

Memorandum

Subject: Watershed Improvement Permit Appeals--Summary of Decision

From: Jon Groveman, Executive Officer

Date: June 2, 2003

The following summary is not part of the decision of the Water Resources Board issued in Re: Morehouse Brook, Englesby Brook, Centennial Brook and Bartlett Brook, Docket Nos. WQ-02-04, WQ-02-05, WQ-02-06 and WQ-02-07 (CONSOLIDATED), Findings of Fact, Conclusions of Law, and Order (May xx, 2003).

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 PERMITS AT ISSUE

This decision pertains to appeals of four Watershed Improvement Permits (WIPs) issued by the Agency of Natural Resources (ANR). The appeals were brought by the Vermont Natural Resources Council and the Conservation Law Foundation. In addition, the City of South Burlington filed a cross appeal. The WIPs at issue authorize both existing and new stormwater discharges into Bartlett Brook, Centennial Brook, Englesby Brook, and Morehouse Brook. ANR has determined that the Vermont Water Quality Standards (VWQS) are not being met in these waters due, in whole or in part, to the collected discharge of stormwater runoff.

II WHAT IS A WIP?

Bodies of water that do not meet one or more of the *minimum* water quality requirements of the 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, stormwater, phosphorus or pathogens) for which minimum water quality requirements are not being met. These parameters are known as the "pollutants of concern" for the impaired waters. As noted above, the waters covered by the WIPs are impaired for stormwater.

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." Under Act 109 of 2002 (the stormwater bill) the Legislature specifically authorized ANR to issue WIPs as a clean up plan for waters impaired by stormwater, if certain conditions are met.

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.

The WIPs rely on the use of source controls called “Best Management Practices” (BMPs) to clean up the impaired waters. In other words, the WIPs require dischargers to control the flow of stormwater into the impaired waters and as long as the controls are properly applied, the dischargers will be in compliance with the WIPs.

Prior to Act 109, ANR was not specifically authorized by state law to adopt a clean up plan for impaired waters that was based on the use of source controls or BMPs. Rather ANR was required to implement a Waste Load Allocation or Total Maximum Daily Load (TMDL) as a clean up plan for impaired waters. A TMDL establishes the maximum amount of a pollutant that may be introduced into a water body and still ensure attainment of the VWQS. Unlike the source control/BMP approach to cleaning up waters utilized in the WIPs, a TMDL must specify feasible pollutant allocations among contributing sources to an impaired water. In sum, the TMDL requires ANR to determine which dischargers are causing an impairment and then to allocate loads among the various dischargers to ensure that the total maximum load of pollutants in a particular water body is not exceeded. In contrast, the WIPs rely exclusively on source controls/BMPs to clean up waters without actually determining the maximum load of pollutants a water body can assimilate.

III SUMMARY OF DECISION

In its decision, the Vermont Water Resources Board (Board) concluded that the WIPs do not comply with the requirements of state law that must be met for ANR to use the WIPs as a clean up plan for waters impaired by stormwater. The Board found that state law clearly requires that in order for ANR to issue a WIP for waters impaired by stormwater the WIP must include “a schedule of compliance no longer than five years reasonably designed to assure attainment of the VWQS in the receiving waters.” ANR acknowledged throughout the proceeding that it cannot assure that the WIPs will achieve attainment of the VWQS in the impaired waters within five years, or within any definitive period of time. Accordingly, the Board had no choice but to conclude that the WIPs do not comply with state law and may not be issued for these specific impaired waters.

The Board further concluded that WIPs are a narrow exception to the general rule that ANR must implement a TMDL to clean up impaired waters. Act 109 created the option of using WIPs rather than TMDLs to allow ANR to adopt clean up plans without determining the maximum loads of pollutants that a water body can assimilate or allocating specific loads among discharges to assure attainment of the VWQS *in situations where ANR could reasonably assure attainment of the VWQS through the use of source controls/BMPs*. The WIP option may work in some circumstances where ANR can assess the problems in a watershed and develop a source control plan to clean up the waters within the required time frame (five years). However, in watersheds with complex and pervasive water quality problems that are not easily identifiable and solvable, a load analysis and allocation through a TMDL is necessary to properly analyze the water quality problems and provide the level of assurance necessary to determine that the VWQS will be attained.

IV ANR’s POSITION

In reaching its decision, the Board addressed several arguments that ANR raised in defense of the WIPs. First, ANR argued that the schedule of compliance in a WIP need apply only to the construction of stormwater treatment systems and not to attainment of the Vermont Water Quality Standards in the receiving waters. Second, ANR contended that the WIPs could not reasonably provide for compliance with the VWQS in the receiving waters within any definite period of time because of the complexity of the pollution problems involved. Third, ANR explained that the WIPs at issue represent substantial progress toward bringing the receiving waters into compliance with the VWQS and that subsequent iterations of the WIPs will be designed to finish the job. Fourth, ANR asserted that it cannot incorporate more comprehensive management strategies into the WIPs because its legal authority does not extend to nonpoint-source discharges. Finally, ANR claimed that administrative and economic considerations do not support a more comprehensive approach to managing the receiving waters at this time. In addressing ANR's defenses the Board concluded that:

- Act 109 requires that WIPs include more than a schedule of actions that will be taken over a five year period to improve water quality. Act 109 clearly provides that the WIP option may be used only if the WIP includes “a schedule of compliance no longer than five years reasonably designed to assure attainment of the VWQS in the receiving waters.” Accordingly, the WIPs must be reasonably designed to attain the VWQS within five years after issuing a WIP.
- Act 109 does not mandate the use of WIPs. Rather, Act 109 creates the option for ANR to use a WIP as opposed to a TMDL to clean up impaired waters. Accordingly, if a WIP cannot be designed to reasonably assure attainment of the VWQS in five years, as required by law, the WIP option may not be used for that impaired water.
- The iterative application of source controls/BMPs (trial and error to see to what extent source controls work to clean up the waters) is not authorized under state law unless the iterative application of source controls/BMPs is part of the TMDL process, in which the use of BMPs may be adjusted through modifying the TMDL based on monitoring and experience.
- ANR has the authority to manage and control nonpoint sources of stormwater pollution (nonstructural controls on stormwater such as road maintenance, streambank stabilization and pet waste management) through the issuance of WIPs. The Board does not determine the precise limits of ANR's regulatory authority to manage nonpoint sources of stormwater pollution or how or when ANR must use this authority. However, the Board recognizes that the management of both point and nonpoint sources of pollution is essential to any effective clean up plan.
- ANR may consider economic and administrative considerations in selecting reasonable alternatives to clean up impaired waters. Act 109 clearly encourages ANR to use cost effective measures to address waters impaired by stormwater. However, to be cost effective a clean up plan must be effective – it must result in attainment of the VWQS. Accordingly, ANR may not rely on economic considerations as a rationale for developing a WIP that does not reasonably assure attainment of VWQS in five years as required by

Vermont law.

V EFFECT OF DECISION

ANR may address the Board's decision by re-issuing WIPs for the water bodies in question with a schedule of compliance of no longer than five years that is reasonably designed to assure attainment of the VWQS *or* ANR may establish and implement TMDLs for these water bodies. Until a valid clean up plan is established (a WIP or TMDL) no new or increased discharge of stormwater may be authorized to an impaired water. As the Board stated in its Hannaford decision, the baseline for determining whether a permitted discharge is new or increased is the actual discharge from a particular site. See In re Hannaford Bros. Co., No. WQ-01-01, Findings of Fact, Conclusions of Law, and Order at 10-14 (Jan. 18, 2002), aff'd, No. 280-02 CnCv (Chittenden Co. Super. Ct. Apr. 30, 2003).

VI CONTACT INFORMATION

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