

**VERMONT AGENCY OF NATURAL RESOURCES
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
WATERSHED MANAGEMENT DIVISION**

**Response to Public Comments on Procedure for Water Quality Remediation Plans
July 7, 2015**

On May 1, 2015, the Vermont Department of Environmental Conservation (DEC) placed on public notice and requested public comment on its Procedure for Water Quality Remediation Plans (Procedure). The public comment period remained open for 30-days.

The Procedure applies to Water Quality Remediation Plans (WQRPs). A WQRP is a plan developed by a discharger, as required by the Secretary of Natural Resources, to bring an impaired water into attainment with the Vermont Water Quality Standards (VWQS). Pursuant to 40 C.F.R. § 130.7(b), the State may use a WQRP in lieu of a Total Maximum Daily Load (TMDL) for an impaired water when the State determines that the pollution control requirements of the WQRP are stringent enough to meet the VWQS within a reasonable period of time. The Procedure defines the minimum components that must be included in a WQRP as well as the requirements for public notice and comment on WQRPs.

DEC received public comments from the Vermont Natural Resources Council and VHB. DEC's responses to these comments are below.

1. Comment - We do not agree that the use of WQRPs in lieu of TMDLs is lawful under the Clean Water Act and implementing regulations. Consistent with 40 C.F.R. § 130.7, at a minimum, the WQRPs should contain: (1) a margin of safety; (2) a wasteload allocation; (3) compliance with water quality standards, not just compliance with best management practices; and (4) reasonable assurances that VWQS will be met within a reasonable time.

1. Response – Section 130.7(b)(1)(iii) requires states to create TMDLs for waters for which “other pollution control requirements (e.g. best management practices) required by local, State, or Federal authority are not stringent enough to implement any water quality standards (WQS) applicable to such waters.” Thus, this provision of federal law allows for states to try *other pollution control requirements*, such as a WQRP, to remediate impaired waters before immediately resorting to creating and implementing a TMDL.

This interpretation is supported by U.S. EPA guidance. EPA's July 29, 2005 “Guidance for 2006 Assessment Listing and Reporting Requirements Pursuant to Section 303(d), 303(b), and 314 of the Clean Water Act” states:

EPA regulations recognize that alternative pollution control requirements may obviate the need for a TMDL. Segments are not required to be included on the section 303(d) list if ... more stringent effluent limitations required by state, local, or federal authority, or “[o]ther pollution control requirements (e.g., best management practices) required by local, State or Federal authority” are stringent enough to implement applicable water quality standards (see 40 CFR 130.7(b)(1)) within a reasonable period of time. This guidance acknowledges that the most effective method for achieving water quality standards for some water quality impaired segments may be through controls developed and implemented without TMDLs (referred to as a “4b alternative”) ...

States should provide in their submission the rationale which supports their conclusion that there are other pollution control requirements” sufficiently stringent to achieve applicable water quality standards within a reasonable period of time.

Specifically, this rationale should include: (1) a statement of the problem causing the impairment, (2) a description of the proposed implementation strategy and supporting pollution controls necessary to achieve water quality standards, including the identification of point and nonpoint source loadings that when implemented assure the attainment of all applicable water quality standards, (3) an estimate or projection of the time when water quality standards will be met, (4) a reasonable schedule for implementing the necessary pollution controls, (5) a description of, and schedule for, monitoring milestones for tracking and reporting progress to EPA on the implementation of the pollution controls, and (6) a commitment to revise as necessary the implementation strategy and corresponding pollution controls if progress towards meeting water quality standards is not being shown.

Beyond the foregoing, there is nothing in federal regulation or guidance specifying the required elements of “other pollution control requirements required by local, State, or Federal authority.”

2. Comment - Part III No. 2 should require that the discharger include a map identifying the pollutant sources, not just a list of the sources of the impairment.

2. Response – DEC agrees and has updated the Procedure to incorporate this comment.

3. Comment - The discharger should estimate and quantify the reductions from the BMPs so that the permitting authority can determine whether the BMPs will in fact reduce the pollution discharge and remediate the impaired water. To address this concern, we propose that Part III No. 3 of the Procedure include the following language: “The discharger must estimate the pollutant reductions from each BMP so that the permitting review authority can determine whether the proposed pollution control requirements of the WQRP are stringent enough to meet the VWQS within a reasonable period of time.”

3. Response – Estimating the pollutant reductions associated with various components of a WQRP is an essential component of the use of the WQRP approach. Depending on the type of

impairment, and nature of BMPs applied to mitigate the impacts, quantifying the necessary, and anticipated, pollutant reductions is a likely course of action. For example, addressing stormwater impacts may involve estimating existing sediment load, and the extent of unmanaged impervious surface, relative to an “attainment condition.” In such an instance a WQRP is likely to include an estimate of the pollutant reduction capacity of the BMPs used, and a demonstration that the target can be reached. However, BMPs include a wide range of practices and activities, some of which do not necessarily lend themselves to quantification. For example, where BMPs address factors such as lack of stream buffer there may not be sufficient supporting data to strictly estimate the “pollutant reductions from each BMP.”

Therefore, DEC may require dischargers subject to WQRPs to estimate and quantify the reductions from BMPs in particular situations, but does not find it necessary to include this provision in the Procedure. DEC notes that under Section III. of the Procedure, a WQRP, “to provide assurances that it will ensure attainment of the VWQS,” may include additional components beyond those explicitly listed within the Section.

4. Comment - For the sake of clarity, we suggest that the last sentence of Part III No. 3 read: “The BMPs included in a WQRP, plus an adequate margin of safety, must be sufficient to ensure attainment of the VWQS.”

4. Response – DEC believes the original language is more protective and conservative than the proposed language. Under Section III.3., as drafted, the BMPs alone must be sufficient to achieve water quality standards, and then, to protect against the chance that the BMPs do not perform as expected, there must be a margin of safety on top of those BMPs to ensure attainment of water quality standards. Under the suggested language, one could interpret it to mean that the BMPs alone do not need to be calculated to ensure attainment of water quality standards.

5. Comment – Compliance schedules required under Part III No. 6 should set attainment of the water quality standards within two (2) years.

5. Response – Nothing in the federal Clean Water Act or in state statute requires such a compliance schedule. Although one of the main purposes of WQRPs is ensure impaired waters meet water quality standards quickly, a two year time frame may not be a reasonable period of time to require an entity to implement all necessary remediation and restoration measures, let alone enough time for the water to respond to such measures.

6. Comment – Compliance schedules should include interim targets to track progress and help the Department determine whether additional BMPs are necessary to meet attainment by the compliance date.

6. Response - DEC understands the term “interim targets” to mean instream measurements that can be used to document the trajectory of surface waters from their current state towards attainment of water quality criteria. DEC disagrees with the universal applicability of interim targets. In the case of Jay Peak’s impairments, DEC acquiesced to use of interim biological targets on the strength of many years of prior available data. However, in the case of biological measurements, the response of individual biometrics to installation of one or more BMP’s is in

nearly all instances unpredictable, as biological and chemical conditions will vary with natural variation in rainfall, organic inputs, predation, and other factors. In a general sense, in a WQRP watershed, biological and chemical metrics will improve and show progress towards attainment in response to incremental BMP installation, though variation is often observed as a result of factors outside the control of the WQRP responsible party. Therefore, DEC does not have confidence in its ability to predict biological or chemical responses sufficiently to rely on interim metrics as part of all WQRPs, and thus, does not think it appropriate to include such a requirement in the Procedure.

7. Comment – The WQRP should include consequences for failing to meet interim targets or compliance dates. We suggest including the following language: “Failure to meet an interim target or compliance date will require additional BMPs or other remediation measures and a halt on the addition to any new discharges of the pollutant(s) of concern.”

7. Response – As stated in Section IV. of the Procedure, implementation of and compliance with a WQRP must be enforceable. Therefore, if a discharger subject to a WQRP fails to properly implement or comply with the requirements of its WQRP, the Agency may enforce against the discharger. Penalties may include requiring the discharger to: stop work, implement activities to remediate the impairment, and pay monetary penalties.

8. Comment – The WQRP procedure should include the methodology the Department will use to track the pollutant loads and determine whether targets are being met year to year. We propose the following addition to the Part III list of WQRP components: “A methodology to track progress of pollution load reductions over time as remediation projects are implemented.”

8. Response – DEC tracks WQRP progress by: (1) ensuring the WQRP responsible party is implementing BMPs in accordance with the WQRPs enforceable compliance schedule, and (2) requiring and conducting biological monitoring to track the impaired water’s response to implementation of the WQRP. If the biology does not respond as anticipated, DEC may require the WQRP responsible party to implement additional measures to ensure achievement of water quality standards within a reasonable period of time.

9. Comment – As a general matter, the Clean Water Act and implementing regulations unquestionably require compliance with water quality standards. To achieve water quality standards, as a starting point, there must be “no net increase” of the pollutant(s) of concern; and water quality standards must be attained within a reasonable time. At a minimum, the Department must measure the assimilative capacity of the impaired waters, quantify the pollution reductions from each of the proposed BMPs, and compare these estimated reductions to the proposed discharges.

9. Response – WQRPs are plans to reduce discharges. The comment pertains to standards for issuing a permit in an impaired water and hence is outside the scope of the Procedure.

10. Comment - A WQRP must be enforceable through an individual permit to assure attainment of Vermont Water Quality Standards and to comply with Clean Water Act requirements. WQRPs are effluent limitations. Therefore we propose revising Part IV § 2 in

order to make this clear, as follows: “Make the discharger’s compliance with and implementation of the WQRP enforceable through an individual permit.”

The CWA requires permits for dischargers to assure compliance with water quality standards. Clean Water Act § 301(b)(1)(C). Moreover, the stated goal of Vermont's water quality plan is to “assure consistency with applicable requirements of the federal Clean Water Act.” 10 V.S.A. § 1264. This requires providing “enforceable standards for the permitting and management of discharges” as per 10 V.S.A. § 1250. It is our understanding that the Department is using WQRPs to satisfy these statutory requirements.

The Clean Water Act requires “regulation in fact, not only in principle.” *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 498-99 (2d Cir. 2005). The state cannot implement a “self-regulatory” permitting regime whereby the issuance of discharge permits is not conditioned on compliance with the terms of a WQRP. See *id.* at 498 (stating that permits authorizing the discharge of pollutants may issue “only where such permits ensure that every discharge of pollutants will comply with all applicable effluent limitations and standards”).

The Second Circuit in *Waterkeeper* required nutrient management plans (NMPs) to be included in discharge permits issued to Concentrated Animal Feeding Operations (CAFOs) because the plans are effluent limitations. *Id.* at 502 (explaining why nutrient management plans are effluent limitations and therefore must be included in discharge permits). The court rejected EPA’s arguments that inclusion of the NMPs as permit conditions was not statutorily compelled because they were merely “planning tools” to help dischargers comply with effluent limitations. *Id.* at 502-03 (holding that “the CAFO Rule—by failing to require that the terms of the nutrient management plans be included in NPDES permits—violates the Clean Water Act”). Similarly, an individual permit without the applicable WQRP does not assure compliance with VWQS because WQRPs establish best management practices and other remediation measures in lieu of TMDLs or other effluent limitations.

The Clean Water Act “unquestionably provides that all applicable effluent limitations must be included in each NPDES permit.” *Id.* at 502; *Sierra Club Mackinac Chapter v. Dep’t of Env’tl. Quality*, 747 N.W.2d 321, 333-34 (2008); *Am. Paper Inst., Inc. v. U.S.E.P.A.*, 996 F.2d 346, 349 (D.C. Cir. 1993). The EPA may itself issue NPDES permits only upon the condition that permittees will meet the relevant standards. 33 U.S.C. 1342(a)(1) (the EPA “shall prescribe conditions for such permits to assure compliance with all applicable requirements, including effluent limitations”). The CWA requires that minimum standards for compliance be set as conditions for the issuance of permits. *Id.* at 335; *Env’tl. Def. Ctr., Inc. v. U.S. E.P.A.*, 344 F.3d 832, 855 (9th Cir. 2003). Therefore, failure to include WQRPs in individual permits would violate the minimum requirements of the Clean Water Act.

10. Response – DEC agrees with the foregoing, and that was the intent of the Procedure. When the Department issues discharge permits for a project that is also subject to a WQRP, the discharge permit will require compliance with the WQRP. Therefore, the following sentence has been added as Section IV.3., “the Secretary shall ... require that all individual discharge permits issued for projects subject to WQRPs shall include as a condition a requirement to comply with the WQRP.”

11. Comment – With regards to WQRP amendments, the Procedure should outline when a WQRP amendment is required. For instance, a WQRP amendment should be required when impaired waters fail to meet interim targets, compliance dates, or in the case of backsliding.

11. Response - The comment confuses desired content for the subject Procedure with other complementary assessment processes already undertaken by DEC as a matter of business. In the case of WQRP watersheds, the Department relies primarily on the biennial water quality assessment process undertaken in fulfillment of Section 305(b) of the Clean Water Act to determine the need for amendments, revisions, or even wholesale replacement of WQRPs. This does not imply that the Department does not annually review WQRP Performance Monitoring Reports. Rather, it is the biennial assessment cycle that typically triggers amendments to WQRPs.

12. Comment - We agree with the Department’s commitment to update the public on the results of WQRP monitoring reports and the health of the waters subject to the WQRP through a public meeting. Any public meetings should be held as soon as possible after sampling and at least within six months of sampling.

12. Response - It is infeasible to expect biological monitoring results to be available at the latest six months after collection. Department scientists are required to assess independently-derived biological data for compliance with quality assurance procedures prior to acceptance of consultant data. Setting an arbitrary six-month deadline will require that Department staff set aside other important work during their busiest laboratory season. As such, the Department is unwilling to establish a prescribed timeline to convene a public meeting.

13. Comment – I’m having a hard time being able to connect the idea of a “discharger” with the requirement for ensuring attainment of VWQS. Every situation is different, but I would say that more often than not, there are multiple entities/dischargers/sources that may be responsible for non-attainment of Standards in a given watershed. So, if a WQRP is developed by a discharger that doesn’t have ownership or control of all discharges contributing to non-attainment, then it would seem impossible to provide such assurance, unless it was known what was going to be done with respect to the other sources, and when BMPs associated with these would be implemented. While the plan can certainly identify these sources, and potentially even recommend BMPs, it would seem that the schedule of compliance should be limited to the implementation of BMPs for discharges that the entity is preparing the plan has actual control over.

13. Response – The Department concurs that the schedule of compliance for a WQRP is applicable to the BMPs that address pollution sources controlled by the entity subject to the WQRP. To the extent there are other sources of pollution requiring mitigation to achieve compliance with Vermont Water Quality Standards, it is the responsibility of the Department to use existing authorities to mitigate the impacts from those sources as necessary, such as through requiring an upgrade to an existing stormwater system through a stormwater discharge permit.