

State of Vermont
WATER RESOURCES BOARD

Re: Taftsville Hydroelectric Project (CVPS)
401 Certification,
Docket No. WQ-93-06

and

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

MEMORANDUM OF DECISION ON
ANR NOTIONS TO DISMISS

This decision, dated April 1, 1994, pertains to Motions to Dismiss filed by the Agency of Natural Resources (ANR) in the above-captioned matters. As is explained below, the Water Resources Board (Board) has determined that the ANR's motions should be denied.

I. BACKGROUND

On September 29, 1993, the Secretary of the Agency of Natural Resources (Secretary) issued a 401 Water Quality Certification to the Central Vermont Public Service (CVPS) in connection with the utility's application to the Federal Energy Regulatory Commission (FERC) for relicensure of the Taftsville Hydroelectric Project on the Ottauquechee River near the village of Taftsville in the Town of Woodstock, Vermont. On October 14, 1993, CVPS appealed the Secretary's decision to the Board, challenging findings and conditions contained in the certification. On October 7, 1993, the Secretary issued a 401 Water Quality Certification to CVPS in connection with the utility's application to the 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 Board, challenging findings and conditions contained in the certification. Both the Taftsville and Cavendish Hydroelectric Project appeals were timely filed with the Board pursuant to 10 V.S.A. §§ 1024 and 1004.

Notice of these appeals was published in accordance with Rules 18 and 20 of the Board's Rules of Procedure, and prehearing conferences were held in Montpelier, Vermont, at 1:00 p.m. and 2:00 p.m. on November 22, 1993, convened by the Board's delegate, Kristina L. Bielenberg, Esq. Persons present and participating in the Taftsville prehearing conference were: Kenneth C. Picton, Esq.,



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Corporate Counsel for CVPS, appellant; and Kurt Janson, Esq., Counsel for ANR. Persons participating in the Cavendish prehearing conference were Kenneth C. Picton, Esq. for CVPS, appellant; Kurt Janson, Esq., for ANR; and Chris Kilian, Esq., for the Vermont Natural Resources Council (VNRC).

Prehearing Conference Reports and Orders were issued by the Board Chair, William Boyd Davies, on December 21, 1993. In accordance with the timeframes set forth in the Orders, ANR filed Motions to Dismiss in the two appeals on December 23, 1993, and CVPS filed written responses in opposition to the motions on December 30, 1993. Given that the ANR and CVPS offered identical arguments in both appeals, the Board consulted with the parties and with their agreement scheduled oral argument with respect to the ANR's two motions at the same time, even though the two cases were not consolidated. Therefore, oral argument in the Taftsville and Cavendish Hydroelectric Project appeals were heard by the Board at 11:00 a.m. on February 15, 1994, in Brandon, Vermont.

Due to technical difficulties, the oral argument was not tape recorded and the parties were provided with an opportunity to reargue their positions before the Board. Both CVPS and the ANR waived reargument. Therefore, the Board deliberated with respect to the ANR's motions to dismiss on March 29, 1994, and voted to issue this memorandum of decision.

II. ISSUES

1. Is CVPS a person aggrieved within the meaning of 10 V.S.A. § 1024(a)?
2. Is CVPS's appeal moot for lack of controversy?

III. DISCUSSION

1. CVPS is a person aggrieved within the meaning of 10 V.S.A. § 1024(a).

Title 10 V.S.A. § 1024(a) states in relevant part: "Any person aggrieved by the decision of the secretary under . . . section 1004 Of this title may file an appeal with the board . . ." 1 Section

¹ A "person" is defined as including any corporation or other legal entity. 1 V.S.A. § 128. The "secretary" is defined as the Secretary of the Agency of Natural Resources, and the "board" as the Vermont Water Resources Board. 10 V.S.A. § 1002(4) and (11).

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1004 authorizes the Secretary to make state certification determinations for purposes of section 401 of the federal Clean Water Act. Therefore, a corporation which is "aggrieved" by the decision of the Secretary of ANR respecting a section 401 water quality certification may appeal to the Water Resources Board.

CVPS applied for and received from the Secretary two 401 water quality certifications in connection with its applications to FERC for relicensure of its hydroelectric facilities in Taftsville and Cavendish, Vermont.. These certifications contain certain conditions governing operation of CVPS's hydroelectric facilities, which the ANR asserts that CVPS agreed to accept. The ANR argues that because CVPS **received** state approval for its projects subject to the agreed upon conditions, CVPS is not an aggrieved person within the meaning of 10 V.S.A. § 1024(a) and consequently this Board lacks jurisdiction to consider the utility's two appeals. In support of its position that CVPS's appeals should be dismissed, the ANR cites the cases, In re M.C. & C.C. Juveniles, 156 Vt. 643 (1991) and Texaco, Inc. v. Federal Power Commission, 317 F.2d 796 (10th Cir. 1963), reversed on other grounds 377 U.S. 33, 84 S.Ct. 1105 (1964).

CVPS replies that while it agreed to certain terms of 'an operational protocol to be incorporated in a Memorandum of Understanding (MOU) for presentation to FERC in its relicensing proceedings., it never agreed to have the terms of that protocol incorporated in the state water quality certifications. Indeed, CVPS filed written objections with **the** ANR in response to the draft certifications, arguing that the inclusion of the proposed conditions was outside the agency's authority under section 401 of the Clean Water Act (CWA).

As an applicant for dam relicensure by FERC, CVPS is required by federal law to obtain state water quality certifications under section 401(a) of the CWA as a prerequisite to federal approval. 33 U.S.C. § 1341(a). To challenge conditions imposed in state certifications, FERC has repeatedly warned applicants that they must turn to the state courts, not to FERC, for relief. Town of Summersville, 60 FERC ¶ 61,291 at 61,990, 62,026 (1992), reh'g denied, 63 FERC ¶ 61,037 (1993); Central Maine Power Co., 52 FERC ¶ 61,033 at 61,173 (1990).

CVPS has an interest in the continued operation of its hydroelectric facilities. Its status is not equivalent to a non-custodial parent in a CHINS proceeding, as the ANR asserts. Therefore, In re M.C. & C.C. Juveniles, 156 Vt. 643 (1991) is

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inapposite.² To the extent that the FERC is compelled to adopt conditions imposed in the state water quality certifications, CVPS will be obligated financially to satisfy those conditions, either by implementing the required measures or facing possible enforcement action. This threat of pecuniary harm is a foreseeable consequence of the Secretary's decision, **and** not merely speculative. Grievance of Boocock, 150 Vt. 422, 424-426 (1988); Town of Cavendish v. Vermont Public Power Supply Authority, 141 Vt. 144, 147 (1982).

Therefore, without answering the ultimate question posed by CVPS's appeals -- whether the Secretary has exceeded his authority in imposing specific conditions related to protecting and enhancing recreational use and other values associated with public waters -- the Board agrees with CVPS that it is a person aggrieved by the Secretary's decision within the meaning of 10 V.S.A. § 1024(a) and is entitled to have the merits of its appeals considered by the Board. As a matter of law, CVPS's state law remedy for challenging the scope of the section 401 water quality certifications issued to it by the Secretary is appeal to the Board, followed by further appeal to superior court, pursuant to § 1024(b).

2. CVPS's appeal is not moot for lack of controversy.

For the reasons stated above, the Board also concludes that CVPS's appeal is not moot for lack of controversy.

CVPS has a clear interest in the outcome of its appeals. The issue concerning the scope of the Secretary's authority in making section 401 determinations is not a hypothetical question. CVPS has appealed to the Board precisely because it seeks relief from conditions it asserts are beyond the scope of the Secretary's authority -- conditions which will affect the outcome of its relicensure proceedings before FERC. The issue presented is very much "[a]live." In re Barlow, #91-491, slip. op. (August 13, 1993). Moreover, it is highly likely that CVPS will become "embroiled again in the same controversy," as the appellant has other hydroelectric projects which will require relicensure by FERC, and therefore additional state water quality certifications. In re Petition of Green Mountain Power Corp., 148 Vt. 333 (1987).

² The case, Texaco, Inc. v. Federal Power Commission, 317 F.2d 796 (10th Cir. 1963) also has no bearing. First, that decision involved review of rulemaking proceedings, where the objectionable conditions imposed were of general applicability; and secondly, because future administrative action was contingent. In the present proceeding, action by the FERC is a certainty.

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Therefore, CVPS's appeals are appropriately addressed to the Board, and, if necessary, the state courts, pursuant to 10 V.S.A. § 1024(a) and (b).

The Board declines to address CVPS'S due process and other arguments in light of the Board's decision to deny the ANR's Motions to Dismiss on the two grounds posited by the agency.

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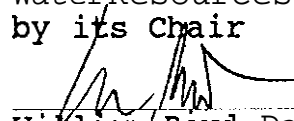
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IV. ORDER

The Board denies the **ANR's** Motions to Dismiss in the matters, In re: Taftsville Hydroelectric Project (CVPS), Docket No. **WQ-93-06**, and In re: Cavendish Hydroelectric Project (CVPS), Docket No. WQ-93-08.

Dated at Montpelier, Vermont, this 1st day of April, 1994.

WaterResources Board
by its Chair


William Boyd Davies.

Concurring:

William Boyd Davies
Stephen Dycus
Ruth Einstein
Jane Potvin
Byrd **LaPrade**, Acting Member

Recused:

Mark **DesMeules**