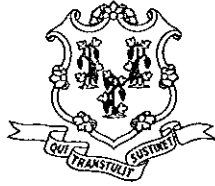


The Connecticut General Assembly

Legislative Commissioners' Office

Edwin J. Maley, Jr.
Commissioner
William A. Hamzy
Commissioner

Larry G. J. Shapiro
Director



Legislative Office Building
Suite 5500
Hartford, Connecticut
06106-1591
(860) 240-8410
fax (860) 240-8414
e-mail: lco@cga.ct.gov

Memorandum

To: Legislative Regulation Review Committee
From: Legislative Commissioners' Office
Committee Meeting Date: October 25, 2011

Regulation No:	2010-47b
Agency:	Department of Energy and Environmental Protection
Subject Matter:	Stream Flow Standards and Regulations
Statutory Authority:	26-141b (copy attached)

	Yes or No
Mandatory	Y
Federal Requirement	N
Permissive	Y

For the Committee's Information:

1. This is a resubmittal of regulations that were rejected without prejudice at the committee's meeting on December 21, 2010. The resubmittal addresses the substantive concerns and technical corrections noted in the December 21, 2010, report. However, a number of the regulations' provisions have been substantively revised and consequently create the substantive concerns and technical corrections noted below.

2. The certification page submitted by the agency incorrectly lists Public Acts 26-141b-1 to 26-141b-8 as authority for the adoption of the proposed regulations. There are no such public acts. The statutory authority for the proposed regulations is section 26-141b of the Connecticut General Statutes.

3. The proposed regulations establish release requirements for dam owners or operators. Under the provisions of the proposed regulations, such requirements go into effect ten years after the Commissioner of Energy and Environmental Protection publishes the classification for a river or stream segment in the Connecticut Law Journal. Before a river or stream segment's classification is published, said commissioner is required to prepare a map of proposed classifications for rivers and stream segments in the state. The proposed regulations do not establish a deadline or timeframe for the preparation of such map nor a deadline by which a river or stream segment's classification has to be published in the Connecticut Law Journal. Accordingly, at this time, it is not known when compliance with the release requirements contained in the proposed regulations will actually be required.

Substantive Concerns:

1. On page 11, in section 26-141b-5(d), there are two methods by which a river or stream segment can be reclassified. The first method is if a person petitions the commissioner to change the classification. The second method is if the commissioner, on his or her own initiative, proposes a classification change. While subsection (d) sets forth the procedures applicable to a petition filed by a person seeking a classification change, it is unclear what procedures, if any, apply to a proposed classification change initiated by the commissioner.

2. On page 11, in section 26-141b-5(d) and on pages 15 and 16 in subsections (b) and (c) of section 26-141b-6, respectively, reference is made to the "current water supply plan". It is unclear if these references are intended to mean the water supply plan in effect as of the effective date of the regulations, or the water supply plan in effect when a petition is filed to change a classification or when a dam owner or operator alters the required minimum release, respectively.

3. On page 12, in section 26-141b-5(d)(1)(B)(ii)(a), it is unclear what is meant by "water conservation and balances uses of existing sources of supply".

4. On page 12, in section 26-141b-5(d)(1)(C), it is unclear what is considered to be an "overriding social or economic justification for changing the classification".

5. On page 17, in section 26-141b-6(c)(2)(B), it is unclear what is meant by "new sources".

6. On page 17, in section 26-141b-6(d)(2), it is unclear what is meant by "Continue to make reduced releases in accordance with subsection (c) of this section and as may be modified in accordance with subsection (b) of this section,".

7. On page 19, in section 26-141b-6(f)(1)(E)(i), it is unclear what constitutes "the period in question".

8. On page 19, in section 26-141b-6(f)(1)(E)(ii), it is unclear if "at the same season" means the season for which the variance would be granted or the season at the time of the commissioner's consideration of the variance request.

9. On page 20, in section 26-141b-6(f)(1)(E)(v), the regulation provides that in deciding whether to grant a variance as an alternative release requirement the commissioner may consider "...the requestor's ability to comply with the release required in ...subdivision (2) of this subsection." Subdivision (2) of the subsection allows the owner or operator to apply to the commissioner for a site specific release as an alternative release requirement. Because a site specific release appears to be a more tailored, individualistic alternative release than a variance, it is unclear under what circumstances such dam owner or operator would be unable to meet the requirements of a site specific release and therefore seek a variance from the commissioner.

10. On page 20, in section 26-141b-6(f)(1)(E)(vi), the regulation provides that in deciding whether to grant a variance the commissioner may consider "any comments received in response to the notice published in accordance with subparagraph (D) of this subsection." Subparagraph (D) sets forth the required content for the notice to be published by the requestor of the variance in a newspaper of general circulation and also requires that notice of the variance application be provided to certain public officials, commissioners, organizations and permittees. Subparagraph (D) does not require that the notice published in such newspaper or provided to such public officials, commissioners, organizations and permittees indicate that in response to the request for a variance persons can submit comments to the commissioner. Accordingly, it is unclear how such persons will know that they are allowed to submit comments to the commissioner and how such persons will know of the method they should use to submit any such comments to the commissioner.

Technical Corrections:

1. Starting on page 1, throughout section 26-141b-2, a comma should be inserted before "as defined in" for proper form.
2. On page 2, in section 26-141b-2(28), "and" should be "or" for accuracy, and "these terms are" should be deleted for proper form.
3. On page 3, in section 26-141b-2(34), a period should be inserted after "adopted" and "but shall not include dam outlet works" should be "'River or stream segment' does not mean dam outlet works" for clarity.
4. On page 3, in section 26-141b-2(35), quotation marks should be inserted before "River" for proper form.
5. On page 3, in section 26-141b-2(38) "the lesser of" should be inserted after "and" and ", whichever is less" should be deleted for clarity.
6. On page 8, in section 26-141b-5(a)(7), "as contained in a local or state plan," should be "as contained in an applicable local or state plan," for clarity.

7. On page 10, in section 26-141b-5(b)(2)(C), "commissioners" should be "Commissioners" for proper form.
8. On page 10, in section 26-141b-5(b)(3)(A), "to the commissioner" should be inserted after "comments" for clarity.
9. On page 10, in section 26-141b-5(c), subparagraph designators "(A)" and "(B)" should be subdivision designators "(1)" and "(2)", respectively and "river or stream system or segment" should be "river or stream segment" for consistency with the definition of "river or stream segment" contained in section 26-141b-2(34) of the proposed regulation.
10. On page 11, in section 26-141b-5(d), "river or stream system or segment's" should be "river or stream segment's", "river or stream system or segment" should be "river or stream segment" for consistency and "pursuant to subsection (c) of this section" should be inserted after "segment's classification" for clarity.
11. On page 11, in section 26-141b-5(d)(1)(A)(i) and (ii), "stream system" should be "stream segment" for consistency.
12. On page 11, in section 26-141b-5(d)(1)(A) and (B), "stream system or segment" should be "stream segment" for consistency.
13. On page 11, in section 26-141b-5(d)(1)(B)(i), "stream systems" should be "stream segments" for consistency.
14. On page 11 and 12, in section 26-141b-5(d)(1)(B)(ii), subsection designators "(a)", "(b)" and "(c)" should be subclause designators "(I)", "(II)", and "(III)", respectively, for proper form.
15. On page 12, in section 26-141b-5(d)(1)(B)(ii)(I), a comma should be inserted after "but not limited to" for proper form.
16. On page 12, in section 26-141b-5(d)(1)(C), "For river or stream system or segment" should be "For a river or stream segment" for consistency and "an" should be inserted before "overriding" for clarity.
17. On page 12, in section 26-141b-5(d)(2)(B), "stream system or segment's" should be "stream segment's" for consistency.
18. On page 12, in section 26-141b-5(d)(2)(C), "river or stream" should be inserted before "segment" for consistency.
19. On page 12, in section 26-141b-5(d)(2)(D), "stream system" should be "stream segment" for consistency.
20. On page 13, in section 26-141b-5(d)(2)(F), "stream system" should be "stream segment" for consistency.

21. On page 13, in section 26-141b-6(a), "stream system or segment's" should be "stream segment's" for consistency.
22. On page 14, in section 26-141b-6(a)(3)(B)and(C), "is required" should be "shall be required" for clarity.
23. On page 15, in section 26-141b-6(b)(1)(A), "and" should be deleted for proper form.
24. On page 16, in section 26-141b-6(c)(1)(D), a comma should be inserted after "36" for proper form.
25. On page 16, in section 26-141b-6(c)(1)(F), "steps taken and result of work plan implementation" should be "steps taken and the result of the work plan implementation" for clarity.
26. On page 17, in section 26-141b-6(c)(2)(A), "(A) through (F)" should be "(A) to (F), inclusive" for proper form.
27. On page 17, in section 26-141b-6(c)(3), "subdivision." should be "subdivision; or" for proper form.
28. On page 17, in section 26-141b-6(c)(4), ", as applicable," should be inserted after "section" for clarity.
29. On page 17, in section 26-141b-6(d)(1), "stream system or segment's" should be "stream segment's" for consistency.
30. On page 17, in section 26-141b-6(d)(2), "Development as appropriate before granting or deny" should be "Development, as appropriate, before granting or denying" for clarity.
31. On page 17, after "request.", "The commissioner may request additional information prior to acting on such request." should be inserted for clarity, and on page 18, in section 26-141b-6(d)(2), a colon should be inserted after "the commissioner's consideration in such request", "and the commissioner may request additional information" should be deleted for clarity.
32. On page 19, in section 26-141b-6(f)(1)(A)(ii), "commissioner" should be "Commissioner" and "Agriculture," should be "Agriculture or" for proper form.
33. On page 19, in section 26-141b-6(f)(1)(D)(i), the subsection designators "(a)", "(b)" and "(c)" should be subclause designators "(I)", "(II)" and "(III)", respectively, for proper form.
34. On page 19, in section 26-141b-6(f)(1)(E), "to grant the variance" should be "to grant a variance" for clarity, "appropriate" should be "applicable" for accuracy, and "stream system" should be "stream segment" for consistency.

35. On page 20, in section 26-141b-6(f)(1)(E)(vi), "subdivision" should be "subparagraph" for accuracy.
36. On page 20, in section 26-141b-6(f)(1)(F), "alternative release" should be "variance" for consistency.
37. On page 20, in section 26-141b-6(f)(2)(A), "stream system or segment's" should be "stream segment's" for consistency.
38. On page 20, in section 26-141b-6(f)(2)(B), "provided" should be "prescribed" for accuracy.
39. On page 20, in section 26-141b-6(f)(2)(B)(ii), "applicable" should be inserted before "narrative" for clarity.
40. On page 20, in section 26-141b-6(f)(2)(B)(iii), "section 16-141b-7" should be "section 26-141b-7" for accuracy.
41. On page 20, in section 26-141b-6(f)(2)(C), "stream system" should be "stream segment" for consistency.
42. On page 21, following section 26-141b-6(f), the subsection designator "(c)" should be "(g)" for proper form and in subsection (g), "subsection (c) of section 26-141b-5" should be "subsection (d) of section 26-141b-5" for accuracy.
43. On page 22, after the last period in subsection (g) and before "Sec. 7" a new paragraph and appropriate spacing should be inserted in order to designate the beginning of a new section of the regulation.
44. On page 22, in section 26-141b-7(a)(4), "stream system or segment" should be "stream segment" for consistency.
45. On page 23, in section 26-141b-7(c)(2), a semi-colon should be inserted after "commissioner" for proper form.

Recommendation:

<p>Approval in whole with technical corrections with deletions with substitute pages Disapproval in whole or in part <input checked="" type="checkbox"/> Rejection without prejudice</p>
--

Reviewed by: Bradford M. Towson / Angela R. Rehm

Date: October 13, 2011

Sec. 26-141b. Adoption of regulations establishing flow standards for rivers and streams. Procedure. The Commissioner of Environmental Protection shall, on or before December 31, 2006, and after consultation and cooperation with the Department of Public Health, the Department of Public Utility Control, an advisory group convened by the Commissioner of Environmental Protection, and any other agency, board or commission of the state with which said commissioner shall deem it advisable to consult and after recognizing and providing for the needs and requirements of public health, flood control, industry, public utilities, water supply, public safety, agriculture and other lawful uses of such waters and further recognizing and providing for stream and river ecology, the requirements of natural aquatic life, natural wildlife and public recreation, and after considering the natural flow of water into an impoundment or diversion, and being reasonably consistent therewith, shall adopt regulations, in accordance with the provisions of chapter 54, establishing flow regulations for all river and stream systems. Such flow regulations shall: (1) Apply to all river and stream systems within this state; (2) preserve and protect the natural aquatic life, including anadromous fish, contained within such waters; (3) preserve and protect the natural and stocked wildlife dependent upon the flow of such water; (4) promote and protect the usage of such water for public recreation; (5) be based, to the maximum extent practicable, on natural variation of flows and water levels while providing for the needs and requirements of public health, flood control, industry, public utilities, water supply, public safety, agriculture and other lawful uses of such waters; and (6) be based on the best available science, including, but not limited to, natural aquatic habitat, biota, subregional basin boundaries, areas of stratified drift, stream gages and flow data, locations of registered, permitted, and proposed diversions and withdrawal data reported pursuant to section 22a-368a, locations where any dams or other structures impound or divert the waters of a river or stream and any release made therefrom, and any other data for developing such regulations or individual management plans. Such flow regulations may provide special conditions or exemptions including, but not limited to, an extreme economic hardship or other circumstance, an agricultural diversion, a water quality certification related to a license issued by the Federal Energy Regulatory Commission or as necessary to allow a public water system, as defined in subsection (a) of section 25-33d, to comply with the obligations of such system as set forth in the regulations of Connecticut state agencies. Any flow management plan contained in a resolution, agreement or stipulated judgment to which the state, acting through the Commissioner of Environmental Protection, is a party, or the management plan developed pursuant to section 3 of public act 00-152*, is exempt from any such flow regulations. Flow regulations that were adopted pursuant to this section and sections 26-141a and 26-141c prior to October 1, 2005, shall remain in effect until the Commissioner of Environmental Protection adopts new regulations pursuant to this section.