

**State of Vermont
WATER RESOURCES BOARD**

**RE: Kent Pond (VT Dept. of Fish & Wildlife)
Docket Nos. MLP-03-10, MLP-03-11, and CUD-03-13**

MEMORANDUM OF DECISION AND DISMISSAL ORDER

Issued February 18, 2004

This decision pertains to preliminary issues raised by the Agency of Natural Resources (ANR) regarding Docket No. CUD-03-13. ANR moved for dismissal of this particular appeal on two grounds: (1) the Appellants failed to comply with an order of the Water Resources Board (Board) directing the Appellants to supplement their Notice of Appeal by a specified deadline to address certain deficiencies in that Notice of Appeal; and (2) the Appellants lack the requisite standing to sustain an appeal of a Conditional Use Determination. As is explained in more detail below, the Board concludes that the Appellants lack the requisite standing and, therefore, it dismisses their CUD appeal for lack of jurisdiction. This ruling, however, does not affect the Board's prior standing rulings with respect to the consolidated encroachment permit appeals, Docket Nos. MLP-03-10 and MLP-03-11.

I. PROCEDURAL HISTORY

On June 18, 2003, the Director of the Water Quality Division, Department of Environmental Conservation (DEC), issued Conditional Use Determination #2002-275 (CUD) to the Department of Fish and Wildlife (DFW) 103 South Main Street, Building 10 South, Waterbury, VT 05676 (Applicant). The CUD authorizes the Applicant to construct a parking area and walkway in a Class Two wetland and its buffer zone adjacent to Kent Pond in Killington, Vermont (Project), pursuant to 10 V.S.A. § 905(7)-(9) and the Vermont Wetland Rules (VWR), §8. The authorized construction is intended to provide access to an Americans with Disabilities Act (ADA) accessible fishing platform in Kent Pond, Killington, Vermont, that is the subject of two appeals of an Encroachment Permit before the Board, Docket Nos. MLP-03-10 and MLP-03-11.

On July 17, 2003, Michelle Meadows Management, LLC, Michelle Werle and Mark Werle (Appellants) filed a Notice of Appeal with the Board seeking reversal of the CUD. This appeal was timely filed pursuant to 10 V.S.A. §1269 and VWR §9.

A prehearing conference was held in this matter on October 14, 2003, and a Prehearing Conference Report and Order (Prehearing Order) was issued on December 19, 2003. Except as noted below, no party objected to the Prehearing Order and the terms and conditions of that Prehearing Order became final and binding on December 29, 2003. Accordingly, the Prehearing Order is incorporated herein by reference.

At the prehearing conference, ANR orally objected to the standing of the Appellants, after counsel for the Appellants was unable to clarify what his clients' interests were that were allegedly affected by the issuance of the CUD. As a consequence of ANR's objection, the Appellants' counsel was instructed that his clients would have an opportunity to supplement their Notice of Appeal in order that they might indicate what alleged injury or potential injury to their interests, as they related to the wetland and its functions, would arise as a result of the issuance of the CUD. The Prehearing Order, Section XIII, Item 3, established a deadline of December 30, 2003, by which the Appellants were required to supplement their Notice of Appeal to address ANR's standing challenge.

Also at the prehearing conference, the Board's Acting Chair for this proceeding asked counsel for the Appellants to clarify the scope of the matters on appeal. When counsel for the Appellants was not able to do so, the Acting Chair provided the Appellants until December 30, 2003, to answer his questions concerning the scope of the appeal. The Acting Chair's requests were memorialized in the Prehearing Order, Section XIII, Item 4.

On December 30, 2004, the Appellants responded to the Acting Chair's request for clarification of the scope of appeal by answering the questions posed in the Prehearing Order, Section XIII, Item 4. However, they did not identify which specific functions, other than those identified by ANR in the CUD, are being performed at a significant level by the wetland at issue. They also advised the Board that they "reserved the right to further supplement and/or amend their Notice of Appeal." Additionally, the Appellants filed a Request for Extension of Time that sought to extend the December 30, 2004, deadline to clarify the issues on appeal and to move the date of hearing from March 30, 2004 to a later date in May 2004.

On January 6, 2004, ANR filed a Motion to Dismiss (ANR's Motion) and an Opposition to the Appellants' Request for Extension of Time. Also on January 6, 2004, Noyes Family Properties, a party to the two encroachment permit appeals, filed Comment on Appellants' Request for Extension of Time.

On January 13, 2004, the Acting Chair issued an Order denying the Appellants' two extension requests. He did not, however, rule on ANR's Motion, since the deadline to respond to that motion and make any requests for oral argument before the Board was January 22, 2004, under the terms of the Prehearing Order, Section XIII, Item 7.

On January 22, 2004, Noyes Family Properties filed a Memorandum in Opposition to ANR's Motion to Dismiss. On January 23, 2004, the Appellants filed their Opposition to Motion to Dismiss (Appellants' Opposition).

No party filed a request for oral argument by the January 22, 2004, deadline.

On January 23, 2004, ANR filed its Reply to Appellants' Opposition to Motion to Dismiss (ANR's Response).

The Board considered ANR's Motion, the Appellants' Opposition, ANR's Response, and other documents from the record in this matter, such as the Appellants' Notice of Appeal, in deliberations on February 17, 2004. This matter is now ready for decision.

III. ISSUES

- (1) Must the Appellants' CUD appeal be dismissed for failure of the Appellants to comply with the terms and requirements of a Board Order?
- (2) Must the Appellants' CUD appeal be dismissed for lack of standing?

IV. DISCUSSION

A. Failure to comply with the terms and requirements of a Board Order

ANR moves for involuntary dismissal of the CUD appeal on the basis that the Appellants have failed to comply with a requirement of a Board order. Specifically, the Appellants were required by the Prehearing Order to file on or before 4:30 p.m., December 30, 2003, "a statement to supplement [their] Notice of Appeal, describing the interest(s) that the Appellants have that will or may be "injured" should the CUD be allowed to stand" in order to address the standing requirements of 10 V.S.A. § 1269 and Procedural Rule 19(A)(7). Prehearing Order, Section XIII, Item 3. ANR asserts that the Appellants did not file the required information by the deadline specified in the Prehearing Order.¹ Therefore, they move for dismissal, asserting that the Board has authority to dispose of the CUD appeal pursuant to its own Procedural Rules 19(E) and 24.

¹ Parties were required to file any objections to the Prehearing Order, in whole or in part, on or before December 29, 2004. Prehearing Order, Section XIII, Item 20. "Filing" with the Board means receipt at the Board's office during normal business hours, not the date upon which a filing is post marked. Procedural Rule 9(C).

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In response, the Appellants ask the Board to deny ANR's Motion. They respond that their "interest" in the building of the Project walkway and parking lot was fully explained to ANR in their First Supplemental Notice of Appeal (July 9, 2003) and in their Opposition to ANR's Motion to Dismiss (July 9, 2003), both in Docket No. MLP-03-10. The Appellants ask the Board to take judicial notice of the fact that this information was available and known to ANR prior to the ANR's request for augmentation of the Notice of Appeal in CUD-03-03 and the Prehearing Order. Appellants' Opposition at 1-2. The Appellants then recite thirty separately numbered allegations of fact in support of their claim of standing. Appellants' Opposition at 3-7.

As noted on page 2, *supra*, ANR orally challenged the standing of the Appellants at the prehearing conference held on October 14, 2003, based on the alleged paucity of information contained in the Notice of Appeal. ANR's counsel indicated that his client "would be satisfied if the Appellants should augment their Notice of Appeal indicating what alleged injury or potential injury to their interests, as they relate to the wetland and its functions, would arise as a result of the issuance of the CUD." Prehearing Order, Section VIII(A), at 5. The parties' counsel *agreed* that the Appellants should augment their Notice of Appeal by a specific deadline to address the standing question, and this deadline was established in the Prehearing Order. The Appellants were also provided further guidance concerning where the Board's past decisions on standing could be found and how such a supplemental filing could be made. Prehearing Order, Section VIII(A), at 5. As noted above, the deadline established in Section XIII, Item 3, of the Prehearing Order was December 30, 2003, and the Appellants filed no supplemental materials by that deadline. Furthermore, the Appellants did not file a timely objection to the Prehearing Order; thus, by its express terms, the provisions of that order became final and binding upon the prehearing conference participants.

ANR asserts that because the Appellants did not supplement their Notice of Appeal by the December 30, 2003, deadline that the Board must necessarily dismiss the CUD appeal pursuant to Procedural Rule 24 and 19(E), as construed in past Board decisions. ANR relies upon a prior statement of the Board, to the effect that the Board will treat a "motion for involuntary dismissal as a motion to dismiss under WRB Rule 24 but will look to the Rules of Civil Procedure for guidance in reviewing. . ." such a motion. ANR's Motion at 2, citing Re: Morehouse Brook, Englesby Brook, Centennial Brook, and Bartlett Brook, Docket Nos. WQ-02-04, -05, -06, and -07 (Consolidated), Findings of Fact, Conclusions of Law, and Order at 16 (June 2, 2003). ANR asserts that the Appellants' failure to comply with the requirement of the Prehearing Order should be treated as a failure of a plaintiff to prosecute or to comply with an order of a court under Vermont Rule of Civil Procedure 41(b)(2), and, further, that the Board

need not “consider the evidence relating to [such motion] in the light most favorable to the nonmoving party.” Re: Morehouse Brook at 16. However, just as the Board declined to grant the appellant’s motion for involuntary dismissal in the Morehouse Brook case, it does so here for several reasons.

First, Procedural Rule 24 provides, in relevant part: “The Board *may*, on its own motion or at the request of a party, dismiss, in whole or in part, any matter before the Board for reasons provided by these Rules, by statute, or by law.” (Emphasis added.) Procedural Rule 24, itself, does not state in detail the possible reasons for dismissal, but rather the *procedure* by which the parties and Board may be governed.

Second, ANR asserts that Procedural Rule 19(E) provides the Board with authority “to dismiss [the] appeal without oral argument where appellants have failed to comply with its order.” ANR Motion to Dismiss, Memorandum of Law at 2. While it is true that the Board may exercise its authority to dismiss an appeal for failure of appellants to comply with a Board order, the Board need not necessarily take such action. Indeed, Procedural Rule 19(E) states: “Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is grounds only for such action as the Board deems appropriate to prevent unnecessary hardship or delay or to prevent injustice, which *may* include dismissal of the appeal.” (Emphasis added.) Thus, Procedural Rule 19(E) gives the Board the latitude to fashion a remedy which may include dismissal if, for example, an appeal fails to state a claim or seek relief within the Board’s jurisdiction to grant, constitutes a clear abuse of process, or for other circumstances which are not relevant here.

Third, the citation to Procedural Rule 41(b)(2) adds nothing to ANR’s argument. The provision cited to merely provides that a *defendant* may move for dismissal of a pending court proceeding for failure of the plaintiff to, among other things, comply with an order of the court. It does not *require* the court to actually grant the defendant’s request.

Fourth, and most importantly here, while the Prehearing Order directed the Appellants to supplement their Notice of Appeal by a certain deadline, this “requirement” was added as a remedial measure to provide the Appellants with ample opportunity to demonstrate a basis in fact and law for their claim of standing, once ANR had squarely challenged their standing as a preliminary issue at the prehearing conference. If the Appellants elected not to supplement their appeal in accordance with the guidance provided to their counsel at the prehearing conference and in response to Section XIII, Item 3, of the Prehearing Order, they were on notice that the

Board would make its decision based upon the pleadings and other information extant in the record. In other words, the consequence of their failure to supplement their Notice of Appeal was possible dismissal on jurisdictional grounds, not involuntary dismissal for failure to comply with a Board order.

For the above reasons, the Board declines to grant ANR's Motion based on the Appellants' procedural failure to supplement their Notice of Appeal by the December 30, 2004, deadline.

B. Failure to demonstrate standing

An appeal of a CUD decision of the Secretary of ANR is heard *de novo* by the Board pursuant to 10 V.S.A. § 1269. See VWR § 9. Title 10 V.S.A. § 1269 creates a right of appeal in "[a]ny person or party in interest aggrieved by an act or decision of the secretary" pursuant to 10 V.S.A. ch. 47, subch. 1. Procedural Rule 19(A)(7) requires an appellant to provide in its notice of appeal, among other information, "[a] statement of the reasons why the appellant has standing to appeal the Secretary[']s . . . act or decision." The Board has issued numerous decisions construing and applying the standing standard of 10 V.S.A. § 1269 and similar statutes. Re: Vermont Agency of Transportation (Route 7), Docket No. WQ-03-01, Memorandum of Decision at 2-3 (June 4, 2003); Re: CCCH Stormwater Discharge Permits, Docket No. WQ-02-11, Memorandum of Decision at 7-8 (Mar. 21, 2003) (hereinafter, CCCH Memorandum of Decision); Re: Home Depot, U.S.A., et al., Docket No. WQ-00-06 and Docket Nos. CUD-00-7 and CUD-00-08 (Cons.), Memorandum of Decision on Preliminary Issues and Order at 3-10 (Sept. 8, 2002) (hereinafter, Home Depot Memorandum of Decision).

A CUD is issued by the Secretary of ANR, or her designee, when a positive finding is made that a proposed project will not have an undue adverse impact to one or more of the protected functions and values for which the wetland is deemed significant. See VWR § 9. Thus, in order to have standing to appeal a CUD, an appellant must demonstrate some material "interest" and an alleged "injury" to that interest that is attributable to the Secretary's act or decision. However, the "interest" and "injury" alleged must have some nexus with the water resource at issue.

The Vermont Wetland Rules clearly contemplate that persons living in the vicinity of a significant wetland may have an interest in the protection of that wetland. However, a person's ownership of property within or adjacent to a significant wetland or its buffer zone does not per se entitle a person to appeal or participate as a party in a conditional use determination appeal pursuant to 10 V.S.A. § 1269 and the Vermont Wetland Rules. *See, e.g., Re: Champlain Oil*

Company, Docket No. CUD-94-11, Preliminary Order at 2-4 (Jan. 3, 1995) (denying party status to person who owned real property immediately adjacent to the subject Class Two wetland for failure to demonstrate the requisite interest). On the other hand, the Board has found that an organization representing persons living adjacent to or in the vicinity of a Class Two wetland at issue and who alleged use and enjoyment of that resource *related to that wetland's specific significant functions* (flood water storage, recreation, or nature observation) demonstrated a cognizable interest giving rise to standing. Home Depot Memorandum of Decision at 9. In contrast, an organization representing area businesses did not demonstrate standing, where it did not allege that any of its members owned property adjacent to the wetland in question nor that any of its members made use of or enjoyed that resource for any of the specific functions and values that made that wetland a significant wetland. Home Depot Memorandum of Decision at 10.

In the present CUD appeal, the Appellants were placed on notice at the prehearing conference that they should supplement their Notice of Appeal "by indicating what alleged injury or potential injury to their interests, as related to the wetland and its functions, would arise as a result of the issuance of the CUD." They were further advised that "[a]n alleged 'injury' might include a detriment to the use and enjoyment of the wetland that might arise if the Secretary's decision were allowed to stand." They were also advised how to find the Board's past decisions on standing and how to supplement their Notice of Appeal. Prehearing Order, Section VIII(A), at 5; Section XIII, Item 3. Nevertheless, as noted at page 4, *supra*, the Appellants declined to supplement their appeal by the deadline established in the Prehearing Order. Instead, they relied upon their Notice of Appeal, their prior filings in Docket No. MLP-03-10 to support their claim of standing in that proceeding, and, presumably, the thirty numbered alleged statements of fact contained in their Opposition to ANR's Motion.

An examination of the Appellants' Notice of Appeal (July 17, 2003) only reveals that the Appellants are allegedly "abutting and/or interested landowners." On the second page of the Notice of Appeal, the Appellants allege that they "own property within the subject Class Two wetland and/or the associated buffer zone; or within close proximity thereto." Although they alleged that the issuance of the CUD for the proposed parking lot and walkway "will have undue adverse impacts to the protected functions of the Class Two wetland, and associated buffer zone on the subject property," they did not indicate what injury will or may occur to their "interests" as a result of the alleged impacts to the Class Two wetland and its protected functions.

In support of their standing claim, the Appellants ask the Board to take judicial notice of several documents from their companion appeal of the encroachment permit issued for the handicapped-accessible fishing platform, Docket No. MLP-03-10. The Board takes notice of those documents here, noting, however, that the thirty enumerated alleged facts in their Opposition to ANR's Motion in the CUD appeal appear to have been lifted in entirety from the

Appellants' Opposition to ANR's Motion to Dismiss (July 9, 2003) in Docket No. MLP-03-10. An examination of both filings reveals that while the Appellants, as individuals and as a business entity, own real property adjacent to or accessible by easement to Kent Pond, there is no information to support their initial representation in their Notice of Appeal in Docket No. CUD-03-13 that they actually own real property in the Class Two wetland and or associated buffer zone. Furthermore, while there are allegations related to the Appellants use and enjoyment of Kent Pond, as individuals and as a business entity, there are no allegations of fact indicating what use or enjoyment they make, as individuals or as a business, of the wetland itself with reference to the functions and values that make that wetland significant.

The Appellants were provided guidance on how to supplement their Notice of Appeal to address ANR's standing challenge and an opportunity to make a supplemental filing. Having elected not to file such additional information, but instead to rely on documents previously filed in the encroachment permit proceeding, the Appellants have failed to meet their burden of proof in demonstrating that they are persons or parties in interest aggrieved by the Secretary of ANR's decision to issue a CUD pursuant to 10 V.S.A. §1269. Accordingly, the Board dismisses Docket No. CUD-03-13 for lack of jurisdiction.

Finally, the Board notes that Noyes Family Properties (a/k/a Noyes Family Partnership) filed on January 22, 2004, an Opposition to ANR's Motion to Dismiss in Docket No. CUD-03-13. As noted in the Prehearing Order, while Noyes Family Properties is a bonafide Appellant with respect to the consolidated encroachment permit appeals, it neither filed a party status petition nor was granted party status in the CUD appeal. Prehearing Order at 2, 5, 12. Therefore, the Board has declined to address the issues raised by the Noyes Family Properties in their briefing on the standing issue in the CUD appeal.

V. ORDER

It is hereby ordered:

- (1) Docket No. CUD-03-13 is dismissed for lack of jurisdiction due to the Appellants' lack of standing; however, the Board retains jurisdiction to hear the other two consolidated appeals, MLP-03-10 and MLP-03-11;
- (2) Conditional Use Determination #2002-275, as issued by the Secretary of ANR, remains in full force and effect; and

- (3) Jurisdiction over Conditional Use Determination #2002-275 is returned to the Agency of Natural Resources.

Dated at Montpelier, Vermont, this 18th day of February, 2004.

WATER RESOURCES BOARD
By its Acting Chair

\s\ John D.E. Roberts

John D. E. Roberts

Concurring:
David J. Blythe
Lawrence H. Bruce, Jr.
Michael Hebert