



Agency of Agriculture, Food & Markets  
116 State Street  
Montpelier, VT 05620-2901  
(Phone) 802.828.5667

Office of the Secretary

**TO:** Senator Ann Cummings, Senate Committee on Finance, Chair  
**FROM:** Anson Tebbetts, Secretary  
**DATE:** March 23, 2023  
**SUBJECT:** S.115: An act relating to miscellaneous agricultural subjects, Section 8 & 9  
**CC:** Senator Robert Starr, Senate Committee on Agriculture, Chair  
Senator Christopher Bray, Senate Committee on Natural Resources and Energy, Chair

Dear Chair Cummings,

The Agency of Agriculture (AAFM) writes to respectfully clarify some misunderstanding about the proposed language in Sections 8 and 9 of S.115 that we've observed in discussions around the Statehouse. To be clear, we believe that the small percentage of municipalities that are charging farmers stormwater operation fees are exceeding their statutory authority and lack the power to do so. Rather than farmers potentially suing municipalities to enforce existing the law, we proposed a statutory clarification to ensure towns become compliant. We are also comfortable with the provision that would not require towns to reimburse previously collected fees.

As Legislative Counsel Michael O'Grady has repeatedly explained, the issue is straightforward. Farms are regulated by the Agency of Agriculture and are required to manage their own stormwater. Farms cannot allow waste to discharge from their production areas and must also comply with additional provisions found in the Required Agricultural Practices. Farms' required collection of stormwater from impervious surfaces in production areas can be incredibly expensive. And, once farms collect it, they are not allowed to dump it into the municipal system and rather have to land apply the manure and agricultural waste to crop fields during the growing season per the standards of a Nutrient Management Plan.

Because farms have stormwater requirements in the RAPs, Title 10 V.S.A. and the Agency of Natural Resources have exempted farms from the requirement to obtain an Operational Stormwater Permit or to charge related fees.. To permit AAFM and ANR to both regulate farm stormwater would result in double fees for the same stormwater operations management that would not create any additional water quality benefit—it simply imposes duplicative additional fees. Towns can elect to manage stormwater in lieu of State (ANR's) management, but their authority cannot exceed ANR's stormwater authority.<sup>1</sup> It is axiomatic that

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<sup>1</sup> Specifically, municipalities may choose to regulate stormwater as follows: "Stormwater management and control. Any municipality may adopt bylaws to implement stormwater management and control consistent with the program developed by the Secretary of Natural Resources pursuant to 10 V.S.A. § 1264." 24 V.S.A. § 4414 (9), [emphasis added]. Since the Secretary of the Agency of Natural Resources (ANR) cannot issue stormwater operations permits for farms or charge related fees, the small percentage of towns that elected to charge farms are not operating a program "consistent" with ANR's authority.

Instead, those towns are operating a program that exceeds ANR's authority and directly contradicts ANR's program by ignoring a clear statutory exemption. For ANR's program, the law is clear that it may not regulate farm operational stormwater: "No permit is required under this section for: (A) Stormwater runoff from farms in compliance with agricultural practices adopted by the Secretary of Agriculture, Food and Markets, provided that this exemption shall not apply to construction stormwater permits required by subdivision (c)(4) of this section. (B) Stormwater runoff from concentrated animal feeding operations permitted under subsection 1263(g) of this chapter." 10 V.S.A. § 1264 (d)(1).

Since ANR cannot issue a permit or charge farms a related stormwater operations fee, and since municipalities' regulatory authority is limited to the authority granted ANR, towns cannot ignore the express exemption.

municipalities only exercise the authority the State grants them. Here, some towns exceeded their statutory authority by doubly charging farms for farm stormwater although the State (and accordingly the towns) cannot.

The legal requirements seem clear, but the equities are also important. Why should farms in some municipalities be charged double to manage their stormwater when the State (AAFV) also regulates their stormwater and when the State cannot charge them twice in those towns where ANR manages non-farm stormwater? Farmers should not be charged twice based on the location of their farm—particularly when municipal stormwater fees are contrary to the plain statutory exemption.

The General Assembly’s Legislative Counsel, the Vermont Agency of Agriculture Food & Markets, and the Vermont Agency of Natural Resources agree that municipalities are prohibited by current State law from assessing stormwater utility user fees on farms including because Required Agricultural Practices are exempt from municipal bylaw regulation under 24 V.S.A. § 4413(d)(1).

S.115 provides a gentle prospective solution to an ongoing issue. Municipalities can cite the new law to get into compliance while enjoying indemnity from their prior mischarged fees. VAAFV seeks a non-litigious resolution to a years-long conflict between the Agency and municipalities and between farmers and municipalities.

To explain a bit as to why there are two separate standards for stormwater in Vermont – one for farming and one for everyone else – it is important to dig into the reason for the agricultural exemption in stormwater statute. The exemption for farms under State stormwater statutes found in Title 10 is generally due to two reasons: 1) that is how the federal government regulates stormwater between developed land and farms and for which the EPA has delegated regulation of these areas of law to ANR, and 2) Vermont farmers are held to a higher regulatory standard than State stormwater permitting at ANR as a no-discharge standard exists for farm production areas.

The Required Agricultural Practices (RAPs) in Section 6.01 of the rule establishes the requirement that farms cannot discharge agricultural stormwater from the production area into surface water or into any conveyance that would reach surface water. Farms cannot discharge agricultural waste from a farm production area into a municipal stormwater network – this would be a violation of the RAPs, and a farmer found to be discharging would be required to upgrade their infrastructure, come into compliance with the RAP standards, and may face related penalties. The cost of stormwater management projects can quickly run over \$500,000 for a waste storage collection project on even small farms. Legislative council’s research and presentation to the Task Force to Revitalize the Vermont Dairy Industry in 2022 underscores the high ongoing cost and burden for farms to comply with the State’s agricultural water quality standards: an average of \$90,000 a year for an average dairy farm’s compliance with the RAPs.<sup>2</sup> Municipalities are assessing stormwater utility fees on farms which have no functional stormwater discharge as the farm collects all runoff in a waste storage

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<sup>2</sup> O’Grady, Michael. Environmental Compliance Costs of Dairy Farming in Vermont. Task Force to Revitalize the Vermont Dairy Industry 10/24/22  
<https://legislature.vermont.gov/Documents/2022/WorkGroups/RevitalizingDairy/Documents%20and%20Testimony/W~Michael%20O’Grady~Environmental%20Compliance%20Cost%20of%20Dairy%20Farming~10-24-2022.pdf>



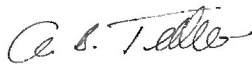
facility. These standards on farms far exceed the requirements for every other sector's management of their stormwater as stormwater permits issued through ANR allow the discharge of pollutants.

We caution that if anyone is considering wading into the policy discussion of additional operational stormwater permitting on farms, this is a 'Pandora's Box' that is best left closed. If farms must participate in a municipal stormwater utility, then they should be able to use it--which could result in direct waste discharges from farms. Allowing a farm to participate in a stormwater utility would mean a farm can arguably build a stormwater retentions system similar to a parking lot – which is allowed to discharge in periods of high-flow precipitation. Vermont farms are not allowed to discharge agricultural waste per the RAPs. Farmers are being assessed a stormwater utility user fee – but a farm cannot use the stormwater utility. The implementation of a stormwater treatment practice on a farm would make that farm noncompliant with the RAPs as the RAPs establish a no-discharge standard from the production area.

“All-in” was a rallying cry that was associated with the passage and implementation of Act 64 of 2015 – Vermont's ‘Clean Water Act’. This ‘All-in’ motto was intended to mean that ‘every sector needs to do its part’, not that ‘farms need to do more than their fair share to cleanup Lake Champlain and then *also* pay for a Homeowners Association in their town to clean out their stormwater pond.’ To speak more about equity, municipal Wastewater Treatment Facilities (WWTF) are actually given an allocation for future growth and are allowed to increase their phosphorus loading over the life of the Lake Champlain Basin Total Maximum Daily Load (TMDL) for Phosphorus from 25 Metric Tons of phosphorus a year in 2018 to 32 Metric Tons of phosphorus at the close of the TMDL.<sup>3</sup> Farms are contributing 41% of the phosphorus loading to Lake Champlain but are responsible for 56% of the cleanup – that WWTF increase already requires farms to do more than their fair share so municipalities can discharge more phosphorus. Farms have also been making great progress to cleanup Lake Champlain since the passage of Act 64 of 2015 – over 95% of reported phosphorus reductions from the state have come from Agriculture.<sup>4</sup>

Some towns are erroneously exercising an authority they lack. The proposed language is a gentle means to requires those towns to correct the error. We hope you will support this common-sense correction and we will be pleased to discuss it further.

Sincerely,



Anson Tebbetts  
Secretary

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<sup>3</sup> EPA. Phosphorus TMDLs for Vermont Segments of Lake Champlain. June 17, 2016. Page 48.  
<https://attains.epa.gov/attains-public/api/documents/actions/1VTDECWQ/66080/104776>

<sup>4</sup> Vermont Department of Environmental Conservation. Vermont Clean Water Initiative 2022 Performance Report.  
<https://dec.vermont.gov/sites/dec/files/WID/CWIP/Vermont%20Clean%20Water%20Initiative%202022%20Performance%20Report.pdf>

