

State of Vermont
WATER RESOURCES BOARD

**RE: Lost Cove Homeowners Assoc., Inc.
Docket No. CUD-98-04 (DEC #97-185)
(Gale Driveway, near Brickyard and Red Rocks Road, Colchester, Vermont)**

MEMORANDUM OF DECISION

This Memorandum of Decision addresses certain preliminary issues related to **the above-**captioned proceeding. As explained below, the Water Resources Board ("Board") concludes that the Appellant, Lost Cove Homeowners Association ("LCHA" or "Appellant"), has standing to bring this appeal and grants it party status. The Board grants party status by permission to certain property owners within the Lost Cove Subdivision, and denies it to others. The Board denies the Motion to Dismiss filed by **Barden** Gale and Melanie Amhowitz ("CUD Applicants"). Finally, the Board clarifies the scope of appeal in this proceeding.

I. BACKGROUND

On August 24, 1998, the Department of Environmental Conservation ("DEC"), Agency of Natural Resources ("ANR") issued Conditional Use Determination #97-1 85 ("CUD") to Paul Gale, agent for the CUD Applicants. The CUD allows the construction of a driveway to serve a residential lot and the installation of a 24-inch culvert within a Class II wetland and buffer zone in Colchester, Vermont ("Project").

On September 23, 1998, the LCHA filed an appeal of the CUD pursuant to 10 V.S.A. §1269 and Section 9 of the Vermont Wetland Rules ("VWR"). At the prehearing conference on October 29, 1998, several preliminary issues were identified and the Chair, William Boyd Davies, directed counsel for the Appellant and the CUD Applicants to brief these. See Prehearing Conference Report and Order (Nov. 2, 1998) as modified by Chair's Memorandum (Nov. 12, 1998).

II. PRELIMINARY ISSUES

1. Who is/are the person(s) with the requisite real property interest to qualify as the CUD Applicant(s) in this proceeding?
2. **Does** LCHA have standing to bring this appeal? Should individual property owners in the Lost Cove subdivision be granted party status in this proceeding?
3. Does collateral estoppel bar this appeal?

4. Does judicial estoppel bar this appeal?
5. Should the Appellant's statement of issues be limited thereby narrowing the scope of review?

III. DISCUSSION

A. Prooer Applicant(s)

In order to assure that a CUD may be enforced against the one liable for its proper execution, the Board must assure that its decision in this matter accurately identifies those who own the real property on which the Project is to be constructed, even though another person may act as an agent in securing that CUD.

At the prehearing conference, the Chair requested clarification of the identity of the person or persons having the requisite property interest to qualify as CUD Applicant(s) in this proceeding. The Chair sought this clarification given the fact that the ANR had issued the CUD to Paul Gale, even though Mr. Gale has represented himself to be an agent for others in securing the CUD. &Preheating Conference Report and Order at 3, V.(A)(1), and 9, X., Items 1 and 3.

On November 17, 1998, counsel for the CUD Applicant(s) responded to the Chair's request. According to this filing and the attached deed, **Barden** Gale and Melanie Gale Amhowitz are the owners of the real property on which the Project is to be constructed. Their father, Paul Gale, conveyed the subject lot to his two children in 1976 and served as **their** agent in the CUD proceeding before the ANR. Indeed, the CUD application filed by Paul Gale with the ANR, clearly indicates that he was serving as agent for landowners, **Barden** Gale and Melanie Gale Amhowitz.

The Board concludes that the ANR committed a technical error in issuing CUD #970185 when it identified Paul Gale as the CUD Applicant and omitted reference to his children. Accordingly, the Board hereby grants party status to **Barden** Gale and Melanie Gale Amhowitz pursuant to Board Procedural Rule 22(A)(7). The Board will correct the ANR's mistake in any subsequent order issued related to **this** proceeding by identifying **Barden** Gale and Melanie Gale Amhowitz as the proper CUD Applicants and parties to this appeal. However, prior to issuing any such order, **Barden** Gale and Melanie Gale Amhowitz will be required to sign and file a letter with the Board, indicating that they authorize their father, Paul Gale, to serve as their agent and representative in this CUD proceeding and further authorizing him to retain legal counsel to represent them in their capacities as CUD Applicants. See Board Procedural Rule 23(B).

B. Standing/ Party Status of LCHA and the Association's Members

Counsel for LCHA indicated at the prehearing conference that in addition to LCHA he was representing certain members of the Association who own land adjoining the wetland at issue. The Chair therefore asked counsel for the LCHA to clarify which entities and individuals were seeking party status in this proceeding and he provided the CUD Applicants with an opportunity to respond to such supplemental filing. The Chair asked the LCHA and CUD Applicants to address both the standing standard in 10 V.S.A. §1269 and the party status standards in the Board Procedural Rule 22. See Prehearing Conference Report and Order at 4, V.(A)(2), and 9, X., Items 1 and 3.

On November 17, 1998, the Appellant filed a Motion to Intervene and Petition for Party Status. On December 1, 1998, the CUD Applicants filed a Motion to Dismiss, in part based on the allegation that the Appellants lack standing, to sustain their appeal based on the arguments that they lacked a substantial interest at the time of the filing of the appeal and they do not qualify for "derivative standing." In response, on December 15, 1998, LCHA and other party status petitioners filed Appellants' Opposition to Applicants' Motion to Dismiss and Memorandum of Law.

1. Standing of LCHA

Title 10 V.S.A. §1269 provides: "Any person or party in interest aggrieved by an act or decision of the secretary pursuant to this subchapter may appeal to the board within thirty days." If the Board concludes that a person is aggrieved by the Secretary's (ANR's) decision, it may further inquire whether, pursuant to Board Procedural Rule 22(A)(7), the scope of review should be narrowed to consideration of only those issues addressed by the decision which present an actual injury or threat of injury to its legally protected interests. See In re Killinaton, WQC-97-10, Memorandum of Decision at 8 (May 20, 1998).

LCHA is a Vermont non-profit corporation and therefore a "person" within the meaning of the Board's statutes and rules, Board Procedural Rule 2(G). LCHA persuasively argues that it had an equitable, if not a vested future legal interest, in the Lost Cove common lands, at the time that it filed its notice of appeal in this proceeding and that it currently owns and is responsible for the management of the common lands for the benefit of Association members. Those common lands abut the Project and contain two ponds and other wetlands that are hydrologically connected to the wetland that is the subject of the CUD. In other words, LCHA argues that the wetland that will be crossed by the Project is part of a larger wetland complex that has been enhanced for certain functions by the addition of the two ponds built by the Lost Cove developer under prior CUDs. **LCHA argues** that, if the driveway and culvert are constructed as presently approved by the ANR in its CUD decision, LCHA's interest in the pond improvements on the

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common lands will be adversely affected because the wildlife habitat and fisheries functions that those ponds perform will be diminished. LCHA further asserts that the wildlife and migratory bird habitat value of the wetland complex also increases its recreational, aesthetic and open space functions. LCHA asserts that these functions will be adversely affected if the Project is constructed as approved.

Unlike some statutory provisions, 10 V.S.A. §1269 does not require that a person be fully vested in real property that will or may be adversely affected by the application of the Secretary's decision in order to demonstrate the necessary aggrievement to support standing. See, e.g., Mad River Valley v. Town of Warren Bd., 146 Vt. 126 (1985) (construing "interested person" standing requirement of then 24 V.S.A. §4464(b)(1) to require title in real property; an "assignment" in such property was insufficient). Indeed, as the Board has concluded in prior CUD appeals and other appeals for which 10 V.S.A. §1269 serves as the basis for appeal, the statutory standing requirement is to be read broadly to include persons who can demonstrate a nexus between their use and enjoyment of the water resource (wetland) at issue and the Secretary's determination. See, e.g., In re: Aquatic Nuisance Control Permit #C93-01-Morey, Docket No. WQ-93-04, Memorandum of Decision on Party Status (Aug. 25, 1993); In re Appeal of Larivee, Docket No. 92-09, Preliminary Order: Party Status (March 16, 1993).

Accepting as true the statements contained in Errol Briggs's affidavit and the supporting documents attached to LCHA's pleadings, the Board concludes that LCHA has demonstrated that it possesses the requisite standing to bring this appeal by virtue of the nexus between (1) its interest in the common lands and the subject wetland, and (2) the potential, if not actual harm, to that interest that may result if the ANR's decision is sustained, because of the Project's alleged degradation of certain wetland functions. For the same reasons, the Board further concludes that LCHA has a "substantial interest" in the outcome of this proceeding, pursuant to Board Procedural Rule 22(A)(7), supporting a full inquiry into the impacts of the Project on wetland functions under Section 8 of the VWRs. Unlike the Killington case referred to by the CUD Applicants, the ANR's CUD decision authorizes only one project and the Board therefore must review de novo the impacts of that project with respect to all protected wetland functions. See In re Killington, WQC-97-10, Memorandum of Decision (May 20, 1998) (Appellant was granted party status with respect to Woodard Reservoir Project but not Interconnect Project, both projects having been addressed in the Secretary of ANR's decision.) Finally, because LCHA is equitable owner and custodian of the common lands for the benefit of its members, the Board need not determine whether "derivative standing" exists as a separate basis for finding standing in this appeal.

2. Party Status of Association Members

LCHA's Notice of Appeal was tiled only by LCHA, a Vermont non-profit corporation.

No property owner within the Lost Cove subdivision filed a notice of appearance and petition for party status either before or at the prehearing conference. Board Procedural Rule 22(B)(2) and Notice of Appeal and Prehearing Conference (Oct. 9, 1998). However, at the direction of the Board's Chair, LCHA filed a Motion to Intervene and Petition for Party Status, clarifying which of counsel's clients intended to seek party status in this proceeding. The Motion was filed by LCHA "AND individual members" of the Association.

The Motion seeks party status as of right (Board Procedural Rule 22(A)(7)) and, alternatively by permission (Board Procedural Rule 22(B)), for LCHA and each of its member property owners. The Motion does not identify any of the individual property owners by name with the exception of the Warners, Sobels, and Terriens. There is no dispute that these specific Association members own land adjoining the Project and benefit from the subject wetland and associated ponds. Moreover, the CUD Applicants do not directly contest the intervention request of these individuals.

Accordingly, the Board grants the Warners, Sobels, and Terriens party status by permission pursuant to Board Procedural Rule 22(B) because (1) they did not timely petition the Board; however, (2) they have substantial real property interests in the subject wetland, separate and distinct from that held by LCHA, which may be adversely affected if the ANR's CUD decision is **affirmed** or modified; (3) LCHA cannot adequately represent their separate real property interests; (4) there is no alternative means for these petitioners to protect their interests except to participate in this CUD appeal; and (5) intervention will not unduly delay and prejudice the interests of other parties to this proceeding, especially since counsel for the Appellant has indicated that he will coordinate the cases of his clients, consistent with Board Procedural Rule 22(B)(4). See In re: Aquatic Nuisance Control Permit #C93-01-Morey, Docket No. WQ-93-04, Memorandum of Decision on Party Status at 5-7 (Aug. 25, 1993). The Board, however, directs counsel for these intervenors to file with the Board current and accurate address information for these individuals so that they may be added to the Board's service list.

The Board **denies** the intervention request of the other individual property owners and LCHA members on the basis that (1) their petition is untimely; (2) they have not identified themselves with particularity nor adequately addressed the other provisions of Board Procedural Rule 22(B)(1); and (3) it appears that LCHA can adequately protect their interests in the common lands and related improvements.

C. Collateral Estoppel as Bar to this Appeal

In their Motion to Dismiss, filed on December 1, 1998, the CUD Applicants argued for dismissal of this appeal on the basis that litigation of the issues raised by LCHA are "barred by the doctrine of collateral estoppel." The principal issue in this appeal is whether the proposed

driveway and culvert will result in an undue adverse effect on the protected functions of the subject wetland. Prehearing Conference Report and Order at 4, VI.(1).

The CUD Applicants argue that this issue was raised and decided in CUD proceedings initiated by the developer of the Lost Cove subdivision and, therefore, the LCHA, as successor-in-interest, is bound by the ANR's prior determinations concerning what functions are at issue and what uses are authorized. Accordingly, the CUD Applicants would have the Board dismiss this appeal on the basis that LCHA is barred from relitigating these issues in the present CUD appeal.

In its December 15, 1998, tiling, the LCHA distinguishes the present Project and its impacts on the subject wetland from the projects that were approved by the ANR in prior CUDs issued to the developer of the Lost Cove subdivision. It also emphasizes that as a result of the construction of the open water ponds done in conformance with the CUDs, it has actually improved the wetland complexes' wildlife habitat and fisheries functions. Therefore, the facts and issues presented in this appeal are not the same as those raised in the prior CUD proceedings.

Collateral estoppel is a doctrine intended to eliminate repetitive litigation, and give repose to litigants. Applying collateral estoppel prevents a party from relitigating those issues necessarily and essentially determined in a prior action. Berisha v. Hardy, 144 Vt. 136,138 (1984). Although collateral estoppel does not apply to administrative proceedings as an inflexible rule of law, the principles of issue preclusion have been applied by the Board on occasion to prevent the relitigation of issues decided in prior proceedings. See In re: Killington, Docket No. WQC-97-10, Memorandum of Decision at 9-10 (May 20, 1998); In re: Appeal of Poultnev River Committee, Docket No. 92-04, Preliminary Ruling (Aug. 11, 1992), affirmed In re Appeal of Poultnev River Committee, Docket No. SO693-92 RcCa (Feb. 3, 1994) (affirmed on grounds of res judicata).

In examining a prior action or decision and determining whether an issue in a current proceeding should be barred on the ground of collateral estoppel, it is useful to consider the five elements and analysis set forth by the Vermont Supreme Court in recent cases. The Court has said that preclusion may be found only when: "(1) preclusion is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as the one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair." State v. Pollander, Docket No. 96-387, slip op. at 3 (Dec. 5, 1997), citing Treanier v. Getting Organized, Inc., 155 Vt. 259,265 (1990).

Reviewing the tilings made by LCHA, it appears that LCHA is in privity with the developer of the Lost Cove subdivision and there were unappealed CUDs issued to the developer

that included certain findings regarding the wetland functions impacted by the developer's own activities. However, it cannot be said that the same issues were litigated in these prior CUDs: (1) the Project now proposed is not the same as the projects for which the prior CUDs were issued and therefore the impacts of the Project may be different; and (2) the wetland functions allegedly have been changed and improved since the issuance of the earlier CUDs, in large part because of the open water ponds constructed by the Lost Cove developer. Indeed, the ANR's CUD decision corroborates the LCHA's position in that it recognizes that the wetland's value for fisheries has been improved by the creation of the two ponds, even though the ANR's ultimate conclusion is that the Project would not adversely affect the fisheries habitat function.

Because a Class Two wetland is presumed to serve all ten functions set forth in Section 5 of the VWRs until determined otherwise by the Board, and because the present appeal before the Board is de novo, it is possible that the Board could conclude, ~~given the~~ different location and construction requirements of the proposed driveway and culvert, that the Project will have different impacts on different functions than those found by the ANR respecting other CUD applications, reviewed in previous times, respecting different activities. Accordingly, the Board concludes that collateral estoppel does not bar this appeal.

D. Judicial Estoppel as Bar to this Appeal

In its Motion to Dismiss, filed on December 1, 1998, the CUD Applicants argued that this appeal should be dismissed because it is barred by "the doctrine of judicial estoppel." Under the doctrine of "judicial estoppel," a party "is bound by his judicial declarations and may not contradict them in a subsequent proceeding involving [the] same issues and parties." Black's Law Dictionary at 848 (Sixth ed., 1990). The CUD Applicants cite as authority Simon v. Safelite Glass Corp., 128 F.3d 68 (2nd Cir. 1997) for the proposition that, even if the earlier statement was made in an administrative proceeding and was not under oath, such statement could be used to bar the party from taking a contrary position.

The Appellant, in its responsive pleading of December 15, 1998, asserts that the doctrine of judicial estoppel is inapplicable in the present appeal because the present appeal does not give rise to the same issues considered in the prior CUD applications and that circumstances (namely, the value of certain wetland functions) have changed as a result of the improvements made by the Lost Cove developer and therefore representations made by that developer in its prior CUD applications cannot bind the LCHA in the present appeal. The LCHA further argues that in order for the statements to have preclusive effect, they would need to be made in the present proceeding by the developer, not by its successor-in-interest LCHA.

The Board has not recognized the doctrine of judicial estoppel before and the CUD Applicants cite no authority supporting the use of judicial estoppel in Vermont administrative

proceedings. Contrary statements are usually allowed by the Board to be offered at the **evidentiary phase** of a **proceeding** to impeach a witness or to **influence** the weight to be given to an item of evidence. The Board, however, has never dismissed an appeal or limited its scope based entirely on the contrary representation of a party in a prior proceeding, whether or not unrelated to the present appeal. This is particularly true given that the ANR conducts only an informal fact-finding while the Board is statutorily required to conduct a de novo contested case proceeding.

For reasons similar to those related to the Board's ruling on the collateral estoppel argument, the Board denies the CUD Applicants' Motion to Dismiss based on the doctrine of judicial estoppel. A close review of the **CUDs** issued in prior proceedings reveals that the Project now under consideration, and the wetland functions that it will allegedly impact, are different than those described in prior applications submitted by the Lost Cove developer. Therefore, even if LCHA could be bound by the developer's prior representations, the Board concludes that those representations were made with respect to different projects sited in different locations with respect to the subject wetland, with different potential or actual impacts on the wetland functions as they existed at the time of application. Accordingly, the Board concludes that judicial estoppel does not bar this appeal.

E. Scope of Review and Appellants' Statement of Issues

Board Procedural Rule 1 S(D) of the Board Rules of Procedure states: "The scope of any de novo or appellate proceeding shall be **limited** to those issues specified in the petition or notice of appeal unless the Board determines that substantial inequity or injustice would result from such limitation." Board Procedural Rule **18(A)** describes the contents of a notice of appeal. In the event that the issues in controversy need clarification before a matter goes to hearing, the Board or its Chair may convene a preheating conference to clarify those issues and establish a hearing order. Board Procedural Rule 24(A).

In its Notice of Appeal, the Appellant stated that its appeal involves "the authority of the Board to authorize conditional uses in wetland under 10 V.S.A. §§905b(8) and 1272 and Section 8 of the Vermont Wetland Rules, and particularly the mitigation requirement of Rule 8.5.b(1) of the Vermont Wetland Rules." Additionally, the Appellant stated that it was "concerned that the proposed plan does not provide adequate facilities to ensure proper water flow and does not include appropriate screening. Accordingly, it sought denial of the CUD application or modification of the CUD Applicants' plan.

Because analysis under Section 8 of the **VWRs** requires consideration of the impacts of a project under all ten of the protected functions under **VWR** Section 5 unless the parties stipulate otherwise, the Chair at the prehearing conference asked the Appellant to attempt to narrow the

issues by clarifying which functions it asserted were adversely impacted by the Project. Prehearing Conference Report and Order at 5, VI., and 9, X., Item 2.

In its response to the Prehearing Conference Report and Order, filed November 10, 1998, the Appellant indicated that its Notice of Appeal raised contentions touching on four of the mitigation standards (VWRs, Section 8.5(b)(1), (2), (4) and (5)), rather than just the first mitigation standard (VWR Section 8.5(b)(1)) expressly identified by section number in its Notice of Appeal. Accordingly, in his Memorandum to the Parties, dated November 12, 1998, the Chair advised the parties that the burden of proof rested upon the CUD Applicants to demonstrate compliance with all of the mitigation standards of Section 8.5(b) of the VWRs.

On November 17, 1998, the Appellant filed its Statement of Issues on Appeal and List of Impaired Functions for the Board's review. The Appellant listed the following functions: 5.1 (water storage for flood and stormwater); 5.2 (surface and groundwater protection); 5.3 (fisheries habitat); 5.4 (wildlife and migratory bird habitat); 5.8 (recreational and economic benefits); 5.9 (open space and aesthetics); and 5.10 (erosion). Additionally, it raised the four mitigation standards identified in its November 10, 1998, filing.

On December 1, 1998, the CUD Applicants filed Objections to the Appellant's Statement of Issues. The CUD Applicants objected to the alleged expansion of the scope of this appeal to include an inquiry into seven wetland functions and four mitigation standards. The CUD Applicants argued that the Appellant had not demonstrated, pursuant to Board Procedural Rule 18(D) that substantial injustice or inequity would result from limitation of the appeal to just consideration of mitigation standard 8.5(b)(1).

On December 15, 1998, the Appellant filed its Response to the CUD Applicant's Objection to Appellant's Statement of Issues and Impaired Wetland Functions. The Appellant argued that the scope of appeal was defined by its initial Notice of Appeal, even though it did not identify with particularity each regulatory section at issue.

The Board adopts the Chair's expansive scope of review in this de novo appeal. This case involves consideration of one project (the proposed driveway and culvert) on one wetland complex. The Appellant did what was minimally required by Board Procedural Rule 18(A) to commence this appeal. It described the decision appealed from, and it referenced the jurisdictional basis of the appeal, the statute at issue, and Section 8 of the VWRs. It provided a brief "statement of issues and a statement of reasons why the decision appealed from was in error." Finally, the Appellant described the requested relief.

Application of Section 8 of the VWRs necessarily requires the Board to conduct a de novo inquiry into the impacts of a project on all ten presumptively significant functions. See In

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re Chamnlain Marble Company, Docket No. CUD-97-06, Prehearing Conference Report and Order at 3 (Sept. 18, 1997). However, the Board has recognized that where there is no dispute between the parties concerning which functions may exist but are not adversely affected by the project, the Board, in its sound discretion, may focus its inquiry on those functions which are clearly implicated. See In re Darrvl and Stephanie Landvater, Docket No. CUD-96-06, Findings of Fact, Conclusions of Law, and Order at 9-10 (Aug. 28, 1997). This does not mean that the CUD applicant is entirely relieved of its burden of proof with respect to all ten functions; rather, it means that the Board's limited administrative resources are to be used to decide issues actually in controversy.

In the Landvater case, the CUD applicant did not challenge most of the ANR's CUD findings and he appealed only one condition imposed by the ANR. That condition (limiting the cutting of trees in a buffer zone) was specifically designed to mitigate impacts under function 5.4 (wildlife and migratory bird habitat). The only parties were the CUD applicant and the ANR, and they were largely in agreement concerning the issues in dispute. The Board, therefore, limited its de novo review to consideration of the impacts of the applicant's proposed activity on function 5.4, 5.10, and what mitigation measures, if any, should be imposed to alleviate those impacts. In re Darrvl and Steohanie Landvater, Docket No. CUD-96-06, Findings of Fact, Conclusions of Law, and Order (Aug. 28, 1997).

The Landvater case is distinguishable from the present appeal. Here the Project involves a driveway crossing Through a Class Two wetland, rather than activities in a buffer zone. The Appellant is not the CUD Applicant and the Appellant seeks denial or modification of the CUD on several grounds based on the allegation that the Project will have multiple undue adverse impacts. Indeed, the Appellant has identified seven out of ten functions which it alleges in some degree will be adversely affected by the Project. Therefore, while the CUD Applicants clearly have the burden of proof in proving that the Project will not have an undue adverse impact on any of the ten functions for which the wetland is presumed to be significant, the Board will focus its inquiry on finding facts related to the Project's alleged impacts on those seven functions identified by the Appellant, without prejudging whether those impacts are adverse, whether they are minimal, and if they are adverse, whether the CUD Applicants have mitigated those impacts.

If the Board determines that there are adverse impacts, it will apply the mitigation standards in Section 8.5(b) of the VWRs. In doing so, it will take into account the structure of Section 8.5(b), VWR. That rule states in relevant part: "The following measures shall be used to mitigate adverse impacts on protected functions, other than minimal impacts, to the extent necessary to achieve no net undue adverse effect." The rule then lists five measures each connected with the conjunctive word "and." The Board has long recognized that if a project has an adverse impact on a wetland function, the applicant must demonstrate either that the impact is minimal or that it has undertaken to mitigate that impact applying all five standards. In re:

Appeal of Larivee, Docket No. CUD-92-09, Findings of Fact, Conclusions of Law, and Order at 19-20 (March 25, 1994). If, however, in conducting its analysis, the Board concludes that the applicant has failed to mitigate adverse impacts applying any one of the mitigation measures and there is no evidence that the applicant has attempted to mitigate applying any other measure, the Board may deny the CUD application. See In re Champlain Oil Company, Docket No. CUD-94-11, Findings of Fact, Conclusions of Law, and Order at 14-15 (Oct. 4, 1995).

The Appellant's Notice of Appeal, while it places emphasis on the ANR's alleged error in not evaluating the Project for mitigation under Section 8.5(b)(1), also raises other concerns touching on other mitigation standards. Therefore, the Board will not limit its consideration of whether the CUD Applicants have mitigated any adverse impacts of the Project to just a review under Section 8.5(b)(1), as to do so would defeat the aggressive mitigation scheme contemplated by Section 8.5(b) of the VWRs.

In summary, the Board denies the CUD Applicants' request to limit the scope of review in this proceeding.

VIII. ORDER

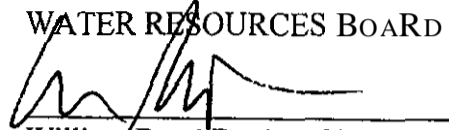
1. **Barden** Gale and Melanie Gale Amhowitz are the CUD Applicants with respect to DEC #97-185 and Docket No. CUD-98-04. **Barden** Gale and Melanie Gale Amhowitz are hereby **GRANTED** party status as of right pursuant to Board Procedural Rule 22(A)(7). The CUD Applicants are hereby directed to sign and file a letter with the Board on or before **4:30 p.m., Tuesday, February 16, 1999**, said letter to indicate that they authorize their father, Paul Gale, to serve as their agent and representative in this CUD proceeding and further authorizing him to retain legal counsel to represent them in their capacities as CUD Applicants.
2. LCHA has standing to bring this appeal and is GRANTED party status pursuant to Board Procedural Rule 22(A)(7).
3. The **Warners, Sobels, and Terriens** are **GRANTED** party status by permission pursuant to Board Procedural Rule 22(B). Counsel for these intervenors shall file with the Board on or before **4:30 p.m., Tuesday, February 16, 1999**, the current and accurate address information for these individuals so that they may be added to the Board's service list.
4. All other LCHA members (persons owning property in the Lost Cove subdivision) are DENIED, in their individual capacities, party status as of right and by permission.
5. The CUD Applicants' Motion to Dismiss is **DENIED** for the reasons stated above.

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6. The CUD Applicants' Objections to Appellant's Statement of Issues is **DENIED**. The Board will hear this appeal de novo consistent with the issues framed in the Prehearing Conference Report and Order as explained in this decision.

Dated at Montpelier, Vermont, this 13th day of January, 1999

WATER RESOURCES BOARD



William Boyd Davies, Chair

Concurring:

Ruth Einstein
Gail Osherenko
Jane Potvin