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November 20, 2008

Stephen Perkins
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USEPA Region 1
1 Congress Street, Suite 1100
Boston, Massachusetts 02114-2023

VIA FIRST-CLASS MAIL AND ELECTRONIC MAIL

Re: Follow-Up to CLF/EPA De-delegation Petition Meeting of October 27, 2008

Dear Mr. Perkins:

We appreciated the opportunity to meet with EPA Region 1 last month and discuss our concerns and recommendations regarding Vermont's National Pollutant Discharge Elimination System (NPDES) program. We submit this letter as a follow-up to that meeting in order to provide written recommendations as requested, further information on some discussion points, and additional analysis regarding the adequacy of Vermont's NPDES permits. Based on our conversations at the meeting, it is our understanding and expectation that this letter will become a part of the administrative record.

Proposed Corrective Actions

Conservation Law Foundation (CLF) looks forward to working with EPA and the State of Vermont to ensure that Vermont's NPDES program meets the minimum requirements of Clean Water Act (CWA) delegation. The following proposals are offered as the best means to address the deficiencies detailed in CLF's petition of August 14, 2008 and supplement of October 21, 2008, as well as the additional analysis presented in this letter. These proposals also correlate with the recommendations in the August 13, 2008 letter to EPA from thirteen individuals and environmental organizations. Each of the proposed corrective actions must be implemented for Vermont's program to come into compliance with the Clean Water Act.

I. The State of Vermont must dramatically improve the frequency, weight, and transparency of its CWA enforcement activity.

Suggestions for implementing this corrective action include meeting the following benchmarks no later than June 2009:

- The Vermont Agency of Natural Resources (ANR) must reliably capture and document economic benefit in every penalty by:
 - Considering economic benefit in every penalty calculation, including penalties for non-major facilities.
 - Obtaining the expertise to regularly and properly calculate economic benefit in all penalty calculations (not just where economic benefit is likely to be “significant”).
 - Revising its penalty calculation worksheets to contain a reliable formula and thorough instructions for calculating economic benefit. The formula must account for every benefit a violator receives from violating the law and conform to EPA’s definition of economic benefit as described in the Interim Revised CWA Settlement Penalty Policy Notice (60 Fed. Reg. 22,063) and any subsequent rules or guidance.
 - Keeping a detailed record of economic benefit calculations (e.g., a thorough explanation and calculation on the penalty calculation sheet).
- ANR must increase the frequency and weight of enforcement actions by:
 - Applying the top-down approach to all penalty calculations (i.e., starting with the maximum penalty and working down based on mitigating factors rather than the other way around).
 - Issuing enforcement orders with penalties for all Significant Non-Compliances (SNCs).
 - Identifying a meaningful number of un-permitted dischargers each month and giving them notice of permit requirements (e.g., Concentrated Animal Feeding Operation (CAFO) dischargers or dischargers who need to apply for coverage under the Multi-Sector General Permit (MSGP)).
 - Issuing enforcement orders with penalties to all un-permitted dischargers who fail to apply for a permit within 30 days of notice by ANR.
 - Submitting every penalty assessed for CWA violations to EPA for approval before issuance.
- ANR must make all proposed penalties, including economic benefit calculations, available for public notice and comment by posting them on its website.
- ANR must improve its use of Supplemental Environmental Projects (SEPs) by:
 - Collecting SEP payments immediately due and payable as penalties when late.
 - Pursuant to its SEP policy, ensuring that: every SEP requires the violator to explain that the SEP is an element of an enforcement action settlement when publicizing the SEP. ANR should also require violators to provide proof that third-party recipients of SEP funds, if any, have notice of this requirement.
 - Modifying its SEP policy in order to eliminate the exception that allows municipalities to pay 100% of their fines as SEPs; eliminate the exception that allows municipalities to perform pre-existing legal obligations as SEPs, and; require pollution reduction and prevention SEPs for significant non-compliance violations.

- ANR must include a federal CWA count(s) in all enforcement actions that are NPDES violations (i.e., violations of a numbered NPDES permit, or discharging without a permit where the discharge is jurisdictional under the CWA).

To ensure that these improvements are implemented, EPA should:

- Conduct a comprehensive quarterly review of *all* violations and enforcement actions in Vermont on an ongoing basis (including non-majors and non-significant non-compliance).
 - The review should produce a report that is publicly available on EPA's and ANR's websites.
 - The review should use the requirements listed above as performance measures and require timely corrective action wherever ANR fails to meet the measures.
- Proactively bring a series of enforcement actions in Vermont for violations of NPDES permits and discharging without a permit (e.g., at CAFOs or MSGP facilities).
- At a minimum, EPA should review the discharge monitoring reports for key wastewater treatment facilities in Vermont to identify permit violations.

II. All CWA enforcement actions in Vermont must comply with CWA public participation requirements.

Suggestions for implementing this corrective action include:

- Vermont must bring its water pollution control laws into compliance with the Clean Water Act's minimum public participation requirements (40 C.F.R. § 123.27(d)) no later than June 2009.
- In the interim, EPA should take over enforcement in Vermont in order to protect the public's participation rights.

III. ANR must exert regulatory control over CAFOs and stormwater dischargers as mandated under the CWA.

Suggestions for implementing this corrective action include:

- ANR must propose CAFO regulations consistent with EPA's final CAFO rule no later than December 31, 2008.
- Effective immediately, ANR must require every CAFO in Vermont that discharges to acquire an NPDES permit.
- Beginning in March 2009, ANR must monthly inspect all Vermont CAFOs or AFOs that could qualify as CAFOs, and regularly consider all inspections or other information from EPA and Vermont's Agency of Agriculture, Food, & Markets regarding discharges. The results of the inspections must be available to the public.
- Until that time and at regular intervals afterwards, EPA should commit its own enforcement and investigatory staff to evaluate compliance with the Clean Water Act by conducting random inspections and sampling at Vermont CAFOs and AFOs.

- ANR must use its residual designation authority to require all point source stormwater dischargers that cause or contribute to water quality standards violations in Potash, Englesby, Bartlett, Morehouse, and Centennial Brooks to obtain NPDES permits no later than June 2009.
- ANR must determine which facilities are subject to the Multi-Sector General Permit and require the facilities to comply with the MSGP (including its Stormwater Prevention Pollution Plan and Discharge Monitoring Report requirements), and verify that facilities certifying “no exposure” are in fact causing “no exposure.”
- EPA should evaluate non-compliance with stormwater permitting requirements by comparing known industrial facilities with actual MSGP permittees in Vermont, and should take enforcement action including the issuance of § 308(a)(A) letters to non-compliant facilities.

IV. ANR must implement Vermont’s anti-degradation policy.

Suggestions for implementing this corrective action include:

- ANR must propose an anti-degradation implementation rule and its adoption should be part of the next triennial review process before the Water Resources Board.
- In the interim, ANR must conduct and document an anti-degradation analysis for every activity subject to Vermont’s anti-degradation policy, with the analysis subject to approval by EPA.
- Until Vermont adopts anti-degradation implementation methods, EPA should promulgate anti-degradation implementation regulations for Vermont pursuant to 33 U.S.C. § 1313(c)(4)(B).

V. ANR must develop adequate water quality-based effluent limitations (WQBELs) as necessary in NPDES permits.
(See “Additional Analysis” below.)

Suggestions for implementing this corrective action include:

- No later than June 2009, ANR must ensure that all NPDES general and individual permits covering discharges that are subject to the Lake Champlain Phosphorus Total Maximum Daily Load (TMDL) wasteload allocation for developed land sources are amended to include specific WQBELs for phosphorus discharges that will result in consistency with the assumptions and requirements of the TMDL wasteload allocation.
 - Each amended permit must document the portion of the gross wasteload allocation available to the discharge or discharges authorized under such permit.
 - Each amended permit must include continuous phosphorus monitoring requirements to ensure compliance with the WQBELs.
- No later than June 2009, ANR must ensure that all NPDES permits for wastewater treatment facilities that discharge phosphorus into segments of Lake Champlain that do not currently attain Vermont Water Quality Standards numeric phosphorus criteria are amended to include WQBELs for phosphorus at a level that will ensure that the discharge will not cause or contribute to the ongoing exceedances of water quality standards.

Consistent with EPA's letter to Commissioner Laura Pelosi dated April 30, 2008, such limits would, until such time as water quality standards are attained, of necessity be more stringent than the maximum wasteload allocations indicated in the Lake Champlain TMDL.

- Effective immediately, ANR must conduct and document a "reasonable potential analysis" consistent with the requirements of 40 C.F.R. § 122.44(d)(1)(ii) for every NPDES permit it issues.

To ensure full implementation of all corrective actions within the reasonable timeframes proposed, EPA should issue directives to ANR and begin discussions with other necessary parties as soon as possible. EPA should require ANR to provide monthly progress reports of good-faith milestones and assurance that it will achieve the required improvements. If Vermont does not achieve each of these corrective actions in a timely fashion, EPA should withdraw approval of Vermont's NPDES program.

Further Information on Discussion Points

During our meeting, among other topics, CLF and EPA discussed the status of Vermont's implementation of the anti-degradation requirements and Vermont's penalty collection efforts. We offer the following information in response to the discussion regarding these two issues.

1. In its Petition (pages 49-50), CLF explained that Vermont met a criterion for de-delegation by failing to adopt a rule to implement its anti-degradation policy ("[f]ailure . . . to promulgate . . . new authorities when necessary").¹ In response to EPA's observation at our October meeting that ANR should be implementing Vermont's anti-degradation policy even if it does not yet have an anti-degradation implementation rule, CLF submits that it has come across no evidence to indicate that ANR is in fact implementing anti-degradation.

Based upon our limited review of selected permits issued over the past several years, we have seen no evidence that ANR routinely performs an anti-degradation analysis. For example, in Vermont's recent Multi-Sector and Construction General Permits, there is nothing to suggest that ANR conducted anti-degradation analyses.² In addition, as CLF's Petition recounted (page 50), EPA's David Pincumbe pointed out ANR's apparent failure to conduct anti-degradation analysis in his 2007 comments on South Burlington's draft permit.³ CLF also documented earlier instances of this failure in a 2004 letter to EPA concerning permits for the Circ Highway.⁴

¹ See 40 C.F.R. § 123.63(a)(1)(i).

² See VT ANR, *General Permit 3-9020 (2006) for Stormwater Runoff from Construction Sites (CGP)* (hard copy at FN 166 in CLF Petition Sources); VT ANR, *Vt. Multi-Sector General Permits for Stormwater Discharges Associated with Industrial Activity MSGP 3-9003 NPDES Number VTR05001 (MSGP)*, at 11, 41 (stating only that dischargers must comply with "any additional conditions imposed by the Secretary . . . to comply with Vermont's anti-degradation policy," and might need to monitor for anti-degradation requirements) (hard copy at FN 166 in CLF Petition sources); VT ANR, *Vt. Multi-Sector General Permit (MSGP) for Stormwater Discharges Associated with Industrial Activities Fact Sheet (December 2005)* (Attachment 1).

³ Hard copy of comments at FN 390 in CLF Petition sources.

⁴ Hard copy of 2004 letter at FN 383 in CLF Petition sources.

The law is clear: a state must “develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy.”⁵ The “policy and implementation methods shall, at a minimum” ensure that existing uses and high quality waters are protected.⁶ Further, NPDES permits issued under state programs must comply with water quality standards, of which an anti-degradation policy is an important element.⁷ Vermont’s failure to implement its anti-degradation policy in practice – particularly in its NPDES permits – does not ensure that existing uses and high quality waters will be protected as required. It is a serious failure, evident in the great number of waters currently on Vermont’s lists of 303(d) and priority surface waters.⁸ Further, it satisfies another general criterion for withdrawal: “Where the operation of the State program fails to comply with the requirements of this part.”⁹

Consequently, CLF’s proposed corrective actions include requirements that Vermont fully implement its anti-degradation policy and document anti-degradation analyses for the permits that it issues.

2. During our recent meeting, CLF commented that ANR’s failure to assess and collect adequate penalties reflects a generally negative attitude toward CWA enforcement at ANR. A recent quote by Julie Moore, Director of the Clean and Clear Center at ANR, provides a public statement representative of that attitude. The statement was made on Vermont Public Radio’s “Vermont Edition” program. In response to a caller who asked Ms. Moore to explain why ANR had collected only two fines under the NPDES Construction General Permit program, despite issuing thousands of permits since 1999 and even after the Vermont Natural Resources Council report had documented numerous violations at permitted sites across the state, Ms. Moore responded in part by saying:

I would comment on generally the role of fines vs. violations and that our number one concern, and I know this is true also for our counterparts at the Agency of Agriculture, is to see the water quality problem addressed. It’s not to extort a penalty from the person unless there’s a truly egregious violation.¹⁰

By equating the agency’s lawful “enforcement” duties with the unlawful act of “extortion,” ANR broadcast a troubling message. This quote suggests that the agency does not understand the role that consistent and rigorous enforcement of laws plays in protecting water quality and the public health. Ms. Moore’s statement sends the message that the agency sees its lawful duties and one of its most important enforcement tools –

⁵ 40 C.F.R. § 131.12(a).

⁶ *Id.*

⁷ See 33 U.S.C. §§ 1311(b)(1)(C), 1342(a)(1); *PUD No. 1 of Jefferson County v. Wash. Dep’t of Ecology*, 511 U.S. 700, 704-05 (1994).

⁸ See DEC, *State of Vt. 2008 303(d) List of Waters*, available at http://www.vtwaterquality.org/planning/docs/pl_2008.303d_Final.pdf; DEC, *State of Vt. 2008 List of Priority Surface Waters – Part C*, available at http://www.vtwaterquality.org/planning/docs/pl_2008.State_Lists_Final.pdf.

⁹ 40 C.F.R. § 123.63(a)(2). “This part” refers to 40 C.F.R. Part 123, which incorporates 40 C.F.R. § 122.44(b)(1), (d) (permits must meet water quality standards requirements) through 40 C.F.R. § 123.25(a)(15).

¹⁰ Mitch Wertlieb, *VT Edition: Laura Pelosi, Julie Moore & Mike Rapacz on Lake Champlain Phosphorus Levels* (June 4, 2008), at http://www.vpr.net/news_detail/80811/ (last visited November 11, 2008) (exchange between caller and Ms. Moore begins at 20:15 and ends at 21:05).

penalties – as “intimidation,” or an “abuse of authority.”¹¹ ANR’s characterization of enforcement fines evinces an agency culture in which the specific and general deterrent effect of penalties is critically undermined and polluters escape accountability.

The counter-productive attitude signified in this statement offers further support for CLF’s proposed corrective actions regarding CWA enforcement in Vermont.

Additional Analysis - Failure to Develop Adequate WQBELs in NPDES Permits

The following analysis relating to the absence of WQBELs in Vermont’s NPDES permits provides further evidence that Vermont’s implementation of the NPDES program is legally deficient. ANR has not remedied its failure - documented in the April 30, 2008 letter from Stephen Perkins to Laura Pelosi - to issue permits consistent with the WQBEL requirements of 40 C.F.R. § 122.44(d). Accordingly, EPA’s own analysis demonstrates that Vermont meets another criterion for de-delegation: failure to “develop an adequate regulatory program for developing water quality-based effluent limits [WQBELs] in NPDES permits.”¹²

Clean Water Act regulations require NPDES permits to contain WQBELs as necessary to ensure achievement of “all applicable water quality standards” and to be “consistent with the assumptions and requirements of any available wasteload allocation [WLA] for the discharge[s].”¹³ As made apparent in Stephen Perkins’ letter of April 30th, Vermont’s NPDES program fails to provide requisite WQBELs in NPDES permits in several important ways.

The underlying concern of the letter is that Vermont’s work thus far “has not reduced enough phosphorus to meet the load reduction requirements of the TMDL” in Lake Champlain.¹⁴ Specifically, the letter states that the phosphorus limit in the St. Albans wastewater treatment plant permit (0.5 mg/l) should ensure that the discharge will not “cause or contribute to an exceedance of water quality standards, in accordance with 40 C.F.R. § 122.4(d).”¹⁵ It goes on to explain that the current limit is “approximately 30 times the in-lake criterion of 0.017 mg/l for the Bay,” and that phosphorus discharged at that concentration would “contribute to the impairment.”¹⁶ Nevertheless, ANR issued the final St. Albans permit on October 3, 2008 with a phosphorus limit of 0.5 mg/l.¹⁷

The letter also cites the 40 C.F.R. § 122.44(d) requirement that “all effluents be characterized by the permitting authority to determine the need for [WQBELs] in the permit, including a

¹¹ See *Dictionary.com Unabridged (v 1.1)* (Random House, Inc.), at <http://dictionary.reference.com/browse/extort> (last visited Nov. 11, 2008). The full definition of extort is: “Law: a. to wrest or wring (money, information, etc.) from a person by violence, intimidation, or abuse of authority; obtain by force, torture, threat, or the like. b. to take illegally by reason of one’s office.”

¹² See 40 C.F.R. § 123.63(a)(2)(ii), (5).

¹³ *Id.* § 122.44(d)(1)(vii)(A), (B) (applicable to State NPDES programs).

¹⁴ Letter from Stephen S. Perkins to Laura Pelosi, at 1 (Apr. 30, 2008) (“Perkins Letter”) (Attachment 2). CLF does not necessarily agree that the load reduction requirements of the TMDL, mentioned here and in relation to developed land sources, are appropriate. However, it is clear that NPDES permits must, at a minimum, be stringent enough to meet those requirements.

¹⁵ *Id.* at 3.

¹⁶ *Id.*

¹⁷ City of St. Albans Discharge Permit, NPDES No. VT0100323, at 3 (Oct. 3, 2008) (Attachment 3).

determination of ‘whether a discharge causes, has the reasonable potential to cause, or contributes to an instream excursion’” of water quality standards.¹⁸ The letter expresses concern that ANR is not meeting this requirement: “VTDEC’s fact sheets do not typically provide information on current water quality of the receiving water, current effluent quality, or whether the discharge has a reasonable potential to cause or contribute to water quality standards violations.”¹⁹ The lack of information made it “difficult to determine whether water quality standards would be attained.”²⁰ The letter referenced Middlebury’s draft permit as an example of one “lack[ing] information,” and warned: “The permit cannot just rely on the Lake Champlain TMDL for establishing a phosphorus limit for the lake but must also establish a phosphorus limit that will ensure attainment of standards in Otter Creek.”²¹ The letter also advised ANR to develop WQBELs sufficient to “ensure compliance with the applicable water quality requirements of all affected States” when issuing permits for discharges into the Long Island Sound watershed.²² It is clear from reading this letter that Vermont has failed to “develop an adequate regulatory program for developing [WQBELs].”

Additionally, there is no assurance that the NPDES permits subject to the Lake Champlain TMDL WLA for developed land sources are “consistent with the assumptions and requirements of [the WLA] for the discharge[s]” as required by 40 C.F.R. § 122.44(d)(1)(vii)(B).²³ The Lake Champlain Phosphorus TMDL allocates 94 metric tons/year to developed land sources, which include “all stormwater discharges requiring NPDES permits.”²⁴ However, there is no indication that the NPDES stormwater permits in the Lake Champlain Basin contain WQBELs sufficient to ensure the watershed-wide 94 metric ton/year limit will not be exceeded. For instance, neither the Multi-Sector General Permit nor the Construction General Permit provides a tonnage limit on phosphorus discharges from those sources.²⁵ Consequently, there is no analysis or explanation of how the Best Management Practices (BMPs) under those permits will comply with the TMDL tonnage limit so as to constitute adequate WQBELs.²⁶ The performance audit of Vermont’s Clean and Clear has also noted that the BMPs utilized in Vermont’s stormwater program are not tailored to maximize the reduction of phosphorus pollution. After conducting a comprehensive

¹⁸ Perkins Letter at 5.

¹⁹ *Id.* at 4.

²⁰ *Id.* at 5.

²¹ *Id.*

²² *Id.* at 5-6.

²³ 40 C.F.R. § 122.44(d)(1)(vii)(A), (B) (applicable to State NPDES programs). For the reasons explained in this paragraph, there is also no assurance that the permits are meeting the § 122.44(d)(A) requirement that WQBELs be utilized as necessary to achieve WQS.

²⁴ VT DEC & NY DEC, *Lake Champlain Phosphorus TMDL 27-28 n.2* (2002), available at http://www.anr.state.vt.us/dec/waterq/planning/htm/pl_tmdl.htm.

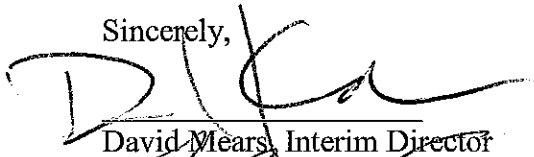
²⁵ See *MSGP* at 14 (“If you . . . find that the applicable TMDL does not specify a wasteload allocation or other requirements either individually or categorically for your discharge . . . compliance with this permit shall be deemed adequate to meet the requirements of the TMDL.”); *id.* at 14, 28 (circularly, directing permittee to develop SWPPP to meet WLA by determining the “WLA applicable to [the] discharge” (if any) and the “corresponding effluent limitation with which [it] must comply”); *CGP* at 28 (“Where an EPA–approved or established TMDL has not specified a wasteload allocation applicable to construction stormwater discharges, but has not specifically excluded these discharges, adherence to an EPSC Plan that meets the requirements of this permit will be presumed to be consistent with the approved TMDL.”).

²⁶ Under EPA regulations, the vast majority of effluent limitations for stormwater discharges in NPDES permits are expressed in the form of Best Management Practices. See 40 C.F.R. § 122.26(c), (d), *rule vacated on other grounds by NRDC v. EPA*, 526 F.3d 591, 608 (9th Cir. 2008).

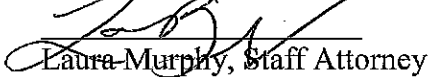
review of ANR's stormwater programs, including its NPDES permitting programs, the audit concluded: "There has apparently been no attempt made by ANR to influence the selection of stormwater treatment practices in the Lake Champlain Basin to optimize phosphorus reductions (e.g., by assigning credits or restricting permissible treatment options to those believed to be most efficient at removing phosphorus)." ²⁷

Thank you for your consideration and for hearing our concerns. Based on the record, it is clear that no further informal investigation is required and that EPA should initiate formal de-delegation proceedings under 40 C.F.R. § 123.64(b). CLF requests that EPA convene a hearing that includes CLF and ANR and that all parties, including EPA, participate in all discussions and meetings moving forward. Such proceedings should be commensurate with the significance of the decision EPA must make, and any and all information or materials presented to or relied upon by EPA must become part of the administrative record. CLF requests that EPA convene a three-way discussion with EPA and State of Vermont officials to lay out the steps necessary for Vermont's program to come into compliance with the Clean Water Act.

Sincerely,



David Mears, Interim Director



Laura Murphy, Staff Attorney

Environmental & Natural Resources Law Clinic at Vermont Law School
For Conservation Law Foundation

/s/
Anthony Iarrapino, Staff Attorney
Conservation Law Foundation

Cc: Jonathan L. Wood, Secretary, Vermont Agency of Natural Resources
Warren Coleman, General Counsel, Vermont Agency of Natural Resources
Laura Pelosi, Commissioner, Vermont Department of Environmental Conservation

²⁷ Green Mountain Institute for Environmental Democracy, *Performance Audit of Vt. Clean & Clear* 51 (Jan. 14, 2008). Hard copy at FN 9 in CLF Petition sources.