

**State of Vermont
Water Resources Board**

**In re: Appeal of Cole
(Discharge Permit No. 1-1107,
Stratton Corporation, Stratton, Vermont)
Docket No. WQ-92-13**

**MEMORANDUM OF DECISION
STRATTON CORPORATION'S MOTION TO DISMISS**

This decision pertains to a preliminary matter in the above-captioned appeal. As explained below, the Water Resources Board (Board) has decided to deny the Motion to Dismiss Appeal filed by Stratton Corporation (the permittee).

I. BACKGROUND

On January 4, 1993, the Water Resources Board (Board) received a notice of appeal filed by Malvine Cole seeking reversal of the decision of the Agency of Natural Resources (ANR) granting Discharge Permit No. 1-1107 to Stratton Corporation. The permit allows stormwater discharge into Styles Brook from roads, parking and buildings associated with development of the Sun Bowl Community located in Stratton, Vermont. Styles Brook is a Class B tributary of the North Branch of Ball Mountain Brook. The appellant owns property adjacent to Styles Brook, and downstream from the stormwater discharge authorized by the ANR. She filed her appeal pursuant to 10 V.S.A. § 1269, seeking reversal of the agency's determination on the basis that the discharge into Styles Brook would not comply with 10 V.S.A. §§ 1263, 1264 and applicable state water quality standards.

On January 13, 1993, the appellant was informed by Board staff that her notice was substantially incomplete. On January 28, 1993, she timely submitted a supplemental filing to the Board. On February 19, 1993, the staff determined that her appeal was complete and should be docketed.

A prehearing conference was held on April 8, 1993, in Manchester, Vermont, at which the appellant, permittee, and others entered appearances. A draft Prehearing Conference Report and Order was issued on April 14, 1993, with participants having until April 22, 1993, to respond with written comments and suggested changes. Only the appellant filed timely written comments. On April 23, 1993, the Board received a Motion to Dismiss Appeal filed by Alan B. George, Esq., counsel for the permittee. On April 30, 1993, the appellant filed with the Board a responsive memorandum.

Throughout this proceeding, the appellant has appeared without counsel.

Memorandum of Decision - Motion to Dismiss
In re: Appeal of Cole
Docket No. WQ-92-13
page 2 of 4

II. ISSUE

The issue before the Board is whether the appeal filed by Malvine Cole should be dismissed for the reason identified in the permittee's motion.

III. DISCUSSION

The permittee argues that the notice of appeal filed by Ms. Cole, and subsequently supplemented, does not satisfy the requirements of the Board's Rules of Procedure, Rule 18(A)(4), in that the appellant has failed to state with specificity the issues and reasons why the act or decision appealed from was in error. The permittee notes that the determination by the ANR to issue or withhold issuance of a stormwater discharge permit is not made in the context of a contested case. Instead, it is made by the agency in its supervisory capacity based on an evaluation of scientific and technical facts. Therefore, the agency's determination is presumed to be correct and valid absent a specific allegation or claim that any facet of the design, engineering, plans or management practices incorporated in the permit is inappropriate, erroneous or deficient. Because Ms. Cole has identified only a generalized claim of error, the permittee contends that her appeal should be dismissed for failure to comport with the requirement of Rule 18(A)(4).

The Board disagrees that Rule 18(A)(4) requires such specificity in pleadings. Ms. Cole filed her appeal pursuant to 10 V.S.A. § 1269, which states, in relevant part: "Any person or party in interest aggrieved by an act or decision of the secretary pursuant to this subchapter may appeal to the board." Section 1269 does not specify what information must be contained in a notice of appeal in order to initiate an appeal to the Board. Instead, the Board's Rules of Procedure, specifically Rule 18(A), sets forth six elements that should be included in a notice in order to identify the jurisdictional basis and subject matter of the appeal. One of these elements, Rule 18(A)(4), calls for the inclusion of "[a] statement of issues and a statement of reasons why the petitioner or appellant believes any act of decision appealed from was in error." The purpose of this provision is to prompt an appellant to state the issues in dispute with reasonable specificity in order to alert affected persons concerning the scope of the appeal. However, this section does not require hypertechnical pleading.

Ms. Cole's filings of January 4 and January 13, 1993, allege that the Secretary's decision is in error on the basis that the agency failed to consider relevant evidence she has to offer con-

Memorandum of Decision - Motion to Dismiss
In re: Appeal of Cole
Docket No. WQ-92-13
page 3 of 4

cerning the impacts of the proposed stormwater discharge on Styles Brook. In particular, she challenges the agency's factual determinations concerning the impacts of the proposed discharge on water quality, existing uses, aquatic biota, and fish and wildlife, and the adequacy of the controls to maximize infiltration and minimize erosion. The Board believes that Ms. Cole has provided the permittee and others with sufficient information to place them on notice concerning the scope of her appeal.

It has always been the Board's policy to construe notices of appeal liberally, especially in de novo appeals filed by pro se appellants. While specificity in pleadings is desirable and indeed encouraged by the Board, it is unwilling to dismiss an appeal merely because the appellant has failed to assert specific technical and engineering facts in error. Indeed, Rule 18 (E) of the Board's Rules of Procedure provides that the Board may treat any writing "substantially complying" with the requirements of Rule 18 as a notice of appeal. The permittee's argument that great deference is due the agency's technical and engineering determinations is an appropriate standard to be applied by an administrative body or court with appellate powers after consideration of the record on appeal. However, it is not the standard that the Board applies in making an initial determination whether a person aggrieved by a Secretary's determination is entitled to a de novo hearing.

The question of whether Ms. Cole's notice of appeal is specific enough to satisfy the requirements of Rule 18 is a close one, but on balance the Board believes that the notice as a whole meets the purpose of focusing the appeal to a particular set of issues related to the impacts of the proposed discharge on Styles Brook. This is consistent with the determination of the Board's staff that Ms. Cole's supplemental filing adequately corrected the defects identified in her January 4 notice of appeal so as to warrant docketing and the scheduling of a prehearing conference. See Rules 18(B) and 24, Board Rules of Procedure. The permittee had every opportunity to seek further clarification and refinement of the issues in controversy both at the prehearing conference and by filing timely written objections or comments in response to the draft Prehearing Conference Report and Order Report. The permittee did not do so. Given the forgoing reasons, the Board is unwilling to dismiss Ms. Cole's appeal based on the defect now asserted by the permittee.

Memorandum of Decision - Motion to Dismiss
In re: Appeal of Cole
Docket No. WQ-92-19
page 4 of 4

IV. ORDER

The permittee's Motion to Dismiss appeal is denied.

Dated at Burlington, Vermont, this 28th day of May, 1993.

Water Resources Board,
by its Chair

Dale A. Rocheleau
Dale A. Rocheleau

Concurring: Ruth Einstein
Jane Potvin
Stephen Raynes

A:\STRATPRL.ORD