

State of Vermont
WATER RESOURCES BOARD

Re: **Cavendish Hydroelectric Project (CVPS)**
401 Certification
Docket No. WQ-93-08

PREHEARING CONFERENCE REPORT AND ORDER

I. BACKGROUND

On October 7, 1993, the Secretary of the Vermont Agency of Natural Resources (Secretary) issued a 401 Water Quality **Certification** to the Central Vermont Public Service Corporation (CVPS) in connection with CVPS's application to the Federal Energy Regulatory Commission (FERC) for relicensure of the Cavendish Hydroelectric Project on the Black River near the Village of Cavendish, Vermont. On October 22, 1993, CVPS appealed the Secretary's decision to the Water Resources Board, challenging findings and conditions **contained** in the certification. This appeal was filed pursuant to 10 V.S.A. §§ 1024 and 1004.

On October 26, 1993, the Board's staff notified CVPS that its appeal was deemed complete and docketed. On that same date, the Board issued a Notice of Appeal and Prehearing Conference which was sent to persons required to receive notice and published in the Rutland Herald on October 28, 1993, pursuant to Rule 18 of the Board's Rules of Procedure.

On November 22, 1993, at 2:00 p.m., a prehearing conference was convened at the Water Resources Board's Conference Room, 58 East State Street, Montpelier, Vermont, by the Board's delegate, **Kristina L. Bielenberg**, pursuant to Rule 24 of the Board's Rules of Procedure. The following persons were present and participated:

Kenneth C. **Picton**, Esq., Corporate Counsel for CVPS, appellant
Kurt **Janson**, Esq., Counsel, Agency of the Natural Resources
(ANR)
Chris **Kilian**, Esq., Counsel, Vermont **Natural Resources** Council
(VNRC)

On November 24, 1993, a draft prehearing conference report and **order** was circulated to the prehearing conference participants for **comment**. On December 8, 1993, the Board received comments from **CVPS**. No other participants submitted comments before the filing **deadline**. A final prehearing report and order is now ready for issuance.

Prehearing Conference Report and Order
Re: Cavendish Hydroelectric Project (CVPS)
401 Certification
Docket No. WQ-93-08
page 2 of 6

II. ISSUES

Based on the appellant's notice of appeal, the issues statement presented by attorney **Picton** at the prehearing conference, and **CVPS's** comments regarding the draft prehearing conference report and order, the main issue in **this** appeal appears to be the following:

Whether the Agency of Natural Resources exceeded its statutory authority and usurped the authority of FERC in establishing certain conditions unrelated to water quality with respect to **CVPS's** 401 Water Quality Certification. The specific conditions objected to are: Conditions A, C, H, I, J, K, M, N, O, P, and Q.

10 V.S.A. § 1024(a) directs the Board to conduct a de novo hearing in appeals from 401 Water Quality Certifications. Therefore, the issue before the Board may more **appropriately be** stated: **What** is the scope of the Board's authority to condition a 401 Water Quality Certification?

Persons granted party status or amicus curiae status by the Board will be directed to brief these questions in accordance with the requirements and deadlines set forth in a Supplemental Prehearing Conference Order.

III. PRELIMINARY ISSUES

A. Composition of the Board and Disclosures

At the prehearing conference, the Board's delegate identified the present members of the Board (Chair Davies, DesMeules, Dycus, Einstein, and Potvin). She made disclosures regarding their present, and where applicable, their past employment and familial relations to the parties. She noted that member DesMeules has **recused** himself from all 401 certification appeals because his wife is employed by ANR in the division which handles these matters. She indicated that the Chair, in order to create a five-member panel for this proceeding, may appoint a former Board member to **serve** as an Acting Member of the Board. In its December 8, 1993, **filing** with the Board, CVPS requested that the Chair appoint an **acting** member in place of member DesMeules to assure that a **five-member** panel will hear this matter.

At the prehearing conference, a deadline of December 13, 1993, **/was** set for the filing of any written requests for further disclosures. Only CVPS responded by this deadline, requesting in its

Prehearing Conference Report and Order
Re: Cavendish Hydroelectric Project (CVPS)
 401 Certification
 Docket No. WQ-93-08
page 3 of 6

December 8 comments that members Dycus and Einstein make certain written responses to its requests for disclosure. Copies of Board member responses will be forwarded to the parties prior to Board action in this matter.

With respect to members Davies and Potvin, prehearing conference participants are deemed to have waived objections to their participation in this matter. A list of potential acting members will be circulated to prehearing conference participants to provide them with an opportunity to file written objections respecting the participation of particular individuals.

B. Party Status

CVPS is the appellant in this proceeding. Title 10 V.S.A. § 1024 states that "any person aggrieved by the decision of the secretary . . . under section 1004" may file an appeal. The ANR **contends** that CVPS is not a person aggrieved. Counsel for ANR **indicates** that he may file a Motion to Dismiss based on this contention. (See III(D) below.)

The ANR seeks party status in this appeal. The ANR is **entitled** to party status as a matter of right under Rule 22(A)(4) of the Board's Rules of Procedure, having been represented by counsel at the prehearing conference. The ANR agrees to submit a written notice of appearance for the record.

VNRC was represented by counsel at the prehearing conference but did not submit a written notice of appearance. At the prehearing conference, a deadline of December 13, 1993, was set for VNRC to make any party status requests. On December 10, 1993, VNRC filed with the Board a written request for intervention in this matter under Rule 22(A), and, in the alternative, Rule 22(B). VNRC participated in the **ANR's** information gathering proceeding below. VNRC specifically objects to the **ANR's** findings with respect to the interpretation and application of the State's Endangered Species Act to a rare bryophyte found in the Black River and to the **ANR's** conclusion(s) concerning adequate stream flow.

The above prehearing conference participants shall file **written** appearances, motions, and petitions in accordance with the **requirements and** deadlines set for in the Order below. Following **review** of various party status filings, and after oral argument (if prehearing conference participants so request), the Board shall issue a Preliminary Order confirming party status:

Prehearing Conference Report and Order
Re: Cavendish Hydroelectric Project (**CVPS**)
401 Certification
Docket **No.** WQ-93-08
page 4 of 6

C. Amicus Curiae Request

On November 3, 1993, the Board received a Motion to Intervene as Amicus Curiae filed by Edward V. Schwiebert, Esq., on behalf of Vermont Marble Power Division of OMYA, Inc. (OMYA).

At the prehearing conference, a deadline of December 13, 1993 was set for the filing of objections to **OMYA's** amicus curiae request. No prehearing conference participants filed objections by that deadline. Indeed, CVPS noted its support for **OMYA's** request in its December 8 comments respecting the draft prehearing conference report and order.

D. **ANR** Motion to Dismiss

In addition to asserting that CVPS is not "a person aggrieved," ANR contends that this appeal presents no case or controversy. Counsel for ANR indicates that he may file a Motion to Dismiss based on this contention. (See III(B) above.)

ANR shall file any Motion to Dismiss in accordance with the requirements and deadline set forth in the Order below. **Prehearing** conference participants wanting to respond to such a Motion shall do so in accordance with the requirements and deadline set forth in the Order below.

E. Motion to Stay

On October 22, 1993, CVPS filed a Motion to Stay Proceedings with the Board. CVPS asks the Board not to conduct a hearing on the merits of this proceeding until the United States Supreme Court has heard and issued its decisions with respect to the City of Tacoma and Simoson Paper cases. The Court is expected to hear City of Tacoma in February 1994 and may issue its decision in summer 1994.

Prehearing Conference participants objecting to **CVPS's** request for a stay of proceedings shall file their responses in accordance with the requirements and deadlines for such filing to be **established** in a Supplemental Prehearing Conference Order.

IV. STIPULATIONS

To the extent that certain facts and legal issues are not in dispute, the parties may prepare a stipulation setting forth those

Prehearing Conference Report and Order
Re: Cavendish Hydroelectric Project (CVPS)
401 Certification
Docket No. WQ-93-08
page 5 of 6

facts and legal issues. The requirements and deadline for such filing shall be established in a Supplemental Prehearing Order.

At the prehearing conference, ANR asked CVPS to clarify whether there are indeed substantive factual issues in dispute (i.e.: portage requirement). On November 24, 1993, CVPS informed the Board and parties that it was not seeking a de novo hearing related to the record leading to the issuance of its 401 certification.

V. **WITNESSES AND EXHIBITS**

Deadlines for filing final witness lists, and prefiled testimony and exhibits shall be established in a Supplemental Prehearing Order.

VI. **ORDER**

1. On or before 4:30 p.m., Monday, December 23, 1993, ANR shall file any motion to dismiss. Such motion shall be supported by legal memorandum.
2. On or before 4:30 p.m., Monday, December 27, 1993, CVPS and ANR shall file any written response to VNRC's intervention request.
3. On or before 4:30 p.m., Monday, December 27, 1993, CVPS, ANR, OMYA and VNRC may file written requests for oral argument on any party status request, on OMYA'S request for amicus curiae status, and on ANR's motion to dismiss.
4. On or before 4:30 p.m., Monday, December 27, 1993, CVPS, ANR and VNRC shall file any written requests for Board member disqualification, stating the specific factual basis and legal authority supporting such disqualification.
5. On or before 4:30 p.m., Monday, January 3, 1994, VNRC shall file any rebuttal to CVPS's or ANR's responses.
6. On or before 4:30 p.m., Monday, January 3, 1994, CVPS, OMYA and VNRC shall file any written response to ANR's motion to dismiss. Such responses shall be supported by legal memoranda.
7. Oral argument on a motion will be recorded electronically by the Board or, upon request, by a stenographic reporter. Any

Prehearing Conference Report and Order

Re: Cavendish Hydroelectric Project (CVPS)

401 Certification

Docket no. WQ-93-08

page 6 of 6

party wishing to have a stenographic reporter present or a transcript of the proceedings must submit a written request to the Board no less than ten (10) days before the date of the scheduled argument (**Thursday December 23, 1993**), and make arrangement for the appearance of a **stenographic** reporter, pursuant to Rule 28(C) of the Board's Rules of Procedure.

8. Any motions, petitions, memoranda, or other filings should be submitted to the Board as an original and five (5) copies, and accompanied by a certificate of service indicating delivery by hand or by first class mail to all persons listed on the attached certificate of service. Filing means receipt at the Board's office in Montpelier. The Board does not accept filings by FAX.
9. Any case or decision cited as authority in a filing, which is not reported in Vermont Reports, must be included as an attachment to such filing.
10. Pursuant to Rule 24(B) of the Board's Rules of Procedure, this order will be binding on all persons who have received notice of the Prehearing Conference, unless there is a timely objection to the Prehearing Conference Order, or a showing of cause for, or fairness requires waiver of a requirement of this Prehearing Conference Order.

Dated at Montpelier, Vermont, this 21st day of December, 1993.

Water Resources Board,
by its Chair


William Boyd Davies