

State of Vermont

Water Resources Board

Re: Appeal of Fred Fayette
Docket No. 91-08

Authority:
29 V.S.A. §406

Preliminary Order and Declaratory Ruling

Pursuant to Board Rules of Procedure 16 B. and 21, the following Order is entered in the above-entitled case. This Order is final as to the matters contained therein. There being no facts in dispute as to these preliminary matters, the Board makes the following Conclusions of Law.

I. Appellant raises the issue whether construction of the outfall pipe prior to the issuance of a discharge permit will serve the public trust and public good as that term is defined in Title 29 V.S.A. §402 and §405.

Title 29 V.S.A. §408 specifically provides the Board with authority to require any permit conditions necessary to protect the public good. The Board may enlarge upon those conditions set by the Department of Environmental Conservation (DEC). In re Joseph and Philippa Merchaud, WRB No. 88-07 (1988). Included within this authority is the ability to set pre-conditions to construction, including a requirement that construction not begin until a discharge permit has been issued.

Therefore, the Board now holds that it has the authority to hear testimony, make findings and determine conclusions of law on the issuance of an encroachment permit for an outfall pipe prior to the issuance of a discharge permit.

II. Appellant raises the additional issue of whether the Board has the authority or is required by law under Title 29 V.S.A. Chapter 11 to establish whether the effluent discharge released from the Burlington treatment facility should be released from the proposed new outfall pipe or the existing outfall.

There is no statutory authority under Title 29 V.S.A. Chapter 11 to weigh the proposed encroachment against an existing outfall. See 29 V.S.A. §405. Vermont Water Quality Standards, Section 1-04 A.2 (effective May 27, 1991), however, places a burden on a discharge permit applicant to show that

"there is no alternative method of, or location for, waste disposal that would have a lesser impact on water quality..." Appellant, therefore, has the opportunity to raise the issue when the City of Burlington seeks a discharge permit from DEC. 10 V.S.A. §1263(b). At that time, all relevant information necessary to a balancing of the two sites will be available.

Therefore, the Board now holds that it lacks authority under Title 29 V.S.A. Chapter 11 to determine whether Burlington's effluent discharge should be released from the proposed new outfall or the existing outfall.

III. The appellant also raises the issue whether the Board has the authority under Title 29 V.S.A. Chapter 11 or under the Chittenden County Superior Court Consent Order, Docket No. 722-89CnC, to determine whether the proposed outfall pipe can be utilized for discharge purposes prior to the issuance of a discharge permit.

Title 29 V.S.A. §408(b) specifically provides that "no person granted a permit under this chapter is relieved of his responsibility to comply with any other applicable federal, state and local laws, regulations and permits." Additionally, Title 10 V.S.A. §1263 specifically provides that anyone intending to discharge waste into the waters of the state must obtain a permit from the Agency of Natural Resources (ANR). The City is without authority to utilize the proposed outfall prior to issuance of a discharge permit.

The Board notes that the Consent Order does not require that the outfall be used prior to the issuance of a discharge permit.* Any such interpretation is impermissible given the

* The Board does not agree with ANR's argument that Section II A.3. of the Consent Order (Order) requires the City to utilize the new outfall as soon as it is constructed. Section II A.2. specifically requires that the parties go through the reclassification process for the 12.8 acre outer harbor area. Section VIII G. of the Order explicitly states that it does not preempt the need for an encroachment permit for construction of the outfall pipe. The notion that the Order either states or has the imprimatur of the Court that the discharge permit process can be ignored while the two other crucial processes must be adhered to is contrary to the tenor of the document. Moreover, if the city can continue to utilize the existing outfall in the event that the Board fails to reclassify the outer harbor area (Section II A. 3.), then it must certainly be able to continue to utilize the existing outfall until a discharge permit has properly issued under statutory requirements.

statutory mandates of Titles 29 and 10.

Finally, the Board wishes to reemphasize that under 29 V.S.A. §408(a), the Board has the authority to require any conditions on the permit that the Board considers necessary to "protect the public good."

Therefore, the Board now holds that it does not have authority under Title 29 V.S.A. Chapter 11 or under the Chittenden County Superior Court Consent Order to permit the proposed outfall pipe to be utilized for discharge purposes prior to the issuance of a discharge permit. The Board does have authority to place conditions on the encroachment permit which may affect the ability of the City to utilize the outfall pipe prior to the issuance of a discharge permit.

Dated at Burlington, Vermont this 20th day of December, 1991.

Vermont Water Resources Board
by its Chair

Dale A. Rocheleau
Dale A. Rocheleau, Chair

Concurring: Elaine Little
Stephen Reynes