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Jon Groveman, VNRC Policy and Water Program Director
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<by electronic correspondence>

Dear Jon and Colleagues,

Thank you for your recent letter pertaining to the proposed amendments to the Vermont Water Quality Standards (VWQS) and in particular proposed changes to the Antidegradation Policy. In the following, please see the Department's clarifications, based on the specific questions raise. I look forward to meeting with you and others on this important topic in the coming weeks. Please note that the public hearings for the draft Standards are scheduled between August 22 and August 31, and I would be happy to meet with you any time prior to the close of the public comment period on September 7th to discuss these proposed changes further. I look forward to hearing from you.

With Regards,



Neil C. Kamman, Manager
Monitoring, Assessment and Planning Program

Cc: *Pete LaFlamme, Director, WSMD*
Mary Borg, Dep. Director, WSMD
Elizabeth Schilling, Associate General Counsel, DEC

Question: When we met with ANR on May 16th to discuss the proposed changes, you indicated that the provision was being altered to conform with EPA's model language. However, the language in the proposed rule only partially tracks EPA's approach to this issue. The proposed rule allows a lowering of water quality to prevent substantial adverse or social impacts in the "area where the waters are located." EPA allows a lowering of water quality if it is necessary to accommodate "important economic or social development" in the area where the water is located. The current rule allows a lowering of water quality if ANR finds that "the adverse economic or social impacts on the people of the state" resulting from maintaining water quality "would be substantial and widespread." What is the intent of the new language in section 29A-105(c)(2)(B)?

Answer: The Department's original proposal, presented to stakeholders on May 16th, did indeed align to the federal language, which allows a lowering of water quality if it is "necessary to accommodate important economic or social development in the area in which the waters are located." The Department initially proposed these amendments in order to address concerns that EPA had articulated with us in prior discussions on this topic pertaining to application of the Antidegradation Policy contained in the 2014 (and prior) VWQS.

During our stakeholder meeting, the Department noted a clear and significant level of concern regarding the proposed change, among the stakeholders represented by your letter, and others. Most people that provided feedback expressed concern that the meaning of the policy language was being changed in a manner that would lessen the protections conferred by the Antidegradation Policy. Therefore, the Department elected to further revise the proposed language, to retain the existing "adverse economic or social impacts to people of the State" clause, but to also incorporate the federal provision relative to "the area in which the waters are located." The proposed clause keeps the focus on the impacts to the *people of Vermont* rather than on the impacts to *development* broadly.

The purpose of the proposed Antidegradation Policy language amendments is twofold: to comply with federal requirements and to set the stage for a workable Antidegradation Rule, as required by Act 64 of 2015. In the context of promulgating an Antidegradation Rule, the Department's perspective is that the current language contained in the 2014 WQS is so expansive as to be unworkable. Therefore, consistent with the federal policy, the modifier "in the area in which the waters are located" has been proposed to provide a more meaningful geographic scale for any socioeconomic justification that may be necessary to accommodate a proposed *limited* lowering of water quality. Additionally, it is an important clarification that the Department cannot approve a limited lowering that would result in a water becoming impaired. The existing language in the Antidegradation Policy still requires that, "In all cases, the level of water quality necessary to maintain and protect all existing uses as well as applicable water quality criteria shall be maintained."

Question: How would the "area where the waters are located" be defined?

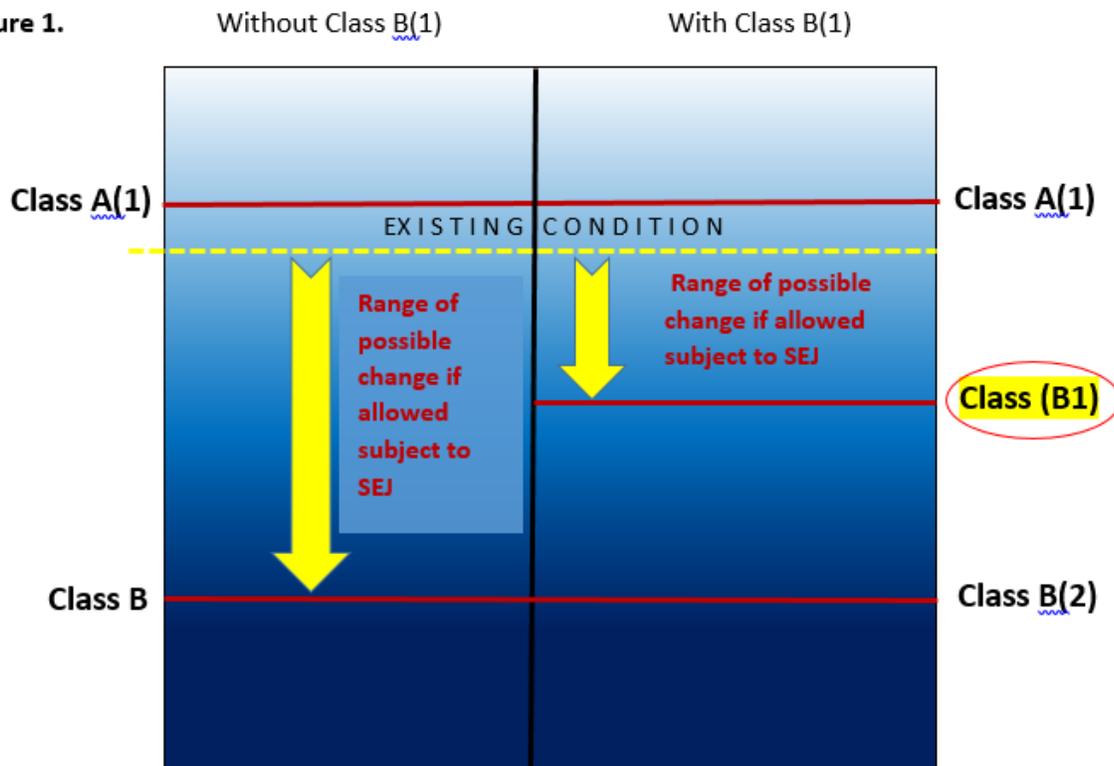
Answer: The Department plans to define the geographic scope of analysis through the forthcoming Antidegradation Rule, which will be subject to robust stakeholder input. One geographic scope that the Department is presently considering is the watershed basin planning level (Otter Creek, Winooski River, etc.). In addition, the Antidegradation Rule could include different scales of analysis depending on the particular permit or project type at hand. As an example, a proposal for a major, multi-basin project, such as a linear project, may be appropriate to evaluate relative to the boundaries of the State, while a smaller-scale energy development project, or large residential or commercial proposal may be appropriately evaluated relative to the scale of a planning basin. Finally, the Department would retain the present approach of conducting statewide socioeconomic justifiability for general permits prior to permit issuance.

Question: Our position is that the VWQS should not be weakened, and the proposed change should not make it easier to justify lowering water quality. Is this the intent of the proposed change?

Answer: The Department agrees that the VWQS should not be weakened, and that is not the intent of these proposed changes. Currently, and remaining unchanged, the Policy states, “In all cases, the level of water quality necessary to maintain and protect all existing uses as well as applicable water quality criteria shall be maintained.” Therefore, although a “limited lowering of water quality” is permitted under the Policy after conducting a socio-economic justification, that lowering may never go so far as to impair existing or designated uses (i.e. if the uses of a water are Class A(1), then the quality of the uses must remain A(1) even if a “limited lowering” is permitted).

Additionally, the Department believes that the VWQS 2016 rulemaking presents a real improvement in our ability to protect existing uses for surface waters. Specifically, under the current VWQS, the Department could potentially allow a cumulative lowering of quality from the present condition to the minimum criteria for the class of water, if the socioeconomic impacts of disallowing the lowering were of such consequential magnitude. If the present condition of the water is at the higher end of Class B, the allowed cumulative lowering could be significant. However, under the new classification structure in the VWQS, the statutorily created intermediate B(1) Class “floor” (see Act 79 of 2016) substantially reduces the amount of lowering that could be authorized, in the event that a Class B(1)-level use is designated or existing. This change is especially important because it significantly strengthens the concept of existing use protection by providing standards to protect the existing uses of waters that are demonstrably and consistently attaining the Class B(1)-level. Figure 1 shows a hypothetical use condition that falls at the top of the Class B range under present standards and at the top of Class B(1) under the proposed standards, and how the consideration of any lowering, subject to socioeconomic justification, may be evaluated.

Figure 1.



Question: Has ANR determined how it will implement this language in the Antidegradation Rule?

Answer: As noted above, the Department will run a robust stakeholder process to develop the Antidegradation Rule, during which all of the policy options discussed above can be thoroughly evaluated by all parties.

Question: Has EPA requested this change?

Answer: EPA has, in prior discussion with the Department, expressed their concerns over the expansiveness of the present Antidegradation Policy language.

Question: What are the expected benefits to water quality or others of this change?

Answer: The ability to implement an Antidegradation Policy that has a clear geographic scope of analysis will provide transparency to all stakeholders involved in any specific review. This is beneficial. More importantly, the opportunity for existing use protection that results from the creation of the new Class B(1), coupled with robust data documented by the tactical basin planning process, provides a significant step forward in our ability to protect those surface waters that consistently demonstrate attainment of uses at higher-levels than Class B(2).

Question: What is the intent of the proposed alternatives analysis defined in section 29A-105(c)(3)? This is a new provision that would be added to the "Antidegradation Policy." We do not oppose the use of alternatives analysis in permitting. However, it is unclear how the analysis will be utilized to determine whether water quality may be lowered. Again, in order to evaluate this proposal, it would be helpful to know if ANR has determined how it will implement this language in the Antidegradation Rule?

Answer: The proposed alternatives language, along with the public participation language, reflects new federally-required language pursuant to 40 C.F.R. § 131.12(a)(ii), as adopted under the "Final Rulemaking to Update the National Water Quality Standards Regulation" in 2015. The insertion of the alternatives analysis carries forward good practice that occurs with many projects already. A good example would be the avoidance and minimization steps that are taken, and documented, during the development of a project subject to Sections 404 and 401 of the federal Clean Water Act. In those instances, applicants commonly undergo iterative project designs that identify alternatives to avoid or minimize impacts to water resources. The Department's interpretation of the federally-required language is that a lowering would only be allowable when an alternative that prevents or lessens the degradation is selected. Should an alternative be chosen that prevents a degradation entirely, then antidegradation would be satisfied, de-facto. This is a useful provision that will be further addressed by the Antidegradation Rule.