

**IN THE SUPREME COURT
OF THE STATE OF VERMONT**

In Re: Morrisville Hydroelectric Project Water Quality

Supreme Court Docket No. 2018-339

On Appeal from Superior Court Environmental Division
Docket No. 103-9-16 Vtec

**REPLY BRIEF OF CROSS APPELLANTS/APPELLEES
MORRISVILLE WATER & LIGHT DEPARTMENT**

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INTRODUCTION

This matter involves an appeal from the Vermont Superior Court, Environmental Division's Decision on the Merits ("Merits Decision") which adjusted a water quality certification ("WQC") issued by the Agency of Natural Resources ("ANR"). Appellants, ANR, and Vermont Natural Resources Counsel and Vermont Council of Trout Unlimited ("VNRC/VTTU"), appealed limited sections of the Merits Decision and Appellees/Cross-Appellants Morrisville Water & Light ("MWL") appealed part of the Merits Decision as well as part of the Environmental Division's Decision on Motions ("Motions Decision").

Significant portions of the Merits Decision, including but not limited to the aesthetic requirements for the Morrisville Facility, the aesthetic requirements for the Cady's Falls Facility and the four (4) year phase in period, have not been appealed. PC, 38-39, 48-51, 67-68.

ARGUMENT

I. The Amici mischaracterize the flow regimes adopted by the Environmental Division as degrading water quality and prioritizing a commercial use.

The Amici, National Wildlife Federation, Sierra Club and Connecticut River Conservancy (collectively "Amici"), assert the flow regimes set forth in Merits Decision degrade water quality and prioritize a commercial use over the designated use of aquatic habitat. *Amici's Brief*, p. 3, 5, 14. The flow regimes adopted by the Environmental Division, however, significantly increase minimum flows at the Morrisville Facility, Cady's Falls Facility and Green River Facility (collectively the "MWL Facilities"), which corresponds with improvements to existing water quality and aquatic habitat. *See* Tr. 4/2/18, 119:15-23, 147:22-25, 165:14-20; 4/11/18, 95:18-25, 113:1-12. These increased minimum flows also correspond with a reduction in energy generation at the MWL Facilities. SPC 38, Table 9.

For example, at the Morrisville Facility, the Merits Decision increases the minimum flow in the primary bypass from 12 cubic feet per second (“CFS”) to 43 CFS. This increase improves water quality and aquatic habitat by increasing flow and circulation. PC 32-33. This increase in flow at the Morrisville Facility also decreases MWL’s annual energy generation, but meets all applicable requirements of the Vermont Water Quality Standards (“VWQS”) – including protecting the designated use of aquatic habitat and existing use of hydroelectric generation. PC 29-43; SPC 38. Similarly, at the Cady’s Falls Facility the Merits Decision increases the minimum the minimum flow from 5.5 CFS to 65.5 CFS which results in a 35% increase in habitat availability and 13% reduction in annual energy generation. PC 52; SPC 38.

ANR’s Procedure for Determining Acceptable Minimum Stream Flows (“Streamflow Procedure”) identifies 7Q10 as a general minimum flow for hydroelectric facilities. SPC 46; Tr. 4/2/18, 55:23 - 56:19. The minimum flows set forth in the Merits Decision exceed the 7Q10 requirement at all of the MWL Facilities. SPC 36-37. Thus, contrary to the Amici’s arguments, water quality is not degraded as a result of the Environmental Division’s adjustment of flow regimes at the MWL Facilities. Nor does the Environmental Division’s Merits Decision prioritize the commercial use of energy generation over the protection of aquatic habitat.

II. The Amici’s interpretation of anti-degradation policy ignores the plain language of the federal regulations and Vermont Water Quality Standards.

As discussed in MWL’s original brief, and acknowledged by the Amici, under the Clean Water Act (“CWA”) state water quality standards must protect both designated and existing uses of water. 40 C.F.R. § 131.10; 40 C.F.R. § 131.11(a)(1); 40 C.F.R. § 131.12; *Amici’s Brief*, pp. 6-7. Consistent with these requirements the Vermont Water Quality Standards (“VWQS”) identify and require both designated and existing uses to be protected. VWQS § 3-04(A); VWQS § 1-03(B)(1); VWQS § 1-03(C)(1).

The Amici misinterpret federal regulations and VWQS as limiting the application of Vermont's Anti-Degradation Policy to situations where designated uses are fully supported. *Amici's Brief*, pp. 6-9; 14-17. In other words, the Amici interpret federal regulations and VWQS as requiring designated uses to take precedence over existing uses and allowing existing uses to be degraded. *Id.*

The plain language of the federal regulations and VWQS require designated uses and existing uses to be maintained and protected. *See* 40 C.F.R. § 131.11(a)(1); 40 C.F.R. § 131.12; VWQS § 3-04(A); VWQS § 1-03(B)(1). The VWQS specifically require “[e]xisting uses of waters and the level of water quality necessary to protect those existing uses shall be maintained and protected regardless of the water’s classification.” VWQS § 1-03(B)(1). Similarly, the basic floor of the federal anti-degradation policy does not allow an existing use to be eliminated or for water quality to drop below levels needed to maintain an existing use. 40 C.F.R. § 131.12(a)(1).

The plain language of the VWQS do not allow, as the Amici suggest, designated uses to take precedence over existing uses. *Amici's Brief*, p. 7. Nor do the VWQS allow existing uses to be degraded, rather the VWQS explicitly require they be “maintained and protected”. VWQS § 1-03(B)(1). Therefore, the Amici’s argument is a misconstruction of the plain language of the VWQS – which are at issue in this appeal.

III. There is no basis to restrict the winter drawdown at the Green River Reservoir to 1.5 feet.

ANR disputes that the winter drawdown condition in MWL’s WQC is arbitrary and capricious. *Reply Brief of ANR*, pp. 17-19. However, as discussed in MWL’s original brief and below, the littoral habitat assessment ANR conducted at the Green River Reservoir (the “DEC Study”) was flawed and does not support a finding that the Green River Reservoir has been

negatively affected by winter drawdowns or that restricting the winter drawdown of 1.5 feet is necessary to meet VWQS. *Brief of MWL*, pp. 37-38.

ANR ignores that the DEC Study – which was not designed or tested to assess the impacts of winter drawdowns – identified statistical differences for only two of the eleven parameters measured. PC 14, ¶¶ 117-18. There were no statistical differences noted for any physical components of littoral habitat and the only statistical differences were related to percent of aquatic plant cover and number of odonate exuviae. *Id.* at 115-16.

Eric Davis testified he wouldn't give much weight to the difference in odonate exuviae and acknowledged extraneous factors unrelated to odonate can influence a onetime count of odonate exuviae. Tr. 4/10/18, 37:18-24; 55:17-21. Mr. Davis further acknowledged ecological data can change from year to year in a lake, and that factors other than a winter drawdown – such as prevailing winds and ice and inter-annual differences in weather – can reduce aquatic plant cover in water bodies. 55:14-16; 55:22 - 56:6. Thus, these two parameters cannot reasonably be relied on to establish the winter drawdown has negatively affected the reservoir or to limit the winter drawdown at the Green River Reservoir to 1.5 feet.

The DEC Study also did not use valid reference conditions. A reference condition is defined as:

the range of chemical, physical, and biological characteristics of waters minimally affected by human influences. In the context of an evaluation of biological indices, or where necessary to perform other evaluations of water quality, the reference condition establishes attainable chemical, physical, and biological conditions for specific water body types against which the condition of waters of similar water body type is evaluated.

VWQS § 1-01(B)(39).

A manmade reservoir, such as the Green River Reservoir, is different from a natural lake due to different bathymetry, water turnover rates, and substrate and water chemistry. Tr. 4/2/18,

178:21 – 180:1; Tr. 4/6/18, 18:1-23; 44:2-6. As natural lakes and a manmade reservoir are dissimilar systems one would expect a manmade reservoir to be statistically different. Thus, natural lakes are an invalid reference condition for the Green River Reservoir. *See* WQS § 1-01 B.39. A valid reference condition in this instance would be another manmade reservoir that has minimal human influences, such as no water level drawdown.

Lastly, in his assessment of the results of the DEC Study, Eric Davis testified the DEC Study indicated the winter drawdown has an adverse impact on the littoral zone of the Green River Reservoir. Tr. 4/11/18, 11:2-10; 74:13-16. There was no testimony the winter drawdown at the Green River Reservoir had 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.” WQS §3.04(B)(4)(d) (emphasis added). On the contrary, MWL set forth evidence showing under existing conditions fish species have maintained abundant self-sustaining populations in the Green River Reservoir and there is a desirable mix of aquatic habitat types. Tr. 4/2/18, 176:24 – 178:2; 4/6/18, 29: 4 -30:4; 40:25 – 42:7.

Because aspects of the DEC Study were flawed and ANR failed to establish that the current winter drawdown has an “undue adverse effect,” there was no basis for the Environmental Division to restrict the winter drawdown to 1.5 feet. There was, however, sufficient reliable evidence establishing a maximum winter drawdown of 6 feet meets VWQS. Tr. 4/2/18, 211:23 – 212:15.

IV. The Vermont Water Quality Standards implicitly allow for the consideration of social and economic factors.

Despite a clear decision from the Environmental Division, ANR argues in the Merits Decision the Environmental Division considered social and economic factors, specifically the ability to generate power at the Cady’s Falls Facility. *ANR Reply Brief*, p. 21-22. This assertion is

wrong but highlights how the VWQS implicitly allow for the consideration of social and economic factors.

The VWQS direct the Secretary of ANR to consider certain factors when identifying existing uses, including the use of water for recreation or fishing and the use of the water for a commercial activity. VWQS § 1-03(B)(1). These factors implicitly call for the consideration of social and economic issues – such as energy generation, profits for commercial activities (including hydroelectric facilities and fishing/recreation business ventures) and recreation. While the Environmental Division did not consider social and economic factors, by arguing the Environmental Division considered social and economic factors at the Cady's Falls Facility, ANR acknowledges the VWQS implicitly allow for the consideration of such factors. *ANR Reply Brief*, p. 21-22.

The Environmental Division was clear in its Merits Decision that a minimum flow of 100 CFS at the Cady's Falls Facility causes a reduction in energy generation that does not support or maintain the existing use of hydroelectric generation. PC 51 – 53. As noted in the Merits Decision, a minimum flow of 100 CFS at the Cady's Falls Facility, as set forth in MWL's WQC, supports the designated use of aquatic habitat but results in an approximately 21% reduction in energy generation. PC 52; SPC 38, Table 9. This reduction in energy generation does not maintain or protect the existing uses of energy generation. PC 52; Tr. 4/2/18, 154:4-8; SPC 34.

Thus, in order to ensure compliance with Vermont's anti-degradation policy, the Environmental Division correctly balanced the existing use of hydroelectric generation against the designated use of aquatic habitat. PC 51 - 53. The Environmental Division made clear in its Decision on the Merits that in conducting this balancing it considered only existing and designated uses. *Id.* The Environmental Division did not broadly consider social and economic

factors as MWL argues is appropriate. If the Environmental Division had considered social and economic factors, MWL would have proposed a different set of conditions. SPC 37; 38, Table 9.

V. The Streamflow Procedure is directly applicable to water quality certifications.

ANR mischaracterizes MWL's arguments on the consideration of social and economic factors and fails to directly oppose them. *ANR Reply Brief*, pp. 20-21. ANR sidesteps the fact that ANR's Streamflow Procedure states ANR has a "responsibilit[y] to strike a balance between competing water uses in the public interest," and that ANR "shall consider any public benefits or detriment realized by restoration of acceptable conservation flows compared to any public benefit or detriment realized by the continued release of less than acceptable conservation flows," which ANR failed to do in MWL's WQC. SPC 46-47.

ANR also does not address or acknowledge that Streamflow Procedure is a state action directly related to water quality. As discussed in MWL's original brief, the phrase "any other appropriate requirement of State law" is not limited to state water quality standards and encompasses any state action related to water quality. *Brief of MWL*, p. 32-36. ANR attempts to argue the Streamflow Procedure is not an "other appropriate requirement of state law" because it is a policy statement that does not set standards for water quality certifications. *Reply Brief of ANR*, pp. 20-21. The Streamflow Procedure, however, states it is "applicable to agency determinations of acceptable minimum stream flow, made pursuant to...issuance of water quality certificates pursuant to Section 401 of the Federal Clean Water Act and FERC licensing or relicensing actions." SPC 42.

Moreover, ANR cites to the policy goals of congress and state of Vermont "to restore and maintain the chemical, physical, and biological integrity of the state's water" to support their argument that the Merits Decision must be reversed. *ANR Reply Brief*, p. 22. Those policies do

not set standards or requirements for water quality certifications, but ANR concedes it considered them when issuing MWL's WQC. *Id.* If those broad policy goals are relevant to a WQC it is irrational for ANR to argue they need not consider the Streamflow Procedure, which is directly applicable to water quality certifications.

ANR's citation to the policy goals of congress and state of Vermont arguably opens the door to allowing the consideration of other state policies in a WQC. Examples of relevant goals and policies can be found in the VWQS and the Vermont Energy Plan. The VWQS specifically provide that it is the policy of the State of Vermont to "protect and enhance the quality, character and usefulness of its surface waters" as well as to "manage waters ...to allow beneficial and environmentally sound development." VWQS § 1-02(A)(1), (7).

In addition, the Vermont Department of Public Service has adopted the Vermont Energy Plan, as required by 30 V.S.A. § 202b, and which provides general guidance on the State's goals for renewable energy, including hydroelectric power. *See* Vermont Energy Plan (2016) <https://bit.ly/2Ejcvlv>. Vermont's goal is to achieve 90 percent renewable energy by 2050. *Id.* § 1.1. If policies and goals of the state of Vermont cited by ANR are relevant to a WQC, as ANR states, the goals and policies set forth in the VWQS and Vermont Energy Plan should certainly be considered in a WQC.

CONCLUSION

As discussed in MWL's original brief and above, there is no basis for this Court to overturn the Environmental Division's order adjusting the flow regimes at the MWL Facilities. The adjusted flow regimes set forth in the Merits Decision meet all applicable requirements of the VWQS and there is no factual or legal basis to reverse the adjusted flow regimes.

MWL requests, however, that this Court reverse the Environmental Division's decision with respect to the consideration of social and economic factors in a WQC and the winter drawdown at the Green River Reservoir.

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CERTIFICATE OF COMPLIANCE

I, Clara E. Conklin, Esq., counsel of record for cross appellants/appellees Morrisville Water & Light Department, certify this brief complies with the word count limit in V.R.A.P. 32(a)(7)(A). According to the word count of the Microsoft Word processing software used to prepare this brief, the text of this brief contains 2,446 words.



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