

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.

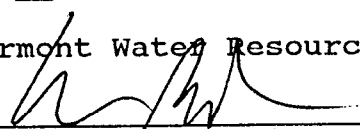
On November 1, 1995, the Board deliberated, considering the arguments of the parties in this matter. It determined that in light of DFW's filing, Permit C92-01 should be declared null and void and that the above-captioned appeal should be dismissed for mootness. Therefore, it is hereby ordered that:

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

Dated at Berlin, Vermont, this 1<sup>st</sup> day of November, 1995.

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

Vermont Water Resources Board

  
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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

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,

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/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.



