

**State of Vermont
WATER RESOURCES BOARD**

- RE: Home Depot, USA, Inc., et al.
Docket No. WQ-00-06**
- RE: Home Depot, USA, Inc., et al.
Docket No. CUD-00-07
and**
- RE: Home Depot, USA, Inc., et al.
Docket No. CUD-00-08 (Consolidated)**

MEMORANDUM OF DECISION ON PRELIMINARY ISSUES AND ORDER

This decision pertains to several preliminary issues in the above-captioned appeals. As explained below, the Water Resources Board (“Board”) determines that Friends of Vermont’s Way of Life, Inc. (“Friends”) has the requisite standing to sustain its two appeals, Docket Nos. WQ-00-06 and CUD-00-07; Rutland Region First, Inc. (“RRF”) lacks the requisite standing to sustain its appeal, Docket No. CUD-00-S and, therefore, that appeal is dismissed; and the scope of appeal in Docket No. WQ-00-06 is limited to the consideration of whether a discharge permit should be authorized for stormwater runoff from the Home Depot Project (“Project”). Additionally, the Board concludes that Docket Nos. WQ-00-06 and CUD-00-07 should not be consolidated; however, the hearings should be scheduled back-to-back, with a joint site visit, and the Chair is directed to work with the parties to identify stipulated facts and exhibits common to the two appeals which may be included in the respective records of the two proceedings in the interests of greater efficiency and the avoidance of duplicative effort

I. BACKGROUND

On May 24, 2000, the Waste Management Division, Department of Environmental Conservation (“DEC”), as the representative of the Secretary of Agency of Natural Resources (“ANR”), issued a discharge permit for stormwater runoff into waters of the state (“DEC Permit #1-0460”) to Home Depot, USA, Inc., Ann Juster, and Homer and Ruth Sweet, collectively (“Permit Applicants”). DEC Permit #1-0460 authorizes the Permit Applicants to discharge treated and controlled stormwater runoff from the roadways, parking, and roofs associated with the Rutland Ma!!, Route 4, Rutland, VT, to an unnamed tributary of Tenney Brook.

On June 2, 2000, the Water Quality Division, DEC, as the representative of the Secretary of ANR, issued a conditional use determination (“CUD”) (“DEC #1999-284”) to the Home Depot, USA, Inc., and Homer and Ruth Sweet, collectively (“CUD Applicants”). DEC #1999-284 authorizes the Applicants to fill 16,480 square feet of Class Two Wetland and 53,938 square feet of wetland buffer as part of reconstruction and expansion of the Rutland Ma!!.

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On June 15, 2000, Friends appealed DEC Permit #1-0460 and DEC #1999-284 to the Board and sought consolidation of the two appeals. On June 30, 2000, RRF appealed DEC #1999-284 to the Board. All three appeals were timely filed and docketed.

On June 23, 2000, counsel for the Permit and CUD Applicants filed notices of appearance in WQ-00-06 and CUD-00-07, respectively.

On July 10, 2000, counsel for the CUD Applicants filed a notice of appearance in CUD-00-08.

On July 17, 2000, counsel for the ANR entered his appearance in all three appeals

On July 19, 2000, the Board's Chair, David J. Blythe, Esq., convened a prehearing conference in the above-captioned matters. The following persons entered timely appearances and participated: counsel for the Friends, RRF, the Permit Applicants and CUD Applicants (collectively, "Applicants"), and ANR. A Preheating Conference Report and Order ("Preheating Order") was issued on July 21, 2000, and no objections to the Preheating Order were raised by the prehearing conference participants by the July 27, 2000 deadline. Accordingly, that Preheating Order is final and binding, except as amended by this or subsequent orders of the Board. The Preheating Order identified certain preliminary issues and established deadline for filing motions, legal memoranda, and requests for oral argument.

On July 27, 2000, the Applicants filed Motions to Dismiss for Want of Standing and supporting memoranda in opposition to the party status of Friends and RRF and with respect to the three appeals. The Applicants also filed an Objection to Consolidation of the appeals.

On August 17, 2000, RRF filed a letter with the Board indicating that it would not be filing a responsive memorandum. On that same date, Friends filed a Response to the Applicants Motions to Dismiss for Want of Standing with respect to Docket Nos. WQ-00-06 and CUD-00-07 and also a Motion and supporting memorandum with respect to the Scope of Appeal in WQ-00-06.

On August 17, 2000, the Board issued a Notice of Oral Argument

On August 25, 2000, ANR filed a Responsive Memorandum on the Scope of Appeal in WQ-00-06. On that same date, the Applicants filed a Responsive Memorandum on the Scope of Appeal in WQ-00-06 and Friends' Standing.

On August 28, 2000, RRF filed a letter indicating that it would not participate in oral argument on preliminary issues.

On August 29, 2000, the Board convened oral argument with respect to the preliminary issues briefed by the prehearing conference participants. Those participating were counsel for Friends, the Applicants, and ANR.

The Board deliberated on August 30, 2000. This matter is now ready for decision.

II. PRELIMINARY ISSUES

1. Whether Friends and RRF have standing to support their respective appeals?
2. Provided Friends has standing to challenge the discharge permit issued for the Project, what is the scope of appeal in Docket No. WQ-00-OS?
3. Provided Friends and/or RRF have standing, whether two or more of their appeals should be consolidated for hearing before the Board?

III. DISCUSSION

A. Standing

Title 10 V.S.A. § 1269 provides that “[a]ny person or party in interest aggrieved by an act or decision of the [S]ecretary” of ANR pursuant to the Water Pollution Control subchapter may appeal to the Board within thirty days of that act or decision. Stormwater discharge permits and CUDs may both be appealed pursuant to 10 V.S.A. §1269. Whether Friends is a person or party in interest aggrieved by the issuance of DEC Permit #1-0460 and whether Friends and RRF are each persons or parties in interest aggrieved by the issuance of CUD DEC #1999-284 are threshold questions to be decided by the Board.

Jurisdiction to decide the merits of an appeal is contingent upon a finding that an appellant has the requisite “standing” -- a legally cognizable interest and an “injury” arguably attributable to the Secretary’s act or decision, Despite the common usage of the “persons aggrieved” standard, there has been limited guidance in Vermont on the precise definition of what it means to be aggrieved. See Trombley v. Bellows Falls Union High School District, 160 Vt. 101, 106 (1993). Therefore, the determination of what it means to be “aggrieved” has been decided by the Board

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on a case-by-case basis. See Appeals of Nathan Wallace-Senft and Anita Bellin, Docket Nos. WQ-99-04 and CUD-99-05, Dismissal Order (Aug. 19, 1999); Re: Aquatic Nuisance Control Permit #C93-01-Morey, Docket No. WQ-93-04, Memorandum of Decision on Party Status at 4 (Aug. 25, 1993). Determining "aggrievement" involves a mixed question of fact, law, and public policy. Re: Huskv Iniection Molding Systems, Inc., Docket No. MLP-98-06, Memorandum of Decision at 5 (Feb. 22, 1999).

The Board has construed the person "aggrieved" standard liberally to allow a person demonstrating some interest **affected** by the act or decision of the Secretary or his representative within DEC an opportunity to appeal that act or decision. See Re: Huskv Iniection Molding Systems, Inc., Docket No. MLP-98-06, Chair's Preliminary Ruling at 4 (Jan. 13, 1999). A would-be appellant's interest may or may not be a riparian property interest or a pecuniary interest, but it **must** be something more than a generalized interest or a complaint about the decision maker's favored approach to approving an activity. Re: Appeals of Nathan Wallace-Senft and Anita Bellin at 4. The Board has recognized that an organization may be a "person" aggrieved. Re: Appeal of Vermont Natural Resources Council (Sugarbush), WQ-92-05, Prehearing Conference Report and Order at 2 (8/18/92); see also Procedural Rule 2(A)(10) ("person"). If it seeks standing in its representational capacity, it must demonstrate that its members make use and enjoyment of the water resource in question and that that use and enjoyment is germane to the organization's purpose. Re: Huskv Iniection Moldine Svstems, Inc., Docket No. MLP-98-06, Chair's Preliminary Ruling at 6.

In instances where a party has challenged the standing of an appellant, the Board has generally looked to the appellant's notice of appeal to find facts demonstrating a nexus between the appellant's alleged interest, the injury asserted, and the act or decision of the Secretary or his representative in DEC. In making its standing determination, the Board also has looked at the appellant's representations at a prehearing conference or in filings supplementing the notice of appeal. Id.; see also, Re: Appeal of Larivee, Docket No. CUD-92-09, Preliminary Order: Party Status at 4 (Mar. 16, 1993) (Board confirmed standing/ party status of appellant based on supplemental filings filed after the prehearing conference).

The Board has not required an appellant or petitioner for party status to present **affidavits** to support the factual allegation set forth in its notice of appeal or petition, even though it has indicated that affidavits or other such information might provide a reasonable basis upon which to find legally protected interests allegedly **affected** by the approved Project activities. Re: Appeal of Nathan Wallace-Senft and Anita Bellin at 5-6. Indeed, with respect to party status petitions, the Board has said:

The Board assumes that the signer of a petition has read the document and that to the best of the signer's knowledge, information and belief, formed after reasonable inquiry, the

document is well grounded in fact. Cf. Vermont Rules of Civil Procedure 11. Based upon this assumption, the Board presumes the veracity of the factual allegations contained in a petition. Of course, affidavits and/or other documentary evidence in support of a petition may be filed.

Those who oppose factual allegations contained in a petition for party status which satisfies, prima facie, the requirements of Rule [25] of the Rules should come forward with affidavits or other documentary evidence sufficient to call into question the factual basis for the petition. However, they are not compelled to do so. If no such supporting materials are presented, the Board, after affording the presumption noted above, will evaluate the competing allegations on their face to determine whether the petition satisfies the applicable requirements.

Re: Kevin Rose and the Champlain Kayak Club, MLP-96-01, Preliminary Memorandum of Decision and Order on Party Status at 1-2 (May 7, 1996). The Board sees no reason to depart from this practice in considering an objection to an appellant's standing.

The Board has routinely considered an appellant's alleged interest(s) in the outcome of a proceeding in relation to the purpose of the statutory program under which the appealed permit or decision was issued. When additional guidance has been needed, the Board historically has looked to its own rule on party status, Procedural Rule 25, to determine party "standing." Id. (citing former Procedural Rule 22). Some times requiring an appellant to address party status standards in addition to statutory standing and at other times not has resulted in confusion concerning Board practice amongst practitioners. See Re: Killington, Ltd., Docket No. MLP-97-09, Memorandum of Decision at 5, fn. 4 (Feb. 10, 1998). Accordingly, in recently amending its Procedural Rules, the Board added to Rule 25(A) the requirement that persons seeking to participate in contested cases before the Board, "including appellants," must petition the Board for party status. Board Procedural Rules, Rule 25 (eff. Feb. 22, 1999). For this reason, the Board will consider the standing of Friends and RRF with reference to both the statutory standard and Board's party status rule.

1. Standing of Friends, Docket No. WO-00-06

The Applicants move for dismissal of Docket No. WQ-00-06 based on their assertion that Friends has failed to make a case that it has standing or qualifies for party status under 10 V.S.A. § 1269 and the Board's Procedural Rules. Docket No. WQ-00-06, Applicants' Opposition to Party Status and Motion to Dismiss Appeal of Friends at 2 and 6 (Jul. 27, 2000)

In its Notice of Appeal, counsel for Friends described the organization as a non-profit, public benefit corporation with an incorporation date of February 2, 2000. Its membership is

comprised of members who live in the City of Rutland, Rutland Town, and several surrounding Rutland County communities. Counsel further stated Friends was organized “for the purpose of supporting growth that is sustainable and which does not threaten Vermont’s environment.” Docket No. WQ-00-06, Notice of Appeal at 7.

Counsel for the Friends observed that DEC Permit #1-0460 authorizes the discharge of stormwater runoff from the Project into an unnamed tributary of Tenney Brook. Notice of Appeal at 1 and 5. He further asserted that a number of its members live in the vicinity of the Project and use and enjoy Tenney Brook and Dunklee Pond, downstream of the Project, for a number of activities such as water wading and nature observation. Notice of Appeal at 9. More specifically, at least one member, Mary Ann Noerpel, allegedly owns property which abuts Dunklee Pond. Notice of Appeal at 7-8. Counsel for Friends represented that the organization’s members are concerned with the impacts of the Project, including, but not limited to the degradation to Tenney Brook and Dunklee Pond allegedly attributable to stormwater discharge from the Project. Notice of Appeal at 8. In the Friends’ statement of errors and party status petition, counsel asserted that the present stormwater system approved for the Rutland Mall has been poorly maintained and resulted in sedimentation and other deleterious effects to downstream portions of Tenney Brook and Dunklee Pond with allegedly adverse impacts to water quality and aquatic habitat. Notice of Appeal 2-6. He further asserted that in issuing DEC Permit #1-0460, the ANR relied on inadequate or inaccurate data from the Applicants regarding the functioning of the current stormwater system and the capacity of the proposed facilities to properly retain and treat stormwater runoff from the Project. Notice of Appeal 2-6. He further alleged that increased stormwater flows attributable to the Project, especially peak discharges, may result in higher water levels adversely affecting adjacent and downstream properties. Notice of Appeal at 8-9.

The Board concludes that Friends has made a prima facie showing that it has standing in its representational capacity to support its appeal in Docket No. WQ-00-06. The Board assumes the veracity of counsel’s factual representations that Friends’ members use and enjoy Tenney Brook and Dunklee Pond for recreational purposes and wildlife observation and that those members who own real property adjacent to these water resources have a legitimate concern about the impact of increased peak stormwater flows upon their properties. These uses are germane to Friends’ organizational purpose of supporting growth which does not threaten Vermont’s environment. While affidavits from Friends’ members might have shed more light on the specific nature of and frequency of their use of Tenney Brook and Dunklee Pond and on past problems with flooding attributable to storm events in their watershed, the Board concludes that Friends has made sufficient factual allegations to support its claim that it is a person aggrieved by virtue of the fact that its members have specific and substantial interests in the protection of water resources downstream of the Project which are different from those of the general public and that DEC Permit #1-0460 may not adequately protect those interests.

In their July 27, 2000, Motion to Dismiss for Want of Standing and supporting memorandum in opposition to the party status of Friends in Docket No. WQ-00.06, the Applicants refer the Board to their memorandum in opposition in Docket No. CUD-00-07 to support their allegations that Friends lack standing. The principal argument put forth by the Applicants in that memorandum is that Friends' members own property far from the point of discharge from the Project and, in any event, the stormwater discharge system approved by DEC Permit #1-0460 is better than the system currently serving the Rutland Mall. Docket No. CUD-00-07, Memorandum in Opposition to Party Status of Friends and Motion to Dismiss for Want of Standing (Jul. 27, 2000). For example, the Applicants point to the fact that Friends' member Mary Ann Noerpel owns property "located 1 mile from the ditch." *Id.* at 6. As a consequence, the Applicants assert that Friends has failed to demonstrate a legally cognizable interest, substantial or otherwise, that might be affected by the relocation of its "ditch" through which stormwater will be discharged to Tenney Brook. *Id.* at 7.

The Board is not persuaded by the Applicants' arguments and factual allegations that Friends have failed to satisfy the applicable requirements of either 10 V.S.A. § 1269 or Board Rule 25.' As evidenced by the Board's decisions on standing and party status in prior cases, including those cited *supra*, one need not be a riparian property owner immediately adjacent to a project to demonstrate an "interest" that is legally cognizable. Moreover, the question is not at this early phase of a proceeding whether the project as authorized will result in injury to such an interest. Indeed, the standards for finding party status under Procedural Rule 25(B)(7) and (8) are whether the appellant is:

(7) Any person upon whom the applicable statute confers an unconditional right to intervene or a conditional right to intervene and the conditions are satisfied; [or]

(8) Any person demonstrating a substantial interest which may be affected by the outcome of the proceeding where the proceeding affords the exclusive means by which that person can protect that interest and where the interest may not be adequately represented by existing parties.

(Emphasis added.)

Title 10 V.S.A. § 1269 provides a conditional right to intervene in that one must

¹ Friends sought party status under Procedural Rules 25(B)(7) and (8) and 25(C). Docket No. WQ-00-06, Notice of Appeal at 11. The Board notes that Procedural Rule 25(C) addresses the standards for permissive intervention and therefore it is not an appropriate rule for an appellant to cite in seeking party "standing" in a contested case proceeding.

demonstrate that he or she is a person in interest “aggrieved” by an act or decision of the Secretary of ANR or his representative. As noted above, the Board has determined that Friends has made a prima facie showing that it has satisfied the conditions for intervention under 10 V.S.A. § 1269. Therefore, the Board concludes that Friends has satisfied the requirements for party status of right pursuant to Procedural Rule 25(B)(7). Additionally, the Board concludes that Friends satisfies the requirements for party status pursuant to Procedural Rule 25(B)(8).

The “interest” which Friends’ members have in the use and enjoyment of **Tenney Brook** and **Dunklee Pond** is “substantial” within the meaning of Procedural Rule 25(B)(8). In a prior permit proceeding involving the stormwater system for the **Rutland Mall**, the Board found that appellant Richard Davis, a property owner on **Dunklee Pond**, had the requisite interest to support party standing under then Procedural Rules 22(A)(1), (2) and (3), the predecessors to Procedural Rule 25(B)(7) and (8). Re: Appeal of Richard Davis, Docket No. WQ-87-05, Prehearing Conference Report (Apr. 21, 1987). While Mr. Davis’s standing was not challenged by any party to that proceeding, the Board concludes nonetheless that Friends has demonstrated that its members, some of whom own property adjoining or in the vicinity of **Tenney Brook** and **Dunklee Pond** and make use of those public waters for recreation and other purposes have a specific interest in protecting those waters’ existing uses and Class B water quality. Moreover, Friends has alleged certain impacts to those waters arising from potential increases in erosion and sedimentation that may arise if DEC Permit #1-0460 is allowed to stand. Since appeal of that permit to the Board is the exclusive means by which Friends may obtain a de novo review of that Permit and there is no other party who has timely appealed this Permit who could adequately represent the interests of Friends’ members, the Board concludes that Friends satisfies the standards for party status of right pursuant to Procedural Rule 25(B)(8). See Re: Killington, Ltd., at 5-6.

Accordingly, the Board determines that Friends has standing and party status to support its appeal in Docket No. WQ-00-06.

2. Standing of Friends. Docket No. CUD-00-07

The Applicants move for dismissal of Docket No. CUD-00-07 based on their assertion that Friends has failed to make a case that it has standing or qualifies for party status under 10 V.S.A. § 1269 and the Board’s Procedural Rules. Docket No. CUD-00-07, Applicants’ Opposition to Party Status and Motion to Dismiss Appeal of Friends at 2 and 6 (Jul. 27, 2000)

The Board does not summarize here all of the factual allegations made by counsel for Friends in its Notice of Appeal in CUD-00-07 and referred to at page 6, supra. The Board notes, however, that with respect to its appeal of DEC #1999-284, Friends specifically alleged that that CUD authorizes the Applicants to fill 16,480 square feet of Class Two wetland and 53,938

square feet of wetland buffer as part of a reconstruction and expansion of the Rutland Mall, that the CUD authorizes the installation of a new culvert north of the existing culvert to discharge stormwater runoff into the wetland through a tributary of Tenney Brook. Notice of Appeal at 1-3.

While the Applicants assert that the only wetland affected by their Project is the so-called “ditch” that transports stormwater runoff from the existing mall to Tenney Brook, a review of DEC #1999-284 reveals that the ANR considered the impacts of the Project on a wetland complex approximately 17 acres in size which is contiguous to the Project impact area. Since the Applicants did not appeal this CUD, including the DEC’s findings concerning the wetland resource at issue, it may be assumed that those members of Friends who live adjacent to or in the vicinity of the wetland complex and make use and enjoyment of that resource related to that wetland’s significant functions (for example, for flood water storage, recreation, or nature observation) have a cognizable interest. Whether certain of these wetland functions will be adversely affected by the Applicant’s proposed development activities authorized by DEC #1999-284 is a question to be decided in the course of a merits hearing, not at this preliminary stage.

The Board therefore concludes that while Friends could have provided the Board with more detailed information or affidavits to support its allegations, Friends has provided information which satisfies the minimum requirements for a finding that it is a “person aggrieved” under 10 V.S.A. § 1269. For the same reasons set forth at pages 7-8, supra, the Board also determines that Friends satisfies the requirements for party status under Procedural Rules 25(B)(7) and (8).

Accordingly; the Board determines that Friends has standing and party status to support its appeal in Docket No. CUD-00-07.

3. Standing of RRF. Docket No. CUD-00-08

The Applicants move for dismissal of Docket No. CUD-00-08 based on their assertion that RRF has failed to make a case that it has standing or qualifies for party status under 10 V.S.A. § 1269 and the Board’s Procedural Rules. Docket No. CUD-00-08, Applicants’ Opposition to Party Status and Motion to Dismiss Appeal of RRF at 2 and 6 (Jul. 27, 2000) (hereinafter, “Motion to Dismiss re: RRF”).

In its Notice of Appeal, counsel for RRF described the organization as a Vermont corporation, incorporated on December 23, 1997, comprised of “a group of businesses and business persons who support sustainable growth.” Counsel for RRF indicated that member **businesses are** located within and member business persons reside in Rutland City, Rutland Town, and surrounding Rutland County communities. Additionally, counsel for RRF averred that “[t]he interest of RRF specifically relates to the substantial environmental and land use impacts which

will result from the proposed Home Depot Project” and she recited “a long history” of alleged violations related to the Project site. Docket No. CUD-00-08, Notice of Appeal at 7. Finally, counsel for RRF stated that her client “feels that the protection of the wetland area involved in [its] appeal, as well as the much larger wetland adjoining the [P]roject, is of paramount importance to the continued viability of the Rutland Region community” and she cited concerns about cumulative impacts of prior construction in the wetland, the diversion of streams, and the general degradation of the wetland due to neglect and violations of prior permit conditions. Notice of Appeal at 9.

Even though the Applicants challenged RRF’s standing, this appellant did not supplement its Notice of Appeal with additional information or a legal memorandum in support of its Notice of Appeal and request for party status under Procedural Rules 25(B)(7), (8) or 25(C). RRF also did not appear through counsel at Oral Argument on August 29, 2000.

While the Board assumes the veracity of RRF’s averments, the Board is not convinced that RRF has demonstrated that it is a person aggrieved under 10 V.S.A. § 1269 or that it satisfies the requirements for party status under the sections of Procedural Rule 25 that it has cited. Specifically, by its own admission, RRF does not own real property. Therefore, it does not qualify as a person aggrieved by virtue of owning property adjacent to the wetland or buffer zone in question, See Vermont Wetland Rules (“VWR”), Section 8.2. RRF has not alleged that any of its members actually own property adjacent to the wetland complex or its buffer zone or make actual use of the wetland or the waterways that run through it for recreation, nature observation, or other purposes related to the wetland’s functions. Moreover, as the Applicants have alleged, the “interest” of RRF appears to relate more to economic sustainability than to environmental protection. Motion to Dismiss re: RRF at 2; see Notice of Appeal at 7. RRF has not averred facts which would suggest that either in its own right or in its representational capacity it has more than a generalized concern about the protection of the wetland resource in question.

Accordingly, the Board concludes that RRF has not demonstrated that it is a “person aggrieved” under 10 V.S.A. § 1269. Additionally, RRF has offered no convincing factual allegations in support of its request for party status under Procedural Rules 25(B)(7) or (8).

The Board therefore determines that RRF lacks standing to support its appeal and Docket No. CUD-00-08 must be dismissed.

B. Scope of Appeal in WO-00-06

Having determined that Friends has standing to support its appeal in Docket No. WQ-00-06, the Board must next determine the scope of appeal in that proceeding.

In its Notice of Appeal, Friends made certain factual allegations concerning waste water that would likely be generated by a proposed Garden Center to be developed as part of the Project. In short, Friends argued that such waste water does not qualify as stormwater runoff and therefore could not be approved as part of a stormwater discharge permit issued by the DEC. Docket No. WQ-00-06, Notice of Appeal at 2-3. At the prehearing conference, the Applicants objected to Friends' attempt to raise in their appeal of DEC Permit #1-0460 the question of whether another discharge permit is required under 10 V.S.A. § 1264 for waste generated by the Project. Counsel for the Applicants asserted that his clients applied for a discharge permit for stormwater and the only issue legitimately on appeal is whether they are entitled to such a permit. As a consequence of this discussion, the Chair set a briefing schedule for parties to address, as a preliminary issue, the appropriate scope of appeal in Docket No. WQ-00-06. Prehearing Order at 6-7 and 13.

On August 27, 2000, Friends filed a Motion and Memorandum on Preliminary Discharge Permit Appeal Issue in which it asserted that if the waste stream from the Project contained wastes other than stormwater, the Board should declare DEC Permit #1-0460 void ab initio and issue a remand order directing the ANR to conduct an initial regulatory review of all proposed waste sources from the Project, review these under applicable law and regulations, and only then issue such discharge permit or permits for such wastes proposed to be discharged to Tenney Brook. On August 24, 2000, ANR filed a Responsive Memorandum on the Board's Authority to Decide the Jurisdictional Issue Concerning Discharge Permits, in which it argued that only the ANR has authority to issue a jurisdictional ruling concerning what permit or permits are required for a discharge for the Project, but, in any event Friends' request was moot because ANR had in fact issued a discharge permit that covered all of the discharges entering the stormwater system for the Project under both 10 V.S.A. §§ 1263 and 1264 and applicable rules. On August 25, 2000, the Applicants filed a Memorandum in Response to the Preliminary Stormwater Discharge Issue, reiterating their arguments made at the prehearing conference that the Board's scope of review should be confined to consideration of the stormwater discharge approved by DEC Permit #1-0460 and, furthermore, to the extent that there will be any waste from the proposed Garden Center, such waste should be allowed to discharge through the stormwater discharge system under a so-called "de minimis exception" to 10 V.S.A. § 1263.

The Board has carefully considered the parties' memoranda and oral arguments and determined that the scope of appeal in Docket No. WQ-00-06 should be narrowly confined to the review of the discharge of stormwater runoff from the Project and the proposed system for its retention and treatment. The Board bases its determination on the following factors. First, all discharges of waste to waters of the state, including waste carried by stormwater, require a discharge permit under 10 V.S.A. § 1263. Section 10 V.S.A. § 1264 does not, in and of itself, authorize the issuance of "stormwater discharge permits." It merely articulates a legislative policy that stormwater runoff is, in some respects, different from the discharge of other wastes because

of the influence of natural events of stormwater runoff and should be managed accordingly. While the term “stormwater runoff,” as used in § 1264 at all times relevant to this proceeding, was “limited to collected discharges from large scale development to sensitive water quality areas,” the Board further defined the term “stormwater runoff” in Section 1-01(B)(33) of the Vermont Water Quality Standards (“VWQS”) (eff. April 21, 1997) to mean:

- natural precipitation that does not infiltrate into the soil, including any material dissolved or suspended in such water. Stormwater runoff does not include wastes from combined sewer overflows.

(Emphasis added.)’

Whether or not ANR considered the waste stream from the proposed Garden Center in its review of the Applicants’ discharge permit application, the Board finds that DEC Permit #1-0460, on its face, authorizes only the discharge of “Stormwater Runoff to Waters of the State” under 10 V.S.A. §§ 1263 and 1264 and the permittees were only granted permission to “discharge treated and controlled stormwater runoff from the roadways, parking, and roofs associated with the ‘Rutland Mall’” to an unnamed tributary of Tenney Brook. There is no language in DEC Permit #1-0460, including the conditions of that permit, authorizing the discharge of any wastes other than that suspended in natural precipitation is to be controlled and treated by the stormwater facilities proposed by the Applicants. Accordingly, the Board advises the parties that its scope of review in Docket No. WQ-00-06 will be limited only to the discharge of stormwater runoff from the Project and a consideration of the facilities proposed by the Applicants for the control and treatment of stormwater runoff prior to its discharge into the Tenney Brook tributary?

² The Board notes that 10 V.S.A. § 1264(a) was amended in this last Legislative session to incorporate the VWQS definition of “stormwater runoff.” See Act No. 114 (H.3 16). This statute was signed into law on May 19, 2000, and became effective upon passage. Therefore, it is not applicable to this proceeding. However, the fact that the Legislature sought to use the same definition found in Section 1-01(B)(33) of the VWQS that was in force at the time of the filing of the Applicants’ discharge permit application emphasizes the point that the authorization of discharges of “stormwater runoff” has a limited and specific meaning that does not include consideration of discharges of wastes dissolved or suspended in waters other than natural precipitation.

³ The Board observes that ANR has the authority under 10 V.S.A. §§ 1263 and 1264 to issue one discharge permit that authorizes the discharge of all wastes from a given project; however, it must clearly identify in its public notice of application, and in any permit that it issues, the various wastes contained in the discharge for the project.

Should Friends or the Applicants require clarification concerning whether other alleged Project discharges of waste require an amendment to the pending permit or another discharge permit, their proper course of action is to request a declaratory ruling from the ANR pursuant to 3 V.S.A. § 808.

Accordingly, the Board rules that the scope of appeal in Docket No. WQ-00-06 is limited to consideration of only stormwater runoff from the Project and the infrastructure proposed for its control and treatment.

C. Consolidation of WO-00-06 and CUD-00-07

In its Notices of Appeal, Friends proposed consolidation of Docket Nos. WQ-00-06 and CUD-00-7. The Board may consolidate appeals for hearing pursuant to Procedural Rule 33(B).

The Applicants opposed consolidation of these appeals at the prehearing conference and the Chair subsequently issued a preliminary ruling consolidating the two CUD appeals but not Docket Nos. WQ-00-06. See Preheating Order at 4-5 and 14, Item 9. Since the Applicants raised their objection to consolidation again in their filing of August 27, 2000, the parties were invited to address this issue at oral argument on August 29, 2000. They declined to do so.

Accordingly, the Board upholds the Chair's preliminary ruling that Docket Nos. WQ-00-06 and CUD-00-07 should not be consolidated, but instead scheduled for hearing back-to-back, if possible. The records in both proceedings shall be kept separate and separate decisions shall be issued. The parties shall make every reasonable effort to identify stipulated facts and exhibits common to the two appeals and implement other measures to avoid duplication of effort and assure an efficient use of Board time at the hearings.

IV. ORDER

For the reasons stated herein, it is hereby ordered that:

1. Friends has standing to pursue its appeals in Docket Nos. WQ-00-06 and CUD-00-07;
 2. RRF lacks standing to pursue its appeal and Docket No. CUD-00-08 is dismissed;
 3. The scope of appeal in Docket No. WQ-00-06 is limited to consideration of only stormwater runoff from the Project and the infrastructure proposed for its control and treatment as discussed in Section III.(B) above; and
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In re: Home Deoot. USA Inc.. et al.

Docket No. WQ-00-06 and Docket Nos. CUD-00-07 and CUD-00-08 (Cons.)

Memorandum of Decision on Preliminary Issues and Order

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4. Docket Nos. WQ-00-06 and CUD-00-07 shall not be consolidated for hearing.

Dated at Montpelier, Vermont, this 8th day of September, 2000

WATER RESOURCES BOARD



David J. Blythe, Chair

: Concurring:
Barbara Farr
Jane Potvin
Gail Osherenko*

* Gail Osherenko, a former Board member of the Water Resources Board, participated in oral argument and deliberations with respect to preliminary issues pursuant to an appointment order issued under authority of 10 V.S.A. § 905(1)(F).

State of Vermont
WATER RESOURCES BOARD

**RE: Home Depot, USA, Inc., et al.
Docket No. WQ-00-06**

**RE: Home Depot, USA, Inc., et al.
Docket No. CUD-00-07**

SCHEDULING ORDER

The Water Resources Board ("Board") has issued this day a Memorandum of Decision on Preliminary Issues and Order. As a result of the Board's rulings, the parties to the Docket No. WQ-00-06 appeal are the Home Depot, USA, Inc., Ann Juster, and Homer and Ruth Sweet ("Applicants"), Appellants Friends of Vermont's Way of Life, Inc. ("Friends"), and the Agency of Natural Resources ("ANR"). The parties to the Docket No. CUD-00-07 appeal are Home Depot, USA, Inc., and Homer and Ruth Sweet ("Applicants"), the Friends, and the ANR. Although Docket Nos. WQ-00-06 and CUD-00-07 are not consolidated for hearing, the deadlines and tiling requirements set forth in this Scheduling Order are applicable to both proceedings. This Scheduling Order supplements Section XIII. of the Prehearing Conference Report and Order ("Prehearing Order") issued on July 21, 2000. It is hereby ordered:

On or before **4:30 p.m., Thursday, September 28, 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.

On or before **4:30 p.m., Thursday, October 12, 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.

3. On or before **4:30 p.m., Thursday, October 26, 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.

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.

On or before **4:30 p.m., Thursday, November 2, 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.

On or before **4:30 p.m., Thursday, November 9, 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.

On or before **4:30 p.m., Thursday, November 9, 2000**, all parties shall submit a single, combined list of all prefiled testimony and exhibits.

On or before **4:30 p.m., Thursday, November 9, 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

On or before **4:30 p.m., Thursday, November 9, 2000**, the parties shall file a joint proposed itinerary for the site visit to be held on November 21, 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 and content of the proposed site visit.

10. On or before **4:30 p.m., Thursday, November 9, 2000**, the parties shall file any

stipulations. These may be in the form of joint statements of fact or proposed joint decisions.

11. On or before **4:30** p.m., Thursday, November 9, 2000, the parties shall file any proposed findings of fact, conclusions of law, and orders.
 12. The Chair or his designee will conduct a second prehearing conference by telephone on Tuesday, November **14, 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 Thursday, November **9, 2000**. The Board's staff will arrange the conference call.
 13. On Tuesday, November **21, 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.
 14. 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, October **26, 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)**.
 15. On or before **4:30** p.m., Thursday, November **30, 2000**, any party may file any revised or supplemental proposed findings of fact, conclusions of law, and orders, including any proposed CUD conditions.
 16. The Board may waive the filing requirements upon a showing of good cause, unless such waiver would unfairly prejudice the rights of other parties.
 17. 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 **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).
 18. All parties shall label their own prefiled testimony and exhibits with their name. The labels
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on the exhibits must contain the words WATER RESOURCES BOARD, Re: Home Depot, USA Inc., Docket No. WQ-00-06 @Docket No. CUD-00-07, 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 prefled 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: "HD" for the Permit or CUD Applicants, depending on the proceeding; "F" for Friends; and "ANR" for Agency of Natural Resources. Exhibits shall be assigned consecutive numbers, For example, the CUD Applicants would number their exhibits HD-1, I-ID-2, HD-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. HD-2A, HD-2B, etc. However, each page of a multi-page exhibit need not be labeled.

Concerning preparation of the combined list of all **prefled** 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 prefled testimony. An **example** is as follows:

CUD APPLICANTS LIST OF EXHIBITS
RE: HOME DEPOT, USA, INC., CUD-00-07

<u>Number</u>	<u>Description</u>	<u>Status</u>
HD-1	Prefiled Direct Testimony of Charlotte Brodie	
HD-2	CUD Application filed with ANR on _____	
I-ID-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.

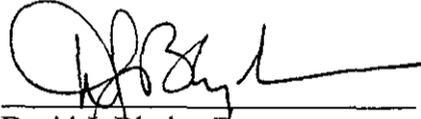
Exhibits offered to the ANR for its consideration in evaluating the CUD request, if they are to be considered by the Board **de novo**, must be introduced into the evidentiary record for this proceeding.

19. Pursuant to Procedural Rule 28(B), this 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., Monday, September 18, 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 8th day of September, 2000.

WATER RESOURCES BOARD

By its Chair



David J. Blythe, Esq.

Water Resources Board
Proposed Hearing Day Agenda for November 21, 2000, in Rutland Area

- 8:00 a.m.** Parties arrive at hearing site and review last minute details with Board's counsel.
- 8:15 a.m.** Board meets with its counsel to review agenda for the day.
- 8:30 a.m.** Board convenes briefly to introduce itself and obtain an overview from the parties in WQ-00-06 and CUD-00-07 concerning the site visit itinerary
- 8:40 a.m.** Board conducts site visit of Project and subject wetlands and waterways.
- 10:00 a.m.** Board reconvenes and places site visit observations on the record for WQ-00-06 and CUD-00-07.
- 10:15 a.m.** Board opens hearing in Docket No. WQ-00-06. Chair offers introductory comments.
- 10:20 a.m.** Appearances and five-minute opening statements by the Permit Applicants, Friends, and ANR.
- 10:35 a.m.** Board hears brief oral argument on any **preliminary** issues with respect to WQ-00-06, including any requests to review Chair's preliminary **evidentiary** rulings. Board deliberates.
- 10:50 a.m.** Board announces its rulings on preliminary issues and identifies any documents to be officially noticed. Parties offer any stipulated facts and exhibits for admission.
- 11:00 a.m.** Permit Applicants offer all direct and rebuttal evidence; Friends and ANR conduct cross-examination of Permit Applicants' witnesses, followed by Board questions, redirect, recross, and possible further Board questions.
- 12:00 noon** Board recesses for Lunch and Board meeting.
- 1:00 p.m.** Board reconvenes **WQ-00-06 hearing** and Friends offers all direct and rebuttal evidence; Permit Applicants and ANR conduct cross-examination of Friends' witnesses, followed by Board questions, redirect, recross, and possible further Board questions.
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- 2:00 p.m. ANR offers **all direct** and rebuttal evidence; Permit Applicants and Friends conduct cross-examination of **ANR's** witnesses, followed by Board questions, redirect, recross, and possible **further** Board questions.
- 2:30 p.m. Time permitting, five-minute closing statements by Permit Applicants, Friends, and ANR.
- 2:45 p.m. Board Chair offers closing instructions and recesses hearing in **WQ-00-06**. Board takes short break.
- 3:00 p.m. Board opens hearing in Docket No. **CUD-00-07**. Chair offers introductory comments,
- 3:05 p.m. Appearances and five-minute opening statements by the Friends, CUD Applicants, and ANR.
- 3:20 p.m. **Board** hears brief oral argument on any preliminary issues with respect to **CUD-00-07**, including any requests to review Chair's preliminary evidentiary rulings. Board deliberates.
- 3:35 p.m. Board announces its rulings on preliminary issues and identifies any documents to be officially noticed. Parties offer any stipulated facts and exhibits for admission.
- 3:45 p.m. CUD Applicants offer **all direct** and rebuttal evidence; Friends and **ANR** conduct cross-examination of CUD Applicants' witnesses, followed by Board questions, redirect, recross, and possible **further** Board questions.
- 4:45 p.m. Friends offers **all direct** and rebuttal evidence; CUD Applicants and **ANR** conduct cross-examination of Friends' witnesses, followed by Board questions, redirect, recross, and possible **further Board questions**.
- 5:45 p.m. **ANR** offers **all direct** and rebuttal evidence; CUD Applicants and Friends conduct cross-examination of **ANR's** witnesses, followed by Board questions, redirect, recross, and possible **further** Board questions.
- 6:15 p.m. Time permitting, five-minute closing statements by Permit Applicants, Friends, and ANR.
- 6:30 p.m. Board Chair offers closing instructions and hearing in **CUD-00-07** is recessed..

*Parties and their witnesses should be prepared to continue the hearing into the evening hours, if necessary. The Board would like to complete these **hearings** in one day!*