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## **HIGHWAYS - VERMONT**

### [In re Diverging Diamond Interchange Act 250](#)

**Supreme Court of Vermont - November 6, 2020 - A.3d - 2020 WL 6534557 - 2020 VT 98**

Objector sought review of Environmental Commission's decision granting Agency of Transportation's application for an Act 250 land use or development permit for highway project involving reconfiguration of interstate exit, citing concerns of phosphorus and chloride discharges into impaired lake.

The Superior Court, Environmental Division, granted permit and entered a postjudgment motion clarifying its decision. Objector appealed.

The Supreme Court held that:

- Environmental Division did not apply an improper de minimis standard in determining whether project would cause undue water pollution;
- Mere possibility of additional mitigation measures, without more, did not require a finding that phosphorus discharge was undue pollution;
- Environmental Division did not improperly afford Agency a presumption of compliance with criterion of no undue pollution;
- Environmental Division did not improperly shift burden of proof to objector with respect to issue of chloride pollution;
- Finding that project would not cause undue chloride pollution was not clearly erroneous; and
- Environmental Division acted within its discretion in not joining town as a necessary co-applicant.

Environmental Division did not apply an improper de minimis standard in determining whether proposed project would cause undue water pollution precluding grant of an Act 250 land use or development permit sought by Agency of Transportation for highway project involving reconfiguration of interstate exit, even if Division characterized amount of phosphorus discharged by project into impaired lake as exceedingly small, where Division considered testimony from both parties' experts regarding amount of phosphorus discharges, Division agreed with objector that there was no automatic allowance for de minimis water pollution, and Division also weighed project's compliance with applicable regulations, ability of floodplains to retain phosphorus, and available mitigation measures.

Mere possibility of additional mitigation measures, without more, did not require a finding that water pollution from phosphorus discharges into impaired lake was undue water pollution that would preclude grant of an Act 250 land use or development permit sought by Agency of Transportation for highway project involving reconfiguration of interstate exit, where Agency provided evidence of a carefully designed stormwater treatment system that used grass channels to remove phosphorus, and objector's expert testified that additional mitigation measures were available but could not quantify the expected reduction in phosphorus load or offer an opinion as to effect of reductions.

Environmental Division did not improperly afford Agency of Transportation a presumption of

compliance with criterion of no undue water pollution for granting an Act 250 land use or development permit based on existence of stormwater permit for highway project involving reconfiguration of interstate exit; stormwater permit vested in regulations that did not include specific standards for phosphorus or chloride discharges, Division was concerned about strength of a presumption arising out of project's circumstance because phosphorus or chloride discharges were at issue, and Division expressly evaluated each pollutant on the merits rather than relying upon a presumption.

Environmental Division did not improperly shift burden of proof to objector with respect to issue of undue chloride pollution from proposed highway project involving reconfiguration of interstate exit, in determining whether grant Agency of Transportation's application for an Act 250 land use or development permit, where Division considered all evidence presented by Agency, including statewide snow and ice control plan, project's chloride management plan, and extensive expert testimony, Division concluded that Agency satisfied its burden based on that evidence, and Division then considered objector's evidence and concluded that it was insufficient to disturb that conclusion.

Environmental Division did not clearly err in finding that proposed project would not cause undue chloride pollution that would preclude grant of an Act 250 land use or development permit sought by Agency of Transportation for highway project involving reconfiguration of interstate exit, even though Division did not have evidence before it about chloride use by town that was responsible for maintaining portion of project, where Agency witness testified that town's plan was reasonable and accorded with Agency's statewide snow and ice control plan, Agency had agreement with town detailing town's responsibility for winter road maintenance, and order granting permit provided that project was required to abide by conditions imposed by District Commission including chloride management plan.

Environmental Division acted within its discretion in not joining town as necessary co-applicant on appeal of Environmental Commission's grant of Agency of Transportation's application for an Act 250 land use or development permit for highway project involving reconfiguration of interstate exit, where Agency effectively controlled land such that appropriate permit conditions could be imposed on project, project's chloride management plan accorded with Agency's snow and ice control plan and also incorporated town's snow and ice plan by reference, Agency's expert testified that town's plan was reasonable, permit required Agency to perform winter road management in accordance with chloride management plan, and Agency's agreement with town required town to abide by chloride management plan.