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DEC Response to Points Raised by VNRC et al. in 2/20/23 Letter on Aquatic Nuisance Control Rulemaking Process – Issues and Recommendations to Discuss

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1.0 Introduction

This document presents the points raised by members of the ANC Focus Group (representing Vermont Natural Resources Council, Lake Champlain Committee, CLF) and partner organizations (Connecticut River Conservancy and CRVTU) regarding issues and recommendations to raise during the Focus Group deliberations, and preliminary responses from VT DEC. While the letter from VNRC et al. suggests discussing these issues at our 2/24 meeting, we already have an agenda for that meeting that is quite packed, and we may not get to some or all of these issues until subsequent meeting. Therefore, DEC staff from the Lakes and Ponds Program are providing some preliminary responses that present our perspective on these issues that will hopefully contribute to discussing these matters in the future.

2.0 Issues Raised and DEC Preliminary Responses

Permit Process - As stated in the first meeting of the Stakeholder Group, one challenge with the ANC program is that one Department of Environmental Conservation (DEC) staff person has the burden of making complicated and often controversial permit decisions. We would like the Stakeholder Group to discuss the decision-making process for these permits, including who at ANR makes the decisions. Specifically, we recommend that Department of Fish and Wildlife biologists and the Department of Health have a formal role in deciding whether a permit should be granted and/or what conditions should be included in the permit.

DEC Response: *The DEC agrees. In 2019, the DEC began drafting an internal review procedure to formalize how others within DEC as well as staff within the Department of Fish and Wildlife and Department of Health are involved with the application review process. This procedure was reviewed and approved by technical staff within the state and was ready to be signed by state leadership over a year ago. Unfortunately, it is still waiting to be signed. Once signed, it will be posted to DEC's webpage so that the public can see who is involved with the application review process. The DEC believes this is an important document that helps formalize internal technical input on an application as well providing transparency to the public on who all reviews an application. While this procedure isn't signed, the Lakes & Ponds Program operates under this procedure as this is what the technical staff have agreed to.*

Burden of Proof - We believe that the burden to prove that the adverse ecological impacts of applying an aquatic nuisance control do not outweigh the benefits should rest on the applicant proposing to use a pesticide/herbicide to control an aquatic nuisance.

DEC Response: *The DEC agrees. The burden of proof for any application is on the applicant. As a current example, an applicant for a pesticide hires their own consultants or contractors to do biological surveys to support their application as the DEC does not do this for an applicant.*

Ban of Herbicide/Pesticide Use - Currently, applications only address using chemicals in a waterbody. We recommend modifications to this approach to allow a petition to request a ban on the use of herbicides/pesticides in a waterbody to address an aquatic nuisance.

DEC Response: *While an interesting idea worth additional discussion, the statutory authority for ANC permitting is for reviewing proposed projects, not for reviewing petitions or bans from projects occurring within a waterbody. An analysis would need to be done to determine whether there is currently a tool to review such a petition or a tool that would have the authority to impose some kind of ban.*

Community Opposition - Community opposition to applying an herbicide/pesticide to a waterbody should influence the ANC permit process. Widespread community opposition to granting a permit should have significant weight in the permit process.

DEC Response: *This issue will be discussed during Theme 2 of the ANC Rulemaking Process on “Public Good Determination.” To help us consider this topic, which we will do at a future meeting when we get to ANC Rulemaking Focus Group Theme 2, here are a number of questions:*

- *How would one propose to measure opposition versus support for a project?*
- *Who is considered the community?*
- *What weight should public opinion be given?*
- *What if public opinion changes over time?*
- *Given that the burden of proof is on the applicant, what standard should an applicant follow to gauge public opinion?*
- *What if there is strong community support for a project where the DEC determines that the project should be denied?*
- *Should public opinion carry more weight than a scientific determination or an agency / department policy or procedure that influences our permit adjudication?*

The current scope of review for ANC applications is to make a technical determination on the findings. While an application could be seen as having community opposition, without any formal surveying, no one really knows what the specific breakdown is between those for or opposed to a project. Even if DEC wanted to understand how people within a community felt about a project, it quickly becomes complicated to make this kind of determination. It should also be noted that adding a weight to public opinion would include adding weight to community support for a project. This approach could create scenario where public opinion might override scientific determinations on a project. It should also be noted that a permit can be appealed.

One other way to look at this issue is to consider the existing appeal process; Is the appeal process for DEC permits not sufficient to address the concern related to public opinion? It could be argued that appeals have costs associated with them and relying on the appeal process to “cancel” a project with little public support is sub-optimal, but it is important to at a minimum consider how an permit decision appeal effort, which may or may not be successful can be used as a tool to represent public interest in a given permit decision.

Appropriate Control Response - Additionally, we would like to discuss how the Department assesses whether other methods of control—such as hand pulling, or benthic mats—might be more appropriate in a given situation.

DEC Response: *One of elements of theme 1 for our ANC rulemaking group is to try to define what is meant in statute by the phrase “there is no reasonable nonchemical alternative available.” This theme is developed in much more detail in the document I sent around yesterday.*

Funding - We would like to discuss the need for additional funding for continued scientific research, data collection, monitoring and reporting on the ANC trends in Vermont.

DEC Response: *Happy to discuss at a future meeting.*

Thank you for your consideration. We look forward to discussing these issues at our next meeting.

DEC Response: *We have a very full agenda at our next meeting, so we may not get to these issues right away, but these preliminary responses provide some indication of our perspective on these issues and also provide some questions / comments for future discussion. Thank you for submitting these queries.*