

**State of Vermont**  
**Water Resources Board**

**Re: Middlebury College Snow Bowl  
Docket No. 91-05**

**Authority:  
10 V.S.A. §1269**

**ORDER**

**Findings of Facts**

The following Findings of Facts were stipulated to by the ANR and Middlebury College and filed with the Board on January 29, 1992:

1. On February 21, 1991, the Permits, Compliance and Protection section of the Department of Environmental Conservation forwarded a letter to Middlebury College notifying the school that it must obtain an indirect discharge permit by July 1, 1991, to comply with amendments to Chapter 47 of Title 10 of the Vermont Statutes (Water Pollution Control). On April 30, 1991, Middlebury College applied for an Indirect Discharge Permit. On October 3, 1991, the Agency of Natural Resources issued an Indirect Discharge Permit to Middlebury College. The issuance of this permit does not affect the appellant's right of appeal.

2. Section 14-403 of the Indirect Discharge Rules requires all existing sewage systems with a design capacity of 6500 gallons per day (gpd) or more to obtain an indirect discharge permit by July 1, 1991; Section 14-403 is based upon 10 V.S.A. §1263(f) which states, "Existing indirect discharges from on-site sewage disposal systems of less than 6500 gpd shall not require a permit."

3. The capacity of a system is based upon design flows which are set forth in the Environmental Protection Rules, Appendix 7-A, and which are incorporated by reference in the Indirect Discharge Rules §14-403.

4. Under the Environmental Protection Rules, cafeterias such as the Snow Bowl facility are determined to have a daily flow quantity of 50 gpd per seat.

5. The Snow Bowl is licensed by the Health Department for 250 seats; According to the Environmental Protection Rules, the sewage system has a design capacity of 12,500 gpd.

6. There is no dispute between the parties on the interpretation of the Indirect Discharge Rules or Appendix 7-

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A of the Environmental Protection Rules.

7. Middlebury has no records to indicate what the sewage system was engineered or designed to accommodate.

8. Middlebury's record-keeping of the actual sewage system demands of the Snow Bowl for January 13, 1991 through March 25, 1991 indicate that the facility uses less than 6500 gpd; the highest sewage demand, as measured by Middlebury's meters, was 3942 gpd.

9. The sole matters for the Board to determine are those legal questions set forth in the Prehearing Order dated September 3, 1991.

10. The parties waive any rights to an evidentiary hearing and further waive all rights to argue orally before the Board on the substantive issues presented.

The Board makes these additional Findings of Facts:

11. On June 10, 1991, the Water Resources Board ("Board") received a properly filed appeal from Middlebury College, pursuant to 10 V.S.A. §1269, appealing a decision of the Agency of Natural Resources ("ANR"), Department of Environmental Conservation ("DEC"), Permits, Compliance and Protection Section, requiring Middlebury College to obtain an indirect discharge permit by July 1, 1991 for its Snow Bowl facility.

12. A Motion to Dismiss was filed by the ANR on July 19, 1991. The ANR argued that the validity of an Indirect Discharge Rule was at issue, that the Board could not rule on the validity of an Indirect Discharge Rule and that only the Washington Superior Court could issue a declaratory judgment on the validity of a rule. Middlebury College filed a reply memorandum to the Motion to Dismiss on July 26, 1991.

13. A Prehearing Order was issued by the Board on September 3, 1991.

14. The Board issued a Preliminary Order on January 20, 1992, holding 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 Board denied the Motion to Dismiss filed by the ANR.

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15. Although the methodology established by the Indirect Discharge Rules for calculating the design capacity of an existing sewage disposal system was correctly applied by the DEC to Middlebury's Snow Bowl sewage disposal system, the relevant standard for determining an exemption from permitting requirements is the actual usage of the system, not the capacity.

16. The application of flow quantities established for "cafeterias," as set forth in Appendix 7-A of the Environmental Protection Rules, to a determination of design capacity of the Middlebury College Snow Bowl sewage disposal system is unreasonable in light of the meaning and the intent of 10 V.S.A. §1263(f).

17. Indirect Discharge Rule 14-403 does not allow for waiver of the methodology used by the DEC in calculating design capacity for the Middlebury College Snow Bowl and does not allow substitution of actual water meter readings collected as an alternative methodology for determining whether an indirect discharge permit is required; the Indirect Discharge Rules do not accurately reflect the intention and meaning of §1263(f).

#### Conclusions of Law

1. The Board has jurisdiction pursuant to 10 V.S.A. §1269 to hear this appeal.

2. The appellant properly filed this appeal in accordance with the appropriate statutory and regulatory requirements.

3. The DEC and Middlebury College are proper parties in interest pursuant to Rule 22 of the Board's Rules of Procedure.

4. The parties waived their right to a full de novo hearing.

5. Those on-site indirect discharge systems existing as of May 17, 1986, which have an actual discharge of less than 6500 gpd, are exempt from the permitting requirements of 10 V.S.A. §1263(f).

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6. Section 14-403(A)(1) of the Indirect Discharge Rules, requiring pre-May 17, 1986 on-site sewage systems with a design capacity of 6500 gpd or more to obtain an indirect discharge permit, is invalid to the extent that it requires such a system which has an actual usage of less than 6500 gpd to obtain an indirect discharge permit.

### 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 DEC has interpreted §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).

Title 10 V.S.A. §1259(e), 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

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1263..." (emphasis added)

The word "capacity," present in §1259(e), is conspicuously absent from §1263(f). Yet, Indirect Discharge Rule §14-403(A)(1), which is intended to embody in regulation the requirements of 10 V.S.A. §1263(f), includes the word "capacity."

The Board is mindful of the fact that rules constitute "prima facie evidence of the proper interpretation of the matter they refer to," 3 V.S.A. §845(a), and that rules are "valid and binding" and have the "force of law unless amended or revised or unless a court of competent jurisdiction determines otherwise." Id.

There are several different classes of administrative rules. Some are legislative in nature and deserve statutory force upon going into effect. As long as they are confined within the limits of the statutory delegation, their force will be recognized by the courts. Davis, Administrative Law Treatise, §5.04, p. 308 (1970). Others are interpretative rules, which only interpret a statute to assist or guide an administrative agency in the performance of its duties. Id. "Interpretative rules consist of administrative construction of a statutory provision." Pickus v. United States Board of Parole, 507 F.2d 1107, at 1113 (D.C. Cir. 1974). Indirect Discharge Rule §14-403(A)(1) is an interpretive rule.

That Indirect Discharge Rule §14-403(A)(1) is invalidated to the extent that it requires a discharge permit to be obtained for all systems which have a design capacity of 6500 gpd or more, but which actually use less than 6500 gpd, is incidental to the Board's interpretation of 10 V.S.A. §1263(f). This interpretation is a function of the Board's appellate responsibilities under 10 V.S.A. §1269. Were the Board to be bound by the DEC's interpretation of a statutory requirement merely by virtue of the fact that the DEC adopted the interpretation through formal rule making, the Board's appellate responsibilities would be severely compromised. The Board does not believe that formal rule making was intended to have such a result.

Although the Board recognizes the administrative advantage of utilizing a system's design capacity as the basis

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for establishing a permit exemption cutoff,\* such a reading of 10 V.S.A. §1263 is inconsistent with the subsection's language and the intent of the legislature.

The fundamental rule in the construction of statutes is to ascertain and give effect to the intention of the legislature. In re A.C., 144 Vt. 37 (1984); Verrill v. Daley, 126 Vt. 444 (1967). The intention and true meaning of the legislature are to be ascertained from a consideration of the whole and every part of the act, the subject matter and its effect and consequences. Rutland Cable T.V. v. City of Rutland, 122 Vt. 1 (1960), and cases cited therein. If the meaning of the statute is plain on its face, however, it must be enforced according to its terms and there is no need for construction. Paquette v. Paquette, 146 Vt. 83 (1985).

The plain language of 10 V.S.A. §1263(f) indicates that indirect discharges of less than 6500 gpd shall not require a permit. This interpretation is consistent with a legislative intent to grandfather those systems which have a capacity of 6500 gpd or greater, but which actually use less than 6500 gpd. Had the legislature intended to hold existing systems to the same standard it was creating for new systems, it would have included the word "capacity" in 10 V.S.A. §1263(f), as it did in 10 V.S.A. §1259(e).

Even more compelling is the fact that the legislature established a discharge impact threshold of 6500 gpd. The key to this threshold is not the capacity of the system, but rather the daily usage and its impact on the water quality of

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\*A determination of the need for a discharge permit for a particular system is currently based solely upon a mathematical determination of flow quantities for a particular type of establishment. The seating capacity is multiplied times the flow quantity (in gallons per day) from Appendix 7-A of the Environmental Protection Rules. A determination based upon actual system usage would require the development of a system of monitoring. This may require nothing more than the analysis of water usage records submitted by the establishment, but, in any event, would require some greater degree of administrative oversight.

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the state. The development of a standard based upon design capacity for new systems provides a "margin of safety" between what the legislature has determined is the threshold for determining impact on water quality and that level considered to be safe in light of the combined effects of numerous sources of indirect discharges.

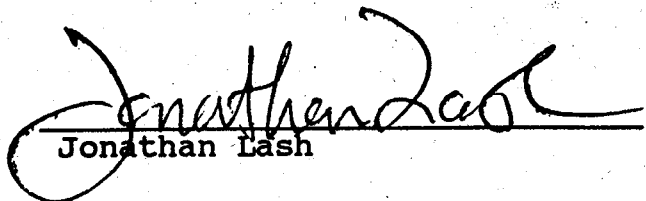
Were the DEC to promulgate rules providing that, in the absence of actual flow data, design capacity is an appropriate starting point for determining whether an existing system does or does not require an indirect discharge permit, the Board would consider such a rule to be consistent with the language and legislative intent of 10 V.S.A. §1263(f). This would more appropriately establish Appendix 7-A of the Environmental Protection Rules as a "default value" chart to provide a margin of safety for those existing systems which have been unable to provide adequate data on their actual usage.

**Order**

The Board now holds that the Middlebury College Snow Bowl dining room facility is not required to obtain an indirect discharge permit pursuant to 10 V.S.A. §1263(f), provided that it continues to use less than 6500 gpd.

Dated at MONTPELIER, Vermont, the 10th day of  
MARCH, 1992.

Vermont Water Resources Board  
by its Acting Chair

  
Jonathan Lash

Concurring: Elaine Little  
Stephen Reynes