

Aquatic Nuisance Control (ANC) Rulemaking Focus Group

Minutes from Meeting #4, March 30, 2023

Organizations Represented

- VTDEC
- SOLitude Lake Management
- Rutland Bass Club
- Lake Iroquois Association
- Conservation Law Foundation
- Town of Fairlee
- VNRC
- Vermont Fish & Wildlife
- FOVLAP
- Lake St. Catherine Association
- Lake Champlain Committee
- Rutland Bass Club
- Vermont Fish and Wildlife Department
- US Fish & Wildlife

Topics Discussed

1. House 31

- House 31 has been voted out of the house as a study committee bill rather than a moratorium.
- This bill, if passed, has the potential to impact the rulemaking process as the future study committee may suggest changes to the current version of statute for which this rulemaking focus group is developing rules, and statutory changes could render our rulemaking work irrelevant or in applicable
- The rulemaking group believes it is best to continue with this process in the meantime, and reevaluate when and if House 31 is enacted

2. VNRC Letter

- The focus group discussed two points in the letter sent from VNRC et al to DEC on 2/20/2023
- The group started with discussing the first point in the letter, entitled "Permit Process," which expresses concern over the fact that one DEC staff person has final say over permit decision
 - DEC does not agree on this point as the permit adjudication process works with a variety of agencies and staff within DEC to approach these permit decisions
 - This process is defined in the ANC Permit Application Internal Review Procedures, which have now been approved by the DEC, FWD, and VDH Commissioners.
 - Statute dictates that DEC has final authority over the end point of the permit process but seeks input from other departments through internal review

procedure. DEC is responsible for enforcing permit conditions and complying with law.

- Findings in permits also spell out how other departments are involved
 - Under the Internal Review Procedures, if DEC opts to issue a permit over the objection of one of the other consulted departments, DEC has to provide written responses as to why we decided not consider their specific input
 - Recent practice shows that DEC does in fact take into account other partners' input and DEC has not, at least since 2018, issued any permits over the objections of any partners and has modified permit conditions in response to their feedback
 - Prior to 2018, consultation may have been less than ideal
 - VNRC feels that this rulemaking process needs to incorporate F&W and VDH, but the Focus Group agreed that such a change cannot be addressed via rulemaking and would require statutory change.
- The focus group then discussed the third point in the letter, entitled "Ban of Herbicide/Pesticide Use," which recommends that stakeholders concerned about a given body of water should have the ability to petition the State to ban the use of chemicals to address an aquatic nuisance on that body of water, similar to how a stakeholders have the ability to petition to the state to ban wake boats and/or personal watercraft under the Use of Public Waters Rule.
- VTDEC is uncertain whether this approach can be introduced via rulemaking to the ANC statute as currently written
 - However, Vermont State Law does allow members of the public to petition the state to take certain management actions, and we can consider incorporating a petition process to ban use of chemicals under the ANC statute
 - If this were done, there needs to be the ability to provide an emergency response approach for new or dangerous AIS, preferable at the discretion of the WSMD Director
 - ANC tools are already limited, and DEC is concerned that such an approach may tie hands of DEC and/or decentralize decision making from the state level to the local level, which may not be consistent with the principal that lakes and ponds are waters of the state to be held in trust for public benefit and use.
 - Criteria to authorize a justify a ban on chemical use may need to be established.
 - Under rulemaking, DEC can create new requirements for permit applicants to increase standards and requirements for chemical uses.
 - If a ban were desired by certain members of the public, who would have the authority to submit that petition?
 - VNRC believes that it should be those that have interest in the health of body of water

- Fear that if bodies of water are broken up into smaller sections via this rulemaking, that management may be impacted downstream
- Are there rules regarding terrestrial nuisance species? What's the difference between terrestrials and aquatics?
 - VTDEC will reach out to FPR on this question
 - Vermont's public waters are held in public trust for the benefit of all Vermonters and visitors, and public recreational uses are protected, which likely requires a different approach for management of nuisance species when compared to terrestrial ecosystems
- Other permit processes are strictly based on science and public meetings were required. Permittees lean on VTDEC to provide this science and administration. Fear that local special interest groups are having too much of an impact on everyone else.
 - This concern needs to be considered if and when conflicts arise

3. Rulemaking Theme #1: Improving Definition of Terms

- The Focus Group began to discuss the term “acceptable” in the context of the statutory finding “ acceptable risk to the non-target environment.”
- VTDEC has attempted to clarify what the nontarget environment actually is by writing into permit conditions what that target environment is, what is considered non-target, and how it is being reviewed.
 - This approach creates technical assessment of how project may interact with nontarget environment and measures that reduce this impact. This creates the stage to create conditions that support the safety of the nontarget environment.
- VTDEC considers how the management effort interacts and controls the species of concern
 - Still concern over what the term “acceptable” means.
 - VT F&W looks at the population of potential nontarget species and what the habitat may look like in the absence of target species. Also considers cumulative impacts over the years.
 - Considers impacts on plants in small populations at a more individual level for RTE
 - Considers the impact on species like turtles, especially those with low reproduction rates
 - There are comments made on common species when the project is much larger
 - For herbicide treatments, DEC generally avoids authorizing treatments in locations where RTE are present; this is a principal we could try to reinforce in rule
- How does VTDEC know what the baseline nontarget species impacts may be
 - VTDEC does have a database on these environments and does require preliminary pre-treatment surveys by the applicants, as well as post treatment surveys

- May be necessary for permittee to identify this baseline. However, this brings up the concern over what needs to be included in this baseline. Does an herbicide project baseline need to include macroinvertebrates, algae, amphibians, etc. Where is the line drawn?
- The term “acceptable” may include a 100% removal of nontarget species if necessary depending on circumstances (i.e. lampricide)
- One size fits all approach may not work in this situation given different goals of different treatment types
- Rulemaking process should allow some flexibility for growth and change as data comes in
- Plant surveys are used to determine where RTE are which then changes how and where management projects may take place
- Permits are written with the idea that they are adaptive management guidelines. Permits set conditions and then management changes as new data is received
- The term acceptable needs to take into consideration larger scale of impacts from a state level as well as zoomed in to an individual population.
- Does the term acceptable risk make determinations regarding flow and drift?
 - VTDEC has determined ProcellaCOR in a lake or pond is an acceptable use of this herbicide. VT Agency of Agriculture begins to have oversight on this topic as pesticide applicators are required to be licensed.
 - VTDEC does look at residence time for lakes but this metric is not typical decisional regarding Procella Cor Treatments
- Does VTDEC consider that ProcellaCOR should not be used sequentially in the same area?
 - VTDEC does look at not allowing application of pesticide in the same area. This does also fall onto the pesticide applicator as it is required on the label.
 - VT DEC has not authorized more than two years of consecutive use of Procella Cor at the same treatment location
 - Is this redundant or does it begin to encroach on Agency of Agriculture?
- VTDEC asks that group look at definitions and terms for next meeting and make suggestions prior to the next meeting
- How can VTDEC improve optics surrounding pesticide use?
 - We didn’t have time to revisit this point but continue to consider how to encourage objective data collection and decision making

4. Meeting Frequency

- The Focus Group agreed to try to meet every 2-3 weeks, recognizing that members are busy especially when Legislature is in session.
- A meeting poll for meeting #5 will be sent shortly.