

MEMORANDUM OF UNDERSTANDING
BETWEEN
VERMONT AGENCY OF NATURAL RESOURCES,
VERMONT DEPARTMENT OF ENVIRONMENTAL CONSERVATION
&
VERMONT DEPARTMENT OF AGRICULTURE, FOOD & MARKETS
CONCERNING
AGRICULTURAL NONPOINT SOURCE POLLUTION REDUCTION PROGRAM
(as per Act 261 of 1992)

Whereas, the Secretary of the Vermont Agency of Natural Resources has been directed to delegate to the Commissioner of the Vermont Department of Agriculture, Food and Markets the state agricultural nonpoint source pollution control program planning, implementation and regulation, to the extent compatible with federal requirements; and,

Whereas, the Vermont Department of Environmental Conservation is the designated lead State water quality agency, responsible for the management and enforcement of the water pollution control statutes of the State [Title 10 V.S.A. Chapters 37 and 47], the protection of ground water [Title 10 V.S.A. Chapter 48] and is authorized to apply administrative penalties [Title 10 V.S.A. Chapter 201]; and,

Whereas, the Vermont Department of Agriculture, Food and Markets is the State agency responsible for promoting a healthy, prosperous and environmentally responsible agricultural industry; and,

Whereas, the two Departments are committed to eliminating or reducing as much as possible agricultural pollutant loadings; and,

Whereas, the two Departments recognize the need for improved coordination and cooperation in achieving compliance by agricultural operators with the State's water pollution control laws and programs while preserving the profitability and productivity of Vermont's agricultural economy.

Now therefore, the Secretary of the Agency and the Commissioners of the two Departments agree to the following terms:

1. The rationale and procedures contained in Attachment I [Enforcement procedures for addressing cases of water pollution caused by agricultural activities] are hereby endorsed and shall be adhered to in an objective, professional and timely fashion by the staff of each Department.
2. Any proposed significant changes to the procedures contained in Attachment I will be presented by the proponent for discussion prior to the formal adoption by the two Departments. Any amendments to this memorandum of understanding must be by the written and mutual consent of both Departments.
3. The Commissioner of the Department of Agriculture, Food and Markets and the Commissioner of the Department of Environmental Conservation shall meet annually to review and, if necessary, to revise this memorandum to ensure compliance with the Clean Water Act and with provisions of Title 10 V.S.A. Section 1258. Major revisions of the memorandum shall be noticed for public comment. The Commissioners shall provide opportunity for public review of program accomplishments no less than once every five (5) years starting no later than 1996.
4. This memorandum may be amended at any time by mutual consent of the parties and after providing opportunity for public comment.

So signed this 16th day of April, 1993
and in effect until formally amended by the Agency of Natural
Resources and the Departments of Environmental Conservation and
Agriculture, Food and Markets or terminated by the Vermont
General Assembly.

Chuck Clarke
Chuck Clarke
Secretary, VT Agency of Natural Resources

Jack Long
Jack Long
Acting Commissioner, VT Department of Environmental Conservation

George M. Dunsmore
George Dunsmore
Commissioner, VT Department of Agriculture, Food & Markets

I. INTRODUCTION.

- a. The Secretary of the Vermont Agency of Natural Resources (hereafter the "Secretary") is authorized under Title 10 V.S.A. Section 1250 et seq., to manage discharges to waters of the state by administering a permit program consistent with the National Pollutant Discharge Elimination System established by Section 402 of Public Law 92-500 and with guidelines promulgated in accordance with Sections 304(h)(2) of Public Law 92-500. The Secretary is also charged, under Title 10 V.S.A. Section 1258, with managing waters to obtain and maintain the classifications established.
- b. The Secretary, pursuant to Title 10 V.S.A. 1259(i), is required to delegate to the Commissioner of the Vermont Department of Agriculture, Food and Markets (hereafter the "Commissioner DAF&M") the state agricultural nonpoint source (NPS) pollution control program planning, implementation and regulation, to the extent such delegation is compatible with federal requirements.
- c. The Commissioner DAF&M is required under Title 10 V.S.A. Section 1259(i) to develop by rule, implement and enforce agricultural land use practices in order to reduce the amount of agricultural pollutants entering waters of the state. Title 6 V.S.A. Section 4810(b) provides that the Commissioner DAF&M shall coordinate

with the Secretary in implementing and enforcing programs, plans and practices developed for reducing and eliminating agricultural NPS pollutants.

- d. The Secretary and Commissioner DAF&M are required to adopt a memorandum of understanding for these purposes under Title 10 V.S.A. §1259(i) and Title 6 V.S.A. Section 4810(b). The Secretary and Commissioner DAF&M hereby enter into this memorandum of understanding, considered to be consistent with federal requirements, which describes the procedures to be used while coordinating their respective efforts and in developing and implementing a functional and comprehensive agricultural NPS pollution reduction program. The objectives of the program are to achieve water quality standards, to protect the biological, physical and chemical integrity of the water and to protect public health through public education, river basin planning, use of accepted agricultural practices and, in certain cases, best management practices, financial assistance and enforcement action when applicable.
- e. Actions by the Commissioner DAF&M under this MOU shall be consistent with Title 10 V.S.A. Chapter 47, the VT Water Quality Standards [Title 10 V.S.A. Section 1259(i)] and the federal Clean Water Act. The U.S. Environmental Protection Agency (EPA) has received a sixty (60) day comment period and has determined this

MOU is compatible with the federal Clean Water Act.

- f. For purposes of this memorandum, Commissioner DAF&M means the Commissioner of the VT Department of Agriculture, Food and Markets or his/her designee. Commissioner DEC means the Commissioner of the VT Department of Environmental Conservation of the Agency of Natural Resources or his/her designee.

II. AGRICULTURAL NONPOINT SOURCE (NPS) PROGRAM PHILOSOPHY.

- a. A viable agricultural industry and environmental protection can co-exist in the State of Vermont.
- b. Agricultural NPS control efforts in Vermont have relied upon the voluntary adoption of agricultural conservation measures by agricultural operators and the availability of financial assistance programs.
- c. Decisions regarding future agricultural NPS control efforts in Vermont should build upon previous accomplishments and incorporate recent advances in agricultural NPS technology and control programs.

III. AGRICULTURAL NONPOINT SOURCE (NPS) PROGRAM ADMINISTRATION.

- a. The Secretary is responsible for the planning, management, implementation and enforcement of Vermont's overall point source and NPS pollution reduction program except for elements pertaining to agricultural NPS pollution as delegated pursuant to Title 10 V.S.A.

§1259(i) and as defined in this memorandum of understanding (MOU) and attachment.

- b. The Commissioner DAF&M is responsible for the implementation and enforcement of agricultural components of the state's NPS pollution reduction program.
- c. The Commissioner DAF&M, in consultation with the Secretary, is responsible for making, adopting, revising and amending reasonable rules which define accepted agricultural practices described in Title 6 V.S.A. Section 4810 as well as other rules deemed necessary to carry out the provisions of Title 6 V.S.A. Chapter 215.
- d. The Commissioners DAF&M and DEC will be invited to participate in all scheduled meetings regarding agricultural NPS planning, management and enforcement which may occur with the U.S. Environmental Protection Agency (EPA).
- e. The Commissioner DAF&M is responsible for the issuance and follow-up of enforcement actions relating to agricultural NPS pollutants. The Commissioner DAF&M will cooperate with the Secretary on issues, information and actions relating to enforcement of agricultural NPS pollution in accordance with enforcement protocols found in Section V and Attachment I of this MOU.

- f. As part of the agricultural NPS pollution reduction program implementation responsibilities, the Commissioner DAF&M will develop and, as soon as practicable, begin delivering an intensive public information and education program designed to encourage the voluntary implementation of agricultural NPS control measures.

IV. COORDINATION WITH BASIN PLANNING ACTIVITIES.

- a. The Secretary shall retain state and federally mandated responsibilities related to basin planning, water quality management planning and the wasteload allocation process except that the Secretary shall coordinate with the Commissioner DAF&M about those aspects of basin planning and water quality management planning which relate to the agricultural NPS component of each plan.
- b. The Secretary shall be responsible for determining the extent to which designated water uses and water quality standards are supported or impaired and for determining the causes and sources of water quality problems. The Commissioner DAF&M may assist the Secretary with these determinations.
- c. The Commissioner DAF&M shall cooperate with the Secretary in basin/water quality management planning processes by preparing appropriate sections of each

plan which relate to the implementation of controls and programs affecting agricultural NPS waste and runoff.

- d. The wasteload allocation process results in the allocation of a river's limited assimilative capacity to receive discharges from point and nonpoint sources. The Commissioner DEC shall be responsible for the designation of wasteload allocations within specific river basins or watersheds. The Commissioner DEC shall coordinate with the Commissioner DAF&M when making determinations regarding the magnitude of any wasteload allocation dedicated to pollution from agricultural nonpoint sources.
- e. The Commissioner DAF&M shall follow the priorities identified in the most recent version of the Vermont State Clean Water Strategy¹ which describes the nature, location and extent of agricultural NPS pollution and the prioritization of river basins or waterbodies for further action.
- f. The Commissioner DAF&M, in collaboration with the Commissioner DEC, shall conduct evaluations to determine to what extent and which land treatment

¹ The VT State Clean Water Strategy (SCWS) is a document prepared by VT DEC in 1989 which contains a description of water programs, water quality management needs and a listing of waterbodies which are considered high priority for remedial action. The document's strategically planned actions were based on a statewide water quality assessment, the targeting of waters for restoration and protection, public participation and water programming emphasis. The SCWS is being revised in 1992 and 1993.

measures, including best management practices, are necessary in each basin to achieve water quality standards.

- g. The Commissioner DAF&M shall cooperate with the Commissioner DEC and shall be responsible for preparing descriptions of agricultural NPS programs and practices for the biennial water quality assessment report required by Section 305[b] of the federal Clean Water Act and for the report required under Title 10 V.S.A. Chapter 47.
- h. The Commissioner DEC shall retain the responsibility for evaluating the effectiveness of agricultural NPS control programs in attaining water quality standards. Such evaluations will be based on all available information with an emphasis on water quality monitoring data. The Commissioner DAF&M shall be responsible for determining the effectiveness of land use practices to reduce the release of agricultural pollutants and for compatibility with sound agricultural practices.

V. AGRICULTURAL NONPOINT SOURCE ENFORCEMENT PROTOCOL.

- a. The VT Department of Environmental Conservation, as the designated lead state water quality management agency, is responsible for the enforcement of the state's water pollution control statutes. The Commissioners DAF&M

and DEC agree to the division of enforcement responsibilities in the manner set forth below and in Attachment I, until such time as rules governing enforcement procedures are adopted.

- 1.) The Commissioner DEC, after consultation with Commissioner DAF&M, may initiate enforcement action to correct any agricultural NPS violation only after the Commissioner DEC has determined the violation has or will cause water quality to fail to meet Vermont water quality criteria or Vermont Water Quality Standards.
- 2.) The Commissioner DAF&M is responsible to enforce violations of agricultural NPS control standards (Accepted Agricultural Practices and Best Management Practices) that result in agricultural NPS pollution in accordance with authorities and procedures in Title 6 V.S.A. Section 4810 and with any other lawful authority.
- 3.) In circumstances where the Commissioner DAF&M wishes to terminate an enforcement action, short of having achieved compliance, the Commissioner DAF&M shall provide notice to the Commissioner DEC. The Commissioner DEC may initiate a separate enforcement action upon receipt of such notice.
- 4.) The Commissioners DAF&M and DEC agree that the DAF&M shall exercise complete authority in the execution and conduct of enforcement cases within its

jurisdiction and that any disagreement(s) related to the conduct or execution of enforcement action(s) shall be resolved on a program-wide basis during the annual program review and not as an oversight of any specific enforcement case. This provision shall not extinguish authority by the Commissioner DEC to initiate action under subsection a.1 of this section.

- b. Title 6 V.S.A. Section 4810(a) requires the Commissioner DAF&M to develop by rule, implement and enforce agricultural land use practices in order to reduce agricultural pollutants entering waters of the state.
- c. Prior to rule adoption required under Title 6 V.S.A. 4810, agricultural NPS enforcement authority shall reside with the Secretary.
- d. The Commissioners DAF&M and DEC shall cooperate in the expeditious handling of complaints. The Commissioner DAF&M shall assume responsibility for the processing of, response to and resolution of all complaints relating to agricultural NPS pollution. The Commissioner DEC shall retain responsibility for the processing of, response to and resolution of complaints regarding point source pollution from agriculture. The Commissioners DAF&M and DEC shall cooperate to act upon and resolve any complaints of doubtful jurisdiction, and shall keep a log of complaints received and their

resolution.

- e. The Commissioner DAF&M shall provide to the Commissioner DEC and shall make available to the public, on or before December 15 of each year, an annual enforcement report which will summarize the nature of complaints received and the water quality standards or criteria violated, the location (reported by drainage basin) of complaints, the actions taken by the DAF&M and problems resolved, and those complaints remaining to be resolved as required by Title 10 V.S.A. Section 8017. The annual enforcement report shall contain a log of events related to each case in order to determine the time of response. The annual report shall also contain a description of instances where the Commissioner DAF&M has determined Best Management Practices (BMP) are necessary, where BMPs have been ordered and where BMPs have not been implemented due to insufficient financial assistance.

VI. PROCESS FOR DEVELOPMENT OF AAPS & BMPs.

- a. The Commissioner DAF&M is required to promulgate rules to define Accepted Agriculture Practices (AAP) and Best Management Practices (BMP).
- b. AAPs define agricultural management standards to protect water quality. BMPs are more protective of water quality than AAPs. BMPs are actions which may be

prescribed or ordered by the Commissioner DAF&M on a site, crop or farm specific basis within specified basins when sufficient financial assistance is available.

- c. The Commissioners DAF&M and DEC have determined that every agricultural operator in Vermont shall adopt and follow AAPs. The Commissioner DAF&M shall institute rule making to adopt AAPs within one year of the signing of this MOU. The proposed AAPs shall be reasonable and expected to achieve or make substantial progress toward achieving water quality standards.
- d. Implementation of AAPs by Vermont agricultural operators creates a rebuttable presumption of compliance with water quality standards and removes such practices from regulation under the provisions of Title 10 V.S.A. Section 1259(c), (d) and (e). The presumption that the use of AAPs in an individual instance or as a general practice complies with VT Water Quality Standards may be overcome by water quality data or results from a water quality study deemed conclusive by the Secretary.
- e. The Commissioner DAF&M shall, within two (2) years of the signing of this MOU, institute rule making to adopt BMPs and a method of implementing BMPs in individual basins as authorized by Title 6 V.S.A. Sections 4810 and 4811.
- f. BMPs shall be required by the Commissioner DAF&M, when sufficient financial assistance is available, for

agricultural landowners/operators in watersheds identified by the Commissioners DEC and DAF&M in basin plans and the most recent State Clean Water Strategy as failing to meet water quality standards or water uses due to agricultural pollution.

- g. Notwithstanding subsection f above, the Commissioner DAF&M shall require the implementation of remedial actions if data, studies or other evidence conclusively show that VT Water Quality Standards are being violated.

VII. NONPOINT SOURCE (NPS) GRANT NEGOTIATION & SHARING.

- a. The Secretary shall be the state's lead person to apply for and administer federal funds under Public Law 92-500, as amended. The Commissioner DAF&M shall be consulted during the process on matters which may relate to agricultural NPS pollution.
- b. The Secretary and the Commissioners DAF&M and DEC are committed to building capacity within the Department of Agriculture, Food and Markets to establish and maintain a strong, functional and effective agricultural NPS pollution reduction program as part of Vermont's overall clean water program.
- c. The Commissioner DAF&M is an eligible applicant for federal Section 319 grant funds administered by the Commissioner DEC pursuant to annual guidance issued by the EPA.

d. The Commissioner DAF&M may compete for Section 319 competitive grant funds along with other eligible applicants and is eligible for funds under this program prescribed for agricultural purposes by federal guidance. The Commissioners DAF&M and DEC agree to annually review the distribution of Section 319 base grant funds to assure that the DAF&M's agricultural NPS program receives a proportionate share of base grant funds prescribed. Such an award shall be in accordance with annual Section 319 guidance.

Attachment I - Enforcement procedures for addressing cases of water pollution caused by agricultural activities.

Attachment I

Enforcement procedures for addressing cases of water pollution caused by agricultural activities.

Introduction & Rationale

Nonpoint source pollution from agricultural operations represents, in many areas of Vermont, a significant and chronic source of pollutant loading to the state's larger bodies of water and can create severe use impairment to local waters. There is a recognizable distinction made between the long term, unintended movement of pollutants into surface or ground waters that is largely weather dependent and the deliberate or negligent dumping, disposal or willful mismanagement of agricultural wastes or chemicals by farm operators or owners.

Vermont agricultural and water quality officials have determined that chronic, uncorrected pollution from agriculture and agricultural activities is not acceptable and, in carrying out agricultural production activities while safeguarding the environment, certain practices should be followed by all agricultural operators. This attachment sets out the coordinated enforcement procedures to be followed by the Departments of Agriculture, Food and Markets (DAF&M) and Environmental Conservation (DEC) with respect to agricultural point and nonpoint sources (NPS) of pollution. DAF&M will have lead discretion in enforcing agricultural NPS violations.

Based on the recognition that some agricultural pollutant loading is inadvertent and unintended while another more controllable proportion involves deliberate actions or conscious neglect, a two-tiered approach is established for correcting individual cases of water pollution arising from agricultural activities. The first tier, involving unintended instances which are rainfall driven and which lack a discrete point of discharge are to be addressed through a "nonpoint source approach." The second tier involves existing or imminent discharges to a waterway through a conveyance or the deliberate placing of wastes, soil or agricultural chemicals into surface waters.

The nonpoint source approach, discussed in Section A below, shall be led and coordinated by the VT DAF&M. The VT DEC is responsible for enforcement of point source violations and, in cases of agricultural point source violations, shall notify DAF&M prior to initiating any investigations or enforcement actions.

Attachment I

PROCEDURES FOR ADDRESSING AGRICULTURAL NONPOINT SOURCE PROBLEMS.

The seven major components in Vermont's improved agricultural nonpoint source (NPS) pollution enforcement strategy will be:

- Timely response by VT DAF&M to complaints of suspected or alleged agricultural NPS pollution.
- Early identification by VT DAF&M of actual surface or ground water pollution.
- Early involvement by VT DAF&M.
- Enforcement of Accepted Agricultural Practices (AAP) by the VT DAF&M.
- Reasonable time provision to allow the farm operator and/or landowner to voluntarily carry out corrective measure(s).
- Follow through assurance by VT DAF&M.
- Information sharing in order to reach consensus on the appropriateness of voluntary compliance actions and in support of enforcement action(s) taken by either department.

1. Receipt & processing of complaints.

Members of the public, including local government employees, have reported and are likely to report known or suspected cases of agricultural pollution or cases where AAPs are not being followed to any one of several State or local agencies. It is essential that these complaints be handled promptly, in a consistent manner and that the person making the complaint be informed, in a timely fashion, what, if any, polluting condition(s) were discovered, what action(s) were taken during the discovery and the timing of any future actions.

a. Complaint to VT Environmental Conservation Department (DEC).

Several different divisions of DEC may receive a complaint regarding pollution from agricultural activities or from failure to implement AAPs. All complaints received by DEC will be immediately referred to VT DAF&M for their investigation unless it appears, based upon the information provided, that the complaint is of an agricultural point source discharge.

Any division of VT DEC receiving a complaint regarding agricultural pollution or AAP implementation will prepare a file for each complaint received. The original file shall be submitted to VT DAF&M and a copy of the file shall be submitted to DEC, Enforcement Division (DEC-ENF).

VT DAF&M shall investigate the complaint within five (5) days of the referral. DAF&M shall reply, in a timely fashion, to the person making the complaint regarding what actions were taken in response to the complaint.

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b. Complaint to VT Agriculture, Food & Markets Department (DAF&M)

Agricultural pollution or AAP implementation problems may be noted by VT DAF&M personnel in the field or through complaints made directly to DAF&M by the public. Upon receiving a complaint or upon noting a problem in the field, DAF&M shall investigate the complaint within five (5) days. DAF&M shall reply, in a timely fashion, to the person making the complaint regarding what actions were taken in response to the complaint. Complaints of agricultural point source pollution shall be referred to DEC-ENF.

2. Initial Site Inspection & Problem Evaluation.

The principal purpose of a timely site inspection by VT DAF&M is to observe reported on-farm and/or reported in-stream conditions in order to determine whether an actual or potential agricultural nonpoint source pollution condition exists or if AAPs have not been implemented.

Upon receiving a complaint or notice of an agricultural pollution problem outlined above, the VT DAF&M may obtain background information concerning the farm operation and operator/owner in question and shall arrange a site visit within five (5) days of the pollution complaint. Appropriate staff persons from DAF&M shall visit the site after advising the property owner or farm operator (or both). The DAF&M may request assistance from VT DEC (Water Quality Division), if appropriate, in order to assess biological impact(s) to surface water or to assess impacts to other water uses.

If the nature of the problem is minor or indeterminate, VT DAF&M may choose to "close the file" on the complaint. The DAF&M shall report back to the person(s) lodging the complaint and to DEC-ENF the basis for such action.

If water pollution is present but not originating from agricultural nonpoint sources, VT DAF&M shall refer the case to DEC-ENF.

If agricultural nonpoint source pollution is present or if AAPs have not been implemented, VT DAF&M will document and discuss its findings with the landowner or farm operator (or both) within fourteen (14) days of the site inspection, encourage the owner/operator (or both) to work with state and federal agencies as prescribed in 6 V.S.A. Section 4812 to draw up plans to correct the problem and, advise the owner/operator that a follow-up procedure is in effect. The DAF&M shall be responsible for documentation coordination and for contacting the complainant regarding inspection findings/recommendations.

Attachment I

3. Follow-up Procedure by DAF&M.

Within forty-five (45) days after presenting findings and recommendations of the site inspection to the owner/operator, the VT DAF&M shall conduct a second site visit to determine whether recommended corrective measures have been installed or whether a plan for corrective measures has been completed. The completed plan, which shall include an implementation schedule, shall constitute evidence that the owner/operator is taking steps to correct the problem. The DAF&M shall have the responsibility for assisting the owner/operator adhere to this schedule.

If this second site visit reveals the owner/operator has not installed recommended corrective measures or has failed to complete a plan for corrective measures, the VT DAF&M shall contact and inform the owner/operator that legal enforcement action, under 6 V.S.A. Section 4812(b), by the State is probable unless a specified action is taken within a thirty (30) day period.

4. Termination of Enforcement Action.

Upon expiration of the additional thirty (30) day "grace" period specified in #3 above and absent compliance by the landowner/operator, the Commissioner DAF&M shall exercise further appropriate enforcement powers authorized by statute [Title 6 V.S.A. Section 4812(b)] to bring the landowner or farm operator (or both) into compliance.

If, at anytime, the Commissioner DAF&M decides to terminate enforcement proceedings, before achieving compliance, the Commissioner DEC shall be notified of that decision and be given the opportunity to carry on or initiate separate enforcement actions in order to achieve compliance. The Commissioner DAF&M will, at this decision point, transfer the file to the Commissioner DEC. The DEC may employ the full range of lawfully available administrative and legal options to secure compliance in such instances.

5. Completed Case File.

Following the completion of an enforcement case by VT DAF&M, the Commissioner DAF&M will provide to the Commissioner DEC a summary of the complaint, the investigation, findings and resolution of the case.