

State of Vermont
WATER RESOURCES BOARD

In re: **Deerfield** River Hydroelectric Project
§ 401 Certification
Docket Nos. WQ-95-01 and WQ-95-02

PREHEARING CONFERENCE REPORT AND ORDER

I. BACKGROUND

On January 30, 1995, the Secretary of the Vermont Agency of Natural Resources (Secretary) issued a § 401 Water Quality Certification to the New England Power Company (NEPCo) in connection with the utility's application to the Federal Energy Regulatory Commission (FERC) for relicensure of the Deerfield River Hydroelectric Project, consisting of eight separate facilities. Of the eight facilities, three facilities (the Somerset Dam, the Searsburg Dam and power appurtenances, and Harriman Dam and power appurtenances) are located wholly within Vermont and one facility, Sherman Dam, has a reservoir that straddles the state line with Massachusetts. The three facilities in Vermont are located in the towns of Stratton, Somerset, Searsburg, Wilmington, Whitingham and Readsboro, Vermont. On February 14, 1995, the Vermont Natural Resources Council (VNRC) and the Vermont Federation of Sportsmen's Clubs (VFSC) appealed the Secretary's decision to the Water Resources Board (Board). On February 14, 1995, NEPCo also tiled an appeal of the Secretary's decision to the Board. These appeals were filed pursuant to 10 V.S.A. §§ 1004 and 1024(a) and challenged the findings, conclusions and conditions contained in the certification.

On March 1, 1995, the two appeals were deemed complete and docketed. The appeal tiled by VNRC and VFSC was docketed WQ-95-01 and that tiled by NEPCo was docketed WQ-95-02. On that same date, a joint Notice of Appeal and Prehearing Conference was sent to persons required to receive notice and forwarded to the Brattleboro Reformer for publication, pursuant to Rules 18(C) and 20 of the Board's Rules of Procedure.

Entering timely appearances were the ANR, represented by Kurt Janson, Esq.; the Board of Selectmen for the Town of Whitingham (Whitingham), represented by Selectman Edward Mangold; the Windham Regional Commission (WRC), represented by Melissa M. Reichert; The Commonwealth of Massachusetts (Massachusetts), represented by Margaret Van Deusen, Esq., Assistant Attorney General; and the Conservation Law Foundation (CLF) and six other organizations, each entering separate notices of appearance and nominally represented by Mark Sinclair, Esq.'

¹ These six organizations are the Appalachian Mountain Club (AMC), American Rivers, Inc., (AR), New England Friends for the Liberation of Whitewater (NE/FLOW),



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On April 3, 1995, at 1:30 p.m., a joint 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., pursuant to Rule 24(A) of the Board's Rules of Procedure. Those participating in this prehearing conference were:

VNRC and VFSC, by Christopher M. Kilian, Esq.
NEPCo, by Mark Slade (in-house counsel) and Robert E. Woolmington, Esq.,
Witten, Saltonstall, Woolmington, Bongartz & Campbell, P.C.
ANR, by Kurt Janson, Esq.
Massachusetts, by Ian Polumbaum, Esq., Assistant Attorney General
Seven petitioners for intervention, by Mark Sinclair, Esq.

Also present were Jeffrey Cueto of ANR and Cleve Kapala, NEPCo.

At the prehearing conference, the participants agreed that Docket Nos. WQ-95-01 and WQ-95-02 should be consolidated. It was further agreed that the appellants should supplement their notices of appeal with statements of findings and conditions at issue. VNRC and VFSC reserved the right to object to the party status requests of the seven petitioners for intervention. NEPCo offered a proposed prehearing schedule for the filing of preliminary motions and the pre-filing of testimony, exhibits, and objections.

On May 5, 1995, VNRC and VFSC filed a statement of findings and conditions at issue. On May 11, 1995, NEPCo filed a statement of findings and conditions at issue.

Due to the Board's busy hearing schedule, further action with respect to Docket Nos. WQ-95-01 and WQ-95-02 was deferred until early 1996. On February 20, 1996, those who had entered timely appearance were notified of a status conference to be held by teleconference. This teleconference was convened by Kristina L. Bielenberg, Esq., on March 14, 1996, at 10:00 a.m. Those participating were:

VNRC and VFSC, by Christopher M. Kilian, Esq.
NEPCo, by Robert E. Woolmington, Esq., Witten, Saltonstall, Woolmington,
Bongartz & Campbell, P.C.
Seven petitioners for intervention, by Mark Sinclair, Esq.

The Deerfield River Compact (DRC), American Whitewater Affiliation (AWA), and Deerfield River Watershed Association (DRWA). Including CLF, these organizations are hereinafter referred to as "the seven petitioners for intervention."

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Whitingham, by Edward Mangold, Selectman
Massachusetts, by Margaret Van Deusen, Esq., Assistant Attorney General
ANR, by John Kassel, Esq.’

During the course of this teleconference, the participants discussed a proposed prehearing schedule filed by NEPCo.

On March 21, 1996, a draft Prehearing Conference Report and Order was circulated to those who had entered timely appearances. (See attached certificate of service.) On March 28, 1996, the Board received comments from NEPCo and counsel for VNRC and VRSC. Some of these have been incorporated and others rejected by the Chair. Therefore, a final Prehearing Conference Report and Order is now ready for issuance.

II. STANDARD OF REVIEW

Any hearing on the merits in these appeals shall be conducted as a de novo proceeding, pursuant to 10 V.S.A. §1024(a). The applicant for the certificate, NEPCo, bears the burden of proof and persuasion.

III. PRELIMINARY ISSUES

A. Intervention Requests

On March 31, 1995, Mark Sinclair, Esq., filed a motion on behalf of seven petitioners for intervention. The motion requests party status alternatively under Rule 22(A)(7) of the Board’s Rules of Procedure and Rule 22(B). The motion further requests that, if party status is denied, the petitioners be granted the right to participate as amicus curiae.

At the prehearing conference on April 3, 1995, and again at the status conference on March 14, 1996, VNRC and VFSC indicated that it reserved the right to object to the seven petitioners’ request. In particular, VNRC and VFSC expressed concerns that the proceedings could become unwieldy unless the representation and participation of the petitioners is clarified and appropriately restricted pursuant to Rules 22(B)(4) and 23(B) of the Board’s Rules of

On February 5, 1995, John Kassel, Esq., entered a Substitute Notice of Appearance for the ANR

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Procedure. VNRC and VFSC's grounds for objection and requests for Board determinations are summarized in its filing of March 28, 1996.

Any person objecting to the motion of the seven petitioners shall file such objection in writing in accordance with the terms set forth in the Order below.

B. Scope of Appeals

In their filings of May 5 and 11, 1995, VNRC and NEPCo set forth the findings and conditions in the Secretary's certificate which are at issue in their respective appeals. At the status conference on March 14, 1996, the participants were encouraged to identify any findings, conclusions and conditions in the Secretary's decision which are not at issue in this proceeding. NEPCo proposed that it and other participants be given a chance to identify any other findings and conclusions that they believed necessarily fell within the scope of the notices of appeal. VNRC and VFSC indicated that it challenges only those findings and conditions of the Secretary set forth in VNRC's May 5, 1995, filing with the Board. VNRC and VFSC asserted that no other findings and conditions of the Secretary are properly within the scope of its notice of appeal, unless stipulated to by the parties subject to the Board's jurisdiction. VNRC and VFSC noted that they do not argue that additional findings, not set forth in NEPCo's filing of May 11, 1995, should fall within the scope of NEPCo's notice of appeal.

While an appeal before the Board is heard de novo, the Board has previously ruled that the scope of its review is limited to the issues arguably within the scope of an appellant's notice of appeal. Since the appellants in this proceeding disagree concerning how broadly the Board should construe the scope of the appeals before it, they and the other parties to this proceeding will be provided an opportunity to both respond to the appellants' filings of May 5 and 11, 1995, and file any supporting legal memoranda on the scope of review, both in accordance with the terms set forth in the Order below.

C. Other Issues

Any other matters requiring resolution by the Board preliminary to the prefiling of testimony and exhibits shall be filed in accordance with terms set forth in the Order below.

IV. DISCLOSURES

At the prehearing conference on April 3, 1995, the current Board members were identified by name (Chair William Boyd Davies, Stephen Dycus, Ruth Einstein, Gail Osherenko, and Jane Potvin) and their present and past employment and affiliations.

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It is specifically noted here that Board member Einstein is a former employee of the ANR, although she was not associated with the program that reviews hydroelectric project relicensure. Moreover, member Osherenko served as a staff attorney with VNRC between February and June 1981 and as a member of its Board of Directors between 1983 and 1988. MS. Osherenko terminated her membership with VNRC upon her appointment to the Water Resources Board. (See enclosed disclosure statements in the matter, In re: Clvde River Hydroelectric Project, Docket No. WQ-94-10.)

Any party or petitioner for intervention seeking additional disclosures or requesting **recusal** shall do so in accordance with the terms set forth in the Order below. In the event that a Board member is disqualified from sitting in this proceeding, the Chair may appoint a former Board member to serve as an acting Board member, pursuant to 10 V.S.A. § 805(1)(F).

V. STENOGRAPHIC RECORD

All hearings before the Board are recorded by electronic sound recording device. Parties and petitioners for intervention were urged to hire a court reporter to make a stenographic record of the proceeding. The Board's designee recommended that they review Rule 28(C) of the Board's Rules of Procedure and consider entering a cost-sharing agreement.

VI. SUPPLEMENTAL PREHEARING ORDER

At the status conference on March 14, 1996, the parties and petitioners for intervention discussed a proposed prehearing schedule for the filing of motions with respect to preliminary issues, **prefiled** testimony and exhibits, and objections. A portion of that schedule has been adopted, with modifications, by the Board Chair and is incorporated into the Order below.

At the status conference, NEPCo argued that in light of the extreme factual complexity of the issues before the Board that the initial filing deadline of November 1, 1996, was a realistic one for preparation and coordination of concise, integrated testimony. VNRC and VFSC specifically objected to NEPCo's proposal that all parties file direct testimony on the same date (November 1, 1996), arguing that NEPCo should file first given that it bears the burden of proof and persuasion in this proceeding.

A draft Supplemental Preheating Order addressing a filing schedule for **prefiled** testimony and exhibits, and objections thereto, will be circulated for comment to those persons entering timely appearances. A final Supplemental Prehearing Order will be issued by the Board's Chair in April 1996, governing the timing and sequence of filings preliminary to a hearing on the merits.

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VII. ORDER

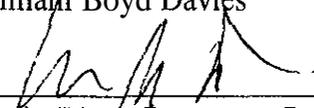
1. Docket Nos. WQ-95-01 and WQ-95-02 are consolidated for hearing and decision.
2. The following are parties as of right:
 - a) VNRC and VFSC, pursuant to 10 V.S.A. § 1024(a) and Rule 22(A)(7) of the Board's Rules of Procedure;
 - b) NEPCo, pursuant to 10 V.S.A. § 1024(a) and Rule 22(A)(7) of the Board's Rules of Procedure;
 - c) ANR, pursuant to **Rule 22(A)(4)** of the Board's Rules of Procedure;
 - d) Whitingham, pursuant to Rule 22(A)(2) of the Board's Rules of Procedure;
 - e) WRC, pursuant to Rule 22(A)(3) of the Board's Rules of Procedure; and
 - f) Massachusetts, pursuant to Rule 22(A)(5).
3. On or before **4:30 p.m., Monday, April 1, 1996**, representatives for Massachusetts shall file with the Board affidavits indicating that they may lawfully practice law in Vermont and file a notice of substitution of counsel.
4. On or before **4:30 p.m., Monday, April 1, 1996**, any party wishing to object to the party status requests of the seven petitioners for intervention (see motion of March 31, 1995), shall file a written response with the Board, supported by memorandum of law.
5. On or before **4:30 p.m., Monday, April 1, 1996**, NEPCo and any other party or petitioner for intervention shall file any objection concerning the scope of appeal presented by VNRC's notice of appeal, as supplemented by its filing of May 5, 1995. On or before this same deadline, VNRC and any other party or petitioner for intervention shall file any objection concerning the scope of appeal presented by NEPCo's notice of appeal, as supplemented by its filing of May 11, 1995. Objections shall be supported by memoranda of law.
6. On or before **4:30 p.m., Monday, April 1, 1996**, any party or petitioner for intervention seeking additional disclosures from any Board member concerning any actual or potential conflict 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. Failure to file a timely request for disclosure may be deemed a waiver of objection to the participation of a Board member.

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7. On or before **4:30 p.m., Friday, April 12, 1996**, VNRC and NEPCo may file responses to the objections filed in accordance with Item 5 above.
8. On or before **4:30 p.m., Friday, April 19, 1996**, all motions for preliminary rulings from the Board shall be filed with supporting memoranda of law.
9. On or before **4:30 p.m., Wednesday, May 1, 1996**, any responses to motions for preliminary rulings shall be filed with supporting memoranda of law.
10. 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 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.
11. 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 April, 1996.

William Boyd Davies



Chair, Water Resources Board