

FINAL PUBLIC RESPONSIVENESS SUMMARY
TO
COMMENTS ON THE SMALL SCALE WASTEWATER TREATMENT AND
DISPOSAL RULES
March 27, 2002
RULE #1: CLOSING THE TEN-ACRE EXEMPTION

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EXECUTIVE SUMMARY:

The Agency proposed revised rules regulating potable water supplies and wastewater systems during October of 2001. Ten informational meetings and two formal hearings were held to receive public comment. Many pages of written comments were also received. There were many general comments and specific technical or editing comments as well. Where comments were extremely similar we have consolidated them and made a very general count of the number of individuals making that specific comment, to give some idea of the emphasis made on the point. The numbers are included in parentheses after the comment. Example: (3). A comment made by an organization is considered an individual comment. We have made efforts to distill the point of each comment, include it in the list, and respond. We have tried diligently to capture the essence of concerns in specific instances. If you feel your specific comment was not adequately translated, we apologize and ask you to please contact the Agency and get a further explanation of our position. Please note that in rewriting the proposed rules to respond to the comments received, other revisions had to be made in order for the rules to make sense. As a result, not all of the changes between the proposed rule and the final proposed rule are identified in this responsiveness summary.

Comments received at the informational meetings and the responses are posted on the Agency web site at <http://www.dec.anr.state.vt.us/regulate.htm>. These comments with those made at the formal hearings are also included in this public responsiveness summary.

Closure of the 10-acre exemption.

As originally proposed, the rule would close the 10-acre exemption on 9/1/2002. Ten-acre lots could be created until that date and could be built on until that date. Lots created and improved before 9/1/2002 would be exempt in the future unless they were subdivided or had something other than a single family residence with its potable water supply and wastewater system constructed on them.

The Agency received considerable comment on this rule. There was about a five-to-one ratio of comments in favor of closing the exemption, however many felt that the one-summer build-out provision was so unreasonable as to be no build-out period at all. There were also some individuals who felt that the exemption should never be closed. Many commenters were concerned about the fragmentation of habitat and agricultural lands, the proliferation of spaghetti lots, and the inequity of having a lot with 9.9 acres require a permit but one with 10.1 acres not require one. This last point was made specifically by commenters who believe that ten-acre lot owners next to them have created wastewater systems that may threaten their permitted lot's water supply.

The Agency maintains its position that all potable water supply and wastewater systems should meet public health standards. The State of Vermont and one county in Texas are the only entities that do not require this of all systems. This has been a main point in the struggle for revision of the on-site statutes and rules. During the discussions in the

legislature, a main request has been that the Agency not close the ten-acre exemption until the technical standards are revised. In a separate rule, the Agency proposes to revise the technical standards, allow new technologies and modify siting conditions based on the current science of on-site systems.

The Agency received many comments on this issue indicating concerns over poor land use practices, loss of wildlife habitat and degradation of natural resources that result from the existence of the ten-acre exemption. Under the provisions of 3 V.S.A. section 2293, agencies are required to consider the effects of their programs on traditional settlement patterns, the working and rural landscape, strong communities and a healthy environment. The ten-acre exemption works to the disadvantage of such goals.

Based on the comments received, the Agency has changed the build-out provision of this rule to allow development until 9/1/2004. At the same time, we kept the closure date for creating new lots. New exempt ten-acre lots may not be created after 9/1/2002.

RESPONSE TO PUBLIC COMMENTS ON PROPOSED RULE #1:

Closing the ten-acre exemption:

1. Why two rules? Both rules should be combined. If closure of the ten-acre exemption is not adopted how do we know you will continue with revisions to the technical standards? This is just the same proposal that has been being made for years. If S.27 passes will the 10-acre exemption still close?

The Agency has been working to close the ten-acre exemption and revise the technical standards for on-site systems for many years. Several commenters do not want the 10-acre exemption closed (7). Others feel that it is appropriate to close the exemption if the new technical standards and innovative systems are allowed by the rules. Last year the Governor stated that if S.27 was not passed the Agency would close the 10-acre exemption by rule. That is this rule. S.27 provides for many other changes to be made to the program by consolidation of four statutes and providing for delegation of the permit program to qualified municipalities. We are delaying the adoption of revised technical standards until the end of the legislative session so that we may incorporate any such changes in these rules. The Agency has been very straightforward in its presentation of the rules to the legislature and intends to go forward with revised technical standards as promptly as we can after we understand what the Legislature intends to do or not do, or when S.27 is passed if that should happen sooner. S.27 as currently drafted includes closure of the 10-acre exemption at a delayed timeframe.

1. Why is it so important to close the 10-acre exemption? We do not need more state bureaucracy in hard times. It is not necessary to do this now. There is no health threat from 10-acre lots. How many 10-acre lots have failed systems? The 10 acre exemption is a 30 year commitment of the state to its citizens that they will always be able to build on their property. The state should not go back on its word. ANR is just trying to get more taxes and institute statewide zoning. State employees have been known to just approve the projects they like and turn down those they don't.

The Agency believes that all buildings that require potable water supplies and wastewater systems should meet the appropriate public health standards for those systems. The size of a lot should not determine whether those standards have to be met. The exemption also is inequitable because it allows an owner of a large lot to construct non-complying systems nearby an owner of a small lot whose systems must comply.

The Agency also believes that the 10-acre exemption works against good land use practices. Originally it was thought that a house in the center of a ten-acre square would not be likely to cause a problem to neighbors. That has been demonstrated not to be the way the ten acre lots are configured, as many spaghetti lots are created where all the development is at the road frontage in

close proximity to each other, while the remaining acres are narrow strips unusable for anything, including farming. Owners often purchase large lots simply to avoid contacting the state, whether or not the lot qualifies for a permit. This causes fragmentation of agricultural and forestry land as well as wildlife habitat. The Agency believes that closing the exemption will encourage the smaller lots, leaving more land in other uses.

When the 10-acre exemption was accepted as a compromise for Act-250 passage, it was believed that a ten-acre lot would provide for a suitable septic system that would not endanger water supplies. It has been shown that that is not true and that in addition the evasion allowed by the creation of the 10-acre lots significantly promotes bad land use practices. We believe a lot should not be developed for housing if it is unsuitable for water supply and sewage disposal systems that protect the public health and environment. Buildings not requiring water supply and sewage disposal may be built on such properties if they meet other permitting requirements. The Agency believes that science should dictate the places where soil-based water supplies and septic systems may be placed, and we are modifying the rules to be as reasonable as possible in that regard. We also believe that towns should appropriately plan for significant increases in development that could occur due to those changes in the rules. We believe that the comment regarding state employees was actually a reference to an employee of an old Natural Resource Conservation District program that was eliminated some years ago. Agency employees' actions are subject to an informal appeal process and a formal appeal process that can eventually be taken to the Water Resources Board, if necessary. It is unlikely that an employee could pick and choose among projects without an owner or a consultant being able to point that out very quickly and remedy the situation.

2. Is this rule a law? What is your authority to close the 10-acre exemption? If the Legislative Committee on Administrative Rules does not accept the rule, can the Agency adopt it anyway? Does this rule have to be approved by the House and Senate? What statute allows the agency to assign its responsibility for rule administration to someone other than the agency? Has this policy been signed by the Government Operations committees and signed into law?

The Agency has authority to close the exemption by rule. The Agency's general rulemaking authority is provided by 3 V.S.A. §2803 and 2822. The original rulemaking authority for subdivisions was given to the Agency when the subdivision program in 18 V.S.A. §1218 was transferred from the Department of Health to the Agency in 1979. At that time the Agency was given authority to create and amend rules relating to subdivisions in 18 V.S.A. section 1218(b).

The Agency has proposed closing the 10-acre exemption in various bills to the legislature for nearly 10 years. The House has passed two bills closing the exemption and the senate has passed one, in various sessions. These bills extended the timeframes for closing the exemption until the Agency prepared

rules providing for the use of new technologies. Last year at the beginning of the legislative session, the Governor announced that if the legislature did not act to close the exemption during the session, he would direct the Agency to close the exemption by rule. The Agency is not assigning its rule administration to others. Rulemaking is in the purview of the Executive Branch and does not need to be signed by the Government Operations Committees.

3. The 10-acre exemption should not go first (2). The legislature will oppose this action. The new technologies will not be available until after the 10-acre exemption closes. We oppose this rule; it does not include modern technologies.

Although closure of the ten-acre exemption is expected to be through the adoption process by May 2002, it does not close the exemption for creating exempt 10-acre lots until September 1, 2002, after the date that we expect the new technologies to be available. The lots may be built on until 9/1/2004. A few of the new technologies have already been approved and others are in the pipeline.

4. ANR should only make technical decisions not land use policy decisions. The marketplace will eliminate the need for the 10-acre exemption if the new systems are available, so there will be no need to close it by rule. Will closing the 10-acre exemption encourage smaller lots?

The Agency believes that closing the 10-acre exemption by applying the technical standards for potable water supplies and wastewater systems to development on those lots is eliminating a convenient evasion route rather than establishing land use policy. Many 10-acre lot owners create these lots simply to avoid having to meet the rules, whether or not the lot can meet the standards. We expect in many cases that smaller lots will be created, if an owner cannot conveniently avoid the permit process by creating a large lot.

5. Can lots still be created and constructed on before 9/1/2002? It is not clear that the exemption does not close until 9/1/2002 even though the rule is adopted in February or March. That should be highlighted.

The exemption is not being closed for ten-acre lots created before 9/18/69 or for 10-acre lots created by 9/1/2002 that have been developed by 9/1/2004. Those landowners do not have to revise their systems nor do they have to get a permit unless and until the property is further subdivided, even if their system fails. New ten-acre lots may be created until September 1, 2002 and those lots and existing ten-acre lots may be built upon and keep their exempt status as long as the house and its septic system and potable water supply are all substantially complete by 9/1/2004.

6. Closing the 10 acre exemption will drive a lot of development between now and 9/1/2002. Act 250 will prevent a run on lots being created. Many people will throw

up shacks just to beat the deadline (2). It will cost more to hire an engineer than to get a junk trailer installed on a lot.

People will react differently to the new rules depending on their specific circumstances. Certainly some people may put residences and substandard systems on lots just to circumvent the new requirements. The lots will have to have a substantially completed potable water supply and wastewater system on the lot as well, not just the trailer. The build-out deadline has been extended to 9/1/2004.

7. The 9/01/2002 date for build-out is unreasonable (3). Builders are booked solid. This is not a window. The exemption should not be closed for existing 10 acre lots that are undeveloped. It should be extended for existing 10-acre lots for about three years (2), especially since other existing lots stay exempt. The rules should be modified to provide a longer phase out of the exemption. Use the timeframes included in S.27. The ability to create more 10-acre lots should be closed immediately but build out on existing lots should be extended.

S.27 allowed ten-acre lots to be created until the rules for technical standards for system design were effective and for those lots to be built upon for another two years after that. Many people were concerned that this would lead to a great deal of development, in the meantime, that would not have to meet the standards for safe potable water supplies and septic systems. After the legislative session, the Governor decided to set September 1, 2002 as the appropriate date for closing the ten-acre exemption and allowing build-out on ten-acre lots. Based on public concern, the build-out date has been amended to 9/1/2004. The closure date remains at 9/1/2002 for creating new exempt 10-acre lots.

8. The exemption should not be closed in towns that do not have planning until the 5-year planning period is over and the new systems are available to them.

The rule changing the technical standards will allow the innovative systems to be used in all towns when the revised technical standards are adopted. That is expected to be before September 1, 2002 when the exemption closes.

9. We support closing the 10-acre exemption (25). It is necessary to stop spaghetti lots. It is necessary to prevent health hazards. It will reduce fragmentation of wildlife habitat. It will promote smaller lots. Why have you waited so long to close the 10-acre exemption? Lots have been developed around the septic standards. There should have been land use controls instead. You say you don't want your rules to control land use. Look at the Mobile Home Park Rule. It controls the size of sites, landscaping, traffic control, things that have nothing at all to do with sewage.

The Agency has been working on revising the rules and closing the 10-acre exemption for over 9 years. We agree that the current rules have influenced the land use patterns. We consistently encourage towns to do local planning and

zoning, however it is not a requirement. The Agency has restricted the use of the modified site conditions in towns that have not created the land use controls in an effort to address this concern. The Mobile Home Park rule reflects statutory language. S.27 would modify the Mobile Home Park rule to eliminate much of that language and place regulation of those conditions in mobile home parks unrelated to water supply and wastewater systems with the Agency of Commerce and Community Development which regulates other conditions in mobile home parks.

10. The ten-acre exemption should be closed at a date certain, in the future. Will a buyer of a 10-acre lot have recourse against the seller if the lot turns out to not be developable?

The exemption is being closed on 9/1/2002. Build-out on such lots is extended to 9/1/2004. The seller of a lot is not responsible for the actions of a state agency that influence the development of a lot. The seller is responsible only for any data regarding the current restrictions and physical characteristics of the lot that he/she may need to represent to the buyer.

11. Will the Agency have the necessary staff to process the increased number of permits closing the exemption will create?

The Agency will need to change the way some of the work is handled in order to accommodate the new influx of permits. We have been considering several ways to do this including doing less technical review and relying more on the certifications of projects by the designers, as well as moving to general permits or permits by rule where that is possible. The Agency will continue to focus its efforts on review of the soils early in the project design. That is crucial to project success. We are committed to administering this significant public health and environmental protection program appropriately and will take the actions necessary in FY 2003 to do so.

12. We would like a comprehensive reform package that reforms the entire program as well including licensing of installers, delegation to municipalities, etc.

The Agency will continue its nine year effort to work with the legislature on S.27, the current proposal that incorporates the comprehensive reform, consolidates the four statutes, eliminates many of the isolated exemptions, provides for statewide technical standards for systems, licenses installers and allows for municipal delegation.

13. If good science will not allow a system to be built then no system should be allowed.
(3) There should be one construction standard for these systems for all lots (2). A system isn't necessarily substandard just because it doesn't meet the rules.

The Agency agrees that all systems should meet standards that protect the public health and the environment. Closing the exemption will bring another 1/3 of new systems into compliance with these standards. While systems can be constructed that will work well and not precisely meet some particular item in the rules, the Agency believes that these rules reflect a good minimum standard for construction of potable water supply and wastewater systems.

14. It is inequitable for a person with a small lot to have to comply when a person with a large lot can build right next to them, perhaps even compromising the small lot owner's water supply, and not have to comply.

The Agency agrees that this is a major inequity perpetrated by the existence of the 10-acre exemption. Several commenters spoke of personal experience in this regard.

15. People use the 10 acre exemption just to avoid the state. How will you let them know it will be easier to meet the rules?

There will be several workshops held on the new rules after they are adopted. We expect that interested parties such as the real estate industry will also "get the word out" when the rules are adopted.

16. Has anyone thought about giving tax credits when the 10-acre exemption is closed?

Towns can make that choice now by deciding on the highest and best use categories. If no development can occur on a parcel, the town can decide to tax it as less valuable land if they choose, similar to the current use program.

17. If you close the 10-acre exemption, there will be a lot of more work that a site technician cannot do.

We expect that there will be a lot of additional permits being sought. Site technicians are restricted by statute to preparing the applications for one-lot subdivisions and to designing potable water supplies and wastewater systems with flows up to 600 gallons per day. Some of the new work will be within their purview. The Agency has proposed in S.27 to moderately extend the Site Technicians' authorities.