Environmental and Natural Resources Law Clinic
Vermont Law School
PO Box 96 - Chelsea Street
South Royalton, VT 05068
802.831.1630
Fax: 802.831.1631

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Lisa Jackson
Administrator
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Curt Spalding
Regional Administrator
USEPA Region 1
5 Post Office Square, Suite 100
Boston, Massachusetts 02109-3912

Carl Dierker
Regional Counsel
USEPA Region 1
5 Post Office Square, Suite 100
Boston, Massachusetts 02109-3912

Stephen Perkins
Director, Office of Ecosystem Protection
USEPA Region 1
5 Post Office Square, Suite 100
Boston, Massachusetts 02109-3912

VIA UNITED STATES POSTAL SERVICE AND ELECTRONIC MAIL

Re: Supplementary Update to Conservation Law Foundation's 2008 Petition for Withdrawal of the National Pollutant Discharge Elimination System Program Delegation from the State of Vermont

Dear Ms. Jackson, Mr. Spalding, Mr. Dierker, and Mr. Perkins:

Conservation Law Foundation (CLF) submits this supplementary update in support of its August 14, 2008 petition and six subsequent filings seeking withdrawal of the National Pollutant

Discharge Elimination System (NPDES) program delegation from the State of Vermont.[1] CLF again requests that the United States Environmental Protection Agency (EPA) commence formal withdrawal proceedings pursuant to 33 U.S.C. § 1342(c)(3) and 40 C.F.R. § 123.64(b) without further delay.

This supplement illustrates that Vermont's NPDES program continues to fall short of minimum Clean Water Act (CWA or Act) requirements. Specifically:

1) Vermont's provisions for public participation in enforcement remain unlawful under the Clean Water Act;
2) Vermont's Agency of Natural Resources (ANR) still does not regulate concentrated animal feeding operations (CAFOs) or take action on CAFO violations as required under the Clean Water Act;
3) ANR has allowed the Waterbury wastewater treatment facility to discharge phosphorus at levels far exceeding its wasteload allocation under the Lake Champlain Total Maximum Daily Load (TMDL) for years, acting under the color of state law that conflicts with the Clean Water Act and through an unlawful permit allowing unlimited phosphorus discharges indefinitely. ANR has also attempted to "modify" Waterbury's NPDES permit without public notice and comment as required by the Clean Water Act;
4) ANR continues to develop permits without adequate water quality-based effluent limitations (WQBELs) as required by the Clean Water Act; and
5) ANR continues to fail to adequately enforce the Clean Water Act.

The source documents for this supplementary update are on file with the Environmental and Natural Resources Law Clinic (ENRLC) at Vermont Law School and can be made available to EPA or other interested persons upon request. They were obtained primarily through public records requests to ANR, and we express our appreciation to those who facilitated the requests. In addition, ANR has recently made some changes to its website that improve public access to information – e.g., posted copies of Assurances of Discontinuance (AODs) on the Compliance and Enforcement Division page, which helped in our review of ANR's recent enforcement practices.[2]

I. Vermont's provisions for public participation in enforcement remain unlawful under the Clean Water Act.

As CLF demonstrated in its August 14, 2008 petition, Vermont does not comply with minimum federal requirements regarding public participation in enforcement, thus satisfying two criteria for withdrawal: state legislative or judicial action limiting the State's legal authority to meet federal public participation requirements (withdrawal criterion 1(ii)), and failure to comply with

[1] The six subsequent filings with EPA provided further grounds for withdrawal, additional supporting evidence, and requests that EPA begin formal withdrawal proceedings. *See* "10.21.08 CLF Petition Supplement," "10.23.08 CLF Response," "11.20.08 CLF FollowUp Letter," "1.8.09 CLF Supplementary Letter," "2009-02-26 CLF Petition Letter," "2010-03-03 CLF Letter to EPA FINAL."

[2] The website also posts final draft assurances of discontinuance after signed by the parties (http://www.anr.state.vt.us/dec/co/enf/cfm/ps/enf-ps.cfm), pursuant to 10 V.S.A. § 8007(c) ("The secretary or the land use panel shall post a final draft assurance of discontinuance to its website . . . .").

federal public participation requirements in its operations (withdrawal criterion 2(iii)).[3] As CLF explained in detail, Vermont has not ensured that the public is allowed to participate in enforcement processes in one of the two permissible ways set forth in 40 C.F.R. § 123.27(d): by providing intervention of right, or by providing an assurance that ANR will respond to all citizen complaints in writing, not oppose permissive intervention, and conduct public notice and comment on settlements.

The situation has not changed since August 2008. Vermont's law remains the same: it still precludes intervention of right in administrative enforcement actions. It still does not assure that ANR will respond in writing to citizen complaints, not oppose permissive intervention, and conduct public notice and comment on settlements.

II. Vermont's Agency of Natural Resources (ANR) still does not regulate concentrated animal feeding operations (CAFOs) or take action on CAFO violations as required under the Clean Water Act.

As CLF demonstrated in its August 14, 2008 petition, ANR neither requires CAFOs that discharge to seek NPDES coverage, nor enforces against CAFO discharge violations when they occur.[4] The situation has not changed, and ANR's persistent inaction satisfies two criteria for withdrawal: failure to exercise control over activities required to be regulated, including failure to issue permits (withdrawal criterion 2(i)), and failure to act on violations of permits or other program requirements (withdrawal criterion 3(i)).[5]

As CLF explained in 2008, Vermont is home to an increasing number of CAFOs that discharge even while its waterways suffer from agricultural pollution. The problems remain today, with more discharging CAFOs and more Vermont waters impaired from agricultural pollution than any other source.[6] Yet, despite the fact that ANR's records reveal numerous CAFO discharges and high risk areas for discharges over the past few years, ANR has still not penalized a single facility nor required a single facility to obtain a NPDES permit in compliance with the Clean Water Act. Moreover, ANR continues to rely heavily on Vermont's Agency of Agriculture,

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[3] *See* 40 C.F.R. § 123.63(a)(1)(ii) ("[w]here the State's legal authority no longer meets the requirements of this part, including . . . [a]ction by a state legislature or court striking down or limiting State authorities") and 40 C.F.R. § 123.63(a)(2)(iii) ("[w]here the operation of the State program fails to comply with . . . [federal regulatory] public participation requirements").

[4] "Enforce," "enforcement," and "enforcement actions" refer to ANR's formal enforcement mechanisms through which penalties and court-approved injunctive obligations may be imposed – Administrative Orders (AOs) and Assurances of Discontinuance (AODs). See Appendix A to CLF's original petition for an overview of ANR's enforcement mechanisms.

[5] *See* 40 C.F.R. § 123.63(a)(2)(i) ("[w]here the operation of the State program fails to comply with the requirements of this part, including. . . [f]ailure to exercise control over activities required to be regulated under this part, including failure to issue permits"), and 40 C.F.R. § 123.63(a)(3)(i) ("[w]here the State's enforcement program fails to comply with the requirements of this part, including . . . [f]ailure to act on violations of permits or other program requirements").

[6] *See* Agency of Natural Resources (ANR), Dep't of Envtl. Conservation (DEC), *Draft for Public Comment, State of Vt. 2010 303(d) List of Waters, available at* http://www.anr.state.vt.us/dec/waterq/mapp/docs/mp_303d_draft.pdf (28 waters impaired from agricultural sources, 11 from mines and tailings, 10 from PCBs, etc.). The draft 2010 list proposes 14 waters total for delisting.

Food and Markets (AAF&M) – not an authority delegated to administer the NPDES program – to regulate and monitor the facilities.

A. Vermont CAFOs discharge nutrients, pathogens, and other pollution into rivers, lakes, and streams.

The examples below – drawn from ANR's files – demonstrate that CAFO discharges persist in Vermont. ANR found three large operations to have actually discharged – one in December 2009, one in February 2010, and one in April 2010 - yet ANR took no action to issue NPDES permits or to penalize the operations for their unpermitted discharges. ANR found five medium operations to have actually discharged in September 2009, with evidence of one discharge as recently as April 2010. Again, ANR failed to take action to regulate these facilities or to enforce against violations as required by the Clean Water Act.

In fact, two of the large operations with current discharge problems already had discharge problems of which ANR was fully aware. As we laid out in our original petition, one facility was cited more than once for discharge violations and another raised "serious concerns" because a stream ran through its production area:[7]

> [Pleasant Valley Farm] was cited for a "direct discharge of wastes (*i.e.*, sediments) into the stream that runs through [its] property." At the same CAFO, almost a year later, a DEC employee working on an EPA-funded water quality project observed "6 to 10 persistent, concentrated, active runoff pathways" into the brook. Samples from the pathways contained "very high concentrations of phosphorus," with the LFO's protection measures having been "largely ineffective." Samples from the brook contained high bacteria, phosphorus, and nitrogen concentrations, leaving "little doubt . . . that the runoff from the fields . . . is largely responsible for these water quality patterns." The LFO was cited again in 2000 for violating its LFO permit by stacking manure so that the "manure pile [wa]s threatening to create a discharge into" a brook, and failing to mitigate erosion so that it was "causing a discharge of sediment into" the brook. Later that year problems persisted. The DEC project manager observed "evidence of continuing concentrated overland flow from the fields to the stream" on August 1st, and noted his "strong sense that the apparent failure of the state to take a strong stand in th[at] case [wa]s impairing the credibility of Vermont's policies on agricultural water quality issues." On September 11th, 2000, AAF&M issued another Notice of Violation to the LFO.
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> . . .
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> In one case, a stream actually ran through the CAFO's production area. In the words of ANR staff, this created "very difficult logistical problems for implementing an effective remedy" and caused "serious concerns whether normal waste control practices/ structures will be effective in preventing discharges

[7] Aug. 14, 2008 CLF Petition, at 43-46 nn. 309-10, 339-45 (describing violations and concerns at Pleasant Valley Farm and Knoxland Farm, respectively) (citations omitted).

during significant precipitation/runoff events." AAF&M and ANR had actually been communicating about this problem since early 2002, with ANR indicating it was "not sure that [it] could issue a [NPDES] permit for a barn over a stream."

ANR did not enforce against these facilities or require them to obtain NPDES permits, then or now.

CASE STUDY 1: Pleasant Valley Farm

On February 10, 2010, AAF&M received a neighbor complaint that Mill Brook (a.k.a. Godin Brook) had foam on its surface and smelled of manure.[8] AAF&M's Accepted Agricultural Practices (AAP) Report about the complaint stated that a manure breach had occurred at the St. Pierre Farm due to a double pump failure that "allowed manure to come out onto the ground, run down the driveway and into the roadside ditch."[9] The AAP Report further explained that the owners "used the excavator to clean out the ditch and remove any manure form [sic] the ice. That opened the ice and is probably when manure entered the stream."[10] An AAF&M memorandum on the pump failure reveals that the actual volume of discharges released to the brook could have been anywhere between 100 gallons to 10,000 gallons.[11]

AAF&M made extensive recommendations to St. Pierre Farm to "reduce the potential for a discharge to occur in the future": install a high alarm in the holding tank to indicate if the manure level is above normal operational level, install an overflow pipe in the holding tank, modify the detention pond to meet Natural Resource Conservation Service (NRCS) waste storage facility conservation practices, construct a new waste storage facility to meet NRCS standards, and implement better housekeeping practices to avoid sweeping bolts and cut pieces of thread rod into the floor drain (which could cause a pump failure).[12] As of CLF's file review on June 1, 2010, there was no documentation of any progress to implement such fixes. In addition, ANR had not enforced against the facility or required it to seek coverage under a NPDES permit.

CASE STUDY 2: Knoxland Farm, Inc.

AAF&M issued Knoxland Farm, Inc. an Assurance of Discontinuance (AOD) on December 8, 2009 for several violations of its Large Farm Operation (LFO) Permit and of Vermont's AAPs,

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[8] *AAP Report: Manure Complaint* (Feb. 10, 2010) (*"Feb. 10 Manure Complaint"*) at 1.

[9] *Id.* The Pleasant Valley Farm, a large CAFO owned by Mark and Amanda St. Pierre, is sometimes referred to as the "St. Pierre Farm." *See* Internal AAF&M Memorandum on St. Pierre Farm – Pleasant Valley Farm Anaerobic Digester Pump Failure ("St. Pierre Memo") (Mar. 31, 2010).

[10] *Feb. 10 Manure Complaint, supra* note 8, at 2.

[11] St. Pierre Memo, *supra* note 9, at 3.

[12] *Id.* In contrast to ANR's failure to penalize the St. Pierre Farm, EPA fined the facility for wetland violations and required it to restore the approximately forty-one acres of wetlands it illegally filled between 1998 and 2002. *See* Press Release, EPA, Richford, Vt. Dairy Farmers Pay Consequences for Filling 41 Acres of Wetlands (Sept. 4, 2008), *available at:* http://yosemite.epa.gov/opa/admpress.nsf/dc57b08b5acd42bc852573c90044a9c4/777eaf2a85c8bd09852574ba006510c7!OpenDocument (explaining that "[t]he wetlands filled were located in the watersheds of the Missisquoi and Pike Rivers, both of which flow into Lake Champlain. These wetlands likely helped stabilize stream banks, detained nutrients and sediments, filtered pollutants and helped absorb flood waters.").

which were observed during AAF&M's November 3, 2009 site inspection.[13] In particular, AAF&M observed "[t]he release of wastes, both actual and potential . . . from the southern-most barn on the south side of the home farm production area to the stream running alongside the barn."[14] AAF&M also observed "[l]eachate from the mortality composting site on the Heifer Farm . . . entering a ditch which then discharges to waters . . ." and "runoff manure from an area where cows congregate" at the "last barn up the hill from the mortality composting area . . . along with runoff from an exposed pile of bedded pack . . . running over the driveway and down-gradient to a nearby stream."[15]

AAF&M made extensive recommendations in its AOD to Knoxland Farm "[i]n order to resolve this matter," including modifying the curb and splash guard to "prevent the release of wastes from the barn into the stream and to prevent the runoff of manure from the commodities bunk into the stream;" improving the livestock composting area in order to "prevent the discharge of leachate into the ditch and to waters;" depopulating the upper barn "so that the remaining livestock can be fenced under the existing cover and excluded from the uncovered outdoor barnyard;" and removing the existing pile of bedded pack or ensuring "that any area used for the storage of manure or the confinement of animals [is] under cover, including the area where the animals congregate outside."[16] As of CLF's file review on June 1, 2010, there was no documentation of any progress to implement such fixes. In addition, ANR had not enforced against the facility or required it to seek coverage under a NPDES permit for its discharges.

CASE STUDY 3: Kane's Scenic River Farms, LLC

An AAF&M and ANR April 8, 2010 inspection at Kane's Scenic River Farms, LLC identified evidence of a "very recent discharge" and many associated problems.[17] First, it was observed that there were pump problems in the silage leachate pump station and "leachate flowed out of the pump station via a 12" overflow pipe and entered a ditch system which directed it to waters of the State."[18] Also, a surface water, dry bed, ditch, canal, or etc., passed through the production area.[19]

Additionally, the waste handling and storage structures were not being properly maintained.[20] Instead, "maintenance problems were observed."[21] Specific maintenance problems included "silage [that] has been spilled/pushed over the west wall . . . and could possibly runoff and enter the diversion ditch system which directs the clean water away from the north and the west side of the feed bunk," and "inadequate free board in upper manure pit."[22] Further, "overflow from the

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[13] *See* AAF&M, *In the matter of: Knoxland Farm, Inc.* Assurance of Discontinuance, No. 2009-12-01 LF (Dec. 8, 2009).
[14] *Id.* at 3.
[15] *Id.*
[16] *Id.* at 3-4.
[17] *See Vt. DEC Animal Feeding Operation Assessment Form* (form of 4/8/10). Kane's is a new LFO from the date of CLF's original petition.
[18] *Id.* at 4.
[19] *Id.* at 2.
[20] *Id.*
[21] *Id.*
[22] *Id.*

silage leachate pump stations serving the middle and upper feed bunks entered a ditch system which conveys it to waters."[23]

The inspection report made extensive recommendations to the facility, including: better housekeeping practices to prevent the silage from spilling over the walls, following through on the plan to remove manure from the upper manure pit as soon as possible, piping the overflow from the silage leachate pump station to the lower manure pit, and grading and seeding the ditch in the area of the pump station.[24] The report also made recommendations for further agency action to"[i]ssue a compliance schedule to complete the work on the silage leachate overflow," and "[p]ossibly issue an NOAV with directive and schedule for the work including reporting requirements"[25] as well as "[f]ollow-up confirmation (AAF&M or ANR) to document project to eliminate the discharge from the overflow has been completed and observe housekeeping practices."[26] ANR issued an NOAV on April 21, 2010,[27] and received a reply from Kane on April 28, 2010 advising ANR that the facility had completed "the construction necessary to eliminate the discharge from the silage leachate."[28]

As of CLF's file review on June 1, 2010, there was no documentation that ANR had followed-up to confirm the project's completion or to observe housekeeping practices, as recommended in the inspection report. Instead, ANR closed the file based on the facility owner's response and an email with photos from AAF&M.[29] In addition, ANR had not enforced against the facility or required it to seek coverage under a NPDES permit.

CASE STUDY 4: Black & Whiteface Ranch

During an AAF&M and ANR Medium Farm Operation (MFO) inspection of Black & Whiteface Ranch on September 9, 2009, evidence of a past discharge was discovered from the silage storage bunk area to a tributary that flows to Otter Creek.[30] According to the inspection report, the discharge occurred because the silage storage bunk area was graded to discharge all runoff to a man-made channel/ tributary that flows to Otter Creek.[31] The report also documented the "high risk" that manure from the Main Barn could flow over an embankment into the tributary absent proper management.[32] The "absence" of proper management was already evident as shown by the report's recommendations for specific corrective management practices, below.[33]

First, the report urged Black & Whiteface to finish constructing a project to "eliminate the discharge from the bunks" into the tributary and to modify the Main Barn to "physically prevent

[23] *Id.*
[24] *Id.* at 5.
[25] *Id.*
[26] *Id.*
[27] ANR, Notice of Alleged Violation (Apr. 21, 2010).
[28] Letter from Thomas Kane to Brian D. Kooiker, ANR (Apr. 28, 2010).
[29] Email from Randy Bean, ANR, to Katie Gehr, AAF&M (May 3, 2010).
[30] *Vt. Agency of Agriculture, Food & Markets Medium Farm Operation Assessment Form* 1-2 (form of 9/9/09).
[31] *Id.* at 2.
[32] *Id.*
[33] *Id.* at 4.

the discharge of waste" into the tributary.[34] It then recommended a follow-up inspection to ensure the construction was completed by November with a note that if the construction requirement was not met, enforcement actions or requiring a CAFO permit may be necessary.[35]

On October 30, 2009, ANR requested the status of the construction project from AAF&M and explained that ANR had not issued an NOAV since it appeared that construction was moving forward.[36] AAF&M replied that it might visit the facility to check on the project and Black & Whiteface Farm's owner assured it that the majority of work was done.[37] AAF&M's update, which did not arrive until January 4, 2010, followed a site visit which revealed that a pump had not been installed in the pump station.[38] ANR replied that it would be "forced to issue something" to move construction forward before runoff season unless the facility completed the project as soon as possible.[39] AAF&M's reply came two and a half months later on March 26, 2010, stating that the project had been completed.[40] As of CLF's file review on June 1, 2010, there was no indication that ANR had independently verified either the completion of the project or the cessation of the discharge. In addition, ANR had not enforced against the facility or required it to seek coverage under a NPDES permit.

CASE STUDY 5: Magnan Home Farm

Evidence that leachate from a feed bunk had discharged into a ditch system to Black Creek was discovered at Magnan Home Farm on an AAF&M and ANR MFO site visit on September 1, 2009.[41] The inspection report recommended that the operation "eliminate the discharge by collecting and pumping the silage leachate to the unused manure pit on the north side of Chester Arthur Road as soon as possible but by no later than the end of this construction season (~ November)."[42]

ANR issued an NOAV on October 26, 2009.[43] The NOAV directed a written response be provided to ANR by November 30, 2009 that included a description of the construction to be completed such that the discharge would be eliminated and a schedule with a date certain of when the work would be completed.[44] No such response was received.[45] An internal ANR

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[34] *Id.* The project consists of: (1) collecting and pumping the silage leachate to the newly constructed silage leach pit located to the north of the "east silage bunk" side, then spreading leachate as a soil enhancement via the nutrient management plan (NMP); (2) culverting the intermittent tributary through the silage bunk area to prevent waste from entering the waterway; (3) modifying the high risk area at the east end of the Main Barn to physically prevent the discharge of waste into the intermittent tributary or constructing a berm at the top of the embankment to prevent wastes from entering the waterway. *Id.*

[35] *Id.*

[36] Email from Randy Bean, ANR, to Nathaniel Sands, AAF&M (Oct. 30, 2009).

[37] Email from Nathaniel Sands, AAF&M, to Randy Bean, ANR (Nov. 2, 2009).

[38] Email from Nathaniel Sands, AAF&M, to Randy Bean, ANR (Jan. 4, 2010).

[39] Email from Randy Bean, ANR, to Nathaniel Sands, AAF&M (Jan. 5, 2010).

[40] Email from Nathaniel Sands, AAF&M, to Randy Bean, ANR (Mar. 26, 2010).

[41] *Vt. Agency of Agriculture, Food & Markets Medium Farm Operation Assessment Form* 1-2 (form of 9/1/09).

[42] *Id.* at 3.

[43] *See* ANR, Notice of Alleged Violation (Oct. 26, 2009) ("Oct. 26 NOAV"); *see also* Internal ANR memorandum on Magnan Home Farm ("Magnan Memo") (Apr. 9, 2010).

[44] Oct. 26 NOAV, *supra* note 43, at 1.

[45] Magnan Memo, *supra* note 43.

memorandum noted that ANR received updates from AAF&M on the construction on January 12, 2010 (stating that part of the construction had gone underway, but the project had not yet been completed) and on April 5, 2010 (stating that the project had not been completed).[46]

By April 8, 2010, the construction still had not been completed and it was clear that the leachate discharge into the ditch persisted.[47] At this point ANR "instructed them to prioritize completion of the leachate system (elimination of the discharge)."[48] ANR received word from AAF&M on May 24, 2010 that the project was finally completed[49] and responded that it considered the NOAV closed.[50] As of CLF's file review on June 1, 2010, there was no indication that ANR had independently confirmed either completion of the project or elimination of the discharge. In addition, ANR had not enforced against the facility or required it to seek coverage under a NPDES permit.

CASE STUDY 6: Scribner Farm

An AAF&M and ANR MFO site inspection on September 2, 2009 revealed that Scribner Farm discharged contaminated water along a roadway into a stormdrain and ditch system flowing into the Winooski River.[51] ANR issued an NOAV on October 26, 2009 stating:

> Specifically, barnyard waste and silage leachate is directed to a stormdrain followed by a ditch system that discharges to the Winooski River. (See the attached Assessment Form for additional description of the discharges).[52]

The NOAV directed the facility to eliminate these discharges and provide a written response by November 30, 2009 with a description of the construction to be undertaken and a schedule with a date certain for when the work would be completed.[53] ANR received a response from the owner on November 30, 2009 that included a note from him and a letter dated November 12, 2009 from the NRCS explaining how Scribner Farm and NRCS had been working on solutions to eliminate discharges.[54] Because "no specific details of the project or date certain for elimination of the discharge" were included in the letter, ANR drafted a 1272 Order with a schedule to eliminate the discharge by October 31, 2010, which it finalized and issued on February 11, 2010.[55] The 1272 Order stated:

> C. Evidence of a past discharge from the production area through a direct conveyance was discovered during this inspection. Water contaminated with silage leachate and barnyard waste from the

[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] Email from Stephanie Zehler, AAF&M, to Randy Bean and Brian Kooiker, ANR (May 24, 2010).
[50] Email from Randy Bean, ANR, to Stephanie Zehler, AAF&M, and Brian Kooiker, ANR (May 24, 2010).
[51] *Vt. Agency of Agriculture, Food & Markets Medium Farm Operation Assessment Form* 1-2 (form of 9/2/09).
[52] ANR, Notice of Alleged Violation (Oct. 26, 2009) at 1.
[53] *Id.*
[54] Letter from Ellen Sivret, NRCS, to Scribner Farm (Nov. 12, 2009); undated handwritten note from facility.
[55] *See* ANR *In The Matter of: Stephen Scribner*, 1272 Order No. 7-1002 (Feb. 12, 2010).

adjacent barn flows along the roadway to a catch basin and pipe into a ditch and to the Winooski River.

D. The discharge of contaminated water from this area to waters of the State is a violation of the EPA animal feeding regulations (40 CFR Parts 122 and 412) as well as 10 V.S.A. Chapter 47, Section 1259.

. . .

G. Based on the inspection and the submitted follow-up documentation it is the finding of the Secretary that Mr. Scribner's operation and maintenance of his farm can reasonably be expected to create or cause a discharge to waters of the state. Because there is no certainty of elimination of the discharges based on the submitted documentation, the Department has set forth a schedule based on a reasonable period of time to eliminate the discharges. The schedule to eliminate the discharges is not contingent upon funding availability from a third party.[56]

As of CLF's file review on June 1, 2010, ANR had not enforced against the facility or required it to seek coverage under a NPDES permit.

CASE STUDY 7: Nop Home Farm

Evidence was discovered of discharges from two places at Nop Home Farm at an AAF&M and ANR MFO site inspection on September 9, 2009:

> Discharge 1: A catchbasin located in the travel lane/hoof clipping area between "south barns" is piped to an adjacent ditch which flows into a pond.
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> Discharge 2: A series of catchbasins located adjacent to the silage bunks and "north barn" area is piped to a ditch which flows for several hundred feet into the Middlebury River.[57]

The first sentence in the report's recommendations stated: "Eliminate the discharges."[58]

ANR issued an NOAV on October 26, 2009 directing the facility to provide ANR with a written response by November 30, 2009 with a description of the construction to be completed such that the discharge would be eliminated and a schedule with date certain when the work would be completed.[59] The facility responded to the NOAV indicating an intent to eliminate the discharges.[60] ANR then issued a draft 1272 Order for the facility's "review and comment."[61]

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[56] *Id.* at 1-2.
[57] *Vt. Agency of Agriculture, Food & Markets Medium Farm Operation Assessment Form* 2 (form of 9/9/09).
[58] *Id.* at 3-4.
[59] ANR, Notice of Alleged Violation (Oct. 26, 2009) at 1.
[60] Letter from Warren Nop to Christine Thompson, ANR (Nov. 30, 2009); *see also* Letter from Brian Kooiker, ANR, to Mr. Nop (Jan. 6, 2010) ("Jan. 6 Kooiker Letter") and accompanying Draft 1272 Order No. 7-1001 (Jan. 6, 2010).

The letter accompanying the draft order stated that, as a result of the facility's response "indicating [an] intent to eliminate the discharges, the [Vermont Department of Environmental Conservation] has decided to establish a compliance schedule to provide you additional time to eliminate the discharges."[62] The final Order was issued on February 11, 2010, with some additions regarding funding and a compliance schedule.[63] As of CLF's file review on June 1, 2010, ANR had not enforced against the facility or required it to seek coverage under a NPDES permit.

CASE STUDY 8: Sheldon Junction Farm

An AAF&M and ANR MFO site inspection on September 1, 2009 revealed that the Sheldon Junction Farm discharged silage leachate and barnyard runoff from the production area to a ditch system that conveys to McGowan Brook.[64] The inspection report recommended that the operation complete installation of a collection tank and pumping system, install a pipe along the barn and under the driveway, and convey the silage leachate and runoff to the manure pit "to eliminate the discharge . . . as soon as possible but by no later than the end of this construction season (~ November)."[65] The inspection report also recommended a follow-up inspection in November to confirm that the work had been completed or "begin enforcement actions and/or require CAFO permit."[66]

ANR issued an NOAV on October 26, 2009 directing the owner to submit a description of the construction to be completed such that the discharge would be eliminated and a schedule with date certain when the work would be completed.[67] An internal ANR e-mail of December 9, 2009 stated that ANR received a telephone call from the facility owner with an update on the construction project, which was almost complete.[68] There is no indication that the owner submitted either a description of the construction or a schedule for completion of the construction in accordance with the NOAV. Nevertheless, on January 4, 2010, ANR concluded after a site visit that the violations referenced in the October 26, 2009 NOAV were properly addressed.[69] As of CLF's file review on June 1, 2010, ANR had not enforced against the facility or required it to obtain coverage under a NPDES permit.

B. Other Vermont facilities operate at "high risk" for discharging.

Almost as troubling are the operations at "high risk" for discharging or, put in regulatory terms, those that "propose to discharge" – i.e., based on an objective assessment of the facility's design,

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[61] Jan. 6 Kooiker Letter, *supra* note 60.
[62] *Id.*
[63] Letter from Brian Kooiker, ANR, to Warren Nop (Feb. 12, 2010); ANR, *In the Matter of: Nop Brothers and Sons*, 1272 Order No. 7-1001 (Feb. 11, 2010).
[64] *Vt. Agency of Agriculture, Food & Markets Medium Farm Operation Assessment Form* 1-2 (form of Sep. 1, 2009).
[65] *Id.* at 3.
[66] *Id.* at 4.
[67] ANR, Notice of Alleged Violation (Oct. 26, 2009) at 1.
[68] Email from Brian Kooiker, ANR, to Randy Bean, ANR (Dec. 9, 2009).
[69] Internal ANR memorandum on Bourdeau MFO (Jan. 4, 2010). ANR's files refer to Sheldon Junction Farm and Bourdeau Farm interchangeably.

construction, operation, and maintenance, a discharge will occur.[70] Some factors relevant to the objective assessment include: discharge history; proximity to waters of the United States; type and quality of waste storage; management of mortalities; drainage of production areas; and standard operating procedures.[71] The assessment should consider the many possible sources of pollutants, which include "animal confinement areas, feed storage areas; manure, litter, and process wastewater storage areas; confinement house ventilation fan exhaust; land-applied manure, litter, or process wastewater; and other site specific pollutants," as well as any "pathways" for pollutants to reach waterways.[72] As described below, the MFO inspections conducted by AAF&M and ANR as of CLF's file review on June 1, 2010 revealed numerous high risk areas for discharges implicating these criteria (in addition to the actual discharges described above).[73]

Despite these serious problems, ANR's follow-up response has not been diligent. Of the six facilities with problem areas, ANR recommended no further action for two.[74] ANR deferred to AAF&M's jurisdiction to "correct" the "problem area" in one,[75] and recommended just three for follow-up visits in late fall or spring (with the option to instead contact AAF&M to confirm the completion of corrective work for the third facility).[76] Of the three recommended for follow-up visits, only one follow-up was documented eight months later and it was conducted by AAF&M rather than ANR.[77] For another of the three recommended for follow-up visits, ANR sent a letter to the facility seven months later requesting a follow-up visit,[78] but as of June 1, 2010 (when late

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[70] 40 C.F.R. § 122.23(d)(1); U.S. EPA, *Implementation Guidance on CAFO Regulations – CAFOs that Discharge or Are Proposing to Discharge ("Implementation Guidance")* at 2 (May 28, 2010), *available at* http://www.epa.gov/npdes/pubs/cafo_implementation_guidance.pdf.

[71] *Implementation Guidance, supra* note 70, at 2.

[72] *Id.*

[73] ANR had also noted potential problems at a large CAFO - Vermont Egg Farm (VEF) - which had proposed to expand its Large Farm Operation permit with AAF&M. ANR stated that "several components of the modifications [we]re problematic," including the planned construction of a swale which would convey drainage from the existing building, the proposed building, and a portion of the access road to a swale flowing into a tributary of Rock River. Internal ANR memorandum on Vermont Egg Farm Proposed Expansion ("VEF Memo") (Mar. 11, 2009). ANR said that could "trigger the 'discharge' definition in 40 C.F.R. 122.2 and require issuance of a NPDES permit if th[e] drainage w[ere] contaminated." (It is unlikely that drainage from CAFO buildings might not be "contaminated." As EPA knows, "[w]ater that comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding is process wastewater and cannot be discharged unless authorized by an NPDES permit." *Implementation Guidance, supra* note 70, at 4.) ANR also noted other problems with the proposal: an insufficient holding tank that would lead to "ponding in the manure loading area," and insufficient monitoring on the tank so that if the tank were to overflow it would contaminate the runoff conveyed down the swale and result in a "discharge." VEF Memo. ANR concluded:

> [T]he recent design modifications have significantly increased the potential for a discharge to occur from the VEF . . . . Specifically a conveyance system has been proposed to deliberately direct runoff towards waters of the State, plus a wastewater storage system has been proposed that is not designed to function properly and does not include any mechanisms to properly monitor the system.

Id.

[74] *MFO Assessment Form* (forms of 8/31/09 and 5/12/10).

[75] *MFO Assessment Form* (5/12/10).

[76] *MFO Assessment Form* (forms of 9/9/09, 9/3/09, and 8/31/09).

[77] Email from Nathaniel Sands, AAF&M, to Randy Bean, ANR (May 19, 2010).

[78] Letter from Carol S. Carpenter, ANR, to J. Denis Michaud, Clair-A-Den Farm (Apr. 15, 2010) ("I will telephone you next week to discuss a time and date when we might meet at the farm.").

fall/spring had passed) this follow-up remained undocumented. The third recommended follow-up visit continued to be undocumented as of June 1, 2010.

Following are specific examples from ANR's files.

Deferred to AAF&M

Railview Farm
An AAF&M and ANR site inspection on May 12, 2010 identified "high risk" for discharges in the facility's north end of the pasture where "a water course enters the pasture through a 30" culvert."[79] The inspection report continued to describe the water pathway: "After about 400' this water course enters a man-made pond. There is an outlet (30" culvert?) on the east side of pond and the water flows south through a channel along the east side of the pasture."[80] The north end of the pasture where the culvert exited was "heavily disturbed (trampled)," there was no vegetation, and the presence of a concrete "feed pad" caused cows to loiter in the area, "compound[ing] the problem."[81] The inspection report recommended the operation "take actions in this area such as fencing the animal away from the water course and providing a different water source or relocating the animals."[82] It also recommended "close coordination with AAF&M . . . since their MFO permit has jurisdiction to correct this problem" and the "problem area does not meet the definition of a production area."[83]

Follow-up Visits Recommended

Correia Limited Partnership
An AAF&M and ANR site inspection on September 9, 2009 found that this facility had catchbasins in its production area that collected runoff and conveyed it through a series of ditches and culverts to a ravine directed toward Wards Creek.[84] There was no water in the ravine during the inspection, but the inspection report noted a "high risk" that runoff from the production area would mix with the natural drainage and flow into Ward Creek during large stormevents.[85] The report urged the operation, "[d]ue to the very high potential for a discharge to occur during large stormevents," to construct a project that would redirect the runoff from the collection into a pit that could then be used as irrigation or nutrients per a nutrient management plan.[86] It also recommended a follow-up: "Due to high risk potential a follow-up visit should be done in the spring or late fall during a stormevent to determine if a discharge."[87]

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[79] *MFO Assessment Form* (form of 5/12/10) 2.
[80] *Id.*
[81] *Id.*
[82] *Id.* at 4.
[83] *Id.* "Production area" includes the "animal confinement area," which "includes but is not limited to open lots," "feedlots," and "cowyards." 40 C.F.R. § 122.23(b)(8). It is unclear why ANR considered the un-vegetated feed pad area where cows loitered not to be part of the production area.
[84] *MFO Assessment Form* 2 (form of 9/9/09).
[85] *Id.*
[86] *Id.* at 3.
[87] *Id.* at 4.

As of CLF's fie review on June 1, 2010, there was no indication that ANR had conducted a follow-up visit. Instead, eight months after the inspection, AAF&M sent ANR an update that Correia had installed the recommended project (in the fall).[88] ANR responded that "[w]hile this MFO did not have discharges from the production area and trigger our program, from my observations (and yours) additional conservation practices were warrented [sic] to better manage the runoff from the bunks."[89] As of CLF's file review on June 1, 2010, there was also no indication that ANR had independently verified completion of the project.

Clair-A-Den Farm

An AAF&M and ANR site inspection on September 3, 2009 found "very high potential" for a discharge at this facility, but no evidence of a discharge because it was "too heavily vegetated."[90] The pictures accompanying the report tell another story, with notations like: "silage leachate to Greensboro Brook," "SL #5 into brook," contaminated SW from storm manhole towards Greensboro Brook," and "flows down bank towards Lamoille R."

Nevertheless, the report identified multiple problem areas, with "[o]ne high risk area in the production area . . . across from Route 16 at the feed storage bunk where leachate could flow across the ground and into a culvert located a few feet from Greensboro Brook."[91] The report noted that, also, "manure from the small barn is being piled next to the barn (between the barn and Route 16) and adjacent to Greensboro Brook."[92] Further, the report identified "[a]nother high risk area . . . where manure from the 3 calf/young stock barns is pushed to an area about 50' from the Lamoille River."[93] Moreover, AAF&M and ANR found "[e]vidence indicat[ing] that the manure [wa]s not contained to this area and has flowed across vegetated terrain towards the river. Also, calf bedding including manure was piled at the bank of the Lamoille River."[94] Additionally, the inspection report noted that the waste handling and storage structures for all but the milking barn were not being properly maintained – instead, manure was "pushed from barns."[95] The report recommended that both AAF&M and the owner contact NRCS to commence work "soon" to address the problems.[96] It also recommended a follow-up inspection: "Will need to complete a follow-up inspection after heavy vegetation dies back; in late fall or spring. Depending on the results, the farm may be designated as a CAFO."[97]

More than seven months later, ANR wrote to the facility's owner notifying him that ANR would like to conduct a follow-up inspection and would telephone the next week to set a time.[98] As of CLF's file review on June 1, 2010, there was no record of a follow-up inspection.

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[88] Email from Nathaniel Sands, AAF&M, to Randy Bean, ANR (May 19, 2010).
[89] Email from Randy Bean, ANR, to Nathaniel Sands, AAF&M (May 19, 2010).
[90] *MFO Assessment Form* 2 (form of 9/3/09).
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at 4.
[97] *Id.*
[98] Letter from Carol S. Carpenter, ANR, to J. Denis Michaud (Apr. 15, 2010).

Old Ryan Farm

The August 31, 2009 AAF&M and ANR site inspection report for this facility stated that the facility had a stream flowing through its production area, creating a high risk that silage leachate could enter the stream (a tributary to the Fairfield River) until a treatment system was constructed.[99] The report gave several recommendations for improving the high risk area:

1. Collecting and separate silage leachate and directing this runoff to the abandon manure pit (high strength waste) or a vegetated filler strip (low strength waste).
2. Grading and concreting a portion of the barnyard to direct the runoff into the abandon manure pit.
3. Constructing treatment berms and strips to treated any discharge from the abandon manure pit.[100]

The report also recommended a follow-up inspection in November or "contact with AAF&M" to confirm the construction project's completion.[101] As of CLF's file review on June 1, 2010, there was no documentation of a follow-up visit or project completion.

No Further Action Recommended

Woodnotch Farm

An AAF&M and ANR inspection of this facility on May 12, 2010 revealed a high risk of discharges from the feed (silage) bunks where the "leachate discharges to the north via sheet flow into an adjacent field and is dispersed due to flat topography."[102] The report warned that "[t]he perimeter of the field between the bunks and the field cannot be ditched. If this area [were] ditched, the runoff would be collected and could be discharged to the drainage system for Route 22A."[103] The report recommended, "[t]o prevent a future discharge," not constructing a ditch to collect the leachate from the high risk areas and, "for housekeeping purposes," installing a pipe system for any overflow from the "low flow tank to the leachate pond."[104]

Despite the high risk area and recommendations, the report concluded that "no further action [wa]s needed" (on ANR's part) because the facility was "well managed "and located a significant distance from receiving waters."[105] Thus, as of CLF's file review on June 1, 2010, there was no indication that ANR had conducted any follow-up to ensure there were no discharges from the high risk area into the Route 22A drainage system, or that the report's recommendations had been followed.

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[99] *MFO Assessment Form* 2 (form of 8/31/09).
[100] *Id.* at 3 ([sic] throughout).
[101] *Id.* at 4.
[102] *MFO Assessment Form* 2 (form of 5/12/10).
[103] *Id.*
[104] *Id.* at 4.
[105] *Id.*

Duhamel Farm

An AAF&M and ANR inspection report of August 31, 2009 described as a "potential problem area" a collection pond for silage leachate and barnyard runoff.[106] The pond discharged through a series of pipes and ditches, eventually discharging into a heavily vegetated natural shallow ravine.[107] The report noted that if the ravine were "ditched or channelized by human activities, the flow could be collected and may be discharged" to a tributary of the Rock River.[108] The report had two recommendations to help manage the pond discharges, but no recommendations for further action on ANR's part to ensure the pond discharges were in fact well-managed.[109] As of CLF's file review on June 1, 2010 – more than nine months later – there was no indication that ANR had conducted any follow-up investigation to determine whether the collection pond discharges were reaching the Rock River tributary.

III. ANR has allowed the Waterbury wastewater treatment facility to discharge phosphorus at levels far exceeding its wasteload allocation under the Lake Champlain Total Maximum Daily Load (TMDL) for years, acting under the color of state law that conflicts with the Clean Water Act and through an unlawful permit authorizing unlimited phosphorus discharges indefinitely. ANR has also attempted to "modify" Waterbury's NPDES permit without public notice and comment as required by the Clean Water Act.

Over a period of five years, ANR has disregarded the Clean Water Act's requirements for phosphorus pollution control at the Waterbury sewage treatment plant. ANR's conduct and the state legislation supporting it fulfill multiple criteria for withdrawal:

1) By issuing a permit to Waterbury that conditions compliance with a water quality-based effluent limitation on adequate funding, thereby delaying compliance indefinitely, ANR has exhibited both a failure to have an "adequate regulatory program for developing water quality-based effluent limits in NPDES permits" (withdrawal criterion (5)), and a failure to issue permits that "conform to the requirements of [the state program requirements of the federal CWA regulations]" (withdrawal criterion (2)(ii)).[110]
2) By passing legislation that prohibits requiring municipal compliance with water quality standards or TMDL allocations unless the State provides funding to the municipalities, Vermont has taken action limiting its legal authority to achieve an adequate WQBEL program or to issue legally sound permits (withdrawal criterion 1(ii)).[111]
3) By attempting to modify Waterbury's NPDES permit without the proper procedures, including public notice and comment, ANR has again demonstrated a failure to issue

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[106] *MFO Assessment Form* 2 (form of 8/31/09).
[107] *Id.*
[108] *Id.*
[109] *Id.* at 4.
[110] *See* 40 C.F.R. § 123.63(a)(2)(ii) ("[r]epeated issuance of permits which do not conform to the requirements of this part") and 40 C.F.R. § 123.63(5) (failure to "develop an adequate regulatory program for developing water quality-based effluent limits in NPDES permits").
[111] 40 C.F.R. § 123.63(a)(1)(ii) ("Where the State's legal authority no longer meets the requirements of this part, including . . . [a]ction by a State legislature or court striking down or limiting State authorities.").

permits that conform to the requirements of the Clean Water Act (withdrawal criterion (2)(ii)).[112]

A. Waterbury's 2005 NPDES permit is unlawful under the Clean Water Act.

Waterbury's 2005 NPDES permit is unlawful because it conditions compliance with a water quality based-effluent limitation for phosphorus on adequate funding, thereby delaying compliance with the limitation indefinitely.

On August 13, 2004, ANR renewed Waterbury's wastewater treatment facility (WWTF) NPDES permit.[113] The permit became effective on January 1, 2005, to expire on December 31, 2009. (Waterbury has applied for permit renewal, but no draft permit has been issued.) The facility discharges into the phosphorus-impaired[114] Main Lake segment of Lake Champlain via the Winooski River. According to a recent technical report for the Lake Champlain Basin Program, the average annual phosphorus concentration in the Main Lake has exceeded the water quality criterion for all but two of the past nineteen years.[115] In addition, the Winooski itself recently showed an increase in phosphorus loading from 2000 levels based on United States Geological Survey research.[116] Phosphorus levels remain too high in most other parts of Lake Champlain as well, with several water segments chronically exceeding their established targets.[117]

Waterbury's previous NPDES permit had required "monitor only" for phosphorus - despite the fact that the Main Lake was already impaired for phosphorus according to the Vermont Department of Environmental Conservation's [DEC's] own research and the permit should therefore have contained a water quality-based effluent limitation as required under the Clean Water Act.[118]

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[112] 40 C.F.R. § 123.63(a)(2)(ii) ("[r]epeated issuance of permits which do not conform to the requirements of this part").

[113] Village of Waterbury Discharge Permit ("Current Waterbury Permit"), NPDES No. VT0100463 (signed Aug. 13, 2004).

[114] Vermont Department of Environmental Conservation (DEC), *State of Vermont Draft 2010 List of Priority Surface Waters – Part D, available at* http://www.anr.state.vt.us/dec/waterq/mapp/docs/mp_2010_priority_waters_lists.pdf; DEC, *State of Vermont 2008 List of Priority Surface Waters – Part D, available at* http://www.vtwaterquality.org/mapp/docs/mp_2008.State_Lists_Final.pdf; Vermont Agency of Natural Resources & New York Department of Environmental Conservation, *Lake Champlain Phosphorus TMDL ("TMDL")*, at 1-3 (Sept. 25, 2002).

[115] Smeltzer et al., *Lake Champlain Phosphorus Concentrations and Loading Rates, 1990-2008* 11 (Fall 2009), *available at* http://www.lcbp.org/techreportPDF/57_Phosphorus_Loading_1990-2008.pdf.

[116] Candace Page, *Study Shows Drop in Phosphorus Entering Lake Champlain,* Burlington Free Press (June 8, 2010).

[117] Lake Champlain Basin Program, *2008 State of the Lake and Ecosystem Indicators Report* 4, *available at* http://www.lcbp.org/PDFs/SOL2008-web.pdf. The report characterized the Main Lake as "at or near targets," but as mentioned above the actual data shows annual targets exceeded all but twice since 1990 with a trend that is neither improving nor deteriorating. *Id.*

[118] *See* Village of Waterbury, Discharge Permit, NPDES No. VT0100463 (signed Mar. 24, 2000); *TMDL, supra* note 114, at 3-8 (comparing 1990-91 .012 mg/l phosphorus concentration average in Main Lake with .010 mg/l water quality criterion based on Vermont's 1991 water quality standards); 33 U.S.C. § 1311(b)(1)(C) (requiring effluent limitations stringent enough to meet water quality standards); 40 C.F.R. § 122.44(d) (requiring permits to ensure compliance with water quality standards).

The 2005 permit established effluent limitations based on the Lake Champlain Total Maximum Daily Load (TMDL) as follows:

> Total Phosphorus Annual Limitation: 1241 lbs
> Total Phosphorus Monthly Average: 0.8 mg/l.[119]

The permit specified that actual compliance with these limitations was not necessary until December 31, 2007, and then only if adequate state funding was available - effectively voiding the limitations indefinitely:

> The above schedule is contingent upon the availability of state funds to provide 100% of the eligible costs for a phosphorus removal project sufficient to meet the permitted effluent limitations. In the event that adequate state funds are not available for the permittee to meet the schedule established above, then the Agency shall amend this condition and establish a revised schedule that reflects the availability of state funds to complete the phosphorus removal project.[120]

It is black-letter law under the Clean Water Act that permits must contain limits necessary to ensure compliance with water quality standards.[121] Nothing in the Act allows such limits to be contingent upon funding.[122] Even the provisions allowing for schedules of compliance presuppose a date upon which compliance will actually occur.[123] The permit written by ANR violates both of these fundamental principles.

In particular, the permit violates Vermont's own regulations regarding schedules of compliance. The regulations state that "[w]here a schedule of compliance is included as a condition in a permit, effluent limitations shall be included for the interim period as well as for the period

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[119] The TMDL set Waterbury's wasteload allocation for phosphorus at .563 metric tons/year, which converts to 1241 lbs/year according to the formula provided in the TMDL. *TMDL, supra* note 114, at 22-23. The TMDL also required Waterbury to establish a monthly average concentration limit of .8mg/l for phosphorus, a requirement from which Waterbury had previously been exempt under Vermont statute. *Id.* at 24.

[120] Current Waterbury Permit, *supra* note 113, at I.B (p. 4).

[121] 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. §§ 122.4(a), (d), 122.44(d). The limited flexibilities contemplated by the Act's regulatory scheme (e.g., federally approved variance or mixing zone provisions per 40 C.F.R. § 131.13), are not applicable here.

[122] "[T]he legal standard is that cost and technological considerations are not factors in setting water quality-based effluent limits. Rather, section 301(b)(1)(C) of the CWA requires unequivocal compliance with applicable water quality standards, and does not recognize an exception for cost or technological infeasibility." *In re City of Attleboro, MA Wastewater Treatment Plant,* 2009 WL 5326324, NPDES Appeal No. 08-08 (Envtl. App. Bd. Sept. 2009).

[123] 33 U.S.C. § 1362(17) (defining "schedule of compliance" as "a schedule of remedial measures including an enforceable sequence of actions or operations *leading to compliance* with an effluent limitation") (emphasis added); 40 C.F.R. § 122.47(a) ("The permit may, when appropriate, specify a schedule of compliance *leading to compliance.* . . . Any schedules of compliance under this section shall require compliance *as soon as possible*") (emphases added); *Catskill Mountains Chapter of Trout Unltd. v. City of New York,* 451 F.3d 77, 87 (2d Cir. 2006) (schedule of compliance "allow[s] the permittee to *achieve compliance* over time"); Vermont Water Pollution Control Permit Regulations, 13.4(c), (d) Terms and Conditions of Permits, *available at* http://www.anr.state.vt.us/dec/ww/Rules/WPC/1974WPCregs.pdf (detailing process Secretary must follow "in setting schedules in permit conditions *to achieve compliance* with applicable effluent standards and limitations, water quality standards, and other legally applicable requirements") (emphasis added).

following the final compliance date."[124] Waterbury's permit contained no interim effluent limitations. Instead, it directed Waterbury to submit a series of three progress reports to ANR on the status of plans to achieve compliance with the phosphorus limits. Waterbury failed to submit the first two altogether, but ANR took no action to enforce against these violations despite clear direction from its own regulations that "[i]f a permittee fails or refuses to comply with an interim or final requirement in a permit such noncompliance shall constitute a violation of the permit for which the Secretary may modify, suspend or revoke the permit or take direct enforcement action."[125]

In fact, ANR is now taking the position that it lacks clear authority under current state regulations to include schedules of compliance for WQBELs in NPDES permits at all, and is therefore seeking more lenient language in the next adoption of Vermont's water quality standards.[126] This position is obviously inconsistent with the issuance of a permit to Waterbury providing an indefinite amount of time to come into compliance with a WQBEL.

B. The 2008 1272 Order purportedly "modifying" Waterbury's NPDES permit and the underlying state statute supporting the Order's terms are unlawful under the Clean Water Act.

On August 29, 2007, the Town of Waterbury sent a letter to the DEC Commissioner requesting relief from its phosphorus effluent limitations: "**At this time I am formally asking for a complete waiver of, or an extension of time for the implementation of, the new phosphorus effluent limits for the village of Waterbury WWTF-NPDES # VT100463, Vermont Permit # 3-1160.**"[127] In January 2008, eleven days after Waterbury was to come into compliance with

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[124] Vermont Water Pollution Control Permit Regulations, 13.4(c) Terms and Conditions of Permits, *supra* note 123.
[125] *Id.*13.4(d)(5). ANR has also been negligent in enforcing against other violations of the permit. In a July 2007 compliance inspection report for the Waterbury facility, ANR gave Waterbury an "unacceptable" inspection rating based on the failure to submit the interim reports, repeated violations of E. coli and Total Suspended Solids effluent limitations (caused in part by pilot studies on in-lagoon phosphorus removal), incorrect analytical reporting, and facility/equipment malfunctions or vulnerabilities. ANR did not take enforcement action for any of these violations. Letter from Suzanne P. Pickett, ANR, to William Shepeluk, Waterbury (July 27, 2007).
[126] *See* Vermont Agency of Natural Resources, Department of Environmental Conservation, *Rationale for DEC Proposed Addition of Compliance Schedule Language to Vermont Water Quality Standards 12/15/09* 3 (referring to EPA Region 1 opinion that "[e]xisting compliance schedule language in DEC's NPDES regulations . . . is not explicit enough as to the use of compliance schedules in permits applying WQBELs") (submitted to Vermont Natural Resources Board).
[127] Letter from William A. Shepeluk, Waterbury Municipal Office, to Jeff Wennberg, DEC Commissioner (Aug. 29, 2007) (emphasis in original). This letter was one in a long series of contention between Waterbury and DEC regarding the choice of a phosphorus removal system (in-lagoon or filtration) and funding/grant-eligibility. DEC approved Waterbury's treatment preference (filtration) on April 27, 2009 (Letter from Justin Johnson, DEC, to William Shepeluk, Waterbury (Apr. 27, 2009)), but since that time the cost estimate of the filtration alternative increased and DEC staff raised the possibility of bringing in a value engineering/third-party neutral. *See, e.g.,* email from Tom Joslin, DEC, to Alec Tuscany, Waterbury Public Works (Dec. 19, 2005) ("only in-lagoon phosphorus removal will initially be treated as eligible for Vermont phosphorus grant funding at all affected lagoon plants, at least in the absence of plant expansion [necessitating more phosphorus treatment") (emphases in original); email from Brian Kooiker, DEC, to Tom Joslin, DEC (June 21, 2006) ("The only statutory basis for modifying [Waterbury's phosphorus schedule] is if the legislature has not appropriated funds for the project. Clearly that is not the case here as the legislature earmarked $500,000 specifically for the Waterbury phosphorus removal project. It is WWMD's position that $500,000 is sufficient to build a complying system at the Waterbury facility irrespective of whether the Town's consultant has proposed a project whose cost far exceeds $500,000. We therefore will not be

these limits, ANR issued a 1272 Order attempting to modify the 2005 permit by extending compliance until two years after "EPA approval of the final revised Lake Champlain TMDL."[128] The "final revised Lake Champlain TMDL" was a potentiality created by Vermont statute.

As ANR explained in the Order, a law recently passed by the Vermont legislature might have required ANR to reopen the TMDL in order to ensure that the future aggregate phosphorus loading from wastewater treatment facilities would not exceed their aggregate loading from 2006 (10 V.S.A. § 1385). According to ANR, such a revision of the TMDL would force Waterbury to reduce its phosphorus discharges more than required by the current TMDL (so, lower than the "limits" in the current permit). ANR estimated that the additional reductions would cost approximately 1.1 million dollars to Waterbury, which was "more than the funds currently provided pursuant to 10 V.S.A., Section 1625(e)."[129] 10 V.S.A. § 1625(e) requires ANR to award 100% state assistance grants for municipal projects necessary to reduce phosphorus to the levels required by 10 V.S.A. § 1266a (which is, to .8 mg/l or as needed to achieve compliance with the TMDL or with water quality standards). In 2004, ANR had received $500,000 from the legislature for phosphorus removal at the Waterbury WWTF.

ANR further explained that 10 V.S.A. § 1266a meant ANR could not require compliance with that section (.8 mg/l or as needed to achieve compliance with the TMDL or with water quality standards) except as funded by the state:

> "The secretary of natural resources shall establish a schedule for municipalities that requires compliance with this section at a rate that corresponds to the rate at which funds are provided under subsection 1625(e) of this title. To the extent that funds are not provided to municipalities under that subsection, municipal compliance with this section shall not be required."[130]

ANR concluded:

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modifying the existing permit schedule and should the Town fail to comply with the 12/31/07 compliance date we are fully prepared to enforce that date."); email from Tom Joslin, DEC, to DEC staff (Dec. 10, 2007) ("Another development that may finally move this project forward is the response of ANR and the legislature to Act 43. That final response will clarify whether the current phosphorus loading or a stricter loading will apply to Waterbury. If a stricter limit will apply, we will probably drop our objection to filtration. In fact, my cost estimate for our Act 43 response assumes filtration at Waterbury and most of the other municipal plants larger than 200,000 gpd permitted capacity."); email from Brian Kooiker, DEC, to Justin Johnson, DEC Commissioner (Dec. 14, 2007) ('It remains our position that 0.8mg/l phosphorus limit can be achieved through in-lagoon chemical precipitation (i.e., a low cost option.)"); email from Christine Thompson, DEC, to Laura Pelosi, DEC Commissioner (May 1, 2009) (after DEC approved the filtration option: "Waterbury can now begin final design of the project but, because only about half of the needed 1.8 million funding is available at this time, the **start** of construction is probably at least 2 years away) (emphasis in original); email from Tom Joslin, DEC, to various DEC staff (Nov. 16, 2009) ("I enthusiastically support . . . value engineering. . . . In my opinion, if we don't bring in a third party, this project will remain deadlocked.") (emphasis in original).

[128] ANR, 1272 Order No. 3-1160, *In the Matter of Village of Waterbury,* at 2 (Jan. 11, 2008).

[129] *Id.*

[130] *Id.* at 2 (quoting 10 V.S.A § 1266a).

> The Agency therefore finds that it is reasonable to provide Waterbury with additional time to comply with phosphorus standards prescribed in 10 V.S.A. Chapter 47 in the event that the TMDL is revised.[131]

ANR provided the following "additional time:"

> Notwithstanding [the phosphorus implementation schedule in the permit], but no later than twenty four months after EPA approval of the final revised Lake Champlain TMDL, Waterbury shall achieve compliance with the revised phosphorus allocation for the Waterbury WWTF as prescribed in the revised TMDL.[132]

Two handwritten notes on Waterbury's 2005 permit reference this newly delayed schedule. In part I.A of the permit ("Special Conditions/Effluent Limits"), next to the effluent limits for phosphorus, the note says: "1/11/08 1272 Order delays this." In Part I.B ("Special Conditions/Phosphorus Implementation Schedule"), another note repeats: "1/11/08 1272 Order delays this."

The Order also stated that, if the legislature were to amend or repeal 10 V.S.A. § 1385 (the provision calling for possible reopening of the TMDL), ANR could reopen the Order to reflect the amendments. 10 V.S.A. § 1385 has indeed been amended to require, instead of no increase from 2006 aggregate loading, that ANR reopen the TMDL as of July 2013 (assuming no further legislative changes) in order to amend load allocations to "reasonably assure" that water quality standards will be met.[133] As of our file review on June 1, 2010, ANR had not reopened the 2008 1272 Order.

ANR's actions here and the underlying state statute supporting them do not comply with the Clean Water Act. First, like the 2005 permit, the 1272 Order and 10 V.S.A. § 1266a condition compliance with water quality standards/WQBELs on adequate funding. For the reasons explained above, this is impermissible under the Clean Water Act.

Second, the 1272 Order is procedurally impermissibe as a "modification" to the underlying permit because ANR did not hold public notice and comment on the Order. Clean Water Act regulations mandate that any non-minor permit modification be subject to the same public notice and comment as draft permits.[134] The regulations define seven categories of modification that

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[131] *Id.*
[132] *Id.*
[133] 10 V.S.A. § 1385(a)(1)(C).
[134] 40 C.F.R. §§ 122.62 ("If a permit modification satisfies the criteria in § 122.63 for 'minor modifications' the permit may be modified without a draft permit or public review. Otherwise, a draft permit must be prepared and other procedures in Part 124 (or procedures of an approved State program) followed."), 122.63 ("Any permit modification not processed as a minor modification under this section must be made for cause and with Part 124 draft permit and public notice as required in § 122.62."). Part 124 sets forth various criteria for permit issuance, including draft permits, fact sheets, public notice and comment, and response to comments. 40 C.F.R. §§ 124.1-124.21. The corresponding state regulations are at Vermont Water Pollution Control Permit Regulations, 13. Permits, *available at* http://www.anr.state.vt.us/dec/ww/Rules/WPC/1974WPCregs.pdf.

qualify as "minor,"[135] and the 1272 Order - extending the requirement to comply with WQBELs indefinitely (until potentially more stringent limits are set in a potentially revised TMDL, and until adequate state funding exists) – fits none of them. The only category with any potential relevance is the one concerning compliance schedules, which provides that an "interim date" in a compliance schedule can be changed if it is not more than 120 days after the original interim date and it does not interfere with the final compliance date.[136] The compliance schedule that ANR proposed in the 1272 Order does not satisfy these qualifications. Instead, it extends a final compliance date indefinitely (from December 2007 to two years after any final revised TMDL is approved by EPA). The 1272 Order "modification" also violates ANR's own regulations, which provide that: "After notice and opportunity for a public hearing, any permit issued hereunder can be modified, suspended, or revoked in whole or in part during its term . . . ."[137]

C. Waterbury has actually been discharging phosphorus at levels far exceeding its TMDL wasteload allocation for more than seven years.

Adding environmental injury to regulatory insult, Waterbury's actual phosphorus discharges have far exceeded its wasteload allocation under the TMDL since the TMDL was adopted in 2002. Under the TMDL, Waterbury's phosphorus allocation is 0.8 mg/l (monthly average concentration) and 1241 lbs (annual limitation). As illustrated in the following tables, the allocation was exceeded for every single reporting parameter – both concentration and loading - for the past seven years, in most cases by at least 250 percent.[138]

TMDL Allocation: 0.8mg/l (monthly average concentration)
1241 lbs (annual limitation) (averages to 3.4 lbs/day)

* Refers to lbs monthly (daily) average.

2010

	Jan	Feb
mg/l	5.3	4.8
lbs*	10	11

2009

	Jan	Feb	March	April	May	June	July	Aug	Sept	Oct	Nov	Dec
mg/l	3.3	2.5	4.5	3.4	3.9	3.9	4.8	4.6	4.6	4.8	6.1	5.1
lbs*	2	5**	5***	11	9	8.4	11	11	8	9	12	12

** This was the average lbs reported on the DMR, but is probably inaccurate. The only daily lbs amount recorded was 4.5, which would average to 4.5, not 5.
*** This was the average lbs reported on the DMR, but is probably inaccurate. The two daily lbs amounts reported were 10 and 7.0, which would average to 8.5, not 5.

[135] 40 C.F.R. § 122.63.
[136] *Id.* § 122.63(c).
[137] Vermont Water Pollution Control Permit Regulations, 13.8 Modification, Revocation and Suspension of Permits, *supra* note 123.
[138] The information for these charts and calculations was taken from Waterbury's discharge monitoring reports.

2008

	Jan	Feb** (leap year)	March	April	May	June	July	Aug	Sept	Oct	Nov	Dec
mg/l	5	22	3.8	3	3.1	4	4	4.5	2.8	4.6	2.8	3.4
lbs*	14	47	10	9	10	8	9	16	7	11	7	7

** Facility noted that limits were unusually high and was retesting.

2007

	Jan	Feb	March	April	May	June	July	Aug	Sept	Oct	Nov	Dec
mg/l	1.2	.82	.9	3	3.5	4.2	5.3	6.2	5.7	5.4	6	5.4
lbs*	3	1.6	2	10	5	17	15	18	13	19	19	14

2006

	Jan	Feb	March	April	May***	June***	July	Aug**	Sept**	Oct	Nov	Dec
mg/l	4.1	4	4.6	4.4	44	16	5.5	4.7	4.5	5.4	4.8	3.7
lbs*	10	10	14	10	44	16	20	13	10	14	15	8

** Monthly average not reported. Taken from daily sample reported.
*** Parameters for these months appear inaccurate. May monthly averages based on samples reported would be 4.6 mg/l, 8.2 lbs. June monthly averages based on samples reported would be: 4.7 mg/l, 12.6 lbs. These numbers used in analysis below.

2005

	Jan	Feb**	March**	April**	May**	June**	July	Aug	Sept**	Oct	Nov	Dec**
mg/l	5.5	6.2	5.7	4	4.4	5.5	30	9	8.1	5.7	3.6	3.7
lbs*	12	11	11	9	9.4	12	***	25	17	10	10	8

** Monthly average not reported. Taken from daily sample reported.
*** Lbs not reported. Mg/l seems inaccurate. Assumed 10 for purposes of analysis below.

2004

	Jan	Feb (leap year)	March	April**	May	June**	July**	Aug	Sept	Oct**	Nov	Dec**
mg/l	3.8	4.4	5.1	4	4.9	5	5.3	5.9	6.3	5.9	5.7	5.9
lbs*	9.8**	9.1	10.2	10	9	19.3	12	20.5	11	11	13	11

** Monthly average not reported. Taken from daily sample reported.

2003

	Jan	Feb	March	April	May**	June	July	Aug	Sept	Oct	Nov	Dec
mg/l	5.2	5.4	5.9	4	4.1	4.3	5.6	6.8	6.2	6.1	5	4
lbs*	16	12	***	9.4	2.8	8	10	18	13	15	14	11

** Reporting seems inaccurate.
*** Lbs not reported. Assumed 10 for purposes of analysis below.

Based on these averages:

- In 2003, Waterbury discharged 4234.8 lbs of phosphorus, 241% more than its wasteload allocation.
- In 2004, Waterbury discharged 4451.4 lbs of phosphorus, 259% more than its wasteload allocation.
- In 2005, Waterbury discharged 4395.4 lbs of phosphorus, 254% more than its wasteload allocation.
- In 2006, Waterbury discharged 4411.2 lbs of phosphorus, 255% more than its wasteload allocation.
- In 2007, Waterbury discharged 4170.8 lbs of phosphorus, 236% more than its wasteload allocation.
- In 2008, Waterbury discharged 4680 lbs of phosphorus, 277% more than its wasteload allocation.
- In 2009, Waterbury discharged 3151 lbs of phosphorus, 154% more than its wasteload allocation.

IV. ANR continues to develop permits without adequate water quality-based effluent limitations (WQBELs) as required by the Clean Water Act.

As CLF explained in its November 20, 2008 filing with EPA Region 1, ANR has failed to write permits with adequate water quality-based effluent limits, thus satisfying two criteria for withdrawal: failure to have an "adequate regulatory program for developing water quality-based effluent limits in NPDES permits" (withdrawal criterion (5)), and repeated issuance of permits that "do not conform to the requirements of [the state program requirements of the federal CWA regulations]" (withdrawal criterion (2)(ii)).[139] In addition to the Waterbury situation described above, ANR's handling of two recent permits illustrates that it continues to satisfy these two withdrawal criteria, both for failure to develop adequate WQBELs and for failure to follow required procedures in issuing NPDES permits.

Clean Water Act regulations require permits to, among other things: 1) contain water quality-based effluent limits for pollutants that cause, have reasonable potential to cause, or contribute to water quality standards violations, and 2) ensure compliance with the water quality requirements of all affected states.[140] According to EPA's own analyses, the permits recently drafted by ANR for the Quechee and White River Junction wastewater treatment facilities do not meet these requirements.

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[139] *See* 40 C.F.R. § 123.63(a)(2)(ii) ("[r]epeated issuance of permits which do not conform to the requirements of this part"), and 40 C.F.R. § 123.63(5) (failure to "develop an adequate regulatory program for developing water quality-based effluent limits in NPDES permits").

[140] 40 C.F.R. §§ 122.4(d), 122.44(d).

For the Quechee WWTF, EPA plainly stated in a formal objection letter that ANR's draft permit modification violates the above-cited regulatory provisions:

> [W]e have determined that [the modification] does not satisfy federal requirements to ensure compliance with Connecticut's water quality standards. . . . Any increase in nitrogen loading from the facility would clearly result in an additional contribution to a water quality standards violation and would be inconsistent with 40 C.F.R. §§ 122.4(d) and 122.44(d). . . . Although the draft modification does not allow the flow to increase until an upgrade is completed, there is no requirement that the upgrade be operated in a manner that would prevent an associated increase in nitrogen loads, nor is there any other requirement that would ensure that increased nitrogen loads are not discharged. As currently written, the draft permit modification does not comply with 40 C.F.R. §§ 122.4(d) and 122.44(d). Consequently, EPA hereby objects to the permit issuance pursuant to 40 C.F.R. §§ 123.44(c)(1) and (8).[141]

As the letter states, the modification would authorize the Hartford-Quechee WWTF to increase discharges by greater than fifty percent in flow to the Ottauquechee River, which empties into the Long Island Sound, already impaired for nitrogen. The modification would not ensure no increase in nitrogen loading so as to comply with Connecticut's water quality standards (WQS). The letter outlines the provisions necessary to remedy the draft modification, including provisions for nitrogen treatment optimization and any others recommended by the Connecticut Department of Environmental Protection (DEP). It directs ANR to revise the draft modification consistent with its recommendations, and to re-submit to EPA as a "proposed" permit before final issuance. As of our file review on April 14, 2010, ANR had not submitted a revised proposed permit to EPA.

Previously, EPA had voiced almost identical concerns regarding ANR's draft permit for the Hartford-White River Junction WWTF. On October 22, 2009, EPA Region 1 emailed DEC explaining why the permit should take into account WQS for downstream states and advising ANR to include a nitrogen removal optimization provision in the permit.[142] EPA emphasized that its focus for nitrogen optimization was on "operational changes, not major capital investments."[143] On November 4, 2009, in response to some resistance from DEC,[144] EPA provided further comments again explaining the basis for downstream WQS requirements and advising Vermont to "ensure that it meets the requirements of Clean Water Act section 402(b)(5)

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[141] Letter from Stephen Perkins, EPA Region 1, to Justin Johnson, DEC Commissioner (Jan. 15, 2010) ("Jan. 15 Perkins Letter"). We have recently learned from Region 1 officials that the facility withdrew its request for a modification. However, this does not address the underlying problem regarding ANR's development of adequate WQBELs.

[142] Email from Ken Moraff, EPA Region 1, to Christine Thompson, DEC (Oct. 22, 2009).

[143] *Id.*

[144] An internal ANR email of October 23, 2009, indicated that the DEC Commissioner wished to reach a compromise and recommended that ANR staff review EPA's suggestions regarding nitrogen optimization to see if the suggestions could be adapted into an acceptable permit requirement. (Email from Christine Thompson to Brian Kooiker, Randy Bean, and Carol Carpenter (October 23, 2009).) However, a subsequent letter from the Commissioner to EPA abandoned this approach. (Letter from Justin Johnson to Ken Moraff, attached to November 4, 2009 email from Ken Moraff to Justin Johnson et al., *infra* note 145.)

re: recommendations of downstream states that may be affected by NPDES permit issuance."[145] Connecticut, as a downstream state, had submitted similar comments to ANR on November 3, 2009.[146]

Notwithstanding the EPA guidance and Connecticut's comments, ANR issued the permit without the requested conditions on November 9, 2009. Two weeks later, it responded to Connecticut's comments claiming that there was currently no legal basis for requiring Vermont to reduce nitrogen loadings, and proposing an interstate discussion to reach an agreement that would establish such legal basis.[147] It also denied Connecticut's request for additional nitrogen monitoring in the permit, stating that "the monitoring is intended solely to support Vermont DEC's efforts, and those of the Vermont Water Resources Panel, to establish numeric in-stream water quality criteria for total nitrogen."[148]

As EPA explained in a follow-up letter, the permit issuance was "procedurally and substantively flawed in several respects."[149] Procedurally, ANR had failed to submit a "proposed" permit to EPA before issuing the final permit, as required by federal regulations.[150] It had also failed to provide notice or explanation, either before permit issuance or in the Response to Comments accompanying permit issuance, of its decision and reasons for rejecting EPA's and Connecticut's comments.[151] Substantively, the issued permit failed to include provisions for nitrogen removal optimization and was therefore inconsistent with 40 C.F.R. § 122.44(d).[152]

EPA decided to treat the issued permit as a "proposed" permit unless ANR agreed to "proceed expeditiously" to modify it.[153] EPA delineated the time it would have to object to such proposed permit (90 days from the date EPA received the permit, which was November 16, 2009), and specifically referenced several grounds supporting an objection, described above. In closing, EPA said:

> We recognize that you are interested in meeting with Connecticut and New York to discuss the Long Island Sound nutrient issue, and we would be happy to assist in setting up and facilitating such a meeting. *Meanwhile, however, it is important the DEC's issuance of permits to facilities whose discharges may affect downstream waters occurs in a manner consistent with the procedural and*

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[145] Email from Ken Moraff, EPA Region 1, to Justin Johnson and Catherine Gjessing, DEC (Nov. 4, 2009). Section 402(b)(5) requires a permitting State to either include in a permit the recommendations of a State whose waters may be affected by the permit, or notify the affected State and EPA in writing if it decides not to include the recommendations, along with an explanation. 33 U.S.C. § 1342(b)(5).

[146] Letter from Paul E. Stacey, Connecticut Department of Environmental Protection (DEP), to DEC (Nov. 3, 2009).

[147] Letter from Justin Johnson, DEC Commissioner, to Paul E. Stacy, Connecticut DEP (Nov. 23, 2009).

[148] *Id.* at 2.

[149] Letter from Stephen Perkins, EPA Region 1, to Justin Johnson, DEC Commissioner (Dec. 18, 2009) ("Dec. 18 Perkins Letter").

[150] *Id.* at 1. 40 C.F.R. § 123.44(j) requires a State to submit a "proposed permit" to EPA even after it's submitted a "draft permit" if, among other things, there is "significant public comment" on the draft permit. In EPA's view, "the comments of an affected downstream state . . . constitute significant public comment." Jan. 15 Perkins Letter, *supra* note 141.

[151] Dec. 18 Perkins Letter, *supra* note 149, at 1.

[152] *Id.* at 2.

[153] *Id.*

substantive requirements of the Clean Water Act and its implementing regulations.

I hope to hear from you as soon as possible regarding your intentions for addressing the issues discussed above and to have the issues resolved within the 90 days we have for objecting to the permit.[154]

Nevertheless, ANR did not "proceed expeditiously" to modify the permit (there was no submission to EPA as of our file review on April 14, 2010), and EPA did not object to the permit (there was no objection within the 90-day period - which ended around or about February 16, 2010 - or as of our file review on April 14, 2010).

V. ANR continues to fail to adequately enforce the Clean Water Act.

CLF's August 14, 2008 petition laid out in extensive detail the numerous deficiencies of ANR's enforcement regime. Put broadly, the deficiencies showed that ANR consistently takes too few and too lenient enforcement actions, thus satisfying two criteria for withdrawal: failure to act on "violations of permits or other program requirements" (criterion 3(i)) and failure to "seek adequate enforcement penalties or to collect administrative fines when imposed" (criterion 3(ii)).[155]

The following snapshots, in conjunction with the CAFO and Waterbury scenarios described above, illustrate that ANR's enforcement program remains deficient.[156]

ANR's Supplemental Environmental Project (SEP) policy and practices remain inadequate.

- ANR's revised SEP policy, issued by DEC on June 14, 2010, still allows governmental entities (excluding federal) to pay 100% of their fines as SEPs, but also states that "[i]n federally delegated programs an SEP will not be accepted when it is contrary to the delegation or federal law."[157] Though the policy has a positive addition clarifying that SEP funds are not tax deductible, other changes create room for more leniency in SEPs – further reducing their deterrent value.

  For instance, where the previous policy required unexpended SEP funds to convert to civil penalties "immediately due and payable" upon noncompliance with the SEP, the

[154] *Id.* at 2-3 (emphasis added). We have recently learned from Region 1 officials that the State and Town requested a hearing the day before the 90-day objection period ended. This late request for a hearing does not correct the permit's WQBEL issues "as soon as possible" or resolve them within the 90-day period, as requested by EPA.

[155] *See* 40 C.F.R. § 123.63(a)(3)(i) ("[f]ailure to act on violations of permits or other program requirements") and 40 C.F.R. § 123.63(a)(3)(ii) ("[f]ailure to seek adequate enforcement penalties or to collect administrative fines when imposed"). "Enforce," "enforcement," and "enforcement actions" refer to ANR's formal enforcement mechanisms through which penalties and court-approved injunctive obligations may be imposed – Administrative Orders (AOs) and Assurances of Discontinuance (AODs). See Appendix A to CLF's original petition for an overview of ANR's enforcement mechanisms.

[156] In this section, "discharge violations" refers to violations of a NPDES permit or violations of 10 V.S.A. §§ 1259(a), 1263, or 1264 (excluding indirect discharges).

[157] DEC, *Supplemental Environmental Project (SEP) Policy* 3, 5 (June 14, 2010) (*"2010 SEP Policy"*).

new policy creates an exception when "an extension of time is granted by the assigned Compliance & Enforcement Division attorney."[158] The new policy also creates disincentives for pollution prevention and reduction SEPs by stating that they "are only approved in very rare circumstances."[159] Further, it eliminates the provision describing the penalty offset ratio for non-pollution prevention and reduction SEPs (previously 1.2:1), leaving open the possibility that such SEPs can receive a dollar-for-dollar penalty offset ratio.[160]

- In practice, ANR adheres to its policy by allowing municipalities to pay 100% of their fines as SEPs. In each of the five municipal Assurances of Discontinuance (AODs) for discharge violations for 2008-2009, the entire fine was expressed as a SEP with no civil penalty.[161]

  In addition, ANR still does not convert late SEP payments to civil penalties on a regular basis, despite language in each AOD stating that any amount unexpended by the Respondent as of the deadline "shall be converted to a civil penalty and shall be immediately due and payable to the State of Vermont."[162] At least 3 of the 11 2008-2009 SEP agreements for discharge violations were not funded by the deadlines in their AODs, and did not convert.[163] It also appears that ANR has difficulty tracking SEP payments and does not make timeliness a priority, which undermines both the importance of the SEPs themselves and the little deterrent effect they might have.[164] However, ANR did

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[158] *Id.* at 5; ANR, *Supplemental Environmental Project (SEP) Policy* 5 (Sept. 1, 2006) (*"2006 SEP Policy"*). The new policy also gives oversight over SEP approval to Compliance & Enforcement Division attorneys, with the Director of the Compliance & Enforcement Division having final say when there is disagreement. *2010 SEP Policy* at 4-5. The previous policy required approval of the DEC Commissioner for SEPs over $10,000. *2006 SEP Policy* at 5.

[159] *2010 SEP Policy, supra* note 157, at 2.

[160] *Id.* at 5; *2006 SEP Policy, supra* note 158, at 5.

[161] *Agency of Natural Resources v. South Burlington School District* AOD (Vt. Env. Ct. Feb. 12, 2008); *Agency of Natural Resources v. Town of Springfield* AOD (Vt. Env. Ct. Dec. 8, 2008); *Agency of Natural Resources v. Town of Proctor* AOD (Vt. Env. Ct. Apr. 29, 2009); *Agency of Natural Resources v. Town of St. Albans* AOD (Vt. Env. Ct. Nov. 18, 2009); *Agency of Natural Resources v. Village of Alburg* AOD (Vt. Env. Ct. Dec. 4, 2009). The Alburg and Proctor SEPs later converted to civil penalties because ANR and the violators could not agree on projects. Conversation between Laura Murphy, ENRLC, and Gary Kessler, ANR (June 14, 2010) ("June 14 Kessler conversation") (to the best of Gary Kessler's knowledge).

[162] AODs with late SEP payments: *Agency of Natural Resources v. Boccarossa* AOD 3 (Vt. Env. Ct. Nov. 2, 2009); *Agency of Natural Resources v. Lemington Timber Co. LLC* AOD 2 (Vt. Env. Ct. Apr. 10, 2009); *Agency of Natural Resources v. Riendeau* AOD 3 (Vt. Env. Ct. Mar. 25, 2008); ANR, "Document regarding Calculation and Collections of Certain Penalties and SEPs" ("Payment Chart") (May 7, 2010) (provided in response to ENRLC public records request of Apr. 15, 2010); June 14 Kessler conversation, *supra* note 161. Late payments did not convert to penalties (as of 6/3/10 and 6/14/10 inquiries): Email from Gary Kessler, ANR, to Laura Murphy, ENRLC ("June 3 Kessler email") (June 3, 2010); June 14 Kessler conversation, *supra* note 161. Note that, though not timely, Riendeau has been making steady payments on his SEP. *Id.*

[163] *Id.* (all sources). A third did not have payment due as of the date we received public records from ANR (May 7, 2010). *Agency of Natural Resources v. Babcock* AOD (Vt. Env. Ct. Nov. 18, 2009). Another was technically due and late, but the terms of the AOD were confusing with the potential to be reopened. *Agency of Natural Resources v. Piggy and the Three J, LLC* AOD (Vt. Env. Ct. June 17, 2008); June 3 Kessler email, *supra* note 162.

[164] For instance, the chart that ANR provided in response to our request for the dates SEP payments were made noted that a South Burlington School District SEP had been paid on October 23, 2008 – which would have been late. Payment Chart, *supra* note 162. A subsequent conversation revealed that October 23 was the date ANR confirmed

take a step in the right direction when it converted one SEP to a penalty after agreement on a SEP project could not be reached and the SEP payment was consequently late.[165]

As detailed in CLF's original petition, the failure to timely collect on overdue SEPs undermines the deterrent effect associated with those SEPs. Furthermore, the failure to regularly convert late SEP payments to civil penalties (which are payable to the state treasury) deprives the State of sorely needed revenue to shore up critical state services, including staffing for environmental protection at ANR.

ANR continues to take too few enforcement actions.

- According to documents produced for CLF, ANR issued 54 NOAVs for discharge violations in 2008 and 2009.[166] Only one was followed by formal enforcement.[167]

- Only 2 of the 60 facilities identified in ANR's internal significant noncompliance (SNC) reports and draft reports for SNC violations from October 2007 to March 2009, 12 of which were repeat offenders, were subject to formal enforcement action for those violations.[168]

ANR continues to choose lenient options when it does enforce.

- Of the 27 enforcement actions for discharge violations in 2008 and 2009, 22 were Assurances of Discontinuance (including 3 conversions from Administrative Orders). Only 8 were Administrative Orders (AOs), and at least 3 of those later converted to AODs with accompanying penalty reductions: $15,000 to $10,000; $7,725 to $2,500; and

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payment, not necessarily the date the SEP was paid. Conversation between Gary Kessler, ANR, and Laura Murphy, ENRLC (May 25, 2010). In a follow-up email, Gary Kessler explained that he called and found out the actual receipt date was April 15, 2008 (which was early). June 3 Kessler email, *supra* note 162.

[165] Email from Gary Kessler, ANR, to Laura Murphy, ENRLC (June 24, 2010) (re: SEP in Springfield AOD of Dec. 8, 2008).

[166] The DEC stormwater program accounts for almost half of these NOAVs, issuing 25 in 2008-2009. The Enforcement Division issued 6 additional NOAVs for stormwater violations.

[167] ANR, Notice of Alleged Violation (Marcellino) (Jan. 14, 2008); *Agency of Natural Resources v. Marcelino & Company, Inc.* AOD (Vt. Env. Ct. Apr. 27, 2010). Data as of our record review on June 28, 2010. Recall that ANR does not issue an NOAV for each enforcement action, so there are instances where an AO or AOD issues without a preceding NOAV. Aug. 14, 2008 CLF Petition, at 12 n.72.

[168] DEC, *Significant Non-Compliance Report* (10/1/07 – 3/30/08); DEC, *Significant Non-Compliance Report Draft* (4/1/08 – 9/30/08); DEC, *Significant Noncompliance Review Summary* (10/1/2008 – 3/31/2009); DEC, *Significant Noncompliance Review Summary Draft* (3/31/2009 – 9/30/2009). The reports for the periods April 2008 - September 2008 and April 2009 - September 2009 were preliminary draft documents; final reports were not written for those periods. Letter from Virginia D. Little, DEC, to Laura Murphy, ENRLC (June 8, 2010). We did not count violations where the report listed a violation but noted "no violation." Enforcement action data is accurate as of our file review on June 28, 2010. Alburg and Springfield were the two facilities subject to enforcement for the SNC violations listed in the reports. *Agency of Natural Resources v. Village of Alburg* AOD (Vt. Env. Ct. Dec. 4, 2009); *Agency of Natural Resources v. Town of Springfield* AOD (Vt. Env. Ct. Dec. 8, 2008). Three facilities on the SNC reports received AODs for violations different from those listed on the SNC reports (Montpelier, Proctor, and St. Albans).

$20,500 to $8,000 ($2,000 as penalty, $6,000 as SEP).[169] As explained in CLF's August 2008 petition, AODs are the more lenient enforcement option, often resulting in significant penalty discounts as documented here.[170]

- The average fine per enforcement action for discharge violations in 2008 and 2009 was $5,830.[171] In contrast, the Clean Water Act authorizes a $37,500 penalty for each violation, and Vermont's statute was recently amended to authorize a $42,500 penalty for each separate violation.[172]

[169] *Agency of Natural Resources v. Pikor* AOD (Vt. Env. Ct. Feb. 4, 2009) (dismissing AO of Mar. 20, 2008); *Agency of Natural Resources v. Welch* AOD (Vt. Env. Ct. Aug. 6, 2008) (vacating AO of Apr. 9, 2008); *Agency of Natural Resources v. Riendeau* AOD (Vt. Env. Ct. Mar. 25, 2008) (dismissing AO of Jan. 17, 2008). Two other AO respondents had subsequent AODs, but the AODs did not explicitly vacate the previous AOs. (Codling AO of May 28, 2008 and AOD of Nov. 7, 2008; Pion AO of Apr. 1, 2008 and AOD of Oct. 2, 2008).

[170] Aug. 14, 2008 CLF Petition, at 12-14.

[171] ENRLC, *2010-07-12 Average Fine Calculation*. Where an AOD had both a penalty and a SEP, the total fine amount used for this calculation includes both the penalty amount and the SEP amount, counted as one fine.

[172] 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4; An Act Relating to Enforcement of Environmental Laws, Vermont H.685 § 5 (2007-08), codified at 10 V.S.A. 8010(c)(1). Unlike the CWA, which authorizes the same $37,500 penalty for continuing violations, Vermont authorizes only a $17,000 penalty for each day of continuing violation. 10 V.S.A. 8010(c)(1).

Request

For the foregoing reasons, CLF again requests that EPA commence proceedings under 33 U.S.C. § 1342(c)(3) and 40 C.F.R. § 123.64(b) to withdraw the NPDES program delegation from the State of Vermont. There is ample record evidence that Vermont satisfies multiple criteria for withdrawal. Further informal investigation is unnecessary, and EPA should issue an order for a hearing to commence withdrawal proceedings as soon as possible.

Sincerely,

David Mears, Director

Laura Murphy, Staff Attorney
Environmental & Natural Resources Law Clinic at Vermont Law School
For Conservation Law Foundation

/s/ Anthony Iarrapino
Anthony Iarrapino, Staff Attorney
Conservation Law Foundation

Student Clinicians

Siobhan McIntyre
Shahin Milani
Leslie Welts

Cc: Joel Blumstein, Regulatory Legal Office, EPA Region 1
Ann Williams, Office of Regional Counsel, EPA Region 1
Jonathan L. Wood, Secretary, Vermont ANR
Meghan Purvee, General Counsel, Vermont ANR
Justin G. Johnson, Commissioner, Vermont DEC
Catherine Gjessing, General Counsel, Vermont DEC
Gary Kessler, Director, Compliance & Enforcement Division, Vermont ANR