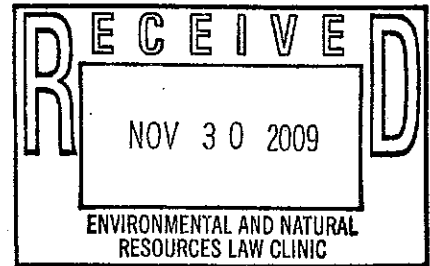




UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 1
1 CONGRESS STREET, SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023



November 24, 2009

Justin Johnson, Commissioner
Vermont Department of Environmental Conservation
103 South Main Street
Waterbury, VT 05671

Dear Commissioner Johnson:

As you know, on August 14, 2008, the Vermont Law School (VLS) and the Conservation Law Foundation (CLF) filed a petition asking EPA to withdraw approval for the State of Vermont to administer the National Pollutant Discharge Elimination System (NPDES) program. Staff from your office, EPA, VLS and CLF have been engaged in discussions over many months to address all the issues raised by the petition. We have made progress on a number of fronts, and I greatly appreciate the significant investment of time by you and your staff, as well as staff from EPA, VLS and CLF.

One of the most difficult remaining issues concerns Vermont's provisions for public participation in enforcement. On October 27, 2009, Gary Kessler of your staff made a proposal for addressing the public participation issue. That proposal was discussed at the last large workgroup meeting held on November 5, 2009, but no resolution was reached. To facilitate the process, I believe that it will be helpful for Region I to clearly express its views on this proposal, and that is the purpose of this letter.

The Clean Water Act (CWA) and EPA's implementing regulations require that states administering the NPDES program provide for public participation in their enforcement process. Under the EPA regulations, states have two options to satisfy this requirement. They may either:

- 1) Provide authority which allows intervention as of right in any civil or administrative enforcement action; or
- 2) Provide assurance that the state agency will:
 - (i) investigate and provide written responses to all citizen complaints;
 - (ii) not oppose permissive 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.

40 C.F.R. §123.27(d).

The proposal made by Gary Kessler states that the Department of Environmental Conservation (DEC) intends to focus on the second of the two options set out above. The proposal indicates that a document would be signed by you which provides assurances that DEC would do the following:

- 1) Investigate and provide a written response to all CWA citizen complaints.
- 2) Not oppose intervention by any citizen in instances where permissive intervention is presently authorized.
- 3) Publish notice on the DEC webpage of all proposed settlements of CWA enforcement actions and provide 30 days for the public to submit comments on the proposed settlement.

EPA Region I has carefully reviewed this proposal. Given Vermont's current enforcement practices and the proposal's intention not to expand the current opportunities for permissive intervention, it is our view that the proposal does not provide for sufficient public participation. The portions of the proposal regarding responses to citizen complaints and publishing notice of and accepting comment on settlements closely match the federal requirements and would be acceptable.

However, as we understand it, current state law allows for permissive intervention in only a particularly narrow category of state administrative enforcement actions. Permissive intervention is authorized only for administrative orders (AOs) and, for those, only by a narrow class of interested citizens, namely, those with a property interest or some other interest distinct from the public at large. Moreover, current Vermont law does not allow for permissive intervention in assurances of discontinuance (AODs). Because AODs are the enforcement tool used by DEC in the vast majority of its formal enforcement actions, opportunities for permissive intervention, as a practical matter, do not exist in most cases in Vermont. The State proposes no expansion of existing permissive intervention authorities. As a result, we view the proposal as insufficient in the context of the State's existing narrow authorization for permissive intervention and its current enforcement practices.

Although EPA's regulations are not prescriptive as to precisely when permissive intervention must be allowed, both the Clean Water Act and case law interpreting the public participation provisions clearly point to authorized states needing to provide more expansive opportunities for public participation in enforcement than is provided by current Vermont law. In the CWA's initial statement of goals and policy, it declares that,

"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." 33 U.S.C. § 1251(e).

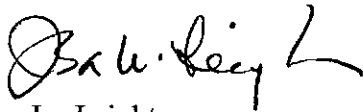
Moreover, the courts interpreting EPA's public participation in enforcement regulations have indicated that the permissive intervention option is acceptable only when the opportunities for intervention are meaningful. The D.C. Circuit stated that these regulations, "must do more than pay lip service to public participation; instead, the public must have a genuine opportunity to speak on the issue of protection of its waters on federal, state and local levels." NRDC v. EPA, 859 F. 2d 156, 177 (D.C. Cir. 1988).

Vermont's Environmental Court has also opined on the adequacy of the State's public participation in enforcement requirements. It stated that "ANR's narrow application of §123.27(d) as applying only to AOs and not AODs defeats the intent behind the CWA, its regulations, and the EPA's delegation of administration and enforcement to ANR." ANR v. Montagne & Branon, No. 291-12-07 (April 9, 2008).

Given the above, we strongly encourage the State of Vermont to pursue the necessary statutory changes to expand the opportunities for permissive intervention in state CWA enforcement actions. At a minimum, we recommend that permissive intervention be extended to your AODs and that the class of persons who may seek permissive intervention in AOs and AODs be expanded to be consistent with what is available under federal law.

EPA staff is available to you and your staff to assist in the development of appropriate statutory changes and to explain to interested parties why such changes are necessary. Please feel free to contact me if you would like to discuss this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Ira Leighton", with a stylized flourish at the end.

Ira Leighton
Acting Regional Administrator

cc: Chris Kilian, CLF
David Mears, VLS