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House Judiciary Committee

Testimony on S.45

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My name is Merrill Bent and I am the managing director of Woolmington Campbell Bent & Stasny in Manchester VT. I appreciate the opportunity to speak to you today about the proposed changes to the right to farm law.

I. There is no Problem to Solve: Vermont Does Not Have a Problem with Frivolous Suits Against Farmers.

My law firm was involved in what I believe to be the only case in recent history to which it has applied, known as Aerie Point. The case was an extreme outlier case, and it was not even a close call that the right to farm law was not intended to insulate the type of damage involved. Even if the presumption had applied, the court found that it would have been overcome because of substantial adverse effects on health and welfare. The Plaintiff also proved their claims of trespass and nuisance on top of that.

Aerie Point concerned extreme changes to upslope farming fields and practices without any consideration for what would happen downhill property or Lake Champlain. The upslope farm installed 119 miles of tile drains which collected and concentrated water and then discharged it at high velocity right onto and through my client's land. In other words, the flows of water were changed in a manner that has resulted in a permanent physical invasion of someone else's property.

- Reference to Video, Trial Ex. 37. This is a trial exhibit, and it was taken after a modest rainfall in November 2021. (*N.B. another witness has made a misstatement to another committee that this video was from an extreme rain event last summer. That witness is mistaken.*). Before the pipes were installed, this area was an occasional trickling stream. The increased flows have turned it into river rapids whenever it rains a modest amount. This is happening on multiple areas of the property, with erosion digging deep channels through a large area of land.
- Reference to **Photos**. Trial Ex. 10. The erosion is so extreme that it interfered with the operations of the much smaller farm that leased land from Aerie Point.
- Reference to **Photo.** Trial Exs. 19, 32, 33. The water goes through Aerie Point's property, and right into Lake Champlain, in huge brown plumes, which were shown to have increased levels of phosphorous and e. coli. This effects not just the intervening landowner, but everyone who uses and enjoys Lake Champlain.
- Reference to **Photos.** Trial Exs. 16, 23. The contamination in the water causes increases in cyanobacteria, known as blue-green algae, and other deposits into

the land and onto the lakeshore. It prevents people from normal lakeside activities like swimming because it's not safe.

Aerie Point involved a plaintiff who was raised on a large cattle farm. They value and respect farms and farmers. They understand the challenges that farmers face, and this is not a family that would have complained about a minor inconvenience.

The plaintiff also did not rush into litigation. They asked for and engaged in efforts to resolve this well before resorting to a lawsuit. Before filing suit, they hired an expert from Cornell University at their own expense to make sure they were correct about the source of the damage, and to literally design and propose a remediation plan. Unfortunately, that plan was not accepted, and they were left with no other options to protect their property.

While both the nuisance and trespass laws permit for it, the Plaintiffs did not seek any money damages from the farm in their suit—all they asked from the court was to require the farm to stop the damage to their property.

Adding trespass to the right-to-farm protection would absolve farming activities even when their activities physically invade and damage someone else's land. It could potentially immunize farms who start exporting agricultural waste onto their neighbor's land, which is what **is continuing to happen** to Aerie Point—the only case Vermont has seen in the last 20+ years. It would not be good policy to immunize the type of property damage involved in the one case that has gone through the Vermont courts.

All of the concerns that this law is intended to address are hypothetical. Nobody has identified any real cases in which there have been unfounded claims brought against a farm.

II. This Law Would Not Prevent Lawsuits

This law will not prevent any suits from being filed, or from going through discovery and to trial. The law would still require the parties to litigate in order for a determination to be made regarding application of the presumption, and the underlying claims would most likely be litigated at the same time to avoid the need for two, duplicative trials if the presumption does not apply or is overcome. The law does not provide a mechanism for early disposition of these cases without discovery, nor could it without violating plaintiff property owner's fundamental rights, including due process rights.

Additionally, placing the initial burden with the plaintiff does not mean that the plaintiff will not be entitled to discovery, nor does it mean that a farm wouldn't need to put on evidence in response to the plaintiff's evidence.

With regard to the mediation requirement, the Vermont Rules of Civil Procedure already provide for mandatory mediation. It is not required prior to filing suit, because in general people are not in a position to meaningfully mediate before they have had discovery.

III. Constitutional Infirmities

This law is vulnerable to a challenge for violation of at least two fundamental constitutional rights, in addition to posing the potential for takings claims against the State, which Professor Echeverria will discuss in his testimony.

1. **Common Benefits Clause.** Vermont's Common Benefits Clause secures equal protection under the law. Vt. Const. Ch. I, Art. 7. The law is oppressive and discriminatory for certain subset of property owners in the state, and inures only to the benefit of a small class of citizens. Because there are so few lawsuits against farms in this State, it cannot be said that it is reasonably related to a legitimate public purpose for this provision. There is no benefit to the public. *Choquette v. Perrault*, 153 Vt. 45, 54, 569 A.2d 455, 460 (1989).

2. **Right to Access to the Courts.** Access to the courts is a fundamental right under the Vermont Constitution. Vt. Const. Ch. I, Art. 4; *Knapp v. Dasler*, 2024 VT 65, ¶ 35. This law would impinge upon that right for landowners who happen to have been damaged by a neighboring farm, by requiring them to incur the cost of a mediation before having access to the court. This is an expense other landowners do not face for the exact same claims brought against any other defendant.

Conclusion

Aerie Point is an extreme, isolated example. Imposing potentially unconstitutional roadblocks that would infringe upon property rights is a disproportionate response, which will create unknowns and the potential for unintended consequences. The law now in effect discourages lawsuits, and requires a plaintiff to carefully analyze the facts and the law before bringing a nuisance action. It already poses a higher bar than in other suits. The proposed changes would impact the property rights of just one subset of people, in order to benefit another specific subset of people. It will inhibit a whole class of Vermonters—specifically those who live next to (or nearby) farms—from protecting what is usually Vermonters' most valuable asset—their land—in the rare situations that warrant it. It will place farmers in a separate class, immune from liability for causing damage to someone else's property, and basically authorize them to externalize their costs onto someone else.