



November 1, 2017

Secretary Julie Moore
Chair
Act 73 Clean Water Working Group
One National Life Drive
Montpelier, VT 05620-3522

Via Email: Julie.Moore@vermont.gov

Re: Comments on the Oct. 18 Draft Report of the Working Group on Water Quality Funding

The Lake Champlain Committee, Vermont Natural Resources Council, Vermont Conservation Voters, Connecticut River Conservancy, the Vermont Chapter of the Sierra Club, and Lake Champlain International appreciate the opportunity to offer input on the Draft Report of the Working Group on Water Quality Funding (“Draft Report”). We thank the members of the Act 73 Clean Water Working Group, particularly its Chair, Secretary Julie Moore, for the work that went into compiling this report. Below is a general summary of our comments, followed by a more in-depth analysis of our concerns with the Draft Report.

General Summary

Overall, we are deeply disappointed that the Draft Report fails to meet the core charge of the Working Group to recommend long-term, stable funding for water quality that has a nexus to the sources of water pollution. Specifically, we find Recommendations 1 and 5, which respectively recommend that the state rely solely on existing revenue sources for “short-term”¹ funding and that the state contract with a consultant to conduct further study, to be unacceptable. We fundamentally disagree that no new revenue sources are needed in the short-term. As we have consistently stated since Act 64 passed in 2015, for Act 64 to be successful the State of Vermont

¹ “Short term” as used in the Draft Report could stretch until FY 2014.

must put in place a long-term, stable and flexible revenue source that can be deployed to implement the highest priority water quality projects. Further, we disagree that the implementation of a long-term solution can be delayed for an indeterminate amount of time, and pushed off for yet another study.

We are concerned that the Draft Report continues to rely primarily on capital funds for the next five years of funding. As detailed below, capital funds have limits in terms of how they can be spent and are not guaranteed in that there is competition for these funds in the Legislature. Accordingly, we do not recommend that capital funds be the primary source of revenue in the short or long term.

The Draft Report estimates that the first five years of costs for water quality is \$84 million dollars. This is in contrast to the Act 64 Clean Water Report prepared by the State Treasurer² (“Treasurer’s Report”) that estimated \$115 million in costs over a five-year period. The five-year estimate in the Treasurer’s Report is based on a twenty-year average. We are concerned that this discrepancy in estimated five-year costs is being used as a justification to raise less revenue over the next five years and as a rationale to delay identifying a long-term stable funding source for water quality.

It is our understanding that the Working Group’s conclusion that less funding is needed over the next five years is based, in part, on the premise that the *Phosphorus TMDLs for Vermont Segments of Lake Champlain*³ (“TMDL”) places constraints on the type of projects eligible for clean water funding. We do not agree with this premise. According to the TMDL, water quality projects that are part of the TMDL Implementation Plan will be based on the Tactical Basin Plans. We do not believe that these projects are limited in terms of which sector of pollution (wastewater, agriculture, developed land, natural resources) they fall into. As such, we see no justification to limit spending over the first five years of TMDL implementation.

The Draft Report’s proposed funding during this first five-year period focuses heavily on the wastewater and developed land sectors. We disagree with this focus and recommend that more emphasis be placed on water improvements to address agricultural pollution and erosion and sedimentation that can be addressed through natural resources restoration projects – as prioritized in the Tactical Basin Plans.

In addition, we are very concerned that the Draft Report bases the recommendation to raise less revenue in the first five years on the capacity of the Agency of Agriculture, Food and Markets (“AAFM”) to disburse funds to necessary farm pollution control projects. Given the documented water problems Act 64 is designed to address, and the fact that farm pollution is by far the greatest contributor of phosphorus to Lake Champlain, it is unacceptable to delay funding because AAFM argues that it does not have an adequate level of staffing to distribute funds. Rather than delay funding, we submit staff should be added to AAFM so we can get the money

² *Clean Water Report Required by Act 64 of 2015*, Office of the State Treasurer, State of Vermont (January 15, 2017).

³ *Phosphorus TMDLs for Vermont Segments of Lake Champlain*, U.S. Environmental Protection Agency, Region 1, New England, Boston, MA (June 17, 2016),

on the ground to fund clean water projects – or this program should be moved to the Department of Environmental Conservation.

Specific Comments

The Agencies Fall Short In Their Statutory Charge, Again

The Draft Report fails to meet the charge from the Vermont Legislature.

Act 73 specifically states:

Sec. 26. WORKING GROUP ON WATER QUALITY FUNDING

(a) Establishment. There is established the Working Group on Water Quality Funding to develop recommendations for equitable and effective long-term funding methods to support clean water efforts in Vermont. ...

(d) Powers and duties. The Working Group on Water Quality Funding shall recommend to the General Assembly draft legislation to establish equitable and effective long-term funding methods to support clean water efforts in Vermont. ...

(f) Report. On or before November 15, 2017, the Working Group on Water Quality Funding shall submit to the General Assembly a summary of its activities, an evaluation of existing sources of funding, and draft legislation to establish equitable and effective long-term funding methods to support clean water efforts in Vermont.

The Working Group did not make recommendations or offer draft legislation for a long-term clean water revenue source or for long-term administration of a clean water fund as required by Act 73. Accordingly, the Draft Report does not meet key requirements of Act 73.

This is not the first instance of a report to the Legislature on clean water funding not providing the requested information. For example, Act 138 (2012), Act 97 (2014), and now Act 73 (2017) all asked for recommendations on long-term, stable funding for clean water, and no such recommendation was ultimately made. It is extremely frustrating to continue to see the request for a clear long-term path for water funding kicked down the road.

Inaction Caused by Fear of Political Repercussions Will Result In Long-Term Economic Consequences

As noted above, the Draft Report proposes to look at funding in five-year increments over the twenty-year life of the TMDL. In addition, the Draft Report concludes that the first five-year period requires less funding than subsequent five-year periods. We disagree with this approach for several reasons.

First, the TMDL Phase 1 and Phase 2 Implementations occur over a twenty-year span. Accordingly, a long-term focus on funding water quality improvements is needed. Addressing funding in five-year increments creates a lack of vision and consistency that is necessary to plan and secure the necessary investments in water quality improvements to address the types of severe problems we are seeing in places like Lake Carmi.

The reluctance to invest in clean water without a long-term stable plan not only will result in the pollution of our public waters, but will have significant economic impacts as well. For example, in Georgia and on the shores of Lake Carmi we have seen diminished property values as a result of the severe pollution. This same type of pollution threatens the vital contribution that tourism makes to Vermont's economy. Without a long-term funding solution, it will become harder to curb the overall economic impacts of polluted waterways.

According to the Treasurer's Report, over \$2.5 billion is spent annually in tourism, and of these funds, "visitor spending contributes \$318 million in tax and fee revenues in 2013 and supported an estimated 30,000 jobs for Vermonters. That \$318 million contributed \$115 million to the general fund, \$188 million to the education fund and \$15 million to the transportation fund."⁴ This problem must be addressed long term, as the economic costs and burden will soon shift to Vermont residents to make up the difference as the tourists dwindle. The longer it takes to recommend and implement the revenue needed for clean water, and get those funds onto the ground in a cost-effective way that curbs pollution sources, the more polluted our waters will become and the more pronounced the economic impacts.

The Focus on a Short-Term Timeline is Inadequate

The Treasurer's Report uses a twenty-year timeline to gauge compliance costs by sector as this mirrors the TMDL compliance. The Treasurer's Report simply divided the twenty-year funding need into annual portions to determine the annual need. The Working Group argues that, due to fluctuations in the funding needs as general permit and other obligations go into effect, five-year increments will provide a more accurate picture of these funding needs. While this might be true, this problem cannot be addressed anew every five years; this needs to be approached long-term. The Draft Report focuses on FY20 to FY24, but then the issue falls off a fiscal cliff because there is no long-term proposal, just an acknowledgement that there will be additional financial obligations in the next five years.

Over the course of several meetings, the Working Group debated a number of administrative and revenue avenues initially listed in the Treasurer's Report that are not included in the Draft Report. These include funding mechanisms such as a flat parcel fee, a per-acre fee, a tiered per parcel fee, and an impervious surface fee. It is our understanding that the 'pros' and 'cons' of these debated revenue mechanisms and administrative avenues will be offered in the Final Report, and we look forward to reviewing them at that time. However, as previously noted, if the Final Report does not include a clear recommendation for a long-term, stable dedicated funding source to put in place once the "Bridge Funding" expires, the Working Group will have failed to meet its charge.

New Stable Revenue Sources Are Needed in Both the Short-Term and the Long-Term

The environmental community maintains that a clean water revenue source must be long-term, stable, have a nexus to the pollution, and involve all sectors and citizens so everyone is "all-in." The short-term funding recommendation proposed by the Working Group meets none of these criteria and has significant problems.

⁴ Treasurer's Report, *supra* note 2, 1-2.

It should be noted that in the span of a year, the agencies in the Working Group have recalculated the revenue numbers dedicated to clean water, including ANR, AAFM, and the Agency of Transportation (“VTrans”). Why these same numbers were not included in the Treasurer’s Report as existing revenue is a question. But, even if the numbers are agreed upon, the gaps in spending show the need for new revenue sources beyond the restricted capital funds and Property Transfer Tax.

Recommendation 1 states: “In the near term, the Act 73 Working Group recommends existing revenue sources to fund clean water investments.”⁵ A main concern with this Recommendation is that none of these funding sources are stable, therefore, clean water revenue could be much less than projected and could fluctuate from year to year, making planning and implementation difficult.

The Draft Report then states that clean water funding will rely on “[e]xisting revenue sources, totaling an average \$78 million a year, including \$25 million in state funds, \$25 million from municipalities, \$16 million from federal sources, [and] \$11 million in private investments.”⁶

It should be noted however, that much of this money does not “exist,” but instead is hoped for. The current reliability of funding from the federal government will not be discussed here, but it is not assured that the state will receive \$16 million annually. Further, the municipal and private spending are assumed obligations, not money in hand, as the municipalities will have to find a revenue source for these funds – in other words, impose a fee or tax on their residents, while the private sector will have to fulfill their permit obligations.

Private entities are responsible for complying with individual permit requirements, and, as such, must take actions to curb water pollution. However, we are concerned that the state may not take enforcement actions necessary to ensure permit obligations are met. This concern with environmental enforcement underscores the point that private permit obligations should not be assumed. The state as a whole must improve its enforcement programs to ensure private actors do their part to address water pollution.

The Draft Report continues: “State funds comprise \$19 million from the Capital Bill, \$4 million from the Clean Water Fund; \$1 million from the General Fund; and \$2 million in state funds from the Transportation Bill.”⁷ But, these sources are assumed as well, as most of it will have to be approved by the Vermont Legislature annually, again leading to the possibility of fluctuating revenue on short notice and difficulty to plan even over a span of a few years.

While the funding sources in the Draft Report are not stable, long-term, or with a nexus to the pollution, the capital bond funds may well involve all sectors because it is debt that the state must repay. However, as noted above, capital bond funds are subject to the annual legislative process, which means they must be requested (and defended) every legislative session and therefore, the amount authorized could be altered annually. There are many competing priorities

⁵ Draft Report of the Working Group on Water Quality Funding 2017 Act 73, Section 26 (October 18, 2017) 35.

⁶ *Id.*

⁷ *Id.*

for these capital dollars, such as mental health facilities, prisons, and other facilities. Further, the Treasurer has recommended that our capital funding levels decline in the coming years. Accordingly, it is highly unlikely that the level of capital funding assumed in the Draft Report could be maintained for the next five years.

Finally, the capital bond revenue is restricted in use and cannot be used for some of the most important programs to reduce phosphorus and sedimentation. Capital funds can be used for wastewater programs and projects on developed lands, such as stormwater projects. However, they cannot be used for many agricultural and natural resources projects that are some of the most cost-effective strategies for reducing pollution. This is another reason why capital funds should not comprise the bulk of our clean water funding.

Additionally, the Property Transfer Tax Clean Water Surcharge is not stable and does not meet the “all in” approach to water funding. The Property Transfer Tax does not apply to all Vermonters. Moreover, as we saw clearly last Legislative Session, it is not a stable source of funding as these funds can be diverted for other priorities in any given year.

While we agree that the FY18 – FY19 Capital Bill “Bridge Funding” should stay at current levels (as that money is currently being allocated for projects), we disagree that it should be used as the primary source of another five years of “Bridge Funding” for the reasons stated herein. As previously noted, we request that the Final Report include a clear recommendation for long-term, stable, dedicated funding after the “Bridge Funding” that was put into place last Legislative Session expires.

ANR Needs to Invest More Funds in the Agriculture and Natural Resources Sectors

In the Draft Report, the Working Group targets too much revenue to the wastewater and developed lands sectors, and not enough to agriculture and natural resources. Some of this comes from the constraints in use of the capital bond revenues. However, some projects in the agriculture and natural resources sectors are neglected in favor of wastewater and stormwater projects to the extent that there is an annual gap of \$14 million between existing revenue and needed revenue in the agriculture sector for which a solution has not been offered.

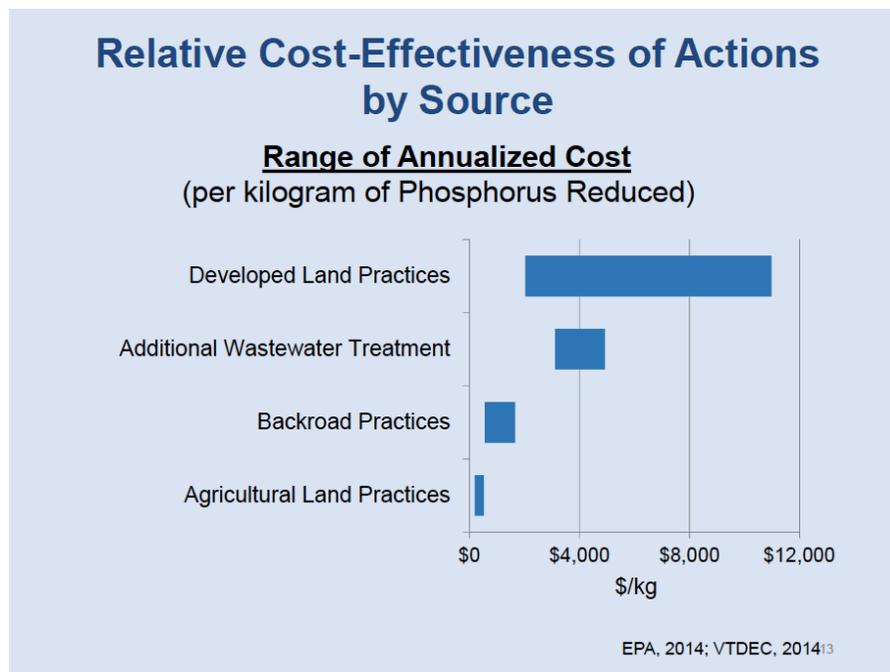
By its comments and actions, ANR seems convinced it must focus on wastewater and municipal sector reductions over other more cost-effective reduction avenues. However, as noted herein, we are not aware of any funding constraints in Act 64 or the TMDL that requires a preference for funding wastewater projects. To the contrary, the TMDL is clear that Tactical Basin Plans should determine implementation priorities.

We are aware that Act 64 provides that the Clean Water Fund Board shall “during the first three years of its existence... prioritize awards or assistance to municipalities for municipal compliance with water quality requirements.”⁸ Accordingly, for the initial period of time after Act 64 went into effect, the Legislature did prioritize funding for municipal projects, such as projects in the wastewater and stormwater sectors. However, as Act 64 was enacted in 2015, this

⁸ 10 V.S.A. §1389(e)(2).

three-year time period expires in FY18, after the bridge funding established by the Legislature expires in July 2019.

Other than this provision, there is no other specific mention of prioritization of projects in the various sectors. Section 37 of Act 64 outlines the Vermont Clean Water Fund and enumerates its uses, but gives ANR broad discretion.⁹ Further, the statutory language that created the Board also provides broad discretion and specifically states that, “[a]ll recommendations from the Board should be intended to achieve the greatest water quality gain for the investment.”¹⁰ This clearly indicates that ANR, in this case through the Board, should invest in projects that will reduce the base load of pollution to Vermont waters, and as discussed below, beyond the wastewater and stormwater sectors. As the provision in (e)(2) does not apply to spending after FY18, it appears ANR has more spending latitude than it realizes, and could indeed shift funds from wastewater and developed lands sectors to the agriculture and natural resources sectors.



The recommendation to continue with a majority of the short term funding from capital bonds would mean that we would continue to underfund the sectors that need to be addressed the most. As the chart above indicates, a focus on more cost-effective sectors will mean revenue can be stretched further and more projects could be implemented to reduce the base load towards reaching the goal of the TMDL. In the natural resources sector, purchase of floodplains and lands in river corridors from willing sellers would take these lands out of agricultural production and protect them from development, thereby reducing phosphorus and sedimentation from these

⁹ 10 VSA § 1387.

¹⁰ 10 VSA §1389(d)(1).

lands permanently. While restricted capital funds can be used for lands purchase, the staff time to identify the lands and engage in the process must be paid for with unrestricted funds.

The Working Group acknowledges that the sector that contributes the most phosphorus and sedimentation, agriculture, will have a \$14 million annual funding gap under its proposal. Yet it offers no solution for this gap. AAFM claims that it cannot distribute adequate funds due to a lack of staff. The argument by the Agency here implies that, even if a windfall of funding for farmers became available, there would not be enough staff to engage farmers and make sure funding gets to the appropriate programs. The final Report must detail how the capacity issue will be addressed.

The Working Group Recommendations Will Likely Ensure Vermont Misses Its TMDL Obligations

The proposed status quo of revenue levels, the current funding distribution patterns, and the prolonged timeline for more study will make it more likely that goals set by the U.S. Environmental Protection Agency (“USEPA”) and listed in the *Phosphorus TMDLs for Vermont Segments of Lake Champlain* will go unfulfilled.

In the TMDL, the USEPA approved the specific benchmarks to reduce phosphorus and sedimentation set in each of the Phase 2 Tactical Basin Plans. “Beyond 2017, the accountability framework will shift to gauging progress on a watershed-specific basis, keyed to whether VT implements the measures of the Phase 2/Tactical Basin Plans.”¹¹ After the general permits and regulations are issued under Phase 1, the Tactical Basin Plans will provide the roadmaps for TMDL implementation. “Each Tactical Basin Plan will include an ‘Implementation Table’ that lays out the priority actions to be taken by specific dates. Those actions and dates will constitute the report card elements for the specific basin.”¹² Many of the Tactical Basin Plans contain projects that are keyed in the agricultural and natural resources sectors. With the current focus on wastewater, it is hard to see how the goals of the Tactical Basin Plans will be met.

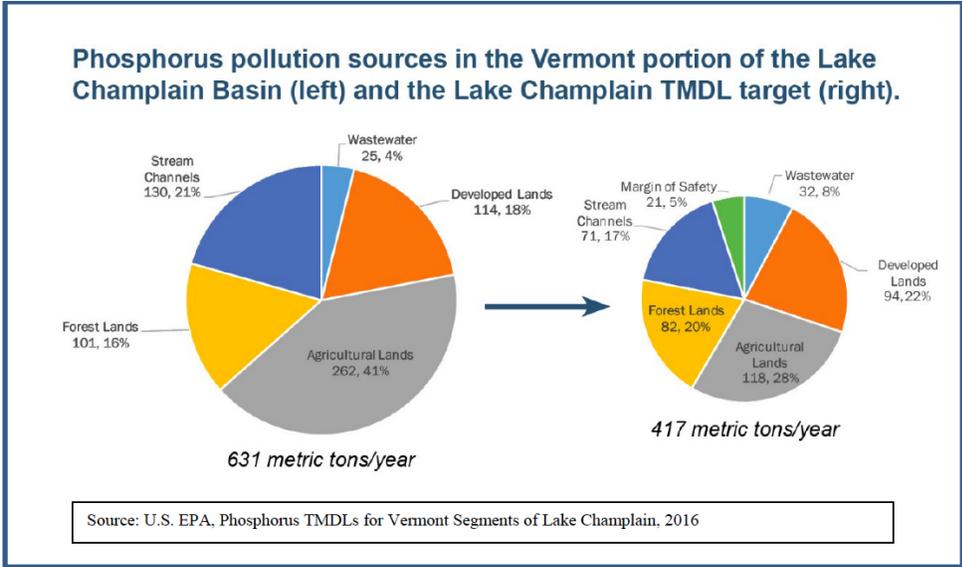
The goal of the TMDL is to reduce the base load of phosphorus and sedimentation from 631 metric tons per year to 417 metric tons per year.¹³ The Working Group strays from this goal, as the funding in the short-term recommendation focuses on wastewater treatment and municipal stormwater from developed lands. Instead, to fulfill the TMDL obligations, the focus should be on agriculture and natural resources, while wastewater should only be prioritized where it is a relatively cost effective strategy. Long term funding is necessary to fulfill the overall obligation of the TMDL and reduce the base load of phosphorus by the required 34%.¹⁴

¹¹ *Phosphorus TMDLs*, supra note 3, 57.

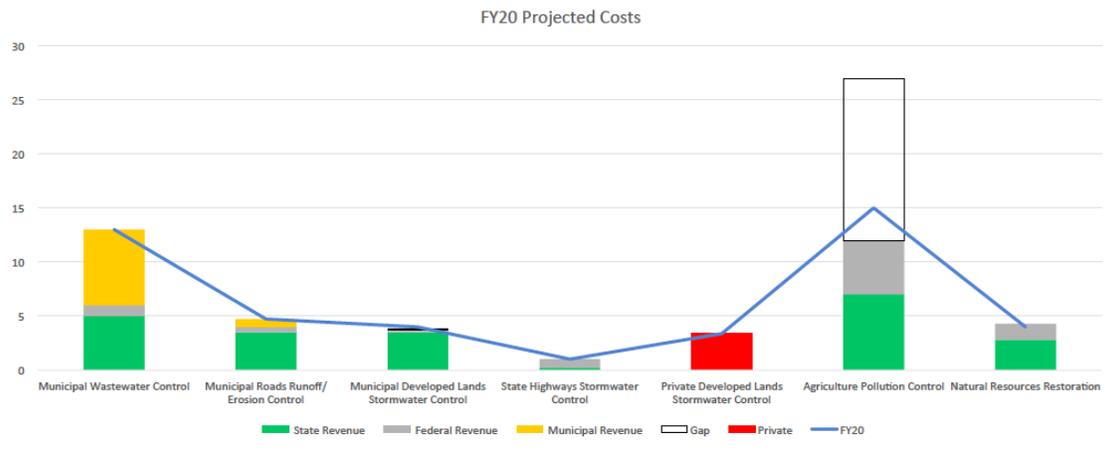
¹² *Id.*

¹³ *Id.* at 48.

¹⁴ *Id.*



As the above chart indicates, the wastewater sector comprises only 4% of the base load of phosphorus and the developed lands sector adds another 18%. Because of this, the focus of allocation of clean water funds should be on the base load from agriculture (41%), forests (16%), and stream banks (21%). Instead, a majority of the funding recommended by the Working Group is dedicated to 22% of the problem, while the two sectors that contribute 78% of the pollution receive a lesser amount of funding.



As the above chart indicates, a majority of the funding is dedicated to wastewater and the four municipal and roads categories taken as a whole, while a large gap exists for agriculture and the natural resources sector goes underfunded. More funds need to be allocated to the agricultural and the natural resources sectors, as many of the programs in these sectors cannot utilize restricted money from capital bonds or the state and federal transportation money.

As to the natural resources sector, more funds need to be allocated to this program for easements, land purchases, restoration projects, and building on-the-ground capacity to develop the necessary local relationships to move projects forward. The Tactical Basin Plans call for extensive projects in the natural resources sector. These Plans prioritize promoting flood resiliency, protecting river corridors, restoring stream equilibrium, minimizing floodplain encroachment, and protecting wetlands. For some floodplains, particularly those in agricultural used to grow crops such as corn, the most effective way to protect water quality is a conservation easement or land purchase from willing sellers so it is taken out of use. These are all projects that are currently underfunded in favor of wastewater and stormwater projects, and to comply with Phase 2, there will need to be a seismic shift in revenue distribution.

Largely due to the reliance on capital bond revenues, the state of Vermont will continue to contribute an outsized portion of funds on wastewater and stormwater, and not nearly enough on the largest sources of the problem. If the largest sources of the pollution remain underfunded, it is difficult to see how we will reach the goals set in the TMDL Plan and protect and restore water quality.

Conclusion

In conclusion, we have found ourselves at these crossroads before, disappointed that another request by the Vermont Legislature for recommendations on a long-term, stable, dedicated clean water revenue source has come up woefully short. As we have just discussed, the recommendations outlined in this Draft Report will not fulfill the goals of the TMDL. This and the lack of adequate recommendations in past reports lead to a conclusion that it may be time that revenue collection, administration, and distribution of funds for clean water protection and restoration is removed from these agencies and given to a Clean Water Authority.

Sincerely,



Lori Fisher
Executive Director
Lake Champlain Committee



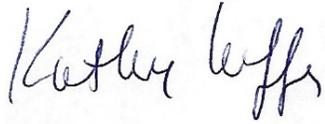
Mark Nelson
Chair
Vermont Chapter of the Sierra Club



Jon Groveman
Policy and Water Program Director
Vermont Natural Resources Council



Lauren Hierl
Political Director
Vermont Conservation Voters



Kathy Urffer
River Steward
Connecticut River Conservancy



Juliana Dixon
Program Manager
Lake Champlain International