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VIA REGULAR MAIL & ELECTRONIC MAIL

PETITION FOR WITHDRAWAL OF THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM DELEGATION FROM THE STATE OF VERMONT

Conservation Law Foundation (CLF) hereby petitions the United States Environmental Protection Agency (EPA) to initiate proceedings pursuant to Clean Water Act Section 402(c)(3) and its implementing regulations at 40 C.F.R. §§ 123.63, 123.64. Vermont has failed to administer the NPDES program in accordance with the Clean Water Act (CWA). It has failed to adequately enforce against polluters; failed to comply with the public participation provisions of the CWA; failed to regulate concentrated animal feeding operations (CAFOs), and; failed to promulgate and implement an anti-degradation implementation plan.

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INTRODUCTION

There is a water quality problem in Vermont. Lake Champlain is severely polluted with phosphorus, which chokes many of its bays with toxic algae blooms and nuisance weed growth that render summer recreation impossible. Nine of its segments are subject to a total maximum daily load (TMDL)[1] whose wasteload and load allocation are very far from being met. Another 46 surface waters are subject to TMDLs for various impairments including pathogens, sediment, stormwater, and phosphorus.[2] An additional 101 stream and river segments, and 15 lake and pond waters in Vermont, are impaired for numerous pollutants including *E. coli*, nutrients, stormwater, phosphorus, metals, PCBs, sediment, fecal coliform, acid, and toxics.[3] The pollutants come from various sources including wastewater treatment facilities, agricultural activities, stormwater runoff, land development, and erosion.[4] At least 12 of the impairments on Vermont's draft 2008 303(d) list are attributable to stormwater pollution, 30 to agricultural sources, and 10 to spills and other events from wastewater treatment/collection facilities.[5] Even more Vermont waters are "stressed" and in need of further assessment – 147 segments according to Vermont Agency of Natural Resources' (ANR's) most recent tally.[6]

ANR has abdicated its duty to prevent and redress these water quality problems by failing to properly administer the Clean Water Act. It suffers from a failure of leadership and a lack of resources; well-qualified and dedicated staff have been unable to overcome these hindrances. For example, a recent ANR report stated that "[o]nly two programs surveyed believed they had adequate staff to effectively carry out [compliance and enforcement]," and that "[a]ll programs struggle with the lack of resources to utilize the tools already available to achieve compliance."[7] For its part, ANR leadership expresses hostility toward vital components of the Clean Water Act and great pessimism about the landmark law's utility in protecting and restoring water quality. At a recent meeting of its Stormwater Advisory Group, ANR Secretary George Crombie stated that if regulators addressed water quality problems "[b]ased on what the Clean Water Act says, we'd be closing down the nation."[8]

An audit of Vermont's "Clean & Clear" program to reduce phosphorus in Lake Champlain concludes that, among other things, "[t]here have been no significant reductions in phosphorus

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[1] *See* Agency of Natural Resources (ANR), Dep't of Envtl. Conservation (DEC), TMDL Information ("TMDL Information"), http://www.vtwaterquality.org/planning/htm/pl_tmdl.htm.
[2] *Id.*
[3] DEC, *Draft for Public Comment, State of Vt. 2008 303(d) List of Waters ("303(d) List"), available at* http://www.anr.state.vt.us/dec/waterq/planning/docs/pl_2008.303d_draft.pdf.
[4] *Id.*
[5] *Id.*
[6] DEC, *State of Vt. Draft for Public Comment 2008 List of Priority Surface Waters – Part C ("Part C List"), available at* http://www.anr.state.vt.us/dec/waterq/planning/docs/pl_2008.statelistings_draft.pdf.
[7] *Vt. Agency of Natural Resources Compliance & Enforcement Task Force Report ("C&E Report")* 30, 32 (Sept. 17, 2007). *See also The Center for Watershed Management Task Force Report & Organizational Structure: Vt.'s New Approach to Watershed Management ("Task Force Report")* 48 (Oct. 2007) ("The Task Force feels strongly that both additional enforcement staff and tools need to be added to the CWM [Center for Watershed Management].").
[8] Introductory Remarks of George Crombie at the April 30, 2008 meeting of ANR's Stormwater Advisory Group, Waterbury, VT.

loads to Lake Champlain from the sum of [Clean & Clear] programs."[9] The increasing pollutant loads come from various sources, many of which are subject to Clean Water Act regulation. For example, sewage treatment plants, which can offer "certain and predictable" reductions in phosphorus through "proven engineering technology" are an important contributor.[10] Recent estimates indicate that approximately half of the phosphorus load entering Lake Champlain is from stormwater runoff from developed land. [11] In some Lake segments pollution from poorly-managed agricultural activities and land uses predominates.[12] St. Albans Bay, which already has extensive problems with internal phosphorus loading, receives 73% of its phosphorus load from agricultural sources.[13]

Poorly managed manure, silage leachate, and milkhouse waste all contribute to the Lake's phosphorus woes.[14] Manure is an especially powerful source of phosphorus: "Even 5% of manure entering surface waters is a 100 ton contribution dwarfing all other sources of phosphorus in the state."[15] Additionally, "[o]verland flow from farms can be a significant source of easily mobilized phosphorus, especially if the overland flow originates near areas of concentrated animal activity such as barnyards."[16] It is this "concentration," this increasing trend toward fewer and larger dairy operations that transforms some Vermont farms into animal feeding operations, with increasingly serious and complex waste management problems. An ANR position paper explains: "There is widespread evidence that the concentration and scale of many Vermont dairy production facilities have outstripped the landscape's ability to sustain its inherent capacity to sustain ecosystem services."[17] Yet, despite recognizing the potential scale of the problem and a command from the Vermont General Assembly,[18] ANR has failed to regulate Concentrated Animal Feeding Operations under the National Pollutant Discharge Elimination System.

The citizens of Vermont, as well as neighboring citizens who share waters with Vermont, deserve a robust implementation of the law designed to assure clean water. Instead, the deficiencies in Vermont's NPDES program resulting from inconsistent and inadequate leadership and resources cripple the overall effectiveness of efforts to protect, restore, and maintain Vermont waters. The deficiencies are so serious as to warrant program withdrawal unless and until Vermont officials swiftly undertake sweeping and concrete corrective actions to reform Vermont's Clean Water Act permitting and enforcement program. Specifically, Vermont's NPDES program satisfies the following criteria for withdrawal under 40 C.F.R. § 123.63(a):

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[9] *See* Green Mountain Institute for Environmental Democracy, *Performance Audit of Vt. Clean & Clear ("Clean&Clear Audit")* v. (Jan. 14, 2008), *available at* http://www.anr.state.vt.us/cleanandclear/news/PerformanceAud' it-CleanandClear-Jan142008.pdf.

[10] *Id.* at 73.

[11] *See id.* at 39.

[12] Lake Champlain Basin Program, *State of the Lake: Lake Champlain in 2005 – A Snapshot for Citizens* 8 (2005), *available at* http://www.lcbp.org/lcstate.htm.

[13] Eric Smeltzer, DEC, *The Phosphorus Problem in St. Albans Bay: A Summary of Research Findings* 4 (July 3, 2003), *available at* http://www.anr.state.vt.us/dec/waterq/lakes/docs/lp_stalbansphosphorus.pdf.

[14] *Clean&Clear Audit, supra* note 9, at 29.

[15] *Id.* at 29-30.

[16] *Id.* at 96.

[17] *Vt. Agency of Natural Resources Sustainable Agriculture Ecosystem Management Strategy: A Position Paper by the VT DEC River Management Program* (3/13/07 Draft).

[18] 10 V.S.A. § 1263(g) (directing ANR to adopt CAFO regulations by July 1, 2007).

I. Criteria (3)(i) and (3)(ii): "The Administrator may withdraw program approval . . . [w]here the State's enforcement program fails . . . to act on violations of permits or other program requirements" or fails to "seek adequate enforcement penalties or to collect administrative fines when imposed."

ANR has a continuing history of failing to adequately enforce against water polluters, as demonstrated by an examination of ten years of compliance and enforcement data revealing many serious shortcomings in ANR's enforcement practices. Specifically, ANR failed to adequately recoup economic benefit in its penalty calculations; it took formal enforcement actions for only a small percentage of discharge violations, and consistently chose more lenient options when it did; it failed to enforce timelines for funding of Supplemental Environmental Projects by admitted lawbreakers; it consistently allowed "significant noncompliance" violators to break the law without facing formal enforcement action or penalty assessment, and; it did not adequately address high rates of noncompliance in its stormwater program with either oversight or enforcement actions.

ANR's failure to act on violations and failure to assess appropriate penalties render the achievement of enforcement policy goals - most importantly that of deterrence - practically impossible. When the consequences of violating the CWA are so insignificant, violators have little incentive to comply. Such lenient practices continue to allow degradation of Vermont waters and undermine the integrity of the CWA regulatory program.

II. Criteria 1(ii) and (2)(iii): "The Administrator may withdraw program approval . . . [w]here the State's legal authority no longer meets the requirements of this part, including [a]ction by a State legislature or court striking down or limiting State authorities" and "[w]here the operation of the State program fails to comply with . . . the public participation requirements of this part."

Vermont's statutory and agency-level enforcement processes do not satisfy federal requirements for public participation in enforcement. Vermont statutes and the Environmental Court rules offer no intervention of right in environmental enforcement actions. There is no statutory or regulatory requirement that ANR provide notice and comment on settlements or respond to each citizen complaint in writing. The only public participation provided for is narrowly-defined permissive intervention in limited circumstances involving a mode of enforcement that ANR rarely employs. Additionally, ANR has actually resisted the only known formal attempts made by the public to intervene in Clean Water Act enforcement actions, either ignoring or formally opposing the requests. A Vermont Court recently reviewed state environmental enforcement laws, concluding that they fell far short of the Clean Water Act's requirements for public participation and noting that reading those laws to exclude public participation in the majority of cases, as ANR did, had been found "abhorrent."[19]

ANR's hostility toward public participation and the failure of Vermont law to adequately provide for it diminishes the effectiveness of enforcement. It diminishes polluters'

[19] *See ANR v. Montagne & Branon,* No. 291-12-07, at 7-8 (Vt. Env. Ct. Apr. 9, 2008).

accountability to the public, and excludes an important voice for clean water from the process. It also leads to less public awareness about water quality problems, thereby compromising the deterrent effect negative publicity could have.

III. Criterion (2)(i): "The Administrator may withdraw program approval . . . [w]here the operation of the State program fails to . . . exercise control over activities required to be regulated under this part, including failure to issue permits."

Despite the fact that there are CAFOs in Vermont that require NPDES permits, ANR refuses to regulate them. There are documented discharges from CAFOs of various sizes in Vermont, as well as problematic discharge areas at many more of them; but ANR has not issued a single NPDES permit to a CAFO. The permitting program administered by the Agency of Agriculture, Food and Markets is not an adequate substitute, and cannot lawfully be considered as a substitute in any case. Given the destructive impacts animal feeding operation wastes can have on surface waters, and the trend toward fewer and bigger animal operations in Vermont, ANR's unwillingness to use an important tool to help contain those impacts is inexplicable. It further undermines the effectiveness of Vermont's CWA program.

IV. Criterion (1)(i): "The Administrator may withdraw program approval . . . [w]here [the State fails to] promulgate or enact new authorities when necessary."

Vermont has not adopted an anti-degradation implementation procedure as required by federal regulations, making it impossible for ANR to issue permits with the proper considerations and protections meant to be afforded by Vermont's anti-degradation policy. Additionally, the implementation rule that ANR has drafted—only after being ordered by the Vermont General Assembly to do so—suffers from numerous deficiencies. It fails to meet minimum federal requirements or to satisfy Vermont's EPA-approved anti-degradation policy. Until an effective rule is adopted and the anti-degradation policy fully implemented, the existing uses of Vermont's waters, as well as its outstanding resource and high quality waters, remain at increased risk of degradation.

DISCUSSION

Unless otherwise noted or available online in an electronic database, the source documents for this Petition are on file with the Environmental and Natural Resources Law Clinic (ENRLC) at Vermont Law School. Most of them were obtained through extensive public records requests at the Agency of Natural Resources and the Agency of Agriculture, Food and Markets (AAF&M). CLF and ENRLC would like to express their appreciation to the staff members who facilitated those requests.[20] The documents can be produced for EPA or other interested members of the public upon request.

[20] CLF paid $917.58 in public records fees to obtain copies of the documents from ANR and AAF&M.

I. Criteria (3)(i) and (3)(ii): ANR consistently fails to adequately enforce the Clean Water Act.

A. ANR fails to adequately recoup economic benefit in its penalty calculations, which compromises important Clean Water Act enforcement goals.

As explained below, it is vitally important that Clean Water Act penalties capture any economic benefit polluters enjoy from violating the CWA. ANR, however, consistently fails to sufficiently recoup economic benefit in its penalty calculations. Both EPA and ANR itself have raised concerns about ANR's inability to reliably assess economic benefit; and, according to a recent query, ANR has not hired an economic benefit specialist to address this deficiency.

EPA has thoroughly explained the importance of economic benefit recovery. Its penalty policy recognizes that two important goals of penalties are to deter noncompliance and to ensure a level playing field.[21] Penalties should be large enough to ensure specific and general deterrence; that is, they should deter "future violations by the same violator," as well as "violations by other members of the regulated community."[22] They must also ensure that "violators do not obtain an economic advantage over their competitors."[23] In order to accomplish these goals, penalties must generally "recover the economic benefit of noncompliance, plus an appropriate amount reflective of the gravity or seriousness of the violations."[24] Economic benefit is especially important because it "prevent[s] a violator from profiting from its wrongdoing."[25]

EPA has explained that a non-complying facility may reap an economic benefit not only from delaying the costs of coming into environmental compliance, but also from avoiding compliance costs altogether.[26] "Avoided costs typically include the continuing, annually recurring costs that a violator would have incurred if it had complied with environmental regulations on time (e.g., the costs of labor, raw materials, energy, lease payments, and any other . . . operation and maintenance [expenses for] the pollution control equipment)."[27] EPA has also highlighted how a violator may gain an illegal competitive advantage over other complying competitors.[28] This component of economic benefit "focuses on how delaying and avoiding compliance allows violators to manufacture and sell products in the marketplace more cost-effectively, and also examines violators' short-term and long-term economic advantages associated with improved market position."[29]

The economic benefit factor also stands firmly grounded in the equitable concept that a violator should not be allowed to weigh the costs and benefits of polluting and still choose to pollute

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[21] Notice: Interim Revised CWA Settlement Penalty Policy Issued, 60 Fed. Reg. 22,063, 22,063 (May 4, 1995).
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *United States v. Municipal Auth. of Union Twp.*, 150 F.3d 259, 263 (3d Cir. 1998).
[26] Notice: Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, 64 Fed. Reg. 32,948, 32,949-50 (June 18, 1999) (explaining, among other things, how a violator enjoys an economic benefit and specifically how a violator may gain a competitive advantage from avoiding compliance).
[27] *Id.* at 32,950.
[28] *Id.* at 32,951-52.
[29] *Id.* at 32,951.

simply because it would be less costly to incur some small fines than to come into compliance. Such a practice would compromise the spirit of the CWA, as well as Vermont's efforts to support small, local businesses. As discussed above, those businesses unable to absorb the costs of arguably "cheap" pollution would be unable to compete against larger companies or facilities able to take such a risk. Penalizing for economic benefit helps ensure against such injustices by ensuring that facilities do not in fact achieve an economic benefit through their noncompliance.

Despite the importance of economic benefit, ANR has been largely incapable of determining it. As stated in EPA's 2004 review of ANR, ANR does not have a "reliable approach" to calculating economic benefit.[30] This deficiency allows a violator to enjoy the benefit of operating at a cheaper cost than competitors, and to operate its facility without having to endure delay or additional requirements of the permitting process.[31] As EPA further noted, when ANR did calculate economic benefit, it considered only the cost of equipment that a facility would have had to install and operate to be in compliance - ignoring the actual costs of the installation, operation, and maintenance.[32] EPA's criticisms were well-placed, as the economic benefit estimate "must encompass *every* benefit that defendants received from violation of the law."[33] Difficulty in reaching the estimate is no excuse, for "[i]t would eviscerate the [CWA] to allow violators to escape civil penalties on the ground that such penalties cannot be calculated with precision."[34]

ANR acknowledged its economic benefit problem in a 2007 report, which recommended the agency get access to an economic benefit expert because "ANR currently has no specific in-house expertise which focuses on economic benefit."[35] Despite this acknowledgement and EPA's concerns, ANR had yet to hire an economic benefit specialist as of March 2008,[36] and to the best of our knowledge still has not. There is also no indication that ANR has cured the deficiencies highlighted in EPA's 2004 report regarding its calculation of economic benefit. Though its penalty calculation form has a section for "Economic Benefit & Cost of Enforcement Adjustment," the form contains no guidance on how to calculate economic benefit.[37] There is only a blank space within which to insert the calculation. Though ANR's Rule on Environmental Administrative Penalties contains some guidance in its definition of economic benefit, it is far from sufficient to ensure that all relevant factors are taken into consideration and calculated with the requisite expertise.[38] ANR's failure to properly consider economic benefit

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[30] EPA, *Final Report: Review of the State of Vt.'s Environmental Enforcement Programs & Assistance & Pollution Prevention Programs ("2004 EPA Report")* 19 (Sept. 2004).
[31] *Id.*
[32] *Id.*
[33] *United States v. Municipal Auth. of Union Twp.*, 929 F. Supp. 800, 806 (M.D. Pa. 1996) (citation omitted).
[34] *Id.* at 806-07.
[35] *C&E Report, supra* note 7, at 17.
[36] Email from ANR to ENRLC (Mar. 6, 2008).
[37] ANR, *Environmental Administrative Penalty Form* 4 (provided in response to 2-29-08 request for the "worksheet ANR uses to calculate economic benefit and penalties," *supra* note 36).
[38] *See* ANR, Environmental Administrative Penalty Rules § 104(3), *available at* http://www.anr.state.vt.us/site/html/enf/enf-adminpenrule.htm. ("'Economic benefit' means the estimated net savings or net income or net gain realized by a respondent as a result of violations. Economic benefit may include the estimated net income or net gain realized by a respondent through the use of facilities before all required environmental permits are obtained. In determining economic benefit, the cost of returning to compliance and/or remediation shall be considered. Economic benefit may not be less than zero."). The definition of "economic

makes it apparent that it has been incapable of seeking adequate enforcement penalties.[39] Further, Vermont's statutory cap on penalties recoverable by ANR limits them to $170,000 regardless of actual economic benefit.[40]

B. As illustrated by an analysis of compliance and enforcement data for a ten-year period, ANR consistently fails to act on or collect adequate penalties for Clean Water Act violations.

CLF reviewed ten years of compliance and enforcement data in order to assess ANR's enforcement practices. The results, reported below, reveal many weaknesses in ANR's approach. They are not limited to one particular division (e.g., the ANR Enforcement Division), but are illustrative of broad deficiencies across Department of Environmental Conservation (DEC) water quality programs with NPDES jurisdiction, and include other divisions' failures to refer violations for formal enforcement. Specifically, the results show a consistent failure by ANR to act on or collect adequate penalties for violations of its CWA program. Such leniency fails to accomplish the important enforcement goals of deterrence and fairness, and compromises the effectiveness of the CWA regulatory program. Further, because Vermont law allows penalty mitigation where there is "unreasonable delay by the secretary in seeking enforcement,"[41] ANR may hamper its ability to assess adequate amounts by failing to timely enforce, even in the rare instances where it does seek penalties.[42]

The results are reported in four general categories, with each category offering snapshot illustrations of ANR's enforcement deficiencies from 1997-2007. The categories are:

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benefit" in the new enforcement act, though broad, likewise provides little guidance on the actual calculation of economic benefit. *See* 10 V.S.A. § 8002(11).

[39] Though EPA did not appear to echo its concern over ANR's economic benefit approach in a more recent report, the description of ANR's economic benefit practice suggests that EPA's concerns should not be abandoned. *See* EPA Region 1, *Review of the Vt. Agency [of] Natural Resources.FY 2006 State Enforcement & Compliance Programs ("2006 EPA Report")* 37-38 (Sept. 24, 2007). The report only looked at 4 enforcement actions, most of which were for overflow-type incidents where staff costs were the only factors taken into account for economic benefit, and found to be "de minimis." *Id.* at 37-38.

[40] 10 V.S.A. § 8010(c). Higher penalties could be recovered in Vermont Superior Court by Vermont's Attorney General, but ANR has rarely referred cases to the Attorney General. *See 2004 EPA Report, supra* note 30, at 18; CLF, *Lost Opportunities: Surveying the Weak Enforcement of Vermont's Environmental Laws ("Lost Opportunities")* 6 (Jan. 2007). An April 2008 Memorandum of Understanding between ANR and the Attorney General's office requiring increased consultation on pending enforcement cases has potential to improve the numbers.

[41] *Id.* § 8010(b)(2).

[42] This factor may have been responsible for the weak penalty assessed against Jay Peak after a two-year period during which Jay Peak refused to timely obtain and then fully abide by a number of water quality permits, including the NPDES construction stormwater permit. *See* Letter from CLF to ANR 9 (Apr. 17, 2007) ("Notice of Intervention Pursuant to 40 C.F.R. § 123.27(d) in Ongoing Administrative Enforcement Proceeding against Jay Peak Resort, Inc. for Violations of Clean Water Act N.P.D.E.S. Permits") ("Jay Peak Notice of Intervention") (detailing continuous violations from 2004-2007 with AOD finally resulting on Feb. 16, 2007). A subsequent AOD assessed an $85,000 settlement, $60,000 of which was a SEP - hardly an adequate amount to deter such egregious violations. *See ANR v. Jay Peak Resort, Inc.* AOD, No. 94-5-07 (Vt. Env. Ct. May 10, 2007).

1) Enforcement program overview, showing that ANR took formal enforcement action for a very limited number of violations, and consistently favored more lenient options;

2) Supplemental Environmental Projects (SEPs), showing that ANR frequently failed to enforce these agreements, which of themselves are inferior enforcement options;

3) Significant Non-Compliance (SNC), showing that ANR has an historic practice of allowing violators in significant non-compliance to escape formal enforcement actions and penalties, and;

4) Stormwater, showing that ANR did not adequately oversee or enforce against the high rates of noncompliance in its NPDES stormwater program.

Note on Municipal Violations

As this section will illustrate, many of the most egregious examples of noncompliance and inadequate enforcement involve municipalities. Though municipalities do operate under resource constraints, those constraints should not serve as licenses to illegally pollute.[43] Instead, in line with the important enforcement goal of deterrence, the consequences of noncompliance with the Clean Water Act must be strong enough to motivate municipal compliance. Otherwise, "[w]hen an administrative action results in a compliance order with no civil penalties, violators will often continue their pollution unabated, causing serious environmental contamination, and economic hardship to the public and competitors."[44]

The NPDES program serves a very important function in this regard, where a true threat of meaningful enforcement, such as substantial penalties, can force the kinds of public investments and solutions necessary to comply with CWA requirements. As put by EPA's 1991 Inspector General:

> "[V]igorous enforcement . . . is pivotal in promoting improved water quality. Waste water facilities will operate within their permit limitations if Federal agencies or States are serious about compliance. But as long as EPA and the States continue to take ineffective enforcement actions and

[43] *See, e.g.*, 33 U.S.C. § 1362(5) (defining "person" to include "municipality"); Philip H. Gitlen, *Private Attorneys General: Let's Do It Right*, 2 Fall Alb. L. Envtl. Outlook 17, 20 (1995) ("As a matter of environmental public policy, there seems little, if any, reason to distinguish between government and private polluters. In fact, the federal, state, and local governments are among the largest polluters in the nation."); Amy Luria, *The Suitability of CERCLA Liability for Municipal Pollution of Rivers*, 30 Seton H. Legis. J. 57, 104 (2005) ("[N]o municipality required to renovate its sewage system and pay penalties pursuant to the CWA has experienced bankruptcy or financial devastation, despite the high costs associated with such renovations and fines."). Though EPA's penalty policy provides for the mitigation of penalties against municipalities, it is only under certain circumstances and only to a certain amount. *See* EPA, *Interim CWA Settlement Penalty Policy* 17-20 (Mar. 1, 1995), *available at* http://www.epa.gov/Compliance/resources/policies/civil/cwa/cwapol.pdf.

[44] David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority is Shared by the United States, the States, and Their Citizens?*, 54 Md. L. Rev. 1552, 1610-11 (1995).

> reduce proposed fines down to insignificant amounts, the companies and local governments that comply with environmental laws are the ones being penalized, not the violators."[45]

Absent such threat, the entire regulated community – including municipalities - has little incentive to comply. "[E]nforcement without the threat of meaningful sanctions often directly translates into noncompliance. Absent a targeted enforcement effort against municipal dischargers in the 1980s, for instance, the great majority of municipal facilities violated the Clean Water Act."[46] As the regulator, ANR has the responsibility to leverage that threat and ensure accountability for violations of the Act. When ANR fails to do so, as discussed below, it abandons its duty to protect and restore Vermont's waters.

Note on Source Documents

The calculations, summaries, and case studies reported in this section are based on a review of multiple ANR files. The documents, as well as organizational charts created for their analysis, are on file with ENRLC. Our analysis is as accurate and complete as possible based on the available information. As will become evident, however, there is a need for better enforcement data management at ANR. ANR has acknowledged that it is limited by a lack of resources and IT support in tracking compliance and enforcement activities.[47] This lack of centralized, comprehensive, accessible information on compliance and enforcement not only hinders government transparency, but also makes it more difficult for ANR to fulfill its responsibility to protect Vermont's waters.

Unless otherwise noted, the information in this section is based on a review of: 1) all Notices of Alleged Violation (NOAVs) issued by or reported to the Enforcement Division between January 1, 1997 and December 31, 2007; 2) all Administrative Orders (AOs), Assurances of Discontinuance (AODs), and Emergency Orders (EOs) issued by the Enforcement Division between January 1, 1997 and December 31, 2007; 3) all Notices of Alleged Violation issued by the stormwater program between January 1, 1997 and December 31, 2007; 4) all Significant Non-Compliance Reports from the Wastewater Management Division between January 1, 1997 and December 31, 2007; and, 5) the compliance files for the 17 Vermont facilities listed in the United States Public Interest Research Group's (US PIRG's) 2007 report on CWA compliance.[48] (For a detailed explanation of these enforcement mechanisms, please see Appendix A. In brief,

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[45] *Id.* at 1552 (quoting John Martin, 1991 EPA Inspector General).

[46] Clifford Rechtschaffen, *Deterrence vs. Cooperation & the Evolving Theory of Environmental Enforcement*, 71 S. Cal. L. Rev. 1181, 1186, 1226, 1227 (1998) (in wake of enforcement reform movement, finding "fundamental problem with relying primarily on cooperative enforcement" and positing that "a deterrence-based system of enforcement contains many attributes that are equally if not more essential to achieving compliance") (citation omitted).

[47] *See C&E Report, supra* note 7, at 16. A recent revision to Vermont's environmental enforcement laws is a step in the right direction in this regard, calling for a report to the legislature on establishing a "publicly available, searchable database of enforcement actions." *See* An Act Relating to Enforcement of Environmental Laws, Vermont H.685 § 12 (2007-08).

[48] U.S. PIRG Education Fund, *Troubled Waters: An Analysis of 2005 Clean Water Act Compliance ("Troubled Waters")* 35 (Oct. 2007), *available at* http://www.environmentamerica.org/home/reports/report-archives/our-rivers-lakes-and-streams/our-rivers-lakes-and-streams/troubled-waters-an-analysis-of-2005-clean-water-act-compliancei.

ANR may issue an NOAV to a party when it "determines that a violation exists."[49] AOs are formal administrative enforcement orders, and AODs are agreements offered by violators.[50] EOs are issued only rarely, generally to abate immediate threats or for ongoing unpermitted activities.[51])

The following limitations on the above information should be noted. First, the NOAVs issued by or reported to the Enforcement Division from 1997-2007 do not account for all NOAVs issued by ANR during 1997-2007. This is because, in October 2003, the separate divisions of ANR stopped reporting their NOAVs to Enforcement. Thus, for the enforcement program overview (subsection (1) below), our estimate of NOAVs issued for unauthorized discharges or permit violations will be low because it does not account for all NOAVs issued subsequent to October, 2003 – primarily, those issued by the Wastewater Management Division. We were unable to ascertain the number of NOAVs issued by the Wastewater Management Division subsequent to October 2003 because, to do so, we would have had to review the compliance file of every NPDES facility.[52] However, our estimate does include all NOAVs issued by the stormwater program subsequent to October 2003, to the extent that program was able to account for the NOAVs it had issued.[53]

Second, in our analysis of Significant Non-Compliance violations, assumptions about NOAVs are based on the semiannual SNC Reports of the Wastewater Management Division. Usually, the Reports contain notations about recommended or completed follow-up actions. The notations are probably, but not necessarily, accurate.[54] For instance, it is possible that an NOAV was issued and not noted on the SNC Report; and also possible that an NOAV was recommended on the SNC Report but never issued.[55] Similar assumptions are made about 1272 Orders, another informal enforcement mechanism utilized by ANR. It should also be noted that the number of reported SNC violations will be lower than the number of actual SNC violations. This is because there are some time periods for which there are no SNC Reports, or only a preliminary SNC Report was issued, due to staffing shortages.[56]

1. <u>An overview of the enforcement program shows that ANR took formal enforcement actions for only a small percentage of discharge violations, and even then consistently chose the more lenient enforcement option.</u>

a. <u>ANR failed to take formal enforcement action for the great majority of known discharge violations, thereby failing to create disincentives to noncompliance.</u>

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[49] 10 V.S.A. § 8006(b).
[50] *Id.* §§ 8007, 8008.
[51] *Id.* § 8009.
[52] *See* email from ANR to ENRLC ("Feb. 8 email") (Feb. 8, 2008).
[53] *See* email from ANR to ENRLC (Jan. 22, 2008) ("it is unlikely there are many or any NOAVs . . . that we have not accounted for").
[54] *See* Feb. 8 email, *supra* note 52.
[55] *Id.*
[56] This is true for the time periods 10/97-3/98; 10/99-3/01; 4/01-6/01; 10/02-3/03; 4/03-9/03; 10/04-3/05; 10/05-3/06; 10/06-3/07. The Report for 4/07-9/07 had not been completed as of Jan. 15, 2008.

Vermont's water pollution control law is the means through which it implements the federal NPDES program.[57] Two primary components of that law are the prohibition against discharging to waters of the state without a permit ("1259(a) prohibition"), and the related requirement to obtain permit coverage for any discharges, including stormwater discharges.[58] Of all the NOAVs known to be issued for violations of these provisions from 1997-2006, only 10% (32 of 319) were followed by formal enforcement actions.[59] Ninety-nine of those 319 NOAVs were for clear NPDES violations (e.g., violations of a term or condition of a numbered NPDES permit).[60] Of those 99 NPDES-related NOAVs, only 9 were followed by formal enforcement actions (1 EO, 5 AODs (two of which converted from AOs) and 3 AOs).

ANR's failure to enforce is also evident in its lack of commensurate responses to egregious violations highlighted in US PIRG's 2007 report. In that report, which described how the CWA's goals have not been met in the nation's polluted waters, Vermont had the dubious distinction of being one of the 10 states with the "highest average permit exceedance" for major NPDES facilities in 2005.[61] In fact, Vermont was second only to New Mexico for the highest average exceedance level.[62] The average exceedance for all 50 states was already high, at nearly 4 times the allowed amount (263%).[63] Vermont's average exceedance was "egregious," at almost 9 ½ times permit limits (822.9%).[64] In 7 instances, permit exceedances were at least 6 times (500%) the permit limits.[65] The report also revealed that over half of Vermont's major facilities (17 of 33) exceeded their permits at least once in 2005.[66] There were more than 30 permit violations for those 17 facilities,[67] followed by only one formal enforcement action. It was against the Burlington Main STP, which had exceeded *E. coli* limits by 17,562%.[68] ANR issued an AO assessing penalties of $17,500, but later converted the penalties to a SEP of $7,500 in an AOD[69] - a 60% reduction.

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[57] Agreement between Martin L. Johnson (Vermont) & John A. S. McGlennon (EPA) (Delegation Agreement) 1 (Feb. 28, 1974) (referring to 10 V.S.A. Chapter 47); *Montagne & Branon, supra* note 19, at 5 ("Vermont's NPDES permitting program generally satisfies the delegation requirement through implementation of 10 V.S.A. § 1259(a)").
[58] 10 V.S.A. §§ 1259(a), 1263, 1264.
[59] Please see "Note on Source Documents," pp. 9-10, for a general explanation of the source documents for these calculations. In reviewing ANR's NOAVs, if the NOAV was not clearly for a discharge and/or NPDES violation (e.g., for permit violations), it was not counted. Also, the number of enforcement actions assumes that no enforcement actions were taken more than a year after the violations in 2006 NOAVs (i.e., in 2008 for violations in pre-2007 NOAVs). We did not consider 1272 Orders in this analysis because they are not formal enforcement actions and they do not include penalties.
[60] It is very likely that several of the other discharge violations would also qualify as NPDES violations, but the facts in the NOAVs did not give enough information for us to make that assumption.
[61] *Troubled Waters, supra* note 48, at 2-3. EPA designates facilities as "major" based on a scoring system that considers various factors. *Id.* at 1 n.a.
[62] *Id.* at 12.
[63] *Id.*
[64] *Id.* at 8, 12.
[65] *Id.* at 13.
[66] *Id.* at 9, tbl. 1.
[67] *See id.* at app. B, *available at* http://static.uspirg.org/reports.asp?id2=35946 (select "Vermont" from dropdown menu:, "Download a state appendix").
[68] *Id.*
[69] *Secretary v. City of Burlington* AO (Vt. Env. Ct. Dec. 9, 2005); *ANR v. City of Burlington* AOD, No. 9-1-06 (Vt. Env. Ct. Apr. 24, 2006).

ANR also fails to enforce against "minor" facilities, which, as EPA has acknowledged, account for the bulk of NPDES facilities in Vermont. [70] From 2001-2006, an average of 67 minor facilities per year were in "noncompliance," for instance for violations of permit limits, reporting requirements, or enforcement orders.[71] The average number of enforcement actions per year for that noncompliance: one. 2003 saw 87 permittees in noncompliance, and zero formal enforcement actions. 2004 saw 69 permittees in noncompliance, and zero formal enforcement actions.

b. When it did enforce, ANR consistently chose lenient options that fail to accomplish CWA enforcement goals.

Even when ANR takes enforcement actions, the mode of choice is an Assurance of Discontinuance, not an Administrative Order. Of the 32 formal enforcement actions for the NOAVs referenced above, 2 were EOs, 22 were AODs (5 of which converted from AOs), and only 8 were AOs (not including those that later converted to AODs). Of the *total* 149 known enforcement actions taken by the Enforcement Division for discharge violations from 1997-2007, only 28 were AOs, 12 of which later converted to AODs.[72] Seven were Emergency Orders, and 114 were AODs (including the 12 conversions). As noted in Appendix A, and below in the SEP discussion, AODs are more lenient enforcement options because they are negotiated with the violators and rely heavily on the use of SEPs that are often unenforced. Further, the average fines assessed in AODs are significantly lower than those assessed in AOs.[73] In many cases, penalties are significantly lowered or eliminated when AOs convert to AODs, after violators undertake remedial measures that they were already legally obligated to complete by existing permits, regulations, or statutes. This problem was noted in CLF's 2007 report that analyzed environmental enforcement generally and concluded that penalties often shrink dramatically when AOs are converted to AODs.[74]

A few examples illustrate the point.

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[70] *2006 EPA Report, supra* note 39, at 2.

[71] DEC, *Annual Noncompliance Report for NPDES Non-Majors* (Calendar Years 2001-2006). This average assumes that ANR did not report a facility more than once in each noncompliance report. We believe the assumption to be accurate because ANR appears to have a practice of indicating when facilities might be counted twice. *See* 2001 *Annual Noncompliance Report* (indicating that 20 facilities in one category were also counted in another category). For our estimate, there were no such indications. Also, we do not have data for pre-2001 because ANR did not report minor noncompliance to EPA prior to that time, despite regulatory reporting requirements. *See* Feb. 8 email, *supra* note 52; 40 C.F.R. § 123.45(c).

[72] There is a seeming discrepancy between the fact that our tracking of NOAVs for discharge and/or NPDES violations turned up only 32 enforcement actions, but there were actually 149 enforcement actions for discharge and/or NPDES violations in the ten-year time period. However, the discrepancy can be attributable to the fact that ANR is not required to issue NOAVs before taking formal enforcement actions. 10 V.S.A. § 8006(b) ("the secretary *may* issue") (emphasis added). When our matching of NOAVs to subsequent enforcement actions left many enforcement actions "NOAVless," it led to the conclusion that, in practice, ANR does not issue NOAVs prior to all enforcement actions. Also, some of the enforcement actions may have followed NOAVs issued by the Wastewater Management Division post-October 2003, of which NOAVs we do not have records as explained above.

[73] *Lost Opportunities, supra* note 40, at 7 (for the years 1995-2005, average AOD amount $3,019; average AO amount $12,515).

[74] *Id.* at 10-11. A recent addition to Vermont's environmental enforcement law provides some hope that SEPs can no longer be mere requirements that violators undertake previously required projects. *See* 10 V.S.A. § 8007(b)(2). Municipalities, however, are excepted. *Id.*

- On August 1, 2003, an ANR officer responded to a discharge complaint in connection with a logging operation on the property of North Country Real Estate Development. The officer observed an illegal discharge to state waters from the log landing and noted that no erosion controls were in place. The officer subsequently issued written recommendations to North Country to bring the site into compliance with Acceptable Management Practices (AMPs). The officer returned to the site on August 19th and observed that very few of the recommendations from the AMP report were followed. Additional written recommendations for temporary and permanent erosion control measures were issued. On August 20th, ANR issued an NOAV for §1259(a) illegal discharges to state waters. The compliance directive contained within the NOAV ordered North Country to immediately take actions to eliminate further discharges and follow the AMPs that were previously issued. On August 29th, the officer revisited the site. No additional erosion controls were in place. The officer returned September 14th. No additional erosion controls were in place. On September 23rd, the officer visited the property again. No additional erosion controls were in place and the officer noted turbid water leaving the log landing and discharging into the Black River. On September 13th, 2004, nearly one year after the NOAV and multiple compliance directives were issued, no erosion controls had been installed and ANR finally issued an AO to North Country. The AO contained a penalty of $12,250 to be paid within 30 days. On February 2, 2005, more than three months after the payment due date, ANR entered into an AOD with North Country.[75] The AOD stated that North Country had made efforts to improve water flow but noted that additional close out work at the site was still needed - practices that were already components of Vermont's AMPs to which North Country was subject.[76] Nonetheless, ANR reduced the $12,250 penalty to $5,000, ordered a principal of the North Country Real Estate to complete a training course, and issued specific instructions for close-out work at the site.

- In January 2000, ANR issued an AO to the Village of Waterbury for discharging sodium hypochlorite into a stream, killing fish, salamanders, and microinvertebrates. The AO ordered the Village to pay $25,000 in penalties. After the Village took remedial measures to eliminate the illegal discharge (and thereby comply with Vermont's discharge prohibition), it entered into an AOD with ANR in which fines were completely eliminated and Waterbury was told to contribute $8,500 to a SEP.[77]

- In 2002, ANR issued an AO to the Town of Bethel for discharging *E. coli* in excess of its discharge permit, discharging condoms and feminine hygiene items into the White River, and inadequately staffing its wastewater treatment facility operations. The AO included $75,000 in penalties. The Town hired an engineer and consultants, and worked with the Wastewater Management Division to improve the facility to bring it "in[to] compliance

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[75] *Secretary v. N. Country Real Estate Dev., LLC* AO (Vt. Env. Ct. Sept. 13, 2004); *ANR v. N. Country Real Estate Dev., LLC* AOD, No. 195-10-04 (Vt. Env. Ct. Feb. 16, 2005).

[76] *See* Vt. Department of Forest, Parks, & Recreation, *Acceptable Management.Practices for Maintaining Water Quality on Logging Jobs in Vt.* 9-36 (2006), *available at* http://www.vtfpr.org/watershed/documents/Amp2006.pdf.

[77] *Secretary v. Village of Waterbury* AO (Vt. Env. Ct. Jan. 5, 2000); *ANR v. Village of Waterbury* AOD, No. 160-8-00 (Vt. Env. Ct. Aug. 30, 2000).

with the Discharge Permit."[78] The fine was eliminated less than a year later and replaced with a $20,000 SEP.

- In 2005, ANR issued an AO to the City of Burlington for discharging 900,000 gallons of non-disinfected wastewater into Lake Champlain. The City also exceeded its permit limit for *E. coli* bacteria. The permitted limit was 77 *E. Coli* colonies/100 ml. A test of the discharge indicated 13,600 *E. Coli* colonies/100ml. ANR assessed Burlington a fine of $17,500 for, among other things, "failing to properly operate the plant," resulting in violations of its permit.[79] The plant hired an independent consultant to examine the plant's operation and the fine was eliminated in favor of a $7,500 SEP.

These cases typify a pattern of ANR's lenient enforcement practices. ANR undermines the deterrent effect of its enforcement program by regularly mitigating fines simply because a violator acquiesces to upholding its pre-existing legal responsibilities—often well after missing compliance deadlines established in the enforcement proceeding—and by engaging in open-ended settlement negotiations that allow the violator to delay its moment of financial accountability.[80] Unless and until ANR demands greater accountability from those who engage in illegal water pollution activities, its overly-tolerant enforcement of the Clean Water Act exposes Vermont water quality and public health to great risks.

2. ANR weakened Clean Water Act enforcement by failing to enforce Supplemental Environmental Project requirements.

In its 2004 report, EPA detailed the problems with ANR's use of SEPs.[81] Though ANR has a new SEP policy, many of EPA's concerns remain valid. Furthermore, even if ANR's SEP agreements were otherwise sufficient to accomplish CWA enforcement goals, ANR's blatant failure to timely enforce the agreements negates their utility.

a. ANR's new SEP policy does not remedy the problematic aspects of SEPs that make them inferior enforcement tools, as raised by EPA in its 2004 review of ANR.

Though SEPs can have environmental value under appropriate circumstances, they can also compromise environmental enforcement in multiple ways. As explained by EPA in 2004, because a SEP is usually an agreement for a violator to pay funds to a third party, "[i]nstead of the deterrence and stigma of paying a fine, the violator has the satisfaction and positive publicity of promoting an environmental cause," especially because at that time Vermont did not require a violator to include the fact that the SEP resulted from an enforcement action in public statements about the SEP.[82] SEPs also "substantially reduce[] the deterrent effect of penalties" because

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[78] *Secretary v. Town of Bethel* AO (Vt. Env. Ct. Sept. 4, 2002); *ANR v. Town of Bethel* AOD, No. 205-9-02, at 3 (Vt. Env. Ct. Apr, 8, 2003).
[79] *City of Burlington* AO, *supra* note 69; *City of Burlington* AOD, *supra* note 69, at 1-2.
[80] *See, e.g.,* Jay Peak Notice of Intervention, *supra* note 42. As mentioned *supra* note 74, it is hopeful that recent revisions to Vermont's enforcement law will prevent non-municipal SEPs from containing pre-existing legal responsibilities.
[81] *2004 EPA Report, supra* note 30, at 23-25.
[82] *Id.* at 24.

"performance of SEPs may be viewed in the regulated community as a benign way to avoid paying a penalty."[83] Further, because Vermont gave full credit for the violator's out-of-pocket costs against the SEP, which ignored the tax benefits to the violator, "the actual cost to the violator of performing an SEP is much lower than the cost of paying a cash penalty of the same amount."[84] Thus, "SEPs may be seen in the regulated community as a very inexpensive way of satisfying the ANR's settlement demands."[85] A final concern voiced by EPA was that Vermont gave "dollar-for-dollar credit for all SEP expenditures, without consideration of the relative environmental value of the SEP."[86] So, a violator that performed a moderate SEP would receive the same credit as a violator that performed a valuable SEP, even though "SEPs vary greatly in the actual health and environmental benefits they produce."[87] Another problem with SEPs is that they may be spread over multiple payments; they are not immediately due and therefore lack the sting of actual penalties.[88] Further, because ANR places no time limits on how long polluters may negotiate SEPs, polluters may prolong the SEP process and the consequences of their illegal actions by engaging in prolonged negotiations with ANR.[89]

ANR's new SEP policy of September 1, 2006 does not solve the problems. As an initial matter, though its terms might seem to address some of EPA's concerns, those terms are rendered practically meaningless by a disclaimer prominently displayed on the first page of the policy: "In exercising its discretion, the Agency may take action that varies from the practices contained in this policy, if such action is appropriate in a specific case."[90] Even absent the disclaimer, the policy is flawed. For instance, the policy purports to eliminate a violator's ability to pay 100% of penalties in the form of a SEP. But, municipalities (some of the largest polluters in Vermont) are excepted and may continue to pay 100% of their penalties as SEPs,[91] including SEPs that fund activities that municipal violators had already planned and budgeted for or were already required to undertake by law.[92]

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[83] *See id.*
[84] *Id.*
[85] *Id.*
[86] *Id.* at 25.
[87] *Id.*
[88] *Lost Opportunities, supra* note 40, at 10.
[89] *See, e.g.,* Jay Peak Notice of Intervention, *supra* note 42 (referring to "protracted, behind-closed-doors negotiation between the violator and ANR's Enforcement Division").
[90] ANR, *Supplemental Environmental Project (SEP) Policy ("2006 SEP Policy")* 1 (Sept. 1, 2006).
[91] *Id.* at 5.
[92] The new enforcement act likewise excepts municipalities from the new requirement that SEPs not "primarily benefit[]" the violator, for instance by requiring activities that are required by law, part of the usual course of business, or otherwise planned. *See* 10 V.S.A. § 8007(b)(2)(C).

The resolution of ANR's enforcement actions against the City of Burlington for egregious violations of its NPDES permits for its sewage treatment plants in 2005 demonstrates how ANR's SEP practices have often failed to hold polluters accountable. *See ANR v. City of Burlington* AOD, No. 204-9-05 (Vt. Env. Ct. Oct. 3, 2005) (assessing $58,375 SEP). ANR later allowed the City to apply its SEP payments to a project that it had already planned on completing and was in fact required by law to complete. The City of Burlington's NPDES Municipal Separate Storm Sewer System (MS4) Permit requires it to "reduce the discharge of pollutants from [its] small MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act." *General Permit 3-9014, NPDES Number: VTR040000,* § 4.1.1 (effective 2003). Yet a 2005 study of Burlington's stormwater discharge to Burlington Bay from its College Street pipe identified the city's discharge as a "significant contributor of various pollutants to Lake Champlain," most notably high concentrations of phosphorus "in many cases 100 or more times higher" than background levels in Lake

The policy itself addresses EPA's concern regarding positive publicity, but ANR has failed to implement the policy. The policy states that "[t]he respondent *must* agree in the Assurance of Discontinuance that whenever it publicizes a SEP or the results of the SEP, it *will* state in a prominent manner that the project has been undertaken as part of the settlement of an enforcement action with the Agency."[93] Despite this mandatory language, only 1 of 7 SEP AODs issued for discharge violations after the policy became effective had any language about SEP publicity.[94] The other 6 AODs did not contain the required language concerning publicity of their SEPs or SEP results.[95] Thus, in practice, ANR has not effectively addressed EPA's concern on the issue of positive publicity for violators.

Additionally, ANR has not adequately addressed EPA's concern that it does not account for the relative environmental value of different SEP projects. Though the new policy requires different SEPs to have different "penalty offset ratio[s],"[96] the policy does not appear so effective in practice. Under the new policy, most "SEPs greater than $10,000 will have a penalty offset ratio of 1.2:1, meaning that $1 of the penalty will be offset for each $1.20 expended."[97] Pollution prevention and pollution reduction SEPs, however, "will have a penalty offset ratio of at least 1.5:1, meaning that $1 of the penalty will be offset for each $1.50 expended on the SEP."[98] Thus, pollution prevention and reduction SEPs have a higher value because more funds must be expended toward them in order to offset penalties. However, giving these SEPs a "higher" value may greatly reduce their occurrence: because violators may propose their own SEPs,[99] there is little chance they would propose SEPs with the higher offset ratio (and therefore the higher payment). These projects, now given more value by ANR, will likely *not* be the ones most often proposed by violators; there is an economic disincentive to expend large funds on a SEP when there are cheaper available SEP options. Thus, while facially addressing the issue, ANR has again undermined the effectiveness of its new policy and failed to remedy EPA's concerns.

Champlain's Burlington Bay. *See* Burlington Community & Economic Development Office, *College Street Stormdrain Project Grant Application*, at 4-5. This analysis showed that Burlington had not reduced the discharge of pollutants from its pipes to the "maximum extent practicable" as was already required by law. Instead of separately holding Burlington accountable for this violation of its permit, ANR simply allowed Burlington to correct this violation with the funds that were supposed to act as penalties for Burlington's previous violations (detailed in Oct. 3rd AOD). *See* Letter from Gary Kessler, ANR to Laurie Adams, City of Burlington (March 19, 2007). While the short-term result seems to be a positive for the environment, the longer term effect weakens the overall incentive for a polluter to proactively comply with pre-existing legal obligations because polluters know there will be no true penalty for failure to comply with the law. Instead, ANR sends the message that a polluter can wait to be caught for one violation before taking steps to address other violations it is committing.

[93] *2006 SEP Policy, supra* note 90, at 3 (emphasis added).

[94] *See ANR v. Duane Wells Constr., Inc.* AOD, No. 209-9-07, at 3 (Vt. Env. Ct. Oct 5, 2007) ("in the event that Respondent publicizes the SEP or the results of the SEP, Respondent shall state in a prominent manner that the project was or is being undertaken as part of the settlement of an environmental enforcement action with the Agency of Natural Resources").

[95] *See ANR v. Mt. Snow, Ltd.* AOD, No. 229-9-06 (Vt. Env. Ct. Nov. 29, 2006); *ANR v. Jay Peak Resort, Inc.* AOD, No. 35-2-07 (Vt. Env. Ct. Feb. 16, 2007); *ANR v. Hammond* AOD, No. 78-4-07 (Vt. Env. Ct. Apr. 19, 2007); *ANR v. Inkel* AOD, No. 41-2-07 (Vt. Env. Ct. May 8, 2007); *Jay Peak* AOD, *supra* note 42 (May 10, 2007); *ANR v. Montagne* AOD, No. 291-12-07 (Vt. Env. Ct. Dec. 31, 2007).

[96] *2006 SEP Policy, supra* note 90, at 5.

[97] *Id.*

[98] *Id.*

[99] *Id.* at 1 (ANR has discretion to accept "a SEP proposed by a respondent as part of settling an enforcement action.").

ANR is not entirely blind to the shortcomings of SEPs. One strong recommendation from the programs surveyed in its 2007 compliance and enforcement report stated:

> SEPs should be abolished. They reduce the deterrence value by giving the violator an opportunity to buy good public relations. They are the executive branch appropriating money to projects which would not necessarily be approved by the legislative branch.[100]

b. <u>ANR further diminished the enforcement value of SEPs by failing to adhere to mandatory terms requiring SEPs to convert to civil penalties when not timely paid.</u>

In addition to the above failings inherent in ANR's SEP program, ANR fails at an astonishing rate to timely enforce SEP agreements once made. Within the water pollution discharge program specifically, ANR routinely failed to convert SEPs to civil penalties when violators did not pay on time in accordance with the AOD mandates under which they were ordered.

Of 20 SEPs surveyed from 1997-2007 for discharge and/or NPDES permit violations, only 20% (4 of 20) were fully funded by the dates ordered in their AODs.[101] Sixteen of the 20 SEPs were paid anywhere from 1 to 394 days late. None of the SEPs converted to civil penalties,[102] despite clear mandates in the AODs and ANR's SEP policy that a SEP must be "converted to the original penalty amount in a pro rata manner and deemed *immediately* due and payable to the state" upon failure to fulfill any of its terms.[103]

Following are some representative examples of ANR neglecting its duty to collect late SEP payments as civil penalties, a practice that makes the enforcement value of SEPs even less useful.

- In an April 5, 2000 AOD, the Town of Randolph agreed to fund a $20,000 SEP with two payments of $10,000 each.[104] This penalty was assessed because a chlorine feeder line at the Town pool ruptured, released chlorine into the White River, and ultimately caused a fish kill that "occurred over approximately a mile and a half of the river and killed approximately 24,775 non game species and 1818 game species of fish."[105] The first $10,000 payment was due July 31, 2000, with "the remaining $10,000 of the SEP [due] no later than July 31, 2001."[106] Neither payment was made on time. Instead, Randolph paid the $20,000 on August 29, 2001[107] – 394 days past the first deadline, and 29 days past the second deadline. Nothing converted to a civil penalty, despite language in the

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[100] *C&E Report, supra* note 7, at 43.
[101] The 20 SEPs were chosen as a representative sample from the 10-year period and were generally the SEPs with the highest dollar amounts from each year.
[102] Email from ANR to ENRLC (Feb. 20, 2008).
[103] *See, e.g., 2006 SEP Policy, supra* note 90, at 5.
[104] *ANR v. Town of Randolph* AOD, No. 67-4-00, at 3 (Vt. Env. Ct. Apr. 5, 2000).
[105] *Id.* at 1-2.
[106] *Id.* at 3.
[107] Email from ANR to ENRLC (Feb. 26, 2008) (in chart provided by Enforcement Division: "SEP Payment Dates per VLS Request Dated 2/21/08" ("SEP Payment Chart")).

AOD stating that: "If Respondent fails to fund the SEP on or before July 31, 2000 *and* July 31, 2001 . . . the money allocated for the SEP that has not been expended by the Respondents, *shall be converted* to a civil penalty . . . ."[108]

- In 2003, ANR enforced against Cabot Creamery Cooperative, Inc. for discharging "[a]pproximately 5,000 to 7,500 gallons of wastewater" into the Winooski River.[109] On August 25th, Cabot Creamery agreed to fund $2,345 towards a SEP, payable within 90 days.[110] The payment was not made until December 15th[111] - 21 days past the November 24th deadline. ANR failed to convert the late payment to civil penalties.

- On September 19, 2003, ANR and the Vermont Agency of Transportation (VTrans) entered into an Assurance of Discontinuance for a variety of violations related to excavation work at Knapp Airport in Berlin, Vermont.[112] According to the AOD, VTrans agreed to fund two SEPs: one general SEP for at least $30,000, and another to the United States Geological Survey (USGS) for $50,000.[113] The general SEP was payable within 120 consecutive calendar days,[114] due January 17, 2004. The payment was made in August, 2004,[115] making it over 200 days late. The USGS project payment was due no later than June 1, 2004. It, too, was made in August,[116] over two months beyond its scheduled due date. ANR did not convert either overdue SEP into a civil penalty.

- On February 16, 2007 Jay Peak Resort, Inc. agreed to contribute $16,000 to fund a SEP within 90 days of the issuance of its AOD.[117] The SEP was not funded until November 8, 2007[118] - 175 days late. ANR did not convert it to a civil penalty. The SEP contribution had been assessed for numerous violations (some of them recurring), such as stormwater violations, open burning violations, late reporting violations for their wastewater system, and construction violations (such as driving a bulldozer through clearly delineated wetlands).[119]

3. ANR has an historic practice of allowing significant non-compliance violators to break the law without facing formal enforcement action or penalties, thereby failing to discourage non-compliance with the CWA.

ANR's anemic enforcement practices are especially evident in its treatment of SNC violators. Of well over 2000 SNC violations reported in ANR's SNC Reports from 1997-2007, only 12 violations resulted in formal enforcement action, and ANR assessed only 3 monetary penalties.

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[108] *Town of Randolph* AOD, *supra* note 104, at 3-4 (emphasis added).
[109] *ANR v. Cabot Creamery Cooperative, Inc.* AOD, No. 139-8-03, at 1-2 (Vt. Env. Ct. Aug. 25, 2003).
[110] *Id.* at 2.
[111] SEP Payment Chart, *supra* note 107.
[112] *Secretary v. Vt. Agency of Trans.* AOD, No. 157-9-03 (Vt. Env. Ct. Sept. 19, 2003).
[113] *Id.* at 5.
[114] *Id.*
[115] SEP Payment Chart, *supra* note 107.
[116] *Id.*
[117] *Jay Peak* AOD (Feb. 16, 2007), *supra* note 95, at 6.
[118] SEP Payment Chart, *supra* note 107.
[119] *See Jay Peak* AOD, *supra* note 95, at 2-4.

In such an enforcement environment, violators can be confident that they will not suffer financial accountability as a result of their noncompliance.

a. Overview of ANR's Significant Non-compliance Policy

ANR's "SNC" policy is a policy utilized by the Wastewater Management Division as a means of prioritizing responses to significant noncompliance with discharge permits.[120] ANR identifies four categories of significant noncompliance.[121] A violation of previous enforcement actions is the first, which includes violating requirements imposed in an AO, AOD, or EO.[122] The second type of violation is failure to meet compliance schedules in discharge permits or orders.[123] However, if state statute or ANR's policy makes compliance contingent on the availability of state or federal funding, and the sole reason for failure to meet the schedule is unavailability of such funds, the violation will not be considered a SNC.[124] This has been an "ongoing issue with EPA relative to the lack of enforcement of some SNC violations."[125]

Violations of permit effluent limits are the third category.[126] This does not include all transgressions of permit limits. To determine which effluent limit violations are SNCs, ANR calculates the magnitude of the violation based on a Technical Review Criteria (TRC), which is some factor of the permit limit.[127] For example, the TRC for *E. coli* is 10 x the permit limit.[128] Exceedance of that TRC is then considered over a specific period of time. For example, if the permit requires daily sampling, 5 TRC violations in a month will qualify as a SNC.[129] A permittee that does not exceed the TRC may still be guilty of a SNC violation if it is a chronic violator.[130] The final category of SNCs is violations of sampling and reporting requirements.[131] A violator must fail to submit a report within 30 days of the due date for two reporting periods, or perform less than 90% of the required analyses in a consecutive 12-month period, to be considered a significant noncomplier.[132]

The SNC policy seems to recognize that violations involving late or nonreporting are worrisome because of the potential for facilities to discharge in excess of their permits without self-monitoring checks. Among other purposes, reporting ensures that the regulating agency, as well as the facility itself, can keep track of discharges at the facility; thus it is crucial that a method for transparent monitoring and reporting exist.[133] This is particularly true when the information

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[120] *See* DEC, *Procedure for Determining Significant Non-compliance for Vt.'s Water Pollution Control Permit Program ("SNC Policy")* 1 (1995).
[121] *Id.* at 2-4.
[122] *Id.* at 2.
[123] *Id.*
[124] *Id.*
[125] *2004 EPA Report, supra* note 30, at 10.
[126] *SNC Policy, supra* note 120, at 2.
[127] *Id.* at 3.
[128] *Id.*
[129] *Id.*
[130] *Id.* at 4-5.
[131] *Id.* at 5.
[132] *Id.* .
[133] The requirement to report is important enough that "Congress took steps to ensure the timely discovery of abateable hazards and to facilitate the implementation of measures calculated to minimize pollution damage. Absent

would otherwise be difficult for the public (or an agency working in the public's interest) to discover. As put by one Court of Appeals:

> "[T]he reporting and records retention requirements of the NPDES permit . . . are central to adequate administration and enforcement of limits on substantive discharges under the Clean Water Act. Unless a permit holder monitors as required by the permit, it will be difficult if not impossible for state and federal officials charged with enforcement of the Clean Water Act to know whether or not the permit holder is discharging effluents in excess of the permit's maximum levels."[134]

A policy of self-monitoring and reporting by facilities is a practical solution to that problem, and can be effective if properly followed. Facilities, too, benefit from vigilant monitoring and reporting. It allows them to thoroughly understand their own processes and the consequences of their actions, which can help them not only be responsible citizens in the community, but also streamline their operations. In the end, everyone wins when the system works. When it does not, the consequences are serious: "[F]ailure to monitor and report monitoring results accurately undermines the self-reporting system on which the entire NPDES system is based."[135]

Finally, while ANR has several enforcement options available to it for responding to SNCs, the policy states that the type of response "will be at the discretion of the Department."[136] The range of that discretion can vary from an AO with stiff penalties to no action at all.

b. ANR took formal enforcement actions against less than 1% of known SNC violations from 1997-2007, giving SNC violators little incentive to come into compliance with the CWA.

ANR's predominant response to SNC violations has been little to no action. Of the approximately 2,500 SNC violations in ANR's semiannual SNC Reports from 1997-2007, only 12, or about 0.4%, resulted in formal enforcement actions, of which there were four.[137] Two enforcement actions were AODs;[138] one was an AO;[139] the other was an EO.[140] Nine hundred

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a requirement to report, discharges of small amounts of oil such as is the case here, might well go undetected or, at least, the possibility of abatement would be lessened." *United States v. Mobil Oil Corp.*, 464 F.2d 1124, 1127 (5th Cir. 1972) (involving discharge of oil into navigable waterway) (citation omitted).

[134] *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1115 (4th Cir. 1988).

[135] *See Pub. Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc.*, No. 89-3193, 1995 WL 461252, at *12 (D.N.J. 1995).

[136] *SNC Policy, supra* note 120, at 1.

[137] We drew this conclusion by comparing violations detailed in ANR's SNC Reports from 1997-2007 against formal enforcement actions for discharge and/or NPDES violations from 1997-2007. For a general explanation of the sources for this section, please see "Note on Source Documents," pp. 9-10. Note that it is possible that a 2007 SNC violation was followed by a 2008 enforcement action, which we did not review. However, this is unlikely. The final SNC Report we reviewed was for the period ending in March, 2007, *supra* note 56. Thus, in order for an enforcement action to be unaccounted for, there would have had to have been a 7-month time lapse between violation (March 2007) and enforcement action (January 2008).

[138] *ANR v. Dorset Fire Dist. No. 1* AOD, No. 96-5-00 (Vt. Env. Ct. May 5, 2000); *ANR v. Town of Shelburne* AOD, No. 11-1-03 (Vt. Env. Ct. Jan. 27, 2003).

[139] *Secretary v. Judge Companies, Inc.* AO (Vt. Env. Ct. Nov. 8, 2000).

twenty-two of the violations (36.8%) were noted as receiving corresponding NOAVs, and 18 violations (0.7%) were noted as subject to 1272 Orders. ANR had a range of responses for the remaining violations, from threatening to close down the facility to dropping the issue with a notation that the problem was "resolved." The latter was more common.

Following are some examples that typify ANR's lax approach to SNC violators. Note that many of the violations were for late reporting or failure to report altogether, which are particularly worrisome for the reasons discussed above.

- Bradford Oil Company was cited for 15 SNC violations for late and non-reporting from 2001 to 2004, none of which resulted in an NOAV or formal enforcement. In most cases, no action was taken. In other cases, ANR indicated that a "reminder letter [was] to be sent to Bradford Oil to explain the importance of timely reports and stress that delinquent reporting is a violation of the permit."[141]

- The Town of Chester had 90 SNC violations over the course of approximately five years ending in 2007. Violations included late reporting and failure to submit an emergency power failure plan. Also cited were violations of pH and settleable solids limits. The common notations for half of those violations (44) were "no action" or "resolved."

- The Town of Benson had a total of 68 SNC violations during the period of 2001-2006. The violations included late reporting, non-reporting, failure to meet permit effluent limits, and failure to meet compliance schedules. ANR had issued an NOAV for 6 of those violations but as indicated by the "no further action taken" notes that accompany most of Benson's violations, ANR's response went no further.

- For the 1997-1999 reporting period, MacIntyre Fuels had three exceedances of total petroleum hydrocarbons. ANR responded with a letter telling the company to fix the system and correct the violations. Two years later, ANR commented on MacIntyre Fuels's 9 non-reporting violations with a simple, "explanations acceptable." ANR took no further action according to the Reports.

- The Arlington School was cited for 18 SNC violations from 2001-2003. The violations included failure to submit sledge depth accumulation measurements and failure to report UV system cleaning and maintenance. None of those violations elicited an NOAV, even after repeated violations. No AOs or AODs were issued either, and ANR's notes indicate that the only actions taken were notes in inspection letters, "follow up" phone calls, or a simple "resolved."

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[140] *Secretary v. Town of Hartford* EO, No. 267-12-05 (Vt. Env. Ct. Dec. 16, 2005).
[141] Internal ANR memo, at 6 (Dec. 14, 2004).

c. For the approximately 2,500 known SNC violations from 1997-2007, ANR assessed only three penalties, clearly failing to recoup the economic benefit of or deter SNC violations.

ANR's lack of meaningful enforcement action is especially evident in its failure to assess penalties for all but three of these SNC violators. Problems with ANR's general use of penalties – or lack thereof - have not gone unnoticed by EPA in the past. In its 2004 review of ANR's enforcement policies, EPA stated that it was "concerned that the penalties assessed by the ANR are at levels that may not be achieving economic disincentives and deterrence."[142] ANR also noted the problem in its 2007 compliance and enforcement report, where survey results included the recommendation that "[p]enalties should be assessed more often to better serve as a deterrent."[143] An analysis of ANR's annual reports to the legislature on enforcement from 1995 to 2007 shows that only 16% of confirmed violations of Vermont's environmental laws resulted in enforcement action with the possibility of a fine.[144]

ANR's treatment of SNC violators offers no evidence that it has resolved the longstanding problems it has had with inadequate and ineffective enforcement. Of the approximately 2,500 SNC violations, ANR assessed only three penalties, for $37,000 total.[145] In one case, the Dorset Fire District failed to comply with its reporting requirements "during the term of the Direct Discharge Permit."[146] The permit was obtained on February 22, 1995, and expired on January 1, 2000. The Fire District was allowed to pay its entire $3,500 penalty as a SEP. In another case, the Town of Shelburne violated its *E. coli* limit approximately 20 times, its chlorine limit at least 90 times, its phosphorus limit at least 8 times, its total suspended solids limit at least 12 times, and its biological oxygen demand limit at least 2 times.[147] Its entire penalty was a SEP which, included in the above discussion, was not timely paid and did not convert to civil penalties.[148]

As illustrated by the following examples, ANR failed to assess penalties in instances where SNC violations were similarly egregious.

- Summit Management had 10 violations for late reporting from the years 1999 to 2006. After 2 violations in 1999 and 1 in 2003 for which ANR took no action, ANR issued an NOAV for 3 violations in early 2004. There was no follow-up action for that NOAV. The permittee then had 2 more violations later that year, and 2 again in 2006. ANR took no action for those subsequent violations according to the Reports.

- A 2005 Emergency Order for the White River Junction Wastewater Treatment Facility described overflows from the collection system (owned by the Town of Hartford) that resulted in discharges of wastewater containing untreated sanitary waste into the Connecticut River. The discharges constituted a threat to the public health. To address

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[142] *2004 EPA Report, supra* note 30, at 18.
[143] *C&E Report, supra* note 7, at 43.
[144] CLF, *Enforcement Actions – Fines Chart (1995-2007).*
[145] *Dorset Fire* AOD, *supra* note 138; *Town of Shelburne* AOD, *supra* note 138; *Judge Companies* AO, *supra* note 139.
[146] *Dorset Fire* AOD, *supra* note 138.
[147] *Town of Shelburne* AOD, *supra* note 138.
[148] *Id.* (SEP due on 4/27/03); SEP Payment Chart, *supra* note 107 (SEP paid on 9/5/03 and 1/26/04).

this problem, an engineering assessment recommended the Town separate its combined sanitary and stormwater collection system. Funds were approved for this purpose in December 1995; yet, as of December 2005, the project still had not been completed. ANR issued an Emergency Order on December 16, 2005 to compel compliance, but the EO did not include any penalty.[149] The possibility of a $50,000 civil penalty was mentioned, but only as a remedy if the Town did not complete the project.

ANR's tolerance of an ongoing threat to public health and failure to drive expeditious compliance by exercising its power to levy fines strongly suggests that its NPDES enforcement program administration is not up to the task of restoring, maintaining, and protecting water quality and public health in Vermont.

4. ANR's NPDES stormwater program suffered from a high rate of noncompliance and a low rate of oversight and enforcement, thereby failing to protect Vermont's waters from the numerous harmful pollutants associated with stormwater.

ANR's stormwater program also suffers from insufficient compliance and enforcement practices, further compromising the achievement of the CWA's water quality goals. As EPA knows, Vermont has struggled to bring its stormwater program into compliance with federal requirements.[150] ANR was more than a decade overdue in fully implementing this aspect of the NPDES program. The overdue Multi-Sector General Permit (MSGP) program then allowed for a long phase-in of the Stormwater Pollution Prevention Plan (SWPPP) requirement,[151] which further extended the period of time during which Vermont's waters were deprived of CWA protections. Additionally, Vermont has failed to report to EPA regarding its stormwater program.[152] As of this January, there was still no formal reporting to EPA regarding Vermont's stormwater permitting and permit compliance.[153]

As explained by EPA in its stormwater rules, the pollution associated with stormwater can have extremely harmful water quality impacts.[154] Generally, stormwater discharges can "chang[e] natural hydrologic patterns, accelerat[e] stream flows, destroy[] aquatic habitat, and elevat[e] pollutant concentrations and loadings."[155] Stormwater may "contain or mobilize high levels of contaminants, such as sediment, suspended solids, nutrients (phosphorous and nitrogen), heavy

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[149] *Town of Hartford* EO, *supra* note 140.

[150] *See, e.g.,* Letter from Kira Jacobs, VT State Unit, EPA Region 1, to Winslow Ladue, Policy & Planning Coordinator, ANR, at 2 (Sept. 8, 2004) (in EPA's comments on Vt. DEC's 2003 End of Year Report under the Performance Partnership Agreement, stating: "Vermont needs to issue a stormwater permit for industrial activities since they are one of the only states in the country that has not done so.").

[151] *See* ANR, Notice of Issuance of General Permit 3-9003: Vt. Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (Aug. 18, 2006) (allowing existing facilities 270 days to file SWPPPs), *available at* http://www.vtwaterquality.org/stormwater/docs/msgp/sw_msgp_notice_of_issuance.pdf.

[152] *See, e.g.,* Letter from Erik Beck, VT State Unit, EPA Region 1, to Winslow Ladue, Policy & Planning Coordinator, ANR, at 2 (Aug. 26, 2003) (in EPA's comments on Vt. DEC's 2003 Mid-Year Report under the Performance Partnership Agreement, stating "Please provide an update on the development and implementation of the Multi-Sector General Permit.").

[153] *Clean&Clear Audit, supra* note 9, at 47 (citing 11/29/07 personal communication).

[154] Phase I Stormwater Rule, 55 Fed. Reg. 47,990, 47,992 (Nov. 16, 1990); Phase II Stormwater Rule, 64 Fed. Reg. 68,722, 68,724 (Dec. 8, 1999).

[155] 64 Fed. Reg. at 68,724.

metals and other toxic pollutants, pathogens, [and] toxins."[156] Specifically, stormwater from construction activities "negatively impact[s] receiving waters by changing the physical, biological, and chemical composition of the water, resulting in an unhealthy environment for aquatic organisms, wildlife, and humans."[157] Intensive construction may cause "severe localized impacts on water quality because of high unit loads of pollutants, primarily sediments."[158] Sediment is one of the top causes of pollution to Vermont's waters, accounting for approximately 75% of its water quality impairments.[159] "Construction sites can also generate other pollutants such as phosphorus and nitrogen from fertilizer, pesticides, petroleum products, construction chemicals and solid wastes."[160] These materials can be "toxic to aquatic organisms" and make water unsuitable for contact recreation.[161] In addition to the contaminants listed above, stormwater from industrial facilities may also contain wastes from unauthorized connections.[162]

In Vermont, 17 surface waters are currently impaired by stormwater pollution.[163] Numerous other waters are at serious risk of impairment from stormwater-related pollutants caused by activities that typically generate stormwater pollution.[164] Yet, ANR's enforcement of stormwater pollution controls – particularly those for industrial and construction activities - remains deficient. As reported in the recent Clean & Clear audit, inspections have revealed a fairly high non-compliance rate with both state and federal stormwater permits.[165] Problems are especially evident in ANR's administration of two federally required permits – the Multi-Sector General Permit and the Construction General Permit.[166]

a. By the end of 2007, ANR had not enforced against any violations of the SWPPP and DMR requirements of the Multi-Sector General Permit, and had failed to bring hundreds of jurisdictional facilities under its ambit.

As its name implies, the "Multi-Sector" GP is meant to cover facilities in a variety of industrial sectors, including timber, chemical, and paper products; oil and gas extraction refining; metals and coal mining; plastics manufacturing; leather tanning; and air transportation facilities.[167] The facilities must submit SWPPPs unless they can certify "no exposure" - that all of their activities are protected by a storm-resistant shelter to prevent exposure to precipitation causing runoff.[168] SWPPPs must include facility specific information regarding potential pollutant sources as well as Best Management Practices to prevent stormwater pollution.[169]

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[156] *Id.*
[157] *Id.*
[158] 55 Fed. Reg. at 47,992.
[159] Vt. Natural Resources Council, *Unchecked & Illegal: How ANR Is Failing to Protect Vt.'s Lakes & Streams ("Unchecked & Illegal")* 8 (2008) (citing 2004 303(d) List).
[160] 55 Fed. Reg. at 47,992.
[161] *Id.*
[162] *Id.*
[163] *303(d) List, supra* note 3; TMDL Information, *supra* note 1.
[164] *Part C List, supra* note 6 (multiple problems caused by land development, urban runoff, and road runoff).
[165] *See Clean&Clear Audit, supra* note 9, at 48.
[166] Both permits are available at http://www.vtwaterquality.org/stormwater/htm/sw_permits.htm.
[167] *See* ANR, Multi-Sector General Permit ("MSGP"), *available at* http://www.vtwaterquality.org/stormwater/htm/sw_msgppermit.htm (listing 30 industrial sectors subject to MSGP).
[168] MSGP, *supra* note 166, at §§ 1.8, 2.
[169] *Id.* § 2.

As the Clean & Clear audit reported, however, it is not known how many facilities in Vermont are subject to the MSGP and "overall compliance appears low."[170] The "best available data" suggest there may be as many as 3,023 facilities required to obtain coverage or to certify "no exposure."[171] Assuming that half of the estimated 3,023 facilities in Vermont would qualify for "no exposure," there would be 1,511 facilities required to seek coverage and submit SWPPPs. But, according to the audit, only 632 "receiv[ed] coverage" under the MSGP in 2006-2007.[172]

Facilities that did seek permit coverage were required to submit SWPPPs either prior to seeking coverage, or by May 15, 2007.[173] However, 54 of the 290 MSGP facilities identified by ANR on November 15, 2007 had not submitted SWPPPs.[174] An additional 90 facilities submitted SWPPPs after the May 15th deadline, with 27 submitting them more than 30 days past the deadline.[175] ANR had not taken or considered enforcement actions for these 144 instances of late or non-submittal of SWPPPs by the close of 2007.[176]

ANR is also failing to enforce another important requirement of the MSGP. In addition to SWPPP requirements and subject to a limited exception, each industrial sector must monitor its discharges to ensure compliance with benchmark water quality parameters.[177] These parameters are specific to each industry and each facility must submit results from all benchmark monitoring to ANR on provided discharge monitoring report (DMR) forms.[178] At the beginning of this year, 95 of 231 facilities required to submit DMRs had not yet submitted them.[179] Yet, no formal enforcement actions had been taken against facilities that submitted DMRs late or failed to submit the reports.[180] It should be noted that the true number of facilities required to submit DMRs is probably closer to 1,511, if the best data available mentioned above is accurate.

The requirements of the long-overdue MSGP are clear and straightforward. ANR's inaction in

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[170] *Clean&Clear Audit, supra* note 9, at 48.
[171] *Id.*
[172] *See id.* (632 facilities receiving coverage under MSGP). By "receiving coverage," it is possible that the Clean & Clear audit meant that 632 facilities *responded* to the MSGP by either seeking coverage or claiming no exposure. This is because a list provided to CLF by ANR of MSGP facilities submitting SWPPPs included only 290 facilities, not 632. Email from ANR to CLF (Nov. 15, 2007) ("Nov. 15 email") (excel spreadsheet detailing list of facilities that had submitted SWPPPs with submittal dates, and facilities that had not submitted SWPPPs). One explanation for the confusion is that the remaining 342 facilities responded to the MSGP but were not required to submit SWPPPs because they claimed "no exposure."
[173] MSGP, *supra* note 166, at § 2, tbl. 2-1.
[174] Nov. 15 email & spreadsheet, *supra* note 172.
[175] *Id.* In tallying the number of facilities that submitted more than 30 days late, we did not include SWPPPs submitted on June 15, 2007.
[176] Email from ANR to ENRLC (Jan. 4, 2008) ("Jan. 4th email") (in response to request for "all documents on actions taken and/or considered regarding [MSGP] facilities that did not submit SWPPPs by the May 15th, 2007 deadline," stating that "to the best of my knowledge," there were "no documents relevant" to the request).
[177] MSGP, *supra* note 166, at §§ 3.2.2, 3.2.2.5 (benchmark monitoring not required if facility is inactive and unstaffed, with "no industrial materials or activities exposed to stormwater").
[178] *Id.*
[179] Emails from ANR to ENRLC (Jan. 8, 2008) (attaching list of 231 facilities receiving letter about DMR requirements (and thus required to submit DMRs), and lists of facilities that had submitted DMRs).
[180] Jan. 4 email, *supra* note 176 (in response to request for "[a]ll records of compliance and/or enforcement actions taken and/or considered regarding MSGP facilities that have not submitted Discharge Monitoring Reports (DMRs) as required," only responsive document was letter sent to 231 facilities notifying them of DMR requirements).

the face of widespread noncompliance with these pollution-prevention requirements at the inception of this program sends a message that permit violations will be tolerated over the remaining life of the permit. This puts Vermont waters at continued risk of contamination from stormwater laden with industrial waste. Further, in light of the mitigating penalty factor for "unreasonable delay by the secretary" referenced above, ANR may handicap its ability to drive compliance through deterrence as the program progresses because it has taken a lenient approach early on.

b. ANR has taken an extremely low number of formal enforcement actions for extremely high noncompliance with the Construction General Permit.

Enforcement of Vermont's other federally required stormwater permits is also problematic. Of 36 known NOAVs issued from 1997-2007 for violations of NPDES stormwater permits, most notably the Construction General Permit, ANR had taken formal enforcement action against only 2 by the end of 2007. (Only 3 of the 36 NOAVs post-dated October, 2007.) In one enforcement action, Jay Peak, Inc. had failed to install stormwater treatment facilities more than a year after the required date, and had discharged stormwater from construction sites without the requisite permits.[181] The resulting enforcement action was an Emergency Order that assessed no penalties.[182] Between issuance of the NOAV and resulting EO, Jay Peak had received two additional NOAVs for installing a culvert across a stream in a protected riparian area before an application was submitted, and for unauthorized construction site grubbing, among other things.[183] No formal enforcement action was taken for violations in the second and third NOAVs, though Jay Peak was the subject of two AODs in 2007 for different but related violations.[184]

In the only other enforcement action to follow a NPDES construction NOAV, Stratton Gardens was issued an AO and ordered to pay a penalty of $87,500 for failing to install erosion controls and maintain controls that were installed, failing to obtain a stormwater permit for the property prior to creation of impervious surfaces, and other discharge violations.[185] ANR ordered a stay of any new or further development of the property for 837 days – the amount of time equal to the number of days that Stratton Gardens had commenced construction without the requisite permits in place. Stratton Gardens ceased further construction activities on the property and took steps to prevent future erosion. The AO was subsequently converted to an AOD, and the penalty was reduced to $61,625.[186]

An on-the-ground study by Vermont Natural Resources Council (VNRC) in late 2007 confirmed that the rate of non-compliance with the Construction General Permit is magnitudes higher than ANR's meager enforcement presence suggests: Of 29 active construction sites visited, only 1 was in compliance with its permit.[187] For 3 of those, VNRC notified ANR, which issued

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[181] ANR, Notice of Alleged Violation (May 17, 2004).
[182] *Secretary v. Jay Peak, Inc.* EO (Vt. Env. Ct. Feb. 16, 2005).
[183] ANR, Notice of Alleged Violation (Sept. 10, 2004) (Oct. 5, 2004).
[184] *Jay Peak* AOD (Feb. 16, 2007), *supra* note 95; *Jay Peak* AOD (May 10, 2007), *supra* note 42.
[185] *Secretary v. Stratton Gardens, LLC* AO (Vt. Env. Ct. Feb. 3, 2006).
[186] *ANR v. Stratton Gardens LLC* AOD, No. 30-2-06 (Vt. Env. Ct. June 29, 2006).
[187] *Unchecked & Illegal, supra* note 159, at 17, 27.

NOAVs, but did not assess fines.[188] Further, though "[e]very site is required to undertake basic erosion prevention measures . . . 67% of the sites visited did not have a single erosion prevention measure in place."[189] Not one site had a "properly installed and maintained stabilized construction entrance."[190] Additionally, 90% of 500 recent applicants for the Construction General Permit claimed that their projects were "Low Risk," thus requiring less erosion prevention controls.[191] However, only a very small number of projects were expected to be "Low Risk" when the CGP was revised in 2006.[192]

II. Criteria (1)(ii) and 2(iii): Vermont fails to provide for public participation in enforcement as required by the Clean Water Act.

Public participation in the enforcement process is vital to ensuring the goals of the Clean Water Act are met. The Act, its regulations, legislative history, and interpretive case law all underscore the crucial importance of public participation in regulatory and enforcement processes. When the public is excluded, it becomes too easy for unmotivated or overburdened agencies to give polluters a pass, jeopardizing the health of the very waters the agencies are obligated to protect. Public participation is not only important as a policy matter, it is a Clean Water Act *requirement.* ANR has chosen to defy this requirement, and Vermont law itself does not comply with CWA public participation requirements.

In fact, in a recent ruling against an intervention request by CLF (discussed below), Vermont's Environmental Court commented on Vermont's failure to comply with CWA public participation requirements.[193] The Court noted that it had been "unable to uncover the specific Vermont regulations which implement [40 C.F.R. § 123.27(d)] for an environmental infraction that results in an assurance of discontinuance."[194] It rejected ANR's contention that the CWA's public participation requirements apply only to AOs, not AODs, and noted insufficiencies within Vermont law:

> It appears undisputable that ANR's narrow application of § 123.27(d) as applying only to AOs and AODs defeats the intent behind the CWA, its regulations, and the EPA's delegation of administration and enforcement to ANR. However, ANR's narrow interpretation appears to be encouraged by enactments by our state Legislature . . . as well as . . . our own Rules of Procedure. In particular, the Legislature's authorization of ANR's use of AODs, without notice or intervention rights, as an alternative to judicial proceedings appears to ignore a clear mandate of the CWA.[195]

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[188] *Id.* at 18-23.
[189] *Id.* at 29.
[190] *Id.* at 31.
[191] *Id.* at 13.
[192] *Id.* at 15.
[193] *Montagne & Branon, supra* note 19.
[194] *Id.* at 5.
[195] *Id.* at 8.

As EPA has never formally reviewed Vermont's NPDES program for compliance with these requirements,[196] CLF urges EPA to take a hard look now. EPA will find that the whole structure of Vermont's environmental enforcement system excludes public participation – both in law and in practice.

A. Public participation is a critical component of the Clean Water Act, and CWA regulations set specific public participation standards that delegated states must meet.

Public participation was so important to the drafters of the Clean Water Act that they made it one of the Act's explicit, mandatory goals:

> Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter *shall* be provided for, encouraged, and assisted by the Administrator and the States.[197]

The United States Supreme Court has noted this "strong Congressional desire that the public have input in decisions concerning the elimination of water pollution," as well as its applicability to "the administration of the NPDES permit program."[198] A contemporary Senate Report explained the reasoning behind the goal:

> A high degree of informed public participation in the control process is essential to the accomplishment of the objectives we seek – a restored and protected natural environment . . . . [T]he manner in which [CWA] measures are implemented will depend, to a great extent, upon the pressures and persistence which an interested public can exert upon the governmental process.[199]

The Clean Water Act gave an explicit directive toward meeting its public participation goals, instructing EPA and the states to "develop and publish regulations specifying minimum guidelines for public participation in such processes."[200] As explained by the Court of Appeals for the District of Columbia Circuit:

> Congress contemplated that these regulations would do more than pay lip service to public participation; instead, "[t]he public must have a genuine opportunity to speak on

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[196] Letter from Susan Studlien, Director, Office of Environmental Stewardship, EPA, to Anthony Iarrapino, CLF (July 25, 2007) ("EPA was unable to locate any records responsive to the first portion of your request concerning EPA's review and/or approval of the Vermont ANR NPDES program insofar as the records discuss compliance or noncompliance with 40 CFR § 123.27(d).").

[197] 33 U.S.C. § 1251(e) (emphasis added).

[198] *Costle v. Pac. Legal Found.*, 445 U.S. 198, 215-16, 220-21 (1980) (holding that EPA's public participation regulations for permit actions were valid and that EPA had complied with them).

[199] S. Rep. No. 92-414, at *3679 (1971). The Report also stated that "[a]n essential element in any control program involving the nation's waters is public participation. The public must have a genuine opportunity to speak on the issue of protection of its waters." *Id.* at *3738 (regarding permit issuance process).

[200] 33 U.S.C. § 1251(e).

> the issue of protection of its waters" on federal, state, and local levels. "[C]itizen groups," it was said, "are not to be treated as nuisances or troublemakers but rather as welcome participants in the vindication of environmental interests."[201]

When EPA was slow in developing the regulations, the United States Court of Appeals for the Seventh Circuit cited the CWA directive and ordered EPA to comply.[202] The Court also held that EPA's approval of Illinois' NPDES program was invalid and directed EPA to withdraw such approval because it had "failed to establish guidelines by which the adequacy of the Illinois provisions for public participation in the enforcement of the state program could be assessed."[203] The Court found it "clear that Congress intended that EPA guidelines would address, *and state programs following those guidelines would provide for, citizen participation in state NPDES enforcement.*"[204]

The regulations that ultimately resulted set out specific public participation guarantees which delegated states must meet.[205] They provide that "[a]ny State administering a program *shall provide for public participation* in the State enforcement process by providing either" 1) authority for intervention of right, or 2) investigations and responses to citizen complaints, *and* assurance that the state will not oppose allowed permissive intervention, *and* public notice and comment on "any proposed settlement of a State enforcement action."[206] In its Preamble to those regulations, EPA explained that public notice and comment for settlements was especially important to avoid privately negotiated and quickly adopted settlements: "[I]t is just such a situation, with its potential for abuse, which public participation is designed to avoid."[207]

As explained below, Vermont lacks the public participation safeguards required under the Clean Water Act. Not only does Vermont's environmental enforcement law itself fall short of satisfying the CWA's mandatory public participation requirements, but ANR has also blocked citizen attempts to intervene in enforcement processes.

B. Vermont's statutory and regulatory enforcement procedures do not satisfy Clean Water Act requirements for public participation in enforcement actions.

To fulfill its obligations as a delegated state, Vermont must ensure that the public is allowed to participate in enforcement processes in one of two ways, set forth in 40 C.F.R. § 123.27(d). Vermont could provide for intervention of right; or it could assure that ANR responds to all citizen complaints in writing, does not oppose permissive intervention, and has public notice and

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[201] *NRDC v. EPA,* 859 F.2d 156, 177 (D.C. Cir. 1988) (upholding EPA regulations specifying minimum public participation requirements for states).
[202] *Citizens for a Better Env't v. EPA*, 596 F.2d 720, 723, 725 (7th Cir. 1979).
[203] *Id.* at 721, 725.
[204] *Id.* at 723 (emphasis added).
[205] 40 C.F.R. § 123.27(d).
[206] *Id.* (emphasis added).
[207] Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,383 (May 19, 1980).

comment on settlements.[208] As explained below, Vermont law lacks the necessary requirements and its enforcement program therefore fails to meet delegated state requirements.[209]

1. Vermont does not allow intervention of right in administrative enforcement actions.

The first means by which a state may comply with CWA public participation requirements in enforcement is by allowing intervention of right in "any civil or administrative action to obtain [fines or injunctive relief] by any citizen having an interest which is or may be adversely affected."[210] As discussed above, the two primary formal enforcement tools utilized by ANR are Assurances of Discontinuance and Administrative Orders, and neither provides for intervention of right.

There is nothing in the statute governing AOs and AODs that provides for intervention of right.[211] Because there is no statutory intervention of right in environmental enforcement proceedings, the only route left for intervention of right would be nonstatutory. However, the Environmental Court Rules[212] bar nonstatutory intervention of right, thus eliminating all avenues for intervention of right in AO and AOD proceedings. The Rules provide that Vermont's Rules of Civil Procedure apply to reviews of environmental enforcement orders (which include AOs and AODs).[213] Vermont's Rules of Civil Procedure have provisions for nonstatutory intervention, but the Environmental Court Rules then exclude those provisions from applying in environmental enforcement order proceedings.[214]

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[208] 40 C.F.R. § 123.27(d).

[209] *See, e.g., Frilling v. Village of Anna,* 924 F. Supp. 821, 841 (S.D. Ohio 1996) (recognizing that 40 C.F.R. § 123.27(d) public participation requirements are binding upon delegated states and failure to comply calls validity of state program into question). The Attorney General's (AG's) abilities to request a hearing and be heard on an environmental enforcement order, and to recommend veto of insufficient AODs, 10 V.S.A. §§ 8007(c), 8012(a), are no substitute for the regulatory requirements. Aside from the obvious fact that the Attorney General does not represent all the individual persons or entities who might intervene in an environmental enforcement proceeding or comment on an AOD, the Attorney General would not be an independent third party. In contrast, the AG's office stated in response to a request for communications between it and ANR on an AOD that responsive documents could not be produced because they were "confidential communications between two State of Vermont lawyers in the course of providing legal services to the State of Vermont and are protected from disclosure pursuant to 1 V.S.A. § 317(c)(4) [common law privileges]." Letter from Vt. Office of the Attorney General to CLF (May 16, 2007).

[210] 40 C.F.R. § 123.27(d)(1).

[211] *See* 10 V.S.A. §§ 8007, 8008, 8012 (allowing limited *permissive* intervention for AOs).

[212] The Environmental Court has jurisdiction over ANR's administrative enforcement tools (AOs, AODs, EOs) for violations of 10 V.S.A. Chapter 47 (Water Pollution Control); which, as discussed above, is the means through which ANR implements the Clean Water Act. *See* 10 V.S.A. §§ 8003, 8007, 8008, 80009. *See also Montagne & Branon, supra* note 95, at 8 ("we do not agree with ANR that this Court lacks authority to adjudicate environmental violations prosecuted under state law, including those prosecutions it maintains as the entity delegated by the federal EPA to prosecute violations under the federal CWA").

[213] V.R.E.C.P. 4(a)(2).

[214] *Id.* 4(a)(3) ("the following . . . shall not apply . . . 24(a)(2) (Nonstatutory Intervention as of Right), 24(b)(2) (Nonstatutory Intervention by Permission)").

2. Vermont provides no assurance that ANR will respond in writing to all citizen complaints or provide notice and comment on proposed settlements, and does not offer meaningful permissive intervention.

The second means by which Vermont may comply with the CWA's enforcement public participation requirements is by providing

> assurance that the State agency . . . will
>
> (i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in § 123.26(b)(4);
> (ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and
> (iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.[215]

All three of these requirements must be met in order for a state's enforcement processes to comply with the Clean Water Act. Failure to meet any one of them would bring a state's program into noncompliance. Vermont fails to meet at least two of these requirements.

First, there is no statutory or regulatory requirement that ANR provide written responses to the complaints it receives about violations of environmental laws. ANR's website explaining how to lodge a complaint is also silent on the subject.[216] There is therefore no "assurance" that it will respond in writing to all citizen complaints.

Second, there is no assurance that ANR will – and in fact it does not - publish notice of and provide at least 30 days for comment on proposed settlements. There is nothing in the Vermont statutes, Environmental Court Rules, or ANR regulations that requires notice and comment on proposed AODs. In fact, the statute governing AODs requires only that the AOD be posted on ANR's website and provided to "a person" upon request, filed with the Environmental Court and the Attorney General, and that it become final when signed by the Environmental Court.[217] The Environmental Court Rules basically mirror the statute in this regard.[218] As is plain from the discussion of the Jay Peak and Branon-Montagne cases below, ANR has not chosen of its own accord to provide notice and comment, either.

Regarding the other requirement – to not oppose permissive intervention - it should be noted that the one provision for permissive intervention in Vermont's environmental enforcement actions is statutory.[219] (Non-statutory permissive intervention, like non-statutory intervention of right, is prohibited by the Environmental Court Rules.[220]) It applies only to Administrative Orders and

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[215] 40 C.F.R. § 123.27(d). Section 123.26(4) states that the agency must encourage public reporting of violations and let the public know about reporting procedures.
[216] *See* ANR, Enforcement Division, To File an Environmental Violation/Complaint, http://www.anr.state.vt.us/site/html/enf/enf-complaint.htm.
[217] 10 V.S.A. § 8007(c).
[218] V.R.E.C.P. 4(b).
[219] 10 V.S.A. § 8012(d).
[220] *See* V.R.E.C.P. 4(a)(3) and text accompanying note 214, *infra*.

very narrowly limits the parties that may seek intervention. Specifically, it provides that "[t]he environmental court may grant party status to an aggrieved person" in reviews of Administrative Orders.[221] An "aggrieved person" must "demonstrate[] that the interest of that person is not adequately represented by any other party."[222] Further, he or she must have had an "ownership, leasehold or contractual interest in real property directly affected by the violation" or "an interest in the outcome of the proceeding which is distinct from the interest of the public-at-large because of the person's place of residence, place of employment or place of business."[223]

Such stringent requirements conflict with the spirit and purpose of permissive intervention. In discussing the non-statutory means of permissive intervention under Federal Rule of Civil Procedure 24 (which is substantially similar to the Vermont counterpart and requires only that the intervenor have a claim or defense involving a "common question of law or fact"[224]), the Supreme Court has held that the Rule "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation."[225] It has further explained this low threshold by noting that a permissive intervenor "has by definition neither a statutory right to intervene nor any interest at stake that the other parties will not adequately protect or that it could not adequately protect in another proceeding."[226] A permissive intervenor "typically becomes a party only to ward off the potential effects of *stare decisis*," but an intervenor of right becomes a party "because 'the disposition of the action may as a practical matter impair or impede his ability to protect that interest.'"[227] By doing away with non-statutory permissive intervention and explicitly requiring that permissive intervenors in AO proceedings have an interest that cannot be adequately represented by another party, and a specific pecuniary ("ownership, leasehold or contractual interest in real property") or distinct personal ("place or residence, place of employment or place of business") interest, Vermont's standards make it that much more difficult for anyone to intervene in the small number of enforcement actions (AOs) where permission could be granted.[228]

It is questionable whether such limited permissive intervention would satisfy the regulatory requirement, even if ANR satisfied the requirements to investigate and respond in writing to all citizen complaints, and provide public notice and comment on proposed settlements. As explained by the District of Columbia Circuit, which relied upon EPA's assertion in the case, the "permissive intervention" option may not be used to fulfill a state's public participation requirements unless the state actually provides some means of permissive intervention.[229]

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[221] 10 V.S.A. § 8012(d). *See also* V.R.E.C.P. 4(d)(3) (providing that Environmental Court "may grant party status to an aggrieved person as provided in 10 V.S.A. § 8012(d)" in reviews of Administrative Orders).
[222] *Id.*
[223] *Id.* § 8012(d)(1), (2).
[224] Fed. R. Civ. P. 24(b); Vt. R. Civ. P. 24(b).
[225] *Sec. & Exch. Comm'n v. U.S. Realty & Improvement Co.,* 310 U.S. 434, 459 (1940).
[226] *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 374, 382 n.1 (1987) (Brennan, J., dissenting).
[227] *Local No. 93 v. City of Cleveland,* 478 U.S. 501, 539 n.* (1986) (Rehnquist, J., dissenting) (citing Fed. R. Civ. P. 24).
[228] The standards are even more stringent than those for *intervention of right* as intended by EPA. *See* 45 Fed. Reg. 33,383 (in preamble to public participation in enforcement rule, stating that the breadth of intervention of right must be similar to that of CWA citizen suit provision, whose legislative history indicates "Congress' intention to give citizens the broadest right of participation permitted by the requirement of 'standing' contained in the U.S. Constitution").
[229] *NRDC v. EPA,* 859 F.2d at 178.

> Were the second option open where permissive intervention is impossible, public participation would be limited to that flowing from the state's agreement to respond to citizen complaints and to entertain citizen comments on proposed settlements of state enforcement actions – rights dismissed by the Seventh Circuit as "no more than a legalistic articulation of a common courtesy and hardly . . . satisfaction of the EPA's statutory duty to issue regulations promoting public participation in state enforcement."[230]

Though permissive intervention is technically not "impossible" in Vermont, it is extremely limited and hardly succeeds in "promoting public participation in state enforcement."

3. Additionally, Vermont's environmental enforcement procedures are not "comparable" to CWA requirements for purposes of precluding a citizen suit.

In light of the defects described above, it is evident that Vermont's program is not "comparable" to the federal requirements, and would not be found so for purposes of precluding a citizen suit against a violator. The CWA provides that, where a state has commenced and is diligently prosecuting an action under "comparable" state law for a CWA violation, there generally can be no citizen suit based on the same violation.[231] CWA provisions to which state programs must be comparable include those for public participation in civil penalty assessments (whether by the agency or by a court), such as public notice and comment, and opportunities for hearings or appeals for those who commented.[232]

Where the state fails to provide for adequate public participation in enforcement, courts have not hesitated to declare the state program not comparable and the citizen suit not barred. For instance, in a 1992 Northern District of Ohio case, the Court held that an agency enforcement action did not preclude a citizen suit because Ohio law was not comparable to the CWA in a "very significant way:" it "lack[ed] public participation safeguards."[233] In that case, Ohio's regulations did not have mandatory notice requirements; instead, the agency had discretion to avoid public notice, comment, and hearings. The Court noted that public access to public records did not suffice:

> The detailed, mandatory safeguards of citizen participation contained in § 1319(g)(4) are not comparable to simply having a public record on file somewhere for a citizen to look at should that citizen somehow discover that a particular action has been taken. Public notice is fundamental to protecting citizen participation in agency decisions. If the public does not know about agency actions, it cannot avail itself of any right to participate in any action that may be taken pursuant to that statute.[234]

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[230] *Id.* (citation omitted).
[231] 33 U.S.C. § 1319(g)(6)(A). *See also id.* § 1365(B)(1)(b) (precluding citizen suit but allowing intervention of right in federal court).
[232] *Id.* § 1319(g)(4) (requirements apply to civil penalties, which may be assessed by agency, *id.* § 1319(g)(1), or a court, *id.* § 1319(d)).
[233] *NRDC v. Vygen Corp.*, 803 F. Supp. 97, 100-02 (N.D. Ohio 1992).
[234] *Id.* at 102.

In another case, the Sixth Circuit found that the administrative enforcement proceedings in Tennessee's Water Quality Control Act were not "comparable" to CWA § 309(g).[235] The reasons were threefold: 1) there was no public notice of hearings; 2) there was no requirement that the state give third parties an opportunity to initiate or join consent orders or enforcement proceedings; and 3) Tennessee's Open Meetings Law did not mandate public participation in ongoing enforcement prosecutions.[236] Thus, the "only window for redress" available was in certain proceedings before the Chancery Court where adversely affected parties would have forty-five days to intervene before final judgment on a consent order was entered.[237]

Vermont's program would likewise fail to meet the comparability standard. It can be satisfied "so long as the state law . . . provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and adequately safeguards their legitimate substantive interests."[238] Vermont's program does neither. As discussed, it does not provide for public notice and comment on environmental enforcement orders. It does not then allow for commenters to participate in any hearings on the matter, and in fact excludes most interested parties from intervening. The "only window for redress" available in Vermont is the very limited permissive intervention allowed in Administrative Order proceedings, which is further limited by the fact that the overwhelming majority of ANR's enforcement actions are not AOs, but AODs.[239]

C. In its operations, ANR has failed to comply with CWA public participation requirements by ignoring or opposing intervention requests.

In reviewing ANR's public participation practices, it should be extremely telling that, since at least 1997, there has not been one intervening party in an enforcement action for CWA violations.[240] The only two known attempts by the public to intervene, both made by CLF, have been rejected by ANR. In both instances, settlements were privately negotiated between ANR and the violators and quickly adopted by the Environmental Court with no opportunity for public involvement.

In the first case, ANR was enforcing against Jay Peak Resort in 2007 for numerous violations, including NPDES permit violations.[241] CLF had learned of the enforcement action and Jay Peak's continuous and egregious violations through a public records request to ANR – which request ANR had in large part preliminarily denied on the basis of an "open enforcement action"

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[235] *Jones v. City of Lakeland,* 224 F.3d 518, 523-24 (6th Cir. 2000).
[236] *Id.*
[237] *Id.* at 524.
[238] *Ark. Wildlife Fed'n v. ICI Americas, Inc.,* 29 F.2d 376, 381 (8th Cir. 1994) (citation omitted).
[239] For the same reasons, Vermont would also fail to meet the "diligently prosecuting" test for preclusion of a citizen suit. *See Frilling,* 924 F. Supp. at 841 (holding that state action was not "diligently prosecuted" for purposes of precluding citizen suit because citizens had been denied right to intervene).
[240] *See* letter from ANR to ENRLC (Dec. 27, 2007) (in response to 12-6-07 request for "[a]ll documents regarding intervening parties" in AOs and AODs related to water quality from 1997-2007, only produced documents were CLF correspondence and responses regarding Jay Peak and Branon-Montagne cases). *See also* Candace Page, *Swanton Couple Want Voice in Pollution Case,* Burlington Free Press (Mar. 20, 2008) (reporting ANR statement that public participation in enforcement was nonissue, "I've been at the agency 11 years, and I cannot think of another time when someone has said 'I want to be involved.'") (external quotation marks omitted).
[241] Jay Peak Notice of Intervention, *supra* note 42, at 2.

against Jay Peak.[242] Subsequently, CLF and VNRC filed a Notice of Intervention with ANR in an effort to ensure Jay Peak would be held fully responsible for its violations and the environmental degradation it had caused.[243] In the Notice, CLF and VNRC invoked the public participation requirements of CWA regulations. ANR ignored the Notice and filed an AOD with the Environmental Court on May 10, 2007. The AOD was adopted by the Court on the same day.[244]

In the second case, ANR was enforcing against an animal feeding operation for discharges of manure into Lake Champlain from drainage ditches.[245] On December 6, 2007, CLF filed a Notice of Intervention with ANR, again invoking the CWA's regulatory public participation provisions.[246] CLF noted its special interest in the case based on its Lakekeeper program to improve water quality in Lake Champlain, and voiced special concerns about the negative impacts manure has on water quality.[247] ANR responded, in entirety:

> [ANR is] in receipt of your letter dated December 6, 2007 regarding the above encaptioned matter. As you are aware the Agency has a different interpretation of the Clean Water Act provisions. As this is a Division operational matter you should contact the Division Director if you feel the need to discuss this further.[248]

CLF then filed a Notice of Intervention with the Environmental Court, requesting that the Court provide it with "notice and an opportunity to be heard in any proceedings on this matter that may occur at the Environmental Court."[249] When informed that there was currently no docket for the case, CLF repeatedly called the Environmental Court in an effort to find out when the AOD was filed so that it could refile the Notice of Intervention. The AOD was filed on Friday December 28th, after CLF had called the Court for that day, and adopted by the Environmental Court on Monday December 31st. Subsequently, the Environmental Court issued a Notice of Hearing, stating that it would treat CLF's previous Notice of Intervention as a request for the AOD to be vacated and the matter re-opened.[250] ANR then formally opposed CLF's request to intervene with a filing[251] and at the hearing on March 19, 2007. As mentioned above, the Environmental Court ultimately denied CLF's request to intervene while noting the "apparent conflict between the specific directives of federal regulations and the Vermont laws, regulations and rules enacted

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[242] Letter from ANR to CLF, at 1 (Mar. 28, 2007).
[243] Jay Peak Notice of Intervention, *supra* note 42.
[244] *Jay Peak* AOD (May 10, 2007), *supra* note 42.
[245] *Montagne* AOD, *supra* note 95, at 1-2.
[246] Letter from CLF to ANR (Dec. 6, 2007) ("Notice of Intervention Pursuant to 40 C.F.R. § 123.27(d) in Ongoing Administrative Enforcement Proceeding against David and Kelly Montagne and/or Gene and Desiree Branon for Violation of Clean Water Act Section 301(a)").
[247] *Id.* at 3.
[248] Letter from ANR to CLF (Dec. 11, 2007).
[249] Letter from CLF to Jacalyn M. Fletcher, Court Manager, Environmental Court (Dec. 13, 2007), at 1 ("Notice of Intervention Pursuant to Federal Regulation in Forthcoming Enforcement against David and Kathy Montagne and/or Gene and Desiree Branon for Violation of the Clean Water Act Section 301(a)").
[250] *ANR v. Branon*, Notice of Hearing (Vt. Env. Ct. Jan 3, 2008).
[251] An Opposition to the Conservation Law Foundation's and Michael and Melissa Ewell's Request to Intervene and Vacate the Court-Approved Assurance of Discontinuance, No. 291-12-07 (Feb. 15, 2008).

to implement environmental protections," and regretting that it did not "enjoy the jurisdictional authority . . . to determine the State's general compliance with federal CWA regulations."[252]

III. Criterion (2)(ii): ANR fails to issue permits to CAFOs required to be regulated under the Clean Water Act.

Concentrated animal feeding operations have been point sources subject to NPDES jurisdiction since the very inception of the Clean Water Act in 1972.[253] Despite this, despite the fact that Vermont is home to an increasing number of CAFOs that discharge, and despite the fact that Vermont's waterways continue to suffer from agricultural pollution, ANR has never issued a single NPDES permit to a CAFO. As discussed below, there are documented discharges from *at least* 3 large CAFOs and 30% of 2007-inspected Medium Farm Operations in Vermont, with many other operations teetering on the edge of unauthorized discharges.

A. Programs administered by the Agency of Agriculture, Food & Markets are not an adequate substitute for the important CWA protections of a NPDES program.

As EPA knows, animal feeding operations in Vermont are currently regulated by the Vermont Agency of Agriculture, Food & Markets primarily under Large Farm Operation (LFO) Rules, the Medium Farm Operation (MFO) General Permit, and Accepted Agricultural Practices (AAPs). There are currently 18 LFOs in Vermont with AAF&M permits. As of December 19, 2007, 160 operations had submitted Notices of Intent to Comply (NOICs) for coverage under AAF&M's MFO General Permit; 8 of these were determined to be Small Farm Operations (SFOs). However, a 2007 AAF&M report indicated that there were 200 MFOs in Vermont.[254] All but two of the LFOs, and some of the MFOs, are "CAFOs" under the federal regulatory definition.[255]

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[252] *Montagne & Branon, supra* note 19, at 8.

[253] Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), Pub. L. No. 92-500, § 502(14), 86 Stat. 816, 887 (1972). Though EPA extended the deadline for some newly defined CAFOs (as defined in the 2003 CAFO Rule) to seek permit coverage, Revised Compliance Dates for CAFOs, 72 Fed. Reg. 40,245, 40,247 (July 24, 2007), it is not clear that any of Vermont's CAFOs are "new." The old definition specified that most AFOs were not CAFOs if they "discharge[d] only in the event of a 25 year, 24 hour storm event." CAFOs, 41 Fed. Reg. 11,458, 11,460 (Mar. 18, 1976). Vermont law requires LFO permittees to store animal wastes "so as not to generate runoff from a 25-year, 24-hour storm event." 6 V.S.A. § 4851(f). However, a facility that does in fact discharge in the absence of such event, regardless of its storage capabilities, is not exempt from the CAFO definition. *See Concerned Area Residents for the Env't v. Southview Farm,* 34 F.3d 114, 122 (2d Cir. 1994) (explaining that an AFO with the requisite number of animals is presumably a CAFO unless "'the only time a discharge of pollutants into navigable waters occurs is during a 25 year, 24-hour rainfall event,'" and dismissing the exception because "there [wa]s no claim that the run-offs in question were caused by 25-year, 24-hour rainfall event") (citing Fed. Reg.). As is evident in the ensuing discussion, many LFOs (and MFOs) have had storage and management problems or discharges that would have excluded them from the exemption. Further, ANR's inaction and refusal to permit CAFOs predates last summer's extension.

[254] Vt. AAF&M, *Act 78 – Section 16 Annual Report – 2006 ("Section 16 Report")* 3 (Jan. 2007) (report to state legislature, stating that there were "200 MFOs currently identified by the Agency").

[255] The forms used by ANR to inspect Vermont's LFOs confirm that most are "CAFOs." The first four questions ask about the number and type of animals, the number of days the animals are stabled/confined and fed/maintained over any 12-month period, and whether any crops, vegetation, forage growth, or post-harvest residues are sustained in the normal growing season over any portion of the lot or facility. *VT DEC Animal Feeding Operation Assessment Form* (2007). All but four qualified as CAFOs under the federal definition at 40 C.F.R. § 123.23(b). The LFO permits for 2 of those 4, one of which denied access to ANR for the inspections, have the requisite number of animals to qualify as CAFOs. *See* Permit to Manage a Large Farm Operation, LFO Permit # 2001-04, at 2-3

1. AAF&M's animal feeding operation programs are not equivalent to the NPDES CAFO program.

The permits issued by the Agency of Agriculture, Food & Markets are obviously not NPDES permits. AAF&M is not the delegated NPDES authority in Vermont. As stated by ANR, "[I]ssuance of an LFO permit does not preclude the need for issuance of a CAFO permit by ANR."[256] And, as stated by EPA, "The permits issued by VT-AAFM are not NPDES permits. Facilities that are subject to the CAFO permitting requirements must apply to VT-ANR to obtain NPDES permit authorization for regulated discharges from their facilities."[257]

Additionally, the terms of the AAF&M permitting program are not sufficient to meet NPDES requirements. This is most apparent in their failure to meet important oversight provisions of federal NPDES regulations for information gathering, public participation, and recordkeeping.[258] For instance, the LFO program does not satisfy public notice and comment requirements of the NPDES program. Draft CAFO permits must be publicly noticed and at least thirty days must be allowed for public comment; and the agency is required to consider and respond to comments when issuing a final permit.[259] In contrast, Vermont's LFO Rules require a "public informational meeting" only for LFO projects that propose a new barn construction; the public then has only five business days to submit comments about such project.[260] The Agency of Agriculture, Food & Markets has discretion to require a public meeting for barn expansions, but only if the barn is "already subject to permitting requirements," and no meeting at all is required for LFOs seeking a permit to operate.[261] Further, there is no requirement that the permit, or the LFO's Nutrient Management Plan (NMP), be available for review at the meeting.[262] As EPA knows, the *Waterkeeper* Court was adamant that Nutrient Management Plans must be subject to public notice and comment along with the CAFO permits of which they are a part.[263] This is important because Nutrient Management Plans are key tools in protecting water quality by managing land

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(permitted for 750 mature dairy cows); Permit to Manage a Large Farm Operation, LFO Permit # 2002-03, at 1-2 (permitted for 1000 mature dairy cows). MFOs in Vermont that discharge pollutants through man-made devices, or pollutants that pass near the production area or come into contact with animals, are likewise "CAFOs." *See* 40 C.F.R. § 122.23(b)(6)(ii). Vermont's statutory definition of "MFO," which triggers the requirement to seek coverage under AAF&M's General Permit, contains the same "AFO" and animal number requirements as the federal definition. *Compare* 10 V.S.A. § 4857 (1), (2) *with* 40 C.F.R. § 122.23(b)(1), (6)(i). As discussed below, there are documented discharges from the production areas of some of these MFOs.

[256] Letter from Jeffrey Wennberg, Commissioner, DEC, to Robert Varney, Regional Administrator, EPA Region 1, at 2 (Jan. 12, 2007) ("Wennberg Letter").

[257] Letter from Robert Varney, Regional Administrator, EPA Region 1, to Christopher M. Kilian, Vice President & Director of Vt. Advocacy Center, CLF, at 1-2 (Jan. 29, 2007).

[258] There is also a strange, seeming loophole for animal feeding operations with 700 mature dairy animals. The MFO law and regulations apply to AFOs with 200-699 mature dairy animals. 6 V.S.A. § 4857(2); AAF&M, General Permit for Medium Farm Operations ("General Permit for MFOs"), Subch. II.C.1.c (Feb. 13, 2007), *available at* http://www.vermontagriculture.com/ARMES/awq/documents/GP_for_MFOs.pdf. The LFO law and regulations apply to AFOs with *more than* 700 mature dairy animals. 6 V.S.A. § 4851(a); AAF&M, Large Farm Operation Rules ("LFO Rules"), Subch. 3 (2007), *available at* http://www.vermontagriculture.com/ARMES/awq/documents/LFORules.pdf.

[259] 40 C.F.R. §§ 124.10(a), (b), 124.17.

[260] LFO Rules, *supra* note 258, subch. 5.B.2.

[261] *Id.*

[262] *See id.*

[263] *Waterkeeper Alliance, Inc. v. EPA,* 399 F.3d 486, 502-04 (2d Cir. 2005).

application discharges to minimize phosphorus and nitrogen loading to surface waters.[264] Additionally, they are highly technical plans that would be difficult for the public to meaningfully review and comment on within the 5-day period provided for under Vermont law.

Under EPA's revised proposed CAFO rule, the public participation provisions of Vermont's MFO General Permit would be especially problematic. They require only that, "[u]pon filing of a NOIC with General Permit, the Agency will post on its official website the fact that the farm has sought coverage. The agency shall post the farm name and town."[265] The proposed rule, on the other hand, has detailed public notice and comment provisions for general permit coverage. In response to the *Waterkeeper* decision, it requires NOICs and NMP terms (which will be incorporated into the permit) to be available for public review and comment, and requires the agency to respond to significant comments before issuing the permit.[266] A recent case in Michigan confirmed that failure to include NMP terms in General Permits violates the CWA: "We conclude that Michigan's CAFO permit program does not satisfy the requirements of the Clean Water Act because it does not require inclusion of the required minimum effluent limitations [nutrient management plans] in the general permit and it does not provide for the requisite public participation."[267] Currently, Vermont's MFO General Permit only requires the permittee to keep a copy of the NMP at the MFO, and to make it available to AAF&M at reasonable times.[268]

The NOIC for the MFO General Permit also lacks necessary information requirements. NPDES regulations require that notices of intent for coverage under CAFO General Permits contain various pieces of information, several of which are not on the MFO NOIC: the requirement to submit a topographic map of the area showing the location of the production area; the total number of acres under the control of the MFO for land applications, and; the estimated amount of manure, litter, and process wastewater generated per year.[269]

Public participation and agency oversight are further limited in that LFO operating permits (which are individual permits) have no expiration date. There are no provisions for permit renewal (and thus public input) under the LFO Rules. This is in stark contrast to federal regulations, which specify that "NPDES permits shall be effective for a fixed term not to exceed 5 years."[270] CAFO regulations further specify that a CAFO must submit a renewal application at least 180 days before its permit expires.[271] And, under the LFO program, if AAF&M does not

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[264] *See id.* at 500.
[265] General Permit for MFOs, *supra* note 258, subch. II.D.4.
[266] Revised CAFO Rule in Response to Waterkeeper Decision, 71 Fed. Reg. 37, 744, 37,785 (June 30, 2006).
[267] *Sierra Club Mackinac Chapter v. Dep't of Envtl. Quality,* No. 269181, 2008 WL 161188 (Mich. Ct. App. 2008) (holding Act's public participation mandate, 33 U.S.C. § 1251(e), applicable to nutrient management plans).
[268] General Permit for MFOs, *supra* note 258, subch. V.C.1.
[269] *Compare* 40 C.F.R. §§ 122.28(b)(2)(ii) ("Notices of intent for coverage under a general permit for concentrated animal feeding operations must include the information specified in § 122.21(i)(1), including a topographic map."), 122.21(i)(1) (application requirements for CAFOs), 122.23(d)(3) ("A notice of intent for a general permit must include the information specified in §§ 122.21 and 122.28".") *with* AAF&M, *Notice of Intent to Comply (NOIC) for Coverage under the Vt. Medium Farm Operation (MFO) General Permit, available at* http://www.vermontagriculture.com/ARMES/awq/documents/NOIC.pdf.
[270] 40 C.F.R. § 122.46(a).
[271] *Id.* § 122.23(h).

make a permit determination within forty-five business days, the permit is actually awarded by default[272] – a practice that finds no support in the Clean Water Act.

Recordkeeping requirements under AAF&M's program are also not as stringent as federal CAFO requirements. For instance, federal regulations require permittees to keep records of the date, time, and estimated volume of any overflows.[273] The LFO Rules do not have an equivalent requirement. Instead, permitted LFOs must notify the agency of spills or accidental releases *if* they result in discharges to waters of the state.[274] To the extent that an overflow might be a violation of a permit condition, of which the LFO Rules require reporting, the date, time, and volume is *not* required to be reported.[275] The LFO Rules also do not have the federal requirement for a permittee to provide an explanation in its records if it fails to correct deficiencies found pursuant to its own inspections.[276] The MFO General Permit lacks the above requirements and more.[277]

2. AAF&M is not well-positioned to enforce the requirements of the CWA.

AAF&M's dual role with animal feeding operations puts it in an awkward situation. As noticed by the recent Clean & Clear audit, AAF&M's role as agricultural booster presents a conflict of interest when it also attempts to enforce water quality rules: "AAFM and ANR need to consider the appropriate role for inspection and enforcement of agricultural water quality programs. AAFM has the clear role of determining the long term viability of farming operations and ANR has the clear role for protecting water quality."[278] The audit went on to explain that the "regulatory staff" and the "assistance staff" at AAF&M "do not often work together visibly in order to maintain a strong relationship with farmers that are in need of technical assistance."[279] The conflict is also apparent in a letter to an LFO about a meeting on the LFO Rules, in which AAF&M stated: "[I]t is vital that we get the message to farmers that the LFO program is for the farmers."[280]

The current arrangement between AAF&M and ANR, whereby they deal collaboratively with CAFOs pursuant to a Memorandum of Understanding (MOU), is also of questionable functionality. It has failed to result in any NPDES CAFO permits being issued, and the agencies were apparently hard-pressed to agree upon its terms. In June, 2005, the Vermont legislature directed the agencies to develop a new MOU to be consistent with federal CAFO regulations.[281] (The prior Memorandum of Understanding went into effect in 1999.) The comment period for the new MOU did not begin until a year and a half later, in December 2006. Observations of an ANR staff member, in referring to a monthly coordination meeting between ANR and AAF&M, reflect the tension between the agencies:

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[272] LFO Rules, *supra* note 258, subch. 5.B.4.f.
[273] 40 C.F.R. § 412.37(b)(6).
[274] LFO Rules, *supra* note 258, subch. 7.B.6.
[275] *Id.* at subch 7.B.5.
[276] *See* 40 C.F.R. § 412.37(b)(3).
[277] *Compare* General Permit for MFOs, *supra* note 258, subch. V *with* 40 C.F.R. § 412.37.
[278] *Clean&Clear Audit, supra* note 9, at 101.
[279] *Id.* at 102.
[280] Letter from Leon C. Graves, Commissioner, AAF&M (Nov. 12, 1999).
[281] An Act Relating to Agricultural Water Quality, No. 78 (June 24, 2005) (codified at 10 V.S.A. § 4810(b)).

> I am of the opinion that, without the two agencies coming to an agreement on some very broad policy level issues . . . that our discussions of the discreet issues will largely be an exercise of spinning our wheels. How we resolve the issues as they arise, needs to be guided by or considered within the context of a state policy or strategy for sustaining agriculture and ecosystem services. . . . Right now we are just flailing around.[282]

B. ANR's continuing refusal to regulate CAFOs ignores the reality that there are CAFOs in Vermont qualifying for NPDES coverage, and fails to accomplish the associated water quality improvements that regulation could afford.

1. In derogation of its responsibilities under the Clean Water Act, ANR has exhibited an historic reluctance and refusal to regulate CAFOs.

As EPA is aware, ANR has been reluctant to establish its own program to implement EPA's CAFO regulations.[283] It has stated in various venues that it intends to wait until any and all litigation surrounding the final revised rule has been resolved before developing CAFO rules in Vermont.[284] EPA has deemed this position "unacceptable," and has insisted more than once that ANR implement a CAFO permitting program as soon as the revised rule is final, regardless of any outstanding legal challenges.[285] In fact, it was EPA's understanding under the 2004-2006 Performance Partnership Agreement grant program that ANR would issue a general permit for CAFOs by mid-2007.[286] This should have been a manageable task, as evidenced by Vermont's

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[282] Internal ANR email (3-29-07). There was apparently some confusion within ANR, too. At one point, the draft MOU was forwarded to AAF&M from ANR without input from key ANR staff. Internal ANR email (5-8-06).

[283] Wennberg Letter, *supra* note 256.

[284] *Id.* at 2 ("ANR proposes that CAFO Rules should not be adopted by ANR until EPA's revisions to its CAFO Rules are final and any legal challenges thereto have been resolved."). *See also Implementation by the Agency of Natural Resources of a National Pollutant Discharge Elimination System (NPDES) Permit Program for Farms Subject to the Federal Clean Water Act Regulations for Concentrated Animal Feeding Operations (CAFO)* (Jan. 2006) (annual report to Vermont legislature) ("ANR recommends that development of CAFO rules in Vermont await adoption of the final federal revised CAFO regulations. Should those regulations be subject to additional court challenges ANR recommends that development of state rules await resolution of the court challenges."); DEC, *End of Year Report for the Performance Partnership Agreement between the Vt. DEC & the U.S. EPA, Region 1: New England for Federal Fiscal Year 2006* (Jan. 2006) 4 ("Vermont . . . will continue to work on the CAFO program when the federal CAFO program is adopted and through the appeal period."); Memorandum of Understanding between Vt. ANR & Vt. AAF&M Concerning MFO, LFO & CAFO Regulation (Draft) 3 (Dec. 20, 2006) ("Whereas, CAFO Rules will not be adopted by ANR until EPA's revisions to its CAFO Rules are final and any legal challenges thereto have been resolved . . . .").

[285] EPA, *Detailed Comments Regarding Vt. PPA End of Year Report for 2006* 1 ("Vermont DEC's statement on page 4 of the main report regarding development and implementation of new CAFO regulations after appeals are exhausted is unacceptable.") (Apr. 4, 2007); Letter from Robert Varney, Regional Administrator, EPA Region 1, to Jeffrey Wennberg, Commissioner, DEC, at 1 (Feb. 1, 2007) ("Varney Letter") ("When EPA's final revised CAFO regulations are promulgated, we expect your agency to implement its CAFO permitting program consistent with the revised regulations. The state should begin implementation as soon as the regulations become effective, rather than waiting for all legal challenges to be resolved.").

[286] Letter & attachments from Robert Varney, Regional Administrator, EPA Region 1, to Jeffrey Wennberg, Commissioner, DEC, *reprinted in Vt. DEC End of Year Report for 2005 and Update for Federal Fiscal Year 2006 to the Performance Partnership Agreement between the Vt. DEC & the U.S. EPA, Region 1 for Federal Fiscal Years 2004, 2005, & 2006* 36, 39 (Jan. 2006) ("Vermont ANR will issue a general permit consistent with EPA requirements to cover CAFOs" by "completion date" of Sept. 30, 2007.). *See also* EPA internal report, *CAFO Rule*

neighbor and fellow steward of Lake Champlain, New York, which has had a CAFO General Permit since 2004.[287] Other states have likewise been "actively implementing their existing regulations and continu[ing] to issue permits, and some have already revised their programs to reflect the *Waterkeeper* decision since it was issued in 2005."[288]

The Vermont legislature has also ordered ANR to develop CAFO permitting regulations, by a mid-2007 deadline that ANR has missed.[289] In the meantime, however, as directed by both EPA and the Vermont legislature, ANR must "evaluate applications for CAFO permits based on the substantive permitting standards and criteria of the current CAFO regulations that remain in effect" because "any discharges from a CAFO require an NPDES permit."[290] It must "take all necessary steps to implement its strategy for issuing CAFO permits that meet the minimal requirements of the federal program."[291] This is consistent with EPA's mission to "work with State permitting authorities to implement existing CAFO regulatory and permitting requirements" as it "finalize[s] decision-making regarding the *Waterkeeper* rule" because "[t]he implementation of the 2003 CAFO rule is critical in [EPA's] mission to restore and protect watersheds across the nation."[292] Most importantly, it is entirely consistent with ANR's legal duties as the delegated Clean Water Act authority in Vermont.[293]

ANR's refusal to issue any permit to any CAFO in Vermont is most troubling. It reflects a real reluctance to regulate and a fear that Vermont's CAFOs will view ANR as the "enforcer,"[294] and suggests a lack of true concern for the quality of Vermont's waters. It also reflects at best a misunderstanding of and at worst a disregard for ANR's obligations under the Clean Water Act, whose statutory mechanisms are *regulation* and *enforcement.*

This reticence in addressing CAFO pollution is evidenced not only by the fact that ANR has never issued an NPDES permit to a CAFO, but by agency communications and positions

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Implementation Regional Summary for Is Q1 2006 Report (1/1/06-3/31/06) ("[r]egulations to be developed NLT 7/1/2007 . . . . [s]tate plans to issue General Permit" by 2007).

[287] *See* N.Y. State Department of Environmental Conservation, Permit for Concentrated Animal Feeding Operations (CAFOs), http://www.dec.ny.gov/permits/6285.html (2008).

[288] Memorandum from Benjamin H. Grumbles, Assistant Administrator, EPA Office of Water, to Regional Administrators I-X (May 3, 2007) ("Grumbles Memorandum").

[289] 10 V.S.A. § 1263(g) (directing ANR to adopt CAFO regulations by July 1, 2007).

[290] *See* Varney Letter, *supra* note 285, at 1. *See also* 10 V.S.A. § 1263(g) ("Until such regulations are adopted, the substantive permitting standards and criteria used by the secretary to evaluate applications and issue or deny discharge permits for concentrated animal feeding operations shall be those specified by federal regulations.").

[291] *EPA's Vt. DEC 2007 PPA Priorities & Commitments List,* no. 69, *reprinted in* letter from Robert Varney, Regional Administrator, EPA Region 1, to Jeffrey Wennberg, Commissioner, DEC (May 17, 2006).

[292] Grumbles Memorandum, *supra* note 288.

[293] *See* 40 C.F.R. §§ 123.25 ("[a]ll State Programs . . . must be administered in conformance with . . . § 122.23), 122.23 ("Concentrated animal feeding operations (applicable to State NPDES programs)").

[294] *See* email from ANR to AAF&M (Apr. 19, 2007) (suggesting that AAF&M letter to LFOs about upcoming inspections "show[] the inspections are a way of helping them to be [sic] compliance rather than being an enforcement hammer"); internal ANR email (Apr. 19, 2007) (noting Secretary's suggestion to remove sentence from draft inspection plan that stated AAF&M would inspect LFOs where ANR was denied entry: "[The Secretary] believes doing this will perpetuate the idea that AAF&M are the 'good guys' and ANR is the evil enforcer that should be avoided. . . . We need farmers to chance [sic] their perception about ANR and we can start this change by showing them that AAF&M and ANR are partners in helping farmers to find and resolve environmental problems at their farms.").

throughout the years. In 1999, ANR leadership was urging EPA to abandon its recently announced plans to inspect CAFOs in Vermont.[295] Seven years later, leadership remained negative about upcoming EPA inspections, informing staff that "EPA insists they want to inspect" CAFOs and that therefore, "[w]e need a plan."[296] The plan, as it turned out, was for ANR and AAF&M to inspect Vermont's LFOs prior to EPA's inspections.[297]

The official goal of ANR's inspections was to "identify discharges or deficiencies at large CAFOs which require the farm to either obtain a federal CAFO permit or prevent/correct the discharge/deficiency."[298] Thus, even if ANR were to find a discharge on the day of inspection, it would not necessarily require the CAFO to obtain an NPDES permit.[299] Such "discretionary" permitting decisions are not acceptable. As stated by EPA in the pending proposed CAFO rule, "Any CAFO that discharged or proposed to discharge and failed to obtain an NPDES permit would be in violation of the NPDES regulatory requirement to seek coverage under an NPDES permit."[300]

2. There are documented discharges from CAFOs of various sizes in Vermont, and problematic discharge areas in many more of them.

As revealed by the results of CAFO inspections and by information in ANR's and AAF&M's animal feeding operation files, *there are CAFOs in Vermont that, by law, should have NPDES permits.* As discussed below, there are documented discharges from CAFOs of various sizes in Vermont, and numerous facilities walking a precarious line between discharging and not. ANR's public insistence to the contrary, that "'no discharges to state waters were observed'"[301] during its inspections, distorts the truth.

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[295] Letter from Canute E. Dalmasse, Commissioner, DEC, to Ron Manfredonia, EPA Region 1 (Oct. 21, 1999).
[296] Email from Jeffrey Wennberg, Commissioner, DEC, to ANR staff (Sept. 14, 2006).
[297] Internal memorandum to George Crombie, Secretary, ANR (Apr. 13, 2007) ("2007 CAFO Inspection Program Plan").
[298] *Id.*
[299] There is some question about the extent to which ANR would have considered the permit option at all. Internal communications suggest that the primary goal of the inspections was to get any discharging CAFOs on a "compliance schedule" in advance of EPA's inspections. *See, e.g.,* internal ANR email (Mar. 16, 2007) ("If a discharge is discovered, the Secretary would like us to issue an Order to the farm that contains a schedule for getting the farm into compliance."); internal ANR email (Apr. 19, 2007) (in comment on "Inspection Followup" section of draft inspection plan, which included enforcement orders and permit issuance, stating Secretary's belief that "our primary goal should be to get the farm in compliance"); *id.* (in paragraph of draft inspection plan that was later removed, stating: "Scheduling of the joint inspection program is designed to sufficiently predate the EPA CAFO inspection effort (targeted for August 2007) such that any discharges/deficiencies can be corrected before the EPA inspections.").
[300] 71 Fed. Reg. at 37,749.
[301] Louis Porter, *Inspections Show Compliance*, Rutland Herald, Sept. 17, 2007 (statement of ANR Secretary). This same article noted state Representative David Deen's observation that the inspections were done in a "'dry summer and fall'" under which conditions "'you would not expect there to be any problem unless somebody was flagrantly violating the AAPs [accepted agricultural practices].'"

a. Several of Vermont's large CAFOs have discharged, and even more have problematic areas where discharges are likely but oversight is lacking.

In fact, clear evidence of a past discharge from one Large Farm Operation *was* observed during ANR's inspections – from the LFO's feed storage areas to a tributary of the Connecticut River.[302] Despite this, and despite recommendations to improve the LFO's manure handling areas and leachate collection system, the only "further action" suggested was a "possible" follow-up visit after the leachate problem had been addressed.[303] More than seven months later, as of January 15, 2008, there was no documentation of follow-up in the file. The LFO had been cited earlier in 2007 for using an uncertified waste storage facility that was "filled to capacity and overflowing," and for failing to control manure runoff.[304] Another LFO had actually received an NOAV from ANR three years earlier for "discharging liquid manure and dairy wastes to state waters."[305]

Further, the inspections revealed that discharges from other LFOs were a real possibility and suggested that, on any other given day, would potentially occur. Of the LFOs inspected (one denied access), 11 had "problem areas" – "areas where there is a potential to discharge wastes to surface waters" – some with "multiple problem areas."[306] The two main problems were: 1) "failure to adequately control runon/runoff to or from barnyards, manure handling areas and other areas containing wastes," and 2) "failure to adequately control, disperse or infiltrate leachate/runoff from feed storage bunker areas."[307] In some cases, these problems were "exacerbated . . . by the close proximity of barnyards and manure handling areas to surface waters."[308] In one case, a stream actually ran through the CAFO's production area. In the words of ANR staff, this created "very difficult logistical problems for implementing an effective remedy" and caused "serious concerns whether normal waste control practices/ structures will be effective in preventing discharges during significant precipitation/runoff events."[309] AAF&M and ANR had actually been communicating about this problem since early 2002, with ANR indicating it was "not sure that [it] could issue a [NPDES] permit for a barn over a stream."[310]

Of the 11 LFOs with problem areas, ANR recommended no further action for one.[311] ANR recommended just 5 for follow-up visits,[312] and 4 for "possible" follow-up.[313] Of the 5 recommended for definite follow-up visits, only 2 follow-ups were documented six months later,

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[302] *VT DEC Animal Feeding Operation Assessment Form ("DEC Assessment Form")* § V (June 12, 2007). This is the LFO that is permitted for 750 mature dairy cows, but did not have 700 mature dairy cows on the date of ANR's inspection, *supra* note 255.
[303] *Id.* § VII.
[304] AAF&M, Notice of Violation 1-2 (May 23, 2007).
[305] ANR, Notice of Alleged Violation (May 11, 2004).
[306] Internal memorandum to George Crombie, Secretary, ANR & Warren Coleman, General Counsel, ANR, at 1 (July 27, 2007) ("Summary: 2007 ANR/AAF&M Joint CAFO Inspection Program").
[307] *Id.*
[308] *Id.*
[309] *Id.* at 1-2.
[310] Internal AAF&M Memorandum (June 3, 2002).
[311] *DEC Assessment Form* § VII (June 5, 2007).
[312] *Id.* (forms of 6/6/07 (2), 6/7/07, 6/13/07, 7/10/07).
[313] *Id.* (forms of 6/12/07, 6/13/07, 6/21/07, 6/22/07).

as of January 15, 2008.[314] Of those 2 follow-ups, one had another follow-up recommended for late fall/early winter,[315] which as of January 15th (when late fall/early winter had passed) was undocumented. The other did not recommend another follow-up, despite findings that a berm near the feed bunker might not be high enough during rain events, and that "good housekeeping practices [are] an on-going necessity particularly due to the proximity of the stream through this property."[316] None of the 4 LFOs recommended for possible follow-up had records of follow-up inspections as of January 15th, almost seven months later. This is troubling because, of those 4, one had evidence of a past discharge,[317] and another was characterized as having "high" potential to discharge manure "[a]bsent judicious housekeeping measures."[318] One LFO, which had evidence of a manure pit overflow and inappropriate runoff controls,[319] received a follow-up visit though no visit was recommended. The follow-up revealed that problems identified on the initial visit still existed, and another follow-up was recommended for late fall/early winter.[320] As of January 15th – again after late fall/early winter had passed - there was no documentation of further follow-up at that CAFO.

The LFO that denied access has been the subject of numerous complaints and investigations. It was cited by AAF&M in 2000 for failure to apply for an LFO permit.[321] Investigations in 2004 revealed problems with mortalities and bunk area runoff.[322] A 2006 investigation found a "definite violation" of the AAPs for feedbunk runoff into a ditch and possible "DEC issue[s]" surrounding silage runoff into cornfield ditches that allegedly emptied into a stream.[323] It has also been ordered to remedy groundwater contamination caused by its operations.[324]

EPA's inspections of 4 large CAFOs in Vermont also revealed some problems. At one, a tile for perimeter drainage around a manure lagoon had a "slow drip of liquid entering [a] stream."[325] Samples collected up and downstream of the drainage tile showed that ammonia nitrogen, nitrate nitrogen, and total phosphorus were all higher downstream of the tile.[326] Ammonia nitrogen was more than 3 times higher; phosphorus was more than double.[327] At another, though no runoff was observed, the CAFO was looking for a new site for a mortality pile, "considering such factors as proximity to surface water."[328] Previously, that LFO had been cited for failure to submit a complete LFO application, including failure to demonstrate that its waste management

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[314] ANR internal memorandum (Oct. 19, 2007) (re: Oct. 18, 2007 followup inspection) ("Oct. 19 memo"); ANR internal memorandum (Oct. 29, 2007) (re: Oct. 26, 2007 followup inspection) ("Oct. 29 memo").
[315] Oct. 19 memo, *supra* note 314.
[316] Oct. 29 memo, *supra* note 314.
[317] *DEC Assessment Form, supra* note 302, at § V.
[318] *DEC Assessment Form, supra* note 313, at § III.5 (form of 6/13/07).
[319] *DEC Assessment Form* §§ III.5, V.1 (June 5, 2007).
[320] ANR internal memorandum (Oct. 19, 2007) (re: another Oct. 18 followup inspection).
[321] AAF&M, *In re: Robert & Janet Lawson* Assurance of Discontinuance (Mar. 29, 2000).
[322] Internal AAF&M emails & memos (May 24, 2004; June 14, 2004, June 28, 2004); internal AAF&M memos (June 10, 2004; June 18, 2004).
[323] Internal AAF&M email (Nov. 22, 2006); *NPS Report: Manure Complaint* (Nov. 22, 2006).
[324] *See* Entry Order, No. 44-2-06 (Vt. Orleans Sup. Ct. Dec. 13, 2007) (referring to Order of Jan. 31, 2006).
[325] Science Applications International Corporation, *Concentrated Animal Feeding Operation Inspection* 3 (Aug. 22, 2007).
[326] *Id.* at 4.
[327] *Id.*
[328] Science Applications International Corporation, *Concentrated Animal Feeding Operation Inspection* 3 (Aug. 23, 2007).

system met proper standards, that its feed bunker discharge was controlled, and that it had a complete NMP.[329]

Another investigation at a large CAFO followed a complaint under the Accepted Agricultural Practices program that a berm along a cornfield was opened to allow runoff into a river.[330] The AAF&M investigator confirmed that the berm had been dug out, and noted in a photograph "the two spots on the field edge where there is potential point source runoff."[331] At one of those spots, the investigator noted "what appears to be a channel that could allow runoff to flow easily down to the river."[332] The investigator did not see any runoff, but indicated that evidence of runoff would be unlikely at that time because there was snow cover.[333]

Another CAFO was cited twice in 2007 for various LFO permit violations, including failure to "control point sources of contaminated runoff from the livestock feeding operation to prevent discharges to waters."[334] The contaminated runoff included manure and feed bunk waste that channeled to a nearby stream.[335] Another was cited for a bunk complex discharge that drained to an overflowing runoff pond, into a ditch and a creek, and another discharge into a different stream.[336] Another was cited for using two uncertified waste structures.[337] Another was cited in 2001 for failure to submit proof of its compliance with various permit conditions, including the requirement to control discharges from roof areas, barnyards, and feed storage areas.[338]

Another was cited for a "direct discharge of wastes (*i.e.*, sediments) into the stream that runs through [its] property."[339] At the same CAFO, almost a year later, a DEC employee working on an EPA-funded water quality project observed "6 to 10 persistent, concentrated, active runoff pathways" into the brook.[340] Samples from the pathways contained "very high concentrations of phosphorus," with the LFO's protection measures having been "largely ineffective."[341] Samples from the brook contained high bacteria, phosphorus, and nitrogen concentrations, leaving "little doubt . . . that the runoff from the fields . . . is largely responsible for these water quality patterns."[342] The LFO was cited again in 2000 for violating its LFO permit by stacking manure so that the "manure pile [wa]s threatening to create a discharge into" a brook, and failing to mitigate erosion so that it was "causing a discharge of sediment into" the brook.[343] Later that year problems persisted. The DEC project manager observed "evidence of continuing concentrated overland flow from the fields to the stream" on August 1st, and noted his "strong

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[329] AAF&M, *In re: Robert & Larry Gervais* Assurance of Discontinuance, No. 2001-LFO-AOD-03 (Jan. 23, 2002).
[330] *NPS Report: Manure Complaint* (Nov. 26, 2007).
[331] *Id.* at 1.
[332] *Id.* at 3.
[333] *Id.*
[334] AAF&M, Notice of Violation 1-3 (June 8, 2007); AAF&M, Notice of Violation 1-3 (May 16, 2007).
[335] *Id.*
[336] AAF&M, Notice of Violation 2 (May 16, 2007).
[337] AAF&M, Notice of Violation 2 (July 20, 2007).
[338] AAF&M, *In re: Ernie Audet* Assurance of Discontinuance, No. 2001-LFO-AOD-002 (Jan. 23, 2001).
[339] AAF&M, Corrective Action Letter 1 (June 18, 1999).
[340] Letter from ANR/DEC to AAF&M 1 (Feb. 28, 2000) (in context of Lake Champlain Agricultural Watersheds 319 National Monitoring Program Project).
[341] *Id.* at 1.
[342] *Id.* at 1-2.
[343] AAF&M, *In re: Mark St. Pierre* Assurance of Discontinuance, at 1-2 (June 21, 2000).

sense that the apparent failure of the state to take a strong stand in th[at] case [wa]s impairing the credibility of Vermont's policies on agricultural water quality issues."[344] On September 11th, 2000, AAF&M issued another Notice of Violation to the LFO.[345]

b. Several of Vermont's Medium Farm Operations have discharged, and even more have problematic areas where discharges are likely but oversight is lacking.

There are also documented discharges from and problems with MFOs in Vermont. Of the MFOs that had been inspected by AAF&M as of December 19, 2007, 30% had past and/or current discharges from production areas.[346] All of the inspected MFOs were given recommendations to ensure that wastes do not reach surface waters.[347] One was advised to ensure that an exposed pipe did not contain water, which would be a "direct conveyance to waters of the state."[348] Other recommendations included improving silage leachate systems, fencing animals out of streams, and moving mortality piles.[349] Fifteen MFOs indicated on their NOICs that animals confined in their production areas have access to waters of the state;[350] none of those MFOs had been inspected as of December 19, 2007. Another 18 did not answer that question on their NOICs.[351] A January 2007 report to the Vermont legislature identified 18,600 animals at MFOs in need of increased manure storage capacity.[352] The same report identified 142 MFOs as having no silage leachate collection or treatment system, and 171 with no clean water diversion or barn yard runoff controls.[353]

Another operation that submitted an NOIC under the MFO General Permit[354] was the subject of an ANR enforcement action for a point source discharge of liquid manure into Lake Champlain.[355] The action was initiated around the time that photos of the discharge were published in the *St. Albans Messenger*.[356] Another MFO was recently cited by AAF&M for violating AAPs by failing to properly maintain its lagoon, causing manure to flow out of the cleanout tank into a ditch.[357] Another discharged to a lake through a pipe connected to its

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[344] Internal DEC memo (Aug. 28, 2000).
[345] AAF&M, Notice of Violation (Sept. 11, 2000).
[346] *Vt. Agency of Agriculture, Food & Markets Medium Farm Operation Assessment Form ("MFO Assessment Form")* (forms of 11/1/07, 11/6/07, 11/7/07).
[347] *Id.; MFO Assessment Form* (forms of 9/18/07, 9/20/07, 9/21/07 (2), 11/1/07 (2), 11/7/07 (1)).
[348] *Id.* (form of 11/1/07).
[349] *Id.* (forms of 9/18/07, 9/20/07, 9/21/07 (2), 11/1/07 (2), 11/6/07, 11/7/07).
[350] NOICs of 3/1/07, 3/2/07 (2), 3/23/07, 3/29/07, 4/2/07, 4/10/07, 5/1/07, 7/9/07, 7/25/07, 8/6/07, 8/7/07, 9/10/07, 9/19/07, 11/25/07.
[351] Handwritten record of NOICs of 3/12/07, 7/9/07, 8/1/07 (2), 8/2/07, 8/8/07, 8/9/07, 8/10/07, 8/13/07 (3), 8/16/07, 8/27/07, 9/10/07 (3), 9/12/07, 10/7/07. These NOICs are not on file with ENRLC. They are on file with AAF&M.
[352] *Section 16 Report, supra* note 254, at 4 (Jan. 2007).
[353] *Id.* SFOs have similar problems. About 50% needed increased manure storage capacity, and about 95% did not have silage leachate treatment or clean water diversion structures for barnyard runoff. *Id.* at 6.
[354] Handwritten record of NOIC of 8/1/07, *supra* note 351. This NOIC is not on file with ENRLC. It is on file with AAF&M.
[355] *Montagne* AOD, *supra* note 95; ANR, Enforcement Division, *Complaint Investigation Report* 16 (May 20, 2007) ("Based on the above investigation, statements, photos and site visits, it is apparent that a point source discharge to Lake Champlain occurred at the B&M Dairy").
[356] AAF&M, *Timeline of Events – Branon Manure Spreading Incident, Giroux Road, St. Albans.*
[357] AAF&M, Corrective Action Written Warning (Nov. 30, 2007).

manure fields.[358] Manure had been spread on a field, and then overflowed to a lake during a rain event. Manure also reached the lake by traveling down through a pipe on the edge of the field that emptied into the lake. One of the remedial options discussed during the investigation was to "completely plug the pipe to stop any further direct discharges."[359] Because the manure had been applied within accepted agronomic rates, no violation of the AAPs was found, and AAF&M referred the case to ANR.[360] Despite the pipe discharge, ANR responded that "the focus should be to come up with a plan and implement same to prevent future discharges/problems."[361] ANR Enforcement was "inclined to leave this with [AAF&M], if [AAF&M was] willing, to work with the parties to come up with a viable solution."[362]

c. Agricultural discharges and their impacts on Vermont's waters are a constant concern, which ANR fails to ameliorate in its failure to regulate CAFOs.

Other reports from the Agency of Agriculture, Food and Markets AAP program also show that discharges are a constant threat. The number of citizen complaints about possible AAP violations illustrates the public's growing concern for water quality in Vermont (117 in 2007, 92 in 2006).[363] Several complaints have been lodged and violations found for spreading manure during the winter ban.[364] One recent violator had an "extensive history" of winter spreading.[365] This is obviously troubling because such improper applications of manure are more likely to cause runoff that can pollute surface waters – a problem addressed by EPA when it clarified the "agricultural stormwater" exception in its 2003 CAFO Rule.[366] Other 2007 violations included leachate discharges from feed bunkers into channels connected to rivers.[367]

Even where AAF&M did not act upon violations, or where no official violations were found, a survey of the investigative reports from 2007 alone reveals numerous threats – potential and realized - to water quality. Investigations found problems like manure overflowing from a barn into a stream,[368] manure spreading overflowing into a ditch,[369] silage leachate running off into ditches,[370] and a "potential discharge from [a] barnyard area to [a] nearby stream."[371] NOAVs issued by ANR for discharges from agricultural activities revealed similar issues.[372] The

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[358] *NPS Report* (Aug. 8, 2007).
[359] *Id.* at 11.
[360] Email from AAF&M to ANR (Aug. 9, 2007).
[361] Email from ANR to AAF&M (Aug. 9, 2007).
[362] *Id.*
[363] AAF&M, *Non-Point Source (NPS) Investigation Tracking Sheet* (sheets of 2007, 2006).
[364] *See, e.g.*, AAF&M, *Agricultural Non Point Source Reduction Program Enforcement Report 2000/2001* (28 complaints of winter spreading; 14 violations of nutrient/pesticide application).
[365] AAF&M, Notice of Violation, at 4 (Mar. 2, 2007).
[366] 40 C.F.R. § 122.23(e).
[367] AAF&M, Corrective Action Written Warning (Warnings of 6/8/07, 6/26/07).
[368] *AAP Report: Manure Complaint* (Mar. 16, 2007).
[369] *AAP Report: Manure Complaint* (May 2, 2007).
[370] *AAP Report: Runoff Complaint* (Sept. 4, 2007); internal AAF&M Memorandum (Aug. 9, 2007) (referring to a large CAFO).
[371] *NPS Report – Franklin County Fly Over* 4 (Sept. 6, 2007).
[372] ANR, Notice of Alleged Violation (NOAVs of 4/2/97, 6/27/97, 10/17/97, 7/17/98, 10/29/98, 1/26/00, 5/2/02, 5/11/04).

NOAVs stated, variously, that "the manure pit serving the 300-head operation has overflowed on more than one occasion and discharged to a tributary of [a brook];"[373] that there was an "ongoing discharge of wastewater containing byproducts of corn silage and cow manure to an unnamed tributary of [a brook];"[374] and that "[d]uring application of manure and whey mix ran off went to brook located @ side of field and into state waters."[375]

In another observation, an AAF&M specialist stated:

> [E]very time I drive by this site I think this must be an AAP violation . . . . This area is a barnyard or animal holding area or production area (feed lot) it just is not paved, but otherwise, it is a feed lot. The adjacent somewhat vegetated area around the stream does not seem to be preventing discharges, please look at the foamy white discharge directly into the stream, coming from the pad/bunker & feeding area.[376]

In light of the above facts, the absence of any CAFO permitting actions by ANR suggests serious institutional denial of, or willful blindness to, the CAFO reality in Vermont.[377] Such inaction is inexcusable in the face of Vermont's degraded waters, especially when 30 of those waters are

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[373] *Id.* (NOAV of 7/17/98).
[374] *Id.* (NOAV of 10/17/97).
[375] *Id.* (NOAV of 10/29/98).
[376] Internal AAF&M email (Nov. 16, 2007).
[377] Changes that were made between the actual inspection assessment forms that ANR used to inspect large CAFOs (handwritten entries), and those that were used for official write-up, point to this conclusion. For instance, section III.5 ("Waste Handling, Treatment and/or Management Operations") was changed from:

> "Can pollutants from the disposal of wastes and wastewaters enter a surface water, dry bed ditch, canal, etc? [Check yes or no.] If yes, name the surface water, dry bed, ditch, canal, etc., and describe how the discharge may occur (see map, photo or sketch)," to the more benign:
>
> "Describe any problem areas within the production area where discharges may occur and describe how wastes may enter surface waters."

Sections V.6 and V.7 were deleted altogether. Previously, they read:

> "List any discharges which have occurred from the production area within the last five years and describe how and why the discharges occurred (i.e. failure of manure storage structure, etc.)," and: "Describe any problem areas within the production area where discharges are likely to occur."

The straightforward "*[c]an* pollutants enter surface waters was changed to the nebulous "describe . . . where discharges *may* occur." The requirement to identify and describe past discharges was removed, as was language about "likely" discharges. Instead, the remaining question in section V.2.b asked if there was "evidence of a past discharge," which could only be assessed on the day of inspection. Though the changes might seem minor, they are indicative of careful linguistic choices that minimize information about, and control characterization of, discharges at the CAFOs.

A promising job description for a CAFO position, developed internally at ANR in early 2007, acknowledged the need for CAFO oversight resources. *See* internal ANR email (Mar. 1, 2007) (person would perform inspections and "[d]raft and issue CAFO permits"). However, that position had not been filled as of Feb. 22, 2008.

impaired by agricultural pollution and 23 more have been listed as being at risk of impairment because of agricultural pollution.[378]

IV. Criterion (1)(i): ANR has failed to promulgate a procedure to implement its anti-degradation policy, and its draft procedure does not comport with water quality requirements.

A. ANR continues to issue permits without the benefit of required procedures with which to implement the water quality protections of Vermont's anti-degradation policy.

As stated by EPA when seeking comments on anti-degradation approaches:

> Antidegradation plays a critical role in allowing States . . . to maintain and protect the finite public resource of clean water and ensure that decisions to allow reductions in water quality are made in a public manner and serve the public good.[379]

EPA's regulations therefore require states to "develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy."[380] The policy is a "principal element" of a state's water quality standards.[381] Both the policy and its implementation procedure must be included in a state's water quality standards when it submits them to EPA for review.[382] As CLF noted in a 2004 letter to EPA, "a water quality standard is not administratively complete until an implementation rule has been promulgated."[383] Despite these requirements, Vermont has no approved antidegradation implementation procedure.

EPA has been clear about its dissatisfaction with Vermont on this front, stating in a 1999 letter that it had "repeatedly emphasized the importance of Vermont developing antidegradation implementation procedures to complement the antidegradation policy."[384] EPA further warned:

> It is important that Vermont develop a comprehensive antidegradation implementation procedure in order to avoid federal action. . . . This issue should be addressed as soon as possible, but no later than July 2000 when the standards become fully effective.[385]

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[378] *See 303(d) List, supra* note 3, *Part C List, supra* note 6.
[379] ANPRM, Water Quality Standards Regulation, 63 Fed. Reg. 36,742, 36,780 (July 7, 1998).
[380] 40 C.F.R. § 131.12(a).
[381] *Raymond Proffitt Found. v. EPA*, 930 F. Supp. 1088, 1091 (E.D. Pa. 1996).
[382] 40 C.F.R. § 131.6(d).
[383] Letter from Robert J. Moore, Lake Champlain Lakekeeper, to Linda Murphy, Director, Office of Ecosystem Protection 2 (Feb. 11, 2004) ("Rob Moore Letter").
[384] Letter from Linda M. Murphy, Director, Office of Ecosystem Protection, to Gerry F. Gossens, Chairman, Vt. Water Resources Board 5 (Dec. 22, 1999) (in letter approving revisions to Vt.'s 2000 Water Quality Standards).
[385] *Id.*

At the time, EPA withheld action "with the understanding that Vermont w[ould] work expeditiously with EPA to develop an acceptable implementation procedure."[386] Instead, it took a recent mandate from the Vermont legislature for ANR to begin the process of implementing the antidegradation policy.[387] Pursuant to that mandate, ANR recently drafted an implementation rule that has yet to be publicly noticed, commented upon, or adopted. Additionally, as discussed below, the draft rule suffers from several inadequacies.

Until a proper rule is adopted, permits will continue to issue without adequate anti-degradation analyses and protections. This issue was raised by CLF in its 2004 letter, in which it pointed out that ANR had issued permits to the Chittenden County Circumferential Highway (Circ Highway) for which no anti-degradation analyses had been conducted, despite the fact that the Circ Highway could impact several aquatic species and related existing uses.[388] As CLF reported, "based on testimony of ANR officials before the Vermont Water Resources Board, the Agency fails to understand how the standard should be applied."[389] EPA has also voiced concern on this point, stating in comments on South Burlington's 2007 Draft Wastewater Permit that "[a]n evaluation of consistency with the anti-degradation provisions of the water quality standards should have been completed and included in the Fact Sheet."[390]

When CLF wrote its 2004 letter, it urged EPA to "notify Vermont ANR that an implementation rule must be adopted or USEPA will be forced to promulgate one for the state."[391] It raised concerns that, "[u]ntil an implementation rule is promulgated, new and expanded sources of pollutants may be authorized in Vermont that harm existing uses and degrade high quality waters."[392] Four years later, those concerns remain. The provisions of Vermont's anti-degradation policy can only protect Vermont's waters if they are being properly implemented.

B. ANR's draft anti-degradation implementation rule fails to fulfill Vermont's anti-degradation policy and fails to meet minimum federal requirements.

Vermont's current anti-degradation policy is in its Water Quality Standards, the most recent of which became effective on January 1, 2008.[393] Pursuant to federal regulations, the policy calls for the protection of existing uses ("Tier I"), high quality waters ("Tier II"), and outstanding resource waters ("Tier III").[394] The draft implementation rule fails to do justice to Vermont's anti-degradation policy, and even falls short of some minimum federal requirements. A few of its shortcomings are highlighted below.

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[386] *Id.* at.3.
[387] 10 V.S.A. § 1251a(c).
[388] Rob Moore Letter, *supra* note 383, at 3.
[389] *Id.* at 2.
[390] Email from David Pincumbe, EPA, to ANR (Nov. 20, 2007).
[391] Rob Moore Letter, *supra* note 383, at 3.
[392] *Id.* at 3.
[393] Vt. Natural Resources Board, *Vt. Water Quality Standards ("VT WQS")* (2008), *available at* http://www.nrb.state.vt.us/wrp/rules.htm.
[394] *Id.* at § 1-03 (Anti-Degradation Policy); 40 C.F.R. § 131.12 (Antidegradation policy).

Applicability

- ANR's draft rule impermissibly exempts categories of discharge permit applications from anti-degradation review. The exempted categories include: discharges resulting from certain types of response actions, such as those taken under CERCLA and RCRA; discharges from wastewater treatment facilities that "eliminate and consolidate" certain types of unpermitted discharges, and; discharges requiring permits "solely . . . to reduce or eliminate existing water quality impairments."[395] Additionally, the draft rule exempts permit renewals or amendments from anti-degradation review unless they "propose[] an increase in pollutant loading or increase in demand on the assimilative capacity of the receiving waters."[396]

  These blanket exemptions are improper. As EPA has stated, states must, at a minimum "apply antidegradation requirements to activities that are 'regulated' under State . . . or federal law"[397] – which include at least some of the above discharges. The exemptions find no support in Vermont's Water Quality Standards, either, which apply to "any request for a permit required by state or federal law."[398] They are also inconsistent with Vermont's water quality policy, upon which the Water Quality Standards are based, to "control the discharge of wastes to the waters of the state, prevent degradation of high quality waters and prevent, abate or control *all* activities harmful to water quality."[399]

Protection of Existing Uses (Tier I)

- The draft rule's definition of "existing use" includes an inexplicable requirement that the use must also have been "designated by the Secretary."[400] Under federal regulations, and Vermont's substantially similar counterpart, "existing uses" are "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards."[401] The requirement that an existing use be "designated" by the Secretary essentially requires that "existing" uses also be "designated" uses, and completely eviscerates the primary purpose of the anti-degradation policy: to maintain and protect *existing* uses.[402]

- The draft rule fails to include sufficient guidelines and standards for the Secretary to follow in determining whether a discharge will "interfere with the maintenance and protection of any existing use."[403] The only guidance given is minimal, and is only for certain existing uses: contact and non-contact recreation, and fishing.[404] As a result, there

[395] ANR, *Draft Anti-Degradation Implementation Rule ("Draft Rule")* § 22-301(b) (Jan. 2008).
[396] *Id.* § 22-301(a)(2).
[397] 63 Fed. Reg. 36,780.
[398] *VT WQS, supra* note 393, at § 1-01(A)(2), (B)(4).
[399] *Id.* § 1-02(A)(3); 10 V.S.A. § 1250(3) (emphasis added).
[400] *Draft Rule, supra* note 395, at § 22-401(a).
[401] 40 C.F.R. § 131.3(e); *VT WQS, supra* note 393, at § 1-01(B)(18).
[402] 40 C.F.R. § 131.12(a)(1) ("Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.").
[403] *Draft Rule, supra* note 395, at § 22-402(a).
[404] *Id.* § 22-402(b)(1).

is too much potential for ANR to make inconsistent, uninformed, or improperly influenced decisions regarding an activity's interference with an existing use.

Protection of Water Quality in High Quality Waters (Tier II)

- The draft rule leaves too much discretion to ANR in determining whether an activity or discharge will lower high quality water significantly enough to require a socio-economic justification (SEJ) analysis. There are no factors that are required to be considered, and the suggested factors are vague.[405] For instance, the draft rule suggests that ANR consider the "predicted consumption of the remaining assimilative capacity of the receiving water," but offers no guidance on what an unacceptable level of consumption might be.[406] This is troubling because it is a high quality water's enhanced assimilative capacity that makes it high quality, and any infringement on that should be very carefully predicted and limited.[407]

  Additionally, the draft rule directs ANR to require an SEJ analysis for "insignificant discharges or activities" whose aggregate or cumulative impact could be significant, but only "when deemed appropriate based on Best Professional Judgment."[408] There is no guidance on how to determine aggregate or cumulative impacts – for instance, information on a baseline year and characteristics – or on how ANR should apply Best Professional Judgment. Even more troubling, there is no cap on these cumulative "insignificant" ("*de minimis*") discharges. EPA has "warned against procedures that do 'not adequately prevent cumulative water quality degradation.'"[409] And, a Court has struck down EPA's approval of a 20% *de minimis* standard for cumulative discharges as too high, explaining that

  > without a cumulative cap on *de minimis* discharges, individual *de minimis* discharges could easily consume all of the available assimilative capacity for a given pollutant parameter, reducing water quality to the minimum level necessary to support existing uses without ever having undergone Tier 2 review.[410]

- The burden that the draft rule requires a permit applicant to meet in justifying a significant lowering of water quality is impermissibly low. The draft rule requires only that the applicant show "that the adverse socio-economic impacts of not lowering the water quality *exceed* the . . . benefits of maintaining the existing water quality."[411] To do so, the applicant must provide information on the "adverse effects" that would result from

[405] *See id.* § 22-502(c).
[406] *Id.*
[407] *See, e.g., Ohio Valley Envt'l Coalition v. Horinko*, 279 F. Supp. 2d 732, 770, 777 (S.D.W. Va. 2003) (upholding EPA's approval of W. Va.'s anti-degradation provision setting 10% limit on reduction in assimilative capacity from individual discharger before Tier II review is triggered).
[408] *Draft Rule, supra* note 395, at § 22-502(e).
[409] *Ohio Valley,* 279 F. Supp. at 769 (quoting 63 Fed. Reg. 36,783).
[410] *Id.* at 732, 770-71.
[411] *Draft Rule, supra* note 395, at § 22-503(a) (emphasis added).

maintaining the high quality water.[412] In contrast, Vermont's anti-degradation policy requires a showing that the adverse impacts "*specifically* resulting from" maintenance of the high quality waters would be "substantial and widespread."[413] EPA likewise expects the applicant to meet a very high burden when proving that a lowering of water quality is justified:

> This provision is intended to provide relief only in a few extraordinary circumstances where the economic and social *need* for the activity clearly outweighs the benefit of maintaining water quality above that required for the "fishable/swimmable" water, and the two cannot both be achieved. The burden of demonstration on the individual proposing such activity will be very high.[414]

Nothing in the draft rule requires the applicant to meet a "very high" burden, or even to show that the need for the activity "clearly outweighs" the benefits of high quality waters. It has no requirement that the adverse impacts be "substantial and widespread." In short, it makes it entirely too easy for an applicant to "justify" degrading Vermont's high quality waters.

- The draft rule leaves too much to agency discretion in determining whether an SEJ analysis justifies a lowering of water quality, stating only that ANR "will . . . issue a draft permit when the SEJ analysis indicates that a lowering of water quality is justified" – or a "tentative" denial when the analysis indicates otherwise.[415] There are no guidelines or factors to consider, including suggested weight to give to each factor. At the least, there should be an explicit requirement that a lowering of water quality cannot be found "necessary" unless there are no alternatives to it.

  EPA has endorsed this approach on more than one occasion, stating in the Federal Register that a lowering of water quality should not be allowed unless "all feasible alternatives to allowing the degradation have been adequately evaluated, and that the least degrading reasonable alternative is implemented."[416] And, in a 2005 memo, it explained what it means for a lowering of water quality to be "necessary": "there are no alternatives to allowing a new or increased discharge that will lower water quality."[417]

- The draft rule has no requirement that existing uses be protected fully when a significant lowering of water quality is allowed. The federal regulations clearly state that "[i]n allowing such degradation or lower water quality, *the State shall assure water quality*

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[412] *Id.* § 22-503(a)(2).
[413] *VT WQS, supra* note 393, at § 1-03(c)(2)(a).
[414] EPA, *Water Quality Standards Handbook ("WQS Handbook")*, at App. G, p.7 (2nd ed. 1994) (emphasis in original), *available at* http://www.epa.gov/waterscience/standards/handbook/index.html.
[415] *Draft Rule, supra* note 395, at § 22-503(g).
[416] 63 Fed. Reg. at 36,784.
[417] Memorandum from Ephraim S. King, Director, Office of Science & Technology, EPA, to Water Management Division Directors, Regions 1-10, at 1 (Aug. 10, 2005).

adequate to protect existing uses fully."[418] Vermont's rule states only that the proposed lowering of high quality water cannot "result in a failure to meet the criteria and indices for the classification of the receiving water."[419] There is therefore no guarantee that "existing uses" will be protected because in Vermont there is no requirement that a water body's classification be based on existing uses, and it is in fact more likely to be based on designated uses.[420]

- The draft rule does not "assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control" when allowing a lowering of water quality, as required by federal regulations.[421] Instead, it merely requires SEJ applicants to submit "an outline" of the methods that particular applicant will use to meet "the highest statutory and regulatory requirements" for its particular discharge or activity.[422] This is a break from federal requirements, which apply to *all* point sources or activities in the receiving water. As explained by the *Ohio Valley* Court:

> [E]ven after public participation and a finding of necessity, a new or expanded use is permitted to degrade water quality only when the State assures that all *other* new and existing point sources are achieving the highest regulatory requirements and that nonpoint sources are controlled by best management practices.[423]

Additionally, the complete failure to mention nonpoint source controls violates the federal requirement to also achieve "all cost-effective and reasonable best management practices for nonpoint source control," as well as Vermont's anti-degradation policy which includes a similar requirement incorporating accepted agricultural practices.[424] The omission is unacceptable and illegal, because "if a State does not assure that best management practices are achieved for nonpoint source control, the State cannot permit the lowering of water quality from point sources on any Tier 2 water, economic or social necessity notwithstanding."[425]

- The draft rule's public participation provision is inadequate. As EPA has stated, the intent of public participation in the anti-degradation context "is to ensure that no activity that will cause water quality to decline in existing high-quality waters is undertaken

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[418] 40 C.F.R. § 131.12(a)(2) (emphasis added).
[419] *Draft Rule, supra* note 395, at § 22-503(f).
[420] *See, e.g., VT WQS, supra* note 393, at § 3-02 ("Class (A)1 Ecological Waters" shall be managed "compatible with the following *designated* uses") (emphasis added); 10 V.S.A. § 1253 (agency need only give "due consideration" to "existing and obtainable water qualities," and "existing and potential use of waters" in classifying them).
[421] 40 C.F.R. § 131.12(a)(2).
[422] *Draft Rule, supra* note 395, at § 22-503(d)(1).
[423] *Ohio Valley,* 279 F. Supp. 2d at 751 (emphasis in original).
[424] *VT WQS, supra* note 393, at § 1-03(C)(2)(c) ("all cost effective and reasonable accepted agricultural practices and best management practices, as appropriate for nonpoint source control").
[425] *Ohio Valley*, 279 F. Supp. 2d at 763.

without adequate public review . . . ."[426] The draft rule only requires ANR to "provide the opportunity for public comment on its tentative decision with respect to the anti-degradation determination in accordance with the public participation requirements of the particular permitting program involved."[427] It is unclear whether the "tentative" decision subject to public comment includes decisions to *allow* significant lowerings of water quality in draft permits, or just "tentative denial[s]" previously referenced in the draft rule.[428] The rule should require that clear notice be given of any decision to allow a lowering of water quality, as well as the reasons for that decision. Without clear notice and information on ANR's underlying rationale, the public cannot give meaningful review to these important Tier II decisions.

Protection of Water Quality for Certain Outstanding Resource Waters (Tier III)

- The draft rule requires ANR and permittees to utilize "[a]ll practical means of minimizing any temporary lowering of water quality" in outstanding resource waters, but provides no guidance on how to do so.[429] Without recommendations on proper standards or practices, or the procedures for identifying them, there is too much potential for improper considerations to influence agency decision-making and too little assurance that "all practical means" will in fact be utilized.

[426] *WQS Handbook*, *supra* note 414, at 4-7.
[427] *Draft Rule*, *supra* note 395, at § 22-503(h).
[428] *Id.* § 22-503(g).
[429] *Id.* § 22-601(a).

REQUEST

For the foregoing reasons, CLF petitions EPA to initiate proceedings pursuant to Clean Water Act Section 402(c)(3) and its implementing regulations at 40 C.F.R. §§ 123.63, 123.64 to order Vermont officials to take necessary corrective actions to cure the serious deficiencies in Vermont's delegated NPDES program described above. In the event that Vermont officials fail to undertake corrective actions, CLF requests that EPA officials withdraw NPDES authority from Vermont until such time as its officials reform water pollution regulation in Vermont so that it complies with the Clean Water Act's minimum requirements. CLF requests that any actions EPA takes in response to this Petition be part of a public process. It is vitally important that the public be informed about these major decisions affecting Vermont's waterways and given a voice to the maximum extent allowed by law.

for David Mears

David Mears, Interim Director

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Cc: George Crombie, Secretary, Vermont Agency of Natural Resources
Warren Coleman, General Counsel, Vermont Agency of Natural Resources

The Environmental and Natural Resources Law Clinic at Vermont Law School submits this petition on behalf of the above-named persons and not on behalf of Vermont Law School.

Appendix A. Overview of ANR's Enforcement Mechanisms

By the authority granted it in 10 V.S.A. § 8003(a)(3), ANR may enforce the CWA through a variety of mechanisms. When it "determines that a violation exists," it may issue a "written notice of the alleged violation" (NOAV), which describes the violation; identifies the "statute, rule, permit, assurance or order that is the subject of the prospective violation;" informs the violating party of the "secretary's intended course of action to address the alleged violation;" and contains compliance directives "if appropriate."[1] As an informal mechanism, where ANR determines that there may be a discharge to waters, it may issue an order "establishing reasonable and proper methods and procedures for the control of that activity" (1272 Orders).[2] Formal enforcement actions, taken by ANR's Enforcement Division, include assurances of discontinuance (AODs), administrative orders (AOs), and emergency administrative orders (EOs).[3] An AOD effectively functions as a negotiated settlement between ANR and the violating party. An AOD must contain a statement of the facts that provide the basis for the violation(s) and "an agreement by the respondent to perform specific actions to prevent, abate or alleviate environmental problems caused by the violation, or to restore the environment to its condition before the violation, including financial responsibility for such actions."[4] The parties may include other information in an AOD. It must be in writing, be signed by the respondent, "specify the statute or regulation alleged to have been violated," and be filed simultaneously with the Attorney General and the Environmental Court.[5] "Final" drafts must be posted on ANR's website and provided to "a person upon request."[6]

An AO, in contrast, is not considered a negotiation or an offer from the party. It is a more proactive tool of agency enforcement. An AO must include:

> (1) a statement of the facts which provide the basis for claiming the violation exists;
> (2) identification of the applicable statute, rule, permit, assurance or order;
> (3) a statement that the respondent has a right to a hearing under section 8012 of this title, and a description of the procedures for requesting a hearing;
> (4) a statement that the order is effective on receipt unless stayed on request for a hearing filed within 15 days;
> (5) if applicable, a directive that the respondent take actions necessary to achieve compliance, to abate potential or existing

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[1] 10 V.S.A. § 8006(b).
[2] *Id.* § 1272.
[3] *Id.* §§ 8007, 8008, 8009.
[4] *Id.* § 8007(a).
[5] *Id.* § 8007(c).
[6] *Id.*

environmental or health hazards, and to restore the environment to the condition existing before the violation; and
(6) a statement that unless the respondent requests a hearing under this section, the order becomes a judicial order when filed with and signed by the environmental court.[7]

An EO may be issued when a violation or likely violation satisfies one of three criteria, and when ANR satisfies procedural prerequisites.[8] ANR may only issue an EO where a violation or likely violation poses "an immediate threat of substantial harm to the environment or an immediate threat to the public health," or a party has commenced and is continuing an unpermitted activity that actually requires a permit.[9] The statute contains additional procedural prerequisites further illustrating the fact that - although available - EOs are more specialized enforcement options.[10]

ANR may include administrative penalties in Administrative Orders and certain Emergency Orders, and may include "monetary penalties" in Assurances of Discontinuance.[11] The factors that ANR must consider in assessing penalties loosely mirror those of the Clean Water Act.[12] ANR must consider criteria including the degree of the impact on public health and safety, the violator's compliance record, the role of the penalty as a deterrent, and the duration of the violation.[13] Having considered all factors listed in the statute, ANR may assess a penalty not to exceed $42,500 "for *each* determination of a separate violation."[14] If ANR deems a violation to be "continuing," it may assess an additional $17,000 penalty for each day that the violation continues.[15] The total of all penalties assessed pursuant to those guidelines, however, may not exceed $170,000.[16]

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[7] *Id.* § 8008(b)(1)-(6).
[8] *Id.* § 8009.
[9] *Id.* § 8009(a).
[10] *See id.* § 8009(b).
[11] *See id.* §§ 8010(a) (allowing ANR to include administrative penalties in any AO issued under § 8008 and in EOs issued pursuant to § 8009(a)(1) or (3)), 8007(b)(3) (AODs may include "monetary penalties").
[12] *Compare* 10 V.S.A. § 8010(b) *with* 33 U.S.C. § 1319(g)(3) (determining amount of administrative penalties).
[13] 10 V.S.A. § 8010(b) (the complete list includes seven items for consideration in calculating administrative penalties).
[14] *Id.* § 8010(c) (emphasis added).
[15] *Id.*
[16] *Id.* These amounts reflect a recent amendment to the statute, updating from $25,000, $10,000, and $100,000. *See* An Act Relating to Enforcement of Environmental Laws, Vermont H.685 § 5 (2007-08).