

**State of Vermont  
WATER RESOURCES BOARD**

**In re: Clyde River Hydroelectric Project,  
§ 401 Certification  
Docket No. WQ-94-10**

**ORDER**

On June 7, 1995, the Water Resources Board (Board) issued a Stay Order in the above-captioned appeal. As explained below, the Board now orders that the stay be lifted so that it may proceed to consideration of motions with respect to the merits of this proceeding.

**I. BACKGROUND**

On December 14, 1995, six months after the issuance of the stay order, the Board's designee wrote to the parties and petitioners for intervention in this proceeding asking for a status update concerning a license application amendment request filed by Citizens Utilities Company (Citizens) with the Federal Energy Regulatory Commission (FERC). In response to this request, the Vermont Natural Resources Council (VNRC), Vermont Federation of Sportsmen's Clubs (VFSC), and the Trout Unlimited (TU) petitioners for intervention jointly filed on January 12, 1996, a written request asking that the proceeding before the Board be "reactivated" or, alternatively, that the appeal be dismissed with prejudice, based on their assertion that the FERC had accepted and was indeed processing the amendment to Citizens' license application.

In response to this filing, the Board's designee held a telephone status conference on February 19, 1996. As a result of the status conference, a Supplemental Prehearing Order was issued by the Board's Chair on March 20, 1996, granting party status to the various petitioners for intervention and setting forth deadlines for written filings with respect to the question of whether the Board should lift the stay. A notice of oral argument was issued on this same date. Oral argument before the Board with respect to the status of the stay was held on April 18, 1996, with counsel for Citizens, the Agency of Natural Resources (ANR), VNRC/VFSC and the TU groups participating. Deliberations were also held on April 18, 1996, with those Board members present voting unanimously to lift the stay.

**II. DISCUSSION**

The June 7, 1995, stay order states in relevant part that the stay "shall continue until the Board receives notification in writing from the appellant that the FERC has issued a decision concerning the utility's request for amendment of its federal license application." Stay Order at 1-2 (June 7, 1996). Citizens was directed to file such written notification with the Board within thirty (30) days of the FERC's decision. The stay was issued in response to Citizens' suggestion

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that it would be an unwise expenditure of the Board's and parties' resources to litigate this appeal until it was known whether the FERC "either rejects or accepts the utility's amendment request." Id. at 1.

The Board's intention in granting this stay order was not to delay Board review until a final Environmental Impact Statement (EIS) is prepared with respect to Citizens' project, but rather to ~~enable~~ Citizens to obtain an indication from FERC as to whether the federal agency would accept for processing the utility's amendment request. While the FERC has not issued a formal decision or letter docketing or noticing "acceptance" of Citizens' amendment, the FERC's actions to date indicate that it has reviewed and accepted public comment with respect to the utility's amendment, as evidenced by the communications from FERC's own staff. VNRC/VFSC, the ANR, and the TU groups persuasively argue that such actions are tantamount to the "decision" contemplated in the Board's stay order.

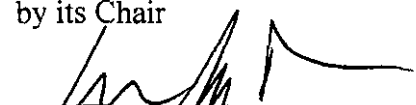
The Board sees no reason why its stay order should remain in force when it is apparent that the FERC is now considering Citizens' license application, as amended. The Board's authority to conduct a \$401 project review for conformance with the Vermont Water Quality Standards (VWQS) is not predicated on completion of the FERC's environmental review. Indeed, the Board has a duty to hear pending appeals in an expeditious and timely matter. Consequently, rather than await (Perhaps indefinitely) the issuance of a final EIS, the Board believes that the appropriate course of action at this time is to lift the stay and take up consideration of Citizens' pending Motion for Preliminary Ruling, filed December 19, 1994, and any other motions that the parties to this proceeding may wish to file prior to the issuance of a scheduling order in anticipation of a hearing on the merits.

**III. ORDER**

Therefore, it is hereby ordered that the Board's Stay Order, issued on June 7, 1995, be lifted.

Dated at Montpelier, Vermont, this 3<sup>rd</sup> day of May, 1996.

Vermont Water Resources Board  
by its Chair

  
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William Boyd Davies

Concurring:  
William Boyd Davies  
Stephen Dycus  
Gail Osherenko  
Jane Potvin