

State of Vermont
Water Resources Board

Appeal of Gerald & Patricia Fitz
In re: Proposed Retaining Wall
and Fill, McAllister Pond,
Lowell, Vermont

29 V.S.A. Section 408
Findings of Fact,
Conclusions of Law &
Order

INTRODUCTION

Following a public hearing on January 3, 1989, held at Lowell, Vermont, the hearing referee appointed by the Water Resources Board issued preliminary findings of fact on February 3, 1989. All parties to this proceeding received copies of the preliminary findings and were given an opportunity to respond in writing. Responses were filed by the Agency of Natural Resources and by Tim McInerney.

On the basis of its record in this matter, the Water Resources Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Preliminary finding of fact #4 is amended to read as follows:

"Prior to construction, the Fitz's applied for and received a zoning permit from the Town of Lowell for the residence."

2. The third and fourth sentences in preliminary finding of fact #5 are amended to read as follows:

"The Department outlined three options for the Fitz's to pursue in order to resolve the situation. These options were (Exhibit #1):"

3. Preliminary finding of fact #10 is amended to read as follows:

"The wall and backfill resulted in some loss of fish and wildlife habitat. This loss occurred in the productive littoral zone of the Pond. No assessment has been made as to the impact of this loss on the fish or wildlife inhabiting the Pond."

4. Preliminary finding of fact X12 is amended to read as follows:

"The Fitz's camp is the first to be constructed on the Pond. There are no other man-made structures on or near the shoreline. There is no abrupt delineation of the

shoreline, with the Pond being bordered by emergent aquatic vegetation and wetlands. The fieldstone wall is unique on the shoreline, creating an abrupt man-made delineation where no others exist."

5. Preliminary finding of fact #17 is amended to read as follows:

"The applicant stated that when construction of the fieldstone wall and the placement of fill occurred in June of 1988, the actual water level of the Pond was below the base elevation of the wall, due perhaps to the unusual drought conditions during the early summer of 1988."

6. Except as modified above the Water Resources Board adopts in their entirety the preliminary findings of fact issued by its hearing referee on February 3, 1989.
7. The Board finds that the Pond in the vicinity of the applicant's project is bordered by an extensive wetland area which acts as a buffer to human encroachment. The loss of this buffer as a result of the Fitz's encroachment, adversely affects the wildlife habitat value of the Pond.

CONCLUSIONS OF LAW

1. The Board concludes that the encroachments constructed by the Fitz's are subject to the jurisdiction of 29 V.S.A. Chapter 11 because they occur below the mean water level of McAllister Pond as determined according to rules adopted for that purpose by the Water Resources Board on November 14, 1972. The applicable rule in this case is rule 3 which provides the following method for determining the mean water level on ponds **such** as McAllister Pond:

For those lakes and **ponds** that have natural outlets, exclusive of Lake Champlain, the elevation of the natural control section plus the mean depth of **flowage** over it as measured during the period June 1 to September 15.

The Board concludes that the beaver dam itself constitutes a natural control section for purposes of implementing rule 3 and therefore the placement of fill and the construction of the fieldstone retaining wall constitute encroachments below the mean water level of McAllister Pond.


2. On the basis of the above findings of fact the Board concludes that the Fitz's encroachment will not adversely affect the public good with respect to its impacts on water quality, navigation and other recreational and public uses including fishing and swimming or consistency with municipal shoreline zoning ordinances or applicable state plans.
3. The Board concludes that the Fitz's encroachment will have an adverse impact on fish and wildlife habitat, aquatic and shoreline vegetation and is not consistent with the natural surroundings.

ORDER


Based on the above findings of fact and conclusions of law, the Water Resources Board hereby denies the appeal of Gerald and Patricia Fitz and affirms the decision of the Department of Environmental Conservation dated November 22, 1988 to deny their application for a permit to construct a retaining wall and place fill below the mean water level of McAllister Pond in the Town of Lowell.

Dated at Berlin, Vermont this 31st day of March, 1989.

Vermont Water Resources Board



David M. Wilson, Chairman




Thomas J. Adler



William D. Countryman



Elaine B. Little



Sheldon M. Novick

State of Vermont.
Water Resources Board

Appeal of Gerald and Patricia
Fitz
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Vermont.

Preliminary Findings of
Fact

INTRODUCTION

On November.30, 1988 Gerald and Patricia Fitz filed an appeal with the Water Resources Board from a decision of the Department of Environmental Conservation dated November 22, 1988 to deny their application for a permit to construct a retaining wall **and place** fill below the mean water level of McAllister Pond in the Town of Lowell. This appeal was filed under the provisions of 29 V.S.A. § 406.

A public hearing regarding this **appeal** was conducted at Lowell, Vermont on January 3, 1989 by a hearing referee appointed by the Vermont Water Resources Board. The following **persons** were given party status in this **proceeding**:

- (1) Gerald and Patricia Fitz
- (2) Department of Environmental Conservation
- (3) Leonard Shackleton
- (4) Tim **McInerney**

During the course of the hearing the following documents **were** entered into the record;

Exhibit 1: A copy of 'all correspondence from the file of the Department of Environmental Conservation **concerning the** application- **(#88-77) filed by Gerald and Patricia Fitz.**

Exhibit 2: Two black and white photographs each taken on July 11, 1988 showing the shoreline of the Fitz's property on McAllister Pond including the retaining wall and fill as they existed on that date.

Preliminary Findings of Fact

1. McAllister Pond (Pond,) is located in the Town of Lowell. The Pond has a surface area of approximately 25 acres and a maximum depth of approximately 7 feet. The Pond is a natural body of water with an outlet 'stream **at** the south end.

2. Gerald and Patricia Fitz own property adjacent to the Pond. In June of 1988 the Fitz's, in conjunction with the construction of a seasonal residence or camp on their **property constructed** a fieldstone wall (wall), approximately 30 feet long and 18 inches high, at or near the shoreline of the Pond. The area adjacent to **wall was** backfilled **with** native soil bulldozed from the upland portion of the property.
3. Construction of the wall and its **backfilling were** completed by July 11, 1988. The purpose of this construction was **to** define a **boundary between** the shoreline of the Pond and the developed property. The wall was not constructed in response to existing or anticipated erosion or **any** other similar problem.
4. Prior to construction, the Fitz's applied for, and received, a zoning permit from the Town of Lowell.'
5. The Department of Environmental Conservation (Department) visited the Fitz property on July 11, 1988 and again July 19, 1988. Following the second visit the Fitz's were advised **that** in the Department's judgment, the construction of the wall and its backfilling **constituted** an encroachment under 29 V.S.A. Chapter 11. The Department outlined three opinions for the Fitz's to pursue in order to resolve the situation. Those opinions were (Exhibit 1):
 - (a) **The owner** could voluntarily remove the wetland **fill..**
 - (b) The owner could file **an application** for, after-the-fact review of the project.
 - (c) The owner could do nothing and likely be pursued, **as an** enforcement action.
6. On **August** 17, 1988, the Fitz's filed an application for the wall and backfill material as constructed. Following a review **of this** application the Agency **issued its** decision denying the application on November 22, 1988.
7. The Pond has no public access and is not used for swimming on a regular or **consistent** basis do the presence of leeches. The **Pond** does provide: resting and feeding habitat for migratory waterfowl, **feeding habitat** for herons, potential nesting habitat for black ducks, mallards, common snipe, and green wing teal and habitat for muskrats.
8. The Pond is **used** for fishing. The Department of Fish and Wildlife annually stocks the pond with 300 to 500 brook trout. The Pond also has a naturally reproducing population of bullhead.

9. The Department estimates that the area disturbed by the Fitz's in conjunction with the construction of the wall and its backfilling may extend 10 to 12 feet **into the Pond** and encroach upon an area of approximately 300 square feet. **These estimates** are based on the Department's computation of the Pond's mean water level for purposes of 29 V.S.A. Chapter 11.
10. The Department's assessment that **the** wall and backfill would result in the loss of fishing and wildlife **habitat is** not based on any site specific analysis of the **actual or** potential impacts of **this particular** encroachment. Rather this assessment is based on a generic concern about the cumulative effect of allowing such encroachments in the literal zone of Vermont's lakes and ponds when no compensating public benefit is achieved.
11. At the Fitz **property** there is no abrupt **delineation** of the shoreline of the Pond. In its natural condition, the area disturbed to construct and backfill the wall was a sedge-**swale** type wetland with emergent aquatic vegetation at the **shoreline**. The emergent aquatic vegetation, which has been removed by the construction, serves to **stabilize** the shoreline preventing erosion.
12. The Fitz's camp, is the first camp to be constructed on the Pond. There **are no** other man-made structures on or near the shoreline and therefore **the** fieldstone wall is unique as a shoreline feature.
13. The **stream which** serves as the Pond's natural outlet has been dammed by beavers for several years. As a result of the beaverdam and accumulated **debris**, the water level of the Pond is raised above the natural outlet of the **stream** as shown by the presence of **submerged** tree stumps on exhibit 2. Some fluxuation in the actual water level of the Pond has occurred from time to time over the past several years.
14. The Water Resources Board has adopted rules under, 29 V.S.A. § 401 for determining the mean water level for purposes of establishing **jurisdiction under** 29 V.S.A. Chapter 11. The applicable rule for McAllister Pond is Rule 3 which provides that the mean **water** level be determined on the following basis:


the elevation of the natural control section, plus the mean depth of **flowage** over it as measured during the period June 1, to September 15.

15. The Department maintains' a cumulative record of water level readings for many lakes and ponds throughout the State of Vermont. This record is used to compute the mean water level of specific lakes **and ponds**, for jurisdictional purposes under 29 V.S.A. Chapter 11, in **accordance** with the applicable Board rule.
16. Prior to the Fitz **application**, the Department had not taken a water level reading on McAllister Pond. For purposes of establishing **the mean** water level in conjunction with its review of the Fitz application, the Department established a bench mark at the beaver dam and determined the mean water level on **the basis** of the depth of **flowage** over that dam on July 11, 1988. The Department estimates that the "beaver dam and other debris have raised the water level two feet above the natural level" (Exhibit, #1).
17. When the' construction of the fieldstone wall and the placement of fill occurred in June 1988 the actual water level of the Pond was below the base elevation of the wall, due perhaps to the unusually dry conditions during the early summer of **1988**.
18. On July 11, 1988, the water level of the Pond was approximately six inches above the base elevation of the wall.

Opportunity for Parties to File Exceptions or Requests

The above preliminary findings of fact are issued in accordance with 10 V.S.A. § 905 by the referee appointed by the Vermont Water Resources Board. All parties in interest to this proceeding, as identified above, **have the opportunity** to file **exceptions** or requests to these findings. In order to be **considered by** the Water Resources Board any such exceptions or **requests must** be received at this office on or before February 24, 1989. Any questions and **all** correspondence regarding this **matter should** be addressed to the Vermont Water Resources Board, State Office Building, Montpelier, Vermont 05602, telephone 8 28-2871.

Done this 3rd day of February, 1989 at Montpelier, Vermont;



William A. Bartlett
Hearing Referee