State of Vermont
WATER RESOURCES BOARD

RE: Town of Shoreham Wastewater Treatment Facility **Authority:**
Docket No. WQ-00-11 (DEC Amended Permit #3-1459) **10 V.S.A. § 1269**

MEMORANDUM OF DECISION ON PRELIMINARY ISSUES

This decision pertains to certain preliminary issues defining the scope of the above-captioned appeal. As described in more detail below, the Water Resources Board ("Board") rules that the only issue properly before the Board is whether the Town of Shoreham's June 2000 Guidelines comply with the requirements of Act 51[1] and, if not, why not. To answer this question, the Board will convene an evidentiary hearing and accept legal argument from the parties concerning the appropriate disposition of this matter.

I. BACKGROUND

On November 9, 2000, the Wastewater Management Division, Department of Environmental Conservation, Agency of Natural Resources ("ANR") issued an amended discharge permit, DEC Permit #3-1459 ("Amended Permit") to the Town of Shoreham ("Applicant") to allow discharges from the Applicant's Wastewater Treatment Facility ("WWTF") into Cedar Swamp in the Town of Shoreham ("Project").

On December 8, 2000, Conservation Law Foundation ("CLF") appealed the Amended Permit to the Board pursuant to 10 V.S.A. § 1269.

On January 18, 2001, the Board's Chair, David J. Blythe, convened a prehearing conference in this matter. On January 29, 2001, a Prehearing Conference Report and Order ("Prehearing Order") was issued. The Prehearing Order made certain party status rulings[2] and established a schedule for the briefing of preliminary issues. The Prehearing Order was subsequently amended on February 6, 2001, in response to ANR's objections. The amended Prehearing Order is incorporated herein by reference.

On February 28, 2001, CLF filed a Memorandum of Law on Preliminary Issues ("CLF's

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1 1997 Vt. Laws 51, Sec. 5 (pilot project on cost-effective off-site mitigation of phosphorus discharges from small, municipally-owned treatment plants)

2 The parties to this appeal are: Appellant CLF, Applicant Town of Shoreham, Addison County Regional Planning Commission, ANR, and several landowners in the Town of Shoreham (Robert Growney, Joseph and Deborah Kelley, Paul and Rene Saenger, and William and Carleen Telgen). See Prehearing Order, Section XIII., at 1.

Memorandum"). On March 14, 2001, ANR filed a Reply Memorandum of Law on Preliminary Issues ("ANR's Reply Memorandum"). On March 21, 2001, the Applicant filed a Reply Memorandum of Law and supporting Exhibits. The Applicant Reply Memorandum contained two objections in the nature of a motion for partial dismissal of the appeal ("Applicant's Motion to Dismiss").

Oral argument before the Board with respect to the preliminary issues and the parties' filings was held on April 3, 2001. Those parties participating through counsel were CLF, the Applicant, and ANR. The Board asked the participating parties to file certain documents referenced in their legal memoranda and also several other documents key to deciding the preliminary issues so that it could take official notice of these pursuant to 3 V.S.A. §810(4).

Accordingly, on April 6, 2001, the Applicant and ANR filed the following documents, which the Board so noticed, no objections having been raised by the parties:

(1) Applicant's "Nonpoint Source Reduction Phosphorous [sic] Reduction Program," dated February 2000 ("February 2000 Guidelines").
(2) DEC Discharge Permit No. 3-1459, issued on May 8, 2000 ("Permit")[3] and related Fact Sheet, dated May 2000;
(3) Response Summary for the Draft Discharge Permit #3-1459, not dated but issued after April 6, 2000 public hearing ("Draft Permit Response Summary");
(4) Letter, dated May 17, 2000, from Town of Shoreham to Eric Smeltzer, ANR, with attached "Guidelines for Nonpoint Source Phorsphorous [sic] Reduction" ("May 2000 Guidelines");
(5) Letter, dated June 6, 2000, from Valerie Demong, Chair, Town of Shoreham, to Eric Smeltzer, ANR, with Applicant's "Guidelines for Nonpoint Source Phosphorous [sic] Reduction, revised June 6, 2000" ("June 2000 Guidelines");
(6) Letter, dated July 14, 2000, from Brian Kooiker, ANR, advising Applicant of issuance of draft Amended Permit based on ANR approval of June 2000 Guidelines;
(7) Letter, dated July 14, 2000, from Brian Kooiker, ANR, to Town of Shoreham Town Clerk, enclosing copies of public notice for the draft Amended Permit;
(8) Letter, dated August 15, 2000, from counsel for CLF and VNRC, containing public comment regarding the draft Amended Permit and requesting a hearing;
(9) Letter, dated August 22, 2000, from Brian Kooiker, ANR, to Town of Shoreham Town Clerk, enclosing copies of public notice for a public hearing on the draft

[3] At oral argument, Chair Blythe asked the Applicant to file copies of the Permit by April 6, 2001, and also instructed ANR to file certain documents in its possession related to the process for noticing and issuing the Permit and Amended Permit. The Applicant's copies of the Permit were missing several pages. Accordingly, the Board took official notice of the Permit filed by ANR.

Amended Permit;

(10) Response Summary for Draft Amended Discharge Permit #3-1459, not dated but issued after September 26, 2000 public hearing ("Draft Amended Permit Response Summary");

(11) Letter, dated November 9, 2000, from Brian D. Kooiker to Town of Shoreham re: Final Amended Discharge Permit #3-1459 and Response Summary;

(12) DEC Amended Discharge Permit #3-1459, issued on November 9, 2000, incorporating June 2000 Guidelines ("Amended Permit");

(13) ANR, Administrative Rule 87-46, Wasteload Allocation Process, dated September 1987;

(14) Vermont Water Pollution Control Permit Regulations, Section 13, dated February 26, 1974; and

(15) State of Vermont, 1998 List of Waters, including Part A: List of Impaired Surface Waters for Clean Water Act Section 303(d) Reporting and Part B: List of Waters for Section 303(d) "De-Listing," dated December 11, 1998, pages 2-5 and 8, listing the receiving waters affected by the Project discharge (Cedar Swamp and Otter Creek Section of Lake Champlain) and including TMDL completion dates for each.

On April 6, 2001, CLF filed a Reply Memorandum to the Applicant's Motion to Dismiss ("CLF's Reply Memorandum"). On April 11, 2001, the Applicant filed a Reply Memorandum of Law to CLF's April 6, 2001, filing ("Applicant's Reply Memorandum").

The Board deliberated on April 19, 2001. This matter is now ready for decision.

II. ISSUES

The objections raised by the Applicant in its March 21, 2001, Motion to Dismiss and further addressed in its April 11, 2001, Reply Memorandum are:

A. Whether CLF has failed to timely appeal one or more of the following issues?

B. Whether CLF is barred from raising one or more of the following issues if it did not raise them in the ANR proceeding below?

The issues identified in the Prehearing Order, Section VII.C, at 6-8, are:

(1) Can any discharge be authorized into the Otter Creek section of Lake Champlain, a Water Quality Limited Segment on the Environmental Protection Agency's approved

1998 State of Vermont List of Targeted and Impaired Waters ("§303(d) list")?

(2) Is the Town of Shoreham required to implement water quality based effluent limitations ("WQBELs") for phosphorus control and, if so, what should these be?

(3) Which of the Vermont Water Quality Standards ("VWQS") are at issue in this appeal?

(4) As a matter of law, do the June 2000 Guidelines comply with Act 51 and, if not, why not?

The above four issues were framed at the prehearing conference to refine and narrow the issues set forth in CLF's Notice of Appeal.[4] See Board Rule of Procedure 28(A)(2) (One of the purposes of a prehearing conference is to "[c]larify the issues in controversy.") No party, including CLF, objected to the issues as framed by the February 6, 2001, deadline set forth in the Prehearing Order, Section XIII, Item 9 at 12.[5] Accordingly, this Memorandum of Decision is

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[4] The issues set forth in CLF's Notice of Appeal at 4 are:

1. Can the new measurable and detectable discharge of phosphorus from the Shoreham Wastewater Treatment Facility be permitted into the Otter Creek section of Lake Champlain which currently does not meet the in-lake phosphorus criterion of the Vermont Water Quality Standards and has been listed as a Water Quality Limited Segment on the Environmental Protection Agency approved 1998 State of Vermont List of Targeted and Impaired waters?

2. What water quality based effluent limitations (WQBELs) for phosphorus control are required if the discharge of phosphorus from the Shoreham Wastewater Treatment Facility is permitted?

3. Does the controlling regulatory program require both installation of technological controls in the Shoreham Wastewater Treatment Facility as well as development and implementation of an enforceable and specific "Off-Site Phosphorus Offset Plan"?

4. What are the specific requirements and scope of an enforceable and specific "Off-site Phosphorus Offset Plan"?

As suggested in the Prehearing Order at 6-8, the parties struggled to clarify which elements of these issues were contested or not contested and which could be answered based on briefs rather than on a full evidentiary hearing.

[5] ANR, in its filing of February 6, 2001, objected to the inclusion of these four issues in the Prehearing Order, arguing that the only questions properly within the scope of this appeal were: (1)

addressed to the Applicant's objections to the scope of appeal presented by the above-stated issues.

III. DISCUSSION

A. Whether CLF has failed to timely appeal one or more of the above issues?

The Applicant's first objection is that CLF has failed to timely appeal most of the issues raised in its Notice and Appeal. The Applicant's arguments may be summarized as follows. The Permit issued on May 8, 2000 was a final decision with respect to all matters related to the Project, with the one exception being what specific phosphorus reduction measure the Applicant would use to meet the monthly average concentration limit of 0.80 milligrams per liter required either under 10 V.S.A. §1266a or an Act 51 pilot program authorized by the ANR. The Permit contemplated that there would be some discharge of phosphorus into a tributary of the Otter Creek section of Lake Champlain (a phosphorus-impaired water on the §303(d) list), that this discharge would not be in excess of the statutorily-imposed effluent limitation, and, further, that the Applicant was "approved" for participation as an Act 51 pilot program if the Applicant so elected to meet its phosphorus reduction target through a plan providing for implementation of non-point source reduction measures. Once the Applicant elected under Condition I.B. of the Permit[6] to meet its phosphorus reduction target through an Act 51 plan, the only question left

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What is the applicable law for the Board to review the phosphorus reduction requirement of the Amended Permit? and (2) Does the phosphorus reduction requirement of the Amended Permit comply with applicable law? ANR also objected to the attribution of the four above-stated issues to its counsel. ANR, however, did not object to the issues *as framed*. The Chair issued an order on February 12, 2001, amending in part the Prehearing Order by eliminating the attribution of these issues to ANR's counsel. However, the Chair declined ANR's request to limit the scope of the issues to be considered preliminarily in this proceeding.

[6] Condition I.B. of the Permit states:

[I.]B. Phosphorus Reduction

Under the 1997 Act 51, the Department [of Environmental Conservation] may allow an off-site phosphorus reduction pilot project at a municipal treatment facility with a discharge of less than 50,000 gpd in lieu of complying with the provisions of 10 V.S.A. §1266a. The Department has determined that the Town is eligible to pursue the pilot project consistent with a Department approved plan, in lieu of phosphorus removal at the treatment facility.

By November 15, 2000, the Permittee shall submit a written decision to the Department indicating

open was whether the specific plan adopted by the Applicant and approved by the ANR through the issuance of the Amended Permit in November, 2000, was in compliance with Act 51 requirements. Thus, in the Applicant's opinion, the only issue now properly before the Board is whether the June 2000 Guidelines comply with the requirements of Act 51. According to the Applicant, the other three issues raised by the appellant are not properly before the Board because they were not appealed by CLF within the 30-day window provided by 10 V.S.A. §1269 for appeals from the Permit. That appeal would have had to have been filed on or before June 7, 2000.

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which of the following phosphorus reduction options the Town will pursue. The Department will assume a default decision of the "Nonpoint Source Reduction Program," dated February 2000, if a written decision is not received by this date. Upon notification and/or following the above date, the Department will amend the discharge permit to include language detailing the option and, if the offset plan is the option, the plan will be made an addendum to the discharge permit.

1. Off-Site Phosphorus Reduction Plan:
   Submit to the Department an amended off-site phosphorus reduction plan consistent with the provisions of Act 51, or notify the Department that the previously approved "Nonpoint Source Phosphorus Reduction Program", dated February 2000 will be utilized. If the Permittee submits the former, the Permittee shall prepare the plan and receive preliminary approval from the Department prior to November 15, 2000. If the permittee elects to follow either of these off-site reduction options, this permit shall be amended to incorporate the approved plan.

   If implementation of all the elements of the approved plan (or an approved amended plan) are not substantially completed as described in the plan by June 30, 2004 (or an approved alternate date) the Department may require the Town to install phosphorus removal, subject to available state funding, at the treatment facility; or

2. Phosphorus Removal:

   By January 15, 2001, the Permittee shall submit to the Department a Basis for Final Design for phosphorus removal at the wastewater treatment facility such that the effluent will meet a concentration limit of 0.80 mg/l, monthly average.

   By March 1, 2001, the Permittee shall submit to the Department the 90% design plans for phosphorus removal at the wastewater treatment facility.

   The installation and operation of phosphorus removal equipment shall be completed concurrent with the initial startup and operation of the wastewater treatment facility.

CLF argues that the Permit issued in May 2000 was not a *final*, appealable decision. CLF argues that essentially all issues related to phosphorus management by the Applicant, including what federal and/or state standards are applicable in evaluating the Applicant's discharge of phosphorus, only became ripe once the ANR approved the Applicant's June 2000 Guidelines with the issuance of the Amended Permit in November, 2000. CLF argues that had it tried to raise the issues framed by its appeal at the time of the issuance of the Permit, that appeal would have been deemed premature because there was no approved in-plant technology or specific Act 51 plan for the Board to review to determine Project conformance with applicable law.

The Board has previously ruled, and the Vermont Supreme Court has affirmed, that a party may not litigate through a permit amendment proceeding a matter finally decided in a prior permit in which the "subject matter and causes of action are identical or substantially identical." Indeed, the Vermont Supreme Court has stated that a permit decision not timely appealed to a reviewing Board or court is a *final* decision and is therefore not subject to attack in a subsequent application proceeding, whether or not the original permit was properly granted in the first instance. In re Taft Corners Associates, 160 Vt. 583, 593 (1993); Levy v. Town of St. Albans Zoning Bd. of Adjustment, 152 Vt. 139, 143 (1989). The public policy reason for the "finality rule" is to prevent the undermining of the orderly governance of development and the upset of reasonable reliance on the permit process. In re Taft Corners Associates at 593.

Consistent with Vermont Supreme Court precedent, the Board has previously determined that an appellant was precluded from challenging the lampricide treatment of the Poultney River authorized by a 1990 aquatic nuisance control permit when that permit had become final and binding and what was then before the Board on appeal was a 1992 permit amendment that addressed only five minor modifications to the 1990 permit. Re: Appeal of Poultney River Committee, WQ-92-04, Preliminary Order (Aug. 11, 1992); affirmed In re Poultney River Committee, Vt. 94-165 (June 26, 1995) (applying the doctrine of *res judicata)*.

The Board has considered the parties' arguments and concludes that there is support for the Applicant's position that the "finality rule" applies in this case. Both the text of Permit Condition I.B. and the various documents noticed related to the Permit and Amended Permit lead to the conclusion that the May 2000 Permit contemplated that a minimal discharge of phosphorus would be allowed into a segment of phosphorus-impaired waters, the Otter Creek section of Lake Champlain, but that that discharge would not exceed the statutory standard set forth in 10 V.S.A. §1266a and Act 51. See, e.g., Draft Permit Response Summary. Condition I.B. of the Permit refers to Project compliance with Act 51 as an alternative to compliance with 10 V.S.A. §1266a. Both statutes impose a phosphorus concentration limitation of 0.80 milligrams per liter on a monthly average basis. Thus, regardless of whether the Applicant elected to achieve compliance through in-plant technology in conformance with 10 V.S.A. §1266a *or* implementation of the

February 2000 Guidelines, identified as a "default" option in Condition I.B. of the Permit *or* developed and obtained approval for a *revised* off-site non-point phosphorus reduction plan, the same effluent limitation standard was applicable.

The Board, therefore, concludes that, contrary to CLF's assertion, the Permit set forth a final, appealable determination that a limited discharge of phosphorus into impaired waters was permissible and that the limitation that the Applicant was expected to achieve was that imposed by state statute, 10 V.S.A. §1266a or Act 51. Whether or not ANR made the correct determination concerning applicable legal standards -- federal or state -- is a question the Board has no jurisdiction to decide. This is because issues (1), (2), and (3), stated at pages 3-4 supra, have *not* been timely raised by CLF.[7] What *is* properly before the Board is the limited question of whether the June 2000 Guidelines, an addendum to the Amended Permit, are in compliance with Act 51, the enabling statute for the Applicant's off-site, non-point source phosphorus reduction plan. In the Board's opinion, this is a narrow question and one requiring both an evidentiary hearing and briefing. Accordingly, the Board has determined that the remaining issue (4) on page 4, supra, should be reframed to state: As a matter of law *and fact*, do the June 2000 Guidelines comply with Act 51 and, if not, why not?

B. Whether CLF is barred from raising one or more of the above issues if it did not raise them in the ANR proceeding below?

The Applicant's second objection is that CLF has raised issues before the Board which were not raised in proceedings before the ANR. The Town asserts that since CLF did not raise certain issues during hearings or public comment periods before the ANR, it is precluded from doing so on appeal. Therefore, the Applicant asks the Board to strike certain portions of CLF's Memorandum of Law regarding the Project's failure to comply with federal law or certain sections of the VWQS and dismiss the issues to which these sections are addressed.

The Board does not need to reach the merits of the Applicant's second objection, because it has already concluded that issues (1), (2), and (3) were untimely raised by CLF in its appeal of the Amended Permit. However, the Board wishes to clarify for the parties in this proceeding, and in others, its view on the general question of whether a party who has failed to offer comment to ANR on specific provisions of a draft permit is barred from raising its concerns in an appeal of the final permit.

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[7] Nevertheless, the Board notes for the record that the version of the VWQS applicable to both the Permit and Amended Permit is the 1997 version, since both the initial application and the June 2000 Guidelines were filed with the ANR prior to the effective date of the 2000 VWQS, which was July 2, 2000. See, e.g., ANR document (5) identified at 2, supra (June 2000 Guidelines filed by Applicant on June 6, 2000).

The Board has never dismissed or limited the scope of an appeal simply because an interested person offered no comment or only some comment with respect to a draft permit. This is because ANR's permit process, unlike a District Commission proceeding, is not a contested case hearing comporting with the requirements of the Vermont Administrative Procedure Act, 3 V.S.A. ch. 25. Compare In re Taft Corners Associates, 160 Vt. 583, 591-93 (Environmental Board has no jurisdiction to decide issues regarding criteria that were not before the District Commission and not ruled upon by it). Rather, ANR uses an informal notice-and-comment decision making process that does not contemplate that a complete evidentiary record will be developed in support of or in opposition to the issuance of a permit. The Water Resources Board is, in fact, the *first* administrative forum where a party has a right to raise and brief issues, present and challenge evidence, cross-examine witnesses, and have a decision supported by a record. Accordingly, the Board has generally taken a liberal view in hearing issues timely raised by an appellant which are within the Board's jurisdiction, which are within the ambit of the applicable law, and which are arguably raised by the subject matter of the permit under appeal. By its action in this matter, the Board does not depart from its prior practice in this regard.

IV. CONCLUSION

The Board concludes that issues (1), (2) and (3), referenced in Section II. above, have not been timely raised and should be dismissed. Furthermore, the Board concludes that the only issue properly before the Board is: Whether, as a matter of law and fact, the June 2000 Guidelines comply with Act 51 and, if not, why not.

V. ORDER

It is hereby ordered:

1. Issues (1), (2), and (3) identified in Section II., at pages 3-4, were not timely raised by CLF in its Notice of Appeal and are therefore dismissed.

2. Issue (4) identified in Section II. at page 4 was timely raised and is therefore properly before the Board for decision. The Board determines, however, that this issue is a mixed question of law and fact and therefore it modifies the issue as follows: Whether, as a matter of law and fact, the June 2000 Guidelines comply with Act 51 and, if not, why not.

3. Consistent with Item 2 above, the Board directs the parties to brief the above-stated issue and prefile any evidence addressing its merits according to a Scheduling Order to be issued this day by the Board's Chair.

Dated at Montpelier, Vermont, this 2nd day of May, 2001.

WATER RESOURCES BOARD

/s/ David J. Blythe
David J. Blythe, Chair

Concurring:
Lawrence H. Bruce, Jr.
Jane Potvin
Mardee Sánchez

Recused:
John D.E. Roberts