

STATE OF VERMONT
SUPERIOR COURT
ENVIRONMENTAL DIVISION

In re: Agency of Natural Resources –)
Declaratory Ruling: Discharge at) DOCKET NO. 23-ENV-0053
NEWSVT Landfill Facility)

**CONSERVATION LAW FOUNDATION AND VERMONT NATURAL RESOURCES
COUNCIL'S ENTRY OF APPEARANCE AND MOTION TO INTERVENE**

NOW COMES Conservation Law Foundation (CLF) and Vermont Natural Resources Council (VNRC) (Applicants), by and through counsel, Mason Overstreet of CLF and Jon Groveman of VNRC, and hereby timely enter appearances pursuant to V.R.E.C.P. 5(c), and jointly move to intervene in the above-captioned matter pursuant to 10 V.S.A. 8504(n)(4), (6) and V.R.C.P. 24(b).

BACKGROUND

The subject of this appeal is a Declaratory Ruling, issued on May 5, 2023 by Secretary Julie Moore, of the Vermont Agency of Natural Resources (ANR) regarding the discharge from Underdrain #3 (UD-3) at the New England Waste Services of Vermont, Inc. (NEWSVT) landfill facility in the Town of Coventry, Vermont. Secretary Moore's decision declined to require a federal Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit for the discharges from Underdrain #3 at NEWSVT's landfill. SEC. JULIE S. MOORE, VERMONT AGENCY OF NATURAL RESOURCES, DECLARATORY RULING RE: NEWSVT UNDERDRAIN # 3 5 (May 5, 2023). The Declaratory Ruling allows NEWSVT to continue discharging pollutants—through an amendment to NEWSVT's 2018 Solid Waste Facility Certification—from UD-3 into a wetland complex adjacent to the Black River, which flows into Lake Memphremagog. *Id.* at 3–

5. These pollutants discharged from UD-3 harm the aquatic and recreational values of the downstream waters, as well as their general environmental health.

Because this Court enjoys *de novo* authority in this appeal, this proceeding is the decisive forum for those like VNRC and CLF whose members have a longstanding and deep interest in the overall health of Vermont’s waterways—including the Black River and Lake Memphremagog—to seek redress. For these reasons, set forth below in further detail, Applicants respectfully ask this Court to grant their joint Motion to Intervene in the above-captioned appeal.

MEMORANDUM

I. CLF AND VNRC ARE ENTITLED TO INTERVENE AS AGGRIEVED PERSONS.

Under 10 V.S.A. § 8504(n), “[a]ny person may intervene in a pending appeal if that person: . . . (4) is a person aggrieved . . . [or] (6) meets the standard for intervention established in the Vermont Rules of Civil Procedure. 10 V.S.A. § 8504(n)(4), (6). A “person aggrieved” is one “who alleges injury to a particularized interest protected by the provisions of law listed in section 8503 of this title, attributable to an act or decision . . . by the Secretary . . . that can be redressed by the Environmental Division” 10 V.S.A. § 8502(7). Section 8503 specifically includes acts or decisions involving Chapter 47, the Water Pollution Control Statute. *Id.* § 8503(a)(1)(E). Here, VNRC and CLF allege injuries to their members’ particularized aesthetic and recreational interests in the Black River and Lake Memphremagog that are protected by Vermont’s water pollution control statutes. These injuries are directly attributable to Secretary Moore’s decision not to require an NPDES permit for UD-3’s discharges since such a permit would require specific pollutant controls and other protections not currently in place. These injuries can be redressed by this Court in this proceeding. As a result, Applicants satisfy the elements permitting intervention.

Intervenor VNRC is a Vermont-based not-for-profit member-supported state-wide environmental advocacy organization that has been addressing environmental issues in Vermont, including issues related to water quality, for sixty years. VNRC's mission is to protect and enhance Vermont's natural environments, vibrant communities, productive working landscapes, rural character, and unique sense of place through advocacy, collaboration, research, and education.¹ VNRC serves as a watchdog of the State administration to ensure laws are implemented as intended through rulemaking and agency oversight. Specifically, VNRC works on environmental policy related to clean water, healthy forests and wildlife, forestry, agriculture, sustainable communities, land use, and climate change and energy. VNRC has over five thousand members who reside in Vermont, including members that will be harmed by UD-3's discharges at the NEWSVT landfill.

Intervenor CLF is a not-for-profit member-supported regional environmental advocacy organization. CLF's mission is to "protect New England's environment for the benefit of all people."² CLF uses the law, policy, and market solutions to advocate for creative solutions to keep pollution discharges from degrading water quality. CLF has thousands of members, including hundreds who reside in Vermont.

Applicants allege injuries to their members' particularized interests in the aesthetic and recreational use, safe enjoyment, and general environmental health of the receiving waters related to NEWSVT's UD-3 discharges due to the lack of an NPDES permit. CLF and VNRC have members who regularly use and enjoy these receiving waters for fishing, boating, swimming, wildlife viewing, as well as other recreational and personal uses. Applicants' members are aggrieved by Secretary Moore's decision not to require an NPDES permit for UD-

¹ *How We Work*, VNRC.ORG, <https://vnrc.org/how-we-work/> (last visited June 21, 2023).

² *About*, CLF.ORG, <https://www.clf.org/about/> (last visited June 21, 2023).

3's discharges because those discharges, which contain arsenic, cadmium, and per- and polyfluoroalkyl substances (PFAS) pollutants, degrade the water quality of the downstream waters that members use and enjoy. Requiring a NPDES permit would better protect members' interests in these waters due to the intentionally designed, and citizen-enforceable, water quality-based effluent limits that would be tailored to UD-3's specific discharges. See 33 U.S.C. §§ 1313, 1342(a)(2), 1365(a)(1); Northwest Environmental Advocates v. City of Portland, 56 F3d 979, 986 (9th Cir. 1995) ("The plain language of CWA § 505 authorizes citizens to enforce *all* permit conditions.") (emphasis in original); see also Waterkeeper All., Inc. v. EPA, 399 F.3d 486, 498 (2d Cir. 2005) (explaining that a discharge is allowed ". . . where . . . [NPDES] permits *ensure* that every discharge of pollutants will comply with all applicable effluent limitations and standards.") (emphasis in original).

Applicants' members' use and enjoyment of waterways downstream from UD-3 for their "aesthetic and recreational values" create a cognizable and protectable legal interest in the existing and future condition of these waterbodies. Zaremba Group Act 250 Permit Appeal, No. 36-3-13 Vtec, at 26 (Vt. Env'tl. Ct. Feb. 14, 2014) (Walsh, J.) (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972) and citing Summers v. Earth Island Inst., 555 U.S. 488, 494 (2009) for proposition that use and enjoyment by an organization's members confer legal interest on the organization whose purpose is related to protecting such values.). Moreover, VNRC and CLF allege injuries that are concrete and particular to its specific members, "rather than a general policy concern shared with the public." In re Pion Sand & Gravel Pit, 245-12-09 Vtec, slip op. at 7 (Vt. Super. Ct. Env'tl. Div. July 2, 2010) (Durkin, J.). Secretary Moore's May 5th, 2023 decision not to require an NPDES permit for UD-3's discharges that are causing or contributing to exceedances of Vermont's Water Quality standards that protect aquatic habitat and

recreational uses of public waters adversely impacts CLF and VNRC's members' particularized aesthetic and recreational interests in the Black River and Lake Memphremagog.

Under 10 V.S.A. § 8504(h), this Court reviews Secretary Moore's decision challenged by Appellants *de novo*. Under that standard, this Court may accept, reject, or modify Secretary Moore's decision. Moreover, this Court may order ANR to require NEWSVT to apply for an NPDES permit—with appropriate pollutant limits—for UD-3's discharges. See In re: Stormwater NPDES Petition (Conservation Law Foundation Appeal), 14-1-07 Vtec (Vt. Env'tl. Ct. Aug. 28, 2008) (Durkin, J.) (holding under the *de novo* standard that “whatever the ANR might have done with a petition properly before it, this Court may also do on appeal.”) As a result, Applicants' members' alleged injuries to their concrete and particularized aesthetic and recreational interests can be redressed by this Court and intervenor status should be granted.

II. ALTERNATIVELY, VNRC AND CLF MEET THE PREREQUISITIES FOR PERMISSIVE INTERVENTION UNDER V.R.C.P. 24(b).

In addition to meeting the standard to intervene as aggrieved persons under 10 V.S.A. § 8504(n)(4), VNRC and CLF also meet the prerequisites for permissive intervention under the V.R.C.P. 24(b). See 10 V.S.A. § 8504(n)(6) (specifying that a person may intervene . . . “if that person (6) meets the standard for intervention established in the Vermont Rules of Civil Procedure”). “Permissive intervention” is permitted under two scenarios: “(1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common” V.R.C.P. 24(b). “In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” *Id.*

Applicants' alleged injuries to their members' particularized interests are based upon the same record of facts and questions of law as Appellants in the above-captioned appeal. In

addition, the only way for Applicants to address Secretary Moore’s decision is through participation in this proceeding. Finally, CLF and VNRC’s status as intervenors will not unduly delay or prejudice the adjudication of the rights of any of the original parties. Applicants have timely filed their motion seeking intervention, will abide by the to-be-determined schedule, and will closely coordinate with the original parties so as to not cause any delay.

CONCLUSION

CLF and VNRC have a longstanding interest in protecting and enhancing the aesthetic and recreational values and the general environmental health conditions of the Black River and Lake Memphremagog on behalf of their members. These values and conditions are adversely impacted by ANR’s decision not to require a NPDES permit for UD-3. Applicants therefore request party status to safeguard those interests in this *de novo* appeal.

To conclude, Applicants respectfully ask this Court to grant their Motion to Intervene into the proceedings for the above-captioned appeal—either as aggrieved persons pursuant to 10 V.S.A. § 8504(n)(4), or under the standards set forth in the Vermont Rules of Civil Procedure Rule 24(b).

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