



February 18, 2021

Submitted via email to Misha.Cetner@vermont.gov

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RE: Public Comments on Permit Number 3027-LEP

Dear Misha:

Introduction

The Lake Champlain Committee (LCC), Conservation Law Foundation (CLF), and Vermont Natural Resources Council (VNRC) (Collectively the “Commenters”) have reviewed the application and draft permit decision for Permit Number 3027-LEP, described as the *M/V Adirondack Artificial Reef Project*. The Commenters have significant questions and concerns about the proposal to sink the *M/V Adirondack* ferry in Lake Champlain. As set forth below, in light of the questions about the impacts of the project, the Commenters believe that the Vermont Department of Environmental Conservation (VTDEC) does not have sufficient evidence to determine that the proposed project does not adversely affect the public good.¹

It is well established that the applicant for a permit bears the burden of proof to establish compliance with all applicable criteria: *Kent Pond*, MLP-03-10 and MLP-03-11 (Cons.), Findings of Fact, Conclusions of Law, and Order (05/12/04).² The burden of proof includes both the burden of production and burden of persuasion: *City of South Burlington and Town of Colchester*, WQ-03-02, Findings of Fact, Conclusions of Law, and Order (12/29/03).³ The burden of production means the burden of producing sufficient evidence upon which VTDEC can make positive findings that the project complies with the law.⁴ The applicants for the project have not met the burden of proof and VTDEC does not have sufficient evidence in the record that the proposed project meets the applicable criteria.

¹ 29 V.S.A. § 403 (a)(3).

² <https://anrweb.vt.gov/PubDocs/DEC/Decisions/wrp/2004/mlp03-10&11dec.pdf>.

³ <https://anrweb.vt.gov/PubDocs/DEC/Decisions/wrp/2003/wq03-02-fco.pdf>.

⁴ *Id.*

Moreover, the Commenters submit that VTDEC should employ the precautionary principle when determining whether a project adversely affects the public good. The Lakes and Ponds Encroachment permit administered pursuant to 29 V.S.A. § 403 (a)(3) requires VTDEC to manage public trust waters in a manner that benefits all Vermonters. When unanswered questions exist regarding the impact of a project on public trust waters and effects on the public good, VTDEC must follow the precautionary principle and exercise caution in the face of uncertainty of the impacts of the proposed project.

Specific Comments

1. Responsibility for the Project

The Commenters have questions about who the applicant and co-applicants are for the project. The principal applicant for the project is the Vermont Division for Historic Preservation. This raises several questions: Does the State of Vermont currently own the ferry? Will the State be solely responsible for complying with any permit issued for the project and any liability that may stem from impacts from the project if a permit is granted?

2. Public Good

As noted above, the applicants have the burden to prove that the proposed project does not adversely affect the public good. Under Vermont's Management of Lakes and Ponds statute, 29 V.S.A. § 403(a)(3), "No permit shall be granted if the encroachment adversely affects the public good."⁵ 402(6) defines "public good" as, "that which shall be for the greatest benefit of the people of the State of Vermont."⁶ The statute goes on to say, "In determining whether the encroachment will adversely affect the public good, the Department 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..."⁷

In re Svendsen Dock Extension, the Vermont Environmental Court confirmed that, "The State has expressly reserved the right to manage Vermont lakes and ponds... for the greatest benefit of the people of Vermont." The Court went on to recognize that this responsibility is vested in the VTDEC.⁸ In another case involving a dock extension, *In re Champlain Marina, Inc.*, the Court elaborated that the reference to "public good" made it "quite possible that the Legislature intended to incorporate all Vermont citizens into this statute's 'zone of interests' for purposes of standing."⁹

The case law referencing the public good standard suggests that the language should be taken in plain meaning. The lakes and ponds in Vermont should be managed to achieve the *greatest benefit* for all the people in Vermont. The proposed sinking of the *M/V Adirondack* would benefit a small segment of the public: the diving community. However, the cumulative effects from sinking the ferry could adversely affect the much larger segment of Vermonters who use the Lake for other purposes.

⁵ Vt. Stat. Ann. tit. 29, § 403(a)(3).

⁶ Vt. Stat. Ann. tit. 29, § 402(6).

⁷ Vt. Stat. Ann. tit. 29, § 405(b).

⁸ *In re Svendsen Dock Extension Variance*, No. 1-1-09VTEC, 2009 WL 4396711 (Vt.Env'tl. Ct. Oct. 14, 2009).

⁹ *In re Champlain Marina, Inc.*, No. 28-2-09VTEC, 2009 WL 4396755 (Vt.Env'tl. Ct. July 31, 2009).

3. Public Awareness & Outreach

A public meeting was held by the permit applicants on March 5, 2020, but it's not clear how extensive the outreach was to alert members of the public. A 1998 Vermont Supreme Court case outlines that the meeting should not sway the VTDEC's decision one way or the other: "The encroachment permit is not granted or denied at the public information meeting. Rather, the purpose of the meeting is to determine the impact of the encroachment on the public interest."¹⁰

The timeline for this project did not provide adequate opportunity for public review. No public meeting was scheduled during the public comment period (January 19, 2021 to February 18, 2021) associated with the draft decision. The authors of these comments could not request a public meeting within the 14 days following the draft decision date, as we did not become aware of the decision until February 3, 2021, after the 14-day window had passed. Additionally, members of the public were and continue to be significantly inhibited from becoming aware of or participating in the VTDEC's public comments process due to the COVID-19 pandemic.

4. Precedent

The Commenters recognize the cultural history of the *M/V Adirondack*, however its preservation via sinking should not come at the expense of our public resource: Lake Champlain. This is a precedent-setting project in the Lake; no vessel has purposefully been sunk to create an artificial reef and therefore the proposed project has the potential to set a deleterious precedent for littering the bottom of Lake Champlain with obsolete vessels.

According to the Lake Champlain Maritime Museum, there are currently 60 shipwrecks and miscellaneous sites resting on the bottom of Lake Champlain.¹¹ Ten of these wrecks are classified as Vermont Underwater Historic Preserves.¹² There is not a shortage of vessels to serve as artificial reefs or dive sites.

Moreover, if the ferry is sunk, the vast majority of people will not be able to view the ferry under Lake Champlain. If historic preservation of the ferry is the goal, preservation of the ferry on land, creation of an in-water static display, or in-depth documentation of the ferry's history would be better ways to achieve this goal than sinking the ferry in public trust waters.

In addition, the Commenters are concerned about the cumulative impact of sinking boats or other structures into the Lake. If VTDEC determines that sinking this ferry does not adversely affect the public good without addressing the issues raised in this comment, what guidance and parameters have they set to limit the number of boats or structures that may be disposed of in Lake Champlain?

5. Evaluation of Practical Alternatives to Proposed Action

The permit requires that the applicants describe "less intrusive alternatives" to the project that have been considered. Although there are other means to dispose of defunct ferry ships, such as scrapping the material, the applicants offer no alternatives in their permit application. Here, the applicants maintain that the purpose of the project is to create, "an artificial reef/Underwater

¹⁰ *Parker v. Town of Milton*, 169 Vt. 74, 80, 726 A.2d 477, 482 (1998).

¹¹ <https://www.lcmm.org/archaeology/shipwrecks/>.

¹² <https://www.lcmm.org/archaeology/vermont-underwater-historic-preserves/>.

Preserve.”¹³ The applicants describe the alternatives to the specific site chosen for the sinking; however, no alternative means of disposing of the ferry are addressed. The applicants present the creation of an historic diving site and artificial reef as the only goals of the project, with disposal of the non-functional ferry as an ancillary benefit.

The Vermont Historic Site webpage maintains that the most cost-effective option is to scrap the ferry and sell the parts. The major downside to this option is that the historic legacy of the *M/V Adirondack* would be lost; however, this option, among others listed on the Historic Site’s FAQ page, should be investigated further because although they don’t create an artificial reef or dive site, they will serve as less environmentally hazardous alternatives.¹⁴

6. Historic Significance

We question the historic designation of the *M/V Adirondack* as to whether it was modified during its period of significance on Lake Champlain—when it began its service on the Lake in 1954 until present. When the vessel arrived at Lake Champlain, what did it look like, has it retained all of those character-defining features post-arrival, and will it retain those features if it is sunk? All of the other boats in the Underwater Historic Preserve (UHP) were sunk in their original form.

7. Water Quality

Questions remain about the cumulative impacts of lead, polychlorinated biphenyls (PCBs), and other debris that may breakdown and diffuse into Lake Champlain from the *M/V Adirondack*, even after following the *National Guidance: Best Management Practices for Preparing Vessels Intended to Create Artificial Reefs produced by the, U.S. Environmental Protection Agency and U.S. Maritime Administration, May 2006*.¹⁵

The application highlights a difference between the *M/V Adirondack* and all of the other UHP vessels in the Lake—while the other historic vessels are wooden, the *M/V Adirondack* would be the first UHP vessel with a steel hull.¹⁶ The ecological unknowns associated with sinking a steel-hulled ship the size of the *M/V Adirondack* in Lake Champlain may represent research opportunities, but they may also pose threats to the underwater environment. Correspondence between Jonathan Eddy (the application preparer) and J. Ellen Marsden, Professor of Wildlife and Fisheries Biology at the University of Vermont, is included in the appendix to the permit application.¹⁷ The letter from Marsden to Eddy identifies several research opportunities, but also pitfalls of creating artificial wildlife habitat meant to attract divers and anglers. First, the ship may degrade natural habitat. Second, a lack of long-term assessments may not account for long-term environmental impacts of the sunken vessel. Third, the wildlife habitat created by the proposed artificial reef may not create habitat for new populations of fish but induce them to leave natural habitats. Marsden includes, “there is currently no funding in place to conduct a scientific evaluation of the impacts of the ferry.”¹⁸

¹³ https://anrweb.vt.gov/Pubdocs/DEC/ENB/SHORE/7542-3027_Lake%20EncroachmentApplication_AdminComplete.pdf.

¹⁴ <https://historicsites.vermont.gov/sites/histsites/files/documents/Adirondack%20Ferry%20Project%20FAQ.pdf>.

¹⁵ <https://www.epa.gov/sites/production/files/2015-09/documents/artificialreefguidance.pdf>.

¹⁶ *Id.*

¹⁷ https://anrweb.vt.gov/Pubdocs/DEC/ENB/SHORE/7542-3027_Appendices_LEP_FerryAdirondack.pdf.

¹⁸ *Id.*

With toxic contaminants we often learn after the fact that they cause more environmental harm than originally understood. We see no reason to put Lake Champlain at risk through the sinking of a vessel that contained lead and PCBs. If the applicants are able to meet the burden of proof in the future and address the questions raised in this comment, as a condition for the final permit issuance, VTDEC should require bonding for the non-State permit applicant, the Lake Champlain Transportation Company, in case of contaminant pollution, lake navigation issues, or other problems that may arise due to faulty engineering, analysis, or project implementation.

8. Long-term Monitoring

Again, if the applicants are able to meet the burden of proof in the future and address the questions raised in this comment, the Commenters advocate for long-term biological, chemical, and physical monitoring on and around the *M/V Adirondack*. Among the scientific community, little is known about the efficacy of vessels serving as artificial reefs in freshwater ecosystems, especially in Lake Champlain. In a 2015 peer-reviewed article published in the *Journal of Great Lakes Research*, McLean et al. state: “Our investigation underscores the need to develop standard protocols for monitoring the biological and physical attributes of artificial structures. Further, long-term monitoring is needed to assess the benefits of artificial reefs to fish populations and inform future artificial reef projects.”¹⁹

Additionally, the Commenters note that the Vermont Fish & Wildlife Department’s position on the *M/V Adirondack Artificial Reef Project* providing fish habitat is that: “This project would neither benefit or adversely impact fish and wildlife habitat. The structure would likely attract fish, but not truly be a benefit to fish and wildlife habitat as Champlain does not lack in habitat” (Pientka).²⁰ If a project of this nature moves forward in Lake Champlain, it warrants long-term monitoring; the State would have the responsibility to ensure the health of the Lake a year from now or 100 years from now.

9. Navigation & Recreation

The proposed site is a high boat traffic area and the safety of all Lake Champlain recreationists, from anglers to paddlers, must be protected. The Coast Guard deployed a temporary buoy to mark the proposed location of the vessel from September 6 to September 20, 2019.²¹ In order to fully comprehend the burden to navigation, a more thorough examination should be done. The aforementioned study lasted only two weeks and may not account for increased boat traffic at other times during the year, for example Fourth of July Weekend or Labor Day Weekend. We emphasize the necessity for proper safety measures to be considered and implemented at the site, if the final permit is approved, with all recreationists in mind.

Conclusion

For the reasons stated herein, the applicants for the proposed project have not met the burden of proof to demonstrate that sinking the ferry will not adversely affect the public good and therefore the Lakes and Ponds permit should be denied.

¹⁹ McLean, Mathew et al. “Artificial reefs and reef restoration in the Laurentian Great Lakes.” *Journal of Great Lakes Management*, vol. 41, no. 1, 2015, pp. 1-8. *ScienceDirect*, doi: <https://doi.org/10.1016/j.jglr.2014.11.021>.

²⁰ Pientka, Bernie. “Re: Inquiry, Potential for Artificial Reef to Provide Fish Habitat in Lake Champlain.” Received by Lauren Sopher, 14 April 2020. Email Exchange.

²¹ *Id.*

Sincerely,

A handwritten signature in black ink, appearing to read 'L. Sopher'.

Lauren Sopher
Director of Science and Water Programs
Lake Champlain Committee

A handwritten signature in black ink, appearing to read 'Zack Porter'.

Zack Porter
Lake Champlain Lakekeeper
Conservation Law Foundation

A handwritten signature in black ink, appearing to read 'Jon Groveman'.

Jon Groveman
Policy and Water Program Director
Vermont Natural Resources Council