

STATE OF VERMONT)	SUPERIOR COURT
)	ENVIRONMENTAL DIVISION
)	
In re: Agency of Natural Resources –)	DOCKET NO. 22-ENV-00054
City of Rutland Wastewater Treatment)	
Facility National Pollutant Discharge)	
Elimination System (NPDES) Permit)	
Permit # 3-1285)	

VERMONT NATURAL RESOURCES COUNCIL MOTION FOR SUMMARY

JUDGMENT

NOW COMES Vermont Natural Resources Council (VNRC), by and through counsel, Jon Groveman, Esq. and Jamey Fidel, Esq., and hereby moves for summary judgment on all issues set forth in the Statement of Questions (SOQ) filed in this matter pursuant to Vermont Rule of Civil Procedure (V.R.C.P.) 56(a).

Standard of Review

A court shall grant summary judgment pursuant to V.R.C.P. 56(a) if "the moving party demonstrates 'that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law' on the legal issues presented." *North Willard Street CU*, 121-10-19 Vtec. slip op. at 1, 2020 WL 5753103 (Vt. Super. Env'tl. Div. July 09, 2020) (quoting V.R.C.P. 56(a)). The Vermont Rules of Civil Procedure apply to the Environmental Court through Rule 5(a)(2). V.R.E.C.P 5(a)(2). When the Court considers the motion, "the nonmoving party 'receives the benefit of all reasonable doubts and inferences.'" *Id.* (quoting *Robertson v. Mylan Lab'ys, Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356, 362, 848 A.2d 310, 317-18 (2004)). The nonmoving parties' "allegations made in opposition to the motion" are taken as true, "so long as they are supported by affidavits or other evidentiary material." *Gates v. Mack Molding Co., Inc.*, 2022 VT 24, ¶ 13, 216 Vt. 379, 385, (2022) (quoting *Robertson*, 204 VT at ¶ 15, 176 Vt. at 362,

848 A.2d at 317-18).¹ As set forth below, there are no genuine issues of material of fact in this matter and VNRC is entitled to summary judgment on the SOQs it filed in this appeal as a matter of law.

MEMORANDUM OF LAW

Introduction

A combined sewer overflow (CSO) is a discharge to waters from a combined sewer system. *Ex. 9 CSO Rule (2016)*. A combined sewer system (CSS) is a system of structures that collect sanitary wastewater and stormwater through piping to a treatment facility that discharges to a receiving water. 33 U.S.C. §1342. During periods of heavy rainfall, the volume of wastewater typically exceeds the capacity of the combined waste-stormwater system resulting in the overflow of raw or partially treated sewage into receiving waterways. *Ex. 4 EPA CSO Guidance (1995)*. Such overflow events are called combined sewer overflows. *Ex. 4 EPA CSO Guidance (1995)*.

A CSO includes raw sewage and stormwater that may contain untreated human waste and pollutants from residential, commercial and industrial establishments as well as solids, metals, bacteria, viruses and other pollutants washed from streets and parking lots. *Ex. 6 CSO Rule 2016*. These discharges "pose risks to human health, threaten aquatic life and its habitat, and impair the use and enjoyment of the Nation's waterways." *Ex. 3 EPA CSO Control Policy (1994)*.

The City of Rutland (Rutland) Wastewater Treatment Facility (WWTF) has been discharging CSOs for decades. *Finding #4*. While actions have been taken by Rutland to reduce CSOs, millions of gallons of CSOs are discharged from the Rutland WWTF annually. *See*

¹ The Statement of Undisputed Material Facts and Exhibits filed by the parties in this matter serve to satisfy the requirement of V.R.C.P. 56(c)(1) that the moving party file a separate and concise statement of undisputed material facts with a motion for summary judgment.

Vermont Watershed Management in DEC at ANR Combined Sewer Overflows and Untreated Discharges, ANR, <https://anrweb.vt.gov/DEC/WWInventory/SewageOverflows.aspx> (last visited Dec. 5, 2023). For example, there have been over 1.7 million gallons of CSOs reported by the Rutland WWTF between August and December of this year. *Id.*

Despite the severity of CSO discharges from the Rutland WWTF, Discharge Permit #3-1285 that was issued by the Agency of Natural Resources (ANR) to Rutland in 2022 does not include any conditions that require Rutland to implement projects to reduce CSOs or take specific actions to directly address CSOs over the five year term of the permit. *Ex. 15 2022 Discharge Permit & Fact Sheet*. To the contrary, the 2022 Discharge Permit only requires that Rutland report on progress in addressing CSOs based on the requirements set forth in plans and orders that are outside the scope of the 2022 Discharge Permit. *Ex. 15 2022 Discharge Permit & Fact Sheet*.

In this appeal, VNRC argues that ANR's failure to include specific conditions in Discharge Permit #3-1285 to reduce and address CSOs violates the Clean Water Act (CWA). VNRC further argues that failing to include conditions to directly reduce and address CSOs in the 2022 Discharge Permit deprives the public of the ability to comment on and enforce conditions in National Pollutant Discharge Elimination System (NPDES) permits in violation of the CWA. 40 C.F.R. § 124.10; 10 V.S.A. § 7712; 33 U.S.C. §1365(a)(1).

Based on the arguments set forth herein, the Environmental Division should grant VNRC's motion for summary judgment and remand the matter to ANR to include required conditions to address CSOs in the permit.

Background

The City of Rutland (Rutland) owns and operates the Rutland Wastewater Treatment Facility (WWTF). *Finding #1*. The WWTF provides primary and secondary treatment for the

wastewater received from the City and Town of Rutland before discharging the treated wastewater into Otter Creek. *Finding #3*. In December 1986, the WWTF began discharging to Otter Creek from its upgraded combined sewer collection system. *Finding #4*.

On November 7, 2002, the Vermont ANR issued a discharge permit to the Rutland WWTF. *Finding #8*. With regard to CSOs, the permit prohibited the discharge of CSOs from the Rutland WWTF during dry weather and required Rutland to report on the effectiveness of Rutland's efforts to address CSOs. *Ex. 5 2003 Discharge Permit*. The permit also states that Rutland must comply with the schedule for eliminating CSOs. *Ex. 5 2003 Discharge Permit*. However, no schedule for eliminating CSOs was attached to the permit. *Ex. 5 2003 Discharge Permit*.

In 2008, in its application for a Discharge Permit renewal, Rutland submitted an interim CSO report.² *Finding #11*. This report indicated that overflows may still be occurring during certain high-flow events, but the data were inclusive. *Finding #11*. In response to the March 21, 2008 report, Rutland proposed changes to its CSO monitoring program to secure more accurate data. *Finding #12*.

In 2009, ANR issued an Order pursuant to 10 V.S.A. § 1272 (2009 1272 Order) to Rutland requiring specific monitoring and reporting on the four remaining overflow sites. *Finding #13*. Title 10, Section 1272 authorizes ANR to issue an order to control an activity or manage substances which may cause a discharge to the waters of the state that violates Vermont's water pollution laws. 10 V.S.A. § 1272. ANR's Guidance indicates 1272 Orders should only be utilized when there is "no directly applicable permit" to address a discharge. *Ex. 6 1272 Order Summary Sheet*.

² Under the CWA, NPDES permits must be renewed every five years. 33 U.S.C. § 1342(b)(1)(B).

In 2010, Rutland submitted a report to ANR that included an analysis of the remaining four overflow sites: S/N 002 (Cemetery), S/N 003 (Homeplate), S/N 005 (West Street Siphon), and S/N 009 (Third Base). *Finding #14*. The results of the report indicated that Rutland did not meet the requirements of the ANR CSO Control Policy. *Finding #14*.

On March 20, 2012, Rutland proposed a four-year schedule to complete its CSO work. *Finding #15*. The proposed schedule was specific to the completion of the Library Avenue Separation Project (S/N 003 and S/N 009). *Finding #15*. On June 27, 2012, ANR issued an amended 1272 Order (2012 1272 Order) to Rutland. *Finding #16*. The 2012 1272 Order included a requirement that the Library Avenue Separation project be completed by 2015 and a requirement that by December 31, 2013, Rutland provide a projected schedule for the design and completion of a CSO elimination project that would reasonably result in compliance with the ANR CSO Control Policy for CSOs S/N 002 and S/N 005. *Finding #16*. On October 22, 2015, Rutland submitted confirmation of the Library Avenue Separation project's completion. *Finding #17*.

On May 8, 2018, ANR issued an amended 1272 Order to Rutland (2018 1272 Order) to ensure all remaining CSOs in Rutland are brought into compliance with the requirements of state and federal law, including the Vermont Water Quality Standards (VWQS). *Finding #20*. The 2018 1272 Order included requirements that Rutland provide a detailed list of selected CSO control projects necessary to bring CSOs into compliance with VWSQ and a timeline for implementing those projects; and a strategy to ensure that new sources of stormwater and wastewater to the CSS do not increase the volume, frequency, or duration of CSO events. *Finding #21*.

On May 18, 2022, ANR issued a renewed Discharge Permit #3-1285 to Rutland, effective June 1, 2022. The 2022 Discharge Permit is valid for five years and requires Rutland to reapply

for permit renewal to ANR by September 30, 2026. *Finding #37*. The 2022 Discharge Permit identifies four remaining CSO discharge points at the WWTF: S/N 002 (Calvary), S/N 003 (Home Plate), S/N 009 (Third Base) and S/N 010 (West Street). *Finding #38*.

The conditions in the 2022 Discharge Permit related to CSOs require that Rutland report on progress on addressing CSOs including “[K]ey CSO control accomplishments, highlighting those that reduced the frequency and magnitude of CSOs; projects under design; and construction that occurred in the previous year.” *Ex. 15 2022 Discharge Permit & Fact Sheet*. There are no conditions or requirements in the 2022 Discharge Permit that identify projects or specific actions that Rutland is required to take or complete to reduce or address CSOs during the five year term of the permit. *Ex. 15 2022 Discharge Permit & Fact Sheet*.

Rather than including conditions that require Rutland to implement projects to reduce or address CSOs over the five year term of the permit, the 2022 Discharge Permit Fact Sheet references a 1272 Order that requires actions to address CSOs. *Finding #39*. Specifically, the Fact Sheet states, “To ensure the remaining CSOs are brought into compliance with the Vermont Water Quality Standards, the Secretary, concurrent with issuance of this final permit, shall issue a 1272 Order to the Permittee, requiring the creation of a Long-Term Control Plan that complies with the requirements of the CSO Rule.” *Finding #39*.

The 1272 Order requires that certain projects and actions to mitigate CSOs be completed by 2026. *Ex. 17 2023 1272 Order*. In addition, the 2022 Long Term Control Plan (LTCP) states that “[b]ased on recent wastewater collection system metering and calibration of a system hydraulic model . . . [there are] 22 projects which, in theory, would need to be completed in order for [Rutland] to meet the CSO elimination goal. *Finding #46 (emphasis added)*. The 22 projects identified in the LTCP go beyond the actions that Rutland is required to take in the 2023 1272 Order. *Ex. 17 2023 1272 Order; Ex. 16 2022 LTCP*.

ANR guidance provides that 1272 Orders should be used when there is no directly applicable permit to address a discharge to waters. *Ex. 6 1272 Order Summary Sheet*. The 1272 Orders consists of a letter issued by ANR describing the actions that a polluter must take to address a discharge. *Ex. 6 1272 Order Summary Sheet*. ANR guidance further indicates that 1272 Orders are issued within days of a discharge being identified. *Ex. 6 1272 Order Summary Sheet*.

There is no opportunity to comment on a 1272 Order or other public process associated with their development and issuance. *Ex. 6 1272 Order Summary Sheet*. In addition, there is no authority for the public or any entity other than ANR to enforce the terms of a 1272 Order if the Order is not being implemented. *Ex. 6 1272 Order Summary Sheet*.

In contrast, under the CWA and Vermont law, NPDES permits are subject to robust public notice and comment. 40 C.F.R. § 124.10; 10 V.S.A. § 7712; 33 U.S.C. §1365(a)(1). The CWA requires that NPDES permits be put on notice for at least 30 days to provide the public with an opportunity to comment on the permit. *Id.* Under the CWA, the public may request a hearing on an NPDES permit. Moreover, conditions in an NPDES permit are subject to the citizen suit provisions of the CWA that includes allowing any citizen to “commence a civil action on his own behalf against any person (including the United States and any other governmental instrumentality or agency) who is alleged to be in violation of a permit condition. 33 U.S.C. § 1365(a)(1).

VNRC has raised three issues in its appeal of the 2022 Discharge Permit through the SOQ. The issues may be summarized as follows: (1) whether the 2022 Discharge Permit is legally required to contain specific requirements to reduce or address CSOs over the five year term of the permit; (2) whether it is a violation of the citizen suit and public participation requirements of the CWA to issue an NPDES permit without conditions that require Rutland to

implement specific projects and take other steps to reduce or address CSOs; and (3) whether the matter should be remanded to ANR to revise the permit to include the specific CSO projects so that the public has the opportunity to comment on the project's actions to reduce or address CSOs in the permit.

As argued herein, the Environmental Division should grant summary judgment on VNRC's SOQs because the CWA, at a minimum, requires that the 2022 Discharge Permit include a list and schedule of projects and actions to be implemented to reduce or address CSOs. Moreover, by using a 1272 Order to address the CSO discharges rather than the 2022 Discharge Permit, ANR has deprived the public of the opportunity to review and comment on the specific actions Rutland must take to address CSOs during the five year term of the permit, and deprived the public of its right to hold ANR and Rutland accountable through the citizen suit provisions of the CWA to ensure that the CSOs from the WWTF are properly abated.

EPA Rules, Guidance and Policy on CSOs under the CWA Require that Specific CSO Conditions be Included in the 2022 Discharge Permit.

CSS are subject to scrutiny under Section 402 of the Clean Water Act as they are sewage structures that collect sanitary wastewater and stormwater through piping to a treatment facility that discharges to a receiving water. 33 U.S.C. § 1342. The NPDES permit program applies to owners or operators of treatment works treating domestic sewage. 40 C.F.R. § 122.

Under 40 C.F.R. § 122.2, "treatment works treating domestic sewage" means a Publicly Owned Treatment Works (POTW) which mirrors the definition of "treatment works" as defined by the CWA. 40 C.F.R. § 122.2. The definition of POTW under 40 C.F.R. § 403.3 includes sewers, pipes and other conveyances only if they convey wastewater to a POTW Treatment Plant. 40 C.F.R. § 403.3. Accordingly, the four CSO discharge points identified in the 2022 Discharge Permit are subject to the NPDES permitting requirements of Section 402 of the CWA.

In 1989, the EP's Office of Water adopted a National CSO Strategy to address CSOs from POTWs. *Ex. 1 EPA CSO Strategy (1989)*. The CSO Strategy generally required if CSOs occur, they occur only in wet weather, and that all wet weather CSOs must ultimately be brought into compliance with the technology and water quality based requirements of the CWA. *Ex. 1 EPA CSO Strategy*.

Building upon its CSO Strategy, in 1994 EPA adopted a CSO Control Policy. *Ex. 3 EPA CSO Control Policy (1994)*.³ The CSO Control Policy provided guidance as to how to address CSOs in NPDES permits, ensures that CSOs are managed in NPDES permits to meet the CWA, and ensures public involvement in the decision making process. *Ex. 3 EPA CSO Control Policy (1994)* at 1-3.

As part of implementing the CSO Control Policy, EPA issued the 1995 CSO Guidance for Permit Writers to set forth how CSO's should be addressed in NPDES permits. *Ex. 4 EPA CSO Guidance (1995)*. The CSO Guidance provided that NPDES permits should include the specific actions that a permittee is taking to abate and eliminate CSOs, even as part of a phased approach to eliminating CSOs. *Ex. 4 EPA CSO Guidance (1995)* at 2-1 – 2-3.

Specifically, the CSO Guidance breaks down addressing CSOs in NPDES permits into two phases. *Ex. 4 EPA CSO Guidance (1995)*. According to the CSO Guidance, in Phase I, NPDES permits should require a permittee to implement the nine minimum controls (NMC)

³ In 2000, the CWA was amended to incorporate the EPA CSO Control Policy. 33 U.S.C. § 1342 (q). Under 33 U.S.C.. § 1342 (q), "[E]ach permit, order, or decree issued pursuant to this chapter after December 21, 2000, for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the "CSO control policy")."

identified in the 1994 EPA CSO Control Policy and develop a LTCP for abating and eliminating CSOs. *Ex. 4 EPA CSO Guidance (1995)*.

Phase II is defined by the EPA CSO Guidance as typically the first permit issued after the NPDES permit requiring that the NMCs are implemented, and a LTCP is developed. *Ex. 4 EPA CSO Guidance (1995)*. In phase II, the NMCs are still listed as technology based controls that must be met, and the NPDES permits should include specific conditions that set forth an implementation schedule for CSO controls, conditions governing the operation and maintenance of the control projects, post construction monitoring conditions, a construction timeline, financing plans, and milestones for permitting requirements. *Ex. 4 EPA CSO Guidance (1995)* at 3-28, 4-1, 4-15, 4-22. The Rutland WWTF is clearly in Phase II as at least three NPDES permits have been issued for the WWTF since Rutland was required by ANR to take steps to address CSOs in its NPDES permits.

Importantly, the CSO Guidance for CSO Phase II permitting provides that the “permit writer should develop permit conditions that specifically require the implementation of the selected CSO controls, once approved” *Ex. 4 EPA CSO Guidance (1995)* at 4-23. The CSO Guidance also provides specific examples of how NPDES permit writers should include conditions in the permits “to list specific activities necessary to implement selected control” for CSOs. *Ex. 4 EPA CSO Guidance (1995)* at 4-24. For instance, the CSO Guidance explains, “if one of the selected CSO controls is construction of a retention basin, the permit writer should include specific language for the various activities necessary to complete the construction, as shown in the italicized site specific language in Exhibit 4-3” *Ex. 4 EPA CSO Guidance (1995)* at 4-24. Exhibit 4-3 in the Guidance clearly depicts a description of the CSO project and date by which actions to implement the project must be taken. *Ex. 4 EPA CSO Guidance (1995)* at 4-25.

The EPA CSO Control Policy sets forth the conditions that a Phase II NPDES permit must include with regard to CSOs. *Ex. 3 EPA CSO Control Policy (1994)* at 10. These “include requirements that insure that selected CSO controls are implemented, operated and maintained as described in the long-term CSO control plan.” *Ex. 3 EPA CSO Control Policy (1994)* at 10. When read together, it is clear that the EPA CSO Control Policy and EPA CSO Guidance require that the specific actions that will be taken by a permittee, including the construction of CSO control projects, must be included in the NPDES permit. *Ex. 3 EPA CSO Control Policy (1994)*.⁴ The failure to include the specific CSO conditions in the project violates the CWA.

The EPA CSO Strategy, EPA CSO Control Policy and EPA CSO Guidance all recognize that it may take more than one NPDES permit cycle to effectively address CSOs. These EPA policies also provide that, under Phase II, NPDES permits may include a CSO progress report and an agency may issue an administrative or judicial order to address situations when CSOs cannot be fully addressed in one NPDES permit cycle. *Ex. 1 EPA CSO Strategy (1989)*, *Ex. 3 EPA CSO Control Policy (1994)*, *Ex. 4 EPA CSO Guidance (1995)*. However, these EPA policies do not allow progress reports and enforcement orders to be used as the exclusive mechanism to address the Phase II permitting of CSOs. For example, the EPA CSO Control Policy specifically states:

[U]nless the permittee can comply with all of the requirements of the Phase II permit, the NPDES permit authority should include, in an enforceable mechanism, compliance dates on the fastest practicable schedule for those activities directly related to meeting the requirements of the CWA. For major permittees, the compliance schedule should be placed in a judicial order. Proper compliance with the schedule for implementing the controls recommended in the long-term CSO control plan constitutes compliance with

⁴ As noted herein, the EPA CSO Control Policy also requires that the Phase II NPDES permit include the NMC, water quality based effluent limits for CSOs, a monitoring program to determine the effectiveness of CSO controls, conditions that maximize the treatment of CSOs during wet weather and a specific NPDES permit reopener clause if CSOs fail to meet the Vermont Water Quality Standards (VWQS). None of these requirements are included in the 2022 Discharge Permit. *Ex. 15 2022 Discharge Permit & Fact Sheet*.

the elements of this Policy concerning planning and implementation of a long term CSO remedy.

Ex. 3 EPA CSO Control Policy (1994) at 10.

The EPA CSO Control Policy clearly requires two actions to address CSOs in Phase II NPDES permits. The first action is including minimum conditions to address CSOs in NPDES permits, including the specific projects and actions that will be implemented over the five year term of the permit to reduce CSOs, NMCs, water quality based effluent limits for CSOs, a monitoring program to determine the effectiveness of CSO controls, conditions that maximize the treatment of CSOs during wet weather and a specific NPDES permit reopener clause if CSOs fail to meet the VWQS. *Ex. 3 EPA CSO Control Policy (1994); Ex. 4 EPA CSO Guidance (1995).* The second action is the use of a compliance schedule and a judicial order when all CSOs that are violating water quality standards cannot be abated in one five year NPDES permit cycle. *Ex. 3 EPA CSO Control Policy (1994); Ex. 4 EPA CSO Guidance (1995).*

As noted, the CSOs at the Rutland WWTF have been going on for decades, and Rutland's LTCP provides that at least 22 projects must be completed before all CSOs at the WWTF will be abated; however, all 22 projects set forth in the LTCP are not included in the 2023 1272 Order nor are the projects required to be completed by 2026. *Findings #4, 46; Ex. 17 2023 1272 Order.* Accordingly, it is clear that the CSOs at the Rutland WWTF will not be fully addressed by 2026 when the 2022 Discharge Permit expires. As such, it is appropriate under the EPA CSO Control Policy for a compliance schedule and a judicial order to be used to address the CSO projects that will not be completed by 2026.

However, under the EPA CSO Control Policy, and consistent with the EPA CSO Guidance, the 2022 Discharge Permit must include specific requirements and actions that Rutland will take over the five year term of the permit to address CSOs. *Ex. 3 EPA CSO Control*

Policy (1994); Ex. 4 EPA CSO Guidance (1995). These requirements must include, at a minimum, the CSO projects and actions identified in the 2023 1272 Order and the minimum conditions for Phase II permits set forth in the EPA CSO Control Policy.

Excluding Specific CSO Conditions from the 2022 Discharge Permit Violates the Notice and Comment and Citizen Suit Provisions of the CWA.

As noted, CWA NPDES permits are subject to robust public notice and comment. 40 C.F.R. § 124.10. More specifically, under the CWA and Vermont law, an NPDES permit must be put on notice for at least 30 days, a public hearing will be held if a person requests a hearing, and ANR is required to respond to comments on the permit. *Id.*; 10 V.S.A. § 7712.

In contrast, orders issued pursuant to 10 V.S.A. § 1272 consist only of a letter issued by ANR describing the actions that a polluter must take to address a discharge. *Ex. 6 1272 Order Summary Sheet*. Moreover, 1272 Orders involve no notice of the order, no opportunity to comment on the order, and no opportunity for a public hearing on the order. *Ex. 6 1272 Order Summary Sheet*. By including all of the specific actions that Rutland must take to reduce or address CSOs in a 1272 Order, ANR has deprived the public of their right to review and comment on the CSO conditions under the CWA.

VNRC submits that if CSO conditions were included in the 2022 Discharge Permit, the public could comment on how effective the required actions will be in addressing CSOs, whether additional actions should be required by the permit and whether the schedule for taking such actions is appropriate. By omitting all such conditions from the permit, ANR has violated the rights of the public to review and comment on the CSO conditions in violation of the CWA.

In addition, by failing to include conditions in the NPDES permit related to implementing CSO control projects, ANR and Rutland avoid the citizen suit provisions of the CWA. Pursuant to 33 U.S.C. §1365(a)(1) “any citizen may commence a civil action on his own behalf against

any person (including the United States and any other governmental instrumentality or agency) who is alleged to be in violation of (A) an effluent standard or limitation or (B) an order issued by the Administrator or a State with respect to such a standard or limitation..." The term "effluent standard or limitation under this chapter" includes a permit or condition of a permit issued under §1342. Under the CWA, any citizen may bring a civil action against a government entity or agency alleged to be in violation of its NPDES permit or the conditions of that permit.

Conditions related to implementing CSO control projects must be included in the NPDES permit so that the permittee and ANR are subject to the accountability afforded by the citizen suit provisions, and the failure to do so violates the CWA. Under the current scheme where CSO control projects are developed and implemented through 1272 Orders outside of the NPDES permit process, Vermonters are deprived of being able to utilize the citizen suit mechanisms if the 1272 Order is not being properly implemented. This is a violation of the CWA.

Finally, the 1272 Order may not be used as a mechanism to address CSOs. ANR guidance provides that 1272 Orders should be used when "there is no other directly applicable permit" to address a discharge to waters. *Ex. 6 1272 Order Summary Sheet*. In the case of CSOs, there is a directly applicable permit available to address the discharge - the NPDES discharge permit. ANR is already issuing a discharge permit for the Rutland WWTF. Accordingly, ANR is violating its own guidance in using a 1272 Order to address CSOs when another directly applicable permit mechanism exists.

Moreover, under ANR's own guidance, 1272 Orders may only be used when ANR believes there is an immediate need for a legal order to protect a wetland and water resources. *Ex. 6 1272 Order Summary Sheet*. In the case of CSOs, there is no immediate need to issue a special order to address the discharge. To the contrary, ANR and Rutland are well aware that there are four CSO discharge points from the WWTF. ANR and Rutland know that CSOs will

discharge from these points as long as the WWTF is operating. Accordingly, there is no need for a special order to be issued. Rather, CSOs must be addressed through the NPDES permit for the Rutland WWTF.⁵

Conclusion

In issuing the 2022 Discharge Permit for the Rutland WWTF ANR has misinterpreted EPA policy and guidance under the CWA for addressing CSOs by failing to include any conditions in the permit that require Rutland to implement specific projects and take specific actions to reduce and address CSOs. The EPA CSO Policy, which was incorporated by reference into the CWA in 2000, clearly distinguishes between actions that a permittee must be required to take in an NPDES permit and longer term actions that must be taken by a WWTF to address CSOs that will occur after an NPDES permit expires in five years. 33 U.S.C.A. § 1342 (q); *Ex. 3 EPA CSO Control Policy (1994)*. This point is amplified in the EPA CSO Guidance that explicitly directs agencies issuing NPDES permits to list specific CSO control projects with dates that the project must be completed in the NPDES permit. *Ex. 4 EPA CSO Guidance (1995)* at 4-25. The 2022 Discharge Permit directly contradicts the CSO Guidance and violates the CWA by failing to include required conditions in the permit to address CSOs.

This CWA violation is not merely procedural. Rather the violation has deprived the public of the right to comment on and enforce CSO conditions under the CWA. CSOs are a significant problem at the Rutland WWTF that have been occurring for decades through multiple NPDES permit cycles. Affording the transparency for developing and implementing CSO conditions required by the CWA through the NPDES permit process will foster more public

⁵ Clearly ANR contemplates that 1272 Orders should be used in urgent situations. The 1272 Order Summary Sheet indicates that 1272 Orders are issued "generally within days" and the examples of 1272 provided are temporary coffer dams and actions needed to remediate harm to a wetland. *Ex. 6*. These emergency situations are in stark contrast to address discharges from CSO outfalls at a WWTF.

confidence in steps being taken to address CSOs and provide a proper level of accountability for the ANR and Rutland to resolve these harmful discharges.

For the reasons set forth herein, this matter must be remanded to ANR so that the required CSO conditions can be included in the permit and made available for public review and comment.

DATED at Montpelier, Vermont this 6th day of December, 2023.

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