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Re: Coalition Comments on the Vermont Agency of Natural Resources Department of Environmental Conservation Proposed Antidegradation Implementation Rule

Dear Bethany:

Vermont Natural Resources Council, Connecticut River Conservancy, Conservation Law Foundation, Lake Champlain Committee, Audubon Vermont, and Vermont Council of Trout Unlimited ("Coalition") appreciate the opportunity to submit the following comments regarding the Vermont Agency of Natural Resources ("Agency" or "ANR") Department of Environmental Conservation ("Department" or "DEC") Proposed Antidegradation Implementation Rule ("Proposed Rule" or "Rule").

In this era of climate change, there is an urgent need for visionary-proactive regulatory efforts that result in deep long-lasting change and increase the State's resiliency abilities. For Vermont to successfully confront the challenges on the horizon, it must be able to seamlessly access, navigate, and deploy all of its available tools. One of those bedrock tools—which the Agency will need to utilize now and into the future—is the Proposed Rule. Undoubtedly, it will serve as a critical backstop for ensuring the protection of high quality and vulnerable waterways during a time of shifting demands, increased development pressures, and the effects from a changing climate. For these reasons, we cannot emphasize enough the importance of this Rule. And yet, we acknowledge that antidegradation—both in theory and practice—is fraught with misunderstandings, nuance, and technicalities.

We are encouraged that the Agency prioritized this long-overdue effort. And we commend the Agency for their hard work to-date on the Proposed Rule, as well as organizing the thoughtful and productive pre-rulemaking stakeholder process. Indeed, active and collaborative engagement from interested community members is a core ingredient to the development of successful and effective regulations.

Overall, our organizations support the Proposed Rule as drafted and view it as an improvement and significant step forward towards protecting Vermont's high quality waters, as required by the Clean Water Act's ("CWA") Antidegradation Policy and the Vermont Water Quality Standards

("VWQS").[1] However, despite the Proposed Rule's changes—when compared to the 2010 Interim Anti-Degradation Implementation Procedure—there is still work to be done and improvements to be made.[2] We hope that the Agency will take the necessary time to consider these comments and collaboratively work to accommodate the suggested changes and additions.[3]

EXECUTIVE SUMMARY

Our organizations broadly support the Proposed Rule and view it as a clear improvement from historic antidegradation procedures. In particular, we support and appreciate the provisions in the Rule requiring an individual permit and a site specific analysis for activities that may result in more than a limited lowering of very high quality waters—defined as Class A1, A2, and B1 waters under the VWQS and the Proposed Rule.[4] Currently, under the existing regime and Interim Procedure, there is no requirement for individual permit review, or site-specific analysis under an individual permit, to ensure that Vermont's very high quality waters are not degraded. In comparison, the Proposed Rule's requirement that an individual permit review and site-specific analysis also includes a cumulative impact analysis examining whether previous permitted and unpermitted activities have rendered very high quality waters vulnerable to degradation is a major improvement.

While these additions in the Proposed Rule are a significant step forward, we remain concerned that the individual antidegradation review mentioned applies only to certain permits issued by the Department. As discussed below, in order to effectively combat and address the full range of threats to very high quality waters the Proposed Rule must apply to the full suite of permits issued, including but not limited to, all wastewater disposal (septic) permits, stream alteration permits, water quality permits issued by the Agency of Agricultural, Food and Markets ("AAFM"), farm pollution under the Required Agricultural Practices ("RAPs"), and silvicultural activities that are regulated under the Accepted Management Practices for Maintaining Water Quality on Logging Jobs in Vermont ("AMPs") that may affect very high quality waters.

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[1] *See* 40 C.F.R. § 131.12(a) (requiring that "[States] shall develop and adopt a statewide antidegradation policy [which] . . . shall, at a minimum, be consistent with . . . ."); *see also* STATE OF VERMONT, AGENCY OF NATURAL RESOURCES, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, VERMONT WATER QUALITY STANDARDS § 29A-105(a) (2022) (stating that "[a]ll waters shall be managed in accordance with these rules to protect, maintain, and improve water quality.")

[2] *See* VT AG. OF NAT. RES. DEP'T OF ENVT'L CONSERVATION, INTERIM ANTI-DEGRADATION IMPLEMENTATION PROCEDURE (OCTOBER 12, 2010), https://dec.vermont.gov/sites/dec/files/wsm/Laws-Regulations-Rules/AntiDegredationImplementationProcedure-Interim.20101012.pdf [hereinafter "Interim Procedure"].

[3] These comments include both narrative explanations and specific in-text recommended edits. Should the Agency or Department experience any confusion regarding these comments or their organization, we remain available to discuss and clarify at any time.

[4] *See e.g.*, VT AG. OF NAT. RES. DEP'T OF ENVT'L CONSERVATION, PROPOSED ANTIDEGRADATION IMPLEMENTATION RULE § IV(b)(9), https://dec.vermont.gov/sites/dec/files/wsm/mapp/docs/Vermont-Antidegradation-Rule-SOS.pdf [hereinafter "ANR Proposed Rule"] (detailing that ". . . the Secretary shall require a site-specific Tier 2 analysis through the use of individual permits to ensure protection of these waters."); For these comments, as in the pre-rulemaking stakeholder discussions, we use the phrase "very high quality waters," which refers to A1, A2, and B1 waters. *See e.g.*, VT AG. OF NAT. RES. DEP'T OF ENVT'L CONSERVATION, PROTECTING VERMONT'S VERY HIGH QUALITY WATERS, https://dec.vermont.gov/sites/dec/files/wsm/mapp/docs/Protecting-Very-High-Quality-Waters.pdf.

Moreover, we are concerned about the Proposed Rule's applicability involving general permits that do not involve an individual review for discharge activities that may impact and degrade very high quality waters. The U.S. Environmental Protection Agency ("EPA") recognizes that it may be necessary for states to take a broader approach to address potential water quality impacts in order to protect high quality waters.[5] From our perspective, if the Agency does not adopt a broader-comprehensive approach here—expanding the range of activities covered under the Proposed Rule to include certain nonpoint sources of pollution—it will result in degradation of very high quality waters in violation of state and federal law.

In addition, we strongly support the Proposed Rule's requirement that allows for waters to receive the enhanced protection of individual antidegradation review before a water is formally reclassified as an A1, A2, or B1 water. It is an understatement that this provision and requirement is long-overdue and will help address the gap in protections for many of Vermont's waters that have not yet been classified to their actual level of water quality. We respectfully request clarification about how this provision will be implemented from a time and logistics perspective by the Department. Related, we reiterate our concerns about the delay of reclassifying waters to-date—resulting in relatively few protected Class A waters, zero B1 waters, and the vast majority of waters classified as B2 (average quality) in Vermont. Given the pressures that Vermont faces, we cannot underscore enough the importance of efficiently classifying and reclassifying vulnerable waters across the State to ensure that they receive adequate protections.

Finally, our organizations support the improvements to the Proposed Rule's Social and Economic Justification ("SEJ") section and applicable determination-threshold of what constitutes a "socioeconomic impact."[6] Here, we acknowledge that antidegradation policy, as designed under the Clean Water Act, is intended to be a balancing tool versus an explicit mandate against degradation.[7] Importantly however, allowing degradation under the Rule should be an exceptionally high threshold and intended not to become a common occurrence—hence the emphasized federal verbiage "necessary" and "important."[8] To that end, it is vital that the

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[5] U.S. ENVTL. PROT. AGENCY, WATER QUALITY STANDARDS HANDBOOK CH. 4: ANTIDEGRADATION 10 (2012), https://www.epa.gov/sites/default/files/2014-10/documents/handbook-chapter4.pdf.

[6] *See* ANR PROPOSED RULE, *supra* note 4, at § IV(b)(7) (stating that under the Determination of Socioeconomic Impact "[t]he Secretary shall consider the following factors as appropriate in determining the anticipated economic or social changes resulting from the proposed activity . . . .")

[7] *See e.g.*, Robert L. Glicksman & Sandra B. Zellmer, *Improving Water Quality Antidegradation Policies*, 4 GEO. WASH. J. ENERGY & ENVTL. L. 1, 7 (2013) (explaining that "[a]ntidegradation programs seek *to balance* the protection of existing clean air and water quality and continued economic growth") (emphasis added); *see also* N. William Hines, *A Decade of Nondegradation Policy in Congress and the Courts: The Erratic Pursuit of Clean Air and Clean Water*, 62 IOWA L. REV. 643, 650 (1977).

[8] *See* 40 C.F.R. § 131.12(a)(2) (stating that "[w]here the quality of the waters exceeds levels necessary to support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, *that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located.* In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control") (emphasis added).

Proposed Rule clearly identify and articulate both the high required threshold and applicant's burden of proof in order to justify degradation and lowering of a high-quality water. Without surgical clarity, a slippery slope develops giving weight to what should be in practice a heightened exception. The result: environmental degradation, loss of biodiversity, impacts to human health and communities—all of which are difficult to restore. For this reason, we must carefully and thoughtfully craft appropriate and effective language that can adequately weather pressures from the present day and future alike.

GENERAL COMMENTS AND RECOMMENDATIONS

I. The Department should include additional permits under the Rule's Applicability section that may affect very high quality waters as well as require individual permit review and cumulative impact analysis for activities under those permits.

Our organizations support the requirement in the Proposed Rule that individual permits are required in Class A1 and B1 watersheds, and that this individual permit review include a specific Tier 2 antidegradation and cumulative impact analysis.[9] However, it is concerning that the permits and activities listed in the Applicability section appear overly narrow and do not address the full range of activities that may degrade Vermont's very high quality waters. Here, we recommend that the Department add the following permits under the Applicability section: wastewater system and potable water supply permits for wastewater systems less than 6,500 gallons per day design flow; and stream alteration and water withdrawal permits pursuant to Title 10, Chapter 41.[10]

The activities covered under these permits have the potential to degrade Vermont's very high quality waters and must be afforded individual antidegradation review as well as cumulative impact analysis. Wastewater systems, if not properly designed, sited, and maintained can result in the pollution of nearby waters. We believe it is vital for the Agency to conduct an individual review of the permitting of these systems to ensure that there is no degradation of very high quality waters. An effective review of wastewater system permits must address the soils, hydrology, and proximity of the proposed wastewater system to waters. Moreover, the cumulative impact analysis embedded in the Proposed Rule is crucial to apply to the review of multiple wastewater systems in an area that may affect very high quality waters. However, applying a cumulative impact analysis is not possible without an individual review of these systems. Similarly, in-stream work regulated by stream alteration permits, as well as direct water withdrawals can also degrade high very quality waters. Accordingly, these permits should also be required to obtain an individual review when an associated activity may affect a very high quality water.

II. The Department should amend the Proposed Rule to ensure authorizations for coverage under general permits that may affect very high quality waters receive additional scrutiny.

[9] *See* ANR PROPOSED RULE, *supra* note 4, at § IV(b)(9)–(10).
[10] *See e.g.,* STATE OF VERMONT, AGENCY OF NATURAL RESOURCES, DEPT. OF ENV. CONSERVATION, STREAM ALTERATION GENERAL PERMIT (April 19, 2022), https://dec.vermont.gov/sites/dec/files/wsm/rivers/docs/StreamAlterationGeneralPermit_2022-04-19.pdf.

As drafted, we are concerned about the Proposed Rule's Applicability language involving general permits triggering antidegradation review that may affect high quality waters.[11] In particular, the Applicability section's provision covering general permits effectively exempts authorizations for coverage issued under a general permit for antidegradation review, unless the Secretary determines that the proposed activity warrants a site-specific Tier 2 analysis through the use of an individual permit. This is problematic for several reasons outlined below.

First, when an applicant applies for coverage under a general permit, the person or entity agrees to comply with the overarching terms and conditions of that general permit. On the whole, those terms and conditions are not necessarily narrowly tailored, or designed, to address and mitigate specific discharge risks to high quality waters. For example, various general permits that address stormwater pollution, including construction stormwater permits and the three-acre stormwater permit, both could involve direct discharges to Class A1, A2 or B1 waters that, as drafted under the Rule, would not trigger an individual permit to ensure that these high quality waters are not degraded.[12] In contrast, as drafted, the Proposed Rule requires protection of Vermont's highest quality waters through the use an individual Tier 2 antidegradation review—not compliance with general conditions that do not account for the unique facts and circumstances around a discharge to a high quality water. Put another way, failing to individually address potentially degrading discharges from general permits into very high quality waters runs counter to the Proposed Rule's intent. To correct this discrepancy, all jurisdictional general permits should be required to implement a uniform approach that effectively addresses and mitigates discharges to Class A1, A2, and B1 waters. In this case, the most effective way to resolve the discrepancy is simply to require individual permits in lieu of general permits for projects that may affect very high quality waters.

Second, without delving into peer-reviewed literature or the theories behind general permits, the phrase "if it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck" applies in this Rule's case regarding general permits. While general permits are designed to efficiently allow a variety of applicants to come under their collective umbrella-like coverage, generally, each applicant must submit a notice of intent ("NOI") for coverage. In effect, the NOI closely resembles many aspects of an individual permit. Under certain general permits, for example, Vermont's National Pollutant Discharge Elimination System Pesticide General Permit ("PGP"), applicants submit an NOI, which includes a Pesticide Discharge Management Plan ("PDMP") that must be narrowly tailored and designed to the applicant's specific activities to ensure minimizing the discharge of pollutants to waters of the state.[13] The relevance and

[11] *See* ANR PROPOSED RULE, *supra* note 4, at § III(e) (specifying that "[a]uthorizations issued under a general permit subject to this Rule are exempt from subsequent review under this Rule unless the Secretary determines based on credible and relevant information and best professional judgment that the proposed activity, due to its potential impact, requires a site-specific Tier 2 analysis through the use of an individual permit").

[12] *See e.g.*, STATE OF VERMONT, AGENCY OF NATURAL RESOURCES, DEPT. OF ENV. CONSERVATION, NPDES GENERAL PERMIT 3-9020 FOR STORMWATER RUNOFF FROM CONSTRUCTION SITES (May 19, 2020), https://dec.vermont.gov/sites/dec/files/documents/3-9020_Stormwater_ConstructionGeneralPermit_2020-02-19.pdf; STATE OF VERMONT, AGENCY OF NATURAL RESOURCES, DEPT. OF ENV. CONSERVATION, GENERAL PERMIT 3-9050 (2020) FOR OPERATIONAL STORMWATER DISCHARGES (December 1, 2020), https://dec.vermont.gov/sites/dec/files/wsm/stormwater/docs/2020_09_01%20Final%20GP%203-9050.pdf.

[13] *See e.g.*, STATE OF VERMONT, AGENCY OF NATURAL RESOURCES, DEPT. OF ENV. CONSERVATION, NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PESTICIDE GENERAL PERMIT 9 (July 15, 2022),

importance here is that each NOI involves specific mitigation details according to the applicant's proposed discharge and its effects.

Under the existing language in the Proposed Rule, while the discretion exists for the Secretary to require individual permit review, if warranted, general permits and authorizations under general permits are largely exempt from additional antidegradation review. This is despite the point that each applicant's NOI for coverage involves individual and specific requirements according to their activities. As drafted, the Rule allows for discharges to high quality waters under the auspices of general permit authorizations that will not necessarily receive the scrutiny that they deserve, resulting in potential degradation to waterways. This also runs counter to the intent of the antidegradation policy under the Clean Water Act. To this end, we recognize the additional time and resources required to perform individual antidegradation review under each general permit, but believe it is necessary for effective implementation of the Rule, especially when very high quality waters are involved.

III. The Department should strengthen the Proposed Rule's Authority and Purpose section.

It is no secret that antidegradation policy is nuanced and commonly misunderstood. Inserting "achieve and maintain the highest possible water quality" galvanizes and sharpens the actual intent of the Rule and further clarifies the bar for water quality goals. The phrase additionally links to an important theme under the Rule—allowing degradation is the exception—not the norm. For this reason, we propose the following draft language under section I (b):

> "Section 29A-105, Antidegradation Policy (Policy), of the Vermont Water Quality Standards is adopted under the authority of 10 V.S.A. Chapter 47. The primary goal of the Policy is to achieve and maintain the highest possible water quality ~~the maintenance and protection of water quality~~ and protect and enhance existing and designated uses."[14]

IV. The Department can and should extend the Proposed Rule's jurisdiction to agricultural and silvicultural activities that may degrade very high quality waters.

A significant gap in the Proposed Rule is that it does not apply to the regulation of water quality impacts from agricultural, silviculture, and other nonpoint source pollution. Under the Clean Water Act, Congress intentionally and consciously distinguished between point source and nonpoint sources of pollution, authorizing EPA to regulate the former. Importantly however, Congress left it up to states to determine the extent of regulation for nonpoint source pollution. Thus, Vermont can determine when, and how, the Proposed Rule applies to nonpoint sources of pollution.[15] Here, in accordance with Section 510 of the Clean Water Act, Vermont retains the

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https://dec.vermont.gov/sites/dec/files/wsm/lakes/PGP/VT_NPDES_PGP_2022.pdf (specifying a under section 3.1 that all Operator's "must minimize the discharge of pesticides to waters of the State . . . .").

[14] For an applicable example that also uses this language, we direct the Department to Minnesota's "Antidegradation Purpose" which specifies that "[t]he purpose of the antidegradation provisions . . . is to achieve and maintain the highest possible quality in surface waters of the state." Minn. Admin. Rules part 7050.0250 (2016).

[15] *See e.g., American Wildlands v. Browner*, 260 F.3d 1192 (10th Cir. 2001) (explaining and distinguishing federal jurisdiction under the Clean Water Act involving nonpoint source pollution that "[i]t is true that states are required to assure that there shall be achieved . . . cost-effective and reasonable best management practices for nonpoint

inherent authority to establish its own water quality standards—including antidegradation provisions—that may be more stringent than federal standards.

Under Vermont law, all farms must comply with the Required Agricultural Practices ("RAPs") and certain farms must obtain Small Farm Operation ("SFO"), Medium Farm Operation ("MFO") and Large Farm Operation ("LFO") permits.[16] To address the potential degrading impacts of water pollution from farms adjacent to high quality waters, the Agency should conduct an individual antidegradation review of SFO, MFO, and LFO permits that may affect Class A1, A2 or B1waters. These permits were not designed to protect high quality waters and without applying an individual Tier 2 antidegradation analysis applied to the activities on these farms there is an unacceptable risk of degrading Vermont's high quality waters. Similarly, the RAPs were not designed to address water quality impacts to Vermont's very high quality waters. Accordingly, the Agency and AAFM should propose amendments to the RAPs to specifically address practices that farms must implement to ensure protection of affected A1, A2, and B1 waters.

As noted, the Proposed Rule also does not address the potential impact of timber harvesting and forestry roads to very high quality waters. Water pollution from silviculture is addressed in Vermont through the AMPs.[17] Like the RAPs, we presume the AMPs were not necessarily designed with a specific focus on ensuring that silvicultural activities will not degrade Class A1, A2, or B1 waters. Rather, they were developed, generally, to prevent discharges of sediment and logging slash to streams and bodies of water. Because harvesting activities can occur in higher elevation waters where very high quality wasters exist, silvicultural activities should be designed to ensure that water quality is maintained accordingly and not degraded.

To do this, we recommend that implementing the AMPs—which are critical to maintaining water quality and are mandatory for lands enrolled in the Current Use Program—should also be mandatory for silvicultural activities on lands nearby to Class A1, A2, and B1 waters. These lands could be mapped, and mandatory AMP implementation would better protect very high quality waters. We also understand and acknowledge that the AMPs do not apply to logging that is intended to clear land for development. As a result, Proposed Rule should include a provision that requires an individual Tier 2 antidegradation review for logging activities to clear sites for development that may affect Class A1, A2, and B1 waters.

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source control . . . [i]t is also true that the standard-setting process in 33 U.S.C. § 1313 applies generally to waters polluted by both point source and nonpoint source pollution" (internal quotation marks omitted); *But cf. Northwest Envtl. Advocates v. U.S. Envtl. Prot. Agency*, No. 3:05-cv–01876–AC, 2012 WL 653757, at *18–18 (D. Or. Feb. 28, 2012) (declining to follow *American Wildlands* because "many temperature impacted waters in Oregon are impaired in while or in part by non-point sources of pollution, the challenged provisions could present a considerable obstacle to the attainment of water quality standards when, by law, the sources of pollution are deemed to be in compliance with water quality standards."); *see also* 40 C.F.R. § 131.12(a)(2).

[16] AAFM, REQUIRED AGRICULTURAL PRACTICE FOR THE AGRICULTURAL NONPOINT SOURCE CONTROL PROGRAM (2018), https://agriculture.vermont.gov/sites/agriculture/files/documents/RAPFINALRULE12-21-2018_WEB.pdf [hereinafter "RAPs"]; DEC, GENERAL PERMIT 3-9100 FOR DISCHARGES FROM MEDIUM CONCENTRATED ANIMAL FEEDING OPERATIONS, NPDES Number: VTG910002.

[17] *id.*

In addition, the Proposed Rule should be integrated into permits and applications that are required to review the potential impact of harvesting, for example, Vermont's Heavy Cut Law.[18] Any application that files for a "heavy cut"[19] that may affect a very high quality water should automatically trigger an individual Tier 2 antidegradation analysis under the Proposed Rule. We recommend that any logging activity, forestry activity, or farming conducted above 2,500 feet elevation, that requires an Act 250 permit and may affect a very high quality water should similarly trigger an individual Tier 2 antidegradation analysis under the Proposed Rule.[20]

Finally, EPA's Water Quality Standards Handbook ("Handbook") acknowledges that states may need to regulate nonpoint sources of pollution, such as water pollution from agricultural and silvicultural pollution, "if any, controls on nonpoint sources are needed to provide for attainment of State water quality standards."[21] The VWQS include compliance with the Antidegradation Policy of the CWA. Accordingly, the Proposed Rule must address the potential impact from agricultural and silvicultural activities to ensure that these activities do not degrade Vermont's Class A1, A2, and B1 waters. If discharge pollution from agricultural and silvicultural activities are categorically exempt from the Proposed Rule, ANR will have little ability to review such activities to ensure that Vermont's very high quality waters are managed to their classification.[22] Finally, for examples outside of Vermont, we direct the Department to Oregon's Antidegradation Rule, which proactively identifies nonpoint sources of pollution in its Purpose section.[23]

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[18] *See* 10 V.S.A. § 2625(b)(1)–(2) (requiring the submission of a Intent-to-Cut Notification to Vermont Department of Forests, Parks, and Recreation if a landowner plans to conduct a "heavy cut" (defined as "a harvest leaving a residual stocking level of acceptable growing stock below the C-line, as defined by the United States Department of Agriculture silvicultural stocking guides for the applicable timber type") of forty acres or more.); *see also* 10 V.S.A. § 2625(a)(2).

[19] *id.* § 2626(a)(2).

[20] *See e.g.*, 10 V.S.A. § 6001(3)(A)(vi) (defining "Development" to include "[t]he construction of improvements for commercial, industrial, or residential use above the elevation of 2,500 feet."); *id.* § 6001(3)(D) (stating that "development" does not include ". . . construction of improvements for farming, logging, or forestry purposes below the elevation of 2,500 feet."). Relevant here is that Act 250 jurisdiction is triggered by the purpose of the use (e.g. improvements for commercial, industrial, or residential use) and the location (above 2,500 feet in elevation), which 10 V.S.A. § 6001(3)(A)(vi) applies to. However, there is an exception for farming, logging, or forestry below 2,500 feet in elevation through 10 V.S.A. § 6001(3)(D). There is no exception for farming, logging, or forestry above 2,500 feet in elevation.

[21] U.S. ENVTL. PROT. AGENCY, WATER QUALITY STANDARDS HANDBOOK CH. 4: ANTIDEGRADATION 10 (2012), https://www.epa.gov/sites/default/files/2014-10/documents/handbook-chapter4.pdf.

[22] *See e.g.*,10 V.S.A. § 1258(a) (specifying that "[a]fter the classification of any waters has been determined by the Secretary, those waters shall be managed under the supervision of the Secretary in order to obtain and maintain the classification established. The Secretary may enforce a classification against any person affected thereby who, with notice of the classification, has failed to comply. An action to enforce a classification shall be brought in the Superior Court of the county wherein the affected waters are located.") The Agency will not meet its obligation to manage waters in accordance with their classification if the Agency does not address risks to high quality waters through all the permits and rules that apply to water quality—including the RAPs and AMPs and other regulations related to agricultural and silvicultural activities.

[23] *See e.g.*, OAR, chapter 340, division 41, 340-041-0004 (stating that "[t]he purpose of [Oregon's] Antidegradation Policy is to guide decisions that affect water quality to prevent unnecessary further degradation from new or increased point and *nonpoint sources of pollution*, and to protection, maintain, and enhance existing surface water quality to ensure the full protection of all existing beneficial uses") (emphasis added).

V. The Department should further refine and clarify the threshold for when a limited lowering of water quality is permitted under the Proposed Rule's Tier 2 Antidegradation Analysis.

Tier II antidegradation is a controversial and commonly confused concept: that a social or economic benefit to people of the State comes from allowed degradation and allocation of assimilative capacity of a waterbody.[24] Here, we do not dispute, and acknowledge, the inherent balancing act that is part of antidegradation. However, federal language, the intent behind antidegradation policy, generally, as well as academic literature support the presumption that permitted degradation (limited lowering of water quality) under antidegradation should be the exception—not common practice.[25] For this reason, it is imperative for Vermont to include explicit language in the Rule specifying the line where degradation is, and is not, permitted under the Tier 2 Antidegradation Analysis.

Particularly relevant when determining the threshold permitting a limited reduction in the existing quality of a high quality water are the terms "necessary" and "important" under 40 C.F.R. § 131.12(a)(2).[26] To ensure consistency with the importance and need to clarify, what should in practice be, a high bar for discharges resulting in a limited reduction of existing high quality waters we propose inserting "under exceptional circumstances," after "an analysis of alternatives," in IV(b)(2)(B) of the Proposed Draft Rule. In addition, we suggest inserting "important and" before "substantial adverse" in the Rule to ensure consistency with federal language.[27] Including these suggested additions makes the threshold for a limited lowering of a high quality water clear.

VI. The Department should reform the existing reclassification process to efficiently enable unclassified and classified streams to receive necessary and deserved protections.

The Vermont Water Quality Standards and the Proposed Rule offer the added protections needed for high quality waters. The Proposed Rule notes that high quality waters and those candidate waters eligible for reclassification—ranging from B2 to a higher water quality, particularly A1 and B1—will receive similar protections through the individual permitting process and cumulative impact analysis, assuming a complete petition for the particular waters has been filed

[24] *See generally* ANR PROPOSED RULE, *supra* note 4, at § IV(b).
[25] *See* sources cited *supra* notes 7 & 8.
[26] *See supra* note 8 (stating that "[w]here the quality of the waters exceeds levels necessary to support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, *that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located.* In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control") (emphasis added).
[27] *id.*

with the Secretary.[28] We strongly support this level of protection for candidate waters even though the formal reclassification process has not occurred.

However, we remain concerned about the backlog for formal reclassification that eligible candidate waters are facing due to the onerous petition process. Without formal reclassification, these waters are in a legal limbo and could be subject to degradation in the future due to political pressure, changes in Agency or Department policy, or perhaps a legal challenge of the requirement for an individual permit for a water that is technically still a B2 water. For these reasons, we respectfully ask the Department to provide a roadmap as to how the reclassification process will proceed and ways to expedite the process.

Again, while we support the protection of candidate waters in-line for reclassification, it is concerning that there is no concrete plan for simplification or restructuring of the reclassification process, or a timeline for implementation of these needed changes. To that end, the Department has indicated a preference to shift to a data-driven process and away from the current public petition process. Both, of course, have merit, but importantly, the process is onerous and needs simplification.

We believe that a data-driven process would remove some of the subjective nature of the petition process, but the Department should establish under what provisions rulemaking for reclassification would be initiated, how this would proceed, timing, and other guidance parameters. Further, under a data-driven process, the Department should provide the public with parameters for what is required to propose a water for reclassification, whether by petition, or another means. Finally, we ask that the Department set a timeline for reclassification rulemaking. Without a formal timeline—in the Proposed Rule or otherwise—the process will not be completed, thereby failing to provide assurance that high quality candidate waters will retain the needed protection to prevent degradation.

VII. Formatting Suggestions.

It appears that the formatting in the Proposed Rule is off beginning after section III, Applicability. The next section, Information Required from Applicant, begins with roman numeral II, when it should be IV. Subsequent changes are required to ensure consecutive numbering consistency.

CONCLUSION

In an era of climate change and shifting demands, it is vital that Vermont secure and implement nimble and effective regulations for the protection of water quality to ensure the safety and health of our communities, biodiversity, and environment at-large. Vermont can serve as a leader and beacon of hope, but we must decide whether and how best we will carry on that role. As a result, the importance and timing of this Rule is critical.

[28] *See* ANR PROPOSED RULE, *supra* note 4, at § IV(c)(4) (specifying that "[f]or waters where the Secretary determines water quality data meets or exceeds the minimum criteria for a higher class for one or more designated uses, or the Secretary has received an administratively and technically complete petition to reclassify waters, any permit issued by the Secretary must ensure the maintenance of water quality necessary to protect that existing use.")

As we mentioned at the outset, the Proposed Rule, as compared to its interim procedure predecessor, and years prior without a substantive rule, is a significant improvement and step forward, which our organizations broadly support. And yet, there is still significant work to be done to ensure that the Rule effectively carries out its implementation duties to achieve, protect, and maintain water quality across Vermont.

Thank you again for the opportunity to submit these comments, and for your thoughtful attention to this matter. Our organizations remain available to discuss the issues in these comments at any time.

Respectfully submitted, Dated: February 14, 2023

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