

State of Vermont  
WATER RESOURCES BOARD

PREHEARING CONFERENCE REPORT AND ORDER

<b>RE: Norland Corporation c/o Arnot Development Group, Inc. Waterbury, Vermont</b>	<b>Docket No. WQ-97-08 (Appeal of Indirect Discharge Permit #ID-9-0240)</b>
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**I. BACKGROUND**

On November 10, 1997, the Water Resources Board ("Board") received a notice of appeal filed by the Arnot Development Group, Inc. ("Arnot") on behalf of Norland Corporation ("Norland") of Stowe and purportedly on behalf of the Harvey Farm Homeowners Association of Waterbury'. The appellant in this proceeding will hereinafter be referred to as Norland. On November 13, 1997, the Board's Executive Officer, William Bartlett, sent Arnot a letter acknowledging receipt of the notice of appeal and declaring the appeal administratively complete. However, the November 13 letter also identified a deficiency with respect to Amot's citation to an administrative rule rather than a state statute as the basis for the appeal. In order to remedy the deficiency, Mr. Bartlett advised Arnot to clarify the statutory basis upon which the appeal was filed. On December 2, 1997, Amot supplemented Norland's notice of appeal citing to 10 V.S.A. §1269 as the statutory authority.

Norland seeks review of a decision by the Department of Environmental Conservation ("DEC"), Agency of Natural Resources ("ANR"), granting to Norland as permittee Indirect Discharge Permit #ID-9-0240 ("Permit") pursuant to 10 V.S.A. §1263 and Chapter 14 of the ANR's Environmental Protection Rules. The Permit is a renewal of the initial indirect discharge permit ("Original Permit"), which authorized the discharge of treated domestic sewage from one subsurface disposal system serving lots 6-16 of Norland's "Harvey Farm Subdivision" into groundwater and indirectly into Shaw Mansion Brook.<sup>2</sup> Norland contends that the monitoring conditions set forth in the Permit are not warranted and that the Original Permit, issued to Norland on October 7, 1992, contained no such conditions, or significantly less onerous conditions.

Pursuant to a notice of prehearing conference which was distributed to interested persons and published in the Times Argus, Board Chairman, William Boyd Davies,

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While it was initially uncertain who Amot represents, it has been clarified, as discussed herein, that Amot only represents Norland. Norland's attorney, William Kelk, confirmed Amot's representation of Norland in this matter by a written filing dated February 3, 1998.

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The Harvey Farm Subdivision is governed by the terms of Land Use Permit #5W1152 issued by the District #5 Environmental Commission on September 18, 1992 and amended on November 19, 1992 and is also subject to the terms of DEC's subdivision permit #EC-5-1682-I issued August 3, 1992.

convened a prehearing conference concerning the referenced appeal on Thursday, January 22, 1998 at 2:30 p.m. in the Water Resources Board's Montpelier Office. Those attending the prehearing conference were as follows:

Andy Raubvogel, Esq., for the Agency of Natural Resources  
Andrew Flagg, Agency of Natural Resources  
Paul Arnot of Arnot Development Group, for No-land Corporation  
James Comley, for the Harvey Farm Homeowners Association  
Dale Perzanowski, an interested homeowner

## II. DISCLOSURES AND POTENTIAL CONFLICTS

Chair Davies began the conference by identifying the other Board members who will be hearing this case and by seeking to identify any conflicts of interest, or potential conflicts of interest. No such conflicts were identified. Chair Davies next asked Norland's representative, Mr. Arnot, to explain the relationship between the Norland Corporation and the Harvey Farm Homeowners Association ("HFHA"). Of specific interest was the question of whether Mr. Arnot was the legal representative for both entities in this case, which he purported to be in the notice of appeal.

After some discussion of the rationale for having these relationships clarified, all participants in the conference agreed that Norland Corporation is the named permittee and that the HFHA had never specifically appointed Mr. Arnot to act on its behalf relative to the pending appeal. Notwithstanding, those homeowners present at the conference emphasized the similarity of the two entities' positions regarding the monitoring conditions and noted that the HFHA would seek to participate as a party through Mr. Comley. Due to potential conflicts between the rights and responsibilities of Norland, as compared with those of HFHA - and by extension the homeowners - it was further agreed that Norland and the HFHA should be represented independently in this proceeding.<sup>3</sup>

## III. ISSUES

Chair Davies explained that while Norland raised objections to the ANR's assertion of jurisdiction over the project, any formal challenge to the ANR's jurisdiction was required to have been raised within the appeal period which commenced after issuance of the Original Permit. No such appeal was filed and there remains no jurisdictional issue in the present appeal.

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On Wednesday, January 28, 1998, Mr. Comley filed a separate request for party status on behalf of the Harvey Farm Homeowners Association. That filing will be addressed in more detail under Section IV. of this Prehearing Order pertaining to party status.

Norland seeks *de novo* review of the DEC's issuance of Permit # ID-9-0240. Norland tiled the appeal on the basis that it objected to conditions which affirmatively require Norland, as permittee, and indirectly the HFHA, to pay the costs associated with monitoring the level of the discharge in order to mitigate the potential impacts created by the discharge. Norland and the HFHA contend that the ANR erred in its interpretation of Chapter 14 of ANR's Environmental Protection Rules - the Indirect Discharge Rules ("IDR") and argue that no monitoring is necessary given the project design.

In the context of this *de novo* review, the central legal issue is whether the applicant can demonstrate by clear and convincing evidence that it is entitled to receive an indirect discharge permit for the continued operation of the subsurface disposal system serving lots 6 through 16 of the Harvey Farm Subdivision. The IDR's indicate at § 14-303 that "the maximum period for which a permit can be issued is five years and the Secretary may issue permits for periods less than five years. An indirect discharge permit renewal application will be subject to rules, regulations, and standards in effect at the time the renewal permit is issued."

A related legal issue that has been raised by Norland is whether the permitting entity has the authority to impose monitoring conditions such as those contained in the Permit in conjunction with its issuance of an indirect discharge permit.

The waters potentially affected by the discharge are Class B waters of the state including Shaw Mansion Brook and the Winooski River. The applicable Water Quality Standards are those effective April 21, 1997 and the particular Indirect Discharge Rules applicable in this appeal are those effective February 29, 1996. The Original Permit was issued in 1992 and therefore, the indirect discharge under review is a "New Indirect Discharge" as that term is defined on page 7 of the Indirect Discharge Rules.

#### IV. PARTY STATUS

Among those parties which have the authority to intervene as of right pursuant to Water Resources Board Rule of Procedure ("WBR") 22(A), only ANR has filed a timely notice of appearance. Norland, the permit applicant, also tiled a timely notice of appearance by tiling its Notice of Appeal. Finally, the HFHA has sought permissive intervention pursuant to WBR 22(B).

In support of HFHA's party standing petition HFHA's representative, Mr. Comley contends that the owners of the homes in the development will be adversely affected by the requirement that monitoring be conducted as a condition of granting a renewal of the permit. Moreover, the HFHA contends that the imposition of the Quality Assurance/Quality Control plan will place the permittee, and by extension the HFHA and the individual homeowners under a considerable financial burden. At the Prehearing Conference; no party objected to the participation of HFHA as a party in this case.

HFHA has demonstrated reasonable grounds for party standing independent of the named permittee, the Norland Corporation. Moreover, intervention by the HFHA will provide HFHA a greater assurance that its interests are directly protected by an HFHA designated representative and such intervention will not unduly delay the proceedings or prejudice the interests of the other parties to this proceeding. Although HFHA's party status request sought permissive intervention under WBR 22(B), the nature of the interests which they are trying to protect, and the significance of the outcome of this proceeding to those interests warrants granting HFHA party status as of right, under WBR 22(A)(7).

#### V. STANDARD OF REVIEW

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

#### VI. BURDEN OF PROOF

As stated above in Section III, Norland is seeking renewal of a permit for a New Indirect Discharge, that is, one which came into existence after May 17, 1986. The project for which Norland sought the Original Permit was determined to be an on-site waste disposal system with a capacity in excess of 6500 gpd. As such, the system is not exempt from the applicable Environmental Protection Rules and pursuant to 10 V.S.A. § 1259(e) the applicant carries the burden of proof in order to secure a permit. See also, IDR §14-400 at Page 20. Specifically, the permit applicant must demonstrate by clear and convincing evidence, and the Board must find, that the discharge:

- A. will not significantly alter the aquatic biota in the receiving waters;
- B. will not pose more than a negligible risk to public health,
- C. will be consistent with existing uses of the waters, and potential beneficial uses of the waters; and
- D. will not cause a violation of the VWQS effective April 21, 1997.

10 V.S.A. §1259(e).

#### VII. SCOPE OF PROCEEDING

The statement of issues set forth herein is intended to define the issues before the Board in this case. The scope of the proceeding is limited to consideration of these issues and all relevant evidence in support of or in opposition to the issuance of a discharge permit pursuant to 10 V.S.A. §1263 and the ANR's IDR effective February 29, 1996.

## VIII. OTHER PRELIMINARY MATTERS

### A. Site Visit and Protocol

As noted at the prehearing conference, the value of a site visit may be minimal in this case. Nevertheless, the Board will, at the parties request, conduct a site visit on the hearing day if a site visit is specifically requested by any party not later than the date for the filing of prefiled direct testimony, March 17, 1998. If there is no such request filed on or before March 17, there will be no site visit and the parties should expect the hearing to take place at the Board's conference room in Montpelier. In preparation for the site visit (if one is requested) 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 relined to comport with the Board's observations. This site visit protocol must be filed by the date on which proposed findings are due, May 1, 1998.

### B. Court Reporters and a Stenographic Record

Board Rule of Procedure 28(C) covers the procedure for recording of hearings. If any party chooses to make arrangements to have the hearing recorded by a professional court reporter, such party shall inform the Board, and all parties not later than Friday, May 1, 1998. Copies of such transcript shall be distributed pursuant to WBR 28(C).

### C. Second Preheating Conference

A second prehearing conference may be conducted by telephone during the week preceding the hearing day to address evidentiary objections and outstanding procedural issues. This conference may also address such issues as the hearing day schedule including the order of the presentation of evidence and cross examination, estimates of total time needed, and a review of a site visit protocol if a site visit is to be held on the hearing day. If such a conference is held, parties will be informed by subsequent written notice.

## IX. WITNESSES, EXHIBITS, AND PREFILED TESTIMONY

Parties made a preliminary identification of witnesses at the prehearing conference. No further information regarding potential witnesses or exhibits has been provided other than a list of the Harvey Farm homeowners. The scheduling order will set forth a date certain by which the parties are directed to file preliminary witness lists and exhibit lists.

At the time exhibits are filed, such exhibits shall be labeled with the name of the

party submitting the exhibit or the appropriate abbreviation noted below, as well as an exhibit number. For instance, Norland will mark exhibits N1, N2, etc., HFHA will use H1, H2, etc., and the ANR will use the abbreviation ANR1, ANR2, etc. If an exhibit consists of multiple pages, it should be numbered as follows: N1-1, N1-2 etc. Only the original oversized exhibits (those larger than 8% x 14 inches) need to be filed with the Board, however, an 8% x 11 inch copy shall be provided to Board members in conformance with WBR 19. All color photographs, maps and graphical charts or diagrams shall be duplicated in color with as close a likeness to the original document as is practicable.

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

#### X. SCHEDULING

- A. On or before **4:30 p.m. on Tuesday, February 24, 1998**, any party objecting to any provision of this Preheating Order shall file such objections with the Board. Also not later than **February 24, 1998**, parties shall file their preliminary witness lists and their preliminary list of exhibits which will be prefiled.
- B. On or before **4:30 p.m. on Tuesday, March 17, 1998**, all parties shall file Prefiled Direct Testimony with the Board. Also on or before **Tuesday, March 17, 1998**, any party who wants the Board to conduct a site visit in conjunction with the May 12, 1998 hearing day shall file a written request to that effect.
- C. On or before **4:30 p.m. on Tuesday, April 14, 1998**, all parties shall file Prefiled Rebuttal Testimony with the Board.
- D. On or before **4:30 p.m. on Friday, May 1, 1998**, any objections to the Prefiled Direct and Rebuttal Testimony shall be filed. Also on or before **4:30 p.m. on Friday, May 1, 1998** any **Proposed Findings of Fact, Conclusions of Law, and Order** shall be filed, in both hard copy and on disk if available. Disks should be in a format readable by the PC versions of either Microsoft Word, or WordPerfect 5.1, 6.1 or 7.
- E. 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 1, 1998**.
- E. The Proposed Site Visit Protocol, if a site visit is requested on or before

Tuesday, March 17, 1998, shall also be filed not later than **4:30 p.m. on Friday, May 1, 1998.**

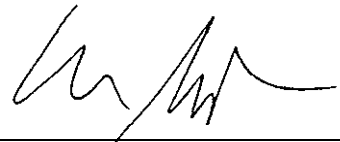
- F. The Hearing and Site Visit (if requested) will be held on **Tuesday, May 12, 1998** with the exact time and location to be provided to parties by subsequent written notice.
- G. Supplemental Proposed Findings of Fact, Conclusions of Law, and Order will be due within 7 days after hearing, but not later than **4:30 p.m. on Tuesday, May 19, 1998.**

XI. ORDER

- A. Norland is hereby granted party status pursuant to Board Rule of Procedure 22(A)(7).
- B. ANR is hereby granted party status pursuant to Board Rule of Procedure 22(A)(4).
- C. The HFHA has demonstrated standing and is hereby granted leave to intervene as of right pursuant to Board Rule of Procedure 22(A)(7).
- D. This Prehearing Order, including the Schedule set forth at Section X, above, shall guide the course of the remainder of this proceeding. Any party who wishes to object to this order may do so, but shall file such objection not later than **4:30 p.m. on Tuesday, February 24, 1998.** Additional prehearing 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.

Dated at Montpelier on this 13th day of February, 1998.

WATER RESOURCES BOARD  
by its Chair



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William Boyd Davies