Environmental and Natural Resources Law Clinic
Vermont Law School
PO Box 96 - Chelsea Street
South Royalton, VT 05068
802.831.1630
Fax: 802.831.1631

October 23, 2008

Stephen Perkins
Director, Office of Ecosystem Protection
USEPA Region 1
1 Congress Street, Suite 1100
Boston, Massachusetts 02114-2023

VIA FIRST-CLASS MAIL AND ELECTRONIC MAIL

Re: Response to ANR's 10.3.08 Response to CLF's Petition for Withdrawal of the NPDES Program Delegation from the State of Vermont

Dear Mr. Perkins:

Conservation Law Foundation (CLF) submits this letter in response to the Vermont Agency of Natural Resources' (ANR's) letter to you of October 3, 2008, in which it responded to CLF's de-delegation petition of August 14, 2008. This letter will only address aspects of ANR's response that are relevant to Clean Water Act de-delegation criteria as laid out in 40 C.F.R. § 123.63(a).

<u>**Enforcement of the Clean Water Act**</u>

<u>EPA's 2006 Review</u>

ANR relies heavily on EPA's September 24, 2007 *Review of the Vermont Agency for Natural Resources FY 2006 State Enforcement and Compliance Programs* to defend its enforcement practices. However, the 2006 Review is limited in its scope and findings. For instance:

1) The primary focus of the Review is on major facilities of which, as EPA states on the first page of the report and CLF pointed out in footnote 70 of its Petition, Vermont

has a "very low number."[1] Specifically regarding "enforcement activity," the 2006 Review cautions that, "because the universe of major facilities in each program is small, analysis is difficult."[2]

a. For example, in speaking of Vermont's "low" significant non-compliance (SNC) rate, the Review notes that "VT ANR has very few significant non-compliers showing up in the PCS data system."[3] While the Review attributes this to ANR addressing violations "quickly and informally," the truth is that ANR enters almost none of its non-major discharge monitoring reports (DMRs) into the PCS database in the first place – about 1%, according to 2006 EPA data.[4]
b. The limitation is also apparent in EPA's response to the metric for "percentage of SNCs addressed appropriately," which was: "There were no unaddressed instances of SNC due to permit limit violations in the 2006 fiscal year at Vermont's *major* facilities."[5]
c. EPA's Review notes only 2 instances of SNC permit violations (including late reporting) for FY06. In contrast, ANR's SNC Report for just the second half of that period shows at least 110 effluent, non-reporting, and late-reporting violations from 9 different facilities.[6]

2) EPA's Review is limited to FY06, which does not adequately account for recurrences by SNC violators that are repeat offenders – a few examples of which are laid out on page 21 of CLF's Petition.

3) Additionally, as explained in CLF's Petition, "informal" action is not a proper regulatory response to serious and/or continuous violations, and it does not achieve "'economic disincentives and deterrence.'"[7] The fact remains that, for a ten year period, less than 1% of SNC violations were subject to formal enforcement action by ANR (pages 20-23 of CLF's Petition).

---

[1] US EPA Region 1 New England, *Review of the Vt. Agency for Natural Res. FY 2006 State Enforcement & Compliance Programs (2006 Review)* 2 (Sept. 24, 2007) (hard copy at FN 39 in CLF Petition sources).
[2] *Id.*
[3] *Id.* at 34.
[4] *See* EPA, Enforcement and Compliance History Online (ECHO), "Percent of NPDES Individually Permitted Non-Majors with Limits and DMRs in PCS or ICIS-NPDES," www.epa-echo.gov/docs/percent_dmrs_2006.pdf (Attachment 1).
[5] *2006 Review* at 37 (emphasis added).
[6] *See* WWMD, *Significant Non-Compliance Report,* at 2-5 (Nov. 28, 1006) (SNC period 4/1/06 through 9/30/06) (Attachment 2). The estimate of 110 violations is conservative because it counts each monthly average exceedance as 1 violation, not 30/31 violations per EPA's Penalty Policy and U.S. Court of Appeals caselaw. *See* EPA, *Interim Clean Water Act Settlement Penalty Policy,* at Attachment 1 (1995), *available at* www.epa.gov/Compliance/resources/policies/civil/cwa/cwapol.pdf; *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.,* 897 F.2d 1128, 1139-40 (11th Cir. 1990); *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.,* 791 F.2d 304, 314 (4th Cir. 1986), *vacated on other grounds by* 484 U.S. 49 (1987). *But see United States v. Allegheny Ludlum Corp.,* 366 F.3d 164, 188-89 (3d Cir. 2004).
[7] *See* CLF Petition at 22 (quoting EPA *Final Report: Review of the State of VT's Environmental Enforcement Programs & Assistance & Pollution Prevention Programs* 18 (Sept. 2004)).

4) The Review does not consider single-event violations unless they were followed by formal enforcement action because none "were reported and tracked by PCS in FY06 according to the state review framework results"[8] – a constraint that is further limited by the fact that ANR takes formal enforcement action for such a small percentage of known violations (as detailed on pages 10-27 of CLF's Petition).

5) As pointed out on page 7 of CLF's Petition, EPA's analysis of ANR's economic benefit practice is also narrow. The limited analysis is not consistent with the importance EPA places on economic benefit recovery (outlined on pages 5-6 of the Petition.) For example:

   a. EPA's analysis is based on a review of only 4 enforcement actions - 3 of which included only minor economic benefit consideration because economic benefit was found to be "de minimis," and most of which relied solely upon staffing costs to calculate economic benefit.[9] The review criterion itself is broader: "Degree to which a state includes both gravity and economic benefit calculations for *all* penalties."[10]
   b. Two of the 4 actions were significantly unrepresentative of ANR's formal enforcement actions for discharge violations for FY06, of which there were 21 in our records (13 AODs, 7 AOs {5 of which were vacated/dismissed by subsequent AODs}, and 1 EO). Burlington North's settlement of $58,375 was $39,499 over the mean and $52,750 over the median settlement/penalty amount for these enforcement actions; Shelburne's settlement of $83,250 was $64,374 over the mean and $77,625 over the median.[11]

The 2006 Review is therefore based upon an incomplete picture of the enforcement scene in Vermont. It lacks the breadth of information and depth of analysis necessary to make a reasoned decision under the de-delegation criteria in 40 C.F.R. § 123.63(a). CLF respectfully refers EPA to its Petition and supporting sources as a starting point for such decision-making.

Supplemental Environmental Projects (SEPs)

ANR makes two problematic assertions regarding SEPs.

1) ANR states that "SEP funds are not used to correct a violation or remediate an involved site. That obligation is separate from a SEP, which focuses on projects that are independent from and beyond existing compliance requirements."[12] It is true that ANR's

---

[8] *2006 Review* at 34.
[9] *Id.* at 37-38.
[10] *Id.* at 37 (emphasis added).
[11] The 20 penalty/settlement amounts for the 21 enforcement actions were: AOs: $3500, $3500, $9250, $5250, $17,500, $87,500, $3500; AODs: $1412.50, $61,625, $6500, $2625, $7500, $3900, $1500, $2000, $300, $6000 (from previous AOD in enforcement action), $83,250, $12,531, $58,375. Some AO penalties were reduced by subsequent AODs within the same fiscal year.
[12] Letter from Laura Q. Pelosi, Commissioner, Vt. Dep't of Envt'l Conservation to Stephen S. Perkins, Dir., Office of Ecosystem Protection, EPA Region 1 (DEC Letter), at 2 (Oct. 3, 2008).

SEP *Policy* does not allow SEPs for required or previously planned actions, but ANR's practice is not consistent with its policy.[13] For example:

a. As CLF explained in footnote 92 of its Petition, the City of Burlington was allowed to expend SEP funds for previously required and planned activities.
b. Several SEP requirements in a 2007 AOD regarding manure discharges were specifically tailored to remediate the involved site so that the farming operation would no longer discharge.[14] The respondent agreed to "re-contour and tile the 30 acre field that was the source of th[e] violation."[15] The SEP plainly states that "[t]he purpose of the recontouring/tiling is to eliminate discharges of soil and manure from the farm to Lake Champlain."[16] The SEP also required the respondent to allow state personnel onto the field to evaluate conditions before and after the work was completed, and to create a 25 foot buffer "in accordance with" Vermont's accepted agricultural practices (with some exceptions).[17]

2) ANR states that it has a "near perfect record of achieving compliance with SEP agreements" and that it is "extremely rare that SEPs are not funded and implemented as agreed by the parties."[18] This statement is in conflict with CLF's factual findings about the timeliness of SEP payments, which were based on data from ANR; and ANR does not offer contrary data. As explained on pages 17-18 of CLF's Petition, only 4 of 20 surveyed SEPs from 1997-2007 for discharge and/or NPDES violations were fully funded by the dates ordered in their AODs.

CLF respectfully refers EPA to its Petition for additional information about problems with ANR's SEP practices (pages 14-18).

Stormwater

Again, CLF refers EPA to the specific findings in its Petition regarding stormwater enforcement, particularly concerning the coverage, Stormwater Pollution Prevention Plan, and DMR requirements of the Multi-Sector General Permit, and the Construction General Permit (CGP) generally (pages 23-27). CLF also notes the following:

1) ANR states that it has issued 17 CGP Notices of Alleged Violation (NOAVs) and referred 3 cases for formal enforcement. This continues to be a low rate of formal enforcement (3 actions for 17 known violations is less than 20%), especially when considering that there are probably numerous violations for which no NOAVs were issued.

---

[13] *See* ANR, *Supplemental Environmental Project (SEP) Policy* (Sept. 1, 2006) (hard copy at FN 90 in CLF Petition sources).
[14] *ANR v. Montagne* AOD, No. 291-12-07 (Vt. Env. Ct. Dec. 31, 2007) (hard copy at FN 95 in CLF Petition sources).
[15] *Id.* at 2.
[16] *Id.*
[17] *Id.* at 3-4.
[18] DEC Letter at 2.

2) The August 29, 2008 letter from Kim Greenwood and related article in *The Essex Reporter*[19] do not support the broad implication in ANR's statement that "ANR's efforts [in the CGP program] are proving to be successful."[20] Only 5 facilities were visited; they were all in the Essex/Colchester area; they were primarily big, visible projects. While the improvement is encouraging, it is not necessarily representative of smaller sites or areas outside Chittenden County.

Regulation of Concentrated Animal Feeding Operations (CAFOs)

ANR states that "[n]o information was acquired during [agency CAFO] inspections to indicate that NPDES permits are required at any of these farms at this time."[21] CLF respectfully refers EPA to the numerous and detailed factual findings in its Petition regarding discharges and discharge problems at Vermont CAFOs, including findings based on agency inspections (pages 42-47). CAFO discharges require NPDES permits.[22]

Anti-Degradation Procedure

ANR does not deny that it does not have an anti-degradation implementation plan as required by Clean Water Act regulations. As laid out in CLF's Petition, EPA has been aware of, unsatisfied with, and communicative about Vermont's lack of progress in this area since at least 1999 (pages 49-50). ANR's draft rule has not been publicly noticed for comment. Further, as uncontroverted by ANR and as evidenced in EPA comments on South Burlington's 2007 Draft Wastewater Permit, ANR continues to issue permits without the requisite anti-degradation analysis (see pages 48-49 of CLF's Petition).

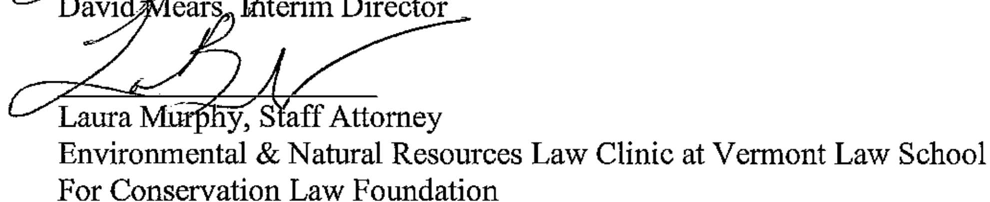
Regarding the draft rule itself, ANR states that CLF's "primary question and criticism" was that the scope of discharges under review was too narrow.[23] CLF notes that this criticism was two paragraphs long, respectfully refers EPA to the additional four pages it devoted to analysis of the draft rule, and re-asserts the importance of the issues and authority it raised there (pages 51-55 of the Petition).

[19] DEC Letter Attachment 2.
[20] DEC Letter at 3.
[21] *Id.* at 4.
[22] *See, e.g.*, 40 C.F.R. § 122.23(a); Revised CAFO Rule in Response to Waterkeeper Decision, 71 Fed. Reg. 37,744, 37,747-48 (June 30, 2006); *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 504-06 (2d Cir. 2005); Vt. ANR DEC & N.Y. State DEC, *Lake Champlain Phosphorus TMDL* (Sept. 25, 2002) ("Permitting of CAFOs by Vermont DEC *will be undertaken* on a case-by-case basis *where evidence of a discharge or potential discharge exists*.") (emphasis added).
[23] DEC Letter at 4.

Thank you for your consideration of this response. CLF looks forward to continuing this important dialogue about the health of Vermont's waters.

Sincerely,

David Mears, Interim Director


Laura Murphy, Staff Attorney
Environmental & Natural Resources Law Clinic at Vermont Law School
For Conservation Law Foundation

Student Clinician
Graham Zorn

Cc: Anthony Iarrapino, Staff Attorney, CLF
Laura Pelosi, DEC Commissioner
Warren Coleman, ANR General Counsel
George Crombie, Secretary ANR