



Vermont Council

December 18, 2015

Agency of Agriculture, Food and Markets  
116 State Street  
Montpelier, VT 05620

*Via email to AGR.RAP@vermont.gov*

**Re: Comments on Pre-Draft Required Agricultural Practices**

The Vermont Council of Trout Unlimited (“VTTU”) writes in comment of the Pre-Draft Required Agricultural Practices Regulations for the Agricultural Non-point Source Pollution Control Program (“Draft RAPs”) as required in Act 64 ‘An act relating to improving the quality of State waters.’ We commend the Vermont Agency of Agriculture, Food and Markets (“AAF”) for updating the regulations and practices to eliminate nonpoint discharge and erosion from agricultural sources. This is one of the most important steps towards protection and restoration all surface waters of the state. Overall, VTTU found the Draft RAPs to be far-reaching and incorporated a number of agricultural nonpoint pollution sources into the regulations. However, VTTU also found the Draft RAPs to be deficient in some areas. Most significantly was the applicability of the RAPs to most, but not all, farms. There is also need for more robust education, inspection and enforcement criteria, and some of the specific regulations need to be strengthened.

VTTU consists of five chapters touching all parts of the state with a total of over 1,200 members. Our mission is to conserve, protect and restore Vermont’s fisheries and their watersheds. While much of the public focus of Act 64 is on the health of Lake Champlain, VTTU is focused on the rivers, streams, and headwaters that also benefit from Act 64. Moreover, the interconnectivity of groundwater, surface runoff and the connection to our waterways is of particular concern, as nonpoint pollution and indirect discharge from agricultural activity and livestock waste has a significant impact on surface water and adjacent water bodies, particularly smaller waterbodies and headwaters.

## General Comments

The Draft RAPs are a solid step towards curbing agricultural runoff and its impacts on surface waters. The Draft RAPs provide concrete direction on farming practices and procedures that will reduce runoff and lead to the restoration of the state's lakes and rivers. This is the beginning of a process that will include education, assistance and, if need be, enforcement to bring Vermont's agricultural community into compliance. But, there is one important shortcoming that pervades the entire regulation – the Draft RAPs must apply to all properties that raise crops or livestock, regardless of acreage or number.

VTTU is concerned about the limited applicability of the RAPs in the overall farming community. Rather than the RAPs applying to all agricultural operations, regardless of size, AAFM has created an artificial floor with a regulatory definition of what constitutes a farm, effectively exempting any agricultural activity below this threshold. While AAFM has taken steps forward in many areas, it also takes a step back with the 'floor' placed regarding the size of farms that have to follow the RAPs.

VTTU acknowledges that much of reasoning for this floor is financial in nature. However, the Draft RAPs includes increased targeted funding through Act 64 and the Clean Water Fund Board to implement the Act. Further, at no point in Act 64 is there an outlet for financial constraints to allow for only partially implementation of the Act. VTTU will continue to advocate for greater financial resources for AAFM both in the general budgetary process and that a greater percentage of the Clean Water Fund Board funding be allocated for agriculture over other areas. But, lack of funds cannot be a reason to not fully implement, educate and enforce the RAPs.

From a legal standpoint, it is the intent of both Act 64 and the Vermont legislature that all farms follow the RAPs. 6 V.S.A. §4810a(a) plainly states the Secretary "shall" "assure practices on all farms eliminate adverse impacts to water quality." The regulation must be applied to all farms, regardless of size or number of livestock. One cannot use the regulatory definition of a "farm" to deflect the issue, arguing it is only a "farm" if the regulation defines it as a "farm." This twists the intent and purpose of the law. Raising crops or livestock is an agricultural practice that can cause nonpoint pollution. All agricultural practices regardless of size can pollute waterways, therefore, the RAPs must apply to all farm practices.

As a practical matter, AAFM has stated in the past that some farmers did not follow the current AAFMs due to a lack of education and awareness of the regulation. Now with the Draft RAPs, rather than increase the scope of education, AAFM has instead limited who must comply. AAFM is circumventing this education problem by exempting, in their words, "thousands" of smaller farms from following the RAPs. But these "thousands" will still add to water pollution.

The issue cannot be a lack of funds to educate or enforce. VTTU will continue to vigorously advocate for more funds for AAFM programs to educate, assist and enforce the RAPs. But, the RAPs must be applicable to all agricultural practices, regardless of size.

## **Specific Comments**

VTTU agrees with many of the specific provisions that have been put forward, but there are some areas where the Draft could be strengthened or, in some cases, more clearly stated.

### Designation of Small Farms §§ 2.25, 3.1(a)-(d)

If the RAPs were to be followed by all farms, then this small farm designation would likely be unnecessary. That aside, if the definition is retained, it is too complex and should be simplified. In the Draft RAPs, the definition of a “Small Farm” entails the number of acres the farm encompasses, the amount of livestock it possesses, or a specific income level. But, in their current form, the Draft RAPs allow for a farm to fluctuate in and out of the definition, and therefore in and out of the requirement to comply.

To illustrate, what if a property owner has 80 pigs, which would put the owner into the small farm designation, but then sells all but ten of the pigs, thereby removing the farm from the criteria. Does it first comply with RAPs, then not? Or if a farm decides to raise livestock or plant crops one year, but does not the next? Is the manure stored from previous years exempt? Is the farmer expected to waiver in and out of compliance, following the guidelines one year but not the next? The goal needs to be protecting surface and ground water from nonpoint pollution. The simpler solution is to have all farms follow the RAP guidelines.

### §3.1 Presumption of Compliance without Verification

Similar to the issue of applicability of the RAPs noted above, presumption of compliance seems to be borne out of fiscal concerns, rather than sound environmental policy. The Draft RAPs state in §3.1 that a person engaged in farming as defined in §3.2 and who meet these “minimum threshold criteria” in the regulation “shall be presumed” to be in compliance with the RAPs. In this, it will be “presumed” the discharge to waters of the state is not occurring.

Compliance cannot simply be presumed. It must be verified. AAFM is making a leap of faith to presume that a small farm is in compliance and not discharging until it can be shown otherwise. VTTU contends that it must be assumed discharge is occurring until it can be verified that a farm is in compliance. If the issue is once again a lack of staff, AAFM should consider third-party, independent assistance or some other avenue. While VTTU reiterates its support for increased funding for education, assistance, and additional staff, there cannot be a presumption of compliance without some type of verification.

### §4.10 Inspection of Certified Small Farm Operations (SFOs):

AAFM states small farms “shall be inspected within 10 years of initial certification” and then subsequently inspected “based on potential impacts to water quality from the small farm.” §4.10(f). Here, a farm will self-certify and could be inspected once in ten years, then never again. This is simply inadequate. This inspection and verification must occur more promptly and repeatedly than once in ten years. VTTU would suggest that every three to five years is

necessary, as conditions can change, and would again suggest third-party, independent assistance if needed.

AAFM estimates that this new Small Farm Operations (SFOs) certification program would apply to approximately 2,500 farms. This places much-needed focus on the many farms below Medium Farms Operations and Large Farm Operations that contribute to water pollution. Farm certification, even self-certification, is a positive step towards better farm practices in preventing pollution, but self-certification without inspection and verification from the agency or an independent third-party amounts to little more than a voluntary program. This is similar to the current AAP program and is outside the legislative intent. AAFM should eliminate self-certification and instead verify that the process is being followed with inspection every three to five years. With no enforcement threat and no danger of being inspected, this becomes a voluntary program, not the mandatory program that was envisioned to protect surface waters.

### §5 Required Agricultural Practices

Overall, this is a solid regulation to prevent indirect discharge and protect surface and ground waters. In particular, we are pleased it includes surface waters, intermittent waters, and groundwater. It is important to acknowledge the interconnectivity of surface and ground water in curbing pollution.

#### §5.2 Nutrient, Agricultural Inputs and Waste Storage

Overall, this section seems solid. Section 5.2(e) regarding field stacking of manure is one of the more important provisions and VTTU fully supports the regulations on setbacks and rotation of manure stacking. A flood, human-error or other event that washes this stored manure into a waterway would have a devastating impact on water quality and undo what might have been years of successful preventative measures.

Some commentators have asked for exemptions from these rules for small farms that may have difficulty in compliance. VTTU opposes exemptions to the setback and stacking rules, and argues that rather an exemption, that manure could be disposed of in an alternate manner rather than reducing setback distances or rotation requirements. We understand that smaller farms can be a variety of sizes and these stacking provisions may be difficult for a specific farm to comply. However, exemptions should not be entertained as pollution could still occur. The size of a farm does not lessen the chance that an event could result in a massive amount of manure entering a waterway. Therefore, if the farm cannot follow the setback regulations, then alternative disposal, even off-site, should be required, but flat exemptions should not be allowed.

#### §5.3 Nutrient Management Planning

VTTU supports the inclusion of all farms in requiring Nutrient Management Plans (NMPs). The Draft RAPs state that “[a]ll Certified Small Farm Operations ... shall implement a field by field nutrient management plan.” §5.3(a) Again, this gets to the definition of a small farm, but does not include all agricultural practices. The statute clearly does not differentiate: the Secretary

shall establish standards for nutrient management on farms, including “required nutrient management planning on all farms that manage agricultural wastes.” 6 V.S.A. §4810a(a)(4)(A). It is understandable that there is an expense associated with these plans, but some consideration must be made for this.

#### §5.5 Waste Application Standards and §5.6 Winter Manure Spreading Exemptions

VTTU commends the agency on efforts to strengthen the regulation to eliminate winter spreading of manure and other nutrients. The accumulation of nutrients on frozen ground and the possibility of a cumulative effect of phosphorus loading during the spring runoff must be eliminated. There is always concern about exemptions, but we hope they will be granted sparingly and as a last resort. We also hope the Secretary will not hesitate to expand the December 15 to April 1 ban as needed, articulated in §5.5(b). With this process, education will be key, particularly in regards to anticipated weather events, but so will enforcement.

However, indirect discharge from dairy waste, such as whey, as a source of phosphorous in waste application standards is conspicuously absent here, as well as in the NMPs. AAFM must address the issue of indirect discharge from dairy waste as a source of phosphorous and acknowledge its relation to other phosphorous loading practices, including the application of manure and industrial fertilizer. The major assumption with indirect discharge by regulating agencies is that no harmful products are contained in indirect discharge effluent, and therefore there is no damage or risk to the environment. But, manure, fertilizer and indirect dairy discharge are all sources of phosphorous and other pollutants, so the cumulative effects of the application to farm fields must be taken into account when AAFM considers runoff from agricultural fields into groundwater as well as adjacent surface waters. It is important to prevent future impacts of indirect discharge on our surface waters, particularly headwaters and spring sources of rivers.

Finally, VTTU understands that an exemption from the winter spreading ban in §5.6(a) is more a practical matter of emptying waste lagoons filled to capacity than it is spreading nutrients for the upcoming growing season, but this is the manifestation of the problem. Logically, this practice could be curbed or eliminated by requiring the construction of larger waste lagoons when a new lagoon is constructed. But for current farms, this may not be practical. That said, winter spreading exemptions must be rarely granted, and used in a true emergency rather than to compensate for poor planning.

Overall, VTTU supports the efforts of AAFM to prevent excessive nutrient loading from manure spreading, especially during weather events and the winter season. We ask that the cumulative impacts of spreading of all nutrient sources must be taken into account, not just manure. Further, we ask the Secretary to limit winter spreading exemptions and pay close attention to enforcement, particularly for violations of the winter spreading ban.

#### §5.7 Buffers Zones

The buffer setback is an important aspect of the Draft RAPs to reduce phosphorus runoff and sedimentation due to erosion. There is concern that the buffer width will be inadequate, but it is

understood that this distance is a result of legislative compromise and is established by statute. VTTU would ask that more specificity in the Draft RAPs for types of vegetation and practices for maintaining the buffers, such as exclusion of livestock and not allowing harvest of the buffer.

#### §6.0 Livestock Exclusion

The section of the statute concerning the exclusion of livestock from rivers, streams and headwaters has been a prime concern for VTTU since the legislative session. For small streams that make up the headwaters of watersheds, livestock exclusion is key. Excess sedimentation in a small stream can have larger downstream impacts on water quality, potentially impacting broad portions of the watershed. The Draft RAPs should more clearly define the purpose of this section and more clearly explain the methods to reach this goal.

The language in Act 64 is plain; the language in the Draft RAPs is not. The statute states the Secretary shall “[e]stablish standards for the exclusion of livestock from waters of the State to prevent erosion and adverse water quality impacts.” 6 V.S.A. §4810a(a)(9). In the Draft RAPs, no stream access for livestock is allowed except at crossings and defined watering areas. Further, adequate cover must be maintained and a 3 inch minimum of growth on all pastures. We would ask that the regulation be more specific so as to eliminate any confusion.

Exclusion of livestock from surface waters will reduce erosion and manure in the waterway. This purpose should be adequately explained, either here or in future education practices. The exceptions to the rules have a good basis, but, with the understanding that some of this will be case-by-case, the exceptions could be better defined to avoid confusion, as well. First, how crossings are established and what is acceptable must be better explained. Second, the phrase “defined watering areas” is vague and implies that sections of streams could be excluded from the regulation, rather than a watering area that is adjacent to or diverted from the river or stream. Finally, we ask that exceptions “based on site specific characteristics,” be variations on such practices, rather than outright exceptions that undermine the purpose of the rule.

Overall, all farmers with livestock should be required to follow the RAPs. But as an organization that strives to protect rivers, streams and headwaters, VTTU is particularly concerned that all livestock owners follow §6.0. Just three equines, four cows, fourteen swine, or another number of livestock that would exempt a farmer from the RAPs can cause significant erosion and pollution to small surface waters and feeder streams. The cumulative impact of several such exempt farms could severely undermine other efforts to restore state waters.

#### §7.0 Ground Water Quality and §8.0 Investigations

VTTU is pleased that AAFM has included an extensive section on protection of groundwater. As Vermont is one of the few states that holds groundwater in public trust for use by all citizens, not just surface land owners, it is important that all water regulations protect groundwater quality and quantity. It is important to prevent future impacts to protect groundwater not only as a source of drinking water, but also as vital feeders for surface waters, particularly headwaters and spring sources of rivers.

The well-established nexus between groundwater and surface waters is not mentioned in the Draft RAPs. Nevertheless, the impacts that excessive surface nutrient application can have on groundwater and the efforts that can be taken to prevent this are detailed. Excessive nutrient application may not directly impact surface waters, but pollution to groundwater will eventually contaminate nearby surface waters. Pollution that affects groundwater could leach into surface waters, and the converse is also true. Both of these factors could have broad impacts on downstream waters and the overall watershed.

The investigative practices established in §8.0 are welcome, particularly that the agency “shall” investigate if a complaint is received by water supply owner or tenant in the vicinity of the farm alleged to contaminate the area groundwater. This recognizes that groundwater flows and is connected beneath the surface of adjoining property. Further, it empowers neighbors to protect their health and safety, and that of the environment.

However, VTTU would ask that the “approaches to identify and remediate sources” of contamination outlined in §8.0(e) be separated into two sections. It is appropriate that the Secretary “may use” the approaches established in (i), (ii), (iii), (v), (vi) and (vii) to investigate, as some may be more appropriate investigative avenues in case-by-case situations.

But, the corrective actions buried in §8.0(e)(iv) should be mandatory and a separate section. It is more appropriate that, upon finding contamination from an agricultural practice, the Secretary “shall” “[r]equire corrective actions.” That the Secretary “may” “[r]equire corrective actions” is entirely inadequate and undermines the purpose of the section. Corrective actions cannot be optional. Within (iv), there are several options that could be employed as the situation dictates, and therefore designated and differentiated by “or,” but overall action to prevent further contamination should be immediate. Moreover, this should also be a trigger for enforcement and possible penalties if warranted.

### A Note on Enforcement

While not specified in this section of Act 64, the RAPs are only as successful as its implementation. Without the threat of enforcement, implementation may very well fail. If once again lack of staff is the issue, AAFM should call on the expertise of the Vermont Department of Environmental Conservation to assist in compliance and enforcement. VTTU applauds that the Attorney General’s Office has been given more civil and criminal means to enforce violations, but it is AAFM who must report these violations to the Attorney General. The gaps caused by inadequate inspections and verification means that discovery of these violations may be too few and far between to be effective.

### Conclusion

VTTU again thanks AAFM for the opportunity to comment on these pre-draft regulations and we will continue to monitor and comment on the regulations as they move towards finality. VTTU commends AAFM on drafting a solid basis for the new Required Agricultural Practices. But, these RAPs needed to be fine-tuned. Foremost, to be effective, they must apply to any property

owners that plants crops or owns livestock. A lack of funding and staff cannot be a basis to implement a partial regulation. The cumulative impact of these exempt farms, even unknown in number, will undermine the overall purpose of Act 64.

Sincerely,



Clark Amadon, Chair  
Vermont Council of Trout Unlimited

*The Vermont Council comprises of the:*

Central Vermont Chapter, representing members in Chittenden, Addison, Orleans, and Franklin Counties.

Connecticut River Valley Chapter, representing members in Windham and Windsor Counties.

Greater Upper Valley Chapter, representing members in Windsor, Orange, and Caledonia Counties.

MadDog Chapter, representing members in Washington, Lamoille, Caledonia, and Essex Counties.

Southwest Chapter, representing members in Bennington and Rutland Counties.