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TESTIMONY OF MASON OVERSTREET, STAFF ATTORNEY
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BEFORE THE SENATE COMMITTEE ON NATURAL RESOURCES AND ENERGY

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Good morning Chairman Bray and Members of the Committee,

Thank you for the opportunity to testify on H.466, an act relating to surface water withdrawals and interbasin transfers. For the record, my name is Mason Overstreet and I appear before this Committee as a Staff Attorney with Conservation Law Foundation Vermont.

For background and context, I have been actively involved with this issue since the original Killington-Pico Snowmaking Interconnect proposal that has been discussed in previous testimony. Early on, I participated in meetings, presentations, and negotiations with the Agency of Natural Resources, Killington, and concerned conservation organizations about the snowmaking interconnect proposal. Afterwards, as a Staff Attorney and Professor at Vermont Law School's Environmental Advocacy Clinic (EAC), I served as lead on a research project on behalf of the conservation organizations involved (Connecticut River Conservancy, Vermont Natural Resources Council, and three chapters of Trout Unlimited) with the Killington-Pico project. At the EAC, we investigated and produced a report (attached to this testimony) regarding Vermont's existing regime(s) relating to surface water withdrawals, examined what other states have done, worked closely with the leading national and international experts and scholars on the issue, and considered proactive resilient solutions in the face of climate change. Finally, I was actively involved with H.833—now Act 173—where I testified about the legislation (including before this Committee), presented to the Act 173 Study Group, as well as attended every Study Group meeting and thoroughly reviewed and followed the Study Group's findings and recommendations—including the legislation that we're discussing today.

Since the introduction of H.466, surprisingly and disappointingly, I have noticed that there is a significant amount of misinformation and blatant falsehoods about the legislation, including its purpose, its intent, and how it will impact existing and future surface water users in Vermont. I say disappointing because this legislation should be non-controversial, as it is designed and intended to be in everyone's best interest—businesses and the environment alike—which I will discuss shortly. For these reasons, I have organized and focused my testimony in an effort to clarify some of the misunderstandings and confusion.

1. **H.466 is a proactive step towards building water resilience in Vermont.**

First and importantly, Conservation Law Foundation supports H.466 as a means for the State of Vermont to proactively improve the State's existing (or basically non-existent) regime regarding surface water withdrawals and interbasin transfers in an effort to ensure both the equitable distribution of surface water for existing and future users, while simultaneously providing resilient long-lasting protections for the State's aquatic ecosystems and surface water resources at-large.

2. Lessons learned from the Killington-Pico Snowmaking Interconnect and the need for a new system.

Next, I would like to add to some of the previous testimony and subsequent questions that arose about the context of the Killington-Pico Snowmaking Interconnect proposal, as it plays an important role as a backdrop to the greater issue that we're discussing. Specifically, that project shined a bright light on the regulatory holes in Vermont's existing system regarding surface water withdrawals and interbasin transfers. But importantly, as Senator McCormack noted during earlier testimony too, this is not a new issue. Indeed, state agencies, advocates, businesses, and recreationists have all known about the existing regulatory hole. Note: When I refer to the regulatory hole, I am referencing the point that under Vermont's current system, aside from a few exceptions such as snowmaking and public water supplies, the State has very minimal data and knowledge about the extent of those withdrawing surface water, annual withdrawal-usage quantities, and the associated environmental impacts of those usages. Moreover, under the current Common Law system, Vermont's existing system somewhat resembles the "Wild Wild West" in the sense that riparian landowners and those withdrawing surface waters can withdrawal as much as desired so long as it's "reasonable" under the *Reasonable Use Doctrine*. Generally, that system has worked well up to the present broadly for several reasons. First, historically, Vermont has been fortunate to have healthy and substantial surface water resources. Second, Vermont was not confronting the effects of climate change. Third, Vermont has had a relatively small population and generally few surface water users as compared to other states and regions (largely due to healthy and consistent precipitation events). To summarize Killington-Pico highlighted the regulatory gaps in Vermont's existing regime, however, this was by no means a new issue.

3. Looking onto the horizon: Climate change and Vermont

In that same vein, there appears to be a lot of confusion and misinformation about the effects of climate change on Vermont, the state of Vermont's surface water resources, and how climate change will, or will not, impact our surface water resources. (Note: Here, it is imperative that as informed citizens, we distinguish anecdotal personal observations and remarks from peer reviewed-published findings and data.) Based on what I've heard from previous testimony and rhetoric circulating about the legislation, a lot of this misinformation can be broken down into one overarching summary—that Vermont's basically a temperate rainforest with plentiful water resources; that we're one of the highest on the list of annual precipitation when compared to

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other states, and; we're expected to receive more precipitation from the effects of climate change. Lets carefully this now. In response, as this Committee heard from Jeff Crocker, and as you can review in the May 17, 2021 presentation to the Act 173 Study Group from the State's Climatologist, Dr. Dupigny-Giroux, we know that climate change is altering Vermont's historic weather patterns and precipitation events and drought are becoming more erratic and localized—making access to surface water both uncertain and unpredictable. Again here, while science shows that Vermont will not resemble some of our fellow western states regarding water availability, we do know that Vermont will experience more intense and variable weather events with an increase in the occurrence of drought and flood periods. This translates to increases in pro-longed drought periods, which is likely to impact how Vermonters use and rely on surface water resources for off-stream uses. Here too, it is important that we factor in both increases in population and increased off-stream usages, which are likely to result in user conflicts during low water availability. This is a core underlying reason why it is essential that we enact H.466 in order to (1) better understand the impacts on these waterbodies and potential impacts to businesses and individuals that rely on them, and; (2) thoughtfully develop and plan an equitable-resilient system to avoid future conflicts between users resulting from climate-induced drought and increased developmental pressures, while simultaneously ensuring aquatic ecosystems are protected. H.466 benefits all Vermonters—businesses, farmers, and the environment.

4. The rationale and importance behind H.466's threshold requirements.

Pivoting to several specific aspects of H.466, I'd like to first emphasize the importance of the 5,000 GPD threshold under the legislation's registration and reporting program. (For reference, that program under H.466 can be found on p. 8 (§1042) of the version that passed the House.) First, based on what I previously mentioned about climate change, it is critical that the Agency of Natural Resources be able to accurately and fully study the issue. Indeed, successful public management of the state's surface water resources is impossible without accurate accounting for both the water available for use and the amount of water withdrawn for use. This is the rationale and reasoning behind the registration and reporting threshold of 5,000 gallons within a 24-hour period. This number was not set to burden existing users. Rather, the Act 173 Study Group was intentional about minimizing administrative burdens and sensitive toward those existing users already under other strain by other regulatory requirements. This is why the registration program under the legislation is both streamlined and the reporting period was not set during the busy season. (Reports for persons withdrawing surface water above 5,000 gallons within a 24-hour period are due *annually* by January 15th.) Put into practice, this simply requires persons meeting the threshold to keep a running log and file it in the off season.

5. Vermont is behind the times: Creating surface water resiliency benefits all.

Some previous testimony has argued that the development of a permitting program under H.466 (§1043) is premature and sidesteps public involvement and input. Put simply, this is false.

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As I previously mentioned, we know that climate change is rapidly altering our historic weather patterns and precipitation events are becoming more erratic. All of our neighboring states, as well as twenty-one other eastern states, have enacted similar-type legislation regarding surface water withdrawals. Since its founding, Vermont has always stood on the forefront of pressing issues with proactive consideration of effective solutions and necessary responses. Surprisingly, with this particular issue, Vermont is behind the times. As we enter the era of climate change and shifting demands, it is vital that Vermont implement resilient measures to protect and manage its surface water resources. H.466 merely sets out the starting point for the State to begin developing a permitting program—informed and based off the data that is received and analyzed from the legislation's registration and reporting program. Put another way, this is not a "done deal." Rather, the program will be developed via administrative rulemaking, which involves ample opportunities for all interested stakeholders to be involved, comment, and influence the process and final result. Moreover and importantly, the development of a permitting program is in everyone's best interest. Indeed, it is a proactive step that will benefit businesses, farms, and industry at-large because it will provide predictability, reliability, certainty, and consistency to all users. Businesses, farms, and industry who are not evaluating the risks to their activities from climate change are doing themselves a disservice by not understanding future risks to their operations and activities. H.466 is a climate-resilient step towards minimizing future risks and ensuring certainty and predictability for all.

6. **The Act 173 Study Group ensured that that all voices were heard and everyone had a seat at the table.**

Finally, I would like to respond to several points raised in previous testimony related to H.466's impacts on farmers, farming, and certain industries. First, as humans, when we perceive a threat, it is an instinctual tendency that we often want to villainize, blame, and defend. Sometimes, certain actions warrant those responses. Here, however, with H.466, there is no villain. H.466 has the best interest of everyone in mind and it is in all of our collective interests to support and enact the legislation. From the outset with H.833 (Act 173), the Act 173 Study Group, and now H.466, all stakeholders have been involved. There was no deliberative attempt to leave any particular sector out or "pull the wool over anyone's eyes." In regards to the agricultural sector, the Agency of Agriculture Food & Markets (AAFM) was the selected agricultural point of contact representative throughout the research and discussions leading to the Act 173 Study Group's Report and the development of H.466. If certain farmers feel that their opinions were not solicited, they should reach out to AAFM about the process. Furthermore, substantial thought was given to sectors, like farms, who are already under administrative and regulatory burdens. This is exactly why specific aspects of the legislation were intentionally crafted to minimize burdens and time-requirements. To reiterate, under the legislation's registration and reporting program, the paperwork is both straightforward, minimal, streamlined, and required during the off season (e.g. not during the growing season). Moreover, there are a significant amount of farms who withdraw surface water that will most likely qualify as exempt under the legislation's programs because the withdrawals are from either a constructed farm

pond or other impoundment that is used for irrigation or livestock watering. The agricultural sector was carefully taken into consideration during the development and drafting phases of H.466. Finally, as I previously mentioned, this legislation is necessary to ensure that farmers who need access to surface water for farm operations will continue to have equitable and reliable access in the future under a changing climate.

That concludes my testimony. Thank you again for the opportunity to speak before this Committee.