

**State of Vermont
WATER RESOURCES BOARD**

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

STATUS CONFERENCE REPORT AND ORDER

On September 26, 2000, David J. Blythe, Esq., Chair of the Water Resources Board ("Board") convened a status conference in the above-captioned appeal. This status conference was convened to explore possible settlement of this matter through alternative dispute resolution and to discuss a proposed hearing day schedule for October 10, 2000. See Preheating Conference Report and Order ("Preheating Order") at 6, Section VIII., B. (Sept. 6, 2000); Supplemental Preheating Order at 5, Section III. (Sept. 22, 2000).

Those participating in the status conference were:

E. Bruce and Deborah Hallett, Applicants/Appellants, by Jack Long, Esq.,
Clark, Long & Werner (by telephone);
Agency of Natural Resources ("ANR"), by Conrad Smith, Esq.;
Signa Mills, by David Gartenstein, Esq., Downs, Rachlin & Martin (by telephone); and
Vermont Natural Resources Council ("VNRC"), by Kelly Lowry, Esq.

I . SETTLEMENT NEGOTIATIONS

The Chair reminded the parties that the Board is receptive to requests for informal dispute resolution. He inquired whether the parties to this proceeding had discussed possible settlement of this appeal since the preheating conference on August 10, 2000.

Counsel for the ANR indicated that counsel for the Applicants had called him several times to set up a meeting to discuss settlement but that no meeting date had been set. Counsel for the Applicants confirmed that he had tried to reach counsel for the ANR with no avail

Given that it appeared from the parties' representations that settlement of this matter was not imminent, counsel for the Board suggested that status conference participants discuss plans for the October 10 hearing day and whether certain issues should or should not be considered by the Board on that date.

II. CORRECTIONS

The Board's counsel noted that several of the parties have identified the present appeal by

various docket numbers. She asked that all subsequent filings be identified by the following docket number: CUD-00-09.

She further noted that there was a typographical error at 5, Section IV., Item 1, in the Supplemental Prehearing Order issued on September 22, 2000. She noted that the deadline for filing objections to the Chair's preliminary rulings in that order was to be **2:30 p.m., Tuesday, September 26, 2000, not** September 23, 2000. Accordingly, she noted that the Chair would consider any objections to the Supplemental Prehearing Order made orally at the status conference.

III. OBJECTIONS RELATED TO PRELIMINARY ISSUES

The Chair noted that the Board had received by 2:30 p.m. on September 26, 2000 a filing from ANR raising objections to the Supplemental Preheating Order ("Objections"). Specifically, the ANR objects to both Board consideration of and the briefing scheduling for preliminary issue (1). That issue, as stated in the Supplemental Prehearing Order at 3-4, Section II.A. is:

Whether the ANR has the authority to require after-the-fact (retroactive) CUD applications and issue or deny after-the-fact CUDs? If not, should this appeal be dismissed? If so, what is the authority for after-the-fact CUDs?

The Supplemental Preheating Order called for the filing of legal memoranda on this issue on or before October 2, 2000, and responsive memoranda on or before October 6, 2000.

Since none of the parties participating by teleconference had received and reviewed the Objections, the Chair asked counsel for ANR to summarize its arguments for the benefit of all status conference participants. He then asked each of the parties to offer their reactions. The parties concurred that preliminary issue (1) involved both a mixed question of law and fact and that the parties would need to present fact witnesses as well as briefing. They also agreed that more time was required to research and brief this question than was provided for in the Supplemental Prehearing Order.

Accordingly, the Chair agreed to issue a Status Conference Report and Order that would set forth a filing schedule that would supersede the schedule in the Supplemental Prehearing Order for preliminary issue (1). He further advised the parties that this schedule would allow for the prefiling of evidence on this issue simultaneous with the filing of evidence on the merits and that cross-examination of any witnesses with respect to this issue would be held on December 12, 2000 in conjunction with the merits hearing. Parties would also be expected to brief this issue as

part of the proposed findings of fact, conclusions of law, and order due prior to the hearing on December 12, 2000 and in any supplemental conclusions of law following the hearing.

The Chair further agreed, based on the arguments made by Signa Mills and VNRC in their filings of September 19, 2000, that preliminary issue (3) regarding whether the Project or portions thereof are an allowed use under Section 6.2(l) of the Vermont Wetland Rules ("VWR") is also a mixed question of law and fact and should therefore be considered by *the* Board on December 12, 2000 after the pre-filing of evidence and further briefing. See Supplemental Prehearing Order at 4.

Finally, the Chair inquired of the parties whether preliminary issue (2), which is the Applicants' equitable estoppel claim, could be addressed as a legal question through oral argument on October 10, 2000, or whether it would require a factual inquiry based on prefiled evidence and cross-examination of witnesses. Both counsel for the Applicants and ANR agreed that fact witnesses would need to provide testimony to address the elements of equitable estoppel. While counsel for the Applicants argued that live testimony could be offered in an hour-and-a-half on October 10, 2000 in conjunction with oral argument on this issue, counsel for the ANR urged the Chair to require the pre-filing of evidence on this issue and consideration of this question at a later date.

Accordingly, the Chair agreed that preliminary issue (2) regarding equitable estoppel should not be considered by the Board on October 10, 2000, but instead considered by the Board on December 12, 2000. He stated that prefiled evidence would be required and legal argument could be submitted as part of the proposed findings of fact, conclusions of law and orders contemplated by the Board's standard scheduling order. The Chair emphasized, however, that on December 12, 2000, the Board would entertain cross-examination and argument on the equitable estoppel issue *prior* to taking evidence and argument on the other issues before the Board. The Board might decide either to make a ruling on the equitable estoppel issue from the bench or take the evidence and argument under advisement and proceed with the merits hearing.

The Board's counsel noted that the only preliminary issue left to be considered and decided by the Board on October 10, 2000, is the question of whether VNRC should be granted *amicus curiae* status.

IV. PROPOSED HEARING DAY SCHEDULE FOR OCTOBER 10, 2000

The Chair asked the parties if they had a comments regarding the proposed hearing day agenda for October 10, 2000, which was sent to them as an attachment to the Supplemental Prehearing Order. Based on the Chair's preliminary determinations, as noted above in Section

III., and with the agreement of the parties, the Chair noted that the proposed hearing day schedule would be revised such that the Board would place its site visit observations on the record and accept any stipulated facts and exhibits into the record *prior* to recessing for lunch. In that way, parties would in all likelihood be able to leave the hearing site by 1:00 p.m.

A copy of the Revised Hearing Day Schedule is attached

V. OTHER

The Chair and Board's counsel inquired whether any of the parties had additional objections to the Supplemental Preheating Order. No objections were raised beyond those noted by the ANR and referred to in Section III. above.

VI. SCHEDULING ORDER

The Board's counsel reviewed with the status conference participants a proposed schedule for the **prefiling** of evidence, evidentiary objections, and pleadings in advance of and following the merits hearing scheduled for December 12, 2000. She noted that the Chair, in his discretion, could issue a scheduling order as part of the Status Conference Report and Order, but she suggested that all participants note the suggested dates in their calendars until such time as an order formalizing the schedule is issued.

Counsel for all the parties and VNRC agreed that the dates and sequence of filings proposed by the Board's counsel were reasonable, presented no **conflicts**, and could be complied with so that the appeal could be heard by the full Board on December 12, 2000.

VII. SITE VISIT ITINERARY

September 28, 2000, was the deadline for the filing of a joint site visit itinerary. **See** Prehearing Order at 12, Section **XV.C.**, Item 2. None of the parties filed a site visit itinerary by the September 28, 2000 deadline. Accordingly, the parties are referred to the attached instruction sheet in order to assure that the site visit on October 10, 2000 is conducted fairly and with efficiency.

VIII ORDER

1. The Supplemental Prehearing Order is amended such that the three preliminary issues identified at 3-4 in Section B.A. shall be considered by the Board at its hearing on December 12, 2000, rather than on October 10, 2000. Thus, Section IV., Items 2 and 3 of the Supplemental Prehearing Order are superseded by this order. Additionally, the schedule for pretiling argument on issue (1) as set forth in Section IV., Items 4 and 5 of the Supplemental Prehearing Order, is superseded by the filing schedule set forth in this order. In all other respects, this order supplements Section XV of the Prehearing Conference Report and Order issued on September 6, 2000, and Section IV. of the Supplemental Prehearing Order issued on September 22, 2000.
2. On or before **4:30 p.m., Thursday, November 2, 2000**, the Applicants 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 filed with the Board and be made available for inspection and copying at the Board's office by any party prior to the hearing.

3. On or before **4:30 p.m., Thursday, November 9, 2000**, all parties other than the Applicants 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 filed with the Board** and be made available for inspection and copying at the Board's office by any party prior to the hearing.

4. On or before **12:00 noon, Wednesday, November 22, 2000**, 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.

5. 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.
6. On or before **4:30 p.m., Thursday, November 30, 2000**, any party may file in writing any evidentiary objections to prefiled testimony and exhibits previously filed. If objections are not timely filed, they shall be deemed waived. Any objections shall be supported by legal memoranda.
7. On or before **4:30 p.m., Thursday, November 30, 2000**, any party may file in writing any evidentiary objections to prefiled testimony and exhibits previously filed. If objections are not timely tiled, they shall be deemed waived. Any objections shall be supported by legal memoranda.
8. On or before **4:30 p.m., Wednesday, December 6, 2000**, any party may file in writing any responses to evidentiary objections filed in accordance with Item 5 above. If responses are not timely tiled, they may be excluded. Any objections shall be supported by legal memoranda.
9. On or before **4:30 p.m., Wednesday, December 6, 2000**, all parties shall submit a single, combined list of all prefiled testimony and exhibits.
10. On or before **4:30 p.m., Wednesday, December 6, 2000**, all parties shall file in writing any requests for time beyond the time allotments identified in the attached Proposed Hearing Day Agenda. The Chair may allow more time if good cause is shown.
11. On or before **4:30 p.m., Wednesday, December 6, 2000**, the parties shall file any stipulations. These may be in the form of joint statements of fact or proposed joint decisions.
12. On or before **4:30 p.m., Wednesday, December 6, 2000**, the parties and VNRC shall file

any proposed findings of fact, conclusions of law, and orders, including any proposed CUD conditions.

13. The Chair or his designee will conduct a second prehearing conference by telephone on **Thursday, December 7, 2000, at 1:00 p.m. at the Board's office in Montpelier, Vermont.** The purpose of this prehearing conference is to address any pending evidentiary objections 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 Tuesday, December 5, 2000.** The Board's staff will arrange the conference call.
 14. On **Tuesday, December 12, 2000,** the Board will convene a hearing in this matter. The specific time and location of this hearing shall be announced in a subsequent notice.
 15. 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., Thursday, November 30, 2000.** 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).
 16. On or before **4:30 p.m., Friday, December 22, 2000,** any party and VNRC may file any revised or supplemental proposed findings of fact, conclusions of law, and orders, including any proposed CUD conditions.
 17. The Board may waive the filing requirements upon a showing of good cause, unless such waiver would unfairly prejudice the rights of other parties.
 18. Parties shall file an original and **seven collated copies** of prefiled testimony, legal memoranda, all prefiled testimony, all prefiled exhibits which are 8% by 11 inches or smaller, and any other documents filed with the Board, and mail one copy to each of the **parties' representatives** listed on the Board's Certificate of Service, but not to persons listed under "For Your Information." 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; also see Procedural Rule 30(D) (prefiled testimony).
 19. All parties shall label their own prefiled testimony and exhibits with their name. The labels on the exhibits must contain the words WATER RESOURCES BOARD, Re: E. Bruce and Deborah Hallett, Docket No. CUD-00-09, 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 letters as follows: "A" for the CUD Applicants; "ANR" for Agency of Natural Resources; "M" for Signa Mills. Exhibits shall be assigned consecutive numbers. For example, the CUD Applicants would number their 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 APPLICANTS' LIST OF EXHIBITS
RE: E. BRUCE AND DEBORAH HALLETT, CUD-00-09

<u>Number</u>	<u>Description</u>	<u>Status</u>
A-1	Prefiled Direct Testimony of Wetlands Consultant "X"	
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 been admitted.

Exhibits offered to the 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.

20. Pursuant to Procedural Rule 28(B), this Order is binding on all parties, unless a written

objection to the Order, in whole or in part, is filed on or before **12:00** noon, **Tuesday, October 10, 2000**, 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 2nd day of October, 2000

WATER RESOURCES BOARD

By its Chair



David J. Blythe, Esq.

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

Water Resources Board
Revised Hearing Day Agenda for October 10, 2000,
in Londonderry and Winhall Area

- 9:30 a.m. Parties arrive at Assembly Room, Town of Londonderry Office Building, Old School Street, South Londonderry, and review last minute details for site visit and hearing with Board's counsel.
- 10:00 a.m. Board meets with its counsel to review agenda for the day.
- 10:15 a.m. Chair convenes and hearing, offers introductory comments, and asks parties to enter their appearances.
- 10:20 a.m. Oral argument on *amicus curiae* challenge.
1. Appellants' challenge to VNRC's *amicus curiae* status. (5 min. inclusive of direct and rebuttal)
2. VNRC's responsive argument (5 min. inclusive of direct and rebuttal)
- 10:30 a.m. Board recesses to deliberate and reconvenes to announce ruling.
- 10:45 a.m. Board conducts site visit of Project and subject wetlands and waterways.
- 12:00 noon Board returns to Londonderry Office Building, reconvenes hearing, and places site visit observations on the record.
- 12:30 p.m. Board accepts stipulated facts and exhibits into the record.
- 12:40 p.m. Board considers and rules on any objections tiled with respect to the Status Conference Report and Order.
- 1250 p.m. Board recesses hearing for deliberations, lunch, and regular Board meeting.
-

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

Water Resources Board
INSTRUCTIONS FOR OCTOBER 10, 2000 SITE VISIT

The parties are responsible for putting together a well-organized site visit of the wetland and buffer zone at issue in this proceeding. To assure this result, it is important that the parties communicate with each other well in advance of the site visit and resolve any disputes concerning who will serve as each party's spokesperson during the site visit, what physical features will be pointed out to the Board for observation, what path the Board will take on its site visit to avoid unnecessary back-tracking, and other matters to facilitate efficient use of the allotted site visit time. Experience has demonstrated that a site visit "rehearsal" - an actual walk-through the wetland and its buffer zone by counsel for the parties for the purpose of determining how much time is *actually* needed to *move from* station to station and to plot out the most expeditious route -- is a very worthwhile exercise for all of the parties. Counsel and their clients are reminded that *the purpose of a site visit is to orient the Board to the important features that will be the subject of testimony or be referenced in exhibits*; it is not an opportunity to actually provide evidence to the Board or lobby its members. With this in mind, here are a few helpful pointers for planning a joint site visit:

1. Parties should agree upon a site plan or map that the Board can use throughout the site visit and proceeding as a general guide to the site and its features. This site plan or map should have a *directional* reference and scale. It should be filed as a stipulated exhibit on October 10, and may be marked "STIP-1." See Status Conference Report and Order for filing instructions for exhibits.
 2. The parties should agree upon a lead spokesperson to guide the Board on the site visit. In a proceeding like this, it may be advisable that the Applicants and the ANR each have a spokesperson to point out relevant features. All spokespersons should be designated in advance and have a written outline or "script" describing the features that need to be pointed out to the Board and the sequence in which these features should be observed. It is very helpful if the Board members are each provided with a copy of this script for reference purposes only.
 3. The Board will drive to the site in its own vehicle(s). However, the parties should decide amongst themselves, in advance of October 10, who will drive the lead vehicle to guide the Board to the site, what is the most expeditious route to and from the Londonderry Town Offices, and where are the most convenient (and safe) areas for parking in the vicinity of the subject wetland.
 4. It is very helpful if the parties can agree upon and stake in advance the perimeter of the subject wetland and also the outside perimeter of the buffer zone. Where a wetland has not been formally delineated and there is a debate concerning the actual location of these features, each party's consultant may indicate with its own stakes the presumed location of these features, particularly with reference to key disturbance areas. Such stakes should be noted on the site plan or map referenced in (1) above.
 5. Counsel for the parties are responsible for "policing" their own clients and consultants to assure that they do not engage in ex parte discussions with Board members.
 6. If a dispute arises during the course of a site visit concerning whether a spokesperson is testifying as opposed to merely identifying a feature of note, the Board's Chair will be the arbiter of the dispute.
 7. Direct any questions about site visit protocols to the Board's counsel in advance of October 10
-