

State of Vermont
WATER RESOURCES BOARD

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

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to an appeal filed by Champlain Oil Company (Champlain) from a decision of the Agency of Natural Resources (ANR) denying conditional use determination (CUD) #91-351. For the reasons stated below, the Water Resources Board (Board) affirms the ANR's decision and denies Champlain Oil's CUD application.

I. Procedural History

On February 7, 1994, Champlain filed with the ANR a revised CUD application, #91-351, seeking permission for the placement of 0.9979 acres of fill within a Class Two wetland for the purpose of enabling the construction of a convenience store, restaurant, gasoline service islands and parking spaces, to be located on Route 78, in the Village of Swanton, Vermont (the project). On August 12, 1994, Champlain filed with the Board a notice of appeal, requesting review of the ANR's denial. This appeal was filed pursuant to 10 V.S.A. § 1269 and Section 9 of the Vermont Wetland Rules.

On August 15, 1994, the appeal was deemed complete and docketed. A Notice of Appeal and Prehearing Conference was issued on September 19, 1994, and published in the St. Albans Messenger, September 22, 1994. On October 6, 1994, a prehearing conference was convened in the Board's Conference Room, in Montpelier, Vermont. A Prehearing Conference Report and Order governing the proceedings was issued by the Chair on November 4, 1994. This was followed by a Supplemental Prehearing Order on February 14, 1995.

Those entering timely appearances and granted party status in this matter were: Champlain, represented by John R. Ponsetto, Esq., Gravel and Shea; ANR, represented by John B. Kassel, Esq., and Kurt Janson, Esq.; and the Abenaki Nation, represented by Anthony Patt, Esq., and David M. Peterson, Alternatives for Community and Environment. On January 3, 1995, the Board denied party status to Gerry Bovat of Swanton, represented by Scott Michael Mapes, Esq. Preliminary Order: Party Status and Takings Issues, In re: Champlain Oil Company, Docket No. CUD-94-11 (Jan. 3, 1995); Order: Motion to Alter Decision, In re: Champlain Oil Company, Docket No. CUD-94-11 (Feb. 14, 1995).

The Board held a de novo hearing at the Village of Swanton Municipal Complex in Swanton, Vermont, on April 27 and 28, 1995. The Board conducted a site visit of Champlain's proposed project site and the involved Class Two wetland on April 27, 1995. The Board recessed the hearing on April 28. On May 23, 1995, the Board received memoranda of law from the parties.

The Board deliberated in this matter beginning May 31, 1995. Following a review of the evidence and the parties' filings, the Board declared the record complete on August 30, 1995. This matter is now ready for decision.

II. Issues

The issues raised by Champlain may be summarized as follows:¹

- A. Whether, pursuant to Section 8 of the Vermont Wetland Rules (Rules), Champlain's project would have more than a minimal impact on the following wetland functions: surface and ground water protection (Rules, Section 5.2); wildlife and migratory bird habitat (Rules, Section 5.4); and open space and aesthetics (Rules, Section 5.9).

¹ In its Notice of Appeal seeking review of the ANR's CUD denial and at the prehearing conference, Champlain raised the following issue:

Whether Champlain had 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.

See Prehearing Conference Report and Order at 2, In re: Champlain Oil Company, Docket No. CUD-94-11 (Nov. 4, 1994).

The Board considered this question as a preliminary matter and ruled that it had no authority to decide whether the ANR's denial of CUD #91-351 constituted a regulatory taking. Preliminary Order at 5-7, In re: Champlain Oil Company, Docket No. CUD-94-11 (Jan. 3, 1995).

- B. If the project would have more than a minimal impact on the above-listed functions, has Champlain demonstrated compliance with the mitigation and compensation measures required by Subsections 8.5(b) and (c) of the Rules.
- C. Whether, pursuant to Section 8 of the Rules, the project would have an undue adverse impact on the above-listed wetland functions, so that CUD #91-351 should be denied.

III. Findings of Fact

A. General description of the project and involved wetland

1. Champlain has applied for a CUD to obtain permission to place 0.9979 acres of fill within a Class Two wetland in Swanton, Vermont. The purpose of the fill is to provide a foundation for the construction of a gas station, convenience store, and fast food restaurant housed in a 2,580 square foot building to be located on Route 78, near Interstate I-89, in the Village of Swanton, Vermont. Champlain also intends to use the filled site for gas pump islands, canopy, underground gasoline storage tanks, utilities, and parking areas to accommodate twenty-five parking spaces.
2. Champlain is a business corporation, with offices in South Burlington, Vermont. It is in the business of wholesale distribution of gasoline and petroleum products. The company operates in Vermont, New York and New Hampshire. The purpose of its project is to expand its business to the Swanton I-89 interchange, providing a travel service area for the traveling public.
3. The project would be located within a 6.47 acre parcel owned by Champlain in the northwest quadrant of the intersection of Route 78 and I-89 in Swanton.
4. Champlain's 6.47 acres consists of two parcels of land acquired by Champlain at different times. The first parcel (1.47 acres) was acquired on March 28, 1989, and consists of a narrow, triangular lot with 200 feet of frontage on Route 78, and over 600 feet along the right-of-way from the I-89 southbound exit ramp. The second parcel (5 acres) is adjacent to and just west of the first parcel and was acquired on October 29, 1993.
5. The proposed 0.9979 acres of fill would occupy a square area approximately 200 feet by 200 feet, and would span the two parcels owned by Champlain. The fill would abut Route

78 on the south and the Bovat Mobil Station and Grand Union properties on the west.

6. Virtually all of Champlain's 6.47 acre parcel is Class Two wetland, characterized as shallow marsh. The only upland portion of the site is a narrow strip of fill extending from the Bovat Mobil Station property just easterly of Champlain's western property line.
7. Champlain owns no other real property in the area of the I-89 and Route 78 interchange. Several other undeveloped properties exist in the area of the interchange and consist of filled land, wetland or a combination of both.
8. The wetland located on Champlain's property comprises the southernmost portion of a large Class Two wetland, estimated to be in excess of 75 acres, extending north and northwest from Route 78 and west of I-89. The 75-acre wetland is the remnant of an historically larger wetland, estimated to have been approximately 175 acres, which was significantly reduced in size by draining for agriculture and the placement of fill for road improvements, a railroad bed, homes, and various commercial uses.
9. The 75-acre wetland is identified on the National Wetland Inventory Map for the Swanton area (Map 11C) as PF0/SSIC.
10. Impacts to three of the wetland's significant functions are at issue in this appeal: surface and ground water protection (Rules, Section 5.2), wildlife and migratory bird habitat (Rules, Section 5.4), and open space and aesthetics (Rules, Section 5.9).

B. Impacts of the Project on Wetland Functions

Function 5.2. Surface and ground water protection

11. The 75-acre wetland was bifurcated prior to 1916 by a road bed (abandoned "Diagonal Road"). That portion of the wetland south of the Diagonal Road was subsequently reduced in size between 1962 and 1985 by the construction of I-89 and the placement of fill for, among other developments, the Bovat Mobil Station, Grand Union supermarket, and related parking areas. As a consequence, the southern portion of the 75-acre wetland is now approximately 10 acres in size.
12. Whereas that portion of the wetland north of the "Diagonal Road" is largely wooded or dominated by scrub/shrub, the 10-acre portion which includes Champlain's property is wet

marsh, with a canopy of 90 to 95 percent emergent herbaceous vegetation including approximately 30% cattails, 5% common reed (*Phragmites* sp.), and the remainder in low graminoids such as *Carex lacustris*.

13. The terrain of the wetland south of the "Diagonal Road" gently slopes to the south. Waters in this area tend to collect in small depressions and percolate through the mat of emergent herbaceous vegetation. Waters leave this portion of the wetland in two directions. Some exits through a ditch to the north and west of the Bovat Mobil Station. However, much of the water in the wetland congregates in a vegetated drainage corridor along the eastern edge of the Champlain property and within the right-of-way of the I-89 southbound exit ramp.

Waters traveling through the eastern corridor slowly enter an open drainage ditch along Route 78 and move in a westerly direction before entering a metal roadside culvert and then passing through another culvert under Route 78. On the south side of Route 78, the waters are directed by open ditch through a forested wetland in a southerly direction a distance of approximately 3,000 feet. Here the waters enter the Missisquoi River, which flows into Lake Champlain.

14. Contaminants, primarily petroleum products and other automobile-related wastes, enter the surface waters of the wetland from adjacent roadways, parking lots and other impervious surfaces.
15. Dense vegetation in the 10-acre portion of the wetland traps and filters these contaminants in two ways. First, contaminated waters entering the wetland from the interstate itself, as well as the southbound exit ramp, flow into the drainage corridor along the interstate right-of-way, and from there back up into the wetland located on Champlain's property, especially during periods of high water. Cattails and the other emergent herbaceous vegetation within the wetland and drainage corridor effectively slow the movement of these waters, in turn causing some contaminants to settle and others to bind with or become trapped in the vegetation as the waters recede toward the Route 78 ditch.
16. Contaminated waters entering the wetland from the Bovat Mobil Station and Grand Union properties enter the Champlain plain portion of the wetland from the north and west. These waters move slowly through the emergent herbaceous vegetation, eventually reaching the drainage corridor to the east of Champlain's property and the Route 78 ditch to the south. However, in the process, heavy particles settle and other

contaminants are filtered and retained by the dense vegetation, eventually becoming imbedded in the wetland's highly organic soils.

17. That portion of the wetland comprising Champlain's project is especially critical in protecting and enhancing water quality, because it is at this location that contaminated surface waters gather and "pool" before leaving the wetland complex, especially during periods of high water, as in the spring or after storm events.
18. Under Champlain's project proposal, approximately ten percent of the surface area of the 10-acre portion of the wetland complex would be filled. However, because of the "pooling" effect in Champlain's portion of the wetland, more than ten percent of the wetland's capacity to filter contaminants would be eliminated. There is no credible evidence to indicate that any portion of the remaining nine acres of the wetland would effectively replace the treatment capacity of that area proposed to be filled.
19. Under Champlain's project proposal, stormwater runoff from its own development and from the Bovat Mobil Station would be directed north into the 10-acre portion of the wetland complex. From here these waters would be joined by flows from the wetland to the north and directed in an easterly direction along the north side of the proposed fill.
20. From here, the flows would be directed overland through a swale to be constructed by Champlain. This swale has been designed to be shallower and broader in contour than the present drainage corridor, and would be vegetated by native wetland plant materials.
21. To determine the design of the proposed channelization of run-off and other surface flows, Champlain evaluated the present drainage patterns of the existing 10-acre portion of the wetland. It applied two computer programs, SCSTR55 and Haested Methods QTR55, to assess flows from 3.6 acres of the wetland, the area that Champlain determined to be the source of waters draining southerly and easterly through its property and the existing drainage corridor.

It entered into the computer data concerning water elevations at the site, collected on two different occasions during two different seasonal conditions. It predicted pre- and post-development run-off using a 25-year storm model, the standard typically used by the Vermont Agency of Transportation to size road culverts. It is not certain

which of two methods of calculation the SCSTR55 program applied. However, it is known that the SCSTR55 program itself used a pond and swamp adjustment factor of five percent, even though nearly one-hundred percent of the area evaluated is wetland.

22. Champlain performed no modeling or study of the quantity or quality of contaminants for either pre- or post- development run-off.

Function 5.4. Wildlife and migratory bird habitat

23. That portion of the wetland comprising Champlain's project is used by wetland dependent avian species such as the red-winged blackbird. However, it is not known whether the wetland has the habitat to support one or more breeding pairs of waterfowl or bird species specifically listed in the Section 5.4(a) of the Rules.
24. The larger, 75-acre wetland contains evidence that it is used by muskrats and potentially is also used by other furbearers and game animals. Muskrats also use the southern portion of the 10-acre wetland and have created burrows in the embankment along Route 78, all within the area proposed by Champlain to be filled.
25. Some conditions indicative of wildlife habitat diversity are present. The dominant wetland vegetation class within the southern portion of the wetland is shallow marsh. (See also Finding 5.) It is hydrologically connected with other wetlands of different dominant classes or open bodies of water within 1 mile.

Function 5.9. Open space and aesthetics

26. The intersection of I-89 and Route 78 is a busy interchange for travelers coming to and from Canada on the interstate, and those traveling to the Missisquoi National Wildlife Refuge just north of Swanton Village.
27. The area on both sides of Route 78 west of I-89 was historically wetland. In recent years, the placement of fill and development of a commercial service area has significantly altered the viewscape leading from I-89 to the center of the Village of Swanton.
28. Today the viewscape along both sides of Route 78 west of I-89 is dominated by gas stations, restaurants, a super-market and other service-related and commercial structures, and ancillary parking areas.

29. The only wetland area readily visible to motorists, cyclists, and pedestrians along this portion of Route 78 is the 10-acre wetland and, more specifically, that portion of the wetland owned by Champlain between I-89 and the Bovat Mobil Station.
30. The 10-acre portion of wetland is also visible to the motoring public from the southbound exit ramp for I-89, although a row of pine trees within the interstate right-of-way partially obstructs the view.
31. The width of the wetland frontage along Route 78 is approximately 240 feet. The area proposed to be filled and occupied by the project would involve 200 feet of this frontage.
32. That portion of the wetland owned by Champlain and immediately adjacent to Route 78 (approximately one third of an acre) is dominated by the giant reed grass (*Phragmites* sp.), a non-native species. This grass partially obstructs the view into the interior of the 10-acre wetland, which is largely dominated by native species of cattails, sedges, live and dead maples, and various shrubs.
33. While the wetland vegetation visible to the public is not unique to the Swanton area, the wetland itself is a pleasing landscape and a distinct natural feature in an otherwise commercially-developed area.

IV. Conclusions of Law

A. Conditional Use Determination Analysis

The wetland which Champlain proposes to fill and develop in order to implement its project is identified on the National Wetland Inventory Map for the Swanton area and therefore is a Class Two or "significant" wetland under the Rules. A Class Two wetland is presumed, until otherwise determined by the Board, to serve all of the functions specified in Section 5 of the Rules. Rules, Section 4.2(b).

Development may occur in a Class Two wetland and its buffer zone, provided that such activity either falls within the grand-

fathering provisions of Section 1.1 of the Rules² or is an allowed use under Section 6.2 of the Rules. All uses which are not identified as allowed uses in Section 6.2 of the Vermont Wetland Rules are conditional uses. Conditional uses may be allowed within significant wetlands or their associated buffer zones only under the terms of an order issued by the Secretary of the ANR, or by the Board on appeal, in accordance with the provisions of Section 8 of the Rules. The three-step analysis in the CUD review process is designed to protect the significant wetland functions of Class Two and Class One wetlands in furtherance of the State goal of "no net loss of such wetlands and their functions." Rules, Section 1.1.

Section 8.5 of the Rules sets forth the general requirements for authorization of a conditional use in a significant wetland or in its adjacent buffer zone.

The Secretary may determine that a proposed conditional use in Class One or Class Two wetlands or their buffer zones will have no undue adverse impact only when the Secretary determines that the proposed use will not result in an undue adverse effect on protected functions. In making this determination, the potential effect of any proposed conditional use shall be assessed on the basis of both its direct and immediate effects as well as on the basis of any cumulative or on-going effects on the significant wetland.

The Secretary shall not determine that any proposed conditional use is in compliance with these rules if it has an undue adverse effect on protected functions unless the Secretary determines that these impacts are

² Champlain's entire property is subject to the requirements of the Vermont Wetland Rules. While it acquired its first parcel on March 28, 1989, prior to the effective date of the Rules (February 23, 1990), it has provided no evidence that complete applications for local, state and federal permits related to either the regulation of land use or the protection of wetlands had been submitted for its project as of February 23, 1990. See Rules, Section 1.1(1). Moreover, it has provided no evidence supporting the conclusion that it meets any other test for vesting prior to February 23, 1990. See Rules, Section 1.1(2)-(3).

sufficiently mitigated. Adverse impacts on any protected functions, other than minimal impacts, shall be presumed to constitute an undue adverse effect unless mitigated in accordance with subsection (b) ... [of Section 8.5].

Thus, under Section 8.5(a), there are two ways to qualify for a CUD: either (1) the proposed conditional use will have no undue adverse impact under the protected wetland functions, or (2) any undue adverse impact on the protected functions will be sufficiently mitigated, such that there will be "no net undue adverse effect." Findings of Fact, Conclusions of Law and Order at 16, In re: Appeal of Larivee, Docket No. CUD-92-09 (March 24, 1994).

For adverse impacts other than minimal impacts, Section 8.5(b) of the Rules requires an applicant to apply five listed mitigation measures. Mitigation measures are avoidance measures applied to the project in order to avoid impacts or to reduce impacts to a minimal level.

Section 8.5(b) states:

The following measures shall be used to mitigate adverse impacts on protected functions, other than minimal impacts, to the extent necessary to achieve no net undue adverse effect:

- (1) The proposed activity cannot practicably be located on the upland portion of the site in question or on another site owned, controlled or available to satisfy the basic project purpose; and
- (2) All practicable measures have been taken to avoid adverse impacts on protected functions; and
- (3) The applicant has evaluated each of the protected functions in accordance with the protocols determined by the Department of Environmental Conservation; and
- (4) The proposed conditional use has been planned to minimize potential adverse impacts on the protected functions; and
- (5) A plan has been developed for the prompt restoration of any adverse impacts on protected functions.

The Board has previously determined that an applicant must meet all five mitigation provisions to achieve no net undue adverse effect. In re: Appeal of Larivee at 19. A CUD will be

denied if the applicant fails to meet any one or more of these five mitigation measures. Id. at 19-20.

Only in rare cases may an applicant use compensation under Section 8.5(c) as a means of mitigating adverse impacts, and then only to address impacts on protected functions that are deemed compensable. These are 5.1, 5.2(e), 5.4(a)(1 and 2), and 5.9 of the Rules. Therefore, the use of compensation as a mitigation tool is highly limited.

B. Impacts Analysis

1. Surface and ground water protection (Section 5.2)

The Board concludes that Champlain's project would have an undue adverse effect on the function of surface and ground water protection, specifically on surface water protection. Champlain has failed to support its allegation that its project would have only a minimal adverse impact on this function.

The evidence supports the conclusion that the project as proposed would have a direct and immediate adverse effect by eliminating nearly one acre of wetland with the capacity to treat contaminants entering the wetland from adjoining properties and uses. Moreover, because that portion of the wetland comprising Champlain's property is where contaminated waters "pool" during periods of high water, it plays a particularly important role in retaining and treating stormwater runoff, thereby protecting and enhancing the quality of surface waters leaving the wetland through the Route 78 culvert and entering the Missisquoi River.

Champlain takes exception to the ANR's assertions concerning the amount and source of contaminants reaching the wetland and also alleges that "pooling" at its property is a direct result of malfunctioning culverts along Route 78. However, as the party with the burden of production and persuasion, it offered no credible evidence in support of its position. It presented no testimony on the quantity or quality of contaminants entering the affected wetland and it presented no evidence, other than the unsubstantiated statements of its civil engineer, concerning the causes of pooling at the site. Indeed, the Board finds that the hydrology assessment conducted by Champlain has significant deficiencies, and is therefore an unreliable indicator of flow patterns at the wetland site.

Moreover, the project as proposed would add additional stormwater and contaminants to the remaining Class Two wetland.

Although Champlain has provided no information to indicate how much contaminated stormwater would enter the wetland from its property, common sense dictates that the proposed gas station with service islands and parking areas would generate some petroleum contaminated run-off that would reach the wetland.

Therefore, the Board concludes that the proposed project would have more than a minimal adverse, direct impact with respect to surface water protection. The project also would pose a potential cumulative and on-going adverse effect with respect to this function. Rules, Section 8.5(a).

2. Wildlife and migratory bird habitat (Section 5.4)

The Board concludes that Champlain's project would not have an undue adverse effect on the function of wildlife and migratory bird habitat.

While the Board believes that the wetland complex as a whole is important for this function, the Habitat Evaluation Procedures (HEP) Study of the southern 10-acre portion of the wetland, prepared with the participation of the ANR staff, strongly indicates that the adverse impacts of Champlain's project on wildlife and migratory bird habitat would be minimal. This is because the area that would be affected, while it is used by wetland dependent species, does not exhibit characteristics suggesting that it can support a significant number of breeding waterfowl or broods of waterfowl or that it has the necessary habitat to support breeding pairs of other listed bird species. Rules, Section 5.4(a).

Moreover, while there is evidence that muskrats use the wetland in the area of the Champlain's project and that more than one condition of wildlife habitat diversity is present, the HEP study suggests that this portion of the wetland is currently marginally suitable to meet the cover and food requirements of the species identified by the parties and they have offered no credible testimony to indicate otherwise. Moreover, the intensity of human activity in the area adjacent to Route 78 and adjacent properties suggests that Champlain's own project will have only a minimal impact on what is already a degraded habitat for wildlife.

Finally, while the 10-acre portion of the wetland may serve as an important corridor for wildlife moving north and south between the wetland to the south of Route 78 and to the larger wetland complex to the north, the parties provided insufficient evidence on this point to support an affirmative finding.

3. Open space and aesthetics (Section 5.9)

The Board concludes that Champlain's project would have an undue adverse effect on the function of open space and aesthetics.³

The wetland in question is open space that is highly visible to the public. It is located at a principal intersection leading to the Village of Swanton and therefore is at the figurative, as well as literal, gateway to that municipality. It is the last remnant of a significantly larger historic wetland that was filled and developed prior to the adoption of the Rules. This wetland is readily observable from Route 78 and also observable from I-89. In an area dominated by service-related businesses and other commercial structures, it is a highly distinctive feature in the surrounding landscape.

Converting 200 feet out of 240 feet of the Route 78 road frontage from giant reed grass and cattails to gasoline pumps, service islands, canopy, convenience store, restaurant and parking area would represent a direct and immediate adverse effect on the significant wetland function of open space and aesthetics. It would also constitute a cumulative adverse effect, given the general degradation of the viewscape in the vicinity of Champlain's property.

Therefore, the Board concludes that Champlain's proposed project would have both a direct and also a cumulative adverse effect on the wetland's substantial contribution to open-space and aesthetic character of the landscape.

³ As the Board recently stated in a decision regarding the reclassification of a wetland, the standards to be applied in evaluating a wetland's significance for open space and aesthetics are "collective" or "community" standards of value, not a personal ones. Decision at 19, Ftn. 5, In re: Reclassification of Moon Brook Wetland, Docket No. WET-94-02 (Aug. 9, 1995). The Board determines that such standards for evaluating the impacts of a development proposal are also applicable in the review of a CUD application. See also, Findings of Fact, Conclusion of Law and Order at 7-13, In re: Queechee Lakes Corp., No. 3W0364-1A-EB (Vt. Env. Bd., Feb. 3, 1987) (applying similar "community" standards in aesthetics analysis under in Act 250 environmental review process.)

C. Mitigation and Compensation

Having determined that Champlain's project would have an undue adverse effect on two of the wetland functions at issue, the Board must determine whether the applicant has used all five mitigation measures provided by the Rules so as to achieve no net undue adverse effect. If it has failed to avail itself of any one or more of the five measures, then its proposal must be denied. In re: Appeal of Larivee at 19-20.

Because the Board determines that Champlain has failed to demonstrate that it has used the measures set forth in Section 8.5(b)(2), (4) and (5) of the Rules, it does not reach the question briefed by the parties in their post-hearing memoranda concerning the applicability and meaning of Section 8.5(b)(1) of the Rules. See Champlain Oil Company's Memorandum of Law re: Vermont Wetland Rules § 8.5b(1) (May 12, 1995) and ANR's Reply Memorandum on Vermont Wetland Rules § 8.5b(1) (Alternative Sites) (May 23, 1995).

With respect to the project's impacts on surface water protection, the Board determines that Champlain has not offered to implement mitigation measures to avoid adverse impacts on the wetland's capacity to protect and enhance water quality through treatment of contaminated surface waters. While Champlain asserts that the proposed channelization of stormwater and overland flow through the constructed swale will actually improve water quality, the testimony of its consulting engineer does not support this conclusion. The modelling for this system does not take into account the treatment function of the wetland. Rather, it was designed to be used for the sizing and installation of road culverts, as is evidenced by the types of data and calculations used by this methodology. As a consequence, it cannot be said that the Champlain has applied all practicable measure to avoid adverse impacts on the protected function described in Section 5.2 of the Rules, that the proposed conditional use has been planned to minimize potential adverse impacts on this function, or that it has a plan for the prompt restoration of this function if restoration is even possible. Rules, Section 8.5(b)(2), (4), (5).

Therefore, the Board concludes that Champlain has not discharged its burden of proof to show that the proposed channelization and swale would avoid or even minimize adverse impacts to the protected function of surface water protection, let alone enhance water quality treatment.

With respect to the project's adverse impacts on open space and aesthetics, Champlain offered no evidence whatsoever concerning how it proposes to mitigate those impacts using any of

the five measures set forth in Section 8.5(b). Moreover, while compensation is available for adverse impacts on function 5.9, Champlain has not explained how it might be eligible to use compensation to offset adverse impacts or offered a proposal for doing the same.

Therefore, the Board cannot conclude that Champlain has discharged its burden of proof that it has mitigated the adverse impacts on the open space and aesthetic function of this wetland.

D. Conclusion

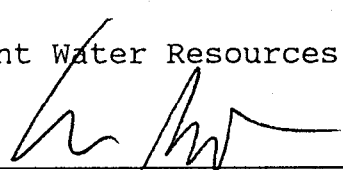
Champlain's CUD request to place 0.9979 acres of fill in a Class Two wetland in Swanton, Vermont, for the purpose of enabling construction of a convenience store, restaurant, gasoline service islands and parking spaces, based on the evidence presented, does not satisfy the standards in Section 8 of the Rules, in that this activity will have an undue adverse impact on the significant wetland at issue.

V. Order

The decision of the ANR denying Conditional Use Determination #91-351 is hereby affirmed.

Dated at Montpelier, Vermont, this 4th day of October, 1995.

Vermont Water Resources Board



William Boyd Davies, Chair

Concurring:

William Boyd Davies
Stephen Dycus
Ruth Einstein
Gail Osherenko
Jane Potvin