Great River Hydro

MEMORANDUM

TO: Bethany Sargent, Program Manager
VT Department of Environmental Conservation
Watershed Management Division, Monitoring and Assessment Program

FROM: John Ragonese, FERC License Manager, Great River Hydro, LLC

DATE: April 23, 2021

RE: Proposed changes to the VT Water Quality Standards

Bethany,

Thank you for the opportunity to provide comments on the suggested changes to the VT Water Quality Standards as indicated on a Markup WORD version shared with the working group. I have highlighted the changes proposed for which we have comments below:

§ 29A-101 Applicability (b) "Concerning any application […]" is deleted.

- This proposed deletion is very problematic and unfair to any applicant. GRH sees no reason for removing this paragraph.
- It could render moot the results of any studies performed to assess consistency of a proposed project on existing surface water quality [existing standards] if the standard changes after the study is performed and/or is updated before a 401 certification is issued, denied, or waived.
- In the context of a FERC relicensing proceeding where the license issuance is dependent upon a 401 (issued or waived), this could result in a denial of a 401 certification because Vermont may state that insufficient information was provided to determine that a proposed project is consistent with current standards. This is particularly problematic when relicensing occurs under the Integrated Licensing Process where States request studies in advance of both the License and 401 application specifically to address both the FERC NEPA review AND the 401 process. One can't change the rules once the game has begun, so to speak.

§ 29A-102 Definitions (34) and (43)

- Adding the phrase "*riparian area that supports woody debris recruitment and temperature refuge*" to the definitions of Physical Habitat Structure as well as Stream Processes implies that the State of Vermont believes the Clean Water Act has a degree of jurisdictional authority over upland vegetation within riparian

areas that has the potential to create instream debris or provide shade to jurisdictional waters.

- Adding this to the definition of Physical Habitat Structure clearly expands the present spatial scope that includes in-the-stream areas, streambanks, woody debris on the stream bed and on the stream banks. Live or dead vegetation within a riparian area that could add to instream debris or provide temperature moderating capability could encompass vegetation as far as 150 feet from the actual stream.
- Adding this phrase to these definitions is unnecessary, is already included within the riparian policy, creates confusion and inherently conflicts with the in-stream or jurisdictional wetlands scope of the Clean Water Act or 401 authority.

§ 29A-103(f)(2) Hydrology Policy

- By deleting the phrase, "*to the extent practicable*", it suggests that there is always a means of determining conditions which preserve the natural flow regime of waters. GRH acknowledges that is the goal but as a policy, it must recognize that cannot always be achieved and therefore we strongly recommend the phrase remain in the policy statement. As stated, it acknowledges the need for flexibility when addressing complex streamflow systems that, in some cases, stray from a pure natural flow regime but benefit designated uses and maintain or expand biological integrity.
- For the same reason, GRH believes it is important to recognize there are circumstances when artificial streamflow regulation is a necessary reality that cannot be totally eliminated. The continued use of the word "*cooperating*" in the same sentence recognizes the need for a degree of case specific flexibility. Policy is not the same as a goal and it has to be grounded and reflect the landscape it applies to.

§ 29A-104 Classification of Water Uses

- GRH does not understand the reason or meaning behind the re-arrangement of the order of designated uses and is concerned that it somehow conveys one is potentially a higher priority or better use than another listed below it. It would be appreciated if the Department explains the need and rationale for this change.
- I ask this as I am curious if it relates to my comment below regarding the addition of the language to § 29A-105(a)(6) "*When existing uses are incompatible, or conflict with designated uses, conditions shall be imposed to attain the water quality necessary to support the highest and best use*."

§ 29A-105(b) and (b)(6) Antidegradation Policy

- GRH is concerned about the additions to this Section.
- In reference to the proposed modified (in bold)sentence, "*In determining the existing uses to be protected and maintained under this section and all other sections of these rules, the Secretary shall consider* ***the designated uses of the water, and*** *at least the following factors:"*, GRH would like to understand the purpose and meaning behind specifying [adding], " *the designated uses of the water, and".* The factors which are already listed under § 29A-105(b)(1-5) appear to represent designated uses. If so, why the need to also add " *the designated uses of the water, and"* as if they were distinct and different.

- GRH encourages the Department to clarify the distinction between existing uses and designated uses.
    - GRH considers a water withdrawal or hydro project that exists or previously existed on or after November 28, 1975 to meet the criteria as an Existing Use and therefore the title of (b) Protection and Determination of Existing Uses is misleading. Rather this sub-section is about determining the level or degree of protection existing uses are warranted, not determining whether they exist or not. Existence is defined by the definition and this sub-section states *"those existing uses shall be maintained and protected regardless of the water's classification"*. The changes made in subsection (b) suggest they might not be protected and therefore is counter to the first sentence. GRH suggests the language be modified to read, *"In determining the* ***extent to which*** *existing uses* ***will*** ~~***to***~~ *be protected and maintained under this section and all other sections of these rules, the Secretary shall consider the designated uses of the water, and at least the following factors:…"*
    - GRH further recommends the last item proposed for **addition**, *"When existing uses are incompatible, or conflict with designated uses, conditions shall be imposed to attain the water quality necessary to support the highest and best use."* be modified to read, *"When existing uses* ***appear*** ~~*are*~~ *incompatible, or* ***appear to*** *conflict with designated uses, conditions shall be imposed to attain the water quality necessary to support* ***designated use without eliminating the existing use which must also be maintained and protected*** ~~*of the highest and best use*~~." This will maintain consistency with the first sentence in sub-section (b), eliminate the confusion and undefined term highest and best use, and provide for a realistic yet flexible approach needed in conflicting situations.

§ 29A-206(e) Water Quality Certifications Issued Pursuant to §401 of the Clean Water Act

- GRH sees value in listing potential State laws that could potentially apply to an activity requiring a Water Quality Certification.
- Regarding the language: *"Any certification issued by the State shall establish conditions necessary to ensure that the federally licensed or permitted activity will comply with these rules, as well as with any other appropriate requirement of state law, including:"*
    - Is this addition suggesting the provisions or permits necessary to comply with these state laws will be issued under a single WQC?
    - Given the fact that some of these laws might not apply, it would make sense to also add the following identified text to the proposed addition, *"Any certification issued by the State shall establish conditions necessary to ensure that the federally licensed or permitted activity will comply with these rules, as well as with any other appropriate requirement of state law,* ***as applicable,*** *including:"*
    - The WQC application should be revised so that the applicant can identify those laws and regulations that would apply, as well as those that do not.

§ 29A-304 (c)(1) Flow Study Requirements

- GRH is concerned with the replacement of *"the Instream Flow Incremental Methodology (IFIM)"* with *"hydraulic habitat studies"* without more definition as to what sort of studies are potentially acceptable.
- Include examples in a definition of *"hydraulic habitat studies"* in either § 29A-102 or Definitions.
- Do not delete "*IFIM*" as a suggested study methodology in this sub-section and consider listing any others that might be used or reference § 29A-305 Numeric Biological Indices and Aquatic Habitat Assessments, so that there is more guidance in terms of what the expectations are for the applicant.

§ 29A-305 (a) Numeric Biological Indices and Aquatic Habitat Assessments

- Adding language that requires an Applicant to obtain Secretary approval of a study in this Section is problematic.
- GRH performs, and hydro relicensing in general often requires, numerous studies under the Integrated Licensing Process as a means of having all the necessary study requirements and studies performed <u>in advance of a FERC application and therefore in advance of the 401 process</u>. Study plans are developed, agencies and stakeholders such as the Department comment and make recommendations for changes, applicants often adjust to address those concerns and ultimately FERC determines what studies are necessary and they are performed. Results are reviewed by agencies such as the Department and comments are addressed. If the study scope was not followed studies are potentially redone or continued. All of this is done in advance of a 401 WQC application. To specify that after all of that, the Secretary may not approve those studies is very problematic for those situations. Therefore, <u>we strongly recommend not adding the sentence</u>, "*Applicants shall obtain the Secretary's approval of study plans prior to conducting an evaluation"* as the studies would have already been performed according to a study scope developed in consultation with Department staff.
- Similarly, in § 29A-304 Hydrology Criteria (c)(2) the existing sentence, *"The Secretary need not consider any flow study unless the study plans have obtained the Secretary's approval"* Is equally problematic from a timing and process standpoint given the situation described above and could result in a denial long after study scope, plans and execution have taken place.
- Replacement of the word "*may*" with "*shall*" is not a problem for GRH as long as it is clear that this is specific to determining whether or not the results of the studies provide adequate proof of "full support of aquatic habitat use" and does not pertain to whether or not the Secretary has approved the studies.