

TOWN OF GROTON

v.

STATE OF VERMONT

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Caledonia Superior Court

Docket No. 44-2-99

On appeal from Water Resources Board

Docket No. SAP-9801

DECISION AND ORDER

This action is an appeal from proceedings before the Water Resources Board, Docket No. SAP-98-01, pursuant to 10 V.S.A. § 1024.

Appellant Town of Groton, wishes to rebuild a dam on the Wells River destroyed by ice and high water in mid-January, 1998. In order to realize these plans Groton needs a stream alteration permit. See 10 V.S.A. § 1022. On March 20, 1998, the Department of Environmental Conservation denied the permit. Groton appealed to the Water Resources Board. On January 25, 1999, the Board, after *de novo* review, 10 V.S.A. § 1024 (a), affirmed the DEC's denial. See *In re Town of Groton, No. SAP-98-01, Findings of Fact, Conclusions of Law, and Order* (Jan. 25, 1999)(hereinafter Board's Decision). On February 23, 1999, Groton appealed the Board's decision to this Court. See 10 V.S.A. § 1024(b). Appellant does not challenge any of the Board's findings. Groton contends the Board erred in two ways: first, the Water Resources Board should not have excluded evidence regarding public benefits including fire safety and public safety; second, the Water Resources Board should not have rendered its decision based on existing conditions at the time of the decision, and ignored the condition of the river prior to the washout of the dam. The court has considered the arguments, but finds no error, and therefore affirms the Board's decisions.

At the outset, the court notes that this review of administrative agency action is on the record, with some deference given to the agency's determinations. See Conservation Law Foundation v. Burke, 162 Vt. 115,126 (1994); V.R.C.P. 74. The court presumes that decisions made by an agency within its area of expertise are correct, valid, and reasonable absent a clear showing to the contrary. See Petition of New England Telephone and Telegraph Co., 159 Vt. 459,462 (1993). This court has a narrow role in ensuring that the decisions of the Water Resources Board are made in accordance with law. See Burke, 162 Vt. at 126. Further, this court is not a higher environmental agency entrusted with the power to make environmental law and policy de novo or with the power to apply the policy it develops to the facts it finds. See id. The reviewing court does not defer to the agency's purely legal determinations on issues not falling within the agency's area Of expertise, but it does view the record in a light favorable to supporting any findings of fact underlying those legal determinations. See Bigelow v. Dept. of Taxes, 163 Vt. 33, 35 (1994).

1. Evidence regarding fire protection and public safety

Groton argues that the Board must consider the fire safety benefits to the Town citizens. However the Legislature established the values that provide "benefits'to society." The Legislature guided the Board's discretion by authorizing it to grant, deny or condition stream alteration permits within 10 V.S.A. § 1023(a). Section 1023 reads as follows:

(a) Upon receipt of an application, the secretary shall cause an investigation of the proposed change to be made. Prior to making a decision, a written report shall be made by the secretary concerning the effect of the proposed change on the watercourse. The permit shall be granted, subject to such conditions determined to be warranted, if it appears that the change:

- (1) will not adversely affect the public safety by increasing flood hazards, and
- (2) will not significantly damage fish life or wildlife,
- (3) will not significantly damage the rights of riparian owners, and

(4) in case of any waters designated by the board as outstanding resource waters, will not adversely affect the values sought to be protected by designation

(b) The reasons for the action taken under this section shall be set forth in writing to the applicant. Notice of the action of the secretary shall also be sent to the selectmen of the town in which the proposed change is located, and to each owner of property which abuts or is opposite the land where the alteration is to take place.

10 V.S.A. § 1023.

The record reveals, and the Board concluded, that the proposed project would result in making the impoundment area unsuitable for many life stages of fish species; that to make this section of the Wells River unsuitable would result in significant damage to fish life and wildlife; and significant damage to fish life could not be alleviated by any mitigation measures.

Groton argues that the Board should have also considered the dam's value for fire protection purposes. However, this consideration is outside those factors the Legislature specifically mandated the Board consider. See § 1023(a). Moreover, the record also reveals that although fire protection is important there are several alternative water sources available for fire protection. Therefore, the Board's decision is reasonable because use of alternative sites would meet fire protection needs while preserving habitat and not significantly damaging fish life.

Accordingly, the court concludes that Appellants had an opportunity to present evidence to show public benefits including fire safety and public safety and they did present evidence. The fact the Board refused to admit this evidence is not grounds for error as the evidence is outside the list of factors the Board is required to consider in deciding whether to grant or deny a permit. See 10 V.S.A. § 1023(a). In light of the Board's findings and conclusions, made within and consideration of the Board's mandate, the denial of the permit is affirmed. See 10 V.S.A. § 1023(a)(2) (permit can issue only if it "will not significantly damage fish life or wildlife").

## 2. Exclusion of Exhibit, and Limited Recognition of Michael Girard's Expertise

Appellants next argue that the Board erred in not measuring the dam's impact against the baseline of the pre-existing environment when the dam was in existence and the river was not free flowing. To determine what point in time constitutes the appropriate baseline the Board looked to the Vermont Water Quality Standards ("VWQS") which define a similar concept, background conditions, to mean conditions that exist in the absence of human or cultural influences, or conditions due to human or cultural influences that are not subject to regulation or management. See Board's Decision at 10. In the context of hydroelectric dams, the Board noted it declined to evaluate historical, pre-dam, free-flowing conditions in order to establish background conditions primarily because doing so would be problematic. See *id.* The Board noted uncertainty in the ability to establish these conditions and a refusal to speculate as to what they may have been.

The Board applied the same reasoning to § 1023 and found that Groton did not present sufficient evidence to meet the standard it now advocates. The Board found that "[i]nsufficient evidence was presented to quantify how much fish habitat was tilled in by sediment when the Village Dam was in existence." As a result, the Board "decline[d] to establish a baseline by speculating as to water quality and fish habitat associated with the *impounded* condition of the waters in question during the past two centuries." Groton did not meet its burden of demonstrating that rebuilding the dam "will not significantly damage fish life." 10 V.S.A. § 1023(a)(2).

It is this Court's conclusion that the Board's decision to use the Wells River's free-flowing condition as the "baseline" is well supported by Vermont law. Only when natural conditions cannot be reasonably ascertained, may artificial conditions be used as a baseline. The

Board's adoption of natural conditions as the baseline is affirmed.

The Board's adoption of current, naturally flowing conditions as the baseline is also consistent with the statute's plain language. A permit cannot issue unless the "change" resulting from the permitted activity and structure "will not significantly damage fish life or wildlife," 10 V.S.A. § 1023(a)(2). There is nothing in the plain language of this statute to suggest the Board must look at "change" from the standpoint of last century, as opposed to "change" from the present point in time to what the river and fish habitat would be like should the Board grant the permit. Had the Legislature intended the Secretary or the Board to evaluate "change" from a historical basis before the river became free flowing, it could have said so. The Court notes that the situation might be different had the dam not washed out, and as a result substantially alter the fish habitat.

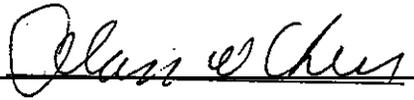
The Board's determination as to baseline also effectuates the statute's purposes consistent with Vermont's other water quality programs. The statute's primary purpose is to restore and preserve the natural flow of Vermont's water resources. See 10 V.S.A. § 100 1. The Wells River's existing condition in Groton Village is its natural flow. It would be inconsistent with the statute's purpose of protecting natural flow for the Board to apply an artificial and non-existing flow as a baseline.

After examining the record, the court agrees with the Board that currently the proposed dam site provides one of the Wells River's few quality fish habitat areas. Construction of the dam will "change" existing habitat by eliminating it. In addition, the Board's baseline furthers the statute's purpose of protecting the public's dominion over Vermont's water resources. It is in the public interest that the waters of the state shall be protected, regulated and where necessary controlled under the authority of the state. See 10 V.S.A. § 1001.

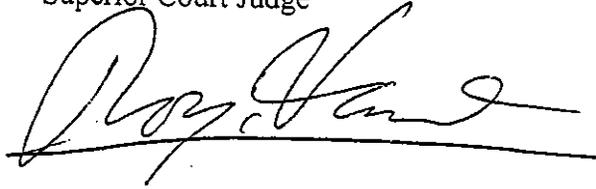
ORDER

The Decisions of the Water Resources Board are AFFIRMED.

Dated this 17<sup>th</sup> day of August, 2000.

  
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Hon. Alan W. Cheever,  
Superior Court Judge

  
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