



State of Vermont
Department of Environmental Conservation
Office of the Commissioner
103 South Main Street/1 South
Waterbury, VT 05671-0404

AGENCY OF NATURAL RESOURCES

July 21, 2011

To Interested Stakeholders:

The Department of Environmental Conservation (Department) has finalized an interim procedure implementing the public trust doctrine for groundwater quality. In 2008, the legislature declared that groundwater in Vermont is a public trust resource and this procedure is an exercise of the Department's obligation as the trustee of this natural resource to ensure that it is protected for present and future generations. The final procedure identifies a number of regulatory activities that present a heightened risk to groundwater and requires the person proposing the activity to clearly demonstrate the proposed action does not harm the public's rights in groundwater.

This procedure is not the final expression of the Department's obligation as the trustee. This procedure was developed to serve as a bridge, to allow the Department to comprehensively examine groundwater science, planning, and management in conjunction with interested stakeholders. Such an examination should:

- Coordinate and strengthening existing data gathering and resource planning programs at the municipal, regional, and state level.
- Recognize that groundwater and surface water are parts of a single water resource system and to the extent feasible propose changes to regulatory programs to manage groundwater and surface water in a conjunctive manner.
- Incorporate public trust principles, including revisions to standards and the use of points of compliance, into regulatory programs to ensure the protection of groundwater for present and future generations.
- Reinforce that a person whose activities result in damage to a public trust resource is responsible to remediate that damage and compensate the public for their losses.

This examination will be conducted by staff in collaboration with one or more subcommittees made up of a diverse set of interested stakeholders. The objective of this examination is a proposal to amend the State's Groundwater Protection Rule and Strategy to incorporate these concepts and any other recommendations that the subcommittee(s) may have. These subcommittees will be technically focused working groups, much like the process used by the Agency when considering the amendment of the Groundwater Withdrawal Reporting and Permitting rules. Persons who have an interest in participating as members in these subcommittee(s) should send an e-mail expressing their interest to George Desch at george.desch@state.vt.us.

Sincerely,

A handwritten signature in dark ink, appearing to read "DKM", written over a horizontal line.

David K. Mears, Commissioner
Department of Environmental Conservation.



**AGENCY OF NATURAL RESOURCES
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
INTERIM PROCEDURE FOR IMPLEMENTATION OF
GROUNDWATER PUBLIC TRUST
PRINCIPLES FOR GROUNDWATER QUALITY
SUMMARY OF CHANGES
July 20, 2011**

On February 28, 2011 the Vermont Superior Court, Environmental Division issued an opinion in the *In re: Omya Solid Waste Facility Certification* [Doc. 96-6-10 Vtec] permit appeal finding that the Agency failed to properly consider the public trust doctrine in groundwater as established by 10 V.S.A. § 1390(5) and remanded the certification to the Agency for further consideration.

In response to this decision the Agency has developed a procedure entitled "**INTERIM PROCEDURE FOR IMPLEMENTATION OF GROUNDWATER PUBLIC TRUST PRINCIPLES FOR GROUNDWATER QUALITY.**" ("Procedure"). The Procedure provides guidance to the public, Agency staff, and the regulated community on the implementation of the public trust doctrine until such time as the Agency can address significant legal, technical, and policy issues through an amendment of the Groundwater Protection Rule and Strategy. ("final policy")

The Agency opened a public comment period on May 13, 2011 and that comment period closed on June 10, 2011.

After review of comment and discussion of the proposed revisions, the Agency has streamlined and simplified implementation of public trust requirements. This streamlined approach is appropriate for following reasons:

- It prevents establishing a policy in the Procedure that is inconsistent with the approach taken in the final policy.
- It allows stakeholders to have a full and complete discussion of many complicated technical, legal, and policy considerations in developing the final policy.
- It allows regulated activities to proceed while ensuring a heightened awareness and protection of groundwater resources.

In addition, the Agency is not responding to comments on the Procedure. Many of the comments warrant additional discussion and consideration as a part of a final policy and it is premature to respond to those comments at this time.

Policy decisions made in the context of this Procedure do not represent the final policy of the Agency and are subject to modification and change in the final policy. The compliance of a project with these Procedures does not vest any rights in these requirements and a substantial

alteration or expansion of an activity approved under these Procedures may be subject to complete review under the final policy.

The following is a summary of the changes made to the Procedure in response to comment and a brief explanation of the change:

- The Procedure adds a new paragraph to the introductory section clarifying that groundwater is a public trust resource, the Agency is a trustee of that resource, and the Agency has an obligation to protect that resource for present and future generations of users. This change was made to clarify the Agency's view of its obligation to manage groundwater as a public trust resource.
- The Procedure clarifies that existing high-quality drinking waters be maintained. Comments identified that not all groundwater in Vermont is suitable for use as a drinking water source because of naturally occurring contamination or contamination from past industrial practice. The Procedure was modified to address this comment.
- The Procedure clarifies that the procedure does not create jurisdiction over currently unregulated activities. This does not mean that the groundwater public trust doctrine does not create jurisdiction over activities that have a potential to impact groundwater that are not otherwise regulated, however, the purpose of this document is to provide guidance on the implementation of these principles in the context of environmental permitting. The Procedure does not address broader jurisdictional issues.
- The Procedure clarifies what constitutes a "high risk" underground injection control well. The prior procedure was not clear as to what UICs are high risk activities. Specific types of UICs have been identified as high risk.
- The Procedure clarifies that all stormwater permits are considered Tier II activities. Comments on the treatment of stormwater varied from managing all stormwater as Tier I to clarifying that all stormwater management activities are Tier II. After consideration of these comments, the Agency concluded that stormwater is a Tier II activity because the stormwater program fits the definition of a Tier II activity as it is a high volume program that presents a low risk of harm to groundwater. The Agency agrees with comments that the groundwater impacts of stormwater discharges should be addressed in the development of the final policy.
- The Procedure clarifies that remedial actions are Tier II activities. Treating remedial activities as Tier II is appropriate because unlike permitting programs the harm this

Procedure seeks to prevent (groundwater contamination) has already taken place and the purpose of the remedial action is to mitigate impacts to human health and the environment. The scope of what constitutes a remedial action is limited. It would apply to situations such as the cleanup of a leaking underground storage tank, the post closure care of a municipal landfill, or unpermitted releases of a hazardous material. Remedial action would not apply to a permitted activity that is better than a previous activity (i.e. the operator of an unlined landfill's decision to apply for a certification for a lined facility is not a remedial activity).

This Procedure does not affect or limit the Agency's authority to bring a public trust right of action as contemplated under 10 V.S.A. § 1390(5) against a person who has contaminated groundwater.

- The procedure eliminates two tests used to determine public benefit under the Procedure. The Agency heard from a number of commentors that the proposed tests were not appropriate in the context of an interim procedure. The reasons given for why these tests should not be considered included:
 - That the correlative rights test considered factors that were not appropriate in the context of implementing the public trust doctrine;
 - That the imposition of these standards in an interim context might prejudice the direction of a final implementation policy; and
 - That the imposition of these standards would result in a significant drain on Agency resources.

The elimination of these tests in this Procedure does not preclude the Agency from reconsidering these tests or similar analyses when developing the final policy.

- In addition to being consistent with local and regional plans, the Procedure adds that a permitted activity must be consistent with source water protection areas, Class I or II groundwater areas, and municipal groundwater overlay districts. Commentors recommended that the Agency consider other groundwater protection planning tools when evaluating the project is consistent with public trust principles. The Agency agrees with these comments.
- The Procedure requires that reasonable doubts regarding compliance with the groundwater protection rule and strategy are construed against an applicant. This concept places the burden on the applicant to demonstrate that their project conforms to the groundwater protection rule and strategy and when there is a reasonable doubt that the project is compliant then the project is not in the public trust. It also places the burden on

the applicant of providing sufficient information, in the context of the regulatory program being considered, to show compliance with the groundwater protection rule and strategy.

- The Procedure requires that Tier I permits provide for a reasonable opportunity for comment. 10 business days or more is deemed reasonable. The Agency received comment that in order to have a meaningful review of whether the facility meets its public trust obligations, there needed to be a reasonable comment period. The Agency agrees with this comment.
- The Procedure requires an affirmative finding of compliance with this procedure prior to issuing a permit, certification, or authorization. The Agency received comment that it was important to document and affirmatively find in each approval that the regulated activity is in the public trust. The Agency agrees with this comment and has incorporated it into the Procedure.
- Section 5 (Regulatory Review Directive) has been removed from the Procedure. The Agency is removing this section from the Procedure, but intends to examine these issues in developing the final policy.

**AGENCY OF NATURAL RESOURCES
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

**INTERIM PROCEDURE FOR IMPLEMENTATION OF
GROUNDWATER PUBLIC TRUST PRINCIPLES FOR
GROUNDWATER QUALITY**

§ 1. INTRODUCTION

In adopting this procedure, the Secretary finds:

- (1) 10 V.S.A. 1390(5) declared that "groundwater resources of the state are held in trust for the public." The Agency of Natural Resource is the trustee of those groundwater resources. As trustee for those resources, the Agency has a duty to assure that those resources are protected for present and future generations.
- (2) It is necessary to develop a policy that is in harmony with the plain language of No. 199 of the Acts of the 2007 Adj. Sess. (2008); 10 V.S.A. Chapter 48; the history of the development of state law regarding groundwater, and the principles embodied within the public trust doctrine in Vermont.
- (3) It is necessary to develop an interim procedure for the management of groundwater quality ("Procedure") to allow for a thoughtful public discourse on how to ensure the public's interest in groundwater while also allowing regulated activities to proceed. The management of groundwater quantity is addressed under the Groundwater Reporting and Withdrawal Rule and 10 V.S.A. § 1418(i).
- (4) The public trust doctrine retains an undiminished vitality. The doctrine is not fixed or static, but one to be molded and extended to meet changing conditions and the needs of the public it was intended to benefit. The very purposes of the trust have evolved in tandem with the changing public perception of the values and uses of waterways. The extension of the principles contained within the public trust doctrine to groundwater requires an adaptation of that doctrine to meet the unique resource management needs related to groundwater.
- (5) There are significant distinctions between surface waters and groundwater and as such, the application of public trust principles to groundwater is necessarily different.
- (6) The history of the public trust doctrine and the uses associated with surface waters and groundwater provide ample support for divergent approaches in managing those resources in accordance with the public trust.

- (7) The use of groundwater includes a significant number of private uses such as, drinking water sources for private individuals and businesses, agricultural, and industrial uses.

§ 2. DECLARATION OF POLICY

It is the policy of the Agency of Natural Resources to manage groundwater as a common resource available for the benefit of the people of the State. In implementing this policy, the Secretary shall:

- (1) Manage groundwater to minimize the risks of groundwater quality deterioration by regulating human activities that present risks to the use of groundwater in the vicinities of such activities while balancing the state's groundwater policy with the need to maintain and promote domestic, farming, agricultural processing, commercial, and industrial uses;
- (2) Protect Vermont's groundwater resources in order to maintain existing high-quality drinking water, and
- (3) Ensure that all persons have a right to the beneficial use and enjoyment of groundwater free from unreasonable interference by other persons.

§ 3. APPLICABILITY

- (a) Tier I permits and activities. Tier I regulated activities are those which the Secretary has determined may pose a risk to groundwater quality if not properly managed and which are currently regulated by the Secretary. These activities are regulated through permits, certifications, approvals, or authorizations. Tier I regulated activities are as follows:

- (1) Any new indirect discharge of sewage to an in-ground system with a capacity of greater than 50,000 gallons per day;
- (2) Any new indirect discharge of non-sewage waste exclusive of the land application of food processing wastes to farm fields or digesters;
- (3) Any solid waste management facility certification or other approval issued by the Secretary for the management through land application of wastewater treatment biosolids, septage, and short paper fiber where:
 - (A) With respect to biosolids or septage, those materials are permitted to be applied to a land application site each year; or
 - (B) With respect to short paper fiber or a product derived from short paper fiber which contains greater than 30% short paper fiber, where those materials are applied to a site comprising greater than ten acres.

- (4) Any solid waste management disposal activity authorized under a full facility certification;
 - (5) Any hazardous waste management facility certification; and
 - (6) Category 1 underground storage tanks; and
 - (7) The following types of underground injection wells:
 - (A) Vehicle washing facilities;
 - (B) Slaughter houses;
 - (C) Public community water system treatment backwash;
 - (D) Mine dewatering activities and discharges from quarries excluding sand and gravel pits; and
 - (E) Quarries with blasting, excluding perchlorate free blasting.
- (b) Tier II permits and activities. Tier II regulated activities are those which the Secretary has determined pose a low risk to groundwater. Tier II activities are regulated through permits, certifications, approvals, and authorizations. Tier II activities are presumed to be consistent with the public trust and not significantly degrade groundwater quality. Tier II activities are not subject to Section 4 of this procedure. Tier II regulated activities include the following:
- (1) Wastewater disposal systems which are permitted under the Wastewater System and Potable Water Supply Rules;
 - (2) Discharges of regulated stormwater with coverage under an individual or general NPDES permit, state stormwater permit, or stormwater offset permit;
 - (3) Any new indirect discharge of sewage to in-ground systems with a capacity of 50,000 gallons per day or less;
 - (4) Any new indirect discharge of sewage utilizing spray disposal;
 - (5) Any new indirect discharge of non-sewage involving the land application of food processing wastes on farm fields or to digesters;
 - (6) Underground injection wells that are not classified as high risk;
 - (7) Residuals management certifications that are not classified as Tier I;

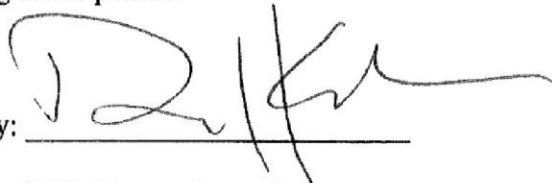
- (8) Any solid waste management certification for a disposal activity authorized under an insignificant waste management event approval or categorical certification; and
 - (9) This procedure does not apply to regulated activities that are remedial in nature, including the remediation of contaminated sites, the post-closure care of non-operational landfills and other similar activities.
- (c) The Secretary may designate any regulated activity that is a Tier II activity a Tier I activity upon finding based on credible and relevant information that the activity presents more than a low risk to groundwater in the area or down gradient from the area where the activity is being conducted.

§ 4. INTERIM PERMITTING STRATEGY

- (a) This section applies to only Tier I activities.
- (b) A regulated activity that does not present a risk to groundwater quality through the application of adequate engineering or management controls to ensure that the regulated activity is designed not to discharge to groundwater shall not be subject to the rest of this section.
- (c) In making its determination as to whether a regulated activity meets the public trust requirements established by 10 V.S.A. § 1390(5) the Secretary shall determine:
 - (1) The activity has a public benefit. In making a determination as to whether the activity has a public benefit, the Secretary shall consider:
 - (A) Whether the regulated activity is located in an area that is consistent with any municipal plan for the municipality where the regulated activity is located;
 - (B) Whether the regulated activity is consistent with any regional plan for the area in which the regulated activity is located;
 - (C) Whether the regulated activity is consistent with the source protection plan requirements for either zone one or zone two of a public water supply source protection area where the regulated activity is located; and
 - (D) Whether the regulated activity is consistent with any municipal groundwater protection overlay district established by 24 V.S.A. § 4414(2).

- (d) In conducting a review of the regulated activity, the applicant shall bear the burden of demonstrating compliance with applicable rule standards established for the protection of groundwater and the Groundwater Protection Rule and Strategy. Any reasonable doubt that the regulated activity would be protective of the groundwater resource shall be construed against the applicant.
- (e) The regulated activity shall have a comment period on the proposed activity which provides the public with a reasonable opportunity for meaningful public comment. For purposes of this section, a comment period of 10 business days or greater shall be deemed reasonable.
- (f) Prior to the issuance of a permit, certification, or other authorization the Secretary shall make an affirmative finding that the requirements of this procedure have been satisfied. The Secretary shall incorporate all the findings and conditions required by this section decision issued by the Secretary regulating the activity, including an individual permit or a general permit.

By: _____



Date: July 20, 2011

David K. Mears, Commissioner
Department of Environmental Conservation
Agency of Natural Resources