

State of Vermont
Water Resources Board

In re: Aquatic Nuisance Control Permit #C93-01-Morey
Lake Morey; Town of **Fairlee**, Vermont
Docket No. WQ-93-04

MEMORANDUM OF DECISION ON PRELIMINARY ISSUES

This decision pertains to several preliminary issues raised by appellants David Adams, Xern McCarty and Amy McCarty in the above-captioned **appeal**. The appellants have asked the Water Resources Board (**Board**) to clarify the standard of **review to be applied in** this proceeding, the scope of the hearing, and who carries the burden of proof.

I. BACKGROUND

The **appellants have** sought Board review of a decision of the Agency of Natural Resources (ANR) granting an aquatic nuisance control, permit **to the** Town of **Fairlee** (permittee) for the application of Garlon 3A to the waters of Lake Morey, located in **Fairlee, Vermont**, for the purpose of controlling **Eurasian water-milfoil**.

A prehearing conference was convened in this **matter on** June 18, 1993, in Berlin, Vermont. A Prehearing Conference Report and Order was issued on **July 1, 1993**, establishing certain deadlines for filings on preliminary matters **and requests for party status**. On **July 6, 1993**, the appellants filed a written request seeking to supplement their notice of appeal. The permittee and the **ANR** each filed timely written comments or objections on July 12, 1993. The appellants timely filed a legal memorandum on preliminary issues on July 12, 1993.

Oral argument on preliminary issues and requests for intervention was noticed on July 6 and held on July 14, 1993. Those persons **addressing the Board** were the appellants, the permittee and **ANR**.

The Board deliberated on the preliminary issues raised by the appellants on July 14, August 4 and August 19, 1993.

II. ISSUES

1. What is the standard of review in this proceeding?
2. **What is** the scope of the proceeding?
3. Who carries the burden of proof in this proceeding?

III. DIBCUBBION

A. Standard of Review

A person aggrieved by a determination of the Secretary of ANR with respect to application of a pesticide to the waters of the state may appeal that determination to the Water Resources Board, pursuant to 10 V.S.A. § 1269. That statute requires the Board to hold a **de novo hearing** and issue an order affirming, reversing or **modifying the** act or decision of the Secretary.

The Vermont Supreme Court has described the de'novo standard of review as follows:

A **de novo** hearing is one where the case is heard as though no action **whatever** has 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). It is **error** for the Board merely to **affirm** or reverse the decision of the administrative body from which **the** appeal has been taken. Id., 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 has **recognized these** principles in its own proceedings. In re: Appeal of VNRC, Docket No. **DAM-92-02**, Prehearing Conference Order and Preliminary Order at 5-6 (**Apr. 10**, 1992); In re: Appeal of Larivee, Docket No. **CUD-92-09**, Memorandum of Decision on Preliminary **Issues** at 4-5 (July 13, 1993~).

The appellants argue that a de novo standard of review requires the Board to consider whether a permit should be issued and not whether the ANR should have issued the **permit**. **Appellants'** Preliminary Issues Memorandum at 2 (July 12, 1993). Therefore, the appellants question the role of the **ANR** in this proceeding, because, as 'the decisionmaker below, the agency has **"no material interest**' in the outcome" of this proceeding. Memorandum at 2. The appellants also question the applicability of Rule 28(B) of the Board's Rules of **Procedures**, which provides that "[i]n the case of appeals, a tied vote shall be deemed affirmation of the decision appealed **from**." Memorandum at 2.

The Board agrees with the appellants that the relevant inquiry **is whether** the Board should issue a permit applying the criteria found in 10 V.S.A. § 1263a(e). **Therefore**, it is irrelevant in this case how or why the agency reached its decision below. The ANR, as a **party of** right pursuant to Rule 22(A)(4) of the Board's Rules of **Procedure**, **is entitled** to present evidence and argument relevant to the Board's de'novo determination of this appeal. The Board

shall **exercise** its independent judgment in making findings of fact and conclusions of law based on an evaluation of the entire record. Therefore, the Board finds it unnecessary to revisit the **"role"** of the ANR in this proceeding.

The Board notes the appellants' other concern about the application of Rule 28(B) in this de novo hearing. However, the Board declines **to rule** on the application of the tie-vote provision when, **at** this stage of the proceeding, the issue is not ripe for consideration.

B. Scope of the Proceeding

The de novo nature of this proceeding requires the Board **to** make a new decision on whether a permit **should** be granted or **denied**, and if granted, with what conditions. **The appellants** argue that 10 V.S.A. § 1269 requires that the ANR make affirmative findings on each of the five criteria, **"so the Board must do the same."** Memorandum at 3.

The Board disagrees. The appellants **identified** in their notice of appeal only three statutory criteria at issue. These are 10 V.S.A. § 1263a(e)(1), (2), and (3). **At the** prehearing conference, the appellants sought board consideration of criteria 10 V.S.A. § 1263a(e)(5). Neither the permittee nor the ANR objected to the Board's consideration of this criteria. Prehearing Conference Report and Order at 2 (July 1, 1993).

Rule 18(D) of the **Board's** Rules of Procedure states: **"The** scope of any de novo or appellate proceeding shall be limited to those issues specified in the petition or notice of appeal unless the Board determines that substantial-inequity or injustice would result from such limitation."

The Board has recently construed this rule in another appeal filed pursuant to 10 V.S.A. § 1269. In re: Appeal of Cole, Docket No. WQ-92-12, Memorandum of Decision on Requests for Intervention at 8 (July 9, 1993). In that appeal, a **person who** sought intervention, asked the Board to consider issues beyond those identified in the notice of appeal. In clarifying the scope of that proceeding, the Board interpreted Rule 18(D) to limit the issues to those raised in the notice of appeal as clarified in the **Pre-hearing** Conference Report and Order. **Id.** at 8. The Board relied for authority on the Vermont Supreme Court's decision, Village of Woodstock v. Bijan Bahramian, Vt. _____, Docket No. 91-017 (Vt. March 12, 1993). In that case, the Court declared that a **superior** court with de novo powers is confined in its review of a zoning permit application to the issues identified in the notice of appeal; it may not review the entire zoning permit under all of the criteria that the local zoning board **considered**. **Id.** at 9,

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Therefore, the Board concludes that the issues to be considered in this proceeding in evaluating the permittee's planned application of Garlon 3A are:

- Whether there is no reasonable nonchemical alternative available (10 V.S.A. § 1263a(e)(1));
- Whether there is acceptable risk to the nontarget environment (10 V.S.A. § 1263a(e)(2));
- Whether there is negligible risk to public health (10 V.S.A. § 1263a(e)(3)); and
- Whether there is a public benefit to be achieved from the application of the proposed pesticide (10 V.S.A. § 1263a(e)(5)).

Even though it was not included in the appellants' notice of appeal, the Board, like the parties, believes that the public benefit criterion must be addressed because it is the ultimate legal question before the Board. All other criteria are subsumed under this criterion. Therefore, the Board determines that substantial inequity or injustice would result from the exclusion of this issue. Rule 18(D), Board Rules of Procedure.

In their memoranda of July 6 and July 12 and again at oral argument, the appellants asked the Board to consider the application of the public trust doctrine and certain "procedural deficiencies" related to the manner in which the permit #C93-01-Morey was administered by the ANR and the permittee prior to this appeal. Appellants' Presentation of Additional Appellants and Discussion of Additional Issues at 2-4 (July 6, 1993); Appellant's Preliminary Issues Memorandum at 2-3 (July 12, 1993). The appellants argued that these "issues" are inherent elements of the Board's determination under 10 V.S.A. § 1263a(e).

The Board does not share the appellants' view with respect to application of the public trust doctrine. The application of the common law public trust doctrine is within the authority of the Board only when there is a legislative directive. In re: Appeal of Angney, Docket No. 89-14 (1991); affirmed, In re: Angney, Docket No. S96-91 LaCa (Sept. 4, 1992), affirmed on reconsideration, In re: Angney, Docket No. S96-91 LaCa (March 8, 1993) (construing the ANR's and Board's respective authorities in regulating encroachments under 29 V.S.A. § 401.) Absent such express authority, the Board has declined to consider the public trust in its proceedings, deferring to the judicial and legislative branches of government to work out the implications of this doctrine in a contested case. In re: Appeal of VNRC, Docket Nos. DAM-92-02 and WQ-92-05 at 39-41 (Feb. 8, 1993); accord, Okemo Mountain, Inc., #2S0351-12A-EB, Memorandum of Decision at 4 (Sept. 18, 1990).

Pursuant to 10 V.S.A. § 1263a(e)(5), the Board is required to evaluate whether there is a public benefit to be **achieved from** the application of the proposed herbicide. The Board does not construe this criterion as providing it with the authority to make a public trust determination. The appellants have failed to direct the **Board to caselaw** or other sources supporting a different conclusion. **Therefore, the** Board lacks authority to consider the public trust **doctrine** in this proceeding.

The Board believes that the appellants' use of the term "procedural deficiencies" is a misnomer. **The question**, properly stated, is whether the Board, **in** order to make the risk assessment required by criteria 10 V.S.A. §1263a(e)(2) and (3), can consider evidence concerning the physical attributes **and** ecology of Lake Morey, the habits of persons within the zone of risk, and, the **competence** and experience **of** the permittee and its agents relevant to the **use** and monitoring of the proposed **herbicide**. The Board concludes that it can and should consider such evidence. **However**, in reaching this conclusion, the Board offers no opinion at present concerning the relevancy of any particular item **of evidence** that the parties may propose to offer.

C. Burden of Proof

The appellants argue in this de novo proceeding that the burden of production **and** persuasion belongs with **the** permittee. Appellants' Preliminary Issues Memorandum at 4 (July 12, 1993).

Title 10 V.S.A § 1263a(e) **states** that an aquatic nuisance control **permit** shall be issued "**when** the applicant demonstrates and the secretary **finds**" that each of the statutory criteria have been met. The Board reads this language and the case law on de novo appeals (see page 2, supra) as requiring the permittee to demonstrate, by a preponderance of the evidence, that it has satisfied each of the statutory criteria identified as within the scope of the appeal. Such a demonstration is required if the Board is to make affirmative findings on each of the criteria that are properly before the Board.

IV. ORDER

1. This appeal shall be heard de novo. The Board **shall hear** this **matter** as **though** no permit had been issued below. Therefore, no presumption **exists** in favor of the permittee.
2. The hearing in **this** appeal shall be limited to the issues identified above. Specifically, the Board will hear evidence relevant to determinations under 10 V.S.A. **§ 1263a(e) (1), (2), (3) and (5).**
3. The permittee has the burden of proof in this appeal.

Concurring: Dale A. Rocheleau
Ruth Einstein

Concurring in part, dissenting in part:

Stephen Dycus
Jane Potvin

Not participating: Mark DesMeules

Dated at Montpelier, Vermont, this 24th day of September, 1993,
to accurately reflect the Board's decision of September 10, 1993.

Vermont Water Resources Board
by its Vice-Chair


Mark DesMeules

n
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(Dissenting Opinion by Stephen Dycus, Joined by Jane Potvin)

DISSENTING OPINION BY STEPHEN DYCUS, JOINED BY JANE POTVIN

I respectfully dissent from that part of the Board decision holding that the public trust doctrine has no application in this case. I believe that the Board is obligated to consider public trust values here, even though the General Assembly has not expressly directed it to do so.

The common law public trust doctrine was first articulated by our Supreme Court in Hazen v. Perkins, 92 Vt. 414 (1918), a case involving the same body of water, Lake Morey, that is the center of this controversy. In that decision the Court made clear that the waters at issue here are boatable and therefore public, id. at 418, and, that they are held by the State in trust "for the common public use of all." id. at 419.

The Board indicates that application of the public trust doctrine is "within the authority of the Board only when there is a legislative directive." It is true as a general matter, of course, that the Board may exercise only that authority conferred upon it by the General Assembly. In In re: Agency of Administration, 141 Vt. 68, 75 (1982), our Supreme Court pointed out that an executive agency must act within the boundaries of its enabling legislation. But the public trust doctrine does not confer authority on one or another branch of the State government. Instead, the doctrine imposes limitations on the exercise of the State's authority, by whatever branch, in order to protect public trust values. See Vermont v. Vermont Railway, Inc., 153 Vt. 337, 341-347 (1989) (hereinafter CVR). See also National Audubon Society v. Superior Court of Alpine County, 33 Cal. 3d 419, 658 P.2d 709 (1983) (public, trust doctrine must be applied by administrative agency in absence of legislative directive); Kootenai Environmental Alliance v. Panhandle Yacht Club, Inc., 671 P.2d 1085 (Idaho 1983) (same); and United Plainsmen Ass'n v. North Dakota State Water Conservation Comm., 247 N.W. 2d 457 (N. Dak. 1976) (same).

It should be noted here that in the exercise of authority delegated to it by the General Assembly, the Board is limited in various ways not described in any legislation. These limitations effectively transcend and modify specific legislative grants of administrative authority. For example, the Board may not exercise its rule-making authority in a way that discriminates against persons on the basis of their race. Neither may it decide appeals in permit proceedings so as to take property for public use without just compensation. The public trust doctrine represents the same kind of transcendent limiting principle that restricts action by any agency of the state.

In In re: Ananey, Docket No. S96-91LaCa (Sept, 4, 1992), affirmed on reconsideration, In re: Ananey, Docket No. S96-91LaCa (Mar. 8, 1993), the Lamoille Superior Court decided that the Department of Environmental Conservation had **usurped the** authority of the Water Resources Board. when it adopted **rules** for administration of the encroachment statute, 29 V.S.A. §§ 401-409, that **included** criteria for permitting based on the public trust doctrine. Whatever may be said of the independent power of the Department of Environmental Conservation to adopt rules for its operation, the Court described no constraints on the Water Resources Board's **application of** public trust principles. Thus, Ananey does not **clearly stand for the** proposition, as today's Board says it does, that the Board may apply the public trust doctrine only **when there is a legislative directive**.

Indeed, in an earlier case arising under the same statute, In re: Williams Point Yacht Club, Docket No. S213-89CnC (April 16, 1990), the Chittenden Superior Court ordered the Board to consider and to make findings and conclusions required by the public trust doctrine in ruling on the appeal of a permit application. That Court, went on to reject the contention that the statute was intended by the legislature to **"embody and supplant"** the public trust doctrine. Slip op. at 5. The Williams Pond holding is thus consistent with the Supreme Court's declaration in CVR that **"statutes purporting to abandon the public trust are to be strictly construed; the intent to abandon must be clearly expressed or necessarily implied"** 153 Vt. at 347, quoting City of Berkeley v. Superior Court of Alameda County, 26 Cal. 3d 515, 528, 506 P.2d 362, 369, cert. denied, 449 U.S. 840 (1980). In the aquatic nuisance statute under consideration here, 10 V.S.A. § 1263a, the General Assembly has remained silent on the application of the public trust doctrine. So we must assume that it did not intend to limit the application of the doctrine by the Board.

In its decision today, the Board **also** points to its own earlier decision in In re: Appeal of VNRC, Docket Nos. DAM-92-02 and WQ-92-5 (Feb. 8, 1993), as well as the decision of the Environmental Board (Sept. 18, 1990), each one declining to apply the public trust doctrine in its proceedings and **deferring to** the judicial and legislative branches of government to work out the implications of the doctrine. Both decisions cite Westover v. Village of Barton Electric Dept., 149 Vt. 356 (1988), for the proposition that a state agency may not act outside the scope of its enabling legislation. But Westover involved an attempt by the Public Service Commission, to rule on the constitutionality of a village ordinance, a clear expansion of the Commission's legislative authority. The Westover Court, relied in turn on

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Trybulski v. Bellows Falls Hydro-Electric Corp., 112 Vt. 51 (1941), a case involving the Public Service Commission's refusal to entertain a damage claim, where the Court declared that the Commission "only has such powers as are expressly conferred upon it by the Legislature." Id. at 7. Neither decision is apposite here. The issue before us is not expansion of the Board's authority beyond that spelled out in enabling legislation, but constraints on that authority based in the common law public trust doctrine.

For all the foregoing reason, it is my view that the Board cannot escape its obligation to consider public trust values in ruling on this appeal.