

7. Criterion 1(E) (Streams)

I. Requirements for Issuance of Permit

Criterion 1(E) requires "that, in addition to all other applicable criteria, the development or subdivision of lands on or adjacent to the banks of a stream will, whenever feasible, maintain the natural condition of the stream, and will not endanger the health, safety, or welfare of the public or of adjoining landowners." 10 V.S.A. § 6086(a)(1)(E). Act 250 defines "stream" as "a current of water which is above an elevation of 1,500 feet above sea level or which flows at any time at a rate of less than 1.5 cubic feet per second." *Id.* § 6001(18).

II. Burden of Proof

The applicant bears the burden of proving compliance with Criterion 1(E). *Id.* § 6088(a).

III. Analysis

Under Criterion 1(E), the question is whether the project will disrupt the natural condition of a stream, and if so, whether the applicant has considered "all reasonable alternatives" which would allow the stream to remain in its natural condition, both during and after construction. *Re: Mark and Pauline Kisiel*, 5W1270-EB, Findings of Fact, Conclusions of Law and Order (Altered) at 26-27 (August 7, 1998), *rev'd on other grounds, In re Kisiel*, 11 Vt.L.W. 401 (Dec. 29, 2000)(motion for reargument denied, March 22, 2001)(citing *Re: Okemo Mountain, Inc.*, #2S0351-12A-EB, Findings of Fact, Conclusions of Law, and Order (Revised) at 14 (July 23, 1992)). The natural condition of a stream includes its "volume, depth, velocity of water flow, physical features, aesthetic values, bank stability, water quality, and habitat for fish and a variety of other life forms." *Okemo*, #2S0351-12A-EB, Findings, Conclusions and Order at 4 (Jul. 23, 1992).

Thus, compliance with applicable Vermont Water Quality Standards (VWQS) provisions which pertain to the stream's "volume, depth, velocity of water flow, physical features, aesthetic values, bank stability, water quality, and habitat for fish and a variety of other life forms," *Okemo*, #2S0351-12A-EB, Findings, Conclusions and Order at 4 (Jul. 23, 1992), is relevant to whether a stream will remain in its natural condition under Criterion 1(E). "Special attention" should be given in reviewing aesthetic impacts in fragile headwaters and other sensitive areas. *See Re: Quechee Lakes Corp.*, #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order (Nov. 4, 1985).

If a project will disrupt the natural condition of a stream in any way, the Commission must determine whether the applicant has considered all reasonable alternatives to minimize impacts to the streams. *Re: Mark and Pauline Kisiel*, 5W1270-EB, Findings of Fact, Conclusions of Law and Order (Altered) at 26-27

(August 7, 1998), *rev'd on other grounds, In re Kiesel*, 11 Vt.L.W. 401 (Dec. 29, 2000)(motion for reargument denied, March 22, 2001)(citing *Re: Okemo Mountain, Inc.*, #2S0351-12A-EB, Findings of Fact, Conclusions of Law, and Order (Revised) at 14 (July 23, 1992)(alternatives analysis required where project disrupts the natural condition of a stream)).

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