

State of Vermont
WATER RESOURCES BOARD

Re: E. Bruce and Deborah **Hallett**
Docket No. CUD-2000-09

SUPPLEMENTAL PREHEARING ORDER

A Prehearing Conference Report and Order (“Prehearing Order”) was issued in the above-captioned matter on September 6, 2000. The prehearing conference participants were provided an opportunity to file objections to that order on or before September 19, 2000. Prehearing Order, Section XV.C., Item 9. at 13. This Supplemental Prehearing Order is intended to address some of the objections timely filed and to clarify certain matters to be addressed at the status conference on Tuesday, September 26, 2000.

I. PARTY STATUS AND *AMICUS CURIAE* RULINGS

Section XV. B. of the Prehearing Order set forth certain preliminary rulings governing the participation of interested persons in this proceeding. Since no objections were filed by the September 19, 2000 deadline to the grant of party status to the Applicants/Appellants E. Bruce and Deborah Hallett (“Appellants”) and the Agency of Natural Resources (“ANR”), these rulings have become final. Furthermore, since no objection was filed by the September 19, 2000 deadline to the denial of the petition for intervention filed by Dorothy and Steward Read, that ruling has become final.

Additionally, while the Appellants objected to the grant of party status to **Signa Mills** in their filing of August 25, 2000, based on the argument that Ms. Mills has “unclean hands,” they did not timely renew their party status objection after the issuance of the Prehearing Order and before the September 19, 2000 deadline for objections. See Prehearing Order, Section XV. B., Item 1 at 11 and C., Item 3 at 12. Therefore, the Chair’s preliminary ruling granting Ms. Mills’ party status pursuant to Rule 25(C) of the Board’s Rules of Procedure (“Procedural Rule”) has become final. The Chair notes that the doctrine of “unclean hands” is not a bar to the grant of party status under Procedural Rule 25.

The Appellants objected to the grant of *amicus curiae* status to the Vermont Natural Resources Council (“VNRC”) in their filing of August 21, 2000. The Chair issued a preliminary ruling granting VNRC *amicus curiae* status. Prehearing Order, Section XV. B., Item 1. Nevertheless, the Appellants timely renewed their objection in their filing of September 13, 2000. Accordingly, the Board will hear oral argument from the Appellants and VNRC on October 10, 2000, regarding the issue of whether VNRC should be granted *amicus curiae* status under Procedural Rule 26. All filings made by VNRC shall be considered a part of the record of this proceeding, unless and until such time as the Board issues a ruling denying VNRC’s pending request for *amicus curiae* status

II. REVISIONS TO THE PREHEARING ORDER

A. Appellants' Requests for Revisions

The Appellants made three filings between the issuance of the Prehearing Order and the September 19, 2000 deadline for objections. See Prehearing Order, Section XV.C., Item 9. at 13.

In their filing of September 13, 2000, they asked the Board in response to Section XV.C., Item 4 of the Prehearing Order to revise a paragraph found in Section VIII(A) of the Prehearing Order at 5-6 in the interest of recharacterizing the preliminary matters at issue. The Chair has reviewed this request and grants it in part and denies it in part. Specifically, the Board revises the paragraph in question to read:

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

The Appellants' request is granted in part and denied in part. The above paragraph memorializes the discussions at the August 10, 2000, prehearing conference, and provides the basis for establishing an August 31, 2000 deadline for Appellants' memoranda on preliminary issues, including any memoranda addressed to the applicability of the Vermont Wetland Rules' ("VWR") farming exemption. See Board Memorandum re: Status Report at 2 (Aug. 17, 2000); Prehearing Order, Section XV.A., Item 3 at 10-11. Just because the Appellants elected not to address the farming exemption issue in their filing of August 30, 2000, does not mean that the Prehearing Order should be amended to eliminate any reference to this matter in the report section of that order. Accordingly, the only amendment that is granted with respect to the above paragraph is designed to clarify that counsel's arguments with respect to the applicability of the allowed use section of the VWR extend to the Project or portions of the Project.

In its filing of September 15, 2000, Appellants' sought to substitute its own list of preliminary issues for those listed in the Prehearing Order, Section VIII.C. at 6-7. With two exceptions, all of Appellants' requests are denied.

First, the Chair grants the Appellants request to eliminate preliminary issue (1) in the Prehearing Order regarding the farming exemption on the basis that the Appellants failed to timely raise the issue in their filing of August 30, 2000, and have affirmatively waived the issue. Second, the Chair grants the Appellants request to amend preliminary issue (2) in the Prehearing Order regarding whether the Project, or a portion of the Project is an allowed use under the VWR. However, since the Appellants have only identified VWR Section 6.2(1) in their August 30 and

Sept 18, 2000 tilings as the basis for their allowed use argument, the preliminary issue is further narrowed to address only that subpart of VWR Section 6.2.

The Appellants' request to amend preliminary issue (3) in the Prehearing Order is denied. The first clause of that issue is sufficiently clear as written to put the parties on notice that the Board invites briefing on the question of whether the Board has the authority and power to decide equitable estoppel claims.

The Appellants' request to add as a preliminary issue the question of whether the Board has authority to reverse the CUD on the basis that the ANR allegedly acted "arbitrarily and capriciously" is denied. The Board is required by 10 V.S.A. § 1269 to apply a *de novo* standard of review. Therefore, it is immaterial whether the ANR acted arbitrarily or capriciously. The Board must hear all evidence anew and exercise its own judgment in making a determination whether a CUD should issue for this Project or a portion thereof, if the Board concludes that it has the jurisdiction to do so.

The Chair denies the Appellants' requests to amend preliminary issues (4) and (5). It is obvious from the Prehearing Order who sought party status and *amicus curiae* status. As noted on page 1, Appellants have preserved their objection to the grant of *amicus curiae* status of VNRC, but all party status determinations are now final.

Finally, the Chair notes that the Appellants, in their filing of September 15, 2000, have sought clarification concerning the meaning of the issue identified in Section VIII.B. of the Prehearing Order at 6 -- specifically, "whether the Board (or ANR) has the authority to require a CUD *after* wetland impacts have allegedly occurred." This question was raised *sua sponte* by the Chair because it goes to the question of whether the Board has jurisdiction to hear this matter and is therefore the first preliminary issue that must be decided by the Board. This question should not be new to the parties as it was raised by counsel for Signa Mills and others, attorney Peter D. Van Oot, in a letter dated March 24, 2000, to Stephan B. Syz of the ANR. See Appellants' filing of Aug. 21, 2000; Exhibit 7 at 2. In order to clarify the issue, however, the Chair has amended the text as noted below and established a briefing schedule to specifically address this question as set forth in the Order, Section IV, Items 4. and 5., at 4-5.

Section VIII.C. of the Prehearing Order is amended as follows:

1. ~~Does the Project fit within the so-called "farming exemption of the VWR, codified at Section 3-1?~~

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?

2. May the Board consider the doctrine of equitable estoppel and, if so, has the Appellants demonstrated that the State of Vermont should be estopped from either requiring a CUD, or enforcing any potential violations of the ~~Vermont Wetland Rules~~ VWR?
3. **Is the Project, or any portion of the Project,** as constructed, an allowed use under the VWRs Section 6.2(1)?

Oral argument on the above preliminary issues, and the objection to the grant of *amicus curiae* status of VNRC, shall be heard by the Board on October 10, 2000. All requests by the Appellants to have the Board consider any of the above issues in separate declaratory ruling proceedings are hereby denied for the reason set forth in the ANR's filing of September 19, 2000 See also In re State Aid Highway No. 1, Peru, Vt., 133 Vt. 4, 7 (1974).

B. ANR's Requests for Revisions

In its filing of September 19, 2000, ANR asks the Board to revise the issues as framed in Section X. of the Prehearing Order at 7-8. The request is granted in part and denied in part. Should the Board determine that it has jurisdiction to hear this matter on the merits, the issues on appeal shall be:

- (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 protection functions, are the these impacts minimal? Section 8.5(a) of the VWR:~~
- (3) If the there is an 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? Section 8.5(b) of the VWR.

The Chair agrees with the ANR's analysis in its filing of September 19, 2000 at 4, that a determination of whether an adverse impact is minimal and therefore undue, is properly made in the context of issue (1) as framed above. The Chair also agrees that reference to "minimal" impact in renumbered issue (2) above is properly deleted. The Chair does not agree, however, that the mitigation question, renumbered issue (2), should be excluded on the basis that it was not

expressly identified in Appellants' Notice of Appeal. The Appellants are entitled under VWR Section 8.5(b) to offer evidence -- including new evidence -- on the question of whether they have or can mitigate any undue adverse impacts. It would be a substantial inequity or injustice to deny them the opportunity to offer such proofs when VWR Section 8.5 specifically contemplates a two-step analysis to determine whether there is no net undue adverse impact on protected functions.

The Chair denies ANR's request to not include preliminary issue (3) above on the basis that it was not within the ambit of Appellants' Notice of Appeal. The Chair specifically requested at the prehearing conference that participants identify all preliminary issues, including defenses, and the Appellants so complied. Whether or not the Appellants adequately briefed this issue in their filing of August 30, 2000 is a matter for the Board to decide after all filings have been received and oral argument is heard on October IO, 2000.

III. SEPTEMBER 26 STATUS CONFERENCE

The parties shall be prepared to discuss at the Status Conference on September 26, 2000 whether this matter may be settled through alternative dispute resolution. Additionally, the parties should be prepared to discuss the attached proposed Hearing Day Agenda for October 10, 2000, and a joint site visit itinerary. Parties also should bring their calendars to this Status Conference to discuss a possible filing schedule to bring this matter to hearing on December 21, 2000 should the Board decide to hear this matter on the merits.

IV. ORDER

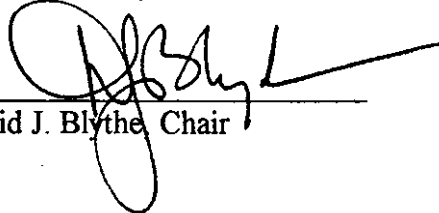
1. The Prehearing Order is amended as provided in Section II. above. Any objections to the Chair's preliminary rulings shall be tiled in writing no later than **2:30 p.m., Tuesday, September 23, 2000.**
 2. The preliminary issues to be considered by the Board on October 10, 2000, are those identified in Sections I and II.A. above.
 3. Should this matter be heard on the merits, the issues in this matter are those framed in Section II.B. above.
 4. On or before **4:30 p.m., Monday, October 2, 2000**, all parties shall file memoranda
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addressing preliminary issue 1. as restated in Section B.A. above. By this deadline, all parties who file memoranda on this issue shall indicate whether they intend to present oral argument on this issue to the Board on October 10, 2000.

5. Any party seeking to respond to arguments made in memoranda filed in accordance with Item 4. above, may do so on or before **4:30 p.m., Friday, October 6, 2000**. By this deadline, they shall indicate whether they intend to present responsive oral argument to the Board on October 10, 2000.
6. This Order supplements the Prehearing Order. Except as expressly provided above, nothing in this order shall be construed to amend the terms and filing requirements of the Prehearing Order which became final in **all** other respects on September 20, 2000.

Dated this 22nd day of September, 2000, at Montpelier, Vermont.

WATER RESOURCES BOARD



David J. Blythe, Chair