STATE OF VERMONT
PUBLIC SERVICE BOARD

In re: Lowell Mountain Wind Project Appeal of Energize Vermont, Inc., et al	))	Docket Nos. 7628-A, 7628-C, & 7628-E

REPLY TO
GREEN MOUNTAIN POWER'S
AND THE AGENCY OF NATURAL RESOURCES'
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

NOW COME Energize Vermont, Inc., Don and Shirley Nelson, Jim Blair, Kevin McGrath, Robbin Clark, Nancy Warner, and Jack Brooks, individually and collectively (hereinafter "Appellant" or "Appellants"), by and through their attorneys, Hershenson, Carter, Scott & McGee, P.C., P.O. Box 909, Norwich, Vermont, 05055-0909, and respectfully submit the following Reply to Appellee, Green Mountain Power's ("Appellee"), Proposed Findings of Fact and Conclusions of Law ("Appellee's PF") and to the Vermont Agency of Natural Resources' ("ANR") Proposed Findings of Fact and Conclusions of Law ("ANR's PF"), in the above entitled matter.

I. Certain findings proposed by each of Appellee and ANR mischaracterize the evidence and/or are self-serving and unsupported and should not be adopted by the Board.

Numerous findings proposed by each of Appellee and ANR to justify the use of experimental and unproven level spreaders are misleading, mischaracterize the evidence, and/or are self-serving and unsupported. These proposed findings include, but are not limited to, the following:

- A number of Appellee's proposed findings suggest that the proposed level spreaders comply with the "technical criteria" for level spreaders contained in Section 3.7 of the Vermont Stormwater Management Manual ("VSMM"), which is the Watershed Hydrology Protection

Credit ("WHPC"). Appellee's PF, ¶¶ 124, 128, 144, 147, 186, 191. This assertion, however, is not correct. As discussed in Appellants' Proposed Findings of Fact and Conclusions of Law, Appellee's proposed level spreader design does not meet the criteria for the WHPC and/or fails to incorporate certain key elements of the site design approach contained in the WHPC. Appellant's Proposed Findings, pp. 30-32. In addition, it is undisputed that Appellee's project does not meet the criteria of the WHPC: "this project does not qualify for or rely upon the WHPC." Appellee's PF, ¶ 128. Further, as specifically stated in Appellee's Exhibit GMP-JAN-C10, "it would not be possible for the project to maintain a maximum impervious cover of 5% or less within all watersheds nor will the project be able to assure ongoing maintenance of at least 90% of the forest plan within all contributed watersheds, as required by the credit." In addition, Appellee's own witness testified that the project does not meet the WHPC's minimum criteria requirement for stream buffers. Nelson, Cross Examination Testimony 7/11/12, p. 124. The reality is that Appellee's proposed level spreaders do not meet the full technical criteria of the WHPC. Despite their admissions of noncompliance, Appellee nevertheless propose that the criteria they do not meet are not "technical" and therefore not relevant. Appellee's proposed findings are unsupported and without merit.

- Appellee's proposed finding 130 states that the designer's certification of compliance containing required by VSMM, Section 2.5.2 has been provided. A review of the designer's certification, however, reveals that it does not contain "details, with a reasonable level of surety,

on how the system will achieve the records of performance standards," as required by Section 2.5.2. Exhibit GMP-JAN-C3. Further, to the extent any details are provided in the application materials such details are not certified at all or prepared by the individual who provided the designer's certification.

- Appellee's proposed finding 144 states that "GMP chose [the approach of following some but not all of the WHPC criteria for level spreaders] because the WHPC contains the only DEC specifications for level spreaders in Vermont, and GMP sought to take advantage of the DEC's extensive study of level spreaders and its experience and expertise with managing stormwater runoff and Vermont." Appellee's proposed findings attribute the information in this sentence to the testimony of Appellee's witness, Mr. Nelson, and ANR's witness, Kevin Burke. Appellee's PF, ¶ 144. By implication, Appellee appears to suggest that ANR presented evidence of its extensive study of level spreaders prior to adoption of the Watershed Hydrology Protection Credit. Appellee's PF, ¶ 144. Such an implication is misleading and completely unsupported by the record. The prefiled testimony, prefiled rebuttal testimony, and cross examination testimony of Kevin Burke is completely devoid of any reference to any studies performed by ANR much less an extensive study. In fact, this self-serving and unsupported statement is based on a statement made by Appellee's witness, Mr. Nelson, and not on any information provided by nor supported by ANR. Nelson, Prefiled Rebuttal Testimony, p. 18.

- In Appellee's proposed finding 151, Appellee states that "Mr. Torizzo's own use of level spreaders to achieve the same result that GMP is seeking here is contradictory to his testimony in this case that such designs 'will cause runoff leaving the spreader to be concentrated rather than sheet flow form.'" Appellee's characterization of Mr. Torizzo's use of a level spreader in a different project is misleading. Mr. Torizzo testified that the level spreader that he had designed was intended for an entirely different purpose than the level spreaders proposed for Appellee's project. Torizzo, Cross Examination Testimony, 7/13/12, p. 37. Specifically, Mr. Torizzo testified that although the level spreader he designed employed a rock lip, his design did not intend to create, nor was it required to create discharge in the form of sheet flow. Torizzo, Cross Examination Testimony, 7/13/12, p. 37.
- Appellee's proposed finding 176 states that "[t]he spreaders designed for this project are in fact substantially more protective than what would be required in Maine." This proposed finding is also misleading. Appellee omits and/or ignores the fact that the Maine requirements limit the use of level spreaders and vegetated buffers to slopes of less than 15% for water quality purposes. Exhibit EVT-JAN-CROSS-44. Appellee's own Exhibit GMP-JAN-C5 indicates that the proposed level spreaders are being used to comply with the applicable water quality standards, and Appellee's Exhibit GMP-Reb-1 indicates that 21 of the 31 proposed level spreaders and vegetated buffers are on slopes of 15% or greater. Appellee also omits and/or ignores the fact that the Maine requirements limit level spreaders to 25 feet in length. Exhibit

EVT-JAN-CROSS-44. This length requirement limits the amount of impervious surface area that can drain to any one level spreader. Appellee's suggestion that level spreaders up to 100 feet long, like the ones proposed by Appellee, are more protective than a smaller level spreader handling less runoff is not supported by the plain language of the Maine regulations. Exhibit EVT-JAN-CROSS-44. In addition, the Maine regulations require that "flow from the level spreader will remain in sheet flow until entering a natural or man-made receiving channel." Exhibit EVT-JAN-CROSS-44. Contrary to the Maine requirements, Appellee's model indicates that sheet flow will not be maintained until it reaches a natural or man-made receiving channel. Nelson, Cross Examination Testimony 7/11/12, p. 135. Accordingly, Appellee's proposed finding 176 conflicts with the actual requirements in the Maine standard and cannot be supported.

- Appellee's proposed finding 186 states that "VT DEC took into consideration the available and relevant work in preparing the WHPC level spreader criteria in 2011, upon which the design for the level spreaders for this project were based." This statement is totally unsupported in the record. Nowhere in the testimony offered by ANR or by Appellee is there any indication that ANR conducted a thorough review of regulations from other states and government agencies or existing studies of level spreaders. Appellee's proposed finding also conflicts with the substantial body of studies and regulations from other states that indicate that level spreaders are not appropriate stormwater treatment practices for locations such as Lowell

Mountain (Exhibits EVT-JAN-CROSS-36 through EVT-JAN-CROSS-57). Appellee's proposed finding also conflicts with Appellee's statement in its own Exhibit GMP-JAN-C10, which states that "no data associated with performance of these types of systems are currently available."

- Appellee's proposed finding 192 states that "DEC stormwater staff have observed the performance of level spreaders in the field for this project, and although not yet certified as final design for the operational permit, the level spreaders are performing as expected, even in large storm events, and those level spreaders that are at final design specifications are performing remarkably well." Initially, it should be recognized that the finding that the level spreaders are "performing as expected" is offered in the face of the fact that the State of Vermont is currently experiencing a drought and the rainfall conditions are not reflective of what will be experienced over the life of the project. Accordingly, DEC's recent observations cannot be offered to support the proposition that the level spreaders are performing as expected.

In addition, Appellee's proposed finding 192 mischaracterizes the evidence presented by ANR's witness, Mr. Burke. Mr. Burke's testimony demonstrates that he has not observed the performance of the level spreaders during a storm event. Specifically Mr. Burke stated in his testimony that he did not get on the site until "probably 12 hours after the [May 29, 2012] storm." Burke, Cross Examination Testimony, 7/13/12, p. 159. Given that Appellee has argued that the appropriate Time of Concentration with which to model its level spreaders is only 6 minutes

(Appellee's PF, ¶ 235),[1] Appellee's proposed finding 192 cannot be supported by observations made more than 12 hours after the end of the storm.

- Related to Appellee's proposed finding 192, ANR's proposed findings 94 and 95 state that "[t]he detention basins on the Sheffield wind site are oversized and are receiving less water than they were designed to hold." and "[t]he basins on the Kingdom Community Wind site are receiving less water than they were designed to hold." Both of these proposed findings are attributed to the testimony of Mr. Burke, but the record is devoid of any information to support a finding that Mr. Burke has any knowledge of how much water is actually being received into the basins on either the Sheffield site or the Kingdom Community Wind site and per his own testimony he was not on the project site to observe actual conditions during the May 29, 2012 storm event. Burke, Cross Examination Testimony, 7/13/12, p. 159.

- Appellee's proposed finding 218 states with respect to Appellee's revegetation plan that "[t]hese specific requirements for treatment of the fill areas will ensure that these areas will perform similar to 'open space (good)' conditions from the stormwater system perspective." This statement is misleading in that it is at odds with Appellee's own revegetation plan which only requires Appellee to attain revegetation with a 50% coverage rate (Exhibit GMP-JAN-Reb-5, p. 7.) whereas the TR-55 guidance requires "open space, good condition" to have grass cover

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[1]Mr. Burke also indicates that the stormwater drainages in Appellee's project are sized such that even with wet ponds the required detention is only "a relatively minimum detention time, . . . maybe hundreds of minutes . . ." Burke, Cross Examination Testimony, 7/13/12, p. 136.

greater than 75%. Exhibit GMP-JAN-Reb-3.

II. ANR's interpretation of Section 2.5.2 and 1.1.2 of the VSMM is inconsistent with the plain language of the regulation and, therefore, is not entitled to deference and should not be followed.

Appellee and ANR both argue that the Board should defer to every aspect of ANR's decision below, including both factual determinations and regulatory interpretations. Specifically, both Appellee and ANR argue that ANR's interpretation of Sections 2.5.2 and 1.1.2 of the VSMM is entitled to a presumption of validity and that the Board "must accept" any interpretation of the VSMM put forth by ANR. Appellee's PF, pp. 77, 92; ANR's PF, p. 41. This argument, however, ignores a substantial body of jurisprudence that requires a finding that ANR's interpretation of the VSMM is entitled to no deference where, as here, it is inconsistent with the plain language of the regulation. *See, e.g.*, *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S.Ct. 2381, 2386, 129 L.Ed.2d 405 (1994) ("we must defer to the Secretary's interpretation unless an alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation."); *In re Verburg*, 159 Vt. 161, 165, 616 A.2d 237, 239 (1992) ("the presumption of validity for an agency's interpretations of its regulations may be overcome by the existence of compelling indications of error in such interpretations.").

In general, courts give deference to an agency's interpretation of its own regulations. *See Thomas Jefferson Univ.*, 512 at 512, 114 S.Ct. at 2386. Such a review standard, however, "does

not equate with mere judicial passivity in determining the propriety of [ANR] interpretations of its own rules." *In re Vitale,* 151 Vt. 580, 583, 563 A.2d 613, 615 (1989); *In re Wal-Mart Stores, Inc.*, 167 Vt. 75, 80, 702 A.2d 397, 400 (1997). Specifically, no deference is due, and an agency's interpretation will be overturned, where an agency's interpretation of its regulations is inconsistent with the plain language. *See Conservation Law Foundation v. Burke*, 162 Vt. 115, 121, 645 A.2d 495, 499 (1993) (refusing to allow ANR to create a *de minimis* exception that did not exist in the language of the regulation); *Univ. of Cincinnati v. Bowen*, 875 F.2d 1207, 1209 (1989) ("The key question for this court is not whose interpretation of the statute we prefer, but whether we are persuaded that the Secretary's interpretation is reasonable and consistent with the regulation's language.") (emphasis added).

When reviewing an agency's interpretation of its regulations, courts determine the intent of the regulation by looking first at the plain language used. *In re Bennington School, Inc.*, 2004 VT 6, ¶13, 176 Vt. 584, 845 A.2d 32 ("We look first to the plain language of the statute[2] for guidance."). If the meaning of the language used is plain courts need not look further. *See Id.* at ¶12 ("The definitive source of legislative intent is the statutory language, by which we are bound unless it is uncertain or unclear.") *In re Musto Construction Permit*, Docket No. 132-7-09 Vtec, slip op. at 12 (Vt. Envtl. Ct., January 27, 2011) (finding development review board's interpretation was not determinative where the plain meaning of the regulatory language was

[2]Regulations are interpreted using the rules of statutory construction. *See In re Bennington School, Inc.*, 2004 VT 6, ¶12.

clear and not ambiguous). Courts determine the meaning of the plain language "giving effect to the whole and every part of the ordinance." *In re Trahan*, 2008 VT 90, ¶19, 184 Vt. 262, 958 A.2d 665. Thus, Courts may not ignore language in a regulation. *In re Appeal of Lunde*, 166 Vt. 167, 171, 688 A.2d 1312, 1315 (1997) (Courts may not construe regulatory language "in a way that renders a significant part of it pure surplusage."); *In re Musto Construction Permit*, Docket No. 132-7-09 Vtec, slip op. at 12 (Vt. Envtl. Ct., January 27, 2011) (denying application where applicant's interpretation of zoning regulation, which was followed by the development review board, "would render [the regulatory provision] . . . surplusage."); *see also Vincent v. Apfel*, 181 F.3d 1143, 1147 (1999) (overturning decision to deny social security benefits to a person who would have been eligible but for a one month delay where the Commissioner's decision "completely overlooks the specific language of the statute and the regulation which contains the words 'would have been eligible.'" "There is no justification for adding limiting language to a clear and unambiguous statute and regulation."). Similarly, an agency may not add words to reach an interpretation that varies the plain language of the regulation. *See Conservation Law Found. v. Burke*, 162 Vt. at 121, 645 A.2d at 499 ("If the Agency wishes to include an additional de minimis exception, it must do so explicitly."); *In re Carrigan,* Docket No. 38-2-10 Vtec, slip op. at 12, (Vt. Envtl. Ct, January 13, 2011) (where the Court found "no specific authorization in the Zoning Regulations for waivers", the plain language of zoning regulation limited the development review board "to using waivers only where specifically authorized.") (emphasis

added); *see also Lal v. Immigration and Naturalization Serv.*, 255 F.3d 998, 1003-05 (2001) (overturning agency decision to require "ongoing" disability where regulation required only "compelling reasons for being unwilling to return to his or her country . . . arising out of the severity of the past persecution.") (emphasis added).

In the present case, the language of VSMM Sections 2.5.2 and 1.1.2 are clear and are not ambiguous. Thus, there is no need or reason to look to ANR's "interpretation" of plain language of the VSMM. *See In re Bennington School, Inc.*, 2004 VT 6, ¶13, 176 Vt. 584, 845 A.2d 32 ("The definitive source of legislative intent is the statutory language, by which we are bound unless it is uncertain or unclear."). Furthermore, the interpretation of VSMM Sections 2.5.2 and 1.1.2 proposed by GMP and ANR is inconsistent with the plain language of those regulatory provisions. Specifically, Section 2.5.2 of the VSMM provides as follows: "[t]he performance standard for [Alternative] STPs shall meet the applicable treatment standards specified in section 1.1," (Emphasis added). The applicable treatment standards include the Channel Protection Treatment Standard ("CPv"), which requires all STPs, including Alternative STPs to provide extended detention of stormwater runoff. Section 1.1.2 contains specific language that establishes a limited exception to CPv "[f]or projects that have disconnected the majority of impervious surfaces per use of the credits in Section 3 such that routing to a detention facility is not achieved. (Emphasis added). In such a case, "the designer may use an alternative design standard." VSMM, Section 1.1.2.

Appellee and ANR suggest that when ANR is reviewing an alternative stormwater treatment practice under Section 2.5.2, Section 1.1.2 and/or Section 2.5.2 should be interpreted to allow ANR discretion to permit the use of the alterative design standard to achieve CPv compliance even where, as here, the project does not qualify for any of the credits in Section 3. Appellee's PF, pp. 94-95; ANR's PF, p. 40-41. Alternatively stated, Appellee and ANR ask the Board to believe that section 2.5.2 provides discretion for the Board to create an additional "credit" in Section 3 for level spreaders on 30% slopes so that Appellee's project can use the alternative design standard to satisfy a treatment standard that it does not otherwise comply with. Regardless of how their interpretation is stated, however, the VSMM provides no such discretion. Burke, Cross Examination Testimony, 7/13/12, p. 165. Appellee and ANR have danced around this shortcoming, and have suggested that their proposed interpretation should be followed because they are "achieving the same result" as the credits, or "given that the effective result" was similar to the credits, Nelson, Cross Examination Testimony, 7/11/12, p. 162, or because their project uses a design "similar to level spreaders presented in the credit or other disconnection credits." Burke, Cross Examination Testimony, 7/13/12, p. 148; ANR's PF, ¶ 101.[3] Neither Appellee nor ANR, however, have pointed to any specific language in the VSMM

[3]Appellee and ANR also both suggest that if their interpretation is not followed then no alternative stormwater treatment practice can ever be approved. Appellee's PF, pp. 95-96, ANR PF, p. 40. Their claim is a non sequitur. Merely because the level spreaders proposed for this particular project do not satisfy the requirements of the VSMM does not mean, and neither Appellee nor ANR have offered any evidence to indicate that, no other type of alternative stormwater treatment practice could ever be approved. In fact, a plain reading of the credits in

that creates such an exception. In fact, the plain language of the VSMM contains no such exception.[4]

Reading Section 1.1.2 of the VSMM as Appellee and ANR propose would ignore the regulatory language that limits the use of the alternative design standard to projects that achieve disconnection "per use of the credits in Section 3." Such an interpretation would render the language "per the use of the credits in Section 3" mere surplusage, and is not permissible. *See In re Musto Construction Permit*, Docket No. 132-7-09 Vtec, slip op. at 12 (Vt. Envtl. Ct., January 27, 2011) (interpretation zoning ordinance to allow expansion of nonconforming structure not permissible where zoning ordinance included specific language allowing expansions in limited circumstances); *see also Vincent v. Apfel*, 181 F.3d 1143, 1147 (1999) (overturning decision to

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VSMM Section 3.3, Disconnection of Non-Rooftop Runoff Credit, suggest that a level spreader collecting runoff from an impervious area with a flow path length of less than 75 fee and an area of less than 1000 square feet that discharges to a vegetated buffer on a slope of less than 5% would qualify for the credit, and thus would qualify under Section 1.1.2 to use the alternative design standard. Simply because Appellee has chosen not to follow the design credits in section 3, it does not automatically follow that every alternative stormwater treatment practice must therefore also fail. The real issue is that the VSMM provides only limited exceptions to the CPv extended detention requirement and ANR wants the ability to grant more exceptions. What ANR and Appellee propose is really to create a new "credit in Section 3", which 2.5.2 clearly does not provide for. As discussed below, the only legitimate way to provide ANR's desired discretion is to amend the VSMM by following the procedures set forth in the Vermont Administrative Procedures Act. 3 V.S.A. § 836.

[4]Other discrepancies between the plain language of Section 2.5.2 and 1.1.2 of the VSMM and the interpretations proposed by Appellee and ANR are discussed in Appellants' Proposed Findings of Fact and Conclusions of Law and adequately set forth a discussion of the issues involved without the need to be reviewed here.

deny social security benefits to a person who would have been eligible but for a one month delay where the Commissioner's decision "completely overlooks the specific language of the statute and the regulation which contains the words 'would have been eligible.'").

Similarly, reading Section 2.5.2 of the VSMM as Appellee and ANR propose to allow ANR to create additional exceptions to CPv that are not specifically provided for in the plain language is also impermissible. *See Conservation Law Found. v. Burke*, 162 Vt. at 121, 645 A.2d at 499 ("If the Agency wishes to include an additional de minimis exception, it must do so explicitly."); *In re Carrigan,* Docket No. 38-2-10 Vtec, slip op. at 12, (Vt. Envtl. Ct, January 13, 2011) ("no specific authorization in the Zoning Regulations for waivers" limited development review board "to using waivers only where specifically authorized."); *Lal v. Immigration and Naturalization Serv.*, 255 F.3d 998, 1003-05 (2001) ("ongoing" disability cannot be required where regulation only requires review of "past persecution."). Such an interpretation would also undermine the purpose of CPv by impermissibly creating additional exceptions to CPv. *See Rogers v. Watson*, 156 Vt. 483, 491, 594 A.2d 409, 413 (1991) ("We typically construe exemption narrowly so they do not undermine the general rule").

If ANR had intended to create the discretion they have suggested, ANR was required to do so explicity. *See Conservation Law Found. v. Burke*, 162 Vt. at 121, 645 A.2d at 499; *In re Carrigan*, Docket No. 38-2-10 Vtec, slip op. at 12. The appropriate mechanism to do so would be for ANR to amend its regulations pursuant to the procedures set forth in the Vermont

Administrative Procedures Act ("Vermont APA"). 3 V.S.A. § 836. Using the process in the Vermont APA, ANR could, for example propose an amendment to Section 2.5 that gives ANR the discretion to create additional Section 3 credits for additional types of disconnections not currently covered in Section 3. Alternatively, ANR could propose an amendment to Section 1.1.2 that deletes the reference to "the credits in Section 3" and makes it clear that any disconnection can qualify to use the alternative design standard. In either case, the formal process for adopting amendments to regulations that is set forth in the Vermont APA would require public notice, hearing and comment, none of which have happened here with respect to ANR's proposed use of "discretion" to justify the use of level spreaders that do not otherwise comply with CPv as required by Section 2.5.2 and Section 1.1.2.

Improvising solutions without a formal process to amend the VSMM, as ANR and Appellee propose here, and in disregard of the plain language of the regulations is an affront to the requirements of the Vermont APA and applicable case law. ANR's and Appellee's disregard of the plain language of the VSMM and ANR's failure to follow the available procedures to amend its regulation are fatal to their proposed interpretation that would allow Appellee to satisfy CPv by using the alternative design standard even though it has not used, and does not qualify for, the credits in Section 3. Such an interpretation is inconsistent with the plain language of the regulation and cannot be followed.

Dated at Hartford, Vermont, this 13th day of September, 2012.

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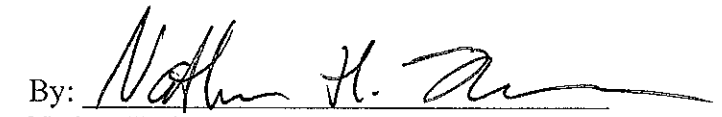
By: 
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