

## Comments and Questions on ANR Proposed Amendments to the VWQS EPR Chapter 29A

Submitted by Jeff Nelson, VHB and Warren Coleman, MMR LLC - 9/7/16

- 1) Section 29A-102 Definitions: There are a number of new or amended definitions that warrant explanation and understanding of how they will be used in assessing compliance with the VWQS. In particular, it would be useful to understand how these definitions tie back into the criteria for various designated uses.

Equilibrium condition

Flow Characteristics

Full support of Uses

Physical Structure

Stream Processes

- 2) Sections 29A-102 Definitions and Section 29A-306 Aquatic Habitat: Given the proposed addition of the following definitions: (14) Equilibrium Condition, (34) Physical Structure, and (43) Stream Processes, along with the proposed Management Objective language as written appears to be inconsistent with existing policy, and would be highly problematic. For example, the combined reading of these sections would seem to make it impossible for ANR to issue a Sec. 401 Certification for any kind of hydroelectric project, including existing facilities undergoing relicensing. In contrast, EPR Chapter 27 (Section 27-102(c)) recognizes the following: "Many of Vermont's cities, towns, villages, highways, and other critical infrastructure have been built next to streams, and are therefore vulnerable to flooding and erosion. The State recognizes that particular stream reaches must be managed in a non-equilibrium condition to protect pre-existing improved property." The language should be revised to recognize that there are existing departures from the equilibrium condition, and that obtaining Sec. 401 certification for such facilities would not be precluded by the aquatic habitat criterion.
- 3) Section 29A-305 Numeric Biological Indices and Aquatic Habitat Assessments: In subsection (a), we disagree with the deletion of "and aquatic habitat uses", as the determination of full support for the aquatic biota use should, of necessity, demonstrate full support of aquatic habitat criterion, since appropriate habitat is required for healthy biota.
- 4) Section 29A-103 Riparian Policy: The Riparian policy includes an expanded concept of "the provision of habitat and travelways for a wide variety of species". Presumably this is designed to protect non-aquatic species like birds and mammals that use the riparian areas. Why is this change being proposed as part of the VWQS? How will it be used as part of the VWQS? What is the relationship, if any, to the ANR Buffer Policy/guidance document used for Act 250 and Section 248 proceedings?

5) Section 29A-105 Antidegradation Policy:

- a) Section 29A-105(b): For Existing Uses, the factors to be considered now includes the concept of habitat that “is capable of supporting...” aquatic biota, wildlife or plant life. It should be limited to something that has occurred or is occurring and not something that could occur prospectively. That has been how existing uses have always been viewed and this would be a significant departure.

The concept of existing uses should have little value in Vermont because unless a waterbody is impaired it is meeting all the designated uses and therefore would protect any identified existing uses. As you are aware, because Vermont does classify all its waters for all uses the concept of existing uses is of limited utility. It is the so-called “floor” for water quality protection and probably has utility in other states that do not classify waters like Vermont. The only instance where this might make sense in Vermont is if you discovered an existing use that would not be protected sufficiently where the designated uses are being met. Only one example has ever been described and that is where you have a remnant cold water fish population that exists in a stream (perhaps due to a cold water spring) that is classified as warm water. In this instance, the designated uses for a warm water stream would not be sufficient to likely protect the cold water fishery. Therefore, in order to protect the fishery, you would identify it as an existing use and apply the appropriate temperature or other criteria to protect it.

- b) Section 29A-105(c) Protection and Maintenance of High Quality Waters: As a general matter, ANR explains in their Fact Sheet and Q&A that changes to the Antidegradation Policy in the VWQS are to “provide alignment with Federally-required language,” and other federal requirements for public notification and an alternatives analysis. Later in the document they note that the state policy being proposed is “substantially stronger than the requirements of the federal policy.” Taking the three parts of high quality water protection in turn:

- 1) Public notice and comment: Providing public notice on draft decisions and an opportunity for public comment is appropriate, required by Federal law, and is already a concept in the Interim Anti-Degradation Implementation Procedure (2010).
- 2) Analysis of Alternatives: This analysis is new Federal requirement. The EPA adopted this requirement in 2015 and has defined how this should be applied by the states. ANR proposes to define this later in the Antidegradation Rule. It would be helpful to make people aware of this given the many obvious questions it raises.

- 3) In addition to an analysis of alternatives analysis, an applicant may still need to demonstrate that the lowering of water quality is “necessary to prevent substantial adverse economic or social impacts on the people of the State in the area in which the waters are located.” ANR has limited the physical scope of this determination to the “area in which the waters are located” and presumably the people of the area where the waters are located, but as ANR notes this is still “substantially stronger than the requirements of federal policy.” Federal policy requires that the state must determine that a lowering of water quality is “necessary to accommodate important economic and social development in the area in which the waters are located.”

Why is ANR not proposing an amendment that is identical to the Federal requirement? How ANR will define “substantial adverse economic or social impacts on the people of the State in the area in which the waters are located.”

- 4) Can ANR provide examples where the 2010 Interim Procedure has been applied in a variety of permit situations? Are there examples where the “necessary to prevent substantial adverse economic or social impacts on the people of the State” test has been applied?

#### 6) General Questions –

- a) Is the GMNF proposed classification based on data or management objectives? Or presumptions about the condition of those waters?
- b) Section 29A-104 Classification of Water Uses: Why does the list of designated uses include “other recreational uses” in separate types of recreational uses? This is confusing.
- c) Section 29A – 302 Criteria: Why are specific temperature criteria given for “waters for fishing” and not other uses such as biota? Please explain.