

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
Docket No. 175-12-14 Vtec

In re: CLF Petition to Require Mandatory)
Best Management Practices for)
Agricultural Non-point Sources)
Identified in the Missisquoi)
Basin Plan,)
AAFM Docket # 2014-06-04 ARM.)

STIPULATION OF THE PARTIES FOR REMAND

In order to resolve the appeal filed in the above-captioned matter, the parties, Appellant Conservation Law Foundation (CLF), by and through their attorney, and Respondent, Vermont Agency of Agriculture, Food and Markets (AAFM), by and through Vermont Attorney General William H. Sorrell, pursuant to V.R.E.C.P. 5(i), hereby stipulate and agree as follows:

WHEREAS, on May 22, 2014, CLF filed a Petition with the Secretary of AAFM (the Secretary) under 6 V.S.A. § 4813(a) to require that agricultural operations located in critical source areas identified in the Lake Champlain Basin Program report, titled "*Identification of Critical Source Areas of Phosphorus within the Vermont Sector of the Missisquoi Bay Basin*" (Study), be subject to mandatory best management practices (BMPs) in addition to the requirements of the Vermont Accepted Agricultural Practices (AAPs);

WHEREAS, on July 18, 2014, the Secretary held a public hearing on the initial Petition, as required by 6 V.S.A. § 4813, in St. Albans to provide farmers and other affected citizens with an opportunity to be heard and extended the public hearing process until August 18, 2014 to enable farmers and interested persons additional opportunity to provide written comments;

WHEREAS, on November 17, 2014, the Secretary issued his *Secretary's Decision* denying the request to impose mandatory BMPs on farms in the Missisquoi Bay basin;

WHEREAS, on December 16, 2014, CLF filed an appeal of the *Secretary's Decision* in Vermont Superior Court, Environmental Division;

WHEREAS, while the appeal of the *Secretary's Decision* was pending in the Environmental Court, the Vermont Legislature passed comprehensive water quality legislation in the form of House Bill 35 (H. 35), Act 64 (2015 Sess.);

WHEREAS, Act 64 changes a number of the considerations underlying the Secretary's November 14, 2014 *Secretary's Decision*;

WHEREAS, the parties are in agreement on a number of issues raised by the initial CLF Petition including that water quality in the Missisquoi Bay suffers from an abundance of phosphorus and that historical and current land uses, including agriculture, transportation, development, forestry and others, have contributed and continue to contribute to on-going phosphorous loading that impairs the water quality of the Bay;

WHEREAS, on August 31, 2015, the parties reached a resolution and agreed on substantive terms of a proposed revised decision by the Secretary on CLF's Petition to require BMPs in the Missisquoi Bay basin, subject to the Secretary's consideration of public input as contemplated by 6 V.S.A. § 4813 and the *BMP Rules*;

WHEREAS, the above-captioned matter was held in abeyance to allow the Secretary to conduct appropriate notice and receive public input on the Secretary's proposed *Revised Secretary's Decision* on the CLF Petition;

WHEREAS, the parties agreed that the Secretary would consider any public input he received in making his final determination of the *Revised Secretary's Decision* on CLF's

Petition, and that the Secretary could withdraw the proposed *Revised Secretary's Decision* based on such public input;

WHEREAS, the parties agreed that if, after considering public input, the Secretary then decided to enter the *Revised Secretary's Decision* as proposed and noticed to the public, the parties would request through Stipulation that the Court remand this matter to the Secretary for final action on the *Revised Secretary's Decision*;

WHEREAS, the parties further agreed that within 14 days of such remand, the Secretary shall withdraw the *Secretary's Decision* dated November 17, 2014 and shall issue the *Revised Secretary's Decision* as proposed or as approved by Petitioner CLF if subsequent revisions are non-substantive or *de minimus*;

WHEREAS, the Secretary already has issued proper notice and provided opportunity for public input on the *Revised Secretary's Decision*;

WHEREAS, the public input period was extended from September 4, 2015 to October 20, 2015;

WHEREAS, after consideration of the public input expressed during the 2014 CLF Petition process, public input on the proposed *Revised Secretary's Decision*, the statutory changes in Act 64 and the impact that Act 64 will have on Vermont's water quality and farms and on the statutory obligations of AAFM, the Secretary has decided to enter the proposed *Revised Secretary's Decision* as noticed;

WHEREAS, the *Revised Secretary's Decision* sets out findings of fact and rationale that supports the revised decision;

WHEREAS, the Attorney General believes that this *Stipulation of the Parties for Remand* and settlement of the appeal is in the State's interests as it fairly resolves the Petition; and

WHEREAS, this *Stipulation of the Parties for Remand* has been negotiated by the AAFM and the CLF in good faith;

NOW, THEREFORE, the parties hereby stipulate and agree as follows:

1. The parties respectfully request that, pursuant to V.R.E.C.P. 5 (i), the Court remand the CLF Appeal back to the Secretary of AAFM for reconsideration under the law, including Act 64 (2015) and further action in accord with this stipulation;
2. Within 14 calendar days of such remand, the Secretary shall withdraw his November 17, 2014 *Secretary's Decision* and issue the *Revised Secretary's Decision* (copy attached);
3. The Secretary shall defend the *Revised Secretary's Decision* in the event that it is appealed by another party, and shall implement the *Revised Secretary's Decision* in accord with the terms set forth therein, unless its implementation is stayed by judicial order of a court of competent jurisdiction;
4. So long as the AAFM follows all schedules and other terms set forth in the *Revised Secretary's Decision*, CLF agrees not to file or assist any third-party in preparing or filing a petition under 6 V.S.A. § 4813 as to BMPs for phosphorus in the Missisquoi Bay Watershed for a period of 10 years from the date that this Stipulation is accepted by the Court and the matter is remanded to the Secretary.

5. AAFM further agrees that as it implements 6 V.S.A. § 4810 under Act 64 to assess BMPs needed on farms in the St. Albans, Otter Creek, and South Lake watersheds,¹ it will follow the same or similar methodology set forth in the *Revised Secretary's Decision* for the Missisquoi Bay Watershed. In return, CLF agrees not to file or assist any third-party in preparing or filing a petition for implementation of BMPs to reduce phosphorus under 6 V.S.A. § 4813 as to those other three watersheds, for a period of 4 years from the effective date of the *Revised Secretary's Decision* on the Missisquoi Bay Watershed.
6. If the AAFM implements the same or similar methodology to assess and require BMPs on farms in the St. Albans, Otter Creek, or South Lake watersheds within 4 years of the effective date of the *Revised Secretary's Decision*, as demonstrated by AAFM issuing the first annual notice pursuant to ¶7, and following all other schedules and timeframes as described in the *Revised Secretary's Decision* for the Missisquoi Bay Watershed for such noticed watershed, CLF further agrees not to file or assist any third-party in preparing or filing a petition for implementation of BMPs for phosphorus under 6 V.S.A. § 4813 for such watershed for a period of 10 years from the date AAFM issues its first annual notice for that watershed.
7. CLF agrees that it will communicate to the federal Environmental Protection Agency ("EPA"), in writing within 10 days of the effective date of the *Revised Secretary's Decision*, that CLF believes the methodology set forth in the *Revised Secretary's Decision* constitutes the "reasonable assurances" that EPA requires for the federal

¹ A map of Vermont's watersheds is available at: <http://www.watershedmanagement.vt.gov/planning/html/plbasis.htm> (last accessed August 26, 2015).

Clean Water Act for agricultural non-point source pollution sources subject to the provisions of this stipulation in the Missisquoi, and/or the St. Albans, Otter Creek, and South Lake watersheds of Lake Champlain.

8. The parties agree to meet and confer as needed and upon request of a party, to avoid disputes concerning the *Revised Secretary's Decision*, and in the event of a dispute between the parties regarding their obligations and covenants, attempt to resolve those disputes in the manner set forth below. The parties agree to the following conference schedule and dispute resolution procedure:
 - a. The parties shall meet and confer one year after the commencement of education, outreach, and compliance activities as set forth in Section III, paragraph 6 of the *Revised Secretary's Decision*, and then meet and confer semi-annually thereafter to identify and informally resolve implementation challenges, if any.
 - b. Either party may at any time initiate dispute resolution procedures by providing written notice to the other party identifying the matter in dispute. The parties shall attempt to resolve the dispute through informal discussions by telephone or in person, within 30 calendar days after receipt of such notice.
 - c. If the parties are unable to resolve the dispute by informal discussion as set forth in paragraph 8b of this *Stipulation*, within 15 days thereafter the party initiating the dispute process shall prepare and submit to the other party a detailed summary of the matter(s) in dispute and a statement of its position, including any data, analysis, or opinion supporting its positions and all supporting documentation. The responding party shall have 30 days thereafter to prepare and submit its summary, statement, and supporting documentation. The parties shall thereafter meet, confer, and attempt to resolve the dispute within 15 days of the response.
 - d. If the parties are unable to resolve the dispute within the 90 day time frame set forth above, either party may seek remedies available to it as provided by law.
 - e. The time periods for dispute resolution may be extended or shortened by mutual agreement of the parties, provided that the parties agree to use reasonable efforts to resolve the dispute at the earliest possible time, taking

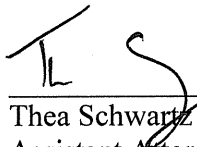
into consideration the primary objective of protecting public health, safety, welfare, and actual harm to the environment.

9. The AAFM recognizes that, under 6 V.S.A. §4813, CLF is a person with an interest in the *Revised Secretary's Decision* and agrees that it shall not contest standing of CLF as a party in any future action brought in a court of competent jurisdiction to challenge the Secretary's compliance with the *Revised Secretary's Decision*;
10. The AAFM and CLF hereby waive all rights to contest or appeal the Court's *Order of Remand* and they shall not challenge, in this or any other proceeding, the validity of any of the terms of this *Stipulation* or this Court's jurisdiction to enter the *Order of Remand*.

[remainder of page intentionally left blank]

DATED at Montpelier, Vermont this 15th day of January, 2016.

WILLIAM H. SORRELL
ATTORNEY GENERAL


By: 

Thea Schwartz
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3193

Attorney for the Vermont
Agency of Agriculture, Food and
Markets

DATED at Montpelier, Vermont this 15th day of January, 2016.

CONSERVATION LAW
FOUNDATION

By: 

Christopher Kilian, Esq.
Conservation Law Foundation
15 East State Street, Suite 4
Montpelier, VT 05602-3010
(802) 223-5992