

Act 76 Guidance Chapter 6 - Responsiveness Summary

On Friday February 10, 2023, the Vermont Agency of Natural Resources (ANR), Department of Environmental Conservation (DEC) notified the public about the 30-day public comment period for the final draft of the Act 76 Guidance Chapter 6 (Clean Water Projects). A summary of the public comments that were received through the public-comment period ending March 13, 2023, for this iteration of Chapter of Act 76 Guidance and are included in the following section.

Act 76 Guidance Chapter Workgroup sessions have been ongoing and specific review meetings for each Chapter of Guidance has been conducted with Act 76 stakeholders, including CWSPs, BWQC members, NGOs (including Watersheds United Vermont), and other stakeholder organizations and representatives of Agency of Natural Resources technical programs and VHCB.

The DEC prepared this responsiveness summary to address specific comments and questions submitted during the comment period and to indicate how the Chapter has been modified in response to those comments.

Formal comments received by 03/13/2023, were submitted by:

- The Lamoille and Missisquoi CWSP (referred to here as the Northwest Regional Planning Commission or NWRPC)
- The Northern Lake Champlain CWSP (referred to here as the Chittenden County Regional Planning Commission)

NWRPC

I am writing to share NRPC's views on version 6 (public comment version) of Chapter 6 of the Act 76 Guidance document. I have provided my thoughts below in hopes DEC will reconsider its position on some of the important issues raised by the text. Very simply, the proposed guidance still does not align with Act 76 and Rule. CWSPs are DEC grantees created by statute and having a mandate clearly informed by administrative rule. We object to the amount of text directing CWSPs how to carry out their role. \1 Thus, we believe it would be a mistake if the guidance is finalized without addressing the following:

- Comment: DEC's Guidance must conform to the CWSP Rule and give more explicit recognition to total P reduction as a criterion for project selection. In light of the fact that CWSPs were created to help the state achieve P reduction targets, the lack of emphasis on absolute P reduction is perplexing to say the least. \2

Response:

DEC disagrees and believes that Guidance is in conformance with Act 76 and the CWSP Rule. The CWSP Rule provides a list of criteria that must be considered when prioritizing projects: "consider empirical project-specific factors including the pollution reduction, cost effectiveness of that reduction, design life, cost of operation and maintenance of the project,

and conformance with the basin plan.” However, the CWSP Rule does not require them to be equally weighted, leaving DEC room to provide emphasis where needed. DEC's decision to emphasize cost-effectiveness is therefore in conformance with Rule.

DEC agrees that the total phosphorus load reduction value is paramount in achieving Vermont’s clean water goals that help meet TMDL target load reductions, as well as CWSP target load reductions. Rule and Guidance provide flexibility for CWSPs and BWQCs to weight prioritization criteria. CWSPs and BWQCs may consider total phosphorus load reduction *in addition* to the project’s cost effectiveness in treating phosphorus when scoring/prioritizing projects. However, acknowledging that Formula Grant funds are limited and are allocated based on a target and cost per unit of total phosphorus load reduced, CWSPs and BWQCs must consider phosphorus cost effectiveness in prioritization of projects. Estimated total phosphorus load reductions must be calculated consistently with DEC’s Standard Operating Procedures for Tracking & Accounting and cost effectiveness must be calculated consistently with the equation described in Chapter 6 (the relevant equations/calculations are incorporated into the Interim Phosphorus Reduction Calculator Tool) in order to maintain consistency:

- (1) with the assumptions implicit in the Fund Allocation Methodology,
- (2) in project prioritization across watersheds, and
- (3) with how the state will account for progress toward meeting phosphorus targets at the CWSP/watershed-scale and at the TMDL implementation-scale.

Please be advised that if total phosphorus load reduction of a project were to be considered without consideration of the cost effectiveness of the total phosphorus load reduction, CWSPs may find themselves pacing off track to meet the total phosphorus load reduction target assigned based on funds allocated in the Formula Grants.

No substantive edits were made to Chapter 6 as a result of this comment. However, one minor edit was made to better articulate the standardized approach for calculating pollution reduction cost effectiveness is required “... to ensure consistency between how projects are prioritized and how progress toward achieving targets will be assessed.”

• Comment: DEC’s Guidance must not dictate a single approach be used to calculate cost effectiveness when other reasonable approaches may exist, cost estimates are volatile, and DEC’s need for particular data for tracking or comparison purposes (i.e., meeting DEC definition of cost effectiveness) can be provided by the CWSPs regardless of the specific method of prioritization. Further, the Guidance’s must not dictate that that DEC’s method of calculating cost effectiveness be the “primary metric for ranking projects.” \3

Response:

DEC disagrees and believes that a consistent approach is needed to calculate cost effectiveness as part of project scoring/prioritization. See response to comment above for explanation on why consistency is needed in calculating cost effectiveness tied to total phosphorus load reduction performance of a project.

Regarding cost estimates being volatile, Chapter 6 recommends the CWSP recalculate cost effectiveness of a project when the project's cost estimates change and revisiting the project's scoring/prioritization with the CWSP/BWQC to determine if the project is still a priority use of Formula Grant funds.

See response to comment above for acknowledgement that CWSPs and BWQCs have flexibility to establish their own scoring/prioritization approach, including weighting of criteria. However, cost effectiveness must be considered and calculated in a consistent format articulated in Chapter 6.

Finally, we agree that CWSPs/project implementers will submit final project data upon construction/implementation to meet DEC's reporting requirements. However, a project's estimated total phosphorus load reduction value must be calculated consistently from prioritization through construction, since prioritization of funds are based on a project's anticipated contribution toward meeting the target once the project is constructed/implemented.

Note that edits have been made to section 5(b)(ii)

- **Comment:** The 'granting versus project solicitation' dichotomy presented on page 4 must be removed or, alternatively, presented merely as an idea CWSPs may wish to consider. \4 It is an unreasonable leap of logic for DEC to assert that because the CWSP Rule contemplates different types of project solicitations (the actual focus is on project identification and assessment versus design and implementation) that this structure should form the backbone of the CWSP work.\5

Response:

The project solicitation mechanism is presented as an alternative to granting in instances where a CWSP may determine the need to contract for services to support implementation of clean water projects as needed to meet targets that are not being met through grant rounds. Additionally, if the nature of the resulting relationship is better suited for a subcontract as opposed to a subgrant CWSPs will need to solicit those projects outside of a granting round. An example may be entities who are ineligible to receive grant funds may have projects that could be funded by the CWSP. The guidance more vaguely outlines scenarios where granting is ill suited and refers to the Agency of Administration's bulletin guidance. CWSPs should not look at these as options, as contracting is more of an exception under the Formula Grant framework. In other words, CWSPs should not co-opt a granting round in favor of a sole-sourcing or direct contracting unless there are projects that cannot advance otherwise.

- **Comment:** In "Project Selection Considerations," Guidance must not suggest BWQCs have authority beyond what is provided in Rule. CWSPs working with BWQCs may choose to develop policies in this area. However, it is entirely inappropriate for the Guidance to present interpretations as fact without extensive discussion with—and more importantly concurrence of—CWSPs.

Response:

DEC understands that the Rule provides BWQCs with authority to provide final score adjustments - " BWQC shall consider the preliminary scoring and ranking of all proposed clean water projects as drafted by the CWSP for both project development or implementation categories and make any adjustments to the co-benefits scoring as needed. The BWQC shall vote to advance clean water projects for both development and construction to fulfill pollution reduction goals. "

Further the Rule does not require BWQCs to accept any of the proposed projects and provides further guidance in order to clarify BWQC roles and responsibilities, DEC does not interpret this as going beyond their authority. DEC conducted a robust review of Chapter 6 with CWSPs, BWQC members, and other stakeholders to seek the balance necessary to enhance communication and coordination on project proposal considerations. Please note that ANR (e.g., the DEC Act 76 Team) embarked on the guidance development process in order to facilitate these conversations and provide project selection guidance that fulfills DEC's obligations called out in the Act that "guidance" shall address "how the Clean Water Service Provider integrates prioritizes and selects projects..." (§ 924 (a)(3)(A)).

Endnotes- Comments on Chapter 6 of Guidance

Comment: 1 Dictating how grant supported CWSPs must function in a document that also notes "Grants are commonly issued to organizations that perform public benefit activities *with a high degree of independence*" [emphasis added] is hypocritical and wrong.

Response:

DEC disagrees. As a function of the intent of Act 76 (of 2019), the Guidance is intended to address CWSPs' obligation with respect to implementation of the Act and related CWSP Rule. Pursuant to the Act, the Guidance references the Act and the Rule, and in doing so provides necessary guidelines on the use of Clean Water Funds. Chapter 6 goes on to state that "Grantees often adhere to programmatic requirements of the state program under which the grant is issued (e.g., this guidance document and the CWIP Funding Policy) and are required to submit financial, programmatic and/or performance reports to the Granting Agency." Thus, the Guidance recognizes the policy requirements in utilizing the state's Clean Water Funds as well as to provide flexibility, so that giving due consideration to the expertise of those organizations and other requirements for the administration of the grant program. Further the CWSP Rule establishes requirements for the implementation of 10 V.S.A., Chapter 37, Subchapter 5, related to the operational, financial, managerial, and technical aspects of CWSP services, as well as the governance structure for BWQCs. In this regard, DEC's intention is to strike the balance between adherence to state policy while applying the needed latitude to navigate the ability for CWSPs to issue subgrants to organizations within a basin.

Comment: 2 Please note that, in this regard, NRPC fully supports use of DEC's P reduction estimation tools.

Response:

Duly noted and appreciated.

Comment: 3 As we have commented previously, DEC should not dictate that CWSPs prioritization models that combine P reduction and cost effectiveness into a single synthetic criterion. Doing so will only compound the uncertainty already inherent in the P reduction and cost data.

Response:

See responses to comments above.

Comment: 4 The structure presented in guidance is a proverbial ‘solution in search of a problem.’ Not only is imposing such a structure at odds with the high degree of independence that CWSPs have as grantees, but the structure also has no real basis in Rule. The issue that *should* be addressed in Guidance but isn’t the need for solicitations to address two categories of projects--identification and assessment projects versus design and implementation projects.

Response:

Guidance regarding “granting versus project solicitation” is not an issue of “degree of independence.” It is necessary to conform with the state’s Bulletin 5 (governing granting) and Bulletin 3.5 (governing contracting) and is intended to make both granting and contracting solicitation mechanisms available to CWSPs based on project priorities and project implementer roles/capacity.

DEC fully intends to draft clean water project guidance around project identification and development that will serve as a supplement to Chapter 6 in the coming months. DEC did not focus on that part of guidance in Chapter 6 yet as project identification and development activities have ongoing grants/contracts during the transition to the suite of Act 76 funding programs.

Comment: 5 DEC's very detailed requirements relating to each project type (in terms of scope, milestones, and deliverables) reduce the differences between grantees as project sponsors and contractors as project sponsors substantially, perhaps to the point of irrelevance but for allowing sponsoring organizations to manage projects. Furthermore, CWSPs are already addressing the allowances found in Rule by following procedures based on the status of the applicant/project sponsor. The procedures will work as well as if not better than what is proposed and be less complicated.

Response:

CWSPs must implement procedures in accordance with the Rule, Guidance, and Funding Policy. Accordance with these requirements will be assessed to determine CWSPs’ adequate progress and inform CWSPs’ reappointments. It is unclear if this footnote is questioning the requirement of standard milestones and deliverables. Standardized milestones and deliverables per clean water project type are necessary to ensure consistent expectations/requirements, especially in a decentralized framework, for how projects progress through project steps and how projects are tracked and reported.

Comment: 6 CWSP Rule section § 39-403 (e) states that “Based upon project priorities identified under § 39-403(d), the BWQC shall consider the preliminary scoring and ranking of all proposed clean water projects as drafted by the CWSP for both project development or implementation categories *and make any adjustments to the co-benefits scoring as needed.* The BWQC shall vote to advance

clean water projects for both development and construction to fulfill pollution reduction goals. Individual clean water projects should not be voted for advancement outside of this selection process unless to address an urgent water quality concern with the concurrence of the Secretary."

Response:

As stated in the Rule, no DEC response appears to be warranted.

CCRPC

Comment: The language starting on page 4 trying to define procurement, sub-granting, solicitation and procurement is dense and somewhat confusing. We urge you to streamline this text, so it is consistent with Act 76. As Basin 5 CWSP, CCRPC complied with state procurement policies (e.g., we prequalified subgrantees and subcontractors) and we have just completed our first round of solicitation for subgrant applications. The entire paragraph on page 5 regarding "project solicitation and/or procurement" is confusing, especially the part about "project solicitation" outside of a granting round....".

Response:

Project solicitation and procurement language in Chapter 6 is written within the constraints of the CWSP Rule and other sections of published Guidance. DEC did its best to simplify and streamline the language within these constraints.

Comment: The language starting on page 18 regarding "Leverage and Match" prescribing a re-evaluation of pollution reduction cost effectiveness if more match money is found is punitive and disincentivizes finding match money. As a CWSP, my goal is to meet the P-reduction target and not exceed the allowable funds I receive from the Clean Water Fund. For example, if a watershed group is providing funds from private citizens or uses volunteer staff that effort should not be penalized. Why does DEC care as long as the P-reduction target is met???

Response:

The intent of re-evaluating cost effectiveness is to provide transparency to the BWQC in the event a project becomes less cost effective. This may be warranted if the project budget increases and/or the project's estimated total phosphorus load reduction is less than originally estimated. This is warranted if new information is learned in the process of prioritizing a project within a funding round, but DEC acknowledges it may not be possible to re-evaluate once a project step is funded. DEC encourages this to occur between funding steps, as needed.

DEC has revised Chapter 6 to reflect on this comment as it relates to section 5(b)(ii) - "Project Costs for Budget Development" that clarifies the use of leveraged/ matching funds as it pertains to crediting for overall project cost considerations, such that CWSPs may claim credit for the pollution reduction they fund, together with any leveraged funds brought in, so long as the leveraged funds do not result in another organization also 'claiming credit' for reducing pollution in accordance with an allocation of the TMDL.

Comment: Lastly, I have read the March 8 comments sent to you by Northwest RPC and agree that the concerns they have identified need to be addressed in collaboration with the CWSPs.

Response:

Duly noted. See DEC's comments that appear above.

Summary of DEC Revisions Made to Chapter 6, Version 6

Sections edited by DEC since Version 6 are highlighted in yellow in the final version 7.0

- “Municipal Separate Storm Sewer System (MS4) Permit” Section was edited to:
 - Clarify that MS4 permit regulatory projects are ineligible at all project steps from design through O&M.
 - Clarify process to request case-by-case approval for a CWSP and MS4 to partner on a project that supports both regulatory and non-regulatory goals.
 - Clarify that if a CWSP and MS4 partner on a project, the CWSP and MS4 must negotiate, and document portion of funding provided, and phosphorus reduction credit claimed by each entity.
 - Clarify that MS4s may work on non-regulatory Formula Grant projects if in the future they have fully met their regulatory phosphorus reduction targets, *as determined by the DEC Stormwater Program*.
- “Transportation Separate Storm Sewer System (TS4) Permit” Section was added to refer to an addendum to Guidance defining Agency of Transportation (VTrans) TS4 projects that are ineligible for Formula Grant funds. The draft addendum will be circulated for stakeholder review/comment.
- “Pollution Reduction Cost Effectiveness” Section was edited to:
 - Clarify importance of consistency in between how projects are prioritized and how progress toward achieving targets will be assessed.
 - Clarify it is the responsibility of the CWSP to ensure phosphorus estimates for prioritization purposes are calculated consistently with DEC accounting methods, and that DEC provides/maintains tools to support this process.
 - Acknowledge that project costs and estimated phosphorus reductions are subject to change as projects develop/advance, but CWSPs and project implementers should do their best to anticipate the project costs and phosphorus reductions.
 - Clarify that DEC will ultimately be the entity to determine final phosphorus reduction credit based on the final constructed projects and DEC accounting methods.
 - Clarify how leveraged funds/co-funding should be accounted for in estimating cost effectiveness for prioritization and crediting purposes, with the intent of incentivizing CWSPs/partners to bring in new funding sources above and beyond those administered/provided/captured by the State of Vermont.