

Stormwater Summary

What is Stormwater?

Stormwater runoff is precipitation, snowmelt, and the material dissolved or suspended in it that runs off impervious surfaces and discharges into surface waters or into groundwater via infiltration. Impervious surfaces include paved streets, parking lots, and building rooftops.

Why is Stormwater an Issue?

- Stormwater can include sediment, bacteria, and other pollutants that adversely affect water quality.
- Failure to obtain a stormwater permit when required is a violation of state and federal law.
- A permit is required for several types of stormwater discharges, described below.
- Legal issues, described below, exist regarding the discharge of stormwater to impaired waters.
- Lack of a valid state permit is an encumbrance on property title and may complicate real estate sales.

Federal Clean Water Act Requirements

- The federal Clean Water Act (CWA) § 301(a) prohibits the discharge of pollutants to navigable waters unless the discharge complies with the CWA and its permit requirements.
- Stormwater is a pollutant.¹ Thus, stormwater discharges must comply with the CWA.
- CWA § 402(p)(2), requires the following categories of stormwater discharges to obtain a permit called a National Pollutant Discharge Elimination System (NPDES) permit:
 1. Stormwater discharges permitted before 1987;
 2. Stormwater discharges associated with industrial activity (Multi-Sector General Permit);
 3. Stormwater discharges from a MS4 serving a population of 250,000 or more;
 4. Stormwater discharge from a MS4 serving a population of 100,000 or more but less than 250,000;
 5. *Stormwater discharges for which the Administrator of U.S. EPA or the State determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to U.S. waters.* (Residual designation authority).
- U.S. EPA's Phase I and II rules impose additional requirements on stormwater discharges.

Phase I Rules: require a NPDES permit for stormwater discharges from: medium and large MS4s in incorporated places or counties with populations of 100,000 or more; and 11 categories of industrial activity, including construction disturbing 5 or more acres.

Phase II Rules: require a NPDES permit for a stormwater discharges from: certain regulated small MS4s²; and construction activity disturbing between 1 and 5 acres of land. The Phase II Rules also preserved EPA and state CWA § 402(p)(2)(E) residual designation authority.

¹ A "discharge" is any addition of any pollutant to navigable waters from any point source. A point source is any conveyance from which water may be discharged, e.g., pipes, outfalls, ditches, concentrated animal feeding operation, or vessel, but does not include agricultural stormwater runoff. A "pollutant" is any dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural water. CWA § 502.

State Requirements

State Statute:

10 V.S.A. § 1264 regulates the discharge of stormwater to state waters. This statutory section has been amended several times and is the section under which many of the questions regarding stormwater arise. Below is a summary of the major amendments to § 1264 from 2002 to 2013.

- Act 222 (1981): 10 V.S.A. § 1264 first enacted. Amended four times between 1981 and 2001.
- Act 109 (2002): Authorized ANR to develop clean up plans for stormwater impaired waters that relied on source controls rather than a TMDL. The alternative clean up plans were called watershed improvement permits (WIPs) and were required to obtain compliance with water quality standards in 5 years. WIPs would have allowed the issuance of permits in impaired waters. As discussed below, the WRB invalidated the use of WIPs.
- Act 140 (2004): Comprehensive amendment of state stormwater discharge requirements.
 1. Rules: Required ANR to adopt stormwater management rules for impaired and unimpaired waters by June 15, 2005. The rules have been adopted.
 2. Long-term permit solution: Required ANR to complete and implement TMDLs for each of the 17 stormwater impaired waters by 2007. ANR received appropriations to develop and implement the TMDLs. Municipalities also received funds to aid TMDL development. Act 43 of 2007 extended the deadline for completion of the 17 TMDLs to January 15, 2010.
 3. Interim permit program: Established a state stormwater permit program for impaired waters separate from state NPDES program and the regulatory requirements of the federal permit. Allows ANR to issue state discharge permits--not state NPDES permits--in the interim between passage of Act 140 and completion of the TMDLs for each of the 17 impaired watersheds.
 4. Real estate transfer exemption: In an impaired watershed, the failure of a discharger to obtain, renew, or comply with the terms and conditions of a stormwater discharge permit issued before June 30, 2004, is not an encumbrance on real estate title under *Bianchi*.
- Act 154 (2006): Allowed ANR to review an applicant's compliance history in permit process.
- Act 43 (2007): Provided that an ANR watershed improvement permit (WIP) must provide reasonable assurance of compliance with the Vermont water quality standards in five years.
- Act 130 (2008): A residential subdivision may transfer to a municipality a pre-2004 stormwater discharge permit or a stormwater discharge permit implementing a total maximum daily load plan.
- Act 54 (2009): Directed ANR to adopt alternative guidance for operational-phase stormwater permitting of renewable energy projects located in high-elevation settings.

² The Vermont MS4s are Burlington, Burlington International Airport, Colchester, Essex, Essex Junction, Shelburne, South Burlington, UVM, VTRANS, Williston, and Winooski.

- Act 159 (2010): Required high elevation alternative guidance to be adopted by Fe. 1, 2011.
- Act 53 (2011): ANR shall respond to an application to discharge stormwater runoff to an unimpaired water for a telecommunication facility in 40 days for a general permit or 60 days for individual permits. Required high elevation stormwater rules for renewable energy to be applies to telecommunications facilities.
- Act 91 (2012): Transferred statutory discharge standards from expiring interim statute to § 1264.
- Act 138 (2012): Authorized ANR to adopt rules for stormwater discharges during emergencies.
- Acts 190 and 199 (2013): Extended ANR response time requirements for telecommunications facilities until 2017.

State Case Law and Water Resources Board (WRB) Decisions

1. Bianchi v. Lorentz (Vt. Supreme Ct. 1997)

Violations of local land use regulations, including an expired permit or failure to obtain a permit, are an encumbrance on the title of a property.

2. In re Hannaford Brothers Co & Lowe's Home Centers, Inc. (WRB June 29, 2001)

State law does not allow a new or increased discharge of measurable and detectable pollutants of concern--including stormwater--into impaired waters that lack a TMDL. Absent a TMDL, a discharge into an impaired water may be permitted only if the proposed discharge will not increase the load of pollutants for which the receiving water is impaired.

3. In re Morehouse Brook (WRB June 2, 2003)

WRB overturns use of WIPs. WIPs must include a schedule of compliance, no longer than five years, reasonably designed to assure attainment of Vermont water quality standards. However, according to ANR, it is impossible to predict when a water will meet water quality standards. Thus, WIPs cannot assure attainment of water quality standards and are invalid.

4. Conservation Law Foundation v. Hannaford Bros. Co (D. Vt. May 14, 2004).

All stormwater discharges do not require a NPDES permit. The plain language of the CWA indicates that NPDES permits are not required for some stormwater discharges. However, neither the decision nor EPA rules specify what discharges do not require NPDES permits.

5. In re Stormwater NPDES Petition (WRB Oct. 14, 2004)

Existing discharges into stormwater impaired streams must obtain a NPDES permit unless the discharge is of a "de minimis" nature. Stormwater discharges or categories of discharges in impaired waters contribute to the violation of state water quality standards. Thus, a NPDES permit is required under CWA § 402(p)(2)(E) residual designation authority, which requires a NPDES permit when EPA or a state determines a discharge contributes to a violation of a water quality standard. However, according to the CWA and EPA guidance, de minimis discharges do not need NPDES permits. Neither the decision nor the CWA define what constitutes a de minimis discharge. The decision also does not address new or expanded discharges. The decision's impact is discussed below.

6. In re Stormwater NPDES Petition (Vt. Supreme Ct. Aug. 25, 2006)

Overtaken decision of Water Resources Board and held that a NPDES permit is not required for every discharge of stormwater to state waters. The Board erred in relying on previous Board decisions that involved the state stormwater program and were not applicable to the question of ANR's application of the federal residual designation authority under the CWA. ANR's residual designation authority under CWA § 402(p)(2)(E) is not optional, but the agency has broad discretion in exercising the authority based on particular conditions, including any data at its disposal. ANR erred when it refused to exercise the residual designation authority without undertaking a fact specific analysis to determine if particular discharges contributed to a violation of the state's water quality standards or was a significant contributor of pollutants to state waters.

On remand from the Vermont Supreme Court, however, ANR did not conduct a residual designation analysis³ as ordered by the Court. In a letter to CLF, ANR argued that the progress it had made in developing TMDLs for Potash Brook and other stormwater impaired waters in Chittenden County had rendered CLF's petition for ANR to designate a category of stormwater discharges "irrelevant." CLF appealed, asking the Environmental Court to designate all *non-de minimis* stormwater discharges as needing NPDES permits. The summary of the Environmental Court's decision on that appeal follows directly below.

7. In re Stormwater NPDES Petition (Vt. Environmental Court Aug. 28, 2008)

Environmental Court held that under its CWA residual designation authority, ANR had determined that discharges caused or contributed to a violation of water quality. Consequently, the Environmental Court held that all non de minimis discharges which provide a net contribution to stormwater loading in the impaired waters required a NPDES permit. The Environmental Court ordered 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. ANR was required to complete the process of notifying the responsible and interested parties in these NPDES permit proceedings within 90 days from the Environmental Court's decision. ANR moved for reconsideration of the Environmental Court decision.

8. In re Stormwater NPDES Petition (Vt. Environmental Court Feb. 18, 2009)

Environmental Court upheld its original decision ordering ANR to permit all no-de minimis stormwater discharges in the relevant impaired waters.

9. In re Sheffield Wind Project (Vt. Env. Division, 2010)

Environmental division held that stormwater permit applicant did not need to measure baseline water quality at a proposed wind turbine site prior to permitting in order for ANR to effectively implement the antidegradation policy of the Vermont Water Quality Standards. Court held that permit should be granted subject to several changes to the permit.

10. In re Appeals of ANR Permits in Lowell Mountain Wind Project (Vt Supreme Court May 23, 2014)

ANR properly applied the agency Stormwater Management Manual when approving the operational phase stormwater management plan for the Kingdom Community Wind Project (

³ Pursuant to 40 CFR § 122.26[a][9][i][D].