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February 26, 2009

Ira W. Leighton
Acting Regional Administrator
USEPA Region 1
1 Congress Street, Suite 1100
Boston, Massachusetts 02114-2023

VIA FIRST-CLASS MAIL AND ELECTRONIC MAIL

Re: Action on CLF's 8.14.08 Vermont NPDES De-delegation Petition

Dear Mr. Leighton:

On August 14, 2008, Conservation Law Foundation (CLF) filed a petition formally requesting that the Environmental Protection Agency (EPA) require Vermont to take action to remedy the deficiencies in its National Pollutant Discharge Elimination System (NPDES) program, and to withdraw Vermont's NPDES authority failing corrective action. The petition is a comprehensive, fifty-six page document that thoroughly details Vermont's satisfaction of six de-delegation criteria as laid out in 40 C.F.R. § 123.63(a). In sum, the petition shows:

- 1) Vermont meets de-delegation criteria 40 C.F.R. § 123.63(a)(3)(i) and (ii) (failure to "act on violations of permits or other program requirements" and failure to "seek adequate enforcement penalties or to collect administrative fines when imposed") through its longstanding failure to adequately enforce against water polluters.
- 2) Vermont meets de-delegation criteria 40 C.F.R. § 123.63(1)(ii) and (2)(iii) (where "the State's legal authority no longer meets the requirements of this part" and where "the operation of the State program fails to comply with . . . the public participation requirements of this part") through the failure of its statutory and agency-level enforcement processes and practices to satisfy federal requirements for public participation in enforcement.
- 3) Vermont meets de-delegation criterion 40 C.F.R. § 123.63(a)(2)(i) (failure to "exercise control over activities required to be regulated under this part, including failure to issue permits") through its failure to regulate concentrated animal feeding operations (CAFOs).

- 4) Vermont meets de-delegation criteria 40 C.F.R. § 123.63(a)(1)(i) (failure to “promulgate or enact new authorities when necessary”) through its failure to adopt implementation measures for its anti-degradation policy.

Since filing the petition, CLF has made four additional supporting submissions to EPA:

- 1) On October 21, 2008, CLF filed a *Supplement to Petition for Withdrawal of the National Pollutant Discharge Elimination System Program from the State of Vermont*. This supplement detailed an additional reason Vermont meets the de-delegation criterion for failing to “exercise control over activities required to be regulated . . . including failure to issue permits.”¹ It explained that, even after three court decisions recognizing the Vermont Agency of Natural Resources’ (ANR’s) clear obligations to exercise residual designation authority to control stormwater discharges, ANR has yet to require permits for the discharges.
- 2) On October 23, 2008, CLF filed a *Response to ANR’s 10.3.08 Response to CLF’s Petition for Withdrawal of the NPDES Program Delegation from the State of Vermont*. CLF’s response provided specific, well-documented facts that explained how ANR’s brief, generalized response to the petition was neither factually correct nor sufficient to rebut the petition’s thoroughly drawn conclusions.
- 3) On November 20, 2008, CLF filed a letter regarding *Follow-Up to CLF/EPA De-delegation Petition Meeting of October 27, 2008*. This letter presented proposed corrective actions for Vermont to take to remedy its NPDES program; further information on some discussion points raised during CLF’s October 27, 2008 meeting with EPA, including further evidence that Vermont is neither implementing its anti-degradation policy nor exhibiting a proper regulatory attitude toward enforcement; and additional analysis showing that Vermont meets other criteria for de-delegation through its failure to “develop an adequate regulatory program for developing water quality-based effluent limits [WQBELs] in NPDES permits,” thereby issuing permits that do not comply with the Clean Water Act.²
- 4) On January 8, 2009, CLF filed a letter regarding *Supplementary Documents in Support of De-delegation Petition*. This letter explained how several recently produced EPA Freedom of Information Act documents strengthen the grounds for CLF’s petition, specifically in regards to EPA’s knowledge and expectations regarding Vermont’s insufficient enforcement penalties, failure to regulate CAFOs,³ and failure to implement the anti-degradation policy.

¹ 40 C.F.R. § 123.63(a)(2)(i).

² *Id.* § 123.63(a)(2)(ii), (5). A recent letter from Region 1 on Middlebury’s final permit again identified permit inadequacies and voiced “several concerns with the responses provided” by ANR to Region 1’s comments on the draft permit. Letter from Roger A. Janson, EPA Region 1 Office of Ecosystem Protection to Brian D. Kooiker, Vermont Department of Environmental Conservation, at 1 (Feb. 3, 2009) (Attachment 1). Among the problems highlighted were failures to complete or to share reasonable potential analyses with the public.

³ A more recently produced document further illustrates Vermont’s failures in the CAFO arena. *EPA’s Issues for the New MOU between DAFM and ANR* (Aug. 10, 1998 Draft) (Attachment 2). It recognizes some of the flaws in Vermont’s Large Farm Operation (LFO) permitting program, several of which CLF pointed out in its petition. *Id.* at 1-2 (“The automatic approval provision in the LFO law applying to applications not acted on within 45 business days does not apply to applications for NPDES permits. Similarly, the absence of a specific permit term for LFO permits does not alter the five year term for NPDES permits.”; “While administrative penalties for violations of the LFO law are limited to \$5,000 per violation, this cap does not apply to NPDES violations.”; “The public process

In addition to these filings, CLF had a lengthy meeting with EPA Region 1 officials on October 27, 2008, in which we discussed the petition and related issues in detail, and answered substantive questions from EPA. We also provided EPA with the multi-volume source materials for the petition in mid October, 2008.

Despite this voluminous and cogent record, more than six months have passed since CLF filed its original petition without a definitive response from EPA or even a timeline for a decision. At a time when Vermont's waters continue to exceed water quality standards and seasonal regulated activities are soon to increase, action is urgently needed. One hundred fifteen lake, pond, stream, and river segments are on Vermont's 2008 303(d) list, with impairments for pollutants including E. coli, nutrients, sediment, metals, and stormwater.⁴ One hundred thirty-eight more are listed in need of further assessment, with another ninety already subject to Total Maximum Daily Loads.⁵ As spring approaches with increases in construction and CAFO activities, Vermont's water quality problems will only worsen if corrective actions are not swiftly undertaken. EPA must act immediately to mitigate these real world implications of delay.

Further, the environmental and business communities, indeed all Vermonters, understand that the quality of life in Vermont, including economic opportunities, is dependent upon the ecological health of our waters.⁶ Unless EPA requires Vermont to undertake the sweeping reforms needed to protect our lakes, ponds, rivers, and streams - or does so itself - the quality of our waters will continue to decline at a real cost to our economy, our quality of life, and the environmental integrity of our state. We need clean water for safe drinking water supplies, healthy habitat, and enjoyment of our waterways through fishing, swimming, and boating.

It is clear that no further informal investigation is required and that EPA should initiate formal de-delegation proceedings under the Clean Water Act and its implementing regulations. EPA should call a public hearing pursuant to 40 C.F.R. § 123.64(b)(1) and issue a subsequent order for corrective action pursuant to 33 U.S.C. § 1342(c)(3). EPA should make "robust use" of its authority to restore Vermont's waters without further delay.⁷

requirements of 40 CFR Sec. 124.10 shall be met for all NPDES permits." It also clearly states that "[i]f a discharge is found on a farm that meets the definition of a CAFO, an NPDES permit *must* be issued." *Id.* at 1 (emphasis added). CLF's petition documented multiple discharges at CAFOs, yet no NPDES permit has been issued more than ten years after EPA's comments on the MOU.

⁴ State of Vermont, *2008 303(d) List of Waters* (Oct. 2008), available at http://www.vtwaterquality.org/planning/docs/pl_2008.303d_Final.pdf.

⁵ State of Vermont, *2008 List of Priority Surface Waters outside the Scope of Clean Water Act Section 303(d) - Part C & Part D*, available at http://www.vtwaterquality.org/planning/docs/pl_2008.State_Lists_Final.pdf.


⁶ See Lake Champlain Steering Committee, Lake Champlain Basin Program, *Opportunities for Action: An Evolving Plan for the Future of the Lake Champlain Basin* 105-08 (April 2003) (discussing economic importance of Lake Champlain and clean waters). The significance of Lake Champlain's water quality for tourism was recently highlighted in Peter Greenberg's *Don't Go There*, in which he recommended bringing a "haz-mat suit along with the sunscreen" for those who ventured to beaches along Lake Champlain where the "water often looks cloudy and green and smells foul." Peter Greenberg, *Don't Go There: The Travel Detective's Essential Guide to the Must-Miss Places of the World*, Chapter 2 (2008).

⁷ See Memorandum from Lisa P. Jackson, EPA Administrator, to EPA Employees (Jan. 23, 2009), available at <http://www.epa.gov/administrator/memotoemployees.html> ("EPA will intensify our work to restore and protect the quality of the nation's streams, rivers, lakes, bays, oceans and aquifers. The Agency will make robust use of our authority to restore threatened treasures such as the Great Lakes and the Chesapeake Bay, to address our neglected

Sincerely,



David Mears, Interim Director



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For Conservation Law Foundation

 /s/
Anthony Iarrapino, Staff Attorney
Conservation Law Foundation

Student Clinician
Paul Ballenger

Cc: Stephen Perkins, Director, Office of Ecosystem Protection, EPA Region 1
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

urban rivers, to strengthen drinking-water safety programs, and to reduce pollution from non-point and industrial dischargers.”).