

State of Vermont
WATER RESOURCES BOARD

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

MEMORANDUM OF DECISION

**VNRC's Motion for Review and Reconsideration of
Preliminary Order**

I. BACKGROUND

On December 10, 1993, the Water Resources Board (Board) received a Petition for Party Status from the Vermont Natural Resources Council (VNRC) in the above-captioned matter. On April 1, 1994, the Board issued a Preliminary Order granting VNRC permissive party status, pursuant to Rule 22(B) of the Board's Rules of Procedure.

On April 15, 1994, VNRC filed a Motion for review and reconsideration of the Board's Preliminary Order. It filed its request pursuant to Rules 29(C) and 21 of the Board's Rules of Procedure. VNRC asked the Board to grant it party status as of right and to reconsider the scope of the proceeding.

II. DISCUSSION

The Board has considered VNRC's request and declines to reconsider its decision for the reasons stated below.

First, the Board notes that Rule 29(C), providing for motions to alter decisions, applies only to final decisions of the Board, not to Preliminary Orders. This **is** apparent from a reading of the entire rule.

Second, Rule 21 provides that preliminary rulings of the Board's chairman with respect to pre-hearing issues such as party status are reviewable by the Board. This rule, however, does **not** provide a mechanism for review and reconsideration of Preliminary Orders issued by the full Board, the circumstance presented here.

Nevertheless, the Board concludes that it has the implied power to modify a Preliminary Order where a moving party can demonstrate that such modification is necessary to prevent manifest injustice. In support of this position, the Board notes that it has express authority to modify prehearing orders "to prevent manifest injustice." Rule 24(B) of the Board's Rules of

Procedure. There is no functional or legal difference between a Preliminary Order and a Prehearing Conference Order issued by the Board and **addressing the** issues of party status and the scope of proceeding.

Nevertheless, the Board declines to exercise its authority to modify its Preliminary Order of April 1, 1994, because it cannot find, based on the arguments presented by VNRC, that modification is necessary to prevent manifest injustice.

First, VNRC petitioned the Board for Party Status under Rule 22(A) and (B) of the Board's Rules of Procedure, and the Board granted it permissive party status pursuant to the latter section of the Rule. Therefore, VNRC has not been denied an opportunity to participate in the present proceeding.

Second, the Board is still not persuaded by VNRC's argument that the issue it asks the Board to consider is within the scope of the appeal **presented** by the appellant, Central Vermont Public Service Corporation.¹ Rule 18(D) of the Board's Rules of Procedure clearly states that the scope of any de novo or appellate proceeding "shall be limited to those issues specified in the petition or notice of appeal unless the Board determines that substantial, inequity or injustice would result from such limitation." As it emphatically noted in its Preliminary Order at page 3, the Board is unwilling to allow its intervention rules to be used as a device to expand the substantive scope of a proceeding, where the petitioner (in this case, VNRC) could have filed a timely appeal in the first instance to challenge the determination of the Secretary of the Agency of Natural Resources and did not elect to do so.

The Board has a duty to retain control over the management of appeals that are brought to it. Although the parties of right to this proceeding did not object to VNRC's party status request, the Board in determining the basis for granting VNRC party status was required to assess whether VNRC was entitled to party status as of right or by permission with limitations. Based on the petition before it, the Board concluded that VNRC was not entitled to party status of right. Nevertheless, because the Board believed

¹ The issue, as restated by VNRC in the motion presently before the Board is:

Under § 401 of the Clean Water Act, 33 U.S.C. § 1341, is the presence of a rare, but not legally threatened or endangered, bryophyte in a hydroelectric project bypass a legitimate ground for waiver of **instream** flow conditions necessary for compliance with the Vermont Water Quality Standards.

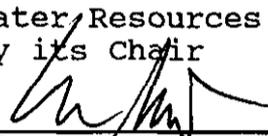
that VNRC could greatly contribute to the proceeding without prejudicing the interest of existing parties, the Board exercised its discretion and granted VNRC permissive intervention. The Board sees no reason to reverse its position here.

III. ORDER

VNRC's Motion for Review and Reconsideration of Preliminary Order is hereby denied.

Dated at Montpelier, Vermont, this 19 day of May, 1994.

Water Resources Board
by its Chair



William Boyd Davies

Concurring:

William Boyd Davies
Stephen Dycus
Ruth Einstein
W. Byrd LaPrade, Acting Member

Dissenting:

Jane Potvin