

9-12-91

STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION

FINAL DECISION
IN THE MATTER OF APPLICATION OF SUMMIT HYDROPOWER PARTNERSHIP
FOR §401 CERTIFICATION

NOTED



I. INTRODUCTION

Summit Hydropower Partnership ("Applicant") has requested that the Commissioner of Environmental Protection certify, pursuant to §401 of the Clean Water Act ("CWA"), 42 U.S.C. §1341, that discharges associated with construction and operation of a proposed hydroelectric project at Cargill Falls on the Quinebaug River in Putnam, Connecticut will not violate Connecticut's water quality standards. The Applicant proposes to use an existing dam, owned by the Town of Putnam, to generate approximately 5,400,000 kilowatt-hours per year of electricity for sale to the Connecticut Light and Power Company (DEP Ex. 8). The Applicant proposes to construct at the site a new powerhouse containing a 1.2 megawatt turbine (DEP Ex. 8). The proposed project would be operated in a run-of-river mode, in which the rate of water entering the facility would equal the rate of water leaving it on an instantaneous basis. The Applicant originally proposed to maintain a minimum flow release at the dam of 58 cubic feet per second (cfs), and, when the natural flow of the river is below 58 cfs, to release all of the water over the dam (DEP Ex. 8). During the hearing, the Applicant presented a proposed stipulation, drafted in consultation with Department staff, which would have increased flows at certain times of the day and year (App. Ex. 13).

Cargill Falls is located in the center of the Town of Putnam, Connecticut, which intervened in this proceeding. The Mayor of Putnam, Donald St. Onge, testifying for the Town at the hearing, stated that the Falls have "become a focal point of our community" (Tape 5 at 391). Cargill Falls is featured on the cover of the Southern New England Telephone Company telephone directory for Putnam and neighboring towns, and is depicted in the Town's logo (Int. Ex. 4; Testimony of William Simmons, Selectman, Town of Putnam, Tape 4). A town park is located on the east bank of the Quinebaug River, overlooking the Falls. (DEP Ex. 8, att. 12).

The Hearing Officer's proposed decision was issued on December 24, 1990, and the Applicant objected to it. Oral argument was held on April 15, 1991.

II. SECTION 401

Section 401 of the CWA, 33 U.S.C. §1341, provides in pertinent part:

Any applicant for a federal license or permit to conduct any activity, including, but not limited to, the construction or operation of facilities, which may result in any discharge to the navigable waters, shall provide the licensing or permitting agency with a certification from the State in which the discharge originates or will originate that any such discharge will comply with the applicable provisions¹ of sections 1311, 1312, 1313, 1316 and 1317 of this title...

¹Sections 1311, 1312, 1313, 1316 and 1317 of the Clean Water Act provide, inter alia, for the establishment of technology-based effluent limitations by the U.S. Environmental Protection Agency ("EPA") and the States, and for the establishment of water quality standards by the States. Section 1313 of the Clean Water Act sets forth the guidelines for the adoption of State water quality standards, which standards must be approved by EPA. EPA has promulgated regulations which establish minimum requirements for approvable State water quality standards. 40 CFR Part 131.

Because the Applicant has applied to the Federal Energy Regulatory Commission ("FERC") for a permit under the Federal Power Act, 16 U.S.C. §§791a, et seq., to construct and operate the proposed project, and because the proposed project will result in discharges to the navigable waters, the Applicant is required by §401 to seek certification from the Commissioner that the project will comply with the State's water quality standards.

III. WATER QUALITY STANDARDS

Connecticut's water quality standards were adopted by the Department under the authority of §22a-426 of the Connecticut General Statutes and were approved by the U.S. Environmental Protection Agency ("EPA") under §303 of the CWA. As required by the federal regulations governing State adoption of water quality standards, 40 CFR 131.6, Connecticut's water quality standards consist of classifications designating uses for the various waters of the State, water quality criteria sufficient to protect those uses, and an antidegradation policy. Connecticut Water Quality Standards, January 1987 ("WQS").

In designating the appropriate uses for State waters, the Department considered the many factors listed in §22a-426 in order to determine what level of protection should be sought for each water. This process involved a balancing of competing interests, including weighing the economic needs of the State against the need for the preservation of water supplies for drinking, agriculture and industry. Water quality criteria are included in the standards in order to protect the designated uses. For example, for waters which have been classified as suitable for fishing, the Department has established

criteria for various pollutants, which criteria, if met, will protect the fishery resource.

As noted, the water quality standards also contain an antidegradation policy. Antidegradation is defined in the water quality standards as "a statement of practice required by federal law which prohibits a State from lowering surface water quality classifications or standards in order to accommodate new or increased wastewater discharges or land use practices which impact a particular watercourse. The State must attain, and maintain the most sensitive existing and potential use for a respective waterbody." WQS at 40. The water quality standards further provide that "surface waters with a classification goal of B or SB and with existing quality better than established standards for that Class will be maintained at their existing high quality." WQS II.2 at 2.

The Quinebaug River at Putnam has been classified C/B_C (App. Ex. 4). The classification C/B_C indicates that although the water quality goal at the site is B_C, the present water quality does not meet "water quality criteria [for Class B] for one or more designated uses [for Class B] due to pollution." WQS at 16. The Water Quality Standards require that the criteria and standards for the water quality goal, in this case Class B, be applied when analyzing the consistency of a proposed activity with the standards.² Class B waters have been designated for the following uses: "recreational use; fish and

²"It is the State's goal to restore or maintain surface waters to a quality consistent with their designated use and supportive quality criteria goals." WQS II.1 at 2. "Where existing water quality does not meet the designated use and quality criteria goals, the existing quality will be identified, followed by the use goal (e.g. C/B)." WQS II.32 at 7.

wildlife habitat; agricultural and industrial supply and other legitimate uses including navigation." WQS at 12. The use of the subscript c further identifies the water quality goal as that quality suitable for a cold water fishery. WQS at 6.

IV. BURDEN OF PROOF

The applicant for a permit³ bears the burden of proving that the proposed activity meets the requirements of applicable law and regulations. Socony Mobil Oil Co., Inc. v. Zoning Board of Appeals, 153 Conn. 257, 259-260 (1965); Atlantic Refining Co. v. Zoning Board of Appeals, 150 Conn. 558, 561 (1963); Final Decision in the Matter of Application of Michael Cannata, No. DIV-87-48, 4/5/91, at p. 2. The standard of proof in an administrative case is the same as that for a plaintiff in most civil cases--proof by a fair preponderance of the evidence. Vigorito v. Allard, 143 Conn. 70, 71 (1955); 3 Davis, Administrative Law 16.09 (2nd. Ed., 1978). According to Black's Law Dictionary, 6th Ed., a preponderance of the evidence means "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Therefore the Applicant in this case

³Under section 401 of the CWA, State water quality certification is a necessary prerequisite to obtaining authorization to proceed with a project. As such, certification is analogous to any other permit, although it bears a different name. Indeed, under the Uniform Administrative Procedure Act ("UAPA"), both permits and certificates are treated as licenses. Conn. Gen. Stat. §§4-166, et seq. The UAPA defines license as "the whole or part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law." §4-166(6).

bears the burden of proving by a preponderance of the evidence that the proposed project will not violate Connecticut's water quality standards. To meet this burden of proof, the Applicant must prove, inter alia, that the proposed activity will not interfere with designated and existing uses at the site, including recreational uses.

V. RECREATIONAL USE

The first question raised for review is whether the Department may lawfully consider the use of Cargill Falls for recreational viewing in deciding whether to grant water quality certification. Specifically, do Connecticut's water quality standards protect out-of stream recreational uses such as viewing; and does federal law prohibit State water quality standards from addressing such matters?⁴

⁴The Applicant appears also to have raised as a separate matter the question whether the Department may consider the aesthetic quality of the Falls. The Applicant submits that the water quality statutes do not encompass aesthetic quality in the sense of natural beauty.

As already noted, the water quality standards contain criteria for various parameters which, if met, will protect the designated uses of a waterbody. These parameters include dissolved oxygen, turbidity, and aesthetics. Although not necessary to the outcome of this case, I do agree with the Hearing Officer that the "aesthetics" criterion of the Connecticut water quality standards encompasses the concept of the natural beauty of a site, and is not limited to physical appearance or characteristics, such as color, odor or turbidity, of the water itself. Indeed, because water quality criteria are generally intended to protect designated uses, the "aesthetics" criterion should be understood to, inter alia, protect recreational viewing. It is interesting to note that other statutes, not involved in this case, clearly deem aesthetics to be a protectable characteristic of aquatic sites. Specifically, the Coastal Management Act at Conn. Gen. Stat. §22a-93(15) defines "adverse impacts on coastal resources" to include, among other things, "degrading visual quality through significant alteration of the natural features of vistas and viewpoints." Additionally, the Tidal Wetlands Act at Conn. Gen. Stat. §22a-28 provides for the preservation of tidal wetlands in order to, among other things, protect "recreation and aesthetic enjoyment." Cf. Final Decision in

As noted above, the designated uses for waters classified as B, the classification goal for the Quinebaug River at Putnam, include recreational use. I agree with the Hearing Officer, who concluded that recreational use, as the term is used in the Connecticut Water Quality Standards, includes viewing of the waters of the Falls and their natural beauty.

The Applicant argues that federal law, specifically the Federal Power Act and the CWA, prohibits State water quality standards from addressing aesthetic quality or out-of-stream recreational uses such as recreational viewing. The Hearing Officer correctly rejected this argument. The CWA grants States the authority, through the §401 certification process, to review federally-licensed projects for consistency with State water quality standards. Nothing in the CWA or its implementing regulations limits States to the protection of "in-stream" uses. Moreover, as the Hearing Officer correctly noted, the CWA allows States to adopt standards for the protection of water quality which are more stringent than federal law. CWA §§301(b)(1)(C), 401(d); Power Authority of State of New York v. Department of Environmental Conservation, 379 F.Supp. 243 (D.C.N.Y., 1974).

It is true, as the Applicant has observed, that Class B waters are designated for multiple uses, which include industrial supply, and it is also true that hydropower generation is a legitimate industrial use. However, even

the Matter of Applications of William Holmberg and John Rhode, Nos. SD-H-87-164 and SD-H-87-298, 6/17/91, at p. 11 (discussing this issue in the context of the Coastal Management Act); Final Decision in the Matter of Applications of Frank Maratta, Nos. SCEL-88-112 and SD-H-88-196, 1/14/91 (indicating that viewing a waterbody is a recreational use of that water protected by the structures and dredging statutes, Conn. Gen. Stat. §22a-359 et seq.).

legitimate uses of a waterbody may not impair other existing and potential designated uses, including recreational viewing.⁵ The Applicant has failed to demonstrate that such impairment would not occur here. It is undisputed on this record that recreational viewing of the falls is an existing use of the waterbody. (DEP Ex. 8; Testimony of William Simmons, Tape 4; Testimony of Mayor Donald St. Onge, Tape 6 at 372) Furthermore, based upon the photographic evidence (DEP Ex. 14; App. Ex. 7, 12) and the evidence concerning present and proposed flow rates (DEP Ex. 8; App. Ex. 7, 13; Int. Ex. 7, 8), I see no reason to disturb the Hearing Officer's factual findings or her conclusion that this project, both as proposed in the application and the proffered stipulation, would make the waters of the Quinebaug River at Cargill Falls less desirable for recreational viewing. Therefore, the proposed discharge would be inconsistent with the applicable provisions of the water quality standards and would violate the standards' antidegradation policy.

VI. ECONOMICS

The second question raised for review is whether the Department may consider economic benefit to be derived from the project in deciding whether to grant certification. Because at hearing the Applicant urged that economics be considered, the Hearing Officer did so, and concluded that economics may not permissibly be considered. The Hearing Officer observed, however, that even if

⁵As noted in the text above, the antidegradation policy in the water quality standards states that "the State must attain and maintain the most sensitive existing and potential use for a respective water body." WQS at 40.

it were permissible to consider economics, the evidence presented demonstrated at most a "de minimus economic gain" to the State from the proposed project (Proposed Decision at 20).

At oral argument, the Applicant denied that it had raised economics as a basis for certification, and argued that to consider economics when applying the water quality standards would be impermissible. Modifying its initial approach, Department staff suggested that while economics may play some role when applying the standards, consideration of economics in this case would be inappropriate. Although the parties are now essentially in harmony on the issue, I will discuss it briefly to provide guidance to future applicants for §401 certification.

As noted above, Conn. Gen. Stat. §22a-426, which authorizes the Department to adopt water quality standards, requires the Department to consider several factors in developing those standards. Under that statute, the standards must protect the public health and welfare, promote the economic development of the State, and preserve and enhance the quality of state waters for present and future use for public water supplies, propagation of fish and aquatic life, recreational purposes, agriculture, industry, and other legitimate uses. Thus, in developing the water quality standards--specifically, in designating the appropriate uses for various waters--the Department considered the competing goals of environmental protection and economic development.

This case does not involve the development of water quality standards, but instead calls for the application of the standards to a particular proposed activity. In such a case, the water quality standards provide for consideration of economics in only one situation: when the Department is deciding whether to lower the designated use classification of a particular

waterbody.⁶ This situation is not presented here. Accordingly, I agree with the Hearing Officer that consideration of economics is inappropriate in this case. However, even if such consideration were appropriate, there is no evidence in the record which causes me to question the Hearing Officer's factual finding that there is no economic benefit in this case.

VII. CONCLUSION

In light of the foregoing, I adopt the Hearing Officer's findings and conclusions with the following modifications and accept her recommendation that water quality certification for this project be denied:

Finding 3. This finding is amended by adding the following language to the end of the first full paragraph: "These regulations provide for consideration of economic factors when implementing water quality standards in only two situations. First, economics may be considered when deciding whether to change the designated use classification of a particular waterbody, and when deciding whether certain designated uses are attainable. 40 CFR 131.10 and 40 CFR 131.3(g). Second, economics must be considered before lowering the quality of a water which exceeds levels necessary to protect fish, shellfish, wildlife and recreation. 40 CFR 131.12."

Conclusion B. This conclusion is modified by deleting the last sentence of the first paragraph and deleting the second paragraph, and inserting in lieu

⁶The water quality standards allow lowering the designated use goal of a water only if "it has been demonstrated to the Commissioner that such change is justifiable due to overriding economic or social needs and will not interfere with or become injurious to any existing uses made of, or presently possible in such waters". WQS II.4 at 2. See 40 CFR 131.10 (g), (h) and (j).

thereof: "In other words, will the proposed minimum flow rates adequately protect the existing use of the river, namely, recreational use. However, before reaching that dispositive question, it is necessary to decide as a preliminary matter whether viewing of the scenic vistas of Cargill Falls is a recreational use envisioned by the water quality standards."

Conclusion C. This conclusion is modified by deleting the words "passive" and "passively", and by deleting the word "quiet" from the last paragraph. This conclusion is further modified by adding the following sentence to the end of the fourth paragraph: "'Where a statute or regulation does not define a term, it is appropriate to focus upon its common understanding as expressed in the law and upon its dictionary meaning.' Zipperstein v. Tax Commissioner, 178 Conn. 493, 500, 423 A.2d 129 (1979)."; and by adding the following footnote after the first sentence in the fifth paragraph: "Footnote: It is interesting to note that other statutes, not involved in this case, clearly deem aesthetics to be a protectable characteristic of aquatic sites. Specifically, the Coastal Management Act at Conn. Gen. Stat. §22a-93(15) defines "adverse impacts on coastal resources" to include, among other things, "degrading visual quality through significant alteration of the natural features of vistas and viewpoints." Additionally, the Tidal Wetlands Act at Conn. Gen. Stat. §22a-28 provides for the preservation of tidal wetlands in order to, among other things, protect "recreation and aesthetic enjoyment." Cf. Final Decision in the Matter of Applications of William Holmberg and John Rhode, Nos. SD-H-87-164 and SD-H-87-298, 6/17/91, at p. 11 (discussing this issue in the context of the Coastal Management Act); Final Decision in the Matter of Applications of Frank Maratta, Application Nos. SCEL-88-112 and SD-H-88-196, 1/14/91 (indicating that viewing a waterbody is a recreational use of that water protected by the structures and dredging statutes, Conn. Gen. Stat. §§22a-359 et seq.)."

Conclusion D. This conclusion is modified by deleting the first five paragraphs as unnecessary to the decision.

Conclusion E. This conclusion is amended by inserting the following paragraph after the quotation from Power Authority v. Williams: "The Connecticut water quality standards provide for consideration of economics in the implementation of the standards in only one situation: when the Department is deciding whether to lower the designated use classification of a particular waterbody. WQS II.4 at p. 2; See 40 CFR 131.10 (g), (h) and (j). This situation is not presented here."

Conclusion F. This conclusion is modified by deleting from the first paragraph the word "passive", the words "and that the term 'aesthetics' includes the notion of the natural beauty of the site", and the words "aesthetic quality and", and by deleting from the second paragraph the words "an aesthetically undesirable level". In lieu of the words "an aesthetically undesirable level," insert the words "a level which will impair all existing recreational use at the site, i.e., recreational viewing."

September 12, 1991
Date

Timothy R. E. Keeney
Timothy R. E. Keeney
Commissioner

Copies sent to all parties
by certified mail