SUPREME COURT OF THE UNITED STATES

No. 92–1911

PUD NO. 1 OF JEFFERSON COUNTY AND CITY OF TACOMA, PETITIONERS *v.* WASHINGTON DEPARTMENT OF ECOLOGY ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[May 31, 1994]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

The Court today holds that a State, pursuant to §401 of the Clean Water Act, may condition the certification necessary to obtain a federal license for a proposed hydroelectric project upon the maintenance of a minimum flow rate in the river to be utilized by the project. In my view, the Court makes three fundamental errors. First, it adopts an interpretation that fails adequately to harmonize the subsections of §401. Second, it places no meaningful limitation on a State's authority under §401 to impose conditions on certification. Third, it gives little or no consideration to the fact that its interpretation of §401 will significantly disrupt the carefully crafted federal-state balance embodied in the Federal Power Act. Accordingly, I dissent.

Section 401(a)(1) of the Federal Water Pollution Control Act, otherwise known as the Clean Water Act

(CWA or Act), 33 U. S. C. §1251 *et seq.,* provides that "[a]ny applicant for a Federal license or permit to conduct any activity . . . , which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . that any such discharge will comply with . . . applicable provisions of [the CWA]." 33 U. S. C. §1341(a)(1). The terms of §401(a)(1) make clear that the purpose of the certification process is to ensure that discharges from a project will meet the requirements of the CWA. Indeed, a State's authority under §401(a)(1) is limited to certifying that "any discharge" that "may result" from "any activity," such as petitioners' proposed hydroelectric project, will "comply" with the enumerated provisions of the CWA; if the discharge will fail to comply, the State may "den[y]" the certification. *Ibid.* In addition, under §401(d), a State may place conditions on a §401 certification, including "effluent limitations and other limitations, and monitoring requirements," that may be necessary to ensure compliance with various provisions of the CWA and with "any other appropriate requirement of State law." §1341(d).

The minimum stream flow condition imposed by respondents in this case has no relation to any possible "discharge" that might "result" from petitioners' proposed project. The term "discharge" is not defined in the CWA, but its plain and ordinary meaning suggests "a flowing or issuing out," or "something that is emitted." Webster's Ninth New Collegiate Dictionary 360 (1991). Cf. 33 U. S. C. §1362(16) ("The term `discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants"). A minimum stream flow requirement, by contrast, is a limitation on the amount of water the project can take in or divert from the river. See *ante,* at 7. That is, a minimum stream flow requirement is a limitation on intake—the

opposite of discharge. Imposition of such a requirement would thus appear to be beyond a State's authority as it is defined by §401(a)(1).

The Court remarks that this reading of §401(a)(1) would have "considerable force," *ante*, at 9, were it not for what the Court understands to be the expansive terms of §401(d). That subsection provides that

> "[a]ny certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that *any applicant* for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section." 33 U. S. C. §1341(d) (emphasis added).

According to the Court, the fact that §401(d) refers to an "applicant," rather than a "discharge," complying with various provisions of the Act "contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to a `discharge.'" *Ante*, at 9. In the Court's view, §401(d)'s reference to an applicant's compliance "expands" a State's authority beyond the limits set out in §401(a)(1), *ante*, at 9, thereby permitting the State in its certification process to scrutinize the applicant's proposed "activity as a whole," not just the discharges that may result from the activity. *Ante*, at 10. The Court concludes that this broader authority allows a State to impose conditions on a §401 certification that are unrelated to discharges. *Ante*, at 9–10.

While the Court's interpretation seems plausible at first glance, it ultimately must fail. If, as the Court asserts, §401(d) permits States to impose conditions unrelated to discharges in §401 certifications, Congress' careful focus on discharges in §401(a)(1)—the provision that describes the scope and function of the certification process—was wasted effort. The power to set conditions that are unrelated to discharges is, of course, nothing but a conditional power to deny certification for reasons unrelated to discharges. Permitting States to impose conditions unrelated to discharges, then, effectively eliminates the constraints of §401(a)(1).

Subsections 401(a)(1) and (d) can easily be reconciled to avoid this problem. To ascertain the nature of the conditions permissible under §401(d), §401 must be read as a whole. See *United Savings Assn. of Texas* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988) (statutory interpretation is a "holistic endeavor"). As noted above, §401(a)(1) limits a State's authority in the certification process to addressing concerns related to discharges and to ensuring that any discharge resulting from a project will comply with specified provisions of the Act. It is reasonable to infer that the conditions a State is permitted to impose on certification must relate to the very purpose the certification process is designed to serve. Thus, while §401(d) permits a State to place conditions on a certification to ensure compliance of the "applicant," those conditions must still be related to discharges. In my view, this interpretation best harmonizes the subsections of §401. Indeed, any broader interpretation of §401(d) would permit that subsection to swallow §401(a)(1).

The text of §401(d) similarly suggests that the conditions it authorizes must be related to discharges. The Court attaches critical weight to the fact that §401(d) speaks of the compliance of an

"applicant," but that reference, in and of itself, says little about the nature of the conditions that may be imposed under §401(d). Rather, because §401(d) conditions can be imposed only to ensure compliance with specified provisions of law—that is, with "applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard[s] of performance under section 1316 of this title, . . . prohibition[s], effluent standard[s], or pretreatment standard[s] under section 1317 of this title, [or] . . . any other appropriate requirement[s] of State law"—one should logically turn to those provisions for guidance in determining the nature, scope, and purpose of §401(d) conditions. Each of the four identified CWA provisions describes discharge-related limitations. See §1311 (making it unlawful to discharge any pollutant except in compliance with enumerated provisions of the Act); §1312 (establishing effluent limitations on point source discharges); §1316 (setting national standards of performance for the control of discharges); and §1317 (setting pretreatment effluent standards and prohibiting the discharge of certain effluents except in compliance with standards).

The final term on the list—"appropriate requirement[s] of State law"—appears to be more general in scope. Because this reference follows a list of more limited provisions that specifically address discharges, however, the principle *ejusdem generis* would suggest that the general reference to "appropriate" requirements of state law is most reasonably construed to extend only to provisions that, like the other provisions in the list, impose discharge-related restrictions. Cf. *Cleveland* v. *United States*, 329 U. S. 14, 18 (1946) ("Under the *ejusdem generis* rule of construction the general words are confined to the class and may not be used to enlarge it"); *Arcadia* v. *Ohio Power Co.,* 498 U. S. 73, 84 (1990). In sum, the text and structure of §401

indicate that a State may impose under §401(d) only those conditions that are related to discharges.

The Court adopts its expansive reading of §401(d) based at least in part upon deference to the "conclusion" of the Environmental Protection Agency (EPA) that §401(d) is not limited to requirements relating to discharges. *Ante*, at 10. The agency regulation to which the Court defers is 40 CFR §121.2(a)(3) (1993), which provides that the certification shall contain "[a] statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." *Ante*, at 10. According to the Court, "EPA's conclusion that *activities*—not merely discharges—must comply with state water quality standards . . . is entitled to deference" under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837 (1984). *Ante,* at 10.

As a preliminary matter, the Court appears to resort to deference under *Chevron* without establishing through an initial examination of the statute that the text of the section is ambiguous. See *Chevron*, *supra*, at 842–843. More importantly, the Court invokes *Chevron* deference to support its interpretation even though the Government does not seek deference for the EPA's regulation in this case.[1] That the Govern-

[1]The Government, appearing as *amicus curiae* "supporting affirmance," instead approaches the question presented by assuming, *arguendo*, that petitioners' construction of §401 is correct: "Even if a condition imposed under Section 401(d) were valid only if it assured that a `discharge' will comply with the State's water quality standards, the [minimum flow condition set by respondents] satisfies that test." Brief for United States as *Amicus Curiae* 11.

ment itself has not contended that an agency interpretation exists reconciling the scope of the conditioning authority under §401(d) with the terms of §401(a)(1) should suggest to the Court that there is no "agenc[y] construction" directly addressing the question. *Chevron, supra*, at 842.

In fact, the regulation to which the Court defers is hardly a definitive construction of the scope of §401(d). On the contrary, the EPA's position on the question whether conditions under §401(d) must be related to discharges is far from clear. Indeed, the only EPA regulation that specifically addresses the "conditions" that may appear in §401 certifications speaks exclusively in terms of limiting discharges. According to the EPA, a §401 certification shall contain "[a] statement *of any conditions* which the certifying agency deems necessary or desirable *with respect to the discharge of the activity*." 40 CFR §121.2(a)(4) (1993) (emphases added). In my view, §121.2(a)(4) should, at the very least, give the Court pause before it resorts to *Chevron* deference in this case.

The Washington Supreme Court held that the State's water quality standards, promulgated pursuant to §303 of the Act, 33 U. S. C. §1313, were "appropriate" requirements of state law under §401(d), and sustained the stream flow condition imposed by respondents as necessary to ensure compliance with a "use" of the river as specified in those standards. As an alternative to their argument that §401(d) conditions must be discharge-related, petitioners assert that the state court erred when it sustained the stream flow condition under the "use" component of the State's water quality standards without reference to the corresponding "water quality criteria" contained in those standards. As explained above, petitioners' argument with regard to the scope

of a State's authority to impose conditions under §401(d) is correct. I also find petitioners' alternative argument persuasive. Not only does the Court err in rejecting that §303 argument, in the process of doing so it essentially removes all limitations on a State's conditioning authority under §401.

The Court states that, "at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to §303 are `appropriate' requirements of state law" under §401(d). *Ante,* at 11.[2] A water quality standard promulgated pursuant to §303 must "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U. S. C. §1313(c)(2)(A). The Court asserts that this language "is most naturally read to require that a project be consistent with *both* components, namely the designated use *and* the water quality criteria." *Ante*, at 13. In the Court's view, then, the "use" of a body of water is independently enforceable through §401(d) without reference to the corresponding criteria. *Ante*, at 13–14.

The Court's reading strikes me as contrary to common sense. It is difficult to see how compliance with

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[2]In the Court's view, §303 water quality standards come into play under §401(d) either as "appropriate" requirements of state law, or through §301 of the Act, which, according to the Court, "incorporates §303 by reference." *Ante,* at 11 (citations omitted). The Court notes that through §303, "the statute allows states to impose limitations to ensure compliance with §301 of the Act." *Ante*, at 11. Yet §301 makes unlawful only "the [unauthorized] *discharge* of any pollutant by any person." 33 U. S. C. §1311(a) (emphasis added); see also *supra,* at 5. Thus, the Court's reliance on §301 as a source of authority to impose conditions unrelated to discharges is misplaced.

a "use" of a body of water could be enforced without reference to the corresponding criteria. In this case, for example, the applicable "use" is contained in the following regulation: "Characteristic uses shall include, but not be limited to . . . [s]almonid migration, rearing, spawning, and harvesting." Wash. Admin. Code (WAC) 173–201–045(1)(b)(iii) (1990). The corresponding criteria, by contrast, include measurable factors such as quantities of fecal coliform organisms and dissolved gases in the water. WAC 173–201–045(1)(c)(i) and (ii).[3] Although the Act does not further address (at least not expressly) the link between "uses" and "criteria," the regulations promulgated under §303 make clear that a "use" is an aspirational goal to be attained through compliance with corresponding "criteria." Those regulations suggest that "uses" are to be "achieved and protected," and that "water quality criteria" are to be adopted to "protect the designated use[s]." 40 CFR §§131.10(a), 131.11(a)(1) (1993).

The problematic consequences of decoupling "uses" and "criteria" become clear once the Court's interpretation of §303 is read in the context of §401. In the Court's view, a State may condition the §401 certification "upon *any limitations* necessary to ensure compliance" with the "uses of the water body." *Ante*, at 12, 13 (emphasis added). Under the Court's interpretation, then, state environmental agencies may pursue, through §401, their water goals in any way they choose; the conditions imposed on certifications need not relate to discharges, nor to water quality criteria, nor to any objective or quantifiable standard, so long as they tend to make the water more suitable for the uses the State has chosen. In short, once a State is allowed to impose

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[3]Respondents concede that petitioners' project "will likely not violate any of Washington's water quality criteria." Brief for Respondents 24.

conditions on §401 certifications to protect "uses" in the abstract, §401(d) is limitless.

To illustrate, while respondents in this case focused only on the "use" of the Dosewallips River as a fish habitat, this particular river has a number of other "[c]haracteristic uses," including "[r]ecreation (primary contact recreation, sport fishing, boating, and aesthetic enjoyment)." WAC 173–201–045(1)(b)(v). Under the Court's interpretation, respondents could have imposed any number of conditions related to recreation, including conditions that have little relation to water quality. In *Town of Summersville,* 60 FERC ¶61,291, p. 61,990 (1992), for instance, the state agency required the applicant to "construct . . . access roads and paths, low water stepping stone bridges, . . . a boat launching facility . . . , and a residence and storage building." These conditions presumably would be sustained under the approach the Court adopts today.[4] In the end, it is difficult to conceive of a condition that would fall outside a State's §401(d) authority under the Court's approach.

The Court's interpretation of §401 significantly disrupts the careful balance between state and federal interests that Congress struck in the Federal Power Act (FPA), 16 U. S. C. §791 *et seq*. Section 4(e) of the FPA authorizes the Federal Energy Regulatory Commission (FERC or Commission) to issue licenses for projects "necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams . . . over

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[4]Indeed, as the §401 certification stated in this case, the flow levels imposed by respondents are "in excess of those required to maintain water quality in the bypass region," App. to Pet. for Cert. 83a, and therefore conditions not related to water quality must, in the Court's view, be permitted.

which Congress has jurisdiction." 16 U. S. C. §797(e). In the licensing process, FERC must balance a number of considerations: "[I]n addition to the power and development purposes for which licenses are issued, [FERC] shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality." *Ibid.* Section 10(a) empowers FERC to impose on a license such conditions, including minimum stream flow requirements, as it deems best suited for power development and other public uses of the waters. See 16 U. S. C. §803(a); *California* v. *FERC*, 495 U. S. 490, 494–495, 506 (1990).

In *California* v. *FERC,* the Court emphasized FERC's exclusive authority to set the stream flow levels to be maintained by federally licensed hydroelectric projects. California, in order "to protect [a] stream's fish," had imposed flow rates on a federally licensed project that were significantly higher than the flow rates established by FERC. *Id.*, at 493. In concluding that California lacked authority to impose such flow rates, we stated:

> "As Congress directed in FPA §10(a), FERC set the conditions of the [project] license, including the minimum stream flow, after considering which requirements would best protect wildlife and ensure that the project would be economically feasible, and thus further power development. Allowing California to impose significantly higher minimum stream flow requirements would disturb and conflict with the balance embodied in that considered federal agency determination. FERC has indicated that the California requirements interfere with its comprehensive planning authority, and we agree that allowing California to

> impose the challenged requirements would be contrary to congressional intent regarding the Commission's licensing authority and would constitute a veto of the project that was approved and licensed by FERC." *Id.*, at 506–507 (citations and internal quotation marks omitted).

California v. *FERC* reaffirmed our decision in *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U. S. 152, 164 (1946), in which we warned against "vest[ing] in [state authorities] a veto power" over federal hydroelectric projects. Such authority, we concluded, could "destroy the effectiveness" of the FPA and "subordinate to the control of the State the `comprehensive' planning" with which the administering federal agency (at that time the Federal Power Commission) was charged. *Ibid.*

Today, the Court gives the States precisely the veto power over hydroelectric projects that we determined in *California* v. *FERC* and *First Iowa* they did not possess. As the language of §401(d) expressly states, any condition placed in a §401 certification, including, in the Court's view, a stream flow requirement, "*shall* become a condition on any Federal license or permit." 33 U. S. C. §1341(d) (emphasis added). Any condition imposed by a State under §401(d) thus becomes a "ter[m] . . . of the license as a matter of law," *Department of Interior* v. *FERC*, 952 F. 2d 538, 548 (CADC 1992) (citation and internal quotation marks omitted), regardless of whether FERC favors the limitation. Because of §401(d)'s mandatory language, federal courts have uniformly held that FERC has no power to alter or review §401 conditions, and that the proper forum for review of those conditions is state court.[5]

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[5]See, *e.g.*, *Keating* v. *FERC*, 927 F. 2d 616, 622 (CADC 1991) (federal review inappropriate because a decision to grant or deny §401 certification "presumably turns on questions of substantive state environmental law—an area that Congress expressly

Section 401(d) conditions imposed by States are therefore binding on FERC. Under the Court's interpretation, then, it appears that the mistake of the State in *California* v. *FERC* was not that it had trespassed into territory exclusively reserved to FERC; rather, it simply had not hit upon the proper device—that is, the §401 certification—through which to achieve its objectives.

Although the Court notes in passing that "[t]he limitations included in the certification become a condition on any Federal license," *ante*, at 6, it does not acknowledge or discuss the shift of power from FERC to the States that is accomplished by its decision. Indeed, the Court merely notes that "any conflict with FERC's authority under the FPA" in this case is "hypothetical" at this stage, *ante*, at 21, because "FERC has not yet acted on petitioners' license application." *Ante*, at 20–21. We are assured that "it is quite possible . . . that any FERC license would contain the same conditions as the State §401 certification." *Ante*, at 21.

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intended to reserve to the states and concerning which federal agencies have little competence"); *Department of Interior* v. *FERC*, 952 F. 2d, at 548; *United States* v. *Marathon Development Corp.*, 867 F. 2d 96, 102 (CA1 1989); *Proffitt* v. *Rohm & Haas*, 850 F. 2d 1007, 1009 (CA3 1988). FERC has taken a similar position. See *Town of Summersville,* 60 FERC ¶61,291, p. 61,990 (1992) ("[S]ince pursuant to Section 401(d) . . . all of the conditions in the water quality certification must become conditions in the license, review of the appropriateness of the conditions is within the purview of state courts and not the Commission. The only alternatives available to the Commission are either to issue a license with the conditions included or to deny" the application altogether); accord *Central Maine Power Co.*, 52 FERC ¶61,033, pp. 61,172–61,173 (1990).

The Court's observations simply miss the point. Even if FERC might have no objection to the stream flow condition established by respondents *in this case*, such a happy coincidence will likely prove to be the exception, rather than the rule. In issuing licenses, FERC must balance the *Nation's* power needs together with the need for energy conservation, irrigation, flood control, fish and wildlife protection, and recreation. 16 U. S. C. §797(e). State environmental agencies, by contrast, need only consider parochial environmental interests. Cf., *e.g.,* Wash. Rev. Code §90.54.010(2) (1992) (goal of State's water policy is to "insure that waters of the state are protected and fully utilized for the greatest benefit to the people of the state of Washington"). As a result, it is likely that conflicts will arise between a FERC-established stream flow level and a state-imposed level.

Moreover, the Court ignores the fact that its decision nullifies the congressionally mandated process for resolving such state-federal disputes when they develop. Section 10(j)(1) of the FPA, 16 U. S. C. §803(j)(1), which was added as part of the Electric Consumers Protection Act of 1986 (ECPA), 100 Stat. 1244, provides that every FERC license must include conditions to "protect, mitigate damag[e] to, and enhance" fish and wildlife, including "related spawning grounds and habitat," and that such conditions "shall be based on recommendations" received from various agencies, including state fish and wildlife agencies. If FERC believes that a recommendation from a state agency is inconsistent with the FPA—that is, inconsistent with what FERC views as the proper balance between the Nation's power needs and environmental concerns—it must "attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities" of the state agency. §803(j)(2). If, after such an attempt, FERC "does not adopt

in whole or in part a recommendation of any [state] agency," it must publish its reasons for rejecting that recommendation. *Ibid.* After today's decision, these procedures are a dead letter with regard to stream flow levels, because a State's "recommendation" concerning stream flow "shall" be included in the license when it is imposed as a condition under §401(d).

More fundamentally, the 1986 amendments to the FPA simply make no sense in the stream flow context if, in fact, the States already possessed the authority to establish minimum stream flow levels under §401(d) of the CWA, which was enacted years before those amendments. Through the ECPA, Congress strengthened the role of the States in establishing FERC conditions, but it did not make that authority paramount. Indeed, although Congress could have vested in the States the final authority to set stream flow conditions, it instead left that authority with FERC. See *California* v. *FERC*, 495 U. S., at 499. As the Ninth Circuit observed in the course of rejecting California's effort to give *California* v. *FERC* a narrow reading, "[t]here would be no point in Congress requiring [FERC] to consider the state agency recommendations on environmental matters and make its own decisions about which to accept, if the state agencies had the power to impose the requirements themselves." *Sayles Hydro Associates* v. *Maughan*, 985 F. 2d 451, 456 (1993).

Given the connection between §401 and federal hydroelectric licensing, it is remarkable that the Court does not at least attempt to fit its interpretation of §401 into the larger statutory framework governing the licensing process. At the very least, the significant impact the Court's ruling is likely to have on that process should compel the Court to undertake a closer examination of §401 to ensure that the result it reaches was mandated by Congress.

Because the Court today fundamentally alters the federal-state balance Congress carefully crafted in the FPA, and because such a result is neither mandated nor supported by the text of §401, I respectfully dissent.