

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6316

Application of Town of Hardwick Electric)	Hearing at
Department for authorization to make repairs to the)	Hardwick, Vermont
Mackville Dam located in Hardwick, Vermont)	December 17, 1999
)	

Order entered: 3/14/2000

PRESENT: Wayne L. Foster, Hearing Officer

APPEARANCES: Trevor R. Lewis, Esq.
for Town of Hardwick Electric Department

Jon M. Groveman, Esq.
for Agency of Natural Resources

Sarah Hofmann, Esq.
John J. Cotter, Esq.
for Vermont Department of Public Service

I. INTRODUCTION

This case concerns a petition filed by the Town of Hardwick Electric Department ("Hardwick") on November 30, 1999, requesting authorization, under Chapter 43 of Title 10 of the Vermont

Statutes, to proceed with repairs to the Mackville Dam ("Mackville")

The Agency of Natural Resources ("ANR") must issue three individual permits for the proposed project. These permits are a Water Quality Certificate, a Wetland Conditional Use Determination ("CUD"), and a Lakes and Ponds Encroachment permit. Hardwick has filed application materials with the ANR for all three permits and both organizations are working toward resolving all technical issues that must be addressed in the process for obtaining these three permits.¹

On February 23, 2000, the Board's engineering consultant, Stephen C. Knight, Jr., P.E., submitted his report on this matter to the Board.

II. FINDINGS

Based upon the substantial evidence of record and the testimony presented at the hearing, I hereby report the following findings to the Board in accordance with 30 V.S.A. § 8.

1. Hardwick is a Vermont municipal electric company subject to the jurisdiction of the Board. Pet. at 1.
2. Hardwick is the owner of a dam (Mackville) which is located in the unincorporated village of Mackville, within the Town of Hardwick, Vermont. The dam, built in the early 1900s, is constructed of granite blocks and impounds a pond of approximately 11 acres surface area. The purpose of the dam was to supply water to a hydroelectric facility, located downstream of the dam. The hydro facility was abandoned in the late 1940s and the dam is no longer used for a hydro facility or any other active utility function, but has remained under the ownership of Hardwick. At present, the pond and surrounding area serve recreational purposes. Bongiovanni pf. at 2-3; pet. at 1.
3. The effects of weather and time have resulted in water leakage under and around the granite blocks plus some shifting of the blocks. As a result, the dam in its existing condition does not meet current engineering and safety standards. Bongiovanni pf. at 3.

integrity. Retaining the existing granite blocks, however, will preserve the character of the existing historic dam. Bongiovanni pf. at 3; exh. Board-4.

5. On September 24, 1999, Hardwick received consent from the Board, pursuant to 30 V.S.A. § 108(c), for the issuance and sale of up to \$585,000 in General Obligation Bonds to fund both the needed repairs to the Mackville Dam and repairs to the electric generator at the Wolcott hydroelectric plant, located several miles downstream of the Mackville Dam. Board Order, dated September 24, 1999, at 4.

6. Hardwick has obtained the necessary approval from voters in the Town of Hardwick to finance the subject dam repairs. Bongiovanni pf. at 5.

7. After obtaining all necessary permits, Hardwick intends to begin the proposed construction as soon as possible in the 2000 construction season, with an estimated start date of April 15, 2000, and an estimated completion date of October 15, 2000. Bongiovanni pf. at 5; exh. Hardwick-1.

Cultivated Agricultural Land

[10 V.S.A. § 1086(a)(1)]

8. There is no active farming adjacent to the proposed project work area. No cultivated agricultural lands are expected to be rendered unfit for use, including both the immediate and long range agricultural land use impacts. The proposed project will result in no change in water level and no new land being flowed. Exh. Hardwick-1.

Scenic and Recreational Values

[10 V.S.A. § 1086(a)(2)]

9. No cutting of trees or alterations of the scenic nature in the proposed project area will occur. The general scenic corridor as viewed from the proposed project area or from other vantage points will

Fish and Wildlife

[10 V.S.A. § 1086(a)(3)]

11. The Department of Fish and Wildlife has investigated the potential effects on fish and wildlife resources resulting from the proposed project. Exh. Board-1.

12. In accordance with 10 V.S.A. § 1084, the Commissioner of the Department of Fish and Wildlife has certified that the department does not anticipate significant adverse effects on fish and wildlife habitats to result from this proposed project, provided that (1) the proposed project construction plan is followed and (2) measures are undertaken to ensure that uncured concrete is not discharged to State waters. Exh. Board-1.

13. To ensure that silts, sediments, or uncured concrete will not come in contact with waters of the State and to protect water quality, (1) all work will be performed in the dry, (2) silt fence and haybales will be placed upstream of the proposed dam, (3) silt fence will be placed along the exposed pond banks in the vicinity of the dewatered area between the cofferdam and the existing dam, (4) the contractor will be required to seal the annular space between the bypass piping and the opening in the dam, and (5) the contractor will be required to submit his schedule of accomplishment of erosion control work prior to construction for review and approval by the project engineer and the ANR. In addition, the contractor will be required to accomplish erosion control in accordance with current Vermont Agency of Transportation Standard Specifications for Construction #105.22, #105.23, #105.24 and others as appropriate. Exhs. Board-2, Board-4.

Forests and Forest Programs

15. Hardwick must obtain a Water Quality Certification from the ANR for the proposed project. The ANR's water quality certification process includes setting a minimum stream flow rate. Tr. at 8-17, 31-35; exh. Hardwick-1.

16. Hardwick has submitted its request for Water Quality Certification to the ANR. Tr. at 31; exh. Board-3.

Existing Uses
of the Waters

[10 V.S.A. § 1086(a)(6)]

17. During construction of the proposed project, approximately 0.2 acres of Mackville Pond will be dewatered to allow construction of the proposed new concrete dam along the upstream face of the existing dam. In addition, the pond will be lowered by 3 to 6 feet during construction. As a result, swimming and boating activities may be suspended during construction, although other uses, such as fishing, will continue to be allowed. Exh. Hardwick-1.

18. Upon the completion of construction, all current recreational uses will be returned. Exh. Hardwick-1.

Hazard to Navigation, Fishing, Swimming
or Other Public Uses

[10 V.S.A. § 1086(a)(7)]

19. The proposed new outlet works will not result in any new hazard to navigation, fishing, or other public uses and it will be posted, warning all to remain clear of it at all times. As a result, the proposed project will not create any new hazard to the public use of Mackville Pond. Exh. Hardwick-1.

21. The proposed construction will stabilize the pond level by eliminating seepage through the existing dam. In addition, by constructing the proposed new dam along the upstream face of the existing dam, the integrity of the existing historic dam structure will be maintained.

Exh. Hardwick-1.

Classification, if any, of affected waters

[10 V.S.A. § 1086(a)(10)]

22. The waters of Mackville Pond are classified as Class B in accordance with the Vermont Water Quality Standards adopted July 12, 1994.

Any Applicable State, Regional or Municipal Plans

[10 V.S.A. § 1086(a)(11)]

23. The proposed project will have no known effect on any state, regional or municipal plans.
Exh. Hardwick-1.

Municipal Grand Lists and Revenues

[10 V.S.A. § 1086(a)(12)]

24. The proposed project is not expected to have any adverse effect on the municipal grand list and revenues. The existing dam and pond are central features of the neighborhood and contribute to its historic character and recreational opportunities, thus enhancing the values of nearby properties and having positive impact on the grand list and associated revenues. As a result, repairing the existing dam, as opposed to removing it, will help preserve the grand list and revenues from the properties in the vicinity of the dam. Exh. Hardwick-1.

Public Safety

Based upon all the above evidence, the proposed Mackville Dam repairs will serve the public good, having given due consideration, among other things, to the effect the proposed project will have on:

- (1) the quantity, kind and extent of cultivated agricultural land that may be rendered unfit for use by the project, including both the immediate and long range agricultural land use impacts;
- (2) scenic and recreational values;
- (3) fish and wildlife;
- (4) forests and forest programs;
- (5) the need for a minimum water discharge flow rate schedule to protect the natural rate of flow and the water quality of the affected waters;
- (6) the existing uses of the waters by the public for boating, fishing, swimming and other recreational uses;
- (7) the creation of any hazard to navigation, fishing, swimming or other public uses;
- (8) the need for cutting clean and removal of all timber or tree growth from all or part of the flowage area;
- (9) the creation of any public benefits;
- (10) the classification, if any, of the affected waters under Chapter 47 of Title 10;
- (11) any applicable state, regional or municipal plans;
- (12) municipal grand lists and revenues; and
- (13) public safety.

To the extent these findings are inconsistent with any proposed findings, such proposed findings are denied.

IV. BOARD DISCUSSION

Each of the parties filed comments in response to the Hearing Officer's Proposal for Decision ("PFD"). Hardwick supports the PFD, and has not sought any changes to the PFD.² The Department also supports the PFD, but requests that we add a paragraph to the Order incorporating the minimum stream flow rate that may be established in ANR's Water Quality Certification for the project.³ ANR requests that the Order be modified to incorporate by reference the terms and conditions of all three ANR permits that are required for the project; ANR contends that at a minimum, the Board's Order should incorporate ANR's minimum stream flow determination.⁴

Hardwick responded to ANR's comments, objecting to the incorporation by reference of the terms and conditions of the ANR permits. Hardwick contends that to do so would exceed the Board's jurisdiction, and may violate due process requirements.⁵

These issues can be readily resolved. First, we note that the PFD already includes the express requirement that Hardwick "comply with all conditions and requirements of any other permits required by the State of Vermont," including the three identified ANR permits. This in effect accomplishes the result that ANR seeks in its comments: the Order as drafted requires Hardwick to comply with the terms and conditions of the ANR permits (and any other required State of Vermont permits).⁶ We thus see no reason to add to the existing language, except as noted in the paragraph that follows.

With respect to the minimum stream flow, both the Department and ANR correctly note that 10 V.S.A. § 1086(b), a vital part of the statute governing this proceeding, requires that our Order include "conditions for minimum stream flow." Although such a condition is implicit in the PFD's requirement that Hardwick comply with all requirements of ANR and other state permits, we agree with the Department and ANR that this statutorily required condition should be made explicit. Thus,

The minimum stream flow rate as established by the Vermont Agency of Natural Resources and set forth in its Water Quality Certification is incorporated herein upon issuance.

As noted above, Hardwick has objected to such incorporation of the terms or conditions of an ANR permit. Hardwick, however, has requested that this Docket proceed expeditiously to a final order, yet has not presented evidence directly demonstrating compliance with 10 V.S.A. § 1086 (b). The Board is granting Hardwick's petition, but to do so has resulted in a situation where our final order will issue prior to ANR's determination of a minimum stream flow. This leaves us with the options of either issuing an order that relies upon ANR's yet-to-be determined stream flow requirement to meet the § 1086(b) criterion, or remanding the case back to the Hearing Officer to require that Hardwick present additional testimony on the stream flow issue. We conclude that the former is by far the preferable option, in light of the need for prompt repair of Mackville Dam.⁷ This is also an equitable result, given that Hardwick did not present direct evidence on minimum stream flow in this docket, and elected instead to rely on the upcoming ANR determination.

V. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. The Findings and Conclusions of the Hearing Officer are adopted.
2. The repair of the Mackville Dam in Hardwick, Vermont, by the Town of Hardwick Electric Department, in accordance with the evidence and plans submitted in this proceeding, will serve the public good, in accordance with 10 V.S.A. § 1086.

3. The Town of Hardwick Electric Department shall obtain and comply with all conditions and

5. Prior to the beginning of construction, the Town of Hardwick Electric Department shall file with the Board a copy of the Water Quality Certification, the Wetland Conditional Use Determination, and the Lakes and Ponds Encroachment permit.

DATED at Montpelier, Vermont, this 14th day of March, 2000.

<u>s/Michael H. Dworkin</u>)	PUBLIC SERVICE
)	
)	BOARD
<u>s/Suzanne D. Rude</u>)	
)	OF VERMONT
)	
<u>s/David C. Coen</u>)	

OFFICE OF THE CLERK

Filed: March 14, 2000

Attest: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or mail) of any technical errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of