

**State of Vermont  
WATER RESOURCES BOARD**

**RE: Links at Lang Farm, Essex, Vermont  
Docket No. WET-99-02DR  
(Petition filed by the Department of Environmental Conservation)**

**PREHEARING CONFERENCE REPORT AND ORDER**

On February 1, 2000, Water Resources Board ("Board") Chair Gerry Gossens convened a prehearing conference in Montpelier, Vermont, in the above-captioned matter. The following persons participated in the prehearing conference:

Conrad W. Smith, Esq. for the Petitioner, Department of Environmental Conservation ("DEC"), Agency of Natural Resources; and  
Philip A. Kolvoord, Esq., Kolvoord, Overton & Wilson, for Links at Lang Farm, LLC, CUD Applicant ("CUD Applicant")

Also present and assisting the Chair in the conduct of the prehearing conference was the Board's Associate General Counsel, Kristina L. Bielenberg, Esq.

**I. PROCEDURAL BACKGROUND**

On December 30, 1999, the DEC filed a petition for declaratory ruling with the Board pursuant to WRB Rule of Procedure ("Procedural Rule") 16(B), seeking Board review of an Advisory Opinion entitled In re: Links at Lang Farm, Essex, Vermont, WET-99-01-AO. The DEC asked the Board to determine that three wetlands, located on property owned by John and Nancy Lang and subject to a CUD application filed by the CUD Applicant, are wetlands protected under the Vermont Wetland Rules ("VWRs") by virtue of being contiguous to Class Two wetlands.

On January 6, 2000, the DEC's petition was deemed completed and docketed as Docket No. WET-99-02DR. A Notice of Petition for Declaratory Ruling and Notice of Prehearing Conference was published in the Burlington Free Press on January 17, 2000, in accordance with Procedural Rule 22.

On February 1, 2000, the Board's Chair convened a prehearing conference in this matter pursuant to Procedural Rule 28.

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## II. INTRODUCTIONS

The Chair introduced himself and staff to those present at the prehearing conference and asked for appearances.

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 petitions for declaratory rulings, including those arising from "appeals" of Executive Officer Advisory Opinions, pursuant to Procedural Rule 16(A).

## III. PURPOSE OF PREHEARING CONFERENCE

The Chair described the purpose of a prehearing conference. He specifically noted that the purpose of a first preheating conference, such as this one, is to: (1) identify parties or persons seeking party status; (2) clarify the issues in controversy; (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 Chair advised those present to obtain copies of the Procedural Rules, effective February 22, 1999, as well as the **VWR**, to prepare for the hearing in this matter. Those present indicated that they already had copies of these rules, but the text for these rules are also available by downloading text from the Board's Web site:

**<http://www.state.vt.us/wtrboard>**

## IV. STANDARD OF REVIEW

The Board's counsel advised the preheating conference participants that the present petition for declaratory ruling would be heard as a de novo contested case -- that is, as if no decision had been reached by the Executive Officer. As a consequence, she cautioned the prehearing conference participants that any evidence that they might have submitted to the DEC or to the Executive Officer in support of or in opposition to a determination of wetland contiguity, including the CUD application which gave rise to this proceeding, would have to be resubmitted to the Board in the form of prefiled exhibits. The Board's counsel further reminded the preheating conference participants that since the ANR had brought the appeal seeking to overturn the Executive Officer's Advisory Opinion, it would have the burden of proof and persuasion in demonstrating that contiguity exists with respect to the three wetlands at issue. Finally, it was noted that the Advisory Opinion issued by the Board's Executive Officer was not binding law, but that any decision reached by the Board in the declaratory **ruling proceeding** would establish binding precedent concerning the interpretation of the contiguity provision of the **VWRs**.

V. DISCLOSURES

The Chair identified for the prehearing conference participants the current Board members: members Gossens, Blythe, Farr, Roberts, and Potvin. He distributed copies of biographical notes for each of these persons and 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 participating in the prehearing conference 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. However, they were advised that a deadline would be set for filing any objections or requests for further disclosure in the Prehearing Conference Report and Order.

The Chair **further** disclosed that Executive Officer William A. Bartlett would not advise the Board or otherwise participate in this proceeding, as Mr. Bartlett was the author of the **advisory** opinion that gave rise to the present petition.

The prehearing conference participants are hereby advised that if new appointments are made to the Board during the pendency of these appeals, 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.

VI. EX PARTE CONTACTS

The prehearing conference participants are cautioned against communicating directly with Board members concerning the appeals during their pendency. 3 V.S.A. §813. All persons having procedural questions are directed to bring them to the attention of the Board's counsel staffing this case, **Kristina L. Bielenberg, Esq.** (Phone: 828-5443).

VII. PARTY STATUS AND REPRESENTATION

The only persons who entered timely appearances in this matter and sought party status were: the Petitioner DEC by attorney Smith; and the CUD Applicant, Links at Lang Farm, LLC, by attorney Kolvoord. There were no objections to the grant of party status to these persons. Therefore, DEC was granted party status, as Petitioner, pursuant to Procedural Rule 25(B)(5); and the CUD Applicant was granted party status, pursuant to Procedural Rule 25(B)(1).

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### VIII. INFORMAL DISPUTE RESOLUTION

The Chair inquired of the parties whether there was any interest in engaging in settlement negotiations or alternative dispute resolution. He noted that time could be built into the schedule of this proceeding to allow for such informal resolution if the parties believed that the issues in this matter could be resolved or 'narrowed through negotiations or mediation.

The parties indicated that they had tried to reach a settlement prior to the prehearing conference and that they were willing to continue negotiations. Accordingly, the Chair indicated that the filing deadline for the first prefiled testimony would be delayed to allow the parties two weeks in which to finish up negotiations. At the suggestion of the parties, a telephone status conference will be held in mid-February at which time they will report to the Chair on whether a settlement has been reached with respect to **all** or some of the issues before the Board.

### IX. PRELIMINARY ISSUES

Counsel for the CUD Applicant raised two preliminary issues.

First, he asked whether the Board would consider anew the question of whether Wetland 98-10 is a Class Two wetland by virtue of contiguity. He noted that Procedural Rule 19(C) states that "the scope of any proceeding shall be limited to those issues specified in the notice of appeal unless the Board determines that substantial inequity or injustice would result from such limitation." He asked for an opportunity to move for expansion of the scope of the appeal to include consideration of Wetland 98-10.

Counsel for the CUD Applicant also asked whether the DEC could be required to specify the factual matters at issue by identifying which of the findings of fact in Advisory Opinion, WET-99-01-AO, are allegedly in error. He indicated that a stipulation as to the facts not at issue would, in the alternative, help to narrow the matters to be litigated.

The Chair indicated that he would take the CUD Applicant's requests under advisement and rule on these requests in the Preheating Conference Report and Order. See further discussion under Section X.

### X. ISSUES

The issue in this proceeding is the following:

Whether Wetland 98-3, Wetland 98-4 and Wetland 98-6 are contiguous to Class Two wetlands (98-5 and 98-7) and therefore subject to protection under the VWRs.

The ANR does not seek review of the Executive Officer's determination that Wetland 98-10 is contiguous to a Class Two wetland. In light of the CUD Applicant's request to have the Board consider anew the status of Wetland 98-10, the Chair will adjust the tiling schedule to allow for the filing of a motion to expand the scope of the proceeding and the filing of a response by DEC. Any such motion and response shall address the standard set forth in Procedural Rule 19(C), regarding limitation of matters at issue.

The Chair will not require the DEC to file a more definite statement of the findings of fact at issue in this proceeding.

#### XI. WITNESSES, EXHIBITS, AND PREFILING SCHEDULE

The Chair explained to the prehearing conference participants that prefiled testimony and exhibits would be required in this proceeding. The Board's counsel asked each participant to provide a preliminary list of witnesses and exhibits to help get a sense of how long a hearing will be required to address the matters on appeal.

Counsel for the DEC indicated that he would be calling six or seven witnesses. These would include DEC staff Stephen Syz and Karen Bates, as well as perhaps a second person from the Wetlands Office. He also indicated that DEC might call one or two persons knowledgeable about soils to testify regarding aerial maps and soils data for the subject site and a civil engineer to interpret the municipal sewer line designs for the property.

Counsel for the CUD Applicant indicated that he would likely call Steve Kolvoord or Jonathan Lang, Jeff Nelson and/or Bill Suhr from Pioneer Environmental Associates, and possibly an engineer as a rebuttal witness. He also indicated that he might call Marty Abair from the Army Corps of Engineers or the Board's Executive Officer, William Bartlett, as witnesses.

The parties are encouraged to work together, 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 the Prehearing Conference Report and Order would contain specific instructions for the **prefiling** of testimony and exhibits. She emphasized that with respect to all filings, including prefiled testimony and exhibits and proposed findings of fact, conclusions of law, and orders, 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"

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means that a parties' submissions must be received at the Board's office by the deadline stated in a Prehearing Conference Report and Order or in subsequent orders of the Board or Chair. See Procedural Rules 8, 9, and 10.

## XII. HEARING DAY SCHEDULE

The Board's counsel indicated that the hearing with respect to the pending appeals would likely be held on April **25, 2000**, depending on whether the Board is required to decide preliminary issues in this matter. The parties are asked to reserve this date until further notice. The Board's counsel also noted that the hearing would be scheduled at a public facility in close proximity to the subject wetland, most likely at the Essex Municipal Offices.

The Board's counsel outlined for the prehearing conference participants the typical hearing day schedule (see enclosure) and answered their procedural questions. The parties are asked to plan their cases in accordance with the proposed time allotments and, if additional time is required, to file requests for additional time in accordance with the Preheating Conference Report and Order. Parties are encouraged 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 parties that they should use the certificate of service accompanying the Prehearing Conference Report and Order to determine who should receive copies of all filings. Parties are not required to serve filings on persons listed under the "For Your Information" section of the certificate of service.

Parties are responsible for advising the Board of any changes in address, including changes related to the assignment of new 911 street numbers.

## XIV ORDER

1. The following persons or entities are granted party status in this proceeding:  
DEC, as Petitioner, pursuant to Procedural Rule 25(B)(5); and  
Links at Lang Farm, LLC, as the CUD Applicant, pursuant to Procedural Rule 25(B)(1).
2. Any requests for disqualification of any of the current Board members identified in Section V. above, or any requests for **further** disclosure, shall be filed on or before

**4:30 p.m., Tuesday, February 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.

3 . The issue in this proceeding is whether Wetland 98-3, Wetland 98-4 and Wetland 98-6 are contiguous to Class Two wetlands (98-5 and 98-7) and therefore subject to protection under the VWRs. Any person objecting to the issue as framed, including the scope, of the issue with respect to the wetlands under consideration, shall file a motion, supported by legal memorandum addressing Procedural Rule 19(C), on or before **4:30 p.m., Wednesday, February 9, 2000.**

4. Should a motion to alter or expand the scope of the matters to be decided in this proceeding be timely filed in accordance with Item 3 above, a responsive filing, supported by legal memorandum, may be filed with the Board on or before **4:30 p.m., Tuesday, February 15, 2000.**

5. The Chair or his designee will conduct a status conference by telephone on **Thursday, February 17, 2000, at 9:00 a.m. at the Board's office in Montpelier, Vermont.** The purpose of this conference is to determine the status of settlement negotiations in this proceeding and assess what changes, if any, in the prehearing schedule are warranted as a result of such negotiations. 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, February 15, 2000.** The Board's staff will arrange the conference call.

6. On or before **4:30 p.m., Thursday, March 2, 2000,** the DEC 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 1/2 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.

7. On or before **4:30 p.m., Thursday, March 16, 2000,** the CUD Applicant shall file final

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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 1/2 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.

8. On or before **4:30 p.m., Thursday, March 30, 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 1/2 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.

9. 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.
10. On or before **4:30 p.m., Thursday, April 6, 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.
11. On or before **4:30 p.m., Thursday, April 13, 2000**, any party may file in writing any responses to evidentiary objections filed in accordance with Item 10 above. If responses are not timely filed, they may be excluded. Any objections shall be supported by legal memoranda.
12. On or before **4:30 p.m., Thursday, April 13, 2000**, all parties shall submit a single,

combined list of all prefiled testimony and exhibits.

13. On or before **4:30 p.m., Thursday, April 13, 2000**, all parties shall file in writing any requests for time beyond the time allotments given in Section IX. above. The Chair may allow more time if good cause is shown.
  14. On or before **4:30 p.m., Thursday, April 13, 2000**, parties shall file a joint proposed itinerary for the site visit to be held on April 25, 2000. To the extent that the parties cannot agree concerning the relevancy of any proposed site visit itinerary item, they should communicate their disagreement in writing in a submission to the Board so that the Chair may rule on the scope of the site visit.
  15. On or before **4:30 p.m., Thursday, April 13, 2000**, parties shall file any stipulations. These may be in the form of joint statements of fact or proposed joint decisions.
  16. On or before **4:30 p.m., Thursday, April 13, 2000**, parties shall file any proposed findings of fact, conclusions of law, and orders.
  17. The Chair or his designee will conduct a second prehearing conference by telephone on **Thursday, April 20, 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, site visit issues, 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, April 18, 2000. The Board's staff will arrange the conference call.
  18. On Tuesday, April 25, 2000, the Board will convene a hearing in this matter. The specific time and location of this hearing shall be announced later.
  19. 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, April 13, 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).
  20. On or before **4:30 p.m., May 2, 2000**, any party may file any revised or supplemental proposed findings of fact, conclusions of law, and orders, including any proposed CUD
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conditions.

21. The Board may waive the filing requirements upon a showing of good cause, unless such waiver would unfairly prejudice the rights of other parties.
22. Parties shall file an original and **seven collated copies** of prefiled testimony, legal memoranda, all prefiled testimony, all **prefiled** exhibits which are 8 1/2 by 11 inches or smaller, 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 will be revised once party status 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.
23. Each party shall label their prefiled testimony and exhibits with their name. The labels on the exhibits must contain the words WATER RESOURCES BOARD, Re: Links at Lang Farm, Docket No. WET-99-02DR, 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 a letter as follows: "DEC" for the Department of Environmental Conservation and "**LINKS**" for the CUD Applicants. Exhibits shall be assigned consecutive numbers. For example, the CUD Applicant would number its exhibits LINKS-1, LINKS-2, LINKS-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. LINKS-24A, LINKS-24B, 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 APPLICANT'S LIST OF EXHIBITS  
RE: LINKS AT LAND FARM, WET-99-02DR

<u>Number</u>	<u>Description</u>	<u>Status</u>
LINKS-1	Prefiled Direct Testimony of Jeffrey A. Nelson	

