

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
Docket No. 76-7-18 Vtec

Champlain Parkway SW Discharge Permit

ENTRY REGARDING MOTION

Title: Emergency Motion to Continue (Motion 14)

Filer: Fortieth Burlington, LLC

Attorney: Judith L. Dillon

Filed Date: November 26, 2019

Response in Opposition filed on 11/27/2019 by Jonathan T. Rose, Attorney for the City of Burlington

Response in Opposition filed on 11/27/2019 by Hannah W. Smith, Attorney for the Vermont Agency of Natural Resources

The motion is DENIED.

The matter before the Court is Fortieth Burlington LLC's (Fortieth") appeal of a Vermont Agency of Natural Resources' ("ANR") decision to issue the City of Burlington ("City") a renewed stormwater discharge permit. On August 22, 2019, this Court granted the City's and ANR's motions for partial summary judgement ("decision"). Champlain Parkway SW Discharge Permit, No. 76-7-18, slip op. at 1 (Vt. Super. Ct. Env'tl. Div. Aug. 22, 2019) (Durkin, J.). On Sept. 19, 2019 Fortieth filed a motion to clarify, alter, or amend ("motion to clarify") this Court's decision. On Nov. 18, 2019, while this motion to clarify was under consideration, Fortieth filed another motion adding support for its motion to clarify based upon newly discovered information. Presently before the Court is Fortieth's further support of its motion to clarify this Court's decision.

Fortieth's most recent memorandum supplements their earlier motion to clarify, which was made pursuant to V.R.C.P. 59(e).¹ There are four principal reasons for granting a Rule 59(e) motion: "(1) to correct manifest errors of law or fact upon which the judgment is based; (2) to allow a moving party to present newly discovered or previously unavailable evidence; (3) to prevent manifest injustice; and (4) to respond to an intervening change in the controlling law." Old Lantern Non-Conforming Use, No. 154-12-15 Vtec, slip op. at 2 (Vt. Super. Ct. Env'tl. Div. Sep.

¹ V.R.C.P. 59(e) gives the Court broad power to alter or amend a judgment "if necessary to relieve a party against the unjust operation of the record resulting from the mistake or inadvertence of the court and not the fault or neglect of a party." Rubin v. Sterling Enter., Inc., 164 Vt. 582, 588 (1996); Reporter's Notes, V.R.C.P. 59(e).

13, 2017) (Durkin, J.) (quotations omitted); In re Green Mountain Power Corp., 2012 VT 89, ¶ 50, 192 Vt. 429 (stating that under Rule 56(e), “[t]he trial court enjoys considerable discretion in deciding whether to grant such a motion to amend or alter”) (quoting In re SP Land Co., 2011 VT 104, ¶ 16, 190 Vt. 418). While 56(e) permits presentation of newly discovered information, this Court recognizes that an action to alter or amend “a judgment after its entry is an *extraordinary remedy* which should be used sparingly.” In re Zaremba Grp. Act 250 Permit, No. 36-3-13 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Apr. 10, 2014) (Walsh, J) (emphasis added) (quotation omitted).

In this Court’s prior decision, we granted summary judgment in favor of the City because the undisputed facts showed that the Champlain Parkway (“project”) is a public transportation project and the right-of-way activities were initiated prior to January 1, 2017. See generally Champlain Parkway SW Discharge Permit, No. 76-7-18, slip op. at 11–16 (Vt. Super. Ct. Envtl. Div. Aug. 22, 2019) (Durkin, J.) (holding that §1.4 (“transition clause”) of the 2017 Vermont Stormwater Treatment Manual (“VSMM”) may be applied to this project).

Fortieth presents newly discovered information that the Federal Highway Administration (“FHWA”) and VTrans have issued a Notice to rescind the 2010 Record of Decision (“ROD”) for the project.² Notice to rescind the 2010 Record of Decision, 84 Fed. Reg. 54944 (Oct. 11, 2019) [hereinafter 84 Fed. Reg. 54944]. Fortieth contends that the FHWA’s rescission invalidates the “requisite first step” and subsequent actions relevant to right-of-way valuation activities (“ROW activities”) because the ROD is required to initiate right-of-way activities pursuant to §6–69 of the Right Of Way Manual. As a result, Fortieth argues that the City cannot rely on invalidated right-of-way activities to support the proposition that ROW activities began before 2017. The City counters that subsequent rescission of a ROD does not invalidate ROW activities that were initiated while a valid ROD was in place. The issue presently before the Court is whether the FHWA’s rescission of the ROD invalidates the ROW actions initiated prior to January 1, 2017, which would in turn negate the applicability of the transition clause authorizing the use of the 2002 VSMM standards. We hold that it does not, and therefore the transition clause is still applicable and the 2002 VSMM standards apply.

Pursuant to 40 C.F.R. §1506.1, until an agency issues a ROD, “no action concerning the proposal shall be taken which would (1) have an adverse environmental impact; or (2) Limit the choice of reasonable alternatives.”³ Limitations on actions during NEPA process, 40 C.F.R.

² The FHWA, in conjunction with VTrans, decided to rescind the ROD because “[a]lthough the 2005 Draft Supplemental Environmental Impact Statement (“SEIS”) and the 2009 Final SEIS each considered disproportionately high and adverse impacts on minority and low-income populations in accordance with Executive Order 12898, public outreach for that analysis was limited to the general public involvement associated with the NEPA process. Since the 2010 ROD, FHWA has become aware of new information about the project impacts that may bear on the project decision.” Notice to rescind the 2010 Record of Decision, 84 Fed. Reg. 54944 (Oct. 11, 2019).

The Notice of Intent to prepare the Supplemental Environmental Impact Statement (“SEIS”) was published in the Federal Register on December 31, 2003. Id. The ROD was issued on January 13, 2010. Id.

³ In their motion, Fortieth has provided no information or argument concerning how forwarding the pending proposal would adversely impact the environment or limit the choice of reasonable alternatives. See Fortieth

§1506.1(a) (1977). The statute also states that §1506.1(a) “does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance.” 40 C.F.R. § 1506.1(d); see also 40 C.F.R. § 1500.2 (directing federal agencies to “[i]ntegrate the requirements of NEPA with other planning and environmental review procedures required by law . . . so that all such procedures run concurrently rather than consecutively”).

Courts have consistently sought to ease the practicality of multiple levels of assessment, including allowing agencies the discretion to partially issue RODs for incomplete environmental assessments. Sensible Traffic Alternatives & Res., Ltd. v. Fed. Transit Admin. of U.S. Dep't of Transp., 307 F. Supp. 2d 1149 (D. Haw. 2004) (holding that an agency may issue an ROD that accepted only the first phase of a project and leave acceptance of the remainder of a final environmental impact statement for a later time, so long as the first phase actions did not violate §1506.1(a)). As such, §1506.1(a) grants the responsible agencies flexibility in deciding “to take some preparatory steps toward completion of the project while the NEPA environmental review process is ongoing.” See Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 145 (2010) (“Even if a particular agency proposal requires an EIS, applicable regulations allow the agency to take at least some action in furtherance of that proposal while the EIS is being prepared.”); see also Burkholder v. Peters, 58 F. App'x 94, 98 (6th Cir. 2003) (holding that while a state agency violated NEPA by signing final design contracts before federal environmental review was completed, the “FWHA[’s] substantial independent oversight of the environmental assessment process removed the possibility of any taint resulting from regulatory violations). Thus, while the statute does not expressly address whether state actions concerning a proposal may be taken when a previously issued ROD is rescinded, relevant cases support a flexible interpretation concerning actions taken absent and ROD.

The initial ROD issued in this project concerned a supplemental environmental impact statement (SEIS) issued pursuant to 23 C.F.R. §771.130. An SEIS that “address[es] issues of limited scope, such as the extent of proposed mitigation or the evaluation of location or design variations for a limited portion of the overall project . . . must not necessarily: . . . (2) [r]equire the withdrawal of previous approvals; or (3) [r]equire the suspension of project activities for any activity not directly affected by the supplement.” Supplemental environmental impact statements, 23 C.F.R. §771.130(e). Here, the FHWA’s rescission of the SEIS was limited for the purposes of reviewing census data and engaging in “targeted public outreach to any minority and low-income populations in the project study area in order to determine whether conclusions reached in the 2009 Final SEIS and 2010 ROD remain valid.” 84 Fed. Reg. 54944. The FHWA intends to create a written evaluation that recommends whether a new SEIS or an amended ROD is appropriate for the project to go forward. *Id.* Moreover, FHWA expressly stated that “FWHA and VTrans continue to recognize a strong need for this project. The [w]ritten evaluation will provide a basis for determining the way forward to implement this project.” *Id.*⁴ This Notice

Burlington’s newly discovered information in further support of its motion to clarify, alter, or amend the August 22, 2019 Decision on Motions at 1–3 (filed Nov. 18, 2019).

⁴ As the statute is silent, it is unclear if § 1506.1(a) solely governs instances in which no ROD has been previously issued or includes occasions where RODs have been rescinded. 40 C.F.R. § 1506.1(a). Considering the

provides a clear indication of FHWA's intent to proceed with the project and addresses current actions being taken by the FHWA in furtherance of that goal.

The VTrans' Local Transportation Facilities Guide to the Right-of-Way Phase ("LTF ROW Guide")⁵ and VTrans' April 18, 2018 Right of Way Manual ("ROW")⁶ include descriptions of FHWA authority and approval at various states within the ROW process, but neither address the impacts of rescission of an ROD.⁷ As noted in our last decision, both the LTF ROW Guide and the ROW Manual outline extensive preliminary planning activities that require a substantial amount of preparatory effort and investment. Champlain Parkway SW Discharge Permit, No. 76-7-18, slip op. at 15 (Vt. Super. Ct. Envtl. Div. Aug. 22, 2019) (Durkin, J.); see also LTF ROW Guide at 4, 11–13, ROW Manual §§2-5, 2-6–2-21, 2-28–2-31. Nevertheless, neither makes any reference to a FHWA ROD. *Id.*

It remains undisputed that the ROW activities taken by the City and addressed in our Decision were, at the time taken, authorized by FHWA under a valid ROD. Indeed, there is no express requirement within 40 C.F.R. §§ 1500, 1505.2, 1506.1, the LTF ROW Guide, or the ROW Manual that a rescinded ROD invalidates all prior ROW activities. Given (1) the absence of clear authority concerning impacts of rescinded RODs; (2) the flexibility embedded within statutory provisions encouraging agency review procedures "run concurrently;" (3) the courts' history of allowing agencies to take "preparatory steps" during the NEPA process; (4) the express intent of FHWA and VTrans to continue the project; and (5) the fact that a valid ROD was in place at the time the ROW activities took place, we see no reason to use the extraordinary remedy of altering or amending our prior Decision pursuant to Rule 56(e).

Based upon the above analysis, this Court declines to alter or amend its prior Decision that FHWA and VTrans initiated ROW activities prior to January 1, 2017. The City is therefore entitled, pursuant to the transition clause, to apply the 2002 VSMM standards. As such, Fortieth's motion

case interpretations of this provision and the limited nature of the FHWA's SEIS rescission, this Court is inclined towards the former. 84 Fed. Reg. 54944; Burkholder v. Peters, 58 F. App'x 94, 98 (6th Cir. 2003); Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 145 (2010); Sensible Traffic Alternatives & Res., Ltd. v. Fed. Transit Admin. of U.S. Dep't of Transp., 307 F. Supp. 2d 1149 (D. Haw. 2004).

⁵ The LTF ROW Guide is an informal document that contains guidelines for right-of-way acquisition process. VTrans published the LTF ROW Guide to aid municipalities and other groups acquiring property for federally funded transportation projects. LTF ROW Guide, 1–3.

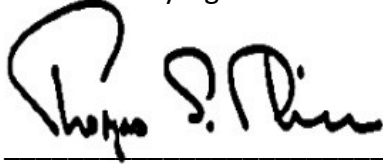
⁶ The ROW Manual directs VTrans' right-of-way acquisition process and agents of VTrans are required to follow the ROW Manual when acquiring land. ROW Manual, § 1-2 (2018). It was designed to comply with Vermont and Federal statutes, including 23 C.F.R. § 710 and 49 C.F.R. § 24. The Federal Highway Administration certified that the ROW Manual meets the requirements of 23 C.F.R. § 710 on June 13, 2012. *Id.*

⁷ The LTF ROW Guide requires federal environmental clearance, in the form of a CE, EA, or EIS be obtained prior to negotiation and all acquisition must be in accordance with current FHWA Directives and Title III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. LTF ROW Guide at 16–18. The ROW Manual requires FHWA authorization prior to negotiation. ROW Manual at § 6-96. However, neither the ROW Manual nor the LTF ROW Guide reference the rescission of a ROD as an absolute withdrawal of authorization. See ROW Manual; see also LTF ROW Guide.

to alter or amend under 59(e) our Decision granting judgment as a matter of law on the applicability of the transition clause is **DENIED**.

So Ordered.

Electronically signed on November 27, 2019 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
Environmental Division

Notifications:

Judith L. Dillon (ERN 5040), Attorney for Appellant Fortieth Burlington, LLC

Brian S. Dunkiel (ERN 4594) and Jonathan T. Rose (ERN 2170), Attorneys for the City
of Burlington

Randy Joe Miller (ERN 7037) and Hannah W. Smith (ERN 6759), Attorneys for the Vermont
Agency of Natural Resources