

STATE OF VERMONT

SUPERIOR COURT  
Environmental Division Unit

ENVIRONMENTAL DIVISION  
Docket No. 141-11-16 Vtec

RDA Designation Sunnyside Brook  
Watershed

DECISION ON MOTION

**Decision on Motion for Summary Judgment**

This is an appeal from a decision by the Agency of Natural Resources (ANR) declining to exercise its Residual Designation Authority (RDA), upon petition of R.L. Vallee, Inc. (Vallee), over stormwater discharges into Sunnyside Brook. The matter is now before the Court on the ANR’s motion for summary judgment.

ANR is represented by attorneys Hannah Smith and Kane Smart. Vallee is represented by attorneys Alexander J. LaRosa and Jon Anderson. The Conservation Law Foundation (CLF) intervenes pursuant to 10 V.S.A. § 8504(n)(4)(6) and V.R.C.P. 24, and is represented by attorney Elena M. Mihaly.

**I. Regulatory Background**

To understand the facts and issues raised by this appeal, a summary of the regulatory background is useful. In 1987, Congress amended the federal Clean Water Act (CWA) with a two-phase approach to address the discharge of pollutants contained in stormwater runoff.<sup>1</sup> In re Stormwater NPDES Petition, 2006 VT 91, ¶ 3, 180 Vt. 261.

In Phase I, the amendment required National Pollutant Discharge Elimination System (NPDES) permits for certain specified point source discharges of stormwater, including discharges from municipal separate storm sewer systems (MS4s) serving populations larger than 100,000 and stormwater discharges associated with industrial activity. 33 U.S.C. § 1342(p)(2)(B)–(D). These requirements were subsequently set out in the federal Environmental Protection Agency’s (EPA) Phase I Rules at 40 C.F.R. § 122.26(9)(i)(A) and (B).<sup>2</sup> It further vested the EPA, or any duly

<sup>1</sup> The 1987 amendment is codified at 33 U.S.C. § 1342(p).

<sup>2</sup> The preamble to the Phase I rules is at National Pollutant Discharge Elimination System Permit Application Regulation for Storm Water Discharges, 55 Fed. Reg. 47,990 (Nov. 16, 1990) (codified at 40 C.F.R. pts. 122–24).

authorized state agency such as ANR,<sup>3</sup> with residual authority to extend CWA jurisdiction to additional point-source stormwater discharges that “contribute[] to a violation of a water quality standard or [are] a significant contributor of pollutants to waters of the United States.” Stormwater NPDES Petition, 2006 VT 91, ¶ 3 (quoting 33 U.S.C. § 1342(p)(2)(E)).

After further study, the EPA promulgated Phase II Rules<sup>4</sup> requiring that two additional categories of stormwater discharges obtain NPDES permits: small municipal separate storm sewer systems serving municipal populations within urbanized areas (i.e. small MS4s), and construction sites between one and five acres in size. Stormwater NPDES Petition, 2006 VT 91, ¶ 4; 40 C.F.R. § 122.26(a)(9)(i)(A), (B). The Phase II rules also preserve the residual designation authority, or RDA, to identify additional point-source stormwater discharges that require NPDES permits. 40 C.F.R. § 122.26(a)(9)(i)(C), (D). While RDA previously could be exercised only over specific discharges, the Phase II rules enable RDA to cover “categor[ies] of discharges within a geographical area.” Stormwater NPDES Petition, 2006 VT 91, ¶ 11 (quoting 40 C.F.R. § 122.26(a)(9)(i)(D)).

A NPDES permit is required under the RDA if the permitting authority “determines that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.” 40 C.F.R. § 122.26(a)(9)(i)(D).<sup>5</sup>

The regulations authorize any person to petition the implementing agency “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).

In response to a § 122.26(f)(2) petition asking ANR to exercise its RDA pursuant to § 122.26(a)(9)(i)(D)—as is the case here—ANR has discretion to determine whether a stormwater discharge “contributes” to a violation of a water quality standard. Stormwater NPDES Petition,

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<sup>3</sup> The responsibility to administer NPDES permits in Vermont has been delegated to ANR. 10 V.S.A. § 1258.

<sup>4</sup> 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).

<sup>5</sup> Sub-part (C) authorizes the EPA or delegated state agency to require a NPDES permit upon “determin[ing] 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 pollutant(s) of concern.” 40 C.F.R. § 122.26(a)(9)(i)(C). This subpart has not been raised in the matter now before the Court.

2006 VT 91, ¶¶ 21, 28. The EPA and the Vermont Supreme Court have provided some guidance on the exercise of this discretion.

First, ANR need not conclude that a stormwater discharge “contributes” to a violation of a water quality standard just because stormwater will discharge a “measurable or detectable amount” of a pollutant into waters that are impaired for that pollutant. Id. ¶ 28. Instead, the amount of the pollutant being discharged should exceed some kind of threshold before it is considered to contribute to a violation. Id. ¶ 7. The EPA has “‘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. “While th[is] ‘de minimis’ standard was mentioned by EPA as one that [ANR] could ‘reasonably’ adopt, it was not advanced as an exclusive standard.” Id. ¶ 28 n.6.

Second, the EPA has noted that “stormwater discharges . . . must be evaluated on a ‘case-by-case’ basis.” Id. ¶ 7. The Vermont Supreme Court has also observed that the determination of whether a stormwater discharge “contributes” to a violation of water quality standards “requires a particularized, fact-specific analysis.” Id. ¶ 27.

ANR’s discretion ends once it determines that a stormwater discharge “contributes” to a violation of water quality standards; at that point it must exercise its RDA by requiring a NPDES permit. Stormwater NPDES Petition, 2006 VT 91, ¶ 28.

## **II. Standard of Review**

We will grant summary judgment to a party “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” V.R.C.P. 56(a). In determining whether there is any dispute over a material fact, “we accept as true allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material.” White v. Quechee Lakes Landowners’ Ass’n, Inc., 170 Vt. 25, 28 (1999) (citation omitted). “Further, the nonmoving party receives the benefit of all reasonable doubts and inferences.” Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356 (citation omitted).

## **III. Material Facts**

For the sole purpose of deciding the pending motion, the Court recites the following facts which it understands to be undisputed:

### **a. Background**

1. The Exit 16 Corridor consists of Route 2/7 in the area between the Winooski - Colchester border north to Rathe Road, and the section of Interstate 89 that crosses Route 2/7, including the on- and off-ramps for Exit 16.
2. The Vermont Agency of Transportation (VTrans) manages the stormwater runoff from impervious surfaces in the Exit 16 Corridor.
3. The Exit 16 Corridor is in the Sunnyside Brook watershed.
4. Sunnyside Brook drains approximately 584 acres in the Town of Colchester.
5. Stormwater from the Exit 16 Corridor flows into VTrans' municipal separate storm sewer system (MS4), or potentially the Town of Colchester's MS4.<sup>6</sup>
6. An MS4 is a system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels or storm drains) that are used for collecting or conveying stormwater and are neither a combined sewer system nor part of a publicly-owned treatment system.

### **b. Municipal Separate Storm Sewer System (MS4)**

7. In 2003, ANR, acting as the delegated state agency to administer the CWA in Vermont, issued Small Municipal Separate Storm Sewer System General Permit No. 3-9014 (the MS4 General Permit) to regulate stormwater discharges from MS4s in urbanized areas.

#### **i. VTrans MS4 Authorization**

8. VTrans is subject to regulation under the MS4 General Permit because it was designated as an operator of a "non-traditional" MS4. VTrans is required to comply with the terms and conditions of the MS4 General Permit in urbanized areas, including within the Town of Colchester.
9. On June 3, 2013, VTrans sought authorization to discharge under the MS4 General Permit, as amended and reissued on December 5, 2012. ANR granted that authorization on October 1, 2013.

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<sup>6</sup> Vallee and CLF seek to refute this fact by citing a statement by Padraic Monks (of ANR's Department of Environmental Conservation) acknowledging it is likely that not all discharges in the Sunnyside Brook watershed are "subject to NPDES regulation," and by pointing out that Colchester's MS4 notice of intent to discharge does not list Sunnyside Brook as a receiving water. Neither of these assertions, however, disputes whether all of the Exit 16 stormwater flows into VTrans' MS4 or the Town of Colchester's MS4.

10. Discharges from VTrans property in the Exit 16 Corridor are subject to regulation through VTrans' MS4 General Permit authorization.

11. VTrans' MS4 authorization remained in effect until December 5, 2017.<sup>7</sup>

**ii. Colchester MS4 Authorization**

12. On May 28, 2013, the Town of Colchester sought authorization to discharge under the MS4 General Permit. ANR gave authorization on October 1, 2013.

13. The Town of Colchester filed an amended notice of intent for authorization to discharge under the MS4 General Permit on September 29, 2016. The NOI does not list Sunnyside Brook as a receiving water, and does not list any VTrans discharges to be incorporated into the authorization. The NOI does list other receiving waters and other discharges to be incorporated into the authorization.

14. The parties dispute whether discharges from VTrans property to the Town of Colchester MS4 are subject to regulation through the Colchester MS4 authorization.

**c. The Multi-Sector General Permit**

15. ANR issued Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity 3-9003 (MSGP 3-9003) on August 4, 2011. The permit was set to expire after five years. MSGP 3-9003 is a NPDES permit issued pursuant to the CWA.

**d. Transportation Separate Storm Sewer System (TS4)**

16. On December 28, 2016, ANR issued Transportation Separate Storm Sewer System General Permit 3-9007 (the TS4 General Permit) to regulate stormwater discharges from impervious surfaces owned or controlled by VTrans. The TS4 General Permit was issued pursuant to the CWA.

17. The TS4 General Permit creates a comprehensive program to address the post-construction stormwater runoff from all impervious surfaces owned or controlled by VTrans, excluding rail lines, rail yards, public transit facilities, and rail trails.

18. The TS4 General Permit incorporates the requirements of Vtrans' existing stormwater permits and authorizations, including: authorization to discharge under the MS4 General Permit; authorization to discharge under MSGP 3-9003; numerous individual permits covering its regulated stormwater runoff; authorizations under General Permit 3-9015 for New Stormwater

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<sup>7</sup> It is the Court's understanding that discharges after this date are to be covered by the TS4 General Permit; see facts ¶ 16–22.

Discharges to Waters that are not Principally Impaired by Stormwater Runoff and General Permit 3-9010 for Previously Permitted Stormwater Discharges to Waters that are not Principally Impaired by Stormwater Runoff.

19. The TS4 General Permit expands ANR's existing jurisdiction by regulating discharges from impervious surfaces that are not subject to existing NPDES permits.

20. To regulate these previously unregulated discharges, ANR exercised its RDA under 10 V.S.A. § 1264(e) by issuing a Final Designation of VTrans Impervious Surface Requiring Permit Coverage on December 28, 2016.<sup>8</sup>

21. VTrans is required to apply for authorization to discharge under the TS4 General Permit before December 28, 2017.

22. All VTrans property, including in the Exit 16 Corridor, is subject to the jurisdiction of either the MS4 General Permit or the TS4 General Permit.

#### **e. The RDA Petition**

23. On or about June 27, 2016, Vallee filed a petition with ANR (the Petition), pursuant to 40 C.F.R. § 122.26(f)(2).

24. The Petition asks ANR to determine, pursuant to 40 C.F.R. § 122.26(a)(9)(i)(D), "that existing stormwater discharges into Sunnyside Brook contribute more than de minimus levels of pollutants to existing violations of Vermont water quality standards in both Sunnyside Brook and Lake Champlain (the receiving waters) and therefore require [NPDES] permits pursuant to" 33 U.S.C. § 1342(p)(2)(E), i.e. pursuant to ANR's RDA.

25. The Petition states that "Vallee's expert research in [a separate Act 250 proceeding over the Exit 16 Corridor] revealed that point-source stormwater discharges from the Exit 16 Corridor flow into Sunnyside Brook, and that more than de minimus levels of the pollutants in that stormwater, specifically phosphorus, travel quickly to Lake Champlain via Sunderland Brook and the Winooski River."

26. The Petition goes on to state that "more than de minimus levels of chloride from road salt used in the Exit 16 Corridor flow from point sources within the Corridor into Sunnyside Brook." It further notes that Sunnyside Brook is listed as impaired for chloride in the most recent draft

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<sup>8</sup> The Final Designation, at 1 n.1, states that 10 V.S.A. § 1264(e) is "consistent with and at least as stringent as 40 C.F.R. § 122.26(a)(9)(i)." On the record now before us, it is unclear to the Court whether, or how, the Final Designation and the TS4 General Permit are related.

CWA Section 303(d) list of impaired waters, that Vallee’s testing confirmed high chloride levels in the brook, and that this contamination is due to “the use of chloride to de-ice roads and parking lots in the area (including, without limitation, VTrans’ use of chloride in the Exit 16 Corridor).”

27. The Petition concludes by stating that “[p]oint-source discharges in the Exit 16 Corridor containing chloride and phosphorus are running into impaired receiving waters, namely Sunnyside Brook and Lake Champlain . . . . As these discharges are readily identifiable non-de minimus point-source pollution discharges that contribute to existing water quality violations, [ANR] should exercise its RDA and issue the necessary and appropriate NPDES permits.”

28. The Petition contains a supporting affidavit by a stormwater consultant stating that “concentrations and calculated loads of phosphorus” exist in Sunnyside Brook and increase as one moves downstream, and that this phosphorus is carried into Lake Champlain.

29. The Petition contains a second stormwater consultant affidavit, with graphs attached, indicating that Sunnyside Brook is seriously impaired for chloride, and concluding that this is caused by the use of de-icing products in the brook’s watershed, which are collected and discharged into the brook by stormwater systems. The second affidavit also indicates that stormwater discharges “from landscaped areas and pavement in this highly developed area” carry phosphorus into Sunnyside Brook, and that most of this is then carried to Lake Champlain.

30. ANR responded by letter dated October 5, 2016, stating that it could neither grant nor deny the Petition because it lacked the “site specific data regarding the potential pollutant contribution from each discharge.”

31. Vallee appealed ANR’s decision on November 3, 2016.

#### **IV. Procedural History**

ANR filed its motion for summary judgment on June 14, 2017. Vallee filed a response to the motion and a motion for leave to withdraw appeal and file a new petition on July 26, 2017. CLF filed a response to the summary judgment motion and a response to Vallee’s motion for leave to withdraw appeal and to file a new petition on July 27, 2017. ANR replied to the responses and filed a memorandum in opposition to Vallee’s motion for leave to withdraw on August 11, 2017. CLF and Vallee filed replies in support of Vallee’s motion for leave to withdraw on August 30, 2017.

During a September 18, 2017 hearing, the Court denied the motion for leave to withdraw on the record, and gave the parties leave to file additional briefs in response to ANR’s motion for

summary judgment. Vallee and CLF submitted their supplemental responses on October 13, 2017, and ANR filed a reply on October 27, 2017.

## **V. Discussion**

ANR's summary judgment pleadings present two arguments.

First, ANR argues that the Petition fails to clearly identify any point-source discharges from areas outside of the Exit 16 Corridor that are not covered by the MS4 authorizations, the MSGP, or TS4 General Permit over which it could exercise its RDA. ANR therefore asks the Court to dismiss the appeal without prejudice, which would allow Vallee to re-file a more specific petition.

Vallee and CLF counter that the Petition contains sufficient information to require ANR to exercise, or determine whether to exercise, its RDA in the Sunnyside Brook Watershed.

CLF asks the Court to deny ANR's request for dismissal and rule, as a matter of law, that the Petition requires ANR to exercise its RDA power over "those non-de minimus discharges in the Sunnyside Brook Watershed that cause or contribute to a water quality violation." CLF Response, Oct. 13, 2017 at 3. Vallee asks the same, but with "express instructions [that ANR] exercise its RDA power over at least" the discharges identified in an attachment to its response. Vallee Response, Oct. 13, 2017 at 8.

Second, ANR argues that stormwater discharges in the Exit 16 Corridor are already regulated by existing NPDES permits. To the extent the Petition focuses on the Exit 16 Corridor, ANR asks the Court to hold as a matter of law that because stormwater discharges in the Exit 16 Corridor are regulated by existing NPDES permits, there is no need to exercise RDA over the same discharges.

Vallee and CLF respond that there are stormwater discharges in the Sunnyside Brook Watershed generally that are not regulated by an existing permit. They also argue that some Exit 16 Corridor stormwater discharges are unregulated by existing permits, and that even the regulated discharges are eligible for RDA regulation if existing permits do not sufficiently control pollutants.

### **a. Whether the Petition asks ANR to exercise RDA over stormwater discharges outside of the Exit 16 Corridor**

ANR argues that the Petition does not specify any point-source discharges from areas outside of the Exit 16 Corridor and not covered by existing NPDES permits over which it could

exercise its RDA. To the extent the Petition might address discharges outside of the Exit 16 Corridor, then, ANR asks the Court to dismiss the appeal without prejudice, which would allow Vallee to re-file a more specific petition. Vallee and CLF argue that the Petition asks, or includes sufficient information to require, ANR to exercise RDA over all discharges in the entire Sunnyside Brook Watershed that contribute to more than de minimis violations of Vermont water quality standards, and that the specificity ANR seeks is unnecessary.

Looking to the Petition, we can understand the confusion.

In its first paragraph, the Petition simply asks ANR to determine “that existing stormwater discharges into Sunnyside Brook contribute more than de minimus levels of pollutants to existing violations of Vermont water quality standards in both Sunnyside Brook and Lake Champlain (the receiving waters) and therefore require” NPDES permits pursuant to ANR’s RDA. This preliminary statement takes the form of a general request, and could apply to any and all stormwater discharges into Sunnyside Brook. The rest of the Petition, however, focuses almost entirely on stormwater discharges from the Exit 16 Corridor. It is therefore understandable that some would read the Petition to address all stormwater discharges to Sunnyside Brook, while others would read it to address only Exit 16 Corridor discharges.

In subsequent filings made in this appeal, Vallee has clarified that it seeks to have ANR exercise RDA over all stormwater discharges in the Sunnyside Brook watershed, including those from the Exit 16 Corridor.

With that clarification, we can address whether the request is sufficiently specific for ANR to act. In this, we may rely on precedent. In June 2003, CLF and the Vermont Natural Resources Council (VNRC) “filed a petition with ANR seeking a determination that existing stormwater discharges into Potash, Englesby, Morehouse, Centennial, and Bartlett Brooks contribute to violations of the Vermont water quality standards and therefore require NPDES permits under the CWA.” In re Stormwater NPDES Petition, 2006 VT 91, ¶ 6. There, as here, the petitioners sought to have ANR exercise its RDA over entire watersheds where stormwater discharges allegedly contributed to water quality standard violations. Id. Then, as now, ANR declined to conduct an analysis of whether stormwater discharges in the watersheds contributed to such violations. Id. ¶ 8.

The Vermont Supreme Court held that a petition identifying stormwater discharges in general, in a specific watershed, is sufficient to require ANR to act under Phase II rules. Id. ¶ 12–

14. Such a petition requires ANR to conduct “a particularized, fact-specific determination on a case-by-case basis as to whether certain discharges or categories of discharges ‘contribute[] to a violation of a water quality standard.’” *Id.* ¶ 26 (quoting 40 C.F.R. § 122.26(a)(9)(i)(D)). The Court remanded the matter to ANR to conduct this analysis. *Id.* ¶ 30.

ANR may have been hesitant to act on Vallee’s Petition because of confusion over whether Vallee sought an exercise of RDA over the entire watershed, or just the Exit 16 Corridor. That issue has now been clarified. With this clarification, we see no need to dismiss the matter and have Vallee re-petition ANR. Instead, we remand the Petition to ANR to conduct a particularized determination of whether stormwater discharges in the Sunnyside Brook Watershed contribute to a violation of the Vermont water quality standards. In doing so, we note that in the course of this appeal the parties have shared specific information with each other on stormwater discharges that may contribute to violations of water quality standards. On remand, we direct the parties to continue this communication in order to clarify the scope of the Petition as much as possible.

**b. Whether stormwater discharges in the Exit 16 Corridor are regulated by existing permits such that asserting jurisdiction Exit 16 Corridor discharges through the RDA would be barred or unnecessary.**

**i. Whether ANR can exercise RDA over discharges already regulated by existing NPDES permits**

The parties disagree over whether it is necessary, or possible, to exercise RDA over discharges that are already regulated by existing NPDES permits.

CLF argues (with Vallee joining the argument) that the only consideration for an agency administering the NPDES program in determining whether to exercise its RDA is the standard set out in 40 C.F.R. § 122.26(a)(9)(i)(D). Under that subsection, a NPDES permit is required if ANR “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.” CLF notes that this subsection does not exempt discharges that are already regulated by NPDES permits from RDA. CLF notes that EPA could have included such an exemption, and would have done so if that is what it intended.

CLF is correct that § 122.26(a)(9)(i)(D), taken alone, does not say that RDA cannot be exercised over discharges already regulated by existing NPDES permits. We do not, however, extract parts of a regulation and interpret them in stark isolation. Instead, we “read the sections

of the regulatory scheme in context and the entire scheme in pari materia.” Richards v. Nowicki, 172 Vt. 142, 149 (2001) (citation omitted); see also Stormwater NPDES Petition, 2006 VT 91, ¶ 14.

The preamble to the Phase II rules explains that the RDA was retained in those rules to maintain the authority to “designate remaining unregulated discharges composed entirely of storm water for regulation on a case-by-case basis,” and to address “individual instances of storm water discharge[s that] might warrant special regulatory attention, but do not fall neatly into a discrete, predetermined category.” National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68722-01, 68,781 (Dec. 8, 1999) (emphasis added). These passages show that the RDA is a catch-all to regulate discharges that do not fall into other categories, squarely contradicting the interpretation advanced by CLF and Vallee.

Our Supreme Court interpreted the RDA as such a catch-all when it held that a petition can ask ANR to exercise RDA over an entire watershed, noting that:

Nothing in the regulations . . . would appear to bar [a petition asking ANR to exercise RDA over] a ‘category’ consisting of existing discharges within a watershed not covered by the more specific provisions of the Phase I and II Rules relating to industrial activity, construction sites, and municipal sewer systems.

Stormwater NPDES Petition, 2006 VT 91, ¶ 13 (emphasis added). We also interpreted the RDA as a mechanism to regulate stormwater discharges that are otherwise unregulated. In re: Stormwater NPDES Petition, No. 14-1-07 Vtec, slip op. at 34 (Vt. Env. Ct. Aug. 28, 2008) (Durkin, J.).

Reading the RDA as a catch-all is also logical. Agency of Nat. Res. v. Deso, 2003 VT 36, ¶ 17, 175 Vt. 513 (rejecting statutory construction that leads to absurd results) (citation omitted). Read in this way, the NPDES permitting regime defines specific categories to be regulated, and then sets out the residual authority to regulate other discharges that would otherwise go uncontrolled.

CLF and Vallee’s reading, however, would require multiple permits under the same permitting regime for the same single discharge. Because the permits would issue under the same requirements and guidelines, they would theoretically be identical and duplicative. We see no logic in such a scheme. Alternatively, a second permit would issue to address deficiencies in the first permit (and then possibly a third, and fourth, and so on). This would potentially undercut

existing ways of addressing deficiencies, such as the appeal and permit renewal processes, and conflict with settled notions of finality in permitting. It would also create a clumsy patchwork of layered permits, band aids stuck to each little gap in the regulatory scheme. Further, it would lead to an inefficient use of Agency, party, and Court resources.

For these reasons, we conclude that the RDA is to be exercised only over discharges that are not already regulated by the NPDES program. If a discharge is regulated by an existing NPDES permit, RDA cannot be extended over that discharge.

**ii. Whether all Exit 16 stormwater discharges are subject to regulation under the NPDES stormwater program.**

To the extent that the Petition calls for ANR to exercise its RDA over Exit 16 Corridor discharges, ANR contends that these are already subject to regulation under the NPDES stormwater program. CLF and Vallee disagree.

ANR notes that Exit 16 Corridor stormwater discharges go into the VTrans MS4 or potentially the Colchester MS4, both of which are regulated through the MS4 General Permit. ANR further points out that stormwater discharges from all surfaces owned or controlled by VTrans, including the Exit 16 Corridor, are subject to regulation under the TS4 General Permit. Although VTrans is not yet authorized to discharge under the TS4 General Permit, it is required to apply for and obtain such authorization. Therefore, ANR argues, it has already exercised NPDES jurisdiction over all Exit 16 Corridor stormwater discharges, and there is no need to extend NPDES jurisdiction over these same discharges through the RDA.

CLF and Vallee challenge this reasoning in two ways.

First, CLF and Vallee argue that any Exit 16 Corridor stormwater discharges that enter the Colchester MS4 are not “regulated” by the Colchester MS4 authorization. This is because the Colchester MS4 authorization does not list VTrans discharges (it does list other discharges), and does not list Sunnyside Brook as a receiving water (it does list other receiving waters). According to Vallee and CLF, therefore, although some Exit 16 Corridor discharges go into the Colchester MS4, and that system has an authorization to discharge under the MS4 General Permit, there is no MS4 authorization to specifically discharge Exit 16 Corridor stormwater discharges via the Colchester MS4. ANR disputes this at some level by noting that while Colchester’s NOI does not list Sunnyside Brook as a receiving water, “it identifies 42 outfalls to Sunderland Brook and its tributaries, one of which includes Sunnyside Brook,” and that “the Town identified a number of

permitted outfalls to Sunnyside Brook in its Stormwater Infrastructure Inventory.” ANR Reply, Oct. 27, 2017 at 7 n.7.

The facts now on the record are insufficient for the Court to determine whether any Exit 16 Corridor stormwater discharges go into the Colchester MS4, or, if so, whether those would be “regulated” by the Colchester MS4 authorization. Even if we were to assume that discharges do go into the system and are not regulated by the authorization, however, this would not overcome ANR’s overriding point. VTrans must apply for authorization to discharge all stormwater from property it owns or controls under the TS4 General Permit. If CLF and Vallee are correct—that Exit 16 Corridor stormwater discharges to the Colchester MS4, and is not covered by the Colchester MS4 authorization—then VTrans must apply to have those discharges covered under the TS4 General Permit. These and all other Exit 16 Corridor stormwater discharges will then be regulated under the TS4 General Permit.

Second, CLF and Vallee submit that the current MS4 authorizations do not regulate chloride and phosphorus, and ANR can and should exercise RDA to cover this gap in regulation.

ANR responds in part that chloride and phosphorus will be addressed through the implementation of total maximum daily loads (TMDLs). We have previously held, however, that the TMDL process does not relieve ANR of its duty to exercise RDA. In re Stormwater NPDES Petition, No. 14-1-07 Vtec, slip op. at 7–8 (Vt. Env. Ct. Feb. 18, 2009) (Durkin, J.).<sup>9</sup> Nevertheless, if the current NPDES permits and authorizations do not regulate phosphorus and chloride discharges from the Exit 16 Corridor, and if the NPDES program requires ANR to regulate those discharges, VTrans must apply to have those discharges covered under the TS4 General Permit.

We therefore conclude that ANR has already extended NPDES jurisdiction to all Exit 16 Corridor stormwater discharges. Those discharges are already regulated through the NPDES program, or are to be regulated through the NPDES program under the TS4 General Permit. Vallee and CLF’s request that ANR extend NPDES jurisdiction through the RDA is therefore moot. Skaskiw v. Vermont Agency of Agric., 2014 VT 133, ¶ 33, 198 Vt. 187.<sup>10</sup>

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<sup>9</sup> We also previously noted, in a separate matter, that ANR asserts that VTrans’ authorization to discharge under the TS4 General Permit must comply with the TMDLs for phosphorus. R.L. Vallee, Inc. et al MS4, No. 122-10-16 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. May 2, 2017) (Walsh, J.). We decline to rely on that assertion here. Stormwater NPDES Petition, 2006 VT 91, ¶ 24.

<sup>10</sup> To the extent that CLF and Vallee may seek to challenge whether the TS4 authorization addresses the concerns about Exit 16 Corridor discharges raised here (i.e. the sufficiency of chloride and phosphorus regulation and discharges into the Colchester MS4), those challenges are not ripe for review. R.L. Vallee, Inc. et al TS4, No. 7-1-17 Vtec, slip op. at 5–6 (Vt. Super. Ct. Envtl. Div. Jul. 18, 2017) (Walsh, J.).

## VI. Conclusion

For the foregoing reasons, ANR's motion for summary judgment is **GRANTED**.

The scope of Vallee's petition may have been unclear, but this confusion has been clarified: Vallee seeks ANR's determination of whether to exercise its RDA over any discharges in the Sunnyside Brook Watershed. We remand this issue to ANR to analyze whether it must exercise RDA over any discharges in the Sunnyside Brook Watershed.<sup>11</sup>

Stormwater discharges over which ANR has already extended NPDES jurisdiction, including those from the Exit 16 Corridor, are exempt from this analysis.

A Judge Order is issued simultaneously with this decision. This completes this matter.

Electronically signed on December 22, 2017 at 10:21 AM pursuant to V.R.E.F. 7(d).



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Thomas G. Walsh, Judge  
Superior Court, Environmental Division

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<sup>11</sup> The Court notes, however, that if the parties agree that the present matter is complete, a new petition that encompasses this and other issues may be filed with ANR.