

VERMONT ENVIRONMENTAL BOARD
10 V.S.A., Chapter 151

RE: Hawk Mountain Corp. and Our World MEMORANDUM OF DECISION
Sewer Association, Inc. by Motion to Reconsider
F. Ray Keyser, Jr., Esq. Land Use Permit
Keyser, Crowley, Banse & Facey, Inc. #3W0347-EB
P.O. 975
Rutland, VT 05701

On August 21, 1985, the Environmental Board ("the Board") issued its Findings of Fact, Conclusions of Law and Order in regard to the above appeal. On September 5, 1985 (within the time period specified in Board Rule 31(A)) the Agency of Environmental Conservation ("AEC") filed a "Motion to Reconsider" and, at AEC's request, consideration of that motion was deferred to allow AEC the opportunity to prepare briefs and argument. On October 15, AEC filed a Memorandum of Law and on October 16, 1985, the Board convened a public hearing to hear oral argument with respect to the motion. The following were present at the hearing:

AEC by William Griffin, Esq., Assistant Attorney General;
Town of Pittsfield by John D. Hansen, Esq.;

In deliberations following the hearing, the Board determined to deny the Motion. The reasons for this decision are set forth below.

I. ISSUES PRESENTED

While the Board's August 21 decision addressed several different issues, AEC objects only to one portion of that ruling: AEC argues that the Board erred in concluding that it had the authority to decide whether or not the Vermont Water Quality Standards and the provisions of 10 V.S.A., Chapter 47 were applicable to the Hawk project. AEC argues that only AEC and, on appeal, the Water Resources Board ("WRB") have the authority to determine whether or not the discharge permit requirements of 10 V.S.A. § 1263 are applicable to the Hawk project. The Town argues that, in the absence of a WRB decision on the issue, this Board has the power to decide applicability of the Water Quality Standards and Chapter 47 of Title 10.

II. DENIAL OF MOTION

The AEC Motion to Reconsider is denied for the following reasons, in addition to those previously set forth on page 16 of our August 21 decision.

A. Inherent Powers of the Board

As AEC has stated:

A public administrative authority has only such powers as are expressly granted by the legislature, together

with those implied as necessary for the
full exercise of those granted.

N.H.-Vt. Physician Service v. Commissioner of Banking and Insurance, 132 Vt. 592, 596 (1974). The Board is empowered by 10 V.S.A. § 6089 to hold de novo hearings on all issues identified in appeals brought from decisions of the district commissions. Before granting a permit on appeal, the Board is required to make all findings set forth in the ten criteria of 10 V.S.A. § 6086(a). Criterion 1 (§ 6086(a) (1)) states, in part:

. . . the board .. shall find that
the subdivision or development:

(1) Will not result in undue water
or air pollution. In making this
determination it shall at least consider:

. . . the applicable health and water
resources department regulations.

. . .
(B) Waste disposal. A permit will
be granted whenever it is demonstrated
by the applicant that ... the develop-
ment or subdivision will meet any
applicable health and water resources
department regulations regarding the
disposal of wastes

The Town raised the issue of the project's conformance with the WRB's Water Quality Standards ("Standards") adopted pursuant to 10 V.S.A. § 1252(c). 10 V.S.A. § 6086(a) (1) is silent with regard to the question: who should decide which regulations are applicable? The Board is not expressly authorized to answer this question. However, we conclude that because we must decide whether or not a project complies with applicable regulations, and because 10 V.S.A. § 6086(d) provides that regulatory permits are not a conclusive answer to the latter question, we must of **necessity** have the implied power to decide which regulations are applicable, unless (as we note below), the body responsible for adopting and interpreting the Standards has addressed the issue. We do not see how the Commissions and the Board could discharge their obligations under Criterion 1(B) unless they are free to decide what regulations apply and what regulations do not apply. This is especially the case where, as here, the agency which authored the rules in question is not a party to these proceedings.

B. Water Resources Board Jurisdiction.

10 V.S.A. § 1252 confers on WRB the exclusive authority to adopt Water Quality Standards and to issue declaratory rulings with regard to those standards. We cannot agree with AEC that

we must defer to AEC's interpretation of those Standards; while AEC is responsible for administration of the discharge permit program (see 10 V.S.A. §§ 1258, 1263, 1264 and 1265), the Standards fall within the WRB's purview.

Had the WRB previously determined the applicability of the Standards to the Hawk project or had the Standards specifically created an exemption for indirect discharges from land-based, sub-surface disposal systems, we would defer to the WRB's primacy in this area. Further, had Hawk or AEC requested a stay of the Board's proceedings to allow the pursuit of a declaratory ruling request before the WRB, we may well have acted favorably on that request. If at any point the WRB determines through declaratory ruling or otherwise that the Water Quality Standards are inapplicable to the Hawk project, we will withdraw our decision with regard to that issue in deference to the WRB's jurisdiction./1/

Absent a determination by the WRB, the parties left this Board with its statutory responsibility to decide conformance with water resources regulations and the first step in that inquiry must of necessity be the selection of applicable regulations. Because the burden of proof under Criterion 1 lies with the Applicant (see 10 V.S.A. § 6088) it was incumbent upon Hawk to secure a determination from the WRB or persuade this Board that the Standards do not apply.

C. AEC Certification Decision

The AEC brief states: "The only issue raised by this motion is whether the Board has authority to overrule the Agency's decision." We expressly do not overrule any decision made by AEC concerning Hawk. AEC issued Hawk a certification of compliance under the Board of Health Regulations. This "decision" was not a determination, based upon factual investigation, concerning whether or not the project would cause a direct or indirect discharge of waste to the Tweed River. Rather, as AEC representatives testified, through an interpretation of the Water Quality Standards in conjunction with the Board of Health Regulations, AEC has, in the past, established as general administrative policy that no discharge permit is required for (and the Standards do not apply to) a project which conforms with the Board of Health Regulations.

/1/ In view of the WRB's decision in Re: Appeal of Vermont Natural Resources Council and Connecticut River Watershed Council, issued October 10, 1985, to which AEC refers' we doubt the WRB would disagree with our conclusions.

Thus, the "decision" to which AEC refers is a general interpretation of the WRB Standards and Chapter 47. While the AEC reading of these provisions is entitled to some weight, it is the WRB opinion with regard to these matters which is controlling.

AEC also suggests that the Town should have exercised its right to appeal the AEC "decision" pursuant to 10 V.S.A. § 1269. However, we are not sure that this remedy was available to the Town. It is not clear from the record whether the Town received notice of the filing of Hawk's certification application or received notice when the certification was issued. Even had the Town received the document, condition #5 of the certification would lead a reasonable person to conclude that the Standards and Chapter 47 are applicable to the Hawk project. AEC also suggests that the Town could have requested a declaratory ruling from the WRB on this issue. However, in view of the Supreme Court's sentiments concerning the use of the latter procedure in lieu of appeal mechanisms provided by statute (see In re State Aid Highway No. 1, Peru, Vermont, 133 Vt. 4 (1974)) it is not at all clear that the declaratory ruling route was available to Pittsfield.

Finally, the AEC's process for reviewing certification applications does not invite public participation by affected municipalities and other interested parties. No notice is provided that an application has been filed, no public hearing is convened, there is no provision for involvement by parties other than the applicant during the course of application review, and notice of permit issuance and notice of appeal rights are not provided. If the AEC review process included these provisions we might be more inclined to foreclose Pittsfield from addressing before the Board the question of the applicability of the Standards to the Hawk project.

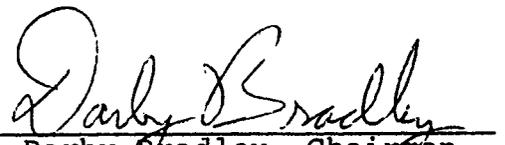
III. ORDER

The Agency of Environmental Conservation's Motion to Reconsider is denied.

Dated at Montpelier, Vermont **this 30th day** of October, 1985.

VERMONT ENVIRONMENTAL BOARD

By:


Darby Bradley, Chairman

Lawrence H. Bruce, Jr.
Jan S. Eastman
Samuel Lloyd
Roger N. Miller
Donald B. Sargent