

**State of Vermont
WATER RESOURCES BOARD**

PREHEARING CONFERENCE REPORT AND ORDER

**RE: Killington Ltd.
Killington Road
Killington, Vermont 05751**

**Docket No. WQC-97-10
(Appeal of DEC's issuance of §401
Water Quality Certificate)
and
Docket No. MLP-97-09
(Appeal of DEC's MLP
Permit #97-26)**

I. BACKGROUND

The Water Resources Board ("Board") received notices of appeal in December of 1997 in the above-captioned matters. Specifically, on December 1, 1997, Nicholas J. Lenge tiled an appeal from Department of Environmental Conservation ("DEC") Permit #97-26 which authorized encroachments and water level fluctuations of the Woodward Reservoir. The following persons, in addition to Mr. Lenge, joined in the appeal: Thomas and Valerie Hickey, Joseph E. Calabrese, Thomas J. Calabrese, Lucas Krupywnckuj and Allison Peck, Gilford and Shirley Richardson, Jonathon and Paula Tucker, Paul M. Dorr and Christene M. Baranowski, William and Janice Nacel, John Tidd¹ and George and Patricia Hodgdon (hereinafter called the "MLP Appellants"). The Board docketed the appeal of DEC Permit #97-26 as MLP-97-09. On December 5, 1997, Nicholas J. Lenge, Joseph E. Calabrese, Thomas J. Calabrese, and Lucas Krupywnckuj ("§401 Appellants") tiled an appeal seeking review of a decision by the DEC of the Agency of Natural Resources ("ANR"), granting to Killington Ltd. ("Killington") a \$401 Water Quality Certification ("Certification") in conjunction with Killington's Woodward Reservoir Snowmaking Expansion ("Woodward Project") and its Killington/Pico Interconnect Project ("Interconnect Project"), referred to collectively as the "Project".

On December 19, 1997, William Boyd Davies, Chair of the Water Resources Board convened a prehearing conference relative to MLP-97-09. On December 24, 1997, Chair Davies issued a Memorandum to Parties regarding dates for filing of memoranda concerning party status and the scope of issues on appeal relative to the MLP Appeal. In response to the Chair's request regarding the MLP Appeal, Appellants tiled, on January 5, 1998, a Memorandum in Support of Party Status; on January 6, 1998, Killington tiled an Objection to Appellant's Notice of Appeal; and on January 12, 1998, Appellants filed a response to Killington's Objection to Notice of Appeal and Killington tiled a response to Appellants' Memorandum in Support of Party Status.

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Mr. Tidd later declined to seek party status in the MLP proceeding.

On January 22, 1998, Chair Davies convened a preheating conference relative to WQC-97-10, and a second prehearing conference in MLP-97-09.2 A portion of the January 22, 1998 preheating conference was a combined preheating relative to both of the above-captioned cases. On or before the January 22, 1998 prehearing conference, all persons or entities which had prepared party standing requests with respect to either case submitted those to the Board. In addition, certain parties who chose to intervene as of right in the §401 Appeal participated in the prehearing conference and submitted their entries of appearance. At the prehearing conference, Chair Davies set forth several tiling deadlines relative to the §401 Appeal which allowed the Appellants additional time in which to: state what they maintained to be the relevant issues under consideration; clarify those seeking party status; and to suggest any appropriate requirements of state law that should be considered by the Board in the §401 Appeal. Other parties in the §401 Appeal were allowed to respond by a date certain. Provision was made for brief oral argument on these issues if requested by any party.

On January 26, 1998, counsel for the MLP Appellants and the §401 Appellants filed a Motion to Consolidate Hearings. Chair Davies issued a ruling on February 23, 1998 granting the consolidation request emphasizing that the consolidation of the appeals was only with respect to tiling schedules and a coordinated presentation of evidence. Such consolidation, as was noted in the February 23, 1998 Order, does not merge the above-captioned appeals into a single cause, or change the rights of the parties, or make the parties in the MLP Appeal parties in the §401 Appeal, or vice-versa.

On February 10, 1998, the Board issued a Memorandum of Decision with respect to MLP-97-09 concerning the party standing and scope of appeal issues. On February 18, 1998, Killington filed a Motion to Alter seeking clarification of the scope of public good factors which were in issue. Appellants filed a timely Response to Motion to Alter on February 27, 1998. The full Board deliberated with respect to the Motion to Alter on March 10, 1998 and on March 20, 1998, issued a Memorandum of Decision with final rulings on party standing and the scope of appeal in the MLP Appeal.

On February 23, 1998, Chair Davies issued Rulings on Party Standing relative to the §401 Appeal and issued corrections to certain filing deadlines. Only one objection to

Also on January 22, 1998, a prehearing conference was convened by Environmental Board Chairwoman, Marcy Harding, concerning the appeal of Act 250 permit #1R0813-5. The Act 250 appeal involves substantially the same parties as those identified in the above-captioned proceedings. The Act 250 proceeding will follow an independent filing schedule and the merits hearing is scheduled for July 7, 1998.

the party standing determinations in the §401 Appeal was noted.

Numerous filings were received by the Board with respect to the scope of review and appropriate state law issues in the §401 Appeal, at least one of which sought oral argument on these issues. Accordingly, on March 10, 1998, the Board heard brief oral arguments. Immediately thereafter, the Board deliberated with respect to the issues. On March 30, 1998, the Board issued a Memorandum of Decision relative to the 5401 Appeal ruling on the scope of appeal and the other appropriate requirements of state law that will be considered. Additionally, the Board affirmed the one Chair's Ruling on Party Standing, pertaining to the Belangers, which had been appealed.

Pursuant to Water Resources Board Rule of Procedure ("WBR") 24(B), this Prehearing Order, including the Memoranda of Decision, and Rulings on Party Standing referred to above and which are incorporated herein by reference, shall control the subsequent course of these proceedings.

II. REMAINING PRELIMINARY MATTERS

A. DISCLOSURES AND POTENTIAL CONFLICTS

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. No issues arise to the level at which they would constitute either an actual or perceived conflict of interest.

Among the parties to these proceedings are Barry and Lynne Lawson. Barry Lawson is a professional facilitator who is currently providing his services to ANR pursuant to a contract which, among other things, directs Mr. Lawson to convene meetings of a collaborative task group with the ultimate aim of proposing to the Board revisions to the current Vermont Water Quality Standards. Board staff have played an advisory role with respect to the task group and have consistently discussed issues pertaining to the VWQS with Mr. Lawson and other task group participants over the past year. Mr. Lawson is expected to present the proposed recommendations of the task group to the Board in the form of a summary report during the month of April, 1998. Although interpretation of the VWQS is central to the present appeal, Mr. Lawson's involvement with the VWQS has been extremely general and Board staff have exercised caution not to discuss the present case or any pending matter with Mr. Lawson. Any subsequent conversation between Mr. Lawson and the Board members will be restricted to the recommendations of the task group relative to proposed rule changes and will not address the above-captioned appeal or any other case pending before the Board.

Any potential concerns involving Mr. Lawson's participation may be dismissed altogether because he has informally indicated to Board staff that he does not seek to be a party in the above-captioned matters and that his initial involvement with the Woodward Project arose from the Act 250 proceedings before the District #1 Environmental Commission. No written confirmation of the Lawsons' request to withdraw as parties has been tiled to date. Accordingly, Barry and Lynne Lawson continue to be parties in the referenced appeals.

B. SITE VISIT AND PROTOCOL

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.

C. COURT REPORTERS AND STENOGRAPHIC RECORD

WBR 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, May 22, 1998**. Copies of any transcript shall be distributed pursuant to WBR 28(C).

D. ISSUED WITH THIS PREHEARING ORDER A CORRECTED MEMORANDUM OF DECISION IN THE §401 APPEAL

Pursuant to WBR 29(B), the Board is issuing along with this Prehearing Order a corrected page 15 of the Memorandum of Decision dated March 30, 1998. The issuance of this corrected page merely corrects a typographical error on the line with the heading titled "Order." The Roman numeral V. should be III. Such correction shall not affect the effective date of the decision for purposes of computing the period allowed for an appeal or a motion to alter.

E. PETITIONS FOR AMICUS CURIAE STATUS

On March 2, 1998, Chris Kilian, Esq., on behalf of the Vermont Natural Resources Council ("VNRC"), tiled a Petition for Status as an Amicus Curiae, raising particular concerns with aspects of the Project that might adversely impact Class A watersheds. VNRC is an approximately 5000 member Vermont conservation organization with a water resources program and significant expertise involving

interpretation of the Clean Water Act. VNRC has been a participant in several matters before this Board involving the appropriate management of Class A watersheds, as well as proceedings involving the applicability of the VWQS to snowmaking activities. VNRC has also had frequent involvement in proceedings before the Board involving §401 water quality certification appeals, in which state and federal water resources regulation intersect.

On March 9, 1998, David Kelley, Esq., on behalf of the Vermont Ski Areas Association (“VSAA”) filed a Motion for Leave to Intervene as Amicus Curiae relative to the §401 Appeal. VSAA represents fifteen alpine ski areas in Vermont and has significant interests in the regulatory actions and legal interpretations which may affect its member ski areas.

Both VNRC and VSAA’s motions raise concerns which relate most directly to the potential impacts associated with the Interconnect Project. The Board’s Memorandum of Decision dated March 30, 1998 limiting the scope of review may render moot some of the issues which these Amicus Petitioners have raised. In addition, however, each has expressed legitimate concerns about interpretation of the VWQS and the Snowmaking Rules which will be the subject matter of the §401 Appeal.

The Amicus Petitioners possess substantial knowledge of the water quality issues associated with this type of project and each may be affected in future cases by the manner in which the Board interprets the VWQS in this context. Accordingly, the Board will grant both VNRC and the VSAA status as *amicus curiae* in the matter WQC-97-10 to provide legal memoranda on the legal issues as stated in the Memoranda of Decision dated March 30, 1998. Any such filing shall not exceed 20 pages in length and shall otherwise be filed in accordance with the Board’s Rules of Procedure. The filing deadline for such legal memoranda shall be the same as that which has been established for parties in this case, **4:30 p.m. on Friday, May 22, 1998**. Supplemental memoranda of law not to exceed 10 pages in length may be filed not later than **4:30 p.m. on Tuesday, June 16, 1998**.

III. WITNESSES, EXHIBITS, AND PREFILED TESTIMONY

A. PRELIMINARY LISTS OF WITNESSES AND EXHIBITS

On December 19, 1998, Killington’s co-counsel, James Caffrey, Esq. filed a Notice of Appearance with respect to Docket No. MLP-97-09 and also submitted a preliminary list of witnesses and exhibits. On January 29, 1998, the MLP Appellants filed their preliminary list of witnesses and exhibits.

Parties in the \$401 Appeal have also made a preliminary identification of witnesses and testimony.

B. FILING REQUIREMENTS

At the time exhibits are tiled, 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. *If the thickness of the combined prefiled testimony exceeds one inch, it shall be three-hole punched and submitted in a binder -preferably with tabs marking the separate sections.* For instance, the Appellants would mark their exhibits A-1, A-2 and so on; Killington will mark exhibits K-1, K-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 tiled with the Board, however, an 8% x 11 inch copy shall be provided to Board members in conformance with WBR 19. *All colorphotographs, 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 Preheating Order reflecting a schedule for filing of final witness lists, exhibits, and establishing the manner in which the Board will hear live testimony may be issued subsequent to this Prehearing Order.

IV. SCHEDULE

- A. On or before **4:30 p.m. on Thursday, April 16, 1998**, any party objecting to Section V.A. of this Preheating Order shall tile such objections with the Board.
- B. On or before **4:30 p.m. on Tuesday, April 21, 1998** all parties shall tile Prefiled Direct Testimony in conformance with the instructions set forth at Section III.B. with the Board.
- C. On or before **4:30 p.m. on Monday, May 11, 1998** all parties shall tile Prefiled Rebuttal Testimony in conformance with the instructions set forth at Section III.B. with the Board.
- D. The Proposed Site Visit Protocol shall also be tiled not later than **4:30 p.m. on Thursday, May 11, 1998**.
- E. *On* or before **4:30 p.m. on Friday, May 22, 1998** all parties shall file Proposed Findings of Fact, Conclusions of Law, and Orders 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.

- F. Also on or before **4:30 p.m. on Friday, May 22, 1998**, those granted status as *amicus curiae* and who **wish** to file memoranda relative to the legal issues in controversy, shall file such memoranda.
 - G. Also on or **before 4:30 p.m. on Friday, May 22, 1998**, any party who chooses to make arrangements to have the hearing recorded by a professional court reporter shall inform the Board and all parties to this proceeding.
 - H. The Site Visit and Hearing will be held on **Tuesday and Wednesday, June 2, 1998 and June 3, 1998 (if necessary)** with the exact time and location to be provided to parties by subsequent written notice.
 - I. Supplemental Proposed Findings of Fact, Conclusions of Law, and Order and supplemental legal memoranda by *amicus curiae* **will** be due within two weeks after the hearing, but not later than **4:30 p.m. on Tuesday, June 16, 1998**.
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V. ORDER

This Preheating Order, including the Schedule set forth herein, shall guide the course of the remainder of this proceeding. Additional preheating conferences and supplemental orders may be required prior to the hearing. If a subsequent prehearing conference is conducted for any purpose, parties will receive written notice.

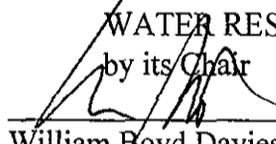
A. AMICUS CURIAE IN THE §401 APPEAL

Both VNRC and VSAA are granted leave to file memoranda on legal issues consistent with sections II.E, IV.F, and IV.1 of this Preheating Order.

B. PARTY STANDING ISSUE IN THE MLP APPEAL

On January 23, 1998, Lynne and Barry Lawson filed a letter with the Board in which they requested party status in the appeal of Permit 97-26. The Lawsons' also sought and have been granted party status in the Certification appeal. See Re: Killington Ltd., Docket No. WQC-97-10, Chair's Rulings on Party Standing at 7 (Feb. 23, 1998); Re: Killington Ltd., Docket No. WQC-97-10, Memorandum of Decision on Scope of Review and Other Appropriate Requirements of State Law at 14 (March 30, 1998). For the reasons stated in the February 23, 1998 Chair's Rulings on Party Standing, the Lawsons are granted party status in the appeal of Permit 97-26.

Dated at Montpelier on this 7th day of April, 1998.

WATER RESOURCES BOARD
by its Chair


William Boyd Davies
Chair

standing.

II. ORDER

A. FINAL STATEMENT OF ISSUES ON APPEAL

1. Whether the Project complies with §1-03 of the VWQS in relation to the Woodward Reservoir and Associated Waters.
2. Whether the Project complies applicable water conservation measures, water use efficiency and ground water alternatives including those set forth in Chapter 16 of the ANR's Environmental Protection Rules entitled "Water Withdrawals for Snowmaking, and in particular, § 16-05 of those Rules
3. Whether the Project complies with the requirements of § 16-05 of the EPRs concerning Water Withdrawals for Snowmaking.
4. Whether the water drawdown (of Woodward Reservoir) will affect ice thickness to the extent that the Project would fail to support the beneficial uses and values set forth at §3-03(A).
5. Whether the Project will comply with §3-01(B)(5) of the VWQS - particularly in regard to the impacts of the Project on the physical and chemical nature of the substrate, the species composition, and the propagation of fish. Such review shall include an analysis of whether the construction of intake and pipeline and the associated tinter water drawdown may result in undue erosion and sedimentation at the Woodward Reservoir.
6. With respect to §3-03(A) and §3-01(B)(5) of the VWQS, as well as the requirement that existing uses shah be protected, whether the Applicant's water level management plan ensures the protection of smelt spawning and protection of other aquatic biota.
7. Whether the Woodward Reservoir and Associated Waterbodies constitute high quality waters thereby implicating the provisions of §1-03 (C).