VERMONT WATER RESOURCES BOARD

W-NOTES

ANNOTATIONS and CITATIONS

January 2005

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WATER RESOURCES BOARD
W-NOTE INDEX
CITATIONS and ANNOTATIONS

January 2005

W-Note summaries are generated by the staff of the Water Resources Board to facilitate research of Board precedent. They have not been reviewed by the Board and do not constitute a formal decision.

Common References and Acronyms:

ANR	**The Agency of Natural Resources**
Board	**Water Resources Board**
CWA	**Clean Water Act**
DEC	**Department of Environmental Conservation**
NPDES	**National Pollutant Discharge Elimination System**
TMDL	**Total Maximum Daily Load**
VWQS	**Vermont Water Quality Standards**
VWR	**Vermont Wetland Rules**
WBR or Rules	**Board Rules of Procedure**
WIP	**Watershed Improvement Permit**
WLA	**Waste Load Allocation**

Case references listed within are intended to provide simple access to the text of the decisions. ***The references are not in proper citation form.*** Citations to cases in legal memoranda should conform to the following format:

- Appeals -- *Case Name*, Docket Number, Type of Decision (Date of Decision).

  e.g., Re: Darryl and Stephanie Landvater, CUD-96-06, Findings of Fact, Conclusions of Law and Order (08/28/97).

- Declaratory Rulings -- *Case Name*, Declaratory Ruling # ___, Type of Decision (Date of Decision).

  e.g., Re: S.T. Griswold & Company, Inc., WET-98-02DR, Decision (09/16/98)

If you have any questions or comments about the W-Notes, please contact Kristina L. Bielenberg, Associate General Counsel (828-5443; kristina.bielenberg@state.vt.us).

I. NATURE AND SCOPE OF POWERS (1001-1030)

1001. General

* The standing and case and controversy requirements enforce the separation of powers between the three different branches of government by confining the judiciary to the adjudication of actual disputes and preventing the judiciary from presiding over broad-based policy questions that are properly resolved in the legislative arena. *Village of Ludlow (Ludlow Wastewater Treatment Facility),* WQ-01-08, Memorandum of Decision (04/05/02).

* Although the Board is not an Article III court, the Board is nevertheless limited in its quasi-judicial powers to determining actual controversies that arise between identified parties and that come to the Board for review under express statutory authority. *Id.*

* Board did not have the authority to hear and determine disputes between riparian users regarding use or allocation of the subject waters and, in particular, claims for "compensation" in connection with such matters; such disputes must be heard by a superior court. *Vermont Natural Resources Council (Sugarbush),* DAM-92-02 and WQ-92-05, Findings of Fact, Conclusions of Law and Order (02/08/93) and Memorandum of Decision (03/01/93); *see In re Application of Snowbridge, Inc., Appeal of VNRC, et al.,* S-197-93 VnCa (02/12/97) (Dismissal by Stipulation).

* Board cannot adjudicate private damage claims or provide general equitable relief; these matters are reserved to the courts. *Id.*

1002. Amendments to Statute; New Statute; Repeal

* Had the General Assembly intended to pass legislation determining that the Applicant's plan met the substantive standards of Act 51 (1997), it could have expressly amended Act 51 to so provide or included language in Section 47a of Act 61 (2001) designed to supersede Act 51's substantive requirements as applied to the Applicant by including language to the effect, "notwithstanding any provisions of law to the contrary." It did neither. *Town of Shoreham Wastewater Treatment Facility*, WQ-00-11, Memorandum of Decision on Motion to Dismiss (07/31/01).

* In accordance with 1 V.S.A. § 213, a new act of the General Assembly cannot change the substantive standards affecting an action begun or pending at the time of the act's passage. *Id.*

* Section 47a of Act 61 (2001) does not purport to be an amendment to Act 51 (1997); however, even if it were construed as an amendment to Act 51, it could not apply to the case in progress if it would affect a pre-existing "right, privilege, obligation or liability." Under Act 51, any municipality qualifying as a pilot project has a statutory obligation to comply with the substantive standards of that act. *Id.*

* Were the Board to construe Section 47a of Act 61 (2001) as the Applicant suggested, it would have completely vitiated the pending proceeding and the need for a determination that the Applicant's plan complies with state statutory standards intended to protect the water quality of Lake Champlain. *Id.*

1003. Concurrent and Conflicting Jurisdiction

* The Board has not been granted the powers of equity to order ANR to fulfill its legal obligations nor does the Board have jurisdiction to review on appeal ANR's enforcement actions or declaratory rulings. *Citizens for Safe Farms, Inc. (Hinsdale Farm*), WQ-04-02, Memorandum of Decision (10/14/04); *appeal docketed,* No. 2004-510 (11/18/04) (pending).

* Actions taken by ANR pursuant to the Agricultural Non-Point Sources Pollution Reduction Program, 6 V.S.A. §§ 4810-4855, *amended by* Act 149 of 2004, are not appealable to the Board because that statutory program provides for appeals to Environmental Court from decisions of the Secretary of Agriculture, and limits those appeals to the permit applicant and the Secretary of Agriculture. *Id.*

* The authority of the Board to designate waters as outstanding resource waters under the VWQS does not extend to designating waters as outstanding national resource waters under federal law. Although the Board does not apply federal anti-degradation requirements directly, Vermont's Tier 3 anti-degradation requirements are intended to be consistent with federal Tier 3 regulations. *Waters of the Green Mountain National Forest*, ORW-03-01, Memorandum of Decision (06/28/04).

* Motions to stay an appeal from ANR's denial of a petition to exercise its residual designation authority to require federal permits for stormwater discharges pending the outcome of related litigation in federal district court were denied. As a state delegated to administer the Clean Water Act, Vermont had a duty to act on the petition without waiting for the federal litigation to become final, which could take years. In addition, inconsistent results between the Board and the district court were not likely because the theories presented to the federal court and to the Board were different. *Stormwater NPDES Petition*, WQ-03-17, Memorandum of Decision (04/01/04).

* Absent express statutory authority, the Board does not have jurisdiction to stay a decision of ANR. *Vermont Agency of Transportation (Route 7),* WQ-03-01, Memorandum of Decision, (08/28/03).

* ANR's permit amendment extending expiration date of stream alteration permit under appeal to the Board was *void ab initio*, since ANR had no jurisdiction to amend the permit. *Terry Thomas*, SAP-01-06, Findings of Fact, Conclusions of Law and Order (01/08/02).

* Scope of amended permit under appeal was limited to the discharge of stormwater runoff and did not include non-stormwater discharges from a proposed garden center; accordingly, while Board did not review such non-stormwater discharges, it nonetheless concluded that the Secretary of ANR had authority to evaluate such discharges and could impose conditions, including the preparation, filing, and implementation of such pollution prevention plan as necessary to assure the protection of surface and groundwater quality. *Home Depot, USA, Inc. et al.*, WQ-00-06, Findings of Fact, Conclusions of Law, and Order (02/06/01) and Memorandum of Decision re: Motion to Alter (03/16/01); *dismissed with prejudice,* SO-244-01 RcCa (07/11/01).

* ANR conducts the initial review of a CUD application and the Board's role is to conduct a *de novo* review of the application. While the law may allow the Board to consider new evidence and proposed monitoring requirements that were not reviewed by ANR, the Board's fundamental obligation is to review the merits of the same application that was reviewed by ANR. *Champlain Marble Company*, CUD-97-06, Memorandum of Decision and Remand Order (05/07/98).

* When an appeal from a Department of Environmental Conservation decision is timely filed with the Board, the cause is transferred to the Board from the Department, and the Department is divested of jurisdiction with respect to all matters within the scope of the appeal. *Laurence and Roberta Coffin*, MLP-97-05, Chair's Preliminary Ruling (08/12/97).

* While the Executive Officer issued an advisory opinion concluding that the appeal was deficient in certain substantial respects, jurisdiction remained with the Board during the time that the appellants were afforded an opportunity to supplement their notice or seek review by the full Board; at no time was jurisdiction returned to the Department and therefore the permit amendment, issued by the Department during the pendency of the matter before the Board, was *void ab initio*. *Id.*

* Where Appellant filed a timely appeal of a conditional use determination, the ANR had no jurisdiction to issue an amended Conditional Use Determination for the project that was the subject of the appeal. *Jamie Badger*, CUD-96-07, Memorandum of Decision and Order of Remand (06/04/97).

* A conditional use determination was void *ab initio* if it was "issued" by a body with which jurisdiction did not lie. *Id.*

* A party's filing of a notice of appeal with the superior court during the pendency of a hearing before the Board did not automatically divest the Board of jurisdiction nor stay its proceeding on the merits. *Robert A. Gillin*, MLP-94-01, Findings of Fact, Conclusions of Law, and Order (08/23/94), *aff'd, Robert A. Gillin v. Department of Fish & Wildlife and Department of Environmental Conservation*, 608-11-95 WnCv & 616-11-95 WnCv (09/22/97); *aff'd, Robert A. Gillin, Trustee v. State of Vermont,* No. 98-022 (06/30/99).

* Board has authority to hear appeals from decisions of the Secretary to "grant, deny, renew, revoke, suspend, annul or withdraw a permit" under 3 V.S.A. § 2873 (c)(4); however, it does not have appellate authority to adjudicate enforcement matters. *Vernon Squiers* EPR-94-06, Dismissal Order (01/03/95).

* The Board's Dismissal Order had no bearing on an amendment issued by ANR during the pendency of an appeal of the underlying conditional use determination. Indeed, the Board questioned the authority of ANR to issue such an amendment when jurisdiction over the conditional use determination was with the Board. *Proctor Gas, Inc.*, CUD-93-02, Dismissal Order (10/27/93).

* The Board and the Secretary of ANR each have broad authority to protect Vermont's significant wetlands. A person may request a conditional use determination from the Secretary that a proposed development within a significant wetland or its buffer zone is in compliance with the VWR. That determination, which is in the nature of an advisory opinion, is appealable to the Board. *Appeal of Larivee,* CUD-92-09, Memorandum of Decision on Preliminary Issues (07/13/93).

* Board lacked authority under 29 V.S.A. ch. 11 or under court consent order to allow the proposed outfall pipe to be used for discharge purposes prior to the issuance of a discharge permit. *Appeal of Fred Fayette*, MLP-91-08, Preliminary Order and Declaratory Ruling (10/15/91).

1004. Constitutional Issues (including Public Trust)

* The Vermont Supreme Court has expressed reluctance to apply the doctrine of laches to cases involving the state's administration of the public trust. *City of South Burlington (Bartlett Bay Wastewater Treatment Facility)*, WQ-01-04, Second Prehearing Conference Report and Order (04/18/02).

* The state's continuing power as administrator of the public trust includes the power to revoke previously granted rights. The state cannot by acquiescence relinquish its duty to protect the public trust. *Id.*

* The standing and case and controversy requirements enforce the separation of powers between the three different branches of government by confining the judiciary to the adjudication of actual disputes and preventing the judiciary from presiding over broad-based policy questions that are properly resolved in the legislative arena. *Village of Ludlow (Ludlow Wastewater Treatment Facility),* WQ-01-08, Memorandum of Decision (04/05/02).

* Although the Board is not an Article III court, the Board is nevertheless limited in its quasi-judicial powers to determining actual controversies that arise between identified parties and that come to the Board for review under express statutory authority. *Id.*

* The Board has no authority to rule on the constitutionality of a statute. It can, however, interpret a statute's provisions so as to support its validity, fulfill the Board's charge to regulate proposed activities affecting public waters, and achieve a rational result. *Town of Shoreham Wastewater Treatment Facility*, WQ-00-11, Memorandum of Decision on Motion to Dismiss (07/31/01).

* Board has no authority to rule on the constitutionality of 29 V.S.A. ch. 11, however, it can interpret its provisions so as to fulfill its charge to regulate proposed encroachments on public waters. *Husky Injection Molding Systems, Inc.*, MLP-98-06, Memorandum of Decision (02/22/99).

* Board evaluated the project's impacts upon the "public good" before considering the project in light of the public trust doctrine. If the Board determined that the Project would have an adverse affect upon the public good, then this statutory analysis would be dispositive and the Board would not reach the public trust doctrine; if, on the other hand, the Board determined that the project would not have an adverse effect upon the public good, then the Board would determine whether the project, taking into consideration its cumulative effect upon the waters of the State of Vermont, would have a detrimental effect on public trust uses. *Dean Leary (Point Bay Marina, Inc.)*, MLP-96-04, Memorandum of Decision (03/18/97).

* Board evaluated the proposed dock's impacts upon the "public good" before considering the dock in light of the public trust doctrine, as statutory claims are to be considered before constitutional questions and, if the dock would have an adverse affect upon the "public good," it would be unnecessary to reach

the public trust question. *Kevin Rose and the Champlain Kayak Club (Blodgett),* MLP-96-01, Findings of Fact, Conclusions of Law and Order (11/07/96).

* The lampricide treatment of the Poultney River was authorized by the 1991 permit amendment; the appellant had thirty days to appeal that permit, but it did not; therefore, the decision to treat the river was final and the only issues properly before the Board in 1992 were the merits of the five modifications authorized by the 1992 permit amendment. *Appeal of Poultney River Committee*, WQ-92-04, Preliminary Order (08/11/92); *aff'd, Poultney River Committee*, Vt. No. 94-165 (06/26/95). (*But see*, Dissenting Opinion).

* Board had no authority to decide whether ANR's denial of a conditional use determination constituted a regulatory taking. *Champlain Oil Company*, CUD-94-11, Findings of Fact, Conclusions of Law and Order (10/04/95).

* Neither 10 V.S.A. § 1269 nor the statutes granting the Board authority to designate and protect wetlands expressly authorize the Board to determine whether an act or decision of the Secretary amounts to a regulatory taking under the Fifth and Fourteenth Amendments of the United States Constitution and Chapter I, Article 2 of the Vermont Constitution. Moreover, the Board has no implied authority to decide such claims. *Champlain Oil Company*, CUD-94-11, Preliminary Order: Party Status and Takings Issues (01/03/95).

* Although Board did not have the power to decide whether the act or decision of the Secretary constituted a regulatory taking, the parties were prudent in raising and preserving all questions before the Board, even those beyond its power to decide. *Id.*

* The public trust doctrine as reflected in the Vermont Constitution, Chapter II, Section 67, does not preclude the Board from considering appeals from Agency of Natural Resources dam permit and §401 certification decisions. The Legislature has given primary jurisdiction to the Board to hear *de novo* appeals from ANR Dam orders and §401 certifications and it would thwart the Legislature's intent to deny the parties timely review on the merits of a project, pending resolution of public trust and constitutional challenges. *Appeal of Vermont Natural Resources Council (Sugarbush),* DAM-92-02 and WQ-92-05, Findings of Fact, Conclusions of Law and Order (02/08/93) and Memorandum of Decision (03/01/93); *see In re: Application of Snowbridge, Inc., Appeal of VNRC, et al.,* S-197-93 VnCa (02/12/97) (Dismissal by Stipulation).

* Board's authority is limited to carrying out the statutes that govern the Board's work; thus, Board would not consider arguments that the Lakes and Ponds statute [29 V.S.A. ch. 11] was invalid or that the Board has powers conferred directly by the Vermont constitution under the Public Trust Doctrine. *Appeal of Richard and Alice Angney*, MLP-89-14; *Appeal of Robert and Ann Tucker*, MLP-89-16 and *Appeal of Herman LeBlanc*, MLP-89-17, Findings of Fact, Conclusions of Law and Order (02/12/91); *see In re Richard and Alice Angney*; S96-91LaCa, Opinion and Order, 9/04/92 and Opinion and Order (03/05/93).

1005. Delegation or Surrender of Powers

* The VWQS are intended to implement Tier 3 of the federal antidegradation regulations and rely on Vermont's outstanding resource waters statute, 10 V.S.A. §1424a, as the implementing procedure. *Waters of the Green Mountain National Forest*, ORW-03-01, Memorandum of Decision (06/28/04).

* A salient objective of the state water pollution control program is consistency with the Clean Water Act. *Stormwater NPDES Petition*, WQ-03-17, Memorandum of Decision (04/01/04).

* The federal NPDES permitting program represents the legal backdrop for Vermont's permitting system. *Id.*

* The state's laws must be construed with a view to the federal permitting scheme. *Id.*

* Although Vermont does not directly apply federal law, the Vermont Water Pollution Control Act is broadly written and intended to authorize ANR to fully implement the Clean Water Act in Vermont. *Id.*

* States delegated to administer the NPDES permitting system must have the authority to administer certain enumerated provisions of the federal regulations. *Id.*

* Board has no authority to rule on the constitutionality of 29 V.S.A. ch. 11, however, it can interpret its provisions so as to fulfill its charge to regulate proposed encroachments on public waters. *Husky Injection Molding Systems, Inc.,* MLP-98-06, Memorandum of Decision (02/22/99).

* Board was not required by its enabling statutes to adopt rules governing the permitting of encroachments as a prerequisite to the Board's exercise of its common law trustee responsibility to safeguard public trust property. *Dean Leary*, MLP-94-08, Memorandum of Decision (12/28/94).

* The Board has a duty, independent of the public good determination under 29 V.S.A. § 405, to assure the protection of public trust uses. *Id.*

*The application of the common law public trust doctrine is within the authority of the Board only when there is a legislative directive to consider it. Absent such express authority, the Board has declined to consider the public trust doctrine in its proceedings, deferring instead to the judicial and legislative branches of government to work out the implications of this doctrine in a contested case. *Aquatic Nuisance Control Permit, #C93-01-Morey* WQ-93-04, Memorandum of Decision on Preliminary Issues (09/24/93); *aff'd, In re Aquatic Nuisance Control Permit #C93-01-Morey*, Docket No. 94-5-94-OeCv, Opinion and Order (02/06/95).

* Department of Environmental Conservation could not give by rule to the Board the appellate power to review Department declaratory rulings with respect to the regulation of buildings and land, pursuant to 3 V.S.A. § 2873(c)(3). *Appeal of Verburg/Wesco*, EPR-91-03, Order (01/09/92).

1006. Implied Powers

* The Board has the inherent authority to issue a motion to compel access to a property subject to its jurisdiction, and in an appeal of a conditional use determination, it has the authority to issue an order requiring the applicant to admit another party access to its property for the purpose of site evaluation in preparation for a *de novo* hearing on the merits of the conditional use determination application. *Appeal of Larivee*, CUD-92-09, Memorandum of Decision on Appellant's Motion to Compel Access to Site (08/12/93).

* Remand to the agency below is appropriate for jurisdictional defects, such as a failure to provide adequate notice, or in the discretion of the reviewing body where new issues are presented that were never presented to the agency below and justice so requires. Where, however, the reviewing body is charged with holding a *de novo* hearing and the alleged deficiencies are in the Secretary's failure to make certain findings and conclusions with respect to the subject wetland's functions, no jurisdictional defect exists requiring remand. *Id.*, Memorandum of Decision on Preliminary Issues (07/13/99).

1007. Independent Review; Compliance with Other Statutes

* Board read Section 47a of Act 61 (2001) to mean that Applicant was eligible to participate in the pilot program authorized by Section 5 of Act 51 (1997), but not that the Applicant's plan for cost-effective, off-site efforts to reduce phosphorus loadings for each year of its waste treatment plant operations satisfies the substantive standards of Act 51. *Town of Shoreham Wastewater Treatment Facility*, WQ-00-11, Memorandum of Decision on Motion to Dismiss (07/31/01).

* To determine whether the Applicant's plan meets the substantive standards of Act 51 (1997) requires the type of particularized fact finding that can only occur as a result of a contested case proceeding or hearing convened by an agency or court with jurisdiction to hear the matter. *Id.*

1008. Statutory Construction

* The plain meaning of 10 V.S.A. § 1264(f)(1) is that Watershed Improvement Permits must be reasonably designed to achieve compliance with the uses and criteria of the VWQS in the waters to which they apply within five years. ANR's position that this statute merely requires the construction of certain

treatment systems within five years is not only contrary to the plain meaning of the statute, but also contrary to the balance of the Vermont Water Pollution Control Act, Vermont's associated regulations, the federal Clean Water Act, and associated federal regulations. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook*, WQ-02-04, WQ-02-05, WQ-02-06 and WQ-02-07 (Cons.), Memorandum of Decision (12/19/02) (dissenting opinion).

* Whether the Board has jurisdiction over an appeal from a decision of a natural resources conservation district with respect to an agricultural dam permit is a question of statutory construction. *Hinsdale Fa*rm, DAM-02-09, Memorandum of Decision (12/11/02); *aff'd*, 858 A2d 249, 2004 Vt. 72.

* In the absence of a statutory provision or rule addressing an issue under consideration, the Board must resort to common law principles and may look to the decisions of other administrative agencies for guidance. *CCCH Stormwater Discharge Permit*, WQ-02-01, Dismissal Order (08/13/02), *amended by* Order (08/29/02).

* Board read Section 47a of Act 61 (2001) to mean that Applicant was eligible to participate in the pilot program authorized by Section 5 of Act 51 (1997), but not that the Applicant's plan for cost-effective, off-site efforts to reduce phosphorus loadings for each year of its waste treatment plant operations satisfies the substantive standards of Act 51. *Town of Shoreham Wastewater Treatment Facility*, WQ-00-11, Memorandum of Decision on Motion to Dismiss (07/31/01).

* Had the General Assembly intended to pass legislation determining that the Applicant's plan met the substantive standards of Act 51 (1997), it could have expressly amended Act 51 to so provide or included language in Section 47a of Act 61 (2001) designed to supersede Act 51's substantive requirements as applied to the Applicant by including language to the effect, "notwithstanding any provisions of law to the contrary." It did neither. *Id.*

* Section 47a of Act 61 (2001) does not purport to be an amendment to Act 51 (1997); however, even if it were construed as an amendment to Act 51, it could not apply to the case in progress if it would affect a pre-existing "right, privilege, obligation or liability." Under Act 51, any municipality qualifying as a pilot project has a statutory obligation to comply with the substantive standards of that act. *Id.*

* Were the Board to construe Section 47a of Act 61 (2001) as the Applicant suggested, it would have completely vitiated the pending proceeding and the need for a determination that the Applicant's plan complies with state statutory standards intended to protect the water quality of Lake Champlain. *Id.*

* When the Board is faced with a statute that is silent concerning who has a right to file an appeal, the Board turns to its own Procedural Rule 22 *[now Rule 25]* for guidance on party standing. Therefore, even though 3 V.S.A. § 2873(c)(4) does not specify who may file appeals from a subdivision permit, Appellants were found to meet the requisite standards for "parties of right" under Rule 22(A)(7) *[now Rule 25(B)(7)]* thereby sustaining their appeal. *McIntyre and Lovett*, EPR-98-02, Memorandum of Decision (08/12/98).

II. JURISDICTION (1031-1130)

A. General (1031-1070)

1031. General

* The Board has not been granted the powers of equity to order ANR to fulfill its legal obligations nor does the Board have jurisdiction to review on appeal ANR's enforcement actions or declaratory rulings. *Citizens for Safe Farms, Inc. (Hinsdale Farm*), WQ-04-02, Memorandum of Decision (10/14/04); *appeal docketed,* No. 2004-510 (11/18/04) (pending).

* Actions taken by ANR pursuant to the Agricultural Non-Point Sources Pollution Reduction Program, 6 V.S.A. §§ 4810-4855, *amended by* Act 149 of 2004, are not appealable to the Board because that statutory program provides for appeals to Environmental Court from decisions of the Secretary of Agriculture, and limits those appeals to the permit applicant and the Secretary of Agriculture. *Id.*

* As a general matter, an agency action for which there is no other adequate remedy may be appealed unless the action has been committed by law to the agency's discretion or if a statute precludes review. *Id.*

* An agency's inaction or failure to act may be appealable if the agency is under a clear statutory duty to act. Thus, inaction is tantamount to a final agency action if the inaction has the same impact on the parties as denial of relief. *Id.*

* The Board has no jurisdiction to review the conversations between ANR staff and the staff of other agencies or members of the regulated community in the absence of a final agency action that ANR has had an opportunity to prepare for legal review. *Id.*

* The Board has jurisdiction under the Vermont Water Pollution Control Act to hear an appeal from ANR's denial of a petition to exercise its residual designation authority to require federal permits for stormwater discharges. *Stormwater NPDES Petition*, WQ-03-17, Memorandum of Decision (04/01/04).

* While the Board does not have enforcement authority, the Board must ensure that the terms of a permit issued by ANR are consistent with the requirements of an administratively final cleanup plan for the receiving waters. *Vermont Agency of Transportation (Route 7),* WQ-03-01, Memorandum of Decision (08/21/03).

* The jurisdiction of administrative bodies will not be presumed but rather is limited to that which has been conferred upon them by statute. *Hinsdale Farm*, DAM-02-09, Memorandum of Decision (12/11/02); *aff'd*, 858 A2d 249, 2004 Vt. 72.

* It is the function of the legislature, not the Board, to redefine the Board's jurisdiction, if the legislature so chooses. *Id.*

* The jurisdiction of administrative bodies will not be presumed but rather is limited to that which has been conferred upon them by statute. *Id.*

* It is the function of the legislature, not the Board, to redefine the Board's jurisdiction, if the legislature so chooses. *Id.*

* Jurisdiction over a Permit under appeal lies with the Board and only the Board may vacate or declare void that Permit absent a formal remand of the matter to ANR. *CCCH Stormwater Discharge Permit*, WQ-02-01, Dismissal Order (08/13/02), *amended by* Order (08/29/02).

* Lake Champlain is considered "public waters" of the State of Vermont and the proposed dock would encroach more than 50 feet beyond the shoreline delineated by the mean water level of the lake; consequently, the Department of Environmental Conservation had jurisdiction over the application for that project and the Board had jurisdiction to hear the appeal of the DEC's decision. *Kevin Rose and the Champlain Kayak Club (Blodgett),* MLP-96-01, Findings of Fact, Conclusions of Law and Order (11/07/96).

* Board did not have the authority to hear and determine disputes between riparian users regarding use or allocation of the subject waters and, in particular, claims for "compensation" in connection with such matters; such disputes must be heard by a superior court. *Appeal of Vermont Natural Resources Council (Sugarbush)*, DAM-92-02 and WQ-92-05, Findings of Fact, Conclusions of Law and Order (02/08/93) and Memorandum of Decision (03/01/93); *Application of Snowbridge, Inc., Appeal of VNRC*, S-197-93 VnCa (02/12/97) (Dismissal by Stipulation).

* Board cannot adjudicate private damage claims or provide general equitable relief; these matters are reserved to the courts. *Id.*

1032. Advisory Opinion or Declaratory Ruling on Jurisdiction

* The Board dismissed a Petition for Declaratory Ruling on whether all conditions of a state operational stormwater discharge permit had been met. The Board concluded that its jurisdiction over this matter had been divested at the time the petitioner appealed the issuance of the permit to Superior Court and,

subsequently, to the Vermont Supreme Court, where the matter was pending when the Emergency Petition was filed with the Board. *Hannaford Bros. Co. and Lowes Home Centers, Inc.,* WQ-01-01, Chair's Order (10/06/04). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Board lacked authority under 29 V.S.A. ch. 11 to determine as a preliminary matter in an encroachment permit appeal whether the municipal applicant's effluence discharge should be released from the proposed new outfall or the existing outfall; arguments concerning how such alternatives should be weighed is appropriately raised by the applicant in a discharge permit proceeding. *Appeal of Fred Fayette*, MLP-91-08, Preliminary Order and Declaratory Ruling (10/15/91).

* Board lacked authority under 29 V.S.A. ch. 11 or under court consent order to allow the proposed outfall pipe to be used for discharge purposes prior to the issuance of a discharge permit. *Id.*

1033. Concurrent (See also Section I. 1003.)

1034. Dismissal for Lack of Jurisdiction

* The Board dismissed a Petition for Declaratory Ruling on whether all conditions of a state operational stormwater discharge permit had been met. The Board concluded that its jurisdiction over this matter had been divested at the time the petitioner appealed the issuance of the permit to Superior Court and, subsequently, to the Vermont Supreme Court, where the matter was pending when the Emergency Petition was filed with the Board. *Hannaford Bros. Co. and Lowes Home Centers, Inc.,* WQ-01-01, Chair's Order (10/06/04). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* While a Prehearing Order directed Appellants to supplement their Notice of Appeal by a certain deadline, this requirement was added as a remedial measure to provide the Appellants with ample opportunity to demonstrate a basis in fact and law for their claim of standing, once that standing had been challenged as a preliminary issue at a prehearing conference. Appellants, who elected not to supplement their appeal in accordance with guidance provided at the prehearing conference, were on notice that the consequence of their failure to supplement their Notice of Appeal was possible dismissal on jurisdictional grounds, not involuntary dismissal for failure to comply with a Board order. *Kent Pond,* MLP-03-10, MLP-03-11, and CUD-03-13 (Consolidated), Memorandum of Decision and Dismissal Order (02/18/04).

* The Board dismissed an appeal from a decision of a natural resources conservation district with respect to an application for an agricultural dam permit for lack of jurisdiction. *Hinsdale Farm*, DAM-02-09, Memorandum of Decision (12/11/02);*aff'd*, 858 A2d 249, 2004 Vt. 72.

* As a general rule, the Board decides only such issues as are brought to its attention based on the record of the pending appeal and it presumes that jurisdiction exists, absent a motion challenging jurisdiction on standing or other grounds. If a party opponent failed to raise jurisdictional objections in a prior appeal, the Board's determinations are nonetheless conclusive under the rule of finality. *OMYA, Inc.*, WQ-01-09, Memorandum of Decision (05/16/02).

* Legal standing is a jurisdictional requirement. The Board does not have jurisdiction to hear an appeal if an appellant does not have legal standing. *Village of Ludlow, (Ludlow Wastewater Treatment Facility),* WQ-01-08, Memorandum of Decision (04/05/02).

* Having found after a limited evidentiary hearing on preliminary issues that the appellant in this case does not have legal standing, the Board dismissed the appeal for lack of jurisdiction. *Id.*

* Where appellants provided the Board with no facts supporting a protected interest distinct from that of the public's and as a consequence were unable to demonstrate any threatened injury to a protected interest, they lacked standing and therefore failed to establish a basis for the Board's assertion of jurisdiction. *Nathan Wallace-Senft (Bennington Bypass Project)* WQ-99-04 and CUD-99-05, Dismissal Order (09/08/99).

* Where Board concluded that Petitioner was not a proper petitioner within the meaning of Section 7.1 of the VWR, it had no jurisdiction to consider the petition; therefore, the Board, on its own motion, dismissed the petition, thereby terminating the wetland reclassification proceeding. *Petition for Reclassification of Wetlands Residents for Northeast Kingdom Preservation, LTD*, WET-98-03, Dismissal Order (05/13/99).

* The threshold issue before the full Board is the sole question of whether the Appellants' appeal was timely filed. The Board Rules of Procedure effective April 25, 1988 govern this proceeding. The present appeal was taken pursuant to the Management of Lakes and Ponds statute, codified at 29 V.S.A. §401-409 (Chapter 11). The statute at §406(a) provides that an appeal of a permit issued by DEC may be filed with the Water Resources Board *within 10 days of the date of notice of the action.* The Board concludes that the phrase "notice of action" as it occurs in 29 V.S.A. §406(a) means the DEC's issuance of findings of fact and permit decision. Thus, the date of permit issuance commences the running of the statutory appeal period. *Town of Milton*, MLP-97-02, Dismissal Order (07/30/97); *aff'd, In re Milton Arrowhead Mountain*, Vt No. 98-337 (01/02/99).

* The last sentence of 29 V.S.A. §406(c) supports the Board's interpretation of the appeal period established by statute. Section 406(c) concludes with the sentence: "The action of approving or denying an application shall not be effective until 10 days after the department's notice of action." The Board's interpretation is supported further by the language of 29 V.S.A. §406(a) that specifies that the filing of an appeal shall stay the action of the department. Therefore, when a timely appeal is filed the action is stayed, whereas, if no appeal is filed within 10 days of the date of the department's notice of action, the department's decision becomes final. *Id.*

* The Management of Lakes and Ponds statute contains no language supporting a claim that the Legislature intended either actual or constructive notice. Rather, the Board concludes that the date of the notice of action means the date the findings of fact and permit decision are mailed. Any appeal of DEC's decision must be received by the Board within 10 days from the date of mailing. *Id.*

* An appeal of an informal agency enforcement determination was dismissed for lack of jurisdiction, even though official who issued the decision erroneously instructed the alleged violator that one of his options included "appeal" of that decision to the Board. *Vernon Squiers* EPR-94-06, Dismissal Order (01/03/95).

* There was no legal basis for retention of jurisdiction over appeal once the permittee unconditionally relinquished its interests in the encroachment permit that was the subject of the appeal. *Dean Leary*, MLP-94-08, Dismissal Order (03/11/96).

1035. Limited Jurisdiction

* The authority of the Board to designate waters as outstanding resource waters under the VWQS does not extend to designating waters as outstanding national resource waters under federal law. Although the Board does not apply federal antidegradation requirements directly, Vermont's Tier 3 antidegradation requirements are intended to be consistent with federal Tier 3 regulations. *Waters of the Green Mountain National Forest*, ORW-03-01, Memorandum of Decision (06/28/04).

* The Public Water Supply and Wastewater System Permit Act expressly excludes ANR's enforcement decisions from the Board's review. *William and Ann Lyon,* EPR-03-16, Memorandum of Decision (04/21/04); *appeal docketed,* No. 2004-231 (05/14/04) (pending).

* Although the Board deplores the piecemeal review of development projects, the Board is estopped from reviewing development which the ANR, the body with original jurisdiction over CUD applications, has not first determined is subject to its jurisdiction and then reviewed and addressed in a written determination under VWR, Section 8. *Barden Gale and Melanie Gale Amhowitz*, CUD-99-08, Memorandum of Decision on Preliminary Issues (03/21/00).

* Using an expansive interpretation of a definition in the VWQS, here the phrase "regulation under the Act," to accomplish an extension of jurisdiction would violate a basic tenet of administrative law -- that an administrative body may not use its rulemaking authority to enlarge a restrictive grant of jurisdiction. *Passumpsic Hydroelectric Project*, WQ-94-09, Memorandum of Decision (08/15/95).

* Board lacked jurisdiction to hear an appeal of a declaratory ruling issued by the Department of Environmental Conservation with respect to the regulation of buildings and land, pursuant to 3 V.S.A. § 2873(c)(3); in the absence of express authority to hear such matters, appeal was to the Supreme Court pursuant to 3 V.S.A. § 815(a). *Appeal of Verburg/Wesco*, EPR-91-03, Order (01/09/92).

1036. Original v. Appellate

* When an appeal from a Department of Environmental Conservation decision is timely filed with the Board, the cause is transferred to the Board from the Department, and the Department is divested of jurisdiction with respect to all matters within the scope of the appeal. *Laurence and Roberta Coffin*, MLP-97-05, Chair's Preliminary Ruling (08/12/97).

* The filing of an amendment to a permit to allow the relocation of a service and swim dock did not require the Board, in its appellate role, to review the entire marina project for public trust compliance; rather, public policy, as well as the holding in *Mono Lakes*, requires that all existing development within the waters of Vermont be reviewed in a comprehensive manner by ANR, irrespective of whether an application for a permit amendment has been filed. *Dean Leary (Point Bay Marina, Inc.),* MLP-96-04, Memorandum of Decision (03/18/97).

1037. Remand, Appropriateness of (See also Section V. F. 1583)

* Remand to ANR is appropriate when the Board determines that ANR should consider project modifications proposed during the course of an appeal that raise serious questions about whether the modified project would result in new or different impacts on the water resource at issue. *CCCH Stormwater Discharge Permits*, WQ-02-11 and WQ-03-05, -06, -07 (Consolidated), Memorandum of Decision (08/28/03).

* The Board summarily denied a motion for reconsideration that requested the Board to affirm issuance of discharge permits that violated Vermont law and that requested in the alternative that the Board remand these unlawful discharge permits to ANR to implement them for a five-year trial period. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook*, WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated), Order (06/27/03).

* Jurisdiction over a Permit under appeal lies with the Board and only the Board may vacate or declare void that Permit absent a formal remand of the matter to ANR. *CCCH Stormwater Discharge Permit,* WQ-02-01, Dismissal Order (08/13/02), *amended by* Order (08/29/02).

* The Secretary of ANR's failure to post notice of a CUD application at the municipal clerk's office for the municipality in which the affected wetland was located was a jurisdictional defect requiring the Board to remand the matter on appeal to the ANR so that it could properly re-notice and, if requested by a member of the public, re-open the permit application review process. *Al J. Frank*, CUD-00-02 and *Gregory C. Lothrop*, CUD-00-03 (Consolidated), Remand Order (04/24/01).

* In the context of a stream alteration permit application, ANR's actions foreclosed the opportunity of any party entitled by statute to receive notice of the permit application to meaningfully participate. Were such an expedited review process allowed, those entitled by statute to receive notice would necessarily be required to appeal the issuance or denial of a permit to the Water Resources Board simply to ensure that a hearing was conducted on the application or to allow a meaningful opportunity to comment on the application. The Board determined such a result to be inconsistent with the respective functions of ANR and the Board, the former having technical expertise and being charged with administering the stream alteration program in the first instance and the latter being a body with limited technical expertise and having appellate jurisdiction. Accordingly, the Board remanded the matter for initial consideration by ANR. *George Carpenter, Jr.,* SAP-99-06, Remand Order (12/14/99).

* Remand to the agency below is appropriate for jurisdictional defects, such as a failure to provide adequate notice, or in the discretion of the reviewing body where new issues are presented that were never presented to the agency below and justice so requires. Where, however, the reviewing body is charged with holding a *de novo* hearing and the alleged deficiencies are in the Secretary's failure to make certain findings and conclusions with respect to the subject wetland's functions, no jurisdictional defect

exists requiring remand. *Appeal of Larivee*, CUD-92-09, Memorandum of Decision on Preliminary Issues (07/13/93).

1038. Retention

* At the request of the parties, an appeal of a general MS4 permit was continued to allow ANR to amend the permit by adding two towns that ANR had inadvertently omitted. *Small Municipal Separate Storm Sewer Systems (MS4s),* WQ-03-08, Prehearing Conference Report and Order (07/09/03).

* Even where there are substantial deficiencies in a notice of appeal and the appellant must remedy them before the matter can be accepted by the Executive Officer for notice and publication, jurisdiction resides with the Board to oversee that the appeal is perfected and, if so, to hear the matter on the merits. *Laurence and Roberta Coffin*, MLP-97-05, Chair's Preliminary Ruling (08/12/97).

* If the permittee wished to abandon its interest in an encroachment permit, the Board would not stand in its way of doing so; accordingly, the Board rejected ANR's recommendation that the Board retain jurisdiction over the swim and service docks authorized by the encroachment permit under appeal while allowing abandonment of other proposed encroachments. *Dean Leary*, MLP-94-08, Dismissal Order (03/11/96).

B. Permits (1071-1100) **(See also Section IV. 1305 and Section VIII.)**

1071. General

* ANR's permit process, is not a contested case hearing, but rather an informal notice-and-comment process that does not contemplate that a complete evidentiary record will be developed in support of or in opposition to the issuance of a permit. *Town of Shoreham Wastewater Treatment Facility,* WQ-00-11, Memorandum of Decision on Preliminary Issues (05/02/01).

1072. Authority to Issue

* DEC lacked authority under 10 V.S.A. § 1263(c) to require operation of the pretreatment facility at less than its design capacity. *Appeal of Lucille Farm*, WQ-85-03, Findings of Fact, Conclusions of Law and Order (02/25/86); *In re Lucille Farm Products, Inc.*, S151-86 WnCa (09/01/87).

1073. Authority to Affirm, Reverse, or Modify ANR Permits

* The Board modified a discharge permit to contain WQBELs consistent with the Lake Champlain Phosphorous TMDL. *Village of Enosburg Falls*, WQ-03-03, Memorandum of Decision (04/21/04).

* Jurisdiction of a Permit under appeal lies with the Board and only the Board may vacate or declare void that Permit absent a formal remand of the matter to ANR. *CCCH Stormwater Discharge Permit,* WQ-02-01, Dismissal Order (08/13/02), *amended by* Order (08/29/02).

* The Board in performing its *de novo* authority under 10 V.S.A. § 1269 is required to issue an order "affirming, reversing or modifying the act or decision of the secretary." The Board reads this language to allow it to extend permit expiration and renewal deadlines as well as modify any substantive terms or conditions established in a permit. 10 V.S.A. §1263(c)-(d). The Vermont Supreme Court and other administrative agencies have recognized the need to accommodate the passage of time in land use permit proceedings by directing the extension of permit deadlines. *Appeal of Vermont Marble Company (OMYA),* WQ-91-15, Findings of Fact, Conclusions of Law and Order (01/14/94).

1074. Authority to Stay ANR Permits (See also Section X. 1902.4)

* The Board lacks authority to stay a discharge permit issued under Chapter 47 of Title 10 and has no separate authority to stay ANR's approval to proceed under a general discharge permit. *Lowe's Home Centers, Inc.,* WQ-03-15, Order Regarding Motion to Stay (06/03/04).

* Absent express statutory authority, the Board does not have jurisdiction to stay a decision of ANR. *Vermont Agency of Transportation (Route 7),* WQ-03-01, Memorandum of Decision (08/28/03).

* The Board does not have the statutory authority to stay a stormwater discharge permit. *Id.*

* Although past Board precedent suggests that the Board has no authority to issue a stay of an ANR permit or other decision appealed to it pursuant to 10 V.S.A. § 1269, this does not preclude appellants and other parties from seeking other relief. *CCCH Stormwater Discharge Permit*, WQ-02-01, Dismissal Order (08/13/02), *amended by* Order (08/29/02).

C. Permit Amendments (1101-1130)

1101. General

1102. Authority to Issue

III. PARTY STATUS / STANDING (1131-1300)

A. General (1131-1140)

1131. General

* The Board's Rules distinguish between what an appellant must demonstrate to show standing from what a person seeking to intervene as a party in another's appeal must demonstrate to establish party status. *Village of Enosburg Falls*, WQ-03-03, Memorandum of Decision (05/21/03).

* A foreign corporation that has not applied for and obtained a Certificate of Authority (COA) from the Vermont Secretary of State is not precluded from filing an appeal with Board as a person in interest aggrieved by the Secretary of ANR's decision under 10 V.S.A. §1269. *In re CCCH Stormwater Discharge Permits*, WQ-02-11 (ANR Permits #1-1556 and #1-1557), Memorandum of Decision (03/21/03).

* Any party or petitioner seeking to challenge the standing of an appellant or the Chair's preliminary rulings concerning party status must file with the Board a motion to that effect supported by legal memorandum. *In re CCCH Stormwater Discharge Permits*, WQ-02-11, Prehearing Conference Report and Order (12/10/02).

* The conditional right to intervene under WRB 25(B)(7) refers to being an aggrieved party. The analytical framework of WRB 25(B)(8) is more appropriate to determine the standing and party status of a landowner appellant claiming that his drinking-water well would be affected by the application of an aquatic herbicide to a neighbor's pond. The threshold for standing is relatively modest. *Paul Dannenberg*, WQ-99-07, Memorandum of Decision on Motion to Dismiss and Scheduling Order (04/20/00) (decided under previous Water Resources Board Rules of Procedure).

* Intervention in appeals from discharge permits is governed by 10 V.S.A. § 1269 and Rules 22(A) and 22(B) [now 25(B) and (C)] of the Board Rules of Procedure. *Appeal of Cole*, WQ-92-13, Memorandum of Decision: Requests for Intervention (07/09/93).

* Petitioner for intervention could not expand the scope of appeal through its petition, since scope of the appeal was limited to those issued raised in the appellant's notice of appeal as clarified in the prehearing conference report and order. *Id.*

1132. Appearances

* A dated memo signed by the chair of the appellant organization confirming that the appellant had appointed a non-attorney as its representative before the Board was sufficient prima facie authorization for the non-attorney to represent the appellant in this appeal. It was not necessary for the memo to specifically state that the non-attorney was authorized to bind the appellant or to specify the authority of the memo's signatory to act on the appellant's behalf. After the appellant authenticated the memo at a limited evidentiary hearing, the Board concluded that appellant's non-attorney spokesperson was

authorized to represent the appellant in this appeal. *Village of Ludlow (Ludlow Wastewater Treatment Facility),* WQ-01-08, Memorandum of Decision (04/05/02).

* At a limited evidentiary hearing on legal standing and party status, the appellant carried the burden of persuasion and the initial burden of production to prove by a preponderance of the evidence that the appellant's non-attorney representative was authorized to represent the appellant in this appeal. *Id.*

* The prehearing conference report and order established a schedule for the appellant to file evidence of its non-attorney representative's authority to represent the appellant in this appeal. *Id.*

* Where a state agency, other than ANR, entered its appearance but failed to articulate what substantial interest it had in the appeal independent of any interest that might be represented by ANR, it was denied party status of right pursuant to WRB Rule 22(A)(5) [now 25(B)(6)]. The Board, however, in its discretion, allowed the agency to participate as an amicus curiae. *Husky Injection Molding Systems, Inc.,* MLP-98-06, Memorandum of Decision (02/22/99).

1133. Effect of Participation in ANR Proceedings

B. Petitions (1141-1150)

1141. Timeliness

* Failure to timely file a facially adequate petition supporting intervention could not in fairness to the parties be remedied by a filing offered at the time of oral argument on party status issues; therefore, such petition was denied. *Champlain Oil Company*, CUD-94-11, Preliminary Order: Party Status and Takings Issues (01/03/95).

* Regional Planning Commission would have been a party of right, pursuant to Board Rule of Procedure 22(A)(3), had it entered a timely appearance; however, having waited until after the prehearing conference to file its notice, the Board in its discretion granted Regional Planning Commission party status by permission, pursuant to Board Rule of Procedure 22(B) *[now 25(c)]*. *Appeal of Cole*, WQ-92-13, Memorandum of Decision: Requests for intervention (07/09/93).

* Petitioner was denied party status of right because it failed to make its request at or before the prehearing conference and it failed to demonstrate good cause for a late filing. *Appeal of Vermont Natural Resources Council (Sugarbush),* WQ-92-05, Decision and Order (08/18/92).

1142. Sufficiency

* A party status petition apparently limited to WRB 25(B)(7) does not preclude a determination of whether a putative appellant may be granted party status under WRB 25(B)(8). *Paul Dannenberg*, WQ-99-07, Memorandum of Decision on Motion to Dismiss and Scheduling Order (04/20/00).

* Failure to timely file a facially adequate petition supporting intervention could not in fairness to the parties be remedied by a filing offered at the time of oral argument on party status issues; therefore, such petition was denied. *Champlain Oil Company*, CUD-94-11, Preliminary Order: Party Status and Takings Issues (01/03/95).

* Non-profit corporation, dedicated to the conservation of southern Vermont's natural resources and owner of property adjacent to outstanding resource water but two-and-a-half miles downstream of permitted discharge, was granted permissive intervention, where corporation failed to provide sufficient information and justification entitling it to party status as of right pursuant to Board Rule of Procedure 22(A)(7) *[Now 25(B)(8)]*. *Appeal of Cole*, WQ-92-13, Memorandum of Decision: Requests for Intervention (07/09/93).

* Petitioner was denied permissive intervention because he failed to demonstrate through an affidavit or other particularized statement that he had a "substantial interest which may be affected by the outcome of the proceeding." This standard required the petitioner to demonstrate some interest more substantial than a general concern for the protection of the public's use and enjoyment of the particular water body at issue

or a general concern for the natural resources of the state; the Board's permissive intervention rule contemplates a considerable or consequential interest in the outcome of the case. *Appeal of Vermont Natural Resources Council (Sugarbush),* WQ-92-05, Prehearing Conference Order (08/18/92).

C. Party of Right (1151-1180)

1151. Permit Applicants

1152. Municipalities

1153. Municipal Planning Commissions

1154. Regional Planning Commissions

1155. Agency of Natural Resources

* Department of Fish and Wildlife, ANR while entitled to party status of right if it enters its appearance in an encroachment permit, is not a necessary party to that appeal. *Robert A. Gillin*, MLP-94-01, Findings of Fact, Conclusions of Law and Order (08/23/94) and *Robert A. Gillin v. Department of Fish & Wildlife and Department of Environmental Conservation,* 608-11-95 WnCv & 616-11-95 Wncv (09/22/97).

* ANR is a statutory party pursuant to the Board's Rules of Procedure. Accordingly, it is not relevant to determine whether ANR has a material interest in the outcome of a proceeding before the Board. Likewise, the Board need not be preoccupied with the "role of ANR" in a *de novo* proceeding. *Aquatic Nuisance Control Permit, #C93-01-Morey*, Lake Morey, Town of Fairlee, Docket WQ-93-04, Memorandum of Decision on Preliminary Issues (09/24/93); *aff'd, In re Aquatic Nuisance Control Permit #C93-01-Morey*, Docket No. 94-5-94-OeCv, Opinion and Order (02/06/95).

1156. Other Governmental Entities

1156.1. Substantial Interest

* Where a state agency, other than ANR, entered its appearance but failed to articulate what substantial interest it had in the appeal independent of any interest that might be represented by ANR, it was denied party status of right pursuant to WRB Rule 22(A)(5) [Now 25(B)(6)]. The Board, however, in its discretion, allowed the agency to participate as an amicus curiae. *Husky Injection Molding Systems, Inc.,* MLP-98-06, Memorandum of Decision (02/22/99).

1156.2. Adversely Affected by Outcome of Proceeding

1157. Statutory Parties

1157.1 Unconditional Right to Intervene

* Procedural Rule 25(B)(7) is not an appropriate basis for an appellant, who is not a permit applicant, to seek standing under 10 V.S.A. § 1269. *OMYA, Inc.,* WQ-01-09, Memorandum of Decision (04/02/02).

1157.2 Conditional Right to Intervene

* Procedural Rule 25(B)(7) is not an appropriate basis for an appellant, who is not a permit applicant, to seek standing under 10 V.S.A. § 1269. *OMYA, Inc.,* WQ-01-09, Memorandum of Decision (04/02/02).

1158. Others

* To determine the party status of the appellant who seeks to commence an appeal, the Board looks to the statute under which the putative appellant seeks to participate and, if necessary, to its own Rules of Procedure governing party status and intervention. *Paul Dannenberg*, WQ-99-07, Memorandum of Decision on Motion to Dismiss and Scheduling Order (04/20/00).

* Under 10 V.S.A. § 1269, any person aggrieved by a decision of the Secretary of ANR has standing to appeal to the Board. A concise definition of what it means to be aggrieved has not been forthcoming from the courts. The determination of what it means to be aggrieved is a case-by-case inquiry. The Board reads the aggrieved standard broadly. *Id.*

* The appellant made a credible claim to being aggrieved based on the proximity of the appellant's well to a pond permitted to receive aquatic herbicide. Although the appellant did not make some showing of injury, he provided a context in which he perceived some harm to be likely or possible. That is sufficient as a threshold showing on the preliminary matter of his standing to bring the appeal. *Id.*

* The conditional right to intervene under WRB 25(B)(7) refers to being an aggrieved party. The analytical framework of WRB 25(B)(8) is more appropriate to determine the standing and party status of a landowner appellant claiming that his drinking-water well would be affected by the application of an aquatic herbicide to a neighbor's pond. The threshold for standing is relatively modest. *Id.*

* Limited information presented to the Board indicating that the appellant's substantial interest in his private drinking-water supply *may* be affected is all that is necessary to establish party status. However, if a party supplies sufficient evidence to support a conclusion that a neighbor's application of an aquatic herbicide to his pond *could not* affect the appellant's water supply, this matter may be dismissed prior to a full hearing on the merits. *Id.*

* A party status petition apparently limited to WRB 25(B)(7) does not preclude a determination of whether a putative appellant may be granted party status under WRB 25(B)(8). *Id.*

* When the right to appeal is statutorily granted, the appellant need not also demonstrate standing under the Board's Procedural Rules. Chair, however, used WRB Rule 22(A)(7) [now 25(B)(8)] to merely provide guidance on the scope of the issues for which the appellants were entitled to be heard, where certain of the original appellants were determined to lack standing. *Husky Injection Molding Systems, Inc*., MLP-98-06, Memorandum of Decision (02/22/99).

* Appellants demonstrated that they had a "substantial interest which may be adversely affected by the outcome of the proceeding" before the Board *[Procedural Rule 22(B)(7)]* where they owned property adjacent to the project tract and their wells were in close proximity to and down gradient of the Applicant's proposed waste disposal system; appeal to the Board was also the exclusive means by which they could protect their interest and no other parties existed who could adequately represent that interest. *McIntyre and Lovett*, EPR-98-02, Memorandum of Decision (08/12/98).

* A person who lives in the vicinity of a significant wetland and is a member of and representative for a class of persons who have made historical and current use of the wetland in question, has a specific interest in the wetland. If that interest in the wetland may be adversely affected by the issuance of conditional use determination, and there exists no other alternative means for that person to protect that interest, then that person has standing to appeal to the Board pursuant to 10 V.S.A § 1269. *Appeal of Larivee*, CUD-92-09, Memorandum of Decision on Preliminary Issues (07/13/93).

* The VWR clearly contemplate that persons living in the vicinity of a significant wetland may have an interest in the protection of that wetland. However, a person's ownership of property within or adjacent to a significant wetland or its buffer zone does not per se entitle that person to party status in a conditional use determination appeal pursuant to 10 V.S.A. § 1269 and the VWR. *Champlain Oil Company*, CUD-94-11, Preliminary Order: Party Status and Takings Issues (01/03/95).

* Regional Planning Commission would have been a party of right, pursuant to Board Rule of Procedure 22(A)(3) *[now 25(B)(4)]* , had it entered a timely appearance; however, having waited until after the prehearing conference to file its notice, the Board in its discretion granted Regional Planning Commission party status by permission, pursuant to Board Rule of Procedure 22(B). *Appeal of Cole*, WQ-92-13, Memorandum of Decision: Requests for Intervention (07/09/93).

* The dam permit statute (10 V.S.A. § 1099(a)) provides a conditional right to intervene to "persons and parties in interest, as such persons are defined in 10 V.S.A. § 1080(3*). Appeal of Vermont Natural Resources Council (Sugarbush),* WQ-92-05, Prehearing Conference Order (08/18/92).

* Petitioner was denied party status of right because it failed to make its request at or before the prehearing conference and it failed to demonstrate good cause for a late filing. *Id.*

* A corporation can be a "person aggrieved" under 10 V.S.A. § 1099(a). The Vermont affiliate of the Sierra Club could be a "person aggrieved," pursuant to 10 V.S.A. § 1099(a), but as a condition precedent the Board would require the group to file adequate proof of its authority on behalf of the parent organization to be a party to the appeal of the dam permit. *Appeal of Vermont Natural Resources Council (Sugarbush),* DAM-92-02, Prehearing Conference Order and Preliminary Order (04/10/92).

* Organization that did not seek party status at the initial prehearing conference was granted permissive intervention because it demonstrated good cause for its failure to timely request party status, its later appearance would not unfairly delay the proceeding or place an unfair burden on other parties since it intended to coordinate its case with other parties, and it made a *prima facie* showing of a substantial interest which might be affected by the outcome of the proceeding. *Id.*

1158.1 Substantial Interest

* The substantial interest test for intervention as of right is similar to the test the Board has applied to determine whether a third-party appellant has legal standing to appeal. Thus, a person seeking intervention as of right must demonstrate an interest in the resource beyond that of the general public, a concrete and particularized injury to that interest, and the ability of the Board to redress the alleged injury. *William and Ann Lyon,* EPR-03-16, Prehearing Conference Report and Order (11/13/03).

* Party status as of right was denied where the petition for party status on its face failed to demonstrate a substantial interest beyond that of a generally concerned citizen. Prior to the prehearing conference, the petitioner moved away from the area of the project. In addition, the petitioner raised issues involving land use planning that the Board had no ability to address. The petitioner's alleged financial interests in the appeal were tenuous. *Id.*

* A party who credibly alleged that the permitted project could contaminate the public water supply that would serve his building lots and that repairs to the permitted project could disrupt his plans was entitled to intervention as of right. *Id.*

* A relevant substantial interest may be sufficient for intervention as of right in a Board proceeding, even if the party has other interests that may not be germane to the issues before the Board. *Id.*

* Standing inquiries focus on the party appearing before the Board rather than on the merits of the appeal. Consequently, limited information indicating that the appellant's substantial interest in the water resource may be affected by the action appealed from may be sufficient to establish legal standing. However, evidence supporting a conclusion that the action appealed from cannot possibly affect the appellant's interest in the water resource may be grounds for dismissing the appeal for lack of standing. *Village of Ludlow (Ludlow Wastewater Treatment Facility),* WQ-01-08, Memorandum of Decision (04/05/02).

* Appellant who had a purchase and sale agreement and then ownership in fee simple of real property served by an existing water supply adjacent to a proposed subdivision had a "substantial interest" in the outcome of a permit amendment proceeding that would decide whether a proposed waste disposal system would be approved for a location in close proximity to that water supply. McIntyre and Lovett, EPR-98-02, Memorandum of Decision (08/12/98).

* A petitioner for party status as of right or by permission must demonstrate a substantial interest which will in some degree be affected by the outcome of the proceeding. Where a petitioner failed to allege that he actually uses or benefits in some specific way from the subject wetland and failed to state with specificity how the proposed project might adversely affect this interest, the petitioner failed to provide the Board with a detailed statement such that the Board could determine that the petitioner had a "substantial" interest that might be affected by the outcome of the Board's proceeding. *Champlain Oil Company*, CUD-94-11, Preliminary Order: Party Status and Takings Issues (01/03/95).

* An alleged injury to a business interest, alone, does not support a grant of party status in a conditional use determination appeal. *Id.*

1158.2 Adversely Affected by Outcome of Proceeding

* Persons advancing generalized complaints about ANR's actions, or appellants seeking to prevent environmental degradation generally, without more, do not have standing to appeal. The alleged injury to the appellant's interests must be concrete, actual, and particularized. Litigants without a personal stake in the proceedings beyond those affecting the common rights of all persons do not have standing to act on behalf of the public interest. Abstract concern or mere speculation about the effects of a generalized grievance cannot substitute for the threat of actual injury. *Village of Ludlow (Ludlow Wastewater Treatment Facility),* WQ-01-08, Memorandum of Decision (04/05/02).

* To bring suit in its own right, an organization must demonstrate that the matter on appeal may injure or threaten to injure the organization's interests. An organization whose interest in the protection of the resource at issue is no different from that of the general public does not have legal standing. An organization may not lift itself by its bootstraps into a position of legal standing merely by defining its organizational purpose as the protection of natural resources. Like an individual, an organization's interest in the outcome of a proceeding must be direct and immediate in order for the organization's appeal to be legally cognizable and justiciable by the Board. *Id.*

1158.3 Exclusive Means to Protect Interest

1158.4 Interest Not Adequately Represented

D. Permissive Intervention (1181-1210)

1181. Discretionary Act of the Board

* A person who is not a bonafide party or qualified representative of a bonafide party may qualify as a permissive intervener, pursuant to Board Procedural Rule 25(C), if in the Board's discretion, that person or entity demonstrates an interest which is related to the statute or Board rule at issue and may be affected by the outcome of the proceeding. *CCCH Stormwater Discharge Permits*, WQ-02-11, Prehearing Conference Report and Order (12/10/02).

* Regional Planning Commission would have been a party of right, pursuant to Board Rule of Procedure 22(A)(3) [now 25(B)(4)], had it entered a timely appearance; however, having waited until after the prehearing conference to file its notice, the Board in its discretion granted Regional Planning Commission party status by permission, pursuant to Board Rule of Procedure 22(B). *Appeal of Cole*, WQ-92-13, Memorandum of Decision: Requests for Intervention (07/09/93).

1182. Considerations

* Alleged interests involving generalized complaints about a project rather than a particularized grievance relating to the statutes and rules governing the appeal were insufficient to satisfy the requirements for permissive intervention. *William and Ann Lyon*, EPR-03-16, Prehearing Conference Report and Order (11/13/03).

* Rule of Procedure 27(B) is not intended 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. *In re CCCH Stormwater Discharge Permits*, WQ-02-11, Prehearing Conference Report and Order (12/10/02).

* An appellant cannot qualify for party status as a permissive intervenor. Village of Ludlow (Ludlow Wastewater Treatment Facility), WQ-01-08, Memorandum of Decision (04/05/02).

* Appellant who was determined to lack standing under 29 V.S.A. § 406(a), should not have been granted party status by permission under WRB Rule 22(B) *[now 25(C)]*, as appellant failed to demonstrate a "substantial interest" which would be affected by the outcome of the proceeding, and its interest would be adequately represented by other appellants. The Board, however, in its discretion, allowed this

petitioner an opportunity to participate as an amicus curiae. *Husky Injection Molding Systems, Inc*, MLP-98-06, Memorandum of Decision (02/22/99).

* A petitioner for party status as of right or by permission must demonstrate a substantial interest which will in some degree be affected by the outcome of the proceeding. Where a petitioner failed to allege that he actually uses or benefits in some specific way from the subject wetland and failed to state with specificity how the proposed project might adversely affect this interest, the petitioner failed to provide the Board with a detailed statement such that the Board could determine that the petitioner had a "substantial" interest that might be affected by the outcome of the Board's proceeding. *Champlain Oil Company*, CUD-94-11, Preliminary Order: Party Status and Takings Issues (01/03/95).

* An alleged injury to a business interest, alone, does not support a grant of party status in a conditional use determination appeal. *Id.*

* Intervention was granted pursuant to Board Rule of Procedure 22(B) *[now 25(c)]* to a petitioner who entered her appearance prior to the scheduled prehearing conference, who petitioned the Board orally for party status, and who demonstrated a substantial interest which might be affected by the outcome of the proceeding. *Appeal of Cole*, WQ-92-13, Memorandum of Decision: Requests for Intervention (07/09/93).

* Petitioner for permissive intervention must demonstrate a substantial interest which may be affected by the outcome of the proceeding. A "substantial interest" is something more than "a general concern for the natural resources of the state." Rather, the person seeking permissive intervention must demonstrate some specific interest or special connection to the subject body of water. *Id.*

* Petitioner, who demonstrated that her interest was not identical to that of the appellant's, who did not have an alternative means by which she could protect that interest, and where intervention would not unduly delay the proceeding or prejudice the interest of existing parties or of the public, was granted permissive intervention. *Id.*

* Non-profit corporation, dedicated to the conservation of southern Vermont's natural resources and owner of property adjacent to outstanding resource water but two-and-a-half miles downstream of permitted discharge, was granted permissive intervention, where corporation failed to provide sufficient information and justification entitling it to party status as of right pursuant to Board Rule of Procedure 22(A)(7) [now 25(B)(8)]. *Id.*

* Petitioner was denied permissive intervention because he failed to demonstrate through an affidavit or other particularized statement that he had a "substantial interest which may be affected by the outcome of the proceeding." This standard required the petitioner to demonstrate some interest more substantial than a general concern for the protection of the public's use and enjoyment of the particular water body at issue or a general concern for the natural resources of the state; the Board's permissive intervention rule contemplates a considerable or consequential interest in the outcome of the case. *Appeal of Vermont Natural Resources Council (Sugarbush),* WQ-92-05, Prehearing Conference Order (08/18/92).

1182.1 Interest Adequately Protected by Other Parties

* Environmental organization's interests and membership differed from that of other organizational parties; the Board concluded that such an interest could not be adequately protected by other parties and so granted permissive intervention. *Appeal of Vermont Natural Resources Council (Sugarbush),* WQ-92-05, Prehearing Conference Order (08/18/92).

* Petitioner, who held riparian rights to waters downstream of the proposed project, had the requisite interest for party status of right, but because it did not enter a timely appearance in the matter under appeal, it was denied party status of right and permissive intervention with regard to the dam permit. It made, however, a timely party status request in the § 401 certification appeal and, therefore, was granted party status pursuant to the permissive intervention rule. *Id.*

1182.2 Alternative Mean Exist to Protect Interest

1182.3 Undue Delay of Proceeding

1182.4 Prejudice to Existing Parties or Public

1183. Conditions / Restrictions Imposed on Intervenor

1183.1 Joint Representation by Counsel

1183.2 Joint Presentation of Evidence

1183.3 Other

E. Standing (1211-1240)

1211. General / Standing to Appeal

* Facts that may pertain to standing or party status may not always pertain to the merits of a proceeding. Once party status has been granted, the focus of the appeal is not on the interests of these parties but on the regulatory requirements for the project that have been raised by notice of appeal, even if those requirements are not as stringent as these parties believe their interests would warrant. *Waters of the Green Mountain National Forest*, ORW-03-01, Memorandum of Decision (06/28/04).

* The Board dismissed for lack of jurisdiction an appeal regarding the issuance of a Conditional Use Determination after concluding that appellants lacked standing to sustain the appeal. Appellants failed to supplement their Notice of Appeal, as instructed by the Board during a prehearing conference, with information indicating what alleged injury or potential injury to their interests, as related to the wetland and its functions, would arise as a result of the issuance of the CUD. The Board thus concluded that Appellants did not meet their burden of proof in demonstrating that they are persons or parties in interest aggrieved by the Secretary's decision. *In re Kent Pond,* MLP-03-10, MLP-03-11, and CUD-03-13 (Consolidated), Memorandum of Decision and Dismissal Order (02/18/04).

* To have standing to appeal a Conditional Use Determination, an appellant must demonstrate some material "interest" and an alleged "injury" to that interest that is attributable to the Secretary's act or decision. In addition, the "interest" and "injury" alleged must have some nexus with the water resource at issue. *Id.*

* Although the VWR clearly contemplate that persons living in the vicinity of a significant wetland may have an interest in the protection of that wetland, a person's ownership of property within or adjacent to a significant wetland or its buffer zone does not *per se* entitle a person to appeal or participate as a party in a conditional use determination appeal pursuant to 10 V.S.A. § 1269 and the VWR. *Id.*

* Although the VWR clearly contemplate that persons living in the vicinity of a significant wetland may have an interest in the protection of that wetland, a person's ownership of property within or adjacent to a significant wetland or its buffer zone does not per se entitle a person to appeal or participate as a party in a conditional use determination appeal pursuant to 10 V.S.A. § 1269 and the VWR. *Id.*

* When the facts surrounding the standing issue are not in dispute, the Board will decide the standing issue as a matter of law, based on the filings of the parties. If a factual argument relating to standing occurs, the Board may convene a limited evidentiary hearing to decide the facts before applying the law. *In Re Lowe's Home Centers, Inc*., WQ-03-15, Memorandum of Decision (11/26/03).

* As a threshold matter, the Board must determine whether an appellant's legal standing to bring an appeal may be determined as a matter of law or whether any factual arguments relating to the standing issue must first be resolved. *Id.*

* While an appellant may be required to prove the allegations supporting his standing and party status at a hearing if those allegations are controverted, the Board generally attempts to resolve claims concerning standing without holding an evidentiary hearing. *Id.*

* If a reasonable objection to legal standing is made at a prehearing conference or within a time-certain provided by a prehearing conference report and order, the burden of proving standing shifts to the appellant. *Id.*

* If a reasonable objection to legal standing is made, either at the prehearing conference or within a time-certain provided by a prehearing conference report and order, the burden of proving standing shifts to the appellant. *Vermont Agency of Transportation (Route 7),* WQ-03-01, Memorandum of Decision (06/04/03).

* In appropriate circumstances, the Board may require the appellant to file affidavits supporting its supplemental notice of appeal or statement on standing. These affidavits must detail the factual basis for the appellant's alleged standing and allow the permittee to dispute any relevant issues of fact relating to standing. *Id.*

* In most cases, the facts surrounding the standing issue are not in dispute and the Board can therefore decide the standing issue as a matter of law, based on the filings of the parties. However, if a factual argument relating to standing occurs, the Board may convene a limited evidentiary hearing to decide the facts before applying the law. *Id.*

* Legal standing under the Vermont Water Pollution Control Act requires an interest in the resource beyond that of the general public, a concrete and particularized injury to that interest, and the ability of the Board to redress the alleged injury. *Id.*

* Legal standing is available not only to individuals, but also to organizations. *Id.*

* The bar for establishing legal standing before the Board is not high, and the procedure for demonstrating legal standing in appeals to the Board does not need to be onerous or complicated. *Id.*

* The Vermont Water Pollution Control Act must generally be construed to comply with federal requirements, including federal standing requirements. *Id.*

* The essential function of standing is to ensure that Board decisions arise from actual controversies rather than issues of policy shared by the public at large. *Id.*

* Merits issues are not to be confounded with standing issues. *Id.*

* Standing focuses on whether the litigant is the proper party to bring suit, not on whether the issue itself is justiciable. *Village of Enosburg Falls*, WQ-03-03, Memorandum of Decision (05/21/03).

* The Board's Rules distinguish between what an appellant must demonstrate to show standing from what a person seeking to intervene as a party in another's appeal must demonstrate to establish party status. *Id.*

* Under the Vermont Water Pollution Control Act, a person or party in interest aggrieved by an act or decision of ANR has legal standing to appeal. The term aggrieved means a substantial grievance, a denial of some personal, pecuniary, or property right, or the imposition of a burden or obligation. This is analogous to the requirements for legal standing in the courts, which require plaintiffs to be injured or threatened with injury by the governmental action complained of. *Id.; City of South Burlington and Town of Colchester*, WQ-03-02, Memorandum of Decision (05/20/03).

* Standing focuses on whether the litigant is the proper party to bring suit, not on whether the issue itself is justiciable. *Id.*

* The administrative appeals route provided by the Vermont Water Pollution Control Act is intended to be remedial and should be construed liberally. *Id.*

* The Board determined that to gain standing at the beginning of a case, appellants need not prove that there is a substantial likelihood that the discharge affects their interests or that their harm is fairly traceable to the discharge. If, however, the appellant's use and enjoyment of a resource is upstream from the

discharge, the appellant's harm may not be fairly traceable to a discharge and they might not have standing. *Id.*

* Standing must be established in each case separately. *Id.*

* Under its authority to administer the federal Clean Water Act, a state must provide an opportunity for judicial review in state court of the final approval or denial of state-issued permits that is sufficient to provide for, encourage, and assist public participation in the permitting process. A state meets this standard if state law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit. A state will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review). Although this regulation is not directly applicable to the Board, it does suggest that the Board, as an administrative body intermediate between the Secretary of ANR and the State Supreme Court, should be no more restrictive in its standing analysis than the federal courts. *CCCH Stormwater Discharge Permits,* WQ-02-11 (ANR Permits #1-1556 and #1-1557), Memorandum of Decision (03/21/03).

* The determination of standing to appeal centers on whether the appellant constitutes a "person or party in interest aggrieved" by the Secretary's action or decision. "Person" is defined broadly in the Water Pollution Control Act, 10 V.S.A. § 1251(8), as including individuals as well as "public or private corporation[s]." Although the term "aggrieved" is not defined in the Water Pollution Control Act, when paired with the word "person" or "party," the word "aggrieved" means "a substantial grievance, a denial of some personal, pecuniary or property right, or the imposition upon a party of a burden or obligation." *Id.*

* The administrative appeals process provided by 10 V.S.A. § 1269 is intended to be remedial and should be construed liberally. A person appealing under this statutory section must allege facts to show some injury to an interest, attributable to an act of the Secretary of ANR that can be redressed by the Board. *Id.*

* Because the Board is not an Article III court and, thus, not strictly bound by the Parker test, it will be guided by relevant Vermont and federal statutes in addition to court precedent in determining who has standing. *Id.*

* Appellants may be required to prove their allegations of legal standing at a hearing if those allegations are controverted. *Village of Ludlow (Ludlow Wastewater Treatment Facility),* WQ-01-08, Memorandum of Decision (04/05/02).

* Standing inquiries focus on the party appearing before the Board rather than on the merits of the appeal. *Id.*

* Evidence supporting a conclusion that the appellant's interest in the water resource cannot possibly be affected by the action appealed may be grounds for dismissing the appeal for lack of standing. *Id.*

* Persons advancing generalized complaints about ANR's actions, or appellants seeking to prevent environmental degradation generally, without more, do not have standing to appeal. The alleged injury to the appellant's interests must be concrete, actual, and particularized. Litigants without a personal stake in the proceedings beyond those affecting the common rights of all persons do not have standing to act on behalf of the public interest. Abstract concern or mere speculation about the effects of a generalized grievance cannot substitute for the threat of actual injury. *Id.*

* The Board does not have jurisdiction to hear an appeal if an appellant does not have legal standing. *Id.*

* At a limited evidentiary hearing on legal standing and party status, the appellant carries the burden of persuasion and the initial burden of production to prove by a preponderance of the evidence that the appellant has legal standing and party status. *Id.*

* Procedural Rule 25(B)(7) is not an appropriate basis for an appellant, who is not a permit applicant, to seek standing under 10 V.S.A. § 1269. *OMYA, Inc.,* WQ-01-09, Memorandum of Decision (04/02/02).

* Pursuant to Board Rule of Procedure 23, in an appeal of a Chair's Preliminary Ruling on the question of the appellant's standing, the Board relies on the exhibits admitted by the Chair and may, in its discretion, conduct an evidentiary hearing to decide the limited question of standing *de novo*. *Id.*

* To determine the party status of the appellant who seeks to commence an appeal, the Board looks to the statute under which the putative appellant seeks to participate and, if necessary, to its own Rules of Procedure governing party status and intervention. *Paul Dannenberg*, WQ-99-07, Memorandum of Decision on Motion to Dismiss and Scheduling Order (04/20/00). (Decided under prior Water Resources Board Rules of Procedure.)

* Under 10 V.S.A. § 1269, any person aggrieved by a decision of the Secretary of ANR has standing to appeal to the Board. The determination of what it means to be aggrieved is a case-by-case inquiry. The Board reads the aggrieved standard broadly. *Id.*

* Limited information presented to the Board indicating that the appellant's substantial interest in his private drinking-water supply *may* be affected is all that is necessary to establish party status. However, if a party supplies sufficient evidence to support a conclusion that a neighbor's application of an aquatic herbicide to his pond *could not* affect the appellant's water supply, this matter may be dismissed prior to a full hearing on the merits. *Id.*

* In instances where a party has challenged the standing of an appellant, the Board has generally looked to the appellant's notice of appeal to find facts demonstrating a nexus between the appellant's alleged interest, the injury asserted, and the act or decision of the Commissioner of DEC, or the Secretary of ANR. In making its standing determination, the Board has also looked at the appellant's representations, either in its notice of appeal, at a prehearing conference, or in filings supplementing the notice of appeal. *Nathan Wallace-Senft (Bennington Bypass Project)* WQ-99-04 and CUD-99-05, Dismissal Order (09/08/99).

* While it is settled that the injury needed to confer standing may be noneconomic in nature, there must be some showing of harm to a legally protected interest. *Id.*

* Where appellants provided the Board with no facts supporting a protected interest distinct from that of the public's and as a consequence were unable to demonstrate any threatened injury to a protected interest, they lacked standing and therefore failed to establish a basis for the Board's assertion of jurisdiction. *Id.*

* When the right to appeal is statutorily granted, the appellant need not also demonstrate standing under the Board's Procedural Rules. *Husky Injection Molding Systems, Inc*., MLP-98-06, Memorandum of Decision (02/22/99).

* Where one or more original appellants are determined to lack standing, the Board may look to its Procedural Rules for guidance on the scope of the issues for which the appellants may be entitled to be heard. *Id.*

* Appellants were determined to have standing to appeal upon a showing that they use the public waters at issue for various purposes, including aesthetic enjoyment, that they participated in the permit proceeding, and that the proposed would have adverse aesthetic and environmental impacts cognizable under 29 V.S.A. § 405(b). *Id.*

* Whether a person is "aggrieved" is a mixed question of fact, law, and public policy. In applying the aggrievement standard of 29 V.S.A. § 406(a), the Board has routinely considered an appellant's alleged interest(s) in the outcome of a proceeding in relation to the purpose of the statutory program under which the appealed permit was issued. *Id.*

* When the Board is faced with a statute that is silent concerning who has a right to file an appeal, the Board turns to its own Procedural Rule 22 *[now Rule 25]* for guidance on party standing. Therefore, even

though 3 V.S.A. § 2873(c)(4) does not specify who may file appeals from a subdivision permit, Appellants were found to meet the requisite standards for "parties of right" under Rule 22(A)(7) *[now Rule 25(B)(7)]* thereby sustaining their appeal. *McIntyre and Lovett*, EPR-98-02, Memorandum of Decision (08/12/98).

* A person who lives in the vicinity of a significant wetland and is a member of and representative for a class of persons who have made historical and current use of the wetland in question, has a specific interest in the wetland. If that interest in the wetland may be adversely affected by the issuance of Conditional Use Determination, and there exists no other alternative means for that person to protect that interest, then that person has standing to appeal to the Board pursuant to 10 V.S.A. § 1269. *Appeal of Larivee*, CUD-92-09, Memorandum of Decision on Preliminary Issues (07/13/93).

1212. Standing of Individuals

* Legal standing before the Board is not limited to appellants whose use of the resource would be entirely eliminated by the act that aggrieves them. *Vermont Agency of Transportation (Route 7)*, WQ-03-01, Memorandum of Decision (06/04/03).

* Concerns expressed by the appellants about how the permitted discharges at issue would affect their recreational and business interests in the receiving waters represented a sufficient demonstration of injury to support their legal standing. *Id.*

* It is enough to demonstrate legal standing to show that injury to the interests of the appellant might result from the issuance of the permit. *Id.*

* A citizen appellant need not be an owner of land along the particular body of water affected by the secretary's permit decision nor must the appellant demonstrate a pecuniary interest in the outcome of the matter in order to have standing. The Board construes 10 V.S.A. § 1269 liberally such that standing exists where an individual asserts that he or she uses or enjoys the water resource in issue and alleges that that use and enjoyment may in some way be impaired if the secretary's decision is allowed to stand. *In re CCCH Stormwater Discharge Permits*, WQ-02-11 (ANR Permits #1-1556 and #1-1557), Memorandum of Decision (03/21/03).

* While the bar for establishing standing is not high, an appellant must show some level of injury greater than harm to the general public. Mere speculation about the impact of some generalized grievance is not a sufficient basis to find standing. *Id.*

* Because the "injury" to an appellant's interest must be concrete and particularized, not an injury affecting the common rights of all persons, the alleged "injury" to an appellant's interest *must* be something more than a generalized complaint about ANR's approach to approving a specific activity or project involving public waters. *Id.*

* Where two or more appellants file an appeal jointly, only *one* of the Appellants need demonstrate standing under *one* of the standing tests in order for the appeal to survive a jurisdictional challenge to appellants' standing. *Id.*

* Rules of Procedure 19 and 25 (effective January 1, 2002) distinguishes between what an appellant must demonstrate in order to show *standing* from what a person seeking to *intervene* as a party in another's appeal must demonstrate. The rules also clarify that the demonstration of standing must be made at the outset of the appeal. *Id.*

* Where the standing of an appellant is challenged, the Board looks almost exclusively to the appellant's notice of appeal, as originally filed or as supplemented, to find facts demonstrating a nexus between the appellant's alleged interest, the injury asserted, and the act or decision of ANR. *Id.*

* The Board leaves it to each appellant to determine how best to make a prima facie showing that it meets the requisite elements of standing and the Board assumes that the statements contained in a petition or memorandum in support of standing are well grounded in fact. Based on this assumption, the Board presumes the veracity of the factual allegations contained in notices of appeals in favor of the appellant. *Id.*

* Where a prima facie demonstration of standing has been made, those who seek to challenge the standing of an appellant have the burden of coming forward with argument, affidavits and/or other documentary evidence sufficient to call into question the accuracy or legal sufficiency of the representations made in the notice of appeal. *Id.*

* If the standing of an appellant is challenged, the appellant is allowed an opportunity to file a responsive memorandum, affidavits and/or exhibits to rebut the challenge. Those challenging an appellant's standing are also allowed an opportunity to file reply memoranda. The Board evaluates the competing allegations contained in all of the various filings to determine whether the appellant has the requisite standing. *Id.*

* An appellant does not need to own property along the water resource or demonstrate a pecuniary interest to have legal standing before the Board. An appellant's present and historical use of the water resource for recreational purposes, coupled with an allegation that the appellant's use and enjoyment of the waters will be adversely affected by permit under appeal has been sufficient to demonstrate standing before the Board. *Village of Ludlow (Ludlow Wastewater Treatment Facility),* WQ-01-08, Memorandum of Decision (04/05/02).

* The appellant made a credible claim to being aggrieved based on the proximity of the appellant's well to a pond permitted to receive aquatic herbicide. Although the appellant did not make some showing of injury, he provided a context in which he perceived some harm to be likely or possible. That is sufficient as a threshold showing on the preliminary matter of his standing to bring the appeal. *Paul Dannenberg*, WQ-99-07, Memorandum of Decision on Motion to Dismiss and Scheduling Order (04/20/00). (Decided under previous Water Resources Board Rules of Procedure.)

* Appellants had requisite standing where they demonstrated, through timely filed information supplemental to their notice of appeal, that they were persons owning property adjacent to the subject wetland and Project and no party to the proceeding raised facts or argument challenging their claim of standing. *Barden Gale and Melanie Gale Amhowitz*, CUD-99-08, Memorandum of Decision on Preliminary Issues (03/21/00).

* Persons other than the applicant may appeal a conditional use determination decision of the Secretary to the Board. The Board looks to the VWR and its own Rules of Procedure to determine whether a person appealing a conditional use determination satisfies the standing requirements of 10 V.S.A. § 1269. *Appeal of Larivee*, CUD-92-09, Memorandum of Decision on Preliminary Issues (07/13/93).

* Permittee's argument that great deference is due ANR' technical and engineering determinations is an appropriate standard to be applied by an administrative body or court with appellate powers *after* consideration of the record on appeal; however, it is not the standard that the Board applies in making an initial determination whether a person aggrieved by a Secretary's determination is entitled to a *de novo* hearing. *Appeal of Cole*, WQ-92-13, Memorandum of Decision: Stratton Corporation's Motion to Dismiss (05/28/93).

1213. Standing of Organizations

* An organization representing persons living adjacent to or in the vicinity of a Class Two wetland at issue and who alleged use and enjoyment of that resource *related to that wetland's specific significant functions* (flood water storage, recreation, or nature observation) demonstrated a cognizable interest giving rise to standing. *Kent Pond,* MLP-03-10, MLP-03-11, and CUD-03-13 (Consolidated), Memorandum of Decision and Dismissal Order (02/18/04).

* An organization representing area businesses did not demonstrate standing where it did not allege that any of its members owned property adjacent to the wetland in question nor that any of its members made use of or enjoyed that resource for any of the specific functions and values that made that wetland a significant wetland. *Id.*

* An organization has standing to bring suit on behalf of its members when (1) its members have standing individually; (2) the interests it asserts are germane to the organization's purpose; and (3) the claim and relief requested do not require the participation of individual members in the action. *Lowe's Home Centers, Inc*., WQ-03-15, Memorandum of Decision (11/26/03).

* An organization may have standing in its own right, known as organizational standing, or standing to act on behalf of its members, known as representational standing. Organizational standing requires a tangible organizational interest to be threatened with injury by the action appealed and the redressability of this injury by the Board. Representational standing requires that the members on whose behalf an organization is appealing would have standing individually, that the interests the organization asserts on behalf of its members are germane to the organization's purposes, and that the relief the organization requests does not require the participation of these individual members in the appeal. *Vermont Agency of Transportation (Route 7),* WQ-03-01, Memorandum of Decision (06/04/03).

* An unincorporated association constitutes a "person" as that term is used in the Vermont Water Pollution Control Act and may therefore file a notice of appeal in its own name, either in its own right or on behalf of its members. *Id.*

* Only a minimal showing that the managing body of an unincorporated association supports an appeal filed in the name of the unincorporated association is required. *Id.*

* The Board will not necessarily look to the laws governing corporations for ad hoc associations and other informal organizations. *Id.*

* An informal organization like Friends of Route 7 is subject to the same requirements for legal standing as an incorporated appellant. However, the purposes or interests of an unincorporated association, like those of an individual, are flexible and can be defined informally or implicitly. *Id.*

* Even if it is true that the primary interests of an unincorporated association in the past did not involve water quality, this organization would still have the requisite appealable interest for legal standing if one of its current interests includes the water resources associated with the permit at issue on appeal. *Id.*

* The Board finds no basis for a blanket rule requiring an unincorporated association to identify each and every one of the members whose interests the association represents on appeal. *Id.*

* The recreational and business interests in water quality and stream bank stability of an organization's members were germane to the organization's purpose of protecting the interests of its members that may be affected by the permitted project. *Id.*

* Allegations that the permit under appeal violates the conditions of existing WIPs, that the permit fails to use up-to-date treatment systems, and that the permit will lead to further violations of the VWQS in the receiving waters were sufficient to demonstrate that the interests of the appellants in the receiving waters may be injured by ANR's issuance of the permit under appeal, and that this permit represents a sufficient injury to the interests of the appellants to support their legal standing to appeal. *Id.*

* Where the alleged injuries of the appellants arise from the issuance of a stormwater permit that falls within the Board's appellate jurisdiction, the alleged injuries to the appellants satisfy the redressability requirement of legal standing. *Id.*

* The Board looks to decisions of the Vermont Supreme Court for guidance to decide whether an organizational appellant has the requisite standing to challenge an ANR permitting decision. *Village of Enosburg Falls*, WQ-03-03, Memorandum of Decision (05/21/03).

* An organization must demonstrate either organizational standing or associational standing, which may also be called representational standing, to bring an appeal under the Vermont Water Pollution Control Act. *Id.*

* An environmental advocacy organization was not required to produce lists of its members to establish standing to appeal a discharge permit. *Id.*

* To satisfy the representational standing test, an organization must prove that its members have standing individually, the interests it asserts are germane to the organization's purpose, and the claim and relief requested do not require the participation of individual members in the appeal. *Id. See also City of South Burlington and Town of Colchester*, WQ-03-02, Memorandum of Decision (05/20/03).

* The Board looks to decisions of the Vermont Supreme Court for guidance to decide whether an organizational appellant has the requisite standing to challenge an ANR permitting decision. *Id.*

* The Board found that members of an organization would have standing to appeal a discharge permit individually based on affidavits showing that these members use and enjoy the receiving waters and that their use and enjoyment of these waters was threatened by the discharge. *Id.*

* An organization must demonstrate either organizational standing or associational standing, which may also be called representational standing, to bring an appeal under the Vermont Water Pollution Control Act. *City of South Burlington and Town of Colchester*, WQ-03-02, Memorandum of Decision (05/20/03).

* The Vermont Supreme Court suggests two tests under which an organization might have standing: first, the basic organizational standing test and, second, the "representational" standing test (called the "associational" standing test by the Vermont Supreme Court and the federal courts). *CCCH Stormwater Discharge Permits*, WQ-02-11 (ANR Permits #1-1556 and #1-1557), Memorandum of Decision (03/21/03).

* The basic organizational standing test requires an organization to demonstrate that it has a tangible organizational interest (for example, a pecuniary or contractual interest) which is threatened with injury by ANR's action and which is redressable by the Board. The second test, the "associational" or "representational" standing test, is most frequently applied to an organization that, through the appeals process, seeks to protect from injury the interests of its *members*. *Id.*

* Participation in past Board cases is not conclusive of organizational standing or a pre-requisite to standing. It is, however, a supporting factor that can bolster an appellant's claim of standing based on the organization's purpose. *Id.*

* An organization's request for standing to appeal ANR's issuance of a Water Quality Certificate for a hydroelectric facility under the authority of 10 V.S.A. Chapter 41, § 1004, was denied for failure to show that it had a legally cognizable basis for aggrievement as required by 10 V.S.A. §1024(a). *Clyde River Hydroelectric Project,* WQ-02-08(A), (B), and (C) (Consolidated), Prehearing Conference Report and Order (10/25/02).

* To determine whether a non-profit corporation is "aggrieved" by an action of ANR, the Board engages in a two-prong analysis to identify a legally cognizable basis of that aggrievement. First, it looks to see whether the organization has the requisite "organizational" standing and, second, whether it has the requisite standing in its so-called "representational" capacity. *Id.*

* To determine whether an organization is aggrieved within the meaning of 10 V.S.A. §1024(a), the Board first considers whether the organization has demonstrated a substantial interest which may be affected ("injured") if ANR's decision is allowed to stand and, therefore, has a stake in the outcome of *de novo* review by the Board. This test is analogous to the standing requirements utilized by courts, whereby a court must find that, "on the face of the complaint," a plaintiff has alleged sufficient facts to show a protected interest, actual injury or the threat of injury to that interest traceable to the defendant's conduct, and redressability." *Id.*

* Bearing in mind that the "interest" that may be "injured" as a consequence of the Secretary's action may or may not be a real property interest, the Board considers whether the organization itself has an interest in the use and enjoyment of the water resource at issue. *Clyde River Hydroelectric Project*, WQ-02-08(A), (B), and (C) (Consolidated), Prehearing Conference Report and Order (10/25/02).

* The Board may find an organization is aggrieved for purposes of standing to appeal an Agency decision if the organization can demonstrate both an injury to the organization's "purpose," and that the purpose is specifically concerned with the protection of water quality, water-dependent wildlife, or other resource values related to water resources management in Vermont. *Id.*

* To prove legal standing, an organization needed to show a connection between the impacts of the proposed discharge on the water resource and either its organizational interests or the interests of its members. *Village of Ludlow (Ludlow Wastewater Treatment Facility),* WQ-01-08, Memorandum of Decision (05/15/02).

* Because the appellant did not demonstrate a nexus between the permitted discharge on the one hand and either its legal interests or those of its members on the other, the appellant failed to show that its organizational and membership interests were any different from those of the general public. *Id.*

* Evidence that relates to the condition of the water resource but that fails to indicate how the permitted discharge will affect the resource, or where, or that the effects of the permitted discharge will injure any specific or particularized interests of the appellant or its members does not support the appellant's legal standing. *Id.*

* Organizations may have standing either in their own right or in their representational capacity. *Village of Ludlow (Ludlow Wastewater Treatment Facility),* WQ-01-08, Memorandum of Decision (04/05/02).

* Where the evidence indicated that only two members of an organization used the water resource at all, that neither of those members would incur a particularized injury relating to the permit at issue, and that the organization and its members are acting as concerned citizens with a general concern about the environment rather than to redress a direct and immediate, legally cognizable injury, the organization failed to prove legal standing. *Id.*

* A not-for-profit corporation may be a person aggrieved. It may have standing in its own right by demonstrating that the activity authorized by the permit under appeal will injure or threatens to injure its own corporate interests or it may have standing in its "representational" capacity. *OMYA, Inc.,* WQ-01-09, Memorandum of Decision (04/02/02).

* An organization has standing to bring suit on behalf of its members when (1) its members have standing individually; (2) the interests it asserts are germane to the organization's purpose; and (3) the claim and relief requested do not require the participation of individual members in the action. *Id.*

* What constitutes "membership" may vary, depending on the formality of the organization involved. When, however, an organization has sought the benefits of non-profit incorporation, it may, by operation of state law, have corporate members or no members at all. *Id.*

* Non-profit, business group did not demonstrate that it was a "person aggrieved" under 10 V.S.A. §1269 and the Board's Procedural Rules 25(B)(7) and (8) where it did not own real property adjacent to the Class Two wetland or buffer zone in question, it did not allege that any of its members actually owned property adjacent to that wetland or its buffer zone or made actual use of the wetland for its significant functions, and its alleged organizational "interest" was related more to economic sustainability than to environmental protection. *Home Depot, USA, Inc. et al.*, WQ-00-06, Findings of Fact, Conclusions of Law, and Order (02/06/01) and Memorandum of Decision re: Motion to Alter (03/16/01); *dismissed with prejudice,* SO-244-01 RcCa (07/11/01).

1213.1 Organizational Standing

* An organization must demonstrate either organizational standing or associational standing, which may also be called representational standing, to bring an appeal under the Vermont Water Pollution Control Act. *City of South Burlington and Town of Colchester*, WQ-03-02, Memorandum of Decision (05/20/03).

* The Board found that members of an organization would have standing to appeal a discharge permit individually based on affidavits showing that these members use and enjoy the receiving waters and that their use and enjoyment of these waters was threatened by the discharge. *Id.*

* What constitutes "membership" may vary, depending on the formality of the organization, on the nature of the organization itself, and the requirements of corporate law within the jurisdiction in which the organization in question has been incorporated. *CCCH Stormwater Discharge Permits*, WQ-02-11 (ANR Permits #1-1556 and #1-1557), Memorandum of Decision (03/21/03).

* Organizations are not required to provide their members with voting rights in order to represent them in litigation, especially where the jurisdictions of incorporation do not require those corporations to provide its members with voting rights. *Id.*

* An organization that is deemed a membership organization by the jurisdiction in which it is incorporated is qualified to represent its members if those members can demonstrate that they would have standing in their individual capacities and if the organization can meet the other two prongs of the representational standing test. *Id.*

* An organization that demonstrates the requisite "representational" standing to support an appeal under 10 V.S.A. § 1269 is not required to also show that it meets the tests for organizational standing. *Id.*

* A corporation which has not demonstrated that it has the requisite injury to its own interests sufficient to support organizational standing cannot make up for that deficiency by invoking statutory policy statements articulating the public interest, in this instance, the State's water quality policy. *OMYA, Inc.*, WQ-01-09, Memorandum of Decision (05/16/02).

* To bring suit in its own right, an organization must demonstrate that the matter on appeal may injure or threaten to injure the organization's interests. An organization whose interest in the protection of the resource at issue is no different from that of the general public does not have legal standing. An organization may not lift itself by its bootstraps into a position of legal standing merely by defining its organizational purpose as the protection of natural resources. Like an individual, an organization's interest in the outcome of a proceeding must be direct and immediate in order for the organization's appeal to be legally cognizable and justiciable by the Board. *Village of Ludlow (Ludlow Wastewater Treatment Facility),* WQ-01-08, Memorandum of Decision (04/05/02).

* An organization dedicated to environmental protection and sustainable growth that failed to demonstrate that its interests in the permit were different from those of the public generally did not prove legal standing in its organizational capacity. *Id.*

* In appeal of a discharge permit, non-profit corporate appellant failed to demonstrate that it had the requisite corporate interest to sustain its appeal where the interest that it alleged was injured by the terms of the discharge permit was the corporation's purpose and where the evidence showed that the corporation's purpose was so broad that it could not be distinguished from the public's interest generally in the protection of Vermont's water resources. *OMYA, Inc.*, WQ-01-09, Memorandum of Decision (04/02/02).

* It was not necessary for a neighborhood group that had met the requirements for standing in its representational capacity to demonstrate that the project in question would actually result in injury to its members' interests; but, rather, that the organization had a substantial interest which might be affected by the outcome of the appeal. *Home Depot, USA, Inc. et al.*, WQ-00-06, Findings of Fact, Conclusions of Law, and Order (02/06/01) and Memorandum of Decision re: Motion to Alter (03/16/01); *dismissed with prejudice,* SO-244-01 RcCa (07/11/01).

1213.2 Representational Standing

* If a corporation seeks standing in its representational capacity, it must demonstrate that its members make use and enjoyment of the water resource in question and that use and enjoyment is germane to its corporate purposes. *Lowe's Home Centers, Inc*., WQ-03-15, Memorandum of Decision (11/26/03).

* Whether an organization has standing in its representational capacity depends in part on the *relief* sought and whether this relief adequately protects the interests of the individual members. If the legal interests of the individual members are distinct and cannot be adequately protected by the relief sought by the organizational appellant, the question arises whether those individuals should have appealed the permit to secure relief appropriate to their alleged injuries. *Id.*

* Upon determination by the Board that an organization that has standing on the basis of the representational standing theory, the Board need not address the organizational standing arguments. *Id.*

* A local nonprofit, public benefit corporation organized "for the purpose of supporting growth that is sustainable and which does not threaten Vermont's environment" was determined by the Board to be a person in interest aggrieved because its members had specific and substantial interests in the protection

of the water resources downstream of the discharge under appeal which were different from those of the general public and those interests *might* not be adequately protected by the decision of the Secretary. *Id.*

* To satisfy the representational standing test, an organization must prove that its members have standing individually, that the interests it asserts are germane to the organization's purpose, and that the claim and relief requested do not require the participation of individual members in the appeal. *City of South Burlington and Town of Colchester*, WQ-03-02, Memorandum of Decision (05/20/03).

* The Board has held previously that an organization has "representational" standing to bring suit on behalf of its members when: (1) its members have standing individually; (2) the interests it asserts are germane to the organization's purpose; and (3) the claim and relief requested do not require the participation of individual members in the action. *CCCH Stormwater Discharge Permits*, WQ-02-11 (ANR Permits #1-1556 and #1-1557), Memorandum of Decision (03/21/03).

* What constitutes "membership" may vary, depending on the formality of the organization, on the nature of the organization itself, and the requirements of corporate law within the jurisdiction in which the organization in question has been incorporated. *Id.*

* Organizations are not required to provide their members with voting rights in order to represent them in litigation, especially where the jurisdictions of incorporation do not require those corporations to provide its members with voting rights. *Id.*

* Non-membership organizations may represent the interests of their "members" if there is some indicia of membership. *Id.*

* An organization that is deemed a membership organization by the jurisdiction in which it is incorporated is qualified to represent its members if those members can demonstrate that they would have standing in their individual capacities and if the organization can meet the other two prongs of the representational standing test. *Id.*

* To support a claim of representational standing, an organization's members must demonstrate standing in their own right by showing that they have an interest (such as the use and enjoyment of the waters at issue) which may be injured should ANR's act or decision be allowed to stand and that the Board has authority to redress that "injury." *Id.*

* The first prong of the representational test is met by an organization whose members demonstrate both individual interests and injuries sufficient to support the claim of "aggrievement" pursuant to 10 V.S.A. § 1269. Interest can be demonstrated by a claim of regular and specific recreational use of the waters in question and injury can be demonstrated by claiming that their specific uses and enjoyment of these waters may or will be impaired by additional pollutants carried by the storm water discharges allowed under the permit being appealed. *Id.*

* The second prong of the representational test can be met by an organization's corporate governing documents showing that it has an organizational purpose which is *germane* to the protection of water resources in Vermont. This part of the test can also be satisfied in some instances by non-governing corporate documents that clarify the organization's purpose. *Id.*

* An organization meets the third prong of the representational standing test when its members have indicated by affidavit that they lack the financial means, personal time, or the legal and technical expertise required to litigate the complicated issues raised on appeal and that their individual participation in the appeal is not required to resolve any one of the claims or to perfect some aspect of the relief requested. *Id.*

* A non-profit corporation has demonstrated the requisite "representational" standing to support the Board's jurisdiction to hear its appeal if its members would qualify for standing in their individual capacities, if its members' interests are germane to the corporate purpose of the organization, and its members' individual participation is not required to address and resolve the claims and relief raised in the appeal. *Id.*

* An organization that demonstrates the requisite "representational" standing to support an appeal under 10 V.S.A. § 1269 is not required to also show that it meets the tests for organizational standing. *Id.*

* To sustain a claim of "representational" standing, an organization must demonstrate that it meets each of the following three criteria: (1) its members have standing individually; (2) the interests it asserts are germane to the organization's purpose; and (3) the claim and relief requested do not require the participation of individual members in the action. *Clyde River Hydroelectric Project,* WQ-02-08(A), (B), and (C) (Consolidated), Prehearing Conference Report and Order (10/25/02).

* Board denied requests to alter conclusions of law where movant failed to demonstrate that Board had applied erroneous "new" legal standard in requiring non-profit corporation to have voting members to support representational standing, when the basis for the Board's requirement was well-established statutory law applying to non-profit corporations, Title 11B V.S.A. *OMYA, Inc.,* WQ-01-09, Memorandum of Decision (05/16/02).

* A document indicating that its signatory has used the water resource but that did not indicate when or where in relation to the proposed discharge would not alter the Board's decision that an organization failed to prove representational standing. *Village of Ludlow (Ludlow Wastewater Treatment Facility)*, WQ-01-08, Memorandum of Decision (05/15/02).

* In appeal of a discharge permit, non-profit corporate appellant failed to demonstrate that it had standing in its "representational" capacity where it had no voting and, therefore, corporate members pursuant to Title V.S.A.11B. *OMYA, Inc.,* WQ-01-09, Memorandum of Decision (04/05/02).

* In order to obtain representational standing, an organization must show that at least some of its members have standing individually, that the interests it asserts on appeal are germane to the organization's purposes, and that the relief requested does not require the organization's members to participate in the action individually. *Village of Ludlow (Ludlow Wastewater Treatment Facility),* WQ-01-08, Memorandum of Decision (04/05/02).

* If a corporation seeks standing in its representational capacity, it must demonstrate that its members make use and enjoyment of the water resource in question and that use and enjoyment is germane to its corporate purposes. *OMYA, Inc.,* WQ-01-09, Memorandum of Decision (04/05/02).

* Appellant elected not to augment its initial averments, even when the Board provided it an opportunity to supplement its notice of appeal and to file a response to a motion to dismiss for lack of standing. Therefore, relying exclusively on Appellant's notice of appeal, the Board granted the motion to dismiss because the appellant did not aver facts demonstrating the requisite personal or representational interests to support its claim that it was a "person aggrieved." *Home Depot, USA, Inc., et al.,* WQ-00-06 and CUD-00-07, Memorandum of Decision on Preliminary Issues and Order (09/08/00); Findings of Fact, Conclusions of Law, and Orders (02/06/01); *dismissed with prejudice,* SO-244-01 RcCa (07/11/01). *Aff'd,* SO-241-01 RcCa Opinion and Order (08/28/01).

* Non-profit, environmental neighborhood group made a prima facie showing that it had standing in its representational capacity where it alleged facts supporting members' use and enjoyment of the receiving waters for recreational purposes and wildlife observation and further that certain members owning real property adjacent to said waters had a legitimate concern about the impact of increased peak stormwater flows upon their properties. It was not necessary for the neighborhood group to demonstrate that the project in question would actually result in injury to its members' interests; but, rather, that the organization had a substantial interest which might be affected by the outcome of the appeal. *Id.*

* Non-profit, environmental neighborhood group satisfied the minimum requirements for a finding that it was a "person aggrieved" under 10 V.S.A. §1269 and the Board's Procedural Rules 25(B)(7) and (8) where its members used and enjoyed a Class Two wetland complex in connection with that wetland's significant functions and it was clear from the CUD decision under appeal that the ANR had addressed the impacts of the project on the functions of both the small wetland directly affected by the project and the contiguous wetland complex. *Id.*

1214. Petition for Advisory Opinion or Declaratory Ruling

* Board had no jurisdiction to entertain a declaratory ruling request where the Petitioner did not assert that its own legal interests were threatened by injury as a consequence of the application of a statute, rule, or order of the Board. *Northshore Wetlands,* WET-92-03DR, Memorandum of Decision and Order (04/29/94).

1215. Petition for Revocation

1216. Petition for Outstanding Resource Waters Designation

F. Amicus Curiae (1241-1270)

1241. Discretionary Act of the Board

* The orders allowing amici curiae to participate treated their petitions as legal memoranda with respect to the motions pending before the Board. *Hannaford Bros. Co. and Lowes Home Centers, Inc.* WQ-01-01, Memorandum of Decision (08/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Appellant who was determined to lack standing under 29 V.S.A. § 406(a), should not have been granted party status by permission under WRB Rule 22(B) *[now 25 (C)]* , as appellant failed to demonstrate a "substantial interest" which would be affected by the outcome of the proceeding, and its interest would be adequately represented by other appellants. The Board, however, in its discretion, allowed this petitioner an opportunity to participate as an amicus curiae. *Husky Injection Molding Systems, Inc*, MLP-98-06, Memorandum of Decision (02/22/99).

1242. Considerations

1242.1 Consent of Parties

1242.2 State of Vermont, or Officer or Agencies Thereof

* Where a state agency, other than ANR, entered its appearance but failed to articulate what substantial interest it had in the appeal independent of any interest that might be represented by ANR, it was denied party status of right pursuant to WRB Rule 22(A)(5) *[now 25(B)(6)]* . The Board, however, in its discretion, allowed the agency to participate as an amicus curiae. *Husky Injection Molding System, Inc.,* MLP-98-06, Memorandum of Decision (02/22/99).

1242.3 Interest of Petitioner in the Outcome of Proceeding

1242.4 Expertise of Petitioner

1243. Conditions / Restrictions Imposed on Amicus Curiae

* Where an amicus curiae could not identify at the prehearing conference the party with which it would be aligned, but its petition for leave to participate as amicus curiae raised questions about the factual basis for the permits, the Chair ordered the amicus curiae to file its legal memoranda within the times allowed the appellants. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook*, WQ-02-04, WQ-02-05, WQ-02-06 and WQ-02-07 (Consolidated), Prehearing Conference Report and Order (09/20/02), *modified by* Chair's Order (10/18/02).

* An amicus curiae is aligned for procedural purposes with the party whose position it most closely supports and is limited in its participation to the filing of memoranda and the presentation of oral argument on legal issues. *Hannaford Bros. Co. and Lowes Home Centers, Inc.* WQ-01-01, Memorandum of Decision (08/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

G. Representation (1271-1300)

1271. General

* 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 and is not intended 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. *CCCH Stormwater Discharge Permits*, WQ-02-11, Prehearing Conference Report and Order (12/10/02).

* A person who is not a bonafide party or qualified representative of a bonafide party may qualify as a permissive intervener, pursuant to Board Procedural Rule 25(C), if in the Board's discretion, that person or entity demonstrates an interest which is related to the statute or Board rule at issue and may be affected by the outcome of the proceeding. *Id.*

1272. Non-Attorney

* Parties who appear before the Board without counsel are held to the same rules as those who do. *Village of Ludlow (Ludlow Wastewater Treatment Facility),* WQ-01-08, Memorandum of Decision (05/15/02).

* A dated memo signed by the chair of the appellant organization confirming that the appellant had appointed a non-attorney as its representative before the Board was sufficient prima facie authorization for the non-attorney to represent the appellant in this appeal. It was not necessary for the memo to specifically state that the non-attorney was authorized to bind the appellant or to specify the authority of the memo's signatory to act on the appellant's behalf. After the appellant authenticated the memo at a limited evidentiary hearing, the Board concluded that appellant's non-attorney spokesperson was authorized to represent the appellant in this appeal. *Id.*, Memorandum of Decision (04/05/02).

* At a limited evidentiary hearing on legal standing and party status, the appellant carried the burden of persuasion and the initial burden of production to prove by a preponderance of the evidence that the appellant's non-attorney representative was authorized to represent the appellant in this appeal. *Id.*

1273. Dual or Multiple Representation

* Department of Fish and Wildlife was entitled to representation by counsel of its choosing and oral withdrawal by one attorney followed by the entry of appearance by another was acceptable under Board Procedural Rule 23(B). *Robert A. Gillin*, MLP-94-01, Findings of Fact, Conclusions of Law and Order (08/23/94) and *Robert A. Gillin v. Department of Fish & Wildlife and Department of Environmental Conservation*, 608-11-95 WnCv & 616-11-95 Wncv (09/22/97).

1274. Proof of Representative Capacity

* A dated memo signed by the chair of the appellant organization confirming that the appellant had appointed a non-attorney as its representative before the Board was sufficient prima facie authorization for the non-attorney to represent the appellant in this appeal. It was not necessary for the memo to specifically state that the non-attorney was authorized to bind the appellant or to specify the authority of the memo's signatory to act on the appellant's behalf. After the appellant authenticated the memo at a limited evidentiary hearing, the Board concluded that appellant's non-attorney spokesperson was authorized to represent the appellant in this appeal. *Village of Ludlow (Ludlow Wastewater Treatment Facility)*, WQ-01-08, Memorandum of Decision (04/05/02).

* At a limited evidentiary hearing on legal standing and party status, the appellant carried the burden of persuasion and the initial burden of production to prove by a preponderance of the evidence that the appellant's non-attorney representative was authorized to represent the appellant in this appeal. *Id.*

* The prehearing conference report and order established a schedule for the appellant to file evidence of its non-attorney representative's authority to represent the appellant in this appeal. *Id.*

* Representatives of the Commonwealth of Massachusetts were directed to file affidavits indicating that they may lawfully practice in Vermont or, alternatively, file notices of substitution of counsel.

Massachusetts filed a motion for substitution of counsel and admission *pro hac vice*, supported by a letter from a Vermont Assistant Attorney General, and the Board's Chair deemed this to satisfy the requirements of the Board's order. *Deerfield River Hydroelectric Project*, WQ-95-01 and WQ-95-02 (Consolidated), Order (05/03/96).

IV. PERMIT or OTHER CONTESTED CASE DECISION or APPROVAL (1301-1400)

A. General (1301-1320)

1301. Application for Permit

* For the Board to decline to construe a permit under current rules and statutes, the Board must be satisfied that the applicants have a vested right in prior law. Any rights of the applicants in prior law did not vest unless their permit application was complete when the prior law was in effect. Current law applies if the applicants fail to carry their burden by a preponderance of the evidence that prior law applies. *Hannaford Bros. Co. and Lowes Home Centers, Inc.*, WQ-01-01, Memorandum of Decision (06/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Where ANR has not yet taken action on a timely application for a permit renewal, the permit that otherwise would have expired remains in full force and effect under 3 V.S.A. § 814(b). *Town of Cabot,* WQ-00-04, Memorandum of Decision (07/11/00).

1302. Issuance of Permit

* Neither ANR nor the Board can approve a project until the applicant proves compliance, and the applicant cannot prove compliance if it has not submitted plans that are complete in all material respects. Approving a project before an applicant submits complete proof of compliance also deprives other parties of notice of, and an opportunity to be heard on,that evidence. Thus, materially complete plans must be submitted and reviewed prior to approval of the project. *Lowe's Home Centers, Inc.,* WQ-03-15, Findings of Fact, Conclusions of Law, and Order (08/26/04); *appeal docketed*, No. 2004-417 (09/13/04) (pending).

* ANR carried the burden of proof, including the burden of persuasion and the initial burden of production, to show that each of the four watershed improvement permits under appeal should issue because ANR was the proponent of the permits and asserted the affirmative of the issue–that the permits were lawful. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook*, WQ-02-04, WQ-02-05, WQ-02-06 and WQ-02-07 (Consolidated), Prehearing Conference Report and Order (09/20/02), *modified by* Chair's Order (10/18/02).

* A Discharge Permit is required pursuant to 10 V.S.A. §1263 whenever a Public Building Application proposes an on-land sewage disposal system with a design capacity exceeding 40,000 gpd unless certain factors known as the so-called "threshold criteria" are met. *[Application was reviewed under Environmental Protection Rules dated Sept. 10, 1982 governing on-land sewage disposal systems for Public Buildings authorized under 18 V.S.A. Ch. 25 now Chapter 1 - Environmental Protection Rules: Small Scale Wastewater Treatment and Disposal Rules - Effective August 8, 1996.] Appeal of Sunrise Group*, EPR-84-07, Findings of Fact, Conclusions of Law and Order (04/25/85).

* 10 V.S.A. §1263(c) provides that prior to granting a Discharge Permit, the [Board] must determine that:

> the proposed discharge will not reduce the quality of the receiving waters below the classifications established for them and will not violate any applicable provisions of state or federal laws or regulations.

Pyramid Company of Burlington, WQ-77-01, Findings of Fact, Conclusions of Law and Order (06/02/78)

* While discharges of other types of wastes are absolutely prohibited into upland streams, new or increased discharges of stormwater into upland streams may be allowed if Rules 2 [*Similar to current W.Q. Policy*], 5(2) [*Class B narrative standards - designated uses*], 9 [*prohibiting discharge of domestic waste or those wastes which contain pathogenic organisms prior to treatment*], 16 [*Class B criteria*], and

18 [*water type specifications*] of the *Regulations Governing Water Classification and Control of Quality*, dated March 25, 1976, [*now VWQS*] are met. *Pyramid Company of Burlington*, WQ-77-01, Findings of Fact, Conclusions of Law and Order (06/02/78) *[NB: decision issued prior to passage of 10 V.S.A. §1264*].

1303. Denial of Permit

1304. Amendment of Permit

* The Board modified a discharge permit to contain WQBELs consistent with the Lake Champlain Phosphorous TMDL. *Village of Enosburg Falls*, WQ-03-03, Memorandum of Decision (04/21/04).

* In the interests of justice and judicial economy, the Board continued an appeal to allow ANR to amend a general MS4 permit in conformity with ANR's representations at a second prehearing conference even though the permit was pending on appeal to the Board. *Small Municipal Separate Storm Sewer Systems (MS4s)*, WQ-03-08, Second Prehearing Conference Report and Order (09/23/03).

* At the request of the parties, an appeal of a general MS4 permit was continued to allow ANR to amend the permit by adding two towns that ANR had inadvertently omitted. *Small Municipal Separate Storm Sewer Systems (MS4s)*, WQ-03-08, Prehearing Conference Report and Order (07/09/03).

* Board amended stream alteration permit issued by ANR based on stipulated additional condition filed by the parties. *Terry Thomas*, SAP-01-06, Findings of Fact, Conclusions of Law and Order (01/08/02).

1305. Other types of Approvals (See also Section VIII.)

1306. Conditions

* Board amended stream alteration permit issued by ANR based on stipulated additional condition filed by the parties. *Terry Thomas*, SAP-01-06, Findings of Fact, Conclusions of Law and Order (01/08/02).

* Applicant for extension of a construction completion deadline which had expired demonstrated "cause" for a further extension where permit had been issued for thirty years and delay in construction was due to lengthy litigation initiated by another party and temporary loss of funding for the project. *Robert A. Gillin*, MLP-94-01, Findings of Fact, Conclusions of Law and Order (08/23/94) and *Robert A. Gillin v. Department of Fish & Wildlife and Department of Environmental Conservation*, 608-11-95 Wncv & 616-11-95 Wncv (09/22/97).

* To challenge conditions imposed in state § 401 water quality certifications, FERC has repeatedly warned applicants that they must turn to the state courts, not to FERC, for relief. *Cavendish Hydroelectric Project*, WQ-93-08, Memoranda of Decision (04/01/94).

* To challenge conditions imposed in state § 401 water quality certifications, FERC has repeatedly warned applicants that they must turn to the state courts, not to FERC, for relief. *Taftsville Hydroelectric Project*, WQ-93-06, Memoranda of Decision (04/01/94).

* If the agency having jurisdiction finds that the project will serve the public good, the agency shall issue an order approving the application and may attach conditions it considers necessary to protect any of the 13 statutory elements. The order must also include conditions for minimum stream flow to protect fish and other in-stream aquatic life. *Appeal of Vermont Natural Resources Council (Sugarbush)*, DAM-92-02 and WQ-92-05, Findings of Fact, Conclusions of Law and Order (02/08/93) and Memorandum of Decision (03/01/93). See *In re Application of Snowbridge, Inc., Appeal of VNRC, et al.*, S-197-93 VnCa (02/112/97) (Dismissal by Stipulation).

* Board has authority to require any permit conditions necessary to protect the public good and it may enlarge upon conditions set by the Department of Environmental Conservation. *Appeal of Fred Fayette*, MLP-91-08, Findings of Fact, Conclusions of Law and Order (03/16/92).

* In issuing an encroachment permit for a proposed wastewater outfall pipe, the Board required the applicant to obtain a discharge permit from ANR prior to beginning construction of its wastewater outfall pipe. *Id.*

* DEC lacked authority under 10 V.S.A.§ 1263(c) to require operation of the pretreatment facility at less than its design capacity. *Appeal of Lucille Farm*, WQ-85-03, Findings of Fact, Conclusions of Law and Order (02/25/86); *In re Lucille Farm Products, Inc.*, S151-86 Wnca (09/11/87).

* DEC's condition imposing certain reporting requirements on the discharge permit applicant for its pretreatment facility were inconsistent with the Department's own regulations regarding "reporting forms" and therefore an unreasonable condition. *Id.*

1307. Rulemakings v. Permits (See also Section XI.)

* A person who files a petition relating to the residual designation authority may choose whether the petition represents a request for rule making under the Administrative Procedure Act or a request for an appealable determination under the Vermont Water Pollution Control Act. If the petition is filed under the Vermont Water Pollution Control Act but is in the nature of a request for rule making, that would constitute grounds for denying the petition on its merits. It would not change a permitting petition into a rule making request and deprive the Board of jurisdiction to review the permitting action on appeal. *Stormwater NPDES Petition*, WQ-03-17, Memorandum of Decision (04/01/04).

* Because the petitioners asked ANR to apply its existing residual designation authority to stormwater discharges in five stormwater-impaired watersheds without altering any previous written policy or rule, and because the petitioners have not requested the adoption of a written policy applicable to all discharges of a certain type, the Board found that the petition was not in the nature of a request for rule making. *Id.*

1308. Renewals

* A motion to dismiss an appeal of a renewal permit for the reason that the appellant failed to appeal the permittee's prior discharge permits was denied because the renewal permit under appeal entirely replaced the previously issued permits, the appeal of the renewal permit was filed within thirty days of its issuance, and the notice of appeal addressed that permit. *City of South Burlington (Bartlett Bay Wastewater Treatment Facility),* WQ-01-04, Second Prehearing Conference Report and Order (04/18/02).

* The permit renewal process allows progress to be made in water-pollution control. Vermont law plainly requires discharge permits to be reviewed every five years. If a previously issued permit is now deemed not to comply with applicable law, in the course of renewal, it must be subject to change. The permittee cannot have an equitable interest in maintaining an unlawful discharge. *Id.*

* Where ANR has not yet taken action on a timely application for a permit renewal, the permit that otherwise would have expired remains in full force and effect under 3 V.S.A. § 814(b). *Appeal of Town of Cabot*, WQ-00-04, Memorandum of Decision (07/11/00).

B. Application for (1321-1340)

1321. General

1322. Co-Applicancy

* Where petitioner for wetland reclassification petition was not current owner of real property on which the subject wetland was located, the current affected landowner had to join as a co-petitioner in order to effect the requisite standing to support the petition pursuant to Section 7.1 of the VWR. *Ladd's Landing, Ltd., et al.,* WET-01-09, Administrative Determination (11/21/01).

1323. Completeness

* Neither ANR nor the Board can approve a project until the applicant proves compliance, and the applicant cannot prove compliance if it has not submitted plans that are complete in all material respects.

Approving a project before an applicant submits complete proof of compliance also deprives other parties of notice of, and an opportunity to be heard on, that evidence. Thus, materially complete plans must be submitted and reviewed prior to approval of the project. *Lowe's Home Centers, Inc.,* WQ-03-15, Findings of Fact, Conclusions of Law, and Order (08/26/04); *appeal docketed*, No. 2004-417 (09/13/04) (pending).

* After the parties had attached documents to their briefs on preliminary issues but interpreted those documents differently and were not afforded an opportunity to provide testimony, the Board could not be certain that the parties had taken the opportunity to submit and construe all relevant documentary evidence on the question of when a complete permit application was filed. Accordingly, the Board scheduled an evidentiary hearing limited to the preliminary issue of when the permit application at issue was filed and complete for determining whether the permit applicants had a vested right in prior law. *Hannaford Bros. Co. and Lowes Home Centers, Inc.,* WQ-01-01, Memorandum of Decision (06/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* The Board would not make a decision on the other preliminary issues in the case until the questions of when the permit application was complete in fact and deemed complete were resolved. *Id.*

* On the matter of when a permit application was filed and complete and deemed complete, the Board looked at the evidence anew -- as if no decision had previously been made. *Id.*

* The VWQS provide that the applicable law is the law in effect at the time a permit application is filed and deemed complete by ANR. *Id.*

* Generally, a statute will not apply retroactively in Vermont if the person affected has a vested right in prior law. A permit application needs to be proper and validly brought and pursued in good faith for the regulations in effect at the time of filing to apply. An incomplete application does not vest rights. *Id.*

* The vested-rights rule applies absent a controlling statute to the contrary. *Id.*

* The meaning of "deemed complete" in the VWQS calls upon ANR to make an affirmative, prompt, documented decision whether or not a permit application governed by those rules is complete. *Id.*

* For purposes of determining the vested rights of a permit applicant, a complete permit application is such that the applicant would reasonably believe that the reviewing authority could act upon the application's merits. A reasonable-expectation rule rather than a perfect-application rule is appropriate. Good faith requires that a complete application reasonably address all the factors that the agency is legally required to address in its permit review. *Id.*

* Minor deficiencies with a permit application that the permit applicant corrected with simple confirmations and that did not encumber ANR's ability to proceed with its review of the application did not defeat the vested rights of the applicants in the law in effect at the time the application was first submitted to ANR for review. *Id.*

* A decision on the part of stormwater permit applicants to use a wet pond rather than a constructed wetland system at the site, which had no bearing on the design's ability to treat and control stormwater, which the applicants could not reasonably have anticipated to have generated a debate with ANR, and which the applicants changed in accordance with the wishes of ANR's Wetlands Office, represented the kind of give and take that can reasonably be expected to occur once an agency proceeds with its review of a complete permit application and did not defeat the vested rights of the applicants in the law in effect at the time the application was first submitted to ANR for review. *Id.*

* The question of whether conformity with ANR's stormwater treatment and control practices was enough to demonstrate compliance with the VWQS went to the merits of the permit application, not to its completeness. *Id.*

* Applying its *de novo* standard of review, the Board found that an application for a stormwater permit should be deemed complete under the VWQS as of the date ANR received the complete application. *Id.*

* To avoid the unnecessary risk of holding permit applicants hostage to administrative delay, the Board agreed with ANR's practice of protecting the vested rights of permit applicants by retroactively deeming applications complete as of the date the applications were filed and complete in fact. *Id.*

C. Conditions (1341-1360)

1341. General

* Permit Amendment and municipal Act 51 plan, approved and referenced therein, set forth an implement able program of best management practices and a schedule for implementation that met the requirements of Act 51 (1997). They were not so vague and reliant on unspecified future action and deadlines as to constitute an unenforceable and impermissible condition subsequent. *Town of Shoreham Wastewater Treatment Facility*, WQ-00-11, Findings of Fact, Conclusions of Law and Order (11/30/01).

1342. Authority to Impose

1343. Condition Deleted

1344. Condition Amended

* The Board ordered the permit applicants to submit corrected site plans to ANR and ANR to approve the revised plans in conformity with the Board's decision. *Hannaford Bros. Co. and Lowes Homes Center, Inc.*, WQ-01-01, Findings of Fact, Conclusions of Law and Order (01/18/02); *aff'd,* No. 280-02 CnCv (04/30/03); *appeal docketed*, No. 2003-539 (12/14/04) (pending). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* The Board concluded that covering the proposed garden center, along with the proposed stormwater treatment systems for the project, will adequately prevent stormwater runoff from the outdoor garden center from adding pollutants of concern to the receiving waters. The Board therefore ordered the permit applicants to submit plans to ANR for covering the garden center and ANR to approve those plans in conformity with the Board's decision. *Id.*

* Board *sua sponte* extended expiration date of stream alteration permit on appeal due to fact that permit was stayed pending the outcome of the appeal. *Terry Thomas*, SAP-01-06, Findings of Fact, Conclusions of Law and Order (01/08/02).

* Board modified ANR permit conditions to add more specificity regarding implementation and reporting requirements to assure that progress was made in pilot project consistent with requirements of Act 51 (1997). *Town of Shoreham Wastewater Treatment Facility*, WQ-00-11, Findings of Fact, Conclusions of Law and Order (11/30/01)

1345. Superseding Condition

D. Amendment (1361-1380)

1361. General

1362. Administrative Amendment

***** In the interests of justice and judicial economy, the Board continued an appeal to allow ANR to amend a general MS4 permit in conformity with ANR's representations at a second prehearing conference even though the permit was pending on appeal to the Board. *Small Municipal Separate Storm Sewer Systems (MS4s)*, WQ-03-08, Second Prehearing Conference Report and Order (09/23/03).

* At the request of the parties, an appeal of a general MS4 permit was continued to allow ANR to amend the permit by adding two towns that ANR had inadvertently omitted. *Small Municipal Separate Storm Sewer Systems (MS4s),* WQ-03-08, Prehearing Conference Report and Order (07/09/03).

1363. Authority to Issue

1364. Scope of Review of Amendment

* Appellant's appeal of permit *amendment* raised certain issues concerning phosphorus management for the applicant's proposed wastewater treatment facility which were finally decided in a discharge permit issued months previously; therefore, in response to applicant's motion for partial dismissal, Board determined that those issues were untimely raised and could not be considered by the Board within the ambit of the permit amendment proceeding even if ANR applied the wrong legal standards in issuing the discharge permit. *Town of Shoreham Wastewater Treatment Facility*, WQ-00-11, Memorandum of Decision on Preliminary Issues (05/02/01).

1365. Standards for Determining Whether to Issue

E. Revocation (1381-1400)

1381. General

* Appeals of subdivision permit revocation decisions issued by the ANR are reviewed by the Board on the record created by the Commissioner of the Department of Environmental Conservation. *Robert & Barbara White (Revocation)*, EPR-89-01, Findings of Fact, Conclusions of Law and Order (06/14/89)

* In an appellate proceeding where the Board reviews the record created by the Commissioner of the Department of Environmental Conservation, the parties may stipulate as to the content of the record. *Id.*

1382. Burden of Proof

* In an appeal from ANR's decision on a petition to revoke a permit, the petitioner is seeking to change the status quo, and it is the petitioner that is asserting the affirmative of the issue–that the permit must be revoked. Thus, the petitioner carried the burden of persuasion by a preponderance of the evidence to show that the permit is invalid or should be revoked or modified, and the petitioner also carried the initial burden of production. *William and Ann Lyon*, EPR-03-16, Prehearing Conference Report and Order (11/13/03).

* In an appeal from the revocation of a permit by ANR's own initiative, ANR would carry the burden of proof. Assigning the burden of proof to ANR would not be appropriate in an appeal from a proceeding in which ANR invalidated and effectively revoked a permit in the course of a revocation proceeding initiated by a petitioner, even if ANR's decision rested on grounds not presented by the petition to revoke. *Id.*

1383. Right to Cure

1384. Violation

V. ADMINISTRATIVE PROCESS (1401-1600**)**

A. General (1401-1430)

1401. General

* To determine whether the Applicant's plan meets the substantive standards of Act 51 (1997) requires the type of particularized fact finding that can only occur as a result of a contested case proceeding or hearing convened by an agency or court with jurisdiction to hear the matter. *Town of Shoreham Wastewater Treatment Facility*, WQ-00-11, Memorandum of Decision on Motion to Dismiss (07/31/01).

* The Board is the *first* administrative forum where a party has a right to raise and brief issues, present and challenge evidence, cross-examine witnesses, and have a decision supported by a record. *Id.*, Memorandum of Decision on Preliminary Issues (05/02/01).

1402. Authority to Adjudicate

* In accordance with 1 V.S.A. § 213, a new act of the General Assembly cannot change the substantive standards affecting an action begun or pending at the time of the act's passage. *Town of Shoreham Wastewater Treatment Facility*, WQ-00-11, Memorandum of Decision on Motion to Dismiss (07/31/01)

* Section 47a of Act 61 (2001) does not purport to be an amendment to Act 51 (1997); however, even if it were construed as an amendment to Act 51, it could not apply to the case in progress if it would affect a pre-existing "right, privilege, obligation or liability." Under Act 51, any municipality qualifying as a pilot project has a statutory obligation to comply with the substantive standards of that act. *Id.*

* Were the Board to construe Section 47a of Act 61 (2001) as the Applicant suggested, it would have completely vitiated the pending proceeding and the need for a determination that the Applicant's plan complies with state statutory standards intended to protect the water quality of Lake Champlain. *Id.*

* Board has authority to hear appeals from decisions of the Secretary to "grant, deny, renew, revoke, suspend, annul or withdraw a permit" under 3 V.S.A. § 2873 (c)(4); however, it does not have appellate authority to adjudicate enforcement matters. *Vernon Squiers* EPR-94-06, Dismissal Order (01/03/95).

1403. Authority to Review Other State Programs

* Whether the Board has jurisdiction over an appeal from a decision of a natural resources conservation district with respect to an agricultural dam permit is a question of statutory construction. *Hinsdale Farm*, DAM-02-09, Memorandum of Decision (12/11/02); *aff'd*, 858 A2d 249, 2004 Vt. 72.

* Although the effect of the Board's decision may be to invalidate an independently adopted ANR rule, here the Indirect Discharge Rules, the Board in interpreting the statutory language is not determining the validity of either its own rule or a DEC rule. Rather, it is interpreting a statutory provision. The Board held that such interpretation is consistent with the "venerable principle that construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Middlebury College Snow Bowl*, WQ-91-05 Preliminary Order and Findings of Fact, Conclusions of Law and Order (01/20/92 and 2/13/92).

* Even if DEC rule was being construed by Board, such construction would be appropriate where it is the applicability, not the validity of the rule that is at issue. *See* 3 V.S.A. §808. *Id.*

1404. Collateral Proceedings

1405. *Ex Parte* Communications

* Pursuant to 3 V.S.A. § 813, participants in a prehearing conference must avoid communicating directly with Board members during the pendency of proceedings before the Board. *Clyde River Hydroelectric Project,* WQ-02-08(A), (B), and (C) (Consolidated), Prehearing Conference Report and Order (10/25/02).

1406. Rules, Application of

***** The Rules of Evidence generally apply to proceedings before the Board. *Vermont Agency of Transportation (Route 7),* WQ-03-01, Chair's Order (12/03/03).

* The Board treated a motion for judgment as a motion to dismiss under the Board's Rules of Procedure but looked to the Vermont Rules of Civil Procedure for guidance in reviewing the motion. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook*, WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (06/02/03). (The law applied in this case was modified by Act 140 of 2004.)

* Proceedings before the Board are not governed by the Vermont Rules of Civil Procedure but rather by the Board's Rules of Procedure. *Id.*

* The Board denied appellant's request to issue sanctions against a party's attorney who challenged the appellant's standing because such a challenge was within the party's rights and was not frivolous. *City of South Burlington and Town of Colchester*, WQ-03-02, Memorandum of Decision (May 20, 2003).

* Pursuant to Rule 17 of the Board's Rules of Procedure, the Board is authorized to use the procedural rules applicable to contested case proceedings in administrative proceedings to reclassify wetlands and configure wetland buffer zones. *Lake Bomoseen Wetland*, WET-02-04, Memorandum of Decision (03/21/03); *aff'd, Alan & Claudia Wulff v. Vt. WRB,* No. 234-4-03, Opinion and Order (12/03/03); *appeal docketed,* No. 2004-002 (01/23/04) (pending).

* Rule 34(D) of the Board's Rules of Procedure provides that a "party" may file a motion to alter within 15 days from the date of the Board's decision. In an administrative determination proceeding, the Board allowed a Motion to Alter filed by a participant to the proceeding. *Id.*

* The Board determined that two man-made ponds listed on the National Wetland Inventory (NWI), a manure storage pond and a livestock watering pond, are not wetlands within the meaning of the VWR. *Kane Farm Ponds*, WET-02-02, Administrative Determination (06/25/02).

* While many marshes, bogs, fens, and open water wetlands are significant and therefore subject to the Board's protection, not all wet areas are wetlands. Consequently, the Board has authority, pursuant to §§ 4.4 and 7 of the VWR, and Board Rule of Procedure 17, to determine that an area shown as a wetland on an NWI map is not in fact a wetland. *Id.*

* Pursuant to VWR §3.2(a), to be considered a wetland, an area must be characterized by all of three parameters: wetland soils, wetland vegetation, and wetland hydrology. *Id.*

*The Board determined, based on uncontroverted evidence, that two man-made ponds, although presumed to be Class Two wetlands because they appear on the NWI map, are not wetlands because they do not demonstrate all of the three necessary parameters: soils, wetland vegetation, and wetland hydrology. Thus, these man-made ponds do not meet the jurisdictional threshold for regulation under the VWR. *Id.*

* For the Board to decline to construe a permit under current rules and statutes, the Board must be satisfied that the applicants have a vested right in prior law. Any rights of the applicants in prior law did not vest unless their permit application was complete when the prior law was in effect. Current law applies if the applicants fail to carry their burden by a preponderance of the evidence that prior law applies. *Hannaford Bros. Co. and Lowes Home Centers, Inc.*, WQ-01-01, Memorandum of Decision (06/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Section 1.1, VWR, relating to the "grandfathering" of certain projects, has no bearing on cumulative impacts analysis. Where development activities prior to 1990 [adoption date of VWR] had a direct bearing on the functions of the wetland at issue as well as to project impacts, Board did not hesitate to make findings to this effect. *Home Depot, USA, Inc. et al.*, WQ-00-06, Findings of Fact, Conclusions of Law, and Order (02/06/01) and Memorandum of Decision re: Motion to Alter (03/16/01); *dismissed with prejudice,* SO-244-01 RcCa (07/11/01).

* Even though the applicant applied for a water quality certification 20 days prior to the effective date of the 1991 VWQS, all parties and the Board agreed that the 1991 standards should apply: (1) because the applicant chose not to take advantage of the grandfathering provision of the 1991 standards; (2) the ANR applied the 1991 standards in its review of the project; and (3) the 1991 standards reflect the State's current policy with respect to the management and protection of Vermont's water resources. *Appeal of Vermont Natural Resources Council (Sugarbush)*, DAM-92-02 and WQ-92-05, Findings of Fact, Conclusions of Law and Order (02/08/93) and Memorandum of Decision (03/01/93).

1407. Standard of Review

* The appeal of a renewal discharge permit to the Board is *de novo*. Thus, the Board may consider relevant facts on appeal that were not considered initially by ANR. *City of South Burlington, (Bartlett Bay Wastewater Treatment Facility),* WQ-01-04, Second Prehearing Conference Report and Order (04/18/02).

* Permittee's argument that great deference is due ANR's technical and engineering determinations is an appropriate standard to be applied by an administrative body or court with appellate powers *after*

consideration of the record on appeal; however, it is not the standard that the Board applies in making an initial determination whether a person aggrieved by a Secretary's determination is entitled to a *de novo* hearing. *Appeal of Cole*, WQ-92-13, Memorandum of Decision: Stratton Corporation's Motion to Dismiss (05/28/93).

1407.1 *De Novo*

* Although the Board stands in the shoes of the Secretary of ANR in the context of *de novo* appeals, it only does so insofar as it must hear the evidence on appeal as if no prior proceeding had occurred. *Lowe's Home Centers, Inc.,* WQ-03-15, Emergency Motion to Clarify (09/03/04).

* The Board does not review ANR's prior decision to determine whether ANR acted properly, but instead the Board hears the case as if there had been no prior proceedings. *Lowe's Home Centers, Inc.,* WQ-03-15, Findings of Fact, Conclusions of Law, and Order (08/26/04); *appeal docketed*, No. 2004-417 (09/13/04) (pending).

* An appeal of a CUD decision of the Secretary of ANR is heard *de novo* by the Board pursuant to 10 V.S.A. § 1269. See VWR § 9. *Id. Kent Pond,* MLP-03-10, MLP-03-11, and CUD-03-13 (Consolidated), Memorandum of Decision and Dismissal Order (02/18/04).

* In a *de novo* appeal, the Board does not review ANR's prior decision to determine whether the agency acted properly. Rather, the Board hears the case as if there had been no prior proceedings. *City of South Burlington and Town of Colchester,* WQ-03-02, Findings of Fact, Conclusions of Law, and Order (12/29/03).

* Where only certain specific issues have been appealed to the Board for its *de novo* review, the Applicant must produce evidence and persuade the Board, in connection with those preserved issues only, that the project complies with applicable provisions of law. *Id.*

* The scope of a *de novo* appeal is limited to the issues identified by an appellant in its notice of appeal, unless the Board determines that substantial inequity or injustice would result from the limitation. *Clyde River Hydroelectric Project*, WQ-02-08(A) and (B) (Consolidated) Amended WQ Certificate: Findings of Fact, Conclusions of Law, and Order (07/11/03); *appeal docketed,* No. 2004-101 (03/08/04) (pending).

* In a *de novo* proceeding, the Board may consider documents upon which ANR relied in reaching the decision being appealed as well as information from the Agency's administrative record that is offered as evidence by the parties. However, the Board is not restricted to the record considered by the Agency nor is it *required* to give deference to the Secretary's decision. *Id.*

* The Board is not required to defer to ANR's interpretation of the law in a *de novo* appeal from ANR's issuance of a watershed improvement permit. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook*, WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (06/02/03). (The law applied in this case was modified by Act 140 of 2004.)

* The Board's review of a motion to dismiss that was in the nature of a motion for judgment made at the conclusion of ANR's case in chief would involve a *de novo* review of the record upon which the motion was based. The Board would not need to consider the evidence relating to the motion in the light most favorable to the nonmoving party. *Id.*

* A person or organization is not required to comment on a permit during the notice and comment period provided by ANR as a condition precedent to appealing ANR's permitting decision to the Board. *Village of Enosburg Falls*, WQ-03-03, Memorandum of Decision (05/21/03).

* Pursuant to Board Rule of Procedure 23, in an appeal of a Chair's Preliminary Ruling on the question of the appellant's standing, the Board relied on the exhibits admitted by the Chair and, in its discretion, conducted an evidentiary hearing to decide the limited question of standing *de novo*. *OMYA, Inc.,* WQ-01-09, Memorandum of Decision (04/02/02).

* The appeal of a renewal discharge permit to the Board is *de novo*. Thus, the Board may consider relevant facts on appeal that were not considered initially by ANR. *City of South Burlington (Bartlett Bay Wastewater Treatment Facility),* WQ-01-04, Second Prehearing Conference Report and Order (04/18/02).

* Appeals to the Board pursuant to 10 V.S.A. § 1269 are *de novo*. *Hannaford Bros. Co. and Lowes Homes Center, Inc.*, WQ-01-01, Findings of Fact, Conclusions of Law and Order (01/18/02); *aff'd,* No. 280-02 CnCv (04/30/03); *appeal docketed*, No. 2003-539 (12/14/04) (pending). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Under Vermont's Water Pollution Control Act, 10 V.S.A. § 1269, the Board hears appeals from ANR's permit decisions *de novo*. In a *de novo* appeal, the Board does not review ANR's prior decision but rather hears the matter as if there had been no prior proceedings. One of the principal reasons for the de novo review standard under section 1269 is to allow the Board to take a fresh look at the issues presented and to allow the parties to weigh in on matters from which their party status derives. *Hannaford Bros. Co. and Lowes Home Center, Inc.,* WQ-01-01, Memorandum of Decision (06/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* On the matter of when a permit application was filed and complete and deemed complete, the Board looked at the evidence anew -- as if no decision had previously been made. *Id.*

* Applying its *de novo* standard of review, the Board found that an application for a stormwater permit should be deemed complete under the VWQS as of the date ANR received the complete application. *Id.*

* The *de novo* standard in 10 V.S.A. § 1269 ensures that the Board will take a fresh look at the issues on appeal and allow any party a chance to weigh in on matters from which their party status derives. An appellant who had no opportunity to present evidence or to discuss issues before ANR is provided with such opportunity in a *de novo* proceeding. *Town of Cabot*, WQ-00-04, Findings of Fact, Conclusions of Law and Order (09/08/00).

* ANR documents were ruled not admissible because they were not relevant in the *de novo* proceeding before the Board. Board is not charged with reviewing ANR's prior decision to determine whether ANR properly issued the § 401 certification to the applicant, but rather, the Board is required to hear the matter as if there had been no prior proceedings. *Deerfield River Hydroelectric Project*, WQ-95-01 and WQ-95-02 (Consolidated), Chair's Evidentiary Rulings on the Objections of the Parties (02/05/97).

1407.2 Appellate (Review on the Record)

* Appeals of subdivision permits issued by the ANR are reviewed by the Board applying an appellate standard of review, pursuant to 3 V.S.A. § 2873(c)(4) and Board Rule of Procedure 30. Under this standard, factual conclusions of the ANR must be upheld by the Board if evidence available to and presented to the ANR fairly and reasonably supports its conclusions, and the ANR's interpretation of statutes and rules must be upheld if not erroneous. *McIntyre and Lovett*, EPR-98-02, Decision (10/28/98)

B. Preliminary Issues (1431-1480)

1431. General

* The Chair identified the Board's jurisdiction as a threshold issue in an appeal of an agricultural dam permit issued by a Natural Resources Conservation District and decided at the prehearing conference that all other issues in the case would be addressed, if still necessary, after the Board's decision on its jurisdiction over the permit at issue. *Hinsdale Farm*, DAM-02-09, Memorandum of Decision (12/11/02); *aff'd*, 858 A2d 249, 2004 Vt. 72.

* Because the Chair found that it would not be practical to separate preliminary issues from the larger legal and factual issues presented by the consolidated appeals, the Chair decided it would be most efficient to dispense with any attempt to identify preliminary issues and to avoid the delay associated with addressing them and instead to proceed directly to a hearing on the merits, within which the totality of the

evidence could be considered with regard to all the issues presented. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook*, WQ-02-04, WQ-02-05, WQ-02-06 and WQ-02-07 (Consolidated), Prehearing Conference Report and Order (09/20/02), *modified by* Chair's Order (10/18/02).

* Factual disputes may be resolved only after an evidentiary hearing. *Hannaford Bros. Co. and Lowes Home Centers, Inc.*, WQ-01-01, Memorandum of Decision (06/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* After the parties had attached documents to their briefs on preliminary issues but interpreted those documents differently and were not afforded an opportunity to provide testimony, the Board could not be certain that the parties had taken the opportunity to submit and construe all relevant documentary evidence on the question of when a complete permit application was filed. Accordingly, the Board scheduled an evidentiary hearing limited to the preliminary issue of when the permit application at issue was filed and complete for determining whether the permit applicants had a vested right in prior law. *Id.*

* The Board would not make a decision on the other preliminary issues in the case until the questions of when the permit application was complete in fact and deemed complete were resolved. *Id.*

* On the matter of when a permit application was filed and complete and deemed complete, the Board looked at the evidence anew -- as if no decision had previously been made. *Id.*

*Board dismissed appeal on its own motion where appellant failed to appear at hearing, either in her own person or by a representative. *Appeal of Cole*, WQ-92-13, Dismissal Order (10/27/94).

1432. Board Members

1432.1 Disqualification Due to Conflict, Bias, Prejudice, etc.

* Board Chair's statements in a previous proceeding, designed to keep the proceeding within the bounds of the Board's jurisdiction and the issues on appeal, did not indicate personal bias and prejudice against the appellant; the Board therefore denied the appellant's request that the Board conduct new or additional hearings under the supervision of a new Chair. *Robert A. Gillin*, MLP-94-01, Findings of Fact, Conclusions of Law and Order (08/23/94), *Robert A. Gillin v. Department of Fish & Wildlife and Department of Environmental Conservation*, 608-11-95 Wncv & 616-11-95 Wncv (09/22/97); *aff'd, Robert A. Gillin, Trustee v. State of Vermont*, Vt. No. 98-022 (06/30/99)

1433. Collateral Estoppel / Issue Preclusion

* The doctrines of *res judicata*, or claim preclusion, and the doctrine of collateral estoppel, or issue preclusion, do not apply if there was no prior litigation between the parties or their privies involving the permit at issue or a similar permit. ANR's administrative decision to issue a permit did not constitute a prior adjudication. *City of South Burlington (Bartlett Bay Wastewater Treatment Facility)*, WQ-01-04, Second Prehearing Conference Report and Order (04/18/02).

* Although the Board deplores the piecemeal review of development projects, the Board is estopped from reviewing development which the ANR, the body with original jurisdiction over CUD applications, has not first determined is subject to its jurisdiction and then reviewed and addressed in a written determination under VWR, Section 8. *Barden Gale and Melanie Gale Amhowitz*, CUD-99-08, Memorandum of Decision on Preliminary Issues (03/21/00).

* Person who was a party to a prior appeal involving the same wetland and same project was precluded, either under a theory of estoppel or waiver, from challenging in a second appeal the Board's previous (and now final) finding that the CUD Applicant's house was outside the wetland's buffer zone. *Id.*

* Any activity in a Class Two wetland or associated 50-foot buffer zone, other than allowed uses specified in Section 6.2 of the VWRs requires a CUD from ANR (VWRs, Sections 6.3 and 8). As noted in memoranda of decision relative to the scope of review in WQC-97-10, Killington applied for and received

from ANR, CUD #97-405, dated November 21, 1997. CUD #97-405 was not appealed and the Board declined to review the merits of the CUD, or compliance with the VWRs, within the context of these consolidated appeals. *Killington, Ltd*., WQC-97-10 and MLP-97-09, Findings of Fact, Conclusions of Law, and Order (08/14/98); Aff'd,*In re* Killington, Ltd., Docket No. S343-9-98 Wrcv, Decision and Order (10/07/99).

* No collateral attack on CUD in context of permit appeal. Any activity in a Class Two wetland or associated 50-foot buffer zone, other than allowed uses specified in Section 6.2 of the VWRs requires a CUD from ANR (VWRs, Sections 6.3 and 8). As noted in memoranda of decision relative to the scope of review in WQC-97-10, Killington applied for and received from ANR, CUD #97-405, dated November 21, 1997. CUD #97-405 was not appealed and the Board declined to review the merits of the CUD, or compliance with the VWRs, within the context of these consolidated appeals. *Killington, Ltd.*, WQC-97-10 and MLP-97-09 (08/14/98) *aff'd,In re Killington, Ltd.,* S343-9-98 Wrcv (10/07/99).

1434. Chair's Preliminary Ruling

* Pursuant to Board Rule of Procedure 23, in an appeal of a Chair's Preliminary Ruling on the question of the appellant's standing, the Board relied on the exhibits admitted by the Chair and, in its discretion, conducted an evidentiary hearing to decide the limited question of standing *de novo*. *OMYA, Inc.,* WQ-01-09, Memorandum of Decision (04/02/02).

* Board summarily dismissed encroachment permit appeal where appellant repeatedly failed to perfect and prosecute his appeal or object to and seek full Board review of Executive Officer's advisory opinion identifying deficiencies in the notice of appeal and means of corrective action and Chair's Preliminary Ruling proposing dismissal for non-action. *Vermont Department of Fish and Wildlife*, MLP-01-05 Dismissal Order (10/30/01).

* The appeal was dismissed after the appellant did not appear at a prehearing conference. *Nate Smith*, SAP-01-03, Chair's Order (09/06/01).

* Chair is authorized to issue preliminary rulings, including dismissal orders, pursuant to WRB Rule 23. Where Appellant moved to withdraw its appeal, Chair issued a Preliminary Dismissal Order, and no party objected to the Chair's ruling by deadline set forth in that order, dismissal became final and binding. *Stratton Corporation, Village Commons II,* WQ-01-02, Dismissal Order (05/15/01).

* Where Appellant sought summary dismissal of its appeal, Chair's Preliminary Dismissal Order required parties to consent to issuance of a decision not containing findings of fact and conclusions of law as required by WRB Rule 34. *Id.*

1435. Discovery

* Scheduling orders governing the Board's requirement that the parties prefile their evidence in an appeal must be reconciled with the Vermont Rules of Evidence, which generally contemplate the availability of discovery and depositions. *Vermont Agency of Transportation (Route 7),* WQ-03-01, Chair's Order (12/03/03).

* The Board has the inherent authority to issue a motion to compel access to a property subject to its jurisdiction, and in an appeal of a conditional use determination, it has the authority to issue an order requiring the applicant to admit another party access to its property for the purpose of site evaluation in preparation for a *de novo* hearing on the merits of the conditional use determination application. *Appeal of Larivee*, CUD-92-09, Memorandum of Decision on Appellant's Motion to Compel Access to Site (08/12/93)

* Where its own Rules of Procedure are silent on procedural practice, the Board has turned to the Vermont Rules of Civil Procedure for guidance. In determining whether a request to compel access to property for purposes of inspection was reasonable, the Board considered the guidance of discovery rules set forth in the Vermont Rules of Civil Procedure. *Id.*

1436. Dismiss, Motions to

* A motion to dismiss on the merits that relies on facts outside the pleadings must be treated as a motion for summary judgment. *Citizens for Safe Farms, Inc. (Hinsdale Farm*), WQ-04-02, Memorandum of Decision (10/14/04); *appeal docketed,* No. 2004-510 (11/18/04) (pending).

* Where none of the moving parties have styled their motions to dismiss as motions for summary judgment, and none of the motions are supported by affidavits but, rather, rely on the allegations of fact in the nonmoving party's Notice of Appeal, the Board must consider the unopposed alleged facts of the non-moving party as true and draw all inferences in favor of the nonmoving party. *Id.*

* A motion to dismiss that relies on allegations of fact may be treated as a motion for summary judgment. *William and Ann Lyon*, EPR-03-16, Memorandum of Decision (04/21/04); *appeal docketed,* No. 2004-231 (05/14/04) (pending).

* Because the facts underlying a motion to dismiss and objections to this motion to dismiss were in dispute and not supported by affidavits, the Board did not consider them. *Id.*

* Unsupported objections to unsupported allegations of fact in a motion to dismiss were sufficient to defeat the motion. *Id.*

* The Board treated a motion for judgment made at the conclusion of ANR's case in chief as a motion to dismiss under the Board's Rules of Procedure but looked to the Vermont Rules of Civil Procedure for guidance in reviewing the motion. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook*, WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (06/02/03).

* The Board's review of a motion to dismiss in the nature of a motion for judgment would involve a *de novo* review of the record upon which the motion was based. The Board would not need to consider the evidence relating to the motion in the light most favorable to the nonmoving party. *Id.*

* The Board may decline to render judgment on a motion to dismiss in the nature of a motion for judgment until the close of all the evidence. *Id.*

* In view of the complexity of the appeals and the original legal issues involved, the Board decided that all the evidence and arguments of the parties should be considered prior to making a decision on the merits of the case. The Board therefore denied a motion to dismiss in the nature of a motion for judgment made by an appellant at the close of ANR's case in chief. *Id.*

* An applicant has a right to withdraw its permit application, subject to the right of the reviewing Board to make a determination that there is no tangible or obvious prejudice to a party opponent or to the public interest, which includes a determination that dismissal of the matter under appeal will not be contrary to the intent and purposes of the governing statute(s) at issue. *CCCH Stormwater Discharge Permit,* WQ-02-01, Dismissal Order (08/13/02), *amended by* Order (08/29/02).

* If palpable prejudice is present, the Board may either deny withdrawal or condition dismissal of the pending appeal to avoid demonstrated prejudice to an adversary or the public interest. *Id.*

* The Board has the authority to condition or otherwise limit dismissal of a pending appeal when the dismissal is based on the Permittee's relinquishment of interests in the Permit that is the subject of the appeal. *Id.*

* Neither the statutes governing the Board's powers or the Board's Procedural Rules contain a provision expressly providing that an appeal must be dismissed in response to a permittee's relinquishment of its interests in the permit under appeal. *Id.*

* The Board may dismiss appeals upon the request of a party based on a finding that such dismissal is "not contrary to law" or "inconsistent with the intent and purposes" of the act under which the subject permit was authorized. *Id.*

* Although the addition of Rule 36 to the Board's Rules of Procedure (2002) 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. *City of South Burlington (Bartlett Bay Wastewater Treatment Facility),* WQ-01-04, Second Prehearing Conference Report and Order (04/18/02).

* A motion to dismiss that refers to extrinsic evidence may be treated as a motion for summary judgment. *Id.*

* A motion to dismiss an appeal of a renewal permit for the reason that the appellant failed to appeal the permittee's prior discharge permits was denied because the renewal permit under appeal entirely replaced the previously issued permits, the appeal of the renewal permit was filed within thirty days of its issuance, and the notice of appeal addressed that permit. *Id.*

* Having found after a limited evidentiary hearing on preliminary issues that the appellant in this case does not have legal standing, the Board dismissed the appeal for lack of jurisdiction. *Village of Ludlow (Ludlow Wastewater Treatment Facility),* WQ-01-08, Memorandum of Decision (04/05/02).

* Board summarily dismissed encroachment permit appeal where appellant repeatedly failed to perfect and prosecute his appeal or object to and seek full Board review of Executive Officer's advisory opinion identifying deficiencies in the notice of appeal and means of corrective action and Chair's Preliminary Ruling proposing dismissal for non-action. *Vermont Department of Fish and Wildlife,* MLP-01-05 Dismissal Order (10/30/01).

* The appeal was dismissed after the appellant did not appear at a prehearing conference. *Nate Smith*, SAP-01-03, Chair's Order (09/06/01).

* The Board denied a motion to dismiss the appeal filed after the Board issued a decision on preliminary issues because the issues remaining for the hearing on the merits were well within the issues raised by the notice of appeal, even though the Board ruled against the appellants in its decision on the preliminary issues. *Hannaford Bros. Co. and Lowes Home Centers, Inc.* WQ-01-01, Memorandum of Decision (08/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Appellant's appeal of permit *amendment* raised certain issues concerning phosphorus management for the applicant's proposed wastewater treatment facility which were finally decided in a discharge permit issued months previously; therefore, in response to applicant's motion for partial dismissal, Board determined that those issues were untimely raised and could not be considered by the Board within the ambit of the permit amendment proceeding even if ANR applied the wrong legal standards in issuing the discharge permit. *Town of Shoreham Wastewater Treatment Facility*, WQ-00-11, Memorandum of Decision on Preliminary Issues (05/02/01).

* Board has never dismissed or limited the scope of an appeal simply because an interested person offered no comment or only some comment with respect to a draft permit; this is because ANR's permit process, unlike a District [Environmental] Commission proceeding, is not a contested case hearing comporting with the requirements of the Vermont Administrative Procedure Act, 3 V.S.A. ch. 25, but rather an informal notice-and-comment process that does not contemplate that a complete evidentiary record will be developed in support of or in opposition to the issuance of a permit. Board is the *first* administrative forum where a party has a right to raise and brief issues, present and challenge evidence, cross-examine witnesses, and have a decision supported by a record. *Id.*

* Appellant elected not to augment its initial averments, even when the Board provided it an opportunity to supplement its notice of appeal and to file a response to a motion to dismiss for lack of standing. Therefore, relying exclusively on Appellant's notice of appeal, the Board granted the motion to dismiss because the appellant did not aver facts demonstrating the requisite personal or representational interests to support its claim that it was a "person aggrieved." *Home Depot, USA, Inc.,* WQ-00-06 and CUD-00-07, Memorandum of Decision on Preliminary Issues and Order (09/08/00).

* Where Board concluded that Petitioner was not a proper petitioner within the meaning of Section 7.1 of the VWR, it had no jurisdiction to consider the petition; therefore, the Board, on its own motion, dismissed the petition, thereby terminating the wetland reclassification proceeding. *Petition for Reclassification of Wetlands Residents for Northeast Kingdom Preservation, LTD,* WET-98-03, Dismissal Order (05/13/99).

* Failure of a petitioner to comply with a Chair or Board information request can result in the dismissal of a wetland reclassification petition. *Id.*

* Given that 3 V.S.A. § 2873(c)(4) contains no deadline for the filing of appeals, the Board assumes that the Legislature intended that appeals could be filed from subdivision permits at any time; accordingly, the Board denied ANR's Motion to Dismiss a subdivision appeal on the ground that it was allegedly untimely because it was not filed within 30 days of the issuance of the ANR's permit. *McIntyre and Lovett*, EPR-98-02, Memorandum of Decision (08/12/98).

* Board proposed to dismiss appeal on its own motion for failure of the parties to comply with the terms of the Chair's order, subject to the right of the parties to file objections to the Board's proposed order and request oral argument. *Appeal of Poultney River*, WQ-96-05, Dismissal Order (07/18/97).

* Where parties agreed that an appeal was moot, the Board promptly dismissed the matter with prejudice. *Id.*

* Board dismissed appeal on its own motion where appellant failed to appear at hearing, either in her own person or by a representative. *Appeal of Cole*, WQ-92-13, Dismissal Order (10/27/94)

* Where Petitioner for a declaratory ruling did not present a justiciable issue, Board on its own initiative dismissed the petition. *Northshore Wetland*, WET-92-03DR, Memorandum of Decision and Order (04/29/94).

1437. Mootness

* The passage of Vermont's Act 140 of 2004, which substantially revised 10 V.S.A. 1264 with the creation of a state stormwater program, does not moot a controversy that centers on whether NPDES permits are required for stormwater discharges into stormwater-impaired waters. *Stormwater NPDES Petition*, WQ-03-17, Memorandum of Decision (10/14/04); *appeal docketed,* No. 2004-515 (11/22/04) (pending).

* An appeal before the Board was not rendered moot by the fact that a federal district court did not accept appellants' argument that all stormwater dischargers are subject to NPDES permitting because the district court did not reach the issues before the Board in the pending case. *Id.*

* A case becomes moot when a change in law or fact eliminates the controversy so that a decision in the matter will not have any practical effect. *Id.*

* The Board granted a Permittee's Motion to Dismiss an appeal as moot (based relinquishment of interest in the Permit at issue) with the proviso that no objections or requests for oral argument were timely filed by Appellants and other parties to the matter. *CCCH Stormwater Discharge Permit*, WQ-02-01, Dismissal Order (08/13/02), *amended by* Order (08/29/02).

1438. Notice

* Actual notice to ANR, a regional planning commission, a regional chamber of commerce, an economic development corporation supported by area businesses and municipalities, and the five municipalities in the areas of the streams involved, plus published notice in a newspaper circulating in these areas, constituted reasonable notice of an appeal from ANR's denial of a petition to require federal NPDES permits for stormwater discharges into five stormwater-impaired streams. *Stormwater NPDES Petition*, WQ-03-17, Memorandum of Decision (04/01/04).

* The Board has never required appellants or undertaken itself to provide actual notice of an appeal to every conceivable individual who might be able to intervene. *Id.*

* Providing individual notice to every discharger who might be affected would render Vermont's ability to require stormwater dischargers to obtain NPDES permits on a watershed basis needlessly if not impossibly cumbersome. *Id.*

* A petitioner must provide actual notification of a wetland reclassification petition to persons who own land within or adjacent to the mapped wetland polygon and buffer zone of which reclassification is sought. A petitioner is not required to provide actual notification to additional persons who may own land within or adjacent to contiguous wetlands and their buffer zones, unless the Board determines that the contiguous wetland complex may be impacted by its decision . The Board, in its discretion, may require such notification on a case-by-case basis. *Calvin Murray,* WET-03-03, Administrative Determination (10/27/03).

* Providing actual notification of a reclassification petition to the owners of land within or adjacent to contiguous wetlands was not necessary because the Board's decision preserved the status quo of the contiguous wetland complex. *Id.*

* In the interest of administrative efficiency, the issues set forth in a notice of appeal may be clarified and narrowed at a prehearing conference. *Clyde River Hydroelectric Project*, WQ-02-08(A) and (B) (Consolidated) Amended WQ Certificate: Findings of Fact, Conclusions of Law, and Order (07/11/03); *appeal docketed,* No. 2004-101 (03/08/04) (pending).

* Following public notice and a public comment period, the Board received comments only from Agency of Natural Resources indicating that the Agency supported reclassifying a wetland from Class Two to Class Three. Because no other written comments were filed and no person requested a hearing in the matter, the Board did not hold a public hearing, but instead considered the petition in deliberations based solely on the information filed by the petitioner and the ANR. *Town of West Rutland*, WET-02-03, Administrative Determination (08/07/02).

* Where no public comments are filed prior to the public comment deadline and where no person requests a hearing, the Board is not obliged to hold a hearing in the matter of wetland reclassification. *Kane Farm Ponds*, WET-02-02, Administrative Determination (06/25/02).

* With respect to CUD application proceedings, Section 8.3, VWR, does not contemplate that the notice that the Secretary of ANR is required to provide to the municipal clerk is *personal* notice. Rather, the intent of Section 8.3 is to provide both the municipality in which a wetland subject to a CUD application is located and the *public* within that municipality with, at a minimum, *posted* notice of the ANR proceeding with respect to that CUD application and instruction on how to participate. *Al J. Frank*, CUD-00-02 and *Gregory Lothrop*, CUD-00-03 (Consolidated), Remand Order (04/24/01).

* Where ANR, not applicant, created defect in notice of CUD application and Board remanded to ANR because of jurisdictional defect and directed re-noticing of the CUD application, the law applicable to such application was the law at the time of the initial filing of that CUD application with the ANR. *Id.*

* VWR set forth express requirements for notice and posting of conditional use requests in order to inform the public of a proposed action within a significant wetland or its buffer zone. There is no exemption of this requirement for the amendment of a previously issued conditional use determination. *Proctor Gas, Inc. West Rutland*, CUD-93-02, Dismissal Order (10/27/93).

1438.1 Sufficiency

* Neither ANR nor the Board can approve a project until the applicant proves compliance, and the applicant cannot prove compliance if it has not submitted plans that are complete in all material respects. Approving a project before an applicant submits complete proof of compliance also deprives other parties of notice of, and an opportunity to be heard on that evidence. Thus, materially complete plans must be submitted and reviewed prior to approval of the project. *Lowe's Home Centers, Inc.,* WQ-03-15, Findings of Fact, Conclusions of Law, and Order (08/26/04); *appeal docketed*, No. 2004-417 (09/13/04) (pending).

* Actual notice to ANR, a regional planning commission, a regional chamber of commerce, an economic development corporation supported by area businesses and municipalities, and the five municipalities in the areas of the streams involved, plus published notice in a newspaper circulating in these areas,

constituted reasonable notice of an appeal from ANR's denial of a petition to require federal NPDES permits for stormwater discharges into five stormwater-impaired streams. *Stormwater NPDES Petition*, WQ-03-17, Memorandum of Decision (04/01/04).

* The Board has never required appellants or undertaken itself to provide actual notice of an appeal to every conceivable individual who might be able to intervene. *Id.*

* Providing individual notice to every discharger who might be affected would render Vermont's ability to require stormwater dischargers to obtain NPDES permits on a watershed basis needlessly if not impossibly cumbersome. *Id.*

* Appellants did not meet their burden of proof in demonstrating that they were persons or parties in interest aggrieved by the issuance of a Conditional Use Determination because they failed to supplement their Notice of Appeal, as instructed by the Board, with information indicating what alleged injury or potential injury to their interests, as related to the wetland and its functions, would arise as a result of the Secretary's decision. *Kent Pond,* MLP-03-10, MLP-03-11, and CUD-03-13 (Consolidated), Memorandum of Decision and Dismissal Order (02/18/04).

* The Board held that a notice of appeal fairly raised the effects of a proposed phosphorous discharge into the main lake of Lake Champlain, even though the notice of appeal focused on Shelburne Bay. The notice of appeal fairly notified the permittee and other interested persons that the phosphorous limitations in the permit under appeal were at issue because the definition of receiving waters in the VWQS includes all waters adjacent to and downstream from other waters the quality of which could be affected by the discharge and because the other parties would not be prejudiced if the appeal were so construed at this stage of the proceedings. *City of South Burlington (Bartlett Bay Wastewater Treatment Facility),* WQ-01-04, Second Prehearing Conference Report and Order (04/18/02).

* Where petition did not show the entirety of one of the two wetlands for which it sought reclassification but only that portion of the wetlands located on its own property, petitioner's consultant was instructed to file with the Board a map, based on an orthophotograph, showing the entirely of the wetland in question and identifying the real properties, other than those owned by the petitioner, within or adjacent to the wetland in question. The Board required receipt of this information prior to taking final action on the petition. It did this so that it could, among other things, determine whether all persons required to receive notice under Vermont Wetland Rule Section 7.3(b) received notice of the petition and that the Board could assure itself that the wetland was not contiguous to another wetland. *New England Container Company*, WET-01-05, Administrative Determination (09/18/01).

* The Secretary of ANR's failure to post notice of a CUD application at the municipal clerk's office for the municipality in which the affected wetland was located was a jurisdictional defect requiring the Board to remand the matter on appeal to the ANR so that it could properly re-notice and, if requested by a member of the public, re-open the permit application review process. *Al J. Frank*, CUD-00-02 and *Gregory Lothrop*, CUD-00-03 (Consolidated), Remand Order (04/24/01).

1439. Partial / Expedited Review

1440. Preemption

1441. Prehearing Orders

* While a Prehearing Order directed Appellants to supplement their Notice of Appeal by a certain deadline, this requirement was added as a remedial measure to provide the Appellants with ample opportunity to demonstrate a basis in fact and law for their claim of standing, once that standing had been challenged as a preliminary issue at a prehearing conference. The Appellants, who elected not to supplement their appeal in accordance with the guidance provided at the prehearing conference, were on notice that the consequence of their failure to supplement their Notice of Appeal was possible dismissal on jurisdictional grounds, not involuntary dismissal for failure to comply with a Board order. *Kent Pond,* MLP-03-10, MLP-03-11, and CUD-03-13 (Consolidated), Memorandum of Decision and Dismissal Order (02/18/04).

* In the interest of administrative efficiency, the issues set forth in a notice of appeal may be clarified and narrowed at a prehearing conference. *Clyde River Hydroelectric Project*, WQ-02-08(A) and (B) (Consolidated) Amended WQ Certificate: Findings of Fact, Conclusions of Law, and Order (07/11/03); *appeal docketed,* No. 2004-101 (03/08/04) (pending).

* Stipulations of fact are generally binding and may control even after a case has been remanded. *City of South Burlington (Bartlett Bay Wastewater Treatment Facility)*, WQ-01-04, Second Prehearing Conference Report and Order (04/18/02).

* A party's request to be relieved from a stipulation was granted because the party did not expressly enter into it. *Id.*

* Good cause would support a party's request to withdraw from a stipulation entered into at the first prehearing conference because new facts that could be inconsistent with the stipulation did not come to light until after the Board issued the first prehearing conference report and order, the case was essentially starting fresh with the unsuccessful conclusion of negotiations, and withdrawal from the stipulation would not be prejudicial to the other parties. *Id.*

1442. *Res Judicata* / Claim Preclusion

* The doctrines of *res judicata*, or claim preclusion, and the doctrine of collateral estoppel, or issue preclusion, do not apply if there was no prior litigation between the parties or their privies involving the permit at issue or a similar permit. ANR's administrative decision to issue a permit did not constitute a prior adjudication. *City of South Burlington (Bartlett Bay Wastewater Treatment Facility)*, WQ-01-04, Second Prehearing Conference Report and Order (04/18/02).

* Board's Order limiting the scope of review to the 1991 permit amendment under appeal was supported by *res judicata*, not collateral estoppel; *res judicata* bars litigation of a claim if there exists a final judgment in a former litigation in which the "parties, subject matter and cause of action are identical or substantially identical. *Appeal of Poultney River Committee*, WQ-92-04, Preliminary Order (08/11/92). *Poultney River Committee*, Vt. No. 94-165 (06/26/95). *[Note, this case was affirmed on other grounds.]*

* The lampricide treatment of the Poultney River was authorized by the 1991 permit amendment; the appellant had thirty days to appeal that permit, but it did not; therefore, the decision to treat the river was final and the only issues properly before the Board in 1992 were the merits of the five modifications authorized by the 1992 permit amendment. *Id.*

1443. Ripeness (See also Section VI. 1605.1)

* Informal agency actions are not ripe for review unless the informal action imposes an obligation, denies a right, or fixes some legal relationship. By the same token, a matter is ordinarily not ripe for review while the agency is studying whether to take action. Even if non-binding agency actions have persuasive power, they are not final and appealable. *Citizens for Safe Farms, Inc. (Hinsdale Farm*), WQ-04-02, Memorandum of Decision (10/14/04); *appeal docketed,* No. 2004-510 (11/18/04) (pending).

* Generally, an agency action is not final and appealable if the action does not represent the consummation of the agency's decision-making process and if the action does not determine rights or obligations or carry legal consequences. *Id.*

* The Board has no jurisdiction to review the conversations between ANR staff and the staff of other agencies or members of the regulated community in the absence of a final agency action. *Id.*

1444. Sanctions

* The Board denied appellant's request to issue sanctions against a party's attorney who challenged the appellant's standing because such a challenge was within the party's rights and was not frivolous. *City of South Burlington and Town of Colchester*, WQ-03-02, Memorandum of Decision (05/20/03).

1445. Settlement

1446. Stipulations

* The Board must grant a motion for summary judgment if the motion and any opposition do not present a genuine issue of material fact with respect to the subject of the motion and if the motion is supported by a valid legal theory. When considering a motion for summary judgment, the Board must construe all reasonable inferences and doubts in favor of the nonmoving party. *William and Ann Lyon*, EPR-03-16, Memorandum of Decision (04/21/04); *appeal docketed,* No. 2004-231 (05/14/04) (pending).

* Provided a motion for summary judgment is properly supported by affidavits or admissions, any opposition to the facts supporting the motion must be specific and properly supported. *Id.*

* A motion to dismiss that relies on allegations of fact may be treated as a motion for summary judgment. *Id.*

* Because the facts underlying a motion to dismiss and objections to this motion to dismiss were in dispute and not supported by affidavits, the Board did not consider them. *Id.*

* Unsupported objections to unsupported allegations of fact in a motion to dismiss were sufficient to defeat the motion. *Id.*

* Stipulations of fact are generally binding and may control even after a case has been remanded. *City of South Burlington (Bartlett Bay Wastewater Treatment Facility),* WQ-01-04, Second Prehearing Conference Report and Order (04/18/02).

* A party's request to be relieved from a stipulation was granted because the party did not expressly enter into it. *Id.*

* Good cause would support a party's request to withdraw from a stipulation entered into at the first prehearing conference because new facts that could be inconsistent with the stipulation did not come to light until after the Board issued the first prehearing conference report and order, the case was essentially starting fresh with the unsuccessful conclusion of negotiations, and withdrawal from the stipulation would not be prejudicial to the other parties. *Id.*

* Board took official notice of ANR permit under appeal and a letter from ANR staff purporting to extend the expiration date of the appeal in an appeal disposed of informally on the stipulation of the parties, without hearing, subject to the protections of 3 V.S.A. § 810(4), namely, the right of the parties to timely object to the noticing of such documents. *Terry Thomas*, SAP-01-06, Findings of Fact, Conclusions of Law and Order (01/08/02).

* Board amended stream alteration permit issued by ANR based on stipulated additional condition filed by the parties. *Id.*

* Parties may jointly file a stipulation of uncontested facts to limit the issues to be litigated by the Board. *Barden Gale and Melanie Gale Amhowitz*, CUD-99-08, Memorandum of Decision on Preliminary Issues (03/21/00).

* While a Class Two wetland is presumed to serve all of the functions specified in Section 5 of the VWR, where the parties have agreed by stipulation that certain wetland functions are not at issue, the Board makes no findings of fact and conclusions of law in its final decision with respect to such functions. Accordingly, the Board made no findings of fact and conclusions of law with respect to functions 5.5, 5.6, and 5.7. *Lost Cove Homeowners Assoc., Inc.*, CUD-98-04, Findings of Fact, Conclusions of Law and Order (07/16/99) and see *re: Lost Cove Homeowners Assoc., Inc.*, CUD-98-04, Memorandum of Decision and Order re: Motion to Alter (09/01/99)

* While a Class Two wetland is presumed to serve all of the functions specified in Section 5 of the VWR, where the parties have agreed by stipulation that certain wetland functions are not at issue, the Board makes no findings of fact and conclusions of law in its final decision with respect to such functions. Accordingly, the Board made no findings of fact and conclusions of law with respect to functions 5.5, 5.6, and 5.7. *Barden Gale and Melanie Gale Amhowitz*, CUD-99-01, Findings of Fact, Conclusions of Law

and Order (07/16/99); *see also, Barden Gale and Melanie Gale Amhowitz*, CUD-99-01, Memorandum of Decision and Order re: Motion to Alter (09/01/99)

* The parties stipulated, and the Board so found, that the proper delineation of the boundary of a wetland's buffer zone is made by measuring horizontally outward from the border of that wetland. Based on the record, including its site visit observations, the Board concluded that the Project would be located in the buffer zone of the subject Class Two wetland in a location thirty feet from the wetland. *Id.*

* Based on a stipulation of the parties rather than a *de novo* hearing, the Board issued an encroachment permit to the municipal applicant for a proposed wastewater outfall pipe. *Appeal of Fred Fayette*, MLP-91-08, Findings of Fact, Conclusions of Law and Order (03/16/92).

* In an appellate proceeding where the Board reviews the record created by the Commissioner of the Department of Environmental Conservation, the parties may stipulate as to the content of the record. *Robert & Barbara White (Revocation)*, EPR-89-01, Findings of Fact, Conclusions of Law and Order (06/14/89)

1447. Subpoenas and Motions to Compel

* The Board granted a motion to quash a subpoena *duces tecum* because the subpoena duces tecum did not seek relevant evidence and would therefore have caused an undue burden and needlessly complicated and delayed the appeal. *Vermont Agency of Transportation (Route 7)*, WQ-03-01, Memorandum of Decision (06/04/03).

* Where its own Rules of Procedure are silent on procedural practice, the Board has turned to the Vermont Rules of Civil Procedure for guidance. In determining whether a request to compel access to property for purposes of inspection was reasonable, the Board considered the guidance of discovery rules set forth in the Vermont Rules of Civil Procedure. *Appeal of Larivee*, CUD-92-09, Memorandum of Decision on Appellant's Motion to Compel Access to Site (08/12/93).

1448. Summary Disposition

* A motion to dismiss an appeal for lack of merit is in the nature of a motion for summary judgment. *Citizens for Safe Farms, Inc. (Hinsdale Farm*), WQ-04-02, Memorandum of Decision (10/14/04); *appeal docketed,* No. 2004-510 (11/18/04) (pending).

* A party moving for summary judgment before the Board may rely on the statements of fact in a notice of appeal as admissions of a party opponent without having to file affidavits. However, the Board will not grant summary judgment based on legal arguments that are not grounded in an adequate factual record. *Id.*

* The Board must grant a motion for summary judgment if there is no genuine issue of material fact and if the motion can be supported by a valid legal theory. The Board does not act as a finder of fact when it reviews a motion for summary judgment and must therefore resolve all inferences and doubt in favor of the nonmoving party. *Village of Enosburg Falls*, WQ-03-03, Memorandum of Decision (04/21/04).

* Facts offered in support of a motion for summary judgment that were not contested by parties opposing the motion were considered by the Board, even though the facts were not supported by affidavits. *Id.*

* The Board's Rules allow a party to file an affidavit in opposition to an affidavit previously filed in support of a motion for summary judgment or to supplement its own affidavits in reply to opposing affidavits. The Rules do not allow a party to file essential affidavits beyond the deadlines established by a Chair's Order for responding to a motion for summary judgment. *Id.*

* An affidavit that is not based on personal knowledge cannot support a motion for summary judgment or an opposition to a motion for summary judgment. *Id.*

* An opposition to a motion for summary judgment failed to raise a genuine issue of material fact because it lacked supporting affidavits, but this did not necessarily defeat the legal arguments in the opposition. *Id.*

* The provisions for summary judgment under the Board's Rules of Procedure are similar to those under the Vermont Rules of Civil Procedure. *Vermont Agency of Transportation (Route 7)*, WQ-03-01, Memorandum of Decision (08/21/03).

* A successful motion for summary judgment must satisfy a two-part test: First, there must be no genuine issue of material fact. Second, a valid legal theory must support the moving party's request. *Id.*

* The Board does not act as a trier of fact when it considers a motion for summary judgment but instead must draw all reasonable inferences and doubts in favor of the nonmoving party. *Id.*

* The adverse party's opposition to properly supported facts underlying a motion for summary judgment must be specific and properly supported. *Id.*

* A motion for partial summary judgment may be used to limit the issues in the case and to establish the controlling law on the issues that remain for a hearing. *Id.*

* The provisions for summary disposition under Board Rule 36 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. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook*, WQ-02-04, WQ-02-05, WQ-02-06 and WQ-02-07 (Cons.), Memorandum of Decision (12/19/02).

* Under Rule 36(D), the standard of review for a motion for summary judgment is that judgment shall be rendered forthwith if there is no genuine issue of material fact and any party is entitled to judgment as a matter of law. *Id.*

* Rule 36(A) provides that summary judgment may be rendered for the whole case or for only part of a case. *Id.*

* A motion for summary judgment may be defeated by showing either that a material fact supporting the motion is in dispute or that the legal theory supporting the motion is not persuasive. *Id.*

* The Board does not act as a trier of fact when it considers a motion for summary judgment but instead must draw all reasonable inferences and doubts in favor of the nonmoving party and must regard as true all properly supported allegations of the nonmoving party. *Id.*

* The adverse party's opposition to the facts underlying a motion for summary judgment must be specific and properly supported. *Id.*

* Summary disposition is disfavored by the Board unless the moving party's entitlement to summary disposition is clear. *Id.*

* Summary judgment was denied where, based on the record presented by the motion for summary judgment and the responses of the other parties, there remained genuine issues of material fact in dispute relating to questions of law that were not adequately addressed by the parties. *Id.*

* A party moving for summary judgment may use the prefiled testimony of the nonmoving party as admissions under Vermont Rule of Evidence 802(d)(2). *Id.*

* A party opposing a motion for summary judgment may not rely on its own unsworn prefiled testimony without filing supporting affidavits. *Id.*

* A motion for summary judgment should be granted where the undisputed facts indicated that four Watershed Improvement Permits violated the plain meaning of 10 V.S.A § 1264(f)(1). *Id.* (dissenting opinion).

* Although the addition of Rule 36 to the Board's Rules of Procedure (2002) 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. *City of South Burlington (Bartlett Bay Wastewater Treatment Facility),* WQ-01-04, Second Prehearing Conference Report and Order (04/18/02).

* A motion to dismiss that refers to extrinsic evidence may be treated as a motion for summary judgment. *Id.*

* 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. *Id.*

1449. Vested Rights

* Where the parties agreed that the law in effect on the date the permit application at issue was filed with ANR, the Board conducted its review of the permit under the law in effect on that date. *Vermont Agency of Transportation (Route 7),* WQ-03-01, Memorandum of Decision (08/21/03).

* A decision by stormwater permit applicants to use a wet pond rather than a constructed wetland system at the site, which had no bearing on the design's ability to treat and control stormwater, and which the applicants could not reasonably have anticipated to have generated a debate with ANR, and which the applicants changed in accordance with the wishes of ANR's Wetlands Office, represented the kind of give and take that can reasonably be expected to occur once an agency proceeds with its review of a complete permit application and did not defeat the vested rights of the applicants in the law in effect at the time the application was first submitted to ANR for review. *Hannaford Bros. Co. and Lowes Homes Centers, Inc.,* WQ-01-01, Memorandum of Decisions (06/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

C. Evidence (1481-1520)

1481. General

* Although the Board stands in the shoes of the Secretary of ANR in the context of *de novo* appeals, it only does so insofar as it must hear the evidence on appeal as if no prior proceeding had occurred. *Lowe's Home Centers, Inc.,* WQ-03-15, Emergency Motion to Clarify (09/03/04).

* Petitioners were not required to present their evidence water-body-by-water-body because the petition presented common issues of law and fact with respect to the named waters and their sources. *Waters of the Green Mountain National Forest*, ORW-03-01, Memorandum of Decision (06/28/04).

* The Rules of Evidence generally apply to proceedings before the Board. *Vermont Agency of Transportation (Route 7),* WQ-03-01, Chair's Order (12/03/03).

* Where the parties agreed that the law in effect on the date the permit application at issue was filed with ANR, the Board conducted its review of the permit under the law in effect on that date. *Vermont Agency of Transportation (Route 7)*, WQ-03-01, Memorandum of Decision (08/21/03).

* The Board granted a motion to quash a subpoena *duces tecum* because the subpoena *duces tecum* did not seek relevant evidence and would therefore have caused an undue burden and needlessly complicated and delayed the appeal. *Id.* (06/04/03).

* WRB Rule 34(D) requires, among other things, that a motion to alter be supported by a memorandum of law and that this memorandum of law shall state why each requested alteration is appropriate and the location in the existing record of the supporting evidence. The Board denied request to find facts proposed by movant where the movant failed to direct the Board to the location in the record of any specific evidence which either supported those proposed findings or refuted the findings made by the Board. *OMYA, Inc.,* WQ-01-09, Memorandum of Decision (05/16/02).

* Board, in weighing the entirety of the record evidence, adopted some of the movants findings of fact – albeit, not verbatim – and rejected other proposed findings of fact. Disagreement with the Board's choice of findings of fact, alone, is not a basis for alteration of the Board's decision. *Id.*

* Board denied request to alter conclusions of law based on argument of manifest error and also request to file new evidence based on claim of alleged manifest injustice, where movants memorandum of law failed to address standards applicable to WRB Rule 34(D) motions and, in any event, Board found no merit to the movant's substantive claim that the Board had retroactively applied a "new" standard for organizational standing. *Id.*

* The Board may accept new evidence when acting on a motion to alter only to avoid manifest injustice. The term manifest injustice has been used to describe a result that is wholly without legal support or as apparent error. *Village of Ludlow (Ludlow Wastewater Treatment Facility),* WQ-01-08, Memorandum of Decision (05/15/02).

* The purpose of the standards concerning motions to alter is to preserve the integrity of the appeal process by ensuring that arguments and evidence are introduced prior to a final decision and to prevent the use of motions to alter to convert Board decisions into "proposed" decisions to which parties can later respond, thereby elongating the process. *Id.*

* A request in a motion to alter to introduce new evidence that was not introduced at the hearing is not supported by manifest injustice. *Id.*

* For the Board to consider new evidence after the conclusion of a hearing, without a demonstration of manifest injustice, would be unfair to the other parties to the appeal and contrary to principles of finality and judicial economy. *Id.*

* Any alleged harassment of the appellant organization or its members by persons who are not parties to the proceeding, or acting on behalf of parties, is not relevant to the issue of the appellant's legal standing. *Id.*

* Evidence relating to the alleged harassment of the appellant for undertaking activities to protect the environment did not excuse the appellant from demonstrating that it has legal standing to represent its members in this appeal. *Village of Ludlow (Ludlow Wastewater Treatment Facility),* WQ-01-08, Memorandum of Decision (04/05/02).

* Pursuant to Board Rule of Procedure 23, in an appeal of a Chair's Preliminary Ruling on the question of the appellant's standing, the Board relied on the exhibits admitted by the Chair and, in its discretion, conducted an evidentiary hearing to decide the limited question of standing *de novo. OMYA, Inc.,* WQ-01-09, Memorandum of Decision (04/02/02).

* Where the evidence indicated that only two members of an organization used the water resource at all, that neither of those members would incur a particularized injury relating to the permit at issue, and that the organization and its members are acting as concerned citizens with a general concern about the environment rather than to redress a direct and immediate, legally cognizable injury, the organization failed to prove legal standing. *Id.*

* The rules of evidence apply in contested cases. Factual allegations or documents that were not admitted into evidence at the hearing were not taken into account by the Board. *Id.*

* The Board concluded based on the uncontroverted expert evaluation of functions served by the subject wetland conducted by DEC that the subject wetland did not serve any of the functions specified in VWR § 5 at a significant level and therefore did not merit protection under the VWR. Accordingly the Board determined that the subject wetland should be reclassified from Class Two to Class Three and that the VSWI Maps should be changed to reflect this action as provided for in VWR § 4.5.a. *Greenwood Mill Wetland*, WET-01-03, Decision (07/16/01).

* Factual disputes may be resolved only after an evidentiary hearing. *Hannaford Bros. Co. and Lowes Home Centers, Inc.,* WQ-01-01, Memorandum of Decision (06/29/01). [This appeal was reviewed under

the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* After the parties had attached documents to their briefs on preliminary issues but interpreted those documents differently and were not afforded an opportunity to provide testimony, the Board could not be certain that the parties had taken the opportunity to submit and construe all relevant documentary evidence on the question of when a complete permit application was filed. Accordingly, the Board scheduled an evidentiary hearing limited to the preliminary issue of when the permit application at issue was filed and complete for determining whether the permit applicants had a vested right in prior law. *Id.*

* The Board reclassified a wetland from Class Two to Class Three based on the uncontroverted evaluation of the wetland's functions performed by the petitioner's consultant. The evaluation of the wetland's functions was credible in that it was conducted by a professional consultant who thoroughly investigated the functions of the wetland according to the criteria specified in the VWR and in that it was supported by ANR's wetlands biologist who visited the site, worked with the petitioner on the site's wetland management issues, and supported the wetland reclassification petition with detailed correspondence. *Markowski Quarry Ponds,* Administrative Determination (05/09/01).

* The Board reclassified a wetland from Class Two to Class Three based on ANR's uncontroverted evaluation of the wetland's functions. ANR's evaluation of the wetland's functions was credible in that it was conducted by a District Wetland Ecologist who thoroughly investigated the functions of the wetland according to the criteria specified in the VWR. *Crystal Haven Road Wetland*, WET-00-06, Findings of Fact, Conclusions of Law and Order (01/02/01).

* The Board is at liberty to consider all of the evidence, including that garnered from all parties and by the Board itself during its site visit, in determining whether the applicant has met its burden of persuasion. *Town of Cabot,* WQ-00-04, Findings of Fact, Conclusions of Law and Order (09/08/00).

* The Board concluded that two wetlands were not so significant to merit protection under the VWR based on the uncontroverted evaluation performed by the petitioner, where the evaluation was credible and thoroughly documented the existing condition of each wetland. *Golf Course Pond; Snyder Pond*, WET-00-04 and WET-00-05, Order Reclassifying Wetlands from Class Two to Class Three (08/31/00).

* Scope of evidence relevant and therefore admissible in a CUD proceeding was dictated by scope of the issues determined to be properly before the Board on appeal. *Barden Gale and Melanie Gale Amhowitz*, CUD-99-08, Memorandum of Decision on Preliminary Issues (03/21/00).

1482. Admissibility

* Descriptive testimony of an expert witness that did not constitute expert testimony was nevertheless admitted into evidence, pursuant to V.R.E. 701, as opinion testimony of a lay witness to be assigned by the Board whatever weight it might be due. *Waters of the Green Mountain National Forest*, ORW-03-01, 2d Prehearing Conference Report and Order (11/09/04).

* Testimony regarding the meaning of the law is not admissible unless presented by counsel in the form of legal argument. Testimony that constitutes legal argument by persons not engaged in the legal profession is inadmissible. *Id.*

* In an appeal of a stormwater discharge permit issued for the operation of a commercial complex, testimony with regard to construction-phase stormwater runoff, which would require a separate permit that was not the subject of the appeal, was irrelevant and inadmissible. *Hannaford Bros. Co. and Lowes Homes Center, Inc.*, WQ-01-01, Findings of Fact, Conclusions of Law and Order (01/18/02); *aff'd,* No. 280-02 CnCv (04/30/03); *appeal docketed*, No. 2003-539 (12/14/04) (pending). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Testimony with regard to construction site runoff, which would require a separate permit, was irrelevant in an appeal from a stormwater discharge permit issued for the operation of a commercial complex. *Id.*, Second Prehearing Conference Report and Order (12/03/01).

* With the consent of the parties, an out-of-state witness was permitted to testify at a hearing on the merits by telephone with the understanding that the witness would be testifying under oath administered by the Chair at the hearing and subject to the penalties of perjury and provided that the stenographic transcript of the witness's testimony would be sent to him and that the witness would return the transcript with a notarized statement, administered by a person authorized to administer oaths in the jurisdiction in which the statement was made, that the testimony is true. *Id.*

1483. Burden of Proof / Production (See also Section VIII.)

***** The Board may consider all of the evidence, including that provided by parties other than the applicant, to determine whether the burden of persuasion has been met. *CCCH Stormwater Discharge Permits,* WQ-02-11, WQ-03-05, -06, and -07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (10/04/04). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended by Act 109 (2001 Adj. Sess.), eff. May 16, 2002. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* In an appeal of an operational-phase stormwater permit, if the applicant meets its burden of proof that its project complies with ANR's Treatment Manual, the burden of proof shifts to the party challenging the permit to demonstrate that the project discharge will cause or contribute to a violation of the VWQS for the receiving waters. *Id.*

* The VWQS does not provide guidance regarding whether it is part of an applicant's burden of proof to conduct field surveys and present evidence of existing uses so that the ANR can make a finding of what constitutes existing uses for the receiving waters, or, whether the Secretary of ANR, based on prior research and analysis, is charged with making such a determination as the first step in assessing the impacts to those uses of the applicant's proposed discharge. *Id.*

* In an appeal of ANR's approval for coverage under a general permit, the applicant bears the burden of proving by a preponderance of the evidence that its construction discharge complies with the terms and conditions of the general permit. *Lowe's Home Centers, Inc.,* WQ-03-15, Findings of Fact, Conclusions of Law, and Order (08/26/04); *appeal docketed*, No. 2004-417 (09/13/04) (pending).

* In *de novo* proceeding held pursuant to 29 V.S.A. § 406(b), the applicant, bears the burden of proof and persuasion. *Kent Pond,* MLP-03-10 and MLP-03-11 (Cons.), Findings of Fact, Conclusions of Law, and Order (05/12/04).

* Appellants did not meet their burden of proof in demonstrating that they are persons or parties in interest aggrieved by the issuance of a Conditional Use Determination because they failed to supplement their Notice of Appeal, as instructed by the Board, with information indicating what alleged injury or potential injury to their interests, as related to the wetland and its functions, would arise as a result of the Secretary's decision. *Kent Pond,* MLP-03-10, MLP-03-11, and CUD-03-13 (Consolidated), Memorandum of Decision and Dismissal Order (02/18/04).

* The general rule in administrative proceedings is that the applicant or petitioner bears the burden of proof. *City of South Burlington and Town of Colchester,* WQ-03-02, Findings of Fact, Conclusions of Law, and Order (12/29/03).

* The burden of proof includes both the burden of production and burden of persuasion. The burden of production in a *de novo* proceeding means the burden of producing sufficient evidence upon which the Board can make positive findings that the Project complies with the applicable provisions of the state and federal law. *Id.*

* The burden of persuasion refers to the burden of persuading the Board that certain facts are true. The party with the burden of persuasion must establish the elements of its case by a preponderance of the evidence. That generally occurs when the fact finder is satisfied that a proposition is more likely to be true than not true. *Id.*

* The Vermont Supreme Court has provided guidance with respect to the allocation of the burden of proof, specifically the risk of non-persuasion in an administrative proceeding. The fact that a party has the

burden of proof does not mean that he must necessarily shoulder it alone; it simply means that he, and not the other party, bears the risk of non-persuasion." *Id.*

* The Board may consider all of the evidence, including that provided by parties other than the applicant in determining whether the burden of persuasion has been met. *Id.*

* Where only certain specific issues have been appealed to the Board for its *de novo* review, the Applicant must produce evidence and persuade the Board, in connection with those preserved issues only, that the project complies with applicable provisions of law.

* In an appeal from ANR's denial of a petition to require federal discharge permits for stormwater discharges into five streams polluted by stormwater, 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. *Stormwater NPDES Petition*, WQ-03-17, Prehearing Conference Report and Order (12/09/03).

* The burden of proof includes the ultimate burden of persuasion and the initial burden of production. *Id.*

* In Board practice, the party seeking to change the status quo and asserting the affirmative of the issue generally carries the burden of proof. *Id.*

* In an appeal from ANR's decision on a petition to revoke a permit, the petitioner is seeking to change the status quo, and it is the petitioner that is asserting the affirmative of the issue–that the permit must be revoked. Thus, the petitioner carried the burden of persuasion by a preponderance of the evidence to show that the permit is invalid or should be revoked or modified, and the petitioner also carried the initial burden of production. *William and Ann Lyon*, EPR-03-16, Prehearing Conference Report and Order (11/13/03).

* In an appeal from the revocation of a permit by ANR's own initiative, ANR would carry the burden of proof. Assigning the burden of proof to ANR would not be appropriate in an appeal from a proceeding in which ANR invalidated and effectively revoked a permit in the course of a revocation proceeding initiated by a petitioner, even if ANR's decision rested on grounds not presented by the petition to revoke. *Id.*

* In Board practice, the party seeking to change the status quo generally carries the burden of proof. Thus, the permit applicant generally carries the burden of proof in an appeal from the issuance or denial of an individual permit. Similarly, in an appeal from the issuance of a general permit, ANR carries the burden of proof. The burden of proof generally includes both the burden of persuasion and the initial burden of production. *Id.*

* The general rule in administrative proceedings is that the applicant or petitioner bears the burden of proof. *Clyde River Hydroelectric Project*, WQ-02-08(A) and (B) (Consolidated) Amended WQ Certificate: Findings of Fact, Conclusions of Law, and Order (07/11/03); *appeal docketed,* No. 2004-101 (03/08/04) (pending).

* The burden of proof includes both the burden of production and burden of persuasion. The burden of production in a de novo proceeding pertaining to a 401 Certification of a hydroelectric project means the applicant bears the burden of producing sufficient evidence upon which the Board can make positive findings that the Project, including the proposed operational protocol, complies with the applicable provisions of the Clean Water Act. *Id.*

* The burden of persuasion refers to the burden of persuading the Board that certain facts are true. The party with the burden of persuasion must establish the elements of its case by a preponderance of the evidence. That generally occurs when the fact-finder is satisfied that a proposition is more likely to be true than not true. *Id.*

* In determining whether the burden of persuasion has been met in a *de novo* proceeding, the Board may consider all of the evidence, including that provided by parties other than the applicant. *Id.*

* Where only certain specific issues have been appealed to the Board for its *de novo* review, the Applicant must produce evidence and persuade the Board, in connection with those preserved issues only, that the Project and proposed operational protocol complies with applicable provisions of law. *Id.*

* To meet its burden of proof, the applicant must demonstrate that its proposal will comply with each of the applicable provisions of the VWQS for each of the segments of river influenced by project facilities under appeal. *Clyde River Hydroelectric Project*, WQ-02-08(A) and (B) (Consolidated) Amended WQ Certificate: Findings of Fact, Conclusions of Law, and Order (07/11/03) (Dissenting Opinion); *appeal docketed,* No. 2004-101 (03/08/04) (pending).

* In the absence of credible site-specific studies supporting the proposed minimum base stream flow, an applicant has not demonstrated that its proposal will achieve compliance with the VWQS, at least with regard to those criteria that address aquatic biota, wildlife, and aquatic habitat in Class B waters and, therefore, the applicant should be denied a Certificate for failure to meet its burden of proof. *Id.*

* ANR has the burden of proof to show that a general MS4 permit should issue. The burden of proof assigned to ANR includes both the initial burden of production at any hearing on the merits and the burden of persuasion by a preponderance of the evidence. *Small Municipal Separate Storm Sewer Systems (MS4s)*, WQ-03-08, Prehearing Conference Report and Order (07/09/03).

* In a *de novo* proceeding involving an appeal of a discharge permit, the permit applicant carries the burden of proof, by a preponderance of the evidence, to show that a decision and permit should issue authorizing the project discharge. *CCCH Stormwater Discharge Permits,* WQ-02-11, Prehearing Conference Report and Order (12/10/02).

* ANR carried the burden of proof, including the burden of persuasion and the initial burden of production, to show that each of the four watershed improvement permits under appeal should issue because ANR was the proponent of the permits and asserted the affirmative of the issue–that the permits were lawful. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook,* WQ-02-04, WQ-02-05, WQ-02-06 and WQ-02-07 (Consolidated), Prehearing Conference Report and Order (09/20/02), *modified by* Chair's Order (10/18/02).

* At a limited evidentiary hearing on legal standing and party status, the appellant carried the burden of persuasion and the initial burden of production to prove by a preponderance of the evidence that the appellant had legal standing and party status. *Village of Ludlow (Ludlow Wastewater Treatment Facility),* WQ-01-08, Memorandum of Decision (04/05/02).

* At a limited evidentiary hearing on legal standing and party status, the appellant carried the burden of persuasion and the initial burden of production to prove by a preponderance of the evidence that the appellant's non-attorney representative was authorized to represent the appellant in this appeal. *Id.*

* Applicants for a stormwater discharge permit into impaired waters for which a waste load allocation is required but has not yet been established bear the burden of proving by a preponderance of the evidence that the permit under appeal will not allow a new or increased discharge of measurable and detectable pollutants of concern into the receiving waters. *Hannaford Bros. Co. and Lowes Homes Center, Inc.*, WQ-01-01, Findings of Fact, Conclusions of Law and Order (01/18/02); *aff'd,* No. 280-02 CnCv (04/30/03); *appeal docketed*, No. 2003-539 (12/14/04) (pending). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Applicants for a stormwater discharge permit must prove that the permit complies with the VWQS with regard to pollutants for which the receiving waters have not been identified as water quality limited. *Id*

* For the Board to decline to construe a permit under current rules and statutes, the Board must be satisfied that the applicants have a vested right in prior law. Any rights of the applicants in prior law did not vest unless their permit application was complete when the prior law was in effect. Current law applies if the applicants fail to carry their burden by a preponderance of the evidence that prior law applies. *Hannaford Bros. Co. and Lowes Home Centers, Inc.,* WQ-01-01, Memorandum of Decision (06/29/01).

[This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* In the cumulative or on-going effects of any given project, the Board may take into account development and other land uses which have affected the hydrology and other attributes of the wetland(s) at issue. This is the case whether or not such changes predate the adoption of the VWR in 1990 or are subject to those rules, but only to the extent that these changes and their impacts are shown to have a direct and demonstrable relationship to the project's impact on functions under CUD review. *Home Depot, USA, Inc. et al.*, WQ-00-06, Findings of Fact, Conclusions of Law, and Order (02/06/01) and Memorandum of Decision re: Motion to Alter (03/16/01); *dismissed with prejudice,* SO-244-01 RcCa (07/11/01).

* Where CUD applicants submitted a detailed scientific analysis of how their project complied with the VWR and, by design, would actually enhance the fisheries habitat and erosion control functions, and ANR's wetlands expert agreed with this analysis and concluded that the Project satisfies the requirements of Section 8.5, VWR, and no substantial evidence was submitted by project opponents to rebut this expert testimony and other evidence, Board found that loss of 0.38 acres of Class Two wetland would have no undue adverse impacts on the protected functions of both the Class Two wetland directly at issue but also on the contiguous Class Two wetland and their respective buffer zones. *Id.*

* The burden of proof is on the permit applicant. *Town of Cabot*, WQ-00-04, Findings of Fact, Conclusions of Law and Order (09/08/00).

* The burden of proof includes the burden of production and the burden of persuasion. The burden of production in a *de novo* appeal means the burden of producing sufficient evidence upon which the Board can make positive findings that the project complies with applicable rules and regulations. The burden of persuasion refers to the burden of persuading the Board that certain facts are true. Generally the party with the burden of persuasion must establish the elements of its case by a preponderance of the evidence. The party with the burden of proof bears the risk of non-persuasion. *Id.*

* The Board is at liberty to consider all of the evidence, including that garnered from all parties and by the Board itself during its site visit, in determining whether the applicant has met its burden of persuasion. *Id.*

* Initial inquiry is not whether parties advocating for denial of a CUD have proven that a Project, or any part thereof, *will* have an undue adverse impact; rather, the first question is whether the Applicant has proven that the Project, or any part thereof, *will not* have an undue adverse impact on any protected function at issue. *Larry Westall (CUD-99-02) and James and Catherine Gregory,* (CUD-99-03) (Consolidated), Findings of Fact, Conclusions of Law and Order (03/15/00).

* House, that was the subject of an after-the-fact CUD application, was the most dominant man-made feature visible to the public from numerous vantage points and due to its scale, color and location it created an undue adverse impact upon the open space and aesthetics of the subject wetland (function 5.9); the Applicant failed to meet its burden of production and persuasion by presenting to the Board appropriate and credible mitigation measures to alleviate such impact. *Id.*

* Applicant failed to meet its burden of proof that the mitigation measures it proposed would adequately address the adverse impacts of its house upon education and research in the natural sciences (function 5.7), where public use of the wetland for this function was dependent on there being sufficient quality wildlife and migratory bird habitat to support species of birds and animals that could be studied, researched and passively observed, and the Project would have an undue adverse impact upon such habitat. *Id.*

* It is not the Board's role to redesign project subject to its review to assure compliance with the VWR; rather, it is incumbent upon those who have the burden of proof and persuasion to come forward with appropriate and credible mitigation measures. *Id.*

* Where an applicant's proposed channelization of stormwater through a grass swale was not designed to treat contaminants, and the wetland in question was found to perform this function, the applicant failed

to discharge its burden of proof to show that it had avoided or even minimized adverse impacts to the protected function of surface water protection. *Champlain Oil Company,* CUD-94-11, Findings of Fact, Conclusions of Law and Order (10/04/95).

* Where an applicant provided no adequate explanation why it could not reduce the number of driveways crossing the wetland to serve its proposed subdivision, the Board concluded that the applicant had failed to minimize the potential adverse impacts of the project on protected wetland functions, and therefore reversed ANR's decision granting a conditional use determination. *Appeal of Larivee*, CUD-92-09, Findings of Fact, Conclusions of Law and Order (03/25/94).

* In the absence of information regarding the specific characteristic of the proposed discharge, and in consideration of evidence indicating that generally similar wastes may contain heavy metals, suspended solids and oxygen demanding wastes, the Board had no basis on which it could affirmatively determine that the proposed stormwater discharge would not reduce the quality of the receiving waters below their assigned classification. *Pyramid Company of Burlington*, WQ-77-01 (78-1), Findings of Fact, Conclusions of Law and Order (n.d. [06/02/78]).

* In the absence of any provision in the waste load allocation for water quality for the applicant's proposed discharge and in consideration of the fact that the proposed discharge may occur at periods which the actual flow of the lower Winooski River is less than 7Q10, the Board found no basis for affirmatively determining that the applicable provisions of the Clean Water Act had been met. *Id.*

* The applicant has the burden of proof to show that it satisfies the provisions of 10 V.S.A. §1263(c). *Pyramid Company of Burlington*, WQ-77-01, Findings of Fact, Conclusion of Law and Order (n.d. [6/02/78]).

1484. Compliance with Other Statutes

1485. Prefiled Testimony / Exhibits

* Scheduling orders governing the Board's requirement that the parties prefile their evidence in an appeal must be reconciled with the Vermont Rules of Evidence, which generally contemplate the availability of discovery and depositions. *Vermont Agency of Transportation (Route 7)*, WQ-03-01, Chair's Order (12/03/03).

* Failure to clearly set forth the facts or data underlying an expert opinion may affect the weight of that opinion. Alternatively, an expert opinion may be stricken if cross examination reveals that the underlying facts or data are insufficient to support the opinion. *Id.*

* A party that has reasonably prefiled the facts and data supporting a prefiled expert opinion may be permitted to offer additional facts and data into evidence at or prior to the hearing as rebuttal, if warranted by the questions, evidence, or argument of an opposing party. *Id.*

* ANR is fully within its rights not to prefile direct testimony in an appeal to the Board. However, it is appropriate to allow all parties in a case at least one opportunity to respond to testimony and exhibits filed by other parties to an appeal. If any party chooses not to prefile direct evidence, but does prefile rebuttal evidence, other parties will be allowed to prefile surrebuttal evidence in response to the rebuttal filings. *Village of Enosburg Falls,* WQ-03-03, Second Prehearing Conference Report and Order (10/06/03).

* A party moving for summary judgment may use the prefiled testimony of the nonmoving part y as admissions under Vermont Rule of Evidence 802(d)(2). *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook,* WQ-02-04, WQ-02-05, WQ-02-06 and WQ-02-07 (Consolidated), Memorandum of Decision (12/19/02).

* A party opposing a motion for summary judgment may not rely on its own unsworn prefiled testimony without filing supporting affidavits. *Id.*

* In a *de novo* proceeding appealing the issuance of a discharge permit, the evidence previously submitted to ANR in support of or in opposition to the application for the discharge permit, including the

application itself, 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 pre-filed exhibits. *CCCH Stormwater Discharge Permits*, WQ-02-11, Prehearing Conference Report and Order (12/10/02).

1486. Objections

* ANR documents were ruled not admissible because they were not relevant in the *de novo* proceeding before the Board. Board is not charged with reviewing ANR's prior decision to determine whether ANR properly issued the § 401 certification to the applicant, but rather, the Board is required to hear the matter as if there had been no prior proceedings. *Deerfield River Hydroelectric Project*, WQ-95-01 and WQ-95-02 (Consolidated), Chair's Evidentiary Rulings on the Objections of the Parties (02/05/97).

* ANR documents were ruled not admissible because, under V.R.E. 703, these documents could be introduced merely to show the basis of an expert's opinion but not for the truth of the matter asserted. *Id.*

* While evidence of economic and social impacts is ordinarily not admitted in the context of considering an appeal of a hydroelectric project § 401 certification because it is irrelevant to the Board's determination, where the applicant asked the Board to consider such evidence for the limited purpose of evaluating one or more proposed operating protocols that would arguably "enhance" or "upgrade" the quality of water beyond the threshold of compliance with applicable water quality standards, such evidence would be admitted. *Id.*

* Appellant's motion to strike was denied on the bases that the proffered exhibits were relevant, the appellant had stipulated to their admission, and the appellant's objections that the exhibits were incomplete or "untrue" were untimely and intended to raise matters beyond the jurisdiction of the Board and the scope of this proceeding. *Robert A. Gillin*, MLP-94-01, Findings of Fact, Conclusions of Law and Order (08/23/94); *Robert A. Gillin v. Department of Fish & Wildlife and Department of Environmental Conservation*, 608-11-95 Wncv & 616-11-95 Wncv (09/22/97); *aff'd, Robert A. Gillin, Trustee v. State of Vermont*, Vt. No. 98-022 (06/30/99).

1487. Official Notice

* Neither ANR nor the Board can approve a project until the applicant proves compliance, and the applicant cannot prove compliance if it has not submitted plans that are complete in all material respects. Approving a project before an applicant submits complete proof of compliance also deprives other parties of notice of, and an opportunity to be heard on,that evidence. Thus, materially complete plans must be submitted and reviewed prior to approval of the project. *Lowe's Home Centers, Inc.,* WQ-03-15, Findings of Fact, Conclusions of Law, and Order (08/26/04); *appeal docketed*, No. 2004-417 (09/13/04) (pending).

* Board took official notice of ANR permit under appeal and a letter from ANR staff purporting to extend the expiration date of the appeal in an appeal disposed of informally on the stipulation of the parties, without hearing, subject to the protections of 3 V.S.A. § 810(4), namely, the right of the parties to timely object to the noticing of such documents. *Terry Thomas*, SAP-01-06, Findings of Fact, Conclusions of Law and Order (01/08/02).

* Board may reference and construe applicable statutory provisions at any stage of a proceeding, whether or not requested by a party; however, Board declined to "notice" a party's legal interpretation of those statutes, since those conclusions were not "adjudicative facts." *Robert A. Gillin*, MLP-94-01, Findings of Fact, Conclusions of Law, and Order (08/23/94); *Robert A. Gillin v. Department of Fish & Wildlife and Department of Environmental Conservation*, 608-11-95 Wncv & 616-11-95 Wncv (09/22/97); *aff'd, Robert A. Gillin, Trustee v. State of Vermont*, Vt. No. 98-022 (06/30/99).

1488. Presumptions

* Title 10 V.S.A., Sections 1264(e), (g)(1)(A), and (h), creates a rebuttable presumption in favor of the permittee that new discharges of collected stormwater runoff authorized by ANR will not cause or contribute to a violation of the VWQS, provided that (1) the receiving waters are either not impaired or are impaired by sources other than collected stormwater runoff and (2) the applicant's proposed stormwater

runoff collection and treatment system complies with ANR's 2002 Stormwater Treatment Manual. *CCCH Stormwater Discharge Permits,* WQ-02-11, WQ-03-05, -06, and -07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (10/04/04). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended by Act 109 (2001 Adj. Sess.), eff. May 16, 2002. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Application of the plain meaning doctrine suggests that the rebuttable presumption provided in 10 V.S.A. § 1264(g)(1)(A) and (h) extends to compliance with the state's anti-degradation policy expressed in VWQS § 1-03, unless the presumption is successfully rebutted on appeal. *Id.*

* Even where the applicant can demonstrate application of the best control and treatment practices set forth in ANR's Stormwater Treatment Manual, under certain circumstances, the presumption of compliance with the VWQS could be successfully rebutted with credible evidence demonstrating, for example, increases in sediment and other pollutants attributable to a project's collected stormwater discharges into unimpaired waters to the detriment of existing aquatic biota and wildlife or the habitat that supports such biota and wildlife. Under such circumstances, the Board would likely remand the matter to ANR for further inventory and analysis of the receiving waters under Anti-degradation Tiers One and Two and for consideration of the impacts of discharges of sediment upon both "existing" and "designated" uses. *Id.*

* A case involving a discharge into impaired waters is factually distinguishable from the Board's decision in *Home Depot,* which involved a discharge into waters that are not impaired and where, accordingly, the Board accepted application of the treatment and control practices of ANR's Stormwater Procedures as creating a rebuttable presumption of compliance with the VWQS. *Hannaford Bros. Co. and Lowes Home Centers, Inc.* WQ-01-01, Memorandum of Decision (08/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* The fact that the receiving waters did not comply with the VWQS and were listed as water quality limited pursuant to section 303(d) of the Clean Water Act, 33 U.S.C.A. § 1313(d), was sufficient to rebut any presumption of compliance with the VWQS ensuing from conformance of the discharge with the treatment and control practices of ANR's 1997 Stormwater Procedures. *Hannaford Bros. Co. and Lowes Home Centers, Inc.,* WQ-01-01, Memorandum of Decision (06/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* The Board did not decide whether a discharge conforming with any updated stormwater procedures that ANR may develop can be afforded either a permissible inference or a presumption of compliance with the VWQS. Nor did the Board decide how any such presumption would be rebutted in a case involving a discharge into waters that are not impaired. *Id.*

* Where receiving waters were not "impaired," applicants' substantial evidence of project compliance with ANR's 1997 Stormwater Management Procedures constituted presumptive compliance with 10 V.S.A. §§ 1263 and 1264 and the 1997 VWQS, which was not successfully rebutted by project opponent. *Home Depot, USA, Inc. et al.*, WQ-00-06, Findings of Fact, Conclusions of Law, and Order (02/06/01) and Memorandum of Decision re: Motion to Alter (03/16/01); *dismissed with prejudice,* SO-244-01 RcCa (07/11/01).

1488.1 Herbicides / Pesticides (See also Section VIII. F. 1727)

1489. Witnesses

* Expert witnesses may provide opinions in specialized factual areas to assist the Board in resolving mixed questions of law and fact, which in turn may help the Board arrive at a reasonable interpretation or application of the law. *Waters of the Green Mountain National Forest*, ORW-03-01, 2d Prehearing Conference Report and Order (11/09/04).

* 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. Cross examination of

a witness in regard to such legal matters included in a witness's testimony must be limited to clarification of the witness's assumptions. *Id.*

* Although the assumptions used in predicting pollutant loading from stormwater runoff may cover a range of reasonably expected values, disagreement between experts as to the exact extent of that range does not necessarily render any given exercise of professional judgment unreasonable. *Hannaford Bros. Co. and Lowes Homes Center, Inc.*, WQ-01-01, Findings of Fact, Conclusions of Law and Order (01/18/02); *aff'd,* No. 280-02 CnCv (04/30/03); *appeal docketed*, No. 2003-539 (12/14/04) (pending). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* With the consent of the parties, an out-of-state witness was permitted to testify at a hearing on the merits by telephone with the understanding that the witness would be testifying under oath administered by the Chair at the hearing and subject to the penalties of perjury and provided that the stenographic transcript of the witness's testimony would be sent to him and that the witness would return the transcript with a notarized statement, administered by a person authorized to administer oaths in the jurisdiction in which the statement was made, that the testimony is true. *Id.*, Second Prehearing Conference Report and Order (12/03/01).

D. Hearings (1521-1560)

1521. General

* Although the candidate waters for designation as outstanding resource waters were located within seven planning basins, a single hearing location central to the waters at issue was reasonably convenient. *Waters of the Green Mountain National Forest*, ORW-03-01, Memorandum of Decision (06/28/04).

* Following public notice and a public comment period, the Board received comments only from Agency of Natural Resources indicating that the Agency supported reclassifying a wetland from Class Two to Class Three. Because no other written comments were filed and no person requested a hearing in the matter, the Board did not hold a public hearing, but instead considered the petition in deliberations based solely on the information filed by the petitioner and the uncontroverted assessment of ANR. *Town of West Rutland*, WET-02-03, Administrative Determination (08/07/02).

* A litigant's desire for a second opportunity to present its case does not support the granting of a motion to alter, much less a new hearing. *Village of Ludlow (Ludlow Wastewater Treatment Facility),* WQ-01-08, Memorandum of Decision (05/15/02).

* An appellant cannot use a motion to alter as a means of obtaining a second opportunity to prove legal standing. *Id.*

* Mere disagreement with the Board's findings is not grounds for a motion to alter. *Id.*

* A request in a motion to alter that does not relate to a finding of the Board and that, if granted, would not affect the outcome of the Board's decision, was denied. *Id.*

* A motion to alter cannot be used as a chance to reformulate hearing strategies. *Id.*

* The requirement of manifest injustice precludes the Board from granting a new evidentiary hearing to enable a party to make up for the deficiencies in its case at the first one. *Id.*

* Because the appellant did not show that manifest error or manifest injustice would result from the denial of its Motion to Alter, or that the Board's decision overlooked or misapprehended laws or facts previously presented that would probably affect the result, the appellant's Motion to Alter was denied. *Id.*

* Under Section 7.3 of the VWR, those persons notified of the filing of a wetland reclassification petition were given 30 days within which to file written comments or to "request that the Board hold a hearing on the petition." Whether a hearing is actually convened is within the discretion of the Board. *Montenieri Wetland,* WET-90-01, Decision (02/26/91).

* If a hearing is held by the Board with respect to a wetland reclassification proceeding, the Board's Rules of Procedure with respect to contested case proceedings would govern, *as far as applicable*. However, the Board will conduct an "informal hearing," allowing the submission of information either in the form of oral statements (not under oath) or in the form of written material. *Id.*

1522. Hearing Referee

1523. Conduct

* Wetland reclassification decisions, which the Board renders pursuant to VWR § 7, are administrative determinations rather than contested cases. Hearings conducted on reclassification petitions are designed to gather information about the subject wetland's significance for the functions identified in VWR § 5. Parties may present testimony and present exhibits supporting or opposing the reclassification petition based on consideration of the VWR § 5 criteria. Parties are not entitled to cross examination, but they may present argument, their own witnesses, and exhibits in rebuttal. The Board bases its decision on the entire record, including all timely written comments. *North Shore Wetland*, WET-00-03, Findings of Fact, Conclusions of Law, and Order (09/19/00); *dismissed In re Northshore Wetland*, S-1314-00Cnc (05/14/01).

1524. Continuances

* Motions to stay an appeal from ANR's denial of a petition to exercise its residual designation authority to require federal permits for stormwater discharges pending the outcome of related litigation in federal district court were denied. As a state delegated to administer the Clean Water Act, Vermont had a duty to act on the petition without waiting for the federal litigation to become final, which could take years. In addition, inconsistent results between the Board and the district court were not likely because the theories presented to the federal court and to the Board were different. *Stormwater NPDES Petition*, WQ-03-17, Memorandum of Decision (04/01/04).

* In the interests of justice and judicial economy, the Board continued an appeal to allow ANR to amend a general MS4 permit in conformity with ANR's representations at a second prehearing conference even though the permit was pending on appeal to the Board. *Small Municipal Separate Storm Sewer Systems (MS4s)*, WQ-03-08, Second Prehearing Conference Report and Order (09/23/03).

* At the request of the parties, an appeal of a general MS4 permit was continued to allow ANR to amend the permit by adding two towns that ANR had inadvertently omitted. *Small Municipal Separate Storm Sewer Systems (MS4s),* WQ-03-08, Prehearing Conference Report and Order (07/09/03).

* The Board denied a motion to continue the deadline to prefile direct evidence until after the Board ruled on appellants' motion for summary judgment because the indefinite filing extension requested would be unfair to ANR and would unduly delay or disrupt the Board's docket, in contravention of Rule 8(D), the prehearing conference report and order, and the most recent scheduling order issued by the Chair. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook*, WQ-02-04, WQ-02-05, WQ-02-06 and WQ-02-07 (Consol.) (11/15/02).

* Board denied appellant's continuance request even though the issues in a § 401 certification request pending before the ANR would be similar if this matter were appealed to the Board; the Board concluded that it was uncertain when the ANR would make its decision on the certification request, a party would be prejudiced by the Board moving forward with a hearing on the dam permit, and it was not clear how a continuance would benefit the Board in the performance of its responsibilities. *Appeal of Vermont Natural Resources Council (Sugarbush),* DAM-92-02, Prehearing Conference Order and Preliminary Order (04/10/92).

1525. Convening

1526. Request / Failure to Request a Hearing

* Where no public comments are filed prior to the public comment deadline and where no person requests a hearing, the Board is not obliged to hold a hearing in the matter of wetland reclassification matter. *Kane Farm Ponds*, WET-02-02, Administrative Determination (06/25/02).

* No public hearing was held where no hearing was requested. *Tinmouth Channel Wetland Complex*, WET-01-07, Administrative Determination (12/13/01)

* No public hearing was held where no hearing was requested. The Board determined that two casting ponds were wetlands, but not significant wetlands meriting protection as Class Two wetlands under the VWR, based on the uncontroverted information provided by the petitioner and ANR. *The Orvis Company, Inc.,* WET-01-06, Administrative Determination (11/21/01).

* Board did not hold a public hearing on petition to reclassify a wetland from Class Two to Class Three where no such hearing was requested within 30-day notice period. *Ladd's Landing Ltd.,* WET-01-09, Administrative Determination (11/21/01).

* Where no hearing is requested, the Board may act without holding a hearing on a petition for a declaratory ruling. *Burlington Country Club,* WET-01-08DR, Declaratory Ruling (10/30/01).

* Where no public hearing was requested, the Board could make wetland reclassification determination based solely on the uncontroverted information filed by the petitioner and ANR. *New England Container Company*, WET-01-05, Administrative Determination (09/18/01).

* Where no hearing was requested pursuant to Vermont Wetland Rule § 7.4.a., the Board did not hold a public hearing but instead considered a wetland reclassification petition based solely on the information filed by the petitioner and DEC. *Greenwood Mill Wetland,* WET-01-03, Decision (07/16/01).

* Where no public hearing was requested and no comments filed other than by the petitioner, the Board could make wetland reclassification determination based solely on the uncontroverted information filed by the petitioner. *GS Precision Pond,* WET-01-02, Decision (05/15/01).

* Where no hearing is requested pursuant to Vermont Wetland Rule § 7.4.a., the Board may act on a wetland reclassification petition without holding a hearing. *Markowski Quarry Ponds,* Administrative Determination (05/09/01).

* Where no hearing is requested pursuant to VWR § 7.4.a., the Board may act on a wetland reclassification petition without holding a hearing. *Crystal Haven Road Wetland*, WET-00-06, Findings of Fact, Conclusions of Law and Order (01/02/01).

* Where no hearing was requested pursuant to VWR § 7.4, the Board acted on petitions to reclassify wetlands without holding a hearing or a prehearing conference, and the Board deliberated based solely upon the documentation in support of the petitions supplied by the petitioner. *Golf Course Pond; Snyder Pond*, WET-00-04 and WET-00-05, Order Reclassifying Wetlands from Class Two to Class Three (08/31/00).

1527. Panel

1528. Quorum

1529. Reopening

1530. Scheduling

1531. Site Visit

* The Board is at liberty to consider all the evidence, including that garnered from all parties and by the Board itself during its site visit, in determining whether the applicant has met its burden of persuasion. Town of Cabot, WQ-00-04, Findings of Fact, Conclusions of Law and Order (09/08/00).

* The parties stipulated, and the Board so found, that the proper delineation of the boundary of a wetland's buffer zone is made by measuring horizontally outward from the border of that wetland. Based on the record, including its site visit observations, the Board concluded that the Project would be located in the buffer zone of the subject Class Two wetland in a location thirty feet from the wetland. *Barden Gale and Melanie Gale Amhowitz,* CUD-99-01, Findings of Fact, Conclusions of Law and Order (07/16/99). *See also In re Barden Gale and Melanie Gale Amhowitz*, CUD-99-01, Memorandum of Decision and Order re: Motion to Alter (09/01/99).

E. Decisions (1561-1580)

1561. General

1562. Findings

* WRB Rule 34(D) requires, among other things, that a motion to alter be supported by a memorandum of law and that this memorandum of law shall state why each requested alteration is appropriate and the location in the existing record of the supporting evidence. The Board denied request to find facts proposed by movant where the movant failed to direct the Board to the location in the record of any specific evidence which either supported those proposed findings or refuted the findings made by the Board. *OMYA, Inc.,* WQ-01-09, Memorandum of Decision (05/16/02).

* Board, in weighing the entirety of the record evidence, adopted some of the movants findings of fact – albeit, not verbatim – and rejected other proposed findings of fact. Disagreement with the Board's choice of findings of fact, alone, is not a basis for alteration of the Board's decision. *Id.*

* Where Appellant sought summary dismissal of its appeal, Chair's Preliminary Dismissal Order required parties to consent to issuance of a decision not containing findings of fact and conclusions of law as required by WRB Rule 34. *Stratton Corporation, Village Commons II*, WQ-01-02, Dismissal Order (05/15/01).

* A Petitioner may ask for a determination that a subject wetland is significant for only certain values and functions and not for others. If a Petitioner asks for a determination that a Class Two wetland is not significant for a particular function, and the Board finds accordingly, the wetland remains significant for all other values and functions and continues to receive the protections afforded to Class Two wetlands for those values and functions only. For many types of development activities, such partial findings may be easier to obtain and preferable to seeking reclassification of the wetland based on an assessment of all values and functions. *David T. Mance, Jr.,* WET-96-01, Decision (08/15/96).

1562.1 Necessity and Purpose

1562.2 Sufficiency

1562.3 Finality

* Person who was a party to a prior appeal involving the same wetland and same project was precluded, either under a theory of estoppel or waiver, from challenging in a second appeal the Board's previous (and now final) finding that the CUD Applicant's house was outside the wetland's buffer zone. *Barden Gale and Melanie Gale Amhowitz,* CUD-99-08, Memorandum of Decision on Preliminary Issues (03/21/00).

1563. Conclusions

* Board denied request to alter conclusions of law based on argument of manifest error and also request to file new evidence based on claim of alleged manifest injustice, where movants memorandum of law failed to address standards applicable to WRB Rule 34(D) motions and, in any event, Board found no merit to the movant's substantive claim that the Board had retroactively applied a "new" standard for organizational standing. *OMYA, Inc.,* WQ-01-09, Memorandum of Decision (05/16/02).

* Board denied requests to alter conclusions of law where movant failed to demonstrate that Board had applied erroneous "new" legal standard in requiring non-profit corporation to have voting members to

support representational standing, when the basis for the Board's requirement was well-established statutory law applying to non-profit corporations, Title 11B V.S.A. *Id.*

1564. Stay of Decision

* Factors relevant to deciding a motion to stay include the hardship to parties, the impact on the values sought to be protected by the law applicable in the proceeding, any effect upon public health, safety or general welfare, and the likelihood of success on the merits by the person seeking the stay. *Lowe's Home Centers, Inc.,* WQ-03-15, Order Regarding Motion to Stay (09/03/04).

* The Board must deny a request to stay when there is no likelihood that the moving party can succeed on the merits of the motion. *Id.*

* Absent express statutory authority, the Board does not have jurisdiction to stay a decision of ANR. *Vermont Agency of Transportation (Route 7),* WQ-03-01, Memorandum of Decision (08/28/03).

* Whether the Board is the appropriate forum to issue a stay of an appeal filed pursuant to 10 V.S.A. § 1269 is an open question. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook*, WQ-02-04, WQ-02-05, WQ-02-06 and WQ-02-07 (Consolidated), Prehearing Conference Report and Order (09/20/02), *modified by* Chair's Order (10/18/02).

* Since under 10 V.S.A. § 1269, the Board cannot stay the effectiveness of a Department of Environmental Conservation permit decision during the pendency of an appeal of that permit to the Board, the Board also does not have authority to stay the effectiveness of that permit decision as a result of the filing of an interlocutory appeal. *Appeal of Poultney River Committee*, WQ-92-04, Preliminary Order (08/11/92); *aff'd, Appeal of Poultney River Committee*, S0693-92ReCa (02/03/94); *aff'd,Poultney River Committee*, Vt. 94-165 (06/26/95).

* While Board has authority to grant a stay of its own decision, the Board has no authority to stay a decision of the Secretary of ANR appealed pursuant to 10 V.S.A. § 1269. *Appeal of Larivee*, CUD-92-09, Preliminary Order on Motion to Stay (04/05/93).

* The Board lacked authority to grant a stay of a conditional use determination appealed to the Board pursuant to 10 V.S.A. § 1269. *Id.*

F. Post Decision Issues (1581-1600**)**

1581. General

1582. Alter / Reconsider, Motion to

* A motion to alter may ask the Board to reconsider arguments previously made. *Clyde River Hydroelectric Project,* WQ-02-08(A) and (B) (Cons.), Memorandum of Decision (02/02/04); *appeal docketed,* No. 2004-101 (03/08/04) (pending).

* In a motion to alter a decision on preliminary issues of law, the moving party may argue that the Board overlooked or misapprehended laws or facts previously presented that would possibly affect the result or outcome of the proceeding. *Id.*

* With regard to a motion to alter a decision disposing of a case, the moving party may argue that the Board overlooked or misapprehended laws or facts previously presented that affected the result or outcome of the proceeding, thereby giving the Board an opportunity to correct such error prior to possible appeal to a reviewing court. *Id.*

* The purpose of the standards concerning motions to alter is to preserve the integrity of the appeal process by ensuring that arguments and evidence are introduced prior to a final decision and to prevent the use of motions to alter to convert Board decisions into "proposed" decisions to which parties can later respond, thereby elongating the process. *Id.*

* The Board denied the portion of a Motion to Alter that claimed the Board erred in not finding, based on the facts in the record, that a salmonid fishery in a river impacted by a hydroelectric facility is an "exceptional resource value in need of restoration and protection." Because "exceptional resource value in need of restoration and protection" has significant regulatory meaning, a determination that an "exceptional resource value" exists is less a finding of fact than a legal conclusion with substantive consequences. *Id.*

* The Board will deny a Motion to Alter that does not specifically present specific evidence to support general assertions regarding why the requested alteration is appropriate. *Id.*

* The Board will not consider or respond to new arguments raised in a Motion to Alter where the movant fails to allege that actions taken by the Board could not have been reasonably anticipated. *Id.*

* The Board will deny a Motion to Alter that does not specifically present specific evidence to support general assertions regarding why the requested alteration is appropriate. *Id.*

* New arguments in a motion to alter are permitted only with respect to permit conditions or manifest error in the decision itself. Manifest error in the context of the Board's Procedural Rule 34(D)(1) means obvious, patent errors in a decision, such as the misidentification of a party, the wrong citation to a case, or other defect that may readily be determined to be in error. *Id*

* The Board summarily denied a motion for reconsideration that requested the Board to affirm the issuance of discharge permits that violated Vermont law and that requested in the alternative that the Board remand these unlawful discharge permits to ANR to implement them for a five-year trial period. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook*, WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated), Order (06/27/03).

* Pursuant to Rule 34(D), a motion to alter cannot present new arguments unless the new argument is in response to permit conditions or typographical, technical, and other manifest errors, provided that the party seeking the alteration reasonably could not have known of the conditions or errors prior to decision. The Board will not accept new evidence when considering a motion to alter unless the Board determines that doing so is necessary to avoid manifest injustice, which is the "obvious, indisputable and self-evident withholding or denial of justice" as the result of negligence, mistake or omission of the Board. *Lake Bomoseen Wetland*, WET-02-04, Memorandum of Decision (03/21/03); *aff'd, Alan & Claudia Wulff v. Vt. WRB,* No. 234-4-03, Opinion and Order (12/03/03); *appeal docketed,* No. 2004-002 (01/23/04) (pending).

* Rule 34(D) of the Board's Rules of Procedure provides that a "party" may file a motion to alter within 15 days from the date of the Board's decision. *Id.*

* The primary purpose of Rule 34(D) is to allow parties to petition the Board to reconsider the existing record of the proceeding and to bring to the Board's attention laws or facts previously presented that the Board may have overlooked or misapprehended. *Id.*

* Pursuant to Rule 34(D), a motion to alter cannot present new argument unless the new argument is in response to permit conditions or typographical, technical, and other manifest errors, provided that the party seeking the alteration reasonably could not have known of the conditions or errors prior to decision. *Id.*

* The Board will not accept new evidence when considering a motion to alter unless the Board determines that doing so is necessary to avoid manifest injustice, which is the "obvious, indisputable and self-evident withholding or denial of justice" as the result of negligence, mistake or omission of the Board. *Id.*

* The Board denied a Motion to Alter that sought modification of a 100-foot protective wetland buffer zone imposed when the wetland was reclassified from Class Two to Class One. At the time the wetland was reclassified, the Board determined that the 100-foot wide presumptive buffer zone was needed to protect significant wildlife habitat, the wetland's water quality, and its aesthetic and open space functions. *Id.*

* The Board is not required by it Rules of Procedure to hold a hearing prior to rendering a decision on a Motion to Correct and a Motion to Alter. *CCCH Stormwater Discharge Permit*, WQ-02-01, Amended Dismissal Order (08/29/02).

* Mere disagreement with the Board's procedural and substantive rulings, its findings of fact and conclusions of law, is not a basis for correction, or alteration, of a decision. A motion to alter is limited to a reconsideration of the existing record; new argument is available only for certain "manifest errors." New evidence is not permitted, unless it is necessary to avoid "manifest injustice." *OMYA, Inc.,* WQ-01-09, Memorandum of Decision (05/16/02).

* Motions to Alter are granted at the discretion of the Board, which may act without holding a hearing, pursuant to WRB Rule 34(D). *Id.*

* WRB Rule 34(D) requires, among other things, that a motion to alter be supported by a memorandum of law and that this memorandum of law shall state why each requested alteration is appropriate and the location in the existing record of the supporting evidence. The Board denied request to find facts proposed by movant where the movant failed to direct the Board to the location in the record of any specific evidence which either supported those proposed findings or refuted the findings made by the Board. *Id.*

* Board, in weighing the entirety of the record evidence, adopted some of the movants findings of fact – albeit, not verbatim – and rejected other proposed findings of fact. Disagreement with the Board's choice of findings of fact, alone, is not a basis for alteration of the Board's decision. *Id.*

* Board denied request to alter conclusions of law based on argument of manifest error and also request to file new evidence based on claim of alleged manifest injustice, where movants memorandum of law failed to address standards applicable to WRB Rule 34(D) motions and, in any event, Board found no merit to the movant's substantive claim that the Board had retroactively applied a "new" standard for organizational standing. *Id.*

* A corporation which has not demonstrated that it has the requisite injury to its own interests sufficient to support organizational standing cannot make up for that deficiency by invoking statutory policy statements articulating the public interest, in this instance, the State's water quality policy. *Id.*

* Board denied requests to alter conclusions of law where movant failed to demonstrate that Board had applied erroneous "new" legal standard in requiring non-profit corporation to have voting members to support representational standing, when the basis for the Board's requirement was well-established statutory law applying to non-profit corporations, Title 11B V.S.A. *Id.*

* As a general rule, the Board decides only such issues as are brought to its attention based on the record of the pending appeal and it presumes that jurisdiction exists, absent a motion challenging jurisdiction on standing or other grounds. If a party opponent failed to raise jurisdictional objections in a prior appeal, the Board's determinations are nonetheless conclusive under the rule of finality. *Id.*

* New arguments in a motion to alter are permitted only with respect to permit conditions or manifest error. Manifest error means obvious, patent errors in a decision, such as the misidentification of a party, the wrong citation to a case, or other defect that may readily be determined to be in error. *Village of Ludlow (Ludlow Wastewater Treatment Facility),* WQ-01-08, Memorandum of Decision (05/15/02).

* The Board may accept new evidence when acting on a motion to alter only to avoid manifest injustice. The term manifest injustice has been used to describe a result that is wholly without legal support or as apparent error. *Id.*

* The requirements of manifest injustice and of manifest error preclude a party from using a motion to alter as a means of re-litigating a case or expanding the scope of previous proceedings. The proper focus of a motion to alter is on errors that may have been committed by the Board in the prior stages of the proceeding, not on strategies or techniques that proved unsuccessful for the moving party. A motion to alter is not an opportunity for a party to treat the prior proceeding as a first run, to evaluate what may have gone wrong, and to then revise its arguments. *Id.*

* The purpose of the standards concerning motions to alter is to preserve the integrity of the appeal process by ensuring that arguments and evidence are introduced prior to a final decision and to prevent the use of motions to alter to convert Board decisions into "proposed" decisions to which parties can later respond, thereby elongating the process. *Id.*

* A motion to alter may ask the Board to reconsider arguments previously made. Thus, the moving party may argue that the Board overlooked or misapprehended laws or facts previously presented that would probably affect the result. *Id.*

* A request in a motion to alter to introduce new evidence that was not introduced at the hearing is not supported by manifest injustice. *Id.*

* For the Board to consider new evidence after the conclusion of a hearing, without a demonstration of manifest injustice, would be unfair to the other parties to the appeal and contrary to principles of finality and judicial economy. *Id.*

* A litigant's desire for a second opportunity to present its case does not support the granting of a motion to alter, much less a new hearing. *Id.*

* An appellant cannot use a motion to alter as a means of obtaining a second opportunity to prove legal standing. *Id.*

* Mere disagreement with the Board's findings is not grounds for a motion to alter. *Id.*

* A request in a motion to alter that does not relate to a finding of the Board and that, if granted, would not affect the outcome of the Board's decision, was denied. *Id.*

* A motion to alter cannot be used as a chance to reformulate hearing strategies. *Id.*

* The requirement of manifest injustice precludes the Board from granting a new evidentiary hearing to enable a party to make up for the deficiencies in its case at the first one. *Id.*

* Because the appellant did not show that manifest error or manifest injustice would result from the denial of its Motion to Alter, or that the Board's decision overlooked or misapprehended laws or facts previously presented that would probably affect the result, the appellant's Motion to Alter was denied. *Id.*

* Motions to alter are not limited to final decisions. It was therefore procedurally appropriate for ANR to file a motion to alter a memorandum of decision on preliminary issues. *Hannaford Bros. Co. and Lowes Home Centers, Inc.* WQ-01-01, Memorandum of Decision (08/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* A motion to alter may ask the Board to reconsider arguments previously made. In a motion to alter a decision on preliminary issues of law, the moving party may argue that the Board overlooked or misapprehended laws or facts previously presented that would probably affect the outcome of the proceeding. *Id.*

* New arguments in a motion to alter may be made only with regard to manifest error. Manifest error refers to obvious, patent errors in a decision, such as the misidentification of a party, the wrong citation to a case, or other defect that may readily be determined to be error. *Id.*

* The Board denied ANR's request in a motion to alter that the Board clarify its use of the terms "load" and "impact" in a decision on preliminary issues and indicated that the parties would have an opportunity to further address the meaning and application of these terms at the evidentiary hearing on the merits. *Id.*

* Motion to Correct/Alter was denied both because it was untimely filed and because mere disagreement with the Board's procedural and substantive rulings, its findings of fact and conclusions of law, is not a

basis for correction of a decision for "manifest error." *Robert A. Gillin*, MLP-94-01, Findings of Fact, Conclusions of Law and Order (10/04/94)

* Motions to correct manifest error are designed to correct obvious, patent errors in a decision, such as the misidentification of a party, the wrong citation to a case, or other defect that may readily be determined to be in error; a motion to correct manifest error is not intended to be used to reargue a case or expand its scope to relitigate matters determined in previous proceedings. *Id.*

* Motion to Correct/Alter filed 18 days after issuance of Board's final decision was timely where the last day of appeal period fell on a Saturday and Monday was a legal holiday; nevertheless, Motion to Correct/ Alter did not raise issues of manifest error, mistakes or omissions, and therefore it was denied. *Appeal of Robert A. Gillin*, MLP-90-11, Findings of Fact, Conclusions of Law and Order (Motion to Correct) (10/31/91).

1583. Remand

* In an appeal alleging that discharges of stormwater into stormwater-impaired streams contribute to ongoing violations of the VWQS, the Board remanded the matter to ANR to establish any de minimis threshold for federal discharge permitting of stormwater discharges into these streams; to establish permitting conditions for federal discharge permits pending the establishment of comprehensive cleanup plans for these waters; to determine whether to administer these permitting requirements through individual permits, general permits, or some combination of individual and general permits; and to notify dischargers of their federal permitting obligations. *Stormwater NPDES Petition*, WQ-03-17, Memorandum of Decision (10/14/04); *appeal docketed,* No. 2004-515 (11/22/04) (pending).

* Even where the applicant can demonstrate compliance with ANR's 2002 Stormwater Treatment Manual, under certain circumstances, the presumption of compliance with the VWQS could be successfully rebutted with credible evidence demonstrating, for example, that increases in sediment and other pollutants attributable to a project's collected stormwater discharges are detrimental to existing aquatic biota and wildlife or the habitat that supports such biota and wildlife. Under such circumstances, the Board would likely remand the matter to ANR for further inventory and anti-degradation analysis of the receiving waters and for consideration of the impacts of discharges upon both "existing" and "designated" uses. *CCCH Stormwater Discharge Permits,* WQ-02-11, WQ-03-05, -06, and -07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (10/04/04). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended by Act 109 (2001 Adj. Sess.), eff. May 16, 2002. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Evidence of the historical presence of certain rare, threatened and endangered species, alone, without facts to support a finding that operational discharges from a proposed project would actually result in a new or increased discharge causing or contributing to a violation of the VWQS, is not enough to convince the Board that an Operational-Phase Permit should be remanded to ANR for further proceedings to determine whether those species constitute "existing uses" in need of protection. *Id.*

* Remand to ANR for an anti-degradation analysis and an inventory of "existing uses" is not appropriate if the Board has determined that the operational phase of a project will not result in an increased discharge of pollutants of concern. *Id.*

VI. APPEALS TO THE BOARD (1601-1620)

1601. General

* A motion to dismiss an appeal for lack of merit is in the nature of a motion for summary judgment. *Citizens for Safe Farms, Inc. (Hinsdale Farm*), WQ-04-02, Memorandum of Decision (10/14/04); *appeal docketed,* No. 2004-510 (11/18/04) (pending).

* Actions taken by ANR pursuant to the Agricultural Non-Point Sources Pollution Reduction Program, 6 V.S.A. §§ 4810-4855, *amended by* Act 149 of 2004 are not appealable to the Board because that statutory program provides for appeals to Environmental Court from decisions of the Secretary of Agriculture, and limits those appeals to the permit applicant and the Secretary of Agriculture. *Id.*

* The Board lacks jurisdiction over an appeal that alleges ANR's failure to follow procedures established by a 1999 Memorandum of Understanding between ANR and Agency of Agriculture because such errors do not constitute final acts or decisions that are appealable to the Board. *Id.*

* As a general matter, an agency action for which there is no other adequate remedy may be appealed unless the action has been committed by law to the agency's discretion or if a statute precludes review. *Id.*

* An agency's inaction or failure to act may be appealable if the agency is under a clear statutory duty to act. Thus, inaction is tantamount to a final agency action if the inaction has the same impact on the parties as denial of relief. *Id.*

* A petition process provided by federal regulation, 40 C.F.R. § 122.26(f)(2), enables persons to formally petition ANR to exercise its residual designation authority and to appeal to the Board if the Agency refuses to act. *Id.*

* ANR's denial of a petition requesting the Agency to require NPDES permits for a class of stormwater discharges was not a declaratory ruling but, rather, a decision appealable to the Board pursuant to 10 V.S.A. §1269. *Id.*

* A person who files a petition with ANR relating to the residual designation authority may choose whether the petition represents a request for rule making under the Administrative Procedure Act or a request for an appealable determination under the Vermont Water Pollution Control Act. If the petition is filed under the Vermont Water Pollution Control Act but is in the nature of a request for rule making, that would constitute grounds for denying the petition on its merits. It would not change a permitting petition into a rule making request and deprive the Board of jurisdiction to review the permitting action on appeal. *Stormwater NPDES Petition*, WQ-03-17, Memorandum of Decision (04/01/04).

* Because the petitioners asked ANR to apply its existing residual designation authority to stormwater discharges in five stormwater-impaired watersheds without altering any previous written policy or rule, and because the petitioners have not requested the adoption of a written policy applicable to all discharges of a certain type, the Board found that the petition was not in the nature of a request for rule making. *Id.*

* Title 10 V.S.A. § 1269 creates a right of appeal in any person or party in interest aggrieved by an act or decision of the Secretary. *Kent Pond*, MLP-03-10, MLP-03-11, and CUD-03-13 (Consolidated), Memorandum of Decision and Dismissal Order (02/18/04).

* In a *de novo* appeal, the Board does not review ANR's prior decision to determine whether the agency acted properly. Rather, the Board hears the case "as if there had been no prior proceedings." *City of South Burlington and Town of Colchester,* WQ-03-02, Findings of Fact, Conclusions of Law, and Order (12/29/03).

* A person or organization is not required to comment on a permit during the notice and comment period provided by ANR as a condition precedent to appealing ANR's permitting decision to the Board. *Village of Enosburg Falls*, WQ-03-03, Memorandum of Decision (05/21/03).

* Standing focuses on whether the litigant is the proper party to bring suit, not on whether the issue itself is justiciable. *City of South Burlington and Town of Colchester*, WQ-03-02, Memorandum of Decision (05/20/03).

* The general rule of law is that an applicant is presumed to have a right to withdraw its permit application, unless palpable prejudice to an adversary or the public interest would result. *CCCH Stormwater Discharge Permit*, WQ-02-01, Dismissal Order (08/13/02), *amended by* Order (08/29/02).

* Jurisdiction over a Permit under appeal lies with the Board and only the Board may vacate or declare void that Permit absent a formal remand of the matter to ANR. *Id.*

* In instances where a party has challenged the standing of an appellant, the Board has generally looked to the appellant's notice of appeal to find facts demonstrating a nexus between the appellant's alleged interest, the injury asserted, and the act or decision of the Commissioner of DEC, or the Secretary

of ANR. In making its standing determination, the Board has also looked at the appellant's representations, either in its notice of appeal, at a prehearing conference, or in filings supplementing the notice of appeal. *Nathan Wallace-Senft (Bennington Bypass Project)* WQ-99-04 and CUD-99-05, Dismissal Order (09/08/99).

* Board dismissed appeal on its own motion where appellant failed to appear at hearing, either in her own person or by a representative. *Appeal of Cole,* WQ-92-13, Dismissal Order (10/27/94).

1602. Cross-Appeals

1603. Filing

* An appellant must provide in its notice of appeal, among other information, a statement of the reasons why the appellant has standing to appeal the Secretary's act or decision. *Kent Pond,* MLP-03-10, MLP-03-11, and CUD-03-13 (Consolidated), Memorandum of Decision and Dismissal Order (02/18/04).

1603.1 Timeliness

* A motion to dismiss an appeal of a renewal permit for the reason that the appellant failed to appeal the permittee's prior discharge permits was denied because the renewal permit under appeal entirely replaced the previously issued permits, the appeal of the renewal permit was filed within thirty days of its issuance, and the notice of appeal addressed that permit. *City of Burlington (Bartlett Bay Wastewater Treatment Facility)*, WQ-01-04, Second Prehearing Conference Report and Order (04/18/02).

* The permit renewal process allows progress to be made in water-pollution control. Vermont law plainly requires discharge permits to be reviewed every five years. If a previously issued permit is now deemed not to comply with applicable law, in the course of renewal, it must be subject to change. The permittee cannot have an equitable interest in maintaining an unlawful discharge. *Id.*

* Laches is 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. The delay must be not only prejudicial, but also unexcused. *Id.*

* 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. *Id.*

* Appellant's appeal of permit *amendment* raised certain issues concerning phosphorus management for the applicant's proposed wastewater treatment facility which were finally decided in a discharge permit issued months previously; therefore, in response to applicant's motion for partial dismissal, Board determined that those issues were untimely raised and could not be considered by the Board within the ambit of the permit amendment proceeding even if ANR applied the wrong legal standards in issuing the discharge permit. *Town of Shoreham Wastewater Treatment Facility,* WQ-00-11, Memorandum of Decision on Preliminary Issues (05/02/01).

* Given that 3 V.S.A. § 2873(c)(4) contains no deadline for the filing of appeals, the Board assumes that the Legislature intended that appeals could be filed from subdivision permits at any time; accordingly, the Board denied ANR's Motion to Dismiss a subdivision appeal on the ground that it was allegedly untimely because it was not filed within 30 days of the issuance of the ANR's permit. *McIntyre and Lovett*, EPR-98-02, Memorandum of Decision (08/12/98).

* Failure to timely file an appeal with the Board deprives the Board of jurisdiction to hear an appeal. *Appeal of Poultney River Committee*, WQ-92-04, Preliminary Order (08/11/92); *aff'd, Appeal of Poultney River Committee*, S0693-92ReCa (02/03/94); *aff'd; Poultney River Committee,* Vt. 94-165 (06/26/95)

* In an appeal of a 1992 permit amendment, the Board lacked jurisdiction to consider alleged irregularity in the issuance of a 1991 permit amendment; had appellant of 1992 permit amendment wanted review of the 1991 permit, it should have filed a timely appeal of that permit. *Id.*

1603.2 Completeness

* Where the appellants and ANR each claimed that it would be difficult to further define the issues on appeal until obtaining additional information from each other, the notices of appeal were administratively complete, and the information supplied by the appellants was sufficiently detailed to inform ANR of the scope of the consolidated appeals, the Chair decided that further clarification of the issues on appeal would occur through the exchange of prefiled evidence. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook*, WQ-02-04, WQ-02-05, WQ-02-06 and WQ-02-07 (Consolidated), Prehearing Conference Report and Order (09/20/02), *modified by* Chair's Order (10/18/02).

* The VWQS provide that the applicable law is the law in effect at the time a permit application is filed and deemed complete by ANR. *Hannaford Bros. Co. and Lowes Home Centers, Inc.,* WQ-01-01, Memorandum of Decision (06/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* The question of whether conformity with ANR's stormwater treatment and control practices was enough to demonstrate compliance with the VWQS went to the merits of the permit application, not to its completeness. *Id.*

* Applying its *de novo* standard of review, the Board found that an application for a stormwater permit should be deemed complete under the VWQS as of the date ANR received the complete application. *Id.*

* Even where there are substantial deficiencies in a notice of appeal and the appellant must remedy them before the matter can be accepted by the Executive Officer for notice and publication, jurisdiction resides with the Board to oversee that the appeal is perfected and, if so, to hear the matter on the merits. *Laurence and Roberta Coffin,* MLP-97-05, Chair's Preliminary Ruling (08/12/97).

* Notice of appeal need only state issues in dispute with reasonable specificity in order to alert affected persons concerning the scope of the appeal. *Appeal of Cole*, WQ-92-13, Memorandum of Decision: Stratton Corporation's Motion to Dismiss (05/28/93).

* It is the Board's policy to construe notices of appeal liberally, especially in *de novo* appeals filed by pro se appellants. *Id.*

1604. Issues on Appeal / Scope of Review / Scope of Appeal

* Facts that may pertain to standing or party status may not always pertain to the merits of a proceeding. Once party status has been granted, the focus of the appeal is not on the interests of these parties but on the regulatory requirements for the project that have been raised by notice of appeal, even if those requirements are not as stringent as these parties believe their interests would warrant. *Waters of the Green Mountain National Forest,* ORW-03-01, Memorandum of Decision (06/28/04).

* The Board ordinarily restricts the scope of its review to the issues identified by the appellant unless the Board determines that substantial inequity or injustice would result from this limitation. *Kent Pond,* MLP-03-10 and MLP-03-11 (Cons.), Findings of Fact, Conclusions of Law, and Order (05/12/04).

* The appellant waived the opportunity to contest the absence of daily effluent limitations in a discharge permit by failing to identify this issue in the notice of appeal. *Village of Enosburg Falls*, WQ-03-03, Memorandum of Decision (04/21/04).

* An appeal of a CUD decision of the Secretary of ANR is heard *de novo* by the Board pursuant to 10 V.S.A. § 1269. *Kent Pond,* MLP-03-10, MLP-03-11, and CUD-03-13 (Consolidated), Memorandum of Decision and Dismissal Order (02/18/04).

* Although there are circumstances under which the Board may consider evidence pertaining to economic and social impacts, Section 401 Certificate review under the Clean Water Act and the VWQS limits the Board's consideration of a project's impacts to those related to water quality only. *Clyde River Hydroelectric Project*, WQ-02-08(A) and (B) (Consolidated) Amended WQ Certificate: Findings of Fact, Conclusions of Law, and Order (07/11/03); *appeal docketed,* No. 2004-101 (03/08/04) (pending).

* A Water Quality Certificate is merely stayed by the filing of an appeal pursuant to 10 V.S.A. § 1024(a). *Clyde River Hydroelectric Project*, WQ-02-08(A), (B), and (C) (Consolidated), Prehearing Conference Report and Order (10/25/02).

* The Board considers *de novo* the issues raised on appeal, not all matters giving rise to the package of Findings and Conditions comprising the Water Quality Certificate issued by the Secretary of ANR. *Id.*

* Where the appellants and ANR each claimed that it would be difficult to further define the issues on appeal until obtaining additional information from each other, the notices of appeal were administratively complete, and the information supplied by the appellants was sufficiently detailed to inform ANR of the scope of the consolidated appeals, the Chair decided that further clarification of the issues on appeal would occur through the exchange of prefiled evidence. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook*, WQ-02-04, WQ-02-05, WQ-02-06 and WQ-02-07 (Consolidated), Prehearing Conference Report and Order (09/20/02), *modified by* Chair's Order (10/18/02).

* The Chair consolidated eleven appeals of four watershed improvement permits into one case but made clear that the parties may organize their evidence by watershed. Parties that did not appeal all four watershed improvement permits were ordered to confine their evidence to the watershed improvements that they appealed. *Id.*

* A motion to dismiss an appeal of a renewal permit for the reason that the appellant failed to appeal the permittee's prior discharge permits was denied because the renewal permit under appeal entirely replaced the previously issued permits, the appeal of the renewal permit was filed within thirty days of its issuance, and the notice of appeal addressed that permit. *City of Burlington (Bartlett Bay Wastewater Treatment Facility)*, WQ-01-04, Second Prehearing Conference Report and Order (04/18/02).

* Vermont law plainly requires discharge permits to be reviewed every five years. The permit renewal process allows progress to be made in water-pollution control. If a previously issued permit is now deemed not to comply with applicable law, in the course of renewal, it must be subject to change. The permittee cannot have an equitable interest in maintaining an unlawful discharge. *Id.*

* Laches is 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. The delay must be not only prejudicial, but also unexcused. *Id.*

* 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. *Id.*

* The Vermont Supreme Court has expressed reluctance to apply the doctrine of laches to cases involving the state's administration of the public trust. *Id.*

* The Board held that a notice of appeal fairly raised the effects of a proposed phosphorous discharge into the main lake of Lake Champlain, even though the notice of appeal focused on Shelburne Bay, because the Board construes notices of appeal liberally, the notice of appeal fairly notified the permittee and other interested persons that the phosphorous limitations in the permit under appeal were at issue, the definition of receiving waters in the VWQS includes all waters adjacent to and downstream from other waters the quality of which could be affected by the discharge, and because the other parties would not be prejudiced if the appeal were so construed at this stage of the proceedings. *Id.*

* In an appeal of a stormwater discharge permit issued for the operation of a commercial complex, testimony with regard to construction-phase stormwater runoff, which would require a separate permit that was not the subject of the appeal, was irrelevant and inadmissible. *Hannaford Bros. Co. and Lowes Homes Center, Inc.*, WQ-01-01, Findings of Fact, Conclusions of Law and Order (01/18/02); *aff'd,* No. 280-02 CnCv (04/30/03); *appeal docketed*, No. 2003-539 (12/14/04) (pending). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Issues relating to thermal pollution and hydrological modification were considered only insofar as they related to the impairment of the receiving waters because the broader implications of those 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.*

* Based on the Notice of Appeal and the prior decisions and orders issued in the case, the scope of the appeal was limited to the question of whether the permit will allow a new or increased discharge of pollutants of concern into the receiving waters. *Id.*

* Testimony with regard to construction site runoff, which would require a separate permit, was irrelevant in an appeal from a stormwater discharge permit issued for the operation of a commercial complex. *Hannaford Bros. Co. and Lowes Home Centers*, WQ-01-01, Second Prehearing Conference Report and Order (12/03/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* The Board denied a motion to dismiss the appeal filed after the Board issued a decision on preliminary issues because the issues remaining for the hearing on the merits were well within the issues raised by the notice of appeal, even though the Board ruled against the appellants in its decision on the preliminary issues. *Id.* Memorandum of Decision (08/29/01).

* Appellant's appeal of permit *amendment* raised certain issues concerning phosphorus management for the applicant's proposed wastewater treatment facility which were finally decided in a discharge permit issued months previously; therefore, in response to applicant's motion for partial dismissal, Board determined that those issues were untimely raised and could not be considered by the Board within the ambit of the permit amendment proceeding even if ANR applied the wrong legal standards in issuing the discharge permit. *Town of Shoreham Wastewater Treatment Facility*, WQ-00-11, Memorandum of Decision on Preliminary Issues (05/02/01).

* Board has never dismissed or limited the scope of an appeal simply because an interested person offered no comment or only some comment with respect to a draft permit. *Id.*

* 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. *Id.*

* Scope of amended permit under appeal was limited to the discharge of stormwater runoff and did not include non-stormwater discharges from a proposed garden center; accordingly, while Board did not review such non-stormwater discharges, it nonetheless concluded that the Secretary of ANR had authority to evaluate such discharges and could impose conditions, including the preparation, filing, and implementation of such pollution prevention plan as necessary to assure the protection of surface and groundwater quality. *Home Depot, USA, Inc. et al.*, WQ-00-06, Findings of Fact, Conclusions of Law, and Order (02/06/01) and Memorandum of Decision re: Motion to Alter (03/16/01); *dismissed with prejudice,* SO-244-01 RcCa (07/11/01).

* Board denied late motion to expand the scope of the appeal (and provide an alternative argument in support of standing/party status) where the petitioner did not demonstrate why these matters could not have been raised in his notice of appeal and initial party status petition and where to allow such a motion would unfairly burden the parties who had already prepared for a merits hearing on the narrow issues previously framed. *Paul Dannenberg*, WQ-99-07 Findings of Fact, Conclusions of Law and Order (12/29/00).

* Under Section 1-01(B)(33) of the applicable VWQS [1997], "stormwater runoff" meant: ... "natural precipitation that does not infiltrate into the soil, including any material dissolved or suspended in such water." Therefore, whether or not the ANR considered the waste stream (i.e. all discharges) from a proposed garden center in its review of a stormwater discharge permit for the applicant's mall project, on appeal, as a matter of law the Board was limited to review of only the discharge of stormwater runoff from the roadways, parking and roofs associated with the project and a consideration of the facilities proposed for its control and treatment prior to discharge to receiving waters. *Home Depot, USA, Inc., et al.,* WQ-00-06 and CUD-00-07, Memorandum of Decision on Preliminary Issues and Order (09/08/00).

* Procedural Rule 19(C) is not a vehicle to allow appellants to expand the scope of project review to include matters not considered by the ANR in the first instance. Rather, it was designed to put all persons on notice that they must raise in their notices of appeal all bonafide issues that they would like the Board to consider. *Barden Gale and Melanie Gale Amhowitz*, CUD-99-08, Memorandum of Decision on Preliminary Issues (03/21/00).

* While a Class Two wetland is presumed to serve all of the functions specified in Section 5 of the VWR, where the parties have agreed by stipulation that certain wetland functions are not at issue, the Board makes no findings of fact and conclusions of law in its final decision with respect to such functions. Accordingly, the Board made no findings of fact and conclusions of law with respect to functions 5.5, 5.6, and 5.7. *Lost Cove Homeowners Assoc., Inc.,* CUD-98-04, Findings of Fact, Conclusions of Law and Order (07/16/99). *See also Lost Cove Homeowners Assoc., Inc.*, CUD-98-04, Memorandum of Decision and Order re: Motion to Alter (09/01/99).

* While a Class Two wetland is presumed to serve all of the functions specified in Section 5 of the VWR, where the parties have agreed by stipulation that certain wetland functions are not at issue, the Board makes no findings of fact and conclusions of law in its final decision with respect to such functions. Accordingly, the Board made no findings of fact and conclusions of law with respect to functions 5.5, 5.6, and 5.7. *Barden Gale and Melanie Gale Amhowitz*, CUD-99-01, Findings of Fact, Conclusions of Law and Order (07/16/99). *See also, In re Barden Gale and Melanie Gale Amhowitz,* CUD-99-01, Memorandum of Decision and Order re: Motion to Alter (09/01/99).

* To clarify the issues on appeal, the Board, while conforming with Board Rules of Procedure 24(A)(1) and 18(D), must "be free to make common-sense rulings within the general scope of the notice of appeal." *Killington Ltd.,* 159 Vt. at 215 (1992). The Board extended some latitude in interpreting Appellants' allegations of error in order to more clearly frame the issues. However, Board declined to allow the unchecked flexibility to raise new issues advocated by Appellant where Appellant appended a caveat to its Notice of Appeal stating that such notice of appeal was: "not intended to be a complete and comprehensive discussion of all the relevant issues present in this appeal," and that "Appellants reserve the right to bring to the Board for review any other relevant issues, once identified, that fall within its jurisdiction and which have a direct bearing on this appeal*." Killington, Ltd*., WQC-97-10, Memorandum of Decision (03/30/98)

* Rulings on the scope of appeal are necessary in the early stages of an appeal to inform all parties of what the issues are so that evidence may be submitted accordingly. *Id.*

* Where "person aggrieved" has been determined to have standing and has achieved party status pursuant to the Board's Rules of Procedure, the extent of that aggrievement is essential to the Board's determination of the scope of appeal. The nexus between the basis for appellant's aggrievement and the project's impacts are particularly important where, as in this case, the "project" consists of distinct components that are geographically separated. *Id.*

* While a Class Two wetland is presumed to serve all of the functions specified in Section 5 of the VWR, the scope of any *de novo* proceeding must 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. Accordingly, the Board limited its review to consideration of the applicant's tree cutting plan for impacts under functions 5.4 and 5.10. *Darryl and Stephanie Landvater*, CUD-96-06, Findings of Fact, Conclusions of Law and Order (08/28/97)

* The scope of review is limited to the project and the permit on appeal; therefore, the Board could not expand its public trust review to the entire marina when the project and permit addressed only the relocation of a service and swim dock in the public waters of Lake Champlain. *Dean Leary (Point Bay Marina, Inc.),* MLP-96-04, Memorandum of Decision (03/18/97).

* Section 1023(a)(1) was not at issue in *de novo* appeal before the Board because the Appellant did not allege that the Project would adversely affect the public safety by increasing flood hazards. *Clarence Jelley*, SAP-96-03, Findings of Fact, Conclusions of Law, and Order (10/30/96).

* Section 1023(a)(4) was not at issue in *de novo* appeal before the Board because the Board had not designated the subject river an outstanding resource waters. *Id.*

* Board was limited to considering the encroachment permit immediately before it; its jurisdiction could not be expanded by agreement of the parties. Accordingly, the Board could not expand the scope of its review to encompass Public Trust review of the permittee's entire marina and operations when these facilities were not the subject of the encroachment permit under appeal. *Dean Leary*, MLP-94-08, Dismissal Order (03/11/96).

* Despite being a *de novo* appeal, only those provisions of § 1263a(e) that are raised by an appellant in its notice of appeal are within the ambit of the appeal. Findings with respect to the subsections of §1263a(e) that are not appealed are binding upon the applicant/permittee. *Aquatic Nuisance Control Permit, #C93-01-Morey*, WQ-93-04, Findings of Fact, Conclusions of Law, and Order (04/12/94); *aff'd, In re Aquatic Nuisance Control Permit #C93-01-Morey*, Docket No. 94-5-94 OeCv, Opinion and Order (02/06/95).

* The lampricide treatment of the Poultney River was authorized by the 1991 permit amendment; the appellant had thirty days to appeal that permit, but it did not; therefore, the decision to treat the river was final and the only issues properly before the Board in 1992 were the merits of the five modifications authorized by the 1992 permit amendment. *Appeal of Poultney River Committee*, WQ-92-04 (08/11/92); *aff'd, Appeal of Poultney River Committee,* S0693-92 ReCa (02/03/94); *aff'd, Poultney River Committee*, Vt. 94-165 (06/26/95).

* The scope of *de novo* review of the conditional use determination application on appeal was limited to evaluating the impacts of the five proposed driveways on the subject wetland and its buffer zone. However, given the ambiguities in the wetland delineation performed by the applicant's consultants, the Board put the applicant on notice that other proposed development activities, such as the construction of leach fields, if they were to occur within the wetland or its associated buffer zone, would require additional conditional use determinations. *Appeal of Larivee*, CUD-92-09, Findings of Fact, Conclusions of Law and Order (03/25/94).

* Petitioner for intervention could not expand the scope of appeal through its petition, since scope of the appeal was limited to those issues raised in the appellant's notice of appeal as clarified in the prehearing conference report and order. *Appeal of Cole*, WQ-92-13, Memorandum of Decision: Requests for Intervention (07/09/93).

* Board granted motion allowing amendment of the appellant's notice of appeal to include dam project's compliance with the public trust doctrine on the basis that Board Rules of Procedure allow for liberal construction of said notices and appellant had indicated in its cover letter at the time of filing that it specifically reserved "all rights and actions with respect to the public trust doctrine." *Appeal of Vermont Natural Resources Council (Sugarbush)*, DAM-92-02, Prehearing Conference Order and Preliminary Order (04/10/92).

1605. Equitable Defenses

* A permit applicant cannot reasonably rely on an agency employee's interpretation of the law, which is often disputed by third parties. It was unreasonable for a permit applicant to expect that an ANR technical employee's legal opinion could bind the agency, those who may be affected by the project at issue, and the Board. *William and Ann Lyon*, EPR-03-16, Memorandum of Decision (04/21/04); *appeal docketed,* No. 2004-231 (05/14/04) (pending).

* Neither ANR nor the Board on appeal was estopped from finding that a wastewater system permit, issued without a design certification and for which ANR had not received an installation certification, was invalid and that the permit must be revoked. *Id.*

1605.1 Ripeness (See Section V. B. 1443.)

1606. Exhaustion of Administrative Remedies Below

* A person or organization is not required to comment on a permit during the notice and comment period provided by ANR as a condition precedent to appealing ANR's permitting decision to the Board. *Village of Enosburg Falls*, WQ-03-03, Memorandum of Decision (05/21/03).

* Laches is 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. The delay must be not only prejudicial, but also unexcused. *City of South Burlington (Bartlett Bay Wastewater Treatment Facility),* WQ-01-04, Second Prehearing Conference Report and Order (04/18/02).

* 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. *Id.*

1607. Remand

* The Board summarily denied a motion for reconsideration that requested the Board to affirm the issuance of discharge permits that violated Vermont law and that requested in the alternative that the Board remand these unlawful discharge permits to ANR to implement them for a five-year trial period. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook,* WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated), Order (06/27/03).

* The Secretary of ANR's failure to post notice of a CUD application at the municipal clerk's office for the municipality in which the affected wetland was located was a jurisdictional defect requiring the Board to remand the matter on appeal to the ANR so that it could properly re-notice and, if requested by a member of the public, re-open the permit application review process. *Al J. Frank*, CUD-00-02 and *Gregory Lothrop*, CUD-00-03 (Consolidated), Remand Order (04/24/01).

* Where ANR, not applicant, created defect in notice of CUD application and Board remanded to ANR because of jurisdictional defect and directed re-noticing of the CUD application, the law applicable to such application was the law at the time of the initial filing of that CUD application with the ANR. *Id.*

* In the context of a stream alteration permit application, ANR's actions foreclosed the opportunity of any party entitled by statute to receive notice of the permit application to meaningfully participate. Were such an expedited review process allowed, those entitled by statute to receive notice would necessarily be required to appeal the issuance or denial of a permit to the Water Resources Board simply to ensure that a hearing was conducted on the application or to allow a meaningful opportunity to comment on the application. The Board determined such a result to be inconsistent with the respective functions of ANR and the Board, the former having technical expertise and being charged with administering the stream alteration program in the first instance and the latter being a body with limited technical expertise and having appellate jurisdiction. Accordingly, the Board remanded the matter for initial consideration by ANR. *George Carpenter, Jr.,* SAP-99-06, Remand Order (12/14/99).

* ANR conducts the initial review of a CUD application and the Board's role is to conduct a *de novo* review of that application. While the law may allow the Board to consider new evidence and proposed monitoring requirements that were not reviewed by ANR, the Board's fundamental obligation is to review the merits of the same application that was reviewed by ANR. Where the application is changed during the pendency of the appeal, particularly where the prehearing conference report and order did not allow for *any* change in the application, such CUD application shall be remanded to ANR. *Champlain Marble Company,* CUD-97-06, Memorandum of Decision and Remand Order (05/07/98).

* Board remanded appeal to the ANR and advised ANR that, once jurisdiction attached, it could reconsider the proposed the project as altered by the developer provided that the ANR provided persons who had participated in the prior conditional use determination proceeding with notice and an opportunity to participate in the reconsideration proceeding. *Jamie Badger*, CUD-96-07, Memorandum of Decision and Order of Remand (06/04/97).

1608. Waiver of Right to Appeal

* A person or organization is not required to comment on a permit during the notice and comment period provided by ANR as a condition precedent to appealing ANR's permitting decision to the Board. *Village of Enosburg Falls*, WQ-03-03, Memorandum of Decision (05/21/03).

* Board has never dismissed or limited the scope of an appeal simply because an interested person offered no comment or only some comment with respect to a draft permit; this is because ANR's permit process is not a contested case hearing comporting with the requirements of the Vermont Administrative Procedure Act, 3 V.S.A. ch. 25, but rather an informal notice-and-comment process that does not contemplate that a complete evidentiary record will be developed in support of or in opposition to the issuance of a permit. Board is the *first* administrative forum where a party has a right to raise and brief issues, present and challenge evidence, cross-examine witnesses, and have a decision supported by a record. *Town of Shoreham Wastewater Treatment Facility,* WQ-00-11, Memorandum of Decision on Preliminary Issues (05/02/01).

*Board dismissed appeal on its own motion where appellant failed to appear at hearing, either in her own person or by a representative. *Appeal of Cole*, WQ-92-13, Dismissal Order (10/27/94).

1609. Withdrawal, When Allowed

* The Board determined that it was not contrary to the intent and purposes of 10 V.S.A. § 905(7)-(9) and the VWR to grant the applicant's request to withdraw its appeal; however, the effect of dismissing this matter was to leave standing the conditional use determination appealed from, including the conditions previously objected to by the applicant. *Proctor Gas, Inc., West Rutland*, CUD-93-02, Dismissal Order (10/27/93).

1610. Consolidation or Joint Hearings

* Under Rule 33(B), the Board may consolidate cases involving common questions of law or fact if consolidation would be fair and efficient. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook*, WQ-02-04, WQ-02-05, WQ-02-06 and WQ-02-07 (Consolidated), Prehearing Conference Report and Order (09/20/02), *modified by* Chair's Order (10/18/02).

* The Chair consolidated eleven appeals of four watershed improvement permits into one case but made clear that the parties may organize their evidence by watershed. Parties that did not appeal all four watershed improvement permits were ordered to confine their evidence to the watershed improvements that they appealed. *Id.*

* Board ordered that joint hearings be held in a dam permit appeal and a § 401 certification appeal, but did not consolidate these two matters. *Appeal of Vermont Natural Resources Council (Sugarbush),* DAM-92-02 and WQ-92-05, Interim Order (06/15/92).

1611. Stay of ANR Decision

***** A Water Quality Certificate is merely stayed by the filing of an appeal pursuant to 10 V.S.A. § 1024(a) and the Board interprets its standard of review such that it only considers *de novo* the issues raised on appeal, not all matters giving rise to the package of Findings and Conditions comprising the Water Quality Certificate issued by the Secretary of ANR. *Clyde River Hydroelectric Project,* WQ-02-08(A), (B), and (C) (Consolidated), Prehearing Conference Report and Order (10/25/02).

VII. ADVISORY OPINIONS AND DECLARATORY RULINGS (1621-1640)

1621. General

1622. Executive Officer Advisory Opinions

* While the Executive Officer issued an advisory opinion concluding that the appeal was deficient in certain substantial respects, jurisdiction remained with the Board during the time that the appellants were afforded an opportunity to supplement their notice or seek review by the full Board; at no time was jurisdiction returned to the Department and therefore the permit amendment, issued by the Department

during the pendency of the matter before the Board, was void *ab initio*. *Laurence and Roberta Coffin*, MLP-97-06, Chair's Preliminary Ruling (08/12/97).

1622.1 Authority to Issue

1622.2 Notice of

1622.3 Purpose of

1622.4 Right of Review

1623. Declaratory Rulings

* A Petitioner who wishes to have a National Wetland Inventory-designated wetland removed from the jurisdiction of the VWR should request a declaratory ruling from the Board pursuant to 3 V.S.A. § 808 and proceed under the applicable Board Rules of Procedure. *Technology Park Associates, Inc.* WET-95-02, Decision (02/01/96).

* Petitioner for a declaratory ruling did not present a justiciable controversy when the question it presented required a determination concerning the rights of a third party not before the Board based on hypothetical facts. *Northshore Wetlands*, WET-92-03DR, Memorandum of Decision and Order (04/29/94).

* Board had no jurisdiction to entertain a declaratory ruling request where the Petitioner did not assert that its own legal interests were threatened by injury as a consequence of the application of a statute, rule, or order of the Board. *Id.*

* Board may not issue declaratory rulings in substitution for the process set forth in Section 7 of the VWR for reclassifying wetlands or changing the delineation of their boundaries or buffer zones. *Id.*

* Where Petitioner for a declaratory ruling did not present a justiciable issue, Board on its own initiative dismissed the petition. *Id.*

1623.1 Authority to Issue

* The Board is authorized to declare that areas mapped as wetlands on the Vermont Significant Wetland Inventory maps are not wetlands subject to regulation under the VWR. *Burlington Country Club*, WET-01-08DR, Declaratory Ruling (10/30/01).

* The Board has the authority to issue declaratory rulings as to the applicability of laws within its jurisdiction. *Lime Kiln Quarries*, WET-01-04DR, Declaratory Ruling (07/11/01).

* The Board's authority to issue declaratory rulings extends to declaring that a particular body of water or other feature identified as a wetland on the Vermont Significant Wetland Inventory maps is not a wetland. *Id.*

* Where a petitioner has requested in the alternative a declaration that a wetland is not a wetland within the meaning of the VWR and a reclassification of the wetland from Class Two to Class Three unprotected status, and where that petitioner subsequently withdraws its request for a declaratory ruling, the proceeding is converted from a contested case proceeding to an administrative determination under Section 7 of the VWR. *S.T. Griswold & Company, Inc.,* WET-98-02DR, Decision (09/16/98).

1623.2 Notice

1623.3 Purpose

1623.4 Issues / Scope of Review / Scope of Appeal

* A petition for a declaratory ruling is reviewed as a contested case. *[Under VWR § 7 (eff. Jan 1, 2002), petition is now subject to the rules applicable to administrative determinations.]* *Burlington Country Club*, WET-01-08DR, Declaratory Ruling (10/30/01).

1623.5 Wetland Determinations (See also Section X. L. 1836)

* Under Board Rule of Procedure 17, an administrative determination regarding wetlands must be conducted in accordance with the provisions of Part III of the Rules of Procedure, as appropriate. *Kane Farm Ponds*, WET-02-02, Administrative Determination (06/25/02).

* A petition for a declaratory ruling that an area identified as a wetland on the Vermont Significant Wetland Inventory maps is not in fact a wetland must include credible documentation sufficient to enable the Board to determine whether or not the area at issue is a wetland. *Burlington Country Club*, WET-01-08DR, Declaratory Ruling (10/30/01).

* Two golf-course water hazards that appeared as wetlands on the VSWI maps were not wetlands. The Board reached this conclusion on the basis of the uncontroverted evaluation of the ponds performed by the petitioner's consultant. That evaluation was credible in that the consultant thoroughly investigated the ponds according to the criteria for identifying wetlands specified in the VWR and because the evaluation was supported by ANR's Wetlands Office. *Id.*

* A request in a letter from the petitioner's consultant that an area be reclassified from Class Two to Class Three was denied without prejudice because neither the petition nor the notice of the petition included that request. *Id.*

* The Board is authorized to declare that areas mapped as wetlands on the Vermont Significant Wetland Inventory maps are not wetlands subject to regulation under the VWR. *Id.*

* Although an area identified as a wetland on the Vermont Significant Wetland Inventory maps is presumed to be a significant wetland, not all areas designated as wetlands on these maps are in fact wetlands within the jurisdiction of the VWR. *Lime Kiln Quarries*, WET-01-04DR, Declaratory Ruling (07/11/01).

* To be considered a wetland under the VWR, an area must be characterized by hydric soils, hydrophytic vegetation, and wetland hydrology. *Id.*

* Two quarries are not wetlands on the basis of the uncontroverted evaluation of the quarries performed by a professional consultant, which evaluation was credible in that it thoroughly investigated the quarries according to the criteria for identifying wetlands specified in the VWR and because the evaluation was supported by ANR's Wetland Office. *Id.*

* The Board's authority to issue declaratory rulings extends to declaring that a particular body of water or other feature identified as a wetland on the Vermont Significant Wetland Inventory maps is not a wetland. *Id.*

* Board determined that man-made pond was a wetland based on uncontroverted evidence filed by the petitioner. *GS Precision Pond*, WET-01-02, Decision (05/15/01).

* If a petition to reclassify a wetland from Class Two to Class Three raises questions about whether the body of water or area in question is a wetland at all, the Board may treat the petition as both a petition to reclassify a wetland from Class Two to Class Three and as a petition in the alternative for a declaratory ruling that the body of water or area in question is not a wetland. *Markowski Quarry Ponds*, WET-01-01, Administrative Determination (05/09/01).

* A petition to reclassify a wetland from Class Two to Class Three must include credible information to enable the Board to determine that the body of water or area in question is in fact a wetland. If the body of water or area in question is not in fact a wetland but appears on the VSWI maps, the appropriate relief is a declaratory ruling that the body of water or area in question is not a wetland, and the petition must include credible information to that effect. *Id.*

* The Board may declare that a particular body of water or other feature is not a wetland subject to protection under 3 V.S.A. § 808 and WBR 16. *January Stearns' Wetland,* WET-00-01, Order Reclassifying Wetland on Stearns' Property in Cornwall, Vermont (04/05/00).

* In a proceeding that the Board noticed alternatively as either a request for a declaratory ruling that the subject pond was not a wetland or as a request to reclassify the subject wetland from Class 2 to Class 3, the Board was without sufficient information to determine whether the pond was ever a wetland at all. The Board therefore declined to declare that the pond was not a wetland. Rather, the Board concluded that the subject wetland is a Class 3 wetland that is not regulated by the VWR. Therefore no conditional use determination is required for any further action affecting the wetland or its buffer zone. *Id.*

* Quarry, which appeared on the National Wetland Inventory map for the area, did not constitute a wetland within the meaning of the VWR; quarry did not have wetland vegetation or hydric soils and did not support aquatic life. *Stanley Gawet (Marble Quarry),* WET-95-03DR, Decision (02/15/96).

* Two retention ponds did not constitute wetlands within the meaning of the VWR; while both ponds appeared on the National Wetland Inventory for the area, neither pond had hydric soils or significant aquatic life. *Technology Park Associates, Inc*., WET-95-02, Decision (02/01/96).

* Settling ponds located at Petitioner's talc processing facility, although mapped on the National Wetland Inventory map for the area, did not constitute Class Two wetlands subject to protection under the VWR. *Luzenac America, Inc.,* WET-95-01, Decision (11/07/95).

* Quarry located at the Petitioner's talc processing facility, although mapped on the National Wetland Inventory map for the area, did not constitute a Class Two wetland subject to protection under the VWR. *Swinington Quarry, WET-94-01*, Decision (08/16/94).

* Three settling ponds located at the Petitioner's talc processing facility, although mapped on the National Wetland Inventory map for the area, did not constitute a Class Two wetland subject to protection under the VWR. Although these ponds contained water, they did not support vegetation or aquatic life, and the record did not suggest that these ponds provided an environment conducive to supporting significant vegetation or aquatic life. *Luzenac America, Inc.,* WET-93-01, Decision (01/31/94).

* Quarry, which appeared on the National Wetland Inventory Map as a "wetland," was in fact and as a matter of law not a wetland and, therefore, the VWR did not apply to it. *Gold Stone Marble Company Quarry*, WET-91-03DR, Decision (10/30/91).

VIII. STATUTORY PROGRAMS (1641-1648)

A. Definitions (1641-1669)

1641. Agency

* Board may upon receipt of a petition from the DEC, a department of the ANR, reclassify a wetland pursuant to VWR § 7 because DEC qualifies as an "agency" for purposes of VWR § 7.1. *GS Precision Pond*, WET-01-02, Decision (05/15/01).

1642. Aquatic Biota

* Aquatic biota are defined in the VWQS as "organisms that spend all or part of their life cycle in or on the water." Included, for example, are fish, aquatic insects, amphibians, and some reptiles, such as turtles. *Vermont Marble Power Division (OMYA),* WQ-92-12, Findings of Fact, Conclusions of Law and Order (04/13/95).

1643. Contiguity

* The term "contiguous" is defined in VWR Section 2.07 as meaning "sharing a boundary or touching" and includes "situations where the water level of the wetland is directly influenced by the water level of the

adjacent waterbody or wetland" and "where a man-made structure (e.g., roadway) divides a wetland, if surface water is able to flow over, under or thruough that structure. *Id.*

* ANR has interpreted the language, "sharing a boundary or touching" in the VWR's contiguous definition to mean that the three parameters defining wetlands (soils, vegetation and hydrology) must be found continuously between the wetland areas in question, and may be broken only by a man-made structure (e.g., roadway) which divides the areas. *Id.*

1644. Designated Uses

* Designated uses are determined by the classifications for particular waters adopted by the Board as part of the VWQS. *CCCH Stormwater Discharge Permits,* WQ-02-11, WQ-03-05, -06, and -07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (10/04/04). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended by Act 109 (2001 Adj. Sess.), eff. May 16, 2002. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

1645. Discharge

***** A discharge means the addition of a pollutant from a point source. *Citizens for Safe Farms, Inc. (Hinsdale Farm*), WQ-04-02, Memorandum of Decision (10/14/04); *appeal docketed,* No. 2004-510 (11/18/04) (pending).

* Discharge means placing, depositing or emitting any waste, directly or indirectly, into the waters of the state. *Appeal of Vermont Marble Company (OMYA),* WQ-91-15, Findings of Fact, Conclusions of Law and Order (01/14/94).

* The statutory definition of "waste" does not distinguish stormwater from other forms of waste that may not be discharged to the waters of the State of Vermont without a permit. *Pyramid Company of Burlington*, WQ-77-01 (78-1), Findings of Fact, Conclusions of Law and Order (n.d. [06/02/78]).

1645.1 New Discharge

* The Board did not read the definition of "New Discharge" or the discharge criteria in the 1997 VWQS as prohibiting all new discharges into impaired waters without a duly established waste load allocation. Doing so would unnecessarily impede Vermont's efforts to manage and improve permitted discharges before waste load allocations are actually established. *Hannaford Bros. Co. and Lowes Home Centers, Inc.,* WQ-01-01, Memorandum of Decision (06/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

1646. Existing Uses

* What constitutes an "existing use" requires both a factual and a legal determination by ANR. *CCCH Stormwater Discharge Permits,* WQ-02-11, WQ-03-05, 06, and -07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (10/04/04). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended by Act 109 (2001 Adj. Sess.), eff. May 16, 2002. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Because "existing uses" are not the same as "designated uses," merely achieving the water quality classification goals for the waters at issue is not necessarily sufficient to assure protection of existing uses in all receiving waters. *Id.*

* Determinations of existing uses of a particular water body under Vermont's anti-degradation rule, VWQS § 1-03, are made on a case-by-case basis. *Appeal of Town of Cabot,* WQ-00-04, Findings of Fact, Conclusions of Law and Order (09/08/00).

* The protection of existing uses under the CWA and the VWQS gives ANR the discretion to determine whether the degree of use is such that it should be protected, to the exclusion of *any* change in water quality. The mere presence of a use is not determinative. *Id.*

* Incidental contact recreation, which takes place on nearly all of Vermont's waters, is not absolutely protected. The Board looks not only to the presence of an existing use, but more importantly upon how and to what extent the proposed discharge will affect that use. *Id.*

* As provided for in §1-03 (B)(1) of the VWQS, "existing uses" shall be determined on a case by case basis by the Secretary of ANR. With respect to matters on appeal to the Board, wherein the determination of existing uses is required, such determination shall be made by the Board. *Killington, Ltd*., WQC-97-10 and MLP-97-09 (08/14/98) *aff'd, In re Killington, Ltd.,* S343-9-98 Wrcv (10/07/99).

1647. Impaired Waters

* ANR has not demonstrated a legally significant distinction between the terms "impaired" and "water quality limited." *Hannaford Bros. Co. and Lowes Home Centers, Inc.*, WQ-01-01, Memorandum of Decision (08/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Impaired waters, also known as water quality limited segments, are waters that do not meet the VWQS for one or more pollutants. *Hannaford Bros. Co. and Lowes Home Centers, Inc.* WQ-01-01, Memorandum of Decision (06/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

1648. Public Waters

* Lake Champlain is considered "public waters" of the State of Vermont and the proposed dock would encroach more than 50 feet beyond the shoreline delineated by the mean water level of the lake; consequently, the Department of Environmental Conservation had jurisdiction over the application for that project and the Board had jurisdiction to hear the appeal of the DEC's decision. *Kevin Rose and the Champlain Kayak Club (Blodgett)*, MLP-96-01, Findings of Fact, Conclusions of Law and Order (11/07/96).

1649. Receiving Waters

* The definition of receiving waters in the VWQS includes all waters adjacent to and downstream from other waters the quality of which could be affected by a proposed discharge. *City of South Burlington (Bartlett Bay Wastewater Treatment Facility)*, WQ-01-04, Second Prehearing Conference Report and Order (04/18/02).

1650. Reference Condition

* Understanding the term "reference condition," is essential to interpreting provisions of the VWQS related to the management of Class B waters. VWQS § 3-04 (B)(4)(d) prohibits a change from reference conditions that would have an adverse effect on the composition of the aquatic biota, the physical or chemical nature of the substrate or the species composition or propagation of fishes. *Clyde River Hydroelectric Project,* WQ-02-08(A) and (B) (Cons.), Memorandum of Decision (02/02/04); *appeal docketed,* No. 2004-101 (03/08/04) (pending).

* Reference condition does not mean "natural condition" as used in the management goal for Class A(1) waters. *Id.*

1651. Riparian Rights

* Receiving waters constituting waters of the United States and classified by the Board as Class B waters must comply with the VWQS. *Town of Cabot*, WQ-00-04, Findings of Fact, Conclusions of Law and Order (09/08/00).

1652. Total Maximum Daily Load (TMDL)

* The discharge permitting system described by Vermont's waste load allocation process requires ANR to create and implement a pollutant budget for receiving waters. The total water pollution budget in Vermont is the capacity of the receiving waters to assimilate a pollutant while meeting the VWQS. A

TMDL is the amount of the total budget that each source of a pollutant receives. A waste load allocation ensures that all the TMDLs together do not exceed the total budget. *Hannaford Bros. Co. and Lowes Home Centers, Inc.,* WQ-01-01, Memorandum of Decision (06/29/01).

1653. Waste

* "Waste" is defined, among other things, as effluent, sewage or "any substance or material, liquid, gaseous, solid or radioactive, including heated liquids, whether or not harmful or deleterious to waters." 10 V.S.A. 9 1251(12). *Appeal of Vermont Marble Company (OMYA),* WQ-91-15, Findings of Fact, Conclusions of Law and Order (01/14/94).

* The statutory definition of "waste" does not distinguish stormwater from other forms of waste that may not be discharged to the waters of the State of Vermont without a permit; therefore, the applicant was required to obtain a discharge permit pursuant to 10 V.S.A. § 1263(c) absent a statute specifically regulating stormwater discharges. *Pyramid Company of Burlington*, WQ-77-01 (78-1), Findings of Fact, Conclusions of Law and Order (n.d. [6/02/78]).

* Stormwater discharges are 'waste' within the meaning of 10 V.S.A §1251(6) (*Now: 10 V.S.A. §1251(12)). Pyramid Company of Burlington*, WQ-77-01, Findings of Fact, Conclusions of Law and Order (n.d. [06/02/78]).

1654. Water Quality Values

* The term "water quality values" in section 1-03.D of the VWQS includes waters of the highest quality as well as waters of exceptional recreational and ecological significance. The term "water quality values" as used in Section 1-03.D of the VWQS may be understood to include the existing and designated uses and the water quality criteria that apply to the candidate waters--an outstanding resource waters designation based on water quality values is not parameter-specific. An outstanding resource waters designation based on "exceptional natural [or] recreational . . . values" under Vermont's outstanding resource waters statute may constitute a designation based on "water quality values" under Tier 3 of Vermont's antidegradation rule, depending upon the facts of the particular case. *Waters of the Green Mountain National Forest*, ORW-03-01, Memorandum of Decision (06/28/04).

1655. Waters

* Specifically included in the federal definition of "waters of the United States" is a reference to intermittent streams. Subparagraph C of Chapter 122.2 of 40 C.F.R. reads in part:

> "all other waters such as intrastate lakes, rivers, streams (*including intermittent streams*), mudflats, sandflats, "wetlands," slews, prairie potholes, wet meadows, etc.."

Emphasis added. Accordingly, even though proposed discharge was to an intermittent stream that was nearly dry during a portion of the year, such discharge was to a water of the United States. Because of hydrological constraints during certain periods, the discharge was required to meet any applicable water quality standards without relying on assimilation. *UniFirst Corporation*, WQ-97-07, Findings of Fact, Conclusions of Law and Order (05/07/98).

* The Board finds no basis upon which to interpret the statutory definition of waters less broadly than the federal definition. "Waters" are defined at 10 V.S.A. § 1251(13) and § 1-01 (B)(38) of the VWQS. The definition of waters*"includes* all rivers, streams, creeks, brooks . . . springs and *all bodies of surface waters*, artificial or natural, which are contained within, flow through, or border upon the state." *Emphasis added.* The Board concludes that in light of the foregoing, the term "waters" should be read to be coextensive with the federal definition. *Id.*

1655.1 Waters of the State

* The Board concludes that Vermont Marble Co. ("VMC") discharges its waste into the "waters of the state" at the point that its process wastewater enters the 7-gpm stream. The Board agrees with VMC that

but for VMC's process wastewater, there would be no body of surface waters in the area down gradient of the company's settling ponds. Liquid waste, even when it contains a high percentage of water, does not constitute “waters of the state.” *Appeal of Vermont Marble Company (OMYA),* WQ-91-15, Findings of Fact, Conclusions of Law and Order (01/14/94).

* The definition of "waters" of the state includes "all rivers, streams, creeks, brooks, reservoirs, ponds, lakes, springs and all bodies of surface waters, artificial or natural, which are contained within, flow through or border upon the state or any portion of it." 10 V.S.A. § 1251(13). There must be a defined body of surface water present before there can be a finding of "waters of the state." Furthermore, the definition of *'discharge," and the text of 10 V.S.A. § 1263(a), make clear that the Legislature intended to regulate under 10 V.S.A. ch. 47 direct and indirect discharges of waste into the "waters of the state," not the deposition of liquid waste onto land per se. (Emphasis in original) Compare with 10 V.S.A. ch. 159 (Waste Management). *Id.*

* Man-made treatment systems do not constitute “waters of the state.” The fact that the treatment process includes the use of open ditches and overland flows does not mean that it is not a man-made system resulting in effective treatment of waste. Indeed, many treatment systems, including most stormwater management systems, consist of such ditches, overland flows and retention basins. *Id.*

* The Vermont definition of “waters” should be read in connection with federal law; otherwise, treatment lagoons would be “waters of the state.” *Id. Compare Re: S.T. Griswold & Company, Inc.,* WET-98-02DR, Decision (09/16/98).

1655.2 Waters of the United States

* All wetlands occurring in Vermont, Class One, Two or Three, are considered waters of the United States and as such, must comply with any applicable provision of the VWQS. *Killington, Ltd.*, WQC-97-10 and MLP-97-09 (08/14/98*) aff'd,*, S343-9-98 Wrcv (10/07/99).

B. Buildings or Land (3 V.S.A. § 2873(c)(4)) (1670-1675)

1670. General

* When the Board is faced with a statute that is silent concerning who has a right to file an appeal, the Board turns to its own Procedural Rule 22 *[now Rule 25]* for guidance on party standing. Therefore, even though 3 V.S.A. § 2873(c)(4) does not specify who may file appeals from a subdivision permit, Appellants were found to meet the requisite standards for “parties of right” under Rule 22(A)(7) [now Rule 25(B)(7)] thereby sustaining their appeal. *McIntyre and Lovett*, EPR-98-02, Memorandum of Decision (08/12/98).

* Appellants demonstrated that they had a “substantial interest which may be adversely affected by the outcome of the proceeding” before the Board *[Procedural Rule 22(B)(7)]* where they owned property adjacent to the project tract and their wells were in close proximity to and downgradient of the Applicant’s proposed waste disposal system; appeal to the Board was also the exclusive means by which they could protect their interest and no other parties existed who could adequately represent that interest. *Id.*

* Appellant who had a purchase and sale agreement and then ownership in fee simple of real property served by an existing water supply adjacent to a proposed subdivision had a “substantial interest” in the outcome of a permit amendment proceeding that would decide whether a proposed waste disposal system would be approved for a location in close proximity to that water supply. *Id.*

* Board has authority to hear appeals from decisions of the Secretary to “grant, deny, renew, revoke, suspend, annul or withdraw a permit” under 3 V.S.A. § 2873 (c)(4); however, it does not have appellate authority to adjudicate enforcement matters. *Vernon Squiers*, EPR-94-06, Dismissal Order (01/03/95).

* An appeal of an informal agency enforcement determination was dismissed for lack of jurisdiction, even though official who issued the decision erroneously instructed the alleged violator that one of his options included “appeal” of that decision to the Board. *Id.*

1671. Scope of Jurisdiction / Exemptions

1672. Review on the Record

* Appeals of subdivision permits issued by the ANR are reviewed by the Board applying an appellate standard of review, pursuant to 3 V.S.A. § 2873(c)(4) and Board Rule of Procedure 30. Under this standard, factual conclusions of the ANR must be upheld by the Board if evidence available to and presented to the ANR fairly and reasonably supports its conclusions, and the ANR's interpretation of statutes and rules must be upheld if not erroneous. *McIntyre and Lovett*, EPR-98-02, Decision (10/28/98).

* It was within the discretion of the ANR's Assistant Environmental Engineer to require additional hydrogeologic information from a permit applicant in light of the concerns raised by adjoining property owners about potential contamination of their downgradient water supplies from one of the applicant's proposed wastewater disposal systems. *Id.*

* It was reasonable for the ANR's Assistant Environmental Engineer to conclude, based on all of the information in the record, that the Minimum Presumptive Isolation Zones between the proposed septic system on one of the applicant's lots and the adjoining property owners' springs were sufficient to allow the issuance of a subdivision permit. *Id.*

* Board lacked jurisdiction to hear an appeal of a declaratory ruling issued by the Department of Environmental Conservation with respect to the regulation of buildings and land, pursuant to 3 V.S.A. § 2873(c)(3); in the absence of express authority to hear such matters, appeal was to the Supreme Court pursuant to 3 V.S.A. § 815(a). *Appeal of Verburg/Wesco,* EPR-91-03, Order (01/09/92).

* Department of Environmental Conservation could not give by rule to the Board the appellate power to review Department declaratory rulings with respect to the regulation of buildings and land, pursuant to 3 V.S.A. § 2873(c)(3). *Id.*

* Appeals of subdivision permit revocation decisions issued by the ANR are reviewed by the Board on the record created by the Commissioner of the Department of Environmental Conservation. *Robert & Barbara White (Revocation),* EPR-89-01, Findings of Fact, Conclusions of Law and Order (06/14/89).

* In an appellate proceeding where the Board reviews the record created by the Commissioner of the Department of Environmental Conservation, the parties may stipulate as to the content of the record. *Id.*

1673. Environmental Protection Rules

* The Environmental Protection Rules and related Vermont Water Supply Rules did not require that a hydrogeologic study be performed as a prerequisite to the issuance of a subdivision permit. Accordingly, the ANR did not erroneously interpret these rules when it concluded that a subdivision permit could issue based on evidence that the applicant's proposed wastewater disposal system was outside the Minimum Presumptive Isolation Zones for the adjoining property owners' two springs. *McIntyre and Lovett*, EPR-98-02, Decision (10/28/98)

* It was reasonable for the ANR's Assistant Environmental Engineer to conclude, based on all of the information in the record, that the Minimum Presumptive Isolation Zones between the proposed septic system on one of the applicant's lots and the adjoining property owners' springs were sufficient to allow the issuance of a subdivision permit. *Id.*

* The Commissioner of the Department of Environmental Conservation may revoke a subdivision permit if he determines that a the permit was issued on the basis of false or misleading information. However, such decision to revoke is discretionary. The Board affirmed the Commissioner's decision not to revoke. *Robert & Barbara White (Revocation),* EPR-89-01, Findings of Fact, Conclusions of Law and Order (06/14/89)

1674. Remedies / Board Actions

C. Water Supply and Wastewater (10 V.S.A. § 1951 *et seq*.) (1676-1690)

1676. General

* Neither ANR nor the Board on appeal was estopped from finding that a wastewater system permit, issued without a design certification and for which ANR had not received an installation certification, was invalid and that the permit must be revoked. *William and Ann Lyon*, EPR-03-16, Memorandum of Decision (04/21/04); *appeal docketed,* No. 2004-231 (05/14/04) (pending).

* The design certification and installation certification are the essential operative provisions of the Public Water Supply and Wastewater System Permit Act. *Id.*

* Although ANR may waive the submission of certain application materials for projects that present a negligible risk of environmental harm, the design certification is not among the provisions to which ANR's waiver authority applies. *Id.*

* A wastewater system permit is not valid until ANR receives an installation certification. *Id.*

* A wastewater system permit issued without an installation certification is not valId. *Id.*

* The Board revoked the permit for a wastewater system that was issued without a design certification and that was operated without an installation certification. *Id.*

* The Public Water Supply and Wastewater System Permit Act expressly excludes ANR's enforcement decisions from the Board's review. *William and Ann Lyon*, EPR-03-16, Memorandum of Decision (04/21/04); *appeal docketed,* No. 2004-231 (05/14/04) (pending).

1677. Purpose

1678. Scope of Jurisdiction

* The Public Water Supply and Wastewater System Permit Act expressly excludes ANR's enforcement decisions from the Board's review. *William and Ann Lyon*, EPR-03-16, Memorandum of Decision (04/21/04); *appeal docketed,* No. 2004-231 (05/14/04) (pending).

1679. Exemptions

1680. Standard of Review

1681. Environmental Protection Rules

* The Environmental Protection Rules and related Vermont Water Supply Rules did not require that a hydrogeologic study be performed as a prerequisite to the issuance of a subdivision permit. Accordingly, the ANR did not erroneously interpret these rules when it concluded that a subdivision permit could issue based on evidence that the applicant's proposed wastewater disposal system was outside the Minimum Presumptive Isolation Zones for the adjoining property owners' two springs. *McIntyre and Lovett*, EPR-98-02, Decision (10/28/98).

* It was reasonable for the ANR's Assistant Environmental Engineer to conclude, based on all of the information in the record, that the Minimum Presumptive Isolation Zones between the proposed septic system on one of the applicant's lots and the adjoining property owners' springs were sufficient to allow the issuance of a subdivision permit. *Id.*

* Where a discharge to waters includes, even at limited times of the year, a discharge to groundwater, the Board will look to the applicable Groundwater Rule and Protection Strategy to the extent that its limitations are more restrictive than the applicable surface water standard. However, where the Groundwater Rule and Protection Strategy, as here, contains a specific qualification regarding *in situ* remediation of sub-standard groundwater, the Board may not require the numeric enforcement or preventative action limit criteria to be strictly met. Rather, the Board in this case focused upon whether the proposed groundwater impacts should be construed to pose an acceptable risk pursuant to §12-503(6) of the Groundwater Rules effective September 29, 1988. *UniFirst Corporation*, WQ-97-07, Findings of Fact, Conclusions of Law, and Order (05/07/98).

* The Commissioner of the Department of Environmental Conservation may revoke a subdivision permit if he determines that a the permit was issued on the basis of false or misleading information. However, such decision to revoke is discretionary. The Board affirmed the Commissioner's decision not to revoke. *Robert & Barbara White (Revocation)*, EPR-89-01, Findings of Fact, Conclusions of Law and Order (06/14/89).

* The rules that are effective are those which were in force at the time a complete application had been filed with the Secretary. It was improper to hold applicant to the "new rules" for entirety of project. Therefore, limited grandfathering was allowed by Board. *Sunrise Group*, EPR-84-07, Findings of Fact, Conclusions of Law and Order (04/25/85).

1682. Remedies / Board Actions

D. Stream Flow (10 V.S.A. ch. 41) (1691-1705**)**

1691. General

1692. Purpose

1693. Section 401 Certifications (10 V.S.A. 1004; 1024(a))

* In proceedings to amend a Water Quality Certificate for the licensing of a hydro-electric facility, a conclusion by the Board that a particular salmonid fishery is self-sustaining and naturally-reproducing and an "exceptional resource value in need of restoration or protection," triggers application of ANR's *Flow Procedure General Policy* for determining a base flow for the river segment / bypass reach in question. *Clyde River Hydroelectric Project,* WQ-02-08(A) and (B) (Cons.), Memorandum of Decision (02/02/04); *appeal docketed,* No. 2004-101 (03/08/04) (pending).

* In the absence of credible evidence that a self-sustaining salmonid fishery could be established in a bypass reach impacted by a hydro-electric facility coupled with the fact that the Secretary of ANR had not articulated a preferred water management policy for that bypass reach, whether in a basin plan, a Water Management Type recommendation to the Board, or by other means, the Board applies the Specific Policy of ANR's Flow Procedure to establish a base flow for those waters. A clear statement of policy by ANR concerning salmonid management objectives for the river at issue in this matter may have persuaded the Board that higher flows were required in the bypass reach and that it may have been appropriate to apply the General Policy of ANR's Flow Procedures. *Id.*

* Where the Secretary of ANR has not proposed and the Board has not adopted Water Management Type designations for a bypass reach at issue in the water quality certification of a hydroelectric facility, the waters of the bypass reach must achieve the narrative standard set forth in the VWQS pertaining to the classification of the river of which that bypass reach is a part. (In this instance, Class B waters are involved and VWQS § 3-04(B)(4) applies). *Id.*

* In the context of performing an evaluation of water quality in assessing the impacts of a project, the reference condition establishes the attainable chemical, physical, and biological conditions for specific water body types against which the condition of waters of similar water body type is evaluated. This does not mean that the Board should compare one bypass reach with another in order to determine what specific quality of aquatic habitat should be attained. However, it may mean that in a highly impacted/impaired watershed, an assessment needs to be made by comparing the impacted reach with another comparable, but unimpaired, water body type either in that riverine system or in another watershed. *Id.*

* Existing hydroelectric facilities that have never been reviewed for compliance with the VWQS or other applicable state law must obtain a 401 Certificate from Vermont. *Clyde River Hydroelectric Project*, WQ-02-08(A) and (B) (Consolidated) Amended WQ Certificate: Findings of Fact, Conclusions of Law, and Order (07/11/03); *appeal docketed,* No. 2004-101 (03/08/04) (pending).

* In an appeal of a Section 401 Water Quality Certificate issued in conjunction with a request for relicensure of an existing hydroelectric project by the Federal Energy Regulatory Commission, the Board

granted but specifically amended the Findings and Conditions of the Certificate as issued by ANR to ensure compliance with the VWQS and other applicable state law during the licensure period. *Id.*

* Section 401 of the Clean Water Act requires applicants for licensure of hydroelectric projects to obtain state certification that the project complies with the VWQS and other applicable state law provisions. *Id.*

* A Section 401 Water Quality Certificate is merely stayed by the filing of an appeal pursuant to 10 V.S.A. § 1024(a). *Clyde River Hydroelectric Project*, WQ-02-08(A), (B), and (C) (Consolidated), Prehearing Conference Report and Order (10/25/02).

* The Board considers *de novo* the issues raised on appeal, not all matters giving rise to the package of Findings and Conditions comprising a Water Quality Certificate issued by the Secretary of ANR. *Id.*

* As provided for in §1-03 (B)(1) of the VWQS, existing uses shall be determined on a case by case basis by the Secretary of ANR. With respect to matters on appeal to the Board, wherein the determination of existing uses is required, such determination shall be made by the Board. *Killington, Ltd.,* WQC-97-10 and MLP-97-09, Findings of Fact, Conclusions of Law and Order (08/14/98) *Affirmed, In re Killington, Ltd.,* Docket No. S343-9-98 Wrcv, Decision and Order (10/07/99).

* Hydroelectric projects requiring a §401 certification must be reviewed to determine their conformance with the VWQS and consideration of "background conditions" is relevant in the review of such projects. However, the authority to do so derives not from 10 V.S.A. ch. 47, but from federal law and 10 V.S.A. ch. 41. *Passumpsic Hydroelectric Project,* WQ-94-09, Memorandum of Decision (08/15/95).

* The applicant for a §401 Certification in conjunction with the relicensure of hydroelectric facilities has an obligation to remediate water quality conditions further degraded by the presence and operations of its dams. Such facilities, in order to conform with the VWQS, must meet not only water quality criteria, taking into consideration the rules' Anti-degradation Policy and present in-stream conditions, but must also attain the designated uses for the public waters in the reaches where those facilities exist. *Id.*

* The Board declared that the term "background conditions" in section 1-01(B)(6) of the VWQS adopted April 17, 1991 does not mean pre-dam conditions in the context of this appeal. *Id.*

* As an applicant for dam relicensures by FERC, a dam operator is required by federal law to obtain a state water quality certification under §401(a) of the Clean Water Act, 33 U.S.C. §1341(a), as a prerequisite to federal approval. *Cavendish Hydroelectric Project*, WQ-93-08, Memoranda of Decision (04/01/94); *Taftsville Hydroelectric Project*, WQ-93-06, Memoranda of Decision (04/01/94).

* The dam permit statute (10 V.S.A. § 1099(a) provides a conditional right to intervene to "persons and parties in interest, as such persons are defined in 10 V.S.A. § 1080(3). *Appeal of Vermont Natural Resources Council (Sugarbush)*, WQ-92-05, Prehearing Conference Order (08/18/92).

1693.1 Scope of Jurisdiction

* State authority to issue and condition water quality certifications includes authority to require minimum stream flows and appropriate conditions to protect aesthetics. The Board also has authority to consider project-created influences both upstream and downstream of the structures involved. *Clyde River Hydroelectric Project*, WQ-02-08(A) and (B) (Consolidated) Amended WQ Certificate: Findings of Fact, Conclusions of Law, and Order (07/11/03); *appeal docketed,* No. 2004-101 (03/08/04) (pending).

* The State of Vermont exercises its responsibility to protect its water resources in part through the authority delegated to the Secretary of ANR to issue water quality certificates and the *de novo* appellate authority of the Board to hear appeals of those certificate decisions. This authority includes the right to require minimum stream flows and appropriate conditions to protect aesthetics as well as the right to impose conditions to assure compliance with the VWQS and any other applicable requirements of state law relating to water quality. *Id.*

* The Board has authority to consider project *activities as a whole,* not only the civil works but also project-created influences both upstream and downstream of the structures involved in the project, including the reduction or increase in flow levels in the river channel, on a daily or seasonal basis. *Id.*

* While the Secretary may request economic and social impacts data and analysis from the Applicant and other state agencies in order to formulate the "state interest" in Federal Energy Regulatory Commission licensing proceedings, the Board, in its appellate capacity and role as certifying agent, can consider only water-quality related evidence and argument. *Id.*

* The State of Vermont exercises its responsibility to protect its water resources in part through the authority delegated to the Secretary of ANR to issue water quality certificates pursuant to 10 V.S.A. § 1004 and the *de novo* appellate authority of the Board to hear appeals of those certificate decisions pursuant to 10 V.S.A. § 1024(a). *Id.*

* One component of the Snowmaking Rules is a determination that among the alternatives considered, a proposed snowmaking withdrawal is economically feasible. Market dynamics dictate what it means to be "reasonable and feasible" in the context of a strict application of Section 16-05(1) of the Snowmaking Rules. While this may be appropriate in other applications of the Snowmaking Rules (i.e. ANR might consider both natural resource and economic constraints in making an ultimate determination), the Board's role in a §401 proceeding is to assess the impacts of whatever alternative is ultimately selected by an applicant relative to water quality as measured by the VWQS and other applicable law. *Killington, Ltd*., WQC-97-10 and MLP-97-09, Findings of Fact, Conclusions of Law and Order (08/14/98). *Affirmed, In re Killington, Ltd*., Docket No. S343-9-98 Wrcv, Decision and Order (10/07/99).

* While evidence of economic and social impacts is ordinarily not admitted in the context of considering an appeal of a hydroelectric project § 401 certification because it is irrelevant to the Board's determination, where the applicant asked the Board to consider such evidence for the limited purpose of evaluating one or more proposed operating protocols that would arguably "enhance" or "upgrade" the quality of water beyond the threshold of compliance with applicable water quality standards, such evidence would be admitted. *Deerfield River Hydroelectric Project*, WQ-95-01 and WQ-95-02 (Consolidated), Chair's Evidentiary Rulings on the Objections of the Parties (02/05/97).

* The public trust doctrine as reflected in the Vermont Constitution, Chapter II, Section 67, does not preclude the Board from considering appeals from Agency of Natural Resources dam permit and §401 certification decisions. The Legislature has given primary jurisdiction to the Board to hear *de novo* appeals from ANR Dam orders and §401 certifications and it would thwart the Legislature's intent to deny the parties timely review on the merits of a project, pending resolution of public trust and constitutional challenges. *Appeal of Vermont Natural Resources Council (Sugarbush),* DAM-92-02 and WQ-92-05, Findings of Fact, Conclusions of Law and Order (02/08/93) and Memorandum of Decision (03/01/93). *See also In re Application of Snowbridge, Inc., Appeal of VNRC, et al.,* S-197-93 VnCa (02/112/97) (Dismissal by Stipulation).

1693.2 *De Novo* Review

* An appeal of a § 401 water quality certificate to the Board is a *de novo* proceeding and conducted as a contested case. *Clyde River Hydroelectric Project*, WQ-02-08(A) and (B) (Consolidated) Amended WQ Certificate: Findings of Fact, Conclusions of Law, and Order (07/11/03); *appeal docketed,* No. 2004-101 (03/08/04) (pending).

* The Board considers *de novo* the issues raised on appeal, not all matters giving rise to the package of Findings and Conditions comprising a Water Quality Certificate issued by the Secretary of ANR. *Clyde River Hydroelectric Project*, WQ-02-08(A), (B), and (C) (Consolidated), Prehearing Conference Report and Order (10/25/02).

* ANR documents were ruled not admissible because they were not relevant in the *de novo* proceeding before the Board. Board is not charged with reviewing ANR's prior decision to determine whether ANR properly issued the § 401 certification to the applicant, but rather, the Board is required to hear the matter as if there had been no prior proceedings. *Deerfield River Hydroelectric Project*, WQ-95-01 and WQ-95-02 (Consolidated), Chair's Evidentiary Rulings on the Objections of the Parties (02/05/97).

1693.3 Federal Clean Water Act

* Hydroelectric facilities located or proposed to be located on a water body within the boundaries of the State of Vermont are subject to the Secretary of ANR's jurisdiction and protection under the CWA and 10 V.S.A. § 1004. *Clyde River Hydroelectric Project*, WQ-02-08(A) and (B) (Consolidated) Amended WQ Certificate: Findings of Fact, Conclusions of Law, and Order (07/11/03); *appeal docketed,* No. 2004-101 (03/08/04) (pending).

* The goals of the Clean Water Act include a statement demonstrating that Congress intended that individual States should play a leading role in formulating State-specific water quality policies to prevent, reduce, and eliminate pollution. *Id.*

* The licensing agency (in the case of hydroelectric facilities, Federal Energy Regulatory Commission) must incorporate into the federal license a Section 401 Certificate issued by the State. Any applicant for a federal license or permit to conduct any activity that may result in any discharge into navigable water must provide the licensing agency a certificate of the State in which the discharge will originate that the discharge will comply with the applicable provisions of the Clean Water Act. *Id.*

* The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Under Section 303 of the CWA, Vermont, like other states, is required to adopt comprehensive water quality standards establishing water quality goals for Vermont's waters and these water quality standards are subject to review and approval by the Environmental Protection Agency (EPA) for their conformance with the CWA, 33 U.S.C. §1311(b)(1)(C) and §1313(c). *Passumpsic Hydroelectric Project,* WQ-94-09, Memorandum of Decision (08/15/95).

* In determining whether the State should certify the project under Section 401 of the Federal Clean Water Act, the Board must consider the manner in which the project will be operated or conducted and determine that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. In Vermont, the applicable water quality requirements are set forth in the VWQS. *Appeal of Vermont Natural Resources Council (Sugarbush),* DAM-92-02 and WQ-92-05, Findings of Fact, Conclusions of Law and Order (02/08/93) and Memorandum of Decision (03/01/93). See also, *In re Application of Snowbridge, Inc., Appeal of VNRC, et al.,* S-197-93 VnCa (02/112/97). (Dismissal by Stipulation).

1693.4 Vermont Water Quality Standards

* In proceedings to amend a Water Quality Certificate for the licensing of a hydro-electric facility, a conclusion by the Board that a particular salmonid fishery is self-sustaining and naturally-reproducing and an "exceptional resource value in need of restoration or protection," triggers application of ANR's *Flow Procedure General Policy* for determining a base flow for the river segment / bypass reach in question. *Clyde River Hydroelectric Project,* WQ-02-08(A) and (B) (Cons.), Memorandum of Decision (02/02/04); *appeal docketed,* No. 2004-101 (03/08/04) (pending).

* Where the Secretary of ANR has not proposed and the Board has not adopted Water Management Type designations for a bypass reach at issue in the water quality certification of a hydro-electric facility, the waters of the bypass reach must achieve the narrative standard set forth in the VWQS pertaining to the classification of the river of which that bypass reach is a part. (In this instance, Class B waters are involved and VWQS § 3-04(B)(4) applies). *Id.*

* Understanding the term "reference conditions" is essential to interpreting provisions of the VWQS related to the management of Class B waters. VWQS § 3-04(B)(4)(d) prohibits change from reference conditions that would have an undue adverse effect on the composition of the aquatic biota, the physical or chemical nature of the substrate or the species composition or propagation of fishes. *Id.*

* In the context of performing an evaluation of water quality in assessing the impacts of a project, the reference condition establishes the attainable chemical, physical, and biological conditions for specific water body types against which the condition of waters of similar water body type is evaluated. This does not mean that the Board should compare one bypass reach with another in order to determine what specific quality of aquatic habitat should be attained. However, it may mean that in a highly

impacted/impaired watershed, an assessment needs to be made by comparing the impacted reach with another comparable, but unimpaired, water body type either in that riverine system or in another watershed. *Id.*

* Section 401 of the Clean Water Act requires applicants for licensure of hydroelectric projects to obtain state certification that the project complies with the VWQS and other applicable state law provisions. *Clyde River Hydroelectric Project,* WQ-02-08(A) and (B) (Consolidated) Amended WQ Certificate: Findings of Fact, Conclusions of Law, and Order (07/11/03); *appeal docketed,* No. 2004-101 (03/08/04) (pending).

* Lack of fish passage facilities resulting in an undue adverse effect on species composition or propagation of fish is a violation of the VWQS, Section 3-04(B)(4). *Id.*

* In an appeal of ANR's issuance of a Section 401 Water Quality Certificate in conjunction with a request for relicensure by the Federal Energy Regulatory Commission of an existing hydroelectric project, the Board granted the Applicant's request for a Certificate, but specifically amended the Findings and Conditions of the Certificate as issued by ANR to ensure that compliance with the VWQS and other applicable state law will be achieved during the licensure period. *Id.*

* A Certificate issued by the Secretary of ANR fails to achieve compliance with the VWQS if it does not protect the designated uses and values specific to the water body at issue or if it fails to achieve the narrative standards that must be achieved in order to assure their protection. *Id.*

* For a river to be suitable for fishing, there must be suitable habitat for fish and the aquatic biota upon which they feed. This requires that there be adequate minimum habitat flows, which in turn may provide good aesthetic value. *Id.*

* In a Section 401 Water Quality Certificate proceeding for the licensure of a hydroelectric facility, the Board must determine the project's impact on designated uses and aquatic life; in doing so, the Board considers the entirety of the Project's influences, including the impacts of various flow regimes both upstream and downstream of the facility. *Id.*

* As trustees of a public trust resource and also of an important fishery resource, the Board must not only protect those resources for the benefit of all Vermonters, but work for their enhancement. By ensuring that a hydroelectric Project as a whole complies with the applicable provisions of the VWQS, the Board is meeting its obligations under the law. *Id.*

* Where a Class B river has not undergone recent review by the Secretary of ANR as part of a comprehensive basin planning process as required by 10 V.S.A. § 1053(d) and, consequently, no rulemaking has been initiated by the Board to amend the VWQS to designate certain portions of the river by Water Management Type, the classification of the river as B applies to the entire length of the river, including all segments and bypass reaches. *Id.*

* To meet its burden of proof, the applicant must demonstrate that its proposal will comply with each of the applicable provisions of the VWQS for each of the segments of river influenced by project facilities under appeal. *Clyde River Hydroelectric Project,* WQ-02-08(A) and (B) (Consolidated) Amended WQ Certificate: Findings of Fact, Conclusions of Law, and Order (07/11/03) (Dissenting Opinion); *appeal docketed,* No. 2004-101 (03/08/04) (pending).

* A bypass reach that has not been designated by Water Management Type, that is classified as Class B and designated as cold water fish habitat, is subject to the requirements of the VWQS and, therefore, *must* be managed so that there is no undue adverse effect on the species composition or propagation of fishes, measured against "reference condition" waters. This means as measured against those waters that are minimally affected by human influences, not against similarly impacted bypass reaches. *Id.*

* The VWQS require an Applicant seeking Water Quality Certification of a hydroelectric facility to present an operating protocol that will assure the existence of high quality aquatic habitat in the bypass reach so that the existing mix of fish species in the impacted river may propagate and otherwise be supported in *all* segments of the river influenced by the facility, beginning first with those portions of the

river downstream of the dam and, eventually, through the introduction of appropriate fish passage, in those segments above the dam. *Id.*

* In the absence of credible site-specific studies supporting the proposed minimum base stream flow, an applicant has not demonstrated that its proposal will achieve compliance with the VWQS, at least with regard to those criteria that address aquatic biota, wildlife, and aquatic habitat in Class B waters and, therefore, the applicant should be denied a Certificate for failure to meet its burden of proof. *Id.*

* Neither the Board nor ANR could authorize under an application of the Snowmaking Rules any activity that would violate the VWQS. *[See 10 V.S.A. §1032 and §16-01 of the Snowmaking Rules.] Killington, Ltd*., WQC-97-10 and MLP-97-09, Findings of Fact, Conclusions of Law and Order (08/14/98); *Affirmed, In re Killington, Ltd.,* Docket No. S343-9-98 Wrcv, Decision and Order (10/07/99).

*Section 401(a)(1) of the CWA requires:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certificate from the State in which the discharge originates, or will originate…that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of the [Clean Water] Act.

33 U.S.C. § 1341(a)(1). CVPS's application for the present FERC License triggers the requirement for a § 401 certificate. *Lamoille River Hydroelectric Project (CVPS*), WQ-94-03 and WQ-94-05, Findings of Fact, Conclusions of Law and Order (11/05/96).

* In determining compliance with the water quality standards, Section 303 of the CWA is most naturally read to require that a project be consistent with *both* components, namely the designated use *and* the water quality criteria. Accordingly, under the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards. *Id.*

* Section 1-03(B)(1) of the VWQS adopted on April 17, 1991 require existing water uses and the level of water quality necessary to protect those existing uses to be maintained and protected. This section specifies that the determination of existing uses shall be made on a case-by-case basis, taking into account beneficial values and uses and other factors such as habitat, including wetlands, and fish and aquatic life present in the water body. *Id.*

* The VWQS further provide that if the existing use of a water body includes use by aquatic biota, fish or wildlife, a § 401 water quality certificate can be issued only if the activity would not have a "significant impact" on that use. Pursuant to VWQS § 1-03(b)(2), "significant impact" means:

> Impairing the viability of the existing population, including significant impairment to growth and reproduction or an alteration of the habitat which impairs viability of the existing population…*Id.*

* The U.S. Fish and Wildlife Service *Flow Recommendation Policy for the New England Area* and the *Interim Procedure for Determining Acceptable Minimum Stream Flows* prescribe minimum flows for the perpetuation of indigenous fish species. The minima are 4.0 csm for spring spawning and incubation, 1.0 csm for fall/winter spawning and incubation, and 0.5 csm for the remaining period and in cases where spawning and incubation is not applicable. Substantial reduction of flows below these minima for the purpose of refilling the impoundment would imperil fish below the project. *Id.*

* In determining aesthetics impacts of a project, the Board has looked to the aesthetics analysis developed by the Vermont Environmental Board. The Environmental Board's *Quechee Lakes* analysis addresses the standard set forth in 10 V.S.A. 6086(a)(8), Act 250's Criterion 8. In applying the aesthetics criteria, the Board will consider the uniqueness of the landscape feature, the scale, scope, contrast, and context of the feature in relation to its immediate surroundings, as well as the naturalness of the feature. In using this analysis, the Board will determine whether a project consistently exhibits good aesthetic value. *Id.*

* The Board has been granted authority by the Vermont Legislature to adopt Vermont's water quality standards pursuant to 10 V.S.A. ch. 47, the Vermont Water Pollution Control Act. 10 V.S.A. §1253(d); also 10 V.S.A. §905. The purpose of the VWQS is to "achieve the purpose of the water classifications" provided for in 10 V.S.A. ch. 47 and enacted by Board rule." *Passumpsic Hydroelectric Project*, WQ-94-09, Memorandum of Decision (08/15/95).

* Under the general water quality criteria, all waters, except mixing zones, are managed to achieve, as instream conditions, aquatic habitat with "[n]o change from background conditions that would have an undue adverse effect on the composition of the aquatic biota, the physical or chemical nature of the substrate or the species composition or propagation of fishes." VWQS §3-01B.5. *Vermont Marble Power Division (OMYA)*, WQ-92-12, Findings of Fact, Conclusions of Law and Order (04/13/95).

* The U.S. Fish and Wildlife Service *Flow Recommendation Policy for the New England Area* and the *Interim Procedure for Determining Acceptable Minimum Stream Flows* prescribe minimum flows for the perpetuation of indigenous fish species. The minima are 4.0 csm for spring spawning and incubation, 1.0 csm for fall/winter spawning and incubation, and 0.5 csm for the remaining period and in cases where spawning and incubation is not applicable. Substantial reduction of flows below these minima for the purpose of refilling the impoundment would imperil fish below the project. *Id.*

* The VWQS require the Secretary to identify and protect existing uses of state waters. Existing uses to be considered include habitats and wildlife that utilize the waterbody, as well as the use of water for recreation. *Id.*

* In determining whether the State should certify the project under Section 401 of the Federal Clean Water Act, the Board must consider the manner in which the project will be operated or conducted and determine that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. In Vermont, the applicable water quality requirements are set forth in the VWQS. *Appeal of Vermont Natural Resources Council (Sugarbush),* DAM-92-02 and WQ-92-05, Findings of Fact, Conclusions of Law and Order (02/08/93) and Memorandum of Decision (03/01/93). *See also, In re Application of Snowbridge, Inc., Appeal of VNRC, et al.,* S-197-93 VnCa (02/12/97) (Dismissal by Stipulation).

* Even though the applicant applied for a water quality certification 20 days prior to the effective date of the 1991 VWQS, all parties and the Board agreed that the 1991 standards should apply: (1) because the applicant chose not to take advantage of the grandfathering provision of the 1991 standards; (2) the ANR applied the 1991 standards in its review of the project; and (3) the 1991 standards reflect the State's current policy with respect to the management and protection of Vermont's water resources. *Id.*

* Proposed water withdrawal was not a discharge subject to the Discharge Policy and Assimilative Capacity section of the VWQS, however, the temperature and aquatic habitat criteria of the Standards would be affected by the reduction in the quantity of water in the subject river. *Id.*

1693.5 Other Applicable State Law

* A project for which a federal license is required must comply with both the designated uses and the water quality criteria of the state's water quality standards as well other applicable state law that relates to water quality, including consideration of constitutional, common law, statutory, or regulatory provisions that bear some relationship to water quality. *Clyde River Hydroelectric Project*, WQ-02-08(A) and (B) (Consolidated) Amended WQ Certificate: Findings of Fact, Conclusions of Law, and Order (07/11/03); *appeal docketed,* No. 2004-101 (03/08/04) (pending).

* In the absence of site-specific studies, the Secretary may establish hydrologic standards and impose additional hydrologic constraints, consistent with any applicable Agency of Natural Resources rule or procedure. In cases where there is no minimum flow agreement, compliance with the numeric criteria is calculated on the basis of the 7Q10 flow value unless an alternate flow value is set by the VWQS. *Id.*

* In the context of the § 401 Appeal, limitations imposed by state water quality standards adopted pursuant to § 303 of the Clean Water Act, at a minimum, are "appropriate" requirements of state law. *P.U.D. No.1 of Jefferson County and City of Tacoma v. Washington Department of Ecology*, 114 S. Ct.

1900, 1910 (1994). The following state law requirements, in addition to the VWQS, were determined by the Board to be appropriate for consideration in a proceeding: involving water withdrawals for snowmaking: Chapter 16 of the Environmental Protection Rules, effective February 15, 1996, Water Withdrawals for Snowmaking; and 10 V.S.A. §1250, Vermont Water Quality Policy. *Killington, Ltd*., WQC-97-10 and MLP-97-09, Findings of Fact, Conclusions of Law and Order (08/14/98); *affirmed, In re Killington, Ltd*., Docket No. S343-9-98 Wrcv, Decision and Order (10/07/99).

* The Board identified each of the following as Other Applicable State Laws pursuant to §401(d) of the Clean Water Act: Agency Regulatory Powers over Fish and Wildlife (10 V.S.A. Ch. 103); the VWR; Outstanding Resource Waters designations (10 V.S.A. §1424a) though no such designation was applicable in this case. *Vermont Marble Power Division (OMYA),* WQ-92-12, Findings of Fact, Conclusions of Law and Order (04/13/95).

* Where other applicable state law relating to water quality would guide the Board's review of a § 401 certificate on appeal, such law is deemed an appropriate state law requirement that is binding on the applicant. As the Oregon Court of Appeals has declared, "only if a [state law provision] has absolutely no relationship to water quality would it not be an 'other appropriate requirement of State law.'" *(citation omitted)* The Vermont Supreme Court has likewise acknowledged that the CWA allows the state to impose conditions in a § 401 certificate to ensure an applicant's compliance with certain criteria, including "any other appropriate requirement of State law." *Georgia Pacific Corporation and Simpson Paper (Vermont) Co., Inc. v. Department of Environmental Conservation and Sierra Club*, Vt. No. 91-530 at 3, 628 A.2d 944 (1992) (table), *citing,* 33 U.S.C. § 1341 (d). *Lamoille River Hydroelectric Project (CVPS),* WQ-94-3 and WQ-94-05, Findings of Fact, Conclusions of Law and Order (11/05/96).

* The Board identified each of the VWR as other applicable state law, though compliance with those Rules was not necessary to the disposition of this case. *Id.*

* The Board identified each of the following as Other Applicable State Laws pursuant to §401(d) of the Clean Water Act: Agency Regulatory Powers over Fish and Wildlife (10 V.S.A. Ch. 103); the VWR; Outstanding Resource Waters designations (10 V.S.A. §1424a) though no such designation was applicable in this case. *Vermont Marble Power Division (OMYA),* WQ-92-12, Findings of Fact, Conclusions of Law and Order (04/13/95).

1693.6 Remedies / Board Actions

* To address concerns regarding a dam's hydraulic capacity during severe flood events, the Board amended a Water Quality Certificate to provide the flow necessary to support year-round viable habitat conditions for fish and other aquatic organisms and to set forth reasonable requirements for monitoring and consultation to assess the dam's performance. *Clyde River Hydroelectric Project*, WQ-02-08(A) and (B) (Consolidated) Amended WQ Certificate: Findings of Fact, Conclusions of Law, and Order (07/11/03); *appeal docketed,* No. 2004-101 (03/08/04) (pending).

* The Board amended a Water Quality Certificate to incorporate additional safeguards and specific standards by which to assure that a proposed trap-and-truck facility is effective or that ANR can require other implementation measures that will not only maintain, but also enhance, the fisheries of the affected river. The Certificate was also amended to require that ANR provide public notice and an opportunity to comment on any upstream passage plan or effectiveness study filed by the Applicant with ANR for approval. *Id.*

* The Board concurred with ANR's authorization of a fish pipe for downstream fish passage, but imposed additional measures to assure the safe passage of those fish that use the river channel as means of downstream migration. *Id.*

* Because the river at issue in the relicensure of a hydroelectric project is used by landlocked salmon during the fall spawning run, the Board conditioned the Section 401 Water Quality Certificate to provide suitable flow conditions during periods of upstream migration and habitat use. *Id.*

* To assure that fish and egg kills would not continue, the Board conditioned the Section 401 Water Quality Certificate with ramping protocols that address the effects of hydro-peaking on stranding, habitat and fish behavior. *Id.*

* To provide reliable fish passage, the Board conditioned a Section 401 Water Quality Certificate to require both the approval of final plans for the facilities and of effectiveness studies for proposed passage facilities, including a trap-and-truck facility that depends for its success on proper design, operation, and monitoring for compliance with the upstream fish passage plan. *Id.*

* With respect to a 401 Certification, the Board must affirmatively find, like the certifying agency, that there is a reasonable assurance that the activity will be operated or conducted in a manner that will not violate applicable water quality standards. *Appeal of Vermont Natural Resources Council (Sugarbush),* DAM-92-02 and WQ-92-05, Findings of Fact, Conclusion of Law and Order (02/08/93) and Memorandum of Decision (03/01/93); *see In re Application of Snowbridge, Inc., Appeal of VNRC, et al.* S-197-93 WnCa (02/12/97) (Dismissal by Stipulation).

1694. Stream Alteration Permits (10 V.S.A. § 1021 *et seq*.; 1024(a))

* Under 10 V.S.A. § 1023(a)(2), a permit for the activity described in 10 V.S.A. § 1021(a) "shall be granted, subject to such conditions determined to be warranted, if it appears that the change . . . will not significantly damage fish life or wildlife[.]" In this case, the "change" which the Board must consider is the Project. The Project is the reconstruction of the former Village Dam, and the resulting flow modification of the Wells River. *Town of Groton*, SAP-98-01, Findings of Fact, Conclusion of Law and Order (01/25/99).

* Before the Board can determine whether the Project would result in significant damage to fish life or wildlife, it must first establish a base line from which to compare the Project. In determining what constitutes the appropriate base line the Board has generally looked to the VWQS ("VWQS") which define a similar concept, background conditions, to mean conditions that exist in the absence of human or cultural influences, or conditions due to human or cultural influences that are not subject to regulation or management under the Act or under 6 V.S.A., Chapter 215. *VWQS effective April 21, 1997 at §1-01(B)(7)*. *Id.*

* Consistent with the Board's rationale in *Passumpsic* and *Lamoille*, we decline to establish a baseline by speculating as to water quality and fish habitat associated with the *impounded* condition of the waters in question during the past two centuries. Rather, the appropriate baseline in this case should derive from the sound assessment of water quality and fish habitat associated with the present free-flowing condition of the Project Site. *Id.*

* The stream alteration statute specifically provides that "a conformed copy [of the application] shall be simultaneously filed with the town clerk of the town in which the proposed alteration is located, and mailed to each owner of property that abuts or is opposite the land where the alteration is to take place." 10 V.S.A. §1022. The Board concludes that those statutorily entitled to notice *prior* to issuance of the permit, should at least be afforded an opportunity to file objections to the application before a permit is issued. *George Carpenter, Jr.,* SAP-99-06, Remand Order (12/14/99).

* In the context of a stream alteration permit application, ANR's actions foreclosed the opportunity of any party entitled by statute to receive notice of the permit application to meaningfully participate. Were such an expedited review process allowed, those entitled by statute to receive notice would necessarily be required to appeal the issuance or denial of a permit to the Water Resources Board simply to ensure that a hearing was conducted on the application or to allow a meaningful opportunity to comment on the application. The Board determined such a result to be inconsistent with the respective functions of ANR and the Board, the former having technical expertise and being charged with administering the stream alteration program in the first instance and the latter being a body with limited technical expertise and having appellate jurisdiction. Accordingly, the Board remanded the matter for initial consideration by ANR. *Id.*

1694.1 Scope of Jurisdiction / Exemptions

* The Board must affirmatively determine that it has jurisdiction over the Project. *See In re Lake Sadawga Dam*, 121 Vt. 367, 370 (1960). Here the alteration proposed was located on the Wells River which drains greater than 10 square miles at the Site. The Project would involve greater than 10 cubic yards of movement, fill or excavation within the limits of the Wells River watercourse. Accordingly, the Project requires a permit pursuant to 10 V.S.A. § 1021(a), and the Board has jurisdiction over Groton's appeal from the Denial. *Town of Groton*, SAP-98-01, Findings of Fact, Conclusions of Law and Order (01/25/99).

1694.2 *De Novo* Review

* Section 1023(a)(1) was not at issue in *de novo* appeal before the Board because the Appellant did not allege that the Project would adversely affect the public safety by increasing flood hazards. *Clarence Jelley*, SAP-96-03, Findings of Fact, Conclusions of Law and Order (10/30/96).

* Section 1023(a)(4) was not at issue in *de novo* appeal before the Board because the Board had not designated the subject river an outstanding resource waters. *Id.*

1694.3 Statutory Standards (10 V.S.A. 1023)

* Trenching and laying a sewer line under the subject river would not significantly damage fish life or wildlife, pursuant to 10 V.S.A. § 1024(a)(2), if permit conditions regarding prevention of erosion and prevention of discharge of wet concrete into the stream flow were complied with. *Clarence Jelley*, SAP-96-03, Findings of Fact, Conclusions of Law and Order (10/30/96).

* A project would not significantly damage the right of the Appellant riparian owner pursuant to 10 V.S.A. § 1024(a)(3). Although Appellant asserted that proposed trenching and laying of a sewer line under the subject river would contaminate his drinking water well by causing migration of a petroleum plume on his property, the Board concluded that based on the locations and elevations of the properties at issue, the location of the contamination, the location of the Appellant's well and the direction of the flow of groundwater and the subject river, contamination was not likely. *Id.*

1694.4 Remedies / Board Actions

* Board amended stream alteration permit issued by ANR based on stipulated additional condition filed by the parties. *Terry Thomas*, SAP-01-06, Findings of Fact, Conclusions of Law and Order (01/08/02).

* ANR's permit amendment extending expiration date of stream alteration permit under appeal to the Board was *void ab initio*, since ANR had no jurisdiction to amend the permit. *Id.*

* Board *sua sponte* extended expiration date of stream alteration permit on appeal due to fact that permit was stayed pending the outcome of the appeal. *Id.*

E. Dams (10 V.S.A. § 1080 *et seq*.; 10 V.S.A. § 1099(a)) (1706-1720)

1706. General

* Board ordered that joint hearings be held in a dam permit appeal and a § 401 certification appeal, but did not consolidate these two matters. *Appeal of Vermont Natural Resources Council (Sugarbush)*, DAM-92-02 and WQ-92-05, Interim Order (06/15/92).

* A corporation can be a "person aggrieved" under 10 V.S.A. § 1099(a). The Vermont affiliate of the Sierra Club could be a "person aggrieved," pursuant to 10 V.S.A. § 1099(a), but as a condition precedent the Board would require the group to file adequate proof of its authority on behalf of the parent organization to be a party to the appeal of the dam permit. *Appeal of Vermont Natural Resources Council (Sugarbush),* DAM-92-02, Prehearing Conference Order and Preliminary Order (04/10/92).

* Organization that did not seek party status at the initial prehearing conference was granted permissive intervention because it demonstrated good cause for its failure to timely request party status, its later appearance would not unfairly delay the proceeding or place an unfair burden on other parties since it

intended to coordinate its case with other parties, and it made a *prima facie* showing of a substantial interest which might be affected by the outcome of the proceeding. *Id.*

* Board granted motion allowing amendment of the appellant's notice of appeal to include dam project's compliance with the public trust doctrine on the basis that Board Rules of Procedure allow for liberal construction of said notices and appellant had indicated in its cover letter at the time of filing that it specifically reserved "all rights and actions with respect to the public trust doctrine." *Id.*

* Board is required to conduct a *de novo* hearing on all issues, including conditions for minimum stream flow, in an appeal of a dam permit under 10 V.S.A. § 1099(a). *Id.*

1707. Scope of Jurisdiction / Exemptions

* Whether the Board has jurisdiction over an appeal from a decision of a natural resources conservation district with respect to an agricultural dam permit is a question of statutory construction. *Hinsdale Farm*, DAM-02-09, Memorandum of Decision (12/11/02); *aff'd*, 858 A2d 249, 2004 Vt. 72.

* The Board does not have jurisdiction over an appeal from a decision of a natural resources conservation district with respect to an application for an agricultural dam permit because the plain meaning of the Dams Act, 10 V.S.A. ch. 43, does not expressly confer such jurisdiction on the Board. *Id.*

* The public trust doctrine as reflected in the Vermont Constitution, Chapter II, Section 67, does not preclude the Board from considering appeals from Agency of Natural Resources dam permit and § 401 certification decisions. The Legislature has given primary jurisdiction to the Board to hear *de novo* appeals from ANR Dam orders and §401 certifications and it would thwart the Legislature's intent to deny the parties timely review on the merits of a project, pending resolution of public trust and constitutional challenges. *Appeal of Vermont Natural Resources Council (Sugarbush),* DAM-92-02 and WQ-92-05, Findings of Fact, Conclusions of Law and Order (02/08/93) and Memorandum of Decision (03/01/93). *See In re Application of Snowbridge, Inc., Appeal of VNRC, et al.,* S-197-93 VnCa (02/112/97) (Dismissal by Stipulation).

1708. *De Novo* Review

1709. Statutory Standards / Determination of Public Good (10 V.S.A. § 1086)

* To the extent that the applicable VWQS are not listed among the 13 statutory elements under the dam statute, they are among the "other things" that the Board should consider under 10 V.S.A. § 1086(a). *Appeal of Vermont Natural Resources Council (Sugarbush)*, DAM-92-02 and WQ-92-05, Findings of Fact, Conclusions of Law and Order (02/08/93) and Memorandum of Decision (03/01/93); *see In re Application of Snowbridge, Inc., Appeal of VNRC, et al.*, S-197-93 VnCa (02/112/97) (Dismissal by Stipulation).

* Although the Board must consider and make findings as to each element of 10 V.S.A. § 1086(a), the Board retains discretion in determining the relative weight to give each one and it is not incumbent upon the Board to determine that each element individually supports the overall conclusion regarding the project's impact on the public good. Rather, the Board must weigh all the elements required by the statute to determine whether the "greatest benefit of the people of the state" is served by the project. *Id.*

1710. Dam Safety

1711. Remedies / Board Actions

* If the agency having jurisdiction finds that the project will serve the public good, the agency shall issue an order approving the application and may attach conditions it considers necessary to protect any of the 13 statutory elements. The order must also include conditions for minimum stream flow to protect fish and other in-stream aquatic life. *Appeal of Vermont Natural Resources Council (Sugarbush)*, DAM-92-02 and WQ-92-05 (02/08/93) and Memorandum of Decision (03/01/93); *see In re Application of Snowbridge, Inc., Appeal of VNRC, et al.*, S-197-93 VnCa (02/112/97) (Dismissal by Stipulation).

F. Water Pollution Control (10 V.S.A. § 1251 *et seq*.; 10 V.S.A. § 1269) (1721-1745)

1721. General

* The statute authorizing adoption of the Water Pollution Control Regulations, 10 V.S.A. § 1251a, authorizes the adoption of rules "necessary for the proper administration of the secretary's duties" under the statutes governing water pollution control. It does not appear to authorize ANR to regulate the effect of a Board decision on appeal. *Lowe's Home Centers, Inc.,* WQ-03-15, Emergency Motion to Clarify (09/03/04).

* Legal standing under the Vermont Water Pollution Control Act requires an interest in the resource beyond that of the general public, a concrete and particularized injury to that interest, and the ability of the Board to redress the alleged injury. *Vermont Agency of Transportation (Route 7),* WQ-03-01, Memorandum of Decision (06/04/03).

* The Vermont Water Pollution Control Act must generally be construed to comply with federal requirements, including federal standing requirements. *Id.*

* Under the Vermont Water Pollution Control Act, a person or party in interest aggrieved by an act or decision of ANR has legal standing to appeal. The term aggrieved means a substantial grievance, a denial of some personal, pecuniary, or property right, or the imposition of a burden or obligation. This is analogous to the requirements for legal standing in the courts, which require plaintiffs to be injured or threatened with injury by the governmental action complained of. *Village of Enosburg Falls*, WQ-03-03, Memorandum of Decision (05/21/03).

* The administrative appeals route provided by the Vermont Water Pollution Control Act is intended to be remedial and should be construed liberally. *Id. See also, City of South Burlington and Town of Colchester*, WQ-03-02, Memorandum of Decision (05/20/03).

* Under its authority to administer the federal Clean Water Act, a state must provide an opportunity for judicial review in state court of the final approval or denial of state-issued permits that is sufficient to provide for, encourage, and assist public participation in the permitting process. A state meets this standard if state law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit. A state will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review). Although this regulation is not directly applicable to the Board, it does suggest that the Board, as an administrative body intermediate between the Secretary of ANR and the State Supreme Court, should be no more restrictive in its standing analysis than the federal courts. *CCCH Stormwater Discharge Permits*, WQ-02-11 (ANR Permits #1-1556 and #1-1557), Memorandum of Decision (03/21/03).

* Additional loads of pollutants of concern into impaired waters for which a waste load allocation is required but has not yet been established cannot be justified by ANR's position that the receiving waters are already so degraded by so many sources that any additional degradation from the proposed discharge will be indistinguishable from all the rest. ANR's evidence failed to account for cumulative impacts and the necessary policy that pollution from multiple sources does not excuse pollution from any one source. *Hannaford Bros. Co. and Lowes Homes Center, Inc.*, WQ-01-01, Findings of Fact, Conclusions of Law and Order (01/18/02); *aff'd,* No. 280-02 CnCv (04/30/03); *appeal docketed*, No. 2003-539 (12/14/04) (pending). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

1722. Regulated Waters

* Delegated states are responsible for establishing appropriate water-quality based effluent limitations in NPDES permits and otherwise administering their NPDES permitting programs. None of these responsibilities excuse the states from their responsibility under the residual designation authority to require NPDES permits for stormwater discharges that contribute to violations of state water quality standards or that constitute significant contributors of pollutants to federally regulated waters. *Stormwater*

NPDES Petition, WQ-03-17, Memorandum of Decision (10/14/04); *appeal docketed,* No. 2004-515 (11/22/04) (pending).

1722.1 Federal

***** The federal Clean Water Act, 33 U.S.C. §§ 1251-1387, provides that any discharge of pollutants into waters of the United States requires an NPDES. *Citizens for Safe Farms, Inc. (Hinsdale Farm*), WQ-04-02, Memorandum of Decision (10/14/04); *appeal docketed,* No. 2004-510 (11/18/04) (pending).

* All wetlands occurring in Vermont, Class One, Two or Three, are considered waters of the United States and as such, must comply with any applicable provision of the VWQS. *Killington, Ltd.*, WQC-97-10 and MLP-97-09 (8/14/98) *aff'd*, S343-9-98 WrCv (10/7/99).

1722.2 Vermont

* The statutory definition of "waters of the state" does not include all wetlands. 10 V.S.A. § 1251(13). Compare with, *In the matter of McGowan*, 533 So.2d 999 (LA 1988) (definition of "surface water" included "wetlands, swamps, marshes" and other waters). Indeed, because the wetland was an integral part of VMC's man-made waste treatment system, it was exempt under 40 C.F.R 122.2(g) from the definition of "waters of the United States." *Cf. Re: S.T. Griswold & Company, Inc.,* WET-98-02DR (09/16/98). *Appeal of Vermont Marble Company (OMYA),* WQ-91-15, Findings of Fact, Conclusion of Law and Order (01/14/94).

* All wetlands occurring in Vermont, Class One, Two or Three, are considered waters of the United States and as such, must comply with any applicable provision of the VWQS. *Killington, Ltd.*, WQC-97-10 and MLP-97-09 (8/14/98) *aff'd*, S343-9-98 Wrcv (10/7/99).

1722.2.1 Impaired Waters

* The Board reversed ANR's denial of a petition that requested the Agency to require federal discharge permits for stormwater discharges into five stormwater-impaired streams. The Board determined that these discharges contribute to violations of the VWQS and remanded the matter to ANR to establish in the first instance any de minimis threshold for NPDES permitting of the subject stormwater discharges pursuant to the residual designation authority; to establish permit conditions for those discharges above any de minimis threshold; to determine whether to administer the NPDES permits in these watersheds through individual permits, general permits, or some combination of individual and general permits; and to notify stormwater dischargers of their NPDES permitting obligations. *Stormwater NPDES Petition*, WQ-03-17, Memorandum of Decision (10/14/04); *appeal docketed,* No. 2004-515 (11/22/04) (pending).

* Discharges of stormwater that increase the mass loading of stormwater pollutants into stormwater-impaired streams cause or contribute to the violations of the VWQS in these waters. *Id.*

* Discharges of stormwater pollutants into stormwater-impaired streams, except for any de minimis discharges, either directly in the discharge waste stream or indirectly through additional bed and bank scour, cause or contribute to the violations of the VWQS and require NPDES discharge permits. *Id.*

* Title 10 V.S.A., Sections 1264(e), (g)(1)(A), and (h), creates a rebuttable presumption in favor of the permittee that new discharges of collected stormwater runoff authorized by ANR will not cause or contribute to a violation of the VWQS, provided that (1) the receiving waters are either not impaired or are impaired by sources other than collected stormwater runoff and (2) the applicant's proposed stormwater runoff collection and treatment system complies with ANR's 2002 Stormwater Treatment Manual. *CCCH Stormwater Discharge Permits,* WQ-02-11, WQ-03-05, -06, and -07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (10/04/04). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended by Act 109 (2001 Adj. Sess.), eff. May 16, 2002. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* It is a bedrock principle of Vermont law that every discharge into Vermont's waters must conform with the VWQS and that a discharge permit cannot be issued for a new or increased discharge of pollutants of

concern into impaired waters in the absence of a valid plan reasonably assuring that the receiving waters will be able to assimilate these pollutant loads. *Id.*

* To prevail in an appeal involving waters impaired for sediment and pathogens due to stormwater where no approved TMDL has been adopted for those waters, the applicant must demonstrate that the proposed project will not increase the sediment load beyond existing conditions. *Id.*

* Waters that are impaired for one or more pollutants of concern are not "higher quality waters," within the meaning of the State Anti-Degradation Policy, at least with respect to the criteria for which those receiving waters are impaired. *Id.*

* Even where the applicant can demonstrate compliance with ANR's 2002 Stormwater Treatment Manual, under certain circumstances, the presumption of compliance with the VWQS could be successfully rebutted with credible evidence demonstrating, for example, that increases in sediment and other pollutants attributable to a project's collected stormwater discharges are detrimental to existing aquatic biota and wildlife or the habitat that supports such biota and wildlife. Under such circumstances, the Board would likely remand the matter to ANR for further inventory and anti-degradation analysis of the receiving waters and for consideration of the impacts of discharges upon both "existing" and "designated" uses. *Id.*

* Application of the plain meaning doctrine suggests that the rebuttable presumption provided in 10 V.S.A. § 1264(g)(1)(A) and (h) extends to compliance with the state's anti-degradation policy expressed in VWQS § 1-03, unless the presumption is successfully rebutted on appeal. *Id.*

* Even where the applicant can demonstrate application of the best control and treatment practices set forth in ANR's Stormwater Treatment Manual, under certain circumstances, the presumption of compliance with the VWQS could be successfully rebutted with credible evidence demonstrating, for example, increases in sediment and other pollutants attributable to a project's collected stormwater discharges into unimpaired waters to the detriment of existing aquatic biota and wildlife or the habitat that supports such biota and wildlife. Under such circumstances, the Board would likely remand the matter to ANR for further inventory and analysis of the receiving waters under Anti-degradation Tiers One and Two and for consideration of the impacts of discharges of sediment upon both "existing" and "designated" uses. *Id.*

* A discharge of sediment into waters that are impaired by sediment, and for which no TMDL has been established, has a reasonable potential to contribute to a violation of the VWQS and is therefore ineligible for coverage under a general permit that, by its terms, excludes such a discharge from coverage. *Lowe's Home Centers, Inc.,* WQ-03-15, Findings of Fact, Conclusions of Law, and Order (08/26/04); *appeal docketed*, No. 2004-417 (09/13/04) (pending).

* In the context of performing an evaluation of water quality in assessing the impacts of a hydroelectric project, the reference condition establishes the attainable chemical, physical, and biological conditions for specific water body types against which the condition of waters of similar water body type is evaluated. This may mean that in a highly impacted/impaired watershed, an assessment needs to be made by comparing the impacted reach with another comparable, but unimpaired, water body type either in that riverine system or in another watershed. *Clyde River Hydroelectric Project,* WQ-02-08(A) and (B) (Cons.), Memorandum of Decision (02/02/04); *appeal docketed,* No. 2004-101 (03/08/04) (pending).

* A construction site stormwater discharge into impaired waters that is not authorized as a "Limited Duration Activity" under the VWQS is a violation of the VWQS and is, therefore, not covered under an existing General Permit that, by its own terms, does not cover discharges that cause or have reasonable potential to cause or contribute to, a violation of water quality standards. *Lowe's Home Centers, Inc*., WQ-03-15, Memorandum of Decision (11/26/03).

* In the absence of a pollutant load allocation, a permit must include either a five-year schedule reasonably designed to bring the impaired receiving waters into compliance with the VWQS or provisions to ensure that the operational phase of the project will not discharge new or increased pollutants of concern into the receiving waters. *Vermont Agency of Transportation (Route 7),* WQ-03-01, Memorandum of Decision (08/21/03).

* Applying the law in effect on December 12, 2001, the Board held that the stormwater permit at issue must comply with ANR's 1997 Stormwater Procedures, at a minimum, with respect to pollutants that are not causing or contributing to the impairment of the receiving waters. In addition, in the absence of a pollutant load allocation, the permit must include either a five-year schedule reasonably designed to bring the impaired receiving waters into compliance with the VWQS or provisions to ensure that the operational phase of the project will not discharge new or increased pollutants of concern into the receiving waters. *Id.*

* ANR may not lawfully issue a permit for a new or increased discharge of pollutants of concern into impaired waters in the absence of a lawful cleanup plan. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook*, WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (06/02/03). (The law applied in this case was modified by Act 140 of 2004.)

* Every discharge into Vermont's waters must conform with the VWQS, and a discharge permit cannot be issued for a new or increased discharge of pollutants of concern into impaired waters in the absence of a valid plan reasonably assuring that the receiving waters will be able to assimilate these pollutant loads. *Id.*

* WIPs represent a narrow exception to the longstanding requirement of pollutant budgeting for impaired waters. *Id.*

* Vermont law does not require ANR to use WIPs to address any particular stormwater-impaired waters. WIPs are an option, subject to conditions, one of which is that these WIPs include a schedule reasonably designed to bring the receiving waters into compliance with the VWQS within five years. If ANR cannot design a WIP that will satisfy that requirement, then a WIP cannot be issued, and ANR must establish and implement a TMDL for the receiving waters. *Id.*

* The baseline for determining whether a permitted discharge is new or increased is the actual discharge from a particular site. ANR may continue to permit and otherwise manage existing discharges pending the development of an effective cleanup plan. Thus, ANR may undertake efforts to restore impaired waters prior to issuing a WIP, if that would be possible for those waters, or establishing TMDLs. *Id*.

* The Vermont Water Pollution Control Act specifies five years as the maximum period of time within which a source-control alternative must bring waters that receive existing discharges into compliance with the VWQS. This statute also specifies that new discharges that will cause or contribute to violations of the VWQS cannot be authorized. *Id.*

* The scope of ANR's regulatory authority does not justify the issuance of a WIP that fails to provide that the receiving waters will comply with the VWQS. ANR's authority and responsibility extend to nonpoint-source discharges into impaired waters, and a WIP may include appropriate nonpoint-source management strategies. Both WIPs and the TMDL process may require ANR to look beyond structural controls for point-source discharges. *Id.*

* Applicants for a stormwater discharge permit into impaired waters for which a waste load allocation is required but has not yet been established bear the burden of proving by a preponderance of the evidence that the permit under appeal will not allow a new or increased discharge of measurable and detectable pollutants of concern into the receiving waters. *Hannaford Bros. Co. and Lowes Homes Center, Inc.*, WQ-01-01, Findings of Fact, Conclusions of Law and Order (01/18/02); *aff'd,* No. 280-02 CnCv (04/30/03); *appeal docketed*, No. 2003-539 (12/14/04) (pending). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Under the circumstances of this case, the Board does not consider the uses impaired, but rather takes into account the nature and quantity of the pollutants impairing them in determining whether a proposed discharge of pollutants of concern may be permitted when no waste load allocation has been established. *Id.*

* In the absence of a waste load allocation for an impaired water, the level of treatment for an individual stormwater discharge, or class of stormwater discharges, needed to fully address the impairment cannot be determined. *Id.*

* Demonstrating that the proposed discharge into impaired waters for which a necessary waste load allocation had not been established would be sufficient to demonstrate that the proposed discharge would not increase the chemical, physical, or biological impacts of the pollutants for which the receiving waters are impaired. *Id.*

* Applicants for a stormwater discharge permit into impaired waters for which a waste load allocation is required but has not yet been established bear the burden of proving by a preponderance of the evidence that the permit under appeal will not allow a new or increased discharge of measurable and detectable pollutants of concern into the receiving waters. *Id.*

* The question of whether a proposed discharge would be new or increased compared to the actual discharge into impaired waters for which a waste load allocation is required but has not yet been established is determined by measuring whether the proposed discharge would increase the mass loading of pollutants of concern into the receiving waters, either directly in the discharge waste stream or indirectly through additional bed and bank scour. Using direct and indirect mass loading reflects the practical and legal necessity of enabling ANR to manage actual discharges into impaired watersheds pending the establishment of waste load allocations. *Id.*

* Compliance with ANR's 1997 Stormwater Procedures is not, in and of itself, sufficient to justify the addition of pollutants of concern into impaired waters for which no waste load allocation has been performed. Once the state has determined that technology practices such as the 1997 Stormwater Procedures are not sufficient to achieve compliance with the water quality standards in a particular water body, a waste load allocation must be conducted and implemented. *Id.*

* Increased loads of pollutants of concern cannot be discharged into an impaired water until such time as a waste load allocation and compliance schedule demonstrate that these additional loads can be assimilated. *Id.*

* The total maximum daily load and waste load-allocation processes involve calculating the total load of a pollutant or pollutants that a receiving water can assimilate without violating water-quality standards and then allocating the total load among the various dischargers in the watershed. This process enables ANR to determine the appropriate stormwater treatment systems for the individual stormwater dischargers, or classes of stormwater dischargers, in the impaired watershed. To settle upon a particular type of stormwater treatment practice for a given discharge into impaired waters in the absence of a waste load allocation would ignore the water-quality-based approach of the waste load allocation process. *Id.*

* The TMDL and waste load-allocation processes are comprehensive and cannot be the responsibility of an individual discharger with no control over other discharges in the impaired watershed. *Id.*

* Additional loads of pollutants of concern into impaired waters for which a waste load allocation is required but has not yet been established cannot be justified by ANR's position that the receiving waters are already so degraded by so many sources that any additional degradation from the proposed discharge will be indistinguishable from all the rest. ANR's evidence failed to account for cumulative impacts and the necessary policy that pollution from multiple sources does not excuse pollution from any one source. *Id.*

* Using the actual discharge from the site as the baseline for measuring a new or increased discharge of pollutants of concern into impaired waters reflects the intention of the Board and the necessity of the law to enable ANR to manage and improve actual discharges into impaired watersheds for which a waste load allocation has not been established. *Id.*

* The use of actual discharges as a cap on new or increased discharges applies only while waste load allocations or other cleanup plans are being established. Holding the line at actual discharges does not preclude ANR from authorizing and enforcing appropriate treatment technologies that would reduce the level of the pollutants of concern discharging from a particular site. Nor does the prohibition against permitting the discharge of additional pollutants of concern into impaired waters in the absence of a

cleanup plan affect whether the discharge of those pollutants may be increased or decreased from a particular site or group of sites in the waste load allocation process. *Id.*

* Individual dischargers generally will not have control over all the discharges into the receiving waters. Such dischargers are thus not in a position to develop a pollutant budget that would establish an appropriate discharge from their project. The responsibility of comprehensively assessing the receiving waters lies with ANR. *Id.*

* A case involving a discharge into impaired waters is factually distinguishable from the Board's decision in *Home Depot,* which involved a discharge into waters that were not impaired and where the Board, accordingly, accepted application of the treatment and control practices of ANR's Stormwater Procedures as creating a rebuttable presumption of compliance with the VWQS. *Hannaford Bros. Co. and Lowes Home Centers, Inc.* WQ-01-01, Memorandum of Decision (08/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* The Board's decision in *Pyramid Company*, that a new stormwater discharge into impaired waters cannot be permitted in the absence of a waste load allocation providing for the increased discharge, remains consistent with the current statutory and regulatory scheme for water-quality management in Vermont. *Id.*

* ANR has not demonstrated a legally significant distinction between the terms "impaired" and "water quality limited." *Id.*

* The fact that the receiving waters did not comply with the VWQS and were listed as water quality limited pursuant to section 303(d) of the Clean Water Act, 33 U.S.C.A. § 1313(d), was sufficient to rebut any presumption of compliance with the VWQS ensuing from conformance of the discharge with the treatment and control practices of ANR's Stormwater Procedures. *Hannaford Bros. Co. and Lowes Home Centers, Inc.,* WQ-01-01, Memorandum of Decision (06/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Impaired waters, also known as water quality limited segments, are waters that do not meet the VWQS for one or more pollutants. *Id.*

* Vermont law does not allow a new or increased discharge of measurable and detectable pollutants of concern into impaired waters for which there is not an adequate waste load allocation. Permits can be issued for a new or increased discharge of pollutants of concern into impaired waters if a waste load allocation shows that the assimilative capacity of the receiving waters can accommodate the discharge and if other dischargers into that segment are subject to compliance schedules. *Hannaford Bros. Co. and Lowes Home Centers*, WQ-01-01, Memorandum of Decision (06/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Compliance with the anti-degradation requirements of the VWQS and Vermont's waste load allocation process will prevent the restrictions on new or increased discharges into impaired waters from leading to the degradation of unimpaired waters. *Id.*

* The Board did not read the definition of "New Discharge" or the discharge criteria in the 1997 VWQS as prohibiting all new discharges into impaired waters without a duly established waste load allocation. Doing so would unnecessarily impede Vermont's efforts to manage and improve permitted discharges before waste load allocations are actually established. *Id.*

* The Board did not decide whether a discharge conforming with any updated stormwater procedures that ANR may develop can be afforded either a permissible inference or a presumption of compliance with the VWQS. Nor did the Board decide how any such presumption would be rebutted in a case involving a discharge into waters that are not impaired. *Id.*

* In the absence of waste load allocations, discharges into impaired waters may be permitted under Vermont law only if the proposed discharge will not increase the chemical, physical, or biological load of pollutants for which the receiving waters are impaired. *Id.*

1722.2.2Unimpaired Waters

* 10 V.S.A. §1264 gives the Secretary of ANR broad discretion to issue operational-phase stormwater discharge permits for new discharges of collected stormwater runoff into unimpaired waters if an applicant demonstrates that it has incorporated into the design and management of the project the BMPs set forth in ANR's Stormwater Treatment Manual. *CCCH Stormwater Discharge Permits,* WQ-02-11, WQ-03-05, -06, and -07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (10/04/04). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended by Act 109 (2001 Adj. Sess.), eff. May 16, 2002. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* The scope of ANR's regulatory authority does not justify the issuance of a WIP that fails to provide that the receiving waters will comply with the VWQS. ANR's authority and responsibility extend to nonpoint-source discharges into impaired waters, and a WIP may include appropriate nonpoint-source management strategies. Both WIPs and the TMDL process may require ANR to look beyond structural controls for point-source discharges. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook,* WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (06/02/03). (The law applied in this case was modified by Act 140 of 2004.)

* ANR's authority extends not only to discharges, but also to the activities and conditions that cause discharges. *Id.*

* Applicants for a stormwater discharge permit must prove that the permit complies with the VWQS with regard to pollutants for which the receiving waters have not been identified as water quality limited. *Hannaford Bros. Co. and Lowes Homes Center, Inc.*, WQ-01-01, Findings of Fact, Conclusions of Law and Order (01/18/02); *aff'd,* No. 280-02 CnCv (04/30/03); *appeal docketed*, No. 2003-539 (12/14/04) (pending). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* With regard to pollutants not listed as causing the impairment of the receiving waters, a permit must comply with the criteria and uses of the VWQS. *Id.*

* A case involving a discharge into impaired waters is factually distinguishable from the Board's decision in *Home Depot,* which involved a discharge into waters that were not impaired and where the Board, accordingly, accepted application of the treatment and control practices of ANR's Stormwater Procedures as creating a rebuttable presumption of compliance with the VWQS. *Id.*, Memorandum of Decision (08/29/01).

* The Board did not decide whether a discharge conforming with any updated stormwater procedures that ANR may develop can be afforded either a permissible inference or a presumption of compliance with the VWQS. Nor did the Board decide how any such presumption would be rebutted in a case involving a discharge into waters that are not impaired. *Id.*, Memorandum of Decision (06/29/01).

* Proposed discharges into waters that are not impaired must comply with the VWQS, including Vermont's anti-degradation policy. *Id.*

* Compliance with the anti-degradation requirements of the VWQS and Vermont's waste load allocation process will prevent the restrictions on new or increased discharges into impaired waters from leading to the degradation of unimpaired waters. *Id.*

* Where receiving waters were not impaired, applicants' substantial evidence of project compliance with ANR's Stormwater Management Procedures constituted presumptive compliance with 10 V.S.A. §§ 1263 and 1264 and the VWQS, which was not successfully rebutted by project opponent. *Home Depot, USA, Inc. et al.*, WQ-00-06, Findings of Fact, Conclusions of Law, and Order (02/06/01) and Memorandum of Decision re: Motion to Alter (03/16/01); *dismissed with prejudice,* SO-244-01 RcCa (07/11/01).

* The receiving waters for the project discharge were not "impaired" waters listed on the Clean Water Act's 303(d) list of State impaired waters, and Board therefore evaluated project for conformance with 1997 VWQS based on compliance with design standards in ANR's 1997 Stormwater Management Procedures. *Id.*

* Where receiving waters were not "impaired," applicants' substantial evidence of project compliance with ANR's 1997 Stormwater Management Procedures constituted presumptive compliance with 10 V.S.A. §§ 1263 and 1264 and the 1997 VWQS, which was not successfully rebutted by project opponent. *Id.*

1723. Vermont Water Quality Standards

* Discharges of stormwater pollutants into stormwater-impaired streams, except for any de minimis discharges, either directly in the discharge waste stream or indirectly through additional bed and bank scour, cause or contribute to the violations of the VWQS and require NPDES discharge permits. *Stormwater NPDES Petition*, WQ-03-17, Memorandum of Decision (10/14/04); *appeal docketed,* No. 2004-515 (11/22/04) (pending).

* Discharges of stormwater that increase the mass loading of stormwater pollutants into stormwater-impaired streams cause or contribute to the violations of the VWQS in these waters. *Id.*

*The Board reversed ANR's decision to deny a petition that requested the Agency to require federal discharge permits for stormwater discharges into five stormwater-impaired streams. The Board determined that these discharges contribute to violations of the VWQS and remanded the matter to the Agency to issue NPDES permits to dischargers of stormwater into these streams. *Id.*

* It is a bedrock principle of Vermont law that every discharge into Vermont's waters must conform with the VWQS and that a discharge permit cannot be issued for a new or increased discharge of pollutants of concern into impaired waters in the absence of a valid plan reasonably assuring that the receiving waters will be able to assimilate these pollutant loads. *CCCH Stormwater Discharge Permits,* WQ-02-11, WQ-03-05, -06, and -07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (10/04/04). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended by Act 109 (2001 Adj. Sess.), eff. May 16, 2002. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Title 10 V.S.A. §§ 1264(e), (g)(1)(A), and (h), create a rebuttable presumption in favor of the permittee that new discharges of collected stormwater runoff authorized by ANR will not cause or contribute to a violation of the VWQS, provided that (1) the receiving waters are either not impaired or are impaired by sources other than collected stormwater runoff and (2) the applicant's proposed stormwater runoff collection and treatment system complies with ANR's 2002 Stormwater Treatment Manual. *Id.*

* Even where the applicant can demonstrate application of the best control and treatment practices set forth in ANR's Stormwater Treatment Manual, under certain circumstances, the presumption of compliance with the VWQS could be successfully rebutted with credible evidence demonstrating, for example, that increases in sediment and other pollutants attributable to a project's collected stormwater discharges are detrimental to existing aquatic biota and wildlife or the habitat that supports such biota and wildlife. Under such circumstances, the Board would likely remand the matter to ANR for further inventory and anti-degradation analysis of the receiving waters and for consideration of the impacts of the discharges upon both "existing" and "designated" uses. *Id.*

* Pursuant to the VWQS, § 2-03(B)(1), construction that may result in unavoidable short-term non-compliance with criteria for turbidity, aquatic biota, wildlife, and aquatic habitat may be authorized as being in compliance with the VWQS if all requirements of that provision are met. *Id.*

* A discharge of sediment into waters that are impaired by sediment, and for which no TMDL has been established, has a reasonable potential to contribute to a violation of the VWQS and is therefore ineligible for coverage under a general permit that, by its terms, excludes such a discharge from coverage. *Lowe's Home Centers, Inc.,* WQ-03-15, Findings of Fact, Conclusions of Law, and Order (08/26/04); *appeal docketed*, No. 2004-417 (09/13/04) (pending).

* A general permit condition that expressly excludes from coverage any discharge that will "cause, or have reasonable potential to cause or contribute to, a violation of water quality standards" is consistent with requirements of the federal Clean Water Act, 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d), that point-source discharges must meet state water quality standards and that point-source discharges with a "reasonable potential" to cause or contribute to violations of state water quality standards require water-quality based effluent limitations above and beyond technology-based effluent limitations. *Id.*

* Because the LCP-TMDL identifies reductions in phosphorous loading that are a necessary to bring Lake Champlain into compliance with the VWQS for phosphorous, conditions in a Discharge Permit that are not as stringent as those called for in the LCP-TMDL will not ensure compliance with the VWQS. *City of South Burlington and Town of Colchester,* WQ-03-02, Findings of Fact, Conclusions of Law, and Order (12/29/03).

* Discharge permits must, at a minimum, incorporate applicable provisions of a TMDL. If a TMDL indicates certain actions must be taken to bring a waterbody into compliance with VWQS, the actions set forth in the TMDL must be incorporated into applicable discharge permits in order to implement the TMDL and commence the process of cleaning up the polluted water. *Id.*

* A construction site stormwater discharge into impaired waters that is not authorized as a "Limited Duration Activity" under the VWQS is a violation of the VWQS and is, therefore, not covered under an existing General Permit that, by its own terms, does not cover discharges that cause or have reasonable potential to cause or contribute to, a violation of water quality standards. *Lowe's Home Centers, Inc*., WQ-03-15, Memorandum of Decision (11/26/03).

* In the absence of a pollutant load allocation, a permit must include either a five-year schedule reasonably designed to bring the impaired receiving waters into compliance with the VWQS or provisions to ensure that the operational phase of the project will not discharge new or increased pollutants of concern into the receiving waters. *Vermont Agency of Transportation (Route 7),* WQ-03-01, Memorandum of Decision (08/21/03).

* VWQS (2000) defines "reference condition" as "the range of chemical, physical, and biological characteristics of waters minimally affected by human influences. In the context of an evaluation of biological indices, or where necessary to perform other evaluations of water quality, the reference condition establishes attainable chemical, physical, and biological conditions for specific water body types against which the condition of waters of similar water body type is evaluated." *Clyde River Hydroelectric Project*, WQ-02-08(A) and (B) (Consolidated) Amended WQ Certificate: Findings of Fact, Conclusions of Law, and Order (07/11/03); *appeal docketed,* No. 2004-101 (03/08/04) (pending).

* In a Section 401 Water Quality Certificate proceeding for the licensure of a hydroelectric facility, the Board must determine the project's impact on designated uses and aquatic life; in doing so, the Board considers the entirety of the Project's influences, including the impacts of various flow regimes both upstream and downstream of the facility. *Id.*

* ANR may not lawfully issue a permit for a new or increased discharge of pollutants of concern into impaired waters in the absence of a lawful cleanup plan. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook*, WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (06/02/03). (The law applied in this case was modified by Act 140 of 2004.)

* Every discharge into Vermont's waters must conform with the VWQS, and a discharge permit cannot be issued for a new or increased discharge of pollutants of concern into impaired waters in the absence of a valid plan reasonably assuring that the receiving waters will be able to assimilate these pollutant loads. *Id.*

* Vermont law does not require ANR to use WIPs to address any particular stormwater-impaired waters. WIPs are an option, subject to conditions, one of which is that these WIPs include a schedule reasonably designed to bring the receiving waters into compliance with the VWQS within five years. If ANR cannot design a WIP that will satisfy that requirement, then a WIP cannot be issued, and ANR must establish and implement a TMDL for the receiving waters. *Id.*

* The Vermont Water Pollution Control Act specifies five years as the maximum period of time within which a source-control alternative must bring waters that receive existing discharges into compliance with the VWQS. This statute also specifies that new discharges that will cause or contribute to violations of the VWQS cannot be authorized. *Id.*

* Vermont law takes a two-tiered approach to water pollution control. In the first tier, ANR administers the federal NPDES permitting program in Vermont and also uses its own technology-based source controls. The second tier applies to a particular water body when state and federal technology-based controls are not sufficient to attain water quality standards. In tier two, a TMDL must be established and implemented for the receiving waters. *Id.*

* Vermont's Water Pollution Control Act and ANR's accompanying regulations set forth a system for water pollution administration under which ANR has the authority and duty to ensure that Vermont's waters comply with the VWQS. *Id.*

* ANR may consider administrative factors, just as ANR may consider economic factors, in selecting reasonable alternatives for source-control programs and TMDLs. Like economic factors, administrative factors, however valid, may be considered in developing cleanup plans only to the extent these plans include a schedule of compliance reasonably designed to achieve and maintain the classifications and criteria of the VWQS as required by Vermont law. *Id.*

* The scope of ANR's regulatory authority does not justify the issuance of a WIP that fails to provide that the receiving waters will comply with the VWQS. ANR's authority and responsibility extend to nonpoint-source discharges into impaired waters, and a WIP may include appropriate nonpoint-source management strategies. Both WIPs and the TMDL process may require ANR to look beyond structural controls for point-source discharges. *Id.*

* The definition of receiving waters in the VWQS includes all waters adjacent to and downstream from other waters the quality of which could be affected by the discharge. *City of South Burlington (Bartlett Bay Wastewater Treatment Facility)*, WQ-01-04, Second Prehearing Conference Report and Order (04/18/02).

* All wetlands occurring in Vermont, Class One, Two or Three, are considered waters of the United States and as such, must comply with any applicable provision of the VWQS. *Killington, Ltd.*, WQC-97-10 and MLP-97-09 (8/14/98) *aff'd,* S343-9-98 Wrcv (10/7/99).

* With regard to pollutants not listed as causing the impairment of the receiving waters, a permit must comply with the criteria and uses of the VWQS. *Hannaford Bros. Co. and Lowes Homes Center, Inc.*, WQ-01-01, Findings of Fact, Conclusions of Law and Order (01/18/02); *aff'd,* No. 280-02 CnCv (04/30/03); *appeal docketed*, No. 2003-539 (12/14/04) (pending). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Where technology-based treatment and control practices are not sufficient to achieve compliance with the VWQS, ANR must establish a waste load allocation for the affected waters. ANR may then determine the appropriate level of treatment for stormwater discharges, along with suitable water-quality-based effluent limitations for other discharges into the affected waters. *Id.*

* If the receiving waters fail to comply with the VWQS and the state does not have waste load allocations in place, discharges may be permitted provided they do not increase the actual discharges of pollutants that are causing the impairment. *Id.*

* With regard to pollutants not listed as causing the impairment of the receiving waters, a permit must comply with the criteria and uses of the VWQS. *Id.*

* The VWQS do not directly address the issue of how to manage discharges of pollutants of concern into water quality limited segments in the absence of a TMDL or waste load allocation. *Hannaford Bros. Co. and Lowes Home Centers,* WQ-01-01, Second Prehearing Conference Report and Order (12/03/01).

[This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* The management of all discharges, including stormwater, must be designed to achieve compliance with the VWQS. *Hannaford Bros. Co. and Lowes Home Centers, Inc.* WQ-01-01, Memorandum of Decision (08/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* ANR does not have the legal authority to substitute the application of performance standards such as the 1997 Stormwater Procedures, along with an abstract expectation of eventually achieving compliance with the VWQS, for a cleanup plan in the form of a water pollution budget and a schedule of compliance. *Id.*

* The VWQS provide that the applicable law is the law in effect at the time a permit application is filed and deemed complete by ANR. *Hannaford Bros. Co. and Lowes Home Centers, Inc.,* WQ-01-01, Memorandum of Decision (06/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* The question of whether conformity with ANR's stormwater treatment and control practices was enough to demonstrate compliance with the VWQS went to the merits of the permit application, not to its completeness. *Id.*

* Like other discharges, stormwater cannot lawfully cause or contribute to violations of the VWQS. *Id.*

* ANR must manage stormwater discharges in a manner that achieves compliance with the VWQS. *Id.*

* Existing discharge permits cannot be reissued in Vermont unless the discharge is consistent with applicable water quality standards. *Id.*

* The VWQS require the assimilative capacity of receiving waters to be carefully allocated in accordance with the waste load allocation process and that receiving waters have adequate assimilative capacity before a proposed discharge can be permitted. *Id.*

* The discharge permitting system described by Vermont's waste load allocation process requires ANR to create and implement a pollutant budget for receiving waters. The total water pollution budget in Vermont is the capacity of the receiving waters to assimilate a pollutant while meeting the VWQS. A TMDL is the amount of the total budget that each source of a pollutant receives. A waste load allocation ensures that all the TMDLs together do not exceed the total budget. *Id.*

* The Board did not read the definition of "New Discharge" or the discharge criteria in the 1997 VWQS as prohibiting all new discharges into impaired waters without a duly established waste load allocation. Doing so would unnecessarily impede Vermont's efforts to manage and improve permitted discharges before waste load allocations are actually established. *Id.*

* Like other discharges, stormwater cannot lawfully cause or contribute to violations of the VWQS. *Id.*

* Title 10 V.S.A. § 1264 does not modify the permitting requirements of § 1263, which requires stormwater discharges to comply with the federal and state regulatory system designed to ensure that Vermont's waters meet the VWQS. *Id.*

* Existing discharge permits cannot be reissued in Vermont unless the discharge is consistent with applicable water quality standards. *Id.*

* The receiving waters for the project discharge were not "impaired" waters listed on the Clean Water Act's 303(d) list of State impaired waters, and Board therefore evaluated project for conformance with 1997 VWQS based on compliance with design standards in ANR's 1997 Stormwater Management Procedures. *Home Depot, USA, Inc. et al.*, WQ-00-06, Findings of Fact, Conclusions of Law, and Order

(02/06/01) and Memorandum of Decision re: Motion to Alter (03/16/01); *dismissed with prejudice,* SO-244-01 RcCa (07/11/01).

* A discharge will not be considered to impair water quality, even if there is some degree of change in the stream, where the change will not alter the characteristics of the stream or the ability of the citizens of the state to continue using it as they have in the past. *Town of Cabot*, WQ-00-04, Findings of Fact, Conclusions of Law and Order (09/08/00).

* A well-designed wastewater treatment facility with a full-time operator is sufficiently reliable to comply with the VWQS. *Id.*

* Receiving waters constituting waters of the United States and classified by the Board as Class B waters must comply with the VWQS. *Id.*

1723.1 Anti-Degradation

***** Waters that are impaired for one or more pollutants of concern are not "higher quality waters," within the meaning of the State Anti-Degradation Policy, at least with respect to the criteria for which those receiving waters are impaired. *CCCH Stormwater Discharge Permits,* WQ-02-11, WQ-03-05, -06, and -07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (10/04/04). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended by Act 109 (2001 Adj. Sess.), eff. May 16, 2002. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Consistent with federal law, 40 CFR 131.3(I) and 40 CFR 131.6(d), the VWQS include, among other elements, designated uses, water quality criteria, and a state anti-degradation policy. *Id.*

* The VWQS do not provide guidance regarding whether it is part of an applicant's burden of proof to conduct field surveys and present evidence of existing uses so that ANR can make a finding of what constitutes existing uses for the receiving waters, or, whether the Secretary of ANR, based on prior research and analysis by her staff, is charged with making such a determination as the first step in assessing the impacts to those uses of the applicant's proposed discharge. *Id.*

* Under certain circumstances, 10 V.S.A. § 1264(g)(1)(A) and (h) provide a rebuttable presumption in favor of a permittee that a discharge of collected stormwater runoff does not cause or contribute to a violation of the VWQS for the receiving waters. *Id.*

* Application of the plain meaning doctrine suggests that the rebuttable presumption provided in 10 V.S.A. § 1264(g)(1)(A) and (h) extends to compliance with the state's anti-degradation policy expressed in VWQS § 1-03, unless the presumption is successfully rebutted on appeal. *Id.*

* In regard to waters not listed on the 2002 Section 303(d) List, compliance with ANR' 2002 Stormwater Treatment Manual as required by 10 V.S.A. §1264(e)(1) is sufficient to create a rebuttable presumption under 10 V.S.A. § 1264(h) that discharges from the operational phase of a project will not cause or contribute to a violation of the VWQS, including the state anti-degradation policy expressed in VWQS § 1-03. *Id.*

* Even where the applicant can demonstrate application of the best control and treatment practices set forth in ANR' 2002 Stormwater Treatment Manual, under certain circumstances, the presumption of compliance with the VWQS could be successfully rebutted with credible evidence demonstrating, for example, that increases in sediment and other pollutants attributable to a project's collected stormwater discharges are detrimental to existing aquatic biota and wildlife or the habitat that supports such biota and wildlife. Under such circumstances, the Board would likely remand the matter to ANR for further inventory and anti-degradation analysis of the receiving waters and for consideration of the impacts of discharges of sediment upon both "existing" and "designated" uses. *Id.*

* An anti-degradation analysis is not required for construction-phase stormwater discharges that (1) are eligible for coverage under a General Permit, (2) comply with the terms and conditions of the General Permit, and (3) are duly authorized by ANR pursuant to that coverage. *Id.*

* Remand to ANR for an anti-degradation analysis and an inventory of "existing uses" is not appropriate if the Board has determined that the operational phase of a project will not result in an increased discharge of pollutants of concern. *Id.*

* Proposed discharges into waters that are not impaired must comply with the VWQS, including Vermont's anti-degradation policy. *Hannaford Bros. Co. and Lowes Homes Centers, Inc.,* WQ-01-01, Memorandum of Decision (06/29/01/). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Compliance with the anti-degradation requirements of the VWQS and Vermont's waste load allocation process will prevent the restrictions on new or increased discharges into impaired waters from leading to the degradation of unimpaired waters. *Id.*

* Determinations of existing uses of a particular water body under Vermont's anti-degradation rule, VWQS § 1-03, are made on a case-by-case basis. *Town of Cabot,* WQ-00-04, Findings of Fact, Conclusions of Law and Order (09/08/00).

* Waters subject to a corrective-action order issued by ANR and that contained *E.coli* in excess of the Class B criterion are not considered high quality under VWQS § 1-03.C. *Id.*

* A discharge will not be considered to impair water quality, even if there is some degree of change in the stream, where the change will not alter the characteristics of the stream or the ability of the citizens of the state to continue using it as they have in the past. *Id.*

* Even if the effluent resulted in a minor diminishment of water quality, the Board's focus is upon whether such diminishment would effect a significant degradation of the existing use. *Id.*

* Even though a reach of river designed as a waste management zone is a zone of increased risk due to discharge of wastes, compliance with all applicable water quality criteria is required by the VWQS. *Id.*

1723.2 Classifications

* Act 211 of 1991 eliminated what were formerly Class C waters. All former Class C waters became Class B waters. All Class C waters that were previously authorized to receive discharges of wastes or for which a municipality qualified for a discharge permit prior to July 1, 1997, became waste management zones. *Town of Cabot,* WQ-00-04, Memorandum of Decision (07/11/00).

* In the absence of information regarding the specific characteristic of the proposed discharge, and in consideration of evidence indicating that generally similar wastes may contain heavy metals, suspended solids and oxygen demanding wastes, the Board had no basis on which it could affirmatively determine that the proposed stormwater discharge would not reduce the quality of the receiving waters below their assigned classification. *Pyramid Company of Burlington*, WQ-77-01 (78-1), Findings of Fact, Conclusions of Law and Order (n.d. [6/02/78]).

1723.3 Designated Uses

* Designated uses are determined by the classifications for particular waters adopted by the Board as part of the VWQS. *CCCH Stormwater Discharge Permits,* WQ-02-11, WQ-03-05, -06, and -07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (10/04/04). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended by Act 109 (2001 Adj. Sess.), eff. May 16, 2002. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* ANR's 1997 Stormwater Procedures consider neither the classification nor the existing or designated uses of the receiving waters – considerations that lie at the core of Vermont's system for water-pollution control. *Hannaford Bros. Co. and Lowes Home Centers, Inc.*, WQ-01-01, Memorandum of Decision (08/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

1723.4 Existing Uses

* What constitutes an "existing use" requires both a factual and a legal determination by ANR. *CCCH Stormwater Discharge Permits,* WQ-02-11, WQ-03-05, 06, and -07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (10/04/04). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended by Act 109 (2001 Adj. Sess.), eff. May 16, 2002. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Because "existing uses" are not the same as "designated uses," merely achieving the water quality classification goals for the waters at issue is not necessarily sufficient to assure protection of existing uses in all receiving waters. *Id.*

* Evidence of the historical presence of certain rare, threatened and endangered species, alone, without facts to support a finding that operational discharges from a proposed project would actually result in a new or increased discharge causing or contributing to a violation of the VWQS, is not enough to convince the Board that an Operational-Phase Permit should be remanded to ANR for further proceedings to determine whether those species constitute "existing uses" in need of protection. *Id.*

* ANR's 1997 Stormwater Procedures consider neither the classification nor the existing or designated uses of the receiving waters – considerations that lie at the core of Vermont's system for water-pollution control. *Hannaford Bros. Co. and Lowes Home Centers, Inc.* WQ-01-01, Memorandum of Decision (08/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Determinations of existing uses of a particular water body under Vermont's anti-degradation rule, VWQS § 1-03, are made on a case-by-case basis. *Town of Cabot,* WQ-00-04, Findings of Fact, Conclusions of Law and Order (09/08/00).

* Incidental contact recreation, which takes place on nearly all of Vermont's waters, is not absolutely protected. The Board looks not only to the presence of an existing use, but more importantly upon how and to what extent the proposed discharge will affect that use. *Id.*

* The protection of existing uses under the CWA and the VWQS gives ANR the discretion to determine whether the degree of use is such that it should be protected, to the exclusion of *any* change in water quality. The mere presence of a use is not determinative. *Id.*

* Even if the effluent resulted in a minor diminishment of water quality, the Board's focus is upon whether such diminishment would effect a significant degradation of the existing use. *Id.*

1723.5 Mixing Zones

* Even though a reach of river designed as a waste management zone is a zone of increased risk due to discharge of wastes, compliance with all applicable water quality criteria is required by the VWQS. *Town of Cabot*, WQ-00-04, Findings of Fact, Conclusions of Law and Order (09/08/00).

* The proposed Cabot discharge meets the social and economic balancing test of VWQS § 1-03.C.1. because the substantial social benefit of reducing existing in-stream *E.coli* levels will more than offset slight reductions in water quality. *Id.*

* A discharge will not be considered to impair water quality, even if there is some degree of change in the stream, where the change will not alter the characteristics of the stream or the ability of the citizens of the state to continue using it as they have in the past. *Id.*

* Even if the effluent resulted in a minor diminishment of water quality, the Board's focus is upon whether such diminishment would effect a significant degradation of the existing use. *Id.*

* The significance of an existing waste management zone is twofold: (1) with limited exceptions, an existing WMZ retains the designation in a subsequent permit renewal (subject to resizing the WMZ as necessary to accommodate a new or modified discharge); and (2) use of an existing WMZ (without an

expansion of its length) does not trigger the procedural requirements prescribed by statute at 10 V.S.A. § 1252(d). *Town of Cabot*, WQ-00-04, Memorandum of Decision (07/11/00).

* Because the waste management zone, as modified in conjunction with the issuance of the Town of Cabot's Permit, was an existing WMZ, ANR was not required to conduct a permit review process pursuant to 10 V.S.A. § 1252(d)(1)-(8) for new expanded WMZs. *Id.*

* Act 211 of 1991 eliminated what were formerly Class C waters. All former Class C waters became Class B waters. All Class C waters that were previously authorized to receive discharges of wastes or for which a municipality qualified for a discharge permit prior to July 1, 1997, became waste management zones. *Id.*

* Waste management zones were designated by statute in an effort to allow municipalities which had either established discharges or had foreseeable plans to do so to site discharges of waste that prior to treatment were pathogenic to humans with somewhat less of a regulatory burden. *Id.*

* Even if the statute (10 V.S.A. § 1252) authorizing waste management zones anticipates that any WMZ pertains only to a single permitted discharger, the Town of Cabot was not precluded from using an existing WMZ assigned to the Cabot School District's authorized discharge. *Id.*

1723.6 Numeric Criteria

1724. Direct Discharge Permits (10 V.S.A. § 1263)

* In order for the Board to determine whether ANR can lawfully issue a permit which authorizes pollutant limits in excess of those required and authorized by an approved TMDL it must first consider the legal effect of a TMDL, one aspect of which centers on whether permits issued by ANR are required to be consistent with an applicable TMDL. *City of South Burlington and Town of Colchester,* WQ-03-02, Findings of Fact, Conclusions of Law, and Order (12/29/03).

* State and federal law require that a discharge permit be consistent with provisions of an approved TMDL that is clearly applicable to the discharge. *Id.*

* Discharge permits must, at a minimum, incorporate applicable provisions of a TMDL. If a TMDL indicates certain actions must be taken to bring a waterbody into compliance with VWQS, the actions set forth in the TMDL must be incorporated into applicable discharge permits in order to implement the TMDL and commence the process of cleaning up the polluted water. *Id.*

* If an applicant covered by a TMDL is required by the TMDL to comply with an *annual average* pollutant load limit and this annual limit is included in the Discharge Permit, the Discharge Permit is consistent with the TMDL. A Discharge Permit that does not include this annual load limit can be brought into compliance if amended to include the required annual load limit. *Id.*

* The effluent limitations and other provisions of renewal discharge permits are designed to protect a public resource. *City of South Burlington (Bartlett Bay Wastewater Treatment Facility),* WQ-01-04, Second Prehearing Conference Report and Order (04/18/02).

* The holder of a discharge permit for a waste water treatment facility is not required to demonstrate the impacts of the discharge on water quality under flow conditions lower than the design standard of 7Q10. *Town of Cabot*, WQ-00-04, Findings of Fact, Conclusions of Law and Order (09/08/00).

* Where ANR has not yet taken action on a timely application for a discharge permit renewal, the permit that otherwise would have expired remains in full force and effect under 3 V.S.A. § 814(b). *Id.*

* Section 1-04(A)(2) [of the VWQS] requires that "new discharges of waste may be allowed only when… t]here is no alternative method of, or location for, waste disposal that would have a lesser impact on water quality *including the quality of groundwater,* or if there is such an alternative method or location, it would be clearly unreasonable to require its use." Since the project applicant in this case proposed to discharge PCE at non-detectable levels, and partially due to the applicant's land ownership limitations and

engineering constraints, requiring the discharge to be made to a larger water body was an alternative that the Board determined to be unreasonable. *UniFirst Corporation*, WQ-97-07, Findings of Fact, Conclusions of Law and Order (05/07/98).

* Where a discharge to waters includes, even at limited times of the year, a discharge to groundwater, the Board will look to the applicable Groundwater Rule and Protection Strategy to the extent that its limitations are more restrictive than the applicable surface water standard. However, where the Groundwater Rule and Protection Strategy, as here, contains a specific qualification regarding *in situ* remediation of sub-standard groundwater, the Board may not require the numeric enforcement or preventative action limit criteria to be strictly met. Rather, the Board in this case focused upon whether the proposed groundwater impacts should be construed to pose an acceptable risk pursuant to §12-503(6) of the Groundwater Rules effective September 29, 1988. *Id.*

* Board lacked authority under 29 V.S.A. ch. 11 to determine as a preliminary matter in an encroachment permit appeal whether the municipal applicant's effluence discharge should be released from the proposed new outfall or the existing outfall; arguments concerning how such alternatives should be weighed is appropriately raised by the applicant in a discharge permit proceeding. *Appeal of Fred Fayette*, MLP-91-08, Preliminary Ruling and Declaratory Ruling (10/15/91).

* Board lacked authority under 29 V.S.A. ch. 11 or under court consent order to allow the proposed outfall pipe to be used for discharge purposes prior to the issuance of a discharge permit. *Id.*

* 40 C.F.R. §130.32(c) prohibits issuance of a discharge permit if the discharge would conflict with an applicable basin plan. *Pyramid Company of Burlington*, WQ-77-01, Findings of Law, Conclusions of Law and Order (06/02/78).

1724.1 Scope of Jurisdiction / Exemptions

1724.2 *De Novo* Review

* The appeal of a renewal discharge permit to the Board is *de novo*. Thus, the Board may consider relevant facts on appeal that were not considered initially by ANR. *City of South Burlington (Bartlett Bay Wastewater Treatment Facility),* WQ-01-04, Second Prehearing Conference Report and Order (04/18/02).

* Under Vermont's Water Pollution Control Act, 10 V.S.A. § 1269, the Board hears appeals from ANR's permit decisions *de novo*. In a *de novo* appeal, the Board does not review ANR's prior decision but rather hears the matter as if there had been no prior proceedings. One of the principal reasons for the *de novo* review standard under section 1269 is to allow the Board to take a fresh look at the issues presented and to allow the parties to weigh in on matters from which their party status derives. *Hannaford Bros. Co. and Lowes Home Center, Inc.,* WQ-01-01, Memorandum of Decision (06/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

1724.3 Statutory Standards

* The appellant waived the opportunity to contest the absence of daily effluent limitations in a discharge permit by failing to identify this issue in the notice of appeal. *Village of Enosburg Falls*, WQ-03-03, Memorandum of Decision (04/21/04).

* State and federal law require a discharge permit to be consistent with provisions of an approved TMDL that is clearly applicable to the discharge. *Id.*

* The Board modified a discharge permit to contain WQBELs consistent with the Lake Champlain Phosphorous TMDL. *Id.*

* It is not necessary for a TMDL to be fully implemented and for the receiving waters to be restored to compliance with water quality standards before discharges into those waters that are consistent with the TMDL may be permitted. *Id.*

* The Legislature's directions in 10 V.S.A. § 1264 (1998), requiring ANR to consider the unique characteristics of stormwater, do not exempt stormwater from the statutory requirements of 10 V.S.A. § 1263(c) (1998), which authorizes ANR to issue a permit only after determining that the proposed discharge will not reduce the quality of the receiving waters below the classification established for them and will not violate any applicable provisions of state or federal laws or regulations. *Hannaford Bros. Co. and Lowes Home Centers, Inc.* WQ-01-01, Memorandum of Decision (08/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

1724.3.1Federal Clean Water Act

* The federal Clean Water Act, 33 U.S.C. §§ 1251-1387, provides that any discharge of pollutants into waters of the United States requires an NPDES permit. *Citizens for Safe Farms, Inc. (Hinsdale Farm*), WQ-04-02, Memorandum of Decision (10/14/04); *appeal docketed,* No. 2004-510 (11/18/04) (pending).

* Pursuant to 40 C.F.R. § 122.23(b)(6), an Animal Feeding Operation confining from 200 to 699 mature dairy cows is a medium Concentrated Animal Feeding Operation if the farm discharges into regulated waters through a man-made pipe or ditch or if the animals come into contact with regulated waters passing through the operation. *Id.*

* Under the new federal regulations for Concentrated Animal Feeding Operations, 40 C.F.R. § 122.23(a), (d)(1), all CAFOs must apply for an NPDES permit, even those that will discharge only in the event of a large storm. *Id.*

* Although ANR's enforcement discretion is not appealable to the Board, a citizen suit may be filed under section 505 of the Clean Water Act, 33 U.S.C.A. § 1365, if a Large Farm Operation discharges in violation of federal CAFO permitting requirements. *Id.*

* Because the Board held that it does not have jurisdiction over ANR's decision that a Large Farm Operation will not discharge pollutants and will not require a Concentrated Animal Feeding Operation permit, the Board declined to decide whether new federal CAFO regulations apply to the proposed dairy farm at issue in this case. *Id.*

* A general permit condition that expressly excludes from coverage any discharge that will "cause, or have reasonable potential to cause or contribute to, a violation of water quality standards" is consistent with requirements of the federal Clean Water Act, 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d), that point-source discharges must meet state water quality standards and that point-source discharges with a "reasonable potential" to cause or contribute to violations of state water quality standards require water-quality based effluent limitations above and beyond technology-based effluent limitations. *Lowe's Home Centers, Inc.,* WQ-03-15, Findings of Fact, Conclusions of Law, and Order (08/26/04); *appeal docketed*, No. 2004-417 (09/13/04) (pending).

* State and federal law require that a discharge permit be consistent with provisions of an approved TMDL that is clearly applicable to the discharge. *City of South Burlington and Town of Colchester,* WQ-03-02, Findings of Fact, Conclusions of Law, and Order (12/29/03).

* Federal regulation 40 CFR 122.21 (j)(5)(iv), pertaining to WET testing, is only applicable for permit *applications*, not permit *conditions* set by ANR. *Id.*

* USEPA has delegated to Vermont the authority to issue NPDES permits provided that such permits conform with applicable state law and with state water quality standards that have been reviewed and approved by EPA. *Town of Cabot*, WQ-00-04, Findings of Fact, Conclusions of Law and Order (09/08/00).

1724.3.2Vermont Water Pollution Control Act

* If read broadly, Section 1269 of the Vermont Water Pollution Control Act, 10 V.S.A. § 1269, *amended by* Act 115 of 2004, § 29, could authorize the Board to hear an appeal of virtually any act or decision of ANR relating to water pollution control, including decisions not to issue discharge permits and other decisions about the meaning of the law. However, reading section 1269 to authorize an appeal of any act

or decision of ANR to the Board is inconsistent with general principles of administrative law, under which only final agency actions may be appealed. *Citizens for Safe Farms, Inc. (Hinsdale Farm*), WQ-04-02, Memorandum of Decision (10/14/04); *appeal docketed,* No. 2004-510 (11/18/04) (pending).

* ANR acted under the Vermont Water Pollution Control Act of Title 10 when it decided that a discharge permit was not required for a proposed dairy farm. *Id.*

* The Vermont Water Pollution Control Act requires ANR to delegate to the Agency of Agriculture the state's agricultural non-point source pollution control program to the extent doing so is compatible with federal requirements. ANR retains jurisdiction under the Vermont Water Pollution Control Act to issue discharge permits for a Concentrated Animal Feeding Operation. *Id.*

* Vermont implements its delegated authority to administer the federal NPDES permitting program in Vermont through the Vermont Water Pollution Control Act, 10 V.S.A. §§ 1250-1283, *amended by* Act 115 of 2004, and accompanying rules, including the VWQS. *Id.*

* The Legislature's directions in 10 V.S.A. § 1264 (1998), requiring ANR to consider the unique characteristics of stormwater, do not exempt stormwater from the statutory requirements of 10 V.S.A. § 1263(c) (1998), which authorizes ANR to issue a permit only after determining that the proposed discharge will not reduce the quality of the receiving waters below the classification established for them and will not violate any applicable provisions of state or federal laws or regulations. *Hannaford Bros. Co. and Lowes Home Centers, Inc.* WQ-01-01, Memorandum of Decision (08/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* A case involving a discharge into impaired waters is factually distinguishable from the Board's decision in *Home Depot,* which involved a discharge into waters that are not impaired and where, accordingly, the Board accepted application of the treatment and control practices of ANR's Stormwater Procedures as creating a rebuttable presumption of compliance with the VWQS. *Id.*

* The Vermont Water Pollution Control Act applies to all discharges and specifically makes stormwater discharges subject to its provisions. *Hannaford Bros. Co. and Lowes Home Centers, Inc.* WQ-01-01, Memorandum of Decision (06/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* The Vermont Water Pollution Control Permit Regulations provide that a waste load allocation must be performed as necessary to ensure that the discharge authorized by a permit is consistent with applicable water quality standards and that the permit includes appropriate effluent limitations. *Id.*

* In the absence of waste load allocations, discharges into impaired waters may be permitted under Vermont law only if the proposed discharge will not increase the chemical, physical, or biological load of pollutants for which the receiving waters are impaired. *Id.*

1724.3.3Other Law / Presumptions

* Actions taken by ANR pursuant to the Agricultural Non-Point Sources Pollution Reduction Program, 6 V.S.A. §§ 4810-4855, *amended by* Act 149 of 2004, are not appealable to the Board because that statutory program provides for appeals to the Environmental Court from decisions of the Secretary of Agriculture, and limits those appeals to the permit applicant and the Secretary of Agriculture. *Citizens for Safe Farms, Inc. (Hinsdale Farm*), WQ-04-02, Memorandum of Decision (10/14/04); *appeal docketed,* No. 2004-510 (11/18/04) (pending).

* Although ANR has no authority to act under the Agricultural Non-Point Sources Pollution Reduction Program of Title 6 V.S.A., or under the Agricultural Water Quality Act of 6 V.S.A., which are administered by the Agency of Agriculture, ANR retains the exclusive authority under the Vermont Water Pollution Control Act of Title 10 V.S.A. to determine whether any farming operation requires a discharge permit. *Id.*

1725. Indirect Discharge Permits (10 V.S.A. § 1263)

1725.1 Scope of Jurisdiction / Exemptions

1725.2 *De Novo* Review

1725.3 Statutory Standards

1725.3.1Federal Clean Water Act

1725.3.2 Vermont Water Pollution Control Act

* Department of Environmental Conservation lacked authority under 10 V.S.A.§ 1263(c) to require operation of the pretreatment facility at less than its design capacity. *Appeal of ; Farm*, WQ-85-03, Findings of Fact, Conclusions of Law and Order (02/25/86)*In re Lucille Farm Products, Inc.,* S151-86 WnCa (09/11/87).

1725.3.3Other Law / Presumptions

1726. Stormwater Discharge Permits (10 V.S.A. §§ 1263 & 1264)

* A stormwater discharge that contributes in more than a de minimis fashion to a violation of a water quality standard is, by its nature, significant. *Stormwater NPDES Petition*, WQ-03-17, Memorandum of Decision (10/14/04); *appeal docketed,* No. 2004-515 (11/22/04) (pending).

* Discharges of stormwater that increase the mass loading of stormwater pollutants into stormwater-impaired streams cause or contribute to the violations of the VWQS in these waters. *Id.*

* The Board reversed ANR's decision to deny a petition that requested the Agency to require federal discharge permits for stormwater discharges into five stormwater-impaired streams. The Board determined that these discharges contribute to violations of the VWQS and remanded the matter to ANR to establish in the first instance any de minimis threshold for NPDES permitting of the subject stormwater discharges pursuant to ANR's residual designation authority; to establish permit conditions for those discharges above any de minimis threshold; to determine whether to administer the NPDES permits in these watersheds through individual permits, general permits, or some combination of individual and general permits; and to notify stormwater dischargers of their NPDES permitting obligations. *Id.*

* The comprehensive state system for regulating stormwater adopted as Act 140 of 2004 does not supplant NPDES permitting for stormwater discharges in Vermont under the Clean Water Act's residual designation authority. *Id.*

* A person who files a petition relating to the residual designation authority may choose whether the petition represents a request for rule making under the Administrative Procedure Act or a request for an appealable determination under the Vermont Water Pollution Control Act. If the petition is filed under the Vermont Water Pollution Control Act but is in the nature of a request for rule making, that would constitute grounds for denying the petition on its merits. It would not change a permitting petition into a rule making request and deprive the Board of jurisdiction to review the permitting action on appeal. *Stormwater NPDES Petition*, WQ-03-17, Memorandum of Decision (04/01/04).

* Because the petitioners asked ANR to apply its existing residual designation authority to stormwater discharges in five stormwater-impaired watersheds without altering any previous written policy or rule, and because the petitioners have not requested the adoption of a written policy applicable to all discharges of a certain type, the Board found that the petition was not in the nature of a request for rule making. *Id.*

* The Vermont Water Pollution Control Permit Regulations provide that a waste load allocation must be performed as necessary to ensure that the discharge authorized by a permit is consistent with applicable water quality standards and that the permit includes appropriate effluent limitations. *Hannaford Bros. Co. and Lowes Homes Centers, Inc.*, WQ-01-01, Memorandum of Decisions (06/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* In the absence of waste load allocations, discharges into impaired waters may be permitted under Vermont law only if the proposed discharge will not increase the chemical, physical, or biological load of pollutants for which the receiving waters are impaired. *Id.*

* Where receiving waters were not "impaired," applicants' substantial evidence of project compliance with ANR's Stormwater Management Procedures constituted presumptive compliance with 10 V.S.A. §§ 1263 and 1264 and the VWQS, which was not successfully rebutted by project opponent. *Home Depot, USA, Inc. et al.*, WQ-00-06, Findings of Fact, Conclusions of Law, and Order (02/06/01) and Memorandum of Decision re: Motion to Alter (03/16/01); *dismissed with prejudice,* SO-244-01 RcCa (07/11/01).

* Scope of amended permit under appeal was limited to the discharge of stormwater runoff and did not include non-stormwater discharges from a proposed garden center; accordingly, while Board did not review such non-stormwater discharges, it nonetheless concluded that the Secretary of ANR had authority to evaluate such discharges and could impose conditions, including the preparation, filing, and implementation of such pollution prevention plan as necessary to assure the protection of surface and groundwater quality. *Id.*

* The statutory definition of "waste" does not distinguish stormwater from other forms of waste which may not be discharged to the waters of the State of Vermont without a permit; therefore, the applicant was required to obtain a discharge permit pursuant to 10 V.S.A. § 1263(c) absent a statute specifically regulating stormwater discharges. *Pyramid Company of Burlington*, WQ-77-01 (78-1), Findings of Fact, Conclusions of Law and Order (n.d. [06/02/78]).

* Applicant who was denied a discharge permit for stormwater discharge had the option of applying for a temporary pollution permit pursuant to 10 V.S.A. § 1265. *Id.*

1726.1 Scope of Jurisdiction / Exemptions

* ANR's denial of a petition requesting the Agency to require NPDES permits for a class of stormwater discharges was not a declaratory ruling but, rather, a decision appealable to the Board pursuant to 10 V.S.A. §1269. *Stormwater NPDES Petition*, WQ-03-17, Memorandum of Decision (10/14/04); *appeal docketed,* No. 2004-515 (11/22/04) (pending).

* In an appeal of an action or decision taken by ANR, the Board does not merely determine the rights of the parties but also grants relief to the Petitioners and places a legal duty on the Agency. In the instant case, the legal duty arises by the Board's determination that that discharges of stormwater into the waterways involved in the appeal are subject to the NPDES permitting program and its order requiring ANR to establish NPDES permitting conditions for these discharges. *Id.*

* A petition process provided by federal regulation, 40 C.F.R. § 122.26(f)(2), enables persons to formally petition ANR to exercise its residual designation authority and to appeal to the Board if the Agency refuses to act. *Id.*

* The Water Resources Board is authorized by 10 V.S.A. § 1269 to review on appeal Stormwater Discharge Permits and General Permit authorizations that are issued by the Department of Environmental Conservation, Agency of Natural Resources. *CCCH Stormwater Discharge Permits,* WQ-02-11, WQ-03-05, -06, and -07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (10/04/04). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended by Act 109 (2001 Adj. Sess.), eff. May 16, 2002. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* It is not the Board's role to redesign a project for an applicant, but rather to approve, deny, or modify the permit on appeal which authorizes a particular discharge. *Id.*

* The Board has no authority to impose an offset plan for a new discharge of collected stormwater that has not undergone a public review process before ANR and/or where there is insufficient information in the record to assess the effectiveness of such an offset. *Id.*

* The Board lacks authority to stay a discharge permit issued under Chapter 47 of Title 10 and has no separate authority to stay ANR's approval to proceed under a general discharge permit. *Lowe's Home Centers, Inc.,* WQ-03-15, Order Regarding Motion to Stay (06/03/04).

* The Board has jurisdiction under the Vermont Water Pollution Control Act to hear an appeal from ANR's denial of a petition to exercise its residual designation authority to require federal permits for stormwater discharges. *Stormwater NPDES Petition*, WQ-03-17, Memorandum of Decision (04/01/04).

* The Board does not have the statutory authority to stay a stormwater discharge permit. *Vermont Agency of Transportation (Route 7),* WQ-03-01, Memorandum of Decision (08/28/03).

* While the Board does not have enforcement authority, the Board must ensure that the terms of a permit are consistent with the requirements of an administratively final cleanup plan for the receiving waters. *Vermont Agency of Transportation (Route 7),* WQ-03-01, Memorandum of Decision (08/21/03).

* A stormwater discharge permit, issued pursuant to 10 V.S.A. § 1264, is a decision of the secretary appealable under 10 V.S.A. § 1269. *CCCH Stormwater Discharge Permits,* WQ-02-11, Memorandum of Decision (03/21/03).

* Whether or not the ANR considered the waste stream (i.e. all discharges) from a proposed garden center in its review of a stormwater discharge permit for the applicant's mall project, on appeal, as a matter of law, the Board was limited to review of only the discharge of stormwater runoff from the roadways, parking and roofs associated with the project and a consideration of the facilities proposed for its control and treatment prior to discharge to receiving waters. *Home Depot, USA, Inc. et al.*, WQ-00-06, Findings of Fact, Conclusions of Law, and Order (02/06/01) and Memorandum of Decision re: Motion to Alter (03/16/01); *dismissed with prejudice,* SO-244-01 RcCa (07/11/01).

1726.2 *De Novo* Review

* In a *de novo* appeal, the Board does not ordinarily review ANR's prior decision to determine whether the agency acted properly. However, in cases that present matters of first impression, the Board may inquire into the legal and policy considerations that were considered or rejected by ANR to help determine what factual and legal considerations should guide the Board's ultimate decision to affirm, reverse, or modify ANR's act or decision. *CCCH Stormwater Discharge Permits,* WQ-02-11, WQ-03-05, -06, and -07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (10/04/04). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended by Act 109 (2001 Adj. Sess.), eff. May 16, 2002. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Applying its *de novo* standard of review, the Board found that an application for a stormwater permit should be deemed complete under the VWQS as of the date ANR received the complete application. *Hannaford Bros. Co. and Lowes Home Centers, Inc.,* WQ-01-01, Memorandum of Decision (06/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

1726.3 Statutory Standards

* The question of whether a proposed discharge would be new or increased compared to the actual discharge into impaired waters for which a waste load allocation is required but has not yet been established is determined by measuring whether the proposed discharge would increase the mass loading of pollutants of concern into the receiving waters, either directly in the discharge waste stream or indirectly through additional bed and bank scour. Using direct and indirect mass loading reflects the practical and legal necessity of enabling ANR to manage actual discharges into impaired watersheds pending the establishment of waste load allocations. *Hannaford Bros. Co. and Lowes Homes Center, Inc.*, WQ-01-01, Findings of Fact, Conclusions of Law and Order (01/18/02); *aff'd,* No. 280-02 CnCv (04/30/03); *appeal docketed*, No. 2003-539 (12/14/04) (pending). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Compliance with ANR's 1997 Stormwater Procedures is not, in and of itself, sufficient to justify the addition of pollutants of concern into impaired waters for which no waste load allocation has been performed. Once the state has determined that technology practices such as the 1997 Stormwater Procedures are not sufficient to achieve compliance with the water quality standards in a particular water body, a waste load allocation must be conducted and implemented. *Id.*

* Increased loads of pollutants of concern cannot be discharged into an impaired water until such time as a waste load allocation and compliance schedule demonstrate that these additional loads can be assimilated. *Id.*

* The total maximum daily load and waste load-allocation processes involve calculating the total load of a pollutant or pollutants that a receiving water can assimilate without violating water-quality standards and then allocating the total load among the various dischargers in the watershed. This process enables ANR to determine the appropriate stormwater treatment systems for the individual stormwater dischargers, or classes of stormwater dischargers, in the impaired watershed. To settle upon a particular type of stormwater treatment practice for a given discharge into impaired waters in the absence of a waste load allocation would ignore the water-quality-based approach of the waste load allocation process. *Id.*

* The TMDL and waste load-allocation processes are comprehensive and cannot be the responsibility of an individual discharger with no control over other discharges in the impaired watershed. *Id.*

* In the absence of a waste load allocation for an impaired water, the level of treatment for an individual stormwater discharge, or class of stormwater discharges, needed to fully address the impairment cannot be determined. *Id.*

* Applicants for a stormwater discharge permit into impaired waters for which a waste load allocation is required but has not yet been established bear the burden of proving by a preponderance of the evidence that the permit under appeal will not allow a new or increased discharge of measurable and detectable pollutants of concern into the receiving waters. *Id.*

* Additional loads of pollutants of concern into impaired waters for which a waste load allocation is required but has not yet been established cannot be justified by ANR's position that the receiving waters are already so degraded by so many sources that any additional degradation from the proposed discharge will be indistinguishable from all the rest. ANR's evidence failed to account for cumulative impacts and the necessary policy that pollution from multiple sources does not excuse pollution from any one source. *Id.*

* Maintaining groundwater recharge and stream baseflow are critical concerns in stormwater discharge permitting. *Id.*

* The Board's decision in *Pyramid Company*, that a new stormwater discharge into impaired waters cannot be permitted in the absence of a waste load allocation providing for the increased discharge, remains consistent with the current statutory and regulatory scheme for water-quality management in Vermont. *Id.*, Memorandum of Decision (08/29/01).

* A permit cannot be issued for a new stormwater discharge into receiving waters without adequate assimilative capacity. *Id.*, Memorandum of Decision (06/29/01).

* Where receiving waters were not "impaired," applicants' substantial evidence of project compliance with ANR's 1997 Stormwater Management Procedures constituted presumptive compliance with 10 V.S.A. §§ 1263 and 1264 and the 1997 VWQS, which was not successfully rebutted by project opponent. *Home Depot, USA, Inc. et al.*, WQ-00-06, Findings of Fact, Conclusions of Law, and Order (02/06/01) and Memorandum of Decision re: Motion to Alter (03/16/01); *dismissed with prejudice,* SO-244-01 RcCa (07/11/01).

1726.3.1Federal Clean Water Act

* Pursuant to federal regulations 40 C.F.R. § 122.26(a)(1)(v) and (a)(9)(i)(D), stormwater discharges or categories of stormwater discharges that contribute to violations of water quality standards must obtain NPDES permits. *Stormwater NPDES Petition*, WQ-03-17, Memorandum of Decision (10/14/04); *appeal docketed,* No. 2004-515 (11/22/04) (pending).

* Residual designation is an exception to the rule set out in Section 402 of the Clean Water Act that generally prohibits states from requiring permits for discharges composed entirely of stormwater. *Id.*

* State permits are not a perfect substitute for federal permits because the federal NPDES permitting system is subject to federal law and federal regulations, and federal permitting requirements are subject to citizen suits. *Id.*

* Delegated states are responsible for establishing appropriate water-quality based effluent limitations in NPDES permits and otherwise administering their NPDES permitting programs. None of these responsibilities excuse the states from their responsibility under the residual designation authority to require NPDES permits for stormwater dischargers that contribute to violations of state water quality standards or that constitute significant contributors of pollutants to federally regulated waters. *Id.*

* A federal district court decision rejecting the proposition that *all* stormwater discharges are subject to NPDES permitting did not mean that stormwater dischargers are *never* subject to NPDES permitting under the residual designation authority. *Id.*

* The comprehensive state system for regulating stormwater adopted as Act 140 of 2004 does not supplant NPDES permitting under the federal residual designation authority for stormwater discharges in Vermont. *Id.*

* The Clean Water Act's residual designation authority, section 402(p)(2)(E), authorizes ANR, or the Board on appeal, to require dischargers of stormwater who are subject to state stormwater permitting to also obtain NPDES permits. *Id.*

* Discharges of stormwater that increase the mass loading of stormwater pollutants into stormwater-impaired streams, either directly in the discharge waste stream or indirectly through additional bed and bank scour, cause or contribute to the violations of the VWQS and require NPDES discharge permits, unless ANR determines the discharges to be de minimis. *Id.*

* The Board reversed ANR's decision to deny a petition that sought a determination that stormwater discharges into five stormwater-impaired streams contribute to violations of the VWQS and require federal discharge permits. The matter was remanded to ANR to issue NPDES permits to dischargers of stormwater into the subject waterways. *Id.*

* If a category of discharges is appropriate for NPDES permitting, it is the state's responsibility to effectuate the permitting process. It is not the responsibility of citizen petitioners to identify every discharge that might be involved. *Id.*

* A petition process provided by federal regulation, 40 C.F.R. § 122.26(f)(2), enables persons to formally petition ANR to exercise its residual designation authority and to appeal to the Board if the Agency refuses to act. *Id.*

* ANR must establish the conditions of NPDES permits to be issued pursuant to the federal residual designation authority prior to the establishment of comprehensive cleanup plans for the receiving waters. *Id.*

* NPDES permitting under the residual designation authority does not require proof that a discharge is discretely impacting water quality. *Id.*

* A Petition seeking to subject a category of stormwater dischargers to NPDES permitting is not required to identify each discharger within that category. *Id.*

* Federal regulations, 40 C.F.R. § 124.52, do not require that individual notice be given to dischargers who may be subject to general permits; nor do these regulations require individual notice to every discharger within a class of dischargers prior to a determination that these dischargers are subject NPDES permitting under the residual designation authority. *Id.*

* A general permit condition that expressly excludes from coverage any discharge that will "cause, or have reasonable potential to cause or contribute to, a violation of water quality standards" is consistent with requirements of the federal Clean Water Act, 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d), that point-source discharges must meet state water quality standards and that point-source discharges with a "reasonable potential" to cause or contribute to violations of state water quality standards require water-quality based effluent limitations above and beyond technology-based effluent limitations. *Lowe's Home Centers, Inc.,* WQ-03-15, Findings of Fact, Conclusions of Law, and Order (08/26/04); *appeal docketed*, No. 2004-417 (09/13/04) (pending).

* A salient objective of the state water pollution control program is consistency with the Clean Water Act. *Stormwater NPDES Petition*, WQ-03-17, Memorandum of Decision (04/01/04).

* The federal NPDES permitting program represents the legal backdrop for Vermont's permitting system. *Id.*

* The state's laws must be construed with a view to the federal permitting scheme. *Id.*

* Although Vermont does not directly apply federal law, the Vermont Water Pollution Control Act is broadly written and intended to authorize ANR to fully implement the Clean Water Act in Vermont. *Id.*

* States delegated to administer the NPDES permitting system must have the authority to administer certain enumerated provisions of the federal regulations. *Id.*

* Because the parties agreed that federal law did not prohibit the permit under appeal, the Board declined to decide whether and under what circumstances the permit complied with the federal NPDES permitting program. *Hannaford Bros. Co. and Lowes Home Centers*, WQ-01-01, Memorandum of Decision (06/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* In the absence of any provision in the waste load allocation for water quality for the applicant's proposed discharge and in consideration of the fact that the proposed discharge may occur at periods which the actual flow of the lower Winooski River is less than 7Q10, the Board finds no basis for affirmatively determining that the applicable provisions of the Clean Water Act have been met. *Pyramid Company of Burlington,* WQ-77-01 (78-1), Findings of Fact, Conclusions of Law and Order (n.d. [6/02/78]).

1726.3.2Vermont Water Pollution Control Act

* Federal regulations do not by their terms allow state permitting programs to override the residual designation requirements of the federal NPDES permitting program. *Stormwater NPDES Petition*, WQ-03-17, Memorandum of Decision (10/14/04); *appeal docketed,* No. 2004-515 (11/22/04) (pending).

* Delegated states are responsible for establishing appropriate water-quality based effluent limitations in NPDES permits and otherwise administering their NPDES permitting programs. None of these responsibilities excuse the states from their responsibility under the residual designation authority to require NPDES permits for stormwater dischargers that contribute to violations of state water quality standards or that constitute significant contributors of pollutants to federally regulated waters. *Id.*

* The comprehensive state system for regulating stormwater adopted in Act 140 of 2004 does not supplant NPDES permitting under the federal residual designation authority for stormwater discharges in Vermont. *Id.*

* Vermont is not excused from exercising its federally delegated residual designation authority given the continuing absence of any cleanup plan and on-going violations of the VWQS with regard to the receiving waters involved in this appeal. *Id.*

* Although Vermont's stormwater permitting system represents a substantial commitment to addressing stormwater pollution in the state, it is not a substitute for NPDES permitting. *Id.*

* ANR must establish the conditions of NPDES permits to be issued pursuant to the federal residual designation authority prior to the establishment of comprehensive cleanup plans for the receiving waters. *Id.*

* Title 10 V.S.A., Section 1264(g)(1) creates a rebuttable presumption in favor of the permittee that a discharge of collected stormwater runoff authorized by Agency of Natural Resources will not cause or contribute to a violation of the VWQS for the receiving waters, provided that (1) the receiving waters are either not impaired or are impaired by sources other than collected stormwater runoff and (2) the applicant's proposed stormwater runoff collection and treatment system complies with ANR's 2002 Stormwater Treatment Manual. *CCCH Stormwater Discharge Permits,* WQ-02-11, WQ-03-05, -06, and -07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (10/04/04). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended by Act 109 (2001 Adj. Sess.), eff. May 16, 2002. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Pursuant to 10 V.S.A. §§ 1263 and 1264, a discharge approved under a previously issued general permit may only be challenged on the basis of whether that discharge is eligible for coverage under that permit. *Id.*

* To fully consider the effectiveness of a proposed offset, as required by 10 V.S.A. § 1264(f)(3), the Board must be informed of existing conditions, expected reductions in loads, and other information necessary to determine whether an appropriate margin of safety has been allowed to account for "the variability in quantifying the load of pollutants of concern." *Id.*

* 10 V.S.A. §1264 gives the Secretary of ANR broad discretion to issue operational-phase stormwater discharge permits for new discharges of collected stormwater runoff into unimpaired waters if an applicant demonstrates that it has incorporated into the design and management of the project the BMPs set forth in ANR's Stormwater Treatment Manual. *Id.*

* The Secretary of ANR has express authority, pursuant to 10 V.S.A. § 1264(f), to issue individual permits approving the discharge of collected stormwater into waters where a TMDL or waste load allocation has not been prepared and to use offsets to achieve compliance with the VWQS. *Id.*

* Pursuant to 10 V.S.A. § 1264(f)(3), the Secretary of ANR may approve an offset to achieve the "no net increase in load" standard if it is not possible to achieve compliance with this standard "on site." *Id.*

* A person who files a petition relating to the residual designation authority may choose whether the petition represents a request for rule making under the Administrative Procedure Act or a request for an appealable determination under the Vermont Water Pollution Control Act. *Stormwater NPDES Petition*, WQ-03-17, Memorandum of Decision (04/01/04).

* If a petition is filed under the Vermont Water Pollution Control Act but is in the nature of a request for rule making, that would constitute grounds for denying the petition on its merits. It would not change a permitting petition into a rule making request and deprive the Board of jurisdiction to review the permitting action on appeal. *Id.*

* Because the petitioners asked ANR to apply its existing residual designation authority to stormwater discharges in five stormwater-impaired watersheds without altering any previous written policy or rule, and because the petitioners have not requested the adoption of a written policy applicable to all discharges of a certain type, the Board found that the petition was not in the nature of a request for rule making. *Id.*

* Vermont law takes a two-tiered approach to water pollution control. In the first tier, ANR administers the federal NPDES permitting program in Vermont and also uses its own technology-based source controls. The second tier applies to a particular water body when state and federal technology-based controls are not sufficient to attain water quality standards. In tier two, a TMDL must be established and implemented for the receiving waters. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook,* WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (06/02/03). (The law applied in this case was modified by Act 140 of 2004.)

* The Vermont Water Pollution Control Act specifies five years as the maximum period of time within which a source-control alternative must bring waters that receive existing discharges into compliance with the VWQS. This statute also specifies that new discharges that will cause or contribute to violations of the VWQS cannot be authorized. *Id.*

* Vermont's Water Pollution Control Act and ANR's accompanying regulations set forth a system for water pollution administration under which ANR has the authority and duty to ensure that Vermont's waters comply with the VWQS. *Id.*

* Vermont's Water Pollution Control Act specifies five years as the maximum period of time within which a source-control alternative must bring waters that receive existing discharges into compliance with the VWQS. This statute also specifies that new discharges that will cause or contribute to violations of the VWQS cannot be authorized. *Id.*

* Vermont law does not require ANR to use WIPs to address any particular stormwater-impaired waters. WIPs are an option, subject to conditions, one of which is that these WIPs include a schedule reasonably designed to bring the receiving waters into compliance with the VWQS within five years. If ANR cannot design a WIP that will satisfy that requirement, then a WIP cannot be issued, and ANR must establish and implement a TMDL for the receiving waters. *Id.*

* ANR may consider administrative factors, just as ANR may consider economic factors, in selecting reasonable alternatives for source-control programs and TMDLs. Like economic factors, administrative factors, however valid, may be considered in developing cleanup plans only to the extent these plans include a schedule of compliance reasonably designed to achieve and maintain the classifications and criteria of the VWQS as required by Vermont law. *Id.*

* The scope of ANR's regulatory authority does not justify the issuance of a WIP that fails to provide that the receiving waters will comply with the VWQS. ANR's authority and responsibility extend to nonpoint-source discharges into impaired waters, and a WIP may include appropriate nonpoint-source management strategies. Both WIPs and the TMDL process may require ANR to look beyond structural controls for point-source discharges. *Id.*

* ANR's authority extends not only to discharges, but also to the activities and conditions that cause discharges. *Id.*

* Vermont's TMDL process rests on ANR's responsibility and authority with respect to both point-source and nonpoint-source pollution. *Id.*

* ANR's authority with respect to nonpoint-source management includes permitting and enforcement, but these are not the only strategies available to ANR. Education, technical and financial assistance, and coordination with citizens, municipalities and regional planning commissions may be effective strategies in nonpoint-source pollution management. ANR is not required to apply its permitting authority to every nonpoint-source discharge, just as ANR does not apply its permitting authority to every point-source discharge. *Id.*

* The Vermont Water Pollution Control Act calls upon ANR to integrate its management of point-source and nonpoint-source stormwater discharges. *Id.*

* ANR may issue general permits to nonpoint sources. *Id.*

* ANR's authority to include pollution offsets in WIPs is not limited to trading between point sources. *Id.*

* ANR may use a WIP to manage and control nonpoint sources of stormwater pollution, provided the impairment of the receiving waters is at least partly caused by collected stormwater runoff. *Id.*

* The Legislature's directions in 10 V.S.A. § 1264 (1998), requiring ANR to consider the unique characteristics of stormwater, do not exempt stormwater from the statutory requirements of 10 V.S.A. § 1263(c) (1998), which authorizes ANR to issue a permit only after determining that the proposed discharge will not reduce the quality of the receiving waters below the classification established for them

and will not violate any applicable provisions of state or federal laws or regulations. *Hannaford Bros. Co. and Lowes Home Centers, Inc.* WQ-01-01, Memorandum of Decision (08/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* The Vermont Water Pollution Control Act applies to all discharges and specifically makes stormwater discharges subject to its provisions. *Hannaford Bros. Co. and Lowes Home Centers, Inc.* WQ-01-01, Memorandum of Decision (06/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* The receiving waters for the project discharge were not "impaired" waters listed on the Clean Water Act's 303(d) list of State impaired waters, and Board therefore evaluated project for conformance with 1997 VWQS based on compliance with design standards in ANR's 1997 Stormwater Management Procedures. *Home Depot, USA, Inc. et al.*, WQ-00-06, Findings of Fact, Conclusions of Law, and Order (02/06/01) and Memorandum of Decision re: Motion to Alter (03/16/01); *dismissed with prejudice,* SO-244-01 RcCa (07/11/01).

* Where receiving waters were not "impaired," applicants' substantial evidence of project compliance with ANR's 1997 Stormwater Management Procedures constituted presumptive compliance with 10 V.S.A. §§ 1263 and 1264 and the 1997 VWQS, which was not successfully rebutted by project opponent. *Id.*

1726.3.3General Permits

* Pursuant to 10 V.S.A. §§ 1263 and 1264, a discharge approved under a previously issued general permit may only be challenged on the basis of whether that discharge is eligible for coverage under that permit. *CCCH Stormwater Discharge Permits,* WQ-02-11, WQ-03-05, -06, and -07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (10/04/04). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended by Act 109 (2001 Adj. Sess.), eff. May 16, 2002. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Without persuasive evidence in the record that a project is ineligible for coverage under a General Permit, the Board's review of authorizations to discharge under a previously issued general permit is limited by 10 V.S.A. § 1263(b) to whether the discharge complies with the terms and conditions of that permit. *Id.*

* Rule13.12 of the Water Pollution Control Regulations provides in part that, when the Secretary of ANR requires a person to apply for an individual permit who is already covered by a general permit, the general permit coverage remains in force until the individual permit is issued. *Lowe's Home Centers, Inc.,* WQ-03-15, Emergency Motion to Clarify (09/03/04).

* In an appeal of ANR's approval for coverage under a general permit, the applicant bears the burden of proving by a preponderance of the evidence that its construction discharge complies with the terms and conditions of the general permit *Lowe's Home Centers, Inc.,* WQ-03-15, Findings of Fact, Conclusions of Law, and Order (08/26/04); *appeal docketed*, No. 2004-417 (09/13/04) (pending).

* The Board's determination that a construction discharge does not comply with the terms of a general permit does not foreclose the applicant from applying for an individual permit.

* A general permit condition that expressly excludes from coverage any discharge that will "cause, or have reasonable potential to cause or contribute to, a violation of water quality standards" is consistent with requirements of the federal Clean Water Act, 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d), that point-source discharges must meet state water quality standards and that point-source discharges with a "reasonable potential" to cause or contribute to violations of state water quality standards require water-quality based effluent limitations above and beyond technology-based effluent limitations. *Id.*

* The Board lacks authority to stay a discharge permit issued under Chapter 47 of Title 10 and has no separate authority to stay ANR's approval to proceed under a general discharge permit. *Lowe's Home Centers, Inc.,* WQ-03-15, Order Regarding Motion to Stay (06/03/04).

* An appeal from ANR's Notice of Intent to issue coverage under a previously existing General Permit is not an attack on the General Permit itself but, rather, asks the Board to determine whether the discharge at issue complies with the terms and conditions of the General Permit. If it does not meet those terms and conditions, the discharge cannot be covered under the General Permit. *Lowe's Home Centers, Inc*., WQ-03-15, Memorandum of Decision (11/26/03).

* A construction site stormwater discharge into impaired waters that is not authorized as a "Limited Duration Activity" under the VWQS is a violation of the VWQS and is, therefore, not covered under an existing General Permit that, by its own terms, does not cover discharges that cause or have reasonable potential to cause or contribute to, a violation of water quality standards. *Id.*

* ANR may issue general permits to nonpoint sources. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook*, WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (06/02/03). (The law applied in this case was modified by Act 140 of 2004.)

* The baseline for determining whether a permitted discharge is new or increased is the actual discharge from a particular site. ANR may continue to permit and otherwise manage existing discharges pending the development of an effective cleanup plan. Thus, ANR may undertake efforts to restore impaired waters prior to issuing a WIP, if that would be possible for those waters, or establishing TMDLs. *Id.*

1726.3.3.1 WIPs

* Vermont law does not require ANR to use WIPs to address any particular stormwater-impaired waters. WIPs are an option, subject to conditions, one of which is that these WIPs include a schedule reasonably designed to bring the receiving waters into compliance with the VWQS within five years. If ANR cannot design a WIP that will satisfy that requirement, then a WIP cannot be issued, and ANR must establish and implement a TMDL for the receiving waters. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook,* WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (06/02/03). (The law applied in this case was modified by Act 140 of 2004.)

* WIPs represent a source-control alternative to the TMDL process. *Id.*

* The baseline for determining whether a permitted discharge is new or increased is the actual discharge from a particular site. ANR may continue to permit and otherwise manage existing discharges pending the development of an effective cleanup plan. Thus, ANR may undertake efforts to restore impaired waters prior to issuing a WIP, if that would be possible for those waters, or establishing TMDLs. *Id.*

* WIPs represent a narrow exception to the longstanding requirement of pollutant budgeting for impaired waters. *Id.*

* The scope of ANR's regulatory authority does not justify the issuance of a WIP that fails to provide that the receiving waters will comply with the VWQS. ANR's authority and responsibility extend to nonpoint-source discharges into impaired waters, and a WIP may include appropriate nonpoint-source management strategies. Both WIPs and the TMDL process may require ANR to look beyond structural controls for point-source discharges. *Id.*

* The plain meaning of 10 V.S.A. § 1264(f)(1) is that Watershed Improvement Permits must be reasonably designed to achieve compliance with the uses and criteria of the VWQS in the waters to which they apply within five years. ANR's position that this statute merely requires the construction of certain treatment systems within five years is not only contrary to the plain meaning of the statute, but also contrary to the balance of the Vermont Water Pollution Control Act, Vermont's associated regulations, the federal Clean Water Act, and associated federal regulations. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook,* WQ-02-04, WQ-02-05, WQ-02-06 and WQ-02-07 (Consol.), Memorandum of Decision (12/19/02) (dissenting opinion).

* ANR's admission that it could not determine what measures are necessary to achieve compliance with the water quality standards or whether the BMP implementation required by the Watershed Improvement Permits on appeal would be enough to meet the water quality standards indicated that these permits did

not comply with the requirement of 10 V.S.A. § 1269 that Watershed Improvement Permits must be reasonably designed to assure attainment of the water quality standards in the receiving waters. *Id.*

* A motion for summary judgment should be granted where the undisputed facts indicated that four Watershed Improvement Permits violated the plain meaning of 10 V.S.A § 1264(f)(1). *Id.*

1726.3.3.2Construction

***** An anti-degradation analysis is not required for construction-phase stormwater discharges that (1) are eligible for coverage under a General Permit, (2) comply with the terms and conditions of the General Permit, and (3) are duly authorized by ANR pursuant to that coverage. *CCCH Stormwater Discharge Permits,* WQ-02-11, WQ-03-05, -06, and -07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (10/04/04). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended by Act 109 (2001 Adj. Sess.), eff. May 16, 2002. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Supported by credible evidence that the applicant's plans included appropriate and effective implementation of phasing, sequencing, and Best Management Practices during the construction phase of a project, the Board concluded that associated stormwater discharges comply with the terms and conditions of the General Permit under which ANR authorized the discharges. *Id.*

1726.3.3.3MS4 Permits

* ANR has the burden of proof to show that a general MS4 permit should issue. The burden of proof assigned to ANR includes both the initial burden of production at any hearing on the merits and the burden of persuasion by a preponderance of the evidence. *Small Municipal Separate Storm Sewer Systems (MS4s)*, WQ-03-08, Prehearing Conference Report and Order (07/09/03).

1726.3.4Individual Permits

* Rule 13.12 of the Water Pollution Control Regulations provides in part that, when the Secretary of ANR requires a person to apply for an individual permit who is already covered by a general permit, the general permit coverage remains in force until the individual permit is issued. *Lowe's Home Centers, Inc.,* WQ-03-15, Emergency Motion to Clarify (09/03/04).

* The Board's determination that a construction discharge does not comply with the terms of a general permit does not foreclose the applicant from applying for an individual permit. *Lowe's Home Centers, Inc.,* WQ-03-15, Findings of Fact, Conclusions of Law, and Order (08/26/04); *appeal docketed*, No. 2004-417 (09/13/04) (pending).

* Testimony with regard to construction site runoff, which would require a separate permit, was irrelevant in an appeal from a stormwater discharge permit issued for the operation of a commercial complex. *Hannaford Bros. Co. and Lowes Home Centers*, WQ-01-01, Second Prehearing Conference Report and Order (12/03/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

1726.3.4.1Operational Permits

***** 10 V.S.A. §1264 gives the Secretary of ANR broad discretion to issue operational-phase stormwater discharge permits for new discharges of collected stormwater runoff into unimpaired waters if an applicant demonstrates that it has incorporated into the design and management of the project the BMPs set forth in ANR's Stormwater Treatment Manual. *CCCH Stormwater Discharge Permits,* WQ-02-11, WQ-03-05, -06, and -07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (10/04/04). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended by Act 109 (2001 Adj. Sess.), eff. May 16, 2002. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Evidence of the historical presence of certain rare, threatened and endangered species, alone, without facts to support a finding that operational discharges from the project would actually result in a new or increased discharge causing or contributing to a violation of the VWQS, is not enough to convince the

Board that an Operational-Phase Permit should be remanded to the Secretary of ANR for further proceedings to determine whether those species constitute "existing uses" in need of protection. *Id.*

* If the Board determines that the operational phase of a project will not result in an increased discharge of pollutants of concern, remand to ANR for an anti-degradation analysis and an inventory of "existing uses" is not appropriate. *Id.*

* In regard to waters not listed on the 2002 § 303(d) List, compliance with ANR's Stormwater Treatment Manual as required by 10 V.S.A. §1264(e)(1) is sufficient to create a rebuttable presumption under 10 V.S.A. § 1264(h) that discharges from the operational phase of a project will not cause or contribute to a violation of the VWQS, including the state anti-degradation policy expressed in VWQS § 1-03. *Id.*

* Applying the law in effect on December 12, 2001, the Board held that the stormwater permit at issue must comply with ANR's 1997 Stormwater Procedures, at a minimum, with respect to pollutants that are not causing or contributing to the impairment of the receiving waters. In addition, in the absence of a pollutant load allocation, the permit must include either a five-year schedule reasonably designed to bring the impaired receiving waters into compliance with the VWQS or provisions to ensure that the operational phase of the project will not discharge new or increased pollutants of concern into the receiving waters. *Vermont Agency of Transportation (Route 7),* WQ-03-01, Memorandum of Decision (08/21/03).

1726.3.4.2Construction Permits

***** Pursuant to the VWQS, § 2-03(B)(1), construction that may result in unavoidable short-term non-compliance with criteria for turbidity, aquatic biota, wildlife, and aquatic habitat may be authorized as being in compliance with the VWQS if all requirements of that provision are met. *CCCH Stormwater Discharge Permits,* WQ-02-11, WQ-03-05, -06, and -07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (10/04/04). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended by Act 109 (2001 Adj. Sess.), eff. May 16, 2002. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* After determining that the applicant met all requirements of the limited duration activity exception provided in § 2-03(B)(1) of the VWQS, the Board concluded that the construction project's non-compliance with the VWQS would result in only a short-term and de minimis impact on water quality given the particular safeguards imposed by the Secretary of ANR and, in the absence of credible specific evidence to the contrary, the Board also concluded that the receiving waters' existing uses will be maintained and protected. Thus, the Board affirmed ANR's issuance of an Individual NPDES permit authorizing the construction-phase stormwater discharges of the project. *Id.*

1726.3.5Other Law / Presumptions

* Title 10 V.S.A., Sections 1264(e), (g)(1)(A), and (h), creates a rebuttable presumption in favor of the permittee that new discharges of collected stormwater runoff authorized by ANR will not cause or contribute to a violation of the VWQS, provided that (1) the receiving waters are either not impaired or are impaired by sources other than collected stormwater runoff and (2) the applicant's proposed stormwater runoff collection and treatment system complies with ANR's 2002 Stormwater Treatment Manual. *CCCH Stormwater Discharge Permits,* WQ-02-11, WQ-03-05, -06, and -07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (10/04/04). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended by Act 109 (2001 Adj. Sess.), eff. May 16, 2002. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Application of the plain meaning doctrine suggests that the rebuttable presumption provided in 10 V.S.A. § 1264(g)(1)(A) and (h) extends to compliance with the state's anti-degradation policy expressed in VWQS § 1-03, unless the presumption is successfully rebutted on appeal. *Id.*

* Even where the applicant can demonstrate application of the best control and treatment practices set forth in ANR's Stormwater Treatment Manual, under certain circumstances, the presumption of compliance with the VWQS could be successfully rebutted with credible evidence demonstrating, for example, increases in sediment and other pollutants attributable to a project's collected stormwater discharges into unimpaired waters to the detriment of existing aquatic biota and wildlife or the habitat that

supports such biota and wildlife. Under such circumstances, the Board would likely remand the matter to ANR for further inventory and analysis of the receiving waters under Anti-degradation Tiers One and Two and for consideration of the impacts of discharges of sediment upon both "existing" and "designated" uses. *Id.*

* Under certain circumstances, 10 V.S.A. § 1264(g)(1)(A) and (h) provide a rebuttable presumption in favor of a permittee that a discharge of collected stormwater runoff does not cause or contribute to a violation of the VWQS for the receiving waters. *Id.*

* In regard to waters not listed on the 2002 Section 303(d) List, compliance with ANR' 2002 Stormwater Treatment Manual as required by 10 V.S.A. §1264(e)(1) is sufficient to create a rebuttable presumption under 10 V.S.A. § 1264(h) that discharges from the operational phase of a project will not cause or contribute to a violation of the VWQS, including the state anti-degradation policy expressed in VWQS § 1-03. *Id.*

* The receiving waters for the project discharge were not "impaired" waters listed on the Clean Water Act's 303(d) list of State impaired waters, and Board therefore evaluated project for conformance with 1997 VWQS based on compliance with design standards in ANR's 1997 Stormwater Management Procedures. *Home Depot, USA, Inc. et al.*, WQ-00-06, Findings of Fact, Conclusions of Law, and Order (02/06/01) and Memorandum of Decision re: Motion to Alter (03/16/01); *dismissed with prejudice,* SO-244-01 RcCa (07/11/01).

* Where receiving waters were not "impaired," applicants' substantial evidence of project compliance with ANR's 1997 Stormwater Management Procedures constituted presumptive compliance with 10 V.S.A. §§ 1263 and 1264 and the 1997 VWQS, which was not successfully rebutted by project opponent. *Id.*

* The VWQS do not directly address the issue of how to manage discharges of pollutants of concern into water quality limited segments in the absence of a TMDL or waste load allocation. *Hannaford Bros. Co. and Lowes Home Centers*, WQ-01-01, Second Prehearing Conference Report and Order (12/03/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Although ANR may develop means of treating and controlling stormwater discharges that are different from the means employed to treat and control discharges of sanitary and industrial wastes, ANR may not substitute its stormwater treatment and control practices for the legal requirement that the surface waters of this state comply with the classification established for them and the VWQS. *Hannaford Bros. Co. and Lowes Home Centers, Inc.* WQ-01-01, Memorandum of Decision (08/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* The Legislature's directions in 10 V.S.A. § 1264 (1998), requiring ANR to consider the unique characteristics of stormwater, do not exempt stormwater from the statutory requirements of 10 V.S.A. § 1263(c) (1998), which authorizes ANR to issue a permit only after determining that the proposed discharge will not reduce the quality of the receiving waters below the classification established for them and will not violate any applicable provisions of state or federal laws or regulations. *Id.*

* A case involving a discharge into impaired waters is factually distinguishable from the Board's decision in *Home Depot,* which involved a discharge into waters that are not impaired and where, accordingly, the Board accepted application of the treatment and control practices of ANR's Stormwater Procedures as creating a rebuttable presumption of compliance with the *VWQS*. *Id.*

* The fact that the receiving waters did not comply with the VWQS and were listed as water quality limited pursuant to section 303(d) of the Clean Water Act, 33 U.S.C.A. § 1313(d), was sufficient to rebut any presumption of compliance with the VWQS ensuing from conformance of the discharge with the treatment and control practices of ANR's 1997 Stormwater Procedures. *Hannaford Bros. Co. and Lowes Home Centers, Inc.,* WQ-01-01, Memorandum of Decision (06/29/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* The Board did not decide whether a discharge conforming with any updated stormwater procedures that ANR may develop can be afforded either a permissible inference or a presumption of compliance with the VWQS. Nor did the Board decide how any such presumption would be rebutted in a case involving a discharge into waters that are not impaired. *Id.*

* Where receiving waters were not "impaired," applicants' substantial evidence of project compliance with ANR's 1997 Stormwater Management Procedures constituted presumptive compliance with 10 V.S.A. §§ 1263 and 1264 and the 1997 VWQS, which was not successfully rebutted by project opponent. *Home Depot, USA, Inc. et al.*, WQ-00-06, Findings of Fact, Conclusions of Law, and Order (02/06/01) and Memorandum of Decision re: Motion to Alter (03/16/01); *dismissed with prejudice,* SO-244-01 RcCa (07/11/01).

1727. Temporary Pollution Permits (10 V.S.A. § 1265)

* Applicant who was denied a discharge permit for stormwater discharge had the option of applying for a temporary pollution permit pursuant to 10 V.S.A. § 1265. *Pyramid Company of Burlington*, WQ-77-01 (78-1), Findings of Fact, Conclusions of Law and Order (n.d. [06/02/78]).

1728. Offsets

* To fully consider the effectiveness of a proposed offset, as required by 10 V.S.A. § 1264(f)(3), the Board must be informed of existing conditions, expected reductions in loads, and other information necessary to determine whether an appropriate margin of safety has been allowed to account for "the variability in quantifying the load of pollutants of concern." *CCCH Stormwater Discharge Permits,* WQ-02-11, WQ-03-05, -06, and -07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (10/04/04). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended by Act 109 (2001 Adj. Sess.), eff. May 16, 2002. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* The Board has no authority to impose an offset plan for a new discharge of collected stormwater that has not undergone a public review process before ANR and/or where there is insufficient information in the record to assess the effectiveness of such an offset. *Id.*

1729. Aquatic Nuisance Control Permits (10 V.S.A. § 1263(a))

* Appellant was granted "conditional" standing where party opponent asserted that Appellant could not possibly demonstrate injury to a protected interest; the Board ultimately dismissed the appeal because the party opponent offered unrebutted evidence that there was no hydrologic nexus between the body of water to be treated by an aquatic pesticide and the Appellant's source of drinking water. *Paul Dannenberg*, WQ-99-07 Findings of Fact, Conclusions of Law and Order (12/29/00).

* In order for the Board to affirm Secretary's issuance of an Aquatic Nuisance Control Permit, applicant must demonstrate by a preponderance of the evidence and the Board must determine *de novo* that a permit should be granted consistent with the statutory standards of 10 V.S.A. §1263a(e). *Aquatic Nuisance Control Permit, #C93-01-Morey, Lake Morey, Town of Fairlee*, WQ-93-04, Findings of Fact, Conclusions of Law, and Order (04/12/94); *aff'd, In re Aquatic Nuisance Control Permit #C93-01-Morey,* Docket No. 94-5-94-Oecv, Opinion and Order (02/06/95).

* The lampricide treatment of the Poultney River was authorized by the 1991 permit amendment; the appellant had thirty days to appeal that permit, but it did not; therefore, the decision to treat the river was final and the only issues properly before the Board in 1992 were the merits of the five modifications authorized by the 1992 permit amendment. *Appeal of Poultney River Committee*, WQ-92-04, Preliminary Order (08/11/92); *aff'd, Poultney River Committee*, Vt. No. 94-165 (06/26/95).

1729.1 Scope of Jurisdiction / Exemptions

* The application of the common law public trust doctrine is within the authority of the Board only when there is a legislative directive to consider it. Absent such express authority, the Board has declined to consider the public trust doctrine in its proceedings, deferring instead to the judicial and legislative

branches of government to work out the implications of this doctrine in a contested case. *Aquatic Nuisance Control Permit, #C93-01-Morey*, WQ-93-04, Memorandum of Decision on Preliminary Issues (09/24/93); *aff'd, In re Aquatic Nuisance Control Permit #C93-01-Morey*, Docket No. 94-5-94-OeCv, Opinion and Order (02/06/95). (*But see* Dissenting Opinion.)

* Board could not find that there was a public benefit to be achieved from application of aquatic pesticide. *Id.*

1729.2 *De Novo* Review

* Despite being a *de novo* appeal, only those provisions of §1263a(e) that are raised by an appellant in its notice of appeal are within the ambit of the appeal. Findings with respect to the subsections of §1263a(e) that are not appealed are binding upon the applicant/permittee. *Aquatic Nuisance Control Permit, #C93-01-Morey,* WQ-93-04, Findings of Fact, Conclusions of Law, and Order (04/12/94); *aff'd, In re Aquatic Nuisance Control Permit #C93-01-Morey*, Docket No. 94-5-94-Oecv, Opinion and Order (02/06/95).

1729.3 Statutory Standards (10 V.S.A. § 1263)

* Board must make affirmative findings with respect to five statutory factors pursuant to §1263a(e)(1)-(5) in order to issue a permit for an aquatic pesticide: (1) there is no reasonable nonchemical alternative available; (2) there is acceptable risk to the nontarget environment; (3) there is negligible risk to public health; (4) a long-range management plan has been developed which incorporates a schedule of pesticide minimization; and (5) there is a public benefit to be achieved from the application of a pesticide or, in the case of a pond located entirely on a landowner's property, no undue adverse effect upon the public good. *Aquatic Nuisance Control Permit, #C93-01-Morey*, WQ-93-04, Findings of Fact, Conclusions of Law, and Order (04/12/94); *aff'd, In re Aquatic Nuisance Control Permit #C93-01-Morey*, Docket No. 94-5-94-Oecv, Opinion and Order (02/06/95). (*But see* Dissenting Opinion.)

* In contrast to non-chemical alternatives for aquatic nuisance control (which must merely pose acceptable risk to non-target species, negligible risk to public health, and have no undue adverse effect upon the public good), applications for the use of aquatic pesticides must demonstrate that in addition, there is a public benefit to be achieved from application of the chemical treatment and that there is no reasonable non-chemical alternative available. *Id.*

1729.3.1Federal Clean Water Act

1729.3.2Vermont Water Pollution Control Act

1729.3.3Other Law / Presumptions

1730. Emergency Permits (10 V.S.A. § 1268)

1731. Waste Load Allocations / Total Maximum Daily Loads

***** Delegated states are responsible for establishing water quality standards and for allocating pollutant loads in the TMDL process. *Stormwater NPDES Petition*, WQ-03-17, Memorandum of Decision (10/14/04); *appeal docketed,* No. 2004-515 (11/22/04) (pending).

* The Secretary of ANR has express authority, pursuant to 10 V.S.A. § 1064(f), to issue individual permits approving the discharge of collected stormwater into waters where a TMDL or waste load allocation has not been prepared and to use offsets to achieve compliance with the VWQS. *CCCH Stormwater Discharge Permits,* WQ-02-11, WQ-03-05, -06, and -07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (10/04/04). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended by Act 109 (2001 Adj. Sess.), eff. May 16, 2002. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* To prevail in an appeal involving waters impaired for sediment and pathogens due to stormwater where no approved TMDL has been adopted for those waters, the applicant must demonstrate that the proposed project will not increase the sediment load beyond existing conditions. *Id.*

* It is a bedrock principle of Vermont law that every discharge into Vermont's waters must conform with the VWQS and that a discharge permit cannot be issued for a new or increased discharge of pollutants of concern into impaired waters in the absence of a valid plan reasonably assuring that the receiving waters will be able to assimilate these pollutant loads. *Id.*

* A discharge of sediment into waters that are impaired by sediment, and for which no TMDL has been established, has a reasonable potential to contribute to a violation of the VWQS and is therefore ineligible for coverage under a general permit that, by its terms, excludes such a discharge from coverage. *Lowe's Home Centers, Inc.,* WQ-03-15, Findings of Fact, Conclusions of Law, and Order (08/26/04); *appeal docketed*, No. 2004-417 (09/13/04) (pending).

* State and federal law require a discharge permit to be consistent with provisions of an approved TMDL that is clearly applicable to the discharge. *Village of Enosburg Falls*, WQ-03-03, Memorandum of Decision (04/21/04).

* It is not necessary for a TMDL to be fully implemented and for the receiving waters to be restored to compliance with water quality standards before discharges into those waters that are consistent with the TMDL may be permitted. *Id.*

* State and federal law require that a discharge permit be consistent with provisions of an approved TMDL that is clearly applicable to the discharge. *City of South Burlington and Town of Colchester,* WQ-03-02, Findings of Fact, Conclusions of Law, and Order (12/29/03).

* Because the Lake Champlain Phosphorus TMDL identifies reductions in phosphorous loading that are a necessary to bring Lake Champlain into compliance with the VWQS for phosphorous, conditions in a Discharge Permit that are not as stringent as those called for in the LCP-TMDL will not ensure compliance with the VWQS. *Id.*

* Discharge permits must, at a minimum, incorporate applicable provisions of a TMDL. If a TMDL indicates certain actions must be taken to bring a waterbody into compliance with VWQS, the actions set forth in the TMDL must be incorporated into applicable discharge permits in order to implement the TMDL and commence the process of cleaning up the polluted water. *Id.*

* If an applicant covered by a TMDL is required by the TMDL to comply with an *annual average* pollutant load limit and this annual limit is included in the Discharge Permit, the Discharge Permit is consistent with the TMDL. A Discharge Permit that does not include this annual load limit can be brought into compliance if amended to include the required annual load limit. *Id.*

* In order for the Board to determine whether ANR can lawfully issue a permit which authorizes pollutant limits in excess of those required and authorized by an approved TMDL it must first consider the legal effect of a TMDL, one aspect of which centers on whether permits issued by ANR are required to be consistent with an applicable TMDL. *Id.*

* Applying the law in effect on December 12, 2001, the Board held that the stormwater permit at issue must comply with ANR's 1997 Stormwater Procedures, at a minimum, with respect to pollutants that are not causing or contributing to the impairment of the receiving waters. In addition, in the absence of a pollutant load allocation, the permit must include either a five-year schedule reasonably designed to bring the impaired receiving waters into compliance with the VWQS or provisions to ensure that the operational phase of the project will not discharge new or increased pollutants of concern into the receiving waters. *Vermont Agency of Transportation (Route 7)*, WQ-03-01, Memorandum of Decision (08/21/03).

* Vermont law takes a two-tiered approach to water pollution control. In the first tier, ANR administers the federal NPDES permitting program in Vermont and also uses its own technology-based source controls. The second tier applies to a particular water body when state and federal technology-based controls are not sufficient to attain water quality standards. In tier two, a TMDL must be established and

implemented for the receiving waters. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook*, WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (06/02/03). (The law applied in this case was modified by Act 140 of 2004.)

* ANR may consider administrative factors, just as ANR may consider economic factors, in selecting reasonable alternatives for source-control programs and TMDLs. Like economic factors, administrative factors, however valid, may be considered in developing cleanup plans only to the extent these plans include a schedule of compliance reasonably designed to achieve and maintain the classifications and criteria of the VWQS as required by Vermont law. *Id.*

* The iterative application of BMPs may be appropriate within the TMDL process, but not as a substitute for that process. *Id.*

* Adaptive management makes it possible to establish and implement TMDLs, even in the face of scientific uncertainty, by adjusting the use of BMPs and other components of TMDLs based on monitoring and experience. *Id.*

* A source-control plan, such as WIP, may be used as an alternative to a TMDL under specified conditions. *Id.*

* Every discharge into Vermont's waters must conform with the VWQS, and a discharge permit cannot be issued for a new or increased discharge of pollutants of concern into impaired waters in the absence of a valid plan reasonably assuring that the receiving waters will be able to assimilate these pollutant loads. *Id.*

* The baseline for determining whether a permitted discharge is new or increased is the actual discharge from a particular site. ANR may continue to permit and otherwise manage existing discharges pending the development of an effective cleanup plan. Thus, ANR may undertake efforts to restore impaired waters prior to issuing a WIP, if that would be possible for those waters, or establishing TMDLs. *Id.*

* Not only the existing condition of a water body, but also its anticipated future, condition controls whether a TMDL is required. *City of South Burlington (Bartlett Bay Wastewater Treatment Facility)*, WQ-01-04, Second Prehearing Conference Report and Order (04/18/02).

* Under the circumstances of this case, the Board does not consider the uses impaired, but rather takes into account the nature and quantity of the pollutants impairing them in determining whether a proposed discharge of pollutants of concern may be permitted when no waste load allocation has been established. *Hannaford Bros. Co. and Lowes Homes Center, Inc.*, WQ-01-01, Findings of Fact, Conclusions of Law and Order (01/18/02); *aff'd,* No. 280-02 CnCv (04/30/03); *appeal docketed*, No. 2003-539 (12/14/04) (pending). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Where technology-based treatment and control practices are not sufficient to achieve compliance with the VWQS, ANR must establish a waste load allocation for the affected waters. ANR may then determine the appropriate level of treatment for stormwater discharges, along with suitable water-quality-based effluent limitations for other discharges into the affected waters. *Id.*

* If the receiving waters fail to comply with the VWQS and the state does not have waste load allocations in place, discharges may be permitted provided they do not increase the actual discharges of pollutants that are causing the impairment. *Id.*

* Using the actual discharge from the site as the baseline for measuring a new or increased discharge of pollutants of concern into impaired waters reflects the intention of the Board and the necessity of the law to enable ANR to manage and improve actual discharges into impaired watersheds for which a waste load allocation has not been established. *Id.*

* The use of actual discharges as a cap on new or increased discharges applies only while waste load allocations or other cleanup plans are being established. Holding the line at actual discharges does not preclude ANR from authorizing and enforcing appropriate treatment technologies that would reduce the

level of the pollutants of concern discharging from a particular site. Nor does the prohibition against permitting the discharge of additional pollutants of concern into impaired waters in the absence of a cleanup plan affect whether the discharge of those pollutants may be increased or decreased from a particular site or group of sites in the waste load allocation process. *Id.*

* Demonstrating that the proposed discharge into impaired waters for which a necessary waste load allocation had not been established would be sufficient to demonstrate that the proposed discharge would not increase the chemical, physical, or biological impacts of the pollutants for which the receiving waters are impaired. *Id.*

* Individual dischargers generally will not have control over all the discharges into the receiving waters. Such dischargers are thus not in a position to develop a pollutant budget that would establish an appropriate discharge from their project. The responsibility of comprehensively assessing the receiving waters lies with ANR. *Id.*

* The question of whether a proposed discharge would be new or increased compared to the actual discharge into impaired waters for which a waste load allocation is required but has not yet been established is determined by measuring whether the proposed discharge would increase the mass loading of pollutants of concern into the receiving waters, either directly in the discharge waste stream or indirectly through additional bed and bank scour. Using direct and indirect mass loading reflects the practical and legal necessity of enabling ANR to manage actual discharges into impaired watersheds pending the establishment of waste load allocations. *Id.*

* Compliance with ANR's 1997 Stormwater Procedures is not, in and of itself, sufficient to justify the addition of pollutants of concern into impaired waters for which no waste load allocation has been performed. Once the state has determined that technology practices such as the 1997 Stormwater Procedures are not sufficient to achieve compliance with the water quality standards in a particular water body, a waste load allocation must be conducted and implemented. *Id.*

* Increased loads of pollutants of concern cannot be discharged into an impaired water until such time as a waste load allocation and compliance schedule demonstrate that these additional loads can be assimilated. *Id.*

* The TMDL and waste load allocation processes involve calculating the total load of a pollutant or pollutants that a receiving water can assimilate without violating water-quality standards and then allocating the total load among the various dischargers in the watershed. This process enables ANR to determine the appropriate stormwater treatment systems for the individual stormwater dischargers, or classes of stormwater dischargers, in the impaired watershed. To settle upon a particular type of stormwater treatment practice for a given discharge into impaired waters in the absence of a waste load allocation would ignore the water-quality-based approach of the waste load allocation process. *Id.*

* In the absence of a waste load allocation for an impaired water, the level of treatment for an individual stormwater discharge, or class of stormwater discharges, needed to fully address the impairment cannot be determined. *Id.*

* Applicants for a stormwater discharge permit into impaired waters for which a waste load allocation is required but has not yet been established bear the burden of proving by a preponderance of the evidence that the permit under appeal will not allow a new or increased discharge of measurable and detectable pollutants of concern into the receiving waters. *Id.*

* Applicants for a stormwater discharge permit must prove that the permit complies with the VWQS with regard to pollutants for which the receiving waters have not been identified as water quality limited. *Id.*

* Additional loads of pollutants of concern into impaired waters for which a waste load allocation is required but has not yet been established cannot be justified by ANR's position that the receiving waters are already so degraded by so many sources that any additional degradation from the proposed discharge will be indistinguishable from all the rest. ANR's evidence failed to account for cumulative impacts and the necessary policy that pollution from multiple sources does not excuse pollution from any one source. Id.

* By placing the receiving waters on Vermont's Section 303(d) List, ANR has acknowledged that it does not expect technological controls to bring those waters into compliance with the VWQS in the absence of TMDLs and waste load allocations and that in the absence of a waste load allocation for the receiving waters, the correct level of possible stormwater treatment practices for any one discharger or class of dischargers cannot be rationally selected. *Id.* See also *Id.,* Memorandum of Decision (08/29/01).

* The Board's decision *In re Pyramid Company*, that a new stormwater discharge into impaired waters cannot be permitted in the absence of a waste load allocation providing for the increased discharge, remains consistent with the current statutory and regulatory scheme for water-quality management in Vermont. *Id.,* Memorandum of Decision (08/29/01).

* Although the Board recognized ANR's discretion in the areas of whether and how to conduct waste load allocations, ANR already exercised its discretion by listing the receiving waters on its section 303(d) lists, which acknowledge that those waters need TMDLs and waste load allocations. *Id.*

*A permit cannot be issued for a new stormwater discharge into receiving waters without adequate assimilative capacity. Id.

* ANR does not have the legal authority to substitute the application of performance standards such as the agency's Stormwater Procedures, along with an abstract expectation of eventually achieving compliance with the VWQS, for a cleanup plan in the form of a water pollution budget and a schedule of compliance. *Id.*

* A case involving a discharge into impaired waters is factually distinguishable from the Board's decision in *Home Depot,* which involved a discharge into waters that are not impaired and where the Board, accordingly, accepted application of the treatment and control practices of ANR's Stormwater Procedures as creating a rebuttable presumption of compliance with the VWQS. *Id.*

* The treatment and control practices described by ANR's 1997 Stormwater Procedures are a means or a technique for satisfying effluent limitations, not a substitute for the waste load-allocation and TMDL process from which suitable effluent limitations are derived. *Id.*

* The discharge permitting system described by Vermont's waste load allocation process requires ANR to create and implement a pollutant budget for receiving waters. The total water pollution budget in Vermont is the capacity of the receiving waters to assimilate a pollutant while meeting the VWQS. A TMDL is the amount of the total budget that each source of a pollutant receives. A waste load allocation ensures that all the TMDLs together do not exceed the total budget. *Id.*

* The waste load allocation process is not limited to impaired waters; waste load allocations are required whenever ANR estimates that existing or projected discharges exceed a water segment's assimilative capacity. *Id.*

* Vermont law does not allow a new or increased discharge of measurable and detectable pollutants of concern into impaired waters for which there is not an adequate waste load allocation. Permits can be issued for a new or increased discharge of pollutants of concern into impaired waters if a waste load allocation shows that the assimilative capacity of the receiving waters can accommodate the discharge and if other dischargers into that segment are subject to compliance schedules. *Id.*

* The fact that the receiving waters did not comply with the VWQS and were listed as water quality limited pursuant to section 303(d) of the Clean Water Act, 33 U.S.C.A. § 1313(d), was sufficient to rebut any presumption of compliance with the VWQS ensuing from conformance of the discharge with the treatment and control practices of ANR's 1997 Stormwater Procedures. *Id.*, Memorandum of Decision (06/29/01).

* The VWQS require the assimilative capacity of receiving waters to be carefully allocated in accordance with the waste load allocation process and that receiving waters have adequate assimilative capacity before a proposed discharge can be permitted. *Id.*

* The discharge permitting system described by Vermont's waste load allocation process requires ANR to create and implement a pollutant budget for receiving waters. The total water pollution budget in Vermont is the capacity of the receiving waters to assimilate a pollutant while meeting the VWQS. A TMDL is the amount of the total budget that each source of a pollutant receives. A waste load allocation ensures that all the TMDLs together do not exceed the total budget. *Id.*

* The waste load allocation process is not limited to impaired waters; waste load allocations are required whenever ANR estimates that existing or projected discharges exceed a water segment's assimilative capacity. *Id.*

* Vermont law does not allow a new or increased discharge of measurable and detectable pollutants of concern into impaired waters for which there is not an adequate waste load allocation. Permits can be issued for a new or increased discharge of pollutants of concern into impaired waters if a waste load allocation shows that the assimilative capacity of the receiving waters can accommodate the discharge and if other dischargers into that segment are subject to compliance schedules. *Id.*

*The Board did not read the definition of "New Discharge" or the discharge criteria in the 1997 VWQS as prohibiting all new discharges into impaired waters without a duly established waste load allocation. Doing so would unnecessarily impede Vermont's efforts to manage and improve permitted discharges before waste load allocations are actually established. *Id.*

* Proposed discharges into waters that are not impaired must comply with the VWQS, including Vermont's anti-degradation policy. *Id.*

* The Vermont Water Pollution Control Permit Regulations provide that a waste load allocation must be performed as necessary to ensure that the discharge authorized by a permit is consistent with applicable water quality standards and that the permit includes appropriate effluent limitations. *Id.*

* In the absence of waste load allocations, discharges into impaired waters may be permitted under Vermont law only if the proposed discharge will not increase the chemical, physical, or biological load of pollutants for which the receiving waters are impaired. *Id.*

* The applicability of the waste load allocation process rules is comprehensive, and the requirements set forth therein specifically apply to stormwater. *Id.*

* The treatment and control practices described by ANR's 1997 Stormwater Procedures do not constitute water quality standards or technology-based or water-quality based effluent limitations. They are a means or a technique for satisfying effluent limitations, not a substitute for the waste load-allocation and TMDL process from which suitable effluent limitations are derived. *Id.*

* The receiving waters for the project discharge were not "impaired" waters listed on the [Clean Water Act] "303(d) list" of State "impaired" waters, and Board therefore evaluated project for conformance with 1997 VWQS based on compliance with design standards in ANR's 1997 Stormwater Management Procedures. *Home Depot, USA, Inc. et al.*, WQ-00-06, Findings of Fact, Conclusions of Law, and Order (02/06/01) and Memorandum of Decision re: Motion to Alter (03/16/01); *dismissed with prejudice,* SO-244-01 RcCa (07/11/01).

* The VWQS do not directly address the issue of how to manage discharges of pollutants of concern into water quality limited segments in the absence of a TMDL or waste load allocation. *Hannaford Bros. Co. and Lowes Home Centers*, WQ-01-01, Second Prehearing Conference Report and Order (12/03/01). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* 40 C.F.R. §130.32(c) prohibits issuance of a discharge permit if the discharge would conflict with an applicable basin plan. *Pyramid Company of Burlington*, WQ-77-01 (78-1), Findings of Fact, Conclusions of Law and Order (n.d. [6/02/78])

1731.1 Anti-Degradation

* Anti-degradation requirements are designed to avoid the management of waterways at their maximum assimilative capacity. *City of South Burlington (Bartlett Bay Wastewater Treatment Facility)*, WQ-01-04, Second Prehearing Conference Report and Order (04/18/02).

1731.2 Cumulative Impacts

* Not only the existing condition of a water body, but also its anticipated future condition controls whether a TMDL is required. *City of South Burlington (Bartlett Bay Wastewater Treatment Facility),* WQ-01-04, Second Prehearing Conference Report and Order (04/18/02).

* Additional loads of pollutants of concern into impaired waters for which a waste load allocation is required but has not yet been established cannot be justified by ANR's position that the receiving waters are already so degraded by so many sources that any additional degradation from the proposed discharge will be indistinguishable from all the rest. ANR's evidence failed to account for cumulative impacts and the necessary policy that pollution from multiple sources does not excuse pollution from any one source. *Hannaford Bros. Co. and Lowes Homes Center, Inc.*, WQ-01-01, Findings of Fact, Conclusions of Law and Order (01/18/02); *aff'd,* No. 280-02 CnCv (04/30/03); *appeal docketed*, No. 2003-539 (12/14/04) (pending). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

1732. Watersheds/Basin Planning

* The VWQS requires the Secretary of ANR to make determinations of what constitute existing uses either during the basin planning process or on a case-by-case basis during consideration of an application. *CCCH Stormwater Discharge Permits,* WQ-02-11, WQ-03-05, -06, and -07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (10/04/04). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended by Act 109 (2001 Adj. Sess.), eff. May 16, 2002. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* A source-control plan, such as WIP, may be used as an alternative to a TMDL under specified conditions. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook*, WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (06/02/03). (The law applied in this case was modified by Act 140 of 2004.)

* ANR may not lawfully issue a permit for a new or increased discharge of pollutants of concern into impaired waters in the absence of a lawful cleanup plan. Every discharge into Vermont's waters must conform with the VWQS, and a discharge permit cannot be issued for a new or increased discharge of pollutants of concern into impaired waters in the absence of a valid plan reasonably assuring that the receiving waters will be able to assimilate these pollutant loads. *Id.*

* The baseline for determining whether a permitted discharge is new or increased is the actual discharge from a particular site. ANR may continue to permit and otherwise manage existing discharges pending the development of an effective cleanup plan. Thus, ANR may undertake efforts to restore impaired waters prior to issuing a WIP, if that would be possible for those waters, or establishing TMDLs. *Id.*

* 40 C.F.R. §130.32(c) prohibits issuance of a discharge permit if the discharge would conflict with an applicable basin plan. *Pyramid Company of Burlington*, WQ-77-01 (78-1), Findings of Fact, Conclusions of Law and Order (n.d. [6/02/78]).

1732.1 Impaired Waters

* The actual discharge from the site, including the permitted discharge from existing treatment systems, represents the appropriate baseline for determining whether a proposed discharge will increase the pollutants of concern into impaired waters for which a waste load allocation is required but has not yet been established. *Hannaford Bros. Co. and Lowes Homes Center, Inc.*, WQ-01-01, Findings of Fact, Conclusions of Law and Order (01/18/02); *aff'd,* No. 280-02 CnCv (04/30/03); *appeal docketed*, No. 2003-539 (12/14/04) (pending). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Using the actual discharge from the site as the baseline for measuring a new or increased discharge of pollutants of concern into impaired waters reflects the intention of the Board and the necessity of the law to enable ANR to manage and improve actual discharges into impaired watersheds for which a waste load allocation has not been established. *Id.*

* The use of actual discharges as a cap on new or increased discharges applies only while waste load allocations or other cleanup plans are being established. Holding the line at actual discharges does not preclude ANR from authorizing and enforcing appropriate treatment technologies that would reduce the level of the pollutants of concern discharging from a particular site. Nor does the prohibition against permitting the discharge of additional pollutants of concern into impaired waters in the absence of a cleanup plan affect whether the discharge of those pollutants may be increased or decreased from a particular site or group of sites in the waste load allocation process. *Id.*

* The total maximum daily load and waste load-allocation processes involve calculating the total load of a pollutant or pollutants that a receiving water can assimilate without violating water-quality standards and then allocating the total load among the various dischargers in the watershed. This process enables ANR to determine the appropriate stormwater treatment systems for the individual stormwater dischargers, or classes of stormwater dischargers, in the impaired watershed. To settle upon a particular type of stormwater treatment practice for a given discharge into impaired waters in the absence of a waste load allocation would ignore the water-quality-based approach of the waste load allocation process. *Hannaford Bros. Co. and Lowes Homes Center, Inc.*, WQ-01-01, Findings of Fact, Conclusions of Law and Order (01/18/02); *aff'd,* No. 280-02 CnCv (04/30/03); *appeal docketed*, No. 2003-539 (12/14/04) (pending). [This appeal was reviewed under the provisions of 10 V.S.A. § 1264, as amended in 1987. Subsequent amendments to 10 V.S.A. § 1264 were not considered by the Board.]

* Under the circumstances of this case, the Board does not consider the uses impaired, but rather takes into account the nature and quantity of the pollutants impairing them in determining whether a proposed discharge of pollutants of concern may be permitted when no waste load allocation has been established. *Id.*

1732.2 Nonpoint Sources

* The scope of ANR's regulatory authority does not justify the issuance of a WIP that fails to provide that the receiving waters will comply with the VWQS. ANR's authority and responsibility extend to nonpoint-source discharges into impaired waters, and a WIP may include appropriate nonpoint-source management strategies. Both WIPs and the TMDL process may require ANR to look beyond structural controls for point-source discharges. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook*, WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (06/02/03). (The law applied in this case was modified by Act 140 of 2004.)

* ANR's authority thus extends not only to discharges, but also to the activities and conditions that cause discharges. *Id.*

* Vermont's TMDL process rests on ANR's responsibility and authority with respect to both point-source and nonpoint-source pollution. *Id.*

* ANR's authority with respect to nonpoint-source management includes permitting and enforcement, but these are not the only strategies available to ANR. Education, technical and financial assistance, and coordination with citizens, municipalities and regional planning commissions may be effective strategies in nonpoint-source pollution management. ANR is not required to apply its permitting authority to every nonpoint-source discharge, just as ANR does not apply its permitting authority to every point-source discharge. *Id.*

* The Vermont Water Pollution Control Act calls upon ANR to integrate its management of point-source and nonpoint-source stormwater discharges. *Id.*

* ANR's authority to include pollution offsets in WIPs is not limited to trading between point sources. *Id.*

* ANR may use a WIP to manage and control nonpoint sources of stormwater pollution, provided the impairment of the receiving waters is at least partly caused by collected stormwater runoff. *Id.*

* ANR's authority extends not only to discharges, but also to the activities and conditions that cause discharges. *Id.*

* Vermont's TMDL process rests on ANR's responsibility and authority with respect to both point-source and nonpoint-source pollution. *Id.*

* The Vermont Water Pollution Control Act calls upon ANR to integrate its management of point-source and nonpoint-source stormwater discharges. *Id.*

* ANR may issue general permits to nonpoint sources. *Id.*

1732.3 Statutory Standards

* 40 C.F.R. §130.32(c) prohibits issuance of a discharge permit if the discharge would conflict with an applicable basin plan. *Pyramid Company of Burlington*, WQ-77-01, Findings of Law, Conclusions of Law and Order (06/02/78).

1733. Remedies / Board Actions

* The Board summarily denied a motion for reconsideration that requested the Board to affirm the issuance of discharge permits that violated Vermont law and that requested in the alternative that the Board remand these unlawful discharge permits to ANR to implement them for a five-year trial period. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook*, WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated), Order (06/27/03).

* A motion to alter or amend a memorandum of decision overruling objections to legal standing was summarily denied. *Vermont Agency of Transportation (Route 7)*, WQ-03-01, Memorandum of Decision (06/27/03).

* ANR filed a motion for reconsideration asking the Board to modify its decision to reverse ANR's of four Watershed Improvement Permits. The Board denied the motion for reconsideration because the WIPs failed to include a schedule of compliance reasonably designed to bring the receiving waters into compliance with the VWQS within five years as required by 10 V.S.A. 1264(f) and because ANR does not have the legal authority to implement these WIPs for a five-year trial period. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook*, WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated), Chair's Order (06/02/03). (The law applied in this case was modified by Act 140 of 2004.)

G. Navigable Waters (10 V.S.A. § 1421 *et seq*.) (1746-1760)

1746. Outstanding Resource Waters (10 V.S.A. § 1424a) (See also Section III. E. 1216)

* A petition that proposed to designate every water body draining into the waters named in the petition as outstanding resource waters was specific enough for the parties to prepare their cases and for the Board to determine whether the evidence offered would be relevant to a named water body or its sources. *Waters of the Green Mountain National Forest*, ORW-03-01, Memorandum of Decision (06/28/04).

* Petitioners were not required to present their evidence water-body-by-water-body because the petition presented common issues of law and fact with respect to the named waters and their sources. *Id.*

* Although the candidate waters for designation as outstanding resource waters were located within seven planning basins, a single hearing location central to the waters at issue was reasonably convenient. *Id.*

* A petition was not required to include waters located within private in-holdings in the Green Mountain National Forest among the waters that the petition proposed for outstanding-resource designation, and owners of private in-holdings were not required to receive direct notification of the petition. *Id.*

* The VWQS are intended to implement Tier 3 of the federal antidegradation regulations and rely on Vermont's outstanding resource waters statute as the implementing procedure. *Id.*

* The authority of the Board to designate waters as outstanding resource waters under the VWQS does not extend to designating waters as outstanding national resource waters under federal law. Although the Board does not apply federal antidegradation requirements directly, Vermont's Tier 3 antidegradation requirements are intended to be consistent with federal Tier 3 regulations. *Id.*

* The term "water quality values" in section 1-03.D of the VWQS includes waters of the highest quality as well as waters of exceptional recreational and ecological significance. The term "water quality values" as used in Section 1-03.D of the VWQS may be understood to include the existing and designated uses and the water quality criteria that apply to the candidate waters--an outstanding resource waters designation based on water quality values is not parameter-specific. An outstanding resource waters designation based on "exceptional natural [or] recreational . . . values" under Vermont's outstanding resource waters statute may constitute a designation based on "water quality values" under Tier 3 of Vermont's antidegradation rule, depending upon the facts of the particular case. *Id.*

* Waters that constitute exceptional state *or* national resources may have exceptional values and warrant designation as outstanding resource waters under Tier 3 of Vermont's antidegradation rule and Vermont's outstanding resource waters statute. *Id.*

* The fourteen factors that Vermont's outstanding resource waters statute lists for the Board's consideration provide guidance as to the nature and breadth of the inquiry intended by the legislature. These factors emphasize existing, current, and present circumstances. *Id.*

* Under Vermont law, waters proposed for designation as outstanding resource waters shall be so designated if the Board finds that they have exceptional values. Vermont law does not permit the future or potential social, economic, or management consequences of a proposed designation to be balanced against existing exceptional values of the candidate waters to prevent the proposed designation. Evidence of the *future or potential* social, economic, or land-management consequences of the proposed designations in this matter is therefore irrelevant and inadmissible. However, evidence of *existing* social, economic, and land-management practices may be admissible insofar as this evidence is relevant to the issue of whether the candidate waters have exceptional values. *Id.*

* Section 1023(a)(4) was not at issue in *de novo* appeal before the Board because the Board had not designated the subject river an outstanding resource waters. *Clarence Jelley*, SAP-96-03, Findings of Fact, Conclusions of Law and Order (10/30/96).

1746.1 Policy

1746.2 Original Jurisdiction

1746.3 Statutory Standards

* Pursuant to 10 V.S.A. §1424a (a), the Water Resources Board is vested with the authority to designate particular waters of the state as outstanding resource waters. *Great Falls, Ompompanossuc River Outstanding Resource Water*, ORW-95-01, Findings of Fact, Conclusions of Law and Order (03/06/96); *Poultney River Outstanding Resource Water*, ORW-90-01, Findings of Fact, Conclusions of Law, and Order (06/28/91); *Batten Kill Outstanding Resource Water*, ORW-89-02, Findings of Fact, Conclusions of Law, and Order (06/12/91); *Pike's Falls Outstanding Resource Water,* ORW-89-01, Findings of Fact, Conclusions of Law and Order (06/21/91).

* The Outstanding Resource Waters statute, 10 V.S.A. §1424a, provides a series of fourteen items that the Board *may* consider in making its decision. This list of fourteen factors is not intended to be exhaustive but, rather, as guidance as to the nature and breadth of the inquiry intended by the legislature. *Id.*

* The Board is required by statute, 10 V.S.A. §1424a (e), to designate the waters as outstanding resource waters if the Board finds that the waters "have exceptional natural, recreational, cultural or scenic values." *Id.*

* After a public hearing and upon consideration of the evidence, the Board must designate the waters as outstanding resource waters if the Board finds that the waters in question are exceptional for any one of the four values listed in subsection "(e)." *Id.*

1746.3.1Anti-Degradation

* The VWQS are intended to implement Tier 3 of the federal antidegradation regulations and rely on Vermont's outstanding resource waters statute as the implementing procedure. *Waters of the Green Mountain National Forest*, ORW-03-01, Memorandum of Decision (06/28/04).

1746.4 Designation

* The Board must weigh the relevant evidence with due consideration given to the meaning of "exceptional." Webster's Dictionary defines exceptional in the following manner: 1: forming an exception: RARE 2: better than average: SUPERIOR. Thus, a water to be considered an outstanding resource pursuant to 10 V.S.A. §1424a should be analyzed in relation to other waters of the state. It is, therefore, not enough that the Affected Reach demonstrate the baseline values in each of the four categories: recreational, cultural, scenic and natural. Rather, these values must be truly exceptional. *Great Falls, Ompompanossuc River Outstanding Resource Water*, ORW-95-01, Findings of Fact, Conclusions of Law and Order (03/06/96).

1746.5 Remedies / Board Actions

H. Water Well Drillers (10 V.S.A. § 51 *et seq*.; 10 V.S.A. § 1477) (1761-1775)

1761. Licenses

1762. Scope of Jurisdiction / Exemptions

1763. Review on the Record

1764. Standards for Evaluating Applicants

1765. Revocation Standards

1766. Remedies / Board Actions

I. Water Supply Aid (10 V.S.A. § 1571 *et seq*.; 10 V.S.A. § 1629) (1776-1790)

1776. Scope of Jurisdiction / Exemptions

1777. *De Novo* Review

1778. Eligibility for Aid

1779. Standards for Establishing Priorities

1780. Waivers (10 V.S.A. § 1683(b))

1781. Remedies / Board Actions

J. Agricultural Non-Point Sources Pollution Reduction (6 V.S.A. § 4810 *et seq*.) (1806-1820)

1806. Scope of Jurisdiction / Exemptions

1807. *De Novo* Review

1808. Basin Management (6 V.S.A. § 4813)

1809. Remedies / Board Actions

K. Management of Lakes and Ponds (29 V.S.A. § 401 *et seq*.) (1821-1835)

1821. Policy; Public Trust

* To determine the "public good," the Board applies the standards set forth in 29 V.S.A. § 405(b). *Kent Pond,* MLP-03-10 and MLP-03-11 (Cons.), Findings of Fact, Conclusions of Law, and Order (05/12/04).

* While the Board must consider the public good elements listed in 29 V.S.A. § 405(b), it is not required to make an affirmative finding and conclusion with regard to each "public good" element. Additionally, no single element is dispositive in determining whether an encroachment adversely affects the "public good." *Id.*

* The fact that an encroachment project will be visible to the public at certain locations does not, in itself, mean that the project adversely affects the "public good." *Id.*

* Board has no authority to rule on the constitutionality of 29 V.S.A. ch. 11, however, it can interpret its provisions so as to fulfill its charge to regulate proposed encroachments on public waters. *Husky Injection Molding Systems Inc.*, MLP-98-06, Memorandum of Decision (02/22/99).

* The Board has historically interpreted its authority to make public trust determinations narrowly. Rather than declare whether a proposed encroachment is a public use, the Board has construed its authority under 29 V.S.A. ch. 11 to include a determination whether the proposed encroachment serves a public purpose and whether the proposed encroachment will have a detrimental or beneficial effect on known public trust uses. *Id.*

* The Legislature has delegated to the Water Resources Board the authority to make rules for the Department of Environmental Conservation to follow when managing public trust property; when the Board has not adopted any rules, the Department may not usurp the Board's authority and adopt its own rules or procedures regarding application of public trust law. *Richard and Alice Angney*; S96-91LaCa, Opinion and Order (09/04/92) and Opinion and Order (03/05/93).

* Superior Court vacated decisions of the Department of Environmental Conservation summarily denying encroachment permits to individuals on the basis that the Public Trust Doctrine prohibited any encroachment on state waters by "private parties for exclusively private purposes." The Court concluded that the Department had exceeded its delegated authority in promulgating interim procedures interpreting and providing guidance on the application of the public trust doctrine. *Id.*

* The Department of Environmental Conservation [and the Board on appeal] must ensure that private encroachment projects do not adversely affect the waters and submerged lands of the state, and do not adversely affect the use of those resources by other members of the public. *Appeal of Richard & Alice Angney*, MLP-89-14, *Appeal of Robert and Ann Tucker*, MLP-89-16, and *Appeal of Herman LeBlanc*, MLP-89-17, Findings of Fact, Conclusions of Law and Order (02/12/91); *see In re Richard and Alice Angney*; S96-91LaCa, Opinion and Order (09/04/92) and Opinion and Order (03/05/93).

* Board's authority is limited to carrying out the statutes that govern the Board's work; thus, Board would not consider arguments that the Lakes and Ponds statute *[29 V.S.A. ch. 11]* was invalid or that the Board has powers conferred directly by the Vermont constitution under the Public Trust Doctrine. *Id.*

* Superior Court vacated an encroachment permit for a proposed marina facility on Lake Champlain and remanded matter back to the Water Resources Board because the Board failed to make a determination whether the proposed encroachment served a "private" versus a "public" purpose within the meaning of the public trust doctrine. *William Point Yacht Club*, S213-89Cnc, Opinion and Order (04/16/90)

* Superior Court determined that the Water Resources Board had failed to address the requirements of the public trust doctrine when it merely applied the statutory "public good" provisions of 29 V.S.A. §405 and failed to address the independent question whether the proposed marina facility served a "public" purpose. *Id.*

* The public trust doctrine doesn't mandate any specific result but rather is a dynamic concept which provides a framework within which regulatory decisions are made. *Williams Point Yacht Club (Dean Leary)*, MLP-88-02, Findings of Fact, Conclusions of Law and Order (12/30/88) ; see: *In re Williams Point Yacht Club*, S213-89Cnc, Opinion and Order (04/16/90) (permit vacated and remanded)

1822. Scope of Jurisdiction / Exemptions

* The Board is authorized to hear appeals of decisions made by the Department of Environmental Conservation granting or denying encroachment permits pursuant to 29 V.S.A. § 406(a) and (b). *Kent Pond,* MLP-03-10 and MLP-03-11 (Cons.), Findings of Fact, Conclusions of Law, and Order (05/12/04).

* The Board is authorized by 29 V.S.A. § 406(c) to only issue an order affirming, modifying, or reversing the action of the DEC. *Id.*

* The Board may only grant or deny an encroachment permit for the Project as proposed by the Applicant and appealed to the Board. *Id.*

* The Board's jurisdiction, pursuant to 29 V.S.A. § 401 and § 403(b), is limited to the review and regulation of the impact of the actual encroachment as it extends into lakes and ponds that are public waters and their underlying lands. *Id.*

* Public good determination under 29 V.S.A. § 405 does not require consideration of whether a proposed encroachment will be beneficial to the economic interests of working Vermonters. *Husky Injection Molding Systems, Inc.*, MLP-98-06, Memorandum of Decision (02/22/99).

* The Board has historically interpreted its authority to make public trust determinations narrowly. Rather than declare whether a proposed encroachment is a public use, the Board has construed its authority under 29 V.S.A. ch. 11 to include a determination whether the proposed encroachment serves a public purpose and whether the proposed encroachment will have a detrimental or beneficial effect on known public trust uses. *Id.*

* Applicant's proposal to construct a permanent dock extending 50 feet into Lake Champlain and then annually extending that dock for a period of six months with a temporary extension, would not exempt the structure from the requirement to obtain an encroachment permit, as the exempt temporary extensions authorized by 29 V.S.A. § 403(b)(3) are intended to be used only rarely in those years when the water levels of Lake Champlain, in its entirety, are unusually low. *Kevin Rose and the Champlain Kayak Club (Blodgett),* MLP-96-01, Findings of Fact, Conclusions of Law and Order (11/07/96).

* Board lacked authority under 29 V.S.A. ch. 11 to determine as a preliminary matter in an encroachment permit appeal whether the municipal applicant's effluence discharge should be released from the proposed new outfall or the existing outfall; arguments concerning how such alternatives should be weighed is appropriately raised by the applicant in a discharge permit proceeding. *Appeal of Fred Fayette*, MLP-91-08, Preliminary Ruling and Declaratory Ruling (10/15/91).

* Board lacked authority under 29 V.S.A. ch. 11 or under court consent order to allow the proposed outfall pipe to be used for discharge purposes prior to the issuance of a discharge permit. *Id.*

1823. *De Novo* Review

* Appeals to the Board pursuant to 29 V.S.A. § 406(b) are statutorily required to be *de novo* contested case proceedings, in which case the Board must hear the matter as if there had been no prior proceedings. *Kent Pond,* MLP-03-10 and MLP-03-11 (Cons.), Findings of Fact, Conclusions of Law, and Order (05/12/04).

* In *de novo* proceeding held pursuant to 29 V.S.A. § 406(b), the applicant, bears the burden of proof and persuasion. *Id.*

* Pursuant to Board Rule of Procedure 19(C), the Board ordinarily restricts the scope of its review to the issues identified by the appellant unless the Board determines that substantial inequity or injustice would result from this limitation. *Id.*

1824. Encroachment Permits (10 V.S.A. § 404)

* Based on uncontroverted evidence presented by ANR on behalf of the Applicant that it has taken the necessary measures to assure no short- or long-term adverse impacts on water quality of the water body at issue, the Board determined that an encroachment will not adversely affect water quality and Board affirmed issuance of the permit and returned jurisdiction to ANR. *Kent Pond,* MLP-03-10 and MLP-03-11 (Cons.), Findings of Fact, Conclusions of Law, and Order (05/12/04).

* When an appeal from a Department of Environmental Conservation decision is timely filed with the Board, the cause is transferred to the Board from the Department, and the Department is divested of jurisdiction with respect to all matters within the scope of the appeal. *Laurence and Roberta Coffin*, MLP-97-05, Chair's Preliminary Ruling (08/12/97).

* The scope of review is limited to the project and the permit on appeal; therefore, the Board could not expand its public trust review to the entire marina when the project and permit addressed only the relocation of a service and swim dock in the public waters of Lake Champlain. *Dean Leary (Point Bay Marina, Inc.),* MLP-96-04, Memorandum of Decision (03/18/97).

* Lake Champlain is considered "public waters" of the State of Vermont and the proposed dock would encroach more than 50 feet beyond the shoreline delineated by the mean water level of the lake; consequently, the Department of Environmental Conservation had jurisdiction over the application for that project and the Board had jurisdiction to hear the appeal of the DEC's decision. *Kevin Rose and the Champlain Kayak Club (Blodgett),* MLP-96-01, Findings of Fact, Conclusions of Law and Order (11/07/96).

* There was no legal basis for retention of jurisdiction over appeal once the permittee unconditionally relinquished its interests in the encroachment permit that was the subject of the appeal. *Dean Leary*, MLP-94-08, Dismissal Order (03/11/96).

* Board was limited to considering the encroachment permit immediately before it; its jurisdiction could not be expanded by agreement of the parties. Accordingly, the Board could not expand the scope of its review to encompass Public Trust review of the permittee's entire marina and operations when these facilities were not the subject of the encroachment permit under appeal. *Id.*

* If the permittee wished to abandon its interest in an encroachment permit, the Board would not stand in its way of doing so; accordingly, the Board rejected ANR's recommendation that the Board retain jurisdiction over the swim and service docks authorized by the encroachment permit under appeal while allowing abandonment of other proposed encroachments. *Id.*

* Department of Fish and Wildlife, while entitled to party status of right if it enters its appearance in an encroachment permit, is not a necessary party to that appeal. *Robert A. Gillin*, MLP-94-01, Findings of Fact, Conclusions of Law and Order (08/23/94); *aff'd, Robert A. Gillin v. Department of Fish & Wildlife and Department of Environmental Conservation*, 608-11-95 Wncv & 616-11-95 WnCv (09/22/97); *aff'd, Robert A. Gillin, Trustee v. State of Vermont*, VT No. 98-022 (Jun. 30, 1999).

* Applicant for extension of a construction completion deadline which had expired demonstrated "cause" for a further extension where permit had been issued for thirty years and delay in construction was due to lengthy litigation initiated by another party and temporary loss of funding for the project. *Id.*

* Based on a stipulation of the parties rather than a *de novo* hearing, the Board issued an encroachment permit to the municipal applicant for a proposed wastewater outfall pipe. *Appeal of Fred Fayette*, MLP-91-08, Findings of Fact, Conclusions of Law and Order (03/16/92).

* Board lacked authority under 29 V.S.A. ch. 11 to determine as a preliminary matter in an encroachment permit appeal whether the municipal applicant's effluence discharge should be released

from the proposed new outfall or the existing outfall; arguments concerning how such alternatives should be weighed is appropriately raised by the applicant in a discharge permit proceeding. *Appeal of Fred Fayette*, MLP-91-08, Preliminary Order and Declaratory Ruling (10/15/91).

1825. Statutory Standards (10 V.S.A. § 405(b))

* Board evaluated the project's impacts upon the "public good" before considering the project in light of the public trust doctrine. If the Board determined that the Project would have an adverse affect upon the public good, then this statutory analysis would be dispositive and the Board would not reach the public trust doctrine; if, on the other hand, the Board determined that the project would not have an adverse effect upon the public good, then the Board would determine whether the project, taking into consideration its cumulative effect upon the waters of the State of Vermont, would have a detrimental effect on public trust uses. *Dean Leary (Point Bay Marina, Inc.),* MLP-96-04, Memorandum of Decision (03/18/97).

* In appeal of an Encroachment Permit, under 29 V.S.A. ch. 11, statutory claims are to be considered before constitutional questions. *Kevin Rose and the Champlain Kayak Club (Blodgett)*, MLP-96-01, Findings of Fact, Conclusions of Law and Order (11/07/96).

* If a proposed project would adversely affect the "public good," it is not necessary to reach the "public trust" question. *Id.*

* The Board has a duty, independent of the public good determination under 29 V.S.A. § 405, to assure the protection of public trust uses. *Dean Leary*, MLP-94-08, Memorandum of Decision (12/28/94).

* Department of Fish and Wildlife's proposed public boat ramp was consistent with the public trust status of Lake Champlain and the lands lying thereunder and the requirements that these waters and lands be managed to serve the public good. *Appeal of Robert A. Gillin*, MLP-90-11, Findings of Fact, Conclusions of Law, and Order (09/26/91).

* The Department of Environmental Conservation [and the Board on appeal] must determine that a project is affirmatively in accord with the purposes of the public trust; and second, it must then determine whether the adverse effects of the project are so great as to make it inconsistent with the public good. *Appeal of Richard & Alice Angney,* MLP-89-14, *Appeal of Robert and Ann Tucker*, MLP-89-16 and *Appeal of Henry LeBlanc*, MLP-89-17, Findings of Fact, Conclusions of Law and Order (02/12/91). *See also, In re Richard and Alice Angney;* S-96-91 LaCa, Opinion and Order (09/04/92) and Opinion and Order (03/05/93).

* Both public and private activities serve the public good, so long as there is no adverse effect on resource values, or on the use others may make of the state's waters and submerged lands. *Id.*

* Superior Court determined that the Water Resources Board had failed to address the requirements of the public trust doctrine when it merely applied the statutory "public good" provisions of 29 V.S.A. §405 and failed to address the independent question whether the proposed marina facility served a "public" purpose. *William Point Yacht Club*, S213-89Cnc, Opinion and Order (04/16/90).

1825.1 Public Good

* To determine the "public good," the Board applies the standards set forth in 29 V.S.A. § 405(b). *Kent Pond,* MLP-03-10 and MLP-03-11 (Cons.), Findings of Fact, Conclusions of Law, and Order (05/12/04).

* While the Board must consider the public good elements listed in 29 V.S.A. § 405(b), it is not required to make an affirmative finding and conclusion with regard to each "public good" element. Additionally, no single element is dispositive in determining whether an encroachment adversely affects the "public good." *Id.*

* The fact that an encroachment project will be visible to the public at certain locations does not, in itself, mean that the project adversely affects the "public good." *Id.*

* Public good determination under 29 V.S.A. § 405 does not require consideration of whether a proposed encroachment will be beneficial to the economic interests of working Vermonters. *Husky Injection Molding Systems, Inc.,* MLP-98-06 (02/22/99).

* The "public good" is "that which shall be for the greatest benefit of the people of the state of Vermont" (29 V.S.A. § 402(6)) and to determine whether a proposed encroachment will adversely affect the public good, the Board must consider certain elements set forth in 29 V.S.A. § 405(b). However, the Board is neither required to make an affirmative finding and conclusion with regard to each public good element nor is no single element dispositive whether the encroachment adversely affects the public. *Dean Leary (Point Bay Marina, Inc.),* MLP-96-04, Findings of Fact, Conclusions of Law and Order (08/01/97) and Memorandum of Decision (Motion to Alter) (09/30/97)

* Board considered not only the direct effects of the proposed relocation of a service and swim docks on water quality, fish and wildlife habitat, aquatic and shoreline vegetation, navigation and other recreational and public uses, consistency with the natural surroundings, and consistency with municipal shore land zoning ordinances or any applicable plans, but also the cumulative effect of existing as well as proposed docks upon these public good elements. *Id.*

*A proposed 330-foot dock would create an impediment to navigation in Lake Champlain by interrupting the use of paddle craft in public waters because paddlers would be required to detour out into deep waters, away from shoreline scenery and into power and sail boat traffic lanes; consequently, the proposed dock would adversely affect the "public good" and therefore a permit for such encroachment was denied. *Kevin Rose and the Champlain Kayak Club (Blodgett),* MLP-96-01, Findings of Fact, Conclusions of Law and Order (11/07/96).

* Encroachment into public trust waters or lands is prohibited, unless the encroachment will not adversely affect the public good. In adopting 29 V.S.A. § 405(b), the Legislature has given the Department of Environmental Conservation [and the Board on appeal] criteria to consider whether a proposed encroachment adversely affects the public good. *Richard and Alice Angney*; S96-91LaCa, Opinion and Order (09/04/92) and Opinion and Order (03/05/93).

* Marina's proposed water intake pipe and a seasonal floating breakwater and dock system did not adversely affect water quality, fish and wildlife habitat, aquatic and shoreline vegetation, navigation and other recreational and public uses, including fishing and swimming, consistency with natural surroundings and consistency with municipal shoreline zoning ordinances and applicable state plans. *Williams Point Yacht Club (Dean Leary)*, MLP-88-02, Findings of Fact, Conclusions of Law and Order (12/30/88). Also see, *In re Williams Point Yacht Club*, S213-89Cnc, Opinion and Order (04/16/90) (permit vacated and remanded)

1825.2 Impact on Public Trust Uses

* In conducting a Pubic Trust Doctrine analysis, the Board first evaluates a project's impacts upon the "public good" before considering its impacts on public trust uses. *Kent Pond,* MLP-03-10 and MLP-03-11 (Cons.), Findings of Fact, Conclusions of Law, and Order (05/12/04).

* The Board has a duty, independent of the public good determination, to assure the protection of public trust uses. *Id.*

* The Board's duty to conduct a public trust analysis extends to determining whether a proposed encroachment will have a detrimental effect on public trust *uses*, not on "public resources" generally. *Id.*

* In determining whether a proposed encroachment will have a detrimental effect on public trust *uses*, the Board relies on guidance provided by case law both from Vermont and other jurisdictions that recognize the Public Trust Doctrine. *Id.*

* In many instances, the uses identified in 29 V.S.A. § 405 are identical to the uses protected by the Public Trust Doctrine. *Id.*

* Once the Board has identified the public trust uses of a given body of water, the Board weighs the impact of the encroachment on public trust uses with the encroachment's public benefits. *Id.*

* With no credible evidence that a Project will have more than a minimal impact on any of the public trust uses identified for the body of water at issue in this case, and upon a finding that the Project will provide an important public benefit, the Board concluded that the Project will not be detrimental to public trust uses of that water body. *Id.*

* The Board has historically interpreted its authority to make public trust determinations narrowly. Rather than declare whether a proposed encroachment is a public use, the Board has construed its authority under 29 V.S.A. ch. 11 to include a determination whether the proposed encroachment serves a public purpose and whether the proposed encroachment will have a detrimental or beneficial effect on known public trust uses. *Husky Injection Molding Systems, Inc.,* MLP-98-06 (02/22/99).

* Public trust uses and activities are generally those which relate to the vicinity of the lake, stream, or tidal reach at issue. Public trust uses range from commerce and navigation to swimming and environmental preservation and research. In identifying and choosing between competing public trust uses, the Board must consider whether the public has access to property from which they can enjoy the benefit of such uses. *Dean Leary (Point Bay Marina, Inc.),* MLP-96-04, Findings of Fact, Conclusions of Law and Order (08/01/97) and Memorandum of Decision (Motion to Alter) (09/30/97)

* The Board cannot grant to a private party the right to use property impressed with the pubic trust for private purposes, however, this does not mean that all waters or land which fall within the doctrine can never be developed by private parties. Rather, the Board must find affirmatively that a proposed encroachment serves a public purpose before granting a permit. *Id.*

* Proposed relocation of service and swim docks served the public purpose required to reach an affirmative finding with respect to the Public Trust Doctrine, because the public's use and enjoyment of Lake Champlain for recreational boating, swimming, and environmental education was enhanced by, among other things, the provision of sewage pump-out and fueling services, boat launching facilities, dock space for transient boaters, free public access to toilet facilities and the swim dock, and continued free access to the docks by local, state, and federal marine authorities, and by non-profit and educational institutions and groups. *Id.*

* As a result of the proposed relocation of the service and swim docks, vessels must be diverted around the project, but this adverse effect on a public trust use was more than offset by the public purpose served by the project, and the project's beneficial effect on the public trust uses associated with the public's use of Lake Champlain. *Id.*

* The scope of review is limited to the project and the permit on appeal; therefore, the Board could not expand its public trust review to the entire marina when the project and permit addressed only the relocation of a service and swim dock in the public waters of Lake Champlain. *Dean Leary (Point Bay Marina, Inc.),* MLP-96-04, Memorandum of Decision (03/18/97).

* Even though scope of appeal was confined to the permit on appeal, since the project contemplated by that permit would become a part of the marina, the Board was required to consider the cumulative effect of the project and the marina under the public trust doctrine to determine whether the completion of the project would result in a public trust violation. *Id.*

* The filing of an amendment to a permit to allow the relocation of a service and swim dock did not require the Board, in its appellate role, to review the entire marina project for public trust compliance; rather, public policy, as well as the holding in *Mono Lakes*, requires that all existing development within the waters of Vermont be reviewed in a comprehensive manner by ANR, irrespective of whether an application for a permit amendment has been filed. *Id.*

* Board was not required by its enabling statutes to adopt rules governing the permitting of encroachments as a prerequisite to the Board's exercise of its common law trustee responsibility to safeguard public trust property. *Dean Leary*, MLP-94-08, Memorandum of Decision (12/28/94).

* In making its determination whether a proposed encroachment will not have a detrimental effect on public trust uses, the Board may rely on the guidance provided by case law both from Vermont and other jurisdictions recognizing the public trust doctrine. *Id.*

* In many instances, the uses identified in 29 V.S.A. § 405 are identical to the public trust uses protected by the Public Trust Doctrine. *Id.*

* The public benefits of a project must be weighed against their adverse effects, before a permit may be issued. *Appeal of Richard & Alice Angney*, MLP-89-14, *Appeal of Robert and Ann Tucker*, MLP-89-16 and *Appeal of Herman LeBlanc*, MLP-89-17, Findings of Fact, Conclusions of Law and Order (02/12/91). *Also see, In re Richard and Alice Angney*; S96-91LaCa, Opinion and Order (09/04/92) and Opinion and Order (03/05/93).

1826. Remedies / Board Actions

* Board summarily dismissed encroachment permit appeal where appellant repeatedly failed to perfect and prosecute his appeal or object to and seek full Board review of Executive Officer's advisory opinion identifying deficiencies in the notice of appeal and means of corrective action and Chair's Preliminary Ruling proposing dismissal for non-action. *Vermont Department of Fish and Wildlife*, MLP-01-05 Dismissal Order (10/30/01).

* Whether a person is "aggrieved" is a mixed question of fact, law, and public policy. In applying the aggrievement standard of 29 V.S.A. § 406(a), the Board has routinely considered an appellant's alleged interest(s) in the outcome of a proceeding in relation to the purpose of the statutory program under which the appealed permit was issued. *Husky Injection Molding Systems, Inc*., MLP-98-06 (02/ 22/99)

* Appellants, who asserted that they made use of public waters in their town for various uses, including aesthetic enjoyment, who had participated in the encroachment permit proceeding before the Department of Environmental Conservation, and who alleged that the proposed bridge authorized by the Department would have adverse aesthetic and environmental impacts cognizable under 29 V.S.A. § 405(b), had standing to bring an appeal. *Id.*

L. Wetlands (1836-1850)

1836. Wetland Reclassifications (10 V.S.A. § 905(7)-(9); VWR) (See also Section VIII.)

* The Board reclassified a wetland from Class Two to Class Three, pursuant to 10 V.S.A. § 905(7)-(9) and § 7 of the VWR (eff. Jan 1, 2002) (VWR) after determining that the wetland is not a significant wetland, based on analysis of its functions. *Trapp Family Lodge Wetland,* WET-04-01, Administrative Determination (10/06/04).

* For a wetland to be reclassified from Class Three to Class Two, the Board must conclude that the wetland possesses at least one of the ten functional criteria outlined in VWR Section 5. *Sunset Cliff Inc.,* WET-03-01, Administrative Determination (01/23/04); *Sunset Cliff Ass'n v. Water Resources Board,* No. 187-04 CnCv (dismissed for lack of jurisdiction). *Appeal docketed,* No. 551-04-04 WnCv (10/07/04) (pending).

* Class Two wetlands are deemed to be significant wetlands and are afforded a greater degree of protection under the VWR in that a Conditional Use Determination is required for any activity within the wetland or the Wetland's 50-foot buffer, other than allowed uses, as defined in VWR § 6.2. *Sunset Cliff Inc*., WET–03-01, Memorandum of Decision (08/28/03).

* Pending a final decision regarding reclassification of a wetland, the Board imposed a 60-day temporary Class Two designation of the subject wetland, pursuant to VWR § 7.5, to ensure that the wetland was protected while the Board addressed the comments of DEC staff regarding the wetland's significance. *Id.*

* The Board found that the first prong the two-part test set forth in VWR § 7.5. was satisfied by a DEC letter representing the wetland at issue as significant for the functions of wildlife and migratory bird habitat

(§5.4) and hydrophytic vegetation (§5.5). On that basis, the Board found that there is reasonable likelihood that the wetland in question *may be* significant for those functions. *Id.*

* The second prong of the two-part test set forth in VWR § 7.5 was met by the Board's finding that delay in the public hearing and decision could result in substantial or irreversible harm to one or more of the wetland functions while the Petition is pending. *Id.*

* All wetlands contiguous to an NWI-mapped wetland are presumed to be Class Two wetlands, unless determined otherwise by the Board in the course of a reclassification proceeding. *Styles Brook Reservoir,* WET-03-02, Administrative Determination (08/07/03).

* The subject wetland was reclassified from Class Two to Class Three and removed from the Vermont Significant Wetland Inventory ("VSWI") map by the Board after determining that the wetland is not a significant wetland based on uncontroverted assessment of the subject wetland's functions by the petitioner's field naturalist and ANR *Mt. Mansfield Company*, WET-02-08, Administrative Determination (02/25/03).

* A 450 acre wetland complex located at one end of a 2,405 acre lake was found by the Board to serve eight of the ten functions listed in Section 5 of the VWR at such a significant level that it warranted the highest protection of the state through reclassification from Class Two to Class One. *Lake Bomoseen Wetland*, WET-02-04, Administrative Determination (02/06/03); *aff'd, Alan & Claudia Wulff v. Vt. WRB,* No. 234-4-03, Opinion and Order (12/03/03); *appeal docketed,* No. 2004-002 (01/23/04) (pending). *See also, Lake Bomoseen Ass'n v. WRB,* 145-3-03 RdCv, Opinion and Order (04/14/04) (dismissed for lack of jurisdiction); *appeal docketed*, *Reclassification of Lake Bomoseen Wetland*, No. 2004-220 (05/26/04) (pending).

* Wetlands are classified as Class Three either because they do not appear on the NWI Maps for Vermont and have never been evaluated by the Board *or* because, when last evaluated, they were determined not to be sufficiently significant to merit State protection under the VWR. *Id.*

* Unlike a contested case proceeding, the Board is not required by law to hold a public hearing in a wetland reclassification proceeding. *Id*.

* Based on the uncontroverted assessment of the subject wetland's functions by the petitioner's ecologist, which was confirmed by ANR, the Board concluded that two man-made ponds originally constructed as golf-course hazards were not significant wetlands meriting protection under the VWR. Accordingly, the Board ordered the subject wetlands reclassified from Class Two to Class Three. *ABC/MRC, Inc., Kwiniaska Golf Course*, WET-02-06 and WET-02-07 (Consolidated), Administrative Determination (02/06/03).

* A man-made pond that appeared on the National Wetland Inventory map and was classified as a Class Two wetland, was determined by the Board to be a wetland that had once provided two of the ten Section 5 wetland functions (recreational value and open space/aesthetics) but, based on ANR's observations and comments, the Board found that the wetland no longer serves those functions at a significant level and concluded that a reclassification of the wetland to Class Three was warranted. *Town of West Rutland*, WET-02-03, Administrative Determination (08/07/02).

* If the Board concludes that the wetland does not serve any of the ten functions at a significant level, it may reclassify the Class Two wetland to a Class Three wetland. *Id.*

* The Board determined that two man-made ponds listed on the National Wetland Inventory map, a manure storage pond and a livestock watering pond, are not wetlands within the meaning of the VWR, because they did not demonstrate all of three required parameters: wetland soils, wetland vegetation, and wetland hydrology. *Kane Farm Ponds*, WET-02-02, Administrative Determination (06/25/02).

* Pursuant to VWR §3.2(a), to be considered a wetland, an area must be characterized by all of three parameters: wetland soils, wetland vegetation, and wetland hydrology. *Id.*

* No public hearing was held where no hearing was requested. *Tinmouth Channel Wetland Complex*, WET-01-07, Administrative Determination (12/13/01).

* Wetland complex, approximately 1473 acres in area, was determined by the Board to be exceptional and irreplaceable in its contribution to Vermont's natural heritage due to its values for functions VWR § 5.4 (wildlife and migratory bird habitat), VWR § 5.5 (hydrophytic vegetation habitat), VWR § 5.6 (threatened and endangered species habitat), VWR § 5.7 (education and research in the natural sciences), and VWR § 5.9 (open space and aesthetics). Therefore, the Board determined that the wetland complex merited the highest level of protection available under the VWR as a Class One wetland. *Id.*

* In order to adequately protection a Class One wetland for functions VWR § 5.4 (wildlife and migratory bird habitat), VWR § 5.8 (recreational value and economic benefits), and VWR § 5.9 (open space and aesthetics), the Board determined that the presumptive buffer zone of 100 feet should apply to private properties and, where the buffer would extend into property of the State of Vermont as of the date of the Board's order, the buffer would be 300 feet or the boundary of the State property, whichever was greater. *Id.*

* No public hearing was held where no hearing was requested. The Board determined that two casting ponds were wetlands, but not significant wetlands meriting protection as Class Two wetlands under the VWR, based on the uncontroverted information provided by the petitioner and ANR. *The Orvis Company, Inc.*, WET-01-06, Administrative Determination (11/21/01).

* Where petitioner for wetland reclassification petition was not current owner of real property on which the subject wetland was located, the current affected landowner had to join as a co-petitioner in order to effect the requisite standing to support the petition pursuant to Section 7.1 of the VWR. *Ladd's Landing, Ltd., et al.*, WET-01-09, Administrative Determination (11/21/01).

* Board did not hold a public hearing on petition to reclassify a wetland from Class Two to Class Three where no such hearing was requested within 30-day notice period. *Id.*

* Board reclassified Class Two wetland to Class Three based on petitioner's uncontroverted evaluation that the wetland served none of the ten functions in VWR § 5 at a significant level. *Id.*

* Where no public hearing was requested, the Board could make wetland reclassification determination based solely on the uncontroverted information filed by the petitioner and ANR. *New England Container Company*, WET-01-05, Administrative Determination (09/18/01).

* The Board reclassified two wetlands from Class Two to Class Three based on the uncontroverted evidence that the wetlands in question were not significant for any of the ten functions listed in VWR §5 and therefore did not merit protection. *Id.*

* Where no hearing was requested pursuant to Vermont Wetland Rule § 7.4.a., the Board did not hold a public hearing but instead considered a wetland reclassification petition based solely on the information filed by the petitioner and DEC. *Greenwood Mill Wetland*, WET-01-03, Decision (07/16/01).

* The Board concluded based on the uncontroverted expert evaluation of functions served by the subject wetland conducted by DEC that the subject wetland did not serve any of the functions specified in VWR § 5 at a significant level and therefore did not merit protection under the VWR. Accordingly, the Board determined that the subject wetland should be reclassified from Class Two to Class Three and that the VSWI Maps should be changed to reflect this action as provided for in VWR § 4.5.a. *Id.*

* Where no public hearing was requested and no comments filed other than by the petitioner, the Board could make wetland reclassification determination based solely on the uncontroverted information filed by the petitioner. *GS Precision Pond*, WET-01-02, Decision (05/15/01).

* Board may upon receipt of a petition from the DEC, a department of the ANR, reclassify a wetland pursuant to VWR § 7 because DEC qualifies as an "agency" for purposes of VWR § 7.1. *Id.*

* The Board reclassified a wetland from Class Two to Class Three based on the Board's conclusion that the wetland in question, a man-made pond, was not significant for any of the ten functions listed in VWR §5 and therefore did not merit protection. *Id.*

* Where no hearing is requested pursuant to Vermont Wetland Rule § 7.4.a., the Board may act on a wetland reclassification petition without holding a hearing. *Markowski Quarry Ponds,* Administrative Determination (05/09/01).

* The Board reclassified a wetland from Class Two to Class Three based on the Board's conclusion that the wetland was not so significant as to merit protection. *Id.*

* The Board reclassified a wetland from Class Two to Class Three based on the uncontroverted evaluation of the wetland's functions performed by the petitioner's consultant. The evaluation of the wetland's functions was credible in that it was conducted by a professional consultant who thoroughly investigated the functions of the wetland according to the criteria specified in the VWR and in that it was supported by ANR's wetlands biologist who visited the site, worked with the petitioner on the site's wetland management issues, and supported the wetland reclassification petition with detailed correspondence. *Id.*

* If a petition to reclassify a wetland from Class Two to Class Three raises questions about whether the body of water or area in question is a wetland at all, the Board may treat the petition as both a petition to reclassify a wetland from Class Two to Class Three and as a petition in the alternative for a declaratory ruling that the body of water or area in question is not a wetland. *Id.*

* A petition to reclassify a wetland from Class Two to Class Three must include credible information to enable the Board to determine that the body of water or area in question is in fact a wetland. If the body of water or area in question is not in fact a wetland but appears on the VSWI maps, the appropriate relief is a declaratory ruling that the body of water or area in question is not a wetland, and the petition must include credible information to that effect. *Id.*

* The Board reclassified a wetland from Class Two to Class Three based on the Board's conclusion that the wetland was not so significant as to merit protection. *Crystal Haven Road Wetland*, WET-00-06, Findings of Fact, Conclusions of Law and Order (01/02/01).

* The Board determined that the Northshore Wetland exhibits the exceptional characteristics of a Class One wetland based on its review of a modified Wetland Evaluation Technique, the Vermont Wetland Evaluation Form, the Wetland Field Form for Nutrient and Sediment Retention Functions, and general ecological function analyses. *North Shore Wetland*, WET-00-03, Findings of Fact, Conclusions of Law, and Order (09/19/00); *dismissed Northshore Wetland*, S-1314-00Cnc (05/14/01).

* Although all the natural communities in the Northshore Wetland complex have been changed somewhat by human uses and management, they are now primarily under the influence of natural ecological processes and are irreplaceable. *Id.*

* The Board reclassified an abandoned 1500 square foot pond originally dug to provide water to cattle and appearing on National Wetland Inventory maps as an open water palustrine wetland from Class Two to Class Three. The Board reached this conclusion based on ANR's determination that the wetland was not serving significant functions that were protected by the VWR, that the water regime of the wetland depended on surface runoff, and that the mapped soils at the site were not hydric soils. *January Stearns' Wetland*, WET-00-01, Order Reclassifying Wetland on Stearns' Property in Cornwall, Vermont (04/05/00).

* As a legal matter, it is advisable for a person seeking to avoid the regulation attendant to Class 2 wetlands to petition to have a wetland reclassified from Class 2 to Class 3 *prior* to undertaking any activity in the wetland or its buffer zone. *Id.*

* Petitioner lacked standing within the meaning of Section 7.1 of the VWR where it failed to demonstrate that it was an organization "in interest" with the requisite number of bonafide members (15 or more) as of the date of the filing of its wetlands reclassification petition. *Petition for Reclassification of Wetlands, Residents of Northeast Kingdom Preservations, LTD*, WET-98-03, Dismissal Order (05/13/99).

* Where Board concluded that Petitioner was not a proper petitioner within the meaning of Section 7.1 of the VWR, it had no jurisdiction to consider the petition; therefore, the Board, on its own motion, dismissed the petition, thereby terminating the wetland reclassification proceeding. *Id.*

* Petitioner was required to demonstrate that it is an organization "in interest"as required by Section 7.1 of the VWR in order to have standing to prosecute a wetlands reclassification petition. In order to meet the standing requirement, the Petitioner was not required to demonstrate that each and every one of its members has the requisite "interest" to support standing, but rather that the organization, itself, given its purpose, has an interest in the outcome of the proceeding. *Petition for Reclassification of Wetlands, Residents for Northeast Kingdom Preservation, LTD*, WET-98-03, Memorandum of Decision (04/13/99).

* Petitioner was not required to demonstrate in its wetlands reclassification petition that without the Board's timely action, substantial and irreversible harm to one or more of the wetlands' significant functions would result, since the Petitioner did not ask the Board to act on its own motion. *Id.*

* Petitioner was not required to make a *prima facie* demonstration in its petition that the wetlands at issue merited reclassification; a wetland reclassification proceeding is not a contested case and the Petitioner had set forth in its petition the essential factual and legal basis to support its reclassification request. *Id.*

* Petitioners did not demonstrate they had standing to bring a wetland reclassification petition in their own names under Section 7.1 of the VWR; Petitioners owned property near but not adjacent to the subject Class III wetland and they did not explain how their interests as landowners in the functions and values of the wetland were "affected." *Mark & Karen Christiansen*, WET-97-01, Decision (06/17/97).

* Board on its own motion may initiate a reclassification proceeding, however, in the absence of a petition duly supported by a governmental entity or other interested party listed in Section 7.1 of the VWR, the Board must be provided with a sufficiently compelling factual record to justify the exercise of its discretion. The record must convince the Board: (1) that there is a reasonable likelihood that the wetland in question may be significant for one or more of the functions identified in Section 5 of the VWR; and (2) that, without the Board's timely action, strict compliance with the standing requirements of Section 7.1 of the VWR would in all likelihood result in substantial and irreversible harm to one or more of those functions. *Id.*

* Where an affirmative finding is required in order for the Board to reach a conclusion concerning a wetland's significance for a particular function, it is the burden of the Petitioner and other proponents of the reclassification to come forward with information, including testimony based on actual observation and scientific data, to support that finding. *Reclassification of Marble Works Wetland*, WET-94-03, Decision (10/20/95).

* The wetland which the applicant proposed to fill and develop is identified on the National Wetland Inventory Map and therefore is a Class Two or "significant" wetland under the VWR; a Class Two wetland is presumed, until otherwise determined by the Board, to serve all of the functions specified in Section 5 of the VWR. *Champlain Oil Company*, CUD-94-11, Findings of Fact, Conclusions of Law and Order (10/04/95).

* In a decision regarding the reclassification of a wetland, the standards to be applied in evaluating a wetland's significance for open space and aesthetics are "collective" or "community" standards of value, not personal ones. Such standards are also applicable to the review of a conditional use determination application. *Id.*

* Where Petitioner alleged that a Class III wetland was significant for certain functions and the Petitioner did not offer information or argument with respect to these functions, the Board could not make findings concerning the extent to which the wetland performed these functions and therefore could offer no conclusions concerning the wetland's significance for these functions. Accordingly, the Board limited its inquiry and conclusions to only those functions for which the Petitioner and others offered written filings, testimony and exhibits. *Reclassification of Moon Brook Wetland*, WET-94-02, Decision (08/09/95).

* Although a reclassification proceeding is not a "contested case," the Board must systematically evaluate information about the wetland's functions against the criteria and subcriteria set forth in Section 5 of the VWR; since mere assertions of fact will not support findings with respect to these criteria and subcriteria, the Petitioner must provide the Board with specific data about the wetland's functions, through testimony and written submissions, to support a reclassification. *Petition for Reclassification of Brickyard Road Wetlands*, WET-92-04, Decision (07/18/94).

* Designation of wetlands as Class II wetlands under the VWR does not mean that these wetlands and their associated buffer zones cannot be developed; a number of uses are allowed uses pursuant to Section 6.2 of the Rules and many other types of development may be authorized pursuant to Section 8 of the Rules. *Id.*

* Since it was uncontested that at least a portion of the applicant's property is a Class Two wetland subject to the Board's jurisdiction, and no petition for redesignation of the wetland as a Class Three wetland was pending, the conditional use determination appeal before the Board involved a protected Class Two wetland with an associated fifty-foot buffer zone, under the VWR. *Appeal of Larivee*, CUD-92-09, Findings of Fact, Conclusions of Law and Order (03/25/94).

* Under Section 7.3 of the VWR, those persons notified of the filing of a wetland reclassification petition were given 30 days within which to file written comments or to "request that the Board hold a hearing on the petition." Whether a hearing is actually convened is within the discretion of the Board. *Montenieri Wetland*, WET-90-01, Decision (02/26/91).

* If a hearing is held by the Board with respect to a wetland reclassification proceeding, the Board's Rules of Procedure with respect to contested case proceedings would govern, *as far as applicable*. However, the Board will conduct an "informal hearing," allowing the submission of information either in the form of oral statements (not under oath) or in the form of written material. *Id.*

* Although wetland reclassification proceeding was not a contested case, petitioner, who demonstrated at hearing that part of the wetland in question was located on his land, satisfied the "standing" requirement to bring a petition under Section 7.1 of the VWR as an "affected landowner." *Id.*

* The review of a petition for reclassification of a wetland does not fall into the category of "rulemaking" or "contested case" under the Board's Rules of Procedure; instead, a reclassification proceeding involves an "informal hearing" and an "administrative determination." *Id.*

1836.1 Authority; Jurisdiction

* Title 10 V.S.A. §§ 905(7) and (9), authorizes the Board to adopt rules for the identification and protection of wetlands that are so significant that they merit protection under state law and Title 10 V.S.A. § 905(8) authorizes the Board to act on petitions to designate specific wetlands as significant based on functional analyses of those wetlands. *Trapp Family Lodge Wetland,* WET-04-01, Administrative Determination (10/06/04).

* The Board has the implicit authority, when petitioned to do so, to conduct a functional analysis of a specific wetland to determine whether it is not so significant that it merits protection under its rules. *Id.*

* Title 10 V.S.A. § 905(7) authorizes the Board to adopt rules for the identification of wetlands that are so significant that they merit protection. *Sunset Cliff Inc.,* WET-03-01, Administrative Determination (01/23/04); *Sunset Cliff Ass'n v. Water Resources Board,* No. 187-04 CnCv (dismissed for lack of jurisdiction). *Appeal docketed,* No. 551-04-04 WnCv (10/07/04) (pending).

* The reclassification system of the VWR is designed to allow the correction of errors in the mapping system over time. Thus, even if an entire mapped polygon for a project site containing significant wetlands was determined not to be a wetland, the appropriate solution to such a mapping error would not be to remove the actual wetlands on the site from the regulatory purview of the maps but to add the larger wetland complex on the site to the maps in order to ensure that these wetland resources are responsibly managed. *Calvin Murray*, WET-03-03, Administrative Determination (10/27/03).

* Pursuant to Rule 17 of the Board's Rules of Procedure, the Board is authorized to use the procedural rules applicable to contested case proceedings, "as appropriate," in administrative proceedings to reclassify wetlands and configure wetland buffer zones. *Lake Bomoseen Wetland*, WET-02-04, Memorandum of Decision (03/21/03); *aff'd, Alan & Claudia Wulff v. Vt. WRB,* No. 234-4-03, Opinion and Order (12/03/03); *appeal docketed,* No. 2004-002 (01/23/04) (pending).

* In response to a petition or on its own motion, the Board also may determine which functions make a wetland significant, determine the boundaries of a significant wetland, and determine whether an area shown as a wetland on an NWI map is in fact not a wetland. *Lake Bomoseen Wetland*, WET-02-04, Administrative Determination (02/06/03); *aff'd, Alan & Claudia Wulff v. Vt. WRB,* No. 234-4-03, Opinion and Order (12/03/03); *appeal docketed,* No. 2004-002 (01/23/04) (pending). *See also, Lake Bomoseen Ass'n v. WRB,* 145-3-03 RdCv, Opinion and Order (04/14/04) (dismissed for lack of jurisdiction); *appeal docketed*, *Reclassification of Lake Bomoseen Wetland*, No. 2004-220 (05/26/04) (pending).

* Unlike a contested case proceeding, the Board is not required by law to hold a public hearing in a wetland reclassification proceeding. *Id.*

* Pursuant to VWR §§ 4.4 and 7.1, the Board may determine whether to reclassify any wetland to a higher or lower classification, declare which functions make any wetland significant, and decide whether the size or configuration of a buffer zone associated with a significant wetland should be modified. *Id.*

* Pursuant to 10 V.S.A. §905(7)-(9), the Board is charged with the protection of Vermont's significant wetlands. *Kane Farm Ponds*, WET-02-02, Administrative Determination (06/25/02).

* Under Board Rule of Procedure 17, an administrative determination regarding wetlands must be conducted in accordance with the provisions of Part III of the Rules of Procedure, as appropriate. *Id.*

* The Board implements its authority to reclassify wetlands through adoption of the VWR. *Id.*

* While many marshes, bogs, fens, and open water wetlands are significant and therefore subject to the Board's protection, not all wet areas are wetlands. Consequently, the Board has authority, pursuant to §§ 4.4 and 7 of the VWR, and Board Rule of Procedure 17, to determine that an area shown as a wetland on an NWI map is not in fact a wetland. *Id.*

* The Board determined, based on uncontroverted evidence, that two man-made ponds, although presumed to be Class Two wetlands because they appear on the National Wetland Inventory map, are not wetlands because they do not demonstrate all of the three necessary parameters: soils, wetland vegetation, and wetland hydrology. Thus, these man-made ponds do not meet the jurisdictional threshold for regulation under the VWR. *Id.*

* A request in a letter from the petitioner's consultant that an area be reclassified from Class Two to Class Three was denied without prejudice because neither the petition nor the notice of the petition included that request. *Burlington Country Club,* WET-01-08DR, Declaratory Ruling (10/30/01).

* The Board is authorized to reclassify a wetland from Class Two to Class Three, thereby eliminating protection under the VWR. *Id.*

* The Board may determine whether to reclassify any wetland to a higher or lower classification when properly petitioned to do so. VWR §§ 4.4, 7.1. *Greenwood Mill Wetland,* WET-01-03, Decision (07/16/01).

* Board may upon receipt of a petition from the DEC, a department of the ANR, reclassify a wetland pursuant to VWR § 7 because DEC qualifies for standing as an "agency" for purposes of VWR § 7.1. *GS Precision Pond*, WET-01-02, Decision (05/15/01).

* Upon receipt of a petition from an affected landowner, the Board may reclassify a wetland to a lower classification pursuant to VWR §§ 4.4 and 4.7. *Markowski Quarry Ponds*, Administrative Determination (05/09/01).

* Pursuant to VWR §§ 4.4 and 4.7, the Board has the authority to reclassify a wetland to a lower classification, thereby reducing or eliminating its protection. *Crystal Haven Road Wetland*, WET-00-06, Findings of Fact, Conclusions of Law and Order (01/02/01).

* Wetland reclassification decisions, which the Board renders pursuant to VWR § 7, are administrative determinations rather than contested cases. Hearings conducted on reclassification petitions are designed to gather information about the subject wetland's significance for the functions identified in VWR § 5. Parties may present testimony and present exhibits supporting or opposing the reclassification petition based on consideration of the VWR § 5 criteria. Parties are not entitled to cross examination, but they may present argument, their own witnesses, and exhibits in rebuttal. The Board bases its decision on the entire record, including all timely written comments. *North Shore Wetland*, WET-00-03, Findings of Fact, Conclusions of Law, and Order (09/19/00); *dismissed In re Northshore Wetland*, S-1314-00Cnc (05/15/01).

* The Board has jurisdiction over significant wetlands pursuant to 10 V.S.A. § 905(7)-(9) and the VWR. *Id.*

* Not all wetlands are significant and not all wet areas are wetlands. The Board therefore has authority pursuant to Vermont Wetland Rule §§ 4.4 and 7 to reclassify a wetland to a lower classification, thereby reducing or eliminating protection under the VWR. *Golf Course Pond; Snyder Pond*, WET-00-04 and WET-00-05, Order Reclassifying Wetlands from Class Two to Class Three (08/31/00).

* Because not all wet areas are wetlands and not all wetlands are significant, the Board has authority pursuant to VWR §§ 4.4 and 7 to reclassify a wetland to a lower classification and to thereby reduce or eliminate its protection. *January Stearns' Wetland*, WET-00-01, Order Reclassifying Wetland on Stearns' Property in Cornwall, Vermont (04/05/00).

* The Board may declare that a particular body of water or other feature is not a wetland subject to protection under 3 V.S.A. § 808 and WBR 16. *Id.*

* In a proceeding that the Board noticed alternatively as either a request for a declaratory ruling that the subject pond was not a wetland or as a request to reclassify the subject wetland from Class 2 to Class 3, the Board was without sufficient information to determine whether the pond was ever a wetland at all. The Board therefore declined to declare that the pond was not a wetland. Rather, the Board concluded that the subject wetland is a Class 3 wetland that is not regulated by the VWR. Therefore no conditional use determination is required for any further action affecting the wetland or its buffer zone. *Id.*

* Petitioner lacked standing within the meaning of Section 7.1 of the VWR where it failed to demonstrate that it was an organization "in interest" with the requisite number of bonafide members (15 or more) as of the date of the filing of its wetlands reclassification petition. *Petition for Reclassification of Wetlands, Residents of Northeast Kingdom Preservations, LTD*, WET-98-03, Dismissal Order (05/13/99).

* Where Board concluded that Petitioner was not a proper petitioner within the meaning of Section 7.1 of the VWR, it had no jurisdiction to consider the petition; therefore, the Board, on its own motion, dismissed the petition, thereby terminating the wetland reclassification proceeding. *Petition for Reclassification of Wetlands, Residents of Northeast Kingdom Preservations, LTD,* WET-98-03, Dismissal Order (05/13/99).

* Petitioner was required to demonstrate that it is an organization "in interest" as required by Section 7.1 of the VWR in order to have standing to prosecute a wetlands reclassification petition. In order to meet the standing requirement, the Petitioner was not required to demonstrate that each and every one of its members has the requisite "interest" to support standing, but rather that the organization, itself, given its purpose, has an interest in the outcome of the proceeding. *Id.*, Memorandum of Decision (04/13/99).

* Petitioner was not required to demonstrate in its wetlands reclassification petition that without the Board's timely action, substantial and irreversible harm to one or more of the wetlands' significant functions would result, since the Petitioner did not ask the Board to act on its own motion. *Id.*

* Where a petitioner has requested in the alternative a declaration that a wetland is not a wetland within the meaning of the VWR and a reclassification of the wetland from Class Two to Class Three unprotected

status, and where that petitioner subsequently withdraws its request for a declaratory ruling, the proceeding is converted from a contested case proceeding to an administrative determination under Section 7 of the VWR. *S.T. Griswold & Company, Inc.*, WET-98-02DR, Decision (09/16/98).

* Having determined that a wetland is not a significant wetland but rather a Class Three wetland, the Board lacks authority to determine the final boundaries of that wetland, pursuant to Section 7.1(d) of the VWR. *Id.*

* Petitioners did not demonstrate they had standing to bring a wetland reclassification petition in their own names under Section 7.1 of the VWR; Petitioners owned property near but not adjacent to the subject Class III wetland and they did not explain how their interests as landowners in the functions and values of the wetland were "affected." *Mark & Karen Christiansen*, WET-97-01, Decision (06/17/97).

* Quarry, which appeared on the National Wetland Inventory map for the area, did not constitute a wetland within the meaning of the VWR; quarry did not have wetland vegetation or hydric soils and did not support aquatic life. *Stanley Gawet (Marble Quarry)*, WET-95-03DR, Decision (02/15/96).

* Two retention ponds did not constitute wetlands within the meaning of the VWR; while both ponds appeared on the National Wetland Inventory for the area, neither pond had hydric soils or significant aquatic life. *Technology Park Associates, Inc.*, WET-95-02, Decision (02/01/96).

* In order for a body of surface or ground water to constitute a "wetland" within the meaning of Section 2.29 of the VWR and therefore be subject to the Rules' protections, three parameters must all be present: hydrology, wetland vegetation, and hydric soils. *Id.*

* A Petitioner who wishes to have a National Wetland Inventory-designated wetland removed from the jurisdiction of the VWR should request a declaratory ruling from the Board pursuant to 3 V.S.A. § 808 and proceed under the applicable Board Rules of Procedure. *Id.*

* A Petitioner who wishes to have a National Wetland Inventory-designated wetland removed from the jurisdiction of the VWR should request a declaratory ruling from the Board pursuant to 3 V.S.A. § 808 and proceed under the applicable Board Rules of Procedure. *Id.*

* Settling ponds located at Petitioner's talc processing facility, although mapped on the National Wetland Inventory map for the area, did not constitute Class Two wetlands subject to protection under the VWR. *Luzenac America, Inc.*, WET-95-01, Decision (11/07/95).

* While settling ponds at Petitioner's talc processing facility protected surface water by the retention of mineral sediments, they did so as a function of the design and construction of the ponds, not because they were significant wetlands as envisioned by Section 5.1 of the VWR. *Id.*

* While settling ponds at Petitioner's talc processing facility, by virtue of the presence of wastewater, supported some hydric vegetation, they did not support significant vegetation or aquatic life dependent on saturated or seasonally saturated soil conditions for growth and reproduction; indeed, these ponds were expected to become less conducive to wetland species habitat as sedimentation reached pond capacity and the ponds were used for storage of dry tailings solids and reclamation. *Id.*

* Quarry located at the Petitioner's talc processing facility, although mapped on the National Wetland Inventory map for the area, did not constitute a Class Two wetland subject to protection under the VWR. *Swinington Quarry*, WET-94-01, Decision (08/16/94).

* Although Petitioner's quarry contained some wetland vegetation dependent on the hydrology of the quarry, the Board determined that the wetland was not significant for any of the wetland functions set forth in Section 5 of the VWR. *Id.*

* Petitioner for a declaratory ruling did not present a justiciable controversy when the question it presented required a determination concerning the rights of a third party not before the Board and based on hypothetical facts. *Northshore Wetlands*, WET-92-03DR, Memorandum of Decision and Order (04/29/94).

* Board had no jurisdiction to entertain a declaratory ruling request where the Petitioner did not assert that its own legal interests were threatened by injury as a consequence of the application of a statute, rule, or order of the Board. *Id.*

* Board may not issue declaratory rulings in substitution for the process set forth in Section 7 of the VWR for reclassifying wetlands or changing the delineation of their boundaries or buffer zones. *Id.*

* Three settling ponds located at the Petitioner's talc processing facility, although mapped on the National Wetland Inventory map for the area, did not constitute a Class Two wetland subject to protection under the VWR. Although these ponds contained water, they did not support vegetation or aquatic life, and the record did not suggest that these ponds provided an environment conducive to supporting significant vegetation or aquatic life. *Luzenac America, Inc.*, WET-93-01, Decision (01/31/94).

* Quarry, which appeared on the National Wetland Inventory Map as a "wetland," was in fact and as a matter of law not a wetland and, therefore, the VWR did not apply to it. *Gold Stone Marble Company Quarry*, WET-91-03DR, Decision (10/30/91).

*Although wetland reclassification proceeding was not a contested case, petitioner, who demonstrated that part of the wetland in question was located on his land, satisfied the "standing" requirement to bring a petition under Section 7.1 of the VWR as an "affected landowner." *Montenieri Wetland*, WET-90-01, Decision (02/26/91).

1836.2 Buffer Zone Determinations

* In determining whether to reduce the presumptive 100-foot buffer of a Class One wetland, the Board will not consider the physical limitations of property for development. *Lake Bomoseen Wetland*, WET-02-04, Memorandum of Decision (03/21/03) *aff'd, Alan & Claudia Wulff v. Vt. WRB,* No. 234-4-03, Opinion and Order (12/03/03); *appeal docketed,* No. 2004-002 (01/23/04) (pending).

* The Board denied a party's Motion to Alter that sought a reduction of a 100-foot wetland buffer imposed on the party's property when the wetland was reclassified from Class Two to Class One. At the time the wetland was reclassified, the Board determined that the 100-foot wide presumptive buffer zone was needed to protect significant wildlife habitat, the wetland's water quality, and the wetland's aesthetic and open space functions. The Board denied the party's motion to alter because the motion relied on new arguments that did not point to conditions or errors made by the Board or demonstrate that the Board, in making its initial decision, had overlooked or misunderstood law or fact. *Id.*

* Class One wetlands are provided a presumptive 100-foot buffer zone unless sufficient credible evidence is submitted rebutting this presumption, in which case the Board may establish a narrower or wider buffer zone, taking into consideration locale-specific conditions in relation to the wetland resource and its specific functional attributes. *Id.,* Administrative Determination (02/06/03).

* The Board may consider buffer zone questions in the context of a reclassification petition keeping in mind that narrowing of a buffer zone must be supported by evidence that the functions that make a wetland significant will not be compromised. *Id.*

* Certain uses and activities within a Class One or Class Two wetland and/or its buffer zone require a conditional use determination (CUD) from the Secretary of ANR prior to commencement of those uses or activities in order to assure that they will not result in undue adverse impacts to the significant functions of that wetland. *Id.*

* Once the Board determines that a wetland is exceptional and irreplaceable in its contribution to Vermont's natural heritage and, thus, requires reclassification of the wetland to Class One, the Board has considerable discretion in determining the width of the buffer zone that is necessary to preserve and enhance the protected functions now served by the wetland. *Lake Bomoseen Wetland*, WET-02-04, Administrative Determination (02/06/03) (dissenting opinion); *aff'd, Alan & Claudia Wulff v. Vt. WRB,* No. 234-4-03, Opinion and Order (12/03/03); *appeal docketed,* No. 2004-002 (01/23/04) (pending). *See also, Lake Bomoseen Ass'n v. WRB,* 145-3-03 RdCv, Opinion and Order (04/14/04) (dismissed for lack of

jurisdiction); *appeal docketed*, *Reclassification of Lake Bomoseen Wetland*, No. 2004-220 (05/26/04) (pending).

* In considering the evidence proffered to overcome or vary from the effect of the presumptive assignment of the 100-foot buffer zone, in addition to scientific evidence normally reviewed in wetland reclassification proceedings, the Board should also take into account a wide range of evidence, including the Board's own observations, lay testimony and anecdotal evidence about the past, present and anticipated nature of both the wetland itself and the human activities within and adjacent to it. *Id.*

* In order to adequately protection a Class One wetland for functions VWR § 5.4 (wildlife and migratory bird habitat), VWR § 5.8 (recreational value and economic benefits), and VWR § 5.9 (open space and aesthetics), the Board determined that the presumptive buffer zone of 100 feet should apply to private properties and, where the buffer would extend into property of the State of Vermont as of the date of the Board's order, the buffer would be 300 feet or the boundary of the State property, whichever was greater. *Tinmouth Channel Wetland Complex*, WET-01-07, Administrative Determination (12/13/01).

* The 100-foot buffer zone in force as a function of the reclassification of the Northshore Wetland from Class Two to Class One was sufficient to protect functions 5.2 (surface and groundwater protection), 5.3 (fisheries habitat), 5.5 (hydrophytic vegetation habitat), 5.7 (education and research in natural sciences), 5.8 (recreational value and economic benefits), and 5.10 (erosion control through binding and stabilizing the soil). *North Shore Wetland*, WET-00-03, Findings of Fact, Conclusions of Law, and Order (09/19/00); *dismissed, Northshore Wetland*, S-1314-00Cnc (05/14/01).

* To enhance and protect functions 5.4 (wildlife and migratory bird habitat) and 5.9 (open space and aesthetics), the 100-foot buffer zone in force as a function of reclassification of the wetland from Class Two to Class One was reconfigured to extend 300 feet from the delineated wetland boundary, except where such buffer would encroach on the city recreational path it was reconfigured to extend to 25 feet from the path's centerline. *Id.*

* Once a wetland has been designated a Class II wetland, an affected property owner may petition the Board for a final boundary determination by filing a petition pursuant to Section 7.1(d) of the VWR. Alternatively, or in combination, an affected property owner may seek a modification of the wetland's buffer zone pursuant to Section 7.1(c) of the VWR. *Reclassification of Moon Book Wetland*, WET-94-02, Memorandum of Decision (04/03/96).

* The purpose of establishing a buffer zone between a significant wetland and a developed upland area is to protect the integrity of the functions for which that wetland is deemed significant. *Reclassification of Marble Works Wetland*, WET-94-03, Decision (10/20/95).

* Buffer zones may vary in width depending on the function(s) to be protected. Soil properties, groundwater hydrology, topography, wildlife characteristics, and other factors must be evaluated to determine the appropriate buffer requirements. *Id.*

* Buffer requirements may vary according to the specific function to be protected, but the literature generally supports the establishment of wetland buffer zones in excess of fifty feet. *Id.*

* Proponents of an irregular buffer zone, in part less than the presumptive fifty-feet, did not adequately demonstrate why the presumptive buffer zone for a Class II wetland should be set aside in light of the Board's statutory obligation to protect significant wetlands and the functions they serve. On the other hand, neither the Petitioner nor ANR demonstrated that a buffer zone *greater* than fifty feet was needed to protect those functions which the Board determined were significant, given the topography, existing surrounding landuses, and other factors identified in the record and found by the Board. *Id.*

* Reclassification of a wetland from Class II to Class I status, pursuant to Section 4.3 of the VWR, does not automatically require the Board to extend an existing fifty-foot protective buffer zone to one-hundred feet. *Northshore Wetlands*, WET-92-03DR, Memorandum of Decision and Order (04/29/94).

* Petitioner's filing was not a survey memorializing the buffer zone of Scanlon Bog, and the Board accordingly ordered the Petitioner to prepare a survey plat of the buffer zone, conforming with the

requirements of 27 V.S.A. ch. 17. *Petition for Reclassification of Scanlon Bog*, WET-91-01, Decision (04/07/94).

* A buffer zone of 250 feet, except in one area identified by the Board, was found to be adequate to protect the functions which made Scanlon Bog significant as a Class I wetland. In the one area of deviation, the Board directed that a survey memorializing the configuration and location of the buffer zone marked in the field must be made and approved by the Board before the wetland would be permanently designated a Class I wetland. *Petition for Reclassification of Scanlon Bog*, WET-91-01, Decision (12/22/92).

* Board would entertain a petition to permanently designate Scanlon Bog a Class I wetland upon receipt of a survey of the bog's entire buffer zone. *Id.*

*Board interprets Sections 4.3 and 7.4(b) of the VWR to provide that a 100 foot buffer zone would be created when a wetland is designated Class I if the Board is convinced that a larger or smaller buffer zone would not sufficiently provide the necessary protection of wetland functions. *Dorset Marsh*, WET-90-03, Decision (04/22/92).

* Where Board concluded that a wetland merited reclassification to Class I, that one of the wetland's significant functions was as wildlife and migratory bird habitat, and uncontroverted evidence was presented that habitat for wood duck nesting, mink dens, and beaver winter forage required a buffer zone of at least 100 feet, the Board established a 100 foot buffer zone adjacent to the boundaries of that wetland in order to protect its wildlife habitat function. *Id.*

* Where the wetland that was subject to a reclassification petition was located within a 3.08 acre area established by the Town as a Natural Resource Preservation District, and the Town district provided for a buffer zone of between 50 and 200 feet, sufficient to protect the wetland functions which made the wetland significant, the Board established an irregular buffer zone conforming with the current boundaries of the Town district. *North Springfield Bog*, WET-91-02, Decision (03/25/92).

* Board declined to reclassify a Class II wetland to a Class I wetland, but did expand the buffer zone in some areas to 300 feet in order to protect the wildlife function of the wetland, specifically nesting habitat for great blue heron. *Camp Hill Beaver Pond*, WET-90-04, Decision (03/25/92).

* As a prerequisite to granting a requested expansion of a portion of a Class II wetland buffer zone from 50 to 300 feet, the Board required the petitioner to provide it with a survey memorializing the buffer zone's irregular configuration. *Id.*

1836.3. Contiguity

* A petitioner must provide actual notification of a wetland reclassification petition to persons who own land within or adjacent to the mapped wetland polygon and buffer zone of which reclassification is sought. A petitioner is not required to provide actual notification to additional persons who may own land within or adjacent to contiguous wetlands and their buffer zones, unless the Board determines that the contiguous wetland complex may be impacted by its decision. The Board, in its discretion, may require such notification on a case-by-case basis. *Calvin Murray*, WET-03-03, Administrative Determination (10/27/03).

* Providing actual notification of a reclassification petition to the owners of land within or adjacent to contiguous wetlands was not necessary because the Board's decision preserved the status quo of the contiguous wetland complex. *Id.*

* The Board determines that a mapped wetland polygon, consisting mostly of upland but containing a small amount of significant wetland that does not match the Vermont Significant Wetland Inventory wetland designation ascribed to that polygon confers Class Two regulatory status on both the small wetland within the polygon and all contiguous wetlands. *Id.*

* The Board evaluates the functions of a wetland within a mapped polygon based on this wetland's connection to a contiguous wetland complex. *Id.*

* If the Board determines that a wetland contiguous to a mapped significant wetland is significant, it directs ANR to update the Vermont Significant Wetland Inventory maps to reflect the significant wetland complex. *Id.*

* The reclassification system of the VWR is designed to allow the correction of errors in the mapping system over time. Thus, even if an entire mapped polygon for a project site containing significant wetlands was determined not to be a wetland, the appropriate solution to such a mapping error would not be to remove the actual wetlands on the site from the regulatory purview of the maps but to add the larger wetland complex on the site to the maps in order to ensure that these wetland resources are responsibly managed. *Id.*

* Pursuant to VWR Section 4.2(b), all wetlands contiguous to an NWI-mapped wetland are presumed to be Class Two wetlands, unless determined otherwise by the Board in the course of a reclassification proceeding. *Styles Brook Reservoir,* WET-03-02, Administrative Determination (08/07/03).

* The term "contiguous" is defined in VWR Section 2.07 as meaning "sharing a boundary or touching" and includes "situations where the water level of the wetland is directly influenced by the water level of the adjacent waterbody or wetland" and "where a man-made structure (e.g., roadway) divides a wetland, if surface water is able to flow over, under or thruoughthat structure. *Id.*

* ANR has interpreted the language, "sharing a boundary or touching" in the VWR's contiguous definition to mean that the three parameters defining wetlands (soils, vegetation and hydrology) must be found continuously between the wetland areas in question, broken only by a man-made structure (e.g., roadway) which divides the areas. *Id.*

* Where petition did not show the entirety of one of the two wetlands for which it sought reclassification but only that portion of the wetlands located on its own property, petitioner's consultant was instructed to file with the Board a map, based on an orthophotograph, showing the entirely of the wetland in question and identifying the real properties, other than those owned by the petitioner, within or adjacent to the wetland in question. The Board required receipt of this information prior to taking final action on the petition. It did this so that it could, among other things, determine whether all persons required to receive notice under VWR Section 7.3(b) received notice of the petition and that the Board could assure itself that the wetland was not contiguous to another wetland. *New England Container Company*, WET-01-05, Administrative Determination (09/18/01).

* A wetland not appearing on a National Wetland Inventory map but determined to be contiguous to such a wetland was declared a Class II wetland by the Board. *Petition for Reclassification of the Plains Road Wetland*, WET-92-05, Decision (04/29/94).

* Section 2.07 of the VWR defines the term "contiguous;" that portion of the definition which refers to "sharing a boundary or touching" has been interpreted by ANR and the Board to mean that the three parameters defining wetlands (soils, vegetation and hydrology as provided in Section 3.2(a) of the Rules) must be found continuously between the two wetland areas in question, broken only by a man-made structure which divides the areas. *Id.*

* Where the Board determined that a wetland not appearing on a National Wetland Inventory map was contiguous with a mapped, Class II wetland, the Board determined that it was unnecessary for it to determine whether the unmapped wetland was in fact significant for any of the functions identified by the Petitioner. *Id.*

1836.4 Presumptions

* Pursuant to VWR § 4.2(b), a wetland identified on the Vermont Significant Wetland Inventory (VSWI) map, is presumed to be a Class Two wetland. A Class Two wetland is presumed to serve all of the functions specified in VWR § 5 at a significant level, unless the Board determines otherwise. *Trapp Family Lodge Wetland,* WET-04-01, Administrative Determination (10/06/04).

* Pursuant to VWR § 4.2(B), all wetlands identified on the National Wetland Inventory (NWI) Maps for the State of Vermont (1978) are presumed to be functionally significant and are classified as Class Two

"significant" wetlands. *Sunset Cliff Inc.,* WET-03-01, Administrative Determination (01/23/04); *Sunset Cliff Ass'n v. Water Resources Board,* No. 187-04 CnCv (dismissed for lack of jurisdiction). *Appeal docketed,* No. 551-04-04 WnCv (10/07/04) (pending).

* Certain categories of wetlands shown on the Vermont Significant Wetland Inventory maps are exempt from the general rule that mapped wetlands are Class Two. Otherwise, the mapping system does not give any regulatory consequence to the designations ascribed to wetlands on the maps. *Calvin Murray*, WET-03-03, Administrative Determination (10/27/03).

* The fact that a forested wetland within a mapped polygon is classified on the maps as open water rather than as forested does not defeat the effect of the maps. *Id.*

* The fact that some but not all of a mapped polygon is not in fact a wetland does not remove the regulatory effect of the maps with regard to the wetland within the polygon. *Id.*

* The reclassification system of the VWR is designed to allow the correction of errors in the mapping system over time. Thus, even if an entire mapped polygon for a project site containing significant wetlands was determined not to be a wetland, the appropriate solution to such a mapping error would not be to remove the actual wetlands on the site from the regulatory purview of the maps but to add the larger wetland complex on the site to the maps in order to ensure that these wetland resources are responsibly managed. *Id.*

* Class One wetlands are provided a presumptive 100-foot buffer zone unless sufficient credible evidence is submitted rebutting this presumption, in which case the Board may establish a narrower or wider buffer zone, taking into consideration locale-specific conditions in relation to the wetland resource and its specific functional attributes. *Lake Bomoseen Wetland*, WET-02-04, Administrative Determination (02/06/03); *aff'd, Alan & Claudia Wulff v. Vt. WRB,* No. 234-4-03, Opinion and Order (12/03/03); *appeal docketed,* No. 2004-002 (01/23/04) (pending). *See also, Lake Bomoseen Ass'n v. WRB,* 145-3-03 RdCv, Opinion and Order (04/14/04) (dismissed for lack of jurisdiction); *appeal docketed*, *Reclassification of Lake Bomoseen Wetland*, No. 2004-220 (05/26/04) (pending).

* Having determined that the Lake Bomoseen Wetland is exceptional and irreplaceable in its contribution to Vermont's natural heritage, the Board concluded that this wetland complex merits the highest level of protection available under the VWR, including the presumptive 100-foot buffer zone for the entire perimeter of the LBW. The Board allowed a narrower 50-foot buffer zone, however, in a small but highly developed area at one end of the wetland based on ANR's testimony that the narrower buffer zone would not compromise any of the functions that make this wetland so exceptional. *Id.*

* In general, the party seeking to overcome the effect of the presumption has the burden of establishing that under the circumstances, the presumption should not control. As a practical matter in a wetland reclassification proceeding, that burden falls on any participant seeking either a wider or narrower buffer zone than the presumptive buffer zone prescribed by the VWR. *Lake Bomoseen Wetland*, WET-02-04, Administrative Determination (02/06/03) (dissenting opinion); *aff'd, Alan & Claudia Wulff v. Vt. WRB,* No. 234-4-03, Opinion and Order (12/03/03); *appeal docketed,* No. 2004-002 (01/23/04) (pending). *See also, Lake Bomoseen Ass'n v. WRB,* 145-3-03 RdCv, Opinion and Order (04/14/04) (dismissed for lack of jurisdiction); *appeal docketed*, *Reclassification of Lake Bomoseen Wetland*, No. 2004-220 (05/26/04) (pending).

* In considering the evidence proffered to overcome or vary from the effect of the presumptive assignment of the 100-foot buffer zone, in addition to scientific evidence normally reviewed in wetland reclassification proceedings, the Board should also take into account a wide range of evidence, including the Board's own observations, lay testimony and anecdotal evidence about the past, present and anticipated nature of both the wetland itself and the human activities within and adjacent to it. *Id.*

* Pursuant to VWR § 4.2(b), a Class Two wetland is presumed, unless the Board determines otherwise, to serve all the functions specified in VWR § 5 at a significant level. *ABC/MRC, Inc., Kwiniaska Golf Course*, WET-02-06 and WET-02-07 (Consolidated), Administrative Determination (02/06/03).

* Pursuant to VWR § 4.2 (b), a wetland appearing on a National Wetlands Inventory ("NWI") Map for the State of Vermont (1978) is presumed to be a Class Two wetland, unless determined otherwise by the Board as provided by VWR § 7. *Id.*

* Pursuant to VWR § 4.2 (b), a Class Two wetland is presumed, unless the Board determines otherwise, to serve all the functions specified in VWR § 5 at a significant level. *Id.*

* Ponds that appear on the NWI map are presumed to be Class Two wetlands, unless determined otherwise by the Board pursuant to VWR §7 and VWR § 4.2(b). *Kane Farm Ponds*, WET-02-02, Administrative Determination (06/25/02).

* The Board determined, based on uncontroverted evidence, that two man-made ponds, although presumed to be Class Two wetlands because they appear on the NWI map, are not wetlands because they do not demonstrate all of the three necessary parameters: soils, wetland vegetation, and wetland hydrology. Thus, these man-made ponds do not meet the jurisdictional threshold for regulation under the VWR. *Id.*

* Pursuant to VWR § 4.2.b(2), a Class Two wetland is presumed, unless the Board determines otherwise, to serve all the functions specified in VWR § 5 and is therefore subject to protection under the VWR. *Greenwood Mill Wetland*, WET-01-03, Decision (07/16/01).

* A mapped wetland is presumed to be a Class Two wetland, unless determined to be otherwise by the Board. VWR § 4.2.b. Class Two wetlands are presumed, unless the Board determines otherwise, to serve all the functions specified in VWR § 5. *Markowski Quarry Ponds*, Administrative Determination (05/09/01).

* A portion of a settling pond located on the Petitioner's property and designated as an open water wetland on the applicable National Wetlands Inventory map, is presumed to constitute a Class II protected wetland under the VWR. *S.T. Griswold & Company, Inc.*, WET-98-02DR, Decision (09/16/98).

* A portion of the settling lagoon located on the Petitioner's property, designated as an open water wetland on the applicable National Wetlands Inventory map, is presumed to constitute a Class II protected wetland under the VWR. *Champlain Water District*, WET-98-01DR, Decision (07/22/98).

* Where the VWR create a presumption, the person seeking to overcome that presumption carries the burden of both production and persuasion. *Reclassification of Marble Works*, WET-94-03, Decision (10/20/95).

* Section 5.1(a)(6), which provides that a "wetland whose surface constitutes less than one percent of the watershed upstream of its outlet will be presumed to not be significant for reducing the magnitude or frequency of flooding," creates a presumption against, rather than an absolute bar to, a determination that a wetland the size of the Moon Brook Wetland is significant for water storage for flood water and storm runoff. In order to overcome this presumption, Petitioner must provide credible information, not mere assertions, concerning how the specific wetland, alone or in combination with other wetlands in the watershed, actually reduces either the magnitude or frequency of risks to the public safety or damage to public or private property due to floodwater or stormwater runoff. *Reclassification of Moon Brook Wetland*, WET-94-02, Decision (08/09/95).

1836.5 Significance for Specific Wetland Functions

* The Board reclassified a wetland from Class Two to Class Three, pursuant to 10 V.S.A. § 905(7)-(9) and § 7 of the VWR (eff. Jan 1, 2002) after determining that the wetland is not a significant wetland, based on analysis of its functions as described in DEC's Vermont Wetland Evaluation Form. *Trapp Family Lodge Wetland,* WET-04-01, Administrative Determination (10/06/04).

* The Board has the implicit authority, when petitioned to do so, to conduct a functional analysis of a specific wetland to determine whether it is not so significant that it merits protection under its rules. *Id.*

* Pursuant to 10 V.S.A. § 905(7), any determination that a particular wetland is significant will result from an evaluation of at least the eleven functional criteria described in that statute. *Sunset Cliff Inc.,* WET-03-01, Administrative Determination (01/23/04); *Sunset Cliff Ass'n v. Water Resources Board,* No. 187-04 CnCv (dismissed for lack of jurisdiction). *Appeal docketed,* No. 551-04-04 WnCv (10/07/04) (pending).

* Pursuant to VWR Sections 4.4 and 7.1(a) and (c), the Board may, on a case-by-case basis, reclassify wetlands to a higher or lower classification based on an analysis of its functional significance and may also determine whether the size or configuration of a buffer zone associated with a significant wetland should be modified. *Id.*

* Although ANR's analysis of the wetland site at issue indicated that the wetland was significant for two of the functions set forth in VWR Section 5 and characterized the wetland as important habitat and a haven for wetland-dependant and non-wetland dependant wildlife in an increasingly developed area, the Board determined that the wetland is not so significant for any of the Section 5 functions that it merits protection as a Class Two Wetland. *Id.*

* A wetland that does not make an important contribution to protecting property, public safety and aquatic habitat from flood damage is not significant for VWR Section 5.1. *Id.*

* A wetland that performs the functions of groundwater recharge and filtration of pollutants from surface waters but where no evidence is presented to suggest that it does so at a significant level is not functionally significant under VWR Section 5.2. *Id.*

* Wetlands in close proximity to human development may be significant for wildlife habitat functions and values described in VWR Section 4.5 and proximity to human development does not diminish the need to protect or value those functions. *Id.*

* To be functionally significant under VWR Section 5.4(e)(3), a species of wildlife must be listed in that section of the VWR and must actually be present in the wetland. *Id.*

* A wetland with pools of water that do not last long enough to allow amphibians and reptiles to complete their reproductive cycles and migrate from the wetland area does not meet the requirement of VWR Section 5.4(c). *Id.*

* Although potential habitat condition exists, a wetland does not meet the requirements of functional significance under VWR Section 5.4(e)(3) if listed species do not use the wetland site due to its proximity to existing dense human development. *Id.*

* A wetland that meets the minimum standards for habitat diversity but where no evidence exists that the wetland actually provides important habitat for wildlife and migratory birds is not functionally significant under VWR Section 5.4. *Id.*

* VWR Section 5.5 requires consideration of four factors to determine whether a rare community of plant species exist that makes a wetland significant. Where no evidence is presented to support the wetland's significance for these functions, the wetland does not meet the requirements of functional significance under Section 5.5. *Id.*

* To meet the requirements of VWR Section 5.7, evidence must be presented to demonstrate the wetland's usefulness for scientific or educational purposes or to demonstrate characteristics that potentially make it unique or valuable for education or scientific research. *Id.*

* To be significant under VWR Section 5.9, the wetland must not only provide open space, it must possess some unique aesthetic quality or value as open space or have prominence as a distinct feature in the landscape. *Id.*

* An existing Class Two wetland, classified on the VSWI maps as palustrine, open water, permanent, that was created by the construction of an earthen embankment on an unnamed high-gradient stream, that was not located on a site where a wetland existed prior to the creation of the impoundment, that constituted an artificial and highly maintained system, and did not serve any of the functions described in

the VWR, was reclassified to Class Three based on a petition filed by the landowner and supported by ANR's District Wetland Ecologist. *Johnson State College (Upper Pond),* WET-03-04, Administrative Determination (09/26/03).

* Class Two wetlands are deemed to be significant wetlands and are afforded a greater degree of protection under the VWR in that a Conditional Use Determination is required for any activity within the wetland or the wetland 50-foot buffer, other than allowed uses, as defined in VWR § 6.2. *Sunset Cliff Inc*., WET–03-01, Memorandum of Decision (09/18/03).

* A determination by ANR that a wetland is significant for any one of the VWR § 5 wetland functions satisfies the first prong the two-part test set forth in VWR § 7.5. *Id.*

* A wetland that does not serve any of the ten functions at a significant level may be reclassified by the Board from Class Two to Class Three. *Styles Brook Reservoir,* WET-03-02, Administrative Determination (08/07/03).

* The Board may reclassify a wetland as Class Three and direct ANR's Wetlands Office to remove it from the VSWI map if the Board determines that a wetland does not perform any of the ten wetland functions at a significant level. This determination may be based on a functional assessment by a wetland specialist, including specialists within ANR's Wetlands Office. *Id.*

* Where persons opposed to reclassifying a wetland from Class Two to Class Three provided the Board with no information to establish that the wetland performs the specified functions at a *significant* level and that it does so as a result of *wetland processes,* the Board concluded that the wetland is not a significant wetland meriting protection. *Id.*

* The level of significance of a wetland is determined by the Board based on an analysis of a wetland's functional significance in the context of each reclassification decision. The Board may also decide buffer zone questions in the context of a reclassification petition. *Lake Bomoseen Wetland*, WET-02-04, Administrative Determination (02/06/03); *aff'd, Alan & Claudia Wulff v. Vt. WRB,* No. 234-4-03, Opinion and Order (12/03/03); *appeal docketed,* No. 2004-002 (01/23/04) (pending). *See also, Lake Bomoseen Ass'n v. WRB,* 145-3-03 RdCv, Opinion and Order (04/14/04) (dismissed for lack of jurisdiction); *appeal docketed*, *Reclassification of Lake Bomoseen Wetland*, No. 2004-220 (05/26/04) (pending).

* If the evidence submitted as part of a petition to reclassify a wetland indicates that the wetland is exceptional or irreplaceable in its contribution to Vermont's natural heritage for even *one* of the ten functions and values set forth in the VWR, the Board *must* classify the wetland as Class One. *Id.*

* Based on the uncontroverted assessment of the subject wetland's functions by the petitioner's ecologist, which was confirmed by ANR, the Board concluded that two man-made ponds originally constructed as golf-course hazards were not significant wetlands meriting protection under the VWR. Accordingly, the Board ordered the subject wetlands reclassified from Class Two to Class Three. *ABC/MRC, Inc., Kwiniaska Golf Course*, WET-02-06 and WET-02-07 (Consolidated), Administrative Determination (02/06/03).

* The Board may determine that a mapped Class Two wetland is not sufficiently significant to merit protection under the VWR based on an evaluation of that wetland's functions. If the Board concludes that the wetland does not serve any of the ten functions at a significant level, it may reclassify the Class Two wetland to a Class Three wetland. *Id.*

* If the Board concludes that a wetland does not serve any of the ten functions at a significant level, it may reclassify a Class Two wetland to a Class Three wetland. *Town of West Rutland*, WET-02-03, Administrative Determination (08/07/02).

* Wetland complex, approximately 1473 acres in area, was determined by the Board to be exceptional and irreplaceable in its contribution to Vermont's natural heritage due to its values for functions VWR § 5.4 (wildlife and migratory bird habitat), VWR § 5.5 (hydrophytic vegetation habitat), VWR § 5.6 (threatened and endangered species habitat), VWR § 5.7 (education and research in the natural sciences), and VWR § 5.9 (open space and aesthetics). Therefore, the Board determined that the wetland complex merited the

highest level of protection available under the VWR as a Class One wetland. *Tinmouth Channel Wetland Complex*, WET-01-07, Administrative Determination (12/13/01).

* Two man-made ponds on petitioner's property were wetlands within the meaning of VWR § 2.29, but not significant wetlands meriting protection under the VWR. The only wetland functions performed by the two ponds, but not at a significant level, were functions VWR §5.3 (fisheries habitat), VWR § 5.8 (recreational value and economic benefits), and VWR § 5.9 (open space and aesthetics). To the extent that the ponds performed these functions, it was not because of natural wetland processes, but rather the intervention of petitioner's maintenance of the ponds for their intended purpose – as casting ponds for fly casting demonstrations and practice. *The Orvis Company, Inc.*, WET-01-06, Administrative Determination (11/21/01).

* A wetland designated as a Class Three wetland in a reclassification proceeding is so designated because it has been "determined not to be sufficiently significant to merit protection" under the VWR. VWR §4.1.c. If the Board concludes that a wetland does not serve any of the functions specified in VWR § 5 at a significant level, it may reclassify the Class Two wetland to a Class Three wetland. *Greenwood Mill Wetland*, WET-01-03, Decision (07/16/01).

* The Board will reclassify wetlands from Class Two to Class Three if the wetlands do not serve *any* of the ten wetland functions described in VWR § 5. *Markowski Quarry Ponds*, Administrative Determinations (05/09/01).

* The Board has the power and duty to identify and protect significant wetlands through rule making and by acting on petitions or on its own motion to designate specific wetlands as significant. 10 V.S.A. §§ 905(7)-(9). The determination that a wetland is significant must result from an evaluation of at least the criteria set forth in 10 V.S.A. § 905(7). *Id.*

* The Board has the power and duty to identify and protect significant wetlands through rule making and by acting on petitions or on its own motion to designate specific wetlands as significant. 10 V.S.A. § 905(7)-(9). The determination that a wetland is significant must result from an evaluation of at least the criteria set forth in 10 V.S.A. § 905(7). *Crystal Haven Road Wetland*, WET-00-06, Findings of Fact, Conclusions of Law and Order (01/02/01).

* The Northshore Wetland was not only significant, but exceptional and irreplaceable with respect to the following functions: VWR § 5.2 (surface and groundwater protection), VWR § 5.3 (fisheries habitat), VWR § 5.4 (wildlife and migratory bird habitat), VWR § 5.5 (hydrophytic vegetation habitat), VWR § 5.7 (education and research in natural sciences), VWR § 5.8 (recreational value and economic benefits), VWR § 5.9 (open space and aesthetics), and VWR § 5.10 (erosion control through binding and stabilizing the soil). *North Shore Wetland*, WET-00-03, Findings of Fact, Conclusions of Law, and Order (09/19/00); *dismissed In re Northshore Wetland*, S-1314-00Cnc (05/14/01).

* With respect to VWR § 5.1 (water storage for flood water and storm runoff) and VWR § 5.6 (threatened and endangered species habitat), the Northshore wetland was not sufficiently significant to warrant protection under the VWR for these functions. *Id.*

* The Northshore Wetland merited the highest level of protection available under the VWR and was reclassified from Class Two to Class One based on its exceptional and irreplaceable contribution to Vermont's natural heritage due to its values for the functions of hydrophytic vegetation habitat (VWR § 5.5), education and research in the natural sciences (VWR § 5.7), and open space and aesthetics (VWR § 5.9). *Id.*

* Although both the Golf Course Pond, which was constructed as part of a golf course, and Snyder Pond, which was constructed and then abandoned for use as a water source for snow making, appeared on NWI maps, neither wetland significantly served any of the functions protected by the VWR, and the Board therefore concluded that neither wetland was so significant that it merited protection. *Golf Course Pond; Snyder Pond*, WET-00-04 and WET-00-05, Order Reclassifying Wetlands from Class Two to Class Three (08/31/00).

* The Board was not persuaded that the Class Two wetland was significant for certain functions, however, a formal determination of a wetland's lack of significance for certain functions can only be obtained in accordance with the petition process set forth in VWR, Section 7. *Lost Cove Homeowners Assoc., Inc.*, CUD-98-04, Findings of Fact, Conclusions of Law and Order (07/16/99); see also in *re: Lost Cove Homeowners Assoc., Inc.*, CUD-98-04, Memorandum of Decision and Order re: Motion to Alter (09/01/99).

* Pursuant to Section 7 of the VWR, the petitioner asked the Board to determine that a wetland within its settling lagoon did not merit protection for any of the values and functions set forth in Section 5 of the VWR. After review of the written record provided by the petitioner and ANR, the Board concluded that the subject wetland was not so significant that it merits protection for function 5.1 through 5.10 of the VWR. Accordingly, the Board reclassified the wetland within the petitioner's settling lagoon from Class II to Class III. *Champlain Water District*, WET-98-01DR, Decision (07/22/98).

* Having determined that a wetland appearing on a National Wetland Inventory map was not significant for any of the functions identified in Section 5 of the VWR, the Board reclassified that wetland from Class Two to Class Three unprotected status. *S.T. Griswold & Company, Inc.*, WET-98-02DR, Decision (09/16/98).

* Pursuant to Section 7 of the VWR, the petitioner asked the Board to determine that a wetland within its settling lagoon did not merit protection for any of the values and functions set forth in Section 5 of the VWR. After review of the written record provided by the petitioner and ANR, the Board concluded that the subject wetland was not so significant that it merits protection for functions 5.1 through 5.10 of the VWR. Accordingly, the Board reclassified the wetland within the petitioner's settling lagoon from Class II to Class III. *Champlain Water District*, WET-98-01DR, Decision (07/22/98).

* Petitioner's field, although identified as a wetland on the National Wetland Inventory map for the area and located in part in a floodplain, did not contain the necessary hydrology to support wetland vegetation, hydric soils, and aquatic life to qualify it as a wetland within the meaning of the VWR. *Shirley Urie*, WET-96-04DR, Decision (01/08/97).

* A Petitioner may ask for a determination that a subject wetland is significant for only certain values and functions and not for others. If a Petitioner asks for a determination that a Class Two wetland is not significant for a particular function, and the Board finds accordingly, the wetland remains significant for all other values and functions and continues to receive the protections afforded to Class Two wetlands for those values and functions only. For many types of development activities, such partial findings may be easier to obtain and preferable to seeking reclassification of the wetland based on an assessment of all values and functions. *David T. Mance, Jr.*, WET-96-01, Decision (08/15/96).

* Board reclassified a wetland on Petitioner's property from Class Two to Class Three based on the Board's findings that the wetland was not so significant to merit protection for the ten functions identified in Section 5 of the VWR. *Id.*

* Wetland was significant for wildlife and migratory bird habitat (function 5.4) where the Board determined that the wetland provided important habitat for avian species such as wood duck and great blue heron, as well as for small fur-bearing mammals such as muskrat, mink, and beaver, and the wetland met four or more conditions indicative of wildlife habitat diversity. *Reclassification of Marble Works Wetland*, WET-94-03, Decision (10/20/95).

* Wetland adjoining the Otter Creek in downtown Middlebury was significant for recreational value (function 5.8) and open space and aesthetics (function 5.9) where wetland was subject to a conservation easement, was significant for wildlife and migratory bird habitat, was currently of substantial recreational value to the community, and was a readily visible and distinct natural feature in an otherwise urbanized context. *Id.*

* Additional scientific data might support the Petitioner's and ANR's contention that small wetlands, in combination, within urbanized areas, provide many of the benefits referred to in function 5.1. However, if the assumptions which led to the adoption of 5.1(a)(6) are no longer valid, the appropriate means for adjusting the subcriteria to reflect current knowledge is amendment of the Rules. *Id.*

* In the absence of any credible conflicting evidence, the Board has accepted the observations and WET evaluations performed by qualified experts concerning the effectiveness and opportunity ratings of a given wetland for such factors as sediment retention and nutrient retention and removal to determine the significance of a given wetland for the protection of water quality and erosion control with respect to functions 5.2 and 5.10. *Reclassification of Moon Brook Wetland*, WET-94-02, Decision (08/09/95).

* In determining whether a wetland is significant for function 5.1, the Board is required, at a minimum, to consider the extent to which the wetland meets a number of specific subcriteria; not all subcriteria, however, need be met for a wetland to be determined significant for this function, but there must be sufficient information provided to the Board upon which to make affirmative findings of the wetland's significance for some of the subcriteria. *Id.*

* Additional scientific data might support the Petitioner's and ANR's contention that small wetlands, in combination, within urbanized areas, provide many of the benefits referred to in function 5.1. However, if the assumptions which led to the adoption of 5.1(a)(6) are no longer valid, the appropriate means for adjusting the subcriteria to reflect current knowledge is amendment of the Rules. *Id.*

* Wildlife habitat potential of a wetland may be enhanced as a result of the wetland's proximity to urban development. Even though a wetland is small, if it is hydrologically connected to other wetlands in close proximity, it may serve an important role as a travel corridor, if not permanent habitat, for wildlife species recognized in function 5.4 of the VWR. *Id.*

* In order for a wetland to be significant for function 5.8 (recreational value and economic benefits), it must provide substantial recreational values which are related to the wetland's intrinsic values -- i.e. evidence of habitat and use for fishing, hunting, trapping and harvesting of wild foods. Also, evidence of the wetland's use for bird-watching might support a conclusion of the wetland's significance for this function. However, assertions concerning non-wetland related recreational values -- i.e.: use of the wetland as a play area, neighborhood ball field, and kite-flying space -- will not support such a conclusion of significance for function 5.8. *Id.*

* The standards to be applied in evaluating a wetland's significance for open space and aesthetics (function 5.9) are "collective" or "community" standards of value, not personal ones. This is why Section 5.9(a) requires the Board to evaluate whether the wetland can be readily observed by "the public," as opposed to the individual property owner, and why section 5.9(b) and (c) call for an "objective" evaluation of the wetland in comparison with other wetlands in relation to its own surroundings. *Id.*

* Board determined that wetland was significant for functions 5.2 (surface water protection) and 5.10 (erosion control through binding and stabilizing the soil) based on the information provided by the Petitioner and others; the record was insufficient for the Board to make findings supporting the conclusions that the wetland was significant for functions 5.1 (water storage and storm runoff), 5.3 (fisheries habitat), and 5.4 (wildlife and migratory bird habitat). *Id.*

* Board determined that wetlands were significant for functions 5.1 (water storage and storm runoff), 5.2 (surface water protection), 5.9 (open space and aesthetics) and 5.10 (erosion control through binding and stabilizing the soil) based on the information provided by the Petitioner and others; the Petitioner, however, did not provide the Board with sufficient information to enable the Board to conclude that the wetlands were significant for function 5.4 (wildlife and migratory bird habitat). *Petition for Reclassification of Brickyard Road Wetlands*, WET-92-04, Decision (07/18/94).

* The wildlife habitat potential (function 5.4) of a wetland may actually be enhanced as a result of its proximity to development since some animals and birds may benefit because it is the only remaining wetland in the area or because they are dependent on the interaction between the wetland and the human landscape. However, the Board found that the wildlife habitat potential for the wetlands in question were reduced by the lack of interspersion of habitats, the wetlands' close proximity to many domestic animals and humans, a lack of ground denning sites and cavity trees, and a lack of substantial permanent open water. *Id.*

* Wetlands were deemed significant for function 5.9 (open space and aesthetics) where they were located on municipally-owned property, where they were bordered by a public road which made them

readily visible and accessible to the general public, and where the wetlands were surrounded by suburban development and thus were the only remaining tract of forested land in the entire watershed. *Id.*

* Designation of wetlands as Class II wetlands under the VWR does not mean that these wetlands and their associated buffer zones cannot be developed; a number of uses are allowed uses pursuant to Section 6.2 of the Rules and many other types of development may be authorized pursuant to Section 8 of the Rules. *Id.*

* Where the Board determined that a wetland not appearing on a National Wetland Inventory map was contiguous with a mapped, Class II wetland, the Board determined that it was unnecessary for it to determine whether the unmapped wetland was in fact significant for any of the functions identified by the Petitioner. *Petition for Reclassification of the Plains Road Wetland*, WET-92-05, Decision (04/29/94).

* Education in the natural sciences (function 5.7) included use of a wetland by Abenaki people for the teaching of hunting, foodways, crafts and traditional beliefs. *Appeal of Larivee*, CUD-92-09, Findings of Fact, Conclusions of Law and Order (03/25/94).

* Where Class II wetland was found to be exceptional and irreplaceable in its contributions to hydrophytic vegetation habitat, education and research in the natural sciences, and open space and aesthetics, the Board concluded that wetland merited reclassification to Class I, the highest level of protection under the VWR. *Petition for Reclassification of Scanlon Bog*, WET-91-01, Decision (12/22/92).

* Where Board concluded that a wetland merited reclassification to Class I, that one of the wetland's significant functions was as wildlife and migratory bird habitat, and uncontroverted evidence was presented that habitat for wood duck nesting, mink dens, and beaver winter forage required a buffer zone of at least 100 feet, the Board established a 100 foot buffer zone adjacent to the boundaries of that wetland in order to protect its wildlife habitat function. *Dorset Marsh*, WET-90-03, Decision (04/22/92).

* Where a Class III wetland was found to be significant for its value for hydrophytic vegetation habitat and education and research in the natural sciences, but not exceptional and irreplaceable in its contribution to Vermont's natural heritage, the Board reclassified the wetland to Class II rather than Class I, as the Petitioner's had asked. *North Springfield Bog*, WET-91-02, Decision (03/25/92).

* Having determined that a fire pond was not a significant wetland, either alone or in conjunction with other wetlands, the Board reclassified that body of water from Class II to Class III unprotected status. *Franklin Fire Pond*, WET-92-01, Decision (03/25/92).

* Where uncontroverted facts supported conclusion that wetland areas in question exhibited upland characteristics and were not significant for any of the ten functions listed in Section 5 of the VWR, the Board reclassified the subject wetland areas from Class II to Class III. *Hogback/Hollister*, WET-90-05, Decision (07/23/91).

1836.6 Temporary Determinations

* VWR § 7.5 provides that a temporary designation may be established upon petition by the ANR, or by the Board on its own motion, if the Board finds that: 1) there is reasonable likelihood that the wetland in question may be significant based on one or more of the ten functions identified in Section 5 and; 2) failure to grant a temporary designation is likely to result in substantial or irreversible harm to one or more of the Section 5 functions. *Sunset Cliff Inc*., WET–03-01, Memorandum of Decision (09/18/03).

* Temporary designation of Scanlon Bog as a Class I wetland expired by operation of law because Petitioner failed to file the required survey plat by the deadline specified by the Board in a prior order. *Petition for Reclassification of Scanlon Bog*, WET-91-01, Decision (07/12/94).

* Temporary designation as a Class I wetland would terminate (and wetland would revert to Class II status) if Petitioner failed to file by a specified deadline the required survey plat. *Id.*

* A wetland was temporarily designated a Class I wetland and a 250-foot buffer zone was temporarily established where failure to so act was likely to result in substantial or irreversible harm to one or more of

the wetland functions which qualified the wetland for reclassification to the Class I level. *Petition for Reclassification of Scanlon Bog*, WET-91-01, Decision (12/22/92).

1836.7. Wetland Boundary Determinations

* Where petition did not show the entirety of one of the two wetlands for which it sought reclassification but only that portion of the wetlands located on its own property, petitioner's consultant was instructed to file with the Board a map, based on an orthophotograph, showing the entirely of the wetland in question and identifying the real properties, other than those owned by the petitioner, within or adjacent to the wetland in question. The Board required receipt of this information prior to taking final action on the petition. It did this so that it could, among other things, determine whether all persons required to receive notice under Vermont Wetland Rule Section 7.3(b) received notice of the petition and that the Board could assure itself that the wetland was not contiguous to another wetland. *New England Container Company*, WET-01-05, Administrative Determination (09/18/01).

* Having determined that a wetland is not a significant wetland but rather a Class Three wetland, the Board lacks authority to determine the final boundaries of that wetland, pursuant to Section 7.1(d) of the VWR. *S.T. Griswold & Company, Inc.*, WET-98-02DR, Decision (09/16/98).

* Section 7.1 of the VWR does not require the State to delineate and permanently memorialize the boundaries of any wetland that is the subject of a reclassification request. Unless a final boundary determination is requested in a petition, or the Board on its own motion so decides, there is no requirement that such a determination be made as part of the Board's reclassification decision. *Reclassification of Moon Brook Wetland*, WET-94-02, Memorandum of Decision (04/03/96).

* Once a wetland has been designated a Class II wetland, an affected property owner may petition the Board for a final boundary determination by filing a petition pursuant to Section 7.1(d) of the VWR. Alternatively, or in combination, an affected property owner may seek a modification of the wetland's buffer zone pursuant to Section 7.1(c) of the VWR. *Id.*

* Wetlands are non-static ecosystems and a wetland's boundaries are constantly in flux, as a result of both natural and man-made forces. Therefore, although the Board is empowered to make "final" boundary determinations, based on such considerations as hydrology, soil types, and wetland vegetation, such boundaries can be expected to change over time. *Id.*

1837. Conditional Use Determinations

* A CUD may be issued by the Secretary of ANR when a positive finding is made that a proposed project will not have an undue adverse impact on one or more of the protected functions and values for which the wetland is deemed significant. See VWR § 9. *Kent Pond,* MLP-03-10, MLP-03-11, and CUD-03-13 (Consolidated), Memorandum of Decision and Dismissal Order (02/18/04).

* An appeal of a CUD decision of the Secretary of ANR is heard *de novo* by the Board pursuant to 10 V.S.A. § 1269. *Id.*

* Certain uses and activities within a Class One or Class Two wetland and/or its buffer zone require a conditional use determination (CUD) from the Secretary of ANR prior to commencement of those uses or activities in order to assure that they will not result in undue adverse impacts to the significant functions of that wetland. *Lake Bomoseen Wetland*, WET-02-04, Administrative Determination (02/06/03); *aff'd, Alan & Claudia Wulff v. Vt. WRB,* No. 234-4-03, Opinion and Order (12/03/03); *appeal docketed,* No. 2004-002 (01/23/04) (pending). *See also, Lake Bomoseen Ass'n v. WRB,* 145-3-03 RdCv, Opinion and Order (04/14/04) (dismissed for lack of jurisdiction); *appeal docketed*, *Reclassification of Lake Bomoseen Wetland*, No. 2004-220 (05/26/04) (pending).

* A conditional use determination for an activity occurring *within* a Class One wetland may be issued *only* to meet a compelling public need to protect public health or safety. *Id.*

* The Secretary of ANR's failure to post notice of a CUD application at the municipal clerk's office for the municipality in which the affected wetland was located was a jurisdictional defect requiring the Board to

remand the matter on appeal to the ANR so that it could properly re-notice and, if requested by a member of the public, re-open the permit application review process. *Al J. Frank*, CUD-00-02 and *Gregory Lothrop*, CUD-00-03 (Consolidated), Remand Order (04/24/01).

* With respect to CUD application proceedings, Section 8.3, VWR, does not contemplate that the notice that the Secretary of ANR is required to provide to the municipal clerk is *personal* notice. Rather, the intent of Section 8.3 is to provide both the municipality in which a wetland subject to a CUD application is located and the *public* within that municipality with, at a minimum, *posted* notice of the ANR proceeding with respect to that CUD application and instruction on how to participate. *Id.*

* Where ANR, not applicant, created defect in notice of CUD application and Board remanded to ANR because of jurisdictional defect and directed re-noticing of the CUD application, the law applicable to such application was the law at the time of the initial filing of that CUD application with the ANR. *Id.*

* While the Board was charged with ensuring that protected functions associated with a Class Two wetland and the Class Two wetland complex contiguous thereto were not adversely impacted by development activities associated with the expansion of a shopping mall, the Board was not required to consider, in its analysis under Section 8.5(a) of the VWR, any land uses and associated impacts substantially outside the zone of the Project's impacts. *Home Depot, USA, Inc. et al.*, WQ-00-06, Findings of Fact, Conclusions of Law, and Order (02/06/01) and Memorandum of Decision re: Motion to Alter (03/16/01); *dismissed with prejudice,* SO-244-01 RcCa (07/11/01).

* In considering the cumulative or on-going effects of any given project, the Board may take into account development and other land uses which have affected the hydrology and other attributes of the wetland(s) at issue. This is the case whether or not such changes predate the adoption of the VWR in 1990 or are subject to those rules, but only to the extent that these changes and their impacts are shown to have a direct and demonstrable relationship to the project's impact on functions under CUD review. *Id.*

* Section 1.1, VWR, relating to the "grandfathering" of certain projects, has no bearing on cumulative impacts analysis. Where development activities prior to 1990 [adoption date of VWR] had a direct bearing on the functions of the wetland at issue as well as to project impacts, Board did not hesitate to make findings to this effect. *Id.*

* Where CUD applicants submitted a detailed scientific analysis of how their project complied with the VWR and, by design, would actually enhance the fisheries habitat and erosion control functions, and ANR's wetlands expert agreed with this analysis and concluded that the Project satisfies the requirements of Section 8.5, VWR, and no substantial evidence was submitted by project opponents to rebut this expert testimony and other evidence, Board found that loss of 0.38 acres of Class Two wetland would have no undue adverse impacts on the protected functions of both the Class Two wetland directly at issue but also on the contiguous Class Two wetland and their respective buffer zones. *Id.*

* Non-profit, environmental neighborhood group satisfied the minimum requirements for a finding that it was a "person aggrieved" under 10 V.S.A. §1269 and the Board's Procedural Rules 25(B)(7) and (8) where its members used and enjoyed a Class Two wetland complex in connection with that wetland's significant functions and it was clear from the CUD decision under appeal that the ANR had addressed the impacts of the project on the functions of both the small wetland directly affected by the project *and* the contiguous wetland complex. *Home Depot, USA, Inc., et al.,* WQ-00-06 and CUD-00-07, Memorandum of Decision on Preliminary Issues and Order (09/08/00).

* Non-profit, business group did not demonstrate that it was a "person aggrieved" under 10 V.S.A. §1269 and the Board's Procedural Rules 25(B)(7) and (8) where it did not own real property adjacent to the Class Two wetland or buffer zone in question, it did not allege that any of its members actually owned property adjacent to that wetland or its buffer zone or made actual use of the wetland for its significant functions, and its alleged organizational "interest" was related more to economic sustainability than to environmental protection. *Id.*

* Appellants had requisite standing where they demonstrated, through timely filed information supplemental to their notice of appeal, that they were persons owning property adjacent to the subject wetland and Project and no party to the proceeding raised facts or argument challenging their claim of

standing. *Barden Gale and Melanie Gale Amhowitz*, CUD-99-08, Memorandum of Decision on Preliminary Issues (03/21/00).

* Procedural Rule 19(C) is not a vehicle to allow appellants to expand the scope of project review to include matters not considered by the ANR in the first instance. Rather, it was designed to put all persons on notice that they must raise in their notices of appeal all bonafide issues that they would like the Board to consider. *Id.*

* Although the Board deplores the piecemeal review of development projects, the Board is estopped from reviewing development which the ANR, the body with original jurisdiction over CUD applications, has not first determined is subject to its jurisdiction and then reviewed and addressed in a written determination under VWR, Section 8. *Id.*

* Person who was a party to a prior appeal involving the same wetland and same project was precluded, either under a theory of estoppel or waiver, from challenging in a second appeal the Board's previous (and now final) finding that the CUD Applicant's house was outside the wetland's buffer zone. *Id.*

* Scope of evidence relevant and therefore admissible in a CUD proceeding was dictated by scope of the issues determined to be properly before the Board on appeal. *Id.*

* Parties may jointly file a stipulation of uncontested facts to limit the issues to be litigated by the Board. *Id.*

* Initial inquiry is not whether parties advocating for denial of a CUD have proven that a Project, or any part thereof, *will* have an undue adverse impact; rather, the first question is whether the Applicant has proven that the Project, or any part thereof, *will not* have an undue adverse impact on any protected function at issue. *Larry Westall*, (CUD-99-02) and *James and Catherine Gregory*, (CUD-99-03) (Consolidated), Findings of Fact, Conclusions of Law, and Order (03/15/00).

* It would be imprudent public policy and contrary to the Board's mandate under 10 V.S.A. ch. 37 to protect Vermont's significant wetland resources if the Board were to afford any advantage to an applicant for an after-the-fact conditional use determination; accordingly, the Board reviewed an already constructed housing development, and its constituent parts, first, as if the Project were undeveloped and, second, taking into account the impacts of the actual build-out of the Project on the wetland functions at issue. *Id.*

* In evaluating impacts of a Project on wetland functions, the Board evaluated impacts to certain public uses of the wetland (nature walks, bird walking, and tracking) as educational activities rather than just recreational activities and determined that undue adverse impacts to wildlife and migratory bird habitat (function 5.4) had a concomitant undue adverse impact on education and research in the natural sciences (function 5.7). *Id.*

* House, that was the subject of an after-the-fact CUD application, was the most dominant man-made feature visible to the public from numerous vantage points and due to its scale, color and location it created an undue adverse impact upon the open space and aesthetics of the subject wetland (function 5.9); the Applicant failed to meet its burden of production and persuasion by presenting to the Board appropriate and credible mitigation measures to alleviate such impact. *Id.*

* House, that was the subject of an after-the-fact CUD application, and its attendant use constitute an undue adverse impact that could not be mitigated through the planting of a cedar hedge, precisely because the location of the house within the wetland and its protected buffer created a zone of human disturbance, compromising the wetland's value as wildlife and migratory bird habitat (function 5.4). *Id.*

* Applicant failed to meet its burden of proof that the mitigation measures it proposed would adequately address the adverse impacts of its house upon education and research in the natural sciences (function 5.7), where public use of the wetland for this function was dependent on there being sufficient quality wildlife and migratory bird habitat to support species of birds and animals that could be studied, researched and passively observed, and the Project would have an undue adverse impact upon such habitat. *Id.*

* Board will not accept as mitigation a planting proposal that will not fully and adequately screen a project within a reasonably short period of time; accordingly, Board rejected proposal calling for the planting of a cedar hedge that would take up to 30 years to achieve the height necessary to screen the Project from public view and thereby mitigate the undue adverse impact on open space and aesthetics (function 5.9). *Id.*

* It is not the Board's role to redesign project subject to its review to assure compliance with the VWR; rather, it is incumbent upon those who have the burden of proof and persuasion to come forward with appropriate and credible mitigation measures. *Id.*

* While a Class Two wetland is presumed to serve all of the functions specified in Section 5 of the VWR, where the parties have agreed by stipulation that certain wetland functions are not at issue, the Board makes no findings of fact and conclusions of law in its final decision with respect to such functions. Accordingly, the Board made no findings of fact and conclusions of law with respect to functions 5.5, 5.6, and 5.7. *Lost Cove Homeowners Assoc, Inc.*, CUD-98-04, Findings of Fact, Conclusions of Law and Order (07/16/99). *See also In re Lost Cove Homeowners Assoc., Inc.,* CUD-98-04, Memorandum of Decision and Order re: Motion to Alter (09/01/99).

* Having concluded that the impacts on significant wetland functions at issue would be at worst minimal, the Board concluded that the Project would not result in an undue adverse effect on such functions, and therefore no mitigation was required for the Project beyond what the CUD Applicants proposed in their application and through their testimony and exhibits as part of the Project's design and execution. *Id.*

* The Board was not persuaded that the Class Two wetland was significant for certain functions, however, a formal determination of a wetland's lack of significance for certain functions can only be obtained in accordance with the petition process set forth in VWR, Section 7. *Id.*

* While a Class Two wetland is presumed to serve all of the functions specified in Section 5 of the VWR, where the parties have agreed by stipulation that certain wetland functions are not at issue, the Board makes no findings of fact and conclusions of law in its final decision with respect to such functions. Accordingly, the Board made no findings of fact and conclusions of law with respect to functions 5.5, 5.6, and 5.7. *Barden Gale and Melanie Gale Amhowitz*, CUD-99-01, Findings of Fact, Conclusions of Law and Order (07/16/99). *See also, Barden Gale and Melanie Gale Amhowitz*, CUD-99-01, Memorandum of Decision and Order, re Motion to Alter (09/01/99).

* The parties stipulated, and the Board so found, that the proper delineation of the boundary of a wetland's buffer zone is made by measuring horizontally outward from the border of that wetland. Based on the record, including its site visit observations, the Board concluded that the Project would be located in the buffer zone of the subject Class Two wetland in a location thirty feet from the wetland. *Id.*

* The Board had previously recognized the value of natural vegetative screens in visually and auditorially masking human activities. Therefore, in the Board's opinion the planting of native shrubs at the terrace edge (within the buffer zone) would separate residential uses associated with the CUD Applicant's home and yard from an area recognized as significant wildlife and migratory bird habitat. *Id.*

* Given the choice between a remediation plan that calls for restoration of a buffer zone to its former condition by the replanting of native flora versus a plan to establish a lawn and garden, the Board would prefer the former in furtherance of the general wetlands protection policy to assure "no net loss of such wetlands and their functions." However, it is not the Board's role or desire to redesign an applicant's development plan, and as long as the lawn and garden project did not result in an undue adverse effect of protected wetland functions, the Board would approve the Project through the issuance of a conditional use determination. *Id.*

* ANR conducts the initial review of a CUD application and the Board's role is to conduct a *de novo* review of that application. While the law may allow the Board to consider new evidence and proposed monitoring requirements that were not reviewed by ANR, the Board's fundamental obligation is to review the merits of the same application that was reviewed by ANR. Where the application is changed during the pendency of the appeal, particularly where the prehearing conference report and order did not allow

for *any* change in the application, such CUD application shall be remanded to ANR. *Champlain Marble Company*, CUD-97-06, Memorandum of Decision and Remand Order (05/07/98).

* While the Board favors, as a policy matter, refinements to a project proposal that have the effect of mitigating environmental impacts, the appropriate time for such modifications or refinements is when the permit or conditional use applicant is preparing its application. *Id.*

* The cutting of 32 box elders within 10,000 square feet of a buffer zone for a Class Two wetland was not an activity incidental to ordinary residential use and therefore did not qualify as an allowed use pursuant to Section 6.2(r) of the VWR. *Darryl and Stephanie Landvater*, CUD-96-06, Findings of Fact, Conclusions of Law and Order (08/28/97).

* While a Class Two wetland is presumed to serve all of the functions specified in Section 5 of the VWR, the scope of any *de novo* proceeding must 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. Accordingly, the Board limited its review to consideration of the applicant's tree cutting plan for impacts under functions 5.4 and 5.10. *Id.*

* While a buffer zone can provide valuable nesting habitat, as well as necessary screening of the visual and auditory impacts of nearby human activity, such screening is only essential where there is evidence that the wetland or portion in question is in fact important habitat for waterfowl and migratory bird habitat. The same is true for habitat for mammals and other animals. *Id.*

* Because the project objectives could not be practicably achieved in any other manner than to cut the specified trees in the buffer zone and the applicant had taken all practicable measures to avoid adverse impacts and minimize potential adverse impacts with respect to the wetland's erosion control function (5.10), the Board concluded that the proposed cutting of trees did not constitute an adverse impact under the VWR. *Id.*

* Where Appellant filed a timely appeal of a conditional use determination, the ANR had no jurisdiction to issue an amended conditional use determination for the project that was the subject of the appeal. *Jamie Badger*, CUD-96-07, Memorandum of Decision and Order of Remand (06/04/97).

* A conditional use determination was void *ab initio* if it was "issued" by a body with which jurisdiction did not lie. *Id.*

* Board remanded appeal to the ANR and advised ANR that, once jurisdiction attached, it could reconsider the proposed the project as altered by the developer provided that the ANR provided persons who had participated in the prior conditional use determination proceeding with notice and an opportunity to participate in the reconsideration proceeding. *Id.*

* The wetland which the applicant proposed to fill and develop is identified on the National Wetland Inventory Map and therefore is a Class Two or "significant" wetland under the VWR; a Class Two wetland is presumed, until otherwise determined by the Board, to serve all of the functions specified in Section 5 of the VWR. *Champlain Oil Company*, CUD-94-11, Findings of Fact, Conclusions of Law and Order (10/04/95).

* Development may occur in a Class Two wetland and its buffer zone, provided that such activity either falls within the grandfathering provisions of Section 1.1 of the VWR or is an allowed use under Section 6.2 of the VWR. Since the applicant's project was not an allowed use and because the applicant provided no evidence supporting the conclusion that it had filed completed applications for local, state and federal land use and wetland permits and approvals prior to the effective date of the VWR, the project required a conditional use determination. *Id.*

* There are two ways a project may qualify for a conditional use determination: either the proposed conditional use will have no undue adverse impact upon the protected wetland functions, or any undue adverse impact on the protected functions will be sufficiently mitigated such that there will be "no net undue adverse effect." *Id.*

* An applicant must meet all five mitigation provisions of Section 8.5(b) of the VWR to achieve no net undue adverse effect; a conditional use determination will be denied if the applicant fails to meet any one or more of these five mitigation standards. *Id.*

* Only in rare cases may an applicant use compensation under Section 8.5(c) of the VWR as a means of mitigating adverse impacts, and then only to address impacts on protected functions that are deemed compensable. Therefore, the use of compensation as a mitigation tool is highly limited. [Reflects revision of 11/01/95] *Id.*

* A proposal to fill and develop a portion of a Class Two wetland for the purpose of constructing a convenience store, restaurant, gasoline service islands and parking spaces, was found to have undue adverse impacts on two wetland functions (5.2 surface water protection and 5.9 open space and aesthetics) but not an undue adverse impact on one function (5.4 wildlife and migratory bird habitat). *Id.*

* In a decision regarding the reclassification of a wetland, the standards to be applied in evaluating a wetland's significance for open space and aesthetics are "collective" or "community" standards of value, not personal ones. Such standards are also applicable to the review of a conditional use determination application. *Id.*

* Where an applicant's proposed channelization of stormwater through a grass swale was not designed to treat contaminants, and the wetland in question was found to perform this function, the applicant failed to discharge its burden of proof to show that it had avoided or even minimized adverse impacts to the protected function of surface water protection. *Id.*

* The VWR clearly contemplate that persons living in the vicinity of a significant wetland may have an interest in the protection of that wetland. However, a person's ownership of property within or adjacent to a significant wetland or its buffer zone does not per se entitle that person to party status in a conditional use determination appeal pursuant to 10 V.S.A. § 1269 and the VWR. *Champlain Oil Company*, CUD-94-11 (01/03/95).

* A petitioner for party status as of right or by permission must demonstrate a substantial interest which will in some degree be affected by the outcome of the proceeding. Where a petitioner failed to allege that he actually uses or benefits in some specific way from the subject wetland and failed to state with specificity how the proposed project might adversely affect this interest, the petitioner failed to provide the Board with a detailed statement such that the Board could determine that the petitioner had a "substantial" interest that might be affected by the outcome of the Board's proceeding. *Id.*

* An alleged injury to a business interest, alone, does not support a grant of party status in a conditional use determination appeal. *Id.*

* Failure to timely file a facially adequate petition supporting intervention could not in fairness to the parties be remedied by a filing offered at the time of oral argument on party status issues; therefore, such petition was denied. *Id.*

* Neither 10 V.S.A. § 1269 nor the statutes granting the Board authority to designate and protect wetlands expressly authorize the Board to determine whether an act or decision of the Secretary amounts to a regulatory taking under the Fifth and Fourteenth Amendments of the United States Constitution and Chapter I, Article 2 of the Vermont Constitution. Moreover, the Board has no implied authority to decide such claims. *Id.*

* Since it was uncontested that at least a portion of the applicant's property is a Class Two wetland subject to the Board's jurisdiction, and no petition for re-designation of the wetland as a Class Three wetland was pending, the conditional use determination appeal before the Board involved a protected Class Two wetland with an associated fifty-foot buffer zone, under the VWR. *Appeal of Larivee*, CUD-92-09, Findings of Fact, Conclusions of Law and Order (03/25/94).

* Construction of driveways for residential purposes within a Class Two wetland or its buffer zone is not an allowed use under the VWR and, therefore, the Board in its *de novo* review of such a project must determine whether the driveways meet the standard set forth in Section 8 of the VWR. *Id.*

* The scope of *de novo* review of the conditional use determination application on appeal was limited to evaluating the impacts of the five proposed driveways on the subject wetland and its buffer zone. However, given the ambiguities in the wetland delineation performed by the applicant's consultants, the Board put the applicant on notice that other proposed development activities, such as the construction of leach fields, if they were to occur within the wetland or its associated buffer zone, would require additional conditional use determinations. *Id.*

* There are two ways that a project may qualify for a conditional use determination: either (1) the proposed conditional use will have no undue adverse effect on protected wetland functions or (2) any undue adverse effect on protected functions will be sufficiently mitigated such that there will be "no net undue adverse effect." Such assessment also must include an assessment of "the potential effect" of the proposed conditional use "on the basis of both its direct and immediate effects as well as the basis of any cumulative or on-going effect on the significant wetland. *Id.*

* Five proposed driveways were found to have adverse impacts on three protected wetland functions (5.2 surface water protection, 5.4 wildlife habitat, and 5.7 education in the natural sciences) where such impact was found to be more than "minimal." *Id.*

* Education in the natural sciences (function 5.7) included use of a wetland by Abenaki people for the teaching of hunting, foodways, crafts and traditional beliefs. *Id.*

* A conditional use applicant may exclude the public from its property through lawful posting, however, the applicant may not engage in development activities that will alter the hydrology, biochemistry and habitat of a protected Class Two wetland and its associated buffer zone, thereby impairing the important functions of that resource. *Id.*

* Having found that the proposed five driveways would involve more than minimal adverse impacts on one or more protected wetland functions, the Board must consider whether the conditional use applicant has performed mitigation under all five provisions of Section 8.5(b) of the VWR thereby achieving no net undue adverse effect. *Id.*

* Where an applicant provided no adequate explanation why it could not reduce the number of driveways crossing the wetland to serve its proposed subdivision, the Board concluded that the applicant had failed to minimize the potential adverse impacts of the project on protected wetland functions, and therefore reversed ANR's decision granting a conditional use determination. *Id.*

* The Board determined that it was not contrary to the intent and purposes of 10 V.S.A. § 905(7)-(9) and the VWR to grant the applicant's request to withdraw its appeal; however, the effect of dismissing this matter was to leave standing the conditional use determination appealed from, including the conditions previously objected to by the applicant. *Proctor Gas, Inc., West Rutland*, CUD-93-02, Dismissal Order (10/27/93).

* The Board's Dismissal Order had no bearing on an amendment issued by ANR during the pendency of an appeal of the underlying conditional use determination. Indeed, the Board questioned the authority of ANR to issue such an amendment when jurisdiction over the conditional use determination was with the Board. *Id.*

* VWR set forth express requirements for notice and posting of conditional use requests in order to inform the public of a proposed action within a significant wetland or its buffer zone. There is no exemption of this requirement for the amendment of a previously issued conditional use determination. *Id.*

* The Board has the inherent authority to issue a motion to compel access to a property subject to its jurisdiction, and in an appeal of a conditional use determination, it has the authority to issue an order requiring the applicant to admit another party access to its property for the purpose of site evaluation in preparation for a *de novo* hearing on the merits of the conditional use determination application. *Appeal of Larivee*, CUD-92-09, Memorandum of Decision on Appellant's Motion to Compel Access to Site (08/12/93).

* The Board and the Secretary of ANR each have broad authority to protect Vermont's significant wetlands. A person may request a conditional use determination from the Secretary that a proposed development within a significant wetland or its buffer zone is in compliance with the VWR. That determination, which is in the nature of an advisory opinion, is appealable to the Board. *Id.* Memorandum of Decision on Preliminary Issues (07/13/93).

* Persons other than the applicant may appeal a conditional use determination decision of the Secretary to the Board. The Board looks to the VWR and its own Rules of Procedure to determine whether a person appealing a conditional use determination satisfies the standing requirements of 10 V.S.A. § 1269. *Id.*

* Where a person lives in the vicinity of a significant wetland and she is a member of and representative for a class of persons who have made historical and current use of the wetland in question, she has a specific interest in the wetland. If that interest in the wetland may be adversely affected by the issuance of conditional use determination, and there exists no other alternative means for that person to protect her interest, then that person has standing to appeal to the Board pursuant to 10 V.S.A. § 1269. *Id.*

* Remand to the agency below is appropriate for jurisdictional defects, such as a failure to provide adequate notice, or in the discretion of the reviewing body where new issues are presented that were never presented to the agency below and justice so requires. Where, however, the reviewing body is charged with holding a *de novo* hearing and the alleged deficiencies are in the Secretary's failure to make certain findings and conclusions with respect to the subject wetland's functions, no jurisdictional defect exists requiring remand. *Id.*

* The Board lacked authority to grant a stay of a conditional use determination appealed to the Board pursuant to 10 V.S.A. § 1269. *Appeal of Larivee*, CUD-92-09, Preliminary Order on Motion to Stay (04/05/93).

1837.1 Allowed Uses

* Application of a pesticide described in a written plan approved by the Secretary for control of non-native species of nuisance plants, including water milfoil, is an allowed use in a significant wetland or buffer zone pursuant to Section 6.2(g) of the VWR. *Aquatic Nuisance Control Permit, #C93-01-Morey*, WQ-93-04, Memorandum of Decision on Preliminary Issues (09/24/93); *aff'd, In re Aquatic Nuisance Control Permit #C93-01-Morey*, Docket No. 94-5-94-Oecv, Opinion and Order (Feb. 6, 1995).

IX. APPEALS TO SUPERIOR OR VERMONT SUPREME COURT (1851-1900)

(As a subject addressed in the decision)

1851. General

1852. Proper Forum

* Jurisdiction over an appeal from a decision of a natural resources conservation district with respect to an application for an agricultural dam permit is with the superior court rather than the Water Resources Board. *Hinsdale Farm*, DAM-02-09, Memorandum of Decision (12/11/02); *aff'd*, 858 A2d 249, 2004 Vt. 72.

* Board's jurisdiction was not divested because appellants, simultaneous with filing their notice of appeal with the Board, filed an appeal with the Supreme Court, where the Supreme Court stayed any consideration of the appeal before it pending a decision by the Board. *Appeal of Verburg/Wesco*, EPR-91-03, Order (01/09/92).

1853. Exhaustion of Administrative Remedies

1854. Extraordinary Relief

1855. Interlocutory

* Since under 10 V.S.A. § 1269, the Board cannot stay the effectiveness of a Department of Environmental Conservation permit decision during the pendency of an appeal of that permit to the Board,

the Board also does not have authority to stay the effectiveness of that permit decision as a result of the filing of an interlocutory appeal. *Appeal of Poultney River Committee*, WQ-92-04, Preliminary Order (08/11/92); *aff'd; Appeal of Poultney River Committee,* S0693-92ReCa (02/03/94) *aff'd; Poultney River Committee,* Vt. 94-165 (06/26/95).

1856. Preservation of Questions by Administrative Agency

* Although Board did not have the power to decide whether the act or decision of the Secretary constituted a regulatory taking, the parties were prudent in raising and preserving all questions before the Board, even those beyond its power to decide. *Champlain Oil Company*, CUD-94-11 (01/03/95).

1857. Remand / Further Review or Action

* Superior Court vacated an encroachment permit for a proposed marina facility on Lake Champlain and remanded matter back to the Water Resources Board because the Board failed to make a determination whether the proposed encroachment served a "private" versus a "public" purpose within the meaning of the public trust doctrine. *William Point Yacht Club,* S213-89Cnc, Opinion and Order (04/16/90).

* Superior Court vacated decisions of the Department of Environmental Conservation summarily denying encroachment permits to individuals on the basis that the Public Trust Doctrine prohibited any encroachment on state waters by "private parties for exclusively private purposes." The Court concluded that the Department had exceeded its delegated authority in promulgating interim procedures interpreting and providing guidance on the application of the public trust doctrine. *Richard & Alice Angney,* S96-91LaCa, Opinion and Order (09/04/92) and Opinion and Order (03/05/93).

1858. Standard of Review / *De Novo* or Appellate

1859. Standing (See also Section III. E.)

1860. Transcript / Record on Appeal

X. ENFORCEMENT (1901-1950)

1901. General

* The Public Water Supply and Wastewater System Permit Act expressly excludes ANR's enforcement decisions from the Board's review. *William and Ann Lyon*, EPR-03-16, Memorandum of Decision (04/21/04); *appeal docketed,* No. 2004-231 (05/14/04) (pending).

* Board has authority to hear appeals from decisions of the Secretary to "grant, deny, renew, revoke, suspend, annul or withdraw a permit" under 3 V.S.A. § 2873 (c)(4); however, it does not have appellate authority to adjudicate enforcement matters. *Vernon Squiers*, EPR-94-06, Dismissal Order (01/03/95).

* An appeal of an informal agency enforcement determination was dismissed for lack of jurisdiction, even though official who issued the decision erroneously instructed the alleged violator that one of his options included "appeal" of that decision to the Board. *Id.*

1902. Powers of the Secretary of ANR

1902.1 Enforcement

1902.2 Rulemaking

1902.3 Stay of ANR Permit

1903. Powers of the Attorney General

1903.1 General

1903.2 Enforcement

1903.3 Representation of Board / State in Court

1903.4 Sanctions

1904. Citizen Rights of Action

XI. RULES AND RULEMAKING (1951-1999) (As a subject addressed in the decision)

1951. General

* Proceedings before the Board are not governed by the Vermont Rules of Civil Procedure but rather by the Board's Rules of Procedure. *Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook*, WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated), Findings of Fact, Conclusions of Law, and Order (06/02/03). (The law applied in this case was modified by Act 140 of 2004.)

* Additional scientific data might support the Petitioner's and ANR's contention that small wetlands, in combination, within urbanized areas, provide many of the benefits referred to in function 5.1. However, if the assumptions which led to the adoption of 5.1(a)(6) are no longer valid, the appropriate means for adjusting the subcriteria to reflect current knowledge is amendment of the Rules. *Reclassification of Mood Brook Wetland*, WET-94-02, Decision (08/09/95).

* Board was not required by its enabling statutes to adopt rules governing the permitting of encroachments as a prerequisite to the Board's exercise of its common law trustee responsibility to safeguard public trust property. *Dean Leary*, MLP-94-08, Memorandum of Decision (12/28/94).

1952. Administrative Interpretation of Rules

1953. Amendment, Effect of

* The rules that are effective are those which were in force at the time a complete application had been filed with the Secretary. It was improper to hold applicant to the "new rules" for entirety of project. Therefore, limited grandfathering was allowed by Board. *Sunrise Group*, EPR-84-07 (04/25/85).

1954. Authority

1955. Procedure for Adoption

1956. Rulemaking v. Adjudication

1957. Validity