

State of Vermont
WATER RESOURCES BOARD

RE: Clyde River Hydroelectric Project
Docket Nos. WQ-02-08(A) and (B) (Consolidated)

MEMORANDUM OF DECISION

Issued February 2, 2004

This decision pertains to a Motion to Alter filed by the Vermont Natural Resources Council and the Northeast Kingdom Chapter of Trout Unlimited (VNRC/NEKTU) in response to an Amended Water Quality Certificate: Findings of Fact, Conclusions of Law, and Order issued by the Water Resources Board (Board) on July 11, 2003 (Amended Certificate). The Amended Certificate was issued pursuant to Section 401 of the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.* to Citizens Communications Company (Citizens or Applicant) in conjunction with its request for relicensure by the Federal Energy Regulatory Commission (FERC) of the Clyde River Hydroelectric Project (Project). As explained below, the Board denies in part and grants in part the Motion to Alter.

I. BACKGROUND

The Applicant filed its application with the Department of Environmental Conservation (DEC), Vermont Agency of Natural Resources (ANR) on January 24, 2002, and was granted a Certificate by the Secretary of ANR on August 1, 2002, pursuant to 10 V.S.A. § 1004 (Secretary's Action). This Certificate was timely appealed to the Water Resources Board (Board), which conducted a *de novo* contested case hearing with respect to the issues raised on appeal. As noted above, the Board issued the Amended Certificate on July 11, 2003.

On July 25, 2003, VNRC/NEKTU filed a timely Motion to Alter the Amended Certificate pursuant to the Board's Rules of Procedure (Procedural Rules), Rule 34(D). Given summer vacation schedules, by agreement of the parties, the Chair issued an Extension Order on August 1, 2003, establishing deadlines for reply and responsive memoranda. In accordance with that order, Citizens and ANR each filed Reply Memoranda on September 9, 2003. Citizens filed a Response to ANR's Reply Memorandum on September 23, 2003. VNRC/NEKTU filed a Response to both Citizens' and ANR's Reply Memoranda on September 23, 2003.

The Board convened oral argument on October 7, 2003.¹ It deliberated on October 7, November 13, and December 19, 2003, and on January 20, 2004. This matter is now ready for decision.

¹ Counsel for VNRC/NEKTU requested a hearing in the cover letter to its Motion to Alter, but clarified on October 7, 2003, that its intent was to obtain oral argument before the Board, *not* a merits hearing at which it could introduce new evidence.

II. ISSUES

1. Whether the Board will grant or deny VNRC/NEKTU's Motion to Alter, in whole or in part?
2. Whether the Board will modify the reasoning in its Amended Certificate as requested by ANR in its Reply Memorandum?

III. DISCUSSION

A. Standard of Review

Procedural Rule 34(D) provides that a party may file a motion to alter within fifteen (15) days of the date of a decision of the Board. That rule further states that "[t]he Board shall not be required to hold a hearing prior to rendering a decision on such a motion."

The scope of a motion to alter is set forth in subpart (1) of Procedural Rule 34(D). That subpart of the rule provides:

All motions to alter shall be premised upon a proposed reconsideration of the existing record. New arguments are not allowed, with the exception of arguments in response to permit conditions or typographical, technical, and other manifest errors, provided that the party seeking the alteration reasonably could not have known of the conditions or errors prior to decision. New evidence shall not be submitted unless the Board acting on a motion to alter, determines that it will accept new evidence in order to avoid manifest injustice.

A motion to alter may ask the Board to reconsider arguments previously made. In re: Village of Ludlow, Docket No. WQ-01-08, Memorandum of Decision at 3 (May 15, 2002) (hereinafter Ludlow); In re: Hannaford Bros. Co. and Lowes Home Centers, Inc., Docket No. WQ-01-01, Memorandum of Decision at 4 (Aug. 29, 2001) (hereinafter Hannaford). In a motion to alter a decision on *preliminary issues* of law, "the moving party may argue that the Board overlooked or misapprehended laws or facts previously presented that *would possibly affect* the result" or outcome of the proceeding. Hannaford at 4 (emphasis added). With regard to a motion to alter *a decision disposing of a case*, the moving party may argue that the Board overlooked or misapprehended laws or facts previously presented that *did* affect the result or outcome of the proceeding, thereby giving the Board an opportunity to correct such error prior to possible appeal to a reviewing court.

Pursuant to Procedural Rule 34(D)(1), new arguments in a motion to alter are permitted only with respect to permit conditions or manifest error in the decision itself. Manifest error in the context of this rule means “obvious, patent errors in a decision, such as the misidentification of a party, the wrong citation to a case, or other defect that may readily be determined to be in error.” Ludlow at 3; Hannaford at 4, *quoting In re: Gillin*, Docket No. MLP-94-01, Memorandum of Decision and Order at 2 (Oct. 4, 1994); *see also, Re: Lamoille River Hydroelectric Project § 401 Certification*, Docket Nos. WQ-94-03 and WQ-04-05 (consolidated), Memorandum of Decision at 2 (Oct. 18, 1995) (describing manifest error as “obvious on its face”).

The proper focus of a motion to alter, then, is on errors that may have been previously committed *by the Board*, not on strategies or techniques that proved unsuccessful for the moving party. Thus, a motion to alter is not an opportunity for a party to treat the prior proceeding as a first run, to evaluate what may have gone wrong, and to then revise its arguments. Ludlow at 3. As the Environmental Board has explained:

The purpose of the standards concerning motions to alter is to preserve the integrity of the appeal process by ensuring that arguments and evidence are introduced prior to a final decision and to prevent the use of motions to alter to convert Board decisions into “proposed” decisions to which parties can later respond, thereby elongating the process.

In re: White, Docket Nos. 1R0391-EB, 103091-3-EB, 1R03091-4-EB, 1R03091-5-EB, 1R03091-5A-EB, 1R03091-6-EB (Rev.), Memorandum of Decision at 9 (July 24, 1998).

Subpart (2) of Procedural Rule 34(D) sets forth certain requirements concerning the *format* of a motion to alter and supporting legal memorandum, and also for a Reply Memorandum. It requires that movants shall number each requested alteration separately. It further states, in relevant part:

The motion may be accompanied by a supporting memorandum of law which shall contain numbered sections corresponding to the motion. The supporting memorandum shall state why each requested alteration is appropriate and the location in the existing record of the supporting evidence. Any reply memorandum of law shall also contain numbered sections corresponding to the motion.

See In re: OMYA, Inc., Docket No. WQ-01-09, Memorandum of Decision at 3 (May 16, 2002).

With these standards in view, the Board now addresses VNRC/NEKTU’s requested alterations.

B. VNRC/NEKTU's Motion to Alter

In their Motion to Alter, VNRC/NEKTU asked the Board to alter the Amended Certificate, Findings of Fact 147 and 281. VNRC/NEKTU also asked the Board to strike in entirety Findings of Fact 289 and 290 and substitute text proposed by them. They asked the Board to alter its Conclusions of Law in Sections IV.D.1 and IV.D.2 consistent with VNRC/NEKTU's proposed findings. Finally, VNRC/NEKTU asked the Board to strike and replace Conditions B, L, and M of the Amended Certificate and substitute for these their own proposed conditions. In support of their requests for alteration, VNRC/NEKTU filed a Memorandum setting forth various arguments, each of which is discussed below.

1. The Board should recognize that a self-sustaining, naturally-reproducing salmonid fishery in the Clyde River is an exceptional resource value in need of restoration and protection.

VNRC/NEKTU have asked the Board to alter Finding of Fact 147 of the Amended Certificate and associated Conclusions of Law in Section IV.D.1, arguing that the Board erred in not finding, based on the facts in the record, that the salmonid fishery in the Clyde River is an "exceptional resource value in need of restoration and protection." VNRC/NEKTU offered several arguments why the Board should alter Finding of Fact 147, but did not elaborate on the regulatory consequences of making such a finding.

The term "exceptional resource value in need of restoration and protection" has significant regulatory meaning. The ANR Flow Procedure (Exhibit C-7), which was applied by the Board in this case, sets forth two sets of procedures: a General Procedure and a set of Special Polices for domestic water supplies, hydroelectric facilities, and de minimus withdrawals. Ordinarily, the Special Policy for hydroelectric facilities is applied to determine the base flow required in bypass reaches. See ANR Flow Procedure, "Hydroelectric and Hydromechanical" Policy at 11-13. This Special Policy requires that bypasses be analyzed on a case-by-case basis, and, generally, bypass flows of at least 7Q10 are recommended "in order to protect aquatic habitat and maintain dissolved oxygen concentration in the bypass and below the project" and higher or lower bypass flows are prescribed "as a function of the uses and values to be restored or protected in the bypass reach." ANR Flow Procedure, "Hydroelectric and Hydromechanical" Policy at 12. However, "where there are exceptional resource values in need of restoration or protection," the Special Policy for hydroelectric facilities provides that "the General Procedure shall be followed," which may well require higher flows. ANR Flow Procedure, "Hydroelectric and Hydromechanical" Policy at 12. Thus, a determination that an "exceptional resource value" exists in the Clyde River, and in particular in the reach where the Newport 1,2,3 bypass exists, is less a finding of fact than a legal conclusion with substantive consequences.

Turning now to the movants' request, VNRC/NEKTU argue that the Board should have found, based on the record in this proceeding, that a self-sustaining, naturally-reproducing salmonid fishery actually exists or could exist in the Clyde River and, for the purpose of their appeal, could exist in the Newport 1,2,3 bypass reach. Secondly, they would have the Board declare this fishery to be an "exceptional resource value in need of restoration or protection." In support of their argument that the Board erred in not making such a finding and conclusion, VNRC/NEKTU point to a single statement on cross-examination of ANR's hydrology expert, Jeffrey Cueto, and to the Board's own finding of fact concerning DFW's 1991 management objective (Amended Certificate, Finding 147).

The Board is not able to make the finding of fact requested by VNRC/NEKTU. First, the scope of the Board's proceeding did not entail a qualitative examination of the entire Clyde River-Lake Memphremagog fishery. Second, with respect to the Board's examination of the fishery habitat in the Newport 1,2,3 bypass, the facts were entirely inconclusive whether all or portions of this reach had ever or could now support a self-sustaining, naturally-reproducing salmonid fishery.

It is uncontested that the 1,800-foot bypass of the Newport 1, 2, 3 facility has been managed for nearly half a century so that this riverine reach has been virtually dry for significant portions of each year. Accordingly, the Department of Fish and Wildlife (DFW) has not managed this reach of the Clyde River for *any* fish resource or fisheries (Finding of Fact 146, Amended Certificate) even though lower reaches of the river have been managed for salmonid species. Indeed, the record demonstrates that there was considerable disagreement amongst the fisheries experts sponsored by the parties concerning whether salmon had ever been able to ascend the bypass reach and whether all life stages of salmonid could ever be supported in the bypass reach. While the parties provided considerable testimony and other evidence concerning the habitat *potential* of various segments of the bypass reach to support different life stages of salmonid, there was no evidence from which the Board could find that such habitat would actually support a self-sustaining, naturally-reproducing salmonid fishery in the Clyde River.

VNRC/NEKTU also point to Mr Cueto's statement in support of their argument that the Board erred in not concluding that the Clyde River salmonid fishery is "an exceptional resource value in need of protection or restoration."² However, Mr. Cueto is not a fisheries biologist, his statement lacked foundation, and it was conclusory in nature. Therefore, without more evidence from ANR to support this witness' statement, the Board cannot conclude that, for

² Counsel for VNRC/NEKTU asked: "Mr. Cueto, do you consider a self-sustaining naturally reproducing salmonid fishery to be an exceptional resource value in need of restoration or protection in the Clyde River system?" Mr. Cueto responded: "Yes." There was no further explanation. Hearing Tr. at 527-28 (Apr. 2, 2003).

the purpose of applying the ANR Flow Procedure (Exhibit C-7) to determine what minimum flow value should be established for the Newport 1,2,3 bypass, the Board was required to use the General Procedure rather than the Special Policy applicable to hydroelectric facilities.

As VNRC/NEKTU note, the Board looked at DFW's objective for the Newport 1,2,3 bypass in reaching Finding of Fact 147. While the Board found that it was the Department's objective to create conditions in this reach that would result in the support of spawning and juvenile landlocked Atlantic salmon and resident brown trout populations,³ the Board nonetheless found that this objective was never adopted by the Secretary of ANR as formal water management policy. See Finding of Fact 147. VNRC/NEKTU and ANR all argue that the Board should *not* require a "formal declaration" by the Secretary of ANR to support a determination that "an exceptional resource value in need of restoration or protection" exists *before* the Board can impose higher flows in the bypass reach. VNRC/NEKTU also assert that the Board has created a dangerous precedent by giving Citizens a "benefit" through the failure of the Secretary of ANR to perform the non-discretionary duty – that is, the failure to develop a basin plan for the Clyde River that recognizes the exceptional resource value of the river's salmon fisheries.

The Board believes that these parties have read Finding of Fact 147 both too broadly and too narrowly. Finding of Fact 147, read in conjunction with the discussion and fn. 4 on page 27 of the Amended Certificate, stands for the proposition that some clear statement of policy by the Secretary of ANR concerning salmonid management objectives for the Clyde River might well have persuaded the Board that higher flows were required in the bypass reach through application of the ANR Flow Procedure's General Policy. In the absence of credible evidence that a self-sustaining salmonid fishery could be established in the bypass reach, however, the fact that the Secretary of ANR had *not* articulated a preferred water management policy for the Newport 1,2,3 bypass reach, in a basin plan for the Clyde River, a Water Management Type (WMT) recommendation to the Board, *or by other means*, was a factor in the Board's decision to apply the Specific Policy for hydroelectric facilities in establishing a base flow for the bypass reach.

Given the facts of this case, the Board has imposed flow and operating conditions in the Amended Certificate that are designed to protect and *enhance* what salmonid fishery exists in the Clyde River. Therefore, while the Board did not conclude that the salmonid fishery in the Clyde River is self-sustaining and naturally-reproducing and an "exceptional resource value in need of restoration or protection," thereby triggering application of the General Policy in ANR's Flow

³ Finding of Fact 147 refers to *The Clyde River Futures Project Preliminary Report*, April 1991. It should be noted that *The Clyde River Futures Project Final Report*, November 1992, at page 7, (VNRC Exhibit 8) sets as a management goal for the Newport 1,2,3 bypass improvement of habitat for "Landlocked Atlantic salmon and rainbow trout (spawning, incubation, fry and juvenile), and grown trout (all life stages)."

Procedure for determining a base flow for the Newport 1,2,3 bypass reach, the Board nonetheless concludes that it has fashioned an Amended Certificate that will assure Project compliance with the VWQS, other applicable state law, and the Clean Water Act (CWA).

VNRC/NEKTU's request to alter Finding of Fact 147, associated Conclusions of Law in Section IV.D.1, and related Conditions of the Amended Certificate, is denied.

2. The Board has improperly created a zone in the Newport 1,2,3 bypass within which the Vermont Water Quality Standards will not be achieved, an action that is not permitted under Vermont law.

VNRC/NEKTU have asked the Board to alter Finding of Fact 281 of the Amended Certificate and associated Conclusions of Law in Section IV.D.1, arguing that the record amply supports the conclusion that flows substantially greater than 30 cfs are required in the Newport 1,2,3 bypass reach to achieve compliance with the VWQS. VNRC/NEKTU repeat many of the same assertions and arguments that they raised in connection with subsection 1 above, concerning the Board's alleged error in not finding the salmonid fishery in the Clyde River to be "an exceptional resource value in need of restoration or protection."

VNRC/NEKTU's principal argument is that the Board is creating an unlawful "sacrifice zone" by not supporting habitat for a self-sustaining, naturally reproducing salmonid fishery in the Newport 1,2,3 bypass. However, VNRC/NEKTU has not provided any authority from this or another jurisdiction which stands for the proposition that a state is required to impose flow conditions in a bypass reach of a hydroelectric facility that pre-dates the CWA so as to support a self-sustaining, naturally reproducing salmonid fishery where it is questionable that any such fishery ever existed.⁴

Nevertheless, the Board takes seriously VNRC/NEKTU's argument that the Board has misapplied the VWQS in setting a minimum flow value for the Newport 1,2,3 bypass, by not correctly interpreting VWQS § 3-04(B)(4). Accordingly, the Board has revisited the text of the Amended Certificate at page 29 and makes several alterations to that text to clarify its

⁴ Indeed, the oft-cited landmark case, P.U.D. No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology, 511 U.S. 700, 114 S.Ct. 1900 (1994) (Tacoma) and subsequent reported cases largely deal with proposed *new* hydroelectric bypasses, in Class AA or other waters of ecological significance, where state water quality standards set forth very specific management goals, often to protect specific species and life stages of fish. The present Project, involved waters, and applicable water quality standards in the present appeal are factually distinguishable.

interpretation of this provision. These are set forth below at page 10.

VNRC/NEKTU assert that the Board has created a “habitat write-off” by not establishing a minimum bypass flow that will support “high quality habitat” for salmonid species in the Newport 1,2,3 bypass. They argue that the plain language of VWQS § 3-04(B)(4), read in entirety, requires the Board to set a minimum flow in the bypass reach that will provide full support of aquatic biota, wildlife, or aquatic habitat uses, which VNRC/NEKTU interprets to mean most if not all life cycle functions of salmonids, but especially spawning. They assert that the Board relied too much on the text of subpart (d) of VWQS § 3-04(B)(4) in establishing a minimum flow for the bypass reach, with the result that the Board has allegedly failed to manage this Class B water like all other segments of the Clyde River. Memorandum in Support of Motion to Alter at 4-8.

VWQS § 3-04 sets forth the Management Goals and various applicable standards for all Class B waters in the State of Vermont. It should be noted here that Class A(1) waters, known as “Ecological Waters,” must be managed for aquatic biota, wildlife, and aquatic habitat, “consistent with waters in their natural condition.” Class B waters, on the other hand, which constitute roughly 95 percent of all waters in Vermont, must be managed to achieve and maintain a level of quality that fully supports “aquatic biota and wildlife sustained by high quality aquatic habitat *with additional protection in those waters where these uses are sustainable at a higher level based on Water Management Type designation.*” VWQS § 3-04(A)(1) (Emphasis added).

As noted in the Amended Certificate, the Secretary of ANR has not proposed and the Board has not adopted Water Management Type (WMT) designations for the Clyde River, including a WMT for the Newport 1,2,3, bypass reach. See Amended Certificate, Finding of Fact 147. Therefore, the bypass reach must achieve the following narrative standard set forth in VWQS § 3-04(B)(4):

Aquatic Biota, Wildlife and Aquatic Habitat - No change from the reference condition that would prevent the full support of aquatic biota, wildlife, or aquatic habitat uses. Biological integrity is maintained and all expected functional groups are present in a high quality habitat. All life-cycle functions, including over-wintering and reproductive requirements are maintained and protected. In addition, the following criteria shall be achieved:

. . . .

d. no change from reference conditions that would have an undue adverse effect on the composition of the aquatic biota, the physical or chemical nature of the substrate or the species composition or propagation of fishes.

Key to an understanding of VWQS § 3-04(B)(4) is the term “reference conditions.” While VNRC/NEKTU did not discuss this term in their briefing, an understanding of “reference conditions” is essential to interpreting the above provisions related to the management of Class B waters. “Reference condition” does not mean “natural condition” as used in the management goal for Class A(1) waters – “the condition representing chemical, physical, and biological characteristics that occur naturally *with only minimal effects from human influence.*” See VWQS § 1-01(B)(29) (emphasis added). Rather, “reference condition,” as defined by VWQS § 1-01(B)(39), “means *the range* of chemical, physical, and biological characteristics of waters minimally affected by human influences.” (Emphasis added.) In the context of performing an evaluation of water quality as in assessing the impacts of a project, “the reference condition establishes the attainable chemical, physical, and biological conditions for specific water body types against which the condition of waters of similar water body type is evaluated.” As the Board stated at page 30 of the Amended Certificate, this does not mean that the Board should compare one bypass reach with another in order to determine what specific quality of aquatic habitat should be attained. However, it may mean that in a highly impacted/impaired watershed, an assessment needs to be made by comparing the impacted reach with another comparable, but unimpaired, water body type either in that riverine system or in another watershed.

This raises an important point. The Applicant in this proceeding elected to use reference condition water bodies outside the Clyde River watershed. Citizens’ consultants looked at the Missisquoi River near North Troy, the Black River in Coventry, and the Moose River at Victory, all in Vermont, to compare, among other things, unitized 7Q10 values as a surrogate for a 7Q10 value for the Clyde River. The purpose of selecting the three rivers was to capture the natural variability or *range* of chemical, physical and biological characteristics that one might expect in a river like the Clyde River. All three rivers are located in the northern part of Vermont sharing similar precipitation levels, hydrologic and geologic regimes, aquatic organisms, and other factors. CW-2, CW-7; Hearing Tr. at 171 *et seq.* (Apr. 1, 2003). While VNRC/NEKTU asserted at hearing that other reference condition water bodies might have been selected by the Applicant, including Otter Creek in western Vermont and the Battenkill in southern Vermont, the Board believes that it was reasonable for the Applicant to select the reference condition rivers that it did in assessing what minimum flow might be required in the Newport 1,2,3 bypass reach under the narrative standards of VWQS 3-04(B)(4) as well as the Special Policy for hydroelectric facilities in the ANR’s Flow Procedure.

Furthermore, the Applicant’s evidence went beyond a mere comparison with reference condition water bodies. The Applicant relied upon past and updated aquatic habitat assessment studies of the Clyde River, both below and in the Newport 1,2,3 bypass reach, to determine what life stages of what fish species might be supported in different reaches of the river. At the end of the day, it appears that the Newport 1,2,3 bypass can provide high quality aquatic habitat for resident aquatic species of fish and macroinvertebrates with the increased bypass flow authorized

by the Amended Certificate. However, the Board was not persuaded by credible evidence that the Newport 1,2,3 bypass reach has ever or could now support salmonid habitat. This would be the case even if the minimum stream flow was increased substantially in the bypass reach. Thus, while other assessments might have been performed by the Applicant using other methodologies, the Board believes that Citizens has provided sufficient evidence to demonstrate that its Project operations will not have an undue adverse effect on the composition of resident fish and other aquatic species in the Clyde River, including in the Newport 1,2,3 bypass reach. Rather, Project operations will improve aquatic habitat both within the bypass reach and downstream and upstream of this reach through the imposition of a new flow regime and other requirements set forth in the Amended Certificate. As noted in the Amended Certificate itself, these conditions, which include the trap-and-truck and fish pipe operations, will specifically result in an enhancement of the salmonid fishery in the Clyde River by providing upstream and downstream passage during the migratory seasons.

Accordingly, the Board amends the second paragraph on page 29 of the Amended Certificate, starting at sentence four, to read as follows:

. . . .Therefore, the Board concurs with the Secretary of ANR that a minimum flow value of 30 cfs must be imposed, along with other Conditions. The Board concludes that these Conditions will support high quality aquatic habitat in the bypass reach for fish and other aquatic biota. This does not mean that *all* life stages of salmonid will be supported in the bypass reach, especially those of landlocked Atlantic salmon. Thirty cfs will allow for a complete or nearly complete wetted channel width, deeper pools, and less terrestrial vegetative growth in the bypass channel than has historically been the case. Thus, far from resulting in an undue adverse effect on the composition of resident aquatic biota, the Project operations will significantly improve the existing habitat for aquatic biota and wildlife in the bypass reach.

The Board also deletes the last sentence of the second paragraph on page 29.

Finally, VNRC/NEKTU argue that the Amended Certificate raises constitutional issues. For the first time in its Motion to Alter, it raises the new argument that the Amended Certificate “may violate the Common Benefits clause of the Vermont Constitution.” As stated in Procedural Rule 34(D)(1), “[n]ew arguments are not allowed, with the exception of arguments in response to permit conditions or typographical, technical, and other manifest errors, provided that the party seeking the alteration reasonably could not have known of the conditions or errors prior to decision.” VNRC/NEKTU raised other provisions of the Vermont Constitution in its prior filings with the Board in response to Citizens’ proposed Certificate conditions. They have not alleged in their Motion to Alter that they could not have reasonably anticipated the conditions imposed by

the Board in the Amended Certificate, including the base flow imposed for the Newport 1,2,3 bypass, given that the Certificate issued by the Secretary of ANR provided for the same base flow and Citizens argued for the same base flow as an alternative to lower and higher proposed flows. Therefore, the Board does not allow and does not respond to this argument.

VNRC/NEKTU's request to alter Finding of Fact 281, associated Conclusions of Law in Section IV.D.1, and related conditions of the Amended Certificate, is denied.

3. The Board should provide for upstream and downstream fish passage through the natural channel by requiring removal of the remnant dam above the Newport 1,2,3 powerhouse and providing for adequate flows through the bypass.

VNRC/NEKTU have asked the Board to strike in entirety Findings of Fact 289 and 290 and replace them with proposed alternative findings. VNRC/NEKTU's proposed findings and related conditions would require increased bypass flows, the removal of the remnant dam, and the substitution of "natural" fish passage for the truck-and-trap and fish pipe operations authorized by the Amended Certificate issued by the Board.

VNRC/NEKTU assert that they "have provided ample evidence demonstrating that other methods of fish passage are equally viable, and are no more speculative than trap-and-truck," and "that fish can enter into the bypass reach on their own with proper flow conditions." With respect to these assertions, VNRC/NEKTU cite generally to the prefiled testimony and exhibits of its witness Geoffrey Power.

Procedural Rule 34(D)(2) specifically requires that the memorandum of law supporting a motion to alter "shall state why each requested alteration is appropriate *and the location in the existing record of the supporting evidence.*" (Emphasis added.) VNRC/NEKTU did not direct the Board to specific evidence to support their general assertions and requests for amendment. Accordingly, VNRC/NEKTU's request to strike Findings 289 and 290 and substitute its own proposed findings of fact and proposed certificate conditions is denied. To the extent that VNRC/NEKTU's request also contemplates that the Board amend associated Conclusions of Law in Section IV.D.2 of the Amended Certificate, this request is denied.

C. ANR's request for Modification

ANR did not file a timely Motion to Alter. However, in ANR's Reply Memorandum of September 9, 2003, it raised several issues that Citizens argues should have properly been raised in a Motion to Alter, not in a response to VNRC/NEKTU's motion. At oral argument, ANR argued that it merely asked the Board to clarify certain statements in the Amended Certificate,

not to change the ultimate outcome or conditions contained therein.

The Board denies ANR's first request to find that the salmon fishery in the Clyde River is an "exceptional resource value in need of restoration or protection." It does so because this is an untimely request to alter. ANR did not file its request within the fifteen-day period required by Procedural Rule 34(D). However, even if the request were timely, the Board would deny it for the reasons stated above with respect to VNRC/ NEKTU's first request for alteration.

Given the representations of ANR's counsel at oral argument, the Board views ANR's last two requests as more in the nature of requests for clarification rather than actual requests for alteration of the Board's Amended Certificate. Therefore, on its own motion, the Board elects to respond to ANR's comments as follows by clarifying certain points addressed in the Conclusions of Law of the Amended Certificate.

First, the Board notes that it considered the site-specific habitat studies prepared by Citizens, along with other evidence, in reaching its decision concerning what minimum flow to impose in the Newport 1,2,3 bypass reach and conservation flows should be imposed downstream of the bypass reach. Although the Board stated at page 29 of the Amended Certificate that: "[t]he Board cautiously accepts the concept that default minimum flow values may be used, in the absence of conclusive site-specific studies," it followed this clause with the statement that "site specific studies are generally preferred." Thus, the Board did not intend to abandon the policy in Section 3-01(C)(1)(c) that site-specific habitat studies are preferred.

Second, the Board agrees with ANR that the 7Q10 value reference in Section 2-02(B)(1) is designed *primarily* to evaluate proposed wastewater discharges to a receiving water. The Board cited, at page 28, this example along with other provisions of the VWQS to show that the VWQS take into account changes in riverine systems that are attributable to human-made structures. The Board recognizes that the principal regulatory provision for evaluating proposed flows for hydroelectric facilities is the hydrology criteria, Section 3-01(C)(1)(c), and other standards intended to support designated and existing uses in Class B waters.

IV. ORDER

Accordingly, it is hereby ordered:

1. The Motion to Alter filed by VNRC/NEKTU is denied, in part, and granted in part.
2. ANR's request to modify is denied. However, the Board, on its own motion, clarifies two points in its Conclusions of Law that ANR asked the Board to reconsider. See Section III(C) above.
3. The Board's Amended Water Quality Certificate: Findings of Fact, Conclusions of Law, and Order (July 11, 2003) stands as issued, with the exception that the second paragraph on page 29 is amended as described in Section III(B)(2) above.
4. Jurisdiction is returned to the Secretary of the Agency of Natural Resources for the purpose of overseeing and administering the terms and conditions of the Amended Water Quality Certificate.

Dated at Montpelier, Vermont, this 2nd day of February, 2004.

WATER RESOURCES BOARD

/s/ David J. Blythe

David J. Blythe, Chair

Concurring:
John D.E. Roberts, Vice-Chair
Mardee Sánchez⁵

Lawrence H. Bruce, Jr. and Jane Potvin. We continue to disagree with the majority's decision to grant an Amended Certificate, incorporating a minimum stream flow of 30 cfs in the bypass reach and authorizing a trap-and-truck operation in lieu of the stream flow regime proposed by VNRC/NEKTU. Therefore, we stand by our Dissenting Opinion attached to the Amended Certificate.

⁵ Ms. Sánchez participated in oral argument and deliberations with respect to this matter pursuant to 3 V.S.A. § 849.