

**State of Vermont
WATER RESOURCES BOARD**

**RE: Town of Shoreham Wastewater Treatment Facility
Docket No. WQ-00-11 (DEC Amended Permit #3-1459)**

**Authority:
10 V.S.A. § 1269**

**MEMORANDUM OF DECISION
ON MOTION TO DISMISS**

This decision pertains to a Motion to Dismiss filed by the Town of Shoreham (“Applicant” or “Town”) in the above-captioned appeal. As described in more detail below, the Water Resources Board (“Board”) denies the Motion to Dismiss. The Board shall convene an evidentiary hearing concerning the pending Issue, consistent with a revised Scheduling Order issued by the Chair this day.

I. BACKGROUND

On May 2, 2001, the Board issued a Memorandum of Decision on Preliminary Issues, the outcome of which was to narrow the issues in the above case to one question: Whether, as a matter of law and fact, the Town of Shoreham’s June 2000 Guidelines (“June 2000 Guidelines”) comply with Act 51 and, if not, why not (“Issue”). On that same date, Board Chair David J. Blythe issued a Scheduling Order to govern the filing of prefiled evidence and various pleadings in anticipation of a July 10, 2001 hearing in this matter.

In accordance with the Scheduling Order, the parties duly filed prefiled direct evidence during May 2001. Prior to the deadline for filing prefiled rebuttal evidence, the Applicant, on June 7, 2001, filed a Motion to Dismiss in which the Addison County Regional Planning Commission (“RPC”) and Shoreham Landowners¹ joined. This was promptly followed by requests from the Shoreham Landowners and the Agency of Natural Resources (“ANR”), filed on June 7 and 8, 2001, respectively, to stay the Scheduling Order pending a Board decision on the Motion to Dismiss.

On June 8, 2001, the Chair granted a stay of the Scheduling Order and issued a new order providing for the filing of requests for oral argument and legal memoranda in response to the Motion to Dismiss (“Chair’s Order”). The Chair’s Order set June 21, 2001, as the deadline for legal memoranda supporting or opposing the Motion to Dismiss and July 2, 2001, as the deadline for the filing of any responsive legal memoranda.

On June 21, 2001, Appellant Conservation Law Foundation (“CLF”) filed a Memorandum in Opposition to the Motion to Dismiss. No party filed a responsive legal memorandum on or before July 2, 2001.

¹ Robert Growney, Joseph and Deborah Kelley, Paul and Rene Saenger, and William and Carleen Telgen, all granted party status pursuant to WRB Rule 25(C).

The Board convened oral argument in this matter on July 10, 2001, at the Shoreham Fire House, Shoreham. Those parties presenting argument were the Applicant and CLF. Present but not participating were ANR, Shoreham Landowners, and the RPC.

The Board deliberated on July 10 and 31, 2001. This matter is now ready for decision.

II. DISCUSSION

The question posed by the Motion to Dismiss is whether the passage of Section 47a of Act 61 moots the Issue before the Board, thereby requiring dismissal of this appeal.

The amended discharge permit at issue in this appeal, DEC Permit #3-1459 (“Amended Permit”) was issued by ANR to the Applicant on November 9, 2000, and appealed to the Board by CLF on December 8, 2000. See Memorandum of Decision on Preliminary Issues at 1 (May 2, 2000).

Section 47a, entitled “Shoreham Nonpoint Source Phosphorus Control Plan,” was one of several amendments to state environmental statutes approved by the General Assembly as part of the 2001 Capital Construction Act (“Act 61”). Section 47a of Act 61 was signed into law on June 16, 2001, and became effective upon passage. Act No. 61, § 90(a). See attachment to CLF’s Memorandum in Opposition to the Motion to Dismiss.

The Applicant argues that the appeal presently pending before the Board is now moot by virtue of the passage Section 47a of Act 61. It argues that the General Assembly, in passing Section 47a, intended to confirm or validate the Town’s participation as a pilot project under Act 51 (1997). The Applicant, however, further asserts that Section 47a of Act 61 contains a conclusive, substantive determination by the General Assembly that the June 2000 Guidelines -- the Guidelines before the Board -- successfully satisfy all of the “legal requirements” of Section 5 of Act 51 (1997). Accordingly, the Applicant argues that Section 47a effectively moots the Issue before the Board and therefore requires the Board to dismiss this appeal.

CLF, in response, argues that the passage of Section 47a of Act 61 has no effect on the pending appeal. First, it argues that Section 47a, while it may confirm the Town’s right to participate as a pilot project under Act 51, does not alter the substantive requirements of Act 51 or the determination that must be made by the Board as to whether the June 2000 Guidelines comply with those substantive requirements. Second, CLF argues that Section 47a, as new legislation, is “barred” from affecting the pending appeal, given the proscription in 1 V.S.A. § 213

and case law interpreting that statute and the vested rights doctrine. Finally, CLF argues that if Section 47a were deemed to be substantively dispositive of the Issue under appeal, such legislative act would constitute an unconstitutional interference by the General Assembly in the quasi-judicial functions of the Board under the separation of powers doctrine.

The Board has no authority to rule on the constitutionality of a statute. Re: Husky Injection Molding Systems, Inc., MLP-98-06, Memorandum of Decision at 13 (Feb. 22, 1999). It can, however, interpret a statute's provisions so as to support its validity, fulfill the Board's charge to regulate proposed activities affecting public waters, and achieve a rational result. Id.

Accordingly, the Board must turn to the express language of Section 47a of Act 61 and the statutes referenced therein. The text of Section 47a states:

(a) The general assembly finds the following:

- (1) Phosphorus entering Lake Champlain must be reduced;
- (2) The state's primary strategy for phosphorus reduction has been through imposition of technological controls on municipal and industrial wastewater discharges;
- (3) In order to achieve further reductions in phosphorus to Lake Champlain in a cost-effective manner, reductions in nonpoint sources of phosphorus must be explored;
- (4) Section 5 of No. 51 of the Acts of 1997 authorizes the agency of natural resources to conduct two pilot programs to investigate the use of nonpoint phosphorus reduction methods as an alternative to requiring expensive phosphorus controls for municipal wastewater treatment facilities of less than 50,000 gallons per day;
- (5) The Town of Shoreham elected to participate in the pilot program, and adopted or dated its "Guidelines for Nonpoint Source Phosphorus Reduction" Plan on June 6, 2000; and
- (6) The agency of natural resources issued an amendment to the wastewater discharge permit for the Shoreham wastewater treatment facility on November 9, 2000, and accepted Shoreham's participation in the pilot program and its plan adopted or dated June 6, 2000, as authorized by Sec. 5 of No. 51 of the Acts of 1997.

(b) Based on the findings in subsection (a) of this section, the general assembly concludes that the Town of Shoreham's "Guidelines for Nonpoint Source Phosphorus Reduction" Plan adopted or dated June 6, 2000 successfully satisfies all legal requirements for

participation in the pilot program under Sec. 5 of No. 51 of the Acts of 1997 and the requirements of section 1266a of Title 10.

(Emphasis added.)

Applying the “plain meaning” rule of construction to Section 47a of Act 61, it is apparent that the General Assembly intended to find the Applicant eligible for participation in the pilot program authorized by Section 5 of Act 51 (1997). Even CLF does not challenge the legislative determination that the Applicant can participate as an Act 51 pilot project and that ANR has chosen the Applicant for that purpose. However, the sticky question before the Board is whether the legislative conclusion in Section 47a that the June 2000 Guidelines “satisfies all legal requirements for participation in the pilot program under Sec. 5 of No. 51 of the Acts of 1997 and the requirements of section 1266a of Title 10” is a conclusion that those Guidelines satisfy the substantive standards of Act 51, thereby foreclosing review of the Issue presently pending before the Board. The Board concludes that Section 47a cannot be read to have this effect.

Section 5 of Act 51 (1997) states the following:

Sec. 5 Pilot Project on Cost-Effective Off-Site Mitigation of Phosphorus Discharges from Small, Municipally-Owned Treatment Plants

(a) The agency of natural resources may conduct a pilot project to involve no more than two municipally-owned treatment plants that each discharge less than 50,000 gallons per day, and that are initially permitted after July 1, 1991. Treatment plants selected by the agency to participate in this pilot project shall not be subject to the provisions of 10 V.S.A. section 1266a which establish for certain discharges a monthly average phosphorus concentration limit of 0.80 milligrams per liter. Instead, exempt plant permits issued subject to that section shall require implementation of a plan for a cost-effective, off-site reduction in phosphorus loadings for each year the plant operates. The net reduction in phosphorus loading in the affected basin, as a result of the cost-effective, off-site mitigation efforts implemented under the plan, shall be equal to or exceed the extent to which the discharge from the plant exceeds the monthly average phosphorus concentration

(Emphasis added.)

Title 10 V.S.A. § 1266a states in relevant part:

No person directly discharging into the drainage basins of Lake Champlain or Lake Memphremagog shall discharge any waste which contains a phosphorus concentration in excess of 0.80 milligrams per liter on a monthly average basis. The secretary of natural

resources shall establish a schedule for municipalities that requires compliance with this section at a rate that corresponds to the rate at which funds are provided under 10 V.S.A. § 1625(e). To the extent that funds are not provided to municipalities under that section, municipal compliance with this section shall not be required. . . .

Reading the three statutes together, the Board concludes that the General Assembly determined that the Town of Shoreham wastewater treatment facility qualified as one of two municipally-owned facilities eligible for participation as an Act 51 pilot project in lieu of meeting the in-plant phosphorus discharge standard set by 10 V.S.A. §1266a, by virtue of the Town's election to adopt an off-site phosphorus reduction plan and ANR's acceptance of that plan as part of the Town's amended discharge permit. The Board concludes, however, that eligibility to participate as a pilot project does not equate with compliance with the substantive standards for phosphorus reduction contemplated by Act 51. Had the General Assembly wished to achieve that result, it could have expressly amended Act 51 to so provide or included language in Section 47a of Act 61 designed to supersede Act 51's substantive requirements as applied to the Applicant by including language to the effect, "notwithstanding any provisions of law to the contrary." It did neither.

The substantive requirements of Section 5(a) of Act 51 can be summarized as follows:

- (1) the plan must be implemented (i.e.: implementable) "for a cost-effective, off-site reduction in phosphorus loadings for each year the plant operates;" and
- (2) the plan must achieve a net reduction in phosphorus loading in the affected basin; and
- (3) the phosphorus reduction achieved through implementation of cost-effective, off-site mitigation efforts called for by the plan "shall be equal to or exceed the extent to which the discharge from the plant exceeds the monthly average phosphorus concentration limit of 0.80 milligrams per liter."

Compare with CLF's Memorandum in Opposition to the Motion to Dismiss at 3.

To determine whether the June 2000 Guidelines meet the above standards requires the type of particularized fact finding that can only occur as result of a contested case proceeding or hearing convened by an agency or court with jurisdiction to hear the matter. The present appeal is such a proceeding and, in accordance with 1 V.S.A. § 213, a new act of the general assembly cannot change the substantive standards affecting an action begun or pending at the time of the

act's passage.²

At oral argument, the Applicant characterized Section 47a of Act 61 as a "remedial" statutory "amendment," under 1 V.S.A. § 214(b)(4),³ falling within the exception to the general rule that an amendment to a statute does not apply to cases that are pending at the time of the effective date of that statutory amendment. In support of this argument, the Applicant referred the Board to Myott v. Myott, 149 Vt. 573 (1988) (hereinafter, "Myott").

The Board, however, finds no support for either the Applicant's reading of 1 V.S.A. § 214(b)(4) or the applicability of the Myott decision to this proceeding. First of all, Section 47a of Act 61, on its face, does not purport to amend Section 5 of Act 51, as noted above. However, even if it were construed as an amendment to Act 51, it could not apply to the case in progress if it would affect a pre-existing "right, privilege, obligation or liability." Myott at 576. Under Act 51, any municipality qualifying as a pilot project has a statutory obligation to comply with the substantive standards of that act. Indeed, the Myott case does not support the Applicant's position in that it involved a child custody case and a determination by the Supreme Court that the judge below had not abused his discretion in failing to apply a new statute, since the statute at issue worked no fundamental change in the standards under which custody was to be considered and, in retrospect, the court found that the change in the law had no impact on the outcome of the case. Were the Board to construe Section 47a of Act 61 as the Applicant suggests, it would completely vitiate the present proceeding and the need for a determination that the June 2000

² Title 1 V.S.A. § 213 states:

Acts of the general assembly, except acts regulating practice in court, relating to the competency of witnesses or to amendments of process or pleadings, shall not affect a suit begun or pending at the time of their passage.

(Emphasis added.)

³ Title 1 V.S.A. § 214(b) states, in relevant part:

The amendment or repeal of an act or statutory provision, except as provided in subsection (c) of this section, shall not:

(4) Affect an suit, remedy or proceeding to enforce or give effect to any right, privilege, obligation or liability acquired, incurred or accrued under the amended or repealed provision prior to the effective date of the amendment or repeal; and the suit, remedy or proceeding may be institute, prosecuted or continued as if the act of provision had not been repealed or amended.

Guidelines comply with state statutory standards intended to protect the water quality of Lake Champlain.

Accordingly, the Board concludes that the passage of Section 47a of Act 61 did not and could not moot the Issue before the Board. Dismissal of this appeal is, therefore, not required.

IV. ORDER

It is hereby ordered:

- (1) The Applicant's Motion to Dismiss is denied; and
- (2) The Board shall convene an evidentiary hearing to decide the pending Issue, consistent with a revised Scheduling Order issued by the Chair on this day.

Dated at Montpelier, Vermont, this 31st day of July, 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