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August 13, 2025

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Re: Public Trust, Common Benefit, and the Vermont Constitution

Dear Secretary Moore, Commissioners Fitzko and Shortsleeve, and Attorneys Gjessing and Purvee:

I write on behalf of Standing Trees. We have carefully considered Attorney Gjessing's July 29, 2025, letter to me on behalf of the Agency of Natural Resources. We have also re-read her letter to me dated October 16, 2024, on behalf of the Agency, the Agency's press release dated August 27, 2024, and her email to me dated September 4, 2024, on behalf of the Agency, about the press release. The purpose of writing to you today is to ensure that you are aware of what appear to be improper and unconstitutional actions by Agency staff—and to propose a solution. The solution we propose is one that the Agency itself has been proposing for over a year but has not initiated, as you will see below.

The October 16, 2024, and July 29, 2025, letters explicitly represent that the Worcester Range Long Range Management Plan is not a rule, practice or procedure—and therefore is not reviewable in court. The letters represent that Management Plans in general are nothing more than a plan, by the Agency, for how the Agency may act. The July 29, 2025, letter emphasizes that plans are not rules, practices or procedures by the use of boldfaced italics: "LRMP's set forth an outline of actions that ANR ***plans*** to undertake…" The letter then puts a finer point on this position by stating "The plan does not set forth rules or mandate any substantive or procedural requirements." It is, instead, "a blueprint of strategies and activities that the Agency may implement…."

The August 27, 2024, press release announced the commencement of rule-making to govern the Agency's decisions about the use of its lands. The press release stated that the rule would include a "Statewide Plan" that would govern all Agency land. I wrote to Attorney Gjessing to confirm that rule-making actually had not commenced, and that the "comment period" was not the comment period governed by the rulemaking statute. The September 4, 2024, email from Attorney Gjessing to me made explicit that the press release actually was referring to a proposed, possible, rulemaking that had not commenced, and that the rulemaking discussed in the press release actually had not been initiated. Nonetheless, Standing Trees submitted comments on the proposal. A year has passed, yet rule-making has not been initiated.

During that year, we sought information about the Agency's decision-making about timber harvests. We obtained a large quantity of documents evidencing an evaluation process that occurs entirely out of the public's view. Existing Management Plans refer generically to these later site-specific decision-making processes, but the only way to find out the actual questions being asked about each proposed timber harvest, the data being considered about each timber harvest, and the conclusions being reached about each harvest, is to submit repeated Public Records Act requests. These requests typically result in document production many weeks, sometimes months, after the request has been submitted, notwithstanding the statutory deadlines.

We also obtained copies of notices that had been provided to potential logging contractors for past logging contracts in advance of site visits and submission of bids. This information includes the location, silvicultural prescriptions, the types of trees, the quantities of timber, and the public resource protection conditions imposed.

We asked to be provided the same notice of proposed or approved future timber harvests that is provided to potential harvesting contractors in advance of site visits and submission of bids. We were told that the Agency has no written policies on who receives this notice but, we were informed, by email, that the Agency has decided that it will not share this advance notice with Standing Trees. The facts pertaining to proposed timber harvests, including the location, silvicultural prescriptions, the types of trees, the quantities of timber, and the public resource protection conditions being imposed, are all being shared with the timber industry—but kept from the public. We do not know whether Secretary Moore, Commissioner Fitzko or Commissioner Shortsleeve was involved in making that decision. One of the purposes of this letter is to ensure that each of you is aware and to provide the opportunity to rectify the decision.

The Vermont Constitution and the public trust doctrine forbid the Agency's management approach described above. Under Vermont law, all of the boatable or navigable waters in each forest and downstream of each forest are protected by § 67 of Chapter II of the Vermont Constitution and also by the public trust doctrine. Agency documents confirm that boatable, navigable water is found throughout our State Forests, Wildlife Management Areas and State Parks. For example only, in the Camel's Hump Management Area there are 54 acres of beaver ponds. Beaver ponds are boatable and navigable. The health of beaver ponds is directly, inextricably linked with and dependent upon the existence and health of the forests that surround each pond—a fact acknowledged by the Agency in one of its plans. We also know that numerous high-quality trout streams that are tributaries of boatable, navigable waters are found within or adjacent to State Forests, Wildlife Management Areas, and State Parks. The health of these boatable and navigable waters, and of the fish and wildlife that depend on these waters, hinges on the health of the forests through which the tributaries flow.

One of the principles of public trust is that no decisions affecting the public trust may be made behind closed doors. The public trust requires a *public process* that occurs before the decision is made, and that, after the decision is made, is openly shared with the public. For example, the Idaho Supreme Court has ruled:

> … 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.

Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1091 (Ida. 1983) (emphasis in original).

Another principle of the public trust doctrine is that *tributaries* of navigable waters are protected. This was one of the holdings of the leading public trust decision in the modern era, *National Audubon Society v. Superior Court*, 658 P.2d 709. 720-721 (Cal. 1983). It is impossible to protect a public trust river, lake or pond without protecting the tributaries that feed into that river, lake or pond. The experts we have consulted have concluded that the AMPs that the Agency currently relies upon do not provide adequate protection to Vermont's navigable and boatable waters and their tributaries.

Another component of the public trust doctrine is that evaluation of whether state and federal water quality or other *permitting standards are satisfied does not satisfy the public trust standard*. The public trust doctrine imposes a fiduciary obligation upon the State that is distinct from, and more exacting than, satisfying regulatory requirements. The fiduciary obligation necessitates a weighing of public benefits against public costs, unlike any regulatory standard. See, e.g., *In re OMYA Solid Waste Facility Final Certification*, Dkt No. 96-6-10 Vtec, Decision and Order on Motions for Summary Judgment (Vt. Super. Ct., Envtl. Div., 2/28/11)(Wright, J.), slip op at 9-10.

Contrary to the public trust principles described above:

►timber harvest decisions that affect boatable and navigable waters have only addressed (often inadequately) compliance with *regulatory standards*, which does not suffice for *public trust weighing of public benefits against public costs;*

►decisions about timber harvests that may affect the quality and quantity of boatable and navigable Vermont public trust waters and their tributaries are being made *behind closed doors;*

►none of the decision-making has included public trust weighing of impacts on the *beaver pond waters that are found throughout* State Forests, Wildlife Management Areas and State Parks;

►none of the decision-making has included public trust weighing of impacts on *tributaries* of boatable and navigable waters;

►*only the timber industry* is informed when a decision has been made about harvesting timber on state public lands, including information about the location of harvests, the harvest prescriptions, the types of trees to be harvested, the quantities of timber to be removed, and the public resource protection conditions that will be imposed.

Article 7 of Chapter 1 of the Vermont Constitution, the common benefits clause, also bars the Agency's behavior. Economic favoritism of small stores was condemned by the Supreme Court in the *State of Vermont v. Ludlow Supermarkets, Inc.,*141 Vt. 261. 267 (1982) as violative of the common benefits clause, despite the legislature's belief that small stores advanced the public interest. The common benefit clause has also been applied to prohibit unequal public school financing, unequal access to the benefits of marriage, and decisions by selectboards that favor one group of residents over another. The decision to provide the industry, but not the public, notice of proposed or approved timber harvests, including the information that accompanies this notice, violates the common benefits clause much the same way the Supreme Court has prohibited with regard to favoritism of small stores over larger stores, and favoritism of some residents of a town at the expense of others. That information is of potentially enormous importance, and cannot be secretly provided only to the timber industry.

What is at stake is not just unequal access to information, but discriminatory substantive decision-making. Behind closed doors, as far as we have been able to tell from Public Records Act responses, when a timber harvest decision is being made, the economic value of the timber and the Agency's intent to protect the forest products industry are being considered—but not the economic value of the harm imposed on the general public by loss of ecosystem service values caused by timber harvesting. These lost ecosystem service values include the economic value of clean water, flood resiliency, recreation, etc. Our

expert has determined that the public benefits of the ecosystem services provided by state lands far exceeds the economic value of timber harvests for the State of Vermont or private industry. These public benefits are jeopardized each time a timber sale is approved, but—to the best of our knowledge—no accounting is performed by the Agency to weigh these costs and benefits. This too violates the common benefits clause.

The staff refusal to provide Standing Trees the information that it provides the industry about proposed or approved timber sales also is in obvious retaliation for Standing Trees' vigorous advocacy, including the litigation that was dismissed for lack of standing and Standing Trees' frequent resort to the Public Records Act to fill the huge gaps created by the Agency's absence of rules in this area. The Agency's retaliatory action violates Articles 7, 10, 13 and 20 of Chapter 1 of the Vermont Constitution. The staff decision also is arbitrary and capricious.

We would like to avoid litigation, and hope that you agree that there is a straight-forward manner in which these issues can be revolved in the public interest. We ask that rule-making commence, immediately. Specifically, we ask: i) that the Agency make a binding commitment, within ten days of this letter, that it will formally initiate and complete rulemaking for a rule that will govern, among other decisions, how individual timber harvests are approved for State Forests, Wildlife Management Areas and State Parks; ii) that the commitment be to initiate rulemaking within 30 days of the commitment; and iii) that the commitment include a stay of all unit management planning and timber harvest decision-making until rule-making has been completed and each planning process and harvest decision has conformed to the rule.

During the rulemaking process, you can expect that we will ask that the rule address the issues set forth above, among others, such as:

i) How ecosystem service values will be determined and weighed, as compared to forest product values, when applying the public trust doctrine, § 67, and the common benefit clause, during decision-making about each timber harvest that may affect boatable or navigable waters or their tributaries, including beaver ponds.

ii) How ecosystem service values will be determined and weighed, as compared to forest product values, when applying the common benefit clause during decision-making about each potential timber harvest.

iii) How and when there will be public disclosure of each proposed decision to harvest timber, including the evaluations and weighing conducted by the Agency in formulating each proposal, and an opportunity to comment on what has been disclosed.

iv) How and when the public will be informed of the issuance of each final decision to harvest timber once the decision has been made.

If the final rule does not adequately address each of these issues, we will ask the Legislative Committee on Administrative Rules to reject the proposal, and, if need be, we will seek judicial review.

We seek an immediate decision for good reason. Timber harvesting is scheduled for 2026 in the Worcester Range Management Unit.

We look forward to hearing from you within ten days.

Sincerely,

/s/James A. Dumont
James A. Dumont, Esq.

cc: Mr. Zack Porter
Christopher Courchesne, Esq.