

State of Vermont
WATER RESOURCES BOARD

PREHEARING CONFERENCE REPORT AND ORDER

**RE: Unifirst Corporation
P.O. Box 205
Brush Hill Road
Williamstown, Vermont 05679**

**Docket No. WQ-97-07
(Appeal of DEC Permit #3-1435)**

On November 24, 1997, Water Resources Board ("Board") Chairman William Boyd Davies convened a prehearing conference in the above referenced matter. As noted at the conference, this prehearing conference report and order ("Preheating Order") will summarize the parties' statements of the issues, will address preliminary issues including a statement of the relevant disclosures, and will set forth a schedule which will guide the course of this proceeding. Moreover, this Prehearing Order will set forth the rulings on matters of party status.

The following persons attended and participated in the preheating conference:

Stephen A. Reynes, Esq., Attorney for the Appellants
Martin K. Miller, Esq., Attorney for Unifirst
Andrew N. Raubvogel, Esq., Attorney for the Agency of Natural Resources ("ANR")
Joyce Day, Appellant
Alvin Day, Jr., Appellant
Karl H. Johnson, The Johnson Company, Inc., Consultant for Unifirst

I. BACKGROUND

On October 24, 1997, Joyce Day and Alvin Day, Jr. ("Appellants"), represented by Stephen A. Reynes, Esq., tiled a notice of appeal with the Board seeking review of a decision by the Department of Environmental Conservation ("DEC"), Agency of Natural Resources ("ANR"), granting to the Unifirst Corporation ("Unifirst") Discharge Permit #3-1435 ("Permit"). The appeal was timely tiled pursuant to 10 V.S.A. §1269.

The Permit under appeal was issued by DEC pursuant to 10 V.S.A. §1259 and Section 402 of the federal Clean Water Act ("CWA") which establishes the National Pollutant Discharge Elimination System ("NPDES"). The Permit authorizes Unifirst to discharge treated tetrachloroethylene contaminated groundwater from outfall S/N 001 at its facility located at Brush Hill Road in Williamstown into an unnamed tributary of Rouleau Brook. Rouleau Brook is classified by the Board as Class B waters. The tributary into which the discharge has been authorized is characterized by DEC as an "ephemeral" stream.

The Permit limits Unifirst's discharge in accordance with several special conditions as well as the following limitations and monitoring requirements:

EFFLUENT CHARACTERISTICS	DISCHARGE LIMITATIONS		MONITORING REQUIREMENTS	
	Annual Average	Maximum Day	Sample Frequency	Sample Type
Flow	0.033 MGD	0.288 MGD	Continuous	Daily Total
Tetrachloroethylene		8 µg/l	1 x per week	Grab
pH	6.5 to 8.5 S.U.		1 x per week	Grab

The Permit provides a more detailed description of both the allowed discharge as well as the above-noted limitations, conditions and monitoring requirements attendant to the discharge. In addition, the Permit explains the procedures for monitoring and reporting.

II. ISSUES

A. Defining the Site of the Discharge

1. Whether the site at which Unifirst will release waste (hereinafter called "Receiving Site"), characterized in the permit as an ephemeral stream which is a tributary of Rouleau Brook, constitutes "waters" as that term is defined in 10 V.S.A. §1251(13) and §1-01(B)(38) of the Vermont Water Quality Standards ("VWQS").
2. Whether, for purposes of 10 V.S.A. §1263(a), the Receiving Site can be characterized as "waters of the state."
3. Whether it is relevant for purposes of 10 V.S.A. §1263 to

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The terms "discharge" and "receiving waters" may intuitively seem **more** appropriate than the phrases "release waste" and "Receiving Site." However, by **definition, both** "discharge" and "receiving waters" **presume** that waste is being placed, **deposited or** emitted into waters. Parties **seemed to agree at** the **prehearing** conference that during certain periods of the year, the Receiving Site appears to be completely dry. Moreover, these issues were alluded to by Appellants' Notice of Appeal at paragraphs 1 and 2. Thus, as a threshold matter, the Board **must** determine whether the Receiving Site constitutes "waters," "waters of the United States," both, **or** neither. This **definitional** issue is central to determining whether the permitting process applicable to the proposed disposal of this waste should be limited only to those regulations adopted pursuant to 10 V.S.A. §1263 (including the minimum federal requirements applicable to delegated NPDES programs) involving discharges to waters, or whether **some** additional permit is required to ensure that the land based application of **wastes** also meets applicable regulations. The **issue** statements pertaining to the **nature** of the Receiving Site have been expanded herein to fully frame this issue.

determine if the Receiving Site is a "watercourse" as that term is defined in 10 V.S.A. §1002(10), and if so, whether the Receiving Site constitutes a "watercourse."

4. Independent of the issue whether or not the Receiving Site constitutes waters of the state or a watercourse, whether the Receiving Site constitutes "waters of the United States" as that term is defined in 40 C.F.R. 122.2 (1995) and incorporated by reference in §1-01(A)(2) of the VWQS.

B. Jurisdiction

1. If the Receiving Site does not constitute waters of the state, whether it is appropriate to issue a discharge permit pursuant to 10 V.S.A. §1263, which by its own terms requires a permit to be secured only by those persons who "intend[] to discharge waste into the waters of the state..."
2. If the Receiving Site does not constitute waters of the state under 10 V.S.A. Chapter 47, but it does constitute waters of the United States for purposes of the CWA and the VWQS, whether a discharge permit may nonetheless issue under the agency's delegated NPDES permitting authority because the contemplated discharge is to a water of the United States.

C. Consistency between Waters of the State and Waters of the United States

1. Although not raised in the Notice of Appeal, the following issue is one which may be raised in the context of interpreting the multitude of statutes and regulations (both state and federal) which direct the administration of the NPDES program, to wit: whether, for purposes of ensuring consistency among the state and federal statutes and regulations governing the direct or indirect discharge of wastes, generally, and the NPDES program set forth at 33 U.S.C. §1342 (CWA §402) specifically, the Board should determine the state definitions of "waters" of the state to be coextensive with the federal definition of "waters of the United States" as referenced in §1-01(A)(2) of the VWQS. Parties are encouraged to submit testimony and file briefs on this issue.

D. Compliance with Vermont Water Quality Standards

1. Whether the discharge as proposed, violates 10 V.S.A. §1259(e), especially subsection 1259(e)(4) which prohibits the secretary of the ANR from issuing a permit for on-site disposal of sewage into Class B waters, unless the applicant demonstrates by clear and convincing evidence, and the secretary finds, that the discharge will not cause a violation of the VWQS.
2. In particular, whether the discharge violates VWQS §§1-03(B)(2), 1-04, 2-02 and 2-03.
3. Whether a discharge permit under 10 V.S.A. §1263 may be issued to authorize the discharge of waste where the Receiving Site is often dry or has little or no waterflow and no mixing zone in fact.

E. Determining Other Applicable Regulations

1. If *any portion* of the Receiving Site does not constitute waters of the United States, whether in addition to meeting the applicable standards for discharges to waters, the appropriate federal regulations pertaining to the land application of pollutants (i.e. waste) set forth at 40 C.F.R. 122.50 have been complied with.
2. If *any portion* of the Receiving Site does not constitute waters of the United States, whether in addition to meeting the applicable standards for discharges to waters, the appropriate state regulations for the land application of waste, including those set forth 10 V.S.A. Chapters 47 and 159, as well as Chapter 14 of the ANR's Environmental Protection Rules ~~have been complied with.~~
3. Assuming that the Receiving Site constitutes either "waters" as defined in 10 V.S.A. Chapter 47, a "water of the United States," or both, and where an assessment of both stream hydrology and the

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It may be demonstrated that, as a practical matter, even if the Receiving Site constitutes waters or waters of the United States, because the waters may "lose" surface waters (i.e. the effluent stream) to groundwater during portions of the year, the ANR's indirect discharge rules, groundwater policy and other regulations may be necessary to further the goals of 10 V.S.A. § 1263.

groundwater characteristics (including soil permeability) demonstrate that the discharge will impact groundwater resources, whether a permit authorizing a discharge to those surface waters also requires the applicant to demonstrate, and the Secretary of the ANR to conclude, that the discharge conforms with those provisions of 10 V.S.A. §§ 1390-1394 pertaining to groundwater protection.

4. If the Board finds that the policy of 10 V.S.A. §1390 is applicable to the proposed discharge, whether the proposed discharge violates the groundwater resources policy as set forth in 10 V.S.A. §1390 and more particularly, whether the discharge violates the Class III groundwater standards set forth at §§ 12-503 and 12-702 of the Groundwater Rule and Protection Strategy effective September 28, 1988.

F. Prohibitions on the Discharge of Hazardous Materials

1. Whether the proposed discharge contains a "hazardous material" for purposes of 10 V.S.A. §1281.
2. If the pollutants constitute hazardous materials, whether the discharge violates any role of the ANR enacted pursuant to 10 V.S.A. §1281 prohibiting or otherwise regulating the discharge of hazardous materials either directly or indirectly into waters of the state.

III. PARTY STATUS

Appellant Joyce Day's property adjoins the Williamstown elementary school property under which certain of the contaminated waters lie. Moreover, the Receiving Site into which the proposed discharge will flow, are either within or adjacent to Ms. Day's property. Appellant Alvin Day, Jr. is the son of Appellant Joyce Day. Alvin Day owns and operates a motorcycle repair business on the property owned by Appellant Joyce Day. No objection has been made to the inclusion of Alvin Day, Jr. as an Appellant

Among those other parties which have the authority to intervene as of right pursuant to Board Rule 22(A), only ANR has filed a timely notice of appearance. Unifirst, the permit applicant, also filed a timely notice of appearance. The Board received no other requests for party status or entries of appearance. --

IV. STANDARD OF REVIEW

The above-referenced matter is appealed to the Board pursuant to 10 V.S.A. §1269. Section 1269 specifies that the Board's standard of review is *de novo*. In a *de novo* proceeding, the reviewing Board is required to hear the matter as if there had been no prior proceedings. See In re Killington, Ltd., 159 Vt. 206, 214 (1992).

V. BURDEN OF PROOF

As stated above in Section II., there are several statutory and regulatory provisions at issue in this appeal. The issuance of a discharge permit is governed by 10 V.S.A. §1263.

- A. Under 10 V.S.A. §§ 1259 and 1263, the statute provides that in order to receive a permit to discharge into Class B waters, the applicant must demonstrate by clear and convincing evidence that the discharge will not cause a violation of the VWQS. 10 V.S.A. §1259(e).
- B. Accordingly, the permit applicant carries the burden of proof.

VI. SCOPE OF PROCEEDING

The statement of issues set forth herein is intended to define the issues before the Board in this case. The scope of the proceeding is limited to consideration of these issues and all relevant evidence in support of or in opposition to the issuance of a discharge permit pursuant to 10 V.S.A. §1263.

VII. OTHER PRELIMINARY MATTERS

- A. Disclosures and Potential Conflicts of Interest

At the prehearing conference, the current Board members were identified by name and disclosures involving relationships among the parties in interest, their representatives and these Board members were discussed. Parties noted several disclosures at the prehearing conference, none of which arises to the level at which it constitutes either an actual or perceived conflict of interest.

One matter concerning pending litigation in Newport, in which I am involved as a defendant, was discussed at length. In the context of that litigation, the Appellants' attorney, Mr. Reynes, has been contacted by certain of the defendants' representatives to consult on certain matters - and may be asked to provide expert testimony in relation thereto. I only became aware of this through Mr. Reynes' disclosure as I am not directly involved in the preparation of the case. The parties agreed that the issue was worth

exploring further. However, no information has been provided at this time which leads me to conclude that this situation presents either a real or perceived conflict of interest, and that it also does not present even the appearance of impropriety. Accordingly, I decline to recuse myself on the basis of the tenuous potential connection with Attorney Reynes regarding this matter.

The parties did not cite any other potential conflicts, and Attorney Reynes disclosed that he had previously been a member of the Water Resources Board.

B. Stipulations of Facts

Parties are encouraged to file stipulations as to factual matters with which there is agreement among the parties. As noted in the Schedule, such stipulations should be prepared in advance of the submission of prefiled testimony so that the prefiled testimony will be informed by the stipulations regarding factual matters with which there is substantial agreement.

C. Site Visit and Protocol

As noted at the preheating conference, the value of the site visit may be less than that which may be discerned by the Board from photographs and other prefiled testimony. Nevertheless, the Board will conduct a site visit on the hearing day unless parties specifically request otherwise. In preparation for the site visit, and to promote efficiency on the hearing day, parties are encouraged to prepare a stipulation in advance of the site visit as to both the protocol for conducting the site visit and the substance of what will be seen therein. Of course, when the information gathered from the site visit is placed on the record, the parties stipulation may be amended or refined to comport with the Board's observations.

D. Court Reporters and a Stenographic Record

Board Rule of Procedure 28(C) covers the procedure for recording of hearings. If any party chooses to make arrangements to have the hearing recorded by a professional court reporter, such party shall inform the Board, and all parties not later than Friday, February 27, 1998. Copies of such transcript shall be distributed pursuant to WBR 28(C).

E. Second Prehearing Conference to Address Potential Bifurcation of Issues

As noted in Section II. A, B, and C, the threshold issues in this matter require a determination whether the Receiving Site is in fact a water of the state, a water of the United States, neither, or both. Because the resolution of that issue may affect the nature of the evidence respecting the appropriate limitations on any discharge or land-based

disposal of wastes, the Board may conduct a second prehearing conference in which a filing schedule for prefiled testimony, exhibits and legal memoranda relative to this issue may be reviewed prior to the merits hearing on March 10, 1998. Until such time as a second prehearing conference is held, parties are advised to consider this issue in the context of preparing a statement of stipulated facts.

VIII. WITNESSES, EXHIBITS, AND PREFILED TESTIMONY

Parties made a preliminary identification of witnesses and acknowledged that the need for extensive prefiled testimony would be diminished provided that the parties could stipulate as to many of the relevant facts. No exhibits other than photographs of the site were discussed.

At the time exhibits are filed, such exhibits shall be labeled with the name of the party submitting the exhibit or the appropriate abbreviation noted below, as well as an exhibit number. For instance, the Appellants would mark their exhibits A-1, A-2 and so on; Unifirst will mark exhibits U-1, U-2, etc., and the ANR will use the abbreviation ANR-1, ANR-2, etc. Only the original oversized exhibits (those larger than 8% x 14 inches) need to be filed with the Board, however, an 8% x 11 inch copy shall be provided to Board members in conformance with WBR 19. All color photographs, maps and graphical charts or diagrams shall be duplicated in color with as close a likeness to the original document as is practicable.

A Supplemental Prehearing Order reflecting a schedule for filing of final witness lists, exhibits, and establishing an order in which the Board will hear live testimony may be issued subsequent to this Preheating Order.

IX. S C H E D U L I N G

- A. On or before **4:30 p.m. on Tuesday, December 23, 1997**, any party objecting to any provision of this Preheating Order shall file such objections with the Board.
- B. On or before **4:30 p.m. on Tuesday, February 3, 1998**, any stipulation of facts reached by the parties shall be filed with the Board.
- C. On or before **4:30 p.m. on Tuesday, February 17, 1998**, all parties shall file Prefiled Direct Testimony with the Board.
- D. On or before **4:30 p.m. on Thursday, February 26, 1998**, any objections to the Prefiled Direct Testimony shall be filed; all Prefiled Rebuttal Testimony shall be filed; and any Proposed Findings of Fact, Conclusions of Law, and Orders shall be tiled, in both hard copy and on disk if

available. Disks should be in a format readable by the PC versions of either Microsoft Word, or WordPerfect 5.1, 6.1 or 7.

- E. The Proposed Site Visit Protocol shall also be tiled **not later than 4:30 p.m. on Thursday, February 26, 1998.**
- F. The Site Visit and Hearing will be held on **March 10, 1998** with the exact time and location to be provided to parties by subsequent written notice.
- G. Supplemental Proposed Findings of Fact, Conclusions of Law, and Order will be due within 7 days after hearing, but not later than **4:30 p.m. on Tuesday, March 17, 1998.**

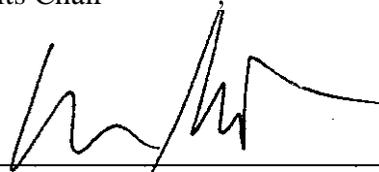
X. ORDER

- A. The statutory directive of 10 V.S.A. §1269 requiring issuance of a written decision within 10 days of the date of the conclusion of the hearing has been waived by the parties.
- B. Joyce Day and Alvin Day Jr. have demonstrated standing to file the instant appeal and are hereby granted leave to intervene as of right pursuant to Board Rule of Procedure 22(A)(7).
- C. ANR is hereby granted party status pursuant to Board Rule of Procedure 22(A)(4).
- D. Unifirst is hereby granted party status pursuant to Board Rule of Procedure 22(A)(7).

- E. This Preheating Order, including the Schedule set forth at Section IX, above, shall guide the course of the remainder of this proceeding. Any party who wishes to object to this order may do so, but shall file such objection not later than **4:30 p.m. on Tuesday, December 23, 1997**. Additional prehearing conferences and supplemental orders may be required prior to the hearing, particularly in regards to the potential bifurcation of issues discussed at Section VII, E. If a subsequent prehearing conference is conducted for this or any other purpose, parties will receive written notice.

Dated at Montpelier on this 12th day of December, 1997.

WATER RESOURCES BOARD
by its Chair



William Boyd Davies