

Petition of the Vermont Natural Resources Council (VNRC), Conservation Law Foundation (CLF), Lake Champlain Committee (LCC), Connecticut River Conservancy (CRC), Vermont Conservation Voters (VCV) Pursuant to 3 VSA § 806 to Amend the Vermont Water Quality Standards to Include an Alternatives Analysis When Reviewing 33 U.S.C. § 401 Certification Applications

Existing Vermont Water Quality Standards (VWQS) do not adequately protect Vermont's waters when the State is reviewing applications for Water Quality Certification under 33 U.S.C. § 401. While some of our neighboring states routinely apply alternatives analysis, Vermont's VWQS generally exempt applications that obtain stormwater permits from alternatives analysis. (Best Management Practices [BMP] imposed under stormwater permitting exempt the application from alternatives analysis.) And while our neighboring states explicitly apply this analysis to wetlands, Vermont's VWQS are less clear. The Vermont Agency of Natural Resources (ANR) has appropriately addressed impacts to wetlands that meet the definition of water of the state and/or are hydrologically connected to waters of the state, but the Petition clarifies that wetlands are protected under the VWQS, including alternatives review. In order to improve Vermont's § 401 process so that it is at least as protective of Vermont's waters as that of neighboring states, the following amendments are proposed:

1. Amend § 29A-102 as follows by adding a new subsection (new matter underlined):

(52) "Wetlands" mean wetlands as defined in 10 V.S.A. § 902(5).

(53) "Restoration Project" means activities associated with the restoration and enhancement of wetlands, rivers and streams, lakes and ponds, and riparian areas for the purposes of reestablishing natural hydrology, floodplain connectivity, natural stream connectivity and morphology or fish and wildlife habitat.

2. Amend § 29A-103 as follows (new matter underlined):

§ 29A-103 General Policies

(a) These rules are intended to achieve the goals of the State's water quality policy (10 V.S.A. § 1250), set forth below, as well as the objective of the federal Clean Water Act (33 U.S.C. § 1251 et seq.) which is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

(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 wetlands and to assure the public health;
- (B) maintain the purity of drinking water;

- (C) control the discharge of wastes to waters and wetlands, 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 wetlands and to reduce existing risks to water quality.

3. Add a new section 29A-108 as follows (new matter underlined):

§ 29A-108 – Water Quality Certifications Under § 401 of the Clean Water Act

- (a) This subsection shall apply to certifications under § 401 of the Clean Water Act, 33 U.S.C. § 1341, pertaining to waters as defined in this rule, and also to all certifications under § 401 of the Clean Water Act, 33 U.S.C. § 1341, pertaining to wetlands, regardless of the classification of the wetland.
- (b) All applications for certification under § 401, except for certifications for restoration projects, shall be supported by an environmental impact statement that includes evaluation of impacts and of alternatives, which statement shall satisfy the standards set forth in the regulations issued by the Council on Environmental Quality under the National Environmental Policy Act unless and until the Secretary issues rules adopting replacement standards. The Secretary must reject an application that does not meet these standards.
- (c) The analysis of impacts and alternatives required under subsection (b) of this section shall evaluate cumulative impacts both of the application and of reasonably foreseeable other applications, and shall consider a range of alternatives that would prevent or lessen the degradation associated with the proposed activity. For purposes of this section, “practicable” means technologically possible, able to be put into practice, and economically viable,” regardless of whether the applicant owns or controls alternative locations at the time of the application.
- (d) The application shall not be granted unless, after an analysis of impacts and alternatives, based on substantial evidence in the record, the Secretary determines that it is more

likely than not that the application will not cause significant impacts or, if there may be significant impacts, that the impacts are limited in degree and extent and are necessary to prevent substantial adverse economic or social impacts.