STATE WATER QUALITY CERTIFICATION OF FEDERAL NPDES PERMITS

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Section 401 of the Clean Water Act (CWA),[1] a provision which dates back to 1970 (prior to adoption of the modern CWA), reflects a congressional decision to give the states the final word on the appropriate level of protection against pollution of the navigable waters by federally licensed activities. In the nearly twenty-five years since section 401 was adopted, the preeminent role of the states in protecting water quality from degradation by such activities has remained largely unchanged, but has taken on increasing significance. Recently, the Supreme Court reaffirmed the power of the states to control pollution from federally-licensed activities in *PUD No. 1 of Jefferson County v. Washington Department of Ecology (PUD)*.[2]

The preeminence of the state role means that, for National Pollutant Discharge Elimination System (NPDES) permits issued by the Environmental Protection Agency (EPA) under section 402 of the CWA,[3] the states often will dictate the most stringent controls on municipal and industrial dischargers. So too, those seeking dredge and fill permits from the Army Corps of Engineers[4] or hydroelectric licenses under the Federal Power Act[5] will find that many of the key permit requirements will come from the states via section 401.

The existence of such a powerful tool means that anyone whose research or practice leads to these various permit schemes will need to

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1. 33 U.S.C. § 1341 (1988). The Clean Water Act, also known as the Federal Water Pollution Control Act, is codified at 33 U.S.C. §§ 1251-1378 (1988).
2. PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, 114 S. Ct. 1900 (1994) [hereinafter *PUD*].
3. 33 U.S.C. § 1342.
4. *Id.* § 1344.
5. 16 U.S.C. § 797 (1994).

understand fully the scope and effect of section 401. This Article attempts to guide the uninitiated through the maze of legal issues that exist or have been resolved in the implementation of section 401, particularly in the context of the NPDES program.[6] Section I provides a brief overview of the key provisions of the CWA and EPA's implementing regulations.[7] Section II focuses on the scope of section 401, including the federal licenses or permits to which its requirements apply, the procedures by which a state may exercise its authority to certify such federal permits, and the permissible contents of a state certification decision.[8] Section III then turns to a discussion of the process by which EPA develops and issues NPDES permits in the 40 states and Territories for which it retains the permitting authority and clarifies the relationship of section 401 to that process.[9] Section IV examines how courts have reviewed section 401 certifications.[10] Section V offers some very brief conclusions.[11]

I. OVERVIEW OF STATUTORY/REGULATORY REQUIREMENTS

In understanding the extent of state authority to certify federal permits under the CWA, one must understand what is the ultimate aim of giving the states that authority: to protect water quality. The overall objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[12] Section 101(a)(2) of the CWA,[13] in turn, sets forth a national goal of attaining water quality that provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water by July 1, 1983 (referred to as the "fishable/swimmable" goal).[14] This goal dovetails well with another key policy of the statute: "to recognize, preserve, and

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6. The focus here is on NPDES permits under section 402 of the CWA. Nonetheless, many of the insights offered here apply as well to hydroelectric licenses or dredge and fill permits.

7. *See infra* notes 12 to 34 and accompanying text.

8. *See infra* notes 35 to 127 and accompanying text.

9. *See infra* notes 128 to 164 and accompanying text.

10. *See infra* notes 165 to 202 and accompanying text.

11. *See infra* notes 203 to 207 and accompanying text.

12. 33 U.S.C. § 1251(a).

13. *Id.* § 1251(a)(2).

14. EPA, WATER QUALITY STANDARDS HANDBOOK (EPA Doc. No. EPA-823-B-94-005a) at 2-1 (Aug. 1994).

protect the primary responsibilities and rights of State to prevent, reduce and eliminate, pollution."[15]

Section 303 of the CWA[16] is the linchpin of the entire statute for achieving these goals. Section 303 requires states to adopt water quality standards (WQS) for all navigable waters within the state.[17] Under EPA's implementing regulations, water quality standards consist of three basic elements: a designation of the intended "uses" for each water body consistent with the goals of the CWA, e.g., the water body is intended for the protection and propagation of fish and wildlife and primary and secondary contact recreation; "criteria," which may be expressed either as numerical constituent concentrations or levels or narrative statements, that describe the quality of water generally necessary to support the designated use; and an "antidegradation" policy stating generally that the navigable waters are not to be degraded over time such that the existing "uses" of the water body can no longer be maintained.[18] Section 303(c)(2) and EPA's implementing regulations require state water quality standards to "protect the public health or welfare, enhance the quality of water and serve the purposes of [the Act]" and where possible, to achieve the "fishable/swimmable" goal.[19] In particular, EPA requires states to designate the "use" of a water body as "fishable/swimmable" wherever attainable.[20] EPA reviews the standards and approves them if they meet

15. 33 U.S.C. § 1251(b).

16. *Id.* § 1313.

17. *Id.* § 1313(c).

18. 40 C.F.R. §§ 131.5, 131.6, 131.11(b), 131.12(a) (1994). EPA's antidegradation regulation actually divides water bodies into three tiers. For all waters, the state must ensure that existing uses are maintained. *Id.* § 131.12(a)(1). In addition, for waters where the existing water quality exceeds that necessary to support the "fishable/swimmable" level of section 101(a()2) of the CWA (Tier II waters), that level of water quality must be maintained unless the state finds that allowing a lower water quality (but no lower than will maintain the existing uses) is necessary to accommodate important economic or social development. *Id.* § 131.12(a)(2). Finally, for waters designated by the states as "outstanding National resource" waters (Tier III waters), the existing water quality must be maintained. *Id.* § 131.12(a)(3). *See generally*, American Paper Inst. v. EPA, 890 F.2d 869, 871-72 (7th Cir. 1989).

Unlike "uses" and "criteria," the anti-degradation policy is not explicitly mentioned as a part of water quality standards in section 303(c)(2). Nonetheless, the Supreme Court decision in *PUD* makes clear that the anti-degradation policy is indeed a part of the state's water quality standards for purposes of the CWA. *PUD*, 114 S. Ct. at 1912 (citing 33 U.S.C. § 1313(d)(4)(B) (congressional recognition of an "antidegradation policy established under [§ 303]")).

19. 33 U.S.C. § 1313(c)(2); 40 C.F.R. § 131.6 (1994).

20. 40 C.F.R. §§ 131.6(a), 131.10.

the requirements of the CWA. If they do not, EPA is to promulgate federal standards in their place.[21]

The structure of the CWA, particularly section 303, reflects the primacy of state authority over water quality. The states have the initial authority and responsibility for determining which uses are appropriate for state waters; EPA's review authority is exercised principally to ensure that any criteria established will maintain and protect such uses.[22] Also in line with the policy of state primacy, section 510 of the CWA explicitly preserves state authority to adopt water quality standards more stringent than required under section 303.[23]

Although the ultimate goal of the CWA is to ensure that waters attain "fishable/swimmable" status, the CWA does not provide for direct enforcement of state water quality standards at the federal level, i.e., simply ordering persons to cease any activities which may impair such standards.[24] Instead, sections 301 and 402 of the CWA require that "point source" discharges of pollutants obtain permits to discharge into the navigable waters at levels which will maintain and protect water quality.[25] As a floor, the CWA establishes limits on the amount of pollutants that may be discharged by point sources on the basis of, generally, the "best available [pollution control] technology economically achievable;"[26] all point sources must achieve pollution reductions reflecting such technology regardless of whether the actual discharge is causing any impairment to water quality.[27] In the case that such technology-based controls prove to be insufficient, however, section 301(b)(1)(C) of the CWA further requires inclusion of "any more stringent" limits necessary to assure compliance with state water quality

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21. 33 U.S.C. § 1313(c)(3).

22. Natural Resources Defense Council, Inc. v. EPA, 770 F. Supp. 1093, 1096 (E.D. Va. 1991), *aff'd*, 1l6 F.3d 1395 (4th Cir. 1993).

23. Homestake Mining Co. v. EPA, 477 F. Supp. 1279, 1284 (D.S.D. 1979); United States Steel Corp. v. Train, 556 F.2d 822, 835 (7th Cir. 1977); City of Albuquerque v. Browner, 865 F. Supp. 733, 739 (D.N.M. 1993).

24. Oregon Natural Resources Council v. Marsh, 832 F.2d 1489 (9th Cir. 1987); *see also* Northwest Envtl. Advocates v. City of Portland, 11 F.3d 900 (9th Cir. 1993), *opinion vacated and superseded*, 56 F.3d 979 (9th Cir. 1995).

25. 33 U.S.C. § 1342 (1988).

26. *Id.* §§ 1311(b)(2)(A), 1314(b).

27. *E.g.*, United States Steel Corp. v. Train, 556 F.2d 822, 838 (7th Cir. 1977).

standards.[28] States may take over the responsibility for issuing NPDES permits from EPA;[29] to date, forty states have done so.[30]

Section 401 provides the crucial link between state water quality standards and federal permit requirements. Section 401(a) requires that any applicant for a federal license or permit for an activity that may result in a discharge to the navigable waters must obtain a certification, that is, a written statement from the state where the discharge will occur approving the issuance of the permit.[31] The purpose of the certification is primarily to ensure that the discharge will be in compliance with the applicable provisions of the CWA, including sections 302, 302, 303,306, and 307, that is, with the technology-based standards of the CWA for point sources and with state water quality standards for *all* permitted activities.[32] Section 401(d) requires the state to list in its certification those conditions that must be included in the federal license or permit to ensure compliance with, among other provisions, state water quality standards, as well as "any other appropriate requirement of state law."[33] The federal agency *may not issue* a permit unless the state has granted or waived certification.[34]

II. THE SCOPE OF SECTION 401

A. To What Activities and Which Discharges Does Section 401 Apply?

Section 401 applies broadly to "any" federal license or permit which may result in "any" discharge to the navigable waters.[35] This language has been interpreted to require section 401 certification for EPA-issued pollutant discharge permits under section 402 of the CWA,[36]

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28. 33 U.S.C. § 1311(b)(1)(C).

29. *Id.* § 1342(b).

30. 59 Fed. Reg. 1535, 1545 (1994) (approving South Dakota as the fortieth program).

31. 33 U.S.C. § 1341(d).

32. Section 302 specifies that no person may discharge pollutants from a point source except in compliance with a permit issued under sections 402 or 404 of the Act. 33 U.S.C. § 1311. Section 301(b)(1)(C) specifically requires that a facility's permit include any limitations "necessary to meet [state] water quality standards . . . established pursuant to any State law or regulations (under authority preserved by section [510] . . .) or any other Federal law or regulation, or required to implement any applicable water quality standard [promulgated by EPA]." *Id.*

33. 33 U.S.C. § 1341(d).

34. *Id.* § 1341(a)(1).

35. *Id.*

36. *See, e.g.*, Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1055 (1st Cir. 1982); section 401 does not apply to state issued NPDES permits since, of course, the state

Corps of Engineers-issued dredge and fill permits under section 404 of the CWA,[37] licenses for hydroelectric projects under the Federal Power Act[38] nuclear power plant operating licenses,[39] and many others.[40]

1. What is a "Discharge?"

One limitation on section 401 is that the federally-permitted activity must result in a "discharge" to navigable waters. Since the term "discharge" under the CWA generally refers to water pollution which comes from "point sources,"[41] the issue has arisen whether section 401 certification is required for a nonpoint source activity for which a federal license or permit is required. For example, in a recent case filed in Oregon, an environmental group sued to overturn a Forest Service license allowing cattle grazing on federal lands, (an activity which EPA regulation defines as a "nonpoint source"),[42] because the licensee failed to obtain a section 401 certification. The plaintiff alleged that the grazing activities would lead to the discharge of polluted runoff which would impair Oregon water quality standards.[43]

The plaintiffs in the Oregon case base their argument on the fact that section 401 is clearly not limited to point source activities. For instance, historically, licenses for hydroelectric projects have been required to obtain section 401 certification.[44] At the same time, most

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does not have any need to certify to its own permit, and since state-issued permits must also ensure compliance with WQS under section 301(b)((1)(C).

37. United States v. Marathon Dev. Corp. 867 F.2d 96, 98 (1st Cir. 1989). As with NPDES permits, state-issued 404 permits are not subject to section 401 certification, since the state would be certifying to its own permit. *See* note 36, *supra*.

38. *PUD*, 114 S. Ct. at 1903; City of Fredericksburg v. FERC, 876 F.2d 1109, 1111-13 (4th Cir. 1989).

39. *E.g.*, Kentucky ex. rel. Stephens v. NRC, 626 F.2d 995, 997 (D.C. Cir. 1980).

40. Permits for which 401 certifications would be required include: permits to construct a dike or dam in a navigable water pursuant to section 9 of the Rivers and harbors Act (33 U.S.C. § 401; 33 C.F.R. Part 321), permits for certain structures or work in or affective navigable waters pursuant to section 10 of the Rivers and Harbors Act (33 U.S.C. § 403 (1983); 33 C.F.R. Part 322 (1994)), or permits to discharge dredge material into the Long Island Sound pursuant to the Marine Protection, Sanctuaries and Research Act (33 U.S.C. § 1413; 33 C.F.R. Part 324). Issuance of all such permit must follow the general procedures of 33 C.F.R. Parts 320 and 325, including the requirements in §§ 320.4(d) and 325.2 to obtain 401 certification.

41. 33 U.S.C. § 1362(14).

42. 40 C.F.R. § 122.3 (1994) (only "concentrated" animal feeding operations included in definition of point source).

43. Complaint at 7-8, Oregon Natural Desert Ass'n v. Thomas, (D. Or.) (No. 94-522-HA [hereinafter ONDA].

44. 18 C.F.R. § 4.3(a)(7) (1995).

hydroelectric projects are considered "nonpoint sources" and do not need an NPDES permit under the CWA.[45] Furthermore, the term "discharge" as used in section 401(a) is not, by its terms, limited to discharges of pollutants. Section 502(16) of the CWA[46] states that "[t]he term 'discharge' when used without qualification *includes* a discharge of a pollutant" (emphasis added). If the term discharge only "includes" the discharge of a pollutant, presumably it also includes other types of discharges, including discharges of "pollution," as defined by section 502(19)[47] to mean "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water," a definition broader than that of "pollutant." Changes in water quality caused by a hydroelectric diversion which affects the ability of fish to live is a "man-induced alteration of the . . . physical [and] biological . . . integrity of water."[48] The interpretation of the word "includes" in the definition of discharge as a nonlimiting term is bolstered by reference to the other definitions in section 501 of the CWA. In the other nineteen terms defined in section 502, the statutory language reads "the term [being defined] *means* . . . ." Only the term "discharge" is defined by reference to what it "includes."[49]

In the Oregon case, the United States has argued that section 401 does indeed apply to licenses for certain activities such as hydroelectric projects which are functionally equivalent to point sources (in that they release pollution from conveyances), but not to nonpoint source activities like grazing from which pollution simply runs off into the navigable

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45. Nat'l Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580, 590 (6th Cir. 1988) (discharges from hydroelectric dam turbines do not need NPDES permits because fish cut up by a turbine does not "add" pollutants); Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 169 (D.C. Cir. 1982) (changes in temperature from water transfers in dams is not a "pollutant" and need not be regulated by an NPDES permit).

46. 33 U.S.C. § 1362(16).

47. *Id.* § 1362(19).

48. *Id.*; *see Gorsuch*, 693 F.2d 156, 161 (D.C. Cir. 1982); *Consumers Power Co.*, 862 F.2d 580, 585-6 (6th Cir. 1988) (describing the water quality problems associated with hydroelectric projects); *PUD*, 114 S. Ct. at 1904.

49. *See also* Power Authority of the State of New York v. Williams, 475 N.Y.S.2d 901, 904 (N.Y. App. Div. 1984) (State has authority to certify a permit to transfer water from the upper to the lower reservoir of a dam, because such a transfer constitutes "discharge of an industrial waste" under New York law, even though it would not be considered to be the "discharge of a pollutant" under the CWA).

waters.[50] The plaintiffs have argued, by contrast, that there is no basis for such a distinction.

Based on the statutory language as well as the purposes of the various provisions, the term "discharge" in section 401(a)(1) can and should be interpreted more broadly than in sections 301(a) and 402 (a)(1) (which define the scope of the NPDES program). Section 402 imposes a federal permit requirement which, in EPA's expert opinion, can be efficiently imposed only on point sources which are adding pollutants to navigable waters.[51] Section 401, by contrast, reflects congressional intent to allow states substantial authority to control all federally-permitted activities which may cause pollution affecting water quality in the state, whether or not an NPDES permit is also required.[52]

2. Where is the "Discharge" Going?

Section 401 authority is limited to certification of federal licenses or permits that result in a discharge only to "navigable waters." For purposes of the CWA, this term has been broadly construed to include wetlands and other waters which are not navigable-in-fact.[53] Nonetheless, section 401 certifications are needed only for discharges into navigable waters, not those outside the territorial boundaries.[54]

3. How Long Will the Federal License Extend?

Section 401(a)(3) further acts as a limitation on state authority. It specifies that a state certification for a license construction of an activity also acts as certification for a subsequent license for the operation of the activity unless the state determines that changed circumstances make the prior certification invalid and no notifies the federal licensing agency within sixty days of receiving notice of the application for the operating

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50. United States Forest Service's Memorandum in Opposition to Plaintiff's and Plaintiff-Intervenor's Motions for Summary Judgement at 7-11, *ODNA*, *supra* note 44.

51. *See, e.g.*, *Gorsuch*, 693 F.2d at 165.

52. *See* H.R. REP. NO. 127, 91st Cong., 1st Sess. 19 (1969) (Congress intended that a person "seeking a Federal license or permit to conduct *any* activity of *any* kind or nature which may result in discharges . . . [must obtain state certification] that such activity will be conducted in a manner that will not reduce the quality of such waters below applicable . . . water quality standards" (emphasis added)).

53. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 137 (1985); Natural Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).

54. Natural Resources Defense Council, Inc. v. EPA, 863 F.2d 1420, 1435 (9th Cir. 1988).

license.[55] This provision has been turned around, however, to mean that a state may include conditions on the operation of a facility in its certification for the construction of the facility.[56]

B. Who Provides the Certification?

Section 401(a) instructs an applicant for a federal license or permit to obtain "a certification from the State in which the discharge originates or will originate."[57] In the interstate context, EPA has interpreted this language to mean that if a facility is located in one state, but the discharge point is in the other, the section 401 certification comes from the state where the discharge point is located.[58] For instance, construction of an intake and discharge pipe for a power plant in Ohio, where the pipe will be discharging into Pennsylvania waters on Lake Erie, should be certified by Pennsylvania.[59] By contrast, for a dam project, the discharge point is where the dam is located, not the furthest point upstream where the water erodes the bank upstream.[60]

Under EPA's interpretation, therefore, only the state where the discharge originates has the authority to provide certification. Nonetheless, section 401 does provide other affected states with some authority to ensure compliance with their water quality standards. Section 401(a)(2) requires federal licensing agencies to notify EPA when they receive applications for licenses and section 401 certifications from the appropriate state.[61] If EPA determines that the discharge may affect the water quality of another state (or states), it is to notify the affected state(s), the licensing agency, and the applicant. The affected state(s)

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55. 33 U.S.C. § 1341(1)(3).

56. *PUD*, 114 S. Ct. at 1909.

57. 33 U.S.C. § 1341(a)(1). States with 401 authority are also the certifying authority for EPA-promulgated water quality standards. The 1972 amendments to 401 so authorized the states; EPA regulations at 40 C.F.R. 121.21(a) (1994) fail to reflect accurately the current statutory provision and instead reflect the pre-1972 provision (in which EPA had the authority to certify for EPA-promulgated standards).

58. Op. EPA Gen. Counsel, 78-8 at 8 (available on LEXIS, ENVIRN library, EPAGCO file). *See also* Nat'l Wildlife Fed'n v. FERC, (912 F.2d 1471, 1483 (D.C. Cir. 1991) (a 401 certification is needed only from the state in which the discharge originates, not affected downstream states); *but see* Lake Erie alliance for the Protection of the Coastal Corridor v. U.S. Army Corps of Engineers, 562 F. Supp. 1063, 1075 (W.D. Pa. 1981) (misreading EPA's 1978 opinion to require 401 certification from the state where the facility is located if the discharge point is in another state), *aff'd mem.*, 702 F.2d 1392 (3d Cir.), *cert. denied*, 464 U.S. 915 (1983).

59. *Cf. Lake Erie*, 526 F. Supp. at 1075 (reaching opposite result).

60. *Nat'l Wildlife Fed'n*, 912 F.2d at 1484.

61. 33 U.S.C. § 1341(a)(2).

have sixty days to register their objections, if any, at which time the licensing agency must hold a hearing and receive the recommendation of EPA on how to ensure compliance with the affected state(s) WQS. The affected state(s) standards must be met, or the permit may not be issued.[62]

The Supreme Court has noted in dicta that section 401(a)(2) "appears to prohibit the issuance of any federal license or permit over the objection of an affected State unless compliance with the affected State's water quality requirements can be insured."[63] Yet, the scope of this prohibition is comparatively limited. Most NPDES permits are issued by states under section 402(b), not EPA, and section 401 certification is not required (indeed, why would it be, since the state would be providing the certification to itself?). For EPA-issued NPDES permits or for other federal licenses, the affected state will not even receive notification and the opportunity to object to a federal license unless EPA determines that its water quality may be affected, and the courts will defer to EPA's judgment even if it conflicts with the affected state's own conclusions.[64] But in those situations where EPA agrees that an affected state's standards may be impaired, the affected state has much the same authority to protect its water quality as the state from where the discharge originates.

Section 401 also clarifies that if a state lacks authority to provide section 401 certifications, EPA shall provide the certifications.[65] This provision had little practical use; for most of the past twenty-five years, the only one of the fifty states which lacked the authority to issue a section 401 certification was South Dakota, and it recently adopted legislation to exercise section 401 authority.[66] EPA's residual authority to certify retains vitality, however, in Indian Country. Since states generally lack the authority to regulate water quality in Indian Country,[67] EPA will generally provide certification for discharges in Indian Country, unless the Indian Tribe has qualified as eligible to establish its own EPA-

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62. *Id.*

63. Arkansas v. Oklahoma, 503 U.S. 91, 103 (1992). The language is dicta because on the particular facts of the case, EPA had found that the water quality standards of the affected state, Oklahoma, would be met, a determination to which the Court deferred even though Oklahoma had apparently come to a different conclusion. *Id.* at 106.

64. *Id.* at 102-03.

65. 33 U.S.C. § 1341(a)(1).

66. S.D. CODIFIED LAWS ANN. §§ 34A-2-33, 34A-2-34 (1995)

67. *See* 56 Fed. Reg. 64,876, 64,877-64,881 (EPA discussion of relevant case law).

approved water quality standards.[68] An Indian Tribe which is treated in the same manner as a state for purposes of the water quality standards program is the certifying agency for discharges on Indian lands.[69]

C. What is the Appropriate Scope of and Conditions to Include in a State Certification?

Section 401 provides the state with the authority to grant, deny, or waive certification. As noted earlier, the statute is clear that if a state denies certification, the federal license or permit may not issue.[70] In addition, section 401(d) provides that a state certification under section 401 "shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure" that the permit will comply with sections [208(e)], 301, 302, [303], 306, or 307 of the CWA "and with any other appropriate requirement of State law."[71] The conditions in the state certification must be included in the federal license or permit. The content of an appropriate state certification under section 401 has spawned quite a bit of litigation. Most of this litigation has occurred in state courts, since federal court review of section 401 certifications is very limited.[72] Many of these cases involve licenses for hydroelectric projects issued under section 10(a) of the Federal Power Act,[73] where there is a significant potential for conflict between federal and state preferences for permit conditions.[74] The issues with which the courts, as well as federal agencies, have wrestled have largely been settled, however, by the supreme Court decision in *PUD*. For that reason, this Article next provides a description of *PUD* as an example of the types of conditions that may be at issue.

1. The Factual Setting of PUD

PUD involved a challenge to a state water quality certification issued under section 401 for the construction of a hydroelectric project on

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68. 40 C.F.R. § 131.7.

69. *Id.* § 131.4(c).

70. 33 U.S.C. § 1341(a)(1).

71. 33 U.S.C. § 1341(d); 40 C.F.R. § 124.53(e)(1) (language in brackets appears in the regulatory provision only).

72. *See* notes 165 to 167, *infra*, and accompanying text.

73. 16 U.S.C. § 803(a) (1994).

74. *E.g.*, In re Tunbridge Mill Hydroelectric Project, 68 FERC ¶ 61,078 (1994) (FERC refuses to include state 401 certification conditions it finds beyond the scope of the state's authority under 401).

the Dosewallips River in Washington.[75] The State of Washington's WQS designates the River as one which "markedly and uniformly exceed[s] the requirements for all or substantially all uses," including, but not limited to, "fish migration, rearing, spawning and harvesting."[76] The proposed hydroelectric project would divert water from the river, run it through turbines to generate electricity, and return the water 1.2 miles downstream of the diversion point.[77] The certification issued by the State of Washington required the petitioner to maintain a minimum instream flow in the "bypass" segment of the river to preserve the existing and designated fishery uses in that high quality segment. In other words, the State certification required that the project leave in the river, and not divert to the hydroelectric turbines, a minimum amount of water (set on a seasonal basis) to ensure that fish could continue to live and spawn in the 1.2 miles of river where the flow of water would be diminished by the project.[78] The State Department of Ecology determined that the minimum stream flows established in the certification were necessary and were the flows recommended by the resource agencies and tribes for maintaining sufficient flows for the fishery resource.[79]

On appeal to the Washington Supreme Court, the certification was upheld. The court ruled that, because of the (EPA-mandated) antidegradation policy in Washington's water quality standards, the State was required to certify that the project would not impair any existing or designated uses for the River, including use as a fish habitat. Given that the State's experts had determined that lower flows of water would risk degradation of the fishery, the state court rules that the State was required under section 401 to include more protective instream flow conditions in its certification.[80]

2. Compliance With State Water Quality Standards

As the U.S. Supreme Court ruled in *PUD*, a state may grant or deny section 401 certification, and also may include any conditions in a certification, in order to ensure compliance with any part of a state's

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75. *PUD*, 114 S. Ct. at 1905.
76. WASH. ADMIN. CODE § 173-201A-030(1) (1990).
77. *PUD*, 114 S. Ct. at 1907.
78. *Id.* at 1908.
79, State Department of Ecology v. PUD No. 1, 849 P.2d 646, 648 (Wash. 1993), *aff'd*, 114 S. Ct. 1900 (1994).
80. *Id.* at 659.

water quality standards, including designated uses or the required anti-degradation policy.[81] In particular, a state may include conditions which will ensure that the designated uses and anti-degradation policy will be protected, even if those conditions are not based directly on the water quality criteria.[82]

The Court's ruling is entirely sound. The Court properly rejected the assumption that a state will always maintain its designated uses and antidegradation policy through enforcement of its water quality criteria, that is, that compliance with the criteria will always be equivalent to attaining and maintaining the designated and existing uses. As the Court explained, a hydroelectric project for which a section 401 certification is required may cause the discharge of sediment which, although technically in compliance with the state's criterion for turbidity, would cover over and ruin a fish spawning bed.[83] The discharge of fill material to construct the dam might affect the hydrology of the stream and might prevent fish migration. Or the turbines of the dam might cause the death of fish in the stream.[84] Similarly, as in *PUD*, the operation of a project may make it impossible for fish to survive in the stream bed, thereby impairing or destroying the existing and designated use.[85] The dam could destroy a white water region of the stream used for recreation. Or the water body may, as in *PUD*, be designated as a Tier II water, in which case the antidegradation policy would prohibit any degradation of water quality absent an explicit authorization by the state.[86] In such situations, if the state determined that the activity seeking a section 401 certification would degrade water quality, impair or destroy the existing and designated use, or otherwise violate the antidegradation policy, even though it would technically assure compliance with the state's water quality criteria, the state could ensure compliance with its water quality standards only by conditioning the certification to protect the designated

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81. 114 S. Ct. at 1910-12.

82. *Id.* at 1910. The Court also resolved the issue of whether a state may include conditions under section 401(d) to ensure compliance with state WQS under section 303 in the first instance, despite the fact that section 401(d), unlike section 401(a), makes no explicit reference to section 303. *Id.* at 1909.

83. *Id.* at 1911-12.

84. *See* Nat'l Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580, 586-6 (6th Cir. 1988) (hydroelectric dam turbines cause fish mortality).

85. 114 S. Ct. at 1912.

86. 40 C.F.R. § 131.12(a)(2).

use or anti-degradation policy directly, such as with a minimum streamflow condition.

The Court also properly rejected the argument that only water quality criteria can serve as the basis for limitations on federal licenses because they are somehow more "objective" than the other provisions of a state's water quality standards.[87] Water quality criteria can be, and frequently are, expressed in narrative terms such as "there shall be no discharge of toxic pollutants in toxic amounts."[88] EPA has frequently translated such narrative criteria into quantifiable requirements on NPDES dischargers.[89] A state's antidegradation policy is highly analogous; it represents a narrative statement of the level of water quality which can be, and has been, translated into specific and quantifiable requirements on federal permittees.[90] So, too, designated uses represent narrative statements of the level of water quality to be achieved. It would have made no sense to conclude that a state may include a condition in a section 401 certification to achieve compliance with a narrative water quality criterion, but not with a narrative statement of the designated use or with the narrative antidegradation policy.

3. Conditions on the "Indirect Effects" of a Discharge

Section 401(a)(1) of the CWA is written very broadly to require certification for any federal license or permit issued to "any activity including, but not limited to, the construction or *operation of facilities*, which *may* result in *any discharge* into the navigable waters."[91] The Court in *PUD* interpreted this language to mean that once a determination is made that the construction or operation of a facility may result in any discharge into navigable waters, the entire operation of that facility, including any indirect effects of the discharge, is open for review and approval in the certification process.[92] For instance, in *PUD*, the construction of the project would result in the discharge of dredge and fill material, and the operation of the project would result in the discharge of

87. *PUD*, 114 S. Ct. at 1911.

88. American Paper Inst. v. EPA, 996 F.2d 346, 349 (D.C. Cir. 1993); Envt'l Defense Fund, Inc. v. Costle, 657 F.2d 275, 288 (D.C. Cir. 1981).

89. *Id.*; *see also* Champion Int'l Corp. v. EPA, 850 F.2d 182, 184 (4th Cir. 1988).

90. American Paper Inst. v. EPA, 890 F.2d 869, 877 (7th Cir. 1989) (EPA's antidegradation regulation does not set specific numeric limits, but "establish[es] criteria" for determining such limits).

91. 33 U.S.C. § 1341(a) (1988) (emphasis added).

92. 114 S. Ct. at 1908.

water at the end of the bypass reach back into the stream. The Court found that once these discharges triggered the requirement for a section 401 certification, the state could establish conditions which control the level of streamflow in the bypass reach during the operation of the project (even though the reduced level of water in the bypass reach is not itself a direct result of either discharge).[93]

The Court reasoned that section 401(d) of the CWA, which provides the authority (and responsibility) for a state to place conditions on its certification, is not explicitly linked to the term "discharge." Rather, section 401(d) specifies that the state's certification "shall set forth any effluent limitations and other limitations . . . necessary to assure that any applicant [for a Federal license] will comply with . . . various provisions of the any other appropriate state law requirements."[94] Since section 301(b)(1)(C), in turn, requires compliance with water quality standards under section 303, a state may include any limitations on the federal license which will assure that *the person* receiving the license complies with state water quality standards. In other words, the existence of a "discharge" acts as a threshold condition triggering the requirement for a certification, which then allows the state to add additional conditions on the activity as a whole.[95]

The Court also noted that EPA has also consistently interpreted section 401 as applying to the indirect effects of the permitted discharge. As EPA had explained in guidance to the states on implementation of section 401, "because the States' certification of a construction permit or license also operates as certification for an operating permit . . . it is imperative for a State review to consider all potential water quality impacts of the project, both direct and indirect, over the life of the

93. *Id.* at 1908-09.

94. *Id.* at 1909 (quoting 33 U.S.C. § 1341(d)) (emphasis in original).

95. The Court's conclusion also is supported by the language of section 401(a)(3), which specifies that the certification provided by a state for construction of a facility satisfies the certification requirement for the operation of the facility unless there are changes either in the facility's operation, the state's water quality standards, or the characteristics of the water. 33 U.S.C. § 1341(a)(3).

project."[96] The Court, as it should,[97] deferred to EPA's interpretation as a reasonable construction of the statute.[98]

4. Conditions Based On "Other Appropriate Requirements of State Law"

The certification may also include conditions to implement "any other appropriate requirement of State Law."[99] *PUD* makes clear that this language, at the least, includes conditions based on state water quality standards under section 303.[100] Whether section 401(d) would allow states to include conditions based on other state laws *beyond* state water quality standards, e.g., environmental quality laws, fish protection statutes, recreation statutes, and the like, is a question that *PUD* explicitly refused to decide,[101] and on which state courts remain split.[102] In *Arnold*

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96. EPA, WETLANDS AND 401 CERTIFICATION: OPPORTUNITIES AND GUIDELINES FOR STATES AND ELIGIBLE INDIAN TRIBES at 22 (1989); *see PUD*, 114 S. Ct. at 1909 (citing this document with approval).

97. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

98. *PUD*, 114 S. Ct. at 1909. In finding EPA's interpretation reasonable, the Court also cited to EPA's general regulations implementing section 401, which require a state to find that "there is a reasonable assurance that the *activity* will be conducted in a manner which will not violate applicable water quality standards." *Id.* (quoting 40 C.F.R. § 121.2(a)(3)) (emphasis in Court opinion)). Ironically, EPA issued these regulations in 1971, before section 401(a)(1) was amended to use the word discharge; the language of EPA's regulation tracks directly the *prior* language of what is not section 401(a)(1), which did not include the word "discharge." 33 U.S.C. § 1171 (1970). The change in language may not have been significant. The legislative history of the 1972 Amendments states that section 401(a) "is *substantially* [the provision] of existing law . . . amended to assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants." S. REP. NO. 414, 93d Cong., 1st Sess. 1487 (emphasis added).

The Court's interpretation is further supported by the legislative history of what is now section 401. *See* H.R. REP. NO. 127, 91st Cong., 1st Sess. 19 (1969) (section 401 is designed to ensure that federally-permitted activities "will be conducted in a manner that will not reduce the quality of [state] waters below applicable . . . water quality standards"); 115 CONG. REC. 9030 (1969) (stmt. of Rep. Edmonson) ("[t]he purpose of [401] is to provide reasonable assurance that no license or permit will be issued by a Federal agency for an activity that through inadequate planning or otherwise could in fact become a source of pollution"); 115 CONG. REC. 9051 (stmt. of Rep. Eilberg) ("[a federal] Agency having jurisdiction over the issuance of permits or licenses must insure that all operations resulting in pollution effects must be carried out in a manner that will comply with established water quality standards").

99. 33 U.S.C. § 1341(d).

100. 114 S. Ct. at 1909.

101. *Id.*

102. *Compare PUD No. 1.*, 849 P.2d at 651-53 (401(d) covers all state laws related to water quality, including flow restrictions, whether or not they are included in the approved section 303 standards), Arnold Irrig. Dist. v. Dept. of Envt'l Quality, 717 P.2d 1274, 1279 (Or. App. 1986) (certification conditions may be based on state laws that bear any relationship to water quality) *with*

Irrigation District v. Department of Environmental Quality, an Oregon Court held that the State could include conditions in a certification based on a comprehensive land use plan and implementing county ordinances, although it could not *deny* certification for failure to comply with such laws.[103] In *Niagara Mohawk Power Corp. v. Department of Environmental Conservation*, a New York court held that section 401 certification conditions could be based solely on state water quality standards.[104]

After *PUD*, however, resolution of this question may now have less practical significance. The Court's holding that states may directly protect designated uses and prevent degradation of existing uses (e.g., ensure protection of fish habitats, ensure adequate recreational opportunities allows states to impose nearly all of the conditions which have been contentious in the past.[105] Nonetheless, the issue may still appear in situations where a state water quality goal is not directly reflected by the designated or existing use.

The Oregon court reached the right result in *Arnold* for the wrong reason. The court reasoned that since the language of section 401(a) explicitly refers to certification of compliance with effluent limitations and water quality standards, Congress intended to limit the state's power to deny certification to licenses which would not comply with such limitations or standards.[106] By contrast,

> Congress did not make the section [303] standards the exclusive water quality criteria which the states may use in placing limitations on section [401] certificates. If Congress had intended to do so, it could have specifically mentioned those standards in section [401(d)], but it did not. Rather it allowed the states to enforce all water quality-related statutes and rules through the states'

Niagara Mohawk Power Corp. v. Dept. of Envt'l Conservation, 624 N.E.2d 146, 149-51 (N.Y. 1993) *cert. denied*, 114 S. Ct. 2162 (1994) (certification conditions may be based only on EPA-approved water quality standards).

103. 717 P.2d at 1278.

104. 624 N.E.2d at 149-151.

105. *See, e.g.*, *PUD*, 114 S. Ct. at 1911 (minimum streamflow condition protects designated fishery use).

106. *Arnold Irrig. Dist.*, 717 P.2d at 1278.

> authority to place limitations on section [401] certificates.[107]

In particular, the court relied on Congress's decision to add an explicit reference to section 303 in the 1977 amendments to section 401(a)(1), but not section 401(d).[108] The 1977 amendments do not, however, reflect a conscious decision to distinguish the state's authority to condition under section 401(d) from its authority to deny under section 401(a)(1). Rather, the omission of a reference to section 303 in section 401(d) appears to have been an artifact of the language codifying the 1977 amendment to section 401(a)(1).[109]

Nonetheless, if one examines the legislative history of the *1972* amendments to section n401, one reaches the same result. Congress intended for states to impose whatever conditions on their section 401 certifications as are necessary to ensure that an applicant complies with all state requirements related to water quality concerns. As submitted to Committee, the House version of what became section 401(d) would have allowed certification conditions necessary to assure compliance with section 301 and "any other applicable water quality requirement in such State."[110] However, the bill, as reported from Committee, deleted all references to state requirements, referring only to compliance with provisions of the Clean Water Act (i.e., essentially the language of the

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107. *Id.* at 1279 (emphasis in original). *See also PUD*, 114 S. Ct. at 1909; Katherine P. Ransel & Erik Myers, *State Water Quality Certification and Wetland Protection: A Call to Awaken the Sleeping Giant*, 7 VA. J. NAT. RESOURCE L. 339, 355-56 (1988) (endorsing this analysis).

108. *Arnold Irrig. Dist.*, 717 P.2d at 1279.

109. As the United States explained well in its amicus brief in *PUD*, when Congress added the reference to section 303 in section 401(a) in 1977, Congress explained that "[t]he inclusion of section 303 is intended to clarify the requirements of section 401" and that "Section 303 is always included by reference where section 301 is listed." H.R. CONF. REP. NO. 830, 95th Cong., 1st Sess. 96, (1977) (other citation omitted).

Indeed, the failure specifically to enumerate section 303 in section 401(d) is an artifact of the way Congress amended the statute in 1977. The 1977 amendments provide that "Section 401 . . . is amended by inserting '303,' after '302' in the phrase 'sections 301, 302, 306, and 307 of this Act' and in the phrase 'section 301, 302, 306, or 307 of this Act' each time these phrases appear." Clean Water Act of 1977, Pub. L. No. 95-217, § 64, 91 Stat. 1566. Section 401(d) included descriptions of Sections 301, 302, 306, and 307, rather than simply listing those sections, as did section 401(a)(1). Accordingly, although the word "303" was added to the list in section 401(a)(1), the amendments did not expressly add the word "303" to the section 401(d).

Brief for the United States as Amicus Curiae Supporting Affirmance, PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, No. 92-1911 (S. Ct.) 17-18 n.7.

110. H.R. REP. NO. 911, 93d Cong., 2d Sess. 166, *reprinted in* 1 *History of the Water Pollution Control Amendments of 1972*, at 853 (Congressional Research Service 1973) [hereinafter Leg. Hist.].

current provision without the reference to state law).[111] The Senate, by contrast, adopted language requiring states to impose conditions to assure compliance with "any more stringent water quality requirements under state law as provided in section 510."[112] The Conference Committee adopted most of the House bill on section 401, yet expanded the scope of section 401(d) "to also require compliance with any other appropriate requirement of State law which is set forth in the certification."[113] If Congress had intended the scope of section 401(d) to be limited to conditions based on state water quality standards, it would have left the language of the House bill alone, since the reference to section 301 limitations would incorporate state water quality standards through section 301(b)(1)(C). The language of the Conference Report strongly suggests that the scope of section 401(d) was designed to be larger than that.

Regardless of how one gets there, state authority to include conditions of related environmental and water quality laws is unquestionable. For instance, in *PUD*, State laws requiring protection of fish, scenic, recreational, and environmental values in streams are directly linked to protection of water quality, especially since the State's designated uses for the stream in question include the uses of fish migration, rearing, spawning and harvesting, that is, the "fishable/swimmable" goal.[114] It was therefore entirely appropriate for the State to include section 401 certification conditions based upon that law.

5. Certification Conditions Affecting Water Quantity Allocations

The particular certification condition at issue in *PUD* was an instream flow requirement. The State did not limit the amount of pollution coming from the project, but instead regulated the very amount of water the project was authorized to remove from the river for hydroelectric purposes. Instream flow requirements for environmental protection have been the subject of continuing debate.[115] Such

111. H.R. REP. NO. 911, 93d Cong., 2d Sess. 356, 1 Leg. Hist. at 1052.

112. S. REP. NO. 414, 93d Cong., 1st Sess. 152, 2 Leg. Hist. at 1685.

113. H.R. REP. NO. 911, 93d Cong., 2d Sess. 138, 1 Leg. Hist. at 321.

114. 849 P.2d at 650.

115. *See, e.g.*, Katherine P. Ransel, *The Sleeping Giant Awakens:* PUD No. 1 of Jefferson County v. Washington Department of Ecology, 25 ENVT'L L. 255 (1995); Andrew H. Sawyer, *Rock Creek Revisited: State Water Quality Certification of Hydroelectric Projects in California*, 25 PAC.

requirements may be necessary to ensure that the water body complies with water quality criteria for temperature or dissolved oxygen.[116] Furthermore, diminution of flow may destroy aquatic habitats or otherwise impair designated uses for the water body.[117] But requiring minimum instream flows means that less water is available in the water body for consumptive uses and may devalue or even eliminate a person's property right to such water.[118]

Because of the potential impact of water quality regulation on water rights, Congress in 1977 added the "Wallop Amendment" to the CWA.[119] Codified at section 101(g) of the CWA,[120] the Wallop Amendment states that

> [i]t is the policy of Congress that the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA]. It is the further policy of Congress that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any state.

As one court has described it, Congress intended an accommodation between state water management and federal protection of the environment, such that the federal government does not "interfere any more than necessary" with state water allocation schemes.[121] Yet the federal government, through the CWA, may regulate water quality even if that regulation has an "incidental effect" on an individual's water rights.[122]

The Supreme Court in *PUD* went even further, however. Rejecting the argument that the CWA allows regulation only of water quality, not water quantity, the Court characterized the distinction between the two "artificial," noting that impaired flow may destroy the

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L.J. 973, 984-92 (1994); Alan Lilly, *EPA's Emerging Role in Water Allocation Decisions*, 36 ROCKY MTN. MIN. L. INST. J. 22-1 (1990); Hobbs & Raley, *Water Rights Protection in Water Quality Law*, 60 U. COLO. L. REV. 841 (1989).

116. Sawyer, *supra* note 115, at 1006.

117. *PUD*, 114 S. Ct. at 1912-13.

118. *See, e.g.*, Lilly, *supra* note 115, at 22-17.

119. Pub. L. No. 95-217 § 5(a), 91 Stat. 1567 (1977).

120. *Id.* § 1251(g).

121. Riverside Irr. Dist. v. Andrews, 758 F.2d 508, 513 (10th Cir. 1985).

122. *Id.* at 512.

physical and biological integrity of navigable waters.[123] The Court went on to conclude that the Wallop Amendment "preserve[s] the authority of each state to allocate water quantity as between users; [it] do[es] not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation."[124] Although the Court cites approvingly to the "incidental effects" test, the language of its opinion would seem to allow a state to impose a minimum streamflow condition in a section 401 certification without restriction, so long as it were related to "'legitimate and necessary water quality considerations.'"[125]

The Court is exactly correct. Any distinction between water quantity and water quality is, and always ha been, artificial. For precisely that reason, the Wallop Amendment has failed to act as a significant brake on the power of the CWA to affect water quantity allocations where necessary. Not surprisingly, however, this part of the opinion, more than any other, has garnered significant attention among commentators,[126] as well as two proposals to amend the CWA.[127]

III. PROCEDURES FOR CERTIFYING NPDES PERMITS

EPA continues to issue NPDES permits for point source discharges of pollutants for forty states and territories and for discharges in Indian Country.[128] For each such permit, EPA must obtain section 401 certification from the appropriate state or tribe. EPA regulations contain detailed procedures for seeking section 401 certification from the state and for incorporating it into the permit once received.

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123. 114 S. Ct. at 1912-13.

124. *Id.* at 1913.

125. *Id.* at 1914 (quoting 3 Legislative History of the Clean Water Act of 1977 (Committee Print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14 p. 532 (1978)).

126. *E.g.*, Ransel, *supra* note 115, at 274-76; Jan G. Laitos, *Water Rights and Water Quality: Recent Developments*, 23 COLO. LAW. 2343, Oct. 1994.

127. 140 CONG. REC. S15240 (daily ed. Nov. 30, 1994) (reprinting S. 2566 Section 1) (proposal of Sen. Wallop to amend Sections 101(g), 401, and 510 of the CWA); 141 CONG. REC. E982 (daily ed. May 9, 1995) (reprinting H.R. 961 section 507) (proposal of Rep. Bachus to amend section 401 of the CWA).

128. *See* 33 U.S.C. § 1362(3) (definition of "State" in CWA includes the 50 States, the District of Columbia, and six territories); 59 Fed. Reg. 1535, 1545 (1994) (40 of those States are authorized to issue NPDES permits in lieu of EPA).

A. Process and Timing For Seeking Certification From the State

The first step in obtaining an NPDES permit is to submit a permit application.[129] EPA regulations request that a permit applicant submit a section 401 certification with the application.[130] If, however, the permit applicant does not submit a section 401 certification with its application, the appropriate EPA regional office will forward the application to the state with a request to grant or deny certification.[131]

The next major step for EPA in processing a permit application is to prepare a draft permit and make it available for public comment.[132] If the state has not submitted its certification by the time a draft NPDES permit is prepared, the regional office will send to the state 1) a copy of the draft permit, 2) a statement that EPA cannot issue the permit until the state has granted or denied certification, or waived its right to certify, 3) a statement that the state's right to certify will be deemed waived 60 days from the date of mailing of the draft permit, unless EPA "finds that unusual circumstances require a longer time."[133]

EPA regulations make it clear that the state must send notice of its certification action within the sixty day time period both to EPA and to the permit applicant.[134] Nonetheless, EPA may, in its discretion, accept certification after expiration of the sixty day period, that is, the *right* to certify is waived, but the certification itself is valid even if submitted late.[135] Indeed, the state may take even longer than the one-year maximum specified in section 401 itself, if EPA chooses to wait for the certification.[136] Furthermore, a state's failure to notify the applicant of its certification is not a basis to reject the certification.[137]

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129. 40 C.F.R. § 124.3 (1994).
130. *Id.* § 124.53.
131. *Id.* § 124.53(b).
132. *Id.* § 124.6, 124.11.
133. *Id.* § 124.53(c).
134. *Id.* § 124.53(d) (1994).
135. Puerto Rico Sun Oil Co. v. EPA, 8 F.3d 73 (1st Cir. 1993); Ackels v. EPA, 7 F.3d 862, 867, No. 92-70239, slip. op at 11658 (9th Cir. Oct. 14, 1993).
136. *Puerto Rico Sun Oil*, 8 F.3d at 79.
137. *In re Champion Int'l Corp.*, NPDES Appeal No. 90-1 at 7, 1990 NPDES LEXIS 54, at *8 (CJO Sept. 5, 1990).

B. Content of An Acceptable State Certification

EPA regulations are also very specific about the content of an acceptable certification. State certifications, not surprisingly, must be in writing.[138] The certification document (usually in the form of a letter to the relevant EPA regional office official) must also enumerate all of the conditions that must be added to the permit necessary to assure compliance with the CWA and appropriate requirements of state law, as authorized by section 401(d) of the CWA.[139] The list of conditions must include citations to the appropriate state law that gives rise to the condition; the failure to provide such a citation waives the state's right to object to EPA's failure to include that condition.[140] Finally, the certification must also include a statement of the extent to which each condition can be made less stringent without violating the state's water quality standards or other applicable laws. Failure to provide this statement waives the state's right to certify or object to any less stringent condition established by EPA during permit issuance,[141] although the certification itself is still valid.[142]

This last requirement is perhaps the most significant. EPA has interpreted this regulation to mean that the state must somehow make it clear to EPA that the relevant permit limit or condition cannot be made less stringent and still comply with the state WQS. For instance, by issuing a state permit limit that has the same conditions on it,[143] or by saying that the requirements are "necessary."[144] If the state properly complies with this requirement, then any resulting permit condition so certified will be deemed "attributable to State certification" under EPA

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138. 40 C.F.R. § 124.53(e).

139. *Id.* § 124.53(e)(1)-(2).

140. *Id.* § 124.53(e)(2). Technically, the state must provide a list of citations only when providing certification of a draft permit, not when the state provides certifications upon receipt of the permit application earlier in the process. Since most states do not provide certification until the draft permit stage, this distinction rarely comes into play.

141. *Id.* § 124.53(e)(3).

142. Ackels v. EPA, 7 F.3d 862, 867, No. 92-70239, Slip. op. at 11658 (9th Cir. Oct. 14, 1993).

143. *In re General Electric Co., Hookset New Hampshire*, NPDES Appeal No. 91-13, 1993 NPDES LEXIS 4 (EAB Jan. 5, 1993). *See also In re Boise Cascade Corp.* NPDES Appeal No. 91-20, 1993 NPDES LEXIS 5 (EAB Jan. 15, 1993).

144. *In re Lone Star Steel Co.*, NPDES No. 91-5, 1991 NPDES LEXIS 22, at *6 (CJO Nov. 24, 1991).

regulations,[145] and therefore not subject to judicial review at the federal level.[146]

C. Procedures Following State Certification

Once the state has provided a valid certification, EPA proceeds to complete the process of issuing an NPDES permit. Under EPA regulations, EPA retains the discretion to make any changes to conditions in the draft permit that EPA deems appropriate after certification, unless the state has precluded such changes through its certification as outlined above.[147] The EPA regional office does not have to submit the revised permit for recertification.[148] Of course, any change in the permit conditions after receipt of state certification means that those conditions are no longer "attributable to State certification" nor immune from review at the federal level.[149]

Problems often arise when the state certifying agency, administrative review bodies, or courts act to alter the legal status of the certification (by staying, vacating, or modifying the certification) after submittal to EPA. At that point, the issue is how EPA decides what is the proper interpretation of the state's WQS, and how best to defer to the state's prerogative to certify the permit. A subsidiary issue is whether the permit upon which the certification is based should be changed.

A state decision to revise or alter a certification can occur at any of three different points in the permit process, and EPA regulations address each of them. If the EPA regional office has not yet issued the permit, once the certification is stayed or vacated at the state level, the EPA regional office shall notify the state that certification will be deemed waived unless a final effective certification is received within sixty days of the notice.[150] If, however, the permit has been issued, but is still undergoing administrative appeal at EPA (either an evidentiary hearing

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145. 40 C.F.R. § 124.55(e).

146. *See infra* notes 165 to 167 and accompanying text.

147. 40 C.F.R. § 124.53(d). *See supra* notes 140 to 141 and accompanying text.

148. 40 C.F.R. § 124.55(d).

149. *In re Boise Cascade Corp.*, NPDES Appeal No. 91-20 at 16 n.10, 1993 NPDES LEXIS 5, at *12 (EAB Jan. 15, 1993); *see also In re Liquid Air Puerto Rico Corp.*, NPDES Appeal 92-1, 1994 TSCA LEXIS 21, at *34-38 (1994) (Region's change to self-implementing provision of state water quality certification to require regional approval lacks basis in record; Region must justify change to certification condition).

150. 40 C.F.R. 122.44(d)(3) (1994).

before an Administrative Law Judge[151] or review by EPA's Environmental Appeals Board[152]), the state must issue a modified certification or notice of waiver; the final permit must contain any more stringent limits identified in the modified certificate.[153] Finally, if the permit has become effective (i.e., administrative appeals are complete), the state must still issue a modified certification or notice of waiver, but EPA may modify the final permit only upon the request of the permittee and only to the extent necessary to delete any conditions which the state court or Agency have invalidated.[154] In either of these last two situations, EPA may treat the prior certification as valid until the modified certification or waiver has been issued.[155] EPA regulations balance the two competing concerns at work in NPDES permitting, the need to guarantee the state's preeminent role in determining appropriate water quality requirements through section 401 certification versus the need to ensure expeditious issuance of valid NPDES permits.

D. Specialized Permit Procedures

1. General Permits

EPA regulations authorize the issuance of general permits for discharges under section 402 of the CWA.[156] A general permit is simply a permit that applies to more than one discharger, and is thus more akin to a regulation than a normal permit. Under EPA regulations, general permits are just like permits issued to individual dischargers in terms of legal effect, and are therefore subject to the same substantive requirements, including technology-based and water quality-based limitations *and* the need for section 401 certification.[157] The procedures for issuance of general permits are slightly different. First, since general permits are issued to more than one discharger, there may not be a permit application to send to the state, and the EPA regional office will likely

151. *Id.* § 124.75.
152. *Id.* § 124.91.
153. *Id.* § 124.55(b).
154. *Id.*
155. Puerto Rico Sun Oil Co. v. EPA, 8 F.3d 73, 76 (1st Cir. 1993).
156. 40 C.F.R. § 122.28.
157. 40 C.F.R. § 124, subpart D; *see also* United States v. Marathon Dev. Corp., 867 F.2d 96, 100 (1st Cir. 1989) (401 certifications are required for issuance of general permits under Sections 402 and 404 of the CWA).

have to wait for preparation of the draft general permit to forward to the state for certification.[158] Also, general permits do not undergo administrative appeal before EPA.[159] Thus, once the EPA regional office issues the general permit, it becomes immediately effective;[160] if the state stays or vacates the certification, it must issue a modified certification or a waiver before EPA will modify the general permit.[161]

2. Permit Modifications

EPA regulations also allow for modification of an NPDES permit during its term, under certain limited circumstances.[162] A modified permit expires on the date specified in the original permit. Section 401 certifications are also required for permit modifications, with one important proviso. When EPA modifies a permit, the conditions left unchanged by the modification remain in effect and are not subject to change nor to a new round of administrative or judicial review.[163] Yet, when the permit is modified, EPA is required to forward the *entire permit* to the state for recertification under section 401, not simply the modified portions, and the state may then require changes to any permit terms, even those not modified (and thus to which the state had certified initially).[164]

IV. JUDICIAL REVIEW OF STATE 401 CERTIFICATIONS

A. Basic Rule

Respect for the primacy of the state role in assuring compliance with its water quality requirements have caused the federal courts to conclude that the validity of section 401 certifications are entirely a state matter. Thus, case law makes it clear that the content of, and procedures for issuing, section 401 certifications are to be reviewed in state, not

158. 40 C.F.R. § 124.53(c).
159. *Id.* § 124.71(a).
160. *Id.* § 124.15.
161. *Id.* § 124.53 Of course, since the general permit applies to more than one permittee, it is not clear whether EPA has to receive a request for modification from all affected dischargers before it may modify the general permit.
162. 40 C.F.R. § 122.62.
163. 40 C.F.R. §§ 122.62 (introductory text), 124.5(c)(2).
164. Ackels v. EPA, 7 F.3d 862, 867, No. 92-70239, Slip. op. at 11658 (9th Cir. 1993).

federal, courts.[165] Furthermore, neither EPA nor other federal agencies are to look behind or second-guess the validity of a state certification.[166] EPA regulations do not allow administrative review of the substance of any permit condition which is "attributable to State certification."[167]

From the point of view of the federal agency, this may constitute somewhat of a blessing in disguise. Since the permit conditions to which the state certifies are immune from review at the federal level, the federal permitting agency does not have to expend the resources to defend such conditions at the administrative level or in court. The federal agencies might even desire the state to certify to the permit's conditions. Of course, by contrast, whenever the state certifies a permit condition, not only does the state ensure that that condition will not be changed at the federal level, the state assumes the responsibility for justifying its decision in state court. Thus, battles may ensue over precisely to what the state has certified and whether that state certification is truly valid.

B. Identifying Permit Conditions that are "Attributable to State Certification"

EPA's basic rule is that a permit requirement is not "attributable to State certification" unless the certification letter makes it clear that the requirement cannot be made less stringent and still comply with the state's WQS.[168] If the certification letter fails to make that point clear,

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165. *E.g.*, Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1056 (1st Cir. 1982); United States Steel Corp. v. Train, 556 F.2d 822, 835 (7th Cir. 1977); Mobil Oil Corp. v. Kelley, 426 F. Supp. 230, 235 (S.D. Ala. 1976); *but see* Keating v. FERC, 927 F.2d 616, 623 (D.C. Cir. 1991) (validity of state's revocation of certification for operation of a facility under section 401(a)(3) is a matter of federal law for FERC to determine); Consolidation Coal Co., Inc. v. EPA, 527 F.2d 1236 (4th Cir. 1976) (due process requires EPA to hold hearing on validity of conditions in state certification); *contra*, *United States Steel*, 556 F.2d 822, 835 (7th Cir. 1977) (declining to follow *Consolidation Coal*).

166. Lake Erie Alliance for the Protection of the Coastal Corridor v. U.S. Army Corps of Engineers, 516 F. Supp. 1063, 1074 (W.D. Pa. 1981), *aff'd mem.*, 702 F.2d 1392 (3d Cir. 1983, *cert. denied*, 464 U.S. 915 (1983); U.S. Dept. of Interior v. FERC, 952 F.2d 538, 548 (D.C. Cir. 1992); *but see Puerto Rico Sun Oil Co.*, *supra* note 155 (EPA permit conditions based on valid state certification were nonetheless "arbitrary and capricious" where record indicated that certification was facially suspect and EPA provided no substantive explanation for wanting to move forward with those permit limits).

167. 40 C.F.R. § 124.55(e).

168. *In re Boise Cascade Corp.*, NPDES Appeal No. 91-20, 1993 NPDES LEXIS 5 (EAB Jan. 15, 1993); *In re General Electric Co., Hookset New Hampshire*, NPDES Appeal No. 91-13, 1993 NPDES LEXIS 4 (EAB Jan. 5, 1993).

then the state waives its right to certify to a less stringent condition,[169] *and* EPA must itself defend that permit condition upon administrative and judicial review (even if EPA does not change the draft condition after certification).[170]

The form of the state's assertion that the permit conditions may not be changed is not crucial. For instance, a statement that additional conditions are "necessary" for compliance with state law is equivalent to saying no less stringent conditions will be acceptable.[171] Indeed, the state need not necessarily include any explicit statement that the permit may not be changed. In a situation where the state listed conditions that must be changed, sent a letter to certify the reviewed conditions and then adopted the same conditions in a separately-issued state permit, EPA found that to be acceptable; the state had clearly indicated that nothing less than those permit conditions would suffice.[172] Yet, the state must somehow make clear that it will not accept change. EPA has determined that a Louisiana certification which said "it was reasonable to expect that the discharge will comply with the applicable provisions of Section 301, 302, 303, 306 & 307 of the Water Pollution Control Act as amended" was ambiguous as to whether the certification could be made less stringent and therefore was not an acceptable basis for denying federal administrative review of the permit conditions.[173]

Conditions that the state identifies in its certification letter for inclusion in an NPDES permit are, almost by definition, "attributable to State certification." Of course, where a state certification includes permit conditions more stringent than those proposed by EPA in a draft permit, EPA must accept those conditions and they become "attributable to State certification."[174] Surprisingly, however, where a state certifies to *less* stringent conditions than those in the draft permit, EPA also includes the less stringent conditions and treats them as "attributable to State certification," unless those conditions represent a "clear error" in

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169. 40 C.F.R. § 124.55.

170. *In re Boise Cascade Corp.*, NPDES Appeal No. 91-20 at 10 n.7, 1993 NPDES LEXIS 5, at *12 (EAB Jan. 15, 1993).

171. *In re Lone Star Steel Co.*, NPDES No. 91-5 at 5, 1991 NPDES LEXIS 22, at *6 (CJO Nov. 24, 1991).

172. *In re General Electric Co., Hookset New Hampshire*, NPDES Appeal No. 91-13, 1993 at 5, NPDES LEXIS 4, at *9-10 (EAB Jan. 5, 1993).

173. *In re Boise Cascade Corp.*, NPDES Appeal No. 91-20 at 10 n.7, 1993 NPDES LEXIS 5, at *12 (EAB Jan. 15, 1993).

174. 40 C.F.R. § 124.53(d).

interpretation of state law[175] or unless the less stringent conditions do not meet minimum federal requirements.[176]

In one interesting set of cases, EPA and the State of Massachusetts ended up in a dispute over who should take responsibility for defending certain permit conditions. In response to the 1987 congressional mandate to adopt numeric water quality criteria for toxic pollutants,[177] the State of Massachusetts adopted criteria which matched EPA's recommended "Gold Book" criteria developed under section 304(a).[178] EPA and the State agreed that these new criteria would form the basis for water quality-based permit limits, though the State had argued that the criteria probably would need further downward adjustment to account for site-specific conditions.[179] Nonetheless, the State issued section 401 certifications that prohibited EPA from making any permit condition less stringent, as contemplated by EPA regulations. When the State learned, however, that EPA was classifying the permit conditions as "attributable to State certification" and therefore not subject to federal review, the State sent a letter to EPA complaining that EPA was putting Massachusetts in the position of defending stringent permit limits which it had questions about from a technical point of view.[180] The State indicated in its letter that it would delete the prohibition against changing limits in its future certifications.[181] Predictably, several permittees challenged the permits on the grounds that the limits at issue were not truly "attributable to State certification" in light of the State's subsequent letter. EPA's Environmental Appeals Board dismissed these challenges, however, finding that the certifications were clear on their face.[182] The Board also noted that the State had issued a further declaration explaining that while it hoped to revise the limits in the future,

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175. *In re* Ina Road Water Pollution Control Facility, Pima County Arizona, NPDES Appeal No. 84-12, 1993 NPDES LEXIS 25 (CJO Nov. 6, 1985); *see also* American Paper Inst. v. EPA, 996 F.2d 346, 352 (D.C. Cir. 1993) (citing with approval *Ina Road* and noting that state power to instruct EPA to adopt less stringent conditions through 401 certification ensures that EPA does not supplant the primary state role in interpreting its own standards).

176. 40 C.F.R. § 124.55(c).

177. 33 U.S.C. § 1313(c)(2)(B).

178. *Id.* § 1314(a).

179. *In re City of Fitchburg, Mass. (East and West Plants)*, NPDES Appeal 94-13, 1994 TSCA LEXIS 18, at *5 (EAB Feb. 7, 1994).

180. *Id.*

181. *Id.*

182. *Id.* at *12.

it stood behind the certifications in the interim.[183] The Board therefore upheld the limits as "attributable to State certification," sending the permittees to state court and shifting responsibility for resolving the issue to the State.

This particular dispute ended somewhat amicably, in that the State letter effectively accepted responsibility for defending the interim limits. Nonetheless, the potential for states and EPA to play chicken and try to avoid responsibility for the substance of a water quality-based permit limit remains high. In one such case, the First Circuit took the drastic step of effectively reviewing a state certification at the federal level when the permittee ended up in the middle of such a dispute.

C. The Effect of Puerto Rico Sun Oil

As noted above, the federal courts have consistently followed the rule that permit conditions based upon state certifications are to be reviewed in state, not federal, court. In the recent First Circuit decision of *Puerto Rico Sun Oil Co. v. EPA* (*PRSOC*),[184] however, this rule came under a somewhat unlikely attack. A brief review of the facts are in order.[185] PRSOC operates an oil refinery in Puerto Rico for which an NPDES permit from EPA[186] is required. In 1988, PRSOC applied to renew the permit. In accordance with its regulations, EPA forwarded the permit application with a request for section 401 certification to the Puerto Rico Environmental Quality Board on October 31, 1988. By August, 1989, EPA had not received a final certification, so it sent a copy of the now-prepared draft permit with a renewed request for certification to Puerto Rico.

Nearly one more year passed before Puerto Rico issued a new certification. The certification was significantly more stringent than the one issued for the previous permit because it failed to allow for any dilution of the effluent in a so-called "mixing zone," apparently because Puerto Rico was in the process of revising its water quality standards regulations and was not including any mixing zone adjustments in its certifications during the interim.[187] EPA issued a new NPDES permit

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183. *Id.* at *12-13.

184. 8 F.3d 73 (1st Cir. 1993).

185. *Id.* at 75-6.

186. Puerto Rico does not have authority under section 402(b) to issue NPDES permits in lieu of EPA. *Id.* at 74.

187. *Id.* at 75.

incorporating the more stringent certification conditions within two months, after receiving a letter from Puerto Rico explaining that the EQB was reconsidering the certification. After the permit was issued, but before it had completed administrative review at EPA, Puerto Rico stayed the effect of the certification and asked EPA to alter the permit to reflect the prior certification. EPA refused, however, finding that under its regulations, EPA could not amend the permit unless and until Puerto Rico issued a revised certification or waived certification.[188] PRSOC then sought judicial review in the First Circuit.

The First Circuit vacated EPA's permit decision. As the court explained,

> EPA's action in adopting the permit in this case is not flawed by procedural mistake. On the contrary, EPA did a commendable job of dotting i's and crossing t's. Nor is there any violation of substantive provisions of the Clean Water Act; for example, nothing in that statute explicitly requires EPA to use mixing zone analyses in its permits. The problem with EPA's decision is simply that the outcome appears on its face to make no sense.[189]

The court quoted with approval the rule that "review of a state certification is a matter for local courts."[190] The court also rejected PRSOC's procedural arguments that 1) the certification was invalid because it had been issued too late,[191] and 2) that EPA was required to disregard the certification once it had been stayed by Puerto Rico.[192] Thus, the court found that the certification was valid and that EPA properly relied on the certification in issuing the permit.

> EPA deals deftly with the Company's procedural objections by showing why some regulation allowed EPA to await EQB's final certification, but to refuse to await EQB's attempt to repair the certification, and allowed EPA to adopt EQB's certification, but to reject EQB 's

188. *Id.* at 76. (citing 40 C.F.R. § 124.55(e)).

189. *Puerto Rico Sun Oil Co.*, 8 F.3d at 77.

190. *Id.* at 81 (citing Roosevelt Campobello Int'l Comm'n v. EPA, 684 F.2d 1041 (1st Cir. 1982)).

191. *Id.* at 79.

192. *Id.* at 80.

> retroactive attempt to brand it as non-final. The only thing that is missing, among this array of finely wrought explanations, is any reason *why* the EPA should want to frustrate the EQB's clumsy, long-delayed but increasingly evident desire to reconsider a mixing zone analysis for this permit.[193]

The court expressed great concern that EPA had so quickly issued the final permit after a long wait for the section 401 certification and then refused to reconsider its action after the State had stayed the certification.[194] The court was also troubled that the PRSOC permit would be much more stringent than those issued either before or after the time when the Puerto Rico regulations were under revision.[195] The court therefore remanded the permit to EPA for further explanation.[196]

The *PRSOC* decision itself does not make perfect sense. The court never comes to terms with the fact that nothing was "missing" from EPA's explanation; EPA's procedural arguments were the whole story. The court agreed with EPA that the Puerto Rico certification was indeed valid for purposes of section 401. The court also agreed that EPA regulations did not allow EPA to change the permit after issuance unless and until the certification was revised or waived. (PRSOC had asked Puerto Rico to take one of those two steps, but Puerto Rico never did.) In other words, the court accepted EPA's arguments that the certification was valid, and implicitly, that the permit limits being challenged were "attributable to [Puerto Rico's] certification."[197] That being the case, EPA had *no authority* to inquire whether the permit conditions would "make sense;" for EPA to do so would require it to look behind the terms of the certification and second-guess Puerto Rico's decision, which EPA could not do. Thus, EPA was under no obligation to explain substantively why it would want to accept Puerto Rico's certification; the law simply required it. As for EPA refusing to alter the permit until Puerto Rico revised the certification to make the limits less stringent (or waived), that again was simply an application of EPA regulations. Furthermore, that regulation itself makes sense, in that it ensures that the state's preeminent authority under section 401 to decide water quality

193. *Id.* at 78 (emphasis in original).
194. *Puerto Rico Sun Oil Co.*, 8 F.3d at 80-81.
195. *Id.*
196, *Id.* at 81.
197. 40 C.F.R. § 124.55(e) (1994).

conditions is preserved and not altered by EPA unless the state clearly indicates its desire to relax the certification.

It is true that PRSOC ended up in the middle of the dispute with a permit that probably neither EPA nor Puerto Rico really intended. The court was probably correct when it concluded that EPA had acted simply to move along its permitting process and that "EPA's patience with EQB had been exhausted and it wanted, as it had warned almost a year before, simply to get done with the permit as soon as it had EQB's final certification."[198] One can also take notice that, by waiting until Puerto Rico finally did certify, EPA would not have to defend the water quality-based permit limits at the federal level. Puerto Rico delayed acting on PRSOC's request to revise the certification, and once the certification was issued, EPA refused to change the permit until Puerto Rico did so. The court would not countenance that result, and put the onus on EPA to resolve the matter. The court's opinion rescued the company from this mess, but in so doing, suggested that EPA must indeed examine a certification to see whether the state has made a plain error in adopting very stringent limits, undercutting the state's primary role under section 401.[199]

Fortunately, the follow-up case of *Caribbean Petroleum Co. v. EPA (CPC)*[200] effectively limited *PRSOC* to its truly peculiar facts. CPC again involved a permit to an oil refinery in Puerto Rico. As in *PRSOC*, Puerto Rico issued a section 401 certification and then granted a motion to reconsider the certification before EPA's permit was issued. Unlike *PRSOC*, however, in *CPC*, EPA waited nearly a year (rather than tow months) to see what action Puerto Rico would take on the reconsideration.[201] Furthermore, at no point did Puerto Rico stay the effect of the section 401 certification during the reconsideration process. Finally, unlike *PRSOC*, the certification at issue in CPC was just like the

198. *Id.* at 77.

199. *See* notes 174 to 176 *infra* and accompanying text (EPA has obligation to impose limits more stringent than those in a 401 certification if the state has made a "clear error" in interpreting its water quality standards.")

200. 28 F.3d 232 (1st Cir. 1994).

201. The panel in *CPC* may not have appreciated the fact that the permits to PRSOC and CPC were issued on the very same day, September 28, 1990, two days before the end of the federal fiscal year. The Court's supposition in *PRSOC* that EPA wanted to move along the permit process (and thus meet its permitting goals for the fiscal year) seems logical. One may well wonder whether the extra time EPA waited for Puerto Rico to act on CPC's request to reconsider its 401 certification was truly significant.

one issued for the previous CPC permit; CPC was not suddenly faced with an unexplainably more stringent permit limit. For all of these reasons, the First Circuit concluded that

> this case is not a feather with Puerto Rico Sun Oil . . . We decline to visit on EPA the responsibility for unexplained, if not inexplicable, EQB delays in undertaking or completing its promised reconsideration, nor to compromise in the meantime the important public interests served by the Clean Water Act.[202]

Thus, the court recognized that the responsibility to fix the certification, if it needs fixing, belongs to Puerto Rico, and yet EPA need not suspend the permit process nor develop the permit limits on its own if the state certifies and then attempts to change the certification. For the most part, *CPC* restores the rule that EPA, and the federal courts, should defer to the state once the state issues its section 401 certification.

V. CONCLUSION

In 1988, a pair of commentators referred to section 401 as a "sleeping giant" which states needed to awaken so to better protect their water quality, including the quality of their wetlands.[203] They warned that several unresolved legal issues prevented the effective implantation of section 401.[204] Well, the giant is awake.[205] And *PUD* is the alarm clock, having resolved many of the outstanding legal issues. The ringing of that clock has certainly caught the attention of Congress, which seems prepared to cut back on the power of states to use section 401 to protect water quality, at least with respect to the Federal Energy Regulatory Committee (FERC) hydroelectric licenses.[206]

Practitioners who deal with NPDES permits should be prepared for EPA to continue to use section 401 as a mechanism to insulate its decisions on water quality-based permit limits from federal review.[207] Also, given the strong endorsement of section 401 offered by the Court in

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202. 28 F.3d at 234, 235-36.

203. Ransel & Myers, *supra* note 115, at 378-79.

204. *Id.* at 378.

205. Ransel & Myers, *supra* note 115, at 255 (title), 283 (referencing earlier article). I should note that the sentence in the text was initially drafted before publication of the second Ransel article, so I take partial credit for the turn of the phrase.

206. *See supra* notes 126 to 127 and accompanying text.

207. *See supra* notes 177 to 201 and accompanying text.

PUD, section 401 may become a tool, especially in the context of FERC licensing, for states to attempt to control federal decision-making with respect to protection of not only water quality, but a wide variety of environmental concerns. Given that the federal courts (with the possible exception of the court in *Puerto Rico Sun Oil*) continue to show little interest in reviewing the substance of state decisions under section 401, the opportunities for state primacy in such environmental decision-making have yet to be exhausted.