

**VERMONT AGENCY OF NATURAL RESOURCES
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

**RESPONSE TO COMMENTS ON DRAFT GENERAL PERMIT 3-9030 FOR
DESIGNATED DISCHARGES TO THE BARTLETT, CENTENNIAL,
ENGLESBY, MOREHOUSE AND POTASH BROOK WATERSHEDS**

NOVEMBER 19, 2009

Comments received on draft General Permit 3-9030:

Identification	Submitted by:	Signed by:
SB	City of South Burlington	Thomas Dipietro Stormwater Superintendent
CLF	Conservation Law Foundation	Anthony Iarrapino Staff Attorney
DC	Dan Connelly, resident of Indian Creek Condominiums	Dan Connelly

Following each numbered comment below, the () identifies the commentator's identification.

Comments pertaining to the Relationship to MS4 Permit, MSGP Permit and Subsequently Designated or Notified Discharges

1. 40 C.F.R. § 122.26(f)(1) provides that the owner or operator of an MS4 may petition ANR to require separate NDPES permits for stormwater discharges into the MS4 system. It is unclear from the draft permit whether such subsequently designated or notified dischargers would be required or eligible to obtain coverage under this permit, or a separate individual or general permit. ANR should clarify this point in its final permit and/or its response to comments. (CLF)

Response:

General Permit 3-9030 states that the Department may designate additional designated discharges for coverage under this permit. This permit is only intended to cover additionally designated discharges that do not discharge into or commingle with a MS4 system. The Department plans to include language in the upcoming reissued MS4 permit that will specify that MS4s may petition the Secretary as provided in federal law to residually designate entities that discharge into or through a MS4 system. The Secretary may residually designate entities as necessary to implement the stormwater TMDLs after issuance of the MS4 permit and the preparation of watershed-specific BMP plans. A new RDA general permit or individual RDA permits will be issued for any residually designated discharges that discharge into or through a MS4 system.

2. ANR has stated that it has not designated contributing dischargers that are already subject to the Multi-Sector General Permit for stormwater discharges associated with industrial activities. It is not clear from materials published by ANR to date how many of these dischargers are present in the TMDL watersheds, nor is it clear how and by when ANR will ensure that such dischargers will do their part to implement the TMDLs. ANR should make this information available to the public no later than the date on which the draft RDA permit is finalized so that the public can assess whether the combination of activities required under these interrelated permits will ensure attainment of water quality standards through full implementation of the TMDL. (CLF)

Response:

In the five watersheds subject to General Permit 3-9030, there are 12 entities that are subject to the NPDES multi-sector permit. The Department plans to amend the multi-sector permit when it is next reissued to include additional requirements for residually designated discharges. These requirements will be equivalent to or more stringent than the requirements for the Category A, B and C discharges covered under this general permit.

Comments pertaining to Transparency and public participation

3. Given the site-specific nature of the requirements imposed on dischargers subject to Section IV.B, the same public participation requirements laid out above apply to materials submitted pursuant to the requirements of Section IV.B.1. In light of the fact that the Secretary will reopen the permit pursuant to IV.B.2, CLF expects that the standard notice and comment opportunities will attend the reopened permit. The final permit should clarify further how that will work. (CLF)

Response:

The Department will use the standard notice and comment process for amending general permits if it reopens General Permit 3-9030 with respect to the discharges subject to Section IV.B. The permit has been clarified to reflect this.

4. The final permit must require dischargers to submit to the Secretary any and all monitoring or other records created by dischargers pursuant to requirements of the final permit. Further, such records should be available for inspections by members of the public upon request. (CLF)

Response:

Pursuant to the general permit, dischargers shall submit an annual inspection report to the Secretary which will be available to the public upon request in accordance with Vermont's public records law.

5. ANR could provide notice and comment opportunities for the EFA approved by the Secretary without much administrative burden by making use of its web site to apprise interested members of the public that the submitted and subsequently

approved materials for a given parcel are available for inspection and review. Considering the technical nature of these materials, ANR should provide for public comment periods of at least 30 days. Without such public comment opportunities, the final permit will be fatally flawed. (CLF)

Response:

General Permit 3-9030 is written to provide permit coverage to Category A discharges upon the submission and approval of the NOI. The NOI is subject to the 10 day general permit review and comment period. The EFA analysis and design plans will take time to conduct and submit to the Secretary. If the EFA analysis and plans do not comply with the requirements of the permit, the Secretary will have enforcement authority for failure to comply with the permit, and citizens will have the citizen suit authority under the Clean Water Act to address non-compliance. The commentator's request that the EFA analysis and BMP design plans be subject to a public comment and review period does not work within the context of a general permit, because under a general permit scheme, notice and comment is provided prior to authorization being granted under the permit, not during the period of coverage under the permit. In order to address the commentator's concern, the RDA permit has been amended so that the Department shall place the EFA analysis and design plans on the Department's website after they have been approved. This will allow any interested citizen or group to independently determine if they consider there to be a permit violation.

6. Permits for discharges under Subpart IV.A (having a previously issued state permit) are not required to be reopened when new BMPs are identified as necessary to the implement TMDL requirements. It does, on the other hand, require reopening permits for discharges under Subpart IV.B for the exact same operational modifications in each case. The handling of the two treatment categories is inconsistent (reopened, not reopened) across physical conditions that can be operationally identical. Furthermore, public comment is unreasonably restricted for the specific case of new treatments under Subpart IV.A. The simplest remedy for this is to require Subpart IV.A permits to be reopened for the same conditions that require reopening for Subpart IV.B permits. (DC)

Response:

Subpart VI.P. of General Permit 3-9030 has been revised and allows the Secretary to require additional measures by this category of dischargers as follows:

If, after granting authorization to discharge under this general permit, the Secretary determines, in his or her discretion, that there is evidence indicating that an authorized stormwater discharge causes or has the reasonable potential to cause or contribute to a violation of the Vermont Water Quality Standards, the Secretary may require the permittee to obtain an individual permit, or the Secretary may modify the authorization to discharge or this general permit to include different limitations and/or requirements.

The Secretary believes that this includes sufficient authority to require additional BMPs as necessary for TMDL implementation and that nothing in General Permit 3-9030 prohibits the Secretary from doing so.

General Comments

7. The Secretary must approve submitted BMP plans in a timely fashion so that completion of BMP installation can take place prior to the expiration date of the permit. CLF understands and appreciates the fact that ANR will have to carefully review a large number of highly technical and site-specific plans submitted by dischargers pursuant to Sections IV.A.1, B.1. Nonetheless, CLF is concerned that the permit appears to unlawfully provide the Secretary with unfettered discretion to delay his or her approval of such plans for a period of time that may extend beyond the expiration date of the permit. This is inconsistent with the fundamental structure of the N.P.D.E.S. program that limits N.P.D.E.S. permits to five-year periods. CLF has faith that ANR does not intend to delay approval of submitted plans in a manner that would lead to noncompliance with the Clean Water Act. CLF therefore requests that the final permit reflect or better explain how the Secretary's approval process will be managed so as to minimize the risk of noncompliance through unlawful delay. (CLF)

Response:

The Department's Stormwater Program does not have mandated review times for any of its permit programs. Applications and other required submittals are reviewed in timeframes dictated by available resources. The Department acknowledges the importance of providing a timely review of these materials, and will make every reasonable effort to dedicate the required resources to doing so. The Secretary has no intent to violate the five year permit term.

8. CLF understands that the analysis and BMP requirements of Section IV.B are drafted so as to allow for coordination with broader remedial efforts planned under the forthcoming MS4 permit. CLF appreciates, therefore, the need for ANR to retain some flexibility in crafting BMP requirements for those sites. CLF is concerned, however, by the fact that the permit allows the Secretary discretion as to whether installation of any structural BMPs or completion of offsets will be required by dischargers with greater than one acre of impervious surface that do not have a previously issued state stormwater permit. Given the size of the parcels fitting this description, the likelihood that there is no existing, modern stormwater treatment infrastructure on those sites, and the overall challenge that ANR and all responsible dischargers will have in meeting the TMDL targets, CLF cannot envision a scenario in which these parcels will not have to do something more than simply comply with the requirements of Appendix C. The final permit should make clear that the Secretary's discretion under Section IVB.2 is limited to the question of what on-site BMPs and/or offsets will be required for these sites and does not include the authority

to hold these large-scale dischargers completely harmless in the implementation of the TMDLs. (CLF)

Response:

The Department agrees that parcels of this size will need to participate in TMDL implementation efforts. However, the Department is not ready, without further site-specific information, to determine the extent of the effort required by any specific discharger within Category B. These dischargers may need to install stormwater BMPs and/or contribute to a fund to be used for the installation/upgrade of BMPs at other sites within the watershed. The Secretary will amend this general permit and issue other permits as necessary to implement the TMDLs. Subpart IV.B.2 of General Permit 3-9030 has been changed to state that stormwater BMP implementation or other measures may be required of this category of discharges in order to implement the TMDL.

9. Will applicants in all categories be required to record the authorization to discharge in the land records as specified in the draft permit? (SB)

Response:

No. Recording will only be required for Category A and Category B dischargers. The intent of this permit is to avoid paperwork requirements for Category C dischargers.

10. Section IX of the permit indicates that the permit will expire in 5 years from the date of issuance. Will applicants in all categories be required to reapply for coverage? (SB)

Response:

Yes.

11. We would discourage the Agency from establishing fees for coverage under permit 3-9030 in the future, especially for those applicants who fall under category IV.C of the permit. (SB)

Response:

The Department is currently considering the appropriate fee structure, if any, for this permit and any additional RDA permits that may be issued in the future. It is important to understand that the issuance of general and individual permits results in increased administrative burdens on the Department, which must be funded. Lack of funding can result in unacceptable permit processing times and limit the ability to track and address permit non-compliance.

12. Will designated discharges that fall into category IV.C of the draft permit have a NPDES permit attached to them? Will these properties be required to renew their permits every 5 years? (SB)

Response:

Yes. Category C dischargers are granted coverage upon final issuance of the permit, subject to losing this coverage if the terms and conditions of the permit are not met. Category C dischargers will be covered under any renewed permit.

13. Will category IV.C have inspection and reporting requirements?

Response:

No, category IV.C will not have inspection and reporting requirements. They fall within the non-reporting category.

14. How will ANR determine if additional work is needed by designated dischargers in category IV.B? Will the EFA be used? If so why not just require that up front, if another process will be used by ANR then that should be clearly indicated in the permit. (SB)

Response:

The Department will determine what BMP implementation or other measures are required for these discharges during the development of the watershed-specific BMP plans that will be required by the reissued MS4 permit. These watershed-specific plans will allow for the most scientifically sound and cost effective implementation strategy across each watershed.

15. How will ANR enforce the disconnection requirements for categories IV.B and IV.C of the permit? (SB)

Response:

The Department will enforce the requirements with existing authority based on the availability of resources.

16. Has ANR considered a de minimus exemption for the draft permit? (ex. .0012 acres of impervious on one site) (SB)

Response:

The Department believes that it is not possible to establish a de minimus level of impervious surface until comprehensive BMP plans have been established for each watershed.

17. The inclusion of Items 3 & 4 in Table 2 of the EFA means that a discharge that has maximized its lot coverage will not be required to install treatment while an adjacent lot with some open space will be. This seems inherently unfair, especially when considering that the lots that have maximized their impervious surface are likely to be large contributors. (SB)

Response:

The concept of “fairness” was stressed during the most recent collaborative meetings of the Vermont Stormwater Advisory Group (SWAG). It is anticipated that it may be necessary to develop a funding mechanism (e.g. contributions to an implementation fund, stormwater utilities, etc.) to “level” any inequities that may arise due to the fact that BMP installation at some sites will be limited due to site constraints. A better understanding of these details will be developed during the development of watershed-specific BMP plans by the affected municipalities and the Department.

18. The limitations in Table 2 of the EFA do not facilitate cooperation between adjacent/nearby landowners and the municipality to construct large scale stormwater treatment projects. If adjacent property owners aren’t provided with some incentive or requirement to work with the municipality or neighboring property owners they will not participate in the solution and will likely result in an increase of the total number of projects and total cost of treatment to reach the TMDL goals. (SB)

Response:

This is why the Department strongly supports the concept of municipally-led TMDL implementation efforts and the creation of solid funding mechanisms, such as stormwater utilities.

Comments pertaining to the Requirements of the permit

19. Given that the sites with less than an acre of impervious surface are an integral part of the overall cleanup of these watersheds, the permit should ensure that small sites have fully explored all opportunities for low impact development retrofit. For example: the permit should require examination of opportunities for reforestation, partnering with adjoining parcels on joint infiltration and/or treatment projects, substitution of impervious to pervious surfaces for driveways and roads, and an examination of other L.I.D. retrofit practices. To facilitate exploration of retrofit that is more robust than the minimum requirements of draft Appendix C, the final permit should also include a process by which a discharger or group of dischargers can apply to have the deadline in Section IV.C extended up to the end of the 2010 construction season. To qualify for the extension, the discharger or group of dischargers must submit information to the Secretary showing that such extension would enable the discharger or group of dischargers to fully explore and implement measures that exceed the minimum requirements of the draft Appendix C. (CLF)

Response:

The Department has amended the draft permit to provide a longer time for implementation by these small sites. DEC has also developed the Small Sites Guide for Stormwater Management for use by this category of discharges, which provides examples of a wider range of options for satisfying the requirements of this permit.

20. Requiring a discharger to submit to the Secretary a certified description of the measures taken to comply with Appendix C requirements will help ANR identify those sites that have fallen short of compliance with this new permit program. It will also allow ANR and the public to understand the baseline against which to judge continued compliance on those sites that have correctly implemented the Appendix C measures from the outset. (CLF)

Response:

Category C discharges are treated as a non-reporting category of discharges in General Permit 3-9030. If a certification requirement were added, the permit would no longer be a non-reporting general permit for these discharges. Compliance by these small sites will necessarily be judged through site visits. The permit is written so that if these small sites do not comply with the permit, then they lose permit coverage. This is a strong incentive for these dischargers to comply. In addition to possible enforcement action by the Department, these sites will be subject to potential Clean Water Act citizen suits. In addition, closings and other real estate transactions may become complicated – a further incentive to compliance. Given these strong incentives along with the fact that the Department has developed a Small Sites Guide for Stormwater Management, the Department believes that these small sites will comply without the necessity of a certification requirement.

21. CLF recommends that ANR consider enhanced good housekeeping procedures such as those proposed by Massachusetts Department of Environmental Protection in its draft permit for stormwater discharges originating from commercial, industrial, and high density residential development. In a section titled “DEVELOPMENT AND IMPLEMENTATION OF THE STORMWATER MANAGEMENT PLAN FOR MEETING THE BASELINE PERFORMANCE STANDARDS,” the Massachusetts draft permit requires as follows:

(B) Sweeping Program. The SMP shall include a program for sweeping all paved surfaces at the Permitted RIA Site to keep them free of sand, litter, and other pollutants. At a minimum, the program shall provide for sweeping at least twice a year, once between November 14 and December 15 (after leaf fall) and once during the month of April (after snow melt). The SMP shall also provide for the proper disposal of street sweepings in accordance with the Bureau of Waste Prevention’s Policy for the Reuse and Disposal of Street Sweepings.

(C) Management of Snow and Deicing Chemicals.

(1) The SMP shall include measures to minimize the risk that the snow removal and deicing activities, including, without limitation, the storage of snow removed from paved surfaces and the application and storage of deicing chemicals, will contribute pollutants to the stormwater discharged from the Permitted RIA Site or interfere with the proper operation of the stormwater management system. At a minimum, these measures shall include the designation of areas for snow disposal in accordance with the Bureau of Resource Protection’s Snow Disposal Guidance and the proper storage of deicing materials in accordance with the Bureau of Resource Protection’s Guidelines on Deicing Chemical Storage. These measures

shall also include standard operating procedures for the loading and unloading of deicing chemicals. (CLF)

Response:

There is limited data available regarding the effectiveness of street sweeping; however, existing data suggest sweeping would need to take place much more frequently than twice a year to result in substantial pollutant removal. Further, street sweeping is viewed as a reasonable cost-effective BMP when structural stormwater treatment is not an option. Because structural treatment is possible in the subject watersheds, the Department does not believe it is appropriate to require street sweeping of the designated discharges at this time.

The Department believes the permit as written addresses the management of snow and deicing chemicals. Dischargers in category B are required to prevent and eliminate the delivery of stormwater pollutants from their sites. Additionally, dischargers in category A are required to maintain their systems and only allow stormwater inputs.

22. Appendix A indicates that designated discharges specified in subpart IV.A of the permit need to complete an Engineering Feasibility Analysis (EFA). The basis for this analysis is the Vermont Stormwater Management Manual (VSMM) with one exception. Instead of using the procedures for groundwater recharge that are found in section 1.1.3 of the VSMM, the draft permit 3-9030 requires that a site achieve “infiltration of all impervious surface runoff from the 1-year storm”. This change raises a number of questions and concerns:

- Instead the EFA should require that applicants maximize the infiltration up to the 1 year storm. However, if site conditions do not make this feasible then a lesser amount of infiltration should be deemed acceptable.
- Will design requirements for STPs be relaxed so that additional infiltration can be achieved on a site?
- Will designers be required to comply with the dimensional requirements for STPs found in the VSMM?
- The permit should provide an exemption of the increased infiltration requirements for those sites that have completed EFAs prior to the final issuance of permit 3-9030. (SB)

Response:

The Department believes that the EFA as written does require “that applicants maximize the infiltration up to the 1 year storm. However, if site conditions do not make this feasible then a lesser amount of infiltration should be deemed acceptable”. Additionally, the Department concurs with the comment that the permit should provide an exemption of the increased infiltration requirements for sites that have completed EFAs prior to the final issuance of this permit. The permit has been clarified to reflect this. With regard to the comments on the design requirements, BMPs must be implemented in accordance with the Vermont Stormwater Manual.

Technical Comments

23. P. 18, Appendix A. Because this is only a feasibility analysis, permittees should be required to include all five of the manual criteria in their submission to the Secretary. The EFA process will flesh out whether attainment of other criteria is, indeed, feasible and desirable but ANR should not rule out flood control options from the very beginning. (CLF)

Response:

The stormwater TMDLs targets for these streams are for the one-year storm. It is the Department's opinion that adding additional requirements for flood control will not help implement the TMDL targets.

24. On page 18, the permit states unequivocally that "infiltration of all runoff from impervious surfaces from the 1-year storm is required by this permit." (Emphasis added). CLF strongly supports the inclusion of this requirement as necessary to achievement of TMDL targets and suggests that some sites may be able to achieve even greater levels of infiltration. On such sites, those greater levels of infiltration should be required before a permittee can opt to satisfy its obligation via the CPv and WQv criteria. It is likely that attaining such a higher infiltration standard on appropriate sites will also be the most economical route to compliance for a permittee. (CLF)

Response:

In the Department's experience it is a rare new site that can infiltrate more than the one-year storm. Additionally, if a site can achieve infiltration of all runoff from impervious surfaces from the 1-year storm the CPv and WQv criteria are satisfied as a result.

25. P.20 EFA. Recognizing that the Clean Water Act requires NPDES permits to include such conditions as are necessary to "ensure" compliance with water quality standards, 40 C.F.R. § 122.4(d), it is inappropriate to preemptively rule out analysis of the feasibility of activities described in #1, #2 and #4 on Table 2 p. 20. Having these options explored in the analysis submitted to the Secretary will provide information that will enable to the Secretary and the permittee to identify the most effective means to identify the conditions necessary to ensure expeditious attainment of water quality standards. (CLF)

Response:

The Department believes that the terms and conditions of the permit are sufficient to implement the TMDL and achieve water quality standards.

26. Table 2 of the EFA – item 10 1,000 square feet is a relatively small area. This could severely limit sw treatment that can be achieved on a site. (SB)

Response:

The Department believes that it is counterproductive to remove the function forested areas play in maintaining the hydrologic balance of the watershed.

27. The Agency should provide guidance on the level of detail that is acceptable for confirming the soil survey and the depth to bedrock in the site assessments. (SB)

Response:

The Department is not requiring test pits or soil borings to confirm the soil survey. However, where deviations are known (i.e. fill brought in) from previous activities on the site they should be noted. If previous activity on the site has confirmed depth to bedrock that should be noted; alternatively, the depth to bedrock for the site can be estimated from published resources including the USDA NRCS Soil Survey or USGS maps.

28. ANR should consider requesting depth to groundwater in the site assessments as it is a limiting factor for many sw treatment practices. If ANR decides to add this then guidance on how to determine this should be made. (SB)

Response:

Depth to groundwater is more appropriately determined during an EFA or other site design work.

Comments pertaining to Legal Requirement for Specific Enforcement of the Lake Champlain TMDL

29. Vermont DEC has identified impermeable surfaces operated by a single entity as a storm water conveyance subject to NPDES regulation. By law (Clean Water Act) that conveyance constitutes a single point source discharge. The draft general permit 3-9030 should be clearer that the designated discharges are point sources. (DC)

Response:

The permit now reflects that residual designation authority applies to point sources.

30. The Vermont DEC NPDES program is required to enforce the Vermont Water Quality Standard (Vt. Code R 12 004 052) for regulated point source discharges. This standard includes specific provisions regarding phosphorus loading of Lake Champlain. This requirement should be cited in general permit 3-9030. (DC)

31. Vermont's NPDES general permit 3-9014 (amended), covering small MS4 facilities, correctly requires municipal storm water treatments to be consistent with the Lake Champlain Phosphorus TMDL (3-9014 P. 3.1.3). There is no reasonable basis for

excluding a similar requirement for similarly regulated residual point source discharges covered by Vermont NPDES general permit 3-9030. (DC)

32. New York State recommendations for phosphorus reduction from point sources are also cited in the Lake Champlain Phosphorus TMDL, but separately from Vermont's. The NYS recommendations are more stringent and more complete than Vermont's. These include a) extended detention basins b) retention ponds and micro-pools, c) infiltration basins, and d) sand or organic filter areas. The draft general permit 3-9030 does provide an explicit recommendation for infiltration basins, though these are not cited by Vermont in the Lake Champlain Phosphorus TMDL (but are in alignment with the NYS recommendation). Illogically, the draft 3-9030 makes no mention of any other treatments recommended by New York State in its phosphorus reduction plan for Lake Champlain. And, while the draft 3-9030 does require maximized infiltration, it does so only for small sites and for sites without a previous stormwater permit. More complete adherence to the New York State list of recommendations, for all categories of Vermont discharges, would be both reasonable and more effective than the nutrient-reduction treatments appearing in draft general permit 3-9030 (but not explicitly cited as nutrient reductions measures). (DC)

Response to 30, 31 & 32:

It is expected that the BMP implementation efforts required by this permit, in conjunction with the TMDL implementation efforts that will be driven by the upcoming reissued MS4 permit, will result in a significant reduction of sediment loading in these impaired streams, thereby decreasing any contribution of phosphorus by these streams to the Lake. This permit is consistent with the TMDLs for the watersheds subject to the RDA permit and is consistent with the Lake Champlain TMDL.

33. The specific recommendation for "Wetland Protection and Restoration" given in the Lake Champlain Phosphorus TMDL is appropriate to residually designated discharges, though not included in 3-9014 for application to MS4 facilities. It should be explicitly cited in general permit 3-9030. Similarly with the 3-9014 general permit, the 3-9030 general permit should cite the promotion of riparian buffers and setback, and the minimization of impervious surfaces for similar consistency with the Lake Champlain Phosphorus TMDL. (DC)

Response:

Wetland Protection and Restoration continue to be part of the Department's Lake Champlain TMDL implementation plan efforts. This general permit is consistent with these efforts, albeit without reiterating all implementation plan components. The Engineering Feasibility Analysis required by this general permit includes a requirement to avoid wetlands and their buffer zones, and the Fluvial Erosion Hazard area of any receiving water. Further, the Vermont Stormwater Manual provides incentives for the protection of these areas.