State of Vermont
Water Resources Board

re: Appeal of Larivee
Docket No. 92-09

Authority:
10 V.S.A. §1269

PRELIMINARY ORDER: Party Status

BACKGROUND

On May 25,' 1992, the Wetlands Office of the Department of Environmental Conservation ("DEC") granted a Conditional Use Determination ("CUD") to Oon Teong Ko of Montreal to construct five iveways and two utility crossings within a Class II wetland and ffer zone for an eight (8) lot subdivision on Maquam Shore Road Swanton, Vermont. On or about June 3, 1992, Louise Larivee led a request to appeal the CUD with the DEC. The DBC forwarded e request to the Water Resources Board ("Board"), and the Board ceived it on June 9, 1992. Ms. Larivee subsequently filed a mplete notice of appeal with the Board on June 22, 1992.

A prehearing conference was held on July 23, 1992. Ms. rivee was present, as were other members of the Abenaki Tribe Tribe"). Neither the Tribe nor Ms. Larivee were represented by attorney. On the day of the prehearing conference, the Board ceived a notarized letter from Donald Morgan, requesting that Ms. rivee -represent him. Mr. Morgan stated in his letter that he ned land abutting the Ko property.

Those persons seeking party status were given until August 3, 92, to file formalrequests and supporting information. Only Ms. rivee filed a request, seeking party status for herself and for Mr. Morgan, both members of the Tribe. On August 14, 1992, counsel r Mr. Ko filed a memorandum in opposition to the party status quests of Ms. Larivee and Mr. Morgan.

On September 16, 1992, the Board deliberated and decided that ither Ms. Larivee nor Mr. Morgan had provided it with sufficient formation to make party status determinations. Ms. Larivee and Mr. Morgan were given 'additional time in which to file supplemental formation, and Ms. Larivee was specifically directed to clarify whether she was seeking party status in her individual capacity or representative for the Tribe. On October 2, 1992, the Board ceived additional submissions, including a letter from Homer St. ancis, Chief of the Abenaki Nation of Missisquoi, authorizing Ms. rivee to serve as the Tribe's representative in the appeal, and formation concerning the Tribe's historical usage and cultural gnificance of the subject wetland. On October 8, the Board ceived further information regarding Ms. Larivee's authorization serve as Tribe representative. However, no additional informa- on was filed in support of Mr. Morgan's party status request.

In re: Appeal of **Larivee**
Docket No. 92-09
Preliminary Order: Party Status

An additional filing deadline of October 26, 1992, was set for the filing of comments in support of or in opposition to Ms. **Larivee's** and **Mr.** Morgan's party status requests. There being no further filings/the Board **deliberated** on October 28, **1992.**

For the reasons stated below, Mr. Morgan **is** denied **party** status in this proceeding. However, **the Board** grants party status to the Tribe, with Ms. Larivee as. representative, pursuant to the Board's Rules of Procedure, Rule 22(B). The Board instructs its staff to convene another **prehearing conference** to establish a schedule **for hearing.**

DISCUSSION

Under **10 V.S.A. §§1272** and **905b(18)** and the Vermont Wetland Rules, Section **8.**, the Secretary of the Agency of Natural Resources **("Secretary")** may authorize conditional uses in a significant **wetland** or in **its** associated buffer zone. However, the Secretary cannot issue a CUD **if the** proposed use will have an undue adverse **effect on** protected wetland functions or unless he determines that these impacts, will be sufficiently mitigated. The Secretary may impose any conditions in a CUD order deemed necessary to achieve **the purposes** of the Vermont Wetland Rules. However, before issuing a CUD, **the** Secretary must give notice of the conditional use request by posting a notice at the town clerk's office of the town wherein the wetland or buffer zone is located and must provide the public au opportunity to comment'on the request. Vermont Wetland Rules, Rule 8.3.

The issuance of a CUD is an administrative act, and neither the authorizing statutes or, Vermont Wetland Rules require the Secretary to provide the petitioner, or other persons, an opportunity **for hearing** before a CUD is issued. Therefore, **a** CUD **is not** a "contested case" subject to the requirements and safeguards of the Vermont **Administrative** Procedure Act, 3 V.S.A. **§809. Nevertheless,** the Secretary's determinations under the Vermont iletland Rules are subject to appeal within 30 days to the Board **pursuant** to 10 V.S.A. **§1269. Any person** who has received a CUD has **an** automatic right of appeal, pursuant to 10 V.S.A. **§1272. Iowever,** 10 V.S.A. **§1269** states that "[a]ny person or party in interest aggrieved by an act or decision of the secretary" may nppeal to the, board.' This statute further states, in relevant **part:**

> The board shall hold a de novo hearing at which all persons and parties in interest as determined by board rule may appear and be heard and shall issue an order affirming, reversing or modifying the act of decision of the **secretary within** 10 days following the conclusion of the hearing.

In re: Appeal of Larivee
Docket NO. 92-09
Preliminary Order: Party Status

Ms. Larivee and Mr. Morgan both claim to be parties in interest under 10 V.S.A. §1269, seeking party status pursuant to the Board Rules of Procedure ("Rules"), Rules 22(A)(7) or 22(B). Hence, the Board must look to its own Rules to determine whether a person seeking to participate in a proceeding satisfies the standing requirements of 10 V.S.A. §1269. In re: Appeal of Town of Fairlee, Preliminary' Order, Docket No. 92-07 at 2 (August 28, 1992) (party status determination under Rule 22(B) in an appeal from a Secretary's administrative act under 10 V.S.A. §§1263a and 1269).

Rule 22(A) states, in relevant part, that upon entering a timely appearance the following shall become parties to Board proceedings:

> 7. any person demonstrating a substantial interest which may be adversely affected by the outcome of the proceeding where the proceeding affords the exclusive means by which that person can protect that interest and where the interest is not adequately represented by existing parties.

A person not meeting the stringent requirements of this Rule may nonetheless obtain party status under Rule 22(B), by permission of the Board, if he or she can demonstrate "a substantial interest which may be affected by the outcome of the proceeding." Rule 22(B)(3). This Rule further states:

> In exercising its discretion ..., the Board shall consider: (1) whether the applicant's interest will be adequately protected by other parties: (2) whether alternative means exist by which the applicant can protect his interest: and (3) whether intervention will unduly delay or prejudice the interests of existing parties or of the public.'

I. Mr. Morgan

The Board finds that, Mr. Morgan does not meet the requirements of Rules 22(A)(7) or 22(B). Mr. Morgan has not demonstated substantial interest which may be affected by the outcome of the proceeding.

In his letter to the Board, received July 23, Mr. Morgan asserted that he owns property adjoining the property that Mr. Ko intends to develop and that he has 5 of 6 acres of wetlands connected to the Ko property. He further asserted that if Mr. Ko were to put fill into the wetland, it would "make my already wet

Lands. more wet" and it might "also drive the wildlife on to my drier property." Letter from Donald Morgan to the Water Resources Board, dated July 22, 1992. In Ms. Larivee's filing of August 3, 1992, she further asserted, as representative for Mr. Morgan, that Mr. Morgan's property values would be affected by the anticipated increased flow of drainage onto Mr. Morgan's property.

However, neither Mr. Morgan nor Ms. Larivee, on his behalf, responded to the Board's request for additional information. Accordingly, the Board was unable to substantiate Mr. Morgan's assertion that his property adjoined Mr. Ko's or that the wetland on his property was connected to the wetland for which Mr. Ko requested a CUD. Therefore, the Board concludes that Mr. Morgan has not demonstrated a substantial interest which may be adversely affected by the outcome of the proceeding, pursuant to Rule 22(A)(7), and the Board declines to exercise its discretion in granting permissive intervention, pursuant to Rule 22(B).

II. The Abenaki Tribe represented by Ms. Larivee

Ms. Larivee filed a timely notice of appeal in this matter, asserting that the proposed activities authorized by the CUD would have an undue adverse effect on the protected functions of the wetland involved. She identified herself as a member of the "Abenaki Community" and asserted that several specific wetland functions might be adversely affected should the CUD be permitted to stand as issued by the DEC. Ms. Larivee attended the prehearing conference scheduled in this matter, and supplemented her initial filings at the Board's request. In support of the petition; the Board received a letter from the Tribe's Chief authorizing Ms. Larivee to serve as its representative in this proceeding. The Board also received a document detailing the Tribe's historical usage of the subject wetlands and discussing its cultural and educational utility to the Tribe today.

The Board has determined that the Tribe, represented by Ms. Larivee, has met the conditions for permissive intervention in Rule 22(B). Therefore, it is unnecessary to address the more difficult question posed by a request for intervention as of right under Rule 22(A)(7).

Specifically, the Board finds that the Tribe's interest in this proceeding is more substantial than a generalized concern for the protection of the public's use and enjoyment of the wetlands. Ms. Larivee, as the Tribe's representative, has identified specific wetlands functions that might be adversely affected by the activities authorized by the CUD. The Board believes that there exist

no other alternative means for the Tribe to protect its interests short of participation in this proceeding. Although the Board acknowledges that the Tribe's participation in this proceeding necessarily lengthens the time before the applicant is able, to obtain finality concerning the status, of his CUD, the Board believes that the issues raised by the Tribe, through its representative, merit careful consideration in light of the requirements of the Vermont Wetland Rules. Finally, the Board concludes that Ms. Larivee is not disqualified to serve as the Tribe's representative merely because she is 'not an attorney licensed by the State of Vermont. Board Rule 23(B) does not require that a party be represented by legal counsel. See also Vermont Aaencv of Natural Resources v. Upper Vallev Reaional Landfill Corporation, et al., Docket No. 92-121 (Vt. 'Sup. Ct., Dec., 31, 1992) (non-lawyer may serve as party representative).

ORDER

The Board now holds that'the Abenaki Tribe, represented by Louise, Larivee, is granted party status pursuant to Board Rule 22(B). Donald Morgan is denied party status.

This matter shall be scheduled for hearing 'following a prehearing conference conducted by Board staff, to establish a schedule -for hearing.

Vermont Water Resources Board
by its Chair

March 16, 1993
Date

Dale A. Rocheleau
Dale A. Rocheleau, Chair

Concurring: Jonathan Lash
Elaine B. Little
Mark DesMeules

lot participating:, Stephen Reynes