

Federal NPDES Permits not yet Required for Stormwater Discharges into Impaired Chittenden County Streams

On August 25, the Vermont Supreme Court issued a much-anticipated decision in the state's ongoing fracas over stormwater, reversing a controversial decision by the former Water Resources Board, but leaving open the possibility that stormwater dischargers might require federal stormwater permits. *In re Stormwater NPDES Petition*, 2006 VT 91.

The case originated in 2003 when the Conservation Law Foundation (CLF) and the Vermont Natural Resources Council (VNRC) filed a petition with the Vermont Agency of Natural Resources (ANR) to require a federal National Pollution Discharge Elimination System (NPDES) permit for existing stormwater discharges into five impaired Chittenden County streams. The petition was intended to compel ANR to invoke the so-called residual designation authority under the federal Clean Water Act. Under the residual designation authority, a federal NPDES permit can be required for an otherwise unregulated stormwater discharge if the Environmental Protection Agency (EPA) or ANR "determines that the discharge, or category of discharges, contributes to a violation of a water quality standard." The residual designation authority has only rarely been invoked in other states, and has never been invoked in Vermont. The possibility of imposition of an entirely new federal permitting regime has been a substantial concern to many potential stormwater dischargers in Chittenden County and elsewhere. Many have also been also concerned that the imposition of a new permitting regime might derail Act 140, the state's new comprehensive stormwater clean-up law.

Upon review of CLF's petition, the secretary of ANR determined that invocation of the residual designation was not required. CLF and VNRC appealed ANR's decision to the Vermont Water Resources Board. In October 2004, the Water Resources Board reversed ANR's decision. The Board noted that it had found, in two previous unrelated cases, that every discharge of stormwater pollutants into the five impaired Chittenden County streams contributed to their impairment, and that such discharges of stormwater cause or contribute to the violation of the Vermont Water Quality Standards in these waters. In light of these conclusions, the Board ruled that ANR was required to exercise the residual designation authority and establish a new NPDES permit program for these impaired watersheds. The Board ordered ANR to identify all sources of stormwater runoff within the stormwater-impaired waters, establish new treatment standards for each discharge, and implement a new federal NPDES permitting program.

ANR and a group of Chittenden County business organizations appealed the Board's decision. VLCT, on behalf of its members, joined these parties as *amicus curiae*, asserting that the Board had exceeded its authority. Under the residual designation authority, a NPDES permit is only required if the applicable agency first "*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)(D). (Emphasis added.) By simply concluding, in the context of two unrelated proceedings, that every discharge of stormwater pollutants to the five impaired Chittenden County streams contributed to their impairment, the Water Resources Board had sidestepped the important requirement that this determination be made on a case-by-case basis. In effect, the Board's conclusion amounted to an adjudication of every potential discharger's legal rights and duties

under the Clean Water Act, without affording any of these potential parties – many of whom might be Vermont municipalities – the opportunity to participate in the decision-making process. The Supreme Court agreed, concluding that the application of the residual designation authority “involves a particularized, fact-specific determination on a case-by-case basis.... It is manifestly not a decision that that can be grounded on a single factual finding, in a separate legal setting, that all existing stormwater discharges contribute to the impairment of impaired waters.”

What does the decision mean for Vermont municipalities? It appears that, in the short run, municipal dischargers into impaired Chittenden County waters will not have to obtain federal NPDES permits. However, the Court has remanded the case to ANR to determine if the residual designation authority might yet apply. Implicit in the Court’s decision is recognition that while Act 140 is not a substitute for the residual designation authority, ANR can consider the implementation of Act 140 in determining if federal NPDES permits will ultimately be required. In the long run, NPDES might still be required if Act 140 is not successful in cleaning up these waters. Considering the lingering specter of an NPDES permitting regime, dischargers into Chittenden County’s impaired streams will have another reason to support the implementation of Act 140.

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