



**The Vermont Chapter of the Sierra Club's Recommendations on Vermont H.35,
An act relating to improving the quality of State waters
(Draft No. 1.2 – January 30, 2015)**

To: Vermont House Committee on Fish, Wildlife, and Water Resources

The Vermont Chapter of the Sierra Club submits these recommendations on Vermont H.35 as a follow-up to our testimony in the House Committee on Fish, Wildlife, and Water Resources on January 28, 2015. We support the provisions that aim to provide more protection for Vermont's waters, but we believe there is more to do. The following recommendations are consistent with the platform document that we provided to the Committee (*Chapter Water Quality Campaign Primary Goal* (January 2015)), but are specific to H.35. We appreciate the opportunity to provide these recommendations, and thank you for your consideration.

Sec. 2 (6 VSA 4810 Authority; Cooperation; Coordination)

- Page 3, line 2 – The words “but not limited to” are scheduled for deletion. We recommend keeping this language in the bill because “but not limited to” makes it clear that AAPs apply to all agricultural activities, not only an exclusive list.
- Page 3, lines 4-6 – Though it is not new, we recommend deleting the sentence regarding a presumption of compliance with water quality standards because it does not have the meaning in might appear to. Whether a farm is contributing to violations of water quality standards is relevant in the Clean Water Act NPDES permitting process. Under the Clean Water Act, any NPDES permit must contain limitations that are sufficient to meet water quality standards whether state law recognizes a presumption or not.
- Page 3, lines 12-17 – We support the change to the BMP section that makes BMPs enforceable without financial assistance as a prerequisite. We support the similar change in section 14, paragraph (c) (page 28, lines 5-12).
- Page 3, line 20 – Page 6, line 2 – We recommend transferring water quality regulation and enforcement for all farms to Vermont's Department of Environmental Conservation. This will help each agency focus its resources on what it is best equipped to do. The Agency of Agriculture, Food, & Markets can focus on assisting and advising farmers; DEC can focus on regulating and enforcing. This and other sections would be revised to reflect the new division of responsibilities, and other structural changes to Vermont's Agricultural Water Quality Law would be necessary as well, e.g., transferring the large and medium farm operation permitting programs to DEC.

Sec. 4 (6 VSA 4810a Accepted Agricultural Practices; Revision)

- We support the requirement that AAPs be revised to be more protective of Vermont's waters and, in general, we support the list of non-inclusive practices in section 4.

- We recommend that the legislation make it clear that the AAPs must be *finalized* (through the rules process) by July 1, 2016 at the latest (page 6, line 18).
- We do not believe that § 4810a(1)(B) (page 7, lines 6-8) is necessary, and we recommend deleting or revising it. All farms/agricultural activities in the State must and should comply with AAPs whether or not AAFM so specifies in the AAPs (see § 4810(1)).
- We recommend amending subparagraph (6) (page 8, line 3) to make it clear that *any* farm handling nutrients (whether agricultural waste or other) must have a nutrient management plan, that the plan must be followed, and that the plan must include site-specific practices that ensure appropriate agricultural utilization of nutrients.
- Page 9, lines 6-15 - Paragraphs (a)(12) and (b) appear to assume that tile drainage will be deemed an acceptable practice by 2018. We recommend revising these paragraphs to account for the possibility that tile drainage may in fact be prohibited; we also recommend making it clear that any standards must *prevent*, not just *reduce*, pollution from tile drainage. E.g., “On or before January 15, 2018, the Secretary of Agriculture, Food and Markets [or DEC, if authority is transferred] shall amend the accepted agricultural practices in order to either prohibit subsurface agriculture tile drainage or include requirements for preventing nutrient contribution to surface waters from subsurface agriculture tile drainage.”
- Page 9, lines 11-15 – We believe this sentence should be deleted. In the event that tile drainage is deemed acceptable and AAPs for tile drainage are in fact established, *those AAPs should be mandatory just as other AAPs are, without any special requirement or designation from AAFM.*

Sec. 5 (Agency of Agriculture, Food, & Markets Report on Subsurface Tile Drainage)

- Page 9, line 16 – Page 10, line 9 – We support the report requirement for subsurface tile drainage in theory.
- This section should be revised to require the report to come jointly from AAFM and DEC, so that DEC plays more than a mere consulting role. DEC is charged with protecting Vermont’s waters from pollution and should have a major decision-making role in this report, especially as tile drains are likely regulable as point sources under the Clean Water Act.
- This section should also be revised to require the report writers to consult with environmental groups and a balanced assortment of farms of all types (e.g., small and organic, large and conventional, and everything in between) – not just with NRCS.
- Finally, this section should be revised to require reporting on how best to *prevent* nutrient pollution from tile drainage, not just how to *mitigate* it (page 10, line 8).



Sec. 6 (6 VSA 4858a Small Farm Certification)

- We support a small farm certification program because it can help to establish education regarding appropriate agricultural practices and accountability. However, we note that small farms are subject to AAPs regardless of the certification program.
- This section should be amended to require AAFM (or DEC, if authority is transferred) to conduct an inspection of every small farm at least once a year, with timely followup inspections until any problem areas are resolved. The same should be required at Medium and Large Farm Operations (Title 6, Chapter 215, Subchapters 4 & 5). We understand that inspections require significant resources, but they are *absolutely necessary* for ensuring that compliance actually occurs. Without honest-to-goodness compliance and enforcement activities, the laws on the books can do very little for cleaning up Lake Champlain.

Sec. 7 (6 VSA 4981 Agricultural Water Quality Certification Training; Rulemaking)

- We support education and outreach to farmers, and the requirement that farm operations attend training.
- If authority is transferred to DEC, this type of program would be ideal as a joint effort between AAFM and DEC.

Sec. 9 (Agricultural Water Quality; Enforcement; Corrective Actions)

- Page 15, line 16 (6 VSA 4991) – We recommend changing “the Secretary may issue” to “the Secretary shall issue.” We need enforcement if we really expect to clean up the Lake and the waters leading into it. This will simply make it mandatory for the Secretary to issue a warning letter to the farm explaining the violations, compliance measures, and funding resources.
- Page 19, line 15 – Page 22, line 12 (6 VSA 4993) – We support the addition of the civil enforcement section and its provisions, which are consistent with well-established standards under the Clean Water Act.
- We recommend adding a section requiring AAFM and DEC (or just DEC, if authority is transferred) to deliver a detailed yearly report to the Legislature including:
 - Detailed descriptions of any complaints received regarding farm water quality issues or problems, and the agency’s follow-up to those complaints.
 - All inspections made and the results of each inspection, e.g., whether violations or problem areas were noted.
 - Whether follow-up inspections were made where potential problem areas were observed, and why or why not.

- For each violation, whether enforcement action was taken, a description of the enforcement action, and the reasoning supporting any decision to enforce or not enforce, including reasoning regarding the extent or severity of enforcement. This requirement should apply whether AAFM, DEC, or the Attorney General is the ultimate enforcement authority.

Sec. 15 (10 VSA 1021 Alteration Prohibited; Exceptions)

- The exemption for timber harvesting activities should be removed (page 29, lines 5-8). The fact that an activity is “subject” to accepted management practices adopted by Forest, Parks, & Recreation does not mean that the activity will not harm the impacted stream. We also believe that the exemption for NRCS- or AAFM-approved streambank stabilization projects should be removed (page 29, lines 9-13). It is not clear who would make the determination that a project is “consistent with” ANR policies regarding fluvial erosion hazards.
- Per this section, the Secretary of ANR already has the authority to approve stream-disturbing activities that are otherwise prohibited.
- Instead, this provision could say that the Secretary of ANR may take into account timber harvesting accepted management practices and NRCS conservation practices in determining whether to approve a stream-disturbing activity.

Sec. 16 (32 VSA 3756(i) Use Value Appraisal; Compliance with Accepted Agricultural Practices)

- Page 29, line 17 - We supported the requirement in the bill as introduced for a report on the use of AAPs as a condition of participation in use value appraisal. We think it is fine to consider how use value appraisal and water quality relate. However, reporting on use value appraisal should not take the place of other important agency work. Similarly, we believe that the use value appraisal idea would be unnecessary if current laws were enforced, and believe that resources should be devoted to enforcing existing laws.

Sec. 18 (10 VSA 1253 Classification of Waters Designated, Reclassification)

- Page 31, line 17 - Page 35, line 7 - We support additions to this section that engage Regional Planning Commissions in water quality planning.

Secs. 19 & 21

- Page 35, line 8 – Page 37, line 12 - We support the integration of water quality protection into local and regional planning.

Sec. 22

- Page 37, line 14 – Page 38, line 4 - We support the requirement that ANR adopt a long-overdue anti-degradation implementation procedure by 2016, and sooner if possible.

Sec. 23 (10 VSA 1264 Stormwater Management)

- We have not conducted a thorough review of this section, and generally would defer to our colleagues at Vermont Natural Resources Council and Conservation Law Foundation and their expertise in this area. However, we do offer some suggestions below.
- Paragraphs (c)(1), (4), and (5) (page 61, line 12 – page 62, line 6) – These sections should be amended to apply to ½ acre or more of affected land (rather than 1 acre or more) in order to help avoid the “death of a thousand cuts.”
- Paragraph (h)(1) (page 64, line 21) – This should be amended to require that permits be renewed at least once every 5 years instead of every 10 years. This will be more protective of Vermont’s waters and will also be consistent with the Clean Water Act.
- Paragraph (j) (page 66, lines 11-17) – Though this paragraph is not new, it should be deleted. Whether a discharge causes or contributes to a water quality standards violation is a question of fact to which no presumption should attach. Under the Clean Water Act, the permitting agency has an obligation to require water quality based-effluent limitations as necessary to ensure compliance with water quality standards.
- Similar to our recommendation for the farm program, this section should be amended to require DEC to conduct an inspection of every permitted stormwater entity at least once a year, with timely followup inspections until any problem areas are resolved. Again, we understand that inspections require significant resources, but they are *absolutely necessary* for ensuring that compliance actually occurs. Without honest-to-goodness compliance and enforcement activities, the laws on the books can do very little for cleaning up Lake Champlain.
- As with farming violations, we recommend adding a section requiring DEC to deliver a detailed yearly report to the Legislature including:
 - Detailed descriptions of any complaints received regarding stormwater water quality issues or problems, and the agency’s follow-up to those complaints.
 - All inspections made and the results of each inspection, e.g., whether violations or problem areas were noted.
 - Whether follow-up inspections were made where potential problem areas were observed, and why or why not.
 - For each violation, whether enforcement action was taken, a description of the enforcement action, and the reasoning supporting any decision to enforce or not enforce, including reasoning regarding the extent or severity of enforcement.

This requirement should apply whether DEC or the Attorney General is the ultimate enforcement authority.

Sec. 24 (10 VSA 1285 Stormwater; Municipal Roads)

- We support the addition of this section to help reduce stormwater pollution from municipal roads.
- We recommend adding a requirement that the agency report to the Legislature after the first two years of implementation of this section. The report should assess the program's usefulness and whether more stringent or additional requirements should be implemented. For instance, though a permit is required for construction or redevelopment of a municipal road (page 67, lines 17-18), a permit for discharge is only required upon designation by the Secretary of ANR (page 67, line 19 – page 68, line 7). It could be that a more robust program is necessary to prevent pollution from municipal roads.

Sec. 26 (10 VSA Chapter 47, Subchapter 7 Vermont Clean Water Fund)

- Paragraph (b) (page 72, lines 1-10) should specify as a funding priority *compliance and enforcement activities by the primary agency(ies) charged with implementing water quality laws*. (If authority is transferred to DEC, this would primarily be DEC.)
- We recommend adding § 1388(b)(9) (page 73, line 9) requiring the Clean Water Board to have at least one representative from an environmental advocacy organization dedicated to water quality in Vermont as a member.
- § 1388(f)(1)(A) (page 74, line 6) – This should be amended to allow the Board to receive proposals from members of the public as well as from the designated agencies.
- § 1388(f)(1)(B) (page 74, lines 9-11) – *This section should require the Board to recommend that significant monies be allocated to compliance and enforcement activities at AAFM and DEC, especially DEC if authority is transferred. E.g., “Such recommendations shall include the recommendation that substantial, adequate funding be provided to AAFM and DEC to engage in significant compliance and enforcement activities consistent with the State’s responsibility to restore and maintain Lake Champlain and other polluted waters.”*
- We also support designating more resources to AAFM to assist farmers in transitioning to practices that do not degrade Vermont’s waterways.
- § 1389 (page 75, lines 8-19) – The Clean Water Investment Report should also include identification of funding sources and amounts, and the source of allocated funds.



Sec. 27 (32 VSA Chapter 245 Impervious Surface Assessment)

- We support the establishment of an impervious surface fee.
- We recommend that the Legislature consider extending the fee to waters outside the Lake Champlain Basin, as waters throughout the State suffer from stormwater pollution.
- We recommend that this section include the requirement that the fee shall increase gradually over the next 10 years (e.g., by \$50 every two years).
- We recommend revising the farming and forestry exemption (page 78, lines 17-18) to include this language: “This exemption shall not be available to farming or forestry operations that have violated Vermont’s water quality laws or rules within the previous calendar year.”

Sec. 28 (6 VSA 366 Tonnage Fees)

- Page 79, line 7 - Page 81, line 12 - We support fertilizer tonnage fees to support agricultural water quality programs.

Secs. 29 & 30 (Department of Environmental Conservation Water Quality Fees; Payment of State Agency Fees)

- Page 81, line 13 – Page 92, line 4 - We support the increases in the fees under this section.
- Page 92, line 6 – Page 93, line 17 – We support the removal of the specified water quality fees from the exemption in 32 VSA 710.

Sec. 31 (Wastewater Treatment Plants; Financial Assistance for Phosphorus Reduction)

- § 1266a (“Discharges of Phosphorus”) sets a maximum mg/l for phosphorus discharges into the Lake Champlain and Lake Memphremagog drainage basins and also recognizes that more stringent limitations may be necessary and required in order to meet water quality standards or a TMDL. (§ 1266a(a)-(b))
- This section also provides that municipal compliance is not required unless sufficient funds are provided to municipalities (§ 1266a(c)). This subsection conflicts with the Clean Water Act and should be deleted consistent with the outstanding requirement of the Corrective Action Plan issued to the State by EPA Region 1 in July 2013. We have no objection to ANR helping municipalities explore and obtain funding resources, but compliance with water quality standards cannot be conditioned on funding under the Clean Water Act.
- We do not believe that reducing the amount of funding that DEC “shall award” to municipalities in order to comply with water quality standards (from 100% to 25%)



resolves this problem. (See § 1625, page 96, line 7.) Under § 1266a, 25% compliance would still be dependent on 25% funding, which is not allowed under the Clean Water Act.

Secs. 34 & 35 (10 VSA 8003(a) & 8503(a))

- Page 98, lines 10-11 – We support the enforceability of timber harvesting accepted management practices by the Secretary of ANR.
- Page 99, lines 1-2 – We support the appealability of ANR decisions relating to timber harvesting accepted management practices.

Sec. 36 (24 VSA 4413(d))

- Page 99, lines 5-13 - Though this section is not new, we recommend amending this section in order to give local authorities and lawmakers more control over issues that may have negative effects on local environments or lands. We recommend specifying that municipal and regional planning do have authority to regulate activities subject to AAPs or accepted management practices for timber harvesting as long as the local regulation exceeds or is in addition to AAPs or accepted management practices.

Sec. 39 (Effective Dates)

- Page 101, line 20 – The small farm certification program should become effective before July 2017, and by July 1, 2016 at the latest. This would give AAFM and small farms more than a year to come into compliance, which should be more than sufficient given that small farms should already be in compliance with AAPs.

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