State of Vermont
WATER RESOURCES BOARD

Re: Hannaford Bros. Co. and Lowes Home Centers, Inc.
Docket No. WQ-01-01

MEMORANDUM OF DECISION

On June 29, 2001, the Water Resources Board (Board) issued a Memorandum of Decision on the preliminary issues in the above-captioned appeal. In response to this decision, the Vermont Agency of Natural Resources (ANR) filed a motion to alter, and the applicants Hannaford Brothers Company and Lowes Home Centers, Inc. (Hannaford and Lowes) filed a motion to dismiss. As explained below, both motions are denied.

I. Procedural History

A. Motion to Dismiss and Motion to Alter

On July 16, 2001, pursuant to Board Rule of Procedure 34(D), ANR timely filed a motion to alter the Board's June 29, 2001, Memorandum of Decision and a memorandum of law in support thereof. The appellants, Conservation Law Foundation and the Voice for Potash Brook (CLF and the Voice) filed a timely response to ANR's motion to alter on July 27, 2001. Hannaford and Lowes did not file a written response to the motion to alter.

On July 17, 2001, Hannaford and Lowes filed objections to the Board's June 29, 2001, Memorandum of Decision. Pursuant to Board Rule of Procedure 24, the Board accepted the objections filed by Hannaford and Lowes as a motion to dismiss. CLF and the Voice filed a timely response to the motion to dismiss. ANR did not file a written response to the motion to dismiss.

A notice of oral argument on the pending motions was issued on August 7, 2001. The Board convened oral argument at its Conference Room in Montpelier, Vermont, at 1:30 p.m. on August 21, 2001. Parties participating in oral argument on the motion to dismiss were Hannaford and Lowes, and CLF and the Voice. Parties participating in oral argument on the motion to alter were ANR, Hannaford and Lowes, and CLF and the Voice.

The Board deliberated immediately following oral argument and on August 28, 2001, and directed its Chair to issue this Memorandum of Decision.

B. Petitions for leave to participate as Amicus Curiae

In response to the June 29, 2001, Memorandum of Decision, the Board received three petitions for leave to participate in this case as amicus curiae. Pursuant to Board Rule of

Procedure 26, an amicus curiae is aligned for procedural purposes with the party whose position it most closely supports and is limited in its participation to the filing of memoranda and the presentation of oral argument on legal issues. On August 1, 2001, the Board issued an order granting leave to Cynosure, Inc. (Cynosure) to participate as amicus curiae and aligning Cynosure with Hannaford and Lowes. In an order issued on August 7, 2001, the Board's Chair granted leave to the Agency of Commerce and Community Development (ACCD) to participate as amicus curiae, aligning ACCD with ANR. In an order issued on August 10, 2001, the Board's Chair also granted leave to the Vermont Natural Resources Council (VNRC) to participate as amicus curiae, aligning VNRC with CLF and the Voice.

The orders allowing the amici curiae to participate treated their petitions as legal memoranda with respect to the motions pending before the Board. Based on Cynosure's petition, the Board granted Cynosure leave to participate in oral argument with respect to both motions. Based on their respective petitions, the Board's Chair granted ACCD and VNRC leave to participate with respect to the motion to alter only, directed that any objections to these orders be filed no later than August 15, 2001, and provided for Board review of any timely filed objection(s) as a preliminary matter on August 21, 2001.

On August 15, 2001, CLF and the Voice filed timely objections to the Chair's Order granting ACCD leave to participate in this appeal as amicus curiae. CLF and the Voice sought Board review of the Chair's ruling and specifically requested that the Board deny ACCD amicus-curiae status, or, in the alternative, cancel the oral argument scheduled for August 21, 2001, and provide CLF with an opportunity to respond to the filings of all petitioners granted leave to participate as amici curiae.

On August 21, 2001, prior to hearing oral arguments on the pending motions, the Board deliberated with respect to CLF's objections and request for relief. On a vote of four to one, with Member Potvin dissenting, the Board voted to affirm the Chair's August 7, 2001, order and deny CLF's requested relief. The Chair announced the Board's decision on the record preceding oral argument on the motions.

Accordingly, ACCD and Cynosure presented oral argument in support of the motion to alter, and VNRC presented oral argument in opposition to that motion. Cynosure presented oral argument in support of the motion to dismiss.

II. Motion to Dismiss

If granted, the motion to dismiss filed by Hannaford and Lowes would avoid the need to address ANR's motion to alter. The motion to dismiss will therefore be addressed first.

In their motion to dismiss, Hannaford and Lowes object to the scope of these proceedings.

The motion asserts that on the preliminary issues, CLF argued that the 2000 Vermont Water Quality Standards should apply to these proceedings and that CLF also requested a blanket prohibition on renewed or amended permits for discharges into impaired waters. Hannaford and Lowes now argue that since the Board's Memorandum of Decision ruled against CLF on both matters, CLF's claims have been resolved, and the appeal should be dismissed. Hannaford and Lowes also argue that the Board's analysis rests on newly adopted policies and that it is unfair for CLF to use the permit in this case to air its complaints with ANR.

The question for assessing the merits of this motion to dismiss is whether the issues CLF presented in its notice of appeal remain viable after the Board's June 29, 2001, Memorandum of Decision on the preliminary issues in this case. CLF's notice of appeal includes both the 1997 and the 2000 Vermont Water Quality Standards in its list of statutes and rules at issue. (Notice of Appeal at 2). In its notice of appeal, CLF asserts, among other things, that "The authorized discharge contributes both hydrological modification and additional pollutant loads to the receiving waters." (Notice of Appeal at 3.) One of the issues raised by the notice of appeal is the following: "If the permit can be lawfully issued, what limitations must be included in the permit to adequately control the discharge?" (Notice of Appeal at 4.) The relief sought by the notice of appeal is denial of the permit with direction to ANR to appropriately consider the discharge or issuance of the permit with the requirement that "pollutant loadings and runoff conditions of the discharges from the proposed development be maintained at a level consistent with the site's natural, undeveloped condition." (Notice of Appeal at 4.)

In its June 29, 2001, Memorandum of Decision, the Board identified the issues for the hearing on the merits in this case as follows:

> In the absence of a wasteload allocation, discharges into impaired waters may be permitted under Vermont law only if the proposed discharge will not increase the chemical, physical, or biological load of pollutants for which the receiving waters are impaired.
>
> The Board will hear from the parties on whether the baseline for measuring any increase in pollutant loads in this case should be the existing discharge at the site, the discharge authorized by the permit Hannaford received in 1995, predevelopment conditions at the site, or some other condition. Details on the mass and concentration of the constituents of the proposed discharge and the impacts of the proposed discharge on the receiving waters in this case are unresolved questions of fact.

(MOD at 19-20.) (See also MOD at 22.)

The Board concludes that the issues remaining for the hearing in this matter are well within the issues raised by the notice of appeal. The scope of these proceedings is defined by applicable statutes and rules governing water-pollution control. Accordingly, the motion to dismiss filed by Hannaford and Lowes is denied.

III. Motion to Alter

A. Standard of Review

Board Rule of Procedure 34(D) provides that a party may file a motion to alter a decision of the Board. Rule 34(D) is not by its terms limited to final decisions. It was therefore procedurally appropriate for ANR to file a motion to alter the June 29, 2001, Memorandum of Decision on preliminary issues under Rule 34(D).

Board Rule of Procedure 34(D)(1) defines the scope of motions to alter as follows:

> All motions to alter shall be premised upon a proposed reconsideration of the existing record. New arguments are not allowed, with the exception of arguments in response to permit conditions or typographical, technical, and other manifest errors, provided that the party seeking the alteration reasonably could not have known of the conditions or errors prior to decision. New evidence shall not be submitted unless the Board acting on a motion to alter, determines that it will accept new evidence in order to avoid manifest injustice.

A motion to alter may ask the Board to reconsider arguments previously made. In a motion to alter a decision on preliminary issues of law, the moving party may argue that the Board overlooked or misapprehended laws or facts previously presented that would probably affect the result.

New arguments in a motion to alter may be made only with regard to manifest error. The use of the term manifest error in Rule 34(D), like its use in Rule 34(C), refers to "obvious, patent errors in a decision, such as the misidentification of a party, the wrong citation to a case, or other defect that may readily be determined to be in error." Re: Robert A. Gillin (Encroachment Permit), No. MLP-94-01, Memorandum of Decision and Order at 2 (Vt. Water Res. Bd. Oct. 4, 1994). See also Re: Lamoille River Hydroelectric Project § 401 Certification, Nos. WQ-94-03 and WQ-94-05 (consolidated), Memorandum of Decision at 2 (Vt. Water Res. Bd. Oct. 18, 1995) (describing manifest error as "obvious on its face").

B. ANR's Requests for Alteration

In its motion to alter, ANR presents new arguments along with arguments that the Board has previously considered and rejected. Upon reconsideration, the Board finds that the arguments ANR has previously made are unpersuasive. ANR's new arguments fail to address the manifest-error standard of Rule 34(D). Accordingly, as set forth below, ANR's motion to alter is denied in its entirety. The Board addresses ANR's arguments in the order presented.

1. ANR first argues that stormwater must be treated differently from discharges of sanitary or industrial waste and that the Board failed to recognize that difference.

The Board agrees that Vermont law recognizes the unique characteristics of stormwater runoff and that it encourages ANR to develop and institute means of treating and controlling stormwater discharges that are different from the means employed to treat and control discharges of sanitary and industrial wastes. When justified by a necessary pollutant load allocation, ANR's stormwater treatment and control practices may be an appropriate means of managing stormwater discharges. ANR may not, however, substitute its stormwater treatment and control practices for the legal requirement that the surface waters of this state comply with the classification established for them and the Vermont Water Quality Standards.

2. ANR argues that 10 V.S.A. § 1264 (1998) modifies the permitting requirements of 10 V.S.A. § 1263 (1998).

The legislature's directions in section 1264 requiring ANR to consider the unique characteristics of stormwater do not exempt stormwater from the other statutory requirements of 10 V.S.A., chapter 47, including those of section 1263(c). To the contrary, section 1264(a) expressly requires that stormwater runoff shall be subject to the provisions of chapter 47, including section 1263(c). Section 1263(c) authorizes ANR to issue a permit only after determining "that the proposed discharge will not reduce the quality of the receiving waters below the classification established for them and will not violate any applicable provisions of state or federal laws or regulations."

3. ANR argues that discharges of stormwater do not need to achieve compliance with the 1997 Vermont Water Quality Standards. In support of this position, ANR points to language in section 2-05 of the 1997 Vermont Water Quality Standards which calls upon ANR to manage stormwater in a manner that is "consistent with these rules."

ANR's argument that stormwater discharges do not need to comply with the Vermont Water Quality Standards is a new argument that does not meet the manifest-error standard. See Rule 34(D). In addition, even if there were manifest error, the Board finds this argument to be without merit. As noted above, under Vermont law, the management of all discharges, including

stormwater, must be designed to achieve compliance with the Vermont Water Quality Standards. See § 1263(c).

4. ANR argues that 10 V.S.A. § 1264 and section 2-05 of the 1997 Vermont Water Quality Standards obviate the Board's decision in Re: Pyramid Company, No. WQ-77-01, Findings of Fact, Conclusions of Law, Discussion, and Order (June 2, 1978).

In Pyramid, the Board decided that a new stormwater discharge into impaired waters cannot be permitted in the absence of a wasteload allocation providing for the increased discharge. As explained in the Board's June 29, 2001, Memorandum of Decision, that principle remains consistent with the current statutory and regulatory scheme for water-quality management in Vermont.

5. ANR argues that waters listed as "impaired" do not require a wasteload allocation unless those waters are also listed as "water quality limited" and that the Board has overlooked that distinction.

ANR's new arguments based on an alleged difference between waters labeled as "impaired" and those labeled as "water quality limited" and the distinction between the terms "pollutant" and "pollution" spring from the agency's reading of federal regulations that are not in effect. See 65 Fed. Reg. 43,586 (July 13, 2000) (to be codified at 40 C.F.R. pts. 9, 122, 123, 124, and 130). Because EPA's new TMDL rule is not in effect, the new TMDL rule cannot be applied to this appeal. In addition, the Board declines to consider ANR's construction of EPA's new TMDL rule because it is a new argument that does not meet the standard of manifest error. See Board Rule of Procedure 34(D).

In any event, the parties, including ANR, stipulated as follows at the prehearing conference in this matter: "Potash Brook and the Shelburne Bay section of Lake Champlain have been listed as Water Quality Limited Segments on the EPA approved 1998 State List of Targeted and Impaired Waters (§ 303(d) list)."[1] ANR's most recent section 303(d) list, like its 1998 section 303(d) list, places Potash Brook and Shelburne Bay immediately next to each other on the list of impaired waters. (1998 section 303(d) list at 11; 2000 section 303(d) list at 11.)[2] By

[1]ANR filed written objections to the Prehearing Conference Report and Order on February 27, 2001, and did not include this stipulation in its objections.

[2]On August 21, 2001, prior to hearing oral arguments on ANR's motion to alter, the Board's Chair asked on the record if the parties had any objection to the Board taking official notice of ANR's 1998 and 2000 section 303(d) lists. Hearing no objection from the parties, the Board took official notice of both lists pursuant section 810(4) of the Vermont Administrative Procedure Act, 3 V.S.A. § 810(4) (1995).

placing Shelburne Bay and Potash Brook on its 1998 and 2000 section 303(d) lists, ANR has formally acknowledged that it does not expect technological controls to bring those waters into compliance with the Vermont Water Quality Standards in the absence of TMDLs and wasteload allocations. For both of these receiving waters, ANR's section 303(d) lists identify under a column labeled "pollutant(s)" the reasons for their impairment. ANR has not demonstrated a legally significant distinction between the terms "impaired" and "water quality limited."

6. ANR argues that the decision to prepare wasteload allocations is a matter within its discretion and that its decision not to have final wasteload allocations in place for the receiving waters in this case should therefore have no bearing on the permit under appeal.

The Board recognizes ANR's discretion in the areas of whether and how to conduct wasteload allocations. See Wasteload Allocation Process at 6, ¶ 2 (1987); Vermont Water Pollution Control Permit Regulations § 13.4.b.(2) (1974). In this case, ANR has already exercised its discretion by listing the receiving waters on its 1998 and 2000 section 303(d) lists. (1998 section 303(d) list at 11; 2000 section 303(d) list at 11.) ANR's section 303(d) lists acknowledge the need for TMDLs and wasteload allocations for the receiving waters at issue. See Clean Water Act § 303(d), 33 U.S.C.A. § 1313(d). The scope of ANR's discretion with respect to the need to perform wasteload allocations or how that should be done is therefore not germane to these proceedings.

7. ANR describes its 1997 Stormwater Procedures as best management practices (BMPs) which ANR intends to use, along with improved technical guidance for stormwater, to meet the criteria of the Vermont Water Quality Standards. ANR asks the Board to alter its June 29, 2001, Memorandum of Decision to reflect that its 1997 Stormwater Procedures address more than water quantity.

ANR's 1997 Stormwater Procedures consider neither the classification nor the existing or designated uses of the receiving waters--considerations that lie at the core of Vermont's system for water-pollution control. ANR does not have legal authority to substitute the application of performance standards such as its 1997 Stormwater Procedures, along with an abstract expectation of eventually achieving compliance with the Vermont Water Quality Standards, for a cleanup plan in the form of a water pollution budget and a schedule of compliance. Indeed, the 1997 Stormwater Procedures themselves provide that "the Agency's determination of continued compliance with the Vermont Water Quality Standards will be based on the Permittee's compliance with the terms and conditions of the stormwater discharge permit, and evaluation of the receiving water." 1997 Stormwater Procedures § I (emphasis added).

8. Citing federal regulations and guidance, ANR argues that its 1997 Stormwater Procedures constitute water-quality based effluent limitations (WQBELs) and that the use of BMPs

for stormwater discharges is appropriate because stormwater discharges cannot feasibly be monitored on an individual basis.

As set forth above, the role of BMPs in implementing TMDLs or in permitting discharges into waters for which TMDLs are not required is not at issue in this case. The EPA guidance documents upon which ANR relies are therefore immaterial to this decision. For the same reasons, the Board does not have occasion in this decision to construe federal regulations providing that WQBELs for stormwater discharges may be based on BMPs. See 40 C.F.R. § 122.44(k).

9. ANR argues that the Board ignored its own precedent in Re: Home Depot U.S.A., No. WQ-00-06, Findings of Fact, Conclusions of Law, and Order (Feb. 6, 2001).

The stormwater discharge at issue in Home Depot was not into impaired waters. Based on the stipulation in this appeal that the discharge at issue is into impaired waters, Home Depot is factually distinguishable from this case.

10. Finally, ANR asks the Board to clarify its use of the terms "impact" and "load."

ANR has not convinced the Board to alter its June 29, 2001, Memorandum of Decision with respect to its use of these terms. The Board concludes that the construction of these terms may require evidence and further legal argument. The parties will have an opportunity to further address the meaning and application of these terms at the evidentiary hearing on the merits.

IV. Order

Accordingly, it is hereby **Ordered**:

1. The motion to dismiss filed by Hannaford and Lowes is denied.

2. The motion to alter filed by ANR is denied in its entirety.

3. An evidentiary hearing will be conducted in accordance with the Board's June 29, 2001, Memorandum of Decision on the preliminary issues in this appeal and the scheduling order issued herewith.

Dated at Montpelier, Vermont this 29th day of August, 2001.

WATER RESOURCES BOARD

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

Concurring:

Lawrence H. Bruce, Jr., Member[3]
Jane Potvin, Member
John D.E. Roberts, Vice Chair
Mardee Sánchez, Member

[3]Board Member Bruce participated in the Board's August 21, 2001, deliberations on the matters addressed in this decision and concurs with the result but has not reviewed the Board's written opinion.