

## Anti-Degradation Meeting #2 – Identification and Protection of High Quality Waters and Existing Uses

February 16, 2010 – Skylight Conference Room, Waterbury, VT

### Existing Uses (Powerpoint presentation by Mary Borg)

- Karen Bates – the discussion of existing uses would be more productive if we discussed specific scenario.
- Jon Groveman – Elimination of existing uses is definitely a violation of WQS, but shouldn't we be concerned with maintaining the level of the use? Most uses exist in many waters.
  - Pete – in permitting, you can never eliminate an existing use, but how you manage levels of use is a Tier 2 question
- Bill Bartlett – I don't think that analysis at Tier 1 is binary (as in the use is there or not). The standard is "protect and maintain"
- Mark Lucas – In the U.S Supreme Court case of PUD the Court stated that no activity is allowed which wholly or partially eliminates a use". Example – water removal in rapids can create a temporal removal of an existing use.
- Bill – Akin to making a determination in a Hydro 401 situation. As a state we should look at how we've dealt with hydro issues.
  - Pete LaFlamme– we can look to EPA guidance in wetlands. Filling a wetland is a partial elimination of quality.

### Existing Uses – Tier 1 (Powerpoint presentation by Rick Hopkins) Current procedures for identifying existing uses

- Jon – do you need all three findings to protect the use?
  - Rick Hopkins – yes, that is how it is implemented
- Bill – are there other procedures for existing uses besides contact recreation?
  - Rick – there are no additional written procedures, although I do believe we rely on the monitoring data
- Ellen Weitzler – in Finding 3, do you consider uses that have occurred historically, but not necessarily right now? There may be cases where water withdrawals have reduced the amount of water available for contact recreation
  - Rick – we try to understand what used to happen based on local accounts
- Mark - remember tier 1 is the floor. It's not the highest level of protection.
- Pete – we are somewhat skewed in VT because our quality is generally good. Other states routinely remove designated uses that cannot be met.
- Bill – existing use is in some ways higher protection
- Mark – existing use is really anti-backsliding; designated uses have to protect at least the existing uses

- Karen – (to Ellen) how is the aquatic biota use being applied in other states?
- Ellen – in coastal states we are talking about removing shellfish as a use. Running into cases where shellfishing beds are closed, but people still do it anyway; hard to remove as a designated use. Mystic River – people fish there, it is not pristine; didn't remove it as an existing or designated use. This is a grey area.
  - Rick – we put in access as a condition so there is no impression that there is a right to swim
- Ellen – but even if a use is not existing, it can still be a designated use, and a UAA would need to be done to remove it. Confusion about Waste Management, mixing zones.
  - Pete – swimming below wastewater outfalls; a waste management zone would not be run through a swimming area. We use a Tier 2 analysis to make this determination.
- Cathy Kashanski – List of existing uses is *not* exhaustive, because we took into account the public access.
- Marie Caduto – this is a large problem because we have many more well documented swimming holes than make it into the basin plan, because the public access isn't there.
  - Pete – we're not ignoring these uses, because they are still designated uses.
  - Jon – disagrees. Thinks that more protection is given to existing uses, rather than designated uses. Concerned about public access: property ownership changes, use shouldn't be eliminated.
  - Mark – remember, we look back to 1975, so if there was historic access, then the designated use is locked in and can become an existing use.
  - Marie – what documentation of these existing uses do we have to look back to in 2050 to know that there was this existing use?
  - Bill – shouldn't make private property rights our issue. We need to document all known uses. Property owners can post their land, but we are concerned about water quality (not access). Limiting existing use determination to a depth of water may not be appropriate (kids swim and people build little rock dams) Example – during UPW, the WR Board created a list of areas where high and low speed boating are and made that available for public comment.
  - Ethan Swift– Basin plans do try to identify these areas, but there have been cases where we have attempted to protect these areas by creating a more formal agreement with the landowners. Some areas also try to do water quality testing.
  - Karen – is existing use the appropriate tool to protect swimming? During basin planning I am using a Google maps application to have community members identify swimming holes, but it is not meant to be exhaustive, as that would take time away from us doing other tasks.
  - Pete – would it be more efficient to look at where swimming doesn't occur?
    - Bill – doesn't stormwater affect swimming
    - Pete – no stormwater does not
    - Mark – we've never done a UAA in VT
  - Jon – There are other uses besides swimming.

- Ellen – Basin planning is a state process. Removing a use (UAA) needs EPA approval and EPA may disagree. It has to go through public comment and they may disagree that it is not an existing use. Hasn't occurred in N.E. but it has occurred in other states. EPA is seeing UAA's by the hundreds in Nebraska.
- Mary (to Ellen) – what is the standard of evidence that is required by EPA to prove that something is a use?
  - Ellen – there aren't specific guidelines, but you don't need a lot of evidence
  - Mary – how does this affect hydro power?
  - Ellen – depends on how much of an area is affected (2 miles vs 50 ft)
  - Mary - is anyone tracking these decisions?
  - Ellen - no
  - Ethan – we have instances where stream conditions are adjusting that may affect whether or not a use is available. Designated uses may be more appropriate in these dynamic systems.

### **Tier 2 – High Quality Waters** (Powerpoint by Neil Kamman)

- Bill – when you look at the distribution of waters meeting water quality standards, it is done on a parameter by parameter basis. We should have a consistent way of describing this to the public.
  - Neil – that is what the Assessment and Listing Methodology does.
- Bill – Do the un-assessed river miles fall into a particular category?
  - Cathy – not really. They tend to be smaller streams in more remote parts of the state.
- Bill – In reference to the water quality metrics, would it be possible to tie the gradient to numbers to avoid squabbling about “minimal, minor, moderate”.
  - Neil – Our biomonitoring metrics are standardized and provide quantifiable thresholds that relate to the actual text in the WQS that define what a minor or moderate change is. Rich Langdon also indicated that there are different ways to index bugs
  - Rich Langdon- Also, the assessments utilize best professional judgment.
  - Bill – during litigation, it is easier to defend our position if the standards are imbedded in the language.
  - Rich – true enough, however this would result in DEC having to reopen the thresholds every time there is an improvement in the biocriteria system resulting from more data that more correctly describe reference conditions.

### **Anti-Degradation Tier II Protection** (Powerpoint by Pete LaFlamme)

#### **Questions/Discussion**

- Tier 2.5 analysis is a way to differentiate management for groups of water
- Harriet King- Are you eliminating ability to do SEJ for the lower quality swath of waters?
  - Neil – Not really, you are just restricting the range in Very High Quality Waters and creating a new minimum condition.

- Harriet - Not sure if this doesn't just make this more complicated. Need to understand what is involved in the SEJ, which will come up in the next meeting.
- Jenna Calvi– Tier 2.5 adds protection to prevent SEJ pushing conditions to the minimum
- Scott Homsted – not sure why it has to have a different process.
  - Mary – a special characteristic can be identified ahead of time so that a proposed project in that watershed can plan for it ahead of time
- Pete – the special characteristic may only apply to certain parameters
- Jon – we are getting into water typing discussions and we got mired back in 2000 because we couldn't agree on how to do typing, and I am not sure we can go forward without discussing typing.
- Ellen – what happens if you put in a project in a VHQP that ends up reducing quality below the new baseline? How is that water not then impaired? It sort of looks like you have put in a new classification (B1/B2) without meaning to.
  - Pete – the water would still be a B water, but that lower portion of the assimilative capacity is there as a buffer.
  - Ellen – there should be a reserve/margin of safety for all waters, not just the very high quality waters, and the courts agree on this.
- Bill – Under the example of the wild trout habitat, the assimilative capacity is still just based on the existing use.
  - Pete – we are talking about existing uses at a higher quality.
    - John – This gets back to the maintain vs eliminate discussion.
- Bill – where do A2 waters fit into anti-deg?
  - A2 is a classification itself with specific criteria. There is no difference in how Tier 2.5 might be implemented.
- Mark – If you protect that brook trout fishery, then that brings up the floor on other parameters such as D.O., pH, etc. Brook trout becomes the indicator. You can't reclassify a water during the permitting process, but tier 2.5 can allow you to manage the use via criteria.
- ? - In reference to Neil's grid, the ecological and recreational characteristics are a place to put in additional thresholds to evaluate these waters by.
- Karen – would aesthetics be a use that would have threshold guidance in this area, rather than swimming which would only need the existing use criteria?

### **Issues for more discussion**

- Should the existing use of swimming be limited by access to the water?
- Opposing viewpoint on what is an existing use: 1) Existing uses are a validation that one of the designated uses is in fact occurring – or – 2) an existing use may be any use that is documented to occur on or after 1975, regardless of whether that use is in fact one of the designated uses.
- Existing use is floor of water quality protection; the concept that an existing use must be protected only comes into play where there is a UAA proposal to remove that use.
- What is elimination of an existing use?

- Existing use needs to be “protected and maintained”, not just not eliminated
  - Is there a spatial or temporal component to the elimination of an existing use
- Tier 2.5 is not a new classification, so degradation beyond the higher floor won't drop a water onto the 303(d) list
- Suggestion that biocriteria values be written into WQS