

State of Vermont
WATER RESOURCES BOARD

Re: Waters of the Green Mountain National Forest
Docket No. ORW-03-01

MEMORANDUM OF DECISION

(Issued June 28, 2004)

Synopsis

A petition proposing outstanding-resource designations for sixty-eight named and mapped water bodies and all their tributaries and associated waters in the Green Mountain National Forest (GMNF) is specific enough for this matter to go to a hearing on the merits of the petition. The petitioners are not required to present their evidence water-body-by-water-body because the petition presents common issues of law and fact with respect to the named waters and their sources. Although the candidate waters in this matter are located within seven planning basins, a single hearing location central to the waters at issue will be reasonably convenient. The petitioners were not required to include waters located within private inholdings in the GMNF among the waters that the petition proposes for outstanding-resource designation, and owners of private inholdings were not required to receive direct notification of these proceedings. The petition adequately defines the waters proposed for designation as outstanding.

Section 1-03.D of the Vermont Water Quality Standards is intended to implement Tier 3 of the federal antidegradation regulations and relies on Vermont's outstanding resource waters statute, 10 V.S.A. § 1424a, as the implementing procedure. The authority of the Water Resources Board (Board) to designate waters as outstanding resource waters (ORWs) under the Vermont Water Quality Standards does not extend to designating waters as outstanding national resource waters (ONRWs) under federal law. Although the Board does not apply federal antidegradation requirements directly, Vermont's Tier 3 antidegradation requirements are consistent with federal Tier 3 regulations.

The water quality values that must, at a minimum, be maintained and protected under Vermont's Tier 3 antidegradation requirements include those of the highest quality waters as well as those of waters of exceptional recreational and ecological significance. The term "water quality values" as used in Section 1-03.D of the Vermont Water Quality Standards may be understood to include the existing and designated uses and the water quality criteria that apply to the candidate waters. An ORW designation based on "natural" or "recreational" values under Vermont's outstanding resource waters statute, 10 V.S.A. § 1424a(e), may constitute a designation based on "water quality values" under Tier 3 of Vermont's antidegradation rule, VWQS § 1-03.D. Waters that constitute exceptional state *or* national resources may have exceptional values and warrant designation as ORWs under 10 V.S.A. § 1424a(e).

Under Vermont law, waters proposed for designation as ORWs shall be so designated if the Board finds that they have exceptional values. Vermont law does not permit the future or potential social, economic, or management consequences of a proposed designation to be balanced against existing exceptional values of the candidate waters to prevent the proposed designation. Evidence of the *future or potential* social, economic, or land-management consequences of the proposed designations in this matter is therefore irrelevant and inadmissible. However, evidence of *existing* social, economic, and land-management practices may be admissible insofar as this evidence is relevant to the issue of whether the candidate waters have exceptional values.

Motions to dismiss the petition are denied. Objections to rulings on preliminary issues of law in the Prehearing Conference Report and Order (Prehearing Order) issued in this matter are denied. A motion to limit the evidence in these proceedings is granted. That portion of the Petition that seeks the designation of the candidate waters as ONRWs is dismissed as a matter of law. An evidentiary hearing will be convened on the question of whether the candidate waters warrant designation as ORWs, a site visit will be scheduled, and requirements and deadlines for the pre-filing of evidence and evidentiary objections will be established consistent with this decision and in accordance with the scheduling order issued herewith.

I. Procedural Background

This matter arose on December 19, 2003, when the Vermont Natural Resources Council (VNRC) and Conservation Law Foundation (CLF), along with various individual petitioners whom these organizations represent (collectively the Petitioners), filed a Petition to Designate Green Mountain Waters as Outstanding Resource Waters and as Outstanding National Resource Waters (Petition) with the Board. The Petition covers some sixty-eight brooks, ponds, wetlands, and rivers, plus all tributaries and associated waters within their watersheds, located within the existing boundaries of the GMNF. The Petition asks the Board to designate the waters identified therein as ORWs pursuant to 10 V.S.A. § 1424a and as ONRWs pursuant to 40 C.F.R. § 131.12(a)(3). The Petition specifically requests the Board to make these designations pursuant to the antidegradation policy, § 1-03.D, of the Vermont Water Quality Standards. In addition, the Petition asks the Board to find that § 1-03.D of the Vermont Water Quality Standards is the implementing provision of the Tier-3 requirement of the federal antidegradation policy.

The Board's Executive Officer provided notice of the Petition as required by Vermont's outstanding resource waters statute, 10 V.S.A. § 1424a, and the Board's Rules, and on February 10, 2004, the Board's then Chair, David J. Blythe, convened a prehearing conference at the Board's conference room in Montpelier, Vermont. Based on Vermont's outstanding resource waters statute and the Board's Rules, the Chair granted party status at the prehearing conference to seventeen separate parties (collectively the Intervenor), in addition to the Petitioners.

The parties and their representatives are identified in a Prehearing Order that Chair Blythe issued on February 18, 2004. Based on the arguments of the parties at the prehearing conference, the Prehearing Order established a schedule for the parties to file memoranda of law, motions, and responses with regard to four preliminary issues of law. In the Prehearing Order, Chair Blythe issued rulings on eight additional preliminary issues that the parties raised at the prehearing conference. However, the Prehearing Order included a schedule for the parties to file objections, motions, memoranda of law, and responses with regard to any or all of Chair Blythe's rulings on these eight issues.

In the Prehearing Order, Chair Blythe invited the parties to file motions and legal memoranda on the following four issues for the Board's consideration:

1. As a matter of law, to what extent, if any, does the effect of an ORW designation differ from the effect of an ONRW designation?
2. Does the designation of a water as an ORW under state law constitute, in and of itself, a designation of that water as an ONRW?
3. Does this Board have jurisdiction to designate a water as an ONRW pursuant to federal law, and in particular, 40 C.F.R. § 131.12(a)(3), as the Petition requests?
4. As a matter of law, to what extent, if any, may the social, economic, or land-management implications of a proposed designation be relevant to the Board's review of a petition to designate waters as outstanding resource waters?

Chair Blythe issued rulings on the eight additional issues in the Prehearing Order as follows:

1. A petition to designate outstanding resource waters need not be limited to one specific water body and may instead take a basin-wide approach to proposed designations.
2. The Petitioners are not required to present their evidence water-body-by-water-body so that not all parties will need to be present at all parts of the hearing.
3. A determination by the Board that one of the water bodies at issue is not suitable for designation as outstanding will not necessarily defeat the entire Petition.

4. The Board does not need to conduct multiple hearings in multiple locations corresponding to the geographic location of the waters at issue but may instead conduct a single hearing at a single location.
5. Hearings on preliminary issues and the hearing on the merits shall be held in Rutland or some other location closer to the GMNF than Montpelier.
6. It was not necessary for the owners of all lands abutting the waters at issue, including the owners of private in-holdings along stream segments not included in the Petition, to receive direct notification of these proceedings.
7. The Petition is not subject to dismissal on its face for failing to more specifically define the waters proposed for designation as outstanding.
8. Evidence relating to the social or economic consequences or the management implications of designating any or all of the waters at issue as outstanding will not be considered unless the Board affirmatively decides as a matter of law that such evidence is relevant to the Board's review of the Petition.

Various parties filed motions, memoranda of law, and/or responses addressing the four preliminary issues that Chair Blythe reserved for decision by the full Board as well as most of the eight preliminary issues that Chair Blythe chose to address in the Prehearing Order. The Prehearing Order invited the parties to request oral argument on these issues, and a number of the parties did so. The Board convened oral argument on the preliminary issues in this matter at the Rutland Holiday Inn in Rutland, Vermont on May 11, 2004.

In addition to offering the parties the opportunity to brief the preliminary issues of law in this matter, the Prehearing Order invited to parties to file requests for a site visit. Site-visit requests were filed by a number of parties, including the Petitioners. Although the Petitioners advised that they will attempt to arrange a fly over, the Petitioners and the other parties who requested a site visit recommend an on-the-ground tour of the waters proposed for designation as outstanding resources as well as surrounding areas. The Board advised the parties at the oral arguments in this matter that arrangements for a site visit would be made once the preliminary issues in this matter have been resolved.

Chair Blythe's term with the Board expired February 28, 2004, and John F. Nicholls took over as Chair on March 1, 2004. Board Member Jane Potvin passed away in April, 2004. Pursuant to 10 V.S.A. § 905(A), Chair Nicholls appointed former Chair Blythe as an Acting Member prior to the May 11, 2004 oral arguments to participate in this decision in place of Jane Potvin. Governor Douglas subsequently appointed Joan Nagy to fill Jane Potvin's position,

effective May 17, 2004. Because Joan Nagy was not appointed until after the oral arguments took place, she took no part in this decision, and Acting Member Blythe continued to serve in this appeal. Member Michael J. Hebert was unavailable for the oral arguments on the preliminary issues in this matter but took part in this decision after listening to the tapes of the oral arguments.

II. Legal Background

A. Federal Antidegradation Requirements

The federal Clean Water Act, 33 U.S.C. §§ 1251-1387, is intended “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” Clean Water Act, § 101, 33 U.S.C. § 1251. In keeping with these goals, the Clean Water Act expressly authorizes the United States Environmental Protection Agency (EPA) to establish an antidegradation policy. *See* Clean Water Act § 303(d)(4)(B), 33 U.S.C. § 1313(d)(4)(B). EPA’s regulations require the states to develop and adopt antidegradation policies, along with implementation methods, that are consistent with a three-tiered antidegradation system described by these regulations. *See* 40 C.F.R. § 131.12(a).

Tier 1 of the federal antidegradation system, 40 C.F.R. § 131.12(a)(1), protects existing uses of waterways and thus represents “the absolute floor of water quality.” EPA Water Quality Standards Handbook (2d ed. 1994), § 4.2. Tier 2 goes further and protects the pillow or cushion of water quality over and above that which is necessary to protect existing and designated uses. Under Tier 2, water quality must be maintained and protected unless “lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located.” 40 C.F.R. § 131.12(a)(2). Even if lower water quality is socially and economically justified, existing uses must be fully protected (in keeping with Tier 1), and both point-source and nonpoint-source discharges must be subject to the highest statutory requirements. *Id.*

Tier 3 antidegradation requirements (which are the subject of this case) apply to waters that “constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance.” 40 C.F.R. § 131.12(a)(3). Thus, Tier 3 provides protection both to waters of the highest quality and to “water bodies that are important, unique, or sensitive ecologically, but whose water quality, as measured by the traditional parameters such as dissolved oxygen or pH, may not be particularly high or whose characteristics cannot be adequately described by these parameters (such as wetlands).” EPA Water Quality Standards Handbook (2d ed. 1994), § 4.7. Under federal regulations, the quality of all waters designated as outstanding “shall be maintained and protected.” 40 C.F.R. § 131.12(a)(3). Whereas Tier 1 and Tier 2 antidegradation requirements

apply to all waters of the United States, Tier 3 antidegradation requirements apply only at the discretion of the states.

EPA guidance provides that the states may allow activities that result in short-term changes in the quality of waters subject to Tier 3 requirements as long as these temporary changes do not compromise the existing uses of the ONRW or the “the essential character or special use that makes the water an ONRW.” EPA Water Quality Standards Handbook (2d ed. 1994), § 4.2. In its Water Quality Standards Handbook, EPA offers the following examples of allowable temporary lowering of water quality in Tier 3 waters: A national park may replace a defective septic system in a campground located adjacent to a stream with an ONRW designation as long as best management practices are used to minimize any disturbance to water quality or aquatic habitat. Taking the same situation except the campground is served by a small sewage treatment plant, the national park could modify the treatment plant to provide enhanced treatment as long as the increased loading of sediment and other pollutants resulting from the construction of these enhancements is only temporary. By way of further example, timber harvesting in a national forest in the area of streams designated as an ONRW could be permitted as long as best management practices for timber harvesting and other preventive measures result in “only temporary and short-term water quality degradation while maintaining existing uses or new uses consistent with the purpose of the management of the ONRW area.” EPA Water Quality Standards Handbook (2d ed. 1994), Ex. 4.1. “Other examples of these types of activities include maintenance and/or repair of existing boat ramps or boat docks, restoration of existing sea walls, repair of existing stormwater pipes, and replacement or repair of existing bridges.” *Id.*

Thus, while ONRWs are elite waters that are set apart from other waterways, ONRWs do not necessarily need to be pristine. Nor does a designation of a waterway as outstanding necessarily demand that all pollutant sources be eliminated or even that all of these sources be subject to extraordinary treatment standards. Except for temporary activities, “EPA interprets [Tier 3] to mean no new or increased discharge to ONRWs and no new or increased discharge to tributaries to ONRWs that would result in lower water quality in the ONRWs.” EPA Water Quality Standards Handbook (2d ed. 1994), § 4.7. As long as the Tier 3 designation remains in place, the quality of these waters cannot be lowered, even in the face of social or economic need, although the nature and purpose of a Tier 3 designation might require that actions be taken or eliminated that will improve water quality to meet the objectives of the designation.

Although federal regulations establish a three-tiered antidegradation policy, some states have adopted antidegradation policies that include not only the three tiers required by federal law, but also a tier that falls between Tier 2 and Tier 3. EPA has accepted this fourth option, aptly known as Tier 2½, because it is more stringent than Tier 2, which applies to all waters, even though it is not as stringent as Tier 3, which applies to waters only at the discretion of the states. Tier 2½ is designed to provide greater protection than Tier 2 in designated waters but to avoid

the Tier 3 prohibition against any lowering of water quality. “The Tier 2½ approach allows States to provide a very high level of water quality protection without precluding unforeseen future economic and social development considerations.” EPA Water Quality Standards Handbook (2d ed. 1994), § 4.2.

Federal regulations require the states to follow “the public participation provisions of the State’s continuing planning process,” 40 C.F.R. § 131.12(a)(2), before lowering water quality on the basis of social or economic necessity under Tier 2. EPA’s regulations do not specifically address the public participation requirements for designating a water as outstanding under Tier 3. See 40 C.F.R. § 131.12(a)(3). However, EPA guidance provides generally that public participation requirements for antidegradation may be satisfied by holding a hearing or issuing public notice with the opportunity to request a hearing. EPA Water Quality Standards Handbook (2d ed. 1994), § 4.8.2. “Activities that may affect several water bodies in a river basin or sub-basin may be considered in a single hearing.” *Id.*

B. Vermont Antidegradation Requirements

The Vermont Water Quality Standards rely on designated uses, water quality criteria, and an antidegradation policy to protect and improve water quality in Vermont’s surface waters. Vermont’s antidegradation policy, which is contained in section 1-03 of the Vermont Water Quality Standards, parallels the three-tiered structure of federal antidegradation regulations. Tier 3 of Vermont’s antidegradation policy provides in its entirety as follows: “The Board may under 10 V.S.A. § 1424a designate certain waters as Outstanding Resource Waters. Where the Board so designates such waters because of their water quality values, their existing quality shall, at a minimum, be protected and maintained.”

The statutory authority referenced in Vermont’s Tier 3 policy is much more detailed than the policy statement itself. Whereas the Vermont Water Quality Standards indicate that the Board “may” designate waters as outstanding, the statute provides that “the board *shall* designate the waters as outstanding resource waters if it finds that they have exceptional natural, recreational, cultural or scenic values.” 10 V.S.A. § 1424a(e) (emphasis added). The statute does not mention the consequences of such a designation except to say that it “shall not invalidate the terms of existing permits issued by the state or federal government.” *Id.*

Vermont’s outstanding resource waters statute lists fourteen factors that the Board “may consider, but shall not be limited to considering,” in deciding whether to designate waters as ORWs. 10 V.S.A. § 1424a(d).¹ The listed factors include numerous considerations directly

¹Section 1424a(d) states as follows:

relating to the existing water quality and ecological functions of the waters. However, these factors also include other considerations such as the “existing usage and accessibility of the waters for recreational, educational, and research purposes and for other public uses,” 10 V.S.A. § 1424a(d)(12), and “existing alterations, diversions or impoundments by permit holders under state or federal law.” 10 V.S.A. § 1424a(d)(14).

The statute requires the Board to hold a hearing on a petition to designate “particular waters . . . as outstanding resource waters,” 10 V.S.A. § 1424a(a), and provides that this “hearing shall be conducted as a contested case.” 10 V.S.A. § 1424a(b). The statute expressly provides that “The hearing shall be held convenient to the waters in question, or in a county where the

In making its decision, the board may consider, but shall not be limited to considering, the following:

- (1) existing water quality and current water quality classification,
- (2) the presence of aquifer protection areas,
- (3) the waters’ value in providing temporary water storage for flood water and storm runoff,
- (4) the waters’ value as fish habitat,
- (5) the waters’ value in providing or maintaining habitat for threatened or endangered plants or animals,
- (6) the waters’ value in providing habitat for wildlife, including stopover habitat for migratory birds,
- (7) the presence of gorges, rapids, waterfalls, or other significant geologic features,
- (8) the presence of scenic areas and sites,
- (9) the presence of rare and irreplaceable natural areas,
- (10) the presence of known archeological sites,
- (11) the presence of historic resources, including those designated as historic districts or structures,
- (12) existing usage and accessibility of the waters for recreational, educational, and research purposes and for other public uses,
- (13) studies, inventories and plans prepared by local, regional, statewide, national, or international groups or agencies, that indicate the waters in question merit protection as outstanding resource waters,
- (14) existing alterations, diversions or impoundments by permit holders under state or federal law.

waters are located.” 10 V.S.A. § 1424a(a). In addition, the statute includes provisions for providing notice of the hearing, 10 V.S.A. § 1424a(b), as well as provisions governing party status. 10 V.S.A. § 1424a(c). Among those entitled to party status are owners of property adjoining the waters at issue and organizations that may be affected by the Board’s designation decision or that have members who use or enjoy the waters or who have a clear interest in the designation. *Id.*

Rule 18 of the Board’s Rules of Procedure specifically addresses “Petitions for the Designation of Outstanding Resource Waters.” These petitions must include, among other things, the “Identification of the specific body of water, or portion thereof, for which designation is sought, including its name and location,” Rule 18(B)(1), a map of the waters and other relevant features, Rule 18(B)(2), a description of the exceptional values of the waters that warrant their designation as ORWs, Rule 18(B)(3), copies of all exhibits that the petitioner intends to offer in support of the petition, Rule 18(B)(4), and a list of any expert witnesses and a summary of their qualifications and testimony, Rule 18(B)(5). The Board may direct the petitioner to provide, among other things, “the names and mailing addresses of all persons owning property abutting the affected waters.” Rule 18(C). In addition, under Rule 18(D), the Board may require service of the petition on persons not otherwise required to be served.

III. Discussion

A. Issues Decided by the Chair in the Prehearing Order

1. Must a petition for the designation of an ORW or an ONRW take a water-body specific approach rather than a basin-wide approach?

Stratton Corporation (Stratton) disagrees with Chair Blythe’s ruling that the Petition may take a basin-wide approach rather than a water-body specific approach and moves to dismiss the Petition. The Vermont statute requires a hearing to be held “on the question of whether *particular* waters should be designated as outstanding.” 10 V.S.A. § 1424a(a) (emphasis added). The Petition, however, includes named waterways, “including all tributaries and associated waters within their watersheds.” (Pet. at 5.) Stratton points out that Procedural Rule 18(B)(1) requires a petition to identify “the specific body of water, or portion thereof, for which designation is sought, including its name and location.” Although Stratton argues that prior Board decisions involving petitions to designate waters as outstanding have focused on particular water bodies, the Petitioners disagree.

The Vermont Agency of Natural Resources (ANR) argues that the Petition is not specific enough under 10 V.S.A. § 1424a or Procedural Rule 18 because the Petition proposes to designate every water body draining into the waters named in the Petition as outstanding

resources. ANR argues that the Board must either dismiss the Petition for not specifically describing all of these waters or require the Petitioners to file supplemental information. In support of its argument, ANR cites section 1-03.D of the Vermont Water Quality Standards, which allows “certain waters” to be designated as outstanding and section 1424a(a) of the outstanding resource waters statute, 10 V.S.A. § 1424a(a), which, as mentioned, authorizes the designation of “particular waters” as outstanding.

ANR also cites the preamble of Procedural Rule 18, which refers to the filing of petitions “seeking the designation of a body of water, of a portion thereof, as outstanding resource waters.” Like Stratton, ANR emphasizes that these petitions must identify “the specific body of water, or portion thereof, for which designation is sought, including its name and location.” Procedural Rule 18(B)(1). Procedural Rule 18(B)(2), as ANR points out, requires the petitioner to submit a “map showing the waters.” Under Procedural Rule 18(B)(3), the petition must include a narrative description of the exceptional features of the waters that the petitioner claims warrant the designation of these waters as outstanding.

ANR argues that designating waters as outstanding on a basin-wide basis will create management problems by failing to provide the level of detail needed to create management and protection plans for the water bodies involved. Further, ANR argues that limiting the Petition to the water bodies that it identifies by name is necessary for the Board to be able to determine whether evidence offered is relevant.

The Board concludes that the Petition identifies the waters at issue with enough specificity under the Board’s Rules and Vermont’s outstanding resource waters statute for this matter to proceed to a hearing on the merits and that the comprehensive approach taken by the Petition is more fair and efficient than the piecemeal approach advocated by certain Intervenors. The Petition is specific enough for parties to prepare their cases and for the Board to determine whether the evidence offered in this matter is relevant to a named water body or its sources. The basin-wide approach taken by the Petition is not grounds for dismissing the Petition as a matter of law.

The Petition states that it “covers a total of 60 brooks, ponds, wetlands, and rivers,” (Pet. at 3), and specifies that these candidate waters include not only the named waters, but also “all tributaries and associated waters within their watersheds.” (Pet. at 3 n. 2, Pet. at 5.) Exhibit 2 of the Petition is a list of the candidate waters. This list includes sixty-seven named waters. For each named water, Exhibit 2 refers to the USGS quadrangle map of the area where these waters are located. Exhibit 2 also references the Vermont planning basin containing each of the listed waters. In addition, for each named water, Exhibit 2 provides a narrative description of the water’s location.

Exhibit 3 of the Petition consists of two color GIS maps depicting the GMNF boundary and the name and location of each of the sixty-seven water bodies listed in Exhibit 2. Exhibit 3 includes one water body that is not listed in Exhibit 2—Lost Pond Bog. However, in Exhibit 10 of the Petition, the affidavit of the Petitioners' expert describes this water body as "a wetland complex located in a depression between Buckball Peak and South Buckball Peak in the town of Mount Tabor." (Ex. 10 at 28.) The affidavit adds that "The Long Trail passes close to this wetland." (*Id.*)

The Petition describes the candidate waters as representing "an interconnected web of largely undisturbed waters [that] forms an ecological island of connected, undisturbed aquatic habitat, ecological connectivity, and virtually pristine chemical, physical and biological water quality." (Pet. at 3.) Included in the Petition is a detailed discussion of why the features of the waters proposed for designation as outstanding warrant such a designation. (Pet. at 9-27.) In addition, the Petition includes numerous supporting exhibits. Exhibit 4, for example, explains the ecological linkages between headwaters and downstream segments. Exhibit 10 is a thirty-four page affidavit of the Petitioners' expert, who describes in detail the features of the water bodies that the Petitioners claim warrant the designation of these waters as outstanding. The Petition attributes various common features to the candidate waters or to groups of these waters.

It is of no consequence that the Petition describes some of the candidate waters in relation to the boundaries of the GMNF or that the Petition extends the proposed designation to tributaries and associated waters that the Petition does not specifically map. Water bodies or portions thereof are commonly described in relation to jurisdictional boundaries. For example, in *In re Poultney River*, No. ORW-90-01, Findings of Fact, Conclusions of Law and Order at 1 (Vt. Water Res. Bd. June 28, 1991), the Board described the waters designated as ORWs as beginning at the Poultney/Fair Haven town line.

The Vermont statute relating to the classification and reclassification of waters describes Class A waters as follows: "The waters of all lakes, ponds and reservoirs, natural or artificial, used exclusively for public water supply prior to July 1, 1971, *and all waters flowing into such lakes, ponds and reservoirs, and all waters located above 2500 feet altitude*, National Geodetic Vertical Datum." 10 V.S.A. § 1253(a) (emphasis added). In the same vein, the Vermont Water Quality Standards, in the preamble to Chapter 4 (Water Quality Classifications), provide, in pertinent part, as follows: "Those waters reclassified by the Board to Class A *shall include all waters within the entire watershed of the reclassified waters* unless expressly provided otherwise in the rule. Watershed shall mean that region which contains waters that drain into a particular brook, stream, river, or other body of water." (Emphasis added.) The water quality classifications of the Vermont Water Quality Standards describe classified waters by their relation to town lines, water intakes, altitude, and other useful features. VWQS §§ 4-01 to 4-17. These classifications frequently include the unspecified waters within the watersheds of named water

bodies. *See id.* While the foregoing authorities relate to the classification of waters rather than to the designation of waters as ORWs, they illustrate the point that describing waters by their watersheds and by reference to physical features or jurisdictional boundaries is a practical and common practice.

2. Must the Petitioners present their evidence water body by water body according to an established schedule so that not all parties will need to be present for all parts of the hearing?

Stratton objects to Chair Blythe's ruling that the Petitioners are not required to organize their evidence water body by water body. Here again, Stratton relies on Rule 18(B), which requires petitions to identify the specific water bodies at issue. Stratton argues that if the hearing is not organized by water body, then parties will be forced to waste time and money participating in portions of the hearing that do not pertain to the water bodies in which they are interested. The Winhall-Stratton Fire District (Fire District) supports Stratton's argument.

The Vermont Forest Products Association (VFPA) points out that the waters at issue are located in seven different planning basins, (Pet. at 3), and argues that these waters present different issues and that the hearing in this matter must be organized either by the geographic location of these waters or by other characteristics.

Although the Petition at issue is broad in its geographic scope, the Board concludes that the Petition is not unreasonably broad. As Chair Blythe pointed out, breaking the hearing in this matter into separate parts, either by candidate waters or by their planning basins, "would result in duplicative evidence and argument and would therefore be inefficient." (Prehearing Order at 12.) The Petition presents common issues of law and fact with respect to the named waters and their sources. These waters are most efficiently considered together rather than in separate proceedings.

3. Must a determination by the Board that one of the water bodies included in the Petition is not suitable for designation as outstanding defeat the entire Petition?

Chair Blythe's decision that Board may grant all, part, or none of the relief requested has not been challenged.

4. Must the Board conduct multiple hearings in multiple locations corresponding to the geographic region of the waters at issue?

The Vermont Ski Areas Association (VSAA) argues that conducting a single hearing in a single location in this matter will violate the public participation requirements for outstanding resource waters designations. VSAA contends that EPA's Water Quality Standards Handbook (2d ed. 1994), § 4.8.2, endorses a single hearing for several water bodies in a single river basin or in a sub basin but does not suggest that a single hearing will suffice for designations involving multiple river basins. This case involves seven of Vermont's seventeen planning basins. (Pet. at 3.) VSAA also relies on the Vermont outstanding resource waters statute, which states that "The hearing shall be held convenient to the waters in question, or in a county where the waters are located." 10 V.S.A. § 1424a(a). In this case, VSAA argues that the waters involved are located in seven counties stretching across half the state.

Stratton also contends that the Board must conduct multiple hearings in this matter and argues that hearings in prior Board cases involving outstanding resource waters petitions were convened close to the waters at issue. In this case, Stratton argues that "there is not one location that is convenient to the waters in question." (Stratton Mot. to Dismiss at 6.) The Fire District supports Stratton's argument.

Obviously conducting a single hearing in a single location in this matter means that the hearing will not take place "in a county where [all] the waters are located." 10 V.S.A. § 1424a(a). However, the Board decides that a single hearing location in this matter will nevertheless be "convenient." *Id.* The Petitioners maintain that "the waters at issue share many common attributes." (Petitioners' Mem. of Law in Response at 10.) As Chair Blythe reasoned, the waters at issue in this matter are "confined to roughly the southwestern quadrant of a small state." (Prehearing Order at 12.) Convening the merits hearing in a location such as Rutland that is centrally located with regard to the waters at issue will be far more efficient overall than conducting multiple hearings in multiple locations. None of the parties have suggested that traveling to a single hearing location in this matter will impose an unreasonable hardship.

5. Shall future hearings in this matter be held closer to the GMNF than Montpelier?

Stratton objects to Chair Blythe's decision to convene future hearings in Rutland because this decision is inconsistent with Stratton's position that a single hearing in a single location violates the statutory requirement that the hearing be "convenient to the water in question." 10 V.S.A. § 1424a(a). However, the Board decides that convening future hearings in this matter in Rutland or in some other location central to the waters at issue will be reasonably convenient.

6. Must the owners of all lands abutting the waters at issue receive direct notification of these proceedings?

Stratton maintains that the petitioners unlawfully failed to provide notice of their petition to “all persons with an interest in lands abutting the waters at issue—including the leaseholders of all camps, the owners of all private in-holdings, and the owners of all privately owned upstream land.” (Stratton Mot. to Dismiss at 7.) In support of this argument, Stratton relies on the notification requirements of the Vermont outstanding resource waters statute. This statute sets forth certain notification procedures that the Board followed in this case and further provides that the Board “may” notify additional persons as “the board deems appropriate.” *See* 10 V.S.A. § 1424a(b). The statute does not require direct notification of the owners of land that adjoins or otherwise drains into the waters proposed for designation as outstanding. Stratton contends that it would be appropriate to notify additional persons who may be affected by the proposed designation. VFPA agrees that providing actual notice to all owners of land abutting the waters at issue would be appropriate in this matter.

ANR agrees with Chair Blythe that the notice requirements of the law have been satisfied in his case. Nevertheless, ANR argues that the Petition’s exclusion of private inholdings is “scientifically flawed,” (ANR Mot. to Dismiss at 19), and that granting the relief requested would render management of the resources involved impractical. In addition, ANR claims that it was inappropriate for the Petition to exclude inholdings in order to avoid involving private landowners in this case.

Neither the statute nor the Board’s Rules require either a petitioner or the Board to provide notice of a petition to designate waters as ORWs to adjoining landowners. *See* 10 V.S.A. § 1424a(b); Procedural Rule 18. Whether or not the waters at issue can be managed as outstanding resource waters on either side of inholdings is a question of fact. The Chair decided that the notice provided in this case, which complied with the statute and added direct notice to the GMNF, was reasonable. The Board agrees.

7. Must the Petition be dismissed on its face because it fails to adequately define the waters proposed for designation as outstanding?

Stratton argues that the Petition must be dismissed on its face because the Petition fails to identify the waters at issue with enough specificity. The reasons Stratton offers in support of this argument are included in its argument that the Petition must take a water body specific approach rather than a basin wide approach. The Fire District supports Stratton’s argument and urges the Board to dismiss the Petition, or alternatively, require the Petitioners to submit maps showing each and every water body that would be designated as an ORW. In addition, the Fire District points out that the Petition identifies high-quality aquatic communities downstream from the areas

proposed for designation. The Fire District argues that these areas are relevant only if the scope of the proposed designations is expanded into these downstream areas.

ANR also argues that the Petition must be dismissed because it fails to adequately define the waters proposed for designation as outstanding. ANR contends that the Petitioners inappropriately excluded certain stream segments from the proposed designation based on the ownership of adjacent lands rather than the ecological characteristics of these stream segments. ANR argues that the Petition is intended to avoid the participation of the owners of these inholdings in these proceedings. ANR concludes that the Petition is not administratively complete under the Board's Rules.

The owners of private inholdings that may be affected by these proceedings would not have been entitled to receive actual notification of these proceedings even if the stream segments traversing their parcels had been included in the waters proposed for designation. *See* 10 V.S.A. § 1424a(b). It is possible that the reason why the Petition does not include private inholdings is because the Petitioners aim to affect the management plan for the GMNF. With regard to high-quality aquatic communities downstream from the areas proposed for designation, the theory of the Petition is that designating the upstream areas as outstanding will help protect these downstream areas based on the river continuum concept, which describes the ecological linkage between upstream and downstream areas. The Board decides that the Petition provides reasonably specific notice of the relief requested and the basis for this request, as required by Procedural Rule 18(B). As already explained, the Board determines that the waters proposed for designation as outstanding are adequately defined.

8. What effect will the proposed designations have on the use of the GMNF and on the Forest Plan for the GMNF?

Chair Blythe ruled in the Prehearing Order that evidence relating to the management implications of the proposed designations will not be considered unless and until the Board rules that evidence of this nature would be relevant. Chair Blythe specifically set aside the relevance of this kind of evidence as a preliminary issue, which is addressed below. Nevertheless, ANR has argued that BMPs will continue to ensure that logging projects in the GMNF will protect existing water quality and comply with Tier 3 antidegradation requirements if the Petition is granted in whole or in part. These matters do not need not be addressed at this juncture.

B. Issues Identified as Preliminary Issues in the Prehearing Order

1. As a matter of law, to what extent, if any, does the effect of an ORW designation differ from the effect of an ONRW designation?

The parties provide the Board with no consistent themes with regard to the question of whether an ORW designation differs by more than name from an ONRW designation. The Bennington County Regional Commission, for example, argues that the ORW designation is more flexible and less restrictive than the ONRW designation. The VSAA sees no difference between the two designations. The VFPA finds the two designations similar but slightly different. ANR argues that the Board does not have any authority to make designations pursuant to the federal antidegradation regulations and that an ORW designation under Vermont law cannot constitute an ONRW designation under federal law. However, ANR concludes that the level of protection provided by the two designations is the same.

Under federal regulations, ONRWs include both “high quality waters,” 40 C.F.R. § 131.12(a)(3), as well as “waters of exceptional recreational or ecological significance.” *Id.* With regard to ONRWs, the federal regulations provide that their “water quality shall be maintained and protected.” *Id.* As noted above, EPA interprets this language to allow temporary changes to water quality, such as those that might result from logging conducted in accordance with BMPs.

The Vermont outstanding resource waters statute provides that an ORW designation shall not invalidate the terms of existing state or federal permits. 10 V.S.A. § 1424a(e). Under the Vermont Water Quality Standards, the “existing quality [of ORWs] shall, at a minimum, be protected and maintained,” VWQS § 1-03.D, but only if “the Board so designates such waters because of their water quality.” *Id.* The Vermont outstanding resource waters statute provides that the designation may be based on “natural, recreational, cultural or scenic values.” 10 V.S.A. § 1424a(e).

In this case, the Petitioners have made clear that they are seeking to designate the waters at issue as outstanding based on their “natural, water-quality values,” (Petitioners’ Mem. in Support at 2), including their “ecological significance.” (Pet. at 6, 9.) The Petitioners specifically ask the Board to interpret the term “water quality values” as used in Section 1-03.D of the Vermont Water Quality Standards to include all designated uses and water quality criteria that apply to the candidate waters, including aquatic habitat, chemical, physical, and biological condition, aesthetics, and recreation. (Pet. at 6.) Doing so, argue the Petitioners, would make section 1-03.D consistent with federal Tier 3 regulations. (Pet. at 8.)

The Board has recently held that Vermont does not directly apply federal water pollution control laws but that Vermont law may be construed to be consistent with federal requirements.

See In re Stormwater NPDES Petition, No. WQ-03-17, Mem. of Decision at 13 (Apr. 1, 2004). As the Board explained in *Stormwater NPDES Petition*, Vermont has the legal authority to issue discharge permits pursuant to the federal National Pollutant Discharge Elimination System (NPDES). *Id.* at 12-14. Vermont discharge permits are actually labeled NPDES permits and include NPDES numbers.

Federal antidegradation regulations do not themselves provide for the designation of waters as ONRWs. Instead, federal regulations require the states to develop and adopt statewide antidegradation policies and implementation methods of their own that are consistent with the three-tiered antidegradation policy of these federal regulations. *See* 40 C.F.R. § 131.12(a). While the Vermont outstanding resource waters statute, 10 V.S.A. § 1424a, is written broadly, Tier 3 of Vermont's antidegradation policy, VWQS § 1-03.D, narrowly provides that "[t]he Board may under 10 V.S.A. § 1424a designate certain waters as Outstanding Resource Waters."

The Board concludes that it does not have the authority to directly apply the federal antidegradation requirements. Nor is the Board authorized, at least under the existing Vermont Water Quality Standards, to designate waters as ONRWs. However, section 1-03.D of the Vermont Water Quality Standards is intended to implement Tier 3 of the federal antidegradation regulations, 40 C.F.R. § 131.12(a)(3), and specifically relies on the Vermont outstanding resource waters statute, 10 V.S.A. § 1424a, as the implementing procedure. Thus, Vermont's Tier 3 antidegradation policy may be construed to be consistent with these federal requirements.

In keeping with federal requirements, and the purposes of Vermont law, the Board interprets the term "water quality values" in section 1-03.D of the Vermont Water Quality Standards to include waters of the highest quality as well as waters of exceptional recreational and ecological significance. The term "water quality values" as used in Section 1-03.D of the Vermont Water Quality Standards may be understood to include the existing and designated uses and the water quality criteria that apply to the candidate waters--an ORW designation based on water quality values is not parameter-specific. The Board decides that an ORW designation based on "exceptional natural [or] recreational . . . values" under Vermont's outstanding resource waters statute, 10 V.S.A. § 1424a(e), may constitute a designation based on "water quality values" under Tier 3 of Vermont's antidegradation rule, VWQS § 1-03.D, depending upon the facts of the particular case.

Because an ORW designation based on water quality values is intended to implement Tier 3 of the federal antidegradation regulations, 40 C.F.R. § 131.12(a)(3), an ORW designation based on water quality values must be at least as stringent as an ONRW designation. Whereas Tier 3 of the federal regulations provides that the water quality of ONRWs "shall be maintained an protected," *id.*, Tier 3 of the Vermont's antidegradation rule provides with respect to waters

designated as ORWs because of their water quality that “their existing quality shall, *at a minimum*, be protected and maintained.” VWQS § 1-03.D (emphasis added).

Waters that constitute exceptional state *or* national resources may have exceptional values and warrant designation as ORWs under Tier 3 of Vermont’s antidegradation rule, VWQS § 1-03.D, and Vermont’s outstanding resource waters statute, 10 V.S.A. § 1424a(e). *See In re Great Falls, Ompompanoosuc River*, No. ORW-95-01, Findings of Fact, Conclusions of Law and Order at 10 (Vt. Water Res. Bd. Mar. 6, 1996) (analyzing candidate waters “in relation to other waters of the state”); *Poultney River* (assessing exceptional values of candidate waters in various contexts, including Vermont, New England, and United States); 10 V.S.A. § 1424a(d)(13) (authorizing Board to consider “studies, inventories and plans prepared by local, regional, statewide, national, or international groups or agencies, that indicate the waters in question merit protection as outstanding resource waters”).

The Board does not need to determine at this juncture the extent, if any, to which the effects of an ORW designation based on water quality values may exceed the requirements of Tier 3 of the federal antidegradation regulations, 40 C.F.R. § 131.12(a)(3). The Board does not address whether an ORW designation based on “exceptional . . . cultural or scenic values” under 10 V.S.A. § 1424a(e) may constitute a designation based on “water quality values” under Tier 3 of Vermont’s antidegradation rule, VWQS § 1-03.D. Nor does the Board address in this case the effects of an ORW designation that is not based on water quality values.

2. Does the designation of a water as an ORW under state law constitute, in and of itself, a designation of that water as an ONRW?

As set forth above, the Board does not have the authority under Tier 3 of Vermont’s antidegradation rule, VWQS § 1-03.D, to designate the waters at issue as ONRWs. However, the Board’s designation of a water body as an ORW based on its water quality values provides at least the level of protection that must be accorded to an ONRW under federal regulations. *Compare* VWQS § 1-03.D *with* 40 C.F.R. § 131.12(a)(3).

3. Does this Board have jurisdiction to designate a water as an ONRW pursuant to federal law, and in particular, 40 C.F.R. § 131.12(a)(3), as the Petition requests?

As set forth above, the Board concludes that it does not have the authority to designate a water body as an ONRW pursuant to federal law. However, the designation of a water body as an ORW under Vermont law is intended to effectuate Tier 3 of the federal antidegradation regulations, 40 C.F.R. § 131.12(a)(3), when the ORW designation is based on water quality

values. *See* VWQS § 1-03.D. That portion of the Petition that seeks the designation of the candidate waters as ONRWs is dismissed as a matter of law.

4. As a matter of law, to what extent, if any, may the social, economic, or land-management implications of a proposed designation be relevant to the Board's review of a petition to designate waters as outstanding resource waters?

The Petitioners argue that their Petition in this case is confined to water quality values under section 1-03.D of the Vermont Water Quality Standards and to natural values, rather than recreational, cultural, or scenic values, under 10 V.S.A. § 1424a(e). Consequently, the Petitioners contend that any consideration of the proposed social, economic, or management implications of the proposed designations would be irrelevant. The Petitioners reason that to consider such evidence in this appeal would be speculative. According to the Petitioners, the social, economic, and management implications of the proposed designations would most appropriately be considered by those who must comply with those designations, once they have been made, and in any separate legal proceedings that may arise with regard to compliance. Accordingly, the Petitioners have moved to limit the evidence in this case to the ecological significance and water quality values of the waters at issue.

In support of their motion, the Petitioners rely on the differences between the Tier 2 and Tier 3 antidegradation policies of Vermont and federal law. The Petitioners point out that social and economic considerations are specifically included in Tier 2 of the state and federal antidegradation rules but that these factors are not included in Tier 3. Relying on the maxim *inclusio unius est exclusio alterius* (the inclusion of one is the exclusion of another), the Petitioners conclude that social and economic factors should not be included in the Tier 3 designation process.

This argument confuses implementation with designation. Social and economic factors are expressly considered in the implementation of Tier 2 antidegradation requirements, which apply automatically to all surface waters. In Tier 3, which applies only to surface waters designated for Tier 3 protection, social and economic factors cannot justify any lowering of water quality once the Tier 3 designation is made. However, this does not mean that social and economic factors cannot be considered in making the designation.

At least some of the Intervenors disagree with the Petitioners that the scope of these proceedings must be limited to water quality and ecological values. They argue that social and economic concerns relate directly to the interests that support their party status. In addition, the Intervenors argue that excluding evidence of social and economic considerations from this appeal

would be inconsistent with the factors listed for the Board's consideration in the outstanding resource waters statute, 10 V.S.A. § 1424a(d).

The Intervenors' argument that their party status supports the consideration of social and economic factors in the designation process conflates party status or intervention considerations with merits considerations. As mentioned above, Vermont's outstanding resource waters statute provides party status to municipalities and regional planning commissions where the waters are located, to ANR, to adjoining property owners, and to organizations that may be affected by the Board's decision or with members who use or enjoy the waters or who have an interest in the designation. 10 V.S.A. § 1424a(c). *See also* Procedural Rule 25(B) (providing party status to, among others, municipalities, planning commissions, and those with a substantial interest in the proceeding).

Facts that may pertain to standing or party status may not always pertain to the merits of a proceeding. For example, an organization may gain standing in a discharge permit appeal by demonstrating that its members use and enjoy the receiving waters. *E.g., In re Village of Ludlow*, No. WQ-01-08, Mem. of Decision at 8 (Vt. Water Res. Bd. Apr. 5, 2002). Once party status has been granted, however, the focus of the appeal is not on the interests of these parties but on the regulatory requirements for the discharge raised by the notice of appeal, even if those requirements are not as stringent as these parties believe their interests would warrant. The Board has often distinguished standing and party-status inquiries (which the Board treats as preliminary issues) from merits inquiries. *See, e.g., id.* at 8-9.

In further support of their argument that the Board may consider evidence of the social, economic, or management implications of the proposed designations, the Intervenors stress that the Board is expressly authorized to consider fourteen factors in making its decision on a proposed designation and that the Board is not limited to considering these factors. *See* 10 V.S.A. § 1424a(d).² The Intervenors argue that while many of these factors do relate to water quality and ecology, some do not. For example, the Board may consider the presence of scenic areas and sites. § 1424a(d)(8). Scenic views may be created by harvesting trees to open up vistas. The Board may consider the presence of historic resources. § 1424a(d)(11). The GMNF has historically been used for logging. The Board may consider "existing usage and accessibility of the waters for recreational, educational, and research purposes and for other public uses." § 1424a(d)(12). The forest is useful not only for logging, but also for education and research relating to forestry. Parts of the forest are used for skiing, hiking, and other activities. The Board may consider "studies, inventories and plans prepared by local, regional, statewide, national, or international groups or agencies, that indicate the waters in question merit protection as outstanding resource waters." § 1424a(d)(13). These plans may include, for example, the

²For the full text of 10 V.S.A. § 1424a(d), see footnote 1.

multiple uses of wilderness, recreation, and logging. The Board is authorized to consider “existing alterations, diversions or impoundments by permit holders under state or federal law.” § 1424a(d)(14). As noted, the Board may not invalidate existing permits. § 1424a(e).

The fourteen factors that Vermont’s outstanding resource waters statute lists for the Board’s consideration in 10 V.S.A. § 1424a(d) “provide guidance as to the nature and breadth of the inquiry intended by the legislature.” *Poultney River* at 7; *In re Pikes Falls*, No. ORW-89-01, Findings of Fact, Conclusions of Law, and Order at 4 (Vt. Water Res. Bd. June 21, 1991). These factors emphasize existing, current, and present circumstances. *See* 10 V.S.A. § 1424a(d). The statute goes on to provide that the Board “*shall* designate the waters as outstanding resource waters if it finds that they have exceptional natural, recreational, cultural, or scenic values.” § 1424a(e) (emphasis added). This language does not permit the Board to balance the social, economic, or management implications of a proposed designation against the exceptional values of the candidate waters. *See Poultney River* at 7 (holding that Board *must* designate candidate waters as ORWs if Board finds these waters exceptional for any *one* of the four values listed in 10 V.S.A. § 1424a(e)); *Pikes Falls* at 4 (same); *In re Batten Kill*, No. ORW-89-02, Findings of Fact, Conclusions of Law, and Order at 10 (Vt. Water Res. Bd. June 12, 1991) (same). *See also Great Falls, Ompompanoosuc River* at 10 (determining that ORW designation ultimately depends on whether candidate waters have exceptional values under § 1424a(e), not on the fourteen factors set forth in § 1424a(d), which serve merely as “guideposts for the Board to consider”).

The Board concludes that the only relevant inquiry in this case is whether the candidate waters exhibit exceptional values. Under 10 V.S.A. § 1424a(e), if the Board finds that the candidate waters have exceptional values, then the Board must designate them as ORWs. Accordingly, the Board finds that considerations of *future or potential* social, economic, or management consequences may not be used to prevent the proposed designation and are therefore irrelevant and inadmissible. However, the Board will consider evidence of the *existing* management of the candidate waters and the *existing* social and economic uses of these waters insofar as this evidence is relevant to the question of whether these waters are exceptional.

IV. Order

Accordingly, it is hereby **Ordered**:

1. The Petitioners’ Motion to Limit the Scope of the Proceedings, filed March 17, 2004, is granted.
2. Stratton’s Motion to Dismiss, filed March 17, 2004, is denied.
3. ANR’s Motion to Dismiss, filed March 17, 2004, is denied.

4. All objections to the Prehearing Order, issued February 18, 2004, are denied.
5. That portion of the Petition that seeks the designation of the candidate waters as ONRWs is dismissed as a matter of law.
6. An evidentiary hearing will be convened on the question of whether the candidate waters warrant designation as ORWs, a site visit will be scheduled, and requirements and deadlines for the prefiling of evidence and evidentiary objections will be established consistent with this decision and in accordance with the scheduling order issued herewith.

Dated at Montpelier, Vermont, this 28th day of June, 2004.

WATER RESOURCES BOARD
By its Chair

/s/ John F. Nicholls

John F. Nicholls

Concurring:

David J. Blythe, Acting Member
Lawrence J. Bruce, Jr., Member
Michael J. Hebert
John D. E. Roberts, Vice Chair