UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 16 2003

OFFICE OF
WATER

Ms. Elizabeth McLain
Secretary
Vermont Agency of Natural Resources
103 South Main Street
Center Building
Waterbury, VT 05671-0301

Dear Madam Secretary:

Thank you for your August 1, 2003, letter to Acting Administrator Marianne L. Horinko, regarding the Conservation Law Foundation's (CLF) petition asking your Agency to determine that storm water discharges to four impaired brooks in Chittenden County contribute to known violations of Vermont's water quality standards (WQS) and therefore require National Pollutant Discharge Elimination System (NPDES) permits. You've asked for guidance from the Environmental Protection Agency (EPA) on several issues related to permits for discharges to impaired waters. Our responses to each of your questions are enclosed.

Thank you for sharing your concerns on these issues. Please contact me if you wish to discuss this matter further, or have your staff call James A. Hanlon, Director, Office of Wastewater Management, at (202) 564-0748.

Sincerely,

G. Tracy Mehan, III
Assistant Administrator

Enclosure

ANSWERS TO QUESTIONS RAISED

1. Where the receiving water does not meet water quality standards and a final TMDL has not been completed, does section 402(p)(2)(E) of the Clean Water Act require that every storm water discharge that contains a measurable and detectable amount of the pollutant, including background levels of sediment, causing impairment to receive a NPDES permit? Or has EPA identified a subset of storm water discharges that require NPDES permits? If so, what criteria are used to identify this subset of discharges?

Clean Water Act (CWA) section 402(p)(2)(E) does not automatically require all storm water discharges that contain measurable pollutants and discharge into impaired waters to obtain NPDES permits. Rather, this section establishes a designation authority under which the permitting agency may make case-by-case determinations of the need for an NPDES permit. The designation authority under § 402(p)(2)(E) is a valuable tool in the regulatory toolbox to protect water quality. During the first phase of the storm water program under the 1987 amendments, § 402(p)(2)(E) ensured that high priority storm water sources, in addition to industrial activities and large and medium-sized municipalities, could be regulated with NPDES permits. To our knowledge, the designation authority was not widely used during the first phase, except for filling "donut holes" in the scope of coverage of municipal separate storm sewer systems (MS4s) in urban areas. EPA and the stakeholders (including States) participating in development of the second phase regulations recognized the continuing importance of the designation authority to protect water quality. The new regulations maintain the designation authority "to assure progress" toward attainment of water quality standards in a watershed. 64 Fed. Reg. 68722, 68781 (Dec. 8, 1999). EPA vigorously defended retaining this designation authority and was upheld in challenges to the second phase regulations. Environmental Defense Center, et al. v. EPA, 319 F.3d 398, 444-447 (9th Cir. 2003).

Neither the CWA nor implementing regulations impose a non-discretionary duty to designate sources. However, an agency should act reasonably in its exercise of discretion to designate (or not) sources based on available information and relevant considerations. EPA does not interpret the regulations to require designation (for NPDES permits) of every storm water discharge to an impaired water with a measurable and detectable amount of the pollutant causing the impairment. However, 40 C.F.R. § 122.26(a)(9) requires a permit to be obtained when, on a case-by-case basis, the permitting authority determines that a storm water discharge is *contributing* to a violation of a water quality standard or is a *significant contributor* of pollutants to waters of the U.S. Of course, both individual and general NPDES permits are options for control of pollutant discharges from designated storm water discharges.

In response to the second part of your question, EPA has not identified a subset of storm water discharges that require NPDES permits, other than the additional MS4s and the smaller construction sites in the second phase regulations. In the Report to Congress preceding those regulations, EPA categorized and characterized the remaining unregulated point sources of storm water and concluded that only certain of those sources within any particular category warranted

regulation under NPDES, and only on a localized basis, to protect water quality. Beyond the sources identified in the first and second phase regulations, EPA anticipated that NPDES agencies (including EPA in some States) would reasonably exercise the authority to designate additional sources as necessary to protect water quality.

In a 1990 Agency guidance document supporting designation under the first phase regulations, EPA did identify a variety of circumstances where storm water sources to impaired waters should be considered for designation. (The guidance document did not identify "criteria" beyond those identified in the CWA.) Among other things, the guidance notes that the reports that States generate under CWA section 305(b) would provide a critical source of information for making designation determinations. The guidance also recommends that designation is appropriate as soon as the adverse impacts from storm water are recognized. In some situations there may not be enough information to determine the cause of impairment or to identify storm water sources that contribute to the water quality standards violation. But where such information exists, NPDES permits should be required for storm water discharges found to be contributing to standards violations. EPA has not defined a threshold level of pollutant contribution that would trigger such a finding, but it would be reasonable to require permits for discharges that contribute more than *de minimis* amounts of pollutants identified as the cause of impairment to a water body.

2. Where the receiving water does not meet water quality standards and prior to the final approval of a TMDL does section 303(d) of the Clean Water Act, or any rule issued thereunder, prohibit a new discharge and/or reissuance of a permit for an existing discharge until a TMDL is complete?

EPA does not interpret the CWA or its implementing regulations to contain an absolute prohibition against the issuance of a permit for a new or existing discharge to an impaired water in the absence of a TMDL. Rather, discharges are to be evaluated on a case-by-case basis to determine if the discharge would cause or contribute to a violation of water quality standards. A permit may be issued if the discharge will not cause or contribute to a violation of standards and, conversely, must be denied if the discharge would cause or contribute to such a violation. See 40 C.F.R. §§ 122.4(d), (i). There are at least three situations in which EPA believes permits for discharges into impaired waters may be issued consistent with current federal regulations prior to TMDL development: first, where the discharge does not contain the pollutant for which the water is impaired; second, in circumstances involving non-bioaccumulative and non-persistent pollutants, where the permit contains effluent limits that are at or below either the numeric criteria or a quantification of a narrative water quality criterion such that the effluent will not increase the pollutant concentration in the waterway; and third, where the increased load is offset by load reductions from other sources discharging to the impaired segment.

3. In a nondelegated state, does EPA, as part of its NPDES permitting responsibilities, issue NPDES permits for discharges of storm water to impaired waters in addition to the Phase I industrial permits or Phase I and II erosion permits? If so,

a. What are EPA's technical requirements for storm water treatment practices?
b. How does EPA determine any appropriate water quality based effluent limit for the discharge and is this limit expressed as a BMP or a numerical limit?
c. Under what conditions does EPA authorize new storm water permits and renew existing storm water permits discharging to receiving waters that currently fail to meet water quality standards?

In a state that is not authorized to administer the NPDES permit program (e.g., Massachusetts or New Hampshire), EPA is the permitting authority and would make the determination under 40 C.F.R. § 122.26(a)(9) whether a storm water discharge is contributing to a water quality standards violation or is a significant contributor of pollutants. To date, EPA Region I (which issues permits in Massachusetts and New Hampshire) has not designated specific, additional sources under Section 402(p)(2)(E), although Region 1 recently re-issued an NPDES general permit for industrial storm water that contains a "sector" for designated discharges in the event Region 1 were to make such a designation (or designations). We expect that water quality-based effluent limitations in NPDES permits for designated storm water discharges would be expressed in most cases as best management practices because of the difficulty of establishing numerical effluent limits. As described in response to question #2 above, new discharges of storm water to impaired waters may be permitted in certain circumstances. Existing discharges of storm water to impaired waters may also be permitted with conditions imposed to ensure that such discharge will no longer cause or contribute to non-attainment of a water quality standard. For instances where EPA is the permitting authority, the Agency might consider other water quality protections that are already in place at a particular source when determining whether to designate that particular source under CWA 402(p)(E), as well as when to make such a designation (or a permit application deadline) effective. Vigorously implemented controls that otherwise might be 'voluntary' may provide a reasonable basis to defer designation of a particular source.

4. We understand that EPA and state programs work differently in that EPA issues a permit that complies with the Clean Water Act and then determines whether there is compliance with the water quality standards, while Vermont, when issuing a permit, must determine that there is and will be compliance with standards before the permit is issued. We are aware of situations in Region I where EPA has issued NPDES permits and simultaneously issued an enforcement order against the permittee for failing to meet water quality standards with the order containing a compliance schedule. How does EPA's approach to permitting affect EPA's answers to the above questions?

It is correct that EPA issues NPDES permits with limits to ensure that technology-based and water quality-based requirements are met, irrespective of whether the permittee can

immediately comply with the requirements. When legally permissible, EPA may include a compliance schedule in the permit itself; in other circumstances, EPA may incorporate a compliance schedule into an administrative order issued simultaneous with or soon after permit issuance. The nature of the permitting approach does not affect EPA's answers to the questions above.

5. What is EPA's position on the assertion by CLF that "unless the discharges identified in CLF's petition are required to obtain NPDES permits through appropriate regulatory action under 402(p)(2)(E), Vermont will be at risk of withdrawal of the NPDES delegation pursuant to 40 C.F.R. §§ 123.63 and 123.64."?

We do not agree with CLF's characterization of the consequences of Vermont's failure to require permits of the discharges identified in CLF's petition. Program withdrawal is a highly unusual action that may occur when a state program no longer complies with the requirements of section 402 of the CWA and 40 C.F.R. Part 123, and the state fails to take corrective action. Further, program withdrawals occur only after the conclusion of withdrawal proceedings, during which the party seeking withdrawal of a state's program will have the burden of coming forward with the evidence in a hearing held pursuant to 40 C.F.R. § 123.64. EPA typically works with states to help identify and correct program deficiencies so that withdrawal is unnecessary.