

State of Vermont
WATER RESOURCES BOARD

Re: Village of Enosburg Falls
Docket No. WQ-03-03

MEMORANDUM OF DECISION

(Issued Apr. 21, 2004)

A motion for partial summary judgment is granted, the issuance of a discharge permit for a wastewater treatment facility is affirmed in part and reversed in part, and this appeal of that permit is dismissed as a matter of law.

I. Procedural Background

A. Prehearing Conferences and Prefiled Evidence

On January 31, 2003, the Vermont Agency of Natural Resources (ANR) issued renewal Discharge Permit No. 3-1234 (Permit) to the Village of Enosburg Falls (VOE). The Permit authorizes VOE to discharge from its Wastewater Treatment Facility (WWTF) to the Missisquoi River, which in turn drains into Lake Champlain. On February 28, 2003, Conservation Law Foundation (CLF) appealed the Permit to the Water Resources Board (Board). The appeal was timely filed pursuant to 10 V.S.A. § 1269. There were no cross-appeals. On March 6, 2003, the Board's Executive Officer acknowledged receipt of the appeal and deemed the appeal complete.

In its Notice of Appeal CLF provided only one reason for appealing: "The ANR Permit failed to require water quality based effluent limits (WQBELs) consistent with the Lake Champlain Phosphorus TMDL [LCPTMDL]." However, the Notice of Appeal goes on to list two issues. The first is whether ANR may lawfully issue a permit that authorizes phosphorus effluent limitations in excess of those called for by the LCPTMDL. The second issue is whether ANR can issue a permit that authorizes a discharge with a reasonable potential to cause or contribute to a violation of the Vermont Water Quality Standards. CLF's Notice of Appeal states the relief that CLF is seeking from the Board in the alternative. The first alternative is to "Deny the permit with specific direction to the ANR regarding appropriate consideration of this discharge." The second alternative request for relief is to "Issue a permit with phosphorus WQBELs that are consistent with the [LCPTMDL]."

The Board's then Chair, David J. Blythe, convened the first prehearing conference in this matter on March 26, 2003 and issued a Prehearing Conference Report and Order (First Prehearing Order) on April 11, 2003. The First Prehearing Order established that the parties to this appeal are ANR, CLF, and VOE. However, VOE objected to CLF's legal standing at the first prehearing conference. (First Prehearing Order at 4.) The Board overruled VOE's standing objections in a May 21, 2003 Memorandum of Decision. In response to objections to the First Prehearing Order that were filed by ANR, Chair Blythe issued an Order clarifying that the only pollutant at issue in this appeal is phosphorus. Chair's Order at 1 (June 6, 2003). The June 6, 2003 Chair's Order established a hearing date and a schedule for the parties to prefile their evidence.

After the Chair postponed the prefiling sequence to allow the parties to discuss settlement, the Board's Executive Officer, acting as a Referee appointed by the Chair, convened a second prehearing conference in this appeal to determine the status of settlement discussions and to determine how this appeal would proceed. The Chair issued a Second Prehearing Conference Report and Order (Second Prehearing Order) on October 6, 2003. The Second Prehearing Order established a new filing schedule and hearing date.

In accordance with the filing schedules issued by this Chair in this matter, ANR prefled its direct evidence, CLF prefled its direct evidence, ANR followed with prefled rebuttal evidence, and CLF then followed that with prefled surrebuttal evidence. VOE prefled a copy of its permit application but has otherwise left the defense of its Permit to ANR. ANR filed objections to parts of CLF's prefled evidence, and CLF filed responses to those objections. CLF filed proposed findings of fact and conclusions of law in this matter, and ANR filed a Motion for Partial Summary Judgment.

With its prefled rebuttal evidence for this appeal, ANR filed a Stipulation between ANR and VOE. The Stipulation maintains the Permit's technology-based effluent limitation for phosphorus of 0.8 mg/l as a monthly average, as required by 10 V.S.A. § 1266a. In addition, the Stipulation adds an annual total phosphorus limitation of 822 lbs to be consistent with the LCPTMDL.

The Board's Executive Officer, acting as Referee, convened a third prehearing conference in this matter on December 9, 2003. In a Third Prehearing Conference Report and Order issued December 29, 2003, the Chair adopted the Referee's rulings on ANR's evidentiary objections, established a schedule for VOE and CLF to file responses to ANR's Motion for Partial Summary Judgment and for ANR to file a reply, and cancelled the hearing on the merits.

B. ANR's Motion for Partial Summary Judgment, CLF's Opposition, ANR's Reply, and CLF's Request Regarding Material Facts

In its Motion for Partial Summary Judgment, ANR argues that because the LCPTMDL was not appealed, it cannot be collaterally attacked in this appeal. ANR therefore asserts that CLF's claims that the LCPTMDL's phosphorus wasteload allocation for VOE is insufficient must be dismissed. In its Motion, ANR argues that the LCPTMDL was appealable to the Board under state law and to federal district court under federal law. ANR contends that by failing to appeal the LCPTMDL, CLF cannot now challenge broad issues of general applicability relating to the LCPTMDL, at least in the absence of exceptional circumstances. ANR thus concludes that the only issue properly before the Board is whether the Permit contains the annual mass load limit for phosphorus as specified by the LCPTMDL (and that this issue has been resolved by the Stipulation between ANR and VOE). VOE filed a response that generally supports ANR's Motion for Partial Summary Judgment.

CLF filed an Opposition to ANR's Motion for Partial Summary Judgment. In its statement of material facts, CLF relied on its own prefiled testimony, without any supporting affidavits. CLF does not challenge the facts alleged by ANR. CLF asserts that it is not challenging the LCPTMDL in this proceeding. Relying on both state and federal law, CLF nevertheless maintains that the LCPTMDL cannot represent a shield that allows discharges that cause or contribute to violations of water quality standards and that effluent limitations more stringent than those derived from the LCPTMDL must be applied if necessary to protect water quality standards. CLF claims that VOE must discharge phosphorus at a concentration less than the water quality standard for phosphorus in order to avoid causing or contributing to a violation of the Vermont Water Quality Standards in Missisquoi Bay. CLF further asserts that while it is not attacking the LCPTMDL, ANR has failed to implement this TMDL. In addition, CLF argues that the Permit violates ANR's permitting regulations by failing to include daily average and maximum quantitative effluent limitations. CLF concludes that it has raised genuine issues of material fact and that ANR's Motion must therefore be denied.

In its Reply to CLF's Opposition, ANR points out that CLF failed to provide affidavits in support of its factual propositions. In this regard, ANR cites the Board's decision in *In re Morehouse Brook*, No. WQ-02-04, Mem. of Decision at 4 (Dec. 19, 2002), in which the Board determined that prefiled evidence cited in support of a motion for summary judgment cannot be considered unless supported by affidavits or cited as an admission by a party opponent. On the merits, ANR argues that the LCPTMDL is the plan to ensure compliance with the Vermont Water Quality Standards and that this compliance cannot be instantly achieved. ANR therefore reiterates its position that the only issue before the Board is whether the Permit contains the annual mass load limit for phosphorus provided by the LCPTMDL.

CLF filed a Request Regarding Material Facts to be Considered in Determining Summary Judgment Motion. In its Request, CLF argues on the basis of Board Rule of Procedure 36(F) that the Board may allow CLF to file an affidavit in support of its Opposition beyond the deadline that the Chair established for filing its Opposition. Attached to CLF's Request is an affidavit of CLF expert witness Robert Moore that attests that his prefiled testimony is "true and accurate to the best of my knowledge, information, and belief."

C. Oral Argument and Participating Board Members

Oral argument on ANR's Motion took place at the Board's conference room in Montpelier, Vermont on January 13, 2004 before the Board's then Chair, David J. Blythe, Vice-Chair John D. E. Roberts, and Member Michael J. Hebert. Member Lawrence J. Bruce, Jr. heard the oral arguments by conference phone. Chair Blythe's term expired February 28, 2004, and John F. Nicholls took over as Chair on March 1, 2004. Pursuant to 10 V.S.A. § 905(F), Chair Nicholls has appointed former Chair Blythe as an Acting Member for purposes of participating in the Board's decision on ANR's Motion for Partial Summary Judgment. Chair Nicholls took no part in this decision.

II. Issues

ANR's Motion for Partial Summary Judgment presents the following issues for decision:

- A. Whether the Board may consider unsworn prefiled evidence that is not supported by affidavits based on personal knowledge or cited as an admission by a party opponent in an opposition to a motion for summary judgment.
- B. Whether the Permit's failure to include an annual mass load limit for phosphorus consistent with the pollutant load allocations of the LCPTMDL has been resolved by the Stipulation between ANR and VOE.
- C. Whether a TMDL established by ANR is appealable to the Board, and if so, whether the TMDL or its accompanying implementation plan may be collaterally attacked in the course of a permit appeal filed after the time period for appealing the TMDL has passed.
- D. Whether the Permit must include phosphorus effluent limitations at or below the phosphorus criterion concentration for the Missisquoi Bay segment of Lake Champlain until such time as this segment complies with the Vermont Water Quality Standards, even though a TMDL for phosphorus has been established for this segment.
- E. Whether the Permit unlawfully fails to include daily average and maximum quantitative effluent limitations for phosphorus.

III. Standard of Review

The Board must grant a motion for summary judgment if there is no genuine issue of material fact and if the motion can be supported by a valid legal theory. The Board does not act as a finder of fact when it reviews a motion for summary judgment and must therefore resolve all inferences and doubt in favor of the nonmoving party. *See Morehouse Brook*, Mem. of Decision at 3 (construing Board Rule 36).

IV. Analysis

A. Unsworn Prefiled Evidence

In response to ANR's Motion for Partial Summary Judgment, CLF filed a statement of material facts that relied on the prefiled evidence of its own expert witness, Robert Moore, without any supporting affidavits. ANR filed objections to CLF's unsupported factual allegations, citing the Board's decision in *Morehouse Brook*. In *Morehouse Brook*, the Board held that prefiled evidence cited in support of a motion for summary judgment cannot be considered unless

supported by affidavits or cited as an admission by a party opponent. *Id.* at 4. CLF then filed an affidavit in which Mr. Moore states that his prefiled testimony and accompanying prefiled exhibits “are true and accurate to the best of my knowledge, information and belief.”

CLF argues that the Board may accept its late-filed affidavit on the basis of Rule 36(F), which provides in part that the Board “may permit affidavits to be supplemented or opposed by further affidavits.” This rule allows a party to file an affidavit in opposition to an affidavit previously filed or to supplement its own affidavits in reply to opposing affidavits. This rule does not allow a party to file essential affidavits beyond the deadlines established by a Chair’s Order. In any event, CLF’s late-filed affidavit is not acceptable because it is not based on personal knowledge. *See, e.g., Levy v. Town of St. Albans Bd. of Adjustment*, 152 Vt. 139, 145, 562 A.2d 1361, 1365 (1989).

CLF’s Request Regarding Material Facts is therefore denied, and its late-filed affidavit, its statement of material facts, and its prefiled evidence will be not be considered in this decision. The facts that ANR offers in support of its Motion for Partial Summary Judgment are not supported by affidavits. However, CLF does not dispute these facts, except for ANR’s characterization of CLF’s prefiled evidence. Accordingly, for purposes of this decision, the Board accepts as true ANR’s factual allegations, except for ANR’s characterization of CLF’s prefiled evidence, and also accepts into the record for this decision the documents upon which ANR relies in its Motion for Partial Summary Judgment.

B. Consistency of the Permit with the LCPTMDL

CLF’s Notice of Appeal asserts, among other things, that the Permit unlawfully fails to include WQBELs consistent with the LCPTMDL. The Board has recently held in a case that presented a nearly identical issue “that state and federal law require that a discharge permit be consistent with provisions of an approved TMDL that is clearly applicable to the discharge.” *In re City of South Burlington and Town of Colchester*, No. WQ-03-02, Findings of Fact, Conclusions of Law, and Order at 10 (Dec. 29, 2003). In the instant appeal ANR and VOE have filed a Stipulation requesting the Board to adopt the annual mass phosphorus load of 822 pounds per year that the LCPTMDL establishes for VOE’s WWTF. The Board accepts this Stipulation and orders ANR to modify the Permit accordingly.

C. Administrative Finality of the LCPTMDL

Although ANR and VOE have agreed with the allegation in CLF’s Notice of Appeal that the Permit must be consistent with the LCPTMDL, ANR’s Motion for Partial Summary Judgment asks the Board to hold that CLF may not collaterally attack the LCPTMDL in this appeal. CLF states repeatedly in its Opposition that it is not challenging the LCPTMDL in this proceeding. CLF does contend in its Opposition to ANR’s Motion that the LCPTMDL has not been properly implemented. However, as set forth above, CLF has not properly supported this allegation with affidavits. Because the issues of whether a TMDL is appealable to the Board or whether a

TMDL or its implementation may be challenged in a permit appeal are not before the Board or not properly raised, and because this appeal is dismissed on other grounds, the Board does not reach these issues in this decision.

D. Effluent Limitations Pending Full Implementation of a TMDL

In its Motion for Partial Summary Judgment, ANR contends that the only question in this case is whether the Permit complies with the wasteload allocations of the LCPTMDL. As set forth above, CLF has failed to raise a genuine issue of material fact in its Opposition to ANR's Motion. However, the failure of CLF to support its factual allegations with affidavits does not necessarily defeat CLF's legal arguments.

CLF argues that a discharge must include not only effluent limitations consistent with a valid TMDL, but also more stringent effluent limitations as may be needed until the TMDL is fully implemented and water quality standards have been attained in the receiving waters. In this case, implementation of the LCPMDL is not expected to attain in-lake phosphorus criteria for many years. CLF contends that merely requiring phosphorus effluent limitations in the Permit to be consistent with the LCPTMDL would unlawfully allow VOE's WWTF to continue to cause or contribute to the existing violation of the water quality standards in Missisquoi Bay while implementation of the LCPTMDL is underway. According to CLF, a TMDL cannot authorize discharges that will cause or contribute to a violation of water quality standards, and stricter effluent limitations than those called for by a TMDL are necessary as long as the receiving waters fall short of attaining applicable uses and criteria. CLF reasons that even if a valid TMDL is in place, discharges of pollutants of concern from the WWTF must be decreased through treatment or offsets to a concentration less than the water quality criteria until the water quality standards have been attained in the receiving waters.

The Board rejects CLF's argument that a TMDL must be fully implemented and the receiving waters restored to compliance with water quality standards before discharges into those waters that are consistent with the TMDL may be permitted. A TMDL and its accompanying implementation plan provide the means of establishing WQBELs in discharge permits. *In re Hannaford Bros. Co.*, No. WQ-01-01, Findings of Fact, Conclusions of Law, and Order at 12 (Jan. 18, 2002); *In re Morehouse Brook*, No. WQ-02-04, Findings of Fact, Conclusions of Law, and Order at 22 (June 2, 2003). In the absence of a necessary TMDL, appropriate effluent limitations for the numerous discharges of pollutants of concern causing or contributing to a water quality standards violation cannot be reasonably established. The idea that effluent limitations for discharges of pollutants of concern into impaired waters cannot be justified by a valid TMDL defies the logic of water quality based permitting and would render the TMDL process meaningless. The Board concludes that CLF's efforts to require all discharges of pollutants of concern into impaired waters to contain effluent limitations more stringent than those required by an applicable TMDL find no support in the law. *See generally In re Stormwater NPDES Petition*, No. WQ-03-17, Mem. of Decision at 3-10 (Vt. Water Res. Bd. Apr. 1, 2004) (describing complementary structure of Vermont and federal water pollution control laws).

E. Daily Average and Maximum Quantitative Effluent Limitations

ANR's Water Pollution Control Permit Regulations provide in part that ANR "shall, for each issued permit, specify average and maximum daily quantitative effluent limitations for the level of pollutants in the authorized discharge in terms of weight (except pH, temperature, radiation, and any other pollutants not appropriately expressed by weight)." § 13.4.c. CLF argues in its Opposition to ANR's Motion that the Permit unlawfully fails to contain daily average and maximum quantitative effluent limitations as required by these regulations. CLF alleges that the Permit's failure to include daily effluent limitations represents one of the reasons why the Permit will unlawfully cause or contribute to a water quality standards violation, even if the Permit is made consistent with the LCPTMDL. Because the Board rejects CLF's theory that the Permit must contain effluent limitations more stringent than those supported by the LCPTMDL as a matter of law, the Board need not consider whether the Permit must contain daily effluent limitations to protect water quality above and beyond the protection that implementation of the LCPTMDL provides.

CLF's Opposition to ANR's Motion arguably characterizes the absence of daily effluent limitations in the Permit not only as an aspect of its position that the Permit unlawfully authorizes water quality standards violations, but also as a distinct violation of the technical requirements of ANR's regulations. CLF's Notice of Appeal does not identify the absence of daily effluent limitations in the Permit as an issue or reason for the appeal in accordance with Board Rule 19(A)(4). The scope of appeals to the Board "shall be limited to those issues specified in the notice of appeal unless the Board determines that substantial inequity or injustice would result from such a limitation." Board Rule 19(C). Accordingly, the absence of daily effluent limitations in the Permit as a discrete issue has been waived.

V. Order

Accordingly, it is hereby **Ordered**:

1. The November 3, 2003 Stipulation between ANR and VOE is approved.
2. ANR's November 21, 2003 Motion for Partial Summary Judgment is granted.
3. CLF's January 5, 2004 Request Regarding Material Facts to be Considered is denied.
4. This appeal is dismissed as a matter of law.
5. ANR's issuance of renewal Discharge Permit No. 3-1234 to the Village of Enosburg Falls on January 31, 2003 is affirmed in part and reversed in part. This Permit is modified by deleting Special Condition 2 of the Permit as issued by ANR and substituting the following for the deleted language: "An annual phosphorus load limit of 822 pounds (0.373 metric tons)." The Permit is also modified by adding an annual limit of 822 pounds

of phosphorus to the Effluent Limits Table of Special Condition 1 of the Permit. All other conditions of the Permit are affirmed.

6. Jurisdiction is returned to ANR.

Dated at Montpelier, Vermont this 21st day of April, 2004.

WATER RESOURCES BOARD
By its Vice-Chair

/s/ John D. E. Roberts

John D. E. Roberts, Vice-Chair

Concurring:

David J. Blythe, Acting Member
Lawrence J. Bruce, Jr., Member
Michael J. Hebert, Member