

State of Vermont
WATER RESOURCES BOARD
29 V.S.A. Ch.11

**In re: Laurence and Roberta Coffin
(Lake Champlain Yacht Club)
Docket No. MLP-97-05**

CHAIR'S PRELIMINARY RULING

In response to a request to withdraw the above-captioned appeal, I preliminarily rule that this matter be dismissed, subject to the right of the statutory parties to file written objections and request oral argument and review by the full Water Resources Board ("Board"), pursuant to Rule 21 of the Board's Rules of Procedure ("WRB Rules").

I. BACKGROUND

On July 17, 1997, the Department of Environmental Conservation, Agency of Natural Resources ("DEC"), issued a Management of Lakes and Ponds ("MLP") permit, #97-02 ("Permit"), to the Lake Champlain Yacht Club, Inc. ("Club"), authorizing it to renovate, modify and expand a floating dock system in the public waters of Lake Champlain, Shelburne, Vermont ("the Project"). On July 24, 1997, Lawrence H. and Roberta R. Coffin of Shelburne, Vermont ("Appellants"), owners of real property abutting the Club, filed a timely notice of appeal with the Board objecting to Condition 10 of the Permit, pursuant to 29 V.S.A. § 406(a).

On July 24, 1997, the Executive Officer of the Board, pursuant to WRB Rule 16(A), sent a letter to the Appellants, indicating that their appeal was substantially incomplete and providing them with an opportunity to supplement their filing by August 8, 1997. The Executive Officer specified the deficiencies. A copy of this letter was sent to the Club, the DEC, and to all persons required to receive notice of this appeal. They were informed that the filing of a timely and substantially complete appeal would stay the effectiveness of the Permit.

On July 28, 1997, the DEC issued an amendment to the Permit, thereby deleting the objected to permit condition. On July 29, 1997, prior to the deadline for supplementing their notice of appeal, the Appellants sent a letter to the Board stating that they wished to withdraw their appeal in regard to Permit Condition 10.

II. DISCUSSION

The Chair of the Board is authorized to issue preliminary rulings as to various procedural matters as are necessary to expedite and facilitate the hearing process. However, any such ruling may be objected to by any party, in which case the ruling shall be reviewed by the Board. WRB

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Rule 21. Moreover, an appeal may be dismissed by a Chair's preliminary ruling, provided that the parties are provided with notice and an opportunity to request oral argument before the full Board before final disposition. WRB Rule 21; see In re: Stephen H. Dana, Docket No. CUD-97-01, Memorandum of Decision and Order of Remand (June 17, 1997).

The Appellants have notified the Board of their intention to withdraw their appeal. The Board has routinely dismissed appeals based on an appellant's request to withdraw. See, In re: Judge Development Corporation, Docket No. UST-94-15 (Dec. 5, 1995); In re: Gordon Whitman, Docket No. CUD-94-12 (Nov. 21, 1994). However, prior to dismissing an appeal the Board must assure itself that such action is not contrary to the intent and purposes of the law it is charged with administering. Id. at 2.

A person aggrieved by a decision of the DEC under 29 V.S.A. § 405(a) may appeal that decision to the Board within 10 days from the date of notice of DEC action. The filing of such an appeal stays the action of the DEC. 29 V.S.A. § 406(a). Therefore, when an appeal is timely filed with the Board, the cause is transferred to the Board from the DEC, and the DEC is divested of jurisdiction with respect to all matters within the scope of the appeal. See In re: Stephen H. Dana at 2; In re: Proctor Gas, Inc., Docket No. CUD-93-02, Dismissal Order at 2 (Oct. 27, 1993). Even where there are substantial deficiencies in said notice and the appellant must remedy them before the matter can be accepted by the Executive Officer for notice and publication, jurisdiction resides in the Board to oversee that the appeal is perfected and, if so, to hear the matter on the merits. WRB Rules 16 and 18(B).

In this proceeding, the Appellants timely filed their notice of appeal with Board, thereby invoking the Board's jurisdiction on July 24, 1997. While the Executive Officer issued an advisory opinion concluding that the appeal was deficient in certain substantial respects, jurisdiction remained with the Board during the time that the Appellants were afforded an opportunity to supplement their notice or seek review by the full Board. At no time was jurisdiction returned to the DEC. Therefore, the DEC was without jurisdiction on July 28, 1997, when it amended the Permit to delete Condition 10. Accordingly, the amendment issued by DEC is void ab initio. See In re: Jamie Badger, Docket No. CUD-96-07, Memorandum of Decision at 2 (June 4, 1997).

This is not the first time that the DEC has amended permits that were on appeal to the Board. Indeed, as recently as two months ago, the Board specifically cautioned the agency against such practice, warning that such alterations, aside from resulting in void actions, deprived interested persons of prior notice and an opportunity to participate in the amendment process. Id. at 3. For this reason, the Board recommended that the Agency of Natural Resources adopt procedural rules to specifically provide for reconsideration of an agency permit or decision

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before it becomes a final, appealable action. *Id.* at 3-4.

In determining that the DEC was without jurisdiction to amend the Permit during the pendency of this appeal, I do not rule on the merits of the Permit amendment issued. If the Appellants would like the Board to remand this matter to the DEC so that a valid permit amendment may issue, they should make such a request to the Board in response to this preliminary ruling. In doing so, however, they should understand that the Permit as issued on July 24, 1997, will stand unaltered until a Permit amendment is validly issued by the DEC. Alternatively, the Appellants may rescind their withdrawal request, perfect their appeal by the deadline set in the order below, and, with the Club and the DEC, jointly move the Board to consider a proposed negotiated settlement calling for the deletion of Condition 10 as a means of resolving their dispute. *Id.* at 3, fn. 1. If such a joint motion is filed with the Board, the Board will publicly notice this appeal and the proposed settlement and convene a hearing to consider the parties' joint request.

Otherwise, if no objections to this order are received by the stated deadline, this matter shall be dismissed. The legal effect of such dismissal will be to terminate this proceeding before the Board and limit the DEC's jurisdiction to the Permit issued on July 24, 1997, unless the Club voluntarily requests an amendment of its Permit and the DEC reinitiates the permitting process.

III. ORDER

Docket No. MLP-97-5 shall be dismissed, unless written objections and a request for full Board review is received on or before **4:30 p.m., Tuesday, August 26, 1997**. Any requests for oral argument before the Board should also be made by this deadline.

Dated at Montpelier, Vermont, this 12th day of August, 1997.

Vermont Water Resources Board



William Boyd Davies, Chair