



STATE OF VERMONT
WATER RESOURCES BOARD
MONTPELIER, VERMONT 05602
(802) 828-2871

December 19, 1984

Vermont Natural Resources Council
c/o Donald Hooper, Director of Operations
7 Main Street
Montpelier, Vermont 00562

RE: Groundwater

Dear Don;

Enclosed please find the Water Resources Board's formal response to your memorandum of September 27, 1984 requesting a declaratory ruling regarding groundwater. I have also enclosed an exchange of correspondence between myself and Bill Griffin of the Attorney General's Office regarding this matter. I trust that this ruling makes the Board's position regarding its authority sufficiently clear.

As I indicated to you at the conference, I would welcome an opportunity to discuss the regulation of groundwater with you and others. Please let me know if you have any questions.

Sincerely,


William A. Bartlett
Executive Officer

WAB/kgr

Enclosure.

State of Vermont
Water Resources Board

In re: Petition of Vermont Natural Resources Council - Authority of **the Water Resources Board** to regulate groundwater 3 V.S.A.; Chapter 25

On December 13, 1984, the Vermont Water Resources Board reviewed a petition dated September 27, 1984, from the Vermont Natural Resources Council requesting a declaratory ruling on the ability of the Board to regulate groundwater in Vermont. On the basis of that review the Board made the following decision.

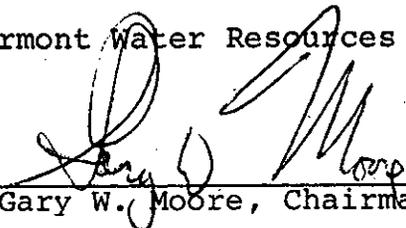
ORDER

The petition is denied for the following reasons:

- (1) The issue of the Water Resources Board's authority to regulate groundwater was raised by the Vermont Natural Resources Council and others in a recent rulemaking proceeding concerning the amendment of Water Quality Standards pursuant to 3 V.S.A. §831 and following. These statutes provide that "where an agency decides in a final proposal to overrule substantial arguments and considerations raised for or against the original proposal; the final proposal shall include a description of the reasons for the agency's decision." 3 V.S.A. §841 (b). The Water Resources Board's memorandum dated November 5, 1984, to the Legislative Committee on Administrative Rules satisfies this statutory requirement and specifically addressed the groundwater issue which the petition seeks to address. It is not necessary nor would it be appropriate for the Board to now address the same issue in a declaratory ruling proceeding.
- (2) Declaratory rulings must be based on actual controversies between real parties in interest. The petition by the Vermont Natural Resources Council does not meet this test.

Done this 17 day of December, 1984, at St. Johnsbury, Vermont.

Vermont Water Resources Board

By 
Gary W. Moore, Chairman

Board Member Participating:

V. Byrd LaPrade
Catherine B. Rachlin
William D. Countryman
William Boyd Davies

JOHN J. EASTON, JR.
ATTORNEY GENERAL

CHARLES A. BRISTOW
DEPUTY ATTORNEY GENERAL

WILLIAM E. GRIFFIN
CHIEF ASST. ATTORNEY GENERAL



STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
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MEMORANDUM

Office of Attorney General

TO: William Bartlett, Executive Officer,
Water Resources Board

FROM: William Griffin, Chief Assistant Attorney General *WG*

RE: Regulation of Groundwater

DATE: November 28, 1984

This is to confirm our recent conversation respecting the VNRC petition for declaratory ruling on the question whether the Board has statutory authority to regulate groundwater. I informed you that I agreed with your impression that this was not a proper subject for a declaratory ruling since declaratory rulings must be based upon actual controversies between real parties in interest, and that is not the case before us. In fact, what we have is a rulemaking proceeding pursuant to 3 V.S.A. §831 and following. These statutes provide that "where an agency decides in a final proposal to overrule substantial arguments and considerations raised for or against the original proposal, the final proposal shall include a description for the reasons for the agency's decision." 3 V.S.A. §841(b). Chairman Moore's November 5 memorandum to the Legislative Committee on Administrative Rules satisfies this statutory requirement and specifically addresses the groundwater issue. It is not necessary nor would it be appropriate for the Board to now address the same issue in a declaratory ruling proceeding, or to seek an Attorney General's opinion on the subject.

If the Board wants to discuss the matter further, please let me know and I will plan to attend its next meeting.

/kac



STATE OF VERMONT
WATER RESOURCES BOARD
MONTPELIER, VERMONT 05602
(802) 828-2871

MEMORANDUM

TO: William Griffin; Assistant Attorney General
Attorney General's Office

FROM: William A. Bartlett, Executive Officer
Vermont Water Resources Board

DATE: November 14, 1984

SUBJECT: Regulation of Groundwater

*William
Bartlett*

As the enclosed correspondence indicates, the Vermont Natural Resources Council has petitioned the Board for a "Declaratory Ruling" regarding the ability of the Water Resources Board to regulate groundwater in Vermont. The Board is seeking advice in two areas: (1) Is this a bonafide petition for a Declaratory Ruling? and (2) Is the Board's view that it does not have statutory authority to regulate groundwater in Vermont under the provisions of 10 V.S.A., Chapter 37 and Chapter 47, correct?

It is the Board's understanding that a petition for a Declaratory Ruling must be based on a case-specific dispute regarding the interpretation of the law. The Vermont Natural Resources Council's petition does not involve such a dispute and **instead** raises a hypothetical question regarding the Board's authority to regulate groundwater. In the absence of a specific dispute, the Board is at somewhat of a loss as to how to proceed in response to Vermont Natural Resources Council's petition. Its not clear on what basis the Board would give public notice or would determine. who the *parties to this* proceeding might be. Is Vermont Natural Resources Council's request, a bonafide petition for a Declaratory Ruling?

The question of the Board's authority to regulate groundwater came up repeatedly at public hearings regarding the proposed amendments to the Vermont Water Quality Standards. Enclosed for your information is a copy of the **responsiveness** summary (see pages 3 and 4) which the Board filed with its final proposed amendments to the Vermont Water Quality Standards. It is the Board's view that the language in 10 V.S.A., Chapter 37 cited in the petition does not in itself confer regulatory authority to the Board. The Chapter 37 language simply says that one of the Board's duties is to regulate groundwater to the extent that such authority is conferred by some other specific statutory authority. Historically the Board may have had such authority in 10 V.S.A., Chapter 47 or Chapter 51, thus the

William Griffin

November 14, 1984

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reference in Chapter 37. However, such, authority has since been transferred to the Secretary. In the absence of any specific authority to regulate groundwater, the language in Chapter 37 has no effect. I believe that this interpretation is consistent with the view expressed by Ben Scotch in opinion 47-79 (see page 8, discussion of 10 V.S.A. §905(a) (12)).

What the Vermont Natural Resources Council is seeking by means of this petition, is to have the Board issue a definitive statement as to its authority to regulate groundwater. Their ultimate objective may be to seek legislation in this area to clarify what they see as a possible lack of continuity between the protection of surface water quality and the protection of groundwater quality.

The Board is not sure that a petition for a Declaratory Ruling, at least as presented in this case, is an appropriate means of addressing that issue. Nevertheless the Board does feel that it would be appropriate to issue some definitive statement regarding its authority to regulate groundwater in Vermont and would like to base that position on a formal written Attorney General's Opinion.

Once you have an opportunity to review this matter I would like to discuss it with you so that I can get an idea of when you would expect to be able to respond to this request. Once you have completed your research,, I would like to schedule your attendance at a future Board meeting so that you can review your response with the Board members.

WAB/kgr

Enclosure

cc Water Resources Board



Vermont Natural Resources Council

7 Main Street, Montpelier, Vermont 05602

Phone: (802) 223-2328

TO: William **Bartlett**, Executive Director Vermont Water Resources Board,
and the members of the Water Resources Board

FROM: Don **Hooper**, Operations Director *DH*

DATE: September 27, 1984

RE: Request for a declaratory **ruling on the** ability of the Water Resources Board to manage **groundwater** in Vermont

PREREQUISITE REQUIREMENTS

- 1) The Vermont Natural Resources Council (an **organization** with over 3,500 members and a **20 year** history of **service** to Vermont's **environment**) has a demonstrated stake in the outcome of this request for a declaratory ruling.,
- 2) The statute at issue is Title 10, specifically Chapter 37 and Chapter 47.
- 3) The factual situation in question is the current revision of the state's water quality standards by the Water Resources Board.
- 4) **The** names and addresses of other individuals affected by the issuance of a declaratory ruling includes **VNRC's members as** well as all residents of Vermont.

DECLARATORY RULING REQUEST

The Water Resources Board has previously expressed reluctance about its authority to draft groundwater **quality** standards; response by individual board members **at** public hearings on the draft water quality standards, July 12, 1984. The Executive Director of the Water **Resources Board** has recently stated that, "the Board **does** not have the statutory authority to address the issue of groundwater **protection,**" page 2 responsiveness summary to public comments to the proposed amendments to the Vermont Water Quality Standards September 10, 1984.

The Vermont Natural Resources Council believes the Water Resources Board does have the statutory authority to address the management of groundwater resources in the state of Vermont through the use of water quality standards. The Council is requesting this declaratory ruling because of the need to eliminate any statutory ambiguity which may exist over Board authority to create an integrated management program for surface and groundwater quality **in** Vermont. The following **statutory language indicates why VNRC** maintains this position.

Under Chapter 37, Section 905 of Duties; Powers: "the Board shall take such actions as they are authorized by statutes in the management of the water resources of the state. The actions shall be in the form of rules and shall include but not be limited to classification of the waters of the State, establishment of water quality standards..." "Water resources" is defined under Chapter 37, Section 902 as "the waters and the values inherent or potential in waters and their uses, " and "waters" under Section 902 is defined as, "any and all rivers, streams, brooks, creeks, lakes, ponds or stored water, and ground water..." (emphasis added).

Confusion is added into this statutory examination by the two different definitions of "waters" of the state in 10 VSA Section 902(3) and Section 1251(13). Section 902 includes groundwater and Section 1251 does not. The Council believes that since Chapter 37 is the specific chapter which creates and authorizes activities of the Board, the Chapter 37 definition of "waters" which includes groundwater should be the guiding one. A literal reading of the statute indicates that the Board is empowered to manage the water resources of the state. Water resources includes groundwater. The Board is empowered to classify the waters of the state. There is nothing which statutorily prevents the Board from also classifying groundwater as A, B, or C. Additionally, the Board is empowered to establish water quality standards. Water, quality standards in many states currently encompass both ground and surface waters.

The Water Resources Board has expressed the belief that only the Secretary is empowered to "control" groundwater in Vermont. This belief is based on 10 VSA Section 1279, which states, "the Secretary shall control the pollution of the groundwater resources and shall develop a comprehensive long-range program to protect these resources." (emphasis added) The distinction which can be drawn between Section 1279 and 905 is that Section 1279 only deals with the pollution of groundwater whereas Section 905 deals with all of the values inherent or potential in groundwater and its uses. Pollution is only one aspect of water resources management. VNRC believes that the statutory power, given the Water Resources Board under 10 VSA Chapter, 37 is much broader than the narrow pollution control in 10 VSA Section 1279.

Statutory interpretation indicates that the Water Resources Board already has the power to manage groundwater resources in Vermont through its *classification* authority. The Council would like to thank the Board in advance of ruling on this important question of Board authority.
