STATE OF VERMONT
ESSEX COUNTY, SS.

RE: GEORGIA PACIFIC CORPORATION — ESSEX SUPERIOR COURT
GILMAN, VERMONT
APPEAL OF CONDITIONS OF CLEAN WATER
ACT SECTION 401 CERTIFICATION — DOCKET NO. S-11-90Ec

JUDGMENT

This is an appeal of a preliminary order dated February 22, 1990 Of the Water Resources Board pursuant to 10 V.S.A. § 1270.

The issue presented in this appeal is whether the Water Resources Board has appellate jurisdiction to review so called Section 401 certification issued under 10 V.S.A. section 1004.

10 V.S.A. section 1004 states:

> The secretary shall be the agent to coordinate the state interest before the Federal Energy Regulatory Commission in all matters involving water quality and regulation or control of natural stream flow through the use of dams situated on streams within the boundaries of the state, and it shall advise the Federal Energy Regulatory Commission of the amount of flow considered necessary in each stream under consideration. The agency of natural resources shall be the certifying agency of the state for purposes of section 401 of the federal Clean Water Act. The secretary shall be the agent of the state and shall represent the state's interest under the provisions of the Federal Power Act, including those that protect state-designated outstanding resource 'waters. However, the secretary's authority shall not infringe upon the powers and duties of the public service board or the relations of that board to the Federal Energy Regulatory Commission as Set forth in the Federal Power Act respecting water used for the development of hydro-electric power or projects incident to the generation of electric energy for public use as part of a public utility system.

The Georgia Pacific Company (GPC) operates the Gilman Dam on the Connecticut River. This hydroelectric dam is licensed by the Federal Energy Regulatory Commission (FERC), an application for relicensing is pending before FERC. As part of this relicensing procedure the State Agency of Natural Resources (ANR) issues a Section 401 Certificate. This certificate takes its name from section 401 of the Federal Clean Water Act, 33 USC, § 1341. The purpose of a Section 401 Certificate is to demonstrate to FERC that the project seeking a license will not violate state water quality standards.

ANR issued the requested 401 Certificate. GPC objects to some of the conditions set forth in the certificate. It appealed to the Water Resources Board for a review.

Administrative agencies are subject to the same checks and balances which apply to other branches of government. In re Agency of Administration, 148 Vt 68, 75 (1982). Administrative Bodies must operate for the purposes and within the bounds authorized by enabling legislation. Id. Where an administrative body exercises its adjudicative function, the courts will be especially vigilant. Id. An administrative body only has such powers as are expressly conferred upon it by the legislature. Westover vs. Village of Barton Electric Dept., 149 Vt. 356, 358 (1988).

Georgia Pacific argues that the Water Resources Board has reviewing authority over ANR's Section 401 Certificates based on 10 V.S.A. § 1269 which says:

> Any person or party in interest aggrieved by an act or decision of the secretary pursuant to this subchapter may appeal to the board within thirty days. The board shall hold a de novo hearing at which all persons and parties in interest as determined by board rule may appear and be heard and shall issue an order affirming, reversing or modifying the act or decision of the secretary within 10 days following the conclusion of the hearing. The order shall be binding upon the department. An appeal filed pursuant to this section shall not stay the effectiveness of any act or decision of the department pending determination by the board.

10 V.S.A. § 1258 states:

> (a) After the classification of any waters has been determined by the board, those waters shall be managed under the supervision of the secretary in order to obtain and maintain the classification established. The secretary may enforce a classification against any person affected thereby who, with notice of the classification, has failed to comply. An action to enforce a a classification shall be brought in the superior court of the county wherein the affected waters are located.
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> (b) The secretary shall manage discharges to the waters of the state by administering a permit program consistent with the National Pollutant Discharge Elimination System established by section 402 of Public Law 92-500 and with the guidelines promulgated in accordance with section 304(h)(2) of Public Law 92-500. The secretary shall use the full range of possibilities and variables allowable under these sections of Public Law 92-500, including general permits, as are consistent with meeting the objectives of the Vermont water pollution control program. The secretary shall adopt a continuing planning

> process approvable under section 303(e) of Public Law 92-500. Neither the secretary nor his duly authorized representative may receive a significant portion of his income directly or indirectly from permit holders or applicants for a permit under this chapter.

Georgia Pacific claims too much for § 1258. None of the provisions it *covers* include the Section 401. The State's § 1258 analysis is cogent.

Because the Section 401 Certificate is beyond the scope of § 1258, it necessarily follows a fortiori that the Water Resources Board does not derive reviewing authority under 10 V.S.A. § 1269 because that section provides for review of acts or decisions under subchapter 1 of chapter 470, Title 10. Section 1004 lies outside of that subchapter. When construing a statute, the function of the court is to ascertain and give effect to the intention of the legislature. Paquette v. Paquette, 146 Vt. 83, 86 (1985). If the meaning of a statute is plain on its face, it must be enforced according to its terms, and there is no need for construction. Id.

10 V.S.A. § 1004 specifically deals with Section 401 Certificates. Statutory provisions relied upon by Georgia Pacific do not. Should there be any conflict, the specific would control over the more general'; Loomberg v. Crowley, 138 Vt. 420, 423 (1980); however, the court doesn't find any such conflict.

This court concludes that the Water Resources Board does not have authority to conduct appellate review (10 V.S.A. §1269) of the issuance of Section 401 Certificates (10 V.S.A. § 1004).

Accordingly, it is ORDERED and ADJUDGED that this matter is hereby remanded to the Water Resources Board with the direction that the appeal to that Board be dismissed, the Board being without jurisdiction to hear the appeal.

Dated this 17th day of August, 1990.

JOHN P. MEAKER, PRESIDING JUDGE

FILED

AUG 24 1990

ESSEX DISTRICT/SUPERIOR COURT
BY _____
CLERK/DEPUTY CLERK