

**State of Vermont  
WATER RESOURCES BOARD**

**In re: Aquatic Nuisance Control Permit #C93-01-Morey  
Lake Morey, Town of Fairlee, Vermont  
Docket No. WQ-93-04**

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

This decision, dated April 12, 1994, pertains to an appeal from a permit issued to the Town of Fairlee by the Secretary of the Agency of Natural Resources authorizing the application of the pesticide Garlon 3A to the waters of Lake Morey for the purpose of controlling Eurasian watermilfoil. As explained below, the Water Resources Board has determined that the ANR's decision granting the permit should be reversed, and the permit declared void, for failure of the permittee to demonstrate that it has met all applicable standards of 10 V.S.A. § 1263a(e).

**I. PROCEDURAL HISTORY**

On June 4, 1993, the Water Resources Board ("Board") received an appeal filed jointly by David Adams, Kern McCarty and Amy McCarty ("the appellants"). The appellants sought reversal of the decision of the Agency of Natural Resources ("ANR") granting Aquatic Nuisance Control Permit #C93-01-Morey ("the permit"). The ANR had issued the permit to the Town of Fairlee ("the Town") on May 11, 1993. The permit authorized the application of the pesticide Garlon 3A to the waters of Lake Morey, located in the Town of Fairlee, Vermont, for the purpose of controlling Eurasian watermilfoil, as part of a three-year Integrated Management Program. This permit was granted under authority of 10 V.S.A. § 1263a.

The appellants filed their appeal pursuant to 10 V.S.A. § 1269. This statute authorizes the Board to hear de novo matters determined by the Secretary of ANR. Pursuant to this statute, the Board may issue an order affirming, reversing or modifying the act or decision of the Secretary.

On June 4, 1993, the Board issued a Notice of Appeal and Prehearing Conference which was sent to persons required to receive notice and published in the Valley News on June 5, 1993, pursuant to Rule 18 of the Board's Rules of Procedure. A prehearing conference was convened by the Board's delegate on June 18, 1993, at the Midstate Regional Library in Berlin, Vermont. A Prehearing Conference Report and Order was issued by the Board's Chair on July 1, 1993.

Persons entering timely appearances in this matter and granted party status were: the appellants, represented by Paul S. Gillies, Esq., of the firm Tarrant and Marks; the Town, represented by David

A. Otterman, Esq., of the firm Otterman and Allen; the ANR, represented by Anne Whiteley, Esq.; and the Lake Morey Protective Association ("LMPA"), represented by Kenneth D. Allen. The Board granted permissive intervention, pursuant to Rule 22(B) of the Board's Rules of Procedure, to the following persons seeking reversal of the permit: Anthony H. and Melissa P. Gahagan, Noelle Walker, Peter and Barbara Wood, Peter Berger, and Tony and Theresa Thurston. These persons were represented by Mr. Gillies, Esq. The Board also granted Rule 22(B) permissive intervention to the following persons supporting the issuance of the permit: William and Marjorie Scott, Donald K. Weaver, James and Margaret Southworth, Richard A. Allen, Philip H. Zalinger, Jr., and Ann Kennard Zalinger. See Memorandum of Decision on Party Status (Aug. 25, 1993).

On August 25, 1993, the Board Chair issued a Supplemental Prehearing Order. The parties filed prefiled testimony and exhibits in accordance with this order.

On September 10, 1993, the Board issued a Memorandum of Decision on Preliminary Issues and a Notice of Public Hearing. The Board held a de novo hearing in this matter on September 28 and 29, 1993, and again on October 26, 1993. It conducted a site visit on September 28, 1993.

After receipt of evidence and closing arguments, the Board recessed the matter pending the submission of proposed findings of fact and conclusions of law, and review of the record and decision. On November 1, 1993, the Town filed a motion to strike testimony or, in the alternative, to accept additional testimony. On November 8, 1993, the appellants filed a response in opposition to this motion. On November 19, 1993, the Board voted to defer action on the permittee's request until receipt of transcripts and review of the record.

The Board declines to grant the Town's motion to strike or, in the alternative, to accept additional testimony. To rebut the testimony of the appellants' witness, Noell Gahagan Walker, the Board permitted the Town to recall its expert witness, Ann Bove, an aquatic biologist and ANR's lead staff for the Eurasian Watermilfoil Control Program who has personal knowledge of the use of suction harvesting to control milfoil at Hall's Lake and at other lakes in Vermont. Tr. at 184-201 (Oct. 26, 1993). The Board has considered and declines the Town's offer to call another ANR staff biologist, Rich Kirn, to testify on the impacts of suction harvesting on fish and wildlife. The Board believes there is ample evidence in the record on the impacts of suction harvesting on non-target species and that Mr. Kirn's testimony would be redundant.

On November 22, 1993, the appellants and the Town each filed proposed findings of fact, conclusions of law, and orders. On November 29, the appellants and the Town also filed briefs on specific legal issues raised at hearing. On December 2, 1993, LMPA filed a response to the appellants' proposed conclusions of law. On December 3, 1993, the Town filed a response to the appellants' legal brief of November 29, and on December 6, 1993, the appellants filed a response to the Town's brief.

The Board deliberated in this matter on December 15, 1993, and January 5, February 15, and March 21, 24, and 29, and April 7, 1994. On April 7, 1994, following a review of the evidence and the parties' filings, the Board declared the record complete and adjourned the hearing.

This matter is now ready for decision. The following Findings of Fact and Conclusions of Law are based exclusively on the record developed at the hearing. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

## II. ISSUES

This appeal requires the Board to decide whether a permit should be issued for the use of a pesticide in waters of the state for the control of nuisance aquatic vegetation, pursuant to 10 V.S.A. § 1263a(e). The Town requested permission to apply the herbicide Garlon 3A to the waters of Lake Morey for the control of Eurasian watermilfoil and this permission was granted by the ANR with the issuance of Aquatic Nuisance Control Permit #C93-01-Morey. In order for the Board to affirm the Secretary's decision to issue this permit, the permittee must demonstrate by a preponderance of the evidence and the Board must determine de novo that a permit should be granted consistent with the statutory standards of 10 V.S.A. § 1263a(e), identified by the appellant in its notice of appeal. Because the appellant does not challenge the Secretary's findings with respect to one statutory standard (10 V.S.A. § 1263a(e)(4)) concerning the existence of a long-range management plan, the Board is asked to make affirmative findings with respect to the following:

(1) Whether there is no reasonable nonchemical alternative available;

(2) Whether there is acceptable risk to the nontarget environment;

studies conducted in other areas of North America have shown that when watermilfoil growth becomes extremely dense, it can affect the aquatic ecosystem.

5. Watermilfoil has become established at nuisance levels in various waterbodies covering a wide range of trophic conditions and it does not necessarily decline in response to reduction of nutrients in an infested waterbody.
6. Watermilfoil was first discovered in Lake Morey in August of 1991 by staff of the Department of Environmental Conservation ("DEC"), ANR.

































































