

State of Vermont
Water Resources Board

Re: DesLauriers Appeal
Docket No: 89-08

Authority:
3 V.S.A. § 2873 (c) (4)

Decision

This case concerns waste water and water supply permit PB-4-1461 issued by the Department of Environmental Conservation (DEC) to Roger Villemaire for the construction of a twenty unit condominium development on property adjacent to that of the DesLauriers in Colchester, Vermont. On June 20, 1989, Ann and Paul DesLauriers filed a petition with the DEC seeking to revoke the permit **on the** grounds that the permittee submitted false and misleading information in the permit application. The Commissioner of DEC denied the petition on September 26, 1989.

The DesLauriers claim that the proposed waste water system will violate the environmental rules (EPR) in that there is not a two year residence time between the permittee's (Villemaire) proposed sewage disposal system and the DesLauriers' spring, and that the permittee failed to identify the petitioners' spring as a "water **supply.**"

The Water Resources Board finds and concludes that the DesLauriers' spring is in use and is a "water supply" which is protected by the **EPRs**. Accordingly, on January 8, 1991 the Board voted unanimously to remand this case to the DEC for further proceedings in accordance with this written decision.

Findings of Fact

1. On June 20, 1989, Ann and Paul DesLauriers filed a petition with the Department of Environmental Conservation seeking to revoke waste water and water supply permit PB-4-1461 issued by DEC to Roger Villemaire. The petitioners claimed that the permittee failed to identify the petitioners' spring as a "water supply," and that there is not a 2 (two) year residence **time between the permittee's** proposed sewage disposal system and the **petitioners' "water supply,"** in violation of the **EPRs**.
 2. By decision dated September 26, 1989, the Commissioner concluded **that the** DesLauriers' spring was not a "water supply" and that the petitioners' failure to exercise their right to use their spring as a "water supply" for over 10 years was unreasonable.
 3. On January 8, 1991, the Board voted unanimously to remand this case to the DEC for further proceedings in accordance with this written decision.
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4. The construction plans for the petitioners' residence and septic system, which was built in 1978, contained a notation that the petitioners intended to use the water from the spring as a **drinking** water supply. The petitioners' spring had, in the past, **served** as a water supply for some cottages on petitioners' land. **Between the** time the DesLauriers' purchased the property (1974) and /the time they stopped using the public water supply (**1989**), they **purchased** supplies and equipment for renovation of the springhouse //and pumping system.

5. The DesLauriers' spring is in use, is potable, and could have **been** used as a source of water prior to 1989, and is therefore a "water supply" within the meaning of the **EPRs**.

6. The residence time between the Villemaire/Bayridge system and the DesLauriers' spring is less than the 720 days required by **Section 8-08(c)** of the **EPRs**.

Conclusions of Law

On June 20, 1989, Ann and Paul DesLauriers petitioned the **Commissioner** of the DEC to revoke a permit that had been issued to **Villemaire/Bayridge** Estates under Section **2.02F** of the **EPRs** claiming that the permittee (Villemaire) had submitted false and **misleading** information in the permit application. More **specifically**, petitioners assert that their spring was not **identified** as a "water supply" in the permit application, and **therefore** the permittee is in violation of the **EPRs** in that there is not a two year residence time between the secondary mound system and the Petitioners' spring.

The Commissioner concluded, by decision dated September 26, 1989, that the DesLauriers' spring was not a "water supply" since it did not meet part one of a two part test for determining whether a water source is a "water supply." The Commissioner found that the spring did not meet part one of the test in that it was not **"potable."** Additionally, the Commissioner found that the DesLauriers did not meet part two of the test in that they did **not** have an unequivocal intent to use the water source. Moreover, the Commissioner, in weighing the equities, applied the doctrine of **laches** and concluded **that** the petitioners failure to exercise their right to use their spring as a "water supply" for over ten years was unreasonable. Accordingly, the Commissioner concluded **that the** permittee cannot be held responsible for failing to identify the DesLauriers' spring as a "water supply," since the spring doesn't meet the two part test, and therefore the permit holder did not **submit** false and misleading information in the permit application.

Under Board Rule 30 "[f]actual conclusions of the Agency shall be upheld by the Board if evidence available to and presented to the Agency fairly and reasonably supports those conclusions." Also, **under** applicable rules of administrative law, the Agency's **conclusions** of law will be upheld if they are fairly and reasonably

supported by the findings of fact. Caledonian Record Publishing Co., Inc. v. Department of Employment and Training, 151 Vt. 256, 260 (1989).

There is no definition of what constitutes a **"water supply"** under the **EPRs**. Although, the Commissioner constructed a two part test through interpretation of the definition of **"potable water supply"** as defined in 10 V.S.A. § 1952 (2), the conclusion **that the DesLauriers' spring is not a "water supply"** is unsupported by the findings.

Under the two **part test** outlined in the Department's decision, **in order for a water source to be a "water supply"** the water **sources** must be potable, and secondly there must be either actual **use** (at the time the Department's permit was issued) or the intent **to use the water source as a "water supply."** In order to **demonstrate** the intent to use a water source as a **"water supply"** a person must have an unequivocal intent to use the water source, **and** that such intent be clearly communicated to an applicant or the **Department** during the permitting process unless there are **reasonable** circumstances that prevent such communication, and that **the user of the water supply start to utilize it within a reasonable period of time from the date that he or she indicated such intent.** Although the Board conceptually agrees with this **test.** This test is modified in accordance with the following **discussion.**

Currently, the DesLauriers' spring is potable and is their **"water supply."** The Commissioner's determination that the 1989 **water** quality analysis, performed by IEA which indicated an absence of coliform bacteria, was not reliable, because there was no evidence as to how they were obtained or to the chain of custody procedures, is contrary to the standard set out in 3 V.S.A. § 810 (1) which allows evidence not admissible under the Vermont Rules of Evidence to be admitted **"if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs."**

The spring is their sole source of water. In 1989 the **petitioners** sought an injunction against Colchester Fire District **No. 3** to prevent the Fire District from disconnecting their residence from the Fire District's water supply. They did not **succeed in** the injunction and the Fire District disconnected the residence from the Fire **District's** water supply since no residence served by the Fire District can also be connected to a private water supply. Although the DesLauriers were connected to another source of water prior to 1989, that does not mean that they are precluded from asserting their right to use the spring as a water source.

The DesLauriers' not only intended to use the spring as a **"water supply"** as early as 1978, but also pursued their goal by purchasing the equipment needed to connect the spring to their residence. The construction plans for the petitioners' residence

and septic system, which was built in 1978, contained a notation that the petitioners intended to use the water from the spring as a drinking water supply. Although the petitioners did not start using the spring as a source **of water** until May 24, 1989, the spring had in the past served as the water supply for some cottages located on the petitioners land. Between the time petitioners purchased their property on Malletts Bay (1974), and the time they stopped using the public water supply (1989), they purchased equipment and supplies for renovating the springhouse and the pumping system. Indeed, the petitioners could have used the spring as a source of water prior to 1989.

Accordingly, the spring located on the petitioners land is in use, is potable, is their sole source of water, and could have been used as a source of water prior to 1989, and therefore is a **"water supply"** within the meaning of the **EPRs**. Thus, the petitioners have asserted sufficient grounds for the revocation of the permit under EPR Section **2.02F**, in that the permit application failed to identify the petitioners' spring as a **"water supply."** However, whether the permit is rescinded is within the discretion of the Commissioner after consideration of this decision and any further proceedings.

There is no disagreement that the residence time between the **Bayridge** system and the petitioners' spring is less than the 720 days required by Section **8-08(c)** of the **EPRs**. The evidence on the record is insufficient to determine whether there is a hydrologic connection between the **DesLauriers** own mound system and the spring.

order

This matter, concerning the petition to revoke permit **PB-4-1461**, is remanded for further proceedings in accordance with this decision.

Dated this _ day of July, 1991.

The Water Resources Board



Elaine B. Little

Mark DesMeules

David Deen