

2. Criterion 1 (Water)

I. Requirements for Issuance of Permit

10 V.S.A. § 6086(a)(1) provides that before granting a permit, the board or district commission shall find that the subdivision or development will not result in undue water or air pollution.

II. Burden of Proof

The burden of proof for Criterion 1 is on the applicant. 10 V.S.A. § 6088(a). The applicant must present evidence sufficient to support a finding that the development will not result in undue water pollution.

II. Analysis

- A. Has the applicant provided sufficient evidence that the project or facility will not result in undue water pollution? Nothing in Act 250 specifically defines “undue pollution.”
1. Whether pollution is “undue” usually depends on facts such as the nature and amount of pollution, character of the surrounding area, whether the activity complies with environmental regulations or recommended levels, whether the pollutant will cause adverse health effects, and whether effective measures will be taken to reduce the pollution. See *a/so* II(B).
 2. Analysis of water pollution generally takes place in context of the subcriteria to Criterion 1. However, the analysis is not limited to the subcriteria. Criterion 1 generally protects state waters from pollution where state regulation has not adequately protected those waters. Activities that have been analyzed under the general requirements of Criterion 1 include:
 - a. proposed sewage treatment systems,
 - b. construction projects,
 - c. landfill, saw mill, and quarry operations,
 - d. dredging operations near wetlands,
 - e. golf course management plans.
 3. If the project has a discharge permit, Conditional Use Determination (CUD), or certificate of compliance creates a

rebuttable presumption that the part of the project covered by that permit, etc., will not result in undue water pollution. See Rule 19. This presumption applies only to the part of the project or discharge covered by the permit, approval or CUD.

- a. This presumption shifts the burden to the party opposing the applicant to produce credible evidence that the applicant has not complied with criterion 1. However, the presumption may be rebutted by any evidence in the record, regardless of which party produced it.
 - b. The burden of persuasion lies always with the applicant. If credible evidence is produced, then applicant must produce additional evidence sufficient to persuade the court that the project will not result in undue air pollution.
4. If the Agency of Natural Resources makes technical determinations in issuing a permit, approval, CUD, or certificate of compliance, the party opposing the agency determination has a heightened burden with respect to those technical determinations.
- a. Technical determinations include wetland function assessment, a project's compliance with specific water quality standards and other scientific determinations. 10 V.S.A. § 6086(d).
 - b. Where the agency has made such determinations, the party must produce *clear and convincing* evidence that the determination was incorrect.
- B. If no permit, approval, CUD, or certificate of compliance has been issued, or the presumption created by those documents has been rebutted, then the applicant must produce sufficient evidence that the project will not result in undue water pollution. Evidence that supports a finding of no undue water pollution should include;
1. site-specific data, including the method by which the project's impacts were evaluated. If possible, the applicant should provide a simulation of the actual conditions that will be present when the project is in operation as evidence.
 2. composition of pollutants to be discharged, including their mobility

and solubility,

3. project design or other steps taken to minimize impacts on water quality,

C. If the applicant fails to produce evidence to persuade the Commission that there will be no undue water pollution, the Commission may deny the permit or require further investigation.

Last Revised: October 16, 2006

J:\ADMIN\TRAINING\MANUAL\final\1(water)final.doc