STATE OF VERMONT

SUPERIOR COURT — ENVIRONMENTAL DIVISION
Docket No. 68-6-17 Vtec

| Hinesburg Hannaford Discharge Permit | DECISION ON MOTION |
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This is an appeal by a group of individuals and organizations[1] (Appellants) of an authorization to discharge under General Permit 3-9015 issued by the Vermont Agency of Natural Resources (ANR) to Commerce Park Associates, Giroux Family Trusts, and Martin's Foods of South Burlington (Permittees) on May 31, 2017. The case is now before the Court on three motions for summary judgment, a motion to amend the Statement of Questions, and a motion to strike the revised Statement of Questions.

Appellants are represented by James A. Dumont, Esq., Permittees are represented by Christopher D. Roy, Esq., and ANR is represented by John Zaikowski, Esq.

**Motion to Amend the Statement of Questions and Motion to Strike**

## I. Procedural History

Appellants originally filed a Statement of Questions on June 26, 2017 containing eight questions, with Questions 7 and 8 each having five subparts.

On August 25, 2017, Appellants moved for summary judgment on Questions 1 and 2, Permittees moved for summary judgment on all Questions,[2] and ANR moved for summary judgment on Questions 3–6, 7a, 7b, 7d, 8a, 8b, and 8d, and for clarification on Questions 1, 2, 7c, 7e, 8c, and 8e.

[1] Brian Bock, Mary Beth Bowman, Kenneth Brown, Dark Star Properties, LLC, Geoffrey Gevalt, Katherine Goldsmith, Deborah Goudreau, Jean Kiedaisch, Rachel Kring, Betheny Ladimer, Responsible Growth Hinesburg, Heidi Simkins, Julie Soquet, Stephanie Spencer, and Johanna White.

[2] Permittees' motion states on its first page that it moves for summary judgment on all questions. However, in the accompanying memorandum, Permittees call for dismissal of Questions 2, 7e, and 8e as vague and overbroad. This part of the motion is therefore more appropriately framed as a motion to dismiss, pursuant to 12(b)(6), or as a motion to clarify.

On September 22, 2017, Appellants filed responses opposing ANR's and Permittees' motions, and Permittees and ANR filed responses opposing Appellants' motion.

On September 25, 2017, Appellants filed a Revised Statement of Questions.

On October 6, 2017, the parties filed replies in support of their motions for summary judgment, and Permittees filed a motion to strike the revised Statement of Questions. The same day, Appellants filed a motion to amend the Statement of Questions.

## II. The Statement(s) of Questions

In the original Statement of Questions:

Question 1 asks whether "the application meet[s] the criteria necessary for inclusion under General Permit 3-9015."

Question 2 asks whether the application meets the "applicable criteria" of the Vermont Stormwater Management Manual (VSMM) including, but not limited to, the Treatment Standards in VSMM Section 1.

Question 3 asks whether the "impervious area" is greater than 10 acres under VSMM Section 1.1.5, and if so, whether the application complies with Treatment Section 1.1.5.

Questions 4, 5, and 6 ask whether the application should be denied because it involves storing stormwater on land owned by Dark Star Properties, LLC (Question 4), the roadbed and culvert of Commerce Street (Question 5), and 300 feet of Commerce Street to host its stormwater piping (Question 6), none of which are owned or controlled by Permittees or can be maintained by Permittee, in violation of 10 V.S.A. § 1264(a)(18) and (e)(1), Stormwater Rules § 18-307(c), and Parts II and V of the General Permit.

Questions 7 and 8 ask whether, under 10 V.S.A. § 1264, the General Permit, and the General Permit rules, the Court should deny the application, or require Permittees to apply for an individual permit, because:

7a and 8a: Permittees discharged for decades prior to and at the time of applying for the permit, in violation of 10 V.S.A. Chapter 47;

7b and 8b: "The application relies on structural treatment without a showing of necessity, contrary to 10 V.S.A. § 1264(a);"

7c and 8c: "The application fails to maintain, as nearly as possible, the predevelopment runoff characteristics, contrary to 10 V.S.A. § 1264(b)(1);"

7d and 8d: The project will likely cause flooding on Route 116, requiring a larger culvert on that road, which will in turn harm Patrick Brook and cost the State money;

7e and 8e: "Other reasons."

## III. Motion to Amend and Motion to Strike

The Revised Statement of Questions strikes original Questions 2, 3, 7, and 8 (including all subparts of 7 and 8), strikes the references to 10 V.S.A. § 1264 and Part II of the General Permit in Questions 4, 5, and 6, and amends Question 1 to read as follows:

> Does the application meet the criteria necessary for inclusion under General Permit 3-9015 by satisfying:
>
> i) sections 1.1.1, 1.1.2, 1.1.3, and 1.1.4 of the . . . VSMM . . . ;
>
> ii) the Court, in its discretion, that it should not require an individual permit under General Permit Rule 18-307(l);
>
> iii) the Court, in its discretion, that notwithstanding co-applicant's history of noncompliance, a permit should issue under 10 V.S.A. § 1264(i); and
>
> iv) the Court that adequate information has been submitted under 10 V.S.A. § 1263(b)?

Permittees argue that the proposed Revised Questions are procedurally improper because they were filed, initially, without a motion to amend. Permittees also contend that amending the Statement of Questions is improper because it comes at a late stage in the proceeding. They explain that the permit on appeal here is related to other permits that have been litigated over many years, and Appellants should have been able to clearly articulate the relevant issues from the time this matter began, instead of doing so months after filing their appeal and after motions for summary judgment have been filed and responded to. Permittees also suggest that the effort to amend the Statement of Questions may be a tactic to delay the proceedings.

Appellants respond that because the proposed new questions are distilled from the original Statement of Questions, they do not raise any issues not contained in the original Statement of Questions and therefore will not prejudice the other parties. Appellants also note that the proposed Revised Questions clarify the issues on appeal.

## IV. Standard of Review

A party appealing a decision to the Environmental Division must file a Statement of Questions to be determined on appeal. V.R.E.C.P. 5(f). The Statement of Questions "functions like a pleading to limit the issues that are to be heard on appeal." Id. Advisory Notes. The Statement of Questions also serves to put the parties, and the Court, on notice as to the issues to be litigated. In re Unified Buddhist Church, Inc., Indirect Discharge Permit, No. 253-10-06 Vtec, slip op. at 5 (Vt. Envtl. Ct. May 11, 2007) (Wright, J.) (explaining that the Court and opposing parties "are entitled to a statement of questions that is not vague or ambiguous, but is sufficiently definite so that they are able to know what issues to prepare for trial.").

If a Statement of Questions is vague or ambiguous, the Court can order the appellant to clarify its Questions. In re Atwood Planned Unit Dev., 2017 VT 16, ¶¶ 13–14 (Mar. 17, 2017). The Court can also order clarification on a motion filed by another party, or grant leave to amend the Questions on the appellant's own motion to amend. Id.; V.R.E.C.P. 5(f) and 2(d)(2).

Guided by the rule on amending complaints under V.R.C.P. 15, we generally take a liberal view to granting motions to amend a Statement of Questions, Buchwald Home Occupation CU Permit, No. 181-12-13 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Apr. 1, 2014) (Walsh, J.), taking into consideration "whether there has been undue delay or bad faith by the moving party, whether the amendment will prejudice other parties, and whether the amendment is futile." Laberge Shooting Range JO, No. 96-8-116 Vtec, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Jan. 4, 2017) (Walsh, J.) (citation omitted).

## V. Discussion

Permittees suggest here that the amendments proposed by Appellants would be futile. We do not wholly agree with this argument for the reasons set out in detail in our discussion of the summary judgment motions below. Although Permittees allege bad faith and delay, it is not clear to the Court that this is the case. Furthermore, even if the motion to amend was made in bad faith and intended to delay, granting it (in part) will actually expedite the proceedings.

Filing a motion to amend a Statement of Questions while summary judgment motions are pending is not necessarily a sign of undue delay. In re All Metals Recycling, Inc. Discretionary Permit Application, No. 171-11-11 Vtec, slip op. at 11 (Vt. Super. Ct. Envtl. Div. Apr. 23, 2012)

(Walsh, J.). Waiting until after summary judgment motions have been filed to raise a new issue is undue delay, however, if that new issue could have been addressed in the summary judgment motions. See In re Harrison Conditional Use, No. 49-5-16 Vtec, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Apr. 18, 2017) (Walsh, J.).

The proposed revisions seek to narrow and clarify the scope of Question 1. Original Question 1 asks whether "the application meet[s] the criteria necessary for inclusion under General Permit 3-9015." This is the type of broad question that we discourage because it fails to identify the specific issues to be litigated for the Court and the other parties. Revised Question 1 includes the same language, but then adds four subparts which identify more clearly what "criteria necessary for inclusion under General Permit 3-9015" are being raised. With the addition of these subparts, Revised Question 1 puts the Court and parties on notice as to what specific issues are to be addressed in the litigation, thereby better achieving the purpose of the Statement of Questions.

The proposed addition of subparts 1(i) and 1(iii) also raises narrow issues that were contained more broadly in the original Statement of Questions.[3]

Original Question 2 asks, in part, whether the application complies with "all of the Treatment Standards" in VSMM Section 1. Revised Question 1(i) is contained in this, because it lists (with more specificity) Treatment Standards from VSMM Section 1. The proposed revision would eliminate the remainder of Question 2. Again, this is a clarification of an issue already raised.

Original Question 8e asks, broadly, whether the Court should deny the application under 10 V.S.A. § 1264, the General Permit, and the General Permit rules, for any "other reason" not specifically listed—another very broad question. Revised Question 1(iii) asks whether a permit should issue under 10 V.S.A. § 1264(i). This revised question falls within the scope of original Question 8e, but is much more specific. The proposed revision would eliminate the rest of

[3] These questions ask whether the application meets the criteria necessary for inclusion under General Permit 3-9015 by satisfying: "i) sections 1.1.1, 1.1.2, 1.1.3, and 1.1.4 of the . . . VSMM . . . ;" and "iii) the Court, in its discretion, that notwithstanding co-applicant's history of noncompliance, a permit should issue under 10 V.S.A. § 1264(i)."

Questions 7 and 8. Again, by identifying a more discrete issue that was initially presented more broadly, Revised Question 1(iii) helps clarify the issues to be addressed at trial.

The proposed changes to Questions 4, 5, and 6 also raise no new issues, and serve to clarify the issues raised in the original versions of those Questions.

Revised Question 1(iv), however, seeks to raise a new issue by asking whether adequate information has been submitted under 10 V.S.A. § 1263(b). That statute requires permit applicants to provide certain information for the purposes of notice. It does not appear that this statute, or the issue of notice in general, was raised, either explicitly or implicitly, in the original Statement of Questions. We recently noted, in dicta, that "we are reluctant to develop a hard rule preventing a party from raising a new issue" in a motion to amend a Statement of Questions. Laberge Shooting Range JO, No. 96-8-116 Vtec, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Jan. 4, 2017) (Walsh, J.). In this case, however, raising a new issue after the parties have filed summary judgment motions would prejudice the other parties, because it could trigger a second round of summary judgment motions. See Harrison, No. 49-5-16 Vtec at 3 (Apr. 18, 2017). With such motions already pending before the Court, the time to raise new issues has already passed. Therefore, the Court will not grant the motion to amend with respect to Revised Question 1(iv).

Revised Question 1(ii) asks whether the application meets the criteria necessary for inclusion under General Permit 3-9015 by satisfying the Court that it "should not require an individual permit under General Permit Rule 18-307(l)." It is not clear what rule this question refers to. There is a section of the Stormwater Management Rule titled "Stormwater Discharge General Permit," but that section does not have a part (l). 16-3 Vt. Code. R. § 505:18-307. Likewise, General Permit 3-9015 does not have a section 18-307(l). Part 12 of the Department of Environmental Conservation Rule 301, or the Vermont Water Pollution Control Regulations, is titled "General Permit Rules." Vermont Water Pollution Control Permit Regulations, 16-3 Vt. Code. R. § 301:13.12; see also General Permit 9-3015, part I.G. This rule also has no section 18-307(l). Because the Revised Question 1(ii) reference to "General Permit Rule 18-307(l)" is unclear, it fails to limit the issues to be heard on appeal, and fails to put the parties and the Court

on notice as to the issues to be litigated. For this reason, we are unable to grant the motion to amend as to Revised Question 1(ii).[4]

## VI. Conclusion

For these reasons, the motion to amend the Statement of Questions is **GRANTED in part**, except for the request to add Revised Questions 1(ii) and 1(iv), which is **DENIED**.

We understand that granting the motion in part will prejudice Permittees and ANR to some degree because it will render moot some of the time and effort they spent moving for summary judgment. We do not, however, believe that this prejudice is undue. Granting the motion will address ANR's motion to clarify Questions 1, 2, 7e and 8e, which ANR and Permittees allege are vague and ambiguous.[5] By narrowing and clarifying the scope of issues to be litigated, granting the motion will also help "to ensure summary and expedited proceedings consistent with a full and fair determination in every matter coming before the court." V.R.E.C.P. 1.

## Motions for Summary Judgment

Granting the motion to amend the Statement of Questions changes the framework within which we analyze the motions for summary judgment. Nevertheless, many of the issues raised and argued in the summary judgment motions remain relevant under the revised questions. We therefore proceed by analyzing the summary judgment motions, insofar as they address the issues remaining in the Revised Questions.

Appellants move for summary judgment on the issue of whether the application satisfies General Permit 3-9015 and the 2002 Vermont Stormwater Management Manual (VSMM) with regard to the Overbank Flood Protection Treatment Standard in Section 1.1.4 of the VSMM. This issue falls within Revised Question 1(i).

ANR moves for judgment on Questions 4, 5, and 6, contending that because the proposed system does not rely on structural treatment on land that the Applicant does not own or control, or does not have the ability to operate, inspect, or maintain, these questions should be answered

[4] Stormwater Management Rule § 18-308 does have a part (l), which addresses circumstances in which ANR may require an individual permit as opposed to allowing coverage under a general permit. The Court is reluctant to assume that Appellants meant to refer to this rule.

[5] Permittees allege vagueness and overbreadth as to Questions 2, 7e, and 8e, but not Question 1.

in the negative. These arguments are still relevant to Revised Questions 4, 5, and 6. ANR moves to clarify Questions 1 and 2, and for summary judgment on those questions to the extent the Court considers them, arguing that the "applicable criteria have been met," including the 2002 VSMM standards. This argument goes to Revised Question 1(i).

Permittees move for summary judgment on Questions 4–6 on the basis that they impermissibly attempt to collaterally attack determinations made in a prior proceeding. In the alternative, Permittees present an argument similar to ANR's for Questions 4 and 5; that these elements of the stormwater system are not used for storage or treatment. Permittees argue that, to the extent Question 6 suggests the application should be denied because Permittees will need to obtain an additional permit in the future pursuant to 19 V.S.A. § 1111, this argument fails.

## I. Standard of Review

We grant summary judgment when the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). When considering a motion for summary judgment, we give the nonmoving party the benefit of all reasonable doubts and inferences. Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356. Once the moving party meets the initial burden of showing no material facts are disputed, the burden shifts to the non-moving party to establish a triable issue of fact. Pierce v. Riggs, 149 Vt. 136, 138 (1987). To establish that a fact is disputed or unsupported by the record, the non-moving party must cite to materials on the record or show that the materials cited by the moving party do not establish the absence of a genuine dispute. V.R.C.P. 56(c).

When considering cross motions for summary judgment, each party is entitled to the benefit of reasonable doubts and inferences when considered as the non-moving party. Vermont Coll. of Fine Arts v. City of Montpelier, 2017 VT 12, ¶ 7 (Vt. Feb. 10, 2017) (citation omitted).

## II. Material Facts

We recite the following facts based on the record before us, and solely to resolve the summary judgment motions.

1. Commerce Park is a commercial subdivision adjacent to, or near, Vermont Route 116, Commerce Street, and Mechanicsville Road in Hinesburg, Vermont.

2. Commerce Park is divided into 15 lots.

3. Lot 15 is owned by Giroux Family Trusts and is the only undeveloped lot in Commerce Park. The lot currently has no impervious surface.

4. Lot 15 is bordered to the south by Mechanicsville Road and to the north (and downgradient) in part by a parcel owned by Dark Star Properties, LLC (Lots 11 and 12, i.e. the Dark Star Lot). Commerce Street is north of the Dark Star Lot, running east-west. Patrick Brook is further north, also running east-west.

5. Applicants propose to construct a 36,000 square foot supermarket and pharmacy with a 128-space parking lot (the Project) on Lot 15.

6. On May 7, 1987, ANR issued discharge permit 1-0501 for Commerce Park. The permit was issued for 12.96 acres of impervious surface.

7. Discharge permit 1-0501 was issued prior to the adoption of the 2002 Vermont Stormwater Management Manual (VSMM).

8. On June 2, 2003, ANR renewed discharge permit 1-0501 for 10.17 acres of impervious surface under General Permit (GP) 3-9010 (Authorization 3034-9010) for Commerce Park. The existing impervious surface at the time of the renewal was 8.9 acres. Lot 15 was undeveloped, with no impervious surface.

9. Stormwater discharges from lots 1–14 are currently authorized under Authorization 3034-9010.R.

10. It is unclear whether the existing culvert under Commerce Street (the Commerce Street Culvert) is covered by an existing stormwater authorization.

11. Permittees submitted two subsequent Notices of Intent (NOIs) for the Project to discharge stormwater under General Permit 3-9015: Application 3034-9015, and Application 3034-9015.A.

12. General Permit 3-9015, Section III, requires proposed projects to comply with the VSMM in effect at the time of application. Both applications (3034-9015 and 3034-9015.A) were filed while the 2002 VSMM were in effect.

13. On March 4, 2013, Applicants filed an NOI for the Project to discharge stormwater under General Permit 3-9015 (Application 3034-9015).

14. The system proposed in Application 3034-9015 included two separate underground stormwater detention areas, or storm chamber systems. Stormwater would run from these chambers into an improved drainage swale located within a stormwater easement running south to north along the westerly boundary of the Dark Star Lot (i.e. between Lots 10 and 11) to the Commerce Street Culvert.

15. Construction of the improved drainage swale would involve disturbing the Dark Star Lot, and the improved swale would have treated Lot 15 stormwater on the Dark Star Lot.

16. During larger storms, the system proposed in Application 3034-9015 would divert some of Lot 15's stormwater away from the Dark Star Lot via a pipe running under Commerce Street (the Commerce Street Bypass Pipe) and discharging north of the Dark Star Lot. When this pipe reached capacity in even heavier storms, excess Lot 15 stormwater would again run down the improved swale between Lots 10 and 11 to the Commerce Street Culvert.

17. On April 10, 2014, ANR approved the stormwater system proposed in Application 3034-9015 by issuing an authorization to discharge under General Permit 3-9015 (Authorization 3034-9015). The authorization was not appealed.

18. On August 19, 2015, Applicants filed an amended NOI for the Project to discharge stormwater (Application 3034-9015.A).[6] The cover letter for Application 3034-9015.A presents it as an application to amend Authorization 3034-9015, and the NOI at part 3.H also describes it as a "proposed amendment."

19. Application 3034-9015.A proposed changing the system approved in Authorization 3034-9015 by relocating two retaining walls between the Dark Star Lot and Lot 15 and eliminating a nearby part of the proposed supermarket parking lot. This would allow the Permittees to enlarge an east-west grass channel, to be located entirely on Lot 15 to the south of the Dark Star Lot, which would then act as a grass treatment channel (instead of only a conveyance channel). The amendment would then eliminate improvements to the existing north-south grass swale between Lots 10 and 11 (leaving it as the existing grass conveyance channel) which would be

[6] The cover letter for the amendment application is dated July 17, 2015, but the NOI itself is stamped "received" August 19, 2015.

used for conveyance instead of treatment. Finally, the new NOI proposed replacing the existing 15-inch Commerce Street Culvert with an 18-inch culvert positioned at a slightly lower elevation.

20. The cover letter for Application 3034-9015.A states that "[n]o changes to the previously proposed collection system, underground detention areas or flow control structure have been proposed."

21. The amendment is intended to address Dark Star Properties, LLC's concerns about the project being located partly on its property by eliminating improvements to the existing swale between Lots 10 and 11, and by creating the larger grass treatment channel on the north side of Lot 15.

22. In the existing configuration, stormwater from larger storms pools on portions of the Dark Star Lot. The increased size of the Commerce Street Culvert is intended to reduce that pooling.

23. Application 3034-9015.A proposes 2.69 acres of impervious surface to be constructed on Lot 15.

24. Like Application 3034-9015, Application 3034-9015.A proposes a catch basin and pipe network to capture stormwater runoff from the Project's impervious surfaces. The stormwater will be directed to two separate underground stormwater detention areas, or storm chamber systems.

25. The storm chamber systems are located entirely on Lot 15. They are identified on site plans as "Underground Storage Vault POI A" and "Underground Storage Vault POI B."

26. The storm chamber systems are designed to provide 12 hours of extended detention for the 1-year, 24-hour storm.

27. Each storm chamber system includes a pre-treatment water quality unit designed to remove sediment, floatables, debris, and oils that may have the potential to clog outlet orifices.

28. Each storm chamber system is designed with an isolator row that provides additional pretreatment by allowing sediment to settle out in the first chamber without passing to the remaining system, thus maintaining the integrity of the chamber system. The isolator row can be accessed for inspection and maintenance.

29. Unlike Application 3034-9015, the system proposed in Application 3034-9015.A includes an east-west Grass Channel located entirely on Lot 15 to the south of the Dark Star Lot (the Grass

Channel). Under the system proposed in Application 3034-9015.A, stormwater will run from the storm chamber systems into the Grass Channel.

30. The Grass Channel is identified on Project Plans as "Grass Treatment Channel POI C." It will be 210 feet long, 8 feet wide, with a slope of 0.24%, to ensure an average residence time of 10 minutes, at a velocity of no greater than 1 foot / second at a depth of generally no more than 4" during the water quality rainfall depth peak discharge.

31. Grass channel design requirements are rated based, which means that they are designed and sized for treatment of stormwater runoff from the peak discharge associated with the water quality rainfall depth (i.e. 0.9", 24-hour storm event), representative of 90% of the annual storm events.

32. The Grass Channel is designed to capture 90% of annual storm events, remove 80% of average annual post-development total suspended solids, and 40% of the total phosphorus load.

33. The Grass Channel is designed to maintain the average annual recharge rate for the prevailing hydrologic soil groups to preserve existing water table elevations.

34. Stormwater will flow from the Grass Channel into the existing grass conveyance channel running north-south between Lots 10 and 11 and identified on Project plans as "Grass Conveyance Channel POI F." While Application 3034-9015 proposed improving this channel, Application 3034-9015.A does not.

35. Water will be conveyed through the grass conveyance channel and then through the Commerce Street Culvert.

36. Unlike Application 3034-9015, the system proposed in Application 3034-9015.A calls for replacing the existing 15-inch Commerce Street Culvert with an 18-inch culvert positioned at a slightly lower elevation. This is intended to alleviate existing flooding conditions on the Dark Star Lot.

37. From the Commerce Street Culvert, water will run into an existing stormwater basin identified on Project plans as the basin for S/N 001. Water leaves this basin to the north through discharge point S/N 001.

38. Discharge point S/N 001 is part of the existing stormwater drainage system for Commerce Park, which is subject to discharge authorization 3034-9010.R.

39. Discharge point S/N 001 is 570–700 feet from the closest part of Lot 15.

40. Water flows from S/N 001 into Patrick Brook, making Patrick Brook the receiving water for the Project's stormwater discharge. Patrick Brook is not stormwater impaired.

41. In Application 3034-9015.A (like in Application 3034-9015), in larger storms some water would flow from the storm chamber systems into the Commerce Street Bypass Pipe and discharging north of the Dark Star Lot into the basin for S/N 001.

42. The peak discharge rate for the 10-year, 24-hour storm event is referred to as the Qp10 flow rate.

43. Measured at discharge point S/N 001, the pre-development Qp10 flow rate is 1.93 cubic feet per second (cfs) and the post-development Qp10 flow rate is 6.09 cfs.[7]

44. Measured at the storm chamber systems, the Qp10 flow rate at POI A is slightly higher post-development than pre-development, although ANR considers it to meet the VSMM 1.1.4 standard. The post-development Qp10 flow rate at POI B is lower post-development than pre-development. The post-development Qp10 flow rate for POI A and B together is less than the pre-development Qp10 flow rate.

45. Plans for Application 3034-9015.A divide Lot 15 and its surroundings, particularly the areas north and downgradient, into POIs A through H.

46. The plans depict the Project site as falling within POIs A and B.

47. The plans depict POIs C through H as being "offsite." These areas include: the Grass Channel, discussed above, in POI C; the northerly and easterly embankments of the raised parking lots and the easterly embankment of the new access road, in POI D; the westerly embankments of the building, in POI F, and westerly embankments of the snow storage area and parking lot, in POI E; the grass conveyance channel between Lots 10 and 11 and the Commerce Street Culvert (both discussed above), in POI F; and the basin for S/N 001, in POI H.

[7] This fact is asserted by Appellants, and is not disputed by the other parties. An engineer's affidavit submitted by Permittees with their opposition memorandum on September 22, 2017, however, alleges that the post-development Qp10 flow rate is 3.97 cfs. O'Leary Affidavit ¶ 12. This difference is not material for the purposes of the pending motions, as the parties agree that the Qp10 flow rate at discharge point S/N 001 increases post-development.

48. ANR approved Application 3034-9015.A with an authorization to discharge (Authorization 3034-9015.A) on May 11, 2017. The Response Summary attached to the authorization includes a comment calling for revocation of the prior authorization (Authorization 3034-9015). In response, ANR states that this is unnecessary because Authorization 3034-9015.A supersedes Authorization 3034-9015.

49. ANR approved Application 3034-9015.A in an authorization to discharge (Authorization 3034-9015.A) on June 1, 2017.

50. It is unclear from the record why the application appears to have been approved twice. In their Notice of Appeal, Appellants appeal the authorization to discharge issued "on May 11, 2017, and then withdrawn and re-issued on May 31, 2017."

## III. Discussion

### a. Revised Questions 4, 5, and 6: Bar on Collateral Attacks

Revised Questions 4, 5, and 6 ask whether the application should be denied because it: involves storing stormwater on land owned by Dark Star Properties, LLC (Question 4), relies on the roadbed and culvert of Commerce Street to detain stormwater (Question 5), and depends on 300 feet of Commerce Street to host its stormwater piping (Question 6), none of which are owned or controlled by Permittees or can be maintained by Permittees, in violation of Stormwater Rules § 18-307(c) and Part V of the General Permit. Permittees move for summary judgment on Questions 4–6, arguing that these questions impermissibly attempt to collaterally attack determinations made when ANR approved Application 3034-9015 on April 10, 2014, a decision that was never appealed.

When ANR approves a permit application (such as the authorization to discharge here) and that decision is not appealed, it generally becomes final and binding and is immune to collateral attack in a subsequent proceeding. In re Entergy Nuclear Vermont Yankee Discharge Permit 3-1199, 2009 VT 124, ¶ 50, 187 Vt. 142 (citing In re Unified Buddhist Church, Inc., 2006 VT 50, ¶ 13, 180 Vt. 515 (mem.)). In an appeal of a permit amendment, aspects of the previously-approved permit that remain unchanged by the amendment normally cannot be collaterally attacked. Champlain Parkway Wetland CU Determination (Time Extension) (CUD No. 2010-125.01), No. 123-10-16 Vtec, slip op. at 7 – 8 (Vt. Super. Ct. Envtl. Div. Apr. 14, 2017) (Durkin, J.).

Here, Application 3034-9015.A is presented as an amendment to Authorization 3034-9015. The proposed amendments include relocating two retaining walls between the Dark Star Lot and Lot 15 and eliminating part of the proposed supermarket parking lot. This would allow the Permittees to enlarge an east-west grass channel, to be located entirely on Lot 15 to the south of the Dark Star Lot, which would then act as a grass treatment channel (instead of only a conveyance channel). The amendment would then eliminate improvements to the existing north-south grass swale between Lots 10 and 11 (leaving it as the existing grass conveyance channel) so that this swale would be used for conveyance instead of treatment. Finally, the amendment proposes replacing the existing 15-inch Commerce Street Culvert with an 18-inch culvert positioned at a slightly lower elevation. The cover letter for Application 3034-9015.A states that "[n]o changes to the previously proposed collection system, underground detention areas or flow control structure have been proposed."

In pre-existing conditions, water pools in the Dark Star Lot, and it is undisputed that water would have continued to pool in the Dark Star Lot under the stormwater system approved in Authorization 3034-9015. That system—and the pooling on the Dark Star Lot that it would have allowed—was not appealed. The system proposed in Application 3034-9015.A would also allow pooling on the Dark Star Lot, but to a lesser extent than occurs in pre-existing conditions, and to a lesser extent than would have occurred under Authorization 3034-9015. In short, although pooling will continue under the system proposed in Application 3034-9015.A, the pooling will be less than would have occurred under the previously-approved system. Because this pooling was already approved and unappealed, and the new application would only reduce that pooling, Appellants are barred by the rule against collateral attacks from raising this issue under this appeal. Permittees' summary judgment motion is therefore **GRANTED** as to Revised Question 4.[8]

It is less clear how the proposed amendments would affect how stormwater runoff moves through the Commerce Street Culvert and Commerce Street Bypass Pipe. As we noted in a decision on this development's Act 250 permit, "a stormwater system is the sum of its

[8] Even if the bar on collateral attacks did not prevent Appellants from bringing Revised Question 4, we conclude that ANR and Permittees should be granted summary judgement on this question for other reasons discussed below.

component parts." Hinesburg Hannaford Act 250 Permit, No. 113-8-14 Vtec, slip op. at 31 (Vt. Super. Ct. Envtl. Div. Apr. 21, 2016) (Walsh, J.). Changing one element in the system may change the way that other elements within the system operate. Construing the facts in the light most favorable to the nonmoving party, the Court must assume for the purposes of ruling on this motion that because of the interconnected nature of the stormwater system, the changes proposed in Application 3034-9015.A might change the way stormwater runoff moves through the Commerce Street Culvert, onto the Commerce Street roadbed, and through the Commerce Street Bypass Pipe.[9] As long as such changes are possible, we are unable to rule as a matter of law that Application 3034-9015.A will make no changes to these elements. Permittees' motion for summary judgment on Revised Questions 5 and 6 based on the bar against collateral attacks is therefore **DENIED**.

**b. Revised Questions 4, 5, and 6: Merits**

ANR and Permittees move for judgment on Questions 4, 5, and 6 on the premise that while Stormwater Management Rule § 18-307(c) and General Permit 3-9015, Part V regulate elements of a stormwater system intended to collect, store, and treat runoff, Application 3034-9015.A does not propose to use land owned by Dark Star Properties, LLC, the Commerce Street Culvert and roadbed, or the Commerce Street Bypass Pipe to collect, store, and treat runoff. Instead, ANR and Permittees submit that these elements are intended to convey stormwater after it has already left the Project site. According to ANR and Permittees, then, Stormwater Management Rule § 18-307(c) and General Permit 3-9015, Part V do not apply to the parts of the proposed stormwater system raised in Revised Questions 4, 5, and 6.

At the outset, we note that we give "substantial deference to an agency's interpretation of its own regulations," including ANR's interpretation of the VSMM. In re ANR Permits in Lowell Mountain Wind Project, 2014 VT 50, ¶ 15, 196 Vt. 467 (citing In re Peel Gallery of Fine Arts, 149 Vt. 348, 351 (1988)). To successfully challenge an agency interpretation of its own regulations, a party must show that the interpretation is "wholly irrational and unreasonable in relation to [the

[9] Permittees, in their September 22, 2017 filing, note that the Commerce Street Bypass Pipe remains unchanged in Application 3034-9015.A. However, they do not assert that the volume and flow rate of water through this pipe will remain unchanged, nor do they cite to anything on the record to support such a conclusion.

regulation's] intended purpose." Id. ¶ 17 (quoting Town of Killington v. Dep't of Taxes, 2003 VT 88, ¶ 6, 176 Vt. 70).

Stormwater Management Rule § 18-307(c) sets out "General Requirements Applicable to Stormwater Discharge General Permits." The first two parts of this subsection require a permittee to allow ANR to "enter upon and inspect the **permitted property** and the stormwater **collection, treatment and control system**," (§ 18-307(c)(1)), to "properly operate and maintain all stormwater **collection, treatment and control systems**," and to "submit an annual inspection report on the operation, maintenance and condition of the stormwater **collection, treatment and control systems**." (§ 18-307(c)(2)) (emphasis added). Similarly, General Permit 3-9015, Part V generally contains operation and maintenance requirements, with Part V.A requiring a permittee to "properly operate, inspect and maintain all stormwater **collection, treatment and control systems** which are installed and used to achieve compliance with this general permit." (emphasis added).[10]

ANR distinguishes systems used for stormwater collection, treatment, and control from systems that convey stormwater. From a plain-language perspective, "collect," "treat," and "control" have different meanings than "convey." Based on the plain language of these terms, then, ANR's interpretation is not wholly irrational and unreasonable. Appellants point to no other interpretation that would render ANR's interpretation irrational or unreasonable.

ANR also submits that the Dark Star Lot, the Commerce Street Culvert and roadbed, and the Commerce Street Bypass Pipe are not on the "permitted property," and so there is no need to allow entrance and inspection under § 18-307(c)(1).

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[10] Stormwater Management Rule § 18-307(c)(3), unlike parts (c)(1) and (2), does not require the permittee to operate or maintain any particular infrastructure, nor does it call for allowing ANR access to infrastructure.

This part of the Rule states, in part, that "[a] general permit shall require BMP-based stormwater treatment practices and not individual source pollutant load allocations." BMP, or best management practices, is defined as "a schedule of activities, prohibitions or practices, maintenance procedures, green infrastructure, and other management practices to prevent or reduce water pollution, including but not limited to the stormwater treatment practices (STPs) set forth in the [VSMM]." Stormwater Management Rule § 18-201(4). The VSMM, section 2, sets out STPs, which it separates into structural and non-structural practices. VSMM 2.0. The VSMM defines structural STPs as "[d]evices that are constructed to provide temporary storage and treatment of stormwater runoff." VSMM at G-11 (emphasis added). Non-structural STPs are not defined, but examples set out in the VSMM suggest that non-structural STPs are intended to collect and treat stormwater. E.g. VSMM 1.1.3, 2.0, 3.0. Generally, then, STPs are intended to meet water quality treatment performance standards by capturing and treating runoff. VSMM section 2.2. Section 18-307(c)(3), then, also appears to focus on capture and treatment, as opposed to conveyance.

There is nothing on the record to suggest that the Dark Star Lot or the Commerce Street roadbed would be part of the "permitted property."

It is not clear from the record whether the Commerce Street Culvert is covered under an existing stormwater permit, or whether it would be covered under Authorization 3034-9015.A and would arguably therefore be part of the "permitted property." Even if the Commerce Street Culvert is part of the permitted system, however, it would be illogical to deny the application for failing to comply with § 18-307(c)(1).

This issue ties in to Appellants' argument that because the Commerce Street Culvert is owned by the Town, and not owned or controlled by Permittees, the Permittees would have to obtain a permit from the Town pursuant to 19 V.S.A. § 1111(c) to allow ANR to enter and inspect the culvert, which does not comply with § 18-307(c)(1). We rejected a similar argument in In re Hinesburg Hannaford CU Approval, No. 129-9-12 Vtec, slip op. at 12 (Vt. Super. Ct. Envtl. Div. Sep. 16, 2015) (Walsh, J.). In that decision, we disagreed with the idea that municipalities cannot grant approval for a private party to install a stormwater pipe below town highways pursuant to 19 V.S.A. § 1111(c). Id. If a private party can install a stormwater pipe below a town highway under this statute, it would be unreasonable to read the Stormwater Management Rule in a way that would prohibit the same thing. See Delozier, 160 Vt. at 434. Furthermore, the need for an additional, future permit is not grounds for denying a permit application. See In re Hinesburg Hannaford CU Approval, No. 129-9-12 Vtec, slip op. at 16 (Vt. Super. Ct. Envtl. Div. Mar. 4, 2015) (Walsh, J.).

ANR's conclusion, that a stormwater culvert built below a town highway complies with the part of § 18-307(c)(1) which requires access to the permitted property, is therefore not wholly irrational and unreasonable.

For these reasons, ANR's and Permittees' motions for summary judgment on Revised Questions 4, 5, and 6 are **GRANTED**.

**c. Revised Question 1**

By revising Question 1, and based on their response to the other parties' summary judgment motions, Appellants appear to agree that the stormwater system proposed in Application 3034-9015.A is eligible for coverage under General Permit 3-9015, provided that it

meets VSMM 1.1.1–1.1.4 and that a permit should issue under 10 V.S.A. § 1264(i). These specific requirements are discussed below.

**d. Revised Question 1(i)**

Revised Question 1(i) asks whether the application meets the criteria necessary for inclusion under General Permit 3-9015 by satisfying sections 1.1.1–1.1.4 of the VSMM. These sections require stormwater systems to comply with different treatment standards.

ANR's summary judgment motion argues that the proposed system complies with VSMM 1.1.1–1.1.4. Appellants' motion argues that it does not comply with VSMM 1.1.4.[11] Again, we defer to ANR's interpretation of its own rules and regulations provided that an opposing party is unable to show that the interpretation is "wholly irrational and unreasonable in relation to [the regulation's] intended purpose." Lowell Mountain, 2014 VT 50, ¶ 17 (citation omitted).

**i. VSMM 1.1.1–1.1.3**

VSMM 1.1.1–1.1.3 set out treatment standards with which a stormwater system must comply. ANR offers a bare-bones and conclusory factual basis, relying on its environmental analyst's affidavit, in arguing that the system set out in Application 3034-9015.A complies with the VSMM 1.1.1–1.1.3 standards.

For example, the Channel Protection Treatment Standard found in VSMM 1.1.2 requires "storage of the channel protection volume (CPv) . . . be provided by means of 12 to 24 hours of extended detention storage (ED) for the one-year, 24-hour rainfall event." ANR alleges in its statement of material facts, supported by an affidavit by an environmental analyst from ANR's stormwater program, that the storm chamber systems are designed to provide 12 hours of extended detention for the 1-year, 24-hour storm. The Groundwater Recharge Treatment Standard in VSMM 1.1.3 requires systems to be designed to maintain the average annual recharge rate for the prevailing hydrologic soil groups to preserve existing water table elevations. ANR alleges in its statement of material facts, again supported by affidavit, that the Grass Channel is designed to meet this requirement.

[11] Appellants' motion repeatedly refers to VSMM 1.14. Because there is no such section in the VSMM, and based on context, we assume they are referring to VSMM 1.1.4.

Although these factual assertions are not disputed by Appellants, they are conclusory and lack any detail or explanation. It is not clear to the Court that this provides a sufficient factual basis to conclude that ANR is entitled to judgment as a matter of law. In re Shenandoah LLC, 2011 VT 68, ¶ 17, 190 Vt. 149. The motion for summary judgment is therefore **DENIED** as to Revised Question 1(i) insofar as that question addresses compliance with VSMM 1.1.1–1.1.3.

### ii. VSMM 1.1.4: the Overbank Flood Protection Treatment Standard

The Overbank Flood Protection Standard in VSMM 1.1.4 requires that "[t]he post-development peak discharge rate shall not exceed the pre-development peak discharge rate for the 10-year, 24-hour storm event." As noted above, the peak discharge rate for the 10-year, 24-hour storm event is referred to as the Qp10 flow rate.

Appellants argue that compliance with the VSMM 1.1.4 standard should be measured at discharge point S/N 001. They submit that because the pre-development Qp10 flow rate at discharge point S/N 001 is 1.93 cubic feet per second (cfs) and the post-development Qp10 flow rate is 6.09 cfs, the standard is not met.[12] ANR and Permittees counter that that compliance with the VSMM 1.1.4 standard should be measured at onsite POIs (e.g. the storm chamber systems), in which case the standard is met.[13]

In addressing whether VSMM 1.1.4 compliance should be measured at the POIs (i.e. the storm chamber systems) or at discharge point S/N 001, the parties focus on ANR's Application Requirements for Operational Permits, which reads in part:

> When discharge points are located far from the site boundary, applicants may use [POIs] as locations where compliance is demonstrated. A POI is a location where flow discharges from the site, but that can be well upslope of Waters of the State. In general, if compliance with the treatment standards is demonstrated at a site boundary POI, then compliance will be assumed at the actual discharge point.

Application Requirements for Operational Permits, Version 1.0, 5/2015, Part 2 at 5.

[12] As noted above, the O'Leary affidavit puts the post-development Qp10 flow rate at 3.97 cfs.

[13] ANR alleges in its statement of material facts, supported by an affidavit by an environmental analyst from ANR's stormwater program, that the storm chamber systems are designed to ensure that the post-development Qp10 flow rate not exceed the pre-development Qp10 flow rate. This assertion is not disputed by Appellants in their response to ANR's motion for summary judgment. In their motion and responsive filings, however, Appellants clearly do dispute this. We therefore treat this as a disputed issue.

ANR and Permittees argue that it is appropriate to use the storm chamber systems as POIs. Appellants disagree. In part, this dispute turns on what the "site" is when using POIs to measure compliance with the VSMM 1.1.4 standard. ANR and Permittees contend that the site includes only impervious surfaces to be constructed on Lot 15. Appellants submit that the site should include impervious surfaces to be constructed on Lot 15, pervious surfaces that will be altered in the proposed construction, and the Commerce Street Culvert.

There is very little information on the record regarding POIs. The Court is not aware of any relevant rules or regulations addressing POIs as that term is used here.[14] While the parties cite to the paragraph from the Application Requirements for Operational Permits, above, it is not clear from this document, or any other information on the record, what the purpose of POIs is or when POIs are appropriate. It is also unclear what weight the Application Requirements should be given in analyzing when POIs are appropriate, since they are not a rule or regulation, and may be a "practice" or "procedure." See 3 V.S.A. § 801.

ANR, which we defer to, interprets "site" in its pleadings as including impervious surfaces only. The Application Requirements for Operational Permits, however, define "site" in the same section addressing POIs as "the area occupied by the impervious and disturbed pervious surfaces of the project." Version 1.0, 5/2015, Part 2 at 5. We therefore have two seemingly contradictory understandings of what the "site" is, both from ANR. Due to this contradiction, we are unable to determine with certainty ANR's position regarding delineation of the site, let alone whether that position is reasonable. We are likewise unable to determine whether Permitees' understanding, that the site is impervious surfaces only, is correct.

On the other side of the dispute, even if ANR and Permittees are incorrect and the VSMM 1.1.4 standard must take into account runoff from both impervious and disturbed pervious surfaces, Appellants have not demonstrated that the standard would not be met, as a matter of law, if both surfaces are taken into account.

[14] The term "points of interest" is not defined in the Stormwater Management Rule, the VSMM, or General Permit 3-9015. These only mention "point of interest" in the definition of "watershed," which they define as "the total area of land contributing runoff to a specific point of interest within a receiving water." Stormwater Management Rule, 16-3 Vt. Code. R. § 505:18-201(26). It is not clear if this definition has any bearing on, or relation to, the points of interest referred to in the Application Requirements for Operational Permits.

For these reasons, no party is entitled to judgment as a matter of law on the question of whether the system proposed in Application 3034-9015.A complies with the VSMM 1.1.4 standard. The motions for summary judgment are therefore **DENIED** as to Revised Question 1(i) insofar as that question addresses compliance with VSMM 1.1.4.

**e. Revised Question 1(iii)**

Revised Question 1(iii) asks whether the application meets the criteria necessary for inclusion under General Permit 3-9015 by satisfying the Court that a permit should issue under 10 V.S.A. § 1264(i), notwithstanding co-applicant's history of noncompliance.

Section 1264(i) reads:

> Disclosure of violations. The Secretary may, at his or her discretion and as necessary to assure achievement of the goals of the program and compliance with State law and the federal Clean Water Act, deny an application for the discharge of regulated stormwater under this section if review of the applicant's compliance history indicates that the applicant is discharging regulated stormwater in violation of this chapter or is the holder of an expired permit for an existing discharge of regulated stormwater.

10 V.S.A. § 1264(i).

While not addressing these Revised Question 1(iii) specifically, ANR argues in its summary judgment motion that the question of whether to deny a permit application based on the applicant's compliance history is discretionary; and the decision to require an individual permit is also discretionary. While this may be true, the relevant statutes and rules set out guidelines that inform the exercise of that discretion. The information on the record before us is insufficient to examine the permit application under those guidelines. We are therefore unable to grant summary judgment to any party on Revised Question 1(iii). ANR's motion for summary judgment as to Revised Question 1(iii) is **DENIED**.

**Order**

1. The motion to amend the Statement of Questions is **GRANTED in part**, except for the request to add Revised Questions 1(ii) and 1(iv), which is **DENIED**.
2. The motions for summary judgment are **DENIED** as to Revised Question 1(i) and 1(iii).
3. Permittees' motion for summary judgment on Revised Questions 5 and 6 based on the bar against collateral attacks is therefore **DENIED**.

4. ANR's and Permittees' motions for summary judgment on Revised Questions 4, 5, and 6 are **GRANTED**.

Electronically signed on December 20, 2017 at 10:00 AM pursuant to V.R.E.F. 7(d).

Thomas G. Walsh, Judge
Superior Court, Environmental Division