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MEMORANDUM

To: Sen. Joe Benning
From: Michael O'Grady
Date: April 8, 2021
Subject: Public Trust and the Reefing of the M/V Adirondack

You have asked for a memo addressing the proposed sinking of the M/V Adirondack ferry to create an artificial reef in Lake Champlain. This memo will summarize the Public Trust Doctrine and how the General Assembly has delegated the Public Trust authority over encroachments to the Department of Environmental Conservation. The memo then discusses the vested rights doctrine in Vermont and how it may apply to the encroachment application to sink the ferry. In addition, the memo briefly discusses the claim that the sinking of the ferry is a water quality issue.

Public Trust Doctrine

The Public Trust Doctrine is an ancient doctrine with roots in Roman law.¹ In the United States, “[a]fter the American Revolution, the people of each state acquired the “absolute right to all . . . navigable waters and the soils under them for their own common use.””² Courts across have implemented this doctrine through the common law in every state³ and many states have enacted statutory or constitutional designations of the public trust in surface water.⁴

Under the common law public trust doctrine, the State, as trustee, holds navigable waters and submerged land beneath navigable waters in trust for the benefit of the people.⁵ The purpose of the public trust doctrine is to preserve for the public access to navigable waters for navigation,

¹ State v. Central Vermont Railway, 153 VT 337, 342 (1989).

² *Id.*, citing Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410, 10 L.Ed. 997 (1842).

³ See, e.g., Mineral County v. Lyon County, 473 P.3d 419 (Nev. 2020).

⁴ See, e.g. 29 V.S.A. § 401; North Carolina General Statutes Annotated § 113-131; Wisconsin Constitution Art. 9, § 1.

⁵ *Id.* See also Zachary C. Kleinsasser, 32 B.C. Env'tl. Aff. L. Rev. 421 (2005).

commerce, and fishing free from obstruction by private parties.⁶ The Vermont Supreme Court has recognized the public trust doctrine and the authority of the State to supervise and control navigable waters and the lands lying under the waters.⁷

The core of the public trust doctrine is the State's authority as sovereign to exercise supervision and control over the navigable waters of the State and the underlying lands. Generally, lands held subject to the public trust may only be used for purposes approved by the General Assembly as public uses, for example the filled lands in the Burlington harbor. However, the General Assembly may delegate its public trust authority to another body, such as a State agency or city, but the General Assembly always retains the right to revoke the delegated powers and exercise them in a more direct manner.

When the General Assembly delegates the legislative approval process under the public trust doctrine, the delegation must be clear and express. The Vermont General Assembly has clearly delegated the Public Trust authority over encroachments⁸ on State lakes and ponds to the Department of Environmental Conservation (DEC) under 29 V.S.A. chapter 11, as provided:

Lakes and ponds which are public waters of Vermont and the lands lying thereunder are a public trust, and it is the policy of the State that these waters and lands shall be managed to serve the public good, as defined by section 405 of this title, to the extent authorized by statute. For the purposes of this chapter, the exercise of this management shall be limited to encroachments subject to section 403 of this title. The management of these waters and lands shall be exercised by the Department of Environmental Conservation in accordance with this chapter and the rules of the Department. For the purposes of this chapter, jurisdiction of the Department 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, as such mean water level is determined by the Department. (emphasis added).⁹

When the General Assembly delegated the public trust authority over encroachments on lakes and ponds, it specified criteria for when an encroachment is prohibited,¹⁰ including the provision that “[n]o permit shall be granted if the encroachment adversely affects the public

⁶ *Id.* Title to the land under navigable waters allows the public to freely enjoy navigation of the waters, to carry on commerce, and to have the liberty to fish and take wildlife on navigable waters.

⁷ *Central Vt. Railway, Inc.*, 153 at 344-346 (citing *In re Lake Seymour*, 117 Vt. 367 (1952); *State v. Malmquist*, 114 Vt. 96 (1944); and *State v. Ouattropani*, 99 Vt. 360 (1926)). The Vermont Supreme Court also has invoked the public trust doctrine in several cases to reject claims of private rights with respect to public waters. *Id.* at 344.

⁸ “Encroach” means to place or cause to be placed any material or structure in any lakes and ponds that are public waters or to alter, or cause to be altered, the lands underlying any waters, or to place or cause to be placed any bridge, dock, boathouse, cable, pipeline, or similar structure beyond the shoreline as established by the mean water level of any lakes and ponds that are public waters under the jurisdiction of the Board. 29 V.S.A. § 402.

⁹ 29 V.S.A. § 401.

¹⁰ 29 V.S.A. § 403.

good.”¹¹ The General Assembly also provided the criteria that DEC must consider in determining whether a proposed activity adversely affects the public good, including:

...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 ordinances¹²

The Division of Historic Preservation submitted an application for an encroachment permit for the sinking of the ferry in April of 2020. Recently, DEC issued a permit for the activity. Persons who object to the issuance of that permit may appeal DEC’s decision.¹³ If the General Assembly attempts to revoke that permit or prohibit activity authorized under the permit, there may be separation of powers issues that the General Assembly should review prior to final action.

“The focus of a separation of powers inquiry is not whether one branch of government is exercising certain powers that may in some way pertain to another branch, but whether the power exercised so encroaches upon another branch’s power as to usurp from that branch its constitutionally defined function.”¹⁴ The General Assembly has exclusive authority to make the law, whereas the authority to execute that law is the Executive power.¹⁵ A legislative act prohibiting the issuance of a permit or revoking a permit under permit authority delegated to an Executive Branch agency could raise issues of the General Assembly attempting to exercise execution of the law.

Vested Rights Doctrine—Vermont Minority Rule

The Vested Rights Doctrine refers to the status a permit applicant may accrue that prevents government from changing the law as it applies to the proposed permit activity.¹⁶ Vermont follows the minority rule to the Vested Rights Doctrine by which rights vest “under existing regulations and laws as of the time when the proper application is filed.”¹⁷ Consequently, in Vermont, the applicant benefits and relies on the law as it existed when the applicant submitted an administratively complete permit application.

Some may argue that the Vested Rights Doctrine is limited to land use law and development. It is true that, historically, the doctrine has been largely applied to land and

¹¹ *Id.*

¹² 29 V.S.A. § 405.

¹³ *See* 10 V.S.A. § 8503(a)(2).

¹⁴ *In re D.L.* 164 Vt. 223, 229 (1995).

¹⁵ *See Waterbury v. Melendy*, 109 Vt. 441, 451–453 (1938).

¹⁶ *See, e.g.* 2 Subdivision Law and Growth Mgmt. § 10:1; *see also In Re Diverging Diamond Interchange Sw Permit 210 VT 577* (2019).

¹⁷ *In re Diverging Diamond* at 589, *citing In re Times & Seasons, LLC*, 2011 VT 76, ¶¶ 13-14, 190 Vt. 163, 27 A.3d 323 (citing the “practicality of administration, avoidance of extended litigation and maneuvering, and certainty in the law and its administration”)

development. However, the Vermont Supreme Court has applied the doctrine to an application for a stormwater permit,¹⁸ which is a water quality permit issued under 10 V.S.A. chapter 47. Thus, it is possible, if not likely, that the Vermont Supreme Court would apply the Vested Rights Doctrine to an application for a permit to encroach on Lake Champlain.

If the Vested Rights Doctrine is applied to the application for sinking of the ferry, a court likely would not give effect to a legislative change altering the law regarding encroachments. More specifically, because the Division of Historic Preservation applied for an encroachment permit for the sinking of the ferry in 2020, the Vested Rights Doctrine in Vermont would dictate that the Division's application should be reviewed, including on appeal, according to the law in existence at the time of the application. A legislative change in 2021 should not apply to the Division's permit application or authorized activity under a permit.

Water Quality and the Sinking of the Ferry

During the Senate Committee on Institutions, witnesses raised water quality concerns with the sinking of the ferry. Superficially, it is reasonable to think that the sinking of the ferry may have water quality concerns. However, legally, the proposed activity likely would not be required to obtain a water quality permit for a discharge to State waters.

Under 10 V.S.A. § 1259, no person shall discharge any waste, substance, or material into waters of the State. "Discharge" means the placing, depositing, or emission of any wastes, directly or indirectly, into an injection well or into the waters of the State.¹⁹ "Waste" means effluent, sewage, or any substance or material, liquid, gaseous, solid, or radioactive, including heated liquids, whether or not harmful or deleterious to waters . . ."²⁰

Although it would seem that the depositing of the ferry in Lake Champlain would be an addition of a substance to the water, it is my understanding that DEC does not require a permit for lost or abandoned vessels when the vessel is not discharging liquids or other harmful pollutants to the water. Thus, if the ferry is stripped of harmful substances or substances that could continue to discharge to waters, a discharge permit would not be required. This position seems to be consistent with the U.S. Environmental Protection Agency and U.S. Maritime Administration's guidance for creating artificial reefs with ships.²¹ National Guidance: Best Management Practices for Preparing Vessels Intended to Create Artificial Reefs

¹⁸ See *In re Diverging Diamond*.

¹⁹ 10 V.S.A. § 1251(3).

²⁰ 10 V.S.A. § 1251(12).

²¹ U.S. Environmental Protection Agency and U.S. Maritime Administration National Guidance: Best Management Practices for Preparing Vessels Intended to Create Artificial Reefs (2006), available at <https://www.epa.gov/sites/production/files/2015-09/documents/artificialreefguidance.pdf>.