

**State of Vermont  
WATER RESOURCES BOARD**

**RE: CCCH Stormwater Discharge Permits,  
Docket Nos. WQ-02-11 and WQ-03-05, -06, -07 (Consolidated)**

**MEMORANDUM OF DECISION**

**I. PROCEDURAL BACKGROUND**

On July 22, 2003, the Appellants, Conservation Law Foundation and Friends of the Earth (CLF/FOE), filed a Motion to Dismiss, Remand, and Stay the Proceeding (Motion).

On July 25, 2003, a Chair's Scheduling Order was issued, establishing deadlines for reply and responsive memoranda.

On August 8, 2003, the Applicant, the Vermont Agency of Transportation (VTrans), and the Agency of Natural Resources (ANR), each filed Memoranda in Opposition to the Motion. CLF/FOE requested oral argument, but none of the parties filed responsive memoranda by the August 18, 2003, deadline set forth in the Chair's Scheduling Order.

A Notice of Oral Argument was issued on August 14, 2003. The Board convened oral argument at 2:00 p.m. on August 26, 2003, in Montpelier, Vermont. Those participating were: CLF/FOE, VTrans, ANR and the Greater Burlington Industrial Corporation (GBIC). The Board deliberated on August 26, 2003, and ordered that the Motion be denied.

**II. DISCUSSION**

The Motion seeks dismissal of Docket No. WQ-02-11, remand of "the application" to ANR for consideration of new analysis and a proposed new off-set plan contained in VTrans direct evidence, and a stay of all other appeals in this proceeding until such time as all of the operational- and construction-phase stormwater discharge permits may be re-consolidated for a hearing before the Board. At oral argument, CLF/FOE clarified (1) that it only sought remand and ANR review of the permit application involving Project operational discharges to Allen Brook, DEC Permit #1-1157; and (2) that it was requesting that DEC Permit #1-1157 be declared void by the Board.

In their respective Memoranda in Opposition and in oral argument before the Board, VTrans and ANR both challenged CLF/FOE's characterization of the direct evidence submitted by VTrans and also CLF/FOE's characterization of the law. VTrans, in particular, argued that the analysis and offset plan set forth in its application for DEC Permit #1-1157 support the conclusion that Project discharges to Allen Brook comply with the Vermont Water Quality

Standards (VWQS) with respect to sediment loadings. However, in response to CLF/FOE's statement of issues, VTrans offered supplemental analysis and an additional offset in the event that the Board concludes, after hearing all of the case, that phosphorus reductions must be achieved in order to support issuance of an operational discharge permit for the Allen Brook segment of the CCCH Project. Both VTrans and ANR argue that CLF/FOE have mischaracterized the law and, in particular, Board precedent on the question of when a remand is required.

The Board has considered the written and oral arguments and concludes that the Motion should be denied. First, the Board has voided and remanded permits only when notice of an application by ANR has been wholly deficient. See Re: George Carpenter, Jr., Docket No. SAP-99-06, Remand Order (Dec. 14, 1999). This is not the case here, and none of the cases cited by CLF/FOE require the Board to remand this matter.

Second, in the principle decision cited by CLF/FOE in support of remand, the facts clearly were different than those presented in the present case. In Re: Champlain Marble Company, Inc., Docket No. CUD-97-06, Memorandum of Decision and Remand Order (May 7, 1998), the Board was presented with a project that was substantially changed – both the pond configuration and the point of outlet were redesigned. This raised serious questions about whether the modified project would result in new or different impacts on the wetland resource at issue. The Board concluded that new project design, operations, and impacts should be considered by ANR, the agency with original jurisdiction. In this case, VTrans disputes CLF/FOE's assertion that it has adopted a new analysis and substantially changed the CCCH Project. Rather, VTrans argues that the Simple Method analysis performed by witness Nelson and the offset plan to convert 10 acres of tilled meadowland in the Town of Williston to untilled meadowland are actually *supplemental* in nature. VTrans asserts that its direct evidence in fact responds to an issue raised by CLF/FOE, namely, whether the CCCH Project discharge will result in a measurable and detectable increase in phosphorus in alleged violation of VWQS.

Given the parties' different characterizations of the evidence and also given that CLF/FOE have not demonstrated that they are entitled to partial dismissal and remand as a matter of law, the Board denies CLF/FOE's request for relief. As the Board recently noted in another case in which it denied a party's request for summary judgment, filed before the submission of all prefiled evidence and a hearing on the merits: "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." Re: Morehouse Brook, Englesby Brook, Centennial Brook, and Bartlett Brook, Docket Nos. WQ-02-04, -05, -06, and -07 (Cons.), Memorandum of Decision at 7 (Dec. 19, 2002). For the same reasons, and because the Board does not believe the evidence presented by VTRANS warrants a remand, the Board denies the present Motion.

**III. ORDER**

CLF/FOE's Motion to Dismiss, Remand, and Stay the Proceeding is hereby denied.

Dated at Montpelier, Vermont, this 28<sup>th</sup> day of August, 2003

Water Resources Board  
By its Chair

/s/David Blythe  
David J. Blythe, Esq.

Concurring:  
Lawrence H. Bruce, Jr., Member  
Michael J. Hebert, Member  
John D.E. Roberts, Vice Chair