State of Vermont
WATER RESOURCES BOARD

Re: Stormwater NPDES Petition
Docket No. WQ-03-17

MEMORANDUM OF DECISION

(Issued Apr. 1, 2004)

This appeal will not be stayed pending the outcome of related litigation in federal district court. The Vermont Water Resources Board (Board) has jurisdiction over this appeal from the denial of a petition to require federal discharge permits for stormwater discharges into five streams polluted by stormwater. The petition at issue in this case is not a request for rule making. Notice of this appeal was reasonable. The Board schedules a second prehearing conference to determine whether any additional preliminary issues of law must be resolved.

I. Procedural Background

On September 26, 2003, the Vermont Agency of Natural Resources (ANR) denied a petition (Petition) filed by the Vermont Natural Resources Council (VNRC) and Conservation Law Foundation (CLF) seeking a determination that existing discharges into Potash, Englesby, Morehouse, Centennial, and Bartlett Brooks contribute to violations of the Vermont Water Quality Standards and require National Pollutant Discharge Elimination System (NPDES) permits. On October 23, 2003, VNRC and CLF (Petitioners or Appellants) appealed ANR's decision to deny their Petition to the Board pursuant to 10 V.S.A. § 1269.

The Notice of Appeal alleges that Potash, Englesby, Morehouse, Centennial, and Bartlett Brooks are stormwater-impaired in that each of these streams currently fails to comply with the Vermont Water Quality Standards as a result of stormwater discharges. Relying on findings of the Board in previous cases involving these steams, the Notice of Appeal alleges that every discharge of pollutants of concern into these waters contributes to the existing impairment. The Petitioners contend that every one of these discharges must therefore be governed by an NPDES permit.

In a letter issued October 31, 2003, the Board's Executive Officer, Jon Groveman, acknowledged receipt of the Notice of Appeal and determined, pursuant to Board Procedural Rule 20, that the Notice of Appeal was substantially complete. In accordance with Procedural Rule 22, Mr. Groveman issued a Notice of Prehearing Conference to persons in interest on October 31, 2003 and published the Notice of Prehearing Conference in *Seven Days* on November 5, 2003. The certificate of service accompanying the Board's Notice of Prehearing Conference includes ANR, VNRC, CLF, the Greater Burlington Industrial Corporation (GBIC), the Chittenden County Regional Planning Commission, the Lake Champlain Regional Chamber of Commerce, and the five municipalities in the areas of the streams involved in this appeal. The

Notice of Prehearing Conference established November 20, 2003 as the deadline for filing written petitions for party status and entries of appearance in accordance with Board Procedural Rules 25 and 27. In addition, the Notice of Prehearing Conference scheduled the prehearing conference in this matter for November 24, 2003.

The Board received petitions for party status in this matter from ANR, the City of South Burlington (South Burlington), and three business organizations: Martin's Foods of South Burlington, Inc., Pomerleau Properties, Inc., and GBIC. These three organizations are collectively referred to herein as the Intervenors.

In its Petition for Party Status, South Burlington expressly declined to take a position either in support of or in opposition to the Petition. In their petitions for party status, the Intervenors, who oppose the Petition, identified numerous legal issues for consideration in this proceeding. Shortly after filing their petitions for party status, the Intervenors filed a Motion to Stay and Memorandum in Support. In their Motion to Stay, the Intervenors ask the Board to stay this appeal until related litigation pending in the United States District Court for the District of Vermont (Docket No. 2:3-CV-121) is resolved.

Executive Officer Jon Groveman, as an appointed Referee, convened a prehearing conference in this matter, as scheduled, on November 24, 2003. The Board's then Chair, David J. Blythe, issued a Prehearing Conference Report and Order (Prehearing Order) on December 9, 2003. No objections to the Prehearing Order were filed.

At the prehearing conference, the Referee heard from the parties on whether any of the issues raised by the Intervenors' Motion to Stay and by their petitions for party status or any other issues should be addressed as preliminary issues prior to any hearing on the merits in this appeal. *See* Prehearing Order at 6. The Prehearing Order established a schedule for the parties to file responses to the Intervenors' Motion to Stay, for the Intervenors to file a reply, and for all the parties to file motions and responses with regard to certain issues for preliminary consideration. The Prehearing Order acknowledged that after the Board addresses these issues, the Chair or his designee may need to convene a second prehearing conference to establish a schedule for resolving any additional legal issues in this matter or to schedule an evidentiary hearing on the merits of this appeal, as may be appropriate. *See* Prehearing Order at 8, 11-12.

The Petitioners, the Intervenors, and ANR filed their motions and memoranda of law in accordance with the schedule set forth in the Prehearing Order, as modified by the Referee on January 13, 2004, at the request of the parties. In their filings, these parties referred extensively to the original Petition filed with ANR. This Petition, however, was not part of the file. Counsel for the Board therefore asked the Petitioners to file a copy of the Petition with the Board. The Petitioners did so on February 23, 2004. South Burlington did not file a motion or memorandum of law on any of the preliminary issues.

On March 9, 2004, the Board heard oral argument at its conference room in Montpelier, Vermont on the preliminary issues that were identified at the prehearing conference. Prior to hearing oral argument, updated biographies of the Board members were distributed to the parties. The Board's Chair, John F. Nicholls, who was appointed effective March 1, 2004, asked if there were any conflicts of interest or other disqualifying interests that might prevent him from serving in this matter. No conflicts or other disqualifying interests were identified.

Chair Nicholls informed the parties that Board Member Jane Potvin was unavailable to hear the oral arguments or to participate in the Board's deliberations or decision on the preliminary issues identified in the Prehearing Order. Pursuant to 10 V.S.A. § 905(1)(F), Chair Nicholls appointed the Board's former Chair, David J. Blythe, on the record, to hear and decide these preliminary issues as an acting member of the Board. There were no objections.

The Board heard oral argument from the Intervenors, ANR, and the Petitioners. South Burlington did not attend or participate in the oral arguments. The Board deliberated immediately following the oral arguments and on March 30, 2004. Vice-Chair Roberts was unavailable to participate in the Board's March 30, 2004 deliberations and therefore did not participate in this decision.

II. Issues

A. Whether this appeal to the Board should be continued until related litigation pending in the United States District Court for the District of Vermont has been finally resolved.

B. Whether the Board has jurisdiction under the Vermont Water Pollution Control Act, 10 V.S.A. §§ 1250-1283, to decide this appeal from ANR's denial of a Petition to issue NPDES permits to dischargers of stormwater into five stormwater-impaired streams.

C. Whether the dischargers identified by the Petition as requiring NPDES permits have been adequately notified of the Petition and whether any failure to provide adequate notice to these dischargers deprives the Board of jurisdiction to decide this appeal.

III. Legal Background

A. Point-Source Permitting

Discharges of pollutants into the waters of the United States are unlawful except for those discharges that comply with certain enumerated provisions of the federal Clean Water Act, 33

U.S.C. §§ 1251-1387. Clean Water Act § 301(a), 33 U.S.C. § 1311(a). Among those enumerated provisions is section 402, 33 U.S.C. § 1342, which establishes an NPDES permitting program for discharges of pollutants. A "discharge" is any addition of a pollutant to waters of the United States from a "point source." Clean Water Act § 502(12), 33 U.S.C. § 1362 (defining discharge of a pollutant); 40 C.F.R. § 122.2 (same). *See also* 40 C.F.R. § 122.1(b)(1) (requiring NPDES permit for discharge of pollutant from point source); 40 C.F.R. § 122.2 (defining discharge). A "point source" is a "discernable, confined and discrete conveyance," which may include, for example, a pipe, ditch, or channel. Clean Water Act § 502(14), 33 U.S.C. § 1362(14) (defining point source); 40 C.F.R. § 122.2 (same).

The NPDES permitting program is administered by the United States Environmental Protection Agency (EPA) or by delegated states that EPA has authorized to act as NPDES permitting authorities. Clean Water Act § 402(b), 33 U.S.C. A. § 1342(b). Approved state programs must be adequate to carry out the requirements of the federal NPDES program, including but not limited to section 402 of the Clean Water Act, 33 U.S.C. § 1342. Clean Water Act § 402(c)(2), 33 U.S.C. § 1342(c)(2). In 1974, the EPA delegated its permitting program under the Clean Water Act's NPDES permitting program to the State of Vermont to be administered under Vermont's EPA-approved program. (Intervenors Ex. K.) *See generally In re Town of Cabot*, Findings of Fact, Conclusions of Law, and Order at 4 (Vt. Water Res. Bd. Sept. 8, 2000) (explaining that EPA has delegated to Vermont authority to issue NPDES permits that conform with applicable state law and water quality standards approved by EPA).

B. The Two-Tiered Approach of the Clean Water Act

The Clean Water Act provides two types of water-pollution controls to achieve its objective of restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters." Clean Water Act § 101, 33 U.S.C. § 1251. EPA promulgates technology-based effluent limitations (TBELs) restricting the quantities, rates, and concentrations of certain point-source pollutants. Clean Water Act § 301, 33 U.S.C. § 1311. The states on the other hand generally promulgate water quality standards, which establish the water quality goals of state waterways. Clean Water Act § 303, 33 U.S.C. § 1313; 40 C.F.R. § 131.2. Water quality standards include not only water quality goals, or designated uses, but also water quality criteria that describe the quality of water that will support the designated uses. 40 C.F.R. § 131.3(b), (f), and (i) (defining water quality criteria, designated uses, and water quality standards).

State water quality standards "serve as the regulatory basis for the establishment of water-quality-based treatment controls and strategies beyond the technology-based levels of treatment required by sections 301(b) and 306 of the Act." 40 C.F.R. § 131.2. *See also* 40 C.F.R. § 130.0(b) (providing that water quality standards provide legal basis for control decisions under Clean Water Act). *See generally Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (describing

two-tiered approach of Clean Water Act). Where point sources discharge pollutants with "reasonable potential" to cause or contribute to violations of state water quality standards, NPDES permits must include water-quality based effluent limitations (WQBELs) above and beyond TBELs. 40 C.F.R. § 122.44(d). *See also* Clean Water Act § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (requiring that effluent limitations for point-source discharges meet state water quality standards). In short, TBELs represent an absolute minimum, whereas WQBELs apply over and above TBELs as necessary to ensure that water quality does not fall below state water quality standards. *See* 40 C.F.R. § 125.3(a).

C. TMDLs

Every two years, each state must submit to EPA a list of those waters within its boundaries that do not comply with the state's water quality standards and for which total maximum daily loads (TMDLs) are required. Clean Water Act § 303(d), 33 U.S.C. § 1313(d); 40 C.F.R. § 130.7. TMDLs are required for waters that are impaired, or water quality limited, by a pollutant and for which other pollution control requirements are not reasonably expected to result in attainment of water quality standards. *See* 40 C.F.R. § 130.7(b)(1). *See also* 40 C.F.R. § 130.2(j) (defining water quality limited segment). A TMDL assesses the assimilative capacity of the receiving waters and allocates responsibility for not exceeding that assimilative capacity among the various pollutant sources in the watershed. *See* Clean Water Act § 303(d), 33 U.S.C. § 1313(d).

Under section 303(d)(1) of the Clean Water Act, 33 U.S.C. § 1313(d)(1), states perform TMDLs according to priority rankings. TMDLs "shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." Clean Water Act § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C). Along with its lists of water quality limited segments, states are required to submit to EPA the loads established for those waters. Clean Water Act § 303(d)(2), 33 U.S.C. § 1313(d)(2). EPA must then approve the TMDLs, after which the state incorporates them into its continuing planning process. *Id.* Each state's continuing planning process must include, among other things, "adequate implementation, including schedules of compliance." Clean Water Act § 303(e)(3)(F), 33 U.S.C. § 1313(e)(3)(F).

Although the NPDES permitting program applies only to point sources of pollution, the TMDL process must consider both point sources and nonpoint sources of pollution. Federal regulations define TMDL as the sum of wasteload allocations for point sources and load allocations for nonpoint sources and natural background. 40 C.F.R. § 130.2(i). *See also* 40 C.F.R. § 130.2(h) (defining wasteload allocation); 40 C.F.R. § 130.2(g) (defining load allocation). Delegated states implement TMDLs through the NPDES permitting system and other pollution control systems authorized by state law. *See* Clean Water Act § 303(e), 33 U.S.C. § 1313(e).

See also 40 C.F.R. § 130.0(d) (describing role of state-authorized pollution control measures in water quality planning and management).

Federal regulations specifically prohibit the issuance of an NPDES permit "To a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards." 40 C.F.R. § 122.4(i) *See also* 40 C.F.R. § 122.2 (defining new source and new discharger). The permitting prohibition described in 40 C.F.R. § 122.4(i) is not absolute:

> The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limits required by sections 301(b)(1)(A) and 301(b)(1)(B) of [the Clean Water Act], and *for which the State or interstate agency has performed a pollutants load allocation* for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that:
>
> (1) *There are sufficient remaining pollutant load allocations to allow the discharge; and*
>
> (2) *The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.* The Director may waive the submission of information by the new source or new discharger required by paragraph (i) of this section if the Director determines that the Director already has adequate information to evaluate the request.

40 C.F.R. § 122.4(i) (emphasis added). *See also* 40 C.F.R. § 122.4(d) (prohibiting the issuance of a permit under conditions that "cannot ensure compliance with the applicable water quality requirements of all affected States").

Section 122.4(i) requires, among other things, that a "pollutants load allocation" be performed before a new discharge causing or contributing to a violation of water quality standards can be permitted. A "pollutants load allocation" refers to the wasteload allocation and load allocation within a TMDL. *See* 40 C.F.R. § 130.2(i) (defining TMDL). *See also Friends of the Wild Swan v. United States Environmental Protection Agency*, 130 F. Supp. 2d 1204 (D. Mont. 2000) (prohibiting EPA from permitting new or increased discharges into water quality limited segments until all necessary TMDLs are established), *rev'd on other grounds*, 74 Fed. Appx. 718, Nos. 00-36001, 36004, 36013 (9th Cir. July 25, 2003).

D. Stormwater Permitting

In 1977, the D.C. Circuit held that the NPDES permitting requirements of sections 301 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311, 1342, apply to all point source discharges, including all stormwater discharges. *See Natural Resources Defense Council v. Costle*, 568 F.2d 1369. In 1987 Congress added section 402(p), 33 U.S.C. § 1342(p), to the Clean Water Act for the purpose of creating a comprehensive national program for non-agricultural stormwater discharges. The 1987 amendments, along with subsequent extensions, exempted discharges composed entirely of stormwater from the NPDES program until October, 1994. Clean Water Act § 402(p)(1), 33 U.S.C. § 1342(p)(1). However, this general exemption is itself subject to exceptions. *See* Clean Water Act § 402(p)(2), 33 U.S.C. § 1342(p)(2).

Specifically, this general permitting moratorium of section 402(p)(1) does not extend to the following five classes of stormwater discharges:

> (A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.
> (B) A discharge associated with industrial activity.
> (C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.
> (D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.
> (E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

Clean Water Act § 402(p)(2), 33 U.S.C. § 1342(p)(2).

In accordance with the 1987 amendments to the Clean Water Act, EPA issued stormwater regulations in two phases--aptly labeled Phase I and Phase II. EPA promulgated its Phase I regulations in November of 1990. 55 Fed. Reg. 47990 (Nov. 16, 1990). EPA's Phase I regulations require NPDES permits for the five classes of stormwater discharges that were not included in the general permitting moratorium of section 402(p). *See* 40 C.F.R. § 122.26(a)(1)(i)-(v).

EPA promulgated its Phase II stormwater regulations on December 8, 1999. 64 Fed. Reg. 68722 (Dec. 8, 1999). The Phase II regulations cover small municipal separate storm sewer systems (MS4s) and construction activities disturbing from one acre to five acres of land. 40 C.F.R. § 122.26(a)(9)(i)(A), (B). In addition, EPA's Phase II regulations retain the authority of EPA and delegated states to designate stormwater sources for NPDES permitting on a case-by-

case basis. *See* 40 C.F.R. § 122.26(a)(9)(i)(C)-(D). This authority of EPA and delegated states to subject stormwater discharges or classes of stormwater discharges to future regulation under the NPDES permitting system is known as the residual designation authority. *See generally Environmental Defense Center v. United States Environmental Protection Agency*, 344 F.3d 832 (9th Cir. 2003) (upholding residual designation authority).

E. Residual Designation

As noted, the general permitting exemption for stormwater established by the 1987 amendments to the Clean Water Act does not include the following: "A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." Clean Water Act § 402(p)(2)(E), 33 U.S.C. § 1342(p)(2)(E). Similarly, EPA's Phase I stormwater regulations include the following in the list of discharges composed entirely of stormwater that must obtain an NPDES permit:

> A discharge which the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines to contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. This designation may include a discharge from any conveyance or system of conveyances used for collecting and conveying storm water runoff or a system of discharges from municipal separate storm sewers . . . .
>
> The Director may designate discharges from municipal separate storm sewers on a system-wide or jurisdiction-wide basis. In making this determination, the director may consider the following factors:
>
> (A) The location of the discharge with respect to waters of the United States . . . ;
> (B) The size of the discharge;
> (C) The quantity and nature of the pollutants discharged to waters of the United States; and
> (D) Other relevant factors.

40 C.F.R. § 122.26(a)(1)(v). Depending on the context, "Director" can mean either the EPA Regional Administrator or the State Director. 40 C.F.R. § 122.2 (defining Director).

EPA's Phase II regulations provide that dischargers of stormwater must obtain NPDES permits if:

> (C) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that storm water controls are needed for the discharge based on wasteload allocations that are part of "total maximum daily loads" (TMDLs) that address the pollutant(s) of concern; or
> (D) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

40 C.F.R. § 122.26(a)(9)(i)(C)-(D).

Federal stormwater regulations include a process for persons to petition EPA or a delegated state with regard to the administration of the NPDES permitting system for stormwater discharges. This petition process specifically includes the residual designation authority: "Any person may petition the Director to require a NPDES permit for a discharge which is composed entirely of storm water which contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 40 C.F.R. § 122.26(f)(2). EPA or the delegated state must "make a final determination on any petition received under this section within 90 days after receiving the petition." 40 C.F.R. § 122.26(f)(5). *See also* 40 C.F.R. § 124.52 (describing procedures for decision making for NPDES permitting required on case-by-case basis, including residual designation of stormwater discharges).

F. Vermont Law

Vermont law includes a two-tiered system of water pollution control that parallels the federal system. *See generally In re Morehouse Brook*, No. WQ-02-05, Findings of Fact, Conclusions of Law, and Order at 16 (Vt. Water Res. Bd. June 2, 2003) (describing Vermont's two-tiered water pollution control program). The Vermont system includes a stormwater permitting program based on best management practices. *See* 10 V.S.A. § 1264. Construing Vermont law, the Board has held that discharges of new or increased pollutants of concern into impaired waters cannot be permitted in the absence of a TMDL or other lawful cleanup plan. *In re Morehouse Brook* at 28-29; *In re Hannaford Bros. Co.*, No. WQ-01-01, Memorandum of Decision at 19 (June 29, 2001), *aff'd*, No. 280-02 CnCv (Chittenden Co. Super. Ct. Apr. 30, 2003) (*Hannaford I*).

In *In re Hannaford Bros. Co.*, No. WQ-01-01, Findings of Fact, Conclusions of Law, and Order (Jan. 18, 2002), *aff'd*, No. 280-02 CnCv (Chittenden Co. Super. Ct. Apr. 30, 2003) (*Hannaford II*), the Board addressed an appeal from ANR's issuance of a state permit for discharges of stormwater into Potash Brook, which was and still is stormwater-impaired. The

Board found that "Every discharge of these pollutants into the receiving waters contributes to the existing impairment." *Id.* at 13. Consequently, the Board concluded that in the absence of a comprehensive cleanup plan for these waters, which receive stormwater discharges from numerous sources, the correct level of treatment cannot be established for any one discharger or class of dischargers without also establishing appropriate treatment requirements for the others. *Id.*

In Morehouse Brook, the Board reviewed Watershed Improvement Permits (WIPs) authorizing stormwater discharges into Bartlett Brook, Centennial Brook, Englesby Brook, and Morehouse Brook, all of which were and still are stormwater-impaired. The Board reversed ANR's issuance of these WIPs because the Board found that the WIPs did not consider the ability of the receiving waters to assimilate stormwater discharges from both existing and new sources of stormwater in these watersheds. *Id.* at 29. *See also id.* at 22 (finding that the WIPs unlawfully failed to account for the "various sources and classes of discharges" in these watersheds).

In their Petition and in their Notice of Appeal, the Petitioners rely on the Board's decisions in *Hannaford II* and in *Morehouse Brook* to support their contention that ANR must, under its residual designation authority, issue NPDES permits for the stormwater discharges into the receiving waters that the Board considered in those cases. It is undisputed that cleanup plans are still not in place for any of the five receiving streams involved in this appeal.

IV. Analysis

A. Stay

The Intervenors and ANR have moved to stay this appeal until a legal action brought by CLF in federal district court has been finally resolved. CLF opposes a stay. The motions to stay filed by the Intervenors and ANR are denied.

The case pending before the Board involves the residual designation authority of 40 C.F.R. § 122.26, which is derived from section 402(p)(2)(E) of the Clean Water Act, 33 U.S.C. § 1342(p)(2)(E). (Notice of Appeal at 2.) The Petitioners ask the Board to reverse ANR's denial of their Petition and require stormwater dischargers in the named watersheds to obtain NPDES permits. In federal district court, on the other hand, CLF contends that the permitting moratorium established by the 1987 amendments adding section 402(p) to the Clean Water Act expired in 1994 and that all stormwater discharges are once again subject to the permitting requirements of section 301. (Plaintiff Conservation Law Foundation's Memorandum in Opposition to Defendants Hannaford Bros. Co.'s and Martin's Foods of South Burlington, Inc.'s Motion to Dismiss at 1 (July 9, 2003) (No. 2:3-CV-121 (D. Vt.).)

As the parties agree, if CLF prevails in federal court, the case before the Board will be rendered moot because the residual designation authority derived from section 402(p) and embodied in 40 C.F.R. § 122.26 will be rendered meaningless by the comprehensive permitting requirement of section 301, as interpreted before Congress added section 402(p) to the Clean Water Act in 1987. *See Costle.* All point-source discharges of stormwater will require an NPDES permit. However, the possibility that the federal district court's decision will render the case before the Board moot does not support continuing the appeal to the Board until the federal litigation is concluded.

First, it may take years before the federal litigation becomes final. Once the District Court has rendered a final decision, that could be appealed to the Second Circuit, and then to the United States Supreme Court. It would be unreasonably harsh to effectively dispose of the Petitioners' appeal to the Board based on a motion for a continuance. As a state delegated to administer the Clean Water Act, Vermont has a duty to act on the Petition.

A second reason for not continuing the case before the Board until the federal litigation is finally resolved is because the theories presented by CLF in federal court and by the Petitioners here are different. The issue before the Board involves the application and meaning of the residual designation authority of section 402(p) and associated federal regulations. The issue in federal court is whether section 402(p) continues to have any meaning at all. Inconsistent results between the Board and the District Court are therefore not likely.

B. Jurisdiction

ANR and the Intervenors argue that ANR's denial of a petition to issue an NPDES permit to a stormwater discharger is not an action under the Vermont Water Pollution Control Act and that the Board therefore does not have jurisdiction to decide this appeal. These parties argue that the Vermont Water Pollution Control Act does not contain any express authority for ANR to act on petitions such as the one presented by the Appellants in this matter. Consequently, ANR and the Intervenors contend that the Petition must be characterized as a request for rule making under the Vermont Administrative Procedure Act, 3 V.S.A. §§ 801-849. Since the Board's appellate jurisdiction does not extend to ANR's decisions with respect to requests for rule making, ANR and the Intervenors conclude that the Board lacks jurisdiction over this appeal.

A closely related argument advanced by the Intervenors is that the nature of the Petition requires that it be treated as a request for rule making rather than as an appealable action. According to the Intervenors, the argument raised by the Petition looks not so much like a contested case as a policy dispute that is legislative in nature, particularly in view of the potentially large class of dischargers that the Petition describes. Here again, because the Board does not have jurisdiction to review ANR's decisions with respect to a request for rule making, the Intervenors maintain that the Board does not have jurisdiction over this appeal.

1. Does the Board Have Jurisdiction under the Vermont Water Pollution Control Act to Hear an Appeal from ANR's Denial of a Petition to Exercise its Residual Designation Authority?

As the Petitioners point out, (Response of VNRC and CLF to Intervenors' and ANR's Motion to Dismiss, or, in the Alternative, Motion for a Continuance at 3), section 1258(b) of the Vermont Water Pollution Control Act provides in pertinent part as follows:

> The secretary [of ANR] shall manage discharges into the waters of the state by administering a permit program consistent with the National Pollutant Discharge Elimination System established by section 402 of [the Clean Water Act] and with the guidelines promulgated in accordance with section 304(h)(2) of [the Clean Water Act]. The secretary shall use the full range of possibilities and variables allowable under these sections of [the Clean Water Act], including general permits, as are consistent with meeting the objectives of the Vermont water pollution control program.

10 V.S.A. § 1258(b).

Section 402 of the Clean Water Act, as modified by the addition of section 402(p) in 1987, is of course the very provision at issue in this case. Certainly, acting on petitions to require stormwater dischargers to obtain NPDES permits may be considered part of administering a permit program consistent with the NPDES system established by section 402 of the Clean Water Act. It is of no consequence that acting on such a petition does not itself represent the issuance or denial of a permit. Section 1258(b) of the Vermont Water Pollution Control Act authorizes ANR to use "the full range of possibilities" under section 402 to administer the state program and to meet its objectives.

A salient objective of the state program is consistency with the Clean Water Act. Section 1263 of the Vermont Water Pollution Control Act, which describes the state's requirements for discharge permits, provides in pertinent part as follows:

> If the secretary [of ANR] determines that the proposed discharge will not reduce the quality of the receiving waters below the classification established for them and will not violate any applicable provisions of state or *federal* laws or regulations, he shall issue a permit containing the terms and conditions necessary to carry out the purposes of this chapter and of applicable *federal* law.

10 V.S.A. § 1263(c) (emphasis added).

Vermont's Water Pollution Control Act specifically requires ANR's stormwater management program to be consistent with "applicable requirements of the federal Clean Water Act." 10 V.S.A. § 1264(b)(4). In addition, the Water Pollution Control Act authorizes ANR to "issue, condition, modify, revoke or deny discharge permits for colleted stormwater runoff, as necessary to assure achievement of the goals of the program and compliance with state law and the federal Clean Water Act." 10 V.S.A. § 1264(e)(1). *See also* 10 V.S.A. § 1250 (setting forth state water quality policy including, among other things, protecting and enhancing water quality; preventing, abating, or controlling all activities harmful to water quality; and providing clear, consistent, and enforceable standards for the permitting and management of discharges).

Based on the Vermont statute, the discharge criteria of the 2000 Vermont Water Quality Standards require compliance "with all applicable state and *federal* treatment requirements and effluent limitations." § 1-04.A.3 (1997) (emphasis added). The Vermont Water Pollution Control Permit Regulations are replete with references to federal requirements. For example, under the definition of "National Pollutant Discharge Elimination System (NPDES)," the Vermont regulations provide that "the national system . . . includes the Vermont program." § 13.1(h). The term "discharge permit" means, among other things, a permit that will not violate any federal laws or regulations. § 13.1(x). Section 13.4.b of the Vermont Water Pollution Control Permit Regulations repeatedly makes clear that a permit must ensure compliance with federal laws and regulations. Similarly, an express purpose of the Vermont Wasteload Allocation Process regulations is to describe "how the allocation is implemented in the State and Federal discharge programs." Wasteload Allocation Process at 1.

The federal NPDES program represents the legal backdrop for Vermont's permitting system. Indeed, the references to federal law in Vermont's water pollution control laws require that the state's laws be construed with a view to the federal permitting scheme. *See, e.g., In re Pyramid Company*, No. WQ-77-01, Findings of Fact, Conclusions of Law, Discussion and Order at 7, 10 (Vt. Water Res. Bd. June 2, 1978) (finding that in absence of wasteload allocation, permittee could not meet burden of proving that proposed stormwater discharge complied with Clean Water Act). Vermont does not directly apply federal law. However, the Vermont Water Pollution Control Act is broadly written and intended to authorize ANR to fully implement the Clean Water Act in Vermont.

Federal regulations provide that states delegated to administer the NPDES permitting program must have the authority to implement certain enumerated provisions of the federal regulations, including 40 C.F.R. § 122.26. 40 C.F.R. § 123.25(a)(9). Section 122.26 includes the residual designation authority and sets forth the petition process at issue in this case. Under 40 C.F.R. § 122.26(f)(5), "The Director shall make a final determination on any petition received under this section within 90 days after receiving the petition . . . ." Director refers to the administrator of the EPA or the director of a delegated state program. 40 C.F.R. § 122.2. The residual designation of a stormwater discharge for NPDES permitting is a "case-by-case

determination," and EPA is authorized to assess the question of whether its designation was proper during the public comment period on a draft permit issued as a result of this designation and at any subsequent hearing. 40 C.F.R. § 124.52(c).

Thus, federal regulations do not describe the petition process as a request for rule making. Indeed, the residual designation authority is already embodied in federal rules. A petition to designate a stormwater discharge or class of stormwater discharges for NPDES permitting is a petition to apply those rules, not a petition for more rules to apply those rules.

EPA could not complete the rule making process required by the federal Administrative Procedure Act, 5 U.S.C. §§ 551-7521, within the 90 day time period established by federal law for acting on residual designation petitions. *See* 5 U.S.C. § 553 (requiring issuance of notice, receipt and consideration of comments, and publication of final rule). *See also* 1 Richard J. Pierce, Jr., Administrative Law Treatise § 6.1 (4th ed. 2002) (describing three-step federal rule making process as "long and resource intensive"). Nor could rule making in Vermont be accomplished within 90 days. *See* 3 V.S.A. §§ 836-843 (describing procedure for adoption of rules).

In sum, the Vermont Water Pollution Control Act broadly authorizes ANR to administer its permitting program in conformity with Vermont's delegated responsibilities under the NPDES permitting program of the federal Clean Water Act. The Clean Water Act's NPDES permitting program includes a process for petitions to be filed to require stormwater dischargers to obtain NPDES permits. Under federal law, these petitions are not treated as rule making requests.

ANR's grant or denial of a petition to exercise its residual designation authority is an act or decision of ANR under the Vermont Water Pollution Control Act. Section 1269 of the Vermont Water Pollution Control Act, 10 V.S.A. § 1269, provides that "an act or decision" of ANR pursuant to this act is appealable to the Board. Section 1269 provides further that "The board shall hold a de novo hearing at which all persons and parties in interest as determined by board rule may appear and be heard . . . ." The rules of evidence apply, *see* 3 V.S.A. § 810(1), and parties are entitled to conduct cross examination. *See* 3 V.S.A. § 810(3). To subject ANR's application of its residual designation authority to rule making would deprive persons affected by ANR's actions of these procedural safeguards of the adjudicative process. Accordingly, the Board concludes that the Board has jurisdiction under the Vermont Water Pollution Control Act to hear an appeal from ANR's grant or denial of a petition to exercise its residual designation authority.

2. Is the Petition in this Case a Request for Rule Making Rather Than an Action Appealable to the Board under the Vermont Water Pollution Control Act?

Even if the Board has jurisdiction under the Vermont Water Pollution Control Act to hear an appeal from ANR's denial of a petition to exercise its residual designation authority, the Board would not have jurisdiction to hear an appeal from a petition for rule making relating to this authority. ANR is specifically authorized to adopt rules as may be necessary to administer the Vermont Water Pollution Control Act. *See* 10 V.S.A. § 1251a. Nothing should prevent a person from requesting ANR to adopt rules relating to its residual designation authority. *See* 3 V.S.A. § 806 (establishing procedure for person to submit written request to agency to adopt a procedure or rule).

Thus, the Board must determine whether the particular Petition at issue in this case is a request for rule making under the Administrative Procedure Act rather than an appealable action under the Vermont Water Pollution Control Act. The Intervenors argue that the Petition is a request for rule making, particularly because of the large category of dischargers identified by the Petition and its watershed-wide approach. The Petitioners disagree. The Board finds that the Petition is not a request for rule making.

A person who files a petition relating to the residual designation authority may choose whether the petition represents a request for rule making under the Administrative Procedure Act or a request for an appealable determination under the Vermont Water Pollution Control Act. If the petition is filed under the Water Pollution Control Act but is in the nature of a request for a rule making, that would constitute grounds for denying the petition on its merits. It would not change a permitting petition into a rule making request (and deprive the Board of jurisdiction to review the permitting petition on appeal).

Although the Intervenors attempt to characterize the Petition before the Board as a request for rule making, it is clear that the Petitioners did not intend their Petition to be treated as such. The Petitioners appealed ANR's denial of their Petition to this Board under the Vermont Water Pollution Control Act. On appeal, the Petitioners maintain that ANR's denial of their Petition is not a denial of a request for rule making but an action appealable to the Board.

Given then that the Petition was not filed as a request for rule making, the next issue is whether the Petition must be denied on its merits because it is more in the nature of a request for rule making than a request for a determination under the Water Pollution Control Act. Unlike a contested case, which involves the legal rights, duties, or privileges of the specific parties to a case that must be determined by an agency after an opportunity for a hearing, a rule involves a broad, general statement of agency intent regarding the agency's application or administration of existing law or policy. *See Beaupre v. Green Mountain Power Corp.*, 172 Vt. 583, 587, 776 A.2d 424, 430 (2001). *Compare* 3 V.S.A. § 801(b)(2) (defining "contested case") *with* 3 V.S.A. § 801(b)(9) (defining "rule").

In support of their argument that the Petition in this matter represents a request for rule making, the Intervenors rely on *Parker v. Gorczyk*, 173 Vt. 477, 787 A.2d 494 (2001). In *Parker*, the Supreme Court considered the validity of a new policy of the Department of Corrections that would make all prisoners convicted of violent felonies ineligible for furlough until the expiration of their minimum sentences. The Supreme Court held that this new policy was in effect a rule which was invalid for failure to comply with the rule making process of the Administrative Procedure Act. The Supreme Court reasoned that the new policy was a rule rather than a practice because the new policy was "generally applicable to all prisoners convicted of violent felonies." 173 Vt. at 479, 787 A.2d at 498.

In *Parker*, the Supreme Court took care to point out that the rule making process of the Administrative Procedure Act applies to "new policies of general applicability," 173 Vt. at 479, 787 A.2d at 498, not the day-to-day individual decisions of an agency. *Parker* is thus inapposite to the case at hand. The Petitioners in this case do not seek an "agency policy of general applicability" 173 Vt. at 480, 787 A.2d at 499. Rather, the Petitioners ask ANR, and the Board on appeal, to apply the existing residual designation authority to a class of stormwater discharges in five stormwater-impaired watersheds.

To define the discharges within this class, the Board may need to evaluate the Petitioners's interpretation of the residual designation authority in this case, along with relevant evidence. However, an argument relating to the interpretation of the law in the course of a particular contested case does not convert that case into a request for rule making. The federal residual designation rule expressly authorizes delegated states to subject a "category of discharges within a geographic area," 40 C.F.R. § 122.26(a)(9)(i)(D), to NPDES permitting. The Petition is consistent with the "case-by-case" application of the residual designation authority on a "localized or regional basis." *See* 65 Fed. Reg. 68781. "The added term 'within a geographic area' [in EPA's Phase II regulations] allows 'State-wide' or 'watershed-wide' designation within the meaning of the terms." *Id.*

In *In re Woodford Packers, Inc*, 2003 VT 60, 830 A.2d 100, the Vermont Supreme Court rejected an argument that rule making was required before ANR could rely on fluvial geomorphology, instead of its twenty-year long practice of relying on flood insurance maps, to determine whether a proposed development was within a floodway or floodway fringe. 2003 VT at ¶ 8, 830 A.2d at 104. The Supreme Court reasoned that ANR's policy change was not an invalid rule making because ANR had the statutory authority to identify floodways and floodway fringes, 2003 VT at ¶ 13, 830 A.2d at 105, and because "this change did not alter any preexisting rule." 2003 VT at ¶ 15, 830 A.2d at 106.

In the instant appeal, the Petitioners ask ANR to apply its existing statutory authority to stormwater discharges in five stormwater-impaired watersheds without altering any previous written policy or rule. The Petitioners have not requested the adoption of a written policy

applicable to all discharges of a certain type. Accordingly, the Board finds that the Petition is not in the nature of a request for rule making, that ANR's denial of the Petition was an appealable action under the Vermont Water Pollution Control Act, and that the Board therefore has jurisdiction to decide this appeal.

C. Notice

Even though ANR and the Intervenors obviously received notice of these proceedings, ANR contends that this case must be dismissed because the Petitioners did not provide notice to all parties in interest at the time they filed their Notice of Appeal with the Board and also because the Board failed to provide notice to all parties in interest before commencing these proceedings. (ANR's Motion to Dismiss or, in the Alternative, Continue Proceedings at 4-9.) ANR asserts that the failure of the Petitioners and the Board to provide actual notice to all existing stormwater dischargers in the five watersheds addressed by the Petition deprives the Board of jurisdiction over persons who may be affected by this appeal. The Board concludes that notice of the Petitioners' appeal to the Board was sufficient to allow this appeal to proceed.

As set forth above, the Board has jurisdiction over this matter under section 1269 of the Vermont Water Pollution Control Act. 10 V.S.A. § 1269. Section 1269 provides that the Board shall decide appeals after a "de novo hearing." Accordingly, this appeal is a contested case. *See* 3 V.S.A. § 801(b)(2). "In a contested case, all parties shall be given an opportunity for hearing after *reasonable notice*." 3 V.S.A. § 809(a) (emphasis added.) A "party" is a "person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party." 3 V.S.A. § 801(b)(5).

Notice of this appeal was reasonable under the circumstances. The Board's Executive Officer, pursuant to Procedural Rules 19(E) and 20(A), accepted the Petitioners' Notice of Appeal as substantially complete. Shortly after receiving this appeal, the Board's Executive Officer published a Notice of Prehearing Conference in *Seven Days*, which circulates in the area of the waters at issue. In accordance with Procedural Rule 22(B), the costs of publication were paid by the Petitioners. In addition, the Executive Officer mailed the Notice of Prehearing Conference to ANR, VNRC, CLF, GBIC, the Chittenden County Regional Planning Commission, the Lake Champlain Regional Chamber of Commerce, and the five municipalities in the areas of the streams involved in this appeal: Colchester, Winooski, Burlington, South Burlington, and Shelburne. In accordance with Board Procedural Rules 22 and 28, the Notice of Prehearing Conference was distributed and published at least seven days prior to the date when the prehearing conference occurred.

The Board has never required appellants, or undertaken itself, to provide actual notice of an appeal to every conceivable individual who might be able to intervene. Given the potentially large class of dischargers involved in this appeal, ANR's argument that the Petitioners and the

Board must provide individual notice of this appeal to every discharger who might be affected is entirely unreasonable. Such a requirement would render Vermont's ability to require stormwater dischargers to obtain NPDES permits on a watershed basis needlessly, if not impossibly, cumbersome. Accordingly, the Board rejects ANR's contention that this appeal must be dismissed for lack of sufficient notice.

V. Other Issues

The Board concludes that this appeal should not be stayed pending the outcome of related proceedings in the United States District Court for the District of Vermont, that the Board has jurisdiction over this appeal pursuant to section 1269 of the Vermont Water Pollution Control Act, that the Petition is not a request for rule making, and that notice of this appeal was reasonable.

However, this appeal presents other issues that the Board has not addressed and that may need to be resolved as preliminary matters. For example, the Board has not addressed the issue of whether all stormwater discharges into stormwater-impaired waters require NPDES permits, ipso facto, as the Petitioners contend, or whether as ANR contends, the residual designation authority may involve other factors, such as the authority of Vermont to issue and enforce state stormwater permits. The Board has also not decided, or determined that it needs to decide, how dischargers will comply with any requirement to obtain NPDES permits (especially those who hold expired state permits), how permitting requirements are to be established once residual designations are made, whether ANR may rely on MS4 permits or multi-sector permits to fulfill these requirements, or whether a permittee that does not discharge new or increased pollutants of concern into impaired waters pursuant to *Hannaford I and II* is not contributing to a water quality standards violation. In accordance with the Prehearing Order for this matter, the Board will convene a second prehearing conference to determine whether any of these issues or any other issues need to be addressed before the Board convenes a hearing on the merits or receives dispositive motions in this matter.

VI. Order

Accordingly, it is hereby **Ordered**:

1. The Intervenors' November 24, 2003 Motion to Stay is denied.

2. ANR's January 22, 2004 Motion to Dismiss or, in the Alternative, Continue Proceedings is denied.

3. The Intervenors' January 29, 2004 Motion to Dismiss is denied.

4. The Board has jurisdiction over this appeal under the Vermont Water Pollution Control Act.

5. Notice of these proceedings was reasonable.

6. The Board will convene a second prehearing conference on **April 22, 2004, beginning at 9:00 a.m. at the Board's large conference room in Montpelier, Vermont** to determine whether any other preliminary issues need to be addressed prior to convening a hearing on the merits.

Dated at Montpelier, Vermont, this 1st day of April, 2004.

WATER RESOURCES BOARD
By its Chair

/s/ John F. Nicholls
_____
John F. Nicholls

Concurring:

David J. Blythe, Acting Member
Lawrence H. Bruce, Jr., Member
Michael J. Hebert, Member