

State of Vermont

Water Resources Board

Re: Appeal of Town of Essex
Authority: 10 V.S.A. §1629

Docket No. 91-02

ORDER

BACKGROUND

In 1982, the Town of Essex ("**Essex**") applied for and received approval of a state wastewater treatment facility grant. The grant included "additional amounts" in excess of the original "**basic** grant", as authorized by former §1625(a)(3) of Title 10 (repealed in 1983). DEC calculated the "additional amounts" based upon estimates of user numbers and operating costs provided by Essex at the time of application. The first installment of the grant was made in April, 1983 and the facility was in operation by 1984.

In February, 1984 Essex appealed the DEC award, requesting an increase in the "additional amounts", based on **up-to-date** figures for the number of users and the operating costs. In October, 1984, DEC denied this request, **ruling** that the original award was appropriate. Essex did not appeal this decision.

In 1988, DEC awarded Essex the final **payment** and informed the Town that adjustment of the "**basic grant**" would be necessary once a final audit of the construction costs was performed. The town accepted the final payment and did not object.

In 1990, a final audit was performed by DEC. The project's eligible costs were **found to be less than projected**. It also appeared that DEC had miscalculated an eligible cost in calculating the "**basic grant**." An overpayment of over \$110,000 was requested from the town. This overpayment request was affirmed in a "**final decision**" of DEC issued in January, 1991.*

*The "**final decision**" referred to by DEC is in reply to a new request from Essex to refigure the grant amount. Essex sought to avail itself of an appeal procedure set up by DEC in its February, 1986 "**Policy for Appeal Resolution Under 205(g) Delegation**." This policy was developed to comply with §205(g) of the federal Clean Water Act, which requires that the state provide an appeals procedure for applicants on all issues regarding a pollution control construction grant so that appeals can be easily processed to the regional office of the Environmental Protection Agency. See 40 CFR 535.3030.

The appeal of this decision was filed with the Board on February 7, 1991 and was substantially completed on March 14, 1991. The appeal claims that DEC erred in not increasing the size of the "additional amounts" authorized in the grant award based on the actual, rather than estimated, number of users and annual operating costs. DEC subsequently filed a Motion to Dismiss arguing that the Board lacks jurisdiction because 10 V.S.A. §1629 limits the scope of the Board's appellate authority to review of DEC's priority system in granting project awards and of DEC's decision on the priority of awards.

Essex does not dispute that DEC conditioned the "basic grant" on necessary adjustments based on the final project construction cost, that the "basic grant" was based on construction costs greater than the actual construction costs, that DEC made an error by including ineligible costs in the grant, or that the DEC audit was accurate.

DISCUSSION

I. Jurisdiction

The general issue of whether the Board has jurisdiction to hear this type of appeal under 10 V.S.A. §1629 was decided this date in In re Appeal of Village of Waterbury. Interim Approval of Water Supply Project; WRB Docket No. 90-14, December 20, 1991. In that case the Board held that the extent of its jurisdiction under §1629 covers appeals of decisions of DEC in establishing the priority system for grant awards and in the prioritization of those awards.

This case differs somewhat from the Waterbury case in that the proposed project is eligible for a grant under 10 V.S.A. §1625, covering awards for pollution abatement projects. The Waterbury case involved an award under §1624, covering water supply projects. Essex argues that the awarding of specific amounts is part and parcel of the priority system. Essex also relies upon the representations made by the Public Facilities Division that an appeal can be made to the Board under DEC's "Policy for Appeal Resolution Under 205(g) Delegation, Water Pollution Control Program."

A quasi-judicial body such as the Board has only those powers expressly conferred by statute, 3 V.S.A. §203, Miner v. Chater, 137 Vt. 330, 333 (1979), or prescribed in terms definite enough to serve as a guide. State v. Auclair, 110 Vt. 147 (1939). An agency must operate for the purposes and within the bounds authorized by enabling legislation. In re Agency of Administration, 141 Vt. 68, 75 (1982). The courts

are especially vigilant where an agency exercises its adjudicative functions. Id.

When construing a statute, a court must 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.

Title 10 V.S.A. §1629 provides the appeal procedure for appeals of DEC decisions on grant applications. Prior to its amendment in the 1981 legislative session, 10 V.S.A. §1629 read:

"Any municipality aggrieved by an act or decision of the department pursuant to this subchapter may appeal such act or decision to the water resources board within 30 days after the date thereof. The board shall hold a hearing at which all persons and parties in interest may appear and be heard and shall issue an order affirming, reversing or modifying the act or decision of the department. Such order shall be binding upon the department..."

In 1981, 10 V.S.A. §1629 was amended to read:

"Any municipality aggrieved by an act or decision of the department in establishing the priority system and the priority of awards to projects under this chapter may appeal to the board within 30 days. The parties in interest may appear and be heard to determine whether the decision of the department complies with the priority system adopted pursuant to section 1628 of this title..."

The plain language of 10 V.S.A. §1629 indicates **that the** legislature sought to provide applicants with a review of the prioritization process under §1628 of Title 10. It is also clear that the amended statute sought to terminate Board review of the actual granting of awards. No due process rights attach to the award of the grant. The Board sees no, real distinction between this fact scenario and that of the Waterbury case. The Board **does not** have jurisdiction to hear an appeal involving any matter other than the priority system and the priority of awards.

Essex refers to legislative intent to bolster its argument that the Board's appellate jurisdiction covers any grant decision of DEC. However, a review of the legislative history of the amendment to this statute reflects no inclination on the part of the Legislature to have the Board continue handling appeals of any grant decision of DEC. To the contrary, the sparse history indicates that appeals under §1629 were to be only on decisions establishing the priority

system or the priority of awards.

The Board disagrees with Essex's argument that DEC should not be able to now take a contrary position regarding the ability of Essex to appeal to the Board. Essex relies upon the January 15, 1991 letter of the Public Facilities Division, indicating that an appeal could be taken to the Board based upon the February, 1986 policy directive. See Footnote *, Page 1.

The Public Facilities Division does not have the authority to determine the Board's jurisdiction. The legislature cannot transfer its legislative power to enact laws. Village of Waterbury v. Melendy, 109 Vt. 441, 451. Functions which are strictly and entirely legislative cannot be delegated. Id.

The February 1986 policy directive of DEC (See footnote *, page 1) can not give the Board appellate jurisdiction that the legislature has not provided. Moreover, the federal regulations regarding CWA §205(g) review provide that the review of the final decision be made by petition to the agency that made the initial decision (DEC). The proper avenue of appeal was and is to the regional office of EPA. 40 CFR §35.3030..

The Board holds that its jurisdiction under 10 V.S.A. §1629 extends only to appeals of decisions of DEC in establishing the priority system for grant awards and in the prioritization of those awards. The Board further holds that it has no appellate jurisdiction pursuant to DEC's "Policy for Appeal Resolution Under 205(g) Delegation, Water Pollution Control Program."

II. Timeliness of the Appeal

Essex secondly argues that the appeal of the DEC decision is timely. This argument is made in response to DEC's argument that Essex had its opportunity to fully appeal this matter when it received a final decision of DEC in October, 1984. The Essex argument is based, at least in part, on the Public Facilities Division letter of January 15, 1991, Stating that the letter is the director's "final decision" as defined in an agency policy directive (the same letter which explains that the decision can be appealed to the Board).

It is unnecessary to reach a decision on this issue. The proper route of appeal was and is to the regional office of the EPA under the CWA, §205(g) and the related regulations, 40 CFR §35.3030. The Board neither has jurisdiction under DEC's 1986 policy directive nor under 10 V.S.A. §1629.

III. It is also unnecessary to reach DEC's equitable estoppel argument.

Vermont Water Resources Board
by its Chair

Dale A. Rocheleau
11/3/92

Dale A. Rocheleau

Concurring: Elaine Little
Stephen Reynes