

State of Vermont
Water Resources Board

In re: Appeal of Vermont Natural Resources Council
Docket No. 92-02

Prehearing Conference Order
and
Preliminary Order

BACKGROUND

The Vermont Natural Resources Council (VNRC), the Mad Dog Chapter of Trout Unlimited (TU) and the Vermont group of the Sierra Club (SC) filed an appeal of the decision of the Agency of Natural Resources (ANR) to issue dam permit #91-1 to Snowridge, Inc. (SRI) for construction of the Sugarbush Snowmaking Pond. On March 2, 1992, the Board received a written request from the Mad Dog Chapter of Trout Unlimited to withdraw its appearance in this matter. On March 4, 1992, the Board held a Prehearing Conference in the above-entitled matter.

As a result of the Prehearing Conference, a number of preliminary issues were raised by the parties. These issues included (1) the party status of SC; (2) a Motion to Amend Appeal to Include Public Trust Doctrine, filed by the appellants; (3) a Motion for Remand, filed by the appellants; (4) a Motion for Continuance (or a Stay), filed by the appellants; (5) a request to have the Board perform an appellate review of the requirements of 10 V.S.A. §1086(b), which mandates that the agency having jurisdiction issue an order including conditions for minimum stream flow to protect fish and instream aquatic life, as determined by the ANR; and (6) the timing and sequencing of filing pre-filed testimony.

The Water Resources Board (Board) conducted a hearing on April 1, 1992, at which the parties were given the opportunity to orally argue the various issues. Counsel for the appellants requested at that hearing that the state chapter of Trout Unlimited be granted party status.

Pursuant to Board Rule 24(B), this Prehearing Conference Order shall control the subsequent course of the proceedings in this case, unless modified by a subsequent Order or at hearing to prevent manifest injustice.

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I. Party Status

The following have requested and are granted party status with respect to this appeal:

a. Snowridge, Inc., represented by Stephen Crampton and Dennis Pearson;

b. Vermont Natural Resources Council, represented by Gerald Tarrant;

c. Vermont group of the Sierra Club, conditionally. See below. The Sierra Club is represented by Gerald Tarrant.

d. Vermont Chapter of Trout Unlimited, represented by Gerald Tarrant.

e. Vermont Agency of Natural Resources, represented by Charles Bristow and Anne Whiteley.

SRI and the ANR are "persons in interest" under 10 V.S.A. §§1081(3) and 1099(a), upon whom the statute confers a right to appear and be heard. Since VNRC is a corporation, it is a "person aggrieved" upon whom the applicable statute confers a right to appeal within 30 days of the ANR decision. 10 V.S.A. §1099(a).

So far, the Vermont group of the SC has failed to show that it is a "person" under 10 V.S.A. §1081(2). However, while the Vermont group of the SC is not a corporation, its parent group, the Sierra Club, is a corporation. It, too, could be a "person aggrieved," upon whom the applicable statute confers a right to appeal within 30 days of the ANR's decision. Therefore, the Board grants party status to the Vermont group of the SC pursuant to Board Rule of Procedure 22(A), subject to the following condition precedent. It is incumbent upon counsel for the Vermont group to provide the Board's legal counsel with adequate proof of the Vermont group's authority on behalf of its parent group to enter into this proceeding. This offer of proof must be made no later than April 20, 1992. Should the Vermont group not present adequate proof by this date, it shall not be granted party status.

The Vermont Chapter of Trout Unlimited is granted party status pursuant to Board Rule of Procedure 22(B). Although

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a local chapter of TU timely filed an appeal with the Board, the subsequent withdrawal of that appearance terminated TU's normal appeal rights pursuant to 10 V.S.A. §1099(a). An appeal pursuant to §1099(a) must be filed within 30 days of the date of the decision of the Department of Environmental Conservation (DEC) (DEC is a department contained within the ANR).

TU also did not seek party status at the initial prehearing conference. Board Rule of Procedure 22(B)(2). The Board has determined, however, that TU has demonstrated good cause for failure to request party status in a timely fashion. The Board has additionally determined that the late appearance of TU will not unfairly delay the proceedings or place an unfair burden on other parties. Id.

The Board finds that TU has made a prima facie showing of substantial interest which may be affected by the outcome of the proceeding. Board Rule of Procedure 22(B)(3). There does not appear to be an alternative means by which TU can protect its interest. Id.

Appellants VNRC, SC and TU have chosen to have one legal counsel represent them jointly. The Board notes that the determination that TU's entrance will not prejudice or place an unfair burden on other parties is based, in part, on counsel's representation that these three parties will coordinate their testimony and other hearing-related activities. See Board Rule of Procedure 22(B)(3) and 22(B)(4).

The Board acknowledges that the interests of TU, SC and VNRC might adequately be protected by the participation of just one of the appellants in this proceeding. See Board Rule of Procedure 22(B)(3). At the same time, the Board must acknowledge the differences in the organizations' major areas of concern and in the make-up of their membership lists. The Board cautions, however, that should any appellant diverge from the co-appellants and seek a continuance to facilitate such divergence, the Board will be extremely reluctant to grant such a request.

II. Motion to Amend Appeal to Include Public Trust Doctrine

The Board grants the appellants' motion, but conditions

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this grant upon the appellants filing an amended notice of appeal no later than April 20, 1992.

The Board disagrees with appellee's contention that, pursuant to Board Rule of Procedure 18(D), appellants failed to join the public trust doctrine as an issue in its original petition or notice of appeal. First, the appellants specifically requested to "reserve all rights and actions with respect to the public trust doctrine" in their cover letter accompanying the original notice of appeal. If the Board has the discretion to treat any writing substantially complying with the requirements of Board Rule of Procedure 18 as a petition or notice of appeal, then it would unfairly limit petitioners in appeals if it were to ignore issues raised in cover documents that accompany formal notices of appeals. Board Rule of Procedure 18(D). Moreover, it has long been recognized that statutes giving and regulating the right of appeal are remedial in nature and should receive a liberal construction in furtherance of the right of appeal. In re Preseault, 130 Vt. 343 (1972), citing Abbadessa v. Tegu, 121 Vt. 496, 498 (1960). An administrative appellate board should pose no stricter a standard when interpreting its own regulations.

Second, the public trust doctrine is a common law doctrine. Although the Water Resources Board does not have the authority to make a broad statement of its powers under the common law, it is incumbent upon the Board to consider the applicability of common law in the context of its decisions.

III. Motion for Continuance

The Board is mindful of the fact that the issues posed by a water quality certification being performed by the ANR as part of a related federal permitting process are similar, if not identical, to those raised in this proceeding. There is no guarantee, however, of when the ANR's water quality certification determination will issue. The ANR has not yet held a hearing on the matter.

Appellants have offered no plausible justification, nor

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does the Board find reason to believe that moving forward will prejudice any party in a substantial manner. The Board also fails to find any reasonable basis to believe that its responsibilities would be benefitted by a continuance. For these reasons, the motion is denied. See Board Rule of Procedure 21.

IV. De novo appeal or de novo/appellate review

Prior to 1975, the "state agency having jurisdiction" language of 10 V.S.A. §1086(b), relied upon by appellants, pertained to the Water Resources Board and the Public Service Board when those two boards handled initial petitions for dam permits. Each determined minimum stream flow conditions independently. See 1968 Op. Atty. Gen. No. 83 (October 15, 1968).

In 1975, legislation enlarged the "state agency" language to give authority for agricultural dams to natural resources conservation districts. The conservation districts were authorized to determine minimum stream flow conditions on their own for those cases where the districts had jurisdiction. 10 V.S.A. §1083a.

In 1987, 10 V.S.A. §1086(b) was amended to require that the "state agency" approving an application must include in its order conditions for minimum stream flow to protect fish and instream aquatic life, as determined by the ANR. The deference provided to the ANR's determination on minimum stream flow remedied the historical problem of each permitting agency independently determining minimum stream flow conditions. Minimum stream flow conditions could thereafter be uniformly established for the initial permitting processes. The amendment, however, did not establish an appellate review process for minimum stream flow conditions determined by the ANR in its own permitting process.

Despite the clear and unambiguous language of 10 V.S.A. §1099(a) giving the Board *de novo* jurisdiction of appeals, the appellants insist that 10 V.S.A. §1086(b) now requires the Board to perform an appellate review of the determination of minimum stream flow conditions established by the ANR. Had the legislature intended such a result, it would have expressly provided so in the appeal section, §1099(a), of the statute. When the legislature intends that a *de novo* hearing

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be held, it makes itself clear, as it did in §1099(a). State Dept. of Taxes v. Tri-State Ind. Laundries, 138 Vt. 292. See, e.g., 8 V.S.A. §4662 (Banking and Insurance Commissioner's determination); 10 V.S.A. §6089(a) (District Environmental Commission's determination); 19 V.S.A. §231(b) (Highway Board's compensation order); 21 V.S.A. §670 (workmen's compensation award); 24 V.S.A. §4472 (zoning decision); 32 V.S.A. §4467 (property appraisal decisions); 10 V.S.A. §1024 (stream alteration and 401 certificates); 10 V.S.A. §1269 (direct and indirect discharge permits); 10 V.S.A. §1933 (underground storage tanks); and 29 V.S.A. §406(b) (lakes and ponds permits).

The Supreme Court has defined a *de novo* proceeding as:

"[One] where the case is heard as though no action whatever had been held prior thereto. All of the evidence is heard anew, and the probative effect determined by the appellate tribunal as though no decision had been previously rendered."

In re Poole, 136 Vt. 242, 245 (1978); Bookstaver v. Town of Westminster, 131 Vt. 133, 136 (1973); See also, Alison v. Town of Rochester, 150 Vt. 525, 527 (1988); Black's Law Dictionary: *de novo* ("anew; afresh; a second time"; citing Archer v. High, 193 Miss. 361, 9 So. 2d 215, 217). "It is error to merely make an order affirming or reversing the decision of the administrative body below." Poole, supra, at 246. In fact, no deference need be paid to the decision below. Chioffi v. Winooski Zoning Board, 151 Vt. 9, 11 (1989).

The Board will conduct an entirely *de novo* hearing on all issues, including conditions for minimum stream flow.

V. Motion to Remand

Because the Board has determined that this case shall be heard *de novo* in its entirety, there is no need to address the substance of this motion. The motion is denied.

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VI. Filing Schedule and Sequencing

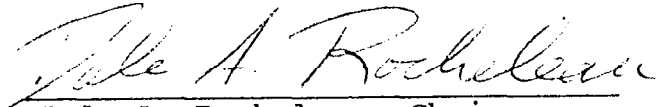
The parties shall file all pre-filed and rebuttal testimony according to the following schedule:

SRI - April 24
Appellants - May 15
ANR - May 29
SRI and
appellants - June 5

Appellants shall have the opportunity to provide rebuttal testimony to SRI's June 5th filing during the hearing.

Dated at MONTPELIER, Vermont, this 10TH day of April,
1992.

Vermont Water Resources Board
by its Chair


Dale A. Rocheleau, Chair

Concurring: Thomas Adler
William B. Davies
Elaine Little
Mark DesMeules