

**State of Vermont**  
**WATER RESOURCES BOARD**

**Re: E. Bruce and Deborah Hallett**  
**Docket No. CUD-00-09**

**CHAIR'S PRELIMINARY ORDER**

I. HALLETTS' MOTION

On October 3, 2000, E. Bruce and Deborah Hallett, Applicants/Appellants, filed with the Water Resources Board ("Board") a document entitled Appellants' Dismissal of Their Appeal ("Motion").

The Board's Rules of Procedure ("Procedural Rules") govern dismissal of appeals pending before the Board. Pursuant to Procedural Rule 24, the Board may dismiss an appeal, in whole or part, for reasons provided by the Procedural Rules, by statute, or by law. Pursuant to Procedural Rule 23, the Board's Chair also may issue dismissal orders, subject to objection by a party and review by the full Board. The Board or Chair routinely dismiss appeals based on motions filed by appellants. See Re: Alpine Pipeline Company, Docket No. EPR-00-10, Dismissal Order (Oct. 3, 2000); Re: Links at Lang Farm, Docket No. WET-99-02DR, Dismissal Order (Aug. 9, 2000) Re: Unified Buddhist Church, Docket No. SAP-00-05, Dismissal Order (Aug. 3, 2000).

Procedural Rule 24 requires that prior to any dismissal, the Board shall provide an opportunity for oral argument. That rule also requires that dismissal decisions shall conform with the requirements of Procedural Rule 34, unless this rule's requirements are either waived in writing by all parties or dismissal is jointly requested in writing by all parties. Procedural Rule 34(A) requires that a decision of the Board shall include findings of fact, conclusions of law, and an order.

The requirements of Procedural Rules 23, 24, and 34 are intended to assure that the rights of all parties are safeguarded in the dismissal process while allowing the expeditious, informal disposition of contested case matters contemplated by 3 V.S.A. § 809(c).

Accordingly, the parties -- the Halletts, Agency of Natural Resources ("ANR"), and Signa Mills -- as well as *amicus curiae* petitioner Vermont Natural Resources Council ("VNRC") shall have an opportunity to file on or before **4:30 p.m., Friday, October 20, 2000**, any written objections and any requests for oral argument in response to the Halletts' Motion. Whether or not a party supports dismissal of this matter, it should file by this deadline a statement indicating whether it waives the requirements of Procedural Rule 34(A), and more specifically, the issuance of a decision containing findings of fact and conclusions of law.

If an objection or request for oral argument is filed on or before October 20, 2000, the

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Board will consider this in conjunction with its regular meeting on **Thursday, November 2, 2000**. If no objection or requests for oral argument are filed on or before October 20, 2000, this matter shall be dismissed.

In light of the filing of the Motion, the site visit and oral argument scheduled to begin at 10:00 a.m. on **Tuesday, October 10, 2000**, at the Town of Londonderry Office Building, South Londonderry, shall be canceled. Any objections, however, to the Status Conference Report and Order (Oct. 2, 2000) ("Status Conference Order") shall be due at the Board's office on or before 12:00 noon on October 10, 2000, as provided in that order at 8-9, Item 20. Furthermore, the prefiling schedule set forth in the Status Conference Order shall be stayed until further notice.

## II. HALLETTS' ASSERTIONS

In its Motion, the Halletts have asserted that among the reasons for seeking dismissal of their appeal are the increased costs and expenses attendant to "[t]he Board's reversal of its initial decision to consider the Appellants' equitable estoppel argument as a preliminary issue" and "[t]he Board's refusal to consider the so-called after-the-fact CUD issue (an issue raised by the Board itself) as a potentially dispositive issue." This characterization of the rulings made to date by the Chair is misleading and needs to be corrected here for the benefit of all parties.

First, the equitable estoppel issue was raised by the Halletts in a request for a declaratory ruling and evidentiary hearing filed on August 21, 2000. As memorialized in the Prehearing Conference Report and Order (Sept. 6, 2000) ("Prehearing Order") at 6, Section VIII.A., the Chair determined that the equitable estoppel question should be treated as a preliminary issue and so identified this matter in Section VIII.C. of the Prehearing Order. Based on the parties' representations that this matter could be decided on briefs and stipulated facts, the Chair advised the parties that this issue would be heard by the Board on October 10, 2000, and established a filing schedule that contemplated that the parties would file memoranda responsive to the equitable estoppel argument on or before September 19, 2000. Prehearing Order at 12, Section XV.C., Item 1. The parties were further directed to file any objections to the characterization of the issues as framed on or before September 19, 2000, so that such objections could be considered at the status conference scheduled for September 26, 2000, and, if objections continued to remain, they could be referred to the full Board for review on October 10, 2000. Prehearing Order at 12, Section XV.C., Item 4. Moreover, the parties were directed to file any objections to the Prehearing Order on or before September 19, 2000, or its terms and requirements would become binding upon all parties. Prehearing Order at 13, Section XV.C., Item 9.

In their filings of September 19, 2000, ANR, Signa Mills, and VNRC each offered responsive argument on the equitable estoppel question and asked that evidence be taken on this issue. Signa Mills specifically asked the Board to defer any evidentiary hearing on preliminary issues until the merits hearing on December 12, 2000.

At the status conference on September 26, 2000, both the Halletts and ANR agreed that fact witnesses would be necessary to provide testimony with respect to the elements of equitable estoppel. The ANR requested that such evidence should be prefiled rather than considered live on October IO, 2000. Accordingly, the Chair ruled that evidence related to the equitable estoppel question should be prefiled and that the Board would entertain cross-examination and argument on this preliminary issue on December 12, 2000, *prior* to considering evidence on the merits. Status Conference Order at 3, Section III (Oct. 2, 2000). A filing schedule for this and other issues was agreed to by the parties and set forth in Section VIII. of the Status Conference Order. The parties were provided until 12:00 noon, October IO, 2000, to file objections to the provisions of the Status Conference Order. Status Conference Order at 8-9, Item 20. Time was allotted for Board review of any such objections on the Hearing Day Agenda.

Accordingly, the Halletts are in error in asserting that the *Board* has "reversed" its decision to have the equitable estoppel question decided as a preliminary issue. Rather, as the Halletts concede, that issue apparently cannot be decided on stipulated facts, but rather requires an evidentiary hearing and that hearing has been scheduled. If the Halletts wished to object to the Chair's rulings and scheduling order, their vehicle was to file a written request for Board review of the objectionable portions of the Status Conference Order. Instead, they have elected to move for dismissal, thereby foreclosing such review.

Likewise, the Halletts are in error in asserting that the Board has "refused" to consider the after-the-fact CUD issue as a preliminary and potentially dispositive issue. As the Halletts correctly note, this issue was not raised by a party. Rather, it was raised by the Chair *sua sponte* in the Prehearing Order at 6, Section VIII.B., as a subject for discussion at the September 26, 2000, status conference. On September 15, 2000, the Halletts filed a letter requesting clarification concerning the meaning and scope of this issue. Accordingly, on September 22, 2000, the Chair restated the issue in the Supplemental Prehearing Order at 3-4, Section II., and, in order to give the parties an opportunity to formally brief the issue, established a filing schedule for legal memoranda prior to the Board's October 10, 2000 meeting day. Supplemental Prehearing Order at 5-6, Section IV., Items 4 and 5.

In response to oral objections to the briefing schedule made by the parties at the September 26, 2000 status conference to the briefing schedule and to the assertions that resolution of this issue required the presentation of fact witnesses, the Chair agreed to issue a

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new order including a prefile and briefing schedule that would supersede the tiling schedule in the Supplemental Prehearing Order. Specifically, the Chair gave the parties an opportunity to file prefiled evidence and briefing on this issue simultaneous with the prefilings of evidence and briefing on the merits. Status Conference Order at 2-3, Section III.

The Chair's decision to have evidence and briefing on the after-the-fact CUD question coincide with the filing of evidence and briefing on the merits was not inconsistent with past Board practice. See, e.g., Re: Darryl and Stephanie Landvater, Docket No. CUD-96-06, Findings of Fact, Conclusions of Law, and Order (Aug. 28, 1997) (Board conducted one evidentiary hearing to consider potentially dispositive allowed use claim as well as merits). If the Halletts objected to this sequence of filings, it was incumbent upon them to seek Board review by filing written objections by 12:00 noon October 10, 2000. Status Conference Order at 8-9, Item 20.

Accordingly, it is inaccurate to characterize the above-described actions as "[t]he Board's refusal to consider the so-called after-the-fact CUD issue as a potentially dispositive issue" requiring an evidentiary hearing prior to a merits hearing, since the Board has never been asked to review or decide the question. Instead, the Halletts have elected to move for dismissal, thereby foreclosing the review of this issue.

### III. ORDER

Accordingly, it is hereby ordered:

1. Due to the tiling of the Halletts' Motion, the site visit and oral argument scheduled to begin at 10:00 a.m. on **Tuesday, October 10, 2000**, at the Town of Londonderry Office Building, South Londonderry, is canceled. The deadline for filing any objections to the Status Conference Order set at 8-9, Item 20. of that order, is extended from 12:00 noon, October 10, 2000, to **4:30 p.m., Friday, October 20, 2000**.
2. The prefilings and briefing deadlines set forth in the Status Conference Order at 5-7, Items 2.-12. and 15.-16., are-until further notice
3. Docket No. CUD-00-09 shall be dismissed, unless a party files a written objection and requests oral argument before the Board on or before **4:30 p.m., Friday, October 20, 2000**. Dismissal of this matter shall mean that the ANR's decision denying Conditional Use Determination Application #1999-447, dated June 8, 2000, shall become binding and final. The dismissal of Docket No. CUD-00-09 shall be issued as a summary order if all parties waive the requirements of Procedural Rule 34(A) or affirmatively concur in the

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proposed summary dismissal by filing a written statement to such effect on or before the October 20 deadline.

4. If a written objection and/or request for oral argument if timely filed, the Board will hear such argument and/or consider such objection on **Thursday, November 2, 2000**, at a time and place to be announced by subsequent notice.

Dated this 5th day of October, 2000, at Montpelier, Vermont

WATER RESOURCES BOARD



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David J. Blythe, Chair