

**State of Vermont
WATER RESOURCES BOARD**

**RE: Champlain Marble Company
61 Main Street
Proctor, VT 05765**

**Docket No. CUD-97-06
(Appeal of DEC File CUD #95-466)
Fisk Quarry Wetlands, Isle La Motte**

PREHEARING CONFERENCE REPORT AND ORDER

I. BACKGROUND

On July 28, 1997, the Water Resources Board (Board) received a notice of appeal filed by Champlain Marble Company (Appellant), by its attorney Paul S. Kulig, of the firm Keyser, Crowley, Meub, Layden, Kulig & Sullivan, P.C. The Appellant requests de novo review of a decision of the Department of Environmental Conservation (DEC), Agency of Natural Resources (ANR), denying Appellant's application for Conditional Use Determination (CUD) #95-446.

The Appellant had sought a CUD to allow it to resume extraction of marble dimensional stone from the Fisk Quarry, off West Shore Road, in Isle La Motte, Vermont. The area in which the proposed activity would occur contains Class II protected wetlands and their buffer zones. The CUD was denied on the basis that the proposed activity would have an adverse impact on certain wetland functions deemed to be significant for such wetlands under the Vermont Wetland Rules (VWR). This appeal was filed pursuant to 10 V.S.A. §1269 and Section 9, VWR.

A Notice of Appeal and Prehearing Conference was issued on August 12, 1997, and sent to all persons required by VWR and the Board Rules of Procedure to receive notice. Additionally, this notice was published on August 26, 1997, in The Islander, a newspaper of general circulation in the area of Appellant's proposed activity.

Timely entry of appearances were made by: Linda Fitch, Fisk Farm, 44 West Shore Road, Isle La Motte, VT 05463; MaryJane Tiedgen, 14240 N. Territorial Road, Gregory, MI 48137; Andy Raubvogel, Esq., Associate General Counsel for the ANR; and Stephanie J. Kaplan, Esq., for South Shore Associates (SSA). No other persons entered timely appearances in this matter.

On September 11, 1997, at 10:30 a.m., a prehearing conference was convened at the Isle La Motte Town Hall, Town Road #1, Box 250, Isle La Motte, Vermont. Conducting the prehearing conference was William Boyd Davies, the Board's Chair; assisted by Kristina L. Bielenberg, Esq., the Board's Legal Counsel. This prehearing conference was held pursuant to Rule 24 of the Board's Rules of Procedure. The following persons appeared and participated in the prehearing conference:

The Appellant, represented by Paul S. Kulig, Esq.
ANR, represented by Andy Raubvogel, Esq.
Linda Fitch, pro se, on behalf of herself and her mother, Violet Fitch

SSA, represented by Stephanie J. Kaplan, Esq.

Members of SSA and the general public were also present. (See Preheating Conference Attendance Sheet, Sept. 11, 1997.)

A Preheating Conference Report and Order is now ready for issuance. This document contains a report of the matters addressed at the prehearing conference, certain party status rulings, and a schedule of filing deadlines to facilitate the hearing process.

II. **DISCLOSURES**

At the preheating conference, the Board's Chair briefly explained the duties of the Board and identified the current Board members by name, occupation, and residence. He also made available to preheating conference participants copies of the Board Fact Sheet containing brief biographical sketches of Board members. The current members are: William Boyd Davies, Chair; Ruth Einstein, Gerry Gossens, Gail Osherenko, and Jane Potvin. The Board's Legal Counsel disclosed that Ms. Potvin, a resident of South Hero, had been asked to review a copy of the distribution list prepared by the ANR for CUD #95-446 prior to the prehearing conference, and that Ms. Potvin had reported that she has no business or other relationships with any of the persons listed on this list that would give rise to a conflict of interest or an appearance of a conflict of interest.

The Chair asked the preheating conference participants whether they knew of any immediate reasons for objecting to the participation of these Board members. No objections were raised. However, the Chair indicated that the prehearing conference report and order would set forth deadlines for requesting disclosures and the filing any written objections.

The Chair asked the Board's Legal Counsel to read into the record a disclosure statement made by William Bartlett, Executive Officer of the Board. In that statement, Mr. Bartlett disclosed the circumstances of a brief visit he had made to the Fisk Farm and Fisk quarry site in the company of Linda Fitch and others just prior to the filing of the present appeal. After the reading of the statement; the Chair asked whether any of the preheating conference participants had any immediate objections to Mr. Bartlett serving as staff to this case. No objections were raised. However, the Chair indicated that an opportunity for requests for further disclosures and filings of any written objections would be provided.

III. ISSUES

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

- A. Are the functions of the subject Class Two wetlands, specifically functions 5.2, 5.3, 5.4, 5.8., 5.9, so significant that they are protected functions under the VWR?
- B. If any or all of these functions are deemed to be significant, has the Appellant mitigated the adverse impacts on those functions, such that these is not undue adverse effect on the subject Class II wetlands?

At the prehearing conference, as part on his introductory comments, the Board's Chair advised the parties that the appeal would be conducted as a de novo proceeding, and that unlike the proceeding before the ANR, the Board would conduct its hearing as a contested case. Accordingly, the Chair explained that the Appellant would have the burden of proof to demonstrate that it is entitled to a CUD under Section 8, VWR. He further noted that, because the wetlands in question are Class Two wetlands, they are presumed to provide all of the functions set forth in Section 5 of the VWR. Further, this means that regardless of what the DEC may have concluded about the significance or lack of significance of certain functions, the Appellant must provide evidence addressing each of the functions as part of its case in chief. The Chair observed that if the Appellant wishes to challenge the presumption of significance attaching to a wetland by virtue of its status as an NWI-mapped wetland or wants a specific determination as to which functions are served by the wetland at significant levels, it must **file a** petition with the Board under Section 7 of the VWR to obtain such a determination.

The Chair's summary of the relevant law prompted the participants to discuss whether issue "A" should be decided in the context of a public notice and comment proceeding under Section 7, VWR. See VWR, §§ 4.2(b), 4.4, and 7. Counsel for the Appellant indicated that he understood that the burden of proof would rest on his client to provide evidence upon which the Board could make affirmative findings under each of the ten criteria under Section 5, VWR, as part of its Section 8 appeal, and that he would discuss the matter further with his client's wetlands consultant to determine whether the Appellant would proceed with the appeal or consider pursuit of a Section 7 proceeding.

In summary, the issue on appeal is whether the Appellant should be granted a Conditional Use Determination under Section 8, VWR. A CUD shall be denied if the proposed activity will result in an undue adverse impact on any of the functions listed in Section 5, VWR, unless such impact is mitigated. See Sections 8(b) and (c), VWR.

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IV. PARTY STATUS RULINGS

The Chair ruled orally that the Appellant had party status (standing) to bring the appeal. See Board Rule of Procedure 22(A)(6). He further ruled that the ANR, was a party of right. See Board Rule of Procedure 22(A)(4).

Timely party status petitions were received from the following: Linda Fitch on behalf of herself and her mother, Violet Fitch, as adjoining landowners (Board Rule of Procedure 22(A)(7)); MaryJane Tiedgen, as an adjoining landowner (Board Rule of Procedure 22(A)(7)); and SSA (Board Rule of Procedure 22(A)(7) and 22(B)). The Chair asked the prehearing conference participants whether they had any objections to the grant of party status to the above petitioners. The Appellant indicated that it had no objections to the grant of party status to the Fitches and MaryJane Tiedgen, but it did object to the grant of party status to SSA on the basis that SSA had failed to demonstrate that its interest could not be adequately represented by existing parties, meaning the ANR, the Fitches, and MaryJane Tiedgen.

After hearing additional representations and argument from counsel, the Chair granted party status to SSA pursuant to Board Rule of Procedure 22(A)(7), on the basis that the members of this organization, some of whom are adjoining property owners, have interests which may be distinct from those of other parties (i.e.: potential effects of proposed activity on their water supplies and on specific, wetland values benefitting their properties). The Chair also noted that, unlike the Fitches and Ms. Tiedgen, the SSA is represented by counsel. He asked, however, that those opposing the grant of a CUD should coordinate the presentation of their case as much as possible. See, for example, Board Rule of Procedure 22(B)(4).

The Chair indicated that the Prehearing Conference Order would contain a deadline for the filing of any objections to the Chair's party status rulings.

Counsel for the Appellant noted that he had received a communication from State Representatives Thomas Alberico and Fred Maslack requesting party status. However, because these requests were not supported by timely petitions explaining the respective interests of these individuals, the Board's Chair declined to grant them party status. He indicated, however, that their names would be added to the "For Information Only" section of the certificate of service.

V. PRELIMINARY ISSUES

The Board's Chair asked the parties to identify any preliminary issues. Linda Fitch had indicated in her party status petition that she questioned whether the appeal should go forward because the Appellant was allegedly revising its proposed operational plan to satisfy certain

permitting requirements at the ANR. Ms. Fitch repeated this concern at the prehearing conference and indicated that she was prepared to file a Motion to Dismiss.

The Appellant responded that it was prepared to proceed with the present appeal using the May 19, 1997, operational plan submitted to the DEC. However, in seeking a storm water discharge permit, it indicated that it was considering other design options. Therefore, counsel for the Appellant indicated that he would discuss with his client whether the appeal should go forward or whether it should seek a return of jurisdiction to the ANR for review of another operational plan. Counsel of ANR suggested that a remand to the ANR might be appropriate if the Appellant was going to redesign its project. The Chair indicated that any change to the May 19, 1997 operational plan would be grounds for return of jurisdiction to the ANR.

SSA and Linda Fitch identified another potential preliminary issue. They dispute the accuracy of the wetland delineation prepared by the Appellant. The Chair indicated that any issue concerning the boundaries of the wetlands and their buffer zones could be addressed in the hearing itself.

The Board's Chair indicated that the Prehearing Order would contain deadlines for the Appellant to notify the Board and parties of its decision whether to proceed with the appeal and for any Motions to Dismiss or other preliminary motions.

VI. REQUEST FOR WITHDRAWAL

Counsel for the Appellant agreed to meet with his client and its wetland consultant to discuss whether it will proceed with this appeal or pursue a new operational plan and therefore request withdrawal. He indicated that he would notify the Board by October 10, 1997, whether his client would be pursuing the project redesign and withdrawal option.

VII. HEARING

The Board's Chair informed the parties that; if this appeal goes forward, it will be heard by a full panel of the Board. He indicated that the proposed date for a site visit and any oral argument before the Board with respect to preliminary issues would be November 4, 1997, at a time and place to be announced by subsequent notice.

The parties also agreed that, should the Appellant not withdraw its appeal, they would work together to develop a joint plan for a site visit of the wetland and submit this in advance of the Board's meeting date of November 4, 1997. It was further agreed that if it appeared that the

planning for the site visit could be facilitated by the convening of a second prehearing conference, that such conference would be held by teleconference at 9:30 a.m. on the morning of Friday, October 31, 1997

After a discussion concerning the number of witnesses that might be called, it was determined that a hearing in the this matter would take between a day-and-a-half and two days. All parties indicated that they could meet on a Saturday, if the Board so required.

VIII. PREFILED TESTIMONY AND EXHIBITS

The parties agreed that prefiled direct and rebuttal testimony and prefiled exhibits should be required. They also agreed to time frames and a sequence of filing. See IX. Order at 7-8, items 9-13. Counsel for SSA requested that, all parties be required to provide oversized exhibits, at cost, to other parties.

Counsel for SSA also requested an opportunity for opening and closing statements at the hearing.

Counsel for SSA asked whether an out-of-state witness could participate in the hearing by teleconference. The Chair preliminarily ruled that a witness could not participate by teleconference on the basis that this procedure is not provided for in the Board's Rules of Procedure and that jurisdictional challenges could arise from such an arrangement.

Finally, the Board's Chair recommended that parties consult with the Board's counsel if they should have questions concerning how to prefile testimony and exhibits. @ compliance with the Prehearing Conference Order.

IX. ORDER

1. **The following are parties as of right in this proceeding:**
 - a. Champlain Marble Company, pursuant to 10 V.S.A. § 1269, Section 9 of the VWRs, and Board Rule of Procedure 22(A)(6);
 - b. Agency of Natural Resources, pursuant to Board Rule of Procedure 22(A)(4);
 - c. Linda Fitch and Violet Fitch., pursuant to Board Rule of Procedure 22(A)(7);
 - d. MaryJane Tiedgen, pursuant to Board Rule of Procedure 22(A)(7); and
 - e. South Shore Associates, pursuant to Board Rule of Procedure 22(A)(7).

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2. On or before **4:30 p.m., Friday, October 10, 1997**, the Appellant shall file either a notice indicating its intention to proceed to hearing on this appeal or a notice of withdrawal based on its intention to redesign the project and seek approvals from the ANR under a new operational plan
3. On or before **4:30 p.m., Friday, October 10, 1997**, any party wishing to obtain further disclosures from a Board member or staff shall file its request in writing. If no such requests are made by this deadline, it may be assumed that objections to the participation of Board members and staff identified in Section II. above are waived.
4. If the Appellant notifies the Board of its intention to proceed to hearing (see Item 2 above), any party wishing to obtain a prehearing ruling by the Board shall file its request on or before **4:30 p.m., Thursday, October 16, 1997**. Such filings may include Motions to Dismiss, objections to the Chair's party status or other preliminary rulings, and requests for disqualification of Board members or staff. Such filings shall be supported by legal memoranda and indicate: whether the sponsoring party requests oral argument before the Board.
5. Any party wishing to respond to tiling provided for in Item 3 above, may do so by filing its responsive pleading, supported by legal memorandum, on or before **4:30 p.m., Thursday, October 23, 1997**. Such a filing shall indicate whether the sponsoring party requests oral argument before the Board.
5. On or before **4:30 p.m., Monday, October 27**, the parties shall jointly file a proposed site visit agenda and map. The agenda shall identify each point of interest that a party wants the Board to view and a brief explanation of why the viewing of this place or thing is important to the party's case. Points of interest shall be keyed to the site, visit map. If the parties cannot agree on a joint proposed site visit agenda and map, they shall individually file by this deadline their respective proposals.
7. A second prehearing conference by teleconference is tentatively scheduled for **9:30 a.m., Friday, October 31, 1997**, to be confirmed by subsequent notice.
8. The Board shall conduct a site visit and hold such oral argument and deliberations with respect to any prehearing issues as are warranted on **Tuesday, November 4, 1997**. The time and location of this proceeding shall be confirmed by subsequent notice.
9. Thirty (30) days from the date of the issuance of an order memorializing the Board's rulings of November 4, 1997, the Appellant 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.

10. Thirty (30) days following the filing of the Appellant's direct testimony and exhibits, all other parties shall file final lists of direct witnesses and direct exhibits. They shall prefile the direct testimony for all witnesses they intend to call as direct witnesses. For each expert witness, they shall file a resume or other statement of qualification.
11. Fourteen (14) days following the filing of direct testimony as provided in Item 10 above, the Appellant 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 who has not previously been called as a direct witness, it shall file a resume or other statement of qualification:
12. Fourteen (14) days following the filing, of the Appellant's rebuttal testimony and exhibits, all other parties shall file final lists of rebuttal witnesses and rebuttal exhibits. They shall prefile the rebuttal testimony for all witnesses they intend to call as rebuttal witnesses. For each expert witness who has not previously been called as a rebuttal witness, they shall file a resume or other statement of qualification.
13. Ten (10) days following the filing of the last prefile rebuttal testimony, all parties shall file any evidentiary objections and/or stipulations as to the admission of exhibits. Any such filing shall indicate whether the sponsoring party requests oral argument before the Board's Chair
14. A final prehearing conference will be held at a date, time and location to be announced by subsequent notice. At this time, the Board's Chair will hear any oral argument with respect to any party's evidentiary objections and establish a final agenda for hearing;
15. The Board shall conduct a hearing in this matter at a date, time and location to be confirmed by subsequent notice;
16. 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.
17. Prefiled testimony shall be filed in question-and-answer format. Each page and each line of testimony shall be numbered.

18. Parties shall file an original and five (5) copies of all prefled testimony and exhibits 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 mail one copy of all prefled testimony and exhibits that are 8 ½ by 11 inches to each of the parties listed on the attached Certificate of Service. For exhibits larger than 8 ½ by 11 inches, parties need provide only a list of oversized exhibits and make such exhibits available for inspection and copying by other parties prior to the date of hearing. Parties are required to provide another party exhibits larger than 8: ½ by 11 inches if that party has offered to pay the cost of reproduction of such oversized exhibits.

19. To save time at the evidentiary hearing, the Board will require that parties label their prefled 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; LF for Linda and Violet Fitch; MT for MaryJane Tiedgen; and SSA for South Shore Associates.

Prefled 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: Champlain Marble Comoanv , Docket No. CUD-97-06, 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.

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 prefled testimony. An example is as follows:

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**Champlain Marble Company, Appellant
LIST OF EXHIBITS**

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<u>Number</u>	<u>Description</u>	<u>Status</u>
A-1	Prefiled direct testimony of _____	
A-2A	Application for DEC CUD#95-466	
A-2B	NWI Map of wetland submitted with Application DEC CUD#95-466	

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

20. 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.
21. 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.
22. 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 Prehearing Conference, unless there is a timely objection to this Prehearing Conference Report and Order tiled by, or a showing of cause for; or fairness requires waiver of arequirement of the order;

Dated at Montpelier, Vermont, this 17th day of September, 1997.

Water Resources Board,
by its Chair



William Boyd Davies