

## LATEST STORMWATER DECISION RAISES QUESTIONS

According to a new Water Resources Board decision, every stormwater discharge in an impaired watershed, except “de minimus” discharges (however they are eventually defined), needs to get a federal National Pollutant Discharge Elimination System (NPDES) permit. This decision, issued on October 14 in response to an appeal of an Agency of Natural Resources decision by the Conservation Law Foundation and Vermont Natural Resources Council, will have severe consequences for municipalities and developers in the five named watersheds, as well as for Lake Champlain and Vermont.

At issue is whether Vermont will be able to implement a stormwater management program developed last year through state legislation, or wait for the federal government to develop standards for a federal stormwater permitting program. The Water Resources Board decision states, “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 minimus discharges.” According to the Environmental Protection Agency (EPA), the federal Clean Water Act prohibits anyone from discharging “pollutants” through a “point source” into a “water of the United States” unless they have a federal NPDES permit.

Over the last two to three years, interested parties including municipalities, homeowners, realtors, developers, the Agency of Natural Resources, the Water Resources Board itself and the conservation organizations named in the first paragraph, met in intensive collaborative sessions. Their purpose was to devise a system under state law that enabled property owners and municipalities in impaired watersheds to move ahead with cleaning up their stormwater discharges, to proceed with transferring title when necessary and to provide developers of new projects an extremely high standard of stormwater management on their sites as a condition of proceeding with their projects. As part of those collaborative efforts, the Water Resources Board convened a docket investigating the science of stormwater management that concluded with some very useful, new information about this evolving science. The culmination of those years of efforts was legislation passed this last session in the form of Act 140 that had the support of all Senators and 127 of 130 House members voting on its final passage.

Act 140 incorporated the Water Resources Board investigative docket recommendations. It provided:

- A needed state system to allow homeowners to transfer property in impaired watersheds.
- Permits to owners of existing developments in the two to three year period between July 1, 2004 and adoption of Total Maximum Daily Loads (TMDLs) for the impaired watersheds.
- A mechanism for developers of new or expanded projects to proceed with those projects if their stormwater discharges met on-site the water quality, recharge and channel protection criteria in the 2002 state stormwater management manual *and* “if the sediment load from the discharge approximates the natural runoff from an undeveloped field or open meadow that is not used for agricultural activity.” (10 V.S.A. 1264 (b)(B)).

- A system of “offsets” whereby if a developer could not meet the discharge standards on his or her site, he or she could clean up a site currently exempt from stormwater regulations in the same watershed, thereby achieving a benefit that would not otherwise be achieved on the offset site.

Finally, Act 140 was clear that once TMDLs or watershed improvement programs were adopted, the standards a permittee would have to meet might be more stringent than those imposed in this interim period.

The parties who supported adoption of the legislation, including VLCT, spent all summer working with the Agency to implement this stringent and progressive program - the first of its kind in the nation. The Department of Environmental Conservation has decided to hold off submitting proposed rules regulating the state permit program until it is clear that it could be put into effect. On Friday, November 12, the Greater Burlington Industrial Corporation (GBIC) and the Attorney General’s office, on behalf of the Department of Environmental Conservation, both appealed the Water Resources Board decision to the Vermont Supreme Court.

The Water Resources Board decision creates significant uncertainties. How does one issue a NPDES permit (until now required only of point-source discharges) before a TMDL is adopted? What happens to the offset program, an innovation designed to clean up discharges not otherwise subject to state rules? What exactly could a “de minimus” discharge be, and how long will it take for that definition to be litigated? When can a property owner in an impaired watershed gain confidence that stormwater management regulations will allow him or her to move ahead with cleaning up discharges, transferring property including single family homes, commencing or completing a project, or improving the culvert under the road that serves your home? What will be the impact of this decision on stormwater management programs in unimpaired watersheds? Exactly whose interests are served by this new decision and how the waters of the state are likely to be cleaned up as a result of this decision is not at all clear as this article is written.

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