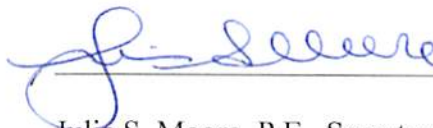


MEMORANDUM OF UNDERSTANDING
between
the AGENCY OF AGRICULTURE, FOOD, AND MARKETS
and
the AGENCY OF NATURAL RESOURCES
REGARDING IMPLEMENTATION AND
ENFORCEMENT of
AGRICULTURAL WATER QUALITY PROGRAMS
AS REQUIRED BY 6 V.S.A. § 4810, 10 V.S.A. §§ 1259(i) and
8003(d)

March 17, 2017



Anson B. Tebbetts, Secretary
Vermont Agency of Agriculture, Food
and Markets



Julia S. Moore, P.E., Secretary
Vermont Agency of Natural Resources



1. Authority

- A. The Vermont Agency of Natural Resources (ANR) is the designated lead State water quality agency, responsible for the management and enforcement of the water pollution control statutes of the State, the protection of groundwater; and has been authorized by the U.S. Environmental Protection Agency to be the delegated Agency to administer the Clean Water Act.
- B. The Vermont Agency of Agriculture, Food and Markets (AAFM) is the State agency responsible for facilitating, supporting, and encouraging the growth and viability of agriculture in Vermont while protecting the working landscape, human health, plant health, consumers and the environment.
- C. This Memorandum of Understanding (MOU) is entered between ANR and AAFM and serves as the memoranda of understanding required by:
 - 1. 10 V.S.A. § 1259(i),
 - 2. 6 V.S.A. § 4810, and
 - 3. 10 V.S.A. § 8003(d).
- D. 10 V.S.A. § 1259(i) requires ANR to delegate to AAFM the state agricultural non-point source pollution control program planning, implementation and regulation, to the extent that such delegation is compatible with federal requirements and to adopt a memorandum of understanding for this purpose.
- E. 6 V.S.A. § 4810(d) requires that AAFM:
 - 1. coordinate with ANR in implementing and enforcing programs, plans and practices developed for reducing and eliminating agricultural non-point source pollutants and discharges from concentrated animal feeding operations and to revise the memorandum of understanding for the non-point source program for this purpose, describing the program administration, grant negotiation, grant sharing, how the two agencies will coordinate watershed planning activities to comply with Public Law 92-500, and how the agencies will apply the anti-degradation implementation policy, including how the agencies will apply the policy to new sources of agricultural non-point source pollutants; and
 - 2. develop a memorandum of understanding regarding the implementation of the federal concentrated animal feeding operation program and the relationship between the requirements of the federal program and State agricultural water quality requirements of 6 V.S.A. Chapter 215 for large, medium, and small farms.
- F. 10 V.S.A. § 8003(d) authorizes the ANR Secretary, at the request of the AAFM Secretary, to take action under 10 V.S.A. Chapter 201 to enforce the agricultural water quality requirements of, rules adopted under, and permits and certifications issued under 6 V.S.A. Chapter 215, and requires that AAFM and ANR enter into a memorandum of understanding for this purpose.
- G. This MOU supersedes the following memoranda of understanding entered by ANR and AAFM:
 - 1. Memorandum of Understanding between Vermont Agency of Natural Resources, Department of Environmental Conservation & Vermont Department of Agriculture, Food & Markets

Concerning Agricultural Nonpoint Source Pollution Reduction Program (as per Act 261 of 1992) signed April 16, 1993,

2. Memorandum of Understanding between Vermont Agency of Natural Resources, Vermont Department of Environmental Conservation, and the Vermont Department of Agriculture, Food, and Markets Concerning CAFO and LFO Regulation, signed October 14, 1999, and
3. Memorandum of Understanding between Vermont Agency of Natural Resources and Vermont Department of Agriculture, Food, and Markets Concerning MFO, LFO, and CAFO Regulation, signed September 17, 2007.

2. Definitions

As used in this MOU:

- A. "Agricultural waste" means material originating or emanating from a farm that is determined by the AAFM Secretary or ANR Secretary to be harmful to the waters of the State, including: sediments; minerals, including heavy metals; plant nutrients; pesticides; organic wastes, including livestock waste, animal mortalities, compost, feed and crop debris; waste oils; pathogenic bacteria and viruses; thermal pollution; silage runoff; untreated milkhouse waste; and any other farm waste as the term "waste" is defined in 10 V.S.A. § 1251(12). *See* 6 V.S.A. § 4802(7).
- B. "Best Management Practice" means site-specific on-farm conservation practices implemented in order to address the potential for agricultural pollutants to enter the waters of the State. *See* 6 V.S.A. § 4810(c).
- C. "Discharge" means the placing, depositing or emission of any wastes, directly or indirectly, into an injection well or into the waters of the state. *See* 10 V.S.A. § 1251(3).
- D. "Person" means any natural person, corporation, municipality, the State of Vermont or any department, agency, or subdivision of the State and any partnership, unincorporated association, or other legal entity. *See* 1 V.S.A. § 128.
- E. "Point source" means any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rollingstock, concentrated animal feeding operation, vessel or other floating craft from which pollutants are or may be discharged.
- F. "Waters" includes all rivers, streams, creeks, brooks, reservoirs, ponds, lakes, springs and all bodies of surface waters, artificial or natural, which are contained within, flow through or border upon the state or any portion of it. *See* 10 V.S.A. § 1251(13).

3. Adoption of Administrative Rules

With respect to the adoption or amendment of an administrative rule affecting agricultural water quality, the Agency proposing the rule agrees to share revisions with the other Agency and to review comments provided by the other Agency. This consultation shall occur before the submission of revisions to the Interagency Committee on Administrative Rules or general distribution of rules to the public as a part of pre-rulemaking public involvement. This consultation includes adoption or revision of rules related to: (1) required agricultural practices (RAPs), (2) Large Farm Operations (LFOs) and Medium Farm Operations (MFOs), and (3) concentrated animal feeding operations (CAFOs).

4. Non-point Source Grant Negotiation and Sharing

- A. ANR is the state's lead organization to apply for and administer federal funds under the Clean Water Act. ANR shall consult with AAFM on matters that may relate to agricultural non-point source pollution as detailed in this MOU.
- B. AAFM is an eligible applicant for federal Clean Water Act (CWA) Section 319 funds administered by ANR pursuant to annual guidance issued by EPA.
- C. AAFM may compete for federal CWA Section 319 competitive grant funds and is eligible for funds under this program prescribed for agricultural purposes by federal guidance.
- D. AAFM and ANR agree to annually review the distribution of CWA Section 319 base grant funds to assure that AAFM's agricultural non-point source program receives a proportionate share of base funds prescribed. Such an award shall be in accordance with annual CWA Section 319 guidance and the current Vermont Nonpoint Source Management Plan approved by EPA.

5. Permitting

A. Information Sharing

- 1. AAFM shall share with ANR information regarding discharges to waters, and ANR shall make any determination as to whether a discharge to waters is or may be a point source discharge.
- 2. ANR shall share:
 - a. results of any inspections that indicate that a CAFO permit is required;
 - b. copies of any draft CAFO permits that are developed; and
 - c. information on any farms under a CAFO permit including inspection reports, compliance efforts, or other communication with the permitted farm.

B. Requirements Applicable to LFO and MFO Permits

- 1. The AAFM Secretary in consultation with the ANR Secretary shall review the MFO general permit prior to its renewal every 5 years to make sure that the permit has conditions within it that prevent unpermitted discharges to the waters of the State. AAFM will provide a copy of any draft general permit to ANR prior to putting it out on public notice. ANR will provide comments within 30 days of receipt of the draft general permit.
- 2. AAFM will provide notice to ANR of the receipt of a notice of intent to comply with the MFO general permit and a copy of any certification submitted pursuant to the MFO general permit regarding the water quality impacts of the farm. ANR will provide comment on a notice of intent or certification within 14 days of receipt from AAFM.
- 3. The AAFM Secretary in consultation with the ANR Secretary will review any application for a LFO permit or individual MFO permit with regard to water quality impacts and, prior to approval of a LFO or individual MFO permit, shall issue a written determination regarding whether the applicant has established that there will be no unpermitted discharges to waters of the State. AAFM will provide to ANR notice of receipt of an application for a new permit or a major amendment, a copy of AAFM's written determination relating to any unpermitted

discharges from the farm, and the draft permit or amendment, prior to the issuance of the individual LFO or MFO permit. ANR will provide comments within 14 days of receipt of the draft permit or amendment and AAFM's written determination relating to any unpermitted discharges.

4. Based on the information provided, ANR may determine that a CAFO permit is required.

C. Permit Administration

1. Requirements Applicable to all LFO and MFO Permits

- a. Review of permits prior to issuance
 - i. Prior to the issuance of any LFO or MFO individual permit, AAFM shall conduct an inspection of the operation. AAFM shall share with ANR any information related to a discharge so that ANR may determine whether it requires a permit issued by ANR.
 - ii. If AAFM or ANR determines that the farm may be discharging to a water, ANR shall conduct an inspection to determine whether the operation is required to obtain a permit issued by ANR for the point source discharge.
- b. LFO permits, general MFO permits, and individual MFO permits shall be at least as stringent as the permit standards established by the federal CAFO regulations and shall meet any applicable federal and state law requirements.
- c. Recordkeeping and reporting requirements for CAFO, LFO, and MFO permits shall, to the extent possible, be the same or substantially the same.

2. CAFO Permitting and Effect of Permits on LFO and MFO Permitting

- a. Nothing in this MOU shall alter any obligation between EPA and ANR with respect to Vermont's implementation of the State's delegated CWA program as defined in the Memorandum of Agreement between Vermont and EPA approved on March 11, 1974, as amended.
- b. Issuance of an LFO or MFO permit or coverage under an MFO general permit shall not preclude the need for ANR to issue a discharge permit under 10 V.S.A §§ 1263 or 1264 for a point source discharge or to be designated as a CAFO under regulations adopted by EPA or the State.
- c. Prior to issuance of a CAFO permit, ANR shall consult with AAFM to ensure consistency with existing AAFM regulatory activities on the farm and to coordinate permitting activities. This consultation includes providing a draft of the CAFO permit to AAFM for review prior to issuance. AAFM will provide comments within 14 days of receipt of the draft permit. In no case shall the effort to ensure consistency between the AAFM and ANR result in a CAFO permit that is less stringent than minimum requirements established by the Clean Water Act.
- d. If ANR issues a CAFO permit, the issuance of that permit shall render any MFO permit or coverage under an MFO general permit void. *See* 6 V.S.A. § 4858(d). When both a LFO and CAFO permit are issued to a farm, ANR shall be lead on enforcement with respect to discharge or water quality violations. ANR and AAFM shall consult prior to initiating any enforcement activity. To the extent that any enforcement action by AAFM relates to discharges to waters, ANR will take the lead on the portion of the

enforcement action relating to such discharges. AAFM has discretion to refer an enforcement action against a farm to ANR and request that ANR take the lead.

6. Compliance

A. Agricultural Non-Point Source Discharge Violations

1. AAFM is responsible to enforce against agricultural non-point discharges in accordance with 6 V.S.A. Chapter 215, Subchapter 10.
2. Pursuant to 10 V.S.A. § 8003(d), ANR upon the request of the AAFM Secretary may take action to enforce against violations of agricultural water quality requirements of rules adopted under, and permits and certifications issued under 6 V.S.A. Chapter 215.

B. Agricultural Point Source, CAFO Permit, and Non-Agricultural Waste Discharge Violations

1. ANR is responsible to enforce against point source discharges of waste to a water of the State, including discharges from a concentrated animal feeding operation and discharges from an agricultural operation that is not in compliance with the required agricultural practices. *See* 10 V.S.A. §§ 1259(f) and 1264(d)(1)(A).

C. Primary Responsibility

1. AAFM shall have primary responsibility for investigation and enforcement of a violation when the alleged violation relates to a non-point source discharge of an agricultural waste that is a violation of an MFO or LFO permit condition, is a violation of Required Agricultural Practices rule, or is a violation of a required Best Management Practice.
2. ANR has primary responsibility for investigation and enforcement of a violation when the alleged violation:
 - a. is a violation of a CAFO permit,
 - b. relates to a point source discharge of agricultural waste, or
 - c. relates to a discharge of non-agricultural waste.
3. Where complaints or field investigations do not identify whether a discharge is a non-point or point source discharge or identify violations of both the Required Agricultural Practices rule or point source discharge rules, AAFM and ANR will discuss the complaint and coordinate the investigatory response.
4. Notwithstanding any other provision of this Section, ANR shall be the decision-maker regarding the existence of a point source, the extent of violations under the State's federally delegated program, the appropriate form of enforcement response, and the timing and nature of requirements to achieve compliance.

D. Investigation and Enforcement

1. ANR shall immediately notify AAFM of any complaint that it receives that relates to an alleged violation identified in Section 6 C.1. or C 2.a.and b.
2. AAFM shall immediately notify ANR of any complaint that it receives or field inspection report that relates to an alleged violation identified in Section 6 C.2.
3. The agency that has the primary responsibility for investigation and enforcement as identified in Section 6 C (the Lead Agency):

- a. shall obtain background information and conduct a site visit of the farm as soon as practical, but in no case later than 10 days from receiving the complaint, and
 - b. may request assistance of the other agency in conducting the investigation, for example, to assess agricultural operations or impacts to water quality and aquatic biota.
4. The Lead Agency shall document its investigation as soon as possible, but no later than 30 days of the investigation, and determine:
- a. if there is a violation or potential violation of 6 V.S.A. Chapter 215, 10 V.S.A. Chapter 47, or of both Chapters;
 - b. if an emergency administrative order is warranted pursuant to 6 V.S.A. § 4993 or 10 V.S.A. § 8009 or a cease and desist order pursuant to 6 V.S.A. § 4993 because: there is a violation that presents an immediate threat of substantial harm to the environment or an immediate threat to the public health or welfare;
 - i. there are conditions that will or likely will result in a violation which presents an immediate threat of substantial harm to the environment or an immediate threat to the public health or welfare; or
 - ii. there is an activity requiring a permit has been commenced and is continuing without a permit; and
 - c. if one of the following outcomes is warranted:
 - i. issuing a corrective action written warning under 6 V.S.A. § 4992;
 - ii. revoking or conditioning coverage under a permit or certification under 6 V.S.A. § 4993;
 - iii. bringing a civil enforcement action under 6 V.S.A. § 4995;
 - iv. pursuing other action, such as consulting with a farmer, under 6 V.S.A. § 4991;
 - v. pursuing a notice of alleged violation pursuant to 10 V.S.A. § 8006; or
 - vi. bringing a civil or criminal enforcement action under 10 V.S.A. chapter 201 or 211.
5. If the Lead Agency determines that there has not been a violation of 6 V.S.A. Chapter 215 or 10 V.S.A. Chapter 47 it shall notify the other agency of its determination. In any investigation of a discharge by AAFM under C.1., AAFM shall notify ANR of all discharges and all evidence of any such discharges that may require a CAFO permit and share information relating to them with ANR.

E. Enforcement Under 10 V.S.A. § 8003(d)

- 1. AAFM may refer a case to ANR for enforcement under 10 V.S.A. § 8003(d) when:
 - a. the matter presents violations of both 6 V.S.A. Chapter 215 and 10 V.S.A. Chapter 47; and
 - b. the matter does not meet the criteria for referral to the Attorney General's Office under Section 6 F.
- 2. Representation during cases under 10 V.S.A. § 8003(d) is as follows:
 - a. The ANR Office of General Counsel shall act as counsel for AAFM in a case brought

under this section with respect to all matters related to 6 V.S.A. Chapter 215. AAFM shall retain authority in the conduct of a case to direct ANR Office of General Counsel with respect to the elements of the case related to 6 V.S.A. Chapter 215.

- b. Either Agency, ANR or AAFM, may request elevation within the management structure of the other Agency on any matter with respect to the following:
 - i. litigation strategy or approach to the case;
 - ii. any issue that ANR Office of General Counsel believes could cause an attorney to breach an ethical standard; or
 - iii. any conflict between the two Agencies with respect to the litigation outcomes of the case.

3. AAFM shall make available witnesses as are necessary for the enforcement proceeding.

7. Basin Planning

A. Anti-Degradation

1. Non-point Discharges

- a. All farms as defined by the Required Agricultural Practices (RAPs) are required to, at a minimum, implement the RAPs.
- b. The RAPs are designed to prevent discharges from farms in the State.
- c. The Vermont Water Quality Standards presume that if an agricultural operation is operating in compliance with the RAPs then non-point source pollution is presumed to be in compliance with the Vermont Water Quality Standards, including the Anti-degradation Policy. Water Quality Standards (WQS) § 2-03(B)(1).
- d. If the waterbody is listed on the Clean Water Act (CWA) Section 303(d) list as impaired and agricultural discharges are causing or contributing to that impairment, then ANR and AAFM shall follow the Agricultural Water Quality and Basin Planning Process established in subsection (b) of this section for the impaired water.

2. Point Source Discharges

Prior to issuing a CAFO permit ANR shall conduct an anti-degradation review in accordance with the Vermont Water Quality Standards and any ANR anti-degradation implementation procedure or rule in effect at the time of the review. ANR's review shall ensure that existing and designated uses and high quality waters are protected in accordance with federal and State anti-degradation requirements.

B. Agricultural Water Quality and Basin Plans

1. ANR shall retain state and federally mandated responsibilities related to water quality management planning, including tactical basin planning and the development of Total Maximum Daily Load (TMDL) allocations. ANR shall consult with AAFM about the agricultural pollution components aspects of: statewide water quality management planning, tactical basin planning, or TMDL allocations, including, the Vermont Surface Water Management Strategy, individual tactical basin plans, and the EPA-required Vermont Non-Point Source Management Strategy.

2. ANR is responsible for determining the extent to which the designated water uses of the Vermont water quality standards are supported or impaired, and for determining the causes and sources of water quality problems. ANR shall provide notice to AAFM when a surface water is proposed for listing as impaired pursuant to Section 303(d) of the Clean Water Act, when that listing is caused by agriculturally derived pollution.
3. AAFM shall assist ANR in the development of sections of each tactical basin plan that relate to the implementation of controls and programs affecting agricultural non-point source waste and runoff.
4. The TMDL allocation process apportions point and non-point sources of pollutants in order to restore a water body's assimilative capacity, and ensure attainment of water quality standards. ANR is responsible for developing initial allocation proposals that reflect the best-available water quality modeling or monitoring information, and shall consult with AAFM when making final determinations regarding the magnitude of any load or wasteload allocation dedicated to pollution from agricultural pollution sources covered by a TMDL.
5. For surface waters subject to EPA-approved TMDL's, ANR shall consult with AAFM in the development of an implementation plan or the portions of an implementation plan pertaining to agricultural land use. Implementation plans shall be inserted into tactical basin plans. An implementation plan shall describe the total reduction in agricultural pollution necessary to achieve Water Quality Standards and shall specify specific sub-watersheds in which targeted actions are envisioned over the five-year lifespan of the implementation plan. ANR and AAFM may also consult with the National Resources Conservation Service in the development of such implementation plans.
6. ANR shall consult with AAFM in determining to what extent and which land treatment measures, including best management practices, are necessary in each sub-watershed to meet TMDL reduction goals. These evaluations will consider the best-available modeling, water quality monitoring, and farm survey data available at the time. ANR and AAFM agree that proposed measures and practices shall constitute a best-available estimation of the achievable load reduction, subject to verification.
7. AAFM shall support the Multi-Partner Agricultural Conservation Practice Tracking and Planning Geospatial Database (commonly referred to as the Agricultural Partners Database (APD)) documenting the practices put in place by its partners and funding provided for practices to achieve the goals and actions outlined in the tactical basin plan. ANR shall maintain the State's Basin-wide Assessment and Tracking Tool (BATT) which is the official State database for tracking pollution reductions associated with surface waters subject to TMDL's across all sectors. Insofar as the APD contains personally-identifiable information subject to Federal confidentiality agreements, ANR's access to farm-specific information shall be governed by the Memorandum of Understanding between the United States Department of Agriculture, Natural Resources Conservation Service (NRCS), Vermont Association of Conservation Districts (VACD), Vermont Agency of Agriculture, Food and Markets (VAAFM), United States Fish & Wildlife Service (USFWS), Poultney Mettowee Natural Resource Conservation District, representing the Southern Vermont Nutrient Management Program (PMNRCD), University of Vermont Cooperative Extension (UVM Extension), United States Department of Agriculture, Farm Service Agency (FSA, Vermont Agency of Natural Resources, Department of Environmental Conservation (VANR-DEC) Lake Champlain Basin Program (LCBP) dated January 10, 2012, as may be amended.)
8. AAFM shall maintain an up-to-date accounting of practices in the APD funded by AAFM.

9. AAFM shall follow the implementation priorities identified in the most recent version of basin-specific tactical basin plans, which describe the nature, location and extent of agricultural non-point source pollution and the prioritization of river basins or waterbodies for further action.
10. ANR shall retain responsibility for evaluating the effectiveness of agricultural pollution control programs in attaining water quality standards. Such evaluations will be based on all available information with an emphasis on water quality monitoring data.

8. General Provisions

- A. This MOU does not govern indirect discharges under 10 V.S.A. § 1263.
- B. This MOU shall not create any appealable or enforceable rights to any person, including the parties to this MOU.
- C. ANR and AAFM agree to develop a training plan to provide education opportunities to the other agency.
- D. ANR and AAFM agree that regular meetings between the management of the two agencies is necessary to carry out the interrelated water quality missions of the agencies. The agencies agree to regular meetings at the management level at least quarterly.
- E. ANR and AAFM annually shall review this MOU to assure compliance with the Clean Water Act and the provisions of 10 V.S.A. § 1258. If the MOU needs to be substantially revised, it shall be noticed in the manner that is set forth in 10 V.S.A. § 1259(i).
- F. This MOU is effective upon signature and remains in effect until such time it is revised.