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Location:
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Montpelier, Vermont

**State of Vermont
Water Resources Board**

Tel: (802) 828-3309

Memorandum

Subject: Hannaford and Lowes Stormwater Discharge Appeal--Summary of Decision

From: William Bartlett, Executive Officer

A handwritten signature in black ink that reads "William Bartlett".

Date: January 18, 2002

The following summary is not part of the decision of the Water Resources Board issued in the matter, Re: Hannaford Bros. Co. and Lowes Home Centers, Inc., Docket No. WQ-01-01, Findings of Fact, Conclusions of Law, and Order (Jan. 18, 2002).

This general summary has been prepared solely for the convenience and information of the general public, and therefore it should not be cited as Board authority with regard to any point of law.

I. SUMMARY OF DECISION

This decision pertains to an appeal of a discharge permit issued to Hannaford Brothers Company and Lowes Home Centers, Inc. The permit at issue authorizes the discharge of treated stormwater wastes from a commercial complex located on Shelburne Road in South Burlington into Shelburne Bay and Potash Brook.

In its decision, the Vermont Water Resources Board (Board) concluded that Hannaford Brothers Company and Lowes Home Centers, Inc. have shown by a preponderance of the evidence that the discharge in question complies with the requirements of applicable Vermont law. Accordingly, the Board has affirmed the stormwater discharge permit in question subject to the correction of deficiencies in the initially approved stormwater treatment system identified during the appeal proceeding.

The Board's January 18, 2002 decision was not unanimous. Concurring in this decision were Board members: David Blythe, John Roberts, Mardee Sánchez and Larry Bruce. Dissenting from this decision was Board member Jane Potvin.

A. CENTRAL LEGAL ISSUE

The central legal issue in this proceeding was, under what circumstances, if any, does Vermont law allow a new or increased discharge of stormwater wastes containing "pollutants of concern," into impaired waters for which the required watershed pollutant clean-up plan has not yet been completed?

B. "IMPAIRED WATERS" and "POLLUTANTS OF CONCERN"

Bodies of water that do not meet one or more of the minimum water quality requirements of the Vermont Water Quality Standards (VWQS) are identified on Vermont's Impaired Waters List.¹ Waters on this List are identified as being "impaired" with respect to only those parameters (for example, phosphorus or pathogens) for which minimum water quality requirements are not being met. In this decision, such parameters are referred to as "pollutants of concern."

The listing of a body of water as "impaired" requires the development and implementation of a watershed pollutant clean-up plan designed to bring those waters into full compliance with the VWQS with respect to the "pollutants of concern."

The receiving waters in this case, Shelburne Bay (a portion of Lake Champlain) and Potash Brook (a tributary to Lake Champlain) are both listed as impaired waters on Vermont's Impaired Waters List. The pollutant of concern for Shelburne Bay is phosphorus. The pollutants of concern for Potash Brook include sediment, pathogens (i.e. organisms causing disease in humans), nutrients and toxic metals. The required pollutant clean-up plan has not yet been developed for these waters.

C. THE BOARD'S JUNE 29, 2001 RULING ON APPLICABLE VERMONT LAW

After providing all parties the opportunity for oral and written argument, the Board issued a ruling in June 29, 2001 holding that applicable Vermont law allows discharges into impaired waters in the absence of the required watershed pollutant clean-up plan under limited circumstances. Specifically, the Board has ruled that under such circumstances there is not a moratorium but, rather, that discharges can be allowed when it is shown that they will not increase the chemical, physical or biological load of pollutants for which the receiving waters are impaired. In short, there is no moratorium on discharges to impaired waters even where the required clean-up plan has not yet been adopted and in fact permits can be issued for discharges that will either reduce the existing impairment or, at a minimum, not make it worse.

D. BASELINE FOR DETERMINING WHETHER THE REQUIREMENTS OF VERMONT LAW SET FORTH IN THE BOARD'S JUNE 29, 2001 RULING ARE MET

On the basis of the evidence and expert testimony presented at the merits hearing on December 10 and 11, 2001, the Board has concluded that the appropriate "baseline" for measuring whether there are increased loadings of pollutants of concern is the actual discharge at the site in question rather than the site's predevelopment or background condition.

¹ This list is required by Section 303(d) of the federal Clean Water Act. Under that provision of federal law, the Agency of Natural Resources is required to update this list and submit it to the U.S. Environmental Protection Agency every two years.

E. LIMITED APPLICABILITY OF THIS DECISION

This decision addresses circumstances, while certainly not unique to this case, that are in fact limited both geographically and temporally. That is, when: (1) there is a new or increased discharge of pollutants for which the receiving waters are already impaired according to Vermont's Impaired Waters List and (2) the implementation of the watershed pollutant clean-up plan required by law has not yet commenced.

The number of situations in which both sets of circumstances is likely to occur in Vermont should be reduced over time as the minimum requirements of the VWQS are achieved either through implementation of watershed pollutant clean-up plans or by other means².

F. CURRENT PROCEDURAL STATUS OF THIS PROCEEDING

While the Board has issued a decision on the merits of Hannaford and Lowe's permit application, it should be noted that as of this date, its decision has not become final and, therefore, this matter is still pending before the Board. Consequently, as in all pending contested case proceedings, the public, press, members of the Legislature, and others are advised not to discuss with members of the Board or with those Board employees currently staffing this case any questions of fact or law at issue in this proceeding. As the Board's Executive Officer, I will be available to respond to appropriate questions concerning the procedural stance of this appeal, matters of general policy regarding the management of public waters, including their classification and regulation, and proposed legislation. I can be reached at the above address or at 828-3355.

The Board's decision in this matter will become final once the 30-day statutory appeal period has run, provided that no party files an appeal within that period (10 V.S.A. §1270). If a motion to alter or correct is filed by a party with the Board within 15 days of the Board's decision (Board Rule of Procedure 34), the Board will be required to rule on that motion, and another 30-day appeal period will commence following that ruling.

² For example, ANR's recently announced "Stormwater Initiative."

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WATER RESOURCES BOARD FACT SHEET

PURPOSE: To ensure effective public participation in the adoption and implementation of public policy regarding the management of Vermont's water resources and wetlands. The Board adopts rules followed by the Vermont Agency of Natural Resources (ANR) in the management of water resources and wetlands and hears appeals of ANR's regulatory decisions in these areas. The Board is created by 10 V.S.A. § 905 and on an annual basis conducts 25-30 meetings and 20-25 hearings.

MEMBERSHIP: The Board consists of five members appointed by the Governor for six year terms. Board members are subject to Senate confirmation and are paid a modest per diem. Current members are (term expiration date):

David J. Blythe (2/04) Board Chair, Attorney in private practice
John D. E. Roberts, (2/05) Dairy farmer, former select board chair
Jane Potvin, (2/06) Small business owner and former legislator
Mardee Sánchez, (2/03) Municipal engineer and zoning administrator
Larry Bruce, (2/07) Attorney in private practice

STAFF: The Board's staff and that of the Environmental Board have merged. The Board's initial contact person is its Executive Officer, William Bartlett (828-3355).

OFFICE LOCATION: The Board's offices are co-located with the Environmental Board at the National Life Records Center Building, National Life Drive, Montpelier, Vermont.

WEB SITE: <http://www.state.vt.us/wtrboard> Copies of all rules adopted by the Board, recent contested case decisions and other related information is available on-line.

MAJOR DUTIES: The Board adopts by rule water resource management policy in the following areas: (1) Vermont Water Quality Standards including surface water classifications; (2) Vermont Wetland Rules; (3) rules regulating the use of public waters primarily to resolve conflicts between recreational uses; and (4) rules regarding the manipulation of the surface level of lakes and ponds.

The Board, acting as a quasi-judicial body, designates Outstanding Resource Waters and hears appeals from regulatory decisions of the ANR under the following regulatory programs: discharges, encroachments and various licensing/certification functions, conditional use determinations for development in and near wetlands, water quality certifications, municipal water and sewer grants, stream alterations, subdivisions, public buildings, tent and travel trailers, campgrounds, mobile home parks and dams.

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(3/2001)

The Vermont Water Quality Standards - an Executive Summary

1. What are Water Quality Standards?

The Vermont Water Quality Standards, based on the considerable policy guidance provided by the Vermont Water Pollution Control Act (10 VSA Chapter 47), provide important water quality management guidance applicable to all waters in Vermont. Water quality standards in their simplest form consist of: (a) water classifications, (b) water quality criteria and (c) associated policies including in particular the anti-degradation policy.

Under federal law all states are required to adopt water quality standards consistent with the Clean Water Act and associated EPA regulations. Under Vermont law the Board has been responsible for adopting the VWQS since the late 1960's and has amended them periodically over the past two decades through the formal APA rulemaking process including public hearings, a written responsiveness summary and legislative oversight.

(a) Water classifications establish water quality management goals expressed in terms of designated uses to be attained and, once attained, protected. These goals are established by Vermont law at 10 V.S.A. §1252 (a):

Class A. (1) Suitable for public water supply with disinfection when necessary; character uniformly excellent; or (2) high quality waters which have significant ecological value.

Class B. Suitable for bathing and recreation, irrigation and agricultural uses; good fish habitat; good aesthetic value; acceptable for public water supply with filtration and disinfection.

It is important to note that water classifications establish water management goals and are not necessarily descriptive of actual water quality at the time they are established. For example, when first classified Class B in the 1960's and early 1970's, a number of such waters were highly polluted. However, having established the goal of making those waters suitable for public water supply use with treatment, the propagation of fish and shellfish and for swimming, Vermont on a statewide basis has over the past 30 years worked to abate unacceptable levels of pollution in order to achieve these goals without major economic or social disruption and in a manner that has been beneficial both environmentally and economically.

(b) Water quality criteria (see 10 V.S.A. §1252(e)) define a number of chemical, physical and biological conditions (i.e. temperature, pH, dissolved oxygen, E. Coli, toxics, etc.) that collectively define a level of water quality necessary to allow the designated uses or goals established by the water classifications to be achieved. Criteria such as temperature, pH and dissolved oxygen describe in-stream conditions necessary to achieve the goal use of "good fish habitat." Criteria such as those established for E. Coli and toxic pollutants describe conditions necessary to protect human health consistent with the goal uses of being "suitable for bathing (i.e. swimming) and recreation" and "acceptable for public water supply." **It's important to note that these criteria do not define optimum water quality conditions but rather the minimum conditions that assure that the goal uses (i.e. designated uses) can be achieved.**

(c) Anti-degradation policy is a key requirement of the federal Clean Water Act and is consistent with guidance provided in Vermont law. This policy requires the protection of all existing uses of waters even if they are not designated uses established by classification. It also requires, except under very limited circumstances, that where actual water quality is currently better than the minimum required to protect existing or designated uses that the existing higher quality must be maintained. Among other things, one effect of this policy is to prevent the higher quality of lightly developed watersheds from becoming an incentive for the receipt of new discharges of waste thereby encouraging sprawl.

2. How are VWQS used?

The VWQS are implemented by the Vermont Agency of Natural Resources (ANR) in one of two ways. First, compliance with the VWQS is required by statute before ANR can issue a number of permits most notably Discharge Permits and Water Quality Certifications¹. Second, ANR can enforce against violations of the VWQS under 10 V.S.A. §1258 regardless of whether a discharge permit is required.

The VWQS have always been applicable to any use of water that impacts water quality including impacts on water quantity. However, prior to the early or mid-1980's the emphasis in terms of the implementation of the VWQS was on point sources (i.e. municipal and industrial wastewater treatment facility discharges). More recently, there has been an increased emphasis nationally and in Vermont on other activities that impact water quality such as water withdrawal, flow manipulation, and stormwater discharges from construction sites, urban areas, etc.

¹ These Certifications are required by the federal Clean Water Act for any activity that requires a federal permit or license where water quality impacts are evaluated. The concept is that federal agencies should not be approving activities that violate state water quality standards. Such Certifications are required for a range of activities including the periodic (once every 30 to 50 years) relicensing of hydroelectric facilities by the federal Energy Regulatory Commission (FERC).