

**State of Vermont  
WATER RESOURCES BOARD**

**PREHEARING CONFERENCE REPORT AND ORDER**

**RE: Town of Cabot  
P.O. Box 36  
Cabot, Vermont 06647**

**Docket No. WQ-2000-04  
(Appeal of DEC Permit #3-1440)  
NPDES# VT0101267**

On May 9, 2000, Stephen Gregg filed an appeal seeking review of a decision of the Department of Environmental Conservation ("DEC"), Agency of Natural Resources ("ANR"), **granting** to the Town of Cabot ("Cabot") Discharge Permit #3-1440 ("Permit"). The Permit was issued on April 11, 2000. The appeal was timely filed pursuant to 10 V.S.A. §1269 which provides that any person or party in interest aggrieved by an act or decision of the secretary of ANR pursuant to [10 V.S.A. Ch. 47, Subchapter I] may appeal to the Board within thirty days.

On June 2, 2000, Water Resources Board ("Board") Vice-Chair, David J. Glythe, Esq., convened a prehearing conference in Montpelier concerning the referenced appeal.

**BACKGROUND**

The Permit under appeal was issued by DEC pursuant to 10 V.S.A. §1259 and Section 402 of the federal Clean Water Act. The Permit authorizes Cabot to discharge treated effluent from the Cabot Wastewater Treatment Facility to the Winooski River in accordance with the terms of the Permit. Such terms include design and engineering specifications and limitations on both the characteristics and volume of the treated effluent. In addition, the Permit at Section B. contains an approved modification of what DEC characterizes as an "existing waste management zone ("WMZ") in the Winooski River which currently extends from Cabot Village to the confluence of Marshfield Pond Brook." In contrast, Mr. Gregg characterizes the approved WMZ as a new WMZ that may be established only after following the procedures established in 10 V.S.A. §1252. Mr. Gregg alleges that such procedures were not followed by DEC. The portion of the Winooski River that will receive the discharge ("Receiving Waters") constitutes waters of the United States and is classified by the Board as Class B waters. As such, the Receiving Waters must comply with the Vermont Water Quality Standards.

On June 2, 2000, the Town of Cabot filed a Motion to Expedite. The Motion is supported by a written explanation of several time-sensitive elements of the proposed project. These include building season limitations, federal grant monies, publicly supported municipal bonding for the project, as well as the time-

frame associated with the construction bidding process. The Board acknowledges these valid concerns and will schedule hearing on the preliminary issues and the merits of the appeal in as expeditious a manner as possible.

I. DISCUSSION

The following persons attended the prehearing conference:

Town of Cabot, by its counsel, Robert Bent, Esq.  
ANR, by its co-counsel, Anne Whiteley, Esq. and Elizabeth Lord, Esq.  
Appellant, Stephen Gregg  
Larry Gochey, Town of Cabot Selectboard Member  
Lancelot Phelps, Town of Cabot Engineering Consultant  
Bob Dufresene, Town of Cabot Engineering Consultant  
Brett Rosenthal, ANR Legal Intern  
Brian D. Kookier, Section Chief, ANR Wastewater/Water Supply Division

On May 18, 2000, Robert Bent, Esq. filed a notice of appearance on behalf of the Town of Cabot. At the prehearing conference, a written request for party status was filed by Stephen Gregg and an entry of appearance was filed by ANR. There have been no additional requests for party status. Moreover, there have been no objections to those party status requests which have been filed.

Vice-Chair Blythe identified for the prehearing conference participants the current Board members: members Blythe, Gossens, Potvin, Roberts, and Farr. He distributed copies of biographical notes for 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 conflicts of interest or other circumstances requiring disqualification of one or more of the named Board members.

Vice-Chair Blythe initiated a general discussion of the issues attendant to this appeal. The Town of Cabot and ANR explained the facts which have given rise to the project application, among which are the existing sources of unabated pollution in the region of the proposed project, an order issued pursuant to 10 V.S.A. §1277 ordering the correction or abatement of the known discharges of untreated or improperly treated sewage into waters of the state. The Town explained, in brief, the lengthy public decisionmaking process that has

precipitated the application to construct the project and much of the funding for same.

Appellant raised concerns about the inadequacy of scientific study of the receiving waters, about the lack of identification of existing uses of the receiving waters (among which are uses he identifies in his notice of appeal), and concerns about the inappropriate and unlawful establishment of what he characterizes as a "new" waste management zone.

Vice-Chair Blythe encouraged the parties to consider an informal resolution of the concerns giving rise to the appeal through alternative dispute resolution. A more detailed statement of the legal issues in this matter follows.

### III. ISSUES

At the prehearing conference one significant preliminary issue was identified concerning the appropriateness/legality of what parties alternatively characterize as the reconfiguration or establishment of a Waste Management Zone. The parties will file memoranda relative to the following statement of that issue on **or before 4:30 p.m. Thursday, June 22, 2000:**

#### A. Preliminary Issues

- (1) Is the Waste Management Zone ("WMZ") attendant to the discharge permit under appeal a "new" or an "existing" WMZ?
  - a. If it is an existing WMZ whether ANR's use of the existing WMZ in the Winooski River which currently extends from Cabot Village to the confluence of Marshfield Pond Brook was appropriately used given the statutory guidance of §1252(b) and (c) and Section 2-06 of the Vermont Water Quality Standards ("VWQS") effective April 21, 1997.
  - b. If the WMZ is a "new" waste management zone, whether ANR complied with the statutory requirements of §1252(d) and Section 2-06 of the VWQS in its issuance of Discharge Permit #3-1440. If any party argues that ANR did not comply with applicable statutes and regulations pertaining to establishment of WMZs, whether such noncompliance compels the Board to remand this matter to ANR; or whether

the appeal of Discharge Permit #3-1440 should proceed to dispose of all other aspects of the appeal.

B. Other legal issues

- (1) Whether the Discharge Permit should issue to the Town of Cabot based on the statutory criteria for issuance of such permit and the requirements of the Vermont Water Quality Standards effective April 21, 1997.
  - a. Specifically, whether, as permitted, the discharge of treated effluent in to the receiving waters will degrade the quality of the water in a manner inconsistent with the applicable requirements of the Vermont Water Quality Standards effective April 21, 1997.
- (2) Whether there is adequate data and supporting documentation to accurately describe the present water quality conditions in the river, and if so, what is that condition.

C. Issues concerning process

- (1) Appellant alleges that he has had "no opportunity to present evidence in support of [his] claims or to discuss water quality issues." Whether the alleged lack of such opportunity was unlawful or whether ANR complied with all applicable requirements to provide public notice and an opportunity to be heard.
- (2) Even if there was a lack of opportunity to pursue Appellants claims of error or to discuss water quality issues, whether Appellants participation this *de novo* appeal renders such concerns moot.

#### IV. EX PARTE CONTACTS

The Vice-Chair cautioned the prehearing conference participants against communicating directly with Board members concerning this matter during its pendency. He directed all persons having procedural questions to bring them to the attention of the Board's attorney Joe Minadeo (Phone: 828-3305).

#### V. STANDARD OF REVIEW

The Vice-Chair reminded the prehearing conference participants that appeals filed pursuant to 10 V.S.A. §1269 are heard de novo. As a consequence, parties are forewarned that any evidence that might have been submitted to the ANR in support of or in opposition to the application for Discharge Permit #3-1440, including the application itself, must be resubmitted to the Board in the form of prefiled exhibits. Board counsel further reminded the prehearing conference participants that the permit applicant has the burden of proof and persuasion in proving that it is entitled to a permit applying the standards set forth in 10 V.S.A. §1263 and the applicable provisions of the Vermont Water Quality Standards effective April 21, 1997.

#### VI. WITNESSES AND EXHIBITS

The Vice-Chair explained to the prehearing conference participants that prefiled testimony and exhibits would be required in this proceeding. The Vice-Chair instructed each participant to provide a preliminary list of witnesses and exhibits. Of particular interest to Cabot and ANR were the names of expert witnesses that will be called by the Appellant with a statement of their qualifications, the matters they will provide expert opinion on and the basis for rendering such an expert opinion. The Town requested that the Board require Appellant to provide such information in as **expeditious** manner as possible. Board counsel read the relevant portion of the notice of prehearing conference which informed participants in the prehearing conference to be prepared to identify such information as soon as the prehearing conference. Accordingly, and in order to allow for the effective and efficient preparation of prefiled **testimony, all parties shall be required not later than Tuesday, June 27, 2000 to file a list of all witnesses, the matters upon which they will provide testimony and a general description of any exhibits that they will submit.** With respect to any witness that a party wishes to have qualify as an expert witness, parties shall state the scope of matters upon which such expert may render an expert opinion, explain how such expertise bears upon the issues in

his matter, and describe the basis for any expert opinion that may be rendered. It was noted that "expert opinion" on legal matters is not relevant to factual disputes. Rather, such opinion, however formed, shall be filed as legal memoranda under the direction of the parties as identified at Section IX.1 below. Although the Board has in past cases acknowledged the value of expert legal opinion in the form of legal briefs by *amici curiae*, no such entity has sought to intervene in this proceeding. Therefore, all expert opinion shall be limited to matters of fact.

Board counsel noted that with prefiled testimony, very little time is required for the offer and admission of exhibits, especially given that evidentiary objections are ruled on at a second prehearing conference held prior to the hearing on the merits. However, it was emphasized that proponents of prefiled testimony are required to attest to the veracity of prefiled testimony in person at the hearing. Such witnesses are then subject to cross-examination and questions by the Board.

Neither party revealed what exhibits would be offered. However, the Vice-Chair encouraged those granted party status to work together, if possible, to prepare stipulated facts, identify exhibits to which there would be no objections, and develop a joint site visit itinerary and proposed report of site visit observations.

The Vice-Chair noted that the Prehearing Conference Order would contain specific instructions for the pre-filing of testimony and exhibits. He noted, however, that with respect to all filings, the parties are required to file an original and 7 copies with the Board as well as a certificate of service indicating that each of the persons listed has been sent a copy of the filing in person or by first-class mail. Those persons listed on the certificate of service will continue to receive notice from the Board. However, parties are required to serve **only** those persons listed as parties, not those listed "for information only."

The Vice-Chair also noted that a second **prehearing** conference would be scheduled about a week before the hearing at which time he **would** make evidentiary rulings based on prefiled objections and review final plans for the hearing day and site visit.

## VII. HEARING DAY SCHEDULE

The typical hearing day schedule follows. The better part of the hearing

Day is devoted to a site visit and the cross-examination of witnesses.

- 9:00 a.m. Parties arrive at hearing site and review last minute details with Board's counsel.
- 9:30 a.m. Hearing convened and Chair offers introductory comments.
- 9:40 a.m. Five-minute opening statements by the Applicant, Appellant, ANR.
- 9:50 a.m. Board departs for a site visit of the project site.
- 10:45 a.m. Board returns to hearing site, reconvenes hearing, and places site visit observations on the record.
- 11:00 a.m. Applicant offers all **prefiled** direct and rebuttal evidence; **appellant/ANR** conducts cross-examination of Applicants witnesses, followed by redirect, recross and Board questions.
- 12:00 noon Board breaks for Lunch.
- 12:45 p.m. Hearing reconvenes.
- 2:00 p.m. Appellant offers all **prefiled** direct and rebuttal evidence; **Applicant/ANR** conducts cross-examination of appellants witnesses, followed by redirect, recross and Board questions.
- 4:00 p.m. Time permitting, five-minute closing statements by Applicant, Appellant, and ANR.
- 4:15 p.m. Closing instructions by the Chair.
- 4:20 p.m. Recess Hearing and Board holds Preliminary Deliberation.

The Vice-Chair directs the parties to plan their cases in accordance with the above preliminary time allotments and, if additional time is required, to file requests for additional time in accordance with the Prehearing Order.. To the extent reasonably possible, parties shall coordinate their testimony and argument so as to eliminate redundancy and achieve efficiency in the presentation of their respective cases. As noted in a Memorandum to Parties dated June 9, 2000, the initial date slated for a hearing, August 8, 2000 has less

than a full-day available for a merits hearing. Accordingly, if upon issuing a decision on preliminary issues after the June 28, 2000 hearing, the Board determines that it needs to follow a "typical hearing day" schedule, the Board will convene a merits hearing instead on August 29, 2000, on which date the Board can devote a full day to the hearing.

### VIII. SCHEDULING

1. On or before **4:30 p.m., on Tuesday, June 27, 2000**, parties shall file any objections to either: (1) the participation of any Board member who will be hearing this appeal; or (2) any provision of this prehearing conference report and order.
2. On or before **4:30 p.m., on Thursday, June 22, 2000**, parties shall file legal memoranda on the preliminary issue of whether the Waste Management Zone authorized in conjunction with the permit is either: (a) a new or an existing WMZ; and (b) if it is a new WMZ whether ANR followed the appropriate public process in establishing such WMZ. This issue is discussed in detail at Section III.A., above. Should any party argue that public process was not adequately provided, legal memoranda should state whether the alleged deficiency in public process compels a remand of the discharge permit application or whether the current appeal should nevertheless be heard. Parties should be prepared at oral argument to discuss how resolution of this preliminary issue will impact the scope of the present appeal.
3. On or before **4:30 p.m., on Tuesday, June 27, 2000**, parties shall file lists of their respective witnesses and a summary of the evidence that each will present. With respect to witnesses who parties seek to have **qualified as** experts, parties shall file a summary of the putative experts qualifications, the subject matter of their expertise, (in general terms) the opinion that such expert will provide, and finally, the basis for such opinion. For example, if Dr. Jones is a hydrologist, the Board **would need** at least the following: a curriculum vitae or resume; a statement of the subject matter involved (hydrology, streamflow, high flow regime, assimilative capacity, etc.); a statement that Dr. Jones will present analysis of a particular issue (e.g. the **7Q10 low flow** condition and how it **impacts** cold water fish distribution); an explanation of the expert basis for that opinion.
4. On **Wednesday, June 28, 2000 at 11:00 a.m., the Board will** convene oral argument with respect to the preliminary issue described in a memorandum

to parties distributed under separate cover, and as repeated at Section III.A. of this Prehearing Conference Report and Order. As noted in a previously issued Notice of Oral Argument, the Board will convene the oral argument at the Downstairs Conference Room at the offices of the Labor Relations Board, 13 Baldwin Street, Montpelier, Vermont.

5. On or shortly after deliberations with respect to the above described oral argument, the Board will determine whether to convene the merits hearing on August 29, 2000 (probable hearing date) or if an abbreviated hearing on August 8, 2000. The following filing deadlines assume an August 29, 2000 hearing. Should the Board decide to convene the hearing on August 8, 2000, the provisional deadlines identified in parentheses shall apply.

8. On or before **4:30 p.m.**, on Tuesday, July **18, 2000**, Town of Cabot shall file **prefiled** direct testimony, including but not limited to the application for a discharge permit and supporting materials. Cabot's prefiled should provide a detailed description of the project. (Provisional deadline: Tuesday, July 11, 2000).

7. **On or before 4:30 p.m.**, on Tuesday, July **25, 2000**, Appellant and ANR shall file prefiled direct testimony. (Provisional deadline: Tuesday, July 18, 2000).

8. **On or before 4:30 p.m.**, on Tuesday, August **15, 2000**, Appellant, ANR, and Town of Cabot shall file prefiled rebuttal testimony. (Provisional deadline: Thursday, July 27; 2000)

9. **On or before 4:30 p.m.**, on Wednesday, August **23, 2000**, Appellant, ANR, and Town of Cabot shall file memoranda of law, objections to prefiled testimony, and a stipulated site visit protocol. (Provisional deadline: Friday, August **4, 2000**)

10. **On Tuesday, August 29, 2000**, the Board will convene a hearing at the Masonic Temple, Town of Cabot. A site visit will be conducted pursuant to the stipulated protocol agreed to by parties. Subsequent written notice will confirm exact time and location of the hearing. (Provisional hearing date: Tuesday, August 8, 2000).

11. **On or before, Tuesday, September 12, 2000**, parties shall file supplemental memoranda of law and may file proposed findings of fact,

conclusions of law; and orders. Proposed findings of fact and conclusions of law may also be submitted on a diskette (IBM formatted 3 1/2 inch floppy) in a word processing format readable by WordPerfect or Microsoft Word. In order to allow supplemental filings, parties have waived the statutory requirement of 10 V.S.A. §1269 for a "decision within 10 days following the conclusion of the hearing." (Provisional date: Tuesday, August 15, 2000).

X. ORDER

i. The parties to this proceeding are:

Appellant Stephen Gregg, pursuant to 10 V.S.A. §1269 and  
and Procedural Rule 25(B)(8);  
The Permittee, Town of Cabot, pursuant to Procedural Rule 25(B)(1);  
ANR, pursuant to Procedural Rule 25(B)(5);

2. The Issues are as stated in Section III.A., above.

3. On or before **4:30 p.m.**, Tuesday, June **27, 2000**, parties shall have an opportunity to object to this prehearing conference report and order, in whole or in part. Such objection shall state the grounds for objection with specificity.

4. Vice-Chair Blythe identified the names of the Board members that will hear this appeal and sought disclosures from those attending the prehearing conference. A "bio sheet" listing the Board members' names and their principal **affiliations** was distributed by counsel. Those attending the conference reviewed that sheet. No known conflicts of interest were identified. Board member John D.E. Roberts has emphasized that he wants to disclose to all participants his status as a voting member of **Agri-Mark/Cabot, Inc.** Any requests for disqualification of any of the current Board members, or any requests for further disclosure, shall be filed on or before **4:30 p.m., Tuesday, June 27, 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 appeal.

5. Parties shall file an original and **seven 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.

6. Preparation of Evidence

Parties shall provide not later than the date for prefiled **direct** testimony a final list of evidence. This list is in addition to that which is required pursuant to Section VI. of this Prehearing Conference Report and Order. 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: Town of Cabot, Docket No. WQ-00-04, 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, "C" for Town of Cabot, and "SG" for Stephen Gregg. Exhibits shall be assigned consecutive numbers. For example, the **Applicant/Permittee**, Town of Cabot would number its exhibits C-1, C-2, C-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. **C-2A, C-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:

TOWN OF CABOT'S LIST OF EXHIBITS  
RE: TOWN OF CABOT, WQ-00-04

<u>Number</u>	<u>Description</u>	<u>Status</u>
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- C-1 Prefiled Direct Testimony of  
Joe Jones
- c-2 Application filed with ANR  
on \_\_\_\_\_
- C-3A-D Survey dated \_\_\_\_\_, sheets  
3A through 3D

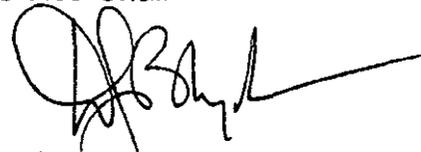
Exhibits offered to the DEC for its consideration in evaluating the Discharge Permit application, if they are to be considered by the Board de novo, must be introduced into the **evidentiary** record for this proceeding.

**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 Boards **office** by any party prior to the hearing.

7. Pursuant to Procedural Rule 28(B), this Prehearing Order, once issued in final form is binding on all parties who have received notice of the prehearing conference. The recipients of such notice are identified in the attached Certificate of Service. Any objection to the prehearing conference report and order filed pursuant to paragraph 3., above, shall not toll any applicable filing deadlines and will be taken up by the Board at its June 28, 2000 meeting.

Dated at Montpelier, Vermont this 16th day of June, 2000.

WATER RESOURCES BOARD  
by its Vice-Chair



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David J. Blythe