

STATE OF VERMONT

Water Resources Board

Temporary Pollution Permit No. 2-0116
McDonald's Corporation Appeal
by Lawrence G. Jensen et al

10 V.S.A., §1269
Findings of Fact,
Conclusions of Law
and Order

Introduction

On July 15, 1982 Lawrence G. Jensen et al filed an appeal with the Vermont Water Resources Board under the provisions of 10 V.S.A., 81269 from the decision of the Commissioner of the Department of Water Resources on June 15, 1982 to issue Temporary Pollution No. 2-0116 to the McDonald's Corporation for the discharge of stormwater runoff into an unnamed tributary of Tenney Brook in the City and Town of Rutland, Vermont. The Water Resources Board identified the following parties in interest in this proceeding:

1. McDonald's Corporation
2. Lawrence G. Jensen, et al
3. Vermont Department of Water Resources

A hearing on this matter was held in Woodstock, Vermont on September 28, 1982 with the following members of the Vermont Water Resources Board present: Duncan Brown, Chairman, Roderic J. Maynes, Catharine B. Rachlin, and William Davies.

In the course of this proceeding the following documents were accepted into evidence:

1. McDonald's Exhibit 1: A letter dated May 12, 1982 addressed to John W. Barrett, Rutland City Clerk, enclosing a document entitled "Legal Notice of Temporary Pollution Permit."
 2. McDonald's Exhibit 2: A letter dated May 12, 1982 addressed to the McDonald's Corporation from Gary Schultz., Vermont Department of Water Resources, enclosing a draft Temporary Pollution Permit dated May 10, 1982.
 3. McDonald's Exhibit 3: A letter dated June 14, 1982 addressed to McDonald's/ Corporation from Gary Schultz, Vermont Department of Water Resources enclosing a copy of Temporary Pollution Permit No. Z-0116.
 4. McDonald's Exhibit 4: An aerial photograph of the project site "Rutland City, Shopping Mall" and further identified as Sheet No. 115124, series 1250 - 1978.
 5. McDonald's Exhibit 5: A topographic map prepared by the U.S. Department of Interior, Geology Survey and further identified as the "Rutland Vermont SW-4 Rutland 15 minute quadrangle" and "Chittenden, Vermont 15 minute quadrangle."
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6. McDonald's Exhibit 6: A letter dated April 8, 1982 addressed to Charles Streator, of the Vermont Department of Water Resources from Taylor McDermott, on behalf of the McDonald's Corporation enclosing an application from McDonald's Corporation for a permit to discharge wastes, a schematic diagram entitled "Dry Well Placed to Facilitate Drainage" and a site plan drawing.
7. McDonald's Exhibit 7: A letter dated March 29, 1982 addressed to Taylor McDermott on behalf of McDonald's Corporation from Charles Streator, on behalf of the Vermont Department of Water Resources enclosing a document, entitled "State of Vermont - Agency of Environmental Conservation Interim Stormwater Management Policy."
8. McDonald's Exhibit 8: A exchange of correspondence between McDonald's Corporation and the Agency of Environmental Conservation consisting of a letter dated April 15, 1982 addressed to Taylor McDermott on behalf of the McDonald's Corporation from Charles Streator, on behalf of the Agency of Environmental Conservation. Mr. McDermott's response to Mr. Streator dated May 3, 1982 enclosing a diagram entitled "Typical Dry Well."
9. McDonald's Exhibit 9: An undated, untitled, three page document consisting of findings prepared by Gary Schultz on behalf of, the Vermont Department Water Resources.
10. Appellants Exhibit 1: A map entitled "Rutland Municipal Zoning District Map" showing the location of the appellant's property with respect to the proposed discharge.
11. Appellants Exhibit 2: Copies of a portion of topographic map showing the location of the proposed discharge and the drainage system in the vacancy of the proposed discharge.
12. Appellants Exhibit 3: A site plan drawing prepared by McDonald's Corporation dated July 15, 1982..
13. Appellants Exhibit 4: A Temporary Pollution Permit No. 2-0867 dated August 4, 1980 issued to Juster Associates.

Motion to Dismiss

As a preliminary matter in this proceeding the Vermont Water Resources Board heard evidence and testimony regarding the McDonald Corporation's Motion to Dismiss this appeal. The Board, by vote of 3 to 1 (Maynes dissenting) decided to deny the Motion to Dismiss this appeal.

Findings of Fact

1. With regard to 10 V.S.A., §1265(c)(1) "the proposed discharge does not qualify for a discharge permit," the Board finds:
 - a. The McDonald's Corporation (hereinafter "the applicant") proposes to build a restaurant facility on a two acre parcel of land located on Woodstock Avenue (U.S. Route 4) in the City of Rutland. The restaurant building and associated paved parking lot will create an essentially impervious surface occupying approximately 0.6 acres.

- b. The **applicant applied** for and obtained Temporary Pollution Permit Number 2-0116 from the Department of Water Resources to discharge **stormwater wastes** from the proposed restaurant facility into an unnamed tributary of Tenney Brook. The **waters receiving** the proposed discharge **are Class B** waters.
 - c. During many storm events, **stormwater wastes will dissipate in the drainage swale** prior to reaching the waters of the state. On some **occasions** the discharge of **stormwater wastes** to the drainage swale may flow by a continuous water course to an unnamed tributary to Tenney Brook,
 - d. The discharge stormwater may contain some suspended solids and may **have** some characteristics which are not in absolute compliance with the technical requirements of the Vermont Water Quality Standards for Class B waters.
2. With regard to 10 V.S.A., §1265(c)(2) "the applicant is 'constructing, installing or placing into operation or has, submitted plans and reasonable schedules for the construction, installation or operation of an approved **pollution abatement facility** or alternate waste disposal system, or that the applicant has a waste for which no feasible and acceptable method of treatment or disposal is known or recognized but is making a bona fide effort through **research** and other-means to discover and **implement** such a method" the Board finds that:
- a. Any treatment of **stormwater** must contend with the fact that the frequency, **volume** and polluting characteristics of the **waste will** vary substantially due to climatic conditions and other factors beyond the scope of **any feasible** treatment system.
 - b. The unique problems associated with the treatment of **stormwater** wastes have been recognized by the State of Vermont in the form of:
 - (1) The Vermont Water Resources Board Pyramid Mall decision June, 2, 1978.
 - (2) The **Agency** of Environmental Conservation's "Interim Stormwater Management Policy" dated September 1, 1980.
 - (3) The amendment of 10 V.S.A., 51264 by Public Act 222, the 1981 Legislative Session, adjourned.'
 - c. The Agency of Environmental Conservation has assumed responsibility for research **in the** area of stormwater wastes and has an on-going program of research in this area which will be basis for the 'development of a plan for **stormwater** management. As part of this effort, **the** Agency of-Environmental Conservation has adopted **guide-lines** for the treatment of stormwater wastes in the form of its "Interim Stormwater Management Policy."
3. With regard to 10 V.S.A., §1265(c)(3) "the applicant needs permission to pollute the waters of the state for a period of time necessary to complete research, **planning; construction, installation or** the operation of an approved and acceptable pollution abatement facility or alternate waste disposal system" the Board finds that:
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- a. The Agency of Environmental Conservation is currently in the process of evaluating its own research and the research of others in conjunction with the preparation of a plan for the management of collected storm-water runoff. This effort will not be completed until January of 1983.
 4. With regard to 10 V.S.A., §1265(c)(4) "there is no present, reasonable, alternative means of disposing of the waste other than by discharging it into the Waters of the state" the Board finds that:
 - a. The subsurface disposal of stormwater wastes is precluded by a high ground water table.
 - b. Any other type of treatment facility that would eliminate all possibility of discharge would be technically and economically, unreasonable in view of the marginal benefits to be obtained.
 5. With regard to 10 V.S.A., §1265(c)(5) "the denial of a temporary pollution permit would work an extreme hardship upon the applicant" the Board finds that:
 - a. The receiving waters for the applicant's proposed discharge currently receive treated and untreated stormwater wastes from the parking lots and roofs of numerous properties located on Woodstock Avenue.
 - b. The applicant has expended substantial sums of money on the development of its site and the construction of its stormwater treatment system, in part, in good faith reliance on the advice of the Department of Water Resources.
 - c. The applicant has expended over \$18,000 in the construction of its stormwater waste treatment system.
 6. With regard to 10 V.S.A., §1265(c)(6) "the granting of a temporary pollution permit will result in some public benefit" the Board finds that:
 - a. The proposed restaurant facility will result in the creation of 50 to 80 full and part-time jobs with an annual payroll of approximately \$250,000 and will generate approximately \$100,000 in local, state and federal tax revenues.
 7. With regard to 10 V.S.A., §1265(c)(7) "the discharge will not be unreasonably destructive to the quality of the receiving waters" the Board finds that:
 - a. Stormwater is a generic term used to describe those waters created by precipitation falling upon, and flowing over, impervious surfaces:
 - b. Some of the pollutants and degrading characteristics in stormwater wastes are the result of precipitation falling through, and being contaminated by pollution in the atmosphere.
 - c. Other constituents commonly found in stormwater wastes are the result of its contact with pollutants found on impervious surfaces. These pollutants may include, oil, grease, heavy metals, organic matter, deicing chemicals and other substances.
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- e. The specific constituents and concentration of the pollutants found in stormwater are unique to the circumstances at any given site at any given time.
 - f. The so-called "first flush" of stormwater runoff contains most of the pollutants contributed by contact with an impervious surface.
 - g. The first flush phenomenon occurs within the first 2 millimeters or 0.08 inches of precipitation. Subsequent stormwater is essentially of the same quality as the precipitation which creates the runoff.
 - h. Stormwater wastes from the impervious surfaces at the applicant's site are directed by gravity flow to a series of dry wells located on the perimeter of the parking lot.
 - i. The dry wells will isolate and treat the first 0.5 inches of runoff in such a manner that no heavy metals or settleable solids from the first flush will reach waters of the state. Some of the suspended solids will also be removed from the treated stormwater.
 - j. The stormwater in excess of the first 0.5 inches will be discharged by overland flow into an existing drainage swale.
8. With regard to 10 V.S.A., §1265(c)(8) "the proposed discharge will not violate any applicable provisions of state or federal laws or regulations" the Board finds that:
- a. The Agency of Environmental Conservation provided notice of the applicant's proposed discharge in accordance with its applicable regulations.
 - b. The Agency of Environmental Conservation's Interim Stormwater Management Policy is more restrictive than that found in most and perhaps any other state.
 - c. The applicant's proposed method of treatment exceeds the requirements of the Agency of Environmental Conservation's Interim Stormwater Management Policy and represents the state-of-the-art in stormwater treatment.
9. The findings of fact as contained herein are categorized by the criteria of 10 V.S.A., §1265(c) for organizational convenience only and are not intended to apply solely to the criteria cited.

Conclusions of Law

1. The specific characteristics of stormwater wastes may vary to such an extent that an affirmative determination that the proposed discharge would not reduce the quality of the receiving waters below their assigned classification is precluded. Therefore, the applicant's discharge of such wastes does not qualify for a "discharge permit" under the provisions of 10 V.S.A., §1263.

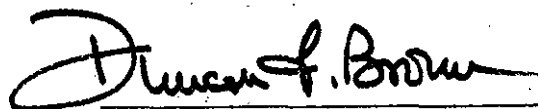
2. The applicant has proposed a method of **stormwater** treatment which complies, with and in some respects is superior to the requirements of the **Agency** of Environmental Conservation's Interim Stormwater Management Policy. The **Agency of Environmental** Conservation has assumed **primary** responsibility for conducting research in this area on behalf of the applicant and others and is making a **bona fide** effort through research and other means to discover a feasible and **acceptable** method of treatment and disposal.
3. The applicant needs permission to discharge stormwater wastes for a period of time until the on-going research by the Agency of Environmental Conservation is completed.'
4. The costs and other practical **considerations** of disposing of the volume of **stormwater** wastes which might occur during major storm events precludes alternative means of disposal.
5. The denial of a Temporary Pollution Permit would effectively prevent the applicant from the development of its property in the manner contemplated; working an **extreme hardship** on the applicant;
6. The granting of a Temporary Pollution Permit would provide local employment opportunities and would increase tax revenues thereby resulting in, some public benefit.
7. The proposed discharge will have little, if any, significant impact on the existing quality of the receiving waters.
8. The **proposed discharge** is consistent with established state policy regarding the management of stormwater wastes and will not violate any applicable provisions of state or federal laws and **regulations**.
9. The applicant's stormwater discharge treatment system satisfies the criteria for a temporary pollution permit pursuant to 10 V.S.A., 81265.

Order

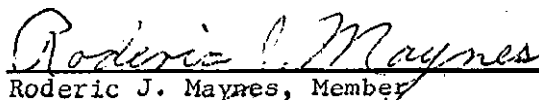
The decision to issue Temporary Pollution Permit No. 2-0116 for effect on June 15, 1982 is affirmed.'

Done this 19th day of October 1982, at Woodstock, Vermont.

The Vermont Water Resources Board



Duncan F. Brown, Chairman



Roderic J. Maynes, Member

10/21/82



William Boyd Davies, Member

Catharine B. Rachlin
Catharine B. Rachlin, Member