



CITY OF RUTLAND  
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RUTLAND, VERMONT 05702

DEPARTMENT OF PUBLIC WORKS  
(802) 773-1813

PAUL G. CLIFFORD  
COMMISSIONER OF PUBLIC WORKS

ALAN J. SHELVEY, P.E., L.S.  
CITY ENGINEER

October 24, 2005

Mr. Doug Burnham  
VT ANR-Water Quality Division  
103 South Main Street  
Building 10 North  
Waterbury, VT 05671-0408

Re: Moon Brook

Dear Mr. Burnham,

We appreciate your, Mr. Fiske's and Mr. Langdon's efforts that went into the response to our request to Jim Pease at Stomwater regarding removing Moon Brook from the Impaired Waters List. The professionalism of you and your staff comes through very clearly in this correspondence.

It appears to us that those gentlemen employed the scientific method and drew conclusions based upon the data available and their best judgment. This is appropriate in the scientific community. However, we are dealing with a regulatory issue where certainty is called for due to the significant regulatory consequences associated with these determinations. Rest assured that our disagreement by no means reflects any disrespect for your staff or their work.

Enclosed is a copy of a follow up letter to Jim seeking a decision regarding that request now that he has had the opportunity to review both of our positions. While we feel that complying with our original is the most appropriate course of action, we have included an alternative that we feel should be acceptable to your staff.

Sincerely,

Alan J. Shelvey, P.E., L.S.  
City Engineer

Cc: Mayor Cassarino  
Paul Clifford, Commissioner of Public Works



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VT ANR-Water Quality Division  
103 South Main Street  
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Waterbury, VT 05671-0408

Re: Moon Brook

Dear Jim,

In response to my letter of August 2, 2005, we received a memorandum composed by Rich Langdon and Steve Fiske under a cover letter from Doug Burnham. While I did not see you "cc'd", I trust that you have a copy of that package.

The memo was very interesting. And while we may not agree with all of it, we do better understand the gentlemen's viewpoint and the reasoning behind their opinions.

I have read it several times and my conclusion remains that there is no official appropriate reference condition for at least the most troublesome portion of Moon Brook. Although the biologists do not agree...."In summary, we cannot agree with your argument that there is no applicable reference condition for Moon Brook.", much of their report deals with the necessity to use best professional judgment. And while it is heartening to know that some local small streams "*that are very similar to Moon Brook*" are doing well with the criteria, and "*Others with similar characteristics (predominantly low gradient streams in fine soil landscapes with riffle habitat separated by extensive pool habitat)*" have met expectations, that does not necessarily mean that those expectations are appropriate. While there may be peripheral issues of disagreement, this seems to be the sticking point.

In my letter, I quoted from the Assessment Methodology manual: (A) "*The Department implements biocriteria only when appropriate reference conditions have been described.*" When taken with other statements in the manual that advise caution in declaring a stream impaired, this statement was interpreted to mean that unless there is an appropriate reference condition, there is no legitimate basis upon which to cast judgment.

The biologists quote a different section of the manual: (B) *"In the absence of applicable biocriteria, all available information and data are used to make scientifically defensible weight of evidence findings that the designated aquatic life uses are fully supported."* The scientists have used this guidance in combination with their professional judgment and experience to justify Moon Brook's listing on the 303 list.

I can understand why they would do this when confronted with such a situation. However, I do not think that it is appropriate, given the significant regulatory consequences of being on that list. There were ground rules set (the reference streams and statement "A") upon which all should be able to rely as the rules. To interject opinion as an authoritative part of the rules (when there are no applicable biological criteria because there is no reference stream) seems unfair.

In using "B" from the manual, the biologists, through best professional judgment, effectively created biocriteria. These criteria were then used to place Moon Brook on the list. This does nothing to negate the meaning and commitment of the State contained in statement "A" since, even with these created criteria, there is still no reference stream thus the criteria should not be implemented.

You now have the arguments from both sides. I hope that, after considering these arguments, you will honor our request that the Agency issue a determination that, due to recently reported evidence, VTDEC will propose that Moon Brook be delisted because these waters should not have been placed on the Impaired Waters List. We also request that beginning immediately and until such time as Moon Brook is found to be impaired using newly developed appropriate criteria and protocol, all development within the Moon Brook watershed be subject only to the Stormwater Management Rule for Unimpaired Waters.

We believe that we have presented a rational argument together with sufficient reasoning to allow you to comply with our request.

Typically this type of communication would end here, leaving the unspoken intimation of continued appeals and perhaps litigation should the request not be complied with. However, based upon our experience with you in the past, I trust that you will respond to this request in a professional manner and such intimation would have no bearing upon your decision.

Therefore, let us remove that cloud now. Should you decide not to honor this request, while we would be disappointed to learn that we can not rely upon a literal interpretation of the rules where such interpretation provides relief in cases of uncertainty, we have no intention to press this argument further at this time.

Although we reserve the right to re-visit it in the future, if we deem it necessary. We have made this decision out of respect for you and your biologists and in keeping with the cooperative relationship that has developed between your division and the City over the last several years.

All is not disagreement. The most significant area where we do agree is that the projects we are currently working on within the watershed will result in a satisfactory level of water quality in Moon Brook.

I wrote: *"We are optimistic that, with the efforts and progress that we and our partners are making, once appropriate criteria are applied, there will not be the requisite instances of failed sampling to put Moon Brook on the list."* (Assuming appropriate monitoring criteria)

Messrs Langdon and Fiske wrote: *"We are also confident that if the proposed mitigation activities are complete, Moon Brook's biological integrity will improve to acceptable levels."*

As you know, the City is concerned that despite our best efforts, Moon Brook may never get off the impaired list, using the currently available criteria. Despite the lopsided balance of credentials, I think that you have to admit, there is a possibility that we could be correct. The brook is on the list as a result of your biologists' conclusions based on best professional judgment. They are sure that they are right: "We are confident that Moon Brook is impaired ...." The Agency relied upon that confidence in putting Moon Brook on the 303 list, with the accompanying "significant regulatory consequences" visited upon the City and its citizens.

The City is asked to also rely upon that confidence and accept that Moon Brook is impaired. If we are to do so, it would seem fair to ask you to accept their confidence that *"if the proposed mitigation activities are complete, Moon Brook's biological integrity will improve to acceptable levels."*

An agreement that, if we implement those improvements, Moon Brook will be removed from the list, whether or not it meets the biomonitoring criteria would satisfy our concerns about the futility of trying to comply with what we see as a probable impossibility. It would also demonstrate the State's unbiased confidence in accepting the professional judgment of their biologists, the same professional judgment that we are expected to accept.

If we do the work and the brook meets the biomonitoring criteria, we are all satisfied. If we do the work and it does not, despite the confidence of the biologists that it will, then perhaps we were right.

In my letter of August 2, 2005, those field projects were listed as:

- Habitat improvement with shade tree planting on private property (with the Rutland Natural Resources Conservation District (RNRCD) and ANR) "Fairgrounds Project"
- Modifications to a private on-stream pond and installation of sediment control and thermal abatement (Rutland City Department of Public Works (DPW) and ANR) "Piedmont Pond Project"
- Negotiations with the owner of another private on-stream pond to allow modifications and sediment control and thermal abatement (DPW). "Combination Pond Project"
- Discussions with commercial property owners along Routes 4 & 7 regarding possible installation of sediment control devices (DPW)

The completion of these projects depends upon at least two factors that are not entirely within our control, the cooperation of private property owners and the availability of funding. Therefore it may be necessary to substitute equivalent projects that are not on this list.

Thank you for your consideration.

Sincerely,



Alan J. Shelvey, P.E., L.S.  
City Engineer

Cc: Mayor Cassarino  
Doug Burnham, VTANR Aquatic Biologist Supervisor  
Paul Clifford, Commissioner of Public Works  
Jeffrey Wennberg, Commissioner, VTDEC