

State of Vermont
Water Resources Board

Re: **Vermont Marble Company (OMYA)**
401 Certification
Docket No. **WQ-92-12**

MEMORANDUM OF DECISION on
APPELLANT'S PETITION FOR DECLARATORY RULING

This decision pertains to a declaratory ruling request filed by the appellant, Vermont Marble **Power** Division of OMYA, Inc. (OMYA), in the above-captioned appeal. For the reasons stated below, the Water Resources Board (Board) has determined that under Vermont law, a § 401 Water Quality Certificate may be issued only by the Secretary of the Agency of Natural Resources (ANR). Therefore, the certificate issued to OMYA by the Commissioner of the Department of Environmental Conservation is null and void. The Board remands this matter back to ANR for a determination by the Secretary, pursuant to 10 V.S.A. § 1004, and dismisses this appeal.

I. BACKGROUND

On December 27, 1991, the ANR received a written request from OMYA for a Water Quality Certificate pursuant to § 401 of the Clean Water Act. OMYA sought the certification in connection with its application to the Federal Energy Regulatory Commission (FERC) for relicensure of the company's **Center Rutland** Hydroelectric Project in the **Town of Rutland**, Vermont.

Following review of the request and the information submitted in conjunction therewith, Elizabeth A. **McLain**, Commissioner of the Department of Environmental Conservation (DEC), issued a § 401 Water Quality Certificate on November 20, 1992.

On December 10, 1992, OMYA filed an appeal with the Board, challenging the findings and conditions contained in the § 401 Water Quality Certificate issued by the DEC. This appeal was filed pursuant to 10 V.S.A. § 1024(a).

On February 3, 1993, OMYA filed with the Board a Petition for Declaratory Ruling, pursuant to, 3 V.S.A. § 808 and Rule 16(B) of the Board's Rules of Procedure. OMYA asked the Board for a ruling as to the applicability of 10 V.S.A. §§ 1004 and 1024, Section 1-03.B.2. of the Vermont Water Quality Standards (VWQS), and § 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1), to its Water Quality Certificate issued by the DEC. OMYA asserted that the certification was not issued pursuant to properly delegated authority and therefore should be declared null and void.

On February 26, 1993, the ANR filed a Motion to Dismiss. The ANR sought dismissal on the basis that the Board lacks subject matter jurisdiction to consider the appellant's petition. Alternatively, ANR sought dismissal on the basis that the DEC issued a § 401 Water Quality Certificate to OMYA under properly delegated authority.

On March 10, 1993, OMYA filed a Response to the ANR's Motion to Dismiss.

There being no dispute concerning the facts giving rise to OMYA's petition, the Board heard oral argument on the parties' requests on August 4, 1993. This matter is now ready for decision.

II. ISSUE

Is a § 401 Water Quality Certificate issued by the Commissioner of the Department of Environmental Conservation (DEC) void and a nullity when Vermont law requires that determinations on such certifications must be made by the Secretary of the ANR?

III. DISCUSSION

A. Jurisdiction to Consider the Appellant's Petition

As a threshold matter, the Board must determine whether it has jurisdiction to consider OMYA's petition for a declaratory ruling.

It is well settled that an agency may issue declaratory rulings as to the applicability of any statutory provision or of any rule of the agency as they may relate to a particular set of facts. 3 V.S.A. § 808; Town of Cavendish v. Vt. Pub. Power Sup. Auth., 141 Vt. 144, 147 (1982). Rule 16(B) of the Board's Rules of Procedure specifically provides:

Any person demonstrating a stake in the outcome may seek a declaratory ruling from the Board as to the applicability of any statutory provision within the jurisdiction of the Board or of any rule or order of the Board.

The ANR seeks dismissal of OMYA's petition, alleging that the petition calls upon the Board to act outside its declaratory ruling authority. The ANR asserts that OMYA's request calls for a declaration concerning the validity of an ANR decision based on construction of statutes and rules that are beyond the Board's authority to construe. Furthermore, at oral argument, the ANR argued that since the Board's appellate review is de novo, it is irrelevant

what procedural deficiencies may have occurred below since the Board is charged with making its decision on OMYA's certification anew.

The Board notes, at the outset, that this is not an instance where OMYA has sought declaratory relief to attack the validity of the DEC's Water Quality Certificate in lieu of other adequate and available remedies for review. In re State Aid Highway No. 1, Peru, VT., 133 Vt. 4, 7-8 (1974). The ANR does not dispute that OMYA filed a timely notice of appeal attacking the merits of the DEC's certification. The ANR also does not dispute that OMYA is a person aggrieved by the DEC's decision. 10 V.S.A. § 1024(a). The question, then, is whether OMYA, having invoked the Board's jurisdiction by appeal, is entitled to obtain a ruling from the Board, based on construction and application of the relevant law, as to whether the decision from which it has appealed is invalid.

The Board believes that OMYA is entitled to such a ruling. Indeed, the Board would be remiss in not answering the question, even where no party had specifically raised it, because the Board's subject matter jurisdiction to consider an appeal on the merits is dependent on there having been a valid, final decision below. 10 V.S.A. §§ 1004, 1024(a). Thus, even though the Board's review of § 401 Water Quality Certificates is de novo, it is an overstatement to say that the action taken below is irrelevant to the present de novo proceeding. In re Maple Tree Place, 156 Vt. 494, 499-500 (1991). Procedural defects amounting to jurisdictional defects below directly affect an appellate body's power to consider a matter de novo. In re Torres, 154 Vt. 233, 235 (1990).

Therefore, without addressing each of the specific arguments raised by the ANR in objection to OMYA's petition for declaratory relief, the Board concludes that as a matter of law it has authority to consider whether the § 401 Water Quality Certificate issued by the Commissioner of DEC is null and void, applying the statutes which grant the ANR and Board the power to make such certifications.

B. Authority to Make § 401 Water Quality Determinations

Section 401 of The Clean Water Act requires any applicant for a federal license or permit to conduct any activity which may result in any discharge into the navigable waters of the United States to obtain a certification from the State in which the discharge originates or will originate that any such discharge will comply with applicable provisions of the Act, including state water quality standards. 33 U.S.C. § 1341(a)(1). In Vermont, the authority to make determinations on such State certifications has been delegated by the Legislature. 10 V.S.A. § 1004. The present statute reads, in relevant part:

The secretary (of the Agency of Natural Resources) shall be the agent to coordinate the state interest before the Federal Energy Regulatory Commission in all matters involving water quality and regulation or control of natural stream flow through the use of dams situated on streams within the boundaries of the state, and it shall advise the Federal Energy Regulatory Commission of the amount of flow considered necessary in each stream under consideration. The agency of natural resources shall be the certifying agency of the state for purposes of section 401 of the federal Clean Water Act and the secretary's determinations on these certifications shall be final action by the secretary appealable to the water resources board.

Prior to 1987, the Department of Water Resources and Environmental Engineering was the certifying agent of the State for the purposes of § 401 of the Clean Water Act. 10 V.S.A. § 1004 (1984). In 1987, the statute was amended to substitute the Secretary of the Agency of Natural Resources as the certifying agent and the Agency of Natural Resources was named the certifying agency for the State. 10 V.S.A. § 1004 (Supp. 1992); 1987, Act No. 67 § 12; Act No. 76 § 18. In 1991, the Legislature further underscored the specific role of the Secretary by further amending § 1004 to provide that the Secretary's determination on a § 401 certification is final action by the Secretary appealable to the Water Resources Board. 10 V.S.A. § 1004 (Supp. 1992); 1991, Act No. 81, § 1.

OMYA argues that the plain language of 10 V.S.A. § 1004, coupled with the legislative history of its amendment, require the Secretary of the Agency of Natural Resources to make § 401 certification determinations and not the DEC through its Commissioner. The Board agrees with this interpretation of the statutes.

Not only does 10 V.S.A. § 1004 expressly state **that the Secretary** is the certifying agent and that his or her determinations on § 401 certifications are final actions appealable to the Board, the term "Secretary" is defined in the same chapter (10 V.S.A. ch. 41) **as meaning "the Secretary of the Agency of Natural Resources."** 10 V.S.A. § 1002(11). This definition was added in 1987, at the same time and in the same legislation which amended 10 V.S.A. § 1004. 1987, Act No. 67 §10; Act No. 76, § 18. Had the Legislature wanted to enable the Secretary to make a subdelegation, it knew how to so do. See, for examples, 10 V.S.A. § 1251(11) ("Secretary! means **the** secretary of the agency of natural resources or his authorized representative."); 3 V.S.A. § 2825(d) ("The secretary may delegate authorities and **duties assigned** to him or her by statute, for the purpose of administering chapters 55 and 159 of Title 10 and

chapter 120 of Title 24."). Instead, the Legislature elected to retain in the Secretary alone the authority to issue § 401 Water Quality Certificates.

The ANR responds that under a pari materia construction of 10 V.S.A. ch. 41, the Agency of Natural Resources is the certifying agency, the DEC is that part of the agency charged with the **administration** of water conservation policy of the state, and the Secretary may lawfully delegate his authority to the Commissioner of DEC to make § 401 certifications. The ANR cites 3 V.S.A. § 214 as additional authority for such subdelegation. 1

Title 3 V.S.A. § 214 states in relevant part: "A secretary, commissioner or director may delegate any authority, power or duty other than a specific statutory authority of the office to a designee." (Emphasis added.) Contrary to the ANR's interpretation, the Board reads that statute as explicitly supporting the proposition that duties which are a specific statutory authority of the office may not be delegated. By the plain language of the statutes (10 V.S.A. § 1004 and § 1002(11)), the Legislature has made the authority for § 401 certification determinations a duty of the secretary only.

While the Agency of Natural Resources is the certifying agency for § 401 certifications, the Secretary of ANR is the highest ranking official of that agency. There are sound policy reasons why the Legislature saw fit to expressly reserve to the

1 In its Motion to Dismiss, the ANR likewise cited Rule 13.11(a) of the Vermont Water Pollution Control Permit Regulations in support of subdelegation of authority. The Board finds it unnecessary to construe and apply these rules, because rules alone do not create lawful delegations. Nonetheless, the Board observes that the Vermont Water Pollution Control Permit Regulations were promulgated in 1974 under the authority and for the purpose of implementing 10 V.S.A. ch. 47. Section 401 Water Quality Certifications are authorized by 10 V.S.A. ch. 41. The Vermont Water Pollution Control Permit Regulations are irrelevant to the question of whether § 401 certification determinations can be subdelegated.

The ANR also attached to its Motion to Dismiss a letter from Secretary Clarke, dated October 13, 1992, purporting to delegate to Commissioner McLain "the authority to implement the protection and control programs" authorized under a number of statutes, including those under 10 V.S.A. ch. 41. Even if this letter effected a lawful subdelegation of authority with respect to some Programs where subdelegation is expressly authorized by the Legislature, it could not create authority for the subdelegation of a specific statutory authority. 3 V.S.A. § 214.

Secretary the sole authority to make § 401 certification determinations. OMYA has identified the sensitive nature of "federal/state relations." Petition for Declaratory Ruling at 7. In addition, there is also the sensitive relationship between the ANR and the Public Service Board. 10 V.S.A. § 1004 ("[T]he secretary's authority shall not infringe upon the powers and duties of the public service board or the relations of that board to the Federal Energy Regulatory Commission as set forth in the Federal Power Act respecting water used for the development of hydro-electric power or projects incident to the generation of electric energy for public use as part of a public utility system.").

The DEC has authority to investigate and advise the Secretary concerning the effect of proposed activities on the state's water-courses under 10 V.S.A. § 1004. However, the actual certification determination is an act requiring significant discretion and judgment that cannot be subdelegated. As this Board learned long ago, absent a statute or act expressly permitting it, a board cannot delegate powers and functions which are "discretionary or quasi-judicial in character, or which require the exercise of judgment." In re Buttolph, 141 Vt. 601 (1982). While the Legislature has not required that the Secretary provide an opportunity for a hearing as a predicate to the issuance of a § 401 certification determination thereby elevating the certification process to a contested case proceeding subject to the Vermont Administrative Procedure Act, 3 V.S.A. ch. 25, the Secretary's determination nonetheless is a specific duty of his office under 10 V.S.A. § 1004, requiring the exercise of considerable discretion and judgment. Had the Legislature intended otherwise, it would have so provided.

The Board therefore concludes that the applicable statutes require the Secretary of ANR to make all final § 401 certification determinations. The Water Quality Certificate issued by the Commissioner of the Department of Environmental Conservation is null and void. There was no final action from which an appeal could properly be taken to the Board. Consequently, the Board lacks subject matter jurisdiction to consider OMYA'S appeal on the merits.

C. Appropriate Relief: Remand and Dismissal

The Board dismisses this appeal and remands the matter to the ANR. Although the Board's Rules do not expressly provide for remand of matters to the ANR, the Board, by virtue of its appellate authority, has exercised its implied power to remand where justice so requires. See, for example, In re: Appeal of Ananey, Docket No. 89-14 (Feb. 12, 1991).

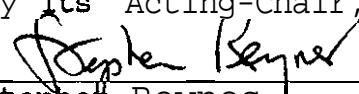
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The Board has recognized the principle that jurisdictional defects, such as a failure to provide adequate notice in the proceeding below, may require a remand. In re: Appeal of Larivee, Docket No. CUD-92-09, Memorandum of Decision on Preliminary Issues at 5 (July 13, 1993), citing In re Conway, 152 Vt. 526 (1990); In re Torres, 154 Vt. 233 (1990). Indeed, when the Supreme Court declared invalid the Board's own order authorizing a dam permit, it remanded the matter to the Board for a new hearing in accordance with the views expressed in its opinion. In re Buttolph, 141 Vt. 601 (1982). Having determined that the Board lacks subject matter jurisdiction to hear this appeal on the merits, the Board believes that justice and common sense dictate remand of this matter to the ANR for further action by the Secretary consistent with this decision. In re Maple Tree Place, 156 Vt. 494, 499 (1991); In re Torres at 236-237.

IV. ORDER

1. The ANR's Motion to Dismiss OMYA's Petition for Declaratory Ruling is denied.
2. The § 401 Water Quality Certification issued by the Commissioner of DEC to OMYA is null and void. There is no final appealable action from the Secretary of ANR.
3. The appeal on the merits in Re: Vermont Marble Company (OMYA), Docket No. WQ-92-12, is dismissed for lack of jurisdiction and this matter is remanded to the ANR for further action consistent with the views expressed herein.

Dated at Montpelier, Vermont, this 1st day of October, 1993.

Water Resources Board
by its Acting-Chair,

Stephen Reynes

Concurring: Stephen Reynes
Ruth Einstein
Jane Potvin
W. Byrd LaPrade
William Boyd Davies