

**State of Vermont
WATER RESOURCES BOARD**

In re: Jamie Badger, Milton, Vermont
Docket No. CUD-96-07

**MEMORANDUM OF DECISION
and
ORDER OF REMAND**

I. BACKGROUND

On or about December 26, 1996, Jamie Badger of Milton, Vermont tiled a notice of appeal ("Appeal") with the Water Resources Board ("Board") pursuant to 10 V.S.A. § 1269. The Appeal was docketed by the Board as CUD-96-07. Mr. Badger sought Board review of Conditional Use Determination ("CUD") #95-098 issued November 25, 1996 by the Department of Environmental Conservation, Agency of Natural Resources ("ANR"). CUD #95-098 denied Mr. Badger's request to construct a driveway in a 20 foot right-of-way partially within the buffer zone of a Class Two wetland ("Proposal"). ANR's denial was based on findings that the Proposal would have an adverse impact both upon the wetland's wildlife and migratory bird habitat function and upon its recreational function. The CUD concluded that the Proposal did not sufficiently minimize these impacts.

Due to administrative error, the Appeal was not date-stamped. By letter dated January 3, 1997, Board staff notified Mr. Badger of the error and indicated that the Board would assume the Appeal was timely tiled because it was postmarked December 24, 1996 -- two days prior to the expiration of the appeal period.

Prior to the publication of the Notice of Appeal and the scheduling of a hearing in the matter, Mr. Badger informed Board counsel that he was attempting to negotiate a settlement with ANR. Mr. Badger requested that the Board delay noticing or otherwise acting on the Appeal. Board counsel agreed to a temporary delay and informed Mr. Badger that he must file a certificate with the Board indicating that the Appeal had been served pursuant to Board Rule 18.

On March 20, 1997, ANR issued what purports to be an amendment to CUD #95-098 ("Amended CUD"). The Amended CUD purports to reverse ANR's decision to deny authorization of the Proposal and to authorize the Proposal as amended by Mr. Badger.

On April 1, 1997, Mr. Badger notified the Board that he was withdrawing the Appeal.

On April 14, 1997, the Board issued a Notice of Appeal and Request to Withdraw Appeal, providing interested persons with an opportunity to seek oral argument or file

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written objections. The Notice indicated that the Board was prepared to consider Mr. Badger's withdrawal request, CUD #95-098, and the Amended CUD at 9:30 a.m. on Wednesday, May 14, 1997 at Classroom 403, College Hall, Vermont College, College Street, Montpelier, Vermont. Among the individuals and entities to whom the Notice was mailed via first-class mail, postage prepaid, was Robert Aranjo, 33 Murray Avenue, Milton, VT 05468. The Notice was published in the legal notice section of the Burlington Free Press on Wednesday, April 16, 1997.

On May 2, 1997, Robert Aranjo tiled a letter with the Board stating that he and his wife own the land across which a portion of the proposed driveway runs. Mr. Aranjo indicated that he and his wife were not aware that CUD #95-098 had been appealed or that Mr. Badger and the ANR were negotiating a compromise that ultimately resulted in the Amended CUD.

On May 2, 1997, Board counsel forwarded a memo to the service list suggesting that the Aranjos discuss the matter informally with Mr. Badger and / or ANR and, if still dissatisfied, that they present their concerns to the Board on May 14, 1997 at 9:30 a.m.

On May 14, 1997, the Board reviewed Mr. Badger's withdrawal request, CUD #95-098, the Amended CUD, and the letter from Mr. Aranjo tiled May 2, 1997. The following individuals were present and participated in the May 14, 1997 proceeding: Mr. Badger and Guy Babb, Esq., who appeared on Mr. Badger's behalf.

On May 14, 1997 and June 4, 1997, the Board deliberated on Mr. Badger's withdrawal request. Following a thorough review of the matter, the Board adjourned. The matter is now ready for decision.

II. DISCUSSION

A person aggrieved by an act or decision of ANR, including the issuance of a CUD, may appeal the act or decision to the Board. 10 V.S.A. § 1269. An appeal to the Board is conducted de novo and the Board's decision is binding upon ANR. Id. When an appeal is tiled with the Board, jurisdiction over the act or decision transfers from ANR to the Board. See id.; In Re: Proctor Gas. Inc., Docket No. CUD-93-02, Dismissal Order at 2 (Oct. 27, 1993). Cf., Kotz v. Kog, 134 Vt. 36, 38 (1975) (notice of appeal properly tiled with Supreme Court divests trial court of jurisdiction). Therefore, because Mr. Badger timely appealed CUD #95-098, ANR had no jurisdiction to issue the Amended CUD. A CUD is void ab initio if it is "issued" by a body with which jurisdiction does not lie.

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This is not the first time that the Board has been faced with this issue. In In Re: Proctor Gas, Inc., the ANR purported to issue an amended CUD while the original CUD was on appeal to the Board. In dismissing the appeal of the original CUD, the Proctor Gas Board stated that it was taking no action concerning the amendment because the amendment was not properly before the Board. In addition, the Board

expresse[d] serious concern about the ANR's decision not to provide public notice of the applicant's amendment request. Sections 8.2 and 8.3 of the Vermont Wetland Rules set forth express requirements for notice and posting of CUD requests in order to inform the public of a proposed action within a significant wetland or its buffer zone. There is no exemption of this requirement for the amendment of a CUD previously issued.

In Re: Proctor Gas, Inc., supra, at 2. By dismissing the Proctor Gas appeal, the Board declared that the original CUD was "left standing."

In the instant matter, the Board finds that remand to ANR of the Appeal is the action most consistent with the intent and purpose of 10 V.S.A. chapter 37 and the Vermont Wetland Rules. Remand is limited to the scope of CUD #95-098 -- the CUD Mr. Badger appealed to the Board'. Once jurisdiction over CUD #95-098 is restored to ANR, ANR can reconsider the Proposal as altered by Mr. Badger without requiring Mr. Badger to initiate the entire CUD process anew. However, ANR should keep me service list apprised when it reconsiders any suggested alterations to the Proposal and provide members of the list with the opportunity to participate in the reconsideration, as appropriate.

When ANR next considers amendments to its rules, it may wish to consider adding a provision that would allow an aggrieved party in the CUD context to file a motion for reconsideration. Such an amendment might eliminate the need for an appeal to the Board in many instances. Cf., 10 V.S.A. § 6007(c) and Environmental Board Rule 3(C)(2) (In an analogous context within the Act 250 framework, certain parties may

¹ By this Memorandum of Decision and Order of Remand, the Board does not specifically approve or disapprove the Amended CUD since the Amended CUD is not properly before the Board at this time. See In re Proctor Gas, Inc., supra. The Board notes, however, that although ANR had no jurisdiction to issue the Amended CUD, the Board always welcomes a motion requesting the Board to consider a proposed negotiated settlement as a means of resolving a properly noticed appeal.

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request reconsideration of a district coordinator's jurisdictional opinion rather than appeal to the Environmental Board. The period within which an appeal may be taken is stayed pending a decision on the reconsideration request.)

III. ORDER

Docket No. CUD-96-07 is hereby remanded to ANR for reconsideration based on the new evidence that resulted in the "issuance" of the Amended CUD. An aggrieved party may appeal the resulting ANR determination pursuant to 10 V.S.A. § 1269.

Dated at Montpelier, Vermont, this 4th day of June, 1997.

Vermont Water Resources Board
by its Chair



William Boyd Davies

Concurring: Ruth Einstein
Gerry Gossens
Jane Potvin
Gail Osherenko

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