

State of Vermont
WATER RESOURCES BOARD

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

PRELIMINARY RULINGS

Admissibility of Evidence and Scope of Review

This order relates to various motions, objections and responses filed by the parties to dated proceeding in anticipation of and preliminary to a de novo hearing with respect to a Section 401 water quality certification (401 certification) issued by the ANR for four hydroelectric facilities on the Lamoille River (the Project) owned and operated by Central Vermont Public Service Corporation (CVPS).

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 (VNRC's Motion). VNRC supplemented its motion on June 16, 1995, by filing objections with the Board (VNRC's Objections). Central Vermont Public Service (CVPS) and the Agency of Natural Resources (ANR), each filed objections with respect to the other parties' prefiled testimony and evidence on June 16, 1995 (CVPS's Objections and ANR's Objections). On June 30, 1995, VNRC, CVPS, and the ANR each filed responses to the various objections (VNRC's, CVPS's, ANR's Responses).

On July 13, 1995, the Board held oral argument with respect to the parties filings. The Board deliberated on July 20 and August 3, 1995. The Board's rulings with respect each of the parties substantive motions and objections follow.

II. ORDER

A. Objections to evidence addressing economic and societal impacts

VNRC's Motion requesting exclusion of evidence offered by CVPS respecting economic and so-called societal impacts associated with the proposed operation of the Project is granted. The Board rules that evidence offered by CVPS, and by any other party in response, related to economic costs, energy issues, and non-water quality environmental effects associated with the Project is irrelevant, immaterial and prejudicial. 3 V.S.A. § 810(1); Board Rules of Procedure, Rule 27(B).

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Such evidence is beyond the scope of the Board's authority to review '401 certifications' and the prejudice of such evidence outweighs any probative value it may have. Therefore, such evidence must be excluded. Only evidence which is germane to determining whether **the Project meets** the Vermont Water Quality Standards (VWQS) and other applicable state law pertaining to water quality concerns is relevant to the review of a 401 certification.

It matters not that the ANR may have requested economic information from CVPS as part of its review of the Project. Such information may have been necessary for the Secretary of ANR to develop the state's position before the Federal Energy Regulatory Commission, authorized by 10 V.S.A. § 1004, but it is irrelevant to the Board's review of the Project under the VWQS.

Therefore, the Board directs its Chair to exclude any testimony or exhibits offered through CVPS's witnesses, Bruce M. Peacock, Jeffrey A. Wallin, and others, which address economic and societal impacts. Likewise, any testimony or exhibits offered by ANR or VNRC addressing economic and societal impacts, either in direct or responsive filings, shall be excluded.

B. Objections to VNRC's evidence based on VNRC's purported lack of standing

The Board overrules CVPS's objection that VNRC is not an "aggrieved person" for the purpose of raising certain issues set forth in its Notice of Appeal on grounds that it did not address these issues in the proceeding below. See 10 V.S.A. § 1024(a).

VNRC was declared to be a party of right in the Prehearing Conference Report and Order issued by the Chair on September 26, 1994. In a de novo proceeding, the decisionmaker is required to hear the matter as if there has been no prior proceeding below, and a party of right may present any evidence that is relevant to

¹ But see, VWQS § 1-03(C) (Anti-Degradation Policy: Protection of High Quality Waters). This provision provides for application of an economic and social impacts balancing test in determining whether a limited reduction in the higher quality of a high quality water should be allowed. However, no party has argued that § 1-03(C) is applicable in this proceeding.

the issues within the general scope of the Notice of Appeal. 3 V.S.A. § 809(c); In re Killington, Ltd., 159 Vt. 206, 214-15 (1992). CVPS had an opportunity at the time of the Prehearing Conference and in response to the draft Prehearing Conference Report and Order to raise its objections to VNRC's standing and statement of issues. It did not do so, nor did it seek timely review of the Chair's order. Board Rules of Procedure, Rules 21 and 24. Therefore, CVPS is bound by the terms of the Prehearing Order. It cannot at this late date in the proceeding use a so-called evidentiary objection to attack both VNRC's party status and the scope of its participation in this proceeding.

C. Objections to VNRC's evidence for failure to raise before the ANR issues set forth in its Notice of Appeal

The Board overrules CVPS's objections to VNRC's evidence on grounds that VNRC failed to raise certain issues before the ANR which VNRC has identified in its Notice of Appeal.

The Board's de novo consideration of a request for 401 certification requires it to apply the Vermont Water Quality Standards (VWQS) and other applicable requirements of state law. In conducting such a review on appeal, the scope of the proceeding is limited to consideration of "those issues specified in the ... notice of appeal unless the Board determines that substantial inequity or injustice would result from such limitation. Board Rules of Procedure, Rule 18(D).

The Board agrees that as a matter of sound public policy and law, those interested in the 401 certification of a hydroelectric facility should participate and raise their issues at the earliest possible opportunity in the review process before the ANR. However, the proceeding before the ANR is not a contested case with the full panoply of rights provided by the Vermont Administrative Procedure Act for the establishment of party status and the development of a record. Therefore, the Board will not unduly restrict the issues raised by an appellant at the expense of conducting a thorough review of the Project in light of federal and state water quality requirements. In re Killington, Ltd., at 214-25.

In its Notice of Appeal, VNRC asserts that the ANR erred in failing to apply certain legal standards and in allegedly considering irrelevant evidence. In a de novo proceeding, claims of error related to the ANR's omissions or inappropriate application of legal standards are relevant to the extent that they illumi-

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nate what legal standards and evidence are relevant to the Board's determination of the matter under appeal.

In making this ruling, the Board specifically rejects CVPS's argument that Rule 30 of the Board's Rules of Procedure should be considered in defining the scope of the evidence on appeal. Rule 30 applies exclusively to those appeals which the Board is required by law to hear on the record, not to those which it is expressly directed by statute to hear de novo. Compare 3 V.S.A. § 2876 with 10 V.S.A. § 1024(a).

D. Objections to evidence regarding fish passage, recreation and aesthetics

The Board overrules CVPS's objections to evidence submitted by both the ANR and VNRC related to fish passage, recreation and aesthetics. There are two reasons for doing so.

First, CVPS relinquished the very claims that it makes in its objection because early in this proceeding it withdrew those portions of its appeal related to the authority and jurisdiction of the ANR to address fish passage, recreation and aesthetics in the context of 401 certification reviews. June 27, 1994, letter from Kenneth Picton to William Bartlett, at 1. Second, CVPS's objections are without merit.

Clearly, consideration of project impacts on instream beneficial uses and values, including impacts on recreation, good aesthetic value, and high quality habitat for aquatic biota, fish and wildlife, is within the scope of the Board's 401 certification review authority. See PUD No. 1 of Jefferson County v. Washington Department of Ecology, ___ U.S. ___, 114 S.Ct. 1900, 1910 (1994). Therefore, even CVPS concedes that some such evidence is relevant to the Board's inquiry. The question which remains unanswered is the extent to which fish passage, portage, and public aesthetic enjoyment of waters are directly related to issues of stream flow and water quality.

The Board in an earlier 401 certification appeal took the view now proffered by CVPS that consideration of recreation and aesthetics is confined to an evaluation of instream water quality. Preliminary Ruling, In re Appeal of Richard Balasur, Docket No. WQ-86-06 (Feb. 18, 1987); decision vacated for lack of jurisdiction, In re: Richard Balaour, No. s22-92 OeC (Vt., Orange Sup. Ct. Jan. 25, 1993). However, because the Board never adjudicated the merits of the Balaour appeal, it did not have the opportunity to consider what evidence was relevant to its evalu-

ation of instream impacts. Therefore, the Board declines to rule at this time that evidence offered by ANR and VNRC concerning fish passage, recreation and aesthetics is irrelevant or beyond the Board's authority, especially in light of case law since the Board's ruling in Balaqur.

E. Objection to evidence respecting dam decommissioning and removal

The Board sustains CVPS's objection to VNRC's evidence on possible decommissioning and removal of the Peterson dam.

The Board has no authority under 10 V.S.A. § 1004 and 1024(a) to order decommissioning and removal of a hydroelectric facility. The Board may deny a 401 certification for a project if it finds that it cannot meet the VWQS and other appropriate requirements of state law, and the FERC is then obligated to deny a license or permit. 33 U.S.C. § 1341(a)(1); CWA § 401(a)(1). But the Board may not require a dam's decommissioning or removal as part of a 401 certification order. Therefore, evidence regarding dam decommissioning and removal is irrelevant to this proceeding.

The Board directs its Chair to exclude testimony offered by VNRC witnesses Robert A. Daniels and Geoffrey Power to the extent that it addresses dam decommissioning and removal. However, to the extent that the witnesses' testimony is germane to the issue of whether the Project complies with the VWQS and other appropriate requirements of state law, the Board rules that such testimony is relevant and admissible.

F. Evidence of Pre-Dam Conditions

The Board sustains CVPS's objection to evidence offered by VNRC respecting pre-dam conditions in the Lamoille River.

For the Board's ruling rejecting the application of pre-dam water conditions to the evaluation of an existing hydroelectric facility in a 401 certification proceeding, the parties are referred to the Board's Memorandum of Decision, In re: Passumusic Hydroelectric Project, Docket No. WQ-94-09 (Aug. 15, 1995).

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G. Other Evidentiary Objections

To the extent that any of the parties' other evidentiary objections are not disposed of by this Order, they will be addressed in rulings issued by the Chair, following argument by the parties, and prior to a hearing on the merits.

Dated at Montpelier, Vermont, this 15th day of August, 1995.

Vermont Water Resources Board
by its Chair



William Boyd Davies

Concurring:
William Boyd Davies, Chair
Stephen Dycus
Ruth Einstein
Gail Osherenko
Jane Potvin