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STATE OF VERMONT

Legislative Committee on Administrative Rules (LCAR)

To: Sen. Christopher Bray, Chair, Senate Committee on Natural Resources
Rep. Amy Sheldon, Chair, House Committee on Natural Resources, Fish,
and Wildlife

From: Legislative Committee on Administrative Rules

CC: Michael O'Grady, Deputy Chief Counsel, Office of Legislative Council

Date: July 9, 2019

Subject: Request for review of the Agency of Natural Resources' public trust
authority over groundwater

The Legislative Committee on Administrative Rules (LCAR) is writing to you regarding the Agency of Natural Resources' (ANR's) Groundwater Protection Rule and Strategy (Groundwater Protection Rule). LCAR approved proposed amendments to the Groundwater Protection Rule on June 20, 2019. During LCAR's discussion with ANR, questions were raised about the scope of ANR's authority under the Rule. As chairs of the Senate and House committees with jurisdiction over groundwater issues, we wanted to bring this issue to your attention for possible review by your committees.

The purpose of the Groundwater Protection Rule is to establish a system to classify, manage, and protect groundwater resources, including protection of the public trust in groundwater. To implement the system, ANR applies the Groundwater Protection Rule to those programs or activities over which it has jurisdiction. Specifically, the Groundwater Protection Rule applies to activities regulated under ANR rules, such as the solid waste rule, indirect discharge rule, stormwater rule, and several other ANR rules.

However, multiple activities that fall outside of regulation under ANR's rules may significantly impact groundwater quality. For example, during review of the Groundwater Protection Rule, LCAR members asked ANR representatives how the Rule applies to agricultural activities such as the spreading of manure. ANR responded that it lacks jurisdiction over agricultural spreading of manure and, as such, the Groundwater Protection Rule does not apply to manure spreading or other activities that it lacks jurisdiction over.

Under 10 V.S.A. § 1390, the General Assembly declared that “the groundwater resources of the State are held in trust for the public” and the State shall manage its groundwater resources “for the benefit of citizens who hold and share rights in such waters.” The Environmental Division of the Vermont Superior Court held that the public trust designation of groundwater requires ANR to “perform the additional level of public trust analysis” that “is distinct from government regulation under the police power.”¹ The Environmental Division noted that ANR’s rules are an exercise of police power and that the public trust analysis must be in addition to the then-existing rules.

ANR has done an admirable job incorporating the public trust analysis into the Groundwater Protection Rule and in other ANR rules. Nevertheless, under the statutory declaration of groundwater as a public trust resource and under the Environmental Division decision, there is a question as to whether ANR’s public trust obligations extend beyond those programs or activities that it holds some police power over. However, this is not a question for LCAR, but for the legislative committees of jurisdiction.

Thus, LCAR asks that the Senate Committee on Natural Resources and Energy and the House Committee on Natural Resources, Fish, and Wildlife consider reviewing whether ANR’s public trust authority over groundwater should extend to activities that can harm groundwater but may not fall under ANR’s current regulatory police power. If the committees review this question, additional statutory and regulatory clarification may be required. If additional clarification or authority is provided, LCAR asks that your committees address how it will relate to or affect the Groundwater Protection Rule.

Thank you for your consideration of this issue. If you need additional information, please contact Michael O’Grady in the Office of Legislative Council.

Sincerely,

Rep. Robin Chesnut-Tangerman
Chair, Legislative Committee on
Administrative Rules
On behalf of LCAR members

¹ In re Omya Solid Waste Facility Final Certification, No. 96-6-10, pp. 8, 10 (Vt. Superior Court, Env. Division Feb. 28, 2011).