EPA Region 1's Interim Response to Petition to Withdraw Vermont's NPDES Program Approval

On August 14, 2008, the Vermont Law School Environmental and Natural Resources Law Clinic ("ENRLC") filed a petition with the United States Environmental Protection Agency ("EPA") on behalf of the Conservation Law Foundation ("CLF") (the "Petitioner"). Subsequently, the Petitioner filed additional materials, as well as supplements on October 21, 2008 and July 21, 2010 (collectively referred to hereinafter as the "Petition"). The Petition asked EPA to withdraw approval for the State of Vermont to administer the National Pollutant Discharge Elimination System ("NPDES") program, based on a number of allegations related to the implementation and enforcement of the program. EPA Region I conducted an informal investigation of the various issues raised by the Petition and had numerous productive discussions with Vermont's Agency of Natural Resources Department of Environmental Conservation ("DEC"), ENRLC, and Petitioner to better understand the issues and to explore potential corrective actions as necessary.

In the course of these discussions, and in order to resolve issues raised by the Petition, DEC has taken specific steps, and has agreed to take future steps, as outlined in the Corrective Action Plan below. The Region believes that these actions, taken together, will adequately address all but one of the concerns the Region identified in the course of the informal investigation of the allegations in the Petition.[1] Provided that the State completes the remaining corrective actions identified below and continues the corrective actions it has already implemented, the Region intends to deny the Petition to withdraw approval of Vermont's NPDES program with respect to all issues except for the issue discussed in Section H below. While DEC has taken interim measures to ensure that DEC can and will administer its permit program consistent with the federal Clean Water Act notwithstanding the issue discussed in Section H, a permanent solution will require further action by the State in the form of a legislative amendment. Therefore, the Region will not deny the Petition as to this remaining issue until such time as the required action is completed.

Corrective Action Plan

A. Public Participation

1. Summary of Petition Allegations

Petitioner alleged that the State's provisions for public participation in the state enforcement process do not meet the requirements of 40 C.F.R. § 123.27(d).

[1] Petitioners raised several issues beyond those discussed herein. Based on the Region's informal investigation and conversations with all parties, the Region does not believe that corrective actions were or are necessary with respect to those additional issues.

2. Region 1's Conclusions

The Region agreed that Vermont's laws for public participation in enforcement were not consistent with 40 C.F.R. § 123.27(d), which was promulgated after EPA approved the State's program. Pursuant to § 402(c)(2) of the Clean Water Act, authorized states have a continuing obligation to ensure that their NPDES programs are consistent with the federal NPDES program requirements. EPA's state NPDES program regulations explicitly identify the failure to comply with public participation requirements as a basis for program withdrawal. See 40 C.F.R. § 123.63(a)(2)(iii).

3. Corrective Actions

DEC acknowledged the need to amend the State's public participation requirements to be consistent with 40 C.F.R. §123.27(d). Since the Petition was filed, the following actions have occurred which, collectively, satisfy EPA's requirements set forth in §123.27(d)(1) and (2).

In March 2011, the Vermont House passed a bill (H. 258) that addressed public participation in enforcement. The Vermont Senate proposed amendments to the House bill in February, 2012, which the House subsequently concurred in. On February 16, 2012, Governor Shumlin signed the bill into law, and it became effective on July 1, 2012. The new law requires DEC to investigate and provide written responses to all citizen complaints of a violation of the approved program, consistent with 40 C.F.R. §123.27(d)(2)(i); provides for permissive intervention in administrative enforcement actions consistent with 40 C.F.R. § 123.27(d)(2)(ii); and provides for public notice of and opportunity for public comment on any proposed settlement of a state administrative enforcement action, consistent with 40 C.F.R. § 123.27(d)(2)(iii).

In addition, with respect to public participation in judicial enforcement, Vermont's Assistant Attorney General Scot Kline submitted a letter to the Region on March 9, 2012, which explains that Vermont law allows intervention as of right in civil judicial enforcement actions in a manner analogous to Rule 24(a)(2) of the federal Rules of Civil Procedure. The letter also provides a commitment that the Vermont Attorney General's Office will not oppose a citizen's motion to intervene in Clean Water Act enforcement cases brought by the State on the basis that the proposed intervener's interests can be adequately represented by the State. This commitment ensures that the intervention as of right provided by the State is consistent with 40 C.F.R. §123.27(d)(1).

The Region concludes that, with the commitment provided by the Office of the Attorney General, the State's authorized program is consistent with 40 C.F.R. §123.27(d)(1) for judicial enforcement actions; and that, as a result of the newly effective legislation, the program is now consistent with 40 C.F.R. §123.27(d)(2) for administrative enforcement actions.

B. Supplemental Environmental Projects ("SEPs")

1. Summary of Petition Allegations

Petitioner alleged that DEC's 2006 SEP policy and its implementation were in several respects inconsistent with EPA's SEP Policy and resulted in a failure to seek and collect adequate penalties. As examples, Petitioner raised concern with a disclaimer in the State's SEP policy allowing Agency action "that varies from the practices contained in the policy, if such action is appropriate in a specific case." Petitioner also expressed concern with a provision allowing SEPs "that fund activities that municipal violators had already planned and budgeted for or were already required to undertake by law." In addition, Petitioner alleged that DEC "routinely failed to convert SEPs to civil penalties when violators did not pay on time in accordance with the AOD mandates under which they were ordered."

2. Region 1's Conclusions

During its informal investigation, the Region identified several concerns about the State's 2006 SEP Policy and its implementation:

a. *Prohibition against SEPs that are otherwise required by law* – Section 4.D. of DEC's 2006 SEP policy appropriately stated that SEPs are not allowed if the activities are otherwise required by law or may be required in the near future. However, Section 8 allowed for deviations from the policy for governmental entities, including deviation from the prohibition on accepting as SEPs projects that are otherwise required by law. DEC indicated that it was its practice not to accept such SEPs from any entities, including governmental entities. The Region concluded that, notwithstanding DEC's practice, the exception in the policy had the potential to, in effect, eliminate penalties for municipal violators entirely by allowing penalty dollars to be spent on projects already required by law rather than to be used in a SEP for something above and beyond what is required by law. In its review of the adequacy of state enforcement programs, EPA requires the calculation and collection of penalties for all categories of violators, including municipalities. *See* 40 C.F.R. § 123.27(a)(3). The exception in the policy could also undermine municipal enforcement by allowing penalty reductions for SEP projects already required by law.

b. *Prohibition against SEPs that are activities already planned and budgeted for* – Section 4.E. of DEC's 2006 SEP policy appropriately stated that SEPs will not be accepted for activities planned, budgeted for, initiated, or completed prior to or during the current enforcement action. However, Section 8 allowed for deviations from the policy for governmental entities. The Region concluded that this policy exception had the potential to undermine the SEP policy's requirement that to qualify as an SEP a project must not be one that an entity had already committed to implement before or during the enforcement action.

c. Late Payment of SEPs – The Region reviewed DEC's guidance entitled "Supplemental Environmental Project (SEP) & Late Penalty Collection Practices," which sets out the procedure to be followed by DEC staff if a SEP payment is not timely made or an acceptable SEP is not found within the timeframe specified in the Assurance of Discontinuance ("AOD"). The Region determined that the guidance appeared to give complete discretion to the case attorney to extend deadlines indefinitely with no adverse

consequences for a respondent who delays in making a SEP payment or developing an acceptable SEP.

d. *Tax Consequences* – Under EPA's SEP policy[2], SEP costs are not tax deductible expenditures. DEC's 2006 policy, in contrast, did not contain such a prohibition.

3. Corrective Actions

a. *Prohibition against SEPs that are otherwise required by law* -- On May 6, 2013, DEC issued a modified SEP policy which no longer contains Section 8's allowance of deviations from the policy for governmental entities. Deletion of this section means that policy deviations are no longer allowed for governmental entities; therefore EPA's concerns discussed above have been remedied.

b. *Prohibition against SEPs that are activities already planned and budgeted for* -- The DEC's modified SEP policy issued on May 6, 2013 addresses EPA's concern, since deletion of Section 8 means that policy deviations are no longer allowed for governmental entities.

c. *Late Payment of SEPs* -- DEC's May 6, 2013 SEP policy now provides in Section 7.C. that when a respondent has failed to fulfill all or part of an SEP, the SEP will be converted to a penalty amount in a pro rata manner and deemed immediately due and payable to the State. The policy further provides that no extensions of time to fulfill all or part of an SEP may be granted without authorization from the Compliance and Enforcement Division Director. In addition, in 2009, with the support of DEC, the Vermont legislature passed a law (10 V.S.A. Section 8007) that requires respondents to place funds to fulfill an SEP into an attorney's interest on lawyer's trust account (IOLTA) or escrow account, if either all funds have not been disbursed, or there is not full and continuing compliance with an applicable payment schedule, no later than 180 days of the effective date of the AOD that required the SEP. Also, the standard language used by the State for an SEP in its cases states that the SEP "shall be funded by the Respondent no later than sixty (60) consecutive calendar days following the date this Assurance is entered as an Order by signature of the Environmental Court ('effective date'). If, at the close of the sixty (60) consecutive days, any of the $XX,000.00 allocated for SEPs has not been expended by the Respondent, that unexpended amount shall be converted to a civil penalty and shall be immediately due and payable to the State of Vermont." These statutory, policy, and practice changes address the Region's concerns. They place clear consequences on a respondent's failure to implement an SEP in a timely way and remove staff discretion to extend SEP deadlines without senior management approval.

d. *Tax Consequences* -- DEC's May 6, 2013 SEP policy now contains a provision (Section 5.F.) that requires respondents to agree in the AOD that SEP expenditures are not tax deductible and, further, to agree not to deduct, or attempt to deduct, such expenditures from their taxes. This modification adequately addresses the Region's concern regarding this issue.

[2] http://www.epa.gov/enforcement/documents/policies/sep/fnlsup-hermn-mem.pdf

C. Significant Non-Compliance ("SNC") Policy

1. Summary of Petition Allegations

Petitioner alleged that DEC failed to take adequate enforcement actions against significant violators.

2. Region 1's Conclusions

The Region evaluated DEC's 1995 policy entitled, "Procedure for Determining Significant Non-Compliance for Vermont's Water Pollution Control Permit Program." This policy describes the types of violations that will be considered significant non-compliance ("SNC") and discusses the responses to those violations. The description of the types of violations that will be considered significant non-compliance appears to be sufficiently comprehensive. However, many violations that would be considered SNC under DEC's policy would not be considered SNC by EPA [3].

With respect to the State response to SNC, the DEC policy provides that "the type of response will be at the discretion of the Department." In contrast, EPA's guidance and policies (see footnote 3) direct that violations at NPDES major dischargers that meet EPA's definition of SNC be addressed through a formal enforcement action or prompt return to compliance.

During the Region's review of the information provided by the Petitioner and of DEC's enforcement files, we determined that most of the violations identified by Petitioner did not constitute SNC under EPA's definition, and of those violations that did meet EPA's definition of SNC, DEC's enforcement response and penalty amounts were consistent with EPA policies and approaches.

3. Corrective Actions

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, DEC has taken and will take the following actions:

a. DEC will exercise its enforcement discretion consistent with EPA's guidance related to timely and appropriate enforcement[4] to bring both major dischargers and non-major dischargers back into compliance.

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[3] Applicable EPA policy/guidance Regarding Significant Non-Compliance**:** Chapter 7 of the *Enforcement Management System, Quarterly Noncompliance Report Guidance*; *Guidance for Preparation of Quarterly and Semi-Annual Noncompliance Reports* (40 CFR 123.45) March 13, 1986; *Final Single Event Violation Data Entry Guide for the Permit Compliance System (PCS)*, May 22, 2006; Memo *ICIS Addendum to the Appendix of the 1985 PCS Policy Statement* from Michael M Stahl, Director, Office of Compliance and James A Hanlon, Director, Office of Wastewater Management, December 7, 2007; *PCS Quality Assurance Guidance Manual*, August 28, 1992.

[4] The Enforcement Management System, National Pollutant Discharge Elimination System (Clean Water Act), 1989. http://www.epa.gov/Compliance/resources/policies/civil/cwa/emscwa-jensen-rpt.pdf; see also

b. DEC has completed the migration to EPA's Integrated Compliance Information System for NPDES ("ICIS-NPDES") and will ensure that all compliance monitoring, violation, and enforcement data are entered into ICIS-NPDES going forward. The ICIS-NPDES data system automatically flags SNC violations at majors that are required to submit discharge monitoring reports and only removes the SNC designation when compliance is achieved or the violation is resolved by a formal enforcement action. The information in ICIS-NPDES is reflected in the public Enforcement and Compliance History Online ("ECHO") website (http://www.epa-echo.gov).

i. The ICIS-NPDES data system will provide facility-specific information that will be used by EPA to evaluate whether violations at major dischargers that meet the federal criteria at 40 CFR § 123.45 are reported and resolved consistent with EPA guidance and policies.

ii. DEC will continue to be responsible for submitting to EPA for publication Annual Non-Compliance Reports for non-major dischargers that will provide summary information indicating whether the State is identifying and addressing violations at NPDES non-major dischargers. In addition, in its upcoming review of the State's NPDES enforcement program, EPA will assess the State's enforcement response not only to violations at majors but also to violations at certain non-major dischargers, including reviewing the State's response to wet weather violations.

The Region believes these actions will assure that Vermont's NPDES enforcement program continues to be aligned with EPA's policies and guidance, will provide greater transparency regarding DEC's enforcement responses against violators defined by EPA to be "significant," and will adequately address the issues raised in the petition.

D. CAFO Permitting and Enforcement

1. Summary of Petition Allegations:

Petitioner alleged that DEC has failed to issue NPDES permits to, or take enforcement actions against, CAFOs, including those that have been found to have discharged. Petitioner asserted that CAFO regulation and enforcement has been left to the Agency of Agriculture, Food, and Markets ("AAFM"), which administers a separate state regulatory program for farms but does not have NPDES program approval.

2. Region 1's Conclusions

Although the DEC has authority to do so in accordance with 10 V.S.A. §1263 and 13.4 (b) of the Vermont Water Pollution Control Regulations, the Region agrees that DEC has never issued a NPDES permit to any CAFO in Vermont and has not adequately regulated a sector of dischargers that are subject to the NPDES program. This failure stems in part from uncertainties about the scope of the program as a result of litigation in federal court

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Memorandum, "Clarification of NPDES EMS Guidance on Timely and Appropriate Response to Significant Noncompliance Violations," May 29, 2008. http://www.epa-otis.gov/otis/docs/EMS%20Guidance%20Memo.pdf

over EPA's CAFO regulations. EPA's state NPDES program regulations explicitly identify the failure to exercise control over activities required to be regulated, including failure to issue permits, as a basis for program withdrawal. See 40 C.F.R. § 123.63(a)(2)(i).

Regarding compliance monitoring and enforcement, DEC has been conducting inspections of CAFOs along with AAFM. Violations have 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. EPA's state NPDES program regulations explicitly identify the failure to act on violations of permits or other program requirements as a basis for program withdrawal. See 40 C.F.R. § 123.63(a)(3)(i).

3. Corrective Actions

Recently DEC has taken steps toward resolving these issues and has committed to take additional steps as discussed below.

a. *Permitting* -- DEC will administer the NPDES permit program to regulate discharges from CAFOs to surface waters in accordance with the federal CWA and the implementing federal regulations. DEC will require CAFOs that discharge to have NPDES permits. *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 751 (5th Cir. 2011). A CAFO that has discharged without a permit remains in violation of the Act so long as there is a continuing likelihood that intermittent or sporadic discharges will recur. *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield*, 890 F.2d 690, 693 (4th Cir. 1989); see also *Carr v. Alta Verde Indus.*, 931 F.2d 1055, 1062 (5th Cir. 1991). DEC will therefore require permits of CAFOs that have discharged in the past, and that are therefore expected to discharge in the future, unless the conditions that led to the discharge are remedied.[5]

i. In September 2011, DEC provided to EPA and Petitioner a preliminary draft general permit for medium CAFOs. Both EPA and Petitioner provided comments on the preliminary draft. DEC issued a draft general permit for public comment on February 28, 2013. Following review of public comments and any additional comments by EPA, DEC will issue a final general permit covering medium CAFOs by June 21, 2013.

ii. DEC will utilize individual permits for large and designated small CAFOs, and may in the future develop and issue general permits for such facilities.

Having assessed the current state of Vermont's NPDES CAFO permitting program and the universe of CAFOs in the State, the Region believes these actions will address concerns raised in the petition about Vermont's CAFO permitting program and will ensure that it will be implemented consistent with federal requirements.

b. *Compliance and Enforcement*

[5] These concepts are discussed further in EPA's December 8, 2011 Hanlon memo entitled "Concentrated Animal Feeding Operation Program Update after National Pork Producers Council v. EPA."

i. *Inspection Coverage* – DEC has committed to meet the goals for CAFO inspections set forth in EPA's *National Pollutant Discharge Elimination System Compliance Monitoring Strategy for the Core Program and Wet Weather Sources* (issued October 17, 2007, hereinafter "NPDES CMS"), available at http://www.epa.gov/oecaerth/resources/policies/monitoring/cwa/npdescms.pdf. For FY'13, DEC will conduct a minimum of 12 inspections of large and medium CAFOs and medium AFOs (which may or may not turn out to be a medium CAFO), and in subsequent years will increase the number of inspections as negotiated with EPA on an annual basis, consistent with the NPDES CMS. In addition, EPA has committed to conducting an additional 12 CAFO inspections during FY'13, and will continue to conduct inspections in subsequent years to complement DEC's efforts. The inspection and re-inspection of farms with discharges or evidence of past discharges will be a high priority.

ii. Response to CWA/NPDES Violations -- 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.

Having considered the current state of Vermont's CAFO universe, the Region believes these actions will address concerns raised in the petition about Vermont's CAFO compliance and enforcement program and will ensure that it will be implemented consistent with federal requirements.

E. Antidegradation

1. Summary of Petition Allegations:

In the initial Petition, Petitioner alleged that DEC had failed to adopt an antidegradation implementation procedure as required by 40 C.F.R. 131.12 and therefore was unable to issue NPDES permits that adequately protected water quality. Petitioner also stated that a recently developed (2008) draft rule was vague and inadequate and provided several comments on the draft rule. In the 2010 supplement, Petitioner asserted that when issuing permits, DEC does not undertake an antidegradation analysis.

2. Region 1's Conclusions:

With respect to the first two allegations, the Region notes that the existence or adequacy of a state's antidegradation implementation procedure may be an issue under the water quality standards program, but it is not, in and of itself, an issue that gives rise to a basis for NPDES program withdrawal. The State does have the requisite antidegradation policy in its water quality standards, and under DEC's existing permit program regulations, it is required to take antidegradation into account in permitting and Clean

Water Act § 401 water quality certifications. Thus, DEC has the authority to issue permits consistent with water quality standards.

With respect to the third allegation, DEC stated at the outset of EPA's investigation that it does engage in an antidegradation analysis in the context of waste water treatment facilities ("WWTFs") and activities requiring CWA § 401 certifications, but not in storm water permits. The Region reviewed several permit fact sheets for permits for WWTFs and concluded that the State does conduct appropriate antidegradation analyses when developing its NPDES permits for WWTFs, but it does not always articulate the extent and nature of its review and conclusions in the fact sheets.

3. Corrective Actions

a. Although, as noted above, the existence or adequacy of an antidegradation implementation procedure is not a basis for withdrawal of Vermont's NPDES program, it is an important component of water quality standards implementation. In 2010, the Vermont legislature blocked DEC from adopting an antidegradation implementation procedure through rulemaking. As a result, DEC adopted an interim policy in October 2010. EPA intends to work with DEC as it develops an antidegradation implementation rule through a formal rulemaking process.

b. DEC has begun and will continue to consider antidegradation requirements in the issuance and conditioning of NPDES storm water permits.

c. For non-storm water NPDES permits, DEC will continue to consider antidegradation requirements in its permit decisions and describe its antidegradation analyses and conclusions in permit fact sheets.

The Region believes that these actions will adequately address the issues raised by the petition by ensuring that antidegradation analyses are included in all NPDES permits and associated fact sheets.

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

1. Summary of Petition Allegations

Petitioner alleged in the July 21, 2010 supplement to the petition that the Vermont DEC issues NPDES permits without adequate water quality-based effluent limitations ("WQBELs") as required by the Clean Water Act. Petitioner raised specific concerns about the absence of nitrogen limits in two permit modifications that would allow the expansion of discharges that contribute nitrogen to Long Island Sound ("LIS"), which is impaired due to nitrogen.

2. Region 1's Conclusions

The Region reviewed a number of permit fact sheets and concluded that analyses to determine whether or not to establish WQBELs were not adequately documented. DEC stated that it does conduct adequate reasonable potential analyses to determine whether,

and the extent to which, WQBELs are necessary. However, DEC often did not include a description of its analysis and basis for permit limits in the permit fact sheets. As a result, neither the public nor EPA, in its oversight role, could readily determine whether sufficient WQBELS were established in any given permit.

The Region also determined that DEC generally has not conducted reasonable potential analyses and established WQBELS for nutrients (primarily phosphorus). The failure to establish limits for nutrients that have the reasonable potential to cause or contribute to an exceedance of the narrative criteria in the Vermont Water Quality Standards is inconsistent with 40 C.F.R. § 122.44(d)(1)(i), which requires limits on any pollutants that "are or may be discharged at levels that will cause, have a reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality." In the absence of a numeric criterion, DEC must derive effluent limits pursuant to 40 C.F.R. § 122.44(d)(1)(vi) for specific pollutants as necessary to ensure that the narrative criteria will be attained and maintained.

Furthermore, the Region determined that DEC's failure to include nitrogen limits in permits for discharges that contribute nitrogen to Long Island Sound was inconsistent with its obligation to issue permits that ensure that discharges will not cause or contribute to violations of water quality standards of all affected (including downstream) states. See, e.g., 40 C.F.R. §§ 122.4(d) and 122.44(d) (which apply to state approved programs pursuant to 40 C.F.R. § 123.25).

3. Corrective Actions

a. EPA has been working with DEC to provide better documentation in its permit fact sheets of DEC's analyses of whether pollutants in the effluent have a reasonable potential to cause or contribute to a water quality standards violation, and to explain the basis for establishing WQBELs. DEC made improvements in the fact sheet for the Pownal permit issued on September 30, 2011. DEC will, in issuance of future NPDES permits, evaluate and set appropriate limits for all pollutants which have reasonable potential to cause or contribute to exceedances of numeric and narrative water quality standards.

b. On December 13, 2012, DEC finalized a procedure for conducting Reasonable Potential Analyses (see attached) and agrees to implement this procedure when issuing NPDES permits. The procedure addresses the Region's concerns relative to establishing WQBELs to meet narrative nutrient criteria, and to conducting and documenting reasonable potential analyses for both numeric and narrative criteria.

c. With regard to the absence of nitrogen limits in permits for discharges that contribute nitrogen to LIS, in 2010 EPA objected to two proposed permit modifications. One permit modification (Hartford-Quechee WWTF) was withdrawn at the request of the permittee. A hearing on EPA's objection to the other permit modification (Hartford-White River Junction WWTF) was held on March 2, 2011. After several productive discussions, there was general agreement between DEC and EPA on necessary changes to the permit modification that address EPA's concerns. EPA sent a letter to DEC on November 10, 2011, reaffirming the objection to the permit modification and identifying expectations

relative to this permit as well as other permits in the LIS watershed. DEC subsequently reissued the permit with conditions, including a numeric total nitrogen limit in lbs/day, that addressed EPA's concerns.

The nitrogen allocation in the Hartford-White River Junction permit is an interim allocation that may or may not be consistent with achieving the statewide nitrogen allocation required by the existing LIS TMDL. To address this concern, DEC will submit to EPA a report on how the statewide nitrogen allocation will be distributed among the universe of permits that authorize discharges into the LIS watershed. DEC submitted a draft of the report to EPA for review and comment on June 4, 2013, and will submit a final report for EPA approval no later than July 31, 2013. Reissuance or modification of any of the relevant permits will be consistent with the report once approved by EPA.

The Region believes that these actions will adequately address the issues related to establishment of WQBELS and nitrogen permitting raised by the Petition.

G. Waterbury Permit

1. Summary of Petition Allegations

Petitioner alleged in the July 21, 2010 supplement to the Petition that DEC has allowed the Town of Waterbury's wastewater treatment facility to discharge phosphorus at levels far exceeding its wasteload allocation in the 2002 Lake Champlain total maximum daily load ("TMDL") and its NPDES permit limits for more than seven years. Although Waterbury's 2005 NPDES permit[6] includes total phosphorus effluent limits of 0.8 mg/l (monthly average) and 1241 lb. per year (consistent with the TMDL), it also states that compliance with these limitations was not necessary until December 31, 2007 and then only if adequate state funding was available. The Petitioner alleged that the condition requiring compliance only if there is adequate state funding, and the underlying state statute on which it is based (10 V.S.A. § 1266a(c)), are inconsistent with the Clean Water Act.

Petitioner also alleged that the § 1272 order issued by DEC in 2008 "modifying" Waterbury's NPDES permit to extend the date for compliance until two years after EPA's approval of a then-anticipated future revision to the Lake Champlain TMDL was unlawful under the Clean Water Act.

2. Region 1's Conclusions

EPA agrees that the Waterbury wastewater treatment facility has not constructed adequate treatment and that the discharge monitoring data show that the Town has not met its 2005 permit limits. Compliance with the phosphorus limits is long overdue.

EPA also agrees with Petitioner that the provision in the permit which ties compliance to funding availability, and the underlying statute at 10 V.S.A. § 1266a(c) on which it was

[6] The Waterbury wastewater treatment facility permit has not been reissued. The 2005 permit has been administratively continued.

based, are inconsistent with the Clean Water Act (see Section H below).[7] Initially, that permit provision was irrelevant because as of 2004, state funding was available for Waterbury to design and construct treatment to meet the permit limits by December 31, 2007. However, in 2007 Vermont's Legislature passed 10 V.S.A. § 1385, which required DEC to reopen the Lake Champlain TMDL in 2008 and reduce wasteload allocations, unless the Act was amended or repealed during the 2008 legislative session. Believing that such revised allocations could result in more stringent permit limits and a need for Waterbury to construct more expensive treatment for which funding was not yet available, DEC issued a § 1272 order to the Town on January 11, 2008. The order extended the Town's compliance date to no later than two years following EPA's approval of the anticipated revised TMDL. The order explicitly provided that if the Legislature amended or repealed 10 V.S.A. § 1385, the order could be revised, and that it would be effective until two years after EPA's approval of the revised TMDL or until it is rescinded or a subsequent order issued. In 2008 the Legislature did repeal 10 V.S.A. § 1385, but DEC has not rescinded the order.

EPA has concluded that the § 1272 order did not modify the terms of the permit, since the issuance of the order did not comply with the substantive and procedural requirements of the NPDES regulations governing permit modifications. Accordingly, the terms of the permit remain in effect and enforceable.

3. Corrective Actions

In working to resolve the Waterbury issue, Region 1 has discussed with DEC newer technologies that may be employed to control phosphorus from the Waterbury wastewater treatment plant. DEC and Town officials and consultants toured two wastewater treatment plants in Massachusetts in June 2011 to see ballasted flocculation systems. A Preliminary Engineering Report that contains the results of pilot testing of multiple ballasted flocculation systems, and which will function as an addendum to the Town's Facilities Plan, is under review by the Town, DEC, and EPA.

In order to bring Waterbury into compliance with its existing NPDES phosphorus limits as soon as possible, on February 25, 2013 the Vermont Agency of Natural Resources and Waterbury entered into an Assurance of Discontinuance ("AOD"), which rescind s the § 1272 order and includes a compliance schedule to achieve compliance with applicable permit limits. The AOD requires installation and operation of a ballasted flocculation system and contains a deadline of September 1, 2014 for achieving the permit's phosphorus limits.

The Region believes that revocation of the § 1272 order and issuance of the AOD adequately addresses the issues raised in the Petition related to Waterbury's discharge.

[7] The 2005 permit's inclusion of a compliance schedule which did not require compliance with phosphorus limits until December 31, 2007 was inconsistent with federal law, since Vermont's water quality standards ("WQS") at the time of permit issuance did not allow for compliance schedules in permits to meet water quality-based effluent limits. On January 17, 2012, EPA approved Vermont's amendments to its WQS which now allow for compliance schedules to be included in permits when necessary to meet limits based on post-July 1, 1977 new, newly interpreted, or revised WQS.

H. Legislative Constraint on Regulating Municipal Discharges of Phosphorus

1. Summary of Petition Allegations

Petitioner alleged that 10 V.S.A. § 1266a conflicts with the Clean Water Act because it prevents DEC, in certain circumstances, from establishing enforceable permit limits consistent with federal requirements. They further asserted that this legislative constraint on DEC's permitting authority is a basis for EPA to withdraw program approval pursuant to 40 C.F.R. § 123.63(a)(1)(ii).

2. Region 1's Conclusions

The Region agrees with the Petitioner's concerns about one of the provisions in 10 V.S.A. § 1266a. Sections 1266a(a) and (b) establish requirements related to the discharge of phosphorous into the drainage basins of Lake Champlain and Lake Memphremagog. Section 1266a(c) requires DEC to set schedules of compliance with phosphorus limits for municipalities based on the rate at which state funds are provided to the municipalities; and, to the extent that state funds are not provided to municipalities, it states that municipal compliance shall not be required.

Section 1266a(c) conflicts with the Clean Water Act, which requires permits to contain limits that are necessary to ensure compliance with, among other things, state water quality standards. 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. This legislative provision is a basis for EPA to withdraw program approval pursuant to 40 C.F.R. § 123.63(a)(1)(ii) ("Where the State's legal authority no longer meets the requirements of this part, including… [a]ction by a State legislature or court striking down or limiting State authorities.")

3. Corrective Actions

On March 16, 2012, the Commissioner of DEC issued a memorandum to the permitting program staff which expresses DEC's commitment to implement the State's NPDES permit program consistent with the Clean Water Act and federal implementing regulations, as well as the requirements of Title 10 V.S.A. Chapter 47 and the Vermont Water Quality Standards. Effective immediately, the Commissioner committed to the following actions:

1) DEC will take all reasonable steps to assist municipalities in securing funding for wastewater treatment plant upgrades associated with phosphorus reduction projects;

2) DEC will refrain from including any reference to 10 V.S.A §1266a(c) or the language of §1266a(c) in its NPDES permits, will not consider costs when setting water quality-based effluent limits, and will require compliance with such limits in final permits notwithstanding § 1266a(c);

3) In the event of a successful appeal of a permit challenging the phosphorous limit based on an argument that DEC failed to comply with 10 V.S.A. § 1266a, DEC will request the Court to remand the matter to DEC. The permit would then be reissued in accordance with applicable public notice requirements, which will provide EPA with the opportunity to object to the reissued permit if EPA determines that the Court-ordered reissued permit violates the CWA.

The Region concludes that the Commissioner's memorandum is a sound interim step which will ensure that permits are issued consistent with federal requirements. Furthermore, in the event of a successful appeal of a permit based on its failure to conform to § 1266a(c), EPA will have the opportunity to object to any permit that DEC proposes to reissue on remand, and permit issuance authority will pass to EPA if DEC does not adequately respond to EPA's objections, pursuant to 40 C.F.R. § 123.44.

However, the Region also believes that the proper long term solution to this issue is a legislative one and will work with DEC as it develops a legislative amendment to 10 V.S.A. § 1266a(c) to ensure consistency with federal law. Until such time as § 1266a(c) is revised to be consistent with the CWA, this portion of the Petition will remain open.