

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
Docket No. 2-1-13 Vtec

In Re: Rutland MS4 Designation Appeal

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**STIPULATION AND SETTLEMENT AGREEMENT BETWEEN THE
AGENCY OF NATURAL RESOURCES AND CITY OF RUTLAND
REGARDING DISMISSAL OF DOCKET NO. 2-1-13 Vtec, WITHOUT
PREJUDICE, AND OTHER MATTERS**

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 City of Rutland hereby agree to the dismissal, without prejudice, of this appeal subject to and in accordance with the following:

The Parties

1. The Vermont Agency of Natural Resources (ANR) is a state agency with various offices in Vermont.
2. The City of Rutland (the City) is a Vermont municipal corporation.

Background

3. ANR first identified Moon Brook as not meeting the Vermont Water Quality Standards 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, ANR 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 ANR reconsider its decision to keep Moon Brook on the 303(d) List, Part A.

6. In October 2008, ANR 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 "Moon Brook TMDL").

7. In 2008, the City submitted comments contesting the Moon Brook TMDL.

8. Since 2005, or for approximately the past eight years, the City and ANR 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. Since 2004, ANR has maintained that stormwater is the principal cause of impairment of Moon Brook. ANR also has maintained that the Lower Reach of Moon Brook and Mussey Brook is appropriately assessed using reference conditions for “warm water medium gradient” (“WWMG”) streams, and that the Macroinvertebrate Biocriteria for WWMG streams should be applied.

10. By contrast, the City has maintained that temperature is the principal cause of the impairment of Moon Brook, and that Mussey Brook and the Lower Reach of Moon Brook may only be accurately assessed using reference conditions for “naturally soft-bottomed (sand-silt) low gradient reaches” as discussed in the September 13, 2005 memorandum to City Engineer Alan Shelvey from Rich Langdon and Steve Fiske of DEC’s Water Quality Division.¹ ANR has not developed Macroinvertebrate Biocriteria for such streams, but rather has applied Macroinvertebrate Biocriteria for WWMG streams to Mussey Brook and the Lower Reach of Moon Brook. The City has maintained that this is inappropriate, and that ANR must develop specific Macroinvertebrate Biocriteria for sand-silt bottomed low gradient streams and then assess whether Mussey Brook and the Lower Reach of Moon Brook comply therewith.

11. On December 5, 2012 ANR issued the final N.P.D.E.S. General Permit 3-9014 for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems (the “MS4 General Permit”). The MS4 General Permit requires

¹ DEC’s ‘Pinkbook Report’ of Biomonitoring Methods uses the term “low gradient slow winder” to describe similar streams.

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 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 total maximum daily load (“TMDL”) must submit a Flow Restoration Plan (FRP) to ANR within three years from the date ANR issues the regulated small MS4 an authorization to discharge under the MS4 General Permit.

12. Concurrently, on December 5, 2012, ANR designated the City of Rutland as subject to the requirements of the MS4 General Permit (the "Final Designation").

13. On January 2, 2013, the City of Rutland filed the current appeal of the Final 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 have entered appearances in the Appeal.

14. ANR and the City now desire to resolve the Appeal through this settlement agreement.

15. ANR believes that this settlement is in the State's interest.

Independent Third Party Review

16. Third Party Review. The Parties will retain an independent third party expert (the "Third Party") 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 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 are referred to herein as the "Questions at Issue."

17. Scope of Third Party Review. The Third Party shall have access to all relevant data developed and used by ANR and the City relating to the Questions at Issue. The Third Party may gather additional data and/or propose further studies to resolve the Questions at Issue subject to the approval of both Parties and funded according to the requirements of Paragraph 18.c. The City and ANR agree to work collaboratively on a detailed scope of work to be performed by the Third Party (the "Original Scope of Work"). The Third Party shall issue a written report summarizing the Third Party's findings, analyses, and conclusions relating to each of the Questions at Issue (the "Third Party Report").

18. Process for the selection of and payment for the Third Party.

a. Selection of Third Party. ANR and the City shall work collaboratively and in good faith to jointly select the Third Party, provided that the Third Party shall be unbiased and independent, and shall have sufficient experience and expertise that the Third Party would qualify as an "expert witness" in a judicial proceeding on each of the Questions at Issue. To facilitate selection of a Third Party, the Parties agree to exchange the names of no fewer than three qualified Third Parties within thirty (30) days of the effective date of this settlement. If the Parties cannot agree on the Third Party, the Parties will collaboratively agree on a process to choose the Third Party. If the Parties cannot agree on a selection

process, the City may reinstate the Appeal by filing a notice of appeal in this Court. The selection of the Third Party shall be subject to a request-for-proposals (RFP) process and to approval by the City's Board of Aldermen and the Secretary of Natural Resources.

b. Contracting with Third Party. The City and ANR shall agree to the terms and conditions of the contract with the Third Party. The City shall be the entity responsible for contracting with the Third Party. ANR and the City shall have the same rights and responsibilities under the terms of the contract, except as otherwise agreed to by the Parties.

c. Payment to Third Party.

i. Generally. The City and ANR agree to equally divide and pay for the costs of the work conducted by the Third Party. ANR agrees to pay fifty percent (50%) of the agreed upon costs of the Third Party contract by entering a grant agreement with the City for the costs of the Original Scope of Work.

ii. Change Orders. In the event that the Third Party believes that additional work beyond the Original Scope of Work is necessary to provide a determinative response to any of the Questions at Issue, the Third Party shall submit a written proposal (each, a "Change Order") to the Parties describing both the nature of the proposed additional work and an estimate for the associated cost. Within thirty (30) days of receiving a Change Order, each Party will advise the other, in writing, as to whether the Party agrees to the Change Order. If both Parties agree to the Change Order, the associated costs will be split evenly between

the Parties. If only one Party accepts the Change Order, the Change Order shall be rejected; however, nothing herein shall prevent the Party accepting the Change Order (the "Accepting Party") from contracting directly with the Third Party (or a person other than the Third Party) under a separate agreement to perform the additional work at the Accepting Party's sole expense, and any conclusions or work product resulting from said Change Order may be submitted as evidence by the Accepting Party in any subsequent legal proceeding.

19. Effect of Third Party Report – Proper application of Macroinvertebrate Biocriteria. ANR agrees to consider all conclusions contained in the Third Party Report in good faith. If the Third Party concludes, and ANR is persuaded by the conclusion(s), that Mussey Brook or the Lower Reach of Moon Brook should be assessed using a reference condition type other than a "warm water medium gradient stream," then ANR shall alter the appropriate reference conditions associated with the stream segments; establish Macroinvertebrate Biocriteria for such stream type; and re-assess the biological conditions of Mussey Brook and/or the Lower Reach of Moon Brook based on the Macroinvertebrate Biocriteria for such stream type. If ANR is not persuaded by such conclusions in the Third Party Report, ANR is under no obligation to make a change to its assessment of Mussey Brook or the Lower Reach of Moon Brook.

20. Effect of Third Party Report – Cause of Impaired Biological Condition. If the Third Party concludes, and ANR is persuaded by the conclusion(s), that the existing Moon Brook TMDL does not accurately address the principal cause of the

impaired biological condition of Moon Brook (or that Moon Brook is not impaired), then ANR shall work with the City and the EPA to nullify the Moon Brook TMDL and to list Moon Brook on the 303(d) list, Part A, for that cause that is determined to be the principal cause of the impaired biological condition of Moon Brook, if any. If ANR is not persuaded by the conclusions in the Third Party Report, ANR is under no obligation to request the EPA to make a change to the Moon Brook TMDL or to modify the 303(d) listing.

21. Within sixty (60) days after its receipt of the Third Party Report, ANR shall deliver to the City a written statement (the "ANR Notice") as to whether ANR deems the Third Party Report to be persuasive under Paragraphs 19 and/or 20. The date on which the City receives the ANR Notice is referred to herein as the "Notice Date." Regardless of ANR's view of the persuasiveness of the Third Party Report under Paragraphs 19 and/or 20, either Party may submit the Third Party Report as evidence in any subsequent legal proceeding.

Stay of Notice of Intent Requirement

22. ANR and the City agree that all of the City's obligations arising under the MS4 General Permit (including, without limitation, the requirement for the City to develop and file a NOI, FRP, or a SWMP) shall be stayed to allow for the Third Party's analysis and for the Parties' review of the Third Party Report.

23. In the event that the Third Party Report supports ANR's position that Moon Brook is impaired principally due to stormwater, then within thirty (30) days of the City's receipt of the Third Party Report, the City either shall file a NOI under

the MS4 General Permit or shall reinstate this Appeal by filing a notice of appeal and a motion requesting a stay of the obligations arising under the MS4 General Permit during the pendency of the reinstated Appeal; the City's obligations arising under the MS4 General Permit shall be governed by this Court's order on the City's motion for stay. Notwithstanding the outcome of any motion for stay, the City agrees to continue implementation of the six minimum control measures approved pursuant to Paragraph 25.

24. In the event that the Third Party Report concludes either that (i) Moon Brook is not impaired, or that (ii) the impairment of Moon Brook is not principally caused by stormwater, then the City shall be released from its obligations under the MS4 General Permit, at least temporarily. If ANR issues an ANR Notice under Paragraph 19 or 20 that ANR deems the Third Party Report to be unpersuasive, the City may reinstate this Appeal by filing a notice of appeal within thirty (30) days of the Notice Date; however, the Parties agree to execute and file a stipulation stating that the City's obligations under the MS4 General Permit shall be stayed until and unless a final judicial order is issued requiring the City to comply with said obligations notwithstanding the Third Party Report.

City Implementation of Six Minimum Control Measures

25. No later than January 1, 2014, the City shall provide ANR a plan to implement the requirements of Section IV.H. (six minimum control measures) of the MS4 General Permit. This plan shall be subject to the review and approval of ANR

("ANR Approval"). The City will implement the approved plan no later than six (6) months after the ANR Approval or October 1, 2014, whichever later occurs.

26. The City, prior to the implementation of the approved plan required by the foregoing Paragraph, shall continue with any measure that it is already implementing as of the date of this Settlement Agreement that constitutes a minimum control measure under Section IV.H. of the MS4 General Permit.

Removal of Dams at Combination Pond and Piedmont Pond

27. No later than February 1, 2014, the City will provide a schedule for the removal of the dam located at Combination Pond and, if deemed necessary by ANR, the dam located at Piedmont Pond (the "Dams"). The schedule will identify key milestones for the removal of the Dams.

28. The City will remove – or, as appropriate, will utilize best efforts to ensure that the owner of the dam remove – the Dam(s) and restore the stream channels by no later than October 1, 2017. The City will convene neighborhood meetings of adjacent property owners and interested persons, and ANR representatives (including representatives from the Dam Safety Section and aquatic biologists from the Watershed Management Division) will be present and will give presentations at such meetings to explain the reasons for requiring the removal of the Dam(s) and restoration of the stream channels.

29. If the Dam(s) are not removed by October 1, 2017, ANR shall convene a conference pursuant to 10 V.S.A. § 1003 to cooperate with identified owners to ensure that the flows from Combination Pond, and if deemed necessary Piedmont

Pond, protect the public's interest. If the identified owners fail to cooperate, the Agency may take appropriate action including, but not limited to, enforcement actions against the owner(s) of the existing Dam(s) requiring the removal of the Dam(s).

30. ANR shall work with the City to coordinate regulatory approvals for the removal of the Dam(s).

31. ANR shall provide technical assistance with the restoration of the stream channels.

Effect on this Appeal and other causes of action

32. The City agrees to the dismissal of this Appeal without prejudice. The City and ANR agree to toll all statutes of limitations applicable to the Appeal to allow for the Third Party review. Except as otherwise provided in Paragraph 18.a., the City shall not reinstate the Appeal prior to the Notice Date. In the event that the City decides to reinstate the Appeal, the City must file a notice of appeal in this Court not later than thirty (30) days after the Notice Date.

33. ANR agrees to work with the City to obtain an effective and enforceable tolling agreement with the EPA regarding the City's existing right to appeal the Moon Brook TMDL. Notwithstanding anything to the contrary contained herein, the City expressly reserves its right to appeal the Moon Brook TMDL if the City determines, in its sole discretion, that an effective and enforceable tolling agreement with the EPA will not be fully executed by the time the applicable statute of limitations on such appeal expires. The City reserves the sole and

exclusive right to determine whether any tolling agreement is or would be sufficiently effective and enforceable for the purposes of this Paragraph.

General Provisions

34. 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 ANR or the City.

35. 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.

36. This Settlement Agreement shall become effective only after it is approved by the Court, and the date of approval will be the Effective Date of this Settlement Agreement. When so approved by the Court, this Settlement Agreement shall become a final Judgment Order, enforceable by the Court.

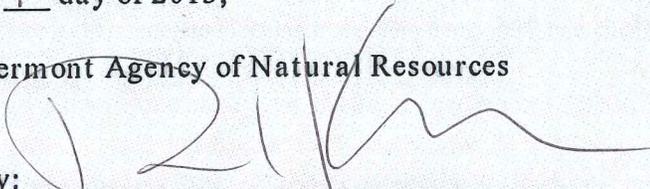
37. This Settlement Agreement resolves only the Appeal by the City of the Final Designation (Docket No. 2-1-13 Vtec).

38. 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.

Dated at Montpelier, Vermont this 9th ^{October} day of 2013,

Vermont Agency of Natural Resources

By: 

David K. Mears, Commissioner, Vermont
Department of Environmental Conservation,
its duly authorized agent

Dated at Rutland, Vermont this 9th ^{October} day of 2013,

The City of Rutland

By: 

Christopher C. Louras, Mayor, its duly
authorized agent

Ordered, adjudged, and approved by:

Thomas S. Durkin
Environmental Judge

Date