

State of Vermont

Water Resources Board

Re: Appeal of Middlebury College
Authority: 10 V.S.A. §1269

Docket No. 91-05

BACKGROUND

On June 6, 1991, Middlebury College filed an appeal of a written determination by the Department of Environmental Conservation (DEC) that the Snow Bowl cafeteria sewage disposal system must obtain an indirect discharge permit pursuant to §14-403 of the Indirect Discharge Rules and 10 V.S.A. §1263(f).

Section 14-403 of the Rules states that all existing systems with a design capacity of 6500 gallons per day (gpd) or more which involve indirect discharge of sewage shall obtain an indirect discharge permit by July 1, 1991. The Rules also specify the method by which the capacity of a system is calculated. Section 14-203(C)(3) indicates that the design flow capacity of an existing system is determined based on the flow quantities established in Appendix 7-A of the Environmental Protection Rules (1982), which are incorporated by reference in the Indirect Discharge Rules. See, also, Environmental Protection Rules, §7-05.

Under Appendix 7-A, cafeterias such as the Snow Bowl facility are determined to have a daily flow quantity of 50 gpd per seat. The Snow Bowl is licensed for 250 seats. The Snow Bowl's sewage system's design flow capacity is 12,500 gpd under Appendix 7-A guidelines, requiring an indirect discharge permit.

Middlebury has not disputed DEC's interpretation of the Indirect Discharge Rules or Appendix 7-A of the Environmental Protection Rules. Nor have they disputed the seating capacity or the total design capacity of the sewage system, which is based on the methodology established in the two sets of rules. Middlebury has acknowledged that it has no evidence to determine what the system was designed to accommodate.

Middlebury does argue that the methodology for calculating design capacity established by the Rules is unreasonable and should be waived. Middlebury bases its argument on actual water readings taken by the College for a two and one half month period in early 1991. The system flow was substantially less than 6500 gpd.

The substance of Middlebury's argument is also based, however, upon the wording of 10 V.S.A. §1263(f). Middlebury

asks the Board to acknowledge that the College does not discharge more than 6500 gpd and therefore is not required by law to have an indirect discharge permit.

DEC has filed a Motion to Dismiss for lack of authority of the Board to invalidate DEC's Indirect Discharge Rules.

DISCUSSION

In 1986, 10 V.S.A. §1263 (discharge permits) was amended to add subsection (f) which reads:

"Existing indirect discharges to the waters of the state from on-site disposal of sewage shall comply with and be subject to the provisions of this chapter, and shall obtain the required permit, no later than July 1, 1991. Notwithstanding the requirements of section 1259(d) and (e) of this title, the secretary shall grant a permit for an existing indirect discharge to the waters of the state for on-site disposal of sewage unless he or she finds that the discharge violates the water quality standards. Existing indirect discharges from on-site sewage disposal systems of less than 6500 gpd shall not require a permit. (emphasis added)

The Department of Environmental Conservation interprets §1263(f) to mean that existing discharges from on-site sewage disposal systems with a design capacity of 6500 gpd or more shall require a permit. Indirect Discharge Rules 14-403 (A)(1). In fact, on-site sewage disposal systems with less than 6500 gpd capacity which are covered by the Environmental Protection Rules are exempt from the Indirect Discharge Rules. Indirect Discharge Rules 14-201.

Title 10 V.S.A. §1259(d) is not relevant to this discussion. Subpart (e) of §1259, also added by amendment in 1986, provides:

"Except for on-site disposal of sewage from systems of less than 6500 gpd capacity that are either exempt from or comply with the environmental protection rules, no person shall cause any new or increased indirect discharge of wastes into Class B or C waters without a permit under section 1263..." (emphasis added)

Section 1259(e) deals with new or increased indirect discharges while §1263(f) deals with existing indirect discharges. Yet, the two sections are not really exclusive of each other. The word "capacity" is present in §1259(e),

but conspicuously absent from §1263(f). Middlebury argues that the absence of the word "capacity" indicates that an actual showing of disposal of less than 6500 gpd, regardless of the capacity, warrants a waiver of the permit requirement. DEC argues that Middlebury's request is tantamount to asking the Board to declare DEC's regulations invalid or inapplicable to the Snow Bowl facility's existing sewage system.

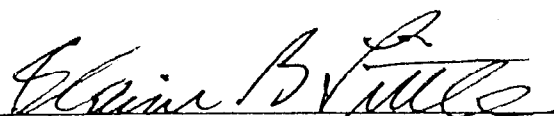
Although the Board recognizes that a potential result of the its decision in this action is the invalidation of a DEC rule, the issue in the first instance is one of statutory interpretation. The Board is being asked to interpret the meaning of the last sentence of 10 V.S.A. §1263(f). If the Board determines that Middlebury is correct in its argument, §14-403(A) of the Indirect Discharge Rules is incorrect.

The Board disagrees with DEC's argument that this case properly belongs before the Washington Superior Court pursuant to 3 V.S.A. §807. The Board is not determining the validity of either its own rule or a DEC rule. See, In re State Aid Highway No. 1, Peru, Vt., 133 Vt. 4 (1974). Rather, it is interpreting a statutory provision. It is a "venerable principle that construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." Committee to Save the Bishop's House, Inc. v. Medical Center Hospital of Vermont, Inc., 137 Vt. 142, quoting Red Line Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367, 381 (1969). Even if the Board were to accept DEC's argument that the Board is construing a DEC rule, it would still have jurisdiction, since the applicability of the rule, not the validity, would be at issue. See, 3 V.S.A. §808.

The Board now holds that it has jurisdiction under 10 V.S.A. §1269 to determine the statutory interpretation of the last sentence of 10 V.S.A. §1263(f). The Motion to Dismiss is denied.

Dated at MONTPELIER, Vermont, this 20th day of JANUARY, 1992.

Vermont Water Resources Board
by its Vice-Chair


Elaine B. Little, Vice-Chair

Concurring: Mark DesMeules
Stephen Reynes