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Daryl G. Ward

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# The Uncertainty Surrounding Grazing and Section 401 of the Clean Water Act: Predicting the Outcome of *Oregon Natural Desert Association v. Dombeck*\*

## I. INTRODUCTION

In July of 1998, the Ninth Circuit released an opinion in *Oregon Natural Desert Association (ONDA) v. Dombeck*,<sup>1</sup> which held that state certification under section 401 of the Clean Water Act (CWA) is required for point sources of pollution, but not required for nonpoint sources of pollution. The decision surprised commentators who had predicted an opposite result.<sup>2</sup> Then in October of 1998, the Ninth Circuit withdrew the earlier opinion,<sup>3</sup> which left the litigants, the state of Oregon and other interested parties wondering what the final outcome would be. This case note discusses why the court should rely on their first impression of the case and reinstate their earlier decision. The note also discusses the implications such a decision would have on water quality and land use on Federal lands.

## II. BACKGROUND

### A. Water Quality Improvement Act of 1970

In 1970, Congress enacted the Water Quality Improvement Act<sup>4</sup> (WQIA) which attempted to control water pollution. These attempts were mostly unsuccessful because WQIA contained two major flaws. First, regulators had to work back upstream to discover the source of pollution. On a stream with multiple dischargers it was very difficult to determine and prove which discharger or combination of dischargers was causing water quality to fall below the quality standards.<sup>5</sup> Second, WQIA allowed dischargers to freely to pollute a water body until the pollutants in the water

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1. No. 97-35065, 97-35112, 1998 WL 407711 (9<sup>th</sup> Cir.).

2. Debra L. Donahue, *The Untapped Power of Clean Water Act Section 401*, 23 *ECOLOGY L.Q.* 201 (1996); Dana G. Leonard, *Pud1, Thomas, and the Future of Section 401 of the Clean Water Act: An Expansion of State Regulation*, 18 *J. LAND RESOURCES & ENVTL. L.* 293 (1998); Alia S. Miles, Comment, *Searching for the Definition of "Discharge": Section 401 of the Clean Water Act*, 28 *ENVTL. L.* 191 (1998).

3. *ONDA*, 1998 WL 407711 at \*1.

4. Pub. L. No. 91-224, 84 Stat. 91 (1970).

5. *ONDA*, 1998 WL 407711 at \*4.

reached the threshold of the water quality standards.<sup>6</sup> Thus, dischargers did not have adequate incentives to implement expensive pollution reducing techniques.

### *B. The 1972 Amendments and Technology Based Effluent Standards*

Congress recognized these flaws and amended the WQIA in 1972. These broad amendments became known as the Clean Water Act (CWA).<sup>7</sup> The new legislation changed the focus of the law by concentrating on reducing the amount of pollution discharged, regardless of the condition of the water body in which the pollution was dumped. Discharges of pollutants were outlawed unless the discharger obtained a permit under the National Pollution Discharge Elimination System (NPDES).<sup>8</sup>

The Act directed the United States Environmental Protection Agency (EPA) to establish NPDES permit limits based on the available pollution reducing technology.<sup>9</sup> These technology standards took into consideration factors such as: age of machinery, processes employed, cost of achieving the effluent guideline, and other environmental impacts.<sup>10</sup> Thus, a NPDES permit requires the discharger to reduce pollutants in their discharge to an amount the EPA decided was technically feasible for the industry. As a safety net, section 303 was enacted, which imposed water quality standards if the technology-based standards failed to achieve the water quality necessary to sustain the designated use for that particular water body.<sup>11</sup>

The NPDES permits were only required for "point sources," which are defined by the CWA as "discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."<sup>12</sup> Discharges of pollutants that do not fit into this category have become classified as nonpoint sources. These nonpoint sources of pollutants are not directly regulated by the 1972 amendments. Congress presumably took this course of action because point source polluters could be identified and regulated more easily than nonpoint source polluters.<sup>13</sup>

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6. *See id.*

7. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1994).

8. *See* 33 U.S.C. § 1342 (1994).

9. The CWA provides for several technology based standards including: Best Practicable Technology (BPT), 33 U.S.C. § 1311(b)(1) (1994); Best Conventional Control (BCT), 33 U.S.C. § 1314(a)(4) (1996); Best Available Technology (BAT), 33 U.S.C. § 1317(a)(2) (1994). For a detailed discussion of these standards see ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION, LAW SCIENCE, AND POLICY, 916-30 (2d ed. 1996).

10. *See supra* note 8.

11. 33 U.S.C. § 1313 (1994).

12. 33 U.S.C. § 1362(14) (1994).

13. *ONDA*, 1998 WL 407711 at \*4 (quoting *Natural Resources Defense Council v. EPA*, 915

The 1972 amendments did enact some indirect regulation of nonpoint sources.<sup>14</sup> Section 208 provided grants for the construction of municipal waste treatment plants. States that participated were required to prepare wastewater treatment plans that included procedures for the identification and control of nonpoint source pollution.<sup>15</sup> "Thus, the Act provides no direct mechanism to control nonpoint source pollution but rather uses the 'threat and promise' of federal grants to the states to accomplish this task."<sup>16</sup> This indirect regulation of nonpoint source pollution was supplemented in 1987 when Congress added section 319 to the Act.<sup>17</sup> Under section 319, states were required to adopt nonpoint source management programs and also provides grants to implement the programs.<sup>18</sup>

### C. Section 401 of the CWA

The purpose of section 401 is to ensure that activities requiring a Federal permit or licence will not cause pollution in violation of state water quality standards. The language of section 401 provides:

Any 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 the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title . . . . No license or permit shall be granted until the certification required by this section has been obtained or has been waived . . . .<sup>19</sup>

Historically, states have exercised their certification authority only for hydroelectric projects, discharges that required a 404 permit, and other point sources.<sup>20</sup>

### D. PUD No. 1 v. Washington

In 1994, the Supreme Court decided *PUD No. 1 v. Washington Dep't of Ecology*,<sup>21</sup> which interpreted section 401. This case involved a proposed

F.2d 1314, 1316 (9<sup>th</sup> Cir. 1990).

14. 33 U.S.C. §§ 1288, 1329 (1994).

15. 33 U.S.C. § 1288 (1994).

16. *ONDA*, 1998 WL 407711 at \*4 (quoting *Shanty Town Assocs. Ltd. Partnership v. EPA*, 843 F.2d 782, 791 (4<sup>th</sup> Cir. 1988)).

17. 33 U.S.C. § 1329 (1994).

18. *Id.*; See also *Natural Resource Defense Council v. EPA*, 915 F.2d 1314, 1318 (9<sup>th</sup> Cir. 1990).

19. 33 U.S.C. § 1341(a)(1) (1994).

20. Miles, *supra* note 2, at 192.

21. 511 U.S. 700 (1994).

hydroelectric dam which included two point source discharges: the release of dredge and fill materials during the construction of the dam, and the release of water through the dam's tailrace. The Washington Department of Ecology placed a limitation in the 401 permit for minimum instream flows, which are considered a nonpoint source. The Supreme Court upheld these minimum instream flow requirements, even though the decrease of instream flows was not related to the point sources.<sup>22</sup> This expansive view of section 401 kindled curiosity about the potential power of section 401.<sup>23</sup> *PUD No. 1*, however, failed to answer whether state certification is needed for an activity requiring a Federal licence or permit which exclusively causes nonpoint source pollution.

### E. *The Split of Authority in the Ninth Circuit*

After the ruling in *PUD No. 1*, various groups filed lawsuits attempting to establish that section 401 applied to activities only causing nonpoint source pollution. In 1996, two district courts in the Ninth Circuit reached opposite conclusions on this issue.

The first case, *Idaho Conservation League v. Caswell*,<sup>24</sup> involved a logging road that would potentially increase the sediment load in a nearby stream. Idaho Conservation League (ICL), as part of its claim, sought to enjoin the construction of the road because the U.S. Forest Service had not required certification under section 401 for the project.<sup>25</sup> The Idaho District Court held that the logging road was a nonpoint source of pollution and section 401 was "only intended to encompass those projects which resulted in a 'point source discharge.'"<sup>26</sup>

## III. FACTS

The second case, the subject of this case note, was *Oregon Natural Desert Association v. Thomas*.<sup>27</sup> Oregon Natural Desert Association filed an action challenging the Forest Service's long-time practice of issuing grazing permits without requiring permittees to first obtain state water quality certification.<sup>28</sup> The grazing permit in question had been issued in

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22. *See id.*

23. *See* Debra L. Donahue, *The Untapped Power of Clean Water Act Section 401*, 23 *ECOLOGICAL L.Q.* 201 (1996).

24. No. CV 95-394-S-MHW, 1996 WL 938215 (D. Idaho, Aug. 12, 1996).

25. *Id.* at \*8.

26. *Id.* at \*9.

27. 940 F. Supp. 1534 (D. Or. 1996).

28. *Id.* at 1537.

1993 to Robert and Diana Burril and allowed them to graze 50 head of cattle in Oregon's Malheur National Forest. "The cattle graze several months a year in and around Camp Creek and the Middle Fork of the John Day River."<sup>29</sup> The parties stipulated that the grazing cattle could potentially pollute these waterways with their waste, increased sedimentation, and increased temperature.<sup>30</sup> Other parties intervened to defend their positions on this important issue.<sup>31</sup>

The district court granted the plaintiffs' summary judgment motion, concluding that "discharge" as used in section 401 applied to both point and nonpoint sources of pollution.<sup>32</sup>

After debate between the EPA, the Forest Service and the Bureau of Land Management, the ruling was appealed.<sup>33</sup> On July 22, 1998, the Ninth Circuit reversed the district court and held that "certification under [section 401] is not required for grazing permits or other Federal licenses that may cause pollution solely from nonpoint sources."<sup>34</sup> Then, in October, 1998, the Ninth Circuit withdrew their initial decision.

#### IV. REASONING

In the initial opinion, the Ninth Circuit reversed the district court's ruling concerning section 401's application to nonpoint sources. The court came to this conclusion after examining "the language of the governing statute, guided not by a single sentence or member of a sentence, but look[ing] to the provisions of the whole law, and to its object and policy."<sup>35</sup> The court relied on the following factors in their decision.

##### *A. 1972 Amendments Changed the Focus of the Clean Water Act*

The predecessor of the Clean Water Act, the 1970 Water and Environmental Quality Improvement Act (WEQI), "attempted to control water pollution by focusing regulatory efforts on achieving 'water quality standards,' standards set by the states specifying the tolerable degree of pollution for particular waters."<sup>36</sup> Enforcers of WEQI had a difficult task of de-

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29. *ONDA*, 1998 WL 407711 at \*1.

30. 940 F. Supp at 1537.

31. The Burills, Grant County, and the Eastern Oregon Public Lands Coalition intervened as defendants and the Confederated Tribes of the Warm Springs Reservation intervened as plaintiffs. *ONDA*, 1998 WL 407711 at \*1.

32. *ONDA*, 1998 WL 407711 at \*7.

33. See Miles, *supra* note 2, at 193.

34. *ONDA*, 1998 WL 407711 at \*7.

35. *Id.* at \*3 (quoting *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 94-95 (1993)).

36. *Id.* at \*4 (quoting *Natural Resources Defense Council v. EPA*, 915 F.2d 1314, 1316 (9<sup>th</sup> Cir. 1990) (citing *EPA v. State Water Resources Control Bd.*, 426 U.S. 200, 202-03 (1976)).

termining and proving which discharger, among all the dischargers on the stream, caused the water quality to fall below acceptable standards.<sup>37</sup> Additionally, the program was flawed because it focused on "the tolerable effects rather than the preventable causes."<sup>38</sup>

The 1972 Clean Water Act changed the focus of controlling national water pollution. Congress directed the EPA to set effluent limitations for point source dischargers. Instead of basing these effluent limitations on the condition of the water receiving the pollution, the limitations were based on the best technical pollution elimination methods available to the discharger. Thus, the CWA banned discharges from point sources, unless the discharger obtained a NPDES permit and met the effluent guidelines.

### *B. The Act's Separate Treatment of Point and Nonpoint Sources of Pollution*

The overall goal of the amendment was to eliminate discharges from point sources.<sup>39</sup> As discussed above in the background section, the CWA directly regulates point source pollution and only indirectly regulates non point source pollution.<sup>40</sup> The Ninth Circuit recognized this distinction in *Oregon Natural Resources Council v. United States Forest Service*.<sup>41</sup> Using CWA's citizen suit provision,<sup>42</sup> Oregon Natural Resources Council (ONRC) attempted to enjoin a logging operation that was causing non point source pollution. Under CWA, a citizen can sue if section 1311 effluent limitations are violated.<sup>43</sup> ONRC argued that the effluent limitations of section 1311 applied to nonpoint sources by virtue of section 1311(b)(1)(C), which referenced state water quality standards. This argument was rejected by the court because it was contrary to the structure and plain language of the Act: "The title and construction of section 1311(b)(1) lead us to the logical conclusion that the 'limitations' set forth in section 1311(b)(1)(C) are 'effluent limitations' and, therefore, by definition, applicable only to point sources."<sup>44</sup> The court used the same reasoning to reach the conclusion that "discharge" as used in section 401 only included point sources.<sup>45</sup>

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37. *Id.*

38. *Id.*

39. 33 U.S.C. § 1251(a) (1994).

40. See *supra* notes 11-18 and accompanying text.

41. 834 F.2d 842 (9<sup>th</sup> Cir. 1987).

42. 33 U.S.C. § 1365 (1994).

43. See 33 U.S.C. § 1365(f)(2) (1994).

44. *Oregon Natural Resources Council v. United States Forest Serv.*, 834 F.2d 842, 850 (9<sup>th</sup> Cir. 1987).

45. *ONDA*, 1998 WL 407711 at \*7.

### C. *The Amendment of § 401*

The language of section 401 was amended in 1972. Prior to 1972, the provision allowed states to certify that a licensed activity would “not violate applicable water quality standards.”<sup>46</sup> After 1972, section 401 required certification that any discharge from the licensed activity “will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317” of Title 33.<sup>47</sup> Each one of these sections regulates point source discharges.

The court recognized that the language of section 401 was changed “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.”<sup>48</sup>

### D. *CWA’s Use of the Word “Discharge”*

The outcome of *ONDA v. Dombeck* hinges on the interpretation of the term “discharge” as used in section 401.

#### 1. *Discharge v. discharge of pollutants*

The plaintiff argued that “‘discharge’ in [Section 401] refers to pollution from both point sources and nonpoint sources.”<sup>49</sup> Section 502 of the CWA defines “discharge” and “discharge of pollutants” as follows: “The term ‘discharge of a pollutant’ . . . means any addition of any pollutant to navigable waters from any point source . . . .”<sup>50</sup> “The term ‘discharge’ when used without qualification *includes* a discharge of a pollutant . . . .”<sup>51</sup>

Therefore, the term “discharge” when used without qualification includes any addition of any pollutant to navigable water from any point source. The term “includes,” is expansive, and the plaintiff argued that “discharge” must include more than point source releases. Because non point pollution is the only other category of pollution, discharge must include nonpoint source pollution. This was the basis of the district court’s ruling that “discharge” must include releases from point and nonpoint sources.<sup>52</sup>

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46. Pub. L. 91-224, § 21(b)(1), 84 Stat. 91 (1970).

47. 33 U.S.C. § 1341(a)(1) (1994).

48. S.Rep. No. 414, at 69 (1971), *reprinted in* 1972 U.S.C.C.A.N., 3735.

49. *ONDA*, 1998 WL 407711 at \*3.

50. 33 U.S.C. § 1362(12) (1994).

51. 33 U.S.C. § 1362(16) (1994) (*emphasis added*).

52. *ONDA*, 940 F. Supp. 1534, 1539-40 (D. Or. 1996).



The Ninth Circuit recognized the expansiveness of the term "includes," but rejected the conclusion that discharge included nonpoint sources. Instead, the court embraced the government's position that "'discharge' is limited to point sources but includes both polluting and nonpolluting releases."<sup>53</sup>

## 2. *Runoff v. discharge*

The court also found that "[t]he terminology employed throughout the Clean Water Act cuts against ONDA's argument that the term 'discharge' includes nonpoint source pollution like runoff from grazing."<sup>54</sup> The court recognized that the word "discharge" is used consistently throughout the act, in reference to the release of effluent from a point source.<sup>55</sup> By contrast, the term "runoff" is used to describe pollution flowing from nonpoint sources.<sup>56</sup> The court reasoned that Congress would have included runoff in section 401 if they had intended to require certification for runoff as well as discharges.<sup>57</sup> This reasoning was based on the language used by Congress in section 313 "which directs federal agencies 'engaged in any activity which may result in the *discharge or runoff* of pollutants' to comply with applicable water quality standards."<sup>58</sup> The court concluded that "[h]ad Congress intended to require certification for runoff as well as discharges, it could easily have written [section 401] to mirror the language of [section 313]."<sup>59</sup>

### E. *Distinguishing PUD No. 1 v. Washington Dep't of Ecology*

The appellees argued that the holding in *PUD No. 1 v. Washington Dep't of Ecology*<sup>60</sup> dictated the District Court's ruling. The Ninth Circuit, however, distinguished *PUD No. 1* because the permit in question there had discharges from point sources as well as nonpoint sources. The point source discharges were a release of dredge and fill materials during construction of a hydroelectric dam and the release of water through the dam's tailrace. *PUD No. 1* held that "a state is free to impose such water-quality limitations 'once the threshold condition, the existence of a discharge, is

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53. 1998 WL 407711 \*3; see also *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) (interpreting "discharge" in section 1362(16) of the Act to include the release from a point source of turbid water that did not contain any pollutant).

54. *ONDA*, 1998 WL 407711 at \*6.

55. See *id.*

56. See 33 U.S.C. § 1288 (1994) (describing urban wastewater plans); 33 U.S.C. § 1314(f) (1994) (providing guidelines for identification of nonpoint sources of pollution).

57. *ONDA*, 1998 WL 407711 at \*6.

58. *ONDA*, 1998 WL 407711 at \*6 (quoting 33 U.S.C. § 1323(a) (1994)) (emphasis added).

59. *Id.*

60. 511 U.S. 700 (1994).

satisfied.’”<sup>61</sup> *ONDA* did not reach the threshold condition of having point source discharges.

## V. ANALYSIS

Before discussing whether section 401 should apply to nonpoint source pollution, a brief description of nonpoint sources and their effect on the environment will be helpful.

### A. Nonpoint Source Pollution

#### 1. What sources are considered nonpoint?

Understanding what nonpoint sources are requires comprehension of the definition of point sources. The CWA defines a point source as: “any discernible, confined and discrete conveyance, including but no limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation,<sup>62</sup> or vessel or other floating craft, from which pollutants are or may be discharged.”<sup>63</sup> Nonpoint sources, however, have not been defined by the Clean Water Act or subsequent regulation.<sup>64</sup> “[Nonpoint source pollution] remains a *de facto* residual category encompassing any source of water pollution that is not regulated as a point source, either because it is not considered to be a discrete conveyance, or because it has been statutorily excluded from the definition.”<sup>65</sup>

Uncertainty remains in the classification of point and nonpoint sources. Runoff is normally considered a nonpoint source pollution, but once it has been collected and discharged from a discrete point, like a storm drain system, it becomes a point source.<sup>66</sup>

The Confederate Tribes of the Warm Springs Reservation argued that the grazing of cattle is “sufficiently similar” to point source pollution to require its inclusion in the definition of the term “discharge.”<sup>67</sup> The basis for this argument is that humans confined cattle to these areas, thereby

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61. *ONDA*, 1998 WL 407711 at \*6 (quoting PUD No. 1 v. Washington Dep’t of Ecology, 511 U.S. 700, 712 (1994)).

62. The Confederate Tribes, an Intervener/Appellee, argued that the grazing operation may constitute a “concentrated animal feeding operation” under 33 U.S.C. § 1362(14) (1994). The Ninth Circuit held that “[t]his position is not tenable” because the requirements of the controlling regulation where not met. *ONDA*, 1998 WL 407711 at \*7.

63. 33 U.S.C. § 1362(14) (1994).

64. JACKSON B. BATTLE & MAXINE I. LIPELES, ENVIRONMENTAL LAW: WATER POLLUTION 419 (2d ed. 1993).

65. *Id.* “[A]gricultural stormwater discharges” and “return flows from irrigated agriculture” are specifically exempted from the definition of point source. 33 U.S.C. § 1362(14) (1994).

66. See Miles, *supra* note 2, at 197-98.

67. *ONDA*, 1998 WL 407711 at \*7. The Ninth Circuit rejected this argument. *Id.* See *supra* note 62 and accompanying text.

causing feces, urine and sediment to directly enter navigable waters. This pollution is more similar to a direct discharge than runoff. The court flatly rejected this argument by agreeing "with the Second Circuit that the term 'point source' does not include a human being, or any other animal."<sup>68</sup> The court stated "[i]t would be strange indeed to classify as a point source something as inherently mobile as a cow."<sup>69</sup>

## 2. *Sources of nonpoint source pollution on federal lands*

Nonpoint sources are the leading causes of water quality impairment for rivers and lakes.<sup>70</sup> In 1994, the EPA listed several types of nonpoint pollution sources among the leading five types of water quality impairment.<sup>71</sup> Agriculture, hydriodic/habitat modification, and resource extraction were included as some of the top contributors of nonpoint source pollution.<sup>72</sup> Many of the activities on Federal land that require a permit, like grazing, timber harvesting, and mining, fit within these categories.<sup>73</sup>

Agriculture, which includes grazing, is the leading source of human related water quality impairment in the nations rivers and lakes. "[It] generates pollutants that degrade aquatic life or interfere with public use of 134, 557 river miles (which equals 60% of the impaired river miles) in 49 States and Tribes."<sup>74</sup> Grazing, which is a major source of agricultural non-point pollution, is damaging because cattle tend to congregate in riparian zones. A healthy riparian buffers the stream from pollution by providing:

(1) [S]tream bank stabilization and erosion control that reduces bioload sediment, (2) filtering and entrapment of sediments and silt, (3) stability against stream damage by high-flow events, (4) ground-water recharge through absorption, (5) shade to maintain stream temperatures suitable for aquatic resource, (6) organic debris that enters the aquatic food chain, and (7) overhanging bank cover from tree roots and shrubs that provide cover and terrestrial insect food for fish.<sup>75</sup>

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68. *Id.* (citing *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 649 (2d Cir. 1993)).

69. *Id.*

70. National Water Quality Inventory (NWQI), 1994 Report to Congress, ES-14, ES-19.

71. *Id.* at Table ES-4, ES-12.

72. *Id.*

73. *Id.* at 33-35.

74. *Id.* at ES-14.

75. Brian L. Frank, *Cows in Hot Water: Regulation of Livestock Grazing Through the Federal Clean Water Act*, 35 SANTA CLARA L. REV. 1269, 1272 (1995) (citing Richard H. Braun, *Emerging Limits on Federal Land Management Discretion: Livestock, Riparian Ecosystems, and Clean Water Law*, 17 ENVTL. L. 43, 46-47 (1986)).

Cattle destroy these vital riparian zones by trampling streambanks and remove stabilizing vegetation from the streambanks. The cattle also add pollutants by defecating in and around the water.

Timber harvesting causes nonpoint source pollution from harvesting, as well as from the construction of roads to gain access to the timber. The heavy equipment associated with timber harvesting disturbs the soil and damages the vegetation of the forest floor. This causes soil erosion, which increases the sediment load of nearby streams and lakes. Logging roads also accelerate soil erosion by funneling runoff and increasing its erosion power.<sup>76</sup>

Mining impairs water quality by increasing soil erosion and acid leaching from mine tailings. "[S]treams impacted by acid mine drainage are devoid of fish and other aquatic life due to low pH levels and the smothering effects of iron and other metals."<sup>77</sup> Mining also disturbs the soil which increases sediment loads in nearby water bodies.<sup>78</sup>

### 3. *The effect of nonpoint source pollution on the nation's waters*

Nonpoint sources "account for about half of the national pollution loads,"<sup>79</sup> and "impair[] more water bodies, surface and ground, urban and rural, than any other pollution source in the country."<sup>80</sup> Nonpoint sources add excessive nutrients, sediment, oxygen-depleting substances, and metals to the water.<sup>81</sup> Removal of stream side vegetation also increases the water temperature.<sup>82</sup> These pollutants breach the integrity of the ecosystem, which causes fish to die and render the water unfit for drinking or other beneficial uses.<sup>83</sup>

It is important to remember that these pollutants are not directly deposited into the stream but are carried in the runoff from land. Thus, habitat destruction and uses that disturb the soil cause nonpoint pollution. At the heart of the connection between nonpoint source pollution and compro-

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76. ROBERT W. ADLER ET AL., *THE CLEAN WATER ACT: 20 YEARS LATER* 182 (1993).

77. NWQI at 34.

78. ROBERT W. ADLER ET AL., *THE CLEAN WATER ACT: 20 YEARS LATER* 181 (1993).

79. Dana G. Leonard, Note, *PUD 1, Thomas, and the Future of Section 401 of the Clean Water Act: An Expansion of State Regulation*, 18 J. LAND RESOURCES & ENVTL. L. 293, 298 (1998) (citing ROBERT W. ADLER ET AL., *THE CLEAN WATER ACT: 20 YEARS LATER* 10-11 (1993); JACKSON B. BATTLE & MAXINE I. LIPELES, *ENVIRONMENTAL LAW: WATER POLLUTION* 422 (2d ed. 1993)).

80. ROBERT W. ADLER ET AL., *THE CLEAN WATER ACT: 20 YEARS LATER*, 171 (1993). Mr. Alder uses "poison runoff" to describe nonpoint source pollution.

81. NWQI at ES-7 to ES-11.

82. *Id.* at ES-8.

83. NWQI at 32.

mised water quality is a truth articulated by EPA: "[T]he health of rivers and streams is directly linked to habitat integrity on shore."<sup>84</sup> Controlling nonpoint pollution will entail regulating land use. This will be politically unpopular and more difficult than regulating point source discharges.<sup>85</sup>

Upon discovery of the major impacts nonpoint source pollution is having on national water quality, one may be inclined to disagree with the court and approve of applying section 401 to nonpoint source pollution. This action seems to be a step in the right direction to curtailing this massive source of pollution. On reflection, however, there are reasons why interpreting section 401 in this manner is justifiable.

*B. Section 401 is Not the Right Tool to Fix the Problem of Nonpoint Source Pollution*

The Ninth Circuit's initial decision on *ONDA v. Dombeck* was correct for the following reasons. First and most importantly, Congress did not intend section 401 to apply to nonpoint source pollution.<sup>86</sup> Second, construing section 401 contrary to Congressional intent is likely to lead to illogical results.<sup>87</sup> Third, many states lack resources and the incentives to implement a meaningful section 401 certification program.<sup>88</sup>

*1. Courts are not authorized to interpret a statute contrary to the intent of Congress*

When interpreting a statute, like section 401, courts are constrained by the language of the statute and the intent Congress placed on that language.<sup>89</sup> After the 1972 amendments of the CWA, the overall structure and language of the act make it unlikely that Congress envisioned the application of section 401 to nonpoint sources of pollution.

*a. The language of the CWA shows Congress's intent*

Throughout the CWA, Congress used "discharge" and "runoff" to distinguish between point and nonpoint source pollution. To illustrate this point, consider section 313 which governs pollution from federal facili-

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84. Miles, *supra* note 2, at 201 (quoting National Water Quality Inventory, 1994 Report to Congress, p. ES-13).

85. See Daniel R. Mandelker, *Controlling Nonpoint Source Water Pollution: Can it be Done?* 65 CHI.-KENT L. REV. 479 (1989).

86. See *infra* notes 89-104.

87. See *infra* notes 105-109.

88. See *infra* notes 110-116.

89. See *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 94-95 (1993).

ties.<sup>90</sup> This section “directs federal agencies ‘engaged in any activity which may result in the *discharge or runoff* of pollutants” to comply with applicable water quality standards.”<sup>91</sup> From this language, the Ninth Circuit concluded that “[s]ection [313] plainly applies to nonpoint sources of pollution on federal land.”<sup>92</sup>

Like section 401, section 313 also originated in section 21 of the Water Quality Improvement Act of 1970.<sup>93</sup> Before 1972, section 313 used the “any discharge” language found in section 401 today. In 1972, Congress amended 313 by changing “any discharge” to “discharge or runoff of pollutants,” thus mandating that section 313 apply to both point and nonpoint source pollution. If Congress had intended section 401 to regulate nonpoint source pollution it would have also have changed “any discharge” to “discharge or runoff of pollutants.” Instead, section 401 retained the “any discharge” language, and other parts of its language were amended to clarify that section 401 only applied to point source pollution.<sup>94</sup>

The 1972 amendment of section 401 reflected the shifting focus from water quality standards to controlling discharges from point sources.<sup>95</sup> When enacted in 1970, section 401 required state certification “that a licensed activity would ‘not violate applicable water quality standards.’”<sup>96</sup> After 1972, section 401 required state certification that licensed activities “will comply with applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of [Title 33].”<sup>97</sup> Each of these sections cross referenced in section 401 regulate point source pollution.<sup>98</sup> Thus, the 1972 amendment of section 401 was “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.”<sup>99</sup>

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90. See *supra* text accompanying notes 53-58.

91. *ONDA*, 1998 WL 407711 at \*6 (quoting 33 U.S.C. §1323(a)) (1994) (emphasis added).

92. *ONDA*, 1998 WL 407711 at \*6. See *supra* notes 50-53 and accompanying text.

93. Pub. L. 91-224, §21(a)-(b), 84 Stat. 91 (1970).

94. *ONDA*, 1998 WL 407711 at \*6.

95. See *supra* notes 45-47 and accompanying text.

96. *ONDA*, 1998 WL 407711 at \*5 (quoting Pub.L. 91-224, § 21(b)(1), 84 Stat. 91 (1970)).

97. 33 U.S.C. § 1341(a)(1) (1994).

98. The Appellees contend that section 1313 regulates nonpoint source pollution because it require states to implement state water quality plans. In its original opinion, the Ninth Circuit rejected this argument on the basis that section 1313 was a supplemental regulation of point sources when multiple point source dischargers, who where within permit limitations, caused water quality to fall below set health standards. See *ONDA*, 1998 WL 407711 at \*5.

99. *ONDA*, 1998 WL 407711 at \*5 (quoting S.Rep. No. 414, at 69 (1971), reprinted in 1972 U.S.C.C.A.N. at 3735).

b. *The legislative history of the Water Quality Improvement Act of 1970 is not indicative of Congressional intent for the 1972 Amendments.*

Relying on legislative history from of the Water Quality Improvement Act of 1970, the district court concluded that Congress intended for section 401 to be used to control nonpoint sources of pollution which was causing significant impacts on the quality of the nation's water.<sup>100</sup> What the district court failed to recognize, however, was the drastic changes Congress made to the CWA in 1972.

The amendments of 1972 changed the focus and structure of the CWA, carefully drawing distinctions between pollution from point sources and nonpoint sources.<sup>101</sup> These distinctions have created a regime where point source pollution is strictly regulated and nonpoint sources have been left virtually unregulated. In essence, Congress decided to focus the regulatory effort on controlling sources of pollution that were identifiable and easy to correct.<sup>102</sup>

After the 1972 amendments, the WQIA was completely overhauled and became the CWA. These extensive revisions negated the relevancy of legislative history prior to the discussion of the current scheme of regulation. In light of the 1972 amendments, the district court's reliance on 1970 legislative history was erroneous.

c. *Twenty-seven years of Congressional acquiescence.*

Although Congressional acquiescence is not always demonstrative of Congressional intent, it tends to show that Congress approves of the way a statute is being interpreted. Congress has amended the CWA several times since 1972, "focusing on nonpoint source pollution in 1987."<sup>103</sup> Even so, Congress "has never amended section 401 to correct or clarify how it was being applied by states, courts and federal agencies."<sup>104</sup> During that time, parties seeking grazing permits have never been required to obtain certification from the state. The fact that Congress has not, during those twenty-seven years, corrected the agencies' interpretation, supports the argument that Congress never intended section 401 to require certification of nonpoint sources.

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100. See *ONDA*, 940 F. Supp. 1534 (D. Or. 1996).

101. See *supra* notes 7-18 and accompanying text.

102. See *ONDA*, 1998 WL 407711 at \*4.

103. Miles, *supra* note 2, at 223.

104. *Id.*

2. *Applying section 401 to permits or licences that "may" release nonpoint pollution would result in absurd results*

Construing a statute for purposes not intended by Congress not only bypasses the constitutional separation of powers doctrine, but may lead to absurd results. Under the district court's reading of section 401, certification would be required for all permits or licences that "may result in any discharge[s]." <sup>105</sup> This is a massive expansion of section 401's scope. Permits to camp in a national park, or hike through a national forest, <sup>106</sup> or raft a river through federal lands would require section 401 certification "to the extent that waste products, including human waste, may enter into waters or there are possible increases in sedimentation or temperature." <sup>107</sup> The Forest Service also pointed out that "even revegetation activities might require prior state certification if they 'may result' in attracting animals that would predictably cross water and deposit sediments or wastes." <sup>108</sup>

Almost any activity could conceivably cause an increase in nonpoint source pollution. If the term "discharge" is interpreted to include nonpoint sources, this absurd result cannot be avoided because the language is clear that "any activity . . . which may result in any discharge" <sup>109</sup> requires state certification or a waiver from the state. There is no provision that activities that cause slight discharges can be excluded. <sup>110</sup> Thus, the district court's ruling would require Federal agencies to ask the state for permission before it carried out any activity on the Federal lands. It is unlikely that Congress intended for states to have this much control over what activities take place on Federal lands. <sup>111</sup>

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105. 33 U.S.C. § 1341(a)(1) (1994).

106. The Forest Service recently announced a new program for the Mt. Hood National Forest and other national forests in Oregon and Washington whereby hikers would have to purchase trailhead permits before hiking forest trails. Presumably such permits fall within the district court's interpretation of section 401 and may therefore require section 401 certification. Brief for Appellant at 24 n.13, *ONDA v. Dombeck* No. 97-35065, 97-35112, 1998 WL 407711 (9th Cir.) (No. 97-35115).

107. *Id.* at 16.

108. *Id.* at 16-17.

109. 33 U.S.C. § 1341(a)(1) (1994).

110. 33 U.S.C. § 1341 (1994).

111. See Alexander H. Southwell, *The County Supremacy Movement: The Federalism Implications of a 1990's State's Rights Battle* 32 GONZ. L. REV. 417 (1996-97); Sally Fairfax & Richard Cowart, *Judicial Nationalism vs. Dual Regulation on Public Lands: Granite Rocks Uneasy Compromises*, 17 ENVTL. L. REP. 10276 (1987).



3. *Section 401 may not be an effective tool to curtail nonpoint source pollution because many states lack the resources and the incentives to implement meaningful certification programs*

Oregon did not bring this lawsuit, nor did it join as a plaintiff in this case. ONDA brought the case hoping that Oregon would be willing to pick up the ball and require meaningful certification that would abate the nonpoint source pollution caused by grazing. This type of voluntary state involvement in controlling nonpoint pollution was included in section 208 and 319 of the CWA. After spending more than two decades attempting to curb nonpoint pollution under this regime, nonpoint pollution continues to be the leading cause of water quality degradation.<sup>112</sup> This result stems from the fact that many states lack the resources and the incentives to effectively regulate the land uses that cause severe nonpoint source pollution.<sup>113</sup>

Responding to the district court's ruling, the Oregon Department of Environmental Quality and the Oregon Department of Agriculture promulgated rules to streamline the process of issuing section 401 certifications.<sup>114</sup> This streamline method adopted Best Management Practices that the U.S. Forest Service had already agreed to incorporate into grazing permits issued in Oregon.<sup>115</sup> These actions demonstrate that Oregon's response was concerned more with maintaining the status quo with as little paperwork as possible.<sup>116</sup> The result was an increase in paper work with no reduction in nonpoint source pollution. Even obtaining waivers from the state would use up both state and federal agency resources that could be put to better use. This type of paper shuffling is not only useless but detrimental because it ties up agency resources and may delay the implementation of methods that would actually reduce nonpoint source pollution.

If the district court's ruling were upheld, some states would implement a certification program that would reduce nonpoint source pollution. The majority, as history has shown, would either waive the certification or implement a weak certification program that would have little effect on point source pollution. This failure would be the result of inadequate funding, overriding local interests, and a lack of ambition to fulfill somebody else's goals.

## VI. CONCLUSION

The Ninth Circuit should stick with their first impressions of this case and not allow section 401 certification for nonpoint source pollution. This

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112. NWQI at ES-14-ES-17.

113. See Miles, *supra* note 2 at 228-231.

114. Miles, *supra* note 2 at 231.

115. *Id.*

116. *Id.* at 231.

major environmental problem will not be cured by trying to make a square peg, nonpoint source pollution, fit into the round hole of section 401. Nor will this problem be solved by adopting regulation methods that history has proven to be ineffective. Although section 401 is not the solution, surely a better solution will be found because nonpoint source pollution is too great of a problem for Congress and the citizens of the United States to ignore.<sup>117</sup>

*Daryl G. Ward*

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117. What this better solution must include is beyond the scope of this case note. For further discussion see David Zaring, *Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future*, 20 HARV. ENTVL. L. REV. 515 (1996).