

**STATE OF VERMONT
WATER RESOURCES BOARD**

**RE: Home Depot, USA, Inc., et al.
Docket No. WQ-00-06**

**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 DEC Permit #1-0460 (“Amended Permit”), authorizing Home Depot, USA., Inc. (“Home Depot”), Ann Juster, and Homer and Ruth Sweet (collectively, “Permit Applicants”) to discharge treated stormwater runoff from the roadways, parking, and roofs associated with the proposed reconstructed and expanded Juster Mall, Route 4, Rutland, Vermont, into an unnamed tributary of Tenney Brook (“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 certain Findings of Fact, a portion of the Conclusions of Law, and two permit conditions.

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. On March 5, 2001, ANR filed a letter indicating an error in the numbering of one of the findings in the WQ-00-06 decision for which it had sought an amendment. 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

ANR asks the Board to amend Findings 8 and 24.E.b., at pages 6 and 16 of the Decision, and to delete Finding 38, at page 19 of the Decision. It also asks the Board to amend a portion of the Conclusions of Law, at page 22 of the Decision, to support the inclusion of a Pollution Prevention Plan, containing certain specified requirements, in the conditions of the Amended Permit issued by the Board. It further asks the Board to amend Condition 8 and add a new section d. to Condition 14 of the Amended Permit, consistent with its requested changes to the

Decision. The CUD Applicants' support ANR's requested alterations.

A. Finding 8

ANR and the CUD Applicants ask the Board to substitute certain words in Finding 8 to better reflect the evidentiary record, excluding evidence related to discharges, if any, from the proposed garden center, consistent with the Board's ruling on the scope of appeal. See Memorandum of Decision on Preliminary Issues and Order at 10-13 (Sept. 8, 2000). The Board agrees with their suggested changes and therefore it grants ANR's request. Accordingly, Finding 8 is amended to read:

8. The Permit Applicants propose using the infrastructure authorized by the Permit to discharge stormwater and ~~wastewater~~ runoff from a proposed garden center to be operated by Home Depot. The Board previously ruled that ~~discharges~~ non-stormwater discharges, if any, from the garden center cannot, as a matter of law, be included within the ambit of the Permit under appeal.

B. Finding 24.E.b.

ANR and the CUD Applicants ask the Board to add language to Finding 24.E.b. to clarify that the ditch wetland is not needed to assist in the control of treated stormwater, at its present location. By implication, the relocated ditch will also not be a part of the stormwater treatment infrastructure. The Board agrees, in light of the record in this proceeding, that the proposed additional language is consistent with the Board's other findings concerning the point of discharge into state waters and the Project's compliance with the 1997 Procedures. Accordingly, Finding 24.E.b. is amended to read:

[24.E.]b. Wetlands, lakes, and ponds may be used in their natural state to assist in the control of treated stormwater, in accordance with the Vermont Wetland Rules.

Ultimate discharge of treated stormwater and receiving waters from the site is into a manmade ditch, which has become a Class Two wetland over time, and which will be relocated as part of the Project in conformity with the Vermont Wetlands Rules. Authorization for the relocation of this ditch has been obtained from the ANR, but is on appeal in a companion CUD case. See Finding 12. As the treated stormwater at the point of discharge (the junction box) meets the 1997 Procedures in all respects, including the 2-year, 24-hour storm event design standard and Best Management Practices, the ditch wetland in its natural state is not needed to assist in the control of

treated stormwater. The ditch wetland has therefore not been incorporated into the overall stormwater system. Moreover, the relocated ditch has not been incorporated into the overall stormwater system design.

C. Finding 38

ANR and the CUD Applicants ask the Board to delete all of Finding 38. They argue that since the drainage ditch wetland and relocated drainage ditch are not a part of the treatment system for stormwater from the Project, there is no factual basis to support incorporation of the vegetative buffer requirements of the Findings of Fact, Conclusions of Law, and Order in Docket No.CUD-00-07 into the stormwater discharge permit Decision.

The Board does not entirely agree with the analysis offered by ANR and the CUD Applicants. The Board has found, based on the evidence, that some stormwater currently travels by sheet flow from the parking area directly into the drainage ditch. See Finding 6. Although the Board agrees with the ANR and Permit Applicants that the proposed treatment system is a substantial improvement over the present system in that sheet flow will now be directed to the detention basin for treatment, the Board is still concerned about untreated stormwater runoff entering state waters from stockpiled snow or other sources along the northern edge of the proposed extended parking area. See Finding 36. Even though the Board has imposed a Condition requiring the filing, approval, and implementation of a snow management plan that is designed to prohibit the stockpiling of snow in close proximity to state waters, the Board concludes that it has additional authority under 10 V.S.A. § 1263(c) to require vegetated buffers to protect adjacent surface and groundwater. The CUD Applicants' expert witness admitted on cross-examination that the ANR's riparian buffer zone policies or guidance documents had not been consulted in the design of the new drainage ditch for the relocated stream channel. While the record in Docket No.WQ-00-06 may not contain sufficient evidence to support the imposition of a riparian buffer zone protection and management plan as a *condition* of the Amended Permit, the Board is not persuaded that it cannot reference in its *findings of fact* a condition imposed by it in a Conditional Use Determination issued in connection with the same mall redevelopment project to achieve the same water quality protection objectives.

Accordingly, the Board grants ANR's request in part, and denies it in part, by amending Finding 38 as follows:

38. The Permit Applicants did not consult, nor did the ANR require that they use, the ANR policies or guidance documents regarding the protection of riparian buffer zones when designing the new drainage ditch for the relocated stream channel. Although the Board concludes that it cannot require a riparian buffer protection and management plan for the stream within the ambit of the Permit on appeal, ~~the use of an adjacent Class Two wetland~~

~~to assist in the control of treated stormwater must nevertheless be in accordance with the Vermont Wetland Rules. See Chapter 2, Section E.2. Therefore, due to the lack of evidence in the record, the Board nonetheless concludes that the vegetative buffer provided for as mitigation in Condition D. of CUD-00-07, issued this day, is a reasonable measure for achieving the relevant benefits of a riparian buffer zone for the relocated stream -- namely, erosion control and surface and groundwater protection as well as the intended purposes of fisheries habitat enhancement and erosion control.~~

D. Conclusion of Law

ANR asks the Board to alter its Conclusions of Law at page 22 of the Decision to require the Permit Applicants to file and the Secretary to approve a pollution prevention plan, as a condition of the Amended Permit. ANR reasons that the Board has authority to issue such a pollution prevention plan, on its own initiative, as a condition of the Amended Permit in order to “prevent inadvertent discharges from occurring within the [authorized] stormwater system.” The ANR also argues that by incorporating the requirement of a pollution prevention plan as a condition of the Amended Permit, the Board may “substantially narrow or eliminate the need for additional permitting processes and the potential for additional appeals.”

The Board denies ANR’s request. Despite the fact that both the ANR and the Permit Applicants concur in the requested changes, and Friends has raised no objections, the Board believes that to grant such a request would require the Board to exceed its discretion and act outside its proper authority.

As the Board noted in its Memorandum of Decision on Preliminary Issues and again in its Decision, the scope of this proceeding was limited from the start by the ANR’s notice of application and the text of the Permit it issued. The Permit issued by the Secretary, and therefore the scope of appeal before the Board, only encompassed the stormwater runoff generated by the mall’s roadways, parking, and roofs and the treatment system proposed by the Permit Applicants to achieve compliance with the applicable law. Therefore, the Board did not take evidence or hear argument concerning any actual or potential discharges, including any non-stormwater discharges, from the garden center nor did it take evidence on what measures would be appropriate to include in any pollution prevention plan.

Consistent with this approach, the Board left it to the Secretary to determine in any subsequent proceeding: (1) whether he or she had jurisdiction over any discharges from the garden center; and (2), if so, whether a pollution prevention plan should be required as a condition of any discharge permit. This was an appropriately deferential response.

The Board recognizes that this approach may leave the Permit Applicants potentially

exposed to further litigation. This outcome, however, is a consequence of the ANR's management of water quality by utilizing independent regulatory programs. ANR's use of separate administrative units for the permitting of direct discharges, indirect discharges, and stormwater discharges, oft times results in piecemeal review of projects. Such an approach, however, is not required by statute. For this reason, the Board strongly urges the Secretary to utilize comprehensive discharge permits when presented with applications for complex projects potentially generating several types of discharges to state waters.

Consistent, however, with the amendment it has granted with respect to Finding 8, the Board amends the second paragraph on page 22 of the Decision as follows:

The Board further notes that the scope of the stormwater discharge authorized by the Amended Permit does not include any other discharges, including non-stormwater discharges, if any, from the garden center proposed to be operated by Home Depot. The Board addressed the scope of appeal in its Preliminary Decision and Order of September 8, 2000, and expressly excluded consideration of the waste stream from the garden center in its review, leaving it to the Permit Applicants and/or the Secretary of ANR to determine whether a new discharge permit is required for such operation. The Board recognizes that garden centers, even those limited to selling containerized plants, may present unique pollution control problems due to the presence of herbicides, pesticides, and other chemical residues attributable to plant care and maintenance. Therefore, the Board, while not authorizing the use of the proposed stormwater system for treating and disposing of discharges from the garden center, believes that the Secretary has authority to specifically evaluate such ~~a proposed~~ discharges, if any, and impose conditions to assure the protection of surface and ground water quality. Such conditions may include the requirement that the applicant prepare, file and implement a pollution prevention plan.

E. Conditions 8 and 14

Consistent with the discussion in Section D. above, the Board denies ANR's request to amend Condition 8 and add a new section d. to Condition 14 of the Amended Permit.

III. ORDER

1. The Board grants ANR's request to amend Finding 8 of the Decision.
2. The Board grants ANR's request to amend Finding 24.E.b. of the Decision.
3. The Board grants in part and denies in part ANR's request to delete Finding 38 of the Decision.
4. The Board denies ANR's request to amend the Conclusions of Law to provide for the imposition of a pollution prevention plan condition.
5. The Board denies ANR's request to amend Condition 8 and add a new Condition 14.d. to the Amended Permit.

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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