

**H.35: An Relating to Improving the Quality of State Waters
House Committee on Judiciary Overview**

A. Water Quality Generally

- The federal Clean Water Act (CWA) is the principal law governing prevention and cleanup of pollution in the nation’s surface waters.
- The CWA imposes multiple requirements on States and property owners to control pollution to waters and improve the quality of polluted waters.
- The CWA has two major parts: 1) financial assistance to states for municipal wastewater treatment; and 2) regulatory programs to prevent pollution of waters or to require cleanup.
 - The regulatory program itself has two components—one to require permits for specific activities, one to establish standards and cleanup to maintain water quality.
- U.S. EPA is the federal agency with authority over implementation of the CWA.
- EPA may delegate a state agency as the permitting and enforcement authority in the state.
 - States must meet minimum requirements for delegation, including statutory and regulatory authority and commitments to implement and enforce.
 - In 1974, EPA delegated ANR as the CWA permitting authority for Vermont.
 - EPA retains oversight over permit issuance and may make recommendations and require conditions for federally required permits such as wastewater permits.
- In addition to enforcement by EPA or ANR, CWA § 505 authorizes any citizen to commence a civil action on his or her own behalf against any person, including a federal, state, or municipal government instrumentality, who is alleged to be violating the CWA.
 - Prior to filing a citizen suit, a person must notify EPA, ANR, and the alleged violator.
 - Citizen suits may not be brought if EPA or ANR is “diligently prosecuting” the violation.

B. Clean Water Act Regulatory Requirements—Permits

- A discharge permit is required for all discharges of pollutants from a point source to a navigable water—wastewater treatment plants, industrial discharges, etc.
- A stormwater permit is required in order to disturb more than one acre land.
- Certain SIC classified industries must implement stormwater controls under a general permit called the Multi-sector General Permit.
- Certain municipalities must implement stormwater controls under a permit called the Municipal Separate Storm Sewer (MS4) Permit.
- A permit is required for Concentrated Animal Feeding Operations that have an actual discharge or are proposing an actual discharge.

C. Vermont Agricultural Water Quality Requirements

- “Animal feeding operation” (AFO) means a lot or facility where livestock or domestic fowl have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and crops, vegetation, or forage growth are not sustained in the normal growing season over any portion of the lot or facility.
 - A large AFO has 700 or more mature dairy cows;
 - A medium AFO has between 200 and 699 mature dairy cows; and
 - A small AFO has less than 200 mature dairy cows.
- Farms in Vermont currently are not required to obtain CAFO permits.
 - CAFO permits are required for “actual discharges” to waters.
 - Vermont law prohibits any farm from discharging to waters.
- Vermont farms instead either must obtain a state permit or comply with accepted agricultural practices (AAPs) to address water quality.
 - Large farms must obtain a Large Farm Operation (LFO) permit.
 - Medium farms must seek coverage under a Medium Farm Operation (MFO) general permit.
 - Small farms must comply with the AAPs, but currently do not need a permit.
- LFO permits, MFO permits, and the AAPs all include conditions or requirements intended to prevent agricultural runoff/discharges to state waters.
- The Agency of Agriculture, Food and Markets (AAFM) implements and enforces the LFO, MFO, and AAP programs.
- ANR enforces discharges to state waters and would implement and enforce a CWA CAFO if required for a farm in Vermont.
- ANR and AAFM have a memorandum of understanding (MOU) regarding how the agencies will respond to agricultural water quality issues and when issues will be referred to ANR for enforcement under ANR’s authority.
- AAFM also has a financial assistance program that provides farms in Vermont with financing to implement or improve water quality practices on the farm. The program is referred to as EQIP or the BMP program.
 - Much of the state financial assistance is used as cost share to draw down federal money from the U.S.D.A. Natural Resources Conservation Service (NRCS).
 - The Capital Bill includes the funding for the EQIP/BMP program.

D. Clean Water Act Regulatory Requirements—Water Quality

- The CWA establishes effluent limits for discrete discharges, and the State can adopt more stringent standards under State law.
- CWA § 303 requires all states to adopt water quality standards, which are the limits, uses, or criteria to evaluate and protect water quality from pollutants.
- CWA § 303(d) requires States to review all waters every three years to determine if the water meets the State water quality standards.
- If a water does not meet the State water quality standards, it is listed as “impaired.”
- If a water is listed as impaired, the State is required to establish a cleanup goal, known as a total maximum daily load (TMDL) plan for the pollutants that caused the impairment.
 - A TMDL is a target or goal that, when reached, should result in the cleanup of the water so that it meets the State water quality standards and is no longer impaired.
 - A TMDL is not the actions that the State must take to clean up a water.
- Actions necessary to clean up a water are included in a separate implementation plan. An implementation plan can include a suite of activities to remediate the water.

E. Lake Champlain TMDL Implementation

- Lake Champlain is impaired due to phosphorus—i.e. it does not meet State water quality standards for use—i.e. recreation, aesthetics, and aquatic biota.
- In 2002, EPA approved a joint TMDL between Vermont and New York for the Lake.
- In 2008, CLF petitioned EPA to disapprove the Vermont portion of the Lake TMDL.
- CLF argued the TMDL was flawed, because it included insufficiently stringent wasteload allocations, lacked reasonable assurances, and lacked an adequate margin of safety.
- In 2011, EPA disapproved the Vermont portion of the Lake Champlain TMDL.
- When EPA disapproves a State TMDL, the CWA requires EPA to issue the new TMDL within 30 days of disapproval—i.e. EPA will issue the new TMDL, not ANR.
- Since 2011, EPA has been working with ANR to design the TMDL for the Lake—i.e. the target goal for bringing the Lake back into compliance.
- When a target is established. The target will be broken down according to the contributors of phosphorus to the Lake.
 - These wasteload allocations will be based on sector—development, agriculture, forestry, etc.—and will be the targets for those sectors.

- The State must develop an implementation plan—the actions to be taken to achieve the TMDL goal—see Phase I Implementation plan.
- Many of the proposed actions will or may require legislative action, including small farm certification, nutrient application, stormwater, impervious surface retrofits, and funding.
- If the State implementation plan is not to EPA’s satisfaction—e.g. it does not provide reasonable assurances it will meet the goal—EPA may exercise the authority it has under the Clean Water Act to attempt to achieve the wasteload allocations and the TMDL itself.
 - For example, EPA retains authority over direct discharge permits. EPA could require direct dischargers of phosphorus—wastewater treatment plants—to lower discharge standards, which would be costly and may not lead to significant benefits for the Lake as a whole.

F. H.35--AAFM Small Farm Certification

- Large and medium farms are permitted. Small farms are not permitted, but subject to AAPs.
- Under the proposed Lake Champlain Phosphorus TMDL Phase I Implementation Plan (Phase I Implementation Plan), AAFM committed to requiring small farms certify AAP compliance.
- Sec. 3 of H.35, 6 V.S.A. §4871, requires small farms to certify compliance with AAPs every 5 years.
- Sec. 3 defines “small farm” as a parcel of land that:
 - includes 10 or more acres of tillable land;
 - houses no more than the max. number of animals for a small farm (e.g. 199 dairy cows), and
 - houses 5 or more livestock or produced annual gross income of \$10,000 or more from farming.
- AAFM is authorized to inspect farms to determine compliance with the AAPs.

G. H.35—AAFM Agricultural Water Quality Enforcement

- The Phase I Implementation Plan specifies that AAFM shall initiate extensive outreach, education, and enforcement of AAPs.
- Sec. 17 adopts and reorganizes AAFM agricultural water quality enforcement authority in a new subchapter--6 V.S.A. chapter 215, subchapter 10, §§4991-4996.
- The new enforcement subchapter streamlines and makes consistent the existing enforcement authority, while also providing new authority, including:
 - Emergency assistance orders to protect water quality--§4993;
 - Mandatory corrective actions--§4992; and
 - Mandatory livestock removal when volume of livestock waste exceeds farm capacity--§4993.
- Sec. 17, §4992, mandates that when AAFM identifies a farm in violation of the LFO, MFO, or AAP requirements, the agency shall provide the farm with a “required corrective action”
 - Under current law, when AAFM identifies a violation, statute provides that they will “recommend” a corrective action.

- Sec. 17 also provides AAFM with civil enforcement authority to enjoin activities, order corrective actions, and levy administrative penalties--§ 4993.
- Administrative penalties shall not exceed \$5,000 for each violation, with the maximum administrative penalty assessed for a separate and distinct violations at \$50,000.
 - Under AAFM's default enforcement authority for all agency programs, the administrative penalty amounts are a maximum of \$1,000 for each violation and \$25,000 for separate and distinct violations.
 - ANR's administrative penalty amounts are \$42,000 for each violation, \$17,000 a day for continuing violations, and \$170,000 as a maximum assessed by ANR.
- Sec. 17 of H.35, §4995, also authorizes the Attorney General to initiate civil enforcement actions for violations of agricultural water quality requirements.
 - The Attorney General currently has civil enforcement authority for violations with ANR's jurisdiction, but not AAFM
 - Sec. 17 is intended to provide the Attorney general with the same civil enforcement authority for agricultural water quality violations as it has for ANR violations.
 - Full suite of enforcement options—injunctive actions, corrective actions, emergency orders, restitution, and reimbursement or agency costs.
 - Civil penalties issued by the Attorney General may not exceed \$85,000 for each violation. In the case of continuing violations, a penalty of not more than \$42,500 may be assessed for each day the violation continues.
 - This is the same penalty amount as for the Attorney General's civil penalty authority ANR violations.
- Secs. 18-20 are conforming amendments, including repeal of sections now incorporated under new enforcement subchapter.

H. H.35--Appeals of AAFM Agricultural Water Quality Violations

- Under Sec. 17, 6 V.S.A. § 4996, appeals of AAFM and Attorney General enforcement of agricultural water quality requirements is to the Civil Division of the Superior Court.
 - The administrative judge may appoint an environmental judge for certain appeals.
- Under current law, LFO and MFO permitting appeals go to Environmental Division.
 - AAFM requested enforcement go to Civil Division because AAFM may enforce more than agricultural water quality violations in one action in one court.
 - For example, AAFM may inspect a farm and find an animal health violation and an agricultural water quality violation.

I. H.35--AAFM Enforcement and Inspection Staffing

- Under H.35, AAFM will be certifying and inspecting small farms
 - Depending on the definition of “small farm” used, there are up to 6,200 small farms.
- According to the Phase I TMDL Implementation Plan, AAFM to date has not inspected small farms for AAP compliance due to limited resources.
 - With its current staffing, AAFM performs 120 investigations annually—usually targeting specific complaints or obvious violations.
- To meet the inspection and certifications requirements under H.35, AAFM has requested 7 new positions. (See additional handout for summary of positions).
- Under H.35, Secs. 7-12, the funding required for the 7 new positions would be generated from increased or new fees on LFOs, MFOs, SFOs, commercial feed distributors, commercial fertilizer distributors, and registrants of economic poisons (pesticides).
 - The House Agriculture Committee proposed striking all increased or new fees.

J. H.35--Compliance with AAPs as Condition of Participation in Use Value Appraisal

- Under Sec. 22 of H.35, 32 V.S.A. §3756, Division of Property Valuation and Review (PVR) shall remove a parcel of agricultural land or farm building from use value appraisal (UVA) if the owner/operator is identified by AAFM as:
 - Out of compliance with the water quality requirements of 6 V.S.A. ch. 215; or
 - Not in compliance with an enforcement order for an agricultural water quality violation.
- After a parcel or building is removed from UVA, a farmer may not apply for reenrollment of the parcel or farm building until AAFM notifies PVR that the owner or operator is complying with the agricultural water quality requirements or is complying with an enforcement order for an agricultural water quality violation.
 - Upon certification of compliance, the owner or operator can apply for enrollment at any time according to the existing requirements for application.
- Under Sec. 23, appeal of the removal of an agricultural parcel or farm building from UVA would be brought under the appeals process for agricultural water quality in 6 V.S.A. ch. 215.
 - Appeals would be to the Civil Division of the Superior Court.
- Sec. 24 redefines the term “development” in 32 V.S.A. § 3752 for purposes of UVA to include removal of an agricultural parcel or farm building from UVA.
 - As development, agricultural land or a farm building included in an AAFM notification would be subject to the land use change tax of 20% of the fair market value of the land or building if enrolled for less than 10 years; 10% if enrolled for more than 10 years.

K. H.35--ANR Stormwater Management Authority

- Sec. 30 rewrites ANR’s statutory stormwater authority in 10 V.S.A. § 1264. The existing section was in need of reorganization, and much of the underlined language is existing authority.
- New authority is included in the new 10 V.S.A. § 1264, including § 1264(g)(2), which requires ANR to issue a general permit for stormwater discharges from municipal roads.
 - The permit shall establish a schedule for implementation, including the inventory of roads, prioritization of projects, and implementation.
 - All cities, towns, and villages shall apply for the permit by July 1, 2021.
 - The Phase I implementation Plan included a commitment to regulate stormwater from municipal roads.
- Additional new stormwater authority is also included in 10 V.S.A. § 1264(g)(3), which requires permits for discharges of stormwater from “legacy” impervious surface.
 - On or before Jan. 1, 2018, ANR shall issue a general permit for discharges of stormwater from impervious surface of 3 or more acres in size that previously were never permitted or were permitted under a permit that did not include the 2002 Stormwater Management Manual or subsequently adopted stormwater manual.
 - The general permit shall require retrofitting or redevelopment of old impervious surface.
 - The general permit shall establish a schedule for implementation, provided that it will be implemented in the Lake Champlain watershed no later than Oct. 1, 2023, and no later than Oct. 1, 2028 for the rest of the State.

D. ANR Water Quality Staffing

- Sec. 42 of H.35 provides for increases in multiple Department of Environmental Conservation water quality related permits.
- The increase in fees would provide for additional revenue of approximately \$1.5 million to be used for staffing of 12 additional positions at ANR to address water quality initiatives in the State. (see additional handout for summary of ANR positions and fees).

Water Quality Staffing and Funding Requested by Agency of Agriculture, Food and Markets

Water Quality Positions for FY 2016 Pending Clean Water Fund

POSITION	PAY GRADE
Water Quality Permitting and Project Manager	27
Water Quality Specialist – small farm inspector	23
Water Quality Specialist – small farm inspector	23
Agriculture Systems Specialist – Ag Engineer	23
Financial Administrator II	23
GIS Project Supervisor	24
Sr. Ag Development Coordinator – Communications	25

A. Summary of Newly Proposed Classified Positions Pending a Clean Water Fund

1. Water Quality Permitting and Project Manager – Grade 27

The Agency currently issues permits to medium and large farm operations. Under the proposed EPA TMDL the agency is expected to create a small farm certification program (5,000+ farms will likely fall under this). This position will assist in the development of the small farm program and align all three farm programs so farms can seamlessly transition from one to the next should they choose to expand. This work will include creating the program, contracting to develop an online registration system for farms to view the permits/certifications, and training for all stakeholders. Additionally, this position will inspect farms for compliance.

2. Two Water Quality Specialists – Small Farm Inspectors – Grade 23

Currently the inspection capabilities within the agency are insufficient to adequately enforce the current regulations, let alone the proposed changes the State has put forth in the EPA TMDL. These two positions will enhance our ability to be present on farms in order to uphold the regulations. Right now the farm to staff ratio is roughly 715 farms per person. (assumptions include: 1,000 dairies and 4,000 other livestock/backyard farms/crop farms, etc., and 7 FTE's for inspectors).

3. Agriculture Systems Specialist - Ag Engineer – Grade 23

As inspectors do their job, they inevitably drive workload onto engineering resources as farms need to make improvements in order to maintain compliance with water quality regulations. If

the inspectors above are to be hired, a professional certified engineering position is essential in order to complete the progression of getting a farm to resolve water quality issues.

4. Financial Administrator II – Grade 23

Included in the additional clean water fund budget proposal is an increase in base allocations for programs. Most of these programs are pass-through grants administered by the Agency to partner organizations. If the funds are increased, a position will be needed to administer the grants in the ARMS division and any new initiatives and cooperative agreements the agency enters into.

5. GIS Project Supervisor – Grade 24

As the Agency performs all of the work in the TMDL, there is a need to show accountability of the progress made. Showing maps is one of the most effective ways to present this information to the public, especially in a natural resource field such as agriculture which is land based. Additionally, the ARM division is about to embark on a new water quality database that will track all of the permitting efforts and this position will ensure a linkage in the permit mapping as well so internal resources can be more efficient in the enforcement process by knowing where farms are situated and the resources they have at their disposal (i.e. Additional manure pits so we don't have to issue them a spreading exemption in the winter which improves water quality or an understanding of who owns land when a complaint comes in and a more immediate ability to contact the farmer to resolve the issue).

6. Senior Ag Development Coordinator – Communications and Marketing – Grade 25

As the Agency increases its presence in water quality regulations and work with farmers, communication of efforts as well as a marketing assistance program will become paramount. This position will work with the Water Quality Specialists, Water Quality Permitting and Project Manager and Ag Resource Management Assistant Director to provide current information on water quality efforts, enforcement actions and programs that can assist farmers to meet water quality goals of the state.

B. Agency of Agriculture Food and Markets—Requested Funding for TMDL Implementation

Staff and operating	Grants	TOTAL
\$952,000 – 7 positions, benefits, travel, fleet, computers, phones etc.	\$248,000 – grants to assist farmers to meet WQ requirements	\$1,200,000

Department of Environmental Conservation

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February 4, 2015

TO: House Fish, Wildlife and Water Resources Committee

SUBJECT: Additional Information on 13 New Clean Water Related Positions

Additional information was requested around the staffing and operational needs associated with the Clean Water Phase One Implementation Plan for FY 2016 which includes 13 new staff positions to meet the state's obligations under the Clean Water Act and the Lake Champlain Phosphorus TMDL. Below we have provided a list of the positions along with a brief description outlining some of the work they'll be performing. The total amount of fee revenue being proposed is \$1.54M which will be used to cover all of the related personnel and operating costs associated with these 13 positions and approximately \$330k for contracting with local Regional Planning Commissions to help get them started with planning efforts for municipalities especially around the transportation related permits.

It is important for us to clarify that there are several aspects and related support functions which are intertwined and necessary for us to carry out our requirements under this Plan. For example, there will be a significant need to conduct "modelling" to identify necessary implementation opportunities to reduce phosphorus to both Lake Champlain and other surface waters across Vermont, as well as to assist in tracking the "best management practices" (BMP) implementation under Phase 1. These efforts are extremely critical to the Stormwater and Wastewater programs as well Rivers and Wetlands. We will also be providing a great deal of financial, technical and educational assistance in reducing nonpoint source phosphorus contributions to Vermont's surface waters, including activities under the Phase I Implementation Plan.

Program Area	# of Positions	Position Description
State Highway Stormwater Regulation	1	The Phase 1 Plan requires the development and implementation of a State Highway (TS4) General Permit, a new program to address stormwater from state highways. The TS4 will include a "phosphorus control plan" covering stormwater discharges from the state highway system. The position is needed to develop the program, provide technical assistance, and review implementation of VTrans' stormwater plans over a multi-year period.

Municipal Highway Stormwater Regulation	1	This is the key position for a new Municipal Highway General Permit, a new program to address stormwater from local roads. This program will involve public outreach to all communities, development of a general permit and technical and permitting standards, and issuing authorizations under the new general permit.
Developed Land Stormwater Regulation	2	These positions will support development and implementation of a new program to address stormwater runoff from existing developed land that is currently unregulated. This effort will include substantial public outreach, the development and issuance of general and individual permits and the permitting of hundreds of currently unpermitted existing impervious surfaces.
Wastewater	2	These are permit writer positions responsible for writing the permits for and assisting municipalities with the task of upgrading wastewater treatment plants to meet new nutrient requirements. This work is critical to the effective implementation of both the Long Island Sound and Lake Champlain TMDLs due to the need to reissue the 94 expired permits and the associated need to develop innovative solutions to assist municipalities with meeting these new limits.
Rivers	1	The Phase 1 Plan emphasizes the need to regulate municipally exempt activities and Act 250 developments and review all development proposals (under state and municipal jurisdiction) on floodplains in the Lake Champlain basin. With this new position the Program will review more municipal projects, create a regional Certified Floodplain Technician Program, and increase the regulatory and technical assistance capacity for floodplain protection. This position will work with the Program's river scientists to capitalize on opportunities identified during their regulatory work to implement projects involving the removal of river corridor and floodplain encroachments.
Wetlands	1	As part of the Phase I implementation plan, DEC has committed to expand technical, educational and regulatory assistance regarding wetland protection and restoration. DEC has also committed to coordinate with partners to increase wetland restoration throughout the basin, increase permit compliance, and give heightened protection to wetlands within the basin which provide water quality protection and erosion control. This staff addition will increase Wetlands Program capacity to carry out all of these tasks.

Administrative	3	The Phase I TMDL Plan will lead to a large administrative workload in reissuing the current expired Wastewater permits, and implementing the expanded stormwater, rivers, and wetlands programs.
Monitoring, Assessment, and Planning	2	<p>The Phase I TMDL Plan requires a watershed modeler to conduct geographic and technical source-sector analyses using a critical source area identification system. The results of this modeling will direct implementation in the form of regulatory permitting actions, funding to prioritized target watersheds, and targeted pollution controls.</p> <p>In order to fulfill the state's obligations under the Lake Champlain TMDL, DEC also needs an environmental analyst to track the pollution reductions associated with implementation projects and to link DEC's tracking system to the tracking work that will be done by AAFM and VTrans.</p>