

State of Vermont
WATER RESOURCES BOARD

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

ORDER

CLF's Motion to Alter Decision

On April 21, 1995, the Water Resources Board received a motion from the Conservation Law Foundation (CLF) seeking clarification of the Board's Memorandum of Decision, dated April 13, 1995, regarding application of the Public Trust Doctrine in the above-captioned appeal. CLF filed its motion pursuant to Rule 29 of the Board's Rules of Procedure, and it may be inferred from the text of its filing that CLF has asked the Board to alter its decision pursuant to Rule 29(C) of the Board's Rules of Procedure.

On April 25, 1995, the Board informed the parties of the filing of CLF's motion and provided them with an opportunity to file written responses. On May 5, 1995, appellant Leary and the Agency of Natural Resources (ANR) each filed written responses. The appellant filed a response in support of CLF's motion and the ANR filed a response in opposition. The permittee filed no response.

On May 9, 1995, the Board deliberated with respect to CLF's motion. After considering the parties' filings with respect to this motion, as well as the Prehearing Conference Report and Order (Sept. 30, 1994) and the permittee's Motion for Pre-hearing Determination (Nov. 15, 1994), the Board determined that CLF's motion should be denied.

CLF has asked the Board to amend its decision to clarify that the Department of Environmental Conservation (DEC), Agency of Natural Resources, in addition to the Board, has a fiduciary obligation under the public trust doctrine to determine that encroachments in public waters will not have a detrimental effect on public trust uses. It seeks a ruling that the DEC, in issuing permits under 29 V.S.A. ch. 11, must find that an encroachment will not interfere with or adversely affect public uses and values protected through application of the doctrine.

A review of the filings in this proceeding reveals that both the appellant and the permittee framed their preliminary questions with reference to the Board's authority to consider the public trust doctrine in deciding whether an encroachment permit should issue and, if so, under what terms. See appellant's second issue, Prehearing Conference Report and Order at 2 (Sept. 30, 1994); permittee's Motion for Prehearing Determination (Nov. 15, 1994). Moreover, CLF in its various responsive filings

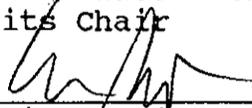
Order: **CLF's Motion to Alter Decision**
In re: **Dean Leary (Appeal of DEC Permit No. 93-29**
Point Bay Marina, Charlotte, Vermont)
Docket No. MLP-94-08
page 2 of 2

directed its argument to the Board's fiduciary duty to apply the public trust doctrine.

To expand the scope of the preliminary ruling of April 13, 1995, to address an issue not previously raised by the parties would be unjust and vitiate the purpose of a motion to alter. Therefore, the Board denies **CLF's** motion.

Dated at Montpelier, Vermont, this 10th day of May, 1995

Vermont Water Resources Board
by its Chair



William Boyd Davies

Concurring:

William Boyd Davies
Stephen Dycus
Ruth Einstein
Gail Osherenko
Jane Potvin