Vermont Superior Court
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Environmental Division

VERMONT SUPERIOR COURT
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ENVIRONMENTAL DIVISION
Docket Nos. 25-ENV-00030
25-ENV-00031
25-ENV-00032

Bellows Falls Hydroelectric Project Water Quality Certification Appeal, et al.	**DECISION ON MOTIONS**

These coordinated matters involve appeals by Connecticut River Conservancy (CRC), Vermont Natural Resources Council (VNRC), Conservation Law Foundation (CLF), and American Whitewater (AW) (collectively, Appellants), from water quality certifications (WQCs) issued by the Vermont Agency of Natural Resources (ANR) to Applicant/Appellee, Great River Hydro, LLC (Applicant or GRH) for hydroelectric projects located on the Connecticut River in Bellows Falls, Vernon and Wilder, Vermont, respectively (the Projects). ANR issued each of the relevant certifications with conditions on April 16, 2025. Appellants timely appealed.

In these matters, Appellants are represented by Attorneys Ronald A. Shems and Nicholas AE Low. Attorneys Jon Groveman and John C. Mason Overstreet also appear on behalf of Appellants VNRC and CLF, respectively. Applicant is represented by Attorneys Merrill E. Bent and Suzanne R. Armor. ANR is represented by Attorneys John Zaikowski and Charles O.M. Peel.

Legal Standard

To prevail on a motion for summary judgment, the moving party must demonstrate "that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a), applicable here through V.R.E.C.P. 5(a)(2). In determining whether there is a dispute over a material fact, "we accept as true allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material." White v. Quechee Lakes Landowners' Ass'n, Inc., 170 Vt. 25, 28 (1999) (citation omitted); V.R.C.P. 56(c)(1)(A). The party opposing a motion for summary judgment "cannot simply rely on mere allegations in the pleadings to rebut credible documentary evidence or affidavits . . . but must respond with specific facts that would justify submitting [their] claims to the factfinder." Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356. (citing Gore v. Green Mtn. Lakes, Inc., 140 Vt. 262, 266 (1981); V.R.C.P. 56(e); State v. G.S. Blodgett Co., 163 Vt. 175, 180 (1995)).

Factual Background

We recite the following facts solely for the purpose of deciding the pending cross-motions. These facts do not constitute factual findings because factual findings cannot occur until after the Court conducts a trial. Fritzeen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000) (mem).

1. GRH has been engaged in the FERC Integrated Licensing Process (ILP) for approximately the past 14 years.
2. Broadly, the ILP is FERC's multi-step default licensing process for hydroelectric projects. It is designed to streamline the process of relicensing hydroelectric projects like the Bellows Falls, Vernon, and Wilder Hydroelectric projects by, among other things, sharing licensing application and environmental information among relevant state and federal stakeholders.
3. In this case, the ILP has included recurring consultation by GRH with Appellants and ANR.
4. As part of GRH's participation in the ILP, it conducted 33 studies relevant to various aspects of the WQC applications, including erosion, water quality monitoring, fish passage, and wildlife in the area. Ex. CC.
5. Appellants participated in the public comment periods for the draft WQCs.
6. GRH revised the proposed WQCs in response to comments from the public and FERC.
7. Appellant CRC entered into a Memorandum of Understanding (MOU) with GRH, ANR, and other federal and state resource agencies in December 2020. Ex. A. The MOU described Applicant's proposed operational changes in detail and put forward specific proposals intended to protect the dwarf wedgemussel.
8. GRH entered into an agreement (the Fish Passage Agreement or the agreement) with the U.S. Fish and Wildlife Service (USFWS), New Hampshire Fish and Game Department, and Vermont Fish and Wildlife Department in August 2022 laying out each party's responsibilities with respect to fish passage measures at the Projects. Ex. C.

Operations

9. GRH's proposed change in operations would significantly increase the amount of time the Projects spend operating at "inflow equals outflow" (IEO) and full impoundment. Ex. A at 13.
10. IEO is defined as either 1) the Project maintaining a stable target water surface elevation (WSE) by discharging from the dam a volume of water equal to the inflow or 2) when inflow exceeds the Projects' maximum generating capacity, passing all inflow via a combination of spillage and discharge. Id. at 19.

11. IEO operation decreases fluctuation in impoundment WSE levels. Ex. SS at 29, 66–67; Ex. VV at 4.
12. Appellants CRC, CLF, and VNRC have previously expressed support for GRH's proposed change in operations.

Climate Change

13. Appellants' climate change expert, Dr. Rebecca Tharp, testified in her deposition that she did not do any specific modeling relating to temperature or water quality impacts with respect to climate change around any of the Projects.[1] Ex. P at 9:21–10:3.
14. Dr. Tharp concedes the Vermont Water Quality Standards do not require modeling of any kind. Ex. P at 36:13.

Dwarf Wedgemussel

15. Under questioning, Appellants' dwarf wedgemussel expert, Dr. Andrew Gascho Landis, identified no problems with or necessary changes to GRH's overwintering plan. Ex. V. at 30:23–33:9.
16. Dr. Gascho Landis could not identify specific potential harms to the mussels apart from possible sediment mobilization. Id. at 21:4–34:5. He also could not cite specific harms caused by the Projects' modified operations related to sediment mobilization apart from potential sediment deposition in unexpected areas of the river and "uncertainty of changing flow regimes . . . ." Id. at 36:19.
17. Dr. Gascho Landis did not have any data to support the conclusion that the proposed operations would mobilize sediment to areas where mussels were located. Id. at 33:23–34:2.

Erosion

18. In its review of Project operations, FERC found that naturally occurring high flows and other anthropogenic factors would remain the dominant causes of erosion in the Project areas, and that while it is possible flows from the Projects could achieve sufficient velocity to mobilize sediment, the majority of Project flows did not exceed that velocity. Ex. GGG at 74.
19. FERC's conclusion aligned with the deposition testimony of Dr. John Field, Applicant's erosion expert witness. See Ex. SS at 22:17 ("[T]here was a supplemental study where we were looking at sediment entrainment that could lead to turbidity at several locations . . . that found

[1] Appellants assert that GRH misrepresents testimony from their expert witnesses' depositions in various locations. Having reviewed the transcripts, the Court finds they speak for themselves and, unless otherwise noted, has seen no evidence of material, intentional misrepresentations of testimony by GRH. Thus, these facts are not genuinely disputed.

that sediment could not be entrained by basically Project flows, if you will. Only high flows beyond generating capacity.")

20. FERC also found that the overall contribution to erosion from the Projects would decrease because the change in operations would reduce the frequency and volume of discharges from the Projects and reduce fluctuations in WSE levels. Ex. GGG at 74.
21. Appellants' erosion expert, Ms. Laura Wildman, declined to offer non-speculative opinions about the Projects' impacts on erosion cycles in the Project areas. See, e.g., Ex. U at 56:12–14.

Wildlife, Aesthetics, Fish Passage, & Salmon Dam

22. Neither Appellants' affiants nor their experts make specific reference to invasive species in any of their testimony.
23. Appellant CRC concedes that GRH incorporated all of its suggestions regarding a study intended to determine the aesthetic quality of water in the Project areas under the VWQS standards. Ex. FF at 11.
24. eDNA is genetic material shed by organisms in the water column that can be used to identify species whose DNA is present in the water. However, false positives can be generated by cross-contamination and excretion of prey DNA by predator species, among other things. Ex. CCC at 2.
25. Appellants' shortnose sturgeon (SNS) expert, Dr. Boyd Kynard, concedes that IEO operation is beneficial to sturgeon spawning as compared to impoundment operation. Ex. T at 85:22.
26. He could point to no data establishing the presence of SNS in the Project areas other than Appellants' proffered study. Id. at 88:15.
27. Dr. Kynard's opinion that there are SNS present in the Project areas was based on Appellants' study, his knowledge of SNS, and anecdotal evidence of live SNS being caught. Ex. 9 at 40:3.
28. Dr. Kynard testified in his deposition that he did not know how to interpret the results of Appellants' SNS eDNA study. Ex. T at 32:11.
29. Dr. Kate Buckman, Appellants' expert witness who co-designed the SNS eDNA study they conducted, did not collect the relevant samples and did not observe the samples being collected. Ex. ZZ at 32.
30. Dr. Buckman did not observe the samples being transported to the lab, nor was she specifically familiar with lab protocols. Id. at 33, 36–38, 39.
31. Appellants' SNS study has not been peer-reviewed at this time. Id. at 31.

32. Appellants Fish Passage expert, Mr. Stephen Amaral, indicated he had no concerns about the Projects' Fish Passage Agreement meeting the requirements of Clean Water Act (CWA) § 401 in his deposition testimony. Ex. S at 48:5. He did not offer any opinion that the WQCs did not meet the § 401 certification requirement. Id.
33. Mr. Amaral also acknowledged that new fish passage designs in the agreement would not affect the Projects' use of their existing fish passage systems, and that some passage will still occur until more permanent facilities are in place. Ex. S at 58:18–19.
34. No party provides expert testimony on the Salmon Dam at the Bellows Falls Project.
35. No party disputes the Salmon Dam was present at Bellows Falls prior to the beginning of the ILP covering the three dams at issue.

Post-Certification Conditions

36. GRH originally developed the recreation plan condition (Condition G) in the WQCs, which ANR adopted as a show of support for the condition.
37. The recreation plan condition mandates implementation of its proposed terrestrial recreational improvements within one year of the effective date of the FERC license. See, e.g., Ex. G at 104.
38. Condition D of the WQCs requires GRH to develop an operations compliance and monitoring plan with 180 days of the effective date of the FERC license. Id.
39. No provision of the VWQS prohibits imposition of post-certification conditions.
40. Appellants CRC, CLF, and VNRC largely object to the testimony of several of Applicant's experts based on their assertions that these experts lack sufficient foundation or qualifications to provide the opinions they put forth.

Discussion

Presently before the Court are the parties' cross-motions for partial summary judgment. The motions and statements of fact are voluminous, span hundreds of pages, and raise both procedural and merits arguments for and against dismissal of each of Appellants' 16 remaining Questions.[2] We begin by summarizing both motions for the sake of intelligibility.

[2] The operative Statement of Questions is Appellants' "Second Revised Statement of Questions" filed on December 18, 2025. It is the same in all dockets. While numbered up to 18, Questions 1, 2, 13, and 15 are "reserved" based on prior Decisions of this Court. We decline to include Appellants' unnumbered "Question" asking about the application of a "reasonable assurance" (as opposed to a "will comply") standard for reasons already articulated in prior Decisions.

Applicant moves for partial summary judgment on all remaining Questions in Appellants' Statement of Questions. For a variety of reasons, they assert that all Appellants lack standing with respect to Questions 3, 5, 6, 8 through 12, 14(a), 14(b), 14(c), 17, and 18. They assert that Appellants CRC, VNRC, and CLF lack standing with respect to Questions 4, 7, and 16. In the alternative, Applicant maintains that it is entitled to judgment as a matter of law on Questions 3, 5, 6, 8 through 12, 14(a), 14(b), 14(c), 16, 17, and 18. Appellants oppose the motion, arguing that they collectively or individually have standing to appeal, that GRH misapplies relevant standing case law, and that GRH's apparent admission that AW has standing on some recreational issues should grant standing on recreational issues to all Appellants.

Appellants cross-move for partial summary judgment on two specific issues: 1) that conditions in the WQCs calling for after-the-fact development of a recreation plan and requirements for monitoring compliance with the VWQS are unlawful conditions subsequent under Vermont law that deprive members of the public of their right to notice and comment; and 2) that the WQCs should consider and account for the impacts of climate change over the course of the Federal Energy Regulatory Commission (FERC) licensure period to be legitimately approved by the State.[3] These issues are largely raised by their Questions 3, 5, 6, and 14(b) and (c). Applicant opposes the motion. It argues that the after-the-fact development of a recreational plan and monitoring requirements are not unlawful conditions subsequent. Further, it argues that the VWQS do not require consideration of climate change and raising such consideration is unwarranted and inappropriate in a WQC appeal. Further, it asserts that, by analyzing historical flow data and simulating various flow conditions, it functionally considered potential climate-related impacts.

Because standing is jurisdictional, the Court addresses Applicant's standing argument first.

I. Appellants' Standing

When analyzing a party's constitutional standing, Vermont has adopted the test laid out in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61(1992). Thus, "[a] plaintiff must, at minimum, show (1) injury-in-fact, (2) causation, and (3) redressability." Parker v. Town of Milton, 164 Vt. 74, 77–78 (citing Hinesburg Sand & Gravel Co., 166 Vt. 337, 341 (1997)) (adopting test for standing articulated in Lujan). "Stated another way, a plaintiff must allege personal injury fairly traceable to the

[3] Appellants make these merits arguments and others in their Opposition to GRH's Motion for Summary Judgment in addition to Appellants' Cross-Motion for Partial Summary Judgment. In an effort to avoid duplication, the Court discusses those arguments in the context of Appellants' cross-motion.

defendant's allegedly unlawful conduct, which is likely to be redressed by the requested relief." Id. at 78.

The injury must be "concrete and particularized . . . and . . . actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560. To be particularized, an injury "must be an invasion of a legally protected interest, not a generalized harm to the public." Parker, 164 Vt. at 77 (citation and quotation omitted); see also Orlandi Act 250 Kennel Permit, No. 71-5-14 Vtec, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Feb. 13, 2015) (Durkin, J.) ("An interest is particularized if it is specific to the appellant rather than a general policy concern shared with the public, although an interest may still be particularized even if it is shared with multiple members of the general public."). Importantly, "the injury-in-fact test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." Lujan, 504 U.S. at 563 (quotation and citation omitted). Also, "[a]n appellant cannot gain party status by making what they admit to be purely speculative allegations and asserting that discovery is necessary to determine whether or not they have any interest that may be affected . . . ." Orlandi, No. 71-5-14 Vtec, slip op. at at 7, n. 2 (Feb. 13, 2015) (Durkin, J); see also Hedges v. Durrance, 2003 VT 63, ¶ 12 (mem.) ("An injury based on speculation about uncertain future events is no injury at all.") (citation omitted).

To establish the second prong of constitutional standing, a party must show "a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." Lujan, 504 U.S. at 560 (quotation, citation, and punctuation omitted).

Finally, "establishing redressability requires showing 'the court can remedy [the injury] by granting the sought-after relief.'" In re Lake Bomoseen Ass'n, 2025 VT 59, ¶ 21 (quoting In re Acorn Energy Solar 2, LLC, 2021 VT 3, ¶ 53). "[I]t must be likely as opposed to merely speculative that the injury will be redressed by a favorable decision." Lujan 504 U.S. at 561 (quotation, citation, and punctuation omitted).

Appellants' Questions raise a variety of issues with respect to the Projects, touching on everything from whether the WQCs account for climate change to compliance with the VWQS and Vermont statutes related to prevention of erosion and protection of endangered or threatened species. They claim standing based on affidavits from members alleging injuries that they assert will result from approval of the WQCs on appeal and expert testimony to buttress those allegations with scientific evidence. In many instances, however, as addressed more specifically below, Appellants fail to allege

non-speculative injuries, injuries that can be distinguished from generalized grievances, or injuries that could be redressed by this Court.

Notably, Lujan recognizes that the quantum of evidence necessary to support a party's claim of standing changes over the course of the litigation:

> At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim. In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial.

Lujan, 504 U.S. at 561 (quotations, citations, and punctuation omitted). Thus, the fact that a Question survived the prior motion(s) to dismiss does not inherently mean the Question has been adequately supported in the face of a subsequent motion for summary judgment challenging Appellants' standing filed after the close of discovery.

Regarding the specific question of injury-in-fact, two preliminary considerations must be mentioned. First, this Court must determine whether GRH has provided sufficient evidence to the Court, in our trial de novo context, to approve the applications for WQCs (which are one component of the FERC licensing process). While the Court's determination may impact Applicant's ability to operate one or more of the dams at issue going forward, there is no argument or request before the Court seeking removal of any of the involved dams. In the context of these WQC appeals, the Court likely lacks authority to mandate such an outcome. This is important because all parties (and FERC) appear to agree that the Projects, as currently operated, cause some level of environmental harm in a variety of areas. The Court understands that many of GRH's proposed modifications should result in some level of reduction in many of these harms. In many respects, Appellants appear to agree with this assessment. Thus, the Court assesses claims of injury through the lens of maintaining the status quo or implementing the modifications proposed in the WQCs.

Second, the Court's determinations regarding injury and redressability must account for Appellants' (particularly CRC's) longstanding involvement in the certification process and "wholehearted[]" support for Applicant's proposed changes in operations. Ex. N at 31, Ex. A at 1. This includes CRC's signing of a 2020 Memorandum of Understanding (MOU) describing Applicant's

proposed changes in great detail, along with specific proposals intended to protect the dwarf wedgemussel. Ex. A at 14.[4]

Appellants' support for much of what Applicant is proposing is especially relevant where Appellants claim injury and either: 1) offer no alternative solution beyond the need for additional data to assess the issue; or 2) propose a solution without making meaningful distinctions between their proffered solution and what Applicant has already proposed, in consultation with FERC, as it relates to their claimed injury. With these considerations in mind, the Court analyzes Appellants' standing in the context of their Questions.

a. Question 10: Dwarf Wedgemussel

Question 10 addresses the Project's compliance with various provisions of the VWQS and impacts to the dwarf wedgemussel. This Question and Appellants' related arguments present a clear example of the Court's concerns addressed in the preceding paragraphs.

The Projects' FERC Environmental Impact Statement (EIS) states that "[u]nder Great River's proposed operations, conditions for dwarf wedgemussel would likely improve relative to existing conditions because the monthly duration of proposed load-following (or Flex) operation would be limited." Ex. GGG at 445. It also notes GRH's overwintering plan would protect wedgemussel winter habitat and minimize the chances of freezing during hibernation. Id. at 446.[5]

Under questioning, Appellants' mussel expert identified no problems with or necessary changes to GRH's overwintering plan. Ex. V at 30:23–33:9. He could not identify specific potential harms to the mussels apart from possible sediment mobilization. Id. at 21:4–34:5. He could not cite specific harms caused by the Projects' modified operations related to sediment mobilization apart from potential sediment deposition in unexpected areas of the river and the "uncertainty of changing flow regimes . . . ." Id. at 36:19. He did not have any data to support the conclusion that the proposed operations would mobilize sediment to areas where mussels were located, and concluded his

[4] CLF and VNRC have also professed support for the MOU, although they are not signatories. See Ex. L; Ex. M at 3 ("VNRC further states that it has supported, is continuing to support, and is not seeking to alter the alternative proposed operational flows agreed to in the MOU to which CRC is a signatory. VNRC seeks only to understand and, if needed, address unanticipated impacts of the alternative proposed operational flows.")

[5] Although the wedgemussel overwintering plan is not directly related to climate change, it does appear the plan includes "temperature-based operational triggers," the absence of which is asserted by Appellants in their Cross-Motion. See Appellant's Motion for Partial Summary Judgment at 17; see also, e.g., Ex. A at 14–15 ("By lowering the water surface elevation (WSE), the habitat they occupy will remain submerged over the winter, protecting largely immobile mussels from exposure and freezing air temperatures. To accomplish this, GRH will lower the WSE at the Wilder and Bellows Falls dams to an elevation at or above the low limit of each of the respective Flexible Operating Impoundment Ranges (specified below in item 9) and maintain that WSE for the limited period of time during which water temperatures consistently drop from 15° C to 10° C.")

deposition by indicating that he would like to see the data informing USFWS' opinion that there was likely to be no adverse effect on the dwarf wedgemussel. Id. at 33–34, 36–37, 39. None of Appellants' affiants point to any other injury related to the wedgemussel.[6] Taken together, and within the broader context of the MOU, Appellants fail to show a non-speculative injury caused by GRH's proposed operations under the WQC applications that could be redressed by this Court. Because Appellants have not alleged any non-speculative impacts on the dwarf wedgemussel from erosion, sediment/sediment deposition, nutrients/nutrient loading, aesthetics, or in other areas resulting from GRH's proposed changes in operations, they lack standing to challenge Applicant's proposed operations in this respect. Question 10 must be **DISMISSED**.

b. Question 3: Climate Change

Appellants' Question 3 asks:

> Whether GRH has provided sufficient information about climate change and relevant climate change impacts including but not limited to: more frequent and more severe weather events, higher flows, greater fluctuations in flows, greater flooding events, higher temperatures, erosion, invasive species, droughts, drawdowns after flooding, and other anticipated impacts over the next 40 or more years to demonstrate that the proposed operations will comply with:
> a. § 29A-104(b) and (d)
> b. § 29A-105(b)(1), (2) and (3)
> c. § 29A-206(a), (b)(1), and (c)
> d. § 29A-302(1)(B)(iii), (2)(A), (3)(A) and (C), (4)(B), and (5)(A)
> e. § 29A-303(3), (4), and (7)
> f. § 29A-304(a), (b), (d)(2), and (e)(2)
> g. § 29A-305(a)
> h. § 29A-306(a)(3), (b)(3), (c)(3), (d)(3), (e)(3), and (f)(4)
> i. 10 V.S.A. § 5403

Second Revised Statement of Questions at 1.[7]

[6] As noted by the standard laid out in Lujan above, surviving a standing challenge at the summary judgment stage requires specific facts detailing injury resulting from the conduct at issue in the litigation, here the WQC applications. Thus, while many of Appellants' members' standing affidavits provided sufficient allegations of injury at the pleading stage, those same allegations may not suffice here. No affiant mentions the mussel apart from general references to protections for threatened and endangered species. Affidavits at 5, 9. This does not meet the standard for a particularized allegation of injury.

[7] The Court declines to reproduce Appellants' Statement of Questions in its entirety due to the number and length of the Questions. We reproduce this Question here to give an idea of the breadth, framing, and format of Appellants' Questions, which are largely consistent throughout their Second Revised Statement of Questions. This Question also touches upon many topics (e.g., erosion, invasive species) that are the subject of their own Questions, which we address below.

In opposing the pending motion and asserting that they have standing, Appellants assert that Applicant has not provided sufficient information for Appellants to be assured that their members will not be harmed through non-compliance with the listed provisions over the next 40 years. This is not the standard for establishing an injury-in-fact, even a threatened injury. See Brod v. Agency of Natural Resources, 2007 VT 87, ¶ 12 ("While the alleged injury need only be threatened to establish standing . . . the threat must be real and apparent.") (internal citation omitted). To have standing, Appellants must allege a concrete injury particular to them, caused by Applicant's proposed changes in operations, that this Court may take action to remediate. They have not done so here.

Appellants point to several naturally occurring events, such as floods, that scientific consensus generally establishes will increase in number and severity as the effects of climate change worsen. No party appears to dispute this fact. Despite this, Appellants have made no non-speculative claims about how they will be injured by these events—over which Applicant has no control—in the context of Applicant's proposed changes in operations.[8] Rather, Appellants insist that Applicant prove now that they have accounted for every possible climate-change-related impact that could occur over the license term such that they can guarantee Appellants will not be harmed. Again, this is not to say that these projected climate impacts will not occur, but in the context of the present appeal, this is not sufficient for a cognizable claim. See Orlandi at 11 ("Standing requires Appellants articulate how the kennel would lead to nonconformity with the Town Plan, and not merely reference to provisions from the Town Plan itself.") (emphasis in original).

Regarding the impacts explicitly listed by Appellants in their Question (i.e., "more frequent and severe weather events, higher flows, greater fluctuations in flows . . . higher temperature, erosion . . . .") they offer no information or modeling about when, where, or how frequently these impacts could occur, or make any distinction in terms of the severity of the impacts, which their expert concedes. See, e.g., Ex. P (Tharp transcript) at 9:21–10:3 ("Q. So I'm wondering if you have done

[8] Appellants cite Pub. Util. Dist. No. 1 of Pend Oreille Cnty., Washington, as an example of a case where conditions were included in a license that responded to the reasonably foreseeable effects of climate change. 177 FERC P 61183, 2021 WL 5994069, at *11 (2021). First, that case involved a request from the EPA to FERC that the project account for existing and foreseeable trends related to climate change; no federal agency has made such a request here, and the VWQS provide no mandate related to climate change. Second, the opinion on which that request was based went beyond identifying general phenomena and actually linked potential effects of climate change to harms to a fish species in the area. See, e.g., id., ("Non-native predatory and competitive fish species could expand their range due to warmer water temperatures, therefore efforts to control them would improve habitat conditions for bull trout by reducing predation and competition. Warmer air temperatures and water temperatures would increase the amount of time that temperatures in the Box Canyon Reservoir are unsuitable for bull trout, which would reduce potential use of the reservoir as a migratory corridor between the tributary habitats and increase potential for isolation in patchy habitats."). Appellants have failed to connect climate change impacts, generally, to harms specific to the area and the applications on appeal.

any, you know, any specific modeling as to what you might expect to see by way of water quality impacts or what you might expect to see by way of temperature impacts . . . As a result of climate change. A. No."). If Appellants cannot offer even general suggestions about trends relating to where, when, or how frequently impacts might occur, it seems unreasonable to expect that Applicant would have successfully done so for every possible eventuality for a period 40 years into the future.

Even assuming, however, that these events will occur over the lifetime of the certification, they do not indicate how Applicant's proposed change in operations would exacerbate the harms caused by these climate impacts. While it is very likely true that weather events, flooding, water fluctuation, drought, and other natural conditions made worse by climate change will affect areas in proximity to the dams, the same could be said of any part of the state of Vermont. Appellants provide no location-specific data of any kind to suggest how the projected impacts of climate-change-driven natural events or conditions could be worse than they otherwise might have been due to the presence of the Projects operating as GRH proposes. Put another way, even if the Court assumes that higher flows, for example, will occur within the next 40 years on the Connecticut River and have impacts, Appellants have provided no understanding or allegation regarding how the dams at issue on appeal and their proposed operation will exacerbate the impacts from higher flow events, generally, on riverine habitat, ecosystems, or recreation.

Most importantly, no portion of the VWQS requires consideration of climate change impacts. Although the VWQS regulate several aspects of the Projects' operation and, by extension, aspects of the Connecticut River that will be affected by climate change in the future (erosion, water quality, etc.), they do not regulate impacts from climate change directly or independently. This Court may not impose permit conditions that are not based in law. See e.g., In re LiCausi, 2008 VT 59, ¶ 9. Thus, not only have Appellants failed to articulate an injury, they have failed to point to a legal standard that would permit action by this Court to redress the injuries they claim. For these reasons, Question 3 must be **DISMISSED.**

Because we find that Appellants fail to assert an injury with respect to the proposed operations and climate change, the Court need not reach GRH's claim that their modeling of water surface elevations at low, medium, and high flow levels using historical data represents a form of de facto climate change modeling.

II. Questions 9, 14a through c

Appellants' Questions 9 and 14a through c address the WQCs and erosion. Question 9 asks whether GRH has provided sufficient information related to erosion, "including assessing baseline

conditions, bank instability, flows and interaction with flows from other facilities, and the impacts of the new flow regimen" to comply with certain provisions of the VWQS. Question 14a asks whether GRH should be required to develop a plan for monitoring the impacts of the proposed changes in operation on things like erosion, bank stability, sediment movement, nutrient concentrations, etc. to comply with various provisions of the VWQS. Questions 14b and c ask whether the post-certification monitoring plan currently proposed by GRH complies with the VWQS and the law relevant to unlawful conditions subsequent and whether the plan circumvents the public's right to notice and comment, respectively. Id.

Applicant contends that Appellants have failed to state a redressable injury-in-fact related to erosion and that it has provided sufficient information to determine compliance with the VWQS. Applicant bases this claim on the testimony of Appellants' erosion experts and its own expert witness. Appellants respond that their experts' inability to point to particular locations where erosion is occurring or will occur derives from the lack of information provided by Applicant and shows the deficiency in their applications.

As we have repeatedly stated, the issues in this appeal are tried de novo to the Court and we are not bound by any action below. In re Killington, Ltd., 159 Vt. 206, 214 (1992) (citing In re Green Peak Estates, 154 Vt. 363, 372 (1990)). Even so, we may consider documents from the below proceeding as persuasive evidence. On this topic, the Court finds excerpts from the FERC EIS to be particularly illuminating. The report divides the Commission's analysis on erosion into two parts—construction-related erosion, and riverbank erosion. The report describes the steps taken by GRH in their erosion analysis, partially reproduced here:

> Great River conducted a riverbank transect and erosion study that included two years of erosion monitoring at 21 sites throughout the three project areas. This study included an analysis of the types and processes of erosion occurring within the three project areas, and a discussion of potential project effects on erosion (Field Geology and Normandeau, 2016a,b, 2017a). [Water Surface Elevation] data were also collected as part of the study to show the variation in impoundment WSEs between normal (i.e., non-spill) project operations and natural high inflow events (Field Geology and Normandeau, 2016b, 2017a,c). In response to the Commission's November 29, 2016, determination on the final study report, Great River filed its February 6, 2017, revised study report, which identifies streamflow velocity as the primary cause of increased or decreased erosion potential. Pursuant to the Commission's July 21, 2017, determination, Great River filed a November 15, 2017, addendum to the revised study report that further evaluates the effects of streamflow

> critical velocity and critical shear stress on erosion at each of the 21 erosion monitoring sites.

Ex. GGG at 73.

After additional description of the work undertaken by GRH on monitoring project operational conditions and erosion, the EIS concludes:

> Based upon Great River's study results, which considered riverbank soil composition, bank height, and river geomorphology, sediment entrainment and riverbank erosion in the three project areas is primarily caused by naturally occurring high flows. As Table 3.3.1-1 shows, naturally occurring high flows result in the streamflow velocities needed to entrain and erode riverbank sediment. **While sediment entrainment can also occur during maximum project generating flow conditions, the majority of project operation flows do not exceed the streamflow velocity thresholds needed to entrain sediment**.
>
> Under future operating conditions, naturally occurring high flows, groundwater seeps, other anthropogenic factors (e.g., boat wakes and shoreline land use practices), and debris and ice build-up would remain the dominant causes of riverbank erosion. Based on the license expiration dates for **upstream** hydroelectric projects, most ongoing effects from their hydropeaking are expected to continue for at least two decades. **The contribution to overall erosion rates resulting from operating the three projects evaluated in this EIS would likely remain static or decrease because proposed operations would reduce the frequency of load-following operations at the projects. This would reduce the frequency that each station discharges between 50% and 100% of their capacity compared to current operations. Project impoundments would also experience less frequent and smaller WSE changes compared to current operations**.

Id. at 74 (emphasis added).

At minimum, without commentary on the accuracy of any information provided, these EIS excerpts demonstrate that GRH devoted substantial time and resources to gathering information on the Projects' potential erosive effects on the surrounding areas under their proposed changes. In this case, however, Appellants' experts assert that GRH has not provided sufficient information for them to understand the full impacts of the Projects' proposed changes in operations on erosive patterns in the area. Appellants rely on the opinions of Ms. Laura Wildman, a licensed civil engineer specializing in water resources and ecological restoration, and Dr. Rebecca Tharp, a PhD in aquatic science who focused on biogeochemistry and nutrient cycling in manmade impoundments in her doctoral work.

Ex. O at 4, 8. In responses to Applicant's first set of interrogatories, Appellants lay out the subject matter to which both experts are expected to testify. The description of Dr. Tharp's expected testimony reads:

> Ms. Tharp is expected to provide an opinion on the following: The proposed operational change to inflow equals outflow combined with climate change induced alterations to river flow **should be considered in modeling, study design, and ongoing monitoring of the project as they will impact the river system over the coming decades. Without appropriate modeling to predict those changes, studies to measure existing conditions, and monitoring to track change over time,** [9] **the hydro operation and the agencies overseeing the permit will have no basis on which to evaluate potential impacts and respond in a timely manner**. Study and monitoring topics to be considered include characterization of existing impoundment sediment chemistry to predict changes in internal nutrient release resulting from more stable pond level; evaluation of likelihood of impoundment stratification under new operating conditions; monitoring protocols for harmful algal blooms; modeling groundwater elevation and hydraulic gradients as it relates to bank erosion under proposed operational conditions; ongoing monitoring of erosion at bank sites (possibly via UAS) for early detection and associated adaptive management planning; protocol for reducing risk for sensitive species during operational alterations (i.e., shut downs, flood events).

Ex. O at 4 (emphasis added).

Under questioning, Dr. Tharp concedes that "[She is] not as familiar with [the riverbank transect and erosion studies] as [she] is with the water quality studies." Tharp transcript at 67:17–18. She acknowledges the VWQS do not require the kind of monitoring she suggests. Tharp transcript at 37:24–38:5 ("Q. To your understanding, did the Vermont water quality standards require ongoing monitoring? A. No. The standards—the standards are the standards. The permits are where you get the requirements of how you indicate whether you're meeting the standards."). She does not definitively state that the Projects are likely to cause erosion. Tharp transcript at 69:18–19 ("Q. So are you offering an opinion that the projects are likely to cause bank erosion? A. No. But there isn't an assessment of whether—there isn't an ongoing monitoring protocol to determine whether and where and if they are.")

[9] In their final EIS, FERC recommends conducting a new baseline survey at three study sites where Project operations were previously identified as contributing to erosion (under impoundment operation) and an additional survey following five years of proposed operation to allow comparison between the baseline and impacts from the proposed change in operations. Ex. GGG at 75.

Turning to Ms. Wildman, the description of her expected testimony reads:

> Ms. Wildman is expected to provide an opinion on the following: It is unclear in the § 401 Water Quality Certifications exactly what data was used to evaluate or understand the impact of changes in operation to hydrology and potential changes in the erosion cycle, sediment deposition and movement. Increased elevation level of impoundments plus continued surface water elevation changes due to moderated peaking may impact a new saturation and desaturation zone along riverbanks. Additionally, the increased surface water elevations with the impoundments may change where sediment is deposited, including expanding sediment deposition further up the tributaries. Overall, analysis at this point is challenging because it is unclear what was provided to the Agency to make their determination; modeling is limited to a few figures that limit us to snapshots (in time and location) of the actual changes. More information is needed for a proper analysis to be done.

Ex. O at 8.

Under questioning, Ms. Wildman repeatedly declined to make definitive conclusions about the impact of the Project's proposed changes in operation on erosion, asserting insufficient information exists to draw such conclusions. See, e.g., Ex. U at 56:16–17 ("Q. Are you offering an opinion that the changes in operation will have an impact on the erosion cycle? A. I'm offering an opinion that they may . . . That they may, and that we don't have enough data to confirm what their impact will be right now."); Id. at 4–5 ("Q. Are you offering an opinion in these appeals that the changes—the proposed operations [sic] in operation will have an impact on sediment deposition? A. No. That they may.")

Neither Dr. Tharp nor Ms. Wildman's testimony rises to the level of a cognizable, redressable injury in this appeal sufficient to provide Appellants standing on this Question. Neither expert's claim of injury appears to be concrete or imminent. Dr. Tharp states that the effects of the change in operation combined with the effects of climate change should be monitored on an ongoing basis to best understand the impact of those changes. While this may be the case, a desire for ongoing monitoring beyond what is required by the relevant statutes does not represent an injury in fact. This is particularly true where the injured party's claimed harm is an inability to determine whether and where erosion is occurring, but the relevant licensing agency has found the provided application materials to be satisfactory. Reply to Response to SUMF at 12. Similarly, Ms. Wildman states it is "unclear" what was provided to ANR in making its determinations and that the changes in operations "may" impact saturation zones and change where sediment is deposited. Ex. O at 4. When pressed,

she declined to state that the changes will have negative impacts with respect to sediment deposition, only that they may. Thus, the claims as stated do not allege an injury-in-fact at this stage of proceedings, after the close of discovery. See Lujan, 504 U.S. at 564 n. 2 ("Where there is no actual harm, however, its imminence (though not its precise extent) must be established."). Read together, Appellants' assertions of standing functionally attempt to prove a negative: that they cannot conclusively establish their standing until they have information beyond what is required or available. This is insufficient at this stage of the proceeding.

Further, as noted, the circumstances presented here are the Projects' transition from impoundment to IEO (Flex) Operation, which this Court understands essentially means run-of-river with the discretionary ability to operate in an impoundment and release mode limited by time, water elevation and discharge volume.[10] Ex. GGG at 707; Ex. A at 13, 19. All parties and FERC agree that the change in operations will reduce the amount of fluctuation in water surface elevations at the Projects. Ex. G at 21; Ex. U at 56; Ex. GGG 71–74. Combined with the elimination of much of the dam's impoundment operation, this very likely means a net decrease in erosive forces acting on the banks of the Connecticut River resulting from the dams. Ex. GGG at 74, Ex. U at 28, 56. Appellants' erosion expert acknowledges this. Id. Appellants maintain, however, that there could be changes in the Projects' sediment deposition patterns, and changes in nutrient release resulting from a more stable pond level. Ex. O at 4, 8. In the context of these Projects, where an operational change will have an effect all parties concede is beneficial (i.e., better than the status quo), but not without some potential for creating a different, lesser harm, it is not clear these claims constitute cognizable injuries for standing purposes.

Thus, Appellants have failed to demonstrate that they have standing to challenge erosion-related issues. Questions 9 and 14a through c are **DISMISSED**.

III. Questions 7 and 18: Natural Flow Regime & 15-Mile Falls

Appellants' Question 7 asks whether GRH's "proposed change from the natural flow regime" will comply with various provisions of the VWQS. Appellants' Question 18 asks whether Applicant has provided enough information about flows from an unrelated project, the facilities at 15-Mile Falls, to demonstrate it will comply with various provisions of the VWQS.

The references to the 15-Mile Falls facilities in the three applications before the Court primarily state the fact that it exists upstream from the Projects. The one exception in the Wilder

[10] IEO is an acronym for "inflow equals outflow," while "flex" references the ability to impound and release under certain defined circumstances.

application notes that "Fifteen Mile Falls continues to have peaking impacts at the Wilder facility." Exhibit 11 at 12. No affiant mentions 15-Mile Falls, and Appellants have provided no expert testimony on the subject. They have alleged no injury.[11]

Because Appellants lack standing to address the issues raised in Question 18 it is **DISMISSED**.

Question 7 is similarly deficient. All parties agree that a major feature of GRH's applications is its proposal to change the mode of operations for the three facilities from impoundment —which store and release large amounts of water on a specified schedule—to "IEO" or "inflow-equals-outflow." Ex. A at 1, Motion at 16. IEO facilities allow water to flow through the dam at a much more regular rate. Id. The fundamental premise of this Question is also not clear to the Court. The dams, and the river impacted by the dams, are not presently under a "natural flow regime" as defined by the VWQS. See 29A-102(28) ("'Natural flow regime' means a water's characteristic pattern of variability in flow rates and water levels, annually, seasonally, and daily, **without the influence of artificial flow regulation.**") (emphasis added). They have not been for at least as long as the dams have existed in these locations. Further, all parties appear to agree that the Projects' proposed operational mode (i.e., IEO) represents a state closer to a river's "natural flow regime" than impoundment operations. Because the applications on appeal do not relate to a change in conditions "from" natural flow, Appellants fail to present any possible injury related to the proposed change actually before the Court. For this reason, Question 7 is **DISMISSED.**[12]

IV. Question 11: Invasive Species

Question 11 asks whether the impacts of the proposed new flow regimen on invasive species will comply with various provisions of the VWQS. Applicant moves to dismiss this Question on the

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[11] In the FERC EIS, the "Riverbank Erosion" subsection of § 3.3.1.2 – Environmental Effects states: "[T]he Connecticut River Conservancy recommends that Great River explicitly address how the success of minimizing hydropeaking operations would be affected by upstream projects, which will continue to hydropeak." Ex. GGG at 72. Despite noting the effects of the upstream operations, the EIS adds "contribution to overall erosion rates resulting from operating the three projects evaluated in this EIS would likely **remain static or decrease** because proposed operations would . . . reduce the frequency that each station discharges between 50% and 100% of their capacity compared to current operations." Id. at 74 (emphasis added). It concludes, "Although reducing peaking operations at projects upstream of Wilder dam could provide even more stable WSEs at [the Projects], and the potential to further reduce shoreline erosion, evaluating these effects is beyond the scope of this EIS." Id. at 75.

[12] GRH references Appellants CRC, CLF, and VNRC in their Motion on this Question, but fail to mention Appellant AW. GRH does not explicitly concede AW has standing on this issue, but even if it did, this Court has "an independent obligation to determine whether subject matter jurisdiction exists." In re Charron 13-Lot PUD Preliminary Plat, No. 24-2-19 Vtec, slip op. at 1 n.1 (Vt. Super. Ct. Envtl. Div.) (June 7, 2019) (Durkin, J.) (quoting Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006)); Brod v. Agency of Nat. Res., 2007 VT 87, ¶ 8, 182 Vt. 234 (citation omitted). "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter," this Court must respond accordingly. V.R.C.P. 12(h).

grounds that: 1) none of the cited provisions of the VWQS address aquatic invasive species; 2) that the provisions at issue address an aquatic "mixing zone" created by a project, which the parties agree is not present here; and 3) Appellants' experts (Ms. Wildman and Dr. Tharp) offered no testimony on aquatic invasive species.

Appellants again fail to cite a non-speculative injury with respect to the impacts of the new flow regimen on invasive species. Although Appellants' members frequently mention endangered and threatened species in their declarations, none mention invasive species. While they make general references to protecting the health of the river as a whole, this broad statement does not equate to articulating a threat posed by invasive species that is actual, imminent, concrete and particularized caused by GRH's proposed change in operations. See, e.g., Ex. 1 at 7, 9, 11. Further, neither of Appellants' experts put forth as those with knowledge on invasive species, Ms. Wildman and Dr. Tharp, provide any testimony on the topic. See Exs. 11, 12, 14, P, U, P (supp.), and U (supp.). Given that Appellants have failed to articulate any injury related to invasive species, Question 11 is **DISMISSED**.

V. Question 17: Aesthetics

Question 17 asks whether GRH's proposed changes in operations will comply with aesthetics requirements in VWQS §29A-306(c)(3). For Class B(2) rivers and streams such as the Connecticut River, § 29A-306(c)(3) requires that waters be managed to achieve and maintain good aesthetic quality, and that "[w]ater character, flows, water level, bed and channel characteristics, and flowing and falling water [be] of good aesthetic value." §29A-306(c)(3).

GRH argues that the Court should dismiss Question 17 on standing grounds or alternatively grant GRH judgment as a matter of law. They argue that the failure by Appellants' experts to offer testimony on the Projects' potential impact on aesthetics means they lack standing on this issue. Id. at 91. Further, they note that CRC was previously offered the opportunity to make additional comments on a flow aesthetics study done by GRH and declined, and Applicant offers affirmative testimony that the Projects will comply with the recommended aesthetic flow consistent with the results of that study. Id.; Ex. FF at 11. It further argues that Appellants have failed to show how it has not met its burden of production or proof relative to aesthetics.

Appellants respond that Applicant's motion on Question 17 fails because it is not supported by undisputed facts, and that Applicant "has failed to meet its burden of production and burden of proof in demonstrating that the proposed operation will meet aesthetic standards." Opposition at 12.

As with Question 11, Appellants fail to cite a concrete injury related to aesthetics that is redressable by action of this Court. First, Appellants concede that neither Ms. Wildman nor Dr. Tharp offer opinions relating to the Projects' impacts on aesthetics. They also do not dispute that the revised study plan, which included the Bellows Falls aesthetic flow study, incorporated all suggestions offered by CRC. Having failed to provide any injury or allegation related to aesthetics, they have failed to establish they have standing to raise issues related to aesthetics under the VWQS. Thus, Question 17 should be dismissed on these grounds.

Appellants contend that summary judgment should not be granted on Question 17 because a dispute of material fact exists. Because they have failed to demonstrate any injury, such that the Question must be dismissed for lack of subject matter jurisdiction, the Court need not adjudicate whether there is a dispute of material fact. Even if we must, however, there is no genuine dispute. Appellants point to responses to interrogatories and disputes related to the qualifications of Applicant's proposed expert, John Ragonese, and some of his statements. These alleged disputes do not present a genuine issue for trial, as contemplated by Rule 56, and are more semantic than material.[13] The Court further need not adjudicate the reliability of any of Mr. Ragonese's statements or opinions given the fact that Appellants have failed to identify any aesthetic injury. For these reasons, Question 17 must be **DISMISSED**.

VI. Question 12: Sturgeon

Question 12 asks whether the impacts on the Shortnose Sturgeon (SNS) from GRH's proposed activities at the Bellows Falls and Vernon Projects will comply with various provisions of the VWQS and the Vermont Endangered Species Act, 10 V.S.A. § 5403.

GRH contends that Appellants' experts fail to establish that SNS exist in areas affected by the Bellows Falls and Vernon Projects, and that even if they could, Appellants have failed to articulate a redressable injury-in-fact related to SNS and the Projects. Underlying the debate about the presence of SNS in the Project areas is a debate about the sufficiency of a study conducted by Appellants that

[13] For example, paragraph 106 of Applicant's SUMF states "There are no known recorded observations of unusual color or odor of the water associated with the Projects. Ex. B, Aff. of John Ragonese, ¶ 48." Appellants respond, "Disputed. The cited statement is that Mr. Ragonese is not aware of any such recorded observations." Reply to Response at 80. The statement made was, "I am aware of no recorded observations of unusual color or odor of the water associated with the Projects." Ex. B at 6. It is true that these are different statements. This does not, however, represent a genuine dispute of material fact under Rule 56. Nor is it the type of dispute that will assist the Court in resolving these motions, unless Appellants are prepared to support their implication that recorded observations of this type exist from a source unknown to Mr. Ragonese with specific facts demonstrating a genuine issue for trial, which they have not done. See V.R.C.P. 56(c)(2), (e); Jadallah v. Town of Fairfax, 2018 VT 34, ¶ 14 (citing Clayton v. Unsworth, 2010 VT 84, ¶ 28) (An opponent to a motion for summary judgment must identify specific facts, with citations to the record, showing that there was a genuine issue for trial).

appears to indicate some positive detections of environmental DNA[14] from SNS in areas around the Bellows Falls and Vernon Projects. GRH contends for various reasons ranging from methodological flaws to lack of peer review that the study should not be relied upon by the Court.

Appellants respond that summary judgment should not be granted on Question 12 because there are material facts in dispute. They note that their expert on SNS, Dr. Boyd Kynard, "testified that if shortnose sturgeon are present in the project area, fish passage would have to be reconsidered to account for that." Opposition at 10. In defense of the study, they assert their expert was qualified to design the study, has the professional qualifications to understand the study, and that the study was "conducted consistent with appropriate methodologies." Id.

As an initial matter, a need to modify fish passage "if shortnose sturgeon [were] present" does not meet the standard for an injury-in-fact. Id. This concern is inherently speculative and not concrete, imminent, or particularized. Appellants do not dispute that Dr. Kynard agreed that GRH's proposed change in operations would be beneficial to sturgeon spawning. Reply to Response to SUMF at 51–52. Further, Appellants do not dispute that Dr. Kynard could not identify any published information or data that established the presence of SNS in the Project areas. Id. at 50; Ex. T at 11. These facts make the disputed admissibility of Exhibit CCC—a letter that appears to be from FERC ultimately affirming GRH's opinion that the Projects are not likely to adversely affect SNS—somewhat less relevant.

Appellants also do not dispute that Dr. Kynard's assertion that there were SNS present in the Project areas was based solely on the study they conducted and anecdotal evidence of live sturgeon being caught or observed. This Court declines to base decisions around the WQCs on secondhand accounts of anecdotal evidence of live sturgeon.[15] With respect to the at-issue study, although the Court has not seen the study itself, the parties have extensively discussed the process surrounding the study, and some aspects of that process as described give the Court cause for concern. Some examples include that the work has apparently not been peer-reviewed and that the individual testifying to the credibility of the methodology did not collect the samples, did not see the samples collected, did not

[14] Although the parties dispute the admissibility of Exhibit CCC, no party appears to dispute that exhibit's definition of eDNA: "eDNA is the genetic material shed by organisms in the water column. Water is collected and then the eDNA is separated out, amplified, and identified to species. This technique is used to sample areas and identify species whose DNA is present in the water. Typically, this means that an individual from that species occurred in the area; however, "false positives" can be triggered by introduction of contaminated materials (e.g., fishing waders that haven't been cleaned) or digestion of prey (excreting the prey DNA into the water column by the predator species)." Ex. CCC, p. 2.

[15] To be clear, the Court does not take lightly the potential presence of endangered or threatened species in the Project areas. More credible or published information documenting the presence of SNS in these areas could alter the potential for a cognizable injury in this situation.

transport the samples to the testing laboratory and was not specifically familiar with the testing protocols. Reply to Response to SUMF at 84, 86–87, Ex. ZZ at 32–33, 36–38, 39. Critically, nowhere do Appellants indicate how the study would determine whether a positive detection came from a living or dead SNS, or whether it came from DNA excreted by a predator species or other external source. Put another way, SNS eDNA can enter an ecosystem in a number of ways other than the existence of a sturgeon living in the Project areas. In this Court's view, the positive detections establish any one of these possibilities. This fact is particularly relevant given Dr. Kynard's admissions that he did not know how to interpret data from the study and did not know how to distinguish if the positive detection came from excretion of DNA by a predator. Ex. T at 1. Taken in conjunction with the fact that this is the sole source of Appellants' expert's opinion that there are SNS in these locations, the Court does not find that this is sufficient to definitively establish the presence of the SNS, let alone state an injury particular to Appellants. For this reason, Question 12 is **DISMISSED**.

VII. Question 8: Fish Passage

Question 8 asks whether GRH's proposal regarding fish passage will comply with various provisions of the VWQS, caselaw regarding unlawful conditions subsequent, and the Vermont Endangered Species Act (10 V.S.A. § 5403). GRH contends that both of Appellants' disclosed experts relating to fish passage, Dr. Kynard and Mr. Stephen Amaral, fail to articulate an injury-in-fact related to fish passage. They also contend this Court lacks jurisdiction over the Fish Passage Agreement as it was reached by non-parties to this case, including federal agencies.

Appellants respond by characterizing GRH's argument as one claiming the existence of federal preemption stemming from the agreement. They assert there is no preemption present here. They maintain that because the agreement "calls for development of post-certification fish passage measures, the certifications' reliance on the fish passage agreement violates prohibitions on conditions subsequent." Opposition at 9.

To begin, Appellants' arguments related to Dr. Kynard are identical to those the Court addressed above relating to Question 12, concerning SNS. Without more evidence or argument, the Court finds no imminent injury-in-fact related to SNS arising from the Projects.[16] Further, for the reasons discussed below, these time-limited conditions agreed to by all parties, including the federal agency overseeing ANR's re-certification of the Projects, do not impermissibly expand ANR's authority or undermine finality, and thus are not unlawful conditions subsequent.

[16] Mr. Amaral states that he is not offering any opinions about SNS, which Appellants do not dispute.

Additionally, the Court has doubts about its jurisdiction to opine on whether an inter-governmental agreement between state and federal agencies intended to resolve issues related to fish passage in relicensing proceedings before FERC complies with the VWQS, and it has been presented with no compelling argument to the contrary. This is a court of limited jurisdiction. 4 V.S.A. § 34. Putting aside any preemption argument, the agreement is functionally a contract reached in large part by parties not before the Court. Although ANR, and thus this Court, has authority to administer the VWQS, this Court likely lacks the authority to determine the validity of or alter the agreement itself, unlike the WQCs. To the extent Appellants argue that the agreement has been incorporated into the process through submission as part of Applicant's applications, Appellants fail to point to any way the agreement actually violates the VWQS. As a result, they fail to identify an injury-in-fact related to the agreement and lack standing on this issue.

Further, Appellants do not dispute that Mr. Amaral, their expert, does not have any opinion regarding the fish passage agreement's failure to meet CWA § 401 requirements. They do not materially dispute Mr. Amaral's further statement that he does not have any concerns about the agreement complying with § 401.[17] Finally, they do not dispute that the new fish passage designs in the agreement will not affect the Projects' use of their existing fish passage systems and that some passage will still occur "until more permanent and more effective facilities are in place." Ex. S at 58:18–19. All of these facts indicate the lack of a cognizable injury-in-fact.

Turning to Appellants' descriptions of their own expert's expected testimony, Mr. Amaral's contentions that there "may be efficiencies and considerations that need to be evaluated to meet water quality standards" and that the fish passage agreement "lacks detail" do not rise to the level of a non-speculative injury. Ex. O at 6. The same can be said of his recommendation that the updated fish passage guidelines due out this year should be incorporated into the design plans for new fish passages. Id. Finally, his assertions that there: 1) "may" be a problem with grouping American eel and Sea lamprey for upstream passage; 2) that there are "questions about the appropriateness" of designing new eel ladders as opposed to using traditional ones; and 3) similar questions exist about the "potential efficacy of grouping all anadromous fish in studies and the value of trapping shad" all fail to meet the

[17] In disputing the relevant paragraph of Applicant's Statement of Material Facts, Appellants omit the latter part of Mr. Amaral's statement following his statement that he would leave the issue of the agreement's § 401 compliance to the "lawyers and the folks." Ex. S, 48:11–13. He then explains that he is "assuming that particularly [if] FERC is to accept this, then it would have to meet all the applicable regulations . . . ." Id.

standard of a concrete, particularized, imminent injury. Taken together, Appellants lack an asserted injury and Question 8 is **DISMISSED**.

VIII. Question 16: Salmon Dam

Appellants' Question 16 asks whether Applicant's proposal to leave the Salmon Dam in place at Bellows Falls complies with various provisions of the VWQS. GRH contends that CRC, CLF, and VNRC again fail to articulate an injury-in-fact on this Question, and they are silent on AW's standing.

Appellants argue that Applicant's motion is improperly supported and there is a dispute of material fact precluding summary judgment. They also appear to assert that Applicant cannot base its standing argument on the responses to interrogatories propounded by Applicant on Appellants.

This Court is aware of no rule stating that interrogatories that are subject to objections should not be considered by the Court or cannot form the basis of a motion for summary judgment. Further, V.R.E.C.P. 2(e) does not require this Court's rigid conformity with the Vermont Rules of Evidence when the evidence is "of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs." V.R.E.C.P. 2(e).

Moreover, notwithstanding Appellants' objections to the relevant interrogatory, they respond (albeit "without waiving" their objections). See e.g., Ex. J at 94–95. In these responses, Appellants refer to their disclosures regarding experts in other interrogatories. See, e.g., id. ("Without waiving the above objections, CRC refers to CRC's revised answer to Q. Applicant: CRC 1-2 and the disclosure therein regarding Laura Wildman, Rebecca Tharp, Boyd Kynard, and Stephen Amaral."). None of these expert disclosures mention the Salmon Dam, much less any injury related to it. Ex. O at 4–9.

Neither party mentions AW's response to the same interrogatory about the Salmon Dam's compliance with the VWQS, which states:

> Without waiving the above objections, AW answers as follows: The Salmon Dam was constructed to prevent Salmon from accessing the bypassed reach where there was no fish passage. With the cessation of the Atlantic Salmon restoration program by the USFWS on the Connecticut River, the Salmon Dam no longer serves any project purpose. Man made structures such as the Salmon Dam are a hazard to recreational users as low-head dams create recirculating currents that can result in flush drownings. The presence of the Salmon Dam eliminates and/or degrades recreation opportunities in the bypassed reach. There is also no portage around the Salmon Dam and its presence prevents access to downstream egress.

Ex. K at 12.

Although this response comes closer to articulating an injury than any other Appellant on this subject, AW fails to show a causal connection between their asserted injuries and GRH's proposed change in operations.[18] No party disputes that the Salmon Dam existed prior to re-licensure. Nothing about the re-licensure seeks approval to alter the Salmon Dam. Thus, the risk of harm posed by the dam was present prior to approval of the WQCs, and the approvals that are the subject of these appeals cannot have caused that harm. To the extent Appellants may be arguing that the decision not to remove the dam creates harm by perpetuating an existing harm, they point to no standard in the VWQS requiring the dam's removal or modification. As such, this Court's ability to redress the alleged harm is also not clear. Because no Appellant has provided an injury-in-fact related to the applications on appeal, they lack standing to challenge issues related to the Salmon Dam. For these reasons, Question 16 is **DISMISSED**.

IX. Questions 5 and 14b: Unlawful Conditions Subsequent

Questions 5 and 14b ask whether Applicant's proposal to develop post-certification recreation and operations compliance and monitoring plans comports with VWQS § 29A-206(a) and (c) and the Vermont Supreme Court's holding in In re Treetop Dev. Co. Act 250 Dev., 2016 VT 20.

Appellants argue that GRH's current proposals for post-certification plans "fail to establish concrete measures to ensure compliance with water quality standards even after the certifications are issued." Cross-Motion at 11. In their view, the WQCs "address recreation in part with conditions subsequent—conditions that are open-ended and extend ANR's jurisdiction beyond its legal bounds." Cross-Motion at 12. Appellants make similar arguments concerning the proposed Operations Compliance and Monitoring Plan (monitoring plan), and add that because neither plan currently exists, it is impossible to certify compliance with § 401.

Applicant responds that Appellants lack standing on this Question. GRH also contends, in concert with ANR, that terrestrial recreational improvements are under the primary jurisdiction of FERC. This places the recreation plan outside of the Agency's jurisdiction, and therefore outside the jurisdiction of this Court. With respect to the monitoring plan, they assert that the provisions of the VWQS cited by Appellants do not preclude imposition of a post-certification monitoring plan. Relatedly, Applicant argues the conditions are limited and specific enough to be lawful conditions subsequent.

a. Recreation Plan

[18] As noted above, this Court has an independent obligation to determine whether subject matter jurisdiction exists, even if not raised by any of the parties. In re Charron, slip op. at 1 n.1.

i. Compliance with VWQS § 29A-206(a), (c)

Pursuant to CWA § 401, VWQS § 29A-206(a) requires that for "any federally licensed or permitted activity that may result in a discharge into waters of the United States, the State issue, waive, or deny water quality certification ensuring the discharge will comply with all applicable water quality requirements." VWQS § 29A-206(a). No party disputes that the Projects are federally permitted activities that discharge into the Connecticut River.

First, the Court notes that Appellants invoke § 29A-206(a) and (c) in their Statement of Questions, then appear to fail to reference either provision again in response to the pending motion on this issue. By failing to engage with the VWQS they have failed to articulate how alleged noncompliance with the VWQS harms them. Equally important, they have failed to articulate how a condition requiring development of a post-certification recreation plan violates the VWQS at all. This is particularly relevant given that Appellants appear to concede that the VWQS do not require development of a recreation plan.

To the extent Appellants argue that a post-certification condition inherently violates the VWQS because it means that the State-issued certification contemplated by the standards cannot show a discharge "will comply" with applicable water quality requirements, this argument is inapposite as it relates to the recreation plan specifically. Section 29A-206(a), for example, regulates the water quality of discharges and does not have any bearing whatsoever on a condition requiring terrestrial recreational improvements. See Town of Springfield, Vt. v. State of Vt. Env't Bd., 521 F. Supp. 243, 248–249 (D. Vt. 1981) (distinguishing between state regulation of water itself and federal regulation of "other aspects of the federal project," which includes recreation.) This distinction further reinforces the idea that these two facets of this hydroelectric project—the water quality of discharges and the appropriateness of requiring terrestrial recreational improvements after certification—are simply unrelated.

§ 29A-206(c) mandates that a state certification of a federally licensed project must contain conditions necessary to ensure that the activity will comply with the VWQS as a whole and various other provisions of Vermont law. These include: 10 V.S.A. chapter 37 (wetlands protection and water resource management); 10 V.S.A. chapter 41 (regulation of stream flow); 10 V.S.A. § 1264 (stormwater management); 29 V.S.A. chapter 11 (management of lakes and ponds); and ANR's Rules for Water Withdrawals for Snowmaking. As noted above, Appellants fail to state how a condition mandating a post-certification recreation plan violates the VWQS. Further, they fail to draw any connection between the challenged condition and any of the other relevant laws. A review of those laws shows

they address recreation in unrelated contexts. See 10 V.S.A. § 1021 (concerning recreational mineral prospectors); see also 10 V.S.A. § 905b (referring to the protection and management of water resources, but not terrestrial recreational improvements).

For these reasons, the Court finds that Appellants have failed to state an injury-in-fact with respect to the condition allowing GRH's post-certification recreation plan as it relates to the VWQS.

ii. Compliance with Treetop

Appellants also allege, however, that the conditions do not comply with In re Treetop Dev. Co. Act 250 Dev., 2016 VT 20, and are unlawful conditions subsequent. Appellants' claim suffers from two fatal deficiencies: 1) the authority to impose conditions related to terrestrial recreational improvements lies outside ANR's (and therefore this Court's) authority; and 2) the condition imposed does not violate Treetop.

It is undisputed that GRH maintains terrestrial recreational infrastructure and proposes to conduct maintenance and improvements related to such infrastructure. The WQCs incorporate GRH's FERC license proposals for recreational facilities and enhancements. These proposals include a condition mandating "(i) specific recreational improvements to be implemented; (ii) the development of a recreational management plan to ensure those measures remain available for use by the public, (iii) consultation with relevant stakeholders; and (iv) Department review and approval." Id. Appellants appear to take issue with the provision of the proposal that calls for ANR/DEC review and approval.

ANR does not have the authority to impose conditions related to terrestrial recreation on an applicant. It will, however, incorporate an applicant's proposed conditions into an application to show support for those suggestions to FERC. Because FERC expressly preempts ANR's authority in this area, ANR and an applicant cannot develop a recreation plan prior to final issuance of GRH's FERC license, which necessarily follows the issuance of a state certification. Thus, authority to impose conditions related to terrestrial recreational improvements lies solely with FERC. See Town of Springfield, Vt. v. State of Vt. Env't Bd., 521 F. Supp. 243, 249 (D. Vt. 1981) ("We also reject the [Environmental] Board's principal contention that preemption under the [Federal Power] Act applies only to state regulation of those aspects of a project directly related to the construction and operation of the hydroelectric generating facility but does not extend to the regulation of corollary aspects, such as road relocation and recreational improvements, which are not directly involved in power generation.") Thus, ANR and this Court on appeal lack the authority to impose new conditions related to the Applicant's plans to undertake terrestrial recreational improvements.

Further, Treetop does not stand for the proposition that any condition subsequent must inherently be unlawful. Treetop concluded that a condition allowing a District Commission, as opposed to the NRB, to retroactively impose conditions related to stormwater management to be unlawful. Treetop, 2016 VT 20. Because the condition allowed the District Commission to modify the permit indefinitely, without apparent limitation on the conditions that could be imposed, the Vermont Supreme Court deemed it an impermissible expansion of authority that undermined finality. Id. at ¶ 14. In so doing, it distinguished the condition at issue from legitimate post-permit conditions:

> Permissible conditions include those with prospective application that are intended to alleviate adverse impacts that either are or would otherwise be caused or created by a project, or those necessary to ensure that the development is completed as approved, such as those requiring permittees to take specific action when triggered by certain events, incorporating a schedule of actions necessary for continued compliance with Act 250 criteria, and requiring future compliance related filings, including affidavits of compliance with respect to certain permit conditions.

Id. at ¶ 12.

Notably, the at-issue condition was not independently imposed by ANR, but was instead functionally a self-imposed condition by Applicant. Further, the condition is clearly one "requiring permittees to take specific action when triggered by certain events, incorporating a schedule of actions necessary for continued compliance . . . and requiring future compliance related filings . . . ." Id. at ¶ 12.

The condition requires that, within one year of the approval of the WQCs, GRH must take various specific actions such as improving portage, installing floating docks and boat slides, maintaining a call-in number for boating conditions, and developing a recreation plan detailing the implementation of these and other measures. Ex. G at 105. The plan must include a schedule for implementation and checking recreational sites for maintenance needs, as well as how those needs will be addressed and future enhancements considered. Id. The condition is functionally one requiring a schedule for implementing and maintaining specifically defined recreational sites and taking actions necessary for continued compliance with the VWQS, and through those standards, the Clean Water Act. The plan is a compliance-related filing. It does not seek to approve or alter any aspects of the site or operations. In this instance, ANR's review and approval of GRH's proposed schedule of actions is not an expansion of ANR's authority. Further, a post-certification condition that has a specific, reasonable time limit does not undermine the purposes of finality in land use permitting. As

such, the recreation plan is not an unlawful condition subsequent, and Applicant is entitled to judgment as a matter of law on Question 5.

b. **Operations Compliance and Monitoring Plan**

Appellants make similar arguments concerning the proposed "Operations Compliance and Monitoring Plan" conditions in the WQCs. They allege the monitoring plan represents an unlawful condition subsequent that "leav[es] it until after the certifications issue to decide what should be monitored and how and what objective measurements should be to show compliance." Cross-Motion at 12. The Court disagrees.

The condition laid out in the WQCs states:

> The Applicant shall develop, within 180 days of the effective date of the FERC license, an operations compliance and monitoring plan **detailing how the Project will operate in compliance with IEO operations[,] Flexible Operation, and Transition Operation**. The plan shall also include **when the Project is being operated in response to emergency and system operations requirements**. The plan shall also include a **method for continuous monitoring and reporting outflow releases (e.g. spillage and turbine discharge) at the Project, impoundment levels, and inflow**. The plan shall include provisions for the operations data [to] be submitted to the Department. The plan shall include **procedures for reporting deviations from prescribed operating conditions to the Department. Reports shall be made within 15 days after a deviation and will include, if possible, the cause, severity, and duration of the deviation, observed or reported adverse environmental impacts from the incident, pertinent data, and measures to be taken to avoid recurrences**. The plan shall be subject to Department approval. The Department reserves the right to review and approve any material changes made to the plan.

Ex. G at 104 (emphasis added).

Unlike terrestrial recreational improvements, ANR has authority to regulate water quality in this context. Like the recreation plan, however, this time-limited condition cannot be an unlawful condition subsequent because it does not impermissibly expand ANR's authority or undermine finality. As indicated by the quoted text above, the condition requires the plan contain information on how the dam will comply with Applicant's proposed change in operations, how and when the dam will be operated in response to emergencies, provisions for reporting deviations from standard operating conditions and any environmental impacts, and how Applicant intends to avoid a recurring deviation. None of these requirements purport to add to or alter the overall goals of the WQCs or the operation of any of the dams. Instead, the condition simply sets requirements for reporting on

the dams' operation. ANR's proposed review and approval relates to their authority to revise these reporting requirements, not the operation of the dam itself or the overall scope of the project.

Appellants' further argument that the post-certification conditions are unlawful because it is impossible to certify compliance with a non-existent plan ignores the fact that state administrative entities like the Public Utility Commission routinely condition certifications on conditions that will be implemented post-licensure. Petition of Vt. Electric Power Co., Inc., 131 Vt. 427, 435 ("By attacking the post-certification procedure . . . the appellants ignore the fact that it is an accepted practice of the [Public Service] Board and administrative tribunals generally.") (citations omitted); see also City of Salisbury, N. Carolina v. FERC, 36 F.4th 1164, 1167 (D.C. Cir. 2022) (upholding flood-protection plan condition to be developed post-licensure); American Rivers v. FERC, 129 F.3d 99, 111 (upholding multiple conditions imposed by Vermont state agency that took effect post-certification). No provision of the VWQS prevents imposition of such a condition.

Appellants do not state how the condition imposed fails to establish compliance with the multiple chapters of Vermont law referenced by VWQS provision 29A-206(c). To the extent that they assert that the post-certification condition results in an inability to understand the bases of the WQCs, this is unsupported by the record before the Court and the additional application materials presented. Accordingly, Applicant is entitled to judgment as a matter of law on Question 14b.

XI. Questions 6 and 14c: Notice and Comment

Appellants' Questions 6 and 14c ask whether GRH's proposed development of a post-certification recreation plan and an operations compliance and monitoring plan "circumvent[s]" the public's right to notice and comment under 33 U.S.C. § 1341 and VWQS § 29A-206(e). GRH argues that notice and comment is not required under the VWQS for these plans, that Appellants participated in the public comment period for the draft certification, and that the cited section of the CWA only requires notice of the draft water quality certification decision, not subsequent steps in the process. GRH also asserts that Appellants attempt to claim a procedural injury with no underlying connection to an actual injury-in-fact. Applicant further notes that CRC appears on a list of stakeholders with whom it is recommended GRH consult regarding development of the post-certification recreation plan.

Appellants claim that they have all demonstrated standing on the issue of recreational impacts, and that notice and comment periods from the draft certifications cannot apply to the post-certification plans.

Appellants assert a procedural injury without any nexus to an actual injury-in-fact under the WQCs, nor any indication of how this Court could redress such an injury under the relevant law in these circumstances. Summers v. Earth Island Inst., 555 U.S. 488, 496 ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing. Only a 'person who has been accorded a procedural right to protect *his concrete interests* can assert that right . . . .") (quotation omitted). No party disputes that GRH provided the required notice and comment period related to their draft WQCs and Appellants participated therein. The final EIS notes many places where it accounts for and is responsive to Appellants' comments, including FERC's recommendation that a recreation management plan be developed in consultation with CRC.

Appellants premise their standing relative to this notice and comment issue on the declarations in their members' affidavits. The declarations largely contain conclusory statements that assert the affiant is harmed by the lack of ability to comment post-certification because they expected CRC and other groups to represent their interests by commenting on the recreation and operations monitoring plans post-certification. See, e.g., Ex. 1 at 12 ("I rely on CRC to represent my interests in the above-captioned matters including commenting on the draft Water Quality Certifications for the Project as well as the recreation plan among other issues."). A party "cannot rely on conclusory allegations or mere conjecture" to defend against summary judgment. Mello v. Cohen, 168 Vt. 639, 641 (1998). Even if any of the affiants' statements approached the level of some concrete injury, they have identified no law that requires a post-certification opportunity for comment.[19] For these reasons, Appellants fail to state a redressable injury-in-fact on Questions 6 and 14c and they are **DISMISSED**.

XII. Question 4: Recreation

Appellants' Question 4 asks whether GRH's proposal for the Projects includes sufficient information about recreation to demonstrate that the proposed operations will comply with various provisions of the VWQS. Applicant asserts that all Appellants but AW lack standing on this Question because they fail to identify any criteria the Projects will not meet. In the alternative, Applicant claims that it is entitled to partial judgment as a matter of law because Appellants' experts fail to highlight any dispute of material fact related to the cited provisions.

Appellants respond that Appellants CRC, CLF, and VNRC have standing regarding the impacts of the proposed operations on recreation. They argue that without a recreation plan, it is not

[19] Although not directly relevant to Appellants' lack of standing on this Question, the Court also understands that FERC has recommended CRC be part of the post-issuance recreation plan review.

possible to determine whether the plan, and thus the WQCs, will meet the requirements of the VWQS. They also contend disputes of material fact exist regarding GRH's expert witness testimony relating to compliance with the cited provisions of the VWQS.

To begin, for the reasons stated above, the post-certification recreation management plan is not an unlawful condition subsequent. Second, Appellants' claim that they have standing on recreation "if" the Project fails to comply with §§ 29A-104(b) and (d) on designated and existing recreational uses represents another example of a speculative concern that cannot be an injury-in-fact. Kelly, 216 Vt. 445, 458 ("An injury based on speculation about uncertain future events is no injury at all.").

Third, Appellants CRC, CLF, and VNRC dispute the testimony of Applicant's experts on water quality, fish, and other sensitive wildlife. The alleged dispute is not genuine and is instead based on the qualifications of Applicant's experts. A dispute about an individual's qualifications goes to the weight to be given to their testimony, see e.g., New England Power Co. v. Town of Barnet, 134 Vt. 498, 508 (1976); it does not constitute a dispute of the underlying facts of their testimony for summary judgment purposes. Appellants further attempt to undercut the testimony of Applicant's experts by taking issue with the data underlying their opinions and their qualifications to opine on the various metrics implicated by the cited provisions of the VWQS. Nowhere do Appellants CRC, CLF, and VNRC state how GRH's proposed change in operations will negatively impact water temperature, nutrient loading, turbidity, or dissolved oxygen content or give an example of an instance where those operations will violate the statute or VWQS. The same can be said regarding the Projects' impact on full support of the use of the area around the Projects as aquatic habitat under VWQS § 29A-305(a). None of these things constitute a cognizable injury-in-fact.

By contrast, AW asserts a cognizable injury. It asserts that GRH's proposed change in operations will decrease the Projects' minimum flow below an identified number of cubic feet per second that they contend is ideal for recreational boating (2,500 cfs) during boating season. Ex. D at 23. They buttress this asserted injury with declarations from their members making clear they regularly recreate in Project areas and will be personally negatively impacted by this proposed change. Applicant largely does not contest AW's standing on this issue.

AW's standing on this issue, however, does not automatically extend to all other Appellants, as they contend. Appellants rely upon Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay, 868 F.3d 104, 109–110 (2d Cir. 2017), in support of this assertion. This case concerned two organizations seeking redress for an identical injury, namely, a municipal ordinance's potential

harm to day laborers in the municipality. Here, Appellants do not seek relief from an identical injury—only AW has identified an interest in recreational boating and demonstrated that the interests of their members will be adversely affected by GRH's proposed change. Standing "is gauged by the specific common-law, statutory or constitutional claims that a party presents." Hinesburg Sand & Gravel Co. v. State, 166 Vt. 337, 341 (1997). No other party asserts the same injury or interest in recreational boating. For these reasons, all Appellants except for AW are **DISMISSED** with respect to Question 4.

Conclusion

For the reasons stated above, Questions 3, 6, 7, 8, 9, 10, 11, 12, 14a-c, 16, 17, and 18 are dismissed as to all Appellants for lack of standing. Question 4 is dismissed as to Appellants CRC, CLF, and VRNC for lack of standing. Applicant is entitled to judgment as a matter of law on Question 5. Applicant is entitled to judgment as a matter of law in the alternative on Question 14b. At this time, Appellant AW's Question 4 remains in these appeals. The Court will schedule a status conference to discuss resolution of the remaining issue on appeal and other matters of concern to the parties and the Court.

Electronically signed on November 2, 2026, pursuant to V.R.E.F. 9(d).



Joseph S. McLean
Superior Court Judge
Environmental Division