Water Quality Certification and Relicensing: Sharing Legal Strategies

Obtaining a state water quality certification, required under the Clean Water Act, can be a significant challenge in hydroelectric licensing proceedings. Project owners are employing — with varying degrees of success — several legal strategies to obtain acceptable certifications. By reviewing potential strategies, project owners can better understand how to effectively approach the certification process.

By Sarah A. Verville and Matthew D. Manahan

Section 401 of the Clean Water Act provides that "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" state water quality standards.[1] The Federal Energy Regulatory Commission (FERC) takes the position that a Section 401 certification is required in order for it to issue a new license (relicense) to continue operating an existing hydroelectric project because "relicensing is an activity that may result in a discharge because, without a new license, the discharge will not be authorized to continue."[2]

For almost 20 years, states have continued to expand their interpretation of the applicability of Section 401, and hydropower owners are finding it increasingly difficult to reach agreement with the certifying agency on mutually acceptable certification conditions. States from Washington to North Carolina to Maine now include a host of conditions relating to the same types of natural resource conditions that FERC includes in a license. Perhaps most significantly, certifications often include "reopeners" — conditions that allow a state certifying agency to reopen the certification by imposing additional or different requirements in the future and conditions purportedly giving the state certifying agency the independent authority to enforce the certification's conditions.

Apart from the obvious strategy of trying to come to agreement or settlement with the state certifying agency, several legal strategies can be used to try to obtain acceptable certifications. The strategies argue that:

— Certification is not required;

— Water quality standards conflict internally;

— The state certifying agency has not acted within the one-year deadline; and

— The state certifying agency's authority is limited.

Licensees in Georgia, Maine, and Washington are employing one or more of these strategies, with varying degrees of success. Reviewing these licensees' circumstances and experiences can be useful for other project owners as they develop comprehensive strategies for obtaining acceptable water quality certifications.

Strategy 1: Show that certification is not required

Several licensees have argued that a water quality certification should not be required because their project results in no discharge under Section 401. Those licensees so far have been unsuccessful in convincing FERC that certification is not required. However, the U.S. Supreme Court is expected to rule later in 2006 on the question: When does a hydropower project with no pollutant discharge result in a discharge, triggering the need for a water quality certification?

In the Supreme Court case, *S.D. Warren Co. v. Maine Department of Environmental Protection,* S.D. Warren has objected to the need for certification for five run-of-river projects, with capacities ranging from about 800 kW to 2.4 MW, located on the Presumpscot River in Maine. On January 26, 2001, the FERC licenses for Warren's 1.35-MW Saccarappa, 800-kW Mallison Falls, 1-MW Little Falls, 1.9-MW Gambo, and 2.4-MW Dundee projects expired. Warren filed its application for relicensing with FERC on January 22, 1999. Warren also filed its requests for water quality certifications with Maine's Department of Environmental Protection (MDEP), and simultaneously took the position that the dams cause no discharge into the Presumpscot River within the meaning of Section 401. Warren argued that the projects do not introduce any substance, pollutant or otherwise, into the water.

On February 15, 2005, the Maine Supreme Judicial Court held that the

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operation of Warren's dams does result in an addition to the river and therefore a "discharge" occurs.[3] While the Maine court acknowledged that Warren is not adding more water or a pollutant to the river, the court held that a discharge results because Warren's dams exercise "private control" over the water and thus remove the water from the river. When the water is "added" back into the river as it flows through the dam, there is a "discharge" of water into the river.

On October 11, 2005, the U.S. Supreme Court agreed to review Warren's appeal of the Maine court's decision, and, in particular, the issue of whether the mere flow of the Presumpscot River through Warren's dams constitutes a discharge into the river and thereby triggers the need for water quality certification. On November 25, 2005, Warren filed its brief with the Supreme Court. The Court heard oral arguments February 21, 2006; a decision is expected sometime in 2006.

In 2004, the city of Augusta, Georgia, similarly argued that the original licensing of the Augusta Canal Project did not require a certification from South Carolina. There are no generating facilities at the project, but flows from the project are used at three downstream hydroelectric plants: 2.475-MW Sibley Mill, 2.05-MW King Mill, and 1.2-MW Enterprise Mill. The Augusta Canal project's diversion dam, from which flows are released, extends across the Savannah River to the South Carolina side. Augusta argued that a certification from South Carolina is not required because when water is flowing continuously in the same river there is no discharge. FERC stated that it is the dam's and the impoundment's alteration of the characteristics of the water passing through them that determines whether certification is required, and not the specific design or components of the facilities. FERC held that, because it had no evidence showing that Savannah River water is unchanged by its passage through the Augusta Canal Project, it could not determine with certainty that there will not be a discharge.[4] Subsequently, FERC dismissed Augusta's rehearing request. Augusta's request for certification is pending before the South Carolina Department of Health and Environmental Control.

In another situation involving a dam without a power generation component, FPL Energy argued that the operation of the dam (which consists of storing and releasing clean water) does not require water quality certification because there is no discharge and no discharge of pollutants. The dam is part of the Flagstaff Storage Project in Maine, for which FPL is seeking a new license (relicense). FERC rejected FPL Energy's arguments and held that the relicensing of a hydropower project is an activity that may result in a discharge because, without a new license, the discharge of water through the dam will not be authorized to continue. FERC also held that Section 401 requires certification of an activity that involves some alteration of the chemical, physical, or biological integrity of the water, even if it does not involve the discharge of a pollutant.[5]

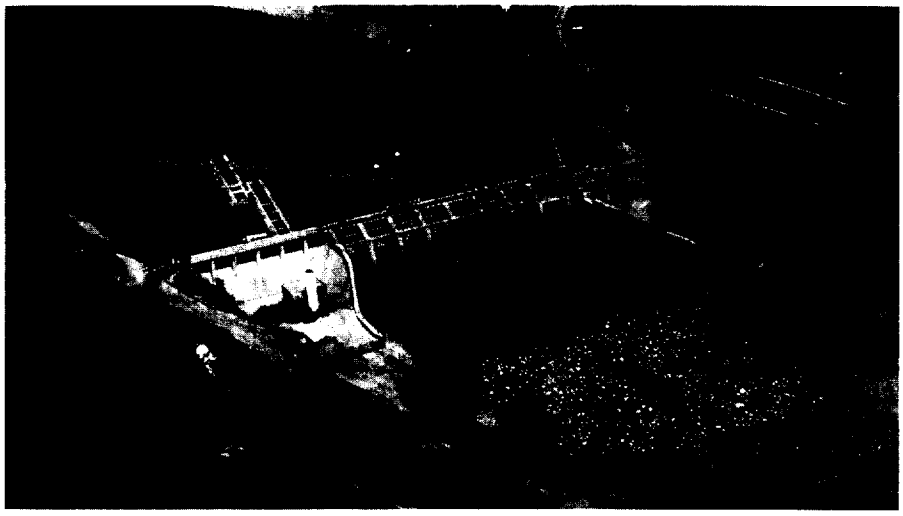
The Supreme Court's decision in *Warren* could settle the question of whether the mere flow of water through an existing dam constitutes a discharge that triggers the need for certification. Until that question is resolved, when applying for a certification licensees should consider reserving their right to argue that certification is not required because there is no discharge. In addition, while FERC has stated that relicensing is an activity that may result in a discharge, it has left the door open for licensees to argue that certification is not required where there is no alteration of the chemical, physical, or biological integrity of the water.

Strategy 2: Show that water quality standards conflict

As part of relicensing the 48-MW Lake Chelan Project in Washington State, Chelan Public Utility District (PUD) agreed to release minimum flows into a bypass reach that historically had been dry for much of the year. The problem was that significantly higher minimum flow releases would be required in the hottest summer months to meet state water quality standards for temperature. Chelan County PUD was able to show, however, that the release of higher minimum flows to achieve the temperature standards would reduce the useable habitat area for fish. Chelan also determined that the higher minimum flow would cost the utility approximately $2.5 million in lost revenue each year.

With the agreement of most of the participants in the relicensing, the Washington Department of Ecology (the state certifying agency) issued a water quality certification requiring development of an adaptive management plan. The plan would address compliance with state temperature standards as well as achievement of biological objectives the temperature standards are intended to support. If, after ten years, the Department of Ecology determines that the applicable standards (either the temperature standards or the biological objectives) cannot be achieved, Ecology will initiate a process to modify the standards, including the possibility of conducting a use attainability analysis, or UAA. (For details on a UAA, see the box on page 14.) Ecology agreed to the ten-year adaptive management plan because it would allow the agency a sufficiently lengthy period of time to determine what level of support for fish, and what water temperature, would be rea-

The 2.4-MW Dundee hydro project on the Presumpscot River in Maine is one of five projects featured in a 401 water quality certification case at the U.S. Supreme Court. In the case, project owner S.D. Warren argues that certification is not required because the mere flow of water through a dam does not constitute a discharge into the river.



The 401 water quality certification for Chelan Public Utility District's 48-MW Lake Chelan Project, issued by the Department of Ecology in Washington State, requires the development of an adaptive management plan for evaluating results of minimum flow requirements over ten years.

sonable and feasible to achieve.

The Confederated Tribes of the Umatilla Indian Reservation and the Columbia River Inter-Tribal Fish Commission appealed Ecology's water quality certification to the Washington Pollution Control Hearings Board (PCHB), which upheld Ecology's certification, with clarifications.[6] The PCHB rejected the argument that the certification is "a sham intended to set up a UAA, which will create a new less stringent standard." The PCHB stated that Washington's water quality regulations allow for compliance schedules of up to ten years for achieving compliance with water quality standards. The PCHB noted that testimony in the record showed that neither Ecology nor Chelan PUD take lightly the prospect of a UAA. Finally the PCHB stated that any site-specific standard or alteration of a use designation pursuant to a UAA must be subject to public hearings for review, and must also be approved by the U.S. Environmental Protection Agency (EPA).

Although this strategy may work for some licensees, a similar strategy was not successful in Maine. In the Maine case, the state's Department of Environmental Protection, known as MDEP, in 2003 issued a water quality certification for FPL Energy's Flagstaff Storage Project. The certification contained drawdown restrictions that would protect the designated uses of the lake for supplying water for hydroelectric generation and as habitat for fish and aquatic life. In issuing the certification, the MDEP commissioner overruled the prior staff interpretation that the applicable water quality standard for aquatic life should be applied to impoundments as if the impoundments were natural lakes.

Non-governmental organizations appealed the certification to the Maine Board of Environmental Protection (MBEP), arguing that that winter drawdown restrictions did not meet water quality standards for aquatic life. In granting the certification, the organizations argued, the MDEP commissioner employed a new water quality standard for aquatic life that requires a UAA prior to its adoption. In response, FPL Energy argued, in part, that the MDEP commissioner's interpretation of the aquatic life standard was necessary to achieve the designated use of hydroelectric power generation.

In 2004, the MBEP reversed the MDEP commissioner's action and denied water quality certification.[7] The MBEP acknowledged that more restrictive drawdown regimes could affect the designated use of hydropower, but the MBEP concluded that, where there is an apparent conflict between attainment of various designated uses, a UAA is needed to adopt a subclassification of a designated use that allows less stringent criteria than the MDEP staff's prior interpretation. The MBEP rejected FPL Energy's contentions that the MDEP commissioner had not created a new lower standard when the commissioner overruled the prior staff interpretation of how the aquatic habitat standard should be applied to impoundments.

The decision is being appealed in state and federal courts. Decisions are not anticipated before the end of 2006. If the courts ultimately uphold the MBEP, FPL Energy will have to go through a UAA process.

For hydropower projects, a UAA process potentially could result in a significant, if not total, loss of project generation and value, depending on how EPA factors in project economics. Because the outcome of the UAA is both uncertain and potentially onerous, licensees should examine carefully other options before agreeing to undergo a potentially contested UAA process.

Strategy 3: Agency has not acted within one year

Section 401 of the Clean Water Act requires that a state must act on a certification application within one year. If a state agency fails to act within the one-year deadline, the state is deemed to have waived certification. And, federal licensing of the project may proceed without the state's issuance of a water quality certification. In 2003, in a non-hydropower case known as Airport Communities Coalition v. Graves, a federal court held that any certification conditions imposed by the state after the one-year period are merely recommendations, which the federal licensing agency has discretion to adopt, reject, or modify.[8]

In that case, the Washington Department of Ecology issued its certification within the one-year deadline, but local governments appealed the certification to the PCHB. The PCHB added conditions to the certification, but those conditions were added more than one year after the applicant had applied for certification. The U.S. Army Corps of Engineers (the federal agency responsible for issuing a dredge and fill permit under Section 404 of the Clean Water Act) incorporated some but not all of the conditions that the PCHB had added. The local governments appealed, arguing that the Corps must adopt all of the conditions added by the PCHB. The court disagreed, and stated that conditions issued after the one-year deadline must be treated differently than the issuance of conditions within the one-year deadline.

Relying on the court's decision in the *Airport Communities* case, FPL Energy argued in the Flagstaff case that the MDEP waived certification by failing to take final action on the certification application within the one-year deadline. FPL Energy initially filed its request for certification in 1995, and withdrew and refiled its request seven times under the threat that the MDEP would

This diversion dam, part of the city of Augusta, Ga.'s, August Canal project, extends across the Savannah River from Georgia to South Carolina. The city argued certification from South Carolina was not required — when water is flowing continuously in the same river there is no discharge. The Federal Energy Regulatory Commission, however, required the city to obtain certification from South Carolina.

deny certification if FPL Energy did not withdraw and refile. The MDEP commissioner finally granted certification, and several non-governmental organizations appealed the certification to the MBEP.

Before the MBEP acted on the appeal, FERC issued a new license for the project, which incorporated the conditions of the MDEP commissioner's certification. While a rehearing request filed by one of the NGOs was pending, the MBEP reversed the commissioner's certification and denied certification, but after the one-year deadline. Stating that the validity of the license had been called into question, FERC then stayed the license until the appeal of the MBEP decision was resolved.

FPL Energy requested rehearing of FERC's decision, arguing that because the state certifying agency (the MDEP, which consists of the commissioner and the MBEP) did not issue a final certification until after the one-year deadline, FERC should lift the stay. FPL Energy argued that FERC should either remove from the license all certification conditions (because MDEP waived certification) or incorporate the conditions included in the MDEP commissioner's certification (because those conditions were issued within the one-year deadline). In a split decision, FERC denied FPL Energy's request, holding that issuance of an initial certification within one year is sufficient, and subsequent reversal, even by the agency itself, makes the certification invalid but does not result in waiver.

In sum, when a state certifying agency reverses a certification or adds new conditions as a result of an administrative appeal after the one-year deadline, license applicants should consider requesting that FERC ignore the post-one-year changes (or consider new or changed conditions discretionary) or consider the certification waived.

Strategy 4: State certifying agency's authority is limited

License applicants have used a number of arguments to show that the state certifying agency has exceeded the scope of its authority both under Section 401 and under state law.

Using Section 401(d) of the Clean Water Act, states often include conditions that purport to give the state the exclusive ability to reopen, modify, and enforce the certification's conditions. As a result of the 1997 *American Rivers*[9] case, which held that FERC is required to incorporate the certification's conditions into its license without modification, FERC must include these "reopener" conditions in its license, even though they conflict with FERC's own authority to enforce or modify license conditions.

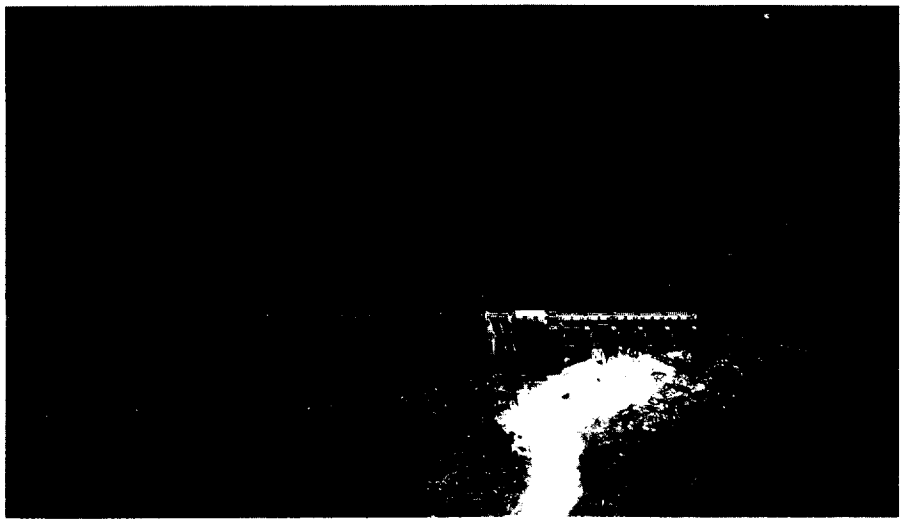
Section 6 of the FPA provides that a license may be altered upon mutual agreement between the licensee and FERC. FERC takes the position that it has the exclusive authority to enforce or modify the conditions of a certification.[10] Thus, amendment of certification conditions that have been incorporated into a license may occur only when a licensee has applied for and FERC has approved a license amendment. Similarly, the provisions of the Clean Water Act contemplate that only the federal licensing agency may amend the conditions of a certification.[11]

This conflict between the state certifying agency's authority and FERC's authority to modify and enforce Section 401 conditions is being litigated in at least one case and could be litigated in others if state certifying agencies and hydropower owners are unable to reach agreement on mutually acceptable certification conditions.[12] License applicants should consider appealing a state's inclusion of any provision giving the agency the right to reopen, modify, or enforce a certification. In some instances, the

Defining UAA

According to Environmental Protection Agency (EPA) regulations, a use attainability analysis, or "UAA," is a scientific assessment of the factors that affect whether a water body can achieve uses (such as recreation or fish habitat) that have been designated by the state or EPA in the applicable water quality standards. The assessment includes an evaluation of whether it is feasible, from a physical, chemical, biological, and economic perspective, for the water body to achieve the designated use.

With regard to dams, if the dam results in non-attainment of a designated use, a state must demonstrate that attaining the designated use is not "feasible" (i.e., that the water body cannot be restored to its original condition or cannot be operated in a way that would result in the attainment of the use). Thus, a UAA could assess the effects of significant changes in project operation, such as changing project operation from a store-and-release mode to a run-of-river mode, in order to attain a designated use. If the changes are "feasible," based on the considerations discussed above, the currently applicable water quality standard must be met. Only if the changes are not "feasible" may the standard be changed.



This dam is part of the Flagstaff Storage Project in Maine, for which FPL Energy is seeking a new Federal Energy Regulatory Commission (FERC) license. FPL argued that the operation of the dam, which consists of storing and releasing clean water, does not require water quality certification because there is no discharge and no discharge of pollutants.

applicant may agree that a modification of a certification is reasonable. But, if the applicant does not appeal a reopener in a certification, it may be difficult in the future to object to modifications that a licensee considers unreasonable.

Certifications often include conditions that require the applicant to enhance existing uses, create habitat for extinct species, and otherwise take action to improve other selected uses unrelated to water quality, at the expense of hydropower generation. The Clean Water Act requires that states' water quality standards include an anti-degradation law that maintains and protects existing instream uses. States' anti-degradation laws include a trigger date for a use to be considered an existing instream use protected by the antidegradation law.

Depending on when a hydropower project was constructed, hydropower generation may be an existing instream use. License applicants have argued that the imposition of flow and impoundment level conditions that are intended to enhance designated uses, such as fish and wildlife, at the expense of hydropower generation violates the anti-degradation policy because the conditions do not maintain and protect the existing instream use of hydropower generation. In addition, they have argued that states do not have the authority to impose conditions intended to restore an extirpated species because those species are not an existing instream use (because they were not present on the antidegradation trigger date, which usually is in the early or mid-1970s). While the restoration of extirpated species may be an appropriate fish-

ery management objective conditions intended to restore such species may be imposed only through other statutes (such as Section 18 of the Federal Power Act), and not under Section 401.

Finally, license applicants have argued that state certifying agencies have exceeded their authority under state law when, for example, a state certifying agency did not follow its own regulations or attempted to impose a standard that was not adopted in accordance with the state's administrative procedures statute.

While the extent to which a designated use may be enhanced at the expense of an existing instream use such as hydropower generation has not been settled, this argument may provide leverage for applicants to try to reach settlement with the state certifying agency on appropriate certification conditions.

The dizzying 'war of the whirleds'

The process of obtaining Section 401 certification can be dizzying, and is becoming the driving factor in many hydroelectric licensing proceedings. Licensees are whirled about by forces that seem beyond their control but, just as water passing through whirling turbines in hydroelectric powerhouses produces electricity when properly harnessed, licensees can exert some power when they know their potential strategies. Prior to initiating the licensing proceeding, licensees should plan a comprehensive strategy for obtaining an acceptable certification, just as they would to obtain a FERC license.

The Supreme Court's decision in Warren could provide relief. Otherwise, federal legislation to amend Section 401 may be the only solution that can resolve the federal-state-licensee "war of the whirleds" over water quality certification as it applies to hydropower projects. ■

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Notes

[1]33 U.S.C. § 1341(a).

[2]FPL Energy Maine Hydro LLC, 111 FERC ¶ 61,104 (2005).

[3]S.D. *Warren Company v. Board of Environmental Protection,* 2005 ME 27.

[4]*City of Augusta, Georgia,* 109 FERC ¶ 61,210 (2004). Augusta did not object to obtaining certification from Georgia.

[5]FPL Energy Maine Hydro LLC, 111 FERC ¶ 61,104 (2005).

[6]Confederated Tribes of the Umatilla Indian Reservation et al. v. Department of Ecology et al., PCHB No. 03-075 (April 21, 2004).

[7]*FPL Energy Maine Hydro LLC,* Water Quality Certification #L-19313-32-G-N (Me. BEP, July 15, 2004).

[8]*Airport Communities Coalition v. Graves,* 208 F. Supp. 2d 1207 (W.D. Wash. 2003).

[9]*American Rivers v. FERC,* 129 F.3d 99 (2d Cir. 1997).

[10]*Erie Boulevard Hydropower, L.P.,* 102 FERC ¶ 61,052 (2003).

[11]33 U.S.C. § 1341(a)(5).

[12]*S.D. Warren Company v. Maine Department of Environmental Protection,* 2005 ME 27, petition for cert. granted, 74 U.S.L.W. 3220 (U.S. Oct. 11, 2005) (No. 04-1527).