

Testimony of the Western States Water Council

**Submitted to the
Senate Committee on Environment and Public Works**

**Regarding State Authorities and
S. 3303 – Water Quality Certification Improvement Act**

August 16, 2018

I. INTRODUCTION

My name is Tony Willardson, and I am the Executive Director of the Western States Water Council (WSWC). The Council is a government entity, instrumentality of each and every participating member state. A bi-partisan organization created pursuant to a Western Governors' resolution in 1965, we represent eighteen states. Our members are appointed by and serve at the pleasure of their respective Governors, advising them on water policy issues. Our mission is to ensure that the West has an adequate, secure and sustainable supply of water of suitable quality to meet its diverse economic and environmental needs now and in the future.¹

Chairman Barrasso, Senator Carper and members of the Committee, we appreciate your leadership on issues related to water, public works, the environment and the economy, and particularly your efforts to achieve a balance between federal policies and programs and the role of the states in our federalist system. The Council represents a diverse set of States but find common ground in declaring that Western states have primary authority and responsibility for the appropriation, allocation, development, conservation and protection of water resources, both groundwater and surface water, including protection of water quality, instream flows and aquatic species.

The Congress has historically deferred to state water law as embodied in Section 8 of the Reclamation Act, Section 10 of the Federal Power Act, Section 101(g) and 101(b) of the Clean Water Act, and myriad other statutes. Any weakening of the deference to state water laws is inconsistent with over a century of cooperative federalism and a threat to water rights and water rights administration in all western states.² The Council has addressed many issues under the jurisdiction of this Committee.

The Council has called for leadership at all levels of government, in partnership with the public sector, to address the Nation's infrastructure and water needs as a public policy priority – and to work together with each other and with States to streamline permitting processes and coordinate environmental and other regulatory reviews to eliminate duplicative procedures, reduce costs of compliance and construction, and ensure timely completion, maintenance, or relicensing of authorized infrastructure projects so vital to the West and the Nation.³

This month, meeting in Newport, Oregon, the Council adopted two resolutions. One recognizing Congress stated policy in the Endangered Species Act Section 2(c)(2) that "Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert

with conservation of endangered species,” and calling upon “federal agencies to engage in a substantive discussion of past, present and future efforts to work in concert with State agencies to implement Congress’ intent....”⁴

The second reiterates our position that the transport of water through constructed conveyances to supply beneficial uses – without subjecting the water to intervening industrial, municipal, or commercial use – should not trigger federal NPDES permit requirements, simply because the transported water contains different chemical concentrations and physical constituents, and calls for the use of available State authorities to protect the water quality of the receiving water body in a water transfer. The Council supports EPA’s current rule expressly excluding water transfers from regulation under the NPDES permitting program and supports the codification of 40 CFR 122.3(i) into statute.⁵

Lastly, the Council has been working with its member states to revise and refine recommendations for redefining waters of the United States under the Clean Water Act and clarifying federal and state jurisdiction, recognizing that all waters are protected by the States, regardless of the extent of federal jurisdiction or limits thereof.

II. THE WATER/ENERGY NEXUS IN THE WEST

The Council has called for integrating water and energy resources planning and policy.⁶ The West enjoys diverse and abundant energy resources, including renewable and non-renewable resources, but water is scarce in much of the region and may or may not be sufficient for all proposed uses. Maintaining adequate and sustainable supplies of clean water and energy present interrelated challenges given a growing population, increasing water and energy demands, and an uncertain climate subject to multi-year drought and other extremes. An integrated approach to water and energy resource planning, development, diversification, management and protection is necessary to achieve a thriving and sustainable future for the West.

The Council has specifically supported federal legislative and administrative actions to authorize and implement reasonable hydropower projects and programs that enhance our electric generation capacity and promote economic development, through streamlined permitting processes, while appropriately protecting environmental resources – also declaring that past, present and future hydropower development and operational changes should recognize and ensure consistency with state law and regulatory authority, including delegated authority under federal law.⁷

The Federal Power Act

Of note, Section 10 of the Federal Power Act (FPA) of 1920 directed the Federal Energy Regulatory Commission (FERC) to coordinate the development of hydroelectric projects as part of a comprehensive plan for improving our waterways. Section 10(a)(1) required that any plan “...shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, for the

adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes...and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.”

Section 10(a)(2) requires that the Commission shall consider the “...extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared...” pursuant to federal law or the state in which the project is located. Moreover, FERC is to consider: “The recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.”

Further, Section 27 states: “That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.”⁸

Balancing federal and state authority related to hydropower development has been a difficult and sometime contentious undertaking.

In 1983, FERC issued a license authorizing the operation of a hydroelectric project along Rock Creek in California, setting an interim minimum flow rate of water that must remain in the bypassed section of the stream rather than drive the generators. The State Water Resources Control Board (SWRCB) issued a state permit conforming to those federal requirements but reserving the right to set different permanent requirements. When SWRCB considered a draft with considerably stricter requirements, the licensee petitioned FERC for a declaration that FERC possessed exclusive jurisdiction to determine the project’s minimum flow rates. FERC agreed, concluding that setting flow rates was “integral to its planning and licensing process” under the Federal Power Act, and that “giving effect to competing state requirements would interfere with its balancing of competing considerations in licensing and would vest in States a veto power over federal projects inconsistent with the FPA,” as interpreted by the Supreme Court in *First Iowa*.⁹ California sued.

California v. FERC reached the 9th Circuit Court of Appeals which found that “...one reading would construe the [Section 27] to limit state authority to the area of property rights involving water for irrigation, municipal use, and related activities. Under this reading, any aspect of operating a hydropower project not implicating these rights would fall under exclusive federal regulation. A second reading would construe the section much more broadly as an anti-preemption clause that gives the states final authority over all issues connected to the control and use of water...” California argued for the latter interpretation, but the 9th Circuit disagreed, and held that “...Congress intended to vest regulatory authority in FERC over most aspects of hydropower projects. Only control over certain limited proprietary rights remains in state hands.”¹⁰

California appealed the decision to the Supreme Court, which granted certiorari.¹¹ The issue on appeal was “Whether the Federal Power Act preempts state regulatory water right laws otherwise applicable to hydropower projects licensed by FERC, or instead, whether Section 27 of the Act – which subjects such projects to state laws relating to control, appropriation, use, or distribution of water – precludes such preemption?” Forty-nine states supported California in an amicus brief. The Supreme Court unanimously affirmed the 9th Circuit’s decision.¹²

The Supreme Court determined that the narrow reading of Section 27 of the Federal Power Act in *First Iowa* was not dicta but was necessary to the Court’s holding and interpretation of the law. The Court declined to revisit *First Iowa* and disturb 44 years of precedent governing state and regulatory authority over hydroelectric projects, particularly where there had been no intervening change of law. “The California requirements for minimum streamflows cannot be given effect and allowed to supplement the federal flow requirements.” The Court did, however, note that “...Congress remains free to alter what we have done.”

The states unanimously viewed this ruling as an erosion of state authority over water resources. Shortly after the decision, the Idaho congressional delegation introduced legislation (S. 2805 and H.R. 5194) in the 101st Congress to restore states’ primary authority for regulating water use related to hydropower projects. The WSWC subsequently supported federal legislation to “...assure that applicants for hydropower licenses comply with state substantive and procedural water law, thus restoring to the Act Congress’ intent that state law govern water use associated with a hydropower project.”

III. THE CLEAN WATER ACT

Within the year, the states were looking at amendments to the Clean Water Act to strengthen states’ abilities to mandate minimum streamflows and protect designated uses through Section 401 certification.¹³ Opposing interests sought to further limit state authority while streamlining the federal hydropower licensing process, proposing a bill.¹⁴ to prohibit states from including any conditions for Section 401 certifications not directly related to water quality. The WSWC adopted a position supporting a balanced national energy policy that recognizes legitimate state water management and planning authority to balance competing water uses.

Ironically, as the Congress considered legislation, the Supreme Court in another case upheld States’ authority delegated under Section 401 of the Clean Water Act to impose bypass flows to protect water quality and fish and wildlife – the same requirements States had argued they had power to impose under state law in *California v. FERC*.

In 1994, the U.S. Supreme Court issued a 7-2 decision declaring that minimum streamflow requirements are a permissible condition of Clean Water Act Section 401 certifications. A Washington city and local utility district sought a license to build a hydroelectric project on the Dosewallips River. The proposed project would reduce the water flow below the state’s minimum stream flow requirement to protect fish habitat, a state-designated use of the water under Section 303 of the Clean Water Act. The Washington

Department of Ecology issued a Section 401 certification imposing a minimum stream flow requirement as a condition of the hydropower license, and the applicants objected to the state's authority to impose water flow requirements. In *P.U.D. No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), the Court upheld a state's authority to impose conditions under the Section 401 certification process where necessary to protect a designated use for fish habitat.¹⁵

The Court rejected the argument that water quality requirements were limited to discharges under the Clean Water Act, noting that Washington's instream flow requirement was necessary to enforce the designated use of the river. The Court said that the Clean Water Act preserves each state's authority to allocate water quantity between users and does not limit Section 401 to water quality concerns when protecting designated uses. Importantly, the Court also rejected an effort to read "implied limitations" into Section 401 based on a perceived conflict between Section 401 state certifications and FERC authority under the Federal Power Act and the *First Iowa* interpretation.

Again in 2006, the Supreme Court recognized that State 401 certification authority is "...essential in the scheme to preserve state authority to address the broad range of pollution."¹⁶

Clean Water Act Section 101(b) recognizes the states' critical role in protecting water quality and declares: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution...." Similarly, Section 101(g) further provides that the primary and exclusive authority of each state to "allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act...."

The latter, known as the Wallop amendment, was sponsored by Senator Malcolm Wallop of Wyoming, a respected rancher, conservative, and critic of regulatory red-tape.

Senator Barrasso we look forward to continuing to work with you and other Committee members to balance environmental protection and economic development needs, as well as the respective roles of state and federal agencies in the development, conservation and protection of our water resources – including protection of water quality, instream flows, aquatic species, and States' rights to allocate water and water rights.

Attached to my testimony is a letter summarizing a 2014 survey that addresses questions related to state administration of 401 certification authority that are sometimes raised by critics of the process. Section 401 State certification alone is not usually an obstacle in itself to timely federal licensing and permitting, provided that applications are complete and ancillary federal activities are complete or nearly complete. The majority of requests are processed within 40-90 days, some within a couple of weeks. The vast majority of states have no backlog of certification actions, but a few do. Delays are typically due to submission of an incomplete application, completion of necessary study requirements, and constraints on state resources, including staff limitations and turnover. Certifications may also be held up by the applicant not responding to States' requests for additional information or failing to comment on proposed project conditions. Often substantive details of the proposed action change requiring further review.

IV. CONCLUSION

In conclusion, the Western States Water Council reiterates its position that states have primary jurisdiction over water quantity and quality issues and should retain primary jurisdiction under the Clean Water Act for the integration of water quantity and water quality considerations through the water quality certification process set forth under Section 401.

The Council recently signed a joint letter together with western governors, legislators, attorneys general and various interstate associations of state water and wetland agencies recognizing the “importance of partnerships between states and the federal government,” and that a “balanced system of cooperative federalism has enabled states to implement the CWA effectively and with flexibility.... A vital component of the CWA’s system of cooperative federalism is state authority to certify and condition federal permits of discharges into waters of the United States under Section 401.”

Again, as States, we look forward to working with the Committee to balance the sometimes competing interests surrounding our water and energy policy goals.

END NOTES

¹ [http://www.westernstateswater.org/wp-content/uploads/2014/01/Revised-Rules-of-Organization_2015 July 10. pdf](http://www.westernstateswater.org/wp-content/uploads/2014/01/Revised-Rules-of-Organization_2015_July_10.pdf). The purpose of the Western States Water Council shall be to accomplish effective cooperation among western states in matters relating to the planning, conservation, development, management, and protection of their water resources, in order to ensure that the West has an adequate, sustainable supply of water of suitable quality to meet its diverse economic and environmental needs now and in the future.

² WSWC Position #406 – Regarding Preemption of State Law in Federal Legislation; <http://www.westernstateswater.org>.

³ WSWC Position #419 – Supporting Water Infrastructure Funding.

⁴ 16 U.S.C. 1531; WSWC Position #425 Regarding Endangered Species and State Water Rights.

⁵ WSWC Position #424 – Regarding Water Transfers and NPDES Permits.

⁶ WSWC Position #420 – Integrating Water and Energy Planning and Policy.

⁷ WSWC Position #391 – Supporting Renewable Hydropower Development.

⁸ Federal Power Act, 16 U.S.C. 791a et seq.; P.L. 114-94. Section 27 at 16 U.S.C. 821.

⁹ FERC relied on a narrow reading of Section 27 of the Federal Power Act suggested by the Supreme Court in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946).

¹⁰ *California v. FERC*, 877 F.2d 743 (9th Cir. 1989).

¹¹ In 1989, the WSWC passed a resolution supporting California's efforts to overturn the 9th Circuit's decision on appeal.

¹² On May 21, 1990.

¹³ S. 3186 introduced in the 101st Congress on October 11, 1990; S. 106 and H.R. 649 introduced in the 102nd Congress on January 14 and 24, 1991.

¹⁴ The National Energy Security Act (S. 341) introduced in the 102nd Congress on February 5, 1991.

¹⁵ The *P.U.D. No. 1* decision effectively restored to the states authority under federal law to accomplish what the *California v. FERC* decision said they could not do under state law.

¹⁶ *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006), citing 116 Cong. Rec. 8984 (1970).