

**State of Vermont  
WATER RESOURCES BOARD**

**Re: Waters of the Green Mountain National Forest  
No. ORW-03-01**

**SECOND PREHEARING CONFERENCE REPORT AND ORDER**

(Issued Nov. 9, 2004)

**I. Background**

This matter involves a petition to designate various water bodies in the Green Mountain National Forest as outstanding resource waters (ORWs). The procedural history of this case and a summary of the legal background are set forth a Memorandum of Decision issued June 28, 2004. The parties and their representatives are identified in a Prehearing Conference Report and Order issued February 18, 2004. In accordance with a Chair's Order issued July 15, 2004, a site visit was conducted on September 14, 2004, and the parties have prefiled their direct, rebuttal, and surrebuttal evidence as well as evidentiary objections and responses. The July 15, 2004 Chair's Order established October 21, 2004 as the deadline for any party to request that the merits hearing in this matter be stenographically recorded. No requests to have the merits hearing stenographically recorded have been filed.

The July 15, 2004 Chair's Order scheduled a second prehearing conference for November 4, 2004. On October 19, 2004, a Notice of Prehearing Conference was issued to the parties. In keeping with this notice, Water Resources Board (Board) Chair John F. Nicholls convened a second prehearing conference on November 4, 2004 at approximately 10:00 a.m. at the Killington Town Office in Killington, Vermont. Assisting the Chair was the Board's Associate General Counsel Daniel D. Dutcher and the Board's legal assistant, Jeanne Bragdon.

**II. Purposes of the Second Prehearing Conference**

The second prehearing conference was convened for the following purposes:

- 1) To address the pending evidentiary objections filed by the parties,
- 2) To establish a schedule for the hearing on the merits, including the time that will be needed, and
- 3) To address any other preliminary issues.

### **III. Hearing Schedule**

#### **A. Hearing Dates**

After discussions with the parties, the Chair determined that the hearing on the merits will take place on December 7 and, if necessary, December 8, 2004. After the parties have filed their joint proposed hearing agenda, a Notice of Hearing, including a hearing agenda, will be issued.

#### **B. Hearing Location and Accommodations**

The Chair informed the parties that the hearing on the merits will take place at the Cortina Inn and Resort, 103 U.S. Route 4, Killington, Vermont.

In the absence of some function, the dining room at the Cortina Inn is not usually open for lunch. Parties who would like to eat lunch at the Cortina Inn during the hearing may contact the Board's Administrative Secretary, Karen Dupont (828-2870), no later than November 30, 2004. Ms. Dupont will then make arrangements with the Cortina Inn. Parties who would like to stay at the Cortina Inn for this hearing will need to contact the Cortina Inn directly to make reservations.

### **IV. Court Reporter**

The parties have not filed a request for the merits hearing to be stenographically recorded, and there were no requests for a court reporter at the second prehearing conference. The Chair will not on his own motion require the parties to hire a court reporter for the hearing in this matter. Pursuant to Board Rule of Procedure 31(B), the Board will record the hearing by electronic sound recording device.

### **V. Rulings on Prefiled Evidentiary Objections**

On October 14, 2004, Stratton Corporation (Stratton) filed objections to testimony and exhibits prefiled by Conservation Law Foundation (CLF) and the Vermont Natural Resources Council (VNRC) (Petitioners). The Vermont Agency of Natural Resources (ANR) also filed objections to the prefiled evidence of the Petitioners. The Petitioners filed responses to these evidentiary objections on October 21, 2004. No other evidentiary objections were filed.

#### **A. Stratton's Objections to Petitioners's Prefiled Evidence**

##### **1. Exhibit PETS-3 (GIS Maps)**

Stratton objects to GIS maps of the waters proposed for designation as irrelevant because these maps identify as exemplary aquatic communities areas of the Winhall River downstream

from the waters proposed for ORW designation. The Petitioners respond that these maps are relevant because protecting these allegedly exemplary aquatic communities constitutes one of the reasons why upstream areas of the Winhall River are appropriate for ORW designation. In its June 28, 2004 Memorandum of Decision in this case, the Board rejected the argument that aquatic communities downstream from the areas proposed for designation are irrelevant: “With regard to high-quality aquatic communities downstream from the areas proposed for designation, the theory of the Petition is that designating the upstream areas as outstanding will help protect these downstream areas based on the river continuum concept, which describes the ecological linkage between upstream and downstream areas.” (Mem. of Decision at 15.). Elsewhere in the Board’s June 28, 2004 Memorandum of Decision, the Board held that waters suitable for designation as ORWs based on their water quality values “include waters of the highest quality as well as waters of exceptional recreational or ecological significance.” (Mem. of Decision at 17.) The Petitioners may pursue their theory that areas of the Winhall River and its tributaries that have been proposed for designation as ORWs warrant ORW status based in whole or in part on the ecological significance of these waters with respect to downstream areas. Accordingly, Stratton’s objection to PETS-3 is **overruled**.

At the second prehearing conference, the Petitioners agreed not to rely on Exhibit PETS-3 for the location of exemplary aquatic communities outside the candidate waters. For this reason, the Chair **strikes** from the record the depictions of exemplary aquatic communities on Exhibit PETS-3 that are outside the candidate waters.

## **2. Exhibits PETS 21 through 35 (Prefiled Evidence Not Included Among the Exhibits Filed With Petition and Notice of Appeal)**

Citing Board rule of Procedure 18(B)(4), Stratton argues that any exhibits prefiled by the Petitioners that were not filed with the Petition are inadmissible. Rule 18(B)(4) provides in pertinent part that an ORW petition shall include “Copies of all exhibits which the petitioner intends to offer into evidence in support of the petition.” The Petitioners argue in response that the Board’s Rules do not preclude a party from supplementing a petition in a contested case and that Stratton’s reading of Rule 18(B)(4) is too narrow.

A petition to designate ORWs is not a civil complaint. As then Chair David J. Blythe determined in the first Prehearing Conference Report and Order in this matter, “The Petitioners are not required to make their case in their Petition.” (Prehrg. Conf. Rpt. and Order at 11.) Although a petition to designate ORWs needs to provide interested parties and the Board with adequate notice to proceed with the case, the Board’s Rules are not intended to make the petition both the first and the last word of the petitioners. In its June 28, 2004 Memorandum of Decision, the Board described the purpose of the Board’s Rules relating to ORW petitions: “The Petition is specific enough for the parties to prepare their cases and for the Board to determine whether the evidence offered in this matter is relevant to a named water body or its sources.” (Mem. of

Decision at 10.) The Board's Rules relating to contested cases are expressly applicable to petitions to designate ORWs. See Rule of Procedure 15(B). These Rules include detailed provisions relating to preliminary rulings, prehearing conferences, and evidence. Indeed, it may not be until after the prehearing conference--when the parties have been identified, the issues have been defined, and a schedule for the case has been established--that the petitioners will be able to fairly and efficiently present their evidence. Stratton's objection that the Petitioners did not include Exhibits PETS 21 through 35 with their Petition is **overruled**.

**3. Exhibit PETS-21, Page 13, Lines 16 through 22 (Direct Testimony of Richard Andrews)**

Stratton objects to, and asks the Board to exclude, the following testimony of Richard Andrews relating to a segment of the Winhall River that the Petitioners have proposed for ORW designation:

These waters have no apparent water quality degradation. Stream flows are good even in dry weather. Forest cover is continuous in their watersheds with the exception of very small wetlands and a few regenerating openings. The watersheds are remote and isolated. The western half of the watershed of the upper Winhall River has been protected in Lye Brook Wilderness for 20 years, and it had received little or no disturbance for many years before that.

(Ex. PETS-21 at 13.) Elsewhere in his prefiled testimony, Mr. Andrews states that he is trained in engineering and works as a journalist specializing in technical and business subjects, (*id.* at 1), and that he has spent three or four days a month in the Green Mountain National Forest for the past 25 years. (*Id.* at 2.) In addition, Mr. Andrews is or has been a member of a number of environmental organizations involved in recreation, maintenance, and preservation in the Green Mountain National Forest. Mr. Andrews is currently the Southern Vermont Field Representative for Forest Watch and a member of the Green Mountain Club. (*Id.* at 1.)

Stratton objects that Mr. Andrews is not qualified to offer an expert opinion and that in any event, he did not submit a resume outlining his qualifications as required by the July 15, 2004 Chair's Order. The Petitioners respond that Mr. Andrews is qualified to offer an expert opinion and that he should be permitted to testify as an expert regarding the condition of the Winhall River and its tributaries pursuant to V.R.E. 702. In the alternative, the Petitioners argue that Mr. Andrews's testimony is admissible as opinion testimony of a lay witness pursuant to V.R.E. 701.

The Chair's July 15, 2004 Order clearly states that "For each expert witness, the Petitioners shall file a resume or other statement of qualification." Although the Petitioners's prefiled evidence does not include a resume or statement of qualification for Mr. Andrews, Mr. Andrews does provide a statement of his qualifications on pages 1 and 2 of his prefiled direct

testimony. Generally, parties may make a stronger case for having a witness admitted as an expert by prefiling a resume or statement of qualifications with the prefiled testimony of the witness. However, the failure of the Petitioners to do so in this case with respect to Mr. Andrews does not itself preclude Mr. Andrews from offering an expert opinion.

Nevertheless, the Chair concludes that the portion of Mr. Andrews's testimony to which Stratton objects does not constitute expert testimony but rather opinion testimony by a lay witness. The testimony at issue is descriptive rather than inferential. Pursuant to V.R.E. 701, this testimony appears to be "rationally based on the perception of the witness," V.R.E. 701(a), and it may be "helpful to . . . the determination of a fact in issue," V.R.E. 701(b), namely whether the subject waters have exceptional values pursuant to Vermont's outstanding resource waters statute, 10 V.S.A. § 1424a(e). The Chair will therefore allow this testimony as opinion testimony of a lay witness, and the Board will assign it whatever weight it may be due. Stratton's objections are **overruled**.

#### **4. Exhibit PETS-31 (Portion of List of Candidate Waters Referring to Exemplary Aquatic Site)**

Stratton objects to a list of candidate waters provided by the Petitioners because this list refers to waters of the Winhall River outside the area proposed for designation as an "Exemplary Aquatic Site' on map." Stratton points out that Exhibit PETS-3 ("GIS maps"), identifies "Exemplary Aquatic Communities" rather than any "Exemplary Aquatic Site." Stratton further points out that on Exhibit PETS-33 ("Revised ORW Candidate Waters Maps (North/South)"), no exemplary aquatic areas are depicted. Stratton argues that the term "Exemplary Aquatic Site" is not relevant to any map submitted by the Petitioners and is not relevant to the issue of whether any of the candidate waters should be designated as ORWs and that the reference to the "Exemplary Aquatic Site" in Exhibit PETS-31 ("List of Candidate Waters in Green Mountains") must be excluded.

As set forth with regard to item 1, above, the Petitioners may pursue their theory that the exceptional value of candidate waters derives from their ecological connection to downstream waterways that have not been proposed for ORW designation. Moreover, the reference to an exemplary aquatic site rather than to exemplary aquatic communities in Exhibit PETS-31 is inconsequential. Accordingly, Stratton's objections to Exhibit PETS-31 are **overruled**.

At the second prehearing conference, the Petitioners agreed that the references to "Exemplary Aquatic Site" in Exhibit PETS-31 are intended to refer to exemplary aquatic communities within the waters proposed for designation as ORWs. For this reason, and because Exhibit PETS-3 has been modified accordingly, the term exemplary aquatic site throughout Exhibit PETS-31 shall be understood to refer to exemplary aquatic communities within the waterways proposed for ORW designation.

**5. Exhibits PETS-36, 37, and 40 (Prefiled Rebuttal Testimony, Resume, and Surrebuttal Testimony of William Bartlett)**

Stratton objects to the prefiled testimony and resume of William Bartlett, former Executive Officer of this Board. Mr. Bartlett offers his opinion on the meaning and application of the state and federal laws relating to this case, including prior decisions of the Board. Stratton argues that Mr. Bartlett's testimony constitutes inadmissible conclusions of law. The Petitioners respond that Mr. Bartlett does not present legal argument but rather testifies to matters of ORW policy. In addition, the Petitioners point out that ANR's prefiled testimony includes numerous instances of opinion testimony relating to ORW policy in Vermont.

The Chair finds that the distinction that the Petitioners have attempted to make between law and policy is meaningless with regard to Mr. Bartlett's proposed testimony. The Board may permit expert witnesses to set forth their understanding of the law to enable these witnesses to explain their factual opinions on ultimate issues. Experts may thus explain their policy assumptions or their understanding of the regulatory boundaries within which they have couched their expert opinions. Expert witnesses may provide opinions in specialized factual areas that may assist the Board in resolving mixed questions of law and fact in that certain factual information provided by expert testimony may assist the Board in arriving at a reasonable interpretation or application of the law. It may be appropriate under some circumstances for an agency witness to set forth the policy assumptions upon which other agency experts have organized their factual opinions. Any cross examination with regard to such legal matters included in a witness's testimony must be limited to clarification of the witness's assumptions. It is not appropriate for counsel to test the witness's understanding of the law or otherwise engage in legal argument on cross examination, much less to present testimony or other evidence to rebut a witness's legal conclusions, which counsel may address in closing argument or by way of post hearing brief.

Mr. Bartlett's testimony does not relate to the exceptional value of the candidate waters--a factual issue--but to the meaning of the law. While such matters may be useful to the Board, they may not be presented by a witness but must instead be presented by counsel in the form of legal argument. It is of no consequence that ANR witnesses have testified with regard to policy choices because there has been no objection to such testimony. Counsel for the Petitioners are free to adopt the arguments of Mr. Bartlett in their legal arguments in this case, provided they do not cite Mr. Bartlett's testimony but rather make any arguments in that testimony their own. Mr. Bartlett's rebuttal and surrebuttal testimony and his resume may not be admitted into the record as evidentiary exhibits. Stratton's objections to Mr. Bartlett's rebuttal and surrebuttal testimony and resume are **sustained**, and the Chair **strikes** these exhibits from the record.

**6. Exhibit PETS-38 (Governor's Statement Concerning Water Quality Standards)**

Stratton objects to a 1971 written statement prepared by Governor Dean Davis relating to the establishment of water quality standards for upland streams. Stratton argues that the statement is irrelevant and constitutes inadmissible hearsay. The Petitioners counter that the statement relates to the meaning of the ORW policy of the Vermont Water Quality Standards and urges the Board to take official notice of the statement as a state report or action.

Mr. Bartlett refers to Governor Davis's statement in support of his testimony, which as set forth in item 5, above, constitutes inadmissible legal argument. Like Mr. Bartlett's testimony, Governor's Davis's statement with regard to upland streams relates to issues of law rather than to the issues of fact in this case. If counsel for the Petitioners so choose, they may refer to Governor's Davis's statement in the course of their legal arguments, and they may refer the Board to this document, which the Board will review within its inherent discretion to consider legislative facts. However, this exhibit is not admissible into evidence. *See generally* V.R.E. 201, reporter's notes (distinguishing adjudicative facts from legislative facts). Stratton's objections to this exhibit are therefore **sustained**.

**7. Exhibit PETS-36, Page 8, Line 23 through Page 9, Line 13 (Prefiled Rebuttal Testimony of William Bartlett Referring to Exhibit PETS-38)**

Stratton objects to that portion of Mr. Bartlett's testimony that refers to Governor Dean Davis's 1971 written statement relating to the management of upland streams. This objection is **sustained** because as set forth in item 5, above, Mr. Bartlett's prefiled testimony is inadmissible in its entirety.

**B. ANR's Objections to Petitioners's Prefiled Evidence**

**1. Exhibit PETS-36 (Prefiled Rebuttal Testimony of William Bartlett)**

ANR objects to portions of Mr. Bartlett's rebuttal testimony for the reasons that Mr. Bartlett's testimony constitutes legislative interpretation and legal argument, that Mr. Bartlett's testimony would be irrelevant, immaterial, and prejudicial, and that Mr. Bartlett is not qualified to offer an expert opinion in this matter. ANR further contends that the federal outstanding national resource water (ONRW) process is irrelevant to this case. The Chair disagrees that the federal ONRW process is irrelevant to this case. In its June 28, 2004 Memorandum of Decision in this case, the Board concluded that "Vermont's Tier 3 antidegradation policy may be construed to be consistent with these federal requirements." (Mem. of Decision at 17.) However, as set forth in item A.5, above, Mr. Bartlett's prefiled rebuttal testimony constitutes legal argument and is therefore inadmissible in its entirety. ANR's objection is therefore **sustained**.

**2. Exhibit PETS-40 (Prefiled Surrebuttal Testimony of William Bartlett)**

ANR objects to Mr. Bartlett's surrebuttal testimony for reasons similar to those ANR cites in its objections to Mr. Bartlett's rebuttal testimony. Although here again, the Chair finds that federal law may be relevant to interpreting Vermont's ORW policy, ANR's objections are **sustained** because Mr. Bartlett's prefiled surrebuttal testimony constitutes inadmissible conclusions of law.

**3. Exhibit PETS-38 (Governor's Statement Concerning Water Quality Standards)**

As set forth in item A.6, above, the Board will consider Governor Davis's 1971 statement relating to upland streams if the Petitioners choose to rely in this document in the course of their legal argument. However, this document is not admissible into evidence, particularly because the relevance of this document is supported only by testimony that constitutes inadmissible conclusions of law. ANR's objection to this exhibit is **sustained**.

**VI. Combined Lists of Prefiled Exhibits, Stipulations; Joint Proposed Hearing Agenda; and Proposed Findings of Fact, Conclusions of Law, and Orders**

Pursuant to the July 15, 2004 Chair's Order, combined lists of prefiled exhibits; stipulations; a joint proposed hearing agenda; and proposed findings of fact, conclusions of law, and orders must be filed no later than November 15, 2004. Sample hearing agendas were distributed at the second prehearing conference. The Chair will review the joint proposed hearing agenda filed by the parties and issue a modified hearing agenda to the extent necessary.

**VII. Other Preliminary Issues**

At the second prehearing conference, the Chair circulated photographs that he took at the site visit in this matter and asked the parties whether there were any objections to these photographs being enlarged and admitted into evidence with a directory identifying the areas depicted. There were no objections.

No other preliminary issues were identified at the second prehearing conference.



### **VIII. Order**

1. The Chair's preliminary rulings in this Order shall become final and binding rulings of the Board unless specifically objected to in writing no later than **November 15, 2004**.
2. On or before **November 15, 2004**, all parties shall submit a single, combined list of all prefiled testimony and exhibits.
3. On or before **November 15, 2004**, the parties shall file any stipulations. These may be in the form of joint statements of fact or proposed joint decisions.
4. On or before **November 15, 2004**, the parties shall file any proposed findings of fact, conclusions of law, and orders.
5. The parties shall work together to develop a joint proposed hearing agenda. The parties shall prepare their cases and coordinate with each other in an effort to allow the hearing in this matter to be completed as expeditiously as possible. The parties shall file their joint proposed hearing agenda on or before **November 15, 2004**. The Board or the Chair may modify the joint proposed hearing agenda prior to or during the hearing for the convenience of the parties, the witnesses, and/or the Board and as justice requires.
6. The merits hearing in this matter will take place on **December 7 and, if necessary, December 8, 2004, at the Cortina Inn in Killington, Vermont**. Prior to the hearing, the Board will issue a hearing agenda based on the joint proposed hearing agenda submitted by the parties.
7. No later than **two weeks after the hearing on the merits**, any party may file any revised or supplemental proposed findings of fact, conclusions of law, and orders.
8. 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.
9. Pursuant to Procedural Rule 28(B), this Order is binding unless a written objection to this Order, in whole or in part, is filed on or before **November 15, 2004**, or a showing of cause or fairness requires a 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 9th day of November, 2004.

WATER RESOURCES BOARD  
By its Chair

/s/ John F. Nicholls

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John F. Nicholls