

State of Vermont  
WATER RESOURCES BOARD

In re: Champlain Oil Company (Denial of Conditional Use  
Determination #91-351), Docket No. CUD-94-11

PRRHEARING CONFERENCE REPORT AND ORDER

I. BACKGROUND

On August 12, 1994, the Water Resources Board (Board) received a notice of appeal filed by Champlain Oil Company (Champlain) from a decision of the Agency of Natural Resources (ANR) denying Conditional Use Determination (CUD) #91-351 to Champlain for the placement of 0.9979 acres of fill in a Class Two, wetland to enable the construction of a convenience store, restaurant, gasoline service islands and parking spaces, on Route 78, in the Village of Swanton, Vermont. The appellant specifically objected to the ANR's findings, conclusions and conditions respecting the project's impacts on surface and ground water protection: wildlife habitat and open space and aesthetics under wetland functions §§ 5.2, 5.4 and 5.9 of the Vermont Wetland Rules. This appeal was filed pursuant to 10 V.S.A. § 1269 and Section 9 of the Vermont Wetland Rules.

On August 15, 1994, this appeal was deemed complete and docketed. On September 19, 1994, a Notice of Appeal and Prehearing Conference was sent to persons required to receive notice and on September 22, 1994, it was published in the St. Albans Messenger. Rule 18(C) and 20 of the Board's Rules of Procedure.

Entering timely appearances were Gerry Bovat, an adjoining landowner, on September 8, 1994; the Abenaki Nation on October 6, 1994; and the ANR by Kurt R. Janson, Esq. on October 6, 1994.

On October 6, 1994, at 1:30 p.m., a prehearing conference was convened at the Board's Conference Room, 58 East State Street, Montpelier, Vermont, by the Board's delegate, Kristina L. Bielenberg, Esq., pursuant to Rule 24(A) of the Board's Rules of Procedure. The following persons entered timely appearances and participated.

John R. Ponsetto, Esq., Gravel and Shea, for Champlain,  
appellant  
John B. Kassel, Esq., for ANR  
Scott Michael Mapes, Esq., for Gerry Bovat  
Anthony Patt, Esq., and David M. Peterson, Alternatives  
for Community and Environment, for the Abenaki Nation

On October 18, 1994, a draft Prehearing Conference Report and Order was circulated to the above persons for comment. On October 26, 1994, the Board received comments from the appellant. On October 31, 1994, the Board received comments from Alternatives for

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Community and Environment, as part of the Intervention Petition filed by the Abenaki Nation. A final Prehearing Conference Report and Order is now ready for issuance.

## II. ISSUES

Based on the denial decision in CUD #91-351, the appellant's notice of appeal and its Prehearing Conference Statement, the issues in this matter appear to be:

(a) Whether, pursuant to Rule 8 of the Vermont Wetland Rules, the placement of fill will have more than a minimal impact on the capacity of the affected wetland to protect surface and ground water (function § 5.2 of the Vermont Wetland Rules): on the affected wetland's wildlife and migratory bird habitat (function § 5.4 of the Vermont Wetland Rules): and on the wetland's open space and aesthetic character (function § 5.9 of the Vermont Wetland Rules);

(b) Whether, pursuant to Rule 8 of the Vermont Wetland Rules, the placement of fill will have an undue adverse impact on the wetland's functions of protecting surface and groundwater, providing significant wildlife and migratory bird habitat, and open space and aesthetic character:

(c) Champlain claims that the impacts of its project will have a minimal impact on protected wetland functions and therefore denies that mitigation or compensation is required. Nevertheless, it asks the Board to consider whether it has demonstrated compliance with the mitigation and compensation measures of Rule 8.5(b) and (c) of the Vermont Wetland Rules; and

(d) Whether Champlain has been denied all economically beneficial and productive use of its land, a taking for which compensation is required pursuant to the Fifth and Fourteenth Amendments of the United States Constitution and Chapter I, Article 2 of the Vermont Constitution.

## III. STANDARD OF REVIEW

Any hearing on the merits in this appeal shall be conducted as a de novo proceeding, pursuant to 10 V.S.A. § 1269. The Board shall issue an order affirming, reversing or modifying the act or decision of the Secretary of ANR within ten days of the conclusion of the hearing. The present appeal does not stay the effectiveness of any act or decision of the agency pending determination by the Board.

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IV. PRELIMINARY ISSUES

At the prehearing conference, several preliminary issues were raised by the appellant and potential intervenors. These may be summarized as follows:

(a) Whether the appellant may "amend" the application which resulted in the denial of CUD #91-351 and receive the ANR's approval of said amendment while this appeal is pending before the Board.

In partial answer to the above question, those present at the prehearing conference were provided with a copies of the Board's Dismissal Order in In re: Proctor Gas, Inc., Docket No. CUD-93-02 (Oct. 27, 1993).

In its written comments of October 26, 1994, the appellant clarified that its intent is not to amend the application, but to present the Board, in the context of its de novo review of the proposal, several minor design changes and additional evidence in support of its application. Therefore, the question posed at the prehearing conference is no longer a preliminary issue to be addressed by the Board.

(b) Whether the scope of this appeal may be expanded to include consideration of impacts on the functions of the involved Class Two wetland not identified in the appellant's notice of appeal.

This issue was raised in light of the October 6, 1994, filing by Alternatives for Community and Environment, representative for the Abenaki Nation, which identified function § 5.1 as a function which would or could be adversely affected by Champlain's project.

In its Petition for Intervention, filed October 31, 1994, the Abenaki Nation withdrew their request for review of the CUD application for impacts to function § 5.1 of the Vermont Wetland Rules. Therefore, the question posed at the prehearing conference concerning expansion of the scope of appeal is no longer a preliminary issue to be addressed by the Board.

(c) Whether the Board has the power to decide a takings claim under the United States and Vermont Constitutions.

Any party or potential intervenor may ask the Board to rule on the above-stated preliminary issue or any other preliminary issue in accordance with the terms set forth in the Order below. Any party or potential intervenor may file written responses in accordance with the terms set forth in the Order below.

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**V. INTERVENTION**

The following requested party status at the prehearing conference: the ANR, Gerry Bovat, and the Abenaki Nation. The appellant asked that it be provided with the opportunity to formally object to intervention requests.

On October 28, 1994, the Board received a timely Petition for Intervention from Gerry Bovat and on October 31, 1994, the Board received a timely Petition for Intervention from the Abenaki Nation. Those persons attending the prehearing conference and, objecting to the above party status requests, may file written objections in accordance with the terms set forth in the Order below.

**VI. WITNESSES AND EXHIBITS**

(a) The appellant identified potential witnesses and documents in a Prehearing Conference Statement filed with the Board on October 6, 1994. The appellant reserves the right to call additional witnesses and file exhibits in accordance with the terms set forth in the Order below and any Supplemental Prehearing Order.

(b) Gerry Bovat identified as a potential witness, Sheila McIntyre, a wetland specialist employed by Pinkham Engineering, Burlington. He reserves the right to call additional witnesses and file exhibits in accordance with the terms set forth in the Order below and any Supplemental Prehearing Order.

(c) The ANR identified as potential witnesses: Carl Pagel of the Wetlands Office, Department of Environmental Conservation (DEC); Lawrence Garland and Thomas Myers, District Wildlife Biologists of the Department of Fish and Wildlife; and Steven Syz and David Clough of the Water Quality Division, DEC. The ANR reserves the right to call additional witnesses and file exhibits in accordance with the terms set forth in the Order below and any Supplemental Prehearing Order.

(d) The Abenaki Nation, represented by Alternatives for Community and Environment, identified as a potential witness, David M. Peterson, Wildlife Biologist, and appended to its October 6, 1994, filing various documents it asked the Board to notice in this matter. The Abenaki Nation reserves the right to call additional witnesses and file exhibits in accordance with the terms set forth in the Order below and any Supplemental Prehearing Order.

(e) The parties and potential intervenors agreed to prefile witness lists, testimony, exhibits lists and exhibits, and other

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filings with the Board in accordance with a schedule and terms established in the Order below and any Supplemental Prehearing Order.

In order for the Board to notice any administrative decisions or documents of the ANR, these must be offered as exhibits in accordance with the terms of the Order below and any Supplemental Prehearing Order.

#### VII. STENOGRAPHIC RECORD

All hearings before the Board are recorded by electronic sound recording device. Parties were reminded that if they anticipate that this case might be appealed to court that they should retain the services of a court reporter to create a transcript of the proceeding, consistent with the procedures set forth in Rule 28(C) of the Board's Rules of Procedure.

#### IX. DISCLOSURES

At the prehearing conference, the current Board members were identified by name (Chair William Boyd Davies, Mark DesMeules, Stephen Dycus, and Jane Potvin) and their present and past professional affiliations. No party or potential intervenor sought additional disclosures with respect to the above-named Board members by the October 31, 1994, deadline.

The Board's designee noted at the prehearing conference that membership on the Board might change before this matter could be heard on either a preliminary issue or the merits. In the cover memorandum to the draft prehearing conference report and order, dated October 18, 1994, the Board's designee informed the parties that Gail Osherenko of Norwich, Vermont, had been appointed effective October 27, 1994, to complete the term vacated by member Mark DesMeules. In addition to the disclosures made in the October 18 memorandum, it is noted here that Ms. Osherenko is a Fellow of the Dickey Center Institute of Arctic Studies and Environmental Studies Program at Dartmouth College, is a licensed attorney in Vermont (although she does not actively practice law), and was a member of the Board Directors of the Vermont Natural Resources Council (VNRC) from 1983-1988. Ms. Osherenko also co-authored a wetlands report between February and June 1981, while she served as staff attorney for the VNRC. This report was submitted to the Vermont Agency of Environmental Conservation (now the Department of Environmental Conservation, ANR). See G. Osherenko, S. Kaplan, and D. Bradley, "Vermont Wetlands: Laws and Voluntary Techniques for Conservation" (1982).

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Any party or potential intervenor seeking additional disclosures with respect to Ms. Osherenko should do so in accordance with the terms set forth in the Order below. Any party objecting to the participation of any Board member shall do so in accordance with the terms set forth in the Order below.

**X. SUPPLEMENTAL PREHEARING ORDER**

A Supplemental Prehearing Order setting forth a schedule of filing deadlines for prefiled witness lists, testimony, exhibits, exhibits lists and legal memoranda shall be prepared in consultation with the parties and issued at such time as this matter is ready for a hearing on the merits. This Supplemental Prehearing Order shall also address arrangements for a site visit of the subject site.

**XI. ORDER**

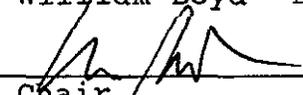
1. The following are parties as of right: Champlain, the appellant, pursuant to 10 V.S.A. § 1269; the ANR, pursuant to Rule 22(A)(4) of the Board's Rules of Procedure.
  2. Gerry Bovat and the Abenaki Nation filed timely petitions for intervention by the October 31, 1994, deadline. Parties may file any written objections to the intervention requests of Gerry Bovat or the Abenaki Nation no later than **4:30 p.m.**, Thursday, November 10, 1994.
  3. On or before **4:30 p.m.**, Thursday, November 10, 1994, any party or petitioner for intervention seeking additional disclosures from member Gail Osherenko, concerning any actual or potential conflicts of interest, shall file a written request with the Board. This request should state any facts known to the requesting party that might require **recusal** of a Board member.
  5. On or before **4:30 p.m.**, Monday, November 21, 1994, any party or petitioner for intervention seeking a preliminary ruling on the remaining issue identified in Part IV., above, or with respect to **any** other preliminary issue, shall file with the Board a motion or motions, supported by legal memorandum.
  6. On or before **4:30 p.m.**, Monday, November 21, 1994, any party or petitioner for intervention objecting to the participation of a Board member in this proceeding shall file a written objection with the Board. This filing should state the reason(s) for the objection(s) and any facts known to the
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party or petitioner which might require the Board member's **recusal**. Failure to file a timely request may be deemed a waiver of objection to the participation of a Board member.

7. On or before 4:30 p.m., Friday, December 2, 1994, any party wishing to respond to any motion filed with respect to any preliminary issues shall file with the Board a written response with supporting legal memorandum.
8. Any motions, memoranda, petitions or other filings with the Board shall be filed as an original and five (5) copies. One copy should also be mailed to each of the persons listed on the attached Certificate of Service until otherwise notified, by the Board. A certificate of service indicating delivery to all listed persons by hand or by first class mail shall also be filed with the Board and listed persons. The Board does not accept filings by FAX.
9. Pursuant to Rule 24(B) of the Board's Rules of Procedure this order shall be binding on all persons who have received notice of the prehearing conference, unless there is a timely objection to the Order, or a showing of cause for, or fairness requires, waiver of a requirement of this Order.

Dated at Montpelier, Vermont, this 4<sup>th</sup> day of November, 1994.

William Boyd Davies

  
Chair,  
Water Resources Board