

State of Vermont
WATER RESOURCES BOARD

RF,: Husky Injection Molding Systems, Inc.
Docket No. MLP-98-06 (DEC #98-13)
(Arrowhead Mountain Lake, Milton, VT)

PREHEARING CONFERENCE REPORT AND ORDER

On December 7, 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:

The Appellants by John L. Franco, Jr., Esq., and Mickey Long
Husky Injection Molding Systems, Inc. ("Husky"), the Permit Applicant, by Dale A. Rocheleau, Esq., and William A. Mason, Esq., Downs Rachlin & Martin, and John Booth and Harry R. Colombo;
Agency of Natural Resources ("ANR") and Department of Environmental Conservation ("DEC") by N. Jonathan Peress, Esq., Jon Groveman, Esq., and Steven Hanna;
Agency of Commerce and Community Development ("ACCD") by John W. Kessler, Esq.;

Town of Milton ("Town") and Town of Milton Planning Commission ("Town Planning Commission") by Gregg H. Wilson, Esq.; and
Chittenden County Regional Planning Commission ("CCRPC") by Arthur Hogan, Jr., Executive Director

I. BACKGROUND

On October 27, 1998, DEC issued Permit No. 98-13 ("Encroachment Permit") to Husky, authorizing the construction of a new bridge over Arrowhead Mountain Lake in the Town of Milton, Vermont ("Project"). The Encroachment Permit was issued pursuant to 29 V.S.A. ch. 11 ("Management of Lakes and Ponds statute").

On November 3, 1998, the Board received a notice of appeal filed by John L. Franco, Jr., Esq., on behalf of his clients, the Building and Construction Trades Council of South Burlington, VT; Richard Prisco of Milton, VT, Bryan Bouchard of Milton, VT; Alan Cadorette of Milton; Jeffery Towne of Milton, VT; Kenneth Cassidy of Milton, VT, Jeffrey Provost of Milton, VT; Kevin Barron of Milton, VT; Scott Carleton of Milton, VT; Chris Bressette of Milton, VT, Michael Hathaway of Milton, VT; Kenneth Smith of Burlington, VT; and Kathleen Richland of Cambridge, VT (individually and collectively "Appellants"). This appeal was filed pursuant to 29 V.S.A. § 406(a).

On November 3, 1998, the Board's Executive Officer advised the Appellants that their filing was substantially complete and docketed the matter as MLP-98-06. On November 5, 1998, a Notice of Appeal, Prehearing Conference, and Hearing was issued and subsequently published in the Burlington Free Press in accordance with Rule 20 of the Board's Procedural Rules ("Rules"). The notice provided that party status petitions should be filed with the Board on or before November 19, 1998.

Those persons filing timely party status petitions were Husky, ANR, ACCD, the Town, and the Town Planning Commission. CCRPC filed its petition on November 25, 1998.

On December 7, 1998, the Board's Chair convened a preheating conference in this matter pursuant to Rule 24.

II. PURPOSE OF PREHEARING CONFERENCE

The Chair described the purpose of a preheating conference. See Rule 24. The Chair advised those present to obtain copies of the Procedural Rules 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. He noted, however, that even if new rules are adopted during the pendency of this proceeding, the Procedural Rules (effective April 25, 1988) will govern practice before the Board in this case.

The Chair further advised those present that his rulings on party status and other matters would be contained in a Prehearing Conference Report and Order which would issue within a week of the prehearing conference.

III. DISCLOSURES

The Chair identified for the prehearing conference participants the current Board members: members Davies, Einstein, Gossens, Osherenko, and Potvin. He distributed copies of biographical notes for these persons and asked the participants whether they were aware of any conflicts of interest or other disqualifying interests which might prevent one or more of the identified persons 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 advised the participants that a deadline would be set in the Prehearing Conference Report and Order for formal requests for disqualification of Board members.

The Chair noted that 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 would be made to the parties so that they would have an opportunity to file any requests for Board member disqualification.

The Chair discloses that Board member Potvin has recused herself and therefore a former Board member may be appointed to hear and decide the merits of this proceeding.

IV. EX PARTE CONTACTS

The Chair cautioned the preheating 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: 8285443).

V. PRELIMINARY ISSUES

A. Party Status

The Chair advised the prehearing conference participants of those notices of appearance and party status petitions that had been received by the November 19, 1998, deadline. He also noted receipt of a petition for party status filed by CCRPC, but after the noticed deadline. The Chair asked those present whether they had any objections to the grant of party status to the Appellants or any of the petitioners.

Husky indicated that it would be filing a Motion to Dismiss in part based on the legal argument that the Appellants lack standing to bring this appeal. ACCD indicated that it too might file a Motion to Dismiss in part based on the standing question. The Chair observed that such motions should address both the standard in 29 V.S.A. §406(a) ("any person aggrieved by the decision of the department") and Rule 22(A)(6) and (7).

Although CCRPC filed a late petition for party status, no prehearing conference participant objected to the grant of party status to this regional planning commission. The representative for CCRPC orally amended its petition to reflect that its request for party status was pursuant to Rule 22(A)(3), not Rule 22(A)(1) or (2) as stated in its written request.

Counsel for ANR clarified that they were appearing on behalf of the Agency and the Department of Environmental Conservation in support of the Encroachment Permit as issued.

There were no objections to ANR's request for party status.

There were no objections to the party status requests of the Town and Town Planning Commission, pursuant to Rule 22(A)(1) and (2) respectively.

The Appellants objected to the party status petition filed by ACCD. They argued that this agency had not clearly articulated a substantial interest, separate and distinct from that of the ANR's, which might be adversely affected by the outcome of this proceeding. The Chair preliminarily ruled that it would grant ACCD party status pursuant to Rule 22(A)(5).

The Appellant's also objected to Husky's party status for the reason identified in Section B. below.

The Chair indicated that he would be making party status rulings shortly and that these would be memorialized in the Prehearing Conference Report and Order. He indicated, however, that the prehearing conference participants would have an opportunity to formally object to such rulings and file written objections supported by memoranda and, if so desired, responsive memoranda.

The Chair encouraged petitioners with similar affected interests and positions with respect to the DEC'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 for example, Rule 22(B)(4).

The Chair also brought to the prehearing conference participants' attention Rule 23(B) governing representation by parties. The Chair noted that the Town and Town Planning Commission had entered an appearance through one counsel. The Chair also noted that counsel for ANR indicated that they were representing both the Agency and the DEC. The Chair cautioned the representatives for the Town/Town Planning Commission and ANR/DEC that if the interests of the entities were to diverge that they would be under an affirmative obligation to promptly notify the Board and arrange for substitution of counsel.

B. Other Preliminary Issues

Husky indicated that its Motion to Dismiss would, in addition to the lack of standing claim, address the issue whether the Appellants had stated a claim upon which relief could be granted.

The Chair inquired of the prehearing conference participants whether the appeal from Docket No. MLP-97-02 or a related Declaratory Judgment action had any bearing on the timing

of the Board's consideration of the standing question in the present proceeding. The prehearing conference participants differed in their opinions on this subject: the Appellants argued that the Board should stay its proceeding until the Supreme Court rendered its decision(s) because the Court's decision could provide guidance on the standing question; Husky and ACCD argued that the Court's decision would rest on jurisdictional and procedural grounds apart from the standing question and therefore the Board should not delay consideration of the standing question.

Husky further observed that the Supreme Court might well issue its decision in the next month or two, which would not result in an objectionable delay in the Board's proceedings. Husky requested that the Board take up party status/ standing questions first, then other preliminary legal questions. Husky requested that the Board rule on the legal issues in this matter and render final decisions from which interlocutory appeals could be taken before conducting a hearing on the merits. In the event that no such appeals were taken and if the Board determined that there was jurisdiction to hear this matter on the merits, Husky and others asked that the Chair schedule a second prehearing conference to determine: (1) whether the March hearing should be rescheduled to a date in May or June, and (2) to establish a schedule for the pre-filing of evidence related to the application of 29 V.S.A. ch. 11.

The Chair indicated that he would take the prehearing conference participants' concerns under advisement and attempt to structure a filing schedule that would allow for sequential briefing on the party status/ standing issues prior to consideration of the other legal questions.

In summary, the preliminary issues identified by the Chair in consultation with the prehearing conference participants were as follows:

Question to be Decided First:

- (1) Whether the Appellants lack standing to bring this appeal.
- (2) Absent a legislative grant of the right to occupy any portion of the airspace over the Lake, did Husky lack "standing" to pursue its permit. "To pursue its permit" means to apply for, obtain, and secure through appeal, the Encroachment Permit issued by DEC.

The prehearing conference participants understand that the Appellants may include in any responsive memorandum to the charge that they lack the requisite standing to bring this appeal arguments related to the following set of preliminary questions.

Questions to be Decided Second:

- (3) Whether the public good determination required by statute (29 V.S.A. § 405) requires that the Project will be beneficial to the economic interests of working
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Vermonters. See 29 V.S.A. § 402(6).

(4) Whether or not the Water Resources Board (and other administrative agencies such as the DEC) have jurisdiction to determine the Project's compliance with the Public Trust Doctrine.

(5) Whether the Appellants have failed to state a claim upon which relief can be granted.

VI. STANDARD OF REVIEW

The Chair reminded the prehearing conference participants that appeals filed pursuant to Management of Lakes and Pond statute are heard ~~de novo~~ de novo V.S.A. §406(b). As a consequence, parties are forewarned that any evidence that might have been submitted to the DEC in support of or in opposition to the application, including the application itself, must be resubmitted to the Board in the form of **prefiled** exhibits. The Chair further reminded the prehearing conference participants that the Encroachment Permit applicant has the burden of proof and persuasion in proving that it is entitled to a permit applying the standards set forth in the Management of Lakes and Ponds statute.

VII. ISSUES

The DEC found that the Project would not adversely affect the public good (29 V.S.A. § 405) and that it "complies with the Public Trust Doctrine." The Appellants ask the Board to either reverse the DEC's action or modify it "with appropriate binding permit conditions and limitations."

In their Notice of Appeal, the Appellants framed the principal factual question as follows: Whether, because the proposed bridge is not at a stage where it is ready to commence construction, the application for the Encroachment Permit is premature and does not address certain environmental and aesthetic issues. However, after further discussion amongst the prehearing conference participants concerning the de novo nature of appeals before the Board, the Appellants agreed that the question is more appropriately framed in terms of whether Husky can meet its burden of proof in addressing the following question:

Whether the Project will adversely affect the public good applying the standards in 29 V.S.A. § 405(b).

Thus, if Husky's permit application (plans and specifications to be followed in the construction of the bridge) are so incomplete or deficient that the Board cannot make affirmative findings with respect to the factors to be considered in 29 V.S.A. §405(b), the DEC's decision should be reversed.

At the preheating conference, the Chair alerted the participants to the fact that the factors to be considered in applying 29 V.S.A. § 405(b) are not the same as the criteria applied in Act 250 or local land use proceedings. Therefore, he cautioned the participants against tiling with the Board evidence and argument drawn directly from District Commission and Town Planning Commission hearings.

Although during the course of the preheating conference the Chair was able to clarify that the "public good" question is the primary factual issue to be decided by the Board, he hereby advises the participants that the Board will make such findings of fact and conclusions of law as are necessary with respect to the Project's impacts on public trust values if it determines, as a preliminary matter, that it has the authority to do so. See, In re: Dean Leary (Point Bay Marina, Inc.), Docket No. MLP-96-04, Findings of Fact, Conclusions of Law, and Order (Aug. 1, 1997).

VIII. WITNESSES AND EXHIBITS

The Chair explained to the prehearing conference participants that prefiled testimony and exhibits will be required in this proceeding. The Chair asked each participant to provide a preliminary list of witnesses, noting that deadlines for the filing of final lists of witnesses and exhibits, as well as prefiled testimony and exhibits, will not be set forth in an order until the preliminary issues are resolved.

The Appellants indicated that they likely would be calling three witnesses with expertise in environmental matters and economic impacts.

Husky indicated that it would be calling four or five witnesses: a Project engineer, persons with environmental expertise, and a person who could testify regarding the "public good" standard.

ANR indicated that it would only call a permit "process" witness.

ACCD stated that it would call no more than one witness. Counsel for ACCD asked the Chair if it could reserve the right to call the Commissioner to provide an opening statement. The Chair noted that such statements were not appropriate in a contested case proceeding.

The Town and Town Planning Commission suggested that one witness would be called from the Town's Planning Office to testify as to the Project's conformance with local zoning and the "public good." The Chair cautioned that testimony about conformance with local regulations was not relevant unless it addressed Project conformance with a shoreline zoning ordinance. See 29 V.S.A. §405(b).

CCRPC indicated that it did not have plans to call a witness at this time, but it would coordinate any evidence with other parties to this proceeding.

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.

The Chair noted that the Prehearing Conference Report and Order would contain specific instructions for the prefiling of testimony and exhibits. He noted, however, that with respect to all filings, including motions and memoranda, the parties are required to file 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 filing in person or by first-class mail.

The Chair also noted that a prehearing conference -- very likely the third in this proceeding -- 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 and site visit.

IX. HEARING DAY SCHEDULE

The Chair outlined for the prehearing 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 to the cross-examination of witnesses. The Chair indicated that a one-day hearing would be scheduled in this matter and the parties could expect that, if necessary, the hearing would run into the evening.

The Chair also noted that the hearing in this matter would be scheduled at a facility in close proximity to the Lake and Project.

The Chair asked those granted party status to plan their cases in accordance with the time allotments to be established in a subsequent scheduling order and, if additional time is required, to file requests for additional time in accordance with deadlines set forth in that order. He again

encouraged parties to coordinate their testimony and argument so as to eliminate redundancy and achieve efficiency in the presentation of their respective cases.

The Chair discussed with the prehearing conference participants the logistics for scheduling this matter for a hearing. He noted that the Board had reserved and noticed March 16, 1998, as the hearing date in this matter. He asked those present whether they perceived any scheduling conflicts with that date. Those present indicated that they did not. The Chair asked the prehearing conference participants to advise the Board's counsel of any known vacation or other scheduling conflicts between December and the end of March.

X. SERVICE LIST

The Chair asked counsel for the Appellants and the other prehearing conference participants to review the certificate of service prepared for the Notice of Appeal and Prehearing Conference and identify those persons, if any, which could be eliminated due to their representation by counsel or should be retained on the "For Your Information" section of the service list.

XI. ORDER

1. The Chair preliminarily grants party status to the following:

- (a) Town pursuant to Rule 22(A)(1);
- (b) Town Planning Commission pursuant to Rule 22(A)(2);
- (c) CCRPC pursuant to Rule 22(A)(3);
- (d) ANR, including the DEC, pursuant to Rule 22(A)(4);
- (e) ACCD pursuant to Rule 22(A)(5);

Rulings on Husky's party status pursuant to Rule 22(A)(6) or (7) and the Appellants' standing/ party status pursuant to 29 V.S.A. § 406(a) and Rule 22(A)(7) shall be made after briefing in accordance with items 4, 5, and 7 below.

- 2. The preliminary issues in this matter are identified as (1)-(2) and (3)-(5) in Section V.(B).
 - 3. The issues on appeal are those identified in Section VII.
 - 4. On or before **4:30 p.m., Tuesday, December 22, 1998**, those persons objecting to the grant of party status to any petitioner so identified in Section V.(A) shall file written
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objections supported by legal memoranda with the Board.

- 5 . On or before **4:30 p.m., Tuesday, December 22, 1998**, parties may file motions supported by legal memoranda on preliminary issues (1) and (2) identified in Section V.(B). These issues address the party status/ standing of **the** Appellants and Husky.
6. On or before **4:30 p.m., Tuesday, December 22, 1998**, all requests for disqualification of any Board member identified in Section III. shall be tiled with the Board. Any such request shall be accompanied by a statement of facts and legal memorandum in support of Board member disqualification.
7. On or before **4:30 p.m., Wednesday, January 6, 1999**, any person may file a responsive memorandum to any objection to the grant of party status/ standing filed in accordance with items 4 and 5 above.
8. The Chair will issue a preliminary ruling on the Appellants' and Husky's standing on or about January 12, 1998.
9. **On or before 4:30 p.m., Tuesday, January 19, 1999**, any party objecting to the Chair's preliminary rulings on standing and party status as provided in items 1 and 8 above, shall file an objection, supported by memorandum, pursuant to Rule 21.
10. On or before **4:30 p.m., Tuesday, January 19, 1999**, parties may file motions supported by legal memoranda on preliminary issues (3) through (5) identified in Section V.(B).
11. **On or before 4:30 p.m., Friday, January 29, 1999**, any party may file a responsive memorandum to any objection to the Chair's preliminary rulings on standing and party status filed in accordance with 9. above.
12. **On or before 4:30 p.m., Friday, January 29, 1999**, any party may file a responsive memorandum to any filings tiled in accordance with item 10 above.
13. The Board will deliberate with respect to all objections to the Chair's preliminary rulings on standing and party status and on all motions and responses with respect to preliminary issues at its meeting on Tuesday, February 2, 1999, or thereabouts.
14. A second preheating conference will be convened shortly after the issuance of the Board's Memorandum of Decision at a date and time to be confirmed by a subsequent notice. The purpose of such prehearing conference shall be to determine: (1) whether the hearing scheduled for March 16, 1999, should be postponed and, if so, to what date,,

it should be rescheduled; (2) if this matter is to proceed toward a hearing on the merits, the terms of a schedule for the prefiling of evidence, evidentiary objections, and other filings; or (3) if the parties intend to file one or more interlocutory appeals, the questions the Board would need to certify for court review.

15. If no party seeks interlocutory review of the Board's Memorandum of Decision and unless objected to at the second prehearing conference, Husky and any party supporting the issuance of the Encroachment Permit shall, on or before 45 days after the date of issuance of the Board's Memorandum of Decision, file their final lists of direct witnesses and exhibits and all prefiled direct testimony and exhibits for all witnesses they intend 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.

16. On or before 20 days after the due date established for the filing of prefiled direct evidence as provided in item 15 above, the Appellants and all parties opposing the issuance of the Encroachment Permit shall file their final lists of direct witnesses and exhibits and all prefiled direct testimony and exhibits for all witnesses they intend 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.

17. On or before 20 days after the due date established for filing of prefiled direct evidence as provided in item 16 above, all parties shall file final lists of rebuttal witnesses and exhibits and all prefiled rebuttal testimony and exhibits for all witnesses they intend to present.

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.

18. On or before 10 days after the due date established for filing in item 17 above, all parties shall file in writing all evidentiary objections to all prefiled testimony and exhibits previously filed, except exhibits larger than 8% by 11 inches, or such objections shall be
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deemed waived.

19. On or before the deadline established in item 18 above, all parties shall file a joint proposed itinerary for the site visit. 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 Board's Chair may rule on the scope of the site visit.
20. The Chair will conduct a third prehearing conference by telephone at a date and time to be confirmed by subsequent notice to address any pending evidentiary objections, the site visit itinerary, and any other preliminary matters. Any party wishing to participate in this conference should so advise the Board's Secretary, Karen Dupont (802-828-2870) at least two days before the scheduled prehearing conference. The Board's staff will arrange the conference call.
21. The Board will convene a hearing in this matter. The specific date, time and location of this hearing shall be announced in a subsequent notice.
22. The hearing will be recorded electronically by the Board or, upon request, by a stenographic reporter, provided such request is made at least 20 days before the hearing date. 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 Rule 28(C).
23. On or before the deadline established in item 18 above, parties shall file proposed findings of fact, conclusions of law, and orders.
24. 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. Instructions for filing prefiled testimony are enclosed.
25. 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 filed with the Board, and mail one copy to each of the **persons** listed on the enclosed sample Certificate of Service. The Certificate of Service will be revised once party status determinations have been made and a revised sample 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.

26. Each party shall label their pretiled testimony and exhibits with their name. The labels on the exhibits must contain the words WATER RESOURCES BOARD, Re: Husky Injection Molding Systems, Inc., Docket No. MLP-98-06, 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 as follows: "A" for Appellants, "H" for Husky, "ANR," "ACCD," "Town/PC" and "CCRPC." Exhibits shall be assigned consecutive numbers. For example, Husky would number its exhibits H-1, H-2, H-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. H-2A, H-2B, etc. However, each page of a multi-page exhibit need not be labeled.

Concerning preparation of the combined list of all pretiled 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:

HUSKY (MLP APPLICANT'S)
LIST OF EXHIBITS
Re: Husky Injection Molding, Inc., MLP-98-06

<u>Number</u>	<u>Description</u>	<u>Status</u>
H-1	Pretiled Direct Testimony of _____, Civil Engineer	
H-2	Permit Application No. 98-13 filed with the DEC on _____	
H-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 DEC for its consideration in evaluating the Encroachment

Permit request, if they are to be considered by the Board de novo, must be introduced into the evidentiary record for this proceeding.

27. 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 22, 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 14th day of December, 1998.

WATER RESOURCES BOARD



William Boyd/Davies
Chair