

**STATE OF VERMONT
WATER RESOURCES BOARD**

PREHEARING CONFERENCE REPORT AND ORDER

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

On November 22, 1996, Water Resources Board ("Board") designee David L. Grayck, Esq., convened a **prehearing** conference in Montpelier with the following persons 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.
and Jim Caffry, Esq.
Jared Leary
R. Avery Hall

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 ("Chapter 11"). Permit 96-11 authorizes Point Bay to relocate service and swim docks in the public waters of Lake Champlain, Charlotte, Vermont ("Project").

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 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 October 2, 1996, the Board appointed David L. Grayck, Esq., Associate General counsel to the Vermont Environmental Board, to serve as staff attorney and Board designee for the purpose of conducting prehearing conferences for the Board.

On October 10, 1996, Board designee Grayck issued a Notice of Appeal and Prehearing Conference.

On November 15, 1996, the Conservation Law Foundation ("CLF") filed a Notice of Appearance **and** Motion to Intervene as a Full Party and in the Alternative to Participate as Amicus Curiae ("Motion"). The Motion also raises a preliminary issue

regarding the public trust doctrine.

On November 19, 1996, Andrew Raubvogel, Esq. filed a Notice of Appearance on behalf ANR.

II. FILINGS AND ORDERS SINCE THE PREHEARING CONFERENCE

On November 26, 1996, Board Chair William Boyd Davies issued a memorandum to the parties which established dates for the submission of standing and party status objections, and memoranda regarding the scope of the Board's review under the public trust doctrine.

On December 9, 1996, CLF tiled a request that the deadlines for the submission of memoranda regarding the scope of the Boards review under the public trust doctrine be extended, and that the Board convene oral argument regarding this preliminary issue.

On December 10, 1996, Point Bay filed a letter in response to CLF's request.

On December 11, 1996, Chair Davies issued a memorandum to the parties which denied CLF's extension request, but granted CLF's request for oral argument.

On December 11, 1996, Board designee Grayck issued a Proposed Prehearing Conference Report and Order.

On December 19, 1996, Point Bay tiled a letter regarding Leary's standing to appeal and CLF's party status to participate in this proceeding.

On January 3, 1997, Leary filed a response to the Proposed Preheating Conference Report and Order.

III. STANDING TO APPEAL AND PARTY STATUS

Under 29 V.S.A. § 406, any person aggrieved by DEC's issuance of Permit 96-11 may appeal to the Board. The Boards Rules of Procedures ("Rules") apply in this appeal.

No objections have been tiled regarding Leary's standing to appeal or CLF's party status to participate in this proceeding. Accordingly, Leary has standing to appeal under 29 V.S.A. § 406, and CLF is granted party status to participate in this proceeding under Rule 22(A)(7).

IV. ISSUES

A. Standard of Review and Burden of Proof

Under Chapter 11, Leary's appeal stays Permit 96-11. The Board adjudicates the appeal as a contested case under Vermont's Administrative Procedure Act, 3 V.S.A. §§ 801-849 ("APA"). Point Bay, as the permit applicant, bears the burdens of proof and persuasion. The appeal is de novo with the Board issuing an order **affirming**, modifying or reversing DEC's issuance of Permit 96-11. See 29 V.S.A. 406(c).

B. Public Good

With regard to public good, 29 V.S.A. § 401 provides, in part:

Lakes and ponds which are public waters of Vermont and the lands lying thereunder are a public trust, and it is the policy of the state that these waters and the lands shall be managed to serve the public good, as defined by section 405 of this title, to the extent authorized by statute.

Except under very limited circumstances, "no person shall encroach on any of those waters and lands of lakes and ponds under the jurisdiction of the board without first obtaining a permit under this chapter." 29 V.S.A. § 403(a). Under Section 403(a), the Board may reverse the action of DEC and void Permit 96-11 "if the encroachment adversely affects the public good." Id. The "public good" is "that which shall be for the greatest benefit of the people of the state of Vermont." 29 V.S.A. § 402(6). Section 405(b) specifies certain criteria which must be considered to determine the public good:

In determining whether the encroachment will adversely affect the public good, the department shall **consider the** effect of the proposed encroachment as well as the potential cumulative effect of existing encroachments on water quality, fish and wildlife habitat, aquatic and shoreline vegetation, navigation and other recreational and public use, including fishing and swimming, consistency with the natural **surroundings** and consistency with municipal shore land zoning ordinances or any applicable state plans.

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 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.

Accordingly, the issue with regard to public good is as follows:

Whether, pursuant to Chapter 11, the Project's encroachment adversely affects the public good with regard to the effect of the proposed encroachment as well as the potential cumulative effect of existing encroachments on water quality, fish and wildlife habitat, aquatic and shoreline vegetation, navigation and other recreational and public use, including fishing and swimming, consistency with the natural surroundings, and consistency with municipal shore land zoning ordinances or any applicable state plans.

C. 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 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).

CLF's Motion requested that the Board issue a ruling regarding the scope of the Board's public trust review. Accordingly, the Board convened oral argument and deliberated on this issue on January 29, and again on March 12, 1997.

Based on In re: Dean Leary (Point Bay Marina, Inc.), Docket No. MLP-96-04, Memorandum of Decision (March 18, 1997) issued on even date herewith, the issue with regard to public trust is as follows:

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

V. CONFLICTS

Those attending the prehearing conference received a Board fact sheet which identified the current Board Chair, William Boyd Davies, and the current Board members. Those attending the prehearing conference were asked if they had any objection to or conflict with Chair Davies or any of the Board members. Point Bay raised an issue with regard to Stephen Dycus. Since Stephen Dycus has completed his term and is no longer a member of the Board, this issue is moot.

Gerry Gossens of Salisbury is now a member of the Board. Mr. Gossens is a

retired intelligence officer, a former legislator and select board chair, and a trustee of the University of Vermont.

VI. PREFILED TESTIMONY AND EXHIBITS

Point Bay has requested that the preheating conference report and order identify what constitutes acceptable prefiled testimony with regard to form.

Because this proceeding is a contested cases under the **APA**, the rules of evidence as applied in civil cases shall be followed subject to certain exceptions. 3 V.S.A. § **810(1)**. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form. **Id.** In addition, parties are **entitled** to conduct **cross-examinations** as necessary for a full and true disclosure of the facts. 3 V.S.A. § **810(3)**.

No prejudice will result **from** the use of prefiled evidence in this appeal, nor did any party object to the Proposed Preheating Conference Report and Order's discussion of prefiled testimony and exhibits.

Rule 25(A) provides, in part, that the Board may direct each party to file a **summary** of the **prefiled** direct testimony of each witness. Rule 25(C) gives **the** Board the discretion to require parties to alter the form of their prefiled testimony. **Accordingly, acceptable prefiled testimony with regard to form shall be in question and answer format, and not in summary form.**

Each question and answer shall be numbered. For example, the **first** question shall be numbered as "**Q1**" and the answer as "**A1**". If prefiled testimony exceeds ten pages, a table of contents should be created. All reports and other documents that constitute substantive testimony must be filed with the prefiled testimony. All persons filing **prefiled** testimony must attend the hearing which the Board will convene in this matter, or the person's prefiled testimony and exhibits may not be admitted. At the hearing, the person will be sworn, given an **opportunity** to correct any **mistakes in** his or her prefiled testimony or exhibits, and then must remain available for cross-examination and Board questions. Accordingly, prefiled testimony and exhibits do not need to be signed and sworn to at the time of their filing **with** the Board.

The parties shall **only** be required to prefile **direct** evidence prior to the hearing. Direct evidence is testimony or exhibits given by a party in support of its own position. For example, Point Bay should file prefile direct evidence regarding why the Project will not adversely affect the public good, nor have a detrimental effect on public trust uses. Conversely, Leary should file prefile direct evidence regarding why the Project will

adversely affect the public good, and why the Project will have a detrimental effect on public trust uses.

The parties will be allowed to present live **rebuttal** evidence at the hearing. Rebuttal evidence is evidence that is given to explain counteract, or disprove facts presented by an adverse party. It is evidence which is offered to contradict the opponent's **direct** evidence. All parties shall be required to file a **list** of their rebuttal witnesses and exhibits prior to the hearing.

VII. HEARING DAY

The Board will convene a single hearing day on April 30, 1997, beginning at 9:00 am. and ending at 6:00 p.m. The hearing day shall proceed as follows:

- (i) A brief overview by Point Bay and ANR (ten minutes);
- (ii) A brief overview by Leary and CLF (ten minutes);
- (iii) Site Visit (not more than 60 minutes);
- (iv) Introduction of all prefiled direct evidence **and presentation** of live rebuttal evidence by **Point Bay and/or ANR** in support of the Project (not more than 90 minutes);
- (v) Lunch (45 minutes);
- (vi) Cross-examination by **Leary and/or CLF** of those persons who have either introduced prefiled direct evidence or presented live rebuttal evidence in support of the Project (not more than 90 minutes);
- (vii) Introduction of all **prefiled direct** evidence and presentation of live rebuttal evidence by **Leary and/or CLB** in opposition to the Project (not more than 90 minutes);
- (viii) Cross-examination by **Point Bay and/or ANR** of those persons who have either introduced prefiled direct evidence or presented live rebuttal evidence in opposition to the Project (not more than 90 minutes);
- (ix) Closing statement by Point Bay and ANR (ten minutes); and
- (x) Closing statement by Leary and CLF (ten minutes);

In using these time allotments, parties are expected to **coordinate** with other parties supporting or opposing the Project. **These time allotments are total time limits. Any party wanting more time must file a written motion on or before Wednesday, April 2, 1997, which states why more time is needed, and how much more time is needed.**

The hearing probably will be convened in Charlotte. The Parties will receive subsequent notice of the hearing location.

VIII. TENTATIVE IDENTIFICATION OF WITNESSES AND EXHIBITS

The following tentative identification of witnesses and exhibits was made at the prehearing conference:

P o i n t ,

Witnesses: Project's design engineer, marine patrol, and expert **regarding** water quality, wildlife, and marine habitat.

Exhibits: Project's plans.

ANR

Witnesses: Personnel involved in preparing and issuance of Permit 96-1 1.

Exhibits: Project application and the Permit 96-1 1.

Leary

Witnesses: Dean Leary and others familiar with the area around the Project, and experts regarding public good and public trust.

Exhibits: Tables of findings **and** photographs

IX. CERTIFICATE OF SERVICE

The parties are only required serve copies on those persons listed as parties on the attached certificate of service. However, the Board will continue to provide a copy of any document it issues to those persons listed as FYI on the certificate of service.

X. ORDER

1. Dean **Leary** has standing to appeal **Permit 96-11**, and CLF has party status to participate in the appeal pursuant to Rule 22(A)(7).

2. With regard to public good, the issue shall be as stated in subsection B, Section IV, above.

3. With regard to public trust, the issue shall be as stated in subsection C, Section IV, above.

4. On or before **Wednesday, April 16, 1997**, all parties shall file prefiled **direct** testimony and exhibits for all witnesses and exhibits, and a witness list.

5. On or before **Wednesday, April 23, 1997**, all parties shall file a list of all **rebuttal witnesses** and exhibits.

6. On **Wednesday, April 30, 1997**, the Board will convene a hearing pursuant to the schedule stated above in Section VII. In using the time allotments provided for in Section VII, the parties **are** expected to coordinate with other parties supporting or opposing the Project.

7. **The time allotments in Section VII are total time limits. Any party wanting more time must file a written motion on or before Wednesday, April 2, 1997, which states why more time is needed, and how much more time is needed.**

8. **No individual** may be called as a **direct** evidence witness if he or she has failed to prefile testimony in accordance with this Order. No individual may be called as a rebuttal witness if he or she has not been identified in a rebuttal **witness** list in accordance with this Order.

9. Prefiled **direct** testimony shall be filed in question and answer form. Each question and page shall be numbered. If prefiled testimony exceeds ten pages, a table of contents should be created. All reports and other documents that constitute substantive testimony must be filed with the prefiled testimony.

10. All persons filing prefiled testimony must attend the hearing which the Board will convene in this matter, or the person's prefiled testimony and exhibits may not be admitted. At the hearing, the person will be sworn, given an opportunity to correct any mistakes in his or her prefiled testimony or exhibits, and then must remain available for **cross-examination** and Board questions. Accordingly, **prefiled** testimony and exhibits

do not need to be signed and sworn to at the time of their filing with the Board.

11. Parties shall file an original and **six copies** of prefiled testimony, legal memoranda, all exhibits which are 8% 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.

12. Parties are required to **file** only lists identifying exhibits which **are** larger than 8% by 11 inches that they intend to present, rather than the exhibits themselves. Exhibits must reasonably be made available for inspection and copying by any party prior to the hearing.

13. Each party shall label their prefiled direct testimony and exhibits. The label shall state the party's name, Water Resources Board, Dean Leary (Point Bay Marina, Inc.), Docket No. MLP-96-04, the number of the testimony or exhibit, a space for the Board to mark whether the testimony or exhibit has been admitted, and a space for the Board to mark the date of admission. Label stickers which can be used by the parties are available from the Board on request; parties must complete the information required on the stickers prior to the filing of the testimony or exhibits.

14. Prefiled direct testimony and exhibits shall be assigned consecutive numbers: for example, Leary will number its prefiled testimony and exhibits Leary 1, Leary 2, Leary 3, etc. Concerning the preparation of witness and exhibit lists, each list must state the full name of the **party** at the top and the 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:

TOWN OF PORT WASHINGTON
LIST OF EXHIBITS
RE: HILDALE LANE MARINA, #3HL6

<u>Number</u>	<u>Description</u>	<u>Status</u>
Smith 1	Prefiled testimony of John Smith	
Smith 2	Site Plan	

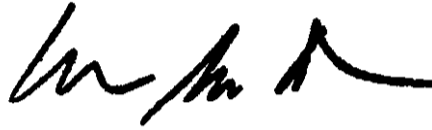
The Board will use the status column to mark whether the testimony or exhibit has been admitted.

15. The hearings will be recorded electronically by the Board. Upon the written request of any party, in accordance with Rule 28(C), the hearing may be recorded by a qualified stenographer in addition to the Board's electronic sound recording. One copy of any transcript made of the hearing must be filed with the Board at no cost to the Board.

16. Pursuant to Rule 24(B), this Order shall be binding on all persons who have received notice of the prehearing conference and shall control the subsequent course of this proceeding, unless this Order is objected to in whole or part on **or before Wednesday, April 2, 1997**, or this Order is modified at the hearing to prevent manifest injustice.

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

WATER RESOURCES BOARD



William Boyd Davies, Chair

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