

FAQ: CLF, VNRC, AND LCC'S DE-DELEGATION PETITION TO EPA

CLEAN WATER ACT FAQs

Q: What is the National Pollution Discharge Elimination System (“NPDES”) program?

NPDES is a federal permit program created by the Federal Clean Water Act (“CWA”) to protect and restore waters across the United States. The NPDES program prohibits facilities, including farms, from discharging pollutants from a *point source* to a surface water without a permit.¹

Q: What’s the difference between a point source and a non-point source?

According to the CWA, a point source is “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.”² In other words, a point source is a single place or thing that releases pollutants, like a pipe. Common agricultural point sources include manure spreading vehicles; manure storage pits; piles of manure, feed, or silage; ditches; and drainage systems. By contrast, a non-point source is any source of water pollution that is not a point source. Fields are the most common agricultural non-point sources.

Q: If NPDES is a federal program, then why is ANR involved?

The CWA authorizes EPA to delegate the administration of the NPDES permit program to state agencies. In 1974, EPA granted ANR authority to administer the NPDES program in Vermont. ANR is consequently responsible for preventing facilities of all kinds, including farms, from discharging pollutants from point sources into Vermont’s waters.

Q: If EPA delegated authority to ANR, then why is AAFM involved?

Although ANR is responsible for administering Vermont’s NPDES program and is Vermont’s lead water-quality agency, state law requires ANR to delegate the regulation of agricultural *non-point source* water pollution to AAFM.³ EPA allows this arrangement for two reasons: (1) the NPDES program requires ANR to regulate *point source* pollution, not *non-point source* pollution, and (2) ANR and AAFM agree that ANR is the decision-maker regarding the existence of an agricultural point source and the appropriate enforcement response.⁴

Q: Can EPA withdraw ANR’s authority to administer NPDES in Vermont?

Yes. EPA’s responsibilities did not end when it granted ANR authority to administer the NPDES program in Vermont. EPA is required to oversee Vermont’s NPDES program, and it must intervene if Vermont’s NPDES program no longer meets the CWA’s requirements.⁵ EPA regulations identify several circumstances that require it to withdraw its approval of a state’s NPDES program or require prompt corrective action. These circumstances include failure to

¹ 33 U.S.C. § 1342(a)(1).

² 33 U.S.C. § 1362(14).

³ 10 V.S.A. § 1259(i).

⁴ Memorandum of Understanding between the Agency of Agriculture, Food, and Markets and the Agency of Natural Resources Regarding Implementation and Enforcement of Agricultural Water Quality Programs, § 6(D)(2) (Mar. 17, 2017) [hereinafter “2017 MOU”].

⁵ 33 U.S.C. § 1342(c).

control point source discharges and failure to monitor point source discharges.

VERMONT NPDES PROGRAM FAQs

Q: How is Vermont's current NPDES program supposed to work?

ANR is Vermont's lead water-quality agency. Under the CWA, it is responsible for regulating all point source discharges in Vermont, including point source discharges from farms. The Vermont General Assembly, however, limited ANR's ability to fulfill its duty by dividing jurisdiction over agricultural water quality between ANR and AAFM. Even though ANR is required to regulate agricultural *point source* water pollution, it must delegate the regulation of agricultural *non-point source* water pollution to AAFM.

AAFM conducts most on-farm inspections and investigations in Vermont. To ensure that ANR nonetheless regulates agricultural point source pollution, AAFM is supposed to act as ANR's eyes. If AAFM identifies evidence of an agricultural point source discharge on a farm, it must notify ANR immediately.

Distinguishing between a point source and a non-point source can be challenging. As Secretary of ANR Julie Moore observed, "there is often no bright line that exists between point and non-point sources in agricultural settings."⁶ When unclear cases arise, the ANR and AAFM have agreed that ANR will decide which agency has jurisdiction.

Q: Does ANR's assessment of Vermont's NPDES program indicate that the program succeeds in regulating agricultural water quality?

No. Secretary of ANR Julie Moore, who is responsible for overseeing ANR's implementation of Vermont's NPDES program, has concluded that ANR and AAFM's division of responsibilities undermines Vermont's NPDES program. Secretary Moore summarized the broken regulatory system's effects:

The net effect is that this largely artificial construct [i.e., distinguishing between point sources and non-point sources] and division of responsibility/overlapping jurisdiction between ANR and AAFM has led to tension and conflict between the agencies, regulatory uncertainty for farmers, and more time-consuming outcomes for water quality resulting in more pollution.⁷

DE-DELEGATION PETITION FAQs

Q: Why did CLF, VNRC, and LCC file the de-delegation petition?

CLF, VNRC, and LCC filed the Petition because ANR is not properly administering the CWA's NPDES program in Vermont. The CWA requires ANR to exercise control over agricultural point source discharges and to monitor agricultural point source discharges. Unfortunately, split jurisdiction over agricultural water quality and AAFM's hostility toward ANR prevents ANR from doing its job. The result is an inefficient, cumbersome, and confusing regulatory system that fails to deliver clean water and that hurts farmers by causing uncertainty and subjecting

⁶ Memorandum from Julie Moore, Secretary, ANR, to Suzanne Young, Secretary, Agency of Administration, and Mike Smith, Secretary, Agency of Human Resources Re: Proposal to Restructure ANR AAFM Water Quality Staff (Oct. 9, 2020) [hereinafter "2020 ANR Memo"].

⁷ *Id.*

farms to inconsistent and unpredictable enforcement.

Q: What does CLF, VNRC, and LCC want EPA to do in response to the Petition?

CLF, VNRC, and LCC want EPA to require Vermont to improve the state's NPDES program. Specifically, our organizations would like EPA to accept a proposal that Secretary of ANR Julie Moore forwarded to the Governor's Office on October 9, 2020 by requiring Vermont to "create a singular program [within ANR] responsible for water quality regulation on Vermont farms."⁸ If Vermont is unwilling to transfer agricultural water quality regulation to ANR, then CLF, VNRC, and LCC request that EPA explore other appropriate corrective actions, including withdrawing approval of Vermont's NPDES program.

Q: How has ANR and AAFM's broken relationship prevented ANR from controlling agricultural point source pollution?

ANR and AAFM's broken relationship has undermined the fragile referral system that ANR depends on to control agricultural point source pollution:

- AAFM disagrees with ANR on what constitutes a point source. Secretary of ANR Julie Moore has described this disagreement as placing Vermont's commitments under the CWA at risk.⁹
- AAFM routinely ignores ANR's status as the sole decision-maker regarding the existence of a point source and the appropriate enforcement response.
- AAFM regularly fails to refer evidence of agricultural point source discharges to ANR.
- AAFM regularly delays referring agricultural point source discharges to ANR. These delays sometimes exceed 5 months and can allow ongoing discharges to continue unabated.
- AAFM routinely fails to finalize farm inspection and investigation reports that ANR relies on until months after the inspection took place. For example, AAFM averaged 177 days to finalize the reports that document its 2019 on-farm inspections.¹⁰ For 4 of those inspections, AAFM spent more than 500 days.

FARM-RELATED FAQs

Q: Why are CLF, VNRC, and LCC targeting farmers? Vermont's farmers are having a tough enough time already. Give them a break.

The Petition does not target farmers. It targets ANR, AAFM, and a poorly-run government program.

The reality is that Vermont's farmers are harmed by AAFM's rivalry with ANR. According to one representative of the farm community, Vermont's "farmers get buffeted, not knowing where

⁸ *Id.*

⁹ Email from Julie Moore, Secretary, ANR, to Anson Tebbetts, Secretary, AAFM (Dec. 5, 2019, 06:48 EST).

¹⁰ This claim is based on a review of 98 reports that documented AAFM inspections conducted on LFOs, MFOs, and CSFOs in 2019.

to go, not knowing who to talk to. They're getting caught in the middle."¹¹ According to another, farmers are "the pinball being batted around."¹² Vermont's farmers should not be caught in regulatory crossfire. As farmers continue to work towards Vermont's water quality goals, they deserve to work with a well-functioning state government capable of delivering regulatory clarity. Instead, the current system forces farmers to face confusion and uncertainty.

Q: Do CLF, VNRC, and LCC want more enforcement against farmers?

CLF, VNRC, and LCC want a well-functioning system that ensures clean water for all Vermonters and that provides regulatory clarity to farmers. Farmers should not be forced to face the confusion and uncertainty that the current system imposes.

In addition, CLF, VNRC, and LCC support programs that make it easier for farmers to meet Vermont's water quality goals. Ideally, all farmers would be well-positioned to meet Vermont's regulations, and enforcement, when necessary, would not surprise or confuse farmers.

Q: Haven't farmers made tremendous strides to protect Vermont's waters? CLF, VNRC, and LCC should give farmers the credit that they deserve instead of cracking down on farmers.

Vermont's farmers are committed to protecting the state's waters and have made significant progress. There's still a long way to go. Under the Lake Champlain Total Maximum Daily Load, farmers are responsible for reducing the amount of phosphorus running off farms to the Lake by 143.3 metric tons per year. Farmers' collective efforts have reduced phosphorus loading by 33.28 metric tons per year.

As farmers continue towards Vermont's water quality goals, they should work with a well-functioning program capable of delivering regulatory clarity. As discussed above, ANR and AAFM's feuding has denied farmers that clarity. CLF, VNRC, and LCC filed the Petition so that farmers, like all Vermonters, can benefit from a predictable, efficient NPDES program.

Q: Why should ANR regulate water quality on farms? Doesn't it make more sense for AAFM to do that job since they understand farms better?

It is important for agricultural water quality regulators to understand farms. That is why Secretary of ANR Julie Moore proposed "transferring the 15 AAFM staff responsible for inspections and enforcement to ANR to create a singular program responsible for water quality regulation on Vermont farms."¹³ Her proposal would bypass ANR and AAFM's broken relationship and eliminate the unworkable system of referrals that Vermont's NPDES program depends on, all while retaining the necessary agricultural expertise. In addition, her proposal would free AAFM to support farms by providing technical, financial, and other assistance without being compromised by AAFM's current regulatory responsibilities.

¹¹ *Task Force to Revitalize the Vermont Dairy Industry* (Nov. 30, 2021) (statement of Jackie Folsom, Member, Task Force to Revitalize the Vermont Dairy Industry and Legislative Director, Vermont Farm Bureau), <https://www.youtube.com/watch?v=JusVwGws53I>.

¹² *Task Force to Revitalize the Vermont Dairy Industry* (Nov. 30, 2021) (statement of John Roberts, Member, Task Force to Revitalize the Vermont Dairy Industry and Executive Director, Champlain Valley Farmer Coalition), <https://www.youtube.com/watch?v=JusVwGws53I>.

¹³ 2020 ANR Memo, *supra* note 6.