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VIA FIRST-CLASS MAIL AND ELECTRONIC MAIL

Re: Supplement to Petition for Withdrawal of the National Pollutant Discharge Elimination System Program Delegation from the State of Vermont

Dear Mr. Johnson, Mr. Varney, Mr. Dierker, and Mr. Perkins:

On August 14, 2008, Conservation Law Foundation (CLF) filed a petition formally requesting that the Environmental Protection Agency (EPA) require Vermont to take action to remedy the deficiencies in its National Pollutant Discharge Elimination System (NPDES) program, and to withdraw Vermont's NPDES authority failing corrective action by Vermont. The petition

demonstrated that Vermont meets at least six criteria for de-delegation as laid out in 40 C.F.R. § 123.63(a), including failure to regulate. This letter provides further evidence that Vermont's Agency of Natural Resources (ANR) fails to "exercise control over activities required to be regulated . . . including failure to issue permits."[1]

Consistent with the NPDES delegation agreement and pursuant to state law, ANR must administer a stormwater permitting program "based on the requirements of the ...NPDES permit program,"[2] employing the "full range of possibilities and variables allowable."[3] The Clean Water Act and its implementing regulations require that stormwater discharges or categories of discharges that an agency determines "contribute[] to a violation of a water quality standard [WQS]" or are "significant contributor[s] of pollutants to waters of the United States" obtain NPDES permits.[4] In 2003, CLF filed a petition requesting that ANR designate stormwater discharges in five impaired Brooks in the Lake Champlain watershed as contributing to WQS violations, and require NPDES Permits for those discharges.[5] Over five years later and after three court decisions recognizing ANR's clear obligations to exercise its residual designation authority (RDA),[6] ANR has yet to require permits for the discharges - thereby exhibiting an ongoing failure to "exercise control over activities required to be regulated."

The most recent decision was issued by Vermont's Environmental Court on August 28, 2008. The Court ruled that "ANR must exercise its residual designation authority to require applications for NPDES permits" for "currently unregulated point source discharges of stormwater that ANR has determined contribute to violations of VWQS [Vermont Water Quality Standards] in the five impaired Brooks."[7] The Environmental Court's ruling followed extensive data collection by ANR in which it was "undisputed that the five Brooks at issue in this case are impaired and that specifically identified stormwater discharges into the Brooks are causing material impairments."[8]

Rather than proceeding expeditiously with NPDES regulation of the contributing point-source stormwater dischargers in a manner that will achieve compliance with water quality standards and the Clean Water Act, ANR has filed a motion to alter the Environmental Court's ruling and

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[1] *See* 40 C.F.R. § 123.63(a)(2)(i).
[2] 10 V.S.A. § 1264(a)
[3] *Id.* § 1258(b).
[4] 33 U.S.C. § 1342(p)(2)(E); 40 C.F.R. §122.26(a)(9)(i)(D), *rule vacated on other grounds by NRDC v. EPA,* 526 F.3d 591, 608 (9th Cir. 2008).
[5] The petition was filed pursuant to Clean Water Act regulations which allow "[a]ny person [to] petition the Director to require a NPDES permit for a discharge which is composed entirely of storm water which contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 40 C.F.R. § 122.26(f)(2).
[6] *In re: Stormwater NPDES Petition (Conversation Law Foundation Appeal),* No. 14-1-07, at 36 (Vt. Env. Ct. Aug. 28, 2008); *In re Stormwater NPDES Petition*, 180 Vt. 261, 276-77 (Vt. Aug. 25, 2006). In addition to the Vermont Supreme Court and the Vermont Environmental Court cases (discussed below), the Vermont Water Resources Board has ruled in this case. It heard CLF's appeal of ANR's first denial of CLF's 2003 40 C.F.R. § 122.26(f) petition. The Board instructed ANR to "implement and require NPDES permits for all existing non-de minimis discharges of stormwater 'that increase the mass loading of stormwater pollutants into these stormwater-impaired streams.'" *In re Stormwater* (Vt. Env. Ct.), at 6 (quoting *In re NPDES Stormwater Petition,* No. WQ-03-17, at 11-12 (Vt. Water Res. Bd. Oct. 14, 2004)).
[7] *In re Stormwater* (Vt. Env. Ct.), at 36.
[8] *Id.* at 27.

stay its effect. Thus, with full awareness of the facts on the ground, ANR continues in its longstanding failure to regulate point-source stormwater discharges that are polluting Vermont's waters in violation of the state's EPA-approved water quality standards. The Environmental Court was sensitive to the "passage of significant time" that has elapsed in this case and noted that, "as more time passes," it was especially important for ANR to begin "the notification and permitting procedures directed" in its decision.[9]

ANR's continued dereliction of its residual designation "authority and responsibility"[10] is further evidence that EPA must step in to require corrective action, or withdraw NPDES authority from Vermont. As the Environmental Court noted more than once, if ANR is unable to "adequately execute its statutory obligations under state and federal law, then relinquishment to EPA may be necessary."[11]

For the above reasons and those stated in its petition of August 14, 2008, CLF respectfully requests that EPA require Vermont officials to take the steps necessary to cure Vermont's NPDES program, and to withdraw Vermont's NPDES authority failing corrective action.

Sincerely,

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Laura Murphy, Staff Attorney
Environmental & Natural Resources Law Clinic at Vermont Law School
For Conservation Law Foundation

/s Anthony Iarrapino, Staff Attorney
Conservation Law Foundation

Cc: George Crombie, Secretary, Vermont Agency of Natural Resources
Warren Coleman, General Counsel, Vermont Agency of Natural Resources
Laura Pelosi, Commissioner, Vermont Department of Environmental Conservation

[9] *Id.* at 26, 28.
[10] 180 Vt. at 272, ¶ 18.
[11] *In re Stormwater* (Vt. Env. Ct.), at 27 ("ANR only has the discretion to either fulfill its statutory duty, or to abdicate that duty to EPA"), 34 ("To the extent that ANR does not have the institutional capacity to perform this analysis and fulfill its statutory obligations under the VWPCA and the CWA, abdication of that duty to EPA may be necessary" (declining to offer opinion on propriety of abdication)), 37 ("ANR must exercise (or abdicate) its residual designation authority, as currently delegated to it by EPA, to require the responsible parties to apply for specific NPDES permits").