

**State of Vermont  
WATER RESOURCES BOARD**

**RE: CCCH Stormwater Discharge Permit  
Docket No. WQ-02-01 (ANR/DEC Permit #1-0788.0202)**

**DISMISSAL ORDER**

This decision concerns a Motion to Dismiss the above-captioned appeal filed by the Permittee, Vermont Agency of Transportation (VTrans), based on its relinquishment of interests in ANR/DEC Permit #1-0788.0202, the stormwater discharge permit for the Chittenden County Circumferential Highway (Segments A & B) (Project).

**I. PROCEDURAL HISTORY**

On July 10, 2002, the Vermont Agency of Transportation (VTrans) filed a Motion to Dismiss and supporting affidavit with the Water Resources Board (Board). VTrans, as the sole Applicant and Permittee for the stormwater discharge permit under appeal, ANR/DEC Permit #1-0788.0202 (Permit), alleged that it intended to relinquish its interests in that Permit and apply anew to the Department of Environmental Conservation (DEC), Agency of Natural Resources (ANR), for a discharge permit or permits on or before July 26, 2002, subject to the requirements of Act No. 109 of 2002. Accordingly, VTrans asked the Board to promptly dismiss the pending appeal as moot, without oral argument.

On July 16, 2002, Chair David J. Blythe issued a Chair's Dismissal Order pursuant to Board Procedural Rule 23. The Chair's Dismissal Order provided the Appellants Conservation Law Foundation and Friends of the Earth (CLF/FOE), the ANR, and other parties and party status petitioners an opportunity to file written objections to dismissal of this matter and requests for oral argument before the Board no later than 4:30 p.m., Tuesday, July 23, 2002. The Chair's Dismissal Order further provided that if no objections and requests for oral argument were received by that deadline, this appeal would be dismissed without prejudice on Friday, July 26, 2002, and the Permit would become null and void.

On July 23, 2002, CLF/FOE filed a joint Objection to the Chair's Dismissal Order, supported by legal memorandum, and a request for oral argument. Accordingly, on July 24, 2002, a Board Notice of Oral Argument was issued, setting argument for August 6, 2002.

On July 30, 2002, ANR and VTrans each filed a Responsive Legal Memorandum in opposition to the CLF/FOE filing. In its filing, VTrans advised the Board that it had notified ANR by letter on July 25, 2002, of its abandonment of the Permit and filing of a new permit application with the Water Quality Division of DEC, and that ANR on July 25, 2002, had acknowledged receipt of VTrans' letter and accepted abandonment of the Permit.

On August 2, 2002, CLF/FOE filed a letter withdrawing its Objection to dismissal of the appeal and waiving oral argument, subject to a request that the Board impose two conditions in its order disposing of this appeal: (1) that ANR and VTrans be required to address the stormwater discharges from both the construction and operational phases of the Project in a single permit proceeding and decision; and (2) that VTrans not commence construction on the CCCH until the final resolution of all appeals filed with the Board regarding the merits of necessary stormwater discharge permits.

Because the CLF/FOE filing asked the Board to grant relief which none of the other parties and party status petitioners had had an opportunity to address in their previous written filings, the Board Chair on August 5, 2002, through a memorandum from Board counsel, advised the Appellants, parties and party status petitioners, that oral argument would not be canceled but instead proceed at the time scheduled in order to allow them an opportunity to address the Board concerning the conditions requested by CLF/FOE.

On August 6, 2002, at 9:00 a.m., oral argument before the Board was convened at the Board's Conference Room in Montpelier, Vermont. Those participating were counsel for CLF/FOE, VTrans, ANR, and the Greater Burlington Industrial Corporation (GBIC).

The Board deliberated immediately following oral argument on August 6, 2002, and again on August, 13, 2002. Based upon a thorough review of the filings and arguments in this matter, the Board has determined that this matter is ready for disposition.

## II. ISSUE

Does the Board have the authority to condition or otherwise limit dismissal of the pending appeal when the dismissal is based on the Permittee's relinquishment of interests in the Permit that is the subject of the appeal?

## III. DISCUSSION

Pursuant to Board Procedural Rule 24, the Board may, on its own motion or at the request of a party, "dismiss, in whole or in part, any matter before the Board for reasons provided by the [Board's Procedural] Rules, by statute, or by law." Neither the statutes governing the Board's powers or the Board's Procedural Rules contain a provision expressly providing that an appeal must be dismissed in response to a permittee's relinquishment of its interests in the permit under appeal and, if so, whether an order providing for such dismissal may impose conditions upon the permittee or any other party to the proceeding being dismissed.

Moreover, the Board has no precedent directly on point.<sup>1</sup>

In the absence of a statutory provision or rule addressing the issue under consideration, the Board must resort to common law principles and may look to the decisions of other administrative agencies for guidance on the question. See Re: Green Mountain Railroad, LUP Application #2W0038-3EB-EB, Findings of Fact, Conclusions of Law, and Order at 7 (Mar. 22, 2002) (citing with favor Jones v. Securities Exchange Commission, 298 U.S. 1, 21 (1936)).

In the Green Mountain Railroad case, cited by ANR in its Responsive Legal Memorandum at 4-6, the Environmental Board found that the general common law principle is that “an applicant is presumed to have an unqualified right to withdraw an application unless palpable prejudice to an adversary or the general public would result.” Id. Said another way, an applicant has a right to withdraw its permit application, subject to the right of the reviewing Board to make a determination that there is no tangible or obvious prejudice to a party opponent or to the public interest, which includes a determination that dismissal of the matter under appeal will not be contrary to the intent and purposes of the governing statute(s) at issue. If palpable prejudice is present, the Board may either deny withdrawal or condition dismissal of the pending appeal.

In the Green Mountain Railroad case, the applicant railroad owned land subject to an Act 250 permit and it filed an application for a permit amendment with the applicable District Environmental Commission (Commission) to obtain authorization for a previously permitted salt and storage building that was constructed in non-conformance with the prior permit issued by the Commission. The applicant subsequently asked the Commission to allow it to withdraw its application based on the argument that it was not subject to Act 250 jurisdiction due to federal laws preempting state land use requirements. The Commission denied the applicant’s request for

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In their Objection to the Chair’s Dismissal Order filed on July 23, 2002, CLF/FOE directed the Board to an Environmental Board decision in support of the proposition that an administrative agency has “discretion to reject a withdrawal or dismissal of any *appeal* if it would prejudice the public interest that the agency is charged to protect.” Re: Ronald L. Saldi, #5W1088-1-EB, Memorandum of Decision at 3 (Oct 1., 1996) (Emphasis added). Indeed, the Water Resources Board and its Chair have previously dismissed appeals upon the request of a party based on a finding that such dismissal is “not contrary to law” or “inconsistent with the intent and purposes” of the act under which the permit that is the subject matter of the appeal was authorized. Re: CCCH Stormwater Discharge Permit, Docket No. WQ-02-01, Chair’s Dismissal Order at 3 (July 16, 2002); Re: Stratton Corporation, Stratton Commons II, Docket No. WQ-01-02, Dismissal Order at 2 (May 15, 2001). CLF/FOE did not direct the Board to any precedent on the question whether a permittee has the qualified or unqualified right to withdraw the *permit* that is the subject matter of the appeal.

withdrawal but issued a permit amendment. The applicant, after seeking reconsideration of the decision, filed an appeal with the Environmental Board. No persons entered their appearances in this appeal as party opponents. *Id.* at 3-5. In its *de novo* review of the matter after oral argument, the Environmental Board concluded that the applicant had failed to timely contest Act 250 jurisdiction over the project, however, it granted the withdrawal on the basis that there was no potential prejudice to an adversary since there were no parties other than the applicant participating in the appeal. Furthermore, there was no prejudice to the public's interest because, in the absence of a permit for the project, there were state enforcement powers to correct or remedy violations of the law, thereby protecting Act 250 values. *Id.* at 8.

The Environmental Board gave the applicant the choice of either filing a formal request for withdrawal of its application with the Environmental Board *or* advising the Board that it no longer sought withdrawal of its application, but rather requested dismissal of its appeal. *Id.* at 9. The applicant subsequently filed a request with the Environmental Board seeking withdrawal of its application, and the Board granted this request, vacated the Commission's decision and the land use permit issued to the applicant, and returned jurisdiction to the Commission. Re: Green Mountain Railroad, LUP Application #2W0038-3B-EB, Memorandum of Decision at 3 (May 16, 2002).

The Board finds the Green Mountain Railroad decisions instructive with respect to certain points of law but not so with respect to others. The Board agrees that the general rule of law is that an applicant is presumed to have a right to withdraw its permit application unless palpable prejudice to an adversary or the public interest would result. However, the facts in the present case are somewhat distinguishable from those in the Green Mountain Railroad case.

First, there *is* an adversary in the present proceeding, the Appellants CLF/FOE. The Board concludes, however, that, based on CLF/FOE's filings of July 23 and August 2, 2002, and the totality of the record before the Board, there is no palpable prejudice to these adversaries. Unlike the situation in Green Mountain Railroad where the applicant had already constructed its building in non-conformance with a prior Act 250 permit, VTrans, the Applicant in this proceeding, has not commenced construction of its Project. VTrans must file and obtain necessary approvals for both stormwater discharges connected with the construction and operational phases of its Project prior to commencing construction.<sup>2</sup> Those participating in this

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The Board, while not directing the Applicant to file either a consolidated application or two applications simultaneously for stormwater discharges related to the construction and operational phases of its Project, notes that it has previously advised the ANR of its displeasure with piecemeal permit review of projects and their impacts. See Re: Lost Cove Homeowners Association, Inc., Docket No. CUD-98-04, Findings of Fact, Conclusions of Law and Order at 21 (July 16, 1999) (Board registered with ANR its concerns about piecemeal issuance of conditional use determinations and subdivision, stormwater discharge and other permits for a project and the

appeal will have the opportunity to review any new permit applications filed by VTrans with the ANR and offer public comment concerning their merits, as well as have the opportunity to seek Board review of any permit decision issued by the ANR. Indeed, the Board trusts that ANR will conduct its review process of any new permit application(s) so as to take into consideration concerns raised by CLF/FOE concerning procedural and substantive deficiencies that led to the present appeal.

Second, there is no demonstration of palpable prejudice to any participant in this appeal nor to the general public because until stormwater discharge permit(s) are issued by ANR, VTrans may not begin construction of the Project without being subject to the State's enforcement powers for violation of applicable law, including the Vermont Water Quality Standards. While it is true that past Board precedent has suggested that the Board has no authority to issue a stay of an ANR permit or other decision appealed to it pursuant to 10 V.S.A. § 1269, this does not preclude appellants and other parties from seeking other relief.<sup>3</sup>

Accordingly, while the Board may impose conditions in its dismissal order so as to avoid demonstrated prejudice to an adversary or the public interest, taking into consideration the record as a whole, the Board concludes that such prejudice is not present and therefore it denies CLF/FOE's request to condition dismissal of this matter.

Finally, while the Green Mountain Railroad case dealt with a request to withdraw a permit application, rather than, as here, notice by the applicant of its intent to relinquish or "abandon" its Permit, the Board concludes that there is no meaningful distinction between the two with regard to the question of whether this matter should be dismissed or not. However, like

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resultant cumulative adverse impacts to wetland and water resources). Such piecemeal review results in conflicts in how natural resources are managed, and inefficiencies and delays in the appellate process, to the detriment of all parties.

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In contrast with other statutes governing appeals to the Board which provide for automatic or discretionary stays, 10 V.S.A. §1269 states in relevant part: "... An appeal filed pursuant to this section shall not stay the effectiveness of any act or decision of the department [of environmental conservation] pending determination by the board." The Board has previously construed this provision to mean that it has no authority to issue a stay of a permit before it on appeal. See Re: Appeal of Larivee, Docket No. CUD-92-09, Preliminary Order on Motion to Stay (Apr. 5, 1993); Re: Appeal of Poultney River Committee, Docket No. WQ-92-04, Prehearing Order: Motion for Partial Stay and Temporary Ex Parte Order at 2 (Sept. 28, 1992). However, this does not preclude a party from asking the ANR to delay the effective date of any permit appealed to the Board; the Board, if and when the issue is properly presented, to revisit its prior interpretation of this statute; or the judiciary to grant a stay or injunctive relief.

the Environmental Board in the Green Mountain Railroad case, the Water Resources Board concludes that since jurisdiction of the Permit under appeal is presently before the Board, only the Board may vacate or declare void that Permit absent a formal remand of this matter to ANR. This is consistent with the Chair's ruling of July 16, 2002, contained in the Dismissal Order at 4, Item 5. Accordingly, the Board declares the Permit null and void as of today, dismisses the appeal without prejudice, and returns jurisdiction to DEC/ANR for the receipt and processing of any new permit application(s) for the Project.

IV. ORDER

It is hereby ordered:

1. CLF/FOE's request to condition dismissal of Docket No. WQ-02-01 is denied;
2. ANR/DEC Permit #1-0788.0202 is declared null and void;
3. The appeal, docketed No. WQ-02-01, is dismissed without prejudice; and
4. Jurisdiction is returned to the Department of Environmental Conservation, Agency of Natural Resources.

Dated at Montpelier, Vermont, this 13th day of August, 2002.

WATER RESOURCES BOARD

/s/ David J. Blythe  
David J. Blythe, Chair

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