

State of Vermont
WATER RESOURCES BOARD

In Re: Kevin Rose and the Champlain Kayak Club
(Appeal of DEC Permit No.: 95-23, Blodgett
Corporation, Lake Champlain, Burlington)
Docket No. MLP-96-01

PREHEARING CONFERENCE REPORT AND ORDER

I. BACKGROUND

On February 8, 1996, Kevin Rose filed an appeal with the Water Resources Board ("Board") on behalf of himself and the Champlain Kayak Club from a January 29, 1996 decision of the Department of Environmental Conservation, Agency of Natural Resources ("DEC") granting Management of Lakes and Ponds Permit No. 95-23 ("Permit"). The Permit authorizes the Blodgett Corporation ("**Blodgett**") to place a 330 foot long post-supported dock in the public waters of Lake Champlain, Burlington from May 15 to September 30 of each year during the life of the Permit ("**Project**"). Mr. Rose appealed the Permit pursuant to 29 V.S.A. § 406 on behalf of himself, in his individual capacity, and as a representative of the Champlain Kayak Club ("**Appeal**").

On February 8, 1996, the Appeal was filed with the Board. On February 12, 1996, the Appeal was deemed complete, and a Notice of Appeal and Prehearing Conference ("Notice") was sent to persons required to receive written notice of the Appeal. On February 16, 1996, the Notice was published in the Burlington Free Press.

On March 13, 1996, George E. H. Gay, Esq., the Board's delegate, convened a prehearing conference ("Conference") at 58 East State Street, Montpelier. The following persons/entities (collectively "Conference Participants") entered timely appearances and participated: Kevin Rose, pro se; Blodgett, by Christopher Gannon, Esq.; the Champlain Kayak Club, by Kevin Rose; the Agency of Natural Resources ("**ANR**"), by John Kassel, Esq.; and the Conservation Law Foundation ("**CLF**"), by Frank Wymond. **Kristina Bielenberg**, Esq., an Associate General Counsel to the Board, was also present.

On March 19, 1996, a draft Prehearing Conference Report and Order was circulated to the Conference Participants for comment. On March 25, 1996, the Board received comments from Blodgett and CLF. A final Prehearing Conference Report and Order is now ready for issuance.

II. ISSUES

The Conference Participants agreed that the issues in the Appeal are:

1. Does the **Project** adversely affect the **public** aood as that term is defined in 29 **V.S.A.** Chapter 11?
2. Is the Project consistent with the Public Trust Doctrine and the Vermont Constitution?'

III. PRELIMINARY ISSUES

During the Conference, CLF filed a motion to intervene or participate as amicus curiae ("**CLF** Motion"). CLF asserts that it may intervene as a matter of right pursuant to Rule 22 (A)(7) of the Board's Rules of Procedure ("**Rules**") and by permission pursuant to Rule 22 (B) of the Rules. In the alternative, CLF requests permission to participate as amicus curiae. Mr. Rose and the Champlain Kayak Club did not oppose the CLF Motion. Both Blodgett and ANR reserved the right to do so.

The Conference Participants agreed that the Notice of Appeal may serve as a petition for party status for both Mr. Rose and the Champlain Kayak Club. The Conference Participants also agreed that Mr. Rose and the Champlain Kayak Club may supplement their petition for party status.

At the Conference, neither CLF nor ANR opposed the standing of Mr. Rose and/or the Champlain Kayak Club to file the Appeal and/or the participation of Mr. Rose and/or the Champlain Kayak Club as parties of right in the Appeal. Blodgett reserved the right to do so.

Mr. Rose agreed to submit to the Board evidence of his authority to serve as representative for the Champlain Kayak Club in filing and prosecuting the Appeal on behalf of the Club.

The Conference Participants did **not object** to **ANR's** February 20, 1996 request to amend the service list.

¹ ***Blodgett agreed to this statement of the issues even though it is somewhat different than that which Blodgett set forth in the tentative issues list it filed during the Conference.***

The Conference Participants agreed that the Appeal is not suitable for an administrative hearing officer proceeding.

The Conference Participants agreed to submit all prefiled testimony in a question and answer format with each witness swearing and/or affirming to the truth and veracity of his/her testimony subject to the penalties of perjury.

The Conference Participants indicated some interest in attempting to settle the Appeal. Mr. Gay advised them that the Board, as a general rule, encourages alternative means of dispute resolution.

Copies of the Board's April 13, 1995 Memorandum of Decision regarding the Public Trust Doctrine in In Re: Dean Leary, Docket No.: MLP-94-08 were made available to the Conference Participants.

The Conference Participants did not address any other preliminary issues.

IV. WITNESSES AND EXHIBITS

During the Conference, Blodgett filed a tentative list of issues, ~~witnesses~~ and exhibits. Blodgett identified James Robear, Facilities Manager, Blodgett, as a potential witness. Further, Blodgett identified the following potential exhibits:

1. Blodgett's Application for Encroachment Permit submitted to State of Vermont Department of Environmental Conservation, dated June 29, 1995, and all exhibits and other materials submitted to said Department in connection with said Application.
2. **Blodgett's** General Permit Application submitted to the Department of the Army, Corps of Engineers, dated June 29, 1995.
3. Letter from David H. Killoy, Chief, Permits Branch, Regulatory Division, Department of the Army, Corps of Engineers, to Christopher R. Gannon, General Counsel of Blodgett, dated September 14, 1995.
4. Department of the Army General Permit (GP) for Piers, Floats, Tie-off Piles, and Mooring Buoys in Navigable

- Waters of the United States, effective date January 26, 1993.
5. Blodgett's drawing no. MC423, "Boat Dock", with annotations by Department of the Army, Corps of Engineers.
 6. Blodgett's Request for Appearance, City of Burlington, Department of Planning & Zoning, Zoning Board of Adjustment, undated.
 7. Blodgett's City of Burlington Zoning Permit Application, dated November 20, 1995.
 - a. Memorandum from Ken Lerner, Assistant Director of Zoning & Planning, City of Burlington, to Zoning Board of Adjustment, dated August 10, 1995.
 9. Memorandum from Mark T. Eldridge, Director of Zoning & Planning, City of Burlington, to Planning Commission dated January 5, 1996.
 10. Burlington Zoning Board of Adjustment Minutes/Findings of Fact - August 21, 1995.
 11. Memorandum from Glynis A. Jordan, Planning and Zoning Assistant, City of Burlington Department of Planning & Zoning, to Cloverleaf Properties, dated January 12, 1996, with enclosures.
 12. Letter from Christopher R. Gannon, General Counsel of Blodgett, to Kevin Rose, dated February 23, 1996.
 13. Miscellaneous photographs of dock site.
 14. Blodgett's drawing no. MC423, "Boat Dock", dated **8/17/95**.
 15. Plan showing Location of Lakeside Boat Club Pier Adjoining Lands of Blodgett Companies, dated August, 1959.
 16. Deed from Lakeside Boat Club to The G.S. Blodgett Co., Inc. and The Blodgett Supply Co., Inc., dated August 14, 1959, conveying the interest of the Lakeside Boat Club in the pier or breakwater shown upon the Plan identified in no. 15 above.

17. The Blodgett Oven Company Purchase Order No. 8970 dated May 19, 1994, issued to Creative Carpentry, Inc., Ferrisburg, Vermont.
18. Creative Carpentry, Inc. Proposal for dock system dated April 28, 1994.

ANR identified Steven Hanna as a potential witness. ANR also tentatively volunteered to provide as yet unidentified expert and/or technical testimony and/or exhibits to **assist** the Board and/or parties **during the Appeal**.

CLF identified an unnamed expert on the Public Trust Doctrine as a potential witness. CLF did not identify any exhibits that it may introduce in the Appeal.

Mr. Rose and the Champlain Kayak Club identified as yet unnamed members of the Champlain Kayak Club and other lake "**paddlers**" as potential witnesses. Neither Mr. Rose **nor the Champlain Kayak Club** identified any exhibits that they may introduce in the Appeal.

The Conference Participants all expressed a desire to reserve the right to modify their respective witness/exhibit lists.

The parties shall file final lists of witnesses and exhibits, resumes of expert witnesses and prefiled testimony and exhibits in accordance with the terms of the Order below and any Supplemental Prehearing Order.

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 the Appeal, they must be offered as exhibits in accordance with the terms of the Order below and any Supplemental Prehearing Order.

V. STANDARD OF REVIEW

Any **hearing on** the merits in the Appeal shall be conducted as a de novo proceeding pursuant to 29 V.S.A. § 406(b). Blodgett, **as** the Permit applicant, bears the burden of Proof and persuasion. The Board shall issue an order affirming, modifying or reversing the action of the DEC pursuant to 29 V.S.A. § 406(c).

VI. STIPULATIONS

Many facts in the Appeal may not be in dispute. Therefore, once party status issues have been resolved, the parties are encouraged to prepare a statement of stipulated facts to be filed with the Board in accordance with the terms set forth in the Order below and any Supplemental Prehearing Order.

VII. DISCLOSURES

The Conference Participants each received a Board fact sheet which identifies the current **Board chair**, William Boyd Davies, and the current Board members. Ms. Bielenberg disclosed that Board member Potvin once operated a fish and tackle business on Lake Champlain **and that** Board member Potvin is presently a part time employee of the Lake Champlain Basin Program.

Mr. Gay advised the Conference Participants that William A. Bartlett, the Board's Executive Officer, is a member of the Champlain Kayak Club.

Mr. Gay asked the Conference Participants if they had any objection to or conflict with Chair Davies, any of the Board members or Mr. Bartlett hearing and/or participating in the Appeal. Blodgett and ANR objected to Mr. Bartlett's participation in the Appeal. There were no other objections.

VIII. POST CONFERENCE FILINGS

On March 26, 1996, Mr. Rose filed with the Board a copy of a March 14, 1996 letter from Robert Lindemann, President, Champlain Kayak Club, to Mr. Rose as evidence of Mr. Rose's authority to serve as representative for the Champlain Kayak Club in filing and prosecuting the Appeal on behalf of the Club. There were no objections or responses to the Lindemann letter.

Neither Mr. Rose nor the Champlain Kayak Club supplemented their petition for party status.

On March 27, 1996, Blodgett filed a response to the **CLF** Motion in which it opposes **CLF's** efforts to intervene as a full party ("Blodgett Response"). Blodgett does not object to **CLF's** participation in the Appeal as amicus curiae. No reply to **Blodgett's** response to the CLF Motion was filed.

There were no requests for oral argument regarding the CLF Motion or the petition of party status of Mr. Rose and the Champlain Kayak Club.

The Board's party status determinations in the Dean Leary case guide the analysis of the CLF Motion. See In re: Dean Leary, Docket No. MLP-94-08, Preliminary Order, Standing and Party Status Issues, December 28, 1994. CLF has demonstrated that it satisfies the requirements of Rule 22 (A)(7) of the Rules in the Appeal. As a consequence, the Board will not, at this time, consider whether or not CLF is entitled to intervene by permission pursuant to Rule 22(B) of the Rules or should be allowed to participate as amicus curiae.

There were no other preliminary motions; therefore, the Conference Participants waive any and all such motions.

IX. ORDER

1. Blodgett and ANR shall be parties to the Appeal as a matter of right pursuant to 29 V.S.A. § 406(c) and/or Rule 22(A) of the Rules.

2. Mr. Rose, the Champlain Kayak Club and CLF shall be parties as a matter of right and by permission pursuant to 29 V.S.A. § 406(c) and/or Rule 22(A) of the Rules.

3. On or before Monday, **March** 25, 1996, Mr. Rose shall submit to the Board evidence of his authority to serve as representative for the Champlain Kayak Club in filing and prosecuting the Appeal on behalf of the Club.

4. On or before Monday, March 25, 1996, Mr. Rose and the Champlain Kayak Club may supplement their petition for party status.

5. On or before Wednesday, March 27, 1996, the Conference Participants may file a response to the CLF Motion or to any supplementation by Mr. Rose and or the Champlain Kayak Club of their petition for party status.

6. On or before Wednesday, **March 27**, 1996, the Conference Participants may file any additional preliminary motions or such motions shall be deemed waived.

7. On or before Wednesday April 3, 1996, the Conference Participants may file a reply to any timely

response to the CLF Motion and/or a response to any preliminary motion.

8. On or before Wednesday April 3, 1996, the Conference Participants may file requests for oral argument regarding the CLF Motion, the petition for party status of Mr. Rose and the Champlain Kayak Club and/or any additional preliminary motions. Oral argument regarding the forgoing matters, if requested, will occur on Thursday, April 18, 1996 at 1:30 p.m. in the Board conference room, 58 East State Street, Fourth Floor, Montpelier.

9. On or before Wednesday, May 1, 1996, Blodgett shall file final lists of witnesses and exhibits and prefiled direct testimony for all witnesses it intends to present.

10. On or before Wednesday, May 22, 1996, ANR, Mr. Rose, the Champlain Kayak Club and CLF shall file final lists of witnesses and exhibits and prefiled direct testimony for all witnesses they intend to present.

11. On or before Wednesday, June 5, 1996, the parties shall file prefiled rebuttal testimony and revised lists showing rebuttal witnesses and exhibits.

12. On or before Wednesday, June 12, 1996, the parties shall file a joint site visit itinerary which shall include, but need not be limited to, a map and a narrative description of the sites to be viewed, transportation arrangements and times ("Itinerary").

13. On or before Wednesday, June 19, 1996, the parties shall file, in writing, all objections to the prefiled testimony and exhibits previously identified or such objections shall be deemed waived.

14. The Board will convene a hearing in the Appeal on sometime in July. The specific date, time and location of the hearing shall be determined later by the Board and the parties shall be promptly notified. The Board will hold a site visit near the outset of the hearing in accordance with the Itinerary.

15. Chair Davies will hold a second prehearing conference with the parties on Thursday, June 27, 1996 at 10:00 a.m. at the Board's conference room, 58 East State Street, Fourth Floor, Montpelier to COVER specific time

allotments on a witness by witness basis, the site visit, rulings on evidence and any other matters deemed relevant.

16. On or before fourteen calendar days after the date of the hearing, the parties shall file proposed findings of fact and conclusions of law.

17. On or before fourteen calendar days after the date of the hearing, each party may file a legal memorandum in support of such party's proposed conclusions of law.

18. No individual may be called as a witness in this matter if he or she has not been identified in a witness list filed in compliance with this Order. All reports and other documents that constitute substantive testimony must be filed with the prefiled testimony. If prefiled testimony has not been submitted by the date specified, the witness will not be permitted to testify. Instructions for filing prefiled testimony are enclosed.

19. The Board may waive the filing requirements upon a showing of good cause, unless such waiver would **unfairly** prejudice the rights of other parties.

20. The parties shall file an original and five copies of prefiled testimony, legal memoranda, all exhibits which are $8\frac{1}{2}$ by 11 inches or smaller, and any other documents with the Board, and mail one copy to each of the parties listed on the attached Certificate of Service.

Parties are required to file only lists identifying exhibits which are larger than $8\frac{1}{2}$ by 11 inches that they intend to present, rather than the exhibits themselves. Exhibits must be made available for inspection and copying by any party prior to the hearing.

21. To save time at the evidentiary hearing, the Board will require that parties label their prefiled testimony and exhibits themselves and submit lists of exhibits which the Board can use to keep track of exhibits during the hearing. With respect to labeling, each person is assigned a letter as follows: B for Blodgett, A for the ANR, R for Kevin Rose, CKC for the Champlain Kayak Club and CLF for CLF. Prefiled testimony and exhibits shall be assigned consecutive numbers: for example, Blodgett will number its exhibits B1, B2, B3, etc. If an exhibit consists of more than one piece (such as a site plan with multiple sheets), letters will be used for each piece, i.e. R2A, R2B, etc. The labels on the

exhibits **must** contain the words **WATER RESOURCES BOARD**, In Re: Kevin Rose and the Champlain Kayak Club, Docket No. MLP-96-01, the number of the exhibit, and a space for the Board to mark whether the exhibit has been admitted and to mark the date of admission. Label stickers which can be used by the parties are available from the Board upon request; parties must complete the information sought on the stickers prior to the hearing.

Concerning preparation of lists of exhibits, each list must state the full name of the party at the top and the Board's case number. There must be three columns, from left to right: NUMBER, DESCRIPTION; and STATUS. The list must **include exhibits** and prefiled testimony. An example is as follows:

KEVIN ROSE
LIST OF EXHIBITS
WATER RESOURCES BOARD
In Re: Kevin Rose and the Champlain Kayak Club,
Docket #MLP-96-01

<u>Number</u>	<u>Description</u>	<u>Status</u>
R1	Prefiled testimony of John Smith	
R2A-D	Plan dated _____, sheets A1 through A4	

The Board will use the status column to mark whether the exhibit has been admitted.

22. The hearings will be recorded electronically by the Board or, upon request, by a stenographic reporter. Any party may arrange to have a stenographic reporter present at the hearing in accordance with Rule 28 of the Board's Rules of Procedure. One copy of any transcript made of proceedings must be filed with the Board at no cost to the Board.

23. Mr. Bartlett voluntarily **recuses** himself from participation in the Appeal. Mr. Bartlett shall not participate in the Appeal.

24. The Conference Participants shall amend their respective service lists in accordance with the Board's attached Certificate of Service.

25. Mr. Rose may serve as representative for the Champlain Kayak Club in filing and prosecuting the Appeal on behalf of the Club.

26. This Order is binding on all parties who have received notice of the Conference, unless an objection to this Order is filed in writing on or before Thursday, April 11, 1996 or fairness requires waiver of a requirement of this Order. Any request for oral argument regarding an objection to this Order shall be filed on or before Monday, April 15, 1996. Oral argument regarding an objection, if requested, will occur on Thursday, April 18, 1996 at 1:30 p.m. in the Board conference room, 513 East State Street, Fourth Floor, Montpelier. The Board will deliberate on any objections to this Order on Wednesday, April 18, 1996 whether or not oral argument occurs.

Dated at Montpelier this 4th day of April, 1996.

WATER RESOURCES BOARD



William Boyd Davies,
Chairman