

VNRC Comments on 8-20-2004 ANR Draft Stormwater Management Rule

The following are the Vermont Natural Resources Council's (VNRC) comments on the 8-20-2004 ANR Draft Stormwater Management Rule (SWM Rule). Overall VNRC believes that the rule is a good start and commends ANR for the significant effort it put into this first public draft of the rule. VNRC's comments are organized by section of the draft rule.

Section 18-301 (e) - VNRC disagrees with the proposal to not apply the Vermont Water Pollution Control Regulations (Rules) to state stormwater permits. The Rules as written clearly apply to stormwater discharges because stormwater discharges are discharges of "any waste material or substance." See Section 13.2 of the Rules. In addition "state stormwater discharge permits" meet the definition of "discharge permits" in Section 13.1(x) of the Rules. VNRC does not believe it is appropriate create a broad exemption for "state stormwater discharges" from the Rules that generally apply to state discharge permits.

Section 18-301 (f) - VNRC disagrees with the proposal to exempt all permits issued under the Stormwater Management Rule from the Wasteload Allocation Process Rule (WLA Rule). Part of the Stormwater Management Rule deals with implementing TMDLs and/or Water Quality Remediation Plans (WQRPs). TMDLs or WQRPs will be used to establish the assimilative capacity of stormwater impaired waters and to set targets for pollutant load reductions in these waters in order to restore the waters to compliance with the VWQS. The very purpose of the WLA Rules is to determine assimilative capacity and allocate pollutant loads to impaired waters. Accordingly, it does not make sense to exempt state stormwater discharge permits from the WLA Rule. As discussed at the meetings on this draft of the SWM Rule, perhaps ANR should update the WLA Rule so it fits better with the TMDLs and/or WQRPs that ANR must implement for stormwater impaired waters.

Section 18-304 (a)(1) – Rather than exempting "discharges of stormwater runoff from farms subject to accepted agricultural practices," only discharges of stormwater runoff from farms complying with accepted agricultural practices should be exempt.

Section 18-304 (a)(A)-(D) – As stated at the meetings on the draft SWM Rule, VNRC objects to any proposal to extend the time frame when dischargers must comply with the SWM Rule beyond what is set forth in the draft. No exemptions should be extended for projects "delayed by litigation." This would potentially open up a major loop hole in the rule that is not acceptable.

In addition, VNRC questions the proposal to extend the exemption to non linear projects that commence within two years of July 1, 2005 and linear projects that commence within five years of the effective date of the SWM Rule. These dates are not mandated by the Stormwater Legislation. Rather, they are modeled after the "grandfather" provisions included in the Legislation. VNRC believes that these dates should be moved up to get all applicable discharges to comply with the SWM Rule as soon as possible.

Sections 18-305 and 18-306 – The SWM Rule should be drafted to ensure that Low Impact Development (LID) techniques are utilized as much as possible to reduce stormwater discharges. For discharges to non impaired waters, covered by § 18-305, and discharges to impaired waters, covered by § 18-306, the SWM Rule should clearly place the burden on the applicant to demonstrate why it is not feasible to develop using LID techniques. This can be accomplished by creating a checklist, which is similar to the non-structural credits set forth in Section 3 of the Vermont Stormwater Management Manual, that an applicant must run through and explain why implementing a LID technique at a site is not feasible. VNRC understands that this issue will be on the agenda for the September 23rd meeting.

Section 18-308 (a)(3) - ANR should be required to hold a public informational meeting on a proposed General Permit if one request for a hearing is submitted not if “there is significant interest in a meeting” as proposed in the draft SWM Rule. When final, the public is precluded by law from challenging the terms and conditions of a General Permit. This means that the provisions of General Permits will cover literally hundreds if not thousands of projects. It is vital that ANR hear from the public when it is proposing a General Permit because it is the only opportunity for the public to raise concerns about the far reaching General Permit terms and conditions. Accordingly, if even one person wants an opportunity to address concerns about a General Permit at a public meeting ANR should be required to grant this request.

Section 18-308 (b) - This Section addresses general requirements applicable to stormwater discharge general permits. A provision should be added to this section that states “no general permit shall be issued for a discharge that will cause, or have the reasonable potential to cause or contribute to a violation of the VWQS.” This is consistent with state and federal law and will place applicants on notice that this is the standard that must be met.

Section 18-308 (b)(3) and (4) - These sections address specific requirements for General Permits for discharges of stormwater to impaired waters. The sections include proposed requirements for General Permits that focus on the use of BMP’s for discharges to impaired waters rather than individual pollutant load allocations, reference the use of adaptive management, and recognize the scientific uncertainty associated with remediating stormwater impaired waters. These concepts are consistent with findings of the Water Resources Board (Board) Stormwater Investigative Docket Report (Docket Report). However, the Docket Report also focuses on the importance of setting targets for pollutant load reduction in impaired watersheds necessary to restore the waters in the clean up plans for stormwater impaired waters and to craft regulatory programs that provide reasonable assurance that the VWQS will be met. Accordingly, somewhere within Section 18-308(4) the SWM Rule should require that the General Permits reference the targets for pollutant load reduction set forth in the TMDLs or WQRPs. In addition, VNRC recommends that the SWM Rule include a provision that prohibits the use of a General Permit for impaired waters for a particular watershed if it can be

established that targets for pollutant load reduction set for the impaired watershed are not being met.

Section 18-308 (b)(4)(C) - This section authorizes ANR to require monitoring conditions in the General Permit. Monitoring should not be an optional component of General Permits for discharges to impaired waters, it should be required. Sound monitoring is key to affirming that the actions being taken are cleaning up the impaired waters.

Section 18-308(c) – This provisions allows ANR to deem General Permits valid for more than five years. This provision should be deleted. General Permits should be reviewed at least every five years to assure that the terms and conditions are appropriate.

Section 18-308(d) – VNRC recommends adding a provision to this section that specifically authorizes the public to Petition to modify a General Permit after it is adopted by ANR.

Section 18-309 (b)(2) - Ten days is an insufficient amount of time to give people to comment on Notices of Intent to be covered by General Permits. VNRC recommends that at least twenty days be provided for public comment.

Section 18-309 (j) - I am not sure that this is the correct Section of the SWM Rule to insert this provision, but somewhere the rule should state that the public may petition to have a discharge covered by an individual permit rather than a General Permit.

Section 18-310 (d)(4) - Because of the concern about the impact of discharges to impaired waters, if one person requests a public informational meeting on proposed individual permit to discharge to an impaired water, ANR should be required to hold the meeting.

Section 18-310 (k) - This Section addresses general requirements for individual stormwater permits. A provision should be added to this section that states “no general permit shall be issued for a discharge that will cause, or have the reasonable potential to cause or contribute to a violation of the VWQS.” This is consistent with state and federal law and will place applicants on notice that this is the standard that must be met.

Section 18-310 (k)(2) (B) - This provision, which addresses conditions in individual permits for discharges to impaired waters should be amended as follows: “shall contain conditions, as determined by the Secretary, consistent with an applicable TMDL or Water Quality Remediation Plan, including but not limited to conditions consistent with pollutant loading targets contained in applicable TMDL or Water Quality Remediation Plan.”

Section 18-505 (b) - This provisions allows ANR to deem authorizations to discharge under a General Offset Permit to be valid for more than five years. This provision should be deleted. General Permits should be reviewed at least every five years to assure that the terms and conditions are appropriate.

Section 18-506(b)(2) - Ten days is an insufficient amount of time to give people to comment on authorizations to discharge under a General Offset Permit. VNRC recommends that at least twenty days be provided for public comment.

Amendments to Vermont Stormwater Management Manual (Manual) - Consistent with the comments above and the discussions at the meetings on the draft, VNRC believes that the Manual should be amended to ensure that Low Impact Development (LID) techniques are utilized as much as possible to reduce stormwater discharges.

Appendix B - VNRC is still doing research into what the appropriate Margin of Safety (MOS) should be for the Non-Imperious Surface Treatment Offset Projects (NISTOP) should be. However, generally VNRC agrees with the concerns raised by ANR at the meeting regarding the need to be conservative when using NISTOPs. As ANR pointed out, unless it can be established that the benefits from implementing a NISTOP is permanent and that remedial work in one stretch of a stream is not simply pushing the sediment loading to another part of the stream system, the MOS for NISTOPs must be extremely conservative.