

state of Vermont
WATER RESOURCES BOARD

In re: Clyde River Hydroelectric Project
§ 401 Certification
Docket No. WQ-94-10

PREHEARING CONFERENCE REPORT AND ORDER

I . BACKGROUND

On July 8, 1994, the Secretary of the Vermont Agency of Natural Resources (Secretary) denied a § 401 Water Quality Certification to the Citizens Utility Company (Citizens) in connection with the utility's application to the Federal Energy Regulatory Commission (FERC) for relicensure of the Clyde River Hydroelectric Project, consisting of five facilities. These facilities involve Seymour Lake in the Town of Morgan and Echo Lake in the Town of Charleston, located on an unnamed tributary which flows into the Clyde River. On the main stem of the Clyde River are the West Charleston facility in the Town of Charleston at river mile 10.8; the **Newport 1,2,3** facility in the Town of Derby at river mile 1.7; and the Newport 11 facility in the City of Newport at river mile 1.5. On July 22, 1994, Citizens, by and through its counsel, Miller, Eggleston & Rosenberg, Ltd., appealed the Secretary's decision to the Water Resources Board (Board), challenging findings, conclusions and conditions contained in the certification. This appeal was filed pursuant to 10 V.S.A. §§ 1004 and 1024(a).

On July 28, 1994 Citizens's appeal was deemed complete and docketed as WQ-94-10. On September 20, 1994, a Notice of Appeal and Prehearing Conference was sent to persons required to receive notice and on September 22, 1994, it was published in the Newport Daily Express, pursuant to Rules 18(C) and 20 of the Board's Rules of Procedure.

Entering timely appearances were the Northeast Kingdom Chapter of Trout Unlimited (NE/TU), represented by Kevin Coffey, **Vice-President** of the Chapter, on September 23, 1994; appellant Citizens, represented by Martin K. Miller, Esq., and Victoria J. Brown, Esq., of Miller, Eggleston & Rosenberg, Ltd.; the ANR by Kurt R. **Janson**, Esq., on October 6, 1994; Vermont Natural Resources Council (VNRC) and the Vermont Federation of Sportsmen's Clubs (VFSC), both represented by Christopher M. Kilian, Esq., on October 6, 1994.

On October 6, 1994, at 10:00 a.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**, Esq., pursuant to **Rule 24(A)** of the Board's Rules of Procedure. The following persons entered appearances and participated:

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Victoria Brown, Esq., Miller, Eggleston & Rosenberg, Ltd., for
Citizens, appellant
Timothy F. Meehan, for Citizens, appellant
John B. Kassel, Esq., for ANR
Stephen Sease, for ANR
Christopher M. Kilian, Esq., for VNRC and VFSC
Mona M. Janopaul, Esq., for National Trout Unlimited (NAT/TU)
Gary R. Doyle, Chairman, Vermont State Council of Trout
Unlimited (VT/TU), for VT/TU
Karen M. Coffey, for NE/TU
David F. Smith, for NE/TU

On October 20, 1994, a draft Prehearing Conference Report and Order was circulated to the above persons for comment. The Board received comments from the ANR (November 4, 1994), VNRC (November 7, 1994), and the appellant (November 8, 1994). A final Prehearing Conference Report and Order is now ready for issuance.

II. STANDARD OF 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).

III. ISSUES AND SCOPE OF APPEAL

Citizens seeks de novo review of the Secretary's denial of a § 401 Water Quality Certification for its Clyde River Hydroelectric Project. Its notice of appeal is broadly stated.

At the prehearing conference, Citizens indicated that it was in negotiations with the parties and that the outcome of those negotiations might result in either a withdrawal of its appeal or a narrowing of the issues to be addressed by the Board.

VNRC and VFSC indicated that they support the Secretary's **denial**, even though the Secretary's decision deferred addressing their concerns regarding flow levels and peaking. VNRC and VFSC did not file their own notice of appeal from the Secretary's decision but instead elected to seek party status because they agreed with the final action of the Secretary -- to deny the certification. Due to their agreement with the Secretary, no **case** or controversy was presented which would have been ripe for review by the Board with regard to the interests of VFSC and VNRC. The certification was denied in its entirety by the Secretary and must be subject to de novo review at the Board. VNRC and VFSC believe that denial of a certification in its entirety cannot be limited

by the appellant -- in this case Citizens Utilities Company -- to

was not unnecessary, since the Board must decide party status and preliminary issues prior to the establishment of a schedule for prefiled testimony and exhibits, thereby allowing the parties several months in which to continue negotiations before preparing for a hearing on the merits.

Should a continuance be required at a later date to facilitate negotiations,

V. INTERVENTION

Board's Rules of Procedure: VT/NRC, VFSC, a n d NAT/TU.

At the prehearing conference, the above organizations were informed that they would have an opportunity to supplement their initial requests, addressing the specific standards in Rule 22(A) and/or Rule 22(B), in accordance with the terms of the Order below. NAT/TU, VT/TU, and NE/TU were encouraged to join in their appearance by counsel, presentation of evidence, and other matters. VNRC and VRSC were encouraged to do the same. See Rule 22(B)(4) of the Board's Rules of Procedure.

Organizations intending to pursue intervention should file their petitions in accordance with the terms of the Order below

VI. WITNESSES AND EXHIBITS

1. At the prehearing conference, the appellant identified the following persons as potential witnesses: Jim Avery, Vice-President of Operations, Citizens; Frank Thomas, Project Engineer, Citizens, who will address all aspects of the engineering of the Clyde River Project; William Countryman, who will address wetlands biology and fisheries; and various local fisherman.

Citizens also identified Richard Sedano, Vermont Public Service Department, as a possible witness on rate impacts. The parties and prospective intervenors discussed the relevance of such testimony in light of the applicable law, the Vermont Water Quality Standards and the Clean Water Act. VNRC and VRSC asked that the legal question whether economic considerations have any applicability in a § 401 proceeding be addressed by the Board in a preliminary ruling. The ANR recommended that the question be addressed only if Citizens actually offers prefiled testimony on economic impacts, in which case the parties could move to strike and request the opportunity to brief the broader legal issue posed by such testimony.

2. At the prehearing conference, the ANR identified the following potential witnesses: Tom Willard and Jeff Cueto, Water Quality Division; Rod Wentworth, Cheryl Ryder, and Len Gerardi, fisheries biologists, Department of Fish and Wildlife; Cedric Alexander, wildlife and wetlands ecologist, Department of Fish and Wildlife; Susan Bulhmer, State Recreation Planner, Department of Forests, Parks and Recreation. The ANR also identified as possible witnesses: officials from the USFW Service: an engineer from the Public Service Department: and independent consultants.

3. At the prehearing conference, VNRC and VFSC indicated that its reserved the right to call as its witnesses a fisheries biologist, a hydrologist, a wetlands ecologist, and an engineer to the impacts of project operations.

4. At the prehearing conference, NAT/TU reserved the right to call as its witnesses a fisheries biologist, a hydrologist, a water quality specialist, and an engineer. VT/TU indicated that its witnesses might include a historian to address the water quality of the Clyde River from a historical perspective. NE/TU reserved the right to call as its witnesses a hydrologist, an engineer, a wetlands ecologist and fishermen familiar with the fisheries, historical and present, on the Clyde River.

5. Parties shall file final lists of direct and rebuttal witnesses and exhibits, resumes of expert witnesses, prefiled testimony and exhibits, and any prehearing legal memoranda, in accordance with the terms of a Supplemental Prehearing Order.

6. If a party wishes the Board to officially notice any ANR procedure, rule, guideline, form, or other document as part of the record in this proceeding, it must offer the document as an exhibit, in accordance with the terms of this and any Supplemental Prehearing Order.

VII. STIPULATIONS

At the prehearing conference, the parties and prospective intervenors were encouraged to identify those findings, conclusions and conditions in the Secretary's decision which are not at issue in this proceeding and to file a stipulation in accordance with the terms of the Order below and any Supplemental Prehearing Order.

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 and any Supplemental Prehearing Order.

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 affiliations. It was noted that the wife of Board member **DesMeules** 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 this appeal. It was also noted that Board member Einstein is a former employee of the ANR, although she was not associated with the program that reviews hydroelectric project relicensure.

Any party or prospective intervenor seeking additional disclosures shall do so in accordance with the terms set forth in the Order below.

The Board's delegate advised those at the prehearing conference that the Chair may appoint former Board members to sit as acting members in a contested case when one or more regular Board members are not available, pursuant to 10 V.S.A. § 805(1)(F).

IX. STENOGRAPHIC RECORD

All hearings before the Board are recorded by electronic sound recording device. Parties and prospective intervenors were urged to consider the hiring of a court reporter to make a transcript of the proceedings. The Board's designee recommended that those attending the prehearing conference review Rule 28(C) of the Board's Rules of Procedure and consider a cost-sharing agreement.

X. SUPPLEMENTAL PREHEARING ORDER

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

XI. ORDER

1. The following are parties as of right: Citizens, the appellant, pursuant to 10 V.S.A. § 1024(a); and the ANR, pursuant to Rule 22(A)(4).
2. VNRC, VFSC, NAT/TU, VT/TU and NE/TU may be granted party status, provided their petitions for intervention address the standards in Rule 22 of the Board's Rules of Procedure. Any petition or supplemental filing shall be made on or before 4:30 p.m., Monday, November 14, 1994.

VFSC, VT/TU and NE/TU must file with the Board signed statements authorizing one officer or attorney to serve as representative in this proceeding. See Rule 23(B) of the Board's Rules of Procedure.

3. On or before 4:30 p.m., Monday, November 14, 1994, any party, or petitioner for intervention seeking additional disclosures from any Board member concerning any actual or potential conflicts of interest, shall file a written request with the Board. This request should state any facts known to the requesting party that might require recusal of a Board member.
 4. Parties may file any written objections to the intervention requests of VNRC, VFSC, NAT/TU, VT/TU and NE/TU no later than 4:30 p.m., Monday, November 28, 1994.
 5. On or before 4:30 p.m., Monday, November 28, 1994, any party or petitioner for intervention objecting to the participation
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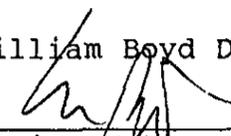
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- of a Board member in this proceeding shall file a written objection with the Board. This filing should state the reason(s) for the objection(s) and any facts known to the party or petitioner which might require the Board member's **recusal**. Failure to file a timely request may be deemed a waiver of objection to the participation of a Board member.
6. On or before **4:30** p.m., Monday, December 19, 1994, any party, seeking a preliminary ruling from the Board shall file a written motion supported by legal memorandum.
 7. On or before **4:30** p.m., Monday, January 9, 1995, any party wishing to respond to any motion filed with respect to any preliminary issues shall file with the Board a written response with supporting legal memorandum.
 8. If no motions are filed requesting preliminary rulings by the Board, the parties shall jointly inform the Board whether a continuance in this matter is warranted and would facilitate resolution or narrowing of the issues in dispute. If the parties elect to jointly file a motion for continuance, they shall do so no later than **4:30** p.m., Monday, January 9, 1995, specifying either the proposed duration of the continuance or an expiration date. If no motions for preliminary rulings are filed and the parties do not request a continuance, then: a draft supplemental order setting forth a schedule for **pre-**filing witness and exhibit lists, resumes, prefiled testimony: and exhibits, and prehearing legal memoranda will be **circu-**lated to the parties for comment prior to issuance of a final: Prehearing Supplemental Order.
 9. If one or more motions for preliminary rulings are filed by the December 19 deadline, any deadlines for a continuance request shall be established by a Supplemental Prehearing Order, after consultation with the parties.
 10. Any motions, memoranda, petitions or other filings with the Board shall be filed as an original and five (5) copies. One copy should also be mailed to each of the persons listed on the attached Certificate of Service (not including the persons listed under For your Information) until otherwise notified by the Board. A certificate of service indicating delivery by hand or by mail to all persons required to receive **service** shall also be filed with the Board and listed persons. The Board does not accept filings by FAX.
 11. Pursuant to Rule 24(B) of the Board's Rules of Procedure this order shall be binding on all persons who have received notice
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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 /&day of ^{November}~~October~~, 1994.


William Boyd Davies

Chair, Water Resources Board
