

State of Vermont
Water Resources Board

In re: Appeal of Vermont Natural Resources Council
Docket Nos. 92-02 and 92-05

Preliminary Order
Party Status

BACKGROUND

On May 20, 1992, the Vermont Natural Resources Council ("**VNRC**") filed an appeal of the decision of the Agency of Natural Resources ("**ANR**") to issue a 401 Water Quality Certification to Snowridge, Inc. ("**SRI**") for construction of the Sugarbush Snowmaking pond. The appeal was filed pursuant to 10 V.S.A. §1024(a). This appeal is the second appeal involving the Sugarbush snowmaking pond. The first appeal, Docket No. 92-02, is an appeal pursuant to 10 V.S.A. §1099(a) (Dam permit statute).

On June 1, 1992, the Board received a letter from Winooski One Partnership requesting party status under Water Resources Board Rule of Procedure ("**Board Rule**") 22(B) for Docket No. 92-02 (Dam permit) and Docket No. 92-05 (401 Certification). SRI objected to both requests. VNRC indicated that it had no objection and ANR indicated that it had no position.

Aprehearing conference in Docket No. 92-05 was held on June 22, 1992, at which the Vermont Federation of Sportsmen's Clubs ("**Federation**") appeared and indicated its intent to seek party status. On June 26 the Federation filed a request for intervention in both Docket Nos. 92-02 and 92-05. The Federation's request was filed by Counsel for VNRC and was authorized by the Federation's Board of Directors. SRI and ANR objected to both requests.

On June 26, 1992, Peter Richardson, a resident of Norwich, Vermont, appearing pro se, filed a request for party status in both Docket Nos. 92-02 and 92-05. Both ANR and SRI filed objections to Mr. Richardson's request. VNRC took no position on Mr. Richardson's request.

DISCUSSION

The issue before the Board is whether to grant the requests for party status by these applicants, either by right of intervention or by permissive intervention.

The Vermont Administrative Procedures Act ("**Act**")

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provides all parties in a contested case the opportunity "to respond and present evidence and argument on all issues involved." 3 V.S.A. §809(c). "Party" is defined by the Act to include "each person...properly seeking and entitled as of right to be admitted as a party." 3 V.S.A. §801(5). The Act does not define the circumstances that entitle a would-be intervenor to intervention as of right. The dam permit statute provides a conditional right to intervene on "persons and parties in interest." 10 V.S.A. §1099(a). A "person in interest" is defined as

"a person who has riparian rights affected by the dam, a substantial interest in economic or recreational activity affected by the dam, or whose safety would be endangered by a failure of the dam."

10 V.S.A. §1080(3). Meeting the definition of "person in interest" is the condition that must be met for intervention as of right. /1/ The 401 water quality certification statute does not provide either an unconditional or conditional right to intervene. See 10 V.S.A. §1024.

Board Rule 22(A) covers intervention as of right. Board Rule 22(B) provides for permissive intervention. Prior to considering a Board Rule, 22(A) or 22(B) request for

/1/ There is a difference between "person in interest" and "persons interested" in Title 10, chapter 43 (dams). The 1981 legislative amendment to the Dam statute defined "person in interest" and inserted the term into two sections, §1095, pertaining to, unsafe dam petitions (replacing the term "taxpayer"), and §1099, the permit appeals section that is relevant in this case. Section 1085, pertaining to a notice of application and informational meeting, was also amended in 1981, but the term "interested persons" was left intact in the public service board notice of hearing clause and the term "persons interested" was inserted into the first sentence regarding notice of application. Had the legislature wanted to equate "interested persons" and "persons interested" (both in §1085) with "person in interest" (in §1095 and §1099), it had the knowledge and opportunity to do so in 1981. "Interested persons," as used in §1085, relates to situations where notice is designed to expand public involvement in the proceedings. In §1095 and §1099, "person in interest" addresses situations where limitation of participation is permitted.

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intervention, the Board is required to look first to the timeliness of the request. Pursuant to Board Rule 22(B)(2), in order to be timely, a potential party must seek party status at or before an initial prehearing conference, unless the petitioner has demonstrated good cause for **failure to** timely enter a request. Although the Board Rules do not specify the standards for determining the timeliness of a Board Rule 22(A) request for intervention, it is within the purview of the Board to interpret its own rules. 3 V.S.A. §808. See Bishou v. Town of Barre, 140 Vt. 564, 577 (1982). The Board believes that the timeliness standard applicable to Board Rule 22(A) requests for intervention should be no less nor no more stringent than the standards applicable to a Board Rule 22(B) request for intervention.

I. Peter Richardson

Peter Richardson seeks party status pursuant to Board Rule 22(A) (Intervention as of right) or, in the alternative, Board Rule 22(B) (permissive intervention) in Docket No. 92-02. He also seeks party status in Docket No. 92-05 pursuant to Board Rule 22(B).

(A) Docket No. 92-02

(1) Rule 22(A)(6) - Statutory right

Board Rule 22(A)(6) provides party status to persons who have entered a timely appearance and upon whom the statute confers an unconditional right to intervene or a conditional right to intervene where conditions have been met. Mr. Richardson failed to timely appear and did not demonstrate good cause for failure to enter a timely appearance. Consequently, Mr. Richardson is denied intervention as of right.

(2) Rule 22(A)(7) - Substantial interest adversely affected; exclusive means of protection: interest not adequately represented

Board Rule 22(A)(7) provides party status to persons who have entered a timely appearance and can demonstrate a substantial interest that may be adversely affected by the outcome of the case. Furthermore, the potential party must show that the proceeding affords the exclusive means for protection of the interest, and the interest is not adequately represented by existing parties. Because Mr. Richardson failed to timely appear in Docket No. 92-02 and did not

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demonstrate good cause for failure to enter a timely request, he fails to qualify for party status pursuant to Board Rule 22(A) (7) .

(3) Rule 22(B) - Permissive intervention

Board Rule 22(B) gives the Board discretion by allowing permissive intervention **when** the applicant demonstrates a substantial interest that may be affected by the outcome of the proceeding. Although Mr. Richardson provided the **necessary** information required by Board Rule **22(B)(1)**, he failed to **file** a petition for party status at or **before the** time of the initial prehearing conference as required by Board Rule 22(B)(2). Mr. Richardson also failed to show good cause **for his untimely** request. Accordingly, his request for party status in **Docket** No. 92-02 is denied., **Board** Rule 22(B)(2).

(B) Docket No. 92-05

Mr. Richardson's party status request was made prior to the initial prehearing conference and **was**, therefore, **t i m e l y** .

(1) Rule 22(A)(6) - Statutory right

Mr. Richardson does not seek party status pursuant to Board-Rule 22(A)(6). The statute at issue, 10 V.S.A. §1024, does not provide either an unconditional or conditional right of intervention. Board Rule 22(A)(6).

(2) Rule 22(A)(7) - Substantial interest adversely affected; exclusive means of protection, interest not adequately represented

Mr. Richardson does not seek party status in Docket No. 92-05 pursuant to **Board Rule** 22(A)(7).

(3) **Rule** 22(B) - Permissive intervention

Mr. Richardson's request was made prior to the initial prehearing conference,, qualifying him for consideration under Board Rule 22(B). Having met the requirements of **Board** Rule **22(B)(1)** and 22(B)(2), Mr. Richardson must demonstrate a **"substantial** interest which may be affected by the outcome of the proceeding." Board **Rule 22(B)(3)**. This standard requires that Mr. Richardson demonstrate some interest more substantial than a **general** concern for the protection of **the public's** use and enjoyment of the **Mad** River.

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Mr. Richardson asserts that he has 'an interest in protecting the public's use and enjoyment of the natural resources of the state, including the Mad River. Mr. Richardson's sincerity or degree of purpose, which the Board does not doubt, is not the issue here. Without a much more detailed statement from Mr. Richardson as to how he has a substantial interest, the request for party status must be denied. A "substantial interest" is something more than a general concern for the natural resources of the state or a constant participation in state processes that affect the natural resources of the state. The Board Rule contemplates, a considerable or consequential stake. Mr. Richardson has failed to show a substantial interest in the outcome of the case. Unlike VNRC, the local chapter of the Sierra Club and the Vermont chapter of Trout Unlimited, whose members submitted affidavits in Docket No. 92-02 setting forth each member's particular use and enjoyment of the Mad River, Mr. Richardson fails to state any specific interest or special connection to the Mad River that may be affected. Moreover, he has not offered any information indicating that this proceeding is the exclusive means by which he can protect his interest nor indicating that his interest is not adequately protected by existing parties. Accordingly, Mr. Richardson is not eligible for party status in Docket No. 92-05. Board Rule 22(B)(3).

II. Vermont Federation of Sportsmen's Club

(A) Docket No. 92-02

(1) Rule 22(A)(6) - Statutory right

The Federation seeks intervention as of right under 10 V.S.A. §1099(a). The Federation has arguably made a showing of a "substantial interest in economic or recreational activity affected by the dam," thereby meeting the definition of a "person in interest" as required by the statute. 10 V.S.A. §1080(3). However, it failed to file its request in a timely manner. Board Rule 22(A) timeliness standards require a party status request to be filed at or before a prehearing conference. The Board also believes and now holds that an untimely request may be permissible when an applicant has provided the Board with good cause for the late filing. Cf. Board Rule 22(B)(2). The Federation, however, did not provide the Board with a "good cause" explanation for its failure to timely file.

Were the statute to be read literally as providing

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intervention as of right at any stage of the hearing process, as the argument of the Federation implies, the **Board** would be forced to permit the entry of a new participant on the afternoon of the last day of hearings. Such a reading **of the** statute is unreasonable and unworkable. It is **the** policy of the Supreme Court to avoid' **construing a** statute in a manner that would render the statute **ineffective** or lead to irrational consequences. Addison County Community Action v. City of Veraennes, 152 Vt. 161 (1989) (citing State v. Tierney, 138 Vt. 163, 165 (1980)); Lubinsky v. Fair Haven Zoning Board, 148 Vt. 47, 50 (1986).

The Board's **Rules** of Procedure are designed to provide reasonableness' and workability and to avoid irrational consequences in **the** conduct of Board proceedings. This is exactly the purpose behind the timely appearance requirements in both Rule 22(A) and Rule 22(B). These requirements are made specific in the public notice of the proceeding that was published in a newspaper of general circulation in the region, and **also forwarded** by the Board to all interested parties on the Board's mailing list. As **the** Federation had constructive notice of the initial pre-hearing conference, its untimely request for party status pursuant, to Board Rule 22(A) is denied.

- (2) Rule 22(A)(7) - Substantial interest adversely affected: exclusive means of protection: interest not adequately represented

Because the Federation's appearance was not timely, it is denied party status under Rule 22(A)(7).

- (3) Rule 22(B) - Permissive intervention

The Federation also argues that it is entitled to party status pursuant to Board Rule 22(B); The Federation did not **seek** party status at **or** before the prehearing conference. Pursuant to Board Rule 22(B)(2), it is incumbent upon the **Federation** to demonstrate "good cause" for failure to request party status in a timely fashion. This it has failed to do. The Federation has **not** **demonstrated** such good cause for the failure and therefore **is** denied permissive intervention pursuant to Board Rule 22(B).

(B) Docket No. 92-05

With respect to Docket No. 92-05, the Federation seeks party status pursuant only to Board Rule 22(B). The

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Federation's request was **timely**.

The Board finds that the Federation has a substantial interest which may be affected by the outcome of **this** proceeding., It bases this finding on the fact that the Federation represents thirty affiliated hunting, fishing, trapping and gun clubs, has historically represented the interests of Vermont hunters and fishermen, currently represents approximately 30,000 members, and provides licensing fees **through** its **members** for various state **recreational** programs.

In an earlier Preliminary Order in **Docket No. 92-02**, the Board determined that the Vermont chapter of Trout Unlimited should be granted permissive intervention. In making this decision, the Board noted that the interests of Trout Unlimited, Sierra Club and VNRC might adequately be protected by participation **of just** one of the three in the proceeding. The Board acknowledged, **however, that** there were differences in the organizations' major areas of **concern and in** the make-up of their membership.

Because' the Federation has interests and members, that differ from VNRC, and because the Sierra Club and Trout Unlimited are not parties to **Docket No. 92-05**, the Board has some doubt as **to whether** all the Federation's **interests will** be adequately **protected** by VNRC. The Board determined in **Docket, No. 92-02** that the **permissive** intervention of the Vermont chapter of Trout Unlimited would not unduly delay the proceedings or place an **unfair** burden on other parties. The Board is making a similar determination here with respect to the Federation's intervention in **Docket No. 92-05**. The **Board's** prior determination was based, in part, on **counsel's representation** that **VNRC, Sierra Club and Trout Unlimited would coordinate their** testimony and other hearing related activities. The Board cautioned in its Preliminary Order, **dated** April 10, 1992, that should any of the three appellants diverge from the other two appellants and request a continuance to facilitate such a divergence, the Board would be extremely reluctant to grant such a request. The same requirement **and** caution are in effect here. Therefore, the Federation is granted party status in **this** proceeding under the same terms that Sierra Club and Trout Unlimited were admitted in **Docket No. 92-02**. The Board does want to make it clear, however, that it places this restriction upon the Federation in order to avoid the possibility of delay, not because it has concluded that the intervention of the Federation will unduly delay the proceedings. Board Rule

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22(B) (4).

III. Winooski One Partnership

(A) Docket No. 92-02

Winooski One Partnership ("Winooski One") seeks party status pursuant to Board Rule 22(A), or, in the alternative, Board Rule 22(B).

(1) Rule 22(A)(6) - Statutory right

Winooski One arguably has riparian rights in relation to the Wad River. Winooski One failed to timely appear and attempted to provide a "good cause" explanation of its failure to request party status in a timely fashion. The Board is not persuaded by Winooski One's explanation. Winooski One was on notice about the original prehearing conference. By its own admission, it was involved in negotiations with SRI prior to the date of the conference. It had the opportunity to contact, the Board and private legal counsel to determine whether its failure to attend the prehearing conference could jeopardize, its party status. Winooski One did not contact the Board and apparently did not contact legal counsel. Even if the Board were to accept as true Winooski's description regarding SRI's assurance that an agreement would be reached and intervention would not be necessary, such an explanation does not lift the burden, upon Winooski One to seek intervention in a legal action at the appropriate time. Therefore, Winooski One is denied party status under Board Rule 22(A)(6). See discussion in part II(A)(1), above.

(2) Rule 22(A)(7) - Substantial interest adversely affected, exclusive means of protection:
interest not adequately represented

Because Winooski One's appearance was not timely, it is also denied party status under Board Rule 22(A)(7). See discussion in part II(A)(?), above.

(3) Board Rule 22(B) - Permissive intervention

Winooski One argues in the alternative that it should be granted permissive intervention. Because Winooski One did not file a timely petition for party status, Winooski One's request for permissive intervention in Docket No. 92-02 is denied.

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(B) Docket No. 92-05

Board Rule 22(B) - Permissive intervention

Winooski One filed a **timely** request for party status in **Docket No. 92-05**. Winooski One seeks permissive intervention, arguing that it is a downstream riparian owner having interests implicated pursuant to 10 V.S.A. **§1023(3)**. In order for the Board to grant intervention, Winooski One must show that it has a substantial interest which may be affected by **the** outcome of the proceeding. **See** Board Rule 22(B)(3).

The Board deems it premature to determine at this point that Winooski One has a substantial interest in the **outcome** of this proceeding. Under the circumstances **of the** case, such a determination of substantial interest implies validation of Winooski One's claim prior to the filing of testimony and legal memoranda. Where the **interest is** arguably substantial, the Board can **permit, intervention** in its discretion. In making a determination to grant party status pursuant to Board Rule 22(B)(3), however, **the** Board must take into account whether Winooski One's interest will be adequately protected by the other parties: whether alternative means exist by which Winooski, One can protect its interest: and whether intervention will unduly **delay the** proceeding or prejudice **the** interests of existing parties or of the public.

Winooski One's interest in this proceeding differs significantly from that of the other parties. Winooski One's concern with reduced flows does not relate to the **instream** flow level, but rather the downstream volume of **available** water. An **instream** flow that may be agreeable to VNRC and the Federation may not be agreeable to Winooski One. Thus, **Winooski One's** interest may not be **adequately protected** by the other parties.

Because Winooski One attempts to quantify the possible injury, a court action for damages may well be an alternative means by which to protect its interest. The Board, however, believes that, although there may be other means by which Winooski One can protect its economic interest, the **Board in** its discretion chooses to address initially the interests that Winooski One raises since they are not adequately represented by other/parties.

Finally, although the intervention of Winooski **One may** result in **the consideration** of legal issues that otherwise would not be considered in this proceeding, the Board cannot

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say that' the expansion of **issues** will unduly delay the proceedings. **Nor will** the inclusion prejudice the **interests** of existing parties. The Board notes here that the fact that a **party** is asked to respond to additional issues because of the inclusion of an additional intervenor does not automatically amount to **prejudice**. Such an expansion is a natural, and often positive, outcome of ensuring that the process' is open to all legitimate intervenors.

The Board cautions Winooski One that its participation in the proceeding is limited **solely** to issues directly related **to** the water **quality certification** as that certification relates to the availability of water downstream.

ORDER

Applicant Peter Richardson is denied party status in Docket Nos. 92-02 and **92-05**. Applicant Vermont Federation of Sportsmen's Clubs is denied party status **in** Docket No. 92-02 and granted party status in Docket **No.** 92-05 provided that it complies **with the** provisions of the discussion in part **II(B)**, above. Applicant Winooski One Partnership is denied party status in Docket No. 92-02, but is granted party status in Docket No. **92-05** provided that it **complies with the** conditions discussed in part **III(B)(3)**, above.'

Vermont Water Resources Board
by its Chair


Dale A. Rocheleau, Chair

Concurring: Mark DesMeules
Elaine Little

8/18/92
Date

Absent: Thomas Adler
William Davies