

**Vermont Department of Environmental Conservation**  
**Agency of Natural Resources**

**Responsiveness Summary to Public Comment regarding:**  
**Act 76 Guidance DRAFT Chapters 2, 3, and 4**

On May 26<sup>th</sup>, 2021, the Vermont Department of Environmental Conservation (VDEC) of the Agency of Natural Resources (ANR) released final drafts of Act 76 Guidance Chapters 2, 3, and 4 for a 30-day public comment period. The public comment period, commenced on May 26 and ended on June 27, 2022. For Chapter 3 only, DEC extended the comment period from June 27 to July 22<sup>nd</sup> to allow for comments on DEC's revised language regarding procurement. Notices were also sent out to by VDEC and the Regional Planning Commissions (RPCs), Natural Resource Conservation Districts (NRCDDs) and Watersheds United Vermont (WUV), as well as other stakeholder organizations that have been participating on the Act 76 Advisory Group.

The DEC prepared this responsiveness summary to address specific comments and questions and to indicate how the plans have been modified in response to public comment. Comments may have been paraphrased or quoted in part. The full text of the comments provided is available for review by contacting the Water Investment Division.

**General**

One commentor offered substantial editorial changes to the language of Chapters 3 and 4, some of which did not affect the substance of the Chapter. These changes were reviewed and those where substantive clarification was provided were accepted. A number of other stylistic changes were not adopted at this time. The Department nonetheless appreciated the attention to detail given by the commentor.

**Chapter 2**

Comment: noting that BWQC language in Chapter 2 confers additional authority to the BWQC than Act 76.

Response: DEC respectfully disagrees. The guidance language is consistent with 10VSA 924(g)(1) which states: "The purpose of a basin water quality council is to establish policy and make decisions for the clean water service provider regarding the most significant water quality impairments that exist in the basin and prioritizing the projects that will address those impairments based on the basin plan."

Comment requesting insertion of this text: "Guidance documents shall not be interpreted to nullify or constrain any legal authority vested in the CWSP by statute or rule."

Response: DEC agrees with the sentiment of this comment and has modified text accordingly.

### **Chapter 3**

Comment: requested that language that states that DEC will review and approve internal control policies in Chapter 3 be changed such that DEC does not approve internal control policies.

Response: DEC agrees, and this language has been removed.

Comment: NRPC suggests removing much of the language from the Internal Control section of Chapter 3 and instead placing it in individual contracts with CWSPs.

Response: DEC disagrees, as this language is intended to highlight for third parties the manner in which the CWSP system operates.

Comment: At chapter 3, Section A4, comment that recommendations regarding administrative funds have little point given the topic is controlled by the Rule.

Response: DEC respectfully disagrees. The allocation of funds to administrative vs. project "pots" has been subject of significant discussion and ongoing confusion. DEC contends this guidance is useful and necessary to confirm our long-standing communications on this matter, and to further clarify the Rule on this matter.

Comment: ACRPC noted that while they understand why project management should be handled separately from engineering, it is not clear to them that an engineering firm would not be qualified to play a project management role should they choose to pursue that option.

Response: DEC agrees that engineering firms may be prequalified as project managers, and that the guidance should not be read to preclude that from occurring.

Comment: ACRPC asked that the threshold for simplified procurement of goods, currently listed as \$1,000.00, be raised to \$3,500.00.

Response: DEC does not desire to make this change at this time.

Comment: At A4, requested strikeout within the allowable expenses for project vs within administrative costs.

Response: DEC disagrees with the strikeout. Procurement activity specific to a given project is viewed by DEC as an eligible project-level expense.

DEC Comment: Upon further review of Section A(6) - Investment of CWSP funds; Insurance on CWSP funds, DEC financial staff identified opportunities for additional flexibility in how CWSPs can insure funds held in their accounts and modified text accordingly.

Comment: NRPC suggests deleting reference to an 'appearance of a conflict of interest' in C.1.e.

Response: DEC agrees.

Comment: Numerous commentors provided input on Section 3.C in written form, and during stakeholder meetings. Commentors expressed concern over the appearance that DEC was

mandating a procurement-by-contracting approach, to the exclusion of allowing CWSPs to conduct subgranting. One commentor recommended deletion of Section 3.C.2.

Response: As a result of this feedback, DEC has substantially revised this section based on stakeholder input, including input stating a preference for the issuance of subgrants.

Noted: DEC accepted edit at A3 regarding staffing. Changed to capacity.

In addition, DEC effectuated the following changes:

- In Section B, DEC financial staff recommended simplification by removal of guidance directing CWSPs to file certain internal control policies or financial reporting documents with DEC
- In Section C(1)(d), DEC has removed reference to debarment checks, since this process is better covered by individual Formula Grant awards.
- In Section 3(c), guidance regarding records retention was simplified.

#### **Chapter 4**

NRPC Comment: Change statutory reference to 10 VSA § 924

Response: DEC agrees, and this reference has been revised

Comment: With respect to the reference “CWSP shall establish a BWQC for each basin and shall coordinate with the TBP statutory partners to select eligible members” – This is not what the law or rule says. The language proposed here conflates Act 76 requirements with language applying specifically to Tactical Basin Planning (NRPC).

Response: For those BWQC members that are represented by TBP statutory partners, those members shall be selected by the applicable...statutory partners for 6 out of the 9 seats. DEC agrees that for the remaining 3 out of 9 members will be selected by the CWSP in consultation with municipalities (2 seats) and conservation organizations (1 seat). Revised to reflect the language in the Act and in concurrence with the Rule.

Comment: Strike reference to the selection and appointment of watershed organizations by Watersheds United Vermont”

Response: WUV is a TBP Statutory partner and serves as the organizing entity for those watershed associations to assist in the development of Tactical Basin Plans pursuant to 10 VSA §1253(d). Since the BWQC shall participate in the basin planning process established in §1253(d), WUV represents the obvious statewide, organizational network of local watershed organizations/ community-based watershed groups that can provide input on suitable BWQC watershed association members. Thus, DEC supports proactive engagement with WUV as the lead organization for CWSPS to consult during selection and appointment of eligible watershed organization.

Comment: Alternate members **shall** be established at the first meeting of a BWQC and may be changed with reasonable prior written notice to the BWQC and CWSP.

Response: DEC agrees, and revision made to reflect this language.

Comment: The following proposed language is unclear. It must be revised and should allow staff whose job function is not related to CWSP (e.g., in housing) to serve as a member of a BWQC.

“For staff of CWSP organizations who may serve as BWQC members (or Alternates) for the basin in which they are not the CWSP. BWQC members shall not include staff of the CWSP host organization providing staff support to their BWQC. Further, staff of CWSP organizations not involved in CWSP management may serve as BWQC members or alternates for the basin in which they are the CWSP.”

Response: DEC agrees that the staffing of BWQCs should remain sufficiently flexible to allow staff of a CWSP host organization to be eligible to serve as a member of the BWQC as long as they do not also serve in the CWSP role, or in a supplemental role to that of the CWSP staffer. Text was modified accordingly.

Comment: Regarding reappointment at BWQC members at the end of their term, the reference to the timing of notification of BWQC members up for reappointment is not in statute or the CWSP rule. (This) might be suggested but should not be mandated. Further, this (reference) should be recast as enabling BWQC bylaws to address this issue.

Response: DEC agrees that the timing of notification is not in statute or the CWSP Rule, and the suggested timeframe is suggested as part of Guidance where advance notification will assist with BWQC member transition and replacement if necessary. This is also the case with how the initial term of replacement may represent the unexpired portion of the term for the member being replaced. A minor modification to the text was made to accommodate this.

Comment: NRPC proposes the inclusion of an additional #4 in this section, such that “If organizations cannot reach consensus regarding representation of the area of endeavor, the CWSP shall select the representatives from eligible organizations.”

Response: DEC disagrees as this is already codified in the CWSP Rule and appears to be redundant. The Guidance should not serve as a proxy for the Rule, but rather suggestions and recommendations to adopt best policies where the Rule can be supplemented, such as where Guidance can promote the development of BWQC bylaws and policies to address this issue.

NRPC Comment: Regarding dismissal of a BWQC member, NRPC suggests striking language regarding the need for a quorum to dismiss a BWQC member for failure to uphold their duties and responsibilities.

Response: It is unclear how the edits proposed in this section would comport with the intent of the suggested process to dismiss a BWQC member.

Comment: Regarding the draft language around the appointment of Ex Officio members, NRPC feels that this language is new, and its implications are unclear.

Response: DEC is proposing that Ex Officio members could be appointed as BWQC members if BWQC policies are developed that allow that as an option.

Comment: The language that encourages the BWQC adoption and implementation of a public participation policy is “surplusage and unnecessary.”

Response: DEC disagrees, as having a robust public participation policy is very much encouraged as an element of community engagement, and for equity and inclusion in clean water

implementation efforts. DEC's tactical basin planning process encourages community engagement and broad participation in the tactical basin planning process, and as a means to encourage diversity and inclusion per clean water implementation efforts. DEC may revise this prose to better reflect TMDL objectives that enhance community engagement for surface water restoration efforts.

Comment: Where is the statutory authority for BWQC participation in the review and involvement in the surface water assessment reports, and their reference in TBPs?

Response: Act 76 stipulates that the purpose of a basin water quality council is to establish policy and make decisions for the clean water service provider regarding the most significant water quality impairments that exist in the basin and prioritizing the projects that will address those impairments based on the basin plan. A basin water quality council shall also participate in the basin planning process (10 V.S.A. § 924(g)(1)). While the BWQC has no statutory authority to opine on assessment reports, their input is nonetheless welcomed as the understanding of assessment reports is key to understanding how to prioritize impairments within their basin.

Comment: Where is the statutory authority to require BWQCs to coordinate with DEC's Watershed Planners as DEC's primary point of contact to liaise with DEC technical programs?

Response: See previous response.

Comment: Why is all this detail included here if there is a whole chapter on this? a-e should be deleted (comment pertains to the section in Chapter guidance on project selection (2.a.i)).

Response: The intent of this section of Guidance is to clearly establish the BWQC's roles and responsibilities, of which includes prioritizing the projects that will address those impairments based on the basin plan.

Comment: This text isn't relevant in a section aimed at BWQCs (comment pertains to the use of DEC's Watershed Projects Database).

Response: DEC disagrees in that all projects that are identified, prioritized, and selected for funding must be entered into DEC's watershed projects database.

Comment: Per the role in reviewing CWSP policies, some of the language removed should be reinserted.

Response: Duly noted.

Comment: Per the above referenced section, #4 is superfluous. However, it also is important to note that it contradicts DEC statements that the Guidance for Subgrants equals the Procurement procedure.

Response: The BWQCs role in reviewing CWSP procurement policy is codified in statute.

Comment: With respect to meetings and actions, the reference to voting on projects outside of regular BWQC meetings does not belong in this section, we have a whole chapter.

Response: The reference is to voting outside of regular BWQC meetings, which DEC sees as appropriate content in the “meetings and actions” section of Chapter 4.

Comment: WRT Meetings and Actions, the section on additional meetings and reference to the Open Meeting Law - is unnecessary. How many different ways and in how many different places must we state the need to follow open meeting law?

Response: Chapter 4 is intended by use of BWQC members and other stakeholders who may not be as well versed in the Open Meeting Law as CWSPs. As such, DEC does not see this inclusion as being unnecessary or redundant.

Comment: Reference to BWQC coordination with DEC Watershed Planners - This seems to move the BWQC into an area of initial project prioritization that is more appropriately the role of the CWSP.

Response: DEC disagrees, as BWQC members need to understand how to review and interpret TBPs.

Comment: Re: Professional Conduct (section 5) should be related to BWQCs and not include CWSPs as well.

Response: This section has been modified to focus on professionalism of the BWQC as remaining text is addressed elsewhere in Guidance.

Comment: Regarding Conflict of Interest – remove reference to CWSPs - Contracts would be more appropriate place to address CWSP standards.

Response: See above.

Comment: Remove Appendix 2 – not appropriate.

Response: See earlier response on the role of WUV in selection.