

Act 76 Guidance Chapter 7 – Responsiveness Summary

From Friday February 7 through March 8, 2024, the Vermont Agency of Natural Resources (ANR), Department of Environmental Conservation (DEC) held a 30-day public comment period for the final draft of the Act 76 Guidance Chapter 7 (Operation & Maintenance). A summary of the public comments that were received through the public comment period, for this iteration of Chapter 7 (Version 1, date 4/26/2024) of Act 76 Guidance, is included in the following section.

In advance of this public comment period, and over the course of ten meetings since October 2022, DEC staff engaged with a group of interested internal and external stakeholders in the development and review of components of Chapter 7. The O&M subgroup membership has included to date (in alphabetical order):

- Angie Allen, DEC Water Investment Division, Watershed Planning Program
- Barbara Noyes-Pulling, Rutland Regional Planning Commission
- Chris Rottler, DEC Water Investment Division, Watershed Planning Program
- Claire Ireland, Vermont Association of Conservation Districts
- Dean Pierce, Northwest Regional Planning Commission
- Gianna Petito, DEC Water Investment Division, Clean Water Initiative Program
- Helen Carr, DEC Water Investment Division, Clean Water Initiative Program
- Hilary Solomon, Rutland Regional Planning Commission
- Jill Sarazen, Lake Champlain Sea Grant
- Karen Freeman, Vermont Housing and Conservation Board
- Kendall Lambert, Vermont Housing and Conservation Board
- Kristen Balschunat, Vermont Youth Conservation Corps
- Lindsey Wight, Missisquoi River Basin Association
- Lyn Munno, Watersheds United Vermont
- Maddie Yandow, Northwest Regional Planning Commission
- Meg Carter, Northwoods Stewardship Center
- Nathanael Johns, Vermont Housing and Conservation Board
- Patrick Hurley, Memphremagog Watershed Association
- Rachel Wood, DEC Water Investment Division, Clean Water Initiative Program

DEC prepared this responsiveness summary to address specific comments and questions submitted during the formal comment period and to indicate how the Chapter 7 Guidance has been modified in response to public comment. Comments may have been paraphrased, merged with like comments, or quoted in part. Guidance has also been modified independent of public comment. A tracked changes version of all edits made to Chapter 7 Guidance during the public comment period, as well as the full text of the comments submitted is available upon request by contacting the Water Investment Division (email Rachel Wood at Rachel.Wood@vermont.gov). DEC expresses gratitude to all who supported the development of Chapter 7 Guidance and who participated in the public comment period.

Formal comments received between February 7 and March 8, 2024, include those submitted by the following entity:

- Northwest Regional Planning Commission (NRPC)

Comments are organized by Chapter 7 Guidance section headers where applicable below.

Introduction

1. Comment: NRPC suggests modification to CWSP Responsibilities section by refining the description of CWSP responsibilities under the heading “The Clean water Service Provider (CWSP)” and incorporating a detailed definition from the Act 76 Rule.

Response: Chapter 7 Guidance includes the citing of Rule listing CWSP responsibilities in a footnote in this section.

Change to Guidance made: No change.

Site Control and Access

2. Comment: NRPC suggests adding a clause to the end of the second full paragraph of Site Access Agreements and Cover Letter section, that allows for the editing of DEC-produced templates for reasons to include de minimis deviations, clarifications, or interpretations, tailoring or customization, and/or supplemental provisions.

Response: DEC discussed comment with the ANR legal team. Of concern to direct edits to the template is current State capacity to review sample document deliverables to ensure deviations are de minimis. The comment is considered a reasonable suggestion for flexibility, however, and DEC will file this as a potential future update to guidance pending more system experience with the existing forms. In the interim DEC encourages feedback on the templates to be submitted and reviewed on an annual basis and considered for future updates and improvements.

DEC agrees with allowing the addition of supplemental provisions to the Site Access Agreement template forms on a project-by-project basis so long as they do not conflict with or negate the original terms of the Site Access Agreement template form.

Change to Guidance made: Added ability for CWSPs to add supplemental provisions to Site Access Agreement Template forms with some conditions but does not allow editing of the templates themselves.

Landowner Changes

3. Comment: NRPC suggests the addition of “directly or via the project implementer” and “in coordination with the project implementer” to Landowner Changes section of guidance.

Response: DEC accepts suggested language change with minor adjustment of replacing project implementor with landowner liaison, as the landowner liaison is the agent designated by the landowner as their preferred point of contact (often the project implementer) and may or may not be the CWSP.

Change to Guidance made (in red): If a landowner transfers their property, they are required per the site access agreement and outlined in the cover letter, to communicate this landowner change to the CWSP **directly or via the landowner liaison** at least 30 days prior to the transfer. If this occurs, CWSPs **in coordination with the landowner liaison** are recommended to...

Clean Water Project Verification

Entities Eligible to be Verifiers:

4. Comment: NRPC proposes adding “CWSP” to the list of entities de facto eligible to be verifiers, inserting the phrase “when they have staff dedicated to project verification activities,” and removing text that states CWSPs may only serve as verifiers with the Department of Environmental Conservation's (DEC's) written approval.

Response: CWSPs are eligible to serve as verifiers in their basin through explicit DEC approval. All clean water partners involved in a project may have degrees of conflict of interest as a verifier (i.e. implicit or explicit incentives pushing a verification finding to be scored higher or lower than appropriate based on the project’s actual condition). Due to the CWSP model where the CWSP’s phosphorus credits and ultimate litmus test of adequate progress under their agreements are impacted by a verification score, the CWSP conflict of interest was identified as holding the closest nexus to, and therefore highest risk to, the integrity of the verification findings and the phosphorus accounting system. Thus, CWSPs were identified by the O&M subgroup and DEC to be the least desirable entity to serve as verifier and to only do so when no other options exist and with extra oversight. The intent of the additional layer of approval is to confirm CWSPs have performed concerted effort in outsourcing this service first, as well as flagging for DEC heightened risk in verification reporting data to support audit planning. It is seen as a reasonable requirement.

Change to Guidance made: No change.

Project Decommission, Repair, and Project Loss

5. Comment: NRPC proposes to remove text that suggests CWSPs must consult with BWQC for project repairs, specifically in cases where the project has failed or is not functioning as intended.

Response: Chapter 4 of Guidance and Act 76 Rule § 39-403 (e) states that “The BWQC shall vote to advance each clean water project for development, design, and construction to fulfill pollution reduction goals.” Though ongoing maintenance expenses are not included in the Guidance/Rule referenced here, the funds for Operation and Maintenance and new project implementation funds are co-mingled as both project completion funds. When co-mingled, high repair expenses (cost of operation and maintenance of the project) can detract from forward progress on new project implementation. Pursuant to Act 76 Rule § 39-502. “The purpose of the BWQC is 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 that will address those impairments based on the basin plan.” High repair expenses not only can hinder forward progress on new project implementation but undermine the BWQC's statutory role to determine said priorities for the basin. A threshold was determined as the most suitable approach by the O&M subgroup and DEC team for striking a balance between CWSP autonomy on O&M work and BWQC authority over project implementation fund prioritization.

Change to Guidance made: No change.

6. Comment: NRPC proposes that CWSPs should weigh the costs of repair or replacement against the expenses associated with phosphorus credit impacts.

Response/Change to Guidance made: DEC accepts this suggestion as another factor that may be considered.

Change to Guidance made: Added a footnote to section clarifying that there may be several reasons a project is not suitable for repair, including the costs associated with repair as compared to the costs to decommission.

Project Repair

7. Comment: NRPC proposes introducing a new threshold for BWQC votes: repair costs greater than 80% of the original implementation cost funded by DEC's Clean Water Program or \$150,000 whichever is lower, cannot proceed without BWQC input.

Response: The O&M subgroup and DEC discussed and reached consensus on the threshold of 75% and \$100,000. These amounts were seen as representing a sizable proportion of a CWSP's total award and given the impact of repair costs on the availability of funds for implementation of new projects, a suitable threshold at which point BWQC members should be engaged in the decision-making again per their responsibility to prioritize clean water projects to address the most significant water quality impairments in the basin (§ 39-502). Given the weight of prior consensus in subgroup engagement, DEC proposes to not change guidance to the new threshold amount.

Change to Guidance made No change.

8. Comment: NRPC proposes language clarifying procedure for decommissioning project that cannot be returned to full functionality, emphasizing the termination of CWSP responsibilities for O&M.

Response: The proposed language from commenter suggests that only projects which cannot return to full functionality are to be decommissioned. Current Guidance supports that there may be other reasons a project is to be decommissioned, such as with an unwilling new landowner (in case of site access license).

Change to Guidance made: No change.

Project Adoption

9. Comment: NRPC proposes several language edits that:
- Clarify the methods by which projects can be identified for adopting, including adjustment to the description of the Clean Water Project Explorer's role.
 - Specify that the CWSP, with or without BWQC assistance, establishes a scoring and ranking process for adoption, emphasizing a non-exclusive list of factors to consider.
 - Add a new provision that absent and approved policy on project adoption, BWQC votes and approves projects for adoption on a case-by-case basis, suggesting a more flexible approach to adoption.

Response:

- DEC accepts suggested language change clarifying description of the Clean Water Project Explorer's role.
- DEC accepts suggested language change emphasizing a non-exclusive list of factors for consideration in establishing an adoption scoring/ranking process.

- c) DEC supports an administratively simpler process and accepts suggested new provision with added clarification that the BWQC must approve the policy on adoption before it can take the place of a BWQC vote to adopt projects.

Change to Guidance made (in red):

- a) The CWSP may use existing public facing tools such as the Clean water Project Explorer to learn about the location and status of existing clean water projects. Note: not all projects displayed in the explorer may be eligible for adoption, as a result of funding source or other reasons.
- b) Adoption commitments impact CWSP's long term CWSP Operation and Maintenance obligations, therefore, demands on their Water Quality Restoration Formula Grant budgets should be considered. Below is a non-exclusive list of factors that may be used in scoring and ranking processes.
- c) Absent a BWQC approved policy addressing project adoption, BWQC votes and approves project(s) for adoption.
 - a. In addition, added a footnote to guidance refencing BWQC responsibilities: Pursuant to Act 76 Guidance Chapter 4, the roles and responsibilities of the BWQC include 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 that will address those impairments based on the basin plan.”

Response to Identified Public Comment Theme

DEC identified a theme in a couple of the submitted comments on Chapter 7 that is addressed in this section. NRPC asked to strike language that limited the role of the CWSP in a manner that NRPC believed was contradictory with Act 76 Statue and the Clean Water Service Provider Rule. This theme was identified within Project Repair and Eligible Verifiers section comments. Below is DEC's response to the identified theme and responses to the specified sections the comments addressed within guidance.

Theme: Comments on DEC limiting role of the CWSP, counter to Act 76 Rule and Statue

Response: Act 76 of 2019 (10 V.S.A. § 924) states “An entity designated as a clean water service provider shall be required to identify, prioritize, develop, construct, verify, inspect, operate, and maintain clean water projects in accordance with the requirements of this subchapter.” Rule (§ 39-101) adds “the CWSP bears responsibility for overseeing clean water project identification, prioritization, development, design, construction, verification, inspection, and operation and maintenance to be administered in accordance with this Rule.” DEC does not interpret either Statute nor Rule to grant the CWSP ability to perform these duties without DEC oversight.

Project Repair

Chapter 7 Guidance provides appropriate DEC oversight and refines the role of CWSP in cases where there is potential blurred responsibilities across partner roles and safeguards against work that may conflict with statutorily or rule defined responsibilities of other entities like the Basin Water Quality Councils (BWQC).

Eligible Verifiers

Chapter 7 Guidance, as drafted, provides appropriate DEC oversight where the success of the program and integrity of the phosphorus accountability system is a concern or where potential CWSP action may infringe upon upholding the intent of the program.