State of Vermont
WATER RESOURCES BOARD

RE: City of South Burlington (Bartlett Bay Wastewater Treatment Facility)
Docket No. WQ-01-04

SECOND PREHEARING CONFERENCE REPORT AND ORDER

I. Background

On March 14, 2002, beginning at approximately 10:00 a.m., Water Resources Board (Board) Chair David J. Blythe convened a second prehearing conference in this matter at the Board's offices in Montpelier, Vermont pursuant to Board Rules of Procedure 23 and 28 (1999). Assisting the Chair was the Board's Associate General Counsel, Daniel D. Dutcher. The following parties participated in the second prehearing conference:

The appellant, Conservation Law Foundation (CLF), by Attorney Mark Sinclair;

The permitting agency, the Vermont Agency of Natural Resources (ANR), by Attorney Glenn Gross; and

The permittee, the City of South Burlington (City), by Attorney Joseph S. McLean of the firm Stitzel, Page & Fletcher.

The second prehearing conference was convened pursuant to Chair's Orders issued February 13 and 26, 2002. The procedural history of this case is set forth in the February 13, 2002, Chair's Order.[1]

II. Purposes of the Prehearing Conference

As the parties were informed by the February 13, 2002, Chair's Order, the second prehearing conference was convened for the following purposes:

1) To discuss the pending motions in this appeal with the parties and to hear oral argument on the pending motions in order to enable the Chair to rule on those motions in a written order;

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[1] The February 26, 2002, Chair's Order granted a continuance of the of the hearing date established by the February 13, 2002, Chair's Order.

2) To clarify the issues in controversy;

3) To identify any preliminary issues;

4) To establish a schedule for prefiling exhibits and testimony for the hearing on the merits that will take place if this matter is not resolved by the disposition of the pending motions;

5) To select a date for the hearing on the merits; and

6) To take such other action as may be necessary to move this appeal to final disposition.

III. Rules of Procedure

On December 11, 2001, the Board adopted new Rules of Procedure, which took effect January 1, 2002. The Board's general practice has been to continue to apply its 1999 Rules of Procedure in appeals that were filed before the 2002 Rules took effect. After discussing this matter with the parties at the second prehearing conference, the Chair ruled that the Board's 1999 Rules of Procedure, which were in effect at the time this appeal was filed, would govern this appeal. There were no objections by the parties.

IV. Pending Motions

At the second prehearing conference, the Chair identified the filings addressing preliminary issues requiring resolution in this appeal. These pending filings are as follows:

1) The City's Motion to Dismiss, filed October 2, 2001, including the City's Statement of Undisputed Facts filed, October 17, 2001. In this motion, the City argued that because CLF failed to appeal the City's prior discharge permits, CLF's appeal must now be dismissed on the basis of res judicata or laches.

2) The City's Further Objection to the Prehearing Conference Report and Order, filed November 14, 2001. Here, on the basis of data recently released by ANR, the City sought relief from any stipulation in this case that Shelburne Bay does not comply with the phosphorous criterion of the 2000 Vermont Water Quality Standards.

3) CLF's Request for Evidentiary Hearing, filed January 15, 2002. CLF requested the scheduling of a hearing on the merits now that settlement discussions among the parties have ended. In its Request for Evidentiary Hearing, CLF identified a number of factual issues, including whether Shelburne Bay and the main lake are

impaired.

4) The City's Motion for a Limiting Order, filed January 18, 2002. The City argued that CLF's Notice of Appeal is limited by its terms to Shelburne Bay's compliance with the Vermont Water Quality Standards and that the scope of this appeal should not extend to the effects of the discharge on the main lake.

The Chair asked the parties whether there are there any other pending motions or other unresolved filings before the Board at this time. None were identified.

The Chair advised the parties that if there was no objection, CLF's Request for Evidentiary Hearing would not be taken up separately but rather considered in the context of the City's Motion for a Limiting Order. There were no objections. Thus, the Chair heard oral argument on the City's Motion to Dismiss, the City's Further Objection to the Prehearing Conference Report and Order, and the City's Motion for a Limiting Order.

ANR did not file written responses to any of these pending motions. CLF did not file a response to the City's Further Objection to the Prehearing Conference Report and Order. However, all parties were permitted to present argument with respect to each of the pending motions.

During the course of the oral arguments, the parties were asked if they had any objection to the Chair taking official notice of the permit under appeal and the accompanying fact sheet and response summary, as well as ANR's Draft Phosphorous TMDL for Lake Champlain. There were no objections. Accordingly, the Chair takes official notice of those documents pursuant to 3 V.S.A. § 810(4) (1995).

A. City's Motion to Dismiss

In its Motion to Dismiss, the City argued that CLF's appeal is untimely, that it violates principles of administrative finality, and that CLF's claims are barred by the equitable doctrine of laches. The City's Motion is based on CLF's failure to appeal the City's prior discharge permits and the financial investments that the City has made based on its receipt of those permits.

The City alleged that it received a discharge permit for the Bartlett Bay Wastewater Treatment Facility (WWTF) in 1996. On February 11, 1998, the City received an amended discharge permit authorizing it to increase its discharge flows from 0.8 to 1.25 million gallons per day (mgd). The average annual flow authorized by the permit under appeal is also 1.25 mgd. The 1998 amended permit included a monthly average discharge limitation for phosphorous of 0.8 milligrams per liter. That is the same average monthly limit for phosphorous included in the permit at issue. Phosphorous is the only pollutant at issue in this appeal.

The City further alleged that in conjunction with the receipt of its 1998 amended permit, it substantially upgraded its treatment facilities and equipment at a cost of over five million dollars. In addition, the City contended that neither CLF nor any other person or party appealed either its 1996 or 1998 permit. On the basis of these facts, the City argued that the issues now presented by CLF may not be raised at this time.

The City filed a Statement of Undisputed Facts in support of its Motion to Dismiss on October 17, 2001. The City's Statement acknowledges that it refers to "extrinsic evidence" and that its Motion to Dismiss must therefore be treated as a motion for summary judgment. (City's Statement of Undisputed Facts at 1 n.1 (citing Vt. R. Civ. P. 56 (relating to Summary Judgment))).

Included with the City's Statement of Undisputed Facts is an affidavit of Charles Hafter, City Manager. Mr. Hafter's affidavit describes discharge permits issued for the Bartlett Bay WWTF in 1996 and 1998 and the financial investments that the City made in reliance on those permits. In addition, Mr. Hafter's affidavit establishes that CLF did not appeal either the 1996 or the 1998 permit.

On October 24, 2001, CLF filed a Response to the City's Motion to Dismiss. CLF did not specifically challenge any of the City's alleged facts but broadly asserted that it either disputes the City's facts or cannot verify them. (CLF's Response at 3 n.1.) The City filed a Reply to CLF's Response on October 31, 2001. In its reply, the City argued, among other things, that CLF's Response was insufficient under Vermont Rule of Civil Procedure 56(c)(2) (describing material to be filed by parties moving for and opposing summary judgment).

Although the Board's 2002 Rules of Procedure provide for summary disposition, see Board Rule 36 (2002), the Board's 1999 Rules of Procedure, which apply to this appeal, do not include a similar provision. However, the 1999 Rules, like the 2002 Rules, include provisions for the filing of motions. See Board Rule 10 (1999 and 2002). In addition, Rule 24 of both the 1999 and the 2002 Board Rules provides in pertinent part as follows: "The Board may, on its own motion or at the request of a party, dismiss, in whole or in part, any matter before the Board for reasons provided by these Rules, by statute, or by law." Under both the 1999 and the 2002 Rules, the Chair may make preliminary rulings and issue dismissal orders "as are necessary to expedite and facilitate the hearing process." Board Rule 23 (1999 and 2002).

Although the addition of Rule 36 to the Board's Rules of Procedure clarifies the procedures relating to summary disposition before the Board, the 1999 Rules of Procedure provide the Chair with the discretion to rule on the City's Motion to Dismiss and to treat it as a motion for summary judgment. Indeed, the provisions for summary disposition under Board Rule 36 (2002) are similar to those for summary judgment under the Vermont Rules of Civil Procedure, except for the omission of certain provisions that do not apply to practice before the

Board. Accordingly, the City's Motion to Dismiss will be addressed herein and reviewed under the standards for summary judgment set forth in Vermont Rule of Civil Procedure 56.

Vermont Rule of Civil Procedure 56(c)(3) articulates the standard of review of a motion for summary judgment: "Judgment shall be rendered forthwith if . . . there is no genuine issue of material fact and . . . any party is entitled to a judgment as a matter of law." The Chair does not decide whether the facts underlying the City's Motion are adequately supported or whether CLF's "mere allegations or denials of the adverse party's pleading," Vt. R. Civ. P. 56(e), are sufficient to raise a genuine issue of material fact. Assuming for purposes of this decision that the factual allegations in the City's Motion to dismiss are true, the Chair concludes that the City is not entitled to judgment as a matter of law.

1. Res Judicata and Collateral Estoppel

In support of its Motion to Dismiss, the City first relies on the doctrine of res judicata, or claim preclusion, and the doctrine of collateral estoppel, or issue preclusion. These doctrines do not apply to this case because there was no prior litigation between these parties or their privies involving this or a similar permit. ANR's administrative decisions to issue a permit to the City in 1996 and to issue an amended permit to the City in 1998 do not constitute prior adjudications. See generally Sheehan v. Department of Employment and Training, 169 Vt. 304, 308 (1999) (discussing doctrines of res judicata and collateral estoppel).

The City relies on the Board's recent decision in In Re: Town of Shoreham Wastewater Treatment Facility, No. WQ-00-11, Memorandum of Decision on Preliminary Issues (May 2, 2001), to support its argument that CLF's appeal is barred. In Shoreham, the town had received a discharge permit for its WWTF in May, 2000, which was not appealed within the thirty-day appeal period established by 10 V.S.A. § 1269 (1998) and thus became final. ANR then issued an amended permit to the town in November, 2000, and CLF appealed the amended permit to the Board. In the amended permit, ANR approved an off-site phosphorous-reduction plan that the town had adopted to avoid having to place certain phosphorous controls on its WWTF. The town argued that CLF's appeal of the amended permit should be limited to the decisions ANR had made with respect to the permit amendment–to whether the town's phosphorous-reduction plan complied with the statutory requirements for such a plan. The Board agreed with the town and decided that by failing to appeal the original permit, CLF was barred from litigating issues that became final once the appeal period for the original permit had expired.

Shoreham is readily distinguishable from the instant case. In Shoreham, the amended permit was appealed while the original permit was still in effect, and CLF was thus able to litigate only the conditions unique to the amended permit. In the instant case, the renewal permit under appeal entirely replaces the previously issued amended permit. CLF appealed the City's renewal permit within thirty days of its issuance, and CLF's notice of appeal addresses that permit.

The City also relies on In re: Appeal of Poultney River Committee, No. WQ-92-04, Preliminary Order (Aug. 11, 1992), aff'd, No. S0693-92RcCa (Rutland Super. Ct. filed Feb. 3, 1994), aff'd, no. 94-164 (Vt. filed June 26, 1995), mem. 163 Vt. 656, 664 A.2d 277 (1995). In that case, ANR had previously issued a discharge permit in 1990 that allowed the Department of Fish and Wildlife to apply chemical lampricides to a tributary of Lake Champlain. The permit had a five-year term. ANR issued amendments to the original permit in 1991. In 1992, ANR issued a new permit with a new number that amended both the original permit and the 1991 amended permit. The 1992 permit specifically adopted portions of the 1991 amended permit. The appellant did not appeal the 1990 original permit or the 1991 amended permit but did appeal the permit issued in 1992. The Board held that the scope of that appeal was limited to changes effected in the 1992 permit and that issues related solely to the 1991 amended permit and the 1990 original permit could not be challenged.

Like Shoreham, Poultney River held that a previously issued permit that was not appealed within the thirty-day time frame could not be challenged in an appeal from a permit amendment. Instead, only the decisions or actions of ANR unique to the amended permit could be challenged. Poultney River is slightly different from Shoreham because the permit amendment appealed from in Poultney River actually replaced the previously issued permits and constituted the only permit in effect. However, the Board found that distinction to be "immaterial." Poultney River at 4.

In the instant case, CLF filed its appeal within thirty days of the issuance of the City's renewal permit. See 10 V.S.A. § 1269. Once the litigation relating to the City's renewal permit is concluded, it will replace the prior discharge permits for the City's Bartlett Bay WWTF.[2] The permit under appeal does not represent an amendment of a previously issued permit that would still be in effect were it not for the most recent action of the permitting agency. Therefore, the City's reliance on Poultney River is misplaced. Neither Poultney River nor Shoreham involved a timely appeal from a permit renewal.

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[2] The permit under appeal provides that it shall become effective on the date of its signing- -June 15, 2001, and that it expires December 31, 2005. The City's 1996 permit provides that it expired December 31, 2000. By its terms, the City's 1998 amended permit also expired on December 31, 2000. Both the 1996 permit and the 1998 amended permit required the City to reapply 180 days prior to their expiration if the City desired to continue to discharge. Under section 814(b) of the Vermont Administrative Procedure Act, 3 V.S.A. § 814 (1995), when a licensee makes timely application for renewal, the existing license does not expire until the application has been finally determined by the reviewing agency and adjudicated on appeal. See also 3 V.S.A. § 801(b)(3) (including "any agency permit" within definition of "license"). Thus, the City's 1996 permit and the 1998 amended permit will expire once the litigation relating to the City's renewal permit becomes final.

Vermont law provides that discharge permits shall expire after five years. See 10 V.S.A. § 1263(d)(4); Vermont Water Pollution Control Permit Regulations § 13.5 (a) (1974). The City's position that changes in renewal permits must be based on changed circumstances is without merit. Vermont's Water Pollution Control Act expressly states that "A renewal permit shall be issued following all determinations and procedures required for initial permit application." 10 V.S.A. § 1263(e). Under Vermont's Water Pollution Control Permit Regulations, review of an application for re-issuance of a permit must insure that the permitted discharge complies with the Vermont Water Quality Standards, including applicable effluent limitations and other requirements. § 13.5.b(2)(c). Under Vermont law, permit conditions may be changed prior to a permit's renewal if "necessary to preserve and protect the quality of the receiving waters." 10 V.S.A. § 1263(d)(3).

Although the lawfulness of the City's permit is not at issue at this stage of this appeal, the City's position that it's renewal permit is insulated from attack because its prior permits were not appealed could allow an unlawful discharge to continue indefinitely. To the extent the City contends that only parties who could have appealed its prior permits are now barred from appealing its renewal permit, the City's position would place arbitrary restrictions on would-be appellants. Such restrictions would invite the formation of ad hoc organizations for the purpose of filing appeals that existing persons or organizations would be barred from prosecuting under the City's scheme. The permit renewal process allows progress to be made in water-pollution control. The City's expectation that its renewal permit cannot be changed with respect to its prior permits in the absence of some material change in circumstances is without merit.

2. Laches

The City next argues that CLF's notice of appeal should be dismissed based on the equitable doctrine of laches. The City contends that CLF's failure to appeal the City's 1996 permit was inexcusable and prejudicial. The City's position is untenable.

The Vermont Supreme Court has defined laches as "the failure to assert a right for an unreasonable and unexplained period of time when the delay has been prejudicial to the adverse party, rendering it inequitable to enforce the right." Stamato v. Quazzo, 139 Vt. 155, 157 (1980). See also State v. Central Vermont Ry., 153 Vt. 337, 353 (1989) (defining laches). The delay must be not only "prejudicial," but also "unexcused." In re Estate of Neil, 152 Vt. 124, 132 (1989). The Vermont Supreme Court has expressed reluctance to apply the doctrine of laches to cases involving the state's administration of the public trust. See Central Vermont Ry., 153 Vt. at 353.

As set forth above, the City's prior permits have expired, and Vermont law expressly provides that renewal permits must include whatever requirements may be necessary for the protection of the receiving waters. 10 V.S.A. § 1263(e). CLF appealed the City's renewal permit

within the thirty-day appeal period set forth by statute. See 10 V.S.A. § 1269. It would be extraordinary to conclude that the equitable doctrine of laches trumps the legislature's clear pronouncements on the time for appealing a discharge permit and the matters that may be included in such an appeal.

The effluent limitations and other provisions of the City's renewal permit are designed to protect a public resource. The Vermont Supreme Court has observed that the state's continuing power as administrator of the public trust includes the power to revoke previously granted rights. Chittenden v. Waterbury Ctr. Cmty. Church, 168 Vt. 478, 494 (1998). The state cannot by acquiescence relinquish its duty to protect the public trust. Id. Although the Board has not yet reached the merits of this appeal, the City's position that its prior permits are unalterable could preclude the state from taking necessary action to prevent the unlawful degradation of a public resource.

Finally, the City has failed to support its laches argument with a sufficient showing of prejudice. Although the City may have made significant financial investments in its Bartlett Bay WWTF in conjunction with its prior permits, the City has not shown that any of these investments would be wasted if CLF prevails in whole or in part on the merits of this case. It is possible, for example, that any relief granted to CLF as a result of this appeal would not require the City to dismantle its current equipment but to add to it or to change its operating procedures. If that turns out to be the case, the City will have saved money by not having lost an earlier appeal.

Vermont law plainly requires discharge permits to be reviewed every five years. If a previously issued permit is unlawful, it must be subject to change. The City cannot have an equitable interest in maintaining an unlawful discharge.

B. City's Further Objection to Prehearing Conference Report and Order

At the first prehearing conference, the Chair asked the following question: "Do the parties agree that Shelburne Bay currently exceeds the in-lake phosphorous criterion of the 2000 Vermont Water Quality Standards?" The Prehearing Order documents the response of the parties as follows: "The parties agreed that Shelburne Bay is currently water-quality limited for phosphorous. ANR added that the most recent data for Shelburne Bay, gathered in 1991, indicates that Shelburne Bay is close to compliance with the phosphorous criterion. CLF stated that compliance with the Vermont Water Quality Standards is required." No objections with regard to this provision of the Prehearing Order were filed within the time period for objections set forth by the Prehearing Order.

On November 14, 2001, the City filed a Further Objection to the Prehearing Conference

Report and Order (Prehearing Order),[3] "to the extent that it states or implies that the parties agree that Shelburne Bay currently exceeds the in-lake phosphorous criterion of the 2000 Vermont Water Quality Standards." (City's Further Objection at 3-4.) The City's Further Objection is based on its interpretation of ANR's 2001 total phosphorous monitoring results for Shelburne Bay, which ANR made available on November 5, 2001.

Although a Chair's Order established a deadline for responses to the City's Further Objection, none were filed. However, CLF indicated in its response to the City's Motion for a Limiting Order (discussed below) that it believes Shelburne Bay is still in violation of the Vermont Water Quality Standards. CLF also stated that "it does not believe that the Board can deny the City's objection and prevent the City (and CLF and ANR) from the opportunity to offer evidence on Shelburne Bay's impairment status pursuant to a de novo hearing as provided by statute." (CLF's Request for Evidentiary Hearing at 2.)

The City's appeal to the Board is de novo. See 10 V.S.A. § 1269. Thus, the Board may consider relevant facts on appeal that were not considered initially by ANR. Stipulations of fact are generally binding, and may control even after a case has been remanded.

The City's Further Objection is granted for the reason that the City did not expressly stipulate that Shelburne Bay exceeds the in-lake phosphorous criterion. When asked if the Bay exceeds the phosphorous criterion of the Vermont Water Quality Standards, the parties agreed only that the Bay is "water-quality limited." Earlier at the first prehearing conference, the parties were asked whether Shelburne Bay was listed as a water-quality-limited segment on the list of targeted and impaired waters that Vermont prepared and submitted to EPA pursuant to section 303(d) of the Clean Water Act, 33 U.S.C.A. § 1313(d). The Prehearing Order indicates that the parties so agreed for phosphorous. Thus the Prehearing Order twice indicates that the parties agreed that Shelburne Bay is listed as water-quality limited but does not reflect any agreement that the Bay exceeds the in-lake water quality criterion for phosphorous. At the second prehearing conference, the parties continued to agree that Shelburne Bay is listed as water-quality limited. The parties will therefore continue to be held to that stipulation, but they will not be held to a stipulation that the Bay exceeds the in-lake phosphorous criterion of the Vermont Water Quality Standards because they never expressly agreed to that proposition.

To the extent that the City arguably did stipulate that Shelburne Bay falls short of the Vermont Water Quality Standards for phosphorous, the City's Further Objection would nevertheless be granted. The Prehearing Order provides that its requirements are binding on the parties unless a showing of cause or fairness requires otherwise. The new facts relating to

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3 By Order of the Chair, dated October 22, 2001, the City's initial objections to the Prehearing Order have been resolved.

Shelburne Bay did not come to light until after the parties entered into stipulations at the first prehearing conference and after the Board issued the Prehearing Order. In addition, the litigation in this case is essentially starting fresh now that the parties have abandoned serious efforts at negotiation. Therefore, the City would have good cause for seeking withdrawal from the stipulation, and there would be no prejudice to CLF if the City were permitted to do so at this stage of the proceedings.

C. CLF's Request for Evidentiary Hearing

CLF's Request for Evidentiary Hearing is based on the unsuccessful termination of negotiations among the parties to this appeal. Although the City disagrees with CLF as to the proper scope of the evidentiary hearing, the City "agrees with CLF that an evidentiary hearing is necessary at this time." (City's Motion for Limiting Order at 4.) CLF has a statutory right to appeal the City's discharge permit under 10 V.S.A. § 1269, which requires the Board to hold a de novo hearing. Therefore, CLF's request is granted, and a hearing will be convened as provided herein.

D. City's Motion for a Limiting Order

In its Request for Evidentiary Hearing, CLF identified a number of factual issues, including whether Shelburne Bay and the main lake are impaired. The City responded to CLF's Request for Evidentiary hearing with a Motion for a Limiting Order. The City argued that CLF's Notice of Appeal is limited by its terms to Shelburne Bay's compliance with the Vermont Water Quality Standards and that the scope of the appeal should not encompass the effects of the discharge on the main lake. CLF filed a Response in Opposition to the City's Motion for a Limiting Order on February 1, 2002, arguing that these proceedings should consider the effects of the permitted discharge not only on Shelburne Bay but also on other parts of Lake Champlain. On February 8, 2002, the City filed a Reply to CLF's Response.

The Board's Rules of Procedure require a notice of appeal to include, among other things, "A concise statement of the issues and a statement of reasons why the petitioner or appellant believes the act or decision appealed form was in error." Rule 19(A)(4) (1999). In addition, a notice of appeal must include "A description of the relief sought." Rule 19(A)(5). The Board's Rules further provide as follows: "The scope of any proceeding under this rule shall be limited to those issues specified in the notice of appeal unless the Board determines that substantial inequity or injustice would result from such limitation." Rule 19(C).

As reasons for the appeal, CLF's Notice of Appeal states that the permit at issue "unlawfully allows a measurable and detectable discharge of phosphorous into the Shelburne Bay section of Lake Champlain which currently does not meet the in-lake phosphorous criterion of the Vermont Water Qaulity Standards and has been listed as a Water Quality Limited Segment . . . ."

(Notice of Appeal at 3 (emphasis added).) CLF's notice of appeal identifies the issue on appeal as follows:

> Can the measurable and detectable discharge of phosphorous . . . be permitted into the Shelburne Bay section of Lake Champlain in the absence of a completed Total Maximum Daily Load and Wasteload Allocation for Shelburne Bay, compliance schedules . . . , . . . WQBELs . . . , and a demonstration that there is adequate assimilative capacity in the receiving waters to accommodate the discharge?

(Notice of Appeal at 3-4 (emphasis added).) The relief sought is "that the Board conduct a de novo review of the ANR Permit for the Bartlett Bay Wastewater Treatment Plant and deny the permit with specific direction to the ANR regarding adequate phosphorous management and controls for this discharge." (Notice of Appeal at 4 (emphasis added).)

As the Board has recently observed, "The Board has generally taken a liberal view in hearing issues timely raised by an appellant which are within the Board's jurisdiction, which are within the ambit of the applicable law, and which are arguably raised by the subject matter of the permit under appeal." Shoreham at 9. Similarly, in In re: Appeal of Vermont Natural Resources Council (Sugarbush), No. DAM-92-02, Prehearing Conference Order and Preliminary Order at 4 (April 10, 1992), the Board found that "it has long been recognized that statutes giving and regulating the right of appeal are remedial in nature and should receive a liberal construction in furtherance of the right of appeal. An administrative appellate board should impose no stricter a standard when interpreting its own regulations." (Citations omitted.)

In In re: Appeal of Cole, No. WQ-92-13, Memorandum of Decision at 3 (May 28, 1993), the Board noted that it construes notices of appeal liberally and disagreed that a notice of appeal must "assert specific technical and engineering facts in error." Rather, the notice of appeal must "state the issues in dispute with reasonable specificity in order to alert affected persons concerning the scope of the appeal. However, this . . . does not require hypertechnical pleading." Id. at 2. See also In re: Amhowitz, No. CUD-99-08, Memorandum of Decision at 4 (Vt Water Res. Bd. March 21, 2000) (explaining that appellants must raise in initial pleading all bonafide issues they would like Board to consider).

The Board has denied late motions to expand the scope of an appeal under circumstances where the petitioner could not demonstrate why these matters were not raised in the notice of appeal and where allowing the motion would unfairly burden parties who have already prepared for a merits hearing on the issues previously framed. See In re: Appeal of Paul Dannenberg, No. WQ-99-07, Findings of Fact, Conclusions of Law, and Order at 12 (Dec. 29, 2000). Thus, in In re: Hannaford Bros. Co. and Lowes Home Centers, Inc., No. WQ-01-01, Findings of Fact, Conclusions of Law and Order at 2-3 (Jan. 18, 2002), the Board held that prefiled testimony with

regard to construction site runoff, which would require a separate permit, was irrelevant in an appeal from a stormwater discharge permit for the operation of a commercial complex. The Board also held that issues relating to thermal pollution and hydrological modification would be considered only insofar as they related to the impairment of the receiving waters. The Board so limited the scope of the appeal because the broader implications of these matters were first raised in prefiled testimony, and the Board had previously indicated in writing that it was construing the notice of appeal more narrowly. Id. at 18-21.

In this case, CLF's Notice of Appeal focused on Shelburne Bay, as did the first prehearing conference. However, the Notice of Appeal also questioned whether there was "adequate assimilative capacity in the receiving waters to accommodate the discharge." (Notice of Appeal at 4.) CLF also asked that "adequate phosphorous management and controls" be imposed "for this discharge." (Id.)

The Vermont Water Quality Standards establish separate phosphorous water quality criteria for different lake segments, including the main lake (0.010 mg/l) and Shelburne Bay (0.014 mg/l). VWQS § 3-01.B.2.c (2000). On the other hand, the Vermont Water Quality Standards also include the following definition of receiving waters: "all waters adjacent to a discharge, and all downstream or other waters the quality of which may be affected by that discharge." VWQS § 1-01.B.38 (2000). Certainly a discharge into Shelburne Bay could not be lawful if the discharge violated the Vermont Water Quality Standards with regard to the main lake.

The hydrological connection between Shelburne Bay and the main lake is obvious. The Notice of Appeal clearly challenges the phosphorous limits in the City's most recent permit, and none of that is changed by looking at the effects of the permit on the main lake. Although the parties have spent some time negotiating, no evidence has yet been prefiled, and a hearing on the merits has only just been scheduled. Although with the main lake at issue, the issues on appeal may be broader than the City would like them to be, the City will be not prejudiced by having to prepare its case to include the broader effects of the discharge. The new data on Shelburne Bay was not available to CLF at the time it filed its notice of appeal. Indeed, nothing suggests that CLF had no interest in the main lake when it filed its Notice of Appeal or that it then considered any impacts of the discharge on the main lake to be unimportant. CLF's Notice of Appeal fairly notified the permittee and other interested persons that the phosphorous limitations in the City's renewal permit are at issue in this case. See Board Rule 19(A)(4). The City's Motion for a Limiting Order is therefore denied.[4]

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[4] The Chair has some doubts about the relevance of ANR's recently released data on Shelburne Bay. Even if it can be shown that the Bay now complies with the in-lake phosphorous criterion of the Vermont Water Quality Standards, the Bay is nevertheless listed as water-quality limited, and

V. Hearing Schedule

The Chair discussed with the parties the time needed for a hearing in this matter. The parties were not certain at the second prehearing conference whether a site-visit would be helpful in this case. Nor could the parties be certain that the hearing in this matter could be concluded in one day, even without a site visit. The parties were advised that the evidentiary hearing in this matter would likely be scheduled in August or September, 2002.

VI. Order

1. The Chair's preliminary rulings in this Second Prehearing Conference Report and Order shall become final and binding rulings of the Board unless specifically objected to in writing no later than **4:30 p.m., Monday, April 29, 2002**.

2. On or before **4:30 p.m., Wednesday, May 15, 2002**, the City and ANR shall file final lists of direct witnesses and exhibits. They shall also 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 prefiled direct testimony shall be filed as prefiled exhibits. 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 larger than 8½ by 11 inches must only be identified to the parties, but one copy of all such exhibits must be prefiled with the Board and 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, June 13, 2002**, CLF shall file final lists of direct witnesses and exhibits. CLF shall also file all direct prefiled testimony and exhibits it

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the imminent de-listing of Shelburne Bay may not be a foregone conclusion. Not only the existing condition of a water body, but also its anticipated future condition controls whether a TMDL is required. See Wasteload Allocation Process at 6 (1987). In addition, anti-degradation requirements are designed to avoid the management of waterways at their maximum assimilative capacity. See VWQS § 1-03 (2000). Presumably, the state of Vermont is not scrapping its plans to establish a phosphorous TMDL for Lake Champlain, and Shelburne Bay is clearly a part of the lake, and thus far, a part of the lake's phosphorous TMDL. See Vermont Dep't of Envtl. Conservation, Lake Champlain Phosphorous TMDL, Vermont Portion, Draft for Public Discussion (June 22, 2001), at 3. Thus, even if the scope of this appeal were limited to Shelburne Bay and even if it were shown that Shelburne Bay now complies with the in-lake criterion for phosphorous, this appeal might still present significant factual and legal issues. See, e.g., Hannaford (addressing management of actual discharges into water-quality limited segments in absence of TMDL).

intends to present. For each expert witness, CLF shall file a resume or other statement of qualification. All prefiled direct testimony shall be filed as prefiled exhibits. 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 larger than 8½ by 11 inches must only be identified to the parties, but one copy of all such exhibits must be prefiled with the Board and made available for inspection and copying at the Board's office by any party prior to the hearing.

4. On or before **4:30 p.m., Tuesday, July 2, 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 prefiled rebuttal testimony shall be filed as prefiled exhibits. 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 prefiled with the Board and made available for inspection and copying at the Board's office by any party prior to the hearing.

5. 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.

6. On or before **4:30 p.m., Wednesday, July 17, 2002**, any party may file in writing any evidentiary objections to prefiled testimony and other exhibits previously filed. If objections are not timely filed, they shall be deemed waived. Any objections shall be supported by legal memoranda.

7. On or before **4:30 p.m., Wednesday, July 31, 2002**, any party may file in writing any responses to evidentiary objections to prefiled testimony and other exhibits previously filed. If responses are not timely filed, they may be excluded. Any objections shall be supported by legal memoranda.

8. On or before **4:30 p.m., Wednesday, August 7, 2002**, the parties shall submit a single, combined list of all prefiled testimony and other exhibits.

9. On or before **4:30 p.m.,Wednesday, August 7, 2002**, the parties shall file any stipulations. These may be in the form of joint statements of fact or proposed joint decisions.

10. On or before **4:30 p.m.,Wednesday, August 7, 2002**, the parties shall file proposed findings of fact, conclusions of law, and orders, including any proposed permit and/or conditions.

11. 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 on the day of the hearing. 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.,Wednesday, August 7, 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.

12. The parties shall work together to develop a joint proposed hearing-day 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 in one ordinary business day. The parties shall file their proposed hearing-day agenda on or before **4:30 p.m, Wednesday, August 7, 2002**.

13. The Chair or his designee will conduct a third prehearing conference on **Thursday, August 22, 2002, 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 and to develop a hearing-day agenda. 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 Monday, August 19, 2002**. The Board's staff will arrange the conference call.

14. The hearing will be recorded electronically by the Board or, at the request of any party, by a qualified stenographic reporter, provided such request is made on or before **4:30 p.m., Thursday, August 29, 2002**. 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. To ensure the availability of a complete and accurate transcript of the hearing in this matter, the parties are encouraged to engage the services of a qualified stenographer. See Procedural Rule 32(B).

15. On **Tuesday, September 17, 2002**, the Board will convene a hearing in this matter. The hearing will take place at a public facility in close proximity to the water resources at issue. If necessary, the Board will schedule a second hearing date on **Monday,**

September 16 or **Wednesday, September 18, 2002**. The specific time and location of this hearing, and the second hearing date, if any, shall be announced in a subsequent notice.

16. On or before **4:30 p.m., Tuesday, October 1, 2002**, any party may file any revised or supplemental proposed findings of fact, conclusions of law, and orders, including any permit and/or conditions.

17. 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.

18. Parties shall file **an original and seven collated copies** of motions, legal memoranda, and any other documents filed with the Board, and mail one copy to each of the persons listed on the Board's Certificate of Service. See Procedural Rules 9 and 30. (Parties are not required to serve filings on persons listed under the "For Your Information" section of the certificate of service.)

Legal memoranda shall be no more than 25 pages and proposed findings of fact and conclusions of law shall be no more than 50 pages. See Procedural Rule 10. Additionally, all prefiled testimony and exhibits must be clearly organized with respect to the issues which are to be 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 7 collated copies of any prefiled testimony. The parties should also provide the Board with an original and 7 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: City of South Burlington, No WQ-01-04, the number of the exhibit, and a space for the Board to mark whether the exhibit has been admitted and to mark the date of admission. The completed labels 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: "City" for the City of South Burlington, "ANR" for the Agency of Natural Resources, and "CLF" for the Conservation Law Foundation. Exhibits should be assigned consecutive numbers. For example, the permittee should number its exhibits City-1, City-2, City-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., City-2A, City-2B, City-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:

APPLICANTS' LIST OF EXHIBITS
Re: City of South Burlington, No. WQ-01-01

Number	Description	Status
City-1	Prefiled Direct Testimony of _____	
City-2	Permit Application filed with ANR on _____.	
City-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.

19. Pursuant to Procedural Rules 23 and 28(B), this Order is binding on all parties and amici curiae, unless a written objection to this Order, in whole or in part, is filed on or before **4:30 p.m., Monday, April 29, 2002**, or a showing of cause, or fairness requires, waiver of a requirement of this Order. The filing of an objection shall not automatically toll that portion of this Order to which an objection is made.

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

WATER RESOURCES BOARD
By its Chair

/s/ David J. Blythe

David J. Blythe