

**State of Vermont  
Water Resources Board**

**In re: Appeal of Larivee  
Docket No. 92-09**

**Authority:  
10 V.S.A. §1269**

**PRELIMINARY ORDER on MOTION TO STAY**

**BACKGROUND**

On May 25, 1992, the Wetlands Office of the Department of Environmental Conservation ("DEC/ANR") granted a Conditional Use Determination ("CUD") to Oon Teong Ko of Montreal to construct five driveways and two utility crossings within a Class II wetland and buffer zone for an eight (8) lot subdivision on Maquam Shore Road in Swanton, Vermont. On or about June 3, 1992, Louise Larivee filed a request to appeal the CUD with the DEC. This appeal was referred to the Water Resources Board ("Board") and subsequently perfected. On March 16, 1993, the Board through its Chair issued a preliminary order granting party status to the Abenaki Tribe, represented by Ms. Larivee.

On March 25, 1993, Louise Larivee on behalf of the Abenaki Tribe filed a Motion for Stay of the CUD, pending the Board's determination of the appeal. Ms. Larivee asserted that the holder of the CUD or his agent has engaged in fill operations in the subject wetland thereby causing irreparable damage to certain wetlands functions. The stay was sought pursuant to Rule 31 of the Board's Rules of Procedure.

The Board considered the Motion for Stay at its regular meeting on March 29, 1993. For the reasons stated below, the Board denies the Motion for Stay.

**DISCUSSION**

CUDs may be granted pursuant to Section 8 of the Vermont Wetland Rules. Appeals from CUD decisions may be filed with the Water Resources Board pursuant to 10 V.S.A. § 1269. Section 1269 states, in relevant part: "An appeal filed pursuant to this section shall not stay the effectiveness of any act or decision of the department pending determination by the board." Therefore, the statute granting jurisdiction to the Board to hear appeals from decisions of the Secretary of ANR or his designee expressly states that the filing of an appeal with the Board, itself, does not stay the agency's determination. The question then is whether the Board has other authority to grant the requested stay.

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Ms. Larivee has asked the Board to grant a stay pursuant to Rule 31 of the Board's Rules of Procedure. Rule 31 states, in relevant part:

No decision of the Board is automatically stayed by the filing of an appeal. Any party aggrieved by a final order of the Board may request a stay by written motion filed with the Board identifying the order or portion thereof for which a stay is sought and stating in detail the grounds for the request.

Applying the plain meaning rule to Rule 31, it is apparent that the Board has authority to grant stays of its own decisions, when a party appeals a Board decision to another tribunal. However, there is no provision, either under Rule 31 or any other applicable statutes or rules governing the Board's powers, which expressly authorizes the Board to stay the ANR's CUD decision.

Therefore, although the Board shares Ms. Larivee's concern that irreparable harm to important wetland functions could result between the time of the filing of an appeal under 10 V.S.A. § 1269 and the issuance of a final Board decision, the Board finds no authority to support the grant of her request for stay. Given this result, the Board directs that Ms. Larivee's appeal be scheduled promptly for a hearing on the merits. Finally, the holder of the CUD, Mr. Ko, is placed on notice that he acts at his peril pending the Board's final determination of this matter.

ORDER

The Board now holds that the Motion for Stay requested by Ms. Louise Larivee, as representative of the Abenaki Tribe, is hereby denied.

This appeal shall be scheduled for hearing.

Vermont Water Resources Board  
by its Chair

April 5, 1993  
Date

Dale A. Rocheleau  
Dale A. Rocheleau, Chair

Concurring: Mark DesMeules  
Ruth Einstein  
Jane Potvin  
Stephen Reynes