

**State of Vermont  
WATER RESOURCES BOARD**

**Re: Hannaford Bros. Co. and Lowes Home Centers, Inc.  
Docket No. WQ-01-01**

**MEMORANDUM OF DECISION**

Applying its de novo standard of review, the Board finds that the application for the permit at issue was filed and complete in fact on April 17, 2000, and the Board deems the application complete as of that date. Accordingly, the permit applicants have a vested right in the 1997 Vermont Water Quality Standards and in title 10, section 1264 of the Vermont Statutes Annotated, as amended in 1987, and those laws shall apply to the permit at issue in this appeal. The proposed discharge, flowing into waters that do not comply with the 1997 Vermont Water Quality Standards, can be permitted only if the permit applicants prove that it will not increase the chemical, physical, or biological impacts of the pollutants for which the receiving waters are impaired. The Board will hear from the parties on whether the baseline for measuring any increase in pollutant load in this case should be the existing discharge at the site, the discharge authorized by the permit Hannaford received in 1995, predevelopment conditions at the site, or some other condition.

**I. Background**

This appeal arises from the issuance of a stormwater discharge permit (permit) by the Agency of Natural Resources (ANR or agency) to Hannaford Brothers Company (Hannaford) and Lowes Home Centers, Inc. (Lowes). The permit allows the discharge of treated and controlled stormwater runoff from the Southland Commercial Plaza in the City of South Burlington (the site) to Potash Brook and an unnamed tributary to Shelburne Bay in Lake Champlain. The project associated with the stormwater permit under appeal (project) involves a multi-building commercial complex with shared access for both new and existing buildings.

Hannaford received a stormwater discharge permit for the initial phase of the project in 1995. The impending expiration of its five-year stormwater permit led Hannaford to apply to ANR for a renewal of the permit in September, 1999. In April, 2000, Lowes filed with ANR an application for renewal and amendment of Hannaford's 1995 permit to allow for the addition of a Lowes Home Center to the project. Hannaford and Lowes (the applicants) supplied ANR with requested additional information shortly before ANR published a draft permit for public comment in September, 2000. On December 12, 2000, ANR issued the permit.

On January 11, 2001, Conservation Law Foundation (CLF) appealed the permit to the Water Resources Board (Board). CLF's Notice of Appeal asserted that the permit unlawfully authorizes a new measurable and detectable stormwater discharge into receiving waters that currently do not meet the requirements of the Vermont Water Quality Standards and that have

been listed as water quality limited segments on the United States Environmental Protection Agency (EPA) approved 1998 State of Vermont List of Targeted and Impaired Waters. CLF also claimed that the permit unlawfully fails to include sufficient permit-specific limitations necessary to assure that the authorized discharge will not cause or contribute to the documented failure of the receiving waters to meet the Vermont Water Quality Standards.

The Board's Chair, David J. Blythe, Esquire, conducted a prehearing conference in this matter on February 13, 2001. Hannaford, Lowes, ANR, and CLF were all granted party status as of right. Permissive intervention was granted to a citizens group known as the Voice for Potash Brook (the Voice), which is represented by counsel for CLF.

At the February 13, 2001, prehearing conference, the parties agreed that the applicants bear the burden of proving that the permit should issue. The parties also agreed on a number of facts, including the following: Potash Brook and Shelburne Bay do not meet the requirements of the Vermont Water Quality Standards. Accordingly, ANR identified both Potash Brook and Shelburne Bay as water quality limited segments on the 1998 list of targeted and impaired waters that the State of Vermont submitted, and that EPA approved, pursuant to section 303(d) of the Clean Water Act, 33 U.S.C.A. § 1313(d). Potash Brook is impaired because of sedimentation, pathogens, and undefined causes, which may include metals, nutrients, and total oxygen. Shelburne Bay is impaired due to excess phosphorous. The applicants used the technology-based treatment and control practices contained in ANR's 1997 Stormwater Management Procedures (1997 Stormwater Procedures) for the design of the stormwater treatment and control systems for their project. ANR relied on the 1997 Stormwater Procedures for its review of the permit application and issuance of the contested permit.

At the prehearing conference, the parties did not agree on the nature of the permitted discharge or its anticipated effect on the receiving waters. The following are among the other issues that the parties disputed at the prehearing conference: whether compliance with the technology-based design specifications of the 1997 Stormwater Procedures creates a presumption of compliance with the Vermont Water Quality Standards; whether the discharge permit at issue is subject to the National Pollutant Discharge Elimination System (NPDES) under the Clean Water Act, 33 U.S.C.A. §§ 1251-1387; whether a discharge into waters that do not meet the requirements of the Vermont Water Quality Standards can be permitted at all; whether the permit unlawfully fails to include permit-specific limitations necessary to assure that the discharge will not cause or contribute to the documented impairment of the receiving waters; and whether the Board should apply the 1997 or the 2000 Vermont Water Quality Standards to the permit on appeal.

On February 16, 2001, Chair Blythe issued a Prehearing Conference Report and Order ("Prehearing Order"). The Prehearing Order set forth a schedule for the parties to file briefs on certain legal issues identified at the prehearing conference and listed in the Prehearing Order. On

March 2, 2001, Chair Blythe issued an Order granting in part and denying in part objections filed by ANR to certain parts of the Prehearing Order, including the framing of certain issues.<sup>1</sup> Oral arguments took place on April 3, 2001. The Board deliberated on the preliminary legal issues following the oral arguments.

The oral arguments as well as the briefs on the preliminary legal issues devoted considerable attention to the issue of whether the 1997 or the 2000 Vermont Water Quality Standards control these proceedings. The 2000 Vermont Water Quality Standards took effect on July 2, 2000. The 1997 Vermont Water Quality Standards became effective on April 21, 1997. A related issue addressed at the oral arguments was whether this case is governed by the current version of 10 V.S.A. § 1264 (Supp. 2000), which became effective May 19, 2000, or by the prior version of 10 V.S.A. § 1264 (1998), which was last amended in 1987. Section 1264 specifically applies to stormwater management, and the May, 2000, changes were substantial.

Whether the current or the prior version of 10 V.S.A. § 1264 applies to these proceedings depends on the factual question of when a complete application for the permit under appeal was filed. See, e.g., In re Taft Corners Assoc's, \_\_\_ Vt. \_\_\_, 758 A.2d 804 (2000). See also In re Ross, 151 Vt. 54, 557 A.2d 491 (1989) (affirming decision that permit request based on partial and insufficient information did not vest rights of applicants in law in effect at time request was filed). Similarly, both the 1997 and the 2000 Vermont Water Quality Standards provide that the applicable Water Quality Standards are those in effect at the time a permit application is filed and deemed complete. VWQS §§ 1-01.A.2, B.4 (1997 & 2000).

In their briefs on the preliminary issues and at the oral arguments on the preliminary issues, the parties disputed when a complete permit application was filed and deemed complete. The applicants and ANR argued that the application was complete in fact and deemed complete when it was originally submitted to ANR in April, 2000, and that the 1997 Vermont Water Quality Standards therefore control. On the other hand, CLF and the Voice (appellants) maintained that the Board should construe the permit using the 2000 Vermont Water Quality Standards because the paper trail left by the applicants and ANR shows that the application was not complete in fact or deemed complete until after the applicants submitted additional information in late August, 2000. The applicants and ANR cited the current version of section 1264 in their briefs but offered no ready explanation for that apparent contradiction when the Board brought it to their attention at the April 3, 2001, oral arguments.

Although the parties attached to their briefs on preliminary issues various documents relating to the matter of when the permit application was filed and complete, the parties interpreted those documents differently. The Board could not be certain that the parties had taken

---

<sup>1</sup>The preliminary issues framed by the Board and the parties, and a summary of the Board's decision on each preliminary issue, are set forth in Part IV, infra.

the opportunity to submit and construe all relevant documentary evidence on the completeness question. Nor were the parties afforded the opportunity to provide testimony. The Board noted in its Prehearing Order that factual disputes would be resolved only after an evidentiary hearing.

In an Order issued April 6, 2001, Chair Blythe scheduled an evidentiary hearing for April 19, 2001. The Chair's Order limited the hearing to the factual question of when a complete permit application was filed and deemed complete for purposes of determining which version of the Vermont Water Quality Standards and which version of 10 V.S.A. § 1264 applies to these proceedings. The April 6, 2001, Order instructed the parties to brief the law governing the issue of when a complete permit application is filed and deemed complete and the Board's standard of review of ANR's completeness determination. The Order advised the parties that the Board would not make a decision on the other preliminary issues in this case until the questions of when the permit application was complete in fact and deemed complete were resolved.

## **II. Findings of Fact**

Having considered the evidence admitted at the April 19, 2001, limited evidentiary hearing, the Board makes the following findings of fact:

1. The project associated with the permit at issue encompasses about thirty acres of development, including both proposed and existing buildings. When completed, the development will consist of some 279,000 square feet of building space, including an expanded Hannaford Brothers Company grocery store, a bank, a hotel, a new Lowes Home Improvement Center, and nearly 1,300 parking spaces.
2. The project is located at the Southland Plaza shopping center on the west side of Route 7, Shelburne Road, about a half mile south of Interstate 89.
3. Hannaford received a five-year discharge permit for stormwater runoff from the site in 1995. The development plans associated with Hannaford's 1995 stormwater discharge permit called for three stormwater management ponds, one of which has been constructed. The 1995 plans also included mitigation for about 0.91 acres of Class III wetland fill through the construction of two wetland/stormwater treatment basins.
4. Hannaford filed an application for renewal of its 1995 permit on September 19, 1999. On April 17, 2000, before ANR had acted on Hannaford's application for a permit renewal, Lowes, as a co-permittee, filed an application for renewal and amendment of Hannaford's 1995 stormwater permit. The April 17, 2000, permit application included plans to replace certain previously proposed retail space with a Lowes Home Improvement Center and to reconfigure parts of the stormwater treatment and control system. Compared to the 1995 plans, the plans associated with the April 17, 2000, permit application would increase the

overall impervious area by about 16,500 square feet.

5. On December 12, 2000, ANR issued the permit under appeal (DEC Permit # 1-1214) to Hannaford and Lowes as copermittees. The permit authorizes discharges of treated and controlled stormwater from two stormwater detention basins into Potash Brook and from a third stormwater detention basin to an unnamed tributary to Shelburne Bay.
6. The points of discharge to Potash Brook are about 1,600 feet and 2,800 feet upstream from Shelburne Bay. The point of discharge to the unnamed tributary is about 3,500 feet upstream from Shelburne Bay.
7. Potash Brook and Shelburne Bay do not meet the requirements of either the 1997 or the 2000 Vermont Water Quality Standards. Both Potash Brook and Shelburne Bay appear on the EPA-approved 1998 State of Vermont List of Targeted and Impaired Waters. Potash Brook is impaired as a result of sedimentation, pathogens, and undefined causes, which may include metals, nutrients, and total oxygen. Shelburne Bay is listed as a water quality limited segment due to phosphorous.
8. Randy Bean processed the permit application on behalf of ANR. Mr. Bean has been engaged in processing permits for ANR since September, 1990. He reviews about thirty stormwater permits a year. Mr. Bean is familiar with the 1996 Department of Environmental Conservation (DEC) Permit Application Review Procedure (Permit Application Review Procedure), and he helped write the 1997 Stormwater Procedures.
9. DEC developed its Permit Application Review Procedure as guidance to assure consistency across programs. The Permit Application Review Procedure describes a detailed system for promptly reviewing permit applications for completeness, documenting completeness reviews, and communicating completeness determinations to permit applicants.
10. ANR did not follow the Permit Application Review Procedure with regard to determining when the application for the permit under appeal was complete.
11. ANR relied on Chapter 1, Part J of the 1997 Stormwater Procedures to conduct its review of the application for renewal and amendment of Hannaford's permit. Part J enumerates nine items that constitute "[a] complete application for a stormwater discharge permit."
12. The 1997 Stormwater Procedures provide as follows: "For purposes of demonstrating compliance with the Vermont Water Quality Standards and receiving a stormwater discharge permit, the applicant shall demonstrate that the design of the development incorporates the treatment and control practices specified in . . . these procedures." (Ch.

1, § I.)

13. The 1997 Stormwater Procedures (ch. 2, § E.1) describe the design of control structures necessary to limit “the post-development peak discharge rate from the site so that it does not exceed the pre-development peak discharge rate from the site for a 2-year, 24-hour storm event.”
14. In its permit review, ANR regarded satisfaction of the 1997 Stormwater Procedures as presumptive compliance with the Vermont Water Quality Standards. Compliance with the 1997 Stormwater Procedures, not the Vermont Water Quality Standards, was therefore the bottom line in ANR’s permit review. ANR did not perform a wasteload allocation pursuant to ANR’s Wasteload Allocation Process rules prior to issuing the permit under appeal. ANR knew of the water quality problems in Potash Brook and Shelburne Bay when reviewing the permit application. The application does not specifically address these impairments. Nor does the application contain a detailed assessment of the receiving waters. In its permit review, ANR viewed considerations of the assimilative capacity of the receiving waters to be reserved for discharges of biological waste rather than stormwater. The important consideration to ANR in its review of the application at issue was hydrologic.
15. ANR received the application for a renewed and amended permit from Lowes on April 17, 2000. The application contained all nine items required by Chapter 1, Part J of the 1997 Stormwater Procedures, except for stormwater calculations relating to natural conditions at the site. The pre-development calculations (required by Part J, Paragraph 7) were available to ANR from Hannaford’s 1995 permit file. ANR did not consider these calculations to be pertinent to its review of the application for renewal and amendment. Consequently, as of April 17, 2000, ANR had all the information it needed to begin its technical review.
16. ANR’s administrative staff sent a letter to Lowes on April 20, 2000. The letter acknowledges receipt of the application but specifically states that “this is not a determination of whether or not the application is complete.” The letter adds that the application was given to Mr. Bean and that he would contact Lowes if additional administrative or technical information was needed.
17. Mr. Bean first looked at the application in mid-June, 2000. It was based on his review of the application at this time that Mr. Bean determined the application to be administratively complete. Mr. Bean’s understanding was that by determining that the application was complete when he first reviewed it in mid-June, he retroactively deemed the application to be complete when it first came in on April 17, 2000.

18. When Mr. Bean first reviewed the application in mid-June, 2000, he found three minor problems with the materials that the applicants submitted on April 17, 2000. First, on-site inspections of the existing stormwater system, as required by Hannaford's original permit, were tardy. Second, the application was for a Hannaford renewal and a Lowes amendment, and ANR needed confirmation that Hannaford and Lowes were copermittees acting in concert. Third, Mr. Bean wanted to be sure that the wetland/stormwater treatment basins at the site would be consistent with the interests of ANR's Wetlands Office. Shortly after Mr. Bean first reviewed the application in mid-June, 2000, he communicated the foregoing problems to the applicants by means of a telephone call to their consulting engineer, Todd Morey.
19. ANR's computer-generated project tracking sheets document certain communications between Mr. Bean and the applicants. One of these sheets indicates that on June 30, 2000, ANR requested the applicants to conduct a site inspection, to provide an agreement between Hannaford and Lowes, and to redesign a wetland pond. This project tracking sheet further indicates that the information from the applicants relating to these matters arrived at ANR on August 25, 2000. Another tracking sheet documents the issuance of the permit in December, 2000. These sheets contain spaces for filling in the date that the application was administratively complete and the date the application was technically complete. On both sheets those spaces are blank.
20. On August 25, 2000, the applicants informed Mr. Bean by memorandum that they had performed "corrective maintenance" of the existing stormwater system. In a separate letter that ANR received on the same date, Hannaford confirmed that Lowes was an authorized copermittee. The balance of the information that the applicants submitted on August 25, 2000, was a revised stormwater management report.
21. Although the revised stormwater management report consists of some seven hundred pages, it is similar to the original report that the applicants submitted on April 17, 2000. The revised report reflects various concerns of ANR's wetlands program relating to the mitigation of filled wetlands. The application submitted to ANR on April 17, 2000, proposed scrapping the previously approved design of a constructed wetland in favor of a wet pond. The wet pond was consistent with the 1997 Stormwater Procedures, but Mr. Bean wanted to be sure the idea was agreeable to Peter Keibel of the Wetlands Office in ANR's Water Quality Division.
22. After consulting with Peter Keibel, the applicants decided to abandon their idea of using a wet pond and to return to the use of a constructed wetland. Mr. Bean did not consider this dialog to have any bearing on the administrative completeness of the application on April 17, 2000. However, Mr. Bean could not consider the application to be technically complete while the debate over a wet pond versus a constructed wetland was going on.

Much of the revised stormwater management report that the applicants submitted on August 25, 2000, consists of revised computer-generated calculations based on the decision of the applicants to substitute a wetland design for a wet-pond design. Mr. Bean was confident that either design would have been acceptable for issuing a stormwater permit and that the wetlands issue related entirely to the concerns of the Wetlands Office.

23. After reviewing the supplemental information that the applicants filed on August 25, 2000, ANR arranged for publication of a draft permit for public comment. ANR's only record that the application was complete is the September, 2000, cover letter for public notice of the draft permit. That document informed the public that the complete permit could be inspected at ANR. ANR issued the final permit after the close of the comment period. CLF then appealed the permit to the Board.

### **III. Discussion**

#### **A. Vested Rights**

##### **1. Burden of Proof**

For the Board to decline to construe the permit under the current rules and statutes relating to stormwater management, the Board must be satisfied that the applicants have a vested right in prior law. See In re Molgano, 163 Vt. 25, 653 A.2d 772 (1994). Any rights of the applicants in prior law did not vest unless their permit application was complete when the prior law was in effect. See In re Ross, 151 Vt. 54, 557 A.2d 490 (1989). Current law will govern this appeal if the applicants fail to carry that burden by a preponderance of the evidence.

##### **2. Standard of Review**

Section 1269 of Vermont's Water Pollution Control Act specifically directs the Board to hear appeals from ANR's permit decisions de novo. 10 V.S.A. § 1269 (1998). In a de novo proceeding, "the case is heard as though no action whatever had been held prior thereto." In re Poole, 136 Vt. 242, 245, 388 A.2d 422, 424 (1978). "In fact, no deference need be paid to the decision below." Re: Appeal of Vermont Natural Resources Council, No. DAM-92-02, Prehearing Conference Order and Preliminary Order at 6 (Vt. Water Res. Bd. April 10, 1992) (citing Chioffi v. Winooski Zoning Board, 151 Vt. 9, 11, 556 A.2d 103, 105 (1989)).

In a de novo appeal, the Board does not review ANR's prior decision but rather hears the matter "as if there had been no prior proceedings." In re Killington, 159 Vt. 206, 214, 616 A.2d 241, 246 (1992) (quoted in Re: Deerfield River Hydroelectric Project, No. WQ-95-02, Chair's Evidentiary Rulings at 4 (Vt. Water Res. Bd. Feb. 5, 1997)). The Board recently explained that one of the principal reasons for the de novo review standard under section 1269 is to allow the

Board to take a fresh look at the issues presented and to allow the parties to weigh in on matters from which their party status derives. Re: Town of Cabot, No. WQ-00-04, Findings of Fact, Conclusions of Law, and Order at 4 (Vt. Water Res. Bd. Sept. 8, 2000). On the matter of when the permit application in this case was filed and complete and deemed complete, the Board will look at the evidence anew--as if no decision had previously been made.

### **3. The Meaning of Complete and Deemed Complete**

The procedures for determining which version of the Vermont Water Quality Standards applies to this appeal and for determining which version of section 1264 applies to this appeal are similar. With regard to the Vermont Water Quality Standards, the 2000 Standards themselves provide that “Concerning any application, the Water Quality Standards in effect at the time of the filing shall apply.” VWQS § 1-01.A.2 (2000). The 1997 Standards are substantially the same. See VWQS § 1-01.A.2 (1997). The 2000 Water Quality Standards go on to say that an “application” is a “request for a permit required by state or federal law when filed with, and deemed complete by, the reviewing authority.” VWQS § 1-01.B.4 (2000) (emphasis added). Similarly, the 1997 Water Quality Standards define an “application” as “any request for a permit, certification or approval required by state or federal law filed with and deemed complete by the Secretary.” VWQS § 1-01.B.4 (1997) (emphasis added).

The question of which version of section 1264 applies hinges on Vermont law addressing the retroactive application of statutes. Many of the cases on this subject involve land-use-planning decisions, but their reasoning applies by analogy to this appeal. Generally, a statute will not apply retroactively in Vermont if the person affected has a vested right in the prior law. For a permit applicant’s rights to vest in the prior law, the application must have been filed and complete before the law changed. In re Ross, 151 Vt. 54, 557 A.2d 490 (1989). Vermont law on vested rights and the retroactive effect of statutes does not use the “deemed complete” language found in the Vermont Water Quality Standards. However, the law on vested rights is instructive not only on the question of which version of section 1264 applies, but also on the question of whether the 1997 or the 2000 Vermont Water Quality Standards govern this appeal.

The Vermont Supreme Court has adopted the minority rule on whether the issuance of a permit vests rights in the applicant against future changes in land-use regulations. Smith v. Windhall Planning Comm’n, 140 Vt. 178, 436 A.2d 760 (1981). In most states, zoning changes have retroactive effect. However, the courts in those states have fashioned an exception where the applicant substantially relied to his detriment on the prior laws. Another exception applies if the amendment was designed to thwart a particular applicant’s plans. Id. at 181, 436 A.2d at 761.

Vermont departed from the majority rule primarily to avoid the protracted litigation that could arise from applying its exceptions. The Vermont Supreme Court’s objective was to create “certainty in the law and its administration.” Id. at 182, 436 A.2d 761. Accordingly, Vermont

has adopted a bright-line rule that vests rights under the regulations in effect at the time the application is filed.

The Vermont Supreme Court adopted the vested-rights rule based in part on the policy contained in 1 V.S.A. § 213 (1995), which provides as follows: “Acts of the general assembly, except acts regulating practice in court, relating to the competency of witnesses or the amendments of process or pleadings, shall not affect a suit begun or pending at the time of their passage.” Whereas section 213 applies to new statutes, section 214, 1 V.S.A. § 214 (1995), contains similar language for amendments or repeals. Under sections 213 and 214, new or amended statutes affecting substantive rights generally do not apply to cases pending on their effective dates, but the general rule does not typically apply to new legislation that is procedural or remedial in nature. Ulm v. Ford Motor Co., 170 Vt. 281, 750 A.2d 981 (2000). Even remedial legislation, however, does not apply to pending litigation if the legislation affects a pre-existing right, privilege, obligation, or liability. Myott v. Myott, 149 Vt. 573, 547 A.2d 1336 (1988).

Sections 213 and 214 may not, by their terms, apply to permit applications, but the Vermont Supreme Court has extended the policy of these laws to land-use appeals. In Application of Preseault, 132 Vt. 471, 474, 321 A.2d 65, 66 (1974) (holding that project’s nonconformance with town plan adopted after developer applied for Act 250 permit could not form basis of permit denial), the Vermont Supreme Court applied the policy of section 213 to zoning ordinances, which the Court reasoned derive from state authority. See also In re Molgano, 163 Vt. 25, 31-32, 653 A.2d 772, 776 (1994) (explaining that holding in Preseault stems from policy of section 213).

The case law on vested rights does not offer definitive guidance on what it means for a permit application to be filed and complete. The Smith case, which explicitly adopted the vested rights rule in Vermont, said the permit application needs to be “proper” for the regulations in effect at the time of filing to apply. 140 Vt. at 181, 436 A.2d at 761. In In re Handy, \_\_\_ Vt. \_\_\_, 764 A.2d 1226, 1233 (2000) (3-2 decision), the Supreme Court said that the permit application must be “validly brought and pursued in good faith.”

In In re Ross, 151 Vt. at 56, 557 A.2d at 491, the Supreme Court held that an incomplete application does not vest rights. The Ross Court found that a complete application under Act 250, 10 V.S.A. §§ 6001-6108 (1997 & Supp. 2000), must cover all of Act 250’s criteria. Ross at 58-59, 557 A.2d at 492. The application in Ross was such that the District Environmental Commission reviewing it was “unable to make findings.” Id. at 55, 557 A.2d at 490 (quoting order of District Environmental Commission). The application, in other words, “failed to supply sufficient information to enable the Commission to render a decision.” Id. at 58, 557 A.2d at 492. The Ross Court explained that “Smith should not be interpreted as an open-ended right to ‘freeze’ the applicable regulatory requirements by proposing a development with inadequate specificity.”

Ross at 56, 557 A.2d at 491 (quotation in original).

The vested-rights rule applies absent a controlling statute to the contrary. In re Handy, 764 A.2d at 1233. See also In re McCormick Mgt. Co., 149 Vt. 585, 588, 589-90, 547 A.2d 1319, 1321, 1322-23 (1988) (reasoning that vested-rights rule cannot be used to undermine legislative policy). While the Vermont Water Quality Standards may not represent a controlling statute to the contrary, both the 1997 and the 2000 Water Quality Standards require an application to be “deemed complete” by ANR in order for the applicant’s rights to vest. VWQS § 1-01.B.4.

The ordinary meaning of “deemed” is “to think, believe, or judge.” Webster’s New World Dictionary 368 (Simon and Schuster eds., 2d College ed. 1982). See also Black’s Law Dictionary 415 (6th ed. 1990) (defining “deem” as “hold; consider; adjudge; believe; condemn; determine; treat as if; construe”). The meaning of “deemed,” the fact that the Vermont Water Quality Standards say “deemed complete” rather than just “complete,” as well as sound policy, call upon ANR to make an affirmative, prompt, documented decision whether or not a permit application governed by the Vermont Water Quality Standards is complete. A deliberate completeness determination on the part of ANR, fairly and efficiently administered, would promote certainty in the administration of the law and thereby serve the purposes of the vested-rights rule.

For purposes of determining the vested rights of a permit applicant, the Board understands a complete application as follows: the application is such that the applicant would reasonably believe that the reviewing authority could act upon the application’s merits. It is safe to say that agencies reviewing complex permit applications commonly ask for supplemental information. Such a request should not necessarily be the death knell for applying the law in effect when the application was originally presented to the agency. The agency should not be discouraged from requesting appropriate additional information, and the applicant should not be encouraged to bury the agency with extraneous information in the hope of preventing the agency from divesting the applicant of its rights by asking for something else. That is why a reasonable-expectation rule, rather than a perfect-application rule, is appropriate. Good faith requires that a complete application reasonably address all the factors that the agency is legally required to address in its permit review. ANR’s completeness determinations should be made accordingly.

#### **4. The Completeness in Fact of the Application at Issue**

The evidence shows that on April 17, 2000, the applicants had supplied ANR with all the materials the 1997 Stormwater Procedures identify for an application to be complete. ANR’s permit reviewer, Mr. Bean, testified that the contents of the application on April 17, 2000, were sufficient to enable him to proceed with a technical review. Mr. Bean did testify that the April 17, 2000, application presented three minor problems. The first two involved a failure to perform routine maintenance of the existing stormwater basin at the site and a need to confirm that

Hannaford had authorized Lowes to submit the application as a copermitee. Both problems were corrected with simple confirmations, and neither encumbered ANR's ability to proceed with its review of the application.

The third problem was whether the decision of the applicants to use a wet-pond rather than a constructed-wetland system at the site was consistent with the interests of ANR's Wetlands Office. The matter of whether to use a wet-pond system or a constructed-wetland system had no bearing on the design's ability to treat and control stormwater, and the record contains no evidence to suggest that the applicants should have anticipated this debate or that their original application was deficient. The applicants changed their stormwater treatment design to reflect the concerns of the Wetlands Office and submitted those changes to Mr. Bean. Based on the record in this case, the dialog between the applicants and ANR on the issue of whether to use a wet pond or a constructed wetland reflects the give and take that can reasonably be expected to occur once an agency proceeds with its review of a complete permit application.

The appellants argue cogently that for an application to be complete, "the applicant must submit sufficient information to allow for a review of the project for conformance with the VWQS." (CLF Mem. on Appl. Completeness at 4.) As a general proposition, that is a fair statement. In this case, however, ANR reviewed and approved the permit application under its 1997 Stormwater Procedures. For purposes of determining when the application at issue in this case was complete, the Board need not decide whether ANR may rely solely on its own procedures, which are not promulgated rules, to determine whether an application for a stormwater permit complies with Vermont law. The Board need only find that ANR--rightly or wrongly--did in fact rely on its 1997 Stormwater Procedures to measure the application's compliance with the Vermont Water Quality Standards, that the applicants expected ANR to operate on that basis, and that on a date certain the applicants submitted information sufficient to enable ANR to proceed with its review.

The applicants set out to provide ANR with the information they reasonably believed ANR would require before issuing a permit. To hold that the applicants were required to provide ANR with information directly addressing the impact of the proposed discharge on the Vermont Water Quality Standards before their rights could vest would be expecting the applicants to have placed themselves in an impossible position. Although the elements of a complete stormwater-discharge-permit application may change over time, in this case the question of whether conformity with the treatment and control practices of ANR's 1997 Stormwater Procedures is enough to demonstrate compliance with the Vermont Water Quality Standards goes to the merits of the permit application, not to its completeness. Accordingly, the Board concludes that for purposes of vesting the rights of the applicants, the application was complete in fact on April 17, 2000--the date ANR received it.

## **5. The Deemed Completeness of the Application at Issue**

Having found that the permit application was complete in fact on April 17, 2000, the Board must also determine when the application was “deemed complete” to be able to decide which version of the Vermont Water Quality Standards and which version of section 1264 applies to this appeal. See VWQS § 1-01.B.4 (1997 & 2000) (defining “Application”). ANR’s handling of its responsibility to deem the application in this case complete did little to promote “certainty in the law and its administration.” Smith, at 181, 436 A.2d at 761. Although at the limited evidentiary hearing in this matter, ANR freely acknowledged the importance to permit applicants and the public of the agency’s completeness determination, ANR never made a formal determination that the application was complete. Its permit reviewer, apparently following the custom of the agency, ignored the completeness sections of the agency’s own permit tracking forms. The agency disregarded its Permit Application Review Procedure by failing to issue and file a letter apprising the applicants (and the interested public) of when the application was administratively complete. ANR’s first written suggestion that the application was complete occurred in September, 2000, when the agency had concluded its technical review of the application and prepared to publish a draft of the permit for public comment.

ANR’s permit reviewer, Mr. Bean, was the first member of the agency’s staff who looked at the application and was qualified to make a completeness determination. Mr. Bean testified that he first looked at the application in June, 2000. Mr. Bean went on to testify that at that time, he determined that the application was administratively complete retroactive to April 17, 2000, when the agency had time-stamped the application as received.

The Board need not determine whether ANR deemed the application complete in April, June, or September of 2000, or at some other time. The Board’s review of ANR’s completeness determination, or lack thereof, is de novo, and the Board accordingly does not defer to the actions of ANR. Under its de novo standard of review, the Board deems the application complete on April 17, 2000--the date ANR received the complete application.

Permit applicants have no control over the time lag between the filing of a complete application and the date ANR makes and records its completeness determination. Were the Board to attempt to divine the date, if any, that ANR appropriately deemed the application in this case complete, and use that date to establish the vested rights of the applicants, the Board would unnecessarily risk holding the applicants hostage to administrative delay. The Board is dismayed at the shortcomings of ANR’s commitment to efficiently conduct and document a completeness determination in this case. However, the Board agrees with ANR’s practice of protecting the vested rights of permit applicants by retroactively deeming applications complete as of the date the applications were complete in fact.

## **B. Stormwater Discharges into Water Quality Limited Segments**

The Board having determined that the Vermont Water Quality Standards and the

applicable statutory scheme in effect on April 17, 2000, control in this case, the remaining preliminary issues in this appeal are now ready for decision. Following a discussion of the legal requirements for the discharge at issue, the Board will summarily address the preliminary legal issues framed by the Board and the parties and identify the major questions of fact remaining for the evidentiary hearing in this matter.

### **1. Federal Requirements**

A central issue in this appeal is whether a discharge may be permitted into impaired waters, and if so, under what circumstances. Impaired waters, also known as water quality limited segments, are waters that do not meet the Vermont Water Quality Standards for one or more pollutants. See 40 C.F.R. § 130.2(j) (defining “Water quality limited segment”). Each state is required to recurrently submit to EPA a list of those waters within its boundaries that do not comply with the state’s water quality standards. Clean Water Act § 303(d), 33 U.S.C.A. § 1313(d); 40 C.F.R. § 130.7. The parties agree that in its 1998 section 303(d) list, ANR identified the receiving waters involved in this appeal as water quality limited segments.

The Prehearing Order directed the parties to address the bearing of federal law on the permit in their briefs on preliminary issues. The appellants declined to do so, advising as follows:

Appellants are taking the position that the question whether a Clean Water Act permit is required for the project is not before the Board in the instant appeal. The appeal currently before the Board is limited to consideration of the legal framework relevant to issuance of a state stormwater permit, and does not include consideration of compliance with the National Pollution [sic] Discharge Elimination System (NPDES) under section 402 of the Clean Water Act. Although some aspects of the CWA and its implementing regulations may come into play as they have been adopted by reference in state law, we do not believe that any federal prohibitions are at issue in the current appeal.

(CLF Mem. on Prelim. Legal Issues Cover Letter.)

Citing CLF’s brief, the reply brief of the applicants followed suit and declined to discuss the federal permitting scheme. (Response Br. of Applicants at 8-9.) In its reply brief on preliminary issues, ANR agreed that “[t]he Board need not address federal law.” (ANR Mem. on Prelim. Issues at 12.) Because the parties agree that federal law does not prohibit the permit under appeal, the Board declines to decide whether and under what circumstances the permit complies with the federal NPDES permitting program.

### **2. Requirements of the Vermont Discharge Permitting Program**

The discharge permitting scheme outlined in the Vermont Water Pollution Control Act, 10 V.S.A. §§ 1250-1283 (1998 & Supp. 2000), seeks to protect the quality of Vermont's receiving waters by obtaining and maintaining their classifications. Vermont water pollution control law includes a system under which ANR has the authority and duty to ensure that discharges into Vermont's waters comply with the Vermont Water Quality Standards. See 10 V.S.A. § 1263 (1998). The Vermont Water Pollution Control Act applies to all discharges, see id., and specifically makes stormwater discharges subject to its provisions. See 10 V.S.A. § 1264(a) (1998). Both the Vermont Water Pollution Control Act and the 1997 Vermont Water Quality Standards recognize that managing stormwater is different from managing sanitary and industrial waste and that ANR must therefore account for stormwater's unique characteristics to effectively manage stormwater discharges. Like other discharges, stormwater discharges cannot lawfully cause or contribute to violations of the Vermont Water Quality Standards. See 10 V.S.A. §§ 1263, 1264 (1998); VWQS § 2-05 (1997).

The discharge permitting system described by Vermont's Wasteload Allocation Process (1987) requires ANR to create and implement a pollutant budget for receiving waters. Vermont's Wasteload Allocation Process defines "Assimilative capacity" as "The measure of a water body's ability to accept wasteloads without degrading water quality below established water quality standards." Wasteload Allocation Process at 3. See also VWQS § 1-01.B.6 (1997) (defining "assimilative capacity"). "Wasteload allocation" means "The distribution of maximum allowable daily loads to dischargers, the sum of which will meet the assimilative capacity of a particular reach of river or stream." Wasteload Allocation Process at 4. "Total Maximum Daily Load (TMDL)" under Vermont's rules is "The total allowable amount of pollutant which a discharger is allowed to discharge to a water body per day which will ensure water quality standards are met." Id.

Thus the total water pollution budget in Vermont is the capacity of the receiving waters to assimilate a pollutant while meeting the Vermont Water Quality Standards. A TMDL is the amount of the total budget that each source of a pollutant receives. A wasteload allocation ensures that all the TMDLs together do not exceed the total budget.

The purpose of the Wasteload Allocation Process is "To stipulate how Federal and State mandated wasteload allocations should be made." Wasteload Allocation Process at 2. The applicability of the Wasteload Allocation Process is comprehensive, and the procedures set forth therein specifically apply to stormwater:

To provide a fair distribution of waste assimilation capacity among all dischargers in a water segment, the use of mathematical simulation modeling should first be employed to determine the assimilative capacity of the receiving water.

All discharges that significantly impact the resource, based on considerations of frequency and/or magnitude, shall be included in such assimilative capacity determinations. These discharges shall include, but not be limited to, municipal and industrial discharges, nonpoint sources, stormwater runoff and combined sewer overflows. All discharges used in the modeling process will be characterized by total maximum daily loads.

Wasteload Allocation Process at 5 (emphasis added). The wasteload allocation process is not limited to impaired waters; wasteload allocations are required whenever ANR estimates that existing or projected discharges exceed a water segment's assimilative capacity. Wasteload Allocation Process at 6.

The Vermont Water Pollution Control Permit Regulations (1974) provide that a wasteload allocation must be performed as "necessary in order to ensure that the discharge authorized by the permit is consistent with applicable water quality standards." WPCPR § 13.4.b.(2). In addition, these rules require discharge permits to include effluent limitations as necessary to comply with water quality standards. WPCPR § 13.4.b.(1)(d). Under Vermont's rules, effluent limitations must be quantitative. WPCPR § 13.4.c. Existing discharge permits cannot be reissued in Vermont unless the discharge is consistent with, among other things, applicable water quality standards. WPCPR § 13.5.b.(2)(c). See also 10 V.S.A. § 1263(e) (1998) ("A renewal permit shall be issued following all determinations and procedures required for initial permit application.")

Like ANR's rules, the 1997 Vermont Water Quality Standards indicate that the Wasteload Allocation Process is comprehensive: "the assimilative capacity of the waters of the State shall be carefully allocated in accordance with the 'Wasteload Allocation Process' as adopted by the Secretary [of ANR]." VWQS § 1-04.B (1997). Section 1-04.A of the 1997 Vermont Water Quality Standards enumerates the requirements for "new discharges of wastes." Among those requirements are that "The receiving waters . . . have sufficient assimilative capacity to accommodate the proposed discharge." VWQS § 1-04.A.6 (1997). Another requirement for "new discharges of wastes" is that "Assimilative capacity has been allocated to the proposed discharge consistent with the classification [of the receiving waters]." VWQS § 1-04.A.7 (1997). The 1997 Vermont Water Quality Standards define "new discharge" as follows: "Any discharge not authorized under the provisions of 10 V.S.A. § 1263 as of January 7, 1985 or any increased pollutant loading or demand on the assimilative capacity of the receiving waters from an existing discharge that requires the issuance of a new or amended permit."

The Board considered a permit for the discharge of stormwater runoff into a water quality limited segment in Re: Pyramid Company, No. WQ-77-01, Findings of Fact, Conclusions of Law, Discussion and Order (Vt. Water Res. Bd. June 2, 1978). In Pyramid, the Board summarized the

position of the applicants and the permitting agency as follows:

the applicant and the Agency of Environmental Conservation [now ANR] contended that stormwater is properly considered as a special type of waste not subject to the statutory and regulatory standards applied to sanitary and industrial wastes. The agency . . . administered its permit programs relating to the discharge of stormwater wastes in accordance with this contention.

Id. at 4.

The Board rejected that contention and denied the permit. Citing both federal and state law, the Board held that the permit was unlawful because the applicant failed to prove that the stormwater discharge would comply with the applicable Water Quality Standards. Id. at 6-7, 9. The Board was not swayed by the argument that a sophisticated stormwater treatment system would represent “a reasonable initial effort to mitigate the impact of its stormwater discharge on the receiving waters.” Id. at 8. The permit could not be issued in the absence of a wasteload allocation providing for the increased stormwater that the permit allowed. Id. at 9-10.

Pyramid stands for the proposition that a permit cannot be issued for a new stormwater discharge into receiving waters without adequate assimilative capacity. In Pyramid, the Board urged “that current State statutes and regulations be reviewed to determine their adequacy and ability to deal with stormwater discharges.” Id. at 10. The Vermont Water Pollution Control Act was amended in 1981 to include section 1264, which was itself amended in 1987. 10 V.S.A. § 1264 (1998). Section 1264, as amended in 1987, requires ANR’s stormwater management plan to “recognize that the runoff of stormwater is different from the discharge of sanitary and industrial wastes.” § 1264(b). However, section 1264 does not modify the permitting requirements of section 1263, which requires stormwater discharges to comply with the federal and state regulatory system designed to ensure that Vermont’s waters meet the Vermont Water Quality Standards. Indeed, Vermont’s pollutant budgeting process would be infeasible if the impacts of stormwater discharges were not accounted for and controlled. Section 2-05 of the 1997 Vermont Water Quality Standards references section 1264 in making clear that ANR must manage stormwater discharges in a manner that achieves compliance with those rules. Neither section 1264 nor section 2-05 in any way obviates the Board’s decision in Pyramid.

### **3. Technology-Based Treatment and Control Practices**

Section I of ANR’s 1997 Stormwater Procedures provides in pertinent part as follows: “For the purposes of demonstrating compliance with the Vermont Water Quality Standards and receiving a stormwater discharge permit, the applicant shall demonstrate that the design of the development incorporates the treatment and control practices specified in . . . these Procedures,

or an applicable basin plan.” The treatment and control practices of the 1997 Stormwater Procedures address water quantity, without giving any direct attention to the chemical, physical, or biological effects of stormwater discharges.

The treatment and control practices described by the 1997 Stormwater Procedures do not constitute water quality standards or technology-based or water-quality based effluent limitations. They are a means or a technique for satisfying effluent limitations, not a substitute for the wasteload-allocation and TMDL process from which suitable effluent limitations are derived. Indeed, the 1997 Stormwater Procedures are not promulgated rules and therefore do not have the force of law. See 3 V.S.A. §§ 801(b)(8), 845(a) (1995).

In Re: Home Depot U.S.A., No. WQ-00-06, Findings of Fact, Conclusions of Law, and Order at 4 (Vt. Water Res. Bd. Feb. 6, 2001), the Board decided, under the facts of that case, in which the receiving waters were not identified as water quality limited segments, that conformance with the treatment and control practices of the 1997 Stormwater Procedures creates a rebuttable presumption of compliance with the 1997 Vermont Water Quality Standards. The parties in this case have stipulated that the receiving waters do not comply with the Vermont Water Quality Standards. The fact that the receiving waters in this case are water quality limited segments under section 303(d) of the Clean Water Act, 33 U.S.C.A. § 1313(d), is sufficient to rebut any presumption of compliance of the sort the Board followed in Home Depot.<sup>2</sup>

#### **4. Management of Existing Conditions in the Absence of TMDLs**

The Board concludes that Vermont law does not allow a new or increased discharge of measurable and detectable pollutants of concern into impaired waters for which there is not an adequate wasteload allocation. Permits can be issued for new or increased discharges of pollutants of concern into impaired waters if a wasteload allocation shows that the assimilative capacity of the receiving waters can accommodate the discharge and if other dischargers into that

---

<sup>2</sup>The Board does not decide in this case whether the presumption the Board described in Home Depot would apply under the 1999 amendments to 10 V.S.A. § 1264 (Supp. 2000) or the 2000 Vermont Water Quality Standards, neither of which apply to this appeal. Nor does the Board decide whether any updated stormwater procedures that ANR may develop can be afforded an inference of the sort the Board described as a presumption in Home Depot. The Board does not address in this decision how any such presumption would be rebutted in a case involving a discharge into waters that are not impaired. The Board emphasizes, however, that proposed discharges into waters that are not impaired must comply with the Vermont Water Quality Standards, including Vermont’s anti-degradation policy. See VWQS § 1-03 (1997 & 2000).

segment are subject to compliance schedules.<sup>3</sup> Compliance with the anti-degradation requirements of the Vermont Water Quality Standards and Vermont's Wasteload Allocation Process will prevent the restrictions on new or increased discharges into impaired waters from leading to the degradation of unimpaired waters.

The Board does not read the definition of "New Discharge" in the 1997 Vermont Water Quality Standards, VWQS § 1-01.B.23 (1997), or the discharge criteria of the 1997 Vermont Water Quality Standards, VWQS § 1-04.A (1997), as prohibiting all "new discharges," *id.*, into impaired waters without a duly established wasteload allocation. Doing so would unnecessarily impede Vermont's efforts to manage and improve permitted discharges before wasteload allocations are actually established. In the absence of a wasteload allocation, discharges into impaired waters may be permitted under Vermont law only if the proposed discharge will not increase the chemical, physical, or biological load of pollutants for which the receiving waters are impaired.

The Board will hear from the parties on whether the baseline for measuring any increase in pollutant loads in this case should be the existing discharge at the site, the discharge authorized by the permit Hannaford received in 1995, predevelopment conditions at the site, or some other condition. Details on the mass and concentration of the constituents of the proposed discharge and the impacts of the proposed discharge on the receiving waters in this case are unresolved questions of fact.

#### **IV. Conclusions**

##### **A. Answers to the Preliminary Issues Framed by the Board and the Parties**

With the foregoing in view, the Board summarily answers the preliminary issues that the parties and the Board framed for this appeal as follows:

1. Which version of the Vermont Water Quality Standards (those effective April 21, 1997, or those effective July 2, 2000) apply to the permit? Which sections of the applicable Vermont Water Quality Standards are at issue in this proceeding and why?

The Board finds that the application for the permit at issue was filed and complete in fact on April 17, 2000, and the Board deems the application complete as of that date.

---

<sup>3</sup>The 1999 amendments to 10 V.S.A. § 1264 (effective May 19, 2000), do not apply to the permit under consideration in this case. The Board therefore does not decide whether the prohibition against new or expanded discharges into impaired waters in the absence of a TMDL and a reasonable compliance schedule for existing discharges comports with the 1999 amendments. See 10 V.S.A. § 1264(f) (Supp. 2000).

Accordingly, the permit applicants have a vested right in the 1997 Vermont Water Quality Standards and in title 10, section 1264 of the Vermont Statutes Annotated, as amended in 1987, and those laws shall apply to the permit at issue in this appeal. Applicable sections of the 1997 Vermont Water Quality Standards will be determined based on the facts presented at the hearing in this matter.

2. What specific practical or legally significant difference does it make which version of the Vermont Water Quality Standards applies?

Having found that the applicants have a vested right in the law as it existed on April 17, 2000, when they filed a complete permit application, the Board does not need to decide what difference it might have made were current law to apply.

3. As a matter of law, what, if any, technology-based standards are required for this permit?

The parties have not brought to the Board's attention any legally required technology-based standards for this permit. The treatment and control practices described by the 1997 Stormwater Procedures do not constitute water-quality standards and are not promulgated rules that have the force of law. Rather, they are a means or a technique for satisfying effluent limits derived from wasteload allocations and TMDLs.

4. Does compliance with the technology-based standards used to design the permit create a presumption of compliance with the Vermont Water Quality Standards? If so, what is the nature of that presumption, how is it rebutted, and where do the burdens of production and persuasion lie?

Any presumption of compliance the 1997 Vermont Water Quality Standards that would apply to this case based on satisfaction of the treatment and control practices described in ANR's 1997 Stormwater Procedures is rebutted by the fact that the receiving waters are water quality limited segments. In the absence of wasteload allocations and TMDLs for the receiving waters involved in this case, the applicants must prove by a preponderance of the evidence that the proposed discharge will not increase the chemical, physical, or biological load of pollutants for which the receiving waters are impaired.

5. To what extent does this Board have jurisdiction to consider whether the project as permitted violates federal law? Which sections, if any, of the Clean Water Act and related federal regulations are implicated?

Because the parties agree that federal law does not prohibit the permit under appeal, the Board declines to decide whether and under what circumstances the permit complies with the federal NPDES permitting program.

6. Under what circumstances does federal law prohibit a stormwater discharge into impaired waters?

Because the appellants have waived any claims based on federal prohibitions, the Board declines to decide whether and under what circumstances federal law prohibits a stormwater discharge into impaired waters.

7. Under what circumstances does Vermont law prohibit a stormwater discharge into impaired waters?

Vermont law prohibits a new or increased discharge of measurable and detectable pollutants of concern into impaired waters for which there is not an adequate wasteload allocation. Permits can be issued for new or increased discharges of pollutants of concern into impaired waters if a wasteload allocation shows that the assimilative capacity of the receiving waters can accommodate the discharge and if other dischargers into that segment are subject to compliance schedules. In the absence of a wasteload allocation, discharges into impaired waters may be permitted under Vermont law only if the proposed discharge will not increase the chemical, physical, or biological load of pollutants for which the receiving waters are impaired. The Board will hear from the parties on whether the baseline for measuring any increase in pollutant loads in this case should be the existing discharge at the site, the discharge authorized by the permit Hannaford received in 1995, predevelopment conditions at the site, or some other condition. Details on the mass and concentration of the constituents of the proposed discharge and the impacts of the proposed discharge on the receiving waters in this case are unresolved questions of fact.

8. Is the discharge allowed by the permit a new discharge or a previously authorized discharge under an amended permit? What bearing does the answer to this question have on the applicability of federal and state law?

Vermont law imposes specific requirements on “new discharges of wastes,” including the requirement that “The receiving waters . . . have sufficient assimilative capacity to accommodate the proposed discharge” and that “Assimilative capacity has been allocated to the proposed discharge.” VWQS § 1-04.A.6 (1997). As explained under paragraph 7, above, the Board does not construe the discharge criteria of the 1997 Vermont Water Quality Standards as prohibiting all “new discharges” into impaired waters without a wasteload allocation. Consequently, whether the proposed discharge is a “new discharge” as that term is defined by the 1997 Vermont Water Quality Standards has no bearing on this decision. The Board does not decide what bearing, if any, the answer to this question may have on the applicability of federal law.

9. Do federal law and regulations prohibit the discharge authorized by the permit?

The Board does not decide whether and under what circumstances federal law prohibits a stormwater discharge into impaired waters.

10. Do Vermont law and regulations prohibit the discharge authorized by the permit?

The answer to this question depends on the issues described under paragraph 7, above.

11. Should the issues be reframed for the hearing in this matter? If so, how?

In accordance with the new scheduling order to be issued for this appeal, the Board will hear from the parties on the correct baseline for determining whether the proposed discharge will increase the chemical, physical, or biological impacts of the pollutants for which the receiving waters are impaired.

**B. Questions of Fact Remaining for the Evidentiary Hearing in this Matter**

Resolution of the preliminary issues leaves the following major question of fact for the evidentiary hearing in this appeal: Will the proposed discharge increase the chemical, physical, or biological impacts of the pollutants for which the receiving waters are impaired? If so, the permit cannot be granted.

**V. Order**

Accordingly, it is hereby **Ordered** that the Board will conduct an evidentiary hearing in this matter consistent with this decision and the scheduling order issued herewith.

Dated at Montpelier, Vermont this 29th day of June, 2001.

WATER RESOURCES BOARD

---

David J. Blythe, Chair

Concurring:

Lawrence H. Bruce, Jr., Member  
Jane Potvin, Member  
John D.E. Roberts, Vice Chair  
Mardee Sánchez, Member