



Summary of CLF, VNRC, and LCC’s Petition to EPA for Corrective Action or Withdrawal of Vermont’s Authorization to Administer the NPDES Program

Legal background to the Petition:

In 1974, the U.S. Environmental Protection Agency (“EPA”) granted the Vermont Agency of Natural Resources (“ANR”) authority to administer the Federal Clean Water Act’s (“CWA”) National Pollution Discharge Elimination System (“NPDES”) permit program in Vermont. Under the NPDES program, ANR must ensure that facilities, including farms, do not discharge pollutants from a *point source*¹ to a surface water without a permit. The Vermont General Assembly, however, limited ANR’s ability to fulfill its duty by dividing jurisdiction over agricultural water quality between two state agencies. State law grants ANR jurisdiction over agricultural *point source* pollution but requires ANR to delegate agricultural *non-point source* pollution control and regulation to the Vermont Agency of Agriculture, Food, and Markets (“AAFM”). This jurisdictional split is based on a legal fiction, not on farming’s realities.

ANR and AAFM have managed their division of responsibilities by designing a system of interagency referrals and consultations. AAFM conducts the vast majority of on-farm inspections and investigations. If AAFM identifies evidence of an agricultural point source discharge, it must immediately notify ANR. EPA allows this arrangement (1) because the NPDES program does not require ANR to regulate agricultural non-point source pollution and (2) because ANR and AAFM agree that ANR is the sole decision-maker regarding the existence of a point source and the appropriate form of enforcement response.

If a state NPDES program does not satisfy the CWA, then any person may petition EPA to require corrective action or to withdraw NPDES authorization. Grounds for withdrawal include failure to exercise control over point source discharges and failure to monitor point source discharges.

Vermont’s NPDES program does not meet the CWA’s standards for the following reasons:

1. ANR and AAFM’s broken relationship and inability to collaborate prevents ANR from exercising control over agricultural point source discharges.
 - *ANR has concluded that its broken relationship with AAFM prevents it from controlling agricultural point source discharges.* In 2016 and 2017, ANR and AAFM hired consultants to improve their relationship. The consultants observed that “[s]hared articulation of outcomes and the priorities/values driving the methods for achieving outcomes, was lacking.” In 2020, Secretary of ANR Julie Moore concluded that ANR and AAFM had made too little progress to justify continued collaboration on agricultural water quality. She circulated a memo within the administration proposing to transfer all agricultural water quality enforcement to ANR. When the administration declined to act

on her suggestion, Secretary Moore asked that further study to improve the agencies' relationship not be imposed since she had "no reason to believe that somehow this time would be different."

¹ Under the CWA, a point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, [or] concentrated animal feeding operation . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Common agricultural point sources include: manure spreading vehicles; excavating machinery; swales; pipes; ditches; feed, manure, and silage piles; collection and drainage systems; and manure lagoons.

- *AAFM disagrees with ANR on what constitutes a point source.* ANR depends on AAFM to refer evidence of agricultural point source discharges identified during farm inspections and investigations. Because AAFM does not agree with ANR on what constitutes a point source, ANR cannot rely on AAFM to make required referrals.
- *AAFM routinely ignores ANR’s status as the sole decisionmaker regarding the existence of a point source and the appropriate form of enforcement response.* Instead, AAFM often attempts to impose its own interpretation or preferred course of action.
- *AAFM regularly fails to refer evidence of point source discharges to ANR.*
- *AAFM routinely fails to refer agricultural point source discharges to ANR in a timely manner.* Although AAFM must “immediately notify ANR of any complaint that it receives or field inspection report that relates to an alleged [point source discharge of agricultural waste],”² AAFM often delays referrals for months. As a result, point source discharges continue unabated & changing conditions alter/eliminate important evidence.
- *AAFM routinely fails to finalize farm inspection and investigation reports until months after the inspections and investigations.* AAFM is required to document investigations within 30 days³ to facilitate ANR enforcement. Instead, AAFM averaged 177 days to finalize reports documenting 2019 farm inspections. For 14 of those inspections, AAFM waited more than a year. For 4 inspections, AAFM delayed more than 500 days.
- *AAFM’s hostility towards ANR and the resulting inconsistent communication confuses farmers, undermining ANR’s efforts to control agricultural point source discharges.*

2. ANR fails to monitor agricultural point source discharges that result from the over-application of manure, fertilizer, and other soil amendments to farmland. Vermont law requires that farms implement field-by-field nutrient management plans (“NMPs”). NMPs are budgets of nutrients that farms use to guide the application of soil amendments, like manure and fertilizer. When properly implemented, NMPs prevent soil amendments from running off fields and into surface waters. Critically, NMPs also allow ANR to determine whether runoff from a farm is a point source discharge prohibited by the CWA; if a farm applies soil amendments in excess of its NMP, then runoff is likely a point source discharge. AAFM identified NMP-related deficiencies during 76 percent of inspections conducted on Vermont’s Large, Medium, and Certified Small Farm Operations in 2019, 2020, and 2021. AAFM nonetheless rarely uses formal enforcement mechanisms to ensure that farms prepare and properly implement NMPs. Moreover, AAFM rarely alerts ANR when farms over-apply soil amendments to farmland. Thus, ANR can’t properly monitor for point source discharges.

Request: CLF, VNRC, and LCC ask EPA to require corrective action or withdraw Vermont’s authorization to administer the NPDES program.

Petitioners request EPA to initiate proceedings⁴ to order Vermont to take corrective actions that cure the deficiencies in the state’s NPDES program, such as enacting legislation that grants ANR exclusive authority over agricultural water pollution. If Vermont fails to take corrective actions, CLF asks EPA to withdraw Vermont’s NPDES authority.

² 2017 Memorandum of Understanding between AAFM and ANR Regarding Implementation and Enforcement of Agricultural Water Quality Programs § 6(D)(2).

³ *Id.* § 6(D)(4).

⁴ *See* 33 U.S.C. § 1342(c); 40 C.F.R. §§ 123.63–64.