



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
FIVE POST OFFICE SQUARE – SUITE 100
BOSTON, MASSACHUSETTS 02109-3912**

December 15, 2011

Deborah Markowitz, Secretary
Vermont Agency of Natural Resources
103 South Main Street, Center Building
Waterbury, VT 05671-0301

Re: Petition to Withdraw Vermont's NPDES Program

Dear Secretary Markowitz:

This letter is in response to your request for an update on the status of EPA's review of the issues raised in the petition filed by the Vermont Law School ("VLS") and the Conservation Law Foundation ("CLF") on August 14, 2008 and supplemented on October 21, 2008 and July 21, 2010 (together referred hereinafter as the "petition"). The petitions asked EPA to withdraw approval for the State of Vermont to administer the National Pollutant Discharge Elimination System ("NPDES") program, based on a number of allegations related to the implementation and enforcement of the program. The Region has been engaged in an informal investigation of the various issues raised by the petition and has had numerous productive discussions with Vermont's Department of Environmental Conservation ("DEC"), VLS, and CLF to better understand the issues and to explore potential corrective actions as necessary. We have made substantial progress toward that end, and I greatly appreciate the significant investment of time by DEC managers and staff, as well as staff from EPA, VLS and CLF.

One critical issue has thus far eluded resolution. As DEC has acknowledged, Vermont's existing laws do not provide for sufficient public participation in administrative and judicial enforcement as required by 40 C.F.R. § 123.27(d). I am writing to reiterate the importance of resolving this issue in a way that addresses the current problem with Vermont law. Pursuant to § 402(c)(2) of the Clean Water Act, authorized states have a continuing obligation to ensure that their NPDES programs are consistent with the federal NPDES program requirements. Section 123.27(d), which was promulgated after EPA authorized Vermont's program, is one of these federal requirements. EPA's state NPDES program regulations explicitly identify the failure to comply with public participation requirements as a basis for program withdrawal. See 40 C.F.R. § 123.63(a)(2)(iii).

As we explained in a January 8, 2010 letter to then-Commissioner Johnson, if EPA were to commence withdrawal proceedings, it would issue an order specifying a time and place for a hearing and the allegations to be considered at the hearing. The State would have thirty days to respond in writing to the allegations. The hearing occurs after the answer is filed, and it is a

formal proceeding subject to specific provisions of the consolidated rules of practice (40 C.F.R. Part 22). If, following the hearing and receipt of a recommended decision by the Presiding Officer, the Administrator determines that there are deficiencies in the State's administration of the program, she would identify the deficiencies and provide up to ninety days for the State to take corrective action. If the State failed to do so, the Administrator would then issue an order withdrawing the program.

As we also explained in the above-referenced letter, there would be significant consequences for dischargers in Vermont, from both the permitting and enforcement perspectives, if Vermont were to lose the ability to implement the NPDES program. Foremost, EPA, rather than DEC, would control the development and issuance of permits, including permits for municipal wastewater treatment plants, combined sewer overflows, industrial discharges, and storm water discharges.¹ EPA would also be responsible for implementing the permit program for CAFOs. Please note that EPA already has a significant workload and backlog related to NPDES permit issuance for dischargers in Massachusetts and New Hampshire. If EPA were to assume responsibility for the Vermont program, that workload would increase and could result in delays in permit issuance for dischargers in Vermont. Delays in permitting could impact the timing of permits to new dischargers wishing to locate in Vermont, and for existing dischargers that wish to expand.

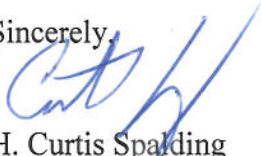
Another consequence is that DEC would no longer have the lead for Clean Water Act enforcement and compliance. Instead, the Region would substantially increase its inspection and enforcement presence in the State. EPA's enforcement approach often differs from that of DEC, with EPA relying more on formal administrative penalty and civil judicial actions. CAFOs subject to an EPA enforcement action would need to work directly with EPA to resolve such cases rather than with DEC and the Agency of Agriculture, Food, and Markets. Vermont permittees would need to adjust their expectations in response to the increased EPA presence, especially regarding the imposition of penalties and the extent to which penalties could be adjusted in light of the fairly restrictive provisions in EPA's supplemental environmental projects (SEP) policy.

Furthermore, a withdrawal of program approval would be difficult to reverse in a short time frame, even if the consequences of such a return are not to the State's liking. If the State were to seek return of the program, EPA would need to follow the complete authorization process, including, but not limited to, a full analysis of Vermont's statutory authorities and its regulations, consultation with other federal resource agencies, and public notice and comment. The full process could take well in excess of a year to accomplish.

¹ Of course, even if EPA were to assume administration of the permit program, DEC would still need to fund a certain number of permit staff to review the permits drafted by EPA, and prepare and issue Clean Water Act Section 401 water quality certifications. These are functions that all states perform under the Clean Water Act to ensure that permits are sufficiently stringent to comply with state water quality standards. In addition, EPA's issuance of NPDES permits would not obviate the need for DEC to continue to issue permits under state law, to the extent that state law requires separate permitting for certain categories of discharges (such as storm water).

Because of the importance of resolving the public participation issue as a part of the overall resolution of the pending petition to withdraw the program, the Region plans to include, in Vermont's 2012 performance partnership grant ("PPG") work plan, a specific commitment by the State to resolve the issue no later than July 1, 2012. Further, we plan to condition the grant on the fulfillment of that condition. I am requesting that by January 31, 2012, you submit a plan and schedule for resolving the public participation issue. My staff and I remain available to assist you in that effort. Please call me at (617) 918-1000, or Stephen Perkins at (617) 918-1500, if you would like to discuss this matter, and thank you for your attention.

Sincerely,



H. Curtis Spalding
Regional Administrator

cc: David Mears, DEC
Laura Murphy, VLS
Chris Kilian, CLF