

## Act 76 Guidance Chapter 9 - Responsiveness Summary

On Tuesday December 5, 2023, the Vermont Agency of Natural Resources (ANR), Department of Environmental Conservation (DEC) notified the public about the 30-day public comment period for the final draft of the Act 76 Guidance Chapter 6 (Clean Water Projects). A summary of the public comments that were received through the public-comment period ending January 8<sup>th</sup>, 2024, for this iteration of Chapter of Act 76 Guidance and are included in the following section.

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

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

Formal comments received by 01/08/2024, include those submitted by the following entities:

- The Lamoille and Missisquoi CWSP (also referred to as the Northwest Regional Planning Commission or NWRPC)

Comment: It (DEC's Guidance) needs to focus more on "adequate progress" and factors determining it. Much of the text concerning the monitoring process really belongs in Chapter 2, while text regarding financial audits belongs in Chapter 3. Discussion of "CWSP Reassignment Review" or de-assignment—and any discussion of Adequate Annual progress—should not be finalized until the contents of Chapter 10 are known. A key reason is that the Act 76 Rule clearly links use of adequate annual progress to determining whether an organization's assignment as a CWSP may be retained.

Response: As has been discussed in the Guidance Chapter 9 workgroup meetings with stakeholders, DEC sees that the determination of "adequate progress" involves both quantitative and qualitative measures. To the extent practical, DEC will rely mostly on quantitative project advancement metrics such as clean water project pollution reduction estimates per clean water projects in the "pipeline", with a secondary eye towards the understanding of CWSP/BWQC coordination and governance. While there may be some overlap in how this chapter addresses the monitoring process with Chapter 2, DEC sees that it is not necessarily redundant, but rather this chapter is intended to serve as including all relevant aspects of the adequate progress review process. While the content of Chapter 10 ("Assignment, Reassignment, and Replacement") is relevant as a potential outcome of an adequate progress determination, it is a separate process that will require separate guidance as it relates to the Clean Water Service Provider Rule.

Comment: Both "adequate progress" and "adequate annual progress" as concepts rely on the existence of meaningful P reduction targets. Given this interdependency, DEC guidance must clearly acknowledge the need for ongoing verification of the achievability of targets. Chapter 9 should list at

least one way—but ideally more than one—DEC has established the ‘achievability’ of CWSP voluntary phosphorus reduction targets.

Response: Act 76 (of 2019) requires that when DEC is making an allocation of pollution reduction, we "shall consider the sectors contributing to the water quality impairment in the impaired water’s boundaries and the contribution of the pollutant from regulated and nonregulated sources within the basin. Those allocations shall be expressed in annual pollution reduction goals and five-year pollution reduction targets as checkpoints to gauge progress (and adapt or modify as necessary, etc.)” (§ 922(a)). The starting points for the basin specific CWSP targets are the Lake Champlain TMDL developed by EPA and the Lake Memphremagog TMDL developed by DEC, which include a reasonable assurance that the TMDL targets can be met as demonstrated based on the TMDL Scenario Tool.

As required by Act 76, DEC estimated the regulatory phosphorus reductions for the agricultural, stream, forest and developed lands sectors and subtracted this from the TMDL phosphorus reduction targets to calculate non regulatory phosphorus reductions for Clean Water Service Providers. We then multiply the Clean Water Service Provider phosphorus load reduction targets by sector costing rates to get the total Clean Water Service Provider costs. And finally, we adjust the targets down substantially to align with the available funding and capacity for project implementation. This analysis provides a high-level analysis of the achievability of CWSP voluntary phosphorus reduction targets.

DEC recognizes that the CWSP implementation efforts are being made on the non-regulatory side of the Lake Champlain and Lake Memphremagog Phosphorus TMDLs will need to take an adaptive management approach as it is only through an iterative process that we can assess where there are gaps in meeting pollution reduction targets for each lake segment and within each basin that drains to that lake segment. There are several sectors where the tools for identifying and then estimating phosphorus reduction potential of specific projects are either recently released (FFI) or are in development (private roads assessment, forest roads inventory) which will provide more granularity around the phosphorus reduction potential of voluntary phosphorus reduction targets in these sectors. We understand that this often requires coordination with individual landowners and evaluation of other project constraints in order to determine the number of these projects that can advance towards implementation.

The development of next iteration of tactical basin plans (considered Phase 4 plans) beginning with the Basin 6 and 7 plans at the end of 2026, will allow for a review of this information and a further adjustment of targets at the basin scale based on information around potential projects across each of these sectors. This is built into the accountability framework of the TMDL and is the reason that CWSP assignments were aligned with the tactical basin planning process. DEC will rely on CWSPs and project partners during this process to provide input into this process based on what has been learned through the initial CWSP assignment.

Comment: Guidance must avoid the use of qualitative measures of progress as much as possible and feel the latest version is somewhat improved over the last. Still, we question whether the task of understanding “adequate progress” has been made any easier by introducing a new concept to be known as “reasonable progress.” Reasonable progress has been defined in a fashion we find both

open-ended and potentially contradictory. Although the text attempts to clarify what is meant by “project dynamics,” “system dynamics,” and “level of effort,” each of those can be negated by determinations by DEC that performance is ineffective, insufficient, and/or lacking in justification.”

Response: As has been discussed in the Guidance Chapter 9 workgroup meetings with stakeholders, the term “reasonable progress” was presented and explained as this is a term often used by the USEPA as guidance to states in developing TMDL implementation plans. This term refers to the assessment of TMDL implementation plan strategies, which are based on an iterative process or a “reasonable progress” approach to attaining water quality standards. Using BMP tracking and accounting info, DEC will be able to assess whether there is reasonable progress in clean water project implementation and water quality improvement. Given that some of the measures used to assess CWSP performance are qualitative in nature, DEC sees the section in Chapter 9 as contributing and supporting those reasonable progress measures that are necessary to complement quantitative metrics of progress made. The commenter is correct that DEC will make the final determination as to whether a CWSP’s performance is reasonable. DEC will base this determination on the actual performance of the CWSP.

In all cases, DEC’s driving interest is in seeing the CWSP system be successful. The intent of introducing the reasonable progress concept is specifically to signal that DEC will not focus exclusively on nutrient reductions, while being blind to other challenges CWSPs and their BWQCs face in identifying, developing, constructing, and maintaining clean water projects.

Comment: Last but not least, the proposal to make “BWQC Coordination” a factor in determining a CWSP’s adequate (annual) progress is misplaced. This is because it is CWSPs rather than BWQCs that have responsibility for achieving targets under Rule. The proposed “qualitative metrics” to be used for evaluation are also very vague. CWSPs are explicitly defined as being assigned “for the purpose of achieving pollutant reduction values established by the Secretary for the basin and bearing responsibility for overseeing identification, prioritization, development, design, construction, verification, inspection, and operation and maintenance of clean water projects within the basin.” Yes, CWSPs work closely and extensively with their BWQCs and other partners in the effort to clean up the Lake. But, simply presenting a list of vaguely-defined metrics offers no real guidance. Without more clarification, DEC runs the risk of making this qualitative aspect of adequate progress measurement pointless, or worse.

Response: DEC disagrees. It is required by the Act 76 Rule (Vermont Environmental Protection Rule - Chapter 39) that CWSPs establish Basin Water Quality Councils “in order 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”. Further, “with direction from the BWQC and in consultation with the applicable basin plan, the CWSP shall oversee identification and prioritization of clean water projects in accordance with the requirements of 10 V.S.A., Chapter 37, Subchapter 5, this Rule, and guidance” (§ 39-403(a)). As such, DEC sees that BWQC coordination is imperative and a very important factor in determining adequate progress in assessing CWSP governance and partner coordination efforts. It is DEC’s perspective that building a strong working relationship between the CWSP and BWQC is critical to the overall success for CWSPs and partners to achieve effective progress in meeting the state’s WQ goals.”