

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. SUCV2010-04156-A

EEL RIVER WATERSHED ASSOCIATION, LTD.,
Plaintiff

v.

KENNETH L. KIMMELL, COMMISSIONER,
MASSACHUSETTS DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
COMMONWEALTH OF MASSACHUSETTS,
Defendants

MEMORANDUM OF DECISION ON PLAINTIFF'S MOTION FOR
JUDGMENT ON THE PLEADINGS

The plaintiff, Eel River Watershed Association ("Association"), brings this action against the defendants, Kenneth Kimmell, Commissioner of the Massachusetts Department of Environmental Protection ("DEP") and the Commonwealth of Massachusetts seeking review pursuant to G. L. c. 30A § 14 of decisions of the DEP relating to discharge limits for nitrogen and phosphorous in the Eel River watershed in Plymouth. The Commissioner's final administrative decision in 2010 upheld the 2008 groundwater discharge permit and rejected the Association's contention that the DEP erred in determining that explicit limits on nitrogen discharge were unnecessary. For the reasons set forth as follows, the plaintiff's motion seeking to overturn the DEP's ruling is Denied.

Factual Background

The administrative record before the court shows the following facts. In the late 1980's,

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the Commonwealth took action against the Town of Plymouth for alleged violations of the Clean Waters Act based upon the Plymouth wastewater treatment facility's failure to meet the standard for ocean discharge of effluent. Since that time, the Association has made an objection concerning issues related to the Eel River's capacity to assimilate nutrients without degrading the river's water quality. The Town of Plymouth and the Pinehills, a company specializing in residential and commercial development, had applied for groundwater discharge permits before March 1999, when the Eel River Nutrient Technical Advisory Committee ("TAC") composed a report that served as a pre-discharge comparison. That report recommended that the Town of Plymouth and the Pinehills, be allowed to discharge large quantities of nutrients into the groundwater of the Eel River watershed.

Nutrient increases in water may result in excessive growth of aquatic plants and depletion of oxygen levels in the water. It is for that reason that limits are placed upon the presence of chemicals that are responsible. The parties do not dispute that such excessive plant growth is spurred by the presence of the elements nitrogen and phosphorous in a particular ratio to one another. With respect to the Pinehills and other residential developments throughout the watershed, the TAC report found that the expected increase in nitrogen would be very large due to the mobility of nitrogen in the groundwater, while the presence of phosphorous would be lessened due to its absorption into soil. The TAC report concluded that it was impractical to try to prevent excess nitrogen levels from being discharged into the ground, and therefore it did not recommend a limit for nitrogen discharge. However, the TAC report did recommend a zero discharge policy for phosphorous as a means to inhibit plant growth since it was the more limited

nutrient in the water.

Following the TAC report, in 2000, the DEP issued permits to the Pinehills and the Town of Plymouth. The Association appealed these permits because they purportedly violated the antidegradation provisions of 314 C.M.R. 4.04(1) and (2). The DEP settled the appeal and issued a revised groundwater discharge permit which greatly reduced the quantity of nitrogen discharged into the groundwater. In 2008, the DEP reissued the groundwater discharge permit, and the Association appealed the permit. A two day hearing was held on July 21 and 22, 2009. The Commissioner of the DEP in her final decision on September 24, 2010 upheld the recommended final decision from August 23, 2010, which concluded that the 2008 groundwater discharge permit should be sustained because it properly established effluent limitations and, in conjunction with the nutrient management plan, was sufficient to protect the existing water quality.

Legal Standard

The standard of review which governs appeals of a decision by an administrative agency under c. 30A requires that it be set aside only if based upon error of law or if unsupported by substantial evidence. *Dube v. Retirement Appeal Board*, 50 Mass. App. Ct. 21, 23 (2000). In undertaking its review, the court is limited to the administrative record, c. 30A § 14(7), and the party appealing the agency decision bears the burden of establishing the invalidity of that decision. *Merisme v. Board of Appeal on Motor Vehicle Liability Policies and Bonds*, 27 Mass. App. Ct. 470, 474 (1983). Further, a reviewing court is not permitted to substitute its own judgment for that of the agency. *Southern Worcester County Vocational Regional High School v.*

Alcoholic Beverages Control Comm., 386 Mass. 414, 420-21 (1984). A reviewing court may not displace an agency's choice between two fairly conflicting views, even though the court would justifiably have made a different choice were it deciding the matter *de novo*. *Zoning Board of Appeals of Wellesley v. Housing Appeals Comm.*, 385 Mass. 651, 657 (1982). Rather, the court in conducting its review must give due weight to the experience and specialized knowledge of the agency, as well as the discretionary authority conferred upon it, and should defer to the agency on questions of fact and inferences drawn from the record. *Cobble v. Commissioner of the Dep't of Social Services*, 430 Mass. 385, 390 (1999), citing *Flint v. Commissioner of Pub. Welfare*, 412 Mass. 416, 420 (1992).

Ruling

The plaintiff alleges that the Commissioner's final decision is contrary to law because it does not establish discharge limitations for both nitrogen and phosphorous under 314 C.M.R. 6.07(2) and because it does not meet the antidegradation provisions of 314 C.M.R. 4.04 (1) and (2). The flow in the Eel River is predominately derived from groundwater discharge because of the permeable soils present in the watershed. The Eel River is classified as a Class B river with high quality water and receives special protection under the Massachusetts water-quality regulations. The Association argues that in the Eel River, nitrogen serves as a nutrient that may promote algal growth in freshwater portions of the river. The Association argues that it is necessary to consider these effects and to limit both nutrients on the Eel River. The Association argues that despite the TAC's recommended zero discharge policy for phosphorous, the permit does not contain any specific numeric limits for phosphorous discharge, while it does clearly

limit nitrogen concentrations to 10 mg/L.

The Commonwealth counters this argument, noting that the zero discharge policy in the permit requires the Town of Plymouth to monitor and to report the levels of phosphorous, and if it reaches certain levels, then the town is required to take mitigating action. The plaintiff disputes this argument as providing insufficient safeguards, noting that the permit allows an increase of phosphorous of greater than one hundred percent over three months before the Town of Plymouth would be required to meet with the DEP to discuss possible options to maintain the water quality. It further notes that the permit allows a forty percent increase in the concentration of nitrogen. The Association asserts that the supplemental nutrient management plan that was intended to mitigate the consequences of the nutrient load provides only "little more than routine best management practices." According to the plaintiff, this nutrient management plan is deficient because it allows substantial increases in nutrients before the Town of Plymouth and the DEP are mandated to discuss alternatives to mitigate the problem. The Association seeks a declaration that the permit is invalid, a remand of the permit to the DEP for further proceedings and an order requiring clear and enforceable requirements for nutrient load allocations for both nitrogen and phosphorous.

This court's review of the Association's allegations against the DEP's decision is based exclusively on the contents and analysis of the DEP presiding officer's decision, since the Association has failed to provide any transcript of the hearing which would set forth the testimony upon which the administrative decision was based. Under the G. L. c. 30A standard of judicial review, the reviewing court must examine the entire record including the evidence

presented as detailed in the transcript to determine whether the agency based its decision on substantial evidence. *Covell v. Dep't of Social Services*, 439 Mass. 766, 782 (2003). The requirement that the party challenging the agency's decision submit a transcript of the hearing to support its claim that the evidence was insufficient is not a "hypertechnical requirement." *Id.* Based on the Association's failure to present the hearing transcript, any challenge to the DEP decision addressed to this court is by necessity circumscribed, and indeed, the court is warranted in denying the Association's challenge outright. *Id.* at 783. Notwithstanding this procedural hurdle which limits the court's ability to ever conclude that the DEP's ruling did not rest on substantial evidence or was arbitrary and capricious, examination of the Commissioner's decision indicates that it was not erroneously rendered under the standard applicable pursuant to G. L. c. 30A.

The DEP's recommended final decision, which was expressly adopted as the Commissioner's final decision, was based on substantial evidence. The recommended final decision concluded that the DEP properly established effluent limitations and monitoring requirements in the permit. Therefore, the permit and nutrient management plan are sufficient to protect the water quality. As the court determined in *Friends & Fishers of the Edgartown Great Pond, Inc. v. Department of Environmental Protection*, if the permit fully meets the requirements of the groundwater discharge permit program, the Commissioner's decision to uphold this permit will be viewed as reasonable. *Friends & Fishers of the Edgartown Great Pond, Inc. v. Dep't of Envtl. Prot.*, 446 Mass. 830, 845 (2006). Testimony of witnesses from the Association, the town of Plymouth and the DEP, as such was described by the DEP's presiding officer in the

recommended final decision, provided the substantial evidence for upholding the DEP's final decision.

The record before the court reflects that the DEP properly interpreted its regulations with reference to their purpose and the design of the controlling statute. See *Brookline v. Commissioner of the Dep't of Envtl. Quality Eng'g*, 387 Mass. 372, 382 (1982). The first issue before the DEP concerned the discharge limits for nitrogen and phosphorous. The recommended final decision concluded that the DEP considered natural background conditions and ways to prevent interference with the maintenance of beneficial uses in adjacent and downgradient waters. The DEP determined that the Association had failed to provide any evidence to demonstrate that an effluent limit for nitrogen lower than that in the permit was necessary to protect groundwater quality. Further, according to the presiding officer, the Association did not provide any evidence that the present discharge of phosphorous posed a risk to the quality of groundwater. The Association has failed to offer to the court evidence to support its allegation that the current discharge limits and nutrient management plan for nitrogen and phosphorous are insufficient to maintain the Eel River water quality sufficient to undermine the DEP decision.

The Association's second allegation concerned the monitoring of effluent at the point of discharge and the Association's argument that additional nitrogen would be discharged but not recorded in the monitoring reports. However, Plymouth provided sufficient evidence that there was no connection between septage receipt and increased levels of nitrogen and the analysis provided by the presiding officer supports that conclusion. Therefore, the permit met the monitoring requirements and the Association failed to provide evidence to successfully challenge

the permit.

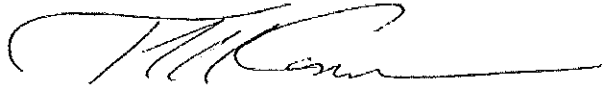
In the recommended final decision, the DEP presiding officer's conclusion that the permit satisfied the antidegradation provisions was supported by substantial evidence. The regulations mandate that existing and designated uses of all waters must be protected and high quality water must be maintained. 314 C.M.R. 4.04(1), (2). The DEP credited the witnesses whom it said had provided up to date scientific views that set forth how to allocate the limitations of nitrogen and phosphorous discharge. The presiding officer in the recommended final decision properly used the total nitrogen to total phosphorous ratio as suggested by DEP witnesses in their testimony in reaching its determination that the Eel River on the Western Branch is phosphorous limited. The presiding officer concluded that based on the evidence presented to her, the permit properly implemented the zero phosphorous discharge policy and its focus on phosphorous was consistent with the theory of nutrient limitation in which the more scarce nutrient is controlled, as a means to promote water quality.

Substantial evidence warranted the DEP's decision to uphold the 2008 permit because the permit met the requirements for the establishment of effluent limitations for monitoring and the antidegradation provisions, as well as the implementation of the nutrient management plan. The DEP ruling did not err in its interpretation of the applicable regulatory framework and it was sufficiently protective of water quality. In short, the DEP, in denying the Association's challenge to the permit, did not reach a decision that was unsupported by substantial evidence nor did it commit error of law.

Order

The plaintiff's motion for Judgment on the Pleadings is Denied.

Date: December 21, 2011

A handwritten signature in black ink, appearing to read 'T. Connors', written over a horizontal line.

Thomas A. Connors
Justice of the Superior Court

Munster, Bridget (DEP)

From: Triplett, Tracy (AGO) [tracy.triplett@MassMail.State.MA.US]
Sent: Tuesday, January 03, 2012 11:16 AM
To: Giorlandino, Salvatore (DEP); Munster, Bridget (DEP); Hartley, Anne (DEP)
Cc: Pardee, Bill (AGO)
Subject: Eel River Watershed Association 30A appeal denied
Attachments: ERWA Memorandum of Decision.pdf

Hi – I've attached a copy of the Superior Court's denial of ERWA's request for judgment on the pleadings in its 30A appeal, DEP docket no. 2008-114. – Tracy

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