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January 8, 2009

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: Supplementary Documents in Support of De-delegation Petition**

Dear Mr. Perkins:

Upon review of EPA's partial document production for Conservation Law Foundation's (CLF's) December 6, 2007 Freedom of Information Act request, CLF submits the following documents as additional support for its August 14, 2008 Petition for Withdrawal of the National Pollutant Discharge Elimination System (NPDES) Program Delegation from the State of Vermont.

I. Enforcement

The following document speaks further to one of the deficiencies in Vermont's program addressed in CLF's petition - the inadequacy of enforcement penalties in Vermont. EPA's 2005 NPDES Profile for Vermont states:

With respect to penalties, there are some areas for enhancement related to the appropriateness of penalty amounts and file documentation. Review of case files indicates that penalty amounts seem quite modest in light of the facts and circumstances of violations and the State's penalty policy; penalties should be at levels that remove all economic incentives for noncompliance and have general deterrence impacts. In addition, although VTDEC does consider and calculate economic benefit, it should ensure that calculations take into account the time

value of money and avoided operations and maintenance costs in order to effectively recoup violators' economic benefit of noncompliance. VTDEC's practice of offering an automatic penalty reduction for parties agreeing to enter into settlements would be improved by limiting such an approach to situations where the violator has already reached compliance and agrees to execute a settlement promptly without negotiation of the amount. VTDEC can also enhance documentation of settlement penalty calculation and adjustments. The Region will continue discussion with VTDEC on these and related issues.<sup>1</sup>

## II. Concentrated Animal Feeding Operations (CAFOs)

The following documents reiterate EPA's - as yet unmet - expectations regarding the Vermont Agency of Natural Resources' (ANR's) responsibilities as the CAFO-permitting authority in Vermont.

- In its response to questions from Vermont about proposed legislation to address water pollution from CAFOs under the Agency of Agriculture, Food, & Markets, EPA stated:

Regardless of whether this bill is adopted, EPA expects that the Agency of Natural Resources (ANR) will issue CAFO permits, since ANR is the permit issuing authority for NPDES permits in Vermont (referred to as "VTPDES" permits, since they are issued under state law consistent with the NPDES program assumption approved by EPA). Because this bill relates to permitting authority by the Agency of Agriculture, Food, and Markets ("AAFM"), its adoption (or lack of adoption) will have no bearing on ANR's responsibility to issue CAFO permits.

Under EPA's new CAFO regulations (issued in 2003, not 2004 as stated in the draft bill), states with approved NPDES permit programs have two years if they need to make statutory changes, or one year if only regulatory changes are needed, to conform state law to the federal requirements. Hence, if changes are needed in ANR's existing CAFO permitting program, we anticipate that ANR would be moving forward with such necessary statutory or regulatory amendments in the near future. ANR's obligation to ensure that its CAFO permitting program is consistent with EPA's new regulations exists regardless of whether this bill is adopted to expand AAFM's permitting authority.<sup>2</sup>

- In Vermont's 2005 NPDES Profile, EPA stated: "[T]he State needs to decide how it will permit CAFOs consistent with EPA's requirements."<sup>3</sup>

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<sup>1</sup> USEPA, *Permitting for Environmental Results (PER), NPDES Profile: Vermont*, at 12-13 (last updated March 2, 2005) (Attachment 1).

<sup>2</sup> Comments in email from EPA to Ben Huffman, Vt. Legislative Counsel, at 1 (Mar. 9, 2004) (Attachment 2).

<sup>3</sup> *NPDES Profile*, *supra* note 1, at 1.

- In its comments on Vermont's Performance Partnership Agreement End of Year Report for Federal Fiscal Year 2005, EPA said:

Thank you for adding a commitment to implement the Combined Animal Feeding Operations program through the development and implementation of both nutrient management technical standards and general permitting program (2007) and a compliance element (2008).<sup>4</sup>

Additionally, EPA's recent Vermont CAFO inspection reports confirm that housekeeping problems and potential discharge areas at Vermont CAFOs remain a live concern.<sup>5</sup>

### III. Anti-Degradation Implementation

The following documents reiterate EPA's as yet unmet expectations and general frustration regarding Vermont's failure to either develop anti-degradation implementation methods or actually implement its anti-degradation policy.

- When EPA commented on the 1999-2000 Performance Partnership Agreement with Vermont, it proposed revisions to make it clear that Vermont must develop anti-degradation implementation methods, including this addition:

Completion of antidegradation implementation procedures by December 1999. A draft of these procedures will be sent for EPA review by September 1999.<sup>6</sup>

- EPA's 2002 comments on a report from Vermont under the Performance Partnership Agreement stated: "Progress has been slow on efforts to resolve out standing EPA issues dealing with Limited Use and Anti-degradation Implementation Policy."<sup>7</sup>

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<sup>4</sup> Erik H. Beck, *EPA's Comments on VT End of Year Report for Federal Fiscal Year 2005*, at 4 (April 7, 2006) (Attachment 3).

<sup>5</sup> See, e.g., Memo from Diane Boisclair, Inspector, to File through Denny Dart, Water Enforcement Supervisor, re: Nea-Toght Farm CAFO Inspection, at 2 (Aug. 25, 2008) (Attachment 4):

The farm did not appear to have a discharge to waters of the U.S. I suggested that they do some housekeeping in the barn where the equipment was stored. There appeared to be a number of empty cans and a leaking oil drum without any type of containment. I also suggested that they clear away some of the vegetation that was on the banks of the manure pit so that they could observe any holes etc in the walls of the manure pit.

<sup>6</sup> Fax from Lynne Hamjian, EPA, to Edward Leonard, VTDEC re: PPA Replacement Pages, at 5 of PDF (May 4, 1999) (Attachment 5). See also Letter from Lynne A. Hamjian, EPA, to Edward Leonard, VTDEC, at 6 of PDF (Dec. 24, 1998) (Attachment 6) ("The second indicator should specify a target date to complete the implementation guide and antidegradation policy. In addition, the DEC should change anti-degradation policy to anti-degradation implementation procedures to reflect the actual product.").

<sup>7</sup> Email from EPA to VTDEC re: EPA's comments on VTDEC's comments on VTDEC's Performance Partnership Agreement End of Year Report for 2001, at 6 of PDF (Apr. 24, 2002) (Attachment 7).

- In the 2005 NPDES Profile, EPA stated:

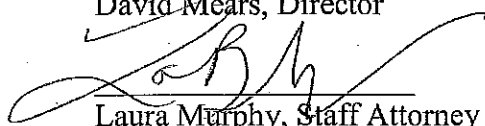
EPA is concerned that the antidegradation provisions in Vermont's water quality standards might not always be considered during NPDES permit development. Furthermore, EPA is concerned about the absence of antidegradation implementation procedures. During the next year, EPA will work with VTDEC to address issues related to the implementation of the antidegradation provisions. The Region knows that Vermont is working on this issue and expects to complete its work in the near term.<sup>8</sup>

Thank you for your consideration of these documents, which provide further insight into EPA's knowledge and handling of Vermont's NPDES deficiencies.

Sincerely,



David Mears, Director



Laura Murphy, Staff Attorney

Environmental & Natural Resources Law Clinic at Vermont Law School  
For 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

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<sup>8</sup> *NPDES Profile, supra* note 1, at 16. The document also expressed concern about the lack of information in Vermont's Fact Sheets. *Id.* at 7 ("The findings identified some potential areas for enhancement of the permits, including providing more detailed information in the fact sheets to better justify effluent limitations, as well as modifying standard permit condition language."). See also Letter from Linda Boornazian, Water Permits Division, EPA, to Linda Murphy, Water Management Division, EPA Region 1 re: NPDES Permit Quality Review Findings (Oct. 29, 2002), at 12-14 (Attachment 8):

Vermont permits may not comply with 40 CFR 122.41 because they do not always include each provision of 40 CFR 122.41, either expressly or by reference. The permits generally refer to state statutes and rule, but evaluation of compliance with federal regulations is not always possible. Neither fact sheets nor permits provide justification for mixing zones or waste management zones. Fact sheets do not identify the author and lack detail regarding justification for effluent limitations. Some permit standard conditions are missing or modified and may not be as stringent as 40 CFR 122.41. For municipal permits, necessary elements were present, but the fact sheets and permits tend to lack information regarding the receiving waters. They also lack information about the permitted facility, such as location, compliance history, monitoring locations, and effluent characteristics.