

State of Vermont
WATER RESOURCES BOARD

In re: Passumpsic Hydroelectric Project,
Docket No. WQ-94-09

MEMORANDUM OF DECISION

**Interpretation of the term "background conditions"
as used in the Vermont Water Quality Standards**

On March 3, 1995, the Vermont Natural Resources Council (VNRC) filed a Motion for Preliminary Ruling asking the Water Resources Board (Board) to rule that, for purposes of water quality certifications of hydroelectric dams, the term "background conditions" in the Vermont Water Quality Standards (VWQS) means pre-dam conditions. As explained below, the Board rejects VNRC's interpretation of the VWQS and determines that the term "background conditions," in the context of this appeal, does not mean pre-dam conditions.

I. BACKGROUND

On March 3, 1995, VNRC filed with the Board the above-referenced Motion for Preliminary Ruling. On March 20, 1995, ANR and CVPS each filed memoranda in response to VNRC's motion. On March 28, 1995, CVPS filed written comments in response to the ANR's filing of March 20.

Oral argument on VNRC's Motion for Preliminary Ruling was held on April 18, 1995. Those presenting argument were VNRC, CVPS, and the ANR. VNRC and CVPS filed post-hearing memoranda on April 25, 1995. On that same date, the ANR filed case decisions to supplement the other parties' filings. On May 4, 1995, VNRC filed written comments in response to CVPS's filing of April 25.

The Board deliberated with respect to this matter beginning on May 31, 1995. This matter is now ready for decision.

II. ISSUE

Does the term "background conditions" mean pre-dam conditions for purposes of application of the VWQS in 401 certification proceedings for hydroelectric dams.

III. DISCUSSION

The term "background conditions" appears at Section 1-01(B)(6) in the 1991 VWQS.¹ That section states:

Background conditions means conditions that exist in the absence of human or cultural influences or conditions due to human or cultural influences that are not subject to regulation under the Act.

The term "Act" is defined in the VWQS as the Vermont Water Pollution Control Act, 10 V.S.A. ch. 47. 1991 VWQS § 1-01(B)(2). The term "background conditions" appears throughout the VWQS in various contexts, but most notably in those sections related to the Anti-Degradation Policy and specific water quality criteria.²

VNRC argues that the term "background conditions" should be interpreted to mean those conditions that existed prior to the construction of a dam -- in other words, pre-dam conditions. Many hydroelectric facilities in Vermont, including the four facilities operated by CVPS that are the subject of this proceeding, have been used for the generation of electrical power since the 1920s, if not before.

1 In its Motion for Preliminary Ruling (March 3, 1995), VNRC cites and quotes passages from the 1994 VWQS (adopted July 12, 1994, and effective Aug. 1, 1994). However, the rules applicable to the present appeal are the 1991 VWQS (adopted April 17, 1991). See 1994 VWQS, § 1-01(A)(2) ("Concerning any application filed with the Secretary, the Water Quality Standards effective since May 27, 1991, shall apply to all applications that are filed before the effective date of these rules."). The application at issue in this appeal was filed on June 21, 1993. All subsequent citations to the VWQS refer to the 1991 rules unless otherwise expressly noted.

2 See, for examples, 1991 VWQS § 1-03(A) (Anti-Degradation Policy, General Policy); § 3-01(A)(1) (Limited Waiver of Water Quality Criteria, Background Conditions); § 3-01(B)(2)(b) and (c) (General Criteria, Temperature); and § 3-01(B)(3)(a) (General Criteria, Phosphorus).

A. A "plain meaning" reading of Section 1-01(B)(6)

VNRC maintains that a "plain meaning" construction of the term "background conditions" supports a pre-dam interpretation of of § 1-01 (B)(6) of the VWQS. VNRC asserts that the "construction of dams on free-flowing rivers are 'human or cultural influences' on the 'conditions' of a river" and, further, that those dams requiring 401 certifications are subject to "regulation under the Act." VNRC's Motion for Preliminary Ruling at 1 (March 3, 1995) (hereinafter referred to as "VNRC's Motion"). Therefore, VNRC reasons that the term "background conditions" means those water quality conditions present prior to the existence of hydroelectric facilities, no matter when those facilities were constructed.

The plain meaning rule is the primary rule of construction used by courts and administrative tribunals in construing administrative regulations as well as statutes. Slocum v. Department of Social Welfare, 154 Vt. 474, 478 (1990). There are, however, limits to the application of the plain meaning rule. When a regulation is ambiguous in its parts or its application would lead to absurd results, a decisionmaker must turn to other aids to construction. These include, but are not limited to, consideration of the purpose and legislative history of the regulation, consideration of the sequence and significance of amendments, and consideration of the regulation as a whole, with an eye toward harmonizing its various provisions. Id. at 478-482; see also, In re R.S. Audley, Inc. 151 Vt. 513, 517 (1989).

Indisputably, dams and various other impoundments are "human or cultural influences" on a river regime. Moreover, the presence and operation of such facilities usually influence, among other things, the amount of dissolved oxygen, the temperature, and the turbidity of waters both upstream and downstream of the facility. Such facilities may have significantly altered historical riverine habitats, converting many to lacustrine ecosystems. Indeed, it is possible that most if not all long-established dams, reservoirs, public water supplies, and other impoundments in Vermont would fail to meet one or more specific water quality criteria in the VWQS if they were to be evaluated using a pre-dam interpretation of the term "background conditions. Therefore, most existing facilities requiring 401 certifications as a condition of federal approval, whether or not used for the generation of electricity, would be subject to state enforcement action and removal. ANR Memorandum in Response to VNRC Motion for Preliminary Ruling at 3-5 (March 20, 1995) (hereinafter referred to as "ANR's Memorandum.")

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It is not reasonable to assume that the Legislature, in enabling the Board to adopt water quality standards, including water quality classifications, and in authorizing the Secretary of ANR to enforce them, intended such a result. Given that these same facilities may actually contribute to and even enhance beneficial values and uses recognized in the classification management objectives for the particular river reaches involved, the Board concludes that general application of a pre-dam interpretation of the term "background conditions" would lead to absurd results and is not supported by law or sound public policy.

The federal government has preempted the states in the permitting of hydroelectric facilities, and the ANR's and Board's limited authority to evaluate and review such facilities for conformance with the VWQS and other "applicable state law" is largely derived from federal authority. State acceptance of this limited delegated authority was accomplished through amendment of chapter 41 (Regulation of Stream Flow), not chapter 47, of Title 10 of the Vermont Statutes Annotated. Therefore, a "plain meaning" reading of § 1-01(B)(6) leads to the conclusion that hydroelectric facilities, like other impoundments requiring 401 certifications, are not subject to "regulation under the Act."

VNRC argues for a broad construction of the term "regulation," one encompassing more than "permitting" or "licensing" of activities resulting in discharges, in order to bring hydroelectric facilities within the ambit of ch. 47. In support of its argument, it points to a definition of the term "regulate" from Black's Law Dictionary.³ VNRC asserts that Black's definition contemplates "application of regulatory provisions" in a very general sense. It contends that certification by the Secretary (or the Board) that a given hydroelectric facility is in conformance with state water quality standards constitutes "regulation under the Act" because the standards themselves were adopted pursuant to the Act. VNRC's Motion at 1-2.

3 VNRC did not identify the edition of Black's Law Dictionary it used for citation. However, it quoted the following definition:

To fix, establish, or control; to adjust by rule or restriction; to subject to governing principles or laws. ... To govern or direct according to rule or to bring under control of constituted authority, to limit and prohibit, to arrange in proper order, and to control that which already exists.

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The Board recognizes that regulation of river flows is key to maintaining and improving water quality in the state. However, it is not prepared to expand the meaning of "regulation under the Act" to encompass the 401 certification of hydroelectric facilities and other impoundments, thereby extending its jurisdiction to condition activities that are clearly not within the state's permitting authority under ch. 47. The Board's earlier attempt to obtain jurisdiction over the review of a hydroelectric facility under ch. 47 was squarely rejected by the court. See Judgment, In re: Georgia Pacific Corporation, Docket No. S-11-90Ec (Meaker, J.) (Aug. 24, 1990). For the Board to now use a definition in the VWQS to accomplish a similar extension of jurisdiction would clearly violate a basic tenet of administrative law -- that an administrative body may not use its rule-making authority to enlarge a restrictive grant of jurisdiction. In re Agency of Administration, 141 Vt. 68, 76 (1982).

This does not mean that the VWQS have no applicability in the review of pre-existing hydroelectric dams, only that VNRC's plain meaning argument does not support its contention that these facilities are subject to regulation like those activities requiring discharge permits under state law. Thus, the Board rejects VNRC's plain meaning interpretation of the term "background conditions."

B. History of the amendment of Section 1-01(B)(6)

VNRC points to the history of the adoption of the definition "background conditions" to support its interpretation of section 1-01(B)(6). It cites an April 24, 1984, staff memo to the Board to support its argument that federally licensed hydroelectric dams which adversely affect water quality are "subject to regulation and management under the VWQS through the water quality certification process" and that such impacts are not to be "accepted as irreversible" in applying those standards. VNRC's Motion at 3.

As the ANR noted in its response to VNRC's Motion, the VWQS were written largely with discharges in mind. ANR Memorandum at 1. The applicability provision of § 1-01(A), for example, states that the VWQS shall apply to all "permit applications" including "applications for the renewal of existing discharges," demonstrating that the Board intended the VWQS to be applied to human and cultural influences subject to regulation under ch. 47 of Title 10, the chapter authorizing the issuance of various discharge permits. In the Anti-Degradation Policy, water quality certifications are distinguished from discharge permits issued pursuant to 10 V.S.A. § 1263. Moreover, under the section

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dealing with hydrology, artificial flow conditions are dealt with separately from natural flow conditions. Section 1-03(B)(2); Section 2-02.

A review of the rulemaking history of the VWQS reveals that prior to the 1984 amendments (effective January 7, 1985), the term "background conditions" did not exist. Instead, the 1978 VWQS used the term "natural origin," defined to mean "that condition which exists in the absence of any direct or indirect human activity." As the staff memo of April 24, 1984, elucidates, the definition, "background conditions," was intended to replace and expand this term by providing that:

those factors which affect water quality can be categorized as being either subject to regulation under the Act (i.e.: a discharge) or not subject to regulation (i.e.: an unusually high or low pH due to local geologic conditions or acid rain).

Quoted in VNRC's Motion at 3.

The Board adopted the definition "background conditions" as part of its comprehensive revision of the VWQS. However, having made the distinction between regulated and non-regulated influences on water quality (i.e.: acid rain), the Board did not go further to articulate in its definition whether there might be regulated activities which adversely influence the water quality of a particular body of surface water but which are not subject to the regulatory jurisdiction of 10 V.S.A. ch. 47. This is because the definition of the term "background conditions" was never designed to define the jurisdictional reach of the VWQS. Being a definition, it simply could not do that. Therefore, in order to understand the application of the term "background conditions" and how it does or does not apply to the review of existing hydroelectric dams, it is important to understand the relation of this term to the whole of the VWQS, including the state water classification scheme, and the classification of waters in the Passumpsic River basin.

C. Reconciling the Parts

VNRC argues that the VWQS "are a blend of State and Federal Law" and that to achieve the purposes of both federal and state requirements, the provisions of chapters 41 and 47 of the Vermont Statutes Annotated must be read "to work in concert" with each other, thereby subjecting hydroelectric facilities to "regulation and management" under the Act. VNRC's Motion at 2-3.

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The Board agrees that hydroelectric projects requiring a 401 certification must be reviewed to determine their conformance with the VWQS and that consideration of "background conditions" is relevant in the review of such projects. However, as stated above, the authority to do so does not derive from 10 V.S.A. ch. 47, but from federal law and 10 V.S.A. ch. 41.

The purpose of the Clean Water Act (CWA) is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. Under Section 303 of the CWA, Vermont, like other states, is required to adopt comprehensive water quality standards (including water quality classifications) establishing water quality goals for intrastate waters, and these water quality standards are subject to review and approval by the Environmental Protection Agency (EPA) for their conformance with the CWA. 33 U.S.C. §§ 1311(b)(1) (C) and 1313(c). The Board has been granted authority by the Vermont Legislature to adopt Vermont's water quality standards pursuant to 10 V.S.A. ch. 47, the Vermont Water Pollution Control Act. 10 V.S.A. § 1253(d); also 10 V.S.A. §905.

The purpose of the VWQS, as VNRC has correctly noted, is "to achieve the purpose of the water classifications" provided for in 10 V.S.A. ch. 47 and enacted by Board rule. 10 V.S.A. § 1253. VNRC's Motion at 2. The classifications established for specific waters of the State in accordance with 10 V.S.A. ch. 47 set water quality management goals for those waters. In making a determination of how to classify a particular body of water, the Board is required to determine whether such classification is in the "public interest." 10 V.S.A. § 1253(d). In making such a determination, the Board must consider, among other things, "existing and potential use of water for public water supply, recreational, agricultural, industrial and other legitimate purposes." (Emphasis added.) 10 V.S.A. § 1253(e)(2).

In classifying the Passumpsic River in 1976, the Board clearly considered the presence and impacts of CVPS's hydroelectric dams, but distinguished their impacts on flow rates from other impacts to the river, most notably, the impacts of various discharges of pollutants. See Order, Proposed Classification for the Passumpsic and Stevens Rivers at 13-16 (Feb. 2, 1976); Classification Order (April 28, 1976). The Board designated the involved reaches as either Class B or Class C, taking into account such factors as existing uses, existing water quality, and the beneficial uses and values to be obtained and maintained. Id. Those portions of the river designated as Class C were subsequently redesignated by act of the Legislature as Class B

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waters.⁴ Nevertheless, the findings supporting the 1976 classification and acknowledging the presence of hydroelectric facilities along the Passumpsic River, support the conclusion that the term "background conditions" cannot and does not mean those conditions which existed prior to the construction and operation of CVPS's impoundments.

CVPS, as the applicant for 401 certifications for its hydroelectric facilities, has an obligation to remediate water quality conditions further degraded by the presence and operation of its dams. Such facilities, in order to conform with the VWQS, must meet not only water quality criteria, taking into consideration the rules' Anti-degradation Policy and present in-stream conditions, but must also attain the designated uses ("beneficial values and uses" as specified in the VWQS) for the public waters in the reaches where those facilities exist. 40 CFR § 131.3(b) and PUD No. 1 v. Washington Dept. of Ecology, 114 S.Ct. 1900, 1911 (1994). For example, if the Board were to determine that one of CVPS's hydroelectric facilities, as it exists and is proposed to be operated, would have an "undue adverse effect" on existing or designated uses, the Board could deny a 401 certification for that particular facility. VWQS § 2-02(B) (Hydrology; Artificial Flow Conditions); see also VWQS § 1-02 (General Policy).

⁴ CVPS argues that at the time that the Passumpsic River was classified by the Board, there were reaches in the areas of the existing dams that were designated Class C waters. See Order, Classification of the Passumpsic and Stevens Rivers (April 28, 1976). Class C waters were defined as "[s]uitable for recreational boating, irrigation of crops not used for consumption without cooking; habitat for wildlife and for common food and game fishes indigenous to the region; and such industrial uses as are consistent with other class "C" uses. 10 V.S.A. § 1252 (1984). However, during the 1991 Adjourned Session, the Legislature amended the water classification statutes generally, eliminating the Class "C" designation and redesignating all waters classified by the Board after July 1, 1971, as "B" waters. 10 V.S.A. §§ 1252 and 1253(b) (Supp. 1994). Therefore, as of the date of the filing of CVPS's applications for § 401 water quality certifications, the Passumpsic River in the areas of its dams was designated Class B waters. See Ftn. 1, supra.

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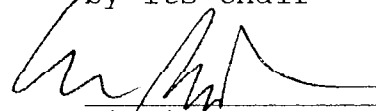
Such an approach is not only supported by the VWQS as a whole and the state water classification scheme in particular, but makes practical sense. The Board is unwilling to speculate concerning the water quality of public waters during the eighteenth, nineteenth, or, for that matter, early twentieth century to establish a benchmark for existing impoundments. Rather, in order to achieve the federal and state goal of protecting and enhancing the quality, character and usefulness of the state's waters, the Board will look at the existing uses and water quality extant at the time that an existing facility is proposed for certification, at the location in the waters of the state where that facility is located, and will consider the specific water quality criteria and beneficial values and uses applicable to that reach of water.

III. ORDER

For the foregoing reasons, it is hereby declared that the term "background conditions" in Section 1-01(B)(6) of the VWQS does not mean pre-dam conditions in the context of this appeal. VNRC's request for a pre-dam interpretation of the term "background conditions" is denied.

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

Vermont Water Resources Board
by its Chair



William Boyd Davies

Concurring:

William Boyd Davies
Stephen Dycus
Ruth Einstein
Jane Potvin