

**State of Vermont
WATER RESOURCES BOARD**

**Re: Hannaford Bros. Co. and Lowes Home Centers, Inc.
Docket No. WQ-01-01**

SECOND PREHEARING CONFERENCE REPORT AND ORDER

I. Background

The parties to this appeal are Conservation Law Foundation (Appellant or CLF) and the Voice for Potash Brook (the Voice), the Vermont Agency of Natural Resources (ANR or Agency), and Hannaford Brothers Company and Lowes Home Centers, Inc. (Applicants or Hannaford and Lowes). On August 29, 2001, Chair Blythe issued an Order establishing a schedule for this appeal. Chair Blythe modified that Order in part on October 22, 2001.

On September 25, 2001, Hannaford and Lowes filed its direct evidence. Hannaford and Lowes identified as witnesses for its case in chief Todd P. Morey (Senior Engineer with the firm DeLuca-Hoffman Associates, Inc. of South Portland, Maine) and Jeffrey A. Nelson (Senior Hydrogeologist and Principal with the firm Pioneer Environmental Associates, LLC. of Middlebury Vermont). On October 26, 2001, Hannaford and Lowes identified both Mr. Morey and Mr. Nelson as rebuttal witnesses. However, Hannaford and Lowes prefiled rebuttal testimony only by Mr. Nelson. Hannaford and Lowes explained that Mr. Morey has been unavailable due to a family illness but that he may be called as a rebuttal witness at the hearing. Hannaford and Lowes has identified a total of 15 exhibits for its case, including prefiled direct and rebuttal testimony.

ANR filed its direct evidence on October 9, 2001. ANR identified Randy Bean (Environmental Analyst with ANR) as its witness for its direct case. ANR filed corrections to Mr. Bean's testimony on October 18, 2001. On October 26, 2001, ANR filed its rebuttal testimony. ANR's rebuttal witnesses are Randy Bean and Doug Burnham (Section Chief for Biomonitoring and Aquatic Studies with ANR). ANR has identified a total of 8 exhibits, including its prefiled direct and rebuttal testimony.

CLF and the Voice filed part of their direct case on October 9, 2001, and then filed supplemental prefiled testimony and an amended exhibit list on October 12, 2001. For their direct case, CLF and the Voice filed testimony for two witnesses: Richard A. Claytor, P.E. (an engineer and the Director of Watershed Services with the firm Horsely & Witten of Sandwich, Massachusetts), and Dr. Robert Pitt (a professor with the Departments of Civil and Environmental Engineering at the University of Alabama). On October 26, 2001, CLF and the Voice filed rebuttal testimony by Mr. Claytor and Dr. James Karr (a professor of fisheries and zoology and of civil engineering, environmental health, and public affairs at the University of Washington). CLF and the Voice asked that Dr. Karr be able to testify at the hearing by

telephone. On October 29, 2001, CLF and the Voice filed a corrected first page of Dr. Karr's rebuttal testimony and filed Dr. Karr's resume, which was inadvertently omitted from their previous filing. CLF and the Voice have identified a total of 9 exhibits, including prefiled direct and rebuttal testimony. CLF and the Voice notified the Board and the parties on November 13, 2001, that "both Dr. Karr and Dr. Pitt will need to testify by phone due to scheduling conflicts and travel complications."

All three parties to this appeal filed both evidentiary objections and responses to evidentiary objections. Evidentiary objections from all the parties arrived on October 30, 2001. On November 6, 2001, each of the parties filed responses to evidentiary objections.

The parties filed their proposed findings of fact, conclusions of law, and orders on November 13, 2001.

Contrary to the August 29, 2001, Chair's Order for this appeal, the parties did not submit a single combined list of all prefiled testimony and exhibits. Nor did the parties file any stipulations. The parties did not file a proposed site-visit itinerary. The parties also declined to develop a joint proposed hearing-day agenda. (See August 29, 2001, Chair's Order at ¶¶ 8, 9, 12, and 13.)

On November 27, 2001, at approximately 1:00 p.m., Water Resources Board (Board) Chair David J. Blythe convened a second prehearing conference in Montpelier, Vermont in the above-captioned appeal. Assisting the Chair was the Board's Associate General Counsel, Daniel D. Dutcher. The following parties participated in the second prehearing conference:

Hannaford and Lowes, by Attorney Kevin F. Leahy;

ANR, by Attorney Warren T. Coleman; and

CLF and the Voice, by Attorney Christopher M. Kilian;

II. Purpose of the Second Prehearing Conference

The second prehearing conference was convened for the following purposes:

- 1) To address the pending evidentiary objections filed by each of the parties;
- 2) To address whether Dr. Karr and Dr. Pitt, two witnesses for CLF and the Voice, may testify at the hearing by teleconference;

- 3) To address whether Hannaford and Lowes, having not prefiled any rebuttal testimony of Todd Morey, may offer Mr. Morey for live rebuttal testimony;
- 4) To address whether the hearing and site visit will require more than one day and to establish a schedule for the hearing, including the site-visit itinerary, and;
- 5) To address any other preliminary issues, procedural or substantive.

III. Preliminary Rulings on Prefiled Evidentiary Objections

The evidentiary standard applicable in contested cases is found in 3 V.S.A. § 810. See Procedural Rule 30(B).

A. Objections by Hannaford and Lowes

1. Objections to Mr. Claytor's Direct Testimony (CLF-14)

Objection 1 (Question 8, page 6, line 5 through page 7, line 4). Hannaford and Lowes objected that Mr. Claytor has made a series of legal conclusions with regard to the Vermont Water Quality Standards. This objection is *sustained in part and overruled in part*. The objection is *sustained* with regard to the testimony beginning with the comma on page 6, line 22 through the end of that sentence on line 24. That testimony is a legal conclusion and is stricken. The rest of this objection is *overruled*. The hearing in this appeal involves mixed questions of law and fact, including questions of policy and interpretation of the Vermont Water Quality Standards. What reliability and weight should ultimately be given to this part of Mr. Claytor's testimony is a matter for the Board to decide after due consideration of all the evidence in this proceeding.

Objection 2 (Question 11, page 9, line 21, through page 12, line 14). Hannaford and Lowes objected that Mr. Claytor's testimony as to the "quality, character, and usefulness of Potash Brook" is irrelevant to the remaining issues in this appeal. Hannaford and Lowes argued that Mr. Claytor's testimony with regard to temperature and baseflow in particular goes beyond the scope of this appeal. Hannaford and Lowes argued that the hearing on the merits in this case involves the issue of whether the proposed discharge will increase the impacts of the pollutants listed as causing the impairment of the receiving waters.

The objection raises the question of whether relevant evidence in this hearing should be defined by the uses impaired (e.g., fishing) or by the pollutants listed by ANR on its section 303(d) list as causing the impairment (e.g., sediment). The hearing in this matter, based on CLF's Notice of Appeal and the Board's June 29, 2001, Memorandum of Decision, is limited to whether the proposed discharge will increase the load of pollutants for which the receiving waters are

impaired. As Hannaford and Lowes pointed out, based on the section 303(d) list, neither temperature nor baseflow is a pollutant of concern. However, it may be possible that factors not listed as causing the impairment of the receiving waters, such thermal or hydrological modification, may influence the impacts of pollutants of concern. Alteration of stream flow, for example, might affect bank stability and thus sediment loading. The Notice of Appeal specifically asserts that “The authorized discharge contributes both hydrologic modification and additional pollutant loads to the receiving waters.” (Notice of Appeal at 3.) The objection raises significant mixed questions of law and fact that should not be decided in the course of ruling on evidentiary objections. The objection is therefore *overruled*. The Board will consider the weight and relevance of Mr. Claytor’s testimony after considering all the evidence in this proceeding and the arguments of the parties.

Objection 3 (Question 13, page 14, lines 13-19; page 16, lines 12-22; page 16, line 23 through page 17, line 8; page 17, lines 12-17; and page 19, lines 15-24). Hannaford and Lowes argued that the Board should not assume that future permit violations will occur. However, Mr. Claytor’s testimony with regard to potential pollutant loading from proposed exterior nursery operations is relevant to the issue of whether the permit at issue will result in a new or increased discharge of pollutants of concern. Mr. Claytor’s testimony with regard to exterior nursery operations is not so speculative that it must be stricken. The opinions of Mr. Claytor as to the manner by which he expects the nursery will be operated will therefore go to the weight of his testimony, not its admissibility. This portion of objection 3 is *overruled*.

Hannaford and Lowes objected to Mr. Claytor’s reliance on a conversation he had with Kim Kendall with the Vermont Natural Resources Council as part of the basis of his opinion. The basis of expert testimony, if of the type reasonably relied on by experts in the field, need not be admissible in evidence. See V.R.E. 703. This portion of objection 3 is *overruled*.

Hannaford and Lowes objected to that part of Mr. Claytor’s testimony in which he states that “I feel that the applicant has not taken such an approach.” The approach referred to is a conservative approach to selecting loading coefficients for stormwater runoff based on the work of “several researchers.” According to Hannaford and Lowes, Mr. Claytor’s feelings are not pertinent, and the reference to “several researchers” represents an unacceptable foundation for opinion testimony. This objection is a matter of semantics. Expert opinions need not be introduced with any particular liturgy. In addition, an expert’s reliance on other researchers is permissible under V. R. E. 703. The strength and basis of Mr. Claytor’s opinions may be explored on cross examination. This portion of objection 3 is *overruled*.

Hannaford and Lowes objected to Mr. Claytor’s testimony that pond monitoring in cold climates has revealed significant sediment scour. Hannaford and Lowes argued that this testimony is without any factual basis and irrelevant. Hannaford and Lowes withdrew this objection at the second prehearing conference. This portion of objection 3 is therefore *moot*.

Hannaford and Lowes objected that Mr. Claytor's reference to groundwater recharge rates is beyond the scope of this appeal and that the witness's conclusions are offered without any basis. As explained above, the Board is not prepared to decide at this juncture that recharge will not affect the loading of pollutants of concern. Evidence relating to recharge will therefore be permitted. Additional details of the basis of this testimony may be explored on cross examination. See V.R.E. 705. This portion of objection 3 is **overruled**.

For the foregoing reasons, the third objection of Hannaford and Lowes is either **moot or overruled**.

Objection 4 (Question 14, page 22, lines 6-9). Hannaford and Lowes objected to Mr. Claytor's conclusion that ANR's work on a new stormwater management initiative represents a recognition on the part of ANR of the shortcomings of its current Stormwater Procedures. Mr. Claytor's conclusions are unresponsive, speculative, and irrelevant. The issue in this case is whether the permitted discharge will cause a new or increased discharge of pollutants of concern. This objection is therefore **sustained**, and the testimony is stricken. See V.R.E. 402, 403.

2. Objections to Dr. Pitt's Direct Testimony (CLF-16)

Objection 5 (Question 4, page 2, lines 12 through 15). Hannaford and Lowes objected to the question posed to Dr. Pitt's as to whether the proposed project will increase the degradation of the receiving waters. The Board agrees that the question may be over broad in that the relevant inquiry in this matter is not the general water quality of the receiving waters, but whether the proposed discharge will increase the load of pollutants of concern in those waters. The Vermont Water Quality Standards do not directly address the issue in this appeal—how to manage discharges of pollutants of concern into water quality limited segments in the absence of a TMDL or wasteload allocation. Hannaford and Lowes also objected that Dr. Pitt provides no foundation for the opinion he offers. Hannaford and Lowes withdrew their objection to the witness's response at the second prehearing conference. To the extent that this objection is not **moot**, the breadth of the question and answer will go to their weight, not their admissibility. The basis of the opinion offered and its relevance to the issues on appeal may be explored on cross examination. See V.R.E. 705. The objection is therefore **overruled**.

Objection 6 (Question 10, page 8, lines 3-14). Hannaford and Lowes argued that Dr. Pitt impermissibly assumes that future permit violations will occur with regard to the proposed nursery operations for the project at issue. As explained above with regard to Mr. Claytor's testimony, the testimony is relevant to the issue of whether the permit at issue will result in a new or increased discharge of pollutants of concern. The opinions of Dr. Pitt as to the manner by which he expects the nursery will be operated will go to the weight of his testimony, not its admissibility. Permit conditions cited by Hannaford and Lowes that regulate the nursery

operation should affect the weight of Dr. Pitt's testimony on this subject, not its admissibility. The objection is therefore *overruled*.

B. Objections by ANR

1. Objections to Mr. Claytor's Direct Testimony (CLF-14)

Objection 1 (Question 11, page 11, line 12 through page 12, line 14.) ANR argued that Mr. Claytor's discussion of thermal impacts and baseflow reduction are irrelevant in that these matters are not pollutants of concern. The Board agrees that the issue in this case is not general compliance with the Vermont Water Quality Standards but rather how to manage an existing discharge into impaired waters for which a pollutant budget is required but has not yet been developed. The standard set forth by the Board in its June 29, 2001, Memorandum of Decision in this case is that the proposed discharge can be permitted pending the establishment of a TMDL as long as the proposed discharge will not increase the load of pollutants of concern in the receiving waters. As noted above, however, the Board cannot be satisfied at this juncture that thermal or hydrological modification of the receiving waters will not affect the loading of pollutants of concern. The objection is therefore *overruled*. The Board will consider the weight and relevance of this testimony after considering all the evidence in this proceeding, including cross examination as to its relevance to the issues defined by the Board, and the arguments of the parties.

Objection 2 (Question 13, page 16, lines 12-17). ANR objected to Mr. Claytor's reference to a discussion with Kim Kendall from the Vermont Natural Resources Council and further objected to Mr. Claytor's discussion of pollutant loads and spills from a proposed on-site nursery. For reasons set forth above (with regard to Hannaford and Lowes objections 3 and 6, this objection is *overruled*.

Objection 3 (Question 13, page 16, lines 18-22). ANR objected to Mr. Claytor's discussion of the impacts of construction-site runoff as irrelevant because it will be addressed by another permit that is not at issue in this case. The Board agrees. The objection is therefore *sustained*, and the testimony is stricken. See V.R.E. 402.

Objection 4 (Question 13, page 19, lines 15-24). Here again, ANR objected to Mr. Claytor's discussion of baseflow. For the reasons set forth with regard to ANR's Objection 1, above, the objection is *overruled*.

Objection 5 (Question 14, page 22, lines 6-9). ANR objected to Mr. Claytor's opinion on ANR's motivation for developing an enhanced stormwater management program, arguing that the testimony is speculative, without foundation, and irrelevant. For the reasons given with regard to Hannaford and Lowes objection 4, ANR's objection is *sustained*, and the testimony is stricken.

2. Objections to Dr. Pitt's Direct Testimony (CLF-16)

Objection 6 (Question 4, page 2, lines 21-22). ANR objected to Dr. Pitt's testimony with regard to pollutant loads associated with the construction phase of the project. ANR argued that the testimony is irrelevant because the construction phase requires a separate permit that is not the subject of this appeal. As noted in ANR's objection 3, above, the Board agrees. The objection is *sustained*, and the testimony is stricken.

Objection 7 (Question 10, page 8, lines 3-13). ANR objected to Dr. Pitt's testimony with regard to proposed nursery operations at the site as speculative and irrelevant. As with ANR's objection 2, this objection is *overruled*.

3. Objection to Mr. Claytor's Rebuttal Testimony (CLF-21)

Objection 8 (Question 4, page 3, lines 20-24; page 4, line 21 through page 5, line 3; page 5, line 19 through page 6, line 5). ANR objected that Mr. Claytor offers legal opinions on the regulation of stormwater discharges into impaired waters and that this testimony must be stricken. This objection is *sustained in part and overruled in part*. The objection is *sustained* with regard to the testimony beginning with the word No on page 4, line 21 and extending through page 5, line 3. That testimony is a legal conclusion and is therefore stricken. The rest of the objection is *overruled*. ANR opened the door to this testimony through the testimony of Mr. Bean. In addition, the objection is *overruled* for the reasons given with regard to Hannaford and Lowes objection 1.

C. Objections by CLF and the Voice

1. Objection to Mr. Nelson's Rebuttal Testimony (HL-25)

Objection 1a (Question 26, page 17, lines 14-24). CLF and the Voice objected on the basis of relevance to Mr. Nelson's testimony with regard to a September 26, 2001, plan released by the Governor's Office and ANR for streams impaired by stormwater. At the second prehearing conference, Hannaford and Lowes withdrew this testimony because it responds to testimony that the Chair struck in response to ANR objection 5, above. The objection is therefore *moot*.

Objection 1b (Exhibit HL-24). CLF and the Voice objected to the admission by Hannaford and Lowes of the September 26, 2001, plan referred to by CLF and the Voice in objection 1a, addressed above. At the second prehearing conference, Hannaford and Lowes withdrew this exhibit for reasons set forth with regard to CLF and the Voice objection 1a, above. The objection is therefore *moot*.

2. Objection to Mr. Morey's Direct Testimony (HL-15)

Objection 2 (All testimony). CLF and the Voice objected to Mr. Morey's testimony as irrelevant in that it revolves around ANR's 1997 Stormwater Procedures. As the Board indicted in its June 29, 2001, Memorandum of Decision in this appeal, compliance with the 1997 Stormwater Procedures is not sufficient to prove that the permit under appeal may issue. Instead, the Applicants bear the burden of showing that the proposed discharge will not increase the impacts of pollutants for which the receiving waters are impaired. While not afforded a presumption, the 1997 Stormwater Procedures and measures taken to comply with the 1997 Stormwater Procedures may be relevant to this inquiry. In addition, CLF and the Voice opened the door to testimony regarding the 1997 Stormwater Procedures in their own case in chief. However, at the second prehearing conference, CLF and the Voice stated that this objection is *withdrawn*, with the understanding that CLF and the Voice do not agree that framing the case in terms of compliance with the 1997 Stormwater Procedures is appropriate.

3. Objection to Mr. Bean's Direct and Rebuttal Testimony (ANR-16, 17)

Objection 3 (All testimony addressing compliance with ANR's 1997 Stormwater Procedures). CLF and the Voice objected to this testimony for the same reasons offered for their second objection, above. Insofar as Mr. Bean's testimony is designed to support arguments already rejected by the Board in its June 29, 2001, Memorandum of Decision on the preliminary issues in this matter and in its August 29, 2001, Memorandum of Decision on ANR's motion to alter, Mr. Bean's testimony is irrelevant. However, the Board will consider all the evidence before deciding what weight to assign Mr. Bean's testimony. At the second prehearing conference, CLF and the Voice stated that this objection is *withdrawn* for the reasons set forth with regard to its second objection, above.

4. Objection to Mr. Bean's Direct Testimony (ANR-16)

Objection 4 (Question 7, page 4, line 16 through page 5, line 20): CLF and the Voice object that Mr. Bean's opinion that the proposed discharge would not exceed applicable biological criteria is beyond the scope of his expertise. The qualifications that a witness must possess to be able to offer an expert opinion are not high. See V.R.E. 702. See also State v. Streich, 163 Vt. 331, 658 A.2d 38 (1995) (applying a flexible standard governed by principles of reliability and relevance for the admission of expert testimony). Mr. Bean's qualifications will go to the weight rather than to the admissibility of his testimony. The objection is therefore *overruled*.

IV. Testimony by Teleconference

The proposal on the part of CLF and the Voice that both Dr. Karr and Dr. Pitt testify by

telephone is governed by Procedural Rule 30(D)(2):

A witness must be present at the hearing to present his or her prefiled testimony in writing and to affirm its truthfulness. Objections to the admissibility of the testimony will be heard either at a hearing or prior to a hearing, as the Board, the Chair or a referee appointed to hear the matter may so direct by order. After the close of direct testimony, a witness must remain available for cross-examination. Prefiled testimony will not be admitted if the sponsoring witness is not available for cross-examination, unless all parties consent to the admission of such prefiled testimony.

This rule plainly requires a witness to be present at the hearing to present his or her testimony and to testify under oath that the testimony is truthful. Although a witness need not be present for cross examination if all parties consent to the witness's absence, the witness must be present to offer his or her prefiled direct testimony and to affirm its truthfulness, regardless of the consent of the other parties.

The Board addressed a motion to allow cross examination of an out-of-state witness by teleconference in Re: Champlain Marble Co., No. CUD-97-06, Order (Nov. 17, 1997). The motion, which was opposed, was first made at the prehearing conference. The Chair denied the motion, and the moving parties then appealed the Chair's ruling to the full Board. The Board affirmed the Chair's ruling and denied the motion, citing several reasons: 1) failure by the moving parties to show that it was impossible for the witness to appear, 2) lack of jurisdiction to administer and enforce an oath given to an out-of-state witness, 3) lack of consent by the non-moving parties, and 4) failure by the moving parties to cite legal authority or administrative precedent supporting cross examination of an out-of-state witness by telephone over the objection of the non-moving parties.

In the case at hand, CLF and the Voice first notified the Board of their "request that the Board accept Dr. Karr's prefiled rebuttal and take his oral testimony at the hearing by telephone" on October 26, 2001, in a cover letter accompanying their prefiled rebuttal testimony. In a November 13, 2001, letter accompanying their proposed findings of fact, conclusions of law, and order, CLF and the Voice informed the Board that "both Dr. Karr and Dr. Pitt will need to testify by phone due to scheduling conflicts and travel complications." Neither letter included any additional explanation of these requests or cited any authority. However, the other parties to this appeal did not file any objections or other comments with regard to the proposal by CLF and the Voice to present the testimony of out-of-state witnesses by telephone.

At the second prehearing conference, CLF and the voice advised the Chair that arrangements have been made for Dr. Pitt to testify in person on December 11. However, CLF and the Voice further advised that Dr. Karr remains unavailable on this date due to his teaching

responsibilities. Neither ANR nor Hannaford and Lowes objected to Dr. Karr testifying by telephone or video conference. The parties and the Chair agreed that if Dr. Karr is permitted to testify without being physically present, telephone would be better than video conference because of the time that would be taken by traveling between the hearing room and the video conference center.

The Chair decided that of the four reasons cited by the Board in Champlain Marble for not allowing an out-of-state witness to testify by teleconference, three were eliminated in this case by the consent of the parties, leaving only the question of whether an oath can be administered to and enforced against an out-of-state witness. Citing State v. Doyen, 165 Vt. 43, 676 A.2d 345 (1996), CLF and the Voice argued that Dr. Karr, if allowed to testify by telephone from outside of Vermont, would be testifying under the oath administered by the Chair at the hearing and that Dr. Karr would be subject to the penalties of perjury. The parties have made arrangements for the hearing on the merits in this matter to be stenographically recorded. All parties agreed that CLF and the Voice will send the transcript of Dr. Karr's transcribed testimony to him in the State of Washington and that Dr. Karr must return the transcript with a notarized statement, containing an affirmative statement by Dr. Karr, under oath administered by a person authorized to administer oaths in the jurisdiction in which the statement is made, that the testimony is true. CLF and the Voice agreed to be responsible for assuring that the hearing room has a suitable telephone jack and speaker phone. Under these circumstances, the Chair agreed to allow Dr. Karr to testify from an out-of-state location by conference phone.

V. Live Rebuttal Testimony in the Absence of Prefiled Rebuttal Testimony

On October 26, 2001, the deadline for the parties to file rebuttal evidence, Hannaford and Lowes filed a letter with the Board explaining that they were unable to file rebuttal testimony by Todd Morey because of his unavailability due to a serious family illness. After providing a brief summary of the subjects that would have been covered by Mr. Morey in prefiled rebuttal testimony, Hannaford and Lowes requested the opportunity for Mr. Morey to give rebuttal testimony at the hearing. After hearing the circumstances at the second prehearing conference off the audio record, all parties and the Chair agreed that Mr. Morey's prefiled rebuttal testimony will be filed with the Board and received by the parties no later than 4:30 p.m., Friday, December 7, 2001. Hannaford and Lowes also agreed to e-mail Mr. Morey's prefiled rebuttal testimony to the Board's counsel by that deadline so that counsel can distribute this testimony to the other Board members electronically. If Hannaford and Lowes do not file and serve Mr. Morey's prefiled rebuttal testimony by the foregoing deadline, Mr. Morey may be precluded from testifying on rebuttal upon the objection of CLF and the Voice.

VI. Hearing Schedule and Site Visit Itinerary

A. Hearing Schedule

The Chair discussed with the parties the time needed for a hearing on this matter. The parties and the Chair agreed that this hearing cannot reasonably be conducted in one day. The Chair and the parties therefore agreed that the hearing will begin on Monday, December 10, 2001, and conclude on Tuesday, December 11, 2001. The parties generally agreed to and the Chair approved the attached hearing schedule.

B. Site Visit Itinerary

The parties did not file a site-visit itinerary. At the second prehearing conference, the parties and the Chair agreed that a site visit in this case was appropriate. The parties and the Chair discussed the site-visit itinerary, estimating that the total site visit would take one hour and that travel time between the site and the hearing room would take fifteen minutes each way, making a total of one hour and thirty minutes for the site visit, including travel time. The parties and the Chair agreed upon the locations needed to be viewed during the site visit. The parties agreed to file a joint site-visit itinerary no later than Tuesday, December 4, 2001.

VII. Other Preliminary Issues

A. Combined List of Exhibits

The parties agreed to file a combined list of all prefiled testimony and exhibits no later than Tuesday, December 4, 2001.

B. Stipulations

The parties do not expect to agree to any stipulations in this matter.

VIII. Order

1. The Chair's preliminary rulings in this Order shall become final and binding rulings of the Board unless specifically objected to in writing no later than **4:30 p.m., Tuesday, December 4, 2001.**
2. The parties shall file a joint site-visit itinerary no later than **4:30 p.m., Tuesday, December 4, 2001.**

3. The parties shall file a combined list of all prefiled testimony and exhibits no later than **4:30 p.m., Tuesday, December 4, 2001.**
4. Hannaford and Lowes will file Mr. Morey's prefiled rebuttal testimony with the Board and deliver Mr. Morey's prefiled rebuttal testimony to the parties no later than **4:30 p.m., Friday, December 7, 2001.** In addition, Hannaford and Lowes shall e-mail Mr. Morey's prefiled rebuttal testimony to counsel for the Board by this deadline.
5. Dr. James Karr may testify by teleconference under the conditions set forth herein.
6. The hearing in this matter shall be conducted in accordance with the attached hearing day schedule.
7. Pursuant to Procedural Rule 28(B), this Order is binding on all parties, unless a written objection to this Order, in whole or in part, is filed on or before **4:30 p.m., Tuesday, December 4, 2001,** 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 3rd day of December, 2001.

WATER RESOURCES BOARD
By it Chair

/s/ David J. Blythe

David J. Blythe