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Vermont Superior Court
Washington Unit
24-CV-03770

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
DOCKET NO. 24-CV-03770

CONSERVATION LAW FOUNDATION, INC.)
)
v.)
)
JULIA S. MOORE,)
in her official capacity as)
SECRETARY OF NATURAL RESOURCES)

DEFENDANT'S MOTION TO DISMISS

Pursuant to Vermont Rule of Civil Procedure 12(b)(6), Defendant Julia S. Moore (the "Secretary") moves to dismiss the Complaint in its entirety with prejudice. In support of this motion, the Secretary respectfully submits the following Memorandum of Law.

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MEMORANDUM OF LAW

Plaintiff Conservation Law Foundation, Inc. ("CLF") has filed this lawsuit seeking to challenge the technical substance of Agency of Natural Resources' ("ANR's") determination that it was not necessary to update rules under the Global Warming Solutions Act ("GWSA" or "Act") before 2025. However, while CLF's Complaint is filled with technical details about the alleged shortcomings of ANR's determination, the Act does not authorize such a lawsuit. The relevant provision of the GWSA permits only deadline suits, which apply if ANR fails to adopt rules it is required to adopt pursuant to statutory deadlines. It does not permit challenges to ANR's substantive determination regarding whether it is "necessary" to update rules in the first instance, nor does it permit challenges to the process ANR followed in conducting its review. Even if it did, the Act does not require that public meetings be held in conjunction with ANR's review of existing rules—only when ANR is adopting rules.

CLF's lawsuit is not proper, and this action should be dismissed with prejudice.

I. STATUTORY AND FACTUAL BACKGROUND

A. Statutory Framework

In 2020, the Vermont Legislature passed the Global Warming Solutions Act, 2020 Vt. Acts & Resolves No. 153 (amending 10 V.S.A. § 578 and codifying 10 V.S.A. chapter 24), a law that amended prior discretionary goals for reductions in greenhouse gas ("GHG") emissions to create a timetable for mandatory reductions.

The Act created three different reduction deadlines, with reductions increasing in magnitude by January 1 of 2025, 2030, and 2050. 10 V.S.A. § 578(a). In addition to creating deadlines for GHG reductions, the GWSA created the Vermont Climate Council, a 23-member body composed of the heads of several administrative agencies as well as legislative appointees. *Id.* § 591(a). The Climate Council was required to adopt a Vermont Climate Action Plan ("CAP"), which sets forth "the specific initiatives, programs, and strategies" to accomplish Vermont's GHG reductions. *Id.* § 592(b). The Act directed ANR to adopt rules "consistent with the specific initiatives, programs, and strategies" in the CAP, with the first set of rules due by December 1, 2022. *Id.* § 593(a), (b).

The GWSA envisions that ANR will periodically review the rules it has adopted under the CAP to ensure they are still adequate to meet the Act's GHG reduction deadlines. Specifically, the Act requires that on or before July 1, 2024, the Secretary shall "review and, if necessary, update" the rules adopted under the CAP, and that "[i]n performing this review and update, the Secretary shall observe the requirements of subsection (c) of this section." *Id.* § 593(d). Subsection (c) essentially applies whenever ANR adopts rules under the Act and requires ANR to "conduct public hearings across the State concerning the proposed rules." *Id.* § 593(c). In addition to and regardless of ANR's periodic review of rules, the GWSA directs ANR to adopt rules consistent with the CAP in 2026 and 2040. *Id.* § 593(e), (g).

Separately, 10 V.S.A. § 594(a) authorizes a cause of action commonly referred to as a "deadline suit," providing that: "any person may commence an action based

upon the failure of the Secretary . . . to adopt or update rules pursuant to the deadlines of section 593 of this chapter." Section 594(b) authorizes a second cause of action not at issue here (if ANR's rules are a "substantial cause" of the State's failure to meet GHG reductions after Vermont's Greenhouse Gas Emission Inventory indicates the rules have not achieved reduction requirements). *Id.* § 594(b).

B. Factual Background

After passage of the GWSA, the newly created Climate Council issued the initial CAP in December 2021. Compl. ¶ 54. The CAP identified five categories of pathways for GHG reductions and, within each pathway, assigned actions to various entities (e.g., to the Legislature, ANR, the Agency of Transportation, the Department of Public Service, the Public Utility Commission, etc.). *See* Vt. Climate Council, *Initial Vermont Climate Action Plan* 65-135 (Dec. 2021).[1] One of these actions was for ANR to adopt a suite of California's motor vehicle emission standard rules: Advanced Clean Cars II, Advanced Clean Trucks, Low NOx Heavy-Duty Omnibus, and Phase 2 Greenhouse Gas rules. *Id.* at 72, 253. On December 1, 2022, ANR adopted these rules, collectively known as the Vermont Low Emission Vehicle

[1]https://outside.vermont.gov/agency/anr/climatecouncil/Shared%20Documents/Initial%20Climate%20Action%20Plan%20-%20Final%20-%2012-1-21.pdf?_gl=1*1uee9r8*_ga*OTEyMDA1OTUwLjE3Mjg4MjQxMDk.*_ga_V9WQH77KLW*MTczMTM0MjU3OS4xMi4wLjE3MzEzNDI1ODYuMC4wLjA. ANR is providing information on the CAP and the Climate Council as helpful background for the Court, but is not relying on this information for its arguments and does not need the Court to take judicial notice of the contents of the CAP or the Climate Council website.

and Zero Emission Vehicle Rule, consistent with the CAP.[2] Compl. ¶ 56. As part f that rule adoption process, ANR held a series of public meetings and hearings consistent with 10 V.S.A. § 593(c).[3]

The Climate Council is comprised of several subcommittees including the Cross-Sector Mitigation Subcommittee and the Science & Data Subcommittee, which focus on scientific and technical issues related to reducing greenhouse gas emissions. *See* 10 V.S.A. 591(c)(2).[4] The Secretary is a member of the Climate Council and the Science & Data Subcommittee, and ANR's Climate Action Office provides administrative, technical and legal support to the Council and generally supports implementation of relevant strategies set forth in the CAP across ANR and coordinates climate action across other state agencies.[5] The Council and the subcommittees meet regularly and their meetings are open to the public, with calendars and agendas posted online.[6] ANR's Climate Action Office also provides information for the public about how to get involved with the Climate Council.[7]

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[2] 12-30-39 Vt. Code R. § 40-101 *et seq*. (Chapter 40, final adopted version of the Vermont Low Emission Vehicle and Zero Emission Vehicle Rule).

[3] Department of Environmental Conservation, Recently Adopted and Proposed Regulations, https://dec.vermont.gov/air-quality/laws-and-regulations/recently-adopted-and-proposed-regulations#:~:text=The%20Zero%20Emission%20Vehicle%20Rules,the%20impacts%20of%20climate%20change (last visited Nov. 19, 2024).

[4] *See also* Vermont Climate Council, https://climatechange.vermont.gov/readtheplan/climate-council-membership (listing members and subcommittees).

[5] Climate Action Office, Agency of Natural Resources, https://anr.vermont.gov/about-us/secretary-office/climate-action-office (last visited Nov. 19, 2024).

[6] Climate Change in Vermont/Calendar, https://climatechange.vermont.gov/calendar (click on calendar entry for meeting information, agenda, minutes, etc.).

[7] Climate Change in Vermont/Get Involved, https://climatechange.vermont.gov/get-involved/get-involved.

On July 1, 2024, the Secretary wrote to inform the Climate Council that ANR had conducted its review under 10 V.S.A. § 593(d) and had determined it was not necessary to update the rules it adopted under the initial CAP. Compl. Ex. A at 15-17, Letter from J. Moore to Vermont Climate Council (July 1, 2024). The Secretary explained the technical basis for this determination and the data and reports that ANR had relied upon in its review.

On July 23, 2024, CLF emailed a "Notice of Alleged Violation" to Secretary Moore, copying the Governor's Office, the Attorney General's Office, the Climate Council, and multiple legislators/legislative committees. *Id.* at 13. The Notice expressed CLF's disagreement with the technical bases underlying the Secretary's determination and the fact that ANR had not held public hearings in making its determination. *Id.* at 2-13. The Notice did not argue that the Secretary had failed to comply with the review deadline of 10 V.S.A. § 593(d). *Id.* CLF subsequently filed this suit on September 24, 2024. Just as in CLF's Notice to the Secretary, CLF's lawsuit seeks to challenge the technical substance of the Secretary's determination, without alleging any violation of the deadline provisions upon which it purports to rely.

II. LEGAL STANDARD

On a motion to dismiss for failure to state a claim, the question is whether, assuming all "facts pleaded in the complaint are true" and making "all reasonable inferences in the plaintiffs' favor," there exists a basis for relief. *See Montague v. Hundred Acre Homestead, LLC,* 2019 VT 16, ¶ 10, 209 Vt. 514, 208 A.3d 609. A

motion to dismiss only should be granted when "'there exist no facts or circumstances that would entitle the plaintiff to relief.'" *Id.* (citation omitted).

However, where the law does not support the Plaintiff's claims, the claims should be dismissed. *See Montague,* 2019 VT 16, ¶ 10 ("The purpose of a dismissal motion 'is to test the law of the claim, not the facts which support it.'") (citation omitted); *Neitzke v. Williams,* 490 U.S. 319, 326 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law.").

III. ARGUMENT

A. ANR has discretion to decide whether regulations need to be updated under the GWSA.

Environmental statutes like the GWSA impose a range of duties on administrative agencies – these duties can be discretionary, *i.e.,* giving the agencies leeway to determine whether and how to act, or non-discretionary, *i.e.,* requiring a specific action by a date certain. The distinction between non-discretionary and discretionary duties is "most clear when the mandate is simply to make a decision by a deadline." *Citizens for Const. Integrity v. U. S.*, 70 F.4th 1289, 1301 (10th Cir. 2023); *see also Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 65 (2004) ("when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be").

The question often arises under the citizen suit provisions of federal environmental statutes, which typically allow suits against the United States Environmental Protection Agency (EPA) for failure to "perform any act or duty

which is not discretionary." *See, e.g.,* 42 U.S.C. § 7604 (Clean Air Act); *Const. Integrity,* 70 F.4th at (holding that suit based on the EPA's failure to make an application decision "before the statutory deadline expired" was proper, but "the decision about *whether* to approve the . . . application 'inevitably required the exercise of independent judgment and discretion'" and thus was not subject to citizen suit) (emphasis in original). It is similar to mandamus under Vermont law. *See Vt. State Employees Ass'n v. Vt. Crim. Just. Training Council,* 167 Vt. 191, 195, 704 A.2d 769, 771 (1997) ("Generally, the purpose of mandamus is to require a public officer to perform a simple and definite ministerial duty imposed by law. Thus, mandamus ordinarily is not available to compel discretionary decisions.") (internal citation omitted).

Duties are discretionary "[i]f the agency has a choice." *Const. Integrity,* 70 F.4th at 1305. Courts only will find a nondiscretionary duty "if there is no room for choice by the agency, as when it must make a decision by a certain date or issue a notification once it makes the requisite findings." *Id.; see also id.* at 1300-05 (collecting cases). For example, in *Our Child.'s Earth Found. v. EPA,* the court looked at a Clean Water Act provision requiring EPA to review effluent limitation regulations every five years and revise them "'if appropriate.'" 527 F.3d 842, 848-49 (9th Cir. 2008). The court noted it was "undisputed" that EPA had a mandatory obligation to review the regulations "for possible revision" and that it was "also undisputed that EPA's ultimate decision *whether* to revise the guidelines and

limitations is discretionary, as 'appropriate.'" *Id.* at 849 (emphasis in original).[8] In contrast, where a statute directs an agency to adopt regulations by a date certain without qualification, the duty to adopt is non-discretionary. *See Sierra Club v. EPA,* 850 F. Supp. 2d 300, 302, 304 (D.D.C. 2012) (where Clean Air Act "direct[ed] the EPA to promulgate emissions standards for major sources of hazardous air pollutants by November 15, 2000," noting that EPA had "non-discretionary duty to issue those regulations by November 15, 2000"); 42 U.S.C. § 7412(e)(1) (providing EPA "shall promulgate regulations . . . not later than 10 years after November 15, 1990").

In this case, the GWSA prescribes both discretionary and nondiscretionary actions by ANR. Section 593(d) prescribes that the Secretary "*shall*, on or before July 1, 2024, review and, *if necessary*, update the rules" adopted under the initial CAP. 10 V.S.A. § 593(d) (emphases added). This provision creates a non-discretionary duty to complete a review by the date specified – the Secretary *shall* do so. But the statute gives the Secretary discretion to determine whether or not it is *necessary* to update the rules – in other words, a non-discretionary duty to update rules is triggered only if the Secretary first determines, in her discretion, that it is necessary to update rules. *See Const. Integrity,* 70 F.4th at 1303 (describing cases where "the non-discretionary duty is triggered only if the discretionary duty is exercised in a particular way"). For example, in *City of Seabrook v. Costle*, 659 F.2d 1371, 1374-75 (5th Cir. 1981), the court held that EPA had discretion in

[8] The court went on to hold that EPA was not required to conduct its review in a particular manner. *Our Child.'s Earth,* 527 F.3d at 851.

determining whether a state implementation plan under the Clean Air Act had been violated. Only after EPA had exercised its discretion in determining that a violation had occurred did it trigger a non-discretionary duty under the Clean Air Act to notify violators. *Id.* at 1374.

As discussed in the following section, this distinction between the Secretary's discretionary and non-discretionary duties is key to understanding this action, and it bars CLF from using 10 V.S.A. § 594(a) to challenge the Secretary's decision not to update the regulations.

B. The GWSA does not authorize a suit challenging the substance of a discretionary determination that updating regulations is not necessary.

Section 594(a) creates a cause of action commonly referred to as a "deadline suit," which permits citizens to challenge agencies for failing to take specific non-discretionary actions by statutory deadlines.[9] Deadline suits have many features that are distinct from other suits challenging agency action – on the one hand, courts exhibit less deference to agencies in the context of a deadline suit.[10] However, the flip side of this reduced deference is that the relief that courts may grant in a

[9] *See generally* U.S. Gov't Accountability Off., GAO-15-34, 2014 WL 7531907, Environmental Litigation: Impact of Deadline Suits on EPA's Rulemaking Is Limited, 3 (2014) (defining deadline suit as "a lawsuit in which an individual or entity sues because [an agency] has allegedly failed to perform any nondiscretionary act or duty by a deadline established in law"); Hannah Perls, *Deconstructing Environmental Deregulation Under the Trump Administration*, 45 Vt. L. Rev. 591, 611 (2023) (noting that many environmental laws empower citizen suits "compelling [an] agency to issue rules by specific deadlines set [by] statute").

[10] *See generally* Emily Hammond Meazell, *Deference and Dialogue in Administrative Law,* 111 Columbia L. Rev. 1722, 1731 ("courts exhibit far less deference in deadline suits" than in other challenges under the federal administrative procedure act); *Sierra Club v. Thomas*, 658 F. Supp. 165, 175 (N.D. Cal. 1987) (rejecting EPA's arguments for delay and enforcing strict statutory deadline in deadline suit).

deadline suit is highly circumscribed and limited solely to enforcing non-discretionary deadlines set by statute, without second-guessing agency reasoning and discretion. *See, e.g.*, *Sierra Club v. McCarthy*, Case No. 13-cv-03953-SI, 2015 WL 889142, at *10 (N.D. Cal. Mar. 2, 2015) ("the appropriate relief in a deadline suit is to compel the agency to act, rather than ordering a particular substantive outcome").

Federal courts have disallowed deadline-type suits where the plaintiff sought to challenge the substance of an agency decision vs. the agency's failure to make the decision (or complete some other specific act by a date certain) in the first instance. *E.g.*, *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64-66 (2004) (rejecting suit challenging discretionary agency action rather than action subject to "categorical imperative"); *Sanitary Bd. of City of Charleston v. Wheeler*, 918 F.3d 324, 331 (4th Cir. 2019) (rejecting citizen suit that challenged "paradigmatic example of agency discretion" because "[p]ut simply, citizens can compel the agency to take some action, but cannot dictate the substance of the resulting decision if it involves the agency's judgment"). For example, in *McCarthy*, the court rejected arguments that a consent decree would be unfair because the decree did not mandate particular nonattainment designations under the Clean Air Act, holding that "the appropriate remedy in a 'deadline' case such as this is to require EPA to issue designations pursuant to a schedule, not to mandate that EPA issue any particular designation." 2015 WL 889142, at *11; *see also id.* ("In a 'deadline suit' such as this, the appropriate remedy is to set a binding schedule for the EPA to make all remaining

designations, while preserving EPA's discretion to determine, based on available information, whether an area is in 'attainment' or 'nonattainment'").

Here, just as with the statutes at issue above, the provision cited by CLF in its Complaint authorizes solely a deadline suit, allowing a person to sue "based upon the failure … to adopt or update rules ***pursuant to the deadlines of section 593***." 10 V.S.A. § 594(a) (emphasis added). But as discussed above, ANR's duty to update rules only is triggered "*if necessary*" based on its review. Here too, the Court should leave the substance of ANR's determination to the agency's discretion.

Tellingly, CLF does not even cite the deadline suit cause of action—or any cause of action at all—in Counts I and II. Compl. ¶¶ 86-96. Instead, it simply alleges that ANR did not conduct a review or update rules "as required" by section 593(d) (which is not itself a cause of action). But as discussed above, 10 V.S.A. § 593(d) does not mandate a particular outcome of the Secretary's review, and the "requirement" to update rules is contingent on that outcome. And there is no dispute that ANR *did* conduct its review and make a determination by the July 1, 2024 deadline. CLF, then, cannot use the deadline suit provision of § 594(a) to bring an action challenging the exercise of ANR's discretion and nitpicking the technical substance that was the basis of ANR's determination.

In addition to being consistent with analogous federal case law, this interpretation is consistent with legislative history. During committee hearings prior to the passage of the GWSA, there was concern that the citizen suit provision would detract state resources away from mitigation and adaptation work to

defending lawsuits.[11] However, multiple commentators—including the former Vice President of CLF Vermont—expressed their understanding that the cause of action section in the bill was narrow. For example, the deadline suit was described as a "fairly simple" case where the court tells ANR to "get these rules done on a timeline" if ANR has not adopted the rules it is obligated to adopt.[12] Legislative Counsel noted that the deadline suit applies upon "the failure of ANR to come forward with rules in a timely fashion."[13] Similarly, the Attorney General's Office—which supported both the GWSA and the causes of action—explained that the deadline suit is not "a very complicated case . . . it either happened or it didn't."[14]

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[11] *See, e.g.,* Recording of February 11, 2020 meeting of House Committee on Energy and Technology, at 55:15 – 56:10 (testimony of assistant legislative counsel Luke Martland explaining that "the Secretary expressed concern that there were going to be resources that might be directed way from the issue of lowering greenhouse gas emissions and improving our State's resilience and instead directed toward litigation"), https://vermont.access.preservica.com/IO_4c5629d5-91ad-45f6-a040-5e2af1ec10aa/; Recording of January 23, 2020 meeting of House Committee on Energy and Technology at 48:24 – 49:45 (testimony of assistant legislative counsel Luke Martland explaining that protracted litigation in Massachusetts arose because law did not provide guidance on causes of action), https://vermont.access.preservica.com/IO_23c1e77d-cfbb-48d6-8368-dd38af4a357c/.

[12] Recording of January 24, 2020 meeting of House Committee on Energy and Technology at 2:05:20 – 2:06:31 (testimony of former CLF Vermont Vice President Jen Duggan); *also id.* at 2:09:55-2:12:00 (noting that "this is a really narrow cause of action section" and describing limitations), https://vermont.access.preservica.com/IO_6cd4877c-2eaa-4a00-b7ff-9237f1d0a098/.

[13] Recording of February 11, 2020 meeting of House Committee on Energy and Technology, at 00:53:35 – 00:56:25 (testimony of assistant legislative counsel Luke Martland about "narrower path" in cause of action section generally), https://vermont.access.preservica.com/IO_4c5629d5-91ad-45f6-a040-5e2af1ec10aa/.

[14] Recording of January 23, 2020 meeting of House Committee on Energy and Technology at 26:30 – 27:10 (testimony of Attorney General's Office), https://vermont.access.preservica.com/IO_23c1e77d-cfbb-48d6-8368-dd38af4a357c/. The Attorney General's Office testimony runs from 0:00:00-0:53:10. *See also* Recording of January 23, 2020 meeting of House Committee on Energy and Technology at 32:40 – 33:35 (statement of Professor Jennifer Rushlow of Vermont Law School describing two limited situations in which cause of action section permits suit), https://vermont.access.preservica.com/IO_a292164f-2d69-4740-b03c-89055fe71702/.

This testimony reflects the sensible understanding that the deadline suit is focused on the failure to meet a deadline—where there is actually an obligation to adopt or update rules. This would be the case if ANR had conducted its review and determined its rules *did* need to be updated, or if ANR failed to adopt rules consistent with the CAP at the regularly scheduled intervals in the GWSA. *See* 10 V.S.A. § 593(b), (e), (g).

Thus, Count I of CLF's Complaint should be dismissed, as the Secretary *did* conduct a review by the statutory deadline – Plaintiffs' claim that the review was "technically and mathematically insufficient" seeks merely to question the exercise of the Secretary's discretion and the substance of ANR's technical determination, which is impermissible within the narrow deadline suit provision created by 10 V.S.A. § 594(a). And Count II of CLF's Complaint must be dismissed as the Secretary had no non-discretionary duty to adopt or amend rules – such a duty would arise only after the Secretary had, in her discretion, determined that updating the rules was necessary.

C. The GWSA does not authorize a lawsuit challenging the process for the Secretary's review and, in any case, does not require public meetings where review indicates that no new regulations are required.

In Count III of its Complaint, CLF asserts that the Secretary was required to conduct public hearings in conducting her review. However, Count III should be dismissed because, as with the Secretary's substantive determination, the deadline suit does not provide a mechanism to challenge the Secretary's review process. Even if it did, the claim would fail.

CLF has again conflated the sequence of the duties imposed by the GWSA. 10 V.S.A. § 593(d) provides that "[i]n performing th[e] review and update, the Secretary shall observe the requirements of subsection (c)." In turn, subsection (c) provides that the Secretary "shall conduct public hearings across the State *concerning the proposed rules*" (emphasis added). Reading these two provisions in conjunction as they are intended, subsection (d) applies the public meeting requirements of the initial 2022 rulemaking process (*i.e.,* subsection (c)) to any rulemaking process that occurs in connection with the 2024 deadline. However, as discussed *supra*, the Secretary has no non-discretionary duty to update rules – rather, the Secretary first must "review" the rules and determine, in her discretion, whether updated rules are necessary. Put differently, subsection (c) refers to the public hearing requirements of the 2022 *rulemaking* process and subsection (d) merely incorporates those same requirements into any 2024 *rulemaking* under subsection (d).

Thus, while ANR certainly participated in and shared information as part of the Climate Council's public process, *see, e.g.,* Compl. ¶¶ 69, 73, ANR was not required to hold public meetings as part of its review. For this reason and because section 594(a) does not provide a cause of action to challenge ANR's review process in the first instance, CLF has failed to state a claim in Count III.

IV. CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court grant this motion and dismiss the Complaint in its entirety with prejudice.

DATED: November 22, 2024

STATE OF VERMONT

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