

10 February 2023

Vermont Agency of Natural Resources
Department of Environmental Conservation
Watershed Management Division
Attn: Bethany Sargent
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Submitted via email: bethany.sargent@vermont.gov

RE: Comments on Vermont Agency of Natural Resources (ANR)/Department of Environmental Conservation (DEC) PROPOSED Antidegradation Implementation Rule

Miss Sargent et alia,

The following comments are submitted by the undersigned group of citizens and grassroots organizations and coalitions representing themselves and or their organizations. Thank you in advance for your consideration.

In the Katherine A. Zogas paper published in the John Marshall Law Review, "The Clean Water Act's Antidegradation Policy: Has It Been 'Dumped'?", we are reminded, "Rather than confine the implementation of the Clean Water Act (CWA) to the Environmental Protection Agency (EPA), Congress explicitly recognized the States as having the primary responsibility for the success of this new legislation. Congress further expressed that its policy under the CWA was to recognize the 'rights of States to prevent, reduce, and eliminate pollution.' In other words, Congress had determined that cooperation between the EPA and the States was not only desirable, but necessary. Congress also took it one step further and expressly called for public participation in the implementation of the CWA." This is particularly relevant given Vermont is a delegated state.

The scholarly work goes on to state that we must "reduce excessive deference to economic considerations. By balancing social considerations directly against economic ones, economic considerations will still be adequately measured while not to the exclusion of social ones." It continues: "It should be presumed that when contemplating a proposed National Pollutant Discharge Elimination System (NPDES) Permit [and General permit] application, the public and state environmental officials should consider economic benefits and detriments as part of their 'social' consideration. ...The apparent willingness courts and state environmental officials have to find adequate economic considerations, in order to degrade water quality, stems from their focus on economic benefits to the exclusion of economic detriments. Closer scrutiny of the economic detriments that follow

from water pollution, however, reveal that the CWA's antidegradation policy serves an important role economically and socially in restricting water quality degradation. This highlights the need to restrict the deference accorded positive economic determinations when it comes to allowing degradation under the CWA. It cannot be denied that economic considerations must be made when granting or denying pollutant dischargers NPDES permits. However, extreme deference towards economic determinations, particularly positive economic determinations, often forecloses adequate consideration of social factors.”

Economic determinations outweighing social factors have led to the bacterial contamination, and now PFAS poisoning, of our public waters. It has provided for the destruction of ridgelines at the expense of headwaters. It continues to permit the widespread application of pesticides that have even exceeded EPA Aquatic Life Benchmarks in some waters. Cyanobacteria outbreaks in public drinking water supplies have exploded as a result. Pharmaceutical byproducts now pollute public waters. It allows for the expansion of landfills and insufficient wastewater treatment and their toxic leachate and contaminated effluent, respectively. All under the guise of "economic benefit" and social good.

The Congressional Research Service in its 2016 report to the members of Congress “Clean Water Act: A Summary of the Law” (October 18, 2016) stated that "The 1972 legislation [Clean Water Act] declared as its objective the restoration and maintenance of the chemical, physical, and biological integrity of the nation’s waters. Two goals also were established: zero discharge of pollutants by 1985 and, as an interim goal and where possible, water quality that is both ‘fishable’ and ‘swimmable’ by mid-1983. While those dates have passed, the goals remain, and efforts to attain them continue." The Antidegradation Rule remains the most powerful tool for achieving those goals, if it is used and implemented properly. Please let this update of the Vermont Antidegradation Rule reflect that our goal of swimmable, drinkable, fishable waters and “efforts to attain them” do in fact continue.

- 1. The Social and Economic Justice (SEJ) Analysis still authorizes ANR to permit the degradation of high quality water in the interest of polluters' economic benefits.**

There is never a benefit to the downstream communities, human and natural, in receiving degraded drinking water or recreational water. The applicant must retain the burden to show a "socioeconomic need" for destroying water quality and associated habitat. Humans have lived for millenia without industrial wind turbines

and industrial solar arrays, for example, but never without drinking water.

2. **The rule must address the Public Utility Commission's ability to determine that degraded water is “in the public good” when permitting energy projects.**
3. **We support that discharges to Class A and B1 waters, under a General Permit, will require an individual permit that requires a review of proposed discharges.**
4. **There should be no exemptions provided for any specific corporation or industry such as the one for process and wash water in cheese manufacturing.**
If it were not waste, it would not be in need of either disposal or discharge. Understanding this definition results from specific statutory definitions, we request that the rule specifically identify the requirement for process and wash water be addressed as a part of Antidegradation Implementation.
5. **Confined Animal Feeding Operation permits, septic permits, and pesticide permits must explicitly require an antidegradation review for those permits to be meaningful.**
Given these are known pollutant discharges, to not subject them to Antidegradation Review creates an unforgivable loophole in our goal—and the legal mandate—to protect and restore public water.
6. **The rule must apply to Required Agricultural Practices and Acceptable Management Practices (forestry).**
Neither industry should be presumed to be in compliance such as they are now. The cumulative, deleterious impacts of these industrial-scale practices are self-evident in the declining state of our public waters per the Agency’s own State Priority Waters List.
7. **The rule must allow the Secretary to require a Tier 2 analysis for poorly designed projects that do not meet those standards.**
Section IV.b.4.(C) allows for an exemption for "certain flow modifying activities," allowing the Secretary to waive a Tier 2 analysis if the proposed project meets specific existing standards.
8. **We support orders issued under 10 V.S.A. § 1082 (Chapter 43) being subject to review under the rule.**
It's not clear if the anti-deg policy would apply to a Chapter 43 application for work at one of these dams when permitting is handled by another agency, such as the

Public Utility Commission. It should. Please clarify this.

9. There should be no reductions in quality, limited or otherwise, of Tier Two waters.

Given the scarcity of high quality waters--Classes A1, A2 and B1-- subjectivity as to what defines "limited" is a recipe for degradation. The science is not subjective thus nor should the rule be.

10. Please explain, as well, how “assimilative capacity” is being interpreted in the case of pesticides, pharmaceutical byproducts, “forever chemicals,” and other emerging contaminants.

We are aware that even with TMDLs in place waters such as Lake Carmi and sections of Lake Champlain have already exceeded their capacity to assimilate nutrients. In our mind this empirically demonstrates that “assimilative capacity” is a political expression rather than a scientific principle.

11. Fully define "important economic or social development."

It should be extremely difficult for economic considerations to outweigh social considerations for reasons already stated.

It is incomprehensible, given the myriad of indicators demonstrating the ongoing degradation to the waters of our state, that the Agency of Natural Resources (ANR) would neglect its responsibility to protect, restore, and enhance said waters for Vermonters by declining to develop the most stringent Antidegradation Rule possible to protect life itself, water. There are no socio-economic benefits to an expansion of the Vermont Priority Waters List--be it Part A (the 303d list) or any additions to Parts B through F. Please reference the Agency’s own Section 305(b) Water Quality Integrated Assessment Report when offering comments on how any further degradation benefits Vermonters and its water-tourism-based economy and the overall economy at large.

Additionally, please offer comments on how the Agency plans to assign dollar values to non-game species and flora and their link to our food web and water cycle when weighing socio-economic benefits.

Finally, given the number of receiving waters that are either tributaries to or are in fact drinking water supplies, what are the costs incurred--in real dollars--to permitting any further degradation to drinking water in terms of drinking water treatment facility upgrades to protect public health, and if not adopted, the costs to

public health from chronic exposure to drinking water using outdated, insufficient technologies.

We implore ANR, given the very real already existing damage and threat for even worse ecosystem damage posed by cyanobacteria, PFAS, pharmaceutical byproducts, and pesticides, to consider and adopt our comments in its final rule.

The EPA authorizes as much, but more importantly, the people of Vermont demand it. The current proposed rule does not represent Vermont's best effort to effect zero discharge of pollutants and water quality that is both "fishable" and "swimmable." We have been patiently waiting for nearly 40 years, and we deserve better. History does not accept excuses. The Vermonters of today and tomorrow are counting on you.

Thank you in advance for your consideration.

With gratitude, on behalf of those downstream,

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