

**State of Vermont  
WATER RESOURCES BOARD**

**Re: Vermont Agency of Transportation (Route 7)  
Docket No. WQ-03-01**

**MEMORANDUM OF DECISION**

The Vermont Agency of Transportation's motion for partial summary disposition is granted.

**I. Procedural Background**

On December 20, 2002, the Vermont Agency of Natural Resources (ANR) issued a renewal discharge permit (Permit) to the Vermont Agency of Transportation (AOT) for the discharge of stormwater runoff from the proposed expansion and renovation of Route 7 in Shelburne to the LaPlatte River, Monroe Brook, Bartlett Brook, and Lake Champlain. Friends of Route 7, Michael Serrano, Patricia J. Ondovchik, and Jack Dubrul II (Appellants) filed a timely Notice of Appeal with the Water Resources Board (Board), challenging ANR's issuance of the Permit. In their Notice of Appeal, the Appellants allege that the Permit is inconsistent with the Watershed Improvement Permits (WIPs) that ANR issued for Bartlett Brook and Monroe Brook and that additional permit conditions are necessary to preserve and protect the quality of the receiving waters.

Board Chair David J. Blythe presided over a prehearing conference in this matter and issued a Prehearing Conference Report and Order (Prehearing Order) on March 13, 2003. The Prehearing Order identified as a preliminary issue the question of whether AOT has a vested right in the law as it existed when it filed its application for a renewal permit in December of 2001. (Prehearing Order at 8.) On June 4, 2003, Chair Blythe issued a schedule for AOT to file a motion for summary disposition or partial summary disposition with regard to the issue of vested rights and for the Appellants to file a response. Chair Blythe subsequently issued an order, on June 18, 2003, granting in part a request of the parties to extend these filing deadlines. In accordance with these orders, AOT filed a Motion for Summary Judgment on July 14, 2003, and the Appellants filed their response two weeks later. The Chair's orders required ANR to file any motion or legal memorandum with regard to AOT's vested rights in this matter by the deadline established for AOT. ANR chose not to comment in writing on the vested-rights issue.

Oral argument on AOT's Motion for Summary Judgment took place on August 5, 2003 at the Board's conference room in Montpelier. Through their counsel, AOT, ANR,

and the Appellants participated.<sup>1</sup> The Board deliberated on AOT's Motion for Summary Judgment immediately after oral argument. This matter is now ready for decision.

## II. Standard of Review

The Board set forth its standard of review of a motion for summary judgment in *In re Morehouse Brook*, No. WQ-02-04, Mem. of Decision at 3 (Dec. 19, 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).

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).

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<sup>1</sup> At oral argument, the parties were asked if they had any objections to the Board taking official notice of certain documents pursuant to 3 V.S.A. § 810(4) for the purposes of this decision. The parties asked for and were granted one week, or until August 12, 2003, to file any objections to the noticing of these documents. No objections were filed. The documents identified at oral argument for official notice included, among others, the Monroe Brook WIP, General Permit 3-9011, including the list of selected discharges to Monroe Brook (Nov. 4, 2002). For purposes of this decision, the Board takes official notice of this document. The Board does not find it necessary at this time to officially notice any of the other documents that were identified at oral argument for official notice.

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 the Board's review of the AOT's renewal permit is governed by the law in effect at the time AOT filed its renewal application.

### **IV. Discussion**

#### **A. Arguments of the Parties**

AOT's Motion for Summary Judgment is more properly framed as a motion for partial summary judgment, or to use the terminology of the Board's rules, a motion for partial summary disposition. *See* Procedural Rule 36(A). AOT is not seeking to end the case with its Motion. Rather, AOT asks the Board to limit the issues and to establish that the controlling law for the hearing on the remaining issues is the law in effect when AOT filed its application for a renewal permit.

In its Motion, AOT alleges that it filed its application for a renewal permit on December 12, 2001. Act 109 of 2002, which amended the stormwater provisions of the Vermont Water Pollution Control Act, 10 V.S.A. § 1264, did not take effect until May 16, 2002. Act 109 authorizes ANR to issue WIPs to manage discharges into stormwater-impaired waters and also requires new stormwater discharges to comply with ANR's 2002 Stormwater Manual. Based on its alleged vested rights, AOT asserts that it is not subject to WIPs and that its discharge is governed by ANR's 1997 Stormwater Procedures (the BMPs that preceded ANR's 2002 Stormwater Manual). *See* 10 V.S.A. § 1264.

The Appellants have conceded that the law in effect on December 12, 2001 governs the renewal permit at issue in this case. Thus, the Appellants agree that Act 109 is not applicable. The Appellants further concede that the Permit should be reviewed under ANR's 1997 Stormwater Procedures rather than the 2002 Stormwater Manual.

Although the Appellants have not challenged any of the factual allegations underlying AOT's Motion, the Appellants maintain that the Permit does not comply with the law in effect when AOT filed its renewal application. Based on Act 114 of 2000 (effective May 19, 2000), codified at 10 V.S.A. § 1264, the Appellants disagree with the allegation of the Appellants that the statute authorizing the WIPs was not in effect when AOT filed its application for a renewal permit. However, the Appellants claim that compliance with the WIPs for both Bartlett Brook and Monroe Brook is a moot issue because of the Board's recent decision in *In re Morehouse Brook*, No. WQ-02-04, Findings of Fact, Conclusions of Law, and Order (June 2, 2003).

The Appellants argue that the Permit must comply with the Vermont Water Quality Standards, citing *In re Hannaford Bros. Co.*, No. WQ-01-01, Mem. of Decision (Vt. Water Res. Bd. June 29, 2001), *aff'd*, No. 280-02 CnCv (Chittenden Co. Super. Ct. Apr. 30, 2003). On the basis of Act 114, the Appellants further argue that the Permit fails to ensure compliance with the Vermont Water Quality Standards and that the Permit does not 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. However, the Appellants conclude that whether the Permit complies with applicable legal standards is a factual dispute that goes to the merits of this case rather than to the vested-rights issue.

## **B. Analysis**

### **1. Effect of the WIPs**

The Appellants suggest that the issue of whether or not the Permit in this case is subject to the Bartlett Brook and Monroe Brook WIPs is moot because these WIPs have been rendered void by *Morehouse Brook*. *Morehouse Brook* reversed ANR's issuance of WIPs for Morehouse Brook, Englesby Brook, Centennial Brook, and Bartlett Brook. *See Morehouse Brook*, Findings of Fact, Conclusions of Law, and Order at 1, 6, 30. The Appellants are therefore correct that the Bartlett Brook WIP is no longer applicable. However, the Monroe Brook WIP, which was never appealed, is now administratively final and cannot be collaterally attacked in this case. *See Bartlett Bay* at 5-6. While the Board does not have enforcement authority, the Board must ensure that the terms of a permit are consistent with the requirements of an administratively final cleanup plan for the receiving waters. Thus, the Board needs to consider whether the Monroe Brook WIP supercedes or invalidates the Permit at issue, in whole or in part.

Under the terms of the Monroe Brook WIP, "US Route 7" is listed as a selected discharge. Selected discharges are existing major discharges of stormwater into

stormwater-impaired waters. Like new discharges, selected discharges must meet the treatment and control requirements of ANR's 2002 Stormwater Manual, although the WIPs allow exceptions to these requirements based on technical constraints arising from site conditions. However, the Monroe Brook WIP further provides that a previous permittee or a selected contributor holding an unexpired individual permit may choose not to seek coverage under the WIP prior to the expiration date of the individual permit, but may instead file a notice of intent to comply with the WIP 90 days prior to the individual permit's expiration. Because AOT has not exercised its option to seek coverage under the Monroe Brook WIP, that WIP does not govern any portion of the Permit at issue.

The Bartlett Brook WIP is void, and the Monroe Brook is not applicable to the Permit. The Board therefore finds that neither the Bartlett Brook WIP nor the Monroe Brook WIP governs the Board's review of the Permit. Accordingly, as AOT has requested, the Board dismisses the first issue raised by the Notice of Appeal, that the Permit violates the terms of the WIPs for Bartlett Brook and Monroe Brook. The remaining issue in this appeal is whether the Permit complies with the law in effect on December 12, 2001, without regard to what any subsequently-issued WIPs may provide.<sup>2</sup>

## **2. Requirements of the governing Law**

AOT contends that the requirement of Act 109 that discharges comply with the technology-based controls of the 2002 Stormwater Manual did not take effect until May

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<sup>2</sup>The Notice of Appeal provides, in part, as follows:

Appellants further state that the renewal was erroneously granted because ANR did not assess whether additional conditions or restrictions are required to preserve and protect the quality of the receiving waters, including Monroe Brook, Bartlett Brook, La Platte River and Lake Champlain. Such additional conditions would ensure that Vermont Water Quality standards [sic] are not violated and would include, but not be limited to, a requirement for the use of detention ponds for the 15 discharge points that are not required [by the Permit] to use detention ponds before stormwater discharges are sent to the receiving waters of Monroe Brook, Bartlett Brook, La Platte River and Lake Champlain.

Notice of Appeal at 2. The relief that the Appellants seek includes "a *de novo* review of the permit application to determine whether additional conditions or restrictions are needed to preserve and protect the quality of the receiving waters . . . ." *Id.*

16, 2002, well after AOT filed its application for renewal in December of 2001. AOT further asserts that at the time it filed its application for the Permit at issue, the technology-based controls for stormwater treatment were those contained in the 1997 Stormwater Practices. The Appellants agree.

The Board notes that the law in effect in December of 2001 requires compliance with the 1997 Stormwater Procedures “at a minimum.” Act 114 of 2000 § 3. *See generally Hannaford*, Mem. of Decision at 18 (June 29, 2001) (describing 1997 Stormwater Procedures as means or technique for establishing effluent limitations necessary for compliance with water quality standards).

The Appellants point out that under Act 114, ANR was authorized to issue individual and general permits for discharges of stormwater into impaired waters, provided those permits contained a schedule of compliance of no more than five years reasonably designed to attain water quality standards. The relevant language of Act 114 follows:

Where the secretary [of ANR] determines the water quality standards are not met in receiving waters due, in whole or in part, to collected stormwater runoff, the secretary may issue for existing discharges a general permit specific to the watershed or a permit for an individual project, but not a statewide general permit for such receiving waters. Any permit issued pursuant to this subsection shall include a compliance schedule of no longer than five years reasonably designed to assure attainment of the water quality standards in the receiving waters.

Act 114 § 3. The Appellants argue that the Permit at issue must comply with these provisions of Act 114. Based on *Hannaford*, the Appellants also maintain that the Permit must comply with the Vermont Water Quality Standards.

The Board recently reaffirmed and applied certain principles of *Hannaford* in *Morehouse Brook*, stating in pertinent part as follows:

the principle of *Hannaford* that ANR may not lawfully issue a permit for a new or increased discharge of pollutants of concern into impaired waters in the absence of a lawful cleanup plan remains sound. Indeed, it is a bedrock principle of Vermont law that every discharge into Vermont’s waters must conform with the Vermont Water Quality Standards and that a discharge permit cannot be issued for a new or increased discharge of pollutants of

concern into impaired waters in the absence of a valid plan reasonably assuring that the receiving waters will be able to assimilate these pollutant loads.

. . . Because the WIPs do not effectively address existing and new discharges, and because ANR has not developed a TMDL for the receiving waters, new or increased discharges of pollutants of concern into these waters are prohibited until an effective cleanup plan is in place.

. . . As set forth in *Hannaford*, [Findings of Fact, Conclusions of Law, and Order at 11 (Vt. Water Res. Bd. Jan. 18, 2002), *aff'd*, No. 280-02 CnCv (Chittenden Co. Super. Ct. Apr. 30, 2003)], the baseline for determining whether a permitted discharge is new or increased is the actual discharge from a particular site.

*Morehouse Brook* at 28-29. These principles apply to this appeal.

Based on the foregoing, the Board concludes that the Permit at issue in this appeal must comply with the 1997 Stormwater Procedures, at a minimum, to ensure compliance with the Vermont Water Quality Standards with respect to pollutants that are not causing or contributing to the impairment of the receiving waters. In addition, the Permit must include *either* a five-year schedule reasonably designed to bring the impaired receiving waters into compliance with the Vermont Water Quality Standards *or* provisions to ensure that the operational phase of the project will not discharge new or increased pollutants of concern into the impaired receiving waters. These requirements present questions of fact, which are reserved for the hearing on the merits.

**V. Order**

It is hereby **Ordered**:

1. AOT's motion for partial summary disposition is granted.
2. The first issue raised by the Notice of Appeal, that the Permit violates the terms of the WIPs for Bartlett Brook and Monroe Brook, is hereby dismissed.
3. The law in effect on December 12, 2001 shall govern the Board's review of the remaining issues in this appeal.

Dated at Montpelier, Vermont this 21<sup>st</sup> day of August, 2003.

WATER RESOURCES BOARD  
By its Chair

/s/David J. Blythe  
David J. Blythe

Concurring:

Lawrence H. Bruce, Jr., Member  
Michael J. Hebert, Member  
Jane Potvin, Member  
John D.E. Roberts, Vice-Chair