

State of Vermont

WATER RESOURCES BOARD

In re: Proctor Gas, Inc., West Rutland, Vermont  
Docket No. CUD-93-02

DISMISSAL ORDER

I. BACKGROUND

On March 23, 1993, the Water Resources Board (Board) received a Notice of Appeal filed by Proctor Gas, Inc. of West Rutland, Vermont, (the applicant), by and through its attorney James P. W. Goss, of the firm Abell, Kenlan, Schwiebert & Hall. The applicant sought Board review of Conditional Use Determination (CUD) #90-254, issued by the Director of the Water Quality Division, Agency of Natural Resources (ANR) on February 22, 1993. This CUD authorizes the applicant to fill .13 acres of the West Rutland Marsh, a Class Two wetland. The applicant had sought CUD approval to fill approximately .3 acres of the subject wetland. Therefore, the applicant asked the Board to issue a CUD authorizing the filling of the additional .17 acres identified in its application or issue a determination that the area proposed for fill is not located in the West Rutland Marsh or its designated buffer or both. This appeal was filed pursuant to 10 V.S.A. § 1269.

Prior to publication of the Notice of Appeal and scheduling of a hearing in this matter, the applicant informed the Board that it was attempting to negotiate a settlement with the ANR. On August 26, 1993, the ANR issued an amendment to CUD #90-254, authorizing the filling of an additional .08 acres within the Class Two wetland. On September 8, 1993, the Board received a Notice of Withdrawal of Appeal from the applicant, enclosing a copy of amended CUD #90-254. On September 21, 1993, the Board issued a notice of the appeal and request to withdraw appeal, providing interested persons with an opportunity to seek oral argument or file written objections to the requested relief and dismissal of this appeal. No objections or requests for oral argument were filed.

On October 6, 1993, the Board reviewed the applicant's withdrawal request and the amended CUD, memorializing the compromise agreement between the applicant and the ANR. Pursuant to Rule 21 of the Board's Rules of Procedure, this matter is ready for decision.

**Dismissal Order**  
**In re: Proctor Gas, Inc.**  
**Docket No. CUD-93-02**  
**page 2 of 2**

**II. DISCUSSION**

The Board determines that it is not contrary to the intent and purposes of 10 V.S.A. § 905 (7)-(9) and the Vermont Wetland Rules to grant the applicant's request to withdraw its appeal. However, dismissal of this matter is limited to the scope of the CUD appealed to the Board. The consequence of dismissal is that CUD #90-254, issued by the ANR on February 22, 1993, is left standing with its condition limiting the area to be filled to .13 acres of wetland.

The Board notes that its dismissal order has no bearing on the ANR's amendment of August 26, 1993, authorizing the placement of fill in an additional .08 acres of wetland. In other words, the Board neither approves nor disapproves this amendment since it is not properly before the Board at this time. Although the Board questions the authority of the ANR to issue an amendment to a CUD when that CUD is pending before the Board, no person or party in interest has challenged this practice by filing a timely appeal of the amendment to CUD #90-254.

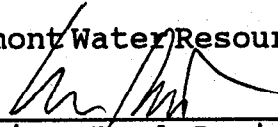
Finally, the Board expresses serious concern about the ANR's decision not to provide public notice of the applicant's amendment request. Sections 8.2 and 8.3 of the Vermont Wetland Rules set forth express requirements for notice and posting of CUD requests in order to inform the public of a proposed action within a significant wetland or its buffer zone. There is no exemption of this requirement for the amendment of a CUD previously issued. Indeed, while the Vermont Wetland Rules are silent concerning a CUD amendment process, the issuance of a new or revised CUD requires public notice, whether or not all purported wetland impacts were identified in the original CUD application.

**III. ORDER**

The above-captioned appeal is hereby dismissed.

Dated at Fairlee, Vermont, this 27<sup>th</sup> day of October, 1993.

Vermont Water Resources Board

  
\_\_\_\_\_  
William Boyd Davies, Chair

Concurring: William Boyd Davies  
Mark DesMeules  
Stephen Dycus  
Ruth Einstein  
Jane Potvin