STATE OF VERMONT
ENVIRONMENTAL COURT

In re: Stormwater NPDES Petition (Conservation Law Foundation Appeal)[1]	**}**	**Docket No. 14-1-07 Vtec**

Decision on Pending Motions

This matter arises out of a denial by the Vermont Agency of Natural Resources ("ANR") of a petition,[2] originally filed in June, 2003, by the Conservation Law Foundation ("CLF"), seeking (1) a determination that existing stormwater discharges into Potash, Englesby, Morehouse, Centennial and Bartlett Brooks ("Brooks") contribute to violations of the Vermont Water Quality Standards ("VWQS") and (2) that such discharges, particularly those associated with or created by development, require National Pollution Discharge Elimination System ("NPDES") permits, pursuant to the federal Clean Water Act ("CWA") and its implementing state statutes.[3]

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[1] The Court previously captioned this appeal "**Conservation Law Foundation Stormwater Discharge Designation**." During our evaluation of the pending motions, we determined that the caption needed to be changed to more accurately reflect the subject matter of this appeal and to mirror the caption from the prior appeal on this petition, noted in footnote 2, below. Appeals to this Court do not follow the format of civil matters involving a plaintiff and a defendant; our appeals most often concern a specific property, permit, or (as in this case) petition. Our captions are more appropriate when they make some reference to the thing that is the subject of the appeal. For further guidance, we also note in the caption the name of the primary appealing party.

[2] This CLF petition was first considered and rejected by ANR in 2003; it was ultimately addressed by our Supreme Court in In re Stormwater NPDES Petition, 2006 VT 91, 180 Vt. 261. The Supreme Court ultimately remanded CLF's 2003 petition back to ANR to "undertak[e] the requisite fact-specific analysis under its residual designation authority to determine whether NPDES permits were necessary for the [stormwater] discharges in question." Id. at ¶¶ 29, 180 Vt. at 277. By letter of the Commissioner for ANR's Department of Environmental Conservation, dated December 14, 2006, ANR again announced it's determination that the 2003 petition from CLF should be denied.

[3] Due to the volume of acronyms in this Decision, the following compilation is intended to assist the reader:

ANR is the Agency of Natural Resources;
BMP is a best management practice;
CLF is the Conservation Law Foundation;
CWA is the federal Clean Water Act;
EPA is the United States Environmental Protection Agency;
DEC is the Department of Environmental Conservation, within the Vermont Agency of Natural Resources;
LA is the Load allocation (from "non-point sources");
NPDES is the National Pollution Discharge Elimination System;
RDA is the residual designation authority conferred on the EPA and the state agencies to which it has delegated such authority and responsibilities under the CWA;
SWAG is the Stormwater Advisory Group;
TBEL is a technology-based effluent limitation;

Appellant CLF is represented by Christopher M. Kilian, Esq., and Anthony N.L. Iarrapino, Esq.; Appellee ANR is represented by Aaron Adler, Esq., and Catherine Gjessing, Esq.; and the Water Resources Panel of the Vermont Natural Resources Board ("Water Panel") is represented by John H. Hasen, Esq. and Mark L. Lucas, Esq.

CLF has moved for summary judgment, which ANR has opposed. The Water Panel filed a response to CLF's motion for summary judgment and also filed a motion to compel mediation.[4] Additionally, ANR moved to dismiss the Statement of Questions filed by CLF and moved to dismiss CLF's request for relief. CLF filed legal memoranda in opposition to the motions to dismiss.

The undisputed facts that are material to the pending motions are listed below.

Factual Background[5]

A. Description of Waterbodies

1. Potash Brook, Englesby Brook, Bartlett Brook, Morehouse Brook and Centennial Brook are located in urbanized areas in Chittenden County and drain into Lake Champlain. Since at least 1998, ANR has documented ongoing violations of the VWQS in these five Brooks. Appellant filed a copy of the 1998 § 303(d) list of impaired state waters as Exhibit Y in this proceeding. 33 U.S.C. § 1313(d).

2. Due to the ongoing violations of the VWQS, ANR placed these five Brooks on the 2006 list of impaired state waters, as required by 33 U.S.C. § 1313(d). This list of impaired state waters, which is prepared every two years pursuant to the Clean Water Act ("CWA"), includes these five Brooks due to a failure to attain the "aquatic life support" use for which these Brooks are designated. Two of the five Brooks also fail to attain the "contact recreation (i.e.

TMDL is the Total Maximum Daily Load;
VWQS are the Vermont Water Quality Standards;
VWPCA is the Vermont Water Pollution Control Act;
Water Panel is the Water Resources Panel of the Vermont Natural Resources Board;
WLA is the Wasteload allocation (from "point sources"); and
WQBEL is a water quality-based effluent limitation.

[4] The Water Panel's motion to compel mediation was later withdrawn during the November 13, 2007 hearing.

[5] All facts recited or referenced here are undisputed unless otherwise noted. For purposes of the motion for summary judgment only, we view the material facts in a light most favorable to the non-moving parties. V.R.C.P. 56(c). We are not yet at the stage of making specific factual findings. Thus, our recitation here should not be regarded as factual findings See Blake v. Nationwide Ins. Co., 2006 VT 48, ¶ 21, 180 Vt. 14, 24 (citing Fritzen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000)(mem.)).

swimming)" use.[6] Appellant filed a copy of the 2006 § 303(d) list of the seventeen impaired state waters as Exhibit A.

3. The 2006 § 303(d) list indicates that stormwater is the vehicle by which sediment and other pollutants—which are causing some of the violations of the VWQS—travel into Englesby Brook, Bartlett Brook, Morehouse Brook and Centennial Brook and that releases of the E. coli bacteria are causing violations of the VWQS in Potash Brook and Englesby Brook.

4. Morehouse Brook drains a small, highly urbanized 262±-acre watershed that straddles the boundary between the City of Winooski and the Town of Colchester. The stream flows generally in a westerly direction, eventually draining into the Winooski River, which then flows into Lake Champlain. The lower stream channel has a relatively steep gradient confined within steep valley walls; this section of Morehouse Brook is characterized by several mass failures of the stream bank that contribute to the large amounts of fine sediment in the stream channel. The upper stream channel is less steep and is less affected by erosion. The entire stream and its tributaries are Class B waters, designated as cold water fish habitat pursuant to the VWQS. The land use breakdown within the Morehouse Brook watershed is 88% developed land (residential, commercial, industrial, etc.), 1% open land (agricultural or open), and 11% forested land (forest, wetland, or open water). See Draft Morehouse Brook TMDL, May 2007, a copy of which was supplied to the Court as Appellant's Exhibit D. Morehouse Brook is designated as impaired on the 2006 § 303(d) list due to non-support of aquatic life designated uses. The source of the impairment is multiple impacts associated with excess stormwater runoff. Id.

5. Centennial Brook drains an 887±-acre watershed in the municipalities of Burlington and South Burlington. The stream flows generally in a northerly direction, with its confluence with the Winooski River located about one half mile above the Winooski Dam. Interstate Highway 89 ("I-89") traverses through the center of the watershed. The entire stream and its tributaries are Class B waters, designated as cold water fish habitat pursuant to the VWQS. The land use breakdown within the Centennial Brook watershed is 71% developed land, 4% open land, and 25% forested land. See Draft Centennial Brook TMDL, May 2007, a copy of which was supplied to the Court as Appellant's Exhibit E. Centennial Brook is designated as impaired on

[6] Englesby Brook and Potash Brook are on the § 303(d) list of impaired state waters due to their failure to support a "contact recreation (i.e. swimming)" use.

the 2006 § 303(d) list due to its non-support of aquatic life designated uses. The source of the impairment is multiple impacts associated with excess stormwater runoff. Id.

6. Bartlett Brook drains a 736±-acre watershed in the City of Burlington. Several small tributaries enter the main branch, which flows generally in a westerly direction and drains into Lake Champlain. The entire stream and its tributaries are Class B waters, designated as cold water fish habitat pursuant to the VWQS. The land use breakdown within the Bartlett Brook watershed is 62% developed land, 21% open land, and 17% forested land. See Draft Bartlett Brook TMDL, May 2007, a copy of which was supplied to the Court as Appellant's Exhibit F. Bartlett Brook is designated as impaired on the 2006 § 303(d) list due to its non-support of aquatic life designated uses. The source of the impairment is multiple impacts associated with excess stormwater runoff. Id.

7. Englesby Brook drains a 605±-acre watershed predominantly in the City of Burlington. The main branch of the brook flows generally in a westerly direction, emptying into Burlington Bay on Lake Champlain. The entire stream and its tributaries are Class B waters, designated as cold water fish habitat pursuant to the VWQS. The land use breakdown within the Englesby Brook watershed is 96% developed land and 4% forested land. See Draft Englesby Brook TMDL, May 2007, a copy of which was supplied to the Court as Appellant's Exhibit G. Englesby Brook is designated as impaired on the 2006 § 303(d) list due to its non-support of aquatic life designated uses and a failure to attain the "contact recreation (i.e. swimming)" use.[7] The source of the impairment is multiple impacts associated with excess stormwater runoff and E. coli contamination. Id.; 2006 § 303(d) list.

8. Potash Brook drains a 7.13± square mile watershed predominantly in the Town of South Burlington. The main branch of the brook flows generally in a westerly direction, emptying into Shelburne Bay on Lake Champlain. I-89 traverses through the center of the watershed. The entire stream and its tributaries are Class B waters, designated as cold water fish habitat pursuant to the VWQS. The land use breakdown within the Potash Brook watershed is 53% developed

[7] The Court notes an apparent discrepancy between the 2006 § 303(d) list which says that Englesby and Potash Brooks do not support a contact recreation use, and each Brook's TMDL which says that Englesby and Potash Brooks are not supporting an aquatic life use. Also, E. coli is listed in the 2006 § 303(d) list as the pollutant causing the impairments in Englesby and Potash Brooks, while stormwater is listed as the pollutant causing the impairment in the Englesby and Potash Brook's TMDL. Because the TMDLs for the Brooks were drafted and approved after the 2006 § 303(d) list, we conclude it more appropriate to follow the Brooks' uses and pollutants as described in the approved TMDLs.

land, 30% open land, and 17% forested land. See Potash Brook TMDL, October 2006, a copy of which was supplied to the Court as Appellant's Exhibit H. Potash Brook is designated as impaired on the 2006 § 303(d) list due to its non-support of aquatic life designated uses and a failure to attain the "contact recreation (i.e. swimming)" use. Id. The source of the impairment is multiple impacts associated with excess stormwater runoff and E. coli contamination. Id.; 2006 § 303(d) list.

B. Procedural History

9. In June of 2003, CLF[8] petitioned ANR, seeking a determination that would require NPDES permits, pursuant to § 402(p)(2)(E) of the CWA, for all stormwater discharges that contribute to known violations of the VWQS in the Potash, Englesby, Bartlett, Morehouse and Centennial Brooks.

10. The petition was filed pursuant to a provision of the federal stormwater regulations authorizing "[a]ny person [to] petition the Director to require a NPDES permit for a discharge which is composed entirely of storm water which 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(f)(2).

11. The petition was premised on findings that the five Brooks in question did not meet the VWQS; that the Brooks were therefore listed on the federally mandated schedule of "impaired waters," known as the § 303(d) list, 33 U.S.C. § 1313(d); and that existing discharges within the five watersheds contribute to these impairments. Appellants filed a copy of the petition with this Court as Exhibit O.

12. The federal CWA—inclusive of the 1987 amendments—created a residual designation authority ("RDA") to administer the protection and remediation of stormwater impaired streams. ANR, a state agency duly certified by the United States Environmental Protection Agency ("EPA") to enforce the federal NPDES permit system, sought guidance from the EPA on the nature and scope of its RDA, specifically within the context of CLF's petition. EPA, in response, advised that stormwater discharges must be evaluated on a "case-by-case basis" and that a permit "must be denied if the discharge would cause or contribute to a violation of water quality standards," but that otherwise "an agency should act reasonably in its exercise of

[8] The Vermont Natural Resources Council joined CLF in the petition to ANR.

discretion to designate (or not) sources based on available information and relevant considerations." See In re Stormwater NPDES Petition, 2006 VT 91, ¶ 7 (citing Letter from EPA to ANR of Sept. 16, 2003). EPA had "not defined a threshold level of pollutant contribution" that would require a NPDES permit, but observed that discharges which contribute more than "de minimis" levels of pollutants would be a "reasonable" standard. Id. Appellants filed a copy of the EPA letter as Exhibit M.

13. In September of 2003, ANR sent a letter to CLF categorically denying its 2003 petition. CLF then appealed ANR's denial to the former Vermont Water Resources Board ("Water Board")[9] under 10 V.S.A. § 1269. Several commercial entities from the Burlington area[10] were granted party status and opposed CLF's appeal in front of the Board.

14. In 2004, after resolving several jurisdictional and procedural issues, the Water Board reversed ANR's decision. See In re NPDES Stormwater Petition, Docket No. WQ-03-17, Mem. Of Decision (Vt. Water Res. Bd. Oct. 14, 2004); see also In re NPDES Stormwater Petition, Docket No. WQ-03-17, Mem. Of Decision (Vt. Water Res. Bd. April 1, 2004). The Water Board remanded the matter to ANR with instructions to implement and require NPDES permits for all existing non-de minimis discharges of stormwater "that increase the mass loading of stormwater pollutants into these stormwater-impaired streams . . .." Id. at 12.

15. ANR and the commercial entities appealed the Water Board's decision to the Vermont Supreme Court. In August of 2006, the Supreme Court reversed the Board's decision that all stormwater discharges in the five watersheds required NPDES permits and remanded the matter back to ANR to undertake the requisite analysis under its RDA to determine whether NPDES permits were necessary for the specific discharges in question, in light of the views expressed in its opinion. In re Stormwater NPDES Petition, 2006 VT 91, ¶ 30.

16. After the Supreme Court decision, ANR renewed its collection of stormwater data and review of CLF's 2003 petition. In December of 2006, Jeffrey Wennberg, then-Commissioner of the ANR's Department of Environmental Conservation ("DEC"), sent a letter ("Wennberg

[9] Prior to the implementation of the 2004 Permit Reform Act, appeals from ANR determinations, such as the decision on CLF's petition, were made to the former Vermont Water Resources Board. The 2004 Permit Reform Act vested jurisdiction of such appeals in this Court. 4 V.S.A. § 1001(b). The remaining responsibilities of the former Water Resources Board are now administered by Water Resources Panel of the Vermont Natural Resources Board.

[10] These commercial entities included Pomerleau Properties, Inc., Martin's Foods of South Burlington, Inc., and Greater Burlington Industrial Corp.

Letter") to CLF, again denying CLF's 2003 petition. In the letter, Commissioner Wennberg announced that ANR had "determined that it is not prudent or necessary to residually designate existing discharges into the five identified streams . . . [t]his conclusion is based on additional scientific data and information gathered and generated by ANR within the past two years, and on ANR's ongoing efforts in developing TMDLs and implementation plans for these waters . . .." Wennberg Letter at 2. The letter also states that "ANR will consider residually designating the discharges that it identifies in the general permit under the authority of 40 C.F.R. § 122.26(a)(9)(i)(C) (which is the more appropriate tool for residual designation after the issuance of a TMDL) if such discharges are 'point sources'. These residually designated discharges would then be subject to a NPDES general watershed permit." Wennberg Letter at 3. Appellants filed a copy of the Wennberg Letter as Exhibit N.

17. In January of 2007, CLF appealed ANR's most recent denial of its 2003 petition to this Court.

18. CLF moved for summary judgment in July of 2007; ANR moved to dismiss CLF's Questions and request for relief in August of 2007. The Court conducted a hearing on November 13, 2007 on the pending motions and thereafter allowed the parties to submit additional briefs. In June of 2008, this Court requested supplemental briefs from the parties in light of possibly changed factual circumstances following EPA's intervening approval of the TMDLs for each of the five Brooks at issue. All parties submitted supplemental briefs.

19. ANR has yet to exercise its residual designation authority for any of the five Brooks. It has chosen not to require applications for specific NPDES permits for the complained-of stormwater affecting one or more of these five impaired Brooks.

C. State Stormwater Permit Amendment

20. During the administrative and judicial proceedings that concerned CLF's petition before ANR and the former Water Board, the Vermont Legislature passed comprehensive amendments to the state stormwater management program. "The amendments, adopted in 2004, essentially require ANR to formulate cleanup plans within three years for the stormwater-impaired waters on the State's 303(d) list (including the five watersheds at issue here), 10 V.S.A. § 1264(f)(3), and to establish an interim permitting program for discharges from new, expanded, or redeveloped impervious surfaces in excess of one acre in order to achieve a 'net zero' discharge goal." In re Stormwater NPDES Petition, 2006 VT 91, ¶ 19.

21. DEC is the permitting authority for the NPDES general permits currently authorized by federal law. NPDES permits administered by the agency include the construction general permit for stormwater discharges associated with construction activity; multi-sector general permits for stormwater discharges associated with industrial activity; and Phase II MS-4 permits for separate municipal storm sewer systems.

D. TMDL Development and SWAG

22. Section 303(d) of the CWA requires each state to identify impaired waters—waters not attaining water quality standards—and then establish a proposed Total Maximum Daily Load ("TMDL") for the pollutants that are responsible for the impairment. The TMDL establishes the allowable pollutant loading from all contributing sources so that the applicable water quality standards will not be exceeded within the brook or body of water. TMDLs must account for seasonal variability and include a margin of safety that accounts for uncertainty. Once the public has an opportunity to review and comment on an ANR-established TMDL, it is submitted to EPA for approval. Upon approval, the TMDL is incorporated into the state's water quality management plan. Depending on the allocations set forth in a TMDL, certain dischargers may be required to obtain discharge permits.

23. In December of 2006, ANR received approval from EPA for the Potash Brook TMDL. Biological data was collected at several sites on the Potash Brook by the DEC from 1987 to 2004. Through the use of biological assessment data, the TMDL concluded that Potash Brook is impaired for aquatic life uses, and ANR listed stormwater as the transporting source for the pollution causing the violation of the VWQS. Aquatic life uses are determined by the health of the aquatic biota (fish and macro invertebrates as measured by biotic criteria). In streams draining watersheds where land development has occurred, biological communities are subjected to stressors associated with stormwater runoff. These stressors include increased watershed pollutant load (e.g., sediment), increased sediment load from in-stream sources (e.g., bank erosion), habitat degradation (e.g., siltation, scour, over-widening of stream channel), washout of biota, and loss of habitat due to reductions in stream base flow. These stressors associated with stormwater runoff may act individually or cumulatively to degrade the overall health of the biological community to the point of impairment. See EPA Approved Potash Brook TMDL, October 2006, a copy of which was supplied to this Court as ANR-Supp. Exhibit 7.

24. In September of 2007, ANR received approval from EPA for the TMDLs that ANR established for the Centennial, Bartlett, Englesby, and Morehouse Brooks. Appellees filed a copy of the EPA approval letter as ANR-Supp. Exhibit 2. As with Potash Brook, each of the four Brooks is impaired for aquatic life uses and stormwater is transporting the pollutants causing the violations of the VWQS within these impaired waters.

25. The five approved TMDLs determine the maximum pollutant loading a specific Brook can receive and still maintain compliance with the VWQS. In addition to the overall watershed target, TMDLs also provide an allocation for that target between point sources and nonpoint sources, or, the Wasteload Allocation ("WLA" for point sources) and the Load Allocation ("LA" for nonpoint sources), respectively.[11] Developed areas typically contain the highest percentage of impervious surface area and convey stormwater via pipes or swales, and thus are defined as point sources for stormwater pollutants and fall into the WLA. Open and forested areas fall into the LA, or nonpoint sources. Because there is a minimal allocation[12] for the open and forested areas, generally all needed reductions to meet the TMDL targets are directed to the point sources from development governed by the WLA. Because of data limitations, the TMDLs do not separate stormwater discharges subject to the NPDES program (e.g., construction general permits, multi-sector general permits, and MS-4 permits) from stormwater discharges that are not currently subject to the NPDES program (e.g., general permits under Vermont's stormwater program). Therefore, because of the data limitations, generally all stormwater discharges from the developed land category are included in the WLA portion of the TMDL.[13] See Potash Brook TMDL, October 2006; Morehouse, Englesby, Centennial, Bartlett Brook TMDL, August 2007 as ANR-Supp. Exhibits 3-7.

26. The impairments in the five Brooks are based on biologic indices—i.e., aquatic life uses. Therefore, numeric pollutant criteria are not used as TMDL targets. Instead, the in-stream

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[11] ANR asserts that the WLA includes both point and non-point sources. We do not believe the undisputed evidence currently before us supports this assertion. The WLA includes point sources that are already covered by NPDES permits (i.e., MS-4) and those point sources currently unregulated by state or federal law; both are still point sources.

[12] Morehouse and Englesby Brooks have a 100% WLA, Centennial Brook has a 99% WLA, Bartlett Brook has a 93% WLA, and Potash Brook has a 91% WLA.

[13] The WLAs include runoff from the NPDES-regulated stormwater point sources (i.e., discharges subject to MS-4 permits, phase 1 and 2 construction site stormwater permits, and from permits required for industrial activities), runoff from non-point sources, and runoff from non-NPDES-regulated point sources (i.e., commercial sources and small construction sites).

targets are expressed as measures of the hydrologic conditions necessary to achieve the Vermont water quality criteria for aquatic life. Specifically, targets are expressed as a percent flow reduction in relation to the flow rate that is equaled or exceeded 0.3% of the time, that is, nearly the maximum flow rate. This target is established for each brook based on the hydrologic conditions in watersheds where the aquatic life criteria were met—i.e., reference watersheds.

27. Using flow duration curves, the flow reduction targets are 25% for Englesby Brook, 54% for Morehouse Brook, 9% for Bartlett Brook, 16% for Potash Brook and 50% for Centennial Brook.[14] See Table 3 of each Brook's TMDL.

28. Hydrologic targets—which the TMDLs rely on—are used as surrogates for water quality and include both the wash-off sediment loads and the sediment loads generated from within the channel system. Similarly, stormwater runoff volume is used as the surrogate for the loading capacity (i.e., the maximum amount of pollutant inputs from the watershed that will allow for compliance with the VWQS).

29. The WLAs are presented in Table 7 of each Brook's TMDL and are expressed as percent reductions in stormwater runoff volume at the 0.3% flow. The reduction targets are 65.3% for Morehouse Brook, 34.4% for Englesby Brook, 63.0% for Centennial Brook, 16.5% for Potash Brook and 33.2% for Bartlett Brook. See Table 7 of each Brook's TMDL. Because stormwater discharges are less amenable to individual WLAs, EPA guidance provides for allocations for stormwater discharges from multiple point sources to be expressed as a single categorical WLA, but only when data or information are insufficient to assign each source or outfall individual WLAs. See Memorandum from the EPA Office of Water to the Water Division Directions entitled "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLA) for Stormwater Sources and NPDES Permit Requirements Based on those WLAs" (Nov. 22, 2002). Vermont DEC has determined that, due to the variable nature of stormwater and the insufficient data on each parcel, all the stormwater runoff from the urban/developed land use category is combined into the aggregate WLAs, as presented in Table 7 of each Brook's TMDL.

30. The WLAs also include allocations for future growth resulting from the development of single-family homes and other small developments.[15] However, the TMDLs do not include an allocation for future growth that creates more than one acre of impervious surface because these

[14] The TMDLs note that the Vermont Water Board's 2004 report identifies flow duration curves ("FDCs") as the best method for defining hydrologic targets.

[15] For example, development that would otherwise not be required to obtain a state stormwater permit.

developments will be required by state law to comply with Vermont's stormwater regulations. 10 V.S.A. § 1264(d)(1)(D).

31. Although the CWA does not require that TMDLs include implementation plans, Vermont DEC has included an implementation plan in each TMDL. Vermont's implementation strategy includes two components: a federally-authorized NPDES permit for all CWA-regulated discharges, and a state-authorized permitting program for stormwater discharges from impervious surfaces generally larger than one acre. The first prong of implementation will involve the issuance of watershed general permits that will require monitoring, treatment and control measures by specifically identified dischargers of stormwater runoff. Based on the data gleaned from a monitoring program, the watershed general permits may be amended to provide for more stringent treatment, controls or BMPs in order to meet the VWQS. The second prong of the implementation plans will include the currently-required NPDES permits issued by ANR for stormwater discharges subject to the CWA (i.e., for construction activities, industrial activities, and municipal discharges.) These NPDES permits will contain conditions for implementation of BMPs. Also, Vermont plans to implement a variety of non-point source control measures. See Potash Brook TMDL, October 2006; Morehouse, Englesby, Centennial, Bartlett Brook TMDL, August 2007.

32. ANR proposes that by October 1, 2008, it will issue plans to implement the TMDLs for the five Brooks at issue, pursuant to recent legislation. 2007, No. 130 (Adj. Sess.), § 4. Under this regime, remedial permits must be issued by January 15, 2010. 10 V.S.A. § 1264(f)(3).

33. To assist in developing implementation plans for the TMDLs, ANR has reconvened a group of stakeholders known as the Stormwater Advisory Group ("SWAG") to consider the complexities of stormwater remediation, the costs of installing control measures, and the determination of appropriate permitting mechanisms to execute the plans. ANR asserts that the complexities and uncertainties associated with control measures designed to implement the TMDLs—including retrofits for existing dischargers—will require significant capital for each Brook at issue and may lead to additional litigation from affected property owners.

E. Additional Site-Specific Data

34. Commissioner Wennberg stated in his December 14, 2006 letter that "over the past two years ANR has gathered extensive data regarding the size and nature of the existing discharges to these five streams. ANR has identified all existing discharge points to these streams and linked

these discharge points to their contributing impervious surfaces. Drainage polygons have been GIS mapped, discharge outfalls have been inventoried and documented, and related property ownership information gathered." Appellants filed a copy of the Wennberg Letter as Exhibit N. It represents the ANR determination that is now the subject of this de novo appeal.

35. The data gathered by ANR was, in part, acquired from a civil engineering firm that contracted with ANR to field-map accurate and up-to-date delineations of the sub-watersheds within each of the stormwater impaired watersheds. During the spring and summer of 2005, the engineering firm conducted field reconnaissance, mapped stormwater outfalls, met with local officials, reviewed permitted and unpermitted stormwater discharge plans, and gathered other stormwater GIS data. This work resulted in the development of a GIS database (the "Mapping Report") of watersheds that depicts the catchments and outfalls for the subject impaired Brooks. Section 5.1 of the engineering firm's Mapping Report includes a table that lists the number of sub-watersheds and all the identifiable closed pipe point-source stormwater discharges and open-channel stormwater discharges in each watershed. The Mapping Report identifies the discharges as follows: Potash Brook consists of 192 sub-watersheds with 207 closed pipe and 60 open-channel point-source stormwater discharges; Morehouse Brook consists of 10 sub-watersheds with 7 closed pipe and 3 open-channel point-source stormwater discharges; Centennial Brook consists of 38 sub-watersheds with 46 closed pipe and 18 open-channel point-source stormwater discharges; Englesby Brook consists of 47 sub-watersheds with 33 closed pipe and 26 open-channel point-source stormwater discharges; and Bartlett Brook consists of 55 sub-watersheds with 26 closed pipe and 29 open-channel point-source stormwater discharges. Appellant filed a copy of the Mapping Report as Exhibit P.

36. The Mapping Report contains data for every identifiable individual point-source discharge in the impaired Brooks. The data sets include a description of the conveyance (i.e., location and condition of the open channel or closed pipe), the odor of the discharge, the deposit stains of the discharge, the vegetative density of the discharge, whether any pipe benthic growth exists (i.e., organisms living on the bottom of the water body), the quality of the pools in the brook, the flowing color of the brook below the discharge, the flowing turbidity below the discharge, the flowing floatables below the discharge, other concerns (i.e., excess trash, bank erosion, excess sediment, etc.) and a cumulative ranking for the "outfall severity." The "outfall severity" ranks the point-source discharges from 1 (limited impact) to 5 (significant impact),

using the data gleamed from the prior analysis. Appendix 2 from Mapping Report. Generally, most discharges in the impaired Brooks are ranked from "1" to "4," with the majority being ranked as "2." Id.

37. In February of 2008, Peter LaFlamme, the current Director of ANR's Water Quality Division, acknowledged that even after the approvals of the TMDLs for the five Brooks at issue, the "problem is the result of not [] any one particular property but the cumulative impact of all the runoff from the watershed." Appellant filed a copy of the audio CD transcript of Mr. LaFlamme's testimony as Exhibit Z.

Discussion

This appeal may be characterized as the latest chapter in a continuing feud over the permitting of unregulated stormwater discharges into impaired waters in the state of Vermont. It is the most recent chapter because, over the past four years, state and federal courts and agencies in Vermont have addressed variations on the single general issue of whether stormwater discharges into the five impaired Brooks contribute to violations of the VWQS, and if they do contribute, whether the discharges require NPDES permits under the CWA.[16]

The five Brooks discussed above are listed[17] as biologically impaired due to stormwater runoff. Therefore, CLF asserts that any discharge of stormwater into the impaired Brooks will necessarily—in a simplistic sense—load pollutants and contribute to violations of the VWQS. However, because a plain-meaning application of the term "contribute" is not always germane to its legal application, it is not therefore settled whether a threshold exists for "contributions" to violations of water quality standards. A resolution of the first issue necessarily begs the second issue; that is, whether the discharges that do contribute to violations require NPDES permits under the CWA, or whether the discharges may be properly regulated exclusively under the existing and proposed state stormwater regime.

The Vermont Supreme Court attempted to refocus this issue in In re Stormwater NPDES Petition, 2006 VT 91, by remanding the case back to ANR with directions. The Court concluded

[16] See In re Stormwater NPDES Petition, 2006 VT 91; In re NPDES Stormwater Petition, Docket No. WQ-03-17, Mem. Of Decision (Vt. Water Res. Bd. April 1, 2004); In re NPDES Stormwater Petition, Docket No. WQ-03-17, Mem. Of Decision (Vt. Water Res. Bd. Oct. 14, 2004); Conservation Law Foundation v. Hannaford Bros. Co., et al., 327 F.Supp.2d 325 (Vt. Dist. Ct., May 14, 2004) aff'd 139 Fed. Appx. 338 (2d Cir. 2005)

[17] 2006 § 303(d) list of impaired waters.

that the former Water Board erred by relying on prior Board decisions[18] to determine that all discharges of stormwater contribute to violations of the VWQS—through the Water Board's application of collateral estoppel—because "[i]t is manifestly not a decision that can be grounded on a single factual finding, in a separate legal setting . . .." Id. at ¶ 26. The Court also rejected several procedural and jurisdictional arguments put forward by ANR regarding the Water Board's jurisdictional authority. Thereafter, the Court addressed the core substantive issue of that appeal. Id. at ¶¶ 10-21. As discussed below, several of the issues resolved by the Supreme Court have been raised again in this most recent appeal on the same CLF petition.

On the merits, the Court did not wholly reject CLF's assertion that ANR should require NPDES permits to be applied for when polluting stormwater is discharged into impaired waters; however, nor did it create a bright-line rule establishing when a NPDES permit application will be required. In its decision, the Supreme Court merely remanded the issue back to ANR, with directions to "undertak[e] the requisite fact-specific analysis under its residual designation authority to determine whether NPDES permits were necessary for the discharges in question." Id. at ¶ 29.

A. Regulatory background of the federal Clean Water Act

In view of the Supreme Court's decision, a summary of the regulatory backdrop of the CWA and its progeny is a useful first step.[19] The CWA was enacted in 1972 "to restore and maintain the chemical, physical and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), "which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water. Id. § 1251(a)(2). In order to restore and maintain the Nation's waters, the CWA prohibits the discharge of any pollutants into navigable waters, unless the discharge complies with the provisions of the Act, including § 402. 33 U.S.C. § 1342.[20]

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[18] See In re Hannaford Bros. Co & Lowes Home Centers, Inc. No WQ-01-01, Mem of Decision (Vt. Water Res. Board, Jan. 12, 2002), aff'd No. 280-02 CnCv (Chittenden Co. Super. Ct. April 20, 2003); and In re Morehouse Brook, Englesby Brook, Centennial Brook & Bartlett Brook, Docket No. WQ-02-04, Mem. Of Decision (Vt. Water Res. Bd. June 2, 2003). ("The [Water] Board characterized these decisions as conclusively holding, for purposes of federal law, 'that every discharge of stormwater pollutants into these stormwater-impaired urbanized waters contributes to the impairment' and therefore requires a NPDES permit, subject to any 'de minimis' exception established by ANR on remand." In re Stormwater NPDES Petition, 2006 VT 91, ¶ 22).

[19] The following discussion of the CWA will necessarily include and involve implementing state statutes and regulations.

[20] A "discharge" is any addition of a pollutant to waters of the United States from a point source. CWA § 502(12), 33 U.S.C. § 1362, 40 C.F.R. § 122.2. A "point source" is a "discernable, confined, and discrete conveyance," which may include, for example, a pipe, a ditch or a channel. CWA § 502(14), 33 U.S.C. § 1362(14), 40 C.F.R. § 122.2.

Section 402 authorizes the issuance of NPDES permits to sanction the discharge of such pollutants, despite the general prohibition contained in 33 U.S.C. § 1342. See 40 C.F.R. 122.1(b)(1).

While Congress empowered EPA to enforce the NPDES permit system, § 402 allows states to establish programs in conformance with federal guidelines so that states may enforce the NPDES permit system together with the enforcement of state water protection regulations, "provide[d the state has] adequate authority to carry out the described program." 33 U.S.C. § 1342(b); 40 C.F.R. § 123.1(f) ("Any state program approved by the Administrator shall at all times be conducted in accordance with the requirements of this part [of the federal regulations]."). In 1974, EPA authorized and duly certified Vermont's agency—ANR—to implement the NPDES permit system in Vermont.

In 1987, Congress enacted the Water Quality Act, which among other things, amended part of the CWA by adding § 402(p). Section 402(p) established a two-phase regulatory approach to address the persistent challenge of limiting pollutants discharged via stormwater. In Phase I of this section, Congress set forth a moratorium, which lasted until October 1, 1994, preventing EPA or authorized state agencies from requiring permits for "discharges composed entirely of stormwater", with four exceptions.[21] 33 U.S.C. § 1342(p)(2)(A)-(D). In Phase II of this section, EPA or an authorized state agency is vested with "residual authority" to designate any other discharge as requiring a NPDES permit if it "contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 33 U.S.C. § 1342(p)(2)(E).

In 1999, after completing the study required under the Phase I Rules,[22] EPA issued the Phase II Rules. See National Pollutant Discharge Elimination System: Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed.Reg. 68,722 (Dec. 8, 1999)(codified at 40 C.F.R. pts. 9, 122, 123, & 124). In addition to defining what stormwater discharges require NPDES permits, the Phase II Rules retained the residual designation authority ("RDA") of EPA and authorized state agencies to require a NPDES permit

[21] The four exceptions are for: (1) discharges subject to an existing permit; (2) discharges associated with industrial activity; (3) discharges from a municipality serving a population of 250,000 or more (MS-4 permit); (4) discharges from a municipality with a population between 100,000 and 250,000 (MS-4 permit). 33 U.S.C. § 1342(p)(2)(A)-(D).

[22] The Phase I Rules required that EPA study those discharge not identified as requiring a permit in Phase I and to issue new regulations based on the results of the study. 33 U.S.C. § 1342(p)(5).

for any additional sources of stormwater pollution if they contribute to a violation of a water quality standard. 40 C.F.R. § 122.26(a)(9)(i)(A)-(D) (2006).

EPA's anti-degradation regulation—40 C.F.R. § 131.12—requires that states adopt anti-degradation policies and identify implementation methods to provide for water quality protection. Using three tiers to prevent degradation depending on use, EPA regulations require, at a minimum, the maintenance and protection of in-stream water uses and water quality to protect existing uses. 40 C.F.R. § 131.12(a)(1). For "high quality waters," water quality shall be maintained and protected unless, based on statutorily provided public procedures, the State finds that lower water quality is necessary to accommodate important economic or social development. 40 C.F.R. § 131.12(a)(2). For "exceptionally high quality waters" that represent an outstanding national resource, water quality shall be maintained and protected with no exception for economic and social necessity. 40 C.F.R. § 131.12(a)(3).

The VWQS contain the following anti-degradation policy in § 1-03(B): "[a]ll waters shall be managed in accordance with these rules to protect, maintain and improve water quality." VWQS § 3-04(A) states that "Class B waters shall be managed to achieve and maintain a high level of quality that is compatible with the following beneficial values and uses: . . . aquatic biota and wildlife sustained by a high quality aquatic habitat with additional protection in those waters where these uses are sustainable at a higher level . . .." VWQS § 3-04(A)(1). Here, the five Brooks at issue are impaired. All Brooks are classified as Class B waters, designated as cold water fish habitat pursuant to the VWQS and are listed as impaired, since the bio-monitoring data does not meet the criteria for Class B standards. Thus, the Brooks do not support the designated uses for Class B waters. See 2006 § 301(d) list for impaired waters; Potash Brook TMDL, October 2006; Morehouse, Englesby, Centennial, Bartlett Brook TMDLs, August 2007.

The CWA generally provides two tiers of water pollution controls to achieve the objectives of the CWA. Tier one controls include technology-based effluent limitations ("TBELs") which provide the minimum required controls for NPDES permits. TBELs are promulgated by EPA to restrict the quantities, rates, and concentrations of certain point-source pollutants and represent the minimum level of control that must be imposed. See In re NPDES Stormwater Petition, No. WQ-03-17, Mem. Of Dec. at 4 (Water Resources Board, April 1, 2004) (citing CWA § 301, 33 U.S.C. § 1311, 40 C.F.R. § 125.3(a)). Tier two controls, on the other hand, supply water quality-based effluent limitations ("WQBELs") that "apply over and above

TBELs as necessary to ensure that water quality does not fall below state water quality standards." Id. (citing 40 C.F.R. 122.44(d)). Thus, "[w]here point sources discharge pollutants with 'reasonable potential' to cause or contribute to violations of state water quality standards, NPDES permits must include [WQBELs] above and beyond TBELs." Id. at 5 (citing 40 C.F.R. § 122.44(d), CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C)). However, the highly variable conditions associated with stormwater discharges—including the intensity and duration of rainfall, the fluctuation of pollutants, and the varying property uses and space limitations within the sub-watersheds—make the application of a numeric WQBEL or TBEL standard complex and nearly unfeasible. Fortunately, EPA regulations, guidance and persuasive case law provide a simplified approach for regulating stormwater through NPDES permits: the use of "best management practices" ("BMPs").

Due to the complexities associated with implementing a numeric WQBEL and a TBEL, NPDES permits for stormwater discharges may include BMPs as a standard to control or abate the discharge of pollutants. 40 C.F.R. § 122.44(k)(2). In Divers' Envtl. Conservation Org. v. State Water Res. Control Bd., 145 Cal.App.4th 246, 256 (4th Dist. 2006), which involved an environmental group's appeal of a NPDES stormwater permit issued for a Navy base that relied upon BMPs, a California District Court of Appeal noted that

> In regulating storm water [NPDES] permits the EPA has repeatedly expressed a preference for doing so by way of BMP's, rather than by way of imposing either technology-based or water quality-based numeric limitations. Unlike discharges of process wastewater where numeric effluent limitations (technology based and/or water quality-based) are typically used to control the discharge of pollutants from industrial facilities, the primary permit condition used to address discharges of pollutants in a facilities storm water [sic] is a pollution prevention plan . . . [s]ite-specific storm water pollution prevention plans allow permittees to develop and implement 'best management practices', whether structural or non-structural, that are best suited for controlling storm water discharges from their industrial facility.

Id. at 256 (internal citations and quotations omitted).

In September of 2003, EPA responded by letter to ANR's questions regarding CLF's residual designation petition. EPA noted that it expected that WQBELs in a NPDES permit for designated stormwater discharges "would be expressed in most cases as best management practices because of the difficulty of establishing numerical effluent limits." Letter from EPA to ANR of 9/16/2003 at 3. Also, the Vermont Water Pollution Control Act ("VWPCA") directs

that the "[discharge] permit shall specify the use of [BMPs] to control regulated stormwater runoff."[23] 10 V.S.A. § 1264(e)(1). Thus, if ANR is compelled to exercise RDA for the impaired Brooks, in full recognition of the implications of the approved TMDLs for the Brooks at issue, ANR has flexibility in crafting the NPDES permits so that they may rely upon BMPs and not specific numeric targets in TBELs and/or WQBELs.

B. Exercise of residual designation authority to require NPDES permits

Returning to the main issue, the CWA requires EPA or an authorized state agency to exercise its RDA to require a NPDES permit if:

> (C) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that storm water controls are needed for the discharge based on wasteload allocations that are part of "total maximum daily loads" (TMDLs) that address the pollutants of concern; or
>
> (D) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, 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).

The dispute now before us in this de novo appeal arose in 2003 when CLF first filed a petition with ANR pursuant to a provision of the federal stormwater regulations authorizing "[a]ny person [to] petition the Director to require a NPDES permit for a discharge which is composed entirely of storm water which 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(f)(2). Five years later, ANR's denial of CLF's petition is now before this Court.[24] We note that we are not asked in this appeal to exercise RDA. Rather, we view the substantive question on appeal as whether ANR is now compelled to exercise RDA, as the EPA's lawful designee.

[23] "Regulated stormwater runoff" is defined in the VWPCA as "precipitation, snowmelt, and the material dissolved or suspended in precipitation and snowmelt that runs off impervious surfaces and discharges into surface waters or into groundwater via infiltration." 10 V.S.A. § 1264(a)(11).

[24] The Court refers the reader to the procedural history above.

C. Jurisdictional issues

ANR raised a threshold issue in its motion to dismiss, asserting that the Environmental Court lacks the jurisdiction to exercise—or compel ANR to exercise—RDA.[25] ANR claims that RDA for stormwater discharges is "explicitly vested in EPA and authorized state agencies." CLF v. Hannaford Bros., 327 F.Supp. 2d 325, 334 (D. Vt. 2004), aff'd 139 Fed.Appx. 338 (2nd Cir. 2005); see also 33 U.S.C. § 1342(p)(2)(E). For the reasons more particularly stated below, we conclude that ANR's assertion that this Court lacks the jurisdictional authority to review CLF's petition is incorrect.

As the state agency authorized by EPA to administer the NPDES permits, ANR is essentially claiming it is exclusively vested with RDA. Thus, ANR contends that it would frustrate its vesting of RDA if the Environmental Court were to compel ANR to exercise RDA—as that would be an unlawful preemption of federal law. ANR therefore moved for this Court to dismiss CLF's Question in this appeal. Because compelling RDA for NPDES permits is the basis of CLF's appeal, granting ANR's motion would effectively dismiss this appeal. For the reasons expressed below, we **DENY** ANR's motion to dismiss CLF's Question.

We agree that ANR's "particular expertise and experience in the area of stormwater permits" affords the agency the opportunity to exercise RDA. In re Stormwater NPDES Petition, 2006 VT 91, ¶¶ 18, 30. However, as discussed below, we conclude that ANR's opportunity to exercise RDA does not mean that ANR has the discretion to ignore its RDA obligations, particularly once, as our Supreme Court emphasized, it has completed the compilation of specific stormwater source data. In re Stormwater NPDES Petition, 2006 VT 91, ¶¶ 29–30.

According to the directives of the VWPCA, the ANR Secretary "may issue, condition, modify, revoke or deny discharge permits for regulated stormwater runoff, as necessary to assure achievement of the goals of the program and compliance with state law and the federal [CWA]." 10 V.S.A. § 1264(e)(1). Furthermore, the Secretary:

> [S]hall manage discharges to the waters of the state by administering a permit program consistent with the [NPDES permitting program] established by section 402 of [the federal CWA] . . . [t]he secretary shall use the full range of possibilities and variables allowable under these sections of [the CWA], including general permits, as are consistent with meeting the objectives of the Vermont water pollution control program.

[25] The Water Panel supported ANR's argument on this issue. Water Panel's response to motion for summary judgment at 4-5.

10 V.S.A. § 1258(b). Thus, it is undisputed that issuing a NPDES permit is within the full range of possibilities ANR may utilize to meet its obligations and objectives under the VWPCA. The Supreme Court noted that ANR's "authority and responsibility to designate stormwaters that contribute to water quality violations was well-established and enforceable prior to the CLF petition." In re Stormwater NPDES Petition, 2006 VT 91, ¶ 18.

The Legislature directed that "appeals of any act or decision of the secretary [of ANR] under this chapter" be made to this Court pursuant to chapter 220 of title 10. 10 V.S.A. § 1269 (emphasis added.) Thus, we look to whether ANR's denial of CLF's petition to exercise RDA is an act or decision of the secretary of ANR. Chapter 220 of Title 10 provides an appeal route for acts and decisions of the ANR Secretary, but expressly excludes enforcement actions and rulemaking from the types of acts or decisions that are appealable to the Environmental Court. 10 V.S.A. §§ 8504; 8503(a). Aside from rulemaking and enforcement actions, there are no further exclusions regarding the appellate jurisdiction of this Court in relation to appeals from an ANR act or decision. Id.

In an earlier proceeding in this very case, the Water Board decided that ANR's "grant or denial of a petition to exercise its [RDA] is an act or decision of ANR under the [VWPCA]" that was within the purview of the de novo appellate subject matter jurisdiction that was once vested in the former Board. See In re NPDES Stormwater Petition, Docket No. WQ-03-17, Mem. Of Dec. at 4 (Vt. Water Res. Bd. April 1, 2004). We are directed by statute to give prior decisions of the Water Board the same precedential weight and consideration that we give our own decisions. 10 V.S.A. 8504(m). We also find the former Water Board's logic and rationale persuasive as it reviewed the appellate authority to consider ANR's denial of this very same petition. In re NPDES Stormwater Petition, Docket No. WQ-03-17, Mem. Of Dec. at 4 (Vt. Water Res. Bd. April 1, 2004). This jurisdictional determination by the Water Board withstood ANR's appeal to the Supreme Court. In re Stormwater NPDES Petition, 2006 VT 91, ¶ 18.

We are, of course, also mindful of the precedential authority of decisions from the Vermont Supreme Court. This obvious legal point is important here because the Supreme Court affirmed the Board's conclusion that the very same petition to ANR that is now before us for review was not a request for rulemaking; the Court concluded that first appeal of CLF's petition was within the Water Board's jurisdiction. On this point, the Court stated that:

> ANR is expressly authorized to consider discharges on a categorical basis within broad geographic areas, and the [Water] Board's authority to review the granting or denial of discharge permits is necessarily co-extensive with that authority. See 10 V.S.A. § 1269 (Board shall hear appeals and issue orders affirming, reversing, or modifying any "act or decision" of the secretary). Accordingly, we discern no merit to the claim that the [Water] Board lacked jurisdiction.

In re Stormwater NPDES Petition, 2006 VT 91, ¶ 18. Therefore, we conclude that the ANR's denial of CLF's petition to exercise RDA is an act or decision of the ANR Secretary that was once properly brought before the Water Board and is now within our appellate jurisdiction.

Furthermore, because appeals from ANR arrive at this Court de novo, 10 V.S.A. § 8504(h), we will "proceed de novo to hear all questions of law or fact, applying the substantive standards that were applicable before the ANR." In re Entergy/Vermont Yankee Thermal Discharge Permit, Docket No. 89-4-06 Vtec, slip op. at 14 (Vt. Envtl. Ct. Jan. 9, 2007) (Wright, J.). This Court's authority, of course, is only as broad as that of the ANR, but our review is nonetheless de novo. Therefore, whatever the ANR might have done with a petition properly before it, this Court may also do on appeal. See In re John A. Russell Corp., 176 Vt. 520, 526-27 (2003) (citation and internal quotation omitted.)

ANR contends that if this Court exercises RDA under its de novo review, it will be an unlawful preemption of federal law by a state judicial body because ANR argues that the RDA for stormwater discharges is "explicitly vested in EPA and authorized state agencies." CLF v. Hannaford Bros., 327 F.Supp. 2d 325, 334 (D. Vt. 2004). ANR, in reliance on Gade v. Natl. Solid Wastes Man. Assn., 505 U.S. 88, 98, 103 (1992), asserts that CLF cannot be granted such relief because state law is preempted where it would be an obstacle to the goals of federal law and the methods used to achieve that goal.

We first note that ANR has mischaracterized the nature of the petition now before us in this de novo appeal. We are not called upon in this appeal to exercise RDA so as to require specific property owners to apply for NPDES stormwater permits. This Court does not posses the knowledge, expertise or resources to administer such a permitting program. Rather, CLF properly constrained the query in its Statement of Questions to whether "existing stormwater discharges that contribute to present water quality standards violations in the [five identified watersheds] require [NPDES] permits under the federal Clean Water Act and its implementing regulations?" Thus, we are not asked to exercise RDA in this appeal; if that were asked of this

Court in the sole Question presented in this appeal, our discussion here would be much shorter and of a different result.

We also find that ANR's reliance on Gade is misplaced. In Gade, the United States Supreme Court reviewed a challenge to an Illinois statute on the basis that it conflicted with the federal Occupational Safety and Health Act ("OSHA"). Gade, 505 U.S. at 93. Similar to the shared regulatory regime in the CWA, the federal OSHA law contained a provision allowing states to develop and enforce occupational health and safety requirements upon the submission and approval of the state plan. Id. at 96 (quoting 29 U.S.C. § 667(b)). However, while Vermont has received approval to administer a delegated NPDES permitting program, in part due to the standards and appeal procedures established in the VWPCA, in Gade the state of Illinois had not received federal approval for its statutory program. Id. at 97. The Court in Gade overturned Illinois's statute based on preemption, in part, because it interfered with the "methods by which the federal statute was designed to reach." Id. at 103 (citation omitted). Thus, the Court in Gade concluded that "if a state wishes to regulate an issue of worker safety for which a federal standard is in effect, its only option is to obtain the prior approval of the [federal delegating authority] . . .." Id. at 103-4. Here, Vermont regulates water quality, in part under federal law, due to the specific approval from EPA in 1974 to do so. Therefore, we see the issue as distinct from the preemption that occurred in Gade.

The Court's "ultimate task in any preemption case is to determine whether [the] state regulation is consistent with the structure and purpose of the [federal] statute as a whole." Vukadinovich v. Terminal 5 Venture, 834 F. Supp. 269, 271 (N.D. Ill. 1993) (citation omitted). We see no interference with the goals or methods of the CWA because appeals of decisions from the NPDES delegated authority—ANR—are appealed de novo to this Court. We conclude that the relationship between the CWA and the VWPCA is cooperative, not exclusive, and that neither the VWPCA nor the review mechanism before this Court for acts or decisions of ANR interferes with the goals or methods that the federal statute was designed to attain. Thus, a reviewing state court's compulsion of ANR to exercise RDA would not be an instance of improper state preemption.

In its explanatory comments to the Phase II Final Rules, EPA rejected a suggested "approach whereby States develop an alternative program that EPA would approve or disapprove based on identified criteria." 60 Fed.Reg. 68,740 (Dec. 8, 1999). "EPA emphasized, however,

that it remained committed to encouraging state 'flexibility' and the avoidance of 'duplication' between state and federal programs, and to this end, stressed that the NPDES permit may be developed 'in coordination with state standards.'" In re Stormwater NPDES Petition, 2006 VT 91, ¶ 20, n. 4 (quoting 60 Fed.Reg. 68,740 (Dec. 8, 1999)). These explanatory comments from EPA bolster our conclusion that compelling ANR to exercise RDA under a CWA-implementing state law—the VWPCA—is not to be outlawed, but rather should be encouraged. We see this as cooperative federalism by the designated state agency—ANR—and not unlawful state preemption.

We also note that we are not persuaded by ANR's argument that the Hannaford case collaterally estops CLF from raising the issue here, as the parties and issues are distinct. Id. at ¶¶ 23-24.

D. Deference to ANR concerning its appealed-from determination

In its memorandum opposing summary judgment, ANR contends that its decision to deny CLF's petition is entitled to deference by this Court. That is, ANR asserts that the Court should defer to ANR's expertise in exercising RDA and should reach the same conclusion as ANR, unless clear error is shown. ANR is thus suggesting we apply a higher standard of review than provided by statute for its decisions regarding RDA. We conclude, however, that this presupposition is not supported by our enabling statute nor by the controlling language from the Supreme Court's decision in In re Stormwater NPDES Petition, 2006 VT 91.

As we discussed above, this proceeding is de novo by statute. In a recent case—also involving ANR—we explained that de novo means that "the case is heard as though no action whatever had been held prior thereto. All of the evidence is heard anew, and the probative effect [is] determined by the appellate tribunal . . . as though no decision had been previously rendered." In re Entergy/Vermont Yankee Thermal Discharge Permit, Docket No. 89-4-06 Vtec, slip op. at 6 (Vt. Envtl. Ct. May 22, 2008) (Wright, J.) (citing In re Poole, 136 Vt. 242, 245 (1978)). In the environmental appeals statute, the Legislature distinguished between appeals from the Act 250 District Commissions, in which the Court is required to give deference to the ANR's technical determinations, 10 V.S.A. § 8504(i), and appeals from ANR decisions, such as the present one. Entergy at 7. If any of the regulations for which the agency is responsible require interpretation in this proceeding, the Court will defer to the agency's interpretation of its own regulations, e.g., Conservation Law Foundation v. Burke, 162 Vt. 115, 121 (1993), and a

statute it administers. In re Entergy/Vermont Yankee Thermal Discharge Permit, Docket No. 89-4-06 Vtec, slip op. at 7 (Vt. Envtl. Ct. May 22, 2008) (Wright, J.) (citing Levine v. Wyeth, 2006 VT 107, ¶ 30; Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984)). However, we will not defer to ANR's construction of federal law and regulations. In re Stormwater NPDES Petition, 2006 VT 91, ¶ 13, n. 2. As the Supreme Court explained in the first round of this case, any possible deference to ANR "does not extend to interpretations of the scope and purpose of the provisions of the CWA and implementing EPA regulations." Id.

While we will not defer per se to ANR's denial of the petition, there is no doubt that in this de novo appeal and in view of ANR's "particular expertise and experience in the area of stormwater permits," see id. at ¶ 30, we will afford the evidence and arguments offered by ANR the appropriate weight it deserves. Yet we will apply anew the substantive legal standards that were applicable before ANR as though no prior ANR action had been taken on the appealed petition.

E. Discretion properly afforded to ANR

Upon asserting this Court's jurisdiction, and after refusing to defer to the ANR, the crux of the issue is whether ANR is to be afforded discretion in its decisions of when, and whether, to exercise RDA. CLF steadfastly relies on the Supreme Court's language throughout its motions to assert that the "exercise of [RDA] is not optional." In re Stormwater NPDES Petition, 2006 VT 91, ¶ 21. Conversely, ANR relies on divergent Supreme Court language to argue that it "enjoys broad discretion in the exercise of its [RDA] 'based on available information and relevant considerations.'" Id. In response to ANR's request for advice on this issue, EPA "underscored its expectation that ANR 'would reasonably exercise the authority to designate additional sources as necessary to protect water quality . . . based on available information and relevant considerations.'" Id. We recognize that the above citations are rife with ambiguous direction. We nonetheless must determine whether ANR reasonably exercised—or reasonably refused to exercise—RDA as necessary to protect water quality based on available information and relevant considerations. If we find that ANR did not act reasonably, or otherwise failed to act, thereby allowing stormwater discharges to continue contributing to a violation of federal water quality standards, then we agree that the "not optional" language—which appears to compel some RDA action—controls.

We turn to the federal regulations.[26] As we mentioned above, 40 C.F.R. § 122.26(a)(9)(i) provides in relevant part:

> [F]or discharges composed entirely of stormwater . . . operators shall be required to obtain a NPDES permit only if:
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> (C) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that storm water controls are needed for the discharge based on wasteload allocations that are part of "total maximum daily loads" (TMDLs) that address the pollutants of concern; or
>
> (D) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, 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).

These regulatory mandates are in the alternative; under either scenario, once the applicable determinations are made, the NPDES administrator is obligated to require "operators to obtain a NPDES Permit . . .." Id. Given that ANR has accumulated enormous data on the specific stormwater pollution contributors to the five impaired Brooks, we turn our focus to Subsection (D).

Subsection (D) provides ANR with the discretion to determine whether a discharge, or a category of discharges within a geographical area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. Concurrently, however, this regulation obligates action by ANR to compel dischargers to obtain a NPDES permit, once ANR determines that a discharge contributes to a violation. Thus, said another way, ANR has some discretion to determine whether a discharge "contributes" to a violation, but once that determination is made in the affirmative, ANR is compelled to exercise RDA. As our Supreme Court noted, once the determination is made as to contribution, RDA "is not optional". In re Stormwater NPDES Petition, 2006 VT 91, ¶ 21.

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[26] We note that we have gotten this far in our analysis without mentioning the standard by which we must asses the pending summary judgment motion. V.R.C.P. 56(c)(3) requires that we first determine whether there is any "genuine issue as to any material fact" and, if not, whether "any party is entitled to judgment as a matter of law." Our first task in this appeal is made relatively simple, since the parties generally do not present a substantive dispute on a material fact. The parties have, however, presented considerable dispute on how the applicable law should be applied to those undisputed facts. We nonetheless view all material facts in a light most favorable to ANR, as the non-moving party. Toys, Inc. v. F.M. Burlington Co., 155 Vt. 44, 48 (1990).

ANR's discretion to determine whether a discharge "contributes" to a violation of water quality is not absolute, but rather, is "a distinct, multi-layered issue" that is to be based on "a particularized, fact-specific determination on a case-by-case basis." In re Stormwater NPDES Petition, 2006 VT 91, ¶¶ 28, 26. While ANR's RDA "is not optional, its discretion in exercising that authority is broad and necessarily focused on particular local and regional conditions, including . . . stormwater discharge data at its disposal and local or regional remedial efforts." Id.

In addition to this guidance, federal regulations list the factors to consider in determining whether a stormwater discharge contributes to a violation of a water quality standard or constitutes a significant contributor of pollutants to waters of the United States: the location of the discharge with respect to the waters of the United States; the size of the discharge; the quantity and nature of the pollutants discharged; and other relevant factors. 40 C.F.R. § 122.26(a)(1)(v).

Therefore, to determine whether a discharge "contributes" to a violation of water quality standards or constitutes a significant contributor of pollutants to an impaired water course, ANR must look to the specific stormwater data—i.e., the number, location, size and composition of the discharges—and compare that data set to the ongoing remedial efforts. Put simplistically, if the identifiable stormwater discharges load more pollutants into the impaired Brooks than the existing remedial efforts remove—in a more than net 'de minimis' amount—then the discharges must be deemed to "contribute" to violations of the water quality standards. If and when the determination is made that stormwater discharges "contribute" to violations of water quality standards, then ANR must exercise its RDA; it has no discretion in this regard, as the Supreme Court so found. In re Stormwater NPDES Petition, 2006 VT 91, ¶ 21.

To the extent that ANR has discretion that the Supreme Court sought to respect, the further passage of significant time, coupled with the specific, Brook-by-impaired-Brook factual findings and subsequent lack of action—which was mandated on remand by the Supreme Court on this matter—leads this Court to view more dimly ANR's plea for more time to fulfill statutory obligations. Once the determination is made that stormwater discharges "contribute" to

violations of water quality standards, ANR only has the discretion to either fulfill its statutory duty, or to abdicate that duty to EPA.[27]

We note that if NPDES permits are required for the stormwater discharges, ANR does have some additional discretion in the design of such permits. As the former Water Board noted, decisions on how to design NPDES permits—which would be required under RDA—are relegated to ANR in the first instance. In re NPDES Stormwater Petition, Docket No. WQ-03-17, Mem. Of Dec. at 11 (Vt. Water Res. Bd. Oct. 14, 2004) ("[F]ederal regulations do not establish requirements for these permits, leaving the permitting requirements to the discretion of the states.") Also, as we stated above, ANR has flexibility in crafting the NPDES permits so that they may be expressed as BMPs, and not necessarily numeric targets with TBELs or WQBELs. 10 V.S.A. § 1264(e)(1). Even CLF acknowledges the remaining discretion ANR enjoys in crafting NPDES permit conditions and their interplay with state permits and state remedial efforts.[28]

1. Fact-specific analysis

Focusing primarily on point source discharges, whether a stormwater discharge contributes to a violation of a water quality standard or constitutes a significant contributor of pollutants to waters of the United States involves a particularized, fact-specific determination on a case-by-case basis that depends on the location of the discharge with respect to the waters of the United States; the size of the discharge; the quantity and nature of the pollutants discharged; as well as other relevant factors. In re Stormwater NPDES Petition, 2006 VT 91, ¶ 28; 40 C.F.R. § 122.26(a)(1)(v).

Based on the information gleaned from the Mapping Report, sworn statements made by ANR, and the five TMDLs, it is undisputed that the five Brooks at issue in this case are impaired and that specifically identified stormwater discharges into these Brooks are causing material impairments. In February of 2008, the Director of ANR's Water Quality Division stated to a Committee of the Legislature that "the problem is a result of not of any one particular property but the cumulative impact of all of the runoff from the watershed." Appellants filed a copy of

[27] The Court is not implying that ANR ought to relinquish its NPDES permitting duties to EPA; rather, the Court is noting that if ANR does not have the institutional capabilities to adequately execute its statutory obligations under state and federal law, then relinquishment to EPA may be necessary.

[28] The proposed order that CLF filed contains a suggested timetable for NPDES permits, but the proposed order does not attempt to suggest the substance of the NPDES permits.

the audio CD transcript from Mr. LaFlamme's testimony as Exhibit Z. However, in that same session, the same speaker stated that ANR essentially "know[s] where all the impervious surfaces are, we know where they drain to, we know the subwatersheds [in which] they are formed, we know the underlying soils, [and] we know property ownership . . .." This knowledge was likely garnered, at least in part, from the Mapping Report marked as Appellant's Exhibit P. The Mapping Report—which was the work product of a civil engineering firm with which ANR contracted to field-map accurate and up-to-date delineations of the sub-watersheds within each of the stormwater-impaired watersheds—depicts the catchments and outfalls, lists the number of sub-watersheds, closed pipe point-source stormwater discharge, and open-channel stormwater discharges in each watershed of the impaired Brooks. Thus, the Mapping Report establishes all material point sources that discharge into each of the impaired Brooks.

The Mapping Report identifies the discharges as follows: Potash Brook consists of 192 sub-watersheds with 207 closed pipe and 60 open-channel point-source stormwater discharges; Morehouse Brook consists of 10 sub-watersheds with 7 closed pipe and 3 open-channel point-source stormwater discharges; Centennial Brook consists of 38 sub-watersheds with 46 closed pipe and 18 open-channel point-source stormwater discharges; Englesby Brook consists of 47 sub-watersheds with 33 closed pipe and 26 open-channel point-source stormwater discharges; and Bartlett Brook consists of 55 sub-watersheds with 26 closed pipe and 29 open-channel point-source stormwater discharges. Each point source has been GIS mapped and field checked for reliability. Therefore, ANR has the multi-layered, site specific data to determine precisely the characteristics and potential loading of stormwater from point sources into the impaired Brooks. This fact appears undisputed; there has been no suggestion in the record presented to us that ANR has material work remaining to complete on "the particularized, fact-specific determination[s, made] on a case-by-case basis" that the Supreme Court directed when it remanded CLF's petition back to ANR. In re Stormwater NPDES Petition, 2006 VT 91, ¶¶ 28, 26.[29]

Also, ANR has analyzed the specific pollutants discharged via the stormwater—notwithstanding the fact that the discharges varied depending on the storm event and local conditions. The Mapping Report contains data for nearly every individual point-source

[29] We note that as more time passes, the data ANR expended so much effort and resources to collect may become stale and require updating. Information concerning property ownership is the first example that comes to mind. This reality speaks further to the import of ANR beginning the notification and permitting procedures directed here.

discharge in the impaired Brooks. The data sets include a description of the conveyance (i.e., location and condition of the open channel or closed pipe), the odor of the discharge, the deposit stains of the discharge, the vegetative density of the discharge, whether any pipe benthic growth exists, the quality of the pools in the brook, the flowing color of the brook below the discharge, the flowing turbidity below the discharge, the flowing floatables below the discharge, other concerns (i.e., excess trash, bank erosion, excess sediment, etc.) and a cumulative ranking for the "outfall severity." The "outfall severity" ranks the point-source discharges from 1 (limited impact) to 5 (significant impact), using the data gleamed from the prior analysis. Appendix 2 from Mapping Report. Generally, most discharges in the impaired Brooks are ranked from "1" to "4," with the majority being ranked as "2." Id.

We now look to the location of the discharges with respect to the waters of the United States—such as Lake Champlain and the Winooski River. We note that all of the impaired Brooks at issue either drain directly into Lake Champlain or flow into the Winooski River, which then flows into Lake Champlain. Several bays in Lake Champlain and portions of the Winooski River are listed as impaired water bodies on the 2006 § 303(d) list of impaired waters due to mercury, PCBs, E. coli and phosphorus loading. 2006 § 303(d) List. Therefore, it is undisputed that the identified stormwater discharges are flowing into the impaired Brooks, which are flowing into larger bodies of impaired waters of the United States.

There are other undisputed relevant factors put before us that we must consider, including: the ongoing impairment of Lake Champlain due to high levels of phosphorous;[30] ANR's allegedly partial enforcement of existing general permits;[31] the variable nature and composition of stormwater discharges; the hydrologic principle that small gains in flow reductions in stormwater impaired brooks create large results in reducing sediment transport and thus will likely improve water quality.[32] For the non-point sources of stormwater, the data is not

[30] For a summary of Vermont's approach to improving the water quality in Lake Champlain, see the "Governor's Clean and Clear Action Plan", at http://www.anr.state.vt.us/cleanandclear/, (last visited August 22, 2008); see also Lake Champlain Phosphorous TMDL of 9/25/02.

[31] The estimated effectiveness of environmental enforcement proceedings was gleaned from ANR's legislative reports for its activities between 1995–2005, per statistics compiled in the CLF report entitled *Lost Opportunities, Surveying the Weak Enforcement of Vermont's Environmental Laws*; see also Clean and Clear Action Plan 2007 Annual Report: ANR Act 43 TMDL Report (submitted January 15, 2008).

[32] See "*Expanded Technical Analysis: Utilizing Hydrologic Targets as Surrogates for TMDL Development in Vermont's Stormwater Impaired Streams*" as prepared by the EPA and the Vermont DEC in September, 2006, and provided to the Court as Exhibit R.

as refined. Regardless, the TMDL has a minimal LA for non-point sources.

2. Ongoing remedial efforts to regulate stormwater discharges

Recent legislative, administrative and judicial proceedings that involved CLF, ANR and many involved stakeholders have resulted in on-going remedial efforts to regulate polluting stormwater discharges to the impaired Brooks. The principal efforts include the amendments to the state stormwater management program, the currently administered NPDES permits for stormwater discharges from large construction sites and municipalities, and the development and EPA approval of the five TMDLs for the Brooks at issue; the later includes the fact-specific analysis by ANR required by the Supreme Court in In re Stormwater NPDES Petition, 2006 VT 91. We will take each ongoing effort in turn and conclude with a cumulative analysis.

The Vermont Legislature passed comprehensive amendments to the state stormwater management program. "The amendments, adopted in 2004, essentially require ANR to formulate cleanup plans within three years for the stormwater-impaired waters on the State's 303(d) list (including the five watersheds at issue here), 10 V.S.A. § 1264(f)(3), and to establish an interim permitting program for discharges from new, expanded, or redeveloped impervious surfaces in excess of one acre in order to achieve a 'net zero' discharge goal. Id." In re Stormwater NPDES Petition, 2006 VT 91, ¶ 19. The Supreme Court recognized that "[n]othing in the state stormwater law evinces an intent to supersede ANR's [EPA-delegated RDA] to require a federal permit when it determines that an existing discharge contributes to a water quality violation." Id. at ¶ 20. However, the Court was persuaded that ANR "may consider cleanup efforts under [the state stormwater law] in determining whether existing stormwater discharges contribute to water quality violations within" the impaired Brooks. Id. at ¶ 21. Therefore, we believe it is appropriate to explore the state stormwater law to determine the extent of its regulatory jurisdiction in relation to the petition now before us.

In essence, the state stormwater law generally requires property owners within a non-impaired watershed to obtain a general stormwater permit for discharges of regulated stormwater[33] from the development, redevelopment, or expansion of impervious surfaces greater than one acre. 10 V.S.A. § 1264(d). The permits shall be consistent with, at a minimum, the 2002 stormwater management manual, shall specify BMPs and may be issued as general permits. Id. at § 1264(e). For discharges in a stormwater-impaired brook with an approved TMDL—as is

[33] "Regulated stormwater" is defined in footnote 23 above.

the case here—ANR may under state law issue either a watershed improvement permit, a general or an individual permit that is implementing a TMDL, or a statewide general permit for new discharges that ANR deems necessary to assure the attainment of the VWQS. Id. at § 1264(f). Discharge permits issued under this section shall require BMP-based stormwater treatment practices. Id. at § 1264(f)(4).

Therefore, the state stormwater law appears to be generally triggered based on the amount of impervious surfaces on a site and whether the discharge enters a stormwater-impaired brook. Once triggered, ANR has discretion in the type of permit required under the state law. It appears from the record now before us that ANR has most often used general permits under its state law enabled powers for the stormwater-impaired waters. However, we note that Vermont DEC's authority under state law to regulate stormwater discharges is limited because jurisdiction under the state stormwater law is only triggered once the amount of impervious surfaces on a site exceeds a certain acreage.

DEC is the permitting authority for the NPDES general permits currently authorized by federal law—which are different and in addition to the permits authorized under the state stormwater law. NPDES permits administered by the Agency include the construction general permit for stormwater discharges associated with construction activity; multi-sector general permits for stormwater discharges associated with industrial activity; and Phase II MS-4 permits for separate municipal storm sewer systems. These permits are required based on discharges from sites that exceed a delineated threshold of disturbed acreage, industrial activity, or population size. Thus, DEC's authority to regulate these discharges under state law is specifically limited by the CWA and its implementing regulations.

In September of 2007, ANR received approval from EPA for the TMDLs that ANR established for Centennial, Bartlett, Englesby, and Morehouse Brooks; ANR received approval in December of 2006 for the Potash Brook TMDL. In addition to the overall watershed target, the TMDLs provide an allocation from point sources, or the WLA, in order to reach surrogate flow reduction targets. Because of data limitations, the TMDLs do not separate stormwater discharges already specifically subject to the NPDES program (e.g., construction general permits, multi-sector general permits, and Phase II MS-4 permits) from stormwater discharges that are not currently subject to the NPDES program (e.g., general permits under Vermont's stormwater program). Therefore, all stormwater discharges from the developed land category

are generally included in the WLA portion of the TMDL. The WLAs are presented in Table 7 of each Brook's TMDL and are expressed as percent reductions in stormwater runoff volume at the 0.3% flow. The flow reduction targets are 65.3% for Morehouse Brook, 34.4% for Englesby Brook, 63.0% for Centennial Brook, 16.5% for Potash Brook and 33.2% for Bartlett Brook. See Table 7 of each Brook's TMDL.

Although the CWA does not require TMDLs to include implementation plans, Vermont DEC has included an implementation plan in each TMDL that it anticipates using. Therefore, the implementation plan is not entirely reliable because "[t]his framework may change over time based on new information gathered by [DEC] and as necessary to meet the requirements of this TMDL." See e.g., Morehouse Brook Final TMDL at 22. In addition to assessing the stream geomorphology, mapping the sub-watersheds, monitoring flow and precipitation, and mapping impervious surfaces, Vermont's implementation strategy includes two permitting components: federally-authorized NPDES permits for all discharges currently regulated under the CWA, and a state-authorized permitting program for stormwater discharges from impervious surfaces larger than one acre. The first prong of implementation will involve the issuance of watershed general permits that will require monitoring, treatment and control measures by specifically identified dischargers of stormwater runoff. The second prong of the implementation plans will include the currently-required NPDES permits issued by ANR for stormwater discharges subject to the CWA (i.e., for construction activities, industrial activities, and municipal discharges.) These NPDES permits will contain conditions for implementation of BMPs. Also, Vermont plans to implement a variety of non-point source control measures. See Potash Brook TMDL, October 2006; Morehouse, Englesby, Centennial, Bartlett Brook TMDL, August 2007. ANR proposes that by October 1, 2008, it will issue plans to implement the TMDLs for the five Brooks at issue, pursuant to recent legislation. 2007, No. 130 (Adj. Sess.), § 4. Under this regime, remedial permits are expected to be issued by January 15, 2010. 10 V.S.A. § 1264(f)(3). Therefore, in essence, the approved TMDLs' implementation plan merely reiterates the current regime: impervious surfaces greater than one acre are to be regulated under the state stormwater law and construction, industrial and municipal activities that trigger the CWA will be regulated with NDPES permits.

Thus, the TMDLs are forward-looking, are not fully implemented, and do not cover all discharges of stormwater. Once implemented, the TMDLs will rely on the state stormwater

law—which is also prospective and not fully implemented—to regulate discharges from impervious coverage that is greater than one acre under a variety of general and individual permit regimes. The TMDLs will also rely on the NPDES permits currently authorized by the CWA for construction, industrial and municipal stormwater discharges. We conclude, therefore, that certain ascertainable stormwater discharges are not triggering any of the aforementioned permit regimes and are likely left unregulated. Also, the divergent permitting mechanisms may mean that the permits are not effective and, by ANR's own admission, are not enforced.[34]

3. "Contribute" analysis

Upon performing the fact-specific analysis and setting forth the ongoing remedial efforts, we are now in a position to determine whether the identifiable stormwater discharges load more pollutants into the impaired Brooks than the existing remedial efforts remove—in a more than 'de minimis' net amount. We conclude that the evidence collected by ANR leads to an undisputed factual conclusion that the stormwater discharges load more pollutants into the impaired Brooks than the existing remedial efforts remove. Therefore, the discharges must be deemed to "contribute" to violations of the water quality standards.

We arrive at this conclusion primarily due to the fact that the current regime of regulating impervious acreage and discharges from construction, industrial and municipal sites leaves certain discharges, already designated by ANR as contributing, unregulated. Based on the undisputed continuing impairments, such discharges are contributing to violations of the VWQS. The fact that some stormwater discharges are currently regulated with NPDES permits and will be regulated under the state stormwater law means that some, but not all of the contributing discharges would be addressed.[35]

As we have already concluded, once the determination is made that a stormwater discharge contributes to a violation of the VWQS, ANR's exercise of its RDA is not optional. ANR contends that the TMDL does not distinguish in the WLA between discharges subject to the state stormwater law and the discharges covered by the NPDES permits for construction, industrial and municipal sites. While it appears undisputed that the TMDLs do not contain such a distinction, this undisputed fact does not relieve ANR from its duty under the CWA to regulate all discharges that contribute to violations of the VWQS.

[34] See footnote 30, above.
[35] We note that the efficacy of these programs is not at issue here.

ANR asserts that the lack of distinction between already permitted and not yet permitted stormwater pollution contributors is a reason why it may lawfully continue to refrain from exercising RDA. We disagree. Rather, ANR already has the necessary volumes of data currently at its disposal to carry its analysis one step further and determine the discharges that are currently not regulated either under the state stormwater law, or by the NPDES permits for construction, industrial and municipal sites. ANR's assertion here ignores the triggering mechanism under the CWA: once the currently unregulated discharges that contribute pollutants are identified, its exercise of RDA is not optional.

A practical first step would be for ANR to identify the complained-of distinctions and then to use Appendix 2 from the Mapping Report to correlate the identified point source outfalls with the properties currently regulated by the state stormwater and the NPDES permits for construction, industrial and municipal sites. This exercise will identify those point source discharges that are unregulated, yet are contributing to violations of the VWQS.

The Vermont Supreme Court emphasized "flexibility and the avoidance of duplication between state and federal programs, and to this end stressed that the NPDES permit may be developed in coordination with state standards." In re Stormwater NPDES Petition, 2006 VT 91, ¶ 20, n. 4 (citing 60 Fed.Reg. at 68,740). If data is limited, RDA may be exercised for a class or a category of discharges. Id. at ¶ 12. To the extent that ANR's analysis of the point sources leads to dual regulation under the state stormwater law and its NPDES permitting authority, the doctrines of preemption lead the Court to expect that the RDA NPDES permits will control. However, that issue is not squarely before the Court at this time. Thus, we forego discussing it further. Similarly, to the extent that discharges are proposed to be covered by the state stormwater law—that is, to be regulated at a future date—they are to be treated as unregulated for purposes of this Decision and are currently contributing to violations of VWQS.

The CWA creates an oversight role for EPA to review NPDES permits prior to ANR's issuance and to also enforce the permits, if they are violated. 33 U.S.C. § 1342(d); Id. at 1342(i). To the extent that ANR does not have the institutional capacity to perform this analysis and fulfill its statutory obligations under the VWPCA and the CWA, abdication of that duty to EPA may be necessary.[36]

[36] We stress that this Court offers no opinion on the propriety of ANR's abdication of CWA duties back to EPA.

To be clear, we do not offer a blanket conclusion that all stormwater discharges into the impaired Brooks require NPDES permits. If we did, we would risk committing the same procedural error that caused the Supreme Court to reverse and remand CLF's petition. Rather, we conclude that all stormwater discharges from point sources that ANR and its contractors have identified and mapped as contributing and are currently unregulated under the state stormwater law and the NPDES permits for construction, industrial and municipal sites, contribute to violations of VWQS. For these identified, currently unregulated point source discharges of stormwater into the impaired Brooks at issue, RDA must be exercised.

F. Relief

Upon compelling ANR to exercise RDA for the identified, currently unregulated point source discharges of stormwater that contribute to impairments of the five Brooks, we are left with the delicate task of providing relief. Well aware of our institutional and jurisdictional limits, we will attempt to perform this charge carefully. Having asserted jurisdiction, CLF requests that this Court remand the matter to ANR to begin notifying contributing dischargers, pursuant to a specific schedule, of their obligation to apply for NPDES permits within 180 days of receiving notice. CLF cites to 40 C.F.R. § 122.26(a)(9)(iii), which states that "discharges designated pursuant to [40 C.F.R. § 122.26(a)(9)(i)(D)] shall" apply for a permit "within 180 days of receipt of notice . . .."

ANR contends that the relief CLF seeks is unlawful and should be avoided on policy grounds; that the relief CLF seeks is within the discretion of ANR and thus beyond the jurisdiction of this Court; that the relief CLF seeks is akin to a mandatory injunction; that on balance of the equities, the relief CLF seeks will lead to increased litigation; and finally that the rehabilitation of the impaired Brooks will cost tens of millions of dollars per water body. We will address each ANR objection in turn.

We note at the outset that in Section C of this Decision, entitled "Jurisdictional Issues," we rejected ANR's argument to defer to their discretion and asserted this Court's jurisdiction for this de novo appeal. Moving to ANR's second point, we reject the characterization of CLF's relief request as akin to a mandatory injunction. Our rules of procedure state that "[t]he order of the court may affirm, reverse, or modify the decision of the tribunal appealed from, may remand the case for further proceedings consistent with the order of the court, and may expressly set forth conditions and restrictions with which the parties must comply." V.R.E.C.P. 5(j) (emphasis

added). We are remanding the matter back to ANR for further proceedings consistent with the decision and judgment of this Court. On remand, ANR must complete their responsibilities as laid out above. That is, ANR must analyze the identified point source discharges and determine what property owners are now obligated to obtain a NPDES permit, as a consequence of ANR exercising its RDA.

Lastly, we respectfully note that ANR's expressed concern over possible increased litigation and its costs are not relevant to present determination we are called upon to make. We are obligated to determine the applicable law and apply it to the undisputed material facts. Similarly, while we are very mindful of the significant monetary obligations that may follow our decision here, we cannot allow those monetary consequences to impact our legal analysis at this stage of the proceedings. We remind the parties that we are a court of limited subject matter jurisdiction, and while acts or decisions of the ANR Secretary may be appealed de novo to this Court, we are not aware of any statutory provision allowing our Court to conduct an economic analysis in these types of proceedings.

Conclusion

We conclude that all identified, currently unregulated point source discharges of stormwater that ANR has determined contribute to violations of VWQS in the five impaired Brooks require NPDES permits. In light of this conclusion, which we have made after review of all the undisputed material facts, while viewing them in a light most favorable to ANR, as the non-moving party, we conclude that ANR must exercise its residual designation authority to require applications for NPDES permits for these specific discharges. In light of this conclusion, we hereby **GRANT** CLF's 2003 petition that NPDES permits are deemed to be required for the specific stormwater discharges that ANR's analysis has determined contribute pollutants to the identified impaired Brooks.[37]

We direct that ANR begin notifying contributing dischargers, pursuant to a specific schedule, of their obligation to apply for NPDES permits within 180 days of receiving notice.

[37] As we note above, ANR's determination that specific discharges contribute pollutants may be a "net' determination; that is, a determination that takes into account any reduction in the delivery of sediment or pollutants to the impaired streams that actually results from measures enacted by state remediation and permit programs. To the extent that a discharge is estimated to have no net contribution, we understand that such stormwater discharges would not require a NPDES permit. Conversely, to the extent that any discharge reduction is merely hypothetical, because remediation is only estimated, based upon future events, such discharges retain their contributing character and must be made subject to NPDES regulation.

Given the passage of time on this very important issue, as well as the considerable work that ANR has already accomplished in collecting the fact-specific data on the specific stormwater discharges that contribute pollutants to these impaired Brooks, we direct that ANR complete the process of notifying the responsible and interested parties in these NPDES permit proceedings within ninety (90) days from this Decision, unless ANR requests (prior to the expiration date) and then receives an extension or stay of such deadline from a court then having jurisdiction over these proceedings. This Court reserves the right to grant such an extension, for good cause, and upon a specific timeline recommended by ANR and after input from the other parties in this proceeding.

For all the reasons more fully discussed above, we **DENY** ANR's motion to dismiss CLF's Statement of Questions and ANR's motion to dismiss CLF's general prayer for relief. We **GRANT** CLF's motion for summary judgment, as we have concluded that, even when viewing the material facts in a light most favorable to ANR, ANR must exercise (or abdicate) its residual designation authority, as currently delegated to it by EPA, to require the responsible parties to apply for specific NPDES permits for the currently unregulated stormwater discharges that ANR has determined provide a net contribution to violations of the VWQS in the five impaired Brooks.

We hereby direct ANR on remand to complete NPDES notification and permit proceedings consistent with this Decision. This concludes the proceedings before this Court in this appeal. A Judgment Order accompanies this Decision.

Done at Newfane, Vermont this 28th day of August, 2008.

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Thomas S. Durkin, Environmental Judge