

State of Vermont
WATER RESOURCES BOARD

RE: Larry Westall
172 River Road
Underhill, Vermont 05489
Docket No. CUD-99-02 (DEC #95-241)

RE: James & Catherine Gregory
by William F. Ellis, Esq.
McNeil, Leddy & Sheahan
271 South Union Street
Burlington, Vermont 05401
Docket No. CUD-99-03 (DEC #95-241)

PREHEARING CONFERENCE REPORT AND ORDER

n On July 29, 1999, Water Resources Board ("Board") Chair Gerry Gossens convened a preheating conference in Montpelier, Vermont, in the above-captioned matters. The Class Two wetland that is the subject of these CUD appeals is located off Browns Trace Road in Jericho, Vermont. The following persons participated in the prehearing conference:

Hobart Heath, holder of a Purchase and Sale Agreement for Lot #3;
Jeffrey Severson, wetlands consultant, at the request of Hobart Heath;
James and Catherine Gregory ("Gregorys"), Owners of Lot #2, by William F. Ellis, Esq., McNeil, Leddy & Sheahan;
Agency of Natural Resources ("ANR") by Jon Groveman, Esq., and Karen Bates, staff member, ANR Wetlands Office;
Jericho Conservation Commission ("JCC") by Thomas Baribault, JCC Chair;
Charles (Chuck) Lacy, owner of property adjoining the subject wetland,
Jericho Center Preservation Association ("JCPA"), owner of property adjoining the subject wetland, by Charles Lacy, JCPA President; and
Gail Schermer, user of the subject wetland.

Also present and assisting the Chair in the conduct of the preheating conference was the Board's Associate General Counsel, Kristina L. Bielenberg, Esq.

Others who did not participate in the prehearing conference, but who entered their timely appearances and requested party status as owners of property adjoining the subject wetland, were: William and Anita Haviland by Gail Schermer. Helen and Ruth Tobin, N.A. van Drimmelen, Robert Thompson, Corinne Wilder Thompson, and Jon and Deanna Trupp. The Board also received correspondence from Ms. Schermer indicating that the Laisdell Pond Association ("LPA") might be seeking party status, but that not all

of the members had given their consent.

Additionally, the Board received timely requests for party status from the following persons who claimed to be users of the subject wetland: J. M. Kim and Robert Schermer.

The CUD Applicant, Larry Westall, did not attend and participate in the prehearing conference, although Hobart Heath orally represented that he was attending the preheating conference at Mr. Westall's request and on Mr. Westall's behalf. David M. Sunshine, Esq., attorney for Mr. Westall in other matters, tiled a letter with the Board on July 27, 1999, indicating that he would not be entering his appearance in the above-captioned appeals, but he asked to be kept on the Board's service list in order to receive Board notices and decisions.

I. PROCEDURAL BACKGROUND

On April 28, 1999, the Agency of Natural Resources issued a decision ("DEC #95-241") denying the conditional use determination application ("CUD application") filed by Larry Westall, requesting post-development authorization for the construction of two houses, associated grading, and installation of water and wastewater infrastructure on two lots within a three-lot subdivision, located off Browns Trace Road in Jericho, Vermont ("Project"). The CUD application requested approval for development in a Class II wetland and its associated buffer zone.

On May 25, 1999, Mr. Westall appealed DEC #95-241 to the Board. This appeal was tiled pursuant to 10 V.S.A. §1269 and Section 9 of the Vermont Wetland Rules ("VWR"). Mr. Westall sought reversal of DEC #95-241 and issuance of a CUD for the Project. On July 15, 1999, this appeal was deemed completed and docketed.

On May 27, 1999, the Board received a notice of appeal from James and Catherine Gregory, through their attorney William F. Ellis, Esq., also seeking Board review of DEC #95-241. The Gregorys sought partial modification of DEC #95-241 to allow a 50-foot encroachment and approval of a shared septic field and related appurtenances.

On June 4, 1999, the Gregory appeal was deemed complete and docketed. On July 15, 1999, the Westall appeal was deemed complete and docketed.

Because both the Westall and Gregory appeals involve the same wetland, the same Project, and challenge the same ANR decision, these matters were noticed jointly on July 15, 1999. The Notice of Appeal and Prehearing Conference was published in the Burlington Free Press on July 16, 1999, in accordance with **Rule 22** of the Board's Procedural Rules ("Procedural Rules").

On July 29, 1999, the Board's Chair convened a prehearing conference in this matter pursuant to Procedural Rule 28.

II. INTRODUCTIONS

The Chair introduced himself and staff to those present at the, prehearing conference and asked for appearances.

The Chair explained that the Water Resources Board is a five-member citizen Board appointed by the Governor. He noted that one of the Board's duties is to hear contested cases. The Chair further noted that a contested case proceeding is much like a court proceeding in that there are specific parties, only witnesses may testify, and there are formal rules of procedure and evidence which govern what the Board may consider in reaching its decision. He noted the difference between this sort of proceeding and a public informational hearing at which any member of the public might speak

III. PURPOSE OF PREHEARING CONFERENCE

The Chair described the purpose of a prehearing conference. He specifically noted that the purpose of a first prehearing conference, such as this one, is to: (1) identify parties or persons seeking party status; (2) clarify the issues in controversy; (3) see if there is any interest amongst the participants in entering negotiations to narrow or eliminate any issues in controversy; and (4) attempt to establish a schedule and hearing day agenda to reflect both the participants' and Board members' schedules and the logistics of convening a site visit before winter. See Procedural Rule 28. The Chair advised those present to obtain copies of the Procedural Rules, effective February 22, 1999, as well as the VWR, to prepare for the hearing in this matter. Copies of these rules were distributed to those present at the prehearing conference. It was noted that these rules also are available by downloading text from the Board's Web site: <http://www.state.vt.us/wtrboard>

IV. STANDARD OF REVIEW

The Chair advised the prehearing conference participants that the present appeals would be heard de novo by the Board -- that is, as if no decision had been made before with respect to Mr. Westall's CUD application. See 10 V.S.A. §1269. As a consequence, he cautioned the prehearing conference participants that any evidence that they might have submitted to the ANR in support of or in opposition to the CUD application in DEC #95-241, including the application itself, would have to be resubmitted to the Board in the form of **prefiled** exhibits. The Chair further reminded the prehearing conference participants that the CUD Applicant and the Gregorlys, as appellants and successors in interest to the CUD Applicant with respect to Lot #1, would have the burden of proof and persuasion in demonstrating that a CUD should issue, applying the standards set forth in Section 8.5 of the VWR.

V. PARTY STATUS AND REPRESENTATION

The Chair noted that the Board had received a number of requests for party status or opportunities to testify from persons claiming to either own land adjoining the subject wetland or to reside in the neighborhood and use the wetland. He also indicated that he had received a letter from Charles Lacy, indicating that, due to the short notice period, a number of persons owning land adjoining the subject wetland and other persons could not respond by the deadline for tiling requests for party status. In response to Mr. Lacy's request, and taking into consideration the comments of other preheating conference participants and the Board's schedule, the Chair indicated that he was inclined **to grant** an extension for party status requests. He polled those present at the prehearing conference to determine whether there were any objections to the grant of a two week extension. There were none.

Accordingly, the Chair said that he would grant an extension and that party status petitions, conforming with Procedural Rule 25, would be accepted for tiling with the Board until the close of business on August 17, 1999. He noted that objections to those requests could be filed with the Board no later than August 23, 1999. He further indicated that he would make rulings concerning any uncontested party status requests shortly thereafter, but that any party status petitions to which objections were tiled would be referred to the full Board for consideration and decision at its meeting on August 31, 1999.

Board counsel reviewed with those present the provisions of Procedural Rule 25. She noted that, as an alternative to participating in the appeals as intervenors of right **or by** permission, persons may testify as witnesses for those who are granted party status or,

pursuant to Procedural Rule 26, elect to submit written argument as Amicus curiae.¹ He noted that the CUD Applicants would qualify as parties of right; so would the Town of Jericho or its Planning Commission were they to enter timely appearances. The Jericho Conservation Commission and those persons or entities owning property adjoining the subject wetland might also be intervenors of right pursuant to Procedural Rules 25(B)(6) and 25(B)(8), respectively. Those using the wetland might be granted party status pursuant to Procedural Rule 25(C), provided that petitioners could satisfy the test set forth in that rule.

Charles Lacy noted that it might not be necessary for many neighbors to request party status if the JCPA were granted party status in this proceeding. The Chair asked those present whether any of them objected to the grant of party status to the Association. There were no immediate objections, although counsel for the Gregorlys noted that he would need to consult with his clients to confirm their position.

The Chair said he would take the prehearing participants' various comments under advisement and make certain preliminary party status rulings with respect party status to be memorialized in the Prehearing Conference Report and Order or in a subsequent order.

It was noted that Mr. Westall, the CUD Applicant and Appellant in Docket No. CUD-99-02, was not present for the prehearing conference. Hobart Heath presented the Chair with a letter, signed by Mr. Westall, which Mr. Heath said authorized him to represent Mr. Westall at the prehearing conference. (See enclosure.)

Counsel for the Board advised Mr. Heath that the letter signed by Mr. Westall did not clearly delegate to Mr. Heath the power to serve as Mr. Westall's representative in these appeals. She informed Mr. Heath that he would need to clarify the status of his participation in this proceeding. She specifically advised Mr. Heath to obtain legal advice to better ascertain his respective liabilities and obligations if he were either to pursue party status in his own right as the holder of a purchase and sale agreement or to serve as a representative for Mr. Westall pursuant to Procedural Rule 27(B). It was noted that if Mr. Heath elects not to serve as Mr. Westall's representative, Mr. Westall will need to appear pro se or appoint another person (such as an attorney or Mr. Severson) to serve as his representative in order to preserve his appeal before the Board.'

¹ Should Mr. Westall fail to prosecute his appeal pro se or through a representative, it is further noted that Mr. Heath may not have the requisite property interest to continue the appeal of Docket No. CUD-99-02 in his own name.

Board counsel further noted that other parties would need to clarify whether they would be represented by counsel or by another person authorized pursuant to Procedural Rule 27(B). She specifically noted that the JCC, the JCPA, and any other associations or entities seeking party status would need to authorize and identify for the Board those individuals who would serve as their representatives. The Chair indicated that August 17, 1999, would be the deadline for filings verifying the appointment of lay representatives or entries of appearance by counsel.

Finally, the Chair advised persons seeking party status as adjoining property owners that it would be helpful if they individually or jointly through JCPA provided the Board with a map showing the location of their respective properties in relationship to the Project site and the subject wetland. A town property tax map might serve this purpose.

VI. DISCLOSURES

The Chair identified for the prehearing conference participants the current Board members: members Gossens, Blythe, Einstein, Roberts, and Potvin. He distributed copies of biographical notes for these persons (see enclosure) 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 prehearing conference indicated that they were not aware of any apparent conflicts of interest or other circumstances requiring disqualification of one or more of the named Board members. However, they were advised that a deadline would be set for filing any objections or requests for further disclosure.

The prehearing conference participants also were advised that if new appointments were made to the Board during the pendency of these appeals, or should the Chair need to appoint a former Board member to hear these cases pursuant to 10 V.S.A. §905(1)(F), additional disclosures would be made to the parties so that they may have an opportunity to file any requests for Board member disqualification.

VI. EX PARTE CONTACTS

The Chair cautioned the prehearing conference participants against communicating directly with Board members concerning the appeals during their pendency. 3 V.S.A. §813. He directed all persons having procedural questions to bring them to the attention of the Board attorney staffing this case, **Kristina L. Bielenberg**, Esq. (Phone: 828-5443).

VI. PRELIMINARY ISSUES

A. Consolidation of Appeals

The Chair discussed with the parties the merits of consolidating Docket No. CUD-99-02 and CUD-99-03, given that the two appeals address the same wetland and the same Project and the persons interested in these matters appear to be the same. See Procedural Rule 33(B). Counsel for the Gregorys indicated some reservation on the basis that he thought that his clients might be prejudiced by consolidation because the part of the Project that concerns his clients might have different and possibly less adverse impacts on the subject wetland than development on Lot #3. Counsel for the ANR agreed that portions of the Project had lesser or different impacts than others.

After further discussion, it was agreed that the issues might be framed to address the fact that the Project entails different development activities with different impacts within the wetland and its buffer zone. Mr. Heath, however, noted that certain amenities and permits are shared by both Lots #1 and #3 (i.e.: wastewater disposal system and subdivision permit) and therefore the review of the two appeals should be consolidated. Counsel for the ANR confirmed that the Project reviewed by the ANR involved development activities on both lots. All of the prehearing conference participants agreed that there would be greater efficiency if the hearing and site visit were consolidated, provided that the Board was sensitive to the fact that the impacts of one part of the Project might be different from those of another.

The Chair said that he would take the preheating conference participants' comments under advisement and make a determination about consolidation at a later date.

B. Non-Adversarial Resolution of Issues

The Chair asked each of the prehearing conference participants whether there was any likelihood that these appeals might be resolved or the issues narrowed or eliminated through negotiation.

Counsel for the ANR indicated that there might be grounds for agreement and the development of a stipulation with respect to that portion of the Project involving Lot #1, since the wetland impacts of that part of the Project are allegedly different than those of the rest of the development. Counsel for the ANR indicated that he was willing to meet with the Gregory's' counsel to discuss this further. Counsel for the ANR indicated that his client was not inclined to enter a settlement with Larry Westall regarding Project

impacts related to Lot #3.

The Chair invited the prehearing conference participants to discuss amongst themselves, after the conference, what opportunities for settlement might be appropriate. Board counsel noted that due to the time **frame** for bringing these appeals to hearing, negotiations would most likely have to occur simultaneous with parties' filings in preparation for the hearing.

C. Stays

As part of his notice of appeal, Mr. **Westall** asked the Board to stay (continue) its proceeding to allow him the opportunity to pursue other options to litigation. The Board's counsel asked Hobart Heath whether the CUD Applicant's stay request had been satisfied by the grant of the filing extension to July 15, 1999. Mr. Heath indicated that such request had been satisfied and that no stay request was currently pending.

VII. ISSUES

The Chair emphasized that the Board's review is limited to consideration of the Project impacts under Sections 5 and 8 of the VWR. Board counsel read to the prehearing conference participants the following three questions which she believed summarized the standards to be applied under Section 8:

- (1) Whether the Project, or any part thereof, will result in an undue adverse effect on protected functions? Section 8.5(a) of the VWR.
- (2) If the Project, or any part thereof, will result in an undue adverse effect on protected functions are these impacts minimal? **Section 8.5(a)** of the VWR
- (3) If the undue adverse effect on protected functions is more than minimal, has this impact been sufficiently mitigated to the extent necessary to achieve no net undue adverse effect? Section 8.5(b) of the VWR

All persons present at the prehearing conference concurred that these are the central issues in dispute. Charles Lacy noted that there is an additional dispute concerning the actual boundary of the wetland and its buffer zone, and therefore the extent of physical impacts of the Project, given the amount of till that has been deposited at the Project site by the CUD Applicant.

The Chair noted that the Board presumes that a Class Two wetland is significant for all ten functions listed in Section 5 of the VWRs, and therefore in a de novo proceeding the CUD Applicant is normally expected to present evidence on the impacts of its Project with respect to each of the ten functions. **Where**, however, neither the Appellant nor the other parties to an appeal contest the ANR's findings and conclusions that only certain wetland functions are significant and only certain of these functions are adversely affected by the Project, the Board limits its review to **the** Project's impacts on only those significant functions specifically identified by the Appellant as at issue.

Accordingly, the Chair noted that the ANR concluded that the Project would only have an undue adverse impact on significant functions 5.4 (wildlife and migratory bird habitat) and 5.9 (open space and aesthetics). It further concluded that the Project would not result in an undue adverse impact with respect to protected functions 5.1 (water storage for flood and storm runoff), 5.2 (surface and ground-water protection), and 5.7 (education and research in the natural sciences). ANR further determined that with respect to the other functions, the wetland was only minimally significant for functions 5.3 (fisheries habitat), 5.5 (hydrophytic vegetation habitat), 5.6 (threatened and endangered species habitat), and 5.10 (erosion control through binding and stabilizing the soil) and further that Finally, the ANR further concluded that the wetland served the function of 5.8 (recreational value and economic benefits), but did not evaluate **the** Project's impacts on this function separate from a general discussion on adverse impacts with respect to function 5.9 (open space and aesthetics).

The CUD Applicant, in its notice of appeal, challenged the ANR's findings and conclusions with respect to the Project's impacts on functions 5.4 and 5.9 and with respect to mitigation under VWR, Section 8.5(b). The **Gregorys**, Owners of Lot #2, in their notice of appeal challenged the ANR's findings and conclusions with respect to the Project's impacts presumably with respect to the same functions, although its notice of appeal does not expressly state so. Some of the persons who have sought party status have asserted that they make recreational use of the wetland for birdwatching, wildlife observations, cross-country skiing, and walking. However, consistent with the ANR's findings and conclusions, the impacts of the Project experienced by recreational users are related to adverse impacts under function 5.9, not function 5.8.

Accordingly, the Chair preliminarily rules that the scope of the Board's review **will** be limited to Project impacts on significant functions 5.4 and 5.9, unless timely objections to such a **limitation** on the scope of the proceeding is timely tiled in accordance with the Order below. Evidence concerning the location of the wetland and buffer zone boundaries prior to development activities at the Project site shall be admissible for the purpose of demonstrating the extent of the Project's physical encroachment upon the wetland and its

buffer zone and the resultant impacts on functions 5.4 and/or 5.9.

VIII. WITNESSES AND EXHIBITS

The Chair asked the prehearing conference participants to offer a preliminary list of witnesses and exhibits to help get a sense of how long a hearing will be required to address the matters on appeal.

Counsel for the ANR indicated that he would be calling two agency witnesses: a wildlife biologist and a wetlands consultant.

Counsel for the Gregorys said his clients would testify along with a wetlands consultant and/or wildlife biologist from the firm, William D. Countryman Environmental Assessment and Planning.

Hobart Heath indicated that he and/or Larry **Westall** would file a copy of the CUD application and supporting materials and call Jeffrey **Severson** as a witness. Board counsel advised Mr. **Severson** to confirm whether Mr. **Westall** or Mr. Heath or both would be his client, and also whether he would be serving as a representative or witness or both.

Charles Lacy reported that JCPA would likely call Hub Vogelmann, a botanist, and Susan Morse, a wildlife ecologist, and various neighbors who use the wetland to testify about aesthetic impacts.

Thomas Baribault for JCC indicated that the Commission would likely call as a witness, David Barrington, a botanist, and perhaps another witness to testify concerning the CUD Applicant's modus operandi with respect to construction of other projects in other communities. This prompted the Chair and the Board's counsel to remind the prehearing conference participants that the jurisdiction of the Board is limited to consideration of the Project's impacts upon the functions identified in the **VWRs** and within the scope of appeal. The Board has no enforcement authority or authority to consider whether the CUD Applicant has violated local permits or municipal ordinances. Therefore, evidence concerning the CUD Applicant's other projects or his alleged bad character is not relevant in the appeals before the Board.

Board counsel discussed the Board's procedures for pretiling testimony and/or exhibits. See Procedural Rule 30. She polled all those present and the consensus was that **prefiled** testimony and exhibits would be appropriate in this proceeding. Since the CUD Applicant and the Gregorys have the burden of proof in these appeals, they would be

required to **pre**file their direct cases first, and two weeks later those opposing the issuance of a CUD would be able to file their **pre**filed direct testimony and exhibits. ANR, JCC, JCPA all agreed that two weeks would be sufficient to prepare and file their direct testimony and exhibits.

Board counsel **further** explained that following the **pre**fil~~ing~~ing of evidence, the parties are routinely allowed to file written evidentiary objections. These are ruled on by the Chair at a second prehearing conference held a week to ten days before the hearing. This allows much of the hearing day to be devoted to cross-examination and Board questions of witnesses. The second prehearing conference is also used to review final plans for the hearing day and site visit.

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. The Chair noted that the Prehearing Conference Report and Order would contain specific instructions for the **pre**fil~~ing~~ing of testimony and exhibits.

Board counsel emphasized that with respect to all filings, including **pre**filed testimony and exhibits and proposed findings of fact, conclusions of law, and orders, the parties are required to file an original and seven copies with the Board as well as serve persons on the Board's certificate of service. She further noted that "filing with the Board" means that a parties' submissions must be received at the Board's **office** by the deadline stated in a prehearing order or subsequent orders of the Board or Chair. See Procedural Rules **8, 9**, and 10

IX. HEARING DAY SCHEDULE

The Chair indicated that the hearing with respect to the pending appeals would likely be held on October 26 or November **16, 1999**, depending on whether the Board would be required to decide preliminary issues in this matter. He asked the prehearing conference participants to reserve these dates until further notice. The Chair also noted that the hearing would be scheduled at a public facility in close proximity to the subject wetland. Various venues were suggested by the prehearing conference participants, including the town library and Jericho Center Church.

The Chair outlined for the prehearing conference participants the typical hearing day schedule (see enclosure) and answered their procedural questions.

The Chair asked the parties to plan their cases in accordance with the proposed

time allotments and, if additional time is required, to file requests for additional time in accordance with the Prehearing Conference Report and Order. He encouraged parties to coordinate their testimony, exhibits, and argument so as to eliminate redundancy and achieve efficiency in the presentation of their respective cases.

X. SERVICE LIST

Board counsel advised the prehearing conference participants that for the time being they should use the certificate of service accompanying the Prehearing Conference Report and Order to determine who should receive copies of all filings. She further noted that this certificate of service would be revised at the time party status rulings were made. Following these rulings, parties would be obligated to serve persons listed as parties, not persons listed under the "For Your Information" section of the certificate of service.

Parties are responsible for advising the Board of any changes in address, including changes related to the assignment of new 911 street numbers.

XI. ORDER

1. The following persons or entities are preliminarily granted party status in both appeals:

Larry Westall, CUD Applicant, pursuant to Procedural Rule 25(B)(1);
James and Catherine Gregory, Owners of Lot #2, pursuant to Procedural Rule 25(B)(8);
ANR, pursuant to Procedural Rule 25(B)(5);
JCC, pursuant to Procedural Rule 25(B)(6); and
JCPA, as owner of property adjoining the subject wetland and as an association of persons residing near or owning property adjoining the subject wetland, pursuant to Procedural Rule 25(B)(8).

Any person objecting to the grant of party status to these persons shall file his or her written objections no later than **4:30 p.m., Friday, August 13, 1999**, pursuant to Procedural Rule 25(F). If no objections are received by this deadline, the Chair's preliminary rulings shall become final. If any objections are tiled by the above deadline, they shall be considered by the full Board at its meeting on August 31, 1999.

2. The deadline for *filing* party status petitions in accordance with Procedural Rule 25, and notices of appearance by counsel or signed statements authorizing representation by non-attorneys pursuant to Procedural Rule 27(B), is extended to **4:30 p.m., Tuesday, August 17, 1999**. Any petition not filed in accordance with the filing requirements of Item 23 below, shall not be accepted for filing and may result in the denial of party status.

Appellant Larry Westall is specifically instructed to notify the Board by this deadline whether he will represent himself or appear through counsel or by a lay representative, be it Mr. Hobart Heath, Jeffrey Severson, or some other person. Hobart Heath is specifically instructed to notify the Board **by this** deadline whether he will serve as Mr. Westall's representative or seeks party status in his own name, pursuant to Rule 25. JCC and JCPA will each notify the Board by this deadline the identity of their respective representatives.

All persons seeking party status as adjoining property owners shall file individually or jointly through JCPA a map showing the location of their respective properties in relationship to the Project site and the subject wetland.

3. Any person objecting to the party status requests of persons who filed timely petitions by the deadline set forth in Item 2 above, shall **file** his or her written objections on or before **4:30 p.m., Monday, August 23, 1999**. Any objections not filed in accordance with the filing requirements of Item 23 below, shall not be accepted for filing. If any objections are timely filed by the above deadline, they shall be considered by the full Board at its meeting on August 31, 1999.
 4. Rulings concerning all party status requests, including those made by individual adjoining property owners filed prior to the prehearing conference, will be issued shortly after the Board's August 31, 1999, meeting.
 5. Any requests for disqualification of any of the current Board members identified in Section VI. above, or any requests for **further** disclosure, shall be filed on or before **4:30 p.m., Monday, August 23, 1999**. Any such request for disqualification shall be supported with a statement of alleged facts and a memorandum of law in support of such disqualification. The failure to file a timely request for disqualification or request for further disclosure shall be deemed waiver of any objections to the participation of a current Board member in the above-captioned appeals.
 6. A **final** ruling concerning whether the above-captioned appeals shall be consolidated will be made **after** all party status determinations and other preliminary
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issues are decided. In the interim, the appellants, all prehearing conference participants, and persons who subsequent to this order request party status, shall assume that these two appeals are consolidated and file their petitions and other correspondence with the Board as joint filings.

7. The issues are those framed in Section VII. above. Any person objecting to the issues as framed shall file his or her objection on or before **Monday, August 23, 1999**.
8. On or before **4:30 p.m., Thursday, September 23, 1999**, Larry Westall or his representative, the Gregorys, and any other party supporting the issuance of a CUD for the Project, or any part thereof, shall file **final** lists of **direct** witnesses and exhibits. They also shall file all direct prefiled testimony and exhibits they intend to present. For each expert witness, they shall file a resume or other statement of qualification. All reports and other documents upon which an expert witness relies in making his or her professional opinion concerning the impacts of the Project shall be filed as prefiled exhibits.

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 tiled with the Board** and be made 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., Thursday, October 7, 1999**, all parties supporting denial of a CUD for the Project, or any part thereof, shall file final lists of **direct** witnesses and exhibits and all direct **prefiled** testimony and exhibits they intend to present. For each expert witness, they shall file a resume or other statement of **qualifica-**tion. All reports and other documents upon which an expert witness relies in making his or her professional opinion concerning the impacts of the Project shall be filed as prefiled exhibits.

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 tiled with the Board** and be made 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., Thursday, October 21, 1999**, all parties shall file final lists of rebuttal witnesses and exhibits and prefiled rebuttal testimony and exhibits they intend to present. For each expert witness, they shall file a resume or other statement of qualification. All reports and other documents upon which an **expert**

witness relies in making his or her professional opinion concerning the impacts of the Project shall be filed as prefiled exhibits.

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 be made available for inspection and copying at the Board's office **by** any party prior to the hearing.

11. 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 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.
 12. On or before **4:30 p.m., Thursday, October 28, 1999**, any party may file in writing any evidentiary objections to prefiled testimony and exhibits previously filed. If objections are not timely filed in accordance with the filing requirements in Item **23** below, they shall be deemed waived. Any objections shall be supported by legal memoranda.
 13. On or before **4:30 p.m., Thursday, November 4, 1999**, any party may file in writing any responses to evidentiary objections filed in accordance with Item **12** above. If responses are not timely filed in accordance with the filing requirements in Item **23** below, they may be excluded. Any objections shall be supported by legal memoranda.
 14. On or before **4:30 p.m., Thursday, November 4, 1999**, all parties shall submit a single, combined list of all prefiled testimony and exhibits.
 15. On or before **4:30 p.m., Thursday, November 4, 1999**, all parties shall file in writing any requests for time beyond the time allotments given in Section IX. above. The Chair may allow more time if good cause is shown.
 16. On or before **4:30 p.m., Thursday, November 4, 1999**, parties shall file a joint proposed itinerary for the site visit to be held on June 8, 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 in a submission to the Board so that the Chair may rule on the scope of the site visit.
 17. On or before **4:30 p.m., Thursday, November 4, 1999**, parties shall file any
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stipulations. These may be in the form of joint statements of fact or proposed joint decisions.

18. On or before **4:30 p.m., Thursday, November 4, 1999**, parties shall file any proposed findings of fact, conclusions of law, and orders, including any proposed CUD conditions.
19. The Chair or his designee will conduct a second prehearing conference by telephone on **Tuesday, November 9, 1999, at 10:00 a.m. at the Board's office in Montpelier, Vermont. The purpose** of this preheating conference is to address any pending evidentiary objections, site visit issues, or other matters requiring rulings preliminary to the hearing in this matter. 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 **Friday, November 5, 1999**. The Board's staff will arrange the conference call.
20. On **Tuesday, November 16, 1999**, the Board will convene a hearing in this matter. The specific time and location of this hearing **shall** be announced later.
21. 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., Monday, November 1, 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 32(B)
22. On or before **4:30 p.m., November, 23, 1999**, any party may file any revised or **supplemental proposed findings of fact, conclusions of law, and orders, including any proposed CUD conditions**.
23. The Board may waive the filing requirements upon a showing of good cause, unless such waiver would unfairly prejudice the rights of other parties.
24. Parties shall file an original **and seven collated copies of prefiled testimony, legal memoranda, all prefiled testimony, all prefiled 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 Board's Certificate of Service. The Certificate of Service will be revised once party status determinations have been made. 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. See Procedural Rule 10.

25. Each party shall label their prefiled testimony and exhibits with **their** name. The labels on the exhibits must contain the words WATER RESOURCES BOARD, Re: Larry Westall, Docket No. CUD-99-02 and Re: James & Catherine Gregory, Docket No. CUD-99-03, 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 CUD Applicant, "G" for the Gregorys, and other parties shall use their initials for the prefix (i.e. "ANR," "JCC," "JCPA). Exhibits shall be assigned consecutive numbers. For example, the CUD Applicant would number its exhibits A-1, A-2, A-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. A-2A, A-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:

CUD APPLICANT'S
LIST OF EXHIBITS
RE: LARRY WESTALL, CUD-99-02 and JAMES AND
CATHERINE GREGORY, CUD-99-03

<u>Number</u>	<u>Description</u>	<u>Status</u>
A-1	Pretiled Direct Testimony of Larry Weston	
A-2	CUD Application filed with ANR on _____	
A-3A-D	Survey dated _____, sheets 3A through 3D	

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

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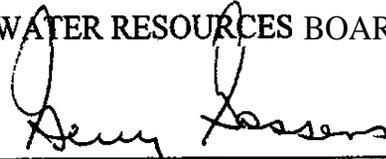
been admitted.

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

26. Pursuant to Procedural Rule 28(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., Friday, August 13, 1999**, 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 4th day of August, 1999.

WATER RESOURCES BOARD



Gerry Gossens, Chair