

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION

Natural Resources Board,)
PETITIONER)
v.)
The Stratton Corporation,)
RESPONDENT)

Docket No.

**COMMENTS ON PROPOSED
ASSURANCE OF DISCONTINUANCE**

NOW COMES the Treetop at Stratton Condominium Association, Inc. (the "Association"), by and through its attorney, A. Jay Kenlan, Esq., of the firm Kenlan, Schwiebert, Facey & Goss, P.C., 71 Allen Street, P.O. Box 578, Rutland, Vermont 05702, and hereby files the following Comments on the Assurance of Discontinuance as posted on the Natural Resources Board ("NRB") web site (the "AOD) pursuant to 10 V.S.A. §8020(c).

I. Background

On November 18, 2002, the District 2 Environmental Commission issued Land Use Permit #2W1142 (the "original Act 250 Permit") to The Stratton Corporation ("Stratton Corporation") for the construction of twenty-five three-unit townhouses (the "Treetop Project") on an approximately 32 acre parcel of land (the "Treetop Property") located on the southwesterly side of the Stratton Mountain Access Road in the Town of Stratton, Vermont. The original Act 250 Permit also approved the development and construction of the infrastructure required for the occupancy, use, and management of the Treetop Project, including the interior roadways and driveways, the stormwater management systems, and the erosion control measures that, together with the Treetop Property, became the common areas and facilities of the Treetop Project. Upon completion of construction of the Treetop Project by Treetop Development Company, LLC, a wholly-owned subsidiary of Stratton Corporation, all of the Treetop units were sold and conveyed to individual condominium unit owners (the "Unit Owners"). As part of the conveyance of each Treetop unit, each Unit Owner acquired an undivided percentage interest in common areas and facilities so that, upon the sale of the last Treetop unit, all of the common areas and facilities were owned by the Unit Owners in common, and neither Stratton Corporation nor Treetop Development Company, LLC

owned any part of the Treetop Project or the Treetop Property. Treetop at Stratton Condominium Association, Inc. was formed on April 16, 2004 pursuant to 27A V.S.A. § 3-101 and has the authority, under 27A V.S.A. § 3-102, to represent the interest of the Treetop Unit Owners in matters affecting the Treetop common areas and facilities.

In short, the Treetop unit owners own the Treetop stormwater management systems and erosion control measures and, when the stormwater management systems and erosion control measures have been brought into compliance with the Treetop Act 250 permit and stormwater permits and properly constructed, will be expected to assume responsibility for their operation, maintenance, and repair.

As the statutory agent for the owners of the infrastructure that is the subject of the draft AOD, the Association represents parties with a particularized interest in the subject of the AOD. The Association has been diligent in participating in the Act 250 proceedings precipitated by Stratton Corporation's unauthorized material changes to its Act 250 and stormwater permits and has put the District 2 Environmental Commission, the Agency of Natural Resources (the "ANR") and the Natural Resources Board (the "Board") on notice of its concerns about the defects, deficiencies and discrepancies in Stratton Corporation's construction of the Treetop stormwater management systems and erosion control measures. Notwithstanding that the Association, as the representative of the owners of the property that are affected by the Treetop Act 250 permit and the stormwater permits, is a necessary party to these proceedings, neither the ANR nor the Board notified the Association that the AOD had been posted. Nor did the ANR or the Board consult with the Association in the drafting of the AOD, even though the record of the Act 250 proceedings demonstrate that the Association has both the engineering expertise and the knowledge of the facts gained from direct observation to have provided valuable input into the drafting of the AOD. Instead, the AOD is simply the result of collaboration between the ANR and Stratton Corporation, with no input from the Association or its engineer.

II. Stratton Corporations Violations of the Treetop Act 250 permit and stormwater management permits, and the 2002 Stormwater Management Manual

The Stratton Master Plan Permit that is referenced in the original Act 250 Permit, the ANR pre-hearing comments and the findings of the Commission supporting the approval of the original Act 250 Permits, and the conditions of the original Act 250 Permits itself make it clear that minimizing earth disturbance, maintaining existing undisturbed vegetative cover and natural slopes, prevention of erosion, avoidance of overland stormwater flow on steep slopes and through steep ditches, and careful management and control of stormwater were critical factors in the approval of Stormwater Discharge Permit #1-1357, Stormwater Discharge Permit #5519-9010 and Act 250 Permit # 2W1142.

While Stratton Corporation and the ANR insist that the only part of the Treetop stormwater management systems and erosion control measures that is required to comply with the stormwater management rules, and the only matter of concern to them, is the Treetop stormwater treatment pond, the enabling statute, Chapter 10 of Title 47 of the Vermont Statutes, makes it clear, in its definition of the "stormwater system, that it is the entire stormwater management system, and its function in preventing soil erosion and degradation of water quality, that must be considered:

"Stormwater system" means the storm sewers; outfall sewers; surface drains; manmade wetlands; channels; ditches; wet and dry bottom basins; rain gardens; and other control equipment necessary and appurtenant to the collection, transportation, conveyance, pumping, treatment, disposal, and discharge of regulated stormwater runoff. 10 V.S.A. § 1264(18)

At the outset of the District 2 Environmental Commission hearings regarding Stratton Corporation's application to amend the original Act 250 permit ("Amendment Application"), the Association undertook an extensive and detailed engineering analysis of the entire Treetop stormwater management systems and its associated erosion control measures 'as built', and compared the stormwater management systems and erosion control measures 'as built' to the systems 'as approved' in the original Act 250 Permit and the stormwater permits. In prefiled testimony by Matthew Beck, PE, John Lens, PE and Marek Kovac, the agent of the property manager of the Treetop Project, reported a number of defects, deficiencies and discrepancies in Stratton Corporation's construction, operation and maintenance of the Treetop stormwater management systems and erosion control measures to the Commission, the ANR, and Stratton Corporation. The most significant of those defects, deficiencies, and discrepancies include the following:

- When the Treetop Project was initially constructed Stratton Corporation had cleared trees and dug approximately 1,300 feet of unapproved and improperly constructed ditches on Stratton Corporation land above the Winterberry Heights section of the Treetop Project. These ditches do not appear on any of the plans that were approved as part of the Act 250 or stormwater permits (the "Approved Plans"); no ditching of any kind was shown in this area on the Approved Plans. While the Approved Plans contained generic construction details and specifications for stone lined ditches, these ditches were not constructed in accordance with the construction details and specifications, nor were they constructed in accordance with good construction practices. The ditches were apparently dug in an effort to divert offsite stormwater from the steep slope below the 91 ski trail into the Bypass Stormwater System that Stratton Corporation was supposed to construct in accordance with the 2002 Stormwater Permit. The ditches were simply scraped out of the steep hillside by the contractor and left without any erosion controls. No engineering or construction was done to insure that offsite stormwater did not erode these ditches and, as a result, the ditches have been downcutting and eroding since

they were constructed. No effort was made to establish the contours of the hillside where the ditches were dug, and no effort was made to insure that the ditches achieved a constant grade. As a result, offsite stormwater has been allowed to pond in certain areas of these ditches, saturating the soils above Winterberry Heights and causing the illegally-cut slope to fail, a situation that has been ongoing since the Treetop Project was built. No provision is made in the AOD to correct this violation.

- In order to construct these ditches, Stratton Corporation removed trees and other natural vegetation outside of the areas designated for construction on the Approved Plans. No provision is made in the AOD to correct this violation.
- Stratton Corporation failed to install the inlet and storm drain culvert above Woodfern Run that were shown on the Approved Plans and that were designed and intended to intercept the offsite stormwater coming from above Winterberry Heights and direct it through the Bypass Stormwater System. No provision is made in the AOD to correct this violation.
- Stratton Corporation failed to construct the retaining walls and stormwater diversion system above the Winterberry Heights garages that are shown on the Approved Plans and required as part of the 2002 Stormwater Permit. Instead, as recognized in Paragraph 13 of the AOD, Stratton Corporation cut the entire slope behind Winterberry Drive and the Winterberry Heights garages to well above the tree line shown on the Approved Plans, and well outside of the area designated for construction on the Approved Plans. All of the existing vegetation that was supposed to have been retained was removed from the cut slope and its grade was significantly increased when compared to the natural terrain. Large sections of the cut slope have failed or are failing due to the steepness of the slope, the instability of the soils, the inability of vegetation to "catch" on the slopes, and offsite stormwater that is saturating the soils. In an effort to address this problem, Stratton Corporation placed an unapproved crushed stone blanket drain on a section of the failed slope behind the garages opposite Winterberry Heights buildings 15, 16, and 17. Neither the elimination of the retaining walls, the creation of the cut slope, nor the blanket drain was approved as part of either the original Act 250 or Stormwater Permits. No design or construction details were provided for the cut slope or the blanket drain. Notwithstanding Stratton Corporation's efforts, offsite stormwater and silt continues to flow from the base of the cut slope out on the Winterberry Drive and the parking areas and Winterberry garage entrances. Much of the offsite stormwater that flows onto Winterberry Drive, as a result of the cut slope, has to be picked up by the On Site Stormwater System. The sections of the cut slope that are failing have not been addressed by Stratton Corporation other than to make vague reference to 'revegetation' and the cut slope continues to fail and allow offsite stormwater to migrate downslope to the On Site Stormwater System. No provision is made in the AOD to correct this violation.
- Stratton Corporation has recently begun randomly planting small tree seedlings on the cut slope, however, unless and until a geotechnical analysis of the cut slope is completed, the cut slope is properly engineered and stabilized, the

destabilizing effect of the ditches above the cut slope has been corrected, and a properly-designed slope-stabilization and planting plan has been provided by Stratton Corporation, the planting that is currently going on will not stabilize the cut slope.

- In eliminating the retaining walls, Stratton Corporation also created a large open ledge cut above the cul de sac at the top of Treetop Road and the drive leading to Winterberry Heights. The ledge cut was not engineer designed nor was it approved in the Treetop Act 250 permit. The unauthorized ledge cut has resulted in severe drainage, rock fall and icing problems that the District 2 Environmental Commission found to result in the reduction in the capacity of the land to hold water, resulting in dangerous and unhealthy conditions. No provision was made in the AOD to correct this violation.
- As a result of Stratton Corporation's improper and unauthorized changes to the Treetop stormwater management systems and erosion control measures, stormwater and surface water has caused significant icing problems along sections of the Treetop Road, and significant erosion problems on driveways and walkways leading to the Treetop units that the District 2 Environmental Commission found to result in the reduction in the capacity of the land to hold water, resulting in dangerous and unhealthy conditions. No provision was made in the AOD to correct this violation.
- The Treetop stormwater management system was designed and approved in Stormwater Discharge Permit # 1-1537, reaffirmed in Stormwater Permit 5519-9001, and approved in the original Act 250 permit as a 'closed' system, as shown on the Approved Plans and described in the Stormwater Permit Application. The intent of the approved closed system was to minimize overland flow because of the steepness of the site, the erodibility of the soils, and the fact that the Treetop Project is located in the headwaters of Styles Brook. Styles Brook was recognized by both the ANR and the District 2 Environmental Commission as an impaired water that was and is particularly vulnerable to erosion from development at Stratton. This vulnerability, and the need for special diligence in not just controlling but preventing soil erosion, was emphasized in both the original Act 250 permit and the stormwater permits. The purpose and intent of the closed system, as approved by the District 2 Commission and the ANR, was to channel and divert regulated stormwater from the surface to the catch basins and underground storm drains as quickly as possible, to minimize the effects of overland flow.

According to the original Act 250 permit and the stormwater permits, steeper sections of drives, and the entire Treetop Road, were to be paved. Continuous curbs were to be constructed on the downhill sides of the drives and along Treetop Road to intercept stormwater coming off the impervious surfaces and channel it along the curbs to the catch basins that were to be installed at regular intervals against the curbs. The catch basins were to be connected to a series of underground storm drain culverts that lead to the stormwater treatment pond. Berms were to be constructed across the entrances to drives to prevent the stormwater coming down Treetop Road from flowing into the drives.

Instead of constructing the carefully-designed closed system that was approved in the original Act 250 permit and the stormwater permits, Stratton Corporation either left openings in the curbs or eliminated them entirely so that regulated stormwater coming across and down the drives was allowed to escape the closed system and run as overland flow along the sides of the drives and down the steep slopes between and below the Treetop units, causing significant soil erosion. In a number of instances, Stratton Corporation did not pave drives with a grade greater than 8%, and failed to pave other areas of drives that had a high risk of erosion. Catch basins that were supposed to intercept the stormwater running along the sides of the drives and Treetop Road were not installed flush with the curbs that were constructed or were constructed with their inlet grates above the level of the pavement so that the stormwater they were supposed to have captured bypassed them. Other catch basins were either paved over or improperly constructed. No provision was made in the AOD to correct this violation.

- Stratton Corporation failed to construct berms across the entrances to drives, as required by the original Act 250 permit and the stormwater permits, thereby allowing regulated stormwater to flow down the drives instead of channeling it to catch basins in Treetop Drive. The regulated stormwater flows down and across the drives and, because there are no curbs and catch basins to collect the stormwater and divert it into the closed system, down the steep slopes between and below the Treetop units, causing significant soil erosion and a discharge of untreated silt-laden stormwater into tributaries of Styles Brook. No provision was made in the AOD to correct this violation.
- Because of the excess, unplanned regulated stormwater that runs down the drives and down the steep slopes between and below the Treetop units, Stratton's contractors dug drainage ditches in the steep slopes between and below the units. None of these drainage ditches were approved as part of the Act 250 and stormwater permits and none appear on the Approved Plans. No engineering was done to properly design the swales, and the swales were not constructed in accordance with the Act 250 or stormwater permits or the Approved Plans. These ditches have failed, causing erosion and downcutting. In several instances these ditches are part of the Bypass Stormwater System and are discharging untreated silt-laden stormwater into tributaries of Styles Brook. No provision was made in the AOD to correct this violation.
- In a number of instances the catch basins shown on the Approved Plans along the edges of the drives and Treetop Road that were intended to intercept regulated stormwater and divert it into the closed system of storm drains were, in a number of instances, constructed away from the curbs and above the level of the pavement so that they are bypassed by the regulated stormwater. In other instances, catch basins were partially constructed, covered with a sheet of plywood, and paved over. Other catch basins were so poorly constructed that they failed prematurely, or failed to perform as intended. No provision was made in the AOD to correct this violation.

- Mr. Beck observed, and reported to the ANR, the District 2 Environmental Commission, and Stratton Corporation that several of the storm drain culverts were crushed during construction, reducing their capacity to carry stormwater and creating gaps in the culvert seams and joints that admit groundwater from outside to infiltrate the culverts and allow stormwater to escape through breaches in the culverts, erode the soils around the culverts resulting in culvert failures, and allowing untreated regulated stormwater to 'pipe' along the culverts, escape the Regulated Stormwater System, and be released into the tributaries of Styles Brook. Mr. Beck was not able to see farther into the culverts. However, in his opinion, it is probable that the culverts were crushed as a result of improper backfill or backfilling practices. In an earlier submission by Stratton Corporation, Stratton Corporation agreed that it would replace crushed culvert ends. Based on Mr. Beck's observations, culvert sections beyond the ends have been crushed and it is likely that more sections of culverts other than the ends are also crushed and need to be replaced; this can only be determined if Stratton Corporation does a video inspection of the entire storm drain culvert system. No provision was made in the AOD to correct this violation.

- At the time the stormwater treatment pond was constructed, the 2002 Stormwater Management Manual required that the stormwater treatment pond be constructed in accordance with the Manual, including the Construction Specifications that begin on Page 76 of Appendix B1 of Volume II. According to the investigations that have been conducted so far by Stratton's engineers, Vanasse Hangen Brustlin, Inc. ("VHB") and observed by Treetop's engineer, Matthew Beck, this was clearly not the case. Anyone observing the construction of the pond for Stratton Corporation would have seen that the materials being used to construct the pond did not conform to the Manual's Construction Specifications. No effort was made by Stratton Corporation or required by the ANR to insure that the pond fill was "taken from approved designated borrow areas" or that it was "free of roots, stumps, wood, rubbish, stones greater than 6", frozen or other objectionable materials," as required by the 2002 Stormwater Management Manual (see Appendix B1, Page 76). Stratton Corporation knew or should have known that the pond was being constructed in violation of the 2002 Stormwater Management Manual and the Approved Plans when it was first constructed.

What the record does show is that, because Stratton Corporation used improper materials in the construction of the stormwater treatment pond, the pond never performed as it was supposed to – it never held water. Yet for almost ten years Stratton Corporation and VHB/Pioneer reported that the pond had been constructed in accordance with its permits and the 2002 Stormwater Management Manual and was working properly. This was not true, and Stratton Corporation and VHB/Pioneer knew it was not true. ANR was notified that the pond was leaking soon after it was built. If ANR did not know that the reports that it was receiving were not true, it could only have been because ANR made no effort to determine whether the leak that had been reported in 2004 had been fixed.

The record shows that, from the time the pond was built, all of the regulated stormwater entering the stormwater treatment pond was allowed to escape through the hole in the bottom of the pond without treatment and without regulation of the rate of flow, both violations of the stormwater permits and the 2002 Stormwater Management Manual. Nothing was said or done about this situation by Stratton Corporation or the ANR until 2010 when Mr. Beck and the Association insisted that Stratton Corporation accept responsibility for the defective pond and fix the problem. Mr. Beck's inspections, correspondence, reports and testimony finally forced Stratton Corporation and the ANR to acknowledge that neither the pond nor the risers complied with the stormwater management permits or the 2002 Stormwater Management Manual, and that Stratton Corporation had to repair the pond.

The Association believes that Condition B of the AOD, if complied with by Stratton Corporation, may correct the defects, deficiencies and discrepancies in the stormwater treatment pond, however, the Association requests that Stratton Corporation be ordered to serve on the Association all engineering analyses, and plans to correct the problems with the stormwater treatment pond, that the remediation plan specifically cite to and demonstrate conformance with applicable provisions of the 2002 Stormwater Management Manual, and provide the Association a reasonable opportunity to analyze and comment on the plan before any action is taken on it by the ANR or the Court. Once the plan has been approved, the Association requests that Stratton Corporation be ordered to file detailed construction plans and specifications with the parties for review and comment before they are approved and implemented, submit test results for approval of the semi-pervious borrow material to be used for the pond base, submit compaction testing reports as the pond is being rebuilt, and provide engineer-certification of completion of repairs to the pond in accordance with the 2002 Stormwater Management Manual.

III. COMMENTS SPECIFIC TO THE AOD

Paragraph 13 of the AOD states that the "the slope above Winterberry Heights has been subject to surface erosion". This significantly understates the problems caused by the clearing and excavating of the naturally existing slope above Winterberry Heights, and the excavation of the drainage ditch above the cut slope. The cut slope has been failing and slumping since it was first excavated. The few efforts that Stratton Corporation has attempted in the past to stabilize the cut slope and stop the erosion have failed because the slope has never been properly engineered. Stratton Corporation is currently engaged in another attempt to stabilize the slope and stop the erosion, apparently without any geotechnical analysis or engineering design, or any properly designed landscaping and erosion control plan. Likewise, unless and until Stratton Corporation properly deals with the offsite stormwater coming from above the cut slope, the cut slope cannot be stabilized.

Paragraph 22 of the AOD recognizes that "the construction of the stormwater collection system and piping in several locations does not conform to the Permit." However, the AOD imposes no requirements on Stratton Corporation to correct the defects, deficiencies, and discrepancies in the Treetop stormwater management

systems and erosion control measures beyond the repair of the stormwater treatment pond.

Paragraph 23 of the AOD states that:

23. On October 21, 2013, the District 2 Environmental Commission issued Land Use Permit Amendment 2W1142-D to address remediation efforts required on the Project Tract, and in particular approved Respondents' proposals to restore the conditions described above in paragraph 21 to comply with the Permit.

A review of the Permit Amendment reveals that its conclusions and permit conditions were limited almost entirely to the problems with the stormwater treatment pond:

The Commission found that:

17. The ANR Stormwater Program has indicated that the repairs to the detention basin and outlet structure will not be required to meet all of the provisions of the 2002 Manual (Vermont Stormwater Management Manual), but rather those repairs will be required to meet the treatment standards for water quality and channel protection in the 2002 Manual, subject to the procedure set forth in Appendix B ("Evaluation Flowchart").

18. The ANR Stormwater Program concluded that the proposed modifications to the outlet structure and stormwater detention basin meet the treatment standards for water quality and channel protection. A final approval was issued on July 22, 2013.

19. The remainder of the site remains subject to the requirements of the 1997 Vermont DEC Stormwater Procedures and the terms of General Permit (Amended) No. 3-9010. ANR has taken the position that the fencing, while shown on the approved plans, was not a requirement under the 1997 procedures and "as such is not an issue that affects applicable treatment standards (1997 Procedures)."

Other than its findings with respect to the stormwater treatment pond, the District 2 Environmental Commission essentially made no findings and imposed no conditions with respect to the other defects, deficiencies, and discrepancies in the Treetop stormwater management systems and erosion control measures that were indentified, in detail, by the Association other than, in essence, to require Stratton Corporation to 'fix the problems and report back when it had done so'.

The Commission expressly recognized in its findings under Criterion 1(E) that:

There is ongoing concern on the site as to erosion as well as the reduction of the capacity of the land to hold water so that a dangerous condition could result. The permit will include conditions as to erosion control during the remediation process and for an extended period post construction. Although the plan will meet stormwater regulations, the Commission needs a demonstration that the ongoing

rock fall and dangerous icy conditions, that are not the norm for a well-planned and executed project, have been successfully resolved. The project originally included retaining walls and a more closed system to handle stormwater and a design which was carefully considered to address the difficulties of building at a high elevation, steep site. This design also addressed the capacity of the land to hold water so that a dangerous condition would not result. The altered, unapproved design has failed in this respect as evidenced by rock fall and abnormally icy conditions which create a dangerous condition. Also, Wetland 2000-3, which had erosion control value and potential water storage capacity, was eliminated, exacerbating problems on this steep site.

Unfortunately, although recognizing the dangers caused by Stratton Corporation's failure to construct the Treetop stormwater management systems and erosion control measures in accordance with the Approved Plans and good construction practices, the Commission does not address these problems. Recognizing that it had not given Stratton Corporation any direction or made any specific findings with respect to the actions that Stratton Corporation was required to take to fix the Treetop stormwater management systems and erosion control measures, the Commission concluded that "[t]he amendment [of the original Act 250 Permit] request is a retrofit – Stratton has hired professionals to design the retrofit – we are assuming the plan will be successful."

Similar to the District 2 Environmental Commission's limited review of Stratton Corporation's permit violations, the AOD limits its conditions for correcting the violations to correction of the problems with the stormwater treatment pond. Given the extent and impacts of Stratton Corporation's permit violations, this limited approach is unacceptable.

Paragraph 25 of the AOD states that:

25. Finding 18 of #2W1142-D Findings of Fact and Conclusions of Law states that the Vermont Agency of Natural Resources' Stormwater Program gave final approval on July 22, 2013 to Respondent's proposed modifications to the stormwater detention basin because the proposed modifications met the treatment standards for water quality and channel protection as required by the 2002 Vermont Stormwater Manual and therefore, complied with General Permit 3-9010.

The "proposed modifications" referenced in Finding 18 refer to Stratton Corporation's July 18, 2012 filing with the ANR, upon which the ANR's July 22, 2013 letter of approval is based. Neither Stratton Corporation's July 18 filing or the ANR's July 22 letter make any mention of the fact that all of the stormwater that was entering the stormwater treatment pond was escaping the pond because of its improper construction and running untreated and unregulated into Styles Brook. Nor do Stratton Corporation's submission or the ANR's response address Stratton Corporation's other violations of its Act 250 or stormwater permits, or propose any actions to correct those violations.

Paragraph 26 of the AOD states that:

26. In September 2013 Respondents began construction to investigate the condition of the stormwater detention basin and to repair and reconstruct known defects. Respondents successfully completed their scope of work with respect to defects that were already known at that time. Their investigation revealed that non-compliant materials had been used in the original construction of the basin, and that further remedial work would be required in 2014.

This statement is not correct. As both Stratton Corporation and the ANR are aware, respondents did not "successfully complete their scope of work" in the fall of 2013. First, the ANR never inspected the work as it was being performed by Stratton Corporation. It is the Association's understanding that a representative of the ANR may have visited the site briefly just prior to the commencement of the work but that no representative of ANR appeared on site after that or actually observed the conditions of the site or the performance of the work by Stratton Corporation. Accordingly, ANR has no independent basis for representing to the Board that the work was 'successfully completed.' The Association, on the other hand, had its engineer, Matthew Beck, on site on occasions while the work was being done. Mr Beck observed, photographed, videotaped and reported to the District 2 Environmental Commission, the ANR and Stratton Corporation on the work as it was being done and conducted tests on the materials that Stratton Corporation was using to 'repair' the pond. In summary, he reported that in every test pit dug by Stratton Corporation the materials used by Stratton Corporation to construct the pond consisted of "roots, stumps, wood, rubbish, stones greater than 6", and other objectionable materials" in violation of the 2002 Stormwater Management Manual and that, absent any evidence to the contrary, it was reasonable to conclude that the entire pond bottom was comprised of 'objectionable materials' and would have to be removed and replaced with suitable materials. He observed and tested the materials that Stratton Corporation was using to fill the test holes and 'repair' the pond. He reported to the ANR, the District 2 Environmental Commission and Stratton Corporation that the materials that Stratton Corporation's contractor placed in the holes from which the unsuitable material was removed was not compacted as required by the 2002 Stormwater Management Manual and that the replacement material was placed over the unsuitable material. He reported that, contrary to the requirements of the 2002 Stormwater Management Manual, concrete was poured in direct contact with the aluminized storm drain and spillway pipes without any protection for the aluminized pipe, and welded areas were not coated to protect them. Both of these circumstances will lead to premature corrosion and failure of the aluminized pipe. He has reported that the 'repairs' that Stratton Corporation made to the pond bottom failed almost as soon as they were made and that the pond still leaks as it did before the repairs were attempted, except that there are now multiple holes.

Both the ANR and Stratton Corporation are well aware that the 'repairs' attempted by Stratton Corporation in the fall of 2013 have, like the previous efforts, failed. Virtually all of the regulated stormwater reaching the stormwater treatment pond is escaping untreated and unregulated through the holes in the pond bottom. The statement in the AOD that Stratton Corporation "successfully completed their scope of work with respect to defects that were already known" in the fall of 2013 is, to be kind, at variance with the facts.

The penalties imposed in the AOD substantially understate the significance of Stratton Corporation's permit violations and are not in accordance with the ANR Environmental Administrative Penalty Rules. These were not inadvertent, minor violations. Even before construction of the Treetop Project commenced, Stratton Corporation directed the engineers who designed the Treetop stormwater management systems and erosion control measures to make many of the changes that have now been found to be permit violations. The engineer advised Stratton Corporation that the proposed changes would compromise the integrity and function of the stormwater management systems and erosion control measures and, if the changes were to be made, Stratton Corporation would have to go through a permit amendment process. Stratton Corporation rejected this advice and made the changes not only without approval, but without engineering input and without regard for environmental impact. As previously discussed, Stratton Corporation knew that the stormwater management systems and erosion control measures were neither constructed in accordance with, nor performing in accordance with, the Treetop Act 250 or stormwater permits, or the 2002 Stormwater Management Manual. Yet Stratton Corporation consistently reported to the ANR on a regular basis that the Treetop stormwater management systems and erosion control measures were constructed in accordance with the Treetop Act 250 or stormwater permits and were performing as designed and approved. Not until the Association demanded that Stratton Corporation take the actions necessary to bring the Treetop stormwater management systems and erosion control measures into compliance with the Treetop Act 250 or stormwater permits did either Stratton Corporation or the ANR take any action to fix the systems.

IV. CONCLUSION

Although the District 2 Environmental Commission made some observations about Stratton Corporation's proposals for repair or reconstruction of the Treetop Stormwater Management System's and Erosion Control Measures, their decision makes it clear that it would be the actions that Stratton Corporation would take in the future and not the promises that it made in its proposals, that would determine whether it had complied with its Act 250 Permit, its Stormwater Permits or the 2002 Stormwater Management Manual. Given Stratton Corporation's past performance, its unwillingness to acknowledge that its deviations from its permits and the approved plans and its constant stonewalling of efforts to fix the problems that it created by failing to construct what it had agreed to construct gives the Association no confidence that Stratton Corporation will take the actions necessary to fix the Treetop Stormwater Management Systems and Erosion Control Measures without specific conditions either established by the ANR and Board or imposed by the Environmental Court as part of the assurance of discontinuance.

The Association has on numerous occasions urged the District 2 Environmental Commission to include appropriate conditions in the Act 250 Permit Amendment to insure Stratton Corporation's compliance; however, the District 2 Environmental Commission has declined to do so and the Association will be appealing the District Commission's May 19, 2014 Memorandum of Decision to the Environmental Court. The issues raised in these Comments and the issues that will be raised in the appeal of the District 2 Commission's Memorandum of Decision are substantially identical; the

Association will be urging the Environmental Court to insure that Stratton Corporation receives clear direction for fixing the problems that it created when it elected to violate it's permits. The Association is not seeking to have Stratton Corporation do anything that it did not agree to do when it first obtained its permits for the Treetop project.

The Association simply seeks to have Stratton Corporation do it right this time.

Respectfully submitted this 22nd day of May, 2014.

**TREETOP AT STRATTON OWNERS
ASSOCIATION, INC.**
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