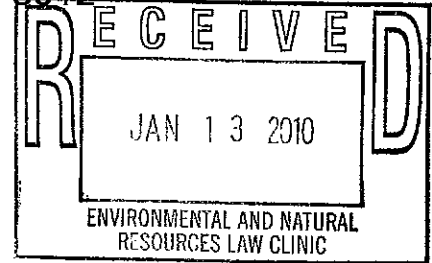




UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
FIVE POST OFFICE SQUARE - SUITE 100
BOSTON, MASSACHUSETTS 02109-2912



January 8, 2010

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

Dear Commissioner Johnson:

This letter is in response to your request that EPA outline the procedural mechanisms and implications of three possible ways that the Vermont Law School's (VLS) and Conservation Law Foundation's (CLF) pending petition to withdraw the Vermont Pollutant Discharge Elimination System (VTPDES) permit program might be resolved. Our preference, of course, is that the discussions that have occurred in recent months among the parties will yield a set of steps that the State intends to take to satisfactorily address the concerns that have been raised. We would expect these steps to be memorialized in writing and to constitute corrective actions that would support denial of the petition by EPA (or withdrawal of the petition by VLS and CLF). The timing of an EPA denial, and whether it would be conditioned upon completion of certain actions, would depend on the nature of the actions to be taken (e.g., enactment of necessary statutory changes).

The two other scenarios that you requested we describe involve the return of the VTPDES permit program to EPA, either by a voluntary transfer by the State to EPA, or by EPA's withdrawal of the program. Both options would be unprecedented, as no state authorized to administer the NPDES permit program has ever returned the program to EPA, nor has EPA ever withdrawn the program from an authorized state.

A voluntarily transfer of the program to EPA could occur pursuant to 40 C.F.R. § 123.64(a). Under this approach, the State must provide advance notice to EPA and submit a plan for the orderly transfer of permits, permit files, compliance files, and all other relevant program information. Notice of transfer must be published at least thirty days in advance in the Federal Register and in newspapers sufficient to provide statewide coverage, and notice must also be mailed to all permit holders, permit applicants, and other regulated and interested persons. The voluntary transfer process is estimated to take a minimum of nine months based on the time frames set forth in the regulations (although there is some ability to make adjustments if agreed to by EPA).

EPA could initiate withdrawal proceedings in response to VLS's and CLF's pending petition to withdraw the program, pursuant to 40 C.F.R. § 123.64(b). If EPA determines that cause exists to

commence withdrawal proceedings, the order commencing proceedings would specify a time and place for a hearing and would specify the allegations to be considered at the hearing. The State would have thirty days to respond in writing to the allegations. The hearing occurs after the answer is filed, and it is a formal proceeding subject to specific provisions of the consolidated rules of practice (40 C.F.R. Part 22). If, following the hearing and receipt of a recommended decision by the Presiding Officer, the Administrator determines that there are deficiencies in the State's administration of the program, she would identify the deficiencies and provide up to ninety days for the State to take corrective action. If the State failed to do so, the Administrator would then issue an order withdrawing the program. The EPA-initiated withdrawal process could take 12 months or more.

If Vermont were to lose the ability to implement the NPDES program, either by voluntarily transferring the program back to EPA or as a result of EPA's withdrawal of program approval, there would be significant consequences for dischargers in Vermont, from both the permitting and enforcement perspectives.

VTDEC would lose control over the development and issuance of permits. For example, EPA would make the decisions as to the scope and content of any CAFO permits as well as the determinations related to whether any given farm is required to obtain a CAFO permit. In addition, EPA could not commit to reissuing individual and general permits in a timely manner, because EPA already has a significant permit workload and backlog in Massachusetts and New Hampshire, the two states in New England without NPDES program approval. Return of the Vermont program would increase that backlog, since EPA does not anticipate receiving additional resources to process permits if we assume responsibility for the Vermont program. Delays in permitting could have particularly negative consequences for new dischargers wishing to locate in Vermont, and for existing dischargers that wish to expand.

Another impact is that VTDEC would no longer have the lead for Clean Water Act enforcement and compliance. Instead, EPA would substantially increase its inspection and enforcement presence in the State. As you know, EPA's enforcement approach often differs from that of VTDEC, with EPA relying more on formal administrative penalty and civil judicial actions. Vermont municipalities would need to adjust their expectations in response to the increased EPA presence, especially regarding the imposition of penalties and the extent to which penalties could be adjusted in light of the fairly restrictive provisions in EPA's supplemental environmental projects (SEP) policy.

It is important to be clear that, even if EPA were to assume administration of the permit program, VTDEC would still need to fund a certain number of permit staff. While Vermont would no longer need to draft permits, it would need to review the permits drafted by EPA, and prepare and issue Clean Water Act Section 401 water quality certifications. These are functions which all states perform under the Clean Water Act, to ensure that permits are sufficiently stringent to comply with state water quality standards. In addition, EPA's issuance of NPDES permits would not obviate the need for VTDEC to continue to issue permits under state law, to the extent that state law requires separate permitting for certain categories of discharges (such as storm water).

You should also understand that a voluntary transfer of the program to EPA, or a withdrawal of program approval, would be difficult to reverse in a short time frame, even if the consequences of such a return are not to the State's liking. While it may take between nine months to a year for the program to return to EPA, reauthorizing the State to assume the program at some future point would take significantly longer. If the State were to seek return of the program, EPA would need to follow the complete authorization process, including, but not limited to, a full analysis of Vermont's statutory authorities and its regulations, consultation with other federal resource agencies, and public notice and comment. The full process could take well in excess of a year to accomplish.

Finally, if the program is returned or withdrawn, we would have to consider decreasing VTDEC's Clean Water Act Section 106 grant to account for the work no longer being performed by the State. Withheld funds would likely be used by EPA to secure contractor support for our implementation of the program.

I hope this letter is a helpful response to your request. Should you want to discuss these matters further, please contact me at 617-918-1501.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen S. Perkins". The signature is fluid and cursive, with a long horizontal stroke at the end.

Stephen S. Perkins, Director
Office of Ecosystem Protection

cc: Christopher Kilian, Conservation Law Foundation
David Mears, Vermont Law School