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For a thriving New England

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October 30, 2020

Secretary Julie Moore
Vermont Agency of Natural Resources
1 National Life Drive, Davis 2
Montpelier, VT 05620-3901

By electronic mail to: ANR.DECCEDcomment@vermont.gov

Re: CLF Comments on Proposed AOD: Vorsteveld Farm, LLP

Dear Secretary Moore:

Conservation Law Foundation (CLF) submits the following comments on the Agency of Natural Resources' (ANR or Agency) proposed Assurance of Discontinuance (AOD) entered into with the Vorsteveld Farm, LLP (Respondent), and respectfully requests a meeting with ANR to discuss the concerns outlined in this letter.

Preliminary Statement

While CLF appreciates the Agency's overdue enforcement attention to the serious water quality and wetland violations on the Vorsteveld Farm, the AOD is deficient when measured against the Vermont Administrative Environmental Law Enforcement Act, 10 V.S.A., chapter 201, in five fundamental respects.

1. The number, classification, duration, and impact of the violations, coupled with the Respondent's clear awareness of the violations, demand a penalty of at least $510,000.
2. The AOD's provisions for monitoring and verifying remediation and restoration action related to the discharge violation are inadequate.
3. The AOD's Wetlands Restoration Plan requirements fail to provide for adequate public review of the Plan and fail to explicitly require restoration of unlawfully filled wetlands to the highest level of ecological function.
4. The AOD must explicitly prohibit the Respondent from seeking after-the-fact wetland permits in lieu of restoration.
5. The AOD must require Respondent to apply for a Concentrated Animal Feeding Operation (CAFO) permit under the federal Clean Water Act due to its unlawful discharge of agricultural waste at the Main Farm Facility and its serious systemic manure management and water quality problems throughout the farm's three facilities.

Statutory Framework

The purposes of Vermont Administrative Environmental Law Enforcement Act, 10 V.S.A., chapter 201 are to:

(1) enhance the protection of environmental and human health afforded by existing laws;
(2) prevent the unfair economic advantage obtained by persons who operate in violation of environmental laws;
(3) provide for more even-handed enforcement of environmental laws;
(4) foster greater compliance with environmental laws;
(5) deter repeated violation of environmental laws; and
(6) establish a fair and consistent system for assessing administrative penalties.

10 V.S.A. § 8001.

Comments

I. The AOD penalty amount is so low it does not fulfill the purposes of chapter 201 and is not in accordance with ANR's Administrative Penalty Rules.

In determining a penalty amount, ANR must consider the following seven factors:

(1) the degree of actual or potential impact on public health, safety, welfare, and the environment resulting from the violation;
(2) the presence of mitigating circumstances, including unreasonable delay by the Secretary in seeking enforcement;
(3) whether the respondent knew or had reason to know the violation existed;
(4) the respondent's record of compliance;
(5) [Repealed.]
(6) the deterrent effect of the penalty;
(7) the State's actual costs of enforcement; and
(8) the length of time the violation has existed.

10 V.S.A. § 8010(b)(1)-(8). The maximum penalty for each violation is $42,500, plus $17,000 for each day a penalty continues, up to a maximum of $170,000. *Id.* § 8010(c).

To standardize the assessment of administrative penalties, ANR adopted the Environmental Administrative Penalty Rules (Penalty Rules), which incorporate the seven statutory factors set forth above and specify how the Agency must weigh each factor in determining the final penalty

amount.[1] ANR rates the severity of violations from 0 to 3 for Penalty Factors (1- 4) and (8) to derive an initial penalty score. The initial penalty can then be adjusted based on Penalty Factors (1-2), (6), and (7).

CLF analyzed the above seven factors for each of the three relevant violations cited in the AOD.[2] According to our analysis, the base penalty for the combined wetland violations should be at least $42,500. The base penalty for the discharge violation should be at least $12,000. This amount should then be increased to the full amount of $170,000 for each of the three violations due to (1) the absence of mitigating circumstances, (2) the need for a deterrent effect; (3) Respondent's economic benefit from avoided compliance; and (4) the continuing nature of these violations. Thus, the final penalty amount should be $510,000 as set forth in further detail below.

A. Number of Violations

The first issue relevant to the penalty assessment is the number of violations. Here, there were three distinct "events" occurring on different days and at different locations, each resulting in a separate violation.

- Violation #1: Respondent removed vegetation and filled an area impacting approximately 6.5 acres of the Panton Road Wetland and its buffer area along Dead Creek. AOD at 1-2. ANR first observed Violation #1 on May 6, 2016. AOD at 1.

- Violation #2: Respondent removed vegetation, dredged, and filled an area impacting approximately 0.6 acres of the Pease Road Wetland and its buffer area near the Arnold Bay Farm Facility. AOD at 2. ANR first observed Violation #2 on June 28, 2017 – more than a year after its observation of Violation #1. *Id.*

- Violation #3: Respondent discharged wastes into Waters of the United States at the Main Farm Facility without first obtaining a discharge permit. AOD at 2-3. ANR first observed Violation #3 on March 13, 2020.[3] AOD at 3.

While ANR may have a general practice of treating multiple violations of the same permit or related violations as one violation, courts have only upheld this approach where all the violations

[1] Environmental Protection Rules, Chapter 20 - Environmental Penalty, *available at* https://dec.vermont.gov/sites/dec/files/documents/dec-environmental-administrative-penalty-rules-2009-10-05.pdf.
[2] CLF did not have access to review the Agency's analysis of these factors because, in response to our public records request, the Agency claimed that records related to their penalty calculation were "exempt from production pursuant to either 1 V.S.A. §§ 317(c)(3) because they are documents subject to the attorney-client privilege or are attorney work product, or 1 V.S.A. §§ 317(c)(15) because they are settlement negotiations." ANR Response Letter to CLF re Public Records Request (Oct. 29, 2020), Ex. 1.
[3] This violation was first documented by the Agency of Agriculture, Food, and Markets (AAFM) on May 8, 2019. AOD at 2.

were caused by the same illegal activity, on the same site, and occurred at the same approximate time. *See e.g., Agency of Nat. Res. v. Tobin*, Dkt. No. 94-8-18 Vtec, WL 1458768 at *3 (Mar. 14, 2019) (single penalty assessment for related violations was only appropriate where all violations related to the same salvage operation on respondent's property and occurred around the same time); *Agency of Nat. Res. v. Wesco, Inc.*, Dkt. No. 60-6-16 Vtec, WL 9917262 at *3 (Jan. 9, 2001) (Court conducted single penalty assessment "[b]ecause all of the alleged violations *stem[ed] from the same incident*.") (emphasis added). ANR's general approach of streamlining the penalty assessment is inappropriate here because the two wetland fill activities referenced in the AOD did not "stem from the same incident." Rather, the disturbance activities occurred at two distinct sites on Respondent's vast farm property located dozens of acres apart from one another and took place months apart in time. Similarly, the discharge violation occurred due to wholly distinct incidents on the farm unrelated to the two wetland disturbance events.

Accordingly, ANR must consider each of the three incidents—the two wetland violations and the discharge violation—as three independent violations for penalty calculation purposes.

B. Classification of Violations

Next, each violation must be classified as either a Class I, II, III, or IV violation. Any activity initiated before the issuance of all necessary environmental permits shall be at least a Class II violation, and may, if it presents a threat of substantial harm to the environment, be a Class I violation. Penalty Rules § 20-201(a-b). *See e.g., Agency of Nat. Res. v. Timberlake Assocs. LLP*, Dkt. No. 59-6-16 Vtec, WL 9917267 at *5 (Oct. 12, 2017) (release of gasoline into soil and groundwater constituted Class I violation due to threat of substantial harm to public health, safety, welfare).

Here, the two wetland violations involved substantial vegetation removal and fill without the necessary wetland permit. Thus, they are at least Class II violations. Since destruction of these wetlands also caused substantial harm to the environment and public safety and welfare (*see* analysis of Penalty Factors 1 and 2 in Part C below), the violations should be elevated to Class I violations.

The discharge violation constituted an activity occurring without the necessary National Pollutant Discharge Elimination System (NPDES) permit under the federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (1972). As such, this violation is at least a Class II violation.

C. Calculation of Base Penalty

The next step in the penalty assessment is to calculate the base penalty amount by assigning values to Penalty Factors 1-4 and 8. The appropriate rating for each Penalty Factor under the statute is calculated below.

i. Penalty Factor 1 and 2: Actual or Potential Impact on Public Health, Safety, Welfare, and the Environment.

Wetland Violations – Rating of "4" for each violation for combined Factors 1 and 2

Penalty Factors 1 and 2 should each be assigned a value of "2" for the wetlands violations because they resulted in at least "moderate actual impact" on public health, safety, welfare, and the environment. Penalty Rules § 20-302(b)(1-2). Wetlands serve important ecological and public health and welfare related functions, including providing habitat for fish, wildlife, and certain sensitive species, as well as water quality protection for recreational and drinking water uses, flood protection, and erosion control.[4] The degree to which a wetland serves these functions depends on the hydrology, soil, vegetation, size, and location of the wetland in the landscape. Although a wetland may not serve all functions, the Vermont Department of Environmental Conservation (DEC) notes on its Wetlands webpage that "each wetland works in combination with other wetlands as part of a complex integrated system."[5]

Courts have routinely commented on the values of wetlands to the State in administrative penalty cases. For instance, in *Secretary v. Wellman*, the court found respondent's dredging activities in a Class II wetland "caused actual harm" to public health, safety, and welfare and to the environment because the disturbance harmed the wetland's crucial functions in protecting the environment and public welfare. *Sec'y v. Wellman*, Dkt. No. 83-4-08 Vtec, WL 4623530 at *5 (Feb. 12, 2009). The *Wellman* respondent's dredging and channelizing activities "reduced the wetland's capacity for flood water storage and reduced its ability to slow peak flows during flooding." *Id.* In addition, by dredging and channelizing the area, the *Wellman* respondent had "caused sediments and organic matter to have a greater likelihood of being transported downstream rather than deposited and removed in the wetland." *Id.* Finally, respondent's activities "adversely impacted the wetland's erosion control function by exposing soil, thereby reducing the stability of the streambank and the channelized area." *Id.* Because the work conducted by respondent exposed close to 400 yards (1,200 feet) of streambank and wetland to degradation and destabilization, the court concluded that respondent's violations of the Wetland Rules "caused real and recurring harm to the environment." *Id.*

Similarly here, Respondent's degradation and destabilization of approximately 6.5 acres of the Panton Road Wetland along Dead Creek and 0.6 acres of the Pease Road Wetland caused real and recurring impacts on the environment and public welfare that were, at a minimum, moderate due to the disruption of the important functions these wetlands serve for flood protection, erosion control, and water quality protection. By dredging the Class II wetland area along Dead Creek (Panton Road Wetland), Respondent caused sediments and organic matter to have a greater likelihood of being transported from the agricultural fields to waters downstream—akin to the

[4] *See* DEC Wetland Functions and Values webpage here: https://dec.vermont.gov/watershed/wetlands/functions.
[5] *Id.*

adverse impact described in *Wellman*. Additionally, as documented in the comments of Aerie Point Holdings, LLC (Aerie) on this AOD submitted Oct. 29, 2020, both the quantity and quality of water flowing on to Aerie's property downslope of the Pease Road Wetland have been and continue to be moderately impacted by Respondent's disturbance activities there, as demonstrated by exceedances in Vermont Water Quality Standards. Finally, ANR's Wetland Program staff confirmed the harmful impact to wetlands at both sites, stating in an internal email that "Yes, there were adverse impacts to class II wetlands and buffers and the acreage involved is not insignificant."[6] Accordingly, Penalty Factors 1 and 2 should each be assigned a value of "2" for the wetlands violations.

Discharge Violation – Rating of "2" for combined Factors 1 and 2

Penalty Factors 1 and 2 should each be assigned a value of "1" for the discharge violation because it resulted in "moderate potential impact" on public health, safety, welfare, and the environment. Penalty Rules § 20-302(b)(1-2). For example, in *Sec'y, Agency of Nat. Res. v. Supeno,* an unpermitted home expansion resulted in "moderate potential impact" to human health and safety because of the risk that the increased load on the local wastewater treatment system would cause the system to fail and could result in human exposure to contaminants or contamination of soil and groundwater). Dkt. No. 98-8-15 Vtec, WL 9917259 at *2,5 (May 15, 2017) (*aff'd*, 207 Vt. 108, Vt. Mar. 16, 2018) (*cert denied nom. Supeno v. Sec'y, ANR*, 139 S. Ct. 313 (2018).

Here, the discharge of agricultural wastes to several ditches that are hydrologically connected to Lake Champlain—a drinking water source for 200,000 Vermonters[7]—similarly caused at least as great a potential impact on public health and the environment as in *Supeno*. Lake Champlain is impaired by the nutrient phosphorus, which causes harmful algal blooms, some of which contain toxic cyanobacteria, and leads to low dissolved oxygen concentrations, impaired aquatic life, and reduced recreational use.[8] City officials in Burlington were forced to close beaches along the Lake a record number of times this year because of blooms of toxic cyanobacteria.[9] Approximately 40 percent of the Lake's phosphorus load is from the agriculture sector.[10]

Likewise, manure deposits in drinking water sources like Lake Champlain can lead to spikes in *E. coli*, a large group of bacteria, some of which can cause diarrhea, while others cause urinary

[6] Internal ANR Emails between Greenwood and Courage, Ex. 2.
[7] *Lake and Basin Facts*, LAKE CHAMPLAIN COMMITTEE, available at https://www.lcbp.org/about-the-basin/facts/.
[8] Lake Champlain Total Maximum Daily Loads at 12, ENVIRONMENTAL PROTECTION AGENCY, https://ofmpub.epa.gov/waters10/attains_impaired_waters.show_tmdl_document?p_tmdl_doc_blobs_id=79000.
[9] John Dillon, *A Boom Year for Blooms: Toxic Algae Closes Beaches, Raises Concern About Water Supplies*, VPR (Oct. 25, 2020), https://www.vpr.org/post/boom-year-blooms-toxic-algae-closes-beaches-raises-concern-about-water-supplies#stream/0.
[10] *Id.*

tract infections, respiratory illness and pneumonia, and other illnesses.[11] Unpermitted discharges of agricultural waste containing manure to ditches that drain to Lake Champlain could result in human and wildlife exposure to contaminants, and therefore pose at least a moderate potential impact to public health and the environment. Accordingly, Penalty Factors 1 and 2 should be assigned a combined value of "2" for this discharge violation.

ii. Penalty Factor 3: Whether the Respondent Knew or Had Reason to Know the Violation Existed

There is "clear evidence that the respondent knew the violation existed," so all violations warrant a "3" score for this Penalty Factor. Penalty Rules § 20-302(b)(3).

Wetland Violations – Rating of "3" for each violation

Respondent knew or had reason to know about its obligations under the Vermont Wetlands Protection statute. Respondent is an established farm that has been operating for over 20 years in Vermont[12] and has navigated myriad state permit applications and renewals under Vermont's environmental and agricultural rules. Moreover, 10 V.S.A § 913(a) is only one sentence long and clearly states that no person shall conduct an activity in a significant wetland or buffer zone except in compliance with a permit. *See Agency of Nat. Res. v. Tobin*, Dkt. No. 94-8-18 Vtec, at *5 (finding respondent knew or should have known about the applicable legal obligations under the waste management statute because "10 V.S.A § 6616 is only two sentences long and clearly states that the release of hazardous material to surface or groundwater is prohibited.").

In addition, the Panton Road Wetland violation (Violation #1) involved activity in saturated soils right along (and potentially within) Dead Creek, which should have alerted Respondent to the potential presence of wetland. And the Pease Road Wetland violation (Violation #2) occurred in an area where Respondent had previously requested and obtained wetland mapping from the Natural Resource Conservation Service (NRCS). *See* Internal ANR Emails, Ex. 3 (ANR Wetlands Program staff stated that "[I]t was found that the [Pease Road] Wetland was also mapped for the farmer by NRCS and labeled as a wetland . . . .").

Furthermore, on July 19, 2017, ANR sent Respondent a Notice of Alleged Violation (NOAV) directing Respondent to restore filled, graded, and cleared wetland and buffer zones at both the Panton Road and Pease Road Wetland areas.[13] ANR Wetland Program staff then had a follow up meeting with Respondent in August, 2017 to inform

[11] *E.Coli*, Centers for Disease Control and Prevention, https://www.cdc.gov/ecoli/index.html.
[12] Chelsea Edgar, *Who wants to work on a Vermont dairy farm?* (Mar. 13, 2019), SEVEN DAYS, https://www.sevendaysvt.com/vermont/milking-it/Content?oid=26454611.
[13] 2017 Wetlands NOAV to Vorsteveld, Ex. 4.

Respondent that vegetation removal and fill activity at both the Panton Road and Pease Road Wetlands amounted to violations of the Wetlands Statute and Rules. Internal ANR Emails between Greenwood and LaPierre, Ex. 3.

Respondent requested time in the fall of 2017 to harvest crops before restoring the Panton Road Wetland site, which ANR allowed. *Id*. However, Respondent did not restore the Panton Road Wetland site after harvesting crops, and ANR sent a follow-up letter in spring of 2018. *Id.* That letter came back to ANR 'return to sender.' ANR then attempted to hand deliver the letter, but it was declined. *Id.* Finally, on January 8, 2020, ANR sent an additional letter to the farm with a copy of the 2017 NOAV. ANR Response Letter to Vorsteveld, Ex. 5.

Respondent not only had reason to know about its legal obligations as a general matter, but also knew the *particular facts* of these wetlands violations as early as July 19, 2017 when ANR sent the NOAV. Accordingly, a "3" should be assigned for this penalty factor for each wetland violation.

Discharge Violation – Rating of "3"

Like the wetland protection requirements above, Respondent had reason to know of the requirement to prevent any discharge of wastes to state waters. The LFO permit under which Respondent operates the farm requires the applicant to certify the farm is in compliance with required agricultural practices (RAPs), which mandate that "all agricultural wastes shall be managed in a manner to prevent runoff or leaching of wastes to waters of the State or across property boundaries." LFO Permit Application, Appendix A; RAPs § 6.02(a); *see also* LFO Rules, Subchapter 6.A.2 (prohibiting direct discharges of wastes from LFO facility to waters of the state).

Further, Respondent had reason to know of the facts of this violation at least by September 17, 2019, when the Agency of Agriculture, Food and Markets (AAFM) mailed its May 8, 2019 inspection report to Respondent, citing the discharge violation. Letter from AAFM to Vorsteveld re May 8, 2019 Inspection, Ex. 6. Respondent was then alerted about the discharge violation again by ANR when the Agency conducted a site visit to the Main Farm facility on March 13, 2020. DEC Farm Inspection Report, Ex. 7.

Since there is clear evidence that Respondent knew the violation existed as early as September 17, 2019—more than seven months before the Agency's eventual enforcement action on April 27, 2020—this criterion should be rated a "3."

iii. Penalty Factor 4: Respondent's Record of Compliance

CLF is unaware of whether Respondent has had any formal enforcement actions brought against it by either ANR or AAFM.[14] Accordingly, CLF assigned a "0" for this penalty factor for all violations.[15]

iv. Penalty Factor 8: Length of Time the Violation Existed

The relevant inquiry for this factor is the time between when the violation occurred and when restoration or remediation took place. *See Agency of Nat. Res. v. Wesco, Inc.*, Dkt. No. 60-6-16 Vtec at *13 (Court analyzed this factor for a petroleum vapor leak based on the time between when the release began and when respondent was responsive to violation.). A "3" for this criterion indicates the violation existed for a "long duration," while a "2" indicates a "moderate" duration. Penalty Rules § 20-302(b)(5).

Wetland Violations – Rating of "3"

Both of the wetlands violations are continuing violations that have existed for a long duration of time. *See* Penalty Rules Section 20-105 ("Any violation of a statute listed in 10 V.S.A. Section 8003(a) or a rule promulgated under such statute . . . or the lack of a necessary permit that continues longer than one day is a continuing violation subject to additional penalties for each day the violation continues."). The Panton Road Wetland and buffer area vegetation removal and fill activities (Violation #1) first occurred around May 6, 2016 and Respondent has yet to complete any restoration of the site, more than *four years* later.[16] Similarly, the Pease Road Wetland vegetation removal, dredging, and filling activities (Violation #2) occurred around June 28, 2017, and Respondent has yet to complete any restoration on the site, more than *three years* later.

Discharge Violation – Rating of "3"

The discharge violation has also existed for a long duration—since at least May 8, 2019—which is a year and a half ago. Accordingly, this criterion should be assigned a "3."

* * *

[14] CLF notes, however, that Respondent received several Corrective Action Letters from AAFM regarding discharge risks at the Main Farm Facility in 2018 and 2019. Apr. 9, 2018 CAL, Ex. 8; Nov. 15, 2019 CAL, Ex. 9.
[15] To the extent that Respondent has one or more prior violations on its record of compliance, then the relevant number should be assigned for this factor.
[16] Although ANR communicated to Respondent that it could delay restoration of the Panton Road Wetland in August 2017 until the crops were harvested that fall, this "allowed" duration of violation would at minimum only reduce the length of Violation #1 by several months in the total span of years. Thus, the length of Violation #1 is still long.

In adding up the above penalty scores, the base score for each wetland violation is "10," which equates to a base penalty of **$21,250 for each violation**. *See* Penalty Rules 20-302(c) (a score of "10" equates to a penalty amount of 50 percent of the maximum penalty for a Class I violation, i.e., 50 percent of $42,500). Because the violations should be treated individually for penalty assessment purposes, the total base penalty amount for the **two violations combined is $42,500.**

The final score for the discharge violation is an "8," which equates to a base penalty of **$12,000**. *See* Penalty Rules 20-302(c) (a score of "8" equates to a penalty amount which is 40 percent of the maximum penalty for a Class II violation, i.e., 40 percent of $30,000).

D. Penalty Adjustments

The next step is to consider appropriate adjustments to the base penalty. First, the penalty amount shall be adjusted to a minimum of 70 percent of the maximum penalty for the class of violation involved if a rating of "3" is assigned to two or more of Penalty Factor three (knowledge), four (compliance record), or five (length of violation). *Id.* Since Penalty Factor three and five above were both assigned "3s" for each violation, the base penalty for each wetland violation should be adjusted to **$29,750** (70 percent of $42,500) (for a total of **$59,500 for both violations**) and **$21,000** (70 percent of $30,000) for the discharge violation.

i. Penalty Factor 2: Mitigating Circumstances

10 V.S.A. § 8010(b)(2) requires consideration of "the presence of mitigating circumstances, including unreasonable delay by the secretary in seeking enforcement." *See also* Penalty Rules 20-302(e)(1) (listing multiple mitigating circumstances, including "prompt actions by the respondent to correct the violation(s)" and "unreasonable delay by the Secretary in seeking enforcement."). For example, in *Agency of Nat. Res. v. Wesco, Inc.*, the court reduced respondent's penalty because (1) respondent "responded promptly and attempted to bring the subject property into compliance voluntarily," and (2) ANR's five-year delay in initiating enforcement had adverse consequences on respondent's ability to present an adequate defense due to documents from the case being destroyed. Dkt. No. 60-6-16 Vtec at *15-16.

No mitigating factors warrant reducing the penalty for either wetland violation.

Respondent did not make any effort to "respond promptly" to correct the violations. In fact, Respondent promised to remediate the Panton Road Wetland violation in the fall of 2017 after harvesting crops from the area, but never followed through on doing so.

Moreover, the delay in ANR issuing its formal enforcement proceeding is not a mitigating factor. From the time when ANR issued the NAOV in 2017 to when it initiated formal enforcement proceedings in April 2020, ANR met with Respondent to discuss the violations, waited for a

period of time to allow Respondent to harvest crops from one of the violation sites before beginning promised restoration activities, and then sent several follow-up letters to Respondent which were refused. Internal ANR Emails between Greenwood and LaPierre, Ex. 3. The delay in enforcement did not disadvantage Respondent's ability to mount a defense. Indeed, the delay provided Respondent time to voluntarily remedy the violation before a formal enforcement proceeding—which Respondent knowingly decided not to do. As such, there are no mitigating factors that would reduce the base penalty amount for these violations.

No mitigating factors warrant reducing the penalty for the discharge violation.

Respondent had warning of the discharge risks posed by the drop inlets and clean water diversion ditches in 2016,[17] 2017,[18] 2018,[19] and 2019[20] from AAFM's annual inspection reports and a Corrective Action Letter. In a written reply to AAFM's November 15, 2019 Corrective Action Letter, which cited the discharge violation,[21] Respondent promised to address the brown colored liquid coming out of the culvert by pouring a concrete strip with a retaining wall to divert all runoff water from trim area into lagoons.[22] Respondent stated the remediation should be done by mid-summer 2020. Respondent evidently did not conduct this remediation, since the AOD requires what appears to be the same remediation measure to be installed ("install a 9' concrete curb along the east side of the hoof trim area above the existing floor").[23]

Furthermore, the time between ANR's observation of evidence of past discharges from Respondent's farm (March 13, 2020) and the Agency's initiation of an enforcement proceeding (April 27, 2020) does not amount to an unreasonable delay. Accordingly, there are no mitigating factors that would reduce the base penalty amount for the discharge violation.

ii. Penalty Factor 6: The Deterrent Effect

ANR should increase the penalty amount here to deter Respondent and the regulated community from similar illegal activities in the future. The Secretary may increase the penalty up to the

[17] 2016 AAFM Inspection of Main Farm Facility at 3-4 (Aug. 10, 2016), Ex. 10 ("The drop inlet on the NW corner of the Main barn is a risk [from the map included with the Inspection, this appears to be the same inlet as one of the problem inlets identified in the AOD that contributed to the discharge of wastes—inlet "1b"]. The pipe needs to be protected with a larger curb to keep barn wastes from entering clean water, or the inlet needs to stop being used for clean water diversion and all water could be sent to the leachate collection and treatment system."). Photos attached to the inspection show debris/waste in the area that drains to this clean water drop inlet (inlet "1b" in the AOD map).
[18] 2017 AAFM Inspection of Main Farm 3-5 (Aug. 30, 2017), Ex. 11 (AAFM inspection showed evidence of wastes to the left of where the northern Clean Water culvert empties into the ditch (which runs east to Dead Creek)).
[19] July 20, 2018 AAFM Inspection All Farms Summary Report, Ex. 12.
[20] Apr. 9, 2018 CAL, Ex. 8 (item #3 states Respondent failed to operate and maintain two clean water ditches on Main Farm, as observed during AAFM's Aug. 30, 2017 inspection).
[21] Nov. 15, 2019 CAL, Ex. 9.
[22] Respondent Response to Nov. 15, 2019 CAL, Ex. 13.
[23] AOD at 4.

maximum amount for the class of violation if the Secretary determines that a larger penalty is reasonably necessary to deter the respondent and/or the regulated community. Penalty Rules § 20-302(e)(2); 10 V.S.A. § 8010(b)(6).

In reviewing the importance of establishing a penalty that will have a deterrent effect upon respondents, courts have considered whether the respondent was cooperative with ANR throughout the investigation, the period of time the violation persisted once the respondent was on notice (i.e., time of willful violation), and respondent's promptness in completing remediation. *See Wesco* at 16; *see also Town of Colchester v. Andres*, Dkt. No. 30-3-11 Vtec at *2 (2014). Courts also assign additional penalties for deterrence in order to instill respect for the law. *See, e.g., Agency of Nat. Res. v. Foss*, Dkt. No. 68-5-13 Vtec, WL 3966231 at *7 (July 23, 2014) (court imposed additional penalty for deterrent effect "to encourage [violators] to respect protected wetlands and their buffers.").

For example, in *Town of Fairfax v. Beliveau*, the defendant continued to violate a zoning ordinance for more than a year after the issuance of a Notice of Violation. Because the length of time the violation existed was within the control of the defendant—at any time defendant either could have applied for approval of the nonconforming use, or could have restored the lawful single-family use of his house—the court found the penalty amount "must go beyond simply the removal of economic benefit . . . and provide a measure of deterrence." Dkt. No. 274-11-8 Vtec, WL 3966231 at *6 (2011). *See also Sec'y, Agency of Nat. Res. v. Supeno*, Dkt. No. 98-8-15 Vtec at *2,5 (*cert denied nom. Supeno v. Sec'y, Agency of Nat. Res.*, 139 S. Ct. 313 (2018)) (penalty increase was necessary to deter future violations because respondents had not cooperated with ANR and had allowed the violations to exist for an extended duration even though they knew or should have known of the violations); *Town of Colchester v. Andres* Dkt. No. 30-3-11 Vtec at *4. ("Given Defendant's refusal to comply with the Town's repeated requests to conform to the Regulations, an additional penalty must be imposed in this case to deter Defendant from continuing his noncompliance and discourage him from repeating his zoning violations.").

The penalty should be increased for all violations to deter Respondent and other farmers from future wetland and discharge violations.

In the present case, Respondent had several years after receiving notice of the wetlands violations in 2017 to come into compliance with the Vermont Wetland Rules by restoring the filled areas. Instead, Respondent did nothing to remediate the wetlands. Due to this willful violation of the law, ANR must impose an additional penalty to discourage Respondent from repeating additional environmental law violations.

Similarly, Respondent had years of warning to make the necessary structural changes to the waste management practices on the Main Farm Facility to eliminate any risk of potential discharge and failed to do so. Even after being notified of the discharge violation by AAFM's 2019 Corrective Action Letter and then promising to address the problem, Respondent did not

carry out that commitment. Meanwhile, Respondent appears to have similar discharge risks due to faulty waste management infrastructure on other parts of the Vorsteveld Farm, indicating this is a systemic problem. *See, e.g.,* photos of discharge plumes and discussion of additional waste management problem areas in Part V below. Due to Respondent's willful violation of the law, and the evident pattern of neglecting water quality requirements in other facilities on the farm over the last several years, ANR must impose an additional penalty to discourage Respondent from repeating additional environmental law violations.

For the wetlands violations, the base penalty thus far is $29,750 for each violation and the maximum for Class I violations is $42,500, allowing for a maximum deterrent increase of $12,750 for each violation. For the discharge violations, the base penalty thus far is $21,000 and the maximum for Class II violations is $30,000, allowing for a maximum deterrent increase of $9,000.

iii. Penalty Factor 7: State's Actual Costs of Enforcement

ANR officials incurred enforcement costs as a consequence of Respondents' violations. As such, these costs should be factored into the overall penalty amount.

iv. Economic Benefit

The Secretary may also recapture economic benefit resulting from a violation up to the $170,000 statutory maximum allowed. 10 V.S.A. § 8010(c)(2). Courts have repeatedly determined that any financial advantage gained from avoided compliance with an applicable law constitutes an economic benefit. *See e.g., Agency of Nat. Res. v. Ken Bacon and Ken Bacon Jr.*, Dkt. No. 102-6-09 Vtec at 6 (2010) ("Respondents realized an economic benefit by avoiding compliance with appropriate [Accepted Management Practices] prior to and during logging operations . . . . These benefits are derived from the avoided time and costs of performing these activities."); *Town of Fairfax v. Beliveau,* Dkt. No. 274-11-8 Vtec at *4 (Defendant enjoyed "substantial economic benefit" from zoning violation for two and-a-half years after receiving notice of the violation; thus, the court decided a financial penalty amount by calculating an amount that would "remove the economic benefit."); *Agency of Nat. Res. v. White,* Dkt. No. 36-2-08 Vtec (2010) (Court found respondent received economic benefit of avoiding costs of compliance for at least one year from date of AOD issuance to date of compliance).

Here, Respondent had the economic benefit of avoided compliance with relevant environmental laws for an extended period (at least three years for wetlands, and one year for discharge) after receiving notice of the violations. These avoided costs of compliance include the cost of hiring a qualified wetland consultant to delineate the wetlands and prepare wetland permit application

materials,[24] the costs of installing waste management structural improvements to eliminate any discharges, and the costs of applying for a Clean Water Act discharge permit. These avoided costs—and the time value of that money not having been spent for a period of years—should be added on to the penalty amount for these violations.

Generally, the calculation of a final penalty under chapter 201, particularly the calculation of economic benefit, "will be imprecise" and "does not require an elaborate or burdensome evidentiary showing; reasonable approximations of the economic benefit will suffice." *Agency of Nat. Res. v. Deso*, 175 Vt. 513, 516 (Vt. 2003) (*citing Pub. Interest Research Grp. of N.J. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 80 (3d Cir.1990). Here, based on average consultant fees in the area, the approximate estimate of the combined economic benefits from Respondent's noncompliance is between $150-$200,000.

v. Continuing Violation

Because these two wetland violations constitute Class I violations, they are subject to between $0 to $17,000 for each day the violation continues (the discharge violation, being a Class II violation, is subject to $0 to $12,000 for each day that the violation continues). Penalty Rules § 20-301(a-b). Any violation of a statute listed in 10 V.S.A. section 8003(a) or a rule promulgated under such statute or the lack of a necessary permit that continues longer than one day is a "continuing violation" subject to additional penalties for each day the violation continues. *Id.* at § 20-105.

Both the Panton Road Wetland violation (Violation #1) and the Pease Road Wetland violation (Violation #2) have continued for at least 1,168 days (as measured from the date of ANR's 2017 NOAV to the date of the AOD),[25] and clearly fall within ANR's definition of "continuing violations." This means ANR could add between $0 to $19 million per wetland violation. Likewise, the discharge violation has continued for at least 319 days (as measured from the date of AAFM's 2019 CAL to the date of the AOD). This means ANR could add between $0 to $3.8 million for this discharge violation. At minimum, ANR must fine Respondent the maximum penalty of $170,000 for each violation to account for their continued nature.

* * *

[24] *See Sec'y, Agency of Nat. Res. v. Irish*, 169 Vt. 407, 418 (Vt. 1999) (avoided cost of hiring wetland consultant to conduct site visit and characterize or delineate the boundaries of Class II wetland was economic benefit triggering imposition of additional penalty).

[25] This is a generous measurement, since prior notice (e.g., an NOAV) is not required before cumulative penalties may be assessed. *Agency of Nat. Res. v. Deso* at 564-65. Therefore in this case, cumulative penalties could be assessed from the date of initial noncompliance, which predates the NOAV.

In conclusion, the minimum penalty amount for each violation should be $170,000—bringing the total penalty amount in the AOD to **$510,000.** This amount reflects an accurate base penalty calculation, as well as the lack of any relevant mitigating circumstances, the need for a deterrent effect, Respondent's economic benefit from avoided compliance, and the continuing nature of these violations. To adequately carry out the purposes of Chapter 201, the penalty amount must be revised to at least $510,000.

II. The discharge remediation measures must require follow-up site visits and monitoring to verify discharges have been eliminated.

The AOD must also be revised to include several post-remediation site visits where ANR can (1) inspect the completion of all measures intended to eliminate the discharges of wastes to the tributaries of Dead Creek, and (2) verify if those measures are adequate to eliminate the discharges, including during wet weather events. These additional procedures are required to achieve the intended result of the AOD. *See Sec'y v. Wellman*, No. 83-4-08VTEC, 2009 WL 4623530 (2009) ("The Court has the authority to affirm an ANR order, or vacate and remand an order when the procedure contained in the order is not reasonably likely to achieve the intended result.").

This verification is particularly necessary given the uncertainty around where the brown colored, manure-scented liquid discharge cited on the Main Farm Facility was coming from. *See* April 5, 2019 Email between Huber and Cash, Ex. 14 (describing substance of phone call with Respondent about the discharge at issue in this AOD, noting that "[Mr. Vorsteveld] explained that he still does not know where any wastes are coming from."); *see also* May 8, 2019 ANR Complaint Report Form at 3, Ex.15 (documenting findings from AAFM staff person's site visit on June 5, 2019, noting he was "not able to confirm which drop inlets connect to culvert [and result in the discharge]."). ANR cannot assure the public that this AOD will result in compliance (i.e., elimination of any discharges of agricultural waste to waters of the state) unless site visits and verification activities are included in the settlement agreement.

III. The Wetland Restoration Plan must be designed to assure restoration of the highest level of sustainable ecological functions, and it should be subject to public review.

The parameters of the Wetland Restoration Plan described on page 5 of the AOD must be revised such that it assures restoration of the wetlands to the highest level of sustainable ecological functions. CLF incorporates by reference the specific measures identified in Aerie Point Holdings, LLC's comment letter submitted to the Agency on Oct. 29, 2019 regarding this AOD.

Additionally, the AOD should require a public notice and comment period before the Wetland Restoration Plan is approved. At a minimum, a copy of the proposed Plan and all supporting documentation should be provided to neighboring landowners who have been adversely impacted by the wetland violations at the same time as filing with ANR.

IV. The AOD should not permit Respondent to apply for an "after-the-fact" wetland permit in lieu of remediation.

The first sentence in the last paragraph on page 5 of the AOD alluding to after-the-fact permits must be deleted. This provision would allow Respondent to limit the scope of its wetland remediation by applying for and securing an "after-the-fact" wetlands permit. This sentence should be struck for three reasons. First, there is no explicit authority or standard in either the Vermont Wetland Protection Statute, the Vermont Wetland Rules, or any Agency guidance documents for issuing a permit to approve unpermitted activities in a wetland after a wetland has been unlawfully destroyed. Second, any post facto assessment of the impact of permitted activities on the degraded wetland is necessarily speculative since prior conditions have been destroyed and can no longer be accurately delineated in the field. Finally, allowing post-destruction, after-the-fact permits changes the risk calculus for violators and undermines environmental enforcement. *See ANR v. Deso*, 2003 VT 36, ¶ 10 (2003) ("Vermont's environmental programs would cease to function if permittees were allowed to unilaterally disregard permit requirements.").

At a minimum, ANR's Wetland Program Staff believe an after-the-fact permit is inappropriate for at least the Panton Road Wetland violation (Violation #1). In an internal communication, a Wetland Staff person noted the Panton Road Wetland violation is "[n]ot eligible for [an after-the-fact] permit due to location along Dead Creek." April 29, 2016 ANR Complaint Report Form at 4, Ex. 16. If this is the case, then the AOD should at a minimum clearly state this restriction. But the more appropriate revision would be to strike this sentence entirely.

V. The AOD must require Respondent to apply for a CAFO NPDES Permit.

In order to further the purposes set forth in the Administrative Environmental Enforcement Statute—specifically, to "enhance the protection of environmental and human health afforded by existing laws" and to "foster greater compliance with environmental laws"— this AOD should require Respondent to apply for a Clean Water Act NPDES permit as a large concentrated animal feeding operation (CAFO).

First, Respondent is required by federal law to seek coverage under a NPDES permit because it (1) meets the regulatory definition of an "animal feeding operation," or AFO, 40 C.F.R. § 122.33(b)(1); (2) is a large concentrated AFO, or CAFO since it confines more than 700 dairy cows (milked or dry),[26] *id.* at § 122.23(b)(4); and (3) has discharged pollutants from a production area to Waters of the United States. *See* U.S. EPA Interim Revised NPDES Inspection Manual at 350 (2017), *available at* https://www.epa.gov/sites/production/files/2017-03/documents/npdesinspect-chapter-15.pdf ("If a large CAFO currently has or had in the past,

[26] As of the AAFM's inspection of Respondent's Farm on May 8, 2019, the Farm confined 1,155 heifers and youngstock and 1,500 mature dairy cows (milkers/dry). May 8, 2019 AAFM General Inspection Form, Ex. 18.

discharges of pollutants from its production area to a water of the United States, those discharges are in violation of the CWA. Again, the large CAFO will need to apply for a permit or permanently remedy the cause of the discharge.").

Second, Respondent must apply for a NPDES CAFO permit due to evidence of serious systemic discharge and water quality problems at all three of the Vorsteveld farm facilities. For instance:

- The photo below, taken by Vicki Hopper[27] on April 17, 2018, shows a stream downslope from the culvert under Arnold Bay Road, draining the Arnold Bay Farm Facility, as it enters White Bay in Lake Champlain. The dramatic plume of sediment pouring from this stream raises the reasonable potential that the upland farm was discharging pollutants into Waters of the United States on this day.

- An AAFM inspection report and a Corrective Action Letter from 2018 document how Respondents repeatedly "failed to operate the Manure Transfer Area at the Arnold Bay

[27] Ms. Hopper is a landowner who lives on the shore of White Bay.

Farm Facility in a manner to prevent runoff of wastes to waters of the US," *see* Apr. 9, 2018 CAL, Ex. 8., and failed to manage a barnyard collection tank that showed evidence of previously overtopping, *see* July 20, 2018 AAFM Inspection All Farms Summary Report, Ex. 12.

- An AAFM inspection report from 2016 documents evidence of the same overflowing barnyard waste collection system as that identified above in 2018. *See* Aug. 10, 2016 AAFM Inspection of Arnold Bay Farm at 5, Ex. 17 ("[T]he barnyard waste collection system needs to be upgraded as it no longer meets waste management standards. The collection system that captures runoff from the heifer barn barnyard south was completely full and did not seem to be functioning as intended."). The photo below, taken on August 10, 2016 by AAFM Agent Sands, shows the "[h]eifer barn barnyard south collection tank at capacity and evidence that it overflows." *Id.* This collection tank is near a surface water. *Id.* at 4.

- At the Exline Farm, a waste feed pile was located within 150 feet of a stream (in violation of the RAPs and posing a risk of discharge to surface water) for a period of at least three years from 2015 to 2018. Apr. 9, 2018 CAL, Ex. 8.

- The photo below, taken by Vicki Hopper on April 20, 2019 shows the mouth of a stream flowing into Lake Champlain shortly after passing next to the Exline Farm Facility. Like the photo above, this silty plume pouring out of the stream raises reasonable concerns as to whether the Exline Farm Facility was discharging pollutants to Waters of the United States on this day.

- The photo below, taken by Vicki Hopper on June 6, 2019, is of Arnold Bay in Lake Champlain. Sediment-laden discharge from the stream depicted above flowed from culverts under Arnold Bay Road, carrying runoff from the the Exline Farm Facility into Arnold Bay.

- ANR water quality sampling of discharges from the Exline Farm Facility and the Arnold Bay Farm Facility cited in Exhibit A of Aerie Point Holdings comments to the Agency on this AOD show E. coli concentrations between 2,650 to 2,876 MPN (most probable number) at two sites downstream of the farm facilities, versus 354 MPN at a reference site.[28] Both discharge sampling results are well above the Vermont Water Quality Standard for E. Coli of 126 MPN.[29]

[28] Exhibit A, Water Quality Data, Comments on AOD by Aerie Point Holdings, LLC, submitted to ANR on Oct. 29, 2020.
[29] Environmental Protection Rule Chapter 29A-306 (f)(1)(B), (2)(B), and (3)(B)).

- On a field visit to several of Respondent's fields around the Arnold Bay Farm Facility and the Exline Farm Facility conducted by Harold van Es, PhD, a soil scientist, and Professor at Cornell University, which took place on October 19, 2020, Mr. van Es observed several nutrient management practices that were improperly implemented. First, Mr. van Es observed that instead of manure being injected into the soil—as per the farm's nutrient management plan—most of the fields he surveyed had manure matter directly on the soil surface. *See* Opinion Letter from Howard van Es, Ex. 19. "In most cases," Mr. van Es wrote, "manure was attempted to be injected but the application rate clearly exceeded the soil adsorption capacity, resulting in manure spilling over the injection groove and laying on the surface." *Id.* Second, Mr. van Es observed a virtual absence of cover crop cover (the nutrient management plan requires establishment of an effective cover crop after corn silage harvest). *Id.* Mr. van Es summarized his findings as follows: "In all, this indicates that any future runoff occurring from these fields will become highly contaminated with manure." *Id*.

Not only are these waste management and water quality issues documented above problematic given the farm's current operations, but the discharge risks may be exacerbated, since Respondent is actively seeking an LFO permit amendment to expand its herd size and produce an additional 4.73 million gallons of manure annually. *See* LFO Permit Amendment Appendix A, Ex. 20; Harold van Es Opinion Letter, Ex. 19 ("Therefore, it is my opinion that additional manure loads as suggested for the amended LFO permit will certainly exacerbate these [manure runoff] concerns.").

ANR has acknowledged the inherent difficulty in keeping track of all potential discharge points that may exist on such a large farm property with multiple outlets. One Agency Report Form from the Main Farm Facility notes that:

> [D]ischarges may exist at the location where drainage enters wetlands bordering Dead Creek and are likely cyclical in nature [i.e. spring run-off, rainstorms] and dependent on fields and barn maintenance conditions at any given time [i.e, planted in corn, cover cropped, tiled, stalls cleaned of manure, etc.]. It would be a significant undertaking for ANR to explore the entire farm complex in order to locate all related infrastructure that may or may not be contributing to any potential discharge from only the piping outlets shown in the Report.

May 8, 2019 ANR Complaint Form at 3, Ex. 15 (explanatory parentheticals in original). Coverage under a CAFO NPDES permit—which would require more robust information gathering and more oversight features than the existing LFO permit—is the best way to further the Administrative Environmental Enforcement Statute's purposes to "enhance the protection of environmental and human health afforded by existing laws" and "foster greater compliance with environmental laws" on this Farm.

Respondent's LFO permit is not equivalent to a NPDES CAFO permit for two main reasons. First, AAFM is not the delegated NPDES authority in Vermont. Facilities that are subject to the CAFO permitting requirements must apply to *ANR* to obtain NPDES permit authorization for regulated discharged from their facilities.

Second, the public participation terms of the AAFM permitting program are not sufficient to meet NPDES requirements. Draft CAFO permits must be publicly noticed, at least thirty days must be allowed for public comment, and the implementing agency is required to consider and respond to comments when issuing a final permit.[30] In contrast, Vermont's LFO Rules require a "public informational meeting" only for LFO projects that propose a new barn construction; the public then has only five business days after the hearing to submit comments about such a project.[31]

Third, LFO operating permits have no expiration date. There are no provisions for permit renewal (and thus public input) under the LFO Rules. This is in stark contrast to federal regulations, which specify that "NPDES permits shall be effective for a fixed term not to exceed 5 years."[32] CAFO regulations further specify that a CAFO must submit a renewal application at least 180 days before its permit expires.[33] Under the LFO program, if AAFM does not make a permit determination within 45 business days, the permit is awarded by default[34]—a practice that finds no support in the CWA.

Due to the evidence of past discharges from Respondent's large CAFO, and due to the systemic nature of manure management problems on this farm writ large, the Agency should require Respondent to apply for a NPDES CAFO discharge permit. At a minimum, ANR must require Respondent to conduct a comprehensive inventory and documentation of all drainage infrastructure on the three farm facilities so that the pathways for agricultural runoff on the farm are fully understood and can be effectively monitored to prevent discharges.

Conclusion

ANR and the Respondent must enter a revised AOD incorporating: a penalty of no less than $510,000; more robust provisions for monitoring and verification of wetlands remediation and restoration; additional requirements for the Wetlands Restoration Plan that include public review and achievement of highest ecological function; a prohibition on after-the-fact wetlands permits; and a deadline by which respondent must apply for a CAFO permit, or at minimum

[30] 40 C.F.R. §§ 124.10(a), (b), and 124.17.
[31] LFO Rules, subch. 5.B.2.k, available at: https://agriculture.vermont.gov/sites/agriculture/files/documents/Water_Quality/2007_LFO_Rules.pdf.
[32] 40 C.F.R. § 122.46(a).
[33] *Id.* § 122.23(h).
[34] LFO Rules, subch. 5.B.4.f

conduct a comprehensive inventory and documentation of all drainage infrastructure on the farm.

CLF appreciates the opportunity to provide comment, and we respectfully request a meeting with the Agency to discuss the concerns outline above.

Please be in touch with any questions.

Sincerely,

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