

State of Vermont
Water Resources Board

Re: **Munson** Appeal
Docket No: **90-10**

Authority:
10 V.S.A. § 905 (9)

Decision

The appellant, Munson Earth-Moving Corporation (MEMC), appealed a decision of the Commissioner of the Department of Environmental Conservation, which denied them a Conditional Use Determination (CUD), by filing with the Water Resources Board on September 20, 1990. Prior to reaching the merits as to whether Munson should receive a CUD, the Board considered the issue, raised by the appellant, as to whether the Wetland Rules even applied to the proposed project.

After consideration of the information obtained from a hearing on this issue, memoranda submitted by the parties, and the Board's own research, the Board finds and concludes that the Vermont Wetland Rules do **not** apply to the project proposed by Munson. Munson has submitted a complete application for all local, state and federal permits as of February 23, 1990, related to either the regulation of land use or the protection of wetlands, and accordingly the proposed project is "**grandfathered**" under section 1.1 of the Wetland Rules. Therefore, the appellant is not required to obtain a Conditional Use Determination.

Findings of **Fact**

1. Munson Earth-Moving Corporation proposes to fill .95 acres of a Class Two wetland with earth material. The wetland and adjacent 50 foot buffer zone are located on the north side of Williston Road (Route 2), east of Airport Drive, northwest of the Avis Rental property, and south of the Burlington International Airport in South Burlington, Vermont.
 2. This project involves the discharge of more than 10 cubic yards of fill into a wetland which is not a watercourse as defined in 10 V.S.A. § 1002.
 3. This proposed project is subject to the Corps of Engineers (COE) nationwide permit # 26, published in the November 13, 1986 Federal Register (33 CFR 330.5 (a) (26)). Formal application to the COE is not required. A nationwide permit is valid only if the standard conditions are met, outlined at 33 CFR 330.5 (b), and management practices are followed, outlined at 33 CFR 330.6. However, as provided for in the management practices, 33 CFR 330.6: (a) (13), the proposed project must also comply with "Regional: Conditions on Nationwide permits in the State of Vermont," which includes compliance with applicable Vermont Water Quality standards.
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4. On January 8, 1990 the South Burlington Zoning Board approved the project with the condition that MEMC secure any necessary approvals and permits from the State.

5. In January 1990 MEMC contacted the Division of Water Quality, Department of Environmental Conservation, to find out whether certain conditions, outlined in a letter from the Assistant Wetlands Coordinator dated September 18, 1987, were sufficient. MEMC was told that a Conditional Use Determination was required, but that MEMC should defer its application for a CUD until the adoption of the Vermont Wetland Rules, since an application format was not available until the Rules were adopted.

6. The Vermont Wetland Rules were adopted on February 7, 1990, and became effective on February 23, 1990. Amendments to Section 1.1 became effective on September 17, 1990.

7. On May 11, 1990 the MEMC filed a complete application with the Department of Environmental Conservation (DEC) for a Conditional Use Determination. On August 21, 1990 the Commissioner of the DEC denied the conditional use because "the proposed conditional use will result in undue adverse impacts on the protected functions and values of the significant wetland."

Conclusions of Law

When the Vermont Wetland Rules first went into effect, the provision for "grandfathering" certain projects did not exist. On September 17, 1990 Section 1.1 of the Wetland Rules was amended to provide in pertinent part:

"Except as provided for below, these rules shall apply to all other land uses occurring within a significant wetland or its associated buffer zone that are commenced after February 23, 1990. These rules shall not apply to any land use for which::

(1) A complete application for all local, state and federal permits related to either the regulation of land use or the protection of wetlands had been submitted as of February 23, 1990, and where the applicant does not subsequently file an application for a permit amendment in a way that would have an undue, adverse impact on a protected function of a significant wetland, and substantial construction of a project commences within two years of the date on which all such local, state and federal permits became final."

With respect to the protection of wetlands at the state level, if the proposed project is "grandfathered" than MEMC was not required to request that the Secretary of the Agency of Natural Resources review the project to determine whether the proposed use will have an undue adverse impact on the protected functions of a significant wetland, otherwise known as a Conditional Use Determination (CUD). If the project is not "grandfathered," the Wetland Rules would apply to the project.

The appellant, Munson Earth-Moving Corporation, asserts that it was not required to apply for a Conditional Use Determination under the Vermont Wetland Rules since the Water Quality Division of the Department of Environmental Conservation (DEC) had no authority to apply the Wetland Rules to the project. The appellant argues **that** the proposed **project meets** the "**grandfather**" conditions set forth in the Section 1.1 amendments to the Rules. MEMC claims that it has obtained approval at the local level from the South **Burlington** Zoning Board to fill **.95** acres, it has done all **that the** state (DEC) requested and/or required, and it has complied with Federal requirements for a "nationwide **permit**" in that such permits are automatically granted for projects where a discharge of fill would cause the loss or adverse modification of less than 1 acre of wetlands.

The DEC argues that MEMC did not submit a complete application for all state and federal permits related to the protection of wetlands, as of February 23, 1990, and therefore the Wetland Rules do **apply** to **MEMC's** proposed filling of a wetland. Specifically, the DEC **asserts that** the proposed activity requires a finding by the Agency of Natural Resources that it meets the regional conditions including compliance with the state water quality standards and a finding by the Corps of Engineers **that the** activity meets the "standard conditions for a federal nationwide permit. The DEC does not dispute that MEMC has obtained all local permits.

The Board agrees that the appellant has obtained all local permits with respect to the proposed project and therefore **MEMC** meets the lower standard of having a "complete application for **all local** permits" within the meaning of Section 1.1 (1) of the Wetland Rules.

With respect to Federal permits relating to the protection of wetlands, **MEMC's** proposed project which would cause the loss or adverse modification of less than one (1) acre of wetlands and is therefore **subject to** the Corps of Engineers nationwide permit # 26. 33 **CFR** 330.5 (a) (26). The COE has determined that the activities within the **ambit** of the nationwide permit will not significantly affect the quality of the human environment and therefore these activities can occur without formal application to the Corps. See 1 "**Public** Notice for Regional Conditions" (Mar. 1, 1985). Since there is no formal application that needs to be submitted to the COE for nationwide permit # 26; the permit is automatically granted; but, the permit is valid only if certain conditions are followed, discussed below. Accordingly, MEMC did not have to apply for a Nationwide permit # 26, and therefore MEMC automatically had a "**complete** application for a federal permit related to the **protection** of wetlands as of February 23, **1990**" within **the meaning** of the "**grandfather**" provision of the **Wetland** Rules.

The proposed project still must comply with "standard: conditions" outlined at 33 CFR 330.5 (b). There is no **requirement** that MEMC apply for a list of "standard conditions" from the COE, however, if MEMC violates any of these standard conditions, then the nationwide permit # 26 is no longer valid.

Additionally the project must comply with management practices outlined at 33 CFR 330.6. These management practices require compliance with regional conditions. 33 CFR 330.6 (a) (13). Moreover, Section 401 of the Clean Water Act provides that any permit involving the discharge of fill or dredged material will not be issued until the state, into whose waters the discharge will take place, has certified that the proposed discharge will comply with the applicable state water quality standards. See 1 "Public Notice of Regional Conditions" (Mar. 1, 1985). The State of Vermont issued water quality certification for all nationwide permits, including nationwide permit # 26, provided that the regional conditions are followed. Id. By notice dated March 1, 1985 the New England Division of the Corps of Engineers published public notice of "Regional Conditions on Nationwide Permits in the State of Vermont." These regional conditions are in effect through; 1992.

Under the regional conditions, applicant's whose projects involve the discharge of more than 10 cubic yards of fill into a wetland which is not a watercourse, as defined in 10 V.S.A. § 1002, cannot initiate an authorized activity until they receive from the DEC a "statement of conditions," if any, which are required for the project to meet the Vermont Water Quality Standards. Regional Conditions, E.1. However, if conditions are not forthcoming within 30 days of receipt of the request, work may proceed unless the applicant is notified otherwise. Regional Conditions, F.2. Thus, MEMC cannot initiate or begin the proposed filling of the wetland until they receive from the DEC a "statement of conditions," if any, which are required for the project to meet the water quality; standards.

MEMC argues that it has already made all necessary requests' and therefore work may proceed unless and until it is notified! otherwise. The DEC maintains that MEMC has never submitted an application requesting authorization in writing from the state that the activity complies with the regional conditions or the water quality standards, other than MEMC's application for a Conditional Use Determination under the Wetland Rules.

In January 1990, MEMC contacted the Division of Water Quality, DEC, to find out whether certain conditions, which had been described in a letter from the Assistant Wetlands Coordinator dated September 18, 1987, were sufficient. MEMC was told that a Conditional Use Determination was required, and subsequently applied for a CUD. Thus, MEMC had made an oral request for condition, but did not memorialize the request by putting it in writing. Given the possible number of requests that the State of Vermont might receive and the possible number of people involved in responding to such a request, it is reasonable that MEMC mustj make its request to the Agency in writing. Once the Agency receives the request it will have 30 days within which to respond or work may proceed, unless MEMC is notified otherwise. Regional Conditions, E.2.

Order

Munson Earth-Moving Corporation has submitted a complete application for all local, state and federal permits related to either the regulation of land use or the protection of wetlands as of February 23, 1990, and accordingly the Vermont Wetland Rules shall not apply to **MEMC's** proposed project to fill .95 acres of a Class Two Wetland with earth material.

Dated this 12 day of June, 1991.

Water Resources Board



David M. Wilson, Chair
Elaine B. Little
Mark **DesMeules**