

State of Vermont  
WATER RESOURCES BOARD

**In re: Lamoille River Hydroelectric Project**  
**§401 Certification**  
**Docket No. WQ-94-03 and WQ-94-05**

**Chair's Evidentiary Rulings on the Objections of the Parties**

This decision sets forth rulings on the various objections of the parties to the prefiled testimony in the above-referenced matter. The rulings of the Chair are final evidentiary rulings subject to the parties right to seek review by the full Board, pursuant to Board Rule of Procedure 21. Such review must be requested in writing no later than **4:30 pm, Wednesday, November 15, 1995**, and must identify the specific ruling(s) objected to. Given the volume of individual rulings, the Chair requests that any party seeking review by the full Board designate the specific objection by using the objection number identified by the Board under the column heading "Objection" in the log of rulings included in Part II.B of this Order.

**I. BACKGROUND**

On March 3, 1995, the Vermont Natural Resources Council ("VNRC") filed with the Water Resources Board ("Board") a Motion for Preliminary Ruling on Admissibility of Evidence and Scope of Review. The Board issued a Revised Supplemental Prehearing Order on March 16, 1995 which established June 16, 1995 as the deadline for filing written objections to the prefiled testimony and exhibits. VNRC supplemented its Motion for Preliminary Ruling by filing a Memorandum of Objections to Prefiled Testimony on June 16, 1995. In addition, both the Agency of Natural Resources ("ANR") and Central Vermont Public Service Corporation ("CVPS") filed their respective memoranda of objections on June 16, 1995.

The parties were afforded an opportunity to respond to the objections filed with the Board and each party did so in writing on June 30, 1995. The Board issued its Preliminary Ruling on the Admissibility of Evidence and Scope of Review on August 15, 1995. This Ruling, though it provided rulings on much of the testimony in this case, did not treat all of the objections identified in the parties' respective memoranda. As such, oral argument before the Chair on the points left open by the Preliminary Ruling was scheduled for September 12, 1995.

On August 30, 1995, VNRC filed a Motion for Modification and Clarification of the Board's rulings which sustained CVPS's objections to evidence respecting dam decommissioning and removal and evidence of pre-dam conditions. (Water Resources Board Preliminary Rulings, In re: Lamoille River Hydroelectric Project, Docket No. WQ-94-03 and WQ-94-05 (August 15, 1995) at p. 5; Preliminary Rulings II.E. and II.F. respectively.) CVPS filed a responsive memorandum in opposition to VNRC's motion on September 13, 1995. The Agency of Natural Resources (ANR) also filed a responsive memorandum on September 12, 1995, supporting VNRC's requests.

Oral Argument was held before the full Board on October 11, 1995. While ANR rested on its written filing, both CVPS and VNRC were represented by counsel and presented oral



argument to the Board. The Board issued an order denying VNRC's Motion for Modification on October 18, 1995.

On October 24, 1995, the Chair resumed oral argument with respect to evidentiary objections. At that time, the Chair addressed the individual objections pertaining to dam decommissioning and removal, which were not ruled on during the pendency of VNRC's motion to modify, and the remainder of the outstanding evidentiary objections. The Chair made rulings on each of the objections and reduced them to writing in the form of a Log of Rulings on the Objections of the Parties. This Log was distributed to the parties as a draft ruling, upon which the parties were encouraged to make comments. The parties did in fact make both technical and substantive comments and to the extent that these corrected the draft rulings, they have been incorporated into the order set forth below.

What follows in parts II.A and II.B are the Chair's Preliminary Rulings on the Objections of the Parties to the Prefiled Testimony. Part II.A includes two general rulings. One addresses the "Road Map ruling" defining limitations on the admissibility of testimony offered by CVPS's lead witness, Bruce Peacock. The other addresses the "Lay Opinion ruling", which explains the proper use of an expert's "lay opinion" regarding either aesthetics or recreation. Part II.A also includes the ruling on the admissibility of the William Countryman affidavit. Part II.B is a log of rulings on the individual objections of the parties to specific offers of evidence.

## II. ORDER

### A. General Matters

#### 1. *Road Map Ruling.*

Many of the objections which VNRC made to the testimony of Bruce Peacock were premised on VNRC's contention that Peacock was testifying to a matter which was beyond his expertise as a mechanical engineer. In addition, VNRC often objected to Peacock's testimony on hearsay grounds. This occurred most frequently when Peacock was referencing the conclusions drawn by other CVPS witnesses. VNRC objected to the need for a "road map" witness and maintained that the individual witnesses could offer their testimony **directly** to the Board which VNRC claims, can sort through the testimony without the aid of a "road map". ANR, in contrast, supported the functional value of a "lead" or "road map" witness and indeed, suggested that its witness, Jeffrey Cueto, performs a similar function.

The Chair ruled that Bruce Peacock has a unique function as CVPS's lead witness. The Chair described Peacock's function by analogizing his role to that of a road map, guiding the **Board through** the entire array of CVPS's testimony. As the "Road Map" witness, who pulls together much of this testimony, Peacock is granted more latitude in his testimony. Peacock is nonetheless qualified as an expert in certain areas set out in the prefilings. His expertise certainly includes mechanical engineering, based on his experience and training, as set forth in the prefiled testimony. Peacock's expertise may also encompass a broader range of technical skill or knowledge but *only* if the **prefiled** testimony and the forthcoming voir dire can qualify Peacock as an expert in these areas. The Chair noted that typically voir dire is used to reign in a witness's range of expertise, not broaden it.

Peacock, as a "road map" witness, is able to refer rather freely to the conclusions of other CVPS witnesses without violating the rule against hearsay. Where, however, Peacock's authority on a given subject to which he makes reference is limited (i.e. where he is not an expert), Peacock is precluded **from** asserting the matter for its truth. Peacock is the assimilator of this evidence, not its sponsor. As such, the Board may consider Peacock's understanding of the conclusions and opinions of another CVPS expert, but the Board may not rely on Peacock as the sponsor of evidence which is outside of the scope of his expertise. In order to establish these matters for their truth, a qualified CVPS expert must independently sponsor the studies, reports and opinions. In the case where Peacock makes his *own* observations on matters which are conducive to lay opinion testimony - namely aesthetics and recreation - the weight afforded his own opinions on these matters is limited by the subsequent "Lay Opinion Ruling".

Where Peacock's testimony is truly "expert testimony" within the scope of his expertise as a mechanical engineer, the Board shall afford added weight commensurate with his expertise. In contrast, the testimony of Peacock, which is objected to and to which the log of rulings indicates "See *Road Map Ruling*", shall be allowed for "road map purposes only".

**RULING:** Testimony admissible for "road map purposes only" is neither expert testimony, nor is it admissible for the truth of the matters asserted. Rather, it may be utilized only to assist the Board in comprehending CVPS's case as a whole.

## 2. *Lay Opinion Ruling.*

Notwithstanding Peacock's unique role as a "road map" witness, there are certain points at which his testimony is not merely facilitating the comprehension of CVPS's case. In instances where Peacock is offering his own opinion on matters *outside* his expertise as a mechanical engineer, the Chair ruled that the Board shall not afford this testimony the weight given to expert testimony.

**RULING:** Where Peacock, or for that matter any other witness, strays from the ambit of his or her expertise to discuss aesthetics or recreation, his or her testimony should be **afforded only** the weight that the testimony of any lay witness would receive. These instances, recorded in the log of Rulings on the Parties' Objections, have been designated alternatively, "Lay Aesthetics Ruling" or "Lay Recreation Ruling," as is appropriate.

## 3. *The William Countryman Affidavit*

At the initial round of oral argument held on September 12th, the Chair of the Water Resources Board ruled in anticipation of the filing by CVPS of an affidavit by William Countryman, the author of VNRC 36. The Chair indicated that **such affidavit** would only be **admissible** if it truly addresses errata. The Chair **further** indicated that a filing akin to additional re-filed testimony would not be admissible.

**RULING:** The **affidavit** was filed on September 28, 1995. Upon review of the **affidavit** and **after** hearing the party's arguments on October 24, 1995, the Chair ruled that **the affidavit is admissible** for the limited purpose of correcting the error which was made in the preface to the report, "Habitat Suitability Information: Lake Sturgeon *Acipenser fulvescens* Rafinesque." The totality of the affidavit is admissible for this limited purpose and VNRC's objection to it is **overruled**. Mr. Countryman will be made available by CVPS for cross examination, though VNRC's cross examination of Countryman will be limited to the issue of addressing the **error** in the report's preface.

## II.B. Log of Rulings on Individual Objections

### Rulings on the VNRC and ANR Objections to CVPS's Testimony

<u>Objection</u>	<u>Exhibit Number(s)</u>	<u>Page(s) and Line No.</u>	<u>RULING</u>
VNRC 1	CV-4 Peacock[D]	p. 6, II. 3-9	<b>Overruled.</b> See <i>Road Map Ruling</i> .
VNRC2	"	p.6 - l. 24 p.7 - l. 11	<b>Overruled.</b> See <i>Road Map Ruling</i> . Except lines 2-4 which are admissible without limitation.
VNRC3	"	p. 7, 11. 12-16	<b>Overruled.</b> See <i>Road Map Ruling</i> .
VNRC4 <i>ANR 1</i>	"	p. 8, 3-12 <i>p. 8, II. 3-12</i>	Sustained. <b>This</b> is appropriately objected to and is an instance of the witness drawing a legal conclusion.
VNRC5 <i>ANR 2</i>	" "	p. 8, II. 15-23 <i>p. 8, II. 21-23</i>	Overruled. As an engineer familiar with hydro projects, Peacock can testify as to the propriety of a 100 cfs release. He merely references the DFM study, and the standard for contested cases in the agency setting would allow admission of his statement. Sustained as to lines 21-23 which "as worded is entirely speculative."
VNRC6	"	p. 8, ln. 24 p.9, ll. 1-5	<b>Overruled.</b> This is another instance of Peacock utilizing his role as CVPS's Road Map witness. See <i>Road Map Ruling</i> .

<u>Objection</u>	<u>Exhibit Number(s)</u>	<u>Page(s) and Line No.</u>	<u>RULING</u>
VNRC7 ANR 3	CV-4 Peacock[D]	p. 9, II. 6-13	<b>Sustained.</b> This testimony falls under the general category of evidence pertaining to economic and societal effects which the Board has ordered in its Preliminary Ruling to exclude. (See Preliminary Ruling <b>(II. A.)</b> ).
VNRC 8 ANR 4	"	p. 9, II. 14-24 to p.10 ll. 1-7	<b>Sustained</b> for same reasons as above
VNRC 9	"	p. 10, II. 8-16	<b>Overruled.</b> Part of the water quality certification (401(d)), requires the incorporation of Vermont's Water Quality Standards, which include a provision entitled "management objectives" 3-03(A). Included under this section are subparts <b>1 &amp; 2</b> which assure compatibility with the following beneficial values and uses: good aesthetic value, recreation, and preservation of high quality habitat. Peacock's testimony offers his opinion as to the treatment of some of these values and uses under <b>CVPS's</b> proposal.
VNRC 10 ANR 5	"	p. 10, II. 17-22	<b>Sustained.</b>
VNRC 11 ANR 6	"	p. 10, l. 23 - p.11, l. 17	<b>Sustained.</b>
VNRC 12 ANR 7	"	p. 13, II. 15-18 p. 13, II. 11-18	Overruled as to the question and first sentence of the answer. Thus the following question and answer are admissible, while the rest of Peacock's response is not. Q: Why is it necessary to draw the reservoirs for NEPOOL? A: In order to maintain weekly cycle capability for Clark Falls, Milton and Peterson Stations at the rated capacities, it is necessary to be able to <b>drawdown</b> Arrowhead Reservoir more than 2 feet at the request of NEPOOL.

<u>Objection</u>	<u>Exhibit Number(s)</u>	<u>Page(s) and Line No.</u>	<u>RULING</u>
VNRC 13	CV-4 Peacock[D]	p. 14, ll. 13-18	<b>Overruled.</b> See <i>Road Map Ruling</i> .
VNRC 14	"	p. 15, ll. 2-9	<b>Overruled.</b> See <i>Road Map Ruling</i> .
VNRC 15	"	p. 15, ll. 21-24 p. 16 ll. 1-3	<b>Overruled.</b> See <i>Road Map Ruling</i> .
VNRC 16 ANR 8	"	p. 16, ll. 10-14, 16-17 p. 16, ll. 4-17	<b>Sustained as to lines 10-14</b> , as there was no competent witness through whom a foundation for this testimony could be established. <b>ANR withdrew its objection to lines 4-9.</b> <b>Sustain as to lines 16 and 17</b> which are argumentative and highly conclusory. <b>NOTE:</b> At this point in the testimony, there is a reference to <u>CVPS's Exhibit 13</u> a response to FERC's additional information request for which CVPS has not laid a sufficient foundation. The Chair ruled that <u>VNRC's objection to Exhibit CVPS-13 was sustained as well.</u>
VNRC 17	CV-4 Peacock[D]	p. 16, ll. 23-24 p. 17, ll. 1-2	<b>Overruled.</b>
VNRC 18	"	p. 17, ll. 2-15	<b>Overruled.</b> This objection is overruled premised on the understanding that Peacock's opinion on this matter is a lay, rather than an expert, opinion. See <i>Lay Aesthetics Ruling</i> .
VNRC 19 ANR 9	"	p. 17, ll. 16-24 p. 18, ll. 1-4	<b>Sustained.</b> Peacock's testimony presents a legal conclusion.

<u>Objection</u>	<u>Exhibit Number(s)</u>	<u>Page(s) and Line No.</u>	<u>RULING</u>
VNRC 20 ANR 6	CV-4 Peacock[D]	p. 18, ll. 5-11	<b>Sustained.</b> FERC conclusions do not bear on the State's water quality certification process.
vNRC 21 ANR 3	"	p.18, ll. 12-20	<b>Sustained per Preliminary Ruling on Economic and Societal Effects.</b>
VNRC 22 ANR 4	"	p. 18, ll. 21-24 <i>p.19, ll. 1-15</i>	<b>Sustained per Preliminary Ruling.</b> <b>Sustained per Preliminary Ruling.</b>
VNRC 23	"	p. 20, ll. 19-24 p.21 ll. 1-4	<b>Overruled.</b> This testimony is offered to show a rationale for arriving at the stream flows contained in the CVPS proposal. As such, it is probative of those flow rates and relevant to this proceeding. See <i>Road Map Ruling</i> .
VNRC 24	"	p. 21, ll.5-10	<b>Overruled.</b> See <i>Road Map Ruling</i> .
VNRC 25	"	p.21, ll. 22-24 p.22, ll. 1-12	<b>Overruled.</b>
VNRC 26	"	p.22, ll. 20-24	<b>Overruled.</b>
VNRC 27 ANR 10	"	p.23, ll. 1-14	<b>Overruled</b> in part. It was noted however that there should be an instruction that Peacock's opinion as to aesthetics is not an expert opinion, See <i>Lay Aesthetics Ruling</i> . <b>Sustained</b> as to lines 3-8, and as to the words "fisheries habitat and" in the question. The question now reads, "Does rock alteration pose a risk to aesthetics?"
ANR 18	CVPS-14		Overruled.



<u>Objection</u>	<u>Exhibit Number@</u>	<u>Page(s) and Line No.</u>	<u>RULING</u>
VNRC 28 <i>ANR 3</i>	CV-4 Peacock[D]	p. 23, ll. 15-22.	<b>Sustained per Preliminary Ruling on economics.</b>
VNRC 29 <i>ANR 4</i>	"	p. 23, ll. 23-24 p. 24, ll. 1-15	<b>Sustained per Preliminary Ruling relating to societal effects.</b>
VNRC 30 <i>ANR 6</i>	"	p. 24, ll. 16-21	<b>Sustained.</b>
VNRC 31	"	p. 27, ll. 6-11	<b>Overruled. See <i>Road Map Ruling</i>.</b>
VNRC 32	"	p. 29, 7-13	<b>Sustained as to lines 10-12</b> which is testimony beyond the expertise of witness Peacock. <b>Overruled as to lines 7-9 and line 13 to which the road map ruling applies. See <i>Road Map Ruling</i>.</b>
VNRC 33 <i>ANR II</i>		p. 29, ll. 14-24, p. 30, ll. 1-3 <i>p. 29, ll. 21-24</i>	<b><i>Sustained in part.</i></b> Delete, “No, the purpose of the attraction is unclear and”. The objection is overruled only as to lines 16-21 (beginning with “the requirement” on line 16 to the end of that sentence). The objection is <i>sustained</i> as to the remainder.
VNRC34		p. 30, ll. 14-15	Sustained.
VNRC 35		p. 30, ll. 16-24	Sustained. Where the objection to the question (above) is sustained, the objection to the answer must also be sustained
VNRC 36 <i>ANR 3</i>		p. 31, ll. 1-8	Sustained per Preliminary Ruling

<u>Objection</u>	<u>Exhibit Number(s)</u>	<u>Page(s) and Line No.</u>	<u>RULING</u>
VNRC 37 ANR 4	CV-4 Peacock[D]	p. 31, ll. 9-24 p. 32, l. 1	Sustained <b>per Preliminary Ruling.</b>
VNRC 38 ANR 6	"	p.32, ll. 2-9	<b>Sustained.</b>
VNRC 39 ANR 12	"	p. 33, ll. 4-24 p. 34, ll. 1-18 p. 33, ll. 5-9	<b>Sustained</b> as to page 33, lines 8 and 9 and page 34, lines 12-18. Overruled as to the remainder. ANR <i>withdrew</i> its objection to lines 5-8.
VNRC 40	"	p. 33, ll. 5-12	<b>Objection was withdrawn.</b>
VNRC 41	"	p. 33, ll. 13-24 p.34, ll 1-5	<b>Overruled. See <i>Road Map Ruling.</i></b>
VNRC 42 ANR 13	"	p. 35, ll. 4-24 p. 36, ll. 1-3 p. 35, ll. 10-12	<b>Sustained</b> as to lines 10-12 which are to be excluded. Objection to lines 13 and 14 is <b>withdrawn.</b> <b>Overruled</b> objection to p. 35, lines 4-10 (the phrase ending with the word "6.5 mg/l"), 15-24 and p. 36, lines 1-3. See <i>Road Map Ruling.</i>
VNRC 43	CVPS-7		<b>Overruled.</b>
VNRC 44	CVPS-7	00022 at sub. 3 (Line 9)	This information may inform the Board concerning what might be necessary to achieve, maintain and possibly enhance present beneficial uses and values of the river. This testimony includes information that is relevant to the Board's determination of which conditions it might impose; therefore, it is admissible for this limited purpose and the objection is overruled.

<u>Objection</u>	<u>Exhibit Number@</u>	<u>Page(s) and Line No.</u>	<u>RULING</u>
VNRC 44 (Cont'd)	CVPS-7	00022 at Milton, Sub. 1 (line 19)	<b>Sustained per Preliminary Ruling on economics.</b>
		00023 at Sub. 3 (line 4)	<b>Overruled. See above ruling on 00022, sub. 3.</b>
		00023 at Clark Falls, Sub. 1 (line 16)	<b>Sustained per Preliminary Ruling on economics.</b>
		00024 at Sub. 3 (line 9)	<b>Overruled. See above ruling on 00022, sub. 3.</b>
		00024 at Fairfax Falls, Sub. 1 (line 19)	<b>Sustained per preliminary ruling on economics.</b>
		<b>00025 at Sub. 3 (line 4)</b>	<b>Overruled. See above ruling on 00022, sub. 3.</b>
VNRC 45	CVPS-7	00030	<b>Overruled.</b> This testimony is setting forth the general guidelines of CVPS's dissolved oxygen monitoring plan. It is relevant and may be offered through Peacock since he is the "lead" witness.
VNRC 46	CVPS-7b		<b>Overruled.</b>
VNRC 47 <i>ANR 14</i>	CVPS-8		<b>Sustained per preliminary ruling.</b> <i>However, due to the probative value of a side-by-side</i>

*comparison of the various flow rate proposals, the parties stipulated to a "sidebar" comparison chart which sets forth each of the parties respective flow proposals. This chart will*

*echo CVPS-8 in form except that it will make no reference to those issues which are excluded by virtue of the Board's Preliminary Ruling on economics and societal effects. Specifically, the chart will make no reference to costs or total megawatt hours.*

<u>Objection</u>	<u>Exhibit Number(s)</u>	<u>Page(s) and Line No.</u>	<u>RULING</u>
VNRC 48 ANR 15	CVPS-9		<b>Sustained per preliminary ruling.</b>
VNRC 49 ANR 16	CVPS-10	<i>p. 2, bottom 2pgphs; p. 8, first 12 lines; p. 58, 3rdpgph; Sections VI &amp; VII</i>	<i>Sustained</i> as to those portions of the Environmental Assessment (EA) which relate to matters regarding economic and societal effects which were ruled on in the Board's Preliminary Ruling (at II.A. (This includes those specific ANR objections to CVPS's discussion of: 1) need for power; 2) cost of alternatives; 3) air emissions of alternatives; 4) FERC recommendations based on the above three matters). By virtue of V.R.E. 106 - the objection is <b>overruled</b> as to matters contained in the EA to which ANR's expert J. Cueto refers and upon which CVPS's experts rely for rebuttal. The scope of the EA which is admissible under V.R.E. 106 is narrow. CVPS's use of the EA is limited to matters, "that are related to the issue for which the part first in evidence was offered."
VNRC 50 ANR 17	CVPS-13		<b>Sustain per preliminary ruling.</b> <i>See above Ruling VNRC 16.</i>
<i>vNRc51</i>	J. Wallin (All testimony & exhibits)		<b>Overruled.</b>

<u>Objection</u>	<u>Exhibit Number(s)</u>	<u>Page(s) and Line No.</u>	<u>RULING</u>
VNRC 52	All testimony & exhibits relevant to Milton Falls by-pass flow requirements and studies.		<b>VNRC's objection is withdrawn.</b>
VNRC 53	Wallin	p. 4, lines 16-24 p.5, lines 1-3	<b>Overruled.</b>
VNRC 54	Wallin	p. 6, lines 14-24 p.7, lines 1-7	<b>Overruled</b> - however, this evidence regarding recreation is not within the <b>ambit</b> of Wallin's expertise. The testimony should be <b>afforded</b> only the weight given to lay witness. This is like the "lay aesthetics" ruling of the first oral argument.
VNRC 55	Wallin	p.8, lines 13-17, & lines 20-23	<b>Overruled.</b>
VNRC 56 <b>ANR 19</b>	Wallin	p.12, lines 8-14	<b>Sustained per preliminary ruling.</b>
VNRC 57	Wallin	p. 12, lines 15-24, p. 13, lines 1-7	<b>Overruled. Lay Recreation</b> ruling.
VNRC 58 <b>ANR 20</b>	CVPS-21	p.6 <b>P.6, II. 4-21</b>	<b>Sustained per preliminary ruling on economics.</b>

<u>Objection</u>	<u>Exhibit Number</u>	<u>Page &amp; Line Numbers</u>	<u>RULING</u>
VNRC 59	CVPS-21	p.9, Fig. 1	<b>Sustained per preliminary ruling on economics</b> , but allow CVPS an opportunity to replace figure 1 with a graph Similar in form but without the label, “30 Year Cost of Flow Release (\$\$)” and the word “millions” on the right axis and without the line indicating “Cost per cfs”.
VNRC 60	Courtney, CVPS-22	p.5, lines 19-21 P.6 lines 1-1 1	<b>S u s t a i n e d .</b>
VNRC 61	Ritzi, CVPS-28		<b>Sustained as to the letter</b> (Page 1 of 12) which incorporates economics and societal effects evidence deemed inadmissible by virtue of the Preliminary Rulings
VNRC 62	CVPS-30	00007	<b>Overruled.</b>

**VNRC and ANR Objections to CVPS's Rebuttal Testimony and Exhibits**

<b>V N R C 6 3</b>	Rebuttal Testimony of B. Peacock	p.2, II. 1 1-23	<b>Sustained.</b>
VNRC 64	Peacock	p.3, II. 2-14	<b>Sustained.</b>
VNRC 65	Peacock	p.3, II. 15-24	<b>Sustained.</b>

<u>Objection</u>	<u>Exhibit Number &amp;</u>	<u>L i n e Numbers</u>	<u>RULING</u>
VNRC 66	Peacock	p. 4, ll. 5-10	<b>Sustained.</b> What FERC did, and how satisfied it supposedly was with CVPS's conclusions is not relevant in this §401 proceeding. Note <i>at this point, VNRC withdrew the lines referred to here, namely, Daniels [D], p. 14, ll. 10-26.</i>
VNRC 67	Peacock	p. 4, ll. 21-23	With the striking of the word " <i>extreme</i> ", the objection is <b>overruled.</b>
VNRC 68 ANR 21	Peacock, rebuttal	p. 8, ll. 13-24 p. 9, ll. 1-3 <b>p. 8, ll. 13 through p. 9, ll. 3</b>	<b>Sustained.</b> The flow rates are to be determined by the regulatory agency, not the applicant. Peacock's legal interpretation of the Water Quality Standards and what they require is irrelevant.
VNRC 69 ANR 22	Peacock	p. 10, ll. 1-8 p. IO, ll. 3-8	<b>Sustained.</b> The conclusions of the draft environmental assessment are not binding upon the Board in a §401 proceeding and are thus irrelevant.
VNRC 70	Peacock	p. 11, ll. 13-18	<b>Sustained.</b>
VNRC 71	Peacock	p. 11, ll. 23-24 p. 12, ll. 1-8	<b>Overruled.</b>
VNRC 72 ANR 23	Peacock	p. 12, ll. 9-15 p. 12, ll. 9-13	<b>Sustained per preliminary ruling.</b>
VNRC 73 ANR 24	Peacock	p. 12, ll. 16-24 p. 13, ll. 1-14 p. 12, ll. 16-24 p. 13, ll. 1-14	<b>Sustained.</b>

<u>Objection</u>	<u>Exhibit Number</u>	<u>Page &amp; Line Numbers</u>	<u>RULING</u>
VNRC 74 <b>ANR 25</b>	Peacock	p.13, ll. 20-24 p.14, ll. 1-3 <b>p. 13, l. 24 through p. 14, 1.3</b>	<b>Sustained.</b> Peacock's views on recreational boating, and whether it should be considered a component of water quality is a legal conclusion and is irrelevant.
VNRC 75	Wallin, J.A., rebuttal	All testimony & exhibits	<b>Overruled.</b> As with <b>Wallin's</b> direct testimony, it would be prejudicial at this juncture to exclude all of <b>Wallin's</b> rebuttal testimony purely on <b>VNRC's</b> contention that he is not a qualified expert witness.
<b>VNRC 76</b>	Wallin	p.2, ll. 22-24 P.3, ll. 1-3	<b>Overruled.</b>
VNRC 77	Wallin	p.3, ll. 3-5	<b>Sustained.</b>
VNRC 78	Wallin	p.3, ll. 16-20	<b>Sustained.</b>
VNRC 79 & VNRC 80	Wallin	p. 3, ll. 20-23 p. 3, ll. 23-24 and p.4, 1	<b>Sustained.</b>
VNRC 81	Wallin	p.4, ll. 17-19	<b>Objection is withdrawn.</b>
<b>VNRC 82</b>	Wallin	p.5, ll. 7-8	<b>Overruled.</b>
VNRC 83	Wallin	p.5, ll. 12-16	<b>Sustained.</b>
<b>VNRC 84</b>	Wallin	p.6, ll. 13-18	<b>Overruled.</b>



<u>Objection</u>	<u>Exhibit Number</u>	<u>Page &amp; Line Numbers</u>	<u>RULING</u>
VNRC 85	Wallin	p.7, ll. 7-12	<b>Overruled.</b> <i>Strike "trying to make apples out of oranges by"</i> so the sentence now reads: "ANR, which chose not to participate in the study, is now analyzing the results as an optimum habitat study when, in fact, it was designed to determine the point of diminishing return (the inflection point) between leakage and the ANR prescribed 70 cfs minimum flow.
VNRC 86	Wallin	p.8, ll.9-10	<b>Objection is withdrawn.</b>
VNRC 87 & VNRC 88	Courtney, Eliz. Rebuttal testimony CVPS-36	p. 1, ll. 12-14  p. 1, ll. 14-21 p. 2, l.1	<b>Sustained.</b>  <b>Sustained.</b>
VNRC 89	Courtney	p.2, ll. 10-15	<b>Objection is overruled</b> , except line 14 and the first word of line 15. The remaining objection is <b>sustained</b> . <i>Strike</i> the reference "nor was it a criteria of the FERC requests".
VNRC 90	Courtney	p.3, ll. 3-7	<b>Overruled.</b>
VNRC 91	Ritzi, Chas. Rebuttal testimony CVPS-37	p.2, ll. 14-17	<b>Objection is withdrawn.</b>

<u>Objection</u>	<u>Exhibit Number</u>	<u>Page &amp; Line Numbers</u>	<u>RULING</u>
VNRC 92	Ritzi	p. 2, ll. IS-20	<b>Overruled</b> , except strike, “the only” <b>and substitute “a”</b> . Thus the sentence now reads: “2. Some VNRC testimony clearly advocates dam removal as a way to provide high quality habitat.”
VNRC 93	Ritzi	p.3, ll. 1-4	<b>Sustained.</b>
VNRC 94	Ritzi	p.3, ll. 5-20 p. 4 ll. 1-7	<b>Sustained.</b>
<i>ANR 26</i>		p.3, l. 5 - <i>p.4, l. 7</i>	
VNRC 94a	Ritzi	p. 3, ll. 16-20	<b>Sustained.</b>
VNRC 95	Ritzi, Chas. rebuttal testimony	p.4, l. 20 p.5, ll. 1-2	<b>Overruled.</b>
VNRC 96	Ritzi	p.5, ll. 3-8	<b>Sustained.</b>
VNRC 97	Ritzi	p.6, ll. 19-23	Overrule as to lines 19-21 up to (and including) the word fluctuated. <b>Sustain</b> as to the remainder <b>Strike</b> the portion stating, “and there are no potential negative impacts to habitat, only an enhancement in comparison to existing conditions.
VNRC 98	Ritzi	p.8, ll. 7-8	Overruled.

<u>Objection</u>	<u>Exhibit Number</u>	<u>Page.&amp; Line Numbers</u>	<u>RULING</u>
VNRC 99	Ritzi	p.9, ll. 2-5	<b>Sustained</b> as to last ½ of line 4 and line 5 <b>striking</b> the statement, “Again, I conclude this area to be high quality habitat. Overruled as to line 2, 3 and the first ½ of 4.
VNRC 100	Ritzi	p.9, ll. 6-9	<b>Sustained</b> as to the last ¾ of line 9 <b>striking</b> the statement, “Once again, I consider this to be high quality habitat.” Overruled as to lines 6-8 and the first ¼ of line 9.
VNRC 101	Ritzi	p.9, ll. 10-14	<b>Overruled.</b>
VNRC 102	Ritzi	p.10, ll. 10-18	<b>Overruled.</b>
VNRC 103	Ritzi	p.10, ll. 19-20 p.11, l.1	<b>Overruled.</b> “Lay recreation ruling”.
VNRC 104	Ritzi	p.11, ll. 5-12	<b>Overruled.</b>
VNRC 105	Ritzi	p.11, ll. 15-19	<b>Overruled.</b>
VNRC 106	Ritzi	p.12, l. 3	<b>Overruled.</b>
VNRC 107 ANR 27	Ritzi	p. 12, ll. 3-20 p. 12, ll. 5-6	<b>VNRC withdraws its objection.</b> <b>ANR objection is overruled.</b>
VNRC 108	Ritzi	p.13, ll. 1-8	<b>Overruled.</b>

<u>Objection</u>	<u>Exhibit Number</u>	<u>Page &amp; Line Numbers</u>	<u>RULING</u>
VNRC 109	Ritzi	p.13, ll. 9-10	<b>Sustained.</b>
VNRC 110	Ritzi, Chas.	p. 13, ll. 11-12	<b>Overruled.</b> Ritzi's testimony on the subject of recreation and swimming safety is not a matter within his expertise. See <i>Lay Opinion Ruling</i> .
VNRC 111	Ritzi	p. 13, ll. 15-17	<b>Overruled.</b>
VNRC 112	Ritzi	p. 18, ll. 11-13	<b>Sustained.</b>
VNRC 113	Ritzi	p. 18, l. 20 p.19, l. 1	<b>Sustained</b> beginning with "and they certainly"; Strike the statement, "and they certainly do not require the recreation of pre-dam much less "aboriginal conditions."
VNRC 114	Ritzi	p. 19, l. 1-3	<b>Overruled.</b>
VNRC 115	Ritzi	p.19, ll. 10-20 p. 22, ll. 1-14	<b>P. 19</b> , sentence. 1: <b>sustained</b> ; sentence 2: <b>overruled</b> ; sentences 3,4 & 5: <b>sustained</b> ; sentence 6: <b>overrule</b> but exclude, "as Dr. Daniels seems to imply." <b>P.20</b> , sentences 1,2 & 3: <b>sustained</b> . <b>P.20</b> , line 8 through p.21, line 17 relating Ritzi's views on Daniels and Power testimony: <b>sustained</b> . <b>P.21</b> , line 18 - p.22, line 1: <b>sustained</b> , but only as to sentence beginning, "Again,...". <b>P.22</b> , first full sentence ending at line 3: <b>Sustained</b> <b>P.22</b> , sentence beginning on line 3: <b>overruled</b> . <b>P.22</b> , sentence beginning on line 5: <b>sustained</b> . <b>P.22</b> , sentence beginning on line 9 through line 14: <b>overruled</b> .

<u>Objection</u>	<u>Exhibit Number</u>	<u>Page &amp; Line Numbers</u>	<u>RULING</u>
VNRC 116	Ritzi	p. 26, ll. 7-8	<b>Sustained.</b>
VNRC 117	Ritzi	p. 28, il. 11-15	<b>Sustained</b> as to lines 11-15 (beginning with the phrase, "here we have...").
ANR 27		<i>p.28, ll. 8-15</i>	<i>Overruled as to lines 8- 11.</i>
VNRC 118	Ritzi	p.28, ll. 18-19	<b>Overruled.</b>
VNRC 119	Ritzi	p. 29, ll. 10-20 p. 30, ll. 1-6	Overruled with "lay recreation" limitation.

#### **VNRC and ANR Objections to CVPS's Surrebuttal Testimony and Exhibits**

<u>Objection</u>	<u>Exhibit Number</u>	<u>Page &amp; Line Numbers</u>	<u>RULING</u>
VNRC 120	Peacock, Bruce surrebuttal testimony CVPS-38	p.1, ll. 13-19	<b>Sustained.</b>
VNRC 121	Peacock, Bruce surrebuttal testimony	p.1, l. 20	Objection is <b>withdrawn.</b>
ANR 28		<i>P. 1, 1.20 - p. 3, 1.5</i>	<b>Sustain per preliminary rulings on economics and societal effects</b>
VNRC 122	Peacock	p.1, ll. 20-25 p. 2, ll. 1-8	<b>Sustained</b> (included in prior ruling).
VNRC 123	Peacock	p. 2, ll. 9-24 p. 3, ll. 1-5	<b>Sustained</b> (included in prior ruling (ANR 28)).

<u>Obiection</u>	<u>Exhibit Number</u>	<u>Page &amp; Line Numbers</u>	<u>RULING</u>
VNRC 124 & VNRC 125	Peacock Peacock	p. 3, ll. 6-10 p. 3, ll. 11-23	<b>Sustained</b> as to 13-23. <b>Overruled</b> as to 6-13.
VNRC 126	Peacock	p. 3, l. 24 p. 4, line 1	<b>Sustained.</b>
VNRC 127	Peacock	p. 4, ll. 2-4	<b>Sustained.</b>
VNRC 128	Peacock	p. 4, ll. 5-20	<b>Overruled.</b>
VNRC 129	Peacock	p. 4, l. 21 - p. 5, l. 3	<b>Overruled.</b> This is an instance where both <b>the Road Map</b> & the <b>Lay Aesthetics</b> rulings apply.
VNRC 130	Peacock	p. 5, ll. 3-6	<b>Sustained.</b>
VNRC 131 ANR 29	CVPS-39		<b>Sustained per preliminary ruling.</b> <i>Refer to Ruling on objection VNRC-47</i> <i>The parties have agreed to develop a joint exhibit with revised columns.</i>
VNRC 132 ANR 30	CVPS-40		<b>Sustained per preliminary ruling.</b>
VNRC 133	Ritzi, Chas. surrebuttal testimony	P. 1, ll. 13-17	<b>Overruled.</b>
VNRC 134	Ritzi, Chas. surrebuttal testimony	p. 1, ll. 13-17 p. 2, ll. 1-4	<b>Overruled,</b> same objection as above.
VNRC 135	Ritzi	p. 2, ll. 2-4	<b>Overruled.</b>
VNRC 136	Ritzi	p. 3, l. 1	<b>Sustained.</b> Strike " <i>only Mr. Daniels' conjecture</i> ".

## Rulings on the VNRC Objections to the Testimony of the Agency of Natural Resources

VNRC made four objections to the testimony of the Agency of Natural Resources. The Agency agreed to withdraw three items of testimony objected to. The Chair of the Water Resources Board ruled on the remaining objection. CVPS objected in two instances to ANR's withdrawal of testimony proffered by Rod Wentworth. CVPS claimed that, "it is left without a piece of testimony that it anticipated, and expected, and in fact, found in the Agency testimony." Notwithstanding, the Chair allowed the withdrawal in all instances. Where CVPS has objected to ANR's withdrawal, it is specifically noted in the following log.

<u>Objection</u>	<u>Exhibit Number(s)</u>	<u>Page(s) and Line No.</u>	<u>RULING</u>
VNRC 137	ANR 1-Cuetoj[D]	p. 9, last 4 words of line 19, p. 10, first 2 words of line 1	ANR withdraws the testimony consisting of the phrase, "enhancing the value of the power produced."
VNRC 138	ANR 18-Wentworth[D]	p. 22, lines 19-20	ANR withdraws the testimony consisting of the sentence, "Since the powerhouse discharges directly into the Milton station impoundment, there are no riverine habitat issues below it." CVPS objects to withdrawal of this testimony. That objection is overruled.
VNRC 139	ANR 18-Wentworth[D]	p. 26, line 18-21	Overruled as to first portion, line 18 through first word of line 21. Sustained as to the full sentence on line 21. Strike the following: "There is a financial benefit to preserving this rating."
VNRC 140	ANR 18-Wentworth[D]	p. 30, line 19-21	ANR withdraws the testimony consisting of the sentence, "Since the powerhouse discharges directly into the Peterson station impoundment, there are no riverine habitat issues below it." CVPS objects to withdrawal of this testimony. That objection is overruled.

### Rulings on CVPS's Objections to the Testimony of VNRC and ANR

<u>Objection</u>	<u>Exhibit Number(s)</u>	<u>Page(s) and Line No.</u>	<u>RULING</u>
CVPS#V 1	VNRC-3 Weigel[D]	p. 7, ll. 7-11	Sustained. Hearsay, no foundation, lack of personal knowledge.
CVPS#V 2	VNRC-5 through VNRC-13  Photographs appended to Weigel testimony		At the September 12th oral argument the objection to these photographs was <b>Sustained</b> unless a foundation could be established. The Chair indicated that Circa 1890's is not enough. There must be some foundation to allow the admission of these photographs. Some indication of when and where - need not present the photographer but VNRC must provide some context for these photos.
CVPS#V 3	VNRC-29 through VNRC-34 Photographs appended to Jenkins' testimony.		<b>Sustained. See above,</b>  <i><b>NOTE: At the October 24th oral argument, VNRC failed to offer any additional foundation, and the above objections to VNRC photograph exhibits are <u>sustained</u>.</b></i>
CVPS#V 1	VNRC-36		<b>Overrulgd.</b>



## Objections Pertaining to Dam Decommissioning and Removal

<u>Objection</u>	<u>Exhibit Number(s)</u>	<u>Page(s) and Line No.</u>	<u>RULING</u>
CVPS#III 1	VNRC-1 Daniels[D]	p.20, ll. 7-9.	<b>Sustained.</b>
CVPS#III 2	VNRC-25 Daniels[R]	p. 8, ll. 24-26 through p.9, ll. 1-12	<b>Overruled.</b>
CVPS#III 3	VNRC-25 Daniels[R]	p.10, ll. 10-13	Sustained <b>in part. Strike</b> “So... that dam removal should be seriously considered.” <b>Overruled</b> as to remainder. The testimony now reads: “In the case of the Peterson facility, the impacts of the dam on the entire aquatic assemblage that would naturally use the river have been severe.”
CVPS#III 4	VNRC-35 Daniels[SR]	p.2, ll. 14-16	<b>VNRC withdrew</b> the testimony objected to
CVPS#III 5	VNRC-37 Power[SR]	p. 2, ll. 1-2	VNRC <b>withdrew</b> that portion of the testimony objected to, consisting of the phrase, “...dam removal at the Peterson Dam.”
CVPS#III 6	VNRC-37 Power[SR]	p.5, ll. 2-3	<b>Overruled.</b>
CVPS#III 7	VNRC-40 Parsons[SR]	p. 2, l.26 - p.3, l.1.	<b>VNRC withdrew</b> the phrase, “if the Water Resources Board finds that removal of the dam is not appropriate..”

The foregoing is hereby ordered.

Dated at Montpelier, Vermont, this <sup>6<sup>th</sup></sup> day of ~~November~~ ~~October~~, 1995.



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William Boyd Davies  
Chair, Water Resources Board