

STATE OF VERMONT

SUPERIOR COURT  
Orleans Unit

CIVIL DIVISION  
Docket No. 108-4-14 Oscv

Seymour Lake Association,  
Plaintiff,

v.

State of Vermont, Agency of Natural Resources,  
Department of Environmental Conservation,  
Defendants.

**Plaintiff's Response to State's Memorandum in Opposition to Plaintiff's  
Motion to Amend Complaint**

The Vermont Supreme Court has held : “Under V.R.C.P. 15(a), a party may amend his pleading once as a matter of course at any time before a responsive pleading is served. A motion to dismiss does not constitute a responsive pleading. V.R.C.P. 7(a), (b); 3 J. Moore, Federal Practice ¶ 15.07[2], at 851-52 (2d ed. 1974). By dismissing the complaint prior to service of a responsive pleading by the defendant, the trial court deprived plaintiffs of their right to amend. The trial court's proper course of action when granting a Rule 12(b) motion to dismiss prior to the service of a responsive pleading is to dismiss with leave to amend. See 6 C. Wright and A. Miller, Federal Practice and Procedure § 1483, at 413 (1971). 'This will afford the party against whom the dismissal is granted the option of amending his pleading or of having a judgment entered against him and taking an appeal.' *Id.* It was error for the trial court not to follow this course of action.” *Neal v. Brockway*, 136 Vt. 119, 385 A.2d 1069 (1978).

See also *6C Wright and Miller, Section 1483 (3<sup>rd</sup> ed. 2004)*.

Defendants claim that this Court lacks jurisdiction because “the sole route of appeal from an ANR decision is to the Environmental Court.” *Defendants' Memorandum dated June 15, 2015 at p. 4*. But ANR cannot assert jurisdiction it never had. ANR was bound by the law, and thus the rulings and jurisdiction of the Public Service Board. See *10 V.S.A. 1081* and *30 V.S.A. 401 and 402*. Under State law the Public Service Board has jurisdiction. They exercised that jurisdiction. Under federal law the State law is primary. *33 U.S.C. 1251(b)*. There is no preemption. There is no excuse for Defendants not complying with the law. Plaintiff is entitled to a declaratory judgment so that this issue may be resolved on its merits.

Dated at Greensboro, Vermont, this 21<sup>st</sup> day of June, 2015.

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David Kelley  
Attorney for Plaintiff