State of Vermont

Vermont Superior Court -- Washington Division

Standing Trees Inc.

v. Docket No. 25-CV-03722

The State of Vermont,
Julie Moore, Secretary of the Agency of Natural Resources, in her official capacity,
Danielle Fitzko, Commissioner of the Department of Forests, Parks, and Recreation, in her official capacity, and
Andrea Shortsleeve, Commissioner of the Department of Fish & Wildlife, in her official capacity

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

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INTRODUCTION

Standing Trees, Inc. ("Plaintiff") brought this action under the Public Trust Doctrine, section 67 of Chapter II of the Vermont Constitution, Articles 7 and 13 of Chapter I of the Vermont Constitution, and the Vermont Administrative Procedure Act ("VAPA"), challenging the State of Vermont's failures to comply with these legal requirements in its management of state public lands and in particular its unlawful practices in authorizing timber harvest affecting Public Trust waters without conducting Public Trust weighing and outside of public view. Defendants State of Vermont and responsible state agency officials ("Defendants") have filed a motion to dismiss Plaintiff's Amended Complaint ("Complaint") under Vermont Rule of Civil Procedure 12(b)(6) for failure to state a legal claim upon which relief can be granted. Defendants' Motion to Dismiss ("Motion") at 1. The Motion should be denied because it misapplied Vermont's standard for adequately-pled complaints, mischaracterized Plaintiff's claims, and ignored Vermont precedent.

First, the Defendants' Motion incorrectly represented Plaintiff's complaint as "first and foremost" seeking an injunction barring implementation of the Worcester Range Management Unit Long Range Management Plan (the "Worcester Plan"). Motion at 2. This is a gross mischaracterization of the Complaint. In fact, the Complaint does not mention the Worcester Plan or any other management plan until Paragraph 73, and the allegations about the Worcester Plan in particular pertain to Count V, alleging violation of 3 V.S.A. § 831(c). "First and foremost" is true, but only with regard to Count V.

It is Defendants who first and foremost—and incorrectly—are focused on management plans, because Defendants rely on them as a sort of affirmative defense. Defendants argue that these plans, including the Worcester Plan, suffice to meet all the State's legal obligations under the Public Trust Doctrine. Motion at 8-9. However; a) as alleged in the Complaint at ¶¶ 7-8, 32,

56, these management plans are devoid of Public Trust and Common Benefit Clause consideration, which Defendants do not deny; b) as a matter of law, Vermont Public Trust duties cannot be satisfied by compliance with other standards such as those the Defendants say they follow; and c) some of the State's forested lands are not now and never have been subject to a management plan, and the Defendants do not allege that management plans have been prepared for all of the state lands that Plaintiff's members use.

Second, Defendants mischaracterized Plaintiff's claims about how Defendants have violated the Public Trust Doctrine, the Vermont Constitution, and the VAPA. Motion at 2. The case is not about the fact, as the Motion argues, that the State "gave insufficient weight to environmental considerations." *Id.* The Complaint alleged that the State's duties under the Public Trust Doctrine and the Vermont Constitution were not considered at all. Compl. at ¶¶ 100, 106, 111, 117.

Third, Defendants say they are unaware of any obligation to ensure public participation in State decisions about public trust resources. Motion at 5-6. To the contrary, public participation is a fundamental, and perhaps the single most important component of, the Public Trust Doctrine, as explained below.

Fourth, Defendants wrongly argued that their management planning process did provide a public process for its decision-making. Motion at 5. This defense ignores the principles of Rule 12(b)(6): the Complaint repeatedly alleges that decisions about where to harvest, how much to harvest, and what protections for public trust resources to impose on each harvest, occur without opportunity for public input. Even as they govern the conduct of the Agency of Natural Resources ("Agency") in other ways, the management plans do not propose or make any of these

decisions. Moreover, as noted above, not all of the State's forested lands that Plaintiff's members use are subject to management plans.

Fifth, Defendants erroneously argued that Chapter II, Section 67 of the Vermont Constitution is not self-executing and that even if it is, Plaintiff has not alleged that its members fish. Motion at 11. Section 67 is self-executing. The Supreme Court of Vermont has been applying it to Vermonters' claims since 1896. *New England Trout & Salmon Club v. Mather*, 68 Vt. 338, 348-49, 35 A. 323, 326 (1896). The only legislative execution it calls for is the adoption of statutory fishing seasons, which the legislature has enacted. Even if this issue was not precluded by *stare decisis*, section 67 also satisfies the general self-execution standards the Court has more recently adopted. Contrary to the Motion, Plaintiff has alleged that its members fish.

Sixth, the Defendants erroneously argued that Plaintiff has not complied with the pleading standards of *Brown v. State*, 2018 VT 1, ¶ 17, 206 Vt. 394, 182 A.3d 597, for Common Benefits Clause claims. Motion at 13-14. Requiring, *inter alia,* proof of ill will or other improper motive, the *Brown* standards are inapposite because they apply only to constitutional tort claims, *i.e.*, claims for damages, which are not the remedy the Complaint seeks. The Complaint meets the pleading standards for equitable and declaratory relief under Article 7.

Seventh, the Defendants wrongly argued that Plaintiff has failed to state a claim for retaliation under Articles 7 and 13 of the Vermont Constitution. Motion at 14. The Complaint alleged that Plaintiff has exercised its protected rights to criticize Defendants, that Defendants have responded by denying Plaintiff access to information that the State otherwise would have provided and that it provides to others, and that the denial is harming Plaintiff. Compl. at ¶¶ 58-72. That suffices.

Lastly, the Defendants argued that in Count V Plaintiff has failed to state a claim for relief because the petition for rulemaking by Plaintiff and others was properly denied on the ground the Worcester Plan is not a policy or procedure because it contains no requirements that govern the Agency's conduct. This is a factual dispute, and the Worcester Plan that Defendants rely on does not support Defendants' description of it. The Complaint adequately pled that the Plan does contain governing requirements, and the Defendants unlawfully failed to commence rulemaking under the VAPA.

STANDARD OF REVIEW

Vermont courts prefer not to resolve cases on motions to dismiss, and, thus, only grant them when it is "beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." *Maple Run Unified Sch. Dist. v. Vermont Hum. Rts. Comm'n*, 2023 VT 63, ¶ 9, 218 Vt. 496, 311 A.3d 139 (quoting *Island Indus., LLC. v. Town of Grand Isle*, 2021 VT 49, ¶ 20, 215 Vt. 162, 260 A.3d 372) (internal quotation and alteration omitted). For this reason, "[m]otions to dismiss for failure to state a claim are ... rarely granted." *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 5, 184 Vt. 1, 955 A.2d 1082 (citing *Gilman v. Me. Mut. Fire Ins. Co.,* 2003 VT 55, ¶ 14, 175 Vt. 554, 830 A.2d 71). Additionally, cases in which a plaintiff invokes a novel theory of liability "should be explored in the light of facts as developed by the evidence, and, generally, not dismissed before trial because of the mere novelty of the allegations." *Ass'n of Haystack Prop. Owners, Inc., v. Sprague*, 145 Vt. 443, 447, 494 A.2d 122, 125 (1985).

When considering a motion to dismiss, courts "assume that all factual allegations pleaded in the complaint are true, accept as true all reasonable inferences that may be derived from plaintiff's pleadings, and assume that all contravening assertions in defendant's pleadings are false." *Mahoney v. Tara, LLC,* 2011 VT 3, ¶ 7, 189 Vt. 557, 15 A.3d 122. Courts should review motions under Rule 12(b)(6) "with all uncontroverted factual allegations of the complaint

accepted as true and construed in the light most favorable to the nonmoving party." *Maple Run*, 2023 VT at ¶ 9 (quoting *Rheaume v. Pallito*, 2011 VT 72, ¶ 2, 190 Vt. 245, 30 A.3d 1263).

Vermont follows an "extremely liberal notice-pleading standard." *Island Indus., LLC.*, 2021 VT at ¶ 24 (quoting *Mahoney*, 2011 VT at ¶ 15). The Vermont Supreme Court in *Colby* expressly rejected the federal pleading standard adopted by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *Colby*, 2008 VT at ¶ 5 n.1. Vermont Superior Courts have interpreted *Colby* to reject both *Twombly* and the plausible pleading standard adopted by the U.S. Supreme Court in *Ashcroft v. Iqbal*. 556 U.S. 662, 680-81 (2009). *See, e.g.*, *Malawia v. Winds Transp. Inc.,* 2025 WL 2840956, at *3 (Vt. Sup. Sep. 30, 2025); *Town of Fairlee v. Forcier Aldrich & Assoc.,* 2018 WL 8666308, at *8 (Vt. Sup. Nov. 07, 2018); *Federal Nat. Mortg. Ass'n v. Moyher,* 2014 WL 2558355, at *4, n.2 (Vt. Sup. Mar. 10, 2014). Defendants' Motion did not accurately state Vermont's notice-pleading standard. Motion at 3.

Under this liberal pleading standard, a complaint must only constitute a "bare bones statement that merely provides the defendant with notice of the claims against it." *Colby,* 2008 VT at ¶ 13. In Vermont, a complaint's purpose is to "initiate the cause of action, not prove the merits of the plaintiff's case." *Id.* Indeed, "Vermont Rule of Civil Procedure 8 on pleading omits the requirement ... that the facts relied upon be pleaded, requiring instead a short and plain statement of the claim showing that the pleader is entitled to relief." *Prive v. Vermont Asbestos Grp.,* 2010 VT 2, ¶ 15, 187 Vt. 280, 992 A.2d 1035 (quoting *Bock v. Gold,* 2008 VT 81, ¶ 5, 184 Vt. 575, 959 A.2d 990) (internal quotations omitted). Plaintiff's factual allegations in the Complaint are far more than the bare bones pleadings that are required by the rules.

Moreover, to the extent that a 12(b)(6) motion to dismiss, like Defendants' here, cites documents outside the pleading (and outside documents relied on in the Complaint) to support its

arguments for dismissal), the motion raises factual disputes that are not yet properly before the Court. *Maple Run*, 2023 VT at ¶ 9.; *Kaplan v. Morgan Stanley & Co. Inc.,* 2009 VT 78, ¶ 10, n.4, 186 Vt. 605, 987 A.2d 258.

ARGUMENT

I. Plaintiff Adequately Pled Defendants' Violations of the Public Trust Doctrine.

A. The Vermont Public Trust Doctrine Requires a Decision-making Process That Is Open to the Public.

Defendants claimed the Complaint does not provide any authority for the public decision-making process required by the Public Trust Doctrine. Motion at 5. However, a complaint is not required to provide legal arguments or legal authority; the Defendants have confused a complaint with a brief. *Colby,* 2008 VT at ¶ 7 ("A complaint need only set out a short and plain generalized statement of the claim from which the defendant will be able to frame a responsive pleading").

This memorandum of law is the proper avenue for Plaintiff to provide authority for this proposition, and the authority is compelling. Long recognized and operative in Vermont, the Public Trust Doctrine is an ancient set of common law protections for public resources, specifically the state's waters, including ponds, lakes, wetlands, seeps, brooks, and rivers that are navigable or that serve as tributaries to navigable waters. *See generally City of Montpelier v. Barnett*, 2012 VT 32, ¶ 17, 191 Vt. 441, 49 A.3d 120. The Vermont Supreme Court has adopted Plaintiff's understanding of the Public Trust Doctrine, including the seminal law review article that explains the principles forming the basis of the Public Trust Doctrine claims in Plaintiff's Complaint—J. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 MICH. L. REV. 471 (1970). According to Professor Sax, the "fundamental function of courts in the public trust area is one of democratization." *Id.* at 561. This means that the courts' duty is to ensure that the public has access to and can participate in state decision-

making processes about public trust resources. *Id.* at 491-497, 531, 557-565. Ensuring a public role is fundamental because the Public Trust Doctrine is essentially a safeguard against usurpation of public resources by private, politically powerful interests for their own benefit. *Id.* at 491-499, 521, 563. Without public access, the proverbial fox is guarding the henhouse and is answerable to no one as it starts picking off the hens.

Moreover, the Vermont Supreme Court recognizes that "the [public trust] doctrine is not fixed or static, but one to be molded and extended to meet [the] changing conditions and needs of the public it was created to benefit." *State v. Cent. Vt. Ry., Inc*., 153 Vt. 337, 342 (1989) (quoting *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. 306, 326 (1984)) (internal quotes omitted). "The very purposes of the public trust have evolved in tandem with the changing public perception of the values and uses of waterways." *Cent. Vt. Ry., Inc*., 153 Vt. at 342 (quoting *Natl. Audubon Soc'y. v. Sup. Ct. of Alpine County,* 658 P.2d 709, 719 (Cal. 1983)).

In summarizing Massachusetts's, Wisconsin's, and California's large bodies of Public Trust law, Professor Sax concluded that its core principle is that any decision about a public trust resource:

> is a matter of general public interest and therefore should be made only if there has been full consideration of the state's public interest in the matter; such actions should not be taken in some fragmentary and publicly invisible way… Consistency with this principle would require that *decisions likely to inhibit public uses be made in a public forum*.

Id. at 531 (emphasis added). The Plaintiff's Complaint alleges that the State's decisions about use of its forest lands, including sensitive riparian areas are inhibiting (and potentially permanently prohibiting) public use of those resources, yet have not and are not being made in a public forum.

The Idaho Supreme Court, after reviewing Professor Sax's article, applied the Public Trust Doctrine in a rural state that like Vermont, has a legislature that meets only a few months each year. *Kootenai Envtl. All. v. Panhandle Yacht Club,* 671 P.2d 1085, 1091 (Idaho 1983) Noting the legislature's episodic schedule, the court decided that requiring specific legislative approval before public trust resources could be impaired was not realistic. State agencies must be allowed to do so—but only if their decision-making process is open to the public and the public has a substantial opportunity to respond to the proposed action:

> [W]e follow the substance of the Massachusetts approach—that public trust resources may only be alienated or impaired through open and visible actions, where the public is *in fact* informed of the proposed action and has substantial opportunity to respond to the proposed action before a final decision is made thereon. Moreover, decisions made by non-elected agencies rather than by the legislature itself will be subjected to closer scrutiny than will legislative decisionmaking.

Id. (citing *Gould v. Greylock Reservation Commission,* 350 Mass. 410, 215 N.E.2d 114 (1966) (emphasis in original).

The Vermont Supreme Court has expressly adopted Professor Sax's view of the nature of the Public Trust Doctrine. In *City of Montpelier v. Barnett*, when discussing the public trust nature of Berlin Pond, the Court wrote:

> This trusteeship does not prevent regulation, but it does demand that regulation have a special public character, both in its aims and in its formation. See J. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 MICH. L. REV. 471, 558–60 (1970) (describing the role of the public trust doctrine as one of "democratization" whereby the courts "thrust[ ] decision making upon a truly representative body").

2012 VT 32, ¶ 18. The *Barnett* decision relied upon the decision of the Vermont legislature, a public forum, to delegate decisions about that use to the City of Montpelier. The Court did not reach the question of whether the democratization principle applies to decisions made by a state agency. The Court, however, based its decision on the same understanding of the Public Trust

Doctrine that Professor Sax and the courts of Massachusetts, California, Wisconsin, and Idaho have concluded applies to administrative agencies. *Id.* Indeed, where the decision-making has been administrative rather than legislative, courts subject it to closer scrutiny than legislative decisions. The courts' role is to ensure that the public forum existed and was not abused. Here, the Complaint alleges that there was no forum at all. Defendants made their decisions behind closed doors, which include decisions that may divest the public of Public Trust resources for decades, if not permanently.

B. Statutory and Rule Compliance, and the Management Planning Process, Did Not Satisfy the Vermont Public Trust Doctrine.

Defendants argue that their alleged compliance with 10 V.S.A. §§ 2601, 2701 and 2750, the Acceptable Management Practices Rule, and the Riparian Management Guidelines, and their use of the non-rule based management planning process sufficed to meet all of their procedural and substantive obligations under the Public Trust Doctrine. Motion at 6-7.

This argument ignores one of the basic attributes of the Public Trust Doctrine. The Public Trust Doctrine is a common-law rule of law that *independently* governs the State's management of public trust resources, in a different manner and for different purposes than statutes and rules, such as those cited by Defendants. It requires an independent analysis that is much broader in scope than the Defendants' obligations under the Worcester Plan and other state laws regulating timber harvesting on state public lands. The independent obligations of the Public Trust Doctrine has been the law in Vermont at least since 1918 when, in *Hazen v. Perkins*, 92 Vt. 414, 419, 105 A. 249, 251 (1918), the Court held that the Public Trust Doctrine imposes obligations on the State that are independent of statutory law. *See State v. Cent. Vt. Ry., Inc.*, 153 Vt. 337, 344 (1989). This independence has been well recognized in Vermont ever since. The Vermont Water Resources Board, for instance, has repeatedly held that regardless of compliance with

statutes or regulations, any application for an encroachment permit must independently satisfy the Public Trust Doctrine by weighing the overall benefit to the public against the overall costs to the public of the encroachment. *See, e.g.*, *In re: Dean Leary (Appeal of DEC Permit No. 93-29 Point Bay Marina, Charlotte, Vermont)*, No. MLP-94-08, Mem. of Decision, at 4-5 (Vt. Water Res. Bd. Apr. 13, 1995) (citing *Hazen v. Perkins*, 92 Vt. at 419 and *State v. Cent. Vt. Ry., Inc.,* 153 Vt. at 337), and *Re: Killington, Ltd.*, Nos. MLP-97-09 and WQ-97-10, Findings of Fact, Conclusions of Law, and Order, at 55-57 (Vt. Water Res. Bd. Aug. 14, 1998) (citing *Hazen v. Perkins*, and *State v. Cent. Vt. Ry., Inc*.).

The Environmental Division of this Court has similarly held that the Public Trust Doctrine must be satisfied independent of compliance with other legal requirements. *In re Champlain Marina Dock Expansion*, Case No. 28-2-09, 2011 WL 121688 (Vt. Sup. Envt'l Div. Jan. 11, 2011) (Durkin, J.), slip op. at 18-20. *See also Kootenai,* 671 P.2d at 1095 ("[M]ere compliance by these bodies [agencies] with their legislative authority is not sufficient to determine if their actions comport with the requirements of the public trust doctrine."); *In re Water Use Permit Applications,* 9 P.3d 409, 445 (Haw. 2000) ("although we regard the public trust and Code as sharing similar core principles," the "[State Water] Code and its implementing agency, the Commission, do not override the public trust doctrine or render it superfluous"); *Natl. Audubon Soc'y. v. Sup. Ct. of Alpine County,* 658 P.2d 709, 728 n. 27 (Cal. 1983) (California Water Code and California Environmental Quality Act did not "render the judicially fashioned public trust doctrine superfluous").

The independent nature of Public Trust obligations negates Defendants' reliance on their duties under 10 V.S.A. §§ 2601, 2701, and 2750, the Acceptable Management Practices Rule, and the Riparian Management Guidelines and on their management plans as compliance with the

Public Trust Doctrine. Motion at 6-9. None of these statutes, rules, or guidelines contain any reference to or purport to implement the Defendants' duties under the Public Trust Doctrine. Plaintiff is entitled to discovery and further investigation regarding Defendants' statements in the Motion, at the very least.

The independent nature of Public Trust obligations also negates Defendants' reliance on the Worcester Plan. The Worcester Plan and its public process were devoid of any consideration of the Public Trust Doctrine. The Complaint at ¶ 32 alleged this absence, and Defendants do not deny it in their Motion. They cannot deny it, in fact, because the Worcester Plan does not mention the Public Trust Doctrine or perform any Public Trust analysis. The only mention of the Public Trust Doctrine or resources subject to its protections can be found in Defendants' responses to Standing Trees' comments on the Worcester Plan; in their response, Defendants *rejected* application of the Public Trust Doctrine to the Worcester Range planning process. Worcester Plan pp. 328-329. As a result, Defendants have yet to seek public input on, or base any decision upon, how their Public Trust obligations should shape their timber harvesting decisions for lands that include or affect public trust waters and their tributaries.

Defendants' position boils down to the untenable and unsupported proposition that their ill-explained, alleged compliance with statutes pertaining to forestry and shorelines, and their discretionary disclosure of, and discretionary weighing, of considerations other than the Public Trust Doctrine, simultaneously satisfy the unaddressed Public Trust Doctrine. It appears that Plaintiff, the public, and the court are expected to take Defendants at their word that they performed an adequate analysis of potential threats and harm to Public Trust resources under the Plan, including under any of various scenarios they may have explored before finalizing the Plan. These statutes, rules, and public processes cited by Defendants do not supplant the Public Trust

Doctrine analysis even though, as in Hawaii, these statutes may "share similar core principles" with the Public Trust Doctrine. *In re Water Use Permit Applications,* 9 P.3d at 452.

One of Defendants' mischaracterizations of the Complaint exemplifies their failure to recognize their independent obligations under the Public Trust doctrine. The issues raised in the Complaint are not that the State "gave insufficient weight to environmental considerations," as the Motion describes the Complaint. Motion at 2. Yet the Complaint alleged that legal duties and obligations under the Public Trust Doctrine and the Vermont Constitution were not considered *at all*, Compl. at ¶¶ 100, 106, 111, 117, as the Worcester Plan proves.

Defendants do not have a rulemaking process akin to that used by many states and the federal government for developing management plans for state forests, parks and wildlife management areas. *E.g.* Massachusetts Public Lands Preservation Act, G.L. c. 3, § 5A; (requiring notice and comment, alternatives analysis in public land planning processes); National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) (requiring notice and comment, alternatives analysis in major federal actions affecting human environment, including management plans); National Forest Management Act, 16 U.S.C. § 1604(a) (requiring public participation and consultation in planning processes and decisions involving national forest lands and resources). Without such a process, which itself is subject to public disclosure and participation requirements, the public has little to no access to agency decisionmaking processes involving state public lands, which contain countless Public Trust resources. Unless and until this Court grants the requested relief, the public will never have the opportunity to provide its views on whether the proposed timber harvests on lands that include or affect navigable waters and their tributaries will satisfy Defendants' Public Trust obligations. Nor will Defendants ever base their decisions about timber harvests affecting public trust waters on whether the proposed harvest

satisfies their Public Trust obligations—Defendants' stated position is that so long as they comply with their statutory and rule duties, they need not consider their Public Trust duties. Motion at 9. The Complaint properly pled that the Public Trust Doctrine requires more, stating a cause of action under the Public Trust Doctrine.

C. The Complaint Did Not Seek Mandamus Relief Under Count I.

Count I seeks declaratory and injunctive relief, not a writ of mandamus, to enforce the Public Trust Doctrine. Compl ¶ 100. The Motion, however, seeks dismissal of Count I because mandamus relief would be inappropriate to remedy failure to honor the Public Trust doctrine, which constitutes yet another misstatement of Plaintiff's Complaint. Motion at 9-10.

To be clear, this Court has abundant jurisdiction to hear and determine claims under the Public Trust Doctrine. *Cent. Vt. Ry., Inc.*, 153 Vt. at 344 (affirming lower court's decision to award equitable relief (declaratory judgment) to Plaintiffs). The Public Trust Doctrine is a common law rule of law, and Vermont courts routinely adopt and apply common law. 1 V.S.A. § 271; *Langle v. Kurkul,* 146 Vt. 513, 516 (1986). Each of the Vermont Supreme Court's precedents under the Public Trust Doctrine were appeals from the Superior Court and its predecessor, the county court. *Barnett*, 2012 VT 32; *Hazen*, 92 Vt. 414; *Cent. Vt. Ry., Inc.*, 153 Vt. 337. Each matter involved injunctive and/or declaratory relief. No questions were raised about whether relief was legally available, assuming the plaintiff prevailed on the merits. *See e.g. Cent. Vt. Ry., Inc.*, 153 Vt. at 344.

Plaintiff has adequately pled violations of the Public Trust Doctrine. The Defendants' Motion should be denied.

II. Chapter II, Section 67 of the Vermont Constitution Is Self-Executing, and Plaintiffs Pled That Its Members Fish.

In challenging Count II of the Complaint, the Defendants claimed that Chapter II, Section 67 of the Vermont Constitution is not self-executing under the criteria of *In re Town Highway No. 20,* 2012 VT 17 at ¶ 29, 191 Vt. 231, 45 A.3d 54, and that, even if it is, that Plaintiff did not allege that its members fish. Motion at 11. Both assertions are incorrect.

The State presents this issue as if it were one of first impression, but it is not. Section 67 has been applied by the Vermont courts on behalf of Vermonters without any implementing legislation since 1896. *New England Trout & Salmon Club*, 68 Vt. at 348-49; *Cabot v. Thomas,* 147 Vt. 207, 212, 514 A.2d 1034, 1038 (1986); *State v. Cent. V. Ry., Inc.,* 153 Vt. at 337; *State v. Kirchoff*, 156 Vt. 1, 11, 587 A.2d 988, 995 (1991); *Hunters, Anglers and Trappers Ass'n of Vermont, Inc. v. Winooski Valley Park Dist.*, 2006 VT 82, ¶ 6, 181 Vt. 12, 913 A.2d 391; *City of Montpelier v. Barnett*, 2012 VT at ¶ 18; *State v. Dupuis*, 2018 VT 86, ¶ 13, 208 Vt. 196, 197 A.3d 343. *Stare decisis* precludes revisiting this question.

If resort to criteria in ¶ 29 of *In re Town Highway No. 20* were necessary, section 67 would meet its tests. *First*, it supplies a sufficient rule by means of which the right given may be enjoyed and protected. Its plain meaning affirmatively grants rights to citizens. It states that "[t]he inhabitants of this State *shall have liberty* in seasonable times,…. to fish in all boatable and other waters (not private property) under proper regulations, to be made and provided by the General Assembly" (emphasis added). As the Supreme Court has stated, "Chapter II, Section 67 extended rights to citizens which the common law had not recognized." *Cabot,* 147 Vt. at 211. The rule and its protection are clear. *Second*, it does more than express general principles; it describes the right in detail. Inhabitants have the right to fish on all boatable waters, subject to legislative regulation, such as establishment of fishing seasons. *Third*, its only directive to the

legislature is to adopt regulations of the right—as opposed to defining the right or explaining what the right consists of. The legislature has done by adopting fishing seasons. State v. Waite, 105 Vt. 265, 166 A. 4, 5 (1933) (citing Vt. Stat. Ann. § 4562). *Fourth*, the history of the provision clearly establishes that its purpose was to extend an affirmative right to citizens. *Cabot* explains this history. 147 Vt. at 211-13.

Finally, self-execution promised to harmonize, and has harmonized, with the scheme of rights in the constitution as a whole. It was not likely to result, and has not resulted, in absurd results or redundant rights. Thus, under any applicable analysis, Section 67 is self-executing, and Plaintiff has properly pled a Section 67 cause of action.

In addition, Defendants erroneously argued that Plaintiff failed to allege that its members fish in boatable waters. Plaintiff's complaint asserts that Standing Trees members "use, enjoy and rely upon" Vermont's lakes, ponds and brooks and their "fish," Compl. at ¶¶ 7, 47, and "recreate on boatable waters," Compl. at ¶ 105. Under Vermont's pleading standard, the court must "assume that all factual allegations pleaded in the complaint are true, accept as true all reasonable inferences that may be derived from plaintiff's pleadings." *Mahoney,* 2011 VT at ¶ 7. It is a reasonable inference, if not a necessary inference, that when a person alleges that they "use, enjoy and rely upon… fish" in Vermont waters, they are alleging that they go fishing in Vermont waters, within the meaning of Section 67. The Court should therefore reject the Defendants' fly-specking of the Complaint's well-pled Section 67 claim and deny the Motion.

III. Plaintiff Adequately Pled a Common Benefits Claim Under the Vermont Constitution.

Next, the Defendants erroneously asserted that Plaintiff failed to allege a Common Benefits Clause claim because the Complaint does not comply with the pleading standards of

Brown v. State, 2018 VT at ¶ 17 (quoting *In re Town Highway No. 20*, 2012 VT at ¶ 37). *See* Motion at 12-14.

The Defendants confused the standard for bringing a constitutional tort claim, *i.e.*, a claim for damages directly under the constitution, with the standards for injunctive or declaratory relief under the Common Benefits Clause. *Brown* was a claim for damages. 2018 VT at ¶ 17. The section of *Town Highway No. 20* quoted in Defendants' Motion pertained to the plaintiff's claims for damages directly under the Common Benefits Clause. Yet, the *Brown* standards have nothing to do with claims for declaratory or injunctive relief under the Common Benefits Clause. If they did, then none of the leading Common Benefits Clause cases could have been brought, including *Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999), and *State v. Ludlow Supermarkets, Inc.*, 141 Vt. 261, 448 A.2d 791 (1982). In none of these cases were there allegations addressing the three-part test of *Brown*—disparate treatment, direct favoring of a particular group, and that the decision was wholly irrational and motivated by ill will, vindictiveness, financial gain, or other improper motive.

Here, the allegations in the Complaint are based upon the precedents for obtaining injunctive and declaratory relief under the Common Benefits Clause, not the precedents for obtaining damages as in *Brown*. The Complaint alleges, in detail, how the Defendants' actions violate the basic purpose of the common benefits clause— protecting the citizenry's common benefits from being diverted for the benefit of the few. This purpose was succinctly captured by Chief Justice Allen in *In re Property of One Church Street City of Burlington*:

> While the focus of the federal Equal Protection Clause and Vermont's Proportional Contribution Clause is the individual and the social calculus of what is required to treat each individual in the society equally, *the emphasis in the Common Benefit Clause is the obverse--what is required to protect the polity from the granting of privilege to the few.*

152 Vt. 260, 263, 565 A.2d 1349 (1989) (emphasis added).

Chief Justice Allen's explanation of the purpose of the Common Benefits Clause in *One Church Street* built upon the Court's earlier decision in *Ludlow Supermarkets, Inc.,* that the clause's basic purpose was to ensure that no Vermonters receive particular advantages over others. 152 Vt. at 263-65 (citing *Ludlow Supermarkets, Inc.,* 141 Vt. at 265, 267, 270). The express purpose of the so-called Sunday closing law in *Ludlow* was "to promote the economic health of small business enterprises." *Ludlow Supermarkets, Inc.,* 141 Vt. at 267. The Legislature expressly targeted a class of beneficiaries of the legislation—small businesses—rather than crafting legislation "instituted for the common benefit, protection, and security of the people, nation or community." *Id.* at 268. The Supreme Court struck down this favoring of the few, noting

> [i]n the present case, however, the statute under consideration uses as its justification and policy the very preferential purpose that our constitution says is improper in Article 7. Even though that preference is premised on a declaration that small business enterprises "are essential and fundamental to the economy of the state," 13 V.S.A. § 3352, without more, this objective of favoring one part of the community over another is totally irreconcilable with the Vermont Constitution. It is the very kind of benefit prohibited as an improper purpose by Chapter I, Article 7. The purpose of the preferential legislation must be to further a goal independent of the preference awarded, sufficient to withstand constitutional scrutiny.

Id. at 269.

Similarly, in *Baker* the Court found that the core purpose of the Common Benefits Clause was to guard against the conferral of advantages to the few:

> The first point to be observed about the text is the affirmative and unequivocal mandate of the first section, providing that government is established for the common benefit of the people and community as a whole. Unlike the Fourteenth Amendment, whose origin and language reflect the solicitude of a dominant white society for an historically-oppressed African-American minority (no state shall "deny" the equal protection of the laws), the Common Benefits Clause mirrors the confidence of a homogeneous, eighteenth-century group of men aggressively laying claim to the same rights as their peers in Great Britain or, for that matter, New York, New Hampshire, or the Upper Connecticut River Valley. See F.

> Mahady, *Toward a Theory of State Constitutional Jurisprudence: A Judge's Thoughts*, 13 Vt. L. Rev. 145 , 151-52 (1988) (noting distinct eighteenth-century origins of Article 7). The same assumption that all the people should be afforded all the benefits and protections bestowed by government is also reflected in the second section, **which prohibits not the denial of rights to the oppressed, but rather the conferral of advantages or emoluments upon the privileged.**
>
> The words of the Common Benefits Clause are revealing… [and] express broad principles which usefully inform that analysis. Chief among these is the principle of inclusion… [T]he specific proscription against governmental favoritism toward not only groups or "set[s] of men," but also toward any particular "family" or "single man," underscores **the framers' resentment of political preference of any kind**. The affirmative right to the "common benefits and protections" of government and the corollary proscription of favoritism in the distribution of public "emoluments and advantages" reflect the framers' overarching objective "**not only that everyone enjoy equality before the law or have an equal voice in government but also that everyone have *an equal share in the fruits of the common enterprise.*"** W Adams, *The First American Constitutions* 188 (1980) (emphasis added). Thus, at its core the Common Benefits Clause expressed a vision of government that afforded every Vermonter its benefit and protection and **provided no Vermonter particular advantage**.

Id. at 208-210 (boldface added).

The Complaint tracks this understanding of the Common Benefits Clause from *Ludlow Supermarkets, Inc.*, *Property of One Church Street*, and *Baker* by providing a detailed explanation of how the State's publicly owned forests are being diverted to the timber industry for private profit, which confers a distinct benefit on the lucky few companies Defendants select. The Complaint alleges that the resources in Vermont State Parks, Forests, and/or Wildlife Management Areas are subject to the protections of the Common Benefits Clause and provide valuable, and often essential services to Plaintiff's members and to the general public. The services include improving and protecting water quality, preventing erosion and other flood damage, mitigating droughts, providing habitat for bats that consume disease-causing insects and economically damaging insects, improving physical and mental health, andproviding aesthetic and recreational opportunities. Compl. at ¶¶ 39-42. The Complaint alleges that these services (provided by intact forests) exceed the value of harvesting timber and that timber harvesting

often diminishes or permanently eliminates said services. Compl. at ¶¶ 45-46. It alleges timber harvests are preceded or accompanied by the construction or improvement of timber access roads, which harm the common benefit resources. Compl. at ¶¶ 49-51. It alleges that the principal beneficiaries of these timber harvesting projects are private timber harvesting contractors. Compl. at ¶¶ 52-55. It then alleges that Defendants' approval of timber harvesting in State Parks, Forests, and Wildlife Management Areas does not serve the common benefit of Vermonters, advantages primarily timber harvesting contractors and the timber products industry, and particularly harms Plaintiff's members, who are residents of the State of Vermont and members of the general public seeking to enjoy the standing trees and surrounding environs of the area where Defendants have approved timber sales. Compl. at ¶¶ 53-55. Private timber harvesters are only a part of the Vermont community but benefit at the expense of the common good. *Id.*

This Complaint goes well beyond the short and plain statement required by Vermont Rule of Civil Procedure 8 by providing a detailed explanation of how the few are benefiting at the expense of the many. It more than suffices.

Baker accepted the reasoning of *Ludlow Supermarkets, Inc.*, and *Property of One Church Street* and adopted a test for pleadings under the Common Benefits Clause. *Baker*, 170 Vt. at 212-15. The complaint must contain a "short and plain statement" that (1) defines the part of the community disadvantaged by the legal requirement; (2) identifies the governmental purpose, if any is known, in excluding a part of the community from the benefit; and (3) explains how the omission of a part of the community from the benefit does not bear a reasonable and just relation to a governmental purpose identified. *See id.* The Complaint meets these standards. It defines the disadvantaged community as the Plaintiff's members and members of the public outside of

timber harvesting contractors and the wood products industry. It identifies the governmental purpose, to the extent known, as being the economic benefits that flow from timber harvesting and the wood products industry. It explains that the exclusion is irrational because of the large economic and noneconomic value of the ecosystem system services provided by intact forests, such as water quality, flood mitigation, species protection and recreation.

Plaintiff's claim is novel but well-grounded in the Vermont constitutional clause that the Vermont Supreme Court has called "the first and primary safeguard of the rights and liberties of all Vermonters." *Baker,* 170 Vt. at 202. In cases in which a plaintiff invokes a novel theory, the claim "should be explored in the light of facts as developed by the evidence, and, generally, not dismissed before trial because of the mere novelty of the allegations." *Ass'n of Haystack Prop. Owners,* Inc, 145 Vt. at 447.

IV. Plaintiff Adequately Pled a Claim for Retaliation for Exercise of its Rights to Free Speech and Petition.

A. The Second Clause of Article 7 Is Self-Executing.

Turning to Count IV of the Complaint, Defendants argued that the second clause of Article 7 is not self-executing. Motion at 15. The clause provides "that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conductive to the public weal." Vt. Const. ch. I, art. 7. Applying the Vermont Supreme Court's criteria discussed above, this clause is self-executing.

The clause meets the first criterion, that it "supplies a sufficient rule by means of which the right given may be enjoyed and protected." This clause establishes an unambiguous right to seek to reform government. No standards or implementation are needed in order to understand the activities that it protects. As *Shields v. Gerhart*, 163 Vt. 219, 223, 658 A.2d 924 (1995),

holds, "the absence of legislative enabling statutes cannot be construed to nullify rights provided by the constitution if those rights are sufficiently specified." The wording of the clause leaves no room for doubt that it is the reformers, and only the reformers, who are to judge whether their efforts are appropriate: "that *the community* hath an indubitable, unalienable, and indefeasible right, to reform or alter government, *in such manner as shall be, by that community, judged most conductive to the public weal*." Vt. Const. ch. I, art. 7.

The second criterion is met because, while the clause is an expression of a general principle, it is a general principle that would not benefit from further details or from an implementing statute. It is more clear for Article 7, than for Article 13, which has been held to be self-executing. *Shields*, 163 Vt. at 227. Article 13 states: "That the people have a right to freedom of speech, and of writing and publishing their sentiments, concerning the transactions of government, and therefore the freedom of the press ought not to be restrained." The second clause of Article 7 states not just that the people have a "right," as in Article 13, but that they have "an *indubitable, unalienable, and indefeasible* right" to reform government, which means that the legislature is powerless to diminish this right. It would be unnecessary, counterproductive, and unconstitutional for a statute to attempt to define the types of reform efforts that are protected and those that are not.

The clause meets the third criterion, because its historical context shows that it addresses a right that is more basic to democracy even than free speech is—the right to seek to alter government. This right was missing from the Articles of Confederation and was not included in the United States Constitution and its amendments. It was, and is, found in state constitutions, including Vermont's, because the nascent states believed it was fundamental to their futures. W. Adams, *The First American Constitutions* Ch. VI, 140 (2001) (an earlier edition of Professor

Adams' study of the first constitutions was relied upon in *Baker*, 170 Vt. at 208.). A legislature that can grant authority to implement this right can just as easily take that authority away—which would render this constitutional clause meaningless. It is the right to seek to reform government. It would be absurd to condition this right upon permission from those who already control the wheels of government.

The clause meets the fourth test, because self-execution of this article harmonizes with the scheme of rights established in the constitution as a whole. *Shields*, 163 Vt. at 224. It goes hand-in-glove with Article 13, protecting the right to criticize government, and with Chapter II, § 72, authorizing amendments to the constitution upon approval by a majority of the voters.

The clause meets the final test, because the clause would not lead to absurd results, or redundancy of rights. It is not absurd because it was an important part of Vermont's, and other states' break from monarchical rule. There is no other clause that protects the right to reform government.

No one of these criteria is dispositive. *Shields,* 163 Vt. at 204. The purpose of this clause requires that it be self-executing.

B. Article 13 is Self-Executing and Was Adequately Pled.

Article 13 of the Vermont State Constitution, which is self-executing under *Shields,* guarantees the right to free speech, and to write and publish one's opinion "concerning transactions of government." Vt. Const. ch. 1, art. 13.

The Defendants claimed that the Article 13 violations were not adequately pled because, while protected speech was adequately pleaded, harm was not adequately pleaded. Motion at 16-17. To the contrary, Complaint ¶¶ 58-72 alleged in detail how Plaintiff has criticized Defendants' actions, and in detail how Defendants have retaliated by depriving Plaintiff of information that

otherwise Defendants would have provided to Plaintiff, that Defendants have provided to others, and that Plaintiff needs in order to protect its members. Paragraphs 67-72 pleaded:

> 67. As a result of Standing Trees' public challenges to and criticisms of Defendants, Defendants have discriminated against Standing Trees, denied information to Standing Trees, and denied Standing Trees access to information that Defendants share with the timber industry.
> 68. Some of Defendants' written communications to Standing Trees have explicitly stated that because of Standing Trees' advocacy, Defendants will not share information with Standing Trees that it would otherwise have shared.
> 69. Some of Defendants' written communications to Standing Trees have acknowledged that while Defendants have established no policy on public access to certain timber management decisions, members of the timber industry will be notified by Defendants of these decisions— but Standing Trees will not be notified.
> 70. Because Vermont Rule of Civil Procedure 75 imposes a 30-day limitation period for challenging government action, Defendants' decisions to notify members of the timber industry but not Standing Trees about certain timber management decisions will result in those decisions becoming potentially unreviewable in court.
> 71. Unless Standing Trees obtains judicial relief, Standing Trees will not learn of Defendants' decisions to harvest timber, and how to conduct harvesting, at the Treatment 1 location, until more than 30 days have expired after these decisions are made, potentially rendering those decisions unreviewable.
> 72. Standing Trees' ability to carry out its purposes and to protect the interests of its members will be directly harmed by Defendants' actions, unless judicial relief is obtained.

This was not conclusory pleading, as Defendants argue. This pleading showed both Plaintiff's exercise of the right and that, as a result, Standing Trees and/or its members suffered injury.

This is adequate pleading under Rule 8 and each of the cases cited by Defendants. Motion at 16. In *Dorsett v. City of Nassau*, 732 F.3d 157 (2d Cir. 2013), for instance, the only harm alleged was delay in approving of a settlement agreement. *Id.* at 159. The county legislature had to approve the settlement, and one of the Defendants was a county legislator. *Id.* Plaintiff claimed that the legislator caused the body to delay its approval. *Id.* at 159-160. The settlement agreement was approved, but later than Plaintiff had hoped. The Court of Appeals concluded that

there had been no legitimate expectation of approval at all, much less approval by any date, so there was no harm. *Id.* at 161. Why Defendants' assert this case in support of their argument is not apparent.

Defendants' Motion incorrectly describes *Zherka v. Amicone* as a case involving a lost government contract. In this case, which centered on a newspaper publishers' defamation claims against the Mayor of Yonkers, New York, , the court held that defamation *per se*, without any actual damages, did not rise to the level of harm under the First Amendment. *Zherka v. Amicone*, 634 F.3d 642 (2d Cir. 2011). Plaintiff does not claim defamation here. Motion at 16.

Tabbaa v. Chertoff, 509 F.3d 89, 102 (2d Cir. 2007), also relied on by Defendants, strongly supports Plaintiff's claim. Motion at 16. *Tabbaa* did not address harm from exercise of free speech; it addressed harm from exercise of the right of association. *Tabbaa,* 509 F.3d at 102. But its principle is applicable here. The Court ruled that no direct interference with the right, nor any chilling effect on the right, need be shown. *Id. Any* retaliation that serves to significantly burden those who engage in religious association is a cognizable harm. *Id.* Heightened scrutiny at the border could significantly burden persons who had attended a religious conference, so constitutional harm had been adequately pled in that case. *Id.* The Plaintiff's Complaint here alleged that Defendants' actions have significantly burdened Plaintiff's rights. Compl. at ¶¶ 58-72

Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83 (2d Cir 2002) does not hold that revocation of a building permit is a sufficient injury. Clearly, it is a sufficient injury, but the issue in the case was whether the complaint adequately alleged improper motive sufficient to sustain a damages action. The decision thus has no bearing on this case.

Gagliardi v. Vill. of Pawling, 18 F.3d 188, 195-97 (2d Cir. 1994), the last case cited by Defendants, does not assist Defendants. It has two relevant holdings. The first supports Plaintiff's claim, because it holds that behavior such as the Gagliardis and Plaintiff engaged in is protected speech—complaints to court and to administrative agencies about a government defendant's conduct (the Gagliardis and Plaintiff both complained to the courts; the Gagliardis complained as well to administrative agencies while Plaintiff complained to both agencies and the legislature; see Compl. ¶¶ 58-66). The second holding is irrelevant. Like *Dougherty*, the claim was a damages claim, with the requirement that plaintiff prove improper motive—which is not applicable to Plaintiff's claims for declaratory and injunctive relief here.

The Motion also incorrectly argues that any informational deprivation can be cured by resort to the Public Records Act (PRA), so Plaintiff has not alleged adequate injury. Motion at 17-18. This argument conflicts with the standards for motions to dismiss. The Complaint alleges, as a factual matter, that other persons receive notice but Standing Trees does not, because of its advocacy. Paragraph 70, quoted above, then alleges as a factual matter that as a result of this retaliation, and because Vermont Rule of Civil Procedure 75 imposes a 30-day limitation period for challenging government action, "Defendants' decisions to notify members of the timber industry but not Standing Trees about certain timber management decisions will result in those decisions becoming potentially unreviewable in court." Loss of opportunity to seek judicial review is a cognizable harm. It is permanent and incurable harm. This factual allegation cannot be rejected on a motion to dismiss. Indeed, unless Plaintiff were to submit PRA requests every weekday, throughout the year, it will receive delayed notice defeating its opportunity for judicial review. Defendants' implicit suggestion that Plaintiff *should* submit daily PRA requests is

absurd; the burden placed on both the Plaintiff and the State would be intolerable. The law imposes no such requirement on members of the public, and for good reason.

Standing Trees' harm is as concrete and prejudicial a harm as the one- to four-day delay suffered by news organizations in obtaining access to court records that was ruled unconstitutional in *Courthouse News Service v. Corsones,* 131 F.4th59, 65 (2d Cir. 2025)(54.8% of complaints were made available to the public on the day of filing; 22.6% were made available on the day after filing; 4.6% were made available two days after filing; 6.7% were made available three days after filing; and 11.4% were made available four or more days after filing).).Delay may not always constitute a constitutional harm, but for both Plaintiff and Courthouse News it does.

V. Plaintiff Properly Pled a Request for Mandamus Relief Under Rule 75 and the Vermont Administrative Procedure Act.

Contrary to Defendants' arguments, Motion at 18-19, Plaintiff's Complaint properly alleged that it is entitled to mandamus relief under Rule 75 and the VAPA. Compl. at ¶¶ 75-80, 86-90, 92-93.

The VAPA defines a practice as a substantive or procedural requirement of an agency affecting one or more persons who are not employees of the agency, that is used by the agency in the discharge of its powers and duties. 3 V.S.A. § 801(b)(7). This includes all requirements, in writing or not. *Id.* A procedure is a practice that has been adopted in writing, including any practice of any agency, whether or not it has been labeled as a procedure. 3 V.S.A. § 801(b)(8). VAPA mandates that where written procedure is used by a state agency, and twenty-five or more persons request that procedure be subjected to rulemaking—including consideration of an alternative rule—the agency must do so. 3 V.S.A. § 831(c). VAPA requires the agency, within

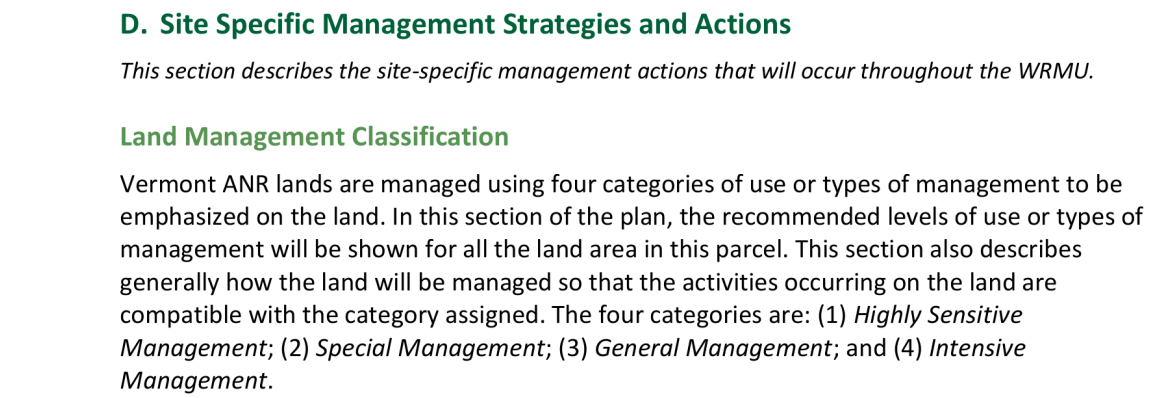
thirty days, to either initiate rulemaking or issue a declaratory ruling that the rulemaking is not needed because the subject matter of the written procedure is already addressed. *Id.*

Here, Plaintiff alleged that the Plan "determines" how future decisions about timber harvesting in the Worcester Range will be made. Compl. at ¶ 74. To "determine" is "to fix conclusively or authoritatively." *Determine,* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (12th ed. 2025). Further, Plaintiff alleged the Plan constitutes a practice or procedure because it "governs" how the Department of Forests, Parks, and Recreation will implement its statutory missions of conservation and related goals. Compl. at ¶ 91. To "govern" in this context means "to control legal procedure for (an action, practice, process, etc.)." *Govern,* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (12th ed. 2025). The Plan thus meets the definition of a policy or procedure in the VAPA. Plaintiff properly alleged sufficient facts to show that the Plan is a procedure governed by Section 831(c), requiring rulemaking following the petition process.

The statute grants no discretion to a government agency that receives a petition from 25 or more persons seeking initiation of rulemaking for a practice or procedure. 3 V.S.A. § 831(c). Therefore, mandamus is the appropriate remedy. Mandamus will ordinarily only compel a public officer to perform an official act which is "merely ministerial and only where the right sought to be enforced is certain and clear." *Alger v. Dept. of Labor & Indus.*, 2006 VT 115, ¶ 15, 81 Vt. 309, 917 A.2d 508 (internal quotation omitted). However, if there is no other adequate legal remedy, a mandamus may also be issued if there is an "arbitrary abuse of power vested by law in an administrative officer . . . which amounts to a virtual refusal to act or to perform a duty imposed by law." *Id. See also In re Fairchild*, 159 Vt. 125, 130 (1992) ("a writ of mandamus is issued wherever a government officer has refused to act, where the duty to act is clear under the law").

Defendants' response to the Complaint is purely factual and is factually incorrect. Based on their summary of the Plan, Defendants ask that the Court reject the factual assertions in the Complaint and therefore conclude that the Plan contains no requirements, just strategies and goals. Motion at 19. The Plan is 394 pages long.[1] Defendants refer only to "Section IV, Management Strategies and Actions." Motion at 19.That section is 57 pages long. In fact, subsections D, E, and F of Section IV contain statements that by their own terms are requirements that are intended to be used by the agency in the discharge of its powers and duties.

What follows are screenshots of parts of the first and second pages of subsection D, pages 151 and 152:



D. Site Specific Management Strategies and Actions

This section describes the site-specific management actions that will occur throughout the WRMU.

Land Management Classification

Vermont ANR lands are managed using four categories of use or types of management to be emphasized on the land. In this section of the plan, the recommended levels of use or types of management will be shown for all the land area in this parcel. This section also describes generally how the land will be managed so that the activities occurring on the land are compatible with the category assigned. The four categories are: (1) *Highly Sensitive Management*; (2) *Special Management*; (3) *General Management*; and (4) *Intensive Management*.

[1] The Plan is available online at: https://fpr.vermont.gov/sites/fpr/files/documents/Worcester%20Range%20Management%20Unit%20Long%20Range%20Management%20Plan%20-%20signed%209-26-2024.pdf.

include natural communities, plants, and wildlife as well as recreation, historic, timber, and water resources.

1.0) **Highly Sensitive Management** – Areas designated as Highly Sensitive Management are described as **"areas with uncommon or outstanding biological, ecological, geological, scenic, cultural, or historical significance…".** Acres managed under this category will have no timber management, salvage harvest, or active wildlife habitat management. However, trees and other vegetation may be cut to restore natural community species composition and structure in limited locations; manage specific habitat conditions for rare, threatened, and endangered species; and to maintain safe and enjoyable recreational conditions.

2.0) **Special Management** – Areas designated as Special Management include areas **"…where protection and/or enhancement of those resources is an important consideration for management."** Timber harvesting and wildlife habitat management

As the Court can see, page 151, Part D is described as follows: "This section describes the site-specific actions **that will occur** throughout the WRMU" (boldface added). The language is not advisory. Page 152 sets forth one such requirement. It states that acres in the Highly Sensitive Management areas "will have no timber management, salvage harvest, or active wildlife habitat management." This is a substantive or procedural requirement that will be adhered to by employees of the agency in the discharge of their duties. It could not be more clear or more clearly binding. It is a "practice."

Mandates to harvest timber are found throughout Subsection D. For example, on page 156, one of the actions that will occur is "Implement Timber Harvest #3 as outlined in Timber Management Goals section," and on page 158 one of the actions that will occur is "Implement Timber Harvest #2 as outlined in Vegetation Management Goals section." On page 161, actions that will occur include "Implement Timber Harvests 1, 3, 4, 5,6, 7, 9, 11 and 12 as set forth in Timber Management Goals section." These are all examples of "the site-specific actions **that will occur** throughout the WRMU."

Subsection E contains other mandates. Screenshots of its first page, page 170, follow:

E. Site-Specific Forest Management Activities

Forest vegetation management activities occur in two main forms - commercial timber sales, and non-commercial vegetation management activities (e.g., invasive plant control, open land management, apple tree pruning and release, and timber stand improvement). Within the WRMU there are roughly 8,641 acres available, accessible, and appropriate for commercial vegetation management activities. Approximately 2,250 of these acres were unavailable to the state to conduct forest management activities prior to the acquisitions of the Brownsville Forest Property in 2019 (758 acres) and the Patterson Brook Headwaters Tract in 2020 (1877 acres), due to being inaccessible or in non-state ownership. With these two acquisitions, a total of 875 acres of existing state land that had previously been inaccessible for timber management became accessible. Of these 875 acres, 440 acres are scheduled for forest management activities in this LRMP.

The majority of the planned timber management actions in this LRMP are commercial vegetation management activities. Over the next twenty years, 12 commercial timber harvests are scheduled to occur throughout the WRMU. In total, treatments will occur across a total of 1,928 acres, or approximately 10.3% of the total forested area within the WRMU. These treatments range in size from 74 acres to 298 acres, with the average treatment size of 161 acres. Many of the larger timber harvests will take two seasons to complete. Most of the timber harvests on the WRMU will be conducted in the winter months to reduce impacts to the site and protect existing regeneration. However, summer logging may be suitable in some instances when ground conditions allow, or soil scarification is required to meet harvest objectives.

Areas identified for treatment in this LRMP will receive additional review and inventory. A detailed review of special wildlife habitat (e.g., habitat for rare, threatened, or endangered species), significant natural communities, important historic or cultural sites, and sensitive natural features (e.g., streams, steep slopes, wetlands, etc.) will be conducted on each

treatment area. A more detailed pre-sale inventory will also be conducted on each treatment area to gather data and information related to forest health, species composition, stand age, forest structure, soil characteristics, wildlife habitat, and information on forest product quality, value, and distribution.

These reviews and inventories will be used to develop silvicultural prescriptions for each treatment area consistent with the management goals for the WRMU. Silvicultural prescriptions are written by State Lands Foresters with input and collaboration from other District Stewardship Team members, and then reviewed by Stewardship Foresters. Current silvicultural guides are referenced to formulate appropriate strategies for treatment. A variety of silvicultural treatments will be utilized depending on the results of the information gathered and an evaluation of opportunities for demonstration projects.

See Table 33 for an implementation schedule of vegetative management on the WRMU. The

As shown above, each area to be harvested "will receive additional review and inventory." A detailed review of special wildlife habitat (e.g., habitat for rare, threatened or endangered species), significant natural communities, important historic or cultural sites, and sensitive natural areas (e.g., streams, steep slopes, wetlands, etc.) "will be conducted on each

site." The results of these studies "will be used" to develop the silvicultural prescriptions for each site. This, too, is a requirement that will be used by employees of the agency in the discharge of their duties. It, too, could not be more clear or more clearly binding. It, too, is a "practice."

Similar mandates are found in Subsection F. *See* page 170 (third, fourth and fifth paragraphs).

The Defendants' responses to comments on the Plan confirmed that the Plan contains requirements that will govern how the agency manages these lands. Comment Theme 107 on page 331 states that "Once a LRMP [management plan] is approved by ANR leadership, management actions identified in the plans are planned and executed based on the goals, strategies and actions of the plan."[2] The Agency will respond to "new conditions on the ground provided they are consistent with existing LRMPs." Comment Theme 114 on page 336 states that the 13 timber harvests set forth in the Worcester Plan will go forward as set forth in the Plan unless and until the Plan is changed.

In ruling on a motion to dismiss the Court must resolve all factual disputes in favor of the plaintiff and leave factual disputes for resolution either on summary judgment or at trial, as discussed throughout this brief. Notwithstanding Defendants' assertions that the Worcester Plan contains no requirements, their description is contested, and goes to the very heart of Plaintiff's claims in this case. If, upon summary judgment or at trial, the Court finds that the Plan does contain requirements, judgment should be issued commanding Defendants to commence rulemaking. That rulemaking process should be subject to public notice and comment, so the public has an opportunity to give the agency input on its plans to properly steward resources that

[2] The State's response to comments, Appendix 6 to the Plan, is available online at: https://fpr.vermont.gov/sites/fpr/files/documents/Worcester%20Range%20MU%20LRMP%20Public%20Responsiveness%20Summary.pdf.

are public and subject to the Public Trust Doctrine. For now, the Court should reject the Defendants' arguments for dismissal of Plaintiff's VAPA claim.

CONCLUSION

The Court should deny the Defendants' Motion to Dismiss.

Respectfully submitted,

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