

**State of Vermont
Water Resources Board**

**In re: Appeal of Cole
(Discharge Permit No. 1-1107,
Stratton Corporation, Stratton, Vermont)
Docket No. WQ-92-13**

**MEMORANDUM OF DECISION
REQUESTS FOR INTERVENTION**

This decision pertains to a preliminary matter in the above-captioned appeal. Subject to the restrictions outlined below, the Water Resources Board (Board) has decided to grant party status to Ilse Mattick, to the Windham Regional Commission (WRC) and to the Conservation Society of Southern Vermont (CSSV) represented by Peter Strong.

I. BACKGROUND

On December 4, 1992, the Agency of Natural Resources (ANR) granted Discharge Permit No. 1-1107 to Stratton Corporation (the permittee), allowing stormwater discharge into Styles and Brazer's Brooks from roads, parking areas and buildings associated with development of the Sun Bowl Community in Stratton, Vermont.

On January 4, 1993, the Water Resources Board (Board) received a notice of appeal filed by Malvine Cole (appellant) seeking reversal of the decision of the Agency of Natural Resources (ANR) authorizing a stormwater discharge into Styles Brook. The appellant owns property adjacent to Styles Brook, and downstream from the stormwater discharge authorized by the ANR. She filed her appeal pursuant to 10 V.S.A. § 1269, seeking reversal of the agency's determination on the basis that the discharge into Styles Brook would not comply with 10 V.S.A. §§ 1263, 1264 and applicable state water quality standards.

No other appeals were timely filed with the Board from the decision of ANR to grant Discharge Permit No. 1-1107 or the companion Discharge Permit No. 1-1106 authorizing stormwater discharge from the permittee's development into Kidder Brook, a Class A water. Styles, Brazer's and Kidder Brooks are all tributaries of the North Branch of Ball Mountain Brook.

This proceeding, therefore, is limited to de novo consideration of the impacts of the proposed discharge on Styles Brook, a Class B tributary of the North Branch of Ball Mountain Brook.

On February 19, 1993, Ms. Cole's appeal was deemed complete and docketed. A notice of prehearing conference was issued on March 15, 1993. Written notices of appearance were filed by Ilse Mattick on March 31, by Peter Strong for the Conservation Society of Southern Vermont (CSSV) on April 2, and by the permittee on

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April 8. A prehearing conference was held on April 8, 1993, in Manchester, Vermont, at which the appellant, permittee, Ms. Mattick and Mr. Strong appeared. The Windham Regional Commission (WRC) filed an untimely written notice of appearance on April 9.

All persons or organizations seeking party status were given until April 23, 1993, to file written petitions for intervention pursuant to Rule 22 of the Board's Rules of Procedure. On April 22 and April 23, respectively, the Board received petitions for intervention from the WRC represented by James P. Matteau, and CSSV represented by Peter Strong. The Board did not receive a written petition from Ms. Mattick.

On April 30, the permittee filed a memorandum with the Board acknowledging WRC's right to party status pursuant to Rule 22(A)(3) of the Board's Rules of Procedure and objecting to the grant of intervention to CSSV. On May 6, the appellant filed a memorandum in support of CSSV's intervention request.

A Prehearing Conference Report and Order was issued on May 7, 1993, confirming the party status of the appellant and the permittee, pursuant to 10 V.S.A. § 1269 and Rule 22(A). Oral argument on the various outstanding intervention requests was noticed on May 18 and held on June 1. Those persons making timely requests to address the Board were the appellant on April 25, and Ilse Mattick and Peter Strong on April 26. Oral argument was held June 1, 1993, in Montpelier, with the following persons addressing the Board: Ms. Mattick, Mr. Strong for CSSV, and James Matteau for WRC. Alan George, Esq., representative for the permittee was not present due to illness and was given an opportunity to file additional objections in writing by June 10, 1993. The permittee did not respond.

The Board deliberated by teleconference on June 14, 1993.

II. ISSUE

The issue before the Board is whether to grant party status, to WRC, Ilse Mattick, and CSSV, either by right of intervention or by permissive intervention, pursuant to Rule 22 of the Board's Rules of Procedure.

III. DISCUSSION

The Vermont Administrative Procedure Act (APA) provides all parties in a contested case the opportunity to respond and present evidence and argument on all issues involved in the proceeding.

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3 V.S.A. § 809(c). "Party" is defined by the APA to include "each person ... properly seeking and entitled as of right to be admitted as a party." 3 V.S.A. § 801(5). The APA does not define the circumstances that entitle a would-be intervenor to intervention as of right. Therefore, the Board has looked to the specific statutes governing appeal rights from particular permits to determine who should be granted party status. In re: Appeal of VNRC, Docket Nos. 92-02 and 92-03, Preliminary Order at 2, August 18, 1992. The water pollution control statute, 10 V.S.A. ch. 47, provides a conditional right to intervene on "persons and parties in interest as determined by board rule." 10 V.S.A. § 1269. In re: Appeal of Town of Fairlee, Docket No. 92-07, Preliminary Order at 2, August 28, 1992. Discharge permits for stormwater are issued under authority of 10 V.S.A. ch. 47. 10 V.S.A. § 1263. Hence, intervention in appeals from discharge permits is governed by Rule 22(A) and 22(B) of the Board's Rules of Procedure (Rule or Rules).

I. Windham Regional Commission

The Windham Regional Commission (WRC) serves a 27-town area in southeastern Vermont, including the Town of Stratton where the permittee is authorized to make its stormwater discharge. Although WRC neither supports or opposes the relief requested in this appeal, it seeks party status as of right pursuant to Rule 22(A)(3) for the limited purposes of cross-examining witnesses and filing memoranda in the course of this proceeding.

Rule 22(A) states, in relevant part, that:

Upon entering a timely appearance the following shall become parties to Board proceedings: ...

(3) the regional planning commission serving the area within, or adjacent to, which the petitioner's or appellant's activity is to take place; ...

Pursuant to Rule 22(B)(2), in order for a request to be timely, a potential party must enter its appearance at or before an initial prehearing conference. The Board has held 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 Rule 22(B) request for intervention.

In re: Appeal of VNRC, Docket Nos. 92-02 and 92-05, Preliminary Order at 3, August 18, 1992. WRC did not file a written notice of appearance prior to the prehearing conference of April 8, 1993, and its written notice of appearance, although dated April 8, 1993, was not received by the Board until April 9, a day after the prehearing conference. Therefore, WRC's did not enter a timely appearance.

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The reason given by WRC for not appearing at the prehearing conference was the illness on April 8 of its Associate Director, James Matteau. Had WRC appeared at the prehearing conference it would have been entitled to intervention of right pursuant to Rule 22(A)(3).

Rule 22(B)(2) provides some relief for late petitioners. This rule states, in relevant part:

The Board may consider an untimely petition if it finds that the petitioner has demonstrated good cause for failure to request party status in a timely fashion, and that late appearance will not unfairly delay the proceedings or place an unfair burden on other parties.

The Board has decided to grant WRC party status on the basis that WRC has demonstrated good cause for failure to request party status in a timely fashion. But for the illness of its staff and the resultant delay in its entry of appearance, WRC would have been entitled as of right to party status pursuant to Rule 22(A)(3). WRC's request for limited participation means that the proceedings will not be unfairly delayed. Moreover, WRC, as an active party in a related proceeding before the District II Environmental Commission, may be able to assist the Board through its cross-examination of witnesses and briefing of issues. The permittee has conceded that WRC is a proper party in this proceeding. No party, including the permittee, has asserted that WRC's participation will create an unfair burden. Therefore, the Board has decided to grant WRC permissive intervention pursuant to Rule 22(B).

II. Ilse Mattick

Ilse Mattick seeks intervention in this proceeding. Ms. Mattick has not identified whether she seeks intervention as of right or by permission. Ms. Mattick is not represented by counsel.

On March 29, 1993, the Board received a letter from Ms. Mattick seeking party status and advising the Board that she would attend the prehearing conference. In the letter and again at the prehearing conference on April 8, Ms. Mattick indicated that she supports the relief requested in this appeal and identified the following as reasons why she should be granted party status: (1) she is an owner of real property adjacent to Styles Brook and downstream from the proposed stormwater discharge; (2) she has long enjoyed Styles Brook for its aesthetic and recreational values; (3) for domestic use, she relies on a well in close proximity to Styles Brook; (4) her vegetable garden, which supplies most of her food, is in close proximity to Styles Brook; (5) if the stormwater discharge were to "pollute" Styles Brook, seepage and contaminated

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ground water would adversely affect her well and vegetable garden; and (6) due to the close proximity of her land and especially her vegetable garden to Styles Brook, any increase in flooding due to the stormwater discharge might damage her property.

Although Ms. Mattick did not file a formal written petition for intervention by April 23, 1993, she filed on May 26 a written request to address the Board at oral argument. Ms. Mattick appeared before the Board on June 1, 1993, and described in greater detail the nature of her interest in this proceeding. Ms. Mattick owns 775 feet of frontage on Styles Brook above the appellant's property and therefore closer to the point of the proposed discharge. Ms. Mattick has resided at this property in the Town of Stratton for well over forty years -- that is, prior to development by Stratton Corporation in the area of Styles Brook. Ms. Mattick's drilled well is less than one hundred feet from Styles Brook and is her source of drinking water. Her two vegetable gardens are respectively 20 and 50 feet from Styles Brook.

The Board determines that Ms. Mattick meets the requirements for permissive intervention pursuant to Board Rule 22(B). Rule 22(B) states that a petition for party status before the Board may be made "either orally or in writing." Ms. Mattick entered an appearance prior to the prehearing conference and made her petition orally at the prehearing conference. Therefore, her petition is timely under Rule 22(B)(2) of the Board's Rules of Procedure. Although the Prehearing Conference Report and Order set a deadline of April 23, 1993, for the filing of all written petitions for party status, the Board concludes that Ms. Mattick's failure to submit a timely written petition memorializing her timely oral request for intervention and previous written notice of appearance is not, in the interest of fairness, a basis for denying her party status.

In order for the Board to exercise its discretion in granting party status pursuant to Rule 22(B), the person seeking intervention must demonstrate a "substantial interest which may be affected by the outcome of the proceeding." Rule 22(B)(3). The Board has previously stated that a "substantial interest" is something more than "a general concern for the natural resources of the state." Rather, the person seeking intervention must demonstrate some specific interest or special connection to the subject body of water. In re: Appeal of VNRC, Docket Nos. 92-02 and 92-05, Preliminary Order at 4-5, August 18, 1992. Ms. Mattick has described with sufficient particularity her property, its relationship to Styles Brook, and her use and enjoyment of both the land and brook, and she has convinced the Board that her interest may be affected by the outcome of this proceeding.

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Additionally, Ms. Mattick has demonstrated to the Board that her interest in this proceeding is not identical to that of the appellant's. Granted, the appellant and Ms. Mattick share a general concern in the impacts of the proposed stormwater discharge on Styles Brook and, in particular, the impacts on water quality, existing uses, aquatic biota, fish and wildlife, and the adequacy of the controls to maximize infiltration and minimize erosion. However, Ms. Mattick has articulated a particular interest in the impacts of potential water pollution and flooding on her drinking water and vegetable garden. This interest is distinct from those claimed by the appellant, and therefore it cannot be said that the appellant can adequately protect Ms. Mattick's interest.

Finally, the Board is not convinced that Ms. Mattick has an alternative means by which she can protect this interest or that intervention will unduly delay the proceeding or prejudice the interest of existing parties or of the public. Even if Ms. Mattick has testified on water pollution issues in related Act 250 proceedings before the District II Environmental Commission, the Board is unwilling to hold that such participation alone precludes her participation in this appeal. Moreover, to the extent that Ms. Mattick coordinates her testimony with that of the appellant and relies on the same expert witnesses, the Board does not anticipate that this proceeding will be unduly delayed or the parties or public prejudiced.

Therefore, the Board has decided to grant Ilse Mattick party status pursuant to Board Rule 22(B).

III. Conservation Society of Southern Vermont (CSSV)

The Conservation Society of Southern Vermont (CSSV) is a nonprofit corporation, dedicated to the preservation of southern Vermont's native beauty and the conservation and protection of its natural resources. CSSV owns Pikes Falls, an Outstanding Resource Water (ORW) on the North Branch of Ball Mountain Brook in Jamaica, Vermont. 10 V.S.A. § 1424a. Pikes Falls is a waterfall, the only one of significance on Stratton Mountain, which is used for swimming, fishing, and other recreational uses. Styles Brook, Brazer's Brook, and Kidder Brook are all upstream tributaries of the North Branch above Pikes Falls. Pikes Falls is approximately two and a half miles downstream from the proposed stormwater discharge into Styles Brook. CSSV opposes the decision of the ANR granting Discharge Permit No. 1-1107 and it supports the relief requested by the appellant. CSSV seeks intervention under Rule 22(A) and, in the alternative, 22(B).

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At the prehearing conference of April 8, 1993, Peter Strong entered an appearance for CSSV. Mr. Strong is Chairman of the Board and President of CSSV. Mr. Strong subsequently filed a timely written petition for intervention on April 22, 1993. Therefore, he meets the timeliness requirements of both Rules 22(A) and 22(B).

To obtain party status as of right under Rule 22(A), a person or entity must meet the requirement of one of seven enumerated categories. Mr. Strong does not identify which category his organization meets, although the Board concludes that if any category were applicable, it would be Rule 22(A)(7). In order to obtain party status under this provision, a person must demonstrate "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 represented by existing parties."

The Board has reviewed Mr. Strong's submittal and considered his arguments on June 1, 1993. It is unable to conclude that Mr. Strong has provided it with a sufficient information and justification to entitle CSSV to intervention as of right pursuant to Rule 22(A)(7). Therefore, the Board has elected to consider CSSV's request pursuant to Rule 22(B), providing for permissive intervention. Applying the standards of Rule 22(B)(3), the Board concludes that CSSV has an interest which may be affected by the outcome of this proceeding in that Styles Brook is a tributary of the North Branch and that the proposed discharge may adversely affect the water quality, existing uses, aquatic biota, fish and wildlife, and aesthetics of waters downstream of Styles Brook, including those at Pikes Falls.

The Board further concludes that CSSV's interest is substantial and distinct from that identified by the appellant, and that CSSV's interest cannot be adequately protected by the appellant or any other party. Even though the appellant and CSSV share some common concerns (for example, the appearance of "iron seeps" in Styles Brook and waters downstream), CSSV is custodian of a significant public resource. Pikes Falls has been designated by this Board as an ORW, one of the few bodies of water so designated in the State of Vermont. The appellant is not an officer of CSSV and nothing in her filings or statements to the Board suggests that she can adequately represent the corporation's interest in Pikes Falls. The Board also is unable to conclude that CSSV's interest can be adequately represented by any other party.

Rule 22(B)(3) requires the Board to consider whether alternative means exist by which the applicant can protect its interest. By his own admission, Peter Strong and CSSV have been active parti-

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Participants in a related Act 250 proceeding before the District II Environmental Commission. Stratton Corporation, Application #2W0911. Specifically, CSSV has challenged the Sun Bowl development's conformance with Criterion 1(A) and (E) and Criterion 8 of Act 250, and sought specific findings and conclusions on water pollution and aesthetics. However, as noted above with reference to Ms. Mattick's intervention request, the Board is unwilling to adopt the view that because issues raised in a person's petition for intervention may have been addressed in a related Act 250 proceeding that this, alone, necessarily precludes the grant of intervention in an appeal before the Board.

The Board also concludes that CSSV's participation will not unduly delay the proceedings or prejudice the interest of existing parties or of the public. The appellant and Mr. Strong have represented that they will coordinate their testimony and the testimony of their expert witnesses on the anticipated impacts of the stormwater discharge on Styles Brook and waters downstream, and the Board is relying on this representation in granting party status. See In re: Appeal of VNRC, Docket Nos. 92-02, Preliminary Order at 3 (April 10, 1992).

Finally, the Board is cognizant of the permittee's concern that CSSV, in including in its intervention petition claims about the impacts of the permittee's proposed discharges to Kidder and Brazer's Brook, is attempting to expand the scope of this proceeding beyond that framed by Ms. Cole's Notice of Appeal. However, Rule 18(D) of the Board's Rules of Procedure specifically states that the scope of any de novo or appellate proceeding "shall be limited to those issues specified in the petition or notice of appeal" with rare exception. Village of Woodstock v. Bijan Bahramian, ___ Vt. ___, No. 91-017 at 9 (Vt. March 12, 1993) (In the context of a zoning appeal, a superior court with de novo powers may not review the entire permit application but is limited in its review to the issues raised in the notice of appeal). CSSV did not file timely appeals from Discharge Permits Nos. 1-1106 and 1-1107. Therefore, the scope of this proceeding is limited to the issues raised in the appellant's notice of appeal as clarified in the Prehearing Conference Report and Order, dated May 7, 1993, and any offers of evidence on the impacts of the permittee's proposed discharges to Kidder and Brazer's Brooks may be deemed inadmissible by the Board.

For the foregoing reasons, the Board has decided to grant CSSV party status pursuant to Board Rule 22(B).

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IV. ORDER

1. The Windham Regional Commission (WRC) is granted party status pursuant to Rule 22(B) of the Board's Rules of Procedure, for the limited purposes set forth in its request for intervention.
2. Ilse Mattick is granted party status pursuant to Rule 22(B) of the Board's Rules of Procedure. The Board urges Ms. Mattick to coordinate her presentation of evidence with the appellant.
3. The Conservation Society of Southern Vermont (CSSV) is granted party status pursuant to Rule 22(B) of the Board's Rules of Procedure. However, the Board restricts CSSV's right of participation to the presentation of evidence and argument related to the proposed discharge to Styles Brook and its anticipated impacts on Pikes Falls. CSSV is instructed to join with the appellant, to the extent possible, in the presentation of expert testimony and other matters.

Dated at Burlington, Vermont, this 9th day of July, 1993.

Water Resources Board,
by its Chair


Dale A. Rocheleau

Concurring: Mark DesMeules
Ruth Einstein
Jane Potvin
Stephen Reynes

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