

STORY OF A DE-DELEGATION PETITION: NUTS, BOLTS, & HAPPY ENDINGS IN VERMONT

*By Laura Murphy**

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When one imagines Vermont, one likely imagines green pastures, old rolling mountains, and clear rivers and streams flowing happily down the mountains and through the pastures. One may not contemplate waters ridden with toxic algae blooms and nuisance weed growth, or overloads of sediment, E. coli, metals, and other pollutants. However, in 2008, these were just the types of problems that the Conservation Law Foundation (“CLF”) sought to address through a National Pollutant Discharge Elimination System de-delegation petition to the United States Environmental Protection Agency (“EPA”). The sixty-one page Petition, filed by the Environmental and Natural Resources Law Clinic (“ENRLC”) at Vermont Law School on behalf of CLF, asked EPA to either withdraw Vermont’s authority to administer the Clean Water Act’s permitting program or to require the State to implement improvements consistent with the Act. After almost five years of subsequent filings, correspondence, and collaborative discussion, the latter result was achieved through a Corrective Action Plan. On July 18, 2013, EPA Region 1 sent this Plan to the State of

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Vermont. It memorialized Region 1's findings and the corrective actions required in eight substantive areas of concern.

CLF would not be the first to utilize the petition process in an effort to improve state water quality. According to EPA's website, approximately forty-one NPDES de-delegation petitions have been filed since 1989.¹ Many of them have been "resolved," some were withdrawn, and some are still "pending"—including Vermont's.²

This article tells the story of CLF's Petition, with particular emphasis on the mechanics of building and then sustaining the Petition through near-resolution. Part I gives some background on water quality in Vermont, the State's initial approval to administer the CWA, and the federal regulatory provision regarding withdrawal petitions. Part II explains in detail the grounds for the Petition and the process of building it, including a description of the applicable legal standards and supporting factual documents. Part III walks through post-Petition developments that included numerous additional filings and multiple conversations with the agencies. Part IV gives an overview of the most recent set of discussions and explains some preliminary positive results. Part V describes the substance of the Corrective Action Plan, specifically EPA's findings and the related corrective actions for the State. Part VI provides a brief analysis of potential litigation options that a petitioner might wish to pursue in the event of a negative outcome on a petition. Finally, Part VII closes with a few reflections on the de-delegation process in Vermont and more generally.

I. IDENTIFYING THE PROBLEM & THE REMEDY

The first line of the Introduction to the Petition stated: "There is a water quality problem in Vermont."³ One hundred seventy-one water bodies were impaired for various pollutants and 147 more were on the verge of being impaired.⁴ In particular, Lake Champlain was suffering from extreme phosphorus pollution that fed toxic algae blooms and nuisance weeds.⁵ Sources of the various pollutant contributors included stormwater, agriculture, development, and wastewater treatment facilities, with

1. U.S. EPA, STATE NPDES PROGRAM WITHDRAWAL PETITIONS, <http://water.epa.gov/polwaste/npdes/basics/withdrawal.cfm> (last updated Apr. 5, 2013).

2. *Id.* (providing access to information by clicking through petition chart at bottom of page).

3. Env'tl. & Natural Res. Law Clinic, Vt. Law Sch. for Conservation Law Found., Petition for Withdrawal of the National Pollutant Discharge Elimination System Program Delegation from the State of Vermont 1 (Aug. 14, 2008) (on file with author) [hereinafter *Petition*].

4. *Id.* (citing state documents).

5. *Id.*

agriculture leading the pack as a cause of impairment for thirty waters.⁶ Why these issues in Vermont? As explained in the Petition, one systemic reason lay with the State's environmental regulator, the Agency of Natural Resources ("ANR"): "ANR has abdicated its duty to prevent and redress these problems by failing to properly administer the Clean Water Act."⁷ CLF had decided to pursue a de-delegation petition to help remedy this failure.

"De-delegation" is actually a bit of a misnomer, though it is a term widely used. Technically, the United States Environmental Protection Agency ("EPA") does not "delegate" Clean Water Act ("CWA" or "Act") permitting programs to states. Rather, EPA has authority to administer the Act's National Pollutant Discharge Elimination System ("NPDES") permitting program, but it may "approve" state programs meeting certain requirements under the Act.⁸ The permitting programs are necessary to help implement the primary mandate of the Act—put simply, that discharges of pollutants into waterways must have permits.⁹ In 1974, EPA approved Vermont's request for authorization to administer its own NPDES program. The State received a letter from then-Administrator Russell Train.¹⁰ Attached to this letter was an "Agreement" between the Secretary of Vermont's Agency of Environmental Conservation (the predecessor to ANR) and the Regional Administrator for EPA Region 1, approved by Administrator Train.¹¹ The Agreement contained a series of provisions explaining how the State's permitting program would function.

Once approved, a state must maintain its program in compliance with the Clean Water Act or risk loss of the program. Under the Act, EPA retains authority to "withdraw" approval of a state program that is not being administered "in accordance with" NPDES requirements.¹² The regulations offer some detail as to how a withdrawal process would play out. Specifically, they provide that EPA may "order the commencement of withdrawal proceedings" on its own initiative or "in response to a petition

6. *Id.* n.6 (citing DEC, *Draft for Public Comment, State of Vt. 2008 303(d) List of Waters*, available at http://www.anr.state.vt.us/dec/waterq/planning/docs/pl_2008.303d_draft.pdf).

7. *Id.*

8. 33 U.S.C. § 1342(a), (b) (2012).

9. *Id.* § 1342; 33 U.S.C. § 1311 (2012).

10. Letter from Russell E. Train, Adm'r, USEPA, to Thomas P. Salmon, Governor, Vt. (Mar. 11, 1974).

11. Agreement between Martin L. Johnson, Sec'y, Vt. Agency of Env'tl. Conservation, and John A.S. McGlennon, Reg'l Adm'r, USEPA Region 1 (Mar. 11, 1974).

12. 33 U.S.C. § 1342(c)(3) (2012).

from an interested person alleging failure of the State to comply with the requirements of this part as set forth in § 123.63.”¹³

II. BUILDING THE PETITION

2007–2008

Given this useful and straightforward guidance in the regulations, the next steps were to review the withdrawal criteria laid out in 40 C.F.R. § 123.63 and to compare them against what was happening in Vermont. In order to determine “what was happening in Vermont” with specificity and detail, we did three things: (1) drew upon CLF’s existing knowledge; (2) filed comprehensive public records requests with state and federal agencies; and (3) explored publicly available materials on agency or other relevant websites.

We began filing records requests in late 2007 and the responsive documents included thousands of pages of information from Region 1, ANR and its Department of Environmental Conservation (“DEC”), and Vermont’s Agency of Agriculture, Food, & Markets (“AAF”). In most cases, the clinic team obtained the documents after spending days or afternoons sifting through boxes of hard copy files in the various agency offices. We then spent the next few months reviewing and analyzing the documents for their de-delegation relevance.

Four substantive areas emerged as serious candidates for withdrawal: enforcement, public participation in enforcement, regulation of concentrated animal feeding operations (“CAFOs”), and anti-degradation. The following sections provide summaries of how the legal criteria were applied to Vermont’s situation in each of these areas in order to make the case for withdrawal.

A. Enforcement

1. Enforcement Withdrawal Criteria

The withdrawal criteria in 40 C.F.R. § 123.63 include:

- 1) Failure to “act on violations of permits or other program requirements.”¹⁴

13. 40 C.F.R. § 123.64(b)(1) (2013).

14. 40 C.F.R. § 123.63(a)(3)(i) (2013).

2) Failure to “seek adequate enforcement penalties or to collect administrative fines when imposed.”¹⁵

As explained below, the Petition detailed the ways in which Vermont’s program met these enforcement-related withdrawal criteria.

2. Enforcement in Vermont

At the time of the Petition, ANR’s Compliance & Enforcement Division was responsible for enforcing against violations of the State’s water discharge program—the program that had been approved by EPA. Pursuant to state law, the Compliance & Enforcement Division utilized three primary tools: Notices of Alleged Violation (“NOAVs”), Assurances of Discontinuance (“AODs”), and Administrative Orders (“AOs”).¹⁶ Generally, NOAVs were letters from the agency informing persons that they had committed violations, AODs were settlements between the agency and the violators, and AOs were orders from the agency assessing penalties and/or requiring corrective action.¹⁷

We reviewed all of ANR’s NOAVs, AODs, AOs, and other enforcement-related documents for water discharges from January 1, 1997 to December 31, 2007. We also reviewed EPA’s periodic enforcement reviews of ANR and a major report by the United States Public Interest Research Group (“US PIRG”).¹⁸ After a comparison of NOAVs to subsequent enforcement orders (AODs and AOs), a review of AOs and AODs for the sufficiency of their terms, an assessment of compliance files for major facilities, and a look at Vermont’s enforcement reports on non-major facilities, a compelling picture of failed enforcement almost painted itself.¹⁹ This included five key areas that the Petition drafters fleshed out in detail.

15. *Id.* § 123.63(a)(3)(ii).

16. *See* VT. STAT. ANN. tit. 10, §§ 8006–8008 (2011).

17. *Id.*

18. *See generally* Petition, *supra* note 3, at 9–10 (“Note on Source Documents”) (citing, among other things, U.S. PIRG Education Fund, *Troubled Waters: An Analysis of 2005 Clean Water Act Compliance* (Oct. 2007)).

19. A “major” facility under the CWA is: “Any NPDES facility or activity classified as such by the Regional Administrator, or in the case of approved state programs, the Regional Administrator in conjunction with the State Director. Major municipal dischargers include all facilities with design flows of greater than one million gallons per day and facilities with EPA/State approved industrial pretreatment programs. Major industrial facilities are determined based on specific ratings criteria developed by EPA/State.” U.S. EPA, NPDES GLOSSARY, http://cfpub.epa.gov/npdes/glossary.cfm?program_id=0#M (last visited Feb. 7, 2014).

First, ANR was not recouping economic benefit in its penalty calculations. A 2004 EPA review and a 2007 ANR report had each identified economic benefit calculation as a deficiency in ANR's program; and, ANR's penalty calculation worksheets provided further evidence that enforcement officers had insufficient guidance on how best to assess economic benefit.²⁰ This was a problem because, as explained by EPA, penalties should serve as a deterrent by "recover[ing] the economic benefit of noncompliance" and ensuring that "violators do not obtain an economic advantage over their competitors."²¹

Second, ANR was enforcing only a small percentage of known water discharge violations. For example, a comparison of NOAVs to enforcement actions (AODs and AOs) revealed that only 10% of violations were followed by an enforcement action.²² At major facilities identified in the US PIRG report, the average permit exceedance in Vermont was 9.5 times the applicable permit limit, and seventeen facilities had violated their permits at least once in 2005.²³ ANR had enforced against only one of these facilities and reduced the facility's initial penalty by 60%.²⁴ Additionally, when it did enforce, ANR preferred the more lenient AOD (which is a negotiated settlement) to the AO. Of the 149 enforcement actions for water discharge violations from 1997-2007, only sixteen ended in AOs; 114 ended in AODs.²⁵ AODs had significantly lower average penalties.²⁶ The Petition provided a few anecdotal examples from the files to illustrate this point in concrete terms, including an enforcement action for a wastewater treatment facility that had discharged sodium hypochlorite into a stream causing kills of fish, salamanders, and microinvertebrates. ANR assessed a penalty in an AO, but later converted the AO to an AOD and converted the penalty to a Supplemental Environmental Project ("SEP"), significantly lowering the payment amount in the process.²⁷

Third, ANR's use of SEPs in the first instance was problematic. In one of its reviews, EPA had noted multiple problems with ANR's SEP program; the Petition raised these concerns as well as other issues. The

20. Petition, *supra* note 3, at 5-7.

21. Interim Revised CWA Settlement Penalty Policy Issued, 60 Fed. Reg. 22,063 (May 4, 1995).

22. Petition, *supra* note 3, at 11.

23. *Id.*

24. *Id.*

25. *Id.* at 12 n.72. The other seven enforcement orders were Emergency Orders, which the agency may use in emergency-type situations. *Id.* See also 10 V.S.A. § 8009 (2013). Note that the total number of enforcement actions did not correlate to the total number of NOAVs that were followed by enforcement actions; this is because not all enforcement actions were preceded by NOAVs.

26. *Id.* at 12 (citation omitted).

27. *Id.* at 13.

concerns arose from the idea that, though SEPs could have environmental benefits, they could also diminish the deterrent effect of enforcement: “[i]nstead of the deterrence and stigma of paying a fine, the violator has the satisfaction and positive publicity of promoting an environmental cause.”²⁸ For instance, ANR’s SEP Policy allowed municipalities to pay 100% of their fines as SEPs—instead of penalties—which detracted from the deterrent value that actual penalties could have.²⁹ And, though ANR’s SEP policy required SEP agreements to have terms explaining that violators must disclose that SEP actions were taken pursuant to enforcement actions when the violators pursued any media surrounding the SEPs, only one of the seven SEP agreements issued pursuant to that Policy had the requisite language.³⁰ Further, ANR was not enforcing its requirements for timely payments of SEPs. Both ANR’s SEP policy and the SEPs that it issued required any remaining SEP amounts to be converted to civil penalties immediately due and payable upon failure of the violator to abide by any of the SEP terms. Despite this, of twenty representative SEPs surveyed, sixteen were paid late and none converted to civil penalties.³¹ Again, the Petition provided some concrete examples to illustrate the point. These included a scenario where a ski resort was 175 days late in its SEP payment; the SEP had been assessed against the resort for multiple violations, including some recurring violations and driving a bulldozer through delineated wetlands.³²

Fourth, ANR was barely enforcing against significant non-compliance (“SNC”) violators. ANR had a “SNC policy” that it used to assess and identify four categories of “significant” discharge violations. Through review of ANR’s internal SNC reports from 1997-2007, and AOs and AODs from the same period, we identified 2,500 SNC violations. Only twelve of these were followed by formal enforcement, for a total of four enforcement actions (one action covering more than one SNC violation).³³ Only three fines were assessed, and two of those were SEP-only fines.³⁴

Finally, the Petition identified shortcomings in ANR’s stormwater program. According to a recent state audit, more than 3,000 facilities were potentially subject to the state’s Multi-Sector General Permit (MSGP) for industrial stormwater discharges, but only about one-fifth of those had

28. *Id.* at 14 (citing EPA, FINAL REPORT: REVIEW OF VT.’S ENVTL. ENFORCEMENT PROGRAMS & ASSISTANCE & POLLUTION PREVENTION PROGRAMS 23–25 (Sept. 2004)).

29. *Id.* at 15.

30. *Id.* at 16.

31. *Id.* at 17.

32. *Id.* at 18.

33. *Id.* at 20.

34. *Id.* at 22.

actually received coverage.³⁵ Additionally, ANR had not taken enforcement actions against the 144 facilities that had either failed to submit Stormwater Pollution Prevention Plans pursuant to the MSGP, or submitted them late.³⁶ Similarly, ANR had not taken enforcement action against 95 MSGP facilities that had either failed to submit Discharge Monitoring Reports, or submitted them late.³⁷ Under another stormwater permit, the Construction General Permit (CGP), ANR had taken only two enforcement actions in follow-up to 36 NOAVs issued over the 1997-2007 period.³⁸ In one of those actions, a ski resort had discharged without permits from more than one construction site, and was more than a year late in installing a stormwater treatment facility, but no penalties were assessed.³⁹ In the other, an AO was converted to an AOD and the enforcement fine was reduced.⁴⁰ A report by a Vermont environmental group also confirmed that there were problems with the CGP program, noting that of twenty-nine facilities visited, only one was in compliance with its permit.⁴¹

B. Public Participation

1. *Public Participation Withdrawal Criteria*

The withdrawal criteria in 40 C.F.R. § 123.63 state that EPA may withdraw approval:

- 1) Where “the State’s legal authority no longer meets the requirements of this part [State Program Requirements in CFR], including action by a State legislature striking or court down or limiting State authorities.”⁴²
- 2) Where “the operation of the State program fails to comply with . . . the public participation requirements of this part [State Program Requirements in CFR].”⁴³

35. *Id.* at 25 (citing GREEN MOUNTAIN INST. FOR ENVTL. DEMOCRACY, PERFORMANCE AUDIT OF VT. CLEAN & CLEAR 48 (Jan. 14, 2008)).

36. *Id.*

37. *Id.*

38. *Id.* at 26.

39. *Id.*

40. *Id.*

41. *Id.* at 26–27 (citing VT. NATURAL RES. COUNCIL, UNCHECKED & ILLEGAL: HOW ANR IS FAILING TO PROTECT VERMONT’S LAKES & STREAMS 17, 27 (2008)).

42. 40 C.F.R. § 123.63(a)(1)(ii) (2013).

43. *Id.* § 123.63(a)(2)(iii).

The Petition laid out the reasons Vermont's program was faulty on paper (insufficient legal authority) as well as in practice (inadequate operation).

2. Public Participation in Vermont

The policy section of the CWA states that “[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program . . . shall be provided for, encouraged, and assisted by the Administrator and the States.”⁴⁴ Consistent with this mandate, NPDES regulations require states to provide for public participation in enforcement actions in one of two specific ways. The state could provide for intervention of right in enforcement actions; or, it could provide assurance that the relevant agency will respond in writing to all citizen complaints, not oppose permissive intervention, and allow for notice and comment on all settlements.⁴⁵

The Petition analyzed state law and agency materials to illustrate that neither of these options was met. First, Vermont statutes contained no provision for intervention of right in AO and AOD proceedings.⁴⁶ Nonstatutory intervention of right was also impossible because the rules of the Environmental Court—which processed AOs and AODs—excluded what would otherwise be the applicable rule of civil procedure providing for intervention of right.⁴⁷

For the second option, there was no statutory, regulatory, or agency guidance material that provided assurance ANR would respond to citizen complaints in writing.⁴⁸ There was also no statutory, regulatory, or agency guidance material that provided for notice or comment on ANR settlements (AODs).⁴⁹ Finally, there was also no assurance that ANR would not oppose permissive intervention. In fact, the agency had rejected the only two attempts by a non-party to intervene in AOD proceedings before the Environmental Court. In the first case, CLF and another environmental group had filed a Notice of Intervention with ANR in an effort to take part in an enforcement action against a ski resort. ANR had ignored the request, and the AOD was adopted by the Environmental Court on the same day it was filed by the parties.⁵⁰

44. 33 U.S.C. § 1251(e) (2011).

45. 40 C.F.R. § 123.27(d) (2013).

46. Petition, *supra* note 3, at 30 (citing VT. STAT. ANN. tit. 10, §§ 8007, 8008, 8012 (2012)).

47. *Id.* (citing VT. R. ENVTL. CT. PROC. 4(a)(2)–(3)).

48. *Id.* at 31.

49. *Id.*

50. *Id.* at 34–35.

In the other case, CLF had filed an official Notice of Intervention with the Court in an action against a dairy facility, and ANR had opposed it. The Court denied CLF's request on the basis that state law did not provide for intervention in AOD proceedings, despite the "apparent conflict between the specific directives of federal regulations and . . . Vermont laws."⁵¹ A local newspaper article about the case reported CLF's position that "[t]he Agency of Natural Resources' stance—that [public participation] language does not apply to negotiated settlements—violates the spirit as well as the letter of the federal law."⁵²

The Petition sought to reinforce these points by noting that, even if ANR satisfied the other prongs of the second option (responding in writing to complaints, providing notice and comment on settlements), the very limited permissive intervention allowed for in Vermont would likely not suffice to fulfill the "permissive intervention" prong.⁵³ At that time, the one intervention option under Vermont law was permissive intervention in AOs (not AODs), and the standard for intervening was extremely limited. As such, it ran counter to the spirit and purpose of the CWA as well as case law interpreting the permissive intervention standard under Federal Rule of Civil Procedure 24. There was also case law under the CWA suggesting that a lack of meaningful permissive intervention would disqualify a state from satisfying the public participation requirements of the federal regulations. For further emphasis, the Petition noted that several cases had found a lack of adequate public participation could also mean that a state action was not "diligently prosecuted" for purposes of barring a CWA citizen suit.⁵⁴

C. CAFO Regulation

1. CAFO Regulation Withdrawal Criteria

The withdrawal criteria in 40 C.F.R. § 123.63 provide that EPA may withdraw approval where a State fails to "exercise control over activities required to be regulated under this part [State Program Requirements in CFR], including failure to issue permits."⁵⁵ The Petition explained how

51. *Id.* at 35 (quoting ANR v. Montagne & Branon, No. 291-12-07, 2008 WL 7242674, at 8 (Vt. Env'tl. Ct. Apr. 9, 2008)).

52. Candace Page, *Pollution Settlement Challenged*, BURLINGTON FREE PRESS, Mar. 20, 2008, available at 2008 WLNR 26980735.

53. See Petition, *supra* note 3, at 31–33.

54. *Id.* at 33–34.

55. 40 C.F.R. § 123.63(a)(2)(i) (2013).

ANR was failing to regulate concentrated animal feeding operations in the State.

2. CAFO Regulation in Vermont

Despite the afore-mentioned vision of a Vermont filled with green pastures, and perhaps the occasional dairy cow spotting the fields, Vermont was and is home to CAFOs. These are the industrial-like facilities that confine large numbers of animals in small spaces.⁵⁶ Under CWA regulations, a CAFO is basically an Animal Feeding Operation (AFO) with a certain number of animals.⁵⁷ In turn, an AFO is a lot or facility where animals are confined for at least 45 days/year and vegetative growth is not sustained during the normal growing season.⁵⁸ A “large” CAFO has a specified number of animals—e.g., 700 or more dairy cows.⁵⁹ A “medium” CAFO also has a specified number of animals—e.g., 300-699 dairy cows—plus a discharge; or, a medium CAFO can be designated by an agency.⁶⁰ “Small” CAFOs may also be designated by an agency.⁶¹

To document what was happening on the ground with CAFOs and AFOs in the State, we reviewed the Vermont CAFO-related files from the EPA; all CAFO-related files at ANR; the “large farm operation” (“LFO”) and “medium farm operation” (“MFO”) files at AAFM (the state agriculture agency); and all complaints filed with AAFM for the past several years regarding potential violations of AAFM’s water quality regulations for farms. AAFM had (and has) a permitting program for LFOs and MFOs; the definitions of LFO and MFO are similar to the federal definitions.⁶² In addition, AAFM had water quality regulations called

56. See, e.g., PEW COMM’N ON INDUS. FARM ANIMAL PROD., PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM PRODUCTION IN AMERICA 6 (2008), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Industrial_Agriculture/PCIFAP_FINAL.pdf.

57. 40 C.F.R. § 123.23(b)(2) (2013).

58. *Id.* § 122.23(b)(1).

59. *Id.* § 122.23(b)(4).

60. *Id.* § 122.23(b)(6), (c).

61. *Id.* § 122.23(b)(9).

62. *Regulatory Programs*, VT. AGENCY OF AGRIC., FOOD & MARKETS, http://agriculture.vermont.gov/protecting_lands_waters/agricultural_water_quality/regulatory (last visited Jan. 22, 2014). Also, compare 40 C.F.R. § 122.23(b) (defining a large CAFO as confining 700 or more mature dairy cows and a medium CAFO as confining 200 to 699 mature dairy cows) with VT. STAT. ANN. tit. 6, § 4851 (2011), and VT. STAT. ANN. tit. 6, § 4857 (2011).

“Accepted Agricultural Practices” that sought to limit nonpoint discharges of wastes to waters of the state.⁶³

The Petition first explained how AAFM’s program was not a proper substitute for a NPDES program. It pointed out that ANR was the NPDES authority in Vermont, not AAFM, and stated the “obvious” fact that AAFM permits were not NPDES permits, citing to two key statements by EPA and ANR along those lines.⁶⁴ It then compared AAFM’s program to NPDES CAFO requirements and identified several important differences, most importantly those regarding information gathering, public participation, and recordkeeping.⁶⁵ This section closed with a review of state correspondence and a recent state audit showing that AAFM’s dual role as agricultural promoter and regulator was creating difficulties for water quality enforcement, including in collaboration with ANR.⁶⁶

In the next section, the Petition gave an overview of several years of dialogue between ANR and Region 1, in which Region 1 urged the State to implement a CAFO program and the State delayed.⁶⁷ Most significantly, the Petition also explained that ANR had not issued a single CAFO permit despite documented discharges and problem areas at multiple facilities in the State. The Petition described the most concerning aspects of the files regarding discharges—e.g., from agency correspondence and inspection reports by EPA, ANR, and AAFM. In sum, the files revealed documented discharges from at least three of Vermont’s eighteen LFOs and from three of the eight MFOs that had been inspected (of approximately 200 MFOs).⁶⁸ Eleven LFOs had “problem areas” according to ANR’s recent inspections, and many LFOs had histories of discharge concerns pieced together from the files.⁶⁹ These included one property with a stream running through the production area and another with prior feedbunk runoff whose owner had denied access to inspectors.⁷⁰ Among other things, MFOs suffered from inadequate waste storage capacity.⁷¹ Other files documented problems such as winter spreading, manure overflowing into ditches and streams, and a

63. *Accepted Agricultural Practice Regulations*, VT. AGENCY OF AGRIC. FOOD & MKTS., (Apr. 24, 2006), <http://agriculture.vermont.gov/sites/ag/files/ACCEPTED%20AGRICULTURAL%20PRACTICE%20REGULATIONS.pdf>.

64. Petition, *supra* note 3, at 37.

65. *Id.* at 37–39.

66. *Id.* at 39–40.

67. *Id.* at 40–41.

68. *Id.* at 36, 43, 45–46 (citing VT. AGENCY OF AGRIC. FOOD & MKTS., ACT 78 – SECTION 16 ANNUAL REPORT – 2006 3 (Jan. 2007) (report to State Legislature, stating that there were “200 MFOs currently identified by the Agency”)).

69. *Id.* at 43–46.

70. *Id.* at 43–44.

71. *Id.* at 46.

“foamy white discharge” going from a feeding area into a stream.⁷² This section closed with the conviction that “the absence of any CAFO permitting actions by ANR suggests serious institutional denial of, or willful blindness to, the CAFO reality in Vermont.”⁷³

D. Anti-Degradation

1. Anti-Degradation Withdrawal Criteria

As mentioned above, the withdrawal criteria include a provision stating that EPA may withdraw program approval where a State fails to “promulgate or enact new authorities when necessary.”⁷⁴ The Petition asserted that Vermont met this criterion because it had failed to implement an anti-degradation procedure.

2. Anti-Degradation in Vermont

The Clean Water Act requires states to develop water quality standards.⁷⁵ Anti-degradation policies are a component of these standards and they aim to maintain existing uses or higher water quality.⁷⁶ When states submit water quality standards to EPA for approval, the submissions should include both the policy and the “methods for implementing such policy.”⁷⁷

The Petition explained that Vermont had not submitted an anti-degradation implementation procedure despite repeated reminders from EPA.⁷⁸ It raised concerns that, without this procedure, ANR could not conduct proper anti-degradation analyses and issue protective permits—concerns that CLF had previously raised in permit comments and a letter to EPA.⁷⁹ Finally, the Petition critiqued what was ANR’s draft anti-degradation implementation rule at the time. Among other things, the applicability of the draft rule was too narrow, the rule left too much discretion to the agency, and the rule established an impermissibly low

72. *Id.* at 47–49.

73. *Id.* at 48.

74. 40 C.F.R. § 123.63(a)(1)(i) (2013).

75. 33 U.S.C. § 1313 (2012).

76. 40 C.F.R. §§ 131.6, 131.12 (2012).

77. 40 C.F.R. § 131.12; *see also id.* § 131.6 (requiring “an antidegradation policy consistent with § 131.12”).

78. Petition, *supra* note 3, at 49–50.

79. *Id.*

burden for dischargers to meet when justifying a lowering of water quality.⁸⁰

III. SUPPLEMENTAL FILINGS & AGENCY DIALOGUE

2008–2011

On August 14, 2008, we filed the Petition with EPA Headquarters and EPA Region 1, with copies to the Secretary and General Counsel of ANR. On Vermont Public Radio, CLF's Vermont director explained:

We want the solution to occur. We want effective program implementation, effective enforcement, and clean water. And if that means that EPA comes in and does it on behalf of the state, so be it. If it means that the state can get its act together and correct the problems that are pervasive and that we have identified in the petition, then that would be a good outcome, too.⁸¹

The Deputy Secretary of ANR countered:

[i]f EPA were to take back our federal water quality programs, Vermonters would then have to go to Boston to get their federal permits rather than getting them here at home and Vermont's environment would be regulated from Boston. And this would not be an improvement in our permitting process.⁸²

The next few years involved a series of supplemental filings and agency discussions that culminated in ANR requesting a formal response from Region 1 by a certain date. The following narrative is offered to provide an example and some insight into how a post-petition process may progress.

80. *Id.* at 50–55.

81. Ross Sneyd, *Environmental Group Wants EPA to Strip Vermont of Regulatory Authority over Pollution*, VPR (Aug. 14, 2008), http://www.vpr.net/news_detail/81711/environmental-group-wants-epa-to-strip-vermont-reg/.

82. *Id.*

A. 2008

The first official reaction to the Petition was a letter from Region 1 on September 15, 2008 stating that the Region would be conducting an “informal investigation.”⁸³ Under CWA regulations, EPA may conduct an “informal investigation” in order to determine “whether cause exists to commence [withdrawal] proceedings.”⁸⁴ To help with that, the Region requested copies of the Petition sources, which a clinic attorney delivered to Boston in the form of nine large binders in mid-October. Also in October, ANR filed a response to the Petition and we filed a response to ANR’s response, as well as a Petition Supplement.⁸⁵ The October 2008 Supplement added another basis for withdrawal: Vermont’s failure to regulate stormwater discharges under its Residual Designation Authority (“RDA”). In 2003, CLF had filed a petition with ANR asking the agency to designate stormwater dischargers for NPDES permit coverage in five impaired waterways. After three court decisions and the passage of five years, ANR still had not done so—thus satisfying the withdrawal criterion for failure to “exercise control over activities required to be regulated under this part [State Program Requirements in CFR], including failure to issue permits.”⁸⁶

Then, on October 27th, CLF and the ENRLC team traveled to Boston to meet with Region 1 officials. In the meeting, we presented summaries and highlights from the Petition, Region 1 asked questions, and a general discussion ensued. Following the meeting, we filed a letter with EPA that proposed specific corrective actions, presented additional information on some topics that arose at the meeting, and documented another basis for withdrawal.⁸⁷ The additional basis for withdrawal was “failure to ‘develop an adequate regulatory program for developing water quality-based effluent

83. Letter from Stephen Perkins, Dir., Office of Ecosystem Prot. USEPA Region 1, to David Mears, Env’tl. & Natural Res. L. Clinic, & Anthony Iarrapino, Conservation L. Found. (Sept. 15, 2008) (on file with author).

84. 40 C.F.R. § 123.64(b)(1) (2013).

85. Letter from Laura Pelosi, Comm’r, Vt. Dep’t of Env’tl. Conservation, to Stephen Perkins, Dir., Office of Ecosystem Prot., USEPA Region 1 (Oct. 3, 2008) (on file with author) [hereinafter *ANR’s Response*]; Letter from David Mears, Dir., Env’tl. & Natural Res. Law Clinic, & Laura Murphy, Staff Attorney, Env’tl. & Natural Res. Law Clinic, to Stephen Perkins, Dir., Office of Ecosystem Prot. USEPA Region 1 (Oct. 23, 2008) (on file with author) [hereinafter *Response to ANR*]; Letter from David Mears, Dir., Env’tl. & Natural Res. Law Clinic, Laura Murphy, Staff Attorney, Env’tl. & Natural Res. Law Clinic, & Anthony Iarrapino, Staff Attorney, Conservation Law Found., to Stephen Johnson, Adm’r, USEPA, Robert Varney, Reg’l Adm’r, USEPA Region 1, Carl Dierker, Gen. Counsel, USEPA Region 1, & Stephen Perkins, Dir., Office of Ecosystem Prot. USEPA Region 1 (Oct. 21, 2008) (on file with author) [hereinafter *October 2008 Supplement*].

86. 40 C.F.R. § 123.63(a)(2)(i) (2013); October 2008 Supplement, *supra* note 85 at 2.

87. Letter from David Mears, Dir., Env’tl. & Natural Res. Law Clinic, & Anthony Iarrapino, Staff Attorney, Conservation Law Found., to Stephen Perkins, Dir., Office of Ecosystem Prot. USEPA Region 1 (Nov. 20, 2008) (on file with author) [hereinafter *November 20th Letter*].

limits [WQBELs] in NPDES permits.”⁸⁸ It relied upon a recent letter from Region 1 that had raised concerns about phosphorus limits for discharges into the Lake Champlain watershed; noted the lack of reasonable potential analysis in ANR’s fact sheets; and advised ANR to ensure that water quality standards for all affected states were met when issuing permits for discharges to the Long Island Sound watershed.⁸⁹

B. 2009

At the beginning of the new year, we filed additional documents that had been recently produced in response to another Freedom of Information Act request to EPA. They strengthened several grounds for the Petition: insufficient penalties in enforcement, failure to regulate CAFOs, and failure to implement anti-degradation methods and policies.⁹⁰ Receiving no formal response, we filed another letter on February 26, 2009. This letter detailed our filings to date and urged EPA to take action on the Petition by initiating formal proceedings.⁹¹ Under the CWA and its regulations, “formal proceedings” are those that would arise after EPA had issued an “order” to commence the proceedings and would involve a public hearing.⁹²

Another meeting ensued in late March, this time at Vermont Law School, where Region 1 provided CLF and ENRLC with a general sense of its progress in each of the Petition areas. Then, from August to December 2009, CLF/ENRLC, Region 1, and ANR engaged in a series of three-party discussions. During that time, Region 1 sent a letter to ANR explaining that Vermont’s current public participation in enforcement was inadequate under the Clean Water Act.⁹³ In particular, the letter noted that Vermont’s option for permissive intervention (described above) was problematic because “both the Clean Water Act and case law interpreting the public participation provisions clearly point to authorized states needing to provide more expansive opportunities for public participation in enforcement than is

88. *Id.* at 7 (citing 40 C.F.R. § 123.63(a)(5)).

89. *Id.* at 7–8 (citation omitted). A “reasonable potential analysis” is the process by which a permitting agency determines whether a particular pollutant will “cause, have the reasonable potential to cause, or contribute to” a water quality standard violation, thus requiring a WQBEL. 40 C.F.R. § 122.44 (d)(1) (2013).

90. Letter from David Mears, Dir., Evtl. & Natural Res. Law Clinic, & Laura Murphy, Staff Attorney, Evtl. & Natural Res. Law Clinic, to Stephen Perkins, Dir., Office of Ecosystem Prot. USEPA Region 1 (Jan. 8, 2009) (on file with author).

91. Letter from David Mears, Dir., Evtl. & Natural Res. Law Clinic, Laura Murphy, Staff Attorney, Evtl. & Natural Res. Law Clinic, & Anthony Iarrapino, Staff Attorney, Conservation Law Found., to Ira W. Leighton, Acting Reg’l Adm’r, USEPA Region 1 (Feb. 26, 2009) (on file with author).

92. See 33 U.S.C. § 1342(c)(3) (2012); 40 C.F.R. § 123.64(b)(1).

93. Letter from Ira Leighton, Acting Reg’l Adm’r, Region 1 USEPA to Justin Johnson, Comm’r, Vt. Dept. of Evtl. Conservation (Nov. 24, 2009) (on file with author).

provided by current Vermont law.”⁹⁴ The letter also stated that ANR’s current proposal to address the issue was insufficient.⁹⁵

C. 2010

Following upon the heels of this letter, Region 1 sent another letter to the State in January of 2010. In response to a State request, this letter outlined the “procedural mechanisms and implications of three possible ways...[the Petition] might be resolved.”⁹⁶ It also expressed the hope that discussions “among the parties will yield a set of steps that the State intends to take to satisfactorily address the concerns that have been raised.”⁹⁷ Those steps not materializing, we sent a short letter to EPA a couple months later asking it to initiate formal withdrawal proceedings.⁹⁸ Those proceedings not ensuing, we filed a “mini-petition” during the summer of 2010.⁹⁹

1. The Mini-Petition

The “mini-petition” was a substantial, 32-page supplement to the original petition. It used recent public records to provide an additional two years of evidence in support of some of the primary Petition issues: CAFO regulation, enforcement, and WQBELs.¹⁰⁰ It also noted that Vermont’s public participation in enforcement remained inadequate, and distilled some troubling new information about the Waterbury wastewater treatment facility.¹⁰¹

For WQBELs, the mini-petition detailed a fairly extensive back-and-forth between EPA and ANR in which EPA raised multiple concerns with two recently drafted ANR permits for wastewater treatment facilities that discharged into the Long Island Sound watershed.¹⁰² For the enforcement

94. *Id.*

95. *Id.*

96. Letter from Stephen S. Perkins, Dir., Office of Ecosystem Prot., USEPA Region 1, to Justin Johnson, Comm’r, Vt. Dep’t of Envtl. Conservation 1 (Jan. 8, 2010) (on file with author).

97. *Id.*

98. Letter from David K. Mears, Dir., Envtl. & Natural Res. Law Clinic, to Lisa Jackson, Adm’r, USEPA & Curt Spalding, Reg’l Adm’r, USEPA Region 1 (Mar. 3, 2010) (on file with author).

99. See Letter from David Mears, Dir., Envtl. & Natural Res. Law Clinic, Laura Murphy, Staff Attorney, Envtl. & Natural Res. Law Clinic, & Anthony Iarrapino, Staff Attorney, Conservation Law Found., to Lisa Jackson, Adm’r, USEPA, Curt Spalding, Reg’l Adm’r, USEPA Region 1, Carl Dierker, Reg’l Counsel, USEPA Region 1, & Stephen Perkins, Dir., USEPA Region 1 (July 21, 2010) (on file with author) [hereinafter *Mimi-Petition*].

100. See generally *id.*

101. *Id.* at 2–3, 16–24.

102. *Id.* at 24–27. We filed an Addendum on July 22, 2010 in order to make the correction that Region 1 had actually formally objected to one of these permits. Letter from David Mears, Dir.,

and CAFO analyses, we utilized the same method we had for the original Petition. That is, we reviewed public records including enforcement documents and CAFO inspection reports to identify continuing problems. On the CAFO front, the mini-petition noted ANR's failure to issue permits as well as ANR's failure to act on violations.¹⁰³ Three LFOs and five MFOs had ANR-documented discharges, but none had been enforced against or required to get a permit. The mini-petition provided narrative case studies of each of these facilities, plus observations from other facilities at "high risk" for discharging, which had received little-to-no follow-up by ANR.¹⁰⁴ On the enforcement front, the mini-petition reported that ANR's SEP Policy was still inadequate; that ANR still took too few enforcement actions (only 1 of 54 NOAVs and 2 of 60 SNCs), and; that ANR continued to choose lenient options (AODs over AOs, small average fines).¹⁰⁵

Finally, a situation at the Waterbury wastewater treatment facility supported several withdrawal criteria. Waterbury discharged into the Winooski River, which flowed into the Main Lake segment of Lake Champlain, which was listed as impaired due to high phosphorous pollution. The facility's ANR-issued permit conditioned compliance with the phosphorus WQBEL on adequate funding—a condition that conflicted with the CWA's mandate that NPDES permits comply with water quality standards regardless of funding.¹⁰⁶ Additionally, ANR had issued an Order attempting to modify the permit by extending the potential compliance deadline until two years after EPA had given final approval on a revised total maximum daily load (TMDL) for Lake Champlain—which was "a potentiality created by Vermont statute."¹⁰⁷ These factors supported withdrawal criteria based on a failure to develop an adequate regulatory program for WQBELs and a failure to issue permits that "conform to [NPDES] requirements."¹⁰⁸ Further, ANR's issuance of the Order was an impermissible attempt to "modify" Waterbury's permit; under the CWA, all

Envtl & Natural Res. Law Clinic, Laura Murphy, Staff Attorney, Env'tl & Natural Res. Law Clinic, & Anthony Iarrapino, Staff Attorney, Conservation Law Found., to Lisa Jackson, Adm'r, USEPA Region 1, Curt Spalding, Reg'l Adm'r, USEPA Region 1, Carl Dierker, Reg'l Counsel, USEPA, & Stephen Perkins, Dir., USEPA Region 1 (July 22, 2010) (on file with author).

103. *Id.* at 3.

104. *Id.* at 5–16.

105. *Id.* at 29–30.

106. *Id.* at 18 (citing 33 U.S.C. § 1311 (2012); 40 C.F.R. §§ 122.4(a), (d), 122.44(d) (2011); City of Attleboro, MA Wastewater Treatment Plant, NPDES Appeal No. 08-08, 2009 WL 5326324, at 25 (EAB Sept. 2009)). The Mini-Petition also noted that the limited flexibilities contemplated by the Act were inapplicable. *Id.* at 18 n.121.

107. *Id.* at 19–20. A TMDL is basically a pollution budget that a state must develop in order to bring a water body into compliance with the water quality standard for a particular pollutant. *See* 33 U.S.C. § 1313(d)(1)(C) (2012).

108. *Id.* at 16 (citing 40 C.F.R. § 123.63(a)(2)(ii), (5)).

non-minor modifications (which the Order was) must undergo public notice and comment.¹⁰⁹

ANR's Order had also noted that, because of a Vermont law, the agency could not require compliance with water quality-based phosphorus limits unless the State provided funding to the facility.¹¹⁰ The State law provided that: "To the extent funds are not provided to municipalities . . . municipal compliance with this section [requiring the Secretary to establish effluent limits to comply with water quality standards] shall not be required."¹¹¹ In addition to the withdrawal criteria regarding inadequate WQBELs, this legislation supported withdrawal because it qualified as "[a]ction by a State legislature . . . limiting State authorities."¹¹²

The Waterbury section closed with a series of graphs depicting how Waterbury had actually been "discharging phosphorus at levels far exceeding its TMDL wasteload allocation for more than seven years."¹¹³ For the past seven years, Waterbury had exceeded every single phosphorus reporting parameter, and usually by at least 250 percent.¹¹⁴

2. Closing out the Year

A few weeks later, the Secretary of ANR wrote to Region 1 requesting a decision on the Petition. He stated: "While ANR believes it is entirely EPA's decision how it would like to proceed on resolving this matter, ANR believes that after two years and hundreds of hours of work, EPA should issue a decision forthwith and certainly no later than October 15, 2010."¹¹⁵ EPA replied that it would be unable to do so given that "a number of important issues raised in the original petition remain[ed] unresolved" and EPA was "in the process of evaluating" the July 21st supplement.¹¹⁶ The letter expressed appreciation for the efforts that Vermont's DEC had thus far taken in an effort to resolve the Petition. EPA again related the desire that the parties could "resolve as many issues as possible and . . . identify, through a corrective action plan, the actions EPA

109. *Id.* at 21–22 (citing 40 C.F.R. §§ 122.62, 122.63, 124.1–124.21).

110. *Id.*

111. VT. STAT. ANN. tit. 10, § 1266a(b), (c) (2010).

112. 40 C.F.R. § 123.63(a)(1)(ii) (2013); Mini-Petition, *supra* note 99, at 16.

113. Mini-Petition, *supra* note 99, at 22–24. Both the TMDL wasteload allocation and the "indefinitely delayed" permit limit were 0.8 mg/l monthly average. *Id.*

114. *Id.*

115. Letter from Jonathan Wood, Sec'y, Vt. Agency of Natural Res., to Lisa Jackson, Adm'r, USEPA, & Curt Spalding, Reg'l Adm'r, USEPA Region 1 (Aug. 9, 2010) (on file with author).

116. Letter from H. Curtis Spalding, Reg'l Adm'r, Office of the Reg'l Adm'r, USEPA Region 1, to Jonathan Wood, Sec'y, Vt. Agency of Natural Res. (Oct. 14, 2010) (on file with author).

believes must be taken by the State to satisfactorily address EPA's concerns."¹¹⁷

D. 2011

After EPA's letter, all appeared quiet. Then, after learning of an enforcement action against a dairy facility about a year later, we filed a letter with DEC expressing Petition-related concerns. The dairy facility had discharged manure from a livestock holding pen into a ditch, which ultimately discharged into Lake Champlain. The Vermont Attorney General was pursuing a civil action on behalf of ANR and AAFM, but had not sought NPDES permit relief. The letter expressed concern that "[t]he action does not seek to require the facility to obtain an NPDES permit despite the fact that the violation at issue is an unpermitted discharge under the Clean Water Act."¹¹⁸ The letter explained why the discharge was jurisdictional under the CWA, noted that Vermont's waters remained impaired for agricultural pollution, and asserted that the agency must "exercise its regulatory authority" in order to "abate agricultural discharges to the fullest extent possible" and fulfill a "required component of Vermont's NPDES program."¹¹⁹ Finally, the letter noted that positive progress on the CAFO issue would be critical to resolution of the Petition. DEC did not respond immediately.¹²⁰ Just a few days after the letter was sent, Tropical Storm Irene hit Vermont, DEC offices were flooded, and the agency was occupied with clean-up and relief efforts.¹²¹

117. *Id.*

118. Letter from Laura Murphy, Staff Attorney & Assistant Professor, Env'tl. & Natural Res. Law Clinic & Anthony Iarrapino, Staff Attorney, Conservation Law Found., to David Mears, Comm'r, Vt. Dep't of Env'tl. Conservation 1 (Aug. 25, 2011) (on file with author).

119. *Id.* at 1-2.

120. DEC replied in January 2012, stating that it would not be requiring a NPDES permit because the facility had "permanently eliminated the discharge." Letter from David Mears, Commissioner, Vt. Dep't of Env'tl. Conservation to Laura Murphy, Env'tl. & Natural Res. Law Clinic 2 (Jan. 23, 2012) (on file with author). Ultimately, the Attorney General settled the case with the violators. In the settlement, the facility agreed to "manage and control the operation . . . to prevent the runoff of wastes from the barnyard . . . into the water of Lake Champlain." Stipulation of Settlement & Consent Decree at ¶ 6, *Vt. v. David & Cathy Montagne*, No. S264-11Fc (Vt. Super. Ct. Sept. 29, 2011). In other words, the defendants agreed to follow the law to which they were already subject. The State did not assess penalties. *Id.* at ¶ 7 (seeking penalty of \$2,000 only if defendants failed to abide by settlement).

121. Dirk Van Susteren, *Vermont Officials Assess the Risks in Towns Lacking Water & Power*, N.Y. TIMES (Aug. 31, 2011), available at http://www.nytimes.com/2011/09/01/us/01flood.html?_r=0; John Herrick, *Tropical Storm Irene: Ruined State Records Get the Freezer Treatment*, VTDIGGER.ORG (Aug. 27, 2013), <http://vtdigger.org/2013/08/27/tropical-storm-irene-ruined-state-records-get-the-freezer-treatment/>.

IV. WORKING COLLABORATIVELY TOWARD SOLUTIONS

2011-2013

In October 2011, the parties reconnected and resumed three-party discussions. Officials from DEC and Region 1 met with CLF/ENRLC at Vermont Law School to begin discussing the Petition and potential resolutions again. The chess pieces were lined up slightly differently this time, though, because a new Governor had taken office in January and had appointed the former Director of the Clinic as DEC Commissioner. In an earlier interview, the new Commissioner had remarked that he would “defend Vermont’s ability to make the improvements necessary to remain the lead regulator of water pollution in the state.”¹²²

Following the October meeting, the parties had a series of conference calls to address various substantive areas of the Petition. The calls continued into 2012 and spanned into the next year. In addition to these calls, there were several opportunities for the parties to offer written comments on various sets of proposed actions—e.g., the draft general permit for CAFOs that DEC was developing.

One highlight came in February 2012, when the Vermont Legislature passed a law providing for public participation in administrative environmental law enforcement.¹²³ The law requires: (1) a 30-day notice and comment period for ANR enforcement actions (AOs, AODs, and “civil citations” commonly known as “tickets”); (2) if any comments were received, a 14-day waiting period after ANR files the enforcement action with the court during which any person who commented on the proposed enforcement action may file a motion for permissive intervention; (3) a prohibition against ANR opposing a motion for permissive intervention, and; (4) a requirement that ANR respond in writing to all citizen complaints filed for violations of a “federally authorized or delegated program.”¹²⁴ The law also provides for a 14-day intervention period for emergency administrative orders.¹²⁵ DEC relayed this success to Region 1 shortly after the law passed, stating: “Both DEC and CLF have strenuously advocated for the introduction and passage of this legislation to ensure consistency

122. Candace Page, *Vermont Environmental Official Addresses Conflicts of Interest*, BURLINGTON FREE PRESS (Jan. 26, 2011), <http://www.burlingtonfreepress.com/article/20110126/NEWS03/110126019/Vermont-environmental-official-addresses-conflicts-interest>.

123. H. 258, Gen. Assemb., 2011–2012 Leg. Sess. (Vt. 2012); VT. STAT. ANN. tit. 10, § 8020 (2012).

124. VT. STAT. ANN. tit. 10, § 8020(b)–(c), (j).

125. *Id.* § 8020(g).

with the public participation requirements related to enforcement under the CWA and the applicable federal regulations.”¹²⁶

The letter also noted that the Vermont Attorney General’s office had committed to meeting CWA requirements for civil enforcement actions (as opposed to administrative enforcement actions handled by ANR).¹²⁷ For civil actions, Vermont would meet public participation requirements through “option one” of the federal regulations—providing for intervention as of right.¹²⁸ The Vermont Rules of Civil Procedure require a court to allow intervention where:

[T]he applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.¹²⁹

Along those lines, Region 1 secured a letter from the Vermont Attorney General’s office in which the office agreed not to “oppose motions for intervention as a matter of right under Vermont Rule of Civil Procedure 24(a)(2) in Clean Water Act enforcement cases brought by this office on the basis that the state adequately represents the interest of the proposed intervenor.”¹³⁰ This promise was necessary to help ensure that intervention of right under Vermont’s Rules of Civil Procedure would be as broad as that required by CWA regulations—which extended to “any citizen having an interest which is or may be adversely affected.”¹³¹ However, the letter specifically stated that its promise did “not affect any other provision of Rule 24(a)(2) or how the office will interpret or apply such provisions in enforcement cases.”¹³² In other words, the letter left open the possibility that the Attorney General would oppose intervention of right on other grounds.

126. Letter from David Mears, Comm’r, Vt. Dep’t of Env’tl. Conservation, to Curtis Spaulding, Reg’l Adm’r, USEPA Region 1 (Feb. 13, 2012).

127. *Id.*

128. See 40 C.F.R. § 123.27(d)(1) (2013) (providing that a state may meet public participation requirements if it allows intervention as of right in certain situations for “any citizen having an interest which is or may be adversely affected” by agency action).

129. Vt. R. Civ. P. 24(a)(2).

130. Letter from Scot L. Kline, Vt. Assistant Attorney General, to Curt Spaulding [sic], Reg’l Adm’r, USEPA Region 1 (Mar. 9, 2012) [hereinafter *March 9th Letter*].

131. 40 C.F.R. § 123.27(d)(1).

132. *March 9th Letter*, *supra* note 130.

V. CORRECTIVE ACTIONS PAST, PRESENT, & FUTURE

Following these series of discussions among the parties, Region 1 was “pleased to transmit” a Corrective Action Plan (“CAP”) to the State in July 2013.¹³³ The CAP was an Interim Response that “adequately address[ed] all but one of the issues identified by the Region during its informal investigation.”¹³⁴ One issue—Vermont’s statute regarding phosphorus compliance and funding—would remain open until addressed by the State with a legislative amendment.¹³⁵ Therefore, the Region intended to deny the Petition with respect to all issues save that remaining issue.¹³⁶ In its letter, the Region noted that the CAP “represents the culmination of significant efforts by all the parties to address the issues,” recognized the “collaborative and productive manner in which the parties have engaged,” and shared the belief that “the actions taken as a result of the Plan will improve the Clean Water Act permit and enforcement programs and better protect Vermont’s waters.”¹³⁷

The CAP addressed eight substantive areas. For each, it summarized the Petition allegations, reported on EPA’s findings, and provided a list of corrective actions. The following sections provide brief summaries of EPA’s findings and the required corrective actions for each issue.

A. Public Participation

EPA agreed that Vermont’s laws for public participation in enforcement were not consistent with federal regulations, which were adopted after EPA approved Vermont’s program.¹³⁸ EPA detailed the corrective actions that the State had already taken to remedy this problem; namely, the public participation legislation of 2012 that ensured consistency with 40 C.F.R. § 123.27(d) for administrative actions, and the Attorney

133. Letter from Kenneth Moraff, Acting Dir., Office of Ecosystem Prot., USEPA Region 1, to Laura Murphy, Staff Attorney & Assistant Professor, Envtl. & Natural Res. Law Clinic & Anthony Iarrapino, Staff Attorney, Conservation Law Found. 1 (Jul. 18, 2013) (on file with author) [hereinafter *July 18th Letter*].

134. *Id.*

135. USEPA, EPA REGION 1’S INTERIM RESPONSE TO PETITION TO WITHDRAW VERMONT’S NPDES PROGRAM APPROVAL 1, 13–14 (Jul. 18, 2013), available at <http://www.clf.org/wp-content/uploads/2013/07/VTCorrectiveActionPlan-FINAL-7-9-13.pdf> [hereinafter *CAP*].

136. *Id.* at 1. On December 13, 2013, Region 1 sent a letter to CLF formally closing out all aspects of the Petition save § 1266a(c)—meaning that it had decided not to initiate withdrawal proceedings for all but the § 1266a(c) issue. Letter from Curt Spalding, Reg’l Adm’r, USEPA, to Laura Murphy, Staff Attorney & Assistant Professor, Envtl. & Natural Res. Law Clinic, & Anthony Iarrapino, Staff Attorney, Conservation Law Found. (Dec. 13, 2013) (on file with author).

137. *July 18th Letter*, *supra* note 133.

138. *CAP*, *supra* note 135, at 2.

General's assurance that it would not oppose intervention of right based on one of the intervention factors.¹³⁹

B. Supplemental Environmental Projects

EPA identified “several concerns” with ANR’s SEP Policy as it existed when the Petition was filed.¹⁴⁰ The Policy allowed municipalities to perform SEPs for activities that were already required by law; it allowed governmental entities to use SEP funds on activities that were already planned or budgeted for; it gave enforcement attorneys complete discretion regarding whether to enforce against late payment of SEPs; and it did not contain a provision stating that SEP contributions are not tax-deductible.¹⁴¹ EPA detailed the corrective actions the State had taken to address these concerns—primarily, the adoption of a new SEP Policy.¹⁴² The new SEP Policy eliminated the exception that allowed governmental entities to perform SEPs that were already required by law, budgeted for, or planned for.¹⁴³ The new Policy also contained a provision regarding tax expenditures and more stringent requirements regarding late payment of SEPs.¹⁴⁴ Additionally, the Vermont Legislature had passed a law in 2009 requiring violators to place SEP funds into an attorney’s IOLTA (interest on lawyer’s trust account) or escrow account under certain circumstances.¹⁴⁵

C. Significant Non-Compliance Policy

EPA explained that many violations that would qualify as significant non-compliance under DEC’s SNC Policy would not qualify as SNC under EPA’s policy.¹⁴⁶ However, EPA noted that while EPA’s policy requires formal enforcement action or prompt compliance for SNC at NPDES major facilities, Vermont’s response was left to DEC’s discretion.¹⁴⁷ After a review of enforcement files, the Region found that Vermont’s responses to violations that would be SNC under EPA’s definition were adequate.¹⁴⁸

139. *Id.*

140. *Id.* at 3.

141. *Id.* at 3–4.

142. *Id.* at 4.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 5.

147. *Id.*

148. *Id.*

The Region identified several actions that DEC had taken or would take “in order to provide for greater clarity to the public regarding DEC’s enforcement actions and to ensure that both SNC and non-SNC violations are addressed in order to obtain a timely return to compliance, consistent with EPA guidance and policies...”¹⁴⁹ These included utilizing enforcement discretion consistent with EPA policy, assuring that dischargers enter compliance and monitoring data into EPA’s system going forward, and continuing to submit compliance reports for non-major dischargers, which would aid EPA in its assessment of the State’s enforcement program.¹⁵⁰

D. CAFO Permitting & Enforcement

EPA concluded that ANR had never issued an NPDES permit to a CAFO and had “not adequately regulated a sector of dischargers that are subject to the NPDES program.”¹⁵¹ EPA also found that CAFO violations had “typically been addressed by AAFM through enforcement of the State’s large and medium farm operation regulations, and permits issued thereunder, rather than by DEC through enforcement of the NPDES CAFO regulations.”¹⁵²

EPA identified steps that DEC had already taken, as well as additional steps that DEC would take, to bring its program into compliance. For permitting, DEC would “require CAFOs that discharge to have NPDES permits.”¹⁵³ A CAFO that discharges is any CAFO that has discharged in the past, where the circumstances leading to the discharge have not been remedied.¹⁵⁴ DEC would issue a general permit for medium CAFOs and issue individual permits to small and large CAFOs.¹⁵⁵ For compliance, DEC would conduct at least twelve inspections of large and medium AFOs/CAFOs for fiscal year (“FY”) 2013, with inspection numbers to increase each year.¹⁵⁶ EPA also committed to inspecting twelve operations in FY 2013. Facilities with “discharges or evidence of past discharges” were to be given “high priority.”¹⁵⁷ For enforcement, EPA was clear that DEC was to be the lead enforcement authority:

149. *Id.*
150. *Id.* at 5–6.
151. *Id.* at 6.
152. *Id.* at 7.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 8.
157. *Id.*

DEC will be the lead Vermont enforcement agency in any case involving a CAFO violation. DEC will require CAFOs to cease any unlawful discharges to surface waters as soon as possible. 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.¹⁵⁸

E. Antidegradation

EPA explained that the lack of an implementation procedure for antidegradation, though relevant under a state's water quality standards program, does not create a basis for NPDES program withdrawal.¹⁵⁹ Rather, states are required to consider antidegradation when writing NPDES permits.¹⁶⁰ The Region found that, though the State conducted "appropriate antidegradation analyses" in wastewater treatment facility permits, it did not adequately explain those analyses in permit fact sheets.¹⁶¹

For corrective actions, the Region stated that it would work with DEC to develop an antidegradation implementation rule.¹⁶² It also stated that DEC had "begun" and would continue to conduct antidegradation analyses for NPDES stormwater permits, and would take care to adequately describe its analyses in fact sheets for non-stormwater permits.¹⁶³

F. Adequacy of Water Quality-Based Effluent Limits in Permits

EPA concluded that DEC did not adequately document the reasonable potential analyses it conducted in order to determine whether permits need WQBELs.¹⁶⁴ The Region also found that "DEC generally has not conducted reasonable potential analyses and established WQBELs for nutrients (primarily phosphorus)."¹⁶⁵ In particular, DEC's failure to include nitrogen limits for discharges into the Long Island Sound watershed

158. *Id.*

159. *Id.*

160. *Id.* at 8–9.

161. *Id.* at 9.

162. *Id.*

163. *Id.*

164. *Id.* at 9–10.

165. *Id.* at 10.

violated the CWA's requirement that NPDES permits assure compliance with the water quality standards of all affected states.¹⁶⁶

For corrective actions, EPA noted that it had been working with DEC to develop better permit fact sheets regarding WQBELs, and that DEC would evaluate in all future permits whether a pollutant has the reasonable potential to cause or contribute to a violation of water quality standards.¹⁶⁷ Further, DEC had developed a procedure for conducting Reasonable Potential Analyses and agreed to follow the procedure going forward.¹⁶⁸ Finally, EPA directed the State to develop a plan for distributing the statewide nitrogen allocation amongst NPDES permits in the State, in order to ensure compliance with the TMDL for the Long Island Sound watershed.¹⁶⁹

G. Waterbury Permit

EPA found that compliance with phosphorus limits at the Waterbury wastewater treatment facility was "long overdue."¹⁷⁰ EPA agreed that Waterbury's permit provision conditioning compliance on funding was inconsistent with the CWA.¹⁷¹ EPA also found that ANR's Order attempting to extend Waterbury's compliance deadline did not actually modify the permit because the Order did not comply with CWA substantive and procedural requirements.¹⁷² Therefore, Waterbury's original phosphorus limit (which it had exceeded during every reporting period for seven years) was "in effect and enforceable."¹⁷³

For corrective actions, Region 1 noted that it had been in discussion with DEC about technologies to improve phosphorus treatment in Waterbury. It then explained that, in February 2013, DEC had issued an Assurance of Discontinuance rescinding the previous Order regarding Waterbury, requiring a new ballasted flocculation system at the plant, and ordering compliance with phosphorus limits by September 1, 2014.¹⁷⁴

166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 11.
170. *Id.*
171. *Id.* at 11–12.
172. *Id.* at 12.
173. *Id.*
174. *Id.*

H. Legislative Constraint on Regulating Municipal Discharges of Phosphorus

EPA agreed that 10 V.S.A. § 1266a(c), Vermont’s law regarding municipal compliance with phosphorus, “conflict[ed] with the Clean Water Act.”¹⁷⁵ EPA explained:

Although compliance schedules in permits are permissible in some circumstances, nothing in the Clean Water Act or its implementing regulations allows for such limits to be effective and enforceable only if, and to the extent that, state monies are available to fund actions necessary to achieve such limits. The Region is concerned that, by conditioning municipal compliance with phosphorous limits on the availability of state funds, this law either constrains DEC’s authority to issue permits containing enforceable limits that ensure compliance with applicable water quality-based effluent limitations (including those based on TMDLs), or creates a barrier to future enforcement actions to ensure compliance with such permit limits.¹⁷⁶

To help correct this problem, DEC had issued a memo in March 2012 that directed agency staffers to:

- 1) take reasonable steps to help municipalities secure funding for phosphorus treatment;
- 2) not consider costs when setting WQBELs in permits, refrain from mentioning 1266a(c) in permits, and require compliance with WQBELs notwithstanding 1266a(c), and;
- 3) request a remand from the court if a permittee successfully challenged a permit based on 1266a(c), which remand would allow EPA to object to the permit upon its reissuance.¹⁷⁷

EPA believed that this memo was a “sound interim step” but that ultimately a legislative solution would be required.¹⁷⁸ Accordingly, EPA concluded:

175. *Id.* at 13.

176. *Id.*

177. *Id.* at 13–14.

178. *Id.* at 14.

“Until such time as § 1266a(c) is revised to be consistent with the CWA, this portion of the Petition will remain open.”¹⁷⁹

VI. WHAT IF: LITIGATION OPTIONS FOR UNFAVORABLE RESULTS¹⁸⁰

When the Corrective Action Plan was released, all of the parties expressed appreciation for the improvements in Vermont’s water quality program and for the collaborative process. As mentioned above, the Region recognized the parties’ efforts and progress toward a better water program in Vermont.¹⁸¹ In press releases, CLF, ANR, and the ENRLC expressed similar sentiments. CLF’s Vermont director praised Region 1 for “fairly weighing and validating key concerns” that the Petition had raised, and also noted that the CAP represented “a heartening reaffirmation by DEC officials of the state’s commitment” to the Clean Water Act.¹⁸² In turn, ANR noted that the State was “pleased with the outcome” and grateful for “the hard work and good faith demonstrated by EPA and CLF in the resolution of this matter without the need to go to court.”¹⁸³ The ENRLC echoed that it had been an “extremely valuable process for Vermont’s water quality.”¹⁸⁴

All might not have ended so well, and if not, there may have been some litigation options for CLF to pursue. A claim might be based on EPA’s failure to conclude the Petition matter, failure to commence withdrawal proceedings, or failure to withdraw program approval. For instance, under the Administrative Procedure Act (APA), a reviewing court can “compel agency action unlawfully withheld or unreasonably

179. *Id.*

180. Portions of this section reflect research conducted by student clinicians Craig Sparks, Graham Zorn, and Tracy Wyeth.

181. CAP, *supra* note 135, at 2.

182. Press Release, Conservation Law Found., Conservation Law Foundation, EPA, and Vermont Officials Reach Agreement on Needed Clean Water Improvements (Jul. 19, 2013), *available at* <http://www.clf.org/newsroom/conservation-law-foundation-epa-and-vermont-officials-reach-agreement-on-needed-clean-water-improvements/>.

183. Press Release, Vt. Agency of Natural Res., Environmental Organizations Agree to Significant Measures to Clean Vermont’s Water, State (Jul. 19, 2013), *available at* <http://www.vermont.gov/portal/government/article.php?news=4437>.

184. Press Release, Vt. Law Sch., Vermont Law School’s Environmental Law Clinic Helps Ensure Clean Water in Vermont (Jul. 19, 2013), *available at* http://www.vermontlaw.edu/News_and_Events/News_Releases/Vermont_Law_School%E2%80%99s_Environmental_Law_Clinic_Helps_Ensure_Clean_Water_in_Vermont.htm. The ENRLC’s press release also named each of the student clinicians who had been assigned to the Petition matter over the years: Emily Stark, Rebecca Turner, Meghan Clark, Jane Kim, John Meyer, Ross Elwyn, Craig Sparks, Graham Zorn, Paul Ballenger, Tracy Wyeth, Evan Belser, Quincy Hansell, Siobhan McIntyre, Shahin Milani, Leslie Welts, Megan Dickie, Toby Dachman, Andrew Grosvenor, Nassy Avramidis, Molly Hann, Ellery Richardson, Patricia Robert, and Richard Sala.

delayed.”¹⁸⁵ For a court to do so, the agency action must be one that the agency is “required to take.”¹⁸⁶ According to another provision of the APA, an agency must “within a reasonable time . . . proceed to conclude a matter presented to it.”¹⁸⁷ Therefore, because EPA would be required to “proceed to conclude” a petition, there would be an action that EPA was “required to take” for purposes of an APA unreasonable delay suit.¹⁸⁸ Additionally, CWA regulations require EPA to “respond in writing” to de-delegation petitions—another action that might be challenged as unreasonably delayed.¹⁸⁹ Whether the agency’s delay was in fact “unreasonable” would then turn on the particular facts and circumstances of the situation.¹⁹⁰

Another potential argument might be that EPA’s failure to commence withdrawal proceedings under 40 C.F.R. § 123.64(b) was in fact a constructive denial of a petition, which denial would be arbitrary and capricious.¹⁹¹ The major Clean Water Act cases on the “constructive” issue suggest that a state’s failure to submit a total maximum daily load (“TMDL”) to EPA over a long period of time, with no plans to remedy, can

185. 5 U.S.C. §§ 702 (2012) (granting a right to review for “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute”), 706(1) (providing scope of review for challenges to agency action).

186. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (“Thus, a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.”); *Benzman v. Whitman*, 523 F.3d 119, 130–32 (2d Cir. 2008) (upholding dismissal of § 706(1) claim where statute used words like “should,” “whenever possible,” and “as appropriate” rather than “outlining discrete actions that a court may require it to do”).

187. 5 U.S.C. § 555(b) (2012).

188. *See Pub. Citizen Health Research Grp. v. Comm’r, FDA*, 740 F.2d 21, 32 (D.C. Cir. 1984) (involving a claim regarding citizen petition for FDA to promulgate a rule stating the “APA empowers the court to evaluate the pace of the agency decisional process and to order expedition if the pace lags unreasonably . . . [5 U.S.C. §§ 555(b) & 706(1)] give courts authority to review ongoing agency proceedings to ensure that they resolve the questions in issue within a reasonable time”) (citations omitted); *see also American Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (“FERC’s insistence that it is not obligated to address a petition filed under one of its own regulations allowing requests for discretionary action, is without merit. Under the APA a federal agency is obligated to ‘conclude a matter’ presented to it ‘within a reasonable time.’”) (citation omitted); *see also Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1099 (D.C. Cir. 2003) (stating that “Mashpee’s claim arose under the Administrative Procedure Act, which imposes a general but nondiscretionary duty upon an administrative agency to pass upon a matter presented to it ‘within a reasonable time,’ 5 U.S.C. § 555(b), and authorizes a reviewing court to ‘compel agency action unlawfully withheld or unreasonably delayed.’ *id.* § 706(1).”).

189. *See* 40 C.F.R. § 123.64(b)(1) (2013) (stating that “[t]he Administrator will respond in writing to any petition to commence withdrawal proceedings.”).

190. *See Mashpee*, 336 F.3d at 1100 (stating that the “[r]esolution of a claim of unreasonable delay is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court.”).

191. In addition to unreasonable delay, the APA provides a cause of action for challenging “arbitrary and capricious” agency actions. *See* 5 U.S.C. §§ 702 (granting a right to review), 706(2)(A) (2012) (stating that a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”).

be a constructive submission of no TMDL that triggers EPA's duty to create the TMDL itself.¹⁹² However, most courts applying this doctrine have found that particular circumstances did not warrant findings of constructive submission – e.g., because the states had taken some actions toward developing TMDLs.¹⁹³ The question may come down to whether the actor has “clearly and unambiguously” decided not to do something; if so, there may be a constructive, challengeable action.¹⁹⁴

If EPA actually did deny a petition, an arbitrary and capricious case would be more straightforward as a challenge to the “denial” of “relief.”¹⁹⁵ Regarding jurisdiction, the Fifth Circuit has held that jurisdiction for review of a petition denial lies in the Courts of Appeal pursuant to CWA section 509, 33 U.S.C. § 1369(b)(1)(D).¹⁹⁶ Section 509 of the CWA provides for judicial review of EPA's action “in making any determination as to a State permit program submitted under section 1342(b) of this title.”¹⁹⁷ Otherwise, an APA action would lie in the federal district courts.¹⁹⁸ In either case, the court would review EPA's decision under the APA's “arbitrary and capricious” standard.¹⁹⁹

Another potential theory could be that EPA's failure to withdraw program approval is a failure to perform a non-discretionary duty, for which

192. See *San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 881–83 (9th Cir. 2002) (discussing relevant cases).

193. *Id.*

194. *Id.* at 883 (holding that the court could not find constructive submission because the state had not “clearly and unambiguously” decided not to submit any TMDLs”) (internal citation omitted).

195. 5 U.S.C. § 702 (2012) (granting right of review of agency action); 5 U.S.C. § 551(13) (2012) (defining agency action as “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act”).

196. *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1288 (5th Cir. 1977) (stating that review of EPA decision after public hearing to revoke or not revoke state's authority “would be a ‘determination as to a State permit program’ within this court's purview under § 509(b)(1)(D), 33 U.S.C. § 1369(b)(1)(D).”). See also *Johnson Cnty. Citizen Comm. for Clean Air & Water v. EPA*, No. 3:05-0222, 2005 WL 2204953, at *6 (M.D. Tenn. Sept. 9, 2005) (finding EPA decision whether to withdraw program approval reviewable only in the Courts of Appeals).

197. 33 U.S.C. § 1369(b)(1)(D) (2012). Section 1342(b) applies to EPA's approval of state programs, whereas § 1342(c) applies to EPA's withdrawal of approval of programs. Presumably, the courts read § 509 as applying to any future determinations regarding state programs once they had been “submitted” to EPA under § 1342(b).

198. 5 U.S.C. § 703 (2012) (specifying that an APA claim may be heard in a court of “competent jurisdiction”); 28 U.S.C. § 1331 (2012) (granting original jurisdiction to federal district courts for “all civil actions arising under the Constitution, laws, or treaties of the United States”).

199. See *Save the Bay*, 556 F.2d at 1290 (“[W]e must emphasize the limited nature of our ultimate review over a decision not to revoke a state's NPDES authority, which would encompass the familiar inquiry whether the decision was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”) (citation omitted).

citizens could bring suit under the CWA.²⁰⁰ Under the citizen suit provision, a few courts have basically found that once EPA has substantial evidence of a state's noncompliance, the agency has a mandatory duty to make an adverse determination and initiate withdrawal proceedings absent improvements.²⁰¹ The reasoning is that, absent such mandatory duty, EPA could "frustrate citizen enforcement of the (Act) . . . merely by refusing to make a finding or determination."²⁰² However, other courts have found that EPA has neither a mandatory duty to decide a petition in a certain way, nor a mandatory duty to initiate withdrawal until certain actions have occurred.²⁰³ These cases rely upon the plain language of the statute, which states:

Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with the requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such

200. 33 U.S.C. § 1365(a)(2) (2012) (allowing citizen suits against the Administrator for failure "to perform any act or duty under this chapter which is not discretionary").

201. These cases dealt with allegations that EPA had mandatory duties under both § 1319(a)(2) (regarding EPA takeover of inadequate state enforcement programs) and § 1342(c)(3) (regarding withdrawal of approval of state programs), and applied similar analyses to both. *See, e.g., Rivers Unlimited v. Costle*, No. C-2-78-48, 11 Env't Rep. Cas. (BNA) 1681, 1684 (S.D. Ohio 1978) (EPA has mandatory duty to "make the requisite finding or determination of noncompliance when presented with substantial evidence of such violations"); *Save the Valley, Inc. v. EPA*, 99 F. Supp.2d 981, 985-86 (S.D. Ind. 2000) [hereinafter *Save the Valley I*] (denying EPA's motion to dismiss and stating: "[W]e read the CWA to impose a mandatory duty on the Administrator to make the requisite finding or determination when he becomes aware of such violations as articulated in § 1319(a)(2)."); *Save the Valley, Inc. v. EPA*, 223 F.Supp.2d 997, 1006, 1013-14 (S.D. Ind. 2002) (*Save the Valley II*) (ordering EPA to initiate withdrawal proceedings if state did not bring program into compliance, reasoning: "In the previous Entry [*Save the Valley I*], we specifically held that the Act requires the Administrator to make a finding under § 1319(a)(2) or a determination under § 1342(c)(3) . . . when [s]he becomes aware of such violations as articulated in § 1319(a)(2) . . . We agree with Plaintiffs that Indiana's program is not in compliance, and that the evidence shows EPA has known that to be true for some time.") (internal quotation marks omitted).

202. *Save the Valley II*, 223 F.Supp.2d at 1007.

203. *E.g., Johnson County Citizen Comm. for Clean Air & Water v. EPA*, No. 3:05-0222, 2005 WL 2204953, at *3-4 (M.D. Tenn. Sept. 9, 2005); *Altman v. United States*, No. 98-CV-237E(F), 2004 WL 3019171, at *3 (W.D.N.Y. Dec. 30, 2004); *Delaware Cnty. Safe Drinking Water Coal., Inc. v. Hanger*, 304 Fed.Appx. 961, 964 (3d Cir. 2008); *Weatherby Lake Improvement Co. v. Browner*, No. 96-1155-CV-W-8, 1997 WL 687656, at *1 (W.D. Mo. Apr. 17, 1997); *Sierra Club v. EPA*, 377 F.Supp.2d 1205, 1207-08 (N.D.Fla. 2005).

program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.²⁰⁴

They hold that “under the plain terms of the CWA, and considering the legislative history viewed as a whole, the decisions of whether to hold a public hearing and whether to make a subsequent determination that a state is not administering its NPDES program in accordance with the CWA are wholly discretionary exercises of the EPA’s authority.”²⁰⁵ Further, “the mandatory duty to withdraw approval arises only after the Administrator has determined that a state is not administering its NPDES program in compliance with federal standards. . . . Without having made such a determination, the EPA has no non-discretionary or mandatory duty to perform.”²⁰⁶ Under these cases, a claim that EPA’s failure to withdraw program approval (as opposed to its failure to conclude a petition matter) is unreasonably delayed might face similar obstacles, as the unreasonable delay claim must rest on some action that the agency is “required to take.”²⁰⁷ If the agency is not required to hold a public hearing or make an adverse determination, the requisite required action would not exist.

VII. CLOSING REFLECTIONS

All in all, Conservation Law Foundation’s Petition was a significant success. It achieved numerous concrete improvements in Vermont’s water quality program as well as promises for future improvements. It was an

204. 33 U.S.C. § 1342(c)(3) (2012).

205. *Johnson Cnty.*, 2005 WL 2204953, *supra* note 203 at *4 (agreeing with “majority view,” where Plaintiffs claimed EPA had duty to hold hearing once it became aware of violations). *See also Altman*, 2004 WL 3019171, at *3 (“Withdrawal of approval occurs only after a hearing has been held and a determination has been made. The statute does not compel the EPA to either hold a hearing or to make such a determination by any specific time, indicating that the withdrawal provision is discretionary.”) (citation omitted); *Delaware Cnty. Safe Drinking Water Coal.*, 304 Fed.Appx. at 964 (“None of the three remaining CWA claims involve a non-discretionary duty, and, thus, they are not subject to suit under the CWA’s citizen-suit provision. . . [M]ost courts have held that the CWA does not create a non-discretionary duty for the EPA to withdraw non-complying state NPDES programs, and contrary decisions have been widely criticized.”) (citations omitted); *Weatherby Lake Improvement Co.*, 1997 WL 687656 at *1 (“The plain language of . . . 402(c) of the Clean Water Act, does not compel the Administrator to investigate complaints or to make findings of violations which would then force EPA to withdraw Missouri’s authority to administer a state NPDES program.”); *Sierra Club*, 377 F.Supp.2d at 1207–08 (“Under the plain terms of the statute, the mandatory duty to withdraw approval arises only ‘whenever the Administrator determines after public hearing’ that a state is not administering its NPDES program in accordance with federal standards. The statute creates no express requirement that a public hearing be held at any specific time, or indeed ever, nor does the statute expressly require the EPA to make a determination one way or the other on the issue of whether a state is complying with federal law.”).

206. *Johnson Cnty.*, 2005 WL 2204953, *supra* note 203, at *4–5.

207. *See supra* note 182 [Norton & Benzman cases].

instance where persistence, a willingness to collaborate, and a fair amount of patience led to favorable results. From an environmental movement perspective, it is the type of process that can serve as a nice complement to – but not replacement for – important litigation.

A similar concept was explored in a recent article by Emily Hammond and David Markell. The article is a very interesting, thoroughly researched assessment of the petition-to-withdraw process as a means to build “legitimacy from the inside out” in agencies.²⁰⁸ It includes an overview of the purposes of judicial review (e.g., ensuring that agencies follow required procedures and adhere to the mandates of their enabling statutes) and explores how those goals might also be met from the inside-out through an empirical assessment of 58 withdrawal petitions.²⁰⁹ The authors note that the petition process stands “at the crossroads of administrative law, cooperative federalism, and environmental law.”²¹⁰ Among other things, they conclude that petition processes have produced “measurable substantive changes in critical areas such as state law and state agency permitting, investigations, and enforcement.”²¹¹ This was the case in Vermont; ideally, the process here can be useful as a model for other advocates seeking systemic clean water reforms in their states.

208. Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARVARD ENVTL. L. REV. 313, 330 (2013).

209. *Id. passim*.

210. *Id.* at 318.

211. *Id.* at 319. Two recent examples of outcomes include a Memorandum of Agreement between Region 5 and the State of Illinois, and a Work Plan Agreement between Region 7 and the State of Iowa, regarding needed improvements to the states’ NPDES CAFO programs.

See Memorandum of Agreement between U.S. Env’tl. Prot. Agency and the Ill. Env’tl. Prot. Agency (Nov. 1, 2010), *available at* http://www.epa.gov/region5/illinoisworkplan/pdfs/memorandum_of_agreement_20101101.pdf;

Work Plan Agreement between Iowa Dep’t of Natural Res. and U.S. Env’tl Prot. Agency (Sep. 11, 2013), *available at* <http://www.epa.gov/region7/water/pdf/ia-workplan-cafo.pdf>.