

**State of Vermont  
WATER RESOURCES BOARD**

**Re: Morehouse Brook (Pine Grove Terrace), No. WQ-02-04(A)**

**Re: Morehouse Brook (City of Winooski), No. WQ-02-04(B)**

**Re: Morehouse Brook (Conservation Law Foundation), No. WQ-02-04(C)**

**Re: Morehouse Brook (Vermont Natural Resources Council), No. WQ-02-04(D)**

**Re: Englesby Brook (Conservation Law Foundation), No. WQ-02-05(A)**

**Re: Englesby Brook (Vermont Natural Resources Council), No. WQ-02-05(B)**

**Re: Centennial Brook (Conservation Law Foundation), No. WQ-02-06(A)**

**Re: Centennial Brook (Vermont Natural Resources Council), No. WQ-02-06(B)**

**Re: Centennial Brook (City of South Burlington) (Cross Appeal), No. WQ-02-06(C)**

**Re: Bartlett Brook (Conservation Law Foundation), No. WQ-02-07(A)**

**Re: Bartlett Brook (Vermont Natural Resources Council), No. WQ-02-7(B)**

**Re: Bartlett Brook (City of South Burlington) (Cross Appeal), No. WQ-02-07(C)**

**PREHEARING CONFERENCE REPORT AND ORDER**

**I. Procedural Background**

On July 1, 2002, the Water Quality Division, Department of Environmental Conservation (DEC), Agency of Natural Resources (ANR), issued Watershed Improvement Permit Nos. 3-9005, 3-9006, 3-9007, and 3-9008 (WIPs or Permits) for existing and new stormwater discharges into Bartlett Brook, Centennial Brook, Englesby Brook, and Morehouse Brook, respectively. ANR has determined that the Vermont Water Quality Standards are not being met in these waters due, in whole or in part, to the discharge of collected stormwater runoff.

Pine Grove Terrace Homeowners Association (Pine Grove Terrace) filed a notice of appeal from the Morehouse Brook WIP on July 30, 2002; the City of Winooski filed a notice of appeal from the Morehouse Brook WIP on July 31, 2002. Conservation Law Foundation (CLF) and the Vermont Natural Resources Council (VNRC) each filed notices of appeal from the Morehouse Brook WIP, the Englesby Brook WIP, the Centennial Brook WIP, and the Bartlett Brook WIP on July 31, 2002. On August 14, 2002, the City of South Burlington filed cross appeals of the Centennial Brook WIP and the Bartlett Brook WIP. The foregoing notices of appeal were timely filed pursuant to 10 V.S.A. § 1269 and Water Resources Board (Board) Rule of Procedure (Procedural Rule) 19(D) and were docketed as indicated above. (Pine Grove Terrace, the City of Winooski, CLF, VNRC, and the City of south Burlington shall hereinafter be referred to as Appellants.)

The Appellants allege that the Permits violate state and federal law including, but not limited to, the Vermont Water Pollution Control Act, 10 V.S.A. §§ 1250-1284, and associated rules and regulations, the Vermont Water Quality Standards, ANR's stormwater procedures and design manuals, the Environmental Law Enforcement Act, 10 V.S.A. §§ 8001-8221, the federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387, and Title 40 of the Code of Federal Regulations. The Appellants ask the Board to deny or modify the permits.

On August 2, 2002, the Board's Executive Officer acknowledged receipt of the notices of appeal of Pine Grove Terrace, the City of Winooski, CLF, and VNRC. The Executive Officer advised Pine Grove Terrace, CLF, and VNRC to cure certain deficiencies in their notices of appeal by August 12, 2002. On August 12, 2002, CLF and VNRC filed timely corrections to their notices of appeal.

Pine Grove Terrace has not filed corrections of its notice of appeal. On August 20, 2002, Pine Grove Terrace filed a request to withdraw its appeal. On August 21, 2002, the Board's Chair, David J. Blythe, issued an Order establishing August 29, 2002, as the deadline for objections to dismissal of Pine Grove Terrace's appeal with prejudice. No objections were filed.

On August 15, 2002, the Board's Acting Executive Officer acknowledged receipt of the City of South Burlington's cross appeals. The Acting Executive Officer advised the City of South Burlington to cure certain deficiencies in its cross appeals and to file any modifications to its cross appeals by August 26, 2002. The City of South Burlington filed timely corrections to its cross appeals on August 20, 2002.

In accordance with Water Resources Board Procedural Rule 22, a Notice of Prehearing Conference was issued to persons in interest on August 15, 2002, and published in the Burlington Free Press on August 16, 2002. The Notice of Prehearing Conference established August 26, 2002, as the deadline for persons seeking to participate as parties to file written notices of appearance and requests for party status.

The following persons qualifying as parties of right filed timely notices of appearance: The City of South Burlington, by Attorney Joseph S. McLean, of Stitzel, Page & Fletcher, on August 5, 2002, in the appeals involving Centennial Brook and Bartlett Brook; and ANR, by Attorneys Warren T. Coleman and Glen Gross, on August 26, 2002, in the appeals involving Morehouse Brook, Englesby Brook, Centennial Brook, and Bartlett Brook.

Attorney Kelly D. H. Lowry, entered his appearance on the notice of appeals filed by VNRC with regard to Morehouse Brook, Englesby Brook, Centennial Brook, and

Bartlett Brook. In addition, Mr. Lowry filed notices of appearance in each of VNRC's appeals on August 22, 2002. Attorney Christopher M. Kilian entered his appearance for CLF by filing its notice of appeal. Attorney Kristen C. Wright of the O'Brien Law Offices filed a notice of appearance on behalf of the City of Winooski on September 4, 2002. Also on September 4, 2002, Attorney Dale Rocheleau of Downs, Rachlin & Martin entered his appearance for the Greater Burlington Industrial Corporation (GBIC) by filing a request for amicus curiae status on GBIC's behalf in all twelve pending WIP appeals.

On September 4, 2002, at about 9:00 a.m., Board Chair David J. Blythe convened a prehearing conference at the Board's Conference Room in Montpelier, Vermont, in the above-captioned matters, pursuant to Procedural Rule 28. The Chair was assisted in the conduct of the prehearing conference by the Board's Associate General Counsel, Daniel D. Dutcher. Through counsel, the following persons participated: the City of Winooski, CLF, VNRC, the City of South Burlington, ANR, and GBIC. No other persons have filed written entries of appearance or petitions for party status. Pine Grove Terrace did not appear at the prehearing conference.

## **II. Purpose of Prehearing Conference**

The Chair explained that the Water Resources Board is a five-member citizen Board appointed by the Governor. The Chair noted that one of the Board's duties is to hear appeals from discharge permits, pursuant to 10 V.S.A. § 1269, and as part of his duties in a contested case proceeding, he is authorized to convene prehearing conferences to expedite the hearing process. See Procedural Rule 28.

The Chair described the purpose of a prehearing conference. He specifically noted that the purpose of a first prehearing conference, such as this one, is to: (1) identify parties or persons seeking party status; (2) clarify the issues in controversy, including any preliminary issues; (3) see if there is any interest among the participants in negotiating to narrow or eliminate any issues in controversy; and (4) attempt to establish a schedule and hearing agenda that accommodates the schedules of the participants and the Board members. See Procedural Rule 28.

The Chair noted that party status determinations, scope of appeal issues, and scheduling matters would be ruled upon and memorialized in a prehearing conference report and order that would be issued after the prehearing conference. See Procedural Rule 28(B).

## **III. Introductions and Disclosures**

The Chair introduced himself and the Board's staff to those present at the prehearing conference. He identified the current members of the Board--Chair David Blythe, Esquire, Vice Chair John Roberts, and Members Jane Potvin, Mardee Sánchez, and Lawrence Bruce, Esquire. The Chair indicated that he has the discretion to appoint a former Board member to hear and decide any preliminary or other matters in this appeal pursuant to 10 V.S.A. § 905(1)(F) if one or more regular Board members are not available.

The Chair distributed to the prehearing conference participants copies of biographical notes for each of the current Board members. The Chair also noted that Board Member biographies and other information about the Board are available on the Board's web site: [www.state.vt.us/wtrboard](http://www.state.vt.us/wtrboard). The Chair asked the prehearing conference participants whether they were aware of any conflicts of interest or other disqualifying interests which might prevent one or more of the current Board members from serving in this proceeding. No conflicts or other disqualifying interests were identified.

#### **IV. Ex Parte Contacts**

The Chair cautioned would-be parties to the appeal against communicating directly with Board members during the pendency of proceedings before the Board. See 3 V.S.A. § 813. All persons having procedural questions were directed to bring them to the attention of the Board's counsel handling this case, Daniel D. Dutcher, Associate General Counsel (phone: 828-3063).

#### **V. Standard of Review and Burden of Proof**

The Chair explained that any hearing on the merits in these appeals shall be conducted as a de novo proceeding pursuant to 10 V.S.A. § 1269. As a consequence of the de novo standard, any evidence that might have been submitted to or generated by ANR in support of or in opposition to the Permits (such as the Permits, response summaries, and any ANR guidance documents used in the review of the Permits) must be resubmitted to the Board in the form of prefiled exhibits. Should these appeals be decided on the merits after a hearing, the Board will issue an order affirming, reversing, or modifying the acts or decisions of ANR. See 10 V.S.A. § 1269.

ANR asserted that the general permits at issue in these appeals are analogous to rules. ANR argued that rule challengers bear the burden of proof and that rules carry a presumption of validity. In the alternative, ANR argued that even if it carries the burden of persuasion, the Appellants should carry the initial burden of production because that would help define the issues at the outset and provide ANR with a better understanding of how to prepare its case. The Appellants countered that in the absence of prehearing

discovery, it would be difficult for them to discern the factual and legal basis for the Permits and that ANR should therefore be required disclose the basis for the Permits initially.

After considerable discussion with the prehearing conference participants, the Chair decided that ANR carries the burden of proof, by a preponderance of the evidence, including the burden of persuasion and the initial burden of production, that each of the Permits should issue. Appeals to the Board are not in the nature of rule proceedings. The applicant generally bears the burden of proof, by a preponderance of the evidence, to show that a permit should issue. ANR, if it seeks to defend a permit in a third-party appeal, generally shares the burden of proof with the permit applicant.

In these cases, the WIPs at issue are general permits that were issued by ANR on its own initiative. These WIPs do not involve permit applicants. However, ANR is the proponent of the Permits and asserts the affirmative of the issue--that the Permits are lawful. Indeed, the Permits involve large categories of dischargers in entire watersheds. It is at least as appropriate for ANR to bear the burden of proving that these comprehensive general permits are legally and factually justified as for ANR to share the burden of proof in third-party appeals involving individual permit applicants.

ANR will carry the initial burden of production--of going forward--because ANR is in the best position to know the details of its own WIP program. See Procedural Rule 30(A). Accordingly, ANR's direct evidence must be prefiled prior to that of the Appellants, and ANR must make a prima facie case. The prefiling schedule for these appeals will allow all the parties to simultaneously prefile rebuttal evidence. ANR will thus have the opportunity to respond directly to the prefiled arguments and evidence of the Appellants through prefiled rebuttal evidence and live cross examination. The issues and arguments of the Appellants will be defined by their notices of appeal and direct evidence and arguments and any additional rulings by the Chair or the Board.

## **VI. Informal Dispute Resolution**

The Chair advised the prehearing conference participants that the Board encourages alternative dispute resolution. The Board will consider building additional time into the schedule for these appeals to allow for such informal resolution if the parties believe that the issues can

be resolved or narrowed through negotiation or mediation. The parties are encouraged to enter into stipulations of fact that would narrow the issues for any evidentiary hearing on this matter. If the parties can agree on all relevant facts, the Board may be able to resolve the case on the basis of stipulated facts and memoranda submitted by the parties.

## **VII. Preliminary Issues**

### **A. GBIC's Request for Amicus Curiae Status**

Pursuant to Procedural Rule 26, GBIC argued to the Chair that the participation of GBIC in these appeals as amicus curiae is desirable. The Chair asked the prehearing conference participants if there were any objections to GBIC's request to participate in these appeals as amicus curiae. There were no objections. The Chair advised the prehearing conference participants that GBIC's amicus request was granted and that GBIC, through its counsel, will be limited pursuant to Procedural Rule 26 to filing memoranda on legal issues and oral argument on its written memoranda.

The Chair asked GBIC with whom it would be aligned in these appeals. GBIC was uncertain due to the numerous appeals and issues raised. It would be inefficient and unfair to the parties to allow GBIC to function as a rover in this case with the ability to file legal memoranda at any time. The September 4, 2002, Memorandum in Support of GBIC Amicus Curiae Status that GBIC filed with the Board raised questions about the factual basis for the Permits. Therefore, pursuant to Procedural Rule 26, and as provided in the attached order, GBIC will file its memoranda within the times allowed the Appellants, which will be after ANR has filed its initial prefiled evidence and explained the legal and factual basis for the Permits.

### **B. Costs of Publishing the Notice of Prehearing Conference**

Procedural Rule 22(A) requires the Board to publish notice of prehearing conferences in a newspaper of general circulation in the region in which the subject of the proceedings is located. Under Procedural Rule 22(B), the appellant is responsible for the publication costs. In order to reduce expenses and paperwork, the Board drafted a single notice of prehearing conference for all twelve WIP appeals. The notice was published in The Burlington Free Press on August 16, 2002. The total cost was \$650.00.

The Chair proposed apportioning that amount, charging each of the twelve Appellants one twelfth of the total cost, or about \$54.17, for each appeal filed. Thus, Pine Grove Terrace and the City of Winooski would each remit \$54.17 to the Board, CLF and VNRC would each remit \$216.67, and the City of South Burlington would remit \$108.33. There were no objections to these arrangements. At the request of the parties, each appellant will receive invoices from the Board for their shares of the costs of publishing the notice of prehearing conference.

### **C. Dismissal of Re: Morehouse Brook (Pine Grove Terrace), No.**

### **WQ-02-04(A)**

On August 21, 2002, a Chair's Order was issued in Pine Grove Terrace's appeal of the Morehouse Brook WIP, Docket No. WQ-02-04(A), establishing August 29, 2002, as the deadline for any objections to the dismissal of this appeal with prejudice. No objections were filed. The bases for the Chair's Order were that Pine Grove Terrace failed to cure the deficiencies in its notice of appeal as requested by the Board's Executive Officer on August 2, 2002, and that Pine Grove Terrace filed a request to withdraw its appeal. The Chair asked if there were any objections to dismissing this case. There were no objections. The Chair advised the parties that the prehearing conference report and order would include a provision dismissing Pine Grove Terrace's appeal.

#### **D. Consolidation**

Under Procedural Rule 33(B), the Board may consolidate cases involving common questions of law or fact if consolidation would be fair and efficient. Not including Pine Grove Terrace's Morehouse Brook appeal, which will be dismissed, eleven appeals of four WIPs by a total of four Appellants are now pending before the Board. The Chair asked if there were any objections to consolidating the eleven appeals remaining in this case. ANR had no objections to consolidating these appeals into one case. The Appellants, however, favored the consolidation of the eleven pending WIP appeals into four cases, one for each WIP at issue. The Appellants were concerned that consolidating all eleven appeals into one case rather than four would compromise the watershed-specific factual development they believe is necessary.

The Chair decided to consolidate all eleven appeals into one case. However, the Chair made clear that parties may organize their evidentiary filings by watershed. Indeed, ANR carries the burden of proof with regard to each WIP under appeal and with regard to each of the eleven appeals still pending. By the same token, each of the Appellants will carry the burden of production with regard to each appeal that it filed should ANR make a prima facie case. The City of Winooski is a party only with regard to the Morehouse Brook WIP and shall confine its evidence to that appeal. Similarly, the City of South Burlington is a party only with regard to the Centennial Brook and Bartlett Brook WIPs and shall confine its evidence to those appeals. The consolidated cases shall be captioned as set forth in the accompanying order.

#### **E. Standing and Party Status**

The Chair inquired of the prehearing conference participants whether there were any standing or party-status objections. There were no objections. The Chair made party-status rulings at the prehearing conference which are incorporated into the accompanying

order.

#### **F. Scope and Timing of the Permitted Project**

The Chair noted that 10 V.S.A. § 1269 states that “An appeal filed pursuant to this section shall not stay the effectiveness of any act or decision of the department pending determination by the board.” (Emphasis added.) The Chair asked ANR whether it is currently proceeding with the WIPs under appeal or whether it plans to stay these permits until these appeals are resolved. ANR stated that it will not voluntarily stay the WIPs at issue and that it plans to issue additional WIPs for other watersheds.

The Appellants stated that they are considering seeking a stay of the WIPs pending the outcome of these appeals. The Chair directed the attention of the parties to Procedural Rule 29, which governs stays. The Chair further informed the parties that whether the Board or some other tribunal is the appropriate forum to issue a stay of an appeal filed pursuant to 10 V.S.A. § 1269 remains an open question. See Re: CCCH Stormwater Discharge Permit, No. WQ-02-01, Dismissal Order at 5 n.3 (Vt. Water Res. Bd. Aug. 13, 2002). The Appellants were directed to include in any motion for a stay filed with the Board a section addressing the Board’s jurisdiction to grant the relief requested.

#### **G. Other Preliminary Issues**

The Chair asked the parties whether there were any other preliminary issues that need to be resolved prior to the pre-filing of evidence related to the merits of the WIPs. CLF suggested that the Board might decide as a matter of law whether the WIPs are subject to certain statutory and regulatory provisions governing the renewal of discharge permits, including 10 V.S.A. § 1263(e) and section 13.5.b of the Vermont Water Pollution Control Permit Regulations. The City of South Burlington suggested that the Board preliminarily determine the legal validity of the WIP program, and then, if the Board determines that the permitting program is valid, the case would move to the more specific factual questions of whether the Permits achieve the results intended.

The Chair has considered these suggestions but concludes that it would not be practical to separate preliminary issues from the larger legal and factual issues presented by these appeals. Accordingly, the Chair finds at this juncture that the most efficient course in these appeals will be to dispense with any attempt to identify preliminary issues and to avoid the delay associated with addressing them and instead to proceed directly to a hearing on the merits, within which the totality of the evidence can be considered with regard to all the issues presented. Therefore, the Chair has not identified any preliminary issues for the parties to address but has established a schedule in the attached order for

this case to proceed to a hearing on the merits.

The City of South Burlington stated that it might raise constitutional issues. The Chair cautioned that the Board does not have the power to declare an act of the legislature unconstitutional. However, the Board will consider whether any other constitutional arguments made by the City of South Burlington or by any other parties, such as whether an act of ANR is unconstitutional, are within the Board's jurisdiction at such time as those arguments may be presented. The parties were directed to address the Board's jurisdiction with respect to any constitutional issues they may raise. The Chair and the parties discussed the possibility that parties may file interlocutory appeals of constitutional issues outside the Board's jurisdiction.

### **VIII. Issues**

The Board's counsel noted that the issues identified by the Appellants are set forth in their notices of appeal and in letters sent to the Board in response to requests by the Board's staff. The Board's counsel and the parties discussed some of the issues on appeal and whether it would be appropriate to seek clarification from the Appellants concerning the scope of the issues and any opportunities for narrowing or refining the issues. The Appellants objected to providing further information about the issues raised, arguing that in the absence of additional information from ANR as to the legal and factual basis for the Permits, the Appellants were not in a position to further refine their issues. ANR, on the other hand, argued that clarification of the issues raised on appeal would assist it with preparing its direct evidence.

The Chair ruled that the information filed by the Appellants is sufficiently detailed to inform ANR of the scope of the appeals in these proceedings. As provided in section V, above, ANR bears the burden of persuasion and the initial burden of production. ANR must explain the legal and factual basis for the Permits in its direct evidence. Following ANR's filing of its direct evidence, the Appellants will be required to file their direct evidence, which will further define the issues they identified in their notices of appeal. ANR and the Appellants will then have an opportunity to file rebuttal evidence. In this fashion, the Appellants will initially obtain additional information about the Permits, and ANR will then obtain additional information about the appeals. ANR will be able to fully respond to the evidence presented by the Appellants and vice versa.

With the approval of the Chair, the parties agreed that they would file legal memoranda with their evidence. The parties were cautioned, however, that legal memoranda would be considered only as legal argument, and not as evidence, which must be admitted in the form of testimony and exhibits.

Counsel for the Board noted that the City of Winooski's notice of appeal does not indicate whether it is based on federal law, state law, or both and does not cite the statutes and rules relied upon. In view of the breadth of legal authority cited by the other Appellants, the City of Winooski was asked to promptly inform the Board and the other parties to these appeals only if it will be relying on any legal authority in addition to that cited by the other parties in their notices of appeal and supplemental letters heretofore filed with the Board.

The City of South Burlington's notice of appeal asks the Board to stay the Permits and/or remand them to ANR. As set forth in section VII.F, above, a stay of the Permits will require a separate motion to stay. The City of South Burlington's notice of appeal (in part IV(3)(A)) questions whether the criteria for measuring compliance with the Vermont Water Quality Standards are achievable. In response to questions from the Board's counsel, the City of South Burlington clarified that it is not seeking to amend the water quality criteria of the Vermont Water Quality Standards in this proceeding and that this provision of its notice of appeal refers to the WIPs.

#### **IX. Witnesses, Exhibits, And Prefiling Schedule**

Each party was asked to provide a preliminary list of witnesses to help get a sense of how long the hearing will need to be in order to address the matters on appeal. A final determination concerning the hearing schedule will not be made until all final lists of witnesses have been prefiling.

Counsel for ANR reported that they would likely call five witnesses: Three from DEC's Division of Water Quality, including one from the Biomonitoring and Aquatic Studies Section, and two independent experts.

Counsel for the City of Winooski indicated that she would likely call two or three witnesses: The City of Winooski's notice of appeal identifies the City Engineer and the Water Pollution Control Facility Superintendent as possible witnesses.

Counsel for CLF stated that he would likely call three witnesses: One will likely address broad approaches to stormwater management, another will likely address the factual considerations unique to the watersheds for the Permits at issue, and a third will likely address water quality conditions and impacts. Counsel for CLF also stated that CLF and VNRC are considering consolidating their cases.

In view of the possibility that CLF and VNRC may present their cases together, counsel for VNRC did not identify additional witnesses at the prehearing conference. However, VNRC's notice of appeal does identify Kim Kendall as a possible witness.

Counsel for the City of South Burlington stated that he would likely call two or three witnesses, who may include engineering experts. Five preliminary witnesses are identified in the City of South Burlington's notice of appeal.

The Chair asked the parties whether a site visit would be necessary in these appeals. The Appellants favored a site visit in order to show the Board representative discharges, existing stormwater treatment and control systems, selected contributors identified by the WIPs and dischargers not identified by the WIPs as selected contributors, and other conditions in the watersheds involved in these appeals. The parties estimated that a site visit would take between a half day and a day.

The Chair discussed with the parties how long the consolidated hearing for these appeals would take. The parties found it difficult to say at this stage but estimated that the hearing could take as long as one day for each of the four watersheds involved. The Chair advised that the length of the hearing would be revisited later. The parties were encouraged to work together to avoid duplication of witness, testimony, and exhibits and, if possible, to prepare stipulated facts, and identify exhibits to which there are no objections. The parties were also encouraged to work together to develop a joint site visit itinerary.

The Chair informed the parties that prefiled testimony and exhibits will be required in this proceeding. The Chair noted that an order governing the prefiling of evidence, with specific instructions for the prefiling of testimony and exhibits, would be issued as part of this prehearing conference report and order. He advised the parties that the filing of prefiled evidence will be staggered such that the ANR files its direct evidence first; then the other parties file direct evidence perhaps three or four weeks later; and two or three weeks after that, all parties simultaneously prefile rebuttal evidence. The parties will be required to file memoranda of law with all of their prefiled direct evidence.

The parties and the Chair discussed the possibility of prefiled surrebuttal evidence in this case. The Chair has concluded that allowing prefiled surrebuttal evidence will cause undue confusion and delay compared to the alternative of considering of any surrebuttal evidence at the hearing. Prefiled surrebuttal evidence will therefore not be permitted.

The Chair indicated that a week or so after the prefiling of evidence has been concluded, all parties will be provided with an opportunity to file written evidentiary objections and, a week or so after that, responses to evidentiary objections. He noted that the Chair will rule on evidentiary objections, hearing day scheduling issues, and other matters as necessary at a second prehearing conference held two weeks or so before the Board's hearing. Objections to the Chair's rulings may be preserved for Board review at

the beginning of the hearing day. The Chair further noted that the Board generally requires that proposed findings of fact, conclusions of law, and orders, as well as proposed permits or permit conditions, be filed prior to the hearing. The parties will have an opportunity after the hearing to file revised or supplemental proposed findings of fact, conclusions of law, orders and proposed permits or permit conditions.

With respect to all filings, including prefiled testimony and exhibits and various pleadings, the parties are required to file an original and six copies with the Board as well as serve persons on the Board's certificate of service. The Chair emphasized that "Filing with the Board" means that a party's submissions must be received at the Board's office by the deadline stated in a Prehearing Conference Report and Order, in subsequent orders of the Board or Chair, or in the Board's Rules of Procedure. See Procedural Rules 8, 9, and 10.

#### **X. Site Visit and Hearing Day Schedules**

The Chair indicated that the hearing dates for this appeal are tentatively scheduled for sometime in February, 2003. Parties were urged to so notify their witnesses.

The hearing will be scheduled at a public facility near the watersheds at issue, somewhere in the Burlington area. The Chair distributed to the parties two sample hearing day schedules.

A site visit will be scheduled in connection with the hearing. The parties are advised to work together to develop a joint site-visit itinerary so that the Board's time is used efficiently during the site visit. The parties should identify the specific stations and sequence of stations they wish the Board to view, and then do a dry run of the site visit to get a better idea of the time involved in conducting the visit.

The Chair and the parties discussed the possibility of conducting the site visit in the fall, well in advance of the remainder of the hearing in this matter. The parties were amenable to this idea. Conducting the site visit in the fall will reduce the possibility of heavy snow cover interfering with the site visit and will also reduce the impact of this case on the Board's winter schedule. In the attached order, the site visit has been scheduled accordingly.

#### **XI. Service List**

The Chair advised the parties that they should use the certificate of service accompanying the Prehearing Conference Report and Order to determine who should

receive copies of all filings. He noted that parties are not required to serve filings on persons listed under the "For Your Information" section of the certificate of service. He further noted that parties or their representatives are responsible for advising the Board of any changes in addresses.

## **XII. Other**

Those intending to participate in this proceeding are advised to obtain copies of the Procedural Rules, effective January 1, 2002, as well as the Vermont Water Quality Standards, effective July 2, 2000, to prepare for the hearing in this matter. These rules are available by downloading text from the Board's web site: [www.state.vt.us/wtrboard](http://www.state.vt.us/wtrboard).

## **XIII. Order**

1. Pursuant to Procedural Rule 22(B), each of the twelve Appellants in these matters shall remit its share of the publication costs of the notice of prehearing conference in accordance with the letters and invoices issued by the Board's administrative staff.
2. Pursuant to Procedural Rules 19(E) and 23, the appeal of Pine Grove Terrace Homeowners Association, captioned Re: Morehouse Brook (Pine Grove Terrace), No. WQ-02-04(A), is **hereby dismissed with prejudice**.
3. Pursuant to Procedural Rules 23 and 33, the cases captioned as

Re: Morehouse Brook (City of Winooski), No. WQ-02-04(B)

Re: Morehouse Brook (Conservation Law Foundation), No. WQ-02-04(C)

Re: Morehouse Brook (Vermont Natural Resources Council), No. WQ-02-04(D)

Re: Englesby Brook (Conservation Law Foundation), No. WQ-02-05(A)

Re: Englesby Brook (Vermont Natural Resources Council), No. WQ-02-05(B)

Re: Centennial Brook (Conservation Law Foundation), No. WQ-02-06(A)

Re: Centennial Brook (Vermont Natural Resources Council), No. WQ-02-06(B)

Re: Centennial Brook (City of South Burlington) (Cross Appeal), No. WQ-02-06(C)

Re: Bartlett Brook (Conservation Law Foundation), No. WQ-02-07(A)

Re: Bartlett Brook (Vermont Natural Resources Council), No. WQ-02-7(B)

Re: Bartlett Brook (City of South Burlington) (Cross Appeal), No. WQ-02-07(C)

are **hereby consolidated** and shall henceforth be captioned as follows:

Re: Morehouse Brook, Englesby Brook, Centennial Brook, and Bartlett Brook,

Nos. WQ-02-04, -05, -06, and -07 (Consolidated).

4. The following are parties to this proceeding:

The City of Winooski in its appeal involving Morehouse Brook, pursuant to 10 V.S.A. § 1269;

CLF and VNRC in their appeals involving Morehouse Brook, Englesby Brook, Centennial Brook, and Bartlett Brook, pursuant to 10 V.S.A. § 1269;

The City of South Burlington as the appellant in its cross appeals involving Centennial Brook and Bartlett Brook, pursuant to 10 V.S.A. § 1269, and as an intervener as of right in the other appeals involving Centennial Brook and Bartlett Brook, pursuant to Procedural Rule 25(B)(2); and

ANR in the appeals involving Morehouse Brook, Englesby Brook, Centennial Brook, and Bartlett Brook, pursuant to Procedural Rule 25(B)(5).

5. GBIC's request for amicus curiae status is **hereby granted** with respect to all eleven pending WIP appeals. GBIC's participation in these appeals is limited to filing legal memoranda and oral argument on its legal memoranda. GBIC shall file its legal memoranda within the times allowed and the other requirements applicable to the Appellants.
6. Any motion for a stay filed with the Board, and any memorandum filed in response, must address the Board's jurisdiction to grant the relief requested.
7. On or before **4:30 p.m., September 30, 2002**, parties shall file any motions addressing any preliminary issues in this matter. Said motions shall be supported by legal memoranda and any requests for oral argument. Because of the close connection between legal and factual issues in these appeals and the need to move forward with a hearing on the merits expeditiously, prehearing motions on preliminary issues are discouraged.
8. On or before **4:30 p.m., October 10, 2002**, any party wishing to do so shall respond to any filings made in accordance with item 7, above. Said responses to motions or requests shall be supported by legal memoranda and any requests for oral argument.
9. Should oral argument be requested with respect to any preliminary matter, it shall be held at the Board's offices in Montpelier, Vermont, at a time and date to be

announced in a subsequent order.

10. On or before **4:30 p.m., October 18, 2002**, ANR shall file final lists of direct witnesses and exhibits. ANR also shall file all direct prefiled testimony and exhibits it intends to present. For each expert witness, ANR 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 shall be filed as prefiled exhibits.

Prefiled direct exhibits which are larger than 8½ 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 by any party prior to the hearing.

ANR shall file a memorandum of law with its prefiled direct evidence.

11. On or before **4:30 p.m., November 7, 2002**, all parties other than ANR 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 shall be filed as prefiled exhibits.

Prefiled direct exhibits which are larger than 8½ 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 by any party prior to the hearing.

Each of the Appellants shall file a memorandum of law with its prefiled direct evidence.

12. If the parties would like the Board to conduct a site visit in connection with the hearing, the parties shall work together to develop a joint proposed site-visit itinerary so that the Board's time is used efficiently during the site visit. The parties are encouraged to ensure that the site visit not take more than half a day. The parties shall identify the specific stations and sequence of stations they wish the Board to view, and then do a dry run of the proposed site visit to confirm the time sequence involved.

The parties shall file their request for a site visit and proposed site-visit itinerary on or before **4:30 p.m., November 12, 2002**. To the extent the parties cannot agree

concerning the need for a site visit or the relevancy of any proposed site-visit itinerary item, they should communicate their disagreement in writing in a submission to the Board so the Chair may rule on the scope and content of any site visit. Any site visit in this matter will take place on **November 19, 2002**.

13. On or before **4:30 p.m., November 26, 2002**, 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 shall be filed as prefiled exhibits.

Prefiled rebuttal exhibits which are larger than 8½ 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 by any party prior to the hearing.

The parties may file memoranda of law with their prefiled rebuttal evidence.

14. 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.
15. On or before **4:30 p.m., December 10, 2002**, 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.
16. Pursuant to Procedural Rule 32(B), the parties are **hereby Ordered** to retain a qualified court stenographer for the hearing in this matter. One copy of a transcript of the proceedings must be filed with the Board as expeditiously as possible at no cost to the Board. The eleven Appellants and ANR shall each be responsible for one twelfth of the costs of having the hearing stenographically recorded and of providing a transcript to the Board. The parties shall coordinate with each other to ensure that the stenographer is timely retained and compensated.
17. On or before **4:30 p.m., December 19, 2002**, any party may file in writing any responses to evidentiary objections filed in accordance with item 15, above. If

responses are not timely filed, they may be excluded. Any objections shall be supported by legal memoranda.

18. On or before **4:30 p.m., January 8, 2003**, all parties shall submit a single, combined list of all prefiled testimony and exhibits.
19. On or before **4:30 p.m., January 8, 2003**, the parties shall file any stipulations. These may be in the form of joint statements of fact or proposed joint decisions.
20. On or before **4:30 p.m., January 8, 2003**, the parties shall file any proposed findings of fact, conclusions of law, and orders, including any proposed permit and/or conditions.
21. The parties shall work together to develop a joint proposed hearing agenda. The parties shall prepare their cases and coordinate with each other in an effort to allow the hearing in this matter to be completed as expeditiously as possible. The parties shall file their proposed hearing agenda on or before **4:30 p.m., January 8, 2003**.
22. The Chair or his designee will conduct a second prehearing conference on **January 16, 2003, at 9:00 a.m. at the Board's office in Montpelier, Vermont**. The purpose of this prehearing conference is to address any pending evidentiary objections, hearing-agenda 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 January 13, 2003**. The Board's staff will arrange the conference call.
23. The hearing in this matter is scheduled to take place from **Tuesday, February, 18 through Friday, February 21, 2003**, as may be necessary. The hearing may take place at a public facility near the water resources at issue. The specific times, dates, and location of this hearing shall be announced in a subsequent notice.
24. Within **two weeks after the completion of the hearing**, any party may file any revised or supplemental proposed findings of fact, conclusions of law, and orders, including any proposed permit conditions.
25. The Board may waive the filing requirements set forth herein upon a showing of good cause, unless such waiver would unfairly prejudice the rights of other parties.
26. Parties shall file an **original and six 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. (Parties are not required to serve filings on persons listed under the "For Your Information" section of the certificate of service.)

Legal memoranda accompanying direct evidence shall be no more than 25 pages, double-spaced. Any legal memoranda accompanying rebuttal evidence shall be no more than 15 pages, double-spaced. Proposed findings of fact and conclusions of law shall be no more than 50 pages, double-spaced. See Procedural Rule 10.

All prefiled testimony and exhibits and all legal memoranda must be clearly organized with respect to the issues and watersheds addressed. All prefiled testimony must be double-spaced and line numbered. All prefiled testimony and accompanying exhibits must be placed in a binder and contain a table of contents, if the evidence in total is more than 50 pages in length. See Procedural Rule 30(D). Parties should file an original and 6 collated copies of any prefiled testimony. The parties should also provide the Board with an original and 6 collated copies of any exhibits offered into evidence. See Procedural Rules 9 and 30.

Each party's prefiled testimony and other prefiled exhibits should be accompanied by a list of exhibits. Each party should label its exhibits, including any prefiled testimony, with its name. The labels should contain the words WATER RESOURCES BOARD, Re: Morehouse Brook, et al., Nos. WQ-02-04, -05, -06, and -07 (Consolidated), 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 should be affixed to all exhibits prior to submission to the Board. Label stickers are available from the Board upon request.

With respect to labeling, each party is assigned letters as follows: "CW" for the City of Winooski, "CLF" for CLF, "VNRC" for VNRC, "CSB" for the City of South Burlington, and "ANR" for ANR. Exhibits should be assigned consecutive numbers. For example, the City of Winooski should number its exhibits CW-1, CW-2, CW-3, etc. If an exhibit consists of more than one piece (such as a site plan with multiple sheets), labels should be used for each piece, e.g., CW-2A, CW-2B, CW-2C, etc. Each page of a multi-page exhibit need not be labeled. However, every exhibit, or every labeled piece of an exhibit must be paginated from front to back. Thus, exhibits or labeled pieces of exhibits containing multiple documents or attachments must be repaginated so that the exhibit or labeled piece of exhibit begins with page 1 and the page numbers continue sequentially to the last page.

Each exhibit list should state the full name of the party at the top and the Board's case name and number. There should be three columns, from left to right: NUMBER, DESCRIPTION, and STATUS. An example follows:

CITY OF WINOOSKI'S LIST OF EXHIBITS

Re: Morehouse Brook, Englesby Brook, Centennial Brook, and Bartlett Brook,  
Nos. WQ-02-04, -05, -06, and -07 (Consolidated)

<u>Number</u>	<u>Description</u>	<u>Status</u>
CW-1	Prefiled Direct Testimony of _____	
CW-2	Permit Application filed with ANR on _____.	
CW-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 ANR for its consideration in evaluating the permit request, if they are to be considered by the Board de novo, must be introduced into the evidentiary record for this proceeding. Exhibits attached to briefs, if they are to be considered by the Board, must also be introduced into the evidentiary record for this proceeding.

27. Pursuant to Procedural Rule 28(B), this Prehearing Conference Report and Order is binding on all parties who have received notice of the prehearing conference, unless a written objection to the Prehearing Conference Report and Order, in whole or in part, is filed on or before **4:30 p.m., September 30, 2002**, or a showing of cause for, or fairness requires, waiver of a requirement of this Prehearing Conference Report and Order. The filing of an objection shall not automatically toll that portion of the Prehearing Conference Report and Order to which an objection is made.

Dated at Montpelier, Vermont, this 20th day of September, 2002.

WATER RESOURCES BOARD  
By its Chair

*/s/ David J. Blythe*

---

David J. Blythe