

**STATE OF VERMONT  
WATER RESOURCES BOARD**

**RE: Home Depot, USA, Inc., et al.  
Docket No. CUD-00-07**

**MEMORANDUM OF DECISION:  
MOTION TO ALTER**

**I. BACKGROUND**

On February 6, 2001, the Water Resources Board (“Board”) issued its Findings of Fact, Conclusions of Law, and Order (“Decision”) in the above-captioned matter. The Board affirmed the decision of the Secretary of ANR, with modifications, and issued amended Conditional Use Determination (“CUD”) #1999-284, authorizing Home Depot, USA, Inc. (“Home Depot”) and Homer and Ruth Sweet (collectively, “CUD Applicants”) to fill 16,480 square feet of Class Two Wetland and 53,938 square feet of wetland buffer as part of reconstruction and expansion of the Juster Mall, Route 4, Rutland, Vermont (“Project”).

On February 21, 2001, in accordance with Board Procedural Rule 34(D), the Agency of Natural Resources (“ANR”) filed a timely Motion to Alter (“Motion”), seeking amendment of Finding 24 at page 9 and deletion of the Board’s conclusion regarding cumulative impacts in paragraphs 2 and 3 of the Conclusions of Law, at pages 15 and 16, of the Decision.

In response, on February 23, 2001, the Chair issued an order setting forth a deadline for reply memoranda and any requests for oral argument.

On February 28, 2001, the CUD Applicants filed a Memorandum in Support of ANR’s Motion. Friends of Vermont’s Way of Life, Inc. (“Friends”), the only other party to this proceeding, filed no reply memorandum by the March 5, 2001, deadline. No party requested oral argument before the Board.

On March 13, 2001, the Board deliberated with respect to ANR’s Motion. The Board’s rulings are memorialized in this Memorandum of Decision and any pages of the Decision that have been altered as a result of the Board’s rulings are attached for the parties’ reference.

**II. DISCUSSION**

**A. Finding 24**

ANR and the CUD Applicants ask the Board to delete the second sentence of Finding 24 on the basis that the record does not contain facts that an “ideal” buffer zone for the Project would be 50 feet between the edge of the proposed extended parking area and the relocated drainage ditch.

The CUD Applicants' exhibits in Docket No. CUD-00-07 describe the buffer actually proposed by the CUD Applicants. There is no evidence in the record of this proceeding that an "ideal" riparian buffer zone between the top of the bank at the extended parking area and the relocated ditch would be at least 50 feet, measured on the horizontal. A review of the tape recording from the hearing on November 21, 2000, reveals that in the context of the stormwater discharge permit appeal, Docket No. WQ-00-06, Friends and ANR cross-examined the CUD Applicants' lead witness regarding the applicability of the ANR's riparian buffer zone policy (which recommends a buffer zone of between 25 and 125 feet, measured from the top of the stream bank). Accordingly, the Board determines that there is no factual support for the second sentence in Finding 24, and therefore it grants ANR's request to delete that sentence. The Board modifies Finding 24 as follows:

24. In designing the buffer zone for the relocated drainage ditch, the CUD Applicants' wetlands consultant and engineering firm did not take into consideration the design guidelines contained in the ANR's riparian buffer policy. ~~Ideally, a buffer zone of at least 50 feet (measured on the horizontal) between the top of the bank at the edge of the extended parking area and the relocated ditch would assure that waste such as untreated stormwater would not enter directly into the surface waters of the relocated drainage ditch and from there to the surface waters in the wetland complex.~~ However, the proposed 25 to 60 foot buffer, if planted with trees and shrubs as described in Finding 19 and additional plantings to encourage the growth of persistent vegetation, will provide adequate surface water protection benefits, if when coupled with other measures as required in the stormwater discharge permit, Amended DEC Permit #1-0460 in WQ-00-06, issued this day.

B. Conclusion of Law - Cumulative Impacts

ANR asks the Board to amend its Conclusions of Law to eliminate the Board's "holding" that cumulative impacts analysis under Section 8.5 of the Vermont Wetland Rules may "take into account development and other land uses which have affected the hydrology and other attributes of the wetland(s) at issue... whether or not such changes predate the adoption of the Vermont Wetland Rules in 1990 or are subject to those rules." ANR also asks the Board to delete the discussion of cumulative impacts analysis which follow in the second and third paragraphs of the Conclusions of Law section of the Decision.

ANR argues that such a "holding" is not necessary to the Decision because the Board determined that with respect to function 5.10, the only function adversely affected by the Project, the impact was so localized and mitigated that findings regarding cumulative impacts were not required. Second, ANR argues that consideration of "pre-1990 impacts to wetlands for every CUD application" would present "a host of regulatory, implementability, and scientific issues" that should best be addressed through a rulemaking proceeding.

The Board denies the ANR's request to eliminate discussion of cumulative impacts analysis in the context of the Decision. As the CUD Applicants have properly noted, the text at issue is *dicta*, not a holding in this case. Furthermore, ANR has inaccurately characterized the Board's statements as requiring analysis of the impacts of pre-1990 development and land uses in its consideration of "all CUD applications." The Board specifically stated that consideration of the cumulative impacts of such development and land use was required "only to the extent that these changes and their impacts are shown to have a direct and demonstrable relationship to the Project impacts on functions under CUD review." While the Board agrees that further discussion concerning implementation of cumulative impacts analysis is appropriate subject matter for possible revisions to the Vermont Wetland Rules, and specifically revisions to Section 8.5, the Board declines to withdraw its *dicta* concerning such analysis in this decision for the reason that both the ANR and parties to this and future proceedings are entitled to notice of the Board's interpretation of its own rules concerning cumulative impacts analysis.

### III. ORDER

1. The Board grants ANR's request to amend Finding 24 of the Decision.
2. The Board denies ANR's request to alter its discussion of cumulative impacts analysis at pages 15 and 16 of the Decision.

Dated at Montpelier, Vermont, this 16th day of March, 2001.

WATER RESOURCES BOARD

/s/ David J. Blythe  
David J. Blythe, Chair

Concurring:  
Barbara S. Farr  
John D.E. Roberts  
Gail Osherenko

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