

State of Vermont
WATER RESOURCES BOARD

**Re: Scott and Sheila McIntyre
and
Abbott and Rosalie Lovett
Docket No. EPR-98-02**

**Authority: 3 V.S.A. §2873(c)(4)
and Environmental
Protection Rules**

MEMORANDUM OF DECISION ON PRELIMINARY ISSUES

This memorandum of decision addresses preliminary issues raised by the parties at the prehearing conference held in this matter on June 30, 1998. As explained below, the Water Resources Board ("Board") grants the Petition for Party Status of Scott and Sheila McIntyre and Abbott and Rosalie Lovett of Richmond, Vermont ("Appellants"), and declares the Appellants parties of right pursuant to Water Resources Board Rule of Procedure ("Procedural Rule") 22(A)(7). The Board denies the ANR's Motion to Dismiss.

I. PROCEDURAL BACKGROUND AND JURISDICTION

On May 14, 1998, the Appellants filed a notice of appeal with the Board seeking review of two Subdivision Permits, #E-4-0633-9-R ("Permit 9/9-R") and #EC-4-0633-10 ("Permit 10"), issued to Ernest Paquette of Richmond, Vermont, ("Permittee") by the Department of Environmental Conservation ("DEC") of the Agency of Natural Resources ("ANR"). Permit 9/9-R was issued on May 28, 1997, and authorized a two-lot, single-family residential subdivision, located off Town Road #17 (Dugway Road) in the Town of Richmond, Vermont. Permit 9-R specifically authorized Lot #8 (1.3 acres) and Lot #19 (2.1 acres), with both lots to be served by on-site water supply and wastewater disposal. Permit 10 was issued on April 16, 1998, and amended Permit 9/9-R, by authorizing the elimination of a pump station for the wastewater disposal system previously approved for Lot 19.

This appeal was filed pursuant to 3 V.S.A. §2873(c)(4) and Environmental Protection Rule ("EPR") 1-201(E) (Aug. 8, 1996), which grant the Board authority to hear appeals from the Secretary of ANR's subdivision permit decisions.

On June 25, 1998, ANR transmitted to the Board the record for Permits 9/9-R and 10. After due notice, the Chair of the Board held a preheating conference in this matter on June 30, 1998, in Montpelier, Vermont, pursuant to Water Resources Board Rule of Procedure ("Procedural Rule") 24. On July 1, 1998, the Chair issued a Prehearing Conference Report and Order ("Preheating Order"), governing the conduct of proceedings through the hearing stage. No party or interested person filed written objections to the Preheating Order.

The following persons have entered timely appearances in this matter: the Permittee,

represented by Matthew T. Daly, Esq., Doremus Associates; the Appellants, represented by Stephanie J. Kaplan, Esq.; and the ANR, represented by Jonathan Peress, Esq.

The Permittee and ANR are parties of right pursuant to Procedural Rules 22(A)(7) and 22(A)(4), respectively. Prehearing Order at 6, IX.(1).

At the prehearing conference, the Permittee challenged the party status requests of the Appellants. Preheating Order at 2, II.(A). Additionally, the Permittee and the ANR challenged the scope of the appeal and requested an opportunity to file a motion to dismiss in part the matter before the Board on the basis that the Appellants appeal of the 9/9R Permit was untimely filed. Prehearing Order at 2, II.(D). The Chair required the Appellants to file a written Petition for Party Status and provided the other parties with an opportunity to file written objections in response. Prehearing Order at 6, IX.(2), (3). The Chair also provided the parties with an opportunity to file motions and legal memoranda on preliminary issues and written responses to these. Prehearing Order at 6, IX.(4), (5). In the Prehearing Order, the parties were advised that the Board would deliberate with respect to preliminary issues at its regular meeting on August 11, 1998. Prehearing Order at 7, IX.(9).

On July 21, 1998, the Appellants filed a timely Petition for Party Status ("Party Status Petition"). Neither the Permittee nor the ANR filed a written objection to this petition.

On July 21, 1998, the ANR filed a Motion to Dismiss ("Motion") and on August 4, 1998, the Appellants filed a written Opposition to Motion to Dismiss ("Memorandum in Opposition"). The Permittee filed no Motion to Dismiss nor any other motion with respect to preliminary issues.

No party filed any objections to the issues in this proceeding as set forth in the Prehearing Order nor timely requested supplementation of the record filed by the ANR on June 25, 1998. Accordingly, the only issues to be decided in this decision are whether the Appellants should be granted party status as of right pursuant to Procedural Rule 22(A)(7) and whether the ANR's Motion to Dismiss should be granted.

The Board deliberated with respect to the preliminary issues on August 11, 1998, and now issues this decision memorializing its rulings.

II. PRELIMINARY ISSUES

- (1) Whether the Appellants qualify for party status as of right pursuant to Procedural Rule 22(A)(7).

- (2) Whether the Board should dismiss that portion of the appeal pertaining to Permit 9/9-R on the basis that such portion of the appeal was untimely filed.

III. DISCUSSION

A. Party Status of Appellants

Title 3 V.S.A. §2873(c)(4) does not specify who may file appeals from the Secretary of ANR's subdivision permit decisions. That statute merely states that appeals from the Secretary's decision are to the Board.

When the Board has been faced with a statute that is silent concerning who has a right to file an appeal, the Board has turned for guidance to its own Procedural Rule on Party Standing, Rule 22. In re: Appeal of Larivee, Docket No. CUD-92-09, Preliminary Order: Party Status at 2-3 (Mar. 16, 1993) and Memorandum of Decision on Preliminary Issues at 3 (July 13, 1993) (finding that Appellant who had appealed a conditional use determination pursuant to 10 V.S.A. §1269 met standards for party status under Rule 22).

The Appellants seek party status as of right in the present proceeding. Although in their Petition for Party Status they have framed their request as one filed under Procedural Rule 22(A)(4), it is obvious from the text of the rule itself and the standards that they have addressed in their pleading that they actually seek party status as of right under Procedural Rule 22(A)(7).¹ That rule states, in relevant part:

Upon entering a timely appearance the following shall become parties to Board proceedings:-

¹ Procedural Rule 22(A)(4) provides: "Upon entering a timely appearance the following shall become parties to the Board proceedings: . . . (4) the Agency." The "Agency" is defined at Procedural Rule 2(A) as the "Vermont Agency of Natural Resources."

At the preheating conference on June 30, 1998, the Chair agreed "to provide the Appellants with an opportunity to file party status petitions addressing the standard in Rule 22(A)(7) and the Permittee's arguments" in opposition to their party status request. Preheating Order at 2, II.(A). The Chair issued a specific order requiring the filing of a Petition for Party Status addressing the same rule. See Prehearing Order at 6, IX.(2). It is obvious that the Appellants' Petition for Party Status, although citing the wrong subpart of Procedural Rule 22(A), was designed to respond to the Chair's order.

....

7. any 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.

At the prehearing conference, the Permittee argued that neither the McIntyres nor the Lovetts could demonstrate that they qualified for party status pursuant to Procedural Rule 22(A)(7) since they did not have "a substantial interest which may be adversely affected by the outcome of the proceeding." With respect to the McIntyres, he also argued that they did not own real property adjoining the Permittee's tract at the time that Permits 9/9-R and 10 were applied for and, with respect to Permit 9/9-R, when it was obtained. Therefore, he argued that the McIntyres could not demonstrate that they had a "substantial interest" supporting their right to bring this appeal. Docket No. 11 at 2, II.(A).

The Appellants' lots are both adjacent to Lot 8 of the Paquette subdivision. The Appellants allege that their shallow wells are spring fed, serve as their only domestic water supplies, are located 205 and 210 feet down gradient of the proposed waste disposal system, and are susceptible to contamination from surface and ground water sources. The Appellants also allege that the Permittee did not submit to the ANR hydrogeologic studies addressing whether there is or is not a hydrogeologic connection between the proposed septic system and the Appellants' wells. Notice of Appeal (May 14, 1998) and Petition for Party Status at 1-2.

The Board concludes that both the McIntyres and the Lovetts meet the standards set forth in Rule 22(A)(7) because an appeal before the Board is the only forum available to the Appellants to obtain the specific relief that they request: denial of the Permits 9/9R and 10, and instructions to the ANR and the Permittee that an appropriate hydrogeologic study must be prepared prior to acceptance of another subdivision permit application for the subject property. Moreover, there are no other parties who can litigate the issues presented by the Appellants and represent their interests.

The Board also concludes that the facts alleged in the Appellants' Notice of Appeal and Petition for Party Status support the conclusion that they each have "a substantial interest which may be adversely affected by the outcome of [this] proceeding." Emphasis added. The burden of proof rests with the Permittee to prove that his project conforms with the EPRs and its requirements for isolation distances and appropriate site evaluation. Therefore, it is not necessary for the Appellants to demonstrate that the siting of the proposed waste disposal system will contaminate their wells. Rather, they merely need to establish, as they have, that because of the close proximity and downgradient location of their wells they have a substantial interest (the safety of their water supplies) which may be adversely affected if the proposed waste disposal system is installed on Lot 8.

At the prehearing conference, the Permittee argued that the McIntyres, in particular, could not meet the "substantial interest" of Procedural Rule 22(A)(7) because they did not own the adjoining property at the time he filed with the ANR the applications for Permit 9/9-R and 10. The Appellants respond that there is no requirement in Procedural Rule 22(A)(7) that only persons owning property adjoining a project at the time an application is filed with the ANR are entitled to have party status in a subdivision permit proceeding. However, even if there were a requirement that a person needed a property interest in adjoining property at the time a permit application was pending before the ANR, the McIntyres allege that they had a purchase and sale agreement when Permit 9/9-R was issued and that they owned their lot by the time Permit 10 was issued. Therefore, they argue that they had substantial property interests in the adjoining property at the time the 9/9-R and 10 Permit applications were pending before the ANR.
Petition for Party Status at 2-3.

The Board concludes that it is immaterial when the McIntyres acquired either a contractual or a real property interest in their Richmond property. The "substantial interest" at stake is their existing water supply. Since 3 V.S.A. §2973(c)(4) gives the Board appellate jurisdiction to hear appeals from subdivision permits at any time following the issuance of such permits by the ANR (see discussion below at 5-8), the Appellants are only required to demonstrate satisfaction with Rule 22(A)(7) at the time of the filing of their appeal.

Accordingly, the Board grants the Appellants' Petition for Party Status, concluding that the McIntyres and Lovetts each have "a substantial interest which may be adversely affected by the outcome of [this] proceeding." and therefore they are entitled to party status as of right pursuant to Procedural Rule 22(A)(7).

B. ANR's Motion to Dismiss

At the prehearing conference the Permittee challenged the scope of the appeal, arguing that the Board could not consider the merits of the 9/9-R Permit since the appeal from this permit was untimely.

In its Motion, the ANR argued that in the absence of an express deadline in 3 V.S.A. §2873(c)(4) for the filing of appeals of subdivision permits decisions to the Board, the Board should infer that a 30-day deadline applies. The ANR argued that the Board should look to the Vermont Rules of Civil Procedure ("V.R.C.P."), Rule 74 and the Vermont Rules of Appellate Procedure ("V.R.A.P"), Rule 4, for authority to impose a 30-day deadline. The ANR further argued that a 30-day deadline is consistent with other statutes and that fairness and the necessity for an expeditious permitting process require such a deadline.

The Appellants' responsive arguments, contained in their Memorandum in Opposition, may be summarized as follows. In the absence of an express statutory deadline, there is no deadline for filing appeals. The Legislature knows full well how to establish such deadlines, and the fact that it hasn't does not mean that the Board has the authority to impose its own 30-day deadline. The Appellants further argue that the court rules cited by the ANR in its Motion are inapplicable to this proceeding, in the absence of the agreement of the parties or a specific Board procedural rule making the court rules applicable. Furthermore, the Appellants argue that, from a policy perspective, the present statutory provision makes sense in that adjoining property owners, whose interests may be adversely affected by a permitted waste disposal system, are not notified by the ANR of either the application for such system or the issuance of a subdivision permit. Accordingly, the Appellants argue that it would be a violation of due process to impose a 30-day deadline for the filing of appeals from permit decisions, of which affected property owners had no notice.

Deadlines for the filing of notices of appeal are jurisdictional in nature. Since administrative agencies have only such powers as are expressly delegated to them by the Legislature or as arise by implication, the Board cannot create or eliminate its own jurisdiction by rule or order. See In re Agency of Administration, 148 Vt. 68, 75 (1982). The ANR has not directed the Board to any law supporting a contrary conclusion.

The Vermont Legislature has established statutory deadlines for administrative appeals to the Board with respect to other permit programs; examples of these appellate deadlines include, but are not limited to, those found in 10 V.S.A. §1024(a) (15 days from notice of the Secretary of ANR's action), 10 V.S.A. §1269 (within 30 days of the act or decision of the Secretary of ANR), and 29 V.S.A. §406(a) (10 days from the notice of the Department of Environmental Conservation's action). In the absence of an appeal deadline in §2873(c)(4), the Board must conclude that the Legislature intended it to hear appeals from permits under 3 V.S.A. §2873(c), including appeals from subdivision permit decisions, at any time that these appeals might be filed with the Board.

The ANR asks the Board to apply V.R.C.P. 74 and V.R.A.P. 4 to create a 30-day appeal deadline like that found in 10 V.S.A. § 1269. The ANR asks the Board to consider its prior decision, Re: Appeal of Balagur, Docket No. 86-06 (Dec. 23, 1991), for the proposition that the Board on its own motion can apply court rules to a given proceeding where no statute or Procedural Rule addresses an issue presented.

In Balagur, the Board applied V.R.C.P. 60(b) in order to consider a post-hearing motion filed by the ANR seeking relief not addressed in the Board's procedural rules. The Orange Superior Court subsequently declared the Board's decision void ab initio. See In re Richard Balagur, Opinion and Order, Docket No. S22-92 OeCBJano 28, 1993). d w e r e

to determine that the principles articulated in its 1991 Balagur decision offer some guidance in this case, it is apparent that the specific court rule applied by the Board in that case did not terminate appeal rights of a party or limit the Board's jurisdiction. Indeed, the cases cited by the Board in its Balagur decision specifically stand for the proposition that court procedural rules may be applied in an agency proceeding only when: (1) the parties consent to their application in the absence of a specific agency procedural rule dealing with the subject matter; or (2) when an agency specifically has incorporated the court rules into its own duly adopted procedural rules. See In re Vermont Public Power Supply Auth., 140 Vt. 424 (1981) and Aneolano v. City of South Burlington, 142 Vt. 131 (1982). No case cited in the Balagur decision, or by the ANR in its present Motion, stands for the proposition that an agency can create or limit its jurisdiction by its own procedural rule, or by the incorporation of a court rule on the subject.

Accordingly, the Board concludes that it cannot bootstrap specific or general appeal deadlines from other statutes or court rules to create jurisdictional deadlines where the Legislature has not given the Board this authority.² Given that 3 V.S.A. §2873(c)(4) contains no deadline for the tiling of appeals, the Board assumes that the Legislature intended that appeals could be filed from subdivision permits at any time.

This reading of 3 V.S.A. §2873(c)(4) has support in the fact that neither 3 V.S.A. §2973(c), nor the EPRs setting forth the procedural and substantive requirements for the issuance of subdivision permits, require the ANR to provide notice to adjoining property owners either of the filing of a permit application or the Secretary's final permit decision. Therefore, adjoining property owners can only file an appeal of a permit decision once they have acquired actual notice of the decision. This might occur well after 30 days of the date of a permit's issuance.

While the Board acknowledges that a 30-day deadline for appeals of ANR subdivision permit decisions would provide greater fairness and finality for the applicant and a more expeditious permit process for the ANR and the Board, such a deadline only makes good legal and policy sense if the Secretary of ANR were required to provide adjoining property owners with notice of the permit decision. Therefore, the appropriate means to obtain a 30-day deadline

² For example, the Legislature has created a general or default statute for the courts by providing a 30-day deadline for the tiling of notices of appeal in the absence of a specific statute setting forth such a deadline. See 12 V.S.A. §2383; E.M. Burlington Co. v. Commr. of Taxes, 134 Vt. 515 (1976). Indeed, the Vermont Supreme Court adopted V.R.A.P. Rule 4 consistent with this authority. However, the Legislature has not adopted a similar statute applicable to administrative appeals of agency decisions to boards or other agencies.

For appeals is not to ask the Board to create such a deadline, **after** the fact and by **fiat** in a **contested case**. Rather, the ANR should direct its request to the Legislature for a specific statutory amendment to 3 V.S.A. §2873(c)(4) including the addition of a notice provision advising adjoining property owners of any action taken by the Secretary.

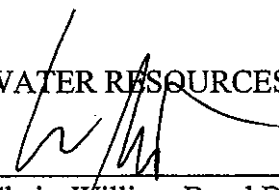
For the foregoing reasons, ANR's Motion seeking dismissal of the appeal with respect to the 9/9-R Permit is denied.

X. ORDER

- (1) The Petition for Party Status filed by Scott and Sheila McIntyre and Abbott and Rosalie Lovett is granted and it is hereby ordered that they are all parties of right pursuant to Procedural Rule 22(A)(7).
- (2) The ANR's Motion to Dismiss is denied.

Dated at Montpelier, Vermont, this 12th day of August, 1998.

WATER RESOURCES BOARD



Chair, William Boyd Davies

Concurring:
Ruth Einstein
Gerry Gossens
Gail Osherenko