



REGION 1 ADMINISTRATOR

BOSTON, MA 02109

September 9, 2024

Julie Moore
Secretary
Vermont Agency of Natural Resources
1 National Life Drive, Davis 2
Montpelier, VT 05620-3901

RE: Joint petition from the Conservation Law Foundation, the
Vermont Natural Resources Council, and the Lake Champlain Committee

Dear Secretary Moore,

On March 16, 2022, EPA Region 1 received a joint petition from the Conservation Law Foundation ("CLF"), the Vermont Natural Resources Council ("VNRC"), and the Lake Champlain Committee ("LCC") (collectively "Petitioners") pursuant to 40 C.F.R. §§ 123.63, 123.64. The Petitioners raised issues with Vermont's administration of the State's National Pollutant Discharge Elimination System ("NPDES") program as it relates to the regulation of the State's Concentrated Animal Feeding Operations ("CAFOs") and requested that EPA Region 1 take corrective action or withdraw its authorization of Vermont's NPDES program, which is administered by the Vermont Agency of Natural Resources ("ANR").

Region 1 recognizes that two agencies, ANR and the Agency of Agriculture, Food, and Markets ("AAFAM"), each have a role in the regulation of agriculture water pollution in Vermont. Region 1 also recognizes AAFM's critical role in providing support to the agricultural community in Vermont: agriculture is an important part of the state's economy and is integral to Vermont's identity. We also know that like the tourism, food and beverage, and outdoor recreation sectors, the agriculture sector depends on clean water for its operations and success. We understand the importance of AAFM's mission and role in Vermont, *and* it is also vital to recognize that the current division of responsibilities between ANR and AAFM is interfering with the regulation of Vermont's CAFOs and preventing Vermont from adequately addressing agricultural water quality.

As described below, concerns similar to those raised in this petition had been previously identified in a 2008 petition filed by the Vermont Law School Environmental and Natural Resources Law Clinic ("ENRLC"). That petition resulted in a 2013 Corrective Action Plan in which Vermont agreed to take steps to improve various aspects of its NPDES program, including its approach to CAFOs.

Based on Region 1's review of the information contained in the Petition, as well as our own investigation, it is clear that Vermont has not adequately addressed deficiencies in its CAFO program and has not complied with the requirements of the 2013 Corrective Action Plan. The flaws in this program are preventing Vermont from adequately controlling phosphorus discharges from CAFOs, which contribute to severe water quality problems in Lake Champlain and other water bodies in the state. Significant changes to the state's implementation of the program are necessary to ensure Vermont meets the obligations associated with its NPDES authorization.

Prior to defining the scope of corrective action, the Region engaged the Petitioners and ANR in settlement discussions, which provided further clarity on the causes of longstanding programmatic and enforcement deficiencies in Vermont's CAFO program, and the steps needed to effectively resolve those deficiencies.¹ It is clear that the relationship between Vermont's Department of Environmental Conservation ("DEC") and AAFM related to implementation of the program is a contributing factor in the failure of the Vermont's CAFO program to meet its Clean Water Act obligations. As a result, ANR's program operations are clearly failing to meet the requirements of the Clean Water Act. This conclusion is supported by evidence assembled by the petitioners and by subsequent inspections, inquiries, and analyses conducted by Region 1. Together, these reveal that ANR has not been provided sufficient resources or operational authority to administer the NPDES program, which has resulted in inadequate monitoring and enforcement activity, among other problems. EPA has closely observed program operations in Vermont for well over a decade and despite having had ample time and opportunity to cure longstanding program deficiencies, many of which were outlined in the 2008 withdrawal petition, ANR has failed to do so. Based on these considerations and EPA's direct experience overseeing program administration, EPA has concluded that the consolidation of authority to implement the NPDES program into ANR, which is the agency that has the legal authority to implement the program, is the only workable solution to quickly resolve this matter and to avoid the initiation of withdrawal proceedings. The following actions are necessary to achieve that end:

1. ANR, the state agency with authority to administer the CWA program, must be responsible for CAFO permitting, monitoring, and enforcement relevant to implementing the Clean Water Act's NPDES program on Vermont's farms. This includes making ANR responsible for conducting routine inspections, enforcing nutrient management planning requirements, and administering discharge permits. While EPA recognizes the critical role played by AAFM in addressing agricultural water pollution, Vermont's extensive sub-delegation of authority to AAFM has undermined the state's NPDES program and rendered it out of compliance with Clean Water Act requirements.
2. Vermont must provide ANR with sufficient resources to administer the NPDES program to meet CWA requirements.

¹ The parties to the settlement conference all expressly agree that this communication does not constitute final agency action on the pending Petition and is not to be construed as a grant or denial, in part or in full, actual or constructive. Rather, given that Vermont's Agency of Natural Resources is the entity authorized to implement the NPDES program, Region 1 is offering the only viable path to resolve this expeditiously short of acting upon the request to withdraw the program. While the Region solicited views and considered information from the parties to be fully informed, the views expressed in this document are EPA Region 1's alone.

BACKGROUND

NPDES Program Approval and Withdrawal

Under Section 301(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1311(a), the discharge of pollutants from a point source into the navigable waters of the United States is prohibited except when the discharge is authorized by a permit issued under the NPDES program. 33 U.S.C. §§ 1311(a), 1342. The CWA defines the “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source,” and a “point source” is “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.” 33 U.S.C. §§ 1362(12), 1362(14). Section 402 of the CWA establishes the NPDES program for permitting the discharge of pollutants from point sources.

On March 11, 1974, EPA authorized Vermont’s request to administer the NPDES program through its Agency of Natural Resources (“ANR”). Under Vermont Law, ANR has primary responsibility for preventing water pollution, administering the NPDES program, and issuing and enforcing NPDES discharge permits. The Vermont Department of Environmental Conservation (“DEC”) is the department within ANR that carries out many of ANR’s duties delegated under the CWA.

Under Section 402(b), States may apply to EPA for authorization to operate the NPDES program for discharges to navigable waters within their jurisdiction. Section 402(c)(2) of the CWA, 33 U.S.C. § 1342(c)(2), requires that authorized State permit programs remain in compliance with the requirements of Section 402 and guidelines that EPA promulgated for State permit programs under Section 304(j)(2) of the Act, 33 U.S.C. § 1314(j)(2). If the Regional Administrator determines that a State is not administering its permit program in accordance with these statutory and regulatory requirements, Section 402(c)(3) authorizes EPA withdraw approval of that program. EPA’s regulations provide that it may withdraw program approval in the following circumstances:

1. Where the State's legal authority no longer meets the requirements of [40 C.F.R. Part 123], including:
 - i. Failure of the State to promulgate or enact new authorities when necessary [40 C.F.R. Part 123.63(a)(1)(i)]; or
 - ii. Action by a State legislature or court striking down or limiting State authorities [40 C.F.R. Part 123.63(a)(1)(ii)].
2. Where the operation of the State program fails to comply with the requirements of [40 C.F.R. Part 123], including:
 - i. Failure to exercise control over activities required to be regulated under this part, including failure to issue permits [40 C.F.R. Part 123.63(a)(2)(i)];
 - ii. Repeated issuance of permits which do not conform to the requirements of this part [40 C.F.R. Part 123.63(a)(2)(ii)]; or
 - iii. Failure to comply with the public participation requirements of this part [40 C.F.R. Part 123.63(a)(2)(iii)].
3. Where the State's enforcement program fails to comply with the requirements of [40 CFR part 123], including:

- i. Failure to act on violations of permits or other program requirements [40 C.F.R. Part 123.63(a)(3)(i)];
 - ii. Failure to seek adequate enforcement penalties or to collect administrative fines when imposed [40 C.F.R. Part 123.63(a)(3)(ii)]; or
 - iii. Failure to inspect and monitor activities subject to regulation [40 C.F.R. Part 123.63(a)(3)(iii)].
4. Where the State program fails to comply with the terms of the Memorandum of Agreement required under § 123.24 (or, in the case of a sewage sludge management program, § 501.14 of this chapter) [40 C.F.R. Part 123.63(a)(4)].
 5. Where the State fails to develop an adequate regulatory program for developing water quality-based effluent limits in NPDES permits [40 C.F.R. Part 123.63(a)(5)].

Under 40 C.F.R. § 126.63(b)(1), proceedings to withdraw a state’s permit program may commence either at the initiative of the Administrator, or in response to a petition from an interested person alleging that the State program fails to comply with requirements as set forth in 40 C.F.R. § 123.63. There is no mechanism under the CWA for partial program withdrawal should that state fail to cure the programmatic and enforcement deficiencies identified by EPA and set out in more detail below. Accordingly, if EPA finally determines that the state is failing to implement the CAFO program in compliance with the Act, EPA will commence the process to assume administration of the entire NPDES program in Vermont.

Concentrated Animal Feeding Operation Regulation in Vermont

Concentrated animal feeding operations (“CAFOs”) are point sources subject to the Federal NPDES permitting requirements in 40 C.F.R. §§ 122.23, 123.25. For purposes of determining whether multiple farms are a single CAFO, two or more animal feeding operations under common ownership are considered one if they adjoin each other or if they use a common system or area for the disposal of waste. 40 C.F.R. § 122.23(b)(2). A CAFO must not discharge unless the discharge is authorized by a NPDES permit. 40 C.F.R. § 122.23(d). Once a facility is designated as a CAFO, the NPDES requirements apply to (1) all animals at the operation, and all manure, litter, and (2) process water generated by those animals or the production of those animals. This includes a CAFO’s discharge of manure via land application to areas under the CAFO’s control to waters of the United States, except where such discharge is an agricultural stormwater discharge as provided in 33 U.S.C. § 1362(14). 40 C.F.R. § 122.23(e). Precipitation-related discharge of manure from land areas under the control of a CAFO is an agricultural stormwater discharge only where a CAFO’s manure has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, as specified in § 122.42(e)(1)(vi)-(ix). A CAFO’s uncontaminated return flows from irrigated agriculture is the only other exemption. 40 C.F.R. § 122.3(f).

As the sole agency with delegated authority, ANR is responsible for the administration of a CAFO program that is in accordance with the CWA and implementing regulations. However, because of a legislatively-created division of authority, ANR’s water pollution authority is limited with respect to agriculture. Vermont law divides jurisdiction over agricultural water quality between ANR and AAFM: specifically, ANR has jurisdiction over agricultural *point source* pollution only, while AAFM’s jurisdiction is broader, including oversight over agricultural *non-point source* pollution. The agencies have managed the division of jurisdiction through Memoranda of Understandings (“MOUs”), dating back to

the 1990s, and most recently updated in 2009 and 2017. While the parties to this agreement had hoped this interagency configuration would yield dividends by providing a holistic framework to control agricultural pollution, in practice, the application of this dual authority over agricultural water quality has resulted in ANR's nonperformance of delegated CWA duties, including the oversight of CAFO point sources. Ultimately, ANR has not fully and effectively administered the NPDES program in accordance with the CWA.

2008 Petition to Withdraw Vermont's Authorized NPDES Program

On August 14, 2008, the Vermont Law School Environmental and Natural Resources Law Clinic ("ENRLC") petitioned EPA on behalf of CLF to withdraw approval for the State of Vermont to administer the NPDES program based on allegations related to the implementation and enforcement of the program.

EPA Region 1 investigated the issues raised in the Petition and collaborated with DEC, ENRLC, and the Petitioner to better understand the issue landscape and explore potential solutions. The 2008 Petition identified many issues with the state's NPDES permitting and enforcement programs. With respect to the CAFO program, the issues were centered around the failure to issue NPDES permits and to take enforcement actions against CAFOs, including those that have been found to have discharged. To resolve the petition, the Parties engaged in collaborative discussions that resulted in an Interim Response and Corrective Action Plan ("the Corrective Action Plan") sent by EPA to ENRLC, CLF, and DEC in July 2013. The Corrective Action Plan for the CAFO permitting deficiencies stated that, "DEC will require permits of CAFOs that have discharged in the past, and that are therefore expected to discharge in the future, unless the conditions that led to the discharge are remedied." In addition, the Corrective Action Plan required DEC to finalize a general permit covering medium CAFOs by June 21, 2013, and to begin issuing individual permits for large and designated small facilities. The Corrective Action Plan for the enforcement and compliance deficiencies included commitments that DEC would inspect a certain number of farms each year; that DEC would be the lead Vermont enforcement agency in any case involving a CAFO violation; and that DEC will require CAFO's to cease any unlawful discharges to surface waters as soon as possible. The Corrective Action Plan noted that DEC may consult with AAFM during inspections and enforcement actions involving CAFOs, but as between the two agencies, DEC shall be the decision maker regarding the extent of CWA violations, the appropriate form of enforcement response, and the timing and nature of the requirements to achieve compliance. In December 2013, EPA Region 1 issued a formal response to the Petition concluding that if the Corrective Action Plan was implemented it would address the deficiencies identified by the petition. As further explained below, ANR has failed to follow through on its commitments as identified in the 2013 Corrective Action Plan.

2022 Petition to Withdraw Vermont's Authorized NPDES Program

On March 16, 2022, CLF, VNRC, and LCC petitioned EPA, alleging that ANR has failed to administer the NPDES permit program in accordance with the CWA. The Petitioners organized their allegations around regulatory factors that support withdrawal of delegation of a state's NPDES program, including "a state's failure to exercise control over activities required to be regulated" under Section 402 of the CWA, and a state's failure "to inspect and monitor activities subject to regulation." Specifically, the Petitioners assert that ANR has failed to exercise control over agricultural point source discharges, and

it has failed to inspect and monitor agricultural point source discharges that result from the application of nutrients, manure, and other soil amendments to farmland. The Petition asserts that ANR's failure to administer the NPDES permit program is rooted in the complex shared responsibilities between ANR and AAFM for Vermont's agricultural water pollution.

The 2022 Petition included numerous allegations which supported the petitioner's program withdrawal request. Upon investigating the allegations contained in the petition, as supplemented by its independent inquiry, it is manifest that ANR is not managing, and currently does not have the staff capacity to manage, its authorized program in a manner that is consistent with the requirements of the CWA and 40 C.F.R. Part 123. Dual authority over the regulation of agricultural stormwater has existed in Vermont for decades now and has failed to ensure compliance with the CWA. EPA has identified the following categories where Vermont has failed to fulfill its delegated CWA responsibilities and summarized them briefly below.

CONCLUSIONS

Failure to Conform State Requirements to NPDES Regulations: Existing ANR CAFO regulations are not consistent with the 2008 Federal CAFO regulations in numerous respects. ANR must amend its regulations to be consistent with Federal regulations. EPA has pointed out these deficiencies to ANR.

Failure to Issue CAFO NPDES Permits. As of the writing of this letter, no individual CAFO permit has been issued to a facility even though there are 37 large CAFOs within the state, 104 medium, and 1,000 small size farms that are potential CAFOs. CAFOs must not discharge unless the discharge is authorized by an NPDES permit, as per 40 C.F.R. § 122.23(d). While there is an existing Medium CAFO NPDES General Permit, no farms have applied for coverage under this permit.

ANR is the delegated entity authorized to implement NPDES permit in Vermont. ANR is required to administer permits for the CAFOs that discharge to waters of the United States. However, Vermont's current approach for regulating discharges from farms relies on the implementation of its Required Agricultural Practices ("RAPs") (6 V.S.A. §§ 4810 and 4810a) by AAFM. Current practice within the state allows an operator to "fix" the discharge when a discharge is observed during an inspection. This approach does not include a requirement to obtain an NPDES permit, nor does it result in any type of enforcement action and is inconsistent with the requirements of the CWA. An NPDES permit is required at the time of discharge. A foundational concept rooted in the CWA and the NPDES regulations is that discharges, when they occur, must meet certain minimum technology and water quality-based limits. Discharges from large and medium CAFOs are subject to technology-based effluent limitations, either based on the effluent limit guidelines or a Best Professional Judgement ("BPJ")/Best Available Technology ("BAT") evaluation. These are minimum requirements that must be met when there is a discharge. A discharge that occurs without a permit authorizing that discharge is a violation of the CWA. There is ample evidence in the record that farms are discharging pollutants to waters of the United States; thus, these farms require NPDES permits, which ANR is failing to issue notwithstanding a commitment to do so pursuant to the agreed upon July 18, 2013, Corrective Action Plan issued by EPA which resolved the 2008 Petition. In summary, the failure of ANR to issue and require coverage under NPDES permits that contain the proper requirements demonstrates that the operation of the state's program fails to comply with the requirements of 40 C.F.R. Part 123.

Failure to Require and Properly Oversee Nutrient Management Plans (NMPs) for regulated CAFOs. To be eligible for the agriculture stormwater exemption under the regulations, farms must have and maintain an up-to-date nutrient management plan (“NMP”) based on site-specific data from the farm. Federal regulations also require the NMP be attached to the NPDES permit, available for public review (See 40 C.F.R. Part 122.23(h)) and reviewed by the NPDES permitting authority on a regular basis. Stormwater discharges from production areas that do not follow a properly developed and reviewed NMP are in violation of the CWA. ANR does not provide sufficient review, enforcement, and oversight of NMPs. EPA expects ANR to review NMPs before site visits, and during the site visit, to verify the following: that there is adequate waste storage; application rates are calculated as required by 40 C.F.R. Part 412.4(c)(2); protocols are documented and implemented for manure, process wastewater and soil testing; records document the implementation of NMP elements (40 C.F.R. Part 122.23(e)); equipment is regularly inspected for leaks (40 C.F.R. 412.4(c)(4)); setbacks and buffers are in accordance with federal regulations (40 C.F.R. Part 412.4(c)(5)(i) and (ii)); and there is proper management of mortalities (40 C.F.R. Part 122.42(e)(1)(ii)). A review of state inspection records and observations by EPA during site visits indicates that ANR is failing to perform oversight of NMPs. ANR is not reviewing the NMPs prior to inspections, requesting information during site inspections to verify they are up to date and accurate, documenting deficiencies or requiring farms to modify the NMP, or taking enforcement for failure to do so. In addition, ANR does not attach the NMP to the NPDES permit or provide an opportunity for public review. ANR is not observing mortality disposal sites to ensure runoff from this part of the production area (40 C.F.R. Part 412.2(h)) is not entering surface waters (40 C.F.R. Part 412.37(a)(4)). In addition, ANR is failing to take enforcement actions to address these issues.

Insufficient review and oversight of NMPs is resulting in farms applying manure at inappropriate application rates, in fields that are unsuitable (frozen ground or saturated soils) and in locations that are not sufficiently protective (buffer zones must meet requirements of 40 C.F.R. § 412.4(c)(5)(i) and (ii)). In summary, the failure to review and oversee the proper development and implementation of NMPs is resulting in ongoing and significant discharges in violation of the CWA.

Failure to Enforce and Monitor Compliance from CAFOs: ANR’s delegated obligations regarding the enforcement and compliance monitoring of the CAFO program are not being met (40 C.F.R 123.26 and 40 C.F.R 123.27). In general, ANR fails to conduct sufficient and timely inspections and fails to take appropriate enforcement actions to deter or mitigate violations. This is because ANR largely relies on AAFM to be their eyes and ears on the ground. In fact, state statute codifies a sub-delegation where AAFM inspects all farms at frequencies determined by farm size, AAFM enforces nutrient management planning requirements, and AAFM only refers any observed discharges to surface water to ANR. This arrangement often breaks down. Further, ANR lacks sufficient resources to expeditiously inspect farms in response to complaints from the public or referrals from AAFM. EPA’s conclusions are based on a review of the materials supplied by the Petitioners, information provided by ANR and AAFM concerning complaints and referrals, and independent inspections conducted by EPA in 2023 and 2024.

EPA reviewed information from ANR and AAFM concerning 113 complaints from February 2021 to January 2023. Based on the records examined by EPA, there are numerous examples of ANR or AAFM inspectors observing discharges to surface waters. EPA found that a significant number of complaints

(26 complaints, or 23%) were unresolved. In addition, despite information in the files including photos and written documentation of discharges, a large number of the complaints (51 complaints, or 45%) were concluded as no violation found and no NPDES permits were issued. Finally, very few of the complaints (8 complaints, or 7%) were noted as violations of the CWA. Generally, when discharges were observed, the facility was allowed to correct the violation without additional enforcement actions or penalties. Some actions have been forwarded to the state attorney general, but the status of these actions is unclear. Based on the information provided to EPA, it is unclear that ANR is appropriately tracking and communicating responses to complaints and whether there are repeated violations. In addition to a review of complaints, between May 2023 and May 2024, EPA conducted ten (10) CAFO NPDES farm inspections in VT. Several of these farms had evidence of ongoing or recent discharges that appear unaddressed.

ANR has been the legally delegated entity under the CWA to implement the NPDES program for over 40 years. This delegation of authority requires ANR to implement an acceptable CAFO regulatory program. ANR is not authorized to further delegate these regulatory responsibilities. Based on EPA's review of the facts in this matter, ANR is not sufficiently and appropriately implementing its CAFO regulatory program. ANR's failure is caused by: (1) the division of Vermont's agricultural water quality program between ANR and AAFM, which has resulted in ANR's nonperformance of delegated duties; and (2) insufficient resources allocated to administer ANR's CAFO permitting and enforcement program. Based on these considerations, the consolidation of the CWA regulatory requirements regarding permitting and enforcement of CAFOs into ANR as the delegated entity under the CWA is the only workable solution. ANR must develop a plan and timeframe for accomplishing necessary regulatory and/or statutory changes to bring ANR into compliance with its regulatory obligations. Failure to address these changes will compel EPA to move towards withdrawal of the entire NPDES program, as there is no allowance under the Act for partial withdrawal.

RESOLUTION

To work towards resolving these failures, EPA engaged in a series of settlement discussions with ANR and the Petitioners. ANR shared four alternatives to resolve the allegations raised in the 2022 Petition. The four alternatives were: (1) Concurrent Agricultural Regulatory Authority; (2) Bifurcated Agricultural Regulatory Authority; (3) Consolidated Agricultural Regulatory Authority with ANR; and (4) EPA becomes Clean Water Act Regulatory Authority in Vermont. EPA reviewed each option presented through the lens of compliance with the delegated program authority of the CWA. The only viable option of those presented above that allows the state to maintain delegation and that satisfies the Clean Water Act requirements is option 3, consolidated agricultural regulatory authority with ANR.

Therefore, to expeditiously resolve ANR's failure to carry out its obligations as the entity authorized to administer the NPDES program and avoid program removal, ANR needs to present a proposed corrective action plan and timeframe for resolution of the issues to EPA on or before December 5, 2024 (90 days from receipt of this letter). The corrective action plan must meet the following requirements: 1) ANR personnel must inspect all potentially jurisdictional farms to determine if a CAFO permit is required; 2) ANR personnel must review nutrient management plans and issue CAFO permits consistent with state and federal requirements; 3) ANR must comprehensively track permitting, monitoring and enforcement actions; 4) ANR must enforce against farms that are discharging without a permit; 5) ANR

must have sufficient personnel to fully implement the foregoing requirements in a timely manner; 6) ANR must seek the necessary statutory and regulatory authority to fully implement the CWA requirements; and 7) ANR must include a reasonable but expeditious timeline, including a date certain for the completion of a corrective action plan. EPA expects to review and, if satisfactory, approve the plan quickly given the ongoing and unauthorized discharges from CAFOs in Vermont, with the resultant adverse impacts on water quality. EPA expects that ANR will immediately execute the plan as approved, and EPA will consult with ANR as necessary and appropriate.

If you have any questions, please contact Thelma Murphy at 617-918-1615 or murphy.thelma@epa.gov.

Sincerely,

David W. Cash, Administrator
EPA Region 1, Boston, MA

cc: Elena Mihaly, Vice President and Director, CLF
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