

State of Vermont  
Water Resources Board

in re: **Appeal of** Vermont  
Natural Resources Council  
Docket Nos. 92-02 **and** 92-05

Authority: **10 V.S.A. § 1024(a)**  
**10 V.S.A. § 1099(a)**

**MEMORANDUM OF DECISION**  
Motions to Alter or Reconsider

On February 23, 1993, Vermont Natural Resources Council (VNRC) and others 1 filed with the Water Resources Board (Board) a Motion to Alter and/or Reconsider the Board's February 8, 1993, decision in the above-captioned matter. 2 VNRC also filed a memorandum in support of its motion. On February 23, 1993, Snowridge, Inc. (SRI) filed a Motion to Reconsider and Revise Certain Conditions imposed by the same Board decision.

VNRC and SRI's motions were timely filed pursuant to the provisions of Rule 29(C) of the Board's Rules of Procedure. The Board consisting of members Adler, Davies, DesMeules and Rachlin, following deliberations, unanimously agreed to act upon both motions without convening a hearing. Based on its review of the parties' filings and the record in the proceeding, the Board hereby denies VNRC's Motion to Alter and/or Reconsider and grants in part and denies in part SRI's Motion to Alter and/or Reconsider.

Ii. VNRC's Motion to Alter and/or Reconsider

Although VNRC asserts that the Board's decision of February 8, 1993; is fundamentally flawed because "it is arbitrary, does not reflect the record evidence, and is contrary to law," VNRC does not identify for the Board any specific facts or conclusions it

believes are in error. Instead, VNRC asks the Board to revisit the issue of conflict of interest it had raised in the final days of the Board's deliberations. 3 Specifically, VNRC asks the Board to reconsider its determinations: (1) that the parties' requests for further disclosure were moot; (2) that the hearing should not be reconvened to rehear arguments of the parties on procedural and/or substantive grounds; and (3) that the decision should be approved and issued under the signature of each member including member Rachlin.

After careful review of the allegations and the law governing conflicts of interest, the Board has determined that it will not reconsider its determinations memorialized in its February 8, 1993, decision, as previous amended.

The Board takes very seriously its constitutional charge to protect the procedural rights of parties appearing before it in contested cases. It is well aware of its obligation to provide a fair and impartial hearing and to preserve the confidence of the public in the integrity of its quasi-judicial proceedings. Moreover, it is cognizant that patent errors concerning disclosure and disqualification can be violative of due process and may result in reversal and remand of its decisions. In re State Aid Highway No. 1, Peru, Vt., 133 Vt. 4, 9 (1974).

Nevertheless, the Board concludes that VNRC's allegations of conflict of interest are speculative and remote at best. VNRC has failed to proffer facts which would suggest that either Chair

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Rocheleau or member Rachlin are "interested in the event of [this] cause or matter" in contravention of 12 V.S.A. § 61(a).<sup>3</sup> Indeed, VNRC has offered no analysis of case law construing that § 61(a) or similar statutes from other jurisdictions. Moreover, **it** has failed to **demonstrate specifically** how **each** Board member's alleged interest contravenes the ethical rules applicable to **part-time gubernatorial appointees** under the Executive Code of Ethics, Executive Order No. 8-91. 4 Bald assertions alone are not enough.

Vermont courts recognize a presumption in favor of the honesty and integrity of administrative panel members, and a presumption that actions of administrative bodies are valid, unless shown by clear and convincing evidence to be otherwise. **The** burden of establishing disqualification rests squarely with the challenging party. See Brody v. Barasch, 155 **Vt.** 103, 109-110 (1990): 5

A. Request to reconsider determination that parties' requests for further disclosures were moot

VNRC first raised objections concerning Chair **Rocheleau's** participation in its filing of January 27, 1993, even **though** each participating Board member made full and adequate disclosures at the outset of the **hearing**. On January 27, 1993, the Chair responded with an affidavit setting forth further disclosures. **When VNRC in** its filing of February 1, 1993, continued its objections to the Chair **Rocheleau's** participation, he **unilaterally** decided to **recuse himself** from all further participation in the

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proceeding. Rocheleau memorandum, dated February 4, 1993. He did so **not** because of an apparent or actual conflict **of interest, but** because the accusations themselves raised the specter of an appearance of conflict of interest.

On the other hand, when VNRC challenged Ms. **Rachlin's** participation, she declined **recusal** and chose to state on the record her reasons for not stepping down. Rachlin memorandum, dated February 5, 1993. Because of the confidential relationship between attorneys and their clients, Ms. Rachlin has no direct knowledge of the interests of the clients of her **husband's** firm and therefore must rely on others to identify conflicts unless they are apparent, as when her husband's firm represents a client in **a case** before the **Board**. As noted in **VNRC's brief, Ms. Rachlin** made **a practice** during her previous tenure on the Water Resources Board of **recusing** herself in **all** cases where **her** husband's firm represented a client, as was done in In re Town of Sherburne, 154 Vt. 596 (1990).

The Supreme Court has declared that the standards of the Code of Judicial Conduct do not apply to citizen boards with adjudicatory powers in the executive branch of Vermont government. In re Crushed Rock, 150 Vt. 613, 623 (1988). Nevertheless, in its Memorandum in support of its **Motion** to Alter and/or Reconsider, VNRC cites cases which either address the specific **conflicts of** judges, which **facially** attack the **statutes or** procedures governing the payment of judges and hearing officers, or which otherwise are

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plainly distinguishable from the present **proceeding** based on the **facts** and applicable law.

The Vermont Supreme Court has found that the applicable standard governing the **disqualification** of citizen board members acting in a judicial capacity is 12 V.S.A. §61(a), which requires **disqualification**, for actual interest in the event of a cause or matter., In re State Aid Highway No. 1. Peru, Vt., 133 **Vt.** 4, 9-10 (1974). If the grounds for disqualification are not obvious, the Vermont Supreme Court has stated that **"the** record should show clearly any **reasons** a judicial officer may have for not qualifying himself.\*@ Id. at 10. In State Aid Highway No. 1. the disqualifying-interest for one Environmental Board member was her membership on the governing board of VNRC, a party to the proceeding. The Court also concluded that the fact that another member had made contributions to VNRC would disqualify the member, **"if** his contributions, or feelings generally, were **sufficient** to give him an interest in the event." Id. at 9 (emphasis added),.

State Aid Highway No 1 stands for the proposition that there must be a nexus between the parties and facts in a **particular** proceeding and the interests of the adjudicator which would result or might result in an impartial or unfair hearing. For example, a **direct pecuniary** interest **in the** outcome of a proceeding is a clear conflict of interest. Moreover, the decisionmaker must have knowledge of those interests which would result in his or her disqualification. Neither Chair Rocheleau nor Ms. Rachlin, after

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reviewing the allegations of the parties, determined that they had interests in the event of this proceeding which required their disqualification. Both made disclosures and observed the Supreme Court's guidelines State Aid Highway 'No. 1 by explaining for the record why they took their respective actions.

Once Chair Rocheleau had recused himself and Ms. Rachlin had stated her reasons for not disqualifying herself, neither decision-maker was required to make further disclosures. VNRC has pointed to no authority which imposes such a duty.

Accordingly, the Board concludes again that the parties' requests for further disclosures are moot. 6

B. Request to reconsider determination not to reconvene hearing to rehear arguments of the parties on procedural and/or substantive matters

It was within the discretion of the Board to determine whether it would rehear the arguments of the parties on any procedural or substantive matters raised by the parties prior to or at the hearing. The Board elected to review the record; and in particular all preliminary and evidentiary rulings made by its Chair, and it chose to vote to ratify all rulings made by the Chair.

The Board notes that under Rule 21 of its Rules of Procedure; any party to a contested case who objects to the Chair's initial ruling has a right to call for review of that ruling by the entire Board. To the extent that no Rule 21 motion was made to any ruling made by the Chair, that ruling is sustained, and to the extent that the Chair reserved ruling on a matter in this proceeding, the Board

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has overruled the objection except as expressly stated in its decision, dated February 8, 1993.

Accordingly, the Board declines to reconsider its determination not to rehear arguments of the parties respecting various procedural and substantive grounds.

- C. Request to reconsider approval of the decision and to issue it under the signature of each member including Ms. Rachlin.

The Board also declines to reconsider its approval of the decision, dated February 8, 1993. As noted above, the Board is comprised of five members. Three members are required to take Board action. Were both Chair Rocheleau and Ms. Rachlin to have disqualified themselves from this proceeding, the three remaining members would have arrived at the same decision for the same reasons. Although administrative bodies acting in a quasi-judicial capacity do not readily discuss their deliberative processes, it is fair to say that this Board prepared and reviewed many drafts before approving and issuing a final decision. Chair Rocheleau did not participate or influence the Board's decision-making process after his recusal. Indeed, to elevate his participation before recusal to that of a controlling influence disregards the statutory scheme that authority is jointly and equally held by all members.

Accordingly, the Board declines to reconsider its previous determination to approve and issue the February 8, 1993, decision

with Ms. Rachlin's signature.

II. SRI's Motion to Reconsider' and Revise Certain Conditions

SRI asks the Board to revise two conditions and one finding of fact in the Board's decision dated February 8, 1993.

A . Requested revision of minimum flow rate

A SRI requests that condition 5 of the Final Order (page 43) be revised to allow the minimum flow rate of .50 csm to be adjusted to a lower value if warranted by the recalculation of the statistical relationship between flows at the Moretown gauge and the withdrawal site. Currently condition 5 only allows the minimum flow value to be adjusted to a higher value. The Board declines to grant SRI's request to revise condition 5.

First, SRI's own testimony was that .50 csm should be the absolute cutoff point. During cross-examination, Dr. Thomas Hardy stated:

And my general sense is that for the Mad River, whether .5 [csm] turned out to be the [February] median flow or 7Q2, I feel comfortable with saying that as an absolute cutoff point that value makes me feel comfortable as a fishery biologist ....

Transcript, October 2, 1992, Dr. Thomas Hardy cross-examination, at page 22.

Second, while the Board has concluded, based on the record in this proceeding, that withdrawals from the Mad River down to a minimum flow rate of .50 csm are "biologically justified" (conclu-

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sion 99), it has also imposed a number of requirements more stringent than the permits issued by the Department of Environmental Conservation (DEC). **These requirements** reduce the frequency of withdrawals in the affected reach of the Mad River at the biologically justified minimum flow rate of .50 csm in order to **insure** that any adverse impacts are **not "undue."** 7

For example; the Board's decision limits the-number of days, on average, at which withdrawals will occur under low flow **condi-** tions by means 'of the pond trigger **mechanism**. See Finding 164. **When in-stream** flows reach an intermediate low flow value, 8 **withdrawal may** only occur when the pond is more than half empty.

B. Recfuested revision of Condition 7

SRI **requests'** that condition 7 be revised **to provide that in** the event that the Board's **order** 'dated February 8, 1993 is amended by the Secretary of **ANR**, the timely **filing of** an appeal would stay the amendment **pending the** Board's final decision. With regard to, the § '401 Certification, this result is required by statute. 10 **V.S.A. § 1024(a)**. Under the dam **statute, the** Board has the authority and discretion to grant a stay (10 V.S.A. **§1099(a)**), but, under the terms of condition 7 of its order, dated February 8, 1993, **the Board** has not done so.

An automatic stay of any future amendments by the Secretary, if, an appeal is timely filed and pending the Board's final decision, protects the interests of all parties in interest.

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**Therefore,** this request is granted.

**C. Requested revision of Finding of Fact 15**

SRI requests that finding of fact **15** be amended to state that the weir of removable posts and **"stop logs"** will be equal in height to the elevation representing an in-stream flow of 2.4 csm. As currently written finding 15 refers to a flow of 1.2 csm. After review of **SRI's** testimony (Prefiled testimony of Rob Apple, April 27, 1992, at page 13) and SRI's own proposed Findings of Fact, dated November 4, 1992 (proposed finding **17**), the Board is **satisfied** that its Finding of Fact 15 accurately reflects the evidence in the record of **this** proceeding. Accordingly, **SRI's** request to amend finding of fact 15 is denied.

III. **ORDER**

1. **VNRC's** Motion to Alter **and/or Reconsider** dated February 23, 1993, is hereby denied.

2. SRI's Motion to Reconsider and Revise Certain Conditions, dated February 23, 1993, is hereby granted in part and denied in part. Specifically, - **SRI's** request to revise condition 7 is **granted**, and **SRI's** requests to revise condition 5 and Finding of Fact 15 **are denied**. Condition 7, at page 44, of the Board's Final Order dated February 8, 1993, is hereby amended to read as follows:

The Secretary may at any **time**, after public notice in accordance with applicable state law and notice by **U.S.** Mail to all parties to this proceeding, amend the

minimum flow rates established in condition 3 as appropriate under applicable law on the basis of the results of the monitoring study provided for in condition 6 above.

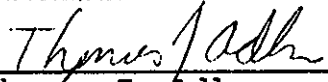
The timely filing of an appeal by a party to this proceeding within 30 days of the Secretary's decision shall stay the action of the Secretary pending a final determination by the Board.

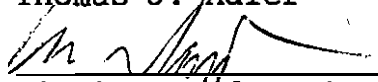
Dated at Montpelier, Vermont this 1st day of March, 1993.

Vermont Water Resources Board

  
Mark DesMeules

  
Catharine B. Rachlin

  
Thomas J. Adler

  
William Boyd Davies

**FOOTNOTES**

1 The Wad Dog Chapter of Trout Unlimited, the Vermont Group of the Sierra Club and Peter F. **Cammann**.

2 The Board issued corrected pages 26 and 44 on February **11**, 1993.

3 The **Board began** deliberations in this proceeding upon receipt of the parties filings **in mid-November** 1992.

On January 27, 1993 the Board received a letter from VNRC, objecting to the participation of Chair Rocheleau pending full disclosure by him of information concerning four of his 'firm's clients in order that appellants might **evaluate** the Chair's potential conflicts of interest. These firms are: The American Forest and Paper Association (AFPA), formerly, the **American Paper Institute (API)**; Central Vermont Public Service Corporation: Killington, Ltd.: Lyons Falls Pulp and Paper, Inc.: and New England Power Company.

On January **27, 1993**, counsel for the Board sent to all parties an affidavit from Chair Rocheleau and a cover letter responding to **VNRC's** request. The parties were given an opportunity to file written comment. concerning the conflict of interest issue until noon, February 1, **1993**.

On January 29, the Board received a copy of a letter sent by VNRC to the **Governor and the Board's** Chair, but not to the parties, elaborating on the Chair's alleged conflicts. In order to disclose this ex parte communication, the Board's counsel forwarded copies of this filing to all **parties so** that they might consider **it** in preparing any written response.

ANR, **VNRC** and Winooski One all filed timely **written** comment. ANR took no position on the conflict of, interest issue. VNRC renewed **its** objection to the participation of Chair Rocheleau,, added an objection to the participation of **member** Rachlin, and **sought. additional** disclosures. Winooski One asked the Board to give the parties an opportunity to directly question **the Chair**, on the record, in order for the parties to evaluate the propriety of the Chair's continued participation.

**Chair** Rocheleau issued a formal Notice of **Recusal** on February 4, 1993. This was received by Board members on February 6. The Board continued its deliberations without Chair Rocheleau and issued its decision on February **8**. Copies. of the Chair's **recusal** notice and member **Rachlin's** disclosure statement were issued with the final decision and order.

4. **The Water Resources Board** consists of five members of the public, appointed by the Governor, to serve on a part-time, per diem basis, for a term of six years each.' When one or more regular members are unavailable to hear a contested case, the Board by its chair may appoint former board members to serve as **acting** members

in that proceeding. 10 V.S.A. § 905(F). In this proceeding, **there are** currently **one** regular member, **DesMeules**, and **three** acting members: **Adler**, Davies and Rachlin. In order for the Board to take action, there must be a concurrence of a majority of the Board. 1 V.S.A. § 172.

5. VNRC has not requested a hearing on these issues and the Board declines to grant one on its own motion. Nevertheless, VNRC had two opportunities to elaborate on the specifics of its allegations: (1) in response to the Board counsel's letter, dated January 27, 1993; and (2) pursuant to a Rule 29(C) motion to alter. VNRC has taken advantage of both opportunities, filing a letter and memorandum of law with the Board on February 1 and again in its present motion and memorandum. It has supplied no affidavits in support of its allegations, but it has proffered various documents which it claims directly bear on the issue of Chair Rocheleau's and Ms. Rachlin's conflicts of interest.

6. Indeed, to the extent that the firms identified by VNRC are lobbyist clients of Mr. Rocheleau's firm, their identity has long been a matter of public record available from the records of the Office of the Secretary of State or as published in Martindale Hubbell. This raises the question whether VNRC, by failing to make reasonable inquiry at the outset of this proceeding, waived its right to raise objections concerning Chair Rocheleau's participation.

In addition, the Board sees no reason to change its opinion in light of VNRC's present Motion to Alter and/or Reconsider. VNRC's latest objections concerning the Chair's participation as counsel in In re Town of Sherburne, 154 Vt. 596 (1990), may well have been waived by virtue of the fact that VNRC, as a party to that earlier proceeding, failed to raise its objection early in this proceeding. Nevertheless, the Board concludes that there is no nexus between the reclassification hearing in the Sherburne case, and the present dam permit and § 401 certification proceeding.

7. See in particular conditions 3, generally, and 3(a), (b), and (e), in particular: condition 4 (requirement to clarify statistical relationship between Moretown gauge and withdrawal site prior to withdrawal); condition 5 (requirement that minimum flow rate of .50 csm can't be adjusted to a lower value) and in particular findings and conclusions 103, 164, 171, 172, 213, 214 and 215.

8. In its permits DEC selected an intermediate low flow value of .60 csm for purposes of phasing-in the withdrawal schedule over a period of years. However, neither DEC or any other party presented any evidence regarding this intermediate low flow value or how it was derived. The intermediate low flow value of .61 csm selected by the Board both for phasing-in the withdrawal schedule and as a necessary part of the pond trigger concept, happens to be

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a value corresponding to the 28Q2 flow. In selecting this number as the intermediate low flow value, the Board does not intend to attribute any policy or scientific significance to either .61 csm or 28Q2. This number was used simply as a known intermediate low flow value between the February median value of .79 csm and the minimum flow rate of .50 csm and because unlike the virtually, identical intermediate value of .60 csm used by DEC, its derivation was at least part of the record of this proceeding.