

The Road to RAPs

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The Road to RAPs

1972 Federal Clean Water Act

- Point Sources
- Permits and technological controls
- Non-point sources left to the states.

The Road to RAPs

- Vermont has assumed CWA permitting under plans approved by EPA.
- Permitting to protect water quality to maintain use classification – swimming, fishing, agricultural irrigation.
- Non-point source permitting – stormwater (new construction) and LFOs, MFOs and AAPs.

The Road to RAPs

- When water quality and existing uses are threatened regulators can impose a plan to limit discharges – A TMDL plan.
- Limit individual and aggregate discharge to amount of pollutant that can be assimilated without degrading the water.

The Road to RAPs

- 2002, EPA approved a TMDL plan for segments of Lake Champlain to limit discharges of phosphorus.
- 2008, Conservation Law Foundation challenged the plan as ineffective.
- 2002 plan imposed less stringent controls on municipal waste water treatment plants justified on the basis of projected reduction in non-point source pollution (ag and stormwater).
- No Reasonable Assurance.

The Road to RAPs

- 2011, EPA withdrew approval of 2002 TMDL plan for LC.
- EPA and State of Vermont began working on a new TMDL plan.
- June 2015 – Act 64 was passed.
- June 2016 – EPA issues new TMDL plan for LC requiring:
 - 80% reduction in phosphorus discharges from ag production areas
 - Average of 54% reduction in ag field runoff
 - 42% reduction in waste water treatment discharges.
- Act 64 provided a reasonable assurance that NPS reductions would be met .

Required Agricultural Practices

Final Rule

- Filed with the Secretary of State, November 18, 2016
- Effective Date December 5, 2016
- Rules on cover crops for annual cropland subject to frequent flooding, effective April 15, 2017
- Rules on October 16-April 14 spreading ban on cropland, perennial grass land, small grain cropland or hay land, subject to frequent flooding effective April 15, 2017

Required Agricultural Practices

Next Round – Due January 15, 2018

- Amendment to RAPs to include requirements for reducing nutrient loads from subsurface tile drains
- Additional Best Management Practices
- Additional changes to the RAPs

Required Agricultural Practices

Farms meeting the minimum threshold criteria:

- Account for nutrient sources, soil test every 5 years, maintain records
- No direct discharges
- Prevent discharges from production areas
- Comply with field stacking rules, rules on waste storage facilities
- Farm at T
- Winter spreading ban
- Cover crops and longer winter spreading ban on frequently flooded fields
- Buffer zones / exclusion of livestock

Required Agricultural Practices

Certified Small Farms:

- Annually certify compliance (may apply for exemption)
- Implement a field by field NMP (590), soil test every 5 years, maintain records
- Inspection every 7 years
- Water quality training
- No direct discharges
- Prevent discharges from production areas
- Comply with field stacking rules, rules on waste storage facilities
- Farm at T
- Winter spreading ban
- Cover crops and longer winter spreading ban on frequently flooded fields
- Buffer zones / exclusion of livestock

Required Agricultural Practices

Inspection

- Statutory authority to inspect small farms at 6 V.S.A. §4871(e)
- 4th Amendment protection from “unreasonable” searches
- Administrative searches/ compliance with regulatory scheme
- Probable cause is NOT required
- Limited in scope / within regulatory scheme
- Pre-compliance review

Required Agricultural Practices

Enforcement

- Who is liable?
- Owner, operator, actor
- Individuals, Partnerships, Corporations, LLCs, Joint Ventures
- Custom Manure Applicators

Required Agricultural Practices

Custom Operator Indemnification Provision

- I. Operator has been certified by the Vermont Secretary of Agriculture Food and Markets (Agency) and Operator services shall comply with all applicable requirements of the Required Agricultural Practices Rule.
- II. Operator has trained his employees in methods or techniques to minimize runoff to surface water, identification of weather or soil conditions that may increase the risk of runoff, and the Required Agricultural Practices Rule.
- III. Operator activities on the farm shall conform to the field by field nutrient management plan of [Farmer.]
- IV. Operator shall indemnify, hold harmless and defend [Farmer] from any loss, liability, damages, administrative or civil penalties, claims, or suits, arising from Operator's failure to comply with the Required Agricultural Practices Rule or the farm's nutrient management plan.

Required Agricultural Practices

Farm Lease

Indemnification Provision

I. Lessee shall comply with all Required Agricultural Practices as promulgated by the Vermont Agency of Agriculture Food and Markets (VAAFAM).

II. LESSEE shall indemnify, hold harmless and defend LESSOR from any loss, liability, damages, administrative or civil penalties, claims, or suits, arising from LESSEE'S failure to comply with the Required Agricultural Practices Rule or the farm's nutrient management plan.

Required Agricultural Practices

Enforcement

Direct Discharge – ANR / DEC Enforcement

- Discreet conveyance of ag waste to surface water via pipe, ditch, or other conduit
- Runoff from production areas, barnyards, feedlots, manure storage areas discharging directly to surface or groundwater

Required Agricultural Practices

ANR / DEC Enforcement

- **Notice of Alleged Violation**
- **Compliance Directive / No hearing**
- **Penalty – Remediation not a factor, appealable**
- **Investigation and enforcement somewhat parallel with VAAFMM**

Required Agricultural Practices

VAAFMM Enforcement

Violations (other than discharge) of RAPs

- **Requests for technical assistance**
- **Inspection, complaint, violation**

Required Agricultural Practices

VAAFM Enforcement

- Verbal Warning
- Meeting, consultation, problem solving, financial assistance
- CSFs more leeway

Required Agricultural Practices

VAAFM Enforcement

If problems is not solved, VAAFM sends a Corrective Action Letter

- Description of the violation
- Identification of the applicable statute, rule or permit condition violated
- The required corrective action to be taken
- Summary of state and federal financial assistance available
- NO penalty at this stage
- Response required in 30 days
- Response (in writing) should include a schedule of abatement for curing the violation and a description of the corrective actions to be taken.

Required Agricultural Practices

CORRECTIVE ACTION

3 V.S.A. § 832a. Rules affecting small businesses

(a) Where a rule provides for the regulation of a small business, an agency shall consider ways by which a small business can reduce the cost and burden of compliance by specifying less numerous, detailed or frequent reporting requirements, or alternative methods of compliance.

(b) An agency shall also consider creative, innovative, or flexible methods of compliance with the rule when the agency finds, in writing, such action would not:

- (1) significantly reduce the effectiveness of the rule in achieving the objectives or purposes of the statutes being implemented or interpreted; or
- (2) be inconsistent with the language or purpose of statutes that are implemented or interpreted by the rule; or
- (3) increase the risk to the health, safety, or welfare of the public or to the beneficiaries of the regulation, or compromise the environmental standards of the State.

Required Agricultural Practices

VAAFM Enforcement

If the farmer does not respond to the Corrective Action Letter

- **A Notice of Violation**
- **Administrative Penalty**
- **Notice of Hearing Rights**

Required Agricultural Practices

Administrative Hearings

- Pre-hearing meeting to negotiate penalty / fix (see Agency Penalty Matrix)
- Administrative Hearing
 - ❖ Notice of time, place and nature of the hearing
 - ❖ Short and plain statement of the matters at issue
 - ❖ Opportunity to respond and present evidence and argument on all issues
 - ❖ Hearing Officer
 - ❖ Rules of evidence
- Appeal to Superior Court / On the Record

Required Agricultural Practices

When is a Hearing Required?

- Permit revocation or modification
- After a Notice of Violation
- Whenever a penalty is assessed
- When a Best Management Practice is ordered
- When a smaller than CSF is required to certify
- When an exemption from Small Farm Certification is sought
- Cease and Desist Orders
- Emergency Orders

Required Agricultural Practices

Current Use

Removal from Current Use Program when:

- After an administrative hearing or a contested judicial hearing, a person is found to be in violation of RAPs or any terms of a permit or certification, or
- A person not in compliance with the terms of an administrative or court order to remedy a violation of RAPs
- Entire parcel or parcels of agricultural land and buildings will be removed from the use value appraisal program
- Subject to a land use change tax. Currently, 10% of the full market value of the land.
- If Secretary certifies that farmer is in compliance, he may re-apply for the program.

Required Agricultural Practices

NRCS

- **Technical Working Groups**
- **Local Work Groups**

