

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

**Ch. 39 Clean Water Service Provider Rule
Responsiveness Summary**

The Vermont Agency of Natural Resources, Department of Environmental Conservation (Department) is presenting the Final Proposed Ch. 39 Clean Water Service Provider Rule (Rule), prepared pursuant to the Clean Water Service Delivery Act of 2019 (Act 76 or Act), for approval by the Legislative Committee on Administrative Rules. The Vermont Secretary of State publicly noticed the proposed Rule online on 12/30/20 and in newspapers of record on 1/7/21. A public comment period ran from the date of notice to February 19, 2021. The Department held two public hearings—one during daytime hours and one during early evening hours—to maximize the opportunity for participation. Safety precautions due to COVID-19 required virtual hearings, with a call-in option and closed captioning available. At the close of the comment period, the Department catalogued 58 comments from 10 organizations and several individuals. This responsiveness summary documents how the Department considered and addressed all comments, including related Rule revisions.

As a preface to the comments and responses, the Department has also prepared the following overview of interrelated Rule sections that may affect the subject of conflicts of interest and the Department’s consideration of associated comments. As one commenter noted, the Rule is complex, and a full appreciation of the Rule cannot be obtained without considering how the subchapters interrelate.

At the highest level, all commenters expressed concern about Rule provisions that relate to conflicts of interest and commenters focused a high proportion of their remarks upon this difficult topic. The role of the Basin Water Quality Council (BWQC) members as established by the Act presents a heightened potential for conflicts of interest. Specifically, the Act states that the purpose of a BWQC 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 clean water projects that will address those impairments based on the basin plan.” 10 V.S.A. § 924(g)(1). The Act identifies statutory members of the BWQC (§ 924(g)(2)), and these members represent organizations that in some instances have a primary mission to build water quality projects. Two examples of conflict are immediately evident: 1) a BWQC member making a decision upon a project for which they propose to receive Formula grant support to implement; and 2) a BWQC member voting against the advancement of an otherwise valid project in order to preserve availability of Formula funds for a project in which they have an interest.

There are three key areas of the Rule that especially relate to the issue of conflicts of interest:

- 1) §§ 39-306 (g-i) - Prequalification and Procurement;
- 2) § 39-403(d) - Clean Water Project Identification, Prioritization, and Selection; and
- 3) Subchapter 6 - Conflicts of Interest.

The Department considered all proposed options with regard to Subchapter 6 and looked at the issue from every viewpoint practicable, taking into consideration the BWQC's statutory purpose (quoted above). In so doing, the Department recognized that the draft Rule as proposed for public comment had strayed from this statutory purpose, particularly in the area of procurement (§ 39-306(g)-(h)). While the approach taken on procurement was intentional and reflective of a long stakeholder dialogue, it was, at its core, beyond the intent of the Act's language. The Department contends that the construction of this section of the draft Rule in fact significantly exacerbated the tension around conflicts because it brought the BWQC unnecessarily close to the procurement process.

The Department noted and concurs with all commenters on the need for a robust conflict of interest policy. The substantial public investment in the work of BWQCs and CWSPs under Act will need to stand up under administrative, legislative, and public scrutiny. Accordingly, the Department will not significantly revise the conflict of interest provision from the original proposal. However, the Department also understands the impact this area of the Rule could be perceived to have; specifically, that statutory members of the BWQC may not be able to serve on a BWQC to fulfill their charge and still have their organizations involved in implementation of clean water projects. Given the importance of those organizations in the effective management of clean water project implementation, and other prospective roles, the Department is committed to making the resulting system work as CWSPs and BWQCs start their work. With all of these considerations in mind, the Department has reached the following conclusions on issues raised.

- 1) The Department has modified procurement to align with the BWQC's statutory charge, by eliminating the allowance of sole source agreements for subgrantees or subawardees selected by a BWQC to implement a clean water project. Allowing BWQC members the authority to select prequalified entities to implement a project, and then take action to direct a project to a BWQC-selected entity exacerbates conflict of interest unnecessarily. The alternative to be further developed in the Secretary's Guidance will be for the BWQC to make decisions to advance a project, allowing the procurement process implemented by the CWSP to unfold after the BWQC's decision to advance a project. The CWSP shall utilize its specific procurement provisions, which may limit solicitation to (no less than three) prequalified entities. Disconnecting the BWQC from oversight of prequalification is also a step toward alleviating the conflict of interest tensions.
- 2) The Department has changed the project selection/prioritization process. More specifically, Rule references to the BWQC deciding upon a "slate of projects" have been eliminated. While this may require additional effort in the decision-making process, making decisions project-by-project should help reduce the frequency of conflict of interest concerns, so long as BWQC members are mindful of the potential for conflict, including the two specific examples above.
- 3) The Department eliminated the authority for the CWSP to make decisions on project advancement when there is no BWQC quorum due to conflicts of interest.
- 4) The Department does not agree with the several suggestions that DEC should serve as the arbiter of project advancement decisions in place of the CWSP when there is no quorum due to conflicts of interest. DEC staff will be available to assist in the

application of empirical scoring, but Act 76 does not confer to DEC a decision-making capacity on specific project advancement efforts by the CWSP and its BWQC.

- 5) The Department declined to reinstate into the Rule certain “explanatory” or “rationale” language about inherent tension around BWQCs and Conflict of Interest that had been included in an early draft of the Rule.
- 6) The Department agrees that a clear and effective project selection process is key to successfully navigating the conflict of interest provisions of the Rule. Accordingly, the Department will provide information on a project advancement process that will be contained in the Secretary’s Guidance to assist CWSPs and BWQCs. DEC will work with the Act 76 Advisory Group in the development of this process.
- 7) The Department revised Subchapter 6 to specifically require persons with a CWSP decision making role to disclose any conflict of interest and recuse from any decision subject to that conflict.

Other areas of comment have been addressed in the comment-specific responses below.

Lastly, as part of its final review of the Rule, the Department identified and addressed minor technical or language corrections, which are reflected in the Final Proposed Rule and “Description of Changes” document.

General

- 1) In this Rule, we are concerned that DEC is putting too much of its legal responsibility for meeting the goals of TMDL(s) on the Clean Water Service Providers (CWSP) and the Basin Water Quality Councils (BWQC). The state of Vermont bears the ultimate responsibility for the nutrient reduction requirements of the Lake Champlain TMDL, as well as any other TMDLs that may be addressed by this structure in the future. While the CWSPs and BWQCs will implement and administer the programs, any failure to meet pollution reduction goals ultimately falls on the state of Vermont.

Response: The Department appreciates this concern. The Rule pertains only to non-regulatory programs, which are critical, but still only one component of addressing the TMDL. Thus, the Department acknowledges its ultimate responsibility to implement the TMDL. The Rule does not assign responsibility, but rather sets forth an assignment of targets, a framework to achieve them, and a requirement that targets be funded.

- 2) The relationship of the CWSP and the BWQC in project selection has certainly been a subject of discussion. Generally, it has been agreed that the CWSP will rely on the expertise of the BWQC members to select a slate of clean water projects to reach the annual pollution reduction goals and then the CWSP will administer this process. But this relationship is still not clear in all parts of the Draft Rule. When specific sections of the Rule are viewed in isolation, the role and relationship of CWSP and the BWQC is sometimes unclear. However, when the Draft Rule is read as a whole, a more complete portrait of the relationship is presented. The Guidance document should emphasize that the CWSP and BWQC relationship is to be viewed within the context of the Section 39-101 Purpose as well as Section 39-502(a) which establishes that it is the responsibility of the BWQC to “establish policy and make decisions ... and prioritize[e] the clean water projects.”

Response: So noted, and the Department will work with partners on this aspect when drafting and developing the Secretary’s Guidance Document (Secretary’s Guidance).

- 3) The BWQC members should be expected to spend time participating in a variety of activities to support the CWSPs, including time preparing for meetings, reviewing projects, attending meetings, and being generally available for the CWSPs when their expertise is needed. I worry that it may be difficult to convince parties to participate fully. The time that they spend reviewing projects and participating is valuable and should be compensated. That compensation needs to be fair and equitable for all parties serving in the BWQC. It is unclear where the funding for this compensation will come from and whether it will be a source fairly and equitably available to each of the entities in the BWQC. For example, the TBP funds are not available to each of these entities and are not currently available equitably between the groups who do receive them. A separate source of funds should be available for the BWQCs and dispersed according to time spent by each member organization, with general oversight by the CWSP to ensure that the time spent is meaningful and efficient. The language in sections related to BWQC includes a broad set of responsibilities, and a mechanism for fair compensation should be clear.

Response: Specific details related to compensation for CWSPs and BWQCs will be noted in the funding documents (i.e. the Formula Grant Award) as well as the Secretary's Guidance. The Department agrees that BWQC members should be duly compensated for their participation in this work.

The Rule § 39-503(g) provides for reasonable compensation in the BWQC, and the Department has revised this section slightly in response to this Comment #3 and Comment #46.

- 4) This decentralization of rules, processes, and timelines can add significant administrative burden to companies and organizations who provide clean water services in multiple basins. Consider steps to streamline this, such as:
- Establishing common procedures across CWSPs, such as one common procurement policy for all CWSPs (Section 39-306-d calls for each CWSP to have a procurement policy) and a common process for pre-qualification requests (Section 39-306-h allows for each CWSP to conduct pre-qualification).
 - Mandating that CWSPs post critical notices such as those for procurement, pre-qualifications, etc. to a central information board (Section 39-307-d requires each CWSP to maintain its own website).

Response: The Department will provide recommendations for procurement and may provide additional information and requirements for prequalification of subcontractors in the Secretary's Guidance. Opportunities for use of a central information system for managing procurement will also be considered for feasibility, including whether the State's procurement system could be made available to CWSPs for this purpose.

Definitions

- 5) In the Definitions, the Dept. added qualifiers to the definition of "clean water project" under (6)(B)(iv) that was not reviewed or discussed by the stakeholders. Our groups are not necessarily opposed to the added qualifiers but want to ensure that they will not limit projects on agricultural lands. We request that the addition be further clarified in Guidance as to what types of natural resource projects are still eligible as noted under subdivision (6)(B)(ii), what size or types of farms do not meet the minimum thresholds needed for compliance with the Required Agricultural Practices (RAPs), and whether non-regulatory projects on farms that are under the scope of the RAPs would remain eligible.

Also, it would be helpful to establish in Guidance exactly what the role of the Agency of Agriculture, Farms & Markets (AAFM) will be and the process they will undertake in their quarterly review of project "eligibility, selection, and progress" under Section 39-403(d)(3), particularly if this will be on a project-by-project basis or by project type. It is understood and agreed that Act 76 funds cannot be used for regulatory compliance, such as on-farm projects necessary for compliance with the RAPs. However, in general, agricultural projects are some of the most cost-effective projects to undertake for nutrient reduction and an added level of CWSP Governance review should not become a barrier to their inclusion in a slate of projects.

Response: The Department agrees, and will clarify in the Secretary’s Guidance in accordance with Rule § 39-304(b), in collaboration and consultation with Agency of Agriculture, Food and Markets (AAFM). As referenced in Rule §§ 39-304(b) and 39-403(d)(3), CWSPs shall consult with AAFM to determine project eligibility on agricultural lands. Based on 10 V.S.A. § 921(4)(A), and current AAFM programming, implementation of an agricultural land use practice on a jurisdictional Required Agricultural Practice (RAP) farm cannot – by definition – be considered an eligible clean water project. Still, many types of natural resources projects will remain eligible for formula funding. Additional information may be found in the 2020 “[Act 76 Report on Water Quality Projects on Farms.](#)”

- 6) Consider changing the definition of “Co-benefit”, as follows:

“... means the additional benefit to local governments and the public provided by or associated with a clean water project, including **but not limited to** flood resilience, **hazard mitigation, educational**, ecosystem improvement, and local pollution prevention.”

Response: The Department has revised the definition of “co-benefit” to expressly reference hazard mitigation and education. Additional examples of co-benefits tracked by the Department may be found in the Clean Water Performance Reports for any given year (for example, see page 12, [2020 Report](#)). The Department notes that the phrase “including” introduces a non-exhaustive list, and it is the Department’s drafting preference and practice to avoid the redundancy within “including **but not limited to**.”

- 7) There has been a lot of talk about prequalifications (section 39-306 (h)), but little detail about what this will entail, or which suite of organizations are included. The rule should more clearly define how and for whom prequalification processes will apply. Ideally CWSPs will develop a uniform system for approving contractors and consultants. I believe that towns, watershed groups, land conservation groups, RPCs, and conservation districts should be handled differently as implementors, since they are listed in state statute, are required members of the BWQC, and (I think) are able to accept funds directly from the DEC without a bid process. The consultants and contractors would go through the full prequalification process and/or the bid process for appropriate parts of projects. The CWSP will be responsible for ultimate success of each project, and part of growing capacity in some areas, may include the CWSP coaching a less-experienced implementer group from one of these categories (district, town, etc) through the implementation process.

Response: The Rule § 39-306(h) has been revised, to remove the allowance for sole sourcing a pre-qualified subgrantee or subcontractor selected by the BWQC to implement a clean water project. It is incorrect that the groups referenced in this comment are uniquely eligible to accept funds directly from the Department without following a bid process. Further clarification and direction of the project selection and procurement requirements will be provided in the Secretary’s Guidance, including information on the pre-qualification process, which will be a tool that CWSPs may use under a modified procurement process.

- 8) I want to clarify something written in paragraph three... The named groups in the paragraph should be treated equally as implementers (even if they happen to be a CWSP) and should undergo a review of qualifications. But I don't think the process should necessarily be the same that we will use for the consultants, engineers, and contractors (the for-profit groups). We need to build capacity in the former group to get as many projects implemented as possible, which will necessitate working with (not disqualifying) the less-qualified or inexperienced groups to help them grow skills and capacity. Thus a different process to understand how we can help inexperienced, potential implementers to better assist the overall goals of Act 76.

Response: Procurement is not the same as training or capacity development. The Department acknowledges the need for capacity development, especially in specific basins, which the Department expects to support through other mechanisms. Further, note that §§ 39-306(h-i) of Rule have been revised, as noted in the Department's Response to Comment #7.

Furthermore, nothing in the Rule prohibits a CWSP from seeking out training or even 'pre-qualifying' themselves for implementing specific project types, should they see fit.

- 9) *Sec. 39-201 - "Administrative Cost"*

Please be more clear that administrative costs may apply to CWSP or BWQC or other subcontracted entities. Replace first sentence with: "Administrative cost" means program and project costs incurred by a clean water service provider **or subaward recipient** ..." Replace the last sentence with the following: "Subaward recipients **are** ~~may be~~ eligible for **administrative** costs **related to their work** depending on the nature of the subaward."

Response: The Department has revised § 39-201 to add: "CWSPs may elect to subaward aspects of Formula Grant administration to subawardees." Administrative costs and project costs will be further defined in the Secretary's Guidance, including when and how "administrative costs" may be subawarded to support Water Quality Restoration Formula Grant program delivery. A point of clarification: administrative costs are intended to fund overall Formula Grant program delivery and administration; individual clean water project costs, including certain administrative activities such as individual project management, administration, and indirect costs, are considered "project completion" costs under the Formula Grant.

- 10) *Sec. 39-201 – BWQC5. "Basin Water Quality Council"*

Please include language specifying the BWQC role in basin planning. Add the following sentence to the end of the definition (language taken from Act 76): "**A basin water quality council shall also participate in the basin planning process.**"

Response: See Rule § 39-502(c), which addresses this BWQC role.

CWSPs

11) § 39-302. *Funding.*

Administrative costs have been previously defined in the draft rule to include reporting costs and is defined in Act 76 as not exceeding 15% of grant amount, these do not need to be repeated here. Remove the following: “...and reporting costs. Administrative costs shall not exceed 15 percent of the total grant amount .”

Response: The Department declines to make the suggested revision to § 39-302. This provision comes from 10 V.S.A. § 925 and is included to be clear about the required grant program parameters, regardless of any redundancy with statute.

12) § 39-306. *Fiscal Management.*

(h) Pre-qualification

Consider defining prequalification. To date there has been debate about this term, what demonstrated level of skill is required, and what the ramifications/limits are. Consider stipulating that future RFQs for prequalification will be standardized across CWSPs. This is to help project implementers who work in more than one basin. We support Watershed United Vermont's suggested language to have CWSPs secure pre-qualification from a third party or DEC should they propose to implement a project. The CWSP RFP did not specify project implementation as a major component of assessments or requests. The skills and qualifications needed to implement the types of projects this process will fund were not adequately assessed through the previous RFP process and should not be given to some organizations while other organizations with longstanding implementation experience go through a separate, more rigorous process.

Response: The CWSP Request For Proposals (CWSP RFP) solicited proposals from entities, who: “will have responsibility for overseeing project identification, prioritization, development/design, construction, verification, inspection, and operation and maintenance” When soliciting proposals from entities to serve as CWSPs, the Department specifically sought qualifications for, and evaluated entities on their technical and project development capabilities. The Department rejects the notion that CWSPs are not authorized to implement projects themselves without completing a second ‘pre-qualification’ process.

Furthermore, requiring pre-qualification of a CWSP could lead to an absurd result: that CWSPs would be tasked with implementing projects that achieve an assigned phosphorus reduction target, while being unable to implement those projects themselves. This would require that all projects be subcontracted/subgranted. Should the CWSP be unable to subcontract or subgrant enough projects, the CWSP would be unable to meet their assigned phosphorus reduction target, defeating the purpose of Act 76.

13) Sec. 39-306(i)

Consider removing the requirement for a written contract for goods totaling \$15,000 or greater. NRCC/VACD believes quotes, estimates, and invoices provide adequate taxpayer protection, and many goods may not have a contract attached, rather an invoice. Services would typically have a contract. Make the following adjustments: “Procurement for **services** by the CWSP or its

subgrantees, for anything except for pre-qualified entities selected by the BWQC to implement a clean water project, shall be by a competitive process for services, with a solicitation of at least three quotations from qualified entities. Purchasing of goods shall require the solicitation of at least two different quotations, except when purchasing items valued at \$5,000 ~~\$1,000.00~~ or less. Records related to the procurement of services shall be retained for the term of the contract plus three years. Records related to the procurement of goods shall be retained for one year after the audit covering the period of purchase of those goods. ~~Procurement of a good or category of goods totaling \$15,000.00 or greater from one vendor in one year shall be by written contract.~~ Equipment and other durable assets purchased by a CWSP shall be maintained.”

Response: The Department disagrees with these changes. A \$1,000.00 threshold is an appropriate threshold for procurement of goods. CWSPs and their subawardees should retain all records for purchases larger than \$1,000.00. The second strike-through would eliminate any upper limit for obtaining a written agreement, which is also not a best practice for financial management.

- 14) For **§ 39-306(h)**. The Clean Water Service Provider RFP process did not pre-qualify CWSPs to implement projects. The CWSPs should go through a prequalification process (just as all other implementing organizations need to) for any project type, whether in their basin or not. DEC should operate a Request for Qualifications for CWSPs that mirrors the process for any other implementing organization. This will not only ensure that the CWSPs are qualified for the projects they are developing, designing, and implementing, but will also give the other implementing organizations assurance that CWSPs are being evaluated in the same manner as their organizations.

Suggested revision: “Sec. 39-306(h) Pre-qualification. Sole source agreements are prohibited, except for pre-qualified subgrantees or subcontractors selected by the BWQC to implement a clean water project. Subgrantees and subcontractors may be pre-qualified through a request for qualifications process implemented by the CWSP. An entity assigned as a CWSP shall be subject to a ~~the~~ pre-qualification process when proposing to implement a clean water project ~~outside the entity’s assigned basin.~~”

Response: See the Department’s Response to Comment #12.

- 15) Consider changing 39-306(i) as follows:

Procurement, Goods and Services. Procurement by the CWSP or its subgrantees, for anything except for pre-qualified entities selected by the BWQC to **develop, design,** or implement a clean water project, shall be by a competitive process for services, with a solicitation **for qualifications or quotes sent to of** at least three quotations from qualified entities. Purchasing of goods shall require the solicitation of at least two different quotations, except when purchasing items valued at \$1,000.00 or less. Records related to the procurement of services shall be retained for

the term of the contract plus three years. Records related to the procurement of goods shall be retained for one year after the audit covering the period of purchase of those goods. Procurement of a good or category of goods totaling \$15,000.00 or greater from one vendor in one year shall be by written contract. Equipment and other durable assets purchased by a CWSP shall be maintained.

Also, add 'operate/maintain to this list of activities.

Response: The Department has revised the Rule, removing the exception allowing for sole sourcing to pre-qualified entities. The Department declines to make the suggested edits qualifying procurement requirements, as CWSPs should follow this process when procuring any services. Additional information on procurement, including information on expectations for bids and on pre-qualifying contractors, will be provided in the Secretary's Guidance.

16) Consider adding the following to 39-306(j):

Funds provided by the Agency of Natural Resources to a CWSP may be used to pay the premiums for this insurance.

Response: The Department has revised the Rule to note that the cost of obtaining Errors and Omissions insurance for BWQC members shall be considered an administrative cost.

17) In developing the Secretary's Guidance (39-304), consider the following:

- Paired watershed work and research have shown that we are more likely to succeed in nutrient-reduction through a targeted approach that first identifies which watersheds are most likely to respond to best management practices and conservation efforts and then focuses implementation on relatively high-contributing fields or areas. DEC, through the tactical basin planning process and other guidelines and training, should support CWSPs to strategically plan for and invest water quality funds for maximum benefit within a watershed, rather than only responding to a list of possible projects (39-403).
- Basin water quality councils bear important responsibility in guiding the work of CWSPs (Subchapter 5). The Rule is unclear about whether and how council members will be compensated for their time. It would be helpful to articulate a common rule regarding payment for the time of Basin Council members.
- The CWSPs have tremendous power under this draft rule. It is not guaranteed that all CWSPs will have a high level of experience with or understanding of the full range of solutions to improve water quality in their basin. While the Basin Councils will help to address this, a training and support program to CWSPs will be critical, including not only technical training on solutions, but also guidance on implementing solutions in a strategic and targeted way to realize maximum water quality benefit.

Response: The Department agrees with the first point. The second point was addressed in Comment and Response #3 (Rule § 39-503(g) provides for reasonable compensation for

participation in the BWQC). The Department further agrees with the third bullet point and will provide training.

18) (m) Leftover Funds.

Current language makes it unclear if funds remain in the CWSP monitored account (with attached oversight and requirements) or if funds are 'released' to be used by the CWSP external to Act 76 activities. Consider adding language that specifies any funds will be part and parcel with existing Act 76 grant structure funding and associated oversights/requirements. Spending of leftover funds should be in coordination with BWQC. Add the bolded sentence to the end of this paragraph: " Use of leftover funds is subject to all other oversight provisions set out in this Rule and shall be spent under coordination with the BWQC ."

Response: The Department agrees, and has revised the Rule with the following addition: "Use of leftover funds is subject to applicable provisions of Subchapters 3, 4, 5, and 6 of this Rule."

19) (n) Risk Reserve.

Consider removing risk reserve or stating an upper amount (suggested \$50,000 or 10%, whichever is less).

Response: The Department wishes to clarify that access to the risk reserve will be in conjunction with the Clean Water Board (the Board). The Board would recommend a risk reserve amount as part of its annual clean water budget public process, considering risk reserve among other clean water funding priorities. Following the Board process, the clean water budget is subject to Governor and Legislative review and approval. If authorized in the state budget, the Department would hold the risk reserve and award funds to CWSPs as specified in the Rule.

Projects

20) The Guidance document should establish that all CWSPs and BWQCs follow identical processes for project selection. It is set in Section 39-304 that Guidance address "how the CWSP and BWQC utilize the Watershed Projects Database to integrate, prioritize, score, and select projects consistent with the applicable basin plan, including how to account for the co-benefits provided by a project, as provided in § 39-403 of this Rule." DEC needs to ensure that a pollution reduction score format is well-established to provide a consistent selection process across all CWSPs. While we understand that DEC is hesitant to establish a numerically weighted system such that 80% of a project score is pollution reduction and 20% is co-benefits, there must be a system that weighs pollution reduction more heavily than co-benefits and that all CWSPs and BWQCs follow the same system.

Response: Duly noted. The Department agrees that pollution reduction is the primary concern when choosing which projects to implement, which is reflected in the fact that CWSP purpose and adequate performance is based on achievement of sufficient pollution reduction (See e.g. Rule §§ 39-101, 39-301(a), 39-701, and 39-702). The Department will articulate approaches to

project advancement as part of the Secretary's Guidance. A predictable staged approach to advancing projects that empirically achieve the most cost-effective nutrient reductions with the greatest number of co-benefits is the desired outcome.

- 21) Please clearly and specifically allow for the consideration and, if appropriate, inclusion of innovative projects that can reasonably be expected to reduce phosphorus and/or other water pollution in waters of the State whether they are in a Basin Plan or on some pre-approved list or not and allow such projects to be promoted and funded through this program. The CWSP task is challenging enough. Effective innovation should not be ignored or discouraged.

Response: Nothing in the Rule impedes innovative projects or solutions. Should an innovative project prove to be both effective and efficient at reducing phosphorus, CWSPs will have an incentive to consider use of that solution in order to achieve their assigned phosphorus reduction targets, provided the innovative solution complies with all other Department rules and regulations, including any applicable permitting. Note also Rule § 39-403(d)(2), which addresses project eligibility, and § 39-402(c) which provides a process for requesting an eligibility determination for a given project type.

- 22) Consider adding the following to 39-401(a):

Pollutant Reduction Determination, Allocation, and Standard Cost.
For waters described in 10 V.S.A. § 922(a) (water listed as impaired pursuant 33 U.S.C. § 1313(d) and not subject to the stated exception), the Secretary shall include the following in an implementation plan **as part of the basin plans**:

Response: The Department agrees with this concept but proposes that this provision be added to the end of Rule § 39-401(a)(2), as follows: "The Secretary shall publish these allocations in the applicable basin plans."

- 23) Consider rewriting 39-401(a)(3):

A determination of the standard cost per unit of pollutant reduction by sector. The Secretary shall publish a methodology for determining standard cost for pollutant reductions. The standard cost shall include the costs of project identification, **project development**, project design, ~~and~~ project construction **and maintenance**.

Response: The standard cost per unit of pollutant reduction under the Formula Grant applies to project identification, project design, and project construction. The Department intends to support project development activities, either as part of preliminary project design (under the Formula Grant) or through a separate funding mechanism. The Department will issue grants to CWSPs to fund the reasonable costs associated with inspection, verification, and operation, and maintenance of clean water projects (see 10 V.S.A. § 1389(e)(1)(A)). The Department has revised § 39-401(a)(3) to include: "When known, costs for project development may be included in the standard cost for pollution reduction."

- 24) **§ 39-403. Clean Water Projects. (d) Clean Water Project Identification, Prioritization, and Selection:** The word “project” in the statement “slate of clean water project” should be pluralized.

Response: The Department has deleted references to “slate of clean water project(s).”

- 25) I am concerned about the line in the rule, which states that (39-403 (e)) a project brought up for consideration outside of the normal schedule for consideration should be prioritized consistent with the accepted ranking processes etc. Assuming the BWQC is meeting at least quarterly, proposing projects outside of the consideration schedule is likely unnecessary and burdensome and they may not receive the attention they are due. These ‘out of schedule’ considerations of projects should be used sparingly, if at all.

Response: The Department agrees that ‘out of schedule’ meetings/project selection should be used sparingly, and only in instances of significant urgency, and has modified the rule accordingly. More information will be provided on this mechanism in the Secretary’s Guidance.

- 26) Consider adding the following to 39-403(e):

Clean Water Project Selection. Based upon project priorities identified under § 39-403(d), the BWQC shall consider the preliminary scoring and ranking of all proposed clean water projects 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 on a prioritized slate of clean water projects for both development and construction to fulfill pollution reduction goals. In the event the BWQC is unable to obtain a quorum to vote on a slate of clean water projects as a result of conflicts of interest among its members pursuant to Subchapter 6 of this Rule, the CWSP, **in consultation with the applicable DEC Basin Planner**, shall be empowered to make a final decision on projects selected for funding. In the event an individual clean water project is brought up for consideration outside of the normal cycle of consideration, the BWQC will consider and decide upon the selection of the individual project consistent with the ranking process and priorities.

Response: The Department has revised the Rule to delete all references to a ‘slate of projects’ and the following statement: “In the event the BWQC is unable to obtain a quorum to vote on a slate of clean water projects as a result of conflicts of interest among its members pursuant to Subchapter 6 of this Rule, the CWSP shall be empowered to make a final decision on projects selected for funding.” These changes are in part based on further consideration of potential conflicts of interest and in part on the mechanics of project selection, as described in the Preface and responses to comments on conflicts of interest.

- 27) Consider adding the following to 39-403(j):

Quality Control and Site Control. The CWSP shall ensure site control to access property where clean water projects are installed, which may include acquisition of a fee simple interest, a maintenance and access easement, or a maintenance and access agreement. Such site control in fee simple, easement, or agreement shall be documented on a form provided by the Secretary. **Such fee simple interest, maintenance and access easement, or maintenance and access**

agreement may be assigned to a third party such as a municipality, non-profit watershed association, conservation district or non-profit conservation organization subject to the approval of the Secretary.

Response: The Department has revised the Rule to add the following statement to § 39-403(j): Such fee simple interest, easement, or agreement may be secured by or assigned to a third party following Secretary approval.

28) The Rule sets forth that the Secretary will “*publish a methodology for calculating pollution reduction values associated with a clean water project in that water for use by CWSPs... Pollution reduction values established by the Secretary shall be the exclusive method for determining the pollutant reduction value of a clean water project*” (39-402-a). This methodology will be central to all the work that follows. It is important to:

- Involve scientists with expertise related to each practice in the articulation and review of the calculations for that practice.
- Establish an adaptive process for calculating pollution reduction values that encourages and enables the scientific community to continually build a body of evidence that will refine calculations over time. The Rule indicates that the Secretary shall review pollution reduction values at least every five years (39-403-a). The process should enable sufficient flexibility to incorporate important scientific advances within this timeframe.
- Establish a protocol that lays out this process.
- Effectively account for the fact that some nature-based interventions will take decades to scale up to their full nutrient load reduction potential but will realize more enduring load reductions over time.

A long-term commitment to science and evaluation is essential to our success.

- Inspection that ensures projects are meeting technical standards should be of equal importance to financial auditing addressed in 39-306-c. The Rule mentions ‘inspection’ as one of the purposes of Clean Water Service Providers (CWSPs). The Rule should also spell out a required system for implementing and reporting upon inspection.
- Subchapter 4, Technical Implementation, should explicitly address and establish a monitoring program to track, monitor, and verify the implementation of practices to meet pre-established pollution reduction targets established under 39-401.

Response: Duly noted. With regard to the ‘adaptive process for calculating pollution reduction’, within its capacity, the Department will continue to review newly emerging information over time. The Department agrees that nature-based interventions will take time to realize their full nutrient load reduction potential and has invested in the Functioning Floodplains Initiative and the forest sector analyses as its primary scientific analysis to support this. Many of these suggestions will be addressed and incorporated in the Secretary’s Guidance.

29) Section 39-402 and the overall rule refer to ‘pollution reduction’ without explicitly stating what determines whether a given pollutant can be mitigated using clean water funds. While nutrients addressed under Total Maximum Daily Loads (TMDLs) are important, it is also important to

ensure that processes are in place and publicly understood to mitigate other contaminants that could threaten the health of humans and aquatic biota.

- It would be helpful for the rule to explicitly articulate what determines qualification of a pollutant under this Rule, how often this is reviewed, and whether and in what circumstances funds can be used to address pollutants other than those that were indicated when the water body was listed as impaired.
- Separately, it would be helpful to clarify for the public the process for identifying and addressing contaminants that may threaten human health or aquatic biota in the future if left unaddressed, but for which a TMDL does not yet exist. This clarification could also help the scientific community to understand and respond to potential gaps in data or research that DEC would need to better regulate contaminants.

Response: The Department agrees on the value of ensuring processes are in place to mitigate other contaminants that may threaten human health or aquatic biota. The assignment of pollution reduction targets to be addressed by this rule is set forth in 10 V.S.A. § 922, established by Act 76. Act 76 placed a focus on phosphorus pollution reduction, first in the Lake Champlain watershed and then in the Memphremagog watershed, as well as a schedule for the other impairments identified in § 922(a). 10 V.S.A. § 922(b). Further, the Department's Watershed Management Division maintains a robust Monitoring and Assessment Program (MAP), the foundations of which are to identify stresses and impairments in relation to the Vermont Water Quality Standards, including the causal pollutant and source of that pollutant. MAP places a particularized emphasis on the assessment of aquatic life use support, and also provides assessment for other protected designated uses. The Department also maintains programs aimed at contaminated site cleanup to protect human health and the environment.

- 30) The Rule establishes a procedure for calculating the design life (39-402). It should also indicate whether and how the design life will be factored into scoring (39-403-d).

Response: The Department has revised § 39-403(d)(4) to include consideration of design life.

- 31) **§ 39-403(d)(3)**. We want to ensure that projects in the agricultural sector are required to go through ANR's natural resources screening and vetting process. It is unclear to us in reading the Rule that this is the case. Please add language to ensure ANR review and approval.

Response: Please see § 39-403(g), which provides that a CWSP may request a Secretary's determination on project type eligibility. ANR's role in eligibility determinations will be further described in the Secretary's Guidance. In addition, all projects must comply with the Department's regulatory and permitting requirements.

- 32) **§ 39-403(e)**. As we discuss more below, we have significant concerns that the conflict of interest rules are not being applied to the CWSPs. We also think that, as currently written, this section of the Rule does not set out the logical order for how projects should be solicited and selected. For the purposes of the Rule, this section should either be more general, with details worked out in Guidance, or should better reflect a more appropriate project selection process.

This is our understanding of the project selection process as envisioned in Act 76. Under Act 76, the BWQC is responsible for determining the priorities for the basin as well as the type(s) of clean water projects that should be solicited (i.e. priority project types, locations, project stages, etc). Using this prioritization framework, the CWSP is responsible for soliciting the project proposals and coordinating with DEC on any objective review of eligibility, pollution reduction scoring, etc. The BWQC (or a third party if needed for conflict of interest reasons) is then responsible for further scoring the projects based on co-benefits and other criteria. The CWSPs will evaluate which combinations of projects could meet pollution reduction targets and the BWQC will vote on individual projects or a suite of projects that meet the CWSP's targets. We are suggesting language changes below to make this section consistent with our understanding of Act 76. It may make sense to include these concepts in the Rule, while including more detailed language on the precise project selection process in Guidance. Regardless, we believe the language should not be left as currently written because it is confusing, overly prescriptive, and does not reflect the reality of the project selection process. To reflect this understanding, § 39-403(e) should be edited to read, "Based upon project priorities identified under § 39-403(d), ~~BWQC shall consider the preliminary scoring and ranking of all proposed clean water projects 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 develop guidelines for the desired suite of projects intended to achieve pollution reduction targets and co-benefits. The CWSP will solicit project proposals and coordinate with DEC on ranking considerations, including natural resources constraints, and pollution reduction algorithm results. The BWQC (with support from a third party if needed) will provide final scoring of all proposed clean water projects, including evaluation of co-benefits ~~drafted by the CWSP for both project development or implementation categories and make any adjustments to the co-benefits scoring as needed. The CWSP must inform the BWQC of options to meet~~ pollution reduction targets. The BWQC shall vote on individual or a prioritized slate(s) of clean water projects for both development and implementation ~~construction to fulfill pollution reduction goals. In the event the BWQC is unable to obtain a quorum to vote on a slate of clean water projects as a result of conflicts of interest among its members pursuant to Subchapter 6 of this Rule, the CWSP shall be empowered to make a final decision on projects selected for funding. If the CWSP and BWQC consider a~~ the event that an individual clean water project is brought up for consideration ~~outside of the normal cycle of consideration, the BWQC will consider and decide upon the selection of the individual project consistent with the ranking process and priorities."~~

Response: The Department has made certain edits to this subchapter which address components of this comment. See response to Comment #26.

As part of the review of this and related comments, the Department is considering refined procedures for addressing project selection and advancement, which, as noted elsewhere in this responsiveness summary, will be contained in the Secretary's Guidance.

- 33) **§ 39-403(g)**. It is unclear if this section requires the Secretary to provide a determination for broad project types that may or may not have a pollutant reduction value or if this section requires the Secretary to provide a determination for specific projects. This needs to be clarified.

If the former, § 39-403(g) should be edited to read, “Methodology for Determining Project Type Eligibility. Upon the request of a CWSP, the Secretary shall evaluate a proposed clean water project and issue a determination as to whether the proposed clean water project type is eligible to receive funding...”.

If the latter, then all projects need to be evaluated by ANR for natural resources impacts, so section **§ 39-403(g) should be removed entirely** and § 39-403(d)(2) should be edited to read: “consult with the Secretary to determine project eligibility before scoring and ranking projects as to whether the proposed clean water project has an impact on natural resources, and the feasibility, permit eligibility, and consistency of the project with goals of the applicable TMDL. The Secretary may also consider the impact of the project on the neighboring community, including noise and odor;”

Response: The Department agrees that approving the eligibility of “project types” is a good and efficient practice, where it is possible to do so. The Rule has been revised accordingly.

- 34) **§ 39-404(a)**. We propose the following edits to clarify § 39-404(a), “When project costs have been incurred, but the project is not completed due to unforeseen circumstances or Acts of God and not due to an act or omission of the CWSP, and there is no functional pollution reduction value: The CWSP may use the Water Quality Restoration Formula Grant to cover costs already incurred, but will not receive credit for any pollution reduction until the project is complete. Leftover funds may be used pursuant to § 39-306(n) of this Rule.”

Response: The Department agrees and has revised § 39-404(a) of the Rule accordingly.

- 35) 39-403(d) Clean Water Identification, Prioritization, and Selection

Please standardize language around implementation to be consistent with language earlier in the draft and existing RFP language based on mutual understanding of responsibilities by the advisory committee. Please remove the reference to a slate of projects as it is not the only method by which projects may be selected. Replace with the following: “When overseeing the identification, prioritization, and selection identifying, prioritizing, and selecting a slate of clean water projects to meet a basin’s pollutant reduction target, the CWSP and BWQC shall:”

-and-

(3)

Suggest removing the word “quarterly” so that consultations with AAFM best fit with CWSPs grant rounds and meeting schedule. “...for projects in the agriculture sector only, consult with AAFM quarterly on project eligibility, selection,...”

Response: The Department agrees with the first point and has revised the Rule to remove the concept of a “slate of projects.” See Responses to Comments #26 and #32. The Department disagrees with adding the word ‘overseeing’ to describe the role of the CWSP and BWQC’s collective activity.

On the final point regarding the removal of 'quarterly' from the AAFM consultation provision, this language was specifically requested by AAFM for addressing agricultural project eligibility (see Comment and Response #5). Section 924(g)(3) of Title 10 also provides that a CWSP may invite support from persons with specialized expertise, including staff of AAFM, to address matters before a BWQC. Therefore, AAFM's participation quarterly or otherwise by invitation when needed should address this concern.

36) 39-403(e): (e) Clean Water Project Selection.

This section and the conflict of interest section should mirror each other and be in compliance with each other. In the event that the BWQC is unable to obtain a quorum this rule language needs to identify a third party entity that can make a final decision on projects, A CWSP might be suitable under certain circumstances but, given this entity may also have to recuse itself if it has a project under consideration, it should not be the designated entity for the purposes of this Rule. Otherwise, the CWSP that has proposed a project now has unilateral decision-making power on the projects that are funded which seems to run counter to the purpose of a conflict of interest policy. We are concerned, however, that a quorum may not be reached in many circumstances (especially if projects are voted on as a slate of projects where any group proposing a project is removed from the project prioritization process), and/or that the same BWQC members (those most active in developing and implementing projects) will have to consistently recuse themselves and therefore no longer have an equal voice at the BWQC table. Act 76 sets the BWQC as the entity "to establish policy and make decisions for the CWSP regarding the most significant water quality impairments that exist in the basin and prioritizing the clean water projects ." A third party "backup" that's used regularly and a situation where statutory BWQC members are removed from this process routinely conflicts with the both the spirit and language in Act 76 detailing the responsibilities of the BWQC members. It might be more possible to meet quorum if funding rounds are held more frequently to minimize the chances that multiple BWQC members have submitted an application and therefore must recuse themselves. More frequent grant rounds, however, increases the administrative burden on this funding process and the cost to support BWQC members in fulfilling their duties as outlined under this Rule. This section should also make clear that if a project sponsor is pre-qualified, that "selection" includes both the project and the proposed implementer. We believe this is the intention of the Agency but want to emphasize that project scoring is based on implementer-specific factors like their pre-existing relationships with landowners (which affects feasibility) and their specific budget estimates. We propose a rewrite of this section that:

- o Proposes a solution to project selection in absence of a quorum that does not rely on a partner that could be in violation of the conflict of interest section (i.e. identifies a neutral third party for project selection should the CWSP have a conflict of interest).
- o Proposes a third party to "preliminarily score and rank projects" should the CWSP have a conflict of interest.
- o Preserves BWQC decision-making authority as outlined in Act 76 and maximizes the opportunity for all council members to have an equal voice to the greatest extent possible (recognizing some may have to recuse more often than others).
- o Preserves the role of BWQC membership to be knowledgeable enough in local

basin issues to support the basin planning process as outlined in Act 76.

o Ensures prequalified project sponsors who propose projects are part and parcel with the project proposal. Project implementers will often propose projects that inherently are related to their ability to complete the work (good landowner relations, experience with the type of project being proposed, previous work in the area, etc).

Given the depth and number of changes needed in this section, we expect better language could be developed through dialogue among the Advisory Council, ANR Counsel, and DEC staff, and we request leaving this section open to further refinement through guidance. We suggest this language be kept broad (such as removing the prioritized slate of projects) to create a conflict of interest policy that is compliant with the Advisory Committee's discussions and recommendations, as well as compliant with the responsibilities given to statutory entities on the BWQC. Below may be a starting point.

Replace with: "...the BWQC shall consider the preliminary scoring and ranking and justification of preliminary assessment of all proposed clean water projects drafted by the CWSP, or third party, for both project development or implementation categories and make any adjustments to the co-benefits scoring as needed. The BWQC shall vote on a prioritized slate of clean water projects for both development and construction and maintenance to fulfill pollution reduction goals. In the event the BWQC is unable to obtain a quorum to vote on a slate of clean water projects as a result of conflicts of interest among its members pursuant to Subchapter 6 of this Rule, a third party without a conflict of interest the CWSP shall be empowered to make a final decision on projects selected for funding..."

Response: The concerns raised in this comment are largely addressed in revisions made and described in Comments and Responses #26 and #32.

37) Sec. 39-403(g) Methodology for Determining Project Eligibility.

This is an opportunity to involve existing DEC offices through establishing guidance for project types and eligibility criteria. It is not the intention of this suggestion to be that the Secretary give guidance on each individual project but rather that the State provide a guidance document that defines each project type and eligibility criteria (similar to the Project Types Table and eligibility criteria provided to current design/implementation block grant recipients), as well as provide an opportunity for DEC program staff to act as Secretary guidance to implementers, CWSPs, and BWQC members. Make the following adjustments: " Upon the request of a CWSP the Secretary shall evaluate a proposed clean water project type and issue a determination..."

-and-

(3)

Suggest removing the word "quarterly" so that consultations with AAFM best fit with CWSPs grant rounds and meeting schedule.

“...for projects in the agriculture sector only, consult with AAFM quarterly on project eligibility, selection...”

Response: Please see the Department’s responses to Comments #33 and #35.

38) 39-403 (g) Methodology for Determining Project Eligibility.

- This is an opportunity to involve existing DEC offices through establishing guidance for project types and eligibility criteria. It is not the intention of this suggestion to be that the Secretary give guidance on each individual project but rather that the State provide a guidance document that defines each project type and eligibility criteria (similar to the Project Types Table and eligibility criteria provided to current design/implementation block grant recipients), as well as provide an opportunity for DEC program staff to act as Secretary guidance to implementers, CWSPs, and BWQC members.
- Make the following adjustments: “ Upon the request of a CWSP the Secretary shall evaluate a proposed clean water project type and issue a determination...”

Response: Please see the Department’s response to Comment #33.

39) 39-403 (j) Quality Control and Site Control.

- Consider replacing CWSP with “responsible party as determined by the operation and maintenance agreement.” The responsible party may or may not be the CWSP.
- Consider that associated costs for securing site access should be part of standard cost estimates.

Response: Please see the Department’s response to Comment #27. Duly noted regarding the cost of securing access.

40) § 39-404. Risk of Project Loss.

- The idea of “credit” for pollution reduction is not mentioned previously or after these sections, and potentially reads as an undefined financial credit. Please standardize the language to the more commonly referred to “pollution reduction goals” in the Rule.

(a) Replace with: “but will not receive credit count towards pollution reduction goals for any pollution reduction...”

For (c),

- Replace with: “may ~~lose~~ not count towards future pollution reduction goals credit ”

Response: The Department agrees and has revised the Rule accordingly.

BWQC

- 41) Regarding membership on a BWQC (39-503(b)) – DEC should allow entities sponsored by a 501(c)(3) to be eligible to have a seat on the council.

Response: The Department agrees with this comment, provided that the sponsoring entity and the sponsored entity shall not both have a seat on the same BWQC at the same time. The Rule has been revised, accordingly. Having a fiscal sponsor and their fiscally sponsored organization both seated presents additional conflict of interest complications.

- 42) Consider revising 39-501 as follows:

(a) Each CWSP shall establish a basin water quality council (BWQC) for each assigned basin. BWQC membership shall comprise the minimum statutory members identified in 10 V.S.A. § 924(g)(2). Additional BWQC membership is only allowed if unanimously approved by the BWQC and approved by the Secretary. When considering the addition of BWQC members, the CWSP shall evaluate the costs of adding to the BWQC membership. ~~Should additional BWQC membership be authorized, the proportionality of representation established by 10 V.S.A. § 924(g)(2) shall be maintained.~~ The CWSP will coordinate assignment or replacement

Response: The Department has added clarifying language addressing this concern in the Rule. For the purpose of clarification, another means to maintaining proportionality of representation is by weighting votes in proportion to the number of seats occupied by a constituency. For example, if a BWQC unanimously elects to seat two additional municipal representatives, producing a BWQC of 11 members, then each municipal member's vote shall count as 1/9 vote, maintaining the proportion of municipal influence at 2/9th of the BWQC. This specific approach could allow inclusion of a greater number of voices, without skewing the proportional representation articulated in the rule.

- 43) § 39-501. Membership and Structure.

- Changes to this section reflect our prior concerns about cost and proportionality of representation, thank you. The current language should stand as is.

Response: Please see the Department's response to Comment #42, above.

- 44) Consider revising 39-501(c)(3) as follows: (3) "Local watershed protection organization" means a community-based, nonprofit organization working with individuals and communities in their local watersheds to protect and improve water quality, habitat, and flood resilience and to connect citizens with Vermont's waters. Watershed protection organizations work with all watershed constituents and do not represent a specific constituency or interest group. ***Organizations that are not a 501(c)3 may serve on a BWQC provided they have a fiscal sponsor that is a 501(c)3.***

Response: We understand the commenter to be referring to section 39-501(b)(3), though the error is quite understandable. The Department has addressed this concern in response to Comment #41.

- 45) **§ 39-501(b)(3).** We propose the following edits to § 39-501(b)(3) to more accurately reflect that watershed groups are open to all members, but do not realistically work with everyone. We believe ‘people’ is a more appropriate word to use than ‘citizen’: “‘Local watershed protection organization’ means a community-based, nonprofit organization working with individuals and communities in their local watersheds to protect and improve water quality, habitat, and flood resilience and to connect ~~citizens~~ people with Vermont’s waters. Watershed protection organizations ~~work with~~ are open to all watershed constituents and ~~do not~~ should not represent a specific constituency or interest group.”

In addition, we feel it is important to clarify that the term “nonprofit” is being applied broadly to mean a not-for-profit organization rather than an organization with 501(c)(3) status. If the term “nonprofit” is understood to mean not-for-profit organization, it is fine to leave the language as-is. If the term “nonprofit” needs clarification, we suggest adding a sentence at the end stating, “...specific constituency or interest group. A nonprofit organization does not need 501(c)(3) status if they work with a fiscal sponsor.” This should also be applied to the “conservation organization” mentioned in 10 V.S.A. § 924(g)(2).

Response: The Department has modified § 39-501(b)(3) as follows to address these comments: “Watershed protection organizations are open to all watershed constituents and shall not represent a specific constituency or interest group.” Please see the Department’s response to Comment #41 regarding 501(c)(3) status.

- 46) **§ 39-503(g).** In order to have engaged, effective BWQCs, we believe BWQC member organizations must be compensated for **all** BWQC responsibilities. To address this concept, we propose **one** of the following edits to § 39-503(g):

WUV has recommended in past comments on this Rule that the language be changed to: “BWQC members from among the appointing entities in 10 V.S.A. § 924(g) shall be entitled to reasonable compensation for participation in BWQC meetings and responsibilities in accordance with the Secretary’s guidance and applicable grant agreements.”

Another option would be to remove the word “meetings”: “BWQC members from among the appointing entities in 10 V.S.A. § 924(g) shall be entitled to reasonable compensation for participation in the BWQC ~~meetings~~ in accordance with the Secretary’s guidance and applicable grant agreements.”

Response: The Department agrees with the second proposed approach on this topic and has revised § 39-503(g) accordingly. See also the Department’s response to Comment #3.

- 47) **§ 39-503. Meetings and Actions.**

(b)(2)

- Some basins have expressed interest in bylaws that include a stronger (for instance consensus-based) model for voting. Consider adding language that allows for such a model if the regional BWQC prefers it.

- Change to: “Decisions shall be binding by at a minimum a vote of the majority of the BWQC members regardless of the number of members present for a vote.”

(4) and (d)

- Consider defining proxy voting and alternate voting. Especially today, it is not hard to imagine these meetings being entirely virtual or through call-ins. If virtual meetings/call-ins are to be allowed, define those types of attendance as considered present with all rights of voting and discussion.

(c)

- This section recognizes that organizations may have good cause to not attend meetings. This should be extended to the second half of the sentence to make clear that organizations that do not attend without good cause or not eliminated from the council.
- Add “failure to attend one-half or more of the scheduled meetings per year without good cause ...”

(g)

- BWQC responsibilities will go beyond in-person meetings. This rule should ensure BWQC members are reasonably compensated for their time in all their duties considered through Act 76 to ensure participation in the process. If work proceeds (whether in meeting or outside meetings) without reasonable compensation, this threatens to leave some partners out of the dialogue if they can not cover their time otherwise. To ensure equal access to work performed under Act 76 we propose the following:
 - Remove “meetings” and replace with: “BWQC members from among the appointing entities in 10 V.S.A. § 924(g) shall be entitled to reasonable compensation for participation in BWQC meetings responsibilities in accordance with the Secretary’s guidance , this Rule, and applicable grant agreements. No BWQC meeting or duties shall occur without reasonable compensation available to all statutory participants for said meeting or duties ”

Response: The Department does not intend to prevent a requirement for greater-than-majority decision making and has revised § 39-503(b) to clarify this. Proxy and alternative voting will be addressed in the Secretary’s Guidance. The Department agrees with and has made the proposed changes to § 39-503(c). Regarding the final comment on compensation, see the Department’s response to Comments #3 and #46.

Conflict of Interest

48) Potential and actual conflicts of interest inherent to the legislature’s designation of Basin Water Quality Council (BWQC) membership should be recognized in the Rule and not paralyze the decision-making process. Some of the BWQC members will represent entities that are capable of effectively proposing, construction and operation clean water projects. The proposed Rule may negate the BWQC’s designated role and participation in project prioritization. If BWQC members must recuse themselves from voting on projects they sponsor, the BWQC regularly may not have sufficient voting members to make decisions about project priorities. The

Legislature codified membership requirements for BWQCs to foster Councils knowledgeable about water quality. The majority of BWQC members are project implementers who will be proposing projects. Recognizing inherent and actual conflicts of interest and minimizing them to the extent possible can be reconciled by permitting BWAC members to vote on a slate of projects, only recusing themselves from voting if projects they sponsor are presented individually for a vote.

49) Consider revising the Conflict of Interest language as follows:

Some of the statutory BWQC members will represent entities that are capable of effectively proposing, constructing, and operating clean water projects. Because the BWQC makes decisions regarding the most important impairments, and prioritizing projects to address them, there may be concern about the potential appearance of, and actual, conflicts of interest. Therefore:

Each CWSP shall adopt a conflicts of interest policy that includes, in part, the following:

(a) All persons engaged in the decision making of the respective CWSP or BWQC or both, shall conduct themselves according to high ethical standards.

(b) Conflict of interest means ~~an~~ **financial** interest, direct or indirect, ~~financial or otherwise,~~ of a person with a CWSP or BWQC decision making role, or such an interest, known to that person, of a member of that person's immediate family or household, or of a business associate, in the outcome of a particular matter pending before the CWSP or BWQC or which is in conflict with the proper discharge of the person's duties under this Rule.

(c) A BWQC member that proposes to implement a clean water project must disclose any potential conflict of interest and shall recuse itself from any BWQC decision making subject to that conflict ***if any of the following conditions are present:***

1. If a project is being considered by itself per §39-403(e)(5), or the project's score or ranking is being considered by itself, the project sponsor shall recuse itself from the BWQC decision making related to that individual project.

2. If a BWQC-member's project is being considered as part of a list or package of projects being voted on and the funding passed through to its subcontractors (engineers, construction firms, etc.) and/or for materials and supplies constitutes in total less than 50% of the overall cost of the project.

3. The project involves payments for fee simple for land or for purchase of an easement to the member, the member's immediate family or household, or to a business associate.

Notwithstanding these limitations, the conflicted BWQC member may answer questions on the subject.

Note that our preferred language for #2 above is as follows: If the project is one of many on a list or package considered by the BWQC as they determine the ranking and priorities for funding and the sponsorship of the project is the only potential conflict of interest; all members of the BWQC may vote on the list or package. If there are other potential

conflicts of interest, each member shall disclose the potential conflict and the BWQC shall determine if the member may vote upon the list or package. However, the proposed 50% threshold language is offered as a potential compromise.

- 50) The conflict of interest policy in the Draft Rule applies only to members of the BWQC, but the CWSP certainly has the potential for a conflict as well. Any entity that would accept funds to perform clean water projects should be subject equally to the same conditions of disclosure and recusal in a conflict of interest policy.

The conflict-of-interest language forces an entity that is well-qualified to do both to instead choose between one or the other, when discretion to do both is in the best interest of the program goals. Further, in some Basins, there may not be enough groups to either populate the BWQC or to undertake the projects needed to meet the pollution reduction goal. This could result in a BWQC without enough qualified members or a Basin without enough on-the-ground partners able to perform clean water projects. The limited number of such groups in some Basins will result in a deficit of expertise somewhere, either at the table or in the field. Clearly expertise is needed in both places.

Instead, a project selection process with more DEC involvement in the weighing of project scores based on pollution reduction would allow the system to operate more effectively. In addition, the conflict interest issues could be addressed by requiring that the BWQC member discloses to the group that they have a conflict of interest in a particular project, be required to recuse for the discussion and the vote on that specific project, but then still be able to decide on the overall slate of projects. Furthermore, if DEC is more involved in project scoring, particularly the pollution reduction value of that project, and this pollution reduction value is the majority of the score for a project, the relatively smaller weight of the co-benefits will limit the impacts of any bias towards that project.

- 51) Conflict of interest (Subchapter 6)

- The CWSP is responsible for setting up the Basin Council (39-303-b, 39-501-a), and the Basin Council provides direction to the CWSP (39-403-a). This could introduce a conflict of interest, which should be addressed in Subchapter 6.
- Subchapter 6.c requires that Basin Council members declare conflicts of interest. It is equally critical to require a declaration and establish checks and balances that mitigate the potential conflict of interest within the CWSPs themselves.

- 52) We are concerned with Subchapter 6, Conflicts of Interest. In particular, section c, which states that "a BWQC member...shall recuse itself from any BWQC decision making subject to that conflict." Many (or all!) BWQC members could be proposing projects at any one time (including NRCs, RPCs, watershed protection organizations, land conservation organizations, and municipalities). If we are to rank projects, then vote on a batch, it certainly makes sense to not rank one's own project, but if any member with a conflict of interest must recuse itself and can't vote on a batch of projects, it becomes a problem (e.g. potentially the majority or all BWQC couldn't vote!). It makes more sense to declare one's conflict of interest outright, and not participate in the ranking of one's projects, but still be able to vote on the finalized slate of projects. In addition, section 39-403(e), which places authority with the CWSP to make the final

decision on projects selected for funding (in case the BWQC is unable to obtain a quorum) is problematic. The CWSP may be an implementer of projects, as they are currently under Clean Water Block Grants, so should not have priority to make these decisions, any more than another member of the BWQC who has a project on the ranked slate of projects.

Additionally, I'd like to confirm that watershed protection organizations that are not 501(c)3 organizations (but who, for example, have a fiscal sponsor) are also able to serve on BWQCs.

53) **Subchapter 6. Conflicts of Interest.** We believe that a new conflict of interest structure should be created to provide fair conflict of interest rules across organizations. Additionally, the structure should hold organizations to high ethical and conflict of interest standards and transparency, while also allowing the collaborative regional decision making envisioned by Act 76.

The conflict of interest rules must be applied to both BWQCs and CWSPs. There are significant conflict issues if CWSPs unilaterally make decisions on their own projects. **If the basic conflict of interest policy structure stays in place, we feel strongly that at a minimum the following three changes must be made to provide adequate conflict of interest controls for the CWSP:**

1. The CWSP must be added to Subchapter 6(c): “A BWQC or CWSP member that proposes to implement a clean water project must disclose any potential conflict of interest and shall recuse itself from any ~~BWQC~~ decision making subject to that conflict.”
2. An additional conflict of interest statement should be added specifically for the CWSPs if the project selection section continues to have the CWSP responsible for the preliminary scoring of projects. In subchapter 6, either in section (c) or a new section (d), a statement should be added to say, “If a CWSP is proposing to implement a project, DEC must provide the preliminary scoring for any CWSP proposed project.”
3. The CWSPs should not be the entity to decide on a proposed suite of projects in situations when the BWQC does not reach a quorum because of conflict. If the CWSP has a project proposed within the suite, then this results in unilateral decision-making by a conflicted entity. Section § 39-403(e) should be modified to remove: “~~In the event the BWQC is unable to obtain a quorum to vote on a slate of clean water projects as a result of conflicts of interest among its members pursuant to Subchapter 6 of this Rule, the CWSP shall be empowered to make a final decision on projects selected for funding.~~”

As an example of a likely scenario that requires #3 above, many of the CWSPs will also have seat(s) on the BWQCs, and will propose projects for design and implementation. It is very possible that as the current draft Rule is written, that entity would need to recuse itself as a BWQC member, but in the absence of a quorum, that same entity in its role as CWSP would be given unilateral decision-making authority on all projects including its own.

Beyond the issue of the conflict of interest section being unequally applied, the section is not consistent with the legislative intent for the functioning of the BWQCs or the CWSPs. The

current conflict of interest Rule would take the responsibility bestowed via Act 76 upon a committee of organizations (BWQC) and transfer it to a single entity (CWSP) who is already controlling much of the process and finances. The BWQCs are intended to be the statutory partners with expertise on the development and implementation of clean water projects in their Basin. Barring a BWQC member from performing their duty to vote on projects if their organization proposes a project will make BWQCs dysfunctional and ineffective. The BWQC may never reach a quorum if enough members are proposing projects or certain members may never be able to participate in their BWQC responsibilities if they are regular project implementers. This may create a situation wherein Conservation Districts and watershed groups (and maybe RPCs) will not participate in a BWQC or will assign an entity from outside the basin in order to avoid conflict, which goes against the Act's intention of having regional decision making and authority.

We suggest the following options to both meet a high level of transparency and conflict of interest standards and also allow for functional CWSPs and BWQCs.

Option 1. Use the following language to ensure that the BWQC members and CWSPs cannot rank or vote on their own project, but can engage in decisions (with disclosure) on other projects or the suite of projects: “All persons engaged in the decision making of a CWSP or a BWQC, or both, shall conduct themselves according to high ethical standards, including the identification of any matter that gives the appearance of or constitutes a conflict of interest and recusal from any decision making on ranking a project for which their organization is an applicant.”

There is precedent for Option 1 in state government and beyond. For example, the Vermont Watershed Grants Administrative Guide, Appendix C, Page 8 states: “If a member has a personal interest in a specific project, he or she shall not participate in the ranking of that project.”

Option 2. If Option 1 doesn't meet the requirements of ANR's conflict of interest standards, the Rule could establish another system that still allows effective decision making. Here are some examples of systems for DEC to consider:

Allow BWQCs to vote on individual projects instead of a suite of projects. Projects can still be presented as a suite or an option of several suites, but would be voted on individually; OR Require that DEC or outside reviewers rank projects and set a standard for the BWQCs so that they can only approve projects that have met a certain threshold in this ranking; OR Require DEC to make the final decision on the suite of projects if the CWSP or a quorum of the BWQC members are conflicted.

54) We remain concerned that the language in this draft Rule will prevent some statutory BWQC members from carrying out their responsibilities as described in Act 76. The conflict of interest and project selection language in the current draft of the Rule will routinely remove BWQC members who implement projects from the prioritization process. This directly conflicts with the responsibilities given to statutory BWQC members in Act 76 including their purpose “to establish policy and make decisions for the CWSP regarding the most significant water quality impairments that exist in the basin and prioritizing the clean water projects” as stated in the

Act. Routine removal of specific BWQC members from project prioritization will also significantly reduce input from locally knowledgeable groups, and set up an inequitable system between implementer and non-implementer groups. One major strength of Act 76 is the decision-making and project prioritization authority it gives to local groups in each region. Act 76 sets out to engage organizations with localized experience and watershed-level knowledge to meet the state's clean water goals. Throughout Advisory Council discussions, it was clear that Act 76 will inherently involve local groups in ranking and reviewing projects, as well as implementing projects funded under this structure, including CWSPs and BWQC members. However, if these groups are consistently recused from this process, there is no clear alternative to provide equivalent local knowledge and experience in the project selection process..

After further discussion with you and ANR counsel, it is clear the intent of this new language is a robust conflict of interest policy and we support this intention. The new language in both of these sections of the Rule was developed outside of Advisory Council discussions, however, and fails to reflect the group's general consensus on how projects might be ranked and selected. The Advisory Council has not had the opportunity to discuss options to meet the State's needs around conflict of interest concerns while maintaining the decision-making authority granted to groups via Act 76. We ask that the updated Rule include language that allows for the State to further consult with the Advisory Council to remedy this issue via Guidance, while not being overly prescriptive in ways that lock the CWSP and BWQC into a system that would likely significantly limit local input and expertise to the point of not allowing statutory organizations to carry out their responsibilities described in Act 76. To address this, we propose to:

1. Remove references to voting on a slate of projects - this model was adopted via the Advisory Council input with the understanding that it addressed the State's concerns around conflict of interest issues. If voting on a slate of projects does not address these issues, it should not be included in the Rule as the model to be used for project prioritization. We look forward to working with the State and other Advisory Council members to find a project prioritization process via Guidance that fully addresses the State's conflict of interest concerns while also allowing BWQC and CWSP groups to participate in the project prioritization process and carry out other responsibilities as described in Act 76.
2. Remove the potential for conflicts of interest in the preliminary scoring process. Should the CWSP have a conflict of interest when reviewing or ranking projects, a third party should be named to perform these services.
3. Remove CWSPs as the decision-making authority when a quorum of BWQC members cannot be reached, in recognition that certain CWSPs may regularly propose projects for funding and may also have a conflict of interest. A lack of quorum is less likely to occur if the BWQC structure is set up to account for voting on individual projects.

55) Subchapter 6. Conflicts of Interest.

(c)

- Both CWSP and BWQC members may propose projects for consideration under this funding vehicle. As such, both should be held to an equal standard to prevent conflicts of interest.
- Insert the bolded: “A BWQC member **or CWSP** that proposes to implement a clean water project must disclose any potential conflict of interest and shall recuse itself from any **BWQC or CWSP** decision making subject to that conflict. Notwithstanding these limitations, the conflicted BWQC member or CWSP may answer questions on the subject project in an open meeting of the BWQC. A BWQC and CWSP may establish further procedures for identification and recusal from projects where conflict of interest exists. All conflicts of interest must be publicly declared.”

Response to Comments on Conflict of Interest:

The Department noted and concurs with all commenters on the need for a robust conflict of interest policy. The substantial public investment in the work of BWQCs and CWSPs under Act will need to stand up under administrative, legislative, and public scrutiny. Accordingly, the Department will not significantly revise the conflict of interest provision from the original proposal. However, the Department also understands the impact this area of the Rule could be perceived to have; specifically, that statutory members of the BWQC may not be able to serve on a BWQC to fulfill their charge and still have their organizations involved in implementation of clean water projects. Given the importance of those organizations in the effective management of clean water project implementation, and other prospective roles, the Department is committed to making the resulting system work as CWSPs and BWQCs start their work. With all of these considerations in mind, the Department has reached the following conclusions on issues raised.

- 1) The Department has modified procurement to align with the BWQC’s statutory charge, by eliminating the allowance of sole source agreements for subgrantees or subawardees selected by a BWQC to implement a clean water project. Allowing BWQC members the authority to select prequalified entities to implement a project, and then take action to direct a project to a BWQC-selected entity exacerbates conflict of interest unnecessarily. The alternative to be further developed in the Secretary’s Guidance will be for the BWQC to make decisions to advance a project, allowing the procurement process implemented by the CWSP to unfold after the BWQC’s decision to advance a project. The CWSP shall utilize its specific procurement provisions, which may limit solicitation to (no less than three) prequalified entities. Disconnecting the BWQC from oversight of prequalification is also a step toward alleviating the conflict of interest tensions.
- 2) The Department has changed the project selection/prioritization process. More specifically, Rule references to the BWQC deciding upon a “slate of projects” have been eliminated. While this may require additional effort in the decision-making process, making decisions project-by-project should help reduce the frequency of conflict of interest concerns, so long as BWQC members are mindful of the potential for conflict.
- 3) The Department eliminated the authority for the CWSP to make decisions on project advancement when there is no BWQC quorum due to conflicts of interest.

- 4) The Department does not agree with the several suggestions that DEC should serve as the arbiter of project advancement decisions in place of the CWSP when there is no quorum due to conflicts of interest. DEC staff will be available to assist in the application of empirical scoring, but Act 76 does not confer to DEC a decision-making capacity on specific project advancement efforts by the CWSP and its BWQC.
- 5) The Department declined to reinstate into the Rule certain “explanatory” or “rationale” language about inherent tension around BWQCs and Conflict of Interest that had been included in an early draft of the Rule.
- 6) The Department agrees that a clear and effective project selection process is key to successfully navigating the conflict of interest provisions of the Rule. Accordingly, the Department will provide information on a project advancement process that will be contained in the Secretary’s Guidance to assist CWSPs and BWQCs. DEC will work with the Act 76 Advisory Group in the development of this process.
- 7) The Department revised Subchapter 6 to specifically require persons with a CWSP decision making role to disclose any conflict of interest and recuse from any decision subject to that conflict.

Corrective Action Plan, CWSP Renewal/Reassignment/Deassignment

56) The Draft Rule provides that if one CWSP fails to meet its goals, a backup CWSP will take its place or fill the gaps. As the state has the legal responsibility for pollution reduction, we maintain the duties of the failed CWSP should become the direct responsibility of DEC until a new, independent CWSP can be identified. This includes working directly with the BWQC on project selection and administering the distribution of funds. Our concern is that a primary CWSP in one Basin that undertakes extra responsibilities as a backup CWSP in another Basin, essentially undertaking administrative duties in two Basins, will become overly burdened and compound the problem by missing pollution reduction goals in both Basins. Instead, DEC needs to play a larger hands-on role if a CWSP fails rather than shift responsibility to another CWSP.

Response: The intent of Act 76 was to create regional capacity for the implementation of clean water projects. The Department will step in should a backup CWSP be unable or insufficiently capable to serve in a backup role. However, the Department’s preference is to ask for a backup entity to serve in an interim capacity until a permanent replacement CWSP is selected. Additional information on backup CWSPs will be provided in the Secretary’s Guidance. The Department has revised the Rule to add service of backup CWSPs in Secretary’s Guidance by inserting a new provision, § 39-304(j).

57) § 39-803. Additional Secretary Actions to Address CWSP Deficiencies and Risks

- NRCC/VACD’s reading of this section (especially (b) and (c)) is that if a CWSP is removed or suspended, the ‘backup’ shall serve on an interim basis until an RFP can be released and a new entity awarded through a competitive process. If this is the case, the exact role and responsibility of the backup organizations as identified through this rule should be stated more clearly.

Response: See the Department's response to Comment #56.

58) Subchapter 8. Renewal of CWSP Term and Removal of CWSP Assignment

§ 39-801. Evaluation and Process for Renewal of Term

- Currently this Rule states that an existing CWSP will have a non-competitive opportunity to continue its role as CWSP unless it does not "meet the requirements for assignment renewal." It is only at this point that the Agency may "initiate the assignment process in § 39-301 to assign a new entity to the subject basin."
- NRCC/VACD see this as a great learning opportunity for all entities that serve to advance clean water in the state and that some may be interested in serving as a CWSP after this first round is complete. To ensure that these basins host the most competent and efficient CWSP possible, we request an open and public application process in alignment with § 39-301 that is triggered when an existing CWSP submits an "assignment renewal application."

Response: The public comment solicitation, evaluation, and required comment consideration clauses at § 39-801(c) and (d) are in the Rule for this expressed purpose. If public comment of sufficient compelling nature causes the Secretary to conclude that there is need to solicit a new CWSP, DEC will execute a new RFP process. However, the Department does not feel it is warranted to impart the uncertainty to CWSPs at this time that their organizations will have to undergo transfer at each term, even if their performance meets or exceeds expectations.