

**State of Vermont
WATER RESOURCES BOARD**

**RE: CCCH Stormwater Discharge Permits
Docket No. WQ-02-11 (ANR Permits #1-1556 and #1-1557)**

PREHEARING CONFERENCE REPORT AND ORDER

I. PROCEDURAL BACKGROUND

On September 23, 2002, the Department of Environmental Conservation (DEC), Agency of Natural Resources (ANR) issued ANR Permits #1-1556 and #1-1557 (Discharge Permits) to the Vermont Agency of Transportation (VTrans or Permittee). Discharge Permit #1-1556 authorizes the Permittee to discharge stormwater runoff from the proposed Chittenden County Circumferential Highway (CCCH) (Winooski River and Redmond Creek watersheds segment / Construction Segment B, and portion of construction Segment A) to the Winooski River, unnamed tributaries to the Winooski River and Redmond Creek and Discharge Permit #1-1557 authorizes the discharge of stormwater runoff from the proposed CCCH (Allen Brook watershed segment / portion of Construction Segment A) to Allen Brook and unnamed tributaries to Allen Brook, all waters of the State.

On October 18, 2002, Conservation Law Foundation (CLF) and Friends of the Earth (FOE) appealed the Discharge Permits to the Water Resources Board (Board). This appeal was filed pursuant to 10 V.S.A. § 1269. There were no cross appeals.

On October 25, 2002, the Board's Executive Officer acknowledged receipt of CLF/FOE's appeal and docketed it as WQ-02-11. A Notice of Appeal and Prehearing Conference was issued to persons in interest on November 6, 2002, and published in Seven Days on November 13, 2002, in accordance with Water Resources Board Procedural Rule (Procedural Rule) 22. November 25, 2002, was set as the deadline for entries of appearance.

The following entered timely notices of appearance in this matter: the Town of Williston on October 25, 2002; VTrans on November 8, 2002; and ANR on November 22, 2002. On November 14, 2002, the Village of Essex Junction entered its appearance and by resolution authorized the Greater Burlington Industrial Corporation (GBIC) to represent it in this appeal before the Board. On November 25, 2002, GBIC entered its appearance, filed a petition seeking intervention as of right or by permission, and forwarded a resolution and other supporting documentation that the Town of Essex authorized GBIC to represent it in this appeal.

On December 2, 2002, at 9:30 a.m., Chair David J. Blythe, Esq., convened a prehearing conference in the above-captioned matter at the Board's Conference Room in Montpelier, Vermont, pursuant to Procedural Rule 28. The Chair was assisted in the conduct of the prehearing conference by the Board's Associate General Counsel, Kristina L. Bielenberg, Esq. The following persons participated:

CLF, Appellant, by Mark Sinclair, Esq., Senior Attorney, CLF;
FOE, Appellant, by Mark Sinclair, Esq.¹;
ANR, by Warren T. Coleman, Esq., Environmental Litigation Attorney, and Glen Gross,
Esq., General Counsel, both of DEC, ANR;
VTrans by John K. Dunleavy, Esq., Assistant Attorney General;
Town of Williston by Paul S. Gillies, Esq., Tarrant, Marks & Gillies; and
GBIC by Dale A. Rocheleau, Esq., on behalf of itself and the Village of Essex Junction
and the Town of Essex.

Also present were: Richard J. Ranaldo, Special Projects Unit, VTrans; Harry Colombo
and John Benson of Dubois and King, Inc., for VTrans; Padraic Monks, Stormwater Section,
Water Quality Division, DEC, ANR; and Jon Groveman, Esq., Executive Officer, Water
Resources Board.

II. INTRODUCTIONS AND DISCLOSURES

Chair Blythe introduced himself and staff to those present at the prehearing conference.
He identified other current members of the Board: Lawrence H. Bruce, Jr., Esq.; Jane Potvin,
John D.E. Roberts; and Mardee Sánchez. See attached biographical statements.

The Chair noted that when CCCH Discharge Permit #1-0788.0202 was on appeal to the
Board in Docket No. WQ-02-01, he and member Potvin made certain disclosures to the
appellants and other interested persons. See attached memorandum dated May 21, 2002. He
noted that in that proceeding, none of the parties or persons in interest had filed written requests
for the disqualification of either Chair Blythe or member Potvin. Chair Blythe inquired of the
prehearing conference participants whether any of them objected to the participation in the
present proceeding of current Board members, including Jane Potvin and himself. Counsel for
the for the Appellants and counsel for all party status petitioners indicated that they had no
objection to participation of the five current Board members.

The Chair further informed the prehearing conference participants that, in the event that
one or more of the Board's current members should subsequently become unavailable or
disquali-fied, he, as Chair, would have the authority 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) and
Procedural Rules 3 and 4. He identified the following former Board members as possible
appointees to hear and decide matters in this proceeding: William Boyd Davies, Byrd LaPrade,

¹ Although Brian Dunkiel, Esq., of Shems Dunkiel & Kassel, PLLC entered his appearance
as co-counsel for the Appellants, counsel for CLF, Mr. Sinclair, indicated that he would
serve as lead counsel for both CLF and FOE in this proceeding.

Sheldon Novick, and Stephen Reynes. See attachments. These were the same former Board members identified at the prehearing conference in Docket No. WQ-02-01 and no prehearing conference participants objected to their participation in that proceeding.

III. PURPOSE OF PREHEARING CONFERENCE

The Chair explained that the Board is comprised of five citizen members appointed by the Governor and confirmed by the Senate. He emphasized that the Board is an agency entirely independent of ANR. He further noted that one of the Board's statutory charges is to hear appeals from ANR discharge permits, pursuant to 10 V.S.A. § 1269. As a part of his duties, the Chair noted that he is authorized to convene prehearing conferences to expedite the contested case 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 amongst the participants in entering negotiations to narrow or eliminate any issues in controversy; and (4) attempt to establish a schedule for filings leading to a hearing day. Procedural Rule 28(A).

The Chair advised the prehearing conference participants that the outcomes of this prehearing conference would be memorialized in a Prehearing Conference Report and Order (Prehearing Order), sent to all participants and interested persons.

IV. EX PARTE CONTACTS

The Chair cautioned prehearing conference participants against communicating directly with Board members during the pendency of proceedings before the Board. 3 V.S.A. §813. He directed all persons having procedural questions to bring them to the attention of the Board's counsel handling this case, Kristina L. Bielenberg, Esq. (Phone: 828-5443).

V. APPLICABLE BOARD RULES

The Chair inquired of the prehearing conference participants whether the applicable regulations in this case are the Board's Vermont Water Quality Standards (VWQS), effective July 2, 2000, and the Board's Rules of Procedure, effective January 1, 2002. He noted that CLF and

FOE had identified in their Notice of Appeal that the 2002 version of the VWQS is the applicable version. No such version exists.

Counsel for all of the prehearing conference participants agreed that the 2000 VWQS and 2002 Rules of Procedure were the applicable Board regulations.

VI. ALTERNATIVE DISPUTE RESOLUTION

The Chair advised the prehearing conference participants that the Board encourages alternative dispute resolution. He invited them to meet after the prehearing conference to discuss whether settlement and the submission to the Board of any stipulated facts or conditions might be feasible. He noted that additional time could be built into the schedule of this proceeding to allow for informal resolution if the parties believe that the issues in this proceeding can be resolved and/or narrowed through negotiation or mediation.

VII. PRELIMINARY ISSUES

None of the prehearing conference participants identified in writing prior to the prehearing conference any preliminary issues requiring resolution by the Board. The Chair, however, inquired whether the participants had since identified any preliminary issues that should be resolved prior to a merits hearing.

A. Continuance

Counsel for CLF/ FOE asked VTrans and ANR to clarify when construction phase discharge permits would be issued by ANR for the two segments of the Project. Counsel for ANR indicated that it might be another three or four months before construction permits would be issued. Accordingly, counsel for CLF/ FOE asked the Chair to grant a continuance of this appeal until such time as the construction phase permits were issued in order that any appeals of those permits might be joined with pending Permit appeal.

All representatives for prehearing conference participants agreed that a continuance was warranted so that both operational and construction phase permit appeals might be consolidated for hearing, although some issues raised with respect to one set of permits might not be identical to those raised for the others. After a brief recess, counsel for ANR suggested that a continuance granted to Monday, March 17, 2003, would probably allow sufficient time for the issuance of the construction permits and the passing of any appeal period.

Counsel for CLF/FOE also raised the question whether a continuance should be granted

until the Federal Highway Administration completes its National Environmental Policy Act (NEPA) review of the CCCH Project. He suggested that this might take six months.

Representatives for other prehearing conference participants objected to a six-month continuance.

The Chair reserved ruling on the question whether this appeal should be continued until the NEPA review is completed. However, he indicated to the prehearing conference participants that he was inclined to not proceed beyond the preliminary phase of the pending appeal until such time as the construction permits are issued for the two segments of the Project at issue in Docket No. WQ-02-11. Accordingly, he indicated that he would convene another prehearing conference on March 17, 2003, or shortly thereafter, at which time the parties could request a further continuance or ask that all related appeals be consolidated and scheduled for a hearing on the merits.

B. Standing

Counsel for VTrans indicated that it had not yet decided whether it would object to the Appellants' standing. However, he asked for an opportunity to brief the issue as a preliminary matter.

The Chair indicated that the Prehearing Order would provide prehearing conference participants with an opportunity to brief any standing issues, and also an opportunity for responses and requests for oral argument, prior to any rulings by the Board on standing challenges.

The prehearing conference participants are directed to the Chair's recent ruling on organizational standing, with guidance on application of the 2002 Rules of Procedure, in the matter, Re: Clyde River Hydroelectric Project, Docket No. WQ-02-08(A), (B), (C), Prehearing Conference Report and Order at 4-9 (Oct. 25, 2002).

C. Party Status and Representation

The Chair noted that a number of persons who filed timely notices of appearance qualify as interveners as of right pursuant to Procedural Rule 25(B). They are:

ANR, pursuant to Procedural Rule 25(B)(5);
VTrans, as Permittee, pursuant to Procedural Rule 25(B)(1); and
the Town of Williston, Village of Essex Junction, and Town of Essex, through their legislative bodies, pursuant to Procedural Rule 25(B)(2).

The Chair observed that Rule of Procedure 27(B) contemplates that either a licensed attorney or other qualified representative (natural person) may appear on behalf of a bonafide party. He stated that this Rule was not intended to be read so as to allow an entity which does not qualify for party status in its own right to secure party status vicariously by virtue of its representation of parties of right. The Chair observed that while the governing board of GBIC might include the “chief officer” (i.e.: the Town Manager) of each town or city in Chittenden County, this does not mean that the municipalities of the Village of Essex Junction and the Town of Essex are members of GBIC, thereby conferring representational status on GBIC. The Chair noted that he could find no Board precedent that would allow GBIC to represent two Vermont municipalities and thereby qualify for party status of right.

The Chair, nevertheless, concluded that GBIC qualifies as a permissive intervener pursuant to Board Procedural Rule 25(C). That rule states that: “A person may, in the discretion of the Board ... , may be permitted to intervene in any proceeding when that person demonstrates an interest which is related to the statute or Board rule at issue and may be affected by the outcome of the proceeding. In exercising its discretion, the Board shall consider: (1) whether the person’s interest will be adequately protected by other parties; (2) whether alternative means exist by which the person can protect its interest; and (3) whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or of the public.”

The Chair concluded, based on his review, within the specific context of this case, of GBIC’s petition for party status, that GBIC has a sufficient interest in its own right concerning how new stormwater management legislation² will be implemented and what impacts such regulation will have on water quality in Chittenden County, as well as on the businesses in the region, as to merit the grant of intervention by permission to GBIC. The Chair noted that no other person entering an appearance in this proceeding shares GBIC’s organizational perspective on the matters at issue and can therefore adequately protect GBIC’s interest in the subject matter of this proceeding and the present appeal is the only forum in which GBIC can participate in stormwater litigation regarding the two segments of the CCCH Project covered by the Permits. Furthermore, GBIC’s participation will not unduly delay the proceeding or prejudice the interests of existing parties or the public provided that GBIC directs its evidence and argument to the water quality issues raised by this appeal. Accordingly, the Chair ruled that GBIC is granted intervention by permission pursuant to Rule 25(C).

The Chair further clarified that the Village of Essex Junction and the Town of Essex qualify as parties of right and that the Prehearing Order would provide their legislative bodies with the opportunity to file new entries of appearance through counsel, consistent with Board

² 10 V.S.A. § 1264 (stormwater management), as recently amended by Act No. 109 (Adj. Sess.).

Procedural Rule 27(B). The Chair observed that his ruling did not preclude those municipalities from electing to be represented by the same counsel as that representing GBIC or from coordinating their respective cases with GBIC. In other words, the municipalities' choice of counsel and strategies for preparing and presenting their cases is within their discretion.

As provided for in Subpart A. with respect to standing, the Prehearing Order will provide prehearing conference participants with an opportunity to brief and respond to party status objections.

VIII. ISSUES

The Chair concluded that review of the issues in this appeal should be deferred until a subsequent prehearing conference, at which time all issues in the pending and any subsequent related appeals could be considered and possibly joined.

IX. SCHEDULING CONFLICTS

All prehearing conference participants are urged to look at their calendars and alert the Board's counsel immediately of any major scheduling conflicts between now and any proposed hearing dates in this matter. Scheduling is done to facilitate the Board's schedule, but reasonable accommodation can occur if counsel for the parties alert the Board and its staff of conflicts in advance of a deadline and hearing date. See, for example, Procedural Rule 8(D).

X. OTHER MATTERS

A. Standard of Review

Any hearing on the merits in this appeal shall be conducted as a de novo proceeding pursuant to 10 V.S.A. § 1269. As a consequence of the de novo standard, the prehearing conference participants are forewarned that any evidence that might have been submitted to the ANR in support of or in opposition to the application for the Permits, including the applications themselves, the Permits, responsiveness summaries, and any ANR regulations or guidance documents used in the review of the Permits, must be resubmitted to the Board in the form of prefiled exhibits in this proceeding.

Should this appeal be decided on the merits, the Board will issue an order affirming, reversing or modifying the act or decision of the ANR. 10 V.S.A. § 1269. VTrans has the burden of proof, by a preponderance of the evidence, to show that a decision and permit should

issue authorizing the Project Discharge.

B. Service List

The prehearing conference participants are advised that they should use the certificate of service accompanying this Prehearing Order to determine who should receive copies of all filings, until such time as all standing and party status determinations become final, at which time the certificate of service may be further revised. Parties are not required to serve filings on persons listed under the "For Your Information" section of the certificate of service. Parties' representatives are responsible for advising the Board of any changes in their own or client's addresses, including changes related to the assignment of new 911 street numbers or a move to a seasonal residence.

C. Rules on the Board's Web Site

Those intending to participate in this proceeding are advised to obtain copies of the Procedural Rules, effective January 1, 2002, as well as applicable Vermont Water Quality Standards to prepare for the hearing in this matter. These rules are available by downloading text from the Board's Web site: **<http://www.state.vt.us/wtrboard>**

XI. ORDER

1. The following are parties of right to this proceeding:

VTrans, pursuant to Procedural Rule 25(B)(1);
ANR, pursuant to Procedural Rule 25(B)(5);
and the Town of Williston, pursuant to Procedural Rule 25(B)(2).

The Town of Essex and the Village of Essex Junction qualify for intervention of right, pursuant to Procedural Rule 25(B)(2), provided that they file new entries of appearance consistent with the instructions in Section VII.C. above, on or before **4:30 p.m., Tuesday, December 31, 2002.**

GBIC is granted permissive intervention, pursuant to Procedural Rule 25(C).

2. On or before **4:30 p.m., Tuesday, December 31, 2002**, any party or petitioner seeking to challenge the standing of one or both Appellants or the Chair's preliminary rulings concerning party status as provided in Item 1 above, shall file with the Board a motion to that effect supported by legal memorandum. This also shall be the deadline for filing

legal memoranda raising any other preliminary issues.

3. Any requests for disqualification of any of the current Board members or former Board members identified in Section II. above, or any requests for further disclosure, shall be filed on or before **4:30 p.m., Tuesday, December 31, 2002**. Any such request for disqualification shall be supported with a statement of alleged facts and a memorandum of law in support of such disqualification. The failure to file a timely request for disqualification or request for further disclosure shall be deemed waiver of any objections to the participation of any current or former Board member identified in Section II. above.
4. On or before **4:30 p.m., Tuesday, January 14, 2003**, any party or petitioner may file a legal memorandum in response to filings made pursuant to Item 2 above. CLF and FOE also may supplement by this deadline their standing petition and any party status petitioner may supplement its petition to respond to a challenge made pursuant to Item 2. Such supplementation may include affidavits, and shall include any requests for oral argument.
5. On or before **4:30 p.m., Tuesday, January 21, 2003**, any party or petitioner may file a legal memorandum in reply to any filing made in pursuant to Items 3 and 4 above. Any memorandum containing citations to case decisions from jurisdictions other than Vermont or reference regulations not adopted by the Board, shall include as attachment copies of those decisions or regulations. Any party or petitioner filing legal memorandum shall indicate whether it requests to participate in oral argument with respect to challenges to standing or party status should such argument be requested pursuant to Item 4 above.
6. Should oral argument be requested with respect to a standing or party status challenge or with respect to any other preliminary ruling timely raised shall be heard by the Board on **Tuesday, January 28, 2003**, at a time and place to be confirmed by subsequent notice.
7. ANR shall file with the Board a statement that it has issued construction phase stormwater permit(s) for the two segments of the CCCH Project at issue in this appeal. If ANR has not filed such a statement by mid-March 2003, ANR or any other party shall file with the Board, on or before **4:30 p.m., Monday, March 17, 2003**, a motion for continuance of this matter. Said motion shall propose a date certain by which it projects that such permit or permits shall issue.
8. No pre-filing schedule shall issue in this matter until the Chair conducts a second pre-hearing conference in this matter. Such prehearing conference is scheduled for **9:30 a.m., Monday, March 24, 2003**, in the Board's Conference Room in Montpelier. In the

event that a party has moved for a continuance pursuant to Item 7 above, this prehearing conference may be rescheduled for a later date.

9. In the event that a party or petitioner expects that it cannot comply with the above schedule, it shall immediately notify the other parties or petitioners and comply with the requirements of Procedural Rule 8(D).
10. Pursuant to Procedural Rule 28(B), this Prehearing Order is binding on all parties who have received notice of the prehearing conference, unless a written objection to the order, in whole or in part, is filed on or before **4:30 p.m., Thursday, December 19, 2002**, or a showing of cause for, or fairness requires, waiver of a requirement of this Prehearing Order. The filing of an objection shall not automatically toll that portion of the order to which an objection is made.

Dated at Montpelier, Vermont, this 10th day of December, 2002.

WATER RESOURCES BOARD
By its Chair

\s\ David J. Blythe

David J. Blythe, Esq.