State of Vermont
WATER RESOURCES BOARD

RE: Husky Injection Molding Systems, Inc.
Docket No. MLP-98-06 (DEC #98-13)
(Arrowhead Mountain Lake, Milton, VT)

CHAIR'S PRELIMINARY RULING

This Chair's Preliminary Ruling addresses standing and party status issues in the above-captioned appeal. As explained below, the Chair rules that the individual Appellants named below have the requisite standing to bring this appeal and are granted party status as of right pursuant to the Board's Procedural Rule ("Rule") 22(A)(7). Kenneth Smith and Kathleen Richland also may have the requisite standing and qualify for standing as of right. However, they must submit for the Board's consideration a supplemental tiling alleging facts demonstrating the basis for their aggrievement. The Chair further rules that the Building and Construction Trades Council of South Burlington, VT ("BCTC") lacks the requisite interest to support standing. He, however, grants BCTC party status by permission pursuant to Rule 22(B). The Chair grants party status to Husky Injection Molding Systems, Inc. ("Husky") pursuant to Rule 22(A)(6). The Chair refers the objection to his preliminary ruling to grant party status to the Agency of Commerce and Community Development ("ACCD") to the full Board for its review and decision.

I. BACKGROUND

On October 27, 1998, the Department of Environmental Conservation ("DEC"), Agency of Natural Resources ("ANR") issued Permit No. 98-13 ("Encroachment Permit") to Husky, authorizing the construction of a new bridge over Arrowhead Mountain Lake in the Town of Milton, Vermont ("Project"). The Encroachment Permit was issued pursuant to 29 V.S.A. ch. 11 ("Management of Lakes and Ponds statute").

On November 3, 1998, the Board received a notice of appeal filed by John L. Franco, Jr., Esq., on behalf of his clients, the BCTC; Richard Prisco of Milton, VT; Bryan Bouchard of Milton, VT, Alan Cadorette of Milton, VT; Jeffery Towne of Milton, VT; Kenneth Cassidy of Milton, VT; Jeffrey Provost of Milton, VT; Kevin Barron of Milton, VT; Scott Carleton of Milton, VT; Chris Bressette of Milton, VT; Michael Hathaway of Milton, VT; Kenneth Smith of Burlington, VT; and Kathleen Richland of Cambridge, VT (individually and collectively "Appellants"). This appeal was tiled pursuant to 29 V.S.A. § 406(a).

On November 3, 1998, the Board's Executive Officer advised the Appellants that their tiling was substantially complete and docketed the matter as MLP-98-06. On November 5, 1998, a Notice of Appeal, Prehearing Conference, and Hearing was issued and subsequently published in the Burlington Free Press in accordance with Rule 20. The notice provided that party status

petitions should be filed with the Board on or before November 19, 1998.

On December 7, 1998, the Board's Chair convened a prehearing conference in this matter pursuant to Rule 24. A Preheating Conference Report and Order was issued on December 14, 1998. Those persons preliminarily granted party status by the Chair were:

(a) Town of Milton ("Town") pursuant to Rule 22(A)(l);
(b) Town of Milton Planning Commission ("Town Planning Commission") pursuant to Rule 22(A)(2);
(c) Chittenden County Regional Planning Commission ("CCRPC") pursuant to Rule 22(A)(3);
(d) ANR, including the DEC, pursuant to Rule 22(A)(4);
(e) ACCD, pursuant to Rule 22(A)(S);

Prehearing Conference Report and Order at 9, XI.(l).

At the prehearing conference, the Appellants objected to the party status of Husky and ACCD, and Husky objected to the Appellants' standing and party status. Accordingly, the Chair asked the parties to brief all party status and standing objections prior to the issuance of rulings on these preliminary issues. The Chair specifically asked the parties to address in their memoranda Husky's party status pursuant to Rule 22(A)(6) or (7) and the Appellants'standing /party status pursuant to 29 V.S.A. § 406(a) and Rule 22(A)(7). Prehearing Conference Report and Order at 3-6, Item V., and 9-10, XI., Items 1, 4, 5, and 7.

On December 16, 1998, the Appellants filed an Objection to Party Status of ACCD and Memorandum in Support of Dismissal of Husky's Encroachment Permit Application for Lack of Ripeness and Lack of Standing.

On December 22, 1998, Husky filed an Objection to the Party Status of the Appellants and Motion to Dismiss the Appeal of the Encroachment Permit.

On December 23, ACCD filed a copy of the Vermont Supreme Court's decision in Wilbur Parker, et al. v. Town of Milton, No. 97-422 (Dec. 18, 1998).

On January 4, 1999, the Appellant filed a Reply Brief in response to Husky's December 22, 1998, filing.

On January 5, 1999, Husky filed a Response to Appellants' Memorandum in Support of Dismissal of Husky's Encroachment Permit Application for Lack of Ripeness and Lack of Standing.

On January 6, 1999, ANR tiled a Reply Memorandum in response to the Appellant's January 4, 1999, Reply Memorandum.

The Chair has considered the parties' tiling and issues the following preliminary rulings pursuant to Rule 21. The Appellants, Husky or any person granted or seeking party status may object to these rulings by filing written objections supported by legal memoranda with the Board on or before **4:30 p.m., Wednesday, January 20, 1999**. See Prehearing Conference Report and Order at 10, XI., Items 9.

II. ISSUES

1. Whether the Appellants lack standing to bring this appeal pursuant to 29 V.S.A. §406(a) and Rule 22(A)(6) or (7)?

2. Whether Husky has the requisite interest to support "standing" and be granted party status of right pursuant to Rule 22(A)(6) or (7)?

3. Whether ACCD should be granted party status pursuant to Rule 22(A)(5)?

III. DISCUSSION

A. Appellants' Standing / Party Status

On December 22, 1998, Husky filed an Objection to the Party Status of the Appellants and Motion to Dismiss the Appeal of the Encroachment Permit. Husky raised two arguments in support of its request: (1) the Appellants are not persons "aggrieved" pursuant to 29 V.S.A. §406(a); and (2) the Appellants lack standing to appeal pursuant to Rule 22(A)(7).

With respect to the first argument, Husky argues that the Appellants have not alleged any basis upon which this Board can find standing to maintain this appeal. They note that the Notice of Appeal is devoid of any assertion that the Appellants' interests in the waters in question will be adversely affected by the bridge or that the issuance of the Encroachment Permit in any way will have a negative effect on their use and enjoyment of Arrowhead Mountain Lake. Husky argues that facts must be specifically alleged in the notice of appeal to support standing under 29 V.S.A. §406(a). They cite in support of their argument the Board's two lead cases on standing in appeals filed pursuant to §406(a): In re: Killinaton Ltd., Docket No. MLP-97-09, Memorandum of Decision at 2-4 (Feb. 10, 1998) and In re: Dean Learv, Docket No. MLP-94-08, Preliminary Order at 2 (Dec. 28, 1994).

In their Reply Memorandum filed on January 4, 1999, the Appellants respond that neither the statute nor the Board's Procedural Rules require that standing interests be specifically pleaded in a notice of appeal. Furthermore, the Appellants argue that the Executive Officer accepted the appeal without determining it to be defective or incomplete pursuant to Rule 18(B). The Appellants also argue that the filing requirements of Rule 18 are non-jurisdictional. Reply Memorandum at l-2. Finally, the Appellants assert that "[t]he majority of the appellants live in Milton nearby the Lake, or are their organizational representative .... [and they] make use of the Lake itself and/or have a direct and daily interest in its aesthetics." The Appellants further dispute specific findings made by the ANR in issuing the Encroachment Permit. Reply Memorandum at 4.

Title 29 V.S.A. §406(a) states, in relevant part: "any person aggrieved by the decision of the department [of environmental conservation] under section 405(c) of this title may appeal to the board within 10 days from the date of notice of action."

The Board has construed the "aggrievement" standard in standing challenges related to the application of 29 V.S.A. $406(a) and other statutes allowing appeals to the Board.[1] In all cases, the Board has construed the standard liberally to allow a person demonstrating some interest affected by the act or decision of the Commissioner of DEC, the Secretary or ANR an opportunity to appeal that act or decision. That interest may of may not be a riparian property interest. For example, in a matter involving an appeal from an encroachment permit granted to Point Bay Marina on Lake Champlain, the Board found that the appellant had standing pursuant to 29 V.S.A. §406(a) based on his present and historical usage and enjoyment of public waters in the vicinity of the project and his allegation that such usage and enjoyment might be adversely affected if the encroachment permit were allowed to stand as issued. In re: Dean Leary, Docket No. MLP-94-08, Preliminary Order at 2 (Dec. 28, 1994).

In instances where a party has challenged the standing of an appellant, the Board has generally looked to the appellant's notice of appeal to find facts demonstrating a nexus between the appellant's alleged interest, the injury asserted, and the act or decision of the Commissioner of DEC, the Secretary or ANR. In making its standing determination, the Board has also looked at the appellant's representations, either in its notice of appeal, at a prehearing conference, or in tilings supple-menting the notice of appeal. See In re: Appeal of Larivee, Docket No. 92-09, Preliminary Order: Party Status at 4 (March 16, 1993) (Board confirmed standing / party status

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[1] See. e.g. 10 V.S.A. §1269 ("Any person or party in interest aggrieved by an act or decision of the secretary [or ANR] pursuant to this subchapter may appeal to the board within thirty days.")

of appellant based on supplemental filings filed after the prehearing conference). Indeed, where the jurisdictional threshold of timely filing of an appeal has been met, the Board has historically been generous in granting amendment and supplementation of notices of appeal and has rejected requests to dismiss based on "hypertechnical pleading" arguments. See In re: Appeal of Cole, Docket No. WQ-92-13, Memorandum of Decision: Motion to Dismiss at 2 (May 28, 1993)

The Notice of Appeal filed in this case does not contain facts alleging how the interests of the Appellants in the use and enjoyment of Arrowhead Mountain Lake may be impaired by the act or decision of the DEC. It includes, however, certain allegations that the project may have aesthetic, shoreline, and erosion impacts which cannot be assessed based on the lack of specificity of the drawings and plans submitted with the application[2] as well as the assertion that the project does not comply with the "public good." Notice of Appeal at 2-3. The Executive Officer found that the Notice of Appeal was timely and substantially in conformance with Procedural Rule 18 when he issued his acknowledgment letter, and no party challenged his determination.

To the extent that the Notice of Appeal was deficient in pleading certain facts to support the Appellants' standing, the Appellants have remedied this defect in their tiling of January 4, 1999. They have asserted that "the majority" of the individual Appellants are residents of Milton, Vermont, and live nearby the Lake. They also have asserted that the appellants in their individual capacities "make use of the Lake itself and/or have a direct and daily interest in its aesthetics." Reply Memorandum at 4. They further assert that:

> They are directly impacted by the bridge's "negative effect on the feeling of remoteness" admitted in DEC Findings ¶ 4 and its inconsistency with the natural surroundings admitted in DEC's Findings ¶ 13, and they dispute the DEC's conclusion that under the instant circumstances '(t)he overall impact of the bridge is considered acceptable.' (DEC Id.ndings ¶ 15 "Cumulative Impact.").

Based on the Appellants' representations, the Chair concludes that those persons who have appealed the Encroachment Permit and who reside in Milton have demonstrated a nexus between their use and enjoyment of the Lake and the alleged injury to that interest that may

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[2] 29 V.S.A. §404(a) states in relevant part: "The application shall set forth the location, type, size and shape of the encroachment and the plans and specifications to be followed in the construction."

result if the Encroachment Permit is allowed to stand." Therefore, the Chair declares that the following named individuals have alleged facts sufficient to give them standing to sustain prosecution of this appeal: Richard Prisco, Bryan Bouchard, Alan Cadorette, Jeffrey Towne, Kenneth Cassidy, Jeffrey Provost, Kevin Barron, Scott Carleton, Chris Bressette, and Michael Hathaway (collectively "Milton Appellants"). The Chair further determines that these individuals should be granted party status as of right pursuant to Rule 22(A)(7) on all issues identified in the Prehearing Conference Report and Order.

The Chair further concludes that Kenneth Smith and Kathleen Richland also may have the requisite standing and qualify for standing as of right. However, they must submit for the Board's consideration a supplemental filing alleging facts demonstrating the basis for their aggrievement on or before Wednesday, January 20, 1999.

The Chair, however, cannot find facts to support the standing of BCTC of South Burlington, Vermont. While the union has argued that it has an interest in defining what constitutes the "public interest" in this appeal and in challenging Husky's right to the Encroachment Permit, the Chair can find no alleged facts that support the union's use and enjoyment of this specific body of public waters, nor, alternatively, that its members' use and enjoyment of the Lake is germane to the organization's purpose. See Wilbur Parker. et al. v. Town of Milton, No. 179-12-98 Cncv (Op. at 5) (not subject to reargument); Hunt v. Wash. State Apple Adver. Comm., 432 U.S. 333,343 (1977). Accordingly, the Chair rules that Building and Construction Trades Council of South Burlington lacks the requisite standing to be an appellant in this proceeding.

The Chair, however, recognizes that BCTC does have a substantial interest in the outcome of this proceeding as it relates to the interpretation of the "public good" and Husky's right to the Encroachment Permit. It may be able to provide evidence and legal argument in this proceeding helpful to the Board in construing and applying the "public good" standard and in addressing the other issues on appeal. The Board has on occasion granted amicus curiae status to organizations that merely wish to brief issues. However, the Chair believes that the union, if granted permissive party status pursuant to Rule 22(B), can be directed to coordinate and facilitate the presentation of its evidence and argument with the other Appellants, thereby expediting the Board's review process. Accordingly, the Chair grants BCTC permissive party

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[3] The Board has no rule of practice requiring the tiling of sworn affidavits to support claims of standing. The Chair, however, invites the Milton Appellants, if they so choose, to file with the Board, prior to its deliberations on any objections to the Chair's Preliminary Rulings, any affidavits they wish to include in the record to further support the basis of their standing in this proceeding.

status pursuant to Rule 22(B), subject to the provisions of Rule 22(B)(4),

B. Husky's Standing/Party Status

The Appellants in their December 16 filing object to the "standing" of Husky on the basis that it lacks title to the airspace over the Lake and therefore could not be a proper applicant for an Encroachment Permit.

Husky responds in its January 6, 1999 filing that the Management of Lakes and Ponds Permit Statute, 29 V.S.A. 5401 et seq. confers standing on Husky, regardless of whether it has a declaration from the Vermont General Assembly granting it title to public trust lands, including airspace over public waters.

Rule 22(A)(6) provides that upon entering a timely appearance, a person shall become a party of right if the statute giving rise to the Board's jurisdiction "confers an unconditional right to intervene" to that person. Title 29 V.S.A. §408(c) unconditionally grants the applicant for an encroachment permit party status in an appeal to the Board of a DEC decision respecting its permit application. Accordingly, whether or not a person was properly deemed an applicant in the first instance by the DEC, the Board is mandatorily required to grant party status of right to an applicant who enters a timely appearance in an appeal of its Encroachment Permit to the Board. The Board has no authority to determine the wisdom nor the constitutionality of this provision. See In re Appeals of Agney, Tomev and Leblanc, Dkt. Nos. 89-14, 89-16 and 89-17, Decision and Order at 11-12 (Feb. 12, 1991); see also Westover v. Village of Barton Electric Dept., 149 Vt. 256, 257-59 (1988).

Accordingly, the Chair rules that the Appellants' objection to Husky's "standing" to participate as a party in this proceeding is overruled and Husky is granted party status as of right pursuant to Rule 22(A)(6). However, having raised the objection, the issue of Husky's "standing" is preserved for future argument before a court of competent jurisdiction should this matter subsequently be appealed.

C. ACCD's Party Status

Board Procedural Rule 22(A)(5) states: "Upon entering a timely appearance the following shall become parties to Board proceedings:... 5. any other governmental entity with a substantial interest which may be adversely affected by the outcome of the proceeding." The word "other," before "governmental entity," refers to a governmental entity other than the ANR, which is specifically listed as a party of right in the immediately preceding subpart, Rule 22(A)(4).

The Notice of Appeal, Prehearing Conference, and Hearing issued by the Board on

November 5, 1998, established a deadline of November 19, 1998, for all party status petitions conforming with Rule 22.

On November 19, 1998, the ACCD filed with the Board its Notice of Appearance with the Board. This notice contained the following statement: "The Agency of Commerce is substantially interested in this appeal because it concerns issues related to how the necessary transportation infrastructure will be permitted and built to serve one of Vermont's most significant new economic development projects."

The Appellants' objected at the prehearing conference to the grant of party status to ACCD on the basis that the agency allegedly has not clearly articulated a substantial interest, separate and distinct from that of the ANR's, which might be adversely affected by the outcome of this proceeding. Prehearing Conference Report and Order at 4, V.(A).

Despite the Appellants' objection, the Chair preliminarily ruled that ACCD would be granted party status pursuant to Rule 22(A)(5). Prehearing Conference Report and Order at 4, V.(A) and 9, XI.(l).

The Appellants' objected to the Chair's ruling in their filing of December 16, 1998. Accordingly, this matter has been referred to the Board for its consideration in deliberations to be held on February 2, 1999, pursuant to Rule 21. Prehearing Conference Report and Order at 10, XI.(13).

IV. ORDER

1. The individual Milton Appellants have standing to bring this appeal pursuant to 29 V.S.A. § 406(a). They are **GRANTED** party status as of right pursuant to Rule 22(A)(7).

2. Kenneth Smith and Kathleen Richland may have the requisite standing and qualify for standing as of right. If they wish to press this claim with the Board, they must submit through counsel for the Board's consideration a supplemental tiling alleging facts demonstrating the basis for their aggrievement, said filing to be made on or before **4:30 p.m., Wednesday, January 20, 1999**.

3. BCTC is determined to lack standing to prosecute this appeal. However, it is **GRANTED** permissive party status pursuant to Rule 22(B), subject to the provisions of Rule 22(B)(4).

4. Husky, as the permit applicant, is GRANTED party status as of right pursuant to 29

V.S.A. §408(c) and Rule 22(A)(6).

5. The question of ACCD's party status is referred to the full Board for its review and decision pursuant to Rule 21.

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

WATER RESOURCES BOARD

William Boyd Davies, Chair