STATE OF VERMONT
WASHINGTON COUNTY, SS.

WASHINGTON SUPERIOR COURT
DOCKET NO. S151-86 Wnca

IN RE LUCILLE FARM PRODUCTS, INC.



## OPINION AND ORDER

Following the court's opinion and order filed June 12, 1987, the appellant Lucille Farm Products filed a motion to reconsider. Hearing was held July 24, 1987. Based upon the memorandum of law and arguments of counsel, the court issues the following ruling:[1]

In our decision filed June 12, we ruled that the state had the authority to regulate the flow of effluent from Lucille's whey plant into its pre-treatment facility. Counsel for Lucille presses the point that the term "discharge" in Title 10, Chapter 47, the Water Pollution Control Act, has a special meaning. 10 V.S.A. §1251(3), as applicable to this case, reads as follows:

> "Discharge" means the placing, depositing or emission of any wastes, directly or indirectly, into . . . the waters of the state.

The parties agree that under 10 V.S.A. §1263 the state may regulate flow of waste into a municipal treatment plants as a "discharge." Lucille's counsel asserts that because the flow of effluent from the Lucille whey plant to the Lucille pretreatment facility is at issue, we are not involved with a "discharge," and that no authority exists to regulate what he says is an internal corporate operation.

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[1]This ruling incorporates the findings of fact from the June 12th order, as well as the conclusions of law with regard to the appellant's procedural issue. It revises only that part of the order that addressed the scope of the Secretary's authority.

Counsel has a point. In our decision, we looked primarily to federal law. Probably we could have based our ruling entirely on state law. The governing authority in this case is Chapter 47 of title 10. Additionally, we were not cognizant of some of the authorities cited in support of the motion for reconsideration.

Conceding that the "discharge" here is waste which flows from the pretreatment facility to the Swanton plant, and conceding that the authority to regulate discharges does not at least directly include regulation of the flow of whey plant waste to the pretreatment facility, it follows that there must be another source for the attempted regulation of Lucille's pretreatment plant loading (Pretreatment Discharge Permit at page 2 of 10) if it is to be enforced.

At the hearing, counsel and the court discussed the issue thoroughly. The memorandum on each of the points raised has been considered. We conclude that, even conceding the state may not regulate the waste as it leaves the whey plant as a discharge into state waters, the state may regulate the loading to the pretreatment facility, which does in turn discharge into state waters via the Swanton sewage plant. The Water Pollution Control Act in its permit process regulates people, specifically those who want to "discharge to the waters of the state." 10 V.S.A. §1258(b). Lucille operates a facility that is intended to discharge waste water into the Swanton sewage plant. Keeping that in mind, there are several sources for the authority to regulate the pretreatment plant loading.

12 V.S.A. §1263(c) establishes the Secretary's authority to set permit conditions. §1263(c) reads as follows:

> (c) If the secretary determines that the proposed discharge will not reduce the quality of the receiving waters below the classification established for them and will not violate any applicable provisions of state or federal laws or regulations, he shall issue a permit containing terms and conditions as may be necessary to carry out the purposes of this chapter and of applicable federal law. **Those terms and conditions may include, but shall not be limited to, providing for specific effluent limitations and levels of treatment technology; monitoring, recording, reporting standards; entry and inspection authority for state and federal officials; reporting of new pollutants and substantial changes in volume or character of discharges to waste treatment systems or waters of the state; pretreatment standards before discharge to waste treatment facilities or waters of the state; and toxic effluent standards or prohibitions.**

Clearly the Secretary has the authority to regulate the effluent to the Swanton treatment plant, a point not at all disputed by Lucille. Additionally, the Secretary has the authority to regulate monitoring and recording requirements, another point not disputed by Lucille. Lucille only disputes the secretary's authority to require it to keep the loading of its pretreatment facility within certain limits.

Under §1263(c), it is difficult to see why the Secretary does not have such authority. If he explicitly can set limits on the effluent quality, monitoring, and reporting, and the section specifically says he "shall not be limited" to the conditions enumerated, it stands to reason that he can set limits on the loading of the pretreatment facility in order to ensure that it keeps the effluent within prescribed limits. Lucille concedes

the state can complain if discharge limits are exceeded. While it is all well and good to prosecute those whose effluent exceeds permit quality limitations, that is at best an after-the-fact remedy. The Secretary is charged with authority to regulate so that the waters will not be polluted. While we can round up the pigs after they have broken out of the pen, it is probably more to the point to ensure their confinement in the first place. We see no problem with the Secretary's setting limits on Lucille's pretreatment plant loading.

10 V.S.A. §1263(d) sets requirements for permits. It reads as follows:

> (d) A discharge permit shall:
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> (1) specify the manner, nature, volume and frequency of the discharge permitted and contain terms and conditions consistent with subsection (c) of this section;
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> (2) **require proper operation and maintenance of any pollution abatement facility necessary in the treatment or processing of the waste by qualified personnel in accordance with standards established by the secretary;**
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> (3) contain additional conditions, requirements and restrictions as the secretary deems necessary to preserve and protect the quality of the receiving waters, including but not limited to requirements concerning recording, reporting, monitoring and inspection of the operation of waste treatment facilities; and
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> (4) be valid for the period of time specified therein not to exceed five years.
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> (Emphasis added.)

If a discharge permit must specify the manner, nature, volume, and frequency of the discharge permitted from a facility, it is difficult to see why the state cannot regulate the volume

of pollutant into the facility. If a discharge permit must contain provisions for "proper operation and maintenance," it is difficult to understand why it cannot contain operating provisions related to incoming pollutants. If a discharge permit must "contain additional conditions, requirements and restrictions as the Secretary deems necessary to preserve and protect the quality of the receiving waters," and by the language of subsection (d)(3) he is "not limited to requirements concerning recording, reporting, monitoring and inspection," it is difficult to see why it cannot contain conditions, requirements and restrictions, such as load restrictions, that will ensure that the facility will work properly. Again, we do not see where the Secretary has exceeded his authority by including in the permit pollutant loading limits on page 2 of 10, to the extent of 2400 lbs/day $BOD_5$ (monthly average) and 5000 lbs/day $BOD_5$ (daily maximum). The objection here is to the inclusion of any such limits at all. There is no evidence to show that the actual limits set are unreasonable or without support.

The Secretary additionally asserts authority to impose loading limits on the facility under 10 V.S.A. §1272. As applicable to the case before us, that section reads as follows:

> If the secretary finds that any person's action, or an activity, results in the construction, installation, operation or maintenance of any facility or condition which **reasonably can be expected to create or cause a discharge to waters in violation of this subchapter,** . . . [he] may issue an order establishing reasonable and proper methods and procedures for the control of that activity and the management of substances used therein which cause discharges . . . in order to

reduce or eliminate those discharges. . . .
(Emphasis added.)

Lucille, on the other hand, argues that the section is reaches only those instances where no discharge is intended, but where the Secretary believes that a facility, or any other condition created by a person, is likely to cause a pollution discharge. In those situations, no permit is required because no discharge is intended. Yet if the Secretary is to protect the waters of the state, he must have authority to regulate situations where pollution discharges are likely.

Counsel for Lucille is probably right. §1272 is not intended to apply to permit applications and the conditions imposed in the permits issued. The section, nevertheless, is helpful in determining the scope of the Secretary's authority under Chapter 47 because it shows us that he is authorized to anticipate trouble and take the action necessary to avoid it. No actual discharge is necessary before the Secretary may take action. He need only believe a facility or a condition "reasonably can be expected to create or cause a discharge to waters in violation of [the Water Pollution Control Act]."

With respect to the Lucille facility, the Secretary apparently believes that, in order to avoid a pollution discharge, the pretreatment plant should not be loaded beyond a certain limit. If the Secretary has the authority to anticipate pollution discharges with respect to facilities not intended for discharges at all, it makes no sense that in a permit he cannot anticipate the consequences of overloading a pretreatment

facility, when the sole purpose of that facility is to treat waste water and discharge it into the waters of the state.

Since by the specific langauge of §§1263 (c) and (d)(3) the Secretary is "not limited" to the conditions enumerated, we believe he may regulate the loading of Lucille's pretreatment plant. By so finding, we do not - as counsel for Lucille fears - give the Secretary license to "regulate ad hoc and at will," Supplement to Appellant's Memorandum of law at 5. Rather, we find that regulation of loading at the pretreatment plant is a narrow power "impliedly necessary for the full exercise of [the Secretary's] expressly granted authority." N.H. - Vt. Physician Service v. Commissioner, Dept. Bank. & Ins., 132 Vt. 592, 596 (1974). While we commend Lucille's counsel for imaginative briefing and argument, and in response we revise our reasoning on the question, we must respectfully decline the relief requested. The motion is denied.

Finally, at oral argument on the motion to reconsider, counsel reminded the court that they had agreed at the original argument that the so-called "Fact Sheet" could be eliminated from the permit, since it appears to be irrelevant. This was not included in the original opinion. We grant the relief requested; the so-called "Fact Sheet," is deleted in its entirety.

Dated at Montpelier, Vermont, September 11, 1987.

Alden T. Bryan
Presiding Judge

Patricia B. Jensen
Assistant Judge

Paul H. Guare
Assistant Judge