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VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151

Re: Sherman Hollow, Inc.,
Richard A. Gadbois, Trustee,
Estate of Ned H. Pettengill,
Roger Lussier and Arthur Elliot
Application #4C0422-5R-1-EB

MEMORANDUM OF DECISION

This decision, dated June 19, 1992, pertains to a ninety-two page motion to alter filed by the Applicants with respect to the Environmental Board's decision of November 19, 1991. As is explained below, the Environmental Board has determined to alter Findings 8, 10, 11, 21, 36, 37, 40, 41, and 42 of that decision and to reverse that portion of the decision which denies the application pursuant to 10 V.S.A. § 6086(a)(l)(E) (streams) and (3) (burden on existing Water supplies) because of lack of water. The majority of the motion is denied and the application remains denied.

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I. BACKGROUND

On November 19, 1991, the Board issued Findings of Fact, Conclusions of Law and Order #4C0422-5R-1-EB, denying the Applicants' request for reconsideration of a 1989 denial of an application for a golf course. In relevant part, the November 1991 decision denied the reconsideration request pursuant to 10 V.S.A. § 6086(a)(l)(B) (waste disposal), (l)(E) (streams), (3) (burden on existing water supplies), and (4) (soil erosion).

The most significant reason for denial under the waste disposal criterion was the failure to submit information concerning the ingredient of Green Life Conditioner. (GLC), a substance the Applicants intend to apply to the soil to promote turf growth. The Board concluded that without this information it could not reliably judge water pollution impacts.

With respect to denial under the criteria involving streams and existing water supplies, the most significant defect found by the Board was that the Applicants had failed to provide for an adequate supply of irrigation water during the months of July and August. The Board'therefore concluded that the Applicants would be forced to use additional water sources during those months and thus would need to propose additional sources which would neither affect the natural condition of Sherman Hollow Brook nor present a burden on nearby wells.

Concerning denial under the soil erosion criterion, the most significant defect was the probable failure to establish turf on the golf course due to a lack of plant nutrients. The Board concluded that turf establishment would be critical in preventing unreasonable soil erosion.

On December 19, 1991, the Applicants filed a motion to alter the Board's decision. On December 27, the Neighbors filed a response. "The Neighbors" consist of parties Paul and Phyllis Austin, Peter and Lucinda Bailey, Lisa Barrett, James Hildebran, Kristin Juergens, Paula Kelley, Janet Labelle, Marlene McDonald, Blanche Perry, and Wendell Sargent.

On January 13, 1992, the Applicants filed a request for a hearing on the motion. On January 14, the Town of Huntington filed a letter in support of the motion.

The Board convened oral argument on February 12, 1992, with the following parties participating:

The Applicants by Andrew H. Neisner, Esq.
The Town of Huntington by Robert Perry, Esq.
The Neighbors by Michael Marks, Esq.

The Board deliberated concerning the motion on February 12, March 25, and June 12, 1992.

II. SUMMARY OF DECISION

The Applicants' motion is best viewed as consisting of three sections: (a) a section relating to various legal claims raised by the Applicants, (b) a section which addresses the Board's findings of fact, and (c) a section which addresses the Board's conclusions of law.

The Board has reviewed the motion and responds to it below. The motion, and the Board's response, can be summarized as follows:

In the section regarding various legal claims, the Applicants make numerous arguments which do not withstand scrutiny. They claim that:

- The Board erred in not accepting a discharge permit offered by the Applicants two months after the last day on which evidence was taken. However, such a permit could only have been accepted if another evidentiary hearing had been convened. Board Rule 13(B) allowed the Applicants to request another hearing but the Applicants never filed such a request. To accept the discharge permit without a hearing would deprive other parties of their right, of rebuttal and the Board of the opportunity to fulfill its duty to ensure that the permit protects the public.

- The Board failed to issue a decision within 20 days of adjournment and therefore is required by law to issue a permit. However, in a case concerning a similar deadline, the Supreme Court held that issuance of a permit is not required if the deadline is missed. In any case, the Board issued a decision within 20 days of when it completed its review of the lengthy and numerous filings made in this case.

- The Board violated due process by ruling that a discharge permit is required. However, the Board made no such ruling.

- The Board exceeded its authority by determining that the Applicants would violate a permit if issued. However, the Board did not make such a determination and in fact stated in several places that it would issue conditions if it were issuing a permit. These statements imply a belief that the conditions will be met.

- The Board exceeded its authority by requiring the Green Life Conditioner (GLC) label to be rewritten. However, the Board made no such determination.

- The Board exceeded its authority by requiring disclosure of trade secrets. However, the law cited by the Applicants actually would allow the Board to keep such secrets confidential if disclosed to the Board and does not prohibit the Board from requiring disclosure. Established procedures exist for preserving the confidentiality of trade secrets disclosed to the government. The Applicants never requested the use of such procedures. Moreover, a party may not prevent the fulfillment of the Board's duty to protect the public by claiming that the ingredients of a substance are trade secrets.

- The Board is being inconsistent with its other decisions in not admitting a discharge permit submitted by the Applicants after the last hearing. However, in the decisions the Applicants cite, permits issued by other state agencies were identified prior to hearing as exhibits and offered during the hearing. Parties had adequate notice of those permits and a chance to rebut them. Here, the Applicants offered the discharge permit following the evidentiary hearings, depriving the other parties of their right of rebuttal.

- The Applicants had no notice that the Board would evaluate waste disposal rather than just pesticides in determining compliance with Criterion l(B). However, the criterion is entitled "waste disposal" and has been part of the statute since 1973.

In the section which addresses the findings of fact, the Applicants argue that some findings contain misleading omissions and also challenge the accuracy of many.

The Board does not believe that any of the alleged omissions are significant. For example, the Applicants argue that Finding 11 is misleading because it quotes only the part of the GLC label which lists some ingredients rather than the remainder of the label. However, the remainder of the label does not address the issue of what is in GLC but contains only conclusory statements about the product's organic nature. Nonetheless, in the interest of completeness, the Board will alter Finding 11 to incorporate the remainder of the label.

With respect to accuracy, the Board concludes that most of the challenged findings are accurate and several of the Applicants' claims of inaccuracy contradict their plans, proposed findings, or statements in their motion to alter. For example, the Applicants dispute Finding 9, which states that they claim that GLC encourages nitrogen fixation through microbial action in soils. However, the Applicants' proposed finding 41 is nearly identical to the Board's Finding 9. The Applicants also dispute Finding 20, which discusses a gap between test pits along the valley floor, by stating that this gap is on other people's property. However, the Applicants' plans show this gap to be within the project site and surrounded by golf course improvements.

The Board has concluded that eight of the findings are not accurate and will alter all eight. Of these findings, six contain minor inaccuracies; only two of those six findings affect the conclusions of law in any way. The six findings are 8, 10, 21, 40, 41 and 42.

The remaining two inaccuracies are Findings 36 and 37, which concern the water available for irrigation. The Applicants contend that their calculations of water demand included not only supply from a pond and wells located on-site but also water from natural rainfall. In contrast, the decision assumes that their water need figures are <u>in addition</u> to rainfall. While the Applicants' presentation gives some reason to believe that assumption, on review of the evidence the Board concludes that it was not correct. Further, if one adds water available from natural rainfall, the Applicants do have enough water.

For this reason, the Board will alter not only Findings 36 and 37 but also a portion of its conclusions of law. That portion is the one in which the decision states that the Board denies the application because of lack *of water* pursuant to Criteria l(E) (streams) and 3 (existing water supplies).

This is the only significant alteration to the conclusions of law which the Board will make. The Board does not agree with the Applicants' arguments concerning its Criterion l(B) conclusions. The Applicants contend that knowing the ingredients of GLC is irrelevant; the Board's decision clearly spells out that the Board must know what is in GLC to decide whether it will cause undue water pollution. They argue that GLC is not "experimental" and has been in use for a long time, but in the motion to alter they also state that it has only been in use for five or six years. They assert that GLC cannot be "bacteriological" because it has no bacteria in it, but they cannot prove it has no bacteria in it. They also have stated that GLC works through stimulating microbes in the soil, and the dictionary defines "bacteriological" as referring to things which have some relationship to bacteria.

Similarly, the Applicants' arguments regarding the Criterion 4 conclusions are not well-founded. The Board's denial is based on the failure to establish turf after construction. The Applicants contest this conclusion by saying that presently grass grows on the site. But the issue is establishing golf course turf, not just any grass. In the 1989 decision, which is binding on this case, the Board concluded that such turf consists of specialized grasses which require **intense.** fertilization and management.

Two arguments which pervade the motion deserve comment in this summary. First, the Applicants continually assert that the Board unfairly kept them from proving *perjury* by the Neighbors. The alleged unfairness is that the Neighbors attacked the Applicants' credibility and that the Board made findings concerning that credibility. However, the Neighbors did not attack the Applicants' credibility and the Board did not make express findings concerning that credibility. Moreover, the findings cited by the Applicants as doing so merely reveal inconsistencies in the Applicants' own testimony.

Second, the Applicants repeatedly make assertions which appear to be claims of deprivation of due process, such as lack of notice or failure to give opportunity to be heard. However, in this case, there has been more notice and opportunity to be heard than in almost any other in the Board's memory. The Applicants had a 1989 decision specifically stating what information was needed. They had the statutes regarding the Act 250 criteria and the discharge permit requirements. They had the rules regarding how other

agency permits are supposed to be supplied to the Board. They had a memorandum of decision from the Board in March 1991 specifying what the Board will consider in the appeal and who had which burdens of proof. They had two oral arguments and five evidentiary hearings in this appeal alone. The Board believes due process has been given.

The following analysis loosely tracks the format and content of the Applicants' motion. The Board has attempted to comprehensively review and answer the Applicants' claims to the extent that the claims are clearly articulated in the motion.

III. ANALYSIS: VARIOUS LEGAL CLAIMS RAISED BY THE APPLICANTS

This section consists of legal claims which the Board concludes do not have merit.

A. 20-Day Deadline

The Applicants claim that the Board missed a 20-day deadline and therefore a permit must be issued. The argument is based on the Board's non-acceptance of the discharge permit submitted after the hearing, the gist being that if the matter had still been open, the Board would have accepted the permit.

10 V.S.A. § 6086(b) is the only provision of Act'250 which mentions a 20-day deadline. The provision concerns partial review of an application under Criterion 10 (conformance with local or regional plans) prior to review under the other criteria at 10 V.S.A. § 6086(a). In relevant part, 10 V.S.A. § 6086(b) provides:

> If the district commission or the board first issues its findings and decision on only subdivision (10) of subsection (a) of this section, that decision shall be appealable under section 6089 of this title. When the complete application has been submitted, the district commission or the board shall issue its findings and decision thereon within 20 days of the final hearing day.

While this provision appears oriented only toward applications which are first reviewed for compliance with Criterion 10, the Supreme Court appears to consider the provision applicable to any application. In re Spencer, 152 Vt. 330, 340 (1989). In any case,this provision must be

interpreted in light of 10 V.S.A. § 6083(d), which requires the Board to make all practical efforts to process permits in a prompt manner.

Concerning the 20-day deadline, Board Rule 30 provides:

> The board or district commission shall, within 20 days of the day of adjournment of the hearing on an application, issue a decision approving, conditionally approving, or denying the application.

In addition, Rule 13(B) provides:

> Any time prior to adjournment of a hearing by the board or a district commission, a party may petition that the matter be recessed for a reasonable period of time. The board or district commission may, on petition or on its own motion, recess a hearing pending the convening of further hearings, receipt of submissions from parties, conduct of investigations, review of evidence in the record, deliberation or other similar reason. During such period, the applicant may, with due notice to all parties to the application, move to reopen the hearing on any of the criteria specified in 10 V.S.A. section 6086(a)(l) through (a)(10) for the purpose of offering further relevant evidence or testimony.

Pursuant to Rule 13(B), the Board, through its Assistant Executive Officer, issued a memorandum on August 27, 1991 stating that the matter was in recess pending filing of proposed findings of fact and conclusions of law, review of the record, deliberation, and issuance of a proposed decision.

The Board did not recess the matter pending submission of a final discharge permit. Moreover, at no time did the Applicants take advantage of Rule 13(B)'s provision allowing them to move that the hearing be re-opened to offer the discharge permit.

In accordance with its recess memorandum, the Board issued a decision within 20 days of its final day of reviewing the record and deliberation. Specifically, the Board completed its review and adjourned the hearing on October 30, 1991 and issued a decision on November 19. Accordingly, the Board complied with the provisions of Rule 30.

For the sake of argument, the Board will suppose that it missed the deadline. Even so, it still would not be required to issue a permit. Neither Act 250 nor the Board Rules specifies that a permit must be issued if a 20-day deadline is missed. See 10 V.S.A. § 6086(b), Rule 30. The Supreme Court has ruled that deadlines which do not specify consequences are "directory" and do not require issuing a decision in favor of an applicant. In re Mullestein, 148 Vt. 170, 173-74 (1987).

Further, in an Act 250 context, the Supreme Court has stated that. in reviewing the application of the time limit, the possible harm to the applicant must be weighed against the overall protection of the public's health, safety, and welfare. In re Spencer, supra, 152 Vt. at 341.

In this case, the Applicants have not alleged any prejudice from the delay. Instead, the prejudice they claim is the Board's non-acceptance of the discharge permit. That permit, however, was filed on October 21, 1991, which is a date considerably more than 20 days after the last hearing day of August 22, 1991. 'Moreover, the potential impact of the project on the environment and the surrounding community undermines the result sought by the Applicants because the Board has concluded that the application does not meet all of the Act 250 criteria.

The Board believes that it has made all practical efforts to process this application promptly. The proceedings have been highly contested and the filings have been numerous and lengthy. Devotion of considerable Board and staff time has been necessary.

B. Due Process

The Applicants appear to make four arguments regarding violations of due process rights. First, the Applicants contend that the Board has determined that a discharge permit is required because of the Board's conclusion that Green Life Conditioner (GLC) is analogous to a fertilizer. Exactly how this violates due process is not stated. In any case, it is not true: Nowhere in the Board's decision is there a ruling that a discharge permit is required. Rather, on page 24 of the November 1991 decision (page 25 in the revised decision), the Board states that "the Applicants have stated that their project is subject to a requirement to obtain such a permit pursuant to 10 V.S.A. § 1263." The Applicants do not challenge the validity of that statement.

Second, the Applicants argue that they were only put on notice of the discharge permit issue by the Neighbors' rebuttal testimony. However, the Applicants cannot claim that they had no notice of the statutes requiring a discharge permit, which were in existence well before the Neighbors' filed rebuttal testimony. (See Section III.D., below, regarding "Discharge Permit/Presumption of Compliance.")

Third, the Applicants argue that the Board is required to give them an opportunity to present evidence prior to rejecting the discharge permit. This is incorrect. The law is that if a permit is properly introduced to create a presumption, and the Board concludes that it is rebutted, the Board must give an applicant an opportunity to introduce independent evidence of compliance. Board Rule 19; In re Hawk Mountain, 149 Vt. 179 (1988). Here, however, the Board concluded that the presumption was never created because the permit was not introduced during the hearings. This difference is critical: Were the Board to accept the permit now, without a hearing to allow parties to rebut it, the Board would violate the Neighbors', due process rights.

Finally, the Applicants contend that the Board restricted cross-examination and evidence regarding perjury by the Neighbors and later made findings "in part based upon the credibility and,honesty of the Appellant in respect to future propensity to violate the permit." However, the Board made no findings based on the Applicants' future propensity to violate the permit and declined to reach the issue. This is discussed more fully in Section III.G., below, regarding "Future Compliance/Bias/Distrust."

C. Exceeding Authority

There are several arguments in the motion in support of the proposition that the Board exceeded its authority. To begin with, the Applicants assert that the Board is rewriting Vermont labeling laws by requiring that GLC's ingredients be disclosed on its label. This is incorrect. The Board's decision states that GLC's ingredients need to be disclosed to the Board so it can evaluate water pollution impacts. In the findings the Board cites the label and quotes what ingredients are listed on it, but this hardly amounts to imposing labeling requirements.

The Applicants also contend that the Board assumed the authority to predict future violations. The Board did not do so.

The Applicants further contend that the Board has no authority to determine what type of discharge permit is required. It does. In re Hawk Mountain, supra, 149 Vt. at 184. However, on page 28 of the November 1991 decision (page 29 in the revised decision), the Board states that it is not going to reach the issue of what type of discharge permit is required for the GLC discharge.

In addition, the Applicants argue that the Board is infringing on privacy by requiring disclosure of trade secrets. The alleged secrets are the ingredients of GLC, which the Applicants claim the manufacturer will not reveal.

This argument has no merit. The provisions the Applicants cite in support of their argument are actually from the Public Records Law. That law says that all public records are available to the public, except for certain types of records which are specifically listed as exempt. 1 V.S.A. §§ 316, 317. One exception is for "trade secrets." 1 V.S.A. § 317(b)(9). Thus, the law allows the Board to prevent the public from reviewing trade secret information - e.g., the ingredients of GLC - filed with it. Accordingly, the authority cited by the Applicants does not prohibit the Board from requiring disclosure to the government but rather enables the Board to preserve the confidentiality of the information disclosed. The Applicants could have requested that the Board invoke these statutes to keep the ingredients of GLC confidential but did not do so.

The reason the law allows the Board to prevent trade secret disclosure is to give effect to the rationale for trade secrets: preventing the loss of advantage over business competitors. Cf. Integrated Cash Management Service v. Digital Transactions, 920 F. 2d 171, 173 (2d Cir. 1990) (gaining advantage over competition is a central element in determining existence of trade secrets). To allow businesses to preserve this kind of advantage while still achieving the disclosure of facts needed for sound adjudication, courts have taken testimony in chambers rather than in public and have not disclosed such testimony to the public. See, e.g., Gai Audio of N.Y., Inc. v. Columbia Broadcasting System, Inc., 340 A.2d 736, 751 (Md. 1975). A similar procedure could have been developed in this case to protect the alleged wishes of GLC's manufacturer.

The Board was created to protect the public health, safety, and welfare through regulation of projects subject to Act 250. 1969 Vt. Laws No. 250 § 1 (Adj. Sess.). TO

achieve this goal, the Board must have sufficient information about substances to be applied to land in order to evaluate compliance with the Act 250 criteria. An applicant cannot defeat this requirement by claiming that the ingredients of a substance are trade secrets. Environmental review cannot be dispensed with to protect the need for confidentiality.

Instead, an established procedure exists which balances the need to protect the environment with the need to protect trade secrets. That procedure is described above. At no time during the pendency of these proceedings have the Applicants requested that the Board invoke such a procedure.

D. Discharge Permit/Presumption Of Compliance

1. Timely Offer of Permit

The Applicants argue that the discharge permit was timely offered because the Board accepted the Neighbors' argument that the permit was not timely. The Applicants state the argument thus:

> If the Board is willing to accept and adopt arguments and evidence from the adverse parties after the date it disallowed evidence by the Appellant,, it invalidates the argument that the hearing was closed.

(Emphasis added.) However, the Applicants' use of the phrase "and evidence" is not correct. The Board accepted no new evidence from anyone after August 22 (the last hearing date). The Board did accept argument from both parties after August 22. The Neighbors supplied argument concerning admission of the permit and the Applicants have had the same opportunity. The permit itself, however, is evidence, and must be offered in compliance with Rule 19.

The Applicants also appear to be arguing that in their April 1991 offer of proof they did not make an election to independently show compliance with Criterion l(B) (waste disposal). This appears to be based on the contentions that they had no notice that a discharge permit would be required until the Neighbors filed rebuttal testimony and the Board stated that GLC was analogous to a fertilizer.

The idea that the Applicants had no notice of legal requirements is difficult to understand. Criterion l(B) requires that the applicant prove compliance with applicable requirements regarding waste disposal. It is not limited to pesticides and fertilizers. It was enacted in 1973. 10 V.S.A. § 6086(a)(l)(B); 1973 Vt. Laws No. 85 § 10. Similarly, a discharge permit is required for waste discharges, and is not limited to discharges containing pesticides and fertilizers. 10 V.S.A. §§ 1251(10), 1259, 1263. The laws pertaining to discharge permits were last amended in 1989. 1989 Vt. Laws No. 116.

The Applicants cannot validly argue that they do not have or did not know they have an obligation to meet statutes enacted prior to their proposal to apply GLC. Thus, when in April 1991 they made their offer of proof (identifying the GLC proposal for the first time) and submitted their lists of exhibits without even mentioning the introduction of another state permit in either document, they made an election to independently demonstrate compliance.

2. Draft Discharge Permit

Throughout their motion, the Applicants place heavy reliance on an assertion that they offered a draft discharge permit to the Board at one of the hearings and that the Chair stated that it was not necessary to offer it because the Board already had it on file. They fault the decision for stating that no discharge permit, draft or final, was offered into evidence.

The Board will alter its decision to state only that no final discharge permit was entered into the record. But the Board does not consider this change to be significant because a draft discharge permit does not create a presumption. It is a draft which may be changed or which may never become final.

Moreover, rather than relying on a permit, the Applicants attempted to provide independent evidence of compliance through the priority pollutant scan. They did not ask pursuant to Rule 19(C) for a recess of the hearings so that a final permit could be obtained.

3. Consistency with Other Board Decisions

A. The Applicants allege that the Board is being inconsistent both with its own, and with District Commission, decisions in not accepting the discharge permit.

In the Board's 1989 decision denying the original application, the Board ruled that District Commission decisions do not bind the Board. The Applicants did not appeal that decision to the Supreme Court and therefore cannot raise this issue now. Even if they could, it is impossible to square the Applicants' argument with the fact that the Board is a quasi-judicial appellate tribunal. See 10 V.S.A. § 6089(a). Requiring the Board to be consistent with District Commission decisions would mean that decisions by a lower tribunal which were not appealed would become binding on the appeals body and thus would undermine the appellate role. Accordingly, the Board declines to review the District Commission decisions cited by the Applicants to see whether the Board's decision is consistent with them.

The only two Board cases cited by the Applicants are Re: Waterburv Shopping Villaae, #5W1068-EB, Findings of Fact, Conclusions of Law, and Order (July 19, 1991) and Eastern Landshares, #4C0790-EB, Findings of Fact, Conclusions of Law and Order (Nov. 19, 1991). Neither case supports the Applicants. Review of the record of those cases shows that in both the applicants identified other state permits before the hearing. In both, the applicants submitted permits at the hearing and parties and the Board were able to question them. In both, parties tried and failed to rebut the permits.

Concerning' Waterburv Shopping Villaae, the Applicants state that in that decision the Board determined that a groundwater monitoring "permit" was required. This is inaccurate. Instead, the Board decided in that case that the state permits were not rebutted provided, among other things, that the developer submitted a groundwater monitoring proaram to the District Commission within 60 days. Waterburv Shopping Villaae at 27-28.

4. Other Agency Comments

The Applicants contend that the discharge permit is supported by letters the Board received from other agencies concerning whether to perform more testing. This is not completely accurate. Only one letter, dated September 24, 1991 from the Vermont Agency of Natural Resources (which issued the discharge permit), states that no other testing is needed. Of the other two letters, one, dated September 12, 1991 from the Vermont Department of Health, merely lists tests it is ready to perform if the Board asks.. The last letter, dated September 16, 1991 from the Vermont Department of

Agriculture, states that it does not know what tests it might perform because it does not know what is supposed to be in GLC.

5. No Rebuttal to the Permit Submitted by the Neighbors

The Applicants contend that the Board must accept the permit because the Neighbors did not rebut it. This is circular. The Neighbors did not rebut the permit because they did not have the opportunity. The Applicants did not put them on notice that they were relying on the permit and did not submit the permit until after the last day of taking evidence.

E. Application of Appropriate Standard

The Applicants contend that the Board did not apply a standard of undue waterpollution because the Board seeks disclosure of GLC's ingredients. It argues that the Board is requiring that nothing ever affect water.

The Board's decision describes why disclosure of GLC's ingredients is needed in order to evaluate whether undue water pollution will occur. The gist is that the Board needs to know what is in GLC to know what its effects will be. Once its effects are known, the Board can then judge whether they are undue. Unless the effects are known, a judgment cannot be made.

F. Retroactive Application of New Standards

The Applicants argue that the Board's decision applies arbitrary, new standards which are inconsistent with the Board's other decisions. First, the Applicants argue that the Board required additional testing for GLC. However, the Board did not do so.

Second, the Applicants argue that the Board has previously given presumptive effect to evidence on travel time, Vermont state erosion control guidelines, and written recommendations by state officials. This is not correct and there is no provision for such in Rule 19.

Third, the Applicants contend that the Board *is* holding "non-toxic" materials to a higher standard than pesticides or fertilizers, a standard which is "undefined." This is inaccurate. The Board is simply seeking disclosure Of

ingredients as a first step in evaluating whether GLC will cause undue water pollution. The Board cannot know whether GLC is "non-toxic" unless it knows what is in GLC.

Finally, the Applicants assert that the Board did not put it on notice that it would be seeking the ingredients of GLC. However, the 1989 decision clearly puts the Applicants *on* notice that the Board needs information to evaluate impacts.

G. Future Compliance/Bias/Distrust

1. Future Compliance

The Applicants claim that the Board decided that they will violate a permit if issued.

The Applicants' characterization of what occurred is not accurate. They say that the Board raised the issue of propensity to violate a permit. However, the Neighbors raised this issue.

Moreover, the Board expressly declined to decide the issue. Notwithstanding, the Applicants claim that the Board did decide it. Their evidence for this is Finding 5, which states in part that "[t]he Applicants will use pesticides and commercial fertilizers to manage the golf course if alternative methods do not work."

This part of Finding 5 is based on Paul Truax's statement during the hearings that:

> Sherman Hollow has committed, in current and previous hearings, to employ every alternative method before using pesticides and commercial fertilizers to manage the golf course.

The Applicants contend at one point in their motion that this statement was made at the District Commission hearings. It was not. It was made during the Board hearings, and was cited as such by the Applicants as their proposed finding 27.

At another point in their motion, the Applicants contend that this statement was meant to refer only to previous hearings. It does not. It also refers to "current" hearings, meaning those before the Board.

Importantly, the Board did not use this or any other finding to conclude that the Applicants will violate a permit. Instead, on page 21 of the November 1991 decision (pages 22 and 23 in the revised decision), the Board cites Mr. Truax's statement as part of the basis for requiring a groundwater monitoring program "if the Board were issuing a permit." The clear implication is that the permit would include a condition to perform the groundwater monitoring program. If the Board had reached a conclusion that the Applicants would violate the permit, it would have been illogical to impose a permit condition.

2. Restriction of Perjury Evidence

The Applicants assert that it was unfair for the Board to restrict their ability to cross-examine and introduce independent evidence relating to perjury by the Neighbors. They state that some of the Neighbors' witnesses testified as to the honesty and credibility of the Applicants. They appear to contend that the Board adopted such testimony. As grounds for this "adoption," they cite the Board findings and conclusions regarding the Applicants' willingness to use pesticides and fertilizers, and also those findings which use the phrase "the Applicants claim ...." They dislike the use of the word "claim" because it implies disbelief.

To begin with, the Board does not believe that the Neighbors actually testified as to the honesty and credibility of the Applicants. Instead, the Neighbors denied certain statements made by Mr. Truax in his prefiled testimony as to their character or background. This is hardly an attack on the Applicants' credibility.

Further, any statements in the decision which imply disbelief arise from inconsistencies in the Applicants' own testimony and not from any statements made by the Neighbors. For example, Mr. Truax's own statement that they will use pesticides and fertilizers if alternative methods do not work is inconsistent with the Applicants' other blanket statements that they will not use pesticides and fertilizers. Similarly, in Finding 51, the Board cites the Applicants' claim that they will place erosion control devices along all streams and then cites plans submitted by the Applicants which show cleared areas along streams which do not have erosion control devices.

The Board is entitled to make findings based on the Applicants' own testimony. Alleged perjury by the Neighbors is irrelevant to such findings.

Moreover, the Board is entitled under Vermont Rules Evidence 403 and 608 to restrict cross-examination and the introduction of character evidence on side issues.

3. Statement that Applicants' Opposed Testing

The Applicants argue that the Board's statement that they opposed testing of GLC is inaccurate because they offered GLC to the Board for testing and because it leaves out the "fact" that other state agencies told the Board no additional testing was needed.

The Applicants did originally state they would offer GLC for testing. They later changed their position and filed an opposition to the Board's testing proposal. The Board's decision accurately states that the Applicants opposed the proposal.

Moreover, it is not true that all state agencies consulted stated that testing was not needed. As discussed above, only one did, and the other two did not.

4. Change from "Pesticides" to "Waste Disposal"

In this section, the Applicants contend that the Board illegally changed the focus of its Criterion l(B) inquiry from "pesticides" to "waste disposal." Exactly how this relates to bias or distrust is not clear. At any rate, they contend that in the 1989 decision, Criterion l(B) was denominated "pesticides" and without notice the Board changed that in the 1991 decision to "waste disposal."

Criterion l(B) is denominated about "waste disposal" and was enacted in 1973. The Applicants cannot claim lack of notice. Nor can they escape the fact that by law even the GLC proposal must meet the criterion.

Further, in this case the Chair issued a prehearing conference report dated December 18, 1990 and the Board issued a memorandum of decision dated March 19, 1991 which both refer to Criterion l(B) as "waste disposal." These were issued prior to the Applicants' April 1991 offer of proof, in which it unveiled its GLC proposal for the first time. They were also issued prior to the Board's evidentiary hearings in July and August 1991.

IV. ANALYSIS: FACTUAL CLAIMS

This section contains a finding by finding analysis of the Applicants' assertions regarding individual findings of fact. The Board assumes some familiarity with the findings.

Finding 2.

Here the Board finds that the on-site soils have poor nutrient value and explains that this was the basis for Applicants' previous proposal for fertilizer use. The Applicants do not dispute the finding's accuracy. Instead, they argue that the finding implies fertilizers are needed to grow plants on site. The Board believes the finding states what it states.

Finding 3.

The Applicants do not challenge the finding's accuracy. Their complaint rather is with use of the word "claims" which is discussed in Section III.G., above.

Finding 4.

The Applicants do not challenge the finding's accuracy. They complain ihstead that the finding violates the de novo nature of the proceeding. However, the finding does not do SO because it merely recapitulates history of proceeding before the District #4 Commission. The Board reviewed the GLC proposal de novo.

Finding 5.

The Applicants do not dispute the accuracy of the finding but dispute its interpretation. This is discussed in Section III.G., above.

Finding 7.

The Applicants do not dispute the accuracy of the finding. They contend the finding is misleading and does not support the implication that, without adding fertilizer, grass cannot grow. However, the finding is intended only to describe Applicants' steer manure proposal.

Finding 8.

The Applicants assert two inaccuracies. First, they state that the finding says that they claim GLC contains no nitrates, potassium, or phosphorus (NKP), when in fact they claimed that GLC contains NKP in trace amounts. This is correct but has no significance because it is implicit in the Applicants' claim of only trace amounts that GLC contains no amounts of NKP worthy of discussion. However, the Board will alter the findings to state the Applicants' claim correctly, and will alter any related statements in the conclusions of law appropriately.

Second, the Applicants assert that the finding stated that they claim that nitrates, potassium, and phosphorus are important and widely-used plant nutrients. This is not correct. The finding merely states that they are such nutrients and does not state that such is the Applicants' position. In their motion, the Applicants do not dispute the fact that these compounds are such nutrients.

Finding 9.

The Applicants dispute the finding that they claim that GLC encourages nitrogen fixation through encouraging microbial action in soils. However, the Applicants' proposed finding 41 states: "Green' Life soil conditioner encourages nitrogen fixation by the microbial action in the soil." The Board concludes that it is not appropriate for an applicant to file a motion to alter a finding that it proposed.

Finding 10.

The Applicants disagree with the statements that "GLC" will be applied at certain rates. They correctly state that the rates reflect the diluted mixture of GLC and water. The finding begins, however, by describing the diluted mixture and the description of GLC application is intended to mean application of the diluted mixture. To clarify, the Board will issue an appropriately altered finding.

Finding 11.

The Applicants do not dispute the finding's accuracy but protest that only a portion of the GLC label is quoted. However, the portion omitted does not describe any of the ingredients of GLC, whereas the quoted portion does (albeit in a general way). Finding 11 is clearly directed toward

describing what has been submitted in terms of a list of GLC ingredients. Nonetheless, to be complete, the Board will alter the finding to contain the remainder of the label.

Finding 12.

The Applicants dispute the finding that there is no verification that the laboratory which performed the priority pollutant scan actually tested GLC. The Applicants contend that William Bress, an employee of the Vermont Department of Health, testified that he saw a piece of paper attached to the lab report identifying the name of who delivered the sample and stating that the person was a Green Life representative. This is double hearsay and the Board is within its discretion not to consider this to be verification.

Finding 13.

The Applicants do not dispute the finding's accuracy but argues that the finding sets an impossible standard. However, the finding sets no standard but merely describes what a priority pollutant scan is and does.

Finding 14.

The Applicants do not dispute the finding's accuracy but argue that the 'finding distorts the evidence because it does not mention Dr. Bress's opinion that no chemical found in GLC exceeds the Vermont Drinking Water Health Advisories. However, the finding is simply directed toward stating what priority pollutants were revealed by the scan. In its conclusions of law, the Board explains that it is not addressing whether the advisories were met because the Applicants have otherwise failed to meet their burden of proof by not providing the ingredients of GLC.

Finding 16.

There are two factual disputes here. First, the Applicants claim they have supplied information on GLC's solubility. They say they submitted testimony that GLC is 99.86 percent water in concentrated form and is highly soluble. In support of this, they cite Exhibit A2, their Organic Turf Management Plan, and the oral testimony of Paul Truax and Timothy Kelly. However, the Board has not been able to verify that these references to the solubility of GLC are in the record.

Second, the Applicants claim that they provided evidence concerning GLC's mobility. To support this, they cite Exhibit A7, Michael Wurth's prefiled testimony. However, Exhibit A7 is entitled "Michael Wurth's Prefiled Testimony ... As Presented at the District Commission Hearing ...." The District Commission did not hear a proposal regarding GLC. Moreover, Mr. Wurth's testimony makes clear that he was calculating water flow rates, not GLC's mobility (how freely it'moves).

Finding 17.

The Applicants dispute the accuracy of the finding only to the extent that it states that GLC is a recently developed product. The Applicants state in their motion that "Ten years is not a recent development." However, they later state (on page 74 of their motion) that the product has only been in *use* for "over five years" and that research was done for several years prior to the product's introduction on the market. It is reasonable for the Board to find that a product designed within the last decade and introduced in the mid-1980's is recently developed.

Finding 20.

The Applicants dispute this finding by saying that the so-called test 'pit gap is not on the Sherman Hollow site but is on the property of others. This does not appear to be true. The gap is shown on Exhibit A10B. The area within the gap is shown on Exhibit A19H as being within the site and surrounded by golf course improvements on all sides.

Finding 21.

The Applicants contend that no bedrock was discovered at Test Pit (TP) #55. Exhibit A9 shows this is correct, but Exhibit A11A shows that the Applicants infer the existence of bedrock at TP #55. The Board will alter this finding to state that the Applicants infer bedrock rather than found bedrock:

Finding 24.

The Applicants assert that there is no evidence to support the finding that water "tends to flow along the surface of the site," arguing that water flows not on the surface but through the weathered till. However, the finding states that "water tends to flow along the surface of the site, or through the permeable weathered till ..."

(Emphasis added.) In addition, the fact that water may sometimes flow along the surface is supported by Exhibit N9, the prefiled testimony of Marcel Hawiger, at 5-6.

Finding 26.

The Applicants do not dispute the accuracy of the finding but argue that it makes a prejudicial omission because the finding states that the shortest travel time for water from the closest tee to the closest neighboring well is estimated to be 27.1 days, but does not say that this figure represents saturated conditions. However, adding the requested data would not change the conclusion reached. on page 30 of the decision about travel time figures, which is that they are meaningless without information on what GLC is.

Finding 27.

The Applicants do not dispute the accuracy of the finding that they have not submitted plans showing outfalls for the tees but instead argue that no such outfalls are proposed. However, the Board's 1989 denial stated that they should submit details for outfalls from the tees and it is therefore appropriate for the Board to find that they did not submit the details. In any case, the question is not significant, because in the Board's conclusions of law it does not cite the lack of outfall's for the tees as a reason for concluding that the deficiencies outlined by the 1989 decision were not met.

Finding 31.

This finding is based on extensive review of the plans by the Board members and staff. The Applicants claim it is inaccurate to state that the outfalls for the third and seventh greens will discharge into nearby watercourses because the third green is 100 feet away, and the seventh is 750 feet away, from the relevant watercourses. The issue, however, is not the location of the greens, but of the outfalls, which are shown to be near watercourses by a comparison of Exhibits A19E and A19G.

Finding 32.

The Applicants do not dispute the finding that they have not provided a groundwater monitoring program but continue to contend that they do not need to do so.

Finding 33.

The Applicants do not dispute the finding that they have not submitted information on the effects of using bacteriological controls but rather dispute the conclusions drawn from the finding. The Board discusses this in Section V.B., below, regarding its conclusions of law under Criterion I(B),.

Finding 34.

The Applicants dispute this finding, and state that it reads as follows:

> The Applicants have not provided information on the effects on aquatic biota of GLC or of its ingredients individually.

However, the finding actually reads thus:

> The Applicants have not provided information on the effects on aquatic biota of GLC as a compound or of its ingredients individually.

(Emphasis added.)

The additional language is significant. There is no information in the record on how GLC - the compound - actually acts on aquatic biota. Instead, the only evidence is the priority pollutant scan, which says more about what is not in GLC than what is in it. While science may know the effects on aquatic biota of the compounds for which the priority pollutant scan tests, such knowledge does not mean that the effects of GLC as a compound are known or have been supplied. Moreover, since the priority pollutant scan does not tell the Board what the ingredients of GLC are, the scan does not tell the Board what the effects of those ingredients are. The finding is accurate.

Finding 35.

The Applicants dispute the accuracy of the finding that the 5th, 7th, 10th, and 16th greens will be placed either on or within 50 feet of a watercourse. It claims that the Board read the wrong plan, Exhibit A19E, and that it should have read Exhibit A19G. However, Exhibit A19E shows both the greens and the watercourses and is the best exhibit for making

the comparison and therefore it was used. It shows what the finding states that it shows. The locations of the greens on A19E are not different from those on A19G.

Findings 36 and 37.

The Applicants contend that their figures on total irrigation water needs (one inch to one and a quarter inch per week) include water from natural rainfall. In other words, the wells and the pond do not have to supply all of that water. The findings assume that the per week need figures are in addition to natural rainfall.

This assumption is based on the manner in which the Applicants compared water needs and water availability. An example is the last page of Exhibit A6, which contains calculations by Wagner, Heindel, and Noyes. The calculations compare the water supply from the on-site pond and wells to a need of one inch per week and conclude that the supply exceeds one inch per week. In stating what the available supply is, no reference is made to rainfall.

Similarly, of the remainder of Exhibit A6 entitled "Golf Course Irrigation Description and Water Calculations for Proposed Golf Course"), those portions which were admitted do not clearly state that the per week need figures include natural rainfall. Moreover, on page 2 of the exhibit, it states:

> From the above analysis, it is concluded that the existing well water supplies used in conjunction with the storage capacity of the reservoir pond are more than sufficient to supply the irrigation requirements of tees and *greens* at Sherman Hollow.

However, on further review, the Board concludes that it was inaccurate to assume that the per week need figures were in addition to rainfall. In Exhibit A2, the Organic Turf Management Program, the Applicants state:

> Irrigation water will be applied in amounts necessary to supplement natural rainfall. This will be in amounts necessary to keep the average water amount at one inch per week or less ....

Further, in Exhibit A7, the prefiled testimony of Michael Wurth, Mr. Wurth states on page 19:

> Based on the one inch per week which Dr. Cooper has indicated is necessary to maintain healthy turfgrass, the aggregate requirement for both irrigation and natural rainfall is 153,340 gallons per week ....

Accordingly, the Board should have considered natural rainfall. Specifically, the November 1991 decision found that, during July and August, the wells and the pond themselves do not account for all of the water needed. They are short by about 47,000 gallons per month or 31 inches of water. On review of the Applicants' rainfall figures for the period 1979 and 1986, the Board finds that the average amount of rainfall for July is .75 inches, ranging from a low of .41 inches in 1982 to a high of 1.25 inches in 1985. The Board also finds that the average amount of rainfall for August is 1.09 inches, ranging from a low of .29 inches in 1984 to a high of 2.18 inches in 1983.

The Board therefore will alter Findings 36 and 37 to take these facts into account. Below, in discussing the conclusions of law, the Board also will decide to alter the conclusions drawn from these facts.

Finding 38.

The Applicants do not dispute the accuracy of this finding but rather disagree with its implication that witness Timothy Xelley, the California golf course manager, is not credible. This is a matter within the Board's discretion as the finder of fact. In re ouechee Lakes Corvoration, 154 Vt. 543, 554-55 (1990).

Finding 40.

The Applicants dispute the statement that they did not supply evidence concerning how the pond is recharged. They state that Michael Wurth and Christopher White orally testified that the pond presently is recharged from groundwater. The Board will alter Finding 40 to delete the sentence regarding pond recharge.

Finding 41.

The Applicants dispute the‘finding that their plans do not show any pipes leading from the wells to the pond. They assert that Exhibit A19G shows a line from the existing wells to the clubhouse and another line from Well 1B to the pond.

Exhibit A19G is entitled "Erosion Control Plan: Golf Course Plan." It is not the irrigation plan. The Applicants submitted separate plans called "Irrigation Plan." These are Exhibits A18A and A18B. The irrigation plans do not show any pipes for getting irrigation water to the pond from the wells.

On review of Exhibit A19G, it appears that the Applicants did show some pipes leading from the wells to the pond. The Board finds that the exhibit includes a line running from one well location to the clubhouse and a faint line running from the location of Well 1B to the pond. The Board will alter Finding 41 to state what Exhibit A19G shows.

Finding 42.

The Applicants dispute the finding that, in areas marked "tree stands" to be preserved, they will have to clear some trees to lay irrigation pipes. They claim there is no basis in evidence for the finding. They also ask that the Board impose a permit condition to prohibit such clearing.

Finding 42 clearly states that the Applicants' plans show irrigation pipe lines running through tree stands to be preserved. It is a reasonable inference, based on the Board's expertise as an agency which regulates construction, that to lay such pipes some trees may have to be cleared. However, the Board does believe it was erroneous to state that trees will have to be cleared because it is possible to lay irrigation pipes without clearing. The Board therefore will alter the finding to state that soil disruption may (as opposed to will) occur and that the Applicants do not plan to clear these areas and have agreed to a permit condition which prohibits such clearing.

Finding 46.

The Applicants do not dispute the accuracy of the statement that the vast majority of the site is presently forested and that well over half of it will have to be cleared. They argue rather that there is a prejudicial omission in that the finding does not state that the site used to be farmland. However, the Applicants have not identified how this prejudices them. Moreover, the clearing of significant portions of forested land is clearly relevant to erosion considerations.

Finding 47.

The Applicants dispute the accuracy of the slope calculations, stating that their expert testified that most of the area to be cleared is on slopes of less than 10 percent and that they discredited the Neighbors' slope testimony.

Finding 47, however, is not based on any expert testimony. It is based on the Board's review of the Applicants' Exhibits A19A through A19G. Slope calculations are based on the contours shown. The Board stands by the finding.

Finding 48.

The Applicants argue that the finding that "the ability of the soils on the site to absorb water is limited" conflicts with the evidence and with Finding 23. However, the finding is supported by the testimony of Hugh Brown (Exhibits N1 and N14), Marcel Hawiger (N9), and the Applicants' soil studies which state that the soils primarily consist of dense, impermeable basal till under a shallow permeable layer of weathered till. There is no conflict with Finding 23: that finding merely states that the top soil layer is highly permeable and the bottom is not very permeable. As Finding 22 indicates, the top soil layer is not very'deep, so that its role in absorbing water is accurately described as "limited."

Finding 51.

The Applicants dispute the finding that Exhibits A19C and A19D show cleared areas adjoining streams with no vegetative buffers or erosion control devices along the streams. This finding was based on the Board's review of the plans and on further review the Board is not convinced that the Applicants' dispute has any merit.

Finding 58.

The Applicants dispute the finding that Exhibit A19E shows stump mounds in areas where trees are to be preserved, saying that Exhibit A19E shows no such mounds. However, Exhibit A19E shows stump mounds, clearly marked "SM." The key says that "SM" means stump mounds. The finding is accurate.

Finding 61.

The Applicants dispute the sentence in the finding which reads "Only oat seed will be used between October 15 and April 15," arguing that Exhibit A19J states that other forms of erosion control will be used during that period. That is true, but the finding is only directed toward describing what grasses will be used. The other control measures referenced by the Applicants include use of hay or straw and jute mats. Those measures are not grass plantings.

Finding 63.

The Applicants do not dispute the accuracy of this finding, which states that their Exhibit A19J contains a reference to nitrates as part of mulch materials. The Applicants instead contend that the mulch was to be used as part of transplanting trees and shrubs and no *such* transplanting is planned. However, the exhibit states that the material is to be used in the planting of trees and shrubs. Exhibit A19G shows tree plantings near the entrance road by Sherman Hollow Brook.

V. ANALYSIS: CLAIMS REGARDING THE CONCLUSIONS OF LAW

A. Scone of Review

The Applicants argue that the Board has somehow violated the concept of de novo review by concluding that the appeal is "governed by the submission made to the district commission." However, the Board has performed a de novo review in this case of whether the reconsideration request, as presented to it, meets the deficiencies set out in its 1989 denial.

B. Criterion 1(B) (Waste Disposal)

Except as stated in Section III.D.2., above, the Board declines to change its conclusions of law regarding Criterion l(B) because the Board does not believe the Applicants' objections are merited. The Board will discuss several of those objections.

1. "Characteristics" v. "Ingredients"

The Applicants *claim* that the Board imposed a *new* standard here of requiring information on the ingredients of GLC. They assert that this is different from the 1989 decision, which required information on "characteristics."

The November 1991 decision explains why it is necessary to know GLC's ingredients in order to ascertain its characteristics. The decision also explains why the Applicants' other evidence on characteristics (the pollutant scan) is insufficient. The decision further explains why knowing the ingredients is relevant to compliance with the statutory standard of undue water pollution. Thus, the Board does not believe the "ingredients" issue is a defect in the decision.

2. GLC as an "Experimental" Product

The Applicants contend that GLC is not experimental because it has "a ten year history" and was "developed over ten years ago."

These statements are an inaccurate characterization of the evidence, which is that the company went into business about ten years ago, that research was done for a few years into the product, and that the product came into use about five or six years ago. The Applicants even state these facts in their motion and thus contradict themselves.

The evidence supports the notion that GLC is a recently developed, experimental product. Research on it was begun within the last ten years. It came into use five or six years ago. It is not widely used.

3. Groundwater Monitoring Program

The Applicants contend that the requirement of a groundwater monitoring program is irrelevant to their GLC proposal. The November 1991 decision clearly explains why it is important and is not defective on this basis.

4. "Bacteriological"

The Applicants dispute the Board's conclusion that the Board cannot tell whether GLC is bacteriological because the Board does not know what is in it. They also dispute the Board's statement that GLC has a bacteriological aspect because of the claim that it works on microbes in the soil. They argue that "bacteriological" means substances which have bacteria in them and that GLC has no bacteria in it.

It is entirely reasonable to conclude that, if one does not know what is in GLC, one cannot tell whether it is bacteriological. If one does not know what is in GLC, then it is not proven that it has no bacteria.

Further, the term "bacteriological" is not necessarily limited to substances which have bacteria in them. The American Heritage Dictionary defines the root word "bacterio-" as a term which "indicates bacteria, bacterial activity, or relationship to bacteria ... ." (Emphasis added.) Clearly, a substance which works on existing microbes in soils may have a relationship to bacteria since it may be acting on bacteria.

5. Aquatic Biota

In this section of the motion, the Applicants reiterate their argument that knowing what is in GLC is not needed to determine effects on aquatic biota. The Board believes that its discussion of this issue in relation to Finding 34 (see Section IV, above) adequately addresses these arguments.

6. Discharge Permit

The Applicants again contend that a discharge permit became important only when the Board decided that GLC was analogous to a fertilizer. However, as stated above in Section III.D.1., if such a permit is required, it is because the Applicants propose a discharge containing GLC which qualifies as waste.

Importantly, the Applicants contend in this section that the Board never decided whether a discharge permit is required. This is true, but it contradicts their assertion earlier in the motion that the Board did make such a decision.

7. Final Discharge Permit as Condition of Act 250 Permit

The Applicants argue that the Board should simply have made obtaining a final discharge permit from the Agency of Natural Resources a condition of the Board's permit. However, to do so, the Applicants would have to independently prove that they meet Criterion l(B), which is their burden under the statute. The law does not allow the Board to issue them a permit unless they have met their burden. 10 V.S.A. §§ 6086(a), 6088. They must meet the burden prior to issuance of a permit, not afterwards.

8. Dilution/Travel Time

The Applicants dispute the Board's statements that evidence on dilution and travel time is not enough to warrant issuance of a permit where the substance (GLC) is basically an unknown. The Board believes that these statements are reasonable and do not constitute a legal defect in the decision.

C. Criteria 1(E) (Streams) and 3 (Existing Water Supplies)

There were two bases for denial under these criteria. One was that the Applicants had not met the deficiencies because their plans do not show the 50-foot buffer to watercourses. The other was that the Applicants' figures show they will not have enough water.

Concerning the first basis for denial, the Applicants reiterate their argument that the wrong plans were reviewed, here stating that the cited plan, Exhibit A19E, is a grubbing plan "which shows the site before construction." However, under the Board's ***rules,*** grubbing is construction. Board Rules 2(C), 2(D). Moreover, the exhibit discusses logging, earthwork, and buffers. In addition, as the Board stated concerning Finding 35 in Section IV, above, the locations of the greens and tees are shown on Exhibit A19E, .as are the watercourses. 'Thus, the right plans were reviewed, and the Board will not change its conclusions in this regard.

Concerning the second basis for denial, the Board has described above in Section IV regarding Findings 36 and 37 that the water supply figures, when viewed in connection with the rainfall figures, indicate that the Applicants will have enough water. The implication of this is that the Board should change its conclusions of law. Specifically, the Board will alter the decision to delete lack of water as a basis for denial and will make a positive conclusion concerning water availability.

D. Criterion 4: Soil Erosion

There are two issues here: erosion during construction and erosion after construction.

Concerning erosion during construction, the Board concluded that the application meets ***Criterion 4*** provided certain conditions are met. The Applicants dispute the findings which support those conditions. As discussed above,

the Board believes those findings are accurate. Further, in light of the above discussion in Section IV regarding Finding 42, the Board will alter its decision to add a condition prohibiting tree-clearing in tree-stands which are to be preserved.

The Applicants also argue that the Board is not being consistent with its decision in Re: Wake Robin, #4C0814-EB, Findings of Fact, Conclusions of Law, and Order (Aug. 14, 1991). This argument starts with the finding that trees will be cut to make room for irrigation lines. In Wake Robin, the Board allowed tree cutting for sewer lines.

It is difficult to understand the Applicants' concern here, since they have agreed to a condition prohibiting tree-clearing. In any case, there is no inconsistency with Wake Robin. The issue in this case is erosion. In Wake Robin, the cutting for sewer lines was an aesthetics issue. Erosion was not before the Board. The aesthetic impact of tree Cutting is different from the erosion impact of tree cutting.

With respect to erosion after construction, the Applicants make two significant arguments. First, they argue that the Board is being inconsistent with other decisions, contending that "several approved golf courses have steeper slopes." But the decisions they cite for these propositions are the Board's decisions in Wake Robin and Re: New Enaland Land Associates, #5W1046-EB-R, Findings of Fact, Conclusions of Law, and Order (Jan. 7, 1992). Neither of these cases involved golf courses. Wake Robin involved a retirement community. New Enaland Land involved a proposal for creating 33 lots.

The Applicants also dispute the Board's conclusion that turf will not become established because of lack of nutrients. It points to the fact that grass grows presently on the site.

The Board's decision addresses turf, not just any grass. Findings 18 and 19 of the Board's 1989 decision, incorporated by reference in the 1991 decision, spell out that turf consists of specialized grasses which require intensive fertilization and management. Thus, saying that grass grows presently on the site does mean that GLC will enable turf to grow.

VI. ORDER

1. The Board will alter Findings 8, 10, 11, 21, 36, 37, 40, 41, and 42 in accordance with the above decision.

2. The Board will alter its conclusions of law in accordance with the above decision.

3. Except as granted in Paragraphs 1 and 2 of this order, the Applicants' motion to alter is denied.

4. Findings of Fact, Conclusions of Law, and Order #4C0422-5R-1-EB (Revised) are hereby issued.

Dated at Montpelier, Vermont this 19th day of June, 1992.

ENVIRONMENTAL BOARD

Elizabeth Courtney, Chair
Ferdinand Bongartz
Arthur Gibb
Lixi Fortna*
Samuel Lloyd
William Martinez*
Charles F. Storrow
Steve E. Wright

*Members Fortna and Martinez continue their dissent on Criterion 4.

sherman.mem(awp6)