

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
APPELLANT'S REQUEST FOR REVIEW OF CHAIR'S PRELIMINARY RULING

This decision pertains to a preliminary matter in the above-captioned appeal. As explained below, the Board affirms the Chair's Preliminary Ruling, dated May 10, 1994, denying the appellant's request to remand this matter to the Agency of Natural Resources or declare Discharge Permit No. 1-1107 void for mootness.

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 the proposed development of the Sun Bowl Community located in Stratton, Vermont.'

In August 1993, the District II Environmental Commission issued a decision and Land Use Permit #2W0911 authorizing the Sun Bowl Project with conditions. On November 16, 1994, Board counsel wrote to the parties in the above-captioned proceeding requesting a status up-date in light of the District Environmental Commission's action. On December 1, 1993, the appellant submitted a memorandum to the Board noting that she was unable to ascertain whether, or not Stratton Corporation plans to proceed with its Sun Bowl Project, and, if so, what amendments to its original proposal it might request, and what impacts if any this would have on the discharge permit under appeal. On December 3, 1993, counsel for Stratton Corporation filed a response with the Board, noting that no change, modification or amendment of its discharge permit was necessary in light of the District Commission's decision,, and it further requested that this matter be scheduled for a hearing on the merits.

On February 18, 1994, following a teleconference with, the parties, Board counsel sent the parties a -draft Supplemental Prehearing Order setting forth filing deadlines for witness lists, exhibits lists, and prefiled exhibits. On February 28, 1994, the Board received a filing, signed by the appellant and intervenors, stating that they were unable to meet the filing schedule since the

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Stratton Corporation had **allegedly made significant** changes in its design plan for the Sun Bowl Project and that as a result the **discharge permitting** process should begin again or the permittee should be required to disclose its new plans.

On March 3, 1994, Stratton Corporation through counsel filed a response with the Board. It noted that the above-captioned appeal was from Discharge Permit No. 1-1107 as issued, and it repeated its assertion that no modification or amendment of that permit was **required** as a result of the District Environmental Commission action. Nonetheless, Stratton Corporation reserved the right to pursue alternatives to the project as approved by the District Environmental Commission.

On April 6, 1994, the appellant and intervenors filed a **follow-up** response with the Board. They called for invalidation of Discharge Permit No. 1-1107 in light of Stratton Corporation's alleged discussions with ANR staff. They further argued that a decision issued by the Bennington Superior Court invalidating the Stratton-Winhall Fire District #1 made it impossible for the Corporation to comply with **the, terms** of a condition of its Land Use Permit. Peter Strong, et al. vs. Selectmen of the Towns of Winhall and Stratton, et al., Docket No. S009-93 BCC (Apr. 11, 1994). On April 8, 1994, the appellant and **intervenors** again filed a memorandum arguing that the invalidation of the fire district meant that Stratton Corporation could not proceed with construction of its project for failure to comply with a term of its Land Use Permit and that as a consequence Discharge Permit No. 1-1107 was not valid.

On April 7, 1994, Chair 'Davies issued a Supplemental Prehearing Order. On April 11, 1994, **this was sent** to the parties along with a memorandum by Board counsel **recounting** the Chair's request that Stratton Corporation notify the **Board if**, prior to a hearing in this matter, circumstances should so change that this matter should become moot. On April 14, 1994, Stratton Corporation informed **the Board** that it did not contemplate any circumstances which would render this matter moot.

On April 25, 1994, the Appellant and intervenors **forwarded** to the Board a copy of the fire district decision and argued that the demise of H.296, a bill designed to remedy the legal defect identified in that decision, resolved the issue of whether or not **Stratton Corporation** could proceed to build its **proposed** Sun Bowl Project. They requested **that** this matter be remanded **to the ANR** for new proceedings.

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On May 10, 1994, Chair Davies issued a preliminary ruling on the appellant's and intervenors' requests pursuant to Rule 21 of the Board's Rules of Procedure. He concluded, based on a review of the parties' filings, that neither a remand in this matter nor a declaration of mootness were warranted. The Chair's ruling set forth his reasons for denying the requests.

On May 19, 1994, Peter Strong, representative for intervenor Conservation Society of Southern Vermont (CSSV), filed a notice of withdrawal from the above-captioned appeal. On May 20, 1994, intervenor Ilse Mattick also filed a notice of withdrawal.

On May 20, 1994, the appellant filed with the Board a written request for review of the Chair's preliminary ruling. Oral argument on the appellant's request was held on June 22, 1994, in Montpelier, Vermont. Those appearing were appellant Malvine Cole and Stratton Corporation, represented by Alan George, Esq., of the firm Carroll, George and Pratt.

The Board deliberated on June 22 and August 10, 1994. This matter is now ripe for decision.

II. ISSUE

Whether, prior to a hearing before the Board, Discharge Permit No. 1-1107 should be remanded to the ANR for further consideration or whether the permit should be declared moot.

III. DISCUSSION

The Water Resources Board is authorized to hear appeals from discharge permit decisions issued by the Secretary of the Agency of Natural Resources pursuant to authority granted by 10 V.S.A. ch. 47. The Board is required to hold a de novo hearing and determine whether the decision of the Secretary should be affirmed, reversed, or modified. 10 V.S.A. § 1269. An appeal filed pursuant to this section does not stay the effectiveness of the agency's act or decision pending determination by the Board. 10 V.S.A. § 1269. Therefore, a party who has been granted a discharge permit by the ANR is entitled to hold that permit subject to possible reversal or modification by the Board.

Act 250 creates jurisdiction in the Vermont Environmental Board and District Environmental Commissions to consider development impacts on water quality as part of a comprehensive environmental review of proposed projects. See 10 V.S.A. § 6086(a)(1)

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(water pollution). However, the Land Use Permit required by Act 250 does not supersede or replace the requirements for a permit of any other state environmental agency. 10 V.S.A. § 6082.

Stratton Corporation has received Discharge Permit No. 1-1107 allowing stormwater discharge into Styles Brook from its proposed Sun Bowl Project. Stratton Corporation has also received Land Use Permit #2W0911 authorizing the construction of the Sun Bowl Project with some modifications. However, the appellant has not demonstrated that those modifications require amendment of Discharge Permit #1-1107, and Stratton Corporation has not indicated that it intends to abandon or modify its discharge permit.

Questions concerning the legal status of the Winhall-Stratton Fire District No. 1 may have a bearing on Stratton Corporation's ability to comply with a condition of its Land Use Permit and therefore may affect the timing of construction or require further amendment of that permit. However, the legal status of the Winhall-Stratton Fire District is not a relevant issue in the present proceeding before the Board.¹ Discharge Permit No. 1-1107, as issued by the ANR, authorizes and establishes conditions for the discharge of stormwater into Styles Brook. The appellant has not directed the Board to any condition in that permit requiring the creation of a municipal fire district to manage stormwater discharge.

The Board concludes that this matter is not moot and that remand to the ANR for further proceedings is not warranted at this time. As the Chair noted in his Preliminary Ruling of May 10, 1994: "As long as the permittee has not indicated an intention to abandon its project entirely or to significantly change the effluent parameters which gave rise to the issuance of the discharge permit in the first instance, .. this appeal should proceed to a hearing on the merits." Therefore, the Board denies the appellant's request for a remand order or a declaration that Discharge Permit No. 1-1107 is void for mootness.

¹ Similarly, the appellant's reference to the failure of the Vermont Legislature to adopt corrective legislation (H.296) in this session has no relevance to the present proceeding.

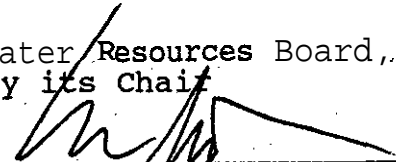
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IV. ORDER

The Board hereby affirms the Chair's Preliminary Ruling, dated May 10, 1994, denying the appellant's request to remand this matter to the Agency of Natural Resources or declare Discharge' Permit No. 1-1107 moot.

Dated at Barton, Vermont, this 10th day of August, 1994.

Water Resources Board,
by its Chair


William Boyd Davies

Concurring:

William Boyd Davies
Ruth Einstein
Jane Potvin
Mark DesMeules