

State of Vermont  
Water Resources Board

In Re: Georgia-Pacific Corporation  
Appeal of Section 401 Certification  
for the **Gilman** Dam

Preliminary Order

The Agency of Natural Resources (the "Agency") has asked the Water Resources Board (the "Board") to dismiss this appeal on the ground that the Board lacks jurisdiction.\* For the reasons given below, we deny the Agency's request.

Background

This proceeding concerns Georgia-Pacific Corporation's hydro-electric power dam on the Connecticut River at **Gilman**, Vermont ("**the Gilman dam**"). The **Gilman** dam holds a federal license which expires December 31, 1990, and must be renewed by the Federal Energy Regulatory ("**FERC**"). Before it will issue or renew a license FERC requires the applicant to submit a "Section **401**" certificate from Vermont stating in substance that the

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\*The only brief submitted on behalf of this request was styled "State's Memorandum of Law," but the State of Vermont is not a party. At oral argument Assistant Attorney General Ron Shems stated that he was in fact appearing on behalf of the Agency of Natural Resources. Although no procedural rules were cited in his brief and the only request made was for a "determination" we are treating this as a request to dismiss under Rule 21 of the Board's Rules of procedure.

applicant would meet state water quality requirements under conditions set forth in the certificate. Section 401, Clean Water Act, 33 U.S.C. 1341; FERC Regulations, 54 Fed. Reg. 23,756, 23,806 (June 2, 1989), to be codified at 18 C.F.R. Part 16.

The Agency on July 28, 1989, issued a Section 401 certificate for the **Gilman** dam, but Georgia-Pacific challenges the Agency's authority to attach conditions to the certificate, and challenges certain of the conditions as arbitrary. **Georgia-Pacific** accordingly, on August 22, 1989, appealed the certification to this Board. The Agency asserts that we have no jurisdiction to hear the appeal. (Two public interest organizations **who have** been granted **intervenor** status have taken no position on the question of jurisdiction.) The Board heard oral argument February I, 1990 on the question of jurisdiction.

### **Discussion**

Section 401 of the Clean Water Act began as Section 21(b) of the Federal Water Pollution Control Act of 1970, adopted at a time when state governments had the leading role in water quality protection. Section **21(b)** recognized the role of the states, and required federal licensing agencies to accept state water quality requirements as conditions of their permits. See e.g. Power Authority of the State of New York v. Department of Environmental Conservation, 373 F. Supp. 243, 243 (N.D.N.Y.1974).

Section 21(b) was carried forward with minor changes in

Section 401 of the Federal Water Pollution Control Act Amendments of 1972, now commonly **referred** to as the Clean Water Act. The substance and purpose of Section 401 remained the same -- to require federal licensing authorities to follow state water quality requirements. Roosevelt Campobello International Park v. EPA, \_\_\_\_\_ **F.2d** \_ (1st Cir. 1982); Mobil Oil Corp. v. Kelley, 426 F. **Supp.** 230, 235 (1976); S. Novick, et al., Law of Environmental Protection Section 12.05(2)(b).

This purpose is accomplished through a "certification" procedure. Section 401, Clean Water Act, 33 U.S.C. Section 1341, now provides that an applicant for a federal license must obtain a certificate (or a waiver) of compliance with state water quality requirements, from any state in which the facility has a "discharge." Section 401(a)(1), Clean Water Act, 33 U.S.C. Section **1341(a)(1)**. No federal license may be issued unless such a certificate is given or waived. Weinberger v. Romero-Barcelo, 456 U.S. 305, 309 (1982). This requirement applies to **EPA-**issued discharge permits, Corps of Engineers dredge-and-fill **permits**, and federal licenses for dams and pipelines. Novick, supra. In Vermont, the Agency (and its predecessor the Department of Water Resources) has granted Section 401 Certificates for Corps dredge-and-fill permits, dams, and other federally licensed facilities since 1970. The Agency does not dispute that, at least until 1984, all Section 401 certifications **could** be appealed to this Board.

Such appeals are authorized by 10 V.S.A. Section 1269, which since 1969 has explicitly provided an appeal to this Board from "acts or decisions" of the Agency "pursuant to" 10 V.S.A. Section 1258, "management of waters," and other provisions of Chapter 47, Subchapter 1, "Water Pollution Control."

It is well established that a Section 401 certification is an "act or decision" ... "pursuant to" Section 1258. A Section 401 **certificate** implements, with regard to federally licensed facilities, the water quality management programs adopted under Section 1258, which broadly authorizes the Secretary of Natural Resources to manage water quality in Vermont. A Section 401 certificate, if it is authorized at all, therefore plainly is an "act or decision" of the Department "pursuant to" the water quality management provisions of 10 V.S.A. Section 1256, appealable to this Board under 10 V.S.A. Section 1269. Opinion of the Attorney General, Opinion No. 82-27 (October 27, 1981); In re Chace Mill Hydroelectric Project, Water Resources Board (November 10, 1961). See also In re Balaur, Water Resources Board (February 13, 1987) (appeal of Section 401 hydropower dam certification).

The Agency argues that in 1984 this long-settled **certification** and appeal authority was altered -- apparently **with** regard to hydro-electric power dams alone -- by an amendment to 10 v.s.A. Section 1004, which named the Agency as Vermont's representative to appear in Section 401 matters before the Federal Energy Commission ("FERC").

The original text of Section 1004, part of the statute concerning regulation of stream flow, authorized the Agency's predecessor, the Department of Water Resources, to appear in Federal Power Commission hearings to represent the State's position on stream flow questions in dam licensing proceedings. FERC then acquired jurisdiction over hydro-electric dams formerly regulated by the Federal Power Commission. (See Department of Energy Reorganization Act, Sections 7101-7352 (1982).) Vermont, in 1984, accordingly updated Section 1004, to designate the Agency as Vermont's certifying agency and "State's **Agent**" to FERC instead of the Federal Power Commission, and with regard to Section 401 water quality matters as well as the older stream flow questions.

The Agency now argues that this 1984 amendment to Section 1004 somehow withdrew the Department's authority and duty to comply with Section 1258, and created a new authority under Section 1004 without any defined content or procedures.

The Department cites no authority and gives us no reason to think the legislature intended such a result. It is unlikely that the legislature, simply by naming the Agency Vermont's "**agent**" and its certifying agency in FERC Section 401 proceedings, and neglecting to cross-reference Section 1258, would have intended to allow the Agency to abandon Vermont's water quality management programs with respect to FERC-licensed hydro-electric power dams.

We are given no reason to suppose such a surprising result

was intended. The purpose of Section 401 certification is precisely to keep federally licensed dams within the state's water quality management program. It therefore would be wrong to construe Section 1004, which authorizes the Agency to appear in Section 401 matters before FERC, in a way that subverts the purpose of Section 401 and of Vermont's **water** quality management programs.

It follows that the Agency's granting of a Section 401 certification for the **Gilman** Dam, and the conditions attached to the certification, if authorized at all, must be acts or decisions "pursuant **to**" 10 V.S.A. Section 1258, and may be appealed to the Board under 10 V.S.A. Section 1269.

The Agency also argues that this Board lacks jurisdiction because, if it accepts this appeal, the Board will have to decide the validity of **FERC's** regulations. This is not correct. The only questions properly **raised** by this appeal are the limits of the Agency's authority under Vermont law. If on consideration it appears that no cognizable claims have been raised the appeal can be dismissed on the merits, but not for lack of jurisdiction.

#### Conclusions of Law

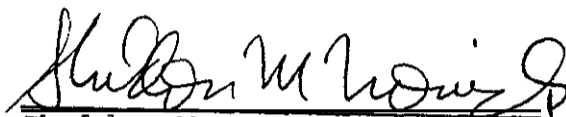
The Board has jurisdiction under 10 V.S.A. Section 1269 to hear appeals of Section 401 Certifications.

Order

The Agency's request under Rule 21 to dismiss this appeal is denied. The appeal will be conducted as a de novo proceeding under 10 V.S.A. Section 1269.

Done this 33<sup>rd</sup> day of February, 1990, at Montpelier.

Vermont Water Resources Board

  
Sheldon M. Novick  
Vice Chairman

  
Elaine B. Little

  
David L. Deen

  
Mark DesMeules