

**State of Vermont  
WATER RESOURCES BOARD**

**RE: Small Municipal Separate Storm Sewer Systems (MS4s)  
Docket Nos. WQ-03-08 and WQ-04-03 (Consolidated)**

**MEMORANDUM OF DECISION  
(Issued July 21, 2005)**

Conservation Law Foundation (CLF) filed appeals of the Agency of Natural Resources (ANR) General Permit # 3-9014 issued March 19, 2003, as amended on February 19, 2004. The appeals were consolidated by the Water Resources Board (Board) on April 22, 2004. The parties to the consolidated appeals reached a stipulated settlement agreement with respect to the matters under appeal on June 10, 2005. Upon review, the Board hereby accepts the stipulated agreement, issues General Permit 3-9014 with amendments recommended by the parties, dismisses the CLF appeals with prejudice, and remands jurisdiction to the Agency of Natural Resources.

**I. Procedural Background**

On March 19, 2003, the Water Quality Division, Department of Environmental Conservation (DEC), ANR, issued General Permit # 3-9014 (Original Permit) for stormwater discharges from small municipal separate sewer systems (MS4s) in the greater urban area of Burlington, Vermont. ANR issued the Original Permit both as a general permit under the Vermont Water Pollution Control Act, 10 V.S.A. §§ 1250-1283, and accompanying state regulations, and as a National Pollutant Discharge Elimination System (NPDES) permit under the federal Clean Water Act, 33 U.S.C. §§ 1251-1387, and accompanying federal regulations. By its terms, the Original Permit applies to eleven MS4s, including eight municipalities and three additional entities that operate storm sewer systems within portions of these municipalities. The eleven MS4s covered by the Original Permit are Burlington, Colchester, Essex, Essex Junction, Shelburne, South Burlington, Williston, Winooski, the University of Vermont (UVM), Burlington International Airport, and the Vermont Agency of Transportation (AOT).

Citing both state and federal law, CLF appealed the Original Permit to the Board on April 18, 2003. The Board's Executive Officer accepted the Notice of Appeal as administratively complete, and a prehearing conference was convened.

A prehearing conference was held on May 20, 2003, and a Prehearing Conference Report and Order (First Prehearing Order) was issued on July 9, 2003. The First Prehearing Order granted party status to CLF, ANR, the City of South Burlington, the Town of Colchester, the Town of Williston, the Village of Essex Junction, the Town of Shelburne, and the City of Burlington. In addition, the First Prehearing Order continued the appeal to allow ANR to amend

the Original Permit to add the towns of Jericho, Underhill and Milton, which ANR had inadvertently omitted from the Original Permit.

A second prehearing conference was held on September 11, 2003, and a Second Prehearing Conference Report and Order (Second Prehearing Order) was issued on September 23, 2003. The Second Prehearing Order granted party status to the Town of Essex and UVM. An additional continuance was granted because ANR had not yet amended the Original Permit in the manner discussed at the first prehearing conference.

A third prehearing conference took place on December 18, 2003 and a third Prehearing Conference Report and Order (Third Prehearing Order) was issued on December 23, 2003. With the consent of the other parties, ANR was granted another continuance to issue an amended permit.

ANR issued the amended permit (Amended Permit) on February 19, 2004. In a Chair's Order issued on March 12, 2004, the fourth prehearing conference was postponed until April 13, 2004 until after the appeal period expired on the Amended Permit.

On March 19, 2004, CLF filed a Notice of Appeal from ANR's issuance of the Amended Permit. The Board's Executive Officer accepted the CLF's Notice of Appeal as administratively complete. Party status petitions and entries of appearance in the appeal from ANR's issuance of the Amended Permit were received from the Town of Shelburne, the City of Burlington, the City of South Burlington, the Town of Colchester, the Town of Williston, the Village of Essex Junction, the Town of Essex, UVM, AOT, and ANR.

On April 13, 2004, a fourth prehearing conference took place in docket number WQ-03-08 and a first prehearing conference in docket number WQ-04-03. No objections were made to ANR's request that these appeals be consolidated. The parties agreed that ANR would file direct evidence first, followed by CLF and the MS4s, followed by rebuttal and surrebuttal from all parties.

On April 22, 2004, a Combined Prehearing Conference Report and Order (Combined Prehearing Order) was issued. The Combined Prehearing Order consolidated pending appeal Docket Nos. WQ-03-08 and WQ-04-03. The Combined Order granted party status to CLF, ANR, the Town of Williston, the Town of Colchester, the City of South Burlington, the Village of Essex Junction, the Town of Essex, UVM, the City of Burlington, the Town of Shelburne and AOT. The Combined Prehearing Order set a scheduling order.

On April 27, 2004, the Board issued a Chair's Order indicating that it would treat the Entry of Appearance filed by Gregg H. Wilson on behalf of the Town of Milton as a petition for party status. On June 18, 2004, Board Chair Nicholls issued a Chair's Order granting the Town of Milton party status in Case No. WQ-04-03.

On May 19, 2004 ANR filed its direct testimony and exhibits with the Board.

On July 18, 2004, CLF filed a Request for Extension with the concurrence of the other parties. On July 19, 2004, a Chair's Order was issued suspending the prehearing schedule to allow the parties to discuss settling this case. The Order required the parties to file a Status Report with the Board on or before September 14, 2004.

On September 14, 2004, CLF filed a Status Report with the Board with the concurrence of the other parties. In its Status Report, CLF informed the Board that the parties have met and consulted on a number of occasions but had failed to reach a settlement. On September 17, 2004, CLF filed a Proposed Schedule on behalf of the parties. On September 21, 2004, a Chair's Order was issued granting CLF's Proposed Schedule (with one minor modification) establishing dates for the parties to file motions for summary judgment and responses.

On October 18, 2004, a Motion for Summary Judgment was filed by CLF. On November 1, 2004, a Motion for Summary Judgment was filed by the Town of Williston, the Town of Colchester, the City of South Burlington, the Village of Essex Junction, the Town of Essex, and the University of Vermont ("Joint MS4s"). On November 1, 2004, a Motion for Summary Judgment was also filed by AOT. On November 19, 2004 responses to the cross motions for summary judgment were filed by CLF, ANR, the Joint MS4s and AOT.

On January 24, 2005, a Chair's Order was issued which stated that the Board deliberated on the Motions for Summary Judgment at its January 18, 2005 meeting. Following deliberation, the Board decided to convene a Status Conference with the parties to discuss the possibilities of settling the appeal. The Status Conference was held on February 3, 2005 to discuss settlement of the appeal. On February 7, 2005, a Chair's Order was issued requiring the parties to file a Status Report no later than April 4, 2005. The parties submitted a Status Report on April 1, 2005 seeking an additional month to continue negotiating a settlement. A Chair's Order dated April 7, 2005 granted the extension and required that the parties file a Status Report with the Board no later than May 2, 2005.

On May 2, 2005, CLF filed a Status Report seeking additional time to reach a settlement. A Chair's Order was issued on May 9, 2005 granting a final continuance until May 31, 2005. On June 10, 2005 the parties filed a Stipulated Settlement Agreement and Joint Motion for Dismissal and Order with the Board ("Stipulated Agreement").

## **II. Findings of Fact**

1. The parties have entered into a Stipulated Agreement that would modify the conditions of the permit at issue in this appeal.
2. The parties request the Board to accept their Stipulated Agreement.
3. The Stipulated Agreement calls for a modification of sixteen sections of the permit under appeal, including provisions relating to monitoring, stream corridor protection, endangered species protection, consistency with other laws and the Lake Champlain Phosphorus TMDL.

4. The Board has reviewed the Stipulated Agreement, and finds that the issuance of a modified permit containing the provisions included in the Stipulated Agreement is not contrary to the public interest or the intent and purposes of the applicable rules and statutes.
5. The Board hereby accepts the Stipulated Agreement.

### **III. Conclusions of Law**

Title 3 V.S.A. § 809(d) provides that “[u]nless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.” The present appeal is a contested case within the meaning of the Administrative Procedure Act, 3 V.S.A. §801(b)(2) and, therefore, may be disposed of by informal disposition pursuant to 3 V.S.A. §809(d), including by stipulated agreement of all parties, provided that such disposition is not contrary to the public interest. *See, e.g., In re: Gordon Whitman*, Docket No. CUD-94-12, Dismissal Order (Nov. 21, 1994) (appeal dismissed following Board determination that stipulation of the parties imposing certain conditions was not contrary to the intent and purposes of Vermont Wetland Rules); *In re: Vermont Marble Power Division of OMYA*, Docket No. WQ-92-12, Findings of Fact, Conclusions of Law, and Order (Apr. 13, 1995) (decision and order issued based on Board approval of stipulation of the parties); *In re: Terry Thomas*, Docket No. SAP-01-06, Findings of Fact Conclusions of Law, and Order (Jan. 8, 2002).

The Board concludes that modification of General Permit 3-9014, by inclusion of the permit conditions stipulated by the parties, is not contrary to the public interest or the intent and purposes of the applicable rules and statutes. Accordingly, the Board affirms the decision of the ANR to issue General Permit 3-9014, but modifies that permit consistent with the Stipulated Agreement of the parties.

### **IV. Order**

Accordingly, it is hereby **ordered**:

1. CLF’s October 18, 2004 Motion for Summary Judgment is dismissed as moot.
2. The Joint MS4s November 1, 2004 Motion for Summary Judgment is dismissed as moot.
3. AOT’s November 1, 2004 Motion for Summary Judgment is dismissed as moot.
4. CLF’s appeals dated April 18, 2003 and March 19, 2004 are dismissed with prejudice.
5. ANR’s Amended General Permit 3-9014 is affirmed, but modified as follows:

A. Section 4.2.5.1.2.1 is added to read:

No later than April 1 of 2007, you must prepare and submit to the Agency a report on legal authorities or strategies you have adopted to protect and regulate development in the stream corridors of stormwater impaired waters as defined by 10 V.S.A. §1264(a)(13).

B. Section 4.2.5.1.2.2 is added to read:

No later than January 1, 2008, you must prepare and submit a plan outlining options for enhanced protection of stream corridors of stormwater-impaired waters. The plan should include a map of stream corridors depicting areas that have been converted to impervious surface and areas that are undeveloped or have not been converted to impervious surface. In preparing this plan you should review riparian buffer and stream fluvial geomorphological information provided to you by the Agency as a result of the Agency's preparation of TMDLs or Water Quality Remediation Plans as set forth in 10 V.S.A. §1264(f)(3)

C. Section 4.2.5.1.2.2.1 is added to read:

For those areas of stream corridors that have not been developed or otherwise converted to impervious surface, your plan should identify options for ensuring enhanced protection, which may include: (1) minimum widths of stream channel buffers requiring protections, and (2) minimum setback requirements, and (3) proposed planning and zoning regulations, municipal ordinances or codes, policies, or other requirements to enhance protection of undeveloped stream corridors.

D. Section 4.2.5.1.2.2.2 is added to read:

For those areas of stream corridors that have been developed or otherwise converted to impervious surfaces, your plan should identify options for stream corridor restoration, which may include: (1) restoring stream buffers, and (2) relocation of development outside stream corridor for redevelopment projects.

E. Section 5.1.5 is added to read:

The Agency may require you on a case-by-case basis to undertake water quality monitoring at an individual stormwater discharge point if there is evidence of an unusual discharge or if it is necessary to verify the effectiveness of BMPs and other control measures in your stormwater management plan.

F. Section 1.3.5 is amended to read:

Any discharge or activity that (1) results in the prohibited take of any federally listed threatened or endangered species or other violation of 16 U.S.C. § 1538 and its implementing regulations, (2) results in the prohibited take, possession, or transport of any state or federally threatened or endangered species in violation of 10 V.S.A. § 5403, or (3) jeopardizes

conservation program programs established by the Secretary under 10 V.S.A. § 5405.

G. Section 3.1.2.2 is amended to read:

Nothing in this permit shall relieve your obligations under any other state or federal permit.

H. Section 1.3.7 is amended to read:

Discharge of any pollutant into any water for which either a Water Quality Remediation Plan has been established pursuant to 10 V.S.A. § 1264 or a total Maximum Daily Load (TMDL) has been either established or approved by the EPA pursuant to section 303(d) of the Clean Water Act unless your discharge is consistent with that Water Quality Remediation Plan and TMDL. This eligibility condition applies at the time you submit a Notice of Intent for coverage (NOI). If a condition changes after your submission of a NOI, you may remain covered by the permit provided you comply with the applicable requirements of Part 3. You must incorporate any limitations, conditions and requirements applicable to your discharges, including monitoring frequency and reporting required, into your SWMP in order to be eligible for permit coverage. For discharges not eligible for coverage under this permit, you must apply for and receive an individual or other applicable general NPDES permit prior to discharging.

I. Section 3.1.3 is amended to read:

As set forth in 1.3.7 in implementing the six minimum control measures set forth in 4.2 you must be consistent with recommendations applicable to your MS4 contained in the implementation section of the Lake Champlain Phosphorus TMDL. The Lake Champlain Phosphorous TMDL recommendation for municipalities include: adoption of erosion control measures (page 65), improved construction and maintenance practices for gravel backroads (page 69), promotion of riparian buffers and setback (page 76) and impervious surface minimization (page 76). Such consistency is also required for any future applicable Water Quality Remediation Plans established pursuant to 10 V.S.A. § 1264 and for other applicable TMDLs for impaired waters adversely affected by your MS4.

J. Section 3.1.4 is amended to read:

The assessment of whether your Stormwater Management Program is consistent with applicable TMDL or Water Quality Remediation Plan recommendations will be based on your implementation and maintenance of best management practices, and not on estimates or measurements of pollutant loading.

K. Section 1 is amended to read:

1. Coverage under this permit

1.1 Permit Coverage

This general permits covers:

- 1.1.1 Small Ms4s in Vermont urbanized areas (UA) as determined by the Bureau of Census in the 2000 Census, and
- 1.1.2 Small MS4s in the watersheds of stormwater-impaired waters as determined by the Secretary which are located fully or partially in a Vermont urbanized area, and
- 1.1.3 Small MS4s in such area as defined by the Secretary when designating a small Ms4 to be covered under this permit pursuant to 40 CFR 123.35(b).

If your small MS4 is not located within an urbanized area or within a stormwater-impaired watershed, only the portion that is within the urbanized area or stormwater-impaired watershed is regulated. A map, which shows the UAs and the stormwater-impaired watersheds in Vermont that are subject to this general permit can be found at: [http://www.vtwaterquality.org/stormwater/sw\\_ms4\\_map.pdf](http://www.vtwaterquality.org/stormwater/sw_ms4_map.pdf)

This permit provides coverage specifically for the designated MS4s in the Greater Burlington urban area municipalities of Burlington, Colchester, Essex, Essex Junction, Jericho, Milton, Shelburne, South Burlington, Underhill, Williston and Winooski, the University of Vermont, the Burlington International Airport and the Vermont Agency of Transportation.

L. The last bulleted point of Section 4.2.2.1 is amended to read:

As a substitute for one or more of these activities, you may contribute \$5000 per activity to sponsor the regional stormwater education and outreach strategy described in the agreement between the designated MS4s, the Chittenden County Regional Planning Commission and the Vermont Agency of Natural Resources dated, January 31, 2003, and its subsequent amendments.

M. Section 4.2.2.2 is amended to read:

Decision Process. If you elect to implement a public involvement/participation program rather than contribute to the regional stormwater education and outreach strategy described in the January 2003 memorandum of agreement and its subsequent amendments between designated.... [remainder of section 4.2.2.2 remains unchanged]

N. The second and third sentences of the second paragraph of Section 4.2.4.1 are amended to read:

The Secretary has issued General Permit 3-9001 (2003) (NPDES Number: VTR 100001) for stormwater runoff from large construction sites that regulates construction activities, which result in a land disturbance equal to or greater than five acres of land. The Secretary also expects to issue General Permit 3-9013 (2005) (NPDES Number: VTR 100002) for stormwater runoff from small construction sites which regulates construction activities which result in a land disturbance of greater than one and less than five acres of land.

O. The first sentence of Section 4.2.6.1.3 is amended to read:

You must provide a list of industrial facilities you own or operate that affect your MS4 and are subject to an individual NPDES Multi-Sector Permit or the Agency's General Permit 3-9003 Multi-Sector General Permit for Stormwater Discharges Associated With Industrial Activity (expected to be adopted in 2005) (NPDES Number: VTR 050001) (MSGP).

P. The first sentence of Section 5.3 is amended to read:

You must submit annual reports to the VTDEC Water Quality Division, Stormwater Management Program by April 1 of each year of the permit term.

6. Jurisdiction is returned to ANR.

Dated at Montpelier, Vermont, this 21st day of July, 2005.

WATER RESOURCES BOARD  
By its Chair

/s/John F. Nicholls  
John F. Nicholls

Concurring:

Lawrence H. Bruce, Jr., Member  
Michael J. Hebert, Member  
John D. E. Roberts, Vice Chair  
Joan B. Nagy, Member