

**State of Vermont
WATER RESOURCES BOARD**

**RE: Hinsdale Farm
Docket No. DAM-02-09**

MEMORANDUM OF DECISION

An appeal from a decision of a natural resources conservation district with respect to an application for an agricultural dam permit is dismissed for lack of jurisdiction.

I. Procedural Background

On August 19, 2002, the Winooski Natural Resources Conservation District (WNRCD), issued an agricultural dam permit (Permit) for the construction of a dairy waste storage facility to Hinsdale Farm in the Town of Charlotte, Vermont, pursuant to section 1083a of Vermont's Dams Act, 10 V.S.A. § 1083a. Pursuant to section 1099 of the Dams Act, 10 V.S.A. § 1099, Citizens for Safe Farming, Inc., William J. and Bonnie F. Bly, Bethany and Shawn Bedard, and Steven and Jane Ann Kantor (Appellants) appealed the Permit to the Water Resources Board (Board) on September 17, 2002. The Notice of Appeal asserts that the Permit was issued in error because it does not serve the public good, adversely affects scenic and recreational values, adversely affects water uses, is hazardous to public health, will contaminate ground and surface waters, is inadequately designed, fails to provide public benefits, will diminish property values, and will be a public safety risk. The Notice of Appeal further claims that the Permit was issued without sufficient information and that notice of the permit application and proceedings was insufficient.

In addition to filing their appeal to the Board, the Appellants also appealed the Permit to Superior Court pursuant to Vermont Rule of Civil Procedure 75. In the complaint they filed in Superior Court, the Appellants state they believe jurisdiction over the Permit properly lies with the Board and that they filed their complaint in Superior Court solely as a protective measure.

On October 10, 2002, Board Chair David J. Blythe convened a prehearing conference in this matter at the Board's offices in Montpelier, Vermont. At the prehearing conference, the Chair granted petitions to intervene by the WNRCD and the Town of Charlotte. Hinsdale Farm argued at the prehearing conference that Superior Court has exclusive jurisdiction to resolve the dispute over the Permit and that the Board must therefore dismiss this appeal. The Appellants countered that the Board is the sole forum for determining whether the Permit was lawfully issued. Neither the WNRCD nor the Town of Charlotte took any position on the Board's jurisdiction over the Permit. The Chair framed the jurisdictional issue presented by Hinsdale Farm and the Appellants as follows: "whether the Board has jurisdiction to hear an appeal from a decision of a

natural resources conservation district with respect to an application for an agricultural dam permit.” Prehearing Conference Report and Order at 9 (Oct. 18, 2002).

The Board’s jurisdiction over the Permit is a threshold issue. Accordingly, the Chair decided at the prehearing conference that all other issues in this case would be addressed, if necessary, after the Board decides whether it has jurisdiction over an agricultural dam permit appeal. The Prehearing Conference Report and Order established a schedule for the parties to file briefs and reply briefs on this issue. The Appellants and Hinsdale Farm each filed briefs and reply briefs in accordance with the schedule established by the Prehearing Conference Report and Order. No briefs were received by the WNRCD or the Town of Charlotte.

On November 19, 2002, the Board convened at the City of South Burlington Municipal Building and heard oral argument from Hinsdale Farm and the Appellants on whether the Board has jurisdiction over an agricultural dam permit appeal. The Board deliberated immediately after the oral arguments on November 19, 2002, and resumed its deliberations on December 10, 2002. This matter is now ready for decision.

II. Issue

Whether the Board has jurisdiction to hear an appeal from a decision of a natural resources conservation district with respect to an application for an agricultural dam permit.

III. Discussion

Under Vermont’s Dams Act, 10 V.S.A. ch. 43, the Public Service Board (PSB) issues permits for dams used to generate hydroelectric power. 10 V.S.A. § 1081. The Agency of Natural Resources, Department of Environmental Conservation (DEC) generally issues permits for other types of dams. *Id.* However, under section 1083a of the Dams Act, natural resource conservation districts (NRCs) issue permits for agricultural dams. In any case, the agency having jurisdiction must approve an application for a dam permit upon finding that the proposed project will serve the public good. 10 V.S.A. § 1086.

The Dams Act expressly provides that decisions of the DEC are appealable to the Board. 10 V.S.A. § 1099(a). The Dams Act also expressly states that actions of the PSB are appealable to the Vermont Supreme Court. 10 V.S.A. § 1099(b). The Dams Act does not state where appeals from actions of the NRCs should be taken. The failure of the Dams Act to specify where appeals from actions of the NRCs should be taken has generated the jurisdictional issue in this case.

It is well settled in Vermont that the jurisdiction of administrative bodies will not be presumed but rather is limited to that which has been conferred upon them by statute. See, e.g., Gloss v. Delaware and Hudson R.R. Co., 135 Vt. 419, 422, 378 A.2d 507, 509 (1977) (citing In re Lake Sadawga Dam, 121 Vt. 367, 370, 159 A.2d 337, 339 (1960) (finding that jurisdiction of public administrative body, unlike that of court of general jurisdiction, will not be presumed but must affirmatively appear in each case)). In keeping with this principle, the Board's enabling legislation provides that the Board "shall take such actions as they are authorized by statutes in the management of the water resources of the state." 10 V.S.A. § 905.

Whether the Board has jurisdiction over appeals from decisions of the NRCs with respect to agricultural dam permits is a question of statutory construction. The objective of statutory construction is to effectuate the intent of the legislature. Thus, if legislative intent can be ascertained on the face of the statute, by its plain meaning, the statute must be applied according to its terms. Town of Killington v. State, 172 Vt. 182, 188, 776 A.2d 395, 400 (2001). However, if a statute is ambiguous, legislative intent may be determined by looking at such matters as legislative history, the policy and purpose of the law, other statutory provisions on the same subject, and the reasonableness of alternative interpretations. See In re Margaret Susan P., 169 Vt. 252, 262, 733 A.2d 38, 46 (1999).

Section 1085 of the Dams Act prescribes different procedures by which the DEC on the one hand and the PSB on the other shall review permit applications. Under section 1085(1), the DEC must "hold a public information meeting . . . to hear comments on whether the proposed project serves the public good and provides adequately for the public safety." (Emphasis added.) On the other hand, the PSB, under section 1085(2), must "hold a hearing . . . to determine whether the project serves the public good . . . and provides adequately for the public safety." (Emphasis added.)

The Dams Act provides that the owners of an agricultural enterprise proposing to construct or alter a dam requiring a permit shall apply to the NRC in which the land is located. "The natural resources conservation districts . . . shall review and approve the applications in the same manner as would the department [DEC]. The districts may request the assistance of the department for any investigatory work necessary for a determination of public good and for any review of plans and specifications." § 1083a(a) (emphasis added). The Dams Act further states, "Notwithstanding the provisions of this section, jurisdiction shall revert to the department when there is a change in use or when there is a change in ownership which affects use." § 1083a(c). "In those cases, the department may . . . hold meetings . . . and issue an order modifying the terms and conditions of approval." Id. With regard to appeals, the Dams Act provides that "A person aggrieved by a decision of the department under this chapter may appeal that

decision to the water resources board within 30 days from its date.” § 1099(a) (emphasis added).

Based on the language of the Dams Act, the Appellants argue that the NRCD issued the permit acting as the DEC. The Appellants reason that the NRCD stands in the shoes of the DEC when the NRCD issues an agricultural dam permit. The Dams Act expressly provides that the Board hears appeals of persons aggrieved by actions of the DEC. The Appellants therefore conclude that since the NRDC acts in the same manner as the DEC when the NRDC issues agricultural dam permits, the Board has jurisdiction over appeals from actions of the NRDC.

Although there is some logic to the Appellants’ argument, the Dams Act does not expressly provide the Board with jurisdiction over appeals from decisions of the NRCDs relating to applications for agricultural dam permits. As the Appellants emphasize, the Dams Act says that the NRCDs shall review permit applications “in the same manner” as the DEC. 10 V.S.A. § 1083a(a). But the Dams Act does not say that appeals from decisions of the NRCDs shall be taken in the same manner as appeals from decisions of the DEC. The statute is silent on how decisions of the NRCDs may be appealed. See 10 V.S.A. § 1099(a).

This case is similar to In re Georgia Pacific Corporation, No. S-11-90Ec (issued Feb. 22, 1990), in which the Essex Superior Court reversed a decision of the Board, holding that the Board did not have subject matter jurisdiction in the case. While decisions of Superior court do not constitute binding precedent, the Georgia Pacific decision does represent persuasive reasoning.

Georgia Pacific arose from the Regulation of Stream Flow Act, 10 V.S.A. ch. 41. Section 1004 of the Regulation of Stream Flow Act, 10 V.S.A. § 1004, authorizes the DEC to issue certifications pursuant to section 401 of the Clean Water Act, 33 U.S.C.A. § 1341, that any discharge from a federally licensed dam will comply with the Vermont Water Quality Standards. Georgia Pacific objected to certain conditions in a section 401 certification that it received from the DEC for a dam that Georgia Pacific operated on the Connecticut River. To seek relief from these conditions, Georgia Pacific appealed the certification to the Board for review. The Board took jurisdiction over the appeal under the Water Pollution Control Act, 10 V.S.A. ch. 47, which grants the Board jurisdiction to hear appeals involving discharges. See 10 V.S.A. § 1269.

The Superior Court held that the Board did not derive authority under the Water Pollution Control Act to review the section 401 certification. At that time, section 1024 of the Regulation of Stream Flow Act provided for appeals to the Board from stream alteration permitting decisions made by the DEC under section 1023, but the statute did not say anything about the DEC’s decisions with regard to section 401 certifications

under section 1004. See Act 67 of 1987 § 7. Shortly after the Superior Court issued its decision in Georgia Pacific, the legislature amended section 1024 to make clear that appeals from the DEC's decisions regarding section 401 certifications under section 1004 are appealable to the Board. See Act 81 of 1991 § 2. Although the Board may have correctly anticipated legislative intent by taking jurisdiction over Georgia Pacific's appeal, the Board did not have jurisdiction over the appeal because jurisdiction had not been "expressly conferred upon it by the legislature." Georgia-Pacific, slip op. at 2. See also In re Agency of Administration, 141 Vt. 68, 75, 444 A.2d 1349, 1352 (1982) (holding that agency must operate within bounds authorized by legislature).

In re Appeal of Verburg/Wesco, EPR-91-03, Order (Vt. Water Res. Bd. Jan. 9, 1992), involved an appeal to the Board of a declaratory ruling issued by the DEC with regard to the flood plain elevation requirements for a development. The DEC's Environmental Protection Rules provided that appeals from declaratory rulings would go to the Board. Although the statute provided that permit appeals were to be taken to the Board, the statute said nothing about appeals from declaratory rulings. Accordingly, the Board held that the DEC's rules lacked authority to give the Board jurisdiction and that the Board did not have jurisdiction over the appeal. See also In re Passumpsic Hydroelectric Project, No. WQ-94-09, Memorandum of Decision (Vt. Water Res. Bd. Aug. 15, 1995) (refusing to expand meaning of Board regulations to extend jurisdiction to matters not within grant of jurisdiction).

In support of their interpretation of the Dams Act, the Appellants cite Kellogg-Hubbard Library v. Labor Relations Bd., 162 Vt. 571, 649 A.2d 784 (1994) (3-2 decision). In that case, the Vermont Labor Relations Board issued an order certifying a certain union as the collective-bargaining unit for a library's employees. The library appealed to Superior Court under Rule 75. Superior Court refused to assert jurisdiction, concluding on the basis of reason and legislative intent that the VLRB's order was directly appealable to the Supreme Court.

The library appealed the Superior Court's jurisdictional decision to the Vermont Supreme Court, and a majority affirmed. Although the VLRB's order was not expressly appealable to the Supreme Court under the controlling statute, similar governmental actions under closely related labor laws were. The majority reasoned that a statute must be construed to carry out legislative intent, even if such construction is contrary to the letter of the statute. Consequently, the majority decided to read the labor relations statutes in pari materia and rejected the library's reliance on the plain meaning rule as "constrained and unreasonable." 162 Vt. at 575, 649 A.2d at 786. The dissent relied on the plain meaning of the statute, which was silent with regard to appeals of VLRB decisions regarding unit certifications. The dissent wrote that "The doctrine of in pari materia is not applicable when the target of two statutes is different." 162 Vt. at 579, 649 A.2d at 789.

Kellogg-Hubbard Library is distinguishable from the matter now before the Board on two grounds. First, Kellogg-Hubbard Library did not use statutory construction to confer jurisdiction on an administrative agency which had not been expressly granted jurisdiction by the legislature. The choice of forums in Kellogg-Hubbard Library was Superior Court or the Supreme Court and did not involve a choice between Superior Court and an administrative tribunal such as the Board. Second, it is not patently unreasonable and obviously contrary to legislative intent that appeals relating NRCD decisions over agricultural dam permit applications go to Superior Court rather than the Board. The jurisdictional scheme involving the administration of dams in Vermont may not be as elegant as the Appellants argue it should be, but it is the function of the legislature, not the Board, to redefine the Board's jurisdiction, if the legislature so chooses.

Hinsdale Farm and the Appellants have provided the Board with extensive arguments and materials relating to the legislative history of the Dams Act. The Board decides, however, that the plain meaning of the Dams Act does not confer jurisdiction upon the Board to decide this appeal. Because the Dams Act is not ambiguous with regard to the Board's lack of jurisdiction over this case, the Board does not need to consider the Dams Act's legislative history.

IV. Order

It is hereby Ordered:

1. The Board does not have jurisdiction to hear an appeal from a decision of a natural resources conservation district with respect to an application for an agricultural dam permit.
2. This appeal is dismissed for lack of jurisdiction.

Dated at Montpelier, Vermont, this 11th day of December, 2002.

WATER RESOURCES BOARD

/s/ David J. Blythe

David J. Blythe, Chair

Concurring:

Lawrence H. Bruce, Jr., Member
Jane Potvin, Member
John D.E. Roberts, Vice-Chair
Mardee Sánchez, Member