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Chuck Ross, Secretary  
Vermont Agency of Agriculture, Food & Markets  
116 State St.  
Montpelier, VT 05620-2901

RE: Comments on Conservation Law Foundation's "Petition to Require Mandatory Pollution Control Best Management Practices for Agricultural Non-Point Sources Identified in the Missisquoi Basin Plan"

Dear Secretary Ross,

The Vermont Department of Environmental Conservation (DEC) offers the following comments on Conservation Law Foundation's (CLF) "Petition to Require Mandatory Pollution Control Best Management Practices for Agricultural Non-Point Sources Identified in the Missisquoi Basin Plan" (the Petition).

DEC agrees with CLF that the State must focus on reducing phosphorus discharges from agricultural operations across the State and especially in Missisquoi Bay and the Lake Champlain watershed to achieve compliance with the State's water quality goals enumerated in 10 V.S.A. § 1250, the Missisquoi Bay Basin Plan, and the Vermont Water Quality Standards. DEC also agrees with CLF that to achieve these goals the State will need to require *targeted* best management practices (BMPs) within Missisquoi Bay to reduce non-point source phosphorus pollution from critical source areas as delineated in the "Identification of Critical Source Areas of Phosphorus Within the Vermont Sector of the Missisquoi Bay Basin" (the Critical Source Area Study). Additionally, DEC agrees with CLF that farm practices to protect water quality must be updated to reflect information obtained over the past several years.

Although DEC agrees with CLF on these primary public policy goals and the general approach to achieving those goals, CLF's use of the Petition is not necessary to achieve those goals. DEC and the Vermont Agency of Agriculture, Food & Markets (AAFM) have been working together and with stakeholders to develop a rigorous plan to reduce phosphorus discharges from agricultural. "Vermont Lake Champlain Phosphorus TMDL Phase I Implementation Plan" (TMDL Phase I Plan) at 66.

The TMDL Phase I Plan already includes a commitment to and timeline for the vast majority of what CLF is requesting through the Petition, including: (1) requiring implementation of targeted BMPs in critical source areas, including Missisquoi Bay, as additional research is completed documenting the reduction values of various practices including cover crops, reduced tillage, and manure injection and aeration, (2) providing funding for targeted BMP and Nutrient Management Plan



(NMP) requirements in Missisquoi Bay as well as St. Albans Bay and South Lake, and (3) updating the statewide Accepted Agricultural Practices (AAPs) to require 25 foot buffers along all perennial streams, the exclusion of livestock from perennial streams where erosion is prevalent, a reduction in field tolerable soil loss for fields in annual crop production from 2T to T on all small farms, and a small farm AAP compliance certification process. TMDL Phase I Plan at 71-72, 75-76, 78-79.

The State has already made the foregoing commitments to the federal Environmental Protection Agency (EPA) through the TMDL Phase I Plan. Pursuant to Section 303(d) and (e) of the Clean Water Act (33 U.S.C. § 1313(d) and (e)) and EPA's 1991 "Guidance for Water Quality-based Decision: The TMDL Process," the TMDL Phase I Plan is the instrument through which the State provides EPA with "reasonable assurances" that it will be able to comply with the nonpoint source reductions required by the TMDL. Thus, if and when EPA approves the TMDL Phase I Plan as part of its issuance of a final TMDL, the State must honor the commitments it has made in the TMDL Phase I Plan to require targeted BMPs in Missisquoi Bay. Therefore, DEC recommends that AAFM grant the Petition consistent with the timeline established in the TMDL Phase I Plan only insofar as the Petition aligns with the TMDL Phase I Plan.

To meet the commitments in the TMDL Phase I Plan, DEC agrees with CLF that the Critical Source Area (CSA) Study and Maps are vital resources for guiding AAFM activities within the Missisquoi Bay watershed and throughout the Lake Champlain watershed and the State. However, such maps cannot substitute for on-the-ground observations. The CSA maps represent a "shot in time" and show the potential for run-off from certain sites at the time the maps were created, but run-off potential may change over time as site conditions change. For example, since the CSA maps were created, a field that was planted with corn may have transitioned to hay as part of normal crop rotation. Typically, a cornfield poses a higher concern for water quality than a field with hay. CSA modeling does not account for these changes or acknowledge practices that farmers may already be implementing to address high runoff potential. Thus, the information from CSA maps must be verified through site visits.

Therefore, the CSA maps should be viewed as part of a broader CSA methodology that the State intends to use to guide its implementation of targeted BMPs, regulation, technical assistance, training and education, and funding. The maps should not serve as the sole basis for requiring a particular agricultural operation to adopt specific BMPs. DEC is already using CSA information to inform planning and grant funding, and DEC proposes to work with AAFM to establish guidance or procedures concerning how the State will use CSA information to further inform its decisions under the TMDL Phase I Plan.

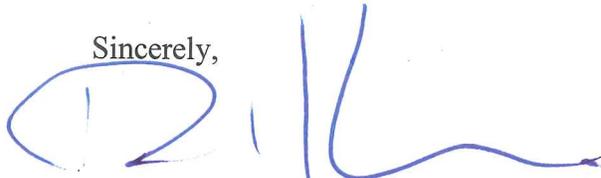
One of the other tools that may inform the State's implementation of targeted BMPs in the near future is the APEX model. This is a farm-specific model that can demonstrate runoff and evaluate the best practices to install to decrease runoff. The APEX model recognizes the individual farm site characteristics, circumstances, and needs, and used in concert with tools such as NMPs and the CSA Study and Maps, will create an individual farm performance standard that will provide a highly effective approach to targeting BMPs.

Finally, in regards to the updates to the AAPs proposed in the TMDL Phase I Plan, it is important to note that the AAPs are "BMPs" within the meaning of the Clean Water Act and as that term is used in the TMDL Phase I Plan. Under the Clean Water Act, "BMPs" are defined as "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of 'waters of the United States'" and "include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage." 40 C.F.R. § 122.2. The AAPs are statewide practices to prevent pollutants from entering the waters of the State and include erosion and sediment controls, animal waste management, fertilizer management, and pesticide management. 6 V.S.A. § 4810(a)(1); Accepted Agricultural Practice Regulations (April 24, 2006). The State's plan to amend the AAPs will serve to address CLF's requests for vegetated

filter strips that are at least 25 feet wide along waterways and livestock exclusion from waterways, and the State's plan to change the AAPs to reduce field tolerable soil loss from 2T to T on small farms will also result in farmers increasing the use of practices such as cover crops and reduced tillage. Importantly, the amended AAPs will apply to agricultural operations across the State, not just to those in Missisquoi Bay.

I appreciate the opportunity to provide these comments. DEC is committed to working cooperatively with you and your agency to achieve a clean Lake Champlain and I have appreciated your demonstrated support for this work.

Sincerely,



David K. Mears, Commissioner  
Department of Environmental Conservation