

State of Vermont
WATER RESOURCES BOARD

RE: E. Bruce and Deborah Hallett
Town of Winhall
Docket No. CUD-2000-09 (DEC #1999-447)

PREHEARING CONFERENCE REPORT AND ORDER

On August 10, 2000, at 3:00 p.m., Water Resources Board ("Board") Chair David Blythe convened a prehearing conference at the Board's Conference Room in Montpelier, Vermont, in the above-captioned matter. The following persons entered timely appearances and participated:

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

I. PROCEDURAL BACKGROUND

On February 28, 2000, E. Bruce and Deborah Hallett ("Applicants") filed a complete application for Conditional Use Determination ("CUD") #1999-447. In the context of the CUD application ("Application"), the Applicants sought to have ANR authorize the following activities: (1) conversion of an open water, wet meadow to a hayfield; (2) conversion of a scrub-shrub swamp and beaver-influenced wetland to a hayfield; (3) the restoration of a roadside ditch; and (4) the construction of a drainage swale (collectively referred to hereafter as the "Project"). Applicants sought a determination that each use should be conditionally approved on the basis that such uses would not have undue adverse impacts under the Vermont Wetland Rules ("VWRs") to the protected functions of a Class Two wetland and its associated buffer zones located on the subject property. Applicants argued alternatively that the Project fits within the farming exemption of the VWRs or that it is an allowed use under the VWRs. The Project is located on land owned by Applicants in the Town of Winhall, Vermont. The VWRs effective February 23, 1990 govern this proceeding.

ANR posted the application on or about the date the application was received through May 5, 2000 and notice of the application was sent to all parties required by VWR Section 8.3 to receive such notice. On April 20, 2000, ANR, acting through the Department of Environmental Conservation ("DEC"), obtained

information about the Project at public informational meetings. One such meeting was held in the field at 4:00 p.m. and a second meeting was held at 7:00 p.m. at the Mountain School in Bondville, Vermont. Written comments were also received relative to the Application. On June 8, 2000, the DEC issued a decision denying the CUD for the Project ("Decision").

On July 7, 2000, the Applicants appealed the Decision to the Board. The appeal was timely filed pursuant to 10 V.S.A. § 1269 and Section 9 of the **VWRs**. The Applicants' appeal was deemed substantially complete by a letter from the Board's Executive Officer dated July 7, 2000.

A Notice of Appeal and Prehearing Conference was issued on July 24, 2000, and published in the Brattleboro Reformer during the week of July 24, 2000, in accordance with Board Procedural Rule ("Procedural Rule") 22.

The Applicants' July 7, 2000 Notice of Appeal was filed by Richard D. Perra, Esq. of the firm Weber, Perra & Munzing, P.C. A subsequent notice of appearance was filed on behalf of Applicants by Jack Long, Esq. of the firm Clark, Long & Werner. Although the subsequent notice of appearance did not initially indicate a substitution of counsel, on August 14, 2000 Attorney Perra filed a formal withdrawal of his appearance. Also filing a written notice of appearance prior to the prehearing conference was Andrew Raubvogel, Esq. on behalf of the ANR.

On August 10, 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, each member of which is appointed by the Governor'. Chair Blythe 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 **VWRs**. He explained that as a part of its duties in contested case proceedings, the Board or its Chair (or the Chair's designee) is authorized to convene prehearing conferences to expedite the hearing process.

The Chair described the purpose of a prehearing conference. He

¹ The Board is presently operating with one vacancy

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 requests would be taken under advisement. A separate opportunity to supplement party status requests was allowed, provided that such supplemental filings were received by the Board not later than Tuesday, August 15, 2000. In addition, as set forth in the Order, parties were provided an opportunity to file objections to party status requests prior to the Chair issuing preliminary rulings in this prehearing conference report and order ("Prehearing Order"). As provided in the Order section (and as previously communicated to parties in a Memo from Board counsel), such objections were due on Tuesday, August 29, 2000 at 4:30 p.m. In addition to objections to requests for party status (including VNRC's request to participate as *Amicus Curiae*), any objections to the composition of the Board (Members Blythe, Farr, Potvin, and Roberts) shall also have been filed not later than 4:30p.m. on Tuesday, August 29, 2000. (Notice of the August 29, 2000 deadline was previously distributed in a Status Memo from Board counsel dated August 17, 2000).

III. FILINGS RECEIVED TO DATE

As of August 29, 2000 at 4:30 p.m., the following filings were received:

On August 15, 2000, from David Gartenstein, Esq., on behalf of intervenors Signa Mills, and Dorothy and Stewart Read, a letter in support of their petition for intervention.

On August 21, 2000, from Jack Long, Esq., on behalf of the Applicants: (1) a Petition for a Declaratory Ruling and Request for an Evidentiary Hearing; and (2) a Memorandum in Opposition to VNRC's Petition for Leave to Participate as *Amicus Curiae*.

On August 22, 2000 a memorandum from Jack Long, Esq. on behalf of the Applicants opposing the Read's petition for intervention (i.e. party status).

On August 25, 2000, from Jack Long, Esq., on behalf of the Applicants: a Memorandum in Opposition to **Signa Mills'** Petition for Intervention, and Request for a Declaratory Ruling and an Evidentiary Hearing.

On August 30, 2000, from Jack Long, Esq., on behalf of the Applicants: a memorandum of law concerning the applicability of VWR §6.2(I) (allowed uses).

IV. **INTRODUCTIONS** AND APPEARANCES

The Chair introduced himself and staff to those present at the prehearing conference. Associate General Counsel, Joe Minadeo, who was the staff member initially assigned to staff this proceeding, indicated to those present that he will be leaving the Board at the end of September. Thereafter, Associate General Counsel **Kristina Bielenberg** will serve as Board counsel for this proceeding. Parties are directed to address all subsequent questions relative to this matter to Attorney Bielenberg at (802) 828-5443 or via **email** at kbielenberg@envboard.state.vt.us

V. **DISCLOSURES**

Chair Blythe identified the current members of the Board: members Blythe, Farr, Roberts, and Potvin. Copies of biographical notes for each of these persons were distributed to those participating in the prehearing conference with the exception of Attorney Gartenstein who was participating by phone. The biographical sheet was distributed with a memo to parties to ensure that all participants could file an objection, if one was warranted, by the August 29, 2000 deadline. The Chair asked the participants whether they were aware of any conflicts of interest or other disqualifying interests that 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. As of the August 29, 2000 deadline for filing objections to the composition of the Board, no such objection has been filed.

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 this case 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

VI. EX PARTE CONTACTS

The Board's Chair cautioned would-be parties to this proceeding against communicating directly with Board members concerning the appeal during its pendency. 3 V.S.A. §813.

VII. 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.

VIII. PRELIMINARY ISSUES

A. SCOPE OF APPEAL

The Chair requested clarification concerning the scope of the Project and the wetland resources allegedly affected by the Project. The Chair also sought a stipulation of facts relative to the timing of the events that transpired with respect to the wetland resources.

Board counsel generally described the issue in this proceeding as an application for a CUD, and therefore an analysis of whether the Project constitutes an undue adverse effect upon any of the wetland functions that had been served by the wetland in issue.

The Applicants' representatives argued that the Project fits within the parameters of the agricultural exemption under the Vermont Wetland Rules, or alternatively, that the Project constitutes an allowed use pursuant to the VWRs.

The Chair asked the Applicants to clarify in writing the scope of the Project for which a CUD is required or in the alternative, to explain why no CUD was or is required. A deadline for their filings and for responsive filings is set forth in the Order section of this Prehearing Order. Appellants have raised another issue in their August 21, 2000 filing concerning the applicability of the doctrine of equitable estoppel. Rather than take this up as a Declaratory Ruling, as requested by Appellants, the more efficient manner in which to address the issues is through the previously established briefing schedule for identification of preliminary issues. Parties will be provided an opportunity an opportunity to supplement filings on the issue of the applicability of the doctrine of equitable estoppel, as set forth in the Order section of this Prehearing Order.

B. INFORMAL DISPUTE RESOLUTION

The 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 Chair indicated that, if a request for continuance to allow negotiations were to be filed, the filing deadline for the first prefiled testimony would be delayed and a telephone status conference would be held in early October 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.

Absent any indications from the parties that they have achieved progress towards settlement, the Chair will nonetheless convene a settlement/status conference at the Board's Montpelier offices in the large conference room at 3:00 p.m. on Tuesday, September 26, 2000. All parties shall attend the status conference prepared to discuss alternative dispute resolution. VNRC, which is granted *amicus* curiae status in this Order, may attend but shall not be entitled to participate. A topic for consideration at the status conference is a question as to whether the Board (or ANR) has the authority to require a CUD *after wetland* impacts have allegedly occurred.

C. SUMMARY OF PRELIMINARY ISSUES

1. Does the Project fit within the so-called "farming exemption" of the

VWRs, codified at Section 3.1?

2. Is the Project, as constructed, an allowed use under the VWRs?
3. May the Board consider the doctrine of equitable estoppel and, if so, has the Appellant demonstrated that the State of Vermont should be estopped from either requiring a CUD, or enforcing any potential violations of the Vermont Wetland Rules.
4. Party Status
5. Amicus Curiae Status

IX. PARTY STATUS AND REPRESENTATION

The Board's counsel noted that the following persons had entered timely appearances: the Applicants, and the ANR, and that, in addition, the following persons had filed party status petitions as of the date of the prehearing conference:

Signa Mills, Dorothy Read and Stewart Read;
VNRC pursuant to Board Rule of Procedure 26.

The Chair asked the prehearing conference participants whether they had any objections to the granting of party status to the above-named persons. He indicated that he would take the participants' comments under advisement, receive objections on or before August 29, 2000, and record his party status rulings in the Prehearing Order.

X. ISSUES

The 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 WVR.
 - (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.
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- (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 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 that are at issue in the proceeding. See Procedural Rule 19(C).

Of the ten functions included in Section 5 of the VWR, the following eight appear to be at issue in this proceeding: 5.1 (water storage for flood and storm water runoff); 5.2 (surface and ground water protection); 5.3 (fisheries habitat); 5.4 (wildlife and migratory bird habitat); 5.6 (threatened and endangered species habitat); 5.8 (recreational value and economic benefits); 5.9 (open space and aesthetics); and 5.10 (erosion control).*

Absent any stipulation (such as one of the type referred to in footnote 2), it is also the applicants burden to demonstrate that any of the above functions are inapplicable.

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. Because of the number and complexity of the preliminary issues, no attempt to set forth a schedule for prefiled evidence has yet been made. Board counsel noted that such prefiled testimony would be required in advance of a merits hearing and that a **filing** schedule would be established later in the proceeding.

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 witnesses' testimony and exhibits and, if

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The ANR, in denying CUD Application DEC #1999-447 determined that the following functions are either not present or are present at such a minimal level as to not be protected functions in the wetland at issue: 5.5 (hydrophytic vegetation) and 5.7 (education and research in natural science). Should parties be in accord that functions 5.5 and 5.7 are not at issue here, a stipulation limiting the scope of review would be advisable to limit the testimony accordingly.

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 prefiling of evidence (i.e. deadlines for the filing of pre-tiled testimony), with specific instructions for the prefiling of testimony and exhibits would be issued should this matter proceed toward a hearing on the merits. As that order will confirm, all filings, including prefiled testimony and exhibits and various pleadings, are required to be filed with the Board with an original and six copies along with a certificate of service verifying delivery to all parties. "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.

The Board's counsel urged all prehearing conference participants to look at their calendars and alert her of any major scheduling conflicts between now the proposed hearing date.

XII. HEARING DAY SCHEDULE

The Board's counsel indicated that a site visit and hearing on preliminary issues (including objections to the Chairs rulings on party status and *amicus* status) with respect to the pending appeal is scheduled for **Tuesday, October 10, 2000**, and that the parties and would-be parties should reserve this date until further notice. Parties were also put on notice that the likely date for a full merits hearing would be December 12, 2000. 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 Winhall.

Attached to this Prehearing Conference Report and Order are two sample hearing day schedules. See attachment. Board counsel 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 prefiled 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. Board Counsel noted that parties are not required to serve filings on persons listed under the "For Your Information" section of the certificate of service. He 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/rules.htm>

xv. ORDER

A. SCHEDULING AND FILING DEADLINES

1. **August 15, 2000:** Intervenors, **Signa Mills**, Dorothy Read, and Stewart Read were to file a supplemental request for party status detailing the location of their properties relative to the **Hallett's** and specifying the basis upon which they qualify for party status. Attorney Gartenstein timely filed that supplemental request and represented that he has copied same to each of the parties listed on the attached certificate of service.

2. August 29, 2000: Any participant objecting to the composition of the Board was required to file such an objection. None has been filed. Also on **August 29, 2000**, any party objecting to requests for intervention was to have filed such an objection. As noted above, Applicants have objected to the participation of **Signa Mills**, Dorothy and Stewart Read, and VNRC. A subsequent opportunity to file an objection with respect to the Chair's party status rulings contained in this Order is provided at Paragraph C., below.

3. **August 31, 2000:** Applicants were to have filed a motion/memorandum

explaining the applicability of the farming exemption under the Vermont Wetland Rules Sec. 3.1, or in the alternative, argue that the Project is an allowed use under the VWRs. On August 30, 2000, Applicants filed such a memorandum. At the Applicant/Appellant's discretion, any factual bases for the applicability of Sec. 3.1, or the determination that the Project was an allowed use may have been supported by affidavits. In the absence of affidavits and/or stipulated facts, the Board will take live testimony on October 10, 2000 in the context of evaluating the legal arguments relative to allowed uses and the applicability of any exemption.

4. In the event that any of the persons listed in Item B. 1. below conclude that all or some of the issues in this matter may be resolved through informal dispute resolution, they shall be prepared to discuss steps towards such resolution at a status conference to be held in the Board's large conference room **at 3:00 p.m. on Tuesday, September 26, 2000 and be prepared at that time to file any motion for stay of proceedings deemed necessary, 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.**

5. Future scheduling

At the prehearing conference, the date identified for a merits hearing was **December 12, 2000**. As discussed at the prehearing conference, **a hearing on preliminary matters and a site visit has tentatively** been scheduled for October **10, 2000**. The hearing on preliminary issues will be held at a facility convenient to the site.

B. PARTY STATUS

1. The parties to this proceeding are:

Applicants/Appellants, E. Bruce and Deborah Hallett, pursuant to 10 V.S.A. §1269, VWR Section 9, and Procedural Rule 25(B)(I);
ANR, pursuant to Procedural Rule 25(B)(5);
VNRC, pursuant to Procedural Rule 26 with the express limitations on participation that are contained within Rule 26.;
Signa Mills, pursuant to Procedural Rule 25(C);

2. Dorothy Read and Stewart Read's petition for intervention is denied

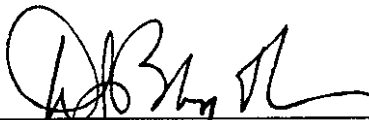
C. FILINGS DUE/OBJECTIONS TO **PREHEARING ORDER**

1. **On or before September 19, 2000**, any party may reply to the Applicants' filing described above in paragraph A.3., as well as any other that has been filed by Applicants' (as discussed in this Prehearing Order at Section III). ****NOTE: This filing deadline has been extended by six days beyond that deadline which was contained** in the preceding Memorandum to Parties/Status Update from Board counsel dated August **17, 2000** **
2. On or before Thursday, September **28, 2000**, Parties shall file a proposed site visit protocol that has been reviewed and commented upon by all parties. To the extent possible, such site visit protocol shall be accompanied by a stipulated set of facts to be jointly filed by the parties **not later than September 28, 2000**. If this stipulation reduces the matters under consideration to a pure matter of law, then the October 10, 2000 hearing will be conducted as oral argument accordingly. However, even in the absence of a complete reduction of disputes to purely legal matters, any stipulated facts that serve to limit the scope of the **evidentiary** hearing on October 10, 2000 will facilitate a more orderly and efficient proceeding.
3. On or before **4:30 p.m.**, Tuesday, September **19, 2000**, any interested participant objecting to the patty status rulings in Items B.1. and B.2. above, shall file his or her written objection supported by a legal memorandum. Any requests for oral argument before the Board with respect to such party status objections shall also be filed on or before **4:30 p.m., Tuesday, September 19, 2000**, with the understanding that the full Board will hear such argument and deliberate with respect to such objections on October 10, 2000, at a time and location convenient to the wetland at issue to be confirmed by separate notice.
4. The issues in this proceeding are those discussed in Sections VIII and framed in Section X. of this Prehearing Order. Any person who objects to the characterization of such issues shall file such an objection with the Board on or before **4:30 p.m., Tuesday, September 19, 2000**. **Any objections** to the statement of issues contained herein will initially be taken up at the status conference scheduled for Tuesday, September 26, 2000. If after such conference, objections to the characterization of issues remain, such objections will be reviewed by the full Board at the October 10, 2000 meeting.

5. Should any person wish to respond to a party status objection filed in accordance with Paragraph C.3. or to the objections to the characterization of legal issues discussed in Paragraph C.4., above, they shall do so on or before **2:30 p.m., Tuesday, September 26, 2000.**
6. If oral argument has been requested by one or more parties, any party may request the Board for time at the oral argument on October 10, 2000, to provide responsive argument provided that such request is filed on or before **2:30 p.m., Tuesday, September 26, 2000.**
7. Until any preliminary issues in this 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 October, November, and December.
8. Parties shall file an original and **six 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.
9. 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., Tuesday, September 19, 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 6th day of September, 2000.

WATER RESOURCES BOARD



David J. Blythe, Esq.
Board Chair

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