



HYDRO PROJECTS IN CALIFORNIA: 401 CERTIFICATION ISSUES

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401 CERTIFICATION IN CALIFORNIA

- Section 401 of the Clean Water Act
- U.S. Supreme Court Review of 401 certification
 - S.D. Warren (2006)
 - PUD No. 1 (1994)
- California's Regulatory Structure
- Issues In Typical Proceedings
- Emerging Issues

SECTION 401 OF THE CLEAN WATER ACT WATER QUALITY CERTIFICATION

- The Federal Energy Regulatory Commission Controls the Licensing of Dams: Federal Preemption
- Clean Water Act (Limited Waiver of Preemption)
 - State can participate in licensing process if it has concerns about water quality.
 - Section 401: Federal licenses are subject to certification from the state that the licensed activity will not violate certain water quality standards.

U.S. SUPREME COURT REVIEW OF HYDRO PROJECTS AND SECTION 401

- *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994); 114 S.Ct. 1900 (Scope of Authority case)

Held: States may impose stream flow requirements on hydro projects under Section 401.

- *S.D. Warren Co. v. Maine Board of Environmental Protection*, 574 U.S. ____ (2006); 1265 S.Ct. 1843 (Scope of Jurisdiction case)

S.D. WARREN CASE

- 401: State Approval for “Any Activity” Which May Result In Any Discharge to Navigable Waters
- Issue: What Is the Meaning of the Term “Discharge?”
- No Definition, But Common Meaning of “Flowing or Issuing Out”
- Discharge of Water from a Dam Is a “Discharge”

U.S. SUPREME COURT HAS SPOKEN

- PUD: Broad Authority to Place Conditions on Hydro Facilities
- S.D. Warren: 401 Jurisdiction Is Broad and Applies to Discharges from Dams

ENVIRONMENTAL REVIEW STRUCTURE IN CALIFORNIA

- Decentralized
- State Water Board Is Agency Authorized to Issue 401 Certification (Calif. Wat. Code § 13160)

STATE WATER BOARD REGULATIONS: CALIFORNIA CODE OF
REGULATIONS (CCR), TITLE 23, DIVISION 3, CHAPTER 28,
ARTICLE 4. WATER QUALITY CERTIFICATION

- Application Filed with State Water Board's Executive Director (23 CCR § 3855(b)(1))
- Review By Applicable Regional Water Board (23 CCR § 3855(b)(2))
- Public Notice and Hearing (23 CCR § 3858)

STATE WATER BOARD REGULATIONS: CALIFORNIA CODE OF REGULATIONS (CCR), TITLE 23, DIVISION 3, CHAPTER 28,
ARTICLE 4. WATER QUALITY CERTIFICATION (con't.)

- Action On Application (Conditions) (23 CCR § 3859) - Delegation to Executive Director
- Standard Conditions (23 CCR 3860)
- Petition for Reconsideration to the Board Itself (23 CCR 3867)

OTHER CALIFORNIA AGENCIES

- Energy Commission
- Public Utilities Commission
- Department of Fish & Game

ISSUES IN TYPICAL PROCEEDINGS (SEE PITT RIVER CERTIFICATION)

- Stream Flows
 - Minimum Pools
 - Ramping Rates
 - Freshet Flows
- Temperature
- Fish Mitigation
- Monitoring

EMERGING ISSUES

- Diverging Environmental Concerns: White Water Recreation vs. Other Instream Uses
- Dam Removal
- Global Warming



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