

State of Vermont
WATER RESOURCES BOARD

In re: Passumpsic Hydroelectric Project
Arnold Falls Hydroelectric Project
Gage Hydroelectric Project
Pierce Mills Hydroelectric Project
§ 401 Certifications, Docket No. WQ-94-09

PREHEARING CONFERENCE REPORT AND ORDER

I. BACKGROUND

On June 16, 1994, the Secretary of the Vermont Agency of Natural Resources (Secretary/ANR) issued four § 401 Water Quality Certifications to the Central Vermont Public Service Corporation (CVPS) in connection with CVPS's applications to the Federal Energy Regulatory Commission (FERC) for relicensure of its hydroelectric facilities on the Passumpsic River. The Passumpsic River Project is located at river mile 5.5 on the Passumpsic River in the Village of Passumpsic; the Arnold Falls Hydroelectric Project is located at river mile 9.7 on the Passumpsic River in the Town of St. Johnsbury; the Gage Hydroelectric Project is located at river mile 7.2 on the Passumpsic River about 2.2 miles south of the Village of St. Johnsbury; and the Pierce Mills Hydroelectric Project is located at river mile 15.2 on the Passumpsic River in the Town of St. Johnsbury, two miles upstream of the Village of St. Johnsbury Center.

On July 1, 1994, the Vermont Natural Resources Council (VNRC) appealed the Secretary's decisions to the Water Resources Board; challenging findings, conclusions, and conditions contained in the four certifications. This consolidated appeal was filed pursuant to 10 V.S.A. §§ 1024 and 1004.

On July 27, 1994, VNRC's appeal was deemed complete and docketed as WQ-94-09. On that same day, a Notice of Appeal and Prehearing Conference was sent to persons required to receive notice and on August 17, 1994, it was published in The Caledonia Record, pursuant to Rule 18(C) and 20 of the Board's Rules of Procedure.

Entering timely appearances were CVPS, represented by Kenneth C. Picton, Esq., and the ANR, represented by John B. Kassel, Esq. On August 25, 1995, the Board received a letter from CVPS requesting that the scheduled prehearing conference be rescheduled to a later date and indicating that ANR and VNRC did not object to this request.

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On August 30, 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. Rule 24(A) of the Board's Rules of Procedure. No persons appeared. A Notice of Continued Prehearing Conference was issued on September 21, 1994. The continued prehearing conference was held on November 8, 1994, at 1:30 p.m., at the Water Resources Board's Conference Room, with **Kristina** L. Bielenberg, Esq., presiding. The following persons entered appearances and participated:

Christopher M. Kilian, Esq., for VNRC, appellant
Carole Gaudet, Law Clerk, for VNRC
Mary C. Marzec, Law Clerk, for CVPS
John B. Kassel, Esq., for ANR

On January 11, 1995, a draft Prehearing Conference Report and Order was circulated to the above persons for comment. On January 27, 1995, the Board received timely comments from counsel for appellant VNRC, CVPS, and ANR. A final Prehearing Conference Report and Order is now ready for issuance.

II. DISCLOSURES

At the prehearing conference, the Board's delegate identified the current Board members by name (Chair William Boyd Davies, Stephen Dycus, Ruth Einstein, Gail Osherenko, and Jane Potvin) and their present and past affiliations. It was noted that Ms. Osherenko had formerly been a member of appellant **VNRC's** Board of Directors. 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 hydro-electric project relicensure. The Board's delegate also disclosed that Carole Gaudet, Law Clerk for VNRC, had been a former law clerk of the Water Resources Board.

CVPS's representative requested an opportunity to obtain further disclosures regarding Ms. Osherenko's connections with VNRC. Any party 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 by virtue of **recusal**, pursuant to 10 V.S.A. § 905(1)(5).

III. ISSUES

VNRC seeks de novo review of the Secretary's issuance of § 401 Certifications to CVPS for its four Passumpsic River hydroelectric facilities. VNRC specifically objects to the Secretary's findings and conditions related to **instream** flows and fish passage. In its Notice of Appeal, VNRC identified two alleged deficiencies in the certifications as issued: (1) the ANR failed to provide adequate conditions for **instream** flow in the de-watered segments associated with the projects: and (2) the ANR failed to provide adequate conditions for upstream and downstream fish passage. Notice of Appeal at 2 (IV. (2), (3)).

VNRC also alleges that the Secretary inappropriately considered the economics of power production in determining levels of water quality protection and acted arbitrarily in applying an agency policy for flow setting for hydroelectric by-passes. Notice of Appeal at 2 (IV. (1), (4)). **At the** prehearing conference, counsel for VNRC offered to present legal memoranda and argument on these two issues. Counsel for ANR responded that these questions were not appropriately before the Board, given **that this** proceeding is de novo and not an appellate proceeding based on a review of the record.

Given that 10 V.S.A. § 1024(a) provides that the Board shall hear § 401 certification appeals de novo, the issues that will be considered by the Board in evaluating the involved projects are as follows:

- (1) What **instream** flows in the de-watered segments associated with the projects are required under applicable law?
- (2) What conditions for upstream and downstream fish passage, are required under applicable law?

The Board may consider the following issues if a party offers as evidence the ANR's "special policy" for flow setting in hydroelectric project by-passes or offers evidence or argument on the economics of power production at the involved facilities:

- (3) Whether the economics of power production at the CVPS dams is an appropriate consideration in determining what levels of water quality protection are required to be consistent with state water quality standards applicable to Class B waters?
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- (4) Whether the Board should rely on an ANR "special policy" for flow setting in hydroelectric project by-passes as a basis for establishing flow conditions in the by-passes for the involved projects?

At the prehearing conference, counsel for VNRC agreed to identify which specific findings and conditions in the four certifications are objectionable and to file these as part of its comments in response to the draft prehearing conference report and order. In its comments of January 27, 1995, VNRC identified the following:

- (a) Passumpsic River Hvdroelectric Proiect: Findings, 91-94; Analysis, 97, **101**; Conditions C & G.
- (b) Arnold Falls Hvdroelectric Proiect: Findings, **102-105**; Analysis 107; Condition G.
- (c) Gage Hvdroelectric Project: Findings, 111-114; Analysis 117, 121-122; Conditions C & J.
- (d) Pierce Mills Hvdroelectric Proiect: Findings 98-101; Analysis 103, 107; Conditions C & G.

IV. WITNESSES AND EXHIBITS

At the prehearing conference, counsel for VNRC was not prepared to offer a tentative list of witnesses. He did, however, indicate that VNRC would likely call a biologist, engineer, and neighbors who could provide testimony regarding existing uses and achievement of designated uses. He also noted that VNRC might call John Warner, fisheries biologist, U.S. Fish and Wildlife Service, and Dave Turin, Boston Regional Office of EPA. However, in its comments of January 27, 1995, VNRC noted that it would not be calling Mr. Turin as a witness.

Counsel for ANR identified the following potential witnesses: Tom Willard, Jeff **Cueto**, Mike Kline, and Alison **DesMeules**, Water Quality Division, ANR; Rod Wentworth, Cheryl Ryder, and Len **Gerardi**, fisheries biologists with the Department of Fish and Wildlife, ANR; Susan Bulmer, State Recreation Planner, Department of Forests, Parks and Recreation, ANR; and John Warner, fisheries biologist, U.S. Fish and Wildlife Service.

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The representative for CVPS identified the following potential witnesses: John Mullen, consulting engineer; Bruce Peacock, Manager, Production Engineering, CVPS; Tom Sullivan, consulting engineer; Charles Ritzzi, fisheries consultant; William Countryman, botanical and wetlands consultant; Elizabeth Courtney, aesthetics consultant; John Truebe, designer of fish passage facilities. In its comments of January 27, 1995, CVPS also identified Jeff Wallin, consulting biologist, as a witness.

All persons present at the prehearing conference indicated a preference to file prefiled testimony and exhibits with the Board. Parties shall file lists of witnesses, resumes or expert witnesses, and prefiled testimony in accordance with the terms of this and any Supplemental Prehearing Order.

In its Notice of Appeal, VNRC specifically identified a "special policy" of the ANR for flow setting in hydroelectric project by-passes. In order for the Board to consider agency policies that are not rules, procedures, guidelines, forms, and other similar documents, as part of the record in this proceeding, they must be offered as exhibits in accordance with the terms of this and any Supplemental Prehearing Order.

V. STIPULATIONS

Those persons present at the prehearing conference were not prepared to file any stipulations with the Board.

To the extent that facts are not in dispute, the parties are asked to prepare and file a statement of stipulated facts in accordance with the terms set forth in 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 were 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 any Supplemental Prehearing Order.

VI. CONTINUANCE

At the prehearing conference, those present discussed whether they should jointly see a continuance of from sixty to ninety days

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to facilitate negotiations. It was decided that a continuance request was unnecessary at this time and that this case should proceed with the issuance of the draft prehearing conference report and order and the request for disclosures.

Should a continuance be required at a later date to facilitate negotiations, the parties may jointly make such a request in accordance with the terms of the Order below or any Supplemental Prehearing Order.

VII. SUPPLEMENTAL PREHEARING ORDER

A Supplemental Prehearing Order setting forth a schedule of filing deadlines for 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.

VIII. STENOGRAPHIC RECORD

All hearings before the Board are recorded by a electronic sound recording device. At the prehearing conference, the Board's delegate recommended that the parties review Rule 28(C) of the Board's Rules of Procedure and consider hiring, under a cost-sharing arrangement, a court reporter to make a transcript of the Board proceeding.

IX. ORDER

1. The following are parties as of right: VNRC, the appellant, pursuant to 10 V.S.A. § 1024(a); CVPS, pursuant to Rule 22(A)(7) of the Board's Rules of Procedure; and ANR, pursuant to Rule 22(A)(4) of the Board's Rules of Procedure.
 2. On or before **4:30** p.m., Friday, February 10, 1995, any party 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.
 3. On or before **4:30** p.m., Friday, March 3, 1995, any party objecting to the participation of a Board member in this proceeding shall file a written objection with the Board.
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This filing should state the reason(s) for the objection(s) and any facts known to the party 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.

4. On or before 4:30 p.m., Friday, March 3, 1995, any party seeking a preliminary ruling from the Board shall file a written motion supported by legal memorandum.
5. On or before 4:30 p.m., Monday, March 20, 1995, any party wishing to respond to any motion filed with respect to any preliminary issues shall file a written response with supporting legal memorandum.
6. 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 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, March 20, 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 Prehearing Order setting forth a schedule for prefiling witness and exhibit lists, resumes, prefiled testimony and exhibits, and prehearing legal memoranda will be circulated to the parties for comment prior to issuance of a final Supplemental Prehearing Order.
7. If one or more motions for preliminary rulings are filed by, the March 3 deadline, any deadlines for a continuance request shall be established by a Supplemental Prehearing Order, after consultation with the parties.
8. 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 any 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.

Prehearing Conference Report and Order

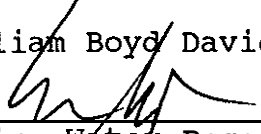
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9. Pursuant to Rule 24(B) of the Board's Rules of Procedure this order shall be binding on all persons who have received notice of the prehearing conference, unless there is a timely objection to the Order, or a showing of cause for, or fairness requires, waiver of a requirement of this Order.

Dated at Montpelier, Vermont, this 1st day of February, 1995.

William Boyd Davies



Chair, Water Resources Board