



Legislative Fiscal Bureau

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January 20, 1998

TO: Members
Joint Committee on Finance

FROM: Bob Lang, Director

SUBJECT: Assembly Bill 540: Payment of Claims Relating to Hydroelectric Facility Fees Paid to the Department of Natural Resources

Assembly Bill 540 was introduced on September 29, 1997, and referred to the Joint Committee on Finance. AB 540 would direct the state to pay \$845,399 from the Department of Administration's GPR sum sufficient claims awards appropriation for payment of claims against the state made by 11 claimants to refund fees paid to the Department of Natural Resources (DNR) for review of their hydroelectric facility proposals.

BACKGROUND

The Federal Power Act of 1986 established a process for licensing hydroelectric facilities on navigable waters. Under the Act, the Federal Energy Regulatory Commission (FERC) is provided the sole authority to issue hydroelectric power project licenses. The Act requires that FERC consider a facility's power generation capability, development impacts and energy conservation capability in making a determination to license a facility. However FERC must give equal consideration to a facility's impact on the protection of fish and wildlife resources, the protection of recreational opportunities and the preservation of environmental quality. The Act also requires that new hydroelectric facility license applicants in the state consult with the state's fish and wildlife agency (for Wisconsin, the Department of Natural Resources) which may study the impact such facilities have on the state's natural resources. Each license application submitted to FERC for facilities in the state must include conditions for the protection, mitigation of damage to or enhancement of fish and wildlife resources based on DNR's recommendations.

Prior to 1992, state fish and wildlife agencies were not allowed to seek or obtain reimbursement from FERC for costs incurred in connection with any studies or reviews carried

out by such agencies in administering its responsibilities under the Act. However, amendments to the Federal Power Act in 1992 provided FERC the authority to reimburse state fish and wildlife agencies for reasonable and necessary costs associated with any studies or reviews carried out by the agencies. Such reimbursements were subject to the annual appropriation of federal funds. No federal funds have yet been appropriated.

In 1989, Wisconsin statutes provided DNR the authority to impose charges on applicants for FERC hydroelectric power facility licenses to assist with costs incurred by the Department in carrying out its responsibilities under the Federal Power Act. From 1989 through 1995, DNR received \$845,399 in fees from 11 facilities that paid DNR to review their hydroelectric facility proposals.

On December 28, 1995, the U.S. District Court for the Western District of Wisconsin ruled unconstitutional the 1989 Wisconsin statute granting DNR the authority to impose charges on hydroelectric facilities for costs incurred in carrying out its responsibilities under the Federal Power Act. The court ruled that the authority to license hydroelectric facilities is reserved to the federal government under the Federal Power Act and that Wisconsin's statute is preempted by FERC's authority to charge license fees. Since 1992 these federal fees were to be sufficient to reimburse state fish and wildlife agencies for the cost of conducting necessary reviews and studies, though no appropriations for this purpose have been made. While the court granted a summary judgement prohibiting future enforcement of the Wisconsin statute, the court did not rule on the facilities' refund of previously collected fees. Wisconsin did not appeal the judgement.

Following the U.S District Court ruling, the 11 facilities filed a claim with the Wisconsin Claims Board on August 22, 1996, to recover the amount of fees paid by each of the licensees. The claimants argue that because DNR's enforcement of the state statute and the exacting of fees based on the statute was deemed unconstitutional, both the law and equitable principles favor refunding of the fees.

DNR recommended that the Board deny the claims on the ground that the state is not legally liable for the reimbursements and that the claims should not be paid on equitable grounds. Alternatively, DNR recommended that the claims be held in abeyance pending either a court ruling regarding the legal obligation of the state or until the statute of limitations on a civil action related to the claim expires. Further, because the claims arise from a state law being declared unconstitutional under federal law, DNR requested that any claims paid be made from the state's sum sufficient claims awards appropriation rather than from a DNR appropriation.

DNR further contended that, if the Board were to recommend an award, only an amount equal to the fees paid after enactment of the 1992 amendments to the Federal Power Act should be granted. The Department believes the 1992 amendments had the effect of preempting the state's authority to assess the fee on the facilities. DNR calculates the amount of fees paid after October 1, 1992, to be \$285,828.

On August 28, 1996, the Claims Board denied the request for reimbursement of the fees paid to DNR. The Board concluded that there was an insufficient showing of negligence on the part of the state and the claim was not one for which the state was legally liable nor one which the state should assume based on equitable principles.

SUMMARY OF BILL

Assembly Bill 540 would direct the state to pay a total of \$845,399 from the general fund for payment of claims against the state made by 11 claimants to refund fees paid to DNR for review of their hydroelectric facility proposals. The bill specifies that acceptance of this payment would release the state from any further claim or liability resulting from these payments. The following table lists the claims for each of the individual claimants.

<u>Claimant</u>	<u>Claim</u>
Consolidated Water Power Company	\$38,343
Flambeau Paper Corporation	233,999
Kimberly Clark Tissue Company	4,089
Nekoosa Papers, Inc.	21,284
Niagra of Wisconsin	38,047
Northern States Power Company	98,117
Weyerhaeuser Paper Company	4,843
Wisconsin Power and Light Company	87,250
Wisconsin Public Service Corporation	164,101
Wisconsin River Power Company	76,463
Wisconsin Valley Improvement Company	<u>78,863</u>
Total	\$845,399

FISCAL EFFECT

The bill directs the state to pay \$845,399 from the Department of Administration's GPR sum sufficient claims awards appropriation. The appropriation is currently set at \$25,000 annually. In addition, \$5,600 has been expended from the claims awards appropriation as of January 15, 1998. Therefore, passage of AB 540 would reduce the 1997-98 general fund balance by approximately \$826,000.

Prepared by: Russ Kava and Al Runde

Laid aside

MO# _____

BURKE	Y	N	A
DECKER	Y	N	A
JAUCH	Y	N	A
SHIBILSKI	Y	N	A
COWLES	Y	N	A
PANZER	Y	N	A
SCHULTZ	Y	N	A
ROSENZWEIG	Y	N	A

GARD	Y	N	A
OURADA	Y	N	A
HARSDORF	Y	N	A
ALBERS	Y	N	A
PORTER	Y	N	A
KAUFERT	Y	N	A
LINTON	Y	N	A
COGGS	Y	N	A

AYE _____ NO _____ ABS _____