

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

RE: IBM Corporation  
Application #4C0354-2-EB (Interlocutory)

MEMORANDUM OF DECISION

This decision pertains to a motion for interlocutory appeal filed by International Business Machines Corporation (IBM) on March 20, 1992. For the reasons explained below, the Environmental Board concludes that the appeal does not meet the standards for an interlocutory appeal enumerated in Board Rule 43 and denies the motion.

I. BACKGROUND

On February 25, 1992, IBM submitted a permit application to the District #4 Environmental Commission for the construction of a wastewater treatment facility to replace the sanitary portion of the existing treatment facility at the IBM plant in Essex Junction. Prior to submitting the completed application, IBM filed a written request with the Chair of the District Commission, pursuant to Rule 11(E), to waive all application fees except for the minimum \$25 amendment fee and costs of publication and recording.

On March 10, the Chair of the District Commission issued a Memorandum of Decision denying IBM's request to waive the application fee. The Chair concluded that the application did not meet the standards for waiving the fee as provided in Rule 11(E). Rule 11(E) states:

(E) In the event that an application involves a project or project impacts that previously have been reviewed, the applicant may petition the chairman of the district commission to waive all or part of the application fee. The chairman may waive all or part of the fee if he or she finds that the impacts of the project have been reviewed in an applicable master permit application, or that the project is not significantly altered from a project previously reviewed, and that there will be substantial savings in the review process due to the scope of review of the previous application (Added, effective March 11, 1982).

On March 20, IBM filed a motion for interlocutory appeal through its attorney, Gregg H. Wilson. On April 13, the Board sent notice to interested persons and provided an opportunity to respond. No responses were submitted and the Board deliberated on April 22, 1992.

EB 541

---

## II. DECISION

Board Rule 43 provides that an appeal may be taken from any interlocutory order or ruling of a district commission "if the order or ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal may materially advance the application process. ... The appeal shall be limited to questions of law."

The Board interpreted the Rule 43 standards in Re: Manle Tree Place Associates, #4C0775-EB, Memorandum of Decision (Dec. 22, 1988). In that decision, the Board ruled that a "question of law" is one where no facts are required to resolve the issue or where a factual record has been developed by the district commission in a manner that allows the Board to assure the relevant facts without engaging in factual determinations. Manle Tree Place at 9-11.

It appears that in order to determine whether the fee should be waived, the Board would have to decide whether or not the project is "significantly altered from a project previously reviewed." Rule 11(E). This determination requires a comparison of the previously reviewed project and the proposed project. The Board has not been provided with a factual record sufficient to determine the relevant facts without engaging in factual determinations to make the comparison. Thus the Board must conclude that this appeal concerns questions of fact and not law, and that the standards of Rule 43 are therefore not met.

## III. ORDER

1. The motion for interlocutory appeal is denied.
2. If IBM wishes to pursue an appeal of the District Commission Chair's decision not to waive the fee, IBM may pay the fee "under protest" and the District Commission's decision will be issued. IBM may then bring an appeal of the decision not to waive the fee to the Board pursuant to Rule 40. If IBM receives a final decision from the Environmental Board or, on appeal, the Supreme Court, reversing the District Commission Chair's decision not to waive the fee, the fee will be refunded to IBM.

IBM Corporation  
Application #4C0354-2-EB  
(Interlocutory)  
Memorandum of Decision  
Page 3

Dated at Montpelier, Vermont, this 4th day of May,  
1992.

ENVIRONMENTAL BOARD

  
Elizabeth Courtney  
Ferdinand Bongartz  
Terry Ehrich  
Lixi Fortna  
Arthur Gibb  
Samuel Lloyd  
Charles Storrow

a:ibm (520)