

State of Vermont
WATER RESOURCES BOARD

Re: Cavendish Hydroelectric Project (**CVPS**) Authority:
 401 Certification, 10 V.S.A. § 1024(a)
 Docket No. WQ-93-08

PRELIMINARY ORDER:
Amicus Curiae and Party **Status** Requests

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.

On November 3, 1993, the Board received a Motion to Intervene as Amicus Curiae filed by Edward V. Schweibert, Esq., on behalf of Vermont Marble Power Division of OMYA, Inc. (OMYA). At the pre-hearing conference held on November 22, 1993, Chris Killian, Esq., counsel for the Vermont Natural Resources (VNRC), indicated that his client wished to participate as a party in CVPS's appeal. On December 10, 1993, within the timeframe provided in the Prehearing Conference Report and Order, VNRC filed a Petition for Party: Status.

Neither CVPS nor the ANR filed timely written objections to the participation of VNRC as a party or OMYA as amicus curiae in this proceeding. CVPS filed a written consent with respect to OMYA's request and filed a written assent with respect to VNRC's participation as a party.

The Board deliberated on the two requests on February 15 and March 9, 1994.

1. The Board has granted amicus curiae status to petitioners in certain limited circumstances consistent with the standards in V.R.A.P., Rule 29. See In re: Vermont Marble Company (OMYA) 401 Certification, Docket No. WQ-92-12, Preliminary Order: Amicus Curiae Status (July 1, 1993).
2. OMYA operates a hydroelectric facility subject to federal relicensure and state water quality certification. The Board's rulings concerning CVPS's certification may serve as precedent in subsequent certification proceedings connected with hydroelectric facility relicensure. OMYA may be able to provide information, analysis, and argument that the nominal parties might not adequately present and that may materially assist the Board in deciding the legal issues before it.

3. VNRC is a statewide conservation organization with substantial interest and expertise in the restoration, maintenance, protection, and enhancement of the water quality of Vermont's rivers and streams. VNRC was an active participant in the ANR's review process of the Cavendish Hydroelectric facility. VNRC has sought party status in this appeal, as a party of right, under Rule 22(A) of the Board's Rules of Procedure, and, alternatively, as a permissive party under Rule 22(B) of the Board's Rules of Procedure.

VNRC challenges the Secretary's findings with respect to the flow level necessary to support fish and macroinvertebrates, on the basis that the ANR did not take into account the stream flow requirements of a particular species of rare bryophyte found in the Black River. This species is not specifically listed as a threatened or endangered species under Vermont's Endangered Species Act. VNRC argues that ANR's interpretation of this Act conflicts with the known requirements of state and federal law protecting water quality. Because neither CVPS nor the ANR contests the stream flow finding challenged by VNRC, VNRC argues that its interest is not adequately represented by either CVPS or ANR.

The Board is reluctant to grant VNRC party status as a matter of right under Rule 22(A), specifically because the issue it has identified does not appear to be within the scope of CVPS's notice of appeal. The Board has stated before that it will not allow its intervention rules to be used as a device to expand the substantive scope of a proceeding, where the petitioner could have filed a timely appeal in the first instance to challenge a determination of the Secretary or Agency. See In re: Appeal of Cole, Docket No. WQ-92-13, Memorandum of Decision: Requests for Intervention at 8 (July 9, 1993). Rule 18(D) of the Board's Rules of Procedure 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" with rare exception.

The issues raised by CVPS in its notice of appeal focus on the authority of the State of Vermont, and, in particular, the Secretary, to impose certain conditions in a section 401 water quality certification. While the matter specifically identified by the VNRC is not within the scope of CVPS's notice of appeal, the issue of whether the Secretary may impose conditions, including conditions related to stream flow, may be addressed by CVPS and the ANR in the course of a hearing on the merits in this appeal. Therefore, the Board has determined that VNRC should be granted permissive party status, pursuant to Rule 22(B), so that it may present **evidence and** argument addressing the issues raised by CVPS with respect to a state's authority to impose stream flow conditions.

ORDER

For the **foregoing reasons**, the Board grants OMYA leave to intervene as amicus curiae and grants VNRC party status under Rule 22(B) of the Board's Rules of Procedure subject to the following:

1. The participation of OMYA as amicus curiae shall be limited to the filing of briefs and the presentation of oral argument on issues that may arise during the course of this proceeding. The Board, in its discretion, may also request amicus curiae to provide information, analysis or argument in response to specific legal issues raised in the parties' filings or at hearing.
2. The participation of **VNRC** as a permissive party shall be limited, **within the** Board's discretion, to issues identified by the Board, **pursuant to** Rule 22(B)(4) of the Board's Rules of Procedure.
3. Amicus curiae and permissive parties shall be bound by the procedural requirements and filing deadlines specified in **the** Board's Rules of Procedure or in orders issued by the Board or its Chair.

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

Water Resources Board
by its Chair



William Boyd Davies

Concurring:

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

Recused:

Mark **DesMeules**