

State of Vermont

In re:

§ 401 Certification
Docket No. WQ-04-03 and Docket No. WQ-94-05

PREHEARING CONFERENCE REPORT AND ORDER

I. BACKGROUND

On April 14, 1994, 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 Lamoille River Hydroelectric Project, consisting of four facilities (the Peterson Plant, the Milton Plant, the Clarks Falls Plant and the Fairfax Falls Plant) in Milton and Fairfax, Vermont, and several impoundments in Georgia, Fletcher and Cambridge, Vermont. On April 21, 1994, the Vermont Natural Resources Council (VNRC) appealed the Secretary's decision to the Water Resources Board (Board), challenging findings, conclusions and conditions contained in the certification. On April 29, 1994, CVPS filed an appeal with the Board, challenging findings, conclusions and conditions of the certificate. These appeals were filed pursuant to 10 V.S.A. §§ 1024(a) and 1004.

On April 28, 1994, VNRC's appeal was deemed complete and docketed as WQ-94-03. On April 29, 1994, CVPS's appeal was deemed complete and docketed as WQ-94-05. On April 29, 1994, a joint Notice of Appeal and Prehearing Conference was sent to persons required to receive notice and on May 5, 1994, published in The Burlington Free Press, pursuant to Rules 18(C) and 20 of the Board's Rules of Procedure.

On Friday, May 20, 1994, at 1:00 p.m., a prehearing conference was convened jointly addressing Docket Nos. WQ-94-03 and WQ-94-05 in the Water Resources Board's Conference Room, 58 East State Street, Montpelier, Vermont, by the Board's delegate, Kristina L. Bielenberg, Esq., pursuant to Rule 24(A) of the Board's Rules of Procedure. The following persons entered appearances and participated:

Christopher M. Kilian, Esq., for appellant VNRC
Kenneth C. Picton, Esq., for appellant CVPS
Ron Shems, Esq., Assistant Attorney General, State of Vermont

On September 1, 1994, a draft Prehearing Conference Report and Order was circulated to the above persons for comment. On September 12, 1994, the Board received comments from VNRC. On September 14, 1994, Kurt R. Janson, Esq., entered an appearance for the Agency of Natural Resources (ANR). On that same date, CVPS filed

Prehearing Conference Report and Order
In re: Lamoille River Hydroelectric Project (CVPS)
§ 401 Certification
Docket No. WQ-94-03 and Docket No. WQ-94-05
page 3 of 6

and 218; Conditions B (including Tables re flowvalues), I and J. VNRC further challenges any other findings and conditions of the ANR which are relevant to its Notice of Appeal.

By letter, filed with the Board on June 27, 1994, the CVPS: notified the Board that it was "withdrawing those portions of its Appeal ... which related to the authority and jurisdiction of the Agency of Natural Resources" but that it retained "its Appeal on those matters relating to factual issues in the findings and conditions. In its notice of appeal, filed April 29, 1994, CVPS specifically challenged the following Findings and Conditions contained in the § 401 Water Quality Certification: Findings 79, 86, 97, 111, 112-116, 118 122, 125, 126, 130, 134, 137, 140, 142-145, 150, 152-155, 171, 172, 179, 183, 187, 204, 207, 210-214, 216, 218-220; Conditions A, B, C, D, E, F, H, I, J, K, L, M, N, O, P, Q, and R.

CVPS is asked to clarify, by identifying by specific page and number, which issues in its notice of appeal it has withdrawn. It should do so in accordance with the terms set forth in the Order below.

V. WITNESSES AND EXHIBITS

1. At the prehearing conference, appellant VNRC reserved the right to call any or all of the following expert witnesses: a fisheries biologist or other persons qualified to address salmon restoration and-fish passage issues. VNRC also reserved the right to call a witness with expertise in macroinvertebrates.

2. At the prehearing conference, CVPS reserved the right to call any or all of the following expert witnesses: Jeff Wallin, biologist consultant; John Mullen, Manager, Hydro Licensing, CVPS; Bruce Peacock, Manager, Production Engineering, CVPS; Tom Sullivan, consulting engineer; Charles Ritz, fisheries consultant; William Countryman, botanical and wetlands consultant; William Martinez, CVPS's Environmental Engineer; Elizabeth Courtney, aesthetics consultant; and John Truby, designer of fish passage facilities.

3. At the prehearing conference, the State of Vermont reserved the right to defend the § 401 Water Quality Certification by calling any or all of the following ANR staff as expert witnesses: Tom Willard, Jeff Cueto, and Rod Wentworth. The State reserved the right to call other biologists and a consultant with expertise in aesthetic issues.

Since the State has withdrawn its appearance in this appeal, and the ANR has entered an appearance as a party of right, it is

Prehearing Conference Report and Order
In re: **Lamoille** River Hydroelectric Project (CVPS)
§ 401 Certification
Docket No. WQ-94-03 and Docket No. WQ-94-05
page 4 of 6

expected that the ANR reserves the rights to call any witnesses it so chooses in defense of the Certification issued by the Secretary.

4. Parties shall file lists of witnesses, resumes of expert witnesses, and prefiled testimony in accordance with the terms of this and any Supplemental Prehearing Order.

5. At the prehearing conference, appellant VNRC specifically identified the ANR's new flow procedure. In order for the Board to consider agency procedures, guidelines, forms, and other documents as part of the record in this proceeding, they must be offered as exhibits in accordance with the terms of this and any Supplemental Prehearing Order.

VI. STIPULATIONS

To the extent that facts are not in dispute, the parties are asked to prepare and file a statement of stipulated facts in accordance with the terms set forth in the Order below.

The parties are also asked to consult with each other concerning what exhibits may be offered without objection (i.e.: documents that may have been filed with the ANR in the proceeding below) and to file a stipulation regarding the admission of these exhibits in accordance with the terms set forth in the Order below.

VII. STANDARD O-F REVIEW

Any hearing on the merits in this appeal shall be conducted/ as a de novo proceeding, pursuant to 10 V.S.A. § 1024(a).

VIII. DISCLOSURES

At the prehearing conference, the current Board members were identified by name (Chair William Boyd Davies, Mark **DesMeules**, Stephen Dycus, Ruth Einstein, and Jane Potvin) and their present and past professional affiliations. It was noted that Mark **DesMeules**' wife had recently been employed by the ANR in the division which reviews hydroelectric project relicensing applications and that he would therefore **recuse** himself from any hearing in these appeals. It was also noted that board member **Ruth Einstein** was a former employee of the ANR, although she was not associated with the program that reviews hydroelectric project relicensure.

Prehearing Conference Report and Order

In re: **Lamoille River Hydroelectric Project (CVPS)**

§ 401 Certification

Docket No. WQ-94-03 and Docket No. WQ-94-05

page 5 of 6

No party sought additional disclosures in accordance with the terms set forth in the draft Prehearing Conference Report and Order.

IX. SUPPLEMENTAL PREHEARING ORDER

A Supplemental Prehearing Order setting forth a schedule of filing deadlines for prefiled testimony and legal memoranda shall be prepared in consultation with the parties and issued at such time as this matter is ready for hearing.

X. ORDER

1. Docket Nos. WQ-94-03 and WQ-94-05 are consolidated for purposes of hearing and decision.
2. The following are parties as of right: VNRC and CVPS, appellants, pursuant to 10 V.S.A. § 1024(a), and ANR, pursuant to Rule 22(A)(4) of the Board's Rules of Procedure.
3. On or before **4:30** p.m., Friday, September 30, 1994, any party objecting to the participation of a Board member in this proceeding shall file a written objection with the Board. This filing should state the reason(s) for the objection and any facts known to the party which might require the Board member's **recusal**. Failure to file a timely request may be deemed a **waiver** of objection to the participation of a Board member.
4. On or before **4:30** p.m., Friday, October 14, 1994, the parties shall either file a joint request for continuance or write to the Board indicating that this matter is ready for hearing. If a continuance is requested, it should specifically state the reason(s) for the request and identify a proposed date of expiration. If the parties determine that this matter should proceed to hearing, they should propose a schedule for the filing of requests for preliminary rulings on jurisdictional and preliminary matters, witness and exhibits lists, prefiled testimony and exhibits, and legal memoranda and stipulations.
5. Parties shall file an original and five (5) copies of any motions, memoranda, or other filings with the Board, and mail one copy to each of the persons listed as parties on the attached Certification of Service. A certificate of service indicating delivery to all listed persons by hand or by first

Prehearing Conference Report and Order

In re: Lamoille River Hydroelectric Project (CVPS)

§ 401 Certification

Docket No. WQ-94-03 and Docket No. WQ-94-05

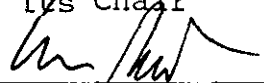
page 6 of 6

class mail shall also be filed with the Board and parties.
The Board does not accept filings by FAX.

9. Pursuant to Rule 24(B) of the Board's Rules of Procedure, this Order shall be binding on all persons who have received notice of the prehearing conference, unless there is a timely objection to the Order, or a showing of cause for, or fairness requires, waiver of a requirement of this Order.

Dated at Montpelier, Vermont, this 26th day of September, 1994.

Water Resources Board
by its Chair


William Boyd Davies