STATE OF VERMONT

SUPERIOR COURT — ENVIRONMENTAL DIVISION
Docket No. 169-12-16 Vtec

Diverging Diamond Interchange A250

ENTRY REGARDING MOTION

Count 1, Act 250 District Commission Decision (169-12-16 Vtec)
Count 2, Act 250 District Commission Decision (169-12-16 Vtec)

Title: Motion in Limine (Motion 24)
Filer: Co-counsel
Attorney: Alexander J. LaRosa
Filed Date: December 23, 2019

Response filed on 01/06/2020 by Attorney Jenny Ronis for party 7 Co-counsel
Response in Opposition

The motion is DENIED.

RL Vallee, Inc. (Vallee) and Timberlake Associates, LLC (Timberlake) appeal Act 250 permit #4C1271 and associated amendments[1], issued jointly on November 28, 2016 by the District #4 Environmental Commission (District Commission) to the Vermont Agency of Transportation (VTrans) for the Diverging Diamond Interchange and related improvements proposed at Interstate 89, Exit 16 in Colchester (the Project).

Background

After this Court issued a Merits Decision granting the Act 250 permit on June 1, 2018, Vallee and Timberlake appealed to the Vermont Supreme Court. On August 30, 2019, the Supreme Court ordered a remand on the narrow issue of the Project's compliance with Act 250 Criterion 1. At issue are Vallee's Amended Questions 1.a and 1.b, asking whether the Project will cause undue water pollution through increased chloride and phosphorous discharges. This matter is scheduled for trial beginning on January 14, 2020. Currently before the Court is Vallee's motion in limine to exclude evidence from the upcoming trial.

[1] Permit amendments #4C0676R-16, #4C0288-21, #4C0757-24, and #4C0471-7.

Discussion

Vallee seeks to preclude VTrans from offering any evidence relating to (1) the Transportation Separate Storm Sewer System (TS4) General Permit, and (2) the Lake Champlain Phosphorous Total Daily Maximum Load (Champlain TMDL) including the "Vermont Lake Champlain Phosphorous TMDL Phase 1 Implementation Plan" (TMDL Implementation Plan).[2]

I. The TS4 General Permit

Vallee argues that evidence relating to the TS4 permit should be excluded for two reasons: first, because this Court struck the TS4 permit from the case in an earlier decision, and second because the permit is irrelevant to the questions before us in this appeal. We address each of these issues in turn.

As to Vallee's first contention, we do not agree that the TS4 permit was "struck" from the case. Vallee points to the Court's February 8, 2018 "Decision on Motion to Dismiss Questions" and suggests that it bars any reference to the TS4 permit going forward. In that decision, we evaluated motions to dismiss several of Vallee's Amended Act 250 Questions. See Diverging Diamond Interchange A250 and SW Permits, Nos. 169-12-16, 50-6-16 Vtec, slip op. at 1–3 (Vt. Super. Ct. Envtl. Div. Feb. 8, 2018) (Walsh, J.). Vallee correctly notes that we did dismiss Amended Questions 2(c) and 2(d), which referenced Vtrans' Municipal Separate Storm Sewer System (MS4) and TS4 General Permits. Id. at 9–10. Our reasons for dismissing those questions, however, had no bearing on Vtrans' ability to introduce evidence in support of its case.

Vallee's Amended Question 2(c) invoked Act 250 Criterion 1(B) and read as follows:

> Is VTrans in compliance with the 1991 Amendment to Rule 13.12 of the Vermont Water Pollution Control Regulations, Chapter 13, in particular subsection F.6. Duty to Operate and Maintain? In in answering this question this Court will have to address whether VTrans is in compliance with its MS4 Permit, and to the extent the TS4 Permit replaces the MS4 Permit, whether VTrans is in compliance with the TS4 Permit.

We dismissed Amended Question 2(c) because the Department of Environmental Conservation (DEC) regulation raised by Vallee, 13.12(F)(6), was "not an 'applicable [DEC] regulation' under Criterion 1(B) in a way that would require VTrans to demonstrate compliance with the MS4 or TS4 permit." Id. at 8. We explained that applicants may offer relevant DEC permits as rebuttable "shorthand" inferences of compliance with those regulations, but instead Vallee sought to "take the Court backwards" through those inferences by challenging the applicant's compliance with broad statewide permits whose scope included "matters irrelevant to the Project now before us." Id. In this Act 250 proceeding, "it would be illogical to require VTrans to demonstrate compliance with these [permits], generally, when for the most part they involve activities entirely unrelated to the Project area at issue here." Id. at 9.

Our decision also stated that analyzing VTrans' compliance with MS4 or TS4 authorizations at the time had no bearing on whether the as-yet unbuilt Project would also be in compliance: "it is not possible for the developer to show [a] nonexistent project is complying with

[2] Vallee also asks us to exclude certain reports written by Vtrans' expert witness Jeff Nelson, and in the alternative, for the opportunity to depose Mr. Nelson on January 9, 2020. The parties have agreed to a supplemental deposition of Mr. Nelson by telephone on January 9, 2020, which we find appropriate. There is no need for us to discuss the issue further.

the stormwater permit in order to obtain an Act 250 permit." Id. Our discussion of Amended Question 2(c) does not now prohibit VTrans from introducing relevant evidence that the Project will comply with Criterion 1, nor does it prohibit Vallee from challenging or rebutting that evidence.

Vallee's Amended Question 2(d) asked: "Must Condition 4 of VTrans' issued Act 250 Permit be amended to require compliance with the TS4 Permit as it is anticipated that the TS4 Permit will replace VTrans' MS4 Permit." The original Act 250 permit for the Project included a condition requiring compliance with the MS4 permit, and Vallee sought an amendment to include the TS4 permit which was still pending at that time. We dismissed Amended Question 2(d) and struck the original condition requiring MS4 compliance, because VTrans was not offering "the MS4 or TS4 permit as proof of compliance with any Act 250 criteria." Id. at 10. As we explained, it was not reasonable to impose conditions requiring compliance with permits covering matters far broader than the Project itself, especially when the permits were not offered as proof of compliance with any criteria. Id. at 9–10. We also noted that "it is not clear that the MS4 or TS4 permits are within the scope of Criterion 1(B), or Act 250 review in general." Id. at 9. Once again, nothing in this discussion prevents VTrans from introducing relevant evidence to support its case.

Vallee suggests that VTrans might now decide to offer its TS4 permit as evidence of compliance with Criterion 1. VTrans states that it has not decided whether to rely on the permit. If the TS4 is offered, Vallee is free to object to its admission or introduce other evidence in rebuttal.

Vallee's second argument seeks to exclude the TS4 permit on relevance grounds. The Vermont Rules of Evidence apply to matters before the Environmental Division. V.R.E.C.P. 2(e).[3] Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." V.R.E. 401. Relevant evidence is generally admissible. V.R.E. 402. All Environmental Division merits hearings are bench trials and, therefore, we are generally liberal in allowing relevant evidence to be admitted. See Re: The Van Sicklen Ltd. P'ship, No. 4C1013R-EB, Mem. of Decision, at 1 (Vt. Envtl. Bd. Sep. 28, 2001). Because of this, we are unlikely to be "unduly swayed by a questionable evidentiary offering" as a jury may be. Id. Once relevant evidence is admitted, we afford it the weight it deserves, if any. Id.; In re Application of Lathrop Ltd. P'ship I, 2015 VT 49, ¶ 90, 199 Vt. 19.

While this Court is often liberal in admitting evidence, we decline to make any determination concerning relevance at this stage. We recognize that the TS4 is broad in scope. Whether it is relevant to the Project in this case is very much an open question, and the sweeping nature of the TS4 prevents us from deciding that question here. Vallee asserts that VTrans' reliance on the TS4 would ask the Court to "defer to future permitting regimes, or yet to be issued permit authorizations or restrictions, to conclude that [the Project] complies with Criterion 1." This Court has no authority, Vallee argues, to "grant a permit on the 'condition' that the criteria of [Act 250] be satisfied at some unspecified future time." Re: Paul E. Blair Family Trust, No. 4C0388-EB, Findings of Fact, Conclusions of Law, and Order, at 6 (Vt. Envtl. Bd. June 16, 1980).

We do not disagree with the legal principle Vallee puts forward, but the facts before us do not allow for any conclusions. VTrans has not introduced the TS4 permit, nor has it made any

[3] The V.R.E.C.P. allow the Environmental Division to relax evidentiary rules when appropriate. See V.R.E.C.P. 2(e).

offer as to why the TS4 may be relevant.[4] If aspects of the TS4 or VTrans' actions under its authorization have "any tendency to make the existence of any fact that is of consequence to [our evaluation under Criterion 1] more probable or less probable," those aspects may be relevant in this proceeding. See V.R.E. 401.

II. The Lake Champlain TMDL and TMDL Implementation Plan

Vallee seeks to exclude any reference to the Champlain TMDL or TMDL Implementation Plan, arguing that (1) this Court has already struck the TMDL from the case (2) the TMDL and TMDL Implementation Plan are irrelevant, and (3) the disclosure of the TMDL Implementation Plan was untimely.

As with the TS4 permit discussed above, we cannot agree that this Court barred all evidence relating to the Champlain TMDL. In an October 11, 2017 summary judgment decision, we held that VTrans' stormwater permit application vested in 2014; before new phosphorous limitations (including the Champlain TMDL) came into effect. See Diverging Diamond Interchange A250 and SW Permits, Nos. 169-12-16, 50-6-16 Vtec, slip op. at 7, 14 (Vt. Super. Ct. Envtl. Div. Oct. 11, 2017) (Walsh, J.). In our June 1, 2018 merits decision, we held that VTrans' Act 250 application vested in November 2013, also before the new phosphorous limitations. See Diverging Diamond Interchange A250 and SW Permits, Nos. 169-12-16, 50-6-16 Vtec, slip op. at 61 (Vt. Super. Ct. Envtl. Div. June 1, 2018) (Walsh, J.). The Vermont Supreme Court affirmed our holdings. See In re Diverging Diamond Interchange SW Permit, 2019 VT 57, ¶¶ 26, 29, 31. These rulings establish that the Project is not bound by the requirements of the Champlain TMDL, but they do not foreclose VTrans from introducing relevant evidence.

Our response to Vallee's relevance argument here is much the same as in the TS4 discussion. On the facts before us, we cannot say that the Champlain TMDL and TMDL Implementation Plan are irrelevant. These are broad schemes which, VTrans contends, speak directly to phosphorous and chloride management. Without any offer to evaluate, this Court cannot determine whether the TMDL itself or the Implementation Plan have "any tendency to make the existence of any fact . . . of consequence . . . more probable or less probable." See V.R.E. 401. If VTrans decides to rely on the Champlain TMDL or documents related to it, Vallee will have the opportunity to challenge the admission or present rebuttal evidence.

Vallee's final argument with respect to the TMDL Implementation Plan urges us to exclude it as untimely. On September 23, 2019, this Court held a status conference on the record. The Court discussed discovery timelines at length, hearing from all parties as to their needs in preparation for trial, and set a discovery deadline for November 28, 2019. We issued a written Scheduling Order following the conference. On November 20, 2019, and upon Vallee's motion, we extended the discovery deadline to December 13, 2019. Vallee's motion expressed a need for additional time to complete depositions, and the November 20 Entry Order stated, in full: "Witness depositions to be completed by December 13, 2019."

Vallee states that the TMDL Implementation Plan was disclosed on December 13, "the last day allotted for the completion of depositions," and contends that the disclosure came after the close of "document discovery." VTrans argues that the disclosure was timely, as the extended

[4] Vtrans asserts that the TS4 permit and Champlain TMDL are "simply legal processes" of which the Court may take judicial notice and are not "evidence" in the typical sense. As it is unclear exactly what VTrans may rely on at trial, we will address this issue if and when the items in question are introduced.

discovery deadline was set for December 13. The September Scheduling Order did not set separate deadlines for document discovery and depositions, nor were separate deadlines discussed at the status conference. The fact that the November Entry Order mentions only depositions reflects Vallee's stated reason for the extension. Vallee's motion was styled as a "Motion to Extend Discovery Deadline" and did not request a separate schedule for document discovery.

This Court has broad discretion in discovery rulings. State v. Lee, 2007 VT 7, ¶ 11, 181 Vt. 605 (citing Schmitt v. Lalancette, 2003 VT 24, ¶ 9, 175 Vt. 284). Considering the context above, there is room for good faith disagreement about the precise deadline for document discovery. The TMDL Implementation Plan was disclosed by the extended deadline of December 13, and we will not penalize VTrans for making use of an extension which Vallee requested in the first instance. We find that the disclosure was timely. In any event, there is no prejudice to Vallee here. "The primary purpose of the civil discovery rules is to prevent surprises to one party by requiring both parties to disclose witnesses, prospective testimony and other evidence well in advance of trial." In re Valsangiacomo, Nos. 130-8-03, 64-4-04 Vtec, slip op. at 8 (Vt. Envtl. Ct. Oct. 10, 2006) (Wright, J.) (citing White Current Corp. v. Vermont Elec. Co-op, Inc., 158 Vt. 216, 223 (1992)). This case has been active since 2016, and the parties are familiar with issues related to the Champlain TMDL. While the Implementation Plan is allegedly quite complex, Vallee has had approximately 30 days to review the details before trial on January 14.

Conclusion

Vallee's motion in limine is **DENIED.**

So ordered.

Electronically signed on January 07, 2020 at 10:58 AM pursuant to V.R.E.F. 7(d).

Tom Walsh

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Thomas G. Walsh, Judge
Superior Court, Environmental Division

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