Commentary on the Environmental Court of Vermont

Introduction

The Vermont Environmental Court is a trial-level judicial branch court that was created in 1990. As of July of 2010, it has been located within the judicial branch. It is a court of record, with all of the authority of the general civil court within its specialized subject-matter jurisdiction. The Court may issue injunctive orders and stays and may analyze local ordinances and state statutes for constitutionality in the context of cases within the Court’s jurisdiction.

Vermont has no intermediate-level appellate court, so any appeals from decisions of the Vermont Environmental Court go directly to the Vermont Supreme Court. The Court’s procedures are governed by the Vermont Rules for Environmental Court Proceedings. The Court handles approximately 300 cases per year. Trials are held throughout the state, in a courtroom in the area where the case arises, so that the litigants do not have far to travel. Previously, the court had

---


2 In July of 2010, Vermont adopted a unified trial court system in which all of the trial courts (civil, criminal, family, probate, and environmental) have become divisions of a single Superior Court, the trial court named in the Vermont Constitution. It is now officially called the Environmental Division of the Superior Court. This commentary as well as Judge Meredith Wright’s article will use the former name of the court to avoid confusion. The reference to Judge Wright’s article is: Judge Merideth Wright, The Vermont Environmental Court, JOURNAL OF COURT INNOVATION 202 (2010) , http://www.courts.state.ny.us/court-innovation/Winter-2010/JCI_Winter10a.pdf (last visited May 18 2011)


4 This will be discussed in further detail below.
only one environmental judge\(^5\) handling everything on her own for fifteen years. In 2004, an act was passed that would allow for there to be two judges\(^6\) at the Vermont Environmental Court. There are two kinds of cases that the Court does not handle: cases having to do with criminal enforcement and cases having to do with torts because these kinds of cases require juries.

\[Access\,\text{to\,the\,Courts/Standing}\]

The first issue this commentary will address is the availability of access to the courts by removing barriers to sue and whether or not this legislation will enhance access to the courts (and justice). The first clause of Principle 10 of the Rio Declaration on Environment and Development is that: “Environmental issues are best handled with participation of all concerned citizens, at the relevant level.”

Access to the Vermont Environmental Court depends on the nature of the case that is brought to the court. For example, issues of access and standing will depend on whether or not the case deals with 1) state environmental enforcement, 2) state environmental permits or 3) municipal and/or land use law related matters. For state environmental enforcement actions, those persons directly affected can join or come into a lawsuit if the government or a government agency has already brought a case, but they cannot initiate causes of action. The agency that they would most likely go to in this situation is the Vermont Agency of Natural Resources.

---

\(^{5}\) The judge, who was the sole environmental judge presiding over the Environmental Court for fifteen years, was Judge Merideth Wright. She was appointed to the Environmental Court at its creation in 1990. Judge Wright has also worked at the US E.P.A. and for many years at the environmental division of the Vermont Attorney General’s Office.

\(^{6}\) The Environmental Court’s second judge, Judge Thomas S. Durkin, was appointed in January of 2005 as cited in Judge Merideth Wright, The Vermont Environmental Court, JOURNAL OF COURT INNOVATION 202 (2010), http://www.courts.state.ny.us/court-innovation/Winter-2010/ICI_Winter10a.pdf (last visited May 18 2011)
some cases, they might also go to an administrative resources board. For municipal, zoning and planning and land use cases, standing is governed by the Vermont Statutes\textsuperscript{7}.

With regard to municipal cases, it is important to refer to section 4465 “Appeals of decisions of the administrative officer” of Title 24 (Municipal and County Government) and within that Chapter 117 which focuses on Municipal and Regional and Planning and Development. With regard to citizen suits, there are two particular provisions that should be noted. With respect to the definition of an interested person, there are five definitions but in particular definitions (3) and (4) are the ones most referred to. Definition (3) states that an interested person is “a person owning or occupying property in the immediate neighborhood of a property that is the subject of any decision or act taken under this chapter, who can demonstrate a physical or environmental impact on the person's interest under the criteria reviewed, and who alleges that the decision or act, if confirmed, will not be in accord with the policies, purposes or terms of the plan or by law of the municipality.”\textsuperscript{8} Definition (4) states that “any ten persons who may be any combination of voters or real property owners within a municipality listed in subdivision (2) of this subsection who, by signed petition to the appropriate municipal panel of a municipality, the plan or a bylaw of which is at issue in any appeal brought under this title, allege that any relief requested by a person under this title, if granted, will not be in accord with the policies, purposes or terms of the plan or the bylaw of that municipality. This petition to the appropriate municipal panel must designate one person to serve as the representative of the

\textsuperscript{7} Specifically when considering standing with regard to municipal cases one should refer to Sections 8501, 8502 and 8504 of the 2005 Vermont Code, http://law.justia.com/codes/vermont/2005/title10/chapter220.html (last visited May 17 2011)

\textsuperscript{8} 24 V.S.A. § 4465. Appeals of decisions of the administrative officer in Chapter 117: Municipal and Regional Planning and Development of Title 24: Municipal and County Government of the Vermont Statutes Online, http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=24&Chapter=117&Section=04465 (last visited May 17 2011)
petitioners regarding all matters related to the appeal.” It is important to note here, that based on these two rules, in order to have standing persons must either be directly affected or within the zone of interests or be a group, which create narrowly defined standards for standing.

Finally, with regard to state environmental permits and state land use permits, there is broad standing whereby anyone can appeal—either citizens or citizens groups. If citizens groups are getting involved, they have to have at least one member with a particularized interest. With respect to standing with relation to appellate cases, there is an automatic presumption of standing. Issues of standing are dealt with in more detail in the “Procedural Elements” section below with regard to appeals.

### Scientific Knowledge

The next inquiry addresses the question of whether the Rules of the Environmental Court of Vermont facilitate the application of environmental science to decision-making.

There is nothing specifically set out in the requirements of the Vermont Environmental Court that indicates that judges need to have a scientific background. The two judges who are currently the environmental law judges on the Vermont Environmental Court attend continuing judicial education courses to maintain and develop their competency in their ability to understand the specialized environmental laws and to assess scientific and technical evidence. It is recommended however that judges feel comfortable with science and have scientific literacy. Judge Meredith Wright borrowed the following quote from Deputy Chief Justice Adel Omar Sherif of the Supreme Constitutional Court of Egypt when he articulated ever so eloquently that:

---

9 24 V.S.A. § 4465. Appeals of decisions of the administrative officer in Chapter 117: Municipal and Regional Planning and Development of Title 24: Municipal and County Government of the Vermont Statutes Online, [http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=24&Chapter=117&Section=04465](http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=24&Chapter=117&Section=04465)  (last visited May 17 2011)
“This distinction resembles that of an artist, on the one hand, compared with a connoisseur of art, on the other. It is not that a judge needs to be able to actually do the engineering or the hydrogeology or the organic chemistry, but it is extremely important that the judge be able to hear the expert testimony with a critical ear, not just to weigh the testimony according to the credentials of a particular expert.”

Effectiveness

The next factor that must be evaluated is the extent to which the legal process protects nature and improves the environment instead of simply determining that one particular party prevails and the other party does not. The fourth clause of Principle 10 of the Rio Declaration states that, “Effective access to judicial and administrative proceedings, including redress and remedy shall be provided.”

One of the ways in which the Vermont Environmental Court can be measured with regard to its effectiveness is the fact that it has the power to issue injunctive relief. Another remedy with respect to environmental damages is the use of monetary damages which may include a provision requiring a party to pay a certain amount until that property is cleaned up. Finally, Vermont also employs a concept which is known as “recapturing the economic benefit.” This ensures that the criminal penalty amount is not commensurate with the profit that is gained but instead that the penalties are so high that they do in fact act as a deterrent to the person who would potentially be committing the crime. For an analysis of that which is considered when dealing with the issue of assessments, one should refer to §8010 contained within Chapter 201-

---

Administrative Law Enforcement of Title 10 of the Conservation and Development section of the Vermont Statutes Online.  

Procedural Elements

Procedural issues with respect to the environmental courts and tribunals can be evaluated in a variety of ways. This includes general accessibility, the costs in creating environmental tribunals, the efficiency or lack thereof when multiple states in one country have to create environmental tribunals, the existence of an appellate system, the issue of transparency, the existence of online electronic filing systems to make access to the courts logistically easier, and global transparency as a whole. The second clause of the Rio Declaration on Environment and Development is that at the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous activities in their communities and the opportunity to participate in the decision-making process.

There is an appellate procedure whereby the interested potential appellant must timely file a notice of appeals, notify a list of potentially interested parties and notify individuals who participated in the proceeding to which the appeal relates. In addition, appellants must file a statement of questions which establishes the scope of appeal. Generally, appeals are addressed in the Vermont Statutes. Specifically they are addressed in “Section 4471 entitled “Appeal to environmental division” in Chapter 117 entitled “Municipal and Regional Planning and Development” of Title 24 of the Vermont Statutes on Municipal County and Government.”

12 24 V.S.A. §4471 Appeal to Environmental Division of Chapter 117: Municipal and Regional Planning and Development of Title 24: Municipal and County Government of the Vermont Statutes Online,
Important aspects of the appellate system in Vermont is the concept of Consolidated Environmental Appeals (described below) and the detailed rules with respect to the appeals of environmental rules and laws at the municipal and regional planning and development levels.

Consolidated Environmental Appeals are described in sections 8501-8505 which is contained in Chapter 220 of Title 10 Conservation and Development of the 2005 Vermont Code.

The purpose of the Consolidated Environmental Appeals chapter is to 1) consolidate existing appeal routes for municipal zoning and subdivision decisions and acts or decisions of the secretary of natural resources…2) standardize the appeal periods, the parties who may appeal these acts or decisions and the ability to stay any act or decision upon appeal, taking into account the nature of the different programs affected, 3) Encourage people to get involved in the Act 250 permitting process at the initial stages of review by a district commission by requiring participation as a prerequisite for an appeal of a district commission decision to an environmental court and 4) Assure that clear appeal routes exist for acts and decisions of the secretary of natural resources. Within the definition section of the Chapter on Consolidated Environmental Appeals, it is also important to take note of the definition of “person aggrieved” which can be found in §8502(7). According to the Code, an “person aggrieved” means a person who alleges

---

13 2005 Vermont Code- Chapter 220- CONSOLIDATED ENVIRONMENTAL APPEALS (contains §§ 8501-8505)
an injury to a particularized interest protected by the provisions of law listed in section 8503 of this title, attributable to an act or decision by a district coordinator, district commission, the secretary, or the environmental court that can be redressed by the environmental court or the supreme court.

In addition to the concept of consolidated environmental appeals, Vermont also has a unique rule for standing to appeal in municipal cases. According to 24 V.S.A. § 4464 Appeals of decisions of the administrative officer, Section (4) states the following:

“Any ten persons who may be any combination of voters or real property owners within a municipality listed in subdivision (2) of this subsection who, by signed petition to the appropriate municipal panel of a municipality, the plan or a bylaws of which is at issue in any appeal brought under this title, allege that any relief requested by a person under this title, if granted, will not be in accord with the policies, purposes or terms of the plan or bylaw of that municipality. This petition to the appropriate municipal panel must designate one person to serve as the representative of the petitioners regarding all matters related to the appeal.”

Although the Vermont Environmental Court is in the process of developing this further, they are in the process of creating a system where they will have electronic filing procedures. An electronic filing system has already been implemented in two model courts in order to test the process.

Access To Information


²⁴ V.S.A. § 4465. Appeals of decisions of the administrative officer in Chapter 117: Municipal and Regional Planning and Development of Title 24: Municipal and County Government of the Vermont Statutes Online, http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=24&Chapter=117&Section=04465 (last visited May 17 2011)
The concept of access to information is that whereby the public is given access to information that is being decided by a particular court or jurisdiction. The third clause of Principle 10 of the Rio Declaration is that “States shall facilitate and encourage public awareness and participation by making information widely available.” The objective of the Aarhus Convention is that in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public-participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.19

A strong indicator of accessibility to information is the presence of prior decisions online and the ease of being able to access them. Some of the decisions of the Vermont Environmental Court are accessible online on the Court’s website but this is not a comprehensive list of all of the decisions.20 The final decisions are also available on the legal search engine, Lexis Nexis. The environmental court is however in the process of making sure that the decisions are more easily accessible and available.

Although the system to access decisions online is still being updated, the text of decisions is available on disks. Other information is accessible as well and is often accessed by individuals calling up or visiting the courthouse. For unrepresented parties, there is an interesting explanation of summary judgment online.

Traditional measures

How does this legislation/tribunal/court address traditional concerns expressed by courts that litigation is costly and wastes time? Article 9(4) of Aarhus also requires that the procedures be “fair, equitable, timely, and not prohibitively expensive.”

The first measure that will be considered that saves both time and expenses, is the fact that the judges of the Vermont Environmental Court travel throughout the state to hear cases in the jurisdiction where they are brought. There are fourteen counties in the state and within those counties there are one or two courts. That the judges appear where the case arises and/or where the parties are saves money in that the parties do not have to pay for themselves and their attorneys to travel to a particular area and court and do not have to pay for accommodation.

The second cost-cutting and time-saving measure is that the judges in the environmental court hold their pre-trial conferences on the phone. This is done not only to save time and money but to also make sure that each case can have the procedure tailored to it and all of this can be resolved and communicated about during the pre-trial conference. From these pre-trial telephone conferences, the following issues can potentially be determined: 1) whether or not there are legal issues that need to be decided, 2) what needs to take place before the court grants summary judgment in one party’s favor, 3) whether permits are required and 4) whether or not a party has standing to sue. In addition to holding pre-trial conferences on the phone, subsequent conferences can be held on the phone as well. The only exceptions to this are the rare cases where there are forty-five parties or sometimes even as many as one hundred and two parties.

The third cost cutting and time saving measure is the use of alternative dispute resolution. If a case is fact-heavy or has many legal issues, it might get sent to mediation first. The judges
order around 40% of the cases to mediation and of that 60% get resolved. There are times when mediations do not settle everything but they are still helpful in that they help to narrow down the case.

The fourth cost cutting and time saving measure is that with regard to the appeals process, appellants file what is known as a “statement of questions.” This helps to define and narrow the case. In many ways, this is like a complaint but it establishes the scope of the appeal.

History

A final factor one must consider when analyzing environmental acts creating environmental tribunals is that of the rationale which led to the creation of the environmental tribunal.

The Environmental Court was initially created to improve the enforcement of Vermont’s state environmental laws, including the state land use law. Vermont has had strong environmental and state land use laws since the late 1960s and early 1970s, but the enforcement of such laws was uneven for two reasons. The first reason was that each of the laws had different enforcement provisions and the second reason was that the inspection and prosecution of cases differed from certain environmental laws to others.

The Uniform Environmental Enforcement Act was enacted in 1989 to create an environmental enforcement system that is meant to foster the existence of and the public awareness of even-handedness, consistency and predictability in the system. The statute authorized the creation of an environmental court on November 2, 1990. This gave the
environmental agency unilateral order authority. Specifically, under the subject of “legislative findings”\textsuperscript{21} the legislature decided:

“The general assembly finds it necessary to standardize and enhance the enforcement powers of the secretary of the agency of natural resources and the enforcement powers of the land use panel of the natural resources board in order to:

(1) enhance the protection of environmental and human health afforded by existing laws;

(2) prevent the unfair economic advantage obtained by persons who operate in violation of environmental laws;

(3) provide for more even-handed enforcement of environmental laws;

(4) foster greater compliance with environmental laws;

(5) deter repeated violation of environmental laws; and

(6) establish a fair and consistent system for assessing administrative penalties.”\textsuperscript{22}

\textsuperscript{21} Vermont Statutes Online at Title 10: Conservation and Development Chapter 201: ADMINISTRATIVE ENVIRONMENTAL LAW ENFORCEMENT § 8001. Legislative findings, \url{http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=10&Chapter=201&Section=08001} (last visited May 17 2011)

\textsuperscript{22} Chapter 201: Administrative Environmental Law Enforcement, Title 10: Conservation and Development of the Vermont Statutes Online, \url{http://www.leg.state.vt.us/statutes/fullchapter.cfm?Title=10&Chapter=201} (last visited May 17 2011)