196 Vt. 467
Supreme Court of Vermont.

In re Appeals of ANR PERMITS IN LOWELL MOUNTAIN WIND PROJECT (Energize Vermont, Inc., Appellants).

No. 13–180.
|
May 23, 2014.

Synopsis

Background: Environmental group and individuals sought judicial review of decision of the Public Service Board (PSB), James Volz, Chair, affirming a permit issued by the Agency of Natural Resources (ANR), approving an operational-phase stormwater management plan for wind-powered electric generation facility.

[Holding:] The Supreme Court, Dooley, J., held that ANR was not required to mandate use of extended detention storage as part of permit approving operational-phase stormwater management plan for wind-powered electric generation facility.

Affirmed.

West Headnotes (5)

[1] Environmental Law
Discharge of pollutants

Vermont Stormwater Management Manual (VSMM) subsection governing channel protection treatment did not mandate that Agency of Natural Resources (ANR) require the use of extended detention storage, unless project qualified for an alternative design standard under a different subsection, in granting permit approving operational-phase stormwater management plan for wind-powered electric generation facility; provisions read as a whole showed that the VSSM was designed to allow flexibility for the evaluation and implementation of new technologies.

Cases that cite this headnote

[2] Administrative Law and Procedure
Effect

An administrative agency must abide by its regulations as written until it rescinds or amends them; otherwise, people will not know how to conduct their affairs.

1 Cases that cite this headnote

[3] Administrative Law and Procedure
Presumptions

Absent a clear and convincing showing to the contrary, decisions made within the expertise of administrative agencies are presumed correct, valid and reasonable.

1 Cases that cite this headnote

[4] Public Utilities
Presumptions in favor of order or findings of commission

In appeals from the Public Service Board's (PSB) decisions made within its original jurisdiction, the Supreme Court accepts as true all of the PSB's findings that are not clearly erroneous, and, in reviewing the PSB's conclusions, the Court defers to its particular expertise and informed judgment. 10 V.S.A. § 8506.

Cases that cite this headnote

[5] Administrative Law and Procedure
Erroneous construction;conflict with statute

A party challenging an administrative agency's interpretation of a statute bears the burden of showing that the agency's interpretation is wholly irrational and unreasonable in relation to its intended purpose.

2 Cases that cite this headnote

Attorneys and Law Firms

****17** Nathan H. Stearns and C. Daniel Hershenson of Hershenson, Carter, Scott & McGee, P.C., Norwich, for Appellants.

Geoffrey H. Hand and Elizabeth H. Catlin of Dunkiel Saunders Elliott Raubvogel & Hand PLLC, Burlington, for Appellee Green Mountain Power, Inc.

William H. Sorrell, Attorney General, and Gavin J. Boyles, Assistant Attorney General, Montpelier, for Appellee Agency of Natural Resources.

Present: DOOLEY, SKOGLUND and CRAWFORD, JJ., and MORSE, J. (Ret.), and PINELES, Supr. J. (Ret.), Specially Assigned.

Opinion

DOOLEY, J.

***469** ¶ 1. Appellants Energize Vermont, Inc. and several individuals challenge the Vermont Public Service Board (PSB)'s affirmance of a permit issued by the Agency of Natural Resources (ANR), approving an operational-phase stormwater management plan for appellee Green Mountain Power (GMP), with respect to the Kingdom Community Wind Project (Wind Project) on Lowell Mountain in Lowell, Vermont. Although appellants raised a variety of challenges to the operational-phase permit, as well as other permits, on appeal to the PSB, the only issue maintained on appeal to this Court is the narrow one of whether ANR complied with certain requirements of its own Vermont Stormwater Management Manual (VSMM) in granting the operational-phase permit. We affirm.

¶ 2. The facts of this case are undisputed. The Wind Project is a wind-powered electric generation facility involving twenty-one wind turbines, along with access roads, a substation, an operations building, and power lines. Because the project contains over twenty-seven acres of impervious surfaces, GMP is required to maintain a permit from ANR to regulate management of its stormwater runoff as long as the project is operational. 10 V.S.A. § 1264(a)(11). In granting the permit, ANR is required to ensure that the permit is "consistent with, at a minimum, the 2002 Stormwater Management Manual [VSMM]." *Id.* § 1264(e)(1).

¶ 3. The VSMM contains regulatory requirements for stormwater treatment practices, known as STPs, which are designed to manage stormwater runoff. Because the parties' arguments rely in large part on the language of the VSMM, we describe the VSMM in detail here. The VSMM is divided into three sections. Section 1 is titled "Stormwater Treatment Practice Sizing Criteria." It sets out five distinct "treatment standards" for water quality, channel protection, groundwater recharge, overbank flood protection, and extreme flood protection. This appeal concerns only the Wind Project's compliance with the channel protection treatment standard.

¶ 4. Subsection 1.1.2 sets forth the standards for channel protection treatment. It begins: "To protect stream channels from degradation, storage of the channel protection volume (CP_v) shall ***470** be provided by means of 12 to 24 hours of extended detention storage (ED) for the one-year, 24–hour rainfall event." The subsection provides a bulleted list of criteria that " shall be applied" to evaluate channel protection volume and STPs for channel protection. ****18** The final bullet in this list states, "For projects that have disconnected the majority of impervious surfaces per use of the credits in Section 3 such that routing to a detention facility is not achieved, the designer may use an alternative design standard." Section 3 of the VSMM addresses "Voluntary Stormwater Management Credits," which the parties agree GMP did not use. Subsection 1.1.2 further contemplates that the "treatment standard for channel protection shall be waived" for several situations which also do not apply to the present case. These are the only places in which subsection 1.1.2 explicitly contemplates exceptions to the channel protection standards it contains. The Wind Project's STP does not conform to the default channel protection standards contained in subsection 1.1.2 because it does not use extended detention storage.

¶ 5. Section 2 of the VSMM is titled "Acceptable Stormwater Treatment Practices." Subsection 2.1 is also titled "Acceptable STPs" and states: "This section outlines STPs that can be used to meet the ... treatment standards set forth in section 1. These acceptable STPs can be used alone, or in combination, to meet the required treatment

standards." VSMM 2.1. The Wind Project has not used an "acceptable STP" as defined by subsection 2.1.

¶ 6. Subsection 2.5 is titled "Alternative STP Designs." It states:

> The stormwater treatment field is rapidly evolving and new stormwater management technologies constantly emerge. A permit applicant may propose and [ANR] may allow the use of STPs other than those listed [above] if the permit applicant can demonstrate to [ANR]'s satisfaction that the proposed alternative STPs will attain the applicable treatment performance standards for [the five treatment standards contained in VSMM Section 1]. **Proposals for use of alternative treatment systems will require consideration of the design through the use of the individual permit application process.**
>
> There are two methods by which a designer may propose an alternative system design evaluation: through consideration of an existing-alternative system ...; or ***471** through a new design-alternative system proposed for use in Vermont.

Subsections 2.5.1 and 2.5.2 pertain to "Existing Alternative Systems" and "New–Design Alternative Systems," respectively. The parties agree that the Wind Project's stormwater treatment practices make up a "new-design alternative system," not an "existing alternative system."

¶ 7. Subsection 2.5.2 states:

> The performance standard for STPs shall meet the applicable treatment standards specified in section 1.1, and shall have the capability to achieve long-term performance in the field. For an alternative STP to be submitted to [ANR] for consideration, a designer's certification of compliance, including pertinent design information must be provided. This certification must provide details, with a reasonable level of surety, on how the system will achieve the requisite performance standards.
>
> ....
>
> If a proposed alternative STP design is successfully approved by [ANR], then this alternative will be available for use by other permit applicants, if determined appropriate by [ANR].

¶ 8. The Wind Project uses an STP known as "level spreaders." The level spreaders function by collecting stormwater in a trough and then dispersing the water across a level edge, through a vegetated buffer. Level spreaders are not specifically referenced in the VSMM. Level spreaders do not meet the default requirements, under subsection 1.1.2, for channel ****19** protection because they do not use "extended detention storage." Rather, as described by the PSB, "A level spreader is a constructed feature which is used to convert concentrated runoff to sheet flow and release it in a non-erosive manner across a slope. Vegetated buffers are defined as the land areas immediately downslope of the level spreader which provide for the 'disconnection' of runoff from impervious surfaces to undisturbed natural vegetated terrain."

[1] **[2]** ¶ 9. Appellants contend that the language of subsection 1.1.2 mandates the use of extended detention storage unless a project qualifies for an alternative design standard using VSMM section 3 credits. Under appellants' reading, the only way to use an alternative ***472** design standard to satisfy the channel protection requirement is by using the credits in section 3, which appellees have not done. Appellants argue that to allow ANR to interpret its manual differently would violate the plain meaning of the regulation and therefore would also violate our instruction that "[a]n administrative agency must abide by its regulations as written until it rescinds or amends them. Otherwise, people will not know how to conduct their affairs." *In re Peel Gallery of Fine Arts,* 149 Vt. 348, 351, 543 A.2d 695, 697 (1988) (citation omitted). Appellants further argue that ANR may deviate from appellants' reading of the VSMM only if ANR amends the VSMM explicitly. For this proposition, they rely upon this Court's decision in *Conservation Law Foundation v. Burke,* 162 Vt. 115, 121, 645 A.2d 495, 499 (1993) ("If the Agency wishes to include an additional de minimis exception, it must do so explicitly.").

¶ 10. This appeal first went to the PSB pursuant to 10 V.S.A. § 8506. Review in the PSB was de novo, although the Board is required to apply "the substantive standards that were applicable before the secretary." *Id.* § 8506(e).

¶ 11. The PSB rejected appellants' argument. In keeping with the statutory standard of review, it gave no deference to ANR's permit decision. It did, however, defer to ANR's construction of its regulation, adopting a "compelling

indication of error" review standard from *In re Electronic Industries Alliance,* 2005 VT 111, ¶ 7, 179 Vt. 539, 889 A.2d 729 (mem.).

¶ 12. The PSB rejected appellants' argument for two main reasons. First, it held that section 1.1.2 of the VSMM does not have the meaning appellants attributed to it:

> significantly ... the limiting word 'only' does not appear anywhere in Section 1.1.2, nor do we read this language to compel that the word 'only' was intended to be read into Section 1.1.2. Rather, we read Section 1.1.2 to simply state expressly that in the case of disconnected projects using Section 3 credits, the Alternative Design Standard may be used.

¶ 13. Second, it ruled that

> the Legislature intended only for stormwater discharge permits to be 'consistent' with the VSMM, as opposed to requiring strict compliance or conformity. The Vermont Stormwater Management Rule similarly states that permits ***473** shall be 'consistent' with the VSMM's treatment standards. Therefore, ANR has discretion to tailor an individual stormwater permit to achieve its intended purpose of protecting water quality so long as such permit is consistent with the VSMM and meets the other statutory criteria for discharge permits.

¶ 14. In conclusion, it held that ANR's interpretation of the VSMM to allow use of the Alternative Design Standard in this case was not erroneous. It explained that ****20** the "narrow reading sought by Appellants would lead to an irrational result in this case because it would require GMP to install structural STPs where they are not necessary to protect water quality, while causing additional environmental impacts through increased clearing." It therefore concluded that appellants failed to demonstrate that ANR's interpretation amounted to compelling error.

[3] **[4]** ¶ 15. In commencing our own review, we must first determine the standard of review that applies in appeals from the PSB sitting in its appellate capacity.[*] As all parties noted, we generally give substantial deference to an agency's interpretation of its own regulations—in this case, ANR's interpretation of the VSMM. *In re Peel Gallery of Fine Arts,* 149 Vt. at 351, 543 A.2d at 697. "Absent a clear and convincing showing to the contrary, decisions made within the expertise of such agencies are presumed correct, valid and reasonable." *In re Johnston,* 145 Vt. 318, 322, 488 A.2d 750, 752 (1985). Interpretation of the VSMM is squarely within ANR's expertise as its authoring agency. This deferential standard remains on appeal, even after the PSB holds a de novo hearing on the matter.

¶ 16. In *Town of Killington v. Department of Taxes,* we deferred to the administrative decision of the Commissioner of Taxes even after a de novo trial in the superior court. 2003 VT 88, ¶ 5, 176 Vt. 70, 838 A.2d 91. We did so in part because of the "substantial deference that courts have traditionally accorded ***474** administrative agencies, particularly where, as here, a decision involves highly complicated ... methodologies within the agency's area of expertise." *Id.* We also did so because this deference was "mirror [ed]" by a statutory provision granting significant discretion to the Commissioner. *Id.* Like *Town of Killington,* this case involves complicated methodologies within an agency's expertise. Also like *Town of Killington,* the statutory authorization for the permitting program delegates discretion to the implementing agency. See 10 V.S.A. § 1264(e)(1) ("The Secretary *may* issue ... discharge permits for regulated stormwater runoff, *as necessary* to assure achievement of the goals of the program and compliance with ... law .... The permit shall contain additional conditions, requirements, and restrictions *as the Secretary deems necessary* ...." (emphases added)). A separate statute requires that the PSB apply the "substantive standards" used by the secretary of ANR. 10 V.S.A. § 8506(e).

[5] ¶ 17. Like the PSB, we accord substantial deference to ANR's interpretation of the VSMM. As this is the same standard used by the PSB, we thus review the PSB's decision de novo. *Travia's Inc. v. State,* 2013 VT 62, ¶ 12,

194 Vt. 585, 86 A.3d 394 ("Where there is an intermediate level of appeal from an administrative body, this Court reviews the case under the same standard as applied in the intermediate appeal."). Appellants therefore bear the burden of showing that ANR's interpretation is "wholly irrational and unreasonable in relation to its intended purpose." *Town of Killington,* 2003 VT 88, ¶ 6, 176 Vt. 70, 838 A.2d 91.

¶ 18. We are not persuaded that ANR's interpretation of the VSMM is irrational or ****21** unreasonable in relation to its intended purpose. We agree with the PSB that the plain meaning of the regulation does not support appellants' argument. Appellants' argument rests on an extremely narrow interpretation of subsection 1.1.2 which we decline to follow, particularly in light of the intended purpose of the VSMM. Appellants point to the provision of subsection 1.1.2 that reads: "For projects that have disconnected the majority of impervious surfaces per use of the credits in Section 3 such that routing to a detention facility is not achieved, the designer may use an alternative design standard." Appellants read this provision as though it begins with the word "only." As stated in their brief: " 'Per the use of the credits in Section 3' means that the *only* time an alternative design standard ***475** may be used to evaluate an STP's compliance with the Channel Protection Treatment Standard is when a project has ... utiliz[ed] the credits in Section 3 of the VSMM." (Emphasis added.) In fact, appellants have added this restrictive gloss themselves. Appellants' addition of the word "only" to subsection 1.1.2 is not a "clear and convincing" showing that ANR's contrary interpretation is in error.

¶ 19. Given the deferential standard of review, this straightforward plain meaning analysis needs little elaboration. Appellants have not met their burden. We note, however, that our analysis is fortified by looking to the VSMM as a whole and the intent of the drafters. See *Burke,* 162 Vt. at 121, 645 A.2d at 499 (stating that we interpret regulations as a whole and look to the intent of the drafters to aid in our interpretation); *In re Verburg,* 159 Vt. 161, 164, 616 A.2d 237, 239 (1992) (stating that we rely on the intent of the drafters in interpreting regulations or statutes).

¶ 20. Reading the VSMM as a whole reinforces our understanding that this provision—allowing use of section 3 credits as a means of achieving a successful alternative design standard for purposes of the channel protection requirement—does not necessarily preclude other means of reaching the same end. Subsection 2.5, entitled "Alternative STP Designs," begins by acknowledging that the "stormwater treatment field is rapidly evolving and new stormwater management technologies constantly emerge." The clear implication of this preface is that ANR aims to be responsive to the need to evaluate new technologies as they arise and will not be bound by obsolete measures. The subsection continues, "the Agency may allow the use of [alternative] STPs ... if the permit applicant can demonstrate to the Agency's satisfaction that the proposed alternative STPs will attain the *applicable* treatment performance standards for water quality, groundwater recharge, channel protection, overbank flood protection and extreme flood control." (Emphasis added.) The key word here is "applicable," a word which is used in the same fashion in subsection 2.5.2, entitled "New–Design Alternative Systems." That subsection requires only that alternative STPs "meet the *applicable* treatment standards specified in section 1.1." (Emphasis added.) Given the cross-reference to subsection 1.1 generally, the subsection 1.1.2 default standard of extended detention storage for channel protection may not be an "applicable" standard for the alternative-design ***476** level spreader STP, because level spreaders use other means of protecting stream channels from degradation—namely dispersion and buffering.

¶ 21. This is not to say that new-design alternative systems are standardless. The VSMM has a more flexible, individualized system of evaluation for new-design alternatives. Subsection 2.5 states, in bold: "Proposals for use of alternative treatment systems will require consideration of the design through the use of the individual permit application process." This is in ****22** contrast with the general permit application process, which involves less scrutiny from ANR at the individual project level. 10 V.S.A. § 1264(e)(2) (providing for general stormwater permits that can be issued to a category of projects). For new-design alternative systems, the VSMM additionally requires a detailed plan of study regarding the project's actual stormwater impact to be completed within three years of the project's construction. If ANR finds the results of the study to be unsatisfactory, it can require the project to be rebuilt using acceptable STPs. All of these provisions, read as a whole, show that the

VSMM is designed to allow flexibility for the evaluation and implementation of new technologies.

¶ 22. This interpretation is further supported by the legislative intent behind the stormwater permitting program. The statutory directives for the program state that stormwater management should use "structural treatment only when necessary"; that management strategies should be "tailor[ed] ... to the region and the locale"; and that the permitting process should "provide [ ] for the evaluation and appropriate evolution of programs." 10 V.S.A. § 1264(a). The narrow reading advocated by appellants would be contrary to this intent because it would require GMP to install extended detention storage where not environmentally necessary; to use strategies not tailored to the locale; and to cause the permitting program to adhere to rigid requirements rather than evolve. Notably, although GMP states that the level spreaders are fully installed and operational, appellants have abandoned on appeal any arguments that the level spreaders are environmentally inferior to other STP designs.

¶ 23. In sum, we find no clear and convincing error in ANR's interpretation of the VSMM to allow an operational stormwater permit for the Wind Project's level spreaders.

Affirmed.

All Citations

196 Vt. 467, 98 A.3d 16, 2014 VT 50

Footnotes

* This is the first appeal from another agency heard by the PSB pursuant to 10 V.S.A. § 8506. In appeals from the PSB's decisions made within its original jurisdiction, we "accept as true all of the [PSB]'s findings that are not clearly erroneous, and, in reviewing the [PSB]'s conclusions, we defer to its particular expertise and informed judgment." *In re Cent. Vt. Pub. Serv. Corp.,* 2006 VT 70, ¶ 3, 180 Vt. 563, 905 A.2d 616 (mem.). This case, however, concerns an appeal from the PSB within its appellate capacity and not within its original jurisdiction.

KeyCite Yellow Flag - Negative Treatment
Disagreement Recognized by U.S. v. Handy, E.D.N.Y., August 4, 2008

104 S.Ct. 2778
Supreme Court of the United States

CHEVRON, U.S.A., INC., Petitioner,
v.
NATURAL RESOURCES
DEFENSE COUNCIL, INC., et al.
AMERICAN IRON AND STEEL
INSTITUTE, et al., Petitioners,
v.
NATURAL RESOURCES
DEFENSE COUNCIL, INC., et al.
William D. RUCKELSHAUS, Administrator,
Environmental Protection Agency, Petitioner,
v.
NATURAL RESOURCES
DEFENSE COUNCIL, INC., et al. *

Nos. 82-1005, 82-1247 and 82-1591.
|
Argued Feb. 29, 1984.
|
Decided June 25, 1984.

Rehearing Denied Aug. 16, 1984.

See 468 U.S. 1227, 105 S.Ct. 28, 29.

Petition was filed for review of order of the Environmental Protection Agency. The Court of Appeals, 685 F.2d 718, vacated regulations, and certiorari was granted. The Supreme Court, Justice Stevens, held that Environmental Protection Agency regulation allowing states to treat all pollution-emitting devices within same industrial grouping as though they were encased within single "bubble" was based on permissible construction of term "stationary source" in Clean Air Act Amendments.

Reversed.

West Headnotes (7)

[1] Federal Courts
Decisions Reviewable

Supreme Court reviews judgments, not opinions.

103 Cases that cite this headnote

[2] Administrative Law and Procedure
Plain, literal, or clear meaning; ambiguity
Administrative Law and Procedure
Permissible or reasonable construction

When court reviews agency's construction of statute which it administers, court is confronted with two questions: whether Congress has directly spoken on precise question at issue; if statute is silent or ambiguous with respect to specific issue, question for court is whether agency's answer is based on permissible construction of statute.

6323 Cases that cite this headnote

[3] Administrative Law and Procedure
Erroneous construction;conflict with statute

Judiciary is final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.

1677 Cases that cite this headnote

[4] Administrative Law and Procedure
Permissible or reasonable construction

Court need not conclude that agency's construction of statute which it administered was only one it permissibly could have adopted to uphold construction, or even reading the court would have reached if question initially had arisen in judicial proceeding.

2453 Cases that cite this headnote

[5] Administrative Law and Procedure
Permissible or reasonable construction

Where legislative delegation to agency on particular question is implicit rather than explicit, court may not substitute its own construction of statutory provision for reasonable interpretation made by administrator of agency.

5863 Cases that cite this headnote

[6] Administrative Law and Procedure
Deference to agency in general

Considerable weight should be accorded to executive department's construction of statutory scheme it is entrusted to administer.

578 Cases that cite this headnote

[7] Environmental Law
Stationary sources in general

Environmental Protection Agency regulation allowing states to treat all pollution-emitting devices within same industrial grouping as though they were encased within single "bubble" was based on permissible construction of term "stationary source" in Clean Air Act Amendments. Clean Air Act, §§ 111(a)(3), 172(b)(6), 302(j), as amended, 42 U.S.C.A. §§ 7411(a)(3), 7502(b)(6), 7602(j).

287 Cases that cite this headnote

Syllabus [a1]

The Clean Air Act Amendments of 1977 impose certain requirements on States ****2779** that have not achieved the national air quality standards established by the Environmental Protection Agency (EPA) pursuant to earlier legislation, including the requirement that such "nonattainment" States establish a permit program regulating "new or modified major stationary sources" of air pollution. Generally, a permit may not be issued for such sources unless stringent conditions are met. EPA regulations promulgated in 1981 to implement the permit requirement allow a State to adopt a plantwide definition of the term "stationary source," under which an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant, thus allowing a State to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble." Respondents filed a petition for review in the Court of Appeals, which set aside the regulations embodying the "bubble concept" as contrary to law. Although recognizing that the amended Clean Air Act does not explicitly define what Congress envisioned as a "stationary source" to which the permit program should apply, and that the issue was not squarely addressed in the legislative history, the court concluded that, in view of the purpose of the nonattainment program to improve rather than merely maintain air quality, a plantwide definition was "inappropriate," while stating it was mandatory in programs designed to maintain existing air quality.

Held: The EPA's plantwide definition is a permissible construction of the statutory term "stationary source." Pp. 2781–2793.

(a) With regard to judicial review of an agency's construction of the statute which it administers, if Congress has not directly spoken to the precise question at issue, the question for the court is whether the ***838** agency's answer is based on a permissible construction of the statute. Pp. 2781–2783.

(b) Examination of the legislation and its history supports the Court of Appeals' conclusion that Congress did not have a specific intention as to the applicability of the "bubble concept" in these cases. Pp. 2783–2786.

(c) The legislative history of the portion of the 1977 Amendments dealing with nonattainment areas plainly discloses that in the permit program Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality. Pp. 2786–2787.

(d) Prior to the 1977 Amendments, the EPA had used a plantwide definition of the term "source," but in 1980 the EPA ultimately adopted a regulation that, in essence, applied the basic reasoning of the Court of Appeals here, precluding use of the "bubble concept" in nonattainment States' programs designed to enhance air quality. However, when a new administration took office

1981, the EPA, in promulgating the regulations involved here, reevaluated the various arguments that had been advanced in connection with the proper definition of the term "source" and concluded that the term should be given the plantwide definition in nonattainment areas. Pp. 2787–2790.

(e) Parsing the general terms in the text of the amended Clean Air Act—particularly the provisions of §§ 302(j) and 111(a)(3) pertaining to the definition of "source"—does not reveal any actual intent of Congress as to the issue in these cases. To the extent any congressional "intent" can be discerned from the statutory language, it would appear that the listing of overlapping, illustrative terms was intended to enlarge, rather than to confine, the scope of the EPA's power to regulate particular sources in order to effectuate the policies of the Clean Air Act. Similarly, the legislative history is consistent with the ****2780** view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments. The plantwide definition is fully consistent with the policy of allowing reasonable economic growth, and the EPA has advanced a reasonable explanation for its conclusion that the regulations serve environmental objectives as well. The fact that the EPA has from time to time changed its interpretation of the term "source" does not lead to the conclusion that no deference should be accorded the EPA's interpretation of the statute. An agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Policy arguments concerning the "bubble concept" should be addressed to legislators or administrators, not to judges. The EPA's interpretation of the statute here represents a reasonable accommodation of manifestly competing interests and is entitled to deference. Pp. 2790–2793.

222 U.S.App.D.C. 268, 685 F.2d 718 (1982), reversed.

Attorneys and Law Firms

Deputy Solicitor General Bator argued the cause for petitioners in all cases. With him on the briefs for petitioner in No. 82-1591 were *Solicitor General Lee, Acting Assistant Attorney General Habicht, Deputy Assistant Attorney General Walker, Mark I. Levy, Anne S. Almy, William F. Pedersen,* and *Charles S. Carter. Michael H. Salinsky* and *Kevin M. Fong* filed briefs for petitioner in No. 82-1005. *Robert A. Emmett, David Ferber, Stark Ritchie, Theodore L. Garrett, Patricia A. Barald, Louis E. Tosi, William L. Patberg, Charles F. Lettow,* and *Barton C. Green* filed briefs for petitioners in No. 82-1247.

***839** *David D. Doniger* argued the cause and filed a brief for respondents.†>>>

† Briefs of *amici curiae* urging reversal were filed for the American Gas Association by *John A. Myler;* for the Mid-America Legal Foundation by *John M. Cannon, Susan W. Wanat,* and *Ann P. Sheldon;* and for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *Robin L. Rivett.*

A brief of *amici curiae* urging affirmance was filed for the Commonwealth of Pennsylvania et al. by *LeRoy S. Zimmerman,* Attorney General of Pennsylvania, *Thomas Y. Au, Duane Woodard,* Attorney General of Colorado, *Richard L. Griffith,* Assistant Attorney General, *Joseph I. Lieberman,* Attorney General of Connecticut, *Robert A. Whitehead, Jr.,* Assistant Attorney General, *James S. Tierney,* Attorney General of Maine, *Robert Abrams,* Attorney General of New York, *Marcia J. Cleveland* and *Mary L. Lyndon,* Assistant Attorneys General, *Irwin I. Kimmelman,* Attorney General of New Jersey, *John J. Easton, Jr.,* Attorney General of Vermont, *Merideth Wright,* Assistant Attorney General, *Bronson C. La Follette,* Attorney General of Wisconsin, and *Maryann Sumi,* Assistant Attorney General.

James D. English, Mary-Win O'Brien, and *Bernard Kleiman* filed a brief for the United Steelworkers of America, AFL-CIO-CLC, as *amicus curiae.*

Opinion

Justice STEVENS delivered the opinion of the Court.

In the Clean Air Act Amendments of 1977, Pub.L. 95–95, 91 Stat. 685, Congress enacted certain requirements applicable ***840** to States that had not achieved the national air quality standards established by the Environmental Protection Agency (EPA) pursuant to earlier legislation. The amended Clean Air Act required these "nonattainment" States to establish a permit program regulating "new or modified major stationary sources" of air pollution. Generally, a permit may not be issued for a new or modified major stationary source unless several stringent conditions are met. [1] The EPA regulation promulgated to implement this permit requirement allows a State to adopt a plantwide definition of the term "stationary source." [2] Under this definition,

an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant. The question presented by these cases is whether EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble" is based on a reasonable construction of the statutory term "stationary source."

I

The EPA regulations containing the plantwide definition of the term stationary source were promulgated on October ***841** 14, 1981. 46 Fed.Reg. 50766. Respondents [3] filed a timely petition for review in the United States Court of Appeals for the District of Columbia Circuit pursuant to 42 U.S.C. § 7607(b)(1). [4] The Court of Appeals ****2781** set aside the regulations. Natural Resources Defense Council, Inc. v. Gorsuch, 222 U.S.App.D.C. 268, 685 F.2d 718 (1982).

The court observed that the relevant part of the amended Clean Air Act "does not explicitly define what Congress envisioned as a 'stationary source, to which the permit program ... should apply," and further stated that the precise issue was not "squarely addressed in the legislative history." Id., at 273, 685 F.2d, at 723. In light of its conclusion that the legislative history bearing on the question was "at best contradictory," it reasoned that "the purposes of the nonattainment program should guide our decision here." Id., at 276, n. 39, 685 F.2d, at 726, n. 39. [5] Based on two of its precedents concerning the applicability of the bubble concept to certain Clean Air Act programs, [6] the court stated that the bubble concept was "mandatory" in programs designed merely to maintain existing air quality, but held that it was "inappropriate" in programs enacted to improve air quality. Id., at 276, 685 F.2d, at 726. Since the purpose of the permit ***842** program—its "raison d'être," in the court's view—was to improve air quality, the court held that the bubble concept was inapplicable in these cases under its prior precedents. Ibid. It therefore set aside the regulations embodying the bubble concept as contrary to law. We granted certiorari to review that judgment, 461 U.S. 956, 103 S.Ct. 2427, 77 L.Ed.2d 1314 (1983), and we now reverse.

[1] The basic legal error of the Court of Appeals was to adopt a static judicial definition of the term "stationary source" when it had decided that Congress itself had not commanded that definition. Respondents do not defend the legal reasoning of the Court of Appeals. [7] Nevertheless, since this Court reviews judgments, not opinions, [8] we must determine whether the Court of Appeals' legal error resulted in an erroneous judgment on the validity of the regulations.

II

[2] **[3]** **[4]** When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, ***843** as well as the agency, must give effect to the unambiguously expressed intent of Congress. [9] If, however, ****2782** the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, [10] as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. [11]

[5] "The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Morton v. Ruiz, 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation ***844** of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. [12] Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. [13]

[6] We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer,[14] and the principle of deference to administrative interpretations.

"has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full ****2783** understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190 [63 S.Ct. 997, 87 L.Ed. 1344]; Labor Board v. Hearst Publications, Inc., 322 U.S. 111 [64 S.Ct. 851, 88 L.Ed. 1170]; ***845** Republic Aviation Corp. v. Labor Board, 324 U.S. 793 [65 S.Ct. 982, 89 L.Ed. 1372]; Securities & Exchange Comm'n v. Chenery Corp., [332] 322 U.S. 194 [67 S.Ct. 1575, 91 L.Ed. 1995]; Labor Board v. Seven–Up Bottling Co., 344 U.S. 344 [73 S.Ct. 287, 97 L.Ed. 377].
"... If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." United States v. Shimer, 367 U.S. 374, 382, 383, 81 S.Ct. 1554, 1560, 1561, 6 L.Ed.2d 908 (1961).

Accord Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699–700, 104 S.Ct. 2694, 2700–2701, 81 L.Ed.2d 580 (1984).

In light of these well-settled principles it is clear that the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is "inappropriate" in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one. Based on the examination of the legislation and its history which follows, we agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble concept in these cases, and conclude that the EPA's use of that concept here is a reasonable policy choice for the agency to make.

III

In the 1950's and the 1960's Congress enacted a series of statutes designed to encourage and to assist the States in curtailing air pollution. See generally Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 63–64, 95 S.Ct. 1470, 1474–1475, 43 L.Ed.2d 731 (1975). The Clean Air Amendments of 1970, Pub.L. 91–604, 84 Stat. 1676, "sharply increased federal authority and responsibility ***846** in the continuing effort to combat air pollution," 421 U.S., at 64, 95 S.Ct., at 1474, but continued to assign "primary responsibility for assuring air quality" to the several States, 84 Stat. 1678. Section 109 of the 1970 Amendments directed the EPA to promulgate National Ambient Air Quality Standards (NAAQS's)[15] and § 110 directed the States to develop plans (SIP's) to implement the standards within specified deadlines. In addition, § 111 provided that major new sources of pollution would be required to conform to technology-based performance standards; the EPA was directed to publish a list of categories of sources of pollution and to establish new source performance standards (NSPS) for each. Section 111(e) prohibited the operation of any new source in violation of a performance standard.

Section 111(a) defined the terms that are to be used in setting and enforcing standards of performance for new stationary sources. It provided:
"For purposes of this section:

.....

"(3) The term 'stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant." 84 Stat. 1683.

****2784** In the 1970 Amendments that definition was not only applicable to the NSPS program required by § 111, but also was made applicable to a requirement of § 110 that each state implementation plan contain a procedure for reviewing the location of any proposed new source and preventing its construction if it would preclude the attainment or maintenance of national air quality standards.[16]

In due course, the EPA promulgated NAAQS's, approved SIP's, and adopted detailed regulations governing NSPS's ***847** for various categories of equipment. In one of its programs, the EPA used a plantwide definition of the term "stationary source." In 1974, it issued NSPS's for the nonferrous smelting industry that provided that the standards would not apply to the modification of major smelting units if their increased emissions were offset by reductions in other portions of the same plant. [17]

Nonattainment

The 1970 legislation provided for the attainment of primary NAAQS's by 1975. In many areas of the country, particularly the most industrialized States, the statutory goals were not attained. [18] In 1976, the 94th Congress was confronted with this fundamental problem, as well as many others respecting pollution control. As always in this area, the legislative struggle was basically between interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs and interests advancing the economic concern that strict schemes would retard industrial development with attendant social costs. The 94th Congress, confronting these competing interests, was unable to agree on what response was in the public interest: legislative proposals to deal with nonattainment failed to command the necessary consensus. [19]

In light of this situation, the EPA published an Emissions Offset Interpretative Ruling in December 1976, see 41 Fed.Reg. 55524, to "fill the gap," as respondents put it, until Congress acted. The Ruling stated that it was intended to ***848** address "the issue of whether and to what extent national air quality standards established under the Clean Air Act may restrict or prohibit growth of major new or expanded stationary air pollution sources." Id., at 55524–55525. In general, the Ruling provided that "a major new source may locate in an area with air quality worse than a national standard only if stringent conditions can be met." Id., at 55525. The Ruling gave primary emphasis to the rapid attainment of the statute's environmental goals. [20] Consistent with that emphasis, the construction of every new source in nonattainment areas had to meet the "lowest achievable emission rate" under the current state of the art for that type of facility. See Ibid. The 1976 Ruling did not, however, explicitly adopt or reject the "bubble concept." [21]

****2785** IV

The Clean Air Act Amendments of 1977 are a lengthy, detailed, technical, complex, and comprehensive response to a major social issue. A small portion of the statute—91 Stat. ***849** 745–751 (Part D of Title I of the amended Act, 42 U.S.C. §§ 7501–7508)—expressly deals with nonattainment areas. The focal point of this controversy is one phrase in that portion of the Amendments. [22]

Basically, the statute required each State in a nonattainment area to prepare and obtain approval of a new SIP by July 1, 1979. In the interim those States were required to comply with the EPA's interpretative Ruling of December 21, 1976. 91 Stat. 745. The deadline for attainment of the primary NAAQS's was extended until December 31, 1982, and in some cases until December 31, 1987, but the SIP's were required to contain a number of provisions designed to achieve the goals as expeditiously as possible. [23]

***850** Most significantly for our purposes, the statute provided that each plan shall
"(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 173...." Id., 747.

Before issuing a permit, § 173 requires (1) the state agency to determine that there will be sufficient emissions reductions in the region to offset the emissions from the new source and also to allow for reasonable further progress toward attainment, or that the increased emissions will not exceed an allowance for growth established pursuant to § 172(b)(5); (2) the applicant to certify that his other sources in the State are in compliance with the SIP, (3) the agency to determine that the applicable SIP is otherwise being implemented, and (4) the proposed source to comply with the lowest achievable emission rate (LAER). [24]

****2786** ***851** The 1977 Amendments contain no specific reference to the "bubble concept." Nor do they contain a specific definition of the term "stationary source," though they did not disturb the definition of "stationary source" contained in § 111(a)(3), applicable by the terms of the Act to the NSPS program. Section 302(j), however, defines the term "major stationary source" as follows:

"(j) Except as otherwise expressly provided, the terms 'major stationary source' and 'major emitting facility' mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator)." 91 Stat. 770.

V

The legislative history of the portion of the 1977 Amendments dealing with nonattainment areas does not contain any specific comment on the "bubble concept" or the question whether a plantwide definition of a stationary source is permissible under the permit program. It does, however, plainly disclose that in the permit program Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality. Indeed, the House Committee Report identified the economic interest as one of the "two main purposes" of this section of the bill. It stated:

"Section 117 of the bill, adopted during full committee markup establishes a new section 127 of the Clean Air Act. The section has two main purposes: (1) to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow ***852** States greater flexibility for the former purpose than EPA's present interpretative regulations afford.

"The new provision allows States with nonattainment areas to pursue one of two options. First, the State may proceed under EPA's present 'tradeoff' or 'offset' ruling. The Administrator is authorized, moreover, to modify or amend that ruling in accordance with the intent and purposes of this section.

"The State's second option would be to revise its implementation plan in accordance with this new provision." H.R.Rep. No. 95–294, p. 211 (1977), U.S.Code Cong. & Admin.News 1977, pp. 1077, 1290. [25]

The portion of the Senate Committee Report dealing with nonattainment areas states generally that it was intended to "supersede the EPA administrative approach," and that expansion should be permitted if a State could "demonstrate that these facilities can be accommodated within its overall plan to provide for attainment of air quality standards." S.Rep. No. 95–127, ****2787** p. 55 (1977). The Senate Report notes the value of "case-by-case review of each new or modified major source of pollution that seeks to locate in a region exceeding an ambient standard," explaining that such a review "requires matching reductions from existing sources against ***853** emissions expected from the new source in order to assure that introduction of the new source will not prevent attainment of the applicable standard by the statutory deadline." Ibid. This description of a case-by-case approach to plant additions, which emphasizes the net consequences of the construction or modification of a new source, as well as its impact on the overall achievement of the national standards, was not, however, addressed to the precise issue raised by these cases.

Senator Muskie made the following remarks:

"I should note that the test for determining whether a new or modified source is subject to the EPA interpretative regulation [the Offset Ruling]—and to the permit requirements of the revised implementation plans under the conference bill—is whether the source will emit a pollutant into an area which is exceeding a national ambient air quality standard for that pollutant —or precursor. Thus, a new source is still subject to such requirements as 'lowest achievable emission rate' even if it is constructed as a replacement for an older facility resulting in a net reduction from previous emission levels.

"A source—including an existing facility ordered to convert to coal—is subject to all the nonattainment requirements as a modified source if it makes any physical change which increases the amount of any air pollutant for which the standards in the area are exceeded." 123 Cong.Rec. 26847 (1977).

VI

As previously noted, prior to the 1977 Amendments, the EPA had adhered to a plantwide definition of the term "source" under a NSPS program. After adoption of the 1977 Amendments, proposals for a plantwide definition were considered in at least three formal proceedings.

In January 1979, the EPA considered the question whether the same restriction on new construction in nonattainment

areas that had been included in its December 1976 Ruling ***854** should be required in the revised SIP's that were scheduled to go into effect in July 1979. After noting that the 1976 Ruling was ambiguous on the question "whether a plant with a number of different processes and emission points would be considered a single source," 44 Fed.Reg. 3276 (1979), the EPA, in effect, provided a bifurcated answer to that question. In those areas that did not have a revised SIP in effect by July 1979, the EPA rejected the plantwide definition; on the other hand, it expressly concluded that the plantwide approach would be permissible in certain circumstances if authorized by an approved SIP. It stated:

"Where a state implementation plan is revised and implemented to satisfy the requirements of Part D, including the reasonable further progress requirement, the plan requirements for major modifications may exempt modifications of existing facilities that are accompanied by intrasource offsets so that there is no net increase in emissions. The agency endorses such exemptions, which would provide greater flexibility to sources to effectively manage their air emissions at least cost." Ibid. [26]

****2788** ***855** In April, and again in September 1979, the EPA published additional comments in which it indicated that revised SIP's could adopt the plantwide definition of source in nonattainment areas in certain circumstances. See id., at 20372, 20379, 51924, 51951, 51958. On the latter occasion, the EPA made a formal rulemaking proposal that would have permitted the use of the "bubble concept" for new installations within a plant as well as for modifications of existing units. It explained:

" 'Bubble' Exemption: The use of offsets inside the same source is called the 'bubble.' EPA proposes use of the definition of 'source' (see above) to limit the use of the bubble under nonattainment requirements in the following respects:

"i. Part D SIPs that include all requirements needed to assure reasonable further progress and attainment by the deadline under section 172 and that are being carried out need not restrict the use of a plantwide bubble, the same as under the PSD proposal.

"ii. Part D SIPs that do not meet the requirements specified must limit use of the bubble by including a definition of 'installation' as an identifiable piece of process equipment." [27]

***856** Significantly, the EPA expressly noted that the word "source" might be given a plantwide definition for some purposes and a narrower definition for other purposes. It wrote:

"Source means any building structure, facility, or installation which emits or may emit any regulated pollutant. 'Building, structure, facility or installation' means plant in PSD areas and in nonattainment areas except where the growth prohibitions would apply or where no adequate SIP exists or is being carried out." Id., at 51925. [28]

The EPA's summary of its proposed Ruling discloses a flexible rather than rigid definition of the term "source" to implement various policies and programs:

"In summary, EPA is proposing two different ways to define source for different kinds of NSR programs:

"(1) For PSD and complete Part D SIPs, review would apply only to plants, with an unrestricted plant-wide bubble.

"(2) For the offset ruling, restrictions on construction, and incomplete Part D SIPs, review would apply to both plants and individual pieces of process equipment, causing the plant-wide bubble not to apply for new and modified major pieces of equipment.

"In addition, for the restrictions on construction, EPA is proposing to define 'major modification' so as to prohibit the bubble entirely. Finally, an alternative discussed but not favored is to have only pieces of process equipment reviewed, resulting in no plant-wide bubble and allowing minor pieces of equipment to escape ****2789** NSR ***857** regardless of whether they are within a major plant." Id., at 51934.

In August 1980, however, the EPA adopted a regulation that, in essence, applied the basic reasoning of the Court of Appeals in these cases. The EPA took particular note of the two then-recent Court of Appeals decisions, which had created the bright-line rule that the "bubble concept" should be employed in a program designed to maintain air quality but not in one designed to enhance air quality. Relying heavily on those cases, [29] EPA adopted

a dual definition of "source" for nonattainment areas that required a permit whenever a change in either the entire plant, or one of its components, would result in a significant increase in emissions even if the increase was completely offset by reductions elsewhere in the plant. The EPA expressed the opinion that this interpretation was "more consistent with congressional intent" than the plantwide definition because it "would bring in more sources or modifications for review," 45 Fed.Reg. 52697 (1980), but its primary legal analysis was predicated on the two Court of Appeals decisions.

In 1981 a new administration took office and initiated a "Government-wide reexamination of regulatory burdens and complexities." 46 Fed.Reg. 16281. In the context of that ***858** review, the EPA reevaluated the various arguments that had been advanced in connection with the proper definition of the term "source" and concluded that the term should be given the same definition in both nonattainment areas and PSD areas.

In explaining its conclusion, the EPA first noted that the definitional issue was not squarely addressed in either the statute or its legislative history and therefore that the issue involved an agency "judgment as how to best carry out the Act." Ibid. It then set forth several reasons for concluding that the plantwide definition was more appropriate. It pointed out that the dual definition "can act as a disincentive to new investment and modernization by discouraging modifications to existing facilities" and "can actually retard progress in air pollution control by discouraging replacement of older, dirtier processes or pieces of equipment with new, cleaner ones." Ibid. Moreover, the new definition "would simplify EPA's rules by using the same definition of 'source' for PSD, nonattainment new source review and the construction moratorium. This reduces confusion and inconsistency." Ibid. Finally, the agency explained that additional requirements that remained in place would accomplish the fundamental purposes of achieving attainment with NAAQS's as expeditiously as possible. [30] These conclusions were ****2790** expressed ***859** in a proposed rulemaking in August 1981 that was formally promulgated in October. See id., at 50766.

VII

[7] In this Court respondents expressly reject the basic rationale of the Court of Appeals' decision. That court viewed the statutory definition of the term "source" as sufficiently flexible to cover either a plantwide definition, a narrower definition covering each unit within a plant, or a dual definition that could apply to both the entire "bubble" and its components. It interpreted the policies of the statute, however, to mandate the plantwide definition in programs designed to maintain clean air and to forbid it in programs designed to improve air quality. Respondents place a fundamentally different construction on the statute. They contend that the text of the Act requires the EPA to use a dual definition—if either a component of a plant, or the plant as a whole, emits over 100 tons of pollutant, it is a major stationary source. They thus contend that the EPA rules adopted in 1980, insofar as they apply to the maintenance of the quality of clean air, as well as the 1981 rules which apply to nonattainment areas, violate the statute. [31]

Statutory Language

The definition of the term "stationary source" in § 111(a)(3) refers to "any building, structure, facility, or installation" which emits air pollution. See supra, at 2784. This definition is applicable only to the NSPS program by the express terms of the statute; the text of the statute does not make this definition ***860** applicable to the permit program. Petitioners therefore maintain that there is no statutory language even relevant to ascertaining the meaning of stationary source in the permit program aside from § 302(j), which defines the term "major stationary source." See supra, at 2786. We disagree with petitioners on this point.

The definition in § 302(j) tells us what the word "major" means—a source must emit at least 100 tons of pollution to qualify—but it sheds virtually no light on the meaning of the term "stationary source." It does equate a source with a facility—a "major emitting facility" and a "major stationary source" are synonymous under § 302(j). The ordinary meaning of the term "facility" is some collection of integrated elements which has been designed and constructed to achieve some purpose. Moreover, it is certainly no affront to common English usage to take a reference to a major facility or a major source to connote an entire plant as opposed to its constituent parts. Basically, however, the language of § 302(j) simply does not compel any given interpretation of the term "source."

Respondents recognize that, and hence point to § 111(a)(3). Although the definition in that section is not literally applicable to the permit program, it sheds as much light on the meaning of the word "source" as anything in the statute.[32] As respondents point out, use of the words "building, structure, facility, or installation," as the definition of source, could be read to impose the permit conditions on an individual building that is a part of a plant.[33] A "word may have a character of its own not to be submerged by its association." ***861** Russell Motor Car Co. v. United States, 261 U.S. 514, 519, 43 S.Ct. 428, 429, 67 L.Ed. 778 (1923). On the other hand, the meaning of a word must be ascertained in the context of achieving particular objectives, and the words associated with it may ****2791** indicate that the true meaning of the series is to convey a common idea. The language may reasonably be interpreted to impose the requirement on any discrete, but integrated, operation which pollutes. This gives meaning to all of the terms—a single building, not part of a larger operation, would be covered if it emits more than 100 tons of pollution, as would any facility, structure, or installation. Indeed, the language itself implies a "bubble concept" of sorts: each enumerated item would seem to be treated as if it were encased in a bubble. While respondents insist that each of these terms must be given a discrete meaning, they also argue that § 111(a)(3) defines "source" as that term is used in § 302(j). The latter section, however, equates a source with a facility, whereas the former defines "source" as a facility, among other items.

We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress.[34] ***862** We know full well that this language is not dispositive; the terms are overlapping and the language is not precisely directed to the question of the applicability of a given term in the context of a larger operation. To the extent any congressional "intent" can be discerned from this language, it would appear that the listing of overlapping, illustrative terms was intended to enlarge, rather than to confine, the scope of the agency's power to regulate particular sources in order to effectuate the policies of the Act.

Legislative History

In addition, respondents argue that the legislative history and policies of the Act foreclose the plantwide definition, and that the EPA's interpretation is not entitled to deference because it represents a sharp break with prior interpretations of the Act.

Based on our examination of the legislative history, we agree with the Court of Appeals that it is unilluminating. The general remarks pointed to by respondents "were obviously not made with this narrow issue in mind and they cannot be said to demonstrate a Congressional desire...." Jewell Ridge Coal Corp. v. Mine Workers, 325 U.S. 161, 168–169, 65 S.Ct. 1063, 1067–1068, 89 L.Ed. 1534 (1945). Respondents' argument based on the legislative history relies heavily on Senator Muskie's observation that a new source is subject to the LAER requirement.[35] But the full statement is ambiguous and like the text of § 173 itself, this comment does not tell us what a new source is, much less that it is to have an inflexible definition. We find that the legislative history as a whole is silent on the precise issue before us. It is, however, consistent with the view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments.

***863** More importantly, that history plainly identifies the policy concerns that motivated the enactment; the plantwide definition is fully consistent with one of those concerns ****2792** —the allowance of reasonable economic growth—and, whether or not we believe it most effectively implements the other, we must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well. See supra, at 2789–2790, and n. 29; see also supra, at 2788, n. 27. Indeed, its reasoning is supported by the public record developed in the rulemaking process,[36] as well as by certain private studies.[37]

Our review of the EPA's varying interpretations of the word "source"—both before and after the 1977 Amendments—convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly—not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena. The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to

engage in informed rulemaking, must consider varying interpretations ***864** and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.

Significantly, it was not the agency in 1980, but rather the Court of Appeals that read the statute inflexibly to command a plantwide definition for programs designed to maintain clean air and to forbid such a definition for programs designed to improve air quality. The distinction the court drew may well be a sensible one, but our labored review of the problem has surely disclosed that it is not a distinction that Congress ever articulated itself, or one that the EPA found in the statute before the courts began to review the legislative work product. We conclude that it was the Court of Appeals, rather than Congress or any of the decisionmakers who are authorized by Congress to administer this legislation, that was primarily responsible for the 1980 position taken by the agency.

Policy

The arguments over policy that are advanced in the parties' briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency and in the 32 jurisdictions opting for the "bubble concept," but one which was never waged in the Congress. Such policy arguments are more properly addressed to legislators or administrators, not to judges. [38]

***865** In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing in ****2793** terests and is entitled to deference: the regulatory scheme is technical and complex, [39] the agency considered the matter in a detailed and reasoned fashion, [40] and the decision involves reconciling conflicting policies. [41] Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the ***866** agency charged with the administration of the statute in light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches." TVA v. Hill, 437 U.S. 153, 195, 98 S.Ct. 2279, 2302, 57 L.Ed.2d 117 (1978).

We hold that the EPA's definition of the term "source" is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth. "The Regulations which the Administrator has adopted provide what the agency could allowably view as ... [an] effective reconciliation of these twofold ends...." United States v. Shimer, 367 U.S., at 383, 81 S.Ct., at 1560.

The judgment of the Court of Appeals is reversed.

It is so ordered.

Justice MARSHALL and Justice REHNQUIST took no part in the consideration or decision of these cases.

Justice O'CONNOR took no part in the decision of these cases.

All Citations

467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694, 21 ERC 1049, 14 Envtl. L. Rep. 20,507

Footnotes

* US Reports Title: **Chevron** U.S.A. Inc. v. Natural Resources Defense Council, Inc.

a1 The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Section 172(b)(6), 42 U.S.C. § 7502(b)(6), provides:
"The plan provisions required by subsection (a) shall—
.....
"(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 173 (relating to permit requirements)." 91 Stat. 747.

2 "(i) 'Stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.
"(ii) 'Building, structure, facility, or installation' means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel." 40 CFR §§ 51.18(j)(1)(i) and (ii) (1983).

3 National Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and North Western Ohio Lung Association, Inc.

4 Petitioners, **Chevron** U.S.A. Inc., American Iron and Steel Institute, American Petroleum Institute, Chemical Manufacturers Association, Inc., General Motors Corp., and Rubber Manufacturers Association were granted leave to intervene and argue in support of the regulation.

5 The court remarked in this regard:
"We regret, of course, that Congress did not advert specifically to the bubble concept's application to various Clean Air Act programs, and note that a further clarifying statutory directive would facilitate the work of the agency and of the court in their endeavors to serve the legislators' will." 222 U.S.App.D.C., at 276, n. 39, 685 F.2d, at 726, n. 39.

6 Alabama Power Co. v. Costle, 204 U.S.App.D.C. 51, 636 F.2d 323 (1979); ASARCO Inc. v. EPA, 188 U.S.App.D.C. 77, 578 F.2d 319 (1978).

7 Respondents argued below that EPA's plantwide definition of "stationary source" is contrary to the terms, legislative history, and purposes of the amended Clean Air Act. The court below rejected respondents' arguments based on the language and legislative history of the Act. It did agree with respondents contention that the regulations were inconsistent with the purposes of the Act, but did not adopt the construction of the statute advanced by respondents here. Respondents rely on the arguments rejected by the Court of Appeals in support of the judgment, and may rely on any ground that finds support in the record. See Ryerson v. United States, 312 U.S. 405, 408, 61 S.Ct. 656, 658, 85 L.Ed. 917 (1941); LeTulle v. Scofield, 308 U.S. 415, 421, 60 S.Ct. 313, 316, 84 L.Ed. 355 (1940); Langnes v. Green, 282 U.S. 531, 533–539, 51 S.Ct. 243, 244–246, 75 L.Ed. 520 (1931).

8 E.g., Black v. Cutter Laboratories, 351 U.S. 292, 297, 76 S.Ct. 824, 827, 100 L.Ed. 1188 (1956); J.E. Riley Investment Co. v. Commissioner, 311 U.S. 55, 59, 61 S.Ct. 95, 97, 85 L.Ed. 36 (1940); Williams v. Norris, 12 Wheat. 117, 120, 6 L.Ed. 571 (1827); McClung v. Silliman, 6 Wheat. 598, 603, 5 L.Ed. 340 (1821).

9 The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. See, e.g., FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32, 102 S.Ct. 38, 42, 70 L.Ed.2d 23 (1981); SEC v. Sloan, 436 U.S. 103, 117–118, 98 S.Ct. 1702, 1711–1712, 56 L.Ed.2d 148 (1978); FMC v. Seatrain Lines, Inc., 411 U.S. 726, 745–746, 93 S.Ct. 1773, 1784–1785, 36 L.Ed.2d 620 (1973); Volkswagenwerk v. FMC, 390 U.S. 261, 272, 88 S.Ct. 929, 935, 19 L.Ed.2d 1090 (1968); NLRB v. Brown, 380 U.S. 278, 291, 85 S.Ct. 980, 988, 13 L.Ed.2d 839 (1965); FTC v. Colgate–Palmolive Co., 380 U.S. 374, 385, 85 S.Ct. 1035, 1042, 13 L.Ed.2d 904 (1965); Social Security Board v. Nierotko, 327 U.S. 358, 369, 66 S.Ct. 637, 643, 90 L.Ed. 718 (1946); Burnet v. Chicago Portrait Co., 285 U.S. 1, 16, 52 S.Ct. 275, 281, 76 L.Ed. 587 (1932); Webster v. Luther, 163 U.S. 331, 342, 16 S.Ct. 963, 967, 41 L.Ed. 179 (1896). If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

10 See generally, R. Pound, The Spirit of the Common Law 174–175 (1921).

11 The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. FEC v. Democratic Senatorial Campaign Committee, 454 U.S., at 39, 102 S.Ct., at 46; Zenith Radio Corp. v. United States, 437 U.S. 443, 450, 98 S.Ct. 2441, 2445, 57 L.Ed.2d 337 (1978); Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 75, 95 S.Ct. 1470, 1479, 43 L.Ed.2d 731 (1975); Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965); Unemployment Compensation Comm'n v. Aragon, 329 U.S. 143, 153, 67 S.Ct. 245, 250, 91 L.Ed. 136 (1946); McLaren v. Fleischer, 256 U.S. 477, 480–481, 41 S.Ct. 577, 577–578, 65 L.Ed. 1052 (1921).

12 See, e.g., United States v. Morton, 467 U.S. 822, 834, 104 S.Ct. 2769, 2776, 81 L.Ed.2d 680 (1984) Schweiker v. Gray Panthers, 453 U.S. 34, 44, 101 S.Ct. 2633, 2640, 69 L.Ed.2d 460 (1981); Batterton v. Francis, 432 U.S. 416, 424–426, 97 S.Ct. 2399, 2404–2406, 53 L.Ed.2d 448 (1977); American Telephone & Telegraph Co. v. United States, 299 U.S. 232, 235–237, 57 S.Ct. 170, 172–173, 81 L.Ed. 142 (1936).

13 E.g., INS v. Jong Ha Wang, 450 U.S. 139, 144, 101 S.Ct. 1027, 1031, 67 L.Ed.2d 123 (1981); Train v. Natural Resources Defense Council, Inc., 421 U.S., at 87, 95 S.Ct., at 1485.

14 Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist., 467 U.S. 380, 389, 104 S.Ct. 2472, 2479–2480, 81 L.Ed.2d 301 (1984); Blum v. Bacon, 457 U.S. 132, 141, 102 S.Ct. 2355, 2361, 72 L.Ed.2d 728 (1982); Union Electric Co. v. EPA, 427 U.S. 246, 256, 96 S.Ct. 2518, 2525, 49 L.Ed.2d 474 (1976); Investment Company Institute v. Camp, 401 U.S. 617, 626–627, 91 S.Ct. 1091, 1097, 28 L.Ed.2d 367 (1971); Unemployment Compensation Comm'n v. Aragon, 329 U.S., at 153–154, 67 S.Ct., at 250–251; NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131, 64 S.Ct. 851, 860, 88 L.Ed. 1170 (1944); McLaren v. Fleischer, 256 U.S., at 480–481, 41 S.Ct., at 577–578; Webster v. Luther, 163 U.S., at 342, 16 S.Ct., at 967; Brown v. United States, 113 U.S. 568, 570–571, 5 S.Ct. 648, 649–650, 28 L.Ed. 1079 (1885); United States v. Moore, 95 U.S. 760, 763, 24 L.Ed. 588 (1878); Edwards' Lessee v. Darby, 12 Wheat. 206, 210, 6 L.Ed. 603 (1827).

15 Primary standards were defined as those whose attainment and maintenance were necessary to protect the public health, and secondary standards were intended to specify a level of air quality that would protect the public welfare.

16 See §§ 110(a)(2)(D) and 110(a)(4).

17 The Court of Appeals ultimately held that this plantwide approach was prohibited by the 1970 Act, see ASARCO Inc., 188 U.S.App.D.C., at 83–84, 578 F.2d, at 325–327. This decision was rendered after enactment of the 1977 Amendments, and hence the standard was in effect when Congress enacted the 1977 Amendments.

18 See Report of the National Commission on Air Quality, To Breathe Clean Air, 3.3–20 through 3.3–33 (1981).

19 Comprehensive bills did pass both Chambers of Congress; the Conference Report was rejected in the Senate. 122 Cong.Rec. 34375–34403, 34405–34418 (1976).

20 For example, it stated:
"Particularly with regard to the primary NAAQS's, Congress and the Courts have made clear that economic considerations must be subordinated to NAAQS achievement and maintenance. While the ruling allows for some growth in areas violating a NAAQS if the net effect is to insure further progress toward NAAQS achievement, the Act does not allow economic growth to be accommodated at the expense of the public health." 41 Fed.Reg. 55527 (1976).

21 In January 1979, the EPA noted that the 1976 Ruling was ambiguous concerning this issue:
"A number of commenters indicated the need for a more explicit definition of 'source.' Some readers found that it was unclear under the 1976 Ruling whether a plant with a number of different processes and emission points would be considered a single source. The changes set forth below define a source as 'any structure, building, facility, equipment, installation, or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control.' This definition precludes a large plant from being separated into individual production lines for purposes of determining applicability of the offset requirements." 44 Fed.Reg. 3276.

22 Specifically, the controversy in these cases involves the meaning of the term "major stationary sources" in § 172(b)(6) of the Act, 42 U.S.C. § 7502(b)(6). The meaning of the term "proposed source" in § 173(2) of the Act, 42 U.S.C. § 7503(2), is not at issue.

23 Thus, among other requirements, § 172(b) provided that the SIP's shall—
"(3) require, in the interim, reasonable further progress (as defined in section 171(1)) including such reduction in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology;
"(4) include a comprehensive, accurate, current inventory of actual emissions from all sources (as provided by rule of the Administrator) of each such pollutant for each such area which is revised and resubmitted as frequently as may be

necessary to assure that the requirements of paragraph (3) are met and to assess the need for additional reductions to assure attainment of each standard by the date required under paragraph (1);

"(5) expressly identify and quantify the emissions, if any, of any such pollutant which will be allowed to result from the construction and operation of major new or modified stationary sources for each such area; ...

.....

"(8) contain emission limitations, schedules of compliance and such other measures as may be necessary to meet the requirements of this section." 91 Stat. 747.

Section 171(1) provided:

"(1) The term 'reasonable further progress' means annual incremental reductions in emissions of the applicable air pollutant (including substantial reductions in the early years following approval or promulgation of plan provisions under this part and section 110(a)(2)(I) and regular reductions thereafter) which are sufficient in the judgment of the Administrator, to provide for attainment of the applicable national ambient air quality standard by the date required in section 172(a)." Id., at 746.

24 Section 171(3) provides:

"(3) The term 'lowest achievable emission rate' means for any source, that rate of emissions which reflects—

"(A) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or

"(B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent. "In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance."

The LAER requirement is defined in terms that make it even more stringent than the applicable new source performance standard developed under § 111 of the Act, as amended by the 1970 statute.

25 During the floor debates Congressman Waxman remarked that the legislation struck

"a proper balance between environmental controls and economic growth in the dirty air areas of America.... There is no other single issue which more clearly poses the conflict between pollution control and new jobs. We have determined that neither need be compromised....

"This is a fair and balanced approach, which will not undermine our economic vitality, or impede achievement of our ultimate environmental objectives." 123 Cong.Rec. 27076 (1977).

The second "main purpose" of the provision—allowing the States "greater flexibility" than the EPA's interpretative Ruling—as well as the reference to the EPA's authority to amend its Ruling in accordance with the intent of the section, is entirely consistent with the view that Congress did not intend to freeze the definition of "source" contained in the existing regulation into a rigid statutory requirement.

26 In the same Ruling, the EPA added:

"The above exemption is permitted under the SIP because, to be approved under Part D, plan revisions due by January 1979 must contain adopted measures assuring that reasonable further progress will be made. Furthermore, in most circumstances, the measures adopted by January 1979 must be sufficient to actually provide for attainment of the standards by the dates required under the Act, and in all circumstances measures adopted by 1982 must provide for attainment. See Section 172 of the Act and 43 FR 21673–21677 (May 19, 1978). Also, Congress intended under Section 173 of the Act that States would have some latitude to depart from the strict requirements of this Ruling when the State plan is revised and is being carried out in accordance with Part D. Under a Part D plan, therefore, there is less need to subject a modification of an existing facility to LAER and other stringent requirements if the modification is accompanied by sufficient intrasource offsets so that there is no net increase in emissions." 44 Fed.Reg. 3277 (1979).

27 Id., at 51926. Later in that Ruling, the EPA added:

"However, EPA believes that complete Part D SIPs, which contain adopted and enforceable requirements sufficient to assure attainment, may apply the approach proposed above for PSD, with plant-wide review but no review of individual pieces of equipment. Use of only a plant-wide definition of source will permit plant-wide offsets for avoiding NSR of new or modified pieces of equipment. However, this is only appropriate once a SIP is adopted that will assure the reductions in existing emissions necessary for attainment. See 44 FR 3276 col. 3 (January 16, 1979). If the level of emissions allowed in the SIP is low enough to assure reasonable further progress and attainment, new construction or modifications with enough offset credit to prevent an emission increase should not jeopardize attainment." Id., at 51933.

28 In its explanation of why the use of the "bubble concept" was especially appropriate in preventing significant deterioration (PSD) in clean air areas, the EPA stated: "In addition, application of the bubble on a plant-wide basis encourages voluntary upgrading of equipment, and growth in productive capacity." Id., at 51932.

29 "The dual definition also is consistent with Alabama Power and ASARCO. Alabama Power held that EPA had broad discretion to define the constituent terms of 'source' so as best to effectuate the purposes of the statute. Different definitions of 'source' can therefore be used for different sections of the statute....
"Moreover, Alabama Power and ASARCO taken together suggest that there is a distinction between Clean Air Act programs designed to enhance air quality and those designed only to maintain air quality....
.....
"Promulgation of the dual definition follows the mandate of Alabama Power, which held that, while EPA could not define 'source' as a combination of sources, EPA had broad discretion to define 'building,' 'structure,' 'facility,' and 'installation' so as to best accomplish the purposes of the Act." 45 Fed.Reg. 52697 (1980).

30 It stated:
"5. States will remain subject to the requirement that for all nonattainment areas they demonstrate attainment of NAAQS as expeditiously as practicable and show reasonable further progress toward such attainment. Thus, the proposed change in the mandatory scope of nonattainment new source review should not interfere with the fundamental purpose of Part D of the Act.
"6. New Source Performance Standards (NSPS) will continue to apply to many new or modified facilities and will assure use of the most up-to-date pollution control techniques regardless of the applicability of nonattainment area new source review.
"7. In order to avoid nonattainment area new source review, a major plant undergoing modification must show that it will not experience a significant net increase in emissions. Where overall emissions increase significantly, review will continue to be required." 46 Fed.Reg. 16281 (1981).

31 "What EPA may not do, however, is define all four terms to mean only plants. In the 1980 PSD rules, EPA did just that. EPA compounded the mistake in the 1981 rules here under review, in which it abandoned the dual definition." Brief for Respondents 29, n. 56.

32 We note that the EPA in fact adopted the language of that definition in its regulations under the permit program. 40 CFR §§ 51.18(j)(1)(i), (ii) (1983).

33 Since the regulations give the States the option to define an individual unit as a source, see 40 CFR § 51.18(j)(1) (1983), petitioners do not dispute that the terms can be read as respondents suggest.

34 The argument based on the text of § 173, which defines the permit requirements for nonattainment areas, is a classic example of circular reasoning. One of the permit requirements is that "the proposed source is required to comply with the lowest achievable emission rate" (LAER). Although a State may submit a revised SIP that provides for the waiver of another requirement—the "offset condition"—the SIP may not provide for a waiver of the LAER condition for any proposed source. Respondents argue that the plantwide definition of the term "source" makes it unnecessary for newly constructed units within the plant to satisfy the LAER requirement if their emissions are offset by the reductions achieved by the retirement of older equipment. Thus, according to respondents, the plantwide definition allows what the statute explicitly prohibits—the waiver of the LAER requirement for the newly constructed units. But this argument proves nothing because the statute does not prohibit the waiver unless the proposed new unit is indeed subject to the permit program. If it is not, the statute does not impose the LAER requirement at all and there is no need to reach any waiver question. In other words, § 173 of the statute merely deals with the consequences of the definition of the term "source" and does not define the term.

35 See supra, at 2787. We note that Senator Muskie was not critical of the EPA's use of the "bubble concept" in one NSPS program prior to the 1977 amendments. See ibid.

36 See, for example, the statement of the New York State Department of Environmental Conservation, pointing out that denying a source owner flexibility in selecting options made it "simpler and cheaper to operate old, more polluting sources than to trade up...." App. 128–129.

37 "Economists have proposed that economic incentives be substituted for the cumbersome administrative-legal framework. The objective is to make the profit and cost incentives that work so well in the marketplace work for pollution control.... [The 'bubble' or 'netting' concept] is a first attempt in this direction. By giving a plant manager flexibility to find the places and processes within a plant that control emissions most cheaply, pollution control can be achieved more quickly and cheaply." L. Lave & G. Omenn, Cleaning Air: Reforming the Clean Air Act 28 (1981) (footnote omitted).

38 Respondents point out if a brand new factory that will emit over 100 tons of pollutants is constructed in a nonattainment area, that plant must obtain a permit pursuant to § 172(b)(6) and in order to do so, it must satisfy the § 173 conditions, including the LAER requirement. Respondents argue if an old plant containing several large emitting units is to be modernized by the replacement of one or more units emitting over 100 tons of pollutant with a new unit emitting less—but still more than 100 tons—the result should be no different simply because "it happens to be built not at a new site, but within a pre-existing plant." Brief for Respondents 4.

39 See e.g., Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist., 467 U.S., at 390, 104 S.Ct., at 2480 (1984).

40 See SEC v. Sloan, 436 U.S., at 117, 98 S.Ct., at 1711; Adamo Wrecking Co. v. United States, 434 U.S. 275, 287, n. 5, 98 S.Ct. 566, 574, n. 5, 54 L.Ed.2d 538 (1978); Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944).

41 See Capital Cities Cable, Inc. v. Crisp, 467 U.S. at 699–700, 104 S.Ct. at 2700–2701; United States v. Shimer, 367 U.S. 374, 382, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961).

149 Vt. 179
Supreme Court of Vermont.

In re HAWK MOUNTAIN CORPORATION
and Our World Sewer Association, Inc.

No. 85-525.
|
Jan. 8, 1988.

Real estate developer appealed decision of Environmental Board denying it land use permit following Agency of Environmental Conservation's issuance of certificate of compliance to proposed sewage system for development. Municipal corporation cross-appealed another determination in Board's finding. The Supreme Court, Peck, J., held that: (1) Board's finding that proposed sewage system was inadequate was supported by evidence; (2) Board had authority to require developer to receive water discharge permit from agency; (3) rebuttable presumption which attached upon compliance certification by Agency disappeared upon introduction of contrary evidence; and (4) expert testimony introduced by municipal corporation demonstrated noncompliance of proposed system.

Affirmed in part and reversed in part.

West Headnotes (4)

[1] **Environmental Law**
Weight and Sufficiency

Environmental Law
Weight and Sufficiency

Environmental Board's findings, that real estate developer's proposed sewage system for additional development was inadequate, and its refusal to issue land use permit were supported by evidence; developer's use of inadequate tests, poor conditions of current sewage system, location of system near Class B waterway and failure to test effect system would have on waterway precluded issuance of permit. 10 V.S.A. §§ 1250-1384, 1252(a), 6001-6091, 6089(a).

Cases that cite this headnote

[2] **Environmental Law**
Discharge of Pollutants

Environmental Board did not exceed its authority by requiring real estate developers to seek water discharge permit, even though Agency of Environmental Conservation waived that requirement and issued certificate of compliance, as water regulations are within purview of Board's authority. 3 V.S.A. § 2873; 10 V.S.A. §§ 1263, 6082, 6086(a)(1), (d).

2 Cases that cite this headnote

[3] **Administrative Law and Procedure**
Presumptions

Environmental Law
Presumptions, Inferences, and Burden of Proof

Rebuttable presumption, that real estate developer's proposed sewage system was in statutory compliance, which attached when Agency of Environmental Conservation issued certificate of compliance, was merely locative, and had no independent probative value; the presumption disappeared upon introduction of evidence that proposed system was, in fact, not in compliance. 10 V.S.A. § 6086(a)(1), (d).

2 Cases that cite this headnote

[4] **Environmental Law**
Presumptions, Inferences, and Burden of Proof

Municipal corporation rebutted presumption, that real estate developer's sewage system complied with statutory requirements, even though Agency of Environmental Conservation issued certificate of compliance; expert testimony that sewage system did not comply with health regulations in a variety of ways demonstrated noncompliance. 10 V.S.A. § 6086(a)(1), (d).

1 Cases that cite this headnote

Attorneys and Law Firms

****261** ***180** Paul S. Kulig of Keyser, Crowley, Banse & Facey, Rutland, for plaintiffs-appellants.

Corsones & Hansen, Rutland, for defendant-appellee.

Before ***179** ALLEN, C.J., HILL, PECK and GIBSON, JJ., and BARNEY, C.J. (Ret.), Specially Assigned.

Opinion

PECK, Justice.

This appeal concerns the denial of a land use permit by the Environmental Board on ****262** the ground that a large sewage system would unduly pollute the Tweed River. We affirm in part and reverse in part.

On appeal, Hawk Mountain Corporation and Our World Sewer Association, Inc. challenge the Environmental Board's finding that the proposed development would result in undue water pollution. Appellants also question the Environmental Board's exercise of jurisdiction when it required appellants to obtain a water discharge permit from the Agency of Environmental Conservation (AEC), even though the AEC itself, following an unwritten practice, had not required one. Appellee, the town of Pittsfield (Pittsfield), cross appeals, arguing that the Board erred by ruling that Pittsfield had not rebutted the presumption created by appellants' ***181** Certificate of Compliance that the project met the requirements of applicable health regulations.

On April 13, 1984, appellants applied to the District Environmental Commission (Commission) for a land use permit to expand by 60 lots an existing vacation home development in the town of Stockbridge, pursuant to 10 V.S.A. §§ 6001-6091 (Act 250). The Commission granted the permit. Pittsfield, the town in which the sewage system for the expansion is located, appealed to the Environmental Board for a de novo review pursuant to 10 V.S.A. § 6089(a). After one hearing before a panel of three Board members and another before the full Board, the permit was denied on August 21, 1985. This appeal followed.

The proposed development contemplates the enlargement of the existing sewage system to service an eventual total of 146 lots. The new system is to consist of a complex of eighteen leach fields, each measuring 3,000 square feet for treating, at maximum, 40,000 gallons of sewage per day. The site for this proposed system lies 200 feet to 400 feet above the Tweed River, which has been classified as a class B waterway by the Water Resources Board, pursuant to its authority under 10 V.S.A. chapter 47, §§ 1250-1384 (Water Pollution Control Act). [1] Two leach fields are currently on this proposed site. They serve 31 lots, and have been found not to function properly.

[1] The Environmental Board found that the proposed sewage system would remove from the domestic wastewater eighty to ninety percent of various contaminants, eighty percent of bacteria, and an uncertain portion of viruses. The Board then found that the unremoved material would leach into the groundwater and, ultimately, be discharged into the river in identifiable, but highly diluted amounts.

Except for these general figures regarding removal rate, the Board found a lack of empirical evidence on the treatment capability of the proposed system. Appellants' evidence was derived from one test conducted in 1979 which used the rudimentary point permeability method. The record reveals that this method of testing is inaccurate and that the only reliable way to determine a leach field's efficiency is to simulate actual conditions by ***182** "loading" the disposal site with effluent and monitoring the filtration. Such a test was never conducted. In addition, appellants offered no evidence on the existing water quality of the river, thus precluding an assessment of the impact of the anticipated discharge on the river. On the basis of this paucity of evidence, the Board concluded that appellants did not carry their burden of proof on the question of undue water pollution.

To obtain a land use permit under Act 250, an applicant must prove that the project will not be detrimental to the public health, safety or general welfare. 10 V.S.A. §§ 6087, 6088. Before concluding that a development will not be harmful, the Environmental Board must find, on the basis of several criteria, that it will not result in undue water pollution. 10 V.S.A. § 6086(a)(1). In making this determination the Board must

consider the applicable **263 health and environmental conservation regulations. *Id.*

In the present case appellants presented to the Environmental Board a Certificate of Compliance obtained in 1982 from the AEC which established a rebuttable presumption, pursuant to 10 V.S.A. § 6086(d) and Environmental Board Rule 19 (1984), that the project complies with applicable health regulations and that it will not cause undue water pollution. The Certificate of Compliance also created a rebuttable presumption that the proposed leach field complex complies with regulations governing the land application of waste disposal. See *In re Wildlife Wonderland, Inc.,* 133 Vt. 507, 514-15, 346 A.2d 645, 649-50 (1975); see also Vermont State Board of Health Regulations, ch. 5, subchapter 10, part III. The Environmental Board ruled that the presumption in favor of appellants with regard to water pollution had been rebutted by appellee, and the Board denied appellants' Act 250 land use permit on the ground that the project would result in undue water pollution.

The Board found that the proposed development did not meet Water Resources Department regulations, and thus criterion one of 10 V.S.A. § 6086 had not been met. Appellants' proposed complex of leach fields was found by the Board to discharge domestic wastes containing pathogenic organisms into the Tweed River in violation of Water Resources Department regulations. See Vermont Water Quality Standards Regulations, § 11 ("Discharges of domestic waste, or wastes which contain pathogenic organisms prior to treatment shall not be permitted in Class B waters regardless of degree of treatment."); see also 10 V.S.A. §§ 1252, 905 *183 (enabling legislation allowing the Water Resources Board to promulgate such regulations). In addition, the Board concluded that since wastes would be discharged into the Tweed River a discharge permit is required under 10 V.S.A. § 1263, and unless appellants complied with this requirement, no Act 250 land use permit could be granted. See 10 V.S.A. § 6086(a)(1).

On appeal, appellants challenge the Board's conclusion that they failed to sustain their burden of proof on the issue of undue water pollution. In contesting this conclusion, appellants attack findings of fact with respect to the treatment capabilities of the leach field system, the method used for testing the soil, the credibility of an agency expert, and whether appellants failed to prove that no undue water pollution would occur because of the lack of evidence as to the existing quality of the river's water.

In Act 250 proceedings the findings of the Board, if supported by substantial evidence on the record as a whole, shall be conclusive upon this Court. 10 V.S.A. § 6089(c). The evidence is viewed in a light most favorable to the prevailing party and modifying evidence is excluded. See *In re Brileya,* 147 Vt. 280, 282, 515 A.2d 129, 131 (1986). Moreover, it is not for this Court to reweigh conflicting evidence, reassess the credibility or weight to be given to particular testimony, or determine on its own whether the factual decision is mistaken. *In re Wildlife Wonderland, Inc.,* 133 Vt. at 511, 346 A.2d at 648.

Upon examination of the record we find substantial support for the Board's findings. See *id.* In addition, with regard to the Board's concern for the existing quality of the river's water, we note that the Environmental Board must of necessity take into consideration the existing condition of the river since the standards for Class B waters require an analysis of the effect of pollutants on the particular water's environment. See Vermont Water Quality Standards, § 5(B)(10)(2). Thus we also find that the Board properly required evidence of the existing water quality of the Tweed River, and the Board did not abuse its discretion by concluding that appellants failed to meet their burden in this regard.

[2] Appellants also argue that the Environmental Board exceeded its authority by requiring appellants to seek a water discharge permit from the AEC when a division of this agency, following an informal practice, told appellants that no permit was necessary. *184 We find that the Board did not **264 exceed its authority by requiring the water discharge permit.

Appellants contend that the Water Resources Board's water quality standards and discharge permit requirements are not Water Resources and Environmental Engineering regulations within the meaning of 10 V.S.A. § 6086(a)(1)(B), and were therefore improperly considered by the Environmental Board. 10 V.S.A. § 6086(a)(1) provides that prior to granting a land use permit the Environmental Board must determine that the proposed development "[w]ill not result in undue water ... pollution. In making this determination it shall *at least* consider ... the applicable health and water

resources and environmental engineering department regulations." (Emphasis added.)

First, we note that the purposes of Act 250 are broad: "to protect and conserve the environment of the state." *In re Juster Associates,* 136 Vt. 577, 580, 396 A.2d 1382, 1384 (1978). To achieve this far-reaching goal the Environmental Board is given authority to conduct an independent review of the environmental impact of proposed projects, and in doing such the Board is not limited to the considerations listed in Title 10. See 10 V.S.A. § 6086(a)(1). Thus, even if we held that water quality standards are not Water Resources and Environmental Engineering Department regulations, the Environmental Board could still properly consider them when determining whether a land use permit should be granted.

In addition, we note that Water Resources Board regulations are administered by the Water Resources and Environmental Engineering Department. 3 V.S.A. § 2873. The Water Resources Board, authorized to create water classifications and quality standards, was created by the same act that created the Department of Water Resources and Environmental Engineering. 10 V.S.A. §§ 901-906. The Department of Water Resources and Environmental Engineering (now incorporated into the Department of Environmental Conservation, 3 V.S.A. § 2873) is not authorized to promulgate regulations, but is charged with administering the water resources regulations and programs created by Title 10, which include the Water Resources Board's water classification program and discharge permit requirements. 3 V.S.A. § 2873. In light of this administrative scheme, water resource regulations administered by the Department of Water Resources and Environmental Engineering come within the purview of 10 V.S.A. § 6086(a)(1), and are properly considered by the Environmental ***185** Board before a land use permit is granted. In addition, we note that appellants' view that the Board may not consider water resource regulations would compel the Board, whose purpose is to protect the waters of the state, to ignore the most directly pertinent regulations concerning water pollution. Under these circumstances, it is clear that appellants have failed to demonstrate any compelling signs of error in the Board's interpretation of the law.

We also hold that the Environmental Board did not exceed its authority by requiring appellants to obtain a water discharge permit pursuant to 10 V.S.A. § 1263, although the AEC had waived this requirement. Act 250 sets up concurrent jurisdiction between the various state environmental agencies and the Environmental Board. See 10 V.S.A. § 6082. However, the legislative scheme indicates that the legislature intended to confer upon the Board powers of a supervisory body in environmental matters. For example, although 10 V.S.A. § 6082 provides that the permit required under Act 250 does not replace permit requirements from other state agencies, 10 V.S.A. § 6086(d) provides that the Environmental Board is not bound by the approval or permits granted by the other agencies. Permits and Certificates of Compliance from other agencies create a presumption that the project satisfies the relevant 10 V.S.A. § 6086(a)(1) criteria; however, the Board must conduct an independent review of the proposed development and may deny the Act 250 permit if it finds the Certificate of Compliance or other required permits were improvidently granted. 10 V.S.A. § 6086(d). In this case the Board concluded that the sewage system did not comply with the applicable Water ****265** Resources Board regulations and found that the system would discharge wastes into the river. Upon concluding that the system would create a discharge into the river, the Board properly held that a water discharge permit would consequently be necessary pursuant to 10 V.S.A. § 1263. Although the Board's determination is at odds with an unofficial practice of a division of the AEC, we cannot, on that basis, reverse the Board's ruling.

The last matter on appeal is Pittsfield's challenge to the Board's ruling that the town had not rebutted the presumption of compliance created by the Certificate submitted by appellants. We reverse on that basis.

[3] **[4]** Pursuant to Environmental Board Rules 19(A) and (C) (1985), promulgated by the Environmental Board in compliance with 10 V.S.A. § 6086(d), the Certificate of Compliance creates a rebuttable ***186** presumption that the leach field complex will not result in undue water pollution. This presumption is merely "locative," placing the burden of going forward with the evidence on the party against whom it operates as a rule of law, but operating without any independent probative value. See *Rutland Country Club, Inc. v. City of Rutland,* 140 Vt. 142, 145-46, 436 A.2d 730, 731 (1981). The presumption disappears when credible evidence is introduced fairly and reasonably indicating that the real fact is not as presumed. See *id.* at 145, 436 A.2d at 732. The standard by which the trier must

measure the attempt to rebut the presumption is not one of credibility, but rather of admissibility: "Does the fact offered in proof afford a basis for a rational inference of the fact to be proved?" *Kruse v. Town of Westford,* 145 Vt. 368, 372, 488 A.2d 770, 772 (1985) (citing *Tyrrell v. Prudential Insurance Co. of America,* 109 Vt. 6, 21, 192 A. 184, 191 (1937)). [2]

To surmount the presumption favoring appellants, Pittsfield introduced evidence through expert testimony that the proposed sewage system did not comply with several of the health regulations regarding waste disposal, including the standards for distances between leach field, for emergency replacement areas, and for manhole distribution. The evidence offered allows a rational inference to be drawn that the system did not comply with the regulations, and thus, was likely to result in undue water pollution. Upon introduction of Pittsfield's evidence, the presumption disappeared, and in accordance with 10 V.S.A. § 6088(a), the burden of proof of compliance with the regulations should have returned to appellants. See *In re Wildlife Wonderland, Inc.,* 133 Vt. at 511, 346 A.2d at 648.

Affirmed in part and reversed in part.

All Citations

149 Vt. 179, 542 A.2d 261

Footnotes

1 "Class B: Suitable for bathing and recreation, irrigation, and agricultural uses; good fish habitat; good aesthetic value; acceptable for public water supply with filtration and disinfection." 10 V.S.A. § 1252(a).

2 The Board adopted these standards regarding presumption in *Burlington Street Department,* 4C0516-1-EB, April 13, 1983.

175 Vt. 579
Supreme Court of Vermont.

In re **WOODFORD** **PACKERS**, INC.

No. 02–056.
|
June 26, 2003.

Applicant appealed decision of the Environmental Board vacating a land use permit that had been granted to it for a proposed retirement village by the district environmental commission. The Supreme Court held that: (1) Agency of Natural Resources (ANR) was not estopped from presenting evidence on appeal regarding the inadequacy of Federal Emergency Agency (FEMA) National Flood Insurance Program (NFIP) to support finding that project site would be free from flood hazards; (2) Secretary of ANR was authorized to make determinations as to what constituted a floodway or a floodway fringe without promulgating a rule; (3) Board reasonably concluded project did not satisfy shoreline criterion for land use permit; and (4) evidence supported determination that project failed to comply with criterion for soil erosion.

Affirmed.

West Headnotes (11)

[1] **Zoning and Planning**
Construction by board or agency

Zoning and Planning
Decisions of boards or officers in general

When reviewing a decision of the Environmental Board, the Supreme Court gives deference to the Board's interpretations of state land use and development law and its own rules, and to the Board's specialized knowledge in the environmental field. 10 V.S.A. § 6001 et seq.

Cases that cite this headnote

[2] **Zoning and Planning**
Decisions of boards or officers in general

Absent a compelling indication of error, the Supreme Court will sustain the Environmental Board's interpretations of state land use and development law on appeal. 10 V.S.A. § 6001 et seq.

Cases that cite this headnote

[3] **Zoning and Planning**
Scope of review

Appeal to the Environmental Board of land use permit that had been granted for a proposed retirement village by the district environmental commission was heard de novo, and, thus, Board properly considered district commission's findings on all appealed land use permit criteria, including floodways criterion, even if Agency of Natural Resources (ANR) did not present testimony on all criteria at the district commission level. 10 V.S.A. § 6089(a)(3).

1 Cases that cite this headnote

[4] **Zoning and Planning**
Administrative review

In a de novo proceeding regarding issues of state land use and development law, the Environmental Board is required to hear the issues as if there had been no prior proceedings in the district commission. 10 V.S.A. § 6089(a)(3).

Cases that cite this headnote

[5] **Zoning and Planning**
Hearing and evidence

Assuming that land use permit applicant relied on the representations of an Agency of Natural Resources (ANR) employee that its proposed retirement village project was not located in the floodway or floodway fringe when using the Federal Emergency Agency (FEMA) National Flood Insurance Program (NFIP) maps, ANR was not estopped from presenting evidence on appeal regarding the inadequacy of the NFIP maps to support a

finding that the site would be free from flood hazards. 10 V.S.A. §§ 6086, 6086(a).

Cases that cite this headnote

[6] Estoppel

Estoppel Against Public, Government, or Public Officers

Estoppel is rarely invoked against the government and is only appropriate when the injustice that would ensue from a failure to find an estoppel sufficiently outweighs any effect upon the public interest that would result from estopping the government in a particular case.

Cases that cite this headnote

[7] Zoning and Planning

Rules and regulations

Secretary of Agency of Natural Resources (ANR) was authorized to make determinations as to what constituted a floodway or a floodway fringe without promulgating a rule pursuant to Administrative Procedure Act (APA); even though ANR's use of "fluvial geomorphology" analysis, instead of Federal Emergency Agency (FEMA) National Flood Insurance Program (NFIP) maps, for determining floodways may have surprised applicant which sought land use permit for proposed retirement village, ANR's alteration of its methodology to determine presence of a floodway did not alter any preexisting rule. 3 V.S.A. §§ 836–844; 10 V.S.A. § 6001(6, 7); 10 V.S.A. § 6086(a)(1)(D).

Cases that cite this headnote

[8] Administrative Law and Procedure

Duty to make

An administrative agency is not required to adopt rules or regulations to carry out what its authorizing statute specifically directs it to do.

1 Cases that cite this headnote

[9] Zoning and Planning

Preservation before board or officer of grounds of review

Supreme Court would decline to address applicant's claim, regarding land use permit criterion for shorelines, that its proposed retirement village project was "not adjacent" to river, where instead of raising that specific claim below, applicant had argued that location of project on shoreline was necessary to fulfill its overall purpose in providing a high quality of life for the senior residents of the project. 10 V.S.A. § 6086(a)(1)(F).

Cases that cite this headnote

[10] Zoning and Planning

Other particular considerations

Environmental Board reasonably concluded, on the facts before it, that applicant's laudable objective of providing walking paths and other facilities to meet the needs of the proposed retirement village's residents was not so integral to the developmental scheme to "of necessity" require location on a shoreline, as was required to satisfy shoreline criterion for land use permit. 10 V.S.A. § 6086(a)(1)(F).

1 Cases that cite this headnote

[11] Zoning and Planning

Other particular considerations

Evidence supported Environmental Board's decision that applicant's proposed retirement village project failed to comply with land use permit criterion for soil erosion; there had been significant erosion at and near the project site, and flood controls implemented by applicant, while intended to prevent the river from inundating heavily eroded areas, had potential for actually increasing the damage done by the river. 10 V.S.A. § 6086(a)(4).

Cases that cite this headnote

****102** Before AMESTOY, C.J., DOOLEY, JOHNSON, SKOGLUND, JJ., and FREDERIC W. ALLEN, C.J. (Ret.), Specially Assigned.

ENTRY ORDER

***579** ¶ 1. **Woodford Packers**, Inc. (WPI) appeals the Environmental Board's decision vacating a land use permit that had been granted to it by the District Environmental Commission. WPI claims that the Board erred by: (1) permitting the Secretary of the Agency of Natural Resources (ANR) to determine both the floodway and floodway fringe when no such determination had been made by the Agency at the District Commission level; (2) allowing the ANR to change the standard for determining floodways and floodway fringes without following the Vermont Administrative Procedure Act (VAPA), and enabling the Secretary of ANR to determine the floodway and the floodway fringe on a case-by-case basis; (3) finding that the proposed development project was located in the floodway; and (4) finding that the project failed to meet Act 250 criteria concerning floodways, shorelines, and soil erosion. We affirm.

¶ 2. WPI proposed to build a thirty-unit retirement village on a 12.5 acre parcel in Bennington, Vermont, bordered on the north by the Roaring Branch ***580** River and on the south and east by Route 9. WPI applied to District Commission # 8 for an Act 250 permit, which was granted in October 2000. The Commission found that both WPI's and ANR's engineers agreed that no proposed buildings or roads would be located within the floodway or floodway fringe of the Roaring Branch River. See 10 V.S.A. § 6086(a)(1) (requiring the District Commission to find that the development will not result in undue water pollution and, "[i]n making this determination it shall at least consider: the elevation of land above sea level; and in relation to the flood plains, the nature of soils and subsoils and their ability to adequately support waste disposal ...."). The Commission further determined that the project would not impinge upon the ability of the river to carry flood waters in the event of a 100–year flood, which the Commission explained was a "theoretical time frame" for determining the frequency of major flooding occurrences. ANR filed a motion to alter the District Commission's decision, which was denied. ANR appealed the Commission's decision to the Environmental Board, asserting that the Commission erred in its conclusions regarding criteria 1(D) "floodways," 1(F) "shorelines," 4 "erosion," and 9(K) "development affecting public investments" under 10 V.S.A. § 6086(a).

¶ 3. The Environmental Board concluded that WPI's proposed project failed to comply with criterion 1(D) for floodways. See *id.* § 6086(a)(1)(D)(ii) ("A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria ... the development ... of lands within a floodway fringe will not significantly increase the peak discharge of the river or stream ... and endanger the health, safety, or welfare of the public or riparian owners during flooding."). The Board found that, for the purposes of Act 250, the Secretary of ANR determined that the entire project would be situated in the floodway. Consequently, the Board observed that placement of buildings and other materials in the floodway would restrict or divert the flow of waters in the event of a 100–year flood, resulting in a significant increase in peak flow adjacent to and downstream from the project, thereby "pos[ing] a safety risk to anyone on the Project site, including but not limited to the senior citizens residing at the Project." The Board also concluded ****103** that the project did not meet criterion 1(F), pertaining to shorelines, because WPI failed to show that the project served some water-related purpose necessitating its location on the shoreline of the Roaring Branch River, pursuant to 10 V.S.A. § 6086(a)(1)(F) (applicant must demonstrate that the project "must of necessity be located on a shoreline in order to fulfill the purpose of the development"). Furthermore, the Board found that the project failed to meet criterion 4 for soil erosion, due to the presence of substantial erosion at and near the proposed project site. Because WPI's project failed to comply with three separate criteria under Act 250, the Environmental Board vacated WPI's land use permit. This appeal followed.

[1] **[2]** ¶ 4. When reviewing a decision of the Environmental Board, this Court gives deference to the Board's "interpretations of Act 250 and its own rules, and to the Board's specialized knowledge in the environmental field." *In re Wal*Mart Stores, Inc.*, 167 Vt. 75, 79, 702 A.2d 397, 400 (1997). Absent a compelling indication of error, we will sustain the Board's interpretations on appeal. *Id.* Given this deferential standard of review, we conclude that the Environmental Board did not abuse its discretion when vacating WPI's Act 250 permit.

¶ 5. WPI's principal contention is that the Board erred in vacating WPI's land use permit for failing to meet Act 250's 1(D) "floodways" criterion under 10 V.S.A. § 6086(a)(1)(D). In support of its argument, WPI contends that: (1) it was ***581** error to permit the Secretary of ANR to determine the floodway when no such determination had been made by ANR at the District Commission level; (2) ANR should not be allowed to determine floodways and floodway fringes on a case-by-case basis, and it was error to allow ANR to determine floodways and floodway fringes without first proceeding through VAPA; and (3) the Board erred in finding that the proposed development would be located in the floodway.

[3] **[4]** ¶ 6. WPI first asserts that the Environmental Board erred by permitting the Secretary of ANR to determine the floodway when no such determination had been made by the Agency at the District Commission level. Act 250 provides that "[t]he [environmental board] shall hold a de novo hearing on all findings requested by any party that files an appeal or cross appeal, according to the rules of the board." 10 V.S.A. § 6089(a)(3). In a de novo proceeding, the Board is required to hear the issues "as if there had been no prior proceedings in the district commission." *In re Killington, Ltd.,* 159 Vt. 206, 214, 616 A.2d 241, 246 (1992). WPI argues that ANR filed an appeal on four separate Act 250 criteria, yet it only presented testimony on two criteria at the District Commission level. However, the statute is clear that an appeal to the Environmental Board is heard de novo, and the District Commission made findings on all four criteria appealed, including 1(D) floodways criterion.

[5] **[6]** ¶ 7. Nor are we persuaded by WPI's alternative theory that ANR should have been estopped from appealing the District Commission's decision because an ANR employee made a prior determination that WPI's project would not be located in the floodway or floodway fringe. Assuming arguendo that WPI relied on the representations of an ANR employee that the proposed project was not located in the floodway or floodway fringe when using the Federal Emergency Agency (FEMA) National Flood Insurance Program (NFIP) maps, ANR was not foreclosed from presenting evidence on appeal regarding the inadequacy of the NFIP maps to support a finding that the site would be free from flood hazards. Estoppel is rarely ****104** invoked against the government and is only appropriate when the injustice that would ensue from a failure to find an estoppel sufficiently outweighs any effect upon the public interest that would result from estopping the government in a particular case. *In re Letourneau,* 168 Vt. 539, 547, 726 A.2d 31, 37 (1998). However well-founded WPI's criticism that the current permit system enables ANR to burden an applicant with inconsistent and contradictory information, the remedy is more likely to be found in the executive and legislative branches, rather than by resorting to the rarely invoked judicial estoppel of a governmental agency. The determination of the floodway and floodway fringe was properly before the Board.

[7] ¶ 8. WPI next argues that ANR's alteration of its long-standing practice of relying on NFIP maps to determine whether a proposed development was within a floodway or floodway fringe required ANR to promulgate the change by rule pursuant to VAPA's rulemaking procedures set forth in 3 V.S.A. §§ 836–844. As a corollary to this argument, WPI contends that without such promulgation, the Secretary of ANR is without legal authority to make floodway determinations on a case-by-case basis.

¶ 9. WPI asserts that for approximately twenty years ANR used NFIP maps to determine whether a proposed development was within either a floodway or a floodway fringe for Act 250 purposes, and that during WPI's permit application process, ANR unilaterally changed the floodway standards by employing fluvial geomorphology techniques ***582** in lieu of the maps. [*] The Environmental Board's opinion noted that NFIP maps, while accurate at the time they were first drafted, often contain inaccuracies, since flood volumes change over time. Because of these inaccuracies, it is common for developers to have more detailed surveys done when the NFIP maps show that part of a proposed development is within the 100–year floodplain. The Board found that it is also customary for ANR to review the resurveyed maps when making its floodway determinations.

¶ 10. That is what happened in this case. In 1998, WPI's predecessor-in-interest, Aaron & Sons, Inc., had the project resurveyed. The new survey of the property revealed that a smaller portion of the project site was located in the floodplain than was depicted on the NFIP maps. During the Board proceedings, ANR Floodplain Engineer Karl Jurentkuff testified that he reviewed both the NFIP maps and the new survey map, and determined

that the new survey map was more accurate. In a letter to the Bennington zoning administrator, however, he cautioned that, because the Roaring Branch River is a "wild stream," no fill should be placed beyond the floodway line scaled from the NFIP maps.

¶ 11. After examining all of the relevant data and extensive testimony, the Board found that the NFIP maps showed that a significant portion of the project site was located within the 100–year floodplain of the Roaring Branch River. Additionally, the Board found that because the banks of the river are unstable, the flooding risk presented in this case is largely erosional. The Board concluded that while the NFIP maps are useful for predicting flooding risks due to inundation, fluvial geomorphology more accurately depicts flooding ****105** risks due to erosion. In addition to these findings, the Board held that the determination of whether a proposed development is located in a floodway is made by the Secretary of ANR.

¶ 12. The authorizing statute at issue in this case is Act 250. Section 6001(6) defines "floodway" as:

> the channel of a watercourse which is expected to flood on an average of at least once every 100 years and the adjacent land areas which are required to carry and discharge the flood of the watercourse, *as determined by the secretary of natural resources* with full consideration given to upstream impoundments and flood control projects.

10 V.S.A. § 6001(6) (emphasis added). Moreover, § 6001(7) defines "floodway fringe" as "an area which is outside a floodway and is flooded with an average frequency of once or more in each 100 years *as determined by the secretary of natural resources* with full consideration given to upstream impoundments and flood control projects." *Id.* § 6001(7) (emphasis added). The plain language of the statute states that the Secretary of ANR is authorized to make determinations as to what constitutes a floodway or a floodway fringe. See *In re Handy,* 171 Vt. 336, 341, 764 A.2d 1226, 1233 (2000) ("We presume that the Legislature intended the plain, ordinary meaning of the language, and if the meaning of that language is plain on its face, we normally ascertain legislative intent solely from the statutory language.").

[8] ***583** ¶ 13. In essence, WPI contends that the Secretary of ANR is without authority to implement the "floodway" and "floodway fringe" determinations without promulgating a rule pursuant to VAPA. We disagree. An agency is not required to adopt rules or regulations to carry out what its authorizing statute specifically directs it to do. See *State v. Wuerslin,* 174 Vt. 570, ——, 816 A.2d 445, 446–47 (2002) (mem.) (Department of Liquor Control not required to promulgate "sting operation" procedure pursuant to VAPA because Department has express statutory authorization to enforce liquor laws with respect to minors by investigating violations and forwarding them for prosecution). While ANR's alteration of its methodology for determining floodways may have been a surprise to WPI—apparently the first applicant to undergo "fluvial geomorphology" analysis—we cannot conclude that it lacked authority to do so.

¶ 14. Where an administrative agency's policy is challenged due to a failure to enact that policy pursuant to VAPA, we must discern whether the policy is a "rule" subject to the rulemaking procedures of VAPA or whether that policy is a "practice" that is exempt from those procedures. *King v. Gorczyk,* 2003 VT 34, ¶ 15, 175 Vt. 220, 825 A.2d 16. VAPA contains provisions that define both a rule and a practice. A rule is defined in 3 V.S.A. § 801(b)(9) as "each agency statement of general applicability which implements, interprets, or prescribes law or policy and which has been adopted in the manner provided by sections 836–844 of this title." On the other hand, a "practice" is defined as "a substantive or procedural requirement of an agency, affecting one or more persons who are not employees of the agency, which is used by the agency in the discharge of its powers and duties. The term includes all such requirements, regardless of whether they are stated in writing." *Id.* § 801(b)(7). A practice is exempt from rulemaking requirements unless an interested person requests that an agency officially "adopt a procedure describing an existing practice." *Id.* § 831(b); *King,* 2003 VT 34, ¶ 16, 825 A.2d 16. In addition, an agency "shall initiate ****106** rulemaking to adopt as a rule an existing practice or procedure when so requested by 25 or more persons or by the legislative committee on administrative rules." 3 V.S.A. § 831(c). Furthermore, VAPA provides that "[w]here due process or a statute directs an agency to adopt rules," the rule or practice in question shall be promulgated according to VAPA's

rulemaking procedures set forth in 3 V.S.A. §§ 836–844. *Id.* § 831(a); *King,* 2003 VT 34, ¶ 16, 825 A.2d 16.

¶ 15. In this case, ANR's decision to utilize fluvial geomorphology to determine the presence of a floodway did not constitute the creation of a rule consisting of an "agency statement of general applicability which implements, interprets, or prescribes law or policy." 3 V.S.A. § 801(b)(9). While ANR's change in methodology in this case diverged from previous floodway assessments, this change did not alter any preexisting rule. ANR's use of the NFIP maps was never formally adopted as a rule. There was no written policy stating that the NFIP maps were used to determine whether development projects were located in floodways, nor was there any generally applicable written policy regarding ANR's use of the new methodology. There was also evidence suggesting that the NFIP maps were quite out-of-date, and fluvial geomorphology was a more accurate technique for making the floodway determination in this case.

¶ 16. We noted in *King* that "there is no bright line between exempt procedures and those rules requiring adoption pursuant to rulemaking requirements." 2003 VT 34, ¶ 23, 825 A.2d 16. The instant case, however, differs significantly from cases in which we have determined that an alteration in policy fell within the ambit of rulemaking under VAPA. This case can ***584** be distinguished from *In re Diel,* 158 Vt. 549, 550, 614 A.2d 1223, 1224–25 (1992), which involved a challenge to the Department of Social Welfare's switch in policy not to consider federal fuel and utility subsidies when recalculating the income of Aid to Needy Families with Children (ANFC) recipients. This Court held that the Department's action fell within the ambit of rulemaking under VAPA, because it "both prescribed and implemented a policy intended to apply generally to a class of ANFC recipients." *Id.* at 554, 614 A.2d at 1227. Similarly, this case is distinguishable from *Parker v. Gorczyk,* 173 Vt. 477, 479–80, 787 A.2d 494, 497–98 (2001) (mem.), where the Department of Corrections' revised furlough policy constituted a generally applicable change in an existing agency policy that affected the rights of all prisoners convicted of violent felonies, and thus constituted a rule subject to proper promulgation under VAPA.

¶ 17. WPI's claim that ANR's application of its floodway determination on a case-by-case basis is without legal authority must also fail. The statutory authority enabling the Secretary of ANR to determine floodways and floodway fringes does not compel the determination be made by rules promulgated pursuant to VAPA. Standardless alteration of ANR's practice of determining floodways may give rise to a violation of due process if arbitrarily and capriciously applied, but in the matter before us the Environmental Board's finding that the Secretary's application of fluvial geomorphology was soundly grounded and supported by the evidence was not error. Nor are we persuaded that the Board erred in relying upon the Secretary's determination that the project would be in the floodway or floodway fringe. As with all Act 250 criteria, the applicant bears the burden of proof. We will accept the Board's findings unless the appealing party demonstrates that they are clearly erroneous. *In re EHV–Weidmann Indus.,* ****107** *Inc.,* 173 Vt. 581, 582, 795 A.2d 1185, 1187 (2002) (mem.). We cannot conclude that the Board committed clear error with respect to the § 6086(a)(1)(D) floodways criterion.

¶ 18. We do not find error with respect to the Environmental Board's determination that WPI's project failed to comply with criterion 1(F) for "shorelines." See 10 V.S.A. § 6086(a)(1)(F). In order to develop on a shoreline, Act 250 requires the applicant to prove that the proposed project "must of necessity be located on a shoreline in order to fulfill the purpose of the development." *Id.* § 6086(a)(1)(F). Act 250 defines "shoreline" as "the land adjacent to the waters of lakes, ponds, reservoirs and rivers. Shorelines shall include the land between the mean high water mark and the mean low water mark of such surface waters." *Id.* § 6001(17).

[9] ¶ 19. WPI asserts that the Board erred by (1) improperly considering the project "adjacent" to the Roaring Branch River and (2) adopting a new standard for determining whether a proposed project meets the "of necessity" requirement of criterion (1)(F). We decline to address WPI's claim that its project was "not adjacent" to Roaring Branch River because the claim was not raised below. See *Bull v. Pinkham Eng'g Assocs., Inc.,* 170 Vt. 450, 459, 752 A.2d 26, 33 (2000) ("Contentions not raised or fairly presented to the trial court are not preserved for appeal."). Indeed, WPI's argument before the Board was that location of the project on the shoreline was necessary to fulfill "applicant's overall purpose in providing a high quality of life for the senior residents of the project." WPI cannot now argue that the Board erred in failing to address an argument never before it.

[10] ¶ 20. WPI further contends that the Board's application of the "must of necessity" language in § 6086(a)(1)(F) represented a change in the Board's interpretation of the statute. The Board, in fact, acknowledged as much, noting in its decision that it now placed more emphasis ***585** on the " threshold question" of whether the project must "of necessity" be located on a shoreline to fulfill its purpose. We find no error in the Board's consideration of whether a project's shoreline location "serves an integral part of the developmental scheme." We have previously held that "criterion 1(F) requires that the Board make its own determination that a development need be located on the shoreline ...." *In re McShinsky,* 153 Vt. 586, 591, 572 A.2d 916, 919 (1990). Here, the Board reasonably concluded, on the facts before it, that the applicant's laudable objective of providing walking paths and other facilities to meet the needs of the project's residents was not so integral to the developmental scheme to "of necessity" require location on a shoreline.

[11] ¶ 21. In addition, we agree with the Environmental Board's decision that WPI's project failed to comply with criterion 4 for "soil erosion," which provides that a proposed development must not cause "unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result." 10 V.S.A. § 6086(a)(4). In its decision, the Board explained that there had been significant erosion at and near the project site, and that the flood controls implemented by WPI, while intended to prevent the river from inundating heavily eroded areas, may actually increase the damage done by the river. The Board concluded that the existing erosion would be exacerbated by the proposed development, and therefore the project failed to comply with criterion 4.

¶ 22. Act 250 mandates that "[b]efore granting a permit, the board or district ****108** commission shall find that the subdivision or development" meets *all* ten criteria under 10 V.S.A. § 6086. *Id.* § 6086(a). Because WPI's proposed project fails to meet three of these criteria, the Environmental Court properly vacated the Act 250 permit.

Affirmed.

All Citations

175 Vt. 579, 830 A.2d 100, 2003 VT 60

Footnotes

* Fluvial geomorphology is described by the Environmental Board as a science that "analyzes physical, chemical, biological, and social data to explain historical causes of problems being experienced in water bodies and to resolve or avoid conflicts between fluvial system dynamics and human investments in the landscape."

155 A.3d 694
Supreme Court of Vermont.

PLUM CREEK MAINE TIMBERLANDS, LLC
v.
VERMONT DEPARTMENT OF FORESTS, PARKS AND RECREATION and Vermont Department of Taxes

No. 14-063
|
September 16, 2016

Synopsis

Background: Owner of forestland sought review of determination by commissioner of Department of Forests, Parks and Recreation (FPR) that owner violated forest-management plan, and of Department of Taxes' consequent removal of land from current-use tax incentive program. The Superior Court, Essex Unit, Mary Miles Teachout, J., reversed. FPR appealed.

Holdings: The Supreme Court, Reiber, C.J., held that:

[1] determination of how residual basal area (RBA), or the amount of tree stock left after cutting, should be measured for purposes of determining landowner's compliance with forest-management plan was an area of agency expertise that would be presumed correct, and

[2] reasonable basis existed for FPR's use of measurements solely from harvested area, rather than from entire stand, as methodology for calculating RBA.

Reversed and remanded.

Dooley, J., filed dissenting opinion in which Skoglund, J., joined.

West Headnotes (5)

[1] Appeal and Error
Cases Triable in Appellate Court

The question of the appropriate standard of review is a legal one that the Supreme Court considers de novo.

Cases that cite this headnote

[2] Woods and Forests
Forest reservations, preserves, or parks

Determination of how residual basal area (RBA), or the amount of tree stock left after cutting, should be measured for purposes of determining landowner's compliance with forest-management plan was an area of agency expertise that would be presumed correct, in landowner's judicial review action challenging determination by commissioner of Department of Forests, Parks and Recreation (FPR) that owner violated forest-management plan; FPR was statutorily entrusted with authority both to set standards for acceptable forest management and to enforce compliance with those standards. 32 Vt. Stat. Ann. § 3752(9)(B)(iii).

1 Cases that cite this headnote

[3] Administrative Law and Procedure
Wisdom, judgment or opinion

Where there are questions about complicated methodologies within an agency's expertise, a reviewing court on judicial review, even in the context of a de novo hearing, must give deference to the agency's decision.

Cases that cite this headnote

[4] Administrative Law and Procedure
Presumptions

Administrative Law and Procedure
Arbitrary, unreasonable or capricious action; illegality

Absent a clear and convincing showing to the contrary, decisions made within the expertise of such agencies are presumed correct, valid and reasonable; review is limited to whether there was a reasonable basis for the agency action.

Cases that cite this headnote

[5] Woods and Forests
Forest reservations, preserves, or parks

Reasonable basis existed for Department of Forests, Parks, and Recreation's use of measurements solely from harvested area, rather than from entire stand, as methodology for calculating residual basal area (RBA), or the amount of tree stock left after cutting, for purposes of determining landowner's compliance with forest-management plan; method promoted overall policy of statutory use value appraisal (UVA) program in which land had been enrolled, it was not logical to purport to measure RBA in an unharvested area, and measuring compliance in the cut areas allowed for more effective oversight by department. 32 Vt. Stat. Ann. § 3751.

1 Cases that cite this headnote

***695** On Appeal from Superior Court, Essex Unit, Civil Division, Mary Miles Teachout, J.

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PRESENT: Reiber, C.J., Dooley, Skoglund, Robinson and Eaton, JJ.

Opinion

REIBER, C.J.

¶ 1. This appeal concerns a timber harvest by landowner **Plum Creek** Maine Timberlands, LLC in forestland enrolled in the current-use, tax-incentive program. The Vermont Department of Forests, Parks and Recreation (FPR) issued an adverse inspection report, concluding that **Plum Creek** violated its forest-management plan and failed to comply with minimum acceptable standards during the harvest. Consequently, the Department of Taxes removed the land from the current-use program and levied a tax assessment. Following **Plum Creek's** appeal, the superior court reversed those administrative decisions. FPR now appeals, arguing that the superior court failed to give appropriate deference to FPR's determination of the proper methodology for measuring compliance with the forest-management plan. We reverse the court's decision, and remand.

¶ 2. The property in question consists of approximately 56,600 acres in northeastern Vermont. Formerly part of the Champion International Corporation holdings, the land was sold in 1998 to the Essex Timber Company. Essex Timber enrolled it in the Use Value Appraisal (UVA), or current-use, program. This tax-incentive program was designed to "encourage and assist the maintenance of Vermont's productive agricultural and forestland" by taxing property enrolled in the program at its "current use" value rather than its fair market value. 32 V.S.A. §§ 3751, 3756(a). To be eligible for the program, forestland must be "under active long-term forest management ... in accordance with minimum acceptable standards for forest management." Id. § 3752(9)(A). "Minimum acceptable standards for forest management" are defined as standards set by FPR. Id. § 3752(13). Eligibility also generally requires compliance with "the regulations adopted by the [Current Use Advisory] Board." Id. § 3755(a). The UVA Program Manual adopted by the Board [1] sets forth minimum standards for forest-management plans, minimum standards ***696** for forest management and regeneration, standard forms for use by landowners enrolled in the program, and appendices containing additional guidance for foresters and landowners.

¶ 3. To enroll in the UVA program, a landowner must file a "forest management plan" and obtain the approval

of FPR, which is tasked with periodically reviewing the plan and inspecting each enrolled parcel. Id. § 3755(c). If upon inspection FPR "finds that the management of the tract is contrary to the ... forest management plan, or contrary to the minimum acceptable standards for ... forest management," it is required to file an "adverse inspection report" with the landowner and the PVR Director. Id. When a report is filed, the PVR Director, in turn, is required to "remove from use value appraisal an entire parcel of managed forestland and notify the owner." Id. § 3756(i)(1). This appeal involves FPR's issuance of such an adverse-inspection report to **Plum Creek**.

I. Facts

¶ 4. Essex Timber prepared a forest-management plan, which FPR approved in 2007. See 32 V.S.A. § 3755(b), (b)(1) (providing that "[m]anaged forestland" must be "subject to a forest management plan" to be eligible for enrollment in UVA program). The following year, Essex Timber sold its holdings to **Plum Creek**, which formally adopted the existing management plan.

¶ 5. Under a strategy developed by FPR to accommodate large landowners, **Plum Creek's** forest-management plan provided more conceptual, and less stand-specific, information than is generally required by FPR for participation in the UVA program. When an actual timber harvest is planned, however, the landowner must submit a "harvest prescription amendment" to the management plan containing more detailed information, and obtain the approval of the county forester for this amendment.

¶ 6. In 2009, **Plum Creek** sought to harvest timber for six stands in its managed forestland and worked with the county forester for Caledonia and Essex Counties to adopt a prescription amendment to its management plan. The plan set both numerical and qualitative goals for each stand to be harvested. Those goals were memorialized in a prescription amendment. For the three stands at issue in this appeal, the prescription provided the following. Stand 34 was to receive a two-staged shelterwood[2] and the target residual basal area (RBA)—the amount of tree stock left after cutting—was set at 30-40 ft^2. Stand 43 also was to receive a two-staged shelterwood cut and some overstory removal and the target RBA was 60 ft^2. Stand 44 was to receive intermediate thinning with a target RBA of 60 ft^2.

¶ 7. In late January 2010, after cutting had begun, the county forester visited the site with several other individuals including **Plum Creek's** forester, an FPR forester, and a forester from the Vermont Land Trust to review the harvest's progress. The county forester expressed concern about the level of cutting in Stand 34. Trees, which had been marked for retention, had been cut, and this sight "raised alarm with everyone as it suggested excessive cutting in disregard of the prescription." Based on the observations of cutting, all, including **Plum Creek's** forester, were concerned about the level of cutting and whether the proper outcome could be met if logging continued. The county forester also observed several violations of the Acceptable ***697** Management Practices (AMPs), which are designed to protect water quality during logging operations. The AMPs violations included the siting of equipment too close to water, improper stream crossings, and mud and sediment where equipment had crossed a stream. In response, **Plum Creek's** forester went to the home of the contracted logger and stopped all cutting in Stand 34. Subsequently, **Plum Creek** worked to correct the AMPs violations by removing the crossings and remediating the sites deemed to be contrary to the AMPs.

¶ 8. In early February 2010, **Plum Creek** suspended the entire harvest pending further investigation. Later that month, the county forester visited the site again with two other state officials: FPR's forester in charge of AMPs compliance and the Agency of Natural Resources (ANR) officer for AMPs enforcement. In a letter to **Plum Creek** written shortly thereafter, the FPR forester identified several additional AMPs violations involving erosion controls, logging debris, stream crossings, seeding and mulching, and protective strips along streams. The letter detailed the necessary remediation measures and closed with the observation that FPR's intentions were to ensure remediation in a timely manner and to educate **Plum Creek's** logging operators so that they could "implement proper practices in the future."

¶ 9. In the course of additional site visits in March and April 2010, the county forester measured the RBA in the harvested portions of the stands. The county forester issued an adverse-inspection report identifying violations in Stands 34, 43, and 44 consisting of "cutting contrary

to the approved forest management plan," as well as practices contrary to the AMPs. His cut contrary finding was based on the following measurements. The county forester calculated that the RBA for 91 harvested acres of the 137 acres in Stand 34 was 19.7 ft^2, well below the prescription level of 30 to 40 ft^2. He determined that the RBA for 40 harvested acres in Stand 43 was 23.3 ft^2, below the prescription target RBA of 60 ft^2, and that the regeneration goal was not met with only 15% of the plots stocked. In Stand 43, the county forester also found that the harvest had failed to meet the prescription's tree-regeneration goal, which called for a "Two Staged Shelterwood ... and Overstory Removal (OSR)" with the goal of "releas[ing] quality growing stock and provid[ing] gaps to promote regeneration." The county forester determined that the RBA for the 8 harvested acres in Stand 44 (out of a total of 37) was 16.3 ft^2, again below the prescription's target level of 60 ft^2.

¶ 10. Related to the AMPs violations, FPR's forester for AMPs compliance sent a letter to **Plum Creek** confirming that he had inspected the sites of the previously identified AMPs violations and had "observed that all of the major remedial actions relating to the AMPs violations have been accomplished" and that **Plum Creek** was now in compliance with the AMPs.

¶ 11. In May 2010, FPR informed **Plum Creek** that it had forwarded the county forester's report to PVR, see 3 V.S.A. § 2289(a), with the recommendation "that the property be removed from UVA for harvesting contrary to the management plan." In July 2010, PVR notified **Plum Creek** that, based on the adverse-inspection report, its "entire parcel" had been removed from the UVA program. **Plum Creek** appealed that decision to the PVR Director pursuant to 32 V.S.A. § 3758(a),[3] ***698** contesting removal of the entire 56,604-acre tract from the program rather than the 470 acres that comprised the harvest area. **Plum Creek** also appealed the adverse-inspection report to the Commissioner of FPR pursuant to 32 V.S.A. § 3758(d).

¶ 12. The FPR Commissioner provided an informal hearing at which no evidence was taken and of which there is no transcript or audio recording.[4] **Plum Creek** provided "remarks" by its lawyer and two employees and also sent a written argument. Apparently, the county forester also was present, although it is not clear that he provided any information in the presence of the **Plum Creek** representatives.

¶ 13. The FPR Commissioner upheld the adverse-inspection report, concluding that the cutting was contrary to the forest-management plan. The Commissioner examined the evidence supplied by the county forester and concluded that both the evidence and the methodology were sound. The Commissioner found that the data were collected appropriately and compliance was measured according to the correct methodology. **Plum Creek** argued that there were no grounds for the violation because harvesting was suspended before the entire stand was cut. **Plum Creek** proffered that if cutting had continued, then the final RBA for the entire stand could have been in compliance. In the alternative, **Plum Creek** asserted that if RBA was measured by averaging the treated and untreated areas of the stands, it would meet the plan goals.

¶ 14. The Commissioner rejected these arguments. The Commissioner explained that it was not necessary to wait for the entire stand to be cut before bringing a violation and that if only a portion of the stand was cut, then compliance should be measured by focusing on the harvested area. The Commissioner acknowledged that the stand is the typical unit for measuring RBA, but explained that focusing on the cut area of the stand was in keeping with forestry practices. After a portion of the stand was cut, this effectively created a new stand because the treated and untreated portions had different distribution, composition, and structure, and therefore the Commissioner concluded that it was appropriate to evaluate them separately. The Commissioner clarified that compliance with the prescription amendment was assessed by looking at the qualitative attributes of the parcel and not just by measuring stocking levels. Therefore, it would make no sense to include the uncut portions of the stand in measuring compliance because the goals of the prescription could not be met in the untreated portion of the stand. For example, in Stand 34, a shelterwood cut was prescribed. This was obviously not achieved in the uncut area where no harvesting occurred. Further, the Commissioner found that the goal was not achieved in the cut area where the RBA of 19.7 was essentially a commercial clear cut. The Commissioner rejected **Plum Creek's** assertion that these two ***699** could be averaged to achieve a numerical RBA that would be within the

prescription goal. The Commissioner also upheld the AMPs violations, noting that they were observed in the field by all parties.

¶ 15. The FPR decision was reported to the Department of Taxes. In March 2011, the PVR Director issued a decision on Plum Creek's appeal, upholding the decision to remove Plum Creek's entire parcel of 56,604 acres from the UVA program, and levying an assessment of a land-use change tax in the amount of $7,860.80.

¶ 16. Pursuant to 32 V.S.A. § 3758(a) and (d), Plum Creek appealed both administrative rulings to the superior court, which consolidated them for review. [5] Following pretrial briefing, the court held an evidentiary hearing over the course of several days in May and June 2013.

¶ 17. Plum Creek presented testimony from a forestry expert, Mr. Holleran, who testified that the cutting was in compliance with the prescription amendment. Mr. Holleran is a forester, who had assisted landowners in managing land that is in the UVA program, but who had no prior involvement in the management of Plum Creek's land and acknowledged at trial that he had never prepared a forest-management plan for a large landowner similar to the type of plan used by Plum Creek. Mr. Holleran presented evidence to advance the same argument Plum Creek made before the Commissioner—that RBA targets were achieved if the RBA was measured across both the treated and untreated portions of each stand. He testified that this was the appropriate calculation because the stand was the accepted unit of measure for RBA compliance. He submitted four written analyses of the harvest based upon several site visits in the fall of 2011 and 2012, and also testified at length in support of his conclusion that the harvest was in compliance with the amended management plan and forest-management standards.

¶ 18. The county forester also testified and described his sampling method. He explained that the cut areas were not in compliance with the forest-management plan either quantitatively—because the measurements of RBA were well below the targets set, or qualitatively—because the observation of the regrowth and condition of the stand did not meet the expectations in the prescription.

¶ 19. The court issued a written decision in January 2014. As to the compliance with the forest-management plan, the trial court framed the issue as an evidentiary question. The court explained that measuring RBA was not within the exclusive expertise of FPR because it is something that foresters do all the time; therefore, the court determined it was free to decide the relative credibility of each expert's method for how to measure RBA when only part of the stand had been harvested. The court stated that the county forester's methodology "was not incorrect" and was consistent with "manual standards." Nonetheless, the court found that Plum Creek's expert provided superior evidence, which was more credible than the state forester's. The court thus adopted Plum Creek's expert's view that RBA should be measured across the entire stand and found, based on that expert's calculations of RBA in those areas, that the harvest was in compliance with the forest-management plan. Consequently, the court concluded that the adverse-inspection report was not justified on this basis.

***700** ¶ 20. The court further found that, although several AMPs violations were identified immediately after the harvest, they were promptly remediated to the satisfaction of the FPR forester responsible for AMPs compliance, and that there was no evidence of any residual harmful effect on water quality. The court noted, "There is no evidence that there was anything more than a few temporary violations of the sort not uncommon in logging operations." The court concluded that the adverse-inspection report was not warranted based on these AMPs violations.

¶ 21. Because the decision by PVR to remove the tract from the UVA program was predicated on the adverse-inspection report, the court concluded that the Tax Department's ruling must be reversed as well. This appeal by the State followed.

II. Standard of Review

[1] **[2]** ¶ 22. The State first contends the superior court erred by failing to accord sufficient deference to the methodology adopted by FPR to determine compliance with the forest-management plan. As a threshold matter, therefore, we consider whether the court applied the correct standard of review. The question of the appropriate standard of review is a legal one that we consider de novo. In re Soon Kwon, 2011 VT 26, ¶ 5, 189 Vt. 598, 19 A.3d 139 (mem.).

¶ 23. The UVA statute provides that an appeal from FPR's decision to the superior court is to be in "the same manner and under the same procedures" as a property tax appeal. 32 V.S.A. § 3758(d). Those appeals are filed pursuant to Rule of Civil Procedure 74, [6] and are de novo. 32 V.S.A. §§ 4461(a), 4467. [7]

¶ 24. This Court established the proper standard of review for appeals to the superior court from an FPR current-use decision in Jones v. Department of Forests, Parks & Recreation, 2004 VT 49, 177 Vt. 81, 857 A.2d 271. In that case, we explained that factual findings are reviewed for "clear error," but "substantial deference" is given to FPR's determinations within its "area of expertise." Id. ¶ 7. Thus, FPR's decision as to a violation should be upheld unless "the Department's finding of ***701** a violation ... was standardless, unsupported by the evidence, or contrary to law." Id. ¶ 14.

¶ 25. The basic framework for the standard of review is not altered simply because in this case there was a de novo evidentiary hearing in the superior court. Because the superior court has conducted a de novo hearing, as factfinder, the court's factual findings are reviewed for clear error. As to questions of policy, however, agency determinations regarding the proper interpretation of policy or methodology within the agency's expertise are entitled to deference, even where there is a de novo hearing in the superior court. ANR Permits, 2014 VT 50, ¶¶ 15–16, 196 Vt. 467, 98 A.3d 16. "[D]ecisions made within the expertise of such agencies are presumed correct, valid and reasonable." Id. ¶ 15 (quotation omitted).

¶ 26. The critical inquiry is in determining whether an issue involves a question of fact, subject to the superior court's discretion as factfinder, or whether it is a matter of policy or methodology within the agency's area of expertise. Four major issues with respect to timber harvesting were contested before the superior court: (1) whether compliance should be measured across the stand as a whole or over only the cut-specific areas; (2) the numerical RBA measurements in the substand areas; (3) whether tree-regeneration measurements should be taken three years after the harvest or immediately after the harvest; and (4) whether a box on a map of Stand 43, labeled "OSR" for overstory removal, meant that OSR could occur only in the box area.

¶ 27. We need not go beyond the first issue to resolve this appeal because although the experts' calculations of RBA in the harvested portions of the stands differed, both measured the RBA in those areas below the target levels. The measurements of the two experts are summarized in the following chart:

Stand Number	Area of Stand (acres)	Area Cut Contary (acres)	Basal Area Prior to Logging (ft^2)	Target RBA (ft^2)	State Forester Calculation of RBA in Cut Area (ft^2)	Plum Creek Calculation of RBA in Cut Area (ft^2)	Plum Creek Calculation of RBA Across Entire Stand (ft^2)
34	137	90.91	82	30-40	19.7	28.5	47.4
43	115	40.15	88	60	23.3	53.1	73.5
44	37	8.47	87	60	16.3	16.3	107

Thus, the main difference in their opinions of whether a violation occurred was the proper methodology for calculating RBA. **Plum Creek's** expert testified that the stand was the unit of measurement and therefore RBA should be measured across the entire stand, regardless of whether the entire stand had been harvested. In keeping with the methodology adopted by the FPR Commissioner, the county forester measured RBA by looking solely at the harvested area of each stand.

¶ 28. The superior court viewed the question of how RBA should be measured for purposes of determining compliance with the forest-management plan as a question of fact, not an area of agency expertise entitled to deference, and compared the relative credibility of the experts to determine how to measure compliance. As explained more fully below, this was error. FPR's decision on the methodology for determining compliance was entitled to deference, and **Plum Creek** had the burden to show it was " 'wholly irrational and unreasonable ***702** in relation to its intended purpose.' " ANR Permits, 2014 VT 50, ¶ 17, 196 Vt. 467, 98 A.3d 16 (quoting Town of Killington, 2003 VT 88, ¶ 6, 176 Vt. 70, 838 A.2d 91).

¶ 29. Like other cases where this Court has applied a deferential standard of review to an agency decision, in this case, deference is due because the methodology for determining compliance is an area over which FPR has broad statutory authority and the relevant expertise. See id. ¶ 16 (explaining that agency is entitled to deference where decision is within agency's area of expertise and within statutory authorization); In re Williston Inn Grp., 2008 VT 47, ¶ 13, 183 Vt. 621, 949 A.2d 1073 (mem.) (explaining that where Legislature entrusts implementation of statute to agency, this Court gives deference to agency's interpretation of those laws). The statutory scheme underpinning the current-use program contains the standards to be applied to all UVA-enrolled

land and highlights the importance of oversight by FPR. FPR is entrusted with the authority both to set standards for acceptable forest management and to enforce compliance with those standards. See 32 V.S.A. § 3752(9)(B)(iii) (defining "managed forestland" as property that is managed in accordance with standards established by FPR); id. § 3755(c) (entrusting FPR with power to determine if "management of the tract is contrary to the conservation or forest management plan" and to issue inspection report if it so finds). Consequently, FPR is entitled to deference in determining how to measure compliance. This is exactly what this Court recognized in Jones, 2004 VT 49, ¶ 14, 177 Vt. 81, 857 A.2d 271 (giving deference to FPR on decision regarding violation of forest-management plan).

[3] ¶ 30. The superior court in essence determined that **Plum Creek's** methodology was better than FPR's. This is not the role of the court. "We have cautioned that courts are not 'a higher environmental agency entrusted with the power to make environmental law and policy,' but rather exercise a 'narrow role in ensuring that the decisions of ANR are made in accordance with law.' " Id. ¶ 14. Where there are questions about "complicated methodologies within an agency's expertise" a reviewing court, even in the context of a de novo hearing, must give deference to the agency's decision. ANR Permits, 2014 VT 50, ¶ 16, 196 Vt. 467, 98 A.3d 16.

[4] ¶ 31. In assessing the validity of FPR's violation, the trial court and this Court on appeal must give deference to FPR's methodology. This does not mean that FPR's decisions will be rubber-stamped, but deference is accorded. "Absent a clear and convincing showing to the contrary, decisions made within the expertise of such agencies are presumed correct, valid and reasonable." In re Johnston, 145 Vt. 318, 322, 488 A.2d 750, 752 (1985). Review is limited to whether there was a "reasonable basis" for the agency action. Id.; see In re DeCato Bros., Inc., 149 Vt. 493, 496, 546 A.2d 1354, 1356 (1988) (explaining that agency decision must meet minimum standard of reasonableness).

III. Measurement of Compliance

[5] ¶ 32. In light of this standard of review, we turn to the question of whether the Commissioner's decision on methodology had a reasonable basis sufficient to satisfy review.

¶ 33. The Commissioner provided the following reasons for adopting a policy of determining compliance by limiting the calculation of RBA to the area that had ***703** been harvested. [8] The Commissioner acknowledged that the typical unit for forest management is the stand, but concluded that where areas of the stand receive different treatment a new stand may be created. The Commissioner explained:

> Although the unit of measure for forest management purposes and UVA is the "stand," management can alter the unit enough to create different stands. As a "stand" is a contiguous group of trees sufficiently uniform in age-class distribution, composition and structure, and growing on a site of sufficiently uniform quality, to be a distinguishable unit, the harvesting in stand 34 has created two separate stands as that area harvested has a very different age-class distribution, composition and structure now compared to that area left untreated. They are no longer the same stand; therefore, they should be sampled and evaluated separately.

In other words, because part of the stand had been cut while the remaining acres were left untouched after cutting was halted, the Commissioner determined that the cut areas should no longer be considered part of the existing larger stand and should be evaluated separately from the uncut areas.

¶ 34. Moreover, the Commissioner explained that averaging the basal area of the logged and unlogged portions did not portray an accurate picture of whether the goals and objectives of the prescription were met. This assessment is well illustrated by Stand 34, for which the prescription called for a shelterwood cut to target sugar maple and yellow birch with large crowns for retention, and set a target RBA of thirty to forty. The Commissioner explained that the purpose of the cut was to create the correct light levels and soil moisture on the ground to promote seed germination

and seedling establishment. The Commissioner explained just looking at an average of the stocking level across the untreated and treated portions of the stand produced an inaccurate picture of whether this goal was met. As the Commissioner stated, "The notion that the goals and objectives of the shelterwood treatment were met by considering shade from trees over a kilometer away (in the uncut portion of the stand) as providing the necessary microenvironmental condition is a misapplication and a complete misunderstanding of the principle of the silvicultural practice." [9]

***704** ¶ 35. We conclude that the Commissioner's decision to determine violations by measuring compliance, both quantitatively and qualitatively, solely in the cut area of the stand was reasonable, and not "standardless, unsupported by the evidence, or contrary to law." Jones, 2004 VT 49, ¶ 14, 177 Vt. 81, 857 A.2d 271.

¶ 36. First, it is a method that promotes the overall policy of the UVA program, which is to maintain productive forestland and to prevent accelerated use. 32 V.S.A. § 3751. If RBA for purposes of compliance could be measured by averaging harvested and unharvested portions of a stand, then cutting, which offends the protection and proper use purposes, could not be prevented because it could still technically comply with numerical prescribed RBA targets. For example, if a prescription provides for a shelterwood cut and sets a moderate RBA target, then the target RBA could be met by clear cutting half of the stand and leaving the other half fully forested and untreated. While numerically this would meet the prescribed RBA under **Plum Creek's** methodology, it certainly would not protect forestland or prevent accelerated use. Id. It also would not achieve the qualitative goals of the shelterwood prescription necessary for the desired tree growth.

¶ 37. Second, restricting measurement to areas already harvested is logical. RBA is a measure of the residual basal area in a stand, which by definition refers to the basal area left after harvest. It is simply not logical to purport to measure RBA in an untreated, unharvested area.

¶ 38. Third, measuring compliance in the cut areas allows for more effective oversight by FPR. If a violation cannot be based solely on observations and measurements taken in the portion of the stand already harvested, then FPR will have to wait for an entire stand to be cut contrary before bringing a violation. For large stands, this could have drastic consequences. **Plum Creek's** expert recognized in this case that if the harvest in Stand 34 had continued in the rest of the stand in the same manner, the entire stand would have been out of compliance. Surely, FPR was not required to wait for those additional forty acres to be clear cut before bringing a violation. [10]

¶ 39. Fourth, it is a method consistently used. As the Commissioner noted, this is how other violations have been calculated. Indeed, it is wholly in keeping with our decision in Jones, in which this Court determined that FPR acted within its discretion in limiting its analysis of whether a violation occurred to the portion of the stand that was cut. 2004 VT 49, ¶ 13, 177 Vt. 81, 857 A.2d 271.

¶ 40. There is no merit to the trial court's concern that because basal area is generally measured across a stand, a landowner would not be on notice that a violation could be brought for overcutting in one area of the stand. The landowner is on ***705** notice that the harvest prescription must be met—both qualitatively and quantitatively—across the entire stand. Further, as demonstrated by Jones and the record in this case, FPR has previously determined compliance by measuring RBA solely in cut portions of the stand.

¶ 41. **Plum Creek** failed to demonstrate that the Commissioner's methodology was "wholly irrational and unreasonable in relation to [the UVA statute's] intended purpose." ANR Permits, 2014 VT 50, ¶ 17, 196 Vt. 467, 98 A.3d 16 (quotation omitted). **Plum Creek's** expert's explanation for why he took the measurement across the entire stand was simply that "the stand is the unit of measure for forest management." He did not provide an explanation of why this was appropriate for a stand that had been only partially treated. He did not provide a clear answer as to whether a landowner could be in compliance with a forest-management plan by clearcutting half of a stand and leaving half of the stand untouched to reach a particular numerical RBA average. In fact, he failed to explain how he could be assured that once cutting was resumed in the areas not yet cut that the stand would still be in compliance with the prescription.

¶ 42. For example, he testified that if the remaining uncut portion of Stand 34 was harvested to a density of 60, then even taking the county forester's measurement of 19.7 for the cut portion, the entire stand would still be

within the prescription of 30 to 40 RBA. There was no assurance, however, that such density would be achieved in the remaining portion and there was no evidence that cutting the remaining portion of Stand 34 to a density of 60 would achieve the goals of the prescription by creating the necessary microclimate conditions on the ground. In response to the question of whether two stands had been created by the cutting, **Plum Creek's** expert answered "that's a complicated question." He acknowledged that that could happen, but felt that for evaluating the prescription, the measurement should be made for the entire stand. While this may be true if the entire stand had received the same treatment, FPR provided reasonable and logical reasons why RBA should be calculated based solely on the part of the stand that had already been cut.

¶ 43. Further, that FPR's methodology in limiting its assessment to the cut area was a logical and reasonable measurement of whether the prescription plan had been followed was acknowledged by **Plum Creek's** expert to some degree. In response to the question of whether the goal of treatment for Stand 44 was met qualitatively, he answered that the prescription was met only in the harvested area. This is logical because obviously the conditions in the uncut areas were unchanged and therefore could not have met the goals of the cut. It also creates, however, an inconsistency in the evaluation method used by **Plum Creek's** expert. If the qualitative assessment of whether the forest-management plan was met must be limited to the area cut, then how can the quantitative assessment include the entire stand? FPR's decision to limit both its qualitative and quantitative assessments to the cut areas was both consistent and reasonable.

¶ 44. Given that both experts calculated the RBA in the cut areas of Stands 34, 43, and 44 below the targets set in the forest-management plan, we conclude that this failure to meet the targets was an adequate basis for issuing the adverse-inspection report, and therefore that the trial court erred in reversing it.

IV. AMPs Violations

¶ 45. In addition to a finding that the stands were cut contrary to the forest-management plan, the adverse-inspection ***706** report was also based on findings that **Plum Creek** failed to implement AMPs. The Commissioner upheld the adverse-inspection report in both respects. The trial court concluded that there was no violation of the forest-management plan and that the AMPs violations were insufficient on their own to justify an adverse-inspection report. The court found that—although "there were [AMPs] violations"—there was "no evidence that [they were] anything more than a few temporary violations of the sort not uncommon in logging operations"; that there was "no evidence" of any residual "detrimental impact on water quality of the type the AMPs are designed to prevent, despite the violations"; and that there was also no evidence of residual "harm to ... wildlife or soil erosion." The court noted, in this regard, that the FPR forester overseeing AMPs compliance determined that **Plum Creek** had remediated the violations within a few months of their discovery, and that the ANR official in charge of AMPs enforcement undertook no enforcement action.

¶ 46. On appeal, the State argues that the superior court's finding that **Plum Creek** violated several of the AMPs protecting water quality compelled affirmance of the Commissioner's decision upholding the adverse-inspection report. Having concluded that the adverse-inspection report was warranted based on **Plum Creek's** violations of the forest-management plan, we need not and do not reach the question of whether the AMPs violations would have provided a sufficient independent basis to issue an adverse-inspection report.

V. Conclusion

¶ 47. In sum, we reverse the superior court and reinstate the adverse-inspection report as upheld by the FPR Commissioner. We remand to the superior court to consider the questions raised in **Plum Creek's** appeal of the PVR Director's decision removing land from the UVA program and leveling a tax assessment against **Plum Creek**.

Reversed and remanded.

DOOLEY, J., dissenting.

¶ 48. On January 15, 2010, the Vermont Department of Forest, Parks and Recreation (FPR) approved logging on land owned by **Plum Creek** pursuant to a plan drafted and

submitted by Plum Creek. Logging apparently proceeded quickly because on January 26, 2010, the staff forester of Plum Creek, the FPR county forester, along with others, visited a harvest of trees on part of Plum Creek's forestland. The date of the visit was apparently arranged so that all could attend and the logging would be in progress; there was no significance to how much of the harvest had been completed, how much was left to complete or where in the forest the contract loggers were working. The site visit was to three "stands," defined and mapped out areas of the forest. A majority of the harvest had already occurred on two stands, while only 20% of the area in the third stand had been logged, although this stand was much smaller than the other two. During the site visit the FPR county forester indicated that he believed that the areas he saw were being "cut contrary," that is, contrary to the plan Plum Creek submitted and FPR approved.

¶ 49. At that point, all logging work stopped. The forestland in the three stands became the equivalent of a "crime scene." Over time, the county forester went back and took measurements of what had been cut in relation to the specifications in the plan. On April 26, he issued an adverse-inspection report recommending that Plum Creek be terminated from the current-use program. The FPR Commissioner accepted the recommendation, and ***707** this controversy unfolded. Plum Creek hired a professional forester to independently evaluate the state of the forest and the allegations of the county forester. Part of the evaluation was to measure regeneration three years after the harvest was terminated. The case proceeded to trial in the superior court, and the court took a view of the stands in the condition they were when logging stopped. Plum Creek took many pictures of the forest at that time, many of which were introduced into evidence. As far as the record before us discloses, the land and forest in controversy is in exactly the same state today as when the site visit occurred over six years ago.

¶ 50. I start with this short story to make three points to which I will return. First, the amount of the land that had been logged has no significance, other than that it was frozen at the time of the site visit. The timeline shows, however, that the entire harvest would have been over in a matter of days if it had been allowed to run its course. Second, no one has claimed that Plum Creek did anything illegal, whoever one might believe in this controversy, so my comparison to a "crime scene" is a purely hypothetical one.[11] The sole issue is whether Plum Creek complied with its plan and whether, as a result, it can receive the substantial monetary benefit of the enrollment of 56,604 acres of forestland in the current-use program.[12] Third, Plum Creek's decision to stop the harvest was required by the county forester's declaration that Plum Creek had violated its plan and the AMPs requirements, the prospect of civil penalties and criminal liability for violating the AMPs requirements, the prospect that all its land would be removed from the current-use program, and most important a subsequent specific direction of FPR. The majority disagrees with this point, as shown by its three footnotes on the issue—ante, nn. 8, 9 and 10—and is acknowledging through these footnotes that the point is central to its rationale. Accordingly, I have added a separate section at the end of the dissent summarizing the facts that show why the majority's conclusion is wrong. See infra, ¶¶ 121–134. If Plum Creek had completed the harvest it would have had no evidence of the state of the harvest at the time of the forester's declaration, evidence that became critical in the defense of this case.[13]

***708** ¶ 51. My disagreements with the majority are deep and extensive and take many pages to fully explain. There are, however, three other points to which I will return on numerous occasions, and I summarize them here as a road map through this dissent. First, by statute, the standard for judicial review in this case is de novo, a standard that by definition provides the broadest and most extensive judicial review of administrative action. While the majority has paid lip service to that standard, it has actually employed the narrowest and most agency-deferential standard of review possible, turning the statutory standard into its opposite. If the standard of review were applied the way it is written, the superior court decision would be affirmed. In In re Town of Sherburne, we recognized in regard to the standard for review of administrative action that courts have a tendency to recite " 'a batch of verbiage and then pay[ ] no attention to what it has said in determining what to do.' " 154 Vt. 596, 607, 581 A.2d 274, 280 (1990) (quoting 5 K. Davis, Administrative Law Treatise § 29:27, at 456-57 (2d ed. 1984)). This is exactly what the majority has done here.

¶ 52. Second, the majority has reversed the decision of the trial court, without a remand, holding that as a matter of law the agency must prevail. At best, this would be an unusual and exceptional action, particularly after four

days of trial and extensive evidence and findings of fact, none of which are found to be erroneous. If the trial court employed the wrong standard of review, the remedy is to remand the matter to the trial court to apply the right standard in light of the evidence and findings of fact. After reading the majority opinion, it is difficult to see what the purpose of the trial was or whether Plum Creek's extensive evidence could even be considered. Indeed, it is hard to understand the purpose of judicial review at all.

¶ 53. Third, the sole question on which this case turns is whether Plum Creek violated a timber-harvesting plan that it drafted and the agency approved. I have attached the plan to this dissent. The superior court found that Plum Creek did not violate the plan. The State claims it did but does not identify the language in the plan it says was violated. The majority adopts the theory of the State because the State's interpretation of the plan is entitled to deference, again with no specific identification of the requirement in the plan that was violated. The result is that the State is entitled to create plan requirements as it goes along, with no advance notice to a landowner and no inclusion of the requirement in the plan document.

¶ 54. Having identified these recurring points, I agree with the majority that proper identification of the standard of review that governs the superior court's review of the decision of FPR to terminate Plum Creek from the current-use program is important, and much of this dissent is about the proper standard of review.

¶ 55. For an instant in its opinion, the majority acknowledges that the Legislature has established the standard of review of the administrative decision for this case as de novo. The leading treatise on administrative law states the "meaning of the de novo standard" as follows:

> This standard tells a court to affirm the agency only if it agrees with the administrative conclusion either as to the entire administrative decision or some part ***709** of it. If the court does not agree, the court is instructed to substitute its own judgment.

C. Koch & R. Murphy, Administrative Law and Practice § 9.22[1] (3d ed. 2016).

¶ 56. This is exactly the meaning of de novo review that our decisions reflect. For example, in Town of Victory v. State, we rejected the application of de novo review in the absence of a legislative direction to use it because "[d]e novo review, whereby the superior court would simply substitute its judgment for that of the director, necessarily usurps power delegated to the executive branch; therefore that standard is inappropriate unless the statute expressly so provides." 2004 VT 110, ¶ 16, 177 Vt. 383, 865 A.2d 373 (emphasis added). As I discuss below, de novo review here means that judicial review is not based on the agency record; indeed, it could not be here because there is virtually no record. I recognize that we have adopted a presumption against de novo review when the review statute does not provide for it. Where, as here, the Legislature expressly provides for it, we must follow the legislative direction.

¶ 57. Instead of implementing this standard of review, the majority has adopted its own standard, unsupported by the governing statute, which is exactly the standard of review that we would adopt if de novo review was not commanded by the Legislature. Indeed, it is exactly the opposite standard of review, as narrow and limited as exists anywhere in our law. In doing so, it has emasculated judicial review, overturning a trial decision based on four days of trial without deciding that any of the findings of fact of the trial court are erroneous and without a remand for factfinding under what it views is the correct standard of review.

¶ 58. This is a case where under neutral standards, de novo review would be appropriate even if the Legislature was silent on the nature of review. There is no factual development in the administrative agency: Plum Creek was not entitled to an evidentiary hearing before the FPR Commissioner; the Commissioner did not offer an evidentiary hearing; and, most importantly, this is not a decision where agency expertise is central. The administrative record is virtually nonexistent, consisting of the county forester's violation determination, the Commissioner's decision, and Plum Creek's filings in opposition to the termination decision. This is a pure adjudicatory case with little or no policy issues. The fundamental issue in this case is what the plan drafted by Plum Creek means—the agency was not interpreting and applying a statute, regulation, or even a policy. Plum Creek is essentially charged with breaching its permit

application; in comparable situations, the agency does not get particular deference in that decision.

¶ 59. The majority has adopted a standard of extreme deference that makes the administrative decision controlling with no meaningful opportunity to contest it. Even if such deference were ever appropriate where the Legislature adopts de novo review, it is totally inappropriate in the case before us. As the trial court concluded, this level of deference allows the agency to create new rules as it goes along where the rules should be set in the controlling documents.

¶ 60. Finally, it is clear from the way that the majority has written its decision that it believes that the only right answer to the circumstances before the court is that provided by the State and that **Plum Creek** is relying on a technicality to avoid its just consequences. In fact, the evidence before the trial court showed many possible rationales, not built on technicalities, on which to resolve the conflict, and **Plum Creek's** explanation for what it did, as ***710** accepted by the trial court, was reasonable. The short answer to the majority's factual assertions is that the case was tried by a very experienced trial judge who made detailed and thorough findings of fact and conclusions based on them, which should be respected rather than rejected out of hand. I will address each of these points below.

I. This Was a Pure Adjudicatory Proceeding Based on Whether or Not Plum Creek Complied with Requirements Contained in Two Documents, and the Evidence and Findings Show It Did Comply

¶ 61. To be eligible for the current-use or Use Value Appraisal (UVA) program, forestland must be "under active long-term forest management ... in accordance with minimum acceptable standards for forest management." 32 V.S.A. § 3752(9)(A). "Minimum acceptable standards for forest management" are defined, in turn, as "refer[ring] to certain standards established by the Commissioner of Forest, Parks and Recreation." Id. § 3752(13). Eligibility also generally requires compliance with "the regulations adopted by the [Current Use Advisory] Board." Id. § 3755(a); see id. § 3753 (establishing Current Use Advisory Board). Comprised of the Commissioner of Taxes, the FPR Commissioner, the Director of the Division of Property Valuation and Review (PVR), members of the private agricultural and forestry sectors, and local government representatives, id. § 3753(b), the Board has several legislatively defined duties: to periodically review the criteria for enrollment in the UVA program, recommend changes and improvements, and adopt rules to carry out its statutory goals. Id. § 3754(a), (c). The UVA Program Manual adopted by the Board sets forth minimum standards for forest-management plans, minimum standards for forest management and regeneration, standard forms for use by landowners enrolled in the program, and appendices containing additional guidance for foresters and landowners.

¶ 62. If any of the above statutes, rules, or policies were involved in this case, the FPR Commissioner would be entitled to substantial deference in interpreting them, a point discussed below. The Commissioner did not conclude, however, that **Plum Creek** violated any of those statutes, rules, or policies. Instead, the FPR Commissioner concluded that **Plum Creek** violated a timber-harvesting plan that **Plum Creek** itself drafted. No policy is involved in determining whether the plan was violated. I would accept that a decision to reject a plan would involve policy, and that decision would be based on agency expertise. But once the plan is accepted, the only relevant determination is whether the plan was violated.

¶ 63. Forestland is eligible for the UVA program if the landowner prepares and submits a ten-year forest-management plan and it is approved by FPR. Id. § 3755(b)(1)(C). In this case, **Plum Creek** had such a plan prepared by the company that owned the land before **Plum Creek**. The plan specified that when **Plum Creek** was to engage in timber harvesting, it was required by the plan to seek and have approved a plan amendment for each "stand" in which the harvesting would occur. These amendments are known as prescriptions, and **Plum Creek** prepared one and had it approved for each of the three stands involved in this case. The prescriptions are prepared on forms supplied by FPR and are very short documents. I have attached the relevant content of these documents to this dissent in an appendix; the content takes up less than two pages. Thus, the decision to remove the land had to be based on a conclusion that **Plum Creek's** timber harvesting violated either ***711** the ten-year management plan or the relevant prescription; in this case it was based entirely on the prescriptions. These documents were drafted by the landowner, not the agency. See Vt. Dep't of Forests, Parks and Recreation, Use Value of Forestland in Vermont at

2 (Feb. 1, 2006) ("County foresters who are employed by the State do not write use value plans. Their role is to advise landowners and consulting foresters, review and approve management plans ... and to conduct on-site monitoring."). They are essentially applications for a permit, and the controlling question is whether **Plum Creek** did what it said it would do in its application.

¶ 64. To a great degree the dispute has centered on cutting in Stand 34 and a rationale that pervades the decisions with respect to each of the stands—that the extent of cutting had to be even across the stand so the remaining forest after cutting would be the same throughout the stand. The Commissioner's decision focused on this stand and this rationale, and the majority decision has almost exclusively focused on it. The trial court found that the residual basal area (RBA) in the cut portion of Stand 34 was 28.5, only a small amount below the lower specification in the minimum prescription RBA of 30 to 40, and that the RBA for the whole stand was 47.4. [14] In his two-page adverse-inspection report, the county forester included three short sentences describing the violation in Stand 34:

> Stand has been cut contrary to prescribed silvaculture. Stand inventoried on 2/10/2010 and 2/12/2010. Residual basal area across 90.91 acres of the stand reduced to 19.7 square feet (36 inventory points with 2.63 standard error).

¶ 65. The Commissioner gave three reasons why **Plum Creek** had violated its Forest Management Plan for this stand:

> [1] There was no indication that the cutting plan would have been modified had the sale reached completion. In fact, **Plum Creek's** forester stated that the logger was not following their directions. The determination of "cut contrary" was based upon those acres cut to date, similar to any other violation that the state has pursued in the past.
>
> [2] Although the unit of measure for forest management purposes and UVA is the "stand," management can alter the unit enough to create different stands. As a "stand" is a contiguous group of trees sufficiently uniform in age-class distribution, composition and structure, and growing on a site of sufficiently uniform quality, to be a distinguishable unit, the harvesting in stand 34 has created two separate stands as that area harvested has a very different age-class distribution, composition and structure now compared to that area left untreated. They are no longer the same stand; therefore, they should be sampled and evaluated separately.
>
> ....
>
> [3] The basis for the shelterwood method as a method of regeneration is that it creates a moderated microenvironment that promotes seed germination and seeding establishment as it elevates light levels near the ground and reduces the withdrawal of soil moisture. To create this microenvironment, the application of the method involves leaving a residual overstory of large crowned, seed bearing trees that are uniformly distributed over the area of the new stand. The notion that the goals and objectives of the shelterwood ***712** treatment were met by considering shade from trees over a kilometer away (in the uncut portion of the stand) as providing the necessary microenvironmental condition is a misapplication and a complete misunderstanding of the principle of the silviculture practice. The residual basal area of 19.7 square feet is considered a commercial clear cut. Additionally, the residual trees comprising this basal area are at best intermediate stems in the 10 to 12 inch diameter class that lack the crown size necessary to provide the shading conditions even if the desired residual basal area target was met. **Plum Creek's** prescription should not be narrowly interpreted to just stocking levels. Recommendations were presented relating to what would be removed (at-risk mature stems) and what would remain (sugar maples and yellow birch with large crowns, quality growing stock).

(Emphasis added.) Except for the one reference to the plan in the third reason, the decision makes no reference to the content of **Plum Creek's** plan. Thus, to determine whether **Plum Creek** violated the plan, the superior court and this Court have to independently examine the plan language in comparison to the rationale.

¶ 66. The **Plum Creek** plan is contained in the appendix to this opinion. The plan says Stand 34 has 137 acres. There is no mention in the plan of an even distribution of trees. Indeed, it says "[t]he understory varies greatly in stocking

of acceptable regeneration." It says that "the majority of the overstory is unacceptable growing stock." It says "the shelterwood will be irregular in distribution."

¶ 67. The first and second grounds for the decision to terminate Plum Creek from the current-use program are inconsistent and unsupported by any record evidence that the Commissioner had even at the time of rendering the decision.[15] Under any standard of review, termination based on these rationales could not be sustained.

¶ 68. The first rationale states that "[t]here was no indication that the cutting plan would have been modified had the sale reached completion." In fact, the Plum Creek manager responsible for the tract sent a letter to the FPR county forester explaining that the timber harvesting contractor had violated Plum Creek's instruction in a number of respects and outlining how the harvesting would be done in the rest of the stand to stay within the prescription overall. The letter was admitted into evidence as exhibit 27. It is uncontroverted and directly contradicts the Commissioner's assertions.

¶ 69. Even if the contrary evidence did not exist, it is important to state that there is nothing in Plum Creek's plan to suggest that the RBA measurement was to be made in the part of the stand that happened to have been "treated" when the county forester appeared for an observation visit. Thus, there was no obligation for Plum Creek staff to give an "indication" they would proceed differently in the remainder of the harvest as long as they met the RBA requirement at the end. Finally, it was irrelevant how FPR had pursued alleged violations in the past. If it wanted the timber harvesting to meet the minimum RBA requirements at all times during the harvest, it should have directed Plum Creek to put that standard in the plan.

¶ 70. The second rationale is even weaker. It is based on the premise that Plum *713 Creek—"management" in the Commissioner's phrasing—had no intention of finishing its harvesting in the stand and was comparing the situation in the treated area with the situation in the untreated area. Thus, both the State and the majority have emphasized the Commissioner's language that Plum Creek asserted that "the goals and objectives of the shelterwood treatment were met by considering shade from trees over a kilometer away (in the uncut portion of the stand)." The statement is entirely disingenuous because the evidence was undisputed that Plum Creek intended that there would be no untreated area and there would be harvesting in all parts of the stand. Plum Creek never argued that a shade tree one kilometer away would make up for the lack of a shade tree in another area. The reality is that there never would be a comparison between treated and untreated parts of the stand if the State had not declared a violation before the harvest was completed and prevented harvesting in the remainder of the stands.

¶ 71. Although this rationale is poorly stated in the Commissioner's decision, it is argued by the State and accepted by the majority as a statement that the cutting that occurred on Stand 34 went beyond a RBA of 30 ft^2 and, therefore, could be grounds for termination of Plum Creek from the current-use program. The State's position is that whenever in the course of a timber harvesting FPR staff measure the RBA of the area in which harvesting has occurred the RBA cannot go below the minimum specified in the plan. Stated differently, the State's position is that all cutting must be even across the stand with no part more cut than another. FPR points to no language in the Plum Creek plan that actually states this requirement, and there is no such language. To the extent that the plan addresses the issue, it is directly contrary to the State's position. The plan says: "The shelterwood will be irregular in distribution." Uneven distribution of shade trees was part of the plan and could be accomplished only by uneven cutting. There is no support for the State's position that uneven cutting within a stand violates Plum Creek's plan.

¶ 72. It is no answer to the absence of the requirement in the plan that FPR is simply enforcing its consistent policy. Whatever may have been FPR's policy, we are necessarily dealing here with legal requirements. FPR's policy is not stated in the plan or in legally adopted regulations. The most important function of judicial review is to prevent an agency from acting outside the legal system in which it operates.

¶ 73. The trial court concluded that this is exactly what occurred here. It found: "In this case, the State's evidence showed that it had relied heavily on RBA measurements ... taken from plots in just a portion of each stand and rejected RBA evidence pertaining to the stands as a whole. In doing so, it imposed a standard that is not in the UVA manual, is not a norm in forestry practice, and was not included in the prescription." It added "Without any rule in the UVA manual or specification in the prescription,

an owner would not be on notice that RBA would be measured other than by the stand as a whole, particularly where the particular prescription calls for a result of 30-40 'overall stand residual basal area.' "

¶ 74. The majority has added a new and different rationale for the Commissioner's decision—that **Plum Creek** is responsible for the measurement of only part of the stand, and must accept it, because it suspended the harvest and never restarted it. This rationale is not in the Commissioner's decision or in the superior court decision. It is legally and factually erroneous.

***714** ¶ 75. It is factually erroneous because **Plum Creek** could not proceed due to the fact that FPR withdrew approval of the harvest based on the April 26 adverse-inspection report of the county forester. In the period between the end of January, when the inspection occurred that led to the termination, and the date of the adverse-inspection report, **Plum Creek** could not proceed because it faced civil penalties and possible criminal liability as a result of the AMPs compliance issues until it resolved those issues to the satisfaction of FPR and ANR. These facts are set out in detail in ¶¶ 128-134 of this dissent.

¶ 76. It is legally erroneous because nothing in the plan or the statute or regulations require that a harvest proceed continuously without interruption. Not even FPR has argued that there is such a requirement. The majority's position that **Plum Creek** violated such a requirement, and thus brought on RBA measurements of only part of the stand, has no support in the law.

¶ 77. Unlike the first two rationales, the third rationale purports to address language in the plan. It says "**Plum Creek's** prescription should not be narrowly interpreted to just stocking levels." In fact, there are no stocking levels in the plan so the Commissioner's statement is curious at best. Nor does the plan state that the RBA minimum must be met by trees that are greater than 12 inches in diameter. Again, if FPR wants such a requirement it must insist that **Plum Creek** put it in the plan. Like the first rationale of the Commissioner, this rationale was not testified to by the county forester who testified for FPR in the trial.

¶ 78. The most important point about the Commissioner's rationale is that it is based on the Commissioner's determination that the RBA in the cut area of the stand was 19.7 ft^2. In fact, as the superior court found, the RBA was 28.5 ft^2, a finding of fact that even the majority accepts, as I discuss later in this dissent. The actual RBA is 50% above the RBA adopted by the Commissioner and close to the minimum RBA for the stand as a whole. It is impossible to know what the Commissioner would have decided if she had to apply the right RBA in rendering her decision and could not rely on a conclusion that **Plum Creek** had actually performed a commercial clear cut.

¶ 79. The majority has largely ignored the glaring holes in the Commissioner's decision because of its holding that deference controls everything. Thus, for the majority, the Commissioner's decision is right because it is not "standardless, unsupported by the evidence, or contrary to law," the standard of review it finds applicable. Ante, ¶ 35. I will address later my differences on standard of review, but the point here is different—that deference has no application where the only question is whether **Plum Creek** complied with its plan and the Commissioner has made fundamental errors in her analysis. While the majority addresses a part of the Commissioner's decision, it never explains how **Plum Creek** violated any provision of its plan. The majority decision relies on the Commissioner's decision because it "promotes the overall policy of the UVA program," "is logical," "allows for more effective oversight by FPR," and "it is a method consistently used." Ante, ¶¶ 36–39. As the above discussion states, I disagree with many of these reasons, but that is entirely beside the point. Nowhere does the majority say that the forester's opinion is required by the plan, the central question that was before the superior court and before us. All of the majority's points are reasons why FPR might have acted to insert the forester's opinion into the plan that **Plum Creek** ***715** submitted, but they are irrelevant to this case because FPR accepted the plan without this language, and the superior court found that the opinion was not contained in or supported by the plan. That is all that should count in this decision.

¶ 80. The majority's decision in this case is entirely different from that in Jones, 2004 VT 49, ¶ 10, 177 Vt. 81, 857 A.2d 271, the decision on which the majority most relies. In Jones, this Court quotes exactly the plan provisions it found were violated and why there was a violation. There were two such provisions. One provided that there would be "selection cuts approximately 40 feet in diameter." Id. ¶ 5. The evidence showed "a series of clear cuts in Stand 3 well in excess of the 'approximately 40 feet in diameter' prescribed in the plan. Evidence of

the extensive cuts—ranging in size from one to two acres—was uncontroverted." Id. ¶ 8. The second part of the plan that was violated allowed " 'limited single tree and group selection cuts' of overstocked areas of hardwoods." Id. ¶ 10. The evidence showed that the cutting in a part of the stand that the landowner identified was "overstocked" and went well beyond the limited single-tree and group-selection cuts specified in the plan. Id. ¶ 14. The difference between the analysis in Jones and the analysis here is glaring.

¶ 81. There are three other points about Jones that are important for comparison in this case. First, Jones involved a completed harvest that the forester inspected during a regular five-year inspection. Id. ¶ 5. It did not involve the interruption of a partially completed harvest with comparisons between harvested and unharvested areas. Second, to the extent that the forester acted based on part of a stand, it was because the prescription authorized cutting only in "overstocked areas" and the landowner had designated the 15.8-acre area involved as overstocked. Id. ¶ 13. There is no such designation in this case. The latter point is important because the majority asserts that **Plum Creek** should have known after Jones that its compliance could be judged based on cutting in only part of a stand. Even assuming that Jones gave a different landowner of different land with a different plan proper notice of an unwritten FPR policy, **Plum Creek** would learn from Jones only that if the landowner specifically designated a part of a stand for a specific different treatment, and violated the requirements of the designation, it could be terminated from the current-use program. The third point is that the trial court was reversed in Jones because its findings and conclusions were "clearly erroneous." Id. ¶ 7. The majority found no findings or conclusions clearly erroneous in this case.

¶ 82. Finally, it is important to reemphasize that the failure to find an inconsistency with the plan is not fixed by the choice of standard ***716** of review.[16] Under any standard of review, the superior court found that FPR's decision is based on a requirement that is not in the **Plum Creek** plan, and the majority has not, and cannot, respond to this conclusion that is determinative of the proper outcome of this case.

II. Standard of Review is De Novo

¶ 83. Having covered the first reason why the majority decision is wrong, I turn to the second—that the majority has used a standard of review inconsistent with the governing statute.

¶ 84. I started this dissent with the meaning of de novo review. While the majority admits that de novo review applies, it is helpful to explain why de novo review is the governing standard. The short answer is because that is what the governing statute says: "An appeal of this decision of the Commissioner may be taken to the Superior Court in the same manner and under the same procedures as an appeal from a decision of a Board of Civil Authority, as set forth in chapter 131, subchapter 2 of this title." 32 V.S.A. § 3758(d). The cross-reference is to the subchapter on property tax valuation appeals to the superior court or to the PVR Director. We explained the effect of this cross-reference in Mollica v. Division of Property Valuation & Review, 2008 VT 60, 184 Vt. 83, 955 A.2d 1171, in the context of an appeal from PVR. Although Mollica was controlled by § 3758(a), rather than § 3758(d), the language governing the appeal was identical in those subsections.[17] Thus, we recognize Mollica as a binding precedent of the interpretation of both subsections. As Mollica holds, the effect of the cross-reference is that appeals to superior court from a decision of the FPR Commissioner is de novo. Mollica, 2008 VT 60, ¶ 8, 184 Vt. 83, 955 A.2d 1171; see 32 V.S.A. § 4467 (stating that superior court on appeal "shall proceed de novo and determine the correct valuation of the property as promptly as possible").

¶ 85. I recognize that it is possible that review can be de novo and on the record generated in the administrative agency at the same time. The appeal process under 32 V.S.A. § 4467 is not on-the-record review. As explained in Shaffer v. Town of Waitsfield, 2008 VT 44, 183 Vt. 428, 956 A.2d 520:

> The proceeding before the appraiser was a de novo hearing, 32 V.S.A. § 4467, which we have consistently held requires the appraiser to try the dispute anew, as though it had never been heard before. This means that the Town was not limited to proffering—and the appraiser was not limited to considering—only such evidence as was presented

> below, and that ***717** the appeal presented taxpayers with the risk of increase as well as the chance of decrease.

Id. ¶ 10 (quotation omitted).

¶ 86. Mollica recognized this. 2008 VT 60, ¶ 8, 184 Vt. 83, 955 A.2d 1171. The trial court here proceeded exactly as specified in Shaffer. Although the majority has reversed the court, there is no suggestion that it proceeded improperly.

¶ 87. Property valuation appeals regularly become battles of expert witnesses, with the municipality's expert witness having no special status greater than the expert witness supplied by the taxpayer, and the court or hearing officer ultimately resolving the matter. A good example of the process is contained in our recent decision on property valuation, Vermont Transco LLC v. Town of Vernon, which involved a utility transmission property valued by the Town at $92 million. 2014 VT 93A, 197 Vt. 585, 109 A.3d 423. The decision turned on whether the Town used the proper methodology for valuing this unique property. The evidence came largely from two expert witnesses who presented different valuation methodologies.

¶ 88. I believe we should apply de novo review in this case even if the Legislature had not directed it. Although we have applied a strong presumption against the availability of de novo review of the decision of an administrative agency, we have generally relied on the analysis of the federal courts under the Federal Administrative Procedures Act (APA). See State Dep't of Taxes v. Tri–State Indus. Laundries, Inc., 138 Vt. 292, 293, 415 A.2d 216, 218 (1980). The Federal APA provides a number of options from which reviewing courts choose the proper standard of review of administrative action. 5 U.S.C. § 706(2). Among the grounds for reversal is that the administrative decision is "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." Id. § 706(2)(F).

¶ 89. De novo review under 5 U.S.C. § 706(2)(F) plays a very limited role in judicial review of administrative proceedings. In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), abrogated by Califano v. Sanders, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977), the U.S. Supreme Court ruled that § 706(2)(F) is applicable in only two instances, one of which would govern this case: "[S]uch de novo review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate." Id. This case is an adjudicatory proceeding specifically authorized by statute. The agency "factfinding procedures" are inadequate; in fact, they are nonexistent. If § 706(2)(F) were applicable here, it would require de novo review.

¶ 90. My conclusion that the factfinding procedures are inadequate requires explanation. The vast majority of administrative decisions are reviewable within the agency under the extensive procedures contained in the Vermont Administrative Procedure Act (Vermont APA), 3 V.S.A. § 800 et seq. For proceedings subject to it, the Vermont APA requires a hearing at which a party can present evidence, Id. § 809(c), and cross-examine witnesses, § 810(3), and on which the decisionmaker renders findings of fact based on the evidence, Id. § 812(a). These requirements, however, are applicable only in a "contested case," defined as a proceeding "in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." Id. § 801(b)(2); see also Id. §§ 809(a), 810, 812(a).

¶ 91. The administrative review statute applicable in this case provides that an "owner who is aggrieved by ... the filing ***718** of an adverse inspection report ... may appeal to the Commissioner" within sixty days of the filing of the report. 32 V.S.A. § 3758(d). There is no requirement of a hearing before the Commissioner. Although there was a face-to-face meeting between the Commissioner and representatives of **Plum Creek**, no evidence was taken, and there is no transcript of what transpired. There are no findings of fact. The decision of the Commissioner is apparently based primarily on the decision of the FPR county forester, even though there is no indication the forester was present at the meeting. The record as transmitted by the Commissioner to the superior court pursuant to Vermont Rule of Civil Procedure 74 consists of the decision, the letters and documents filed by **Plum Creek**, and the written decision of the county forester.

¶ 92. The point is that there are no factfinding procedures applicable in this case. The majority states that:

> The Commissioner examined the evidence supplied by the county forester and concluded that both the evidence and the methodology

> were sound. The Commissioner found that the data were collected appropriately and compliance was measured according to the correct methodology.

Ante, ¶ 13. While it would have improved the Commissioner's decision if she had done and said what the majority attributes to her, her decision does not contain what the majority claims. The Commissioner's decision does say, "The violation is clear and undisputed by information provided by **Plum Creek**." Even the short description of the process before the Commissioner included in the majority decision shows the latter part of this statement is erroneous.

¶ 93. There is an obvious reason why the majority's statement is unsupported by the record—there is almost no record. As I described above, the record consists of the violation decision of the county forester, the filings of **Plum Creek**, and the decision of the Commissioner. The Commissioner's decision contains findings and conclusions that are not in the forester's letter or the filings of **Plum Creek**. The record does not include any information on which the forester relied, any information on the action of middle-management of FPR between the forester and the Commissioner,[18] or the source of many findings and conclusions of the Commissioner. The situation here is essentially identical to that in Conservation Law Foundation v. Burke, 162 Vt. 115, 645 A.2d 495 (1993):

> In order for judicial review to proceed on the record, it is critical that the court have before it the full agency record that was before the Secretary at the time he made his decision. ... Thus, if the agency decisionmaker's decision is based on the work and recommendations of subordinates, the record should include all documents considered by the agency employees whose input reached the decisionmaker.

Id. at 127, 645 A.2d at 502 (quotations omitted).

¶ 94. Burke was not a de novo review proceeding. Id. at 126, 645 A.2d at 502. ***719** The record in that case was as incomplete as that in this case. We held in that case that the superior court must remand the case to the agency to obtain a proper record before proceeding. Id. at 127–28, 645 A.2d at 503. Here, the inadequacy of the supplied record supports the de novo evidentiary hearing held by the trial court to establish a record.

¶ 95. I recognize that Burke held that de novo review was not available even in a case where there is no administrative factfinding and no record on which effective judicial review could have gone forward. As in Burke, the reviewing court in this case could have required the production of a complete record of the administrative action, the proper remedy if de novo review were not statutorily required. In my view, the difference lies in the nature of the administrative decision. In Burke, the decision involved the evaluation of the public health and safety effects of emission of toxic substances from a solid waste incinerator as part of a complex regulatory process. In that circumstance, agency expertise was critical and the need for deference to the agency decision was high. This case, by comparison, essentially comes down to counting trees where agency expertise is relatively unimportant. I will explain the need for expertise in this case below. I emphasize that the above discussion is about how judicial review should have proceeded had there been no legislative requirement of judicial review. In this case, the Legislature has required de novo review, and we are required to follow that direction.

¶ 96. Finally, on this point, it is important to recognize that the Commissioner could have chosen to hold an evidentiary hearing but did not. An evidentiary hearing would have prevented, at least in part, the difference between the information on which the Commissioner rendered her decision and the testimony and evidence on which the superior court rendered its decision. In fact, under the nonprocess employed, there were no self-imposed restrictions on how the Commissioner chose to find the relevant facts, and her decisionmaking process is opaque apart from her reliance on the FPR forester.

III. The Majority's Standard of Review is Wrong and Inconsistent with the Legislature's Direction

¶ 97. In Town of Victory v. State, 2004 VT 110, ¶¶ 14–24, 177 Vt. 383, 865 A.2d 373, we were required to determine the standard of judicial review of a decision of a state agency in valuing state-owned real property in a town

under the state PILOT (payment in lieu of taxes) program. Unlike in this case, the Legislature had provided the right of appeal of a PILOT determination but did not specify the standard of review. We posited three possible choices: de novo review; review under chapter 131 of subchapter 2 of Title 32, specifically 32 V.S.A. § 4467; or traditional deferential on-the-record judicial review. We essentially found that choices one and two were the same, using the analysis discussed above. Id. ¶¶ 14–21. We defined the third possibility as follows: "The third possibility is that the Legislature intended the superior court to treat § 3708 appeals just as it treats appeals from other administrative actions—that is, it should review the record and overturn the agency's determination only if it finds it arbitrary and capricious." Id. ¶ 22. In the absence of a legislative directive to the contrary, we chose the third possibility.

¶ 98. Although there are slight differences in the language, the majority has chosen the third possibility in this case. The decisions which it states have the proper standard of review, In re Johnston, 145 Vt. 318, 488 A.2d 750 (1985), and ***720** In re DeCato Bros., Inc., 149 Vt. 493, 546 A.2d 1354 (1988), are unremarkable examples of "arbitrary and capricious" review based on the administrative record, exactly the standard of review we would have chosen under Town of Victory in the absence of legislative direction to the contrary. In each of these cases there was an evidentiary hearing at the administrative level and findings of fact and conclusions of law. In Johnston, the appeal came directly to the Supreme Court so there could be no independent fact-finding. In DeCato, the judicial appeal went first to the superior court but again it was on the administrative record and the evidence in the administrative hearing. Thus, judicial review in each case proceeded under the Vermont APA, and the standard of review was that routinely applied in APA review.

¶ 99. The problem with deriving the standard of review from these cases is obvious. In this case, the Legislature has specified a standard of review, and it is not the third possibility specified in Town of Victory, highly deferential on-the-record review. Instead, it is a form of de novo review used in property tax appeals. The majority has turned the statutory standard of review into its polar opposite. How it has done so is a fascinating process that reminds me of the child's game of broken telephone where "a child whispers a phrase into the ear of a second child, who whispers it into the ear of a third child, and so on. Distortions accumulate, and when the last child announces the phrase, it is comically different from the original." S. Pinker, Words and Rules: The Ingredients of Language 47 (1999).

¶ 100. The starting point in the majority analysis is two sentences from Jones, 2004 VT 49, 177 Vt. 81, 857 A.2d 271. Jones was a case similar to this one, but the statutory standard of review statute is not reflected anywhere in the decision; apparently neither party recognized its substance and application. The two sentences are: "We discern no basis to conclude that the Department's finding of a violation in this case was standardless, unsupported by the evidence, or contrary to law. Accordingly, we conclude that the court's findings were clearly erroneous and must be reversed." Id. ¶ 14. The majority finds the first sentence to contain the applicable standard of review.

¶ 101. Even if we assume that the Court was aware of the statutory standard of review, I would not find that the language in Jones on which the majority relies was intended as a statement of the standard of review for that and following cases. The first sentence is not followed by a citation to any authority, and the words do not appear in any earlier case, or in any statute, as a standard of review. Certainly, if we were announcing some wholly new standard of review for current-use decisions by FPR, we would explain why we were doing that and how we had the power to do so. In fact, the words have never been cited since as a standard of review, and the development of the correct standard of review occurs in Mollica, a later decision, without relying upon the Jones language. Moreover, as the second sentence explains, the actual standard of review that decides the Jones case is different —that findings of fact cannot stand if so lacking in support in the evidence that they are clearly erroneous—is familiar and totally consistent with de novo review.

¶ 102. Even if we intended some new and different standard of review, the majority has turned it into something more than it says. It does not say the agency will prevail if its decision is based on a standard, is consistent with the evidence, and is consistent with law. At best, it says instead that the agency decision will prevail if those things are true and the decision against it is based on a clearly ***721** erroneous finding of fact. This is a very important point because in this case, unlike Jones, the majority finds no instance where the trial court made a clearly erroneous finding of fact.

¶ 103. I would distinguish the Jones language based on the discussion in the two paragraphs above, but I believe that the likely explanation for its presence in the opinion is that the Court, including I, was unaware of the statutory standard of review. The Jones language is fundamentally at odds with de novo review as required by the statute because under de novo review the court is expected to substitute its judgment for that of the agency when it thinks the agency is wrong. The language has no place in a decision made under a de novo standard of review. If the majority believes it does, it should explain how.

¶ 104. The next step in the majority's analysis is to rely on In re ANR Permits in Lowell Mountain Wind Project, 2014 VT 50, ¶¶ 15–16, 196 Vt. 467, 98 A.3d 16, for the proposition that "decisions made within the expertise of such agencies are presumed correct, valid and reasonable." As the majority states, ANR Permits is a de novo review case, but the quote is taken out of context and, as a result, the meaning is changed. The relevant paragraph of ANR Permits states:

> In commencing our own review, we must first determine the standard of review that applies in appeals from the PSB sitting in its appellate capacity. As all parties noted, we generally give substantial deference to an agency's interpretation of its own regulations—in this case, ANR's interpretation of the VSMM. Absent a clear and convincing showing to the contrary, decisions made within the expertise of such agencies are presumed correct, valid and reasonable. Interpretation of the VSMM is squarely within ANR's expertise as its authoring agency. This deferential standard remains on appeal, even after the PSB holds a de novo hearing on the matter.

Id. ¶ 15 (footnote omitted) (quotation omitted).

¶ 105. The paragraph is solely about the deference accorded an agency in interpreting its own regulations, deference that is entirely consistent with de novo review. See Letourneau v. A.N. Deringer/Wausau Ins. Co., 2008 VT 106, ¶ 8, 184 Vt. 422, 966 A.2d 133. Thus, it was appropriate to cite and rely upon Johnston, which is not a de novo review case. To show the limit of the deference ruling, the Court added: "In keeping with the statutory standard of review, [the PSB] gave no deference to ANR's permit decision." ANR Permits, 2014 VT 50, ¶ 11, 196 Vt. 467, 98 A.3d 16. Thus, the decision does not give general deference to the factfinding, methodology, or conclusions of an agency, the deference involved in this case. This case does not involve the interpretation of regulations by the agency that adopted them.

¶ 106. The majority cites another part of the ANR Permits decision that it finds supports its deferential standard of review. The decision in that case involved the validity of the stormwater discharge permit for a mountain top wind electric generation project. The agency allowed the project to employ an alternative stormwater treatment practice that opponents argued was not authorized by governing regulations. As noted above, the decision turned entirely on whether the design was consistent with the regulations as interpreted by ANR and the Public Service Board (PSB). In reaching our decision that ANR and the PSB properly interpreted the regulations we noted that the Legislature explicitly gave statutory discretion to ANR in determining whether to issue a stormwater discharge permit and that the PSB had to ***722** respect that discretion even within the context of de novo review. Id. ¶ 16.

¶ 107. The ANR Permits analysis cannot change the standard of review in this case. In the context of renewable energy projects, a large number of types of ANR permits are reviewable de novo by the PSB under 10 V.S.A. § 8506. Some of these give specific discretion to ANR in deciding whether to issue a permit; others do not. See 10 V.S.A. § 8503(a). Despite the presence of de novo review, the PSB is required to apply the "substantive standards" applicable to ANR, including any discretion ANR has in determining whether to issue a permit. Id. § 8506(d); ANR Permits, 2014 VT 50, ¶ 16, 196 Vt. 467, 98 A.3d 16. This is the context of ANR Permits.

¶ 108. Here the standard of review is imposed by statute, 32 V.S.A. § 3758(d), for only two administrative actions by FPR: filing an adverse-inspection report that results in termination from the current-use program or refusal to approve a forest-management plan. Under the majority's standard-of-review theory, because either of these actions lie in the discretion of FPR, the statutory standard of review is cancelled and replaced by deferential review.

To state the theory is to expose how illogical it is. ANR Permits does not create a way for a court to refuse to apply the standard of review specified by the Legislature. [19] FPR is entitled to no deference under ANR Permits.

¶ 109. Finally, the majority pivots to a case involving an APA contested case appeal, after an agency hearing, where the standard of review is explicitly deferential and not de novo, In re Williston Inn Grp., 2008 VT 47, ¶ 13, 183 Vt. 621, 949 A.2d 1073 (mem.), demonstrating it has reached the point where there is no difference between a de novo standard and a deferential, on-the-record standard.

¶ 110. The ultimate test of the holding on standard of review has to be whether we have complied with the governing judicial review statute. Whatever the logical twists and turns in analyzing the standard of review, and even if each step of the way appears to be consistent with and controlled by precedent, the result must be consistent with the statute. In the terms of "broken telephone," the result of the majority's analysis is "comically different" from the statutory standard. The majority has turned the statutory standard of review into its polar opposite and found against **Plum Creek** as a matter of law on the polar opposite standard of review.

IV. The Decision Does Not Involve Policy

¶ 111. The majority decision states and reiterates the need to protect and rely on agency expertise in numerous places in support of its deferential standard of review. In citing and discussing ANR Permits, it describes the agency decisions here as "complicated methodologies within an agency's expertise." Ante, ¶ 30, citing ANR Permits, 2014 VT 50, ¶ 16, 196 Vt. 467, 98 A.3d 16. There are three issues on which methodology was disputed: (1) whether even cutting was required so that the area cut never fell below the minimum; (2) the actual RBA in the cut area; and (3) when tree regeneration measurements should be taken to determine whether the goals of the harvest were achieved.

¶ 112. Whether even cutting was a proper requirement was the subject of expert ***723** dispute, and under the statutory standard of review, the superior court could substitute its judgment for that of the Commissioner as I explain above. The superior court believed the expert witness for **Plum Creek** and not the FPR expert witness, the county forester, and should be affirmed on that basis.

¶ 113. My main view on even cutting, however, is different. If even cutting was a plan requirement, it had to be explicitly stated in the plan. The wording of the plan is actually contrary to a requirement of even cutting—it indicates that the shelterwood is irregularly distributed and the "overall stand" RBA must be 30 to 40 ft^2. FPR's expertise may be appropriate to determine whether even cutting should be required, but if it decides even cutting is required it must put it in the plan or a separate regulation. In this case, it did not, and **Plum Creek** cannot be terminated based on the nonexistent requirement.

¶ 114. The second point of dispute is actually relied upon in the Commissioner's decision. The decision states that the RBA for the cut area in Stand 34 was 19.7 ft^2, just above 60% of the required minimum RBA. The superior court found the RBA of the cut area was actually 28.5 ft^2, only 5% below the required minimum RBA. Again, the superior court's conclusion was based on the testimony of **Plum Creek's** expert witness who testified that he measured more trees than the county forester so that the extent he had to extrapolate to reach the estimated RBA was less. The court found:

> Apart from whether RBA is measured across a stand as a whole, the Court finds that Mr. Holleran's methodology for measuring RBA produced a more reliable result, as it was based on measurements taken from a significantly greater number of sample plots. His additional explanation of the difference between his figures and Mr. Langlais's is credible: that it was likely attributable in part to Mr. Langlais not counting all the trees in the sample plots, thereby producing a lower RBA measurement. While Mr. Langlais testified generally that his measurements were taken in a manner consistent with the UVA manual, the Court finds the quality and reliability of Mr. Holleran's measurements to be superior.

The majority states that the trial court could make this factual determination, apparently because, despite the disagreement with the county forester's methodology, and the Commissioner's finding based on that methodology, the disagreement is over the relatively simple matter of counting trees. Ante, ¶ 23 n. 7.

¶ 115. The majority answers, however, that the RBA calculation difference is irrelevant because it came out under a 30 ft^2 RBA, no matter how slightly. Even under the majority's rationale I find that explanation insufficient. The Commissioner's decision relied upon the fact that the RBA was 19.7 ft^2, which would indicate there had been a commercial clear cut. In fact, the RBA was very close to the minimum. The Commissioner was concerned about whether a part of the stand would have "a very different age-class distribution, composition and structure" from the rest of the stand. In fact, if the harvest were completed within the RBA minimum, as intended, it is not clear there would be a "very different" remaining growth anywhere in the stand. The problem, of course, is that the FPR policy that it is implementing is written down nowhere so it is impossible to know what it actually is, a large deficiency when FPR claims it can come in at any time during the harvest of an irregular shelterwood to measure compliance. At a minimum, the Commissioner should be required to explain why an RBA ***724** of 28.5 ft^2 is inadequate in these circumstances.

¶ 116. The third issue in dispute was joined particularly with respect to Stand 43, a different stand from that considered by the majority, but I will consider it here because it is mentioned in the Commissioner's decision with respect to Stand 34. As I excerpted above, the Commissioner's decision states: "the residual trees comprising this basal area are at best intermediate stems in the 10 to 12 inch diameter class that lack the crown size necessary to provide the shading conditions even if the desired residual basal area target was met. **Plum Creek's** prescription should not be narrowly interpreted to just stocking levels." Putting aside whether a landowner can be terminated from the UVA program based on noncompliance with a "broad" interpretation of the plan based on a plan requirement that is not actually in it, the facts as found by the superior court are contrary to the Commissioner's apparent conclusion.

¶ 117. The county forester criticized the harvest because it did not produce the promised regeneration of new trees —he found "there was regeneration in only 15% of the plots examined." This opinion was based on a standard of regeneration of 350 stems per acre immediately after the harvest. **Plum Creek's** expert witness, by comparison, did a regeneration study three growing seasons after the harvest, also against a standard of 350 stems per acre. He found a regeneration rate of 12,000 seedlings per acre, far exceeding the minimum requirement. The superior court accepted the conclusion of **Plum Creek's** expert witness because the UVA manual standard is measured three years after the regeneration harvest and the witness's measurements were more reliable.

¶ 118. Although the majority has not responded to the superior court's analysis and conclusion, it essentially involved the same level of competency as the counting of trees to measure the RBA. It was also the counting of trees, in this case small ones, to measure regeneration. The main difference between the superior court's conclusion and that of the Commissioner involved when the measurements were taken; the superior court's measurement time was in compliance with the governing UVA manual; the Commissioner's conclusion was not.

¶ 119. Again, the superior court conclusion does not involve policy for the same reason that the resolution of the RBA issue does not involve policy. While it does not address a requirement that is stated in the plan, the conclusion of the superior court is nevertheless important for an understanding of the Commissioner's decision. Reduced to its main point, the decision here is about regeneration of a healthy and productive forest. The Commissioner concluded that the cutting level was too great to allow regeneration. **Plum Creek** proved that regeneration, orders of magnitude above what was required, were occurring and thus the harvest cutting rate was a success. The superior court agreed with **Plum Creek**.

¶ 120. Because of the regeneration result, this dispute is largely about a technicality. That is my last point in the following section.

V. The Facts Support **Plum Creek's** Position

¶ 121. There are some important facts not contained in the majority's recitation that bear on whether **Plum Creek's**

position was reasonable and the trial court acted within its discretion in accepting it. One group is laid out in the opening two paragraphs of this dissent, and I will return to these facts below. Another group relates to the present condition of the forest ***725** over which this controversy arises and the goals of the logging activities that FPR approved.

¶ 122. The overall forest in this case was in poor condition to support commercial forestry. The prescription for each of the stands in controversy states that the stand "has high residual stand damage" and the beech trees are diseased. See Appendix. The trial court described the situation and the goals of the timber harvest as follows:

> [T]he general goals were to cut in a manner to change a poor quality old forest into a new forest through the creation of new growth. This would be accomplished by harvesting damaged trees and large trees that would inhibit the growth of desirable young trees, promoting the growth of desirable young trees, retaining trees that could provide seeds and shade for new growth in a desirable growth pattern, establishing even age management on the stands with both existing young trees and new growth, and optimizing conditions for growth for the future.

If this had been a forest in which 100% of the trees were valuable and desirable for sale and the goal was to maximize return on these trees, the requirement that logging occur evenly over a stand would be reasonable and understandable such that excessive harvesting in one part of the stand would be a clear indication that excessive harvesting overall was intended.

¶ 123. The situation in this case was very different. Thus, the prescription for Stand 34, the stand in which this conflict primarily developed, stated: "The shelterwood will be irregular in distribution and will target Sugar Maple and Yellow Birch with large crowns to provide shade and seed distribution." It added, "the portions of the stand will also receive 1-2 acre patches where quality and stocking are not sufficient for shelterwood." See Appendix. Given the "irregular distribution" of logging activity, the presence of an arbitrary area in the stand with a lower RBA than contemplated overall was entirely expectable. Put another way, even cutting was highly unlikely because the trees that needed to be cut were not evenly distributed over the stand. The cutting could not occur pursuant to some artificial standard of equal harvesting per acre.

¶ 124. Finally, it is important to understand that the measure of success for **Plum Creek** was whether regeneration occurred as a result of the harvesting, the exact goal that the Commissioner stated she was enforcing. The evaluation of the partial harvest three years later shows that it was an overwhelming success—the regeneration levels are orders of magnitude in excess of what was required. Thus, **Plum Creek** is being heavily penalized for a success.

¶ 125. This, and the facts in the opening paragraphs, brings me to the heart of my disagreement with the majority's characterization of the facts and **Plum Creek's** perspective on the facts. This conflict would likely never have arisen in the courts if the timber harvesting was completed in the three stands, and that completion was only days away when the site visit occurred. **Plum Creek** never intended to harvest only part of the stand and certainly not only the part of the stand that had been logged to that point. The fact that only part of the stands were harvested, and harvest measurements are available only on a part of the stands, was a direct result of the FPR forester's conclusion based on the site visit that the stands were being "cut contrary." While there is no indication that the FPR forester could or did order the logging stopped, **Plum Creek** was put in a position of stopping logging operations to protect itself from a ***726** FPR decision to terminate it from the UVA program. [20]

¶ 126. The majority has fixed on its view that it makes no sense to average between the logged area of a stand and the unlogged area, relying particularly on the Commissioner's statement that considering a tree a kilometer away in the uncut portion to determine compliance for a tree in the cut portion was a "misapplication and a complete misunderstanding of the principal of the silviculture practice." Everyone agrees with the Commissioner's statement, including **Plum Creek's** expert, but it does not answer the basic problem with the State's position. **Plum Creek** never intended to harvest only part of a stand and did not claim so here. This is an example of attributing

a position to a party to tear it down—a strawman position. The Plum Creek position has always been that the harvest could not be judged in midstream and should have continued to its end, and then it could be judged on whether it violated the plan. The cause of this controversy is the stopping of the timber harvest days away from its completion and the required determination of whether the plan was violated by a timber harvest that was never completed. Plum Creek's expert testified that Plum Creek could complete the harvest fully compliant with the provisions of the plans, particularly the minimum basal area requirements and the use of appropriate treatments in each part of the stands. He noted particularly about Stand 34 that the area that had been logged had been extensively damaged by the 1998 ice storm.

¶ 127. By footnotes 8, 9 and 10 the majority has added to its position that it was fair to consider only part of the stands by stating that if Plum Creek intended that the RBA be judged on the stands as a whole, it should not have shut down the harvest at the time of the initial inspection on January 26, 2010 and should have completed it at some time thereafter. The majority asserts that stopping the harvesting was wholly a decision of Plum Creek and not a decision of FPR. Even the limited facts in the record show that this position is wrong.

¶ 128. There were two adverse consequences of the January 26, 2010 site visit during the harvesting. First, as discussed above, the FPR county forester decided that Plum Creek had "cut contrary" to its plan. Second, the county forester decided that Plum Creek had violated the AMPs in a number of respects. Later that day, the Plum Creek forester sent the FPR county forester an email expressing an intent to comply with program requirements and thanking the forester for cooperation in meeting those standards. The next day, the Plum Creek forester sent the county forester a formal letter describing the situation observed on January 26 and specifying steps Plum Creek would take in the future to comply with the requirements that bound it. It specifically described the steps it would take to correct the AMPs violations alleged by the forester and prevent AMPs violations in the future.

¶ 129. It is important to understand that the consequences for an AMPs violation and a violation of the harvest plan are different. Both can result in termination from the UVA program, but AMPs violations that result in unpermitted discharges of waste into the waters of the state in violation of 10 V.S.A. § 1263(a) can result in civil penalties up to $10,000 per day for each day of violation. See 10 V.S.A. § 1274(a)(6). Such a discharge is also a crime that can result in imprisonment for *727 up to six months. Id. § 1275(a). The FPR county forester found that the AMPs violations were "discharge resulting" such that the civil penalties and possible criminal liability were applicable. When charged with an AMPs violation, Plum Creek was forced to suspend the harvest in order to correct any AMPs violations.

¶ 130. The county forester never responded to the communications from the Plum Creek forester, but another site visit on AMPs compliance was planned with ANR staff responsible for AMPs enforcement. That occurred on February 9 but did not resolve the issues because snow had fallen on the site making it impossible to observe the alleged violations. In a February 18 letter, FPR outlined the steps needed for Plum Creek to come into compliance with the AMPs. Plum Creek hired a contractor to do the remedial work, and the ANR and FPR staff revisited the site on April 19, 2010. On April 27, FPR sent a letter to Plum Creek saying that Plum Creek was now in compliance with the AMPs. Plum Creek could not have moved forward with the harvest until all the AMPs issues were corrected; that is, when it received the April 27 letter.

¶ 131. Meanwhile the parties had a meeting with respect to compliance with the plan on February 18. The Plum Creek representatives hoped to learn at that meeting that there would be no further actions that would prevent it from moving forward with the harvest. Instead, they learned that the county forester was working on an adverse-inspection report which would lead to termination of Plum Creek from the current-use program. During March and April, the county forester continued to take measurements at the stands to complete the adverse-inspection report.

¶ 132. The adverse-inspection report was issued on April 26, 2010, a day before the AMPs compliance letter that would allow Plum Creek to move forward. If there was any question about the continuation of the harvest after the adverse-inspection report, on May 20, 2010, the Director of Forests for FPR sent a letter to Plum Creek saying that a draft of the adverse-inspection report was being reviewed in the "Waterbury office" and had been sent to the Tax Department recommending that all Plum Creek property be removed from the UVA program. The letter

stated, "Until all actions related to the potential UVA violation are completed, FPR will not be in a position to approve any new activities in the area referred to as Clough Brook North." This was a statement that no further harvesting in the relevant area would be allowed pending resolution of this case. Plum Creek interpreted it as such an order and did no further harvesting in the stands involved. That order has been in effect since May 20 and up to today. It was in effect in November 30, 2010 when the Commissioner claimed in her letter that Plum Creek was using the unharvested part of the stands to claim compliance, the rationale endorsed by the majority.

¶ 133. The majority states that this dissent wanted FPR "to wait indefinitely to see if and when the landowner will continue cutting before bringing a violation." Ante, ¶ 38 n.10. That is a mischaracterization of the facts and Plum Creek's position, as well as that of this dissent. The FPR county forester began work on the adverse-inspection report immediately after the January 26 inspection. Plum Creek never could move forward after the January 26 inspection to complete the harvest either because of the AMPs issues or because of the adverse-inspection report and subsequent order denying approval for any further harvest activities. It is FPR, and not Plum Creek, that stopped harvesting activities to this day. [21]

***728** ¶ 134. In summary, the facts—if we decide it on the facts—support Plum Creek's position, not that of FPR. In the end, however, facts are for the trial court and not this Court, and the trial court considered every one of the factual assertions of the majority and either rejected them or concluded that they did not support the Commissioner's decision. We should affirm the trial court's decision.

VI. Conclusion

¶ 135. In conclusion, I believe that this decision is wrong on multiple levels. It is wrong in determining whether FPR or Plum Creek should prevail, and is wrong in ruling as a matter of law. The superior court correctly ruled that Plum Creek never violated its plan, the standard for determining whether it should be terminated from the UVA program, and should be affirmed on that basis. It is wrong by adopting a standard of judicial review that turns a governing statute into its exact opposite. It is wrong in rewarding an administrative process that is opaque and does not contain the minimum standards of fairness. Finally, it is wrong in misusing extreme deference to emasculate judicial review. The majority's holding on standard of review has emasculated judicial review in this case.

¶ 136. I dissent. I am authorized to state that Justice Skoglund joins this dissent.

Appendix to Dissent

Relevant Content of Plum Creek Prescriptions

***729**

Stand #	LM-03-34	LM-03-43	LM-03-44
Acres	137	115	37
Total basal area (ft^2/acre)	82	88	97
Acceptable growing stock basal area (ft^2/acre)	35	38	42
Management activities	Shelterwood cut	Shelterwood cut Overstory removal cut	Intermediate thinning
Forest health conditions	The stand has high residual stand damage. Beech bark *Nectria* complex.	The stand has high residual stand damage. Beech bark *Nectria* complex.	The stand has high residual stand damage. Beech bark *Nectria* complex.
Description of stand conditions	Stand 34 is a well stocked Northern hardwood type with a total basal area of 82 ft^2, of that 35 ft^2 is acceptable growing stock. The stand is dominated by Sugar maple, Yellow birch, Beech, Balsam fir, Red Spruce. The mean stand diameter is 8.4 inches. The stand is weighted towards the medium saw timber size class. The current stand has a high level of residual stand damage and a fair amount of crown die-back. The understory varies greatly in stocking of acceptable regeneration, with small pockets of Sugar maple seedling and saplings in a patchy distribution about the stand.	Stand 43 is a well stocked Hardwood dominated mixed wood type with a total basal area of 88 ft^2, of that 38 ft^2 is acceptable growing stock. The stand is dominated by Yellow birch, Balsam fir, White birch, Red spruce, Red maple. The mean stand diameter is 8.2 inches. The stand is weighted towards the medium saw timber size class. The White birch in the stand is in severe decline and the majority of Balsam fir is mature. The majority of the stand has good stocking in Red spruce seedlings and saplings in the understory.	Stand 44 is a well stocked Northern hardwood type with a basal area of 97 ft^2, of that 42 ft^2 is acceptable growing stock. The stand is dominated by Sugar maple, Yellow birch, Beech, Balsam fir, Red spruce. The mean stand diameter is 7.6 inches. The stand is weighted towards the small saw timber size class. The stand has a fair amount of acceptable stocking in the small saw timber size class.
Management practices to be accomplished during next 10 year plan	Stand 34 will receive a Two Staged Shelterwood (2SS) (even age UVA code 3). The stand lacks an acceptable amount of regeneration and the majority of the overstory is unacceptable growing stock. A low density shelterwood with a residual basal area of 30-40 ft^2 will be utilized to discourage the establishment of beech in the understory. The shelterwood will be irregular in distribution and will target Sugar maple and Yellow birch with large crowns to provide shade and seed distribution. The portions of the stand will also receive 1-2 acre patches where quality and stocking are not sufficient for a Shelterwood. The patches will not affect the overall stand residual basal area of 30-40 ft^2.	Stand 43 will receive a Two Staged Shelterwood (2SS) (even age UVA code 3) and Overstory Removal (OSR) (even age UVA code 4). 30-40% of the stand will receive an Overstory Removal where the overstory is in severe decline and the understory is well stocked with seedling and sapling sized Red Spruce. The remaining portion of the stand will receive a Shelterwood. The harvest will target the at-risk and mature stems. The target residual basal area is 60 ft^2. The harvest will release quality growing stock and provide gaps to promote regeneration.	Stand 44 will receive an Intermediate Thinning (ITH) (even age UVA code 2). The stand is well stocked with small saw timber, however many of the medium and large saw timber stems are in decline. The thinning will target the at-risk and mature stems and leave a target residual basal area of 60 ft^2. This will release the small saw timber size class and open up gaps for regeneration.

All Citations

155 A.3d 694, 2016 VT 103

Footnotes

1 Comprised of the Commissioner of Taxes, the FPR Commissioner, the Director of the Department of Taxes, Division of Property Valuation and Review (PVR), members of the private agricultural and forestry sectors, and local government representatives, 32 V.S.A. § 3753(b), the Board's legislatively defined duties are to periodically review the criteria for enrollment in the UVA program, recommend changes and improvements, and adopt rules to carry out its statutory goals. Id. § 3754(a), (c).

2 A shelterwood cut reduces the basal area to create the particular microclimate conditions necessary to regenerate certain species within the stand.

3 As the statute existed in 2010 when the appeal was taken, the aggrieved party appealed from the PVR Director, who formally removed the property from the UVA program, to the same Director. See 2007, No. 190 (Adj. Sess.), § 4. The statute now states that the appeal goes from the PVR Director to the Commissioner of Taxes.

4 The statute provides no specificity on how the appeal is to be conducted. While the Vermont Administrative Procedure Act (APA) specifies procedures for many types of administrative proceedings, its regulation is generally applicable only to contested cases, see 3 V.S.A. §§ 809-813, which are defined as proceedings in which "legal rights, duties, or privileges

of a party are required by law to be determined by an agency after an opportunity for hearing," Id. § 801(a)(2). There is no requirement that the appeal to the Commissioner provided in § 3758(d) be determined after an opportunity for a hearing. Thus, the APA does not apply to the appeal to the Commissioner, and this was an informal adjudication.

5 Because the **Plum Creek** tract lies in both Essex and Orleans counties, there were actually four administrative rulings, two from each county. All of these rulings were consolidated on appeal.

6 Rule 74 also specifically provides that the rules of civil procedure "shall govern proceedings" in the superior court. V.R.C.P. 74(g). In a departure from Rule 74(e), however, which authorizes trial by jury on "[a]ny question as to which there is a right to trial by jury," the statute provides that tax appeals to the superior court "shall be heard without a jury." 32 V.S.A. § 4461(a).

7 The dissent claims that the standard of review is misidentified, but the dissent largely agrees with the standard articulated here. Review is de novo in the trial court. We emphasize, as we have done in the past in the context of property tax appeals, that although the appeal is de novo this does not mean that the trial court "ultimately owes no deference to the decision of the administrative agency." Mollica v. Div. of Prop. Valuation & Review, 2008 VT 60, ¶ 8, 184 Vt. 83, 955 A.2d 1171; see In re ANR Permits in Lowell Mountain Wind Project, 2014 VT 50, ¶¶ 9–17, 196 Vt. 467, 98 A.3d 16 (explaining that even though review was de novo to public service board, board was still required to defer to agency's interpretation of matters within its area of expertise). Even in the context of de novo review, a court must still defer to an administrative agency's interpretation of a matter within its "legislatively delegated expertise." Mollica, 2008 VT 60, ¶ 9, 184 Vt. 83, 955 A.2d 1171.

The true point of divergence between this decision and the dissent is whether the critical question on appeal is an area within the agency's expertise to which the trial court must defer or a factual determination for the trial court to decide. Because the key inquiry depends on the "proper methodology for implementing a statute" within the purview of FPR, the agency's interpretation is accorded deference. See Town of Killington v. Dep't of Taxes, 2003 VT 88, ¶ 5, 176 Vt. 70, 838 A.2d 91.

8 The dissent repeatedly comes back to the fact that cutting was halted partway through and laments that there would be no conflict about how to measure RBA "if the timber harvesting was completed in the three stands." Post, ¶ 125. Obviously, if cutting had been completed, then the issue of whether to measure RBA in the entire stand or just in the cut portion would not exist. The fact is that cutting did cease. The dissent sees this as an injustice to **Plum Creek**, and places blame on the State for declaring a violation before the harvest was completed. The dissent accuses the majority of appellate factfinding on the issue. There is no need to engage in appellate factfinding. To the extent that it is relevant, the court made sufficient findings on the issue. The trial court found, based on the evidence presented, that it was **Plum Creek's** forester that initially told the logger to cease cutting based on the forester's own concern about the level of cutting he observed during the site visit in late January. Whether **Plum Creek** then continued to suspend cutting voluntarily or felt compelled by concerns expressed by ANR and FPR is not relevant. **Plum Creek** did not claim compliance based on future cutting; rather, it based compliance with the prescription on the fact that the RBA, if averaged between the cut and uncut portions of the stand, was within the goals set.

9 The dissent dismisses this concern and asserts that **Plum Creek** never intended to harvest only part of the stand and its position "has always been that the harvest could not be judged in midstream and should have continued to its end." Post, ¶ 126. It has not "always" been **Plum Creek's** position that the harvest should continue; **Plum Creek** voluntarily chose to stop the harvest based on an assessment by its own forester that the logger was not following its directions. Further, **Plum Creek** did not base its alleged compliance with the prescription goals on a continued cutting plan but alleged it complied with the prescription goals if the RBA was calculated by averaging the cut and uncut portions of the stand. **Plum Creek's** own expert in the superior court testified that if the entire stand had been cut in the same manner as the already harvested portion, it would have been out of compliance.

10 Especially in a situation like this where **Plum Creek** voluntarily ceased cutting, FPR should not have to wait indefinitely to see if and when the landowner will continue cutting before bringing a violation.

11 The State alleged that **Plum Creek** had violated the Acceptable Management Practices (AMPs) for Maintaining Water Quality on Logging Jobs by a number of actions. The alleged violations were corrected shortly after they were identified. The AMPs violations were one of the grounds for the termination of **Plum Creek** from the current-use program and could have been grounds for the State to seek civil penalties in an enforcement action. It did not do so and, in fact, certified that **Plum Creek** was in compliance with the AMPs. Neither the majority nor this dissent has considered the AMPs compliance issue, except as stated in infra, ¶¶ 126–132, to explain why **Plum Creek** was prevented by FPR from finishing the harvest.

12 Although the alleged improper conduct affected only a few hundred acres of land, all contiguous land owned by **Plum Creek** was removed from the current-use program. Although the exact financial impact of the decision is not of record, it is alleged to be well in excess of one million dollars.

13 The majority finds significant that **Plum Creek** "voluntarily ceased cutting" when concerns were raised. Ante, ¶ 38 n. 10. I find significant that the county forester never stated that **Plum Creek** should complete its harvest and the forester would judge compliance based on the completed harvest. Also important is that FPR withdrew its approval for the harvest and only accepted that **Plum Creek** had resolved the AMPs issues after the termination decision was made. Despite **Plum Creek's** immediate letter indicating how it would proceed forward in compliance with the plan and to resolve the AMPs issues, the forester went forward with the termination action in this case and never answered the letter. If there was an attempt to settle this controversy, the evidence lies in the administrative record that was never disclosed.

14 Basal Area (BA) "is a measure of forest density based on the square footage of trees per acre." Jones v. Dep't of Forests, Parks & Recreation, 2004 VT 49, ¶ 10, 177 Vt. 81, 857 A.2d 271.

15 As I discuss infra, ¶¶ 91–93, we have no way of knowing what information the Commissioner actually had because there is no record of the inputs to the Commissioner's decision except for the county forester's determination.

16 I do not think the standard of review is determinative here for the reason stated in the text. If it were relevant, I would apply the standard of review for determinations of whether a permittee has complied with conditions of a permit. In Agency of Natural Resources v. Weston, we held:

> In construing permit conditions, we rely upon normal rules of statutory construction. Our principal concern is to implement the intent of the draftpersons. Ordinarily, we do so by accepting the plain meaning of the words because we presume that they express the underlying intent. We also keep in mind, however, that because land-use regulations are in derogation of property rights, any uncertainty in their meaning must be decided in favor of the property owner. We must be particularly careful that the conduct complained of falls within the clear prohibition of a permit condition before requiring the landowner to pay a large monetary penalty. Finally, we must accord deference to the environmental court's construction of a permit condition, particularly when the court's expertise will assure consistent interpretations of the law.

2003 VT 58, ¶ 16, 175 Vt. 573, 830 A.2d 92 (mem.) (quotations and citations omitted); accord In re Barry, 2011 VT 7, ¶ 19, 189 Vt. 183, 16 A.3d 613. The lessons of these cases are that permit conditions are construed under normal rules of statutory construction and are construed to implement the intent of the draftsperson, who in this case was **Plum Creek**. The deference we give is to the trial court, not the administrative agency. Finally, a prohibition must be clear if, as is the case here, it will be the grounds for a large monetary penalty.

17 Mollica was decided under 32 V.S.A. § 3758(a) because it involved an appeal from the PVR Director, not an appeal from the FPR Commissioner. At the time of the decision, the judicial review statute for such an appeal was identical to § 3758(d), the statute involved here. In 2013, § 3758(a) was amended to delete the cross-reference to the procedure in chapter 131, subchapter 2 of Title 32 and substitute "from there to Superior Court in the county in which the property is located." 2013, No. 73, § 13. Section 3758(d) was not similarly amended. Because the amendment in § 3758(a) came after Mollica was decided, that decision is still controlling precedent on the meaning of § 3758(d).

18 The county forester's adverse-inspection report was sent to the Chief of Forest Management, and thereafter to **Plum Creek**. By letter of May 20, 2010, the Director of Forests of FPR notified **Plum Creek** that the investigation was complete and "was forwarded to the Waterbury Office for review" and sent to PVR, "recommending that the property be removed from UVA for harvesting contrary to the management plan." Even this letter was not part of the record. The record did not include any information about the review in the Waterbury Office or any other action between the county forester's report and the Commissioner's decision.

19 Even if there might be a case for discretion with respect to plan approval, there is none for filing an adverse-inspection report. FPR is required to file an adverse-inspection report if it "finds that the management of the tract is contrary to the ... forest management plan." 32 V.S.A. § 3755(c).

20 Its decision was also based in part on the AMPs violations, and **Plum Creek's** decision not to move forward until these were corrected. They were, however, corrected.

21 The back and forth on this issue is a clear example why appellate factfinding is improper. There has never been factfinding on the question of whether **Plum Creek** could have completed the harvest because it was never an issue in the trial court or raised by the parties on appeal. For the reasons stated in the text, I believe that the majority's characterization of the record on this point is clearly wrong. The alternative, if there is one, is to remand to the trial court to determine the facts.

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