

**State of Vermont
WATER RESOURCES BOARD**

**RE: Kent Pond (VT Dept. of Fish & Wildlife)
Docket Nos. MLP-03-10 and MLP-03-11 (Cons.)**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Issued May 12, 2004

This decision pertains to consolidated appeals of a Management of Lakes and Ponds encroachment permit issued by the Water Quality Division, Department of Environmental Conservation (DEC), Agency of Natural Resources (ANR), for an American with Disabilities Act (ADA)-accessible fishing platform within the public waters of Kent Pond in Killington, Vermont. As discussed herein, the Water Resources Board (Board) affirms the decision of the DEC in issuing the Permit and returns jurisdiction to ANR.

I. PROCEDURAL HISTORY

On April 18, 2003, the DEC issued Management of Lakes and Ponds Permit #2002-016 (Encroachment Permit) to the Department of Fish and Wildlife (DFW), ANR, for an ADA-accessible fishing platform within the public waters of Kent Pond in Killington, Vermont. The Encroachment Permit was issued under authority of 29 V.S.A. ch. 11, the Management of Lakes and Ponds Act.

On April 25, 2003, Michelle Meadows Management, LLC, Michelle Werle and Mark Werle filed a Notice of Appeal with the Board seeking reversal of the Encroachment Permit. This appeal was timely filed pursuant to 29 V.S.A. § 406(a) and docketed as MLP-03-10. An additional appeal was filed on April 29, 2003, pursuant to 29 V.S.A. § 406(a) by Noyes Family Properties, Inc., seeking reversal of the Encroachment Permit. This was docketed as MLP-03-11.

On May 19, 2003, Board Vice-Chair, John D.E. Roberts, serving as Acting Chair of this proceeding, convened a prehearing conference in Montpelier, Vermont, pursuant to Board Procedural Rule 28. On June 3, 2003, a Prehearing Conference Report and Order (Prehearing Order) was issued memorializing the discussions at the prehearing conference and the Acting Chair's rulings. The Prehearing Order set forth the issues on appeal and provided for the consolidation of Docket Nos. MLP-03-10 and MLP-03-11.¹

¹ An appeal of a Conditional Use Determination (CUD) for the parking lot and access to the ADA-accessible fishing platform was filed by Michelle Meadows Management, LLC, Michelle Werle and Mark Werle on July 17, 2003. This was docketed as CUD-03-13 and briefly consolidated with the Encroachment Permit appeals. The Board, however, dismissed the CUD appeal on February 18, 2004. See Kent Pond, Docket Nos. MLP-03-10, MLP-03-11, and CUD-03-13, Memorandum of Decision and Dismissal Order at 8

On June 16, 2003, ANR filed a Motion to Dismiss, alleging that the Appellants lack standing. On July 9, 2003, the Appellants filed their Opposition to the Motion to Dismiss (Appellants' Opposition) and also their First Supplemental Notices of Appeal. On July 21, 2004, ANR filed a Reply to Appellants' Opposition but advised the Board that it was withdrawing its challenge to the Appellants' standing.

On August 5, 2003, the Board conducted a Site Visit of Kent Pond and its surroundings in connection with the consolidated appeals.

On October 14, 2003, the Vice-Chair convened a second prehearing conference in Montpelier, Vermont, which resulted in the issuance of a Second Prehearing Conference Report and Order (Second Prehearing Order) on December 19, 2003. The Second Prehearing Order, among other things, set forth a schedule for the prefiling of witness lists, witness summaries, and exhibits, and established dates for a final prehearing conference and hearing. No prefiled testimony was required in this consolidated proceeding.

On January 15, 2004, the Board issued a proposed Site Visit Report and provided the parties until February 3, 2004, to file any objections, corrections or additional comments regarding this document. None of the parties filed objections or other comment. Accordingly, on February 17, 2004, the Board incorporated the Site Visit Report, without changes, into the record of this proceeding.

The parties prefiled their exhibits, lists of witnesses, and witness summaries in February and March 2004.

On March 25, 2004, the Vice-Chair convened a final prehearing conference in Montpelier, Vermont. On this same day, the Appellants filed a Motion for Summary Judgment. On March 26, 2004, a Final Prehearing Conference Report and Order (Final Prehearing Order) was issued, memorializing the Vice-Chair's rulings on evidentiary matters, referring the Motion for Summary Judgment to the full Board for decision, and establishing a hearing day agenda.

On March 30, 2004, ANR filed a Memorandum in Opposition to the Appellants' Motion for Summary Judgment.

A merits hearing in this matter was held on March 30, 2004, in Rutland, Vermont, with Chair John F. Nicholls presiding. As a preliminary matter, the Board heard oral argument on Appellants' Motion for Summary Judgment, deliberated, and denied that Motion. The Board then proceeded to a merits hearing. The parties participating in this proceeding were:

Appellants Michelle Meadows Management, LLC, Michelle Werle and Mark F. Werle, Esq., represented by Mark F. Werle, Esq., Ryan Smith & Carbine, Ltd., Rutland, Vermont;

Appellant Noyes Family Properties, Inc., represented by Mark F. Werle, Esq.²; and Agency of Natural Resources, represented by David C. Englander, Esq., and Stephen K. Hill, Esq., for Applicant Department of Fish and Wildlife, ANR.

On April 12, 2004, the Appellants filed proposed Findings of Fact and Conclusions of Law. On that same date, ANR filed proposed Findings of Fact, Conclusions of Law, and Order. On April 13, 2004, the Appellants filed a revised page 18 for its proposed Findings of Fact and Conclusions of Law. On April 19, 2004, ANR filed a Reply to Appellants' Findings of Fact and Conclusions of Law. On that same date, the Appellants filed a Reply Memorandum in response to ANR's proposed Findings of Fact, Conclusions of Law, and Order.

The Board deliberated in this matter on March 30, April 20, and May 11, 2004. On May 11, 2004, the Board declared the record complete and adjourned the hearing. This matter is now ready for decision.

II. ISSUE

Whether the proposed encroachment will adversely affect the public good, pursuant to 29 V.S.A. § 405(b).

III. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

To the extent that any proposed Findings of Fact are explicitly included below, they are granted; otherwise, they are denied. See Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corporation, 167 Vt. 228, 241-42 (1997); In re: Village of Hardwick Electric Department, 143 Vt. 437, 445 (1985).

1. Kent Pond is located in Killington, Rutland County, Vermont. It is an artificial pond, approximately 102 acres in surface area, created by impounding Kent Brook. The State of Vermont holds title to all land under Kent Pond and certain flowage rights. The pond is a

² Noyes Family Properties, Inc., has been represented throughout this proceeding by attorney Werle and Gregory B. Craig, Esq., Williams & Connolly, LLP, Washington, D.C. Under the terms of the Prehearing Order at 11, attorney Werle was named as lead counsel for the consolidated appeals, with attorney Craig serving pro hac vice. Attorney Craig was not present for the merits hearing.

navigable water.

2. The eastern shore of Kent Pond is a man-made, earth-filled dam, built in 1965 by the Vermont Department of Fish and Game, the predecessor to DFW, pursuant to an Order of Permission issued by the Board on July 12, 1962. The purpose of the dam was to create an impoundment of water for the purpose providing fishing opportunities. Thundering Brook Road, a highway maintained by the Town of Killington, runs along the top of the dam.
3. DFW stocks Kent Pond with yearling brook trout (900/year) and rainbow trout (2000/year). In 1975, it introduced largemouth bass, which successfully reproduce in Kent Pond. Two surveys of anglers conducted by DFW in 1997 and 2002, involving a total of 155 anglers, revealed that 18 percent were bass anglers, 28 percent were trout anglers and the remaining 54 percent were generalist anglers.
4. Just off Route 100 and adjacent to Gifford Woods State Park, DFW owns and maintains a public access area on the western shore of Kent Pond. Just to the north of the Kent Pond inlet, DFW has constructed a parking area and a concrete ramp to enable the launching of boats into Kent Pond. Although the primary use of this access area is for boat launching, during its Site Visit the Board observed shoreline fishing and evidence of picnicking and other public uses at this access area. A sign board for posting boating and fishing notices is located on the south side of the parking area. There is a portable toilet at the access area.
5. Appellant Michelle Meadows Management, LLC, owns Mountain Meadows Lodge and shoreland property on the southeasterly side of Kent Pond. Appellant maintains a small wooden dock and beach to provide direct access to Kent Pond for the guests of the Lodge. Michelle Werle and Mark Werle are principals of Michelle Meadows Management, LLC. The guests of Mountain Meadows Lodge use Kent Pond for recreational purposes.
6. Appellants Mark and Michelle Werle own land and a residence across Thundering Brook Road from the Michelle Meadows Management, LLC, property. The Werles have an easement across the Michelle Meadows Management, LLC, property, providing them with direct access to Kent Pond by way of the dock and beach. Mark and Michelle Werle and their children use Kent Pond for recreational purposes.
7. Appellant Noyes Family Properties, Inc., owns land and a residence on the northeasterly side of Kent Pond. Appellant's land is separated from the Kent Pond shoreline by a narrow strip of land owned by the U.S. government. Thundering Brook Road provides access to the Appellant's property. Noyes Family members use Kent Pond for recreational

purposes.

8. On April 4, 1991, the General Assembly of the State of Vermont enacted H.114, an Act Relating to Fishing Areas, Act. No. 10 (1991 Sess.). The Act required that the Commissioner of DFW “develop a plan for making the fishing access program in the state of Vermont accessible to people with mobility impairments.” A document prepared by DFW, entitled “A Plan for Angler Accessibility” (Revised January 23, 2004) (hereinafter, the Plan), Attachment 3, identifies Kent Pond as a site for a proposed “wheelchair” accessible facility. According to Attachments 1 and 2 of the Plan, there is only one other handicapped-accessible fishing facility in Rutland County, and that exists in distant Castleton, Vermont.
9. DFW proposes to construct a so-called “universal” fishing platform for the mobility-impaired on the eastern shore of Kent Pond (Project). The purpose of the Project is to provide ADA-accessible, improved shore-based fishing access to the public pursuant to the General Assembly’s 1991 directive and the Plan.
10. The fishing platform will be located on Kent Pond’s earthen dam, between Thundering Brook Road and the pond, approximately 42 feet south of the pond’s concrete outlet structure. This location was selected in order to provide handicapped anglers with ready access to deep water casting and the opportunity to catch both bass and trout.
11. The fishing platform will be 160 square feet in area. The platform will extend only 5.5 feet into the pond along 20 feet of shoreline. The ADA-accessibility requirements for slope and grade and also the space requirements for wheelchairs have dictated the design and size of the proposed fishing platform.
12. To construct the fishing platform, an area approximately 10 feet into the pond and 30 feet along the shore will be excavated. Armor stone will be placed on 6 inches of dense crushed stone, which will be placed on filter fabric. Dense crushed stone will be used for backfill landward of the armor stone for drainage. The top of the armor stone will be covered with 12 inches of reinforced concrete. Gravel will be used to bring the existing slope of the dam up to the elevation of the fishing platform along the entire 20-foot length of the platform.
13. Bituminous concrete pavement will extend from the edge of the existing road pavement to the platform, a distance of 8 feet, sloping up to the platform at a grade of 2.5 percent to prevent runoff from Thundering Brook Road from draining onto the platform. A total of three bollards, posts 7-feet long with a diameter of 6 inches, will be filled with concrete and imbedded vertically in the concrete pavement to 4 feet below grade, for the purpose of protecting anglers and the platform itself from vehicles traveling on the road.

14. Stone fill will extend into the pond another 4 feet in front and along 10 additional feet of shoreline as necessary support for the platform. The Project will therefore alter a total of 285 square feet of existing pond bottom; 110 square feet will be covered with the fishing platform structure and 175 square feet of existing dam embankment that will be replaced with Type II stone.
15. A silt screen curtain will be placed in the water around the perimeter of the work area prior to any work being conducted in the water. The silt curtain will contain any turbidity due to construction activities. The stone fill will be free from silt, clay and other organic material. Fluid concrete will not be placed in the pond.
16. Approximately 285 square feet of existing pond bottom will be altered, including the loss of aquatic habitat in a near-shore area of 110 square feet. The 175 square feet of Type II stone fill will provide new rocky bottom habitat.
17. The shoreline vegetation on the existing dam embankment consists of mown grass. Vegetation with a larger root structure, such as small trees and shrubs, threatens the integrity of earthen dams and is therefore routinely cut or removed. Shoreline vegetation around other areas of the pond consists primarily of woodland and some wetlands vegetation, as observed by the Board on its Site Visit.
18. While DFW/ANR surveys indicate that there are aquatic plants along the shoreline on the eastern side of the pond, the plant beds are in fact generally located in deeper water.
19. There are no known occurrences of rare or irreplaceable natural areas or threatened and endangered animals or plants in the area impacted by the Project.
20. Summer recreational uses of Kent Pond include swimming, kayaking, canoeing and fishing. In winter, the pond is used for cross-country skiing, dog-sledding, and snowshoeing.
21. Observations during angler surveys and annual electro-fishing surveys (mid-June) indicate that the majority of shoreline fishing on Kent Pond occurs along the dam where the fishing platform is to be placed. Public access to the pond by handicapped, shore-based anglers will be enhanced by the construction of the ADA-accessible fishing platform.
22. The dam, road, and outlet structure for Kent Pond are currently visible from the pond and public access area on the westerly side of the pond. The proposed fishing platform will also be visible from these locations. Based on the observations the Board made during its Site Visit on August 5, 2003, the proposed fishing platform will not be visible during at least the months of July and August from Mountain Meadows Lodge or the Lodge's

backyard where weddings are performed.

23. In response to public comment concerning aesthetic concerns, DFW modified the design of the Project to reduce the size of the fishing platform from 8 feet by 30 feet to 8 feet by 20 feet. It also changed the safety handrail and posts on top of the platform so that they would be made of timber rather than steel.
24. The Town of Killington was notified of the proposed fishing platform and raised no issues concerning Project conformity with the town zoning ordinance. The Town of Killington has no shoreland zoning ordinance.
25. The Project is not in conflict with any state plan brought to the Board's attention.

IV. CONCLUSIONS OF LAW

A. Jurisdiction

Title 29 V.S.A. ch. 11 addresses the management of "lakes and ponds which are public waters of Vermont and the land lying thereunder." 29 V.S.A. § 401. "Public waters" is defined in 29 V.S.A. § 402(7) as meaning "navigable waters excepting those waters in private ponds and private preserves as set forth in chapter 119 of Title 10." Although it is an artificial body of water, Kent Pond is not a private pond because: (1) the Department of Fish and Game, the predecessor to DFW, actually constructed the impoundment creating the pond; (2) the State of Vermont owns the lands underlying the pond; and (3) the DFW regularly stocks the waters of Kent Pond. *Cf.* 10 V.S.A. § 5210 (Private Pond). Kent Pond is also a "navigable water," as that term is defined in 29 V.S.A. § 402(4) ("those waters as defined in section 1422(4) of Title 10").³ The Board therefore concludes that Kent Pond is "public waters" within the meaning of 29 V.S.A. § 402(7).

The DEC is charged with the management of lakes and ponds which are public waters; it may exercise its authority in accordance with 29 V.S.A. ch. 11 and "the rules of the Water Resources Board." 29 V.S.A. § 401. DEC is authorized to issue permits for certain encroachments into lakes and ponds that are public waters and on the lands lying thereunder pursuant to 29 V.S.A. §§ 404 and 405. A permit must be obtained before construction of a new encroachment, with certain limited exceptions not relevant here. 29 V.S.A. § 403. The Board is authorized to

³ Title 1422(4) defines a "navigable water" as meaning, in relevant part, "all streams, ponds, flowages and other waters within the territorial limits of Vermont, including the Vermont portion of boundary waters, which are boatable under the laws of the state." Kent Pond is boatable as evidenced by Findings 4 and 20.

hear appeals of DEC's decisions granting or denying such permits pursuant to 29 V.S.A. § 406(a) and (b). Accordingly, the Board has jurisdiction to hear the present appeals of the Permit issued by DEC for the ADA-accessible fishing platform.

The Board notes that its jurisdiction is limited. Both the DEC and the Board may review and regulate the impact of the actual encroachment only under 29 V.S.A. ch. 11, not ancillary development on land. This is because for the purposes of 29 V.S.A. ch. 11, jurisdiction of the DEC and the Board "shall be construed as extending to all lakes and ponds which are public waters and the lands lying thereunder, which lie beyond the shoreline or shorelines delineated by the mean water level of any lake or pond which is a public water of the state." 29 V.S.A. § 401. Furthermore, these agencies may only regulate "the placement of any material or structure" in a lake or pond which is a public water, or the alteration of the lands underlying such waters, or the placement of "any bridge, dock, boat-house, cable, pipeline or similar structure beyond the shoreline as established by the mean water level of any lakes and ponds which are public waters under the jurisdiction of the board." 29 V.S.A. § 403(b). Therefore, DEC and the Board do not have jurisdiction under 29 V.S.A. ch. 11 to regulate land uses that may be ancillary to an encroachment, such as parking areas, public toilets, and trash facilities. Indeed, as shall be explained further below, jurisdiction over land uses adjacent to public waters are intended to be regulated by other means, such as municipal zoning ordinances that include shoreland zoning provisions. See 29 V.S.A. § 405(b); 10 V.S.A. 1425 (Shoreland protection bylaws); 24 V.S.A. § 4411 (Municipal zoning bylaws; regulation of shorelands). State regulations may also apply to such land development, for example, the Vermont Wetland Rules.

B. Standard and Scope of Review

Appeals to the Board pursuant to 29 V.S.A. § 406(b) are statutorily required to be de novo contested case proceedings. In a de novo proceeding, the Board is required to hear the matter as if there had been no prior proceedings. Re: Killington, Ltd, Docket Nos. MLP-97-09 and WQ-97-10, Findings of Fact, Conclusions of Law, and Order at 39 (Aug. 14, 1998) (hereinafter Killington). DFW, as the Applicant, bears the burden of proof and persuasion. In re: Kevin Rose and the Champlain Kayak Club, MLP-96-01, Findings of Fact, Conclusions of Law, and Order at 11 (Nov. 7, 1996) (hereinafter Champlain Kayak Club). The Board must issue an order affirming, modifying, or reversing the action of the DEC pursuant to 29 V.S.A. § 406(c).

The Board ordinarily restricts the scope of its review to the issues identified by the appellant "unless the Board determines that substantial inequity or injustice would result from such limitation." Board Rule of Procedure 19(C). In this consolidated proceeding, the Appellants, in their respective Notices of Appeal, identified a number of issues which, at the initial prehearing conference, the presiding officer concluded were within the ambit of the public good analysis

under 20 V.S.A. § 405(b).⁴

Neither in their Notices of Appeal nor at the prehearing conference did the Appellants ask the Board to conduct a Public Trust Doctrine analysis. Accordingly, the Prehearing Order, issued on June 3, 2003, identified only one area of inquiry: whether the Project would have an adverse affect on the “public good,” pursuant to the analysis in 29 V.S.A. § 405(b). Since no party filed a timely objection to the issue statement as framed in the Prehearing Order, that statement in the Prehearing Order became final and binding as of June 13, 2003. Prehearing Order, Section XIII., Item 14 at 13. Nevertheless, in its prefiled witness summary for Stephen Hanna, in the evidence it offered at the hearing and in its final briefing, ANR raised the topic of the Project’s conformance with the Public Trust Doctrine. The Appellants responded in turn with their own argument on this subject. Accordingly, the Board determines that in the interest of justice it will briefly address the question of the Project’s impacts under the Public Trust Doctrine. However, it will do so, consistent with its past practice, of evaluating a project’s impacts upon the “public good” before considering its impacts on public trust uses. Killington at 53-57; Champlain Kayak Club at 11.

C. Public Good Analysis

Pursuant to 29 V.S.A. § 403(a), “[n]o permit shall be granted if the [proposed] encroachment adversely affects the public good.” The “public good” is defined at 29 V.S.A. § 402(6) as “that which shall be for the greatest benefit of the people of the state of Vermont.” To determine the “public good,” the Board applies the standards set forth in 29 V.S.A. § 405(b). That statute states in relevant part:

In determining whether the encroachment will adversely affect the public good, the [Board] 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 uses, including fishing and swimming, consistency with the natural surroundings and consistency with municipal shoreland zoning ordinances or any applicable state plans.

While the Board must consider the public good elements listed in 29 V.S.A. § 405(b), it is not required to make an affirmative finding and conclusion with regard to each “public good” element. Killington at 54. Rather, 29 V.S.A. § 405(b) sets out the elements to be considered, and no single element is dispositive of whether the encroachment adversely affects the “public good.” Id.

⁴ For example, the Appellants objected to the location and scale of the Project, on the basis, at least in part, that the Project as proposed is allegedly “inconsistent with the natural surroundings.”

ANR has demonstrated that the proposed encroachment will not have an adverse impact on water quality. The various measures undertaken during the construction of the platform, including the use of a silt curtain, will contain short-term turbidity created by the in-pond construction work. No fluid concrete will be placed in the pond, and fill material will be free of silt, clay and organic material. The Appellants have failed to successfully rebut ANR's evidence that it has taken the necessary measures to assure that there will be no short- or long-term adverse impacts on water quality, either in Kent Pond or in waters downstream.

Some minimum aquatic habitat, consisting of a total of 285 square feet of existing pond bottom, will be lost or altered as a result of the proposed encroachment. The proposed encroachment, however, will not have an adverse impact on fish and wildlife habitat overall in Kent Pond. The Board observed that there is little aquatic vegetation presently on the inner face of the Kent Pond dam, where the fishing platform is proposed to be located. The Project will not involve the cutting of overhanging trees or shrubs, as the shoreline vegetation on the dam consists of mown grass. The Board therefore concludes that ANR has provided sufficient evidence to demonstrate that the Project as designed will not adversely affect the fish and wildlife habitat of the Kent Pond.

With respect to public uses such as navigation and recreation, including boating and swimming, ANR has demonstrated that the Project will have only a minimal impact at best. The encroachment will extend only 5.5 feet beyond the shoreline into the pond. Moreover, the Project is designed to enhance recreational fishing opportunities at Kent Pond, by providing handicapped persons with a safe and accessible access area, convenient to waters with both bass and trout fisheries. Thus, the Board concludes that the Project will not have an adverse impact on navigation and recreation and, indeed, will have a positive impact on recreational fishing.

Appellants have expressed greatest concern that the Project is excessive in scale and poorly located for its intended purpose. Part of their argument appears to be that the proposed encroachment, as designed, is not consistent with Kent Pond's natural surroundings, and that an alternative site, closer to the existing public access area, would be a better and less obtrusive location for the Project. The Board, however, has no authority to re-design and re-locate the Applicant's Project. It may only grant or deny a permit for the Project proposed by the Applicant and appealed to the Board. The Board notes that DFW has already reduced the size of its proposed fishing platform in response to public comment. It also has changed some of the materials used for construction, incorporating more wood and timber, to mitigate the visual impacts of the Project. While much of Kent Pond is surrounded by woodland, the Project as designed will be located in the open, along the inner face of the earthen dam on the east side of Kent Pond. This site was specifically selected because in the opinion of DFW staff it provides the best opportunities for deep water casting by handicapped persons, since within a short distance of the shoreline the depth of water in the pond increases rapidly. Thus, the proposed ADA-accessible fishing platform is as small and unobtrusive as it can be, given its stated purpose, and DFW has attempted to mitigate the Project's aesthetic impact, without compromising that

purpose. Thus, while the Project will be visible from the existing public access area and from the pond itself, this fact alone does not mean that the Project adversely affects the “public good.”⁵

Finally, the Town of Killington has no municipal shoreland zoning regulation. Such a regulation could, among other things, control the location of buildings and other structures in the interest of conserving the scenic beauty of shorelands. See 24 V.S.A. § 4411. However, without such a regulation in place, the Board cannot conclude that the Project is inconsistent with any restrictions specifically governing land use development adjacent to Kent Pond. No party has brought to the Board’s attention facts that would suggest the Project is not consistent with any state plan. Indeed, the Project appears to be entirely consistent with the only state plan brought to the Board’s attention in this proceeding, “A Plan for Angler Accessibility” referenced in Finding 8, and the Project is specifically listed in Attachment 3 of the Plan which identifies projects proposed for construction.

In their proposed Findings of Fact and Conclusions of Law, the Appellants argue that the Project fails to comply with the DEC’s “Interim Procedures for the Issuance or Denial of Encroachment Permits” (hereinafter, DEC’s Interim Procedures) and therefore the Board should conclude that the Project will have an adverse affect on the “public good.” While the DEC Interim Procedures may have provided guidance to Water Quality Division staff in assessing the merits of the Project, the Board observes that they do not have the force of law. Indeed, the Appellants were specifically instructed at the initial prehearing conference that the law to be applied in this de novo proceeding is the law set forth in 29 V.S.A. § 405(b). Prehearing Order at 8. Accordingly, the Board has conducted its “public good” analysis applying the statute only.

Based upon the above findings and analysis, the Board concludes that the Project will not adversely affect the “public good.”

D. Public Trust Doctrine Analysis and Impact on “Public Resources”

As noted above, the Appellants did not ask the Board to conduct a Public Trust Doctrine analysis in their Notice of Appeal or at the initial prehearing conference. Thus, this matter was not identified as an issue for decision in the Prehearing Order. Nevertheless, ANR raised the issue in its case-in-chief and briefed the issue and the Appellants have argued that the Board has a fiduciary obligation to protect “public resources,” meaning all “assets, possessions and means of the public,” by taking into consideration the alleged impacts of the Project on public funds, local

⁵ Additionally, the Board specifically found during the course of its Site Visit that the Project would not be visible from Mountain Meadows Lodge and its backyard, at least during the summer months. Also, given their respective locations, it is not likely that the Project would be visible from the residences of Mark and Michelle Meadows and the Noyes Family.

police protection, and garbage removal.⁶ Appellants' proposed Findings of Fact and Conclusions of Law at 14-16. Accordingly, the Board concludes that a brief response is required.

29 V.S.A. § 401 states: "Lakes 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." Killington at 55; In re: Dean Leary, Docket No. MLP-94-08, Memorandum of Decision at 4 (Apr. 13, 1995) (hereinafter Leary). Its duty to conduct a public trust analysis under 29 V.S.A. ch. 11 extends to determining whether a proposed encroachment will have a detrimental effect on public trust *uses*, not on "public resources" generally. In making this determination, the Board relies on the guidance provided by case law both from Vermont and other jurisdictions recognizing the Public Trust Doctrine. Killington at 56. In many instances, the uses identified in 29 V.S.A. § 405 are identical to the uses protected by the Public Trust Doctrine. Killington at 55-56; In re: Dean Leary, Docket No. MLP-94-08, Memorandum of Decision at 4 (Apr. 13, 1995); In re: Aquatic Nuisance Control Permit #C93-01, Docket No. WQ-93-04, Memorandum of Decision and Dissent (Sept. 10, 1993; rev. Sept. 24, 1993). Once the Board has identified the public trust uses of a given body of water, the Board weighs the impact of the encroachment on public trust uses with the encroachment's public benefits. Killington at 55-57.

The public trust uses of Kent Pond include boating, swimming, and fishing. See Findings 4 and 20. They may also include certain winter uses of the pond. Finding 20; Killington at 56. There is no credible evidence that the Project will have more than a minimal impact on any of these uses, and this impact does not rise to the level of being detrimental to those uses. On the other hand, the Project is being constructed by a state agency for the purpose of providing an important public benefit – handicapped-accessible shoreline fishing in Rutland County, where only one such area presently exists, in distant Castleton, Vermont. See "A Plan for Angler Accessibility" referenced in Finding 8, Attachments 1 and 2.

The Board therefore concludes that the Project will not be detrimental to public trust uses at Kent Pond.

E. Conclusion

⁶ The Appellants first raised their "public resources" argument at the hearing on March 30, 2004, and again in their proposed Findings of Fact and Conclusions of Law. In their proposed Conclusions of Law, the Appellants raised the argument in the context of application of DEC's Interim Procedures, § 4(b)(3). The Board concludes that while the Interim Procedures are not applicable in this case, the Appellants' argument touches upon the question of what "public resources" must be considered and protected by the Board in encroachment permit appeals under past Board precedent addressing application of the Public Trust Doctrine.

The Board concludes that DFW has met its burden of demonstrating that the Project will not have an adverse effect on the “public good.” Although the Board was not specifically asked to address the Project’s conformance with the Public Trust Doctrine, the Board concludes that the Project also will not have a detrimental impact on public trust uses. Indeed, the Project will provide important public benefits.

The Board recognizes that the Project may have ancillary land use impacts and associated financial burdens on public services, including municipal services. However, as noted above the Board’s jurisdiction and therefore its inquiry is limited to consideration of Project’s impacts on the “public good” and “public trust uses” as defined by 29 V.S.A. ch. 11. Evidence concerning past and anticipated problems with area policing to control noise and other disturbances of the peace, to assure adequate trash pickup, and to address concerns about proper sanitation and vandalism are not relevant to the Board’s inquiry under 29 V.S.A. ch. 11. Concerns about these problems may, however, be appropriately directed to municipal officials and the Commissioner of DFW outside the context of this proceeding.

V. ORDER

For the foregoing reasons, the Board hereby orders:

1. The Secretary of ANR’s decision to issue Management of Lakes and Ponds Encroachment Permit #2002-016 is affirmed.
2. Jurisdiction is returned to the ANR.

Dated at Montpelier, Vermont, this 12th day of May, 2004.

WATER RESOURCES BOARD
By its Chair,

/s/ John F. Nicholls
John F. Nicholls, Esq.

Concurring:
Lawrence H. Bruce
Michael Hebert
David Blythe, Acting Member

* Note: Vice-Chair Roberts did not attend the hearing in this matter and therefore did not participate in deliberations and the decision in this matter.

