Environmental Court of Vermont State of Vermont

ENTRY REGARDING MOTION

Montpelier WWTF Discharge Permit Docket No. 22-2-08 Vtec

Project: Montpelier Wastewater Treatment Facility

Applicant: City of Montpelier

(Appeal from ANR determination on discharge permit application)

Title: Motion in Limine Re Testimony of Michael Rapacz, (Motion No. 10) Filed by: Mark L. Lucas, Attorney for Natural Resources Board/WR Panel

Filed: November 3, 2008

Title: Motion in Limine Re Testimony of Michael Rapacz, (Motion No. 12)

Filed by: Appellee Vermont Agency of Natural Resources

Filed: November 10, 2008

Response in support filed on 11/11/08 by Appellee City of Montpelier Response in opposition filed on 12/30/08 by Appellant Conservation Law Foundation

Reply filed on 1/15/09 by Natural Resources Board/Water Resources Panel

 \underline{X} Granted (as to expert's model); \underline{X} Denied (as to expert qualification and other testimony)

The Court conducted a hearing on the above-referenced motions over a period of two days (June 23 and 24, 2009). At the close of the taking of evidence and legal arguments, the Court took a brief recess and then delivered its determinations on the record of the June 24 hearing. References to case law and procedural rule precedent (including V.R.E 401, 403, 702, and 703) may be found in the full hearing record. In summary, the Court concluded that:

- 1. The witness (Michael Rapacz) that CLF proposes it may call in rebuttal to witness(es) offered in support of the pending application has provided a sufficient foundation of his education, experience, and research to allow him to be qualified as an expert in the fields of water quality and the instances that contribute to its degradation and non-conformance with federal and state water quality laws and regulations. For this reason, the motions in limine filed by the Water Panel and ANR to exclude Mr. Rapacz as an expert witness are DENIED.
- 2. The Water Panel and ANR have provided multiple challenges to Mr. Rapacz's qualifications and testimony. These challenges may call into question the credibility of some of Mr. Rapacz's offered testimony and opinion, but they go to the weight and credibility of that testimony and are not sufficient to support an absolute exclusion of all of Mr. Rapacz's testimony at this time. The pending motions in limine are therefore DENIED on this basis as well.
- 3. The Water Panel and ANR have provided a sufficient evidentiary foundation for excluding all of Mr. Rapacz's references to the "model" (actually a simple mathematical equation, a copy of which was introduced at hearing as NRB Exhibit DD) he created to aid the Court in understanding his testimony. We therefore STRIKE from the record all

references by Mr. Rapacz to his "Simple Aggregate Loading Model", including those references in his affidavit in support of CLF's motion for summary judgment. Mr. Rapacz is also hereby restricted from making any reference to his Simple Aggregate Loading Model, should he be called upon to testify in any subsequent proceeding in this appeal. In this regard, ANR's and the Water Panel's motions in limine are hereby GRANTED.

Thomas S. Durkin, Judge	<u>June 25, 2009</u> Date
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Date copies sent:	Clerk's Initials
Copies sent to:	
Attorneys Anthony L. Iarrapino and John	L. Davenport for Appellant
Conservation Law Foundation	
Attorneys Warren T. Coleman and Michael	. Steeves for Appellee Vermont Agency

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Attorney Steven F. Stitzel for Appellee City of Montpelier