

**STATE OF VERMONT
WATER RESOURCES BOARD**

In re: Dean Leary (Point Bay Marina, Inc.)
Docket No. MLP-96-04

MEMORANDUM OF DECISION

This memorandum of decision pertains to the preliminary issue of what is the scope of the Water Resources Board's public trust review. As explained below, the Board concludes that the scope of the Board's public trust review is limited to the project authorized by Permit 96-11 ("Project"). However, in conducting its public trust review of the Project, the Board will need to consider the cumulative effect of the Project on the waters in question, given the presence of the existing marina.

I. BACKGROUND

On September 17, 1996, the Department of Environmental Conservation ("DEC"), Agency of Natural Resources ("ANR"), issued Management of Lakes and Ponds Permit 96-11 ("Permit 96-11") to Point Bay Marina, Inc. ("Point Bay") pursuant to 29 V.S.A. §§ 401-409. The Project as authorized by Permit 96-11 allows Point Bay to relocate service and swim docks in the public waters of Lake Champlain, Charlotte, Vermont.

On September 25, 1996, Dean W. Leary ("Leary") filed an appeal from Permit 96-11 pursuant to 29 V.S.A. § 406. Leary contends that the DEC erred in issuing Permit 96-11 with respect to the Project's compliance with the criteria set forth at 29 V.S.A. § 405(b) and the public trust as guaranteed by Vermont's constitution.

On September 27, 1996, the Board, by its Executive Officer, docketed the appeal as MLP-96-04 ("MLP-96-04").

On November 15, 1996, the Conservation Law Foundation ("CLF") filed a motion ("Motion") which, in part, raises the preliminary issue of what is the scope of the Board's public trust review.

On December 18, 1996, Leary filed a memorandum of law regarding the scope of the Board's public trust review.

On December 19, 1996, Point Bay filed a letter with the Board stating that it had no objection to Leary's standing to appeal and CLF's party status to participate in this appeal.

On January 8, 1997, Point Bay and ANR, respectively, filed memoranda relative to the scope of the Board's public trust review.

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On January 29, 1997, the Board convened an oral argument in Montpelier with the following parties participating:

Dean Leary, Pro se

Point Bay Marina, Inc. by Donald R. Powers, Esq. and Peter Allen Martin

Agency of Natural Resources by Andrew Raubvogel, Esq.

Conservation Law Foundation by Mark Sinclair, Esq.

The Board convened a deliberation on January 29, 1997 after the oral argument and again on March 12, 1997. The Board now issues this decision.

II. DECISION

A. The Motion

The Motion contends that if the state has never performed a public trust review for a previously authorized encroachment, then the state has a duty to ensure project compliance with the doctrine before authorizing changes or enlargements to the existing encroachment. The history of Point Bay is as follows:

First, in 1968, this Board gave its authorization to Point Bay for a marina project consisting of already constructed floats and piles extending 400 feet off the shoreline from mean lake level into Lake Champlain, and a proposed breakwater in front of the existing piles and floats, extending an additional 40 feet out into Lake Champlain and running parallel to the shoreline for some 360 feet ("1968 Permit"). The 1968 Permit was issued without any consideration of what effect the activity authorized therein would have under the public trust doctrine.

Second, the marina project as authorized in the 1968 Permit has been modified and expanded twice since 1968. In both instances, the modification and/or expansion was authorized without any public trust review. In 1985, the Department of Water Resources (predecessor to the DEC) issued a permit to Point Bay which authorized the rearrangement and expansion of the marina, including three additional 75 foot pier extensions and fingers ("1985 Permit"). In 1986, the Department of Water Resources issued a permit to Point Bay which authorized the extension of the two main marina dockways an additional 140 feet into Lake Champlain and the addition of six 30-foot

fingers to each dockway extension ("1986 Permit").¹

Third, Permit 96-11 solely authorizes the Project which consists of the relocation of service and swim docks in the public waters of Lake Champlain. In issuing Permit 96-11, the DEC evaluated the Project with regard to the public good and the public trust, but did not conduct a public good or public trust review of the entire marina as authorized by the 1968 Permit, the 1985 Permit, and the 1986 Permit (collectively the "Marina Permits" or "Marina").

Based on these facts and supporting case law, CLF contends that the Board must conduct a public trust review of the Marina as part of the appeal of the Project and Permit 96-11. Alternatively, CLF requests that the Board remand this appeal to the DEC and order the DEC to conduct such a review. Leary supports the Motion.

B. Public Trust

Under 29 V.S.A. § 401, "[l]akes and ponds which are public waters of Vermont and the lands lying thereunder are a public trust . . ." The public trust doctrine "is not fixed or static, but one to be molded and extended to meet changing conditions and needs of the public it was created to benefit." State of Vermont v. Central Vermont Railway, Inc., 153 Vt. 337, 342 (1989).

The Board has previously ruled that it has a duty, independent of the public good determination, to assure the protection of public trust uses. In re: Dean Leary, Docket No. MLP-94-08, Memorandum of Decision at 4 (April 13, 1995). The Board continued:

As a part of State government, the Board has a fiduciary obligation under the public trust doctrine to determine that encroachments will not have a detrimental effect on public trust uses. Hazen v. Perkins, 92 Vt. 414 (1918); State v. Malmquist, 114 Vt. 96 (1944); In re Establishment of Water Levels of Lake Seymour, 117 Vt. 367 (1952); State of Vermont v. Central Vermont Railway, Inc., 153 Vt. 337 (1989). In making this determination, the Board may rely on the guidance provided by case law both from this jurisdiction and other jurisdictions recognizing the public

¹In 1994, the DEC issued a permit for further modifications, but Point Bay abandoned its rights under this permit. In re: Dean Leary, Docket No. MLP-94-08, Dismissal Order (March 11, 1996).

trust doctrine. In many instances, the uses identified in 29 V.S.A. § 405 are identical to the uses protected by the public trust.

Id at 5.

With regard to the scope of its public trust review, the Board has also ruled that it is limited to the project and the permit on appeal. Leary, Docket No. MLP-94-08, Dismissal Order at 3 (March 11, 1996). The Leary decision remains valid and is dispositive of the preliminary issue before the Board.

C. Scope of Review

Under 29 V.S.A. §§ 401-409, a person must first obtain a permit before constructing a new encroachment, or enlarging, extending or adding to an existing encroachment. The DEC makes the initial determination with regard to the new or enlarged encroachment relative to the public good and the public trust. Thereafter, any person aggrieved by the DEC decision may appeal to the Board. The appeal is a contested case under Vermont's Administrative Procedure Act, and is heard de novo with the Board issuing an order affirming, modifying or reversing the DEC's action. See §406(c).

As an administrative body, the Board "has only the adjudicatory authority conferred on it by statute." In re Taft Corners Associates, Inc., 160 Vt. 583, 590 (1993); In re Boocock, 150 Vt. 422, 424 (1988). The Board's jurisdiction under 29 V.S.A. § 406 is limited by the scope of the proceedings below. The Board has no jurisdiction to decide issues that were not before the DEC and not ruled upon by it. Taft Corners, 160 Vt. at 591; In re Vermont Gas Systems, 150 Vt. 34, 40 (1988).

Accordingly, the Board's jurisdiction is limited by 29 V.S.A. §§ 401-409 to that DEC action which is being appealed from, namely the issuance of Permit 96-11. Therefore, the scope of the Board's public trust review is limited to the Project authorized by Permit 96-11.

While the Board concludes that its jurisdiction is limited to the Project authorized by Permit 96-11, the Board cannot totally disregard the effect of the Marina on public trust values. The Project is to become part of the Marina, and the Board must consider the cumulative effect of the Project and the Marina under the public trust doctrine to determine whether the completion of the Project would result in a public trust violation.

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D. Comprehensive Public Trust Review and *Mono Lakes*

The Motion seeks to have the Board follow what was done in National Audubon Society v. Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983) ("*Mono Lakes*"). The central holding in *Mono Lakes* was:

Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.

The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust. The case for reconsidering a particular decision, however, is even stronger when that decision failed to weigh and consider public trust uses.

Id at 728-729.

The Board agrees with the holding in *Mono Lakes*, and strongly suggests that ANR needs to develop a systematic review of all existing private uses of the waters of the State of Vermont to determine whether public trust requirements are currently being satisfied. However, the Board does not agree with CLF's assertion that the filing of an amendment to an existing encroachment requires the Board, in its appellate role, to review the entire Project for public trust compliance. Rather, public policy, as well as *Mono Lakes*, requires that all existing development within the waters of Vermont be reviewed by ANR in a comprehensive manner, irrespective of whether an application for a permit amendment has been filed.

III. STATEMENT OF THE ISSUE

The Board will evaluate the Project's impacts upon the "public good" before considering the Project in light of the public trust doctrine. In Re: Kevin Rose and the Champlain Kayak Club, Docket No. MLP-96-01, Findings of Fact, Conclusions of Law, and Order at 11 (Nov. 7, 1996). If it is determined that the Project will have an adverse affect upon the public good, then this statutory analysis is dispositive and the Board will not reach the public trust doctrine. Id at 12. On the other hand, if it is determined that the

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Project will not have an adverse effect upon the public good, then the issue with regard to the public trust shall be as follows:

Whether the Project, after giving due consideration to the cumulative effect of the Project upon the waters of the State of Vermont, will have a detrimental effect on public trust uses.

Issued concurrently with this memorandum of decision is the Chair's Prehearing Conference Report and Order, and that document shall include the above statement of the issue as one of the two issues in this appeal.

VI. ORDER

1. The Motion is denied for the reasons stated in Section II, above.
2. The issue in this appeal with regard to the public trust shall be as stated in Section III, above, and it shall be incorporated into the Chair's Prehearing Conference Report and Order as one of the two issues in this appeal.

Dated at Montpelier, Vermont, this 18th day of March, 1997.

Vermont Water Resources Board



William Boyd Davies, Chair

Concurring:

William Boyd Davies
Ruth Einstein
Gail Osherenko

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