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VIA ELECTRONIC MAIL

JOINT PETITION FOR CORRECTIVE ACTION OR WITHDRAWAL OF THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM DELEGATION FROM THE STATE OF VERMONT

Conservation Law Foundation ("CLF"), Vermont Natural Resources Council ("VNRC"), and Lake Champlain Committee ("LCC") (collectively "Petitioners") hereby petition the United States Environmental Protection Agency ("EPA") to initiate proceedings pursuant to Clean Water Act ("CWA") Section 402(c)(3) and its implementing regulations at 40 C.F.R. §§ 123.63, 123.64. Vermont has failed to administer the National Pollutant Discharge Elimination System ("NPDES") permit program in accordance with the CWA. Specifically, the state 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. For the following reasons, Petitioners request that EPA either order Vermont to take necessary corrective actions to cure the serious deficiencies described below or withdraw program approval.

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INTRODUCTION

The Vermont Agency of Natural Resources ("ANR") is not properly administering the CWA in Vermont. Hostility wrought by the Vermont Agency of Agriculture, Food, and Markets ("AAFM") against ANR undermines Vermont's NPDES program. The resulting deficiencies are so serious that they warrant program withdrawal unless and until Vermont undertakes concrete corrective actions.

In 1974, EPA granted ANR authority to administer the CWA's NPDES program in Vermont.[1, 2] ANR accepted responsibility for preventing facilities of all kinds from discharging pollutants into Vermont's waters.[3] The Vermont General Assembly, however, limited ANR's ability to fulfill its duty by dividing jurisdiction over agricultural water quality between two state agencies. Vermont law grants ANR jurisdiction over agricultural *point source* pollution but requires ANR to delegate agricultural "*non-point* source pollution control program planning, implementation, and regulation" to AAFM.[4] This jurisdictional split is based on a legal fiction—the distinction between point and non-point sources—that does not reflect farming's realities.

ANR and AAFM have managed their division of responsibilities by designing a cumbersome system of interagency referrals and consultations. AAFM conducts the vast majority of on-farm inspections and investigations.[5] If AAFM identifies evidence of an agricultural point source discharge, it must "immediately notify ANR . . . ."[6] However, "there is often no bright line that exists between point and non-point sources in agricultural settings . . . ."[7] When unclear cases arise, the agencies agree that "ANR shall be the decision-maker regarding the existence of a point source, the extent of violations under the State's federally delegated program, the appropriate form of enforcement response, and the time and nature of requirements to achieve compliance."[8] The system has never worked. It is both "confusing and highly flawed . . . ."[9]

Vermont's decision to divide jurisdiction between ANR and AAFM assumed that the two agencies would join willingly as cooperative regulatory partners. Instead, AAFM treats ANR as

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[1] *NPDES State Program Authority*, EPA, https://www.epa.gov/npdes/npdes-state-program-authority (last visited Dec. 15, 2021).

[2] Unless otherwise noted or available online in an electronic database, the source documents for this Petition are on file with CLF. Most sources were obtained through public records requests with ANR and AAFM. Petitioners would like to express appreciation to the staff members who facilitated those requests. The documents can be produced for EPA or other interested members of the public upon request. Petitioners paid $821.46 in public records fees to obtain copies of documents from AAFM. ANR provided all copies free of charge.

[3] *See* 33 U.S.C. § 1342(a)(1); *id.* § 1362(12) (defining "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source").

[4] *Id.* § 1259(i) (emphasis added).

[5] *See* 6 V.S.A. §§ 4851(h), 4858(b)(3); AAFM, REQUIRED AGRICULTURAL PRACTICES RULE FOR THE AGRICULTURAL NONPOINT SOURCE POLLUTION CONTROL PROGRAM § 4.3(b) (2018) [hereinafter "RAPs"].

[6] RAPs, *supra* note 5, § 6(D)(2).

[7] Attachment 1, Memorandum from Julie Moore, Secretary, ANR, to Suzanne Young, Secretary, Agency of Administration, and Mike Smith, Secretary, Agency of Human Resources Re: Proposal to Restructure ANR AAFM Water Quality Staff (Oct. 9, 2020) [hereinafter "2020 ANR Memo"]; *see* Email from Julie Moore, Secretary, ANR, to Anson Tebbetts, Secretary, AAFM (Oct. 9, 2020, 10:30 EDT).

[8] RAPs, *supra* note 5, § 6(C)(4); *see also id.* § (5)(A)(1) ("AAFM shall share with ANR information regarding discharges to waters, and ANR shall make any determination as to whether a discharge to waters is or may be a point source discharge").

[9] Email from Sean McVeigh, Chief Environmental Enforcement Officer, DEC, to David Huber, Chief Policy Enforcement Officer, AAFM (July 8, 2019, 17:22 EDT).

its rival. Moreover, consultants hired by ANR and AAFM described the agencies as pursuing "divergent missions," lacking a "[s]hared articulation of outcomes," and suffering from a "[h]istory of errors . . . and misunderstandings . . . ."[10]

The interagency collaboration on which Vermont's NPDES program depends is broken: AAFM does not agree with ANR on what constitutes a point source; AAFM routinely ignores ANR's status as the sole decision maker regarding the existence of a point source and the appropriate form of enforcement response; AAFM regularly fails to refer evidence of agricultural point source discharges to ANR; AAFM routinely fails to timely refer evidence of agricultural point source discharges to ANR; and AAFM routinely fails to finalize farm inspection and investigation reports until months after the inspection or investigation took place. As a result, illegal discharges pollute Vermont's waters.

Recognizing the interagency conflict, Secretary of ANR Julie Moore proposed transferring "AAFM staff responsible for inspections and enforcement to ANR to create a singular program responsible for water quality regulation on Vermont farms."[11] The Vermont Agency of Administration declined to act on her suggestion.

All Vermonters are harmed by AAFM's stubborn rivalry with ANR, including farmers. According to one representative of the farm community, Vermont's "farmers get buffeted, not knowing where to go, not knowing who to talk to. They're getting caught in the middle."[12] Vermont's farmers should not be caught in regulatory crossfire. Under the Lake Champlain Total Maximum Daily Load, farmers are responsible for reducing the amount of phosphorus runoff from farms to Lake Champlain by 143.3 metric tons per year.[13] Already, farmers' collective efforts have reduced phosphorus loading by 33.28 metric tons per year.[14] As they continue to work towards meeting Vermont's water quality goals, farmers and all Vermonters need to work with a well-functioning state government capable of delivering regulatory clarity.

Instead of delivering efficiency, clarity, clean water, and a state NPDES program that conforms to the CWA's requirements, Vermont falls short. Unless Vermont swiftly takes corrective action to reform its NPDES program, including creating a singular program within ANR responsible for water quality regulation on Vermont's farms, EPA must withdraw delegation. Specifically, Vermont's NPDES program satisfies program withdrawal criteria (2)(i) and (3)(iii) under 40 C.F.R. § 123.63(a): EPA "may withdraw program approval . . . [w]here the operation of the State program fails . . . to exercise control over activities required to be regulated under [the CWA's NPDES program]";[15] and EPA "may withdraw program approval . . . [w]here the State's

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[10] Center for Achievement in Public Service, Summary Report on Consulting Services: AAFM/DEC Joint Water Project (2017) [hereinafter "CAPS"]; *see* email from Julie Moore, Secretary, ANR, to Susanne Young, Secretary, Vermont Agency of Administration (Nov. 6, 2020, 06:25 EDT).

[11] 2020 ANR Memo, *supra* note 7.

[12] *Task Force to Revitalize the Vermont Dairy Industry* (Nov. 30, 2021) (statement of Jackie Folsom, Member, Task Force to Revitalize the Vermont Dairy Industry and Legislative Director, Vermont Farm Bureau), https://www.youtube.com/watch?v=JusVwGws53I.

[13] EPA, PHOSPHORUS TMDLS FOR VERMONT SEGMENTS OF LAKE CHAMPLAIN 18, 44 (2016) (establishing a total phosphorus allocation for agricultural production areas and agricultural land of 118.21 metric tons per year and identifying a phosphorus baseload from agricultural production areas and agricultural land of 261.5 metric tons per year).

[14] *Clean Water Portal*, ANR, https://anrweb.vt.gov/DEC/cleanWaterDashboard/ (last visited Jan. 27, 2022).

[15] 40 C.F.R. § 123.63(a)(2)(i).

enforcement program fails . . . to inspect and monitor activities subject to regulation [under the CWA's NPDES program.]"[16]

DISCUSSION

I. EPA GRANTED ANR AUTHORITY TO ADMINISTER THE CWA'S NPDES PROGRAM IN VERMONT, AND VERMONT DESIGNED A STATE PROGRAM THAT DEPENDS ON CLOSE COLLABORATION BETWEEN ANR AND AAFM.

The CWA authorizes EPA to delegate the administration of the NPDES permit program to state agencies.[17] State NPDES programs are required to ensure that facilities do not discharge pollutants from a point source to a navigable water without a permit.[18] State programs must be as stringent as their federal counterpart,[19] and they must "at all times" meet the CWA's exacting standards.[20]

In 1974, EPA granted ANR authority to administer the CWA's NPDES Program in Vermont.[21] ANR is Vermont's lead water-protection agency. Accordingly, Vermont law assigns ANR primary responsibility for preventing water pollution,[22] administering Vermont's NPDES program, and issuing NPDES discharge permits.[23] The Vermont Department of Environmental Conservation ("DEC"), a department within ANR, carries out many of ANR's duties under the CWA.

ANR's power to protect Vermont's waters is limited with respect to agriculture. Vermont law requires ANR to delegate agricultural "non-point source pollution control program planning, implementation, and regulation" to AAFM.[24] Thus, jurisdiction over water pollution that originates on Vermont's farms is split: ANR has jurisdiction over point source discharges,[25] and AAFM has jurisdiction over non-point source discharges.

The CWA defines "point source" as "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 [("CAFO")][26] . . . from which pollutants are or may be discharged."[27] Common agricultural point sources include manure spreading vehicles;[28] excavating machinery;[29] swales, pipes, and ditches;[30] piles of feed,

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[16] 40 C.F.R. § 123.63(a)(3)(iii).
[17] 33 U.S.C. § 1342(b); 40 C.F.R. pt. 123.
[18] *See* 33 U.S.C. § 1342(a)(1); *id.* § 1362(12) (defining "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source").
[19] *Id.* § 1342(b); 40 C.F.R. pt. 123.
[20] 33 U.S.C. § 1342(c)(2); 40 C.F.R. § 123.1(f).
[21] *NPDES State Program Authority*, EPA, *supra* note 1.
[22] *See* 10 V.S.A. chs. 47–48.
[23] *Id.* § 1263.
[24] *Id.* § 1259(i).
[25] *Id.* §§ 1259, 1263(g).
[26] *See* 40 C.F.R. § 123.23(b)–(c) (defining what constitutes a CAFO).
[27] 33 U.S.C. § 1362(14).
[28] *Concerned Area Residents for the Env't v. Southview Farms*, 34 F.3d 114, 119 (2d Cir. 1994).
[29] *Avoyelles Sportsmen's League, Inc. v. March*, 715 F.2d 897, 922 (5th Cir. 1983).
[30] *Southview Farms*, 34 F.3d at 118–19.

manure, or silage;[31] collection and drainage systems;[32] and manure lagoons.[33]

The CWA prohibits facilities, including farms, from discharging pollutants from a point source to a surface water without a NPDES permit.[34] A discharge occurs whenever a pollutant, including any agricultural waste,[35] is added to a surface water by a point source.[36] A point source does not need to release pollutants directly into a surface water for a discharge to occur.[37] Rather, the pollutants need only be "fairly traceable from the point source to a navigable water,"[38] such as when manure collected in a tanker is spread on a field and runs off the field into a river.[39]

ANR and AAFM's shared responsibility for agricultural water pollution exposes Vermont's farms to a complex regulatory environment. In keeping with its NPDES delegation, ANR has authority to regulate agricultural point sources, issue NPDES discharge permits to farms and CAFOs, and enforce water quality regulations against farms that discharge from a point source.[40]

AAFM, by contrast, regulates agricultural non-point source pollution and administers state programs designed to prevent point source discharges from happening in the first place.[41] AAFM is consequently responsible for the development and implementation of Vermont's Required Agricultural Practices ("RAPs"), a rule that applies standards to agricultural activities that "have a potential for causing agricultural pollutants to enter . . . waters of the State . . . ."[42] Farms that comply with the RAPs are "presumed to not have a discharge of agricultural pollutants to waters of the State."[43] If a farm complies with the RAPs but nonetheless creates "the potential for agricultural pollutants to enter the waters of the State," AAFM must prescribe additional conservation practices.[44] Moreover, a farm that discharges from a point source is subject to enforcement by ANR whether or not it complies with the RAPs.

Vermont law further directs AAFM to issue permits to Large Farm Operations ("LFOs")[45] and

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[31] *See Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004) ("The piles of debris in this case collected water, which then flowed into the stream. They are, therefore, point sources within the meaning of the CWA.").
[32] *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979).
[33] *See Tenn. Clean Water Network v. Tenn. Valley Auth.*, 273 F.Supp.3d 775, 827–31 (M.D. Tenn. 2017) ("discernible, confined, and discrete ponds that receive wastewater" are point sources).
[34] *See* 33 U.S.C. § 1342(a)(1); *id.* § 1362(12).
[35] *Id.* § 1362(6).
[36] *See id.* § 1362(12) (defining "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source").
[37] *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737, 749 (holding that the CWA applies where the pollutants originate from a point source, "are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water," and reach navigable waters in levels that "are more than *de minimis*.").
[38] *Id.*
[39] *Southview Farms*, 34 F.3d at 119 ("Moreover, we agree with the appellants that, alternatively, the manure spreading vehicles themselves were point sources. The collection of liquid manure into tankers and their discharge on fields from which the manure directly flows into navigable waters are point source discharges under the case law.").
[40] 10 V.S.A. §§ 1259, 1263(g), 1274.
[41] *Id.* § 1259(i).
[42] 6 V.S.A. § 4810; *see* RAPs, *supra* note 5.
[43] 6 V.S.A. § 4810(b); *see* RAPs, *supra* note 5, § 3.1.
[44] 6 V.S.A. § 4810(b).
[45] *Id.* § 4851.

Medium Farm Operations ("MFOs").[46] LFOs and MFOs must comply with the RAPs.[47] Small Farm Operations ("SFOs") that meet certain criteria must also certify compliance with the RAPs.[48] SFOs that certify are known as Certified Small Farm Operations ("CSFOs"). AAFM must inspect LFOs for compliance with their permits and the RAPs at least once each year.[49] MFOs must be inspected by AAFM at least once every three years,[50] and CSFOs must be inspected at least once every seven years.[51] Petitioners' review of more than three years of inspection reports indicates that ANR rarely accompanies AAFM on inspections.

AAFM's LFO and MFO permits are not equivalent to NPDES CAFO discharge permits. Only ANR has the power to issue NPDES permits that allow discharges from CAFOs.[52] Consequently, DEC administers Vermont's CAFO program, and it recently reissued a revised draft Medium CAFO General Permit in 2021.[53]

Nonetheless, AAFM's LFO, MFO, and CSFO programs functionally displace DEC's CAFO program. Indeed, DEC did not hire a second employee to staff its CAFO program until April 2020.[54] ANR has never issued a NPDES discharge permit to a large CAFO in Vermont. Nor have any of Vermont's medium CAFOs ever sought coverage under the current 2013 General Permit.

Vermont law recognizes that ANR's responsibility under the CWA to exercise control over agricultural point source discharges could be compromised by AAFM's lead role regulating and inspecting farms. Vermont law consequently instructs the two agencies to cooperate "in implementing and enforcing programs, plans, and practices developed for reducing and eliminating agricultural non-point source pollutants and discharges from concentrated animal feeding operations."[55]

ANR and AAFM's relationship to carry out agricultural water quality enforcement is governed by a memorandum of understanding that the two agencies signed on March 17, 2017 ("2017 MOU").[56, 57] The 2017 MOU names ANR as the "lead State water quality agency, responsible

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[46] *Id.* § 4858.
[47] RAPs, *supra* note 5, § 3.1.
[48] 6 V.S.A. § 4871.
[49] *Id.* § 4851(h).
[50] *Id.* § 4858(b)(3).
[51] RAPs, *supra* note 5, § 4.3(b).
[52] *See* 10 V.S.A. § 1263(g).
[53] DEC, *General Permit 3-9100 for Discharges from Medium Concentrated Animal Feeding Operations*, NPDES Number: VTG910002.
[54] Email from Chris Gianfagna, CAFO Program Manager, DEC, to Peter Walke, Commissioner, DEC (Nov. 5, 2020, 11:24 EST).
[55] 6 V.S.A. § 4810(d).
[56] Memorandum of Understanding between the Agency of Agriculture, Food, and Markets and the Agency of Natural Resources Regarding Implementation and Enforcement of Agricultural Water Quality Programs (Mar. 17, 2017) [hereinafter "2017 MOU"].
[57] The 2017 MOU is the latest in a series of memoranda that have governed ANR and AAFM's relationship. At least three memoranda, signed in 1993, 1999, and 2007, precede it. *See* Memorandum of Understanding between Vermont Agency of Natural Resources, Department of Environmental Conservation & Vermont Department of Agriculture, Food & Markets Proposed MOU AAFM and ANR Concerning Agricultural Nonpoint Source Pollution Reduction Program (as per Act 261 of 1992) (Apr. 16, 1993); Memorandum of Understanding between Vermont Agency of Natural Resources, Vermont Department of Environmental Conservation and Vermont Department of Agriculture, Food and Markets Concerning CAFO and LFO Regulation (Oct. 14, 1999); Memorandum of

for the management and enforcement of the water pollution control statutes of the State."[58] It explains that ANR is responsible for investigating and enforcing against agricultural point source discharges[59] while AAFM is responsible for investigating and enforcing against agricultural non-point source discharges.[60] To facilitate these responsibilities, AAFM is required to "immediately notify ANR" of any complaint or inspection report that relates to an alleged point-source discharge.[61] Further, if ANR or AAFM determine that a farm "may be discharging to a water," then ANR must conduct an investigation to determine whether the farm requires a NPDES permit.[62]

The 2017 MOU emphasizes that ANR has exclusive authority to determine whether an agricultural point source exists. It states that "ANR shall be the decision-maker regarding the existence of a point source, the extent of violations under the State's federally delegated program, the appropriate form of enforcement response, and the time and nature of requirements to achieve compliance."[63] In 2013, EPA underscored this same point when it delineated DEC's and AAFM's authority with respect to CWA violations by CAFOs:

> 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 requirements to achieve compliance.[64]

In summary, ANR is responsible for operating a state NPDES program that "at all times" meets the CWA's standards,[65] including exercising control over agricultural point source pollution.[66] Vermont's choice to divide authority over agricultural water pollution, however, complicates ANR's task. ANR must cooperate closely with AAFM, the agency that is more often interacting with and inspecting Vermont's farms. If the two agencies' collaboration breaks down, then ANR cannot administer Vermont's NPDES program according to the CWA's requirements.

II. EPA MUST REQUIRE CORRECTIVE ACTION OR WITHDRAW APPROVAL OF A DELEGATED STATE NPDES PROGRAM IF THAT PROGRAM DOES NOT COMPLY WITH THE CWA.

EPA's responsibilities do not end when it grants a state authority to administer a NPDES program. The CWA requires EPA to oversee approved programs, and EPA must intervene when

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Understanding between Vermont Agency of Natural Resources and Vermont Agency of Agriculture, Food and Markets Concerning MFO, LFO, and CAFO regulation (Sept. 17, 2007).

[58] 2017 MOU, *supra* note 56, at § 1(A).

[59] *Id.* § 6(B)(1), (C)(2).

[60] *Id.* § 6(A)(1), (C)(1).

[61] *Id.* § 6(D)(2).

[62] *Id*. § 5(C)(1)(a)(ii).

[63] *Id.* § 6(C)(4); *see also id.* § (5)(A)(1) ("AAFM shall share with ANR information regarding discharges to waters, and ANR shall make any determination as to whether a discharge to waters is or may be a point source discharge").

[64] Letter from H. Curtis Spaulding, Regional Administrator, EPA to Laura Murphy, Vermont Law School, and Anthony Iarrapino, Conservation Law Foundation 8 (Dec. 13, 2013) (RE: Petition to withdraw approval for Vermont to administer the NPDES program) [hereinafter "2013 EPA Letter"].

[65] 33 U.S.C. § 1342(c)(2); 40 C.F.R. § 123.1(f).

[66] *See* 40 C.F.R. § 123.63(a)(2)(i).

a program no longer meets the CWA's requirements.[67]

The CWA requires that any "State permit program . . . shall at all times be in accordance with [Section 402 of the CWA] . . . ."[68] If the EPA Administrator determines that a state is not administering a program in accordance with Section 402 of CWA, then the state must take corrective action within 90 days.[69] If the state fails to do so, then the EPA "Administrator shall withdraw approval" of the program.[70]

EPA's regulations identify several circumstances that require it to withdraw approval from Vermont's NPDES program in this case. These include: (1) a state's failure "to exercise control over activities required to be regulated" under Section 402 of the CWA and (2) a state's failure "to inspect and monitor activities subject to regulation."[71]

Vermont's NPDES program no longer meets the CWA's requirements and satisfies both circumstances for withdrawal identified above. ANR fails to exercise control over agricultural point source discharges and fails to inspect and monitor agricultural point source discharges. EPA is therefore obliged to require Vermont to take corrective action or to withdraw Vermont's authority to administer the CWA's NPDES program in Vermont.

III. ANR AND AAFM'S BROKEN RELATIONSHIP AND AAFM'S UNWILLINGNESS TO COLLABORATE WITH ANR PREVENT ANR FROM EXERCISING CONTROL OVER AGRICULTURAL POINT SOURCE DISCHARGES (CRITERION 40 C.F.R. § 123.63(a)(2)(i)).

Vermont's NPDES program violates Section 402 of the CWA because ANR fails to exercise control over agricultural point source discharges.[72] Vermont's decision to divide authority between ANR and AAFM is the source of ANR's failure. AAFM treats ANR as its rival, vying with ANR for jurisdiction over agricultural water pollution. This undermines ANR's regulation of agricultural point source discharges, including by disputing ANR's authority to determine the existence of an agricultural point source and failing to refer evidence of point source discharges to ANR.

A. ANR and AAFM's relationship is permanently broken, and ANR has concluded that the rupture prevents it from controlling agricultural point source discharges.

ANR can control agricultural point source discharges only if it successfully collaborates with AAFM to overcome the practical difficulties created by the agencies' divided authority over agricultural water pollution.[73] The 2017 MOU facilitates ANR and AAFM's cooperation by formalizing their relationship, including by delineating each agency's responsibilities and instituting interagency referral and reporting requirements.[74] The 2017 MOU, however, can only

[67] 33 U.S.C. § 1342(c).
[68] *Id.* § 1342(c)(2).
[69] *Id.* § 1342(c)(3); *see* 40 C.F.R. § 123.63(a).
[70] *Id.*
[71] 40 C.F.R. § 123.63(a)(2)(i), (3)(iii).
[72] *See id.* § 123.63(a)(2)(i).
[73] *See supra* Discussion, Section I.
[74] 2017 MOU, *supra* note 56, §§ 1(A), 6(B)(1), 6(C)(2), 6(D)(2).

take the agencies so far. Its successful implementation depends on both agencies cooperating in good faith.

ANR and AAFM's relationship is dysfunctional and broken. The permanent rupture inhibits the agencies' collaboration, undermines the 2017 MOU, and prevents ANR from exercising control over agricultural point source discharges.

In 2016, ANR and AAFM engaged the Center for Achievement in Public Service ("CAPS") to help the agencies improve their cooperation and communication.[75] CAPS issued a summary report based on meetings and retreats conducted with ANR and AAFM staff.[76] After conducting a pre-meeting on May 31, 2016, CAPS assessed ANR and AAFM's partnership as follows:

> • Two organizations with shared and divergent missions and fairly different organizational identities and cultures (compliance; development).
>
> • Shared articulation of outcomes and the priorities/values driving the methods for achieving outcomes, was lacking.
>
> • History of errors, exclusion from portions of process, and misunderstandings/ misinterpretations, was long and unaddressed.
>
> • This generated slowed progress toward mandated outcomes, including on writing the [2017] MOU.[77]

CAPS made similar observations after it facilitated a retreat on June 6, 2016. Its report notes that "[c]ultural differences between the AAFM group and the DEC group are real. In broad strokes, with AAFM focused first on promoting and supporting the farms and people, and DEC focused first on policy and enforcement."[78] After facilitating a second joint retreat on June 17, 2017, CAPS observed that ANR's and AAFM's managers knew that the agencies' relationship caused problems:

> They are clear in their expression that focus on the relational aspects of this endeavor, as a rule, detract from their ability to get the work done.
>
> Nonetheless, enforcement actions sometimes cut off a process underway in technical assistance, and/or compliance issues discovered in the [technical assistance] process sometimes were not raised timely with enforcement. When these and other process/communication problems arise, the group (both managers and staff) tended to rely on assumptions about the other group's motivation.[79]

An email exchange that took place two months before CAPS issued its report illustrates the negative assumptions that ANR and AAFM made about each other's motivation. On April 27, 2017, DEC Director of Environmental Compliance Kim Greenwood[80] asked AAFM Chief Policy Enforcement Officer David Huber whether she could attend some of AAFM's weekly water

[75] CAPS, *supra* note 10.
[76] *Id.* at 3.
[77] *Id.*
[78] *Id.* at 4.
[79] *Id.* at 5.
[80] Throughout this Petition, individuals' titles are noted as the titles that were current at the time of the events discussed.

quality enforcement meetings.[81] "I'm wondering if I could sit in on some of your weekly Enforcement team meetings. There's a number of reasons why, not the least of which is the opportunity to learn from your group as you've hopefully learned from the [DEC enforcement meetings]."[82]

Huber responded that he had to check with other AAFM staff before approving Greenwood's request. When he did, he counseled against allowing Greenwood to attend. "I can see more harm than good coming from this. . . ."[83]

Several months later, on November 28 and 29, 2017, ANR and AAFM engaged in a "Lean" event to establish a process for managing incidents, complaints, and violations; to improve the agencies' understanding of their respective roles and responsibilities; and to "[a]dopt and standardize communication processes to allow time to be focused on investigation."[84] Although ANR and AAFM's efforts yielded temporary improvements, the agencies soon returned to old habits. The Project Closeout Report summarizes the outcome:

> The process resulted in increased sharing of complaints between DEC and [AAFM] for a short period of time. It also resulted in a modification to the format of the monthly enforcement meetings between the two. Unfortunately, the process that was identified in the Lean event for decision making and shared information dissipated fairly quickly, *with a realization that there was more fundamental work to be done before such a process could be successful*.[85]

Problems continued more than a year later. On July 8, 2019, DEC Chief Environmental Enforcement Officer Sean McVeigh expressed his frustration that AAFM Chief Policy Enforcement Officer David Huber had failed to contact him with respect to an agricultural point source discharge:

> This is without question a direct discharge and under DEC jurisdiction. I am the point of contact on everything you send DEC. Conversely you are the point of contact for everything I send to AAFM.
>
> Sending this incident to Spills this morning and to me in the afternoon is totally contrary to the above and frankly rather frustrating at this stage of the game.[86]

After Huber explained his reasoning,[87] McVeigh replied that "It seems pointless to discuss these

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[81] Email from Kim Greenwood, Director of Environmental Compliance, DEC, to David Huber, Chief Policy Enforcement Officer, AAFM (Apr. 27, 2017, 09:12 EDT).
[82] *Id.*
[83] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to Jim Leland, Agricultural Resource Management Division Director, AAFM, and others (May. 2, 2017, 09:09 EDT).
[84] AAFM & DEC, A3 Report on Agricultural Enforcement 1 (Dec. 13, 2017); *see* Email from Julie Moore, Secretary, ANR, to Peter Walke, Commissioner, DEC (Mar. 5, 2020, 11:19 EST); AAFM & DEC, A3 Report 1 (Dec. 13, 2017); *see DEC LEAN Initiative*, DEC, https://dec.vermont.gov/administration-innovation/lean (last visited Feb. 2, 2022).
[85] ANR & DEC, Project Closeout Report (emphasis added); *see* Email from Julie Moore to Peter Walke, Commissioner, *supra* note 84.
[86] Email from Sean McVeigh, Chief Environmental Enforcement Officer, DEC, to David Huber, Chief Policy Enforcement Officer, AAFM (July 8, 2019, 16:31 EDT).
[87] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to Sean McVeigh, Chief Environmental Enforcement Officer, DEC (July 8, 2019, 16:47 EDT).

details anymore when we are both working within such a *confusing and highly flawed system*."[88]

Later that year, on November 11, 2019, Secretary of ANR Julie Moore sent an email to Secretary of AAFM Anson Tebbetts that revealed ongoing hostility and suspicion from AAFM towards ANR.[89] In her email, Secretary Moore responded to AAFM Deputy Director of Water Quality Ryan Patch's assertion that an ANR request for proposals was a "waste of taxpayer dollars":

> The tone and tenor of Ryan's message (below) is inflammatory and several of his assertions are both insulting and simply untrue. This is the second time in as many weeks that I have had staff share that [AAFM Director of Water Quality] Laura [DiPietro] and Ryan have told them that the work we are engaged in is "a waste of taxpayer dollars." . . .
>
> This [request for proposals] is not an attempt to somehow usurp AAFM's role in leading nonpoint source pollution control work in the agricultural sector . . . .
>
> *The assertions that our work [i.e., ANR's work] is either poorly conceived or nefarious makes [it] incredibly difficult to engage constructively and needs to stop.*[90]

By October 9, 2020, Secretary Moore had concluded that dividing responsibility for agricultural water pollution between ANR and AAFM was no longer tenable. Secretary Moore circulated a memorandum ("2020 ANR Memo") within the administration that proposed "transferring the 15 AAFM staff responsible for inspections and enforcement to ANR to create a singular program responsible for water quality regulation on Vermont farms."[91, 92] She explained that Vermont's decision to split jurisdiction over agricultural point sources and non-point sources was counterproductive and resulted in more water pollution:

> The net effect is that this largely artificial construct and division of responsibility/overlapping jurisdiction between ANR and AAFM has led to tension and conflict between the agencies, regulatory uncertainty for farmers, and more time-consuming outcomes for water quality resulting in more pollution.[93]

Secretary Moore described how ANR's and AAFM's different approach to agricultural water quality prevented ANR from controlling agricultural point source discharges, as required by the CWA:

> AAFM administers an agricultural water quality program that is premised on preventing discharges to waters so that farms do not trigger Clean Water Act jurisdiction. Specifically, AAFM's farm operating permits require farmers to install barnyard and field-based practices to prevent discharges. In contrast to [ANR's] bright line of whether a discharge is occurring or not, the administration of [AAFM's] program consists of farm inspections to determine whether the farm is

[88] Email from Sean McVeigh to David Huber, *supra* note 9 (emphasis added).
[89] Email from Julie Moore, Secretary, ANR, to Anson Tebbetts, Secretary, AAFM, and Diane Bothfeld, Director of Administrative Services, AAFM (Nov. 11, 2019, 08:37 EST).
[90] *Id.* (emphasis added).
[91] 2020 ANR Memo, *supra* note 7.
[92] Secretary of ANR Julie Moore's 2020 ANR Memo is attached to this Petition as "Attachment 1."
[93] *Id.*

> conforming to performance standards and best management practices. *Put another way, the two agencies use different standards to determine if a violation exists – ANR looks at what is going into the water and AAFM looks at what is happening on the land.*[94]

Secretary Moore's letter did not prompt change. Instead, it yielded suggestions for additional workshops and relationship building between ANR and AAFM.[95] In an email to Secretary of Administration Susanne Young, Secretary Moore explained why these measures could not succeed:

> I wanted to follow up on the conversation that you, [Secretary Tebbetts,] and I had on Monday regarding the opportunities and challenges were agricultural water quality regulatory authorities to be consolidated at ANR – specifically reacting to the suggestion that a "tiger team" or otherwise recommitting ourselves to improved communications and collaboration will somehow resolve the institutional, statutory and, at times, even personal conflicts that exist between the two agencies in this space. I have attached a couple of examples of the significant lengths teams from both agencies have gone to, over a period of years and administrations, in working to bridge this divide – from drafting (but so far being unable to reach agreement on) guidance clarifying how to parse our regulatory jurisdiction to contracting with CAPS for facilitated support in helping improve coordination and collaboration between the agencies.
>
> These efforts . . . have largely failed to achieve any sort of lasting, programmatic change. To be blunt, given this experience, I don't believe it is reasonable to expect a different result absent restructuring the agencies' authorities. Appreciating fully how hard this sort of change would be – particularly "little-p" politically for the staff involved – I truly believe [that creating a singular program responsible for water quality regulation on Vermont farms within ANR] is the best path forward, both for Vermont's farmers and Vermont's environment.
>
> This said, I understand there may simply not be the capacity and/or the will to effect an admittedly-challenging change right now given everything else that is going on. Should the Gov Ops team and/or the Governor decide not to move forward on this, my ask would be that some study, team or working group <u>not</u> be mandated as an alternative. I have no reason to believe that somehow this time would be different.[96]

ANR is aware that its relationship with AAFM is broken beyond repair, and it realizes that the discord prevents it from controlling agricultural point source pollution. Consulting services, workshops, and years of effort have failed to yield the functional collaboration required for ANR to implement a state NPDES program that complies with the CWA.

B. AAFM does not agree with ANR on what constitutes a point source.

ANR can regulate agricultural point source discharges only if ANR and AAFM agree on what constitutes a point source. This is true because AAFM conducts the vast majority of farm

[94] *Id.* (emphasis added).
[95] Email from Secretary Julie Moore to Secretary Susanne Young, *supra* note 10.
[96] *Id.* (emphasis original).

inspections and investigations in Vermont,[97] a circumstance that reflects Vermont's decision to delegate most agricultural water quality regulation to AAFM.[98] ANR consequently relies on AAFM to act as its eyes, depending on AAFM to refer agricultural point source discharges that AAFM identifies during routine farm inspections and investigations.[99] If the two agencies disagree on what constitutes a point source, then ANR cannot rely on AAFM to make the necessary referrals. Unfortunately, ANR and AAFM do not agree, and their disagreement prevents ANR from exercising control over agricultural point source pollution.

In early 2017, ANR and AAFM attended a joint training with the Northeast Environmental Enforcement Project ("NEEP") at the University of Vermont ("UVM"). DEC Director of Environmental Compliance, Kim Greenwood, invited NEEP's Training Coordinator to visit the UVM site with ANR and AAFM before the training. In her invitation, Greenwood explained how NEEP's Training Coordinator would benefit from the pre-training walk-through:

> You'd get a sense of the group and see the issues that we're struggling with regards to property access (we have different enabling statutes and differing interpretations of those statutes) and *we don't always agree on what is a point source versus a non-point source discharge*. . . . You may also gain insight on the cultural issues related to the role of enforcement that can serve as a barrier to our agencies working together.[100]

ANR, AAFM, and NEEP conducted the pre-training visit on April 26, 2017. During the walk-through, DEC Chief Environmental Enforcement Officer Sean McVeigh observed three water quality violations, including unpermitted point source discharges to surface waters.[101] As McVeigh later recounted in a formal investigation report, he "noted and voiced [these three] issues to [AAFM Chief Policy Enforcement Officer David] Huber," but "Huber disagreed with [McVeigh's] assessment on all three of the issues . . . ."[102]

On June 7, 2017, one month after the joint training, AAFM Director of Water Quality Laura DiPietro blamed ANR for the agencies' disagreement regarding agricultural point sources. She explained to Huber that Greenwood and McVeigh "need to tell us what their team and program feels is a discharge. I'd rather them work on it and get back to us . . . [because] what I see is that [Greenwood] is the one coming in with a new perspective and her and [McVeigh] are bending lawyer ears and I am not sure it is consistent with the years of understanding within DEC."[103]

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[97] *See* 6 V.S.A. §§ 4851(h), 4858(b)(3); RAPs, *supra* note 9, § 4.3(b).
[98] *See, e.g.,* 10 V.S.A. § 1259(i); 6 V.S.A. §§ 4851, 4858, 4871.
[99] *See* 2017 MOU, *supra* note 56, § 6(D)(2) ("AAFM shall immediately notify ANR of any complaint that it receives or field inspection report that relates to an alleged [violation of a CAFO permit, point source discharge, or discharge of non-agricultural waste]").
[100] Email from Kim Greenwood, Director of Environmental Compliance, DEC, to Richard Tomczyk, Northeast Environmental Enforcement Project (Mar. 9, 2017, 08:03 EST) (emphasis added).
[101] Email from Kim Greenwood, Director of Environmental Compliance, DEC, to Laura DiPietro, Director of Water Quality, AAFM and David Huber, Chief Policy Enforcement Officer, AAFM (Oct. 30, 2017, 08:54 EDT) (containing EEO Investigation Report 17EC00678 and documenting three unpermitted discharges: (1) large stormwater pond accepts barnyard waste via drop inlets – direct discharge to stream; (2) Silage leachate system - appears to be an injection well; and (3) High/low flow separator on silage leachate system sends stormwater/leachate over embankment to stream).
[102] *Id.*
[103] Email from Laura DiPietro, Director of Water Quality, AAFM to David Huber, Chief Policy Enforcement

More than a year later, on October 12, 2018, Huber described an interagency memo that distinguished point sources from non-point sources. He explained that ANR and AAFM "*disagree as to what is considered a point source*, which lead [*sic*] to the [Vermont Attorney General's Office ("AGO")] drafting a memo describing what is and isn't a point source."[104] The memo had "been in draft form since April 2017" and agency attorneys were responsible for editing it.[105] Huber was frustrated by a request for information relevant to the memo. "Every time I have asked [our lawyer at the AGO] about this memo and whether or not it is finalized, she says that she still needs to finalize her edits. It is hard for me to see that there is all of a sudden a rush . . . ."[106] It is Petitioners' understanding that this memo has still not been finalized.

ANR and AAFM's disagreement over what constitutes a point source persisted more than a year later. On December 5, 2019, Secretary of ANR Julie Moore emailed Secretary of AAFM Anson Tebbetts to express her concern that the disagreement was jeopardizing Vermont's ability to meet its obligations under the CWA:

> I wanted to follow up on a significant concern I have coming out of our leadership meeting on Monday where [AAFM Director of Water Quality Laura DiPietro] asserted that only in limited circumstances (e.g., spreader unloading directly into a ditch) could a situation occur that would result in a point source discharge from an agricultural field. I do not agree with or accept this position . . . .
>
> [In order to resolve concerns identified in the 2008 Withdrawal Petition,] the State agreed that as between the ANR and AAFM, ANR shall be the decision-maker regarding the extent of CWA violations, the appropriate form of enforcement response, and the timing and nature of requirements to achieve compliance.
>
> . . . In an effort to [facilitate this agreement,] ANR and AAFM worked to develop a "checklist" of activities that require referral of a complaint or inspection to ANR for review. The checklist includes scenarios where field practices resulted in a potential discharge requiring ANR enforcement. . . . *[B]ut this document has not been finalized*.
>
> . . . I believe that [DiPietro's] statement from Monday is inconsistent with these prior agreements, as well as past practice, between ANR and AAFM. Regardless, the State has committed to EPA that ANR will have the lead in making decisions as to what constitutes a point source discharge and what does not, as memorialized in our MOU. *[DiPietro's] statement places at risk these commitments.*"[107]

Secretary Moore emphasized that ANR and AAFM must agree on what constitutes a point source for ANR to comply with its delegation under the CWA:

> Effectively addressing this intersection of our work is critical to having an effective water quality protection program that is divided between our two agencies; in an

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Officer, AAFM (June 7, 2017, 11:32 EDT).

[104] Email from David Huber, Chief Policy Enforcement Officer, AAFM to Alyson Eastman, Deputy Secretary, AAFM (Oct. 12, 2018, 12:01 EDT) (emphasis added).

[105] *Id.*

[106] *Id.*

[107] Email from Julie Moore, Secretary, ANR, to Anson Tebbetts, Secretary, AAFM (Dec. 5, 2019, 06:48 EST) (emphasis added).

> effort to make this situation work and allow my agency to fulfill its obligations to EPA, I believe we need to move expeditiously to finalize the "Legal Framework Agricultural Water Quality Point Source vs. Nonpoint Source Discharges" . . . . It is my plan to finalize this memorandum to provide clear guidance to both our Agencies on what constitutes a point source discharge before the end of January and, as such, am requesting that you provide any comments on or before 12/27/2019. I am committed to either making changes in response to AAFM comments or providing detailed responses to those comments.[108]

It is Petitioners' understanding that this memo has not been finalized.

ANR and AAFM's disagreement makes it impossible for ANR to trust that AAFM will refer evidence of all agricultural point source discharges. AAFM simply may not recognize a point source where ANR does. ANR nonetheless must depend on AAFM's referrals because AAFM is usually the first and only agency to interact with Vermont's farms. Under these circumstances, ANR cannot exercise control over agricultural point source discharges.

C. AAFM routinely ignores ANR's status as the sole decision-maker regarding the existence of a point source and the appropriate form of enforcement response.

The 2017 MOU delegates primary responsibility for investigating agricultural point source discharges to ANR.[109] It reserves the investigation of agricultural non-point source discharges to AAFM.[110] "Where complaints . . . do not identify whether a discharge is a non-point or point source discharge . . . AAFM and ANR will discuss the complaint and coordinate the investigatory response."[111] Sometimes, however, discussion and coordination between ANR and AAFM do not resolve which agency should lead. Farms are complex, and agriculture's realities can make differentiating between point sources and non-point sources contentious. As AAFM Director of Water Quality Laura DiPietro explained, "On paper, every definition is clear. In the field no definition is clear."[112]

The 2017 MOU responds to this complexity by emphasizing that "[n]otwithstanding any other provision of this Section, ANR shall be the decision-maker regarding the existence of a point source, the extent of violations under [Vermont's] federally delegated program, [and] the appropriate form of enforcement response . . . ."[113] This arrangement ensures that ANR can control point source discharges, as the CWA requires.

AAFM often threatens ANR's ability to control agricultural point source discharges by refusing to recognize ANR's responsibility and right to decide whether a point source exists. AAFM

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[108] *Id.*
[109] 2017 MOU, *supra* note 56, § 6(C)(2).
[110] *Id.* § 6(C)(1).
[111] *Id.* § 6(C)(3).
[112] John Dillon, *Who Regulates Vermont's Water? Records Show Confusion, Delayed Enforcement By Two Agencies*, VT. PUB. RADIO (Feb. 7, 2020), https://www.vpr.org/vpr-news/2020-02-07/who-regulates-vermonts-water-records-show-confusion-delayed-enforcement-by-two-agencies.
[113] 2017 MOU, *supra* note 56, § 6(C)(4); *see* 2013 EPA Letter, *supra* note 64, at 8 ("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 requirements to achieve compliance").

routinely responds to ANR's jurisdictional claims by attempting to assert control.

For example, on December 1, 2017, DEC Chief Environmental Enforcement Officer Sean McVeigh acknowledged receipt of several agricultural water quality complaints from AAFM Chief Policy Enforcement Officer David Huber.[114] One complaint described two manure compost piles that were leaking into a pond, and a second complaint describe a drainage pipe whose outlet was located about ten feet from a lake.[115] McVeigh expressed concern at AAFM's plans to investigate the two point sources and asserted DEC's jurisdiction:

> It appears you believe all four are your issues. I see two of them as clearly being ANR issues and they should be handled by us;
>
> > 1. Description of suspected violation:*two manure compost piles--- leakage near/ between barns -----flows down to pond*
> >
> > 2. Description of suspected violation:*illegal drainage pipe about 10 feet from lake at the very end of Dewing Road*
>
> Given our very recent discussions/agreement, I must say that if we are going to argue about a pipe complaint we are heading down a very rough road[.][116]

Although Huber transferred the two complaints to DEC that day, AAFM Director of Water Quality Laura DiPietro intervened. She set aside the CWA and the 2017 MOU, citing a political justification for AAFM's attempt to lead the manure pile investigation. She wrote to McVeigh:

> I know this says 'flows down to pond', *but hopefully you're aware of all the media about this site* and how much we've been out there. Hence, why Dave stated we would be taking the lead. Our findings as of late were that the water in the pond doesn't outlet and the piles are the dirt dredged from the bottom of the pond. This was all under a stormwater permit which I assume you can look up.
>
> This all actually makes me think *because this site is so high profile with media and neighbors*, maybe we do coordinate a joint visit to address this complaint?[117]

For AAFM, maintaining appearances and control proved more important than facilitating ANR's lead responsibilities under the CWA.

Less than two years later, on June 21, 2019, AAFM received a complaint that described an agricultural point source discharge: "Take a ride down Maquam Shore north of Sportsmen's Club- see run-off from farmers' fields 50 feet into the lake totally brown- no buffer zone at all!!!"[118] On June 24, 2019, Huber forwarded a copy of the complaint to McVeigh, writing, "Lack of buffers on a field. AAFM will investigate."[119] McVeigh responded and asserted DEC's

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[114] Email from Sean McVeigh, Chief Environmental Enforcement Officer, DEC, to David Huber, Chief Policy Enforcement Officer, AAFM (Dec. 1, 2017, 09:08 EST).
[115] *Id.*
[116] *Id.* (emphasis original).
[117] Email from Laura DiPietro, Director of Water Quality, AAFM, to Sean McVeigh, Chief Environmental Enforcement Officer, DEC (Dec. 1, 2017, 10:36 EST) (emphasis added).
[118] Email from Kathy Jarvis, NEIWPCC Administrative Assistant, Lake Champlain Basin Program, to Laura DiPietro, Director of Water Quality, AAFM (June 21, 09:51 EDT).
[119] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to Sean McVeigh, Chief Environmental

jurisdiction based on the existence of a point source: "Dave *'see run-off from farmers' fields 50 feet into the lake totally brown'* That sounds like a discharge complaint to me. We [DEC] will be taking this one."[120]

Huber immediately disputed DEC's decision regarding the existence of an agricultural point source. "Sounds like non-point source to me if there is no alleged conveyance or point source, and all that is mentioned is a field lacking buffers."[121] McVeigh replied by again asserting DEC's jurisdiction, pointing out that the complaint described "No buffers …on a ditch/brook[.] There are no fields directly adjacent to the lake in that area[.] It must be entering a conveyance[.]"[122]

Huber concluded the exchange by ignoring ANR and DEC's authority to determine the existence of a point source, as well as its "primary responsibility for investigation and enforcement of a violation when the alleged violation . . . relates to a point source discharge of agricultural waste . . . ."[123] Huber explained that he planned to send an AAFM inspector to the farm and invited DEC to send an inspector as well: "Maria [an AAFM inspector] is going [to the farm] tomorrow with Megan Phillips (new coordinator for that area). Perhaps you want to send an EEO to do a joint visit *since we don't agree on the authority?*"[124]

Later that year, on December 6, 2019, Huber notified McVeigh that AAFM would investigate a complaint that related to manure spreading on a snow-covered field.[125] McVeigh replied that DEC would investigate instead.[126] Huber asked for McVeigh to justify ANR and DEC's jurisdiction: "Can you point me to where the complaint alleges a point source discharge? I am unsure as to where your jurisdiction is on this."[127] McVeigh noted that the complaint involved a suspected water quality violation in proximity to "multiple brooks and mapped Class Two Wetlands."[128] Huber responded:

> The part of the complaint that you cite designates which AAFM program the complaint is for. This one is water quality, as in the name of the AAFM Division that handles the complaint. This is no different than any other agricultural water quality complaint that I share with you . . . .
>
> Additionally, what does the information that you cite relate to the complaint of

Enforcement Officer, DEC (June 24, 2019, 14:55 EDT).

[120] Email from Sean McVeigh, Chief Environmental Enforcement Officer, DEC, to David Huber, Chief Policy Enforcement Officer, AAFM (June 24, 2019, 15:18 EDT) (emphasis original).

[121] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to Sean McVeigh, Chief Environmental Enforcement Officer, DEC (June 24, 2019, 15:23 EDT).

[122] Email from Sean McVeigh, Chief Environmental Enforcement Officer, DEC, to David Huber, Chief Policy Enforcement Officer, AAFM (June 24, 2019, 15:28 EDT)

[123] 2017 MOU, *supra* note 56, § 6(C)(3)–(4).

[124] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to Sean McVeigh, Chief Environmental Enforcement Officer, DEC (June 24, 2019, 16:06 EDT) (emphasis added).

[125] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to Sean McVeigh, Chief Environmental Enforcement Officer, DEC (Dec. 6, 2019, 15:11 EST).

[126] Email from Sean McVeigh, Chief Environmental Enforcement Officer, DEC, to David Huber, Chief Policy Enforcement Officer, AAFM (Dec. 6, 2019, 16:44 EST).

[127] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to Sean McVeigh, Chief Environmental Enforcement Officer, DEC (Dec. 6, 2019, 16:48 EST).

[128] Email from Sean McVeigh, Chief Environmental Enforcement Officer, DEC, to David Huber, Chief Policy Enforcement Officer, AAFM (Dec. 6, 2019, 16:50 EST).

> spreading on snow? Nothing in the complaint mentions a wetland or brook.
>
> This sounds like broad overreach. Perhaps [DEC General Counsel John Beling] can weigh in on DEC's legal authority to claim jurisdiction over a complaint that doesn't fall under DEC's jurisdiction?[129]

A leader in Vermont's farm community recently summarized the power struggle between ANR and AAFM. During the Task Force to Revitalize the Vermont Dairy Industry's meeting on November 30, 2021, he described ANR and AAFM's inability to work together:

> I will talk about the agencies. The conflict between [AAFM] and [ANR], unfortunately, is a real conflict, and I do think farmers are . . . the pinball being batted around . . . . And I understand the Federal laws about point source pollution. I mean, obviously [I] worked for [AAFM] for six and a half years. I understand that, but it's almost like . . . they're trying to see who's more important, one or the other.[130]

There should be no power struggle between ANR and AAFM with respect to agricultural point source discharges. EPA delegated responsibility for administering the NPDES program in Vermont to ANR,[131] and the 2017 MOU identifies ANR as the ultimate decision-maker regarding the existence of a point source and the appropriate form of enforcement response.[132] When AAFM fails to recognize ANR's responsibilities, it prevents ANR from exercising control over point source discharges.

D. AAFM regularly fails to refer evidence of agricultural point source discharges to ANR.

The 2017 MOU facilitates ANR's responsibility to control point source discharges by directing AAFM to "immediately notify ANR of any complaint that it receives or field inspection report that relates to an alleged [point source discharge of agricultural waste.]"[133] It also instructs AAFM to "share with ANR information regarding discharges to waters, and ANR shall make any determination as to whether a discharge to waters is or may be a point source discharge."[134] These requirements are meant to address the enforcement challenges posed by Vermont's decision to split jurisdiction over agricultural water pollution between ANR and AAFM.[135] They both help ANR respond promptly to potential point source violations and allow ANR to exercise

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[129] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to Sean McVeigh, Chief Environmental Enforcement Officer, DEC (Dec. 6, 2019, 17:38 EST).
[130] Task Force to Revitalize the Vermont Dairy Industry (Nov. 30, 2021) (statement of John Roberts, Member, Task Force to Revitalize the Vermont Dairy Industry and Executive Director, Champlain Valley Farmer Coalition), https://www.youtube.com/watch?v=JusVwGws53I.
[131] EPA, *supra* note 21.
[132] 2017 MOU, *supra* note 56, § 6(C)(4); *see* 2013 EPA Letter, *supra* note 64, at 8 ("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 requirements to achieve compliance").
[133] 2017 MOU, *supra* note 56, § 6(D)(2).
[134] *Id.* § 5(A)(1).
[135] *See* 10 V.S.A. §§ 1259, 1263(g).

its authority to determine whether a point source discharge has taken place.[136]

AAFM regularly fails to refer evidence of agricultural point source discharges that it observes during inspections and other on-farm activities. AAFM's repeated violations of the 2017 MOU prevent ANR from exercising control over agricultural point source discharges. The following examples illustrate AAFM's conduct:

- On November 26, 2019, AAFM Medium and Large Farm Operations Supervisor Maria Steyaart sent an email to AAFM Chief Policy Enforcement Officer David Huber with the subject line "Lucas Referral Document."[137] Steyaart explained that she and AAFM Specialist Krista Battles had "observed manure running off into the southern and eastern ditches" on Lucas Dairy Farm after the farm applied manure to a field.[138] Steyaart also "observed two runoff paths entering the ditch that runs along the northern edge of [another] field."[139]

  To the best of Petitioners' knowledge, AAFM never referred Steyaart's "Referral Document" to ANR even though ditches are point sources under the CWA. Nor did AAFM give ANR the opportunity to determine whether a point source discharge took place. Instead, Huber rebuked Steyaart:

  > Please do not send any emails like this in the future. This is not what I requested nor is this the type of referral document that staff have been sending me. I am more than happy to discuss this with you over the phone, but please do not reply to this email.[140]

- On November 22, 2019, AAFM Specialists Clarice Cutler and Clark Parmelee "observed runoff flowing downhill from a recent manure application" on Robillard Flats Farm.[141] The AAFM investigation report explains that the specialists saw manure runoff flowing east, off of a field, and "beneath a layer of snow into a surface water that is a tributary to Brighton Brook."[142] The specialists called the farmer, who explained "that he thought that he had stayed far enough on the knoll [while spreading manure] to prevent any runoff from occurring . . . ."[143] Manure spreading vehicles and other farm equipment are point sources under the CWA.[144] To the best of Petitioners' knowledge, AAFM never referred the evidence of a spreading-related discharge to ANR, and ANR never had the

[136] *See id.* § 6(C)(4).
[137] Email from Maria Steyaart, Medium and Large Farm Operations Supervisor, AAFM, to David Huber, Chief Policy Enforcement Officer, AAFM (Nov. 26, 2019, 13:15 EST).
[138] *Id.*
[139] *Id.*
[140] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to Maria Steyaart, Medium and Large Farm Operations Supervisor, AAFM (Nov. 26, 2019, 16:38 EST).
[141] AAFM, Investigation Report, Robillard Flats Farm (report date unknown) (inspected Nov. 22, 2019).
[142] *Id.*
[143] *Id.*
[144] 33 U.S.C. § 1362(14); *Concerned Area Residents for the Env't v. Southview Farms*, 34 F.3d 114, 119 (2d Cir. 1994) ("Moreover, we agree with the appellants that, alternatively, the manure spreading vehicles themselves were point sources. The collection of liquid manure into tankers and their discharge on fields from which the manure directly flows into navigable waters are point source discharges under the case law."); *Avoyelles Sportsmen's League, Inc. v. March*, 715 F.2d 897, 922 (5th Cir. 1983).

opportunity to determine whether a point source discharge took place.

- On June 28, 2019, AAFM Specialists Clarice Cutler and Maria Stewart inspected Routhier & Sons Farm's Main Facility and recorded evidence of potential past point source discharges. They observed "[e]vidence of past runoff toward the perimeter ditch . . . via a small channel" that drained a silage bunk.[145] Their report explained that the perimeter ditch receives agricultural waste, "connects to a surface water, and is hydrologically connected to the Connecticut River . . . ."[146] Ditches are point sources under the CWA. To the best of Petitioners' knowledge, AAFM never referred the evidence of a potential past discharge to ANR, and ANR never had the opportunity to determine whether a point source discharge took place.

- On May 29, 2019, AAFM Specialists Abbi Pajak and Megan Philips documented evidence of potential past point source discharges on B Danyow Farm's Main Farm. Their report describes dark silage leachate draining from a silage bunk, into a ditch, and mixing with clean water.[147] Although the leachate dissipated halfway down the ditch, Pajak and Philips discovered "evidence that the silage leachate flow path had previously run through" the area.[148] They noted that "the area was dark in color," that it "smelled of silage leachate," and that there were signs of errosion.[149] Flowing silage reappeared farther down the ditch.[150] It then ran across a field and into a culvert.[151] The leachate ran to another ditch, where it eventually stopped.[152] The inspectors noted that the ditch "runs directly to a surface water . . . ."[153] Silage bunks, ditches, and culverts are all point sources under the CWA. To the best of Petitioners' knowledge, AAFM never referred the evidence of a potential discharge to ANR, and ANR never had the opportunity to determine whether a point source discharge took place.

  When AAFM Specialists Jake Peterson and Abbi Pajak inspected B Danyow Farm on July 22, 2021, more than two years later, they identified an active point source discharge following the same exact path.[154] They observed silage leachate "black in color" drain from the same silage bunk, flow through the same ditches and culvert, and "enter a surface water . . . ."[155] Only then, likely after allowing periodic discharges to occur unabated for two years, did AAFM choose to inform ANR of the evidence of agricultural point source discharges.[156]

- On April 14, 2019, AAFM Specialist John Roberts alerted AAFM Chief Policy

[145] AAFM, Facility Evaluation Form, Routhier & Sons Inc, Main Facility (Oct. 9, 2019) (inspected June 28, 2019).
[146] *Id.*
[147] AAFM, Facility Evaluation Form, B Danyow Farm LLC, Main Farm (report date unknown) (inspected May 29, 2019).
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] AAFM, Facility Evaluation Form, B Danyow Farm LLC, Main Farm (Aug. 20, 2021) (inspected July 22, 2021).
[155] *Id.*
[156] ANR, Complaint Report Form, 21EC00917 (complaint received Aug. 1, 2021).

Enforcement Officer David Huber to evidence of point source discharges on a farm in Ferrisburgh, Vermont. Roberts noted that he had tried calling Huber, but that Huber had not responded.[157] Consequently, Roberts explained, "I am going to be careful in wording here because I'm writing this from home and cannot send you a link to the S drive."[158] Roberts recounted that he and AAFM Specialist Clarice Cutler had observed a small area "right next to Lewis Creek" where the farm had fed cattle over winter.[159] Roberts "noticed significant amounts of manure and old feed on this area *with a lot of evidence of runoff going directly to Lewis Creek* or to a small tributary and then into Lewis Creek. On the day of our visit it had not been raining but as soon as it does there will be more waste runoff to the Creek."[160]

Rather than immediately refer the matter to ANR, Huber replied, "Did you or did you not see a point source discharge or evidence of a point source discharge? Did you make the attached map with the caption about runoff entering water?"[161] Cutler confirmed, "We saw evidence of a point source discharge but nothing was flowing at the time of the investigation."[162] Huber responded that he believed "that this should be referred to DEC."[163] He then asked whether everyone agreed,[164] and Cutler replied that she "did not see a channel of manure leading to surface water."[165] Huber then wrote, "Ok, perfect. . . . Just want to make sure that there was no observed point source pollution making its way to water."[166]

Huber next spoke with Roberts on the phone. He then notified AAFM staff that "[Roberts] will be changing the map to more accurately reflect his observations . . . . There will not be a referral after hearing the whole story."[167] Roberts subsequently revised the map and caption he had created to document his observations.[168] To the best of Petitioners' knowledge, AAFM never referred the evidence of point source discharges

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[157] Email from John Roberts, Small Farm Water Quality Specialist, AAFM, to David Huber, Chief Policy Enforcement Officer, AAFM and Clarice Cutler, Agricultural Water Quality Specialist, AAFM (Apr. 14, 2019, 16:56 EDT).
[158] *Id.*
[159] *Id.*
[160] *Id.* (emphasis added).
[161] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to John Roberts, Small Farm Water Quality Specialist, AAFM and Clarice Cutler, Agricultural Water Quality Specialist, AAFM (Apr. 15, 2019, 17:06 EDT).
[162] Email from Clarice Cutler, Agricultural Water Quality Specialist, AAFM, to David Huber, Chief Policy Enforcement Officer, AAFM and John Roberts, Small Farm Water Quality Specialist, AAFM (Apr. 16, 2019, 07:41 EDT).
[163] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to John Roberts, Small Farm Water Quality Specialist, AAFM and Clarice Cutler, Agricultural Water Quality Specialist, AAFM (Apr. 16, 2019, 07:48 EDT).
[164] *Id.*
[165] Email from Clarice Cutler, Agricultural Water Quality Specialist, AAFM, to David Huber, Chief Policy Enforcement Officer, AAFM and John Roberts, Small Farm Water Quality Specialist, AAFM (Apr. 16, 2019, 07:55 EDT).
[166] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to John Roberts, Small Farm Water Quality Specialist, AAFM and Clarice Cutler, Agricultural Water Quality Specialist, AAFM (Apr. 16, 2019, 08:07 EDT).
[167] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to John Roberts, Small Farm Water Quality Specialist, AAFM and Clarice Cutler, Agricultural Water Quality Specialist, AAFM (Apr. 16, 2019, 09:56 EDT).
[168] Email from John Roberts, Small Farm Water Quality Specialist, AAFM, to David Huber, Chief Policy Enforcement Officer, AAFM and Clarice Cutler, Agricultural Water Quality Specialist, AAFM (Apr. 14, 2019, 16:56 EDT).

to ANR, and ANR never had the opportunity to determine whether a point source discharge took place. AAFM made that choice for ANR.

- On September 27, 2018, AAFM specialists Steven Cash and Clark Parmelee inspected Daona Farm's Main Farm and found evidence of past point source discharges. They observed silage leachate runoff that was "black in color" pooling below a culvert's outlet.[169] They observed similar black liquid in a nearby ditch. The ditch was not running at the time, but it emptied "into a surface water."[170] In addition, Cash and Parmelee noted that "[b]lack colored wastes were observed around the outlet of the [Bedding Recovery Unit] drain, and in the area of concentrated flow the drain empties into."[171] Their report uses a red arrow to indicate a water quality risk to a nearby surface water.[172] Ditches and drains are both point sources. To the best of Petitioners' knowledge, AAFM never referred the evidence of past discharges to ANR, and ANR never had the opportunity to determine whether a point source discharge took place.

- On October 26, 2017, AAFM inspectors Tyler Knapp and Thomas Bryce described evidence of an agricultural point source discharge at Magnan Brothers Dairy Farm's Main Farm. Their report notes that, "[a]t the time of inspection, agricultural waste was observed in a wetland adjacent to the Clean Water Culvert as well as in the Clean Water Culvert; the water inside the culvert was dark in color and a film of foam was observed on the surface of the water."[173] A culvert is a point source under the CWA.[174] Knapp conducted another inspection on July 6, 2018. His report used identical language to describe evidence of an agricultural point source discharge. "At the time of the inspection, agricultural waste was observed in a wetland adjacent to the Clean Water Culvert as well as in the Clean Water Culvert Outlet; the water inside the culvert was dark in color and a film of foam was observed on the surface of the water."[175] To the best of Petitioners' knowledge, AAFM never referred the evidence of a culvert-based discharge to ANR, and ANR never had the opportunity to determine whether a point source discharge took place.

- On December 8, 2016, AAFM inspectors Abbi Pajak and Nate Sands observed silage leachate flowing into a drain, and mortality compost leachate entering a diversion ditch on Allandra Farm's Home Farm.[176] These wastes combined with clean water and flowed from the diversion ditch into a roadside ditch that intersects with Mud Creek, a surface

[169] AAFM, Facility Evaluation Form, Daona Farm, Main Farm (Jan. 9, 2019) (inspected Sept. 27, 2018).
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] AAFM, Facility Evaluation Form, Magnan Brothers Dairy, Main Farm (report date unknown) (inspected Oct. 26, 2017).
[174] 33 U.S.C. § 1362(14) (defining "point source" to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . . .").
[175] AAFM, Facility Evaluation Form, Magnan Brothers Dairy, Main Farm (report date unknown) (inspected July 6, 2018).
[176] AAFM, Facility Evaluation Form, Allandra Farm Inc., Home Farm (report date unknown) (inspected Dec. 8, 2016).

water.[177] Piles of waste,[178] drainage systems,[179] and ditches[180] are all point sources under the CWA. That same day, the inspectors observed more evidence of point source discharges, this time on Allandra Farm's DeBoer Farm:

> At the time of inspection, silage leachate was observed running over the bunk apron and into a roadside culvert, where it mixed with road runoff and crossed under the road towards the production area. The leachate and runoff ran into a ditch that borders the southern perimeter of the production area. The ditch carrying the runoff was followed until it turned into a swale/conveyance and was followed until it met the Mud Creek. Runoff of dirty water was observed in the ditch and swale the entire way.[181]

Silage bunkers,[182] culverts, ditches,[183] and swales[184] are all point sources. However, to the best of Petitioners' knowledge, AAFM never referred the evidence of a discharge to ANR, and ANR never had the opportunity to determine whether a point source discharge took place.

Nearly one year after discovering this evidence of point source discharges, AAFM sent a Corrective Action Letter ("CAL") to Allandra Farm. That letter explained that the farm had violated Vermont's agricultural water quality laws by "not managing silage leachate from the Feed Bunks at the Home and DeBoer Farms in a manner to prevent the runoff of wastes across property boundaries and to waters of the State."[185]

On December 28, 2018, AAFM inspectors Abbi Pajak and Maria Steyaart observed that little had changed on Allandra Farm. Once again, "it was observed that silage and mortality leachate were not yet contained . . . . Runoff from these areas was observed flowing into the ditch as observed in previous inspections . . . ."[186] Despite this, to the best of Petitioners' knowledge, AAFM never referred the evidence of a discharge to ANR, and ANR never had the opportunity to determine whether a point source discharge took place.

- On April 13, 2016, AAFM inspectors Sylvia Jensen and John Roberts discovered that three manure pits on Benoit Farm's various facilities were overflowing or leaking.[187] Roberts described manure leaking from one pit as "a spring flowering" and traced the manure flow down to a "stream that ran along the edge" of one of the farm's corn fields,

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[177] *Id.*
[178] *Scrap Metal Processors*, 386 F.3d at 1009.
[179] *Earth Sciences*, 599 F.2d at 374.
[180] 33 U.S.C. § 1362(14) (defining "point source" to include "any discernible, confined and discrete conveyance, including but not limited to any . . . ditch . . . .").
[181] AAFM, Facility Evaluation Form, Allandra Farm Inc., Home Farm (report date unknown) (inspected Dec. 8, 2016).
[182] *Scrap Metal Processors*, 386 F.3d at 1009 (piles of waste).
[183] 33 U.S.C. § 1362(14).
[184] *Southview Farms*, 34 F.3d at 118–19.
[185] Corrective Action Warning Letter from AAFM to Allan Brisson, Allandra Farm, Inc. (Oct. 27, 2017).
[186] AAFM, Facility Evaluation Form, Allandra Farm Inc., Home Farm (May 29, 2019) (inspected Dec. 12, 2018).
[187] Memorandum from John Roberts, Small Farm Water Quality Specialist, AAFM Outlining Finds During a North Lake Survey Visit to the Farm of Leon and Linda Benoit 1 (Apr. 13, 2016).

> a surface water.[188] Manure pits and waste ponds are point sources.[189] To the best of Petitioners' knowledge, AAFM did not immediately refer the evidence of a point source discharge to ANR or give ANR an opportunity to determine whether a point source discharge took place. Instead, AAFM waited until another inspection, conducted nearly a year later on April 6, 2017, revealed that the "[m]anure pit at the Home Farm was overtopping and manure may be reaching flowing water."[190] Only then did AAFM refer the matter to ANR.

ANR cannot control agricultural point source discharges, as the CWA requires, if AAFM fails to refer evidence of those discharges to ANR.

E. AAFM routinely fails to *timely* refer agricultural point source discharges to ANR.

To exercise control over agricultural point source discharges, ANR must promptly respond to evidence that AAFM observes during on-farm inspections and investigations. If ANR is unable to respond quickly, discharges may continue unabated, and changing conditions may alter or eliminate important evidence. In February 2020, AAFM Director of Water Quality Laura DiPietro explained to Vermont Public Radio ("VPR") how evidence of a discharge changes rapidly:

> There's this space where, depending on the precipitation, before, after, the conditions of soil saturation, the timing and nature of the type of discharge it might be, it may not all be happening at the same time and space. And so, what one entity may see on one day, the next day it looks totally different.[191]

The 2017 MOU consequently requires AAFM to "*immediately* notify ANR of any complaint that it receives or field inspection report that relates to an alleged [point source discharge of agricultural waste.]"[192]

AAFM, however, routinely delays referring evidence of agricultural point source discharges to ANR. The following examples are typical:

- On December 12, 2019, AAFM Specialist Clark Parmelee responded to a complaint concerning Standard Milk's Main Farm. He observed manure flowing out of an overtopping manure pit and "entering a surface water."[193] AAFM did not refer the discharge to AAFM until January 10, 2020, nearly **one month** later.[194]

- On December 11, 2019, AAFM Specialists Connor Steckel, Abbi Pajak, and Krista Battles inspected Fairfax Farm.[195] They observed liquid that was "dark in color and

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[188] *Id.*at 5.
[189] *Tenn. Clean Water Network*, 273 F.Supp.3d at 827–31.
[190] DEC, Complaint Report Form, 17EC00379 (complaint received May 18, 2017).
[191] Dillon, *supra* note 112.
[192] 2017 MOU, *supra* note 56, § 6(D)(2) (emphasis added).
[193] AAFM, Complaint Investigation, Standard Milk LLC, Main Farm (report date unknown) (inspected Dec. 12, 2019).
[194] Email from Laura DiPietro, Director of Water Quality, AAFM, to Sean McVeigh, Chief Environmental Enforcement Officer, DEC (Jan. 10, 2020, 13:55 EST).
[195] AAFM, Facility Evaluation Form, HJ&A Howrigan & Sons Inc., Fairfax Farm (May 2, 2020) (inspected Dec. 11,

smelled of silage leachate . . . entering a ditch . . . [and] enter[ing] a surface water . . . ."[196] Steckel, Pajak, and Battles further noted that the Farm's 2016 inspection had identified silage leachate runoff from a hay and corn bunk that posed a "moderate risk" to water quality.[197] When they checked on the risk, they observed runoff flowing through a ditch and entering a surface water.[198] AAFM did not refer the discharge to ANR until May 15, 2020, more than **5 months** later.[199]

- On December 10, 2019, AAFM Specialists Clarice Cutler and Nate Sands inspected Nelson Farms.[200] They observed "residual manure on [a manure pit] access road" mixing with manure spread on a field and "enter[ing] a surface water."[201] They also noted runoff "flowing down hill and entering a surface water" from an area where about 200 elk and bison were kept.[202] AAFM did not refer the discharge to ANR until April 17, 2020, more than **4 months** later.[203]

- On November 11, 2019, AAFM Specialist Abbi Pajak inspected McKnight Farm and observed "agricultural wastes running off from the silage bunks into a roadside culvert, flowing through the barnyard, and eventually entering a [surface water]."[204] Despite the clear evidence of an agricultural point source discharge, AAFM did not refer the matter to ANR until December 23, 2019, more than **one month** later.

  On December 24, 2019, the day after ANR was notified, DEC Environmental Enforcement Officer Ryan McCall visited McKnight Farm. He learned that the silage had flowed through a swale but observed that the farm had already "brought in eight (8) dump trucks to fill . . . the barnyard swale . . . so it didn't flood the barnyard and flow downhill to the brook."[205] McCall concluded his report by expressing frustration at having been denied the opportunity to investigate the violation sooner:

  > On my visit to the farm, I did not see a discharge, but I learned nothing to contradict anything in Pajak's supplied information. Had I been notified approximately a month earlier at the time of the initial AAFM inspection, I could have observed the violation documented by Pajak before the farm took corrective measures in the barnyard.[206]

  By the time AAFM referred the matter to ANR, there was nothing for ANR to do but conduct a perfunctory inspection. ANR could neither assess the point source discharge

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2019).
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to Sean McVeigh, Chief Environmental Enforcement Officer, DEC (May 15, 2020, 11:55 EDT).
[200] AAFM, Facility Evaluation Form, Nelson Farms, Irasburg Farm (Mar. 25, 2020) (inspected Dec. 10, 2019).
[201] *Id.*
[202] *Id.*
[203] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to Sean McVeigh, Chief Environmental Enforcement Officer, DEC (Apr. 17, 2020, 11:51 EDT).
[204] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to Sean McVeigh, Chief Environmental Enforcement Officer, DEC (Dec. 23, 2019, 14:03 EST).
[205] DEC, Investigation Report, 19EC01404 IR, McKnight Farm (Dec. 31, 2019).
[206] *Id.*

nor work with the farm to formulate an appropriate response.

- On June 6, 2019, AAFM Specialists Megan Phillips and Maria Steyaart inspected Wright Farm's Main Farm and documented a point source discharge. Leachate and other agricultural wastes flowed through a ditch next to a silage bunk.[207] "The ditch was followed all of the way to a surface water that is located to the north of the Barnyard. Waste from the ditch was entering the surface water at the time of the inspection."[208] In addition, Phillips and Steyaart observed a variety of other issues: evidence that a "manure pit had previously overtopped this spring"; evidence of mortality runoff, agricultural waste, debris, and sediment reaching a clean water inlet; and a silage leachate collection system that was not functioning.[209]

  AAFM did not refer the matter to ANR until November 18, 2019, more than **five months** after the initial inspection. AAFM Chief Policy Enforcement Officer David Huber apologized to DEC Chief Environmental Enforcement Officer Sean McVeigh for the delay when making the referral. "I apologize that this is not timely. I was just made aware of this issue."[210]

  The next day, on November 19, 2019, DEC Environmental Enforcement Officer David Murrish reviewed AAFM's inspection reports for Wright Farm.[211] Murrish noted that winter weather would have made travel across northern Vermont to inspect the farm dangerous that day. "*Considering* this and *the passage of time since the AAFM inspection*, I emailed CEEO McVeigh asking if a rapid response was required. I was advised it was not."[212] AAFM's delay meant that DEC had no reason to rush.

  On November 22, 2019, Murrish visited Wright Farm. He conducted a dye test to determine whether agricultural wastes observed in the ditch that AAFM had identified continued to discharge into surface waters. After "dropping the dye," Murrish watched as it eventually "entered waters of the state."[213] AAFM's delayed referral had allowed a likely ongoing discharge to continue for more than **five months**.

- On February 22, 2018, AAFM conducted a follow-up inspection at Missisquoi Valley Farm based on an in initial inspection conducted on August 3, 2017. [214] The AAFM inspector observed liquid coming out of a catch basin drainage pipe.[215] The water was "discolored" and emitted an "odor."[216] The inspector followed the flow path to a road and then continued "for approximately 279 feet toward the Missisquoi River." There, water flowed into an ice-covered area directly adjacent to the Missisquoi River.[217] AAFM

[207] AAFM, Facility Evaluation Form, Wright Farm, Main Farm (Oct. 18, 2019) (inspected June 6, 2019).
[208] *Id.*
[209] *Id.*
[210] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to Sean McVeigh, Chief Environmental Enforcement Officer, DEC (Nov. 18, 2019, 12:55 EST).
[211] DEC, Investigation Report, 19EC01311 IR, Wright Farm (Oct. 18, 2019).
[212] *Id.* (emphasis added).
[213] *Id.*
[214] AAFM, Facility Evaluation Form, Missisquoi Valley Farm, Main Dairy Complex (Mar. 14, 2018) (inspected Feb. 22, 2018 and Aug. 3, 2017).
[215] *Id.*
[216] *Id.*
[217] *Id*.

determined that this was an "issue that should be referred ANR."[218] Nonetheless, AAFM delayed referring the matter to ANR until March 16, 2018, about **three weeks** after the follow-up inspection.

On May 9, 2018, DEC Environmental Enforcement Officer Reginald Smith visited Missisquoi Valley Farm. He did not find evidence of a discharge.[219]

- On November 11, 2017, AAFM received a complaint that alleged "[m]anure running off from both a cattle feeding area and a manure pile across a property boundary and to a surface water."[220] AAFM did not investigate the complaint until December 1, 2017. When they did, they discovered that the "complaint should be referred to ANR."[221] Nonetheless, AAFM did not refer the matter until December 27, 2017, nearly **one month** later.[222]

  When he received the referral from AAFM Chief Policy Enforcement Officer David Huber, DEC Chief Environmental Enforcement Officer Sean McVeigh protested the delay. "This was found during an inspection conducted on 12/01/17. That is approximately a one month delay in notice to us. That seems excessive. It would be helpful to shorten that timeframe."[223] Huber acknowledged the delay. "I apologize for the delay because it is excessive. I found out about this complaint the same day that I forwarded it to you."[224]

- On April 6, 2017, AAFM Small Farm Operations Supervisor Trevor Lewis alerted AAFM staff that an investigation on Harness Farm had revealed manure running from an overtopping manure pit to a surface water.[225] He explained that "this is the second or third time this has happened . . . ."[226] The next day, AAFM Director of Water Quality Laura DiPietro asked, "Should [a DEC Environmental Enforcement Officer] do the follow up?"[227] AAFM Chief Policy Enforcement Officer replied that DiPietro's proposal made sense because "this is a violation normally handled by an [DEC Environmental Enforcement Officer]."[228] AAFM Agricultural Resource Management Division Director Jim Leland decided to intervene:

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[218] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to Sean McVeigh, Chief Environmental Enforcement Officer, DEC (Mar. 16, 2018, 13:36 EDT).
[219] DEC, Complaint Report Form, 18EC00168, Missisquoi Valley Farm (complaint received Mar. 16, 2018).
[220] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to Sean McVeigh, Chief Environmental Enforcement Officer, DEC (Dec. 27, 2017, 15:40 EST).
[221] *Id.*
[222] *Id.*
[223] Email from Sean McVeigh, Chief Environmental Enforcement Officer, DEC, to David Huber, Chief Policy Enforcement Officer, AAFM, (Jan. 2, 2018, 09:41 EST).
[224] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to Sean McVeigh, Chief Environmental Enforcement Officer, DEC (Jan. 2, 2018, 16:31 EST).
[225] Email from Trevor Lewis, Small Farm Operations Supervisor, AAFM, to David Huber, Chief Policy Enforcement Officer, AAFM, and others (Apr. 6, 2017, 17:12 EDT).
[226] *Id.*
[227] Email from Laura DiPietro, Director of Water Quality, AAFM, to David Huber, Chief Policy Enforcement Officer, AAFM, and others (Apr. 7, 2017, 09:27 EDT).
[228] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to Laura DiPietro, Director of Water Quality, AAFM, and others (Apr. 7, 2017, 10:10 EDT).

> I would like to discuss referral. It seems to me we have enough information at hand now to develop an appropriate report for next steps. We need to identify what those next steps are and then we can "notify" ANR of the case and our proposed response based on our authority. I am afraid that a referral will not accomplish the goal of managing the manure now nor will the response on the part of our regulatory partner be helpful. We have been down this road before.[229]

Rather than refer the matter to ANR, AAFM issued a cease-and-desist order ("CDO").[230] AAFM waited until April 28, 2017, about **three weeks** after observing the point source discharge, to refer the matter to ANR.[231] Before inspecting the farm, ANR was forced to consult legal counsel to determine whether AAFM's CDO affected ANR's jurisdiction or ability to respond to the discharge.[232] On June 9, 2017, two months after AAFM observed the discharge, DEC Chief Environmental Enforcement Officer Sean McVeigh inspected the farm. He found no evidence of a discharge.[233]

ANR is aware that sharing jurisdiction over agricultural water quality with AAFM makes delay inevitable. DEC Deputy Commissioner Kim Greenwood explained to VPR that "delay [in the enforcement of agricultural water quality violations] is inherent in having multiple bodies regulate."[234] She continued that "[h]aving one body who is regulating farms would certainly help with that, so then the issues would be dealt with at the moment that they're found."[235]

F. AAFM routinely fails to finalize farm inspection and investigation reports until months after the relevant inspection took place.

ANR relies on AAFM's inspection and investigation reports when it investigates and enforces agricultural point source discharges. It uses AAFM's reports both to guide its own investigations and to document agricultural point source discharge violations. The 2017 MOU consequently facilitates ANR's access to accurate, timely AAFM reports. It requires both ANR and AAFM to "document [their] investigation as soon as possible, but no later than 30 days of the investigation."[236]

AAFM rarely complies with the 2017 MOU's prompt documentation requirement. Instead, AAFM averaged 177 days to finalize reports that document its 2019 on-farm inspections.[237] For 14 of these inspections, AAFM waited more than a year to produce a final report.[238] For 4 inspections, AAFM spent more than 500 days.[239] Indeed, AAFM managed to meet the 30-day

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[229] Email from Jim Leland, Agricultural Resource Management Division Director, AAFM, to David Huber, Chief Policy Enforcement Officer, AAFM, and others (Apr. 7, 2017, 11:09 EDT).
[230] DEC, Complaint Report Form, 17EC00282, Harness Farm (complaint received Apr. 28, 2017).
[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] Dillon, *supra* note 112.
[235] *Id.*
[236] 2017 MOU, *supra* note 56, § 6(D)(4).
[237] This claim is based on a review of 98 reports that documented AAFM inspections conducted on LFOs, MFOs, and CSFOs in 2019.
[238] *Id.*
[239] *Id.*

target only 5 times, or for just 5.1 percent of its 2019 inspections.[240] AAFM's performance with respect to 2020 inspection reports improved marginally: it averaged 170 days to finalize reports that documented its 2020 inspections.[241]

AAFM's failure to promptly produce accurate and detailed reports prevents ANR from exercising control over point source discharges. Delays force ANR to choose between investigating discharge-related allegations without the benefit of a thorough report's guidance or delaying the investigation until after evidence may disappear.

DEC Chief Environmental Enforcement Officer Sean McVeigh described the problem in an email to AAFM Director of Water Quality Laura DiPietro on January 24, 2020, nearly three years after ANR and AAFM signed the 2017 MOU:

> I appreciate the question about what we need in a referral. I have discussed this with [AAFM Chief Policy Enforcement Officer] David [Huber] and I usually get something workable from him, but what I am not getting with any regularity is your inspection reports. The referral packages appear to be bare bones. I imagine this is to speed up your referral process. It usually meets our absolute minimum, an owner's name, a 911 address of the subject location, a brief description of the issue, a map and selected photos. I can work with that, but I need your final reports as soon as possible. To be clear, I have received some, but by no means all. The ones I have arrived on day one with the referral or sometime considerably later, and sometimes never.[242]

This was not the first time that McVeigh had raised the issue with AAFM. On July 18, 2019, AAFM referred a matter involving Twin Acres Farm to ANR based on an inspection conducted nearly three months earlier.[243] A manure pit had overtopped and "was flowing downhill towards a surface water. . . . Evidence of a past discharge was observed."[244] AAFM apologized for the delayed referral.[245] When DEC Environmental Enforcement Officer Reginald Smith inspected the farm on July 24, 2019, he found no evidence of an agricultural point source discharge.[246]

Several months later, on September 10, 2019, McVeigh emailed Huber an update on the Twin Acres Farm incident. "FYI – We did not see what you saw. The referral delay was considerable."[247] Huber replied, "That's why it would be great if you could use our reports."[248] McVeigh pointed out that his team could not have used AAFM's Twin Acres Farm inspection reports because they never received them. "Yes, it would be great if you sent us referral packages in a timely manner and then followed up with your inspection reports. It would also be in

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[240] *Id.*
[241] This claim is based on a review of 31 reports that documented AAFM inspections conducted on LFOs, MFOs, and CSFOs in 2019.
[242] Email from Sean McVeigh, Chief Environmental Enforcement Officer, DEC, to Laura DiPietro, Director of Water Quality, AAFM (Jan. 24, 2020, 18:01 EST).
[243] DEC, Complaint Report Form, 19EC00741, Twin Acres Farm (complaint received July 18, 2019).
[244] *Id.*
[245] *Id.*
[246] *Id.*
[247] Email from Sean McVeigh, Chief Environmental Enforcement Officer, DEC, to David Huber, Chief Policy Enforcement Officer, AAFM (Sept. 10, 2019, 17:39 EDT).
[248] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to Sean McVeigh, Chief Environmental Enforcement Officer, DEC (Sept. 11, 2019, 08:05 EDT).

compliance with our existing agreement."[249] After waiting two days, Huber replied, "Thanks for your email, Sean. Attached are the [Twin Acres Farm] reports . . . ."[250]

McVeigh was not the only ANR employee to alert AAFM that incomplete reports were hindering ANR's work. On March 18, 2019, DEC Director of Environmental Compliance Kim Greenwood asked Huber for additional information relating to an alleged manure spreading violation and discharge on a farm in Panton, Vermont:

> It is really important that we get the whole file from you when you send these over – as much as you have at that point in time. We've been hamstrung on incidents when we just get a video without a map . . . or when we just get photos. We really do need photos and a map, with at least an "x" on where you observed the discharges, at a minimum. Otherwise we show up and it's a needle in a haystack trying to find these, so whatever information you have is essential, including your inspection reports even if they are draft.[251]

Huber replied that he could prepare a thumb drive with relevant photos, videos, and maps.[252] He asked Greenwood to send someone to pick up the thumb drive containing the files from AAFM's office at the end of the day.[253] Greenwood asked for Huber to email the files instead. "Without these we are essentially standing at a farm guessing where the discharge is occurring."[254]

If ANR is left "standing at a farm guessing where the discharge is occurring," it cannot comply with the CWA by exercising control over agricultural point source discharges.

G. AAFM's hostility toward ANR and inconsistent communication confuses and harms farmers, undermining ANR's attempts to control agricultural point source discharges.

ANR's ability to control agricultural point source discharges depends on clear communication with Vermont's farmers. Vermont's farmers are committed to protecting water quality. However, they cannot comply with the CWA and Vermont's water quality regulations if ANR and AAFM fail to communicate what compliance entails. Clear communication is especially important where a farm's unique characteristics and circumstances require tailored solutions to water quality challenges.

ANR and AAFM, however, do not speak with one voice. Dysfunction and jurisdictional conflict prevent the agencies from aligning their public communication around agricultural water pollution. Poor communication confuses farmers, harms farms, and prevents ANR from

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[249] Email from Sean McVeigh, Chief Environmental Enforcement Officer, DEC, to David Huber, Chief Policy Enforcement Officer, AAFM (Sept. 11, 2019, 16:12 EDT).
[250] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to Sean McVeigh, Chief Environmental Enforcement Officer, DEC (Sept. 13, 2019, 15:41 EDT).
[251] Email from Kim Greenwood, Director of Environmental Compliance, DEC, to David Huber, Chief Policy Enforcement Officer, AAFM (Mar. 18, 2019, 11:50 EDT).
[252] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to Kim Greenwood, Director of Environmental Compliance, DEC (Mar. 18, 2019, 13:50 EDT).
[253] *Id.*
[254] Email from Kim Greenwood, Director of Environmental Compliance, DEC, to David Huber, Chief Policy Enforcement Officer, AAFM (Mar. 18, 2019, 15:32 EDT).

exercising control over agricultural point source discharges.

An email exchange in May 2018 concerning a discharge from a pig farm exemplifies the confusion created among Vermont's farmers by the split jurisdiction. AAFM Agricultural Engineer Patrick Fry emailed AAFM Chief Policy Enforcement Officer David Huber to describe a farmer who was caught between ANR and AAFM:

> I am working with [a farmer] who was under ANR enforcement for allowing runoff from his pig farm [to] reach a surface water. ANR later determined that the surface water was actually a "fen" and not part of their jurisdiction. Despite that I am still working with [the farmer] and he has since moved the pigs to a new area that will not cause an issue. Yet last Friday Dan Mason of ANR stopped by Matt's farm unannounced for an inspection and subsequently requested to have a meeting this coming Friday. This has [the farmer] pretty concerned despite having cleared the issue, and has me confused since ANR determined the matter closed, so any idea what is going on?[255]

The next day, Huber contacted DEC Chief Environmental Enforcement Officer Sean McVeigh to "request that [DEC] stop any meetings or enforcement with [the farmer] as this does not appear to be under [DEC's] jurisdiction."[256] McVeigh responded that ANR was still investigating the farm and intended to continue as planned:

> [Environmental Enforcement Officer Dan] Mason has not completed his investigation and we have not determined a course of action. . . . The site visit will remain on our schedule.[257]

McVeigh also wondered how the farmer had learned that DEC and AAFM were discussing whether DEC had jurisdiction:

> [DEC's] discussion with [AAFM] was about on [*sic*] an open investigation under DEC control. It was not a case closure and it was not intended to be public information. It appears [the farmer] has become aware of our internal discussion. If so, do you know how that happened?[258]

DEC Director of Environmental Compliance Kim Greenwood then joined the conversation to express concern that "information was shared with the farmer prematurely. . . . We clearly have move [*sic*] work to do on communication between our agencies."[259]

Vermont's agricultural community has also expressed frustration over the affect that ANR and AAFM's fraught collaboration causes. During the Vermont Legislative Task Force to Revitalize the Vermont Dairy Industry's meeting on November 30, 2021, Vermont Farm Bureau

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[255] Email from Patrick Fry, Agricultural Engineer, AAFM, to David Huber, Chief Policy Enforcement Officer, AAFM (May 15, 2018, 14:34 EDT).
[256] Email from David Huber, Chief Policy Enforcement Officer, AAFM, to Sean McVeigh, Chief Environmental Enforcement Officer, DEC (May 16, 2018, 09:06 EDT).
[257] Email from Sean McVeigh, Chief Environmental Enforcement Officer, DEC, to David Huber, Chief Policy Enforcement Officer, AAFM (May 16, 2018, 19:55 EDT).
[258] *Id.*
[259] Email from Kim Greenwood, Director of Environmental Compliance, DEC, to Sean McVeigh, Chief Environmental Enforcement Officer, DEC, and others (May 17, 2018, 08:24 EDT).

Legislative Director Jackie Folsom explained that farmers need clear communications from ANR and AAFM if they are to comply with water quality regulations:

> We need better communication and cooperation between ANR and the Agency of Ag regarding regulations. *Sometimes our farmers get buffeted, not knowing where to go, not knowing who to talk to. They're getting caught in the middle*. And I know there's been some strides on both ends, but we need to really make sure that works.[260]

As noted above in Discussion, Section III.C, then Executive Director of the Champlain Valley Farmer Coalition John Roberts seconded her assessment: "I do think farmers are . . . the pinball being batted around in here . . . ."[261]

ANR and AAFM have had years to improve their collaboration. Their contention nonetheless continues to cause farmers anxiety and confusion. ANR cannot exercise control over agricultural point source pollution if farmers do not know who to talk to or what is expected of them.

IV. ANR FAILS TO MONITOR AGRICULTURAL POINT SOURCE DISCHARGES THAT RESULT FROM THE OVERAPPLICATION OF MANURE, FERTILIZER, AND OTHER SOIL AMENDMENTS TO FARMLAND (CRITERION 40 C.F.R. § 123.63(a)(3)(iii)).

Vermont's NPDES program does not meet Section 402 of the CWA's standards because ANR fails to monitor agricultural point source discharges that result from the application of nutrients, manure, and other soil amendments to farmland.[262]

A. ANR can only monitor agricultural point source discharges that result from the overapplication of manure, fertilizer, and other soil amendments to farmland if AAFM ensures that farms implement field-by-field nutrient management plans.

Nutrient management plans ("NMPs") are farm-specific "budget[s] of nutrients" that guide farms' application of manure, fertilizer, and other soil amendments.[263] NMPs ensure that soil amendments are applied at the right rate, at the right time, and in the right place.[264] Developing an NMP requires farms to consider many factors including, among others: the type of soil amendments a farm intends to apply; the variety of crops it plans to grow; the types of soils it manages; and the number of animals it maintains.[265] When properly developed and implemented, NMPs help farms maintain healthy soils and prevent pollutants, such as excess nutrients, pathogens, and manure, from reaching surface waters.[266] NMPs are a critical tool that farms use to steward lands and waters.

Vermont's RAPs require most of Vermont's farms to implement NMPs:

> All Certified Small Farm Operations . . . and all permitted Medium and Large Farm

[260] Statement of Jackie Folsom, *supra* note 12.
[261] Statement of John Roberts, *supra* note 130.
[262] *See* 40 C.F.R. § 123.63(a)(3)(iii).
[263] AAFM, UVM EXTENSION, WRITING AND FUNDING YOUR NUTRIENT MANAGEMENT PLAN (NMP) 1.
[264] USDA, NRCS, NUTRIENT MANAGEMENT CODE 590 (AC) 4 (2021).
[265] *Id.* at 1–12.
[266] *Id.* at 1.

> Operations managing manure, agricultural wastes, or fertilizer for use as nutrient sources shall implement a field-by-field nutrient management plan consistent with the requirements of the USDA NRCS Nutrient Management Practice Code 590 or other equivalent standards approved by the Secretary [of AAFM].[267]

The RAPs recognize that implementing an NMP requires follow-through; planning is not enough. The RAPs consequently require farms to maintain records of "manure and other agricultural waste application" for five years and to provide those records to AAFM upon request.[268] This allows AAFM to monitor whether farms are applying nutrients as prescribed by their NMPs.

NMPs do more than help farms protect Vermont's waters. NMPs also allow ANR to monitor point source discharges that result from the overapplication of manure, fertilizer, and other soil amendments to farmland. They do this by allowing ANR to compare the rate at which a farm applied soil amendments with the farm's NMP. As discussed below, if a farm applied soil amendments *in excess of* its NMP's recommendations, and some of those amendments ran off the land and into a surface water, a prohibited point source discharge may have occurred. If the farm applied soil amendments *in accordance with* its NMP, and some of those amendments reached a surface water, then a CWA-prohibited point source discharge likely *did not* occur. Thus, NMPs are critical both for farm management and for ANR to monitor potential point source discharges. If a farm lacks an NMP or fails to keep soil amendment application records, ANR cannot carry out its duty to inspect and monitor under the CWA.

The foregoing is true because the CWA prohibits the unpermitted discharge of any pollutant from any point source.[269] Pollutants include agricultural wastes[270] that farmers commonly apply to fields, such as manure, fertilizer, and other soil amendments. Point sources include the manure spreading vehicles and other equipment that farms use to apply soil amendments,[271] as well as structures and features that channel or convey amendment-containing runoff away from fields, such as pipes, ditches, channels, tunnels,[272] swales,[273] and drainage systems.[274] If the farm in question is a CAFO,[275] then the entire farm, including land that the farm controls and applies soil amendments to,[276] is a point source.[277]

Congress recognized that these definitions could make farms liable for a wide variety of discharges associated with the application of soil amendments to fields. For example, if a farm spread manure at an appropriate rate, but rain washed the manure into a stream two days later, the farm would have caused an illegal point source discharge with the manure spreading vehicle as the point source. Congress consequently added an agricultural stormwater exemption to the

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[267] RAPs, *supra* note 5, § 6.03(a).
[268] *Id.* at § 6.03(f).
[269] 33 U.S.C. § 1342(a)(1); s*ee* 33 U.S.C. § 1362(12) (defining "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source").
[270] 33 U.S.C. § 1362(6).
[271] *Concerned Area Residents for the Env't v. Southview Farms*, 34 F.3d 114, 119 (2d Cir. 1994).
[272] 33 U.S.C. § 1362(14).
[273] *Southview Farms*, 34 F.3d at 118–19.
[274] *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979).
[275] *See supra* note 26 (explaining when a farm qualifies as a CAFO).
[276] 40 C.F.R. § 122.23(b)(3) (defining "land application area").
[277] 33 U.S.C. § 1362(14).

CWA that "seeks to remove liability for agriculture-related discharges primarily *caused by nature*, while maintaining liability for other discharges."[278]

The agricultural stormwater exemption achieves this by excluding "agricultural stormwater discharges" from the CWA's definition of "point source."[279] A discharge is an agricultural stormwater discharge if its primary cause is precipitation,[280] not farm management. By contrast, a discharge is not an agricultural stormwater discharge if its primary cause is "the over-saturation of the fields" with soil amendments, even if precipitation plays a part in causing the discharge.[281]

Federal regulations reflect this understanding by applying the CWA's agricultural stormwater exemption only if the discharged soil amendments were "applied in accordance with site-specific nutrient management practice[s] that ensure [their] appropriate agricultural utilization . . . ."[282] These practices are often captured in NMPs. Vermont requires farms to maintain and implement field-by-field NMPs for just this reason.[283]

NMPs allow Vermont's regulators to determine whether the CWA's agricultural stormwater exemption applies to cases that involve soil amendments reaching surface waters after they are applied to farmland. If the farm applied the amendments according to its NMP, then the farm "applied in accordance with site-specific nutrient management practice[s],"[284] the agricultural stormwater exemption applies, and the farm did not engage in a point source discharge. If the farm applied the amendments at rates that exceed its NMP, then the farm likely discharged.

ANR can make this determination only if farms develop an accurate, complete NMP and document soil amendment applications. If either the NMP or the application records are missing or faulty, then ANR cannot determine whether the agricultural stormwater exemption applies. Missing or faulty NMPs and records consequently prevent ANR from inspecting and monitoring, no less controlling, potential point source discharges.

Under these circumstances, it is paramount that AAFM ensure that farmers comply with the RAPs and fully implement a field-by-field NMP. Failure to do so would prevent ANR from monitoring agricultural point sources that result from the application of nutrients, manure, and other soil amendments to farmland, as the CWA requires.

B. AAFM's routine failure to enforce Vermont's NMP-related requirements prevents ANR from monitoring agricultural point source discharges that result from the overapplication of manure, fertilizer, and other soil amendments to farmland.

AAFM identified NMP-related deficiencies during 76 percent of the inspections it conducted on Vermont's LFOs, MFOs, and CSFOs in 2019, 2020, and 2021.[285] The deficiencies that AAFM

[278] *Waterkeeper Alliance, Inc. v. EPA,* 399 F.3d 486, 509 (2d Cir. 2005) (emphasis added).
[279] 33 U.S.C. § 1362(14) (defining "point source" to exclude "agricultural stormwater discharges and return flows from irrigated agriculture.").
[280] *Southview Farms*, 34 F.3d at 120–21.
[281] *Id.* at 121.
[282] 40 C.F.R. § 122.23(e).
[283] *See* RAPs, *supra* note 5, § 6.03(a).
[284] 40 C.F.R. § 122.23(e).
[285] This claim is based on a review of the 139 reports Petitioners received from AAFM that documented AAFM inspections conducted on LFOs, MFOs, and CSFOs between April 9, 2019 and October 13, 2021.

discovered varied. Many farms were unable to produce a current NMP upon inspection.[286] Others did not maintain updated records of manure, nutrients, and other soil amendments applied to fields.[287] Some farms had not conducted the soil tests necessary to develop an accurate NMP.[288] Still others had failed to sample their waste storage facilities, also essential to develop an accurate NMP.[289]

AAFM staff recognize that these deficiencies prevent AAFM and ANR from determining whether farms are applying soil amendments "in accordance with site-specific nutrient management practice that ensure [their] appropriate agricultural utilization . . . ."[290] If a farm lacks an NMP, then the agencies cannot compare the farm's actual manure application rate to the appropriate application rate to determine whether the CWA's stormwater exemption applies. If a farm is missing current soil tests for its fields, then the farm's NMP may not incorporate accurate

[286] *See, e.g.*, AAFM, General Information Form, Mack Bros. Farm (Nov. 20, 2019) (inspected Aug. 12, 2019) ("At the time of inspection, and as previously observed at your last inspection, a NMP was not available onsite. The most recent NMP developed was stated to be 2017. It was discussed that the farm should always have an updated NMP and that it needs to be available onsite."); AAFM, General Information Form, River Valley Farm (June 19, 2019) (inspected June 18, 2019) ("As observed, the farm does not have an NMP."); AAFM, General Information Form, Cream Hill Stock Farm (May 21, 2019) (inspected Apr. 9, 2019) ("The farm did not have an NMP available during the inspection."); AAFM, General Information Form, Rawson Farm (July 23, 2019) (inspected Apr. 23, 2019) ("A Nutrient Management Plan (NMP) had not been developed."); AAFM, General Information Form, Rawson Farm (Aug. 7, 2019) (inspected Apr. 30, 2019) ("The farm did not have a current NMP available at the time of the inspection."); AAFM, General Information Form, Scholten Farm (Sept. 18, 2019) (inspected June 18, 2019) ("The farm did not have an NMP available on site at the time of the inspection . . . ."); AAFM, General Information Form, Meadow View Farm LLC (Nov. 13, 2019) (inspected July 18, 2019) ("The farm did not have a Nutrient Management Plan at the time of the inspection.").

[287] *See, e.g.*, AAFM, General Information Form, Pond Hill Ranch (Apr. 26, 2021) (inspected Oct. 14, 2020) ("At the time of inspection the farm was not keeping up to date records of nutrient application from both manure and fertilizer . . . ."); AAFM, General Information Form, Pleasant Acres (Apr. 22, 2021) (inspected Sept. 17, 2020) ("Limited records for manure spreading were available on site at the time of inspection. . . . Limited records for fertilizer applications were available at the time of inspection."); AAFM, General Information Form, Sizen Dairy Farm (Nov. 6, 2019) (inspected Oct. 23, 2019) ("The farm also needs to keep manure and fertilizer spreading records . . . ."); AAFM, General Information Form, Green Mountain Dairy (Nov. 5, 2021) (inspected Oct. 13, 2021) ("Fertilizer records were not available during the inspection."); AAFM, General Information Form, Bryce Farms Inc (Dec. 14, 2019) (inspected Nov. 5, 2019) ("The farm does not have a nutrient management plan, current soil tests, waste analysis, crop records, fertilizer records or manure spreading records.");

[288] *See, e.g.*, AAFM, General Information Form, Green Mountain Dairy (Nov. 5, 2021) (inspected Oct. 13, 2021) ("Soil tests were out-of-date at the time of inspection"); AAFM, General Information Form, Daona Farm (June 3, 2021) (inspected Nov. 12, 2020) ("At the time of inspection it was observed that 27 fields in the NMP had the most recent soil tests in 2015 & 2016, and 13 fields . . . were observed to be using average sample values. All fields must be soil sampled at least once every three years."); AAFM, General Information Form, Richville Farm (Sept. 3, 2020) (inspected Feb. 17, 2020) ("It was observed that 17 fields in [Richville Farm's] 2020 NMP did not have representative soil analyses."); AAFM, General Information Form, Deer Flats Farm (Dec. 2, 2020) (inspected July 28, 2020) ("At the time of inspection, Deer Flats Farm's (DFF) Nutrient Management Plan (NMP) did not have up to date soil samples on any of their fields.").

[289] *See, e.g.*, AAFM, General Information Form, Robeth Holsteins LLC (Jan. 13, 2020) (inspected June 6, 2019) ("The NMP was incomplete for several factors, one being no manure analysis. No manure analysis meant that there were no recommendations for manure spreading rate."); AAFM, General Information Form, Randy Callan Farm (Oct. 5, 2021) (inspected Aug. 26, 2021) ("No current waste analysis available"); AAFM, General Information Form, Corey Acres Farm (Oct. 5, 2021) (inspected Aug. 13, 2021) ("No current waste analysis available"); AAFM, General Information Form, Westcoms Farm (Sept. 24, 2021) (inspected Aug. 11, 2021) ("No current waste analysis available"); AAFM, General Information Form, Chaput Family Farms (Aug. 23, 2021) (inspected July 23, 2021) ("No current waste analysis available").

[290] 40 C.F.R. § 122.23(e).

application recommendations, rendering it less useful.

For example, AAFM Specialists Clark Parmelee and David Wardrop inspected Silver Spring Farm on July 11, 2019. They noted that "[t]he farm does not have a nutrient management plan, current soil tests, waste analysis, crop records, fertilizer records or manure spreading records."[291] Parmelee and Wardrop went on to explain that they were "not able to compare manure spreading records to recommended rates because the farm does not have an NMP or manure spreading records."[292]

Similarly, AAFM Specialists Abbi Pajak and Matt Gardner inspected Mack Bros. Farm on August 12, 2019. They discovered that the farm's NMP, field-by-field manure and fertilizer application records, and field-by-field crop yields were not available for inspection.[293] Pajak and Gardner described how this deficiency prevented them from conducting a complete inspection: "Implementation items associated to the farm's NMP including, but not limited to, crop rotation and manure spreading, could not be verified because NMP was not on-site."[294]

If NMP-related deficiencies prevent AAFM and ANR from determining whether farms are applying soil amendments in accordance with an updated, current NMP, then the agencies cannot determine whether the CWA's agricultural stormwater exemption applies to potential point source discharges from those farms. This makes it impossible for ANR to inspect and monitor agricultural point source discharges that result from the application of nutrients, manure, and other soil amendments to farmland on many farms.[295]

Vermont law authorizes AAFM to use several formal enforcement mechanisms to ensure that farms maintain current NMPs and soil amendment application records. These include issuing corrective action letters, notices of violation, cease and desist orders,[296] revoking farm certifications or permits,[297] and pursuing civil enforcement.[298]

Despite widespread NMP-related deficiencies, AAFM rarely uses formal enforcement mechanisms to require that Vermont's LFOs, MFOs, and CSFOs maintain and implement field-by-field NMPs.[299] The following examples are typical:

- On August 11, 2021, AAFM Specialists Luke Hughes and Sylvia Jensen inspected Westcoms Farm.[300] They identified the following NMP-related problems:

> Soil tests were not available in the NMP[.] Manure application records were not available at the time of inspection. Fertilizer application records were not available at the time of inspection. Crop yield records were not accurate, complete, or available . . . No current waste analysis available[.] NMP not

[291] AAFM, General Information Form, Silver Spring Farm (Sept. 23, 2019) (inspected July 11, 2019).
[292] *Id.*
[293] AAFM, General Information Form, Mack Bros. Farm (Nov. 20, 2019) (inspected Aug. 12, 2019).
[294] *Id.*
[295] *See* discussion *supra* Discussion, Section IV.A.
[296] 6 V.S.A. §§ 4991–93.
[297] *Id.* §§ 4991, 4994.
[298] *Id.* §§ 4991, 4995.
[299] RAPs, *supra* note 5, § 6.03(a).
[300] AAFM, General Information Form, Westcoms Farm (Sept. 24, 2021) (inspected Aug. 11, 2021).

available at time of inspection[.]

To the best of Petitioners' knowledge, AAFM did not use any of its formal enforcement mechanisms to correct the farm's failure to implement a field-by-field NMP.

- On November 16, 2020, AAFM Specialists Sylvia Jensen and David Wardrop inspected Newmont Farm.[301] They discovered that the farm had used an outdated waste analysis in its NMP and that the farm did not have field-by-field fertilizer application records.[302]

  AAFM had identified NMP-related issues on Newmont Farm before. During the farm's May 2, 2019 inspection, AAFM Specialists Clarice Cutler, Abbi Pajak, and Chip Gianfagna[303] observed that the farm's NMP overallocated phosphorus on more than 20 high-phosphorus fields.[304] A programmatic follow-up conducted on March 24, 2020 revealed that "some high risk phosphorus loss fields still have nutrient recommendations above crop removal . . . ."[305]

  Despite identifying NMP-related deficiencies on Newmont Farm during three inspections, to the best of Petitioners' knowledge, AAFM did not use any of its formal enforcement mechanisms to correct the farm's failure to implement a field-by-field NMP.

- On October 14, 2020, AAFM Specialists David Wardrop and Trevor Lewis, accompanied by DEC Environmental Analyst Clarice Cutler,[306] inspected Pond Hill Ranch.[307] Wardrop and Lewis observed that "the farm was not keeping up to date records of nutrient application from both manure and fertilizer as stated in the [RAPs]."[308] The farm had also failed to conduct "an annual waste analysis for each waste storage facility," information that would be used "in the creation of [an] NMP."[309]

  AAFM Specialists Wardrop and Silas Rainville conducted a programmatic follow-up at Pond Hill Ranch on May 19, 2021.[310] Although Wardrop and Rainville reviewed prior observations that related to one of the farm's feedlots, they ignored whether the farm had made NMP-related progress.[311] To the best of Petitioners' knowledge, AAFM did not use any of its formal enforcement mechanisms to correct the farm's failure to implement a field-by-field NMP.

  This was not the first time that AAFM had identified NMP-related deficiencies on Pond Hill Ranch. On July 25, 2018, AAFM Specialists Clark Parmelee and John Roberts inspected the farm.[312] They noted that the farm had not developed an NMP, taken necessary soil samples, or conducted "an annual waste nutrient analysis for each waste

[301] AAFM, General Information Form, Newmont Farm (May 7, 2021) (inspected Nov. 16, 2020).
[302] *Id.*
[303] At the time of the inspection, Chip Gianfagna was an AAFM employee. He had not yet joined DEC.
[304] AAFM, General Information Form, Newmont Farm (Sept. 18, 2019) (inspected May. 2, 2019).
[305] AAFM, Programmatic Follow-up, Newmont Farm (Mar. 25, 2020) (inspected Mar. 24, 2020).
[306] At the time of the inspection, Clarice Cutler had recently joined DEC after having worked for AAFM.
[307] AAFM, General Information Form, Pond Hill Ranch (Apr. 26, 2021) (inspected Oct. 14, 2020).
[308] *Id.*
[309] *Id.*
[310] AAFM, Programmatic Follow-up, Pond Hill Ranch (Aug. 18, 2021) (inspected May 19, 2021).
[311] *Id.*
[312] AAFM, General Information Form, Pond Hill Ranch (Oct. 20, 2018) (inspected July 25 2018).

storage facility."[313] Although AAFM issued a corrective action letter to the farm on February 14, 2019, the letter did not address any NMP-related issues.[314]

- On October 10, 2019, AAFM Specialists Clark Parmelee, David Wardrop, and Andrew Mitchell inspected Sizen Dairy Farm.[315] They noted that the farm did not keep manure and fertilizer spreading records, that it did not maintain crop yield records, and that it had not conducted an annual analysis of agricultural wastes contained in a manure pit, all things that the farm "needs to" do.[316] To the best of Petitioners' knowledge, AAFM did not use any of its formal enforcement mechanisms to correct the deficiencies Parmelee, Wardrop, and Mitchell identified.

- On April 23, 2019, AAFM Specialists Clark Parmelee and Trevor Lewis inspected Rawson Farm.[317] The farm had not developed an NMP, was not tracking manure spreading, and had not conducted an annual analysis of agricultural wastes contained in manure pits that would be applied to fields.[318] Parmelee and Lewis made the following NMP-related recommendations:

  > I recommend keeping manure spreading records that track the amount, source, time and location of where manure is being spread. . . . keeping cropping records that track how much feed was taken off each field. . . . tak[ing] soil samples of all fields receiving nutrients. . . . [having] manure samples analyzed from both manure pits and any manure stacks that the farm may have. *All of these records and analysis will be used in creating an NMP*.[319]

  To the best of Petitioners' knowledge, AAFM did not use any of its formal enforcement mechanisms to correct the farm's failure to implement a field-by-field NMP.

AAFM's failure to deploy its formal enforcement mechanisms, even its most accommodating mechanisms, perpetuates widespread noncompliance with Vermont's field-by-field NMP requirement. Noncompliance prevents ANR from determining whether the CWA's agricultural stormwater exemption applies when farms apply soil amendments. Thus, AAFM's failure to enforce Vermont's NMP-related requirements prevents ANR from inspecting and monitoring agricultural point source discharges that result from the overapplication of manure, fertilizer, and other soil amendments to farmland.

C. AAFM routinely declines to alert ANR when farms overapply soil amendments to farmland.

When farms apply amendments in greater quantities than their NMP recommends, they create a risk that those amendments will run off their fields and pollute surface waters. Moreover,

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[313] *Id.*
[314] Corrective Action Warning Letter from Anson Tebbetts, Secretary, AAFM, to Harry O'Rourke, Pond Hill Ranch (Feb. 14, 2019).
[315] AAFM, General Information Form, Rawson Farm (Oct 23, 2019) (inspected Nov 11, 2019).
[316] *Id.*
[317] AAFM, General Information Form, Rawson Farm (July 23, 2019) (inspected April 23, 2019).
[318] *Id.*
[319] *Id.* (emphasis added).

application in excess of NMP recommendations likely makes the CWA's agricultural stormwater exemption inapplicable. Evidence of overapplication is consequently evidence of a potential point source discharge that AAFM must refer to ANR.[320] Only when AAFM refers that evidence can ANR monitor potential point source discharges and act as "the decision-maker regarding the existence of a point source . . . ."[321]

During routine farm inspections, AAFM often discovers that farms have overapplied soil amendments, particularly manure. AAFM usually declines to alert ANR. The following examples are typical:

- On September 16, 2021, AAFM Specialists Luke Hughes and Maria Steyaart inspected Westminster Farms.[322] They observed "[e]vidence of nutrients applied to field[s] without meeting relevant standards."[323] Westminster Farms had applied manure to fields 302-2 and 302-3 at a rate of 12,529 gallons per acre even though the farm's NMP recommended 11,000 gallons per acre.[324]

  Two years earlier, on August 21, 2019, AAFM Specialists Megan Phillips and Maria Steyaart noted similar overapplications.[325] "Based on the recommendation in the Farm's NMP, Field 907-2 . . . was over applied with manure by 6,700 gallons."[326] Phillips and Steyaart recommended that the farm adhere to its NMP in the future "to prevent over application of nutrients to fields . . . ."[327]

  To the best of Petitioners' knowledge, AAFM never alerted ANR that Westminster Farms had overapplied nitrogen and manure, an omission that prevented ANR from inspecting and monitoring potential point source discharges.

- On August 25, 2021, AAFM Specialists Luke Hughes and Connor Steckel inspected Bess-View Farm.[328] They noted that the farm had applied nitrogen fertilizer in amounts "above guideline values."[329] The farm's NMP indicated that the farm should spread nitrogen at a rate of 150 pounds per acre to field 192-1.[330] Instead, the farm applied nitrogen at a rate of 305 pounds per acre, more than double the NMP value.[331]

  At a previous inspection conducted on November 13, 2019, AAFM Specialists Megan Phillips and Connor Steckel described similar overapplications at Bess-View Farm.[332] Although the farm's NMP recommended applying 6,800 gallons of manure per acre to

[320] 2017 MOU, supra note 29, §§ 5(A)(1), 6(D)(2).
[321] *Id.* § 6(C)(4); *see* 2013 EPA Letter, *supra* note 64, at 8 ("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 requirements to achieve compliance").
[322] AAFM, General Information Form, Westminster Farms, Inc. (Nov. 11, 2021) (inspected Sept. 16, 2021).
[323] *Id.*
[324] *Id.*
[325] AAFM, General Information Form, Westminster Farms, Inc. (Jan. 10, 2020) (inspected Aug. 21, 2019).
[326] *Id.*
[327] *Id.*
[328] AAFM, General Information Form, Bess-View Farm Partnership (Sept. 24, 2021) (inspected Aug. 25, 2021).
[329] *Id.*
[330] *Id.*
[331] *Id.*
[332] AAFM, General Information Form, Bess-View Farm Partnership (Jan. 17, 2020) (inspected Nov. 13, 2019).

field 52-29, the farm applied 9,400 gallons per acre.[333]

To the best of Petitioners' knowledge, AAFM never alerted ANR that Bess-View Farm had overapplied nitrogen and manure, an omission that prevented ANR from inspecting and monitoring potential point source discharges.

- On September 3, 2020, AAFM Specialists Krista Battles and Maria Steyaart inspected Richville Farm.[334] Their field checks revealed that the farm had applied manure at a rate of 12,000 gallons per acre to fields 9759-1 (264) and 9759-11 (269).[335] This rate exceeded the NMP's prescription by 4,000 gallons per acre, or 50 percent.[336]

  At an inspection conducted the previous year, on October 9, 2019, AAFM Specialists Steve Cash and Maria Steyaart identified nearly identical manure overapplications on Richville Farm.[337] The farm had applied manure at a rate of 12,000 gallons per acre to fields 9759-1 (264), 9759-11 (269), 9759-12 (268E), 9759-1 (263A), and 9759-12 (270).[338] The applications exceeded the NMP amount by 4,000 gallons per acre.[339]

  To the best of Petitioners' knowledge, AAFM never alerted ANR that Richville Farm had overapplied manure during successive years on the same fields, an omission that prevented ANR from inspecting and monitoring potential point source discharges.

- On September 1, 2020, AAFM Specialists Maria Steyaart and David Wardrop inspected Gray Farm.[340] The farm's NMP recommended that no manure be spread on field 23 because the field was rated as "Very High" for soil test phosphorus.[341] Gray Farm nonetheless spread manure at a rate of 660 gallons per acre on field 23.[342] Steyaart and Wardrop recommended that Gray Farm "follow [Gray Farm's] NMP recommendations" in future years.[343]

  To the best of Petitioners' knowledge, AAFM never alerted ANR that Gray Farm had overapplied manure, an omission that prevented ANR from inspecting and monitoring potential point source discharges.

- On July 31, 2019, AAFM Specialists Clarice Cutler and Abbi Pajak inspected Maxwell Neighborhood Farms.[344] They learned that the farm had applied 12,400 gallons of manure to field 1730-1 (Chaput 01 (C)) even though the farm's NMP recommended just 9,000 gallons.[345] Cutler and Pajak raised the farm's repeated overapplication with the farmer:

  > At the time of the inspection I discussed the overapplication of manure

[333] *Id.*
[334] AAFM, General Information Form, Richville Farm (Feb. 17, 2021) (inspected Sept. 3, 2020).
[335] *Id.*
[336] *Id.*
[337] AAFM, General Information Form, Richville Farm (Jan. 23, 2020) (inspected Oct. 9, 2019).
[338] *Id.*
[339] *Id.*
[340] AAFM, General Information Form, Gray Farm (July 28, 2021) (inspected Sept. 1, 2020).
[341] *Id.*
[342] *Id.*
[343] *Id.*
[344] AAFM, General Information Form, Maxwell Neighborhood Farms LLC (Jan. 14, 2020) (inspected July 31, 2019).
[345] *Id.*

> documented in the farm's NMP *over the past few years*, and that the over applications have caused the [phosphorus] Index risk ratings to increase to Very High. . . . Manure application rate and timing is one of the ways in which the Agency can assess whether a farm is implementing their NMP, and overapplying nutrients on fields that are at very high risk of moving nutrients off-field is a potential water quality risk.[346]

Cutler and Pajak also noted that the farm had failed to produce manure spreading records during its previous inspection.[347]

To the best of Petitioners' knowledge, AAFM never alerted ANR that Maxwell Neighborhood Farms had overapplied manure over many years, an omission that prevented ANR from inspecting and monitoring potential point source discharges.

By choosing not to alert ANR when it discovers that a farm overapplied soil amendments, AAFM prevents ANR from inspecting and monitoring potential agricultural point source discharges.

REQUEST

I. PETITIONERS REQUEST THAT EPA REQUIRE CORRECTIVE ACTION OR WITHDRAW NPDES AUTHORITY FROM VERMONT.

For the foregoing reasons, Petitioners request that EPA promptly[348] initiate proceedings pursuant to CWA Section 402(c)(3) and its implementing regulations at 40 C.F.R. §§ 123.63, 123.64 to order Vermont to take necessary corrective action to cure the serious deficiencies in Vermont's delegated NPDES program. If Vermont fails to take corrective action, including adopting Secretary of ANR Julie Moore's proposal to transfer agricultural water quality inspection and enforcement to ANR, Petitioners request that EPA withdraw NPDES authority from Vermont until such time as the state reforms water pollution regulation in Vermont so that it complies with the CWA.

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[346] *Id.*

[347] *Id.*

[348] The Administrative Procedure Act ("APA") requires EPA to respond to filings such as this Petition within a reasonable time. *See* 5 U.S.C. § 553(e); 5 U.S.C. § 555(b) ("With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it."). "There is no per se rule as to how long is too long to wait for agency action, but a reasonable time for agency action is typically counted in weeks or months, not years." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (internal citations and quotation marks omitted).

Respectfully submitted, Dated March 16, 2022

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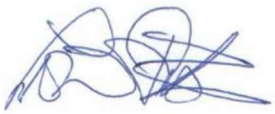

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Cc: Julie Moore, Secretary, Vermont Agency of Natural Resources
John Beling, General Counsel, Vermont Agency of Natural Resources

Anson Tebbetts, Secretary, Vermont Agency of Agriculture, Food, and Markets
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Julia S. Moore, P.E.
Agency Secretary

State of Vermont
Agency of Natural Resources

MEMORANDUM

To: Suzanne Young, Secretary, Agency of Administration

Mike Smith, Secretary, Agency of Human Services

From: Julia S. Moore, P.E., Secretary, Agency of Natural Resources JM

cc: Anson Tebbetts, Secretary, Agency of Agriculture, Food and Markets

Date: October 9, 2020

Re: Proposal to Restructure ANR AAFM Water Quality Staff

Overview/Background

Regulation of agricultural water quality is currently divided between the Agency of Natural Resources (ANR) and the Agency of Agriculture, Food, and Markets (AAFM), depending on whether the water quality concern is being driven by a "point source" (ANR) or a "non-point source" (AAFM) of pollution. The distinction between point and non-point sources is a legal construct, established in the Clean Water Act, at a time when water quality concerns were largely focused on municipal wastewater treatment facilities and factories and, as such, has considerably less practical and often confusing effect in an agricultural setting. The proverbial round peg being pounded into a square hole.

As there is often no bright line that exists between point and non-point sources in agricultural settings, both agencies routinely receive and investigate complaints from the public that fall outside their jurisdiction. Such complaints are then referred to the other agency, requiring additional (often redundant) investigation in order to resolve the complaint. Clearly, this division of responsibility between ANR and AAFM's jurisdiction is both fact-intensive and time-consuming. It also results in lack of clarity for the farming community.

Further complicating matters, the distinction between point and non-point sources in agricultural setting can be changeable, depending on both weather and field conditions. And while this distinction is important from the perspective of the legal framework, it has no practical effect in terms of water quality - neither the receiving water nor the public care whether pollution emanates from a point source or a non-point source, but only that it is occurring.

The net effect is that this largely artificial construct and division of responsibility/overlapping jurisdiction between ANR and AAFM has led to tension and conflict between the agencies, regulatory uncertainty for farmers, and more time-consuming outcomes for water quality resulting in more pollution.

Mechanics and Current Structure

ANR is the federally-delegated entity responsible for administration of the Clean Water Act in the State. That delegation requires ANR (1) establish and maintain a concentrated animal feeding operation (CAFO) permitting program; (2) regulate agricultural point source discharges; (3) determine when a point source discharge is or may occur on a farm and; (4) permit those discharges to manage / eliminate them. ANR's program consists of 2 full-time employees responsible for the CAFO program and an additional 2.5 FTEs inspector-time spent by DEC's Environmental Enforcement Officers (or EEOs) responding to agricultural water quality discharge complaints. (DEC has a staff of seven EEOs that are responsible for responding to all environmental complaints within the State, including agriculture.)

AAFM administers an agricultural water quality program that is premised on preventing discharges to waters so that farms do not trigger Clean Water Act jurisdiction. Specifically, AAFM's farm operating permits require farmers to install barnyard and field-based practices to prevent discharges. In contrast to the Agency's bright line of whether a discharge is occurring or not, the administration of this program consists of farm inspections to determine whether the farm is conforming to performance standards and best management practices. Put another way, the two agencies use different standards to determine if a violation exists – ANR looks at what is going into the water and AAFM looks at what is happening on the land. In addition, AAFM provides technical, engineering, and financial assistance to farms to correct issues when identified. AAFM's water quality program consists of 34 total staff, including the division director, a deputy director, 15 staff responsible for inspections and enforcement, and 17 staff who provide technical assistance including engineering services and agronomic advice. In addition, AAFM included funding for two additional inspection staff in the FY21 Clean Water Fund budget.

Alternative Structure

Restructuring the division of labor between ANR and AAFM offers opportunities to increase government efficiency and provide greater certainty to farmers. Specifically, transferring the 15 AAFM staff responsible for inspections and enforcement to ANR to create a singular program responsible for water quality regulation on Vermont farms. Based on a cursory review, it is anticipated this restructuring would result in a savings of up to two FTEs worth of existing inspector time, as well as the avoided cost associated from being able to forgo the two additional inspectors included in AAFM's FY21 budget, for an estimated savings of $350,000 in combined GF and Clean Water Fund revenues.

Under this model, AAFM would continue to be the lead provider of technical and financial assistance to farmers. This structure is similar to the successful division of labor between ANR and VTrans in addressing water quality concerns associated with stormwater runoff from roads, where ANR is responsible for administering the municipal roads general permit and VTrans provides technical and financial assistance to municipalities thru the Better Roads and Local Roads programs, and municipal road Grant-in-Aid program.