

State of Vermont
WATER RESOURCES BOARD

RE: Central Vermont Public Service Corp.
(Beaver Meadow Road Wetland, Vershire, VT)
Docket No. CUD-04-05

MEMORANDUM OF DECISION AND DISMISSAL ORDER

(Issued April 15, 2005)

This decision pertains to the question whether an appeal to the Water Resources Board (Board) of a Conditional Use Determination was timely filed. As explained below, the Board concludes that the appeal was not timely filed and, therefore, the Board lacks jurisdiction to hear this appeal. Accordingly, the appeal is dismissed.

I. PROCEDURAL BACKGROUND

On August 6, 2004, the Acting Director of the Water Quality Division, Department of Environmental Conservation (DEC), Agency of Natural Resources (ANR), signed a Conditional Use Determination #2004-205, DEC ID #BR04-0211 (CUD). The CUD authorizes the applicant, Central Vermont Public Service Corporation (CVPS), to place utility poles and accessories within Beaver Meadow Road Wetland, a Class Two wetland, and its adjacent 50-foot buffer zone, in the Town of Vershire, Vermont. The CUD was issued pursuant to 10 V.S.A. § 905(7)-(9) and the Vermont Wetland Rules (VWR) § 8. After receiving the CUD, CVPS completed the Project adjacent to Beaver Meadow Road, within the town highway right-of-way, and in part on real property owned by George W. Liebmann, Jr.

On November 2, 2004, George W. Liebmann, Jr., represented by William J. Cheeseman, Esq., filed a Notice of Appeal with the Board seeking reversal of the CUD. The Appellant claimed that neither he nor his attorney received notice of the CUD until October 5, 2004, and that the present appeal was taken within thirty days of receipt of a copy of the CUD. The Appellant asserts that his appeal was timely filed pursuant to 10 V.S.A. §1269 and VWR §9. The Notice of Appeal was supported by Affidavits from George W. Liebmann, Jr., attorney C. Daniel Hershenson, Esq., and attorney William J. Cheeseman, Esq., as well as by various documents initially filed by the Appellant and attorney Hershenson with the Wetlands Office, DEC/ANR, regarding the CUD application.

On November 5, 2004, the Board Chair acknowledged receipt of the appeal and docketed it as CUD-04-05. A Notice of Appeal and Prehearing Conference was issued to persons in interest on November 17, 2004, and published in the Valley News on November 18, 2004, in

accordance with Procedural Rule 22. November 30, 2004, was set as the deadline for entries of appearance, with only the Appellant, the Applicant CVPS, and ANR entering timely appearances.

In response to a Chair's Order issued on November 17, 2004, CVPS and ANR each filed Memoranda of Law on December 2, 2004, addressing the preliminary jurisdictional question raised by the timing of the filing of the Notice of Appeal. CVPS's Memorandum of Law was supported by an affidavit from Timothy O. Upton, Permit Coordinator for CVPS. On December 8, 2004, the Appellant filed a Reply Memorandum of Law (Supplemental Memorandum of Law) which was supported by a supplemental affidavit from George W. Liebmann, Jr.¹

On December 14, 2004, the Board Chair convened a prehearing conference in this matter. On December 30, 2004, he issued a Prehearing Conference Report and Order (Prehearing Order), memorializing certain rulings and establishing a filing schedule for additional briefing on the jurisdictional question.² No objections were filed in response to the Prehearing Order and, therefore, by its terms the order became binding upon all persons who received notice of the prehearing conference. Prehearing Order at 9, Item 9 (Dec. 30, 2004).

As provided in the Prehearing Order, between January 18 and January 26, 2005, the parties filed additional memoranda of law, supporting affidavits and other documents, and statements of fact.

On February 4, 2005, the Appellant sought leave to submit additional filings not provided for in the Prehearing Order. The filings submitted with this request were a Memorandum of Law on Jurisdiction (Third Supplemental Memorandum of Law), a Third Supplemental Affidavit of William J. Cheeseman, additional documents related to the U.S. Postal Service's delivery policy and a Notice of Scheduling Conflict, advising the Board that the Appellant would not be available to testify at an evidentiary hearing on February 22, 2005.

¹ On December 16, 2005, the Board received a notarized copy of the supplemental affidavit for George W. Liebmann, Jr., initially filed by his attorney on December 8, 2005.

² Persons granted party status of right to litigate at least the jurisdictional question are: the Appellant George W. Liebmann, Jr., represented by William J. Cheeseman, Esq., Hershenson, Carter, Scott and McGee, P.C.; CVPS, represented by Carolyn Browne Anderson, Esq.; and ANR, represented by Glen A. Gross, Esq., and David Englander, Esq. Jerold Nau, who is a recipient of the electrical service provided by the Project, is granted permissive intervention pursuant to Procedural Rule 25(C). He appeared at the prehearing conference, pro se.

On February 8, 2005, CVPS filed a Motion to Strike Appellant's February 4, 2005, filings (Motion to Strike), on the basis that Appellant had ample opportunity to file within the time frames established by the Prehearing Order and that the late filed documents were unnecessary and burdensome.

On February 10, 2005, the Appellant filed an Opposition to Motion to Strike.

The Board held oral argument on the preliminary jurisdictional question on February 22, 2005, in Randolph, Vermont. Those persons participating were the Appellant by William J. Cheeseman, Esq.; CVPS by Carolyn Browne Anderson, Esq.; and ANR by Glen A. Gross, Esq. Mr. Nau was not present.

Following oral argument on February 22, 2005, the Board deliberated. The Board continued its deliberations on April 12, 2005. On that same day, the Board closed the record on the preliminary jurisdictional question. It accepted the Appellant's filings of February 4, 2005 and denied CVPS's Motion to Strike. This matter is now ready for decision.

II. ISSUE

Did the Appellant timely appeal CVPS's CUD decision to the Board?

III. FINDINGS OF FACT

The following findings of fact are drawn from the CUD, from party admissions, from undisputed statements contained in the affidavits accompanying the parties's legal memoranda, and various uncontested documents.

1. Beaver Meadow Road in the Town of Vershire crosses the eastern edge of a 32-acre Class Two wetland complex (Beaver Meadow Road Wetland or wetland). The wetland appears on Vermont Significant Wetland Inventory map #45C.
2. The Beaver Meadow Road Wetland consists of a palustrine emergent, scrub-shrub and forested wetland, a pond, as well as an aquatic bed at the southern end of the complex.
3. ANR has determined that the wetland is significant for a number of wetland functions listed in VWR § 5.

4. The Wetland is located on real property owned by the Appellant Charles W. Liebmann, Jr., and at least part of the Approved Project, discussed in 15 below, is located on or adjacent to Mr. Liebmann's real property.
5. Erin Haney is employed as District Wetlands Ecologist for DEC, ANR. In that capacity, she was responsible for providing administrative support and technical review of the CUD application at issue in this appeal and referred to in Finding 7 below.
6. Ms. Haney conducted a site visit of the subject wetland with representatives of CVPS on June 10, 2004.
7. On June 21, 2004, Ms. Haney determined that CVPS had filed a complete application to allow CVPS to install utility polls and extend electric service to a new residence being constructed by Jerold Nau (CUD application).
8. Ms. Haney arranged with her secretary at ANR for the distribution of notice of the CUD application to persons required to receive personal notice pursuant to VWR § 8.2 and arranged for the posting of notice of the application through July 13, 2004, pursuant to VWR § 8.3.
9. Mr. Liebmann sent a letter to Ms. Haney, dated July 8, 2004, objecting to the CUD application and requesting that CVPS be required to mitigate the aesthetic and open space impacts of the Project by placing its line in a buried conduit.
10. Each page of Mr. Liebmann's letter to Ms. Haney was headed; "George W. Liebmann, Jr., P.O. Box 28, Vershire, VT 05079." However, on the last page of this document, Mr. Liebmann asked ANR staff to send mail regarding this matter to his corporate address in New York: "Permafresh Corporation, 2109 Broadway, Suite 6-06, New York, NY 10023." Mr. Liebman requested that mail be sent to his New York address, because a prior notice sent to him at his Vershire address by ANR regarding the CUD application had been returned to ANR by the U.S. Postal Service.
11. On July 12, 2004, attorney Dan Hershenson of the firm Hershenson, Carter, Scott, and McGee, P.C., spoke by phone with Ms. Haney on behalf of his client Mr. Liebmann. He followed this conversation with a letter, dated July 13, 2004, in which he reiterated Mr. Liebmann's concerns about the design and impacts of the proposed line extension.
12. On July 21, 2004, Tim Upton, representative for CVPS, filed written comment in reply to Mr. Liebmann's comment.

13. In response to Mr. Upton's written comment, attorney Hershenson sent a letter to Ms. Haney, dated July 27, 2004, on behalf of Mr. Liebmann.
14. On August 6, 2004, the Acting Director of the Water Quality Division, DEC, ANR, signed CUD #2004-205, DEC ID #BR04-0211 (elsewhere referred to as the "CUD").
15. The CUD authorized CVPS to place five utility poles and accessories within the Beaver Meadow Road Wetland and its adjacent 50-foot buffer zone, within the town right-of-way of Beaver Meadow Road and on Mr. Liebmann's real property (Approved Project). Four of the utility poles were approved for placement in the wetland and one in the 50-foot protective buffer zone for the wetland, resulting in a total area of impact of approximately 2,000 square feet.
16. ANR sent a copy of a Notice of Issuance of CUD to Mr. Liebmann at his Vermont address: "P.O. Box 28, Vershire, VT 05079." The date of postmark for this mailing from ANR was August 9, 2004.
17. The Notice of Issuance of CUD sent to Mr. Liebmann was returned to and received by ANR on August 17, 2005. On the envelope containing the Notice of Issuance of CUD, below ANR's return address, was the statement "Return Service Requested." The U.S. Postal Service stamped at the bottom of the envelope the following message: "Return to Sender" and "Liebmann temporarily away."
18. Ms. Haney was aware of the undelivered envelope referred to in Finding 17 above. She did not, however, send a copy of the CUD to either Mr. Liebmann at his New York address or to Mr. Liebmann's Vermont attorney, Mr. Hershenson.
19. Site work began in preparation for the Approved Project in late August and early September 2004. CVPS set the utility poles for the line extension to Mr. Nau's property on September 24, 2004, and provided electrical service on October 6, 2004.
20. Mr. Liebmann observed site preparation activity by CVPS on Beaver Meadow Road by September 1, 2004. On September 1, 2004, Mr. Liebmann called attorney Hershenson's law office to speak with Mr. Hershenson, but Mr. Hershenson was unavailable to receive his call and Mr. Liebmann spoke with Mr. Hershenson's secretary.
21. Mr. Liebmann spoke to attorney Hershenson by telephone on September 26 and 28, 2004. Mr. Liebmann informed his attorney that CVPS had removed trees and brush and installed utility poles along Beaver Meadow Road through the wetland and its buffer zone.

22. On September 28, 2004, attorney Hershenson FAXed a letter to the District 3 Environmental Coordinator alerting her to CVPS's construction activity along Beaver Meadow Road for the purpose of possible Act 250 enforcement.
23. On September 30, 2004, attorney Hershenson handed the Liebmann case file over to another attorney in his office, William J. Cheeseman, Esq.
24. On October 1, 2004, attorney Cheeseman attempted to reach Ms. Haney by phone to inquire about the status of the CUD application, but was only able to leave a phone message. Ms. Haney informed attorney Cheeseman by phone on October 4, 2004, that the CUD had been issued on August 6, 2004.
25. On October 5, 2004, Ms. Haney went to the law office of attorneys Hershenson and Cheeseman, and left copies of the CUD decision and other related materials with the law office secretary.
26. On November 2, 2004, attorney Cheeseman, on behalf of Mr. Liebman, filed a Notice of Appeal with the Water Resources Board, seeking de novo review of the CUD.

IV. DISCUSSION

Appeals of CUD decisions to the Board are governed by 10 V.S.A. § 1269 and VWR § 9.

At the time that CVPS filed its appeal with the Board, title 10 V.S.A. § 1269 stated, in pertinent part: "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."³

VWR § 9 states in pertinent part: "Any act or decision of the Secretary [of ANR] under these rules may be appealed within 30 days to the Board pursuant to 10 V.S.A. Section 1269 in accordance with the Board's Rules of Procedure."

The Board has long construed the language of 10 V.S.A. § 1269 as establishing a fixed deadline for the filing of notices of appeal with the Board. See In re: Appeal of Valois, Docket No. 92-03, Decision at 2 (May 20, 1992) (CUD appeal filed after 30-day appeal period was dismissed as untimely). Thus, under a strict reading of the statutory language of 10 V.S.A.

³ Appeals of CUD decisions of the Secretary of ANR or his designee are now within the jurisdiction of the Environmental Court, as a result of legislation enacted in 2004. 2003, No. 115 (Adj. Sess.), § 29, eff. Jan. 31, 2005.

§ 1269, the operative time frame for filing an appeal of the CUD in this proceeding was 30 days from the date the Secretary of ANR's designee issued the CUD decision.⁴ Indeed, the Board has codified this principle in Procedural Rule 8(C) which expressly states: "The Board, Chair, or a referee appointed to hear the matter, for good cause upon written motion, may enlarge the time prescribed by these Rules or by its order for doing any act, or may permit an act to be done after the expiration of such time, *but shall not enlarge the time for filing a notice of appeal.*" (Emphasis added.)

The reason for Procedural Rule 8(C) is that filing deadlines are jurisdictional. Filing deadlines are established by the General Assembly, and the Board lacks the discretion to waive or enlarge a statutory deadline – in this case, 10 V.S.A. § 1269. See Trask v. Department of Employment & Training, 170 Vt. 589, 590 (2000) citing In re Roy, 147 Vt. 403 (1986) and Allen v. Vermont Employment Security Bd., 133 Vt. 166 (1975). For this reason, the Board has dismissed appeals that clearly have been filed after the 30-day appeal period provided by 10 V.S.A. §1269. See In re: Appeal of Poultney River Committee, WQ-92-04, Preliminary Order (Aug. 11, 1992); In re: Appeal of Valois, Docket No. 92-03 (May 20, 1992). Other executive branch boards, such as the Vermont Environmental Board, have likewise dismissed appeals that were untimely filed for lack of jurisdiction. See Re: Ruby Iantosca, LUP #2S1085-EB, Memorandum of Decision and Dismissal Order (Oct. 23, 2000) and cases cited therein.

This is the first instance, however, where the Board has been directly presented with the question of whether, due to certain omissions by ANR staff that resulted in the failure of delivery of personal notice of a CUD decision to a person in interest, the time frame for filing an appeal, as a matter of law, should begin at some other date than the date when the decision was issued, or, whether the Board has implied authority and discretion to grant an extension beyond the 30-day appeal period provided by statute. For the reasons discussed below, the Board concludes that regardless of how one construes the Board's authority, the Notice of Appeal filed by Appellant's attorney on November 2, 2004 was untimely; the Board therefore lacks jurisdiction to hear the merits of this appeal, and this appeal should be dismissed. The Board now addresses the parties' principle arguments.

⁴ It should be noted that under the Board's current Procedural Rule 8(A), the Board has allowed Notices of Appeals to be filed on the 31st day following the act or decision of the Secretary of ANR or his designee if the last date of the 30-day appeal period falls on a Saturday, Sunday, State or federal legal holiday or a day on which the office is officially closed for other enumerated reasons. Accordingly, the Board has addressed the "fairness" concerns of the dissenters in In re Roy, 147 Vt. 403 (1986) and implemented a "liberal construction" policy consistent with that of the Department of Employment and Training in Trask v. Department of Employment & Training, 170 Vt. 589, 590 (2000).

- A. Whether the Appellant was entitled to receive personal notice of the CUD decision and, if so, whether due to the failure of the ANR to provide such notice, the 30-day appeal period provided for in 10 V.S.A. § 1269 only began to run at such time as his attorney received personal notice of the decision.

The Appellant argues that he was entitled to personal service upon the issuance of the CUD and since he did not receive this, the 30-day appeal period began to run on October 5, 2004, the date that Ms. Haney hand-delivered a copy of the decision to the office of Mr. Liebmann's attorney. The Appellant relies on 3 V.S.A. § 812(a) and various old Supreme Court cases, including Gates v. Gates, 120 Vt. 241 (1957), for the premise that his client should have received the personal service required in contested case and court proceedings. The Appellant also relies on the *Board's* Rules of Procedure to argue that ANR's CUD proceeding is a "contested case" proceeding subject to the requirement of APA personal notice.

As a matter of law, and as correctly noted by CVPS, the administrative process used by the Agency of Natural Resources to review CUD applications and issue decisions is *not* a contested case proceeding subject to the requirements of the APA, but rather a notice-and-comment proceeding. Under VWR Section 8.4, the Secretary of ANR is only required to provide an opportunity for public comment; he *may* convene an informational hearing but this is within his discretion.⁵ Therefore, the provisions of the APA do not apply to ANR's CUD proceedings, including 3 V.S.A. § 812(a) which requires that "parties" be notified promptly by personal delivery or mail of a decision or order of an agency.⁶

The Appellant also argues that the Board's Procedural Rule 2(A)(4), which provides a definition for a "contested case proceeding," is relevant to the question of what notice is required in ANR's CUD proceedings. Board Procedural Rule 2(A)(4) is not relevant, as it only governs the Board's contested case proceedings, not ANR's notice-and-comment proceedings.

⁵ Compare with 3 V.S.A. § 801(b): "(2) 'Contested case' means a proceeding, including but not restricted to rate-making and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing[.]"

⁶ 3 V.S.A. § 812(a) states in pertinent part:

Parties shall be notified forthwith either personally or by mail of any decision or order. A copy of the decision or order shall be delivered or mailed forthwith to each attorney of record and to each party not having an attorney of record. That mailing shall constitute actual knowledge to that person or party.

Since ANR has no procedural rules of its own, the only rules pertinent to determining what notice the Secretary of ANR or his designee must provide in CUD notice-and comment proceeding are the Vermont Wetland Rules. Section 8 of the VWR states in relevant part:

8.4 Notice of Decision

The Secretary shall provide notice of any decision made under Section 8 to all persons entitled to receive notice under Section 8.2 above.

Section 8.2, VWR, governing initial distribution of the request for a conditional use determination, identifies among the persons who must be served notice of the filing of a CUD application as “all persons owning property within or adjacent to the wetland or buffer zone in question.” Mr. Liebmann qualifies as a person to whom notice of the CUD application at issue was required to be served due to his ownership of real property within the wetlands, pursuant to VWR Section 8.2, and therefore the Secretary of ANR or his designee was directed by VWR Section 8.4 to provide notice to Mr. Liebmann of the CUD decision issued to CVPS. As is apparent from the findings, Mr. Liebmann participated in the ANR proceeding by filing written objections to the CUD application.

The question, then, is what kind of notice was the Secretary of ANR required to provide upon the issuance of the CUD decision? All that VWR § 8.4 requires is that the Secretary of ANR “provide notice” of any CUD decision. The VWR do not specify how such notice shall be accomplished, leaving it to the Secretary of ANR to make that determination.

CVPS and the Appellant dispute whether the Appellant’s attorney, Mr. Hershenson, was provided with oral notice in late July or early August that the CUD was about to be issued. Therefore, the Board does not address the legal question whether oral notice is sufficient. CVPS asserts that the Secretary of ANR provided notice of the issuance of the CUD decision by posting it on ANR’s electronic Environmental Notice Bulletin. The Board is not persuaded, even in this electronic age, that posting on the ANR’s web site provides the kind of notice contemplated by VWR § 8.4. Rather, in the Board’s opinion, the Secretary of ANR or his designee is required to use some means reasonably calculated to provide interested persons with notice of the agency’s decision, which, at a minimum requires the prompt mailing of the CUD or a written notice of decision, by U.S. mail first-class, to persons entitled to notice under VWR § 8.4.

In the present instance, there is no dispute that ANR sent notice of the CUD decision on August 9, 2004, to Mr. Liebmann’s Vershire address in the town where the subject wetland is

located and where Mr. Liebmann owns real property.⁷ This was also the address clearly printed at the top of the correspondence sent to ANR regarding the CVPS's CUD application.

Must ANR have provided additional service to Mr. Liebmann in New York City and to his attorney? The VWR do not direct the Secretary of ANR or his designee to send notice of a CUD decision to an interested persons at any number of possible mailing addresses. If, however, the Secretary or his designee has been *explicitly* informed by an interested person who is not represented by counsel that there is an alternative address to which correspondence should be sent, then good administrative practice would require that ANR staff should revise the distribution list to add the best address to which such correspondence should be directed. In this particular instance, Mr. Liebmann indicated in his July 8, 2004 filing that mail should be sent to his corporate address in New York City, and Ms. Haney, in her affidavit of January 26, 2005, concedes that she forgot to send "an *additional* copy of the notice of decision to Mr. Liebmann at his New York address" as Mr. Liebmann had requested. (Emphasis added.) It is also undisputed that the notice sent by ANR to Mr. Liebmann's Vershire address was returned to ANR, undelivered, which should have prompted ANR staff, exercising even minimum diligence, to examine the CUD file for other address information.

Nevertheless, there is another fact of legal significance in this proceeding. In letters sent by attorney Hershenson to Ms. Haney on July 13 and July 27, 2004, Mr. Hershenson stated that his office represented Mr. Liebmann. ANR's distribution list and the uncontested facts in this appeal reveal that Mr. Liebmann's attorney was *not* sent a copy of the notice of issuance of the CUD, or the CUD decision itself, in August 2004 when the decision was made to grant CVPS's application.

While the Vermont Wetland Rules do not expressly require it, once legal counsel or another duly authorized representative has entered an appearance for a party in a particular CUD proceeding, ANR staff should amend the distribution list so that the notice of CUD decision is sent directly to the interested person's representative rather than directly to the interested person. This comports with administrative norms, regardless whether a proceeding is subject or not to the contested case requirements of the APA. Indeed, the Board, even in its notice-and-comment proceedings, sends copies of all its notices and decisions to attorneys or other duly authorized representatives of record, and only courtesy copies to the parties themselves. See Board Procedural Rules 17 (Administrative Determinations) and 27(B) (Representatives). Once entry of appearance is made by the representative, any notice given to or by a representative of record

⁷ In comparison, Procedural Rule 34(A) expressly requires the Board in its own contested case proceedings to send a copy of its decision by U.S. mail: "A copy of the decision shall be *forwarded by mail* to each party."

for a party is considered in all respects as notice to or by the party represented. Procedural Rule 27(B).

Supposing, as here, ANR staff neglected to send Mr. Liebmann's attorney written notice of the CUD decision, does the time frame for appeal begin at such time in the future that a copy of the CUD decision is actually *received*? The VWRs are silent on this question. Even the APA, 3 V.S.A. § 812(a), does not require actual receipt, but instead the mailing of decision is construed as "actual knowledge" of the decision, whether or not received.

Appellant argues, however, that due to ANR's admitted failure to provide him or his attorney with notice in August 2004, the relevant date for beginning the appeal period was the date his attorney, Mr. Cheeseman received a copy of the CUD, October 5, 2005. This was the date that his attorney had "actual" knowledge of the issuance of the CUD. Since his counsel filed a notice of appeal with the Board on November 2, 2005, the Appellant asserts that his appeal was timely filed.

The Appellant's argument might be persuasive except for his admission that he knew, by September 1, 2004, that CVPS was conducting site preparation activity along Beaver Meadow Road. It is also has admitted that he tried to contact his attorney, Mr. Hershenson, on September 1, 2004, and although it is not known what message he did or did not leave for Mr. Hershenson, it is also admitted that on September 28, 2004, Mr. Hershenson was sufficiently apprised by September 28, 2004, of CVPS's activities, including tree removal and the installation of power poles, that he FAXed a letter complaining about the potential for significant harm to the wetlands to Act 250 District Environmental Coordinator. One may reasonably infer from these facts that both Mr. Liebmann and his attorney were aware in September 2005 that CVPS was undertaking activities for which it sought approval in its CUD application, and yet they did not inquire of Ms. Haney whether or not a CUD decision had issued.

10 V.S.A. § 1269 states in relevant part: "An appeal filed pursuant to this section shall not stay the effectiveness of any act or decision of the department pending determination by the board." The "department" refers to the DEC, the Secretary of ANR's designee for the administration of the Vermont Wetlands Program under the VWR. Therefore, the issuance of a CUD decision allowed CVPS to proceed with the Approved Project during the 30-day appeal period, admittedly at its own risk.

The Appellant argues that Mr. Liebmann, as a lay person, could not have understood the legal significance of CVPS's activities during the month of September, and yet it was precisely because he was aware that site preparation work and the installation of power poles was occurring that he contacted his attorney, who should have known the significance of the no-stay language in 10 V.S.A. § 1269. Thus, in the Board's opinion the Appellant's counsel had "inquiry

notice”⁸ of facts that should have prompted him to determine whether a CUD had issued and, if so, to immediately file an appeal. Instead, no appeal was filed with this Board until November 2, 2004, at least 63 days *after* Mr. Liebmann became aware of CVPS’s site preparation activities; as much as 37 days *after* his counsel says that he became aware of CVPS’s activities, and 33 days *after* Mr. Cheeseman attempted to call Ms. Haney about the status of the CUD decision.

Accordingly, even if the Board were persuaded that some other date than the date the CUD decision was signed should be used in calculating when a 30-day appeal period should be calculated for the purpose of applying 10 V.S.A. § 1269,⁹ the Board does not conclude that the 30-day appeal period was automatically extended by operation of law to allow a filing on November 2, 2005. The question, then, is whether the Board has any discretion to allow an extension of the 30-day appeal period.

- B. Whether the Board has implied authority and discretion to grant an extension beyond the 30-day appeal period provided by statute.

The Board has never decided the question whether it has the implied authority and discretion to grant an extension beyond the 30-day appeal period provided by 10 V.S.A. § 1269.

⁸ The Appellant and CVPS each briefed for the Board’s benefit, the legal distinctions between “actual,” “constructive,” and “inquiry” notice. See Appellant’s Second Supplemental Memorandum of Law (Jan. 18, 2005) and CVPS’s Second Reply Memorandum (Jan. 26, 2005). The Board is persuaded by CVPS’s discussion of “inquiry notice” as it relates to late-filed appeals that a tribunal may distinguish between “delay due to a petitioner’s inaction” from delay due to accident or mistake, including the failure to provide required notice of an order or decision. Second Reply Memorandum at 6-9, citing with favor, In Re Estate of Gardner, 152 Vt. 597, 599-600 (1989).

⁹ For example, ANR and CVPS assert that the 30-day appeal period was triggered by the signing of the CUD decision on August 6, 2004, but the Board might conclude that it wasn’t until August 9, 2004, when notice of that decision was actually placed in the U.S. mail for delivery to interested persons, that the 30-day appeal period began to run. See Board Procedural Rule 8(A) (“The day that a decision or order issued shall be that date on which it has been certified that the decision or order has been placed in the U.S. Mail for delivery to the parties or petitioners.” ANR would do well to specify in its own Rules of Procedure or written practices what constitutes the day that the Secretary or ANR or his designee perfects an “act or decision” for the purpose of calculating the time for appeals under 10 V.S.A. § 1269 or other statutes.

Instead, it has assumed that it does not have such authority.

The parties, however, have suggested that the Board might apply Vermont Rule of Appellate Procedure (V.R.A.P.), Rule 4, at least “for guidance,” to support an extension in this particular case. Although the parties have not briefed this case, the Board has become aware of a recent Supreme Court opinion, which seems to suggest that an administrative agency with contested case authority under the APA has the power and perhaps the duty to allow extensions to untimely filed appeals, at least for “excusable neglect,” pursuant to V.R.A.P. 4. See In re Town of Killington, VT No. 2002-365 (Oct. 24, 2003) (hereinafter Killington).

CVPS in its Memorandum of Law, cites V.R.A.P. 4 for the proposition that if a tribunal finds “(a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced” it may, “upon motion filed within 90 days of entry of the judgment or order or within 7 days of receipt of such notice, *whichever is earlier*, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.” (Emphasis added.) See CVPS’s Memorandum of Law at 8-9 (Dec. 2, 2004). As is evident from the facts above, the Appellant’s counsel received a copy of the CUD on October 5, 2004. Thus, even if he were to consider the Appellant’s Notice of Appeal as a request for an extension of time under this provision of V.R.A.P. 4, that request was untimely since it would have had to have been filed with the Board within seven days of receipt of the CUD decision, that is, in mid-October 2004.

It should be noted, however, that the provision referred to by CVPS is expressly limited to “any civil action” in superior or district court. In contrast, the Supreme Court in the Killington case relied on another provision in V.R.A.P. 4 which allows a tribunal to *extend*, rather than reopen, the time for filing of a notice of appeal by a party under the following circumstances:

- (1) for good cause, with or without motion or notice, if request therefore is made before the expiration of the period originally prescribed by this subdivision [30 days];
- (2) for excusable neglect, upon motion and notice, if request therefore is made within 30 days after the expiration of the period originally prescribed by this subdivision [30 days].

Since no request was filed by the Appellants for an extension within 30 days of the date that the CUD decision was issued, subpart (1) is inapplicable. Likewise, even if the facts in this case supported a case for “excusable neglect,” it is evident that the Appellant still failed to make a timely request.

As the Supreme Court noted in Killington, notwithstanding the flexibility of the ‘excusable neglect’ concept, its application to cases like the instant one “must remain strict lest there be a de facto enlargement of the appeal filing time to sixty days.” Killington, P 17. The

policy behind appeal periods and limitations on their extensions are clear. As the Second Circuit Court of Appeals stated in a case cited in the Killington opinion:

[T]he legal system would groan under the weight of a regimen of uncertainty in which time limitations were not rigorously enforced – where every missed deadline was the occasion for the embarkation of extensive trial and appellate litigation to determine the equities of the [time] bar.” Silivanch v. Celebrity Cruises, Inc., 333 V.3d 355, 368 (2nd Cir. 2003).

For the foregoing reasons, the Board concludes that even if it has the authority and discretion to grant extensions beyond the 30-day appeal period provided for by 10 V.S.A. § 1269, the Appellant has failed to timely avail itself of such an extension.

The Appellant has charged that the failure of ANR staff to send him personal notice of the CUD decision amounted to a denial of due process. Notice of Appeal, Statement of Water Resources Board Jurisdiction (Nov. 2, 2004). The Board agrees that ANR’s failure to send a copy of the notice of CUD decision to Mr. Liebmann’s attorney, and a courtesy copy to Mr. Liebmann at his New York City address, was extremely poor administrative practice in this notice-and-comment proceeding and a practice which certainly deserves correction. The Board, however, is not prepared to conclude that, under the specific facts of this case, such failure to provide personal notice was a violation of due process. As discussed above, the Appellant’s own failure to investigate the status of the CUD decision once he became aware of CVPS’s site preparation activities on September 1, 2004 (which was within the statutory time frame for appeals), and his attorneys’ further delays in making inquiry of ANR staff, significantly contributed to the late filing of the Notice of Appeal beyond any deadline for relief that might be contemplated by V.R.A.P. 4. Also, the fact that the Applicant, in reliance of the CUD decision, long ago completed the extension of electrical service to Mr. Nau’s property, weighs in favor of the Board not disturbing the finality of the CUD decision.

For the foregoing reasons, the Board dismisses this appeal as untimely filed.

V. ORDER

1. The Board grants the Appellant’s request for leave to submit its late filing of February 4, 2005; it denies CVPS’s Motion to Strike this filing.
2. The Appellant’s failure to file a timely appeal deprives the Board of jurisdiction to hear the appeal on the merits.

3 .The appeal is dismissed for lack of jurisdiction.

Dated at Montpelier, Vermont, this 15th day of April, 2005.

Water Resources Board

/s/ John F. Nicholls

John F. Nicholls, Chair

Concurring:

Lawrence H. Bruce, Jr.
Michael J. Hebert
Joan Nagy
John D.E. Roberts