

VERMONT SUPREME COURT
APPELLANTS' DOCKETING STATEMENT

Appealed From:

In Re: In re Sheffield Wind Project Amended Individual Stormwater Permit (No. 5535-INCD.A) (Appeal of Brouha et al.)	Superior Court, Environmental Division Trial Court Docket No. 252-10-08 Supreme Court Docket No. 2011-046
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A. Court/Counsel

- 1) Trial Judge: Merideth Wright
- 2) Trial Counsel for Appellants: Stephanie J. Kaplan, Jared M. Margolis
- 3) Trial Counsel for Applicants-Appellees: Ronald Shems, Geoff Hand, Elizabeth Catlin.
- 4) Counsel in Supreme Court for Appellants: Stephanie J. Kaplan
- 5) Counsel in Supreme Court for Applicants-Appellees: Unknown
- 6) Please list other parties and their counsel: Trial Counsel for Agency of Natural Resources: Judith Dillon
- 7) Dates of Decisions Being Appealed: September 29, 2009 (summary judgment); October 19, 2009 (remand); August 26, 2010 (decision on the merits); and January 6, 2011 (motion to alter).
- 8) Date Notice of Appeal Filed: February 7, 2011

B. Criminal Cases N/A

C. Brief Description of Nature of Case and Result
(Include a summary of facts and the procedural history.)

This is an appeal from decisions of the Vermont Superior Court, Environmental Division, involving a federal NPDES stormwater discharge permit for the construction of an industrial-scale wind electric generating operation consisting of 16 turbines spread across several ridgelines in Sheffield, Vermont. The Appellants are interested persons who live in the area of the proposed project and whose interests will be affected should

the headwater streams located on the steep slopes of the mountains not be adequately protected against degradation from the discharge of sedimentation during construction of the project.

The Agency of Natural Resources (ANR) issued an individual stormwater discharge permit for construction of the project. The construction permit issued by ANR is a federal permit issued pursuant to the National Pollution Discharge Elimination System under the Clean Water Act and is referred to as an NPDES permit.

The federal Environmental Protection Agency (EPA) has delegated to the State of Vermont the authority to administer the federal Clean Water Act within the parameters of the requirements of the federal law. Pursuant to this delegation, Vermont administers two programs: the federal NPDES program that governs construction permits for stormwater discharges, and the state water pollution control program that governs operational permits that are required for the long-term operation and maintenance of a project that generates stormwater.

The Appellants challenged ANR's issuance of the construction permit for this project because they believed that the permit was not protective of the pristine water quality of the headwater streams and the existing uses, which include fishing for the native brook trout that inhabit these streams. The Appellants also challenged the failure of ANR to require the Applicants-Appellees to comply with the Vermont Water Quality Standards (VWQS), despite the fact that there is no dispute that applications for a stormwater discharge permit must comply with the VWQS.

An important part of the VWQS is the Anti-Degradation Policy that is required under both federal and state law. The Anti-Degradation Policy requires that existing instream uses and the level of water quality necessary to protect those uses must be maintained and enhanced. It also requires compliance with standards and limits for various chemical, physical, and biological parameters.

In order to comply with the VWQS, the existing uses and the quality of the waters must be identified before a discharge permit may be issued, and this requires establishing baselines for the existing uses and existing chemical, physical, and biological qualities of the headwater streams on the site. Such benchmarks are necessary to determine during the life of the permit whether the VWQS including the Anti-Degradation Policy are being met.

Despite these requirements, ANR did not require the collection of any baseline data prior to issuing a permit authorizing the discharge of stormwater into the streams during the construction of the project, estimated to take approximately one year, and did not include in the permit requirements for monitoring the streams during construction to ensure that the water quality of the streams would be maintained and enhanced as required by the VWQS.

On appeal to the Environmental Court, the Appellants filed a motion for summary judgment that included, inter alia, arguments that summary judgment should be granted because of the lack of any baseline data and the lack of any requirement that the Applicants-Appellees demonstrate compliance with the VWQS during construction. The Appellants also argued that the Applicants-Appellees have the burden of proving that the project complies with the VWQS. The court ruled that 10 V.S.A. § 1264 provides that the use of Best Management Practices (BMPs) creates a presumption of compliance with the VWQS and puts the burden of proving non-compliance with the VWQS on other parties. The court mistakenly believed that the presumption of compliance applies to federal NPDES construction permits rather than only to operational permits issued pursuant to the state program and not to NPDES construction stormwater permits. The court also ruled that the presumption of compliance does not extend to the need for a baseline determination of existing uses and existing water quality, and that the Applicants-Appellees had to provide such information.

Despite this, and despite the undisputed fact that when ANR had reviewed the application there had been no baseline data provided and therefore ANR had not had an opportunity to determine appropriate protocols or parameters for gathering baseline data on the streams, the court refused to remand the application to ANR despite the Appellants' arguments that this was within the scope of ANR's duties and not the Environmental Court's in the first instance.

The court's denial of the Appellants' motion to remand to ANR for ANR to establish protocols for the Applicants-Appellees to use in identifying the existing uses and water quality of the affected streams, and then to analyze the data once it is collected as part of ANR's review of the application for a permit, was in error and inconsistent with existing precedent. It was error for the court in a de novo appeal to take it upon itself to determine the parameters for establishing and interpreting baseline data when these are matters best understood and analyzed by scientists with specific expertise rather than by a court of law.

A trial was held over the course of 13 days in November and December 2009 and January 2010. On August 26, 2010, the court issued a decision on the merits, ruling that the application complied with the applicable laws and rules and affirming the permit issued by ANR with a few minor modifications. The Appellants filed a timely motion to alter the decision. On January 6, 2011, the court issued a decision denying the motion to alter.

The court's decision on the merits contained a number of plain errors. Among these is the court's erroneous ruling that the clearly mandatory provisions in the handbook for construction permits entitled the *Vermont Standards & Specifications for Erosion Prevention and Sediment Control* are merely guidelines. Another plain error was the court's insistence that only 65.6 of the 83.2 acres located within the flagged limits of construction will be disturbed during construction, in spite of the Applicants-Appellees' own admission that construction could take place anywhere within the 83.2 acres. This

error is significant because the applicant's BMPs were designed to protect the water quality on only 60.5 acres and since the actual size of the project is more than 25% larger than stated in the application, it should be remanded to ANR for ANR to review the larger project and apply the rules and standards applicable to a project of that size.

The most significant error was the court's ruling that the Applicants-Appellees do not need to demonstrate compliance with any of the parameters required in the VWQS including the Anti-Degradation Policy, as long as the Applicants-Appellees implement BMPs and comply with the permit. The court's decision completely eviscerates the VWQS. While implementation of BMPs is an important means of controlling discharges of sediment into the streams, it cannot substitute for monitoring during construction to ensure that the chemical, physical, and biological parameters are being maintained and enhanced as required by the VWQS. Without monitoring of the affected streams during construction, it is impossible to determine whether the existing uses and level of water quality necessary to protect those uses are being maintained and protected; it is impossible to determine if the pH, temperature, and flow of the streams are within the mandatory limits set by the VWQS; and it is impossible to determine whether the aquatic biota and native brook trout and their habitat are being protected from sedimentation and accelerated runoff that is likely to occur during construction of this project on more than 80 acres of fragile soils on steep, high elevation slopes.

Thus without monitoring of the streams during construction, there is no way to know if the provisions of the VWQS and the Anti-Degradation Policy that allow no degradation of the streams are being complied with. The court's disregard of the plain language of the VWQS and the federal Clean Water Act in the context of stormwater runoff has far reaching implications for all stormwater permits and for water quality in the State of Vermont. And because there is no provision in the law allowing exemptions for particular types of stormwater discharges from the need to comply with the VWQS, the court has far exceeded its authority in disregarding what is plainly required under the law.

No transcripts are necessary for this appeal because most of the issues raised are errors of law which do not require factual evidence, and any evidence necessary to support the remaining issues is available in the exhibits or other documents filed with the Environmental Court.

D. Statement of Issues To Be Raised on Appeal

1. Whether the court erred in not granting summary judgment to Appellants on the issue of whether the rebuttable presumption of compliance with the Vermont Water Quality Standards in 10 V.S.A. § 1264 applies to this federal NPDES individual construction stormwater discharge permit.

2. Whether the court erred in not granting summary judgment to Appellants on the issue of whether the Applicants-Appellees could or did comply with the VWQS when they failed to provide ANR with critical information that was required by the Anti-Degradation Policy of the VWQS including identification of existing and designated uses and baseline studies of existing water quality parameters of the affected streams.

3. Whether the court erred in not granting summary judgment to Appellants on the issue of whether the Applicants-Appellees could or did comply with the standards and limits for various chemical, physical, and biological parameters required by the VWQS when they provided ANR with no information necessary to demonstrate that these standards and limits would be met during construction.

4. Even if the rebuttable presumption of compliance of 10 V.S.A. § 1264 is determined to apply to this permit, whether the court erred in ruling that use of BMPs is intended to substitute for actual demonstration of compliance with the Vermont Water Quality Standards.

5. Having ruled in its decision on summary judgment dated September 29, 2009 that a benchmark of existing uses and existing quality of the receiving waters must be established prior to issuance of a stormwater construction permit, whether the Environmental Court erred in not remanding the case to ANR to establish a protocol for collecting data and then to evaluate the data and consider it in its review of the application for a stormwater discharge permit.

6. Whether the court erred in not properly interpreting and applying the Vermont Water Quality Standards – including the Anti-Degradation Policy - to this permit application.

7. Whether the court erred in ruling that Part 3 of the Vermont Standards & Specifications for Erosion Prevention and Sediment Control does not contain mandatory provisions applicable to individual stormwater construction permits.

8. Whether the court erred in ruling that only 65.6 acres of the 83.2 acres located within the flagged limits of construction will be disturbed during construction.

9. Whether the court's decision dated August 26, 2010 approving issuance of a permit and its decision dated January 6, 2011 denying the Appellants' motion to alter should be reversed to the extent the decisions were based on the court's mistaken interpretation of 10 V.S.A. § 1264 with respect to the presumption.

E. Copy of Decision Appealed from to be Attached

Was there a written decision? (Yes or No) Yes

Attached: Decision and Order on Pending Motions dated 9/29/09
 Decision and Order on Pending Motions dated 10/19/09
 Decision and Order dated 8/26/10
 Decision and Order on Motion to Alter dated 1/6/11

F. Inventory of Hearings; Transcripts Ordered

The appellant must list every recorded hearing which was held in this matter, including the date, the type of hearings (e.g., pretrial, suppression, status conference, trial) and the stenographer for each. If the hearing was tape recorded, so state instead of naming the stenographer. Attach additional pages if needed. (NOTE: Transcript(s) must be ordered within ten days of notice of appeal; the attorney ordering the transcript(s) must serve copies of each order upon the clerk of the Supreme Court and all parties, as well as the trial court. See V.R.A.P. 10(b)(1).)

Date of hearing	Length of hearing days/hours	Type of hearing	Reporter's name (or "Tape")	Transcript necessary for appeal?*	Date Transcript ordered
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Merits hearings were held on the following dates: 11/5/09, 12/2/09, 12/3/09, 12/4/09, 12/9/09, 12/14/09, 12/15/09, 12/17/09, 12/22/09, 12/28/09, 1/6/10, 1/7/10, 1/12/10.

All of the hearings were tape recorded.

No transcripts are necessary for the appeal.

Does the appellee agree as to which transcript(s) are essential for the appeal?
 Yes No

If not, indicate name(s), date(s), and reporter(s) of additional transcript(s) needed.

G. Conference; Expedited Resolution

1) Do you request a conference with a staff attorney to discuss either settlement or expedited resolution? No
X

(Most conferences are done by telephone.)

2) Is this matter appropriate for expedited disposition by a three-justice panel pursuant to V.R.A.P. 33.1 and the criteria set forth in V.R.A.P. 33.2? No
X

Please explain.

The legal issues on appeal concerning the proper interpretation of the Vermont Water Quality Standards are matters of wide public interest because they affect the extent to which Vermont's streams are protected from pollution due to stormwater discharges.

Submitted by: Carol Brouha, Paul Brouha, Greg Bryant, Don Gregory, the King George School, Robert Tuthill, and David Zimmerman

Dated this 21st day of February, 2011.

Stephanie J. Kaplan

Stephanie J. Kaplan, Esq.
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