

State of Vermont

Water Resources Board

In **re:** Appeal of Valoia

Docket No. 92-03

BACKGROUND

On **August 29, 1991**, the Department of Environmental Conservation (DEC) issued a Conditional Use Determination permit (CUD) pursuant to the Vermont Wetland Rules (Rules) for **construction of a bike path** by the Town of Essex and the village of Essex Junction. The permit noted that an appeal could be taken to the Vermont Water Resources Board. On **September 4, 1991**, appellant Paul **Valois** forwarded a letter to the DEC **stating** that he was appealing the **DEC's** decision on the **permit**.

On **September 18, 1991**, the DEC **forwarded a** letter to the appellant **notifying** him that the DEC had received his letter. The DEC letter explained that the proper route of appeal is to the Water Resources Board (Board) pursuant to **§9** of the Rules, **and** informed the appellant that his letter was being **forwarded to** the Board.

The Board has no record and the **Board** staff **has** no recollection of the appellant's letter reaching the Board office. In late March, 1992, nearly **seven** months later, the appellant contacted the Board's Executive Officer and inquired about the appeal. At that **time** the **Board** requested a copy of the **DEC** file.

On **April 7, 1992**, the Board's legal **counsel** **contacted** the appellant and **informed** him that the Board had never received the copy of the appellant's September 4 letter to **the** DEC. The **appellant was** informed that, pursuant to Board Rule of Procedure 18, his petition **was** incomplete' and required additional information. He **was** additionally informed that **this** information must **be** filed' **within** 15' days of written **notification**. Board counsel forwarded a letter confirming the substance of the conversation on that same date.

The appellant **failed to** file an amended appeal by April 23, 1992, the fifteenth day.* On April 24, 1992, the Town of Essex filed a Motion to Dismiss based upon two grounds: (1) **failure** to timely appeal; and (2) failure **to** perfect the appeal. The Board took the Motion under advisement at its meeting of May 13, 1992 and considered the legal memoranda of Essex and the appellant.

* Appellant has yet to file an amended appeal.

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DISCUSSION

I. Failure to timely file an appeal

A CUD appeal to the Board is governed by Title 10 V.S.A. §1269, which provides that the appeal is to be filed with the Board within 30 days of the decision of the Secretary of the Agency of Natural Resources., The Board's procedures provide that appellate proceedings are commenced before the Board by filing a petition or notice of appeal with the Board. Board Rule of Procedure 18.*

Although we find no case which specifically addresses failure to timely file an appeal with an administrative board, it is well established that timely filing of the notice of appeal is a jurisdictional requirement. In re Guardianship of L.B., 147 Vt. 82, 84 (1986); V.R.A.P. 3(b). Failure to file a notice of appeal within the prescribed time period deprives the tribunal appealed to of jurisdiction over the appeal. Harvey v. Town of Waitsfield, 137 Vt. 80,82 (1979); Villaue of Northfield v. Chittenden Trust Co., 128 Vt. 240,241 (1969); Shortle v. Rutland Board of Zonina Adjustment, 136 Vt. 202 ~(1978).

Appellant, citing V.R.A.P. 4 and 13, contends that the Board must determine that his September 4 letter to the DEC was sufficient to complete the technical requirement of filing within 30 days. Neither the Civil nor Appellate Rules of Procedure are applicable to an appeal of a DEC permitting decision to the Board. See, Reporter's Notes, V.R.C.P.74; see also, V.R.A.P.13. There is no statutory obligation upon

*The Board does not disagree with appellant's contention that the civil rules can be applied where an administrative agency's rules are silent or where the agency's rules contemplate the applicability of the civil rules. Appellant's Opposition to Motion to Dismiss, fn.3, p.2: see, In re: Appeal Of Balaaur, WRB Docket No. 86-06, December 23, 1991 (V.R.C.P. a guide where Board rules of procedure fail to properly address procedural issues of post-hearing motion). Although the Board's Rules of Procedure do not provide guidance where a party has not timely filed an appeal, Rule 18 provides the required procedure for filing a notice of appeal. This was not followed.

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the DEC, as there is upon the Supreme Court, to transmit the appeal to the proper board. More importantly, filing merely a notice of intention to appeal, rather than an actual notice of appeal, with the wrong administrative agency does not meet filing requirements.

The Board is equally unpersuaded by appellant's reliance upon Mountaineer Association v. Town of Wilminuton, 147 Vt. 627 (1987). In Mountaineer, the Court held that a defect in service of process does not deprive a tribunal of jurisdiction over the subject matter of an action. Service of process, however, assumes the actual filing of an appeal, without which the tribunal lacks jurisdiction. No appeal was filed with the Board.

It is irrelevant that the appellant's efforts may have been in good faith.* It is also irrelevant that the DEC received notice of the appellant's intention. Notifying an appellee of the appellant's intention to appeal does not equate with notification of an appeal already filed.

II. Failure to perfect the appeal

Because the Board has determined that it does not have jurisdiction in this matter, it is unnecessary to reach this issue.

*The issue of good faith does not enter into a determination of the tribunal's jurisdiction. Were good faith an issue, however, the Board would not be inclined to agree with appellant that he had made adequate efforts. Appellant was notified in writing as part of the DEC's August 29, 1991 decision that an appeal of the permit was to the Board. Appellant was further informed in the September 18, 1991 letter from the DEC that an appeal was to the Board. Appellant failed to follow the clear instruction in the DEC's decision to file his appeal with the Board and, once advised of his misfiling, made no effort to contact the Board until late March, 1991, some seven months after the CUD issued.

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ORDER

Appellant's, failure to timely file an appeal with the Vermont Water Resources Board deprives the Board of jurisdiction to hear appellant's appeal. The appeal is dismissed.

Vermont Water Resources Board
by its Acting Chair

Date:

5/20/92

Jonathan Dash

Jonathan Dash, Acting Chair

concurring: Mark, DesMeules
Stephen Reynes

absent; Elaine Little

recused: Dale A. Rocheleau, Chair