

**JOINT AGENCY SUMMARY**  
MIDWEST HYDROELECTRIC LICENSING WORKSHOP ON  
INTEGRATING STATE PROCESSES

Milwaukee, Wisconsin  
April 17 & 18, 2002

Participants:

Federal Energy Regulatory Commission  
Wisconsin Department of Natural Resources  
Wisconsin Department of Administration  
Michigan Department of Environmental Quality

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MIDWEST HYDROELECTRIC LICENSING WORKSHOP ON  
INTEGRATING STATE PROCESSES

The midwest workshop was held April 17 and 18, 2002, in Milwaukee, Wisconsin. Representatives from the 401 and CZM certifying agencies for Michigan and Wisconsin attended. Illinois, Iowa, Missouri, and Oklahoma were invited, but declined to attend. Representatives from the U.S. Forest Service attended as observers. The list of individuals in attendance is attached as Appendix A.

To begin the workshop, Commission staff outlined the FERC licensing process. Staff explained the differences between the Traditional and ALP Processes, as well as FERC's requirements for Section 401 water quality certification and CZMA consistency review. Each state then explained, in some detail, their respective 401 WQC and CZMA processes.

Commission staff identified the goals of the two-day workshop as: (1) familiarize Commission staff with participating states' WQC and CZM processes and programs; (2) familiarize states with FERC's hydro licensing process; and (3) increase efficiency of processes by (a) identifying common attributes and (b) developing potential ways to integrate processes. The following represents a synopsis of the two-day workshop.

**FERC LICENSING PROCESS - (Presented by Mark Pawlowski)**

- ! Commission staff explained that the FERC is an independent agency under DOE, and is responsible for licensing the construction and operation of non-federal hydroelectric projects.
- ! FERC was established and derives its authority from the Federal Power Act. FERC jurisdiction over hydropower projects is affected by (a) U.S. lands, (b) navigable waters, and (c) interstate commerce.
- ! FERC is mandated by law to (a) give equal consideration to both developmental and non-developmental resources, (b) ensure that a hydro-power project is best adapted to the comprehensive development plan of a waterway, and (c) conduct an environmental review in accordance with the National Environmental Policy Act.

- ! FERC regulations stipulate that (a) FERC cannot issue a license without state water quality certification or a waiver, and (b) the water quality certificate is considered waived if not acted on within one year of the request for certification.
- ! If a project lies within or affects a state's coastal zone, (a) FERC cannot issue a license without a state's certification that the project is consistent with any applicable coastal zone management program, (b) CZMA requires the state to inform the Commission whether or not a project is consistent within 6 months of request.
- ! The Traditional Licensing Process typically takes about 5-8 years to complete, while the ALP takes about 4 years. Both licensing processes involve at least a 3-year pre-filing consultation period that begins with the issuance of an ICP (Initial Consultation Package), and is characterized by environmental studies and consultation. The Traditional Process is a rigid regulatory process, where additional information is almost always needed after an application has been filed and uncertainty as to environmental enhancements is common. The ALP is a flexible regulatory process that combines the pre-filing consultation and NEPA processes, improves communication among parties, and reduces the need for additional information as well as the uncertainty in the licensing process.
- ! FERC regulations require that the Section 401 WQC, request for 401 WQC, or waiver thereof, be filed along with the license application.
- ! An applicant for hydropower license, whose project lies within a state's coastal zone or otherwise affects the state's coastal resources, is required to file a consistency determination with the state CZM agency. The timing of this certification is not outlined in FERC's regulations, but typically an applicant files a consistency certification with the state at the time the license application is filed.
- ! The post-filing processing period is characterized by (a) staff's review of the license application, (b) NEPA scoping and review (includes preparing the environmental analysis), (c) several public notices and meetings, (d) additional information requests, if necessary, and (e) a 10(j) resolution process, if necessary.

## **WISCONSIN'S SECTION 401 PROCESS - (Presented by Michael Scott)**

- ! Wisconsin provided a copy of their water quality certification regulations under Chapter NR 299, and Wisconsin Department of Natural Resources staff guidance for issuing 401 water quality certifications.
- ! Prior to the mid-1990's Wisconsin routinely issued waivers of 401 certification. However, after the Supreme Court's decision in Jefferson County, Wisconsin began issuing 401 certificates for hydroelectric projects located in Wisconsin.
- ! Wisconsin's process for 401 certification is flexible, and takes into consideration the needs of the participants.
- ! In developing its 401 certification process for hydroelectric projects, Wisconsin reviewed a number of state programs and adopted a template based on the Vermont 401 certifications.
- ! The Wisconsin DNR determines the completeness of an application based on the requirements in NR 299. These requirements include a description of: 1) the activity, volume of discharge, biological, chemical, and other characteristics of the discharge; 2) the existing environment; 3) size of the affected area; and 4) location of the discharge.
- ! The Wisconsin DNR has 30 days in which to determine the completeness of the application, and once a complete application has been filed, 120 days in which to issue a certification, issue a certification with conditions or deny certification. However, complex or contentious projects may take 1 to 2 years to resolve.
- ! Typically, if the Wisconsin DNR concludes that the application is not complete the Wisconsin DNR denies certification, within the 30 days of receipt of the application, without prejudice. Completeness is determined on a case by case basis depending on the sufficiency of information provided, and the feasibility of studies.
- ! Certificate conditions include conditions related to the protection of water quality, water quantity, and designated uses of the water body.

- ! The most difficult and contentious issues include: 1) fish entrainment protection and passage; 2) flow issues (as a matter of policy the Wisconsin DNR seeks to implement run-of-river operations in most situations or regulation to simulate more natural flow conditions); 3) recreation facilities; and 4) project boundaries.
- ! Water quality certificates issued, with or without conditions, are public noticed, and anyone may request a contested case hearing within 30 days of the notice. Contested case hearings are reviewed de novo.
- ! With very few exceptions, delays associated with issuing water quality certifications are a result of disagreements over potential conditions. Wisconsin prefers to work with applicants to resolve differences prior to the contested case stage. Wisconsin has employed various methods to resolve differences including informal consultation, mediation, and FERC's ADR service, and has been generally pleased with the result.

#### **WISCONSIN CZM PROCESS - (Presented by Alberto Vargas)**

- ! The Wisconsin CZM program is outlined in the document "Strategic Vision for the Great Lakes, June 1999". The CZM program is within the Wisconsin Department of Administration.
- ! Wisconsin's coastal zone is defined as the 15 counties adjacent to Lakes Superior and Michigan. Activities outside the coastal zone may be subject to consistency review if the activity is expected to affect the coastal zone.
- ! The CZM program is a networked program. Program staff work closely with other state agencies including the Wisconsin DNR, State Historical Society, and regional planning commissions to ensure a consistent response to activities affect the coastal zone.
- ! The applicant submits a consistency determination and supporting documentation which includes: 1) a detailed description of the project; 2) an assessment of possible coastal zone effects; and 3) a finding that the activity is consistent with Wisconsin's approved coastal zone policies, including approved shoreline and floodplain ordinances and the management policies of designated state managed coastal areas; and 4) the opportunity for public participation. Typically, the applicant applies for the

Federal permit or license concurrent with submitting its consistency determination.

- ! Coastal program staff review comments received from other state agencies which forms the basis of their determination. If the activity doesn't comply, state agencies may explain how the activity could be modified to be consistent.
- ! The federal agency's public notice is relied upon to solicit public comment on the activity. Joint noticing is encouraged.
- ! If the consistency review takes longer than 3 months, program staff notify the federal agency of the status and basis for the delay. In no case does the process last more than 180 days.
- ! If the program staff object to the applicant's consistency determination, notice is issued explaining: 1) the inconsistency, 2) alternative measures, if any, that could be adopted; 3) the nature and necessity of information not provided, if the objection is based on inadequate information; and 4) appeal rights.
- ! Program staff attempt to resolve disagreements through discussions with the applicant and the federal agency, if appropriate.

#### **MICHIGAN 401 CERTIFICATION PROCESS - (Presented by John Supnick)**

- ! Water quality certification authority rests with the Michigan Department of Environmental Quality, Surface Water Quality Division. The process is closely coordinated with the Michigan Department Natural Resources who serve in an advisory capacity.
- ! Michigan water quality standards include both numerical and narrative standards. Issues addressed include : 1) water quantity and quality issues including: (a) flow releases and monitoring, (b) pond elevations, and (c) numeric water quality limitations and monitoring, including periodic contaminant testing; 2) bank erosion control; and 3) natural organic debris maintenance.
- ! There are no Michigan regulations governing the administration of the 401 certification process or specific requirements for the applicant to meet.

However, there are guidelines for various studies that an applicant may undertake.

- ! The Michigan DEQ and the Michigan DNR operate under a Memorandum of Understanding (MOU). The MOU establishes the responsibilities of each Department, and a timeline for a process by which the Michigan DEQ, with Michigan DNR input, issues 401 certificates for hydropower projects.
- ! A pre-public notice draft of the certificate is provided to the applicant within 129 days of the MDEQ receiving the certification request.
- ! The applicant is provided 21 days to comment on the draft certification.
- ! A draft certificate is issued with a 30-day public comment period, within 199 days following receipt of the certificate request.
- ! The Michigan DEQ issues a final certificate or denial 28 days after the close of the public comment period. The total process is completed within 257 days.
- ! The certification process includes, what is generally, a 21-day dispute resolution process to resolve disputes between the Michigan DNR and the Michigan DEQ. The dispute resolution process can lengthen the 257 day timeline.
- ! There is no provision in Michigan law for administrative relief in the 401 certification process. The only applicant recourse is to seek judicial review in state Circuit Court.

#### **JOINT DISCUSSION OF INTEGRATING STATES' WQC/CZM PROCESSES AND THE FERC LICENSING PROCESS**

- ! It was agreed that delays in water quality certification and CZM determinations do not currently occur in Michigan, and those that infrequently occur in Wisconsin, revolve around disagreements over the applicant's proposal.
- ! Although process delays are infrequent, Michigan and Wisconsin remain concerned with the adequacy and sufficiency of information provided by applicants. Insufficient or inadequate information generally results in a

denial without prejudice or conditions that are more restrictive to assure water quality standards are met (401 certification) or non-concurrence (CZM). Both states' processes allow for alternative mechanisms to resolve these issues.

- ! Michigan and Wisconsin agreed that the suggestions from the previous workshop held in Manchester, New Hampshire were worth further consideration. Michigan and Wisconsin agree that it would be desirable to have: 1) assurance that the pre-filing hydropower application period could accommodate two field seasons, which would improve studies and study results; 2) pre-filing milestones or deadlines; 3) established time limits for FERC's review of the application before Additional Study Requests are issued and subsequently filed; 4) pre-NOI letters listing agency contacts, including resource and regulatory staff and CZM program staff; and 5) FERC staff involvement in the pre-filing hydropower application process, including early communication with staff, staff review of studies and study plans, mediation, etc.
  
- ! Michigan and Wisconsin suggested periodic post-filing conference calls or other such meetings. Such meetings would assist FERC, agency staff, and the licensee in staying on task during the processing of the FERC license application and 401 certifications.
  
- ! Wisconsin suggested that FERC should consider making the alternative licensing process the default process as opposed to the traditional process. Wisconsin has been pleased with their experiences using the alternative licensing process, and notes that the alternative process promotes early resolution of issues.
  
- ! Michigan and Wisconsin state that draft license articles would reduce the need for rehearing requests and help resolve issues related to interpretation of mandatory conditions and uncertainty in compliance roles.

**LIST OF ATTENDEES**  
**Mid West Hydropower Workshop on**  
**Integrating State Processes**  
**April 17 and 18, 2002**  
**Milwaukee, Wisconsin**

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