

State of Vermont
WATER RESOURCES BOARD

In re: Appeal of Poultney River Committee
Docket No. WQ-92-04

DISMISSAL ORDER

On April 15, 1992, the Poultney River Committee (appellant) filed an appeal of an Aquatic Nuisance Control Permit issued to the Department of Fish and Wildlife (DFW), allowing the use of a chemical lampricide on the Poultney and Hubbardton Rivers. Initially, the Board was asked to determine the scope of review of the appeal. In its Preliminary Order, issued August 11, 1992, the Board determined that the appeal was limited to consideration of only those issues reasonably related to the five modifications contained in the 1992 permit (Permit C92-01) issued to DFW, and not the earlier 1990 permit and 1991 permit amendment. The appellant filed an interlocutory appeal. Both the Rutland Superior Court and the Vermont Supreme Court affirmed the Board's decision. See Entry Order, In re Poultney River Committee, Vt. Docket No. 94-165 (Jun. 26, 1995).

On August 24, 1995, in response to a written inquiry from the Board, the appellant indicated that it was prepared to proceed with its appeal. On October 6, 1995, the DFW filed a Motion to Dismiss with the Board, notifying the Board of its intent to withdraw Permit C92-01. On October 18, 1995, the appellant filed a written objection to this motion and requested a hearing. The DFW filed a responsive memorandum on October 20, 1995. This matter was noticed for oral argument before the Board on November 1, 1995. Those entering appearances and offering argument were the appellant, represented by Peter R. Neary, Esq., and the DFW, represented by Robert W. Gagnon, Esq., Senior Assistant Attorney General.

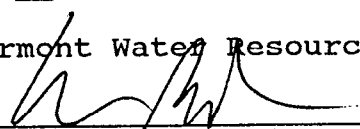
On November 1, 1995, the Board deliberated, considering the arguments of the parties in this matter. It determined that in light of DFW's filing, Permit C92-01 should be declared null and void and that the above-captioned appeal should be dismissed for mootness. Therefore, it is hereby ordered that:

1. Permit # C92-01 is declared null and void; and
2. The above-captioned appeal is hereby dismissed.

Dated at Berlin, Vermont, this 1st day of November, 1995.

Concurring:
William Boyd Davies
Stephen Dycus
Ruth Einstein
Gail Osherenko
Jane Potvin

Vermont Water Resources Board



William Boyd Davies, Chair

State of Vermont

Water Resources Board

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Authority:
10 V.S.A. §1269

Preliminary Order

BACKGROUND

On March 1, 1990, the Department of Environmental Conservation ("DEC") issued Aquatic Nuisance Control Permit C90-01 ("1990 permit") to the Department of Fish and Wildlife ("F&W") allowing the use of chemical lampricides on specific Vermont tributary waters and delta areas of Lake Champlain. The 1990 permit was to remain in effect for five years, expiring on February 28, 1995. This permit authorized an initial treatment of the waters with the lampricide and, if necessary, a second treatment 3 to 4 years later. The 1990 permit contained a provision allowing modification of the permit upon request and in the event the Secretary of the Agency of Natural Resources determined the modification was appropriate. The DEC was required to follow the public hearing requirements of the Procedures for Issuance or Denial of Aquatic Nuisance Control Permits under 10 V.S.A. §1263a when a modification was requested. The Poultney and Hubbardton Rivers were specifically excluded from the coverage of the 1990 permit.

On April 4, 1991, the DEC issued an amendment to the 1990 permit and numbered it C90-01A ("1991 permit amendment"). The 1991 permit amendment authorized treatment of the Poultney and Hubbardton Rivers and extended the expiration date of the 1990 permit by one year. The 1991 permit amendment was not appealed. Appellants were present at the public meeting prior to the issuance 1991 permit amendment.

On March 17, 1992, the DEC approved modifications to both the 1990 permit and the 1991 permit amendment. After modifications, the 1991 permit amendment was reissued as Permit C92-01 ("1992 permit"). The 1992 permit was expressly fashioned after the 1991 permit amendment and specifically adopted the lampricide treatment regime, project description and purpose included in the findings of the 1991 permit amendment.

The 1992 permit contained five modifications to the the 1991 permit amendment. The modifications were:

- (1) a change in the date of the initial treatment of the

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Poultney and Hubbardton Rivers from September, 1991 to September, 1992 (treatment did not occur in September, 1991 because of low flows);

- (2) an extension of the expiration date from February 28, 1996 to February 28, 1997;
- (3) an increase in the lampricide concentration at the Doggman Bridge (on the Poultney River) from 0.8 times the Minimum Lethal Concentration ("MLC") to 0.9 times the MLC for a maximum period of one hour;
- (4) an increase of the maximum lampricide concentration in the Hubbardton River from 1.0 to 1.5 times the MLC, provided that the MLC 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.

A notice of appeal was timely filed by Joanne M. Calvi on April 15, 1992, on behalf of the Poultney River Committee ("Committee"). An amended appeal was filed on April 29, 1992. At issue is whether the scope of review of this appeal is limited to the changes effected in the 1992 permit or whether the appeal implicates *de novo* review of the 1990 permit, 1991 permit amendment and the 1992 permit.

DISCUSSION

I. Validity of 1991 permit amendment

Citing 10 V.S.A. §1263a and §1267 (Revocation of permits), appellants contend that there is no statutory authorization for DEC's amendment of the 1990 permit in 1991, and, therefore, the 1991 permit amendment is invalid. Title 10 V.S.A. §1267 provides that the DEC may revoke, modify or suspend a permit, after notice, provided that it finds that the permit holder submitted false or inaccurate information in the application or has violated a requirement, restriction or condition that requires a change in or elimination of the permitted discharge.

Had the current appeal been timely filed in 1991, in response to the 1991 amendment of the permit, the Board would be in a position to address the merits of the appellants' argument. The proper time to appeal the validity of the 1991

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permit amendment, however, was within thirty days of the issuance of the 1991 permit amendment. 10 V.S.A. §1269.

The Board has previously determined that failure to timely file an appeal with the Board deprives the Board of jurisdiction to hear an appeal. In re: Appeal of Valois, Vermont Water Resources Board Docket No. 92-03, May 20, 1992 (citing In re Guardianship of L.B., 147 Vt. 82, 84 (1986); Harvey v. Town of Waitsfield, 137 Vt. 80, 82 (1979); Village of Northfield v. Chittenden Trust Co., 128 Vt. 240, 241 (1969); Shortle v. Rutland Board of Zoning Adjustment, 136 Vt. 202 (1978)). Since the Board lacks jurisdiction over an appeal based upon an alleged irregularity in the issuance of the 1991 permit amendment, it follows that the Board also lacks the jurisdiction to consider the issue here. Appellants, who were party to the 1991 public hearings, are collaterally estopped from raising the validity of the 1991 permit amendment over a year later (see discussion, *infra*, Part II).

II. Scope of review of the 1992 permit

Although F&W requested that the 1991 permit amendment be amended, the DEC decided, despite the limited number of modifications, to issue a new permit with a new number. DEC's rationale at the prehearing conference for this change was that administrative efficiency and the need to adjust the permit expiration date warranted a new permit. /2/

Regardless of whether the changes made to the 1991 permit amendment should be considered substantive and regardless of the intent of DEC in issuing the 1992 permit, the fact remains that the 1992 permit differs in substantive ways from the 1991 permit amendment. The degree of difference, however, is not relevant to the issue the Board is asked to address at this time.

The question here is one of collateral estoppel (more recently called "issue preclusion"). When an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment,

/2/The DEC acknowledged in a March 17, 1992 letter that the requested modifications to the amended permit were substantive and required a new permit with a new permit number.

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a party who had a full and fair opportunity to litigate the issue in the first action is precluded from relitigating the issue. Restatement (Second) of Judgments §§27, 29 (1982). /3/ When a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the agency's factfinding is given preclusive effect. University of Tennessee v. Elliott, 478 U.S. 788 (1986); United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966).

Issue preclusion does not apply where the party against whom the earlier decision is asserted did not have a full and fair opportunity consistent with the requirements of due process. Restatement (Second) of Judgments §83. See also Elliott, supra; Martin v. Malhojt, 830 F.2d 237, 264 (D.C.Cir.1987); City Wide Learning Center, Inc. v. William C. Smith & Co., 488 A.2d 1310, 1313 (D.C.App. 1985).

The Board takes note that the public hearing held by the DEC on the 1991 permit amendment was not an adjudicatory process. It was, however, the process required by the statute and it was conducted according to the rules adopted by the DEC pursuant to the Administrative Procedures Act. 10 V.S.A. §1263a(i); 3 V.S.A. chapter 25. Appellants sought and obtained a public hearing on the 1991 permit amendment and had the opportunity to participate fully. Appellants also had the opportunity to a full contested case proceeding before the Water Resources Board, a proceeding in which they could present evidence, cross-examine witnesses, and make their legal arguments. Appellants failed to take this last step. Appellants had full opportunity to litigate the issues presented by the 1991 permit amendment, and were accorded the full amount of due process afforded them by the Legislature through the statute and the Administrative Procedures Act. Consequently, the Board concludes that appellants are precluded from questioning the entire content and scope of the 1991 permit amendment. It is immaterial that a new permit has issued. Only those issues that stem from the most recent modifications are open to appeal.

/3/ The first Restatement of Judgments limited collateral estoppel to "a question of fact" in §68(1), but the second Restatement (1982) provides in §27 (subject to some exceptions) that a determination of an issue of fact or law may be conclusive in a subsequent action between the parties.

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ORDER

Appellants failure to timely file an appeal of the 1991 permit amendment precludes consideration of any issue solely related to the 1990 permit or the 1991 permit amendment. The Board has jurisdiction in this appeal over only those issues reasonably related to the five modifications contained in the 1992 permit and enumerated above.

Vermont Water Resources Board
by its Chair


Dale A. Rocheleau 8/11/92
Date

Concurring: Elaine Little
Stephen Reynes

Not participating: Mark DesMeules
Jonathan Lash