

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: PUD NO. 1 OF JEFFERSON COUNTY AND CITY OF
TACOMA Petitioners v. DEPARTMENT OF
ECOLOGY OF WASHINGTON STATE, DEPARTMENT
OF FISHERIES AND DEPARTMENT OF WILDLIFE

CASE NO: 92-1911

PLACE: Washington, D.C.

DATE: Wednesday, February 23, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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PUD NO. 1 OF JEFFERSON COUNTY :
AND CITY OF TACOMA :
Petitioners :
v. : No. 92-1911
DEPARTMENT OF ECOLOGY OF :
WASHINGTON STATE, :
DEPARTMENT OF FISHERIES AND :
DEPARTMENT OF WILDLIFE :

- - - - -X

Washington, D.C.

Wednesday, February 23, 1994

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:21 a.m.

APPEARANCES:

HOWARD E. SHAPIRO, ESQ., Washington, D.C.; on behalf of
the Petitioners.

CHRISTINE O. GREGOIRE, ESQ., Attorney General of
Washington, Olympia, Washington; on behalf of the
Respondents.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
the United States, as amicus curiae, supporting the

1 Respondents.
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1 P R O C E E D I N G S

2 (11:21 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 92-1911, Public Utility District -- the
5 spectators are admonished to remain silent until you get
6 out of the Court. The Court is -- the Court is still in
7 session, and I particularly expect members of the bar to
8 abide that admonition.

9 We'll hear argument next in Number 92-1911, the
10 Public Utility District Number 1 of Jefferson County and
11 the City of Tacoma v. the Department of Ecology of
12 Washington State, Department of Fisheries, and Department
13 of Wildlife.

14 Mr. Shapiro.

15 ORAL ARGUMENT OF HOWARD E. SHAPIRO

16 ON BEHALF OF THE PETITIONERS

17 MR. SHAPIRO: Mr. Chief Justice and may it
18 please the Court:

19 This case is here on a writ of certiorari to the
20 supreme court of Washington. It concerns streamflow
21 quantities for fish habitat at the proposed Elkhorn
22 hydroelectric project on the Dosewallips River. The
23 project is subject to licensing under part 1 of the
24 Federal Power Act.

25 Streamflow requirements determine the quantity

1 of water in cubic feet per second that may be diverted by
2 the hydroelectric project, and the quantity that must
3 continue to flow in the stream.

4 Now, the use of streamflow to generate
5 electricity is at the core of the licensing scheme for
6 hydroelectric projects in part 1 of the Federal Power Act.
7 The question here is whether streamflow quantities at the
8 proposed project are to be determined by the Federal
9 Energy Regulatory Commission under the broadly balanced
10 public interest considerations in part 1 of the Federal
11 Power Act, or by conditions imposed in State
12 certifications under section 401 of the Federal Clean
13 Water Act.

14 If Washington had attempted to impose the
15 challenged streamflow conditions independently of the
16 Federal statute, its action would have been preempted by
17 the Federal Power Act under this Court's decisions in
18 California v. FERC, decided in 1990, and in First Iowa
19 Hydroelectric Cooperative v. FPC, decided in 1946.

20 So another way of stating the question here is
21 whether section 401 of the Clean Water Act shields a
22 State's attempt to regulate streamflow quantities at a
23 hydroelectric project from preemption by part 1 of the
24 Federal Power Act. If the certification conditions in the
25 State section 401 certification are outside of the scope

1 of section 401, then there is no shielding effect.

2 QUESTION: Mr. Shapiro, wouldn't a decision as
3 to preemption be premature here, since the Commission
4 hasn't yet acted on the application for a license?

5 MR. SHAPIRO: No, Your Honor, it would not. The
6 reason is that the process here calls for the
7 certification to be issued as a condition precedent to the
8 issuance of a license. Under section 401(d) of the Clean
9 Water Act, the conditions in the certification become
10 conditions in the license, so that --

11 QUESTION: The Commission is not capable, then,
12 of saying that the amount of water set aside in the
13 certificate is not consistent with the project we have in
14 mind and therefore we're going to change it?

15 MR. SHAPIRO: That is correct, Your Honor, and
16 this point was quite correctly recognized by the supreme
17 court of Washington at petitioner's appendix page 16a,
18 where it pointed out the very thing I have said, that FERC
19 has to comply with the certification condition regardless
20 of its legality.

21 Now, the case they relied on -- U.S. Department
22 of Interior v. FERC -- was a case that involved a
23 challenge by the State of West Virginia to licenses issued
24 on the Ohio River, and in that case West Virginia said
25 that the State of Washing -- the State of West Virginia

1 said that FERC was encroaching on its section 401
2 conditions.

3 In its decision, FERC said no, we cannot impose
4 different conditions, we will comply with what the State
5 says in its certification, and that case was -- the D.C.
6 Circuit's decision in that case was based upon an
7 acceptance of the FERC's representations that it was
8 bound.

9 Now, the United States in its amicus brief has
10 suggested the possibility of a conflict, but I don't see
11 how that can happen under the law as it is structured,
12 since neither FERC nor any Federal court can review an
13 initial section 401 certification. The entire process has
14 to come up under the Federal statute, to be sure, but
15 through the State court system.

16 QUESTION: And certainly the consultation
17 process that the Federal Power Commission, now FERC, is
18 supposed to engage in with the State authorities before
19 determining -- before issuing the license and before
20 determining what the proper flow is in order to preserve
21 fish habitat and so forth, that consultation process
22 becomes rather superfluous if the State has a trump card.

23 MR. SHAPIRO: That is exactly right, and that is
24 really the essence of our argument that in effect we have
25 a kind of a reversal of the preemption process.

1 If a State puts in a condition that's outside of
2 its 401 authority, that condition still must be included
3 in the license. FERC cannot review it, and FERC never
4 gets to the point of undertaking its responsibilities
5 under section 10(j) of the Federal Power Act.

6 Section 10(j) was enacted in 1946, and it said
7 that the State -- recommendations of State fish and
8 wildlife agencies as well as Federal fish and wildlife
9 agencies must be accepted as the basis for any conditions
10 to protect fish and wildlife that the FERC includes in its
11 license, unless it makes very specific findings after
12 attempting to reconcile its differences with the State's
13 or Federal wildlife agencies that the conditions are
14 inconsistent with the purposes and requirements of the
15 Federal Power Act.

16 So what we have here is a situation in which the
17 States can completely circumvent that process simply by
18 imposing conditions in the 401 certification. In fact,
19 that happened in this case, in a related case as one of
20 the amici have pointed out at some length.

21 Having -- I think we should turn immediately to
22 the language of section 401 of the act, because it's
23 fairly forthright. It appears in petitioner's appendix at
24 page 134a.

25 There are two things that are quite apparent

1 from that language. First, the certification process,
2 which is a delegation of Federal authority to the State,
3 is one that not only makes the certification a condition
4 precedent to the Federal license, but it also -- under
5 section 401, the statute clearly distinguishes between
6 certifications by the States and the licensing process.
7 It doesn't transfer the licensing process to the State.
8 Thus, the fundamental balancing process FERC is supposed
9 to undertake remains in effect.

10 Now, the second -- and this is an important
11 point about section 401 -- is that the State's delegated
12 authority is limited by the text to certifying whether any
13 discharge from the licensed activity complies with the
14 applicable water quality provisions that are specifically
15 enumerated in section 401(a).

16 So States aren't authorized to regulate the
17 activity itself -- that is, to regulate the hydropower
18 project. They are to regulate discharges from the
19 hydropower project.

20 Now, among the enumerated provisions
21 specifically listed is section 303 of the Clean Water Act.
22 Section 303 relates to water quality standards.

23 QUESTION: What's the code number?

24 MR. SHAPIRO: I believe it is 1313, Your Honor.
25 We have set it out in the appendix.

1 QUESTION: You experts in the area always use
2 the statute number, which makes those of us who only
3 occasionally visit the field confused.

4 MR. SHAPIRO: Yes, Your Honor, and it is 1313 of
5 33 U.S. Code, and you will find the beginning at page
6 114a. It's a very long section, but the section which I'm
7 about to turn to specifically is section c on page 116a
8 and 117a, and what I would say very briefly about that is
9 that that defines what constitutes a water quality
10 standard. A water quality standard, according to section
11 303(c)(2) on page 117a of the petition -- it's 2a -- says
12 that "A revised or new water quality standard shall
13 consist of the designated uses..."

14 QUESTION: Where are you reading from,
15 Mr. Shapiro?

16 MR. SHAPIRO: Page 117a of the petitioner's
17 appendix.

18 QUESTION: Where --

19 MR. SHAPIRO: It's at paragraph 2a.

20 QUESTION: Oh, thank you.

21 MR. SHAPIRO: "When a State revises or adopts a
22 new standard, the revised new standard must be submitted
23 to the EPA for approval. That new standard, such revised
24 or new water quality standard shall consist of the
25 designated uses of the navigable waters involved, and the

1 water quality criteria for such waters based upon such
2 uses."

3 That requirement for both a designation of uses
4 and water quality criteria to protect those uses becomes
5 quite significant to the first basis for the holding of
6 the Washington supreme court. We have contended, both in
7 the court below and in this Court, that water quality
8 standards applied in a 401 certification are limited to
9 pollution and discharges as opposed to streamflow levels.

10 QUESTION: May I ask you a question that gets
11 specific to the problem that I have with your argument
12 there? 401(a) refers to -- just to the need for
13 discharges to comply with a series of sections: 1311, 12,
14 1316, and so on. 1311(b)(1)(C) refers to limitations
15 "derived by the States including those necessary to meet
16 water quality standards established pursuant" -- and I'm
17 skipping one line here -- "established pursuant to any
18 State law or regulation under authority preserved by
19 section 1370 or any other Federal law."

20 As I understand the argument that's being made,
21 it's this: that in order for the discharge to comply, and
22 hence be entitled to a certificate from the State, the
23 discharge can in effect not be created at the expense of
24 these water quality standards.

25 The water quality standards established by the

1 State include certain upstream flow requirements because
2 they believe, or they have taken the position that they
3 are necessary to preserve, among other things, the
4 fisheries, and therefore that's the reason that they may
5 object and hence fail to certify the discharge, because
6 the discharge is being made at the expense of the
7 violation of an upstream standard that this State is
8 entitled under this section, subsection (C), to establish.
9 Is that an unsound argument?

10 MR. SHAPIRO: Yes, Your Honor, for this reason.
11 Your Honor has stated quite correctly that the discharge
12 must comply with the State's water quality standards as
13 approved by EPA, but the water quality standard has two
14 elements. It must consist of the designated use, which in
15 this case happens to include fish habitat.

16 QUESTION: Yes.

17 MR. SHAPIRO: And it must also violate the
18 criteria to protect that use. In short, the designated
19 use alone is insufficient.

20 QUESTION: If we disagree with you on that, do
21 you lose this argument?

22 MR. SHAPIRO: I certainly lose this aspect of
23 the argument --

24 QUESTION: Yes.

25 MR. SHAPIRO: -- because then the case becomes

1 one in which all that's necessary to make a water quality
2 standard is a designated use. At that point the phrase in
3 the statute referring to criteria to protect that use
4 drops out of the statute. It's as if Congress didn't have
5 to enact it, they could simply say, just designate a use
6 and do whatever you need to protect that use.

7 Now, there's another reason, we have argued, why
8 the statute would not -- is not being properly applied
9 here. Your Honor mentioned in your hypothetical a
10 streamflow requirement by the State. Now, in the Court's
11 decision in FERC v. California, the Court identified two
12 kinds of water allocations, proprietary and
13 nonproprietary. The allocation involved in FERC v.
14 California was a nonproprietary allocation of water
15 designed to -- the allocation was intended to preserve
16 fish and wildlife habitat. It was held to be preempted,
17 but that nonappropriated allocation is still a water -- is
18 still an allocation of water quantity.

19 This act does not, except as expressly provided,
20 reach the allocation of water quantities, whether it's
21 appropriative or nonappropriative.

22 QUESTION: Unless we accept use as being a
23 standard applicable under subsection (C) and hence
24 ultimately through 401(a) -- 401(a) or 401(d).

25 MR. SHAPIRO: Either that --

1 QUESTION: If we accept a use designation, or I
2 suppose if we accept a nondegradation requirement as being
3 a water quality standard sufficient to justify a
4 certification limitation, then that's the end of that
5 argument, is that correct?

6 MR. SHAPIRO: Not as we read the statute, Your
7 Honor. Our contention is that this statute, and section
8 1370, which Your Honor referred to when you read section
9 301, that's section 510 of the act, and it expressly
10 provides that water quality allocations are outside the
11 scope of the act.

12 QUESTION: Could you give me the code number?

13 QUESTION: Well, is it 1370?

14 MR. SHAPIRO: I believe it is 1370, Your Honor.
15 We have reproduced it in our brief at -- I'm sorry to
16 refer you to so many documents -- at page 7, footnote 3.
17 It's in the blue brief at page 7, footnote 3, and we've
18 set out two provisions, section 510, which is 33 U.S.C.
19 1370, and section 101(g).

20 The history of that water quality -- water
21 quantity exclusion is that when water quantity issues were
22 first raised in the Congress, when the first water quality
23 standards act was considered by Congress in 1965, Senator
24 Muskie said expressly to the western delegations who had
25 asked him on the floor about it, he said on the floor,

1 this act concerns water quality, not water quantity. A
2 line was drawn.

3 That line was reconfirmed in 1972, when section
4 510, which is 33 U.S.C. 1370, the second paragraph in our
5 footnote 3, was enacted, and then section 101(g) was added
6 to the act in 1977 because of concerns that the line was
7 being broken. Senator Wallops proposed an amendment that
8 would reconfirm water quantity allocation is not something
9 that is being federalized under this statute. That was
10 the purpose of it.

11 Because the statute requires State water quality
12 standards to meet EPA requirements -- the EPA administers
13 substantial portions of it, the Corps of Engineers
14 administers substantial portions of it -- the effect of
15 these provisions was to leave the State's authority over
16 water quality -- water quantity allocations exactly where
17 they would have been had there been no Clean Water Act.

18 QUESTION: Mr. -- go on, I'm sorry. What do you
19 mean by degradation? Is it your position that -- I assume
20 what you mean by it is not degradation in use, but
21 degradation in quality.

22 MR. SHAPIRO: That is correct, your Honor. The
23 anti --

24 QUESTION: So your --

25 MR. SHAPIRO: -- degradation policy is a part of

1 water quality standards under EPA regulations, and there
2 is a -- there -- after many years, Congress in 1987 added
3 an express reference to the antidegradation policy
4 established under this section.

5 Now, what anti -- what degradation means is that
6 the quality of the water will be lowered, and in this
7 Court's decision in Arkansas v. Oklahoma, the Court
8 affirmed a decision, or an action of the EPA relating to
9 the application of the antidegradation policy.

10 The policy was applied in a very practical way.
11 The State of Oklahoma said that a discharge from a
12 facility in Arkansas was going to degrade its high quality
13 waters. The EPA applied a standard under which it said we
14 have to have parameters to measure that decline. They
15 drew those parameters from the criteria in Oklahoma's
16 water quality standard, and that is the measure of
17 degradation.

18 QUESTION: So a reduction in stream quantity
19 would not constitute degradation unless by reason of the
20 reduction in water quantity the percentage of pollutants
21 would go up downstream.

22 MR. SHAPIRO: Yes. The discharge would in some
23 way change --

24 QUESTION: -- the quality of --

25 MR. SHAPIRO: -- the receding waters by either

1 adding a pollutant or adding water that was inconsistent
2 with water quality criteria.

3 QUESTION: If use designation may be considered,
4 if it reduces the flow so as to preclude a designated use,
5 and I realize you don't concede that use designation may
6 be considered, but that would be the consequence if we did
7 consider it for this purpose.

8 MR. SHAPIRO: Yes, Your Honor. If Your Honors
9 were convinced that use alone were sufficient, then our
10 argument is in serious trouble.

11 QUESTION: Is a change in temperature a
12 degradation of the water?

13 MR. SHAPIRO: Yes, Your Honor. I think it would
14 be helpful if the Court actually looked at the water
15 quality standards applicable in this case, and it's in the
16 red brief at the appendix, pages 10a and 11a, and I
17 apologize for the type size, but they do tell us more
18 concretely what we're talking about here.

19 Now, you'll notice --

20 QUESTION: What was the page reference again,
21 please?

22 MR. SHAPIRO: It is page 10a and 11a, Your
23 Honor, where the criteria are, but I think we probably
24 should begin just for convenience at page 8a, which is
25 where the water quality standards for the Dosewallips

1 River are defined.

2 The Dosewallips River is a class AA river in
3 Washington. It's an extraordinary stream.

4 QUESTION: This is a regulation?

5 MR. SHAPIRO: This is a regulation --

6 QUESTION: A State regulation --

7 MR. SHAPIRO: This is the water quality standard
8 approved by EPA applied in this case.

9 QUESTION: It's not a statute, it's a
10 regulation.

11 MR. SHAPIRO: It is a regulation. Now, if we
12 look at the provisions we see first that there is in
13 subparagraph (b) characteristic uses. Those uses are
14 enumerated, and they include various provisions relating
15 to fish. They also include things like recreation.

16 Now, below that in paragraph (c), we begin the
17 water quality -- the water quality criteria. Now, what
18 are those criteria? Well, we have --

19 QUESTION: Where is -- where is paragraph (c)?

20 MR. SHAPIRO: Paragraph (c) is near the bottom,
21 Your Honor, about five lines up.

22 QUESTION: Where it says, "Water quality
23 criteria"?

24 MR. SHAPIRO: Yes, Your Honor.

25 QUESTION: Okay.

1 MR. SHAPIRO: Now, the first few of those
2 criteria are really numeric physical measures. They refer
3 to fecal coliform organisms, dissolved oxygen, dissolved
4 gas, temperature, which -- maximum temperature,
5 actually -- pH, the balance between acid and alkalinity,
6 and turbidity. We now move with turbidity into something
7 that is a little more of a condition than a pollutant.

8 Then we have two narrative requirements, toxic
9 radioactive, or deleterious material.

10 QUESTION: Where are we on the page?

11 MR. SHAPIRO: On the page we are now on 9a, and
12 we're down near the bottom at (vii).

13 QUESTION: Now, (vii) is a subsidiary part of
14 (c)?

15 MR. SHAPIRO: Yes, Your Honor. It is one of the
16 enumerated criteria.

17 QUESTION: Okay.

18 MR. SHAPIRO: And we have a general narrative
19 requirement for toxic, radioactive, or deleterious
20 material concentrations. The emphasis is on material, and
21 a further one dealing with materials that might offend
22 senses of sight, smell, sound, or taste. Those are the
23 measures of degradation, and one of the other effects of
24 these provisions is that it isn't simply a laundry list of
25 pollutants.

1 The last narrative one, toxic, radioactive, or
2 deleterious material, permits the State to deal with
3 things that aren't specifically listed if they are toxic,
4 and with that I'd like to save the remainder of my time
5 for rebuttal, unless the Court has questions.

6 QUESTION: Very well, Mr. Shapiro.

7 General Gregoire.

8 ORAL ARGUMENT OF CHRISTINE O. GREGOIRE

9 ON BEHALF OF THE RESPONDENTS

10 GENERAL GREGOIRE: Mr. Chief Justice and may it
11 please the Court:

12 The question before the Court today is whether
13 Washington State can enforce its water quality, both the
14 criteria and the antidegradation policy adopted consistent
15 with EPA mandate pursuant to the Clean Water Act. What we
16 have here are water quality standards adopted by the State
17 of Washington, including three key elements:

18 First, a designation of the uses of the water
19 body, 2) The criteria necessary to protect those
20 designated uses, and 3) an antidegradation policy. That
21 antidegradation policy is intended to protect existing
22 uses, those, in this case, of salmon and steelhead.

23 At this proposed project is a dam 50 feet wide
24 which will block the entire channel and divert, on
25 average, 75 percent of the water down to the powerhouse.

1 The central question before this Court then is, can
2 Washington State enforce all of its water quality
3 standards including its antidegradation policy by
4 protecting those existing uses by setting a minimum
5 instream flow or is Washington State limited only to its
6 criteria and the amount of water that may be in that
7 stream at the end of the construction of the project.

8 QUESTION: Now, General Gregoire, you say --
9 where is the antidegradation policy, as opposed to the
10 general water and use criteria classes, found.

11 GENERAL GREGOIRE: The antidegradation policy of
12 the State of Washington is found in respondent's brief at
13 5a.

14 QUESTION: Is it a statute, or --

15 GENERAL GREGOIRE: It is a Washington
16 Administrative Code provision, 173-201-035, adopted by the
17 State as a result of the mandate of EPA. EPA has said
18 they will approve water quality standards of the State
19 only if they include an antidegradation policy. That
20 policy there protects existing uses of a stream. In this
21 case the existing uses are salmon and steelhead.

22 That antidegradation policy has been long
23 recognized by Congress. In 1972, when it put in place
24 what is now the Clean Water Act, it specifically indicated
25 "restore and maintain the chemical, physical, biological

1 integrity of a stream," and when it so stated "maintain,"
2 it has been long held to have meant an antidegradation
3 policy.

4 QUESTION: Well, it certainly means
5 antidegradation insofar as the quality of the water may
6 cause a degradation of the use, but does it include
7 degradation where the quality of the water is constant, or
8 even higher? But the volume of the water, being lesser,
9 affects use.

10 GENERAL GREGOIRE: Your Honor, very clearly EPA
11 has said that antidegradation policy is intended to
12 protect the existing use -- here, salmon and steelhead.

13 QUESTION: Well, of course it is, but does it do
14 so only by regulating quality? Isn't that the issue --
15 whether it does so only by regulating quality, or also by
16 regulating, or permitting the State to regulate volume?

17 GENERAL GREGOIRE: The two are inextricably
18 linked in this case. There is no difference in
19 petitioner's claim that the State of Washington could
20 enforce its criteria if there was a degradation as a
21 result of lowering of the temperature or dissolved oxygen
22 as a result of that reduced flow. That is no different
23 than that reduced flow putting at risk the salmon and
24 steelhead, the existing uses in this stream.

25 QUESTION: Well, it may be different in that

1 only that violates -- only by reducing the quality of the
2 water do you violate the Clean Water Act, which is, after
3 all, called the Clean Water Act not the Voluminous Water
4 Act.

5 (Laughter.)

6 GENERAL GREGOIRE: No question, Your Honor, but
7 the two are inextricably linked here. What we have --

8 QUESTION: What's the textual basis for the
9 inextricable link?

10 GENERAL GREGOIRE: Well, again, if you look at
11 1987 amendments by Congress, what they said very clearly
12 there in amending section 303 of the Clean Water Act is
13 that they had long meant "maintain" to mean the
14 antidegradation policy, and that any standards and
15 permitting standards were subject to and had to be
16 consistent with the antidegradation policy.

17 QUESTION: Well, what if --

18 QUESTION: Well --

19 QUESTION: -- if you start with -- pardon me,
20 I'm sorry.

21 QUESTION: Let me -- where is that language that
22 you just referred to? Where in your brief?

23 GENERAL GREGOIRE: With regard to section 303,
24 Your Honor?

25 QUESTION: Whatever it was that you just

1 referred to, the 1987 --

2 GENERAL GREGOIRE: That is found at petitioner's
3 appendix 121a, wherein it states, "For waters where the
4 quality of such waters equal or exceed levels necessary to
5 protect the designated use..."

6 QUESTION: Where on the page are you reading
7 from?

8 GENERAL GREGOIRE: Let me grab it here, Your
9 Honor.

10 QUESTION: Is it capital B?

11 GENERAL GREGOIRE: Down at the bottom of the
12 page, Your Honor, (4) (B), "Standard attained."

13 QUESTION: Okay. Thank you.

14 GENERAL GREGOIRE: And where it says that, "To
15 protect the designated use..." and then it goes on to talk
16 about effluent limitation, it goes on to talk about water
17 quality standards, it goes on to talk about permitting
18 standards, and says, "They may be revised only if such
19 revision is subject to and consistent with the
20 antidegradation policy."

21 QUESTION: And this is now saying to the States
22 that these standards can't be revised?

23 GENERAL GREGOIRE: That's correct, Your Honor.

24 QUESTION: But how --

25 GENERAL GREGOIRE: EPA -- I'm sorry.

1 QUESTION: But how do we know that "standard"
2 means the use designation as distinct from the criteria?

3 GENERAL GREGOIRE: Well, if you --

4 QUESTION: Where's the definition in any of this
5 of "standard" to make it clear textually that "standard"
6 has the breadth of meaning that you are assuming?

7 GENERAL GREGOIRE: Again, if I can talk about
8 the process here, Congress mandated the partnership
9 between the State and EPA. EPA mandates the State to
10 adopt as part of their water quality standards an
11 antidegradation policy.

12 QUESTION: All right, and where does Congress
13 use the term just as you have used it, as part of your
14 water quality standard, "you've got to include an
15 antidegradation policy and a use designation"? Where is
16 that textual definition?

17 GENERAL GREGOIRE: What Congress has said is you
18 have to list -- as petitioner has indicated, Mr. Shapiro,
19 you have to indicate the designated uses and the criteria
20 to protect that.

21 QUESTION: No, but you're telling me what they
22 have done. I'm asking you where do I find it in a text
23 somewhere?

24 GENERAL GREGOIRE: I'm sorry. Well, in the
25 section Mr. Chief Justice just mentioned, subsection 303

1 specifically talks about the antidegradation policy.

2 QUESTION: But does section 303 do so in a way
3 that makes it plain, in your view, that water quality
4 standard includes use designation and antidegradation
5 policy?

6 GENERAL GREGOIRE: Well, the clear legislative
7 history of that amendment --

8 QUESTION: I guess the answer is no, it doesn't
9 clearly make --

10 GENERAL GREGOIRE: It doesn't articulate it in
11 the way --

12 QUESTION: Yes.

13 GENERAL GREGOIRE: -- in which you just said,
14 Your Honor, but if one looks at that legislative history,
15 it calls that antidegradation policy literally the
16 cornerstone of the Clean Water Act. Every day, agencies
17 such as Department of Ecology apply an antidegradation
18 policy when submitting permits for various and sundry
19 reasons.

20 When they find that their criteria are not
21 there, or insufficient to protect an existing use such as
22 salmon and steelhead, then they resort to the
23 antidegradation policy for purposes of permitting any
24 applicant.

25 QUESTION: Undoubtedly they do, but the question

1 is whether antidegradation means that the quality of the
2 water shall not go below the level necessary for extant
3 uses, and let's look again at page 121a of the section
4 that you were quoting from, (4)(B), standard attained.

5 It reads, "For waters identified under paragraph
6 (1)(A), where the quality of such waters..." not the
7 volume or anything else, "...where the quality of such
8 waters equals or exceeds levels necessary to protect the
9 designated use."

10 Yes, the quality has to be enough to protect the
11 designated use. Then it goes on, "Any effluent
12 limitation," blah, blah, blah, blah, "or any water quality
13 standard shall be consistent with the antidegradation
14 policy," which means that that quality shall not go any
15 lower. It seems to me that's the only sensible way to
16 read it, and all it gets you is that you can't fiddle with
17 the water quality, not that you can't fiddle with the
18 water volume.

19 GENERAL GREGOIRE: But Your Honor, what we have
20 here is a water quality issue putting at risk the uses,
21 the existing uses in this stream. It is no different than
22 the criteria applied in terms of temperature or dissolved
23 oxygen. The result is the same.

24 QUESTION: I understand that's very bad,
25 perhaps, but the point is that the Clean Water Act doesn't

1 seek to prevent degradation from all sources, it seeks to
2 prevent degradation of quality. It seeks to prevent uses
3 going -- or being prevented, or going down to a lower use
4 by reason of water quality, not by reason of volume. I
5 don't see anything in the act about volume.

6 GENERAL GREGOIRE: Your Honor, if I could refer
7 you to 33 U.S.C. section 304, it's found at the State's
8 brief, 32 to 33, note 38. Therein is a clear recognition
9 by Congress that dams constitute nonpoint pollution.

10 QUESTION: Now, this is page 32 and 33 of the
11 red brief?

12 GENERAL GREGOIRE: Yes, Your Honor.

13 QUESTION: Note 38.

14 QUESTION: Note 38?

15 GENERAL GREGOIRE: Yes. There is a clear
16 recognition by Congress that dams constitute and can
17 constitute nonpoint pollution, and that changes caused as
18 a result of the construction of the dam insofar as
19 movement, flow, or circulation of those navigable waters
20 may constitute nonpoint pollution.

21 QUESTION: Is this part of the Clean Water Act?

22 GENERAL GREGOIRE: It is, Your Honor.

23 QUESTION: Is the full text of this -- at least
24 the sentences set forth somewhere else? I mean, if this
25 is the key to your argument, I'm surprised it's only an

1 elided sentence in a footnote.

2 GENERAL GREGOIRE: I apologize, Your Honor. The
3 full text I think you will find, nonetheless, makes clear
4 the State's argument here that nonpoint pollution caused
5 by dams resulting in a change of flow or circulation --

6 QUESTION: No, but change of flow or circulation
7 may also affect quality of the water. If the flow is
8 reduced and pollutants are coming in from another source
9 in an unreduced quantity, that change in flow will affect
10 the quality. So also turbidity, so that, you know, the
11 rate of flow can affect the quality. There's nothing in
12 that that's inconsistent with saying that the Clean Water
13 Act deals with clean water and not with the volume of
14 water.

15 GENERAL GREGOIRE: The Clean Water Act deals
16 with Congress' articulation of maintenance and restoration
17 of the chemical, physical, biological integrity of the
18 Nation's waters. What is put at risk in this case is the
19 biological integrity of the Dosewallips River by putting
20 at risk the existing uses of salmon and steelhead.

21 EPA, by its regulation, makes clear that in
22 carrying out the mandate of Congress all States have to
23 adopt all three elements in order to have their water
24 quality standards approved. Designated uses, criteria,
25 and an antidegradation policy, and EPA goes on in their

1 regulations and makes clear that at no time is a State
2 allowed to use its antidegradation policy to reduce the
3 quality of the water such that existing uses are put at
4 risk.

5 That is this case. That is what is happening
6 here. That's the risk to the salmon and steelhead in the
7 Dosewallips River.

8 QUESTION: You say that the State of Washington
9 had no choice in this case but to do what it did.

10 GENERAL GREGOIRE: That's correct, Your Honor.

11 QUESTION: It wasn't something it just opted to
12 do as within its latitude under the Federal scheme, it had
13 to do this.

14 GENERAL GREGOIRE: We see no option for the
15 State to carry out its water quality standards mandated
16 and approved by EPA to do anything other than what it did
17 in this case.

18 QUESTION: But as I understand it, your answer
19 to the broad argument that this act is concerned with
20 quality, not quantity, is the answer that you gave to me,
21 and that is that the act in effect requires the State and
22 in any event requires licensees to respect the State's
23 certification subject to limits for the purpose of
24 preserving -- of imposing State standards.

25 The word "standard" is defined in such way as to

1 make it clear that it includes not only criteria, but use
2 designation and antidegradation policy. Use designation
3 necessarily -- as Washington has implemented it may
4 necessarily include upstream flow, therefore, under the
5 banner of standards, quantity is subject to regulation
6 through the State certification under this act. Is that
7 the -- are those the steps?

8 GENERAL GREGOIRE: Yes. Could I --

9 QUESTION: And the way to make sure you're
10 right, you tell me, is to look at 303 and its legislative
11 history, because that will make it clear, you tell me,
12 that standards do include the three elements and not
13 merely the element of criteria?

14 GENERAL GREGOIRE: That's correct, Your Honor.

15 QUESTION: Okay.

16 GENERAL GREGOIRE: And the implementing --

17 QUESTION: Well, that doesn't prove it. I mean,
18 the standards have to include the element of use, because
19 you cannot set a quality standard without knowing what the
20 water is going to be used for. If it's going to be used
21 for feeding cattle, it's one thing. If it's going to be
22 used for people swimming, it's something else.

23 So the mere fact that the statute says that the
24 State shall first decide what it wants to use the water
25 for and then set the quality standards doesn't prove that

1 the statute guarantees that whatever the State says the
2 water shall be used for shall for all purposes be
3 protected even under the Federal Power Act, even as
4 against matters that have nothing to do with water
5 quality.

6 The mere fact that you're authorized and
7 required to select a use for the water doesn't prove that
8 that use acquires Federal protection from everything as
9 opposed to just deterioration of water quality.

10 GENERAL GREGOIRE: Maybe I can help in this way,
11 Your Honor. There is a difference between designated uses
12 and existing uses. What Washington undertook in this case
13 was to protect existing uses. Not something it hopes to
14 attain at some time in the future, but what is currently
15 in that stream.

16 As a matter of what went on here, in 1982, by
17 invitation of FERC, the State Department of Ecology and
18 other State and Federal and tribal agencies together
19 undertook a state-of-the-art scientific study of this
20 stream. They tested it. They made three determinations:
21 1) what are the existing uses in that 1.2 mile reach, and
22 what they found were salmon and steelhead. 2) Will the
23 project, as submitted by the applicant in this case, put
24 those existing uses at risk? The answer was yes. Those
25 salmon and steelhead, existing uses in that stream today,

1 would be put at risk.

2 QUESTION: Well, General Gregoire, is there any
3 reason to think that FERC wouldn't protect streamflow in
4 its license review? It has to consult with the State, and
5 if FERC's own test show these problems, do we have any
6 reason to fear that the Federal Government isn't going to
7 consider the State's interests and the concerns about the
8 fish and establish streamflow limitations?

9 GENERAL GREGOIRE: Your Honor, what the State
10 did here was its very limited authority of water quality
11 and ensuring water quality. The FERC process, the process
12 that we talked earlier with Mr. Shapiro about under the
13 Electric Consumers Protection Act, that's intended to look
14 at the entire project and what-all could be put at risk.

15 QUESTION: Well, could you answer my question?

16 GENERAL GREGOIRE: I'm sorry.

17 QUESTION: Is there any reason to think that
18 FERC won't impose streamflow limitations to protect the
19 fish?

20 GENERAL GREGOIRE: I can't answer your question
21 because they have not yet done anything in this case --

22 QUESTION: Well, they haven't done it because
23 they have to get the conditions under the Clean Water Act
24 first, don't they?

25 GENERAL GREGOIRE: They do, Your Honor.

1 QUESTION: Yes, so of course they haven't acted
2 yet.

3 GENERAL GREGOIRE: Right.

4 QUESTION: Yes.

5 GENERAL GREGOIRE: So I don't know that they
6 would set an instream flow to protect the water quality of
7 the State of Washington consistent with the 401
8 certification. The United States argument about whether
9 this is right is in fact a question, one that we submit
10 technically is correct.

11 QUESTION: Well, they would have to set the flow
12 requirement and consult with the State, would they not?

13 GENERAL GREGOIRE: But they are not required --
14 they are not required as a result of that 10(j) process to
15 set that minimum flow solely to protect water quality
16 standards. 401 of the Clean Water Act mandates as a
17 necessary condition precedent to that act that water
18 quality must be protected. That's what the State
19 undertook here to ensure its limited role of protecting
20 water quality was carried out.

21 Then the FERC process would come about in which
22 they would look at much broader issues, not the least of
23 which would be, should the streamflow be greater? Should
24 the streamflow be greater for enhancement? Should there
25 be mitigation? Those all issues will come up in the 10(j)

1 process with FERC, but it must defer to the State's 401
2 water quality certification with regard to the minimum
3 necessary to protect water quality.

4 QUESTION: Doesn't 10(j) require -- require them
5 to protect the fish? I mean, what you're saying is that
6 they don't necessarily have to agree with you or with the
7 State --

8 GENERAL GREGOIRE: Yes.

9 QUESTION: -- about what it takes to protect the
10 fish.

11 GENERAL GREGOIRE: That's correct, Your Honor.

12 QUESTION: But they must protect the fish, in
13 their own judgment at least, right?

14 GENERAL GREGOIRE: Well, not necessarily.

15 QUESTION: No?

16 GENERAL GREGOIRE: They do a balancing there,
17 and they -- it is required under 10(j) --

18 QUESTION: Oh, really?

19 GENERAL GREGOIRE: -- that if they disagree with
20 whatever the Federal and State Fisheries & Wildlife
21 Departments may recommend, they have to state why.

22 QUESTION: If they disagree with it in the sense
23 of saying we don't want these fish?

24 GENERAL GREGOIRE: No.

25 QUESTION: They can't do that, can they?

1 GENERAL GREGOIRE: If they disagree in that they
2 have balanced the need of consumer electrical power, et
3 cetera, against the need for the protection of the fish,
4 but that -- that balancing act -- that balancing act comes
5 after the system that Congress has put in place in the
6 Clean Water Act which says, under no circumstances will we
7 allow the degradation of the water quality. That is the
8 limited role of the State here. That's all it did. The
9 FERC process is much greater -- much greater.

10 QUESTION: Miss Gregoire, I have one collateral
11 question.

12 GENERAL GREGOIRE: Yes, Your Honor.

13 QUESTION: Could the State of Washington under
14 your State constitution simply pass a law telling the city
15 to comply with the State standard as a matter of State
16 law?

17 GENERAL GREGOIRE: Our position would be no.
18 The only way in which this water quality standard was
19 set --

20 QUESTION: No -- no, my question, you just have
21 a State law, and the State law says the city must follow
22 whatever standard we set as a matter of State law.

23 GENERAL GREGOIRE: No, not as a matter of State
24 law, Your Honor --

25 QUESTION: No, this is my hypothetical.

1 GENERAL GREGOIRE: I'm sorry.

2 QUESTION: I'm having a hypothetical statute --

3 GENERAL GREGOIRE: All right.

4 QUESTION: -- that the State of Washington
5 passes, and it says to all of its agents, its cities, you
6 must comply with the water standards we set as a matter of
7 State law.

8 GENERAL GREGOIRE: They can -- yes, they can do
9 that. That is the --

10 QUESTION: The State of Washington could do that
11 under its State constitution?

12 GENERAL GREGOIRE: It could do that, but that
13 would not necessarily answer the question here as to
14 whether it's a water quality decision under 401.

15 QUESTION: Well, it would certainly prevent the
16 city from litigating.

17 GENERAL GREGOIRE: Thank you, Mr. Chief Justice.

18 QUESTION: Thank you, General Gregoire.

19 Mr. Wallace, we'll hear from you.

20 ORAL ARGUMENT OF LAWRENCE G. WALLACE

21 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

22 SUPPORTING THE RESPONDENTS

23 MR. WALLACE: Thank you, Mr. Chief Justice, and
24 may it please the Court --

25 QUESTION: Mr. Wallace, Mr. Shapiro told us in

1 his part of the argument that the FERC is bound as to the
2 conditions that we're talking about now, and it could not
3 change those, and he referred to a case from the D.C.
4 Circuit. Does the Government agree with that statement?

5 MR. WALLACE: Well, we -- in a sense, yes, that
6 the statute says that any condition imposed in the section
7 401 --

8 QUESTION: Well, what do you mean when you say,
9 in a sense you agree?

10 MR. WALLACE: Well, because this Court's
11 decision in Escondido points out that whilst FERC must
12 recite such a condition in the license that it issues, it
13 can also explain any basis it has for disagreeing with
14 that condition, and in a lengthy footnote explain that
15 FERC could then take the position in court that that
16 condition is not a proper one in light of its statutory
17 responsibilities under the Federal Power Act, and I'm
18 referring to footnote 20 on page -- at 466 U.S., page 778.

19 In the Escondido case which we cite toward the
20 end of our brief, this Court dealt with a similar
21 certification required from the Secretary of the Interior
22 when the hydropower project was to go on an Indian
23 reservation and explained how FERC should proceed if it
24 disagrees with the substance of the condition, but
25 nonetheless is required by law to recite the condition.

1 QUESTION: It would have to go to court and say,
2 we don't want this condition in the license we're about to
3 issue?

4 MR. WALLACE: It would make findings as well
5 with respect to it, and probably the applicant would go to
6 court and FERC could support the applicant in that
7 respect.

8 Now, I do want to begin by --

9 QUESTION: But Mr. Wallace, isn't it true that
10 petitioners at least would be disabled. If they lose this
11 case, then aren't they bound by the adjudication, so that
12 they could not then come before FERC and argue for
13 something less than the streamflow required?

14 MR. WALLACE: They are free to argue what the
15 Federal Power Act, with our criteria applicable thereto,
16 would lead to as a conclusion, and if they persuade FERC
17 that its responsibilities under the Federal Power Act are
18 inconsistent with this condition, then a question would be
19 presented about how to reconcile the two statutes, so that
20 it's possible that they could get a judgment that
21 ultimately would supersede this condition, and it's
22 possible that it would not ultimately --

23 QUESTION: They would be precluded with respect
24 to what the Clean Water Act means, but they would be free
25 to argue that there's another Federal -- piece of Federal

1 legislation, that the two Federal acts are at war with
2 each other?

3 MR. WALLACE: Exactly. They would be precluded
4 from arguing that this is not a proper condition under the
5 Clean Water Act, but if I may, I would like to caution --

6 QUESTION: Excuse me, Escondido was referring to
7 different conditions.

8 MR. WALLACE: Yes, but it said how --

9 QUESTION: Well, that makes a big difference,
10 doesn't it? I mean, it's not referring to conditions
11 under the Clean Water Act at all. It's referring to
12 conditions imposed by the Secretary for protection of
13 Indian reservations, wasn't that it?

14 MR. WALLACE: By the Secretary of the Interior
15 under other statutory authority.

16 QUESTION: Well, that doesn't say at all that
17 the same scheme applies under the Clean Water Act.

18 MR. WALLACE: It doesn't say that it does, but
19 it's a strong suggestion by analogy, because these are
20 comparably conditions required to be recited in the
21 license.

22 I want to start by cautioning the Court about
23 the scope of the issue before it. If petitioners are
24 correct that section 401 certificates must be constricted
25 in the way they espouse, the effect cannot be confined to

1 hydropower projects under the Federal Power Act that
2 are -- and licenses that are issued by FERC, taking into
3 account that entire balancing process.

4 Section 401 on its face requires a certificate
5 to be obtained by any applicant for any Federal license or
6 permit to conduct any activity, or construction or
7 operation of any facility which may result in a discharge
8 into the navigable waters. This includes nonhydropower
9 facilities that have to be licensed by the Corps of
10 Engineers, by the Secretary of Interior, by the Secretary
11 of Agriculture, many statutory schemes cited en passant in
12 these briefs.

13 However, they do not contain the same kind of
14 balancing criteria that are spelled out in the Federal
15 Power Act, and a good example of that is the Federal Land
16 Policy and Management Act which is cited in petitioner's
17 reply brief. It's at 43 U.S.C. 1761, which authorizes the
18 Secretaries of Interior and Agriculture, depending on
19 which Federal lands we're talking about, to issue rights
20 of way for reservoirs, canals, ditches, pipelines, slurry
21 and emulsion systems, conveyor belts for timber, power
22 lines, means of transportation, et cetera.

23 There is a much less precise statutory backstop
24 there --

25 QUESTION: And you think that the way the

1 Federal Government decided uniformly for all these old
2 statutes the whole hob -- you know, bundle of them, to
3 require all Federal agencies to abide by State streamflow
4 requirements was the Clean Water Act. You think that
5 significant thing was done so clearly by the change?

6 MR. WALLACE: There's no doubt that they have to
7 comply -- they have to get 401 certificates. They have to
8 comply with the Clean Water Act. The question is the
9 scope of what those certificates can address.

10 QUESTION: It's an indirect way to have such a
11 significant effect upon Federal action.

12 MR. WALLACE: Well, the effect will be there
13 because petitioner admits that the criteria have to be
14 satisfied.

15 We're really arguing about what is the scope of
16 the water quality standards that can be specified in these
17 401 certificates, and if there's one thing that's
18 conspicuous, and conspicuously relevant about the face of
19 the Clean Water Act, it's that water quality standards are
20 required to be adopted not for their own sake, or to
21 satisfy some scientist in a laboratory, but to preserve
22 and protect certain beneficial uses of the waters as well
23 as the public health.

24 And the beneficial use that is relevant here is
25 use as fish habitat, and that is the use designated by

1 Washington, and in interpreting the operative provisions
2 of the act, we should not lose sight of two very simple
3 but very basic propositions that you cannot have fish
4 habitat without fish, and second, that fish --

5 QUESTION: Well, are you here telling us,
6 Mr. Wallace --

7 MR. WALLACE: -- need water to survive.

8 QUESTION: Are you here telling us that the
9 Federal Government can't protect these habitats under any
10 and all licensing schemes that it has, that it can't and
11 it won't? You're here representing the Federal
12 Government, telling us don't trust the Feds, they're not
13 going to do it.

14 MR. WALLACE: This is a Federal --

15 QUESTION: Is that it?

16 MR. WALLACE: -- statutory program, the Clean
17 Water Act, and these standards have been approved by EPA.
18 Of course there are other -- other agencies have
19 responsibilities, although they're not all as specific,
20 and we happen to be dealing with a rather dramatic kind of
21 fish habitat that practically any Federal agency would
22 protect, but the Clean Water Act is not limited in its
23 protections just to that.

24 I would like to --

25 QUESTION: I assume you're speaking for FERC as

1 well as for the rest of the Federal Government, is that
2 right? I mean, your views we can take any of those --

3 MR. WALLACE: We do represent all of these
4 interests in the Court. FERC is not a signatory to this
5 brief, but they've been consulted in what we have filed
6 here.

7 QUESTION: Thank you, Mr. Wallace.

8 Mr. Shapiro, you have 5 minutes remaining.

9 REBUTTAL ARGUMENT OF HOWARD E. SHAPIRO

10 ON BEHALF OF THE PETITIONERS

11 QUESTION: Mr. Shapiro, may I ask you one
12 question before you get started? Do I correctly
13 understand your position to be that even if there never
14 was a Federal Power Act at all, that this condition would
15 nevertheless violate the Clean Water Act?

16 MR. SHAPIRO: Yes, Your Honor.

17 QUESTION: Okay.

18 MR. SHAPIRO: The State has focused on the uses
19 here, saying that uses are the ultimate standard. In
20 effect, therefore, we don't need any criteria.

21 The focus on uses has a reason here. The State
22 admits at page 24 of the red brief that there is no
23 violation by this project of the criteria. The phrase
24 they use is, it is likely that there is no violation.

25 When the certificate was issued, the

1 certificate, which is in the record at petitioner's
2 appendix 83, expressly says that the streamflow
3 requirements are in excess of those required for water
4 quality standards. When the case was before the Pollution
5 Hearing Control Board on motion for summary judgment, that
6 board said that it is clear that these streamflows are not
7 based on and were not intended to be supported by water
8 quality standards.

9 It wasn't until we got to the supreme court of
10 Washington that we got to antidegradation policy, which
11 came back into the case as a part of the water quality
12 standards.

13 Now, antidegradation policy -- it's all
14 recognized -- is established under section 303. That is
15 what the 1987 amendments refer to, the antidegradation
16 policy established under this section. Our position is,
17 quite simply, that if it's established under section 303,
18 it has to comply with the requirements of section 303, and
19 those requirements are that a water quality standard shall
20 consist of uses and criteria, and that in fact is what
21 we're -- what's involved with here.

22 The antidegradation policy applied here was the
23 policy for protecting existing uses. That's set forth at
24 petitioner's appendix, page 7a, in the supreme court of
25 Washington's opinion.

1 Protecting existing uses under EPA's regulations
2 and practice requires that there be criteria to protect
3 the existing uses. In short, you don't get away from
4 criteria in this case.

5 QUESTION: Well, your argument has to be a
6 little more than that. Your argument has to be that
7 criteria are the only thing that count --

8 MR. SHAPIRO: It's the --

9 QUESTION: -- that the uses are just the means
10 of determining what the criteria ought to be.

11 MR. SHAPIRO: That's correct.

12 QUESTION: If you concede that both uses and
13 criteria are independently in there, then you lose,
14 because you're not allowing this use to continue,
15 according to the State.

16 MR. SHAPIRO: I think that is an accurate
17 statement of the State's position. Our position is that
18 the phrase in section 303(c) about uses and criteria is
19 conjunctive, and Congress didn't intend there to be uses
20 independent of criteria, because then there would be no
21 need for the act. We could take that long administrative
22 regulation I referred Your Honors to in the red brief and
23 just throw out all the criteria. In fact, you wouldn't
24 need most of the Clean Water Act.

25 Now, the Clean Water Act expressly says in

1 section 101(a) that it is intended to achieve the
2 physical, chemical, and biological integrity of water, but
3 it also says in the second sentence of section 101(a) that
4 these goals are to be achieved consistent with the
5 provisions of this act.

6 The implementation of that goal is what the
7 fight has been about for nearly 20 years in shaping the
8 Clean Water Act, and therefore I suggest that the Clean
9 Water Act has to be read, particularly when you're dealing
10 with the delegations to the States in section 401, in
11 accordance with the limitations that Congress has
12 provided, otherwise the act turns into something
13 absolutely shapeless.

14 There was a reference by the United States to
15 the Escondido case. Now, the Escondido case was a case
16 involving the authority of the Secretary of Interior or
17 the Secretary of Agriculture to impose a condition on a
18 hydroelectric license under the Federal Power Act if the
19 hydroelectric project is located on reservations subject
20 to the control of those officials, and the Court said that
21 while the condition had to be included in the license, the
22 applicant or FERC could challenge -- the condition's
23 reasonableness was subject to judicial review.

24 But of course, that is a condition specified
25 under the scheme of the Clean Water Act -- under the

1 scheme of the Federal Power Act.

2 CHIEF JUSTICE REHNQUIST: Thank you,
3 Mr. Shapiro.

4 MR. SHAPIRO: Thank you.

5 CHIEF JUSTICE REHNQUIST: The case is submitted.

6 (Whereupon, at 12:22 p.m., the case in the
7 above-entitled matter is submitted.)

CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the
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The United States in the Matter of:*

PUD NO. 1 OF JEFFERSON COUNTY
AND CITY OF TACOMA

Petitioners

v. _____

DEPARTMENT OF ECOLOGY OF
WASHINGTON STATE,
DEPARTMENT OF FISHERIES AND
DEPARTMENT OF WILDLIFE

No. 92-1911

*and that these attached pages constitutes the original transcript of
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