

**State of Vermont  
WATER RESOURCES BOARD**

**RE: Appeal of Nathan Wallace-Senft  
(Bennington Bypass Project)  
Docket No. WQ-99-04 (DEC Permit #1-1357)**

**RE: Appeal of Nathan Wallace-Senft  
(Bennington Bypass Project)  
Docket No. CUD-99-05 (DEC Permit #94-558)**

**PREHEARING CONFERENCE REPORT AND ORDER**

On July 29, 1999, Water Resources Board ("Board") Chair Gerry Gossens, pursuant to Procedural Rule 28, convened a prehearing conference in Montpelier, Vermont, in the above-captioned matters. The following persons participated:

Nathan Wallace-Se&, CUD Appellant and Discharge Permit Appellant, pro se  
Anita Bellin, CUD Appellant and Discharge Permit Appellant, pro se  
Agency of Transportation ("AOT") by Scott Whitted, Esq.  
Steve Lynch, Bennington Bypass Project Manager, AOT  
Agency of Natural Resources ("ANR") by Jon Groveman, Esq.  
Charlotte Brodie, Project Consultant, Dubois and King, Inc.  
John Benson, Project Consultant, Dubois and King, Inc.

Also entering a timely appearance, but not attending, were the following:

Town of Bennington Planning Commission, by Daniel Monks, Zoning Administrator  
Town of Bennington, by the Town Manager, Stuart Hurd

**I. BACKGROUND**

On June 2, 1999, the Board received two letters, characterized as appeals, pertaining to the construction of the western spur of AOT's project known as the Bennington Bypass ("Project"). Both were tiled by Nathan Wallace-Senft and Anita Bellin ("Appellants"), residents of North Bennington. Appellants object to various aspects of the Project and have tiled these appeals relative to two distinct permits issued for the Project by ANR. The first appeal is relative to ANR Discharge Permit Number 1-1357 which is a discharge permit issued on May 3, 1999, addressing stormwater runoff impacts from the Project ("Stormwater Permit"). That appeal has been docketed by the Board as Docket No. WQ-99-04. The second appeal is relative to ANR's Conditional Use Determination Number 94-558 ("CUD") which was also issued on May 3, 1999. The CUD appeal has been docketed by the Board as Docket No. CUD-99-05. The CUD authorizes impacts to wetlands in the Project area as conditional uses, subject to conditions, off-site mitigation and ongoing monitoring of the wetlands impacted by the conditional use.

Although each of the appeals described above is being pursued under a separate statutory authority, there will likely be a substantial overlap in the factual evidence, the parties who will present that evidence, as well as the legal issues involved. Accordingly, the preheating conference relative to these matters will address both pending appeals. Depending upon the more detailed description of the issues in these matters, which will be a subject of any subsequent prehearing conference, additional hearings and site visits with respect to these matters may also be consolidated.

## II. PURPOSE OF PREHEARING CONFERENCE

The Chair described the purpose of a preheating conference. He specifically noted that the purpose of a **first** preheating 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, preliminary lists of witnesses and exhibits, and site visit requests. See Procedural Rule 28. The Chair advised those present to obtain copies of the Procedural Rules, effective February 22, 1999, as well as the Vermont Wetland Rules, to prepare for the hearing in this matter. These are available in hardcopy from the Board or by downloading text from the Board's Web site: <http://www.state.vt.us/wtrboard>

## III. 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 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. An opportunity was provided for any interested participant to object to the participation of any Board member on or before August 17, 1999. No such objections have been filed.

Should new appointments be made to the Board during the **pendency** of these appeals, or should the Chair need to appoint a former Board member to sit on these appeals pursuant to 10 V.S.A. §905(1)(F), additional disclosures will be made to the parties so that they may have an opportunity to file any requests for Board member disqualification.

#### IV. EX PARTE CONTACTS

The Chair cautioned the preheating conference participants against communicating directly with Board members concerning the appeals during their pendency. He directed all persons having procedural questions to bring them to the attention of the Board attorney staffing this case, Joe Minadeo. (Phone: 828-3305 or email [jminadeo@envboard.state.vt.us](mailto:jminadeo@envboard.state.vt.us)).

#### V. PRELIMINARY ISSUES

##### A. Party Status

The Chair briefly reviewed with the preheating conference participants the different kinds of parties and ways that people can participate in contested case hearings before the Board, referring to Rule 25.

The Chair noted that the Board has received Notices of Appearance by several entities, each of which has a right to intervene in the proceeding.

ANR;  
AOT;  
Town of Bennington Planning Commission;  
Town of Bennington;

In addition to those notices of appearance, the Appellants filed a formal request for party status relative to each appeal'. By a letter dated July 28, 1999, the Town of Bennington objected to the party status of the Appellants. At the prehearing conference, Chair Gossens indicated that he would allow supplemental filings objecting to the Appellants' party status or standing to pursue the appeals. As noted at the conference and confirmed by a written memorandum from Board counsel, such objections were due not later than August 17, 1999. On August 17, 1999, AOT filed an objection to Appellants' party standing characterized as a Motion to Dismiss. As described in the Order, the Board will hear oral argument from the parties on AOT's Motion at 1:00 p.m. on August 31, 1999.

The Chair asked if there were any additional objections to the party status requests of

---

1

Appellants also filed a letter on August 17, 1999 indicating that they are members of an organization called Citizens for Alternatives to the Bennington Bypass ("CABB"). The filing explains some of CABB's concerns but it does not purport to designate either of the Appellants as legal representatives of the organization. The Board will consider whether, and if so to what extent, it will consider the Appellants' August 17, 1999 filing at the August 31, 1999 Board meeting.

---

persons presently represented at the prehearing conference. None was identified.

#### B. Representatives

Appellants are appearing with respect to these matters on their own behalf, or pro se. Recipients of this prehearing conference report and order are directed to the requirements of Procedural Rule 27(B) should any party seek to appoint a representative.

#### C. Consolidation of Appeals

As noted in the background at Section I, above, the appeals of both the CUD and Stormwater Permit are closely linked and will likely require the presentation of duplicative evidence. Accordingly, Chair Gossens inquired of the participants whether there was any objection to the Board "consolidating" the proceedings for the purpose of expediting any necessary site visits and to facilitate a more efficient presentation of evidence. Chair Gossens noted that, should the Board issue a permit and or a CUD, such authorizations would be issued independently. No party objected to proceeding in this manner.

#### D. Non-Adversarial Resolution of Issues

The Chair asked each of the preheating conference participants whether there was any likelihood that these appeals might be resolved through informal or formal mediation or negotiation. The Appellants expressed a strong interest in pursuing this course of action and both the Agency of Transportation's and the Agency of Natural Resources' representatives expressed each respective entity's willingness to discuss this matter with the Appellants informally. In light of this, Chair Gossens encouraged the participants to engage in such discussions and noted that he would decline to more specifically define the issues in the proceeding or begin scheduling prefiling deadlines or dates for a hearing or site visit. Chair Gossens noted that a status report would need to be filed

### VI. STANDARD OF REVIEW

The Chair reminded the prehearing conference participants that appeals filed pursuant to 10 V.S.A. §1269 are heard de novo. Consequently, parties are forewarned that any evidence that might have been submitted to the ANR in support of or in opposition to either of the referenced applications, including each application, must be resubmitted to the Board in the form of **prefiled** exhibits. The CUD applicant has 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. Likewise, with respect to the Stormwater Permit, AOT, as applicant, bears the burden of proof.

## VII. WITNESSES AND EXHIBITS

The Chair explained to the prehearing conference participants that **prefiled** testimony and exhibits would need to be filed in this proceeding. No further discussion of this topic was pursued in light of the participants' desire to engage in informal discussions concerning the Project and its impacts. **See** Procedural Rule 30(E) and (D).

The Chair noted that a Preheating Conference Report and Order following the second preheating conference, should one be required, would contain specific instructions for the pretiling of testimony and exhibits. With respect to all tilings, the parties are required to file an original and seven 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 tiling in person or by first-class mail.

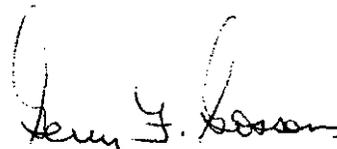
If a second prehearing conference is required it will be scheduled during either the third week of September, or shortly after the **first** week of October. The date, time, and location of any subsequent preheating conference will be confirmed by subsequent written notice not less **than** 10 days prior to the conference.

### VIII. ORDER

1. This Prehearing Conference Report and Order, in conjunction with other additional prehearing orders, shall control the subsequent course of this proceeding. Any party objecting to all or a portion of this Order, shall file such objection with the Board, not later than **4:30 p.m. on Friday, August 27, 1999**. The Board will take up any objection in conjunction with its consideration of the pending Motion to Dismiss on August 31, 1999.
2. On August 17, 1999, AOT tiled a Motion to Dismiss the appeals based on AOT's argument that the Appellants lack standing to pursue the appeal as appellants. Because the Board must provide oral argument in conjunction with consideration of any such motion to dismiss (see Procedural Rule 24), the Board will convene oral argument with respect to this matter at **1:00 p.m. on Tuesday, August 31, 1999** at the Board's regularly scheduled Board meeting in the conference room of the National Life Records Center in Montpelier. ANR, AOT, the Town of Bennington, and the Appellants will each have approximately 10 minutes to present argument on the question of whether the Appellants have the requisite standing to pursue the appeals. To the extent these entities advocate similar legal positions on the question of Appellants' standing, or lack of standing, parties are encouraged to coordinate their presentation of argument to avoid redundancy. The Board has allocated 45 minutes of its meeting to this issue, which includes Board deliberations.

Dated at Montpelier, Vermont this 19 th day of August, 1999.

WATER RESOURCES BOARD



---

Gerry F. Gossens  
Chair