STATE OF VERMONT
WATER RESOURCES BOARD

In re: Great Outdoors Trading Company
Docket No. CUD-96-02

PREHEARING CONFERENCE REPORT AND ORDER

I. BACKGROUND

On July 25, 1996, Earl W. Richardson and Pauline L. Richardson ("Richardsons") filed a notice of appeal ("Appeal") from Conditional Use Determination ("CUD") 94-014 issued on June 25, 1996, by the Water Quality Division, Department of Environmental Conservation ("DEC"), Agency of Natural Resources ("ANR"). CUD-94-014 authorizes Mr. Chuck Wagenheim, The Great Outdoors Trading Co., Inc. ("Permittee") to construct a commercial building and expand a parking lot along Woodstock Avenue/U.S. Route 4 in Rutland, Vermont ("Project") in a Class Two wetland and adjacent 50 foot buffer zone ("Wetland"). The Wetland is substantially located on land owned by the City of Rutland that is known as the poor farm ("Poor Farm"). The Richardsons filed the Appeal pursuant to Section 9 of the Vermont Wetland Rules ("VWR") and 10 V.S.A. § 1269.

On July 30, 1996, the Board's Executive Officer docketed the Appeal as CUD-96-02.

On August 9, 1996, the Permittee filed a Motion to Dismiss the Appeal ("Motion").

On September 4, 1996, the Board appointed David L. Grayck, Esq., Associate General Counsel to the Environmental Board, as staff attorney and Board designee for the purpose of conducting prehearing conferences pursuant to Rule 24(A) of the Board's Rules of Procedure ("Rules").

On September 13, 1996, Board designee Grayck issued a memorandum to parties regarding the Motion and requests for clarification of the issues raised by the Appeal.

On October 11, 1996, the Permittee filed documents in compliance with the September 13, 1996 memorandum.

On October 11 and 18, 1996, the Richardsons filed documents in compliance with the September 13, 1996 memorandum.

On October 18, 1996, Andrew Raubvogel, Esq., filed a notice of appearance on behalf of ANR.

On October 24, 1996, Water Resources Board ("Board") designee David L. Grayck, Esq., convened a prehearing

conference in Montpelier with the following persons participating:

Earl W. Richardson and Pauline L. Richardson
The Great Outdoors Trading Co., Inc.,
by Alan Keyes, Esq.
Agency of Natural Resources by Andrew Raubvogel, Esq.

On November 15, 1996, designee Grayck issued a Proposed Prehearing Conference Report and Order. Pursuant to Rule 24, parties were given until December 2, 1996 to file written comments in response to the Proposed Prehearing Conference Report and Order, and to request oral argument before the Board. No one filed written comments or requested oral argument.

On December 12, 1996, the Board convened a deliberation regarding the Proposed Prehearing Conference Report and Order.

II. PROJECT DESCRIPTION

The Project is located on the north side of Woodstock Avenue in an area of development that includes a shopping mall to the east, other commercial buildings to the east and west on the north and south sides of Woodstock Avenue, and the Rutland Vocational/Technical and High Schools located to the south.

The Project adjoins the Poor Farm. The Poor Farm is approximately 19 acres and is located between the commercial area along Woodstock Avenue and the residential neighborhoods to the north and west of Woodstock Avenue. The Permittee owns 2.5 acres at the Project's location, with the Project involving .81 acres. The Poor Farm separates the Richardsons' property from the Project.

The Richardsons' property is upland from the Project, approximately 700 feet to the west. The Wetland drains to the north and east, away from the Richardsons' property. The nearest portion of the Wetland is 175 feet away from the Richardsons' property, separated by another house and lot owned by Mr. and Mrs. Jones.

The Project includes the construction of a 5,085 square foot restaurant building and 22,865 square feet of landscaping and parking. The building will be served by the City of Rutland sewer system. There will be no new roads. The Project's parking area is designed so that all run-off

is directed to a stormwater detention basin or stormwater treatment swale prior to any discharge to the Wetland.

The Project's area of impact in the Wetland is 27,950 square feet. The Project's area of impact in the Wetland's buffer zone is 15,930 square feet. Of the 15,930 square feet of buffer zone impact, 9,150 square feet is existing parking. The remaining 6,780 square'feet is fill from the prior owner and the road shoulder associated with Woodstock Avenue.

III. RIGHT TO APPEAL

The Permittee contends that, under 10 V.S.A. § 1272, only the person who receives an order pursuant to this section may appeal to the Board as provided in 10 V.S.A. § 1269. The Permittee contends that the Appeal should be dismissed since it is the Permittee, and not the Richardsons, that received CUD-94-014.

In In re: Appeal of Larivee, Docket No. CUD-92-09, Memorandum of Decision at 2 (Julv 13. 1993)., the Board specifically rejected the same contention.. The Board stated, in part:

> Although 10 V.S.A. § 1272 assures that the applicant for a CUD has an automatic right of appeal, 10 V.S.A. § 1269 authorizes a right of appeal to "[a]ny person or party in interest aggrieved by an act or decision of the [S]ecretary [of ANR]." The Board reads this statute to permit other persons than an applicant to appeal the Secretary's determination. The Board looks to the [VWR] and its own [Rules] to determine whether a person appealing a CUD satisfies the standing requirements of 10~V.S.A. § 1269.

Id at 3.

The Richardsons may appeal from CUD-94-014 if they have standing to do so under the Rules. Accordingly, the Board denies the Motion with regard to the contention that only the Permittee has standing to appeal from CUD-94-014.

IV. STANDING

Under 10 V.S.A. § 1269, any person or party in interest aggrieved by an act or decision of the Secretary of ANR may appeal to the Board, and all persons and parties in interest

as determined by the Rules may appear and be heard. "Hence, the Board must look to its own [Rules] to determine whether a person seeking to participate in a proceeding satisfies the standing requirements of 10 V.S.A. § 1269." In re: Appeal of Larivee, Docket No. CUD-92-09, Preliminary Order: Party Status at 3 (March 16, 1993).

A person's ownership of property within or adjacent to a significant wetland or its buffer zone does not per se entitle that person to standing to appeal (or participate) in a CUD appeal. In re: Champlain Oil Comoany, Docket No. CUD-94-11, Preliminary Order at 2-3 (Jan. 3, 1995).

Under 10 V.S.A. § 1269, the Richardsons may seek standing to appeal CUD-94-019 under Rule 22(A)(7) or 22(B). Under either provision, a person must demonstrate a substantial interest which will in some degree be affected by the outcome of the proceeding. The Board stated, in part, in Champlain:

> In his petition, [the petitioner] alleged that he owns land and a commercial enterprise adjacent to the wetland complex and land owned by Champlain that are the subject of this appeal and that he supports the Secretary's denial of CUD #91-351. Although [petitioner] asserted that Champlain's proposed project would have an undue adverse impact on several specified protected wetland functions and also represented that he has "significant property rights meriting protection which rights may not be fully represented by any other party to this proceeding," [petitioner] failed to describe what those "property rights" might be and how they would be affected by Champlain's proposed activity within the significant wetland. He did not allege that he actually uses or benefits in some specific way from the subject wetland nor did he state with specificity how Champlain's project might adversely affect "his property rights" through alleged impacts on the wetland's protected functions. In short, [petitioner] did not offer "a detailed statement" of his interest in this proceeding, thereby enabling the Board to determine whether that interest is "substantial" and whether it might be affected by the outcome of this proceeding.

Id at 3.

Accordingly, in Champlain, the Board concluded that the petitioner failed to demonstrate a substantial interest under either Rule 22(A) (7) or 22(B).

A. Rule 22(A) (7)

Rule 22(A) (7) provides, in part, that upon entering a timely appearance the following shall become parties to Board proceedings:

> [A]ny person demonstrating 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 adequately represented by existing parties.

In Larivee, the petitioner did not demonstrate a substantial interest which would have been affected by the outcome of the proceeding because the petitioner failed to substantiate that his property adjoined that of the permittee, or that the wetland on his property was connected to the wetland for which the permittee had obtained a CUD. Larivee, Preliminary Order: Party Status at 4 (March 16, 1993). Accordingly, the Board denied party status under Rule 22(A)(7).

B. Rule 22(B)

A person not meeting the requirements of Rule 22(A) may have standing to appeal under Rule 22(B) by permission of the Board if he or she can demonstrate "a substantial interest which may be affected by the outcome of the proceeding." Rule 22(B) (3). This rule further states:

> In exercising its discretion . . . . the Board shall consider: (1) whether the applicant's interest will be adequately protected by other parties; (2) whetheralternative means exist by which the applicant can protect his interest; and (3) whether intervention will unduly delay or prejudice the interests of existing parties or of the public.[1]

[1]The term "applicant" in Rule 22(B)(3) refers to the person requesting party status and not the person to whom the CUD has been issued.

In Larivee, the Board granted standing to appeal under Rule 22(B) where a petitioner demonstrated an interest that was more substantial than a generalized concern for the protection of the public's use and enjoyment of the wetland at issue. The petitioner's interests pertained to the wetland's capacity to store stormwater runoff; water quality; and vegetative and wildlife habitat. Fundamental to the Board's conclusion was that the petitioner identified specific wetland functions that might be adversely affected by the activities authorized by the CUD, and that there was no other alternative means for the petitioner to protect its interests.

V. RICHARDSONS' STANDING TO APPEAL

The Richardsons' July 25, 1996 notice of appeal contains allegations of error pertaining to the Permittee's CUD application form and the attached wetland evaluation form. The Richardsons supplemented their notice of appeal with three subsequent submissions. First, on July 30, 1996 in response to a request by the Board's Executive Officer. Second, on October 11, 1996 in response to a request by the Board's designee. Third, on October 18, 1996, again in response to a request by the Board's designee.

As explained below, after reviewing all of the Richardsons' filings and the Permittee's opposing arguments, and consistent with the Board's precedent, the Board concludes that the Richardsons have failed to demonstrate that they have standing to appeal from CUD-94-014.

A. July 25, 1996 Notice of Appeal - CUD Application Form

The notice of appeal contains six allegations of error pertaining to the Permittee's CUD application form.

1. allegation #1

The Richardsons contend that the Permittee's answer to CUD application question #10 erroneously omitted them as adjoining property owners within or adjacent to the wetland or buffer zone in question.

Under VWR § 8.2 and question #10 of the DEC's CUD application form, an applicant must provide certain information to "all persons owning property within or adjacent to the wetland or buffer zone in question."

Prior to the prehearing conference, Board designee Grayck instructed all persons to file a map depicting the wetland, the buffer zone, the Richardsons' property, and the tract or tracts of land upon which the Project is to be constructed.

The map filed by the Richardsons on October 11 depicts the general location of their property and a wet area to the east of their property. The Richardsons' map does not depict a connection between the wet area and the Wetland. However, at the prehearing conference, the Richardsons stated that the wet area is connected to the Wetland.

Absent a connection between the wet area and the Wetland, the Richardsons do not adjoin the Wetland and buffer zone.. See VWR § 4.2. As noted above, the Board denied party status in Larivee, in part, where a petitioner failed to substantiate a claim of a connection between two wetlands. The Richardsons were given an opportunity to file a map depicting the Wetland and buffer zone prior to the convening of the prehearing conference. Their map fails to show any connection between the wet area and the Wetland.

Accordingly, the Board concludes that the Richardsons are not adjoining property owners to the buffer zone and Wetland and, therefore, need not have been listed as such pursuant to VWR § 8.2 in item ten of the Permittee's CUD application.

ii. allegation #2

The Richardsons object to certain letters from the City of Rutland to the Permittee which were made part of the Permittee's CUD application at question #9. The Richardsons state that had they known of these letters, they would have protested to the City of Rutland. In addition, they state an intention to anneal a zoning permit issued by the City of Rutland.

Since the Richardsons were not entitled to notice of the CUD application, their lack of knowledge regarding the letters does not establish a basis for standing to appeal. The Richardsons' appeal of a local zoning decision is not relevant to the issue of standing under the Rules.

Accordingly, the Board concludes that the Richardsons' second allegation of error does not establish standing under Rule 22.

iii. allegations #3-#6

The Board has reviewed allegations #3-#6 and concludes that none of these allegations establish standing to appeal under Rule 22.

The third allegation is that there is an inconsistency between how the Permittee answered CUD application questions #11 and #12. Question #11 pertains to the entire Wetland. The Permittee characterized the entire Wetland as shrub swamp and Palustrine Emergent ("PEM"). Question #12 pertains to the portion of the wetland and buffer zone in the area of proposed impact. The Permittee characterized it as wet meadow with the caveat that "[w]hile wet meadow may be the description of the wetland, it should be noted that the site is dominated by Phragmities and those characteristics normally associated with a meadow are absent."

The fourth allegation is that the Permittee failed to provide a Soil Conservation Service ("SCS") survey or site investigation report as part of its answer to question #12d, nor provide support for the statement that Vermont Agency of Transportation vehicles occasionally park in the Wetland area.

The fifth allegation is that the Wetland is not dry most of the year as stated in question #12e.

The sixth allegation pertains to question #14g which requires the applicant to demonstrate how the proposed project will avoid any adverse impacts on education and research in natural science. The Permittee answered question #14g by stating that "[w]hile the wetland as it currently stands is not significant for this function, efforts will be made to create an outdoor classroom and educational walking trails in the adjacent undisturbed wetland should this application be approved. To insure the outdoor classroom and educational walking trails will be created, the applicant has pledged $25,000 to provide planning, design, and start up money for this effort." The Richardsons contend that since the City of Rutland owns the land where the classrooms and trails would be, the Permittee cannot guarantee their creation.

Even if the Board were to assume that allegations #3-#6 are true, the Richardsons have not demonstrated a substantial interest which will be affected by these alleged errors. The Richardsons have not correlated the alleged

errors to their actual use of, or the benefits they derive from, the Wetland, nor have they stated how these alleged errors might adversely affect their own property through alleged impacts on the Wetland's protected functions. Moreover, the Richardsons' have not disputed in any of their filings that the Wetland drains away from their property.

The Board concludes that the Richardsons have not demonstrated a substantial interest which is more than a generalized concern for the protection of the public's use and enjoyment of the Wetland. Accordingly, the Board concludes that allegations #3-#6 do not establish standing to appeal under Rule 22.

B. July 25, 1996 Notice of Appeal - Wetland Evaluation Form

The Permittee completed a wetland evaluation form and attached it as part of its answer to question #14 of the CUD application form. The Richardsons have made ten allegations of error pertaining to the wetland evaluation form.

The first and second allegations pertain to questions #la and #lb. The Richardsons contend that, notwithstanding the Permittee's answer to the contrary, a "treatment swale was not constructed and it was not to convey runoff from Woodstock Avenue and the school on the southwest side of Woodstock Avenue." Rather, the Richardsons' contend that the Wetland and swale are the natural watershed for the existing highlands and natural springs.

The third allegation is that, notwithstanding the Permittee's answer to the contrary in question #1c, there is a stream associated with the Wetland such that water from the Wetland flows to Tenney Brook and thence into more significant waterways within the City of Rutland and Rutland Town.

The fourth allegation is that the answer to question #1d is inaccurate based on the allegations of error with respect to questions #la and #lb. In addition, the Richardsons also contend that runoff into the natural watershed and swale will increase if there is residential development on 18 acres of upland property owned by the City of Rutland. However, there is no allegation that the Project involves any residential development in the 18 acre upland area.

The fifth allegation is that the answer to question #1e is inaccurate based on the allegation of error with respect to question #1a.

The sixth allegation is that the answer to question #1g is inaccurate based on the allegation of error with respect to question #1a. In addition, the Richardsons contend the Board must determine whether prior filling of portions of the Wetland occurred before the adoption of federal and state wetland rules, although there is no citation to any statutory or regulatory provision in support of this contention.

The seventh allegation is that the answer to question #2 is inaccurate based on their allegation of error with respect to questions #1a and #1d.

The eighth allegation is that the answer to question #2b regarding reduction of contaminant levels in surface waters that recharge underlying or adjacent ground waters is open to question, and that the State has maps which can resolve the question.

The ninth allegation pertains to question/answer #2d. The Permittee answered "no" as to whether the wetland enhances or protects water quality through chemical action or by the removal of nutrients due to the short detention period associated with the limited area of the Wetland which the Project will impact. However, the Permittee does state that the wetland system as a whole does provide water quality enhancement and protection. The Richardsons contend that runoff from the Project, Woodstock Avenue, development along Woodstock Avenue, paved areas around the Rutland Vocational/Technical School, Rutland High School athletic fields, and a closed landfill will go directly into the Wetland.

The tenth allegation is that under Vermont common law, stormwater runoff from a commercial business onto land zoned residential is an accessory use to that business and is illegal and, therefore, all business developments on Woodstock Avenue should connect to a storm water sewer on Woodstock Avenue. The Richardsons have not identified any case law in support of their allegation. This allegation appears to be generally related to form question #2 although the Richardsons do not expressly link this final allegation to any particular question.

The Board once again concludes that, even if allegations #1-#10 are true, they are insufficient to establish standing. The Richardsons have not correlated the alleged errors to their actual use of, or the benefits they derive from, the Wetland, nor have they stated how these alleged errors might adversely affect their own property through alleged impacts on the Wetland's protected functions.

C. July 30, 1996 Filing

On July 30, 1996, the Richardsons complied with the request by the Board's Executive Officer that they describe the result they hope to achieve by the Appeal. The Richardsons stated, in part:

> Over the thirty-one (31) years we have lived within the wetlands, we have seen development after development almost destroy the natural environment. .. The proposal for a detention pond is obviously the easiest, least costly, and least effective method of treating runoff for the [Permittee]. .. We seek the re-design of the [P]roject to provide for runoff from the existing and new site to be directed into an existing storm sewer immediately in front of the project on Woodstock Avenue. We are hopeful that if runoff from this and any future developments are prevented, that the primary wetlands will have restorative powers once sources of pollution are eliminated, or at least not added to.

The relief sought by the Richardsons pertains to VWR §§ 5.2 (surface and ground water protection) and 5.4 (wildlife and migratory bird habitat). However, the Richardsons have not linked this relief to their own substantial interests, nor have they demonstrated how this Project--as opposed to all other development which has preceded the Project--will affect the Wetland.

The Richardsons have not demonstrated an interest which is more than a generalized concern for the protection of the public's use and enjoyment of the Wetland. Accordingly, the Board concludes that the July 30, 1996 filing does not establish standing to appeal under Rule 22.

D. October 11, 1996 Filings

The Richardsons' October 11 filing contains four numbered paragraphs.

i. paragraph #1

In paragraph #1, the Richardsons identified VWR § 4.3 (Buffer zones) and contend that the Permittee has no control over the fifty foot buffer zone contiguous to the Wetland. In conjunction with their identification of VWR § 4.3, the Richardsons repeat most of what they alleged in their sixth allegation of error regarding the CUD application, and also make reference to finding of fact #14 from CUD-94-014.

The Board concludes that VWR § 4.3 does not require the Permittee to.have control over the fifty foot buffer zone contiguous to the Wetland. Rather, VWR § 4.3 merely establishes that there is a fifty foot buffer zone. With regard to the buffer zone surrounding the Project, to the extent that the City of Rutland owns part of it, the VWR do not per se require that a permittee control the buffer zone. While there are significant reasons for a landowner to obtain permission before using another person's land, these reasons are unrelated to the VWR. Moreover, the City of Rutland has received notice of the Project and is on notice as to what the Project involves relative to City of Rutland property.

Accordingly, the Board concludes that paragraph #1 does not establish standing, nor does it state a cognizable issue which could be adjudicated if the Richardsons had standing under Rule 22.

ii. paragraph #2

In paragraph #2, the Richardsons do not reference any VWR provision in conjunction with their discussion of certain activities which occurred in 1988 at the Ray Reilly Tire Mart.

The only activity relevant to the Appeal is that which was applied for as the Project. Accordingly, the Board concludes that paragraph #2 does not establish standing, nor does it state a cognizable issue which could be adjudicated if the Richardsons had standing under Rule 22.

iii. paragraph #3

In paragraph #3, the Richardsons identify Section 8 of the VWR, but their discussion pertains solely to subsections b and c of VWR § 8.5. The Richardsons contend that the Permittee cannot rely on this provision since it does not own or control the Poor Farm.

At finding of fact #14, CUD-94-014 refers to the Permittee's offer to the City of Rutland of $25,000 for the building of a pond in conjunction with the outdoor classroom and educational walking trails described in the application for CUD-94-014.

The Board concludes that paragraph #3 does not establish a basis for standing to appeal for the reasons stated with regard to the sixth allegation in the July 25, 1996 Notice of Appeal. However, if the Richardsons were to have standing to appeal, then an issue would be whether, pursuant to VWR § 8.5, the Project should be issued a CUD based on the Permittee's offer to the City of Rutland of $25,000 for the construction of a pond in conjunction with an outdoor classroom and educational walking trails on the Poor Farm as it pertains to VWR § 5.7 (education and research).

iv. paragraph #4

In paragraph #4, the Richardsons do not reference any VWR provision in conjunction with their discussion of certain correspondence between the Permittee and ANR that took place during January, 1994. The ANR correspondence pre-dates the CUD application by over two years, pertains to a conceptual proposal, is not a binding determination under the VWR, and suggests to the Permittee that, given the presence of protected wetlands on the Project Tract, the Permittee should seek a lower purchase price for the Project Tract. Accordingly, the Board concludes that paragraph #4 does not establish standing, nor does it state a cognizable issue which could be adjudicated if the Richardsons had standing under Rule 22.

E. October 18 Filing

The Richardsons October 18 filing contains five numbered paragraphs, with additional unnumbered paragraphs following the fifth paragraph.

1. paragraphs #1 and #2

In paragraph #1, the Richardsons elaborate on the matters discussed in paragraph #2 of their October 11 filing. In paragraph #2, they elaborate on the matters discussed in paragraph #4 of their October 11 filing. For the reasons stated above, these two paragraphs do not establish standing to appeal under Rule 22, nor a cognizable appeal issue under the VWR.

ii. paragraphs #3, #4, and #5

In paragraph #3, the Richardsons discuss a letter sent by Nancy R. Manley of DEC on April 4, 1994, to Mr. Anthony Stout regarding stormwater issues.

In paragraph #4, the Richardsons discuss the timing of the Permittee's application for CUD-94-014 relative to the Permittee's purchase of land from the City of Rutland.

In paragraph #5, the Richardsons discuss how despite requesting that DEC send them a copy of the application for CUD-94-014 once it was complete, they were not mailed one and, consequently, were denied the opportunity to comment on the application.

Past correspondence, the timing of the Permittee's CUD application, and the Richardsons' interaction with ANR do not establish standing, nor a cognizable appeal issue under the VWR.

iii. unnumbered paragraphs

In the remaining unnumbered paragraphs of their October 18 filing, the Richardsons discuss why they were entitled to notice under VWR § 8.2, and why, based on their participation and/or party status in two prior permitting proceedings regarding a nearby McDonald's restaurant, they are entitled to standing herein. Finally, the Richardsons claim party status under Vermont Rule of Civil Procedure ("VRCP") 24.

For the reasons stated regarding the first allegation in the July 25 Notice of Appeal, the Richardsons were not entitled to notice. Second, past participation in two unrelated permitting proceedings does not establish standing under Rule 22. Finally, VRCP 24 does not apply in this proceeding. Rather, the relevant rule is the Board's own

Rule 22. Therefore, reference to VRCP 24 does not establish standing to appeal.

F. Summary

In summary, the Board concludes that the Richardsons lack standing under Rule 22 to appeal from the issuance of CUD-94-014. The Richardsons have not demonstrated a substantial interest which will be affected by these alleged errors.

VI. ORDER

1. The Richardsons do not adjoin the Wetland and its fifty foot buffer zone.

2. The Richardsons lack standing to appeal CUD-94-014.

3. The Appeal is dismissed with prejudice.

Dated at Montpelier this 20th day of December, 1996.

WATER RESOURCES BOARD

William Boyd Davies, Chair

Concurring:
William Boyd Davies
Ruth Einstein
Jane Potvin

Abstaining:
Gail Osherenko

c:\pho\cu9602.ph2