The Agency of Natural Resources and the FERC Process

Legal Foundation

The *public trust doctrine* is an ancient, common law principal under which the state, as trustee, holds navigable waters and the land submerged beneath navigable waters in trust for the benefit of the people.

The objective of the *Clean Water Act*, passed in 1972 and since amended, is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." One of the act's goals is to provide "for the protection and propagation of fish, shellfish, and wildlife."

Section 401 of the Clean Water Act requires any project that will result in a discharge to the state's waters *and* requires a federal license or permit to obtain a certification from the state that the project or activity meets state water quality standards. Certifications include conditions necessary to ensure the standards will be met during the construction, operation and maintenance of the facility.

Because of Federal Power Act preemption, the water quality certification is the only state "permit" required of projects that fall under FERC jurisdiction.

Vermont Water Quality Standards

Most of the waters of the state are designated as Class B. The management objectives for Class B waters include:

- Aquatic Biota, Wildlife and Aquatic Habitat – Aquatic biota and wildlife sustained by high quality habitat
- Aesthetics – Water character, flows, water level, bed and channel characteristics exhibiting good aesthetic value
- Boating, Fishing and Other Recreational Uses – Suitable for these uses

Potential Issues at Run-of-River Hydroelectric Facilities at Existing Dams

Aquatic Biota, Wildlife and Aquatic Habitat

- Bypass conservation flows – Special flows are needed in the penstock-bypassed reach to sustain existing aquatic habitat; flow requirements may vary with season due to spawning or over-wintering habitat needs of certain fish species
- Dissolved oxygen and temperature – Diverting water through the penstock and turbine (a closed system) reduces reaeration on rivers with dissolved oxygen deficits; spillage flows or turbine venting may be needed to offset a deficit
- Sediment – Sediment is commonly deposited in existing impoundments; it may need to be removed for construction and ongoing maintenance, and may require testing to check for contamination

- Threatened and endangered species – Threatened or endangered plants or animals may be affected by some projects

- Impoundment impacts – Impacts to upstream habitat (including wetlands) and populations may result from changes in impoundment elevations or management

- Riparian vegetation and wetlands – Construction could have direct impacts on these resources

- Fish movement upstream and downstream – Special measures may be necessary to accommodate the movement of fish upstream and downstream, including ways to avoid impingement and entrainment

Aesthetics

- Bypass flows – Special flows may be necessary to maintain good aesthetic value; usually met by aquatic habitat conservation flow

- Location of discharge – At least a portion of the bypass flow must usually be spilled over the dam to provide a veil of water rather than discharged through a gate

Recreation

- Public access to the water for recreational purposes – Parking, signage and facilities, dependent on specific site characteristics and scale of the project

- Canoe/kayak portage – Take-out/put-in for paddlers, if appropriate

Navigating the Process

Contact ANR early in the planning phase – Early interaction with ANR will give you an opportunity to:

- Identify potential issues

- Obtain information and data from ANR that may provide useful background

- Determine additional information needs, the studies necessary to obtain the information and how those studies should be designed

ANR will provide a single point of contact and will coordinate internally among its technical specialists and with other resource agencies (e.g., the U.S. Fish and Wildlife Service).