

State of Vermont  
WATER RESOURCES BOARD

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

MEMORANDUM OF DECISION

VNRC's Motion for Modification and Clarification of Preliminary Ruling

This decision pertains to a Motion for Modification and Clarification of Preliminary Ruling filed by the Vermont Natural Resources Council (VNRC). As set forth below, the Board denies VNRC's request for modification and affirms its Preliminary Rulings of August 15, 1995.

I. BACKGROUND

The Board issued its Preliminary Ruling on the Admissibility of Evidence and Scope of Review on August 15, 1995. On August 30, 1995, VNRC filed a motion seeking modification and clarification of the Board's rulings which sustained Central Vermont Public Service Corporation's (CVPS) 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 for Modification and Clarification on September 13, 1995. The Agency of Natural Resources (ANR) filed a Response to VNRC's Motion for Modification and Clarification on September 12, 1995 supporting VNRC's requests. Oral Argument was held on October 11, 1995. While ANR rested on its written filing, both CVPS and VNRC were represented by counsel on October 11 and presented arguments to the Board.

II. DISCUSSION

Preliminary Rulings, though they relate to issues preliminary to a hearing in a contested case, are nevertheless final orders of the Board. The Water Resources Board's Rules of Procedure acknowledge that once entered, such pre-hearing orders shall control the subsequent course of the proceeding, unless modified at the hearing to prevent manifest injustice. Water Resources Board Rules of Procedure, Rule 24(B). In this instance, VNRC has moved to modify the Board's Preliminary Rulings prior to a hearing on the merits. The Board has previously ruled that it has the implied authority to modify a Preliminary Order prior to such hearing where a moving party can demonstrate that such modification is necessary "to prevent manifest injustice." In re: Cavendish Hydroelectric Project (CVPS), Docket No. WQ-93-08 (May 19, 1994).

In its memorandum in support of its Motion for Modification and Clarification, and in oral argument, VNRC failed to demonstrate how the Board's preliminary rulings will result in manifest injustice if not modified. VNRC merely revisited several previously proffered arguments adding

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citations to new authority

In both its memorandum, and at oral argument. VNRC shifted the focus of the Board's inquiry to its allegation that the Preliminary Ruling, left unmodified, would result in "manifest error." Without ruling on the propriety of equating manifest error with manifest injustice, the Board finds no manifest error in its Preliminary Rulings. A manifest error is an error which is obvious on its face. Typically this is a clerical mistake or a change in the equitable position of the parties, such as the double recovery by the plaintiff which occurred in Dudley v. Snyder, 140 Vt. 129 (1981), the Vermont case cited as supporting authority by VNRC. The Board's rulings sustaining CVPS's objections to evidence on dam decommissioning and removal and pre-dam conditions are the results intended by the Board and therefore stand unmodified.

Nevertheless, it is apparent that the parties are reading the Board's rulings far too broadly. The Board notes that while it declines to modify its ruling in Part II.E., it has not conceded any authority to place conditions on the issuance of a §401 water quality certificate. Even if the Board lacks authority to order dam decommissioning or removal, it may impose conditions in a §401 certificate necessary to achieve, maintain and possibly enhance existing beneficial uses and values, and the practical effect of such conditions could result in the termination of the continued operation of a dam. Also, evidence of historic river conditions, to the degree that such evidence may inform the Board concerning what might be necessary to achieve, maintain, and possibly enhance present beneficial uses and values, may be admissible in this proceeding. However, the burden rests on the sponsor of such evidence to prove its relevancy.

**III. ORDER**

VNRC's Motion for Modification and Clarification of Preliminary Ruling is hereby denied.

Dated at Montpelier, Vermont, this 18th day of October, 1995

Vermont Water Resources Board  
by its Chair

  
William Boyd Davies

Concurring:  
William Boyd Davies  
Stephen Dycus  
Ruth Einstein  
Jane Potvin