

UNIFORMED COPY
RUTLAND SUPERIOR COURT

STATE OF VERMONT
RUTLAND COUNTY, SS.

FILED: FEB - 3 1994

IN RE: APPEAL OF POULTNEY
RIVER COMMITTEE

) RUTLAND SUPERIOR COURT
)

) DOCKET NO. SO693-92RcCa

Gay S. Johnson
Clerk

RULING ON APPEAL FROM WATER RESOURCES BOARD

Before the court is an appeal from a Preliminary Order of the Water Resources Board which was issued on August 11, 1992.

The background of the case can be summarized as follows. On March 1, 1990, the Department of Environmental Conservation (hereinafter "DEC") issued Aquatic Nuisance Control Permit C90-01 (hereinafter "1990 permit") to the Department of Fish and Wildlife, allowing the use of chemical lampricides on specific Vermont tributary waters and areas of Lake Champlain. The Poultney and Hubbardton Rivers were specifically excluded from the coverage of the 1990 permit. However, the permit contained a provision which allowed its modification upon request and upon determination by the Secretary of the Agency of Natural Resources that modification was appropriate.

On April 4, 1991 the DEC issued an amendment to the 1990 permit and designated it C90-01A (hereinafter "1991 permit amendment"). The 1991 permit amendment authorized treatment of the Poultney and Hubbardton Rivers with chemical lampricides and extended the expiration date of the 1990 permit by one year. Appellant Poultney River Committee (hereinafter "Committee") did not appeal the 1991 permit amendment. Members of the Committee were present at the public meeting which was held prior to the issuance of the 1991 permit amendment.

On March 17, 1992, the DEC approved modifications to the 1990 permit and the 1991 permit amendment. The modified 1991 permit amendment was reissued as Permit C92-01 (hereinafter "1992 permit"). The 1992 permit specifically

adopted portions of the 1991 permit amendment, including the lampricide treatment regime, project description, and purpose of the permit. In addition, the 1992 permit contained the following five modifications to the 1991 permit amendment:

- (1) a change in the date of the initial treatment of the Poultney and Hubbardton Rivers from September, 1991 to September, 1992;
- (2) an extension of the expiration date of the permit;
- (3) an increase in lampricide concentration in the Poultney River at the Doggman Bridge from 0.8 times the minimum lethal concentration to 0.9 times the minimum lethal concentration for a maximum period of one hour;
- (4) an increase in the maximum lampricide concentration in the Hubbardton River from 1.0 to 1.5 times the minimum lethal concentration, provided that the minimum lethal concentration shall drop to 1.0 at the confluence of the Hubbardton and Poultney Rivers;
- (5) a change in the minimum allowable river flow of the Hubbardton River, for treatment purposes, from 2.2 cfs to 1.8 cfs.

The Committee filed an appeal of the 1992 permit to the Water Resources Board pursuant to 10 V.S.A. § 1269. A preliminary issue before the Water Resources Board was whether the scope of the appeal was limited to the above five modifications in the 1992 permit or whether the appeal required de novo review of the 1990 permit, the 1991 permit amendment, and the 1992 permit. In a Preliminary Order issued on August 11, 1992, the Water Resources Board ruled that the issues on appeal were limited to those stemming from the five modifications in the 1992 permit.

The Committee appealed the decision of the Water Resources Board to this court pursuant to V.R.C.P. 75. Appeals from the Water Resources Board are governed by 10 V.S.A. § 1270 which states, in relevant part:

All appeals taken pursuant to this section shall be based solely upon the record of the proceedings before the board. The court shall determine whether the board acted arbitrarily, unreasonably, or contrary to law and shall issue its findings and order accordingly. .

. . .

Id.; See In re Classification of Airport and Pond Brooks, 142 Vt. 458, 460 (1983) (stating that the superior court is limited to a review of the findings of the Water Resources Board, "based entirely on the record below, to determine whether the board acted arbitrarily, unreasonably, or contrary to law").

The first issue is whether the Water Resources Board acted arbitrarily. To determine whether the board acted arbitrarily, the court must decide whether the board's decision makes sense to a person -- even if the court might have weighed the factors differently. In re Town of Sherburne, 154 Vt. 596, 605 (1990). The board must explain its reasons for finding as it does; if it does not give reasons, its decision may appear arbitrary. Id.

In this case, the Water Resources Board did not act arbitrarily. The board adequately explained the reasons for its decision, including the failure of the Committee to file an appeal of the issuance of the 1991 permit amendment despite the opportunity for a full and fair contested case proceeding before the Water Resources Board.

The second issue is whether the Water Resources Board acted unreasonably. To determine whether the board acted unreasonably, the court must look to whether the board's factual findings are supported by the substantial evidence as that concept is used in the field of administrative law. Id. (citing 2 C. Koch, *Administrative Law and Practice* § 9.4 at 90-91 (1985)). The reviewing court is not permitted to substitute its own judgment for that of the fact finder; it must search the record and satisfy itself that the findings are supported. Id. at 606.

In the case at bar, the Committee has appealed a Preliminary Order of the Water Resources Board regarding the scope of issues to be considered by the board. Since the substantive issues have yet to be examined by the Water Resources Board, the board has not made any findings of fact. The court,

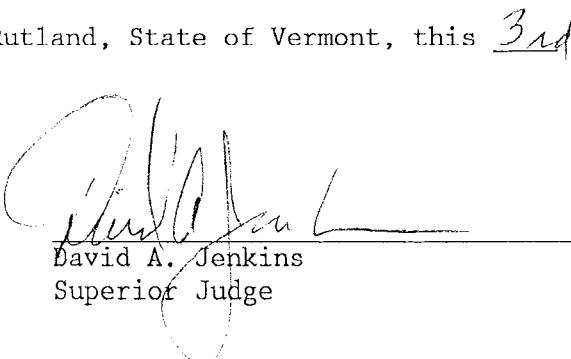
therefore, determines that the issue of whether the board acted unreasonably cannot be considered when reviewing this Preliminary Order in which findings of fact were not necessary.

The final issue is whether the Water Resources Board acted contrary to law. While some deference may be given to an administrative agency's construction of its own enabling legislation or regulations, an agency has no discretion to ignore statutory policy. Id. at 607.

In the case at bar, the board did not ignore Vermont statutory policy. To the contrary, the board properly cited 10 V.S.A. § 1269 in ruling that the appropriate time to appeal the validity of the 1991 permit amendment was within 30 days of the issuance of that permit amendment. The board then went on to discuss the legal concept of issue preclusion and the process by which the appellants could have had a fully contested case proceeding before the Water Resources Board regarding the 1991 permit amendment. Because the appellant Committee failed to take this final step at the appropriate time, the board ruled that the appellant was precluded from bringing up issues surrounding the 1991 permit amendment in the present appeal. Because the board properly based its decision on the relevant Vermont statutes and cases, this court concludes that the board did not act contrary to law.

Based upon the foregoing, the court AFFIRMS the Preliminary Order of the Water Resources Board and remands the case to the board for a hearing on the merits.

Dated at City of Rutland, County of Rutland, State of Vermont, this 3rd day of February, 1994.



David A. Jenkins
Superior Judge