

**State of Vermont**  
**WATER RESOURCES BOARD**

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

**MEMORANDUM OF DECISION**

(Issued Oct. 14, 2004)

Discharges of stormwater pollutants into stormwater-impaired streams, either directly in the discharge waste stream or indirectly through additional bed and bank scour, cause or contribute to the violations of the Vermont Water Quality Standards in these waters and require federal discharge permits, except for any de minimis discharges. The denial of a petition seeking a determination that stormwater discharges into five stormwater-impaired streams contribute to violations of the Vermont Water Quality Standards and therefore require federal discharge permits is reversed. Motions to dismiss this appeal filed by parties opposing the petition are denied. This matter is remanded to the permitting agency to establish any de minimis threshold for federal discharge permitting of stormwater discharges into these streams; to establish permitting conditions for federal discharge permits pending the establishment of comprehensive cleanup plans for these waters; to determine whether to administer these permitting requirements through individual permits, general permits, or some combination of individual and general permits; and to notify dischargers of their federal permitting obligations.

**I. Procedural Background**

The parties to this appeal are the Vermont Natural Resources Council and Conservation Law Foundation (CLF) (Petitioners); the Vermont Agency of Natural Resources (ANR); Martin's Foods of South Burlington, Inc.; Pomerleau Properties, Inc.; the Greater Burlington Industrial Corporation; and the City of South Burlington. This appeal arises from ANR's denial of a petition (Petition) filed by the Petitioners 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. The Petitioners filed their Notice of Appeal pursuant to section 1269 of the Vermont Water Pollution Control Act, 10 V.S.A. § 1269, *amended by* Act 115 of 2004, § 29.

This appeal raises original issues relating to the duty and authority of Vermont, which is delegated to administer the NPDES permitting system of the federal Clean Water Act, 33 U.S.C. §§ 1251-1387, to subject stormwater discharges to NPDES permitting pursuant to the so called residual designation authority of section 402(p)(2)(E) of the Clean Water Act, 33 U.S.C. § 1342(p)(2)(E), and associated federal regulations, 40 C.F.R. §§ 122.26, 124.52. On April 1 of this year, the Water Resources Board (Board) issued a comprehensive Memorandum of Decision on certain preliminary issues in this matter. The April 1 MOD sets forth the procedural history of

this matter in detail and summarizes the state and federal law relating to this case. In its April 1 MOD, the Board held that it would not stay this appeal pending the outcome of related litigation in federal district court, that the Petition was not a request for rule making, that the Board has jurisdiction over this appeal pursuant to section 1269 of the Vermont Water Pollution Control Act, and that notice of this appeal was reasonable.

The April 1 MOD notified the parties that Board Chair John F. Nicholls would convene a second prehearing conference in this matter to determine whether additional preliminary issues need to be addressed prior to a hearing on the merits. Chair Nicholls convened a second prehearing conference on April 22, 2004 and issued a Second Prehearing Conference Report and Order (Second Prehearing Order) shortly thereafter. In the Second Prehearing Order, Chair Nicholls identified a number of preliminary issues that may need to be addressed in this matter but established a schedule for the parties to address the preliminary issues of their choosing.

In motions, memoranda of law, responses, and replies, the parties have written at length about the law relating to this appeal. The Petitioners regard the law as straightforward. The other parties, who oppose the petition, have characterized the law as complex and invite the Board to interpret and apply the law in view of various questions of environmental policy. The Petitioners ask the Board to establish a schedule for the merits of this appeal to be resolved on the basis of motions for summary judgment, whereas the other parties have asked the Board to dismiss this appeal as a matter of law.

Oral arguments on this latest round of preliminary issues took place on August 24, 2004 at the Board's conference room in Montpelier, Vermont before Chair Nicholls, Vice-Chair Roberts, Member Bruce, and Acting Member Blythe. Member Hebert was not able to attend the Board's August 24 meeting but participated in this decision after listening to the tapes of the oral arguments. As set forth below, the Board denies the motions to dismiss this appeal, reverses as a matter of law ANR's decision to deny the Petition, and remands this matter to ANR to issue NPDES permits to dischargers of stormwater into the waterways involved in this appeal.

## **II. Issues**

The issues before the Board may be summarized as follows:

- A. Is ANR's denial of the Petition a declaratory ruling that is not appealable to the Board?
- B. Has this appeal been rendered moot?

- C. May “Other relevant factors” in the federal residual designation regulations relating to the determination of whether a discharge contributes to a violation of a water quality standard include Vermont’s Act 140 of 2004?
- D. Is a discharge of stormwater subject to NPDES permitting if the discharge contributes to a violation of water quality standards even if it has not been shown that the discharge also constitutes a significant contributor of pollutants to regulated waters?
- E. Must the Petitioners identify every discharge that contributes to violations of the Vermont Water Quality Standards in the waters at issue?

### **III. Analysis**

#### **A. Is ANR’s Denial of the Petition a Declaratory Ruling That Is Not Appealable to the Board?**

The opponents of the Petition argue that the Board’s April 1, 2004 MOD in this matter characterizes ANR’s denial of the Petition as a declaratory ruling. These parties argue that declaratory rulings by ANR are appealable to the Vermont Supreme Court rather than to the Board. The opponents of the Petition therefore conclude that the Board lacks jurisdiction over this appeal. The Petitioners disagree that ANR’s decision was a declaratory ruling and go on to argue that even if it was, the Board should still have jurisdiction over this matter.

Section 808 of the Vermont Administrative Procedure Act, 3 V.S.A. § 808, requires state agencies to decide “petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency.” In this case, the Petitioners did not file a request for a declaratory ruling with ANR but rather asked ANR to require NPDES permits for a class of stormwater discharges. ANR was not asked to provide an opinion on the applicability of the law but to take action—namely, to “cover existing stormwater discharges into the receiving waters under the NPDES permitting program immediately.” (Pet. at 9.)

On appeal, the Board must affirm, reverse, or modify the decision of ANR. *See* 10 V.S.A. § 1269, *amended by* Act 115 of 2004, § 29. In its April 1, 2004 MOD, the Board has already determined that ANR’s denial of the Petition was an appealable act or decision under section 1269 and that the Board therefore has jurisdiction over this appeal. In the present decision, the Board does not merely determine the rights of the parties but grants relief to the Petitioners and places a legal duty on ANR by finding that discharges of stormwater into the waterways involved in this appeal are subject to the NPDES permitting program and ordering ANR to establish NPDES permitting conditions for these discharges. Accordingly, the Board finds that ANR’s denial of the Petition was not a declaratory ruling.

## **B. Has this Appeal Been Rendered Moot?**

Those opposing the Petition argue that this appeal is moot as a result of Act 140 of 2004 (codified at 10 V.S.A. §§ 1264, 1264a-c, 27 V.S.A. § 613), which substantially amends the stormwater provisions of the Vermont Water Pollution Control Act. Act 140 requires ANR to establish comprehensive cleanup plans for the waters at issue within three years and allows permitting to occur in the meantime based on a watershed-based net-zero discharge policy, which includes an offset system and an impact-fee mitigation fund. The parties opposing the Petition argue that this comprehensive state system for regulating stormwater evidences an intent on the part of the legislature that NPDES permits should not be required for stormwater discharges in Vermont under the federal residual designation authority. The state stormwater policy, according to the opponents of the Petition, renders this case moot. As these parties point out, a case becomes moot when a change in law or fact eliminates the controversy so that a decision in the matter will not have any practical effect. Black's Law Dictionary 909 (5<sup>th</sup> ed. 1979) (defining moot).

The argument that this matter is moot finds no support in Act 140. In Act 140, the legislature made clear that it was creating a state stormwater program in addition to the federal NPDES permitting program that is administered in Vermont by ANR and that permitting in Vermont must be consistent with the federal Clean Water Act. Act 140, § 1. Act 140 was sent to the governor on May 21, 2004, well after the Board issued its April 1 MOD in this matter. However, Act 140 does not prohibit ANR, or the Board on appeal, from requiring dischargers of stormwater who are subject state stormwater permitting to also obtain NPDES permits under the residual designation authority.

Those opposing the Petition argue further that this matter is moot because ANR denied the Petition under Act 109 of 2002, the prior version of section 1264. As this argument goes, the matter must be sent back to ANR to determine whether the Petition should now be denied under Act 140. However, the opponents of the Petition argue that Act 140 represents even stronger grounds for denying the Petition than Act 109. Thus, the passage of Act 140 does not moot the controversy in this case. The Petitioners continue to argue that stormwater discharges into the waters at issue in this case must be governed by NPDES permits. The other parties in this case continue to disagree. This is a live controversy.

Since the Board issued its April 1, 2004 MOD in this matter, CLF lost its argument in federal district court that all stormwater dischargers are subject to NPDES permitting. *See Conservation Law Foundation v. Hannaford Bros. Co.*, 327 F. Supp. 2d 325 (D. Vt. 2004), *appeal docketed*, No. 04-3398-CV (2d Cir. June 15, 2004). The opponents of the Petition in this matter contort this decision to mean that stormwater dischargers are never subject to NPDES permitting under the residual designation authority. As the Board stated in its April 1, 2004 MOD, the legal theories before the District Court were different from those now before the

Board. The District Court did not reach the issues that the Board must decide in this case. Accordingly, the Board finds that this appeal is not moot.

**C. May “Other Relevant Factors” in the Federal Residual Designation Regulations Relating to the Determination of Whether a Discharge Contributes to a Violation of a Water Quality Standard Include Vermont’s Act 140 of 2004?**

In an argument closely related to their position that this controversy has become moot, the opponents of the Petition contend that Act 140 obviates any need for the residual designation authority to apply to the waters at issue. Federal regulations list the factors that ANR may consider in determining whether a stormwater discharge contributes to a violation of a water quality standard or constitutes a significant contributor of pollutants to waters of the United States and thus requires an NPDES permit:

- (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).

The first three factors clearly relate to the technical consideration of whether a discharge does in fact contribute to a violation of water quality standards or constitutes a significant contributor of pollutants to regulated waters. The fourth item, a catch-all category, would reasonably be read in the same fashion. This fourth item might include, for example, water quality reports generated by the states. The opponents of the Petition read “Other relevant factors” to mean a decision by state authorities not to exercise the residual designation authority based on state policy preferences. Such a reading is inconsistent with the federal regulatory requirement that a stormwater discharge must be governed by an NPDES permit if a delegated state determines that the discharge contributes to a violation of water quality standards or constitutes a significant contributor of pollutants to regulated waters. Act 140 establishes a comprehensive state permitting program for stormwater. Nevertheless, federal regulations do not by their terms allow state permitting programs to override the residual designation requirements of the federal NPDES permitting program.

The parties opposing the Petition point to guidance and correspondence from the United States Environmental Protection Agency (EPA) to support their argument that Act 140 makes NPDES stormwater permitting unnecessary in this case. While EPA guidance may have some persuasive authority, guidance is not law. In any event, the EPA guidance pertaining to this

matter does not support the argument that state stormwater permitting under Act 140 supplants NPDES permitting under the residual designation authority.

In a March 30, 2004 letter to the Vermont House of Representative's Fish, Wildlife, and Natural Resources Committee, EPA Region 1 addressed the issue, as requested, of when NPDES permits are required under the residual designation authority. Quoting a September 16, 2003 letter on the same subject that EPA Region 1 sent to ANR, and which in turn relied on 1990 EPA guidance, Region 1 wrote that when the information exists to determine the cause of the impairment and to identify stormwater sources that contribute to this violation of the water quality standards, then "NPDES permits should be required for storm water discharges found to be contributing to standards violations." Continuing to quote its September 16, 2003 letter, EPA went on to state in its March 30, 2004 letter that it "has not defined a threshold level of pollutant contribution that would trigger such a finding, but it would be reasonable to require permits for discharges that contribute more than a de minimis amounts [sic] of pollutants identified as the cause of impairment to a water body."

In its September 16, 2003 and March 30, 2004 letters, EPA Region 1 suggested that it "might consider" whether state "water quality protections *that are already in place at a particular source*" (emphasis in March 30, 2004 letter) would affect the decision of whether NPDES permitting is required under the residual designation authority. In its March 30, 2004 letter, EPA Region 1 expressed an intention to resolve "within the next two weeks" whether a state stormwater permitting program, in and of itself, could be a sufficient basis to avoid NPDES permitting. The parties have not identified additional EPA correspondence on this subject. Given the on-going violations of the Vermont Water Quality Standards in the receiving waters involved in this appeal and the continuing absence of any cleanup plan, appropriate water quality protections are not "already in place" in these watersheds. As a result, EPA's letters do not excuse Vermont from exercising its federally delegated residual designation authority in this case.

Residual designation is not optional, as the opponents of the Petition suggest. Section 402(p)(2)(E) of the Clean Water Act, 33 U.S.C. § 1342(p)(2)(E), lists residual designation as an exception to the requirement of section 402(p)(1), 33 U.S.C. § 1342(p)(1), that EPA and delegated states "shall not require a permit under this section for discharges composed entirely of stormwater." This means that NPDES permits shall be required for a stormwater discharge that "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). EPA's Phase I regulations are similar. See 40 C.F.R. § 122.26(a)(1)(v). EPA's Phase II regulations affirmatively provide that operators of discharges determined to contribute to a water quality standards violation or to constitute a significant contributor of pollutants to waters of the United States "shall be required to obtain a NPDES permit." 40 C.F.R. § 122.26(a)(9)(i)(D).

Act 140 represents a substantial commitment to addressing stormwater pollution in Vermont. However, the federal permitting system is subject to federal law and federal regulations, and federal permitting requirements are subject to citizen suits. Thus, Vermont's stormwater permitting system is not a perfect substitute for NPDES permitting.

The opponents of the Petition argue that the federal law gives the states the primary responsibility for managing stormwater and that Act 140 must therefore override the residual designation authority of federal law. Delegated states are responsible for establishing water quality standards and for allocating pollutant loads in the TMDL process. These states are also responsible for establishing appropriate water-quality based effluent limitations (WQBELs) in NPDES permits and otherwise administering their NPDES permitting programs. None of these responsibilities excuse the states from their responsibility under the residual designation authority to require NPDES permits for stormwater dischargers that contribute to violations of state water quality standards or that constitute significant contributors of pollutants to federally regulated waters.

Certain opponents of the Petition contend that subjecting stormwater discharges in the watersheds at issue to NPDES permitting would defy legislative intent because the interim permitting scheme of Act 140 then would not pass muster under federal law. The Board does not need to resolve this issue at this juncture. Rather, it is for ANR to establish in the first instance the conditions of NPDES discharge permits to be issued pursuant to the federal residual designation authority prior to the establishment of comprehensive cleanup plans for the receiving waters. Act 140 does not evidence any intent on the part of the legislature to violate the requirements of the federal Clean Water Act. Accordingly, the Board concludes that Act 140 does not excuse stormwater dischargers contributing to violations of the Vermont Water Quality Standards in the receiving waters named in the Petition from obtaining NPDES permits.

**D. Is a Discharge of Stormwater Subject to NPDES Permitting If the Discharge Contributes to a Violation of Water Quality Standards Even If it Has Not Been Shown That the Discharge Also Constitutes a Significant Contributor of Pollutants to Regulated Waters?**

Both section 402(p)(2)(E) of the Clean Water Act, 33 U.S.C. § 1342(p)(2)(E), and EPA regulations, 40 C.F.R. § 122.26(a)(9)(i)(D), provide that a discharger of stormwater must obtain an NPDES permit if EPA or a delegated state determines that the discharge “contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.” *See also* 40 C.F.R. § 122.26(a)(1)(v) (requiring NPDES permit for stormwater discharge which EPA or delegated state determines to “contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States”). The Petitioners have stated in their filings that they do not allege that the discharges into the waters at issue constitute significant contributors or pollutants. Rather, the Petitioners base their Petition

solely on the grounds that discharges of stormwater into the waters at issue contribute to on-going violations of the Vermont Water Quality Standards. The opponents of the Petition argue that the Petition must fail because to be subject to NPDES permitting, a stormwater discharge must *both* contribute to a violation of standards *and* constitute a significant contributor of pollutants to the receiving waters.

This argument tortures the plain language and intention of the Clean Water Act and the federal regulations. The opponents to the Petition read a disjunctive to be a conjunctive. In any event, the argument is of no consequence in this case because a discharge that contributes in more than a de minimis fashion to a violation of a water quality standard would by its nature be significant.

In a related argument, the opponents of the Petition assert that a discharge cannot be subject to NPDES permitting under the residual designation authority unless this discharge alone impacts water quality and this is proved, in this case by the Petitioners. The Board rejected a similar argument in *In re Hannaford Bros. Co.*, No. WQ-01-01, Findings of Fact, Conclusions of Law, and Order at 13 (Jan. 18, 2002), *aff'd*, No. 280-02 CnCv (Chittenden Co. Super. Ct. Apr. 30, 2003), *appeal docketed*, No. 2003-539 (Vt. Dec. 4, 2003):

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

(Citation to record omitted.)

In support of their argument in this case that the Petitioners must demonstrate that a discharge is discretely impacting water quality before it can be subject to NPDES permitting, the opponents of the Petition rely on *Arkansas v. Oklahoma*, 503 U.S. 91 (1992). In *Arkansas v. Oklahoma*, the United States Supreme Court considered the propriety of an NPDES permit for a discharge into impaired waters. *Arkansas v. Oklahoma* involved a discharge from an Arkansas sewage treatment plant into a series of streams that flowed seventeen miles to the Illinois River at a point about twenty-two miles upstream from the state of Oklahoma. Oklahoma's water quality standards allowed no degradation of the Illinois River where it enters the state because Oklahoma



classified that reach of the Illinois River as a high-quality water. *Id.* at 95. The receiving waters in Oklahoma violated that state's water quality standards, apart from the potential impacts of the permit issued for the Arkansas discharge. *Id.* at 98.

The Supreme Court observed that federal regulations prohibit the issuance of an NPDES permit unless permit conditions ensure compliance with state water quality standards, *id.* at 105, and ruled that EPA acted reasonably by requiring the Arkansas discharge to comply with Oklahoma's water quality standards. *Id.* at 107. However, the Court rejected the idea that the Clean Water Act would "prohibit any discharge of effluent that would reach waters already in violation of existing water quality standards." *Id.* The Court reasoned that "no degradation," *id.* at 110, under Oklahoma's water quality standards meant no "actually detectable or measurable" change in water quality." *Id.* at 111 (quoting record). Since the factual record established that the permit at issue would lead only to a "theoretical impact," *id.*, on the receiving waters but not to a measurable or detectable change, the Court held that the permitted discharge would not violate Oklahoma's water quality standards. *Id.* at 111-114.

In the course of its decision, the Court stated as follows:

Although the [Clean Water] Act contains several provisions directing compliance with state water quality standards, the parties have pointed to nothing that mandates a complete ban on discharges into a waterway that is in violation of those standards. The statute does, however, contain provisions designed to remedy existing water quality violations and to allocate the burden of reducing undesirable discharges between existing sources and new sources. Thus, rather than establishing the categorical ban announced by the Court of Appeals--which might frustrate the construction of new plants that would *improve existing conditions*--the Clean Water Act vests in the EPA and the States broad authority to develop long-range, area-wide programs to *alleviate and eliminate existing pollution*.

*Arkansas v. Oklahoma* at 108 (citations omitted) (emphasis added).

*Arkansas v. Oklahoma*, which did not address the residual designation authority, does not stand for the proposition that a prerequisite to NPDES permitting under the residual designation authority is proof that each discharge involved would have a measurable and detectable effect on water quality apart from the effects of all other dischargers involved. Rather, the issuance of NPDES permits to stormwater dischargers under the residual designation authority is consistent with the objectives of the Clean Water Act to "improve existing conditions" and to "alleviate and eliminate existing pollution." *Id.* Accordingly, the Board rejects the argument in this case that

the Petitioners must demonstrate that a discharge is discretely impacting water quality before it can be subject to NPDES permitting under the residual designation authority.

**E. Must the Petitioners Identify Every Discharge That Contributes to Violations of the Vermont Water Quality Standards in the Waters at Issue?**

The opponents of the Petition contend that the Petition was required to identify each and every discharge for which an NPDES permit is allegedly required and that the Petition must be dismissed for failing to do so. This contention is similar to an argument that the Board addressed and rejected in its April 1, 2004 MOD--that each discharger that could be affected by the Petition was required to receive notice of both the Petition and the appeal of ANR's denial of the Petition to the Board.

In support of their argument, the parties who oppose the Petition rely on 40 C.F.R. § 124.52. Under section 124.52(b), EPA or a delegated state must notify stormwater dischargers required to obtain *individual* NPDES permits in writing of the decision that an NPDES permit is required and of the reasons for this decision, and the permitting authority must send an application form with the notice. The discharger must then apply for a permit within 60 days of notice, unless the permitting authority grants permission to submit the application at a later date. The discharger may challenge the determination that a permit is required during the comment period on the draft permit.

Section 124.52(c) provides EPA or a delegated state with the *option* of requiring a stormwater discharger to submit a permit application or other information relating to the discharge *prior* to any determination that an *individual* NPDES permit is required under the residual designation authority. The notified discharger must then submit an application or the other required information within 180 days of receiving notice, unless an extension of time is granted. *See also* 40 C.F.R. § 122.26(e)(5)(i) (requiring submission of permit application within 180 days of notice that discharge contributes to water quality standards violation or constitutes significant contributor of pollutants under 40 C.R.R. § 122.26(a)(1)(v)). Here again, the discharger may challenge the permitting designation during the comment period on the draft permit.

These regulations do not require individual notice to dischargers whom ANR may elect to govern with general permits. Nor do these regulations require individual notice to every discharger within a class of dischargers *prior* to any determination that these dischargers are subject to NPDES permitting under the residual designation authority. These regulations do not require a Petition seeking to subject a category of stormwater dischargers to NPDES permitting to identify each discharger within the category.

EPA's Phase II residual designation regulations require NPDES permits for a "category of discharges within a geographic area." 40 C.F.R. § 122.26(a)(9)(i)(D). However, the opponents of the Petition contend that the process for petitioning ANR to require NPDES permits under the residual designation authority involves only individual discharges, not categories. The operative regulatory language reads as follows: "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) (emphasis added).

The petition process enables persons to formally petition ANR to exercise its residual-designation authority and to appeal to the Board if ANR refuses to act. It would not be reasonable for the law to require NPDES permits for categories of stormwater discharges but to limit the petition process to one discharge at a time. Moreover, if a category were appropriate for NPDES permitting, it is the state's responsibility to effectuate the permitting process, rather than the responsibility of citizen petitioners to identify every discharge that might be involved. The Board does not read the federal regulations to require one petition for each specifically identified discharge and to prohibit petitions from naming categories of discharges.

## **F. Conclusion**

The central issue presented by this appeal is whether stormwater discharges into the five stormwater-impaired streams identified by the Petition contribute to violations of the Vermont Water Quality Standards and therefore require NPDES permits under the residual designation authority. In *Hannaford* and *In re Morehouse Brook*, No. WQ-02-04, Findings of Fact, Conclusions of Law, and Order (June 2, 2003), which together addressed the waters at issue in this case, the Board found that every discharge of stormwater pollutants into these stormwater-impaired urbanized waters contributes to the impairment. As the Board determined in *Hannaford*, at 12-13, discharges of stormwater that increase the mass loading of stormwater pollutants into stormwater-impaired streams, either directly in the discharge waste stream or indirectly through additional bed and bank scour, cause or contribute to the violations of the Vermont Water Quality Standards in these waters.

The Board in its April 1, 2004 MOD, and the Chair in the Second Prehearing Order, invited the parties to address the questions of how permitting requirements would be established in any NPDES permits required in this matter under the residual designation authority. Federal regulations establish that stormwater discharges or categories of stormwater discharges that contribute to violations of water quality standards require NPDES permits. 40 C.F.R. § 122.26(a)(1)(v), (a)(9)(i)(D). However, federal regulations do not establish requirements for these permits, leaving the permitting requirements to the discretion of the states. Although EPA guidance suggests that some de minimis exemption may be appropriate in residual designation permitting, neither EPA guidance nor its regulations establish a de minimis threshold for this case.

None of the parties have chosen to address the establishment of a de minimus threshold or the establishment of permit conditions for NPDES permits required by the residual designation authority. Because ANR denied the Petition, ANR had no reason to address these issues while this matter was within its jurisdiction. The Board finds that the propriety of establishing a de minimus permitting threshold and establishing permitting conditions for discharges that exceed any de minimis threshold are matters to be addressed in the first instance by ANR.

For the reasons set forth above, the pending motions to dismiss this appeal are denied. ANR's decision to deny the Petition is reversed. The Board relinquishes its jurisdiction over the Petition and remands this matter to ANR to establish any appropriate de minimus permitting threshold; to establish appropriate conditions for the NPDES permits that dischargers exceeding any de minimis threshold must obtain; to determine whether to administer these permitting requirements through individual permits, general permits, or some combination of individual and general permits; and to provide appropriate notice to the dischargers subject to these permitting requirements.

#### **IV. Order**

Accordingly, it is hereby **Ordered**:

1. The Intervenors' June 9, 2004 Second Motion to Dismiss is denied.
2. ANR's June 9, 2004 Motion to Dismiss is denied.
3. ANR's September 26, 2003 denial of the Petition dated June 27, 2003, and submitted to ANR by VNRC and CLF on June 30, 2003, seeking a determination that existing stormwater discharges into Potash, Englesby, Morehouse, Centennial, and Bartlett Brooks contribute to violations of the Vermont Water Quality Standards and require NPDES permits is reversed. Discharges of stormwater that increase the mass loading of stormwater pollutants into these stormwater-impaired streams, either directly in the discharge waste stream or indirectly through additional bed and bank scour, require NPDES permits, except for discharges that ANR determines to be de minimis.
4. This matter is remanded to ANR to establish in the first instance any de minimis threshold for NPDES permitting of stormwater discharges into Potash, Englesby, Morehouse, Centennial, and Bartlett Brooks pursuant to the residual designation authority; to establish permit conditions for those discharges above any de minimis threshold pending the establishment of comprehensive cleanup plans for these waters; to determine whether to administer the NPDES permits in these watersheds through individual permits, general

permits, or some combination of individual and general permits; and to notify stormwater dischargers of their NPDES permitting obligations.

5. Jurisdiction is returned to ANR.

Dated at Montpelier, Vermont, this 14th day of October, 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  
John D. E. Roberts, Vice-Chair