

**State of Vermont  
WATER RESOURCES BOARD**

**RE: Darryl and Stephanie Landvater  
101 Chapman Lane  
Williston, VT 05495**

**Docket No. CUD-96-06  
(Appeal of DEC  
CUD File #94-313)**

**PREHEARING CONFERENCE REPORT AND ORDER**

**I. BACKGROUND**

On October 30, 1996, the Water Resources Board (Board) received a notice of appeal filed by Darryl Landvater (Appellant), seeking review of a decision by the Department of Environmental Conservation, Agency of Natural Resources (ANR), granting Conditional Use Determination (CUD) #94-313, with conditions. This appeal was riled pursuant to 10 V.S.A. § 1269 and Section 9 of the Vermont Wetland Rules (VWRs).

The Appellant had asked the ANR for approval to trim the tops off of a 200-foot swath of trees within the buffer zone of a Class Two wetland in order to allow a line of sight from the Appellant's house and porch to certain ponds associated with the wetland, and to plant the exposed bank with low-growing willow sprigs (Proposed Activity). However, the CUD issued by the ANR authorizes the Appellant to trim the tops off of only certain trees, said trimming to be confined to a height of two feet in three 30-foot windows, no closer than 30 feet apart (Approved Activity). The Appellant asserts that it was error for the ANR not to approve the Proposed Activity.

On October 31, 1996, the Executive Officer of the Board, William A. Bartlett, wrote to the Appellant informing him of certain deficiencies in his filing. On November 20, 1996, the Appellant supplemented his notice of appeal, and on December 20, 1996, this appeal was deemed complete and docketed. On that same date, a Notice of Appeal and Prehearing Conference was sent to persons required to receive notice and on December 28, 1996, it was published in the Burlington Free Press. Rule 1 S(C) and 20 of the Board's Rules of Procedure.

A timely entry of appearance was made by James A. Caffry, Esq., counsel for the ANR. No other persons entered appearances in this matter.

On January 13, 1997, at 11:00 a.m., a preheating conference was convened at the Board's Conference Room, National Life Records Center Building, National Life Drive, Montpelier, Vermont, by the Board's duly authorized delegate, Kristina L. Bielenberg, Esq., pursuant to Rule 24(A) of the Board's Rules of Procedure. The following persons appeared and participated in the prehearing conference:

Darryl Landvater, Appellant, pro se  
James A. Caffry, Esq., for the ANR.

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Also present were the Board's Executive Officer, William A. Bartlett, and Associate General Counsel, Donna Russo-Savage, Esq.

On February '13, 1997, a draft Preheating Conference Report and Order was circulated to the above persons for review and comment by February 27, 1997. The Board received no written comments from the Appellant, ANR or others. A final Preheating Conference Report and Order is now ready for issuance.

**II. ISSUES**

Based on the Appellant's Notice of Appeal and his representations at the Prehearing Conference, the issues in this matter appear to be:

- A. Is the Proposed Activity an activity incidental to ordinary residential use and therefore an Allowed Use pursuant to Section 6.2(r) of the VWRs.
- B. Alternatively, if the Proposed Activity is a Conditional Use, should a Conditional Use Determination be issued pursuant to Section 8 of the VWRs, and, if so, with what conditions if any.

At the preheating conference the parties discussed whether issue "A" should be decided as a preliminary matter based on legal briefing or whether it should be considered as an alternate argument, with the factual record for both issues being developed at hearing with legal briefing following. The Boards delegate recommended the latter course, as both issues involve questions of fact as well as law. See IX. Order at 5, item 2.

**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. The Appellant has the burden of proof, by a preponderance of the evidence, to show that either the Proposed Activity is an Allowed Use or that if it is not an Allowed Use that a Conditional Use Determination should issue without the objected to conditions imposed by the Secretary.

**IV. PRELIMINARY ISSUES**

No substantive preliminary issues were raised by the Appellant or ANR before or at the prehearing conference, including, but not limited to, standing and party status challenges.

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It appears that the ANR based its decision solely on a determination that the Proposed Activity would result in an undue adverse impact on wetland function 5.4 (Wildlife and migratory bird habitat). The Appellant, however, requested clarification from the ANR concerning which subcriteria of VWR 5.4 were relied upon by the ANR decisionmakers in making the determination that the Appellant's Proposed Activity would present an undue adverse impact to the wetland function 5.4 and therefore require modification (Approved Activity) in order to mitigate those impacts.

Counsel for ANR agreed to discuss the issue with the ANR Wetland Office staff and respond in writing by Friday, January 17, 1997. The ANR's response was filed with the Board on January 17, 1997.

The Appellant asked for clarification concerning the meaning of "undue adverse impact" and the analysis to be applied in determining whether such an impact exists.

The Board's delegate suggested that the parties review the Board's prior decision, In re: Larivee, Docket No. CUD-92-09, Findings of Fact, Conclusions of Law, and Order (March 24, 1994) (see enclosure).

**V. DISCLOSURES**

At the prehearing conference, the Board's delegate identified the current Board members by name and occupation, by distributing to the prehearing conference participants a Board Fact Sheet. The current members are: William Boyd Davies, Chair; Stephen Dycus, Ruth Einstein, Gail Osherenko, and Jane Potvin. She asked the Appellant and ANR whether they knew of any reasons for objecting to the participation of these Board members and also whether they wished to have an opportunity to request disclosures and file any written objections. Both the Appellant and ANR indicated that they had no objections to the participation of the identified Board members.

The Board's delegate also noted that the term of member Stephen Dycus would expire in February 1997 and that it was not known whether he will be reappointed or whether another appointee will fill the new term before this matter goes to hearing. She said that she would inform the parties of any changes which might occur in the Board's composition prior to a hearing on the merits.

**VI. REFEREE HEARING**

The delegate informed the parties that this matter could be heard by a hearing referee or

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by the full Board. See Rule 4, Board Rules of Procedure. The Appellant indicated that he would prefer a hearing by the full Board given the issues at stake. He also indicated that the best time to set out willow is in April or May, and therefore the timing of the issuance a decision is this matter is critical from the Appellant's point of view.

**VI. SETTLEMENT AND STIPULATION**

The Appellant and counsel for ANR agreed to meet outside the prehearing conference to discuss the possibility of settling this dispute. The Board's delegate encouraged the parties to pursue settlement negotiations and, if it appeared that a stipulation concerning the disposition of this matter could be reached, to advise the Board accordingly.

**VII. PREFILED TESTIMONY AND EXHIBITS**

After much discussion, the parties agreed that prefiled testimony (in question-and-answer format) and prefiled exhibits should be required.

The ANR identified its proposed list of witnesses and exhibits in its Notice of Appearance, filed January 13, 1997. The Appellant indicated that he would have to evaluate who he might call as witnesses after he received the ANR's filing of January 17, 1997. See IV. Preliminary Issues at 3.

It was agreed that the sequence of prefiling should be: (1) Appellant's direct testimony; (2) ANR's direct testimony; (2) Appellant's rebuttal testimony; (4) ANR's rebuttal testimony; (5) followed by objections and hearing.

The parties provided the Board's delegate with information about upcoming scheduling conflicts. She agreed to prepare a schedule that would take into account those conflicts.

**VIII. HEARING**

The parties agreed that it would be productive for the Board to conduct a site visit of the subject wetland. Therefore, the hearing will be scheduled at a location convenient to the hearing site.

The hearing will be recorded electronically by the Board. Any party wishing to have a stenographic record of the proceeding must notify the Board no less than ten (10) days before the scheduled hearing and comply with the requirements of Rule 28(C) of the Board's Rules of Procedure.

**IX. ORDER**

1. **The following are parties as of right in this proceeding:**
  - a. Darryl Landvater, pursuant to 10 V.S.A. § 1269, Section 9 of the VWRs, and Board Rule of Procedure 22(A)(6); and
  - b. ANR, pursuant to Board Rule of Procedure 22(A)(4),
2. A hearing in this matter will be scheduled at a date, time and place to be announced by subsequent notice. The issues to be heard and decided by the Board are those identified in II. Issues at 2.
3. On or before **4:30 p.m., Tuesday, March 11, 1997**, the Appellant shall file a final list of **direct** witnesses and direct exhibits. He shall prefile the direct testimony for all witnesses he intends to call as direct witnesses. For each expert witness, he shall file a resume or other statement of qualification. The Appellant also shall prefile all direct exhibits, except as otherwise noted in item 11 below.
4. On or before **4:30 p.m., Tuesday, March 25, 1997**, the ANR shall file a final list of direct witnesses and direct exhibits. It shall prefile the direct testimony for all witnesses it intends to call as direct witnesses. For each expert witness, it shall file a resume or other statement of qualification. The ANR also shall prefile all direct exhibits, except as otherwise noted in item 11 below.
5. On or before **4:30 p.m., Tuesday, April 8, 1997**, the Appellant shall notify the Board in writing if he believes that the ANR has presented any direct testimony or exhibits which present unfair surprise. He shall further indicate **wether** he requests an opportunity to supplement his direct testimony and exhibits. If such request is granted by the Board, he shall have until **4:30 p.m., May 20, 1997**, to file any supplementary direct testimony or exhibits.
6. On or before **4:30 p.m., Tuesday, May 20, 1997**, the Appellant shall file a final list of rebuttal witnesses and rebuttal exhibits. He shall prefile the rebuttal testimony for all witnesses he intends to call as rebuttal witnesses. For each expert witness, he shall file a resume or other statement of qualification. The Appellant also shall prefile all rebuttal exhibits, except as otherwise noted in item 11 below.
7. On or before **4:30 p.m., Tuesday, June 3, 1997**, the ANR shall file a final list of rebuttal witnesses and rebuttal exhibits. It shall prefile the rebuttal testimony for all witnesses it intends to call as rebuttal witnesses. For each expert witness, it shall file a resume or other statement of qualification. The ANR also shall prefile all rebuttal exhibits, except as otherwise noted in item 11 below.

8. On or before **4:30** p.m., Tuesday, June **17, 1997**, the parties shall **file** in writing all objections to **prefiled** direct and rebuttal testimony and exhibits, or such objections shall be deemed waived. The parties shall also file any memoranda on legal issues in **this** case.
9. A second prehearing conference will be held at a date, time and place to be announced by subsequent notice. At this time, the Board's Chair will hear oral argument **with** respect to any party's evidentiary objections and establish a final agenda for hearing.
10. No individual may be called as a witness in this matter if he or she has not been identified in a witness list filed in compliance with this order. All reports and other documents that constitute substantive testimony must be filed with the prefiled testimony. If prefiled testimony has not been submitted by the date specified, the witness will not be permitted to testify.
11. **Prefiled** testimony shall be filed in question-and-answer format. Each page and each line of testimony shall be numbered.
12. Parties shall file an original and five (5) copies of all prefiled testimony and exhibits which are **8½** by 11 inches or smaller, and any other documents with the Board, and mail one copy to each of the parties listed on the attached Certificate of Service.

Parties are required to file only lists identifying exhibits which are larger than 8 ½ by 11 inches that they intend to present, rather than the exhibits themselves. These oversized exhibits must be made available for inspection and copying by other parties prior to the hearing.

13. To save time at the evidentiary hearing, the Board will require that parties label their prefiled testimony and exhibits themselves and submit lists of exhibits which the Board can use to keep track of exhibits during the hearing. With respect to labeling, each person is assigned a letter or letters as follows: A for the Appellant; ANR for the Agency of Natural Resources.

**Prefiled** testimony and exhibits shall be assigned consecutive numbers: for example, the Appellant will number its exhibits A-1, A-2, A-3, etc. If an exhibit consist of more than one piece (such as a site plan with multiple sheets), letters will be used for each piece, i.e.: A-2A, A-2B, A-2C, etc. The labels on the exhibits must contain the words **WATER RESOURCES BOARD, In re: Darryl and Stephanie Landvater, Docket No. CUD-96-06**, the number of the exhibits, and a space for the Board to mark whether the exhibit has been admitted and to mark the date of admission. Label stickers which can be used by the parties are available from the Board on request; parties must complete the information sought on the stickers prior to the hearing.

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Concerning preparation of lists of exhibits, each list must state the **full name of the party** at the top and the Board's case name and number. There must be three **columns**, from left to right: **NUMBER**, **DESCRIPTION**, and **STATUS**. The list must include exhibits and prefiled testimony. An example is as follows:

Darryl Landvater, Appellant  
LIST OF EXHIBITS

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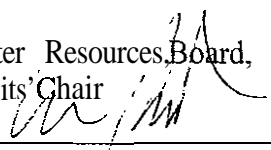
<u>Number</u>	<u>Description</u>	<u>Status</u>
A-1	Prefiled direct testimony of Darryl Landvater	
A-2A	Application for DEC #94-3 13	
A-2B	Map of wetland submitted with Application DEC #94-3 13	

The Board will use the status column to mark whether the exhibit has been admitted.

14. All parties shall file an original and five (5) copies of any motions, memoranda, or other filings with the board, and mail one copy to each of the parties listed on the attached Certificate of Service. 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 parties. The board does not accept filings by FAX.
15. Any written request for a stenographer and stipulation concerning the terms for the allocation of costs shall be filed with the Board at least ten (10) days prior to the hearing at which stenographic services are required.
16. Pursuant to Rule 24(B) of the Board's Rules of Procedure, this order will be binding on all persons who have received notice of the Preheating Conference, unless there is a timely objection to this Prehearing Conference Report and Order filed by, or a showing of cause for, or fairness requires waiver of a requirement of the order.

Dated at Montpelier, Vermont, this 5<sup>th</sup> day of March, 1997

Water Resources Board,  
by its Chair

  
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William Boyd Davies