VERMONT LAW SCHOOL

Environmental Advocacy Clinic
Vermont Law School
PO Box 96, 164 Chelsea Street
South Royalton, VT 05068
802-831-1630 (phone) • 802-831-1631 (fax)

TESTIMONY OF MASON OVERSTREET
STAFF ATTORNEY, ENVIRONMENTAL ADVOCACY CLINIC AT VERMONT LAW SCHOOL,
ON BEHALF OF VERMONT NATURAL RESOURCES COUNCIL, CONNECTICUT RIVER CONSERVANCY, AND THE VERMONT COUNCIL OF TROUT UNLIMITED
BEFORE THE HOUSE NATURAL RESOURCES, FISH AND WILDLIFE COMMITTEE
MARCH 10, 2020

OVERVIEW OF H.833

Good afternoon Chair Sheldon and Members of the Committee,

Thank you for the opportunity to testify about H.833, an act relating to the creation of a Surface Water Diversions and Transfers Study Group to investigate and make recommendations regarding the environmental, economic, and recreational impacts of diverting surface water generally, as well as transferring surface water between watershed basins.

My name is Mason Overstreet and I appear before this Committee as a Staff Attorney at Vermont Law School's Environmental Advocacy Clinic speaking on behalf of Vermont Natural Resources Council, Connecticut River Conservancy, Vermont Trout Unlimited Council, and the National Wildlife Federation's Northeast Regional Center.

All four organizations support H. 833 and strongly believe that Vermont is long overdue on gaining a better understanding of its existing surface water resources, current and projected usages, withdrawal impacts on wildlife and ecological health, and thoughtfully investigating proactive measures to ensure the conservation and management of those resources into the future.

Today, I'd like to summarize the importance of H. 833 and its development of a Study Group to investigate surface water diversions and transfers in Vermont. Also, with me today are two Spring Associates from our Clinic, Peter Utz and Sarah Mooradian. They will address specific topics—which I'll lightly touch on—related to the bill in detail.

STATEMENT OF PURPOSE:

H.833 proposes to "Require the Secretary of Natural Resources to convene a Surface Water Diversions and Transfers Study Group to investigate and make recommendations to the General Assembly regarding the environmental, economic, and recreational impacts of transferring surface water between watershed basins and of diversions of surface water in general."

The Act's proposes that the Study Group is comprised of the following members:

1. Secretary of Natural Resources or designee;

2. Secretary of Agriculture, Food and Markets or designee;

3. One member of the Senate Committee on Natural Resources and Energy (appointed by the Committee on Committees);

4. One member of the House Committee on Natural Resources, Fish and Wildlife (appointed by the Speaker of the House);

5. Two persons representing business or industries reliant on large quantities of surface water (appointed by the Committee on Committees);
6. Two persons representing nonprofit environmental advocacy groups (appointed by the Speaker of the House);

7. One hydrologist (appointed by the Secretary), and;

8. One at-large member (appointed by the Secretary).

SURFACE WATER DIVERSIONS AND TRANSFERS STUDY GROUP DUTIES:

H.833 sets out five core duties for the Study Group, which include:

1. Developing a baseline inventory of current and projected quantity, location, and usage of diversions and transfers of surface water in Vermont;

2. Recommending whether interbasin transfers should occur;

3. Identifying whether the State should consider developing a statewide permitting or other regulatory regime for diversions or transfers of surface water;

4. Analyzing potentially viable regimes to address the unplanned, uncoordinated, and uncontrolled use of surface water in Vermont; and

5. If necessary, propose legislative changes to implement the recommendations of the Study Group.

GENERAL TESTIMONY

Vermont has 7,100 miles of streams and rivers, encompassing 378.5 square miles of surface water.[1] Vermonters commonly associate our environment with snowy winters, rainy springs, temperate summers, and blustery falls that sustain those roughly 400 square miles of surface water to the state. Yet, climate change is altering these historic patterns and precipitation events are becoming more erratic. Simultaneously, there is an increasing demand for the State's finite surface water resources from industry (both new and old), agriculture, residential usages, etc.

Vermont is poised to experience an unprecedented demand for surface water use and transfers from one watershed to another. Such uses pose numerous threats, including the introduction of invasive species and other pollutants, decreases in water quantity needed for habitat and human consumption, and rising conflicts amongst water users. Put another way, Vermont's waters are at risk and the State is ill-prepared and does not have laws in place that can effectively manage this rising problem. Importantly here, and a foundational purpose of H.833, is that Vermont does not know the extent of surface water resource users, annual usage quantities, or the associated environmental impacts of those usages.

Neither the Agency of Natural Resources, nor the Agency of Agriculture, Food and Markets track surface water withdrawals—meaning there's no documentation on surface water usage quantity, usage purpose, water quality and ecological health impacts of withdrawals, and other potential environmental impacts. And Vermont's not the first state to experience this. Trout Unlimited chapters from western states sounded the alarm on impacts in drier states, including the complete dewatering of streams. States such as California highlight that water withdrawal overuse gone un-checked has resulted in critical streams going dry overnight. Industries like hemp and cannabis—some of which are online in Vermont, or coming on shortly—are extremely water intensive.

I'd now like to now touch on and clarify the interplay between interbasin transfers and surface water diversions. First, it's important to understand that an interbasin transfer is a particular type of surface water diversion where water is transferred from one watershed basin to another. To-date, Vermont has minimal experience with interbasin transfers and how to manage and monitor them.

For example, last year, Killington Resort proposed the first-known interbasin transfer of surface water in Vermont. The proposal included a snowmaking interconnect system between to two resorts to improve snowmaking capabilities on Pico Mountain. Regarding surface water, the project proposed—and is currently—pulling water from the Ottauquechee River watershed (Connecticut River Basin) up Killington mountain and over to Pico, discharging it into the Otter Creek watershed (Lake Champlain Basin). The project triggered several permits, many of which

[1] Watershed Mgmt. Div., Vt. Agency of Nat. Res., State of Vermont 2018 Water Quality Integrated Assessment Report Clean Water Act Section 305(b) Report 4 (2018).

related to the construction of the pipeline and infrastructure improvements (Stream Alteration, 401 Water Quality Cert., 404 Dredge and Fill, Act 250, etc.), yet not one of those permits directly addressed the interbasin transfer and surface water diversion nature of the proposal.

A coalition of organizations raised concerns about the interbasin aspect of the proposal because of numerous issues related to water quality e.g. the possible transfer of invasive species, impacts to water quality, watershed basin quantities, etc. This project, which ANR approved last Fall, sparked conversations amongst water groups and the State because it highlighted: 1) the State's lack of knowledge and data on surface water usages, quantities used, impacts to river and stream health, and; 2) a sizeable regulatory hole in Vermont law and regulations regarding a critical state resource with ever-increasing pressures.

My colleagues at the Clinic will provide more in-depth statistics and explanation on the specifics of the issues. Here, I will quickly touch on several key points supporting the proposed Study Group. First, the forecasted predictions for climate change effects on Vermont's surface waters are something to take serious note of—simply put, Vermonters cannot take the State's seemingly infinite amount of surface water resources for granted anymore. Second, the current regulatory framework that exists in Vermont today is piecemeal and fails to specifically address, and proactively monitor and manage both surface water diversions and transfers. Fortunately, when ANR does perform a review under an existing authority (e.g. 401 water quality cert., snowmaking, etc.), the Agency does a flow level review and testing the result of the activity against the State's Water Quality Standards. However, because there's a patchwork quilt of regulations with nothing directly focused on diversions in particular, there's countless project diversions that fall through the cracks with zero analysis on the impacts to the ecological health of the water resources. The proposed Study Group in H. 833 investigates these major gaps and will pose reasonable mending solutions.

Third, the common law doctrine governing surface water usage in Vermont—"riparianism" and its "reasonable use doctrine"—are ill-equipped and purely reactionary. The doctrine is not designed, nor prepared to fully address State-wide surface water diversions, transfers, and major conflicts amongst users. More importantly, under a typical surface water diversion, if there's no permit trigger from ANR, there's no interaction with the water quality standards. Again, this highlights the sizeable hole in the law, whereby the State is in the dark about surface water users' withdrawal impacts on water quality, riverine health, and surface water quantities.

To summarize, Vermont knows little about its surface water resources—including current uses, users, quantities used, impacts, etc. Without proper oversight, Vermont's surface water uses and users pose numerous threats, including the introduction of invasive species and other pollutants, decreases in finite water quantities needed for water quality, habitat, and human consumption, and potential conflicts amongst water users. These threats combined with the uncertainty of climate change impacts places Vermont's water resources at risk.

Since its founding, Vermont has always stood on the forefront of pressing issues with proactive consideration of effective solutions and necessary responses. As we enter the era of climate change and shifting demands, it is vital that Vermont protect and manage its surface waters to ensure natural resource and ecological values are protected. Because of this, a Study Group is needed to better understand this issue and investigate plausible effective solutions—if necessary.