STORMWATER PERMITTING RULE

PUBLIC COMMENT RESPONSE SUMMARY

January 8, 2019

Contents

Vermont Association of Realtors

1. Comment: On behalf of the Vermont Association of REALTORS we would encourage the state to perform outreach to towns either directly or through Vermont League of Cities and Towns regarding the municipal roads permit rules for class 4 roads. Many towns are grappling with whether or not to declassify some of their class 4 roads to trails for fear of expensive retrofits.

Response: The Department acknowledges and supports the comment. We continue to work with the League of Cities and Towns, regional planning commissions, the Department of Forest, Parks, and Recreation, and directly with municipalities to ensure that municipalities understand the requirements for class 4 roads under the Municipal Roads General Permit. Although not directly affected by this Rule, we note here that the requirements for class 4 roads are substantially less than required for other classes.

Chittenden County Regional Planning Commission Board of Directors

2. Comment: The definitions between the MS4 Stormwater Permit and the draft Stormwater Permitting Rule do not match. The Subcommittee recommends that the Agency reconcile the definitions in each of the documents to ensure they match.

Response: The Department has reviewed the definitions in the MS4 General Permit and the Rule. In several instances there are minor differences in the definitions between the two regulations, however, no conflicts exist. Consequently, the definitions in the Rule were not revised.

3. Comment: The page numbers do not match up with where the sections are actually located in the document.

Response: There was an error in the table of contents such that some page numbers were off by a page.

4. Comment: Re 22-101(c)(9) The Rule requires certifications of compliance by licensed professional engineers practicing within the scope of their engineering specialty to satisfy certain permit requirements. This requirement is limiting and expensive for municipalities that do not have a licensed professional engineer on staff. Most people working in the stormwater field are not licensed professional engineers and have the experience to certify whether a stormwater system is in compliance and satisfying permit requirements. The Subcommittee recommends that the requirement should either remove the requirement or extend to stormwater designers and certified inspectors and that the Agency look into offering a State-wide certification program similar to what the State offers for wastewater operators that would allow experts in the stormwater field certify compliance with stormwater systems.

Response: The use of certifications of compliance by licensed professional engineers is consistent with 10 V.S.A. §1264(f)(10) (Rulemaking). Under the Rule, certifications are required for applications for new operational permits, upon completion of a project, and upon permit renewal. Permittees, including non-engineers, may continue to fulfill annual inspection and reporting requirements without an engineer. In the Department's experience, very few non-engineers currently serve as "designers" in performing certification functions, despite the fact that the certifications are required on over 3,000 existing operational permits. Further, verifying that operational stormwater systems are appropriately designed and constructed, and remain in conformance with approved plans, is appropriately limited to licensed professional engineers. Based on our experience implementing the wastewater operator certification program, developing and maintaining a separate certification program would require a significant investment of staff resources. Such an investment is not currently feasible, nor is it clearly

warranted given the small number of non-engineer stormwater professionals who currently provide these services.

5. Comment: Re Section 22-111(b) How will compliance with MRGP standards be addressed? There are regulatory programs in place, but it is unclear how the Agency will determine how implementing the requirements under the MRGP will affect water quality standards.

Response: Municipalities covered by the Municipal Roads General Permit (MRGP) are required to inventory existing road conditions and report on implementation of BMPs (best management practices) necessary to comply with the MRGP. The Department is responsible for ensuring compliance with the MRGP, and also for tracking the pollutant reductions associated with implementation of the BMPs. Pollutant reductions will be estimated based on best available information related to the performance of the BMPs, applied to the actual extent of on-the-ground application.

6. Comment: Section 22-111(c) The cost benefit of phosphorus removal by a stormwater system should also be considered when establishing watershed specific priorities in basin plans.

Response: Please see the response to Comment #44.

7. Comment: Section 22-201(25) The definition of impervious surface should explicitly include gravel surfaces.

Response: The definition of "impervious surface" is established by 10 V.S.A. § 1264 and is not modified by the Rule. The statutory definition includes "paved and unpaved roads" (emphasis added). The term "unpaved roads" includes gravel roads. The Stormwater Program has consistently regulated gravel roads as impervious surface since at least 2002.

8. Comment: Section 22-201(40) The definition of outfall is not consistent between the Stormwater Rule and the MS4 Permit. Outfall is not included in the definitions in the MRGP. Considering that municipalities are required to stabilize outfalls and that the difference between an outlet of a stormwater system and outfall is unclear, it is recommended that the Agency ensure that the definition is consistent across all permitting programs and that the differences between outfall and outlet are clearly indicated.

Response: The definitions between the Rule and MS4 General Permit (MS4 GP) are generally consistent. The Department acknowledges that the Rule has additional language excluding conveyances between MS4s or between receiving waters. The language in the Rule is consistent with how the definition of "outfall" in the MS4 GP is interpreted by the Department; e.g. a cross-culvert under a road conveying a stream does not constitute an "outfall" under the MS4 GP. Future revisions of the MS4 GP will use the definition in the Rule. Where the Municipal Roads General Permit (MRGP) uses the term "outfall" – in two instances – it is used synonymously with "outlet," which generally refers to the end of a pipe or other conveyance, irrespective of whether it is at a point of discharge to waters.

9. Comment: Section 22-201(45)(A) Please include the reference that indicates that sewage from vessels is not considered a pollutant.

Response: The Rule has been modified to include reference to section 1322 of the Clean Water Act.

10. Comment: Section 22-201(64) Please clarify why stormwater ponds are not included in the definition for stormwater system.

Response: The definition of "stormwater system" is established by 10 V.S.A. § 1264 and is not modified by the Rule. This definition is broad and includes "wet and dry bottom basins." Stormwater ponds are covered by the definition of "stormwater system."

11. Comment: Section 22-302(a) Please clarify what responsibility the Secretary has to respond to an application that is administratively complete. It is recommended that the Secretary should respond to an administratively complete application within 60 days and this time period should be indicated in the Rule.

Response: The Stormwater Program's timeframes for processing applications are established by policy and are not affected by the Rule. For reference, the Stormwater Program follows the Permit Expediting Program (PEP) for processing time goals.

12. Comment: Section 22-601(d)(3)(F) Please clarify what additional information the Secretary may request from a designated MS4 operator seeking coverage under an individual permit. This statement is vague.

Response: This condition is intended to ensure the Department acquires all information necessary to make a determination on an application, when such information is not otherwise provided by the other required items. Absent this condition, the Department would be required to deny an application in the event the information provided by the application was not sufficient to make a positive determination regarding the application.

13. Comment: Section 22-901(c)(1) Please clarify why the January 1, 2018 date is being used when this date has passed and the three-acre general permit has not been issued.

Response: The January 1, 2018 date was a statutory requirement at the time the Department commenced the rulemaking process. This requirement was removed by Act 181 of the 2018 legislative session, effective 7/1/2018. The three-acre general permit is required within 120 days of the adoption of this Rule. The final Rule has been revised to remove the January 2018 date requirement.

14. Comment: Section 22-901(c)(3)(D) Has the Agency determined whether credits can be used across sectors?

Response: This Rule allows for the use of stormwater impact fees and stormwater offsets. These mechanisms apply only to the treatment of regulated stormwater runoff under an operational stormwater permit. This Rule does not disallow cross-sector trading, however, several regulatory policy issues need to be addressed prior to implementing a cross-sector pollutant credit trading program, including identifying baseline requirements for load allocation sources, implementation beyond which would create available trading capacity, and whether a reallocation under the Lake Champlain - or other – TMDL is necessary. The Department is intent on modifying this Rule to facilitate trading, pending development of a sound technical and regulatory basis for doing so.

15. Comment: Will a municipality be able to provide input on where funds are allocated within the watershed?

Response: A project permittee, including a project where the municipality is the permittee, that creates offset charge capacity, or is eligible to receive impact fees, may direct that the offset charge capacity or impact fees be reserved for itself or other projects. Additionally, municipalities may seek to implement projects that are eligible to receive funds. Municipalities do not otherwise have the ability to direct the disbursement of funds paid by other entities.

16. Comment: Define the watershed scale the Agency is referring to.

Response: In reference to offset capacity, and management of stormwater impact fees, it is the watershed of the stormwater-impaired waters, and the watersheds of TMDL-established lake segments of Lake Champlain and Lake Memphremagog.

17. Comment: Section 22-901(d)(2) The Subcommittee echoes the same comments mentioned above regarding the requirement to obtain a licensed professional engineer to certify compliance with the stormwater system. The Secretary should either remove this requirement or extend this requirement to stormwater designers, certified stormwater inspectors, etc.

Response: See response to Comment # 4.

18. Comment: Section 22-1001(c)(2) The Rule indicates that a permittee may receive credit for treating all or portions of a site through the use of practices in the Vermont Stormwater Manual and based on a design storm different than specified in the Vermont Stormwater Manual. Please clarify how different of a design storm a permittee can design for, because this statement can be interpreted as the permittee being allowed to design to a smaller design storm.

Response: This section of the Rule is intended to allow a permittee to design to a smaller design storm. In such cases, the level of treatment provided, and hence the percentage of the site in compliance with the applicable standard, will be reduced on a proportional basis using established rainfall-depth practice-efficiency information. The specific standards will be established in the forthcoming operational general permit.

19. Comment: Section 22-1001(c)(4)(C) Clarify what type of land use the Rule is referring to. Is it existing land use or re-development?

Response: The intent is to ensure that the activities would not permanently preclude the existing land use. The Rule has been modified to reflect this.

20. Comment: Section 22-1001(c)(4)(F) This criteria should be removed.

Response: No supporting basis was provided for this comment. The intent of this criterion is to discourage investments in infrastructure that are in conflict with the "Flood Hazard Area and River Corridor Protection Procedure."

21. Comment: Section 22-1001(c)(4)(G) The Subcommittee recommends that the word "natural" should be added before wetland as there are constructed wetlands, gravel wetlands, etc. that are included in stormwater systems.

Response: Man-made structures created in uplands that may exhibit wetland characteristics, such as those described in the comment, are not considered wetlands. The rule has not been modified in response to the comment.

22. Comment: Construction should be allowed within a managed buffer. There is a difference between a natural wetland buffer and a managed buffer that has been maintained over time and this should be noted within the Rule. The utilization of buffer space for water quality improving BMPs may in many cases restore the natural hydrology of the site. Excluding construction of a stormwater system in a managed buffer is too restrictive and will hinder a municipality's ability to meet their stormwater permit requirements.

Response: The Department agrees that managed and natural buffers function differently. The Rule does not require applicants to consider construction in wetlands and their buffer zones to prevent regulatory conflicts, and to ensure that these areas remain undeveloped such that they may be used for restoration activities. The Rule, however, does not preclude their use for stormwater management. Further, section 22-1001(c)(2)(G) of the Rule has been modified to clarify that permittees do need to pursue passive reforestation of these areas as part of the Engineering Feasibility Analysis.

23. Comment: Section 22-1002(b)(4) Please provide a detailed analysis on how the Agency determined that $10,000 per acre of impervious surface was an accurate amount to charge as an impact fee. There are numerous resources available, including national standards and the ERP grants, which indicate the cost of constructing, operating, and maintaining a stormwater system. The Subcommittee agrees that this impact fee amount is too low and needs to be set at the actual cost, because this will de-incentivize applicants from doing more on their site. Please see the table below which details the cost to retrofit various stormwater systems in the Town of Williston. The average retrofit is about $19,000 which is twice the amount that the draft Rule is proposing to charge as an impact fee.

    Town of Williston Stormwater Grant Awards and Cost Effectiveness ERP Grant # Type $/Impervious Acre Treated 2018-ERP-M-1-16 Wet Pond Retrofit $5,537 2018-ERP-M-1-17 Wet Pond Retrofit, New Grassed Swale $21,421

    2018-ERP-M-1-18 Wet Pond Retrofit $7,000 2018-ERP-M-1-19 Wet Pond Retrofit $26,190 2018-ERP-M-2-05 Wet Pond Retrofit $11,261 2018-ERP-M-2-06 New Wet Pond Construction $65,910 2017-ERP-BG-001 Wet Pond Retrofit $43,193 Average Retrofit $19,100 Single New Construction $65,910

Response: Stormwater impact fees range from $10,000 to $50,000 per acre depending on the project category and the corresponding level of treatment required. The $50,000 figure was derived from the Stormwater Program's existing impact fee of $30,000, adjusted for inflation since 2002. The $50,000 figure was broken down by treatment standard (e.g. channel protection volume, water quality volume) based on published cost data for BMP types typically associated with these requirements. The impact fees are intended to be generally reflective of actual costs as a means of incentivizing projects to maximize treatment on site. Retrofit projects (e.g. 3-acre sites) that are potentially subject to impact fees may not choose to pay fees in lieu of providing on-site treatment; rather, impact fees are required when the extent of feasible on-site treatment falls short of required levels. New projects must fully comply with the Vermont Stormwater Management Manual. In the event the project is an impaired water (i.e. stormwater-impaired, Champlain, Memphremagog), and there is no TMDL in place, the Department must determine that overall loading to the receiving water is not increasing, and in the event the project cannot infiltrate all runoff associated with the 1-year storm (this standard exceeds the Vermont Stormwater Management Manual) the project is required to pay a $10,000 fee per acre of impervious surface. The existing impact fee for projects in this category is $6,000 per acre.

24. Comment: Impact fees should not be allowed for new development. Please provide clarity on the Agency's decision to allow this.

Response: Please see the response to Comment #23. The fee is not in lieu of the requirement to comply with the Vermont Stormwater Management Manual or the requirement that the project not increase loading to the receiving water.

25. Comment: Section 22-1002(b)(5) The Stormwater Fund will have a limited amount of money. How will projects be prioritized for funding?

Response: The disbursement of funds is covered under Section 22-1002(c)(2) of the Rule.

26. Comment: There should be a timeline for when funds can be spent within a watershed. Funds should not be indefinitely reserved for an applicant to utilize. The Subcommittee recommends that the Agency develop a timeline for how long funds can be reserved.

Response: A project is only eligible to receive funds upon completing construction of a project eligible to receive funds. Funds may only be disbursed when there are funds in the account. Permittees are only likely to direct funds which they are eligible to receive to other projects in the event they anticipate the need to pay impact fees for those projects. That is, they can accept the funds at such time they are eligible to receive them, or reserve those funds for a future project. If a timeline is imposed a permittee will simply receive the funds for which they are eligible. Imposing a timeline will not result in fees becoming eligible for other projects. An applicant may amend their application to either receive the impact fees or reserve them for a future project.

27. Comment: Section 22-1201(b)(13)(C)(i) The Rule requires a permittee to orally report any noncompliance which may endanger health or the environment within 24 hours. Who is the representative that municipalities are required to report to?

Response: The specific reporting requirements will be included in the individual permit, or authorization under a general permit, itself.

28. Comment: Section 22-1201(b)(13)(C)(ii)(II) There isn't a numerical amount listed for the maximum daily discharge limitation for any pollutants listed in the permit. Should there be or what document should municipalities refer to for this limitation?

Response: Any such reporting requirement would be contained in the individual permit, or authorization under a general permit, itself.

City of South Burlington

29. Comment: §22-1002 The Stormwater Permitting Rule needs to provide more clarity regarding how impact fees will be assessed. The existing language is not specific enough for readers to understand how the different fees described in §22-1002(b)(4)(B)(i) through §22-1002(b)(4)(B)(iii) will be assessed in different situations.

Response: As described in §22-1002(b)(1), impact fees are assessed based on the acreage of impervious surface where compliance with the applicable standards is not achieved.

30. Comment: Based on my reading of the Rule, it appears that a "3 Acre Site" located outside of a stormwater impaired watershed, and subject to an impact fee, would pay only the "Redevelopment" impact fee of $25,000 / acre (§22-1002(b)(4)(B)(i)). However, a "3 Acre Site" located inside of a stormwater impaired watershed, and subject to an impact fee, would pay both the "Redevelopment" impact fee and the "Channel Protection" impact fee (§22-1002(b)(4)(B)(iii)). The resulting fee would be $50,000 per acre.

Response: This is generally accurate, however where a Flow Restoration Plan demonstrates that compliance with a stormwater TMDL will be achieved without providing channel protection volume at a given 3-acre site, compliance with that criterion may be waived.

31. Comment: It should be noted that the redevelopment treatment standard defined in the Vermont Stormwater Management Manual (VSMM) is to provide treatment equivalent to half of the water quality treatment standard. It should be made clear that the redevelopment impact fee is not ½ the water quality impact fee (§22-1002(b)(4)(B)(ii)). This fact that these treatment standards and impact fees have the same titles will lead to confusion.

Response: The Department intended that a project subject to the redevelopment standard would pay a maximum of 50% of the $25,000 per acre fee because redevelopment projects are required to provide 50% of the water quality volume.

The Vermont Stormwater Management Manual describes the Water Quality Treatment Standard for redevelopment projects (a.k.a. the redevelopment standard) as capturing and treating 50% of the water quality volume, or a combination of impervious surface reduction and treatment. The water quality volume is the treatment volume required of new projects and is based on site area, site impervious area, and the runoff generated by 1" of precipitation. A project meeting the redevelopment standard would treat 50% of this volume. Therefore, the Water Quality Treatment Standard for redevelopment is 50% of the water quality volume. The Department intended that the impact fees would be commensurate, such that projects subject to the redevelopment standard would pay 50% of impact fees compared to those projects subject to providing the full water quality volume.

The Department has revised the rule to clarify that the impact fee is $25,000 per acre of impervious surface multiplied by the difference between the required water quality volume (i.e. 50%) and the average water quality volume achieved on a given site. The resulting maximum fee under this standard, for a site providing no treatment, is $12,500 per acre. Similar revisions were also made to the following sections: 22-901(b)(4) – a new subsection; 22-901(b)(3)(D)(iii); 22-1002(b)(4)(B)(i); 22-1002(c)(1)(B); 22-1002(c)(1)(E); 22-1002(c)(3)(A); and 22-1003(f)(1).

32. Comment: Consider providing a table or flow chart that clarifies how and when these fees will be assessed.

Response: The Stormwater Program will consider this in developing application and guidance material to support the forthcoming general permit.

33. Comment: I am concerned that the proposed impact fees do not accurately reflect the cost of installing stormwater treatment in Vermont.

Response: Please see the response to comment #23.

34. Comment: As I understand it, in order to establish impact fee values DEC utilized a previously existing, regional, estimate for the cost of installing stormwater treatment practices and increased this value based on the nationwide construction cost index. However, many stormwater treatment practices have been constructed in Vermont since this original regional estimate was created. As a result, the actual cost of installing treatment in different situations (i.e. retrofit of an existing system, installation of new treatment for existing impervious surface, and installation of new treatment for new impervious surfaces) are available. DEC should consult with the grant administrators in the Ecosystems Restoration Program, as well as State employees in the Municipal Assistance Bureau at VTrans, to obtain actual construction costs. The City of South Burlington alone has implemented a number of stormwater treatment practices over the last decade. These costs are summarized in the attached table.

Response: Please see the response to comment #23.

35. Comment: In order for an impact fee system to function appropriately, the cost per acre value utilized must be close to, or slightly greater than, the real world cost of installing stormwater treatment. If the fee is set too low, it could serve as an incentive for property owners to pay the fee instead of installing stormwater treatment to treat impervious surface on their property. As I understand the process, these funds will then go into a fund dedicated to paying for construction of STPs. However, the cost to construct STPs for treating stormwater runoff in other locations is likely to be higher than treating the runoff where it is generated. This shifts the burden of cost to municipalities and tax/rate-payers.

Response: Please see the response to comment #23. As noted, payment of the fee in lieu of providing on-site treatment is only allowable if providing on-site treatment is infeasible.

36. Comment: Engineering Feasibility Analysis (§22-1001) DEC staff has made significant improvements to the details of the EFA process. Going forward, it will be a much clearer process. §22-1001(c)(4)(G) precludes construction of STPs in any wetland or its 50-foot buffer zone. It is inappropriate for DEC to regulate wetlands and their buffers within the Stormwater Permitting Rule. This is duplicative with regulation found in the Vermont Wetland Rule. This language should be replaced with a reference to what is allowed under the Vermont Wetland Rule.

Response: Please see the response to comment # 22. Additionally, the Department is not regulating activities in wetlands through the proposed rule, nor does it preclude construction in wetlands or buffer zones.

37. Comment: The language in this section is too broad. A distinction must be made between wetland buffer in a natural state and managed wetland buffer (e.g. wetland buffer currently maintained as lawn). If DEC intends to regulate impacts to wetlands and buffers in both the Stormwater Permitting Rule and the Wetland Rule, I recommend revising the language of this section as follows, “Construction within any wetland or its 50-foot natural buffer zone;”. If the language is not modified as proposed, property owners that are maintaining existing wetland buffer as lawn will not be required to consider use of this space for stormwater treatment, nor will they be required to restore the buffer to a natural state. Any opportunity for improving water quality will be lost.

Response: Please see the response to comments #21 and #22.

38. Comment: Requirements for Licensed Professional Engineers (PE): The stormwater permitting rule proposes to require a licensed PE for many tasks that have previously been completed by numerous other water quality professionals. Limiting these tasks to PE’s is unnecessary and inappropriate and will only serve to increase the cost of stormwater management for many municipalities that do not have a licensed PE on staff. If DEC feels that additional oversight of the individuals managing Vermont’s stormwater systems is necessary than it is time to create a stormwater operator certification process similar to the State’s Drinking Water and Wastewater programs. If DEC will not remove this requirement from the rule, the language should be modified to allow these tasks to be completed by a PE or other individuals whose qualifications are approved by the Secretary.

Response: Please see the response to comment #4. The tasks where a PE is required under the proposed rule are currently performed almost exclusively by PEs.

City of Burlington

39. Comment: Burlington's Stormwater Program has reviewed the Draft Stormwater Rule, and has further attended presentations regarding proposed updates to the Groundwater Protection Rule and Strategy. The City would like to underscore the importance of coordination between these respective regulations.

    Municipalities like Burlington have invested substantial resources in infiltration systems to manage and treat stormwater. It is well established that infiltration is the most effective means of providing general treatment of, and more specifically the removal of nutrients from stormwater. Given the necessary requirements for managing phosphorous discharges to Lake Champlain under the TMDL, any regulation that could potentially prohibit infiltration could have serious impacts on compliance with stormwater regulations.

Response: The Department has made a substantial effort to ensure consistency and workability between these regulations. The Department has recently filed the proposed Groundwater Protection Rule and Strategy (GWPRS) with the Interagency Committee on Administrative Rules, as a precursor to the rulemaking process. The Stormwater Permitting Rule has been revised to require that the infiltration of stormwater comply with the GWPRS.

Town of Essex

40. Comment: This written comment pertains to the Municipal Roads General Permit ("MRGP") requirement that municipalities maintain class 4 highways regarding the management of stormwater runoff. By imposing technical standards intended to reduce stormwater runoff from municipal roads, the MRGP operates to require municipalities to maintain their class 4 highways and this requirement appears to be in conflict with the authority municipalities are granted under Title 19 of the Vermont Statutes Annotated.

    A permit is required under the Rule, in accordance with the schedule established under the MRGP, for "a municipality's discharge of regulated stormwater runoff from a municipal road." Section 22-107(b)(5). A "municipal road" is not defined in 10 V.S.A. § 1264, the enabling statute, but is defined in the Rule at Section 22-1101(b)(1) as "all town highways, classes 1-4, as defined under 19 V.S.A. Chapter 3, and their rights-of-way, as well as municipal stormwater infrastructure associated with town highways." It is our understanding that the Agency's position is that the MRGP does not affect a municipality's discretion to maintain a class 4 road or highway as provided in Title 19 of the Vermont Statutes Annotated. The explanation given is that Title 19 deals with the navigability of town highways and the MRGP is separate in that it deals with stormwater discharges per Title 10, and specifically 10 V.S.A. § 1264. However, while Section 1264(c)(6) of Title 10 does require municipalities to obtain and comply with permit requirements before discharging stormwater from a municipal road, the statute does not define "municipal road." As explained below, we believe the permit requirements do in fact affect town discretion with respect to class 4 roads.

    As used in Title 19, "[t]he term 'highway' includes rights-of-way, bridges, drainage structures, signs, guardrails, areas to accommodate utilities authorized by law to locate within highway limits, areas used to mitigate the environmental impacts of highway construction, vegetation, scenic enhancements, and structures." 19 V.S.A. § 1(12) (emphasis added). "Town highways" are class 1, 2, 3, and 4 highways that either the town has authority to exclusively or cooperatively maintain, or that are maintained by the towns except for scheduled surface

maintenance performed by the Agency of Transportation on class 1 highways per 19 V.S.A. § 306a. It has been well-established in Vermont that it is within a town's discretion to provide minimal or no maintenance for a class 4 highway. See Town of Calais v. County Road Comm'rs, 173 Vt. 620 (2002). "Class 4 highways may be maintained to the extent required by the necessity of the town, the public good and the convenience of the inhabitants of the town …." 19 V.S.A. § 310(b).

On the other hand, for higher classified highways, maintenance is required. For example, the Vermont highway classification system set forth in 19 V.S.A. § 302 provides a requirement that class 3 roads be "negotiable under normal conditions all seasons of the year by a standard manufactured pleasure car." 19 V.S.A. § 302(a)(3)(B). But maintenance in not limited to providing navigability. Subsection 302(a)(3)(B) goes on to state that "[t]his would include but not be limited to sufficient surface and base, adequate drainage, and sufficient width capable to provide winter maintenance …." Id. (emphasis added). Thus the maintenance requirement goes beyond navigability. For instance, a town must remove brush "from within the limits of the highways under their care …" 19 V.S.A. § 904 (emphasis added). The duty to maintain highways also includes the duty to "construct a watercourse, drain, or ditch from a highway across lands of any person, pursuant to [Title 19 Chapter 9]." 19 V.S.A. § 304(a)(4). Furthermore, Title 19 specifically grants towns the discretion to construct and maintain drainage systems from highways. 19 V.S.A. § 950 ("Selectmen may lay out, establish, construct, or cause to be constructed and maintained a drain, ditch, or watercourse leading from a highway in the town, across the lands of any person to a watercourse, to carry away the surface water from the highway, or other drainage necessary for public health, if they judge the public good or the necessity or convenience of individuals requires this work.") (emphasis added).

Quite clearly, while a wide array of maintenance is required for class 3 highways, class 4 are maintained only "to the extent required by the necessity of the town, the public good and the convenience of the inhabitants of the town …." 19 V.S.A. § 310(b). A town's discretion with respect to class 4 highways is reiterated elsewhere in Title 19. See, e.g., 19 V.S.A. § 711(b) ("Nothing in this section shall be construed to require a town to maintain a class 4 highway or to upgrade a highway from class 4 to class 3."). The notion of maintenance in Section 310(b) must be read in harmony with other statutory sections in Title 19. The term maintain is much broader than navigability alone. See 19 V.S.A. §§ 302, 904, 950, 952. Town highways encompass more than just the surface of the road and Title 19 provides for a greater level of control and maintenance over all aspects of a town highway. In turn, because municipalities have authority to maintain class 4 highways at their discretion, Title 19 provides an exemption for towns from all levels of maintenance of class 4 highways. The Rule, by explicitly including class 4 roads within its scope, conflicts with a town's authority under Title 19.

While Title 19 itself does reference 10 V.S.A. § 1264 in providing for stormwater management practices, the statutory reference does not reconcile the conflicting authority on class 4 highways. See 19 V.S.A. § 996(a), 2009, Adj. Sess., No. 110, § 17, eff. May 18, 2010 ("The best management practices shall not supersede any requirements for stormwater management already set forth in 10 V.S.A. §§ 1264 and 1264a that apply to state and town highways.") (emphasis added). A fair reading of this section suggests that later requirements for stormwater management that are presently set forth in 10 V.S.A. § 1264 may not supersede these Title 19 best management practices. It also does not provide any indication that the stormwater management requirements in 10 V.S.A. §§ 1264 and 1264a would apply to all town highways. In

fact just the opposite. By specifying that the Title 19 stormwater management practices do not supersede those "already set forth … that apply to state and town highways," the language implies that there are town highways to which Sections 1264 and 1264a do not apply.

Another area of discrepancy between the Rule requirements and the authority in Title 19 is the issue of state aid to municipalities for maintenance of roads. The classification system of town highways is premised on providing a structure for state assistance.

The legislative history indicates that the classification system was introduced in 1973 to clarify the system of state aid to local highways. Prior to the 1973 modification, the major town roads were classified as state aid highways and town highways. The former were the most important highways of the town, and became the class 2 highways under the 1973 system. The latter became class 3 highways under the 1973 system.

Sagar v. Warren Selectboard, 170 Vt. 167, 172 (1999) (internal citations omitted). It has been clear that this statutory scheme gives towns the option of not maintaining class 4 highways, for which no state funding would be provided. Of course, a town may reclassify a class 4 highway to a higher classification in order to gain state financial aid. See Calais, 173 Vt. 620. But if a town does not maintain class 4 highways, state aid for those roadways remains limited. For instance, pursuant to 19 V.S.A. § 306(d)(5), in the case of damage from a nonfederal disaster, in order for a Vermont town to be eligible for repair or replacement of drainage structures on its class 4 town highways, the town must document that it maintained the structure prior to the nonfederal disaster. Here the MGRP is purporting to require towns to maintain class 4 highways to at least a certain degree. Does that mean that all towns complying with the MGRP would now be eligible for nonfederal disaster relief, regardless of whether the class 4 highway was kept navigable? This inconsistency is one example of the lack of harmony among Title 19, Title 10, and the Rule.

This uncertainty as to potential state aid is likely troubling for many Vermont towns. A Transportation Alternatives Grant Program exists, which reserves funds for municipalities for environmental mitigation projects relating to stormwater and highways, but funds are limited. See 19 V.S.A. § 38. In FY 2019, all Grant Program funds (the amount provided for in 23 U.S.C. § 133(h)) will be reserved for municipalities for environmental mitigation projects relating to stormwater and highways. However, in FY 2020 and FY 2021, grant funds will be awarded for any eligible activity, and starting in FY 2022, a maximum of only $1.1 million in funds will be reserved for municipalities for environmental mitigation projects relating to stormwater and highways.

Overall, the broad discretion granted to towns in Title 19 with respect to maintenance or non-maintenance of class 4 highways, as the case may be, is not clearly superseded by the dictates of 10 V.S.A. § 1264. The MGRP requirements appear to be in conflict with Vermont statutes as presently codified. While the general permit does not require municipalities to make class 4 roads negotiable by cars, it does require maintenance of those roads of the nature that is encompassed within Title 19. As the Vermont Supreme Court has emphasized: "[t]he duties of [towns] with respect to roads are entirely statutory." Sagar, 170 Vt. at 171. Without further clarity in Titles 10 and 19 as to the duties of Vermont municipalities, no permit requirements for class 4 highways should be implemented through this Rule.

Response: The Department agrees that Title 19 is *permissive* with respect to municipalities' obligation to maintain class 4 town highways based on the necessity of the town and the public good and convenience of its inhabitants. 10 V.S.A. § 310(b). However, the Legislature has clearly stated its intent that the Title 10 requirement for individual or general permit coverage for stormwater discharge from municipal roads is *mandatory*. See 10 V.S.A. § 1259(a) (discharge to waters of the State requires a permit); 10 V.S.A. § 1264(c)(6) (a municipality "*shall not* discharge stormwater from a municipal road" without first obtaining an individual permit, coverage under a general permit, or coverage under a qualifying municipal separate storm sewer system permit) (emphasis added). Excepting class 4 highways from this permit requirement would undermine the Legislature's intent to "[r]educe the adverse effects of stormwater runoff." 10 V.S.A. § 1264(a)(2)(A). The Department concludes that these distinct statutory provisions can be read and applied in harmony, particularly given that they regulate different aspects of town highways: Title 19 highway classification relates to state funding; Title 19 highway construction and maintenance activities relate, even if indirectly, to navigability; and Title 10, Chapter 47 relates to water pollution control. The MRGP does not require a road to be navigable but does require stormwater management. Therefore, the Department is obligated and intends to regulate class 4 town highways under the municipal road requirements of the Rule.

Conservation Law Foundation (CLF), Vermont Natural Resources Council (VNRC), and Lake Champlain Committee (LCC)

41. Comment: Background It is well established that stormwater runoff is a leading cause of water pollution in the nation.[1] Among the sources of stormwater contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems.[2] Stormwater associated with urban development, in particular, poses two threats to water quality. As human land use intensifies, more pollutants are added to the land surface (e.g., pesticides, fertilizers, animal wastes, oil, grease, heavy metals, etc.) and are washed by precipitation into nearby rivers and streams. At the same time, more impervious and watertight surfaces result in less rainwater penetration, which amplifies the volume of runoff and the pollutant load. As that volume of water runs off development, it increases in speed, causing greater erosion and more phosphorus bound up in soils to move through the watershed. The resulting increased pollutant load adversely impacts the aquatic environment of receiving waters.

    A stark example of the adverse impacts on water quality caused by stormwater runoff is the current phosphorus pollution crisis in Lake Champlain. About 18 percent of the phosphorus load dumping into the Lake is a direct result of stormwater runoff from the developed land sector.[3] For this reason, it is tremendously important that this Rule contain clear reduction requirements pertinent to phosphorus discharges, and that the Three-Acre General Permit—a vital component of the Lake Champlain clean-up plan—is swiftly adopted.[4]

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[1] See, e.g., Environmental Defense Center v. Browner, 344 F.3d 832, 840 (9th Cir. 2003), cert. denied, 124 S.Ct. 2811 (2004) ("Stormwater runoff is one of the most significant sources of water pollution in the nation, at times "comparable to, if not greater than, contamination from industrial and sewage sources.").

[2] U.S. Environmental Protection Agency, Sources and Solutions: Stormwater, https://www.epa.gov/nutrientpollution/sources-and-solutions-stormwater.

[3] Phosphorus TMDLs for Vermont Segments of Lake Champlain at 18, Table 3 (June 2016).

[4] 10 V.S.A. § 1264(g)(3) requires the Secretary of ANR to issue the three-acre general permit within 120 days after the adoption of this rule.

Stormwater runoff poses significant risks for human health and wellbeing beyond those pertaining to water quality. It also presents substantial risks with regard to water quantity. Tropical Storm Irene and the multiple heavy rainstorms hitting Vermont each year since then have shown us the far-reaching and devastating consequences of large amounts of rainwater, coupled with widespread impervious development and infrastructure that is ill-equipped to handle such volumes. Beyond the obvious and immediate risks of injuries and drowning in deep and fast-moving flood waters, long-term threats include "elevated levels of contamination associated with raw sewage and other hazardous or toxic substances that may be in the flood water,"[5] and contamination of drinking water sources.[6]

The frequency of heavy rainstorms associated with high stormwater flows is also increasing due to climate change.[7] The U.S. Environmental Protection Agency (EPA) reports that" [n]ationwide, nine of the top 10 years for extreme one-day precipitation events have occurred since 1990."[8] These global and national patterns are already observable in New England –"average annual precipitation in the Northeast increased 10 percent from 1895 to 2011, and precipitation from extremely heavy storms has increased 70 percent since 1958." [9] Shifts in temperatures and rainfall patterns are projected to continue, resulting in the region experiencing more intense storms and therefore more stormwater and flooding.[10] Compounding the impacts of heavy rainfall events in Vermont is our mountainous topography that funnels stormwater down into the more populated river valleys, which can have a multiplier effect on the impacts.

It is imperative that the Department consider climate change – and the implications for storms, runoff, infrastructure, health, and costs – in planning and decision-making around stormwater management. In the development of this Rule, DEC must plan and prepare for temperatures and precipitation patterns that are different from those we face today, or even those we experienced ten or twenty years ago, and for storms that are becoming ever more extreme.

Response: The Department agrees with the importance of addressing climate change. To this end the 2017 Vermont Stormwater Management Manual (VSMM) incorporates the best available precipitation data for the region (NOAA Atlas 14), thus capturing the trends in increased precipitation experienced by the region, as well as the more intense precipitation experienced in higher-elevation settings. The "Qp", or peak flow, standards of VSMM are designed to prevent flooding associated with 10-year and 100-year storms. Further, VSMM requires that projects include measures designed to ensure that flows from larger storms -upwards of the 100-year storm for larger practices such as basins- are safely conveyed.

42. Comment: DEC should not allow for automatic permit authorization without submission of a Notice of Intent or Application. The undersigned groups strongly oppose language in

[5] U.S. Environmental Protection Agency, Flooding, https://www.epa.gov/natural-disasters/flooding.

[6] U.S. Environmental Protection Agency Office of Water, Climate Change Adaptation and Implementation Plan, Report Number: EPA-100-K-14-001A (May 2014) at 6.

[7] U.S. Environmental Protection Agency, Climate Change Indicators in the United States, 2016 Fourth Edition, at 24, https://www.epa.gov/climate-indicators; see also U.S. Environmental Protection Agency, Climate Adaptation

[8] U.S. Environmental Protection Agency, Climate Change Indicators in the United States, 2016 Fourth Edition, at 24, https://www.epa.gov/climate-indicators.

[9] U.S. Environmental Protection Agency, What Climate Change Means for Massachusetts (Aug. 2016), https://19january2017snapshot.epa.gov/sites/production/files/2016-09/documents/climate-change-ma.pdf.

[10] Id. U.S. Environmental Protection Agency, Manage Flood Risk, https://www.epa.gov/green-infrastructure/manage-flood-risk.

subsections 22-302(a)(1), 22-304(a) and (d-f) that unlawfully allows the Secretary to authorize discharges under a general permit without the permittee submitting any prior application. This runs counter to one of the purposes of this Rule, which is to administer a permit program consistent with the federal National Pollutant Discharge Elimination System (NPDES) program (§ 22-101(b)). Under the NPDES program, all permitees must demonstrate compliance with certain elements; for example, that all permits contain conditions sufficient to meet water quality standards. Clean Water Act (CWA), § 301(b)(1)(C). The Secretary of the Agency of Natural Resources (Secretary) must conduct a review before issuing a discharge permit to ensure discharges meet those requirements.

Likewise, if the Secretary authorizes a discharge without a prior application, the public is deprived of any meaningful opportunity to review and provide comments on any potential impacts of the discharge on water quality. This contravenes the CWA's unambiguous requirements that "[a] copy of each permit application and each permit issued [under section 402] shall be available to the public." 33 U.S.C. § 1342(j).

Additionally, the Secretary's review of permit applications before issuing a permit is necessary to comply with other provisions of this Rule. See, e.g., § 22-308(a) (requiring Secretary to first determine that an application is complete and meets the terms and conditions of this Rule or, if the application is a notice of intent, it meets the terms and conditions of the general permit, and Stormwater Runoff, https://www.epa.gov/arc-x/climate-adaptation-and-stormwater-runoff; before issuance of an authorization); § 22-111 (requiring Secretary to consider information from basin plans prior to the issuance of individual and general permits); § 22-306 ("Secretary shall provide public notice and an opportunity to comment on . . . Notices of intent for coverage under general permits. . .").

Accordingly, we urge DEC to discard any provisions in this Rule that allow for authorizations to discharge without a permit application. The undersigned groups offer suggestions of where and how to amend this language in Part III below.

Response: The Rule's provisions for general permit coverage without a Notice of Intent (NOI), or a "non-reporting" category of discharges, are consistent with 40 C.F.R. § 122.28(b) (Administration of General Permits). The public is provided notice and an opportunity to comment based on the description of and reasons for such a category within the notice of general permit, as described in § 22-304(e) and 40 C.F.R. § 122.28(b)(v). In order to ensure that this same notice is provided with respect to all non-reporting discharges, including those in which the Secretary notifies a discharger that it is covered by a general permit even if the discharger has not submitted an NOI, the Department has revised § 22-304(f) to clarify that it shall only apply to those discharges that have been identified in the notice of general permit pursuant to § 22-304(e).

43. Comment: DEC should include a waiting period between when applicants apply for and receive coverage under a permit to allow time for public comment and Department review. For similar reasons as articulated above, this Rule must also incorporate mandatory waiting periods between when an entity applies for a permit and when the Secretary authorizes a discharge. Having a waiting period between when applicants apply for and receive coverage under a permit is essential to allow sufficient time for the Department and the Secretary to review the application to ensure it meets necessary legal requirements, as well as to allow the public

meaningful opportunity to comment on the permit.[11] For example, under the U.S. Environmental Protection Agency (EPA) 2015 Multi-Sector General Permit (MSGP), a discharge is authorized 30 days after EPA notifies the operator that it has received a complete Notice of Intent.[12]

As pointed out in our section-by-section comments below, this Rule allows for authorization of discharges immediately upon submission of a Notice of Intent, without any waiting period for the Department to conduct a review or for the public to provide meaningful comments, as is required by the CWA and this Rule. We strongly disagree with this approach, and urge DEC to adopt a similar 30-day waiting period as that established in EPA's MSGP for all individual and general permits issued pursuant to this Rule. Specific language changes are identified in Part III below to address this concern.

Response: At this time the Department has no plans to include a non-reporting category in a future general permit, but is including this authority in the event that conditions are such that requiring a NOI would be inappropriate, pursuant to § 22-304(e). All existing stormwater general permits, as well as the forthcoming general permit that will cover three-acre sites, require submittal of a NOI. Under 10 V.S.A. § 7715, and the Department's associated proposed rule (Uniform Environmental Administrative Procedure and Standard Processes For Notice And Comment On Environmental Permits), these NOIs will be processed under the "Type 4 procedures." This means the Department is required to provide notice of receipt of the NOI, a minimum 14-day public comment period, notice of final decision, and response to public comments, via the Environmental Notice Bulletin. Applications for individual permits must wait a minimum of 15 days prior to going on a 30-day public comment period. The Stormwater Permitting Rule does not modify the notice requirements under 10 V.S.A. § 7715.

44. Comment: CLF supports DEC's integration of Tactical Basin Plans into stormwater guidance documents, rules, and permitting procedures, but more clarity is needed. In general, we support DEC's integration of tactical basin plans into stormwater guidance documents, rules, and permitting procedures. It is important for the Secretary to have an accurate understanding of what stormwater projects are being implemented through tactical basin plans, and whether those projects and existing regulatory and permitting thresholds are sufficient to meet the developed land waste load allocation for the Lake Champlain TMDL. In addition, we support the concept that each basin plan issuance after adoption of this Rule include "an assessment of whether the waste load allocation for developed lands in any applicable TMDL is estimated to be met through existing regulatory programs." However, it is unclear who would make this assessment, or how it would be done. We suggest clarifying this in the Rule.

    Finally, we recommend the Department include true criteria that the Secretary must consider when establishing watershed-specific priorities, as opposed to the current list of criteria set forth in section 22-111(c), which are merely data sources (e.g., stream gauge data, stream mapping, etc.) that the Secretary may consider.

[11] See, e.g., Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP) – Fact Sheet at 28 ("EPA may also use the waiting period to determine whether any more stringent requirements are necessary to meet applicable water quality standards, to be consistent with an applicable WLA, or to comply with State or Tribal antidegradation requirements. Additionally, during this waiting period, the public has an opportunity to review the NOIs and request to review the SWPPPs."), available at: https://www.epa.gov/sites/production/files/2015-10/documents/msgp2008_finalfs.pdf.

[12] EPA 2015 MSGP Table 1-2 at 10.

Response: The Department is developing a robust tracking program for regulatory and non-regulatory projects that are undertaken to reduce impacts to surface waters, including Lake Champlain. These tracking data are monitored over time to determine overall phosphorus reductions. For example, the Stormwater Program's project database tracks all regulated projects, including the amount of impervious surface, level of treatment, and the type of project: new, redevelopment, or retrofit of existing site (e.g. 3-acre site). This information allows the Department to determine, over time, more precisely what level of reduction is occurring. Additionally, the Department is required to report to US EPA regarding progress in implementing the Lake Champlain TMDLs, as described in the TMDLs' Accountability Framework. Through these efforts the Department will quantify, and report on, the extent to which phosphorus reductions required under the Lake Champlain TMDLs are being achieved.

The Department has modified the Rule to include the criteria for how the Department will use information from tactical basin plans to establish priorities for the regulatory management of stormwater runoff.

45. Comment: The Department should ensure that the Engineering Feasibility Assessment portion of the Rule is in alignment with feasibility considerations in the Vermont Stormwater Management Manual. The undersigned groups suggest the Department make a few clarifications in the Engineering Feasibility Assessment (EFA) section of the Rule (§ 22-1001). First, we suggest this portion of the Rule include a clear statement that cost cannot be a consideration in the EFA process. The Vermont Stormwater Management Manual (VSMM) notes that cost cannot be a consideration in any part of the feasibility analysis for determining which stormwater treatment practices (STPs) to employ on a site. VSMM 2.2.4.1 ("The designer's detailed justification shall explain the site or design constraints that require use of Tier 3 Practices; cost may not be used as a justification."). This Rule should also include a clear statement indicating this prohibition.

Response: The Engineering Feasibility Analysis section of the Rule is consistent with Section 2.2.4.1 (Water Quality Practice Selection) of the Vermont Stormwater Management Manual. Projects will need to address both sets of criteria, and application guidance will be provided to avoid redundancy. The criteria in § 22-1001 are exclusive; cost is not an allowable feasibility constraint.

46. Comment: We recommend clarifying how the STP Selection Tool generated for the VSMM will be used for three-acre or more retrofit parcels.[13] We presume that this Tool would also be used by designers for retrofit projects to ensure that, where feasible, Tier 1 STPs are selected, and only if unfeasible, Tier 2, and then Tier 3 STPs are used. However, the Rule should contain a clear statement that designers must use this STP Selection Tool for three-acre or greater retrofit projects.

Response: Where three-acre sites are required to meet the Water Quality Treatment Standard, whether required to treat the full water quality volume, or the redevelopment standard of 50% of the water quality volume, they are required under the Vermont Stormwater Management Manual to use the highest tier practice that is feasible on the site. Applicants are required to use the Department's application materials in demonstrating they have met this requirement. The Department currently uses

[13] 13 STP Selection Tool accessible under "Workbooks" subheading at the following website: http://dec.vermont.gov/watershed/stormwater/permit-information-applications-fees/operational-stormwater-discharge-permit-application-materials.

the STP Selection Tool as part of its application process for ensuring compliance with this requirement. The Department has not modified the Rule in response to this comment.

47. Comment: We suggest the Department require professional engineers/designers to stamp the STP Selection Tool worksheet indicating that the analysis is based on the best available science, meets the intent of the Tool, and could not be readily found contrary by another licensed engineer. If designers could be held liable for perjury if someone else were to review the project and identify a higher-tiered design that feasibly meets the standards, it is more likely that designers would heed the feasibility indicators.

Response: The proposed rule requires that the application include a certification of compliance by a licensed professional engineer. The STP Selection Tool, where required, is part of the application itself. Hence, the certification would effectively cover the use of the Selection Tool, along with all other required calculations, site plans, etc. The Department is not inclined to require multiple certifications as part of a single application.

48. Comment: § 22-101(a): We suggest changing the term "predevelopment" to "greenfield" to better reflect the intention of maintaining runoff characteristics of an undeveloped landscape.

Response: The term "predevelopment" has been in use as part of Stormwater Program regulations for well over ten years. It is intended to capture the conditions on a site that currently exist, and may be different than "natural conditions" (e.g. forested), or post-development conditions. The term "greenfield" has a range of connotations (e.g. natural, or undeveloped, or uncontaminated – as in not a "brownfield"). The Department does not believe that substituting "greenfield" for "predevelopment" will improve the clarity of the Rule.

49. Comment § 22-101(b): The sentence "All permits issued under this Rule shall be issued pursuant to the State's approved authority" could benefit from additional clarity. We interpret this sentence to mean that every permit issued under this Rule is to be considered a National Pollutant Discharge Elimination System (NPDES) permit. The undersigned groups strongly support this approach, however the wording could be clearer. DEC could consider changing the sentence to read "Therefore, all permits issued under this Rule shall be NPDES permits issued pursuant to the State's approved authority."

Response: The permits issued under the Rule are consistent with the federal National Pollution Discharge Elimination System, but as they are issued by the State of Vermont, they are more appropriately labeled "State Pollution Discharge Elimination System" or "SPDES" permits. Nevertheless, the Department believes the current description of the Rule's compliance with NPDES, and issuance of permits pursuant to the State's approved authority, is sufficiently clear.

50. Comment: § 22-105(a)(5): This section is worded in a confusing manner and should be clarified. Subsection (a) generally states that "no permit is required under this Rule" for a number of activities labeled one through five. Activity number five is "stormwater runoff requiring permit coverage under Section 22-107(b)(2)," provided one of the scenarios in A-D is true. This reads like no permit coverage is required, unless permit coverage is required. We suggest changing the wording in 22-105(a)(5) to "stormwater runoff requiring permit coverage under Section 22-107(b)(2), provided one of the following transition exemptions applies: . . .".

Response: The Department agrees that the suggested change to § 22-105(a)(5) would improve its clarity, and, therefore, the Rule has been revised accordingly.

51. Comment: § 22-106(7): We suggest striking the second sentence, since compliance with the standards and best management practices set forth in this Rule may create an assumption of compliance, but it will not necessarily "ensure that a new source or new discharger will not cause or contribute to a violation of water quality standards." (emphasis added).

Response: The Department has revised the rule to strike the subject sentence.

52. Comment: § 22-107(c)(1)(A): We have two suggested changes to this section. First, the term "existing stormwater treatment" should be amended to read "existing, operative stormwater treatment" to make clear that the Secretary shall only consider in-place, functioning stormwater treatment practices in any residual designation petition, as opposed to stormwater controls that are anticipated in the future through, for example, implementation of a Total Maximum Daily Load for a waterbody. Second, we suggest DEC change the last two sentences to read as follows: "The Secretary shall make this determination on a case-by-case basis [period]. The Secretary may make this determination based on individual discharges, or according to classes of activities, classes of runoff, or classes of discharge. In making this determination, the Secretary may consider activities, runoff, discharges, or other information identified during the basin planning process."

Response: "Existing" means "in existence or operating at the current time" or "in place." This is specific enough to limit the Secretary's consideration to treatment that is currently in place, as opposed to future treatment. It is also general enough for the Secretary to consider what effect that treatment is having on water quality impacts.

The paragraph as it currently reads requires the Secretary to require a permit for individual discharges determined to have an adverse impact and allows that determination to be made case by case *or* by class—as intended and consistent with federal law. The suggested language adds ambiguity.

53. Comment: § 22-108(a): We seek clarity from DEC around the phrase "independent utility." Can the Department provide an example of when a municipal or state transportation project would have independent utility from adjoining or adjacent impervious surfaces?

Response: A sidewalk project that serves a particular street has utility to pedestrians on that street, irrespective if it connects to other sidewalks.

54. Comment: § 22-111(a): We support DEC's integration of Tactical Basin Plans ("basin plans") into stormwater guidance documents, rules, and permitting procedures. We also support the requirement that each basin plan issued after adoption of this Rule shall include an assessment of whether the waste load allocation for developed lands in any applicable TMDL is estimated to be met through existing regulatory programs. However, the rule lacks details as to who will conduct this assessment, and how it will be done. We suggest greater transparency here. For example, will DEC rely on the BMP Accountability and Tracking Tool for this assessment?

Response: Please see the response to comment #44.

55. Comment § 22-111(c): We suggest changing this to read "The Secretary shall consider the following data, to the extent the information is available, in establishing watershed-specific priorities . . . ." The items listed below subsection (c) are not "criteria," but rather data from various sources. If criteria is what was intended, we suggest the rule contain clearer factors, as opposed to this list of data sources.

Response: Please see response to comment #44.

56. Comment: § 22-201(11): We note that the definition of "development" is identical to the definition of "new development" at § 22-201(35). Is it true that there is no distinction between the two?

Response: Yes, it is true that there is no distinction between the terms "development" and "new development." In the few places that "development" is used on its own within the Rule, it is synonymous with "new development."

57. Comment: § 22-201(14): The last sentence of the definition of "discharge of pollutants" should be amended to read as follows: "This term does not include an addition of pollutants by any indirect discharger, as defined by this Rule." This amendment would clarify which of several definitions of "indirect discharger" is being used in this definition.

Response: For all terms, the default or presumed definition should be as provided within the Rule. The Department disagrees with adding this qualification to individual terms, which could add confusion as to other terms that are not similarly qualified.

58. Comment: § 22-201(23): The definition of "hazardous substance" should be tied to the state definition of "hazardous materials" included in 10 V.S.A. § 6602(16), rather than the C.F.R. citation that is currently included in the Rule. The state definition is a better choice for this Rule because it is more inclusive than the federal definition.

Response: The Department disagrees with tying the definition of "hazardous substance" to the statutory definition of "hazardous materials" in 10 V.S.A. § 6602(16). The § 6602(16) definition is located within the waste management statute and therefore includes many materials that are not appropriately regulated within the stormwater context, including air pollutants. To the extent that substances other than those designated under 40 C.F.R. § 116.4 are to be regulated, the more appropriate and straightforward way to do so would be an addition to the Water Quality Criteria within the Vermont Water Quality Standards.

59. Comment: § 22-201(44): Definition here of "point source" should state "any discernible, confined, and discrete conveyance, including, but not limited to, ..."

Response: The Department's practice is to avoid the use of "but not limited to" in this context, as it is redundant and unnecessary.

60. Comment: § 22-201(61): We disagree that a "stormwater-impaired water" requires a determination by the Secretary, and that it must be "significantly" impaired. We suggest deleting "that the Secretary determines is significantly" from this definition.

Response: The rule uses the statutory definition of "stormwater-impaired water" (10 V.S.A. §1264(b)(12)).

61. Comment: § 22-201(68): The current definition of "toxic pollutant" in the Rule does not include emerging toxic contaminants, such as per- and polyfluoroalkyl substances (PFAS). The Department should consider including a more comprehensive definition of "toxic pollutant" in state statute so that a future stormwater rule could reference a more protective definition.

Response: The Department acknowledges the suggestion for future legislative change and notes that it is currently evaluating how contaminants of emerging concern are and should be addressed across its programs, including appropriate future statutory and rule amendments.

62. Comment: § 22-201(72): We suggest the definition of "waters" should include wetlands.

Response: As drafted, the definition of “waters” is appropriately consistent with the Vermont Water Quality Standards. The Department declines to use this Rule to modify or interpret the definition of “waters” in any way.

63. Comment: § 22-302(a)(1): We are concerned that this provision unlawfully allows the Secretary to authorize discharges without any prior application. See General Comment in Part II(1) above. We suggest revising the provision to read as follows: "The Secretary shall not issue an individual permit or authorization under a general permit before receiving a complete and accurate application, except when a general permit specifically authorizes a discharge without prior application,. There shall be a 30 day waiting period before any permit issuance or authorization is effective.”

Response: Please see response to Comment #42.

64. Comment: § 22-303(a)(1)(F)—change “may” to “shall,” so it is clear that the Secretary’s determination must be tethered to the factors listed.

Response: The Department declines to make this change and notes that § 22-303(a)(1)(F) is consistent with 40 C.F.R. § 122.28(b)(3)(i)(G).

65. Comment: § 22-304(a): We strongly oppose the language in this subsection allowing a person to gain coverage under a general permit without ever seeking authorization or submitting an application to the Secretary. See General Comment in Part II(1) above. Accordingly, this provision should be changed to the following: “A person who fails to submit a notice of intent in accordance with the terms of the general permit is not authorized under the terms of the general permit unless the general permit, in accordance with subsection (e), contains a provision that a notice of intent is not required or the Secretary notifies a person that its facility or activity is covered by a general permit in accordance with subsection (f).”

Response: Please see response to Comment #42.

66. Comment: § 22-304(d): DEC should include a waiting period between applying for and receiving coverage under a permit to allow time for public comment and agency review. See General Comment in Part II(2) above. Accordingly, we suggest the following changes to this subsection: “General permits shall specify whether an applicant that has submitted a complete, accurate, and timely notice of intent to be covered . . . is authorized to discharge in accordance with the permit either upon receipt of the notice of intent by the Secretary, after a waiting period of 30 days specified in the general permit, or on a later date specified in the general permit, or upon receipt of authorization by the Secretary.”

Response: Please see responses to Comments #42 and #43.

67. Comment § 22-304(e): For the reasons articulated in above, this whole section providing for authorization under a general permit without the discharger applying for coverage under the general permit should be deleted.

Response: Please see responses to Comments #42 and #43.

68. Comment: § 22-304(f): For the reasons articulated in Part II(1) above, this whole section allowing the Secretary to notify a discharger that it is covered by a general permit, even if the discharger has not submitted a notice of intent to be covered, should be deleted. If this section

were to remain, it renders the mandatory public notice requirements in section 22-306(1) illusory.

Response: Please see responses to Comments #42 and #43.

69. Comment § 22-306. We reiterate that the public notice and opportunity to provide comment provisions in this section necessitate a waiting period before coverage becomes effective (contrary to what is currently written and allowed for in sections 22-302(a)(1) and 22-304(d-f) of the Rule (allowing the Secretary to notify a discharger that it is covered by a general permit upon receipt of the notice of intent, or even if the discharger has not submitted a notice of intent to be covered). The effect of section 22-304(d-f) is to deprive the public of the right to comment on notices of intent for coverage under general permits, a right that is provided in section 22-306(3) of this rule.

Response: Please see response to Comment #42.

70. Comment: § 22-308(a): The existence of this section provides further support for our position that there must be a waiting period after an application is submitted for authorization. The section reads: "If the Secretary determines that an application is complete and meets the terms and conditions of this Rule or, if the application is a notice of intent, it meets the terms and conditions of the general permit, the Secretary shall issue an authorization. . . ." The Secretary must have a waiting period to make this determination before issuing coverage. See Part II(2) above.

Response: Please see the response to comment #43.

71. Comment: § 22-308(b): Similar to section (i) above, this provision supports a waiting period. The provision reads: "If the Secretary received public comments on an application or draft decision, the Secretary shall provide a response to comments, pursuant to 10 V.S.A. Chapter 170 and the rules adopted thereunder, concurrent with issuance or denial of authorization." (emphasis added). There is no way the Secretary could provide a response to comments concurrent with issuance of a permit if issuance occurs the very moment that an application is submitted. It is difficult to fathom how the public would meaningfully comment on such a decision, either.

Response: Please see the response to comment #43.

72. Comment: § 22-310(e)(3)(A)(iii): This provision of the rule should allow for someone other than just the permittee to request an amendment to a permit to adopt amended standards or rules. Part (iii) should be changed to read "An interested person or permittee requests amendment in accordance with … " This revision is necessary to be consistent with subsection (a), which authorizes requests for amendments by interested persons and/or on the Secretary's initiative.

Response: The Department declines to make this change, as this rationale for amendment is intended to apply when all three conditions of subsection (e)(3)(A) are met. In addition, § 22-310(e)(3)(A)(iii) is consistent with 40 C.F.R. §§ 124.5(a) and 122.62(a)(3)(i)(C).

73. Comment: § 22-310(e)(11): for clarity, we suggest inserting "if/when/where" before the colon.

Response: The Department agrees to add "where" before the colon for clarity.

74. Comment: § 22-310(e)(13): This provision allows a permit amendment "[w]hen the discharger has installed the treatment technology considered by the permit writer in setting effluent limitations imposed under section 402(a)(1) of the CWA and has properly operated and

maintained the facilities but nevertheless has been unable to achieve those effluent limitations. In this case, the limitations in the amended permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by a subsequently promulgated effluent limitations guideline)." We are concerned by this provision, as it purports to elevate technology-based standards above water quality standards, which contradicts the Clean Water Act. Violations of effluent limits should not warrant a permit amendment to adopt less stringent effluent limits. We suggest removing this particular cause for an amendment.

Response: The Department declines to make the suggested change and notes that § 22-310(e)(13) is consistent with 40 C.F.R. § 122.62(a)(16).

75. Comment: § 22-310(e)(14). The undersigned groups wish to clarify that, even if incorporation of the terms of a CAFO's nutrient management plan into the terms and conditions of a general permit when a CAFO obtains coverage under a general permit is not cause for amendment, those terms are still enforceable as water quality standards in the permit.

Response: The Department has decided to address CAFO requirements in a separate, future, CAFO rule. The subject section has been deleted.

76. Comment: § 22-310(h): We do not think that DEC should have to seek the consent of the permittee to make the amendments contained in this section. We suggest the sentence be changed as follows: "After notice to the permittee, the Secretary may amend a permit . . . ."

Response: The Department believes that the causes for amendment outlined in § 22-310(h) are appropriately limited by the requirement for the permittee's consent and therefore declines to make the suggested change. In addition, this section is consistent with 40 C.F.R. § 122.63. We note that § 22-310(f) identifies the conditions under which the Secretary may amend, revoke, or re-issue a permit without the permittee's consent.

77. Comment: § 22-402(b)(1)(C): this exception to the anti-backsliding rule is overly broad and vague. We suggest this exception be removed.

Response: The Department declines to remove this section and notes that it is consistent with 40 C.F.R. § 122.44(l)(2)(i)(C).

78. Comment: § 22-402(b)(1)(E): For the reasons articulated above on section 22-310(e)(13), this should not be a valid exception to the anti-backsliding rule. Accordingly, this exception should be removed.

Response: The Department declines to make the suggested change and notes that § 22-402(b)(1)(E) is consistent with 40 C.F.R. § 122.44(l)(2)(i)(E).

79. Comment: § 22-501(b)(1): We suggest striking ", or original purpose of the facility" from this definition because "original purpose" is a vague term, and an activity could still amount to earth disturbance even if it was the original purpose of the facility.

Response: The definition in the Rule is consistent with 40 C.F.R. 122.26 (b)(15)(i). The Rule has not been revised in response to this comment.

80. Comment: § 22-501(d): For the reasons articulated above in our General Comments (Part II(2)), this section should include a specified notice and delay period between applying for and receiving coverage to allow time for public comment and Department review.

Response: Please see responses to comments #42 and #43.

81. Comment: § 22-501(d)(2): We suggest DEC add a new subsection (E), requiring prominent public display of a permittee's construction General Permit. This will help facilitate compliance with permit conditions.

Response: Section 22-501(d)(2) is consistent with 40 C.F.R. § 122.44(s). The current Construction General Permit requires such posting for moderate risk projects, and the draft replacement Construction General Permit requires such posting for both low risk and moderate risk projects.

82. Comment: § 22-501(d)(2)(C): It is important that the stormwater pollution prevention plan be developed and implemented prior to submitting a notice of intent. Accordingly, we suggest the following change to the first sentence: "Requirements for construction site operators to develop and implement, prior to submitting an NOI, a stormwater pollution prevention plan."

Response: § 22-501(d)(1) of the Rule describes the technology-based effluent requirements for a construction permit. These requirements effectively constitute a stormwater pollution prevention plan, and are required with the NOI at the time of application. Implementation of the elements constituting a stormwater pollution prevention plan is required by the permit authorization.

83. Comment § 22-601(d): One of the application requirements listed in this section should be for the applicant to include a stormwater management plan (SWMP).

Response: The information needed to fulfill the application requirements identified in the subject section effectively make up the required elements of a stormwater management program. § 22-601(e) of the Rule requires the permit include a stormwater management program document.

84. Comment: § 22-601(e)(2)(C)(ii): The term "significant contributor" is not defined. We suggest DEC replace the term "significant contributor" with "non-de minimus" contributor.

Response: The Department declines to make the suggested change as it requires the formulation of an important new defined term and § 22-601(e)(2)(C)(ii) is drafted in accordance with 40 C.F.R. § 122.34(b)(3)(ii).

85. Comment: § 22-701: For the reasons articulated above in our General Comments (Part II(2)), this section should include a specified notice and delay period between applying for and receiving coverage to allow time for public comment and Department review.

Response: Please see responses to comments #42 and #43.

86. Comment § 22-701(a): reference to 22-107(b)(6) should be (b)(7).

Response: This is correct, the Rule has been revised accordingly.

87. Comment: § 22-701(d): the application requirements should include "develop and implement a stormwater pollution prevention plan prior to filing NOI for coverage.

Response: 40 C.F.R. §§ 122.44(i)(4) requires implementation of a stormwater pollution prevention plan (SWPPP). The Department's Multi Sector General Permit requires submittal and implementation of a SWPPP.

88. Comment: § 22-801(a): both references to 22-107(b)(8) should be (b)(9).

Response: The Department agrees and has revised the final rule accordingly.

89. Comment: § 22-801(c): change “Secretary may” to “Secretary shall.”

Response: The Department declines to make the suggested change and notes that § 22-801(c) is consistent with 40 C.F.R. § 122.23(c).

90. Comment: § 22-801(d): For the reasons articulated above in our General Comments (Part II(2)), this section should include a specified notice and delay period between applying for and receiving coverage to allow time for public comment and Department review.

Response: Please see the response to comment #43.

91. Comment: § 22-801(e)(2): this section says that discharges of manure, litter, or excess wastewater to waters of the State from a CAFO . . . “is a discharge from that CAFO subject to permit requirements,” except where it . . . “has been applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the mature, litter, or process wastewater, as specified in 40 C.F.R. §122.42(e)(1)(vi)-(ix).” But those sections of the C.F.R. are standard permit conditions that apply to site-specific nutrient management on permitted CAFOs; they are not an off-ramp to permit coverage as described by the above cited portion of the draft Rule. We suggest deleting that portion of subpart (2) beginning with “, except where” and ending the sentence at “subject to permit requirements” to eliminate any confusion that this provides an off-ramp to permit coverage.

Response: The Department has decided to address CAFO requirements in a separate, future, CAFO rule. The subject section has been deleted.

92. Comment: § 22-801(e)(2)(A): this section has the same problem as outlined in section 22-801(e)(2) above, but worse. The draft rule states that unpermitted Large CAFOs can have precipitation-related discharges of manure etc., and those discharges do not require permit coverage if the nutrients have been applied pursuant to a site specific plan “as specified in 40 C.F.R. §122.42(e)(1)(vi)-(ix).” We suggest removing this section, as it controverts the requirements in the CWA. See CWA Section 301(a).

Response: The Department has decided to address CAFO requirements in a separate, future, CAFO rule. The subject section has been deleted.

Global Foundries

93. Comment: GF currently discharges under a combined wastewater and stormwater permit from the Vermont Department of Environmental Conservation (3-1295 IBM). This permit was administratively extended in 2008 (while under IBM operation) due to ongoing Lake Champlain Phosphorus TMDL investigation. In 2015, upon sale of the IBM operated facility to GLOBALFOUNDRIES, GF was allowed to continue operations under this permit until 2020.

Response: The comment is noted, and the Department confirms GF is covered by permit 3-1295 IBM.

94. Comment: GLOBALFOUNDRIES Stormwater Phosphorus Contribution Stormwater from the GF campus is discharged pursuant to Permit No. 3-1295 into the Winooski River. The Winooski River is one of the tributaries feeding the Main Lake segment of Lake Champlain. According to the Phosphorus TMDLs for Vermont Segments of Lake Champlain (June 17, 2016, U.S. Environmental Protection Agency Region 1, New England) Vermont’s base loading of phosphorus from developed land area (i.e. those with impervious surfaces) into the Main Lake segment was 35.1 mt/yr or 77,382 lbs/yr .

Using the EPA Region 1 phosphorus load constant (1.78lb/acre/yr) it is calculated GF is contributing, in total, 251 lbs/year of phosphorus to this number based on approximately 124 impervious acres at the GF campus. This equates to 0.3% of phosphorus loading from the developed land category into the Main Lake segment, and 0.06% of the total Main Lake Segment yearly phosphorus load.

We are concerned about the extraordinary costs of approximately $30,000 per acre for the retrofit requirement to properties with more than three acres of impervious surface that lack a stormwater permit based on the 2002 Stormwater Management Manual. The total potential cost for the GF Essex, VT site would be $3.7M, if the DEC determines that compliance with Permit No. 3-1295 and the Stormwater Pollution Prevention Plan (SWPPP) approved thereunder does not incorporate the requirements of the 2002 Stormwater Management Manual or any subsequently adopted Stormwater Management Manual. This equates to an estimated cost of $14,700 per pound of phosphorus. This cost could be even higher given the fee schedule of up to $50,000 per acre proposed in the Stormwater Permitting Rule.

Response: The Department acknowledges that phosphorus in stormwater from developed lands comes from a great number of sources – thousands, likely – and that any single discharger is unlikely to make up a large percentage of the total load to a given lake segment.

The maximum fee that GF would pay, based on its location within the Lake Champlain watershed, but outside a stormwater-impaired water, is $12,500 per acre of impervious surface (see response to comment # 31). Given the required feasibility analysis, most sites will be required to provide at least some on-site treatment, thus it is unlikely a given site would pay the impact for its entire acreage.

Regarding the estimated cost per pound of phosphorus removed, as suggested by the comment, the Department notes that the estimate improperly ascribes all costs associated with phosphorus removal to a single year of phosphorus loading. Costs associated with the implementation of stormwater BMPs, or those paid in impact fees that are directed to other projects, are more appropriately looked at over a longer time period, say twenty years, that are in keeping with both the TMDL implementation period and a likely reasonable BMP life span. In other words, although impact fee or construction costs may be incurred at a single point in time, the resulting phosphorus removal will be ongoing.

Finally, the Department notes that pursuant to §22-105(a)(3) of this Rule and 10 V.S.A. §1264(d)(1)(D) of state statute, no stormwater discharge permit is required for stormwater runoff permitted under 10 V.S.A. §1263 as part of a permit for sanitary or industrial waste. Consequently, any portion of the GF site subject to the wastewater permit (#3-1295) would not be subject to this Rule and associated impact fees.

95. Comment: Referencing the 2016 EPA report on Phosphorus TMDLs for Vermont Segments of Lake Champlain, we question whether the extraordinary projected cost of stormwater compliance and subsequent fees present an effective return on investment when looking at contribution to overall TMDL. GLOBALFOUNDRIES supports the State's clean-up efforts regarding our waterways, however we feel the proposed fee schedule ignores actual magnitude of phosphorus discharges of to the lake and focuses simply on those with a large footprint. GLOBALFOUNDRIES recognizes the importance of addressing our own relatively minor contribution to the phosphorus issue, but believe that the fundamental premise of managing the overall cost by area is inequitable.

Response: The Department acknowledges that certain regulated projects will face significant expenses in complying with permit requirements, and further acknowledges that the rule and underlying statute impose requirements on selected sites (e.g. 3-acre sites), but not on all dischargers. Given that achieving the Lake Champlain TMDL necessitates addressing stormwater from developed lands, and given the economic importance of the lake and other waters to Vermont, addressing existing stormwater discharges is a necessary and effective return on investment.

96. Comment:22-107(b)(4): It is not clear to GLOBALFOUNDRIES based on the draft rule how our discharge permit will be evaluated under the standard set forth in Section 22-107(b)(4), since we are discharging subject to Permit No. 3-1295 and the corresponding SWPPP, the principal focus of which is to prevent industrial pollutants from entering stormwater. Please provide more information regarding how compliance with current stormwater management technical standards for infiltration of stormwater and reduction of phosphorus loading will be evaluated for our site, as well as whether and how we can redress any technical deficiencies to bring our site into compliance with the 2002 Stormwater Management Manual as an element of the SWPPP under Permit NO. 3-1295, which is due for renewal in 2020 .

Response: Please see the response to comment # 93.

97. Comment: 22-901: In our review of the rule, we were unable to determine if there are any specific pollutant load allocations that would be applicable to our site as a contributor to the lake watershed as described in Section 22-901(b)(3). We request that ANR provide additional information regarding the pollutant load allocation for our site, or, if that allocation has not yet been established, what methods/scope will be used to determine the allocation. In addition, the agency should clarify whether load allocations will be structured as annual, seasonal, or monthly. We believe that further clarity regarding, and definition of, said allocations are necessary to allow us to understand whether our site will be subject to the requirements of Section 22-901(b)(2), including the potential offset and fee requirements under Section 22-1002 and 22-1003.

Response: Please see the response to comment # 94. Additionally, the Lake Champlain TMDL does not have any site-specific wasteload allocations for stormwater discharges. Rather, all stormwater dischargers are included in the developed lands wasteload allocation. The Lake Champlain TMDL uses an annual allocation.

98. Comment: Section 22-901(c) provides that "[o]n or before January 1, 2018, the Secretary shall issue a general permit for discharges of regulated stormwater runoff from impervious surface of more than three acres in size …". Please provide further clarity regarding when this draft general permit will be issued and what public process – formal and informal – will be followed to solicit input from potentially affected parties like GLOBALFOUNDRIES regarding the implementation schedule, technical standards and use of impact fees, offsets and phosphorus credit trading to achieve compliance under the general permit.

Response: Act 181 of 2018 amended 10 V.S.A. § 1264 to revise the date by which this general permit is required. The general permit is now required no later than 120 days following adoption of this Rule. The Stormwater Program will undertake a formal public comment process consistent with Title 10, Chapter 170, and additionally will reach out to stakeholders to seek additional input. The final Rule has been revised to reflect this change.

99. Comment: 22-1002 –GLOBALFOUNDRIES requests further clarification regarding the determination of Stormwater Impact Fees described in Section 22-1002. As referenced in the

previous section, GLOBALFOUNDRIES seeks to understand whether consideration is given to actual contribution of phosphorus to the waterway in determining the fee structure. Furthermore, we would like to better understand the fee structuring process itself, such as the frequency at which these fees will be assessed (e.g. one-time, annual, or dependent on the frequency of permit renewal.)

Response: The stormwater impact fees are one-time fees. They are based on the amount of impervious surface, and the level of actual treatment provided for the surface. Partial treatment will be accounted for. These factors (amount of impervious surface, level of treatment) are, in effect, a well-established proxy for the contribution of phosphorus from a site. Determining the actual phosphorus from a given site would require a relatively long term monitoring and sampling effort for each site and is infeasible given the large number of sites regulated.

100. Comment: Section 22-1003 – Offsets Under Section 22-1003, we would like to understand whether on-site remediation projects will acceptably qualify as offsets and if there will be specific offset models the state will expect or prefer. We would like to understand if an offset project which also fulfills the requirements of the Stormwater Management Manual would be eligible for monetary consideration. Furthermore, we seek to understand if DEC has a framework in place for phosphorus credit- trading.

Response: As background, it is important to understand that the Rule changes the Department's approach to offsets. Most fundamentally, instead of a particular applicant demonstrating that they have achieved a specific pollutant reduction as a result of the offset, they demonstrate that they have treated a specific amount of impervious surface to a specified level to make up for the area they were not able to treat on site. When a TMDL is in place, such as it is in the Lake Champlain watershed, an applicant will typically only choose to implement an offset to negate any impact fees they would otherwise have to pay. In this sense, offset accounting is monetary instead of pollutant based. With that said, and as noted in response to previous comments, the Department will be tracking all regulated stormwater projects and determining the resulting change in pollutant loading. New projects may only go forward when the Department is able to establish that the receiving water has assimilative capacity, that is, pollutant reductions are occurring as planned. In the event the Department determines a water lacks assimilative capacity, a discharger may pursue an offset to reduce loading and create capacity. In that case, though, compensation for the offset will still be monetary based.

When there is no TMDL in place, an applicant may also choose to implement an offset in order to ensure that pollutant loading will not increase to the receiving water over baseline existing conditions. Whereas the Department previously approached the need to ensure pollutant loading is not increasing in impaired waters without a TMDL on a case-by-case basis, the Department will now do it on a watershed basis through tracking the net effect of new dischargers and remediation projects. Where an impaired water without a TMDL has pollutant loading below the established baseline, new projects may go forward without identifying a particular offset – as long as the Department determines that overall loading is below the baseline. New projects not able to infiltrate the 1-year storm will still pay an impact fee, as will 3-acre and other designated sites that are unable to meet treatment requirements on site.

With that said, and in response to the particular comment, on-site projects that exceed applicable treatment standards (e.g. the redevelopment standard of the Vermont Stormwater Management Manual-VSMM) are eligible as offset projects, as are projects that comply with VSMM that don't otherwise require permit coverage.

101. Comment: GLOBALFOUNDRIES supports the objectives of Vermont's Clean Water Act 64. While this rule is a step in the right direction to help achieve the State's clean water goals, we recognize the enormity of the task facing the State and hope to partner with the DEC to develop solutions that have the best cost-benefit ratios while providing the most significant phosphorus reductions and improvement needed to restore our waters to the requirements set in the Vermont Water Quality Standards.

Response: The Department acknowledges the comment.

Spruce Peak

102. Comment: I am writing this letter in support of the comments submitted by Jeff Nelson and Peter Smiar of VHB on behalf of the Vermont Ski Areas Association, with respect to proposed Stormwater Rule, EPR Chapter 22. These practical suggestions will undoubtedly assist the Division in the implementation of the rule and offer more transparency and guidance to developers such as Spruce Peak.

Response: The Department acknowledges the comment.

103. Comment: In addition to the VHB memo comments, I believe it is imperative that the Division consider some of the negative economic and environmental implications of the Rule. As a developer that wishes to create new, clean water accretive projects, I am concerned that these regulations will make it more difficult to improve sites that currently have problematic stormwater management conditions. These costs could ultimately determine whether or not a project moves forward and whether an existing site is improved. I would welcome any opportunity to serve on a task force to explore these economic and practical development issues.

Response: The Department completed an Economic Impact Analysis for the proposed Rule as required by the Administrative Procedures Act. Additionally, through the use of feasibility criteria and stormwater impact fees, the proposed Rule avoids requiring stormwater retrofits that are unduly challenging, and by extension are likely to have a low cost-benefit ratio. Additionally, the proposed Rule lowers the permit threshold for new development to ½-acre of impervious surface, and maintains the requirements of the Vermont Stormwater Management Manual applicable to new development. These robust requirements—which are higher than for retrofit sites—assist in making investment in existing developed sites relatively competitive compared to development of greenfield sites.

Vermont Ski Areas Association

104. Comment: §22-101(c) This subsection provides a list of ten aspects of stormwater regulation that are included in the Rule. However, the expansion of jurisdiction to include existing three acre impervious surfaces, as well as reducing the future jurisdictional threshold for new/redeveloped/expanded impervious surfaces to ½ acre are not included in the list. To avoid confusion over whether these aspects jurisdiction are covered by this Rule or some other unknown requirements, VHB recommends specifically including both in this list.

Response: The list is intended to cover the broad categories of Rule applicability. These elements (i.e. 3-acre sites, ½ acre threshold) are effectively contained within §22-101(c)(2), which covers post-construction regulated stormwater runoff. Outreach materials, including the Stormwater Program's webpage, provide additional information for the public as to applicable regulations.

105. Comment: §22-105 General Exemptions, part a(4) VHB recommends clarifying "stormwater runoff from dams" to "stormwater runoff from dams and associated infrastructure".

Response: The Department intended that "dam" have the same meaning as in 10 V.S.A. § 1080, where "dam" means any artificial barrier, including its appurtenant works, that is capable of impounding water, other liquids, or accumulated sediments" (emphasis added). The proposed Rule has been modified to incorporate this definition.

106. Comment: §22-105 General Exemptions, part a(5)(A) and (B) VHB believes this phase-in language for the ½ acre permitting requirement will be problematic as far as the sequencing of various permits for a project, and recommend that this language be limited to only to DEC permits that pertain to regulation of the discharge of stormwater runoff.

Response: The transition language in the proposed Rule was established by the Vermont State Legislature via Act 181 of the 2017-2018 legislative session. The Department has administered similar transition language in the past as part of other changes to the regulatory threshold.

107. Comment: Subchapter 1, §22-107 Applicability, part b(4) VHB believes that legislative intent in adopting the requirement in Act 64 of 2015 for retroactive permitting and associated construction of new stormwater infrastructure was to apply such requirements to large, connected impervious surfaces which may have a disproportionate impact on the quality of receiving waters.

However, the proposed language of the Rule that states "the entire site shall be subject to the requirements of the three-acre general permit", while perhaps providing for administrative simplicity, has the potential to result in enormous cost and disruption to regulated entities with large campuses (e.g. ski resorts) with little or no benefit to water quality in many instances.

To address these concerns and provide greater consistency with the language of Act 64, VHB proposes the following definition of "Impervious surface of three or more acres" "Impervious surface of three or more acres means: 1. An individual project from which discharge of stormwater runoff from impervious surfaces of three or more acres in total was previously authorized under an Agency permit issued under a set of standards prior to the 2002 VSMM, or 2. An individual project from which discharge of stormwater runoff from impervious surfaces was previously authorized by the Agency under the 2002 or subsequent VSMM, if the area of existing impervious surface which is not currently receiving stormwater treatment or control plus any proposed expanded, redeveloped, or new impervious surface equals three acres or more, or 3. A contiguous non-linear impervious area of three or more acres, on a tract or tracts of land, for which stormwater discharges have not been previously permitted by the Agency, where the stormwater runoff enters a receiving water at one or more points of discharge. §22-107 Applicability, part b(6).

Response: The Department does not agree that the legislative intent of Act 64 was to regulate only "large, connected impervious surfaces". As background, the Department has implemented the stormwater regulatory thresholds established by the Vermont Legislature at either the parcel, or multi-parcel scale, going back to the 1980s. That is, where the permit threshold was, say, two acres of impervious surface, the Department evaluated whether a given project would create two acres of impervious surface on a given parcel. Or, the Department would also look to see whether the permit threshold was exceeded across multiple parcels operating as a single common plan, or phased

development. Further, it is well established in Vermont that water quality impairments may arise from the combined effect of multiple relatively small areas of impervious surface. To address this issue, the Vermont Legislature lowered the permit threshold in 2005 to 5,000 square feet (0.11 acres) of impervious surface for expansion projects, and most recently in 2018 (Act 181) lowered the threshold for new development to one-half acre, effective 2022. Finally, adopting an approach whereby only large, connected areas were regulated under the requirements for "three-acre sites" would result in substantial areas of impervious surface going unregulated and unmanaged. This would significantly hamper clean water goals, and most notably would likely mean that the phosphorus reductions required by the Lake Champlain TMDLs would not occur unless additional categories of projects were required to obtain permit coverage.

Notwithstanding the above, the Department acknowledges that large, campus-like like projects such as ski areas often have existing small areas of relatively isolated impervious surface for which the benefits of providing enhanced stormwater treatment are likely to be negligible. Such areas may include ski-lift tower bases, sheds, information kiosks, and pump-houses. Devoting engineering resources to these areas, along with undertaking significant construction to implement stormwater management practices, is unwarranted. Consequently, the Department has revised the proposed Rule such that existing isolated impervious surfaces of no more than 400 square feet that are part of a larger project requiring permit coverage are eligible for permit coverage, provided they comply with the terms of a general permit. The Department anticipates the general permit will require that any areas of significant erosion attributable to these areas be addressed. These areas are also exempt from stormwater impact fees and offset requirements. This change has no bearing on the requirements for new development.

108. Comment: §22-107 Applicability, part b(6) VHB recommends that 22-107(b)(6) be expanded to read "or less than one acre if part of a common plan of development that will result in earth disturbance of one acre or greater in total"

Response: The proposed revision more accurately reflects the Department's intent to regulate projects where the total resulting earth disturbance of a common plan of development exceeds one acre. The Rule has been revised accordingly.

109. Comment: §22-107 Applicability, part b(7) VHB recommends adding "as enumerated in §22-701" to clarify the types of industrial activity that are to be regulated.

Response: The Rule has not been revised in response to this comment.

110. Comment: §22-107 Applicability, part c(1) VHB recommends adding "and documented" to the final sentence in this section so that it reads as follows: "The Secretary may make a determination under this subdivision based on activities, runoff, discharges, or other information identified and documented during the basin planning process." The rationale here is that the mere identification of a potential concern should not be grounds for ANR action to require permitting.

Response: The proposed language is not necessary. In order for any information to be identified during the basin planning process it must necessarily be documented. Further, identification of the information does not serve as the basis for designation; the Secretary must still determine that treatment of the discharge is necessary to reduce adverse impacts to water quality. Rather, the Secretary (Department) may use information identified during the basin planning process in formulating such a determination.

111. Comment: Subchapter 1, §22-108 Circumvention (generally)This section seems to adopt a "guilty until proven innocent" approach with respect to private development. Since there are

many factors influencing the timing of projects, VHB recommends that in order for ANR to make circumvention determinations that there be very clear and uniformly applied criteria

Response: The Department disagrees with the characterization of this section. The existing stormwater rules have contained this circumvention condition since 2005 and it has been applied without controversy. Applicants may seek a determination in advance of a project where they are uncertain whether the requirement is applicable to their project and any such determination may be appealed.

112. Comment: §22-110 Effect of a Permit VHB recommends also including a presumption of compliance with 10 VSA §1264, as applicable, in this subsection.

Response: The Department has revised the Rule to provide that compliance with a permit during its term also constitutes compliance, for purposes of enforcement, with the subsection of 10 V.S.A. § 1264(c) pursuant to which such permit was issued.

113. Comment: §22-201 Definitions, (26) "Impervious surface of three or more acres." See comment above regarding §22-107 Applicability, part b(4) which are included here by reference.

Response: Please see the response to comment # 107.

114. Comment: §22-302 Permit Application Requirements, (b)(4) The requirement for a topographical map "extending one mile beyond the property boundaries…depicting…those wells, springs, other surface waters, and drinking water wells…" is incredibly onerous in the case of certain types of authorizations. VHB recommends deleting this entire subsection, as the specific requirements associated with certain discharges should be left to the general permits for such classes of discharges.

Response: These application requirements are required by 40 C.F.R. § 122.21(f)(7). The Department is investigating use of the ANR Atlas or similar tool to allow applicants to easily include the information as part of the application process.

115. Comment: §22-302 Permit Application Requirements, (b)(5)(A) VHB recommends deletion of this subsection as the intent is captured by subsection C of this subsection.

Response: §22-302 Permit Application Requirements, (b)(5)(A) in the proposed Rule was overly broad and has been removed from the final Rule.

116. Comment: §22-307 Changes to Application (1) VHB recommends adding the word "substantially" to this subsection, as follows: "The proposed changes do not substantially reduce the quality of the stormwater discharge;"

Response: The Department believes it is appropriate to provide for a public comment period on revisions to a project that will result in a reduction in the quality of the discharge. This subsection of the Rule has not been revised.

117. Comment: VHB recommends the inclusion of a subsection regarding changes to projects which occur subsequent to authorization but prior to completion of construction. This section should define the extent of changes which can be made to a project before requiring an amended authorization. VHB recommends that this threshold be similar to the provisions identified in §22-307 for application changes not requiring public notice. It is VHB's opinion that the current DEC approach where, "any change" to a project will require an amended authorization is onerous as it is not realistic to expect projects to make the considerable

investment in final construction level plans prior to seeking permits, or to be constructed exactly as they have been permitted, whether changes originate from programmatic changes or design constraints that cannot be foreseen until construction commences.

Response: The requirements concerning amendments and the associated public notice period are established by 10 V.S.A. Chapter 170. The type of change described in the comment would typically fall under the "minor amendment" category and would require a public comment period. From a practical perspective it is important that a permit for a given project should reference site plans that accurately characterize the site. If a project changes and the permit is not updated to reference the correct plans it is difficult for the permittee, the Department, and for any prospective property buyer to assess compliance with the permit. Amending the permit and providing for public comment provides a reasonable means for ensuring the permit and administrative record are accurate. With that said, the Department will review and revise its application forms and processes to more efficiently process amendments by simplifying submittal requirements for administrative and minor amendments.

118. Comment: §22-501 Construction Stormwater Permits, (c)(4) and (5) Since this subchapter applies only to construction phase discharges, these subsections appear to be an attempt to assert jurisdiction over activities that are not jurisdictional in this regard. VHB therefore recommends deletion of this subsection.

Response: The Department has not attempted to improperly assert jurisdiction. The application requirements in question are required pursuant to 40 C.F.R. 122.26(c)(1)(ii)(D) and (E).

119. Comment: Subchapter 7, §22-701 Industrial Stormwater Permits, (A) through (J) Please confirm that all of the facilities and associated SIC codes included in this section as jurisdictional under this subchapter are consistent with the comparable NPDES sections, and that no additional SIC codes have been added.

Response: The Department so confirms.

120. Comment: Subchapter 9, §22-901 Operational Stormwater Permits, (b)(1)Regarding the statement "For discharges of regulated stormwater runoff… the discharge shall comply with the following treatment standards and any additional requirements necessary to comply with the Vermont Water Quality Standards or a TMDL or WQRP", how is an applicant going to know what these additional requirements are and how to comply with them? This statement creates substantial regulatory uncertainty and should be removed.

Response: The language in question is a requirement of 10 V.S.A. 1264(h) and has been a part of existing stormwater rules since at least 2006. Absent this language the Department would not be able to impose any requirements beyond the minimum standards when such requirements were necessary to meet the Vermont Water Quality Standards, and hence would be unable to issue permits in some instances.

121. Comment: Subchapter 9, §22-901 Operational Stormwater Permits, (b)(1)(C) and (b)(3)(D)(ii) Again, we restate our concern regarding how applicability of the three-acre requirement is being proposed. Additionally, this statement: "For purposes of complying with this subsection, the entire impervious surface of three or more acres shall be treated as though

it is being redeveloped." Is overly onerous when considered in the context of remote, disconnected areas of existing impervious surface.

Response: Please see the response to comment #107.

122. Comment: Subchapter 9, §22-901 Operational Stormwater Permits, (b)(2)(B) We fundamentally disagree with the proposal that offset or stormwater fee requirements should be applied in the context of three-acre program where the discharge(s) do not occur to stormwater-impaired waters. The fact that these discharges are existing, and have generally been occurring for many years, and the receiving waters are not impaired due to stormwater runoff provides ample evidence that offsets and or fee payments are not necessary in order to ensure compliance with VWQS, as compliance is already being attained. All that should be required is what is determined to be feasible through the completion and approval by the Department of an EFA.

Response: The comment ignores the fact that the majority of waters in the Lake Champlain basin meet standards, however, discharges from developed lands in those watersheds contribute to the phosphorus impairment of Lake Champlain. That is, although the immediate receiving water to which a project discharges may meet standards it does not negate the fact that waters further downstream are affected by the discharge. The use of stormwater offsets and impacts fees in the entire Lake Champlain basin is consistent with 10 V.S.A. § 1264(g)(3)(D). No offsets or impact fees are required outside of the Lake Champlain basin and stormwater-impaired waters.

123. Comment: Subchapter 9, §22-901 Operational Stormwater Permits, (c)(2) Again, we restate our concern regarding how applicability of the three-acre requirement is being proposed.

Response: Please see the response to Comment # 107.

124. Comment: Subchapter 9, §22-901 Operational Stormwater Permits, (d)(4) VHB believes that the 90-day requirement in this subsection could have unintended consequences and should be revised. Suppose for example a permittee is proposing an expansion, submits appropriate application materials and obtains requisite DEC approval in less than 90 days. This section would appear to require the permittee to delay the work even though the amended permit is in hand.

Response: The intent of this requirement is to help ensure projects have adequate time to obtain permit coverage in advance of project changes. The Department agrees the 90-day notice requirement could result in unnecessary delay. The Rule has been revised to require notification to the Secretary as soon as possible in advance of any proposed expansion or change and that any required amendment, reissuance, or permit coverage be obtained prior to commencing the expansion or change.

125. Comment: Subchapter 9, §22-1003(2) Operational Stormwater Permits VHB requests clarification or modification of this section which appears to require that an applicant "pay the balance" of an offset fee even if that applicant proposes to provide an offset project with sufficient charge capacity to ensure no increase in pollutant load for pollutants of concern to the receiving water. VHB proposes that this requirement be eliminated as the applicant would have

demonstrated no increase in pollutant of concern via the proposed offset project, and therefore payment of fee is not necessary.

Response: As background, the Rule has made significant revisions regarding offsets and impact fees over the system adopted in 2006. The Rule moves from the current system whereby each project must evaluate its pollutant load, and offset a specific amount of pollutants, to a system of accounting based on impervious surface and the level of treatment provided. The proposed system provides applicants and the Department a more objective and efficient approach to evaluating projects completing offsets or paying or receiving impact fees. These efficiencies are essential given the scale of projects likely to fall into these categories in the coming years. Changes in pollutant loading will be tracked by the Department based on the type of project (i.e. new, redevelopment, or retrofit) and the level of treatment provided.

The situation described in the comment is also unlikely to occur to any significant degree. First, it would only be applicable in a stormwater-impaired water or the Lake Champlain watershed when there is no TMDL. Lake Champlain and almost all stormwater-impaired waters have a TMDL. The project would also have to be a new project, and hence subject to the requirement that it not increase the pollutant load over existing conditions (redevelopment and permit renewals are subject to the same no increase standard, but inevitably meet it because by definition they are not adding new stormwater discharges). The project would also have to be subject to impact fees by virtue of not infiltrating the 1-year storm (projects that infiltrate the one-year storm pay no impact fee). The project would also have to negate its increase in pollutant load by treating less than 0.4 acres of existing impervious surface for every acre of new impervious surface (the impact fee for new development in impaired waters without a TMDL is $10,000 per acre of impervious surface; offset projects are compensated at $25,000 per acre for complying with the Water Quality Treatment Standard).

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126. Comment: 22-107(b)(3) regarding the 5,000 square foot expansion of existing impervious surface - We would like this section to provide additional language that allows for the 5,000 s.f. expansion for permitted sites as well as non-permitted sites. Additionally, we would like to see language that allows the 5,000 s.f. exemption to start over if, or when, the initial 5,000 s.f. expansion becomes permitted to the current standard. This is very beneficial to small expansions of large developments such as hospitals, universities, schools, etc. who need to add a utility pad, ADA access walk or ramp, bike racks, sculpture, etc.

Response: The permit thresholds for regulated stormwater runoff are established by statute (10 V.S.A. § 1264). The statute does not contemplate the ability to “re-set” the jurisdictional threshold upon acquiring a permit for expanded impervious surface.

127. Comment: We are also hoping for a clarification as to whether the properties that made stormwater upgrades as part of the 9030 General Permit will again be subject to the 3-acre permit requirements.

Response: Projects previously authorized by General Permit 3-9030 will require renewed permit authorizations. Projects with impervious surfaces of three or more acres, as defined in the Rule, will need to meet the requirements for this category of projects.

Associated Industries of Vermont; Lake Champlain Regional Chamber of Commerce

128. Comment: §22-105(a)(5)(A)-(C) It is not clear why these sections refer to all permits related to land use. We would recommend that they refer only to ANR permits addressing the discharge of stormwater runoff.

Response: Please see the response comment #106.

129. Comment: §22-107(b)(4) [and related sections] Here and in related sections of the rule, language appears to provide for potentially applying standards and requirements intended for impervious surfaces of three acres or larger collectively to multiple surfaces at a site regardless of individual size, connection to each other, or runoff characteristics. We do not believe that this was the intent of Act 64, and we recommend that the language clearly apply only to contiguous surfaces that as a single tract of land are three acres or larger. We have similar concerns and the same recommendation for related sections throughout the proposed rule, including §22-201(26), §22-901(b)(1)(C) and (b)(3)(D)(ii), and §22-901(c)(2).

Response: Please see the response comment # 107.

130. Comment: §22-107(b)(6) This language appears to apply to an earth disturbance of any size if it is part of a common plan of development. We recommend that it clearly apply to earth disturbances that one or more acre in total.

Response: Please see the response comment # 108.

131. Comment: §22-107(b)(7) We recommend that this section reference §22-701 to clarify what activities are covered.

Response: Please see the response comment # 109.

132. Comment: §22-108(b) A single project should be covered or not covered based on clear and objective criteria. We would recommend that such criteria be laid out here.

Response: Please see the response comment # 111.

133. Comment: §22-302(b)(4) This language appears to include areas and features not necessarily relevant to the scope of this rule and covered activities. We recommend deleting or modifying this section to avoid creating undue costs and burdens on applicants.

Response: Please see the response comment # 114.

134. Comment: §22-307(1) and (4) These sections would appear to apply to any change, even de minimis. We would recommend including modifiers such as significantly or substantially as found in (2) and (3).

Response: Please see the response comment # 116.

135. Comment: §22-501(c)(4)-(5) These provisions appear to apply to matters that are not relevant to construction related discharges. We recommend not including them here.

Response: Please see the response comment # 118.

136. Comment: §22-701(A)-(J) We understand that some stakeholders have asked whether all of the facilities and associated SIC codes addressed here are consistent with the comparable NPDES sections, or whether additional SIC codes have been included. We would also include this question here for clarification and potential further comment as warranted.

Response: Please see the response comment # 119.

137. Comment: §22-901(b)(1) We are concerned that referencing "any additional requirements necessary" creates unwarranted uncertainty. We recommend that this language should be removed.

Response: Please see the response comment # 120.

138. Comment: §22-901(b)(2)(B) We are concerned that this provision could require fees or offsets in cases where stormwater is not discharged to impaired waters. We recommend not including such a liability.

Response: Please see the response comment # 122.

139. Comment: §22-901(d)(4) We recommend that this language clarify that any expansion or change need not wait for the full 90 days if fully approved before that time.

Response: Please see the response comment # 124.

Comments Received at 9/13/18 Public Hearing.

140. Comment: Clarification is requested on whether discharges to combined sewers remain exempt under the rule.

Response: Section 22-105(a)(3) exempts stormwater runoff from the requirement to obtain a permit if the discharge is permitted under 10 V.S.A. § 1263 as part of a permit for a discharge of sanitary waste.

141. Comment: The half-acre threshold will have a big impact on downtown areas including redevelopment.

Response: The comment is noted. The permitting thresholds within the Rule were established by 10 V.S.A. § 1264.

142. Comment: Where do projects with Master Plans (e.g. universities and hospitals) under 2002 Rules get involved with this new Rule? Are these projects required to be revised to meet the new standards?

Response: Projects permitted under the 2002 Vermont Stormwater Management Manual are not required to undertake additional actions under the requirements for impervious surfaces of three or more acres.

143. Comment: Are the 1-acre and 3-acre permit thresholds cumulative?

Response: The thresholds are cumulative.

144. Comment: Does the rule include an exemption for farms, such as for a gravel access road?

Response: Section 22-105(a)(1) exempts stormwater runoff from farms in compliance with required agricultural practices from the need to obtain a stormwater permit, with the exception of construction permits.

145. Comment: Do the three-acre requirements apply to farms?

Response: Please see the response to comment # 144.

146. Comment: Has the Department considered the impact on municipalities of requiring inspectors to be professional engineers?

Response: The Department has given this requirement due consideration. Inspections do not need to be performed by professional engineers. Application for operational permits, as well as certifications of compliance for operational permits, do need to be prepared by a professional engineer. Please also see the response to comment # 4.

147. Comment: Can current stormwater inspectors be grandfathered in so as not to be required to be a professional engineer?

Response: There is no such grandfathering allowed by the Rule. Please see response to comments #146 and #4.

148. Comment: Is the Municipal Roads General Permit covered by the rule?

Response: Yes, the Rule covers all stormwater permitting programs administered by the Department.

149. Comment: What if a three-acre site can't meet standards?

Response: The project would first be evaluated pursuant to the Engineering Feasibility Analysis criteria. To the extent the project was not able to meet the applicable treatment standards, the project would pay stormwater impact fees or complete an offset, pursuant to Subchapter 10 of the Rule.

150. Comment: The Engineering Feasibility Analysis criteria requiring re-contouring if it won't interfere with the land use. Does that mean owners would need to undertake re-contouring?

Response: If it will not permanently preclude the land use, site re-grading or re-contouring needs to be undertaken in order to satisfy the requirements of section 22-1001.