

STATE OF VERMONT
WATER RESOURCES BOARD
10 V.S.A. §§ 1021-1025

**Re: Clarence Jelley
(Appeal of Permit #SA-1-0324)
Docket No. SA-96-03**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In this decision, the Water Resources Board issues Stream Alteration Permit #SA-1-0324-WRB.

I. BACKGROUND

On August 1, 1996, Thomas Platt and Judith Platt d/b/a The Garden Restaurant ("Applicants") filed a Stream Alteration Permit Application with the Department of Environmental Conservation ("Department") seeking to lay a section of polyethylene pipe within an iron pipe sleeve under the West River in the Town of Londonderry ("Project") in order to carry sewage effluent to a leachfield across the river.

On August 26, 1996, William C. Brierly, Commissioner of the Department, issued Stream Alteration Permit #SA-1-0324 ("Permit"), authorizing the Project with certain conditions.

On September 9, 1996, Clarence Jelley ("Appellant") filed a notice of appeal ("Appeal") from the Permit pursuant to 10 V.S.A. § 1024.

On September 10, 1996, the Water Resources Board ("Board"), by Executive Officer Bill Bartlett, notified the Appellant that his appeal was incomplete and required the Appellant to file additional information with the Board by September 25, 1996 pursuant to Board Rule of Procedure 18(B). The Appellant completed his appeal by filing the requested information on September 25, 1996. No prehearing conference was held in this matter.

On October 2, 1996, the Board convened a hearing in Montpelier, Vermont with Board members William Boyd Davies, Stephen Dycus, and Ruth Einstein present. The following parties participated in the hearing:

the Applicants by Jeffrey Squire, P.E.;

the Appellant, pro se; and

the Department by Andrew Raubvogel, Esq.

At the hearing, the Board took official notice, pursuant to 3 V.S.A. § 810 and Board Rule 27(B), that the West River is not designated by the Board as an outstanding resource water.

None of the parties objected.

On October 16, 1996, the Applicants and the Department filed proposed findings of fact and conclusions of law.

The Board conducted a deliberative session on October 23, 1996. This matter is now ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied. See Petition of Village of Hardwick Electric Department, 143 Vt. 437, 445 (1983).

II. ISSUES

The issues are:

- (1) whether the Project will significantly damage fish life or wildlife; and
- (2) whether the Project will significantly damage the rights of riparian owners.

III. FINDINGS OF FACT

1. The Project will involve digging a trench five feet in depth under the West River ("Trench") and laying a section of 1½ to 2 inch polyethylene pipe ("Sewer Line") within a 4 inch iron pipe sleeve in the Trench.
2. The proposed Sewer Line would carry sewage effluent from the Applicants' property on the north side of the West River to a leachfield on the south side of the West River ("Leachfield").
3. On September 30, 1996, the Department issued Water Supply/Wastewater Disposal Permit WW-2-0932 ("WW Permit") which authorized construction of the Leachfield.
4. The Project will take one to two days to complete.
5. The Project will occur on the Applicants' property.
6. The Appellant's property is located downstream from the Applicants' property, on the north side of the West River. The Appellant's property abuts the Applicants' property.

7. The Sewer Line is located approximately 120 feet upstream from the Applicants/Appellant property line.
8. The Appellant operates Jelley's Auto Care, an automotive service station, on his property.
9. The Department's Waste Management Division, Sites Management Section, presently is working with the Appellant on remediation of petroleum contamination on the Appellant's property. Such remediation includes groundwater monitoring and a soil vapor extraction system.
10. The petroleum contamination on the Appellant's property consists of groundwater contamination which is generally limited to the western portion of the property.
11. Groundwater flow at the Appellant's property is to the south-south west, toward the West River.
12. The West River flows in a southwesterly direction.
13. The Project will not alter the groundwater flow ordinarily present in the area of the Project.
14. The elevation of the Applicants' property is several feet higher than the elevation of the Appellant's property.
15. The elevation of the bottom of the Trench is higher than the elevation of the Appellant's property.
16. The drinking water well on the Appellant's property is located approximately 30 feet from the petroleum contamination plume. The well is encased in metal for its entire length all the way down to the bedrock. No contamination has been detected in the well.
17. The Project will not impact the quality of water in the well on the Appellant's property.
18. Brook trout and brown trout spawn in the Fall. Spawning is triggered by the length of the days and water temperature. Generally, spawning begins by October 15 each year.

19. Erosion caused by disturbance of the river bank can have a detrimental impact on spawning.
20. Any permit for a project which will occur between October 15 and June 1 should include extra conditions regarding prevention of erosion.
21. If permit conditions regarding prevention of erosion are complied with and appropriate measures are taken to prevent the discharge of wet concrete into the stream flow, there will be no significant damage to fish life.
22. The Board has not designated the West River as outstanding resource waters.

IV. CONCLUSIONS OF LAW

The Applicants are required to obtain the Permit for the Project pursuant to 10 V.S.A. §§ 1021, 1022.

The Board's review of the Permit is in the form of a de novo contested case. 10 V.S.A. § 1024(a). 10 V.S.A. § 1023(a) sets forth the legal standards for issuance of a stream alteration permit:

- (a) . . . The permit shall be granted, subject to such conditions determined to be warranted, if it appears that the change:
- (1) will not adversely affect the public safety by increasing flood hazards, and
 - (2) will not significantly damage fish life or wildlife,
 - (3) will not significantly damage the rights of riparian owners, and
 - (4) in the case of any waters designated by the board as outstanding resource waters, will not adversely affect the values sought to be protected by the designation.

10 V.S.A. § 1023(a). The Applicants have the burden of proof; they must demonstrate that they are entitled to the requested permit.

Only § 1023(a)(2) and (3) are at issue in this case. Section 1023(a)(1) is not at issue

because the Appellant did not allege that the Project would adversely affect public safety by increasing flood hazards. Section 1023(a)(4) is not at issue because the Board has not designated the West River as outstanding resource waters.

The Board concludes that the Project will not significantly damage fish life or wildlife if permit conditions regarding prevention of erosion and prevention of discharge of wet concrete into the stream flow are complied with. Those conditions are listed in the attached Stream Alteration Permit #SA-1-0324-WRB ("Board Permit") which replaces the Permit issued by the Department.

The Appellant expressed a concern that the Project would cause contamination of his drinking water well by causing migration of the petroleum plume on his property. Such contamination is unlikely based on the locations and elevations of the properties at issue, the location of the contamination, the location of the Appellant's well, and the direction of flow of groundwater and the West River. In any event, the Board concludes that the Project will not significantly damage the rights of riparian owners.

Based on the foregoing, the Board hereby issues the Board Permit.

V. ORDER

1. The Permit issued by the Department is hereby void.
2. The Board Permit is granted, subject to conditions.

Dated this 30th day of October, 1996 at Montpelier, Vermont.

Vermont Water Resources Board
by its Chair



William Boyd Davies

Concurring:
William Boyd Davies
Stephen Dycus
Ruth Einstein

**STATE OF VERMONT
WATER RESOURCES BOARD
10 V.S.A. §§ 1021-1025**

**Re: Clarence Jelley
(Appeal of Permit #SA-1-0324)
Docket No. SA-96-03**

STREAM ALTERATION PERMIT #SA-1-0324-WRB

**Permittees: Thomas and Judith Platt d/b/a The Garden Restaurant
P.O. Box 59
Londonderry, VT 05148**

This project, consisting of the installation of a section of polyethylene pipe within an iron pipe sleeve under the West River in the the Town of Londonderry, Vermont ("Project"), is hereby approved pursuant to 10 V.S.A. § 1023(a), subject to the following conditions:

1. The Project shall be accomplished according to the plans prepared by Jeff P. Squire PE dated 8/12/96 and which have been stamped "approved" by the Water Quality Division. No changes shall be made to the approved plans without prior written approval from the Department of Environmental Conservation ("Department").
2. The project shall be completed within 48 hours from the commencement of excavation.
3. The contractor's equipment shall be clean, well maintained, and free of fuel, hydraulic and gear oil leaks.
4. There shall be no discharge of wet concrete to the stream flow.
5. Pumping from excavation areas shall be discharged to an overland area or settling basins such that the effluent shall be clarified before reentering the stream flow.
6. All areas of stream bank disturbed during construction shall be suitably reshaped and stabilized with stone fill or a vegetative planting prior to completion of the project. Strictly limit extent of stream bank disturbance. Maintain as much established vegetation as is possible.
7. Permittee shall contact the Department prior to commencement of excavation in order to (a) obtain the Department's permission to commence excavation and (b) schedule a pre-construction conference with the applicant's engineer and contractor to discuss installation procedure.

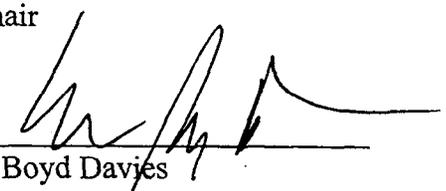
8. The method of installation shall be that which presents the least disturbance of stream flow and results in minimum discharge of turbidity or sediment downstream.
9. The project shall be accomplished on or before November 15, 1996.
10. This permit expires on November 16, 1996.

This permit does not relieve the permittees of the responsibility of obtaining permission from the affected property owners or the responsibility of obtaining all other necessary local, state, or federal permits.

This permit replaces Stream Alteration Permit #SA-1-0324 issued by the Department on August 26, 1996.

Dated at Montpelier, Vermont this 30th day of October, 1996.

Vermont Water Resources Board
by its Chair



William Boyd Davies

Concurring:
William Boyd Davies
Stephen Dycus
Ruth Einstein