State of Vermont
WATER RESOURCES BOARD

Re: Morehouse Brook, Englesby Brook, Centennial Brook, and Bartlett Brook, Nos. WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated)

MEMORANDUM OF DECISION

A motion for summary judgment requesting that four watershed improvement permits be reversed and remanded is denied.

I. Procedural Background

On July 1, 2002, the Water Quality Division, Department of Environmental Conservation, Agency of Natural Resources (ANR), issued Watershed Improvement Permit Nos. 3-9005, 3-9006, 3-9007, and 3-9008 (WIPs or Permits) for existing and new stormwater discharges into Bartlett Brook, Centennial Brook, Englesby Brook, and Morehouse Brook, respectively. ANR has determined that the Vermont Water Quality Standards are not being met in these waters due, in whole or in part, to the discharge of collected stormwater runoff.

On July 31, 2002, Conservation Law Foundation (CLF) and the Vermont Natural Resources Council (VNRC) appealed all four WIPs to the Water Resources Board (Board). The City of South Burlington filed cross appeals of the Centennial Brook and Bartlett Brook WIPs on August 14, 2002.[1] On September 4, 2002, the Greater Burlington Industrial Corporation (GBIC) filed a petition for leave to participate as amicus curiae in all pending WIP appeals.

The notices of appeal allege generally that the Permits violate state and federal law including, but not limited to, the Vermont Water Pollution Control Act, 10 V.S.A. §§ 1250-1284, and associated rules and regulations, the Vermont Water Quality Standards, ANR's stormwater procedures and design manuals, the Environmental Law Enforcement Act, 10 V.S.A. §§ 8001-8221, the federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387, and Title 40 of the Code of Federal Regulations. In their notices of appeal, the Appellants ask the Board to deny or modify the Permits.

Board Chair David J. Blythe conducted a prehearing conference in these matters on September 4, 2002. In a Prehearing Conference Report and Order (Prehearing Order) issued September 20, 2002, the Chair consolidated these appeals as captioned above and

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[1]Additional appellants have since withdrawn their appeals.

assigned the burden of persuasion and the burden of production to ANR in each of the consolidated appeals. The Prehearing Order established February 18 through 21, 2003, as may be necessary, for a hearing on the merits and further established a filing schedule for the merits hearing.[2] The Prehearing Order granted GBIC's petition for leave to participate in these appeals as amicus curiae and ordered GBIC to file any memoranda of law within the times allowed and other requirements applicable to the Appellants.

In accordance with the filing requirements for these appeals, ANR filed its direct evidence and a supporting memorandum of law on October 18, 2002. On November 12, 2002, VNRC filed a Motion for Summary Judgment and a Memorandum in Support. On November 19, 2002, the Board conducted a site visit of the four watersheds involved in these appeals. VNRC and CLF filed their direct evidence and memoranda of law, as scheduled, on November 21, 2002. On November 25, 2002, CLF filed a Memorandum of Law In Support of VNRC Motion for Summary Judgment. ANR followed with a Memorandum In Opposition to Appellant's Motion for Summary Judgment on November 27, 2002.

Oral argument on VNRC's Motion for Summary Judgment took place at the City of South Burlington Municipal Building on December 10, 2002. Neither the City of South Burlington nor GBIC filed responses to VNRC's Motion for Summary Judgment or participated in oral argument. The Board deliberated on VNRC's Motion for Summary Judgment immediately after oral argument on December 10, 2002. This matter is now ready for decision.

II. Standard of Review

VNRC filed its Motion for Summary Judgment pursuant to Board Rule of Procedure 36, which was added to the Board's Rules in the amendments that took effect in January, 2002. The Board has previously noted that "the provisions for summary judgment under Board Rule 36 (2002) are similar to those for summary judgment under the Vermont Rules of Civil Procedure, except for the omission of certain provisions that do not apply to practice before the Board." In re City of South Burlington (Bartlett Bay Wastewater Treatment Facility), No. WQ-01-04, Second Prehearing Conference Report and Order at 5 (Apr. 18, 2002).

[2]Based on objections filed by ANR, the Chair issued an Order on October 18, 2002, making minor revisions to the September 20, 2002, Prehearing Order. Those revisions are not material to this decision.

Rule 36(D) articulates the standard of review of a motion for summary judgment: "Judgment shall be rendered forthwith if . . . there is no genuine issue of material fact and . . . any party is entitled to judgment as a matter of law." Summary judgment may be rendered for the whole case or for only part of a case. Rule 36(A). A successful motion for summary judgment must satisfy a two-part test: First, there must be no genuine issue of material fact with respect to the subject of the motion. Second, a valid legal theory must support the moving party's request for judgment as a matter of law. A motion for summary judgment may thus be defeated by showing either that a material fact supporting the motion is in dispute or that the legal theory supporting the motion is not persuasive. See Bartlett Bay at 5 (assuming for purposes of decision that factual allegations in motion for summary judgment were true and concluding that moving party was not entitled to judgment as matter of law).

The Board does not act as a trier of fact when it considers a motion for summary judgment but instead must draw all reasonable inferences and doubts in favor of the nonmoving party. Wentworth v. Fletcher Allen Health Care, 171 Vt 614, 616, 765 A.2d 456, 459 (2000). In addition, the Board must regard all properly supported allegations of the opposing party as true. Id. However, the adverse party's opposition to the facts underlying a motion for summary judgment must be specific and properly supported. See Rule 36(F). Summary disposition is disfavored by the Board unless the moving party's entitlement to summary disposition is clear.

III. Issue

Whether, based on the evidence and arguments presented by VNRC's Motion for Summary Judgment and the responses of the other parties, the WIPs under appeal do not comply with the requirements of 10 V.S.A. § 1264(f)(1), which provides as follows: "Any permit issued for existing discharges pursuant to this subsection shall include a schedule of compliance of no longer than five years reasonably designed to assure attainment of the water quality standards in the receiving waters."

IV. Discussion

In its Motion for Summary Judgment, VNRC argues that the WIPs must be remanded to ANR as a matter of law. (VNRC Mem. in Supp. of Mot. for Sum. J. at 4.) The WIPs were issued under the authority of Act 109 of 2002, which provides in part as follows: "Any permit issued for existing discharges pursuant to this subsection shall include a schedule of compliance of no longer than five years reasonably designed to assure attainment of the water quality standards in the receiving waters." 10 V.S.A. § 1264(f)(1). VNRC argues that because the WIPs will not result in the attainment of the

water quality standards within any defined period of time, they violate the statute authorizing their issuance. (VNRC Mem. in Supp. of Mot. for Sum. J. at 3.)

The facts VNRC presents in support of its Motion for Summary Judgment are not extensive and are based on ANR's prefiled testimony. (VNRC Statement of Material Facts at 1-2.) ANR's prefiled testimony may be considered as admissions on the part of ANR and used as such by VNRC. See Vt. R. Evid. 801(d)(2). Based on ANR's prefiled direct evidence, VNRC alleges that ANR issued the WIPs under appeal for waters that do not comply with the Vermont Water Quality Standards due, in whole or in part, to stormwater. VNRC further alleges that the WIPs authorize both new and increased stormwater discharges into these impaired waters. (VNRC Mem. in Supp. of Mot. for Sum. J. at 2.)

VNRC goes on to allege that ANR cannot say with certainty that implementation of the WIPs will result in attainment of the Vermont Water Quality Standards in the waters to which the WIPs apply. (VNRC Mem. in Supp. of Mot. for Summ. J. at 2.) In support of this contention, VNRC quotes the following prefiled testimony of ANR witness Doug Burnham: "Ultimately, we cannot determine at this time what measures are necessary to achieve water quality standards, nor can we tell whether BMP implementation alone via the WIPs will be enough to meet standards." (Id. (quoting ANR Exh. 25 at 18).) In addition, VNRC points to the following statement in the Memorandum of Law ANR filed in support of its case in chief: "the timeframe for achieving water quality standards through implementation of the WIPs cannot be precisely determined and may in fact be longer than the initial five-year term of the four WIPs." (Id. (quoting ANR Mem. of Law at 13).)

In its Memorandum of Law in Support of VNRC Motion for Summary Judgment, CLF mounts a somewhat broader attack than the narrow argument advanced by VNRC. Citing numerous provisions of both state and federal law, CLF argues that the WIPs must impose conditions on existing discharges as may be necessary to achieve and maintain compliance with the Vermont Water Quality Standards. (CLF Mem. in Supp. of VNRC Mot. for Summ. J. at 1-4.) CLF further argues that state and federal law prohibit new or increased discharges of pollutants of concern into impaired waters without sufficient pollutant load allocations to assimilate them. (Id. at 4-5.) CLF agrees with VNRC that the WIPs are unlawful under Act 109 because they do not include a schedule of compliance reasonably designed to assure attainment of water quality standards within five years. (Id. at 6-8.)

In response to VNRC's Motion for Summary Judgment, ANR did not serve any affidavits in opposition to the facts cited by VNRC. See Rule 36(B). Consequently,

ANR's unsworn prefiled testimony that ANR cites in its Memorandum in Opposition cannot be considered by the Board. Indeed, the Board cannot consider any of the prefiled evidence in these appeals unless that evidence has been specifically supported by affidavits or cited as an admission by a party-opponent. See Rule 36(C), (F), (G). Because ANR failed to file affidavits supporting the prefiled testimony of its own witnesses that it cited in its response VNRC's Motion, the Board is limited to considering the facts cited by VNRC in support of its Motion for Summary Judgment and the arguments of law that the parties presented in their legal memoranda relating to VNRC's Motion for Summary Judgment and at oral argument.

In its Memorandum in Opposition, ANR argues that genuine issues of material fact are in dispute and that VNRC's reading of Act 109 is incorrect. ANR emphasizes that Act 109 calls for a "schedule of compliance of five years reasonably designed to assure attainment of the water quality standards in the receiving waters." (ANR Mem. in Opp'n at 4 (quoting 10 V.S.A. § 1264(f)(1)) (emphasis added by ANR).) ANR therefore disagrees with VNRC's statement that the WIPs must "make absolutely certain and put beyond doubt the attainment of water quality standards in the receiving waters." (ANR Mem. in Opp'n at 4 (quoting VNRC Mem. in Supp. at 3).) ANR argues that the reasonableness of the compliance schedule called for by Act 109 depends on the "realities of current scientific knowledge." (ANR Mem. in Opp'n at 3.)

Although VNRC does not point this out in its Memorandum in Opposition, the WIPs themselves provide that they are reasonably designed to assure attainment of water quality standards. However, Part VII of the WIPs indicates that the schedule of compliance contained in these permits and intended to satisfy Act 109 is the schedule for dischargers to comply with ANR's best management practices (BMPs) rather than a schedule for the receiving waters to comply with the Vermont Water Quality Standards. (ANR Exhs. 2-6 at 21.)[3] At oral argument, ANR confirmed that it understands the compliance schedule of five years called for by Act 109 to involve commencing the construction of the stormwater treatment systems and taking such other actions as are required by the WIPs rather than compliance with the Vermont Water Quality Standards. Counsel for ANR reaffirmed at oral argument that the WIPs cannot assure attainment of water quality standards within five years.

In its Memorandum in Opposition, ANR argues that the Board needs a full record of facts and law to decide what kind of schedule would be reasonable under Act 109.

[3]Because VNRC references the WIPs in their entirety in its Motion for Summary Judgment, (VNRC Statement of Material Facts in Supp. of Mot. for Summ. J. at 1), the Board may consider the text of the WIPs in this decision.

(ANR Mem. in Opp'n at 5, 7.) ANR contended at oral argument that the statements cited by VNRC in its Motion for Summary Judgment raise factual questions relating to the scientific uncertainty involved in bringing the receiving waters into compliance with the water quality standards. In addition, ANR argued that neither VNRC nor CLF have presented any scientific alternative to the WIPs containing a more definite schedule of compliance.[4] ANR has therefore taken the position that the statements cited by VNRC to Support its Motion for Summary Judgment do not constitute sufficient information for the Board to determine whether or not the WIPs are reasonable and lawful.

The Board concludes that the arguments raised by VNRC in its Motion for Summary Judgment and supported by CLF raise important issues. In particular, the Board agrees that a key issue in this case is whether the compliance schedule required by 10 V.S.A. § 1264(f)(1) must demonstrate in-stream compliance with the Vermont Water Quality Standards within five years or whether the statute requires that actions to improve in-stream conditions be taken in accordance with a five-year compliance schedule without a guarantee that in-stream standards will be met over this five-year period of time. However, at this point in this case, the Board agrees with ANR that mixed issues of fact and law will ultimately determine the meaning of section 1264(f)(1). Accordingly, the Board denies VNRC's Motion for Summary Judgment and requests the parties to brief the issue of what section 1264(f)(1) requires in conjunction with their proposed findings of fact, conclusions of law, and orders.

Based on the prefiled testimony of ANR, VNRC argues that "It is not possible to determine at this time what measures are necessary to achieve water quality standards . . . ." (VNRC Statement of Material Facts at 2.) The Board does not reach this conclusion based on the limited record that VNRC has presented. Given the limited record available to the Board on VNRC's Motion for Summary Judgment, the Board does not find it practicable to "ascertain what material facts exist without substantial controversy and

[4]Indeed, when Member Sánchez asked counsel for ANR at oral argument whether a TMDL (total maximum daily load) would help achieve compliance with the water quality standards within five years, counsel for CLF objected that the question was ranging off the record. When the objection was overruled, counsel for ANR contended that a TMDL would involve the same level of scientific uncertainty as the WIPs. CLF averred in its rebuttal argument that effective alternatives to the WIPs are described in its prefiled testimony. Because this testimony is unsworn, it cannot be considered in this decision. Counsel for VNRC stated at oral argument that a program can be designed to bring the receiving waters into timely compliance with the water quality standards but that these substantive discussions were beyond the scope of its motion.

what material facts are actually and in good faith controverted." Board Rule 36(E). The Board therefore declines to issue an order specifying any facts that appear without controversy. See id.

These appeals present complex questions of fact and important issues of public policy in a case of first impression. Based on the materials available for the Board's consideration, the Board finds that genuine issues of material fact remain in dispute and that related questions of law have not been adequately addressed by the parties. VNRC's Motion for Summary Judgment must therefore be denied.

V. Order

It is hereby Ordered:

1. VNRC's Motion for Summary Judgment is denied.

2. The applicable provisions of the September 20, 2002, Prehearing Order and subsequent orders of the Chair remain in full force and effect unless and until modified by the Chair or the Board.

3. The parties are requested to brief the meaning of 10 V.S.A. § 1264(f)(1) in conjunction with their proposed findings of fact, conclusions of law, and orders.

Dated at Montpelier, Vermont, this 19th day of December, 2002.

WATER RESOURCES BOARD

/s/ David J. Blythe

David J. Blythe

Concurring:

Jane Potvin, Member
John D.E. Roberts, Vice Chair

Dissenting in part; concurring in part:

Lawrence H. Bruce, Jr., Member
Mardee Sánchez, Member

DISSENTING OPINION

We concur with parts I, II, and III of the Board's decision. We also concur that ANR, by failing to include affidavits with its Memorandum in Opposition, has failed to adequately controvert the facts supporting VNRC's Motion for Summary Judgment. We further concur that the limited facts presented do not support VNRC's conclusion that "It is not possible to determine at this time what measures are necessary to achieve water quality standards . . . ." (VNRC Statement of Material Facts at 2.) Otherwise, we respectfully dissent from parts IV and V of the Board's decision.

It is undisputed that the receiving waters involved in these appeals are impaired by stormwater. It is further undisputed that the WIPs ANR has issued to address these violations of the Vermont Water Quality Standards authorize both existing and new stormwater discharges into the receiving waters. Act 109 provides, in pertinent part, as follows: "Any permit issued for existing discharges pursuant to this subsection shall include a schedule of compliance of no longer than five years reasonably designed to assure attainment of the water quality standards in the receiving waters." 10 V.S.A. § 1264(f)(1).

The plain meaning of that provision is that the WIPs must be reasonably designed to achieve compliance with the uses and criteria of the Vermont Water Quality Standards in the waters to which they apply within five years. ANR's position that this language merely requires the construction of certain treatment systems within five years is not only contrary to the plain language of the statue, but also contrary to the balance of the Vermont Water Pollution Control Act, 10 V.S.A. §§ 1250-1283, Vermont's associated regulations and water quality standards, the federal Clean Water Act, 33 U.S.C.A. §§ 1251-1387, and associated federal regulations.

ANR's own witness, in written prefiled testimony that this witness had ample time to consider, testified as follows: "Ultimately, we cannot determine at this time what measures are necessary to achieve water quality standards, nor can we tell whether BMP implementation alone via the WIPs will be enough to meet standards." (VNRC Mem. in Supp. of Mot. for Summ. J. at 2. (quoting ANR Exh. 25 at 18).) This admission clearly

indicates that the WIPs do not comply with the requirement of 10 V.S.A. § 1264(f)(1) that the WIPs must be "reasonably designed to assure attainment of the water quality standards in the receiving waters." Accordingly, we would grant VNRC's Motion for Summary Judgment.

Dated at Montpelier, Vermont, this 19th day of December, 2002.

/s/ Lawrence H. Bruce, Jr.

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Lawrence H. Bruce, Jr., Member

Concurring:

Mardee Sánchez, Member

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