

State of Vermont
WATER RESOURCES BOARD

In re: Dean Leary (Appeal of DEC Permit No. 93-29, Lake Champlain)
Point Bay Marina, Charlotte, Vermont
Docket No. MLP-94-08

PREHEARING CONFERENCE REPORT AND ORDER

I . BACKGROUND

On June 9, 1994, the Water Resources Board (Board) received a notice of appeal filed by Dean Leary of Charlotte, Vermont, seeking review of the June 3, 1994, decision of the Department of Environmental Conservation (DEC), Agency of Natural Resources (ANR), granting Management of Lakes and Ponds Permit No. 93-29 to Point Bay Marina, Inc., (permittee) for the addition of seven finger docks, the relocation of two finger docks, and authorization for previous relocation of a service dock and swim docks in Lake Champlain, Charlotte, Vermont. This appeal was filed pursuant to 29 V.S.A. § 406(a).

On July 1, 1994, this appeal was deemed complete and docketed. On that same date, a Notice of Appeal and Prehearing Conference was sent to persons required to received notice and on July 6, 1994, it was published in the Burlington Free Press. Rules 18(C) and 20 of the Board's Rules of Procedure.

On July 20, 1994, at 1:30 p.m., a prehearing conference was convened at the Board's Conference Room, 58 East State Street, Montpelier, Vermont, by the Board's delegate, Kristina L. Bielenberg, Esq., pursuant to Rule 24(A) of the Board's Rules of Procedure. The following persons entered timely appearances and participated.

Dean W. Leary, appellant, pro se
Donald R. Powers, Esq., for Point Bay Marina, permittee
Peter Martin, Manager, Point Bay Marina
Peter DeGraff, Civil Engineer for Point Bay Marina
Gloria Shaw, owner of shoreland property in Charlotte, VT
Lorraine Lutz, owner of shoreland property in Charlotte, VT
Anne Whiteley, Esq., for DEC/ANR
Steven Hanna, staff, Water Quality Division, DEC/ANR

Entering a timely appearance and requesting party status, but not appearing at the prehearing conference was Glenn A. Mitchell, owner of property on Lake Champlain, Thompson's Point, Charlotte.

On September 2, 1994, a draft Prehearing Conference Report and Order was circulated to the above persons for comment. On September 23, 1994, the Board received comments from the permittee and DEC/ANR. The permittee supplemented its filing on September 26, 1994. A final Prehearing Conference Report and Order is now ready for issuance.

II. ISSUES

Based on the appellant's notice of appeal and his statements at the prehearing conference, the issues in this matter appear to be:

Whether the proposed encroachments will adversely affect the public good, taking into consideration the effect of the proposed encroachments as well as the potential cumulative effect of existing encroachments on water quality, fish and wildlife habitat, aquatic and shoreline vegetation, navigation and other recreational and public uses, including fishing and swimming, consistency with the natural surroundings and consistency with municipal shoreland zoning ordinance or any applicable state plans. 29 V.S.A. § 405(b).

Whether conditions imposed in previous encroachment permits issued to Point Bay Marina, Ltd., assuring public access at the Point Bay Marina should be incorporated in any permit issued in the present proceeding, consistent with the Board's obligation to protect state constitutional and public trust values in public waters.

III. PRELIMINARY ISSUES

At the prehearing conference, the permittee raised the possibility that it would challenge the standing of the appellant and the intervention requests of other persons seeking party status. The permittee also stated that it would file a motion requesting a preliminary ruling as to the applicability of the public trust doctrine in this administrative proceeding.

Any party intending to raise preliminary jurisdictional and procedural challenges shall do so in accordance with the terms set forth in the Order below.

IV. INTERVENTION

At the prehearing conference, Gloria Shaw and Lorraine Lutz represented that they are owners of shoreland property on Thompson's Point, Charlotte, and that their use and enjoyment of Lake Champlain is adversely affected by the wakes, noise, and pollution created by boat traffic in the vicinity of their properties. Glenn A. Mitchell raised similar concerns in his notice of appearance, filed July 15, 1994.

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The Board's delegate explained that there were several options available to them to make their concerns known to the Board: (1) they could seek party status in this appeal pursuant to Rule 22 of the Board's Rules of Procedure, governing intervention; (2) they could discuss with the appellant whether he would call them as witnesses; (3) or they could find ten Vermont voters who would be willing to petition the Board to adopt rules regulating surface use activities on public waters off Thompson's Point, pursuant to 10 V.S.A. § 1424.

Persons wishing to pursue intervention, including Glenn A. Mitchell, should file party status requests addressing the standards for intervention found in Rule 22(A)(6) or (7), and submit this to the Board in accordance with the terms set forth in the Order below.

V. WITNESSES AND EXHIBITS

1. At the prehearing conference, the appellant identified the following possible witnesses: residents of the Flat Rock area of Thompson's Point and Town Farm Bay to testify to use conflicts; fishermen and boaters using Town Farm Bay to testify to use conflicts; State Police and U.S. Coast Guard officials to testify to safety and navigational conflicts; and others, including himself, to testify to effects on water quality, fish and wildlife habitat, and aquatic and shoreline vegetation.
2. At the prehearing conference, the permittee did not identify specific witnesses but reserved the right to call expert witnesses; to rebut testimony offered by the appellant.

In its comments respecting the draft prehearing conference report and order, the permittee reserved the right to call Steven Hanna, Environmental Engineer, Lakes and Ponds Unit, DEC, ANR; Jon Anderson, District Fisheries Biologist, Department of Fish and Wildlife (DFW), ANR; Thomas Myers, Wildlife Biologist, DFW, ANR; an unnamed District Engineer, U.S. Army Corps of Engineers; Commander, Vermont State Police Marine Patrol; Commander, Lake Champlain Coast Guard Station; Peter Degraff, P.E., and Lancelot Phelps, P.E., Phelps Engineering, Inc., Middlebury, Vermont; Ernest Christianson, Regional Engineer, DEC, ANR; John Gaythwaite, P.E., Maritime Engineering Consultants, Inc.; and users of Point Bay, including but not limited to William Perry, James Ross, Dean George, Thurlow Mayhood, and Robert Eastman; and such other additional witnesses as are necessary to rebut the appellant's evidence.

3. At the prehearing conference, the DEC reserved the right to
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call any or all of the following ANR employees as witnesses: Steve Hanna, Environmental Engineer, Lakes and Ponds Unit, DEC, ANR, and Virginia Garrison, Chief, Lakes and Ponds Unit, DEC, ANR. In its comments respecting the draft prehearing conference report and order, the ANR also identified as potential witnesses Jon Anderson, District Fisheries Biologist, DFW, ANR; Tom Myers, District Wildlife Biologist, DFW, ANR; and Eric Smeltzer, Limnologist, Lakes and Ponds Unit, DEC, ANR.

4. At the prehearing conference, the appellant conceded that the Town of Charlotte has no shoreland zoning ordinance. However, the appellant asked the Board to take into consideration the existence of a U.S. Coast Guard mooring designation zone in the area of the proposed encroachments in evaluating effects on recreational and public uses.

In order for the Board to consider ordinances, plans, and any other documents from other state and federal agencies as part of the record in this proceeding, they must be offered as exhibits in accordance with the terms of the Order below and any Supplemental Prehearing Order.

5. Parties shall file final lists of witnesses and exhibits, resumes of expert witnesses, prefiled testimony and exhibits, and prehearing legal memoranda and briefs, in accordance with the terms of the Order below and any Supplemental Prehearing Order.

VI. STANDARD OF REVIEW

Any hearing on the merits in this appeal shall be conducted as a de novo proceeding, pursuant to 29 V.S.A. § 406(b). The Board shall issue an order affirming, modifying or reversing the action of the DEC, pursuant to 29 V.S.A. § 406(c).

VII. STIPULATIONS

A great many facts in this proceeding do not appear to be in dispute, especially those related to the chronology of events leading to the present application. Therefore, once party status issues have been resolved in this proceeding, the parties are encouraged to prepare a statement of stipulated facts to be filed with the Board in accordance with the terms of set forth in the Order below and any Supplemental Prehearing Order.

VIII. DISCLOSURES

At the prehearing conference, the current Board Members were identified by name (Chair William Boyd Davies, Mark DesMeules,

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Stephen Dycus, Ruth Einstein, and Jane Potvin) and their present and past professional affiliations.

In its written comments respecting the draft prehearing conference report and order, the permittee asked for further disclosures concerning member Dycus' previous advocacy concerning the public trust doctrine.

Any party seeking additional disclosures shall do so in accordance with the terms set forth in the Order below.

IX. SUPPLEMENTAL PREHEARING ORDER

A Supplemental Prehearing Order setting forth a schedule of filing deadlines for final witness and exhibit lists, resumes, prefiled testimony and exhibits, and legal memoranda and briefs shall be prepared in consultation with the parties and issued at such time as this matter is ready for hearing.

X. ORDER

1. The following are parties as of right in this proceeding:
 - a. The appellant is a party to this proceeding until such time, if any, as the Board determines that he lacks standing:
 - b. Point Bay Marina, Ltd., permittee; and
 - c. The DEC/ANR is a party of right pursuant to 29 V.S.A. § 406(c).
 2. September 23, 1994, was the deadline for filing requests for additional disclosures from Board members. The permittee was the only party timely filing such a request and its request was limited to member Dycus.
 3. On or before **4:30** p.m., October 7, 1994, any person seeking to challenge the standing of the appellant or move for dismissal of this appeal on other grounds shall file with the Board a motion, supported by legal memorandum.
 4. On or before **4:30** p.m., October 21, 1994, any person seeking intervention in this appeal shall file a petition with the Board pursuant to Rule 22 of the Board's Rules of Procedure.
 5. On or before **4:30** p.m., November 4, 1994, any person wishing to respond to any motion to dismiss filed as provided in Item 3 above, may file a written response with supporting legal memorandum.
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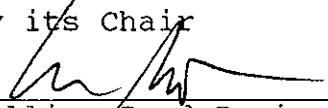
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6. On or before **4:30** p.m., November 4, 1994, any person objecting to the grant of party status to any person who filed an intervention petition shall file the objection in writing, supported by legal memorandum.
7. On or before **4:30** p.m., November 4, 1994, any person **objecting** to the participation of a Board member in this proceeding, shall file a written objection with the Board. This filing should state the reason(s) for the objection and any facts known to that party which might be the Board member's **recusal**. Failure to file a timely objection may be deemed a waiver of objection.
8. On or before **4:30** p.m., November 18, 1994, any person seeking a preliminary ruling on the Board's authority to consider the public trust doctrine in this proceeding shall file with the Board a motion, supported by legal memorandum.
9. On or before **4:30** p.m., December 2, 1994, any person wishing to respond to any motion filed with respect to the applicability of the public trust doctrine in this proceeding shall file a written response with supporting legal memorandum.
10. Any motions, memoranda, petitions or other filings with the Board shall be filed as an original and five (5) copies. One copy should also be mailed to each of the persons listed on the attached Certificate of Service until otherwise notified by the Board. A certificate of service indicating delivery to all listed persons by hand or by first class mail shall also be filed with the Board and listed persons. The Board does not accept filings by FAX.
11. Pursuant to Rule 24(B) of the Board's Rules of Procedure, this order shall be binding on all persons who have received notice of the prehearing conference, unless there is a timely objection to the Order, or a showing of cause for, or fairness requires, waiver of a requirement of this Order.

Dated at Montpelier, Vermont, this 30th day of September, 1994.

Water Resources Board
by its Chair



William Boyd Davies