FILED

OCT 06 2016

VERMONT
SUPERIOR COURT
ENVIRONMENTAL DIVISION

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
Docket No. 2-1-13 Vtec

In Re: Rutland MS4 Designation Appeal

MOTION AND ORDER TO REMAND THE AGENCY OF NATURAL RESOURCES' DESIGNATION OF THE CITY OF RUTLAND

The Secretary of the Vermont Agency of Natural Resources (Agency), by and through its counsel, respectfully requests that, in the event the Court approves the "Final Stipulation, Settlement Agreement, and Order Between the Agency of Natural Resources and City of Rutland Regarding Docket No. 2-1-13 Vtec" (the "Agreement"), the Court remand the Agency's designation of the City of Rutland (City) as a regulated small municipal separate storm sewer system (MS4), dated December 5, 2012 (the "Designation").

Pursuant to V.R.E.C.P. 5(i), the Court, at any time prior to judgment and at the request of the tribunal appealed from, may remand the case for the tribunal's reconsideration. This matter arises from the City's appeal of the Designation, and the Agreement represents the Parties' resolution of the appeal. Therefore, if the Court approves the Agreement, the Agency respectfully requests that the Court remand the Designation to the Agency. Upon remand, the Agency shall withdraw the Designation, and the Agency and the City thereafter shall proceed in accordance with the terms of the Agreement.

DATED at Montpelier, Vermont this 3rd day of October, 2016.

VERMONT AGENCY OF NATURAL RESOURCES

By: _____
Elizabeth B. Schilling, Esq.
Department of Environmental Conservation

So ORDERED: _____ Date: 10.7.2016.
Thomas S. Durkin
Environmental Judge

FILED

OCT 06 2016

VERMONT
SUPERIOR COURT
ENVIRONMENTAL DIVISION

STATE OF VERMONT

SUPERIOR COURT — ENVIRONMENTAL DIVISION
Docket No. 2-1-13 Vtec

In Re: Rutland MS4 Designation Appeal

FINAL STIPULATION, SETTLEMENT AGREEMENT, AND ORDER BETWEEN THE AGENCY OF NATURAL RESOURCES AND CITY OF RUTLAND REGARDING DOCKET NO. 2-1-13 Vtec

This matter involves the City of Rutland's appeal of the Agency of Natural Resources' December 5, 2012 designation of the City of Rutland as a regulated small Municipal Separate Storm Sewer System (regulated small MS4). The Agency of Natural Resources and the City of Rutland hereby agree to the dismissal of this appeal with prejudice subject to and in accordance with the following.

The Parties

1. The Vermont Agency of Natural Resources (Agency) is a state agency with various offices in Vermont.

2. The City of Rutland (City) is a Vermont municipal corporation.

Background

3. The Agency first identified Moon Brook as not meeting the Vermont Water Quality Standards (VWQS) in 1992 when it listed Moon Brook as impaired for aquatic life support on the State's "303(d) List of Impaired Waters, Part A: Impaired Surface Waters in Need of TMDL."

4. In 2004, the Agency clarified Moon Brook's listing on Part A by specifying stormwater as the principal cause of impairment in the Brook.

5. In 2005, the City requested that the Agency reconsider its decision to keep Moon Brook on the 303(d) List, Part A.

6. In October 2008, the Agency established a stormwater total maximum daily load (TMDL) for Moon Brook. The U.S. Environmental Protection Agency (EPA) approved the stormwater TMDL for Moon Brook on February 19, 2009 (the "Stormwater TMDL").

7. In 2008, the City submitted comments to the Agency contesting the Stormwater TMDL.

8. Since 2005, the City and the Agency have not agreed on the cause of the impairment of Moon Brook from the outlet of Combination Pond downstream to Moon Brook's confluence with Otter Creek (said portion herein referred to as "Moon Brook"). The Parties also have disagreed about the proper reference condition used to assess Moon Brook from its confluence with Otter Creek upstream to mile 1.5 (the "Lower Reach of Moon Brook") and of that portion of Mussey Brook that is located within the City (said portion herein referred to as "Mussey Brook"). Finally, the Parties have disagreed about the proper selection and application of the appropriate Biocriteria for Fish and Macroinvertebrate Assemblages in Vermont Wadeable Streams and Rivers (the "Macroinvertebrate Biocriteria") to the Lower Reach of Moon Brook and to Mussey Brook.

9. On December 5, 2012 the Agency issued the final NPDES General Permit 3-9014 for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems (MS4 General Permit). The MS4 General Permit requires municipalities that must comply with the permit, regulated small MS4s, to develop, implement, and enforce stormwater management programs (SWMP) designed to reduce the discharge of pollutants from their small municipal separate storm sewer systems (MS4) to the maximum extent practicable, to protect water quality, and to satisfy the appropriate water quality requirements of the federal Clean Water Act. Pursuant to the MS4 General Permit, a regulated small MS4 must file a Notice of

Intent (NOI) and a SWMP. The Secretary must approve those documents for a regulated small MS4 to receive an authorization to discharge under the MS4 General Permit. The SWMP must contain information on chosen best management practices to meet measurable goals established by the municipality for each of the six minimum measures required by 40 C.F.R. § 122.34 (i.e. public education and outreach on stormwater impacts, public involvement/participation, illicit discharge detection and elimination, construction site stormwater runoff control, post-construction stormwater management for new development and redevelopment, and pollution prevention/good housekeeping for municipal operations). Additionally, a regulated small MS4 that discharges to a stormwater-impaired water with an EPA-approved stormwater TMDL must submit a Flow Restoration Plan (FRP) to the Agency within three years from the date the Agency issues the regulated small MS4 an authorization to discharge under the MS4 General Permit.

10. Concurrently, on December 5, 2012, the Agency designated the City as subject to the requirements of the MS4 General Permit (the "Designation").

11. On January 2, 2013, the City filed the current appeal of the Designation (the "Appeal"). The Conservation Law Foundation, the University of Vermont, the City of Burlington, the City of South Burlington, the Town of St. Albans, the Village of Essex, the Town of Rutland, the Town of Williston, the Natural Resources Board, and the Vermont Agency of Transportation entered appearances in the Appeal.

12. The City and the Agency negotiated a temporary resolution of the issues raised in the Appeal and, on October 9, 2013, they jointly filed a *Stipulation And Settlement Agreement And Order Between The Agency Of Natural Resources And City Of Rutland Regarding Dismissal Of Docket No. 2-1-13 Vtec, Without*

Prejudice, And Other Matters (the "Initial Settlement"). This Court approved the Initial Settlement on October 16, 2013 (the "Initial Order").

13. Among other things, the Initial Settlement required the joint retention of an independent third party expert to examine the data and evidence accumulated by the Parties to determine: (i) whether Moon Brook is impaired; (ii) the principal cause of the impaired biological condition of Moon Brook, if any; (iii) whether Mussey Brook and the Lower Reach of Moon Brook are more properly assessed using macroinvertebrate criteria for "warm water medium gradient" (WWMG) or naturally soft-bottomed (sand-silt) low gradient stream segments; (iv) whether new Macroinvertebrate Biocriteria must be developed to properly and accurately assess the biological condition of Mussey Brook and/or the Lower Reach of Moon Brook; and, (v) whether Mussey Brook and/or the Lower Reach of Moon Brook comply with the Macroinvertebrate Biocriteria so applied (i.e., whether those stream segments are impaired). These five issues were referred to as the "Questions at Issue."

14. As provided in the Initial Settlement, the City and the Agency worked collaboratively on a detailed scope of work to be performed by the third party and then solicited proposals from a list of qualified, prospective experts. The City and the Agency decided to accept the joint proposal submitted by Kleinschmidt Associates and Midwest Biodiversity Institute (KA-MBI). Hereinafter, reference to the "Third Party Expert" refers collectively to the KA-MBI team.

15. On February 27, 2015, the Third Party Expert issued its final written report summarizing the Third Party Expert's findings, analyses, and conclusions relating to each of the Questions at Issue (the "Third Party Report").

16. The Third Party Report found that stormwater and thermal alteration are significant contributing sources to Moon Brook's impairment as well as habitat degradation and chemical impacts (chlorides and PAH compounds). Thus, the

Third Party Report does not identify a single "principal cause of the impairment," whether stormwater or thermal alteration, but rather identifies the foregoing suite of factors as the causes of the impairment. Third Party Report, Section 5.2, pages 5-8 to 5-9.

17. Regarding the proper classification of Mussey Brook and the Lower Reach of Moon Brook, the Third Party Expert concluded that the Agency properly applied its procedure in classifying these stream segments. The City continues to believe that the Agency and the Third Party Expert misclassify the Lower Reach of Moon Brook.

18. The Initial Settlement provided for contingencies depending upon the outcome of the Third Party Report. However, the Initial Settlement did not account for the possibility that the Third Party Report would identify a suite of impairments (stormwater, thermal alteration, habitat degradation, chloride, and PAHs) as the "principal cause" of the impairment. In an effort to allow the Parties time to negotiate this Settlement Agreement, on March 23, 2015, the Agency and the City filed a motion asking this Court to amend the Initial Settlement to enlarge the time by which the City was required to reinstate the Initial Appeal. The Court granted that motion on March 26, 2015, extending the deadline to July 27, 2015.

19. After the initial request to enlarge the time by which the City had to reinstate the appeal, the Parties required additional time to negotiate and therefore, filed several motions requesting additional extensions. The Parties filed motions on July 31, 2015; September 25, 2016; January 6, 2016; June 15, 2016; and August 15, 2016, and requested extensions to September 27, 2015; January 15, 2016; June 15, 2016; August 15, 2016; and October 3, 2016, respectively. This Court granted those motions on September 15, 2015; September 29, 2015; January 20, 2016; June 16, 2016; and August 15, 2016, respectively.

20. The Agency and the City now desire to resolve the Appeal through this Settlement Agreement. This Settlement Agreement is intended to supersede and replace the Initial Settlement and the Initial Order in their entirety. As of the Effective Date, as defined below, the Initial Settlement and the Initial Order shall be rendered null, void, and of no effect.

21. The Parties believe that this Settlement Agreement is in their respective, mutual best interests.

Thermal TMDL

22. The Parties agree that elevated temperatures in Moon Brook are a cause of the impairment of the Brook.

23. As such, the Agency agrees to develop a TMDL to address the thermal impairment of Moon Brook (the "Thermal TMDL").

24. The Agency agrees to submit the Thermal TMDL to EPA for review and approval, by no later than June 30, 2017.

MS4 Designation

25. Within 10 days of EPA's approval of the Thermal TMDL, the Agency shall re-designate the City as a regulated small MS4, but shall exclude from the designation those portions of the City served by a *combined* sewer system.

26. The designation shall be made using the Agency's new and revised procedure for the designation of regulated small MS4s, the "Procedure for Designation of Regulated Small MS4s," dated May 16, 2016 (the "2016 Procedure").

27. The Agency's designation will be based upon criteria in Section IV. of the 2016 Procedure, but shall not be based upon discharges of stormwater to Moon Brook meeting the criteria in Sections IV.(a)(1) and (2) of the 2016 Procedure.

28. The Agency agrees to provide a copy of the designation to the City, prior to issuance, for review and comment by the City.

29. The City agrees to waive its right to appeal the designation made pursuant to the 2016 Procedure and the requirements of Paragraphs 25-28 of this Settlement Agreement.

Modifications to Impoundments & Other Measures to Address Thermal Impairment

30. As of the Effective Date of this Settlement Agreement, the City shall in good faith continue actively pursuing the modification of the impoundments at Combination and Piedmont Pond Dams (the "Impoundments") and shall continue implementing other measures to address the thermal impairment of Moon Brook, including the planting of shade trees along its banks.

31. The City agrees to convene, with assistance from its engineering and consulting firm, neighborhood meetings of adjacent property owners and interested persons to review design alternatives for modifications to the Impoundments.

32. The Agency agrees to send representatives to those meetings, as requested by the City, including representatives from the Dam Safety Section and the Watershed Management Division, to provide information about the need for the modifications to the Impoundments.

33. Based upon the targets in the Thermal TMDL and the feedback received at the neighborhood meetings, the City shall choose design alternatives for each Impoundment.

34. If, despite best efforts, the City is unable to commence implementation and construction of the chosen design alternatives by October 1, 2018, the Agency shall convene a conference pursuant to 10 V.S.A. § 1003 to cooperate with identified dam owners to ensure that flows from the Impoundments protect the public's interest. If the dam owners fail to cooperate, the Agency may seek injunctive relief against the owners of the Impoundment requiring modification.

35. The Agency shall work with the City to coordinate regulatory approvals for removal of or modifications to the Impoundments.

36. The Agency shall provide technical assistance with the restoration of the stream channels, as necessary.

37. **Planting of Shade Trees.** The lack of shade trees along Moon Brook's banks contribute to the elevated temperatures in the stream. Within one year of the Effective Date of this Settlement Agreement, the City shall provide a tree planting plan for publicly owned lands to the Agency for review and approval. In addition, the City shall submit a plan for promoting the preservation and planting of shade trees on private lands. Both plans shall include the types of trees to be planted, the expected number of trees to be planted, and the approximate preferred locations the City will seek to plant them along Moon Brook. After receiving approval from the Agency, the City shall implement its tree planting plans.

Individual Permit

38. The Agency and the City agree to use an individual permit approach to address the Thermal and Stormwater TMDLs for Moon Brook as well as the City's general obligations as a regulated small MS4.

39. Within 180 days of the City's re-designation as a regulated small MS4, pursuant to Paragraphs 25-29 of this Settlement Agreement, the City agrees to file an application for a MS4 Individual Permit (the "Individual Permit").

40. Under the first 5-year permit term, the City shall be required to: (a) continue implementing the six minimum measures in accordance with the "Plan for Implementation of the Six Minimum Measures" submitted by the City in December 2013, as revised in April 2014, and as approved by the Agency on August 6, 2014,

and (b) develop and submit to the Agency a plan (the "Implementation Plan") within three years of the Individual Permit's effective date, which shall:

i. Include any additional measures, beyond modifications to the Impoundments, necessary to address the thermal impacts to Moon Brook and bring the Brook into full compliance with the Thermal TMDL;

ii. Identify the stormwater projects and best management practices (BMPs) necessary to meet the flow targets in the Stormwater TMDL; and

iii. Include a financing plan to implement the thermal and stormwater projects.

41. If individual Implementation Plan components are ready before the entire Implementation Plan is ready, the City may submit individual components separately (e.g. the additional measures to comply with the Thermal TMDL may be submitted separately from the projects to comply with the Stormwater TMDL).

42. Under the first 5-year permit term, the City will not be required to implement structural stormwater BMPs with respect to the Moon Brook watershed.

43. In the event that Vermont Water Quality Standards are met or the Agency determines that they are likely to be met at all locations upstream of RM 0.4, the City will not be required to implement additional structural stormwater BMPs above RM 0.4 to address the remaining impairment below RM 0.4. The City and the Agency will work cooperatively to investigate alternative measures to achieve Water Quality Standards in this lowest segment of Moon Brook.

44. The Agency reserves the right to include additional conditions in the Individual Permit regarding compliance with the Lake Champlain Phosphorus TMDLs; however, notwithstanding anything to the contrary contained herein, with

respect to the Moon Brook watershed, the State shall not require the installation of structural stormwater BMPs during the first 5-year permit term.

45. Public notice of the application and draft Individual Permit as well as the Implementation Plan shall be provided consistent with the requirements of Section 13.3 of the Vermont Water Pollution Control Permit Regulations, as amended October 7, 1991 (VWPCPR).

46. If despite the Parties' best efforts, the work to address the thermal impairment has not brought Moon Brook into compliance with the Vermont Water Quality Standards, the Parties agree to negotiate a compliance schedule as part of the second 5-year permit term to achieve compliance with the Standards. The compliance schedule shall prioritize work to address the Thermal TMDL, as appropriate, and shall take the costs to municipal ratepayers into account.

Six Minimum Control Measures

47. As of the Effective Date of this Settlement Agreement and prior to issuance of the Individual Permit, the City shall continue implementing the "Plan for Implementation of the Six Minimum Measures," approved by the Agency on August 6, 2014.

Additional Measures

48. As of the Effective Date of this Settlement Agreement and as set forth more fully below, the City shall take the following actions, among others, to remediate the stormwater-related chloride and PAH impairments: reduce or modify the use of road salt in locations where stormwater runoff is likely contributing to chloride levels in Moon Brook, and undertake studies to identify the source or sources of metals contamination at RM 0.9, and take actions, as necessary, to remediate the metals contamination.

49. **Reduction of Salt Use.** The use of road salt in the vicinity of Moon Brook is likely contributing to the high levels of chlorides in the stream. Within one year of the Effective Date of this Settlement Agreement, the City shall provide a chloride reduction plan to the Agency for review and comment, that identifies BMPs to reduce and modify the use of road salt locations where stormwater runoff is likely contributing to chloride levels in Moon Brook. After consultation with the Agency, the City shall implement its chloride reduction plan.

50. **Measures to Address Metals Contamination.** The Third Party Report indicated a decrease in water quality (specifically a decrease in benthic communities) at or around RM 0.9. The cause of this decrease was not determined. However, RM 0.9 is in the vicinity of the Howe Center, which is an 18 acre, 130-year-old industrial complex that is located on land that previously served as a foundry site. Sediment chemistry of Moon Brook near the Howe Center, sampled in 2014, indicated elevated levels of several metals (especially iron, lead, nickel, zinc, and copper) as compared to all other sample stations in Moon Brook and other area streams. These sediments may contribute to benthic community impairments at RM 0.9.

i. Within 5 years of the Effective Date of this Settlement Agreement, the City shall undertake studies (Howe Center Studies) to determine whether the sediments contribute to stream impairments in or near the segment of Moon Brook that passes by the Howe Center (Howe Center Segment).

ii. The Howe Center Studies shall identify the source or sources of metals contamination at RM 0.9 and shall determine the best approach for improving water quality of the Howe Center Segment. If the Howe Center Studies so advise, the City shall work with the owner of the

Howe Center to take measures in accordance with the studies' recommendations, to ensure the discharges from the Howe Center do not result in violations of the Vermont Water Quality Standards.

iii. If and to the extent that the City is unable to achieve these results due to owner's refusal to cooperate, the City may, if applicable, petition the Agency to assert its designation authority over the Howe Center Segment to address and remediate the metals contamination (10 V.S.A. § 1264(e) and 40 C.F.R. § 122.26(a)(9)(i)(D)).

Effective Date

51. This Settlement Agreement shall become effective only after it is approved by the Court in a final decision, and the date upon which this Court's approval becomes final and unassailable will be the "Effective Date" of this Settlement Agreement. Upon the Effective Date, this Settlement Agreement shall become a final Judgment Order, enforceable by the Court. Upon the Effective Date, the Court's order approving this Settlement Agreement shall supersede the Initial Order entered in this matter, which shall thereby be rendered null, void, and of no effect.

52. If the Parties desire to alter any schedules set forth herein or otherwise amend this Settlement Agreement, they shall file a motion with this Court with the proposed change. If a dispute arises between the Parties, either Party similarly may file a motion with this Court seeking redress. The filing of any such motion shall automatically stay the passage of any deadlines set forth herein, pending this Court's order resolving the issues raised.

Effect on this Appeal

53. The City agrees to the dismissal of this Appeal with prejudice as of the Effective Date.

54. Without limiting its other representations set forth herein, the Agency agrees to cooperate with the City to implement necessary steps under the Thermal TMDL, the Stormwater TMDL, and the Individual Permit. This cooperation may involve the Agency coordinating the issuance of ancillary permits from other state agencies or exercising the Agency's regulatory authority to assist the City in meeting its obligations.

Effect on Appeal in Federal Court

55. On February 18, 2015, the City filed a Complaint for Declaratory and Injunctive Relief in the United States District Court for the District of Vermont (Docket No. 2:15-cv-00035-wks) (the "Federal Action") challenging EPA's approval of the Stormwater TMDL. On July 29, 2016, the City and EPA filed a Stipulated Motion to Stay (the "Motion to Stay") the Federal Action for five (5) years. The principal purpose of the Motion to Stay was to afford the City the opportunity to negotiate this Final Stipulation and Settlement Agreement with ANR and to allow time for thermal modifications to be completed. Thus, both the Motion to Stay in the Federal Action and this Stipulation in this matter work in tandem to afford the City a meaningful opportunity to determine whether VWQS can be achieved in Moon Brook through implementation of thermal mitigation measures in accordance with a new Thermal TMDL. Nothing in this Settlement Agreement shall be deemed to affect the viability of the Federal Action, nor the City's rights with respect thereto.

General Provisions

56. Notwithstanding the foregoing, if the Court does not approve this Settlement Agreement as submitted, minor deviations in the form of the document excepted, it shall be voidable at the option of either the Agency or the City.

57. Except as otherwise expressly provided herein, nothing in this Settlement Agreement shall be construed to create or deny any rights in, or grant or deny any cause of action to, any person not a Party to this Settlement Agreement.

58. This Settlement Agreement sets forth the complete agreement of the Parties, and may be altered, amended, or otherwise modified only by subsequent written agreements signed by the Parties hereto or their legal representatives and approved by the Superior Court, Environmental Division. Alleged representations not set forth in this Settlement Agreement, whether written or oral, shall not be binding upon any Party hereto, and shall be of no legal force or effect. This Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement. Any signature delivered electronic transmission shall have the same force and effect as if such signature page were an original thereof.

Remainder of Page Intentionally Left Blank
Next Page Signature Page

Dated at Montpelier, Vermont this 29th day of September 2016,

VERMONT AGENCY OF NATURAL RESOURCES

By: _____
Alyssa B. Schuren, Commissioner, Vermont Department of Environmental Conservation, its duly authorized agent

Dated at Rutland, Vermont this 29 day of September, 2016,

RUTLAND CITY

By: _____
Christopher C. Louras, Mayor, its duly authorized agent

Ordered, adjudged, and approved by:

_____
Thomas S. Durkin
Environmental Judge

10.7.2016
Date