

**State of Vermont
WATER RESOURCES BOARD**

**Re: Stormwater NPDES Petition
Docket No. WQ-03-17**

PREHEARING CONFERENCE REPORT AND ORDER

(Issued Dec. 9, 2003)

I. Procedural Background

On September 26, 2003, the Vermont Agency of Natural Resources (ANR) denied a petition (Petition) filed by the Vermont Natural Resources Council (VNRC) and the Conservation Law Foundation (CLF) seeking a determination that existing discharges into Potash, Englesby, Morehouse, Centennial, and Bartlett Brooks contribute to violations of the Vermont Water Quality Standards and require National Pollutant Discharge Elimination System (NPDES) permits. On October 23, 2003, VNRC and CLF (Petitioners or Appellants) appealed ANR's decision to deny to their Petition to the Vermont Water Resources Board (Board). This appeal was timely filed pursuant to 10 V.S.A. § 1269 and docketed by the Board as indicated above.

In a letter issued October 31, 2003, the Board's Executive Officer, Jon Groveman, acknowledged receipt of the Notice of Appeal and determined, pursuant to Board Procedural Rule 20, that the Notice of Appeal is substantially complete. In accordance with Procedural Rule 22, Mr. Groveman issued a Notice of Prehearing Conference to persons in interest on October 31, 2003 and published the Notice of Prehearing Conference in *Seven Days* on November 5, 2003. The Notice of Prehearing Conference established November 20, 2003 as the deadline for filing written petitions for party status and entries of appearance in accordance with Procedural Rules 25 and 27. In addition, the Notice of Prehearing Conference scheduled the prehearing conference in this matter for November 24, 2003, beginning at 9:30 a.m.

The Executive Officer's October 31, 2003 letter acknowledging the Notice of Appeal in this matter was accompanied by a Referee Appointment Order issued on that date by the Board's Chair, David J. Blythe. The Referee Appointment Order appoints Jon Groveman as Referee in this appeal for the purposes of conducting the first prehearing conference, drafting a prehearing conference report and order that will be reviewed and issued by the Chair, and issuing orders with regard to requests for extensions of filing deadlines. The deadline for filing objections to the Referee Appointment Order, by its terms, was fifteen days from the date of its issuance. No objections to the Referee Appointment Order have been received.

The Appellants in this matter are represented by General Counsel Kelly D.H. Lowry for VNRC and Senior Attorney Christopher M. Killian for CLF, who entered their appearances on the Appellants' October 23, 2003 Notice of Appeal. Mr. Lowry also filed a Notice of Appearance on November 24, 2003. On November 4, 2003, Attorney Joseph S. McLean of the firm Stitzel, Page & Fletcher entered his appearance on behalf of the City of South Burlington (South Burlington), which subsequently filed a petition for party status on November 21, 2003. On November 20, 2003, Attorneys R. Bradford Fawley and William J. Dodge of the firm Downs, Rachlin & Martin filed entries of appearance in the form of petitions for party status on behalf of Martin's Foods of South Burlington, Inc. (Martin's Foods); Pomerleau Properties, Inc. (Pomerleau Properties); and the Greater Burlington Industrial Corporation (GBIC). On November 24, 2003, Attorneys Glen Gross and Warren C. Coleman filed entries of appearance on behalf of ANR. No other entries of appearance or petitions for party status have been filed.

On November 24, 2003, at 9:30 a.m., Mr. Groveman convened the prehearing conference in this matter at the Board's Conference Room in Montpelier, Vermont, pursuant to Procedural Rule 28. The Referee was assisted by Associate General Counsel Daniel D. Dutcher. The following persons participated: The Appellants, by Attorney Kelly Lowry; ANR, by Attorneys Glen Gross and Warren Coleman; South Burlington, by Attorney Joe McLean; and Martin's Foods, Pomerleau Properties, and GBIC by Attorney Bradford Fawley.

II. Purpose of the Prehearing Conference

The Referee explained that the Water Resources Board is a five-member citizen Board appointed by the Governor. The Referee noted that one of the Board's duties is to hear appeals from decisions of ANR, pursuant to the Vermont Water Pollution Control Act, 10 V.S.A. §§ 1250-1283. The Referee further advised that as part of the Board's duties in a contested case proceeding, the Board, the Board's Chair, or an appointed referee is authorized to convene prehearing conferences to expedite the hearing process. *See* Procedural Rule 28.

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

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

III. Introductions and Disclosures

The Referee introduced himself and identified the current members of the Board: Chair David Blythe, Esquire, Vice-Chair John Roberts, and Members Jane Potvin, Lawrence Bruce, Esquire, and Mike Hebert. The Referee indicated that the Board 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 Referee distributed to the prehearing conference participants copies of biographical notes for each of the current Board members. The Referee also advised that Board Member biographies and other information about the Board are available on the Board's web site: www.state.vt.us/wtrboard. The Referee 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. As the Referee informed the prehearing conference participants, a deadline for filing further requests for disclosure or objections to the participation of any current Board member in this appeal is set forth below.

IV. Ex Parte Contacts

The Referee cautioned 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 are directed to bring them to the attention of the Board's co-counsel handling this case: Daniel D. Dutcher, Associate General Counsel (phone: 828-3063) and Jon Groveman, Executive Officer (phone 828-3355).

V. Standard of Review and Burden of Proof

The Referee explained that 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 were forewarned that any evidence that might have been submitted to or generated by ANR in support of or in opposition to the Petition (such as the Petition, ANR's denial of the Petition, and any ANR rules or state or federal guidance documents relevant to the Board's review of the Petition) must be submitted to the

Board as evidentiary exhibits. As provided by 10 V.S.A. § 1269, "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 Referee advised that should this appeal be decided on the merits after a hearing, the Board will issue an order affirming, reversing, or modifying the act or decision of ANR. *See* 10 V.S.A. § 1269. After hearing from the parties, the Referee determined that the Appellants carry the burden of proof, by a preponderance of the evidence, to show that the Petition should be granted, in whole or in part. The burden of proof includes the ultimate burden of persuasion and the initial burden of production. *See generally In re Lyon*, No. EPR-03-16, Prehearing Conference Report and Order at 5-6 (Vt. Water Res. Bd. Nov. 13, 2003) (finding that in Board practice, party seeking to change status quo and asserting affirmative of issue generally carries burden of proof and that burden of proof generally includes both burden of persuasion and initial burden of production). The Chair agrees with the Referee's decision that the Appellants will carry the burden of proof, including both the burden of persuasion and the initial burden of production, at any hearing on the merits in this appeal.

VI. Informal Dispute Resolution

The Referee advised that the Board encourages alternative dispute resolution. He noted that additional time can be built into the schedule of this proceeding to allow for such informal resolution if the parties believe that the issues in this proceeding can be resolved and narrowed through negotiation or mediation. The Referee encouraged the parties to enter into stipulations of fact that will narrow the issues for any evidentiary hearing on this matter. The Referee further advised that if the parties can agree on all relevant facts, the Board may be able to resolve this case on the basis of stipulated facts and memoranda submitted by the parties.

VII. Preliminary Issues

A. Standing/Party Status

The Referee inquired of the prehearing conference participants whether there were any standing or party-status objections. There were no objections to legal standing or party status. Although the parties stated that they did not anticipate filing objections to party status following the prehearing conference, the parties requested the opportunity to do so by a time certain. The Referee granted this request. Accordingly, deadlines for filing any objections to legal standing or party status and for filing responses to any such objections are set forth below.

Subject to any subsequent rulings by the Chair or the Board on any objections to legal standing or party status, the Chair determines that the following are parties as of right:

VNRC, pursuant to Procedural Rule 19;

CLF, pursuant to Procedural Rule 19;

ANR, pursuant to Procedural Rule 25(B)(5);

South Burlington, pursuant to Procedural Rule 25(B)(2);

Martin's Foods, pursuant to Procedural Rule 25(B)(8);

Pomerleau Properties, pursuant to Procedural Rule 25(B)(8); and

GBIC, pursuant to Procedural Rule 25(B)(8).

VNRC and CLF shall submit their legal arguments and evidentiary exhibits jointly in this appeal.

Martin's Foods, Pomerleau Properties, and GBIC (Intervenors) shall submit their legal arguments and evidentiary exhibits jointly in this appeal.

B. Scope and Effect of the Petition and Notice of Appeal

As noted, above, the notices of appearance filed on behalf of the Intervenors in this matter are in the nature of a petitions for party status. Each of these petitions for party status raises eight issues with respect to this appeal. On November 24, 2003, the Intervenors filed a Motion to Stay and Memorandum in Support. In their Motion to Stay, the Intervenors ask the Board to stay this appeal until related litigation currently pending in the United States District Court for the District of Vermont is resolved.

The Intervenors rely on Board Procedural Rule 29(D) in support of their Motion to Stay and cite Procedural Rule 23 in the alternative. At the prehearing conference, Mr. Dutcher offered the opinion that Rule 29(D) applies to preliminary stays of certain decisions of ANR and not to stays of appeals filed from decisions of ANR. Mr. Dutcher therefore suggested that Procedural Rule 23, which authorizes the Chair to make preliminary rulings as to matters of

scheduling and continuance, among other things, would provide a more suitable basis for the Intervenor's Motion to Stay. The Intervenor advised that they are amenable to proceeding with their Motion to Stay on the basis of Rule 23.

The Referee heard from the parties on whether any of the issues raised by the Intervenor's Motion to Stay and by their petitions for party status or any other issues should be addressed as preliminary issues prior to any hearing on the merits in this appeal.

1. Pending Federal Litigation

The Intervenor argued that stormwater from property owned by one of the Intervenor in this appeal, Martin's Foods, is subject to pending litigation brought by CLF in federal district court in Vermont. The Intervenor asserted that in this federal litigation, CLF has alleged that all point-source discharges in the United States require NPDES permits. The Intervenor therefore argued that this appeal before the Board will become irrelevant if CLF prevails in federal court. The Intervenor stated that the parties to the federal action have filed their briefs and that the United States Department of Justice is expected to file a brief as amicus curiae on behalf of the United States Environmental Protection Agency.

As the Intervenor read the Notice of Appeal in this matter, the Appellant allege that all point source discharges into the named watersheds require NPDES permits. The Intervenor argued that a decision by the Board on this subject could be inconsistent with the decision that results from CLF's suit in federal district court in Vermont. The Intervenor contended that since the federal action was filed first, the Board should allow the federal court to rule before proceeding with this appeal. The Intervenor did not challenge the jurisdiction of the Board to decide the issues raised by the Notice of Appeal in this matter but did allege that the Vermont Supreme Court may not have the jurisdiction to review these issues in the event the Board's decision is appealed.

ANR agreed that it would make sense for the Board to stay this appeal until the federal litigation has been resolved, stating that the federal litigation may make this appeal moot.

The Appellant argued that they do contend that every point source discharge in the watersheds subject to this appeal requires an NPDES permit. However, the Appellant stated that the pending federal litigation is based on section 301 of the Clean Water Act, 33 U.S.C. § 1311, whereas the instant appeal rests on section 402 of the Clean Water Act, 33 U.S.C. § 1342. The Appellant described the pending federal litigation as encompassing a larger category of discharges than the case before the Board, which involves the discharges only into

the five streams named in the Notice of Appeal. According to the Appellants, these are not inconsistent positions. The Appellants agreed that if CLF prevails in the federal litigation, then this appeal to the Board will be unnecessary, but the Appellants maintained that if the federal suit is not successful, then this appeal to the Board will not be rendered moot by the decision of the federal court.

2. Jurisdiction of the Board

ANR argued that the Board does not have jurisdiction to hear this appeal. ANR contended that the Board's jurisdiction to hear appeals pursuant to 10 V.S.A. § 1269 is limited to actions that ANR takes pursuant to the Vermont Water Pollution Control Act, 10 V.S.A. §§ 1250-1283. ANR argued that the provision of the Water Pollution Control Act at issue in this appeal is unclear. Thus, even though ANR, rather than the federal government, took jurisdiction over the Petition, ANR asserted at the prehearing conference that jurisdiction over the appeal from ANR's action cannot lie with this Board.

ANR added that the Board lacks jurisdiction over this appeal not only because ANR's denial of the Petition was not an act or decision under the Water Pollution Control Act, but also because proper notice is essential to the Board's jurisdiction and such notice was not provided in this matter. ANR argued that if all discharges into the named watersheds require NPDES permits, then all dischargers must be given notice of this requirement. The notice issue, according to ANR, indicates that the appeal before the Board is not in the nature of a typical contested case, but more in the nature of a federal matter, a rule-making petition, or a request for a declaratory ruling with respect to the validity or applicability of rules pursuant to the Vermont Administrative Procedure Act, 3 V.S.A. §§ 801-849.

3. Rule-Making and Public Notice

The Intervenors asserted that the Petition covers every discharge in the named watersheds and that ANR's denial of the Petition should therefore be treated as a denial of a petition for rule-making pursuant to 3 V.S.A. § 806 rather than as an act or decision of ANR pursuant to the Vermont Water Pollution Control Act. The Intervenors argued that ANR cannot be compelled to engage in the rule-making process.

ANR stated that this issue relates to its challenge to the Board's jurisdiction in this matter.

The Appellants argued that the Petition requests NPDES permitting for all contributing discharges in the named watersheds and that this class of discharges is a question of fact. However, the Appellants added that the state has determined the class of discharges contributing to water quality standards violations. ANR countered that the Petition contends that all discharges in the named watersheds require NPDES permits. The Intervenors agreed with ANR's interpretation of the Petition and argued that the class of discharges identified by the Petition cannot be changed on appeal because ANR must have an opportunity to act on a petition before ANR's action may be reviewed by the Board. In support of their position, the Intervenors cited 40 C.F.R. § 122.26, which addresses whether "a discharge" of stormwater requires an NPDES permit.

4. Briefing Schedule

In view of the foregoing, the Referee decided that a briefing schedule would be established for certain preliminary issues in this matter. Deadlines are set forth below for the parties to file responses to the Intervenors' Motion to Stay and Memorandum in Support and for the Intervenors to file replies to any responses to their motion. In addition, deadlines are established below for the parties to file motions and responses with respect to the following preliminary issues:

1. Whether this appeal to the Board should be continued until the related litigation pending in the United States District Court for the District of Vermont (Docket No. 2:3-CT-121) has been finally resolved.
2. Whether the Board has jurisdiction to decide this appeal.
3. Whether the dischargers identified by the Petition as requiring NPDES permits have been adequately notified of the Petition and whether failure to provide adequate notice to these dischargers deprives the Board of jurisdiction to decide this appeal.

Motions, responses, and replies shall set forth all material facts in separately numbered paragraphs and shall be accompanied by separate memoranda of law. Motions for summary disposition or partial summary disposition and any responses shall comply with the requirements of Procedural Rule 36. If this matter is not resolved on the basis of the foregoing preliminary issues, the Chair or his designee will convene a second prehearing conference to establish a schedule for resolving additional legal issues or to establish a schedule for an evidentiary hearing on the merits of this appeal, prefiled evidence, and a site visit, as may be appropriate.

C. Other Preliminary Issues

The Referee asked the parties whether there were any other preliminary issues that needed to be resolved at this juncture. None were identified.

VIII. Witnesses, Exhibits, and Prefiling Schedule

If this appeal is not resolved on the basis of preliminary issues and proceeds to a hearing on the merits, the Chair or his designee will determine whether prefiled testimony and exhibits will be required. The Referee discussed with the parties whether a site visit will be necessary if this matter is not resolved on the basis of preliminary issues. After hearing from the parties, the Referee determined that a decision as to whether a site visit will be conducted will be made, if necessary, following the Board's decisions on the preliminary issues in this matter.

In the event this matter proceeds to a hearing, the parties are 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 will be required to file a joint proposed site visit itinerary for any site visit that takes place in this matter.

An order governing the prefiling of evidence, with specific instructions for the prefiling of testimony and exhibits, will be issued, if appropriate, following the Board's rulings on preliminary issues. The Board's usual practice is to stagger the filing of prefiled evidence such that the Appellants file their direct evidence first; then the other parties file their direct evidence two or three weeks later; and two or three weeks after that, all parties simultaneously prefile rebuttal evidence. A week or so after the prefiling of rebuttal evidence, all parties are provided with an opportunity to file written evidentiary objections and, a week after that, responses to evidentiary objections.

The Chair or his designee rules on evidentiary objections, hearing day scheduling issues, and other matters as necessary at a prehearing conference held two weeks or so before the Board's hearing. Objections to these rulings, which are typically issued in a prehearing conference report and order, may be preserved for Board review at the beginning of the hearing day. The Referee further noted that the Board generally requires that proposed findings of fact, conclusions of law, and orders be filed prior to the hearing. The parties generally have an opportunity after the hearing to file revised or supplemental proposed findings of fact, conclusions of law, and orders.

IX. Stenographer

All hearings and oral arguments are tape recorded. However, the Board, the Chair, or a referee may order the parties to retain a qualified court stenographer for a proceeding when the matter under consideration is complex or if the Board's final decision will likely be appealed. Alternatively, a party, may file a written request for stenographic recording at least 15 days before the proceeding. Stenographic costs may be borne by the party requesting the stenographer or may be shared by the parties. One copy of any transcript made of a proceeding must be filed with the Board at no cost to the Board. *See* Procedural Rule 32(B).

X. Filing and Service

With respect to all filings, including any prefiled testimony and exhibits and various motions, 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. *See* Procedural Rule 9. "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, and 9. The Board's offices are open from 7:45 a.m. to 4:30 p.m.

Parties should use the certificate of service accompanying this Prehearing Conference Report and Order to determine who should receive copies of all filings. Parties are not required to serve filings on persons listed under the "For Your Information" section of the certificate of service. Parties or their representatives are responsible for advising the Board of any changes in address.

XI. Hearing Day Schedule

Any hearing on the merits in this appeal will not be scheduled and the location of any hearing will not be established until the preliminary issues have been resolved. The Referee distributed to the prehearing conference participants two sample hearing-day schedules.

XII. Other

Those intending to participate in this proceeding are advised to obtain copies of the Board's Procedural Rules, effective January 1, 2002, to prepare for the hearing in this matter. These rules are available by downloading text from the Board's web site.

XIII. Order

1. The following are parties to this proceeding:

VNRC, pursuant to Procedural Rule 19; CLF, pursuant to Procedural Rule 19; ANR, pursuant to Procedural Rule 25(B)(5); South Burlington, pursuant to Procedural Rule 25(B)(2); Martin's Foods, pursuant to Procedural Rule 25(B)(8); Pomerleau Properties, pursuant to Procedural Rule 25(B)(8); and GBIC, pursuant to Procedural Rule 25(B)(8).

2. VNRC and CLF shall submit their legal arguments and evidentiary exhibits jointly in this appeal. Martin's Foods, Pomerleau Properties, and GBIC shall submit their legal arguments and evidentiary exhibits jointly in this appeal.
3. Any requests for disqualification of any Board members identified in Section III, above, or any requests for further disclosure, shall be filed on or before **December 23, 2003**. Any such request for disqualification shall be supported with a statement of alleged facts and a memorandum of law. The failure to file a timely request for disqualification or request for further disclosure shall be deemed a waiver of any objections to the participation of any current or former Board member identified in Section III, above.
4. On or before **December 23, 2003**, parties shall file any objections to the Chair's preliminary rulings on legal standing and party status. Said objections shall be supported by legal memoranda and include any requests for oral argument.
5. On or before **January 6, 2004**, any party wishing to do so shall respond to any filings made in accordance with paragraphs 3, and/or 4, above. Said responses shall be supported by legal memoranda and include any requests for oral argument.
6. On or before **January 13, 2004**, any party wishing to do so may file a response to the Intervenor's Motion to Stay and Memorandum in Support. Said responses shall be supported by legal memoranda and include any requests for oral argument.
7. On or before **January 13, 2004**, any party wishing to do so may file a motion with respect to the following preliminary issues:

- a. Whether this appeal to the Board should be continued until related litigation pending in the United States District Court for the District of Vermont (Docket No. 2:3-CT-121) has been finally resolved.
- b. Whether the Board has jurisdiction to decide this appeal.
- c. Whether the dischargers identified by the Petition as requiring NPDES permits have been adequately notified of the Petition and whether failure to provide adequate notice to these dischargers deprives the Board of jurisdiction to decide this appeal.

Said motions shall be supported by legal memoranda and include any requests for oral argument.

8. On or before **January 27, 2004**, the Intervenors shall file any reply to any responses to their Motion to Stay and Memorandum in Support filed in accordance with paragraph 6, above. Said reply shall be supported by a legal memorandum and any request for oral argument.
9. On or before **January 27, 2004**, any party wishing to do so may file a response to any motion filed with respect to the preliminary issues identified in paragraph 7, above.
10. Any oral argument on any requests, objections, or motions filed in accordance with the foregoing paragraphs shall take place before the full Board on **February 17, 2004, beginning at 9:30 a.m. at the Board's conference room in Montpelier, Vermont.** Parties shall each have up to ten minutes for argument with respect to all issues, inclusive of direct and rebuttal arguments and any questions from the Board. The Board will deliberate with respect to such arguments thereafter.
11. If appropriate after the Board addresses the foregoing issues, the Chair or his designee will convene a second prehearing conference to establish a schedule to resolve any additional legal issues in this matter or to schedule an evidentiary hearing on the merits of this appeal. The time and place of the second prehearing conference, if necessary, will be announced in a subsequent order. Until the preliminary issues in this appeal are resolved by the Board, no order scheduling an evidentiary hearing or setting forth the requirements or deadlines for the prefilng of evidence will issue.

12. 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.
13. Parties shall file an **original and six collated copies** of motions, legal memoranda, exhibits 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.) All legal motions, exhibits, and legal memoranda must be clearly organized in accordance with the Board's procedural rules. See Procedural Rules 9, 10, and 36.
14. Pursuant to Procedural Rule 28(B), this Prehearing Conference Report and Order is binding on all parties who received notice of the prehearing conference, unless a written objection to this Prehearing Conference Report and Order, in whole or in part, is filed on or before **December 23, 2003**, or a showing of cause 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 this Prehearing Conference Report and Order to which an objection is made.

Dated at Montpelier, Vermont, this 9th day of December, 2003.

WATER RESOURCES BOARD
By its Chair



David J. Blythe

