

STATE OF VERMONT

SUPERIOR COURT  
ENVIRONMENTAL UNIT

ENVIRONMENTAL DIVISION  
Docket No. \_\_\_\_\_

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

**COMMENTS ON REVISED 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 revised Assurance of Discontinuance dated June 9, 2014 as posted on the Natural Resources Board ("NRB") web site (the "Revised AOD") pursuant to 10 V.S.A. §8020(c).

**I. BACKGROUND**

On May 22, 2014 the Association filed its Comments ("Original Comments") on the Proposed Assurance of Discontinuance (the "Original AOD") that was signed by Stratton Corporation on April 21, 2014, and posted on the Natural Resources Board ("NRB") *Proposed Administrative Orders (AO), Assurances of Discontinuance (AOD), and Citations* web page. The Association repeats and incorporates herein by reference its Original Comments, and supplements the Original Comments as follows.

**II. COMMENTS SPECIFIC TO THE REVISED AOD STANDING, PARTY STATUS AND PARTICIPATION IN ENFORCEMENT PROCEEDINGS**

1. The Treetop condominium unit owners are the owner of the Treetop stormwater management systems and erosion control measures and the land on which they are located with the exception of:
  - o The unauthorized and ineffective drainage ditch that was constructed by Stratton Corporation on Stratton Corporation property above Winterberry Heights in an unsuccessful effort to divert offsite stormwater from the cut slope and ledge cut above Winterberry Heights and Winterberry Heights Drive;
  - o The western-most end of the stormwater treatment pond including a portion of pond 2, the berm, and the spillway and stormwater discharge pipe;
  - o Drainageways located on Stratton Corporation property that currently allow untreated offsite and regulated stormwater to enter the Styles Brook watershed.
2. The Association, as the statutorily-designated representative for and agent of the Treetop unit owners in the operation, administration and protection of the Treetop common areas and facilities, including the stormwater management systems and erosion control measures, has a direct legal interest in, and is expected by the ANR to assume responsibility for, operation and maintenance of the Treetop stormwater management systems and erosion control measures once they have been properly repaired and reconstructed, and brought into compliance with the applicable stormwater management laws, regulations and permits.
3. Any failure by Stratton Corporation to repair and construct the Treetop stormwater management systems and erosion control measures in accordance with the applicable stormwater management laws, regulations, and permits, and good construction practices, will directly and adversely affect the legal and property interests of the Treetop unit owners and the Association.
4. Because of the Association's particularized and property interests in the Treetop stormwater management systems and erosion control measures, and because the Association will be required to take responsibility for those systems and

measures once they have been properly repaired and reconstructed, and brought into compliance with the applicable stormwater management laws, regulations, and permits, the Association is a necessary party to any review or approval of any plans, specifications or proposals by Stratton Corporation to repair or reconstruct the Treetop stormwater management systems and erosion control measures to cure Stratton Corporation's violations of that to come into compliance with Act 250 Permit #2W1142 and the Treetop stormwater permits.

5. Part III.A. of Stormwater General Permit 3-9010 Amended (May 2007) requires that:

The record owner and operator, if any, of the land on which the development occurred for which the previous stormwater discharge or temporary pollution permit was issued, shall apply for coverage under this general permit. The application shall list the name or names of all persons who have a substantial property interest, such as through title, lease, purchase or lease option, right-of-way or easement, in the land described above by reasons of ownership or control and shall describe the extent of their interests. The Secretary may find that the property interest of any such person is of such significance that the application cannot be accepted or the review cannot be completed without their participation as co-applicants.

If an application for coverage under this general permit is made in connection with a subdivision, including but not limited to commercial or residential subdivisions, condominiums and industrial parks, then the owners association, condominium association or similar legal entity shall apply as a co-permittee for coverage under this general permit.

6. On August 29, 2003, Stormwater Discharge Permit No. 1-1537 (the "2003 Stormwater Permit") was issued to Stratton Corporation and Treetop Development Company, LLC (an affiliated company of Stratton Corporation) as "permittee" by the Water Quality Division of the Vermont Agency of Natural Resources (the "ANR") for the construction, operation, management and maintenance of the stormwater management systems (the "2003 Stormwater Permit") for the Treetop project. At the time of the 2003 Stormwater Permit,

Stratton Corporation owned the property on which the Treetop project was to be developed. The 2003 Treetop Stormwater Permit expressly required the permittee, Stratton Corporation, to construct and operate the Treetop stormwater management systems in accordance with the Approved Plans and the 2003 Stormwater Permit.

7. The 2003 Stormwater Permit required, among other things, that:

10. Approved Project Design: This project shall be constructed and operated in accordance with the following site plans and details prepared by Bruno Associates, Inc:

Sheet OA-1 (T), dated 5/14/02, revised 6/4/02; OA-4, dated 5/14/02; ECP-1, dated 5/14/02, revised 6/4/02; ECP-2, dated 5/14/02, revised 6/4/02; ECP-3, dated 5/14/02, revised 6/4/02; ECD-1, dated 5/15/02; D-1, dated 6/3/02; D-2, dated 6/3/02; D-3, dated 6/3/02; D-4, dated 6/3/02; and D-10, dated 6/3/02 [collectively, the "Approved Plans"].

By reference, the above noted plans are made a part of this permit.

11. Maintenance and Maintenance Reporting Requirements:

- a. The basins, swales, and related stormwater collection, treatment and control system shall be maintained in good operating condition at all times and shall be inspected biannually and cleaned as necessary to maintain design specifications. The inspections shall include one in the spring after snowmelt, and one in the fall prior to snow fall.
- b. Any sediment removed from the swales or basins shall be disposed of properly in accordance with state and federal statutes and regulations.
- c. By September 30 of each year the permittee shall submit a written report to the Department of Environmental Conservation, Water Quality Division, Building 10 North, 103 South Main Street, Waterbury, Vermont 05671-0408. This report shall include, at a minimum:
  - i. the dates and details of any cleaning and maintenance operations carried out in the preceding year;

- ii. a narrative summarizing the results of any inspections conducted in the preceding year and highlighting any stormwater related problems encountered, and all remedial steps taken in response;
  - d. Should any erosional problems occur, the permittee is required to immediately correct any such problems.
  - e. Any basins, swales, or related stormwater devices used during construction for erosion control shall be inspected and cleaned to design specifications immediately after construction has been completed.
- 8. Uncontroverted evidence introduced in the District Commission hearing on the Amendment Application established that holes appeared in the bottom of the stormwater treatment pond as early as the late summer of 2004 and that this condition was brought to the attention of Stratton Corporation and ANR at that time. The evidence will show that the stormwater treatment pond had failed soon after it was built and that from 2004 on, the pond has never maintained a water level sufficient to cause the untreated regulated stormwater entering the pond to be treated and then be released in a controlled fashion through the perforated standpipe spillways that Bruno Associates had designed to meet the requirements of the 2002 Stormwater Management Manual. Instead, since the pond was built, all untreated regulated stormwater coming off the Treetop property has been allowed to escape through the hole or holes and enter the Styles Brook watershed without treatment and without regulation as to rate of release, in violation of Vermont's Water Pollution Control statute (10 V.S.A. Chapter 47, Subchapter 01: Water Pollution Control), Stormwater General Permit 3-9010 Amended (May 2007), Stormwater Permit (Authorization to Discharge) 5519-9010, the 2002 Agency of Natural Resources Stormwater Management Manual, as amended, and Land Use Permit #2W1142 (collectively, the "applicable stormwater management laws, regulations, and permits"). Other than three unsuccessful attempts to fix the hole in the pond bottom in late 2004,

this known failure of the stormwater treatment pond was not addressed by either Stratton Corporation or the ANR until 2010, when the Association reported the problems to the ANR and the District 2 Environmental Commission and insisted that Stratton Corporation, the ANR and the District Commission address the failure of the stormwater treatment pond.

9. The 2003 Stormwater Permit provided that it would expire by its terms on August 28, 2007. Stormwater Discharge Permit #1-1537, the original stormwater permit for the Treetop Project, expired on August 28, 2007.
10. Stratton Corporation filed a Notice of Intent (the "2007 NOI") for coverage under General Permit 3-9010 Amended (May 2007) to discharge regulated stormwater, to replace the 2003 Stormwater Permit, on August 24, 2007. The Treetop condominium declaration had been filed in the Stratton land records and the Treetop at Stratton Condominium Association, Inc. had been formed in 2004, three years prior to filing of the 2007 NOI. By the time the 2007 NOI was filed, all of the Treetop condominium units had been sold by subcontractors to third parties, and control of the Association had been transferred to the Treetop unit owners. At the time the 2007 NOI was filed, the Association had already filed suit against Stratton Corporation for construction defects in the Treetop Project and Stratton Corporation. Both Stratton Corporation and the ANR knew at the time the 2007 NOI was filed that the condominium association had been formed, yet no attempt was made by either Stratton Corporation or the ANR to notify the Association of the filing of the 2007 NOI or to obtain the Association's participation as co-applicant, as required by Part III.A. of Stormwater General Permit 3-9010 Amended (May 2007).
11. General Permit 3-9010 Amended (May 2007) provides, in part, that in order to qualify for coverage under the General Permit, the "Previous Permittee shall comply with the requirements set forth in the most recent previously issued stormwater discharge permit or temporary pollution control permit." In this case,

a condition precedent for coverage under General Permit 3-9010 Amended (May 2007) was Stratton Corporation's compliance with the 2003 Stormwater Permit. The evidence in the record of the Amendment Application establishes that Stratton Corporation and the ANR knew or should have known that the Treetop stormwater system was not in compliance with the 2003 Stormwater Permit at the time it filed its NOI for the 2007 Stormwater Permit. Had the ANR required Stratton Corporation to obtain the Association's signature as co-applicant, the Association would have made sure that Stratton Corporation's violations would have been a matter of record in the 2007 NOI.

12. Part V(C), Annual Inspection Report of General Permit 3-9010 Amended (May 2007) and the Annual Inspection Report condition of the 2007 Stormwater Permit, provide that:

The stormwater collection, treatment and control system authorized herein shall be properly operated and maintained. An inspection shall be conducted between the conclusion of spring snow melt and June 15th of each year. The inspection shall evaluate the operation and maintenance and condition of the stormwater collection, treatment and control system. The permittee shall prepare an annual inspection report on a form available from the Department. The permittee shall submit an inspection report to the Department by July 15th of each year or by July 30th if performed by a utility or municipality pursuant to a duly adopted stormwater management ordinance.

13. Part V(D), Designer's Re-Statement of Compliance of the 2007 Stormwater Permit, provides that:

In accordance with a schedule provided in the authorization to discharge, a permittee shall submit to the Secretary a written statement signed by a designer that the stormwater collection, treatment and control system authorized by this general permit is properly operating and maintained. Failure to submit a designer's re-statement of compliance shall constitute a violation of this general permit and may result in the revocation of an authorization to discharge under this general permit.

14. The Restatement of Compliance condition of the 2007 Stormwater Permit provides that:

Every 3 years, the permittee shall submit to the Department a written statement signed by a designer that the stormwater collection, treatment and control system authorized herein is properly operating and maintained. The first re-statement of compliance is due January 20, 2012. Failure to submit a designer's restatement of compliance shall constitute a violation of General Permit 3-9010 Amended (May 2007) and may result in the revocation of this authorization to discharge.

15. In response to a formal document request from the Association, the ANR provided inspection reports for some, but not all, of the years from 2005 through April of 2013. Of the inspection reports received from the ANR, all of the reports through the report filed on July 16, 2009 reported that, with the exception of some specific maintenance items (none of which involved the failed stormwater treatment pond or the other material defects, deficiencies and discrepancies in the Treetop stormwater management systems and erosion control measures identified by the Association), "the stormwater system is being maintained and operated in general conformance with the approved plans and the [discharge permit referenced in the report], and that the stormwater system is in good operating condition."
16. Notwithstanding that Stratton Corporation and the ANR were aware of the failure of the stormwater treatment pond from 2004 on, and were aware that there were material defects, deficiencies and discrepancies between the Treetop stormwater management systems and erosion control measures shown on the Approved Plans, Stratton Corporation routinely submitted, and the ANR routinely accepted, the annual reports required by the 2003 Stormwater Permit and later the 2007 Stormwater Permit. Stratton Corporation knew, at the time each inspection report was filed with the ANR through July of 2009, and the ANR knew or, with reasonable diligence, should have known, that the Treetop stormwater system was not being maintained and operated in general conformance with the approved plans and either the 2003 Stormwater Permit, the 2007 Stormwater



Permit or General Permit 3-9010 Amended (May 2007), and that the Treetop stormwater system was not in good operating condition.

17. Not until 2010, after the Association had noisily publicized and protested the defects, deficiencies and discrepancies that it had discovered in its engineer's investigation of the Treetop stormwater management systems and erosion control measures and demanded action from the ANR and the District Commission, did Stratton Corporation finally acknowledge, in a July 15, 2010, letter from VHB to the ANR, that:

5. Infiltration of ponded water appears to be occurring in the vicinity of CB-109 within the detention basin, with inflow to the drainage structure observed near the base of the structure adjacent to the outlet pipe. Further investigation and repair, potentially through the excavation of some pond bottom material in the area around this structure and replacement with compacted clay, is necessary.

Aside from these maintenance activities, the stormwater management system is in good condition, with ongoing routine maintenance and inspections, and is currently functioning as designed.

The escape of untreated stormwater from the stormwater treatment pond did not merely "appear" to be occurring; as Stratton Corporation and the ANR knew full well, it had been occurring for almost six years with no action by either Stratton Corporation or the ANR. Clearly, addressing the problems with the failed stormwater treatment pond were not "maintenance activities"; the stormwater treatment pond had failed (or, in the finding of the District 2 Environmental Commission, the pond had "substantially deteriorated") because Stratton Corporation had built the pond out of unsuitable materials in violation of the applicable stormwater management and erosion control laws and regulations, permits, and good construction practices.

18. Even before Stratton Corporation filed its application (the "Amendment Application") to amend Land Use Permit #2W1142 (the "Treetop Act 250 permit")

on March 16, 2012, the Association has been actively engaged as a necessary party to the Act 250 proceeding, and has submitted extensive and detailed memoranda, engineering analysis, prefiled testimony, findings of fact and memoranda of law to both the District 2 Environmental Commission and the ANR, documenting Stratton Corporation's failure to comply with applicable stormwater management and erosion control laws and regulations, permits, and good construction practices, and emphasizing its standing not only as the condominium association but as the representative of and the agent for the Treetop unit owners.

19. From its first communications with the ANR concerning the Treetop project, the Association has put the ANR on notice that it is the condominium association for and represents the interests of the Treetop unit owners as owners of the Treetop common areas and facilities including the Treetop stormwater management systems and erosion control measures. The Association first requested and, when its requests were ignored, demanded that it be a necessary party to any actions by the ANR or communications between Stratton Corporation and the ANR regarding Stratton Corporation's efforts to cure its violations of the applicable stormwater management and erosion control laws and regulations, and permits. Except as required for its filings with the District 2 Environmental Commission in connection with the Amendment Application, the ANR has largely ignored the Association's requests and demands except when compelled to do so by a formal FOIA document request.
  
20. On April 2, 2012, Matthew Probasco, Stormwater District Manager for ANR, stated in an email to Stratton Corporation:

Thank you for submitting the revised plans for Stratton Treetop regarding the authorization to discharge under General Permit 3-9010 (NOI #5519-9010). Upon review and in follow-up to our conservation, it has been determined that a formal permit amendment is not required. The revised plans will be inserted as part of the record on file pertaining to this authorization.

The Association had no notice that “revised plans for Stratton Treetop regarding the authorization to discharge under General Permit 3-9010 (NOI #5519-9010)” had been filed with the ANR, did not sign as co-applicant on or have any notice of any application by Stratton Corporation for a determination by the ANR of the necessity of a permit amendment, and had no notice that ANR had made the decision reported in Mr. Probasco's email until months later when Stratton Corporation pulled out the email and attempted (unsuccessfully) to argue that the email was *res judicata* as to the Association's right to challenge the 'decision' that no permit amendment was required. It is the Association's belief that this had all been done *sub rosa* between Stratton Corporation and the ANR to avoid giving the Association notice of, or the opportunity to challenge either Stratton Corporation's claims or the ANR's decisions regarding the defects, deficiencies and discrepancies in the Treetop stormwater management systems and erosion control measures.

21. During the course of the District 2 Environmental Commission hearings on the Amendment Application, Stratton Corporation's engineers submitted memoranda, plans and specifications that, on their face, were non-compliant with the previously-issued stormwater permits, 2002 Stormwater Management Manual, and good engineering practices. The ANR routinely accepted or approved these non-compliant memoranda, plans and specifications without comment until they were brought to the attention of the ANR and the District Commission by the Association's engineer.
22. Finally, in May of 2013, in the face of substantial evidence of non-compliance provided to the District 2 Environmental Commission and the ANR by the Association's engineer, the ANR was forced to acknowledge that the defects, deficiencies and discrepancies in the Treetop stormwater management systems and erosion control measures were more than mere “maintenance items” and that this was not simply a ‘disagreement between engineers.’ In its May 7, 2013,

Memorandum to the District 2 Environmental Commission, the ANR finally conceded that the Stratton Corporation had not built the Treetop stormwater management systems and erosion control measures in compliance with its permits:

ANR wants to stress that it is a very concerned about Stratton's failure to build its stormwater system in compliance with its permit. Since this problem has come to light, ANR has worked to ensure that the problems with the stormwater system are fixed. ANR would be concerned with the failure to comply with any permit, but this situation raises particular concerns because the stormwater from this project discharges to Styles Brook, which is impaired and subject to a WQRP. At this point, the best thing for water quality protection is to fix the stormwater system as quickly as possible.

23. In Condition 7 of the Act 250 Permit Amendment, the District 2 Environmental Commission required Stratton Corporation to "provide weekly reports from a professional engineer during the periods site work is being conducted. The report shall be in affidavit form and shall address compliance with the revised plans." During the approximately 11 week period that sitework was being conducted by Stratton Corporation's contractor in 2013 and the approximately 16 week period that sitework was being conducted by Stratton Corporation's contractor in 2013, Stratton Corporation's engineers, VHB, submitted only one affidavit. This affidavit was provided by Stratton Corporation to the ANR and to the District 2 Environmental Commission. It was not provided to the Association until after it sent a formal document request to the ANR on June 6, 2014. The 2013 Affidavit that Stratton Corporation sent to the District 2 Environmental Commission was not served on the Association or the NRB and therefore constituted *ex parte* communications with the District 2 Environmental Commission.
24. It is the Association's understanding that, on April 24, 2014, Stratton Corporation filed a Notice of Intent for Stormwater Discharge (the "2014 NOI") and, on May 14, 2014, the ANR issued Notice of Authorization, 55-9-9020.1 (the "2014 NOA"). As was the case with the 2007 NOI, both Stratton Corporation and the ANR knew that the Association was a necessary co-applicant but neither sought the

Association's participation as co-applicant or informed the Association that the 2014 NOI had been filed or the that 2014 NOA had been issued.

25. The Transferability condition of 2007 Stormwater Permit provides that:

This authorization to discharge is not transferable to any person except in compliance with Part VI.D. of General Permit 3-9010 Amended (May 2007). A copy of General Permit 3-9010 Amended (May 2007) is available from the Department via the internet at [http://www.vtwaterquality.org/stormwater/htm/sw\\_3-9010.htm](http://www.vtwaterquality.org/stormwater/htm/sw_3-9010.htm).

26. Part VI(D), Transfer of Authority to Discharge of General Permit 3-9010 Amended (May 2007), provides as follows:

Provided all applicable fees under 3 V.S.A. §2822 have been paid, a permittee and/or co-permittee may transfer to another person an authorization to discharge under this general permit by submitting a notice of transfer to the Secretary. The notice shall be submitted prior to the proposed date of any transfer and shall include the following:

1. Notice of Intent number;
2. Name and address of the present permittee;
3. Name and address of the prospective permittee;
4. Proposed date of transfer;
5. A copy of the most recent inspection report as required by Part IV(C) of this general permit;
6. A statement that any deficiencies noted in any inspection report(s) have been corrected and;
7. A statement signed by the prospective permittee, stating that:
  - a. the conditions of the facility operation that contribute to, or affect, the stormwater discharge will not be materially different under the new ownership;
  - b. the prospective permittee has read and is familiar with the terms of this general permit and agrees to comply with all the terms and conditions of this general permit; and

c. the prospective permittee has adequate funding or other means to effect compliance with all the terms of this general permit.

27. The Association has put Stratton Corporation, the ANR, and the District 2 Environmental Commission on notice that it will not sign the certification required under subsection 7 of the Transfer of Authority condition of General Permit 3-9010 Amended (May 2007) unless and until it is reasonably satisfied that the Treetop stormwater management systems and erosion control measures have been properly constructed and repaired in accordance with applicable stormwater management and erosion control laws and regulations, permits, and good construction practices.
28. Finding 27 of the Original AOD states that “[t]he Natural Resources Board developed this Assurance in consultation with the Agency of Natural Resources’ Stormwater Program staff.” It is the Association’s position that, in its consultation with the NRB to develop the AOD and the Revised AOD, the ANR has either negligently, or knowingly and intentionally, withheld information from the NRB about the nature, extent and impacts of Stratton Corporation’s failure to construct, operate and maintain the Treetop stormwater management systems and erosion control measures in accordance with the requirements of the applicable stormwater management laws, regulations and permits.
29. The Association believes that the ANR, by its conduct in this matter, has been more vigorous in its protection of Stratton Corporation’s interests and less than vigorous and diligent in protecting the interests of the public, including the Treetop unit owners. The Association is concerned that, unless its position as an essential party to these proceedings is formally recognized by the NRB or, if necessary, by the Environmental Division, Stratton Corporation will continue to misrepresent the condition of and defects, deficiencies and discrepancies in the Treetop stormwater management systems and erosion control measures and make inadequate and, in many cases, non-compliant proposals for repair and reconstruction of the Treetop stormwater management systems and erosion

control measures, and the ANR will continue to rubber stamp Stratton Corporation's proposals without thorough review and without requiring compliance with applicable stormwater management and erosion control laws and regulations, permits, and good construction practices.

30. The Association and its members are aggrieved persons, as defined in 10 V.S.A. § 8020. The Treetop stormwater management systems and erosion control measures constructed and installed by Stratton Corporations violate the Treetop stormwater and Act 250 permits. The improper construction of the Treetop stormwater management systems and erosion control measures by Stratton Corporation have damaged and continue to damage the Treetop project and the Treetop units that are owned by the Treetop unit owners. The improper construction of the Treetop stormwater management systems and erosion control measures by Stratton Corporation have resulted in a reduction in the capacity of the land to hold water, resulting in dangerous and unhealthy conditions for the Treetop unit owners and their guests and invitees. The Association is expected to assume responsibility for the Treetop stormwater management systems and erosion control measures. As currently constructed and maintained by Stratton Corporation, the Treetop stormwater management systems and erosion control measures are not functioning as designed, intended and permitted, and have prematurely failed and will continue to prematurely fail, at the liability and expense of the Association, unless Stratton Corporation is required to reconstruct and repair the Treetop stormwater management systems and erosion control measures in accordance with applicable stormwater management and erosion control laws and regulations, permits, and good construction practices. The Association is the legal representative of the Treetop unit owners and neither the claims asserted nor the relief requested by Association requires participation of the individual Treetop unit owners.

31. For the reasons stated above, the Association respectfully requests that the NRB include in the Agreement that:

- The Association is an aggrieved person and a necessary party to the AOD and, if necessary, in any enforcement action in the Environmental Division;
- As a party to these proceedings, the Association shall be served with all notices, memoranda, pleadings or other communications between and among Stratton Corporation, the ANR, and the NRB;
- As a party to these proceedings, the Association shall have the right, to file with the NRB such evidence, motions or memoranda as may be relevant to the proceedings, and to reply to such evidence, motions or memoranda as may be filed by any other party;
- Copies of all evidence, motions or memoranda previously filed by any party, including the ANR, with the NRB shall be provided to the Association forthwith.

### **III. STATEMENT OF FACTS AND DESCRIPTION OF VIOLATIONS**

It is presumed that the Statement of Facts and Description of Violations is intended to address and initiate the correction and remedying of all violations of the applicable stormwater management laws, regulations and permits caused by Stratton Corporation's failure to construct and maintain the Treetop stormwater management systems and erosion control measures in accordance with the applicable stormwater management laws, regulations and permits. Assuming that is the case, the Statement of Facts and Description of Violations that appears in the Revised AOD fails to identify many of the defects, deficiencies and discrepancies in the Treetop stormwater management systems and erosion control measures that constitute violations of the applicable stormwater management laws, regulations and permits that need to be corrected by subcontractors. Attached to these Comments as Exhibit A are additional Statements of Facts and Descriptions of Violations that the Association maintains should be included in the Revised AOD and that should be addressed in the Agreement section of the Revised AOD or, if necessary, in an enforcement order issued by the Environmental Division.



In addition to the proposed Supplemental Statement of Facts and Description of Violations, the Association has the following comments of the Statement of Facts and Description of Violations as drafted:

1. As to Statement of Fact 13, the slope above Winterberry Heights and the drainage ditches above Winterberry Heights have been and continue to be subject to erosion and slope failure. Stratton Corporation has submitted no geotechnical analysis of the causes of the slope failure and has offered no evidence of its site-specific engineering analysis, design, or remediation plans to prove that, upon completion of the remediation it will have stabilized the drainage ditch and the cut slope so that failure and erosion will not continue.
  
2. As to Statement of Fact 14, the intermittent stream and wetland that Stratton Corporation expressly agreed to preserve in its application for Act 250 Permit #2W1142 have been destroyed and replaced by an un-engineered stone lined ditch that was not shown on the Approved Plans, was not designed or constructed properly, has failed and continued to erode, allowing untreated, silt-laden offsite stormwater to enter the Styles Brook watershed.
  
3. As to Statement of Fact 19, the District 2 Environmental Commission did not decide that Stratton Corporation had proved that its plans for remediation of the Treetop stormwater management systems and erosion control measures would prevent water pollution or reduction in the capacity of land to hold water. However, the Commission's findings under Criterion 1(B) of Act 250 Permit #2W1142-D states only that:

The District Environmental Commission is very concerned with Stratton's failure to build its stormwater system in compliance with its prior permits, particularly in light of the status of Styles Brook, which is on the Vermont 303(d) list of impaired waters as impaired for sediment. However, the present proposal to fix the stormwater system has been approved by ANR and the Commission greatly appreciates the expertise of the Agency and its opinion that the revised design meets applicable regulations and conforms to Criterion 1(B). The Stormwater Program has concluded that the design changes meet the applicable

requirements set forth in General Permit 3-9010 and the modifications will support efforts to protect Styles Brook and downstream waters.

4. In fact, a review of the ANR's submissions on which the District 2 Environmental Commission relied in making this finding were not concerned with whether Treetop stormwater management systems and erosion control measures were in compliance with General Permit 3-9010 and the Vermont Erosion Control Manual but only with its 'finding' that, however the regulated stormwater got to the "bottom of the hill," as long as it entered the stormwater treatment pond, as long as the stormwater treatment pond was reconstructed in accordance with the Approved Plans and with General Permit 3-9010, the treated stormwater would meet water quality standards. In its responses to the Association and its submissions to the Commission, the ANR expressly disavowed any concern about how the regulated stormwater got to the stormwater treatment pond, whether the means of conveyance of the stormwater were constructed in accordance with the approved plans or were properly constructed, or how much erosion the stormwater caused, as long as it "got to the bottom of the hill" and into the pond.

5. As to Statement of Fact 20, the Commission did not conclude that the plans previously provided by Stratton Corporation satisfied Stratton Corporation's burden of proof under Criterion 4. Instead, the Commission directed Stratton Corporation to study the problems, do what it thought necessary to fix the problems, then come back and tell the Commission what it had done. In its findings under Criterion 4, the Commission found that:

The amendment request is a retrofit – Stratton has hired professionals to design the retrofit – we are assuming the plan will be successful. We, however, will be adding conditions to the permit requiring that Stratton demonstrate that the rock fall problem is eliminated. Similarly, the problems with excessive water and icy conditions on the roads and driveways must be solved. The Commission will retain jurisdiction over this criterion and will, if necessary, impose additional conditions to ensure compliance with Criterion 4.

6. In Condition 8 of Act 250 Permit #2W1142-D, it states that:

The Commission will require yearly reports from Stratton as to the success of the remediation in the form of a signed affidavit from a Vermont registered professional engineer (stormwater, erosion and capacity of the land to hold water) and a landscape professional (as to the success of the revegetation effort). The report from the professional engineer shall outline the condition of the stormwater system including whether there has been an erosion, falling soil or rocks, slumping, or icy conditions on drives and walkways caused by stormwater and/or unstable slopes. The report from the landscape professional shall outline the status of the revegetation and document any needed replacements of damaged plant material. The Commission will monitor implementation of the remediation effort for the next five years.

7. A permit condition that directs a permittee that has violated its permit to do the remediation work, "see how it goes," and then report back to the Commission to let the Commission know whether the "fix" worked or not, is not tantamount to reviewing and approving (and giving the other parties an opportunity to review and question) proposed remediation plans and specifications to determine whether the permittee has met its burden of proof under Criteria 1(B) and 4. The AOD should require Stratton Corporation to do a proper engineering analysis and submit detailed plans and specification that clearly demonstrate that its remediation plan will fix the problems that it created by violating its permits before its remediation plan is approved.

#### **IV. AGREEMENT**

In addition to the proposed Supplemental Statement of Facts and Description of Violations, the Association has the following comments on the Agreement portion of the Revised AOD as currently drafted:

- A. Land Use Permit #2W1142 and #2W1142-D include the following permit condition:

The project shall be completed, operated and maintained in accordance with: (a) the conditions of this permit, (b) Findings of Fact and Conclusions of Law 2W1142-D, and (c) the permit application,

plans, and exhibits on file with the District Environmental Commission and other material representations.

- B. One of the difficulties in obtaining Stratton Corporation's compliance with the Treetop Act 250 permits is the fact that there are so many plans, revisions of plans, permits and revisions of permits, memoranda, and other materials comprising "the permit application, plans, and exhibits on file with the District Environmental Commission and other material representations" that it is difficult, if not impossible, to identify which plans are the currently applicable plans or to hold Stratton Corporation to conformance with a particular set of plans. For example, the original Bruno Associates Approved Plans are "on file with the District Environmental Commission" and, in the Association's opinion, are the "plans on file with the Commission" to which Stratton Corporation should be required to comply. Paragraphs A and B of the Agreement should include a list of the plans, specifications, exhibits, permit conditions, or regulatory provisions that are controlling for purposes of the AOD, and, prior to finalizing the AOD, the parties should be required to submit to the NRB, for review and comment by the other parties, a detailed list of the specific plans, specification and exhibits that the parties contend are the currently effective plans, specification, exhibits and representation that are applicable to Stratton Corporation's compliance with the AOD.
- C. In the Revised AOD, the NRB stated that "The Respondents shall concurrently submit a copy of the plan to the Treetop at Stratton Condominium Association, Inc. for informational purposes." It is not clear what the NRB intended by "for information purposes," but, as discussed previously in these Comments, the Association, as the legally-designated agent for the Treetop unit owners, is entitled to as full participation in the review and critique of any plans or specification submitted by Stratton Corporation and, if necessary, a due process hearing before the Environmental Division on the sufficiency of such plan for compliance with the applicable stormwater management laws, regulations, and permits and good construction practices.

D. In the Revised AOD the NRB states that:

The plan need not include provisions to convert open-system conveyances into closed-system conveyances, because the open-system conveyances comply with the Vermont Stormwater Management Manual and ANR finds replacement of the as-built system would cause greater environmental impact than keeping the status quo and would not ultimately result in a greater environmental benefit.

This statement is not only factually incorrect, it is contrary to the positions previously and consistently taken by both the Environmental Board and the ANR. In the ANR's May 20, 2002, prehearing comments that Elizabeth Lord filed with the District Commission prior to the issuance of Land Use Permit #2W1142, Kim Greenwood and Allen Quackenbush, speaking for the ANR Water Quality Division Staff, placed great emphasis on the predominant importance of erosion control in the design of the Treetop stormwater management systems and erosion control measures:

The Treetop development is similar in nature to that of Solstice. Both projects are for dense residential development and are located in very similar topography and terrain and have similar pre-development conditions. However unlike Solstice, Treetop is to be located in the Styles Brook watershed, a water listed as impaired by sediment due to land development and hydrologic modification. Given the problems experienced at Solstice and the likelihood of a similar experience at Treetop, the Department has reason to believe that the sediment targets in the WQRP will not be met in Styles Brook unless the project is planned in a manner that emphasizes comprehensive erosion and sediment control, careful sequencing, and stringent phasing.

A fundamental concept in erosion and sediment control is the emphasis of erosion control measures over sediment control measures. This emphasis is based on the fact that sediment control measures are at best only partially effective at treating sediment (for example, silt fence is not effective for reducing turbidity). Erosion control measures, such as phasing, vegetation, mulching, and minimizing disturbance are far more effective at preventing sediment transport than are sediment control measures. Sediment control measures, such as silt

fence, sediment basins, and stabilized construction entrances simply function to prevent transport of sediment that has escaped erosion control devices. The less erosion that is occurring, the less reliance that is necessary on the sediment control measures.

Based on the information presented above, the development at Treetop should rely more heavily on erosion than on sediment control. Sediment control appears to be the predominant measure at the Solstice development and, based on the data presented above, was not effective at minimizing sediment transport.

- E. The closed stormwater management systems designed by Bruno Associates and approved in both the 2003 Stormwater Permit and Land Use Permit #2W1142 were designed specifically to minimize overland flows and, as rapidly as possible, channel and direct both the Treetop offsite and regulated stormwater into the underground storm drain system that was designed by Bruno Associates. The closed system would have worked. The unengineered, improperly constructed system that Stratton Corporation built, without any approval from either ANR or the District 2 Environmental Commission, does not work. It has caused, and continues to cause, significant erosion and failure to many of the components of the Treetop stormwater management systems and erosion control measures as built, as evidenced by the almost immediate failure of the Treetop stormwater pond. In its findings in Land Use Permit #2W1142-d, the District 2 Environmental Commission states that “[w]hile Stratton’s plan is not the only way to meet [the priority of erosion prevention over sediment control], it is the plan on the table.” This is not true. The original Bruno Associates plan for a closed system was approved by both the ANR and the District 2 Environmental Commission and has been ‘on the table’ since 2004. While it may be so that, in some circumstances, the ‘open system’ of overland flow that Stratton Corporation chose to build in lieu of the approved closed system may “comply with the Vermont Stormwater Management Manual,” its construction here does not meet the objectives of the ANR as expressed in the May 20, 2002, prehearing comments. That ANR

"found" the "replacement of the as-built system would cause greater environmental impact than keeping the status quo and would not ultimately result in a greater environmental benefit" is not surprising. The only party with whom ANR consulted about the efficacy of constructing the approved closed system was Stratton Corporation and its engineers. It is the Association's understanding that the reason Stratton Corporation built the poorly designed, poorly constructed and unapproved system that the NRB is currently trying to correct rather than the approved closed system was to save money. The Association maintains that the closed system can still be constructed, albeit at a cost to Stratton Corporation that may exceed what it would have cost them to build the approved system in the first place. As to the "environmental impact," one need only look at the lack of proper design and construction, and the resulting failures, of the Treetop stormwater management systems and erosion control measures as built to appreciate the past, current and future environmental damages that have been done, and will continue to be done, by the systems as built. The Association is prepared to present expert engineering and construction testimony to prove that the approved closed system can be constructed and should be constructed not only to protect the environment but to protect the interests of the Treetop unit owners who had a right to expect a properly constructed stormwater management system. The Association respectfully requests the NRB not to foreclose that opportunity by including in the Revised AOD any agreement that saddles the Treetop unit owners and the people of Vermont with the unworkable and unauthorized system that Stratton Corporation built just because "it is there."

- F. Because the defects, deficiencies and discrepancies in the Treetop stormwater management systems and erosion control measures are both violations of Act 250 Permit #2W1142 and the Treetop stormwater permits, any approval of the remediation actions that Stratton Corporation is required to propose in accordance with this AOD must not only be approved by the ANR but must be determined by the District 2 Environmental Commission to satisfy the relevant Act 250 criteria. At best, any approval by the ANR would create a rebuttable

presumption in the Act 250 proceedings, subject to review, comment and challenge by the Association. Accordingly, no construction of the remedial actions should be commenced by Stratton Corporation until its proposals have received both ANR and Act 250 approval.

- G. The AOD should require Stratton Corporation to have its project engineer on site during all construction activities, not just the reconstruction of the stormwater treatment pond, and the engineer's weekly certification should make specific reference to the approved construction plans and specifications and applicable sections of the 2002 Stormwater Manual. Stratton Corporation's past history in intentional non-compliance with its permits, and its recent failures to properly repair the stormwater treatment pond and other repairs to the Treetop stormwater management systems and erosion control measures that have been documented by the Association's engineers to the District 2 Environmental Commission, require a significantly greater degree of diligence, and significantly greater accountability, on the part of Stratton Corporation than Stratton Corporation or the ANR have demonstrated in the past.

#### **IV. CONCLUSION**

As stated in the Association's initial Comments, 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 assurances and commitments that it made in the plans and specification to be approved by the DEC and the District 2 Environmental Commission 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 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



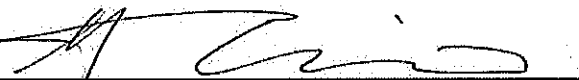
will take the actions necessary to fix the Treetop Stormwater Management Systems and Erosion Control Measures without specific conditions either established by the ANR and Board or imposed by the Environmental Court as part of the Assurance of Discontinuance.

Respectfully submitted this 11th day of July, 2014.

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

By KENLAN, SCHWIEBERT, FACEY & GOSS, P.C.

By: \_\_\_\_\_



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**Exhibit A to Comments on  
Revised Proposed AOD**

**SUPPLEMENTAL STATEMENT OF FACTS  
AND DESCRIPTION OF VIOLATIONS**

The following Supplement Statements of Facts and Descriptions of Violations are based on and can be established at trial by evidence and exhibits in the record of the District 2 Environmental Commission in the matter of Act 250 Permit #2W1142-D. In order for the AOD to address all of the material defects, deficiencies and discrepancies between the Treetop stormwater management systems and erosion control systems as built and the Treetop stormwater management systems and erosion control systems as approved in Act 250 Permit #2W1142 and the Treetop stormwater permits, and to correct all of the defects, deficiencies and discrepancies in the Treetop stormwater management systems and erosion control systems, it is necessary for the AOD to specifically address the following:

1. In its May 20, 2002 Prehearing Comments in connection with Act 250 Permit # 2W1142, the ANR emphasized the importance of erosion control to maintain water quality in Styles Brook:

A fundamental concept in erosion and sediment control is the emphasis of erosion control measures over sediment control measures. This emphasis is based on the fact that sediment control measures are at best only partially effective at treating sediment....

2. Stratton Corporation's application for Stormwater Discharge Permit #1-1357 (the "Stormwater Permit Application") was filed by Stratton Corporation as Exhibit 17 in its application for Act 250 Permit # 2W1142.

3. In the Stormwater Permit Application, Stratton Corporation's engineers, Bruno Associates, represented that:

Stormwater from the majority of the development will be collected by a closed drainage system and conveyed to two inline detention ponds for

treatment and controlled discharge.

\*\*\*\*

The majority of stormwater created by the development will be collected by a closed drainage system and conveyed to a detention pond, where it will receive treatment and detention prior to its discharge towards Styles Brook.

\*\*\*\*

The purpose of the onsite closed drainage system is to collect stormwater runoff originating from the proposed development and to convey that stormwater to the detention pond where it will receive treatment. A closed drainage system was chosen for several reasons. First, the elimination of roadside ditches reduces roadway cut and subsequent slope disturbance. Next, the piped system allows water to be conveyed in a conduit, preventing erosion that would otherwise occur in the steep ditches (>12%). Also maintaining a continuous pipe eliminates outlet scour that would occur at each culvert outlet and deep excavations that would be required for culvert inlets.

4. Finding of Fact 8 of Act 250 Permit # 2W1142 states, in part, that:
  - a. Given the problems at Solstice and the possibility of a similar experience at Treetop, the sediment targets in the [Water Quality Remediation Plan] may not be achieved in Styles Brook unless the project employs a comprehensive erosion control approach.
  
5. Finding of Fact 12 of Act 250 Permit # 2W1142 states that:
  - a. The specific project design elements that adhere to [the criteria for erosion control, storm water management and maintenance of water quality in Styles Brook] are the basis for the stormwater design and Stormwater Discharge Permit #1-1537, issued by ANR in August 2002.
  
6. Finding of Fact 19 of Act 250 Permit # 2W1142 states that:

Stormwater runoff from the site will be treated and conveyed using a combination of measures as included on the project plans and as approved in the Agency's Stormwater Discharge Permit.
  
7. Finding of Fact 23 of Act 250 Permit # 2W1142 states that:

The project has been designed to minimize impact on the four Class 3 wetlands on the site. Specifically, the total area of the four Class 3 wetlands on the project site is 3,980 square feet, or 0.092 acres, of which the proposed total project impact is 955 square feet, or 0.021 acre.

8. Finding of Fact 27 of Act 250 Permit # 2W1142 states that:

27. Design and layout of the Treetop project has avoided sensitive areas wherever possible, including the avoidance of stream, wetland, and buffer impacts, avoidance of steep slopes, and maintaining forest cover to the maximum feasible extent.
9. Finding of Fact 28 of Act 250 Permit # 2W1142 states that:

The overall approach used in developing the phasing plans for the project has been to minimize soil exposure, such that the prevention of erosion is the primary focus, rather than the collection of sediment following the occurrence of erosion.
10. Finding of Fact 30 of Act 250 Permit # 2W1142 states that:

Detailed site specific phasing and erosion control plans have been prepared which spell out the sequence and timing of all earthwork to be completed for project construction to completely minimize the areas and time periods during which soil is exposed to potential erosion, and the protective measures that will be in place.
11. Finding of Fact 32 of Act 250 Permit # 2W1142 states, in part, that:

The Applicant has submitted engineering plans with specific soil erosion control measures, including a detailed site-specific erosion and sediment control program.
12. Condition 1 of Act 250 Permit # 2W1142 states that:

The [Treetop] project shall be completed and maintained in accordance with: (a) Findings of Fact and Conclusions of Law and Order #2W1142 and Findings of Fact and Conclusions of Law and Order #2W0519-10 Revised and 2W0519-10-EB, (b) the plans and exhibits on file with the District 2 Environmental Commission, and (c) the conditions of this permit.
13. Condition 2 of Act 250 Permit # 2W1142 states that:

No changes shall be made in the design or use of this project without the written approval of the District Coordinator or the District 2 Environmental Commission, whichever is appropriate under the Environmental Board Rules.

14. Condition 3 of Act 250 Permit # 2W1142 states that:

By acceptance of this permit without appeal, the Permittee confirms and agrees that the conditions of this permit shall run with the land and the land uses herein permitted, and will be binding upon and enforceable against the Permittee and all assigns and successors in interest.
15. Condition 7 of Act 250 Permit # 2W1142 states, in part, that:

The Permittee shall maintain stream and wetland buffers in accordance with the representations contained in Exhibit 55, . . . . All buffers shall be undisturbed and allowed to grow naturally and vegetation shall not be cut or mowed.
16. Exhibit 55 of Act 250 Permit # 2W1142 provides that:

Given the connection between Wetland 2000-3 and the overall hydrologic network, significant functions are likely to include water treatment and erosion control. Although small, this wetland may also contribute to water storage within the watershed. As proposed, the project would not result in any placement of fill within this wetland.
17. Condition 8 of Act 250 Permit # 2W1142 states that:

There shall be no additional cutting of vegetation on the site beyond those areas identified for construction on the plans without prior written approval from the District Environmental Commission.
18. Condition 20 of Act 250 Permit #2W1142 states that:

The Permittee shall fully comply with the Water Quality Remediation Plan as outlined in the District 2 Environmental Commission and Environmental Board Master Plan decisions.
19. Condition 22 of Act 250 Permit #2W1142 states that:

The Permittee shall comply with Stormwater Discharge Permit #1 -1537 (the "Stormwater Permit").
20. Condition 5 of Stormwater Discharge Permit #1-1537 states that:

The conveyance of all regulated stormwater from roads, parking lots and roofs to the "two detention ponds that discharge to Styles Brook" was to be "primarily by closed system."

21. Condition 10 of Stormwater Discharge Permit #1-1537 requires that:  
Approved Project Design: This project shall be constructed and operated in accordance with the . . . site plans and details prepared by Bruno Associates, Inc.
22. According to the plans approved as part of Act 250 Permit #2W1142 and Stormwater Discharge Permit #1-1537 (the "Approved Plans") the Stormwater Permit Application and Act 250 Permit # 2W1142, the "closed system" was to include the following components:
- a. Paving of drives with slopes in excess of 8%, and other areas of drives at risk for erosion, to prevent erosion of the drives.
  - b. Continuous curbing along the 'downhill' side of drives to intercept and direct regulated stormwater to catch basins, thus preventing the regulated stormwater from flowing overland, and preventing erosion that would otherwise occur in the steep ditches and on the steep slopes.
  - c. Installations of catch basins flush with the curbs and 1" below the paved finished grade to capture and direct the regulated stormwater to underground storm drains.
  - d. Paving of a minimum 10' wide apron at each drive on top of roadway to result in a minimum 2" berm/swale at the edge of the traveled way of Treetop Road to keep stormwater from leaving Treetop Road and running down the drives.
23. The Environmental Board's findings and conclusions in the Stratton Master Plan Permit Application #2W0519-10-EB, the ANR pre-hearing comments to the Act 250 Permit #2W1142, the findings of the Commission supporting the approval of Act 250 Permit # 2W1142, and the conditions of Act 250 Permit # 2W1142, 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 stormwater were critical factors in the approval of Stormwater Discharge Permit #1-1357, Stormwater Discharge Permit #5519-9010 and Act 250 Permit # 2W1142.

24. Without first seeking approval from the Commission or an amendment to Act 250 Permit # 2W1142, Stratton Corporation elected not to install the storm drain inlet and the storm drain culvert from the north side of the 91 ski trail to the manhole south of the intersection of the cul de sac and Woodfern Run drive that were shown on the Approved Plans and approved as part of the Bypass Stormwater System in Act 250 Permit # 2W1142, Stormwater Discharge Permit #1-1357.
25. In lieu of the storm drain inlet and storm drain culvert that were supposed to have been installed in accordance with the Approved Plans, Stratton Corporation cut two diversion ditches, totaling about 1,300 feet in length, in the steep slope below the 91 ski trail.
26. Stratton Corporation did not provide contours, hydrologic studies, engineering designs, or detailed plans and specifications for these diversion ditches.
27. The area disturbed by the diversion ditches was not shown or accounted for as disturbed area on the Erosion Control Plans that were submitted for coverage under Construction General Permit No. 3-9001.
28. In order to construct the two diversion ditches, Stratton Corporation cut trees and cleared and disturbed areas of the natural slope in an area that was not designated for construction on the Approved Plans.
29. The diversion ditches were not shown on the Approved Plans or approved as part of either Act 250 Permit # 2W1142 or Stormwater Discharge Permit #1-1357, nor did Stratton Corporation seek or obtain approval from the Commission to amend its Act 250 Permit to authorize the construction of these ditches.
30. The diversion ditches were not properly designed or constructed, and have caused

and continue to cause significant erosion.

31. In its submission to the District Commission to amend Act 250 Permit #2W1142, Stratton Corporation proposed to take some corrective actions in a total of approximately 100 feet of the 1,300 feet of diversion ditches that it created, however, it has not provided any evidence with respect to the condition or remediation of the remainder of these diversion ditches, any finished contours, or any detailed construction plans or specifications for the reconstruction of these diversion ditches to prevent erosion and water pollution or reduction in the capacity of the land to hold water as required by the Commission in its May 20, 2013 Recess Order.
32. Stratton Corporation cleared approximately two acres of trees and all natural vegetation and tree cover on the steep slope above Winterberry Heights in an area that is not designated for construction on the Approved Plans.
33. Once the slope had been cleared of trees and other vegetation, Stratton Corporation excavated the area to create a cut slope of between 25% and over 50% grade.
34. Stratton Corporation did not seek or obtain approval from the Commission to clear the two acres of trees and natural vegetation and tree cover or to excavate the cut slope.
35. Condition 8 of Act 250 Permit # 2W1142, prohibiting Stratton Corporation from "additional cutting of vegetation on the site beyond those areas identified for construction on the plans without prior written approval from the District Environmental Commission" was included in Act 250 Permit # 2W1142 to maintain natural slopes and vegetation to prevent erosion, an issue critical to the issuance of Act 250 Permit # 2W1142.
36. Notwithstanding Stratton Corporation's periodic unsuccessful efforts to introduce



erosion controls and plantings on the cut slope, the cut slope has been continuously failing and eroding since it was created by Stratton Corporation, resulting in significant erosion and reduction in the capacity of the land to hold water.

37. Stratton Corporation has proposed to remediate the cut slope by planting small trees and shrubs on the cut slope; however, Stratton Corporation has not addressed the cause of the failure of the cut slope or any detailed construction plans or specifications for what may be necessary to stabilize the cut slope.
38. The Treetop project as approved in Act 250 Permit # 2W1142 was supposed to include the construction of retaining walls southerly of Winterberry Heights drive to hold the natural slope and tree cover in the area that is now the cut slope.
39. Stratton Corporation did not construct the retaining walls that it had proposed and that were part of the approved Treetop project.
40. Stratton Corporation did not seek or obtain approval from the Commission to eliminate the retaining walls.
41. Stratton Corporation's failure to construct the retaining walls necessitated the excavation of the cut slope; had Stratton Corporation built the retaining walls it would not have needed to clear and excavate the cut slope.
42. During construction of the Treetop project, Stratton Corporation excavated and removed a section of ledge creating a steep ledge cut above immediately southerly of Winterberry Heights drive and the cul de sac at the upper end of Treetop Road.
43. The ledge cut is in the area where one of the retaining walls was supposed to have been constructed.

44. The ledge cut was not designed by an engineer nor was any geotechnical analysis done at the time of the ledge cut to address the flow of surface water and ground water over and through the ledge cut, the rock falls that have resulted from the freeze-thaw cycle, or the dangerous icing conditions on Winterberry Heights drive and the cul de sac as a result of the flow of surface water and ground water over and through the ledge cut.
45. Surface water and ground water flow over and through the ledge cut. During winter freeze-thaw cycles, sections of the ledge are broken and loosened causing rock falls into the grassed area between the ledge cut and Winterberry Heights drive. These rock falls occur during the time that pedestrians and maintenance workers who mow the grassed area are walking or working in the grassed area and cause unsafe conditions for the pedestrians and maintenance workers.
46. During the winter, surface and groundwater flow over and through the ledge cut onto Winterberry Heights drive and the cul de sac causing significant ice buildup that creates unsafe conditions for pedestrians and vehicles and occasionally prevents vehicular access to Winterberry Heights and Woodfern Run.
47. Neither the Approved Plans nor Act 250 Permit # 2W1142 provided for or approve a ledge cut as constructed by Stratton Corporation.
48. Stratton Corporation did not seek or obtain approval from the Commission to create the ledge cut.
49. In its construction of the Treetop stormwater management system, Stratton Corporation did not pave areas of the drives that exceeded an 8% grade or that would otherwise be subject to erosion, did not install continuous curbs along the downhill sides of the drives, did not properly install many of the catch basins so that their inlets were flush with curbs and 1" below finished grade, and did not install

paved aprons at the entrances to the drives to prevent regulated stormwater from running down the drives, all as required by the Approved Plans, Stormwater Discharge Permit #1-1357 and Act 250 Permit # 2W1142.

50. Instead, the Treetop stormwater management system as built by Stratton Corporation allows regulated stormwater to escape the closed system of curbs, catch basins and storm drain conveyances to the stormwater treatment pond and run down and across the drives, causing erosion of the drives, and then down the steep slopes between and below the Treetop units, causing erosion of the steep slopes.
51. Condition 22 of Act 250 Permit # 2W1142, requiring Stratton Corporation to "comply with Stormwater Discharge Permit #1 -1537," was included in Act 250 Permit # 2W1142 to address potential erosion from stormwater runoff, an issue critical to issuance of Act 250 Permit # 2W1142.
52. Instead of the closed system approved in Act 250 Permit # 2W1142 and Stormwater Discharge Permit #1-1357, Stratton Corporation installed approximately 2,650 feet of un-engineered stone ditches between and below the Treetop units to channel regulated stormwater overland to the stormwater treatment pond.
53. These stone ditches were not shown on the Approved Plans or approved as part of Act 250 Permit # 2W1142 or Stormwater Discharge Permit #1-1357.
54. The unauthorized stone ditches installed by Stratton Corporation were not properly designed or constructed, were not constructed in accordance with the construction details and specifications for stone ditches shown on the approved plans, and have downcut and eroded since they were constructed, causing silt and sediment laden stormwater to enter both the offsite stormwater system and the regulated stormwater systems.

55. In its submissions to the District 2 Environmental Commission in connection with the Amendment Application, Stratton Corporation proposed to take some corrective actions by reconstructing approximately 525 linear feet of approximately 2,650 feet of unengineered stone ditches that it constructed. Its proposed remediation is limited to the "Riprap Channel" construction detail and the Riprap Channel Sizing Criteria on Sheet C-03.2 of Amendment Application. Stratton Corporation has not provided any evidence with respect to the reasons why it is only addressing 525 feet of the unapproved ditches, the condition of the remainder of these stone ditches, any finished contours, or any detailed construction plans or specifications for the construction of these ditches as required by the Commission in its May 20, 2013 Recess Order.
56. During construction of the Treetop project, Stratton Corporation destroyed Wetland 2000-3 and the intermittent stream running from it and replaced it with an un-engineered, unapproved stone ditch.
57. Stratton Corporation did not seek or obtain approval from the Commission to replace Wetland 2000-3 and its tributary with an unengineered stone ditch.
58. Stratton Corporation contended in documents filed with the District 2 Environmental Commission in connection with the Amendment Application that, notwithstanding its representation to the Commission that it would preserve Wetland 2000-3 and its tributary, because Wetland 2000-3 was a Class 3 wetland at the time of issuance of Act 250 Permit # 2W1142, the Commission has no jurisdiction over Wetland 2000-3 or its destruction by Stratton Corporation.
59. Stratton Corporation made Wetland 2000-3, its tributary and its buffer area subject to the Commission's jurisdiction and to Act 250 Permit # 2W1142 expressly by representing to the Commission that Wetland 2000-3 would be preserved as part of

the Treetop project stormwater treatment system.

60. Visual inspection of the storm drain culverts revealed that, as a result of Stratton Corporation's improper construction of the Treetop stormwater system, numerous sections of storm drain culverts were crushed, reducing their flow and creating substantial risk of failure of portions of the stormwater system.
61. Other than to propose to replace crushed ends of storm drain culverts, Stratton Corporation has made no proposal to inspect the remainder of the storm drain culverts to identify all sections of the storm drain culverts that have been crushed, and to replace all crushed sections, not just the ends.
62. As early as the summer of 2004, inspections of the Treetop stormwater treatment pond revealed a hole in the bottom of the pond in the vicinity of Catch Basin 109 ("CB 109") that has allowed regulated stormwater to escape untreated into the watershed of Styles Brook.
63. On at least three occasions in the summer and fall of 2004, Stratton Corporation attempted to plug the leak by dumping material into the hole. None of these efforts was successful and the pond continues to leak.
64. The stormwater treatment pond has never held water, as it was supposed to do in order to comply with the stormwater permits and the 2002 Stormwater Management Manual.
65. The construction specifications for stormwater treatment ponds in Appendix II of the 2002 Stormwater Management Manual state that "[f]ill material must be taken from approved designated borrow areas. It must be free of roots, stumps, wood, rubbish, stones greater than 6", frozen, or other objectionable materials."

66. The failure of the stormwater treatment pond was caused by Stratton Corporation using fill materials that were composed of topsoil, roots, stumps, wood, rubbish, stones greater than 6" in violation of the 2002 Stormwater Management Manual.
67. Stratton Corporation and the ANR have known of the existence of the hole in the stormwater treatment pond since the summer of 2004 and, other than Stratton Corporation's unsuccessful attempts to plug the hole, neither Stratton Corporation nor the ANR did anything to correct the failure of the stormwater treatment pond until Stratton Corporation was forced to address the issue as part of its application to amend Act 250 Permit #2W1142.
68. Stormwater Discharge Permit #1-1357, Act 250 Permit # 2W1142 and the Approved Plans required Stratton Corporation to install four perforated vertical risers in the stormwater treatment pond to control the rate of release of treated regulated stormwater to Styles Brook.
69. The perforated risers that Stratton Corporation installed at the time it constructed the stormwater treatment pond did not comply with Stormwater Discharge Permit #1-1357, Act 250 Permit # 2W1142 or the Approved Plans. Amendment Application
70. In the June 7, 2002 Stormwater Permit Application, Bruno Associates represented that a concrete flow dissipater with baffles and stone rip-rap around it would be located at the outlet end of the closed drainage system to prevent erosive velocities as the stormwater enters the sediment forebay.
71. No flow dissipater was constructed by Stratton Corporation.
72. Subsection 2.7.1.E. of Section 2 of the 2002 Stormwater Management Manual, Volume 1 requires the stormwater treatment pond to be fenced of the safety bench is reduced to less than six feet.

73. In the June 7, 2002 Stormwater Permit Application, Bruno Associates represented that, because the stormwater treatment pond would not be constructed with a safety bench, the pond would be fenced.
  
74. Stratton Corporation did not install a perimeter fence around the stormwater treatment pond, as required by Stormwater Discharge Permit #1-1357, Act 250 Permit # 2W1142 and the Approved Plans.

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