

**State of Vermont
WATER RESOURCES BOARD**

**RE: Larry Westall
Docket No. CUD-99-02 (DEC #95-241)**

**RE: James & Catherine Gregory
Docket No. CUD-99-03 (DEC #95-241)**

MEMORANDUM OF DECISION AND ORDER RE: PRELIMINARY ISSUES

This memorandum of decision addresses certain party status and other preliminary matters referred to the Water Resources Board ("Board") for deliberation and decision.

I . PROCEDURALBACKGROUND

On August 4, 1999, a Prehearing Conference Report and Order ("Prehearing Order") was issued with respect to the two above-captioned Conditional Use Determination ("CUD") appeals. A deadline of August 13, 1999, was established for the tiling of any objections to the Prehearing Order. No persons who received notice of the prehearing conference tiled a timely written objection to the Prehearing Order and, accordingly, it became final and binding on those persons.

The Prehearing Order established certain deadlines for the tiling of additional party status petitions and notices of representation, requests for Board member disqualifications, and objections to the issues as **framed**. The Chair also informed the prehearing conference participants that he would take under advisement the question of whether to consolidate the two above-captioned appeals. The parties were further advised both in the Prehearing Order and in a status memorandum issued on August 19, 1999, that the Board would deliberate concerning outstanding party status requests and other preliminary matters at its meeting on August 31, 1999.

The Board deliberated on August 31, 1999: The Board's rulings on party status and other preliminary issues follow.

II. PARTY STATUS

A. Chair's Preliminary Ruling Now Final

The Chair made certain preliminary party status rulings that were memorialized in the Prehearing Order at page 12, Item 1. No person filed an objection to these rulings by the August 13, 1999, deadline. Accordingly, the Chair's rulings became **final** in accordance with Item 1 of the Prehearing Order. See also Procedural Rule 28(B). Therefore, the following persons and entities have party status in Docket Nos. CUD-99-02 and

CUD-99-03:

Larry Westall, CUD Applicant, pursuant to Procedural Rule 25(B)(1);
James and Catherine Gregory, Owners of Lot #2, pursuant to Procedural Rule
25(B)(g);
Agency of Natural Resources ("ANR"), pursuant to Procedural Rule 25(B)(5);
Jericho Conservation Commission ("KC"), pursuant to Procedural Rule
25(B)(6); and
Jericho Center Preservation Association ("JCPA"), as owner of property
adjoining the subject wetland and as an association of persons residing near
or owning property adjoining the subject wetland, pursuant to Procedural
Rule 25(B)(S).

B. Other Party Status Petitioners

The parties were advised that the deadline for the tiling of party status petitions would be extended to August 17, 1999, and that objections to the grant of party status for persons not preliminarily granted party status would need to be tiled on or before August 23, 1999. Preheating Order at 13, Items 2-4.

No objections were tiled with respect to the various party status petitions tiled by persons not preliminarily granted party status. The Board, therefore, grants party status in both appeals to all of the individuals who filed party status requests either prior to the prehearing conference or by the August 17, 1999, extended deadline.

1. Hobart Heath

On August 13, 1999, the Board received a party status petition from Hobart Heath. He asked for party status as the "contract purchaser" of Lot #3 of the subdivision that is the subject of DEC #95-241, the Agency of Natural Resources' decision under appeal.

The Board rules that Hobart Heath is a party of right pursuant to Procedural Rule 25(B)(g). By virtue of acquiring a substantial contractual interest in the property that is the subject of the ANR's CUD denial, Mr. Heath has a substantial interest which may be affected by the outcome of the Board's proceeding and his participation in the pending two appeals is the exclusive means by which he can protect his contract interest in Lot #3. While Mr. Heath supports the issuance of a CUD, his interest in the outcome of this proceeding may not be the same as the interest of the Appellants, and Mr. Westall, the seller of Lot #3, may not be able to adequately represent Mr. Heath's interest.

2. Party Status Petitioners Opposing the Grant of a CUD

The following persons filed party status petitions prior to the preheating conference held on July 29, 1999, and represented that they own property adjoining the Project that is the subject of this appeal: William and Anita Haviland, Chuck Lacy, Corinne Wilder Thompson, Robert Thompson, Helen and Ruth Tobin, Jon and Deanna Trupp, and N.A. van Drimmelen. None of these persons asserted in their petitions that they own real property adjoining the subject wetland and/or its buffer zone.

On August 17, 1999, the Board received a party status petition from Darrell and Belva Meulemans who asserted that they own property adjoining the subject wetland,

On August 17, 1999, JCPA filed a property tax map, purporting to identify the locations of the properties of the party status petitioners adjacent to the subject Project and/or protected wetland.

Section 8.2 of the Vermont Wetland Rules ("VWR") requires notice to "all persons owning property within or adjacent to the wetland or buffer zone in question." In determining whether a person should be granted party status of right, however, the Board has previously determined that a person must demonstrate "a substantial interest which may be affected by the outcome of the proceeding." Procedural Rule 25(B)(8). A person who owns real property adjoining a subject wetland must allege with specificity that he or she actually uses or benefits from the wetland in some specific way and that his or her use or benefit may be affected by the alleged impacts of the Project on the wetland's protected functions. Mere ownership of property within or adjacent to a significant wetland or its buffer zone does not per se entitle that person to party status in a CUD appeal pursuant to Procedural Rule 25(B)(8). See In re: Champlain Oil Company, Docket No. CUD-94-11, Preliminary Order: Party Status and Takings Issues at 2 (Jan 3, 1995) (construing party status of right under prior but comparable Procedural Rule 22(B)).

Based on a review of the various party status petitions and the JCPA's August 17, 1999, filing, it appears that the following persons own property adjoining the subject wetland: the Meulemans, the Havilands, at least one of the Thompsons, and the Trupps. It is not possible to discern, however, whether any of the other petitioners own real property within or adjacent to the wetland or its buffer zone. Even if one were to assume that all of the above petitioners own property either adjoining the wetland or the buffer zone, they have not demonstrated that they have a "substantial interest" which may be affected by the outcome of the two proceedings, applying the standards described above

The Board concludes, however, that the above-named individuals, by virtue of their ownership of real property in the neighborhood of the wetland, have some interests in the protection of the wetland which may be affected by the outcome of the two proceedings. While the Board believes that these petitioners' interests will likely be adequately represented by the JCC and JCPA, the petitioners' real property interests are distinct from the property interest of the JCPA. Therefore, to assure that their real property interests will be adequately protected, in the event that their legal positions subsequently diverge from that of JCPA, the Board grants these individual property owners permissive intervention pursuant to Procedural Rule 25(C). Nevertheless, to provide for the orderly presentation of evidence and cross-examination of witnesses, the Board will require that each of the above-named individuals shall coordinate and consolidate his or her case through the representative of JCPA, unless he or she can demonstrate that justice and economy require separate representation. &Procedural Rule 25(E).

The Board also received petitions from J.M. Kim and Robert and Gail Schermer. These individuals did not claim to own property adjoining the subject wetland or its buffer zone. They, however, asserted that they make use of the subject wetland for recreational and other purposes. Accordingly, the Board concludes that they have an interest related to the protection of the subject wetland that may be affected by the outcome of the two proceedings and, therefore, the Board grants these individuals permissive intervention pursuant to Procedural Rule 25(C), subject to the same requirement to coordinate and consolidate their cases through the representative of JCPA as imposed upon the permissive parties above.

III. SCOPE OF REVIEW

At the preheating conference, the Chair discussed with the parties the scope of the issues to be addressed in the two appeals. Prehearing Order at S-10. He preliminarily ruled that the scope of the Board's review would be limited to Project impacts on significant functions 5.4 and 5.9, unless objections to such a limitation on the scope of the proceeding were timely tiled. Preheating Order at 9. The deadline for such objections was August 23, 1999, with responses due on or before August 26, 1999. Prehearing Order at 14, Item 7; Status Memorandum, August 19, 1999.

On August 18, 1999, JCPA and JCC jointly requested that the Board consider the impacts of the Project not only under 5.4 and 5.9, but with respect to functions 5.7 (education and research in natural sciences) and 5.8 (recreational value).

On August 26, 1999, Hobart Heath filed an objection to the inclusion of function 5.7 in the Board's review on the basis that the ANR had found that the proposed project

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would not result in an undue adverse impact to this function.

The Board concludes that a consideration of the Project's impacts on functions 5.7 and 5.8, in addition to the two functions identified by the Appellants (5.4 and 5.9) is within the ambit of the Board's review under Section 8, VWR.

A Class Two wetland is presumed to be significant for all ten functions listed in Section 5, VWR. In re: Lost Cove Homeowners Assoc., Inc., Docket No. CUD-98-04, Memorandum of Decision at 9-10 (Jan. 13, 1999); In re: Champlain Marble Company, Docket No. CUD-97-06, Preheating Conference Report and Order at 3 (Sept. 18, 1997). The Board has previously determined that Section 8, VWR, requires consideration of the impacts of a project under all ten of the protected functions under VWR Section 5 unless the parties stipulate otherwise. In re: Lost Cove Homeowners Assoc., Inc., Memorandum of Decision at 9-10. As the Chair correctly observed in the Prehearing Order at 9, "where ... ANR's: the Appellant non the other parties to an appeals contest the a n d conclusions that only certain wetland functions are significant and only certain of these functions are adversely affected by the Project, the Board limits its review to the Project's impacts on only those significant functions specifically identified by the Appellant at issue."

Here, however, the ANR concluded that the wetland was significant for all four of the above functions. DEC #95-241 at 3, Finding 14. The Appellants did not appeal the ANR's finding that the subject wetland was significant for functions 5.7 and 5.8. Since the JCC and JCPA timely objected to the limitation of the scope of appeal to a review under functions 5.4 and 5.9, the Board is obligated to consider in this de novo proceeding the impacts of the Project under functions 5.7 and 5.8. Accordingly, the Board will consider the impacts of the Project upon all four functions in its review under Section 8, VWR. The burden of proof and persuasion shall rest with the Appellants in demonstrating that the Project will not result in an undue adverse effect on these four protected functions and, if it does, whether those impacts have been sufficiently mitigated. See Prehearing Order at 8, Issues (1), (2), (3).

IV. CONSOLIDATION

At the prehearing conference, the parties discussed whether the two appeals should be consolidated. Prehearing Order at 7.

Based on a review of the filings to date, the Board concludes that the two appeals should be consolidated pursuant to Procedural Rule 33(B) and it so rules. The Board reaches its conclusion on the basis that the Westall subdivision was reviewed as a unified

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Project by the ANR in DEC #95-241. Lots #2 and #3 share certain amenities. There are identical parties to the two proceedings. There will be a significant overlap in evidence and argument. Therefore, there are sound legal and policy reasons for consolidating the two appeals to facilitate the efficient presentation of evidence and argument, and conduct of the hearing and site visit.

At the prehearing conference, the Gregorys raised the concern that they might be prejudiced if the two appeals were consolidated, because they assert that the impacts to the wetland and its buffer from development on their lot, Lot #2, are perhaps less adverse than those attributable to development on Lot #3. Prehearing Order at 7.

The Board will address the Gregorys' concern by considering offers of evidence and legal argument regarding the differing impacts of different development activities upon the subject wetland and its buffer zone, thereby allowing the Gregorys, should they choose, to distinguish the impacts of the activities on their lot from those attributable to the rest of the subdivision and related construction. Without prejudging the evidence, the Board notes that it has authority under 10 V.S.A. §1269 to conduct a de novo hearing and affirm, reverse, or modify the decision of the Secretary. Therefore, it has some latitude to craft a decision that addresses the differing requests for relief raised by the Appellants.

V. ORDER

1. In addition to those persons already accorded party status, the following persons are hereby granted party status in the above-captioned appeals:

Hobart Heath, pursuant to Procedural Rule 25(B)(S); and

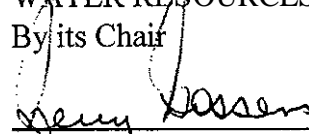
William and Anita Haviland, Chuck Lacy, Corinne Wilder Thompson, Robert Thompson, Helen and Ruth Tobin, Jon and Deanna Trupp, N.A. van Drimmelen, J.M. Kim, and Robert and Gail Schermer, all pursuant to Procedural Rule 25(C).

2. Functions 5.4, 5.7, 5.8, and 5.9 are within the scope of review under the three issues set forth in the Section VII. of the Preheating Order.

3. Docket Nos. CUD-99-02 and CUD-99-03 are consolidated.

Dated at Montpelier, Vermont, this 1st day of September, 1999.

WATER RESOURCES BOARD
By its Chair


Gerry Gossens

Concurring:
David J. Blythe
Ruth Einstein
Jane Potvin
John D. E. Roberts