

## WATER RESOURCES BOARD ISSUES STORMWATER PERMIT DECISION

Back in the August 2001 Legal Corner we reported that the Vermont Water Resources Board (WRB) had rendered a preliminary, but controversial, decision on an appeal of a stormwater permit issued by the Agency of Natural Resources (ANR) to Lowes Home Center in South Burlington. (The WRB is the first stop for appellants of such ANR permit decisions.)

The decision was controversial because the WRB ruled for the first time that Vermont law requires that a more stringent standard be applied to applications for a new or increased discharge of pollutants to an impaired water.

Last month, the WRB issued its final decision in the case. The decision sheds some light on how applications for stormwater permits for discharges to impaired waters will be reviewed in the future. See *Hannaford Bros. Co. and Lowes Home Centers, Inc.*, Docket No. WQ-01-01, Findings of Fact, Conclusions of Law, and Order (Jan. 18, 2002).

As explained in our previous article, the ANR prepares a list of “impaired waters” for the state of Vermont. Waters are listed as impaired if they fail to meet any of the criteria contained in the Vermont Water Quality Standards (VWQS). Based on the WRB’s final decision it is clear that if an applicant applies for a stormwater permit to discharge to one of the impaired waters on the ANR list, the permit can only be granted under two scenarios.

One scenario is that ANR has prepared a wasteload allocation for the waterbody and the discharge is found to be consistent with the allocation. The allocation is based on the Total Maximum Daily Load (TMDL) of pollutants that may be discharged to the waterbody without violating any of the VWQS. To date, no TMDLs have been established in the state of Vermont. While ANR is working on a plan to create TMDLs, until TMDLs are widely established, permit applicants will not be able to count on this scenario to obtain a permit.

The second scenario is that an applicant can establish that the proposed discharge will not increase the “pollutants of concern.” Pollutants of concern mean the pollutants that have been previously discharged into the waterbody that caused the waterbody to become impaired. For example, if a waterbody segment is impaired for phosphorous, the applicant must prove that the proposed stormwater discharge will not increase the amount of phosphorous to the impaired water and phosphorous would be the “pollutant of concern.”

In order to determine whether a proposed discharge will increase the “pollutants of concern,” the WRB had to establish a baseline for measuring the impact of pollutants that would be discharged to the impaired waterbody. Importantly, in its decision, the WRB chose to establish the baseline as the existing conditions at the site, rather than at a pure, unimpaired state.

Based on how the WRB decided to measure the baseline, an applicant is not required to prove that the waterbody will no longer be impaired in order to obtain a permit. Rather, an applicant must prove that the proposed discharge will not *exacerbate* the existing impairment in order to qualify for a permit, a much more relaxed standard.

Considering the evidence in light of the above standards, the WRB concluded that the applicant was able to establish that the proposed discharge will not increase the load of pollutants of concern to the waterbody and the WRB granted the stormwater permit.

In its decision, the WRB indicated it was persuaded that the proposed stormwater discharge system would not increase the pollutants of concern being discharged to the waterbody. The WRB also rejected the notion that proof of compliance with ANR stormwater procedures created any presumption that the proposed discharge would not further impair the waterbody. Rather, the applicant was required to demonstrate through independent expert testimony and modeling that the proposed discharge would not exacerbate the impairment.

Again at the end of the day the question arises, what does this decision mean for Vermont cities and towns? In our opinion, it means that it will be much more difficult to obtain a stormwater permit for a discharge to an impaired water. With the ANR just beginning to establish TMDL's on a widespread basis, an applicant will not be able to rely on the TMDL as a basis for a stormwater permit for some time. Accordingly, to obtain a stormwater permit for a discharge to an impaired water an applicant will have the burden of proving that the proposed discharge will not exacerbate the impairment.

This means if a municipality is the applicant for a stormwater permit it will have to hire experts to design a stormwater system that will not increase the "pollutants of concern" and convince ANR that the system will in fact not exacerbate the impairment. With proposals to increase jurisdiction over municipal projects requiring a stormwater permit, this could become a greater problem for municipalities in the future. See "Waterrelated Issues" in this *VLCT News* and watch VLCT's *Weekly Legislative Report* for information on potential legislative changes that could affect the impact of this decision and the legal obligation of municipalities with regard to stormwater.

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