

## **STORMWATER REGULATIONS: WHERE ARE WE?**

While the 2003 Legislature chose to address few stormwater issues, in other arenas over the last year the subject was front and center.

Cases have been filed in federal and state courts. The Vermont Water Resources Board (WRB) has opened an investigatory docket. New permit standards will soon be in place for stormwater from construction sites between one and five acres in size, and for covering salt and sand piles. The MS-4 communities are moving ahead in their plans for education and upgrades of facilities. But is anything yet certain about stormwater management in Vermont? The answer sure looks like "not much."

### **WATER RESOURCES BOARD *Investigation Into Developing Clean Up Plans for Impaired Waters (Docket 03-01)***

The WRB recently handed down a decision overturning Agency of Natural Resources (ANR) watershed improvement permits (WIPs) for impaired waters in Chittenden County. The WIPs are designed to clean up water bodies in Chittenden County that are currently impaired due to stormwater runoff. (See Legal Corner in August 2003 *VLCT News*.) In the end, instead of appealing the decision to the Vermont Supreme Court, Governor Douglas stated that he would ask the Legislature to address the issue again. In the interim, the WRB opened a fact-finding docket to address questions regarding the technical feasibility of designing clean up plans for stormwater-impaired waters and the degree of certainty that WIPs or other clean up plans could provide that impaired waters would be restored to meet Vermont Water Quality Standards. The WRB hopes to conclude this docket by November 27, 2003.

In its order opening the docket, the WRB stated:

*The desired outcome of the docket is to generate a discussion report that would summarize the technical information submitted as part of the investigation and provide recommendations for developing clean up plans for Vermont's stormwater impaired waters based on the technical information exchanged as part of the docket. The purpose of the docket is NOT to address the legal positions of participants in the docket.*

VLCT staff participated in the first meeting and argued that the results of this docket must at least help design a permit system that enables towns and businesses around the state to move ahead with mitigation and stormwater management projects.

### **DOLLARS FOR STORMWATER CLEANUP CAPITAL PROJECTS AND MS-4 COMMUNITIES**

The cities of Burlington, South Burlington and Winooski, along with the towns of Essex and Shelburne and the village of Essex Junction are allocated, as MS-4 communities, \$1,475,000 in federal monies to perform repairs or construct improvements to (1) municipally owned stormwater discharges that predate the issuance of state stormwater permits, and (2) discharges for which an individual permit was issued. In many instances, those individual permits have expired, and in no case are the contemplated projects associated with new construction or development.

MS-4 communities are communities that must comply with federal Phase II requirements for stormwater. These municipalities have been meeting on an on-going basis for more than two years to address the requirements of the federal Phase II stormwater program. They are most interested in actually putting infrastructure in place that will meet ANR's 2002 stormwater management standards and contribute to cleaning up the stormwater problems in the impaired waters in Chittenden County.

### **EXPIRED PERMITS**

Beginning last winter, municipalities started to receive notices from ANR that they had expired stormwater permits. Not only municipalities, but also many other public and private entities received similar notices. ANR had a backlog of approximately 1,000 expired permits on which it had taken no action to assure maintenance or renewal in years. Many municipalities did not know that they were the owners of a stormwater permit - of any vintage - and many had to contact ANR to determine exactly where and what kind of facility or permit they should be locating. In fact, the letter to municipalities from ANR suggested they call for specific information.

Municipalities are required to renew permits, certify that stormwater systems are operating in compliance with the terms of their original permits, and undertake repair and maintenance responsibilities (both appropriate, but potentially expensive actions for which no state funding has ever been allocated). If the renewed permit is for a facility that discharges into waters that are not impaired for stormwater, permittees need to comply with General Permit 3-9010. Section B 3 of that permit establishes implementation deadlines. For instance, if a project was built but its associated stormwater management system was never built, then the previous permittee shall, **prior to November 15, 2003**, construct a stormwater management system in accordance with Part III of General Permit 3-9010. Likewise, if the system was built but is seriously deteriorated, the previous permittee shall, by November 15, 2003, repair/upgrade or construct a stormwater management system in accordance with Part III of this general permit. If the system is in need of maintenance, that shall be performed before November 15, 2003. There are a lot of such projects outside of impaired waters in Vermont. Town officials should be working hard to meet this deadline. Permit descriptions, notice of intent forms and application forms are available at the Stormwater Section web site, [www.anr.state.vt.us/dec/waterq/stormwaterpermitting.htm](http://www.anr.state.vt.us/dec/waterq/stormwaterpermitting.htm), or by contacting the Stormwater Section at 241-4320.

Municipalities that have previously permitted stormwater discharges to impaired waters were initially required to obtain coverage under WIPs. However, permitting requirements for existing discharge to impaired waters are now up in the air after the Water Resources Board (upon appeal by the Conservation Law Foundation and Vermont Natural Resources Council) overturned four of the WIP permits. (See Legal Corner mentioned above, and discussion below.)

### **SUITS AND APPEALS**

Part of the confusion around what exactly is required in terms of stormwater management stems from the eight (count 'em) appeals or suits of ANR permits that have been filed, particularly for large projects, by the Conservation Law Foundation (CLF) and other groups.

1) CLF appealed the decision of the Water Resources Board to affirm a permit for the discharge of treated stormwater from a proposed Lowes store in South Burlington to Shelburne Bay and Potash Brook (Hannaford Lowes). The appeal was to Superior Court, where a decision has been rendered. There is the possibility now of an appeal by CLF to the Vermont Supreme Court.

2) CLF appealed a Department of Environmental Conservation stormwater construction permit for Lowes in South Burlington to the Water Resources Board.

3) CLF filed a citizen's suit action in federal court under the Clean Water Act alleging that the KMart Plaza and neighbors in South Burlington were discharging without a needed National Pollutant Discharge Elimination System (NPDES) permit.

4) CLF requested that ANR require an NPDES permit for all stormwater discharges into several of the impaired streams in Chittenden County.

5) CLF filed appeals of Circumferential Highway construction and operational permits issued by ANR. Included are two individual operational permits, one individual construction permit and two authorizations to discharge under the general construction permit.

6) CLF appealed the MS-4 general permit.

7) WIPs for four impaired streams were appealed by the CLF and VNRC to the Water Resources Board and overturned by the Board. ANR did not appeal the WRB decision; instead Governor Douglas indicated that he would ask the Legislature to address the issues raised in the WRB decision. As an additional measure, the WRB opened its investigatory docket into technical aspects of the stormwater management. (See above section on WRB.)

8) The stormwater permit for the Route 7 reconstruction project has been appealed by the Friends of Rt. 7 to the Water Resources Board.

### **SALT SHEDS AND SAND PILES**

Last winter, the Department of Environmental Conservation (DEC), Stormwater Section, issued a draft NPDES permit for industrial sites, the Multi-Sector General Permit (MSGP). This meant building covers and impervious barriers for salt piles for those Vermont municipalities that have not already done so.

This is a federally required permit that Vermont, apparently, is the last state to implement. Recently, ANR decided to delay approval and implementation of this permit. A revised draft MSGP permit

will be issued for public comment. The implementation date is anticipated to be sometime in March 2004. That draft permit includes a request to EPA that it grant a five-year extension on the covering of salted sand piles. Towns with salted sand piles will need to return a form to the Stormwater Section indicating where the piles are, and that they create no immediate, substantial impact on the waters of the State.

The largest question for municipalities as they wrestled with implementing this new mandate was what would be the cost of compliance. For information on the MSGP, contact Margaret Torizzo at the Vermont Stormwater Section (241-3780).

#### **MORE RULES AND PERMITS**

Municipal projects may be subject to other stormwater general permits, such as stormwater From Large Construction Sites; Stormwater Discharges from New Development and Redevelopment to non-WIP Waters (General Permit 3-9015); and a (still) draft permit for small construction sites. The best course of action is to call the Stormwater Section of the Department of Environmental Conservation (241-3770). In addition, ANR, will be issuing new stormwater rules, including rules on the use of pollution offsets for stormwater permitting in impaired waters.

#### **BACKYARD TRAINING OPPORTUNITIES**

Finally, if your municipality is about to undertake a project that will require controlling the flow of stormwater from it, Kim Greenwood, DEC Water Quality Engineer, suggests visiting construction sites in your own community to see how effective their erosion control plans are, particularly those your own planning and zoning department may have helped design, or permitted.

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