State of Vermont
WATER RESOURCES BOARD

Re: Citizens for Safe Farms, Inc. (Hinsdale Farm)
Docket No. WQ-04-02

MEMORANDUM OF DECISION

(Issued Oct. 14, 2004)

An appeal from a decision that a proposed large dairy farm does not require a discharge permit is dismissed for lack of jurisdiction.

I. Procedural Background

On December 15, 2003, pursuant to Vermont's Agricultural Non-Point Sources Pollution Reduction Program, 6 V.S.A. §§ 4810-4855, *amended by* Act 149 of 2004, Hinsdale Farms (Hinsdale or Applicant) submitted a permit application for a large farm operation (LFO) to the Vermont Agency of Agriculture, Farms, and Markets (AOA) for a proposed dairy farm in Charlotte, Vermont. AOA denied Hinsdale's permit application on February 13, 2004. Citizens for Safe Farms, Inc. (Citizens) initiated this appeal by filing a Notice of Appeal on March 8, 2004 pursuant to section 1269 of the Vermont Water Pollution Control Act, 10 V.S.A. § 1269, *amended by* Act 115 of 2004, § 29. Citizens appeals from certain actions and inactions of the Vermont Agency of Natural Resources (ANR) relating to AOA's permitting decision.

In its Notice of Appeal, Citizens alleges that ANR violated the procedural requirements of a 1999 memorandum of agreement (MOU) between ANR and AOA relating to ANR's submission of comments to AOA with regard to LFO permit applications. In addition, Citizens claims that ANR unlawfully determined that Hinsdale's proposed manure pit does not require a discharge permit under state and federal law. Citizens asks the Water Resources Board (Board) to order ANR to comply with the procedural requirements of the 1999 MOU by issuing written comments on the issue of whether the proposed LFO requires a discharge permit. Citizens further requests the Board to determine that Hinsdale's proposed LFO requires a discharge permit.

On April 8, 2004, Board Chair John F. Nicholls convened a prehearing conference in this matter, and on April 26, 2004, Chair Nicholls issued a Prehearing Conference Report and Order (Prehearing Order). The Prehearing Order establishes that the parties to this appeal are Citizens, Hinsdale, ANR, AOA, and the Town of Charlotte. Based on objections at the prehearing conference, the Prehearing Order established a schedule for the parties to file objections and memoranda of law relating to the legal standing of Citizens and the jurisdiction of the Board to hear this appeal. ANR filed objections to the Prehearing Order on April 30, 2004, requesting that the issue of whether the matter on appeal is moot be added to the briefing schedule. Chair

Nicholls issued an Order on May 4, 2004 sustaining ANR's objections and modifying the schedule for briefing preliminary issues accordingly.

Motions to dismiss this appeal have been filed by ANR, Hinsdale, and AOA. Citizens has filed oppositions to these motions and has also requested an evidentiary hearing to the extent the Board needs to resolve any factual disputes in the course of addressing the preliminary issues in this matter. The Board convened oral arguments on the pending motions on August 24, 2004 in its conference room in Montpelier, Vermont before Board Chair John F. Nicholls, Vice-Chair John D. E. Roberts, and Members Lawrence J. Bruce and Joan B. Nagy. Member Michael J. Hebert was not able to attend the oral arguments but has reviewed the tapes of those proceedings. The motions and responses filed by the parties present the Board with the following jurisdictional issues:

II. Issues

A. Is this appeal moot because any appealable acts or decisions of ANR were followed by AOA's denial of Hinsdale's application for an LFO permit?

B. Is Citizens without legal standing to bring this appeal because AOA's denial of Hinsdale's application for an LFO permit did not subject Citizens to a particularized injury?

C. Do ANR's comments to AOA with respect to Hinsdale's application for an LFO permit or ANR's decision that Hinsdale's LFO does not require a discharge permit constitute appealable acts or decisions under the Vermont Water Pollution Control Act?

D. Does ANR's failure to comply with the procedural provisions of a 1999 MOU between ANR and AOA with regard to ANR's decision that Hinsdale's LFO does not require a discharge permit constitute an appealable act or decision under the Vermont Water Pollution Control Act?

III. Standard of Review

When considering a motion to dismiss a complaint, the courts assume that the allegations of fact in the pleading are true and further accept as true all reasonable inferences that may be derived from the pleading. *See e.g., Richards v. Town of Norwich*, 169 Vt. 44, 48-49, 726 A.2d 81, 85 (1999). A motion to dismiss that relies on facts outside the pleadings must be treated as a motion for summary judgment. *Condosta v. Grussing*, 144 Vt. 454, 459, 479 A.2d 149, 152 (1984). Upon consideration of a motion for summary judgment, the courts must draw all

reasonable inferences and doubts in favor of the nonmoving party and regard all properly supported allegations of the opposing party as true. *Wentworth v. Fletcher Allen Health Care*, 171 Vt. 614, 616, 765 A.2d 456, 459-460 (2000).

A notice of appeal filed with the Board is not a pleading and is therefore not subject to the same requirements as a civil complaint. Because a notice of appeal is not a complaint or other pleading, a motion to dismiss based on a notice of appeal is in the nature of a motion for summary judgment. In this case, none of the moving parties have styled their motions to dismiss as motions for summary judgment, and none of these motions are supported by affidavits. Rather, the moving parties rely on the allegations of fact in the Notice of Appeal filed by Citizens in support of their motions to dismiss.

A party moving for summary judgment before the Board may rely on the statements of fact in a notice of appeal as admissions of a party opponent without having to file affidavits. *See In re Morehouse Brook*, No. WQ-02-04, Mem. of Decision at 4 (Vt. Water Res. Bd. Dec. 19, 2002). However, the Board will not grant summary judgment based on legal arguments that are not grounded in an adequate factual record. *See id.* at 6. In its opposition to the motions to dismiss that have filed been in this matter, Citizens, the nonmoving party, has alleged facts in addition to those in its Notice of Appeal. Citizens has supported these additional allegations with affidavits and exhibits. *See generally* Board Rule of Procedure 36(B) (authorizing adverse party to serve opposing affidavits and memorandum in opposition to motion for summary judgment). The moving parties have not contested these additional allegations.

Because the motions to dismiss now before the Board rely on the allegations of fact set forth in the Notice of Appeal, the essential facts relating to the preliminary issues in this appeal are not in dispute. The Board must consider the unopposed facts alleged by Citizens as true and draw all inferences in favor of Citizens, the nonmoving party. *See Morehouse Brook* at 3. For purposes of this decision, the material facts in this matter may be summarized as follows:

IV. Facts

Hinsdale proposes to construct a dairy farm in Charlotte, Vermont. This proposed dairy farm includes a 991,000 cubic foot manure pit. (Notice of Appeal at 1.) The manure pit and other operations at Hinsdale's proposed dairy farm will discharge animal wastes into Mud Hollow Brook, which is a tributary of Bingham Brook. Bingham Brook in turn drains into the LaPlatte River, and the LaPlatte River empties into Lake Champlain. Animal wastes reaching Lake Champlain from Hinsdale's proposed dairy farm will contain phosphorous, and Lake Champlain is phosphorous-impaired. (Notice of Appeal at 2.) In response to questions during the oral arguments in this matter, Citizens stated that Hinsdale's LFO permit application proposes 684 mature dairy cows.

On December 15, 2003, Hinsdale submitted a completed application for an LFO permit to AOA. While Hinsdale's LFO permit application was pending, Citizens provided extensive written expert comments to both ANR and AOA indicating that the manure pit and other operations at Hinsdale's LFO would result in a discharge into the aforementioned water bodies and require a permit from ANR. During this time, Citizens also formally requested information from both ANR and AOA relating to decision-making on Hinsdale's permit application. ANR did not respond to Citizens' request, and AOA denied Citizens' request in a telephone call placed by Citizens. (Notice of Appeal at 2.)

AOA chose not to release to ANR any draft decision on Hinsdale's LFO application but rather invited an ANR official to review a draft LFO permitting decision at AOA's offices and advised that AOA would accept oral comments only. (Notice of Appeal at 2-3.) ANR determined that the manure pit would not discharge in a 25-year, 24-hour storm and that the LFO does not require a discharge permit. ANR did not document this decision and does not intend to. (Notice of Appeal at 1, 5.) ANR and AOA purposely avoided any public disclosure of the decisions they made with regard to the issue of whether Hinsdale's LFO requires a discharge permit. (Notice of Appeal at 5.)

On February 13, 2004, less than five days after inviting ANR to provide oral comments, AOA denied Hinsdale's LFO permit application. (Notice of Appeal at 4.) In the findings of fact in its permit decision, AOA did not conclude that Hinsdale's proposed LFO would require a discharge permit but rather found that the LFO would benefit the environment. AOA has also concluded informally that Hinsdale's manure pit will not require a discharge permit. Accordingly, AOA does not plan to address the manure pit in any decision it issues on any new permit application that Hinsdale files in an effort to correct the deficiencies that led to AOA's February 13, 2004 permit denial. (Notice of Appeal at 4; Citizens' Mem. in Support of Bd. Jurisdiction and Opp'n to Mots. to Dismiss (May 28, 2004) at 4-5.) If Hinsdale files a new permit application that is limited to addressing the grounds for AOA's denial of its December 15, 2003 permit application, AOA will not supply ANR with any new application or draft permit. (Notice of Appeal at 4.)

Hinsdale appealed AOA's denial of its application for an LFO permit to Environmental Court. At Hinsdale's request, Environmental Court remanded AOA's denial of Hinsdale's LFO permit application to AOA to enable Hinsdale to work with AOA to correct the deficiencies that led to the permit denial. Because the remand will not involve the manure pit, AOA will not seek further comment from ANR on the manure pit or its operation, and AOA will not reconsider the issue of whether the LFO requires a discharge permit. (Citizens' Mem. in Support of Bd. Jurisdiction and Opp'n to Mots. to Dismiss (May 28, 2004) at 5, Exs. C and D.)

Citizens has approximately 84 members, about seventy-five of whom reside in Charlotte, near the site of Hinsdale's proposed manure pit. Its purposes include protecting its Charlotte members from the impacts of Hinsdale's proposed dairy farm. Citizens advocates on behalf of its members in order to protect their health and welfare and their property, aesthetic, and recreational interests. (Citizens' Mem. in Support of Bd. Jurisdiction and Opp'n to Mots. to Dismiss (May 28, 2004), Ex. B.) The discharge of pollutants from the proposed manure pit will pollute the surface water and ground water used and enjoyed by members of Citizens, whose use and enjoyment of their homes and property will thus be adversely affected. (Notice of Appeal at 6.)

Bill and Bonnie Bly, both members of Citizens, own and live on property that borders Hinsdale Farm. The Blys's one-acre pond is down gradient from Hinsdale's proposed manure pit. This pond drains into Mud Hollow Brook, which in turn discharges into the LaPlatte River. Any discharge from the proposed manure pit could drain into the Blys's pond and the watercourse on their property, contaminating these waters with e-coli, nitrates, and other deleterious substances. The Blys use their pond for swimming and as habitat for wildlife. Pollution of the pond would adversely affect the Blys's recreational and aesthetic uses of their property and diminish their property's value. (Citizens' Mem. in Support of Bd. Jurisdiction and Opp'n to Mots. to Dismiss (May 28, 2004), Ex. A.)

V. Legal Background

A. Federal Law

Citizens' Notice of Appeal alleges that ANR took appealable actions and inactions regarding whether Hinsdale will require a discharge permit under Vermont's Water Pollution Control Act and federal regulations. (Notice of Appeal at 1.) The federal Clean Water Act, 33 U.S.C. §§ 1251-1387, provides that any discharge of pollutants into waters of the United States requires a permit under the National Pollutant Discharge Elimination System (NPDES). Clean Water Act §§ 301(a), 402; 33 U.S.C.A. §§ 1311(a), 1342. A discharge means the addition of a pollutant from a point source. *Id.* § 502(12); 33 U.S.C. § 1362(12). A point source is a discrete and confined conveyance and specifically includes a concentrated animal feeding operation (CAFO). *Id.* § 502(14); 33 U.S.C. § 1362(14). However the Clean Water Act's definition of "point source" expressly excludes "agricultural stormwater discharges and return flows from irrigated agriculture." *Id.* Various provisions of the Clean Water Act direct the United States Environmental Protection Agency (EPA) to establish national technology-based effluent limitation guidelines and standards (ELGs) for various sources of pollutants. *See id.* §§ 301, 304, 306, 307, 402; 33 U.S.C. §§ 1311, 1314, 1316, 1317, 1342.

In 1974 and 1976, EPA promulgated regulations establishing ELGs and NPDES permitting requirements for CAFO's. 39 Fed. Reg. 5704; 41 Fed. Reg. 11458. EPA revised

these regulations in a final rule published February 12, 2003, 68 Fed. Reg. 7176, and which took effect April 14, 2003. 68 Fed. Reg. 7176. Under both the old and the new CAFO regulations, an animal feeding operation (AFO) is a farm where animals are confined and fed without sustained vegetation. 68 Fed. Reg. 7188-7189. *See also* 40 C.F.R. § 122.23(b)(1) (defining AFO). Under the old CAFO regulations, an AFO did not constitute a CAFO and was therefore not required to obtain an NPDES permit if it did not discharge in a 25-year, 24-hour storm. 68 Fed. Reg. 7186. Under the new CAFO regulations, the 25-year, 24-hour discharge no longer constitutes part of the definition of a CAFO. 68 Fed. Reg. 7195-7196. *See also* 40 C.F.R. § 122.23(b)(2) (defining CAFO). In addition, CAFOs are no longer defined by animal units (AU's), but rather by the number of animals of a certain type or by special designation. 68 Fed. Reg. 7188. *See also* 40 C.F.R. § 122.23(b)(4), (6), (9) (defining large, medium, and small CAFOs, respectively).

An AFO confining at least 700 mature dairy cows is a large CAFO under the new regulations. 40 C.F.R. § 122.23(b)(4) (defining large CAFO). An AFO confining from 200 to 699 mature dairy cows is a medium CAFO if the operation also meets one of two additional conditions: First, the farm discharges into regulated waters through a man-made pipe or ditch, or second, the animals come into contact with regulated waters passing through the operation. 40 C.F.R. § 122.23(b)(6) (defining medium CAFO).

EPA or a delegated state may designate an AFO as a CAFO upon determining that the AFO is a significant contributor of pollutants to regulated waters. 40 C.F.R. § 122.23(c). In delegated states, such as Vermont, EPA may designate an AFO as a CAFO only upon determining that the AFO contributes pollutants of concern to impaired waters. 40 C.F.R. § 122.23(c)(1)(i). A small CAFO is an AFO that has been designated as a CAFO and that is not a large or medium CAFO. 40 C.F.R. § 122.23(b)(9) (defining small CAFO).

Under the new CAFO regulations, a large CAFO that affirmatively demonstrates no potential discharge can avoid the NPDES permitting requirement. 40 C.F.R. § 122.23(d)(2). For this permitting exemption to apply, EPA, or the director of a state program in a state like Vermont that has been delegated the authority to administer the NPDES program, must provide an affirmative notification to the large CAFO operator of no potential discharge. This determination considers both the manure production and land application areas of the large CAFO. There can be no addition of pollutants to regulated waters under any circumstances for this permitting exemption to apply. The determination of whether there is no potential discharge from a large CAFO is based on a no-potential-discharge request, which EPA or the delegated state agency must grant or deny. 40 C.F.R. § 122.23(f).

Thus, all CAFOs must apply for an NPDES permit under the new CAFO regulations, even those that will discharge only in the event of a large storm. 40 C.F.R. § 122.23(a), (d)(1). However, a large CAFO with no potential to discharge does not need an NPDES permit if EPA

or a delegated state agency affirmatively grants a no-potential-discharge request. 40 C.F.R. § 122.23(d)(2), (f). Among other things, current ELGs continue to prohibit discharges from large CAFOs except in storms greater than the 25-year, 24-hour storm. 68 Fed. Reg. 7207, 7195-7196. *See also* 40 C.F.R. Part 412 (establishing effluent guidelines and standards for CAFOs). Effluent limitations for medium and small CAFOs are established by the permitting authority on a case-by-case basis using best professional judgment. 68 Fed. Reg. 7207.

Hinsdale's LFO permit application proposes 684 mature dairy cows. Thus, the proposed operation does not fall within the definition of a large CAFO and would not meet the definition of a medium CAFO unless the operation will discharge to surface waters through a pipe or ditch or unless a stream passes through it. *See* 40 C.F.R. § 122.23(b)(6) (defining medium CAFO). Based on Citizens's allegations, the Board assumes for purposes of this decision that both conditions would be present and that Hinsdale's proposed dairy farm would therefore constitute a medium CAFO.

At oral arguments, Citizens asserted that the new CAFO regulations govern this appeal. Citizens further asserted that Hinsdale's proposed operation is a medium CAFO that meets the definition of a "new source," meaning that Hinsdale must apply for a CAFO permit at least 180 days prior to commencing operation of the CAFO. *See* 40 C.F.R. § 122.23(g)(4). Delegated states are required to revise their NPDES permitting programs to reflect EPA's new CAFO regulations within one year of the date these regulations were promulgated, or within two years if the state must amend or enact a statute to conform to the new CAFO permitting requirements. 68 Fed. Reg. 7231 (citing 40 C.F.R. § 123.62(e)). As set forth below, Vermont's statutory amendments relating to CAFO permitting do not take effect until February 13, 2006. Because the Board holds that it does not have jurisdiction over ANR's decision that Hinsdale's project will not discharge pollutants and will not require a CAFO permit, the Board does need to decide whether the new federal CAFO regulations apply to Hinsdale's proposed dairy farm.

B. Vermont Law

Vermont implements its delegated authority to administer the federal NPDES permitting program in Vermont through the Vermont Water Pollution Control Act, 10 V.S.A. §§ 1250-1283, *amended by* Act 115 of 2004, and accompanying rules, including the Vermont Water Quality Standards. *See* 10 V.S.A. § 1258. Section 1259(i) of the Vermont Water Pollution Control Act, 10 V.S.A. § 1259(i), requires ANR to delegate to AOA the state's agricultural non-point source pollution control program to the extent doing so would be compatible with federal requirements. Section 1259(i) further requires ANR and AOA to adopt an MOU for this purpose. In addition, section 1259(i) provides that this MOU "shall address implementation grants, the distribution of federal program assistance and the development of land use

performance standards." ANR retains jurisdiction under the Vermont Water Pollution Control Act to issue discharge permits for a CAFO. *See* 10 V.S.A. §§ 1258, 1259.

AOA issued its decision denying Hinsdale's application for an LFO permit pursuant to the Agricultural Non-Point Sources Pollution Reduction Program, 6 V.S.A. §§ 4810-4855, *amended by* Act 149 of 2004. That law provides, among other things, that a farming operation requires an LFO permit if it involves over 950 AUs of cattle. 6 V.S.A. § 4851(a), (b), *amended by* Act 149 of 2004, § 5. The AUs of mature dairy cattle under this law are calculated by multiplying the number of these animals by 1.4. *See* 6 V.S.A. § 4850. If Hinsdale's farm would include 684 mature dairy cattle, that would amount to 957.6 AUs (684 x 1.4 = 957.6), which places Hinsdale's proposed dairy farm within the permitting requirements of the Agricultural Non-Point Sources Pollution Reduction Program.

Under the Agricultural Non-Point Sources Pollution Reduction Program, AOA may not issue a permit for an LFO unless AOA affirmatively finds that the animal wastes generated by the LFO will not discharge in a 25-year, 24-hour storm event. 6 V.S.A. § 4851(f). *See also* AOA LFO Rule 7.1(a) ("The applicant shall demonstrate that adequate best management system structures are in place to assure that there are no unpermitted discharges of agricultural wastes or dirty water . . . ."). Thus, section 4851(f) effectively removed LFOs from the NPDES permitting requirements for CAFOs under the old federal CAFO regulations by taking them out of the definition of a CAFO (which was not applicable to farms that did not discharge in the 25-year, 24-hour storm event). Section 4851(f) now ensures that under the new federal CAFO regulations, CAFOs in Vermont will comply with the federal ELGs prohibiting permitted large CAFOs from discharging in the 25-year, 24-hour storm.

The appeal provisions under the Agricultural Non-Point Sources Pollution Reduction Program relating to AOA's decision on Hinsdale's application for an LFO permit provide as follows:

> A person seeking a permit who is aggrieved by a final decision of the secretary [of Agriculture] may appeal de novo to the environmental court within 30 days of the final decision of the secretary. The only parties to the appeal shall be the person seeking the permit and the secretary.

6 V.S.A. § 4855.

The Agricultural Non-Point Sources Pollution Reduction Program was substantially amended effective June 3, 2004, and its name was changed to the Agricultural Water Quality Act. Act 149 of 2004 § 1. The Agricultural Water Quality Act continues to include permitting requirements for LFOs. 6 V.S.A. § 4851. These permitting requirements continue to prohibit

AOA from issuing an LFO permit without making an affirmative finding "that the animal wastes generated by [the LFO] will be stored so as not to generate runoff from a 25-year, 24-hour storm event." § 4851(f).

Under Vermont's new agricultural permitting requirements, 700 mature dairy animals are required before the permitting requirements for constructing a barn or operating a farm are triggered. 6 V.S.A. § 4851(a), (b). However, an AFO that houses 200 to 699 mature dairy animals now constitutes a "medium farm" under Vermont law. 6 V.S.A. § 4857(2). A person may not operate a medium farm without an individual or general waste permit issued by AOA. 6 V.S.A. § 4858. Permit conditions must be at least as stringent as those required for federal CAFOs. 6 V.S.A. § 4858(b)(1). General permitting requirements cannot take place until February 13, 2006, or the adoption of rules by AOA, or the resolution of any court proceeding delaying the implementation of general or individual permitting requirements, whichever is later. Act 149, § 14(c). If AOA determines that a small or medium farm is a significant contributor of pollutants, AOA may require the farm to obtain an individual waste permit. 6 V.S.A. § 4858(d). However, AOA must adopt rules before this provision takes effect. Act 149, §§ 9, 14(b); 6 V.S.A. § 4858(b).

Act 149 provides that ANR and AOA must make arrangements to collaborate in a manner that will satisfy the delegation requirements for Vermont's administration of the NPDES permitting program. Act 149, § 10. The Agricultural Water Quality Act provides that any person aggrieved by a permitting decision of the Secretary of Agriculture relating to medium and small farms may appeal to Environmental Court. 6 V.S.A. § 4861. The statute continues to limit appeals from LFO permitting decisions to the farmer. *See* 6 V.S.A. § 4855.

When questioned about the applicable Vermont law at the oral arguments in this matter, Hinsdale declined to assert a vested right in the Agricultural Non-Point Sources Pollution Reduction Program but rather asserted that the Board would lack jurisdiction over this appeal regardless of whether that law or the Agricultural Water Quality Act controlled. The Agricultural Non-Point Sources Pollution Reduction Program governs this case because it was in effect when Hinsdale filed its application for an LFO permit and because the pertinent provisions of the Agricultural Water Quality Act are not yet in effect.

ANR and AOA have entered into two MOUs relating to agricultural water pollution. The first, signed April 16, 1993, by its terms implements the requirements of section 1259(i) of the Vermont Water Pollution Control Act, 10 V.S.A. § 1259(i). As noted, section 1259(i) directs these agencies to enter into an MOU for the purpose of delegating agricultural nonpoint-source pollution control from ANR to AOA. The 1993 MOU deals with accepted agricultural practices (AAPs), agricultural best management practices (BMPs), financial assistance, and enforcement, all of which are addressed by the Agricultural Non-Point Sources Pollution Reduction Program and

will continue to be addressed by the Agricultural Water Quality Act rather than by the Vermont Water Pollution Control Act. The MOU makes clear that ANR's regulation of point-source pollution is not included in the delegation of responsibilities to AOA. A second MOU between ANR and AOA, dated October 14, 1999, expressly addresses CAFO and LFO regulation and focuses on the manure management of LFOs–the subject of this appeal. The 1999 MOU reflects the statutory scheme under which AOA makes LFO permitting determinations pursuant to the Agricultural Non-Point Sources Pollution Reduction Program and ANR makes CAFO permitting determinations pursuant to the Vermont Water Pollution Control Act.

The 1999 MOU expressly provides that it is not intended to alter ANR's relationship or obligation to EPA with regard to Vermont's administration of the NPDES permitting program. Thus, the MOU states that "Issuance of a LFO permit by [AOA] will not preclude the need for a NPDES permit from ANR." 1999 MOU § 5.C.ii. Under this MOU, as under the applicable statutes, AOA makes the LFO permitting decision, and ANR makes the CAFO permitting decision. The MOU does not make ANR's comments with regard to an LFO permit application binding on AOA. The LFO permitting decision is for AOA to make upon consideration of ANR's comments. "ANR shall retain primary responsibility for inspection, investigations and enforcement of CAFO program violations." 1999 MOU § 7.D.

The 1999 MOU calls for information sharing between ANR and AOA generally. With regard to permitting, the MOU provides that AOA will submit copies of all draft LFO permits to ANR for comment and that ANR will likewise submit copies of draft CAFO permits to AOA for comment. With regard to ANR's comments on draft LFO permits, the MOU states that AOA "will request that ANR provide written comments within 5 business days; comments will be accepted until permit issuance." 1999 MOU § 4.A.

VI. Analysis

Citizens filed this appeal to the Board pursuant to section 1269 of the Vermont Water Pollution Control Act, 10 V.S.A. § 1269, *amended by* Act 115 of 2004, § 29. At least some of the moving parties contend that ANR's actions in this matter were not taken under the Vermont Water Pollution Control Act, 10 V.S.A. §§ 1250-1283, *amended by* Act 115 of 2004, but rather under the Agricultural Non-Point Sources Pollution Reduction Program, 6 V.S.A. §§ 4810-4855, *amended by* Act 149 of 2004. If that were so, ANR's actions would not be appealable to the Board because the Agricultural Non-Point Sources Pollution Reduction Program provides for appeals to Environmental Court from decisions of the Secretary of Agriculture, and even then, the parties to the appeal are limited to the permit applicant and the Secretary. *See* 6 V.S.A. § 4855. *See also* Agricultural Water Quality Act, § 4861 (providing that appeals from permitting decisions of Secretary of Agriculture relating to medium and small farms are taken to Environmental Court).

ANR has no authority to act under the Agricultural Non-Point Sources Pollution Reduction Program of title 6, or the Agricultural Water Quality Act of title 6, which are administered by AOA. However, ANR retains the exclusive authority under the Vermont Water Pollution Control Act of title 10 to determine whether any operation requires a discharge permit. The 1993 and 1999 MOUs between ANR and AOA reflect this division of responsibility. Accordingly, ANR acted under the Vermont Water Pollution Control Act of title 10 when it decided that Hinsdale does not need a discharge permit for its proposed dairy farm.

Section 1269 of the Vermont Water Pollution Control Act, 10 V.S.A. § 1269, *amended by* Act 115 of 2004, § 29, provides in pertinent part as follows: "Any person or party in interest aggrieved by an act or decision of the secretary [of ANR] pursuant to this subchapter may appeal to the board within thirty days. The board shall . . . issue an order affirming, reversing or modifying the act or decision of the secretary . . . ." The subchapter referenced is the Vermont Water Pollution Control Act.

If read broadly, the foregoing language of section 1269 could authorize the Board to hear an appeal of virtually any act or decision of ANR relating to water pollution control, including decisions not to issue discharge permits and other decisions about the meaning of the law. However, reading section 1269 to authorize an appeal of any act or decision of ANR to the Board is inconsistent with general principles of administrative law, under which only final agency actions may be appealed. *See* 2 Am. Jur. 2d Administrative Law § 458 ("Even though a statute [relating to judicial review of actions of an administrative agency] does not contain the word 'final,' qualities of administrative finality in an order or administrative determination are nevertheless essential to invocation of judicial review."). The pivotal issue in this case is whether the acts or decisions that Citizens has appealed to the Board are final acts or decisions of ANR.

A. Appealability of Agency Acts or Decisions

Generally, an agency action is not final and appealable if the action does not represent the consummation of the agency's decision-making process and if the action does not determine rights or obligations or carry legal consequences. 3 Richard J. Pierce, Jr., Administrative Law Treatise § 15.11 (4th ed. 2002). *See also Franklin v. Massachusetts*, 505 U.S. 788, 797-798 (1992) (finding action that does not complete agency's decision-making process or directly affect parties constitutes tentative recommendation rather than reviewable final and binding determination under federal agency law). Agency actions must be final to be appealable in order to prevent piecemeal review and to insulate the ordinary duties and policy functions of executive departments from interference by the courts. 2 Am. Jur. 2d Administrative Law §§ 446, 704. *See also Norton v. Southern Utah Wilderness Alliance*, ___ U.S. ___, 124 S. Ct. 2373, 2379-2381 (2004) (finding that limiting review of claims to compel agency action to cases involving failure to

take legally-required, discrete action protects agency from undue judicial interference with lawful agency discretion and avoids judicial entanglement in abstract policy disagreements).

As a general matter, an agency action for which there is no other adequate remedy may be appealed unless the action has been committed by law to the agency's discretion or if a statute precludes review. 3 Pierce § 17.6. An agency's inaction or failure to act may be appealable if the agency is under a clear statutory duty to act. *Id.* Thus, inaction is tantamount to a final agency action if the inaction has the same impact on the parties as denial of relief. 2 Am Jur. 2d Administrative Law § 444. *See also Associacao Dos Industriais v. United States*, 828 F. Supp. 978, 985 (Ct. Int'l Trade 1993) (finding that when inaction has same impact on parties as denial of relief, agency inaction may be tantamount to final action); *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987) (finding agency inaction not appealable in absence of clear-cut nondiscretionary duty of timeliness).

Informal agency actions are not ripe for review unless the informal action imposes an obligation, denies a right, or fixes some legal relationship. 2 Am Jur. 2d Administrative Law §§ 456, 462. By the same token, a matter is ordinarily not ripe for review while the agency is studying whether to take action. *Id.* § 444. Even if non-binding agency actions have persuasive power, they are not final and appealable. 3 Pierce § 15.15.

With regard to review of NPDES permitting decisions, federal regulations provide in pertinent part as follows:

> All States that administer or seek to administer a program under this part shall provide an opportunity for judicial review in State Court of *the final approval or denial of permits* by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit (see § 509 of the Clean Water Act). A State will not meet this standard if it narrowly restricts the class of persons who may challenge *the approval or denial of permits* (for example, if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review.)

40 C.F.R. § 123.30 ("Judicial review of approval or denial of permits") (emphasis added). These regulations do not require delegated states to provide for review of informal agency decisions *not* to issue NPDES permits. With regard to permitting decisions, section 509(B)(1) of the Clean Water Act, 33 U.S.C.A. § 1369(b)(1) provides for judicial review of an action to issue or deny a

permit, but does not mention review of an informal agency decision that a permit is not required. *See also* Clean Water Act § 505(a)(2), 33 U.S.C.A. § 1365(a)(2) (subjecting EPA to citizen suits for failure to perform nondiscretionary act or duty).

Although the Board has never squarely addressed the issues presented in this appeal, the Board has previously addressed the limits of its appellate jurisdiction. In *In re Vernon Squires*, No. EPR-94-06, Dismissal Order (Vt. Water Res. Bd. Jan. 3, 1995), the Board held that ANR's interpretations of a previously issued subdivision permit were not appealable. In *In re Amhowitz*, No. CUD-99-08, Mem. of Decision and Order on Prelim. Issues (Vt. Water Res. Bd. Mar. 21, 2000), the Board considered a third-party appeal under section 1269 of the Vermont Water Pollution Control Act, 10 V.S.A. § 1269, *amended by* Act 115 of 2004, § 29, from a decision by ANR to grant a conditional use determination (CUD) for construction in a wetland. The appellants in *Amhowitz* attempted to raise matters that the permit applicants did not ask ANR to consider in their CUD application. The Board held that it does not have jurisdiction to review on appeal matters that ANR has not first determined are subject to its jurisdiction and then reviewed and addressed in a written determination under applicable law. The Board has recently held that it has jurisdiction under section 1269 over an appeal from ANR's denial of a petition to require dischargers of stormwater into certain stormwater-impaired waters to obtain NPDES permits. *See In re Stormwater NPDES Petition*, No. WQ-03-17, Mem. of Decison (Apr. 1, 2004). In that case, ANR was subject to an affirmative duty to formally act on a legally-authorized petition within a specified period of time.

The Board does not have original jurisdiction over discharge permitting decisions. Moreover, it is undisputed that ANR's enforcement actions, much less its enforcement discretion, are not appealable to the Board. *See* 10 V.S.A. § 1274 (authorizing superior courts to hear enforcement and penalty actions relating to violations of Water Pollution Control Act); 10 V.S.A. § 8012 (authorizing Environmental Court to conduct hearings on ANR enforcement orders relating to water pollution control); 10 V.S.A. § 8221, *amended by* Act 115 of 2004, § 73 (authorizing superior courts to hear enforcement and penalty actions relating to water pollution control).

B. Appealability of ANR's Decision That Hinsdale's Proposed Dairy Farm Does Not Require a Discharge Permit

Neither ANR's comments to AOA with regard to Hinsdale's LFO permit application nor ANR's decision that Hinsdale's proposed dairy farm does not require a discharge permit are appealable to the Board. ANR has not determined that Hinsdale's proposed dairy farm falls within its jurisdiction and has not issued a written determination based on an application or petition. Instead, ANR has made only the provisional decision that it will not take an enforcement

action against Hinsdale for discharging from its proposed dairy farm without a permit because from ANR's current perspective, there will be no discharge.

ANR's decision that Hinsdale's proposed dairy farm will not result in a discharge and does not require a discharge permit imposed no duty to act on anyone's part and resulted in no change to the legal status quo. This decision is not binding on ANR or anyone else, including AOA. The Board has no jurisdiction to review the conversations between ANR staff and the staff of other agencies or members of the regulated community in the absence of a final agency action that ANR has had an opportunity to prepare for legal review.

ANR's decision that Hinsdale does not need a discharge permit at this time does not affect anyone's rights because the LFO permitting decision with respect to Hinsdale's farm falls within the jurisdiction of AOA, not ANR. Should ANR later decide that Hinsdale requires a discharge permit, Hinsdale will then have an opportunity to formally contest any ANR decision on a permit application that Hinsdale chooses to submit or any enforcement action that ANR chooses to take. One defense available to Hinsdale, if supported by the facts, will be that there is no discharge from its operation. By the same token, Citizens may appeal from any decision that ANR makes on any permit application that Hinsdale submits for ANR's review, *see* 10 V.S.A. § 1269, *amended by* Act 115 of 2004, § 29. Citizens may file a citizens suit under section 505 of the Clean Water Act, 33 U.S.C.A. § 1365, if Hinsdale discharges in violation of CAFO permitting requirements. Citizens may not challenge ANR's enforcement discretion before this Board.

ANR has the discretion to determine whether Hinsdale requires a discharge permit, and ANR is free at any time to determine that a discharge permit is necessary. Under the 1999 MOU between ANR and AOA, ANR has an opportunity to comment on a draft LFO permit but is not required to make a formal determination. To convert an informal, non-binding comment made by ANR into an appealable action would violate fundamental principles of administrative law relating to the appealability of final agency actions. ANR's comments related to an intermediate determination made by AOA that a discharge permit was not required in the course of AOA's review of an LFO permit application. *See* 6 V.S.A. § 4851(f). The effects of ANR's decision that Hinsdale does not need a discharge permit were entirely dependent on the decisions of AOA for any binding effect. ANR's decision was therefore not final and thus had no force of law. Accordingly, the Board concludes that it does not have jurisdiction over Citizens's appeal from ANR's decision that Hinsdale's proposed dairy farm does not require a discharge permit.

C. Appealability of ANR's Alleged Procedural Errors

AOA cannot issue an LFO permit without first determining that there will be no discharge. *See* 6 V.S.A. § 4851(f). However, ANR is the agency with the duty and authority to determine

whether a discharge permit is required. *See* 10 V.S.A. § 1259. Under the 1999 MOU between ANR and AOA, AOA *must* consult with ANR on the issue of whether an LFO needs a discharge permit, and AOA *must* ask ANR to comment on draft LFO permits in writing. 1999 MOU § 4.A. Moreover, the 1999 MOU provides that AOA and ANR *will* share information with respect to LFO discharges. 1999 MOU § 3.A.

Citizens has argued that ANR not only erroneously decided that Hinsdale's proposed dairy farm does not require a discharge permit, but also failed to follow the procedures established by the 1999 MOU for reaching that decision. Procedural errors on the part of ANR do not constitute final acts or decisions that are appealable to the Board under section 1269 of the Vermont Water Pollution Control Act, 10 V.S.A. § 1269, *amended by* Act 115 of 2004, § 29. Under section 1269, the Board's standard of review on appeal is *de novo*. While the Board may remand a matter to ANR, the Board has no authority to review ANR's processes in the absence of a final, binding decision within the Board's appellate jurisdiction. The Board has not been granted the powers of equity to order ANR to fulfill its legal obligations. *See* 10 V.S.A. § 905 (defining duties and powers of Board), *repealed by* Act 115 of 2004, § 119(b) (effective Jan. 31, 2005). *See also In re Sugarbush*, Nos. DAM-92-02 and WQ-92-05, Findings of Fact, Conclusions of Law and Order at 39 (Vt. Water Res. Bd. Feb. 8, 1993) (holding authority to provide general equitable relief beyond Board's jurisdiction and reserved for courts). Accordingly, the Board concludes that it does not have jurisdiction over Citizens's appeal from ANR's alleged failure to follow the procedures established by the 1999 MOU.

D. Declaratory Relief

Citizens has alleged that the permitting decision of ANR that precipitated Citizens's appeal "is akin to a declaratory ruling–a clearly appealable act." (Appellant's Mem. in Support of Bd. Jurisdiction and Opp'n to Mots. to Dismiss at 1.) The Board does not have jurisdiction over appeals from declaratory rulings by ANR. *See* 3 V.S.A. §§ 808, 815(a). *See also In re Verburg/Wesco*, No. EPR-91-03, Order (Vt. Water Res. Bd. Jan. 9, 1992) (holding that Board lacks jurisdiction over declaratory ruling issued by ANR). Although finding that ANR's actions amount to a declaratory ruling would divest the Board of jurisdiction over this appeal, ANR's actions cannot fairly be characterized as a declaratory ruling because neither Citizens nor any other party filed a petition for declaratory relief. *See* 3 V.S.A. § 808.

E. Mootness and Standing

Certain parties have argued that ANR's decision that Hinsdale's LFO does not need a discharge permit is moot because AOA ultimately denied the permit. This argument assumes that

ANR's decision was appealable in the first place, which is incorrect. Mootness therefore does not represent a useful basis for determining whether the Board has jurisdiction in this matter.

The argument has also been made that because AOA has denied Hinsdale's permit application, Citizens lacks legal standing because there has been no concrete injury to Citizens' interests. However, this argument also presupposes that the Board would have had jurisdiction if AOA had decided to grant the permit. Thus, determining whether the Board has jurisdiction in this matter on the basis of Citizens's legal standing would overlook the essential issue of whether ANR's acts or decisions were final and appealable and thus ripe for review.

In view of the Board's decision to dismiss this appeal for the reason that the acts or decisions taken by ANR were not administratively final and appealable under section 1269 of the Vermont Water Pollution Control Act, 10 V.S.A. § 1269, *amended by* Act 115 of 2004, § 29, the Board does not reach the issues of mootness and legal standing that have been presented for decision.

VII. Order

It is hereby **Ordered**:

1. Applicant's May 14, 2004 Motion to Dismiss is **granted**.

2. ANR's May 28, 2004 Motion to Dismiss for Lack of Jurisdiction is **granted**.

3. This appeal is **dismissed** for lack of jurisdiction.

4. Because this appeal is dismissed on other grounds, the Board does not address the issues presented by ANR's May 6, 2004 Motion to Dismiss for Lack of Standing and Mootness or AOA's May 28, 2004 Motion to Dismiss.

Dated at Montpelier, Vermont this 14th day of October, 2004.

WATER RESOURCES BOARD
By its Chair

/s/ John F. Nicholls
_____
John F. Nicholls

Concurring:

Lawrence J. Bruce, Jr., Member
Michael J. Hebert, Member
Joan B. Nagy, Member
John D. E. Roberts, Vice-Chair