

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  
**CVPS's Motion for Reconsideration Regarding Evidence  
Addressing Economic and Social Impacts**

This decision pertains to a Motion for Reconsideration Regarding Evidence Addressing Economic and Social Impacts ("Motion for Reconsideration" or "Motion") made orally by Central Vermont Public Service Corp. ("CVPS") at the December 30, 1995 hearing in the above-captioned matter. As set forth below, the Water Resources Board ("Board") denies CVPS's Motion for Reconsideration and affirms its Preliminary Rulings of August 15, 1995.

I. BACKGROUND

A. Procedural History

On March 3, 1995, the Vermont Natural Resources Council ("VNRC") filed a Motion for Preliminary Ruling on Admissibility of Evidence and Scope of Review. VNRC supplemented its motion on June 16, 1995, by filing objections to certain CVPS prefiled testimony and exhibits. Also on June 16, 1995, CVPS and the Agency of Natural Resources ("ANR") filed their respective objections to prefiled testimony and exhibits. On June 30, 1995, VNRC, CVPS and ANR each filed responses to the various objections. On July 13, 1995, the Board heard oral argument with respect to the parties' filings. The Board issued its Preliminary Rulings on the Admissibility of Evidence and Scope of Review on August 15, 1995 ("Preliminary Rulings"). VNRC sought modification of the Preliminary Rulings in a timely Motion for Modification and Clarification of Preliminary Ruling filed August 30, 1995 ("Motion for Modification"). The Board denied VNRC's Motion for Modification by a Memorandum of Decision dated October 18, 1995, thereby affirming the Board's Preliminary Rulings. The Board held hearings in the above-captioned proceeding on November 16, 17, 18, and 29 and on December 1, 2, 29 and 30, 1995.

At the December 30, 1995 hearing, CVPS orally moved the Board to reconsider its Preliminary Rulings. The Board provided the parties an opportunity to brief the reconsideration request, and also provided a filing date for responsive memoranda. On January 29, 1996, CVPS filed a written Motion for Reconsideration. CVPS's Motion for Reconsideration seeks reversal of Preliminary Ruling II.A. Also on January 29, 1996, VNRC filed a Memorandum in Opposition to CVPS's Motion for Reconsideration and ANR filed its Memorandum in Response to CVPS's Motion for Reconsideration. On

February 8, 1996, CVPS and VNRC each supplemented its respective filing. The Board heard oral argument on CVPS's Motion for Reconsideration on February 13, 1996. CVPS, VNRC and the ANR were represented by counsel on February 13 and each presented its arguments to the full Board.

B. Preliminary Ruling II.A. and Footnote 1

Section II.A. of the Board's Preliminary Rulings states:

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).

Preliminary Rulings, In re: Lamoille River Hydroelectric Project, Docket Nos. WQ-94-03 and WQ-94-05 (August 15, 1995) at 1. The Preliminary Rulings further state that:

Such evidence is beyond the scope of the Board's authority to review of [sic] § 401 certifications<sup>1</sup> 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.

Id. at 2. Footnote 1 is critical to the Board's analysis in this decision. It states:

'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 waters should be allowed. *However, no party has argued that § 1-03(C) is applicable in this proceeding.*

Id. (emphasis added).

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II. DISCUSSION

A. Rule 24(B) and Manifest Injustice

CVPS filed its Motion for Reconsideration pursuant to Rule 24(B) and seeks reconsideration of the Board's Preliminary Rulings dated August 15, 1995, in order to allegedly prevent manifest injustice to CVPS, its ratepayers, and the Board. The Board has held that there is no functional or legal difference between a Preliminary Order and a Prehearing Conference Order under Rule 24(B). In re: Cavendish Hydroelectric Project (CVPS), Memorandum of Decision, Docket No. WQ-93-08 (May 19, 1994) ("Cavendish"). The Board has the implied power to modify a Preliminary Order where a moving party can demonstrate that such modification is necessary to prevent manifest injustice. Cavendish at p. 2. Although CVPS correctly maintains that its Motion is not precluded by the 15-day time limit of Rule 29(C), which governs motions to alter Findings of Fact, Conclusions of Law and Orders, the filing of a Motion to Reconsider the Preliminary Rulings nearly four months after their issuance is unreasonable, particularly where those Rulings set forth the scope of review and have guided the parties' presentation of evidence and legal argument.

Rule 24(B) directs the Board to modify a Pre-hearing Order only when it must do so to prevent manifest injustice. The same standard applies to a Preliminary Order. Manifest injustice, as demonstrated in the case law cited by CVPS, does not necessarily arise whenever a party disagrees with a court's, or in this case, the Board's rulings. The Board must first focus on the term "manifest." In a prior Board decision, addressing an appellant's Motion to Correct Manifest Error, the Board interpreted "manifest error" to have a specific legal meaning. In re Robert A. Gillin (Encroachment Permit) ("Gillin"), Docket No. MLP-94-01 (October 4, 1994), Memorandum of Decision and Order, Appellant's Motion to Correct Manifest Errors of the Board at page 2. The Board read the term "manifest" to be synonymous with the terms: "open, clear, visible, unmistakable, indubitable, indisputable, evident and self-evident." Id. citing Black's Law Dictionary, (4th ed. 1975). Thus, "manifest injustice," as contemplated by Rule 24(B), occurs where the Board's pre-hearing order results in the obvious, indisputable and self-evident withholding or denial of justice. Such injustice may be done by the negligence, mistake or omission of the court itself. Black's Law Dictionary 787 (6th ed. 1990).

The arguments and case law supporting CVPS's contention are equally unpersuasive. The cases cited by CVPS involve the alleged miscalculation of a damage

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award where damages could be determined with certainty, and the Supreme Court's suspension of an injunction to avoid a discriminatory impact. Woodhouse v. Woodhouse, 99 Vt. 91 (1925); Moore v. Gilbert, 131 Vt. 545 (1973). CVPS has argued, unconvincingly, that the Board's Preliminary Rulings, if unaltered, would similarly effect a discriminatory impact upon CVPS and its ratepayers.

CVPS also cites a case in which the Supreme Court reversed a decision to deny the defendant's motion to amend its answer on the very day of trial. Bevins v. King, 143 Vt. 252 (1983). In Bevins, the amendment posed no prejudice to any party, and the Court's decision was consistent with the liberal amendment policy of the common law and of V.R.C.P. 15. In this case, however, the parties were required to prefile their testimony and exhibits with the Board. Moreover, at the time CVPS's Motion was filed, the Board had already conducted eight days of hearings at which cross-examination based on the prefiled testimony took place. Consequently, the parties would be greatly prejudiced by a decision, at this late date, to alter the Preliminary Rulings excluding evidence relating to economic costs and societal impacts.

CVPS's arguments relating to manifest injustice are misguided, and its Motion on these grounds demonstrates a misreading of Board Rule 24(B). Although CVPS has fully briefed its disagreement with the Preliminary Rulings, it has failed to establish that the Board reached those Rulings negligently, or by mistake. Moreover, CVPS has failed to demonstrate that affirming Preliminary Ruling II.A. will work manifest injustice on any party, on this Board, or on this proceeding.

#### B. Rule 29(C) Motions to Alter

Water Resources Board Rule of Procedure 29(C), entitled "Motions to alter decisions," provides: "A party may file within 15 days from the date of the decision such motions as are appropriate with respect to the decision." CVPS entitled its motion a "Motion for Reconsideration," which though it may be appropriate under Civil Rule of Appellate Procedure 27, is not referred to in the Board's Rules of Procedure. Board Rule 29(C) does, however, specify the procedure for filing a motion to alter, which the Board has determined to be "the appropriate avenue for seeking substantive reconsideration of a Board decision." Gillin at page 2. The filing deadline of Rule 29(C), governing motions to alter, is 15 days from the date of the decision and is strictly enforced. Here, CVPS made its oral Motion to Reconsider nearly four months after the issuance of the Preliminary Rulings.

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Preliminary Rulings are final orders of the Board which control the subsequent course of the proceeding. In re Lamoille River Hydroelectric Project (CVPS), Docket Nos. WQ-94-03 and WQ-94-05 (October 18, 1995), Memorandum of Decision at page 1. Nonetheless, Preliminary Rulings are not "final decisions" as contemplated by Rule 29 and, therefore, do not trigger the 15 day deadline for requesting review set forth in Rule 29(C). In this case, the Preliminary Rulings set forth the limitations on the Admissibility of Evidence and Scope of Review. The parties prepared their respective cases based on these Preliminary Rulings. CVPS cannot now request that the scope of review and limitations on evidence be altered to allow it to introduce evidence which it has known for four months to have been determined by the Board to be irrelevant, immaterial and inadmissible in this proceeding. CVPS had ample opportunity to raise its Motion to Reconsider prior to the final day of hearings in this matter and it failed to so move.

C. Waiver and the Inapplicability of the Anti-degradation Policy

As indicated at Section I.B., above, the Board specifically noted in footnote 1 of the Preliminary Rulings that "no party has argued that §1-03(C) is applicable in this proceeding." CVPS did not object to this Preliminary Ruling. In failing to so object, CVPS waived its right to argue the applicability of §1-03(C) of the VWQS.

Nevertheless, CVPS argues that the Anti-degradation Policy became an issue in this proceeding when ANR witnesses asserted that the Lamoille River possesses high quality waters. CVPS's supposed reliance on the representations of Agency witnesses with respect to high quality waters arose from CVPS's extensive cross-examination of these witnesses. During this cross-examination, CVPS counsel repeatedly attacked the credibility of these very witnesses and questioned the conclusions that each had drawn with respect to many aspects of the Project. CVPS in its Motion for Reconsideration would have the Board believe that at the eleventh hour it is the Agency's, and not its own experts, upon whose testimony it wants the Board to rely.

Even if the Board were satisfied that the "discovery" of the high quality waters issue was indeed a surprise to CVPS, this evidence would not warrant the submission of new testimony and evidence relating to economic costs and societal effects. Such evidence is only relevant in the context of a §401 relicensure proceeding in applying the Anti-degradation Policy of §1-03(C) of the VWQS. However, in the Anti-degradation Policy there are two requirements which trigger the so-called "balancing of economic interests." The first of these is the requirement that the waters at issue are high quality waters. The second is that there be a degradation of those high quality waters.

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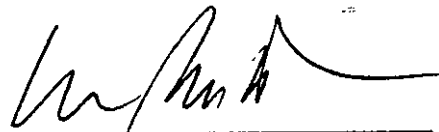
Throughout CVPS's case, it has repeatedly affirmed through its own experts, and through a number of opposing witnesses on cross-examination, that the proposed operation of its Lamoille River Hydroelectric Project would be an *enhancement* of the current water quality in the project reach. Because an enhancement, and not a degradation, of the waters presumably would be effected by the proposed operation, the Anti-degradation Policy is not applicable in the present case, even if the waters at issue were to be determined to be high quality waters.

### III. ORDER

CVPS's Motion for Reconsideration Regarding Evidence Addressing Economic and Social Impacts is hereby denied.

Dated at Montpelier, Vermont this 10th day of May, 1996.

Vermont Water Resources Board  
by its Chair



William Boyd Davies

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