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Via Electronic Mail

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Re: Draft Stormwater Permitting Rule

Dear Mr. Monks:

Conservation Law Foundation (CLF), Vermont Natural Resources Council (VNRC), and Lake Champlain Committee (LCC) submit the following comments on the draft Stormwater Permitting Rule (Rule), released on August 1, 2018. We commend the Department of Environmental Conservation (Department, or DEC) for issuing a comprehensive stormwater rule, and we generally support its adoption. However, we have identified a number of areas in the Rule articulated below that either require revision in order to align with the federal Clean Water Act, or require more detail or clarity.

CLF is a nonprofit, member-supported, environmental organization working to conserve natural resources, protect public health, and promote thriving communities for all in the New England region, including Vermont. CLF has a long history of advocating for clean air, clean water, and healthy communities, including working to promote effective regulations, permits, and strategies to reduce and minimize the significant impacts of stormwater pollution.

Through research, education, collaboration and advocacy, VNRC protects and enhances Vermont's natural environments, vibrant communities, productive working landscapes, rural character and unique sense of place, and prepares the state for future challenges and opportunities.

LCC is a bi-state, member-supported environmental nonprofit organization dedicated to protecting Lake Champlain's health. LCC has a 55-year history of science-based advocacy and education to protect and improve water quality including work on nutrient and stormwater regulations, new generation contaminants, green infrastructure, and low impact development.

I. 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

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

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.

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*

“[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.

II. General Comments

1. DEC should not allow for automatic permit authorization without submission of a Notice of Intent or Application

The undersigned groups strongly oppose language in 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 permittees 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>; U.S. Environmental Protection Agency, *Manage Flood Risk*, <https://www.epa.gov/green-infrastructure/manage-flood-risk>.

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.*

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.

2. 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 in Part III 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.

3. 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.

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.

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.

4. 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.

Second, 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.

Finally, 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.

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>.

III. Section-by-section specific Comments

1. Subchapter 1. GENERAL PROGRAM PROVISIONS

a. § 22-101. PURPOSE

- i. § 22-101(a): We suggest changing the term “predevelopment” to “greenfield” to better reflect the intention of maintaining runoff characteristics of an undeveloped landscape.
- ii. § 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.”

b. § 22-105. GENERAL EXEMPTIONS

- i. § 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: . . .”.

c. § 22-106. GENERAL PROHIBITIONS

- i. § 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).

d. § 22-107. APPLICABILITY; PERMIT REQUIRED; DESIGNATION

- i. § 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.”

e. § 22-108. PHASED DEVELOPMENT AND CIRCUMVENTION

- i.** § 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?

f. § 22-111. BASIN PLANNING AND THE MANAGEMENT OF STORMWATER RUNOFF

- i.** § 22-111(a): We support DEC’s integration of Tactical Basin Plans (“basin plans”) into stormwater guidance documents, rules, and permitting procedures.
- ii.** § 22-111(b): 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?
- iii.** § 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.

2. Subchapter 2. DEFINITIONS

a. § 22-201. DEFINITIONS

- i.** § 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?
- ii.** § 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.
- iii.** § 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.
- iv.** § 22-201(44): Definition here of “point source” should state “any discernible, confined, and discrete conveyance, including, but not limited to,”
- v.** § 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.

- vi. § 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.
- vii. § 22-201(72): We suggest the definition of “waters” should include wetlands.

3. Subchapter 3. GENERAL PROVISIONS REGARDING GENERAL AND INDIVIDUAL PERMITS AND AUTHORIZATIONS

a. § 22-301. TYPES OF PERMITS AND AUTHORIZATIONS

b. § 22-302. PERMIT APPLICATION REQUIREMENTS

- i. § 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.”

c. § 22-303. REQUIRING APPLICANT OR PERMITTEE TO APPLY FOR COVERAGE UNDER INDIVIDUAL OR GENERAL PERMIT

- i. § 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.

d. § 22-304. PROVISIONS SPECIFIC TO GENERAL PERMITS

- i. § 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).~~”

- ii. § 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.”~~

- iii. § 22-304(e): For the reasons articulated in Part II(1) above, this whole section providing for authorization under a general permit without the discharger applying for coverage under the general permit should be deleted.
- iv. § 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.
- e. § 22-306. PUBLIC NOTICE AND OPPORTUNITY TO PROVIDE COMMENT
 - i. 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.
- f. § 22-308. ISSUANCE OR DENIAL OF AUTHORIZATION, AND RESPONSE TO COMMENTS
 - i. § 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.
 - ii. § 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.
- g. § 22-310. AMENDMENT, REVOCATION AND REISSUANCE, AND TERMINATION OF PERMITS
 - i. § 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.

- ii. § 22-310(e)(11): for clarity, we suggest inserting “if/when/where” before the colon.
- iii. § 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.
- iv. § 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.
- v. § 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”

4. Subchapter 4. ESTABLISHING PERMIT LIMITATIONS AND STANDARDS

a. § 22-402. ANTIBACKSLIDING

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

5. Subchapter 5. CONSTRUCTION STORMWATER PERMITS

a. § 22-501. CONSTRUCTION STORMWATER PERMITS

- i. § 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.
- ii. § 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.

- iii. § 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.
- iv. § 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.”

6. Subchapter 6. DESIGNATED MUNICIPAL SEPARATE STORM SEWER SYSTEM PERMITS

a. § 22-601. DESIGNATED MUNICIPAL SEPARATE STORM SEWER SYSTEM PERMITS

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

7. Subchapter 7. INDUSTRIAL STORMWATER PERMITS

a. § 22-701. INDUSTRIAL STORMWATER PERMITS

- i. § 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.
- ii. § 22-701(a): reference to 22-107(b)(6) should be (b)(7).
- iii. § 22-701(d): the application requirements should include “develop and implement a stormwater pollution prevention plan prior to filing NOI for coverage.”

8. Subchapter 8. CONCENTRATED ANIMAL FEEDING OPERATION STORMWATER PERMITS

a. § 22-801. CONCENTRATED ANIMAL FEEDING OPERATION STORMWATER PERMITS

- i. § 22-801(a): both references to 22-107(b)(8) should be (b)(9).
- ii. § 22-801(c): change “Secretary may” to “Secretary shall.”
- iii. § 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.
- iv. § 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.

- v. § 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).

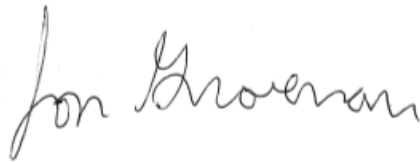
9. Subchapter 10. ENGINEERING FEASIBILITY ANALYSIS, STORMWATER IMPACT FEES, AND OFFSETS

- a. § 22-1001. ENGINEERING FEASIBILITY ANALYSIS
 - i. *See* General Comments in Part II(4) above.

Sincerely,



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