

**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 two motions to alter filed in response to In re: Dean Leary (Point Bay Marina, Inc.), Docket No. MLP-96-04, Findings of Fact, Conclusions of Law, and Order (Aug. 1, 1997) ("Decision"). As explained below, the Board denies the motions, except with respect to condition #9 of the Decision.

I. BACKGROUND

On August 1, 1997, the Board issued the Decision which authorizes the relocation of the swim and service docks at the Point Bay marina ("Project").¹ On August 7, 1997, the Conservation Law Foundation ("CLF") filed a Motion to Alter the Decision. On August 18, 1997, Dean Leary filed a Motion to Alter the Decision.

On August 19, 1997, Board Chair Davies issued a memorandum to the parties establishing the deadline for the filing of responses to the two motions.

On September 2, 1997, Point Bay Marina, Inc. ("Point Bay") and the Agency of Natural Resources ("ANR") each filed a reply to the two motions.

On September 16, 1997, the Board deliberated with respect to the two motions.

II. DECISION

A. Generally

Under Water Board Rule 29(C), a party may file "such motions as are appropriate with respect to the decision."

The motions by Leary and CLF seek the alteration of conditions which the Board made part of Management of Lakes and Ponds Permit 96-11. See 29 V.S.A. §§ 406(c), and 407-408. The new conditions were added pursuant to the Board's public trust doctrine analysis of the Project. The two motions do not seek alteration based on the Board's statutory public good analysis. Most of the alterations requested by Leary and CLF were already requested by Leary as proposed permit conditions. See Leary

¹The Decision contains a detailed procedural summary of this appeal.

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Proposed Findings of Fact and Memorandum of Law at 12-13.² Accordingly, in issuing the Decision, the Board considered and rejected many of the alterations requested by Leary and CLF.

B. Project's Limited Scope and Decision Condition #2

The Project is limited to the relocation of the service and swim docks. The only conditions which may be added to Permit 96-11 are those which are related to the Project. The Board has not conducted a comprehensive public trust review of Point Bay's entire marina. To the extent that the two motions propose conditions which are beyond the Project's scope, these conditions should be considered as part of ANR's comprehensive public trust review of the Point Bay Marina. See In re: Dean Leary (Point Bay Marina, Inc.), Docket No. MLP-96-04, Memorandum of Decision at 4-5 (March 18, 1997).

In issuing the Decision, the Board has included condition #2 which is a general permit condition which applies without any limitation. The supreme court has explicitly approved this type of general permit condition. See In re Denio, 158 Vt. 230, 241 (1992), cited with approval in In re Kostenblatt, 161 Vt. 292, 299 (1994). Condition #2 states:

Point Bay is obligated to complete, operate and maintain the Project in accordance with: [i.] the terms and conditions of Management of Lakes and Ponds Permit 96-11 issued by the Department of Environmental Conservation on September 17, 1996, except as amended hereby; [ii.] the plans, exhibits, and testimony submitted by Point Bay to the Water Resources Board; and [iii.] In re: Dean Leary (Point Bay Marina, Inc.), Docket No. MLP-96-04, Findings of Fact, Conclusions of Law, and Order (August 1, 1997).

It is not necessary for every detail of the Project, or its operation, to be specifically described in permit conditions since condition #2 incorporates the evidence offered by Point Bay and the findings made by the Decision. Therefore, the Board has considered Point Bay's evidence and the findings with respect to whether an alteration proposed by the two motions is necessary.

²CLF did not propose any permit conditions as part of its proposed findings of fact and conclusions of law.

C. Decision on the Changes Proposed by the Motions

i. Condition #3

Condition #3 requires that the sewage pump-out and garbage disposal service be provided to the general boating public. CLF and Leary request that condition #3 expressly state that the sewage pump-out and garbage disposal service be free of charge. With regard to whether this service is free, finding of fact #43 of the Decision provides:

At present, Point Bay does not charge a fee for the use of its sewage pump-out service. In the future, Point Bay may seek to charge a fee for this service.

Since condition #3 must be read in conjunction with condition #2 based on finding of fact #43, the Board declines to alter condition #3 as requested by the motions.

ii. Condition #4

Condition #4 requires that there be a free boat launch available to the general public, including the two boat launch ramps and the associated parking areas. Leary requests that condition #4 require that the boat launch ramps conform to Vermont Department of Fish and Wildlife standards. The Board declines to alter condition #4 since the request exceeds the Project's limited scope. Rather, the sufficiency of the boat launch ramps should be addressed by ANR in its comprehensive public trust review of the Point Bay marina.

iii. Condition #6

Condition #6 requires that there be cooperation with local, state, and federal authorities, as well as non-profit groups and educational programs, and that Point Bay provide dock access to these groups. The two motions request that condition #6 expressly require that there be no charge for dock use by non-profit groups and government agencies.

The Board believes that condition #6 must be read in conjunction with condition #2. Point Bay's evidence to the Board is that Point Bay provides free use to the Vermont State Police and the Vermont Department of Fish and Wildlife. See Exhibit PB-T5 at 3, and Exhibit PB-T7 at 1. Accordingly, Point Bay is obligated to provide free use to these agencies absent a permit amendment. With regard to non-profit groups and other

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governmental agencies, while this use occurs (see Exhibit PB-T1 at 4), the Board declines to alter condition #6 since the request exceeds the Project's limited scope. Rather, the issue of free use by other governmental agencies and any non-profit groups should be addressed by ANR in its comprehensive public trust review of the Point Bay marina.

iv. Condition #7

Condition #7 requires that dock slips be made available to the general boating public, and not just to boaters who rent a slip on a regular basis. The two motions request that condition #7 require set percentages as to how many dock slips will be kept available for transient boat use. CLF also requests that there be a set percentage as to how many slips will be rented without preference to current and past Point Bay customers.

The Board declines to alter condition #7 since the motions raise issues which are beyond the Project's scope. The Project is the relocation of the swim and service docks. The issues raised by the motions relative to condition #7 should be addressed by ANR in its comprehensive public trust review of the Point Bay marina.

v. Condition #8

Condition #8 requires that Point Bay maintain free toilet facilities, and that if these facilities are to be locked, then there shall be signs as to where a key can be obtained. The Board declines to alter condition #8 as it concludes that this condition is sufficient to ensure that Point Bay will maintain free, accessible toilet facilities.

vi. Condition #9

Condition #9 requires that Point Bay maintain the swim dock, and that the swim dock be open to the general public. The two motions request that condition #9 be altered to require that there be no charge for the general public's use of the swim dock. In addition, Leary requests that Point Bay be required to pay an annual fee for the maintenance of a separate swimming facility.

The Board will modify condition #9 to expressly provide that swimming is free to the public. The Board will only re-issue page 26 of the Decision. Accordingly, condition #9 as revised shall state: Point Bay shall maintain the swim dock, and it shall be open to the general public **at no charge**. In all other respects, the Board declines to alter condition #9 as any payment requirement would exceed the Project's scope. Instead, ANR may consider this option as part of its comprehensive public trust review.

vii. Condition #10

Condition #10 limits the posting of no trespassing signs to the boat storage areas, and requires the posting of an "open to the public sign" at the marina's entrance. The two motions seek further limitations upon the use of no trespassing signs, as well as a prohibition against the use of access barriers during the off-season. Leary requests that the Board specify the lettering size in the open to the public sign.

The Board declines to alter condition #10. Condition #10 mitigates the impact of the no trespassing signs by regulating where they can be located, and also by requiring that there be an open to the public sign. The Board will not specify the letter size of any of the signs. Rather, the rationale for condition #10 is clear. The Board believes that ANR will enforce condition #10 if there is an attempt to merely achieve technical compliance by erecting an open to the public sign with lettering that is so small as to be meaningless.

The Board declines to alter condition #10 with respect to off-season access and off-season barriers since these issues exceed the Project's scope. As the Board found in Decision finding of fact #24, the entire Point Bay dock is removed from the water at the end of each boating season. Instead, the issue of off-season access and the placement of barriers should be addressed by ANR in its comprehensive public trust review of the Point Bay marina.

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IV. ORDER

1. The motions to alter by CLF and Dean Leary are denied, except that condition #9 shall be altered to expressly state: Point Bay shall maintain the swim dock, and it shall be open to the general public **at no charge**. Accordingly, the Board hereby issues In re: Dean Leary (Point Bay Marina, Inc.), Docket No. MLP-96-04, Findings of Fact, Conclusions of Law, and Order page 26 (**Revised**) (Sept. 30, 1997).

2. Jurisdiction is hereby returned to the Department of Environmental Conservation, Agency of Natural Resources.

Dated at Montpelier, Vermont, this 30th day of September, 1997.

Vermont Water Resources Board



William Boyd Davies, Chair

Concurring:

William Boyd Davies
Ruth Einstein
Gail Osherenko
Jane Potvin

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V. ORDER

1. The Vermont Water Resources Board hereby modifies Management of Lakes and Ponds Permit 96-11 issued to Point Bay Marina, Inc., as set forth herein.

2. Point Bay is obligated to complete, operate and maintain the Project in accordance with:

- i. the terms and conditions of Management of Lakes and Ponds Permit 96-11 issued by the Department of Environmental Conservation on September 17, 1996, except as amended hereby;
- ii. the plans, exhibits, and testimony submitted by Point Bay to the Water Resources Board; and
- iii. In re: Dean Leary (Point Bay Marina, Inc.), Docket No. MLP-96-04, Findings of Fact, Conclusions of Law, and Order (August 1, 1997).

3. Point Bay shall provide sewage pump-out and garbage disposal services to the general boating public.

4. Point Bay shall maintain a free boat launch available to the general boating public. This includes the two boat launch ramps and the parking areas which members of the public can use without charge.

5. Point Bay shall maintain buoys marking speed limits and no-wake zones in the area around the Dock as it presently does.

6. Point Bay shall cooperate with local, state, and federal authorities, as well as non-profit groups and educational programs, and provide, as it presently does, access to the Dock and its services by the aforementioned.

7. Point Bay shall make dockage available to the general boating public, and not just to boaters who rent a slip on a regular basis.

8. Point Bay shall maintain free toilet facilities. If these facilities are to be locked, then Point Bay shall post signs saying where a key can be obtained.

9. Point Bay shall maintain the swim dock, and it shall be open to the general public **at no charge**.