

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
Docket No. 157-12-16 Vtec

Costco Act 250 Permit Amend. Jurisdictional Opinion (#4-252)
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ENTRY REGARDING MOTION

Act 250 Jurisdictional Opinion (157-12-16 Vtec)

Title: Motion for Summary Judgment Concerning Standing (Motion 4)

Filer: Cross-Appellant Costco Wholesale Corp.

Attorney: Mark G. Hall

Filed Date: June 15, 2017

Response in Partial Support filed on 07/17/2017 by Attorney Gregory J. Boulbol for
the Vermont Natural Resources Board

Response in Opposition filed on July 17, 2017 by Attorneys Jon T. Anderson and Alexander J.
LaRosa for

Appellant R.L. Vallee

Reply in Support of SJ Motion filed on 08/21/2017 by Attorney Mark G. Hall for
Cross-Appellant Costco Wholesale Corp.

The motion is MOOT.

The pending appeal was filed by Appellant R.L. Vallee (“Vallee”) from Jurisdictional Opinion #4-252 issued by the Coordinator for the District 4 Environmental Commission (“District Coordinator”), who concluded that certain revisions to the stormwater treatment system proposed by Costco Wholesale Corp. (“Costco”) did not constitute a change under Act 250 Rule 34(A) that was material enough to require Costco to apply for and receive an amendment to its Act 250 Permit.

Costco’s latest Act 250 Permit (No. 4C0288–19C), issued by the District Commission in 2013, authorized certain expansions at the already-developed Costco property in Colchester, Vermont. Vallee appealed that permit amendment determination to this Court, together with appeals from several other determinations concerning Costco’s proposed expansions. After trial, this Court affirmed the various permit determinations in Costco’s favor, including improvements to its proposed stormwater treatment system. When Vallee and other parties appealed this Court’s merits decision, the Vermont Supreme Court affirmed. In re Costco, 2016 VT 86 (Aug. 5, 2016).

After the conclusion of that litigation, Costco made a change to the manner in which the already-treated stormwater would be transmitted to Sunnyside Brook, which is recognized as a state water. That change required Costco to seek an amendment to its stormwater permit.¹ When the Vermont Agency of Natural Resources (“ANR”) granted Costco an administrative amendment to its stormwater permit (referred to as Permit No. 4114-9015.2A), Vallee appealed that determination to this Court. After a merits hearing, this Court issued a Judgment Order affirming ANR’s administrative amendment of Costco’s stormwater permit. See Costco Stormwater Permit Amendment Appeal, No. 84-7-15 Vtec (Vt. Super. Ct. Envtl. Div. Jul. 29, 2016) (Durkin, J.). When no party to that appeal, including Vallee, appealed our Judgment Order, ANR’s administrative amendment became final.

Vallee secured party status in the Act 250 permit appeal under Act 250 criteria 1, 1(A), 1(B), 1(E), 1(G), and 4.² Vallee also secured party status in the Stormwater Permit Amendment Appeal before this Court.

In the appeal now pending before this Court (Docket No. 157-12-16 Vtec), Costco challenges Vallee’s status as an interested person that has a right to appeal the jurisdictional opinion issued by the District Coordinator. In response, Vallee principally relies upon its status as an interested party in the prior appeals. We consider a challenge to standing as requiring an independent inquiry in each new litigation. See In re Marcelino Waste Facility, No. 44-2-07 Vtec, slip op. at 4 (Vt. Envtl. Ct. Mar. 21, 2008) (Durkin, J.). Given that the pending appeal concerns changes that we concluded were minor in the Stormwater Permit Amendment Appeal, and that Vallee has presented no evidence in the pending appeal as to how the outflow changes that we have determined to be minor could possibly have any impact upon Vallee, we have difficulty agreeing with Vallee’s assertion that it has standing in this independent appeal.

However, given the long history and multiple chapters of the litigation concerning the proposed Costco expansion plans,³ this Court has chosen to address the various substantive motions in this current appeal. Issued contemporaneously with this Order is a Decision that addresses the motion for summary judgment filed by the Vermont Natural Resources Board concerning the sole legal issue raised in Vallee’s Statement of Questions. We have also today issued two separate Entry Orders addressing motions filed by Vallee and Costco on that same singular legal issue.

For all these reasons, we conclude that Costco’s motion challenging Vallee’s standing to file this appeal of the District Coordinator’s Jurisdictional Opinion (#4-252) is now **MOOT**, given that we have rendered judgment upon the sole legal issue presented in this appeal. A Judgment Order accompanies this Entry Order.

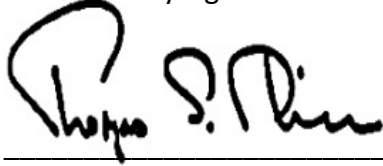
¹ The previously-approved stormwater permit is Permit No. 4114-9015 and is titled “Vermont Department of Environmental Conservation Authorization to Discharge under General Permit 3-9015.”

² See 10 V.S.A. § 6086(a) for a complete list of the Act 250 criteria and sub-criteria.

³ The pending appeal represents the fourteenth appeal presented to this Court of permit or other determinations concerning the proposed Costco expansion plans.

So Ordered.

Electronically signed on December 08, 2017 at Newfane, Vermont, pursuant to V.R.E.F. 7(d).

A handwritten signature in black ink, appearing to read "Thomas S. Durkin", written over a horizontal line.

Thomas S. Durkin, Superior Judge

Notifications:

Jon T. Anderson (ERN 1856), Attorney for Appellant R.L. Vallee, Inc.

Alexander J. LaRosa (ERN 5814), Co-Counsel for Appellant R.L. Vallee, Inc.

Gregory J. Boulbol (ERN 1712), Attorney for the Vermont Natural Resources Board

Mark G. Hall (ERN 2537), Attorney for Cross-Appellant Costco Wholesale Corp.