

State of Vermont
WATER RESOURCES BOARD

**Re: Scott and Sheila McIntyre
and
Abbott and Rosalie Lovett**

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

Docket No. EPR-98-02

PREHEARING CONFERENCE REPORT AND ORDER

On June 30, 1998, William Boyd Davies, Chair of the Water Resources Board ("Board"), convened a prehearing conference in the above-captioned matter in Montpelier, Vermont.

I. BACKGROUND

On May 14, 1998, Scott and Sheila McIntyre and Abbott and Rosalie Lovett of Richmond, Vermont, ("Appellants") tiled a notice of appeal with the Water Resources Board ("Board") seeking review of two Subdivision Permits, #E-4-0633-9-R and #EC-4-0633-10, issued to Ernest Paquette of Richmond, Vermont, ("Permittee") by the Department of Environmental Conservation ("DEC") of the Agency of Natural Resources ("ANR"). Subdivision Permit EC-4-0633-9-R ("Permit 9-R") was issued on May 28, 1997, and revised Subdivision Permit EC-4-0633-9 ("Permit 9"), only in the respect that it corrected the name of the town in which the proposed subdivision is located. Permit 9-R 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. Subdivision Permit EC-4-0633-10 ("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 tiled pursuant to 3 V.S.A. §2873(c)(4) and Environmental Protection Rule 1-201(E) (Aug. 8, 1996).

On May 18, 1998, the Board's Executive Officer deemed the notice of appeal to be substantially complete and docketed this matter as EPR-98-02. A Notice of Appeal and Prehearing Conference was issued on May 27, 1998, and sent to all persons required to receive notice. Additionally, this notice was published on May 30, 1998, in The Burlington Free Press, a newspaper of general circulation in the area of Permittee's proposed subdivision.

Also, on May 27, 1998, the ANR was advised by memorandum to forward the record in this proceeding to the Board. On June 25, 1998, ANR transmitted to the Board the record for Permits 9/9-R and 10.

Timely entry of appearances were made by the Permittee, the Appellants, and the ANR. No other persons entered timely appearances in this matter.

On June 30, 1998, at 10:00 a.m., a prehearing conference was convened by Chair Davies at the Board's Conference Room, National Life Records Center Building, National Life Drive, Montpelier, Vermont. Conducting the prehearing conference was Chair Davies, assisted by Kristina L. Bielenberg, Esq., Associate General Counsel to the Board. 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:

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

II. PRELIMINARY ISSUES

A. Party Status

The Chair asked the parties whether they had any objections to granting party status to the Appellants as parties of right pursuant to Rule 22(A)(7), to the Permittee as a party of right pursuant to Rule 22(A)(7), and to the ANR pursuant to Rule 22(A)(4) of the Board's Rules of Procedure.

Counsel for the Permittee objected to the grant of party status to the Appellants under Rule 22(A)(7) of the Board's Rules of Procedure. He argued that neither the McIntyres nor the Lovetts could meet the standard contained in Rule 22(A)(7) that they demonstrate "a substantial interest which 'may be adversely affected by the outcome of the proceeding.'" However, 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 Permits 9 and 9-R obtained. Therefore, he argued that the McIntyres could not demonstrate that they had a "substantial interest" supporting their right to bring this appeal. In any event, the Permittee argued that the scope of the appeal and the Appellants party status should be limited to consideration of Permit 10 only.

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, and he further agreed to provide the other parties an opportunity to respond to such petitions.

There were no objections by any party to the grant of party status to the Permittee and the ANR.

B. Disclosures

At the prehearing conference, the Board's Chair distributed biographical notes for each of the current Board members, identifying each member's residence, occupation, and major civic activities. The current members are: William Boyd Davies, Chair; Ruth Einstein, Gerry Gossens, Gail Osherenko, and Jane Potvin.

The Chair also disclosed that Sheila McIntyre, one of the Appellants, had worked for the Water Resources Board as a temporary employee from October 1990 until March 1992, but before the appointment of any of the current Board members. Therefore, the Chair expressed his opinion that the Board could render a fully impartial decision without bias in favor of Ms. McIntyre.

The Chair asked the parties whether they were aware of any actual or potential conflicts of interest which might require individual Board members to recuse themselves from this proceeding. The Appellants, Permittee, and the ANR stated that they knew of no conflicts of interest that would require disqualification of any of these Board members, and they orally waived objection to the participation of each of the five current Board members in this proceeding.

C. Standard Review

The Chair advised the parties that, unlike many other appeals which are heard by the Board de novo, appeals tiled pursuant to 3 V.S.A. § 2873(c)(4) are heard by the Board applying an appellate standard of review. He referred the parties to the Board's Rules of Procedure, Rule 30, which governs appellate review proceedings before the Board.

D. Preliminary Motions

As noted in Section I. above, the Appellants' seek Board review of several permits issued by the ANR. Counsel for the Permittee specifically objected to the scope of this appeal including consideration of Permits 9 and 9-R on the basis that such appeal was untimely tiled. He indicated that he would file a motion to dismiss the appeal as it relates to Permits 9 and 9-R. Counsel for the ANR also indicated that he would likely join in such a motion.

The Chair indicated that he would provide an opportunity for the parties to file preliminary motions, including motions to dismiss, and that he would likewise provide an opportunity for the filing of responsive memoranda. The parties were instructed to specifically address the timeliness question in light of the statutory language of 3 V.S.A. §2873(c)(4).

III. ISSUES

Based on the Appellants' Notice of Appeal as clarified by the comments of the Appellants at the Prehearing Conference, and consistent with the standard of review to be applied in this appeal as set forth in Board Rules of Procedure, Rule 30, the issues on appeal are:

1. Whether the ANR erroneously interpreted and applied the Environmental Protection Rules (Eff. August 8, 1996) in not requiring the Permittee to file a hydrogeologic study in conformance with Appendix 1-7D (General Criteria Isolation Distances (b)) to determine if there is a connection between the proposed septic systems on Lots #8 and #19 and the two down gradient shallow wells owned by the Appellants prior to issuing Permits 9,9-R, and 10.
2. If the ANR erroneously interpreted and applied the Environmental Protection Rules by issuing these permits without first obtaining a hydrogeologic study from the Permittee, should the Board reverse the permit decisions of the ANR with directions, or remand this matter to the ANR for reconsideration or further proceedings?

The Chair indicated that the parties would be provided an opportunity to object to the issues as framed and to file responses.

IV. PROCEDURE

Consistent with the standard of review for appellate proceedings, the Chair advised the parties that the record in this appeal would consist of all documents and materials reviewed or considered by the ANR in making its permit decisions. The Chair noted that the ANR had filed the records of its proceedings with the Board by the June 25, 1998, deadline and that lists of ANR documents and the documents themselves were on file and available for inspection and copying at the Board's office.

The Chair noted that, in accordance with Rule 30(A) of the Board's Rules of Procedure,

any party could move the Board to supplement this record with any materials which were before the ANR but omitted from the agency's document lists, or with any materials offered to the ANR prior to and in respect to its decisions but not considered by the agency, in accordance with the terms set forth in the Order, Section IX., below.

The Chair further indicated that rather than hear testimony from witnesses, the parties would be allowed to submit to the Board proposed findings of fact, conclusions of law, and order as well as written memoranda containing argument on the application of statutes, rules and other legal authorities relevant to consideration of the issues in Section III., above. He indicated that the parties may request oral argument before the Board, although the scheduling and conduct of such argument would be within the discretion of the Board. Terms governing the filing of memoranda and requests for oral argument are set forth in the Order, Section IX., below.

V. WITNESSES AND EXHIBITS

Given the appellate standard of review to be used in this proceeding, the Chair noted that the Board would not accept live or prefiled testimony in this proceeding, but it would entertain requests to **supplement** the record and memoranda on factual and legal issues, to be submitted to the Board prior to its consideration of the merits of this appeal. Furthermore, the Board would entertain requests for oral argument.

VI. SCHEDULING

At the prehearing conference, Chair Davies informed the parties that the Board was setting aside only one morning for consideration of this matter. Based upon this, the parties are hereby informed that the day set aside for possible oral argument and deliberations would be **Tuesday morning, October 6, 1998**, at the National Life Records Center Building, Room R2B, at a time to be announced by subsequent notice.

Therefore, the filing schedule for consideration of any preliminary issues and the filing of memoranda in anticipation of this date, is set forth in the Order, Section IX., below.

VIII. STENOGRAPHIC RECORD

Any oral argument scheduled in this matter shall be recorded by electronic sound recording device. Upon the written request of any party filed in accordance with the terms of the Order below, oral argument will be recorded by a qualified stenographer in addition to electronic

sound recording. The party requesting a stenographic recording shall be responsible for arranging the appearance of, and payment to, the stenographer. A transcript shall be prepared by the stenographer on the request of any party and a copy shall be provided to the Board without cost. The stenographic and transcription expenses shall be borne by the party requesting the stenographic recording; however, that party shall be reimbursed on a pro-rata basis by any other party requesting a copy of the hearing transcript. See Rule 28(C) of the Board's Rules of Procedure.

IX ORDER


1. The parties in this proceeding are:
The Permittee, pursuant to the Board's Rules of Procedure, Rule 22(A)(7); and
The ANR, pursuant to the Board's Rules of Procedure, Rule 22(A)(4).
2. The Appellants shall file on or before **4:30 p.m., Tuesday, July 21, 1998**, all petitions for party status, supported by legal memoranda, addressing the standards in Rule 22(A)(7) and the objections of the Permittee as set forth in Section II.A., above.
3. On or before **4:30 p.m., Tuesday, August 4, 1998**, the Permittee and ANR may file written objections to any petitions for party status. Such objections shall be supported by legal memoranda.
4. The preliminary issues to be determined in this proceeding are those identified in Section II.B, above. The parties may file motions and legal memoranda relative to these issues on or before **4:30 p.m., Tuesday, July 21, 1998**.
5. The parties may file responsive memoranda in reply to any motions and memoranda filed in accordance with item 4 above, on or before **4:30 p.m. Tuesday, August 4, 1998**.
6. The issues to be determined in this proceeding are those identified in Section III, above. Any party contesting the issues as framed shall file its objections in accordance with the schedule outlined in items 4 and 5, above.
7. Any party wishing to supplement the record in this matter, shall file a motion and supporting memorandum with the Board on or before **4:30 p.m., Tuesday, July 21, 1998**. The motion should list the documents that it would like the Board to consider and the memorandum should address the reasons why the party believes these documents should be considered by the Board, taking into consideration the standards set forth in the Board's Rules of Procedure, Rule 30(A). The party shall also enclose the specific

documents that the party wishes the Board to consider in supplementation of the record.

8. Any party wishing to object to the inclusion in the record of any documents identified in the filings under item 7 above, shall submit its objections in the form of a memorandum filed on or before **4:30 p.m., Tuesday, August 4, 1998**.
9. The Board will consider any party status petitions, preliminary issues, objections to the issues as framed in Section III., and contested requests for supplementation of the record, in deliberative session at its regular meeting on August 11, 1998. An order memorializing the Board's rulings will issue shortly thereafter.
10. The parties may file any proposed findings of fact, conclusions of law, and orders and supporting memoranda on or before **4:30 p.m., Tuesday, September 8, 1998**. They shall also file any requests for oral argument by this deadline.
11. The parties may file any memoranda in response to filings made in accordance with item 10, on or before **4:30 p.m., Tuesday, September 22, 1998**.
12. This matter shall be considered by the Board at its regular meeting on **Tuesday, October 6, 1998**, at a time and place to be confirmed by subsequent notice.
13. The parties shall file an original and five **collated copies** of all motions, lists, supplemental documents, legal memoranda, and proposed findings of fact, conclusions of law and orders which are 8 1/2 by 11 inches or smaller, and any other documents filed with the Board, and mail one copy to each of the **parties** listed on the attached Certificate of Service.
14. Pursuant to Rule 24, this Order is binding on all parties who have received notice of the prehearing conference, unless a written objection to the Order, in whole or in part, is filed on or before **4:30 p.m., Tuesday, July 14, 1998**, or a showing of cause for, or fairness requires, **waiver** of a requirement of this Order. The filing of an objection does not automatically toll the deadlines and requirements of this Order.

Dated at Montpelier, Vermont this 1st day of July, 1998.

WATER RESOURCES BOARD



William Boyd Davies, Chair