

State of Vermont
WATER RESOURCES BOARD

RE: Al J. Frank
Docket No. CUD-2000-02 (DEC #1999-524)

RE: Gregory C. Lothrop
Docket No. CUD-2000-03 (DEC #1999-524)

PREHEARING CONFERENCE REPORT AND ORDER

On May 25, 2000, at 1:00 p.m., Water Resources Board ("Board") Chair Gerry Gossens convened a prehearing conference at the Board's Conference Room in Montpelier, Vermont, in the above-captioned matters. The Chair was assisted in the conduct of the prehearing conference by the Board's Vice-Chair, David J. Blythe, Esq., and the Board's Associate General Counsel, Kristina L. Bielenberg, Esq. The following persons entered timely appearances and participated:

Al J. Frank, pro se, Appellant;
Gregory C. Lothrop, Appellant, and Carole Lothrop by David L. Grayck, Esq.,
Cheney, Brock & Saudek, P.C.;
John Larkin and Larkin Realty, Applicant, by Carl H. Lisman, Esq., Lisman and
Lisman and Lance A. Llewellyn, P.E., Llewellyn-Howley;
Agency of Natural Resources ("ANR"), by Elizabeth Lord;
Randall Kay, pro se, in his individual capacity and as representative for the Dorset
Heights Water System Association ("DHWSA");
Leonard J. Gluck, pro se;

Also present were Appellant Lothrop and his wife, Carole Lothrop. John K. Dunleavy was present as an observer.

I. PROCEDURAL BACKGROUND

On February 29, 2000, ANR issued a conditional use determination, DEC #1999-524 ("CUD") to John Larkin, Larkin Realty, 410 Shelburne Road, South Burlington, Vermont ("Applicant"), for development in two Class Two wetlands and adjacent buffer zones related to a proposed residential project on the former Marceau farm on the westerly side of VT Route 116 in South Burlington, Vermont ("Project").

On March 16, 2000, Al J. Frank of 58 Butler Drive, South Burlington, appealed the CUD to the Board. On March 28, 2000, Gregory C. Lothrop of 59 Butler Drive, South

Burlington, also appealed the CUD to the Board. Both appeals were timely filed pursuant to 10 V.S.A. § 1269 and Section 9 of the Vermont Wetland Rules ("VWR"). The Lothrop appeal was deemed substantially complete on March 31, 2000. The Board determined that the Frank appeal was substantially complete in a Memorandum of Decision and Order issued on April 28, 2000.

On April 25, 2000, Randall Kay, 28 Old Cross Road, South Burlington, and a member of the DHWSA filed a request to be put him on the service list for the above-captioned appeals, but did not specifically ask for party status.

A Notice of Appeals and Prehearing Conference was issued on May 2, 2000, and published in the Burlington Free Press on May 3, 2000, in accordance with Water Resources Board Procedural Rule ("Procedural Rule") 22.

On May 15, 2000, the Applicant tiled a notice of appearance. On May 19, 2000, William S. Brakeley, pro se, an adjoining property owner residing at 61 Butler Drive, South Burlington, tiled a notice of appearance and party status petition. On May 19, 2000, Carl H. Lisman, Esq., entered his appearance on behalf of Applicant John Larkin and Larkin Realty. On May 23, 2000, Randall Kay filed a party status petition for himself, in his individual capacity, and for DHWSA, as its representative. Also on May 23, 2000, Elizabeth Lord, Legal Assistant, Planning Division of ANR, filed an entry of appearance for herself and Jon Groveman, Esq., on behalf of the ANR.

On May 25, 2000, the Board's Chair convened a prehearing conference in this matter pursuant to Procedural Rule 28.

II. PURPOSE OF PREHEARING CONFERENCE

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 appeals from CUD decisions of the ANR, pursuant to 10 V.S.A. § 1269 and Section 9 of the Vermont Wetland Rules ("VWR"). He explained that as a part of its duties in contested case proceedings, the Board or its Chair is authorized to convene prehearing conferences to expedite the hearing process. Procedural Rule 28.

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; including any preliminary issues; (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. See Procedural Rule 28.

The Board's counsel noted that party status determinations and scope of appeal issues would be taken under advisement and ruled upon in the prehearing conference report and order ("Prehearing Order") that would be issued a few days after the prehearing conference or in a subsequent order. See Procedural Rule 28(B).

III. INTRODUCTIONS AND APPEARANCES

The Chair introduced himself, Vice-Chair Blythe, and staff to those present at the prehearing conference. He noted that due to the fact he will be leaving the Board at the end of June, Vice-Chair Blythe will serve as Acting Chair for this proceeding. Accordingly, Vice-Chair Blythe will issue orders in the above-captioned appeals and conduct prehearing and status conferences in this matter to assure continuity of case management.

The Chair asked for appearances from persons attending the prehearing conference. See Prehearing Order at 1 for a list of participants.

IV. DISCLOSURES

Chair Gossens identified the current members of the Board: members Gossens, Blythe, Farr, Roberts, and Potvin. Copies of biographical notes for each of these persons were distributed to those participating in the prehearing conference. See attachment. The Chair 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 persons present 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. Due to the fact that not all persons seeking party status in this proceeding were present at the prehearing conference, however, those present were advised that the Prehearing Order would establish a deadline for the filing of any objections or requests for further disclosure.

The Board's counsel advised the prehearing conference participants that if new appointments are made to the Board during the pendency of this appeal, 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 will be made to the parties so that they may have an opportunity to file any requests for Board member disqualification.

V. EX PARTE CONTACTS

The Board's counsel cautioned would-be parties to this proceeding against communicating directly with Board members concerning the two appeal during their pendency. 3 V.S.A. §813. All persons having procedural questions were directed to bring them to the attention of the Board's staff handling this case, Kristina L. Bielenberg, Esq. (Phone: 828-5443).

VI. STANDARD OF REVIEW

The Board's counsel explained that any hearing on the merits in these appeals shall be conducted as a *de novo* proceeding pursuant to 10 V.S.A. § 1269. As a consequence of the *de novo* standard, the prehearing conference participants were forewarned that any evidence that might have been submitted to the ANR in support of or in opposition to the application for CUD, including the application itself, must be resubmitted to the Board in the form of *prefiled* exhibits.

Should these appeals be decided on the merits after a hearing, the Board will issue an order affirming, reversing or modifying the act or decision of the Secretary of ANR 10 V.S.A. § 1269. The Applicant has the burden of proof, by a preponderance of the evidence, to show that a CUD should issue for the Project and, if so, with what conditions.

VIII. PRELIMINARY ISSUES

A. SCOPE OF APPEAL

The Vice-Chair requested clarification concerning the scope of the Project authorized by the CUD and the wetland resources allegedly affected by the Project

The Applicants' representatives indicated that the Project encompasses the residential development of approximately 55 acres within a 98-acre property. The Applicant proposes to develop 53 single-family lots and 21 triplexes. It is the Applicant's position that the CUD approves construction within two Class Two wetlands (Wetlands

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“A” and “C”) and their associated buffer zones for the so-called connector road (“Old Cross Road Extension” from Dorset Street through the Marceau property to Route 116 by way of and including a temporary street to Route 116), the so-called link street between the Butler Farms subdivision and the connector road, and the creation of residential lots. See Findings of Fact 1 and 6, and Condition B, CUD

The ANR’s representative indicated that she was not certain whether the CUD authorizes the creation of lots. Appellant Frank indicated that he didn’t believe the CUD encompassed the creation of lots because none of the Conditions in the CUD addressed this subject. Appellant Lothrop asked for further clarification concerning the scope of the Project and indicated that if the Applicant intended to expand the scope beyond what was initially reviewed by the ANR, he would ask for a remand. Appellant Lothrop states his position that any decision or agreement reached by the City of South Burlington with respect to the Project, preceding the filing of the CUD application, might have some bearing on the scope of the Applicant’s construction plans.

The Vice-Chair asked the ANR and the Applicant to clarify in writing the scope of the Project approved by the CUD. A deadline for their filings and for responsive filings is set in the Prehearing Order at 16. He noted that the Board is very concerned about piece-meal review of development within protected wetlands and their buffer zones. Therefore, the parties and would-be parties are invited to brief the issue whether this matter should be remanded to the ANR for further investigation and findings should the scope of the Project be found to be more expansive than what was addressed by the ANR in its CUD review.

Both Appellants Frank and Lothrop agreed that Wetlands “A” and “C” and their respective buffer zones were the wetland resources that would allegedly be adversely affected by the Project. The outflows of these two wetlands converge at or near the boundary with the Butler Farms subdivision, and water from these wetlands is directed through the Butler Farms subdivision by way of a swale. Most of the persons seeking party status in this proceeding have properties which are adjacent to the Project tract and wetland buffer zones or adjacent to the swale which carries water from the wetlands through the Butler Farms subdivision.

B. CONSOLIDATION

The Vice-Chair indicated that he was considering consolidating the two appeals. Consolidation of appeals, pursuant to Board Procedural Rule 33(B) is not uncommon where the same project and substantially the same issues are involved in order to avoid duplication of testimony and unnecessary expense, and where no party would be prejudiced

by such consolidation. If the two appeals were consolidated, one prehearing conference report would be issued with one set of deadlines, there would be one consolidated hearing and site visit, and one decision, although the decision would likely address the separate arguments of the two appellants. The causes of action would not be merged.

The Vice-Chair asked those present whether they had any objections to such a consolidation. It was noted that at oral argument on April 25, 2000, Appellant Frank offered to have his appeal consolidated with the Lothrop appeal. However, at the prehearing conference, Appellant Frank indicated that he deferred taking a position on the question. Counsel for Appellant Lothrop indicated that he did not object to consolidation, provided that the causes of action were not merged. Counsel for the Applicant indicated that he preferred consolidation. The ANR and others present did not object to consolidation.

The Vice-Chair indicated that he would take the participants' positions under advisement and rule on the consolidation question in the Prehearing Order.

The Vice-Chair has determined that consolidation of the above-referenced two appeals is warranted pursuant to Procedural Rule 33(B) because the subject matter and parties involved are substantially the same, such consolidation would avoid duplication of testimony and other evidence, and no party or would-be party has shown how it would be prejudiced by such consolidation. A ruling to this effect is contained in this Prehearing Order at 14.

C. DEFICIENCIES IN NOTICE AND REMAND

The Board's counsel noted that in the Board's May 2, 2000, notice for the above-captioned appeals, parties and those seeking party status were asked to comment on whether the ANR's purported failure to serve the CUD on the Clerk of the City of South Burlington constitutes a defect in notice requiring remand of the CUD to the ANR for further action. See VWR, Section 8.2, 8.3, and 8.4. She noted that the Board had received written comments on this question from only two persons, William S. Brakeley and Randall Kay, on behalf of himself and DHWSA, in their respective filings of May 19 and 23, 2000. They both asked the Board to remand this matter based on the purported defect in notice.

The prehearing conference participants, other than Mr. Kay, were asked to address the notice and remand question. The ANR's representative indicated that she had not discussed this matter with the Wetlands Office staff and was not prepared to comment on either the facts surrounding the notice question or the law. Counsel for Appellant Lothrop indicated that the failure of notice was a fatal defect that could only be cured through

remand to the ANR and a new proceeding before that agency. However, if this matter were remanded to the ANR and Appellant Lothrop subsequently had to file another appeal with the Board, he asked that the ANR be required to pay for the cost of re-noticing the proceeding. Appellant Frank concurred with Appellant Lothrop's response concerning alleged deficiencies in notice, the remedy, and the allocation of re-noticing costs.

Counsel for the Applicant indicated that the alleged failure of notice was innocent error and not a jurisdictional defect requiring remand.

Given that the ANR was unprepared to address the notice and remand question and the prehearing conference participants' differing views on the legal consequences of the purported defect in notice by the ANR, the Board's counsel indicated that the Prehearing Conference Report and Order would establish a deadline for briefing on this preliminary issue and a decision by the full Board.

The Board's counsel proposed that the Board would take up this matter and other preliminary issues at its regular meeting on June 27, 2000. The prehearing conference participants indicated that this date presented a conflict with the Act 250 hearing scheduled for the Project. Accordingly, the Board's counsel indicated that she would consult with the Board's Chair and the Executive Officer to identify another date in late June for Board consideration of preliminary issues.

D. INFORMAL DISPUTE RESOLUTION

The Vice-Chair advised the prehearing conference participants that the Board encourages alternative dispute resolution. He noted that additional time could be built into the schedule of this proceeding to allow for such informal resolution if the parties believe that the issues in this proceeding can be resolved and narrowed through negotiation or mediation.

The Vice-Chair indicated that, if a request for continuance to allow negotiations were be tiled, the filing deadline for the first prefiled testimony would be delayed and a telephone status conference would be held in mid-June at which time the parties would be required to report to the Chair on the progress of the negotiations, including whether a settlement had been reached with respect to all or some of the issues before the Board.

The Board's counsel noted that the Prehearing Order would establish a deadline for the parties to formally request a stay of proceedings to facilitate negotiations.

E. COST OF LEGAL NOTICE

The Board's counsel noted that, pursuant to Procedural Rule 22(B), appellants are responsible for the cost of publishing the initial notices of appeal proceedings. She noted that since there were two persons who filed appeals from the CUD, the cost of publication in the Burlington Free Press was divided between these Appellant Frank and Appellant Lothrop. She further noted that on May 8, 2000, the two appellants were each sent a bill prorating the costs of publication. Both Appellants indicated that they had received this letter.

As of the date of the prehearing conference, neither Appellant had written a check to the State of Vermont for reimbursement of publication costs as requested. Therefore, the Appellants were advised that if payments are not promptly received by **4:30 p.m.**, Thursday, June 1, 2000, the Board Chair would consider whether one or both appeals should be referred to the Board for dismissal.

F. OTHER PRELIMINARY ISSUES

Counsel for Appellant Lothrop raised the question whether a CUD for the Project could properly be issued without the prior or contemporaneous issuance of a stormwater discharge permit, since the alleged adverse impacts of the Project include potentially adverse impacts on the wetland's capacity to handle increased stormwater flows from the impervious surfaces created by the Project. He questioned whether the Board should proceed with a hearing of the appeals until a stormwater permit is issued for the Project by ANR so that the issues can be joined. Appellant Frank concurred in Appellant Lothrop's position regarding the linkage between stormwater management at the Project and adverse impacts on certain wetland functions addressed in the CUD

According to his counsel, the Applicant has not yet tiled a stormwater permit application with the ANR and that the opponents of the Project should not be allowed to dictate the order in which the Applicant applies for ANR permits. He urged the Board to not delay its hearing on the pending appeals.

The ANR's representative indicated that it was the ANR's position in the Act 250 proceeding, and also now before the Board, that any permit or CUD review and approval should be stayed until a stormwater discharge permit has been issued by the ANR.

The Vice-Chair indicated that the Board would want briefing on this preliminary issue since there were strong competing public policy issues at stake, both in favor of the Applicant and those who support a delay in the proceeding to allow joinder of the

stormwater and CUD issues. He noted that the Prehearing Order would provide for a schedule for such briefing.

IX. PARTY STATUS AND REPRESENTATION

The Board's counsel noted that the following persons had entered timely appearances: the Appellants, the Applicant, and the ANR, and that, in addition, the following persons had filed party status petitions prior to the prehearing conference: William S. Brakeley, Randall Kay, and DHWSA.

The Vice-Chair asked the prehearing conference participants whether they had any objections to the grant of party status to the above-named persons. He indicated that he would take the participants' comments under advisement and record his party status rulings in the Prehearing Order.

Initially, the Applicant objected to the grant of party status to William S. Brakeley. The Applicant's coounsel indicated that he had not received a copy of Mr. Brakeley's request in advance of the prehearing conference and therefore he did not know its contents. Accordingly, the Board's counsel reviewed the contents of the Brakeley request and indicated that all persons present at the prehearing conference would be provided with a copy. When it was disclosed by Appellant Lothrop that he owns property on the west side of the swale at the outflow of the subject wetlands and that Mr. Brakeley owns a lot, abutting the Project tract and east of the same swale, the Applicant's representative indicated that he would object if Mr. Brakeley were granted party status pursuant to Procedural Rule 25(C) as a permissive intervenor since his interests could be adequately represented by Mr. Lothrop. (Mr. Brakeley did not specify in his petition under what section of Procedural Rule 25 he was seeking party status.)

Counsel for Appellant Lothrop indicated that he was retained to represent the Appellant and not Mr. Brakeley. Accordingly, Mr. Brakeley's interests were perhaps not adequately represented by another party.

The Applicant objected to the grant of party status to both Randall Kay and the DHWSA in order to avoid duplication. He also objected to the relevancy of the petition in light of the wetland functions at issue and also questioned whether Mr. Kay's and the DHWSA's interests might not be adequately represented by others.

Mr. Kay indicated that he filed the petition both for himself and the DHWSA because of concerns about possible adverse impacts of the Project on the subject wetlands and, in consequence, possible adverse impacts on his water supply from the DHWSA's

community well, located on the McIlvaine property, a property abutting the Project Tract and between 500 and 1000 feet from the subject wetlands and proposed development. He noted that both functions 5.1 and 5.2 have a bearing on the wetlands' function for storing water and protecting groundwater supplies. The ANR's representative indicated that the DHWSA did not qualify as a public water supply, given the small number of users, and therefore the ANR would not be representing the interest of the DHWSA.

The Vice-Chair then asked the prehearing conference participants whether they were aware of any other party status requests. Leonard J. Gluck of 8 Adirondack Street asked for party status under Procedural Rule 25(B) or (C) because he owns property in the Butler Farms subdivision which immediately abuts the swale draining the subject wetlands. He noted that the Butler Farms subdivision does not have a Homeowners Association and therefore his interests cannot be adequately represented by another person or entity in interest.

Appellant Lothrop presented copies of letters requesting party status from several other persons in the Butler Farms subdivision, none of whom were present at the prehearing conference. They included a duplicate of the petition filed by William S. Brakeley on May 19, 2000, and letters from: Bill and Diane Daniels, 67 Butler Drive; Terrence J. Daley, 42 Butler Drive; Margaret Flaherty, 69 Butler Drive; and Mary Lou and Paul Newhouse, 11 Worcester Street.

Copies of these party status petitions were filed with the Board and distributed to the other persons attending the prehearing conference, including representatives for the Applicant and ANR. The Vice-Chair indicated that he would make preliminary rulings on party status of these persons, to which other prehearing conference participants would have an opportunity to object. A deadline for such objections is set forth in the Prehearing Order at 16.

The Board's counsel noted that any persons granted permissive intervention pursuant to Procedural Rule 25(C) may be required to join with other permissive intervenors in the presentation of their evidence and they may be limited in the issues on which they may present evidence, as provided in Procedural Rule 25(E).

X. ISSUES

The Vice-Chair indicated that the issues in this proceeding are the following:

- (1) Whether the Project proposed to be located in a Class Two wetland and its buffer

zone will result in an undue adverse effect on protected functions? Section 8.5(a) of the VWR.

(2) If the Project 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? Sections 8.5(b) of the VWR

The Vice-Chair noted that the Board presumes that a Class II wetland is significant for all ten functions listed in Section 5 of the VWR. The Chair noted, however, that in a de novo proceeding the applicant for a CUD is expected to present evidence on the impacts of its project with respect to each of the wetland functions identified by the appellant in his or her notice of appeal. The Board's counsel clarified that the subject matter of the CUD decision under appeal was limited to an analysis of the Project's impacts on the functions specifically identified by Appellants Frank and Lothrop. See Procedural Rule 19(C).

Of the ten functions included in Section 5 of the VWR, Appellant Al J. Frank appears to have identified the following functions at issue in his April 17, 2000, filing: 5.1 (water storage for flood and storm water) and 5.10 (erosion control). Appellant Gregory Lothrop identified in his March 28, 2000, filing the following functions at issue: 5.1 (water storage for flood and storm water); 5.2 (surface and ground water protection); 5.4 (wildlife and migratory bird habitat); 5.7 (education and research in natural science); 5.8 (recreational value and economic benefits); 5.9 (open space and aesthetics); and 5.10 (erosion control).'

¹ The ANR, in issuing CUD DEC #1999-524 determined that the following functions are either not present or are present at such a minimal level as to not be protected functions in Wetland A: 5.3 (fisheries habitat); 5.5 (hydrophytic vegetation), 5.6 (threatened and endangered species habitat), 5.7 (education and research in natural science), and 5.8 (recreational value and economic benefits). The ANR also determined that with respect to Wetland C, the following functions are either not present or are present at such a minimal level as to not be protected functions: 5.3 (fisheries habitat); 5.5 (hydrophytic vegetation), 5.6 (threatened and endangered species habitat), 5.7 (education and research in natural science), and 5.8 (recreational value and economic benefits) and 5.9 (open space and aesthetics), and 5.10 (erosion control through binding and stabilizing the soil).

XI. WITNESSES, EXHIBITS, AND PREFILING SCHEDULE

The Board's counsel explained to the prehearing conference participants that prefiled testimony and exhibits would be required in this proceeding. She asked each participant to provide a preliminary list of witnesses to help get a sense how long a hearing will be required to address the matters on appeal. She noted that a final determination concerning the hearing schedule would not be made until all lists of witnesses are prefiled.

Appellant Frank indicated that, other than testifying himself, he was not certain who he would call as a witness at this time.

Appellant Lothrop's counsel indicated that he would call one or two expert witnesses and four or five neighbors. He indicated that he may call an ANR witness to address stormwater and wetlands issues.

The Applicant's counsel indicated that he would call: Cathy O'Brien, wetlands consultant; one or two engineers from Llewellyn-Howley; a hydrologist from Heindel & Noyes; and maybe the property owner, Jacqueline Marceau, and John Larkin.

ANR's representative indicated that ANR would call Peter Kiebel, ANR wetlands coordinator, and one or two other ANR staff persons.

Randall Kay indicated that he and DHWSA would call: a consultant from Marin Environmental, Stone Environmental, and/or another environmental engineering firm.

Randall Kay inquired whether Heindel & Noyes had a conflict working and testifying for the Applicant, since Heindel & Noyes had provided service previously to DHWSA. The Board's counsel indicated that this was not a question that could be answered by the Board, but that he might want to consult with his own counsel concerning this matter.

Leonard Gluck said that, at this time, he only anticipated calling himself as a witness.

The Board's counsel expressed the hope that the hearing would take less than a full day. Toward that end, those granted party status are encouraged to work together to avoid duplication of witness testimony and exhibits and, if possible, to prepare stipulated facts, identify exhibits to which there are no objections, and develop a joint site visit itinerary

The Board's counsel noted that an order governing the prefilings of evidence, with specific instructions for the prefilings of testimony and exhibits, would be issued should this matter proceed toward a hearing on the merits. She emphasized that, with respect to all filings, including prefiling testimony and exhibits and various pleadings, 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. "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 in subsequent orders of the Board or Chair. See Procedural Rules 8, 9, and 10.

Appellant Frank noted that he would be out-of-state from June 9 to some time in mid-July. The Board's counsel cautioned Mr. Frank that it was his obligation to obtain coverage of this case and she inquired whether he had considered retaining a representative. He said that he had. She urged him to make plans to identify some person to serve as his representative to receive and respond to filings during his absence.

The Board's counsel urged all prehearing conference participant to look at their calendars and alert her of any major scheduling conflicts between now the proposed hearing date. She asked that all parties and those seeking party status call her within the next two or three days with any conflicts information so that she can work with the Vice-Chair to devise a prefile schedule that anticipates and avoids as many scheduling conflicts as possible.

XII. HEARING DAY SCHEDULE

The Board's counsel indicated that a hearing with respect to the pending appeals is tentatively scheduled for **Tuesday, September 19, 2000**, and that the parties and would-be parties should reserve this date until further notice. The prehearing conference participants were asked to reserve this date and notify their witnesses to do the same. The Board's counsel also noted that the hearing would be scheduled at a public facility in close proximity to the subject wetland, somewhere in South Burlington.

The Board's counsel distributed to the prehearing conference participants two sample hearing day schedules. See attachment. She noted that the parties will be provided with a revised hearing day schedule once all witnesses have been identified by the parties. Again, the Board's counsel encouraged the prehearing conference participants to organize their prefiling testimony, exhibits, and argument so as to eliminate redundancy and achieve efficiency in the presentation of their respective cases.

XIII. SERVICE LIST

The Board's counsel advised the prehearing conference participants that they should use the certificate of service accompanying the Prehearing Order to determine who should receive copies of all filings. She noted that parties are not required to serve filings on persons listed under the "For Your Information" section of the certificate of service. She further noted that parties or their representatives are responsible for advising the Board of any changes in addresses, including changes related to the assignment of new 911 street numbers or seasonal changes in residence.

XIV. OTHER

Those intending to participate in this proceeding are advised to obtain copies of the Procedural Rules, effective February 22, 1999, as well as the VWR, to prepare for the hearing in this matter. The Chair made copies of these rules available to the prehearing conference participants. These rules are also available by downloading text from the Board's Web site: <http://www.state.vt.us/wtrboard>

XV ORDER

1. Docket Nos. CUD-2000-02 and CUD-2000-03 are hereby consolidated for purposes of hearing.
2. The parties to this consolidated proceeding are:

Appellants Al J. Frank and Gregory Lothrop, pursuant to 10 V.S.A. §1269, VWR Section 9, and Procedural Rule 25(B)(7);
The Applicant, pursuant to Procedural Rule 25(B)(1);
ANR, pursuant to Procedural Rule 25(B)(5);
William S. Brakeley, pursuant to Procedural Rule 25(B)(8);
Leonard Gluck, pursuant to Procedural 25(C);
Bill and Diane Daniels, pursuant to Procedural Rule 25(C);
Terrence J. Daley, pursuant to Procedural 25(C);
Margaret Flaherty, pursuant to Procedural 25(C);
Mary Lou and Paul Newhouse, pursuant to Procedural 25(C); and
DHWSA, represented by Randall Kay, pursuant to Procedural 25(C)

Randall Kay, in his individual capacity, is denied party status. Mr. Kay has not

demonstrated how his affected interests are any different from those of other members of the DHWSA. Moreover, Mr. Kay may testify for DHWSA as well as serve as its representative. Therefore, his interests will be adequately represented by the grant of party status to DHWSA. Evidence presented by DHWSA shall be limited to the Project's alleged adverse impacts on functions 5.1 and 5.2 as they relate specifically to potential damage to DHWSA's community water supply. DHWSA, through its representative, may, however, brief any preliminary legal issues set forth below and brief any legal issues germane to the Project's alleged adverse impacts on functions 5.1 and 5.2.

All other persons granted party status pursuant to Procedural Rule 25(C) shall be required to join in their submission and presentation of evidence and argument, pursuant to Procedural Rule 25(E). The Butler Farm residents granted party status under Procedural Rule 25(C) also shall identify a representative to coordinate their case. This person need not be an attorney, but if a non-attorney is to serve as their representative, they must sign and file an authorization letter with the Board pursuant to Procedural Rule 27(B) by the deadline set below.

3. On or before **4:30** p.m., Thursday, June **1, 2000**, the Appellants shall each submit to the Board a check for \$252 to cover the prorated cost of newspaper publication of the initial notice of the above-captioned appeals. Said checks should be made payable to the State of Vermont and sent to Karen Dupont's attention c/o Vermont Water Resources Board, National Life Records Center Building, Drawer 20, Montpelier, Vermont 05620-3201.
 4. On or before **4:30** p.m., Thursday, June **8, 2000**, Appellant Frank shall file a letter with the Board indicating the name and address of the person authorized to serve as his representative before the Board, pursuant to Procedural Rule 27(B). If he should retain an attorney to serve as his representative, his attorney shall file an entry of appearance by June 8, 2000.
 5. On or before **4:30** p.m., Thursday, June **8, 2000**, all Butler Farms residents granted party status pursuant to Procedural Rule 25(C) (see Item 2. above) shall sign and file a letter with the Board indicating the name and address of the person who shall serve as their representative, pursuant to Procedural Rule 27(B). This representative may be one of the persons granted party status or another person so selected by the Butler Farms permissive intervenors.
 6. Any requests for disqualification of any of the current Board members identified in Sections IV. above, or any requests for further disclosure, shall be filed on or before
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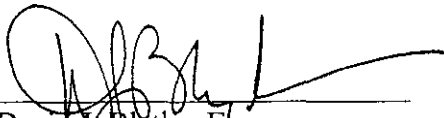
- 4:30 p.m., Thursday, June 8, 2000.** Any such request for disqualification shall be supported with a statement of alleged facts and a memorandum of law in support of such disqualification. The failure to file a timely request for disqualification or request for further disclosure shall be deemed waiver of any objections to the participation of a current Board member in the above-captioned appeals.
7. In the event that all or some of the persons listed in Item 2. above conclude that all or some of the issues in this consolidated matter may be resolved through information dispute resolution, they or their representatives shall file a motion for stay of proceedings and indicate the scope of the issues to be subject to negotiation and the length of stay anticipated to be necessary to enable completion of negotiations. Such motion shall be filed on or before **4:30 p.m., Thursday, June 8, 2000.**
 8. On or before **4:30 p.m., Thursday, June 13, 2000**, anyone objecting to the party status rulings in Item 2. above, shall file his or her written objection support by legal memorandum.
 9. The issues in this proceeding are those discussed in Sections VIII.(A), (C), and (F) and framed in Section X. above. Any person wanting to brief any or all of the preliminary issues or object to the issues framed in Section X. shall do so by filing a legal memorandum, on or before **4:30 p.m., Tuesday, June 13, 2000.** The ANR, Applicant, and Appellants are specifically asked to file legal memorandum on preliminary issues discussed in Sections VIII.(A), (C), and (F).
 10. Any requests for oral argument before the Board with respect to party status objections or issues shall be filed on or before **4:30 p.m., Tuesday, June 13, 2000**, with the understanding that the Board will hear such argument and deliberate on **June 28, 2000**, at the Board's office in Montpelier, Vermont, the time and place to be confirmed by separate notice.
 11. Should any person wish to respond to party status objection filed in accordance with Item 8. above or legal memoranda filed in accordance with Item 7. above, they shall do so on or before **4:30 p.m., Thursday, June 22, 2000.** If oral argument has been requested by one or more parties by the deadline set in Item 10., a party responding to objections or filing responsive legal memoranda may request the Board for time at the oral argument on June 28, 2000, to provide responsive argument by filing such request on or before June 22, 2000.
 12. Until preliminary issues in this consolidated proceeding are resolved by a Board decision and order, no order setting forth the requirements or deadlines for the

prefiling of evidence will issue. However, the parties are forewarned that should the Board decide to hear this matter on the merits, prefiling deadlines will be established for the months of July, August, and September.

13. Parties shall file an original and seven **collated copies** of motions, legal memoranda, 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 may be further revised if party status objections are made and further 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.
14. Pursuant to Procedural Rule 28(B), this Prehearing 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., Wednesday, June 7, 2000**, or a showing of cause for, or fairness requires, waiver of a requirement of this Prehearing 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 31st day of May, 2000.

WATER RESOURCES BOARD



David J. Blythe, Esq.
Vice-Chair of the Board;
Acting Chair for this consolidated
proceeding

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