

**State of Vermont  
WATER RESOURCES BOARD**

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

**CHAIR'S ORDER**

On September 20, 2002, the Chair of the Water Resources Board (Board) issued a Prehearing Conference Report and Order (Prehearing Order) governing the above-captioned matter. The filing schedule in the Prehearing Order contained a clerical error leaving the Appellants less time than intended to file their direct evidence. To correct this error and to make other adjustments to the filing schedule, the deadlines set forth in section XIII of the Prehearing Order were modified by a Chair's Order issued September 24, 2002.

By their terms, the deadline for filing objections to the Prehearing Order and the September 24, 2002, Chair's Order was September 30, 2002. On that date, the Agency of Natural Resources (ANR) filed objections to the Prehearing Order. No other objections were filed. Neither the Prehearing Order nor the September 24, 2002, Chair's Order established a date for filing responses to objections to those Orders. An October 3, 2002, Chair's Order established October 14, 2002, as the deadline for filing any responses to ANR's objections to the Prehearing Order. No responses were filed.

ANR's objections are in the nature of requests to clarify two limited issues in the Prehearing Order. First, ANR requests that the last sentence of the first full paragraph of page 5 of the Prehearing Order be stricken. That sentence reads, "ANR, if it seeks to defend a permit in a third-party appeal, generally shares the burden of proof with the permit applicant." ANR did not mention the last sentence of the second full paragraph of page 5, which reads, "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."

Second, ANR objects to the last sentence of the last paragraph of page 11 of the Prehearing Order. That sentence currently reads as follows: "Prefiled surrebuttal evidence will therefore not be permitted." ANR requests that this sentence be amended to read, "Prefiled surrebuttal evidence will therefore not be permitted, however the Chair maintains the discretion to permit live surrebuttal evidence at the hearing."

It is hereby **Ordered** that ANR's objections to the Prehearing Order are **granted in part and denied in part**. The Prehearing Order shall be amended to reflect ANR's requests. However, in addition to the last sentence of the first full paragraph of page 5, the last sentence of the second full paragraph of page 5 shall also be stricken. Although

Re: Morehouse Brook, Englesby Brook, Centennial Brook, and Bartlett Brook,  
Nos. WQ-02-04, -05, -06, and -07 (Consolidated)  
Chair's Order (Vt. Water Res. Bd. Oct. 18, 2002)  
Page 2

---

the Prehearing Order does not decide that ANR carries any burden of proof in any third-party appeal before the Board, neither sentence is necessary. The changes ANR suggested for page 11 have been modified slightly to reflect the Board's authority over the conduct of the hearing this case. New Prehearing Order pages 5 and 11 are attached.

Dated at Montpelier, Vermont, this 18th day of October, 2002.

WATER RESOURCES BOARD  
By its Chair

*David J. Blythe*

---

David J. Blythe

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. 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.

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

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 prefilings of evidence, with specific instructions for the prefilings 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. However, the Board maintains the discretion to permit live surrebuttal evidence at the hearing.