

State of Vermont
WATER RESOURCES BOARD

RE: Lake Bomoseen Association, Inc.
Docket No. CUD-9805 (**DEC #96-502**)
(Application for a twelve inch (12") annual **drawdown** of Lake Bomoseen)

PREHEARING CONFERENCE REPORT AND ORDER

On November 23, 1998, William Boyd Davies, Chair of the Water Resources Board ("Board") convened a preheating conference in Montpelier, Vermont, in the above-captioned matter. The following persons participated:

Lake Bomoseen Association, Inc. ("LBA" or "Appellant") by A. Jeffrey Taylor, Esq., and Matthew Valerio, Esq., Abatiell & Valerio;
Agency of Natural Resources ("ANR") by N. Jonathan Peress, Esq., and Peter Keibel;
Town of Hubbardton Planning Commission ("Hubbardton Planning Commission") by Chairman Tom Spangenberg;
Rutland County Audubon Society by President Roy Pilcher; and
Alan and Claudia Wulff, pro se;

BACKGROUND

On October 2, 1998, the Secretary of the ANR ("Secretary") issued a decision denying a Conditional Use Determination ("CUD") for application #96-502, filed by the Facilities Engineering Division of the Department of Environmental Conservation ("Facilities Engineering, DEC"). The CUD application requested permission for the annual drawdown of Lake Bomoseen ("the Lake") by twelve inches (12") for the purpose of alleviating winter damage to shoreline structures. The Secretary found that there were several Class Two wetland areas in the project area and concluded, based on the information provided in the application, that there was not reasonable assurance that the proposed conditional use would have no undue adverse effects on several of the protected functions of these protected wetlands. The Class Two wetland areas and their adjacent 50-foot buffer zones are located in and around the Lake in the Towns of Castleton and Hubbardton, Vermont.

On October 20, 1998, the Board received a notice of appeal filed by the LBA through its Executive Director, James P. Leamy, Jr. On October 20, 1998, the Board's Executive Officer advised the Appellant that its filing was substantially complete and docketed the matter as CUD-98-05. On November 2, 1998, the Appellant filed an amended notice of appeal through counsel A. Jeffrey Taylor, Esq. This appeal was filed pursuant to 10 V.S.A. §1269 and Section 9 of the Vermont Wetland Rules ("VWR").

On November 4, 1998, a Notice of Appeal and Preheating Conference was issued and subsequently published in the Rutland Herald in accordance with Rule 20 of the Board's

Procedural Rules ("Procedural Rules"). The notice provided that notices of appearance and petitions for party status should be 'riled with the Board on or before November 19, 1998.

On November 23, 1998, the Board's Chair convened a prehearing conference in this matter pursuant to Procedural Rule 24.

II. PURPOSE OF PREHEARING CONFERENCE

The Chair described the purpose of a preheating conference. See Procedural Rule 24. The Chair advised those present to obtain copies of the Procedural Rules, as well as the VWR, to prepare for the hearing in this matter. The Chair advised the parties that the Board is in the process of amending its Procedural Rules and the VWR. He noted, however, that even if new rules are adopted during the pendency of this proceeding, the Procedural Rules (effective April 25, 1988) and the VWR (adopted Feb. 7, 1990, as amended Sept. 19, 1990) will govern practice before the Board in this case.

The Chair further advised those present that a summary of the preheating conference and any rulings on scheduling and other matters would be contained in a Prehearing Conference Report and Order which would issue within a week of the preheating conference.

III. DISCLOSURES

The Chair identified for the preheating conference participants the current Board members: members Davies, Einstein, Gossens, Osherenko, and Potvin. He distributed copies of biographical notes for these Board members. See enclosure.

The Chair asked the preheating conference participants whether they were aware of any conflicts of interest or other disqualifying interests which might prevent one or more of the identified Board members from serving as decision makers in this proceeding.

Those participating in the preheating conference indicated that they were not aware of **any** conflicts of interest or other circumstances requiring disqualification of one or more of the named Board members. The Chair noted that the Prehearing Conference Report and Order would contain a deadline for the filing of any requests for disqualification. Should new appointments be made to the Board during the pendency of this proceeding, or should the Chair need to appoint a former Board member to sit on this case (10 V.S.A. §905(1)(F)), additional disclosures will be made to the parties so that they may have an opportunity to file any requests for disqualification of these individuals.

IV. EX PARTE CONTACTS

The Chair emphasized that this is a contested case proceeding and he cautioned the prehearing conference participants against communicating directly with Board members concerning this matter during its pendency. He directed all persons having procedural questions to bring them to the attention of the Board's attorney Kristina Bielenberg (Phone: 828-5443).

V. PRELIMINARY ISSUES

A. Party Status

The Chair noted that numerous notices of appearance and party status petitions had been received by the November 19, 1998, deadline. See copies of petitions on file with the Board. He identified the following persons who own property adjoining Lake Bomoseen and who oppose the proposed Lake drawdown and therefore seek Board affirmance of the Secretary's decision:

Sonya Wulff, Hubbardton, family owns lakeshore property on northwest shore of Lake;
Tanya Wulff, Hubbardton, family owns lakeshore property, northwest shore of Lake;
Alan and Claudia Wulff, Hubbardton, lakeshore property owners, northwest shore of Lake;
Thomas Evanoika, owner of Tom's Bait Shop, Castleton, a Lake-dependent business;
Maryanne Adamcik, Hopewell, NJ, owner of property adjoining Lake;
Ronald and Regina Deer, Hubbardton, property owners bordering Class Two wetland on Lake;
Edward J. Sherowski, Castleton, lakeshore property owner, east shore of Lake;
Barbara Carlo, Troy, NY, lakeshore property owner, south of Mason Point, the Lake;
Frank and Annette Sequino, New Hyde Park, NY, lakeshore property owners, east shore of Lake;
Jack Clifford and Martha Francis-Clifford, Castleton, lakeshore property owners, north end of Lake;
Ray and Pat Williams, Hubbardton, lakeshore property owners, north end of Lake;
Wynn Griffith, Hubbardton, lakeshore property owner, northeast shore of Lake;
Frances C. and Henry J. Bargmann, Hubbardton, lakeshore property owners, northern end of the Lake;
David L. Picta, Durham, CT, lakeshore property owner, north of Float Bridge Road, the Lake;
Doug and Carolyn Houghton, Hubbardton, lakeshore property owners, north end of Lake;

Others entering timely appearances were:

Rutland County Audubon Society, Pittsford, by David Yates, Treasurer (supporting the Secretary's decision);

Hubbardton Planning Commission, by Chairman Tom Spangenberg (supporting the Secretary's

decision);

ANR by N. Jonathan Peress, Esq., and Jon Groveman, Esq.; and Lesley M. Nagot, Benson, a person who makes recreational use of the Lake, but who does not own property on its shores (supporting the Secretary's decision).

A petition and various letters from persons opposing the proposed drawdown were also tiled with the Board on or before November 19, 1998. The Conservation Law Foundation ("CLF") asked to be placed on the certificate of service.

The Chair asked all of the persons present at the prehearing conference whether they had any objections to the grant of party status to the above-named adjoining property owners, the Rutland County Audubon Society, and Ms. Nagot. The Appellant indicated that it had objections to the grant of party status to those persons who did not tile petitions in accordance with the requirements of Procedural Rule 22. The Appellant, however, did not specify which individuals or entities it objected to.

The Chair advised the prehearing conference participants that they would be provided an opportunity to tile formal objections to party status petitions and responses. Once party status rulings are made, he encouraged those persons and organizations granted party status with similar affected interests or positions with respect to the Secretary's decision to coordinate the preparation of testimony and exhibits in order to reduce unnecessary redundancy in evidence and thereby expedite the hearing process. See Procedural Rule 22(B)(4).

B. Representation

The Chair brought to the prehearing conference participants' attention Rule 23(B) governing representation by parties. The Chair indicated that if the Wulffs were going to serve as official representatives for neighboring shoreland owners and others who might be granted party status, he would require them to secure the written authorizations of these individuals to serve in such a representative capacity. He further advised them that in light of the fact that the shoreland owners supporting the Secretary's decision were not organized as a formal group or association, that none of the petitioners had indicated that they either could not afford legal counsel or that they had not been able to secure pro bono legal services, and the Wulffs were not familiar with contested case procedures, they should seriously consider whether it would be advisable for them to assume the role of legal representatives for their neighbors. He referred them to the Vermont Supreme Court decision in Vermont Agency of Natural Resources v. Upper Valley Regional Landfill, Corn., 159 Vt. 454 (1992), a copy of which was provided to the Wulffs before the close of the prehearing conference.

The Chair further advised the Wulffs that nothing in the Procedural Rules precluded them from representing themselves, pro se, in this proceeding nor were other individuals granted party

status precluded from representing themselves without counsel. However, the Chair emphasized that since this was a contested case proceeding involving several potentially difficult legal issues, the Wulffs would do well to consult with their neighbors about the merits of retaining an attorney to represent them as a group to the extent that they have common affected interests and positions.

The Chair also asked Roy Pilcher whether he or David Yates was the duly authorized representative for the Rutland County Audubon Society. The Chair noted that the Board would need a statement from the Board of Directors or equivalent governing body authorizing one person to serve as the Society's representative in this proceeding.

The Chair noted that the Prehearing Conference Report and Order would set forth requirements for the filing of written authorizations for representatives. He noted, however, that parties are free to withdraw and to substitute representatives at any point in the proceeding upon the filing of written notice to the Board and all parties.

C. Real Party In Interest

The Chair asked counsel for the ANR to clarify the identity of his client. Counsel reported that he and co-counsel Groveman would be defending the Secretary's decision. The Chair inquired whether Facilities Engineering, DEC, the applicant for the subject CUD, was represented in this proceeding. Counsel for ANR indicated that Facilities Engineering, DEC, had not appealed the Secretary's decision nor filed an entry of appearance through counsel. He further indicated that it was the ANR's position that LBA "stood in the shoes" of the CUD applicant and would be putting forward a case in support of issuance of a CUD for the proposed drawdown.

The Chair further inquired whether LBA had the requisite interest to litigate this matter in lieu of the CUD applicant. He asked counsel for ANR whether this matter might not be moot if in fact LBA did not have authority to control the dam and could not be required to mitigate undue adverse effects even if mitigation was theoretically possible.

Counsel for the Appellant indicated that it would likely call Facilities Engineering, DEC, staff as fact witnesses if Facilities Engineering did not participate as a party to this proceeding. Counsel for ANR resisted such a suggestion and indicated that instead he would be happy to meet with the Appellant's representative to discuss ways that this proceeding might move forward with a "substitution" of CUD applicant, a stipulation of facts to support LBA's standing or some other proposal for the procedural resolution of this matter.

The Chair stated that he would require the parties to address as a preliminary matter whether Facilities Engineering, DEC, is a necessary party to this proceeding and whether LBA

has the requisite standing to bring this appeal in place of the CUD applicant. He indicated that the Prehearing Conference Report and Order would contain deadlines for the filing of legal memoranda and responsive memoranda by any and all parties on these issues.

VI. STANDARD OF REVIEW

The Chair reminded the prehearing conference participants that appeals filed pursuant to 10 V.S.A. §1269 are heard ~~de novo~~. As a consequence, parties are forewarned that any evidence that might have been submitted to the ANR in support of or in opposition to the application for CUD #96-502, including the application itself, must be resubmitted to the Board in the form of **prefiled** exhibits and testimony.

The Chair further reminded the prehearing conference participants that the CUD applicant has the burden of proof and persuasion in proving that it is entitled to a CUD, applying the standards set forth in Section 8.5 of the VWR and analyzing the effects of the proposed drawdown upon all ten protected functions listed in Section 5 of the VWR. Because the Appellant is not the CUD applicant, the Chair asked the parties to consider whether the Appellant could meet its burden of proof, particularly with respect to mitigation of any undue adverse effects to protected functions resulting from the proposed drawdown. Even if mitigation is scientifically possible, the Chair wondered how mitigation could be practically implemented without the participation and consent of the CUD applicant.

VII. ISSUES

The Secretary found that there were seven Class two wetland areas associated with the Lake. He found that the proposed drawdown would have an undue adverse affect on at least six of the wetland areas. The Secretary also found that the wetlands surveyed by the DEC's consultant, DuBois & King, were significant with respect to all ten protected functions listed in Section 5 of the VWR. However, the Secretary found that the proposed drawdown would have an undue adverse effect with respect to only functions 5.4 (wildlife and migratory bird habitat), 5.5 (hydrophytic vegetation habitat), and 5.8 (recreational value). The Secretary found that **alternatives** to the proposed drawdown exist to achieve the project's purpose of minimizing ice damage to shoreline structures. Therefore, the Secretary implicitly concluded that the mitigation standards of Section 5.5(b) had not been met. Accordingly, based on the information supplied by the applicant, the Secretary concluded that there was not reasonable assurance that the proposed conditional use would have no undue adverse effects upon the protected functions of the Class Two wetlands associated with the Lake.

On appeal, the Appellant seeks reversal of the Secretary's decision denying CUD application #96-502 based on several grounds which focus on the mitigation standards of Section 8.5(b) and on the ANR's general interpretation and application of Section 8.5 of the VWR. In its November 2, 1998, Notice of Appeal, the Appellant disputes several factual conclusions found in the DuBois & King report and the Secretary's findings based on those conclusions.

In its Notice of Appeal, the Appellant did not challenge the Secretary's findings that the project was significant for all ten functions and that functions 5.4 (wildlife and migratory bird habitat), 5.5. (hydrophytic vegetation habitat), and 5.8 (recreational value) would be adversely affected by the proposed drawdown. However, the Chair concluded that the Appellant did challenge the Secretary determination that the effects of the project would have an undue adverse effect on the protected functions because of the Secretary's alleged failure to consider possible mitigation of those adverse impacts.

The Chair reminded the preheating conference participants that because the appeal was taken from a denial of a CUD application and because such matters are heard by the Board anew, the Appellant who seeks reversal of the Secretary's decision has the burden of proving that a CUD should be granted. In other words, it is not incumbent on the Secretary to prove that a CUD should be denied; rather, the Appellant is required to offer affirmative proof that any adverse impacts on protected functions would not be undue, to the extent necessary to achieve no net undue adverse effect, applying the five mitigation standards set forth in Section 8.5(b) of the Rules. Therefore, the Chair restated the issues on appeal as follows:

- (1) Whether the proposed drawdown will have more than minimal adverse impacts upon any of the protected wetland functions identified in Section 5 VWR, presumed to be present in the Class Two wetland areas associated with the Lake.

The Chair noted that the Secretary's decision identified the key functions at issue as 5.4, 5.5, and 5.8 of the VWR, however, since the wetlands at issue are presumed to be significant for all ten functions under Section V. the Appellant would need to provide evidence with respect to the project's impacts on all functions to some degree but could focus its case on those functions specifically identified by the other parties as at issue. In this regard, the ANR indicated that new evidence suggested that the proposed drawdown might also have an undue adverse effect on function 5.6 (threatened and endangered species habitat) and it asked leave to present evidence with respect to this function over the Appellant's objection. Similarly, Claudia Wulff argued that the affects of the proposed drawdown would be visible from Route 30 and therefore she indicated that she might provide evidence on the question whether the project would have an undue adverse effect upon function 5.9 (open space and aesthetics). The Appellant indicated that it would likely prepare evidence with respect to function 5.3 (fisheries habitat) in anticipation that the ANR would place this function in issue.

- (2) If the proposed drawdown will have more than minimal adverse impacts upon one or more of the protected functions, whether the applicant has mitigated these impacts, to the extent necessary to achieve no net undue adverse effect by demonstrating:
- (a) The proposed drawdown cannot practicably be accomplished through action located on the upland portion of the site in question or on another site owned, controlled or available to satisfy the basic project purpose; and
 - (b) All practicable measures have been taken to avoid adverse impacts on protected functions; and
 - (c) The applicant has evaluated each of the protected functions in accordance with the protocols determined by the Department of Environmental Conservation; and
 - (d) The proposed drawdown has been planned to minimize potential adverse impacts on the protected functions; and
 - (e) A plan has been developed for the prompt restoration of any adverse impacts on protected functions.

The Chair reviewed these issues with the preheating conference participants and the Appellant and others indicated that they fairly represented the matters in dispute to be decided by the Board.

VIII. WITNESSES AND EXHIBITS

The Chair explained to the preheating conference participants that prefiled testimony and exhibits would be required in this proceeding. The Chair asked each participant to provide a preliminary list of witnesses and exhibits, noting that deadlines for final lists of witnesses and exhibits would be set forth in the Preheating Conference Report and Order.

The Appellant indicated that it would be calling three or four witnesses: an expert on aquatic biology, an aquatic facilities expert, an expert on macrophytic and microphytic species, and potentially an expert or two on endangered species of vegetation and fisheries should the agency present new evidence with respect to functions 5.6 and 5.3.

The ANR indicated that it would be calling up to eight witnesses: a botanist, an invertebrate specialist, a herpetologist, a fisheries biologist, a lake ecologist, a hydrologist, one or more persons knowledgeable about threatened and endangered flora and fauna, a staff person

from Facilities Engineering, and a wetlands generalist.

The Rutland County Audubon Society indicated that it would be calling one witness knowledgeable about birds and bird habitat.

Alan and Claudia Wulff indicated that, in addition to themselves, they reserved the right to call three or four witnesses, although they were not prepared to identify with specificity who these persons might be at this point. However, they might have fewer witnesses depending on whether and how they coordinated their case with that of the ANR.

The Hubbardton Planning Commission indicated that it would not be calling any witnesses.

The Chair noted that the Prehearing Conference Report and Order would contain specific instructions for the pretiling of testimony and exhibits. He noted, however, that with respect to all filings, the parties are required to file an original and five copies with the Board as well as a certificate of service indicating that each of the persons listed has been sent a copy of the tiling in person or by first-class mail.

The Chair also noted that a second prehearing conference would be scheduled about a week before the hearing at which time he would make *evidentiary* rulings based on *prefiled* objections and review final plans for the hearing day agenda, including time budgets for examination of witnesses.

The Chair encouraged those granted party status to work together, if possible, to prepare stipulated facts, identify exhibits to which there would be no objections, and develop a joint site visit itinerary and proposed report of site visit observations. He placed great emphasis on the importance of cooperation in the development of a site visit plan.

IX. HEARING DAY SCHEDULE

The Chair outlined for the preheating conference participants the typical hearing day schedule and answered their procedural questions. Since prefiled testimony is required in this proceeding, the Chair noted that the better part of the hearing day would be devoted to the site visit and the cross-examination of witnesses.

The Chair also noted that the hearing in this matter would be scheduled at a public facility in close proximity to the Lake and the subject wetlands. He encouraged the parties to contact attorney Bielenberg about suggestions of possible hearing locations.

The proposed hearing day schedule is as follows:

- 9:00 a.m.** Parties arrive at hearing site and review last minute details with Board's counsel.
- 9:30 a.m.** Hearing convened and Chair offers introductory comments.
- 9:40 a.m.** Five-minute opening statements by the parties, starting with the Appellant and the ANR and proceeding to statements by others as they so elect.
- 10:00 a.m.** Board departs for a site visit of the subject wetland and project site.
- 11:00 a.m.** Board returns to hearing site and reconvenes the hearing.
- 11:05 a.m.** Board places site visit observations on the record.
- 11:30 a.m.** Appellant offers all pretilled direct and rebuttal evidence; ANR and other parties conduct cross-examination of Appellant's witnesses, followed by redirect, recross and Board questions. Other parties likewise have opportunity for cross-examination of Appellant's witnesses, followed by redirect, recross and Board questions.
- (Board breaks for ½ hour lunch)
- 2:00 p.m.** ANR offers all pretilled direct and rebuttal evidence; Appellant and other parties conduct cross-examination of ANR's witnesses, followed by redirect, recross and Board questions.
- 4:00 p.m.** Other parties offer all pretilled direct and rebuttal evidence; Appellant and ANR are provided with an opportunity to cross-examine other parties' witnesses, followed by redirect, recross and Board questions.
- 5:00 p.m.** Time permitting, five-minute closing statements by parties.
- 5:20 p.m.** Closing instructions by the Chair.
- 5:30 p.m.** Recess Hearing and Board holds Preliminary Deliberation.

The Chair noted that those petitioners granted party status should plan their cases in accordance with the above estimated time allotments. If a party concludes that additional time will be required to present its case, that party must file a request for additional time in accordance

with the Preheating Conference Report and Order. Again, the Chair encouraged the parties to coordinate their testimony and argument so as to eliminate redundancy and achieve efficiency in the presentation of their respective cases. He noted that if time were not available for closing statements, the parties could address their arguments to the Board in post-hearing proposed findings of fact, conclusions of law and orders.

The Chair discussed with the prehearing conference participants the logistics for scheduling this matter for a hearing. A case such as this would normally be scheduled for late March or April in order to meet the 6-month performance deadline established by the Board. The Chair asked the prehearing conference participants whether they foresaw any obstacles to the scheduling of a hearing between mid-March and early May. Counsel for the ANR indicated that he planned to go on vacation during the first two weeks of May. Attorney Valerio anticipated that he would be on vacation during the school break in April. The Chair indicated that he would try to accommodate the parties' concerns and in all likelihood this matter would be scheduled for hearing in late April. He noted, however, that he might not be able to satisfy everyone's scheduling concerns.

X. ORDER

1. On or before **4:30 p.m., Friday, December 11, 1998**, those persons objecting to the grant of party status to any petitioner so identified in Section V.(A) shall file written objections supported by legal memoranda tiled with the Board.
2. On or before **4:30 p.m., Friday, December 11, 1998**, all requests for disqualification of any Board member identified in Section III. shall be filed with the Board. Any such request shall be accompanied by a statement of facts and legal memorandum in support of Board member disqualification.
3. On or before **4:30 p.m., Tuesday, December 22, 1998**, any person may file a responsive memorandum to any objection to the grant of party status tiled in accordance with Item 1.
4. On or before **4:30 p.m., Tuesday, December 22, 1998**, the Appellant, ANR, Hubbardton Planning Commission and any party status petitioner identified in Section V.(A) may file motions supported by legal memoranda on any preliminary issues, including but not limited to those identified in Section V(C).
5. On or before **4:30 p.m., Tuesday, January 5, 1999**, the Appellant, ANR, Hubbardton Planning Commission and any party status petitioner identified in Section V.(A) may file any responsive legal memoranda with respect to the preliminary issues filed in

accordance with Item 4. above.

6. On or before **4:30 p.m., Tuesday, January 5, 1999**, the Rutland County Audubon Society shall file a statement authorizing a specific officer or other person to serve as its representative in this proceeding. On or before the same deadline, Alan and Claudia Wulff shall either notify the Board that they (and other party status petitioners) have retained legal counsel for their representative or advise the Board that they intend to represent themselves as individuals, pro se (without counsel).
7. The Board shall deliberate respecting any party status or preliminary issue timely raised at its regular meeting on **Tuesday, January 12, 1999**, and issue a memorandum of decision shortly thereafter.
8. Unless otherwise directed by a decision or order of the Board or its Chair issued subsequent to this Prehearing Conference Report and Order, the Appellant and any party supporting issuance of the CUD shall file on or before **4:30 p.m., Tuesday, February 23, 1999**, lists of prefiled testimony and exhibits and prefiled direct testimony and exhibits for all witnesses it intends to present.

Prefiled direct exhibits which are larger than 8% by 11 inches must only be identified to the parties, **but one copy of all such exhibits must be filed with the Board**, and will be available for inspection and copying at the Board's office by any party prior to the hearing.

9. On or before **4:30 p.m., Tuesday, March 16, 1999**, the ANR and those parties supporting the Secretary's decision shall file lists of prefiled testimony and exhibits and prefiled direct testimony and exhibits for all witnesses it intends to present.

Prefiled direct exhibits which are larger than 8% by 11 inches must only be identified to the parties, **but one copy of all such exhibits must be filed with the Board**, and will be available for inspection and copying at the Board's office by any party prior to the hearing.

10. On or before **4:30 p.m., Tuesday, March 30, 1999**, all parties shall file revised lists of **prefiled** testimony and exhibits and prefiled rebuttal testimony and exhibits.

Prefiled rebuttal exhibits which are larger than 8% by 11 inches must only be identified to the parties, **but one copy of all such exhibits must be filed with the Board**, and will be available for inspection and copying at the Board's office by any party prior to the hearing.

11. On or before **4:30 p.m., Tuesday, April 6, 1999**, parties shall submit a single, combined list of all prefiled testimony and exhibits.
12. On or before **4:30 p.m., Tuesday, April 6, 1999**, parties shall file in writing all evidentiary objections to all prefiled testimony and exhibits previously filed, except exhibits larger than 8 1/2 by 11 inches, or such objections shall be deemed waived.
13. On or before **4:30 p.m., Tuesday, April 6, 1999**, parties shall file in writing requests for time beyond those given in Section IX. above. The Chair may allow more time if good cause is shown.
14. On or before **4:30 p.m., Tuesday, April 6, 1999**, parties shall file a joint proposed itinerary for the site visit to be held on April 27, 1999. To the extent that the parties cannot agree concerning the relevancy of any proposed site visit itinerary item, they should communicate *their* disagreement in writing so that the Chair may rule on the scope of the proposed site visit itinerary.
15. The Chair will conduct a second prehearing conference by telephone on **Tuesday, April 13, 1999 at 1:00 p.m.** to address any pending evidentiary objections, site visit issues, and other matters preliminary to the hearing on the merits. Any party wishing to participate in this conference by telephone should so advise the Board's Secretary, Karen Dupont (802-828-2870) on or before 12:00 noon on **Tuesday, April 6, 1999**. The Board's staff will arrange the conference call.
16. On **Tuesday, April 27, 1999**, the Board will convene a hearing in this matter. The specific time and location of this hearing shall be announced later.
17. The hearing will be recorded electronically by the Board or, upon request, by a stenographic reporter, provided such request is made on or before **4:30 p.m., Tuesday, April 6, 1999**. Any party wishing to have a stenographic reporter present or a transcript of the proceedings must make his or her own arrangements with a reporter. One copy of any transcript made of the proceedings must be filed with the Board at no cost to the Board. See Procedural Rule 28(C).
18. On or before **4:30 p.m., Tuesday, May 4, 1999**, parties may file proposed findings of fact, conclusions of law, and orders.
19. No individual may be called as a witness in this matter if he or she has not filed prefiled testimony or exhibits in compliance with this Prehearing Order. All reports and other documents that constitute substantive testimony must be filed with the prefiled testimony.

If prefiled testimony has not been submitted by the date specified, the witness may not be permitted to testify.

20. The Board may waive the tiling requirements upon a showing of good cause, unless such waiver would unfairly prejudice the rights of other parties.
21. Parties shall file an original and five **collated copies** of prefiled testimony, legal memoranda, all exhibits which are 8 1/2 by 11 inches or smaller, and any other documents tiled with the Board, and mail one copy to each of the **persons** listed on the enclosed Certificate of Service. The Certificate of Service will be revised once party status determinations have been made and a revised Certificate of Service will be sent to you at that time for your use in serving parties only.

Legal memoranda shall be no more than twenty-five pages and proposed findings of fact and conclusions of law shall be no more than fifty pages.

22. All parties shall label their prefiled testimony and exhibits with their name. The labels on the exhibits must contain the words WATER RESOURCES BOARD, Re: Lake Bomoseen Assoc., Inc., Docket No. CUD-98-05, the number of the exhibit, and a space for the Board to mark whether the exhibit has been admitted and to mark the date of admission. **The completed labels must be affixed to all prefiled testimony and exhibits prior to submission to the Board.** Label stickers are available from the Board on request.

With respect to labeling, each party is assigned a letter or letters as follows: "LBA" for the Appellant, "ANR" for the Agency of Natural Resources, "HPC" for Hubbardton Planning Commission. Should the Rutland County Audubon Society be granted party status, it will be assigned the letters "RCA." All individuals granted party status should use the **first** initials of their **first** and last names (for example, Alan and Claudia Wulff would be "ACW").

Exhibits shall be assigned consecutive numbers. For example, the Appellant would number its exhibits LBA-1, LBA-2, LBA-3, etc. If an exhibit consists of more than one piece (such as a site plan with multiple sheets), letters will be used for each piece, i.e. LBA-2A, LBA-2B, etc. However, each page of a **multi-page** exhibit need not be labeled.

Concerning preparation of the combined list of all prefiled testimony and exhibits, the list must state the full name of the party at the top and the Board's case number. There must be three columns, from left to right: NUMBER, DESCRIPTION, and STATUS. The list must include exhibits and prefiled testimony. An example is as follows:

LAKE BOMOSEEN ASSOCIATION, INC.'S
LIST OF EXHIBITS
RE: LAKE BOMOSEEN ASSOCIATION, CUD-98-05

<u>Number</u>	<u>Description</u>	<u>Status</u>
LBA-1	Prefiled Direct Testimony of _____, Civil Engineer	
LBA-2	Resume of Civil Engineer _____	
LBA-3	CUD Application filed with Secretary on _____.	
LBA-3A-D	Survey dated _____, sheets 3A through 3D	

The Board will use the status column to mark whether or not the exhibit has been admitted.

Exhibits offered to the Secretary for his consideration in evaluating the CUD request, if they are to be considered by the Board de novo, must be introduced into the evidentiary record anew in this proceeding.

23. Pursuant to Procedural Rule 24(B), this Order is binding on all parties who have received notice of the prehearing conference, unless a written objection to the Order, in whole or in part, is filed on or before **4:30 p.m., Tuesday, December 8, 1998**, or a showing of cause for, or fairness requires, waiver of a requirement of this Order. The filing of an objection shall not automatically toll that portion of the order to which an objection is made.

Dated at Montpelier, Vermont this 30th day of November, 1998.

WATER RESOURCES BOARD



William Boyd Davies
Chair