

## **Water Resources Board Rejects State's Stormwater Permits**

The Water Resources Board recently issued a decision that will no doubt have broad implications for legislators, regulators, municipal officials, and citizens throughout the state.

On June 2, 2003, the Water Resources Board (WRB) issued a decision reversing the Agency of Natural Resources' (ANR) issuance of watershed improvement permits (WIPs) for four watersheds located in Chittenden County (Lake Champlain drainage basin) that are impaired by stormwater runoff. The reversal leaves cities and towns that are subject to stormwater permits without clear guidance from ANR as to what is required in order to comply with state laws and regulations.

The basis for the WRB's decision rested on its finding that ANR's issuance of the permits was not in compliance with state law. Specifically, the WRB ruled the WIPs are unlawful because it determined they are not reasonably designed to *assure* that the receiving waters will comply with the Vermont Water Quality Standards within five years and do not ensure that new discharges will not cause or contribute to a violation of the Vermont Water Quality Standards. Docket Nos. WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated) Findings of Fact, Conclusions of Law, and Order (Vt. Water Res. Brd. June 2, 2003).

In short, the WRB held that, because ANR failed to develop a watershed improvement permit that effectively addressed existing and new discharges, and because ANR has not yet developed a total maximum daily load for the receiving waters, new or increased discharges of pollutants of concern into these water bodies are prohibited until ANR develops an effective cleanup plan that complies with state law. *Id.*

### **Stormwater Runoff, Impaired Waters, and Total Maximum Daily Loads**

Stormwater runoff is water that is deposited from rain or snowstorms and not absorbed by the ground due to the existence of impervious surfaces such as streets, driveways, parking lots, and rooftops. As stormwater travels over these roads, highways, and parking lots, it can mix with sediment, motor oil, anti-freeze, heavy metals, and fertilizers; eventually this mix drains into our lakes, ponds, streams, and rivers.

The waterbodies involved in the WIPs under appeal are defined as impaired waters for stormwater. Impaired waters are those waters that are identified as not meeting state water quality standards. Currently, approximately 25 streams in Vermont are impaired primarily due to stormwater runoff. *Id.*

All waters listed as impaired become subject to the Total Maximum Daily Load (TMDL) process under the Clean Water Act. The TMDL process requires the development of a plan that identifies what is causing the impairment and how to achieve the cleanup and restoration of the water body. A TMDL is a pollution cap or ceiling for the water body and an associated cleanup plan that determines exactly how to attain that cap. Vermont's 2000 Section 303(d) List identifies the need for ANR to complete total maximum daily loads for each of the water bodies at issue unless remediation will be completed prior to the scheduled TMDL completion deadline, which is 2009 for all four bodies of water.

### **Watershed Improvement Permits**

WIPs are an alternative to TMDLs that ANR may use to permit discharges to waterbodies that are impaired by stormwater. *Id.* Vermont is the first state to attempt this innovative approach. This option may only be utilized, however, if the WIPs include a schedule *reasonably designed* to bring the receiving waters into compliance with the Vermont Water Quality Standards within five years. Docket No. WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated) Findings of Fact, Conclusions of Law, and Order (Vt. Water Res. Brd. June 2, 2003). If a watershed improvement permit cannot be designed to ensure compliance within five years, then ANR must establish and implement a TMDL for the receiving waters instead of issuing a WIP. 10 V.S.A. §§, 1258,1263(c).

Act 109 of 2002 authorizes ANR to issue “watershed improvement permits as a means of ensuring the water quality standards are achieved and maintained” in impaired waters. 10 V.S.A. § 1264. WIPs are based on the best management practices contained in ANR’s 2002 Stormwater Manual. ANR’s best management practices form the backbone of the watershed improvement permit program and rely primarily on “end of the pipe” structural treatment controls and do not include nonstructural requirements such as erosion prevention, riparian buffer restoration, and wetland protection and restoration.

### **Watershed Improvement Permits Appealed to the WRB**

ANR issued the watershed improvement permits for Bartlett Brook, Centennial Brook, Englesby Brook, and Morehouse Brook on July 1, 2002. These are impaired water bodies due primarily to excessive sediment loading caused by stormwater runoff.

On appeal, the WRB held that the WIPs were unlawful because they failed to include a schedule of compliance that assured attainment of water quality within five years as required by law. The WRB’s findings were in large part based on testimony of ANR experts, one of whom testified that ANR cannot tell whether the watershed improvement permits will be enough to meet the Vermont Water Quality Standards. Docket Nos. WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated) Findings of Fact, Conclusions of Law, and Order (Vt. Water Res. Brd. June 2, 2003).

The WRB also ordered ANR to establish TMDLs for the water bodies due to the absence of a lawful WIP. *Id.* Although ANR argued against the use of TMDLs and claimed it should be able to use a “phased approach that relies on the iterative application of [best management practices] over an indefinite period of time,” the WRB dismissed the argument, reminding ANR that under “Vermont law, compliance with the Vermont Water Quality Standards is not an aspiration but a requirement.” *Id.* The WRB further explained that it is “possible to establish and implement TMDLs, even in the face of scientific uncertainty, by adjusting the use of best management practices] and other components of TMDLs based on monitoring and experience.” *Id.*

It is important to note that the WRB’s decision does not invalidate the watershed improvement permit regulatory scheme. The decision only applies to the four permits on appeal to the WRB because they did not offer sufficient assurance to the WRB that the impaired bodies of water would comply with the Vermont Water Quality Standards within five years.

Moreover, the WRB specifically held that WIPs may be used to address both direct and indirect stormwater runoff despite ANR’s assertion that its regulatory authority is limited to “collected” runoff from point sources only. The WRB also suggested that

ANR may be more effective in implementing WIPs if it considered approaches, other than end of the pipe regulations, in developing cleanup plans that include the protection of riparian buffers and wetlands which can help assimilate sediment loads before they reach the impaired water bodies.

In the wake of its decision and ANR's claims that it will seek a legislative amendment to remove the five-year compliance requirement from 10 V.S.A. § 1264(f), the WRB has initiated a rarely used process of opening an "investigative docket." The process will allow the public, regulators, and scientists to participate in a review and discussion of the legal and scientific issues surrounding WIPs and impaired waters outside of the context of a contested case in an effort to establish accurate information and to find common ground. VLCT will be following and reporting on the progress of the WRB's investigative hearings during the upcoming months and will be exploring creative ways municipal land use regulations can be implemented to ensure that local water quality is protected.

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