

TOWN LOSES RIGHT TO REBUILD DAM

This case involves a dam on the Wells River that was built in 1803, had been repaired or rebuilt twice and was destroyed by ice and high water in January 1998. *Town of Groton v. ANR*, Vt. Entry Order No. 2000-428 (Apr. 19, 2001).

In 1996 the Town of Groton applied for a stream alteration permit from the Vermont Agency of Natural Resources (ANR) in order to repair and replace the dam. The application was incomplete and the Town was unable to submit a completed application until February 1998, by which time the dam had been destroyed by ice and high water. After it was destroyed, the fish habitat in the river improved and now provides high quality habitat for several breeds of fish.

The Secretary of ANR denied the permit. On appeal to the Water Resources Board, it was upheld based on criterion 10 V.S.A. § 1023 (a)(2) which says that a proposed stream alteration must be denied if it will “significantly damage fish life.” Groton appealed to Superior Court, which upheld the Board’s decision. It then appealed to the Supreme Court on two grounds.

First, the Town argued, it should have been allowed to present evidence that the water impounded by the dam was useful for fire fighting. The Board had a duty, the Town said, to consider the public interest and welfare benefits of having water available for that use. The Supreme Court rejected that argument, saying that public safety was not one of the criteria set out in 10 V.S.A. § 1023, therefore the information was not persuasive.

Second, the Town said, when the Board considered “the proposed change” to be made in the stream flow, it should have analyzed (1) the change from the old dam to the new, proposed dam and not (2) the change from the time after the dam washed out in January 1998 to the way it would exist after the new proposed dam was in place.

Analysis (1) would have shown that the fish life would be no worse off with the new dam than it was with the old one (and the Town would win). But, analysis (2) would show that the fish were better off now (no dam) than they had been with a dam, therefore the proposed replacement of the dam would significantly damage fish life (and the Town loses).

This case hinges on the definition of “the proposed change.” Since the dam was gone at the time the application was completed, the river was in its natural state. “The proposed change” is to replace the dam and there is evidence that replacing it will probably have a negative impact on fish life. Therefore, the Board was correct in denying the permit, based on the statutory criteria.

There are a couple of lessons here. First, water quality and good fish habitat have been recognized as important by the legislature. And, second, it is important to take notice when a statute spells out criteria that must be used in making a judgment.