

State of Vermont

Water Resources Board

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

Authority:
29 V.S.A. §406

ORDER

Findings of Facts

1. On June 26, 1991, the Department of Environmental Conservation ("DEC") issued a lakes and ponds permit, pursuant to 29 V.S.A. Chapter 11, to the City of Burlington for the construction of a one-half mile long, ten foot diameter wastewater outfall pipe in the public waters of Lake Champlain.

2. The construction of this pipe is required under a consent order entered into between the City and the Agency of Natural Resources ("ANR") in Chittenden County Superior Court on June 12, 1989.

3. The Water Resources Board ("Board") previously adopted a rule on December 22, 1989, reclassifying to Class C that portion (12.8 acres) of Lake Champlain where the proposed outfall pipe is to empty.

4. On July 5, 1991, an appeal of the permit was filed with the Board pursuant to 29 V.S.A. §406.

5. A prehearing conference, pursuant to proper public notice, was held on August 12, 1991 and a prehearing order was issued on October 15, 1991.

6. Pursuant to preliminary motions, on December 20, 1991, the Board issued a Preliminary Order and Declaratory Ruling in which it held: (1) that the Board 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; (2) that the Board lacks authority under 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; and (3) that the Board does not have authority under 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.

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7. Although the Board would normally hold a de novo hearing pursuant to a Title 29 V.S.A. §406 appeal, the parties agreed that a de novo hearing was not an efficient use of either the Board's or the parties' time and resources.

8. During the course of numerous phone conversations and letters, the parties agreed that the only two remaining issues which they wished to have the Board examine were: (1) Appellant Lake Champlain Transportation Company's concerns regarding potential impediments to navigation in Burlington Bay because of the outfall pipe construction and placement; and (2) Appellant Fred Fayette's concerns whether construction of the proposed outfall pipe could begin prior to the issuance of a discharge permit by ANR.

9. Prior to a scheduled February 12, 1992 hearing, the DEC, the City of Burlington and Appellant Lake Champlain Transportation Company submitted a signed Stipulation to the Board setting forth an agreement disposing of all navigational concerns raised by the Appellant.

10. On January 21, 1992, the DEC forwarded a letter to the Board stating that it did not object to the inclusion of a condition in the original permit requiring that construction of the outfall pipe not commence prior to the issuance of a discharge permit by the Secretary of the ANR.

11. Also on January 21, 1992, the City of Burlington forwarded a letter to the Board stating it would leave to the Board's discretion whether a condition should be amended to the existing encroachment permit requiring construction of the outfall pipe to begin subsequent to the issuance of a discharge permit. The City reasoned that the ANR no longer had any objection to construction of the outfall pipe beginning subsequent to the issuance of a discharge permit. The City also stated that it now appears that a draft discharge permit will issue prior to the earliest date on which the City could begin construction and placement of the outfall pipe.

12. Submission of the Stipulation between the City, ANR and Lake Champlain Transportation Company resolved the final issue existing between Appellant Lake Champlain Transportation Company and the ANR and the City of Burlington.

13. The Board adopts the 12 Findings of the permit

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issued to the City of Burlington by ANR on June 26, 1991, and incorporates them here, as if set forth in full.

14. The Board adopts the 21 Conditions of the permit issued to the City of Burlington by ANR on June 26, 1991, and incorporates them here, as if set forth in full.

Conclusions of Law

1. The Board has jurisdiction to hear this appeal pursuant to 29 V.S.A. §406.

2. Appellants properly filed their appeal in accordance with the appropriate statutory and regulatory requirements.

3. The ANR, the City of Burlington, Lake Champlain Transportation Company and Fred Fayette are proper parties in interest pursuant to Rule 22 of the Board's Rules of Procedure.

4. The parties waived their right to a full de novo hearing.

5. Pursuant to 29 V.S.A. §§407 and 408, the Board can modify the permitting action of the ANR and can include any conditions it considers necessary in the permit to protect the public good.

6. The Stipulation entered into between the ANR, the City of Burlington and Lake Champlain Transportation Company is a binding agreement freely entered into by the parties. Paragraph 6 of said Stipulation is hereby incorporated into and appended to the Conditions of the permit issued to the City of Burlington by the ANR on June 26, 1991. Said Paragraph 6 shall be Paragraph 22 of the Conditions of the permit.

7. The ANR and the City of Burlington waived their right to offer testimony and present evidence regarding whether an additional condition should be placed in the permit requiring issuance of a discharge permit prior to the beginning of construction and placement of the proposed outfall pipe.

8. The proposed encroachment will not adversely affect

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the public good, provided that construction of the encroachment does not precede issuance of a discharge permit by the ANR.

DISCUSSION

Although the Board recognizes the City of Burlington's need to proceed with all due speed and its need to comply with the consent order entered into between the City and the ANR, the Board must also recognize that blind issuance of an encroachment permit without the necessary discharge permit fails to account for the very real possibility that the discharge permit may not issue.

The project proposed in this action is not without its impacts. Excavation of the trench will be extensive (DEC Finding of Fact #6). There will be a major disturbance of lake bottom materials during construction (DEC Finding of Fact #7). The shoreline will serve as a construction base site and will require some restoration (DEC Finding of Fact #8). Finally, to some extent, navigation will be impeded (DEC Finding of Fact #9).

Based upon these obvious impacts, as well as others that may not be so apparent, the Board believes a project of such dimensions and effect should have a precondition for construction that other necessary permits for fulfilling its purpose are obtained.

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 DEC. In re Joseph and Philippa Merchaud, WRB No. 88-07 (1988).

ORDER

The Board now holds that the permit issued to the City of Burlington on June 26, 1991, pursuant to 29 V.S.A. §405, is hereby amended pursuant to 29 V.S.A. §408 as follows:

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Those conditions numbered 1 through and including 21 shall include the additional numbered Paragraphs:

22. Construction and placement of the outfall pipe shall be done in a manner that will reasonably allow boat traffic to enter and leave Burlington Bay by the south end of the harbor, pursuant to the direction of the City of Burlington's Harbormaster and the Coast Guard. Advance notice shall be provided to Lake Champlain Transportation Company when navigation through the south end of the harbor will be obstructed.

23. Construction of the outfall pipe shall not commence prior to the issuance of a discharge permit by the Secretary of the Agency of Natural Resources pursuant to 10 V.S.A. §1263.

All other conditions contained within the original permit shall remain in force and effect.

Dated at MONTPELIER, Vermont this 16TH day of MARCH, 1992.

Vermont Water Resources Board
by its Chair



Dale A. Rocheleau, Chair

Concurring: Elaine Little
Jonathan Lash
Stephen Reynes