

**STATE OF VERMONT
WATER RESOURCES BOARD
10 V.S.A. Chapter 41**

PREHEARING CONFERENCE REPORT AND ORDER

re: Town of **Groton**
Docket No. SAP-98-01

On May 4, 1998, William Boyd Davies, Chair of the Water Resources Board, convened a prehearing conference in the above referenced matter in St. Johnsbury, Vermont with the following persons participating:

Town of Groton by David A. Otterman, Esq., Warren B. Tripp, and Dale Brown
Agency of Natural Resources by Andrew Raubvogel, Esq., Barry Cahoon,
and Eric Palmer
Wayne Knott
Brent Smith
G. Richard Kreis
Frances F. Tripp
Robert Desochers
Clayton Evans
Rep. Mary Grant

I. INTRODUCTION

On March 20, 1998, the Department of Environmental Conservation ("DEC"), Agency of Natural Resources ("ANR"), denied the Town of Groton's ("Groton") application for a stream alteration permit ("Denial"). Groton seeks approval for the reconstruction of a log crib dam on the Wells River in Groton, Vermont ("Project").

On March 30, 1998, Groton tiled an appeal from the denial of its application for the stream alteration permit pursuant to 10 V.S.A. § 1024.

On March 31, 1998, the Board, by its Executive Officer, docketed the appeal as SAP-98-01 ("SAP-98-01").

On April 1, 1998, a Notice of Preheating Conference was issued to all interested persons and parties.

II. PARTY STATUS

A. Groton

As the applicant, Groton has the unconditional right to bring this appeal as a

person aggrieved under 10 V.S.A. § 1024(a). Attorney Otterman has entered his notice of appearance for Groton. Consistent with Board Rule of Procedure 19, service of documents shall be made on Groton by serving any such document on Attorney Otterman.

In addition to Attorney Otterman, the Board will continue to serve copies of all documents it issues upon Groton's Board of Selectman and Planning Commission, Dale Brown, and Warren B. Tripp as indicated on the "For Information Only" portion of the Board's certificate of service. Parties are not required to serve copies on those persons listed on the certificate of service as "For Information Only."

B. ANR

Under Board Rule of Procedure 22(A)(4), ANR is automatically a party to this appeal. Attorney Raubvogel has entered his appearance for ANR. Consistent with Board Rule of Procedure 19, service of documents shall be made on ANR by serving any such document on Attorney Raubvogel.

In addition to Attorney Raubvogel, the Board will continue to serve copies of all documents it issues upon Barry Cahoon and Eric Palmer as indicated on the "For Information Only" portion of the Board's certificate of service.

C. Deadline for filing requests for party status

Dale Brown filed a letter with the Board on behalf of Cristine Stock and Emile Bedard. Mr. Brown clarified that the intent of his letter was to ensure that Ms. Stock and Mr. Bedard be listed on the Board's certificate of service.

The Notice of Prehearing Conference stated, in part, that "[t]hose persons seeking to participate as parties in the appeal should file a written notice of appearance and attend the preheating conference." Under Board Rule of Procedure 22(A)(7) and/or 22(B), persons not otherwise granted the right to participate in an appeal may petition the Board for party status. No requests for party status were made at the Preheating Conference.

Any person who seeks party status shall file a petition for party status consistent with the requirements of Board Rule of Procedure 22(A)(7) and/or 22(B) with the Board on or before **Wednesday, May 20, 1998**. All parties may file an objection to any party status petition on or before **Wednesday, May 27, 1998**. Thereafter, the Chair or the Board will issue a ruling with respect to any party status petitions.

III. CONFLICTS

The Board's members were identified to the parties. No conflicts were identified by any of the parties.

Thereafter, Chair Davies disclosed that, through his association with Northeastern Vermont Development Association ("NVDA"), he knows Barry Cahoon and Emile Bedard both of whom have been, or currently are, associated with NVDA. Chair Davies stated that he did not believe his association with Mr. Cahoon or Mr. Bedard created a conflict. No party objected to Chair Davies serving in this appeal.

In addition, General Counsel Grayck disclosed that he served on the Town of Danville Zoning Board of Adjustment and Planning Commission with Barry Cahoon. General Counsel Grayck is no longer a member of the Danville Zoning Board of Adjustment and Planning Commission. General Counsel Grayck stated that he did not believe his past association with Mr. Cahoon created a conflict. No party objected to General Counsel Grayck serving as the Board's counsel in this appeal.

IV. ISSUES

A. Applicable Statutory Provisions

Under 10 V.S.A. § 1021(a), "[a] person shall not change, alter or modify the course, current or cross-section of any watercourse with a drainage area greater than ten square miles at the location of the proposed change, alteration or modification, or of designated outstanding resource waters, within or along the boundaries of this state either by movement, till, or by excavation of ten cubic yards or more in any year, unless authorized by the secretary [of ANR]."

Under 10 V.S.A. § 1023(a), a permit for the activity described in 10 V.S.A. § 1021(a) "shall be granted, subject to such conditions determined to be warranted, if it appears that the change:

- (1) will not adversely affect the public safety by increasing flood hazards, and
- (2) will not significantly damage fish life or wildlife,
- (3) will not significantly damage the rights of riparian owners, and
- (4) in case of any waters designated by the [Water Resources Board] as outstanding resource waters, will not adversely affect the values sought to be protected by designation."

Under 10 V.S.A. § 1024(a), any person aggrieved by ANR's decision under 10

V.S.A. § 1023(a) may appeal to the Board within fifteen days of the issuance ANR's decision.

The Denial concludes that (i) the Project requires a permit, and (ii) that the Project solely fails to qualify for such a permit under 10 V.S.A. § 1023(a)(2).

B. Issues on Appeal

Accordingly, based on the statutory provisions and Groton's notice of appeal, the issues on appeal shall be as follows:

1. Whether, pursuant to 10 V.S.A. § 1021 (a), the Project does not require a permit.
2. Whether, pursuant to 10 V.S.A. § 1023(a)(2), the Project will significantly damage **fish** life or wildlife.

C. De Novo Appeal and Burden of Proof

The hearing before the Board is de novo and is conducted as a contested case under Vermont's Administrative Procedure Act, 3 V.S.A. Chapter 25 ("APA"). 10 V.S.A. §1024(a). All of the evidence is heard anew, and the probative effect determined by the Panel as though no decision had been previously rendered relative to those issues which are appealed to the Panel. See In re Poole, 136 Vt. 242,245 (1978).

Groton has the burden of proof on both issues on appeal. Re: Clarence Jelley, Docket No. SA-96-03, Findings of Fact, Conclusions of Law, and Order at 4 (Oct. 30, 1996). On appeal, the Board has the same authority granted to the secretary of ANR under 10 V.S.A. § 1023(a), and the Board may issue a permit, issue a permit with conditions, or deny a permit for the Project. Id.

The burden of proof consists of the burden of production and the burden of persuasion. Under the burden of production, there must be sufficient evidence for the Board to make a positive finding with regard to the Project. Under the burden of persuasion, the Board must be persuaded, by a preponderance of the evidence, that the weight of the evidence is in favor of the Project, notwithstanding the evidence presented in opposition to the Project. See In re: Dean Leary (Point Bay Marina, Inc.), Docket No. MLP-96-04, Findings of Fact, Conclusions of Law, and Order at 13 (Aug. 1, 1997).

Groton's permit application for the Project, and all of the documents on file with ANR, are not part of the evidence before the Board, unless introduced by a party. There

must be evidence from which the Board can make its own findings of fact and conclusions of law. The Board cannot simply make an order which **affirms** or reverses the Denial. People, 136 Vt. at 246.

While Groton bears the burden of proof on both issues, the Board must affirmatively determine that it has jurisdiction over the Project. Accordingly, ANR should provide evidence which **affirmatively** establishes this Board's jurisdiction. See In re Lake Sadawga Dam, 121 Vt. 367,370 (1960).

D. No Preliminary Issues At this Time

At this time, the parties have not identified any preliminary issues which would require a decision by the Board prior to the convening of a hearing on the merits. However, the parties did indicate that this might change such that a request for a preliminary ruling may be tiled. The parties were advised that the issuance of a Board ruling on a preliminary issue takes 6-8 weeks, and that this time frame should be **kept** in mind if the parties seek the issuance of a preliminary ruling prior to the filing deadline for prefiled testimony.

V. PREFILED EVIDENCE

Because this proceeding is a contested cases under the APA, the rules of evidence as applied in civil cases shall be followed subject to certain exceptions. 3 V.S.A. § 810(1). Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form. Id. The Board calls the receipt of evidence in written form as "**prefiled**" evidence.

The parties shall be required to **profile direct** evidence prior to the hearing. Direct evidence is testimony or exhibits given by a party in support of its own position. **Prefiled** testimony with regard to form shall be in question and answer format, and not in summary form. Each question and answer shall be numbered. For example, the **first** question shall be numbered as "Q1" and the answer as "A1". If prefiled testimony exceeds ten pages, a table of contents should be created. All reports and other documents that constitute substantive testimony must be filed with the prefiled testimony. All persons tiling prefiled testimony must attend the hearing which the Board will convene in this matter, or the person's prefiled testimony and exhibits may not be admitted. At the hearing, the person will be sworn, given an opportunity to correct any mistakes in his or her prefiled testimony or exhibits, and then must remain available for cross-examination and Board questions. Accordingly, prefiled testimony and exhibits do not need to be signed and sworn to at the time of their tiling with the Board.

The parties will be allowed to present live **rebuttal** evidence at the hearing. Rebuttal evidence is evidence that is given to explain, counteract, or disprove facts presented by an adverse party. It is evidence which is offered to contradict the opponent's direct evidence. All parties shall be required to file a **list** of their rebuttal witnesses and exhibits prior to the hearing.

At the hearing, all parties are entitled to conduct cross-examinations as necessary for a full and true disclosure of the facts. 3 V.S.A. §810(3).

VI. HEARING DAY SCHEDULE

During the prehearing conference, parties were informed that the Board was setting aside a single day for hearing this matter. Based upon this, the Board will convene a hearing on **Tuesday, September 15, 1998, commencing at 9:30 a.m., at the Groton Community Building, 314 Scott Highway, Groton, Vermont.** The hearing day shall proceed as follows:

1. Groton's opening statement (5 minutes);
2. ANR's opening statement (5 minutes);
3. Site visit (30 minutes);
4. Introduction of all prefiled direct evidence and presentation of live rebuttal evidence by Groton (60 minutes);
5. Cross-examination by ANR of those persons who have either introduced prefiled direct evidence or presented live rebuttal evidence in support of Groton (45 minutes);
6. Lunch (45 minutes);
7. Introduction of all prefiled direct evidence and presentation of live rebuttal evidence by ANR (60 minutes);
8. Cross-examination by Groton of those persons who have either introduced prefiled direct evidence or presented live rebuttal evidence in support of ANR (45 minutes);
9. Closing statement by ANR (5 minutes); and

10. Closing statement by Groton (5 minutes).

These time allotments are total time limits. Any party wanting more time must file a written motion on or before Tuesday, September 1, 1998, which states why more time is needed, and how much more time is needed.

The Parties will be sent subsequent confirmation of the hearing's location and starting time.

VII. ORDER

1. Petitions for party status consistent with the requirements of Board Rule of Procedure 22(A)(7) and/or 22(B) shall be tiled with the Board on or before Wednesday, May 20, 1998. Objections to party status petitions shall be filed on or before Wednesday, May 27, 1998.

2. The issues on appeal shall be as stated above in Section IV.

3. On or before **Tuesday, August 18, 1998**, all parties shall file pretiled direct testimony and exhibits for all witnesses and exhibits, except for exhibits which are larger than 8% by 11, and a witness and exhibit list.

4. On or before Tuesday, September 1, 1998, all parties shall file a list of all rebuttal witnesses and exhibits.

5. On or before Tuesday, September 1, 1998, parties shall file all evidentiary objections to all pretiled direct testimony and exhibits previously filed, or such objections shall be deemed waived, except for exhibits which are larger than 8% by 11.

6. The Chair of the Board may convene a second preheating conference on Monday, September 14, 1998. The parties will be sent a confirmation notice of the time and location of the preheating conference. Until a time is set, parties should keep the entire day available for the preheating conference.

7. On Tuesday, September 15, 1998, the Board will convene a hearing pursuant to the schedule stated above in Section VI. **The time allotments in Section VI are total time limits. Any party wanting more time must file a written motion on or before Tuesday, September 1, 1998, which states why and how much more time is needed.**

8. On or before **Thursday, October 1, 1998**, parties shall file Proposed Findings of Fact, Conclusions of Law, and Order in 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, or 6.1.

9. No individual may be called as a direct evidence witness if he or she has failed to prefile testimony in accordance with this Order. No individual may be called as a rebuttal witness if he or she has not been identified in a rebuttal witness list in accordance with this Order.

10. Prefiled direct testimony shall be filed in question and answer format. Each question and page shall be numbered. If prefiled testimony exceeds ten pages, a table of contents should be created. All reports and other documents that constitute substantive testimony must be filed with the prefiled testimony.

11. All persons filing prefiled testimony must attend the hearing which the Board will convene in this matter, or the person's prefiled testimony and exhibits may not be admitted. At the hearing, the person will be sworn, given an opportunity to correct any mistakes in his or her prefiled testimony or exhibits, and then must remain available for cross-examination and Board questions. Accordingly, **prefiled** testimony and exhibits do not need to be signed and sworn to at the time of their filing with the Board.

12. Parties shall file an original and **six copies** of prefiled testimony, legal memoranda, all exhibits smaller than 8 1/2 by 11 inches, and any other documents with the Board, and mail one copy to each of the **parties** listed on the attached certificate of service.

13. Parties are required to file only lists identifying exhibits which are larger than 8 1/2 by 11 inches that they intend to present, rather than the exhibits themselves. Exhibits must reasonably be made available for inspection and copying by any party prior to the hearing.

14. Each party shall label their prefiled direct testimony and exhibits. The label shall state the party's name, Water Resources Board, Town of Groton, Docket No. SAP-98-01, the number of the testimony or exhibit, a space for the Board to mark whether the testimony or exhibit has been admitted, and a space for the Board to mark the date of admission. Label stickers which can be used by the parties are available from the Board on request; parties must complete the information required on the stickers prior to the filing of the testimony or exhibits.

15. Prefiled direct testimony and exhibits shall be assigned consecutive

numbers: for example, Groton will number its prefiled testimony and exhibits Groton 1, Groton 2, Groton 3, etc. Concerning the preparation of witness and exhibit lists, each list must state the full name of the party at the top and the 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:

TOWN OF PORT WASHINGTON
LIST OF EXHIBITS
RE: HILLDALE LANE MARINA, #3HL6

<u>Number</u>	<u>Description</u>	<u>Status</u>
Smith 1	Prefiled testimony of John Smith	
Smith 2	Site Plan	

The Board will use the status column to mark whether the testimony or exhibit has been admitted.

16. The hearings will be recorded electronically by the Board. Upon the written request of any party, in accordance with Rule 28(C), the hearing may be recorded by a qualified stenographer in addition to the Board's electronic sound recording. One copy of any transcript made of the hearing must be filed with the Board at no cost to the Board.

17. Pursuant to Rule 24(B), this Order shall be binding on all persons who have received notice of the prehearing conference and shall control the subsequent course of this proceeding, unless **this** Order is objected to in whole or part on or **before Wednesday, May 27, 1998**, or this Order is modified at the hearing to prevent manifest injustice.

Dated at Montpelier this 1 Ith day of May, 1998.

WATER RESOURCES BOARD



William Boyd Davies, Chair