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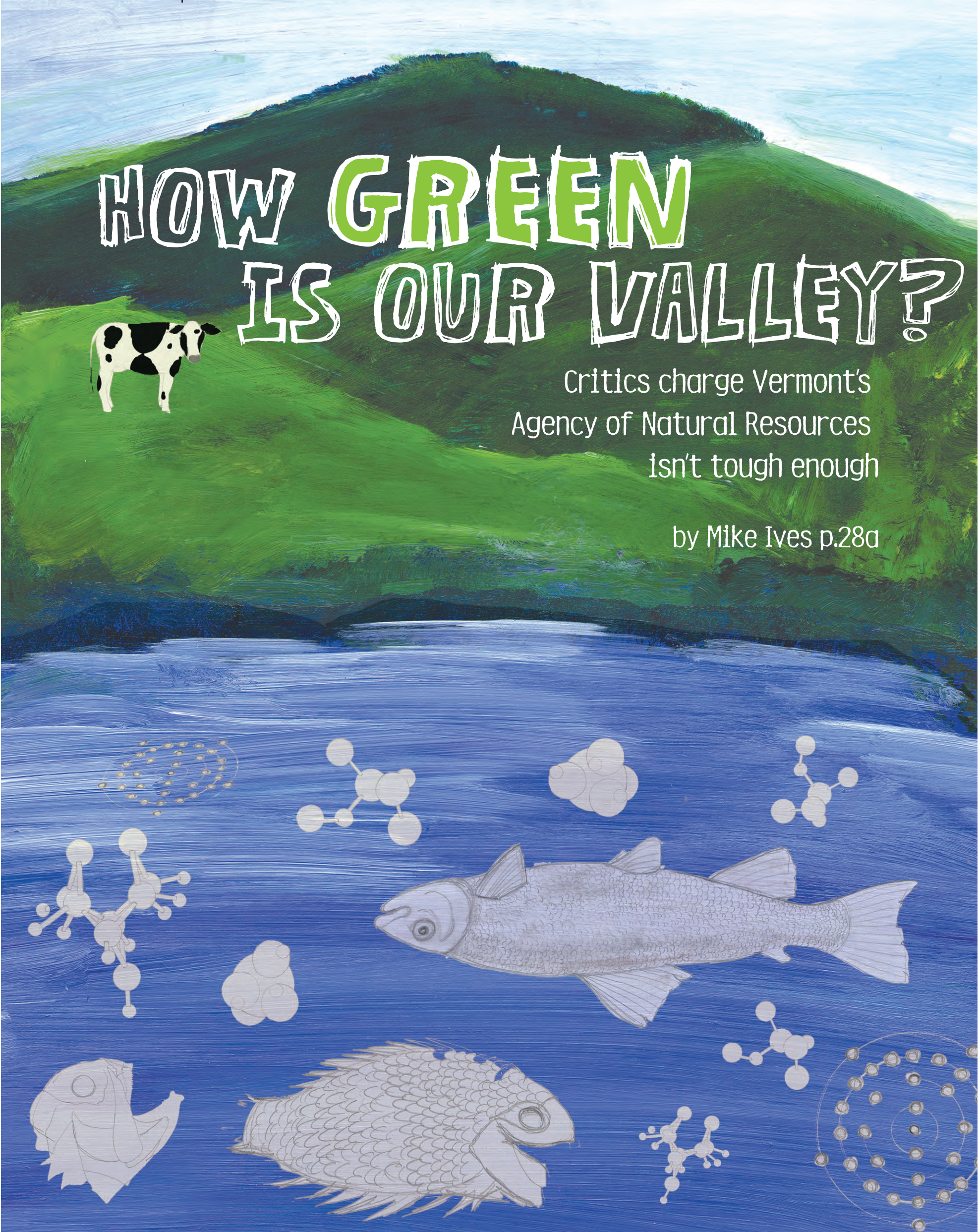
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HOW GREEN IS OUR VALLEY?



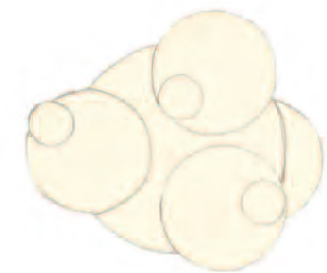
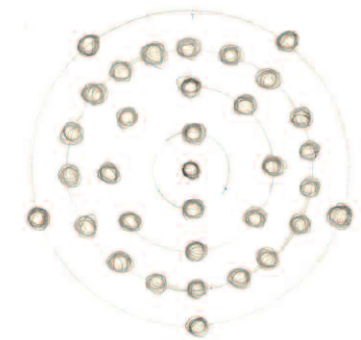
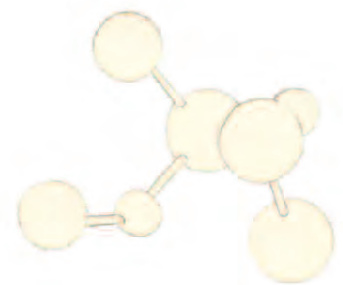
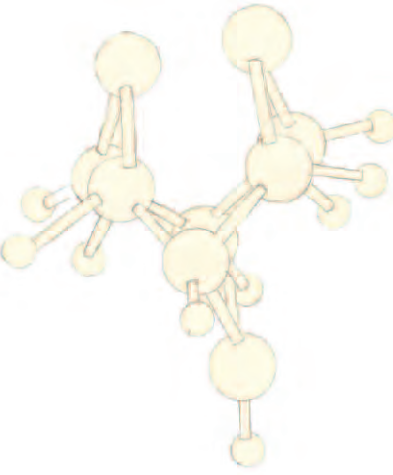
Critics charge Vermont's
Agency of Natural Resources
isn't tough enough

by Mike Ives p.28a



HOW GREEN IS OUR VALLEY?

Critics charge Vermont's Agency of Natural Resources isn't tough enough by Mike Ives



ILLUSTRATIONS:
STEFAN BUMBECK

HEADING SOUTH ON ROUTE 7 FROM

Brandon, drivers might notice a persistent, stationary cloud in the sky. It's possible to view it from up close, too — with proper credentials. Just turn right onto Kendall Hill Road, cruise past the cow pasture, covered bridge, tulip beds and cherry trees. Follow the bend in the road past Smith Pond. Climb a hill and cross some railroad tracks. Then stop to present your authorization forms at the OMYA processing plant.

Inside this sprawling, 385-acre complex of smoke stacks and windowless refineries in Florence, machines produce calcium carbonate — a material that's used in such varied products as food, paint and pharmaceuticals. Unfortunately, the Swiss-owned OMYA is also producing arsenic, and the carcinogenic poison is leaching into the groundwater.

OMYA's operation may be hidden from public view, but John Brabant, 48, knows it well. He's an environmental analyst for Vermont's massive Agency of Natural Resources, and a professional hydrologist. He's been blowing the whistle on OMYA since 2002, when he discovered a curious letter in his own department's outgoing mailbox granting the mining company a "conditional exemption" from solid-waste management regulations — bureaucrat-ese for "ANR won't require a certification process for dumping," he says.

Later that year, Brabant informed a Rutland environmental commission that OMYA needed a permit before it could operate the dump — a new landfill for calcium carbonate "tailings," a euphemism for potentially hazardous waste. In 2003, under pressure from Republican Rep. Peg Flory of Pittsford, he was removed from the case. The order came down from ANR's Department of Environmental Conservation Commissioner Jeff Wennberg, a former mayor of nearby Rutland.

Not surprisingly, Brabant was vindicated to hear about a 2006 study commissioned by Vermont Law School's Environmental and Natural Resources Law Clinic. It hired two firms to test OMYA's waste and groundwater for traces of poisonous metals such as arsenic — the first independent studies of their kind on public record in Vermont. The scientists found arsenic levels "above federal levels established for the protection of human health" in and around the site.

ANR's reaction to the report? As of this month, no solid-waste permit has been issued for OMYA's landfill despite mounting evidence that suggests the project is an environmental hazard.

"We are five years into the operational life of this landfill," Brabant explains. "It's totally illegal. The story here is, how many agencies in state government are willing to look the other way in terms of enforcing the law?"

With 600-plus employees and an operating budget of more than \$80 million, Vermont's Agency of Natural Resources oversees most state-level environmental departments and initiatives. ANR officials issue permits — in theory — for landfills such as OMYA's. Its enforcement officers are supposed to prosecute environmental offenders.

George Crombie, ANR's new head honcho, acknowledges his agency could run more

smoothly and that it needs to get up to speed on pressing environmental issues, such as "non-point source" pollution — i.e., stormwater runoff — and global warming. Last week Crombie announced a sweeping agency overhaul — arguably the most ambitious since its 1970 inception. By 2008, ANR's traditional departments — Fish & Wildlife, Parks & Recreation and Environmental Conservation — will have expanded to 17 "Centers of Environmental Excellence," one of which is called "The Green Center."

Not everyone is impressed. Brabant is just one of a chorus of attorneys and citizen-advocates who suggest that ANR's new look will be just that: cosmetic. They argue that the agency is plagued by longstanding, systemic problems with environmental permitting and enforcement. Plus, say the critics, ANR doesn't keep citizens properly informed about environmental infractions or potential hazards.

When discussing his agency, Secretary Crombie admits that ANR's current organizational structure "makes it very, very hard to make decisions," but says that under his new plan ANR should become more efficient, its actions more transparent. Last week, Crombie visited the OMYA facility. He refers to the solid-waste controversy as a "complex case" that ANR is "working on."

MOST OF VERMONT'S ENVIRONMENTAL

permits are issued by the Department of Environmental Conservation, one of ANR's three primary departments. Some DEC permits are used as part of the Act 250 process, the state's land-use planning law, with all its attendant hearings and appeals. Others are handled internally by ANR. When issuing permits, DEC officials check to make sure requests are in compliance with federal and state laws, such as the Clean Water Act.

According to David Mears, one of the Vermont Law School professors who commissioned the recent tests at OMYA, ANR is too casual for comfort when it comes to environmental protection. Mears came to Vermont in 2005 after working in environmental enforcement in Texas, Washington, D.C., and Washington State. He bases his observation on ANR's indifferent reaction to the discovery of arsenic at the OMYA site. An agency like ANR is "supposed to prevent pollution before it happens," he says. "You don't want to see something bad happen . . . You control it up front. That's exactly what permitting is intended to do."

Mears claims that ANR's permit negligence violates the spirit of famous environmental laws of yore. On the subject of OMYA, he adds, "I've been working in environmental

agencies for close to 20 years [and] I've never seen an instance where [a polluter] was allowed to completely ignore any of the regulatory requirements and just dispose of waste in direct contact with groundwater where there was a potential threat."

Alyssa Schuren of Montpelier, who directs the New England-wide Toxics Action Center, adds that DEC permitting processes are inherently less transparent "to an average resident" than Act 250 ones. In order to find out about potential DEC permits, she explains, citizens would have to either "continually check" the ANR website, call the agency itself, or learn about permits through word of mouth. "Often times residents don't know an applicant has applied for a permit until it's been granted," she observes.

Then there's the problem of enforcement. Between December 2005 and November 2006, ANR's 13-member enforcement division — with an annual budget of just more than \$1 million —received almost 1000 citizen complaints. Approximately three-quarters of those cases were closed as either "no violation," "voluntary correction" or "enforcement action taken." Enforcement actions occurred in approximately one-ninth of all cases.

That's not enough, according to critics.

Questions have also been raised about late payments by polluters and the nature of the fines themselves. Under current Vermont law, violators are allowed to pay 75 percent of environmental penalties toward "Supplemental Environmental Projects," or SEPs. On paper, this allows companies to pay fines directly toward pro-environment projects — which will make up for their malfeasance, *à la* carbon offsets — rather than into state coffers. For example, in a recent settlement with Jay Peak ski resort — the largest water-quality violation in state history — the resort agreed to pay 75 percent of its \$105,000 violation toward Lake Champlain clean-up projects.

SEPs aren't necessarily a bad policy, notes Anthony Iarrapino, an attorney at the Conservation Law



ANNETTE SMITH

four cases, SEP payments were late. ANR, however, did not fine the polluters for delays. In two of those cases, SEPs comprised 100 percent of penalties — a violation of the legal 75-percent limit.

Vermont Law School's Environmental and Natural Resources Law Clinic Director Pat Parenteau once had

The story here is, how many agencies in state government are willing to look the other way in terms of enforcing the law?

JOHN BRABANT, ENVIRONMENTAL ANALYST

Foundation in Montpelier (CLF). But he claims the SEP program is too flexible — it can sometimes result in undeserved *positive* publicity for polluters. Iarrapino suggests that straight fines should replace SEPs as ANR's "dominant enforcement tool."

CLF provided four polluter case files to *Seven Days* for review. In one case, the city of Burlington released several million gallons of raw sewage into Lake Champlain between April and July 2005. Two other polluters — Clarence Brown and Midway Oil — were charged with improper storage of lead batteries and gasoline, respectively. In the Jay Peak case, resort employees conducted illegal burning, discharged sediment into the Jay Branch of the Missisquoi River — a potential hazard to fish and other aquatic species — and drove a bulldozer through a wetland area. In all

Wennberg's job; he served as DEC commissioner in the late 1980s. During that time, he oversaw what was then the largest environmental enforcement case on state record: a \$100,000 settlement, also against Jay Peak. That the resort was recently fined again suggests Jay "needs to be taught a serious lesson, and it needs to be made an example of," he says. The SEP may not send a strong enough message. "If you don't deal with that kind of a violator seriously, then I don't think you're being faithful to all the other people in Vermont who are in compliance," Parenteau says.

House Representative Tony Klein (D-Montpelier) drafted a bill this year to address problems with ANR enforcement. If it passes next year, the legislation would expand ANR's 13-member enforcement division by two officers and grant them all the enforce-

ment capabilities of regular policemen. It would also create a publicly available, searchable database of environmental enforcement actions. Klein points out, "This bill is more about the public" than ANR's enforcement priorities.

In fact, according to both Klein and the environmental attorneys, enforcement and transparency are intricately linked. Vermont's public, they say, is often kept out of the loop by ANR enforcement proceedings. For instance, if Vermonters want to get directly involved in environmental enforcement, state law prohibits them from arguing cases without ANR representation. That explains why Klein's bill includes a provision for "citizen suits" — legal actions that regular Joes and Janes can bring against violators without ANR's help.

Ultimately, Parenteau suggests, "The people that go to Jay Peak to ski and recreate and buy real estate . . . ought to know whether that operation is in compliance with Vermont's environmental laws or not."

Iarrapino of CLF agrees. Along with the Vermont Natural Resources Council (VNRC), his organization requested an active role in the recent Jay proceedings, but was denied access to certain case files by Sal Spinoso, director of ANR's enforcement division. Iarrapino, therefore, says he's "encouraged" by George Crombie's proposed ANR makeover, but also that he sees a "bit of a disconnect" between the secretary's policies and his agency's actions. "It's [Crombie's] people and his agency that have done everything they can to keep [CLF and VNRC] out of . . . the Jay Peak case," charges Iarrapino.

Who's responsible for the shutout? "The problem isn't about any specific individual," Iarrapino notes. "The problem is about the longstanding culture that's taken hold at the agency that views enforcement as a low priority." Until a consistent enforcement policy is enacted, this attorney suggests, "it really won't matter

PHOTO: LEE KROHN

how green is our valley?

<< 29A

whether it's Sal Spinosa or somebody else, because they're gonna be in the fight with an arm tied behind their back."

ONE RECENT AFTERNOON, Enforcement Director Sal Spinosa tilts his chair back in a small, clutterless office in ANR's Waterbury building, a stone's throw from an enormous smoke stack. His window blind is drawn, and fluorescent lights hum overhead. He wears a sweater vest, and his wire-rimmed glasses accentuate a thin nose. Behind him, an inspirational sign reads: "To enforce . . . without fear or favor." A wooden gavel rests menacingly on his desk.

Spinosa is not surprised by Iarrapino's claims — CLF and ANR have been adversaries for a long, long time. He smiles coyly, and responds: "If what [Iarrapino's] saying is that the agency needs to examine itself from top to bottom, then that's happening."

In response to CLF's claims about inefficiency and possible corruption within the agency, Spinosa counters that the accusers themselves may have been "victim-ized" by misinformation. Spinosa, who has directed the division since 1995, admits that a recent CLF- and VNRC-sponsored report on ANR enforcement alerted his office to some inconsistencies in reporting procedures. He maintains, however, that some of CLF's claims are either inaccurate or outdated. "What we try to do [here] is be as conscientious and professional as we can in trying to enforce the state's law. It's really impossible to make everyone happy," Spinosa says.

He concedes ANR's enforcement procedures aren't perfect. He suggests, for example, that while he's "hardly ever" satisfied with the speed with which cases move, he must recognize that other departments are also short on staffing and resources. He's not pushing for new personnel additions to his staff. "We are a fairly small unit that produces a great deal of quali-

The people that go to Jay Peak to ski and recreate and buy real estate . . . ought to know whether that operation is in compliance with Vermont's environmental laws or not.

PAT PARENTEAU, VT LAW SCHOOL

ty, professional work," Spinosa concludes.

When questioned about ANR's transparency to the public, Spinosa admits his division's website is still "a work-in-progress." He adds that he's still weighing the pros and cons of "citizen suits," as outlined in Klein's house bill.

As part of the proposed ANR overhaul, George Crombie has established an internal review committee of the agency's enforcement procedures. But Klein and the attorneys claim that the committee won't do much to alter the status quo for enforcement without outside, non-governmental input. Vermont Law School's Parenteau, for instance, hints that only by including its own "harshest critics" on the committee would the agency have a chance of enacting holistic and lasting reform. "If you want to perceive what's wrong with your operating procedure," he suggests wryly, "then ask some of the people who are on the receiving end of the problem with compliance."

John Brabant, the 18-year ANR employee who was removed from the OMYA case in 2003, happily volunteered for the review committee. Even while stressing that Crombie is a "straight shooter" who will "do the right thing" on the OMYA case, he doesn't mind pointing out that the boss recently denied him a spot on the committee. ANR higher-ups "don't want to hear the truth," he suggests. "The people on that

committee are people who are part of the problem."

Like Brabant, Iarrapino doesn't shy away from making personal accusations against ANR officials. In addition to his claim that the Jay Peak case implies bureaucratic carelessness, he says that the case also suggests an "appearance of preferential treatment" toward resort owner Bill Stegner, an alleged Douglas insider.

Annette Smith, an environmental activist from Danby, goes a

step further. Smith is the founder and director of Vermonters for a Clean Environment — a tiny non-profit that pressures Vermont corporations to clean up their acts. She accuses Governor Douglas of refusing to speak out against OMYA's environmental violations because he's partial to the company. Douglas received at least \$6000 from OMYA-related sources in 2002 and 2003.

Douglas Press Secretary Jason Gibbs calls such allegations "just

absurd." Although he admits he's not familiar with the findings of the recent poisonous metals test at OMYA, he assures, "The governor and his administration take the regulatory responsibility of state government seriously, and the governor expects and demands that any individuals he's appointed to carry out regulatory duties will adhere strictly to the law, period."

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“Vermont Way Forward” — among tuxedoed waiters at Montpelier’s Capitol Plaza Hotel, Smith sits at the headquarters of her “office”: a porch room overlooking a small farm. Smith has close-cropped brown hair and a prominent forehead. A white Toyota hybrid sits in her driveway. Her property can be reached by a rural access road from Danby — an unruffled town of fewer than 2000 residents. Smith inhabits a landscape that probably hasn’t changed much since ANR was established in 1970.

On first glance, Smith’s homestead seems quintessentially “back-to-the-land.” Her windowsill is overflowing with herbs and tomato plants. Twilight filters in through a window, along with the chatter of Smith’s 60 chickens, two cows and a solitary goose. Across the room from her woodstove, however, rests a sleek laptop and a shelf that sags with ANR permits and enforcement dockets — a collection Smith estimates at more than 10,000 sheets of paper.

Now 50, Smith didn’t consider herself an activist until 1999 — the year OMYA proposed construction of a Rutland power plant whose natural gas pipeline would have been installed less than a mile from her home. Eight years later, however, she’s leading a grass-roots campaign for transparency and accountability. When going over case files, she’s as well versed in ANR’s legal activity as a bona fide lawyer.

Why go to such lengths to monitor ANR’s legal activity? Smith insists that she’s the only one keeping serious tabs on OMYA and other companies with shaky environmental records, such as J.P. Carrera and Sons, Inc. and the Champlain Water District. With this, she pulls up a page on her website and scrolls through a list of OMYA’s environmental violations dating back to 1988. In an average month, she claims, her site receives as many as 13,000 hits — including visits by Vermont state officials.

According to this activist, “What I found [in 2001] was that no one knew that OMYA was violating its permits. Nobody [at ANR] was taking the broad overview of the company that I was. As far as the oversight of the state on this site, no one was watching.” She observes, “The way I’ve looked at this over the years is, there’s a fundamental, structural problem at the agency — everything’s done in pieces, and no one takes charge of a site. When you’re dealing with a company that has a lot of complex issues — that’s where we’ve really fallen down as a state.”

In the ’80s, Smith adds, “Vermont was known as the gold standard of environmental protection. Now we don’t deserve that reputation.” ⑦



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