

**State of Vermont
WATER RESOURCES BOARD**

**RE: Terry Thomas
Docket No. SAP-01-06**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to an appeal of a stream alteration permit issued by the Agency of Natural Resources (ANR). Based on a review of the record in this case and the stipulated agreement of the parties, the Water Resources Board (Board) hereby amends the permit and returns jurisdiction over this matter to the ANR.

I. BACKGROUND

On August 20, 2001, the ANR issued Stream Alteration Permit (SAP) #SA-1-0565 (Permit) to Terry Thomas, 58 Pine Street, Bristol, VT 05443 (Applicant) for the replacement of a bridge over Little Notch Creek, Harvey Road (near Rte. 116), in the Town of Bristol, Vermont (Project).

On August, 31, 2001, Elizabeth D'Avignon, 133 Harvey Road, Bristol, VT 05443 (Appellant) appealed the Permit to the Board. This appeal was filed pursuant to 10 V.S.A. § 1024(a), thereby staying the Permit.

A Notice of Appeal and Prehearing Conference was duly issued by the Board on September 10, 2001.

On September 14, 2001, ANR issued an amendment to the Permit, extending the expiration date from October 1, 2001, to October 1, 2002.¹

On October 2, 2001, Board Chair David J. Blythe, Esq., convened a prehearing conference in this matter. The following persons entered timely appearances and were granted party status: Appellant Elizabeth D'Avignon, pro se; Applicant Terry Thomas, pro se; and ANR, represented by Warren Coleman, Esq. A Prehearing Conference Report and Order (Prehearing Order) was issued on October 11, 2001, and no party filed objections to this document. Accordingly, the Prehearing Order became binding upon the parties and is hereby

¹ The Board hereby takes official notice of the following documents for inclusion in the record of this appeal: Permit #SA-1-0565, issued by ANR on August 20, 2001, and a letter from ANR, dated September 14, 2001, authorizing an amendment to the expiration date of Permit #SA-1-0565. Pursuant to 3 V.S.A. § 810(4), the parties have fifteen (15) days from the date of this decision to file any motions contesting the Board's official notice of these documents.

incorporated by reference.

The Prehearing Order included a stay of proceedings until January 7, 2002, to allow the parties time to determine whether issues raised by the Appellant's Notice of Appeal could be addressed by stipulated permit condition(s) and to develop and file any such stipulation(s). Specifically, the Appellant, as a riparian property owner adjacent to the Project, alleged facts sufficient to raise the possibility that the work authorized by the Permit might significantly damage her property interests, including, but not limited to, denying her safe access to her real property during the bridge replacement phase of the Project. See 10 V.S.A. § 1023(a)(3).

On December 21, 2001, the Appellant filed a letter with the Board, asking it to add to the Permit a condition requiring the following amenities during the construction phase of the Project: a sturdy footbridge, parking, and ample lighting.

On December 26, 2001, counsel for the ANR sent to the parties a letter containing a proposed permit condition intended to address the Appellant's concerns. He provided space in that letter for the parties to add their signatures in support of the proposed permit condition.

On January 2, 2002, counsel for the Board sent a memorandum to the parties, including further instructions on how to file a stipulated condition with the Board or how to seek a further continuance of the proceedings.

On January 4, 2002, the Appellant and Applicant agreed to the proposed permit condition by filing signed copies of ANR's letter of December 26, 2001, with the Board.

The Board reviewed the record in this matter and considered the parties' stipulated condition in deliberations on January 8, 2002. This matter is now ready for decision.

II. FINDINGS OF FACT

1. Stream Alteration Permit #SA-1-0565 authorizes the Applicant to replace a bridge over Little Notch Creek, serving Harvey Road, in the Town of Bristol, Vermont (Project). The Permit was issued on August 20, 2001, with an expiration date of October 1, 2001.
2. During the course of work authorized by the Permit, the existing bridge will be lifted off its abutments and removed. New I-beams and decking will be placed on those abutments. The time involved in this phase of bridge replacement will be approximately one week in duration.

3. Appellant Elizabeth D'Avignon resides at and owns real property at 133 Harvey Road, Bristol, VT. This real property borders Little Notch Creek and is adjacent to and just downstream of the Project site. Harvey Road provides access to Ms. D'Avignon's real property.
4. The Permit issued by the ANR does not address how Ms. D'Avignon would obtain access to her real property during the bridge replacement phase of construction on the Project.
5. The parties agree that Ms. D'Avignon should have access to her real property from Harvey Road by way of a stable and well-lit footbridge across Little Notch Creek, with adequate parking space nearby to allow continued access to Rte. 116 during the construction phase of the Project. Applicant Terry Thomas has agreed to provide these amenities. The parties have reduced their agreement to a written permit condition which they have asked the Board to add to the Permit under appeal, thereby eliminating the need for further litigation before the Board.

III. CONCLUSIONS OF LAW

Title 3 V.S.A. § 809(d) provides that “[u]nless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.” The present appeal is a contested case within the meaning of the Administrative Procedure Act, 3 V.S.A. § 801(b)(2) and, therefore, may be disposed of by informal disposition pursuant to 3 V.S.A. § 809(d), including by stipulated agreement of all parties, provided that such disposition is not contrary to the public interest. See, e.g., In re: Gordon Whitman, Docket No. CUD-94-12, Dismissal Order (Nov. 21, 1994) (appeal dismissed following Board determination that stipulation of the parties imposing certain conditions was not contrary to the intent and purposes of Vermont Wetland Rules); In re: Vermont Marble Power Division of OMYA, Docket No. WQ-92-12, Findings of Fact, Conclusions of Law, and Order (Apr. 13, 1995) (decision and order issued based on Board approval of stipulation of the parties). In this appeal, the public interest is articulated in statutory standards found at 10 V.S.A. § 1023(a), the law governing the issuance of stream alteration permits by the Secretary of ANR and, on appeal, by the Board. The specific subcriteria at issue involves a determination whether the changes to the involved watercourse contemplated by the Project will not significantly damage the rights of a riparian owner. See 10 V.S.A. § 1023(a)(3).

The Board concludes that modification of Permit #SA-1-0565, by inclusion of the permit condition stipulated by the parties, will result in a stream alteration which will *not* significantly damage the property rights of the Appellant. Indeed, the inclusion of this permit condition is necessary to assure the Appellant's continued access to her real property, across Little Notch

Creek, during the construction phase of the project. Accordingly, the Board affirms the decision of the Secretary's designee to issue Permit #SA-1-0565, but modifies that permit to add the permit condition stipulated to by the parties.

Additionally, the Board concludes that, due to the fact the Permit was stayed pending the outcome of this appeal, the expiration date of that Permit should be extended to allow the Applicant to complete the Project in 2002. Therefore, the Board shall amend Condition 11. of the Permit to establish a new expiration date of October 1, 2002. In selecting this date, however, the Board is not incorporating the ANR's Permit amendment of September 14, 2001, since that Permit amendment was void ab initio. As the Board has previously observed, ANR officials have no jurisdiction to amend a Permit or other approval once an appeal has been of that Permit or approval has been filed with the Board. See In re: Lawrence and Roberta Coffin, Docket No. MLP-97-05, Chair's Preliminary Ruling at 2-3 (Aug. 12, 1997); In re: Jamie Badger, Docket No. CUD-96-07, Memorandum of Decision at 2 (June 4, 1997); and In re: Proctor Gas, Inc., Docket No. CUD-93-02, Dismissal Order at 2 (Oct. 27, 1993).

IV. ORDER

. It is hereby ordered that:

1. Stream Alteration Permit #SA-1-0565, as issued by ANR on August 20, 2001, shall be amended to establish a new expiration date in Condition 11. of October 1, 2002.
2. The Permit is further amended by the addition of a new Condition 12.:

During the construction period, the Permittee shall provide a safe and stable footbridge with nighttime lighting to ensure access to the residence at 133 Harvey Road, as well as sufficient space for parking of at least one vehicle in proximity to the footbridge.

3. The parties shall have 15 days from the date of issuance of this decision and order within which to file a motion to correct or alter, pursuant to Rule 34 of the Board's Rules of Procedure (Eff. Feb. 22, 1999) or file a motion objecting to the Board noticing the Permit and amendment referred to in Footnote 1. The timely filing of any motion shall stay the effectiveness of this decision and order and toll the time for filing of any appeal. In the event that no motions are timely filed, this decision and order shall become final and binding upon the parties within 30 days of today's issuance.
3. At the time that this decision and order become final, jurisdiction shall return to the ANR.

Dated at Montpelier, Vermont, this 8th day of January 2002.

WATER RESOURCES BOARD
By its Chair

/s/ David J. Blythe
David J. Blythe, Esq.

Concurring:
Lawrence H. Bruce, Jr.
Jane Potvin
John D.E. Roberts
Mardee Sánchez