

Failing our Waters, Failing our Farms:
*Vermont Regulators Turn A Blind Eye to Threat of
Illegal Pollution from Concentrated Animal
Feeding Operations*

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ABOUT US

The Conservation Law Foundation's Vermont Advocacy Center works to solve the environmental problems that threaten the people, natural resources and communities of Vermont. CLF's advocates use law, economics and science to design and implement strategies that conserve natural resources, protect public health, and promote vital communities in our region.

Founded in 1966, CLF is a nonprofit, member-supported organization. It has offices in Boston, Massachusetts; Concord, New Hampshire; Providence, Rhode Island; Montpelier, Vermont; and Brunswick, Maine.

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Unless otherwise noted or available online in an electronic database, the source documents for this report are on file with the Environmental and Natural Resources Law Clinic at Vermont Law School. Most of them were obtained through extensive public records requests at Vermont's Agency of Natural Resources and Agency of Agriculture, Food and Markets. The documents can be produced upon request.

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INTRODUCTION

Vermont's environmental officials have failed to protect the state's waterways and water users from the pollution that often results from large-scale agricultural activities. The regulatory failures highlighted in this report have left farmers vulnerable as well, creating confusion and uncertainty. Large-scale farmers who want to comply with the laws are left in the dark about their legal obligations and potential liability. Furthermore, the failure to regulate discharges from industrial farms sends the wrong message to those farmers who have worked hard to eliminate their discharges and run clean operations

Like most Vermonters, the Conservation Law Foundation (CLF) values both clean water and Vermont's agricultural economy and heritage. CLF believes that Vermont can clean up and protect its lakes, rivers, and streams while also strengthening and maintaining a sustainable agricultural economy. Throughout its history, CLF has worked to accomplish both goals.

Despite strong evidence to the contrary, the myth persists that large farms in Vermont do not discharge pollutants into our waterways. The public records of Vermont state agencies reviewed and discussed as part of this report paint a very different picture. With hundreds and in some cases more than a thousand animals confined on many farms, the risk to our waters of unregulated and illegal dischargers is serious. Vermont's Agency of Natural Resources (ANR) has identified agricultural operations as contributing to the pollution in Lake Champlain and many smaller rivers and streams. This present and worsening pollution problem underscores the risk of ignoring and failing to adequately regulate pollution from larger-scale farms, also known as Concentrated Animal Feeding Operations (CAFOs).

The large-scale operations¹ that are subject to the CAFO regulations discussed in this report represent only a fraction of the total number of animal farms in the state.² Other clean water advocates have recently called for better state enforcement of Vermont's Accepted Agricultural Practices (AAPs), nonpoint source pollution controls applicable to farms of all sizes across Vermont.³ CLF joins with those groups in calling for both better enforcement and better technical and financial assistance to farmers working to comply with AAPs. At the same time, however, implementing and enforcing existing federal laws that regulate discharges from larger-

¹ Please see Appendix A for a discussion of the types of agricultural operations subject to federal CAFO regulations, and in particular the number of animals in confinement at a given animal feeding operation that can trigger federal jurisdiction.

² As of October 2005, there were 1,259 dairy farms in Vermont, down from 2,047 in 1995. UVM Extension, *Report of the Dairy Task Force* 6 (Oct. 2005). There are 16 large CAFOs in Vermont, most of which are dairies. See footnote 105, *infra*. As of December 2007, there were approximately 150 medium farm operations in Vermont that qualify as CAFOs if they discharge – and some of them have. See *id*; page 11, *infra*.

³ The Northern Waters Partners, consisting of seven different water quality advocacy groups in Northern Lake Champlain, included the following plank on their "2008 Action Proposals for Northern Lake Champlain":

* **Enforce the Accepted Agricultural Practices (AAPs).** The current regulations have been in effect since April 2006 as a primary means of addressing water quality concerns related to agriculture, and these Practices are required by law to be in use on all dairy and non-dairy farms. To improve water quality it is time that these rules are followed and their use should be enforced. Provide the necessary technical, educational, financial and regulatory supports for the full implementation of these Practices on all farms.

scale agricultural operations is a key piece of the clean water puzzle that Vermont is struggling to assemble.

Vermont can have clean water and a healthy agricultural economy. Both are threatened, however, if the state turns a blind eye to illegal discharges of manure and other waste products from CAFOs into our waterways. Instead, Vermont should institute economic reforms designed to preserve the integrity and economic viability of Vermont farms. Vermont must resist economic models that push farmers to ratchet up the size of their operations while taking on evermore debt. CLF has made several such proposals, including those in its 2002 white paper on “Policies to Support Vermont Agriculture.”⁴ CLF continues to support economic reforms aimed at helping Vermont family farms survive and thrive. But this debate must proceed from a recognition by state policymakers that failure to implement and enforce federal and state Clean Water laws is not and will not help clean up our waters or sustain our agricultural and overall economy.

Although the report has several subsections, the following is a summary of the central findings:

There are documented discharges from Vermont CAFOs and problem areas in many more, creating a serious threat to Vermont’s waters: An extensive review of agency records at ANR and the Agency of Agriculture, Food and Markets (AAF&M) revealed that several medium and large animal feeding operations qualifying as CAFOs for purposes of the Clean Water Act’s (CWA’s) permitting program have discharged agricultural waste into surface waters. In addition, several other sites are considered “problem areas” with a potential to discharge wastes. ANR’s unwillingness to create a comprehensive Clean Water Act regulatory program for CAFOs violates federal law and jeopardizes the quality of Vermont’s streams, rivers, and lakes.

AAF&Ms regulation of farming operations in Vermont is neither an adequate nor a legal substitute for required CWA protections: The regulatory programs of the Agency of Agriculture, Food and Markets, which currently govern agricultural water pollution in Vermont, are inconsistent with federal permitting standards under the Clean Water Act. Further, AAF&M is not the appropriate authority to regulate Vermont’s known CAFOs. Instead, under federal law that Vermont has voluntarily chosen to administer, the Agency of Natural Resources remains the only state agency delegated the authority to implement the required permitting program (called the National Pollutant Discharge Elimination System, or “NPDES,” program).

⁴ Sandy Levine, Conservation Law Foundation, *Policies to Support Vermont Agriculture* (Mar. 2002), available at http://www.clf.org/uploadedFiles/CLF/Programs/Smart_Growth/Farmland_Protection/Vermont_Family_Farms/VT_farmland_paper.pdf.

KEY RECOMMENDATIONS

To ensure a strong future for both Vermont's waterways and local agricultural economy, CLF makes the following recommendations:

- **Ensure Adequate CAFO-specific Training for ANR Employees**
While the effect of pollution from Concentrated Animal Feeding Operations on our waterways is similar to other regulated pollution, its causes and its cures are often very different. ANR employees tasked with crafting and enforcing CAFO regulations and permits consistent with the Clean Water Act should receive extensive training on farm pollution control measures as well as a general overview on CAFO operations. UVM Agricultural Extension Service, The Environmental Protection Agency (EPA), and other agencies and NGOs could likely provide such training at a low cost to the state.
- **Free the Agency of Agriculture to Focus Solely on Helping Farmers Comply with Clean Water Laws by Transferring All Water Pollution Permitting and Enforcement to ANR**
AAF&M has been dealt a difficult hand by existing state policies. It is supposed to simultaneously advocate for Vermont agriculture and farmers, while also policing those same farmers whose operations run afoul of clean water and other laws. There is undeniable tension between the role of booster and regulator; too often this tension results in weak enforcement of clean water laws. To clarify AAF&M's mission and remove this inherent conflict of interest, permitting and enforcement of all agricultural water pollution programs under state and federal law should be transferred to ANR. AAF&M could then focus solely on its mission of supporting and promoting Vermont Agriculture. Moreover, implementation of the federal CAFO program must, by law, be completed by ANR under its delegation agreement with EPA. Thus, consolidating all water pollution permitting and enforcement in one agency will enhance efficiency and accountability for both the regulators and members of the regulated community.
- **Create a Stakeholder Advisory Committee to Ensure that Vermont's CAFO Program is Effective and Innovative**
Vermont state government should create a blue-ribbon panel of stakeholders and experts to ensure that Vermont's CAFO program is a national model. This panel should consist of farmers, scientists, extension agents, clean water advocates, and state and federal regulators.

In creating this panel, it is imperative to recognize and respect that Vermont agriculture is not monolithic and that there are farms of varying sizes and farmers of varying types who all have an interest in clean water and expertise about how to farm successfully without polluting our waters. Therefore, the panel should include smaller scale meat and dairy producers in addition to representative farmers who operate CAFOs.

The panel's initial mission would be to advise ANR in the expeditious crafting of CAFO rules that were required—by state law—to be adopted by ANR “on or before July 1, 2007.” 10 V.S.A. § 1263(g). The panel could be maintained over the longer term to

evaluate implementation and to propose changes in the rules and permitting programs as lessons are gleaned from implementation of these rules over time.

- **Boost State Funding to Assist Farmers With Pollution Prevention Measures**

Vermont's Congressional delegation has delivered millions of dollars in aid to Vermont farmers for clean water programs, most notably in the form of Natural Resources Conservation Service technical assistance grants. Yet the state had allowed a backlog of projects eligible for this aid to accumulate due to a lack of qualified engineers and funding. During the last legislative session, legislators took the lead in pressuring the Douglas Administration to step up Vermont's financial assistance to farmers by providing much needed state funds to leverage more of this federal money.⁵ This strengthened commitment came in the form of roughly \$1.1 million in reprogrammed agency spending over the next few years. Yet given the value of waters such as Lake Champlain to the state's overall economy, it seems clear that the state must provide more help to farmers instead of relying solely on federal taxpayers for cleanup.

As a source to supplement generous federal assistance, state funding can and should be targeted in a manner that avoids many of the high administration costs associated with federal programs, ensuring that more taxpayer dollars go directly to cleanup and prevention. In particular, UVM Extension has a solid reputation among Vermont agricultural producers and a track record of delivering cost-effective results. Funding could be targeted to UVM Extension specifically to assist farmers in complying with federal law. Unlike state and federal regulators through whom compliance assistance funding might be channeled, Extension has no enforcement obligations. This distinct role may aid Extension in gaining trust of farmers who may be hostile to seeking help from regulators.

⁵ John Dillon, *Towns Say Lake Cleanup Too Costly*, VPR News Feb. 20, 2008.

(Dillon) There's another wrinkle to the lake clean-up issue. Some farmers and lawmakers have complained that the state hasn't helped pay to design manure management systems that would cut pollution from flowing into the lake.

There's \$14 million in federal money available, but there's also a backlog in getting the projects designed and built.

Last week, the administration announced that it would spend \$700,000 over three years to alleviate the backlog.

Essex-Orleans Senator Vince Illuzzi says the money appeared after his Economic Development Committee began looking at the issue.

(Illuzzi) ``The Administration had set aside no money for this purpose until a press release was issued the same day we had a hearing to find out why this was being neglected, why this issue was not a priority."`

ANR'S CONTINUING REFUSAL TO REGULATE CAFOs IGNORES THE REALITY THAT THERE ARE CAFOs IN VERMONT QUALIFYING FOR NPDES COVERAGE, AND FAILS TO ACCOMPLISH THE ASSOCIATED WATER QUALITY IMPROVEMENTS THAT REGULATION COULD AFFORD.

ANR has been resistant to establishing its own program to implement Clean Water Act CAFO regulations.⁶ It has stated in various venues that it intends to wait until any and all litigation surrounding the final revised CAFO rule has been resolved before developing CAFO rules in Vermont.⁷ EPA has deemed this position “unacceptable,” and has insisted more than once that ANR implement a CAFO permitting program as soon as the revised rule is final, regardless of any outstanding legal challenges.⁸ In fact, it was EPA’s understanding under the 2004-2006 Performance Partnership Agreement grant program that ANR would issue a general permit for CAFOs by mid-2007.⁹ This should have been a manageable task, as evidenced by Vermont’s neighbor and fellow steward of Lake Champlain, New York, which has had a CAFO General Permit since 2004.¹⁰ Other states have likewise been “actively implementing their existing regulations and continu[ing] to issue permits, and some have already revised their programs to reflect the *Waterkeeper* decision since it was issued in 2005.”¹¹

⁶ Letter from Jeffrey Wennberg, Commissioner, Dept. Environmental Conservation (DEC), to Robert Varney, Regional Administrator, EPA Region 1 (Jan. 12, 2007) (“Wennberg Letter”).

⁷ *Id.* at 2 (“ANR proposes that CAFO Rules should not be adopted by ANR until EPA’s revisions to its CAFO Rules are final and any legal challenges thereto have been resolved.”). See also *Implementation by the Agency of Natural Resources of a National Pollutant Discharge Elimination System (NPDES) Permit Program for Farms Subject to the Federal Clean Water Act Regulations for Concentrated Animal Feeding Operations (CAFO)* (Jan. 2006) (annual report to Vermont legislature) (“ANR recommends that development of CAFO rules in Vermont await adoption of the final federal revised CAFO regulations. Should those regulations be subject to additional court challenges ANR recommends that development of state rules await resolution of the court challenges.”); DEC, *End of Year Report for the Performance Partnership Agreement between the Vt. DEC & the U.S. EPA, Region 1: New England for Federal Fiscal Year 2006* (Jan. 2006) 4 (“Vermont . . . will continue to work on the CAFO program when the federal CAFO program is adopted and through the appeal period.”); Memorandum of Understanding between Vt. ANR & Vt. AAF&M Concerning MFO, LFO & CAFO Regulation (Draft) 3 (Dec. 20, 2006) (“Whereas, CAFO Rules will not be adopted by ANR until EPA’s revisions to its CAFO Rules are final and any legal challenges thereto have been resolved . . .”).

⁸ EPA, *Detailed Comments Regarding Vt. PPA End of Year Report for 2006* 1 (“Vermont DEC’s statement on page 4 of the main report regarding development and implementation of new CAFO regulations after appeals are exhausted is unacceptable.”) (Apr. 4, 2007); Letter from Robert Varney, Regional Administrator, EPA Region 1, to Jeffrey Wennberg, Commissioner, DEC, at 1 (Feb. 1, 2007) (“Varney Letter”) (“When EPA’s final revised CAFO regulations are promulgated, we expect your agency to implement its CAFO permitting program consistent with the revised regulations. The state should begin implementation as soon as the regulations become effective, rather than waiting for all legal challenges to be resolved.”).

⁹ Letter & attachments from Robert Varney, Regional Administrator, EPA Region 1, to Jeffrey Wennberg, Commissioner, DEC, reprinted in *Vt. DEC End of Year Report for 2005 and Update for Federal Fiscal Year 2006 to the Performance Partnership Agreement between the Vt. DEC & the U.S. EPA, Region 1 for Federal Fiscal Years 2004, 2005, & 2006* 36, 39 (Jan. 2006) (“Vermont ANR will issue a general permit consistent with EPA requirements to cover CAFOs” by “completion date” of Sept. 30, 2007.). See also EPA internal report, *CAFO Rule Implementation Regional Summary for Is Q1 2006 Report (1/1/06-3/31/06)* (“[r]egulations to be developed NLT 7/1/2007 . . . [s]tate plans to issue General Permit” by 2007).

¹⁰ See N.Y. State Department of Environmental Conservation, Permit for Concentrated Animal Feeding Operations (CAFOs), <http://www.dec.ny.gov/permits/6285.html> (2008).

¹¹ Memorandum from Benjamin H. Grumbles, Assistant Administrator, EPA Office of Water, to Regional Administrators I-X (May 3, 2007) (“Grumbles Memorandum”).

The Vermont General Assembly has also ordered ANR to develop CAFO permitting regulations by a mid-2007 deadline that ANR has missed.¹² In the meantime, however, as directed by both EPA and the Vermont legislature, ANR must “evaluate applications for CAFO permits based on the substantive permitting standards and criteria of the current CAFO regulations that remain in effect” because “any discharges from a CAFO require an NPDES permit.”¹³ It must “take all necessary steps to implement its strategy for issuing CAFO permits that meet the minimal requirements of the federal program.”¹⁴ This is consistent with EPA’s mission to “work with State permitting authorities to implement existing CAFO regulatory and permitting requirements” as it “finalize[s] decision-making regarding the *Waterkeeper* rule” because “[t]he implementation of the 2003 CAFO rule is critical in [EPA’s] mission to restore and protect watersheds across the nation.”¹⁵ Most importantly, it is entirely consistent with ANR’s legal duties as the delegated Clean Water Act authority in Vermont.¹⁶

ANR’s refusal to issue any permit to any CAFO in Vermont is most troubling. It reflects a reluctance to regulate, a fear that Vermont’s CAFOs will view ANR as the “enforcer,”¹⁷ and further suggests a lack of true concern for the quality of Vermont’s waters. It also reflects at best, a misunderstanding of, and at worst, a disregard for ANR’s voluntarily-assumed obligations under the Clean Water Act, whose statutory mechanisms are *regulation* and *enforcement*.

This reticence in addressing CAFO pollution is evidenced not only by the fact that ANR has never issued an NPDES permit to a CAFO, but by agency communications and positions throughout the years. In 1999, ANR leadership was urging EPA to abandon its recently announced plans to inspect CAFOs in Vermont.¹⁸ Seven years later, leadership remained negative about upcoming EPA inspections, informing staff that “EPA insists they want to inspect” CAFOs and that therefore, “[w]e need a plan.”¹⁹ The plan, as it turned out, was for ANR and AAF&M to inspect Vermont’s Large Farm Operations (LFOs) prior to EPA’s inspections.²⁰

¹² 10 V.S.A. § 1263(g) (directing ANR to adopt CAFO regulations by July 1, 2007).

¹³ See Varney Letter, *supra* note 9, at 1. See also 10 V.S.A. § 1263(g) (“Until such regulations are adopted, the substantive permitting standards and criteria used by the secretary to evaluate applications and issue or deny discharge permits for concentrated animal feeding operations shall be those specified by federal regulations.”).

¹⁴ *EPA’s Vt. DEC 2007 PPA Priorities & Commitments List*, no. 69, reprinted in letter from Robert Varney, Regional Administrator, EPA Region 1, to Jeffrey Wennberg, Commissioner, DEC (May 17, 2006).

¹⁵ Grumbles Memorandum, *supra* note 12.

¹⁶ See 40 C.F.R. §§ 123.25 (“[a]ll State Programs . . . must be administered in conformance with . . . § 122.23), 122.23 (“Concentrated animal feeding operations (applicable to State NPDES programs)”).

¹⁷ See email from ANR to AAF&M (Apr. 19, 2007) (suggesting that AAF&M letter to LFOs about upcoming inspections “show[] the inspections are a way of helping them to be [sic] compliance rather than being an enforcement hammer”); internal ANR email (Apr. 19, 2007) (noting Secretary’s suggestion to remove sentence from draft inspection plan that stated AAF&M would inspect LFOs where ANR was denied entry: “[The Secretary] believes doing this will perpetuate the idea that AAF&M are the ‘good guys’ and ANR is the evil enforcer that should be avoided. . . . We need farmers to chance [sic] their perception about ANR and we can start this change by showing them that AAF&M and ANR are partners in helping farmers to find and resolve environmental problems at their farms.”).

¹⁸ Letter from Canute E. Dalmasse, Commissioner, DEC, to Ron Manfredonia, EPA Region 1 (Oct. 21, 1999).

¹⁹ Email from Jeffrey Wennberg, Commissioner, DEC, to ANR staff (Sept. 14, 2006).

²⁰ Internal memorandum to George Crombie, Secretary, ANR (Apr. 13, 2007) (“2007 CAFO Inspection Program Plan”). As discussed *infra*, LFOs and MFOs (Medium Farm Operations) are defined by Vermont’s agricultural water quality law and currently regulated by AAF&M under a non-CWA program.

The official goal of ANR's inspections was to "identify discharges or deficiencies at large CAFOs which require the farm to either obtain a federal CAFO permit or prevent/correct the discharge/deficiency."²¹ Thus, even if ANR were to find a discharge on the day of inspection, it would not necessarily require the CAFO to obtain an NPDES permit.²² Such "discretionary" permitting decisions are not acceptable. As stated by EPA in the pending proposed CAFO rule, "Any CAFO that discharged or proposed to discharge and failed to obtain an NPDES permit would be in violation of the NPDES regulatory requirement to seek coverage under an NPDES permit."²³ This analysis demonstrates the extent to which ANR's failure to implement NPDES permitting for CAFOs not only jeopardizes water quality, but also leaves farmers exposed to significant risk of legal liability for discharging without a required NPDES permit.

1. There are documented discharges from CAFOs of various sizes in Vermont, and problematic discharge areas in many more of them

As revealed by the results of CAFO inspections and by information in AAF&M's animal feeding operation files, *there are CAFOs in Vermont that, by law, should have NPDES permits.* As discussed below, there are documented discharges from CAFOs of various sizes in Vermont, and numerous facilities walking a precarious line between discharging and not. ANR's public insistence to the contrary, that "no discharges to state waters were observed"²⁴ during its inspections, distorts the truth.

2. Several of Vermont's large CAFOs have discharged, and even more have problematic areas where discharges are likely but oversight is lacking.

In fact, clear evidence of a past discharge from one Large Farm Operation *was* observed during ANR's inspections – from the LFO's feed storage areas to a tributary of the Connecticut River.²⁵ Despite this, and despite recommendations to improve the LFO's manure handling areas and leachate collection system, the only "further action" suggested was a "possible" follow-up visit

²¹ *Id.*

²² There is some question about the extent to which ANR would have considered the permit option at all. Internal communications suggest that the primary goal of the inspections was to get any discharging CAFOs on a "compliance schedule" in advance of EPA's inspections. *See, e.g.*, internal ANR email (Mar. 16, 2007) ("If a discharge is discovered, the Secretary would like us to issue an Order to the farm that contains a schedule for getting the farm into compliance."); internal ANR email (Apr. 19, 2007) (in comment on "Inspection Followup" section of draft inspection plan, which included enforcement orders and permit issuance, stating Secretary's belief that "our primary goal should be to get the farm in compliance"); *id.* (in paragraph of draft inspection plan that was later removed, stating: "Scheduling of the joint inspection program is designed to sufficiently predate the EPA CAFO inspection effort (targeted for August 2007) such that any discharges/deficiencies can be corrected before the EPA inspections.").

²³ Revised CAFO Rule in Response to Waterkeeper Decision ("Revised CAFO Rule"), 71 Fed. Reg. 37, 744, 37,749 (June 30, 2006).

²⁴ Louis Porter, *Inspections Show Compliance*, Rutland Herald, Sept. 17, 2007 (statement of ANR Secretary). This same article noted state Representative David Deen's observation that the inspections were done in a "dry summer and fall" under which conditions "you would not expect there to be any problem unless somebody was flagrantly violating the AAPs [accepted agricultural practices]."

²⁵ *VT DEC Animal Feeding Operation Assessment Form ("DEC Assessment Form")* § V (June 12, 2007). This is the LFO that is permitted for 750 mature dairy cows, but did not have 700 mature dairy cows on the date of ANR's inspection, *infra* note 105.

after the leachate problem had been addressed.²⁶ As of January 15, 2008, there was no documentation of follow-up in the file. The LFO had been cited earlier in 2007 for using an uncertified waste storage facility that was “filled to capacity and overflowing,” and for failing to control manure runoff.²⁷ Another LFO had actually received a Notice of Alleged Violation (NOAV) from ANR three years earlier for “discharging liquid manure and dairy wastes to state waters.”²⁸

Further, the inspections revealed that discharges from other LFOs were a real possibility and suggested that, on any other given day, would potentially occur. Of the LFOs inspected (one denied access), 11 had “problem areas” – “areas where there is a potential to discharge wastes to surface waters” – some with “multiple problem areas.”²⁹ The two main problems were: 1) “failure to adequately control runoff to or from barnyards, manure handling areas and other areas containing wastes,” and 2) “failure to adequately control, disperse or infiltrate leachate/runoff from feed storage bunker areas.”³⁰ In some cases, these problems were “exacerbated . . . by the close proximity of barnyards and manure handling areas to surface waters.”³¹ 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 during significant precipitation/runoff events.”³² 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.”³³

Of the 11 LFOs with problem areas, ANR recommended no further action for one.³⁴ ANR recommended just 5 for follow-up visits,³⁵ and 4 for “possible” follow-up.³⁶ Of the 5 recommended for definite follow-up visits, only 2 follow-ups were documented as of January 15, 2008.³⁷ Of those 2 follow-ups, one had another follow-up recommended for late fall/early winter,³⁸ which as of January 15th was undocumented. The other did not recommend another follow-up, despite findings that a berm near the feed bunker might not be high enough during rain events, and that “good housekeeping practices [are] an on-going necessity particularly due to the proximity of the stream through this property.”³⁹ None of the 4 LFOs recommended for possible follow-up had records of follow-up inspections as of January 15th. This is troubling

²⁶ *Id.* § VII.

²⁷ AAF&M, Notice of Violation 1-2 (May 23, 2007).

²⁸ ANR, Notice of Alleged Violation (May 11, 2004).

²⁹ Internal memorandum to George Crombie, Secretary, ANR & Warren Coleman, General Counsel, ANR, at 1 (July 27, 2007) (“Summary: 2007 ANR/AAF&M Joint CAFO Inspection Program”).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 1-2.

³³ Internal AAF&M Memorandum (June 3, 2002).

³⁴ *DEC Assessment Form*, *supra* note 26, § VII (June 5, 2007).

³⁵ *Id.* (forms of 6/6/07 (2), 6/7/07, 6/13/07, 7/10/07).

³⁶ *Id.* (forms of 6/12/07, 6/13/07, 6/21/07, 6/22/07).

³⁷ ANR internal memorandum (Oct. 19, 2007) (re: Oct. 18, 2007 followup inspection) (“Oct. 19 memo”); ANR internal memorandum (Oct. 29, 2007) (re: Oct. 26, 2007 followup inspection) (“Oct. 29 memo”).

³⁸ Oct. 19 memo, *supra* note 38.

³⁹ Oct. 29 memo, *supra* note 38.

because, of those 4, one had evidence of a past discharge,⁴⁰ and another was characterized as having “high” potential to discharge manure “[a]bsent judicious housekeeping measures.”⁴¹ One LFO, which had evidence of a manure pit overflow and inappropriate runoff controls,⁴² received a follow-up visit though no visit was recommended. The follow-up revealed that problems identified on the initial visit still existed, and another follow-up was recommended for late fall/early winter.⁴³ As of January 15th, there was no documentation of further follow-up at that CAFO.

The LFO that denied access has been the subject of numerous complaints and investigations. It was cited by AAF&M in 2000 for failure to apply for an LFO permit.⁴⁴ Investigations in 2004 revealed problems with mortalities and bunker area runoff.⁴⁵ A 2006 investigation found a “definite violation” of the AAPs for feedbunker runoff into a ditch and possible “DEC issue[s]” (ANR’s Department of Environmental Conservation) surrounding silage runoff into cornfield ditches that allegedly emptied into a stream.⁴⁶ It has also been ordered to remedy groundwater contamination caused by its operations.⁴⁷

EPA’s inspections of 4 large CAFOs in Vermont also revealed some problems. At one, a tile for perimeter drainage around a manure lagoon had a “slow drip of liquid entering [a] stream.”⁴⁸ Samples collected up and downstream of the drainage tile showed that ammonia nitrogen, nitrate nitrogen, and total phosphorus were all higher downstream of the tile.⁴⁹ Ammonia nitrogen was more than 3 times higher; phosphorus was more than double.⁵⁰ At another, though no runoff was observed, the CAFO was looking for a new site for a mortality pile, “considering such factors as proximity to surface water.”⁵¹ Previously, that LFO had been cited for failure to submit a complete LFO application, including failure to demonstrate that its waste management system met proper standards, that its feed bunker discharge was controlled, and that it had a complete NMP.⁵²

Another investigation at a large CAFO followed a complaint under the Accepted Agricultural Practices program that a berm along a cornfield was opened to allow runoff into a river.⁵³ The AAF&M investigator confirmed that the berm had been dug out, and noted in a photograph “the

⁴⁰ *DEC Assessment Form*, *supra* note 26, § V.

⁴¹ *DEC Assessment Form*, at § III.5 (form of 6/13/07).

⁴² *DEC Assessment Form*, *supra* note 71, § III.5, note 55, § V.1.

⁴³ ANR internal memorandum (Oct. 19, 2007) (re: another Oct. 18 followup inspection).

⁴⁴ AAF&M, *In re: Robert & Janet Lawson Assurance of Discontinuance* (Mar. 29, 2000).

⁴⁵ Internal AAF&M emails & memos (May 24, 2004; June 14, 2004, June 28, 2004); internal AAF&M memos (June 10, 2004; June 18, 2004).

⁴⁶ Internal AAF&M email (Nov. 22, 2006); *NPS Report: Manure Complaint* (Nov. 22, 2006).

⁴⁷ See Entry Order, No. 44-2-06 (Vt. Orleans Sup. Ct. Dec. 13, 2007) (referring to Order of Jan. 31, 2006).

⁴⁸ Science Applications International Corporation, *Concentrated Animal Feeding Operation Inspection 3* (Aug. 22, 2007).

⁴⁹ *Id.* at 4.

⁵⁰ *Id.*

⁵¹ Science Applications International Corporation, *Concentrated Animal Feeding Operation Inspection 3* (Aug. 23, 2007).

⁵² AAF&M, *In re: Robert & Larry Gervais Assurance of Discontinuance*, No. 2001-LFO-AOD-03 (Jan. 23, 2002).

⁵³ *NPS Report: Manure Complaint* (Nov. 26, 2007).

two spots on the field edge where there is potential point source runoff.”⁵⁴ At one of those spots, the investigator noted “what appears to be a channel that could allow runoff to flow easily down to the river.”⁵⁵ The investigator did not see any runoff, but indicated that evidence of runoff would be unlikely at that time because there was snow cover.⁵⁶

Another CAFO was cited twice in 2007 for various LFO permit violations, including failure to “control point sources of contaminated runoff from the livestock feeding operation to prevent discharges to waters.”⁵⁷ The contaminated runoff included manure and feed bunk waste that channeled to a nearby stream.⁵⁸ Another was cited for a bunk complex discharge that drained to an overflowing runoff pond, into a ditch and a creek, and another discharge into a different stream.⁵⁹ Another was cited for using two uncertified waste structures.⁶⁰ Another was cited in 2001 for failure to submit proof of its compliance with various permit conditions, including the requirement to control discharges from roof areas, barnyards, and feed storage areas.⁶¹

Another was cited for a “direct discharge of wastes (*i.e.*, sediments) into the stream that runs through [its] property.”⁶² 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.⁶³ Samples from the pathways contained “very high concentrations of phosphorus,” with the LFO’s protection measures having been “largely ineffective.”⁶⁴ 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.”⁶⁵ 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.⁶⁶ 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.”⁶⁷ On September 11th, 2000, AAF&M issued another Notice of Violation to the LFO.⁶⁸

⁵⁴ *Id.* at 1.

⁵⁵ *Id.* at 3.

⁵⁶ *Id.*

⁵⁷ AAF&M, Notice of Violation 1-3 (June 8, 2007); AAF&M, Notice of Violation 1-3 (May 16, 2007).

⁵⁸ *Id.*

⁵⁹ AAF&M, Notice of Violation 2 (May 16, 2007).

⁶⁰ AAF&M, Notice of Violation 2 (July 20, 2007).

⁶¹ AAF&M, *In re: Ernie Audet* Assurance of Discontinuance, No. 2001-LFO-AOD-002 (Jan. 23, 2001).

⁶² AAF&M, Corrective Action Letter 1 (June 18, 1999).

⁶³ Letter from ANR/DEC to AAF&M 1 (Feb. 28, 2000) (in context of Lake Champlain Agricultural Watersheds 319 National Monitoring Program Project).

⁶⁴ *Id.* at 1.

⁶⁵ *Id.* at 1-2.

⁶⁶ AAF&M, *In re: Mark St. Pierre* Assurance of Discontinuance, at 1-2 (June 21, 2000).

⁶⁷ Internal DEC memo (Aug. 28, 2000).

⁶⁸ AAF&M, Notice of Violation (Sept. 11, 2000).

3. Several of Vermont's Medium Farm Operations have discharged, and even more have problematic areas where discharges are likely but oversight is lacking.

There are also documented discharges from and problems with Medium Farm Operations (MFOs) in Vermont. Of the MFOs that had been inspected by AAF&M as of December 19, 2007, 30% had past and/or current discharges from production areas.⁶⁹ All of the inspected MFOs were given recommendations to ensure that wastes do not reach surface waters.⁷⁰ One was advised to ensure that an exposed pipe did not contain water, which would be a “direct conveyance to waters of the state.”⁷¹ Other recommendations included improving silage leachate systems, fencing animals out of streams, and moving mortality piles.⁷² Fifteen MFOs indicated on their NOICs that animals confined in their production areas have access to waters of the state;⁷³ none of those MFOs had been inspected as of December 19, 2007. Another 18 did not answer that question on their NOICs.⁷⁴ A January 2007 report to the Vermont legislature identified 18,600 animals at MFOs in need of increased manure storage capacity.⁷⁵ The same report identified 142 MFOs as having no silage leachate collection or treatment system, and 171 with no clean water diversion or barn yard runoff controls.⁷⁶

Another operation that submitted an NOIC under the MFO General Permit⁷⁷ was the subject of an ANR enforcement action for a point source discharge of liquid manure into Lake Champlain.⁷⁸ The action was initiated around the time that photos of the discharge were published in the *St. Albans Messenger*.⁷⁹ Another MFO was recently cited by AAF&M for violating AAPs by failing to properly maintain its lagoon, causing manure to flow out of the cleanout tank into a ditch.⁸⁰ Another discharged to a lake through a pipe connected to its manure fields.⁸¹ Manure had been spread on a field, and then overflowed to a lake during a rain event. Manure also reached the lake by traveling down through a pipe on the edge of the field that emptied into the lake. One of the remedial options discussed during the investigation was to “completely plug the pipe to stop any further direct discharges.”⁸² Because the manure had been applied within accepted agronomic rates, no violation of the AAPs was found, and AAF&M

⁶⁹ *Vt. Agency of Agriculture, Food & Markets Medium Farm Operation Assessment Form (“MFO Assessment Form”)* (forms of 11/1/07, 11/6/07, 11/7/07).

⁷⁰ *Id.*; *MFO Assessment Form* (forms of 9/18/07, 9/20/07, 9/21/07 (2), 11/1/07 (2), 11/7/07 (1)).

⁷¹ *Id.* (form of 11/1/07).

⁷² *Id.* (forms of 9/18/07, 9/20/07, 9/21/07 (2), 11/1/07 (2), 11/6/07, 11/7/07).

⁷³ NOICs of 3/1/07, 3/2/07 (2), 3/23/07, 3/29/07, 4/2/07, 4/10/07, 5/1/07, 7/9/07, 7/25/07, 8/6/07, 8/7/07, 9/10/07, 9/19/07, 11/25/07.

⁷⁴ Handwritten record of NOICs of 3/12/07, 7/9/07, 8/1/07 (2), 8/2/07, 8/8/07, 8/9/07, 8/10/07, 8/13/07 (3), 8/16/07, 8/27/07, 9/10/07 (3), 9/12/07, 10/7/07. These NOICs are not on file with ENRLC. They are on file with AAF&M.

⁷⁵ *Vt. AAF&M, Act 78 – Section 16 Annual Report – 2006 (“Section 16 Report”)* 4 (Jan. 2007).

⁷⁶ *Id.* SFOs have similar problems. About 50% need increased manure storage capacity, and about 95% do not have silage leachate treatment or clean water diversion structures for barnyard runoff. *Id.* at 6.

⁷⁷ Handwritten record of NOIC of 8/1/07, *supra* note 75. This NOIC is not on file with ENRLC. It is on file with AAF&M.

⁷⁸ *ANR v. Montagne AOD*, No. 291-12-07 (Vt. Env. Ct. Dec. 31, 2007); ANR, Enforcement Division, *Complaint Investigation Report* (May 20, 2007) (“Based on the above investigation, statements, photos and site visits, it is apparent that a point source discharge to Lake Champlain occurred at the B&M Dairy”).

⁷⁹ AAF&M, *Timeline of Events – Branon Manure Spreading Incident, Giroux Road, St. Albans*.

⁸⁰ AAF&M, *Corrective Action Written Warning* (Nov. 30, 2007).

⁸¹ *NPS Report* (Aug. 8, 2007).

⁸² *Id.* at 11.

referred the case to ANR.⁸³ Despite the pipe discharge, ANR responded that “the focus should be to come up with a plan and implement same to prevent future discharges/problems.”⁸⁴ ANR Enforcement was “inclined to leave this with [AAF&M], if [AAF&M was] willing, to work with the parties to come up with a viable solution.”⁸⁵

4. Agricultural discharges and their impacts on Vermont’s waters are a constant concern, which ANR fails to ameliorate in its failure to regulate CAFOs.

Other reports from the Agency of Agriculture, Food and Markets AAP program also show that discharges are a constant threat. The number of citizen complaints about possible AAP violations illustrates the public’s growing concern for water quality in Vermont (117 in 2007, 92 in 2006).⁸⁶ Several complaints have been lodged and violations found for spreading manure during the winter ban.⁸⁷ One recent violator had an “extensive history” of winter spreading.⁸⁸ This is obviously troubling because such improper applications of manure are more likely to cause runoff that can pollute surface waters – a problem addressed by EPA when it clarified the “agricultural stormwater” exception in its 2003 CAFO Rule.⁸⁹ Other 2007 violations included leachate discharges from feed bunkers into channels connected to rivers.⁹⁰

Even where AAF&M did not act upon violations, or where no official violations were found, a survey of the investigative reports from 2007 alone reveals numerous threats – potential and realized - to water quality. Investigations found problems like manure overflowing from a barn into a stream,⁹¹ manure spreading overflowing into a ditch,⁹² silage leachate running off into ditches,⁹³ and a “potential discharge from [a] barnyard area to [a] nearby stream.”⁹⁴ NOAVs issued by ANR for discharges from agricultural activities revealed similar issues.⁹⁵ The NOAVs stated, variously, that “the manure pit serving the 300-head operation has overflowed on more than one occasion and discharged to a tributary of [a brook];”⁹⁶ that there was an “ongoing discharge of wastewater containing byproducts of corn silage and cow manure to an unnamed tributary of [a brook];”⁹⁷ and that “[d]uring application of manure and whey mix ran off went to brook located @ side of field and into state waters.”⁹⁸

⁸³ Email from AAF&M to ANR (Aug. 9, 2007).

⁸⁴ Email from ANR to AAF&M (Aug. 9, 2007).

⁸⁵ *Id.*

⁸⁶ AAF&M, *Non-Point Source (NPS) Investigation Tracking Sheet* (sheets of 2007, 2006).

⁸⁷ *See, e.g.,* AAF&M, *Agricultural Non Point Source Reduction Program Enforcement Report 2000/2001* (28 complaints of winter spreading; 14 violations of nutrient/pesticide application).

⁸⁸ AAF&M, Notice of Violation, at 4 (Mar. 2, 2007).

⁸⁹ 40 C.F.R. § 122.23(e).

⁹⁰ AAF&M, Corrective Action Written Warning (Warnings of 6/8/07, 6/26/07).

⁹¹ *AAP Report: Manure Complaint* (Mar. 16, 2007).

⁹² *AAP Report: Manure Complaint* (May 2, 2007).

⁹³ *AAP Report: Runoff Complaint* (Sept. 4, 2007); internal AAF&M Memorandum (Aug. 9, 2007) (referring to a large CAFO).

⁹⁴ *NPS Report – Franklin County Fly Over 4* (Sept. 6, 2007).

⁹⁵ ANR, Notice of Alleged Violation (NOAVs of 4/2/97, 6/27/97, 10/17/97, 7/17/98, 10/29/98, 1/26/00, 5/2/02, 5/11/04).

⁹⁶ *Id.* (NOAV of 7/17/98).

⁹⁷ *Id.* (NOAV of 10/17/97).

⁹⁸ *Id.* (NOAV of 10/29/98).

In another observation, an AAF&M specialist stated:

[E]very time I drive by this site I think this must be an AAP violation This area is a barnyard or animal holding area or production area (feed lot) it just is not paved, but otherwise, it is a feed lot. The adjacent somewhat vegetated area around the stream does not seem to be preventing discharges, please look at the foamy white discharge directly into the stream, coming from the pad/bunker & feeding area.⁹⁹

In light of the above facts, the absence of any CAFO permitting actions by ANR suggests serious institutional denial of, or willful blindness to, the CAFO pollution reality in Vermont.¹⁰⁰ Such inaction is inexcusable in the face of Vermont's degraded waters, especially when 30 of those waters are impaired by agricultural pollution and 23 more have been listed as being at risk of impairment because of agricultural pollution.¹⁰¹

⁹⁹ Internal AAF&M email (Nov. 16, 2007).

¹⁰⁰ Changes that were made between the actual inspection assessment forms that ANR used to inspect large CAFOs (handwritten entries), and those that were used for official write-up, point to this conclusion. For instance, section III.5 ("Waste Handling, Treatment and/or Management Operations") was changed from:

"Can pollutants from the disposal of wastes and wastewaters enter a surface water, dry bed ditch, canal, etc? [Check yes or no.] If yes, name the surface water, dry bed, ditch, canal, etc., and describe how the discharge may occur (see map, photo or sketch)," to the more benign:

"Describe any problem areas within the production area where discharges may occur and describe how wastes may enter surface waters."

Sections V.6 and V.7 were deleted altogether. Previously, they read:

"List any discharges which have occurred from the production area within the last five years and describe how and why the discharges occurred (i.e. failure of manure storage structure, etc.)," and: "Describe any problem areas within the production area where discharges are likely to occur."

The straightforward "[c]an pollutants enter surface waters was changed to the nebulous "describe . . . where discharges *may* occur." The requirement to identify and describe past discharges was removed, as was language about "likely" discharges. Instead, the remaining question in section V.2.b asked if there was "evidence of a past discharge," which could only be assessed on the day of inspection. Though the changes might seem minor, they are indicative of careful linguistic choices designed to minimize information about, and control characterization of, discharges at the CAFOs.

A promising job description for a CAFO position, developed internally at ANR in early 2007, acknowledged the need for CAFO oversight resources. See internal ANR email (Mar. 1, 2007) (person would perform inspections and "[d]raft and issue CAFO permits"). However, that position had not been filled as of Feb. 22, 2008.

¹⁰¹ DEC, *Draft for Public Comment, State of Vt. 2008 303(d) List of Waters ("303(d) List")*, available at http://www.anr.state.vt.us/dec/waterq/planning/docs/pl_2008.303d_draft.pdf; DEC, *State of Vt. Draft for Public Comment 2008 List of Priority Surface Waters – Part C ("Part C List")*, available at http://www.anr.state.vt.us/dec/waterq/planning/docs/pl_2008.statelistings_draft.pdf.

PROGRAMS ADMINISTERED BY THE AGENCY OF AGRICULTURE, FOOD & MARKETS ARE NOT AN ADEQUATE SUBSTITUTE FOR THE IMPORTANT CWA PROTECTIONS OF A NPDES PROGRAM.

Concentrated animal feeding operations have been point sources subject to NPDES jurisdiction since the inception of the Clean Water Act in 1972.¹⁰² Vermont is home to an increasing number of these CAFOs, which discharge agricultural pollution into our streams, rivers and lakes. Despite this obvious pollution problem and the state's legal obligation to regulate these farms, ANR has never issued a single NPDES permit to a CAFO. As discussed above, there are documented discharges from *at least* 3 large CAFOs and 30% of inspected Medium Farm Operations in Vermont, with many other operations teetering on the edge of unauthorized discharges.

As EPA knows, animal feeding operations in Vermont are currently regulated by the Vermont Agency of Agriculture, Food & Markets primarily under Large Farm Operation Rules, the Medium Farm Operation General Permit, and Accepted Agricultural Practices. There are currently 18 LFOs in Vermont with AAF&M permits. As of December 19, 2007, 160 operations had submitted Notices of Intent to Comply (NOICs) for coverage under AAF&M's MFO General Permit; 8 of these were determined to be Small Farm Operations (SFOs). However, a 2007 AAF&M report indicates that there are 200 MFOs in Vermont.¹⁰³ All but two of the LFOs, and some of the MFOs, are "CAFOs" under the federal regulatory definition.¹⁰⁴

¹⁰² Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), Pub. L. No. 92-500, § 502(14), 86 Stat. 816, 887 (1972). Though EPA extended the deadline for some newly defined CAFOs (as defined in the 2003 CAFO Rule) to seek permit coverage, Revised Compliance Dates for CAFOs, 72 Fed. Reg. 40,245, 40,247 (July 24, 2007), it is not clear that any of Vermont's CAFOs are "new." The old definition specified that most AFOs were not CAFOs if they "discharge[d] only in the event of a 25 year, 24 hour storm event." CAFOs, 41 Fed. Reg. 11,458, 11,460 (Mar. 18, 1976). Vermont law requires LFO permittees to store animal wastes "so as not to generate runoff from a 25-year, 24-hour storm event." 6 V.S.A. § 4851(f). However, a facility that does in fact discharge in the absence of such event, regardless of its storage capabilities, is not exempt from the CAFO definition. *See Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 122 (2d Cir. 1994) (explaining that an AFO with the requisite number of animals is presumably a CAFO unless "the only time a discharge of pollutants into navigable waters occurs is during a 25 year, 24-hour rainfall event," and dismissing the exception because "there [wa]s no claim that the run-offs in question were caused by 25-year, 24-hour rainfall event") (citing Fed. Reg.). As is evident in the ensuing discussion, many LFOs (and MFOs) have had storage and management problems or discharges that would have excluded them from the exemption. Further, ANR's inaction and refusal to permit CAFOs predates last summer's extension.

¹⁰³ *Section 16 Report*, *supra* note 76, at 3 (report to state legislature, stating that there were "200 MFOs currently identified by the Agency").

¹⁰⁴ The forms used by ANR to inspect Vermont's LFOs confirm that most are "CAFOs." The first four questions ask about the number and type of animals, the number of days the animals are stabled/confined and fed/maintained over any 12-month period, and whether any crops, vegetation, forage growth, or post-harvest residues are sustained in the normal growing season over any portion of the lot or facility. *VT DEC Animal Feeding Operation Assessment Form* (2007). All but four qualified as CAFOs under the federal definition at 40 C.F.R. § 123.23(b). The LFO permits for 2 of those 4, one of which denied access to ANR for the inspections, have the requisite number of animals to qualify as CAFOs. *See* Permit to Manage a Large Farm Operation, LFO Permit # 2001-04, at 2-3 (permitted for 750 mature dairy cows); Permit to Manage a Large Farm Operation, LFO Permit # 2002-03, at 1-2 (permitted for 1000 mature dairy cows). MFOs in Vermont that discharge pollutants through man-made devices, or pollutants that pass near the production area or come into contact with animals, are likewise "CAFOs." *See* 40 C.F.R. § 122.23(b)(6)(ii). Vermont's statutory definition of "MFO," which triggers the requirement to seek coverage under AAF&M's General Permit, contains the same "AFO" and animal number requirements as the federal definition. *Compare* 10 V.S.A. § 4857 (1), (2) *with* 40 C.F.R. § 122.23(b)(1), (6)(i). As discussed below, there are documented discharges from the production areas of some of these MFOs.

1. AAF&M's animal feeding operation programs are not equivalent to the NPDES CAFO program.

The permits issued by the Agency of Agriculture, Food & Markets are obviously not NPDES permits. AAF&M is not the delegated NPDES authority in Vermont. As stated by ANR, “[I]ssuance of an LFO permit does not preclude the need for issuance of a CAFO permit by ANR.”¹⁰⁵ And, as stated by EPA, “[t]he permits issued by VT-AAFM are not NPDES permits. Facilities that are subject to the CAFO permitting requirements must apply to VT-ANR to obtain NPDES permit authorization for regulated discharges from their facilities.”¹⁰⁶

Additionally, the terms of the AAF&M permitting program are not sufficient to meet NPDES requirements. This is most apparent in their failure to meet important oversight provisions of federal NPDES regulations for information gathering, public participation, and recordkeeping.¹⁰⁷ For instance, the LFO program does not satisfy public notice and comment requirements of the NPDES program. Draft CAFO permits must be publicly noticed and at least thirty days must be allowed for public comment; and the agency is required to consider and respond to comments when issuing a final permit.¹⁰⁸ In contrast, Vermont’s LFO Rules require a “public informational meeting” only for LFO projects that propose a new barn construction; the public then has only five business days to submit comments about such a project.¹⁰⁹ The Agency of Agriculture, Food & Markets has discretion to require a public meeting for barn expansions, but only if the barn is “already subject to permitting requirements,” and no meeting at all is required for LFOs seeking a permit to operate.¹¹⁰ Further, there is no requirement that the permit, or the LFO’s Nutrient Management Plan (NMP), be available for review at the meeting.¹¹¹ As EPA knows, the *Waterkeeper* Court was adamant that Nutrient Management Plans must be subject to public notice and comment along with the CAFO permits of which they are a part.¹¹² This is important because Nutrient Management Plans are key tools in protecting water quality by managing land application discharges to minimize phosphorus and nitrogen loading to surface waters.¹¹³ Additionally, they are highly technical plans that would be difficult for the public to meaningfully review and comment on within the 5-day period provided for under Vermont law.

Under EPA’s revised proposed CAFO rule, the public participation provisions of Vermont’s MFO General Permit would be especially problematic. They require only that, “[u]pon filing of

¹⁰⁵ Wennberg Letter, *supra* note 7, at 2.

¹⁰⁶ Letter from Robert Varney, Regional Administrator, EPA Region 1, to Christopher M. Kilian, Vice President & Director of Vt. Advocacy Center, CLF, at 1-2 (Jan. 29, 2007).

¹⁰⁷ There is also a strange, seeming loophole for animal feeding operations with 700 mature dairy animals. The MFO law and regulations apply to AFOs with 200-699 mature dairy animals. 6 V.S.A. § 4857(2); AAF&M, General Permit for Medium Farm Operations (“General Permit for MFOs”), Subch. II.C.1.c (Feb. 13, 2007), available at http://www.vermontagriculture.com/ARMES/awq/documents/GP_for_MFOs.pdf. The LFO law and regulations apply to AFOs with more than 700 mature dairy animals. 6 V.S.A. § 4851(a); AAF&M, Large Farm Operation Rules (“LFO Rules”), Subch. 3 (2007), available at <http://www.vermontagriculture.com/ARMES/awq/documents/LFORules.pdf>.

¹⁰⁸ 40 C.F.R. §§ 124.10(a), (b), 124.17.

¹⁰⁹ LFO Rules, *supra* note 108, subch. 5.B.2.

¹¹⁰ *Id.*

¹¹¹ *See id.*

¹¹² *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 502-04 (2d Cir. 2005).

¹¹³ *See id.* at 500.

a NOIC with General Permit, the Agency will post on its official website the fact that the farm has sought coverage. The agency shall post the farm name and town.”¹¹⁴ The proposed rule, on the other hand, has detailed public notice and comment provisions for general permit coverage. In response to the *Waterkeeper* decision, it requires NOICs and NMP terms (which will be incorporated into the permit) to be available for public review and comment, and requires the agency to respond to significant comments before issuing the permit.¹¹⁵ A recent case in Michigan confirmed that failure to include NMP terms in General Permits violates the CWA: “We conclude that Michigan’s CAFO permit program does not satisfy the requirements of the Clean Water Act because it does not require inclusion of the required minimum effluent limitations [nutrient management plans] in the general permit and it does not provide for the requisite public participation.”¹¹⁶ Currently, Vermont’s MFO General Permit only requires the permittee to keep a copy of the NMP at the MFO, and to make it available to AAF&M at reasonable times.¹¹⁷

The NOIC for the MFO General Permit also lacks necessary information requirements. NPDES regulations require that notices of intent for coverage under CAFO General Permits contain various pieces of information, several of which are not on the MFO NOIC: the requirement to submit a topographic map of the area showing the location of the production area; the total number of acres under the control of the MFO for land applications, and; the estimated amount of manure, litter, and process wastewater generated per year.¹¹⁸

Public participation and agency oversight are further limited in that LFO operating permits (which are individual permits) have no expiration date. There are no provisions for permit renewal (and thus public input) under the LFO Rules. This is in stark contrast to federal regulations, which specify that “NPDES permits shall be effective for a fixed term not to exceed 5 years.”¹¹⁹ CAFO regulations further specify that a CAFO must submit a renewal application at least 180 days before its permit expires.¹²⁰ And, under the LFO program, if AAF&M does not make a permit determination within forty-five business days, the permit is actually awarded by default¹²¹ – a practice that finds no support in the Clean Water Act.

Recordkeeping requirements under AAF&M’s program are also not as stringent as federal CAFO requirements. For instance, federal regulations require permittees to keep records of the date, time, and estimated volume of any overflows.¹²² The LFO Rules do not have an equivalent

¹¹⁴ General Permit for MFOs, *supra* note 108, subch. II.D.4.

¹¹⁵ 71 Fed. Reg. at 37,785.

¹¹⁶ *Sierra Club Mackinac Chapter v. Dep’t of Env’tl. Quality*, No. 269181, 2008 WL 161188 (Mich. Ct. App. 2008) (holding Act’s public participation mandate, 33 U.S.C. § 1251(e), applicable to nutrient management plans).

¹¹⁷ General Permit for MFOs, *supra* note 108, subch. V.C.1.

¹¹⁸ Compare 40 C.F.R. §§ 122.28(b)(2)(ii) (“Notices of intent for coverage under a general permit for concentrated animal feeding operations must include the information specified in § 122.21(i)(1), including a topographic map.”), 122.21(i)(1) (application requirements for CAFOs), 122.23(d)(3) (“A notice of intent for a general permit must include the information specified in §§ 122.21 and 122.28.”) with AAF&M, *Notice of Intent to Comply (NOIC) for Coverage under the Vt. Medium Farm Operation (MFO) General Permit*, available at <http://www.vermontagriculture.com/ARMES/awq/documents/NOIC.pdf>.

¹¹⁹ 40 C.F.R. § 122.46(a).

¹²⁰ *Id.* § 122.23(h).

¹²¹ LFO Rules, *supra* note 108, subch. 5.B.4.f.

¹²² 40 C.F.R. § 412.37(b)(6).

requirement. Instead, permitted LFOs must notify the agency of spills or accidental releases *if* they result in discharges to waters of the state.¹²³ To the extent that an overflow might be a violation of a permit condition, of which the LFO Rules require reporting, the date, time, and volume is *not* required to be reported.¹²⁴ The LFO Rules also do not have the federal requirement for a permittee to provide an explanation in its records if it fails to correct deficiencies found pursuant to its own inspections.¹²⁵ The MFO General Permit lacks the above requirements and more.¹²⁶

2. AAF&M is not authorized or well-suited to enforce the requirements of the CWA.

AAF&M's dual role in connection with animal feeding operations puts it in an awkward situation. As noticed by the recent Clean & Clear audit, AAF&M's role as an agricultural booster presents a conflict of interest when it also attempts to enforce water quality rules: "AAF&M and ANR need to consider the appropriate role for inspection and enforcement of agricultural water quality programs. AAF&M has the clear role of determining the long term viability of farming operations and ANR has the clear role for protecting water quality."¹²⁷ The audit went on to explain that the "regulatory staff" and the "assistance staff" at AAF&M "do not often work together visibly in order to maintain a strong relationship with farmers that are in need of technical assistance."¹²⁸ The conflict is also apparent in a letter to an LFO about a meeting on the LFO Rules, in which AAF&M stated: "[I]t is vital that we get the message to farmers that the LFO program is for the farmers."¹²⁹

The current arrangement between AAF&M and ANR, whereby they deal collaboratively with CAFOs pursuant to a Memorandum of Understanding (MOU), is also of questionable functionality. It has failed to result in any NPDES CAFO permits being issued, and the agencies were apparently hard-pressed to agree upon its terms. In June, 2005, the Vermont legislature directed the agencies to develop a new MOU to be consistent with federal CAFO regulations.¹³⁰ (The prior Memorandum of Understanding went into effect in 1999.) The comment period for the new MOU did not begin until a year and a half later, in December 2006. Observations of an ANR staff member, in referring to a monthly coordination meeting between ANR and AAF&M, reflect the tension between the agencies:

I am of the opinion that, without the two agencies coming to an agreement on some very broad policy level issues . . . that our discussions of the discreet issues will largely be an exercise of spinning our wheels. How we resolve the issues as they arise, needs to be guided by or considered within the context of a state policy or strategy for sustaining agriculture and ecosystem services. . . . Right now we are just flailing around.¹³¹

¹²³ LFO Rules, *supra* note 108, subch. 7.B.6.

¹²⁴ *Id.* at subch 7.B.5.

¹²⁵ 40 C.F.R. § 412.37(b)(3).

¹²⁶ Compare General Permit for MFOs, *supra* note 108, subch. V with 40 C.F.R. § 412.37.

¹²⁷ Green Mountain Institute for Environmental Democracy, *Performance Audit of VT. Clean&Clear* ("Clean & Clear Audit"), at 101 (Jan. 14, 2008), available at <http://www.anr.state.vt.us/cleanandclear/news/PerformanceAudit-CleanandClear-Jan142008.pdf>.

¹²⁸ *Id.* at 102.

¹²⁹ Letter from Leon C. Graves, Commissioner, AAF&M (Nov. 12, 1999).

¹³⁰ An Act Relating to Agricultural Water Quality, No. 78 (June 24, 2005) (codified at 10 V.S.A. § 4810(b)).

¹³¹ Internal ANR email (3-29-07). There was apparently some confusion within ANR, too. At one point, the draft MOU was forwarded to AAF&M from ANR without input from key ANR staff. Internal ANR email (5-8-06).

APPENDIX A

What kind of agricultural operations are subject to Clean Water Act permitting requirements?

1. Distinguishing industrial “CAFOs” from traditional Vermont-scale “Farms”

The Clean Water Act regulates specific types of agricultural operations known as “concentrated animal feeding operations” or “CAFOs” - a name which more accurately reflects their industrial nature. Such large-scale animal feeding operations—sometimes known as factory farms—bare little resemblance to the image of traditional Vermont-scale farms—small herds of animals spending much of the year in pasture—that most people historically associate with the state’s agricultural image. By contrast, industrial feeding operations such as those subject to Clean Water Act regulation confine many hundreds and in some cases more than a thousand animals in heavily mechanized production areas.

Perhaps the most significant difference between today’s increasingly large-scale factory farms and the traditional Vermont-scale farms that are disappearing from the landscape is the amount and type of manure factory farms produce. With ever-larger numbers of confined animals at these factory farms comes a massive amount of slurry-like liquid manure that is laden with pollutants such as pathogens, antibiotics, hormones, and nutrients. This liquid waste is often stored in tenuously-constructed earthen or cement lagoons that are prone to failure. Storage of large volumes of slurry manure also may result in toxic air emissions of gases like hydrogen sulfide and ammonia released from the manure storage areas. Leachate discharge from industrial-scale feed storage areas is another waste problem that can be magnified on concentrated animal feeding operations.

These and other negative environmental consequences of industrial-scale animal feeding operations have been documented and described in detail over the years in many different government studies by EPA and two recent reports by major non-governmental organizations, the Union of Concerned Scientists and the Pew Commission on Industrial Farm Animal Production.¹³²

Recognizing the heightened environmental risks stemming from industrial-scale animal feeding operations, Congress has long-established uniform environmental permitting programs for factory farms that are designed to secure a minimum level of protection for the nation’s water and air resources. These uniform Clean Water Act permitting requirements have been in place since 1972, yet Vermont has yet to implement them consistent with the federal law. The regulatory threshold for the Clean Water Act’s permitting requirements is discussed below.

¹³² * Doug Gurian-Sherman, Union of Concerned Scientists, *CAFOs Uncovered: The Untold Costs of Confined animal Feeding Operations* (2008).

* Pew Commission on Industrial Farm Animal Production, *Putting Meat on the Table: Industrial Farm Animal Production in America* (2008).

2. The Regulatory Definition of “CAFO”

The Clean Water Act – as its name implies – is concerned with the water pollution aspects of CAFOs. Under the Clean Water Act, only certain types of pollution sources have to obtain Clean Water Act permits (also called “NPDES” permits). These sources are called “point sources.” A “CAFO” is listed as a “point source” under the Clean Water Act, so CAFOs that discharge pollutants to surface waters must obtain NPDES permits.

EPA has regulations that specifically define “CAFO.” All CAFOs are places where animals are confined for at least 45 days/year in a lot or facility without sustained vegetation. Typically CAFOs confine animals the entire year. Clean Water Act regulations list the numbers of animals for each category, which differ depending on the type of animal. For example, a “large” CAFO has 700 or more mature dairy cows, or 1,000 or more veal calves, or 30,000 – 125,000 chickens (depending on the type of manure handling system). A “medium” CAFO has 200 – 699 mature dairy cows, or 300 – 999 veal calves, or 9,000 - 124,999 chickens. Concentrated animal feeding operations that confine the number of animals indicated by the foregoing federal regulations and that have discharges to surface waters are subject to the Clean Water Act permitting requirements that Vermont Agency of Natural Resources has stubbornly refused to implement and enforce.

Sources

* Clean Water Act, 33 U.S.C. §§ 1342, 1362(14).

* 40 C.F.R. § 122.23.

* NPDES Permit Regulation & Effluent Limitation Guidelines & Standards for CAFOs, 68 Fed. Reg. 7176 (Feb. 12, 2003).

APPENDIX B

Public Records Requests filed by CLF and ENRLC to Obtain Source Documents for this Report

From: Laura Murphy
To: christine.thompson@state.vt.us
Date: 12/6/2007 1:25 PM
Subject: Public Records Request

CC: ginny.little@state.vt.us

Dear Ms. Thompson:

Pursuant to 1 V.S.A. § 315 et seq., the Environmental & Natural Resources Law Clinic at Vermont Law School on behalf of Conservation Law Foundation hereby requests the following public records:[1] (about:blank#_ftn1)

1) All documentation about or related to enforcement, or the decision not to institute enforcement actions, including internal memoranda regarding enforcement decisions, against the following permittees known to have exceeded permit limits in 2005:

- a. Barre WWTF
Facility Number: VT0100889
- b. Brattleboro WPCP
Facility Number: VT100064
- c. Burlington Main STP
Facility Number: VT0100153
- d. Burlington Riverside WWTF
Facility Number: VT0100307
- e. Dirigo Paper Co. & SRC Corporation
Facility Number: VT0000116
- f. Essex Junction MTP
Facility Number: VT0100111
- g. Fair Haven WWTP
Facility Number: VT0100129
- h. Hartford WWTF
Facility Number: VT0101010
- i. Hinesburg WWTF
Facility Number: VT0101028
- j. Ludlow Village WWTP
Facility Number: VT0100145
- k. Middlebury WWTF
Facility Number: VT0100188
- l. Montpelier WWTF
Facility Number: VT0100196
- m. Northfield MTP
Facility Number: VT0100242
- n. Rutland WWTF
Facility Number: VT0100871
- o. St. Albans WWTF
Facility Number: VT0100323
- p. St. Johnsbury WWTF
Facility Number: VT
- q. West Rutland
Facility Number: VT0100714

2) All documents about the status of Vermont's NPDES Concentrated Animal Feeding Operation (CAFO) program, including but not limited to:

- a. NPDES CAFO permits that have been issued;
 - b. NPDES CAFO permits that are in the process of being issued or any drafts created;
 - c. NPDES CAFO permit applications;
 - d. All documents about program structure, staffing, and implementation.
- 3) All records of communication between the Vermont Agency of Natural Resources (ANR) and/or the Department of Environmental Conservation (DEC) and the Environmental Protection Agency (EPA) regarding Vermont's NPDES CAFO permitting program, or the absence of such program.
- 4) All internal communications within ANR and/or DEC, and between ANR/DEC and the Vermont Department of Agriculture, Food & Markets, regarding Vermont's NPDES CAFO permitting program.
- 5) Any and all documents regarding animal feeding operations (AFOs) and/or concentrated animal feeding operations (CAFOs) in the State as defined by 40 C.F.R. §122.23 or 6 V.S.A. §§ 4851, 4857, and of agricultural operations (AOs) in the State as defined by 10 V.S.A. § 6001(22)(B). This documentation includes but is not limited to:
- a. Location;
 - b. Size: in animals numbers and acres;
 - c. Any discharges from the AFO, CAFO, and/or AO;
 - d. Any water quality violations caused by the AFO, CAFO, and/or AO;
 - e. Any citizen complaints related to water quality.
- 6) All Discharge Monitoring Reports (DMRs) or similar records for all NPDES-permitted facilities in Vermont for the years 1997-2007.
- 7) All compliance and/or monitoring reports for NPDES facilities submitted to EPA for the years 1997-2007, including but not limited to all mandatory yearly reports and spot checks of facilities.

Please release the documents as they become available, rather than waiting for full compilation.

Thank you in advance for your time and assistance. If you have any questions, please do not hesitate to contact me at 802-831-1123 or lmurphy@vermontlaw.edu.

Sincerely,

cc: Virginia Little

[1] Any references to "documentation," "document," or "record" are to be interpreted with the definition of "public document" or "public record" under 1 V.S.A. § 317(b).

Laura Murphy
 Project Staff Attorney
 Environmental & Natural Resources Law Clinic
 Vermont Law School
 PO Box 96, Chelsea Street
 South Royalton, VT 05068
 802-831-1123
lmurphy@vermontlaw.edu

From: Laura Murphy
To: rob.achilles@state.vt.us
Date: 12/6/2007 1:13 PM
Subject: Public Records Request

CC: abbi.pajak@state.vt.us; katie.gehr@state.vt.us; matt.kittredge@state.v...

Dear Mr. Achilles:

Pursuant to 1 V.S.A. § 315 et seq., the Environmental & Natural Resources Law Clinic at Vermont Law School on behalf of Conservation Law Foundation hereby requests the following public records:[1] (about:blank#_ftn1)

- 1) Any and all documentation of animal feeding operations (AFOs) and/or concentrated animal feeding operations (CAFOs) in

the State as defined by 40 C.F.R. §122.23 or 6 V.S.A. §§ 4851, 4857, and of agricultural operations (AOs) in the State as defined by 10 V.S.A. § 6001(22)(B). This documentation includes but is not limited to:

- a. Location;
- b. Size: in animals and acres;
- c. Any discharges from the AFO, CAFO, and/or AO;
- d. Any water quality violations caused by the AFO, CAFO, and/or AO;
- e. Any water quality permits issued to the AFO, CAFO and/or AO;
- f. Any citizen complaints related to water quality.

2) Any and all Nutrient Management Plans (NMPs), and their supporting documentation, filed pursuant to 10 V.S.A. §§ 4851(b), 4858(c), (d).

Please release the documents as they become available, rather than waiting for full compilation.

Thank you in advance for your time and assistance. If you have any questions, please do not hesitate to contact me at 802-831-1123 or lmurphy@vermontlaw.edu.

Sincerely,

cc: Katie Gehr
Matt Kittredge
Abbi Pajak

[1] Any references to “documentation,” “document,” or “record” in this request are to be interpreted with the definition of “public document” or “public record” under 1 V.S.A. § 317(b).

Laura Murphy
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lmurphy@vermontlaw.edu

From: Laura Murphy
To: sal.spinosa@state.vt.us
Date: 12/6/2007 2:04 PM
Subject: Public Records Request

Dear Mr. Spinosa:

Pursuant to 1 V.S.A. § 315 et seq., the Environmental & Natural Resources Law Clinic at Vermont Law School on behalf of Conservation Law Foundation hereby requests the following public records:[1] (#_ftn1)

All water quality AOs and AODs for the years 1997-2007, and their supporting documentation, including but not limited to:

- a. All documents regarding intervening parties;
- b. Accompanying SEP files if any included SEPs.

Please release the documents as they become available, rather than waiting for full compilation.

Thank you in advance for your time and assistance. If you have any questions, please do not hesitate to contact me at 802-831-1123 or lmurphy@vermontlaw.edu.

Sincerely,

Laura Murphy
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Environmental & Natural Resources Law Clinic
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[1] Any references to "documentation," "document," or "record" are to be interpreted with the definition of "public document" or "public record" under 1 V.S.A. § 317(b).

From: Laura Murphy
To: pete.laflamme@state.vt.us
Date: 12/6/2007 1:22 PM
Subject: Public Records Request

Dear Mr. LaFlamme:

Pursuant to 1 V.S.A. § 315 et seq., the Environmental & Natural Resources Law Clinic at Vermont Law School on behalf of Conservation Law Foundation hereby requests the following public records:[1] (about:blank#_ftn1)

- 1) All documentation related to water NOAVs for the years 1997-2007, including but not limited to all documents related to resolutions of the NOAVs.
- 2) All supporting documentation, including internal communications, related to the water pollution aspects of all Performance Partnership Agreements (PPAs) between the Vermont Agency of Natural Resources (ANR) and the Environmental Protection Agency (EPA), excluding the PPAs themselves.
- 3) All records of correspondence between EPA and ANR and/or the Department of Environmental Conservation regarding the water pollution aspects of all PPAs, including but not limited to:
 - a. Correspondence discussing draft water permits issued by ANR;
 - b. Correspondence discussing final water permits issued by ANR.
- 4) All documents on actions taken and/or considered regarding Multi-Sector General Permit (MSGP) facilities that did not submit SWPPPs by the May 15th, 2007 deadline. These facilities are listed in the report attached to an email sent to Anthony Iarrapino by Padraic Monks on November 15, 2007.
- 5) All records of compliance and/or enforcement actions taken and/or considered regarding MSGP facilities that have not submitted Discharge Monitoring Reports (DMRs) as required by the Vermont Multi-Sector General Permit.

Please release the documents as they become available, rather than waiting for full compilation.

Thank you in advance for your time and assistance. If you have any questions, please do not hesitate to contact me at 802-831-1123 or lmurphy@vermontlaw.edu.

Sincerely,

[1] Any references to "documentation," "document," or "record" are to be interpreted with the definition of "public document" or "public record" under 1 V.S.A. § 317(b).

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