

State of Vermont
WATER RESOURCES BOARD

In re: Lamoille River Hydroelectric Project (CVPS)
§ 401 Certification
Docket Nos. WQ-94-03 and WQ-94-05

MEMORANDUM OF DECISION

VNRC's Motion for Admission of Documentary Exhibits

This decision pertains to a Motion for Admission of Documentary Exhibits filed by the Vermont Natural Resources Council ("VNRC"). As set forth below, the Board denies VNRC's Motion.

I. BACKGROUND

The Board held hearings in the above-captioned proceeding on November 16 through 18, 1995, November 29, 1995, December 1 and 2, 1995, and again on December 29 and 30, 1995. In addition, the Board heard oral argument on a number of evidentiary issues both prior to and after the hearing dates listed.

This decision pertains to a motion filed by VNRC on January 15, 1996, while the proceeding was in recess. The motion is identified as a Motion for Admission of Documentary Exhibits ("Motion"). It seeks admission of three exhibits which were marked during VNRC's cross examination of the Agency of Natural Resources' ("ANR") witness Roderick Wentworth at the December 29, 1995 hearing, but which were not admitted into evidence.

On January 18, 1996, the Board received Central Vermont Public Service Corporation's ("CVPS") Opposition to Motion for Admission of Documentary Exhibits ("CVPS's Opposition Memo"). On February 1, 1996, the Board received ANR's Memorandum in Response to VNRC Motion ("ANR Response Memo").

The Board heard oral argument on the Motion at its February 13, 1996 meeting, after which the Board deliberated on the matter in deliberative session. The matter is now ready for decision.

II. DISCUSSION

VNRC's Motion requests the admission of three documents which are marked as follows: VNRC-57, VNRC-59 and VNRC-61. VNRC-57 is ANR's Water Quality Certification, In re: Chace Mill Hydroelectric Project (May 5, 1987). VNRC-59 is an excerpt (pages 1, 36, 37 and 53) from VNRC-58, which is ANR's Water Quality Certification, In re: Essex #19 Hydroelectric Project (November 8, 1993). VNRC-61 is an excerpt (pages 1, 17 and 18) from VNRC 60, which is a Memorandum from Roderick



Wentworth to Larry Becker, dated June 28, 1993, In re: Essex #19 Hydroelectric Project. VNRC maintains that these should be admitted for impeachment purposes.

VNRC-57 was marked and discussed during VNRC's cross-examination of Roderick Wentworth. It purportedly demonstrates the Agency's previous interpretation of the Vermont Water Quality Standards to require fish passage on the Winooski River at the Chace Mill Hydroelectric Project. More particularly, it is supposed to demonstrate an inconsistency between Mr. Wentworth's opinion on fish passage at the Chace Mill project on the Winooski River in 1987 and his opinion on fish passage at the Lamoille River project that is the subject of this proceeding. However, as both the CVPS and ANR responsive memoranda indicate, and as the hearing transcript verifies, VNRC never offered the admission of this document. See ANR Response Memo at p. 1; CVPS's Opposition Memo at p. 1, n. 1; and Volumes I and II of the 12/29/95 Hearing Transcript.

Even if VNRC had moved the admission of VNRC-57, the Board concludes that the document has already been employed for its limited purpose of impeachment. VNRC-57 relates to a different project than the Lamoille Project in issue, it relates to a different river, and the application to which it relates was tiled nearly ten years ago. The Board would exclude VNRC-57 on the ground that it is irrelevant to this proceeding.

VNRC-59 and VNRC-61 also were marked and discussed during VNRC's cross-examination of ANR witness Roderick Wentworth. VNRC-59 and VNRC-61 both address the ANR's requirement of fish passage at the Essex #19 project on the Winooski River. VNRC moved the admission of both of these exhibits. In each instance, Chair Davies denied admission based on a lack of relevance. VNRC sought review of the Chair's decision with respect to VNRC-59 and the full Board upheld the Chair's ruling. Chair Davies explained his ruling to exclude VNRC-61 as follows:

The purpose of this hearing is not for determining whether or not the Agency has been right or wrong in connection with any other application and its handling of any other application. We have a specific application that's being heard de novo by this Board. So what the Agency has done in other instances, conditions that they've imposed is irrelevant.

Transcript 12/29/95, Vol. II at 141-142.

VNRC maintains that VNRC-59 and VNRC-61 are directly relevant to the impeachment of Roderick Wentworth's expert opinion regarding the timing of fish

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passage on the Lamoille River and that, accordingly, they should be admitted. VNRC Motion at p. 3. VNRC premises its argument that Mr. Wentworth's opinions on fish passage in prior §401 certifications are inconsistent with his opinion in the present case on the notion that the Essex #19 project is similar to the Lamoille Project. Specifically, VNRC states that the species of concern are similar, the Winooski and Lamoille Rivers are similar in size, that both rivers are part of the Lake Champlain salmonid restoration program and that the likelihood of a successful fishery restoration effort is similar.

ANR and CVPS in their respective memoranda in opposition maintain that Wentworth's conclusions in the prior certifications are not contradictory or inconsistent, but different. The Board agrees. Despite some similarities among the Chace Mill, Essex #19 and Lamoille hydroelectric projects, the projects involve *different* rivers, *different* water quality standards, and *different* hydroelectric projects.

Even if the Board were persuaded that Wentworth's prior opinions with respect to fish passage were "inconsistent" with the opinion he provided in his prefiled testimony and at hearing in this proceeding, the Board need not admit the documentary exhibits. ANR counsel at oral argument correctly stated the method by which V.R.E. 613 directs the use of documentary exhibits to impeach a witness' credibility. Extrinsic evidence of prior inconsistent statements need not be admitted into evidence to attack the credibility of a witness. V.R.E. 613(a).

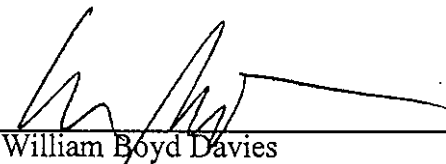
CVPS's Opposition Memo and ANR counsel at oral argument emphasize that the documents at issue have served their respective functions. During VNRC's cross-examination of Mr. Wentworth, Wentworth was shown the alleged prior inconsistent statement. Wentworth clearly stated that he provided different recommendations for the Essex #19 and Chace Mill projects. The purpose of the examination for impeachment purposes was thereby fulfilled in whole. The Board need not now consider the substance of the documents within which the allegedly inconsistent statement is contained.

III. ORDER

VNRC's Motion for Admission of Documentary Exhibits is hereby denied,

Dated at Montpelier, Vermont this 18th day of April, 1996.

Vermont Water Resources Board
By its Chair


William Boyd Davies

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