

6-11-2002

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## Citation Information

Gheleta, Michael, "Protecting Biodiversity in the Relicensing of Non-Federal Hydroelectric Projects in the United States: Consultation and Coordination Between FERC and Fish, Wildlife and Water Quality Agencies and the Role of the Endangered Species Act [abstract]" (2002). *Allocating and Managing Water for a Sustainable Future: Lessons from Around the World (Summer Conference, June 11-14)*.

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Michael Gheleta, *Protecting Biodiversity in the Relicensing of Non-Federal Hydroelectric Projects in the United States: Consultation and Coordination Between FERC and Fish, Wildlife and Water Quality Agencies and the Role of the Endangered Species Act* [abstract], in *ALLOCATING AND MANAGING WATER FOR A SUSTAINABLE FUTURE: LESSONS FROM AROUND THE WORLD* (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 2002).

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# **Protecting Biodiversity in the Relicensing of Non-Federal Hydroelectric Projects in the United States: Consultation and Coordination Between FERC and Fish, Wildlife and Water Quality Agencies and the Role of the Endangered Species Act**

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## **ABSTRACT**

Hydroelectric power facilities operated by entities other than the federal government on the United States' rivers and streams were originally granted licenses of up to 50 years under the 1920 Federal Power Act. The licenses of many such facilities were issued before enactment of significant environmental laws and development of widespread public concern over environmental quality. As these long-term licenses expire, the Federal Energy Regulatory Commission (FERC) is responsible for relicensing these non-federal hydropower facilities, and for considering the environmental impacts of these projects for the first time in many cases.

In the decade between 2000 and 2010, we are in the midst of a wave of license expirations on a significant number of non-federal hydropower facilities. Consequently, FERC is currently engaged in relicensing proceedings for many large projects with substantial hydroelectric capacity, significant economic value, and substantial impacts on biodiversity. Most recently, the United States Congress has gotten involved in the issue of relicensing of non-federal hydropower projects, as both the House of Representatives and the Senate have passed bills on the subject as part of comprehensive energy legislation.

This paper will examine legal and policy issues associated with protecting biodiversity in the relicensing of non-federal hydroelectric projects on United States rivers and streams. A major focus will be consultation and coordination between FERC and other agencies with mandates to protect fish, wildlife and water quality, as well as application of the Endangered Species Act (ESA). Since its enactment in 1973, the ESA has undoubtedly become the environmental law with the greatest impact on development of water resources in the United States.

An introductory discussion will cover the operation of hydroelectric projects and their impact upon biodiversity generally, as well as the current status of FERC relicensing proceedings and problems that have arisen with this process in recent years. The paper will outline legal mandates requiring FERC to consult and coordinate with federal and state resource agencies and to take into account fish, wildlife and water quality impacts in relicensing decisions. The applicability and timing of the ESA in the relicensing process in particular will be addressed. Select hydroelectric projects will be used to illustrate problems which have arisen concerning agency consultation and coordination designed to protect biodiversity.

The paper will also review current efforts in the United States Congress to streamline and otherwise reform the hydropower relicensing process, assessing the impact of various proposals on aquatic biodiversity. The discussion will analyze whether legislative proposals effectively address important unresolved issues that have arisen in FERC relicensing proceedings. Finally, the paper will use the foregoing analysis to make recommendations seeking to promote successful consultation and coordination between FERC and fish, wildlife and water quality agencies seeking to protect biodiversity in relicensing of non-federal hydroelectric projects.