VERMONT SUPERIOR COURT
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ENVIRONMENTAL DIVISION
Docket No. 40-5-20 Vtec

TS4 General Permit #3-9007	DECISION ON MOTIONS

Appellant R.L. Vallee, Inc. (Appellant) appeals the April 21, 2020 "Authorization to Discharge Under State Transportation Separate Storm Sewer System (TS4) General Permit 3-9007" issued by the Vermont Agency of Natural Resources (ANR) to the Vermont Agency of Transportation (VTrans). Appellant raises 14 questions and numerous sub-questions in its Statement of Questions. Chiefly, Appellant challenges the Authorization and the Notice of Intent that preceded it for not including a particular VTrans project, referred to in shorthand as the Diverging Diamond Interchange project, under the TS4 permit. Appellant also raises a number of other challenges to the authorization under state and federal law. Presently before the Court are three motions: ANR's July 27, 2020 motion to dismiss certain questions (adopted by VTrans)[1]; Vtrans's February 1, 2022 motion to dismiss, strike, or clarify certain questions (or in the alternative for summary judgment on those questions); and Appellant's February 1, 2022 motion for partial summary judgment.[2]

Appellant is represented by represented by Attorney Alexander J. LaRosa. ANR is represented by Attorneys Kane Smart and Hannah W. Smith. VTrans is represented by Attorneys Jenny E. Ronis and Justin Kolber.

[1] Subsequent to the filing of that motion, the parties filed a joint "motion for entry of stay order," to continue the appeal while ANR considered VTrans's proposed Phosphorous Control Plan, which was effectively an amendment to the authorization under the TS4 permit. On May 27, 2021, ANR's approval of the Phosphorous Control Plan became final and the "stay" was lifted at a status conference soon thereafter.

[2] Appellant requested oral argument on these motions in its reply in support of motion for partial summary judgment. We declined this request as unnecessary for our deliberation.

Factual and Procedural Background

We recite the following factual and procedural background, which we understand to be undisputed unless otherwise noted, based upon the record before us and solely for the purposes of deciding the pending motions. These recitations do not constitute factual findings, since factual findings cannot occur until after the Court has completed a trial. Fritzeen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000) (mem.); *see also* Blake v. Nationwide Ins. Co., 2006 VT 48, ¶ 21, 180 Vt. 14.

I. The Clean Water Act, NPDES, and State Implementation Thereof

1. Stormwater runoff from agriculture or from impervious surfaces such as roads or buildings may carry pollutants to streams, rivers, and lakes.
2. National and state laws have been enacted to address this problem. As summarized by the Vermont Supreme Court, "Congress enacted the Clean Water Act (CWA or Act), to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' In furtherance of this goal, the CWA prohibits the discharge of any pollutants into navigable waters unless the discharge complies with other provisions of the Act, including § 402 . . . [which] authorizes the issuance of National Pollutant Discharge Elimination System (NPDES) permits for the discharge of pollutants . . .. Congress empowered the Environmental Protection Agency (EPA), or a state agency duly certified by EPA, to enforce the NPDES permit system. In Vermont, that agency is the Agency of Natural Resources . . .. In 1987, Congress amended the CWA by enacting the Water Quality Act. That law added § 402(p), which codified a two-phase regulatory approach to the discharge of pollutants specifically contained in stormwater runoff." In re Stormwater NPDES Petition, 2006 VT 91, ¶ 3, 180 Vt. 261.
3. 10 V.S.A. § 1264, also referred to as the "Vermont Stormwater Rule," creates the general framework for regulating discharges of stormwater to receiving waters in the State of Vermont.
4. The Vermont Water Quality Standards (WQS) are a section of the Vermont Administrative Code that express qualitative and quantitative standards that affect the classification of bodies of water. Those classifications limit discharges to and uses of those waters, so as to achieve the purposes of the Vermont Water Quality Policy and the CWA. Vt. Admin. Code 16-5-100:1-02.
5. As we have explained previously, "If a water body fails to meet the WQS for a pollutant, the water is 'impaired' for that pollutant and, often, the state must develop a limitation or maximum for the amount of that pollutant which may be discharged into the water body; this regulatory limitation

is referred to as a total maximum daily load ('TMDL')." In re: Multiple Wastewater Treatment Facility Appeals, Nos. 138-10-17 Vtec et al., slip op. at 4 (Vt. Super. Ct. Envtl. Div. Feb. 01, 2019) (Durkin, J.) (internal citations omitted).

6. A body of water is considered "stormwater-impaired" if the Secretary determines it is significantly impaired *by* discharges of regulated stormwater runoff. 10 V.S.A. § 1264(b)(12).
7. The Vermont Stormwater Management Manual is a regulation that establishes standards, including best management practices, to minimize pollution from operational (also known as "post-construction") stormwater discharges. These standards are applied to individual projects via permits.
8. 10 V.S.A. § 1264 generally requires construction permits prior to construction of new impervious surfaces that will increase stormwater runoff. It requires operational permits to cover the discharges that result from such surfaces once construction is complete.
9. One tool that the Agency may rely on to implement the provisions of the Vermont Stormwater Rule is a "general permit" to cover a class of discharges of stormwater. As we explained previously, "The concept of the 'general permit' was developed to ease the administrative burdens created by the Clean Water Act's mandate that the EPA regulate every discharge into the waters of the United States. A general permit is a permit containing a set of standard permit conditions that can be applied to a potentially large group of similar discharges." In re Ridgewood Estates Homeowners' Ass'n, No. 57-4-10 Vtec, slip op. at 4 (Vt. Super. Ct. Envtl. Div. Jan. 26, 2011) (Wright, J.)

II. The TS4 Permit

10. ANR initially issued a general permit to cover discharges from sources controlled by VTrans in December 2016. That permit was called the General Permit for Stormwater Discharges from the State Transportation Separate Storm Sewer System (TS4 Permit).
11. Appellant and other related persons appealed that permit to our Court in Docket No. 7-1-17 Vtec. The parties agreed to a stipulated dismissal of that appeal and to remand the general permit to ANR so that it might incorporate certain agreed-to changes. ANR did incorporate those changes.
12. Subsequently, in December 2017, VTrans submitted its Notice of Intent (NOI) to discharge under the TS4 permit. The NOI lists a number of VTrans-controlled sources with existing stormwater permits that VTrans intends to bring under the coverage of the TS4 permit. These sources include airport facilities, mineral mining and dressing facilities, garages, roads, and bridges.

13. ANR issued VTrans authorization to discharge from those sources under the TS4 permit on April 21, 2020. This appeal followed.
14. In May 2021, ANR approved the Phosphorus Control Plan amendment to VTrans's authorization under the TS4 permit.

III. The Diverging Diamond Interchange Permit

15. The Diverging Diamond Interchange (DDI) is a VTrans project to reconstruct portions of US Route 2/7 and its on and off-ramps from Interstate 89 in the Town of Colchester, VT.
16. The purposes of the project are to improve user safety and reduce traffic congestion. In re: Diverging Diamond Interchange SW Permit; Diverging Diamond Interchange A250, Nos. 50-6-16 Vtec, 169-12-16 Vtec, slip op. at 3 (Vt. Super. Ct. Envtl. Div. June 1, 2018) (Walsh, J.).
17. As part of its approvals for the DDI project, VTrans needed a stormwater permit for the new and redeveloped impervious surfaces to be created by the project.
18. Overall, the project creates 4.8 acres of new or redeveloped impervious surfaces.
19. The project includes a stormwater management system that discharges to Sunnyside Brook.
20. Sunnyside Brook ultimately discharges to Lake Champlain.
21. VTrans initially filed an individual stormwater permit application with ANR in February 2013 and then filed revised applications in October 2014 and January 2015. In a previous decision affirmed by the Supreme Court, we deemed their application administratively complete as of October 3, 2014, with vested rights to be considered under the laws and regulations then in effect.
22. ANR approved the stormwater permit application in May 2016 and granted permit no. 6946-INDS for the DDI project.
23. Appellant appealed that permit to our Court, as well as the related Act 250 permit.
24. In a decision dated June 21, 2018, we affirmed ANR's decision to grant permit 6946-INDS.
25. In a decision dated August 30, 2019, the Supreme Court affirmed our decision to grant the stormwater permit.
26. Completion of the improvements contained in the DDI project is a necessary condition under state and local permits for the full operation of a gas station at the Costco on Lower Mountain Valley Road, adjacent to this section of US Route 2/7. Appellant also operates a gas station in that same immediate vicinity and has also appealed those permits.

IV. Lake Champlain TMDL, listing of Sunnyside Brook, changes to SWMM & SW Rules.

27. Over the course of the lengthy and unsuccessful appeals of the DDI permit, Vermont's laws and policies around stormwater discharges changed in several important ways.

28. Lake Champlain, in its various segments, has been considered impaired for phosphorus for decades. In 2002, the EPA approved a TMDL for phosphorus in Lake Champlain jointly submitted by the states of New York and Vermont. In 2011, the EPA revoked its approval of the Vermont portion of the TMDL, in part based on a "finding that Vermont had not provided sufficient 'reasonable assurances' that reductions in nonpoint sources of phosphorus would be attained." Vermont 2016 TMDL Phase I Implementation Plan.

29. In 2015, the Vermont legislature passed Act 64, which revised several aspects of the state's water pollution control laws, including the Stormwater Rule. One of the explicit goals of Act 64 was to help the state prepare to implement a new TMDL for phosphorus in Lake Champlain. Among other changes, Act 64 required ANR to create general permits to regulate stormwater discharges from (i) municipal roads and (ii) three or more acres of new impervious surfaces or existing impervious surfaces that had *not* received a permit incorporating the requirements of the 2002 Stormwater Management Manual.

30. In June 2016, the EPA approved a new TMDL for the Vermont contributions to phosphorus in Lake Champlain. Vermont is implementing that TMDL in two phases. Vermont's Phase I plan was published in September 2016.

31. On October 30, 2014, changes to the Vermont Water Quality Standards took effect, creating quantitative limits for phosphorus and chloride, along with other pollutants.

32. The state declared Sunnyside Brook impaired for chloride in 2016. Diverging Diamond Interchange A250 (Decision on Remand), 169-12-16 Vtec, slip op. at 11 (Vt. Super. Ct. Envtl. Div. April 16, 2020) (Walsh, J.).

33. In July 2017, new Vermont regulations took effect: The stormwater management rules for stormwater-impaired waters, and revisions to the stormwater management manual.

34. In 2020, the Agency of Natural Resources approved General Permit 3-9050 for operational stormwater discharges, to take effect December 2020. This fulfilled the requirement in Act 64 (2015) to create a general permit to cover discharges from three or more acres of impervious surfaces. The categories of facilities and other sources eligible for coverage under GP 3-9050 and the TS4 permit in many ways overlap.

Legal Standard

Presently before the Court are ANR's motion (adopted by VTrans) to dismiss Questions 3–5, 7, and 11–13 of the Statement of Questions under 12(b)(1) or 12(b)(6); VTrans's motion to dismiss, strike, clarify, and/or grant summary judgment on Questions 1 and 10, and Appellant's Motion to grant summary judgment on Questions 1, 2, and 6.

When reviewing a motion to dismiss, this Court accepts all uncontroverted factual allegations as true and construes them in the light most favorable to the nonmoving party. Rheaume v. Pallito, 2011 VT 72, ¶ 2, 190 Vt. 245. On a motion to dismiss for a lack of subject matter jurisdiction under 12(b)(1), we may consider evidence outside the pleadings if necessary to resolve the motion. Conley v. Crisafulli, 2010 VT 38, ¶ 3, 188 Vt. 11. On the other hand, "[i]f, on a motion . . . to dismiss for failure . . . to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." V.R.C.P. 12(b). Because VTrans's February 1 motion, at least as to Question 1, raises issues outside the pleadings, we treat it as a motion for summary judgment on that Question.

To prevail on a motion for summary judgment, the moving party must demonstrate "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), applicable here through V.R.E.C.P. 5. The nonmoving party "receives the benefit of all reasonable doubts and inferences," but must respond with more than unsupported allegations in order to show that material facts are in dispute. Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356. For the purposes of the motion, the Court "will accept as true the allegations made in opposition to . . . summary judgment, so long as they are supported by affidavits or other evidentiary material." Id. When considering cross-motions for summary judgment, as we do here, the Court considers each motion individually and gives the opposing party the benefit of all reasonable doubts and inferences. City of Burlington v. Fairpoint Commc'ns, Inc., 2009 VT 59, ¶ 5, 186 Vt. 332.

Our review is also informed by the fact that this is a de novo appeal from an agency decision to authorize activities under a permit. *See* 10 V.S.A. § 8504(h). In a de novo appeal, we are directed to hear the evidence anew "as though no decision had been previously rendered." In re Poole, 136 Vt. 242, 245 (1978). Necessarily, we also reach our own legal conclusions independently of what was decided below. Chioffi v. Winooski Zoning Bd., 151 Vt. 9, 11 (1989). Even in de novo review, however, we "owe[] deference to agency interpretations of policy or terms when: (1) that agency is statutorily authorized to provide such guidance; (2) complex methodologies are applied; or (3) such decisions are within the agency's area of expertise." In re Korrow Real Est., LLC Act 250 Permit Amend. Application, 2018 VT 39, ¶

20, 207 Vt. 274 (internal quotation marks omitted). Such deference is "not absolute," Id. at ¶ 21, and will not be afforded if the agency applied its authority "arbitrarily and capriciously" in a way that is "wholly irrational and unreasonable in relation to its intended purpose." Id. (internal citations omitted).

Discussion

We will first discuss the motions as to Questions 1 through 7, before proceeding to the remaining Questions. Questions 1 through 7 all concern VTrans' decision *not* to include the previously permitted DDI project within the notice of intent for authorization under the TS4 permit at this time:

- Question 1 asks whether the stipulation approved by the parties in the earlier appeal of TS4 required VTrans to include the DDI project in the NOI.
- Question 2 essentially asks whether the conditions in the TS4 permit apply to the DDI project regardless of its non-inclusion in the NOI.
- Questions 3–5 ask whether the non-inclusion of the DDI project violates 12 V.S.A. §§ 1264(c)1, 3, and 5, respectively.
- Question 6 asks, "If the answer to any of the above questions is yes, must the Agency of Transportation receive a NOI for the DDI project under the TS4 General Permit before it may discharge stormwater from the DDI project? Must it receive an NOI for the DDI project before it commences construction of the project?"
- Question 7 asks whether the non-inclusion of the DDI project violated the Lake Champlain Phosphorous TMDL Phase I Implementation Plan.

ANR moves to dismiss Questions 3–5 and 7 under 12(b)(1). VTrans moves to dismiss and/or grant summary judgment on Question 1, but also requests that we "provide any other relief deemed necessary to the extent that Appellant's questions rely on the incorrect claim that the Exit 16 DDI Project must be included in the TS4 General Permit." VTrans Motion at 9. We therefore treat this as a motion for summary judgment on Questions 2, 6, and 3–5 and 7, should they survive the motion to dismiss, as well as on Question 1. Appellant moves for summary judgment on Questions 1, 2, and 6. We organize our analysis accordingly.

i. *Questions 3–5 & 7*

ANR, seconded by VTrans, moves to dismiss these questions for a lack of subject matter jurisdiction on the basis that 10 § V.S.A. 8504(j) precludes us from addressing them in this appeal. Section 8504(j) reads, "Any appeal of an authorization or coverage under the terms of a general permit shall be limited in scope to whether the permitted activity complies with the terms and conditions of the general

permit." This is a clear and explicit limitation on the scope of the issues that may be raised in an appeal of an authorization under a general permit such as TS4. Our understanding of the purpose of this limitation is that it serves a similar function to 24 V.S.A. § 4472 and the general principle of claim preclusion: It requires parties to raise their challenges to government decisions at the appropriate stage of decision-making, and if they do not, bars them from collaterally attacking that decision at a later stage. *Cf.* City of South Burlington v. Department of Corrections, 171 Vt. 587, 590–91 (2000) (mem.) ("Section 4472 demonstrates an unmistakable intent to limit zoning disputes to a well-defined procedure and to provide finality at the end of the proceedings."). The appropriate time to challenge the terms and conditions of a general permit is upon the issuance of the permit itself, not in an appeal from a subsequent authorization of coverage under that permit. Questions of whether individual projects comply with the general permit, however, are appropriate to raise at the authorization stage.

Questions 3–5 and 7 do not ask whether the discharges which ANR has authorized pursuant to this NOI comply with the terms and conditions of the general permit. Instead, they ask why VTrans has not submitted other discharges for authorization under the general permit. By the explicit directive of Section 8504(j), these Questions must be **DISMISSED.**

ii. *Question 1: Pursuant to this Court's October 9, 2017 Order and the Parties Stipulation, must the DDI project be included and reviewed under the TS4 Permit?*

The plain text of the stipulation does not support Appellant's argument that our 2017 Stipulated Order required inclusion of the DDI permit under the general permit. The paragraph Appellant quotes in its argument comes from the background section of the Court's Order and does not create a legal requirement. The paragraph simply states the general purposes of the TS4 permit, which are well known—to create a general permit for stormwater discharges from certain categories of VTrans-operated facilities. As discussed below, under the statutory and regulatory framework, discharges eligible to be covered under the general permit are not required to receive coverage under the general permit so long as they have coverage under an individual permit. We must therefore **DENY** Appellant's motion and **GRANT** Vtrans's motion for summary judgment on Question 1: the stipulation and Order in Docket No. 7-1-17 Vtec DO NOT require the DDI project to be included and reviewed under the TS4 Permit.

iii. *Question 2: Do the obligations in the General permit apply to DDI project even though VTrans didn't include it in the NOI?*
Question 6: Must DDI come under TS4 before project is constructed or any discharges from it issue?

As a preliminary matter, only Appellant explicitly moves for summary judgment on Questions 2 and 6. These questions involve the same fundamental issues as Question 1, however, and by its request that we "provide any other relief deemed necessary to the extent that Vallee's questions rely on the incorrect claim that the Exit 16 DDI Project must be included in the TS4 General Permit," VTrans's motion for summary judgment extends to these questions as well.

Answering these questions requires an understanding of the state regulatory system for projects likely to generate discharges of stormwater to public water. 10 V.S.A. § 1264 requires a stormwater permit before, among other things, construction or redevelopment of an acre or more of impervious surface. It also requires a permit be in place before actual discharges from impervious surfaces over 3 acres. But that permit may be an individual *or* a general permit: "In accordance with the schedule established under subdivision (g)(3) of this section, a person shall not discharge stormwater from impervious surface of three or more acres in size without first obtaining an individual permit *or* coverage under a general permit issued under this section . . .." 1264(c)(7) (emphasis added).

An individual or general stormwater permit is valid for a maximum term of 5 years, at which point it must be renewed. 10 V.S.A. § 1264(h)(1). The DDI permit stated it was valid for 5 years, and would be valid "notwithstanding any intervening change in water quality, effluent, or treatment standards, or classification of the receiving waters." Appellant Mot. Summ. J. Exh. 1 at 1**.** At the time VTrans filed its NOI for authorization under the TS4 General Permit in December 2017, there were therefore at least three and a half years remaining on the term of the DDI permit.[3] While VTrans applied to replace other individual permits that were not about to expire with coverage under the TS4 permit, *see* Appellant Mot. Summ. J. Exh. 5 at 12–13, it was not required to do so.

At times in its motion, VTrans appears to argue that discharges from the DDI project were not even eligible for coverage under the TS4 permit at the time VTrans filed its NOI. We disagree. VTrans cites section 2.3.(C)2 of the General Permit, but misleadingly quotes only a limited portion of it. Read in its entirety, this section states that "Discharges covered within five years prior to the effective date of this permit by an individual permit or alternative general permit *where that permit established site-specific*

[3] We do not opine here on whether the appeals of the permit lengthened its effective period.

numeric water quality-based limitations developed for the stormwater component of the discharge" are excluded from coverage under the general permit, unless explicitly authorized by the Secretary (emphasis added). The DDI permit did not establish site-specific numeric water quality-based limitations on stormwater discharges. Similarly, VTrans cites Section 8.1(D)(1) which states that coverage is not required under the General Permit for discharges permitted under 10 V.S.A. § 1263. Section 1263, however, establishes the requirements for *intentional* discharges of *wastes*, and is not the provision under which ANR issued the DDI individual permit. Instead, ANR issued the permit under Section 1264, which explicitly differentiates itself from Section 1263. *See* 10 V.S.A. § 1264(d)(1)(D).

These inaccuracies aside, however, VTrans's larger argument is correct: the statutory framework and terms of the TS4 permit do not require that all discharges eligible for coverage under the TS4 permit obtain coverage under it. 10 V.S.A. § 1264 repeatedly refers to the possibility of coverage under either an individual or general permit, with the choice at the discretion of the Secretary. E.g., § 1264(c)(6)(A)(i), (iii); 1264(c)(7); 1264(g)(2)(B). Section 2.2 of the TS4 permit lists the discharges generally eligible for coverage under the permit, but nowhere does it require all eligible discharges to be covered *under* TS4. The purposes section of the permit includes "combin[ing] under one general permit to the greatest extent possible the post-construction operational stormwater requirements" for eligible VTrans operations, but that language is aspirational and does not create legal obligations. *Cf.* In re John A. Russell Corp., 2003 VT 93, ¶ 16, 176 Vt. 520 ("Broad policy statements phrased as nonregulatory abstractions . . . may not be given the legal force of zoning laws") (internal quotations omitted). Moreover, this language expressly indicates that something less than complete coverage of VTrans operations under the TS4 permit is, in fact, envisioned.

Granted, Part 8 of the TS4 permit is what provides the actual permit coverage for discharges from new or previously permitted impervious surfaces (as opposed to, for example, discharges from industrial sources, which are covered by Part 7). Part 8 does require the eligible discharges it lists to receive coverage under the TS4 permit, but it too contains a notable exception—the Secretary may instead "determine[] the discharge requires coverage under an individual permit." *See* § 8.1A. Thus the Secretary could decide that the DDI project, even if eligible for coverage under Section 8.1A, instead required coverage under an individual permit. But there is a more immediate reason why DDI did not need to be included in the NOI: For facilities with existing permits, it is only upon renewal that Section 8.1 requires those facilities to come under the General Permit—or for the secretary to make the determination that an individual permit is required. *See* § 8.1(A)(2) (listing "*Renewals* of the following previously issued authorizations for discharges of stormwater runoff") (emphasis added). At the time this appeal was filed,

the term for permit 6946-INDS had not expired and so renewal was not yet necessary. Therefore, nothing in § 8.1 required VTrans to include DDI in the NOI.

We understand from the parties' filings that VTrans renewed the DDI Individual permit in May 2021, but did so under General Permit 9050, colloquially known as the "three-acre" general permit, and not under the TS4 general permit. Any challenge to that decision must come through an appeal of the authorization of coverage of DDI under the three-acre permit, not through this appeal of the authorization of VTrans's 2017 Notice of Intent for coverage under the TS4 permit. We therefore **GRANT** VTrans's motion for summary judgment on Question 2 and answer it in the negative: the obligations in the General permit DO NOT apply to DDI project, given that VTrans did not include it in the NOI. We also **GRANT** VTrans summary judgment on Question 6 and answer it as follows: the DDI project is NOT required to be covered under the TS4 before the project is constructed or before any discharges from it occur.

iv. Question 10

VTrans moves to dismiss, strike, or clarify, sections ii and iii of Question 10. Because "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," In re Killington Village Master Plan Act 250, No. 147-10-13 Vtec, slip op. at 7 (Vt. Super. Ct. Envtl. Div. Aug. 6, 2014), the Court may order an appellant to clarify their Statement of Questions pursuant to a motion or request from another party. V.R.E.C.P. 5(f); V.R.E.C.P. 2(d)(2)(vi); *see also* In re Atwood Planned Unit Dev., 2017 VT 16, ¶ 13, 204 Vt. 301 ("Given the plain language of Environmental Proceedings Rules 5(f) and 2(d)(2)(vi), the court could require neighbors to limit their statement of questions to ensure [appellee] and the court had notice of the matters to be considered on appeal.").

Question 10(ii) asks, "Does the VTrans [Stormwater Management Plan (SWMP)] and Snow and Ice Control Plan adopted pursuant to the SWMP . . . Contain evidence based rationale's [sic] for how and why it selected each [Best Management Practice (BMP)] in its chloride management plan?" VTrans moves to strike or order this question clarified because, it argues, the relevant provision of the general permit does not require that the rationale for adopting BMPs in the SWMP and Snow and Ice Control Plan be "evidence based." Section 6.2(B)(4) of the General Permit requires VTrans to "provide a rationale for how and why it selected each of the BMPs and measurable goals for the SWMP." While the text requires this rationale to "describe: (1) the stormwater problems to be addressed by the BMPs, (2) the major alternative BMPs to the ones selected and why they were not adopted, (3) the behavioral and institutional changes necessary to implement the BMPs, and (4) expected water quality outcomes," it does not require the

rationale to be "evidence based" per se. We note that Appellant did not respond to VTrans's argument on this issue. We therefore strike the words "evidence based" from Question 10(ii).

Similarly, Question 10(iii) asks whether the SWMP and Snow and Ice Control Plan "[a]dress alternative BMPs and why they were not selected?" VTrans argues that the wording of the question omits an important qualifier from the text of the General Permit—the word "major" before "alternative" at 6.2(B)(4)(2). Again, Appellant has not responded. We add the word "major" before the word "alternative" in Question 10(iii).

v. *Questions 11 and 13*

As with Questions 3–5 and 7, ANR moves to dismiss Questions 11 and 13 for a lack of subject matter jurisdiction, arguing that they do not relate to whether the activities authorized comply with the terms and conditions of the general permit and so are impermissible under 10 V.S.A. § 8504(j). Question 11 asks: "Is the approval of the VTrans NOI as concerns the regulation of chloride discharges to impaired waters consistent with 40 CFR §§ 122.4(d) and 122.44(d) . . .?" Question 13 asks: "Does the approval of the VTrans NOI and associated Snow and Ice Control plan include adequate conditions to ensure to reduce [sic] the discharge of chloride to the 'maximum extent practicable' as required under 40 CFR 122.34?"

40 CFR §§ 122.4(d) and 122.44(d) require that NPDES permits, including where issued by a state agency, ensure compatibility with Clean Water Act water quality requirements and any more stringent state requirements. 40 CFR § 122.34(a) requires that small municipal separate storm sewer systems (MS4s) in particular reduce discharges of pollutants "to the maximum extent practicable, to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act."

While it is true that Questions 11 and 13 do not directly ask whether the activities authorized under this NOI comply with the requirements of the General Permit, they ask whether the authorization satisfies provisions of federal law that apply to the state implementation of NPDES, including as mediated through the General Permit. Pursuant to our understanding of Section 8504(j) expressed earlier, if these questions raise issues that could have been raised in an appeal of the General Permit itself, they should be dismissed, but if they raise issues that could only be raised at the authorization stage, they should not be dismissed.

This is therefore a question of the procedures established by statute or regulations and/or by the TS4 permit itself. The TS4 permit requires VTrans "[p]rior to submitting [its] NOI, [to] provide information to the Secretary[,] either data or other technical documentation, to support a conclusion that the discharge is expected to meet applicable water quality standards." § 2.4(B)(3). It is also our understanding

that VTrans submitted its Snow and Ice Control Plan along with the Notice of Intent. It is therefore at the authorization stage that ANR makes the determinations that Questions 11 and 13 concern, because only at the authorization stage is the information necessary to make these determinations submitted. We therefore conclude that 10 V.S.A. § 8504(j) does not bar raising these questions in this appeal, as they were essentially impossible to raise in an appeal of the General Permit itself.

Nor should these questions be excluded because they concern consistency with the federal regulations. The general permit is part of ANR's system of regulations meant to implement the federal rules, including those cited to in these Questions. We do not believe the drafters of Section 8504(j) meant to exclude all questions about consistency with federal requirements in scenarios of delegated authority, such as ANR's authority under the NPDES system, where those questions relate to the authorization and not the terms of the general permit. We therefore conclude that these questions should not be dismissed and remain at issue.

vi. Question 12

Question 12 asks, "In approving VTrans' NOI and associated Snow and Ice Control Plan, what site-specific and/or time specific analysis did the Agency of Natural Resources conduct?" ANR moves to dismiss this Question under V.R.C.P. 12(b)(6) for failure to state a claim upon which relief can be granted, arguing that in a de novo trial, the analyses conducted by the decision-maker below are not a relevant subject of inquiry. Appellant responds that the analysis could be relevant should ANR argue that it is entitled to deference on interpretation of a statutory term or policy to which those analyses related. Appellant's argument is entirely speculative, however, as it fails to identify any statutory or policy interpretation to which these analyses relate, much less one on which the Agency has argued that it is entitled to deference. Should ANR argue that it is entitled to deference in its interpretation of the statute or regulations, specifically as it relates to the Snow and Ice Control Plan's compliance therewith, questions about its analyses may become relevant. Until that time, however, the Court will conduct its own analysis of the Snow and Ice Control Plan under the substantive issues Appellant has raised elsewhere in its Statement of Questions. Question 12, therefore, is **DISMISSED**.

Conclusion

For the foregoing reasons, we e **DISMISS** Questions 3, 4, 5, 7 and 12. We answer Question 1 as follows: Pursuant to this Court's October 9, 2017 Order and the Parties Stipulation, the DDI project DOES NOT need to be included and reviewed under the TS4 Permit. We answer Question 2 by concluding that the obligations in the General permit DO NOT apply to the DDI project, given that VTrans did not include

it in the NOI. We answer Question 6 by concluding that the DDI project is NOT required to be covered under the TS4 before the project is constructed or before any discharges from it occur. We restate Questions 10(ii) and 10(iii) to read as follows: "Does the VTrans SWMP and Snow and Ice Control Plan adopted pursuant to the SWMP . . . (ii) Contain rationales for how and why it selected each [Best Management Practice (BMP)] in its chloride management plan? (iii) Address major alternative BMPs and why they were not selected?" Lastly, we conclude that Questions 11 and 13 should not be dismissed and remain at issue.

This matter shall be set for a status conference in June. Pursuant to the February 23, 2022 amended Scheduling Order, parties were to be trial ready May 2, 2022 with trial to be scheduled in June. Due to the issuance of this decision, trial will be set in July, 2022. **On or before May 15, 2022**, all parties shall file dates of UNAVAILABILITY for a two (2) day trial in July, 2022; a third day will be held in reserve.

Electronically Signed: 5/5/2022 2:18 PM pursuant to V.R.E.F. 9(d).

Thomas G. Walsh, Judge
Superior Court, Environmental Division