

# Aquatic Nuisance Control Permitting Rulemaking Focus Group



Vermont Department of Environmental Conservation - Lakes and Ponds Program

January 18, 2023



# Agenda

## 1. Introductions and Ground Rules

- Oliver Pierson, Lakes and Ponds Program Manager, DEC

## 2. Goals and expectations of this process

- Pete LaFlamme, Watershed Management Division Director, DEC

## 3. Introduction to Rulemaking

- Hannah Smith, Associate General Counsel, DEC

## 4. Background on ANC Permitting Process to Date and ANC Statute & Definitions

- Misha Cetner, Lake & Shoreland Ecologist, DEC

## 5. Elements of the statute that we want to focus on for rulemaking

- Misha Cetner, Lake & Shoreland Ecologist, DEC

## 6. Focus Group Logistics, Communications, & Next Steps

- Oliver Pierson

## 7. Discussion

The purpose of the first meeting is to:

- Discuss Rationale and Approach for ANC Rulemaking, including identification of key rulemaking themes
- Provide a Background Presentation on Rulemaking under the Administrative Procedures Act, ANC Statute & Definitions, and the ANC Permitting Process to Date and
- Answer questions about the rationale, approach, and process
- Discuss “ground rules” for our group

## **Organization**

- Trout Unlimited & Lake Champlain Committee
- Conservation Law Foundation
- VT Natural Resources Council
- Federation of Vermont Lakes and Ponds
- Lake Champlain Basin Program
- Lake Iroquois Association
- Lake St Catherine Association
- Fairlee Select Board
- Woodard Marine - Boating
- Thetford Legislator
- Rutland-Bennington Legislator
- Lake Champlain United
- Rutland Bass Club
- US Fish & Wildlife Service
- Solitude Lake Management
- Castleton University / Ecologist
- VT Dept of Health - Ecotoxicology
- VT Fish and Wildlife - Fish Biologist
- Private Sector - Bass oriented Fishing Shop
- VT Fish and Wildlife - Non-game
- Vermont DEC

## **Brief Logistics**

- Hybrid Meetings have pros / cons; may go all virtual in future
- The first portion of this meeting will be recorded to share with those that are not able to participate.
  - Won't record discussion at the end
  - Recording will not be shared outside our group and our preference is not to record future meetings
- Explain how one can participate in the meeting given the large number of participants:
  - Either use the raise hand function during the meeting, add a message in the chat, or send follow-up emails to Oliver.

# Aquatic Nuisance Control in Vermont

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- Statute defines an aquatic nuisance as = undesirable or excessive substances or populations that interfere with the recreational potential or aquatic habitat of a body of water, including rooted aquatic plants, animal and algal populations.
  - Aquatic nuisances include zebra mussels (*Dreissena polymorpha*), quagga mussels (*Dreissena bugensis*), Asian clam (*Corbicula fluminea*), fishhook waterflea (*Cercopagis pengoi*), rusty crayfish (*Orconectes rusticus*), spiny waterflea (*Bythotrephes longimanus*), or other species identified by rule.
- Aquatic Nuisance Control Permits are issued under 10 V.S.A. Chapter 50, Subsection 1455
- A permit is required for pesticides, chemicals other than pesticides, biological controls, bottom barriers, structural barriers, structural controls, or powered mechanical devices in waters of the State to control an aquatic nuisance.

# Aquatic Nuisance Control in Vermont

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- Two sets of permitting standards, one for pesticides, and one for all other control types:
- Pesticides:
  - (1) there is no reasonable nonchemical alternative available;
  - (2) there is acceptable risk to the nontarget environment;
  - (3) there is negligible risk to public health;
  - (4) a long-range management plan has been developed which incorporates a schedule of pesticide minimization; and
  - (5) there is a public benefit to be achieved from the application of a pesticide or, if a pond located entirely on a landowner's property, no undue adverse effect upon the public good.

# Aquatic Nuisance Control in Vermont

10 V.S.A. § 1452(8) “Pesticide” means any substance produced, distributed, or used for preventing, destroying, or repelling nuisance aquatic plants, insects, or other aquatic life, including lamprey. Pesticide includes unicellular organisms or extracts from unicellular organisms and does not include biological controls.

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## Pesticide Programs

Professional and homeowner use of pesticides are regulated by this Division under the [Vermont Regulation for the Control of Pesticides](#). These regulations cover sales restrictions, proper use, storage, and disposal of pesticides. Product registration, applicator certificates, dealer licenses, and permits may be required for use of certain pesticides, all of which are issued from this Division. Homeowners and professionals are responsible for following the directions on product labels and for properly disposing of all unused pesticides.



# Aquatic Nuisance Control in Vermont

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- The Secretary can include additional conditions, requirements, and restrictions as deemed necessary to preserve and protect the quality of the receiving waters, to protect the public health, and to minimize the impact on the nontarget environment. Such conditions may include requirements concerning recording, reporting, and monitoring.
- Under statute, anyone can apply for an ANC permit. Most common applicants are municipalities and lake associations.
- All statutory findings need to be made in order to issue a permit.

# ANC Application Process

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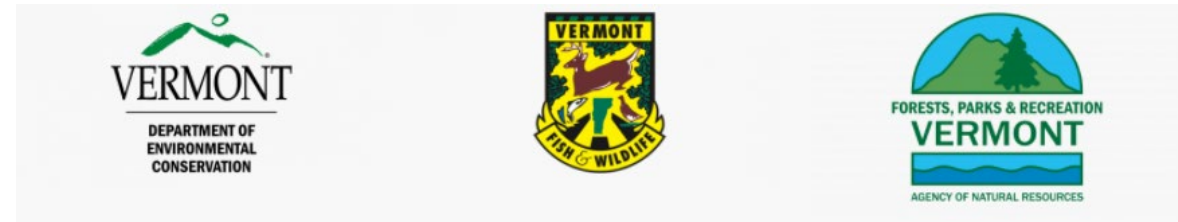
Follows [10 V.S.A. Chapter 170](#). Aquatic Nuisance Control (ANC) applications follow Type 3 Procedures ([10 V.S.A. § 7714](#)). This includes:

- Application materials are posted on the [Environmental Notice Bulletin](#) (ENB).
- Public notice of the draft decision on ENB, which includes 30-day public comment period
- A public meeting on the draft decision if requested or at DEC's discretion
- Public notice of the final decision on the ENB that would include a response to public comments

# Internal Technical Review

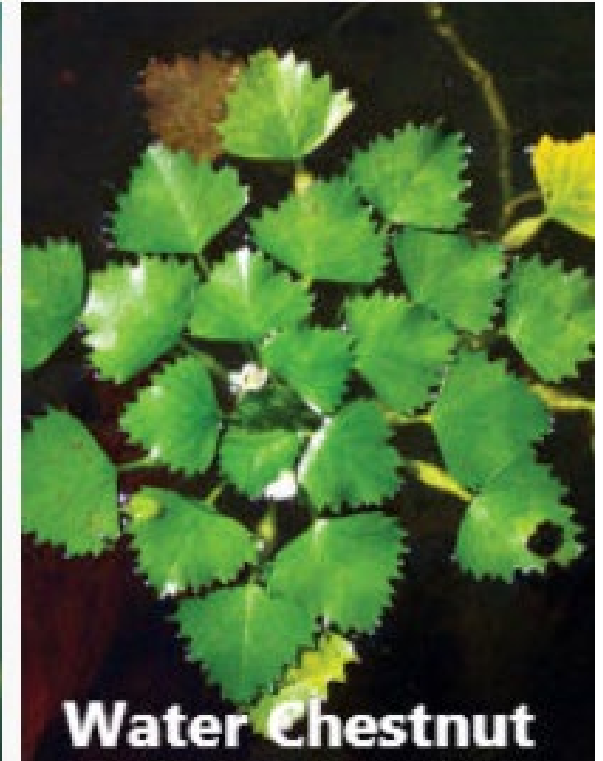
DEC has used a collaborative approach with other experts in the State to help review applications. This includes:

- Department of Health
- Department of Forests, Parks and Recreation:
  - Regional State Park Manager
- Fish and Wildlife Department:
  - Fisheries biologists
  - Natural heritage
  - Access Area Program Manager
- Department of Environmental Conservation:
  - Drinking Water Groundwater Protection Division
  - Wetlands Program
  - Monitoring and Assessment Program



# Technical Review – Programmatic Approach

- The goals of this program are to allow for aquatic nuisance control activities to occur provided it can be found that adequate measures are taken to preserve and protect the quality of the receiving waters, to protect the public health, and to minimize the impact on the non-target environment.
- ANC permits are typically issued for the control of aquatic plants. Projects that target an aquatic invasive species are more likely to be permitted as invasive species are considered one of the ten major stressors on Vermont's surface waters.



# Technical Review – Programmatic Approach

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- Control projects for native aquatic plant species are typically not permitted or are limited in scope to minimize the impact on the non-target environment. Minimizing impacts on native aquatic plant species is a goal of the permitting process.
- Control projects must balance the purpose of a project (e.g., invasive species control, maintaining areas of high public use) with ensuring that the ecological integrity of the waterbody is maintained and risks to public health are negligible. Lakes and ponds are dynamic natural systems and excessive aquatic plant removal has the potential to negatively impact various aspects of an aquatic ecosystem.

# Aquatic Nuisance Control - Common Permits

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- Project types most commonly applied for:
  - Eurasian watermilfoil (EWM) control
    - Bottom barriers
    - Diver assisted suction harvesting (DASH)
    - Herbicide (ProcellaCOR currently, previously Sonar and Renovate)
  - Aquatic nuisance plant control (e.g., dense plant populations impacting public good use)
    - Mechanical harvesting
    - ANC General Permit – barriers and DASH ( $\leq 1,500$  SF)
  - Sea lamprey control
    - Lampricide
    - Structural barriers

# Aquatic Nuisance Control – Current State

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- DEC has made a concerted effort to improve the internal and public review of ANC applications.
  - Aquatic Nuisance Control Internal Review Procedure (draft – at the leadership level for approval)
  - Adjoining Property Owner Notification – the Lakes Program requires that adjoining property owners be notified of an ANC application (e.g., an applicant must notify all shoreline property owners and those living up to one mile downstream for herbicide applications)

# Aquatic Nuisance Control – Current State

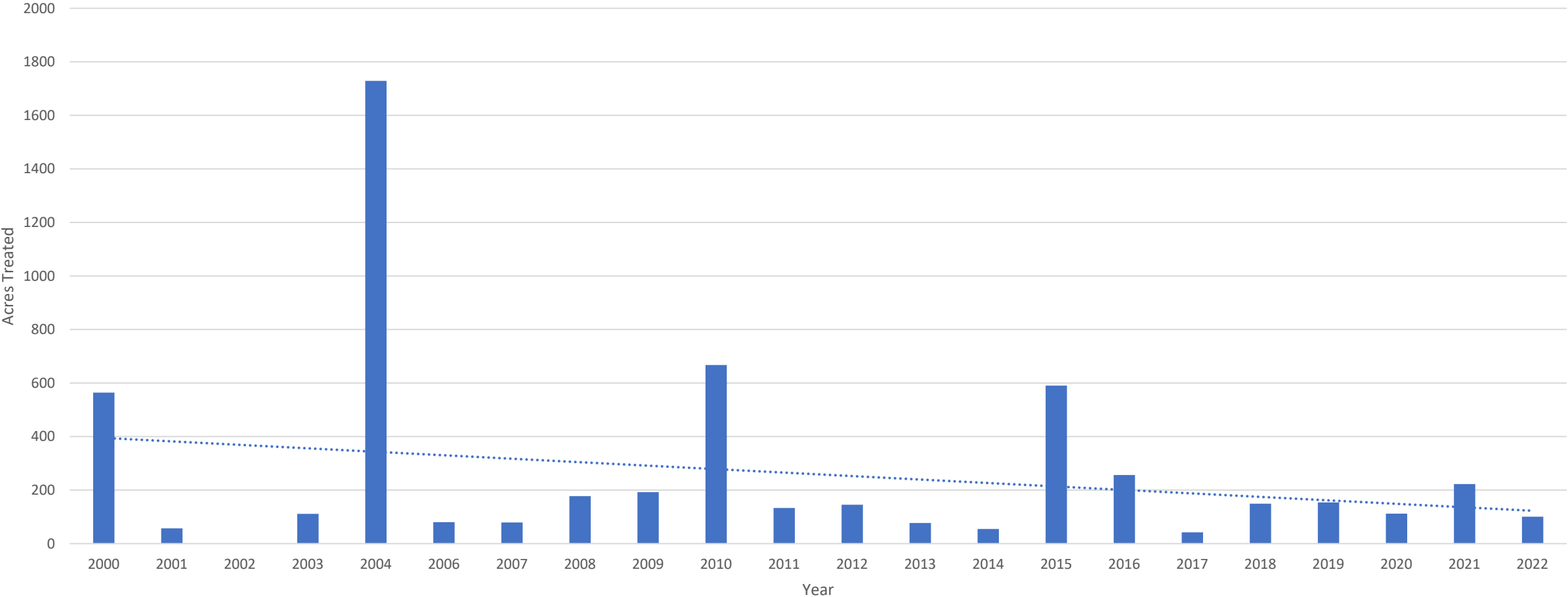
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- Increasingly standardized decisions and permit conditions; set expectations for the public on what they could reasonably apply for and what to expect should a permit be issued.
  - July 1<sup>st</sup> start date for non-chemical plant control projects (protective of the spring spawning period)
  - Littoral zone maximum percentage identified for annual EWM control areas (no greater than 40% of the littoral zone can be targeted annually for EWM control – this paired with allowing for only EWM to be targeted helps ensure physical habitat remains)
  - Better identification of wetlands and how control projects may interact with the Wetlands Rules
  - Pesticide minimization annual reporting now required

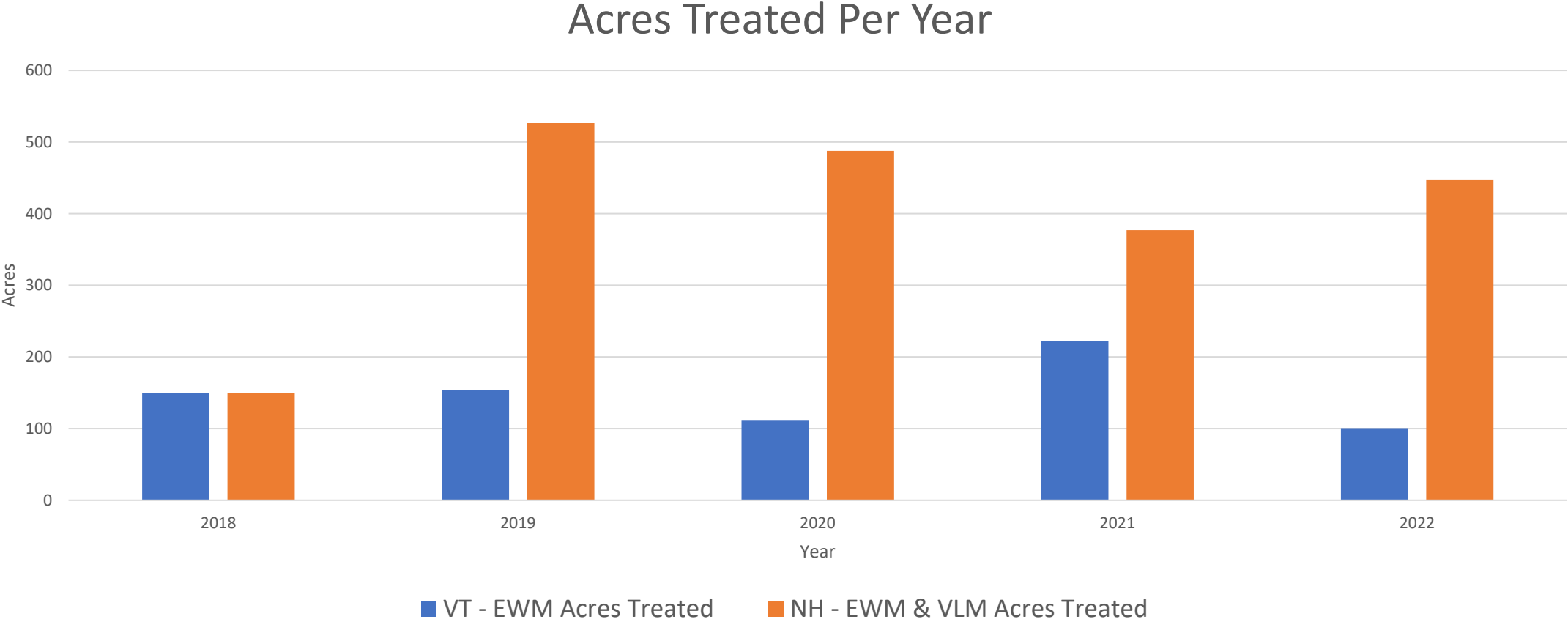


# Acres Treated with Herbicide to Control EWM in VT

Acres Treated Per Year



# Acres Treated with Herbicide – NH & VT Comparison



- NH: values are acres treated with ProcellaCOR to control EWM & VLM.
- VT: all acres treated are for EWM; all of 2018 and one 8.3-acre treatment in 2019 use the herbicide Renovate, remainder of treated acres use ProcellaCOR.

# Rulemaking Themes

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- Theme 1: Develop definitions for terms used in the statutory findings (e.g., acceptable, reasonable, negligible) as well as refine definitions in statute (e.g., aquatic nuisance)
- Theme 2: Develop public good determination review criteria
- Theme 3: Better define permit application requirements and ANC jurisdiction

# Rulemaking Themes

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Theme 1: clarifying definitions:

1. there is no **reasonable** nonchemical alternative available
2. there is **acceptable risk** to the **nontarget environment**
3. there is **negligible risk** to **public health**
4. a long-range management plan has been developed which incorporates a schedule of pesticide minimization
5. there is a public benefit to be achieved from the application of a pesticide

Goal: Use rulemaking to set qualitative / quantitative definitions

Also: Improve definition of Aquatic Nuisance in Statute (see Slide 2)

# Rulemaking Themes

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## Theme 2: Public good determination

1. there is no reasonable nonchemical alternative available
2. there is acceptable risk to the nontarget environment
3. there is negligible risk to public health
4. a long-range management plan has been developed which incorporates a schedule of pesticide minimization
5. there is a **public benefit** to be achieved from the application of a pesticide

How does DEC approach this determination and why?

How should we proceed when abutting municipalities / public is opposed?

# Rulemaking Themes

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Theme 3: Permit application requirements and ANC jurisdiction

1. there is no reasonable nonchemical alternative available
2. there is acceptable risk to the nontarget environment
3. there is negligible risk to public health
4. a long-range management plan has been developed which incorporates a schedule of pesticide minimization
5. there is a public benefit to be achieved from the application of a pesticide.

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Better define permit application requirements, particularly for chemical treatments.

Identify potential permit exclusions, such as private ponds constructed for one of the following purposes: snowmaking, golf course irrigation, stormwater management, or fire suppression.

# Conclusion

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- An aquatic nuisance is defined in statute as interfering with the recreational potential or aquatic habitat of a body of water
- Through rulemaking we should improve how an applicant can clearly demonstrate that aquatic nuisances are indeed interfering with habitat or recreation potential as well as how what metrics or qualitative criteria can be applied to assess whether the five permitting standards for herbicide are met
- Thanks for being willing to participate!

## Focus Group Logistics, Communications, Next Steps

- Oliver will manage scheduling the meetings, will use polls w/ 2-3 options, try to stick to timeline from original email (next slide)
- At the end of each meeting, we will try to outline expectations and topics for the next meeting to give participants time to come prepared to the next meeting to provide input
- We will have a website and publish "sanitized" minutes
- Voluntary agreement to use Chatham House Rule:
  - **When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed**



# Focus Group Logistics, Communications, Next Steps

- Oliver will be the DEC's primary contact for communication to this group.
- To generate discussions in future meetings, we may put together straw proposals to have participants comment on language that may be used in a rule and get focused input on a topic.
- Commenting on a straw proposal could occur during a meeting or can be emailed to Oliver.
  - DEC wants to solicit comments / input to help inform how we draft the language for a rule
  - We won't ask the entire group to be commenting and editing draft rules as that could create a challenging process to manage
  - Folks can certainly provide input on language for the rule (when we get there)

## **ANC Rulemaking Notional Timeline**

- December 2022: Identify Stakeholder Group and Contact Potential Members
- January 2022: Convene Stakeholder Group to :
  - Discuss Rationale and Approach for ANC Rulemaking, including identification of key rulemaking themes
  - Provide a Background Presentation on ANC Permitting Process to Date and Discuss ANC Statute & Definitions
- February and March 2023: Focused Meetings on Theme 1
  - Define the terms “acceptable, reasonable, negligible” in 10 VSA 1455 and thereby better codify the justifications required before chemicals are used
- April 2023: Focused Meetings on Theme 2
  - Public Good Determination
- May 2023: Focused Meetings on Theme 3
  - Permit Application Requirements & Exclusions
- June 2023: Conclude Stakeholder Group with Draft Rule for DEC/ANR Leadership Consideration
- July 2023: Begin Formal Rulemaking Process
- December 2023: Complete Formal Rulemaking Process

- Discussion
- February and March 2023: Focused Meetings on Theme 1
  - Define the terms “acceptable, reasonable, negligible” in 10 VSA 1455 and thereby better codify the justifications required before chemicals are used
- Thanks for your contributions!