



To: VWQS Regulatory Review File

Date: April 23, 2021  
Project #: 57006.01

## Memorandum

From: Jeff Nelson  
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Re: Comments on Proposed 2021 VWQS Amendments

VHB has prepared the following general comments in response to proposed amendments to the Vermont Water Quality Standards ("VWQS") circulated on March 3, 2021.

We appreciate the efforts of the Agency of Natural Resources to conduct pre-Rulemaking stakeholder outreach as an initial step in the process of updating the VWQS. As a general comment, we note that during the stakeholder call on March 5, 2021, several topics were flagged as needing additional discussion and detail. However, these further discussions have not yet occurred, and we believe it is important that prior to moving forward with a draft proposal for Rulemaking, that these topics be explored further with the stakeholder group. As a result, we recommend that the revision process be paused, and more time given for additional pre-rulemaking outreach to be done.

### **Specific Comments:**

#### **§ 29A-101 Applicability (b)**

**Proposed Change:** The entirety of this subsection (as pasted below) is proposed to be deleted.

*Concerning any application, the Water Quality Standards in effect at the time of the filing shall apply. These Water Quality Standards shall apply to those applications, including applications for the renewal of existing approvals, that are filed on or after the date upon which the amended standards become effective, and to all other activities that occur after that date.*

**VHB Comment:** This section, or language that is functionally equivalent, has been in the VWQS going back for over 20 years, if not longer. The principle of vesting is a critically important one for applications for complex or contentious projects which can span several years. By deleting this section, an applicant could be required to restart an entire application and review process if the Standards were to change during the pendency of the review. The removal of this language would change longstanding precedent in Vermont, by removing any vesting of a permit application. In response to a verbal comment on this topic, it was noted that this change is being proposed to ensure consistency with the Clean Water Act ("CWA"). However, no specific citation or background that supports that contention has been provided. It's hard to understand why this change is suddenly required to ensure CWA consistency, when the language has been in the Standards for many years, and to our knowledge this issue was never previously raised. This topic was one of the several that was flagged for further review and discussion, which as of this date has not occurred. Given the above, VHB recommends that subsection (b) not be deleted from the VWQS.



**Specific Comments:**

**§ 29A-101 Applicability (b)**

**Proposed Change:** New proposed language:

*These rules shall apply to wetlands as articulated in Sections §§ 29A-104(e) and 29A-105(e).*

**VHB Comment:** VHB supports the inclusion of this language in the VWQS. However, without some specific guidance to be issued concurrent with this Rule revision, this change has the potential to create significant confusion and uncertainty. Specifically, since wetlands differ substantially with respect to the presence (or absence) of standing water (aka "water column"), the ability to apply and judge compliance with respect to many of the specific narrative and numeric criteria varies as well. As an example, for a wet meadow, with no standing water, it would be inappropriate to apply the turbidity criteria to a hole dug in the feature that may intercept the water table.

**§ 29A-102 Definitions (34) and (43)**

**Proposed Change:** New proposed language to be added:

*"...as well as the riparian area that supports woody debris recruitment and temperature refuge."*

**VHB Comment:** By adding this phrase to definitions of "Physical Habitat Structure" and "Stream Processes" it is unclear if the Agency's intent is to expand jurisdiction of the VWQS to areas that are not actually "waters"? Some clarity should be given of the scope and extent of these expanded definitions, which could, for example, impact properties of landowners who are nearby but uninvolved with an application to which the Standards are being applied in a review context.

**§ 29A-103(b) Water Quality Policy**

**Proposed Change:** The entirety of this subsection (as pasted below) is proposed to be deleted.

*(b)(1) Water Quality Policy. It is the policy of the State of Vermont to:*

*(A) protect and enhance the quality, character, and usefulness of its surface waters and to assure the public health;*

*(B) maintain the purity of drinking water;*

*(C) control the discharge of wastes to waters, prevent degradation of high quality waters, and prevent, abate, or control all activities harmful to water quality;*

*(D) assure the maintenance of water quality necessary to sustain existing aquatic communities;*

*(E) provide clear, consistent, and enforceable standards for the permitting and management of discharges;*



(F) *protect from risk and preserve in their natural state certain high quality waters including fragile high-altitude waters, and the ecosystems they sustain;*

(G) *manage waters to promote a healthy and prosperous agricultural community, to increase the opportunities for use of the State's forest, parks, and recreational facilities, and to allow beneficial and environmentally sound development.*

(2) *It is further the policy of the State to seek over the long term to upgrade the quality of waters and to reduce existing risks to water quality.*

**VHB Comment:** VHB understands that the rationale for this change is that the text proposed for deletion is a direct copy of the policy as included in Statute, so that by referring the reader to Statute, the possibility of inconsistency is avoided should subsequent changes in Statute occur. However, we note that it has been rare for changes in this policy as articulated in Statute to occur, that there are other segments of the VWQS that are direct copies of what is included in Statute, and that by referring the reader to different places, the Standards become less usable as a stand-alone document in review proceedings. For these reasons we recommend that the language be retained in the Standards.

#### **§ 29A-103(f)(2) Hydrology Policy**

**Proposed Change:** deletion of "to the extent practicable" from subsection (a).

**VHB Comment:** As this has been explained, we understand that this change is not intended to change any of the VWQS Hydrology criteria or standards, which are separately articulated from this statement. We also understand that this section simply will affirm that when the Hydrology criteria and standards are met, a project is deemed to provide conditions which preserve the natural flow regime of waters. On that basis, we do not oppose this proposed change.

#### **§ 29A-103(f)(2) Hydrology Policy**

**Proposed Change:** deletion of "achieving voluntary agreements relating to artificial streamflow regulation that" from subsection (b).

**VHB Comment:** We are concerned that with this deletion, the meaning of this subsection is changed significantly. The Statute cited (10 V.S.A. §1003) makes no mention of the VWQS, thus having an unmodified statement "to assure consistency with these rules" doesn't appear to be consistent with the statutory language, and appears to create a more expansive opportunity to compel changes than authorized by the Statute. As a result, VHB recommends that subsection (f)(2) not be modified from the existing VWQS. Alternatively, along with the proposed deletion, we would recommend deleting "to assure consistency with these rules" and replacing that phrase with "to maintain the public interest and welfare or address an emergency situation".

#### **§ 29A-104(d) Designated Uses**



**Proposed Change:** rearrangement of the order in which the designated uses are listed.

**VHB Comment:** As this has been explained, we understand that this change is not intended to imply any particular prioritization of the specified designated uses. On that basis, we do not oppose this proposed change.

#### **§ 29A-104(e) Designated Uses**

**Proposed Change:** New proposed language:

*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.*

**VHB Comment:** This is one of the proposed changes that we believe requires further discussion and review. We have not previously seen the term “highest and best use” in Agency Rules or the VWQS, and are concerned that proposed language this creates an arbitrary and subjective criterion that it would be impossible for an applicant to plan for in the context of a request for Certification. Unless and until further explanation of how the determination of which use(s) are “highest and best” would work in practice, and opportunity for consideration and review is given, we recommend that this language not be included in the VWQS.

#### **§ 29A-105(e) Antidegradation Policy**

**Proposed Change:** New proposed language:

*Protection of Wetlands. Wetlands shall be protected as described by the Vermont Wetland Rules.*

**VHB Comment:** See comment above regarding §29A-101(b). In addition, we do not believe that the VT Wetland Rules (“VWR”), as currently enacted are a complete fit to provide guidance to the Agency and applicants as to how specific questions of compliance with the VWQS in the context of wetlands will be addressed. In other words, as currently structured, the VWR do not contain standards, criteria or process for assessing how proposed activities may impact wetlands in the context of VWQS criteria, not how an applicant would go about making a demonstration of compliance. This needs to be clarified prior to these changes taking effect.

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

**Proposed Change:** New proposed language:

*Section 401 of the CWA requires that for any federally- licensed or permitted activity that may result in a discharge into waters of the United States, the State issue, waive, or deny water quality certification ensuring the discharge will comply with all applicable water quality requirements (33 U.S.C. § 1341). A water quality certification shall not be issued unless there is reasonable assurance that the discharge will not result in a violation of these rules. 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:*

- (a) 10 V.S.A. Chapter 37 (wetlands protection and water quality management);
- (b) 10 V.S.A. Chapter 41 (regulation of streamflow);
- (c) 10 V.S.A. Chapter 49A (lakeshore protection standards);
- (d) 10 V.S.A. § 1264 (stormwater management);
- (e) 29 V.S.A. Chapter 11 (management of lakes and ponds); and
- (f) *The Vermont Water Withdrawals for Snowmaking Rules.*

**VHB Comment:** We agree that the cited state regulatory programs are each targeted to assure water quality protection in the context of specific applications which trigger reviews under the particular programs, and that in past practice, Agency decisions in the context of §401 Certifications have been informed by these programs/permits/reviews as applicable. From that standpoint, we see this change as beneficial to provide greater regulatory certainty as to the criteria for §401 reviews. However, it is also important to note that not all of these programs are applicable to all requests for §401 Certification (e.g. a proposed project requiring a stormwater permit would not trigger a review under the Snowmaking Water Withdrawal Rules). Hence, we recommend adding “as applicable” to the proposed language, as follows:

*“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:”*

Additionally, we note that given that the Vermont Legislature is currently considering H.108 which would address the issuance of Section 401 Certifications. We recommend pausing on this change until the legislative process concludes.

### **§ 29A-304 Hydrology Criteria**

**Proposed Change:** New proposed language in subsection (b)(2) applicable to Class B(1) waters:

*The method for ensuring compliance with this subsection is a site-specific flow study or studies.*

**VHB Comment:** We would recommend that consideration be given also to allowing the use of default streamflow values that could be applied in the absence of a site specific study, in the same way that subsection (b)(3) allows for Class B(2) waters. Such default values could be conservatively set so as not to create undue risk to the resource.



**§ 29A-304 (c) Flow Study Requirements.**

**Proposed Change:** deletion of “the Instream Flow Incremental Methodology (IFIM)” and replacement with “hydraulic habitat studies” as acceptable methodologies for determining streamflow protection requirements pursuant to this section,

**VHB Comment:** As this has been explained, we understand that this change is not intended to prohibit the use of the IFIM methodology, which is well established and accepted nationally, but rather to provide greater flexibility in allowing various methodologies to be used on a case by case basis. We encourage the inclusion of methodologies that appropriately consider aquatic biota and habitat conditions to assess streamflow protection. On that basis, we do not oppose this proposed change.

**§ 29A-304(e) High Flow Regime**

**Proposed Change:** New proposed language in subsection (2) applicable to Class A(2) and B(2) waters:

Insertion of “*timing*” and “*rate of change*” as criteria that must be considered under this subsection.

**VHB Comment:** While we have no objection to the inclusion of this language *per se*, we are concerned that this entire section represents a highly subjective standard with no guidance to applicants as to what constitutes an acceptable condition. Further discussion and review are needed.

**§ 29A-305 Numeric Biological Indices and Aquatic Habitat Assessments**

**Proposed Change:** New proposed language in subsection (a):

*“The Secretary ~~may~~ shall determine whether there is full support of the aquatic habitat use through ...hydrogeomorphic assessments of flow characteristics, physical habitat structure, and stream processes for rivers and streams and aquatic habitat studies for lakes, ponds, and reservoirs. Applicants shall obtain the Secretary’s approval of study plans prior to conducting an evaluation.”*

**VHB Comment:** The replacement of ‘may’ with ‘shall’ removes flexibility from this section, inconsistent with the addition of flexibility in § 29A-304 (c). As a result, studies that may not be applicable at a particular site or project would become mandatory in all cases. The change also prioritizes subjective assessments over the objective Numeric Biological Indices which “may” be applied per subsection (b).

Further, as discussed, to avoid confusion and overly subjective language, it would be helpful to see examples of methods that the Agency would generally find acceptable and consistent with this newly proposed language. We are concerned that by adding this specific approval requirement, the opportunity will exist for excessive delay and unreasonable withholding of approval for a legitimate study plan. Absent such information, as well as opportunity for consideration and review is given, we recommend that this language not be inserted to the VWQS.