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Agency of Natural Resources

September 13, 2012

Susan M. Hudson, Clerk
Vermont Public Service Board
112 State Street
Montpelier, VT 05620-2701

Re: Lowell Mountain Wind Project
Docket No. 7628A-E

Dear Mrs. Hudson:

Enclosed please find for filing in the above captioned matter, the original and eight copies of the Vermont Agency of Natural Resources' Reply Memorandum.

Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Judith L. Dillon".

Judith L. Dillon
Senior Environmental Litigation Attorney

cc: Service List

STATE OF VERMONT
PUBLIC SERVICE BOARD

In re: Lowell Mountain Wind Project
(Appeal of Energize Vermont, Inc., et al)

) Public Service Board
) Docket Nos. 7628 A-E
)

CERTIFICATE OF SERVICE

I, Tina Morgan, certify that on September 13, 2012, I served a copy of ANR's *Reply Memorandum*, in the above captioned matter, to the following interested persons, by electronic mail and by U.S. Mail postage prepaid:

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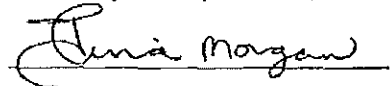
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Dated at Waitsfield, Vermont this 13th day of September, 2012



Tina Morgan, Admin. Assistant

STATE OF VERMONT
PUBLIC SERVICE BOARD

Lowell Mountain Wind Project)
Stormwater Discharge Permit #6216-INDC)
Stormwater Discharge Permit #6216-INDC.1))
Stormwater Discharge Permit #6216-INDS) Docket No. 7628A-E
Wetland Permit #2008-364¹)
Water Quality Certification)
Appeal of Energize Vermont, Inc., et.al.)

REPLY MEMORANDUM OF THE VERMONT AGENCY OF NATURAL RESOURCES

The Vermont Agency of Natural Resources, by and through its attorney, Judith L. Dillon,
Replies to Appellants' Proposed Findings of Fact and Conclusions of Law.

SUMMARY

For the reasons presented in the Proposed Findings of Fact and Conclusions of Law filed by ANR and GMP, the Board should affirm the permits under appeal. Appellants have failed to rebut the presumption created by the Legislature and applied by the Environmental Division of the Superior Court that a permit that implements BMPs will comply with the Vermont Water Quality Standards. Appellants have failed to present any testimony to rebut the testimony and findings of the ANR 401 Panel that there are reasonable assurances that the project will comply with the Vermont Water Quality Standards. Accordingly, the Board should affirm the permits.

NPDES Construction Permit

The EPSC Plans contain sufficient information to allow for the installation of sediment traps

¹ The wetland permit and INDC.1 permit appeals have been dismissed.

Appellants claim' that the project fails to comply with the VSS because the information regarding sediment traps is not contained in a "summary table," is premised on its misreading of the standard for sediment traps. The VSS does not require that information regarding sediment traps be shown in a summary table format. The requirement for a summary table format only applies when the plans do not provide all the information necessary to properly construct and maintain the sediment trap structure. "If the drawings are such that this information cannot be delineated on the drawings, then a table shall be developed." GMP-JAN-A13, at 5.24. After identifying when additional information is needed, the VSS outlines the remedy or method for curing the inability to provide the necessary information, through a summary table format. The VSS outlines the information required for that format. If every plan required a summary table format for each sediment trap, there would be no need for the requirement that "[e]ach trap on a plan shall indicate all the information necessary to properly construct and maintain the structure." The Board must avoid such a construction that would render this sentence as well as the sentences preceding and following it ineffective or superfluous. *See Murdoch v. Town of Shelburne*, 2007 VT 93, ¶ 5, 182 V. 587.

The testimony of Kevin Burke demonstrates that the sediment traps are delineated on the plans and that the plans contain sufficient information to construct and maintain these structures. Accordingly, GMP was not required to provide the information about the sediment traps in a summary table format.

The October 5, 2011, Stop Work Order does not support Appellants claim that the EPSC Plans lack the requisite information to allow the contractor to install the required stormwater treatment practices. As Kevin Burke testified, the EPSC Plans contain the necessary information

on the stormwater features and when and how they should be installed. The contractor, however, ignored the directives of the plan and proceeded with construction without first installing some of the permanent stormwater features which were to serve as temporary sedimentation traps or basins during construction. The information provided was sufficient. The contractor, unfortunately, failed to conform to the Plan. This failure was identified by ANR and corrected through the Stop Work order.

Operational Permit

The Plan of study for the level spreaders complies with the New-Design Alternative System standard, Section 2.5.2, of the Vermont Stormwater Management Manual.

Appellants claim that the plan of study for the level spreaders is insufficient because the proposed monitoring locations are too far downstream from a project discharge point to ensure compliance with the Vermont Water Quality Standards. Appellants confuse the water quality monitoring component of the plan of study required under the individual stormwater permit with the water quality monitoring required as a condition of the 401 Water Quality Certification (WQC). The discharge points discussed by Mr. Nelson in the transcript excerpts referenced by Appellants and in the cited exhibits are those related to the water quality monitoring for the 401 Water Quality Certification. The Water Quality Monitoring Report introduced as GMP-Redirect 1, is the report prepared in compliance with Condition G. GMP-JAN- E6.

The WQC required GMP to submit a plan for biological monitoring for fish and macroinvertebrate populations. GMP provided such a plan that also included temperature monitoring in Roger's Brook, Ace Brook, and the Eastern Branch of the Missisquoi River (EBMR), and stream geomorphic assessments in selected reaches within the EBMR and Ace Brook watersheds. GMP-ANR-E13, at 2. GMP selected the WQC sampling locations with the

assistance of ANR/DEC. The sampling sites were selected to provide sufficient sampling populations to be assessed using ANR protocols and quantitative criteria. Prefiled Testimony of ANR 401 Panel at 16.

Appellants' confusion regarding the level spreader plan of study and its purpose should not distract the Board from finding that the treatment practice complies with the VSMM and the VWQS.

Section 2.5.2 of the VSMM requires a study plan to ensure the performance of level spreader design. Contrary to Appellants claim, the water quality monitoring and sampling locations include water quality monitoring locations at the outfall of the discharge, within the vegetated buffer, and within the receiving stream or wetland in a location that is adjacent to where project-related runoff is entering the system. GMP-JAN-C10, at 6. Under the plan, GMP must analyze the collected water quality samples for TSS and TP to assess removal of these pollutants. The plan of study proposed by GMP satisfies the 2.5.2 requirements.

The monitoring and oversight on the project will ensure that if the level spreaders are not performing as modeled and designed, any deficiency will be identified early. GMP will be required to repair or modify as appropriate the stormwater management systems on site to continue to protect water quality. The protection of water quality is a continuing obligation of the permit. Burke Tr. at 154.

Operational Permit

Channel Protection Alternative Design Standard

The alternative design standard is available "for projects that have disconnected the majority of impervious surfaces" to avoid routing to a detention facility. Disconnection and

avoidance of constructed detention facilities promotes the goal of managing stormwater runoff through use of practices that mimic the natural hydrology of the site. Burke Tr. at 143. Appellants urge the Board to interpret the phrase “per use of the credits in Section 3” as mandating use of the voluntary credits in Section 3 as a prerequisite to the alternative design standard. Such an interpretation violates the rules of statutory construction, undermines the voluntary credit program, defeats the purpose of disconnection, and would render the new-design alternative provision meaningless.

The VSMM was drafted by the Agency and “absent a compelling indication of error” the Board must defer to the Agency’s interpretation of its own rule. *See In re Appeal of Electronic Industries Alliance*, 2005 VT 111, ¶7, 179 Vt. 539, cited in, *In re Sheffield Wind Project*, Decision and Order on Multiple Motions, Docket No. 252-10-08, at 3 (Vt. Envtl. Ct. Sept. 2009). Kevin Burke testified that the Agency interprets the alternative design standard as applying to designs that have disconnected the majority of impervious surfaces to avoid routing to a constructed detention facility. The Agency does not interpret the phrase “per use of the credits in Section 3” as requiring compliance with the voluntary management credits specifically listed in Section 3 of the Manual. The Agency’s interpretation promotes disconnection and stormwater practices that more closely mimic the natural hydrology of the area. The Agency’s interpretation and the use of the level spreader design is consistent with the Legislative finding that the management of stormwater may be best attained by a process that “relies on structural treatment only when necessary.” 10 V.S.A. § 1264(a).

Appellants’ interpretation of the alternative design standard for channel protection also conflicts with general rules of statutory and regulatory construction. In reviewing the alternative design standard, the Board must give effect to the intent of the drafters and endeavor to

harmonize the language with the statute or rule a whole. See *In re Preseault*, 130 Vt. 343, 348 (1972). The Board must avoid an interpretation that leads to irrational or absurd results odds with the purpose of the statute or rule. See *In re Carroll*, 2007 VT19, ¶ 9, 181 VT. 383; *Judicial Watch, Inc. v. Slate*, 2005 VT 108. New-design alternative STPS make use of the alternative design standard for CPV. Appellants' interpretation would disqualify new design alternatives and render that provision of the manual meaningless and would stifle new developments in stormwater management. The Board should avoid such an absurd and irrational result.

The use of level spreaders is consistent with Section 1-04(2) of the VWQS²

Kevin Burke testified that detention basins would provide no greater water quality benefits or channel protection than level spreaders. Burke Tr. at 154-55. The construction of detention basins and the removal of the level spreaders would require additional clearing and disturbance in the watershed. Accordingly, detention basins would not have a lesser impact on water quality. Mr. Burke also testified that based on his observations of the Sheffield wind site, it would not be reasonable to replace the level spreaders on the site with detention basins. *Id.* at 155. The use of level spreaders, therefore, satisfies Section 1-04(A) of the VWQS.

Water Quality Certification

Appellants failed to introduce any evidence in support of their appeal of the 401 water quality certification. The Agency panel has determined that the project will protect the existing high

² Under the legislative presumption, the project complies with VWQS, which includes Section 1-04. See *In re Sheffield Wind Project*, Decision and Order on Multiple Motions, Docket No. 252-10-08, (Vt. Envtl. Ct. Sept. 2009). GMP does not need to demonstrate that the project complies with Section 1-04 or any specific section of the VWQS, because Appellants have failed to rebut the presumption of compliance.

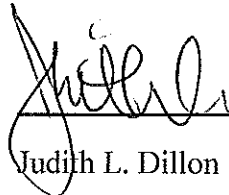
quality waters and will maintain and protect all designated and existing uses. The Agency has testified that the project complies with the anti-degradation policy of the VWQS. The Agency concluded that there are reasonable assurances that the project will not violate the water quality standards. Accordingly, the Board should affirm the WQC.

CONCLUSION

For the reasons stated above and in ANR and GMP's Proposed Findings of Fact and Conclusions of Law, ANR respectfully requests and recommends that the Board affirm the Permits on appeal.

Respectfully submitted this 13th day of September 2012, at Fayston, Vermont.

VERMONT AGENCY
OF NATURAL RESOURCES



Judith L. Dillon