

**State of Vermont
WATER RESOURCES BOARD**

**Re: Vermont Agency of Transportation (Route 7)
Docket No. WQ-03-01**

MEMORANDUM OF DECISION

I. PROCEDURAL BACKGROUND

On August 14, 2003, the Appellants, the Friends of Route 7, Michael Serrano, Patricia J. Ondovchik, and Jack Dubrul II (Appellants) filed a Motion for a Stay (Motion).

On August 22, 2003, the Applicant, the Vermont Agency of Transportation (VTrans), and the Agency of Natural Resources (ANR), each filed Memoranda in Opposition to the Motion. Oral argument was not convened in this matter. The Board deliberated on August 26, 2003, and ordered that the Motion be denied.

II. DISCUSSION

The Motion requests that the Board grant a Stay of the stormwater permits issued by the ANR to VTRANS for the Route 7 project that are currently on appeal before the Board in Docket WQ-03-01. The Appellants filed its Motion pursuant to WRB Rule of Procedure 29. (WRB Rule). WRB Rule 29 (A) provides that:

To the extent that the Board has the discretion to issue stays of a final decision of the Agency or Department, it may do so upon the filing of a motion by any person aggrieved by that decision. The motion shall be in writing, shall identify the order or portion thereof for which a stay is sought, and shall state in detail the grounds for the request. If the stay is requested prior to the determination of party status by the Board, the motion shall also contain an explanation of the movant's interest in the matter under appeal and how that interest may be adversely affected if no stay is issued, consistent with the standards for party status set forth in Rule 25.

The Motion does not address the Board's authority to grant a stay beyond citing WRB Rule 29. As noted above, WRB Rule 29 states that the Board may grant a stay "[T]o the extent that the Board has the discretion to issue stays of a final decision of the Agency or Department." This appeal was brought pursuant to 10 V.S.A. § 1269. 10 V.S.A. § 1269 does not provide express authority for the Board to grant a stay of an ANR permit appealed to the Board. The only reference to a stay in 10 V.S.A. § 1269 is the provision that states an "appeal filed pursuant to this section shall not stay the effectiveness of any act or decision pending determination by the board."

The Board has decided in past cases that if the statute authorizing an appeal to the Board does not expressly grant authority to the Board to stay the ANR permit, such authority does not exist. See In Re: Appeal of Larivee, Docket No. 92-09, Preliminary Order on Motion to Stay (April 1993). Larivee also involved an appeal brought under 10 V.S.A. § 1269. Id. In response to a request for a stay made by the Appellant in Larivee the Board held:

Applying the plain meaning to Rule 31¹, it is apparent that the Board has authority to grant stays of its own decisions when a party appeals a Board decision to another tribunal. However, there is no provision, either under Rule 31 or any other applicable statutes or rules governing the Boards powers, which expressly authorizes the Board to stay the ANR's CUD decision. Therefore, although the Board shares Ms. Larivee's concern that irreparable harm to important wetland functions could result between the time of the filing of an appeal under 10 V.S.A. §1269 and the issuance of a final Board decision, the Board finds no authority to support the grant of her request for stay.

Id at 2.

The Board sees no distinction between Larivee and the Motion filed in this case. Both cases involved a request for stay in an appeal brought pursuant to 10 V.S.A. §1269. Accordingly, the Board sees no justification to deviate from its ruling in Larivee that absent express authority to grant a stay provided in statute, the Board does not have such authority.

The Board further finds that its reasoning in Larivee is still sound. Vermont's Water Pollution Control Laws address stays differently depending upon the permit that is appealed. For example, stream alteration permits and lakes and ponds encroachment permits are automatically stayed when an appeal is filed with the Board. See 10 V.S.A. § 1024 and 29 V.S.A. § 406. Discharge permits and Conditional Use Determinations are specifically not stayed when appealed to the Board. See 10 V.S.A. § 1269. Accordingly, the Legislature has chosen when water related permits will and will not be stayed upon the filing of an appeal. The inference to be drawn is that if the Legislature intended the Board to have the authority to address request for stays beyond the limits placed in statute, it would have said so. Because 10 V.S.A. §1269 does not grant express authority for the Board to grant a stay, it does not have the authority to grant a stay in this case.

III. ORDER

¹ In 1993, WRB Rule 31 was akin to current WRB Rule 29. However, WRB Rule 29 is more specific in drawing a distinction between the Board's authority to stay its own decisions and the authority to stay ANR decisions.

The Appellant's Motion for a Stay is hereby denied.

Dated at Montpelier, Vermont, this 28th day of August, 2003

Water Resources Board
By its Chair

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

Concurring:

Lawrence H. Bruce, Jr., Member
Michael J. Hebert, Member
Jane Potvin, Member