



Western Governors' Association Policy Resolution 08-20

State Authority Regarding the Federal Hydropower Licensing Process

A. BACKGROUND

1. The licenses for over 95 Western hydroelectric projects, many encompassing multiple dams, are due to expire by 2010. In addition to the tremendous workload required to relicense these projects, states face legislative and judicial challenges to their authority under section 401 of the Clean Water Act (CWA) and to their participation in the Federal Energy Regulatory Commission (FERC) relicensing process under the Federal Power Act (FPA). Relicensing may provide the only opportunity during the next 50 years to address the effects a facility has on water quality, fisheries and other natural resources which were unknown or not addressed when projects were first licensed.
2. The CWA sets a national goal of eliminating the discharge of pollutants into navigable waters and an interim goal of providing for swimming and recreation and for the protection and propagation of fish and wildlife. The CWA recognizes state primacy and authorizes a state to carry out the Act under its own laws and regulations if these are at least as protective as federal law. An authorized state must adopt water quality standards that meet or exceed the Act's requirements.
3. To prevent state standards from being violated by federal activities, Section 401 of the CWA requires an applicant for a federal license or permit to apply for certification from the state that potential discharges from the activity will not violate state standards. The state must deny certification if compliance can not be ensured. If necessary, the state can condition these activities to ensure compliance with the standard. Any such federal license, such as a FERC hydropower license, must include these conditions.
4. State involvement in administration of the Clean Water Act is essential to assure that local goals are met at the same time that water quality is protected. States consider land use, economic development, and other locally-adopted policies in their decisions regarding the allocation of the privilege to discharge waste. Normally, no one discharger is given the privilege to use up all the capacity of a water body to assimilate potential discharges; to do so would result in prohibitive pollution-abatement costs for other potential dischargers, thereby curtailing much desired development.
5. States' ability to allocate waste loads among desired development activities has been challenged in the courts by both the hydropower industry and FERC, setting a number of legal precedents. Following several industry challenges to state authority under Section 401, in 1994 the Supreme Court in *Public Utility District No. 1 of Jefferson County and City of Tacoma v. State of Washington Departments of Ecology, Fisheries and Wildlife* ruled clearly in favor of the states' authority. This decision clarified that FERC and the

industry could not virtually ignore the role of states. The decision found that the state acted properly and within federal water quality law when it conditioned a water quality certification for the proposed Elkhorn hydropower development on the Dosewallips river. The certification included instream flow conditions determined by the state, in consultation with federal and state fishery agencies and tribes, designed to protect salmon and steelhead trout, in this case a designated beneficial use of the waters of that river.

6. The Western Governors have long seen the economic importance of hydropower and supported its development subject to a strong state role. At the same time, WGA has worked to make licensing and relicensing more effective and efficient.

B. GOVERNORS' POLICY STATEMENT

1. The critical importance of water resources to the well being of the people of the Western states underscores the necessity that federal decisions on siting and relicensing of hydropower projects give appropriate deference to state policies and decisions regarding development and operation of such projects. The states have an essential role in protecting their natural resources and environment, protecting security of existing rights, and preserving options to provide for orderly water development in the future. It is imperative that any final relicensing process should continue to maintain high environmental standards while preserving water supply and low cost power.
2. Congress should refrain from weakening or removing a vital tool for states to influence hydropower siting and operation within their borders and upon their waters. Section 401 of the CWA is operating as it was intended and should be retained without amendment.
3. Industry's argument that it is unfairly subjected to dual federal-state regulation is inherently invalid. We live in a federal system in which a host of proposed projects, including mining and other activities, even on federal lands, must comply with both state and federal law as a precondition for operation. Exemption of hydropower facilities would be to the detriment of all other water users who would be required to pay for the water quality mitigation that should rightfully have been provided by the hydropower facility. However, the Western Governors recognize the potential for greater collaboration between state and federal licensing procedures to more efficiently complete the relicense process without sacrificing states' input or environmental protection.
4. However, it is appropriate for everyone to have a common understanding of the problems and reasons for any delays in the process. The Western Governors call upon FERC to provide an annual report to Congress, the Administration and Governors identifying any impediments to completion of relicenses.
5. Certification authority under section 401 of the CWA is especially important at this time. Our states are working closely with federal and private partners to restore fish populations under the Endangered Species Act and, in the face of consent decrees, to develop total maximum daily (pollutant) loads (TMDLs) for discharges into state waters so as to bring them into compliance with water quality standards.

6. In the implementation of Clean Water Act provisions, the states should retain primary jurisdiction over related water resource allocation decisions, including how to most appropriately balance state water resource needs with Clean Water Act objectives. The Federal Power Act should be closely examined and amended to clarify and strengthen Congress' historic deference to state primacy over water resource allocation and management. Further, Congress should require that any projects that remain under FERC jurisdiction not be licensed unless or until they acquire a water right or the functional equivalent from the affected state or states.
7. In the interim, each state should continue implementing model statutes and best practices that develop a unified state position, bring the early participation of all interested parties into the process, and coordinate the review of projects, which, when feasible, are consistent with and avoid duplication with federal agency and tribal reviews. Recent experience shows that the relicensing process can be greatly shortened and achieve broad public support if project operators enter relicensing with the premise that fish and wildlife and water quality regulations must be met. FERC's new Integrated Licensing Process is a positive step and incentive, which will help restore the efficient and effective interaction of our federal/state system of governance.

C. GOVERNORS' MANAGEMENT DIRECTIVE

1. The Western Governors' Association (WGA) shall post this resolution to its Web site to be referred to and transmitted as necessary.
2. The staff is directed to continue working with the Governors, state and federal water quality and water and natural resource agencies, and the Western States Water Council in opposing amendments to limit state and federal agency mandatory conditioning authority and to seek sponsorship of legislation restoring full state authority over state waters under the Federal Power Act.
3. The staff is directed to work with state and federal agencies, tribal nations and local governments, the FERC, the hydropower industry, and the environmental community to make the relicensing process more effective and efficient. Staff also is directed to help states participate in the dialogue between FERC and agencies with mandatory conditioning authority and to work with all interested parties in sponsoring workshops and providing technical assistance to ease the relicensing workload that faces our states.

This resolution was originally adopted in 1999 as WGA Policy Resolution 99-016, and was readopted in 2002 as Policy Resolution 02-04.

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