CONFIDENTIAL

LEGISLATIVE BILL REVIEW FORM: 2015

Bill Number: *H.33* **Name of Bill:** *An act relating to authorizing municipalities to regulate the surface water use of public waters used as drinking water supplies*

Agency/ Dept: *ANR / DEC* **Author of Bill Review:** *Leslie Welts, DEC Associate General Counsel*

Date of Bill Review: *January 21, 2015* **Related Bills and Key Players :** *Rep. Warren Kitzmiller, the City of Montpelier, and the Citizens to Protect Berlin Pond*

Status of Bill: (check one): _X___Upon Introduction _____ As passed by 1st body _____As passed by both

Recommended Position:

_____Support ___X__Oppose _____Remain Neutral _____Support with modifications identified in #8 below

Analysis of Bill

1. **Summary of bill and issue it addresses.** *The bill authorizes municipalities to adopt ordinances regulating surface water uses on public waters that are the sources of public water supplies, regardless of where the public water is located. The bill provides that municipal ordinances would control in the event of a conflict with a rule adopted by ANR. The bill would indirectly abrogate the Supreme Court's decision in* City of Montpelier v. Barnett, 2012 VT 32 ¶¶ 19-20 *that the State of Vermont, not the City of Montpelier, has the jurisdiction to regulate public waters or to delegate certain authority to regulate the use of public waters consistent with the public trust to municipalities.*

2. **Is there a need for this bill?** *No. Municipalities already have the opportunity to participate in the rulemaking process when rules are proposed that regulate uses of a surface water that is the source of water for a public water system.*

3. **What are likely to be the fiscal and programmatic implications of this bill for this Department?** *The bill allows a town to interfere with DEC's ability to implement its mandate to hold waters of the state in public trust and to support multiple uses. In particular, this bill raises constitutional, legal, and policy issues for DEC.*

    a. **Constitutional issues:** *this bill seeks to preempt the State's sovereign authority to exercise a continuous supervision and control over the navigable waters of the state in the public trust. In addition, this bill has the potential to interfere with the public's constitutional right to hunt and fish in all boatable waters and other waters (not private property).*

    b. **Legal and policy issues:** *this bill has the potential to interfere with DEC's ability to achieve its policy mandate to protect, regulate, and where necessary, control water resources of the state in the public interest and to promote the general welfare. This bill could also interfere with DEC's ability to implement the Vermont Water Quality Standards and the Use of Public Waters statute and rule, which call for the State to resolve use conflicts in the least restrictive manner possible. Though unlikely, if passed, this bill would also enable a municipality to adopt ordinances for these surface waters that could be less protective than the VT Water Quality Standards.*

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4. **What might be the fiscal and programmatic implications of this bill for other departments in state government, and what is likely to be their perspective on it?** *This bill could potentially interfere with the Department of Fish & Wildlife's efforts to manage and regulate the fish and wildlife of Vermont in the interest of the public welfare, and to provide access to public waters. This bill would also allow municipalities to prohibit any or all recreational uses of public waters, in violation of the public trust doctrine, including waters in which the Department of Forests, Parks and Recreation has established State Parks and recreational access facilities.*

5. **What might be the fiscal and programmatic implications of this bill for others, and what is likely to be their perspective on it?** *Some municipalities may support this bill because they will desire increased authority (likely Montpelier and possibly St. Albans City). This bill may attract the attention of municipal drinking water treatment facilities, but it is unlikely to result in any changes to their practices.*

6. **Other Stakeholders:**

   6.1 Who else is likely to support the proposal and why? *The City of Montpelier, The Citizens to Protect Berlin Pond, any drinking water advocacy groups and some private citizens may support this proposal because they will see it as giving the City of Montpelier the ability to be "more protective" of Berlin Pond which is Montpelier's drinking water source.*

   6.2 Who else is likely to oppose the proposal and why? *Sportspeople, anglers, recreational users and others interested in public access to natural resources because they will see the potential for municipalities to restrict or eliminate access to surface waters. Additionally, residents of towns in which another municipality's water supply is located will likely oppose the bill for the same reasons (e.g., the Town of Berlin).*

7. **Rationale for recommendation:** *This bill has the potential to interfere with constitutional rights of the public related to the Public Trust Doctrine and the State's ability to implement its mandates to provide for the reasonable use of waters of the state and to manage and regulate the fish and wildlife of Vermont in the interest of the public welfare.*

8. **Specific modifications that would be needed to recommend support of this bill:** *None. This bill is too broad as-is and there is no way to suggest modifications without knowing if there is a more specific purpose.*

9. **Gubernatorial appointments to board or commission?**

Commissioner has reviewed this document: _____ ***Date:*** 1/23/15

Secretary has reviewed this document: _____ ***Date:*** 1-26-15

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