State of Vermont
WATER RESOURCES BOARD

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

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The parties to this appeal are the appellant, Conservation Law Foundation (CLF); the intervenor, the Voice for the Potash Brook Watershed (the Voice); the permit applicants, Hannaford Brothers Company (Hannaford) and Lowes Home Centers, Inc. (Lowes); and the permitting agency, the Vermont Agency of Natural Resources (ANR or agency). This appeal involves a permit for the discharge of stormwater from a commercial complex into Potash Brook and the Shelburne Bay section of Lake Champlain. ANR has identified both Potash Brook and Shelburne Bay as impaired (or water quality limited) for certain pollutants (pollutants of concern).

On June 29, 2001, the Water Resources Board (Board) issued a Memorandum of Decision on the preliminary issues framed by the Board and the parties to this appeal. The Board decided in its June 29, 2001, Memorandum of Decision that Vermont law does not allow a permit to be issued for a new or increased discharge of measurable and detectable pollutants of concern into impaired waters for which a wasteload allocation has not yet been established. In its June 29, 2001, Memorandum of Decision, the Board decided to hear from the parties on the appropriate baseline for determining whether the discharge under consideration would be new or increased. On the issue of determining whether the proposed discharge would be new or increased compared to the appropriate baseline, the Board stated in its June 29, 2001, Memorandum of Decision that it would consider evidence and arguments with regard to both the loads and the impacts associated with the proposed discharge.

Having considered the evidence and the arguments of the parties, the Board decides that the appropriate baseline for determining whether the proposed discharge would be new or increased is the actual discharge from the site, including the permitted discharge from the existing treatment systems. The question of whether the proposed discharge would be new or increased compared to this baseline is determined by measuring whether the proposed discharge would increase the mass loading of pollutants of concern into the receiving waters, either directly in the discharge waste stream or indirectly through additional bed and bank scour. The permit applicants, Hannaford and Lowes, have adequately demonstrated that the permit under appeal complies with these standards in that the proposed discharge will not increase the mass load of pollutants of concern in the receiving waters. Subject to the conditions that certain drafting errors in the plans for the proposed stormwater treatment systems be corrected and that the exterior garden center for the Lowes project be covered with a roof, the discharge permit is granted.

I. Background

The procedural history of this appeal is recounted in detail in the Board's June 29, 2001, Memorandum of Decision on preliminary issues and in the Board's August 29, 2001, Memorandum of Decision, which denied both a Motion to Alter filed by ANR and a Motion to Dismiss filed by Hannaford and Lowes. Those decisions are incorporated herein by reference. Following the Board's August 29, 2001, Memorandum of Decision, the parties, as ordered by the Board's Chair, prefiled exhibits and direct and rebuttal testimony for the hearing on the merits. In addition, each of the parties prefiled proposed findings of fact, conclusions of law, permit conditions, and orders, as well as objections and responses to prefiled evidence. Although the amici curiae[1] in this case had the opportunity to prefile proposed conclusions of law, none of them did so.

On November 27, 2001, the Board's Chair convened a second prehearing conference in this matter at the Board's offices in Montpelier, Vermont. At the second prehearing conference, the Chair, among other things, established a hearing schedule and issued preliminary rulings on the prefiled evidentiary objections of the parties. The Chair's preliminary rulings were memorialized in a Second Prehearing Conference Report and Order (Second Prehearing Order) issued December 3, 2001. The Second Prehearing Order provided that the Chair's preliminary rulings would become final unless objected to in writing and preserved for review by the Board.

Objections to the Second Prehearing Order were filed by the CLF and the Voice, which is represented in this matter by counsel for CLF. CLF and the Voice objected to the Chair's preliminary decision (based on objections prefiled by ANR) that evidence regarding the discharge of stormwater during the construction phase of the project is irrelevant. The Second Prehearing Order indicated that construction-phase runoff is irrelevant in this proceeding because the construction phase will require a separate stormwater permit that is not the subject of this appeal, which involves a stormwater permit issued for the project's operational phase. (See Second Prehearing Order at 6, para. 1, and 7, para. 2.)

A de novo hearing on the merits took place on December 10 and December 11, 2001. Both days of the hearing were stenographically recorded and transcribed. As a preliminary matter, the Board heard arguments on the objections filed by CLF and the Voice with regard to the Chair's preliminary ruling that evidence of construction-phase runoff is irrelevant and

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[1] The amici curiae in this appeal are Cynosure, Inc, the Agency of Commerce and Community Development, and the Vermont Natural Resources Council. See MOD at 2 (Aug. 29, 2001).

inadmissible. Those Board members present[2] voted unanimously to affirm the Chair's preliminary ruling.

On December 10, 2001, the hearing was convened at the Champlain Water District Conference Room, which is close to the project site in South Burlington, Vermont. The first day of the hearing included a site visit, and following the site visit, the Board placed its site-visit observations into the record. The second day of the hearing was located at the District 4 Environmental Commission Conference Room in Essex Junction, Vermont.

At the beginning of the hearing on the merits, the Board, on its own initiative, took official notice, pursuant to 3 V.S.A. § 810(4) (1985), of the following documents: The 1998 Vermont Section 303(d) List of Waters,[3] the 2000 Vermont Section 303(d) List of Waters, Vermont's Wasteload Allocation Process (1987), and the Vermont Water Pollution Control Permit Regulations (1974). During the course of the hearing, and at the request of the parties, the Board took official notice of the 1991 and the 1994 Vermont Water Quality Standards. Over forty exhibits, including prefiled testimony, were admitted into evidence.

The Board recessed the hearing pending receipt of written closing arguments and revised or supplemental filings from the parties. On January 3, 2002, the parties filed their final proposed findings of fact, conclusions of law, and orders, along with written closing arguments. The Board initially deliberated immediately after the hearing on December 11, 2001. Additional deliberations occurred on January 2, January 8, and January 17, 2002. On January 17, 2002, the Board declared the record complete and adjourned the hearing. This matter is now ready for final decision.

II. Issues

The Board is presented with the following issues:

1. What is the correct baseline for determining whether a proposed permit would allow an impermissible new or increased discharge of pollutants of concern into impaired waters for which a wasteload allocation has not yet been established?

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[2]Member Sánchez was not present for the first day of the hearing on the merits. However, Member Sánchez reviewed the record of the first day of the merits hearing and participated in the Board's deliberations on this matter. Vice-Chair Roberts arrived late on the second day of the hearing. Vice-Chair Roberts reviewed the record of the proceedings during which he was absent and participated in the Board's deliberations in this matter.

[3]Section 303(d) refers to the federal Clean Water Act, 33 U.S.C.A. § 1313(d).

2. In determining whether a proposed discharge of pollutants of concern represents an impermissible new or increased discharge, should consideration be limited to the mass loads of pollutants of concern or extend to the impacts of pollutant loads on the existing or designated uses of the receiving waters?

3. Using the foregoing considerations, have the permit applicants proved by a preponderance of the evidence that the permit at issue will not allow a new or increased discharge of measurable and detectable pollutants of concern into the receiving waters?

4. With regard to pollutants that ANR has not identified as requiring wasteload allocations for the receiving waters, does the permit at issue comply with the 1997 Vermont Water Quality Standards?

III. Findings of Fact

To the extent that any proposed findings of fact are included herein, they are granted; otherwise, they are denied. See Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corp., 167 Vt. 228, 241-242 (1997); In re: Village of Hardwick Elec. Dep't, 143 Vt. 437, 445 (1983).

1. The project associated with the permit at issue encompasses about 30 acres of development, including both proposed and existing buildings. When completed, the development will include 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 30-acre development site is known as the Southland Plaza shopping center. The Southland Plaza is located in South Burlington, Vermont, on the west side of Route 7, Shelburne Road, about a half mile south of Interstate 189.

3. Lowes proposes to build its new Lowes Home Improvement Center on about 12.5 acres of the Southland Plaza site. The existing Hannaford grocery store is located to the north of the 12.5-acre site proposed for the Lowes project, across Hannaford Drive. A K-Mart shopping center is located to the northeast of Southland Plaza. A wooded area containing the Vermont Central Railroad tracks abuts Southland Plaza to the west. To the south of Southland Plaza, along the southern border of the 12.5-acre Lowes site, an apartment complex is under development. A vacant parcel for which development is planned lies to the east of Southland Plaza, across Fayette Road.

4. The 12.5-acre site for the proposed Lowes Home Improvement Center is currently vacant and is covered primarily with tall grass. Some brush and wooded areas occupy the east and west property lines.

5. In 1987 the Vermont Agency of Transportation used the 12.5-acre site for the proposed Lowes Home Improvement Center to dispose of excess cut material from the construction of the nearby interchange for Interstate 189. The fill that the Agency of Transportation placed on the site ranges from 5 to 20 feet in depth and covers about the eastern two thirds of the 12.5-acre site. Elevations of the fill range from about 205 feet to about 185 feet, with slopes ranging from about 1% to 5%. The western side of the 12.5-acre site slopes steeply toward the railroad tracks. Areas of these slopes exceed 50%.

6. The 12.5-acre site is marked by gullying, which indicates erosion and the export of sediment into Potash Brook, and thence Shelburne Bay.

7. Hannaford received a five-year discharge permit (DEC Permit # 1-1214) for stormwater runoff from the 30-acre site in 1995. The development plans associated with Hannaford's 1995 stormwater discharge permit called for three stormwater management ponds. Because the site has not been fully built, only one stormwater management pond has been constructed.

8. Hannaford timely filed an application for renewal of its 1995 permit in September, 1999. In April, 2000, before ANR had acted on Hannaford's application for a permit renewal, Lowes, as a co-permittee, timely filed an application for renewal and amendment of Hannaford's 1995 stormwater permit. The April, 2000, permit application included plans to replace certain previously proposed retail space with the 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, 2000, permit application would increase the overall impervious area of southland Plaza by about 16,500 square feet. Like the 1995 permit, the proposed permit authorizes a total of three stormwater management ponds for the 30-acre development.

9. On December 12, 2000, ANR issued the permit under appeal (which bears the same number as the permit issued to Hannaford in 1995--DEC Permit # 1-1214) to Hannaford and Lowes as copermittees. The permit under appeal authorizes the discharge of treated stormwater runoff from the roadways, parking lots, and buildings of Southland Plaza to Potash Brook and an unnamed tributary of Lake Champlain. This permit maintains the same three discharge points as the permit issued to Hannaford in 1995. The permit under appeal refers to these discharge points as S/N 001, S/N 002, and S/N 003. S/N 001 discharges stormwater from a small area of the southeastern portion of the 30-acre site to adjacent property and then to an unnamed tributary of Lake Champlain by means of a vegetated swale. S/N 001 is not affected by the proposed permit amendment and is not at issue in this appeal. Discharge point S/N 002 consists of runoff leaving the site to the southwest via an existing 24-inch culvert from a proposed stormwater treatment system

consisting of two connected stormwater treatment basins. After passing beneath the railroad tracks adjacent to the site via the 24-inch culvert, the proposed discharge will enter a vegetated swale, which will then carry the discharge to Potash Brook. S/N 003 is the discharge point from the previously constructed stormwater treatment basin, which discharges to Potash Brook via a stone-lined swale at the northern portion of the site.

10. The points of discharge into Potash Brook are about 1,600 feet upstream from Shelburne Bay for S/N 002 and 2,800 feet upstream from Shelburne Bay for S/N 003. The point of discharge into the unnamed tributary at S/N 001 is about 3,500 feet upstream from Shelburne Bay. Potash Brook flows to the west across the northwestern corner of the 30-acre site, passes beneath the railroad tracks, and then bends to the south as it winds its way to Shelburne Bay, to the west of the Southland Plaza site.

11. 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 ANR's 1998 and 2000 EPA-approved State of Vermont lists of targeted and impaired waters (Section 303(d) Lists).

12. Potash Brook is impaired (or water-quality limited) as a result of sedimentation, pathogens, and undefined causes, which may include metals, nutrients, and toxicity. Shelburne Bay is impaired due to phosphorus. For Potash Brook, ANR's 1998 and 2000 Section 303(d) Lists identify aquatic life support and contact recreation as the uses impaired. ANR's 1998 and 2000 Section 303(d) Lists identify aesthetics and contact recreation as the uses impaired in Shelburne Bay.

13. ANR has not established wasteload allocations or total maximum daily loads (TMDLs) for Potash Brook or Shelburne Bay.

14. ANR relied on its 1997 Stormwater Management Procedures (1997 Stormwater Procedures) to conduct its review of the application for renewal and amendment of Hannaford's 1995 permit.

15. The 1997 Stormwater Procedures provide, in part, 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." (Ex. ANR-15 at 5.)

16. Among other things, the 1997 Stormwater Procedures require that stormwater control structures 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." (Ex. ANR-15 at 11.) The 1997 Stormwater Procedures further require that a minimum of the first inch of stormwater runoff be collected in detention ponds.

17. The proposed stormwater treatment system for the Lowes project uses two connected stormwater detention basins. The system would serve a total area of 14.5 acres, including 8.8 acres of impervious surfaces associated with the Lowes project. Stormwater runoff would be collected in numerous catch basins and travel to the proposed detention basins through a network of culverts. The collected stormwater would initially be directed to the southern detention basin, described as a storage pond or wet pond. From there, the collected stormwater would flow to the northern detention basin, described as a wetland pond or constructed wetland. The treated runoff would travel out of the constructed wetland through an existing ditch prior to reaching the existing 24-inch culvert, which would convey the stormwater beneath the railroad tracks and thence to Potash Brook.

18. By using a combination of a wet pond followed by a constructed wetland, the proposed stormwater treatment and control systems for the Lowes project are more advanced than required by the 1997 Stormwater Procedures.

19. The proposed wet-pond-and-constructed-wetland system includes a high-flow bypass pipe that is intended to divert the discharge from the wet pond around the constructed wetland during larger storm events. The purpose of including the bypass pipe in the treatment system is to avoid scouring of the constructed wetland. The engineers who designed the treatment system intended that flows exceeding about an inch and a half of rainfall over a 24-hour period would enter the bypass pipe. These engineers intended that the bypass pipe would avoid bypassing the first inch of runoff over a 24-hour period, which describes the water-quality design storm. They also intended to design the bypass pipe to allow the treatment systems to control peak flows to predevelopment conditions. Due to drafting errors, the site plans for the proposed treatment systems are inaccurate with regard to the placement of the flow bypass pipe. (Ex. HL-21 at sheets 26, 27A, and 27C.) All drawings submitted into evidence show incorrect elevations for this pipe. In addition, the plans incorrectly represent the bypass pipe to be four inches rather than 30 inches in diameter. The site plans for the proposed treatment system can be corrected to accurately depict the size and invert elevation of the bypass pipe and to assure that the estimated available storage volumes for the wet pond are accurate.

20. The proposed Lowes project includes an outdoor garden center. Covering the outdoor garden center to prevent direct precipitation into the garden center and up-slope runoff from flowing through the garden center, along with the stormwater treatment systems for the project, will adequately prevent stormwater runoff from the outdoor garden center from adding pollutants of concern to the receiving waters.

21. The Simple Model can be used to calculate the stormwater pollutant loads generated by both existing and proposed stormwater discharges. The Simple Model considers the following variables to calculate the total annual loading from a given area: yearly rainfall depth (P), fraction of rainfall events that produce runoff (Pj), a volumetric runoff coefficient (Rv), the concentration of the pollutant in the runoff (C), and the area of the contributing watershed (A).

22. ANR used the Simple Model in its 1997 evaluation of Potash Brook for the Lake Champlain Basin Program.

23. Hannaford and Lowes calculated the existing and projected pollutant loadings of the constituents for which the receiving waters are impaired (the pollutants of concern) using the Simple Model. They compared the projected pollutant loadings from the proposed project with a) existing pollutant loadings from the site and b) the pollutant loadings that would have been discharged had the site been built out in conformity with the 1995 permit issued to Hannaford. Where the contributing area included existing or proposed stormwater treatment ponds, Hannaford and Lowes used the Simple Model to calculate the discharge to the treatment ponds. They then applied a removal coefficient to compute the load expected to be discharged from the treatment ponds to the receiving waters. In their calculations for existing conditions, Hannaford and Lowes did not use a removal coefficient for that portion of the project site which currently does not drain into a stormwater treatment system.

24. Based on the pollutants identified in the Section 303(d) Lists as causing the impairment of the receiving waters, Hannaford and Lowes examined the following stormwater constituents:

Pollutants of Concern	Constituents Examined
Sediment:	Total suspended solids (TSS).
Pathogens:	Total fecal coliform (FC).
Metals:	Each of the most common metals in stormwater runoff–arsenic (As), copper (Cu), lead (Pb), mercury (Hg), and zinc (Zn).
Nutrients:	Total phosphorus (TP) and nitrate-nitrogen (NO3-N).
Toxicity:	Total metals, consisting of the metal constituents listed above.
Phosphorus:	Total phosphorus (TP).

25. Application of the Simple Model is necessarily based on a range of reasonable assumptions. Hannaford and Lowes used reasonable assumptions in their application of

the Simple Model, and their resulting conclusions are valid to within a reasonable degree of scientific certainty.

26. In the project proposed by Hannaford and Lowes, total suspended solids will decrease substantially compared to the actual discharge from the site. For all pollutants of concern other than total suspended solids, the difference between the actual discharge from Southland Plaza and the discharge authorized by the permit at issue are insignificant.

27. Hannaford and Lowes reviewed modeling information, including predevelopment runoff values, in the engineering reports prepared to support the application for the permit issued to Hannaford in 1995. On that basis, Hannaford and Lowes reasonably determined that the previously permitted peak discharge rates for Southland Plaza were below predevelopment peak discharge rates for the site.

28. Both existing and proposed peak flows can be calculated for an existing or proposed site or stormwater treatment system, and peak-flow calculations can be used to determine whether proposed peak flows will modify the bed and banks of the receiving stream.

29. Compared to the peak discharge rates that were previously permitted for Southland Plaza in 1995, the proposed peak discharge rates for the 30-acre site will be reduced for storms from the 2 through 25-year frequency. For the 100-year storm event, peak flows from the proposed project will be so similar to the peak flows permitted in 1995 that the differences will be insignificant.

30. Peak runoff rates from the proposed project will not cause or contribute to the impairment of the receiving waters through sediment mobilization due to stream bed or bank erosion.

31. The Lowes project avoids impacts to the northerly Class 3 wetland at the site. Although the southerly Class 3 wetland will be filled, minimal upslope area drains to that wetland, and it does not provide significant water-quality treatment. Impacts to Class 3 wetlands on the site will therefore not lead to an increase in the mass loading of pollutants of concern into Potash Brook and Shelburne Bay.

32. Compared to the actual discharge from Southland Plaza, the proposed discharge will not increase the mass loading of pollutants of concern into Potash Brook or Shelburne Bay, either directly in the discharge waste stream or indirectly through additional bed and bank scour.

33. Because the proposed discharge will not increase the mass loading of pollutants of concern into Potash Brook or Shelburne Bay, the discharge authorized by the permit at issue will not increase the chemical, physical, or biological impacts of the pollutants for which the receiving waters are impaired.

34. Any thermal pollution associated with the proposed project will not cause an increase in the mass loading of the pollutants of concern into Potash Brook or Shelburne Bay.

35. Any reductions in baseflow associated with the proposed project will not cause an increase in the mass loading of pollutants of concern into Potash Brook or Shelburne Bay.

36. The evidence in this case has not demonstrated the extent to which the actual discharge or the proposed discharge from Southland Plaza may affect the biological community in the receiving waters, particularly when these discharges are considered in view of other activities in the watershed that may cause or contribute to the failure of the receiving waters to comply with the criteria and uses of the Vermont Water Quality Standards.

IV. Conclusions of Law

A. Standard of Review and Burden of Proof

This appeal was filed pursuant to 10 V.S.A. § 1269 (1998). Appeals to the Board pursuant to section 1269 are de novo. The permit applicants, Hannaford and Lowes, bear the burden of proving by a preponderance of the evidence that the permit under appeal will not allow a new or increased discharge of measurable and detectable pollutants of concern into the receiving waters. See MOD at 19 (June 29, 2001). In addition, the applicants must also prove that the permit complies with the 1997 Vermont Water Quality Standards with regard to pollutants for which the receiving waters have not been identified as water quality limited. See generally Re: Town of Cabot, No. WQ-00-04, Findings of Fact, Conclusions of Law, and Order (Vt. Water Res. Bd. Sept. 8, 2000) (placing burdens of production and persuasion on permit applicant).

B. Determining the Correct Baseline

The Board's June 29, 2001, Memorandum of Decision defined narrow issues for the hearing on the merits. The first is how to establish the correct baseline for determining whether the permit will allow an impermissible new or increased discharge. In its June 29, 2001, Memorandum of Decision, the Board concluded that Vermont law does not prohibit all new discharges into impaired waters without an established wasteload allocation. The Board reasoned that "Doing so would unnecessarily impede Vermont's efforts to manage and improve

permitted discharges before wasteload allocations are actually established." MOD at 19 (June 29, 2001).

CLF's Notice of Appeal requests relief in two alternate forms: one is to deny the permit until the discharge at issue is justified by a wasteload allocation, and the other is to issue the permit with the condition that the discharge "be maintained at a level consistent with the site's natural, undeveloped condition." (Notice of Appeal at 4.) Possible options for a baseline that the Board identified in its June 29, 2001, Memorandum of Decision therefore included the existing (actual) discharge at the site, the discharge authorized by the permit Hannaford received in 1995, or predevelopment conditions at the site. MOD at 19, 21 (June 29, 2001). At the hearing on the merits, the parties disagreed as to the most appropriate baseline.

The Board concludes that the actual discharge from the site, including the permitted discharge from existing treatment systems (collectively, the actual discharge), represents the appropriate baseline for determining whether a proposed discharge will increase the pollutants of concern into impaired waters for which a wasteload allocation has not yet been established.[4] Using the actual discharge as the baseline for measuring a new or increased discharge reflects the intention of the Board and the necessity of the law to enable ANR to manage and improve actual discharges in impaired watersheds for which a wasteload allocation has not been established.

The use of actual discharges as the baseline for preventing the addition of pollutants of concern into impaired waters for which no wasteload allocation has been established may not be taken to excuse violations of existing discharge permits, violations of the Vermont Water Quality Standards, or violations of the Vermont Water Pollution Control Act, 10 V.S.A. §§ 1250-1283 (1998 & Supp. 2001). The Board emphasizes that the use of actual discharges as a cap on new or increased discharges applies only while wasteload allocations or other cleanup plans are being established. Holding the line at actual discharges does not preclude ANR from authorizing and enforcing appropriate treatment technologies that would reduce the level of the pollutants of concern discharging from a particular site. Nor does the prohibition against permitting the discharge of additional pollutants of concern into impaired waters in the absence of a cleanup plan affect whether the discharge of those pollutants may be increased or decreased from a particular site or group of sites in the wasteload allocation process. The Board does not address in this appeal whether actual discharges of pollutants of concern or permitted effluent limitations, or some other standard, should serve as the baseline where the proposed discharge would increase existing loads but remain below previously permitted loads for a discharger such as a wastewater treatment facility.

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[4]The Board does not use the term "actual discharge" to mean discharges that violate the terms and conditions of an existing discharge permit or the permitting requirements of 10 V.S.A. § 1263(c) (1998).

By defining actual discharges as the limit on discharges of pollutants of concern into impaired waters pending the establishment of a wasteload allocation, the Board specifically rejects the arguments of CLF and the Voice that the appropriate baseline is background conditions, as that term is used in the Vermont Water Quality Standards. The 1997 Vermont Water Quality Standards use background conditions as the baseline for defining certain water-quality criteria. See §§ 3-01.A, 3-01.B.2.b and c, 3-01.B.3.a and d, 3-01.B.4.b, 3-01.B.5, 3-02.B.1-4. CLF and the Voice argued that the proposed discharge cannot be permitted unless it complies with the criteria and uses of the Vermont Water Quality Standards. However, the parties have agreed that the assimilative capacity of the receiving waters already has been exceeded for certain pollutants. ANR's 1998 and 2000 Section 303(d) Lists identify the pollutants causing the impairment of the receiving waters as phosphorus for Shelburne Bay and as sediment, pathogens, and undefined typical (metals, nutrients, and toxicity) for Potash Brook. Every discharge of these pollutants into the receiving waters contributes to the existing impairment.

By placing the receiving waters on Vermont's Section 303(d) List, ANR has acknowledged, in essence, that in the absence of a wasteload allocation for the receiving waters, the correct level of possible stormwater treatment practices for any one discharger or class of dischargers cannot be rationally selected. Individual dischargers generally will not have control over all the discharges into the receiving waters. Such dischargers are thus not in a position to develop a pollutant budget that would establish an appropriate discharge from their project. The responsibility of comprehensively assessing the receiving waters lies with ANR.

ANR may seek to bring impaired waters into compliance with the Vermont Water Quality Standards and to remove those waters from the Section 303(d) List by authorizing and enforcing stormwater treatment and control practices. Such practices may, in some instances (as in the project involved in this appeal), result in improvement over actual discharges. Using background conditions as a cap on stormwater discharges into impaired waters, as advocated by CLF and the Voice, could needlessly impede efforts to improve the condition of impaired waters through technology controls prior to establishing a wasteload allocation.

Where technology-based treatment and control practices are not sufficient to achieve compliance with the Vermont Water Quality Standards, ANR must establish a wasteload allocation for the affected waters. See Wasteload Allocation Process (1987) at 5-6, Vermont Water Pollution Control Permit Regulations (1974) § 13.4.b (2). ANR may then determine the appropriate level of treatment for stormwater discharges, along with suitable water-quality-based effluent limitations for other discharges into the affected waters. In this case, the receiving waters fail to comply with the Vermont Water Quality Standards, but the state does not have wasteload allocations in place. Under these circumstances, discharges may be permitted provided they do not increase the actual discharges of pollutants that are causing the impairment.

C. Pollutant Loads and Pollutant Impacts

The Board must now consider the most appropriate means of determining whether a proposed discharge of pollutants of concern into impaired waters will exceed actual discharges. The Board's June 29, 2001, Memorandum of Decision discussed new or increased discharges into impaired waters in terms of both loads and impacts. MOD at 19-22 (June 29, 2001). In its August 29, 2001, Memorandum of Decision, the Board specifically provided the parties with the "opportunity to further address the meaning and application of these terms at the evidentiary hearing on the merits." MOD at 8 (August 29, 2001). At the hearing on the merits, the parties took substantially different positions on this issue.

The Board concludes that whether the proposed discharge will result in an impermissible new or increased discharge is determined by calculating whether the proposed discharge will increase the mass loading of pollutants of concern into the receiving waters, either directly in the discharge waste stream or indirectly through additional bed and bank scour. Using direct and indirect mass loading reflects the practical and legal necessity of enabling ANR to manage actual discharges in impaired watersheds pending the establishment of wasteload allocations. It also reflects the requirement of Vermont law that increased loads of pollutants of concern cannot be discharged into an impaired water until such time as a wasteload allocation and compliance schedule demonstrate that these additional loads will be assimilated. See, e.g., VWQS §§ 1-04.A.6, 7 (1997).

The Board is not persuaded by ANR's position that additional loads of pollutants of concern should be permitted because the receiving waters are already so degraded by so many sources that any additional degradation from the proposed discharge will be indistinguishable from all the rest. Dr. James Karr, who testified on behalf of CLF and the Voice, responded succinctly to ANR testimony that the proposed discharge will be inconsequential compared to existing in-stream problems: ANR "seems resigned to a death of a thousand small cuts, none of which are fatal." (Ex. CLF-21 at 5.) ANR's evidence failed to account for cumulative impacts and the necessary policy that pollution from multiple sources does not excuse pollution from any one source.

Compliance with ANR's 1997 Stormwater Procedures is not, in and of itself, sufficient to justify the addition of pollutants of concern into impaired waters for which no wasteload allocation has been performed. Once the state has determined that technology practices such as the 1997 Stormwater Procedures are not sufficient to achieve compliance with the water quality standards in a particular water body, a wasteload allocation must be conducted and implemented. The total maximum daily load (TMDL) and wasteload-allocation processes involve calculating the total load of a pollutant or pollutants that a receiving water can assimilate without violating water-quality standards and then allocating the total load among the various dischargers in the watershed. This process enables ANR to determine the appropriate stormwater treatment

systems for the individual stormwater dischargers, or classes of stormwater dischargers, in the impaired watershed. To settle upon a particular type of stormwater treatment practice for a given discharge into impaired waters in the absence of a wasteload allocation would ignore the water-quality-based approach of the wasteload allocation process.

Although the expert witnesses of Hannaford and Lowes on the one hand, and of CLF and the Voice on the other, reached different conclusions, their testimony makes clear that relatively simple hydrological models can be used to calculate the stormwater pollutant loads generated by both actual and proposed discharges. In addition, the evidence in this case establishes that it is possible to calculate both proposed and actual peak flows and determine whether the proposed peak flows will adversely affect the bed and banks of receiving streams.

Under the circumstances of this case, the Board does not consider the uses impaired, but rather takes into account the nature and quantity of the pollutants impairing them in determining whether a proposed discharge of pollutants of concern may be permitted when no wasteload allocation has been established. As the Board has noted, the TMDL and wasteload-allocation processes are comprehensive and cannot be the responsibility of an individual discharger with no control over other discharges in the impaired watershed. In the absence of a wasteload allocation for an impaired water, the level of treatment for an individual stormwater discharge, or class of stormwater discharges, needed to fully address the impairment cannot be determined. Until ANR completes the TMDL and wasteload allocation processes, or brings the receiving waters into compliance with the Vermont Water Quality Standards by other means, Vermont law prohibits any increase in the mass loading of pollutants causing the impairment.[5] Accordingly, if Hannaford and Lowes demonstrate that their proposed discharge will not increase the mass loading of pollutants of concern, that will be sufficient to demonstrate that the proposed discharge will not increase the chemical, physical, or biological impacts of the pollutants for which the receiving waters are impaired, as Vermont law requires. See MOD at 22 (June 29, 2001).

D. Pollutants of Concern

In its June 29, 2001, Memorandum of Decision, the Board held that a new or increased discharge of measurable and detectable pollutants of concern into impaired waters cannot be permitted unless a wasteload allocation demonstrates that the assimilative capacity of the receiving waters can accommodate the discharge and other dischargers in the affected segment are subject to compliance schedules. MOD at 19 (June 29, 2001). As set forth above, the actual discharge represents the baseline for determining whether a proposed discharge is "new or

[5]The Board does not decide in this case whether a discharge into impaired waters that would increase the mass loading but decrease the concentration of pollutants of concern may be permitted in the absence of a wasteload allocation.

increased." As also set forth above, a proposed discharge will represent an impermissible new or increased discharge with respect to this baseline if the proposed discharge will add, directly or indirectly, to the mass load of pollutants of concern in the receiving waters. The Board now addresses the question of whether the discharge authorized by the permit under appeal complies with these standards.

Using the Simple Model, Hannaford and Lowes's expert Jeff Nelson calculated that under the permit at issue, total suspended solids (TSS) would decrease substantially compared to the actual discharge from the site. Specifically, Mr. Nelson testified that loadings of TSS would decrease from 10.6 tons per year in the actual discharge to 6.2 tons per year under the permit at issue. Mr. Nelson's calculations showed that total fecal coliform (FC) and total phosphorous (TP) would decrease slightly and that the balance of the pollutants considered, which include the metals and nitrogen, would increase slightly. However, Mr. Nelson testified that for all pollutants other than TSS, the changes between the actual discharge and the permit at issue are insignificant. Mr. Nelson concluded that "Given the substantial decrease in projected sediment loadings, and insignificant changes in other pollutants, the proposed stormwater treatment system will result in cleaner runoff reaching Potash Brook than currently occurs." (Ex. HL-24 at 22.)

Mr. Nelson testified that "In addition to the direct loading of contaminants, if stormwater discharge results in changes to the peak flow rates in Potash Brook this could cause stream bed or bank erosion, thus adding more sediment to the stream." (Ex. HL-14 at 22.) Mr. Nelson compared the peak discharge rates from the site to peak discharge rates that were previously permitted in 1995 for the 2, 10, 25, and 100-year storm events. Mr. Nelson's calculations showed that "under the amended permit, peak flow rates from the site for storms from 2 through 25 year frequency would be reduced in comparison to the previously permitted condition." (Ex. HL-14 at 23.) Mr. Nelson's calculations for the 100-year storm event showed that the proposed project would decrease peak flows very slightly at S/N 003 and increase peak flows very slightly at outfall S/N 002. Mr. Nelson therefore concluded that "peak runoff rates from the site under the proposed permit amendment will not cause or contribute to the impairment through sediment mobilization due to stream bed or bank erosion." (Id.)

The Board notes that Mr. Nelson compared peak flows from the proposed development to peak flows authorized by the 1995 permit. Peak flows from the 1995 permit were designed to approximate predevelopment reference conditions. Todd Morey, the engineer who designed the stormwater treatment system for Hannaford and Lowes, testified that "the project has been designed to limit the post-development peak discharge rates from the site to below the previously permitted discharge rates with the understanding that the previously permitted rates were computed to be below the original predevelopment rates." (Ex. HL-15 at 18.) Todd Morey also testified that slight increases in peak flows indicated for the 100-year storm are "beyond the accuracy of the methodology." (Ex. HL-15 at 19.) It was therefore reasonable for Mr. Nelson

to compare the proposed peak flows to previously permitted peak flows and to then conclude that the proposed peak flows will not lead to an indirect new or increased sediment load into the receiving waters as a result of additional bed and bank scour.

Mr. Nelson concluded that "for the constituents associated with the existing impairments, loadings will be either insignificantly changed, or less than those occurring under existing conditions or those already allowed by the prior permit." (Ex. HL-14 at 27.) Mr. Nelson thus concluded that the discharge authorized by the permit at issue will not increase the chemical, physical, or biological impacts of the pollutants for which the receiving waters are impaired. Mr. Nelson addressed both direct and indirect pollutant loads. He also considered flows, sediments, pathogens, nutrients, and metals.

At the hearing on the merits, and in their briefs, CLF and the Voice questioned the assumptions that Mr. Nelson relied on in his use of the Simple Model in this case. Among other things, CLF and the Voice contended that Mr. Nelson overestimated the pollutant loadings from the existing site and used inflated removal efficiencies for the treatment systems. Mr. Nelson relied on data from available studies of the project site and the receiving waters, including studies performed by ANR, the New York State Department of Environmental Conservation, and other consulting firms. Mr. Nelson used his professional judgment to select the most appropriate data for his calculations.

Mr. Nelson testified that he used conservative assumptions for the sediment removal efficiency of the proposed stormwater treatment system for the project. Mr. Nelson therefore concluded that "I expect that our analysis results in an inflated prediction of pollutant loading following the construction of the proposed project." (Ex. HL-25 at 9.) Mr. Nelson stated, and the conflicting expert testimony in this case confirms, that the assumptions used in predicting pollutant loading from stormwater runoff may cover "a range of reasonably expected values." (Ex. HL-23 at 1.) However, disagreement between experts as to the exact extent of that range does not necessarily render any given exercise of professional judgment unreasonable.

Using the Simple Model, CLF and the Voice's expert Richard Claytor compared the loads of pollutants of concern expected to run off the proposed development site to various baselines, including the actual discharge from the site. For all pollutants of concern, Mr. Claytor's calculations indicated that pollutant loads from the proposed site would increase compared to those from the actual discharge. Mr. Claytor's results differ from those of Mr. Nelson because Mr. Claytor "made different assumptions regarding loading rates and pollutant removal capability." (Ex. CLF-19 at 1.) Mr. Claytor concluded from his analysis that the calculations of Mr. Nelson showing no increase in pollutant loading from the proposed project are "suspect." (Id.) Having considered the conflicting expert opinions in this matter, the Board concludes that Mr. Nelson used reasonable assumptions and that his conclusions are valid to within a reasonable degree of scientific certainty.

The challenges that CLF and the Voice mounted against the case presented by Hannaford and Lowes were premised on the position that the discharge of pollutants of concern from the project must comply with "background conditions" as defined by the Vermont Water Quality Standards. See 1997 VWQS § 1-01.B.7. The Board has determined, however, that the actual discharge rather than background conditions is the appropriate baseline for determining whether a discharge permit authorizes an impermissible new or increased discharge of pollutants of concern into impaired waters. Indeed, CLF and the Voice conceded that "even the flawed materials submitted by the Applicants indicate that the existing pollutant loads and impacts for numerous pollutants of concern and the altered hydrology of the site will, at best, be maintained by the amended project." (Proposed Findings and Conclusions of CLF and the Voice at 44.) For the pollutants of concern in this case, that is legally sufficient.

Mr. Nelson's testimony with regard to pollutant loadings assumed that certain removal efficiencies applied to the proposed stormwater treatment systems. For Mr. Nelson's testimony to support issuance of the permit, the proposed treatment systems must serve as planned. The drawings of the proposed treatment systems are inaccurate with regard to a flow bypass pipe that is intended to avoid scouring of the wetland pond. (Ex. HL-21 at sheets 26, 27A, and 27C.) The plans incorrectly represent the bypass pipe to be below the correct elevation and to be four inches rather than 30 inches in diameter. Mr. Morey testified that site plans can be corrected so that the bypass pipe functions as intended and to assure that the estimated available storage volumes for the wet pond are accurate. Hannaford and Lowes provided the Board with suggested language for making the revision of the inaccurate plans a condition of their permit. The Board will order that Hannaford and Lowes submit corrected site plans to ANR and that ANR approve the revised plans in conformity with this decision.

Witnesses for CLF and the Voice testified that Hannaford and Lowes failed to adequately consider a number of facts in their assessment of whether the permit at issue would allow additional pollutants of concern to enter the receiving waters. For example, CLF and the Voice contended that impacts of the project on Class 3 wetlands at the site will reduce the pollutant removal functions of those wetlands. The Board is not persuaded that the impacts to the wetlands on the site undermine Mr. Nelson's conclusions that the proposed project will not increase the mass load of pollutants of concern to Potash Brook and Lake Champlain. Mr. Nelson testified on rebuttal and cross-examination that the project avoids impacts to the northerly Class 3 wetland and that the southerly Class 3 wetland, which will be filled, does not provide significant water quality treatment.

On behalf of CLF and the Voice, expert Richard Claytor testified that elevated pollutant loadings could occur from exterior garden-center operations. On cross examination of Mr. Claytor, Hannaford and Lowes asked "if Lowes covered the garden center to prevent direct precipitation into the garden center and upslope runoff to flow through the garden center, would this eliminate your concern regarding the potential increased loading from the garden center?"

(R. at 213-214 (Dec. 11, 2001).) Mr. Claytor agreed, stating that "if you cover everything, then you're not dealing with the pollutant load." (R. at 214 (Dec. 11, 2001).)

Hannaford and Lowes provided the Board with suggested language for making a no-exposure cover for the garden center a condition for the permit. The Board concludes that covering the garden center, along with the proposed stormwater treatment systems for the project, will adequately prevent stormwater runoff from the outdoor garden center from adding pollutants of concern to the receiving waters. The Board will therefore order that Hannaford and Lowes submit plans to ANR for covering the garden center and that ANR approve those plans in conformity with this decision.

Subject to ANR's approval of plans for a roof for the proposed garden center and ANR's approval of corrected drawings for the proposed detention basins, the Board concludes that Hannaford and Lowes have adequately demonstrated that the proposed project will not result in a measurable or detectable increase in the chemical, physical, and biological impacts of the pollutants for which the receiving waters are impaired.

E. Pollutants Not Identified as Pollutants of Concern

Having determined that the permit will not allow a new or increased discharge of pollutants of concern into the receiving waters, the Board must now address whether the permit complies with the Vermont Water Quality Standards with respect to other considerations. CLF and the Voice contended that the permit will unlawfully increase the temperature and decrease the baseflow of Potash Brook. Hannaford and Lowes countered that neither temperature nor baseflow are within the scope of this appeal.

1. Scope of the Appeal

CLF's Notice of Appeal does not refer to temperature or thermal pollution. In the reasons for the appeal, the Notice of Appeal does state that "The authorized discharge contributes both hydrologic modification and additional pollutant loads to the receiving waters." (Notice of Appeal at 3.) However, the reasons for the appeal, along with the issues and the relief sought, are based on the "documented failure" of the receiving waters to comply with the Vermont Water Quality Standards. (Notice of Appeal at 3.)

The Board's June 29, 2001, Memorandum of Decision addressed threshold issues relating to vested rights and then concentrated on stormwater discharges into water quality limited segments. MOD at 14 (June 29, 2001). The Board noted that it did not need to address the procedures for determining whether stormwater discharges of pollutants not listed as contributing to the impairment of the receiving waters comply with the Vermont Water Quality Standards. Id. at 18 n. 2. The Board defined the "major question of fact for the evidentiary

hearing on this appeal" as follows: "Will the proposed discharge increase the chemical, physical, or biological impacts of the pollutants for which the receiving waters are impaired?" Id. at 22 (emphasis added).

In its August 29, 2001, Memorandum of Decision, the Board denied a Motion to Dismiss filed by Hannaford and Lowes and a Motion to Alter filed by ANR. With regard to the Motion to Dismiss, the Board decided that the issues that CLF presented in its Notice of Appeal remain viable after the Board's June 29, 2001, Memorandum of Decision on the preliminary issues in this case. In its analysis of the Motion to Dismiss, the Board stated that the issues remaining for the hearing on the merits involved the permitting of a proposed discharge into impaired waters in the absence of a wasteload allocation. MOD at 3 (Aug. 29, 2001).

In their prefiled evidentiary objections, Hannaford and Lowes asserted that CLF witness Richard Claytor's testimony with regard to both temperature and baseflow goes beyond the scope of this appeal. Hannaford and Lowes argued that the hearing on the merits was limited to the issue of whether the proposed discharge will increase the impacts of the pollutants listed as causing the impairment of the receiving waters. Second Prehearing Order at 3, 5. ANR also objected that Mr. Claytor's discussion of thermal impacts and baseflow reduction are irrelevant in that these matters are not pollutants of concern. Second Prehearing Order at 6.

With regard to the objections of Hannaford and Lowes, the Chair ruled as follows:

> The objection raises the question of whether relevant evidence in this hearing should be defined by the uses impaired (e.g., fishing) or by the pollutants listed by ANR on its section 303(d) list as causing the impairment (e.g., sediment). The hearing in this matter, based on CLF's Notice of Appeal and the Board's June 29, 2001, Memorandum of Decision, is limited to whether the proposed discharge will increase the load of pollutants for which the receiving waters are impaired. As Hannaford and Lowes pointed out, based on the section 303(d) list, neither temperature nor baseflow is a pollutant of concern. However, it may be possible that factors not listed as causing the impairment of the receiving waters, such as thermal or hydrological modification, may influence the impacts of pollutants of concern. Alteration of stream flow, for example, might affect bank stability and thus sediment loading. The Notice of Appeal specifically asserts that "The authorized discharge contributes both hydrologic modification and additional pollutant loads to the receiving waters." (Notice of Appeal at 3.) The objection raises significant mixed questions of law and fact that should not be decided in the course of ruling on evidentiary objections. The objection is therefore overruled.

Second Prehearing Order at 3-4 (emphasis deleted).

Similarly, the Chair ruled as follows with regard to the objections of ANR:

> ANR argued that Mr. Claytor's discussion of thermal impacts and baseflow reduction are irrelevant in that these matters are not pollutants of concern. The Board agrees that the issue in this case is not general compliance with the Vermont Water Quality Standards but rather how to manage an existing discharge into impaired waters for which a pollutant budget is required but has not yet been developed. The standard set forth by the Board in its June 29, 2001, Memorandum of Decision in this case is that the proposed discharge can be permitted pending the establishment of a TMDL as long as the proposed discharge will not increase the load of pollutants of concern in the receiving waters. As noted above, however, the Board cannot be satisfied at this juncture that thermal or hydrological modification of the receiving waters will not affect the loading of pollutants of concern. The objection is therefore overruled.

Second Prehearing Order at 6 (emphasis deleted).

The permit at issue must comply with the standards set forth herein for the pollutants of concern. With regard to pollutants not listed as causing the impairment of the receiving waters, the permit must comply with the criteria and uses of the Vermont Water Quality Standards. However, the Board concludes that the scope of this appeal, based on the Notice of Appeal and the prior decisions and orders issued in this matter, is limited to the question of whether the permit will allow a new or increased discharge of pollutants of concern into the receiving waters. The question of whether thermal pollution or hydrological modification associated with the discharge independently comply with the Vermont Water Quality Standards is important but outside the issues presented to the Board in this appeal. Thermal pollution and hydrological modification will therefore be considered only insofar as a nexus is shown between these considerations and the mass loading of the pollutants causing the impairment of the receiving waters.

2. Thermal Pollution and Hydrological Modification

a. Thermal Pollution

CLF and the Voice addressed the issue of thermal pollution in the context of addressing the "quality, character, and usefulness of Potash Brook." (CLF-14 at 9.) As the Board has indicated above, the relevant inquiry with regard to pollutants of concern is whether the permit

will allow an increase in the mass loading of these pollutants into the receiving waters. Mr. Claytor speculated that thermal pollution from the site may contribute to a violation of the Vermont Water Quality Standards for temperature. On cross examination, Mr. Claytor acknowledged that he did not conduct any temperature studies on Potash Brook or otherwise uncover any concrete information on whether the proposed project would unduly raise the temperature of Potash Brook. Based on the evidence presented, the Board cannot conclude that any thermal pollution generated by the proposed project will cause an increase in the mass loading of pollutants of concern into Potash Brook or Shelburne Bay.

b. Hydrological Modification

The evidence presented with regard to baseflow similarly fails to establish a sufficient nexus to the issue of whether the proposed discharge will increase the mass loads of pollutants of concern. CLF's evidence with regard to baseflow relates not to the pollutants of concern but to the uses impaired. Maintaining groundwater recharge and stream base flow are critical concerns in stormwater discharge permitting. Reductions in baseflow could theoretically increase the concentration of contaminants in a stream during low flow conditions, increase the frequency of drought-flow conditions, lead to thermal pollution of the stream, and otherwise compromise the stream's ecological functions. The narrow issue on appeal, however, is whether the permit impermissibly increases the load of pollutants of concern in the receiving waters. The evidence does not establish that any reductions in baseflow associated with the project will increase the mass loading of pollutants listed as causing the impairment of the receiving waters.

CLF and the Voice have argued that changes in peak flow rates in Potash Brook could increase the sediment load to the stream by causing additional stream-bank erosion. This allegation with regard to hydrological modification is clearly connected to the critical question in this appeal of whether the proposed permit will add to the mass loading of pollutants of concern. As indicated, above, however, the evidence shows that the proposed discharge will not indirectly add to the mass loading of pollutants of concern through bed and bank scour. The Board therefore concludes that the evidence presented by CLF and the Voice with regard to thermal pollution and hydrological modification did not undermine the required showing by Hannaford and Lowes with respect to these matters.

V. Order

For the foregoing reasons, the Board hereby Orders:

1. The decision of the Secretary of ANR to issue DEC Permit # 1-1214 is affirmed in part and modified in part.

2. DEC Permit # 1-1214 is granted, subject to the following additional requirements:

   a. Condition 10, Approved Project Design, is amended to add, following the list of referenced plans, the following text:

      By reference, the above noted plans are made a part of this permit, with the exception of the following: The permittees shall submit to the Secretary or his designee, prior to the commencement of construction, revised site plan sheets (Ex. HL-21, sheets 26, 27A, and 27 C) that accurately reflect the size and invert elevation of the bypass pipe. The Secretary or his designee shall review and approve those drawings in conformity with Re: Hannaford Bros. Co. and Lowes Home Centers, Inc., No. WQ-01-01, Findings of Fact, Conclusions of Law, and Order (Vt. Water Res. Bd. Jan. 18, 2002), and incorporate them into this permit.

   b. Condition 14, Other Requirements, is amended to add a new subpart e., with the following text:

      The permittees shall submit plans for covering the proposed garden center to the Secretary or his designee, prior to the commencement of construction. The permittees shall employ appropriate no-exposure practices for the proposed garden center by requiring plants and plant supplies, such as fertilizers offered for sale, to be kept under a permanent covered shelter to prevent exposure to rain, snow, snow melt, and runoff. The Secretary or his designee shall review and approve these plans in conformity with Re: Hannaford Bros. Co. and Lowes Home Centers, Inc., No. WQ-01-01, Findings of Fact, Conclusions of Law, and Order (Vt. Water Res. Bd. Jan. 18, 2002), and incorporate them into this permit.

3. Jurisdiction is returned to ANR.

Dated at Montpelier, Vermont this 18th day of January, 2002.

WATER RESOURCES BOARD

/s/ David J. Bylthe
_____
David J. Blythe, Chair

Concurring:

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

Dissenting:

Jane Potvin, Member

DISSENTING OPINION, Jane Potvin

I respectfully dissent from the Board's decision and would deny the issuance of a discharge permit to Hannaford and Lowes.

First, I do not believe that the applicants have met their burden of proof. Under 10 V.S.A. § 1263(c), the Secretary of ANR must determine (and on appeal, the Board must decide after a de novo hearing) that a proposed discharge "will not reduce the quality of the receiving waters below the classification established for them and will not violate applicable provisions of state or federal laws or regulations," including the Vermont Water Quality Standards. The receiving waters--Potash Brook and the Shelburne Bay section of Lake Champlain--are already impaired and the applicants have not demonstrated that the proposed collected storm-water discharges from their project will not further reduce the quality of those waters in violation of the law. In my opinion, even applying the Board's "actual discharge" baseline, the applicants have not put forward sufficient credible evidence to prove that they are entitled to a discharge permit.

However, my reason for dissenting from the Board's decision goes beyond the specific facts of this case. It has long been the policy of the State of Vermont "to protect and enhance the quality, character and usefulness of the surface waters of this state." See 10 V.S.A.

§1250(1). For over thirty years, the permitting and enforcement tools have been in place for the Agency of Natural Resources (ANR) to meet its statutory mandate of managing Class B waters, including the waters that are the subject of this appeal, so that they are suitable for bathing and recreation and provide good fish habitat and aesthetic value. See 10 V.S.A. ch. 47; 10 V.S.A. § 1252(a)(2). In my opinion, there is no excuse for either the "impaired" condition of these public waters or the delay in their clean-up. The law requires that Class B waters should be fishable and swimable, period. See also Vt Const., Ch. II, § 67 ("The inhabitants of this State shall have liberty in seasonable times . . . to fish in all boatable and other waters (not private property) under proper regulations, to be made and provided by the General Assembly.").

Therefore, I disagree with the Board's analysis that "actual discharges" is the appropriate baseline in determining whether a proposed new or increased discharge will impermissibly add to the mass loading of pollutants of concern into impaired waters. In the absence of a wasteload allocation justifying another level of discharge, no applicant should receive a permit unless it can demonstrate that its proposed discharge will not result in pollutant loadings in excess of those attributable to the pre-development condition of the project site (i.e.: natural, undeveloped condition). The type of technological and other controls required to achieve this standard will necessarily vary depending on specific characteristics of the site and the nature and degree of impairment of the receiving waters. Nevertheless, by imposing this standard, as the law requires, applicants, rather than the taxpayers and future generations of Vermonters, will "pay" the cost of pollution clean-up directly attributable to their development projects. Additionally, the cost of implementing such control measures hopefully will induce the development community to pressure the ANR to complete and implement holistic pollution clean-up plans (TMDLs and wasteload allocations) for the impaired watersheds in which the demand for new or expanded development is greatest, thereby benefitting all Vermonters who use and enjoy our state's water resources, including Lake Champlain.

The state's failure to ensure that receiving waters meet even the minimum requirements of the Vermont Water Quality Standards, is evidence that some persons (those who discharge wastes into public water resources) have been given a particular advantage at the expense of persons who rely on clean water, including many commercial, industrial, residential, agricultural and recreational users. This is patently wrong and unfair.