

Comments on the ANR Draft 7.2 Clean Water Bill

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While the version 7.2 draft is somewhat less problematic than the prior versions it still fails in at least three major respects:

1. The draft continues to place the ultimate responsibility for meeting reduction targets on municipalities;
2. The draft continues to rely upon the subdivision of watershed reduction targets and fails to organize the jurisdiction of the utilities by watershed;
3. The draft defines how the grant funding will be allocated but fails to identify the total funding required or where the funding will come from; utilities are given the authority to “raise revenue” without defining what fee or taxation authority will be granted to them.

Assigning and enforcing Load Allocation reduction targets is not consistent with the Clean Water Act.

The State has accepted responsibility to meet reduction targets in the Lake Champlain basin. The State has revised statutes and is revising rules to require regulated entities (towns, private property owners, farmers, wastewater treatment plants, etc.) to meet the reduction targets assigned to their sectors under the Waste Load Allocation. However, ANR and EPA have agreed that there will also be reductions from unregulated non-point source sectors, under the Load Allocation. The obligation to meet these targets belongs to the State, not the municipalities or others regulated under the WLA. The attempt to create a Load Allocation regulatory requirement on towns contradicts the architecture of the CWA, which by definition only regulates Waste Load Allocations. Consistency with the CWA requires that the unregulated LA sector reductions should be achieved voluntarily, or through incentives.

Assigning LA reduction targets to towns cannot be defensibly done. ANR and EPA worked very hard to scientifically establish reduction targets for each lake segment. These reductions must be achieved from changes in the watershed that feed the lake segment. The watershed is a naturally-defined geographic area, identical to the Tactical Basin Plan regions. A town is a politically-defined geographic area. There exists no rational scientific method by which one can allocate these LA reductions among the political subdivisions within the watershed, many of which are themselves subdivided by two or more separate watersheds. Assigning watershed-based LA reduction targets to towns is a square peg/round hole exercise.

Assigning LA reduction targets to towns is self-defeating. LA reductions anywhere in the lake segment watershed are equally valuable in meeting the TMDL and supporting clean water. If the watershed is the focus of the reduction efforts and town boundaries are irrelevant, the need for trading or other inter-municipal agreements or structures evaporates. Organizing the administration of the LA reductions at the watershed level supports the TMDL and eliminates massive complications imposed by municipal reduction targets and regulation.

What is the goal of mandated municipal reduction compliance? ANR states that the capital and O&M costs will be paid by them. If that is the case why do we need to mandate municipal reduction compliance? The only plausible reason is the expectation that the State will not pay the full cost. If municipalities can be sanctioned for their failure to achieve (arbitrary) reduction targets then the burden of paying for the reductions clearly falls to the local taxpayers/ratepayers when the State fails to pay for the full cost. Underfunding the program could be overt – the required funds are not appropriated – or covert, by simply underestimating the real cost of various BMPs. Indeed, even if ANR

accurately estimates the average cost as proposed in the draft bill, by definition half of the BMPS will be underfunded.

What is the alternative to the regulatory model for compliance? ANR is a regulatory agency so it is not surprising that they have proposed this model to achieve these reductions. But regulation is not the only option. I believe ANR could achieve similar results through contracts attached to the proposed block grants. These contracts should have specific deadlines and interim reduction targets in addition to the normal administrative requirements. ANR needs to demonstrate to EPA that the program has a reasonable chance of achieving the reductions, but given that EPA has no authority to regulate desired LA reductions it is at least plausible that contractual compliance would be adequate.

Here is an alternative concept that avoids the problems in the ANR draft:

1. ANR prepares a draft agreement for the administration of a non-regulatory program of evaluating and procuring LA reductions at the watershed level.
2. ANR solicits proposals through an RFP process from qualified entities within each watershed. Entities could include municipalities, coalitions of municipalities, RPCs, NRCDs, and NGOs. In some places, towns might propose to create a special purpose intermunicipal district under existing law to administer the program, possibly in concert with one or more of the other entities.
3. If the contracting entity merely administers the ANR program it need not be a “utility”, and need not have special authority to raise its own revenue. Entities offering this capability, such as a special purpose intermunicipal district, might, however, prove to be preferred partners with ANR.
4. ANR would review the proposals, select the strongest one, and execute the administration contract with that entity. The program would be watershed-wide, rendering artificial political boundaries irrelevant.
5. Qualifying projects would be identified and funded using the block grant funding. Recipients could be NGOs, towns, or another qualifying sponsor with control of the site and the ability to conduct on-going O&M with or without post-construction financial support.

Funding Source. The need for a stable funding source for all of the clean water investments continues. I have been a supporter of the parcel-fee concept but after studying it for the last two years I have concluded that this new fee is inefficient; that is, the cost of administration is unacceptably high regardless of where that responsibility is assigned. The Governor’s proposal offers several significant advantages.

- It has the support of the Governor;
- It does not rely upon a single fee or tax so the full burden does not fall to a single sector;
- It does not require additional overhead to administer;
- It has been approved by EPA.