

Administrative Procedures – Final Proposed Rule Filing

Instructions:

In accordance with Title 3 Chapter 25 of the Vermont Statutes Annotated and the “Rule on Rulemaking” adopted by the Office of the Secretary of State, this filing will be considered complete upon filing and acceptance of these forms with the Office of the Secretary of State, and the Legislative Committee on Administrative Rules.

All forms requiring a signature shall be original signatures of the appropriate adopting authority or authorized person, and all filings are to be submitted at the Office of the Secretary of State, no later than 3:30 pm on the last scheduled day of the work week.

The data provided in text areas of these forms will be used to generate a notice of rulemaking in the portal of “Proposed Rule Postings” online, and the newspapers of record if the rule is marked for publication. Publication of notices will be charged back to the promulgating agency.

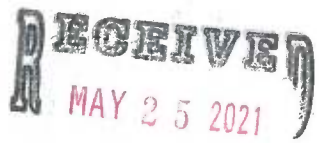
PLEASE REMOVE ANY COVERSHEET OR FORM NOT REQUIRED WITH THE CURRENT FILING BEFORE DELIVERY!

Certification Statement: As the adopting Authority of this rule (see 3 V.S.A. § 801 (b) (11) for a definition), I approve the contents of this filing entitled:

Clean Water Service Provider Rule

/s/ Julia S. Moore , on 5/24/2021
(signature) (date)

Printed Name and Title:
Julia S. Moore, Secretary
Vermont Agency of Natural Resources



RECEIVED BY: _____

BY:

- Coversheet
- Adopting Page
- Economic Impact Analysis
- Environmental Impact Analysis
- Strategy for Maximizing Public Input
- Scientific Information Statement (if applicable)
- Incorporated by Reference Statement (if applicable)
- Clean text of the rule (Amended text without annotation)
- Annotated text (Clearly marking changes from previous rule)
- ICAR Minutes
- Copy of Comments
- Responsiveness Summary

Final Proposed Coversheet

1. TITLE OF RULE FILING:

Clean Water Service Provider Rule

2. PROPOSED NUMBER ASSIGNED BY THE SECRETARY OF STATE

20P-025

3. ADOPTING AGENCY:

Agency of Natural Resources

4. PRIMARY CONTACT PERSON:

(A PERSON WHO IS ABLE TO ANSWER QUESTIONS ABOUT THE CONTENT OF THE RULE).

Name: Chris Rottler

Agency: Agency of Natural Resources

Mailing Address: 1 National Life Drive, Davis 3,
Montpelier, VT 05620

Telephone: 802 461 - 6051 Fax: -

E-Mail: chris.rottler@vermont.gov

Web URL *(WHERE THE RULE WILL BE POSTED)*:

<https://dec.vermont.gov/water-investment/statuses-rules-policies/act-76>

5. SECONDARY CONTACT PERSON:

(A SPECIFIC PERSON FROM WHOM COPIES OF FILINGS MAY BE REQUESTED OR WHO MAY ANSWER QUESTIONS ABOUT FORMS SUBMITTED FOR FILING IF DIFFERENT FROM THE PRIMARY CONTACT PERSON).

Name: Katelyn Ellermann

Agency: Agency of Natural Resources

Mailing Address: 1 National Life Drive, Davis 3,
Montpelier, VT 05620

Telephone: 802 522 - 7125 Fax: -

E-Mail: katelyn.ellermann@vermont.gov

6. RECORDS EXEMPTION INCLUDED WITHIN RULE:

(DOES THE RULE CONTAIN ANY PROVISION DESIGNATING INFORMATION AS CONFIDENTIAL; LIMITING ITS PUBLIC RELEASE; OR OTHERWISE EXEMPTING IT FROM INSPECTION AND COPYING?) No

IF YES, CITE THE STATUTORY AUTHORITY FOR THE EXEMPTION:

PLEASE SUMMARIZE THE REASON FOR THE EXEMPTION:

7. LEGAL AUTHORITY / ENABLING LEGISLATION:

Final Proposed Coversheet

(THE SPECIFIC STATUTORY OR LEGAL CITATION FROM SESSION LAW INDICATING WHO THE ADOPTING ENTITY IS AND THUS WHO THE SIGNATORY SHOULD BE. THIS SHOULD BE A SPECIFIC CITATION NOT A CHAPTER CITATION).

10 V.S.A. §§ 924 and 930, established by Act 76 of 2019

8. EXPLANATION OF HOW THE RULE IS WITHIN THE AUTHORITY OF THE AGENCY:
Under 10 V.S.A. § 924, the Agency of Natural Resources (Agency) is required to adopt rules assigning Clean Water Service Providers (CWSPs) to impaired basins, and under 10 V.S.A. § 930, the Agency has general authority to adopt rules to implement the requirements of 10 V.S.A., Chapter 37, subchapter 5 (Water Quality Restoration and Improvement).
9. THE FILING HAS CHANGED SINCE THE FILING OF THE PROPOSED RULE.
10. THE AGENCY HAS INCLUDED WITH THIS FILING A LETTER EXPLAINING IN DETAIL WHAT CHANGES WERE MADE, CITING CHAPTER AND SECTION WHERE APPLICABLE.
11. SUBSTANTIAL ARGUMENTS AND CONSIDERATIONS WERE NOT RAISED FOR OR AGAINST THE ORIGINAL PROPOSAL.
12. THE AGENCY HAS INCLUDED COPIES OF ALL WRITTEN SUBMISSIONS AND SYNOPSES OF ORAL COMMENTS RECEIVED.
13. THE AGENCY HAS INCLUDED A LETTER EXPLAINING IN DETAIL THE REASONS FOR THE AGENCY'S DECISION TO REJECT OR ADOPT THEM.
14. CONCISE SUMMARY (150 WORDS OR LESS):

The Agency proposes this rule to assign a CWSP to each basin described in 10 V.S.A. § 922(a) for the purpose of achieving pollutant reduction values established by the Secretary. This rule also establishes requirements for the implementation of 10 V.S.A., Chapter 37, subchapter 5, related to the operational, financial, managerial, and technical requirements associated with CWSP service, as well as the governance structure for Basin Water Quality Councils (BWQCs). The rule also proposes requirements related to conflicts of interest policy, oversight and evaluation of CWSP service, and renewal or removal of a CWSP assignment.

15. EXPLANATION OF WHY THE RULE IS NECESSARY:

Final Proposed Coversheet

Vermont and federal statutes mandate that impaired waterbodies be restored in accordance with total maximum daily load (TMDL) requirements for pollution reduction. The Vermont Clean Water Initiative provides funding to implement water quality projects to comply with TMDLs in the State, including phosphorus TMDLs for Lake Champlain and Lake Memphremagog. Act 76 declared that Clean Water Initiative success will depend on sustained and adequate funding for implementation of projects, including non-regulatory projects, and required the Agency to assign Clean Water Service Providers (CWSPs) to oversee the development of non-regulatory projects in impaired watersheds. This rule assigns a CWSP to each basin and establishes foundational requirements for CWSPs and Basin Water Quality Councils, which are councils attached to CWSPs. CWSPs, funded by formula grants from the State, will identify, prioritize, develop, design, construct, verify, operate and maintain clean water projects in their assigned basin.

16. EXPLANATION OF HOW THE RULE IS NOT ARBITRARY:

The Vermont Legislature has concluded that non-regulatory clean water projects are necessary to restore impaired waters and comply with mandated TMDLs. Following an extensive stakeholder process, the proposed rule complies with 10 V.S.A., Chapter 37, subchapter 5, in establishing the Clean Water Service Provider framework to implement these projects.

17. LIST OF PEOPLE, ENTERPRISES AND GOVERNMENT ENTITIES AFFECTED BY THIS RULE:

Landowners, including individuals, organizations and state agencies receiving funding for projects.

Regional Planning Commissions, Natural Resources Conservation Districts, Municipalities, Watershed-based Organizations, and land conservation organizations.

Engineers, designers, consultants, and contractors who are hired to design and construct water quality projects.

The public at large, with an interest in water quality and outdoor educational and recreational opportunities.

18. BRIEF SUMMARY OF ECONOMIC IMPACT (150 WORDS OR LESS):

The Agency of Natural Resources will annually issue a formula grant to each assigned CWSP, 85% of which shall be dedicated towards projects, and 15% of which is reserved for administrative costs. In aggregate, the value of these formula grants could range from an estimated \$6 million to \$9 million per year, depending on available and budgeted funds, which are subject to annual appropriation by the General Assmebly, based on recommendations of the Vermont Clean Water Board. The issuance of sustained investment at this scale for the implementation of non-regulatory water quality projects will have a positive economic impact on job creation and the Vermont economy as a whole. The improvement and maintenance of Vermont's water quality will also have a positive economic impact associated with recreational use of Vermont's waters (swimming, fishing, boating), tourism, and property values.

19. A HEARING WAS HELD.

20. HEARING INFORMATION

(THE FIRST HEARING SHALL BE NO SOONER THAN 30 DAYS FOLLOWING THE POSTING OF NOTICES ONLINE).

IF THIS FORM IS INSUFFICIENT TO LIST THE INFORMATION FOR EACH HEARING PLEASE ATTACH A SEPARATE SHEET TO COMPLETE THE HEARING INFORMATION.

Date: 2/1/2021

Time: 10:00 AM

Street Address: Virtual Hearing via Microsoft Teams with call-in option: meeting link at <https://dec.vermont.gov/water-investment/statuses-rules-policies/act-76>

Zip Code: Call in # +1 802-828-7667; Conference ID# 725822355#

Date: 2/3/2021

Time: 05:00 PM

Street Address: Virtual Hearing via Microsoft Teams with call-in option: meeting link at <https://dec.vermont.gov/water-investment/statuses-rules-policies/act-76>

Final Proposed Coversheet

Zip Code: Call in # +1 802-828-7667; Conference ID#
664390226#

Date:

Time: AM

Street Address:

Zip Code:

Date:

Time: AM

Street Address:

Zip Code:

21. DEADLINE FOR COMMENT (NO EARLIER THAN 7 DAYS FOLLOWING LAST HEARING):

2/19/2021

KEYWORDS (PLEASE PROVIDE AT LEAST 3 KEYWORDS OR PHRASES TO AID IN THE
SEARCHABILITY OF THE RULE NOTICE ONLINE).

Clean Water Service Providers

Basin Water Quality Councils

Water Quality

Regional Planning Commission

Watershed Organization

Natural Resources Conservation District

Vermont Housing and Conservation Board

Non-regulatory projects

Natural Resources projects

Natural Resource restoration

Rain gardens

Functioning Floodplain Initiative

Forestland

Clean Water Initiative

Clean Water Formula Grants

**Ch. 39 Clean Water Service Provider Rule
List of Changes in Final Proposed Rule**

Section	Change	Explanation
§ 39-101	for the purposes-	Grammatic improvement
	10 V.S.A., Chapter 37, <u>S</u> ubchapter 5	Consistency in reference to this statutory subchapter
§ 39-101		Use of acronym previously defined in same paragraph
	governance structure for Basin Water Quality Councils - <u>BWOCs</u>	
§ 39-201(2)	“Administrative cost” means program and project delivery costs incurred by a clean water service provider <u>in the administration of the Water Quality Restoration Formula Grant, including costs to conduct procurement, contractsub-agreement preparation; and monitoring, reporting, and invoicing. Subaward recipients</u> CWSPs may be eligible for these costs depending on the nature of the elect to subgrant or subcontract aspects of Formula Grant administration. <u>Costs to manage and complete individual clean water projects are not administrative costs.</u>	Response to comment; clarification of administrative costs
§ 39-201(5)	“Basin Water Quality Council” or “ <u>BWOC</u> ”	Addition of acronym to definition
§ 39-201(6)(B)(iv)(a)	Change "Section" to §	Use of § symbol
§ 39-201(7)	“Clean Water Service Provider” or “CWSP” means an entity assigned to a basin by the Secretary pursuant to Subchapter 3 of this Rule for the purposes of achieving pollutant reduction values established by the Secretary for the basin and bearings responsibility for overseeing identification, prioritization, development, design, construction, verification, inspection, and operation and maintenance of clean water projects within the basin.	Grammatic improvement
§ 39-201(8)	“Co-benefit” means the additional benefit to local governments and the public provided by or associated with a clean water project, including flood resilience, hazard mitigation, education, ecosystem improvement, and local pollution prevention.	Response to comment
§ 39-201(13)	CWSP lean Water Service Provider-	Use of acronym previously defined
§ 39-301(a)	purposes	Grammatic improvement

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§ 39-301(e)	A transfer shall be documented in a supplement to Appendix A published on the Agency's website; and on the CWSP's website.	Simplifying language
§ 39-304(h)	The the role of the BWQC in annual reporting, annual progress, and CWSP re-assignment; and	Consistency in capitalization; adjusting list based on addition of another item to list
§ 39-304(i)	Governance <u>governance</u> and operations of the BWQC; and	Consistency in capitalization; adjusting list based on addition of another item to list
§ 39-304(j)	<u>reasonable expectations for CWSPs serving in a backup capacity for another CWSP.</u>	Response to comment; addition to Secretary's guidance list to address backup CWSP service
§ 39-305(m)	have written policies prohibiting discrimination based on all protected classes under f Federal and State of Vermont <u>state law</u> .	Correct capitalization
§ 39-306(c)	Audit. Annually, the entity serving as a CWSP shall provide the Department an independent financial and programmatic audit of the entity. The audit shall show all CWSP activities as a separate fund from the <u>entity's</u> other activities of the entity . The audit shall be performed by an independent public accountant in accordance with all applicable laws, regulations, policies, and procedures.	Simplifying language
§ 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 the pre-qualification process when proposing to implement a clean water project outside the entity's assigned basin. The outcome of the request for qualifications shall be valid for up to three years. CWSPs must open the pre-qualification process to new entities at least once per year.	Response to comment; clarifying pre-qualification, including elimination of sole sourcing of entities pre-qualified by BWQC

**Ch. 39 Clean Water Service Provider Rule
List of Changes in Final Proposed Rule**

§ 39-306(i)	<p>Procurement, Services and Goods and Services. Procurement of 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 <u>at least three</u> 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.</p>	Response to comment; revising procurement process to align with BWQC statutory purpose and reduce conflict of interest concerns
§ 39-306(j)	<p>Insurance. The entity serving as CWSP shall comply with the insurance requirements of Water Quality Restoration Formula Grants. Professional liability insurance shall be required for any engineers or architects that are subgrantees or subcontractors, with the CWSP listed as additional insured. The CWSP shall<u>may</u> obtain Errors and Omissions insurance for BWQC members, the cost of which shall be considered an <u>administrative cost.</u></p>	Response to comment; E&O insurance is administrative cost
§ 39-306(m)	<p><u>Use of leftover funds is subject to applicable provisions of Subchapters 3, 4, 5, and 6 of this Rule.</u></p>	Clarifying that use of leftover funds is subject to same CWSP operational and fiscal requirements and project selection process

**Ch. 39 Clean Water Service Provider Rule
List of Changes in Final Proposed Rule**

§ 39-306(n)	Risk Reserve. A risk reserve may be held within the Clean Water Fund pursuant to recommendations of the Clean Water Board, 10 V.S.A. § 1389(d)(1), and subject to annual appropriations. Access to risk reserve funds shall follow the Risk of Loss provisions of § 39-404 of this Rule and the Secretary's guidance.	Adding citation to applicable statutory provision
§ 39-307(c)	limited English proficiency	Correction
	A summary of any inspections <u>inspection, verification, and operation and maintenance activities</u> of previously implemented clean water projects and whether those projects continue to operate in accordance with their design;	Response to comment
§ 39-308(b)(3)	Formula <u>Grant</u> awards	Consistent use of term
§ 39-401(a)(2)	An allocation of the pollutant reduction identified under subdivision (a)(1) of this section <u>chapter</u> to each basin and CWSP assigned to that basin pursuant to Subchapter 3 and Appendix A of this Rule.	Consistency of internal references
§ 39-401(a)(2)	The Secretary shall publish these allocations in the applicable basin plans.	Response to comment
§ 39-401(a)(3)	When known, costs for project development may be included in the standard cost for pollutant reduction.	Response to comment
§ 39-401(b)	subdivision-subsection (a) of this subsection	Consistency of internal references
§ 39-402(a)	subdivision-subsection (a)	Consistency of internal references
§ 39-402(b)	subdivision-subsection (b)	Consistency of internal references
§ 39-402(c)(3)	subdivision-subsection (c)	Consistency of internal references
§ 39-402(c)(5)	subdivision-subsection (c)	Consistency of internal references
§ 39-403(d)	When identifying, prioritizing, and selecting a slate of clean water project <u>projects</u> to meet a basin's pollutant reduction target, the CWSP and BWQC shall:	Removal of slate of projects to improve project selection and reduce conflict of interest concerns
§ 39-403(d)(4)	consider empirical project-specific factors including the pollution reduction, cost effectiveness of that reduction, <u>design life</u> , cost of operation and maintenance of the project, and conformance with the basin plan;	Response to comment

**Ch. 39 Clean Water Service Provider Rule
List of Changes in Final Proposed Rule**

<p>§ 39-403(e)</p>	<p>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 as drafted by the CWSP for both project development or implementation categories and make any adjustments to the co-benefits scoring as needed. The BWQC shall vote on a prioritized slate of <u>to advance</u> 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 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. <u>Individual clean water projects should not be voted for advancement outside of this selection process unless to address an urgent water quality concern with the concurrence of the Secretary.</u></p>	<p>Improvements to align with BWQC statutory purpose and reduce conflict of interest concerns</p>
<p>§ 39-403(d)</p>	<p>Methodology for Determining Project Eligibility. Upon the request of a CWSP, the Secretary shall evaluate a proposed clean water project <u>type</u> and issue a determination as to whether the proposed clean water project <u>type</u> is eligible to receive funding as a part of a Water Quality Restoration Formula Grant. When making a determination, the Secretary shall consider the impact of the project 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.</p>	<p>Response to comment, efficiency benefits</p>

**Ch. 39 Clean Water Service Provider Rule
List of Changes in Final Proposed Rule**

§ 39-403(h)	Permits. For all clean water projects that are administered under CWSP oversight. the A CWSP shall ensure that all local, state, and federal permits necessary for project completion are secured prior to implementation or construction for all clean water projects that are administered under CWSP oversight.	Readability improvement
§ 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 Any site control in fee simple, easement, or agreement shall be documented on a form provided by the Secretary. Such fee simple interest, easement, or agreement may be secured by or assigned to a third party following Secretary approval.	Response to comment requesting affirmation on the potential role of third parties in quality control and site control
§ 39-404	The risk of In the event of a total, partial, or temporary loss of a clean water project during installation or following completion, the CWSP shall cease counting the project's performance towards pollution reduction goals as of the date the performance issue is identified until the project is rehabilitated. Project losses shall be addressed as follows:	Clarification on the impact of project loss on counting pollution reduction
§ 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, but will not receive credit for any pollution reduction until to cover costs already incurred up to the project is complete. date of such circumstances or Acts of God. Leftover funds are <u>may also allowed be used to cover such costs pursuant to § 39-306(n) of this Rule if such funds are available.</u>	Clarification

**Ch. 39 Clean Water Service Provider Rule
List of Changes in Final Proposed Rule**

§ 39-404(b)	When a completed project was appropriately designed, installed, operated, and maintained, but inspection reveals lack of performance due to damage or unforeseen factors, not from negligence or intentional acts of others : The CWSP may use the Water Quality Restoration Formula Grant to rehabilitate the project, but will not receive continuing payment for operation and maintenance of the project for ongoing pollution reduction, unless that project is rehabilitated. <u>Risk reserve and leftover funds are also allowed for rehabilitation if such funds are available.</u>	Clarification
§ 39-404(c)	When the project is damaged or removed due to the negligence or intentional acts of others and not the CWSP, the CWSP may lose future pollution reduction credit, but risk : <u>Risk reserve and leftover funds are allowed for rehabilitation if such funds are available: Access to Risk Reserve funds shall be subject to recommendation by the Secretary pursuant to 10 V.S.A. 1389(d)(1) and limited to funds appropriated for the purpose by the General Assembly.</u>	Clarification
§ 39-404(e)	When the project is installed but fails <u>is damaged or lost</u> due to a negligent or intentional act or omission: the Secretary may exercise authority pursuant to 10 V.S.A. § 924(f) and Subchapter 7 of this Rule.	Language consistency
§ 39-404(f)	Rehabilitated projects will not be considered failed.	Eliminating redundancy and inconsisent phrase, "failed"; the same concept was incorporated into the beginning of § 39-404, in that project performance can be counted following rehabilitation.
§ 39-501(a)	Should additional BWQC membership be authorized, the proportionality of representation established by 10 V.S.A. § 924(g)(2) shall be maintained: <u>either by membership or weighting of votes.</u>	Clarification on how BWQC member proportionality can be maintained

**Ch. 39 Clean Water Service Provider Rule
List of Changes in Final Proposed Rule**

§ 39-501(b)(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 <u>people</u> with Vermont’s waters. Watershed protection organizations work with <u>are open to</u> all watershed constituents and do shall not represent a specific constituency or interest group.	Response to comment
§ 39-501(c)	<u>Organizations with a fiscal sponsor may serve on a BWQC. A fiscal sponsor organization and the sponsored organization shall not concurrently serve on the same BWQC.</u>	Response to comment
§§ 39-501(d)-(f)	Relettering	Relettered following addition (c) to list
§ 39-503(b)(2)	Decisions shall be binding by a vote of the majority of the BWQC members, regardless of the number of members present for the vote, <u>except that the BWQC may adopt and implement a decision making model requiring a greater proportion of votes.</u>	Response to comment related to interest in having consensus model decisions
§ 39-503(c)	BWQC members shall attend all BWQC meetings, unless good cause prevents attendance. Failure to attend one-half or more of the scheduled meetings per year <u>without good cause shall</u> constitute grounds for replacement of the member.	Response to comment
§ 39-503(d)	Alternate members shall be established at the first meeting of a BWQC; and may be changed with reasonable prior written notice to the BWQC and CWSP.	Unnecessary comma
§ 39-503(g)	BWQC members from among the appointing entities in 10 V.S.A. § 924(g) shall be entitled to reasonable compensation for participation in <u>the BWQC meetings</u> in accordance with the Secretary’s guidance and applicable grant agreements.	Response to comment
Subchapter 6	Each CWSP shall adopt a conflicts <u>conflict</u> of interest policy that includes, in part, the following:	Consistency of terms

Ch. 39 Clean Water Service Provider Rule
List of Changes in Final Proposed Rule

Subchapter 6 (a)	Conflict of interest means an interest, direct or indirect, financial or otherwise, of a person <u>or entity</u> with a CWSP or BWQC decision making role, or such an interest, known to that <u>such</u> 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.	Given the nature of BWQC members being representative of entities, this addition makes clear that the entity's conflict must also be addressed
Subchapter 6 (c)	<u>A person engaged in CWSP decision making must disclose any potential conflict of interest and shall recuse itself from any CWSP decision making subject to that conflict.</u>	Addition to make clear that CWSP conflicts of interest must also be addressed.
Subchapter 6 (d)	Relettering	Relettered for addition of (c) to list
§ 39-801(d)	Agency staff shall review the assignment renewal application using the criteria set forth in the Secretary's guidance and make a written recommendation to the Secretary for or against renewal, including consideration of any comments from the public and BWQC.	Correction

Administrative Procedures – Adopting Page

Instructions:

This form must accompany each filing made during the rulemaking process:

Note: To satisfy the requirement for an annotated text, an agency must submit the entire rule in annotated form with proposed and final proposed filings. Filing an annotated paragraph or page of a larger rule is not sufficient. Annotation must clearly show the changes to the rule.

When possible, the agency shall file the annotated text, using the appropriate page or pages from the Code of Vermont Rules as a basis for the annotated version. New rules need not be accompanied by an annotated text.

-
1. TITLE OF RULE FILING:
Clean Water Service Provider Rule
 2. ADOPTING AGENCY:
Agency of Natural Resources
 3. TYPE OF FILING (*PLEASE CHOOSE THE TYPE OF FILING FROM THE DROPDOWN MENU BASED ON THE DEFINITIONS PROVIDED BELOW*):
 - **AMENDMENT** - Any change to an already existing rule, even if it is a complete rewrite of the rule, it is considered an amendment as long as the rule is replaced with other text.
 - **NEW RULE** - A rule that did not previously exist even under a different name.
 - **REPEAL** - The removal of a rule in its entirety, without replacing it with other text.

This filing is **A NEW RULE** .

4. LAST ADOPTED (*PLEASE PROVIDE THE SOS LOG#, TITLE AND EFFECTIVE DATE OF THE LAST ADOPTION FOR THE EXISTING RULE*):

INTERAGENCY COMMITTEE ON ADMINISTRATIVE RULES (ICAR) MINUTES

Meeting Date/Location: December 14, 2020, Microsoft Teams Virtual Meeting

Members Present: Chair Kristin Clouser, Dirk Anderson, Jennifer Mojo, John Kessler, Matt Langham, and Clare O'Shaughnessy

Members Absent: Diane Bothfeld and Ashley Berliner

Minutes By: Melissa Mazza-Paquette

- 2:03 p.m. meeting called to order, welcome and introductions.
- Review and approval of minutes from the November 9, 2020 meeting.
- Addition to agenda: Notice of an Emergency Rule supported by Chair Clouser on 12/8/20 titled 'Vermont Department of Taxes Emergency Rule on Hearing Procedure' provided by the Vermont Department of Taxes
 - Amended agenda approved as drafted.
- No public comments made.
- Presentation of Proposed Rules on pages 2-4 to follow.
 1. Third Party Administrator Rule. Department of Financial Regulation, page 2
 2. Pollution Abatement Facility Operator Rule. Agency of Natural Resources, page 3
 3. Clean Water Service Provider Rule. Agency of Natural Resources, page 4
- Next scheduled meeting is January 11, 2021 at 2:00 p.m.
- 3:35 p.m. meeting adjourned.

**Proposed Rule: Clean Water Service Provider Rule, Agency of Natural Resources
Presented by Neil Kamman**

Motion made to accept the rule by Matt Langham, seconded by Clare O'Shaughnessy and passed unanimously except for Jen Mojo who abstained, with the following recommendations:

1. Missing Adopting Page: Need to include.
2. Economic Impact Analysis, page 3, #9: Expand upon the analysis on how the rule was developed.
3. Economic Impact Analysis and Environmental Impact Analysis, #9: Expand upon the analysis on how the rule was developed.
4. Environmental Impact Analysis, page 1, #4: Define how the Rule will have a positive impact as stated and include range of users.
5. Public Input, page 2, #4 and #5: Clarify who is included in the stakeholder advisory group in #4 and identify who was involved in the development stage in #5.

Administrative Procedures – Economic Impact Analysis

Instructions:

In completing the economic impact analysis, an agency analyzes and evaluates the anticipated costs and benefits to be expected from adoption of the rule; estimates the costs and benefits for each category of people enterprises and government entities affected by the rule; compares alternatives to adopting the rule; and explains their analysis concluding that rulemaking is the most appropriate method of achieving the regulatory purpose.

Rules affecting or regulating schools or school districts must include cost implications to local school districts and taxpayers in the impact statement, a clear statement of associated costs, and consideration of alternatives to the rule to reduce or ameliorate costs to local school districts while still achieving the objectives of the rule (see 3 V.S.A. § 832b for details).

Rules affecting small businesses (excluding impacts incidental to the purchase and payment of goods and services by the State or an agency thereof), must include ways that a business can reduce the cost or burden of compliance or an explanation of why the agency determines that such evaluation isn't appropriate, and an evaluation of creative, innovative or flexible methods of compliance that would not significantly impair the effectiveness of the rule or increase the risk to the health, safety, or welfare of the public or those affected by the rule.

1. TITLE OF RULE FILING:

Clean Water Service Provider Rule

2. ADOPTING AGENCY:

Agency of Natural Resources

3. CATEGORY OF AFFECTED PARTIES:

LIST CATEGORIES OF PEOPLE, ENTERPRISES, AND GOVERNMENTAL ENTITIES POTENTIALLY AFFECTED BY THE ADOPTION OF THIS RULE AND THE ESTIMATED COSTS AND BENEFITS ANTICIPATED:

Engineering firms, construction companies, watershed organizations, Natural Resources Conservation Districts, Regional Planning Commissions, governmental entities that own land, people that recreate on or near water, landowners with documented impacts to surface waters that are not otherwise subject to pollution control requirements, landowners who live near waterbodies. BENEFITS: This rule will have a positive

Economic Impact Analysis

impact for these parties as funds are disbursed to implement natural resource projects. Contractors will be eligible to work on implementing, designing, constructing, maintaining and operating projects. Landowners will benefit if a project is implemented on their land. Improved water quality will provide a boost to businesses from tourists, and from residents who live in Vermont because of the quality of the environment. COSTS: The costs of the rule relate to providing funding for this work, which funds will be used to create jobs and improve the environment.

4. IMPACT ON SCHOOLS:

INDICATE ANY IMPACT THAT THE RULE WILL HAVE ON PUBLIC EDUCATION, PUBLIC SCHOOLS, LOCAL SCHOOL DISTRICTS AND/OR TAXPAYERS CLEARLY STATING ANY ASSOCIATED COSTS:

The rule will have positive impacts on schools, as funds are disbursed to implement projects. Schools may be eligible to apply for funds, and students will be able to learn about water quality restoration and protection by visiting projects.

5. ALTERNATIVES: *CONSIDERATION OF ALTERNATIVES TO THE RULE TO REDUCE OR AMELIORATE COSTS TO LOCAL SCHOOL DISTRICTS WHILE STILL ACHIEVING THE OBJECTIVE OF THE RULE.*

There are no direct costs to school districts from this Rule, and so no alternatives need be considered.

6. IMPACT ON SMALL BUSINESSES:

INDICATE ANY IMPACT THAT THE RULE WILL HAVE ON SMALL BUSINESSES (EXCLUDING IMPACTS INCIDENTAL TO THE PURCHASE AND PAYMENT OF GOODS AND SERVICES BY THE STATE OR AN AGENCY THEREOF):

The rule will have a positive impact on small businesses, as funds are disbursed to implement projects. Small businesses may be hired to implement/design/construct/maintain/operate projects, and will benefit if a project is installed on their property. Improved water quality will also provide a boost to businesses from tourists, and from residents who live in Vermont because of the quality of the environment.

Economic Impact Analysis

7. **SMALL BUSINESS COMPLIANCE:** *EXPLAIN WAYS A BUSINESS CAN REDUCE THE COST/BURDEN OF COMPLIANCE OR AN EXPLANATION OF WHY THE AGENCY DETERMINES THAT SUCH EVALUATION ISN'T APPROPRIATE.*

There is no burden of compliance placed on small businesses by this Rule, as this Rule is related to the disbursement of funding for the construction, operation, and maintainance of clean water natural resource projects.

8. **COMPARISON:**

COMPARE THE IMPACT OF THE RULE WITH THE ECONOMIC IMPACT OF OTHER ALTERNATIVES TO THE RULE, INCLUDING NO RULE ON THE SUBJECT OR A RULE HAVING SEPARATE REQUIREMENTS FOR SMALL BUSINESS:

Failure to adopt this rule will prohibit implementation of Act 76, which would result in the inability to stand up a decentralized network of partners to distribute clean water funding, resulting in a negative economic impact.

9. **SUFFICIENCY:** *EXPLAIN THE SUFFICIENCY OF THIS ECONOMIC IMPACT ANALYSIS.*

This Economic Impact Analysis follows an extensive stakeholder engagement process in the preparation of the proposed rule, and considers an extensive list of positively affected parties. As described in the previous paragraphs, the analysis considered the role of this rule in implementing clean water funding that will provide project opportunities for various entities and lead to water quality improvements that support quality of life, property values, recreation, and related tourism. Finally, the rule does not impose economic burdens on the affected parties.

Administrative Procedures – Environmental Impact Analysis

Instructions:

In completing the environmental impact analysis, an agency analyzes and evaluates the anticipated environmental impacts (positive or negative) to be expected from adoption of the rule; compares alternatives to adopting the rule; explains the sufficiency of the environmental impact analysis.

Examples of Environmental Impacts include but are not limited to:

- Impacts on the emission of greenhouse gases
- Impacts on the discharge of pollutants to water
- Impacts on the arability of land
- Impacts on the climate
- Impacts on the flow of water
- Impacts on recreation
- Or other environmental impacts

1. TITLE OF RULE FILING:

Clean Water Service Provider Rule

2. ADOPTING AGENCY:

Agency of Natural Resources

3. GREENHOUSE GAS: *EXPLAIN HOW THE RULE IMPACTS THE EMISSION OF GREENHOUSE GASES (E.G. TRANSPORTATION OF PEOPLE OR GOODS; BUILDING INFRASTRUCTURE; LAND USE AND DEVELOPMENT, WASTE GENERATION, ETC.):*
Clean water projects will not materially contribute greenhouse gas emissions, and some natural resource projects may have carbon sequestration benefits, as well as climate adaptation benefits.

4. WATER: *EXPLAIN HOW THE RULE IMPACTS WATER (E.G. DISCHARGE / ELIMINATION OF POLLUTION INTO VERMONT WATERS, THE FLOW OF WATER IN THE STATE, WATER QUALITY ETC.):*

The purpose of this rule is to establish a governance structure that allows CWSP and BWQCs to receive and distribute funds, resulting in constructed and maintained natural resources projects that will improve water quality. By design, this Rule will improve water quality and support the continued and improved use and enjoyment of Vermont's waters.

Environmental Impact Analysis

5. **LAND:** *EXPLAIN HOW THE RULE IMPACTS LAND (E.G. IMPACTS ON FORESTRY, AGRICULTURE ETC.):*

This rule will result in constructed natural resources projects on land that will have a positive impact on water quality. These projects will manage lands in a manner that precludes undue adverse impact to surface waters, increases water and habitat quality, and protects natural resources generally.

6. **RECREATION:** *EXPLAIN HOW THE RULE IMPACT RECREATION IN THE STATE:*

Improved water quality in the State will improve the quality of recreation opportunities in the State. This includes fishing, swimming, and recreating on or near waterbodies benefiting from upstream projects financed by grants governed by this Rule.

7. **CLIMATE:** *EXPLAIN HOW THE RULE IMPACTS THE CLIMATE IN THE STATE:*

CWSPs will implement natural resources projects that are likely to have a positive impact on mitigating climate impacts by increasing climate resilience and adaptation.

8. **OTHER:** *EXPLAIN HOW THE RULE IMPACT OTHER ASPECTS OF VERMONT'S ENVIRONMENT:*

9. **SUFFICIENCY:** *EXPLAIN THE SUFFICIENCY OF THIS ENVIRONMENTAL IMPACT ANALYSIS.*

This Environmental Impact Analysis follows an extensive stakeholder engagement process in the preparation of the proposed rule, and considers an extensive list of positive environmental outcomes from clean water projects, including climate mitigation, improved water quality and fish and wildlife habitat, and greater water-related recreation opportunities. These outcomes are also foundational goals of the Federal Clean Water Act and are implemented under requirements of EPA-mandated cleanup plans. Insofar as implementation of this Rule will pursue these goals while not resulting in environmental impacts, this analysis is sufficient.

Public Input

responded to requests for clarification in order to support public comment.

4. PLEASE LIST THE STEPS THAT HAVE BEEN OR WILL BE TAKEN TO COMPLY WITH THAT STRATEGY:

In August 2019, ANR initiated public engagement, in two phases. Phase I, August to November, featured a series of organization-specific one-on-one meetings to discuss the Act and build mutual understanding of its provisions. Over two dozen such meetings were held. In phase II, beginning December 2019, ANR convened a stakeholder advisory group of approximately 12 representative stakeholder groups to assist with the development of both the RFP for selecting CWSPs, and with the drafting of this Rule. Over the past 12 months, the stakeholder group has met frequently, typically every two weeks during the RFP development process, as well as every two weeks during the Rule development timeframe, to present draft language and to solicit input and feedback from the stakeholder group. The group expanded in the period after the RFP was completed to include the selected CWSPs, and additional stakeholders, to balance input from all relevant voices. Stakeholders were encouraged to reach out to their colleagues, partners, and constituencies to update them on the activities of the advisory group, as well as to receive feedback and input on the progress and activities of the development of the rule. Once CWSPs were selected under the RFP, the stakeholder group was reconstituted to include representative staff from each selected CWSP to also participate in the rule development process. Individual meetings were also offered and held with members of the advisory group. Supplemental outreach sessions with other entities were also held with entities on both the RFP, as well as on the rule, including a session with partner Agencies of the State of Vermont, as well as with other stakeholders, such as the Vermont Water Caucus. ANR also held two public hearings during the rulemaking process and responded to requests for clarification to support public comment.

Public Input

5. BEYOND GENERAL ADVERTISEMENTS, PLEASE LIST THE PEOPLE AND ORGANIZATIONS THAT HAVE BEEN OR WILL BE INVOLVED IN THE DEVELOPMENT OF THE PROPOSED RULE:

Individuals below were involved in Phase I or Phase II of the process described in #4 above. Individuals noted with an "*" are standing contributors to the stakeholder advisory group since the initiation of the group.

*Chris Koliba, UVM Professor of Community and Applied Economic Development

*Lyn Munno, for Watersheds United Vermont

*Mary Russ, for Watersheds United Vermont

Mike Kline, for Watersheds United Vermont

*Holden Sparacino, for the Vermont Natural Resources Conservation Council

*Jill Arace, for the Vermont Association of Conservation Districts

*Gianna Petito for Winooski Natural Resources Conservation District

*Jared Carpenter, for Trout Unlimited of VT, the Lake Champlain Committee, and the Vermont Water Caucus

*Amy Macrellis, for Green Mountain Water Environment Association

*Dan Albrecht, for Chittenden County Regional Planning Commission and the Vermont Association of Planning and Development Associations

*Charles Baker, for Chittenden County Regional Planning Commission and the Vermont Association of Planning and Development Associations

*Peter Gregory, for Two Rivers-Ottawaquechee Regional Commission and the Vermont Association of Planning and Development Associations

*Zack Porter, for the Conservation Law Foundation

*Jim Giffin, for the Vermont Clean Water Board

Karina Dailey, for Vermont Natural Resources Council

Public Input

*Karen Freeman, for Vermont Housing and Conservation Board

Jon Groveman, for Vermont Natural Resources Council

Adam Lougee, for Addison County Regional Planning Commission

Amanda Holland, for Northwest Regional Planning Commission

Ed Bove, for Rutland Regional Planning Commission

Hillary Solomon, for Poultney-Mettowee Natural Resources Conservation District

Bonnie Waninger, for Central Vermont Regional Planning Commission

Echo Leahy Center of Vermont

Lake Champlain Sea Grant

Lake Champlain Basin Program

The Nature Conservancy

Northwoods Stewardship Center

Quebec-Vermont Steering Committee for Lake Memphremagog

University of Vermont Cooperative Extension

Vermont Agency of Transportation

Vermont Agency of Agriculture

Vermont Agency of Commerce and Community Development

Vermont Agency of Natural Resources, Department of Fish and Wildlife

Vermont Agency of Natural Resources, Department of Forests, Parks and Recreation

Vermont Citizens Advisory Committee for Lake Champlain

Vermont General Assembly members Amy Sheldon, Chair, HNRFW, and Chris Bray, Chair, SNRE

Administrative Procedures – Scientific Information

THIS FORM IS ONLY REQUIRED WHEN INCORPORATING MATERIALS BY REFERENCE. PLEASE REMOVE PRIOR TO DELIVERY IF IT DOES NOT APPLY TO THIS RULE FILING:

Instructions:

In completing the Scientific Information Statement, an agency shall provide a brief summary of the scientific information including reference to any scientific studies upon which the proposed rule is based, for the purpose of validity.

1. TITLE OF RULE FILING:

Clean Water Service Provider Rule

2. ADOPTING AGENCY:

Agency of Natural Resources

3. BRIEF EXPLANATION OF SCIENTIFIC INFORMATION:

The Clean Water Service Provider Rule contains references to surface water restoration plans (e.g., TMDLs), ANR policy statements, and references the Vermont Water Quality Standards.

Entities serving as CWSPs will be required to undertake clean water project development and implementation concurrent with technical guidelines noted in Subchapter 4 of the Rule which are under development based on several scientific studies. Of these, several of the guidance methodologies are based upon scientific studies and principles, references for which may be found in Item 4, below. These include studies associated with natural resource protection and restoration, including river corridor and floodplain restoration and protection, wetland protection and restoration, riparian and lakeshore corridor protection and restoration, natural woody buffers associated with riparian, lakeshore, and wetland protection and

Scientific Information

restoration, forestland restoration, agricultural land restoration, and studies related to an analysis of co-benefits associated with those projects.

4. CITATION OF SOURCE DOCUMENTATION OF SCIENTIFIC INFORMATION:

Vermont's Functioning Floodplains Initiative -
<https://dec.vermont.gov/rivers/ffi>

Dynamic Stream Equilibrium. Please see the Vermont Surface Water Management Strategy, Chapters One (Introduction) and Two (Channel Erosion; Encroachment; Flow Alteration), at:

<http://dec.vermont.gov/watershed/map/strategy>

http://dec.vermont.gov/sites/dec/files/documents/WSMD_swms_Chapter_1_Introduction_VS.pdf

http://dec.vermont.gov/sites/dec/files/documents/WSMD_swms_StressorPlan_Channel%20Erosion_Web_V3.pdf

http://dec.vermont.gov/sites/dec/files/documents/WSMD_swms_StressorPlan_FlowAlt_V4.pdf

http://dec.vermont.gov/sites/dec/files/documents/WSMD_swms_StressorPlan_Encroachment_V4.pdf.

Vermont Wetland Restoration Initiative

<https://dec.vermont.gov/watershed/wetlands/protect/restore>

Vermont Agricultural Lands Restoration

<https://agriculture.vermont.gov/water-quality/water-quality-initiatives>

5. INSTRUCTIONS ON HOW TO OBTAIN COPIES OF THE SOURCE DOCUMENTS OF THE SCIENTIFIC INFORMATION FROM THE AGENCY OR OTHER PUBLISHING ENTITY:

The Agency of Natural Resources has posted links to scientific documentation on various pages of the Watershed Management Division website as noted above. The documents are also available to the public for review at the Agency's Watershed Management Division offices in Montpelier, VT, or upon request.

**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 Vermonts 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 ef** 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 ½ 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 elsewhere. 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 BWQC 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 NRCDs, 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.

Clean
Text

**ENVIRONMENTAL PROTECTION RULE
CHAPTER 39**

CLEAN WATER SERVICE PROVIDER RULE

**State of Vermont
Agency of Natural Resources
Department of Environmental Conservation
Effective Date: _____**

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Subchapter 1. General Provisions

§ 39-101. Purpose.

The purpose of this Rule is to assign a clean water service provider (CWSP) to each basin 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) for the purpose of achieving pollutant reduction values established by the Secretary. In collaboration with the Basin Water Quality Council (BWQC), consistent with the BWQC's policies and clean water project prioritization, and with technical and financial support from the Agency, 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. This Rule establishes requirements for the implementation of 10 V.S.A., Chapter 37, Subchapter 5, related to the operational, financial, managerial, and technical aspects of CWSP services, as well as the governance structure for BWQCs. The Rule also establishes requirements related to conflicts of interest, oversight and evaluation of CWSP service, and renewal or removal of a CWSP assignment.

§ 39-102. Authority.

This Rule is adopted by the Secretary of the Agency of Natural Resources pursuant to the authority granted by 10 V.S.A. §§ 924 and 930.

§ 39-103. Severability.

The provisions of this Rule shall be severable. If any provision of this Rule or any application of this Rule to any person or circumstance is deemed to be invalid by a court of competent jurisdiction, the invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

Subchapter 2. Definitions

§ 39-201. Definitions.

As used in this Rule, the following terms shall have the specified meaning. If a term is not defined, it shall have its common meaning.

- (1) "Agency" means the Vermont Agency of Natural Resources.
- (2) "Administrative cost" means program delivery costs incurred by a clean water service provider in the administration of the Water Quality Restoration Formula Grant, including costs to conduct procurement, sub-agreement preparation and monitoring, reporting, and invoicing. CWSPs may elect to subgrant or subcontract aspects of Formula Grant administration. Costs to manage and complete individual clean water projects are not administrative costs.

- (3) “Basin” means a watershed basin designated by the Secretary for use as a planning unit under 10 V.S.A. § 1253(d).
- (4) “Basin Plan” means a plan developed and approved in accordance with 10 V.S.A. § 1253(d).
- (5) “Basin Water Quality Council” or “BWQC” means a council established by a Clean Water Service Provider pursuant to 10 V.S.A. § 924(g) in accordance with Subchapter 5 of this Rule, 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.
- (6) “Clean water project” means a best management practice or other program designed to improve water quality to achieve a target established under 10 V.S.A. § 922 that:
 - (A) is not required by a permit under 10 V.S.A., Chapter 47, is not subject to the requirements of 6 V.S.A., Chapter 215, exceeds the requirements of a permit issued under 10 V.S.A., Chapter 47, or exceeds the requirements of 6 V.S.A. Chapter 215, where requirements of 6 V.S.A. Chapter 215 means and includes all agricultural water quality conservation activities on any farm that meets the Required Agricultural Practices Rule (RAP) eligibility requirements; and
 - (B) is within the following activities:
 - (i) developed lands, sub-jurisdictional practices related to developed lands including municipal separate storm sewers, operational stormwater discharges, municipal roads, and other developed lands discharges;
 - (ii) natural resource protection and restoration, including river corridor and floodplain restoration and protection, wetland protection and restoration, riparian and lakeshore corridor protection and restoration, and natural woody buffers associated with riparian, lakeshore, and wetland protection and restoration;
 - (iii) forestry; or
 - (iv) agriculture, when:
 - (a) it is a natural resource project as described in subdivision (B)(ii) of this paragraph that is determined to be eligible in accordance with § 39-403(d)(3) of this Rule; or
 - (b) it is a project on agricultural land that is not subject to the RAP because the farm does not meet the minimum eligibility criteria for the RAP to apply.

- (7) “Clean Water Service Provider” or “CWSP” means an entity assigned to a basin by the Secretary pursuant to Subchapter 3 of this Rule 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.
- (8) “Co-benefit” means the additional benefit to local governments and the public provided by or associated with a clean water project, including flood resilience, hazard mitigation, education, ecosystem improvement, and local pollution prevention.
- (9) “Department” means the Vermont Department of Environmental Conservation.
- (10) “Guidance” means the guidance adopted by the Secretary pursuant to 10 V.S.A. § 924(a)(3) and § 39-304 of this Rule.
- (11) “Maintenance” means ensuring that a clean water project continues to achieve its designed pollution reduction value for, at a minimum, its design life.
- (12) “Secretary” means the Secretary of the Vermont Agency of Natural Resources or the Secretary’s duly authorized representative.
- (13) “Services” means the activities a CWSP performs or oversees, for the purposes of achieving pollutant reduction values established by the Secretary for the basin, including identification, prioritization, development, design, construction, verification, inspection, and operation and maintenance of clean water projects within the basin.

Subchapter 3. Clean Water Service Providers

§ 39-301. Assignment to Basins.

- (a) The Secretary shall assign a clean water service provider (CWSP) to each basin described in 10 V.S.A. § 922(a) (listed as impaired pursuant 33 U.S.C. § 1313(d) and not subject to the stated exception) for the purpose of achieving pollutant reduction values established by the Secretary for the basin in accordance with § 39-101 of this Rule.
- (b) Request for Proposals. The Secretary shall issue a competitive Request for Proposals (RFP), publicly soliciting proposals from qualified entities interested in serving as a CWSP.
- (c) Assignment.
 - (1) Following the competitive RFP process, the Secretary shall assign one entity for each basin to serve as the CWSP for that basin. The Secretary

may also assign a backup CWSP for any basin. The list of assignments shall be set forth in Appendix A.

- (2) An entity may be assigned to serve as the CWSP in more than one basin.
- (3) An entity assigned as a CWSP in any basin is eligible to serve as a CWSP in any other basin on an interim basis as determined by the Secretary, in the event the assigned backup CWSP is unable to fulfill that role.
- (d) **Term.** The duration of the CWSP assignment term shall be set forth in Appendix A and shall not exceed five (5) years, except that the initial set of assignments pursuant to this Rule may extend beyond five years to allow for staggered terms among the various CWSPs.
- (e) **Transfer.** If an entity assigned as a CWSP intends to merge with, be acquired by, or otherwise restructure as a different entity, the Secretary may transfer the assignment to the new entity for the remainder of the term, provided that the new entity meets all applicable requirements of the original CWSP entity and the entities execute an Assignment Transfer Agreement consistent with the transfer plan contents set forth in § 39-803. A transfer shall be documented in a supplement to Appendix A published on the Agency's website and the CWSP's website.
- (f) **Renewal and Termination of Assignment.** The Secretary may renew or terminate a CWSP assignment in accordance with Subchapter 8 of this Rule.
- (g) **Prohibition on Provision of Services Outside Assigned Basin(s).** A CWSP shall not utilize Formula Grant funds in support of clean water projects outside the CWSP's assigned basin.

§ 39-302. Funding.

The Secretary shall administer a Water Quality Restoration Formula Grant Program to award Formula Grants to CWSPs to meet the pollutant reduction requirements under 10 V.S.A. Chapter 37, Subchapter 5. The grant amount shall be based on the annual pollutant reduction goal established for the CWSP by contributing sector, multiplied by the standard cost for pollutant reduction, including administration and reporting costs. Administrative costs shall not exceed 15 percent of the total grant amount.

§ 39-303. Subgrants and Subcontracts.

- (a) **Subgrant Guidance, Requirements.** The CWSP shall timely adopt guidance for subgrants, consistent with the Secretary's guidance pursuant to § 39-304(e), that establishes a policy for how the CWSP will issue subgrants to other organizations in the basin, giving due consideration to the expertise of those organizations and

other requirements for the administration of the grant program. The subgrant guidance shall include a policy and procedures for subgrantees and subcontractors for certification of debarment status and for Certificate of Good Standing requirements, including how the CWSP will audit these requirements.

- (b) The following responsibilities and activities shall not be subgranted, subcontracted, or otherwise delegated by a CWSP:
 - (1) Establishment and coordination of the BWQC;
 - (2) Financial management and oversight of CWSP activities, including procurement decisions, grant and contract signing and oversight, invoice approval, and task order approval;
 - (3) Administrative oversight and approval of technical implementation services regardless of whether those services are provided directly by the CWSP or by a subgrantee or subcontractor;
 - (4) Certification and submission of reports; and
 - (5) Responsibility for compliance with all laws, regulations, nutrient reduction assignments, and guidance applicable to CWSPs.
- (c) Secretary approval is required for any assignment of CWSP rights or benefits and delegation of any CWSP duties to another entity.
- (d) A CWSP may only pay a subcontractor if the CWSP approves and accepts the work performed.

§ 39-304. Secretary's Guidance.

A CWSP shall follow the Secretary's guidance on a CWSP's obligation with respect to implementation of 10 V.S.A., Chapter 37, Subchapter 5. The Secretary shall provide notice to the public of the proposed guidance and a comment period of not less than 30 days. At a minimum, the guidance shall address the following:

- (a) how the CWSP shall determine project eligibility, including the Secretary's role;
- (b) how, for projects in the agriculture sector, the CWSP shall consult the Agency of Agriculture, Food and Markets (AAFM) to determine project eligibility;
- (c) 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;

- (d) how standard project costs will be developed for different clean water project types by contributing sector;
- (e) minimum requirements with respect to selection of and agreements with subgrantees;
- (f) requirements associated with the distribution of administrative costs to the CWSP and subgrantees;
- (g) the Secretary's assistance to CWSPs with respect to their maintenance obligations pursuant to 10 V.S.A. § 924(c);
- (h) the role of the BWQC in annual reporting, annual progress, and CWSP re-assignment;
- (i) governance and operations of the BWQC; and
- (j) reasonable expectations for CWSPs serving in a backup capacity for another CWSP.

§ 39-305. Operating Procedures.

As part of its operating procedures, an entity assigned as a CWSP shall:

- (a) have one principal Director (CWSP Director), who shall be responsible to the Secretary for the entity's compliance with all CWSP obligations set forth in statute, this Rule, and guidance. The CWSP Director shall also be the authorized signatory for all CWSP activities, including execution of agreements with the Agency, invoice payment approval, procurement processes, and subcontracts or subgrants.
- (b) be responsible to the Secretary for compliance with all CWSP obligations set forth in statute, this Rule, and guidance.
- (c) ensure coordination with their BWQC, stakeholders, related entities, and other CWSPs.
- (d) ensure that the entity's policies and services are consistent with the mission, outcomes, and requirements of the Agency.
- (e) review and approve the CWSP budget and monitor the CWSP's financial status.
- (f) monitor costs, projects, construction, and project condition, in accordance with any specific Agency requirements.

- (g) support high quality service provision, with the capacity to monitor the services delivered by contracted entities, in accordance with any specific Agency requirements.
- (h) ensure the entity maintains sufficient technological infrastructure to provide all CWSP services.
- (i) have a statement of its policies and procedures for disposal of assets and debts and obligations in the event of dissolution, including the return to the Department of any assets and property directly obtained with Department funds, as allowed by law.
- (j) be subject to public records law.
- (k) have written personnel practices, policies, and procedures that promote high quality services, and maintain evidence showing that the CWSP adheres to its stated practices.
- (l) implement staff training requirements as established by the Secretary.
- (m) have written policies prohibiting discrimination based on all protected classes under federal and Vermont state law.

§ 39-306. Fiscal Management.

- (a) Role of CWSP Director. The CWSP Director shall be responsible for reviewing and approving the CWSP budget and expenses and managing CWSP financial operations.
- (b) Solvency. The entity serving as the CWSP shall be solvent as a condition of its term of service, as demonstrated by an ability to meet payroll and pay bills in a timely fashion, and by other metrics as the Secretary may establish. An entity serving as a CWSP shall not be overly leveraged. Quarterly, the CWSP shall provide the Department with a cash flow statement, income statement, and balance sheet showing CWSP activities.
- (c) Audit. Annually, the entity serving as a CWSP shall provide the Department an independent financial and programmatic audit of the entity. The audit shall show all CWSP activities as a separate fund from the entity's other activities. The audit shall be performed by an independent public accountant in accordance with all applicable laws, regulations, policies, and procedures.
- (d) Monitoring of Billing and Expenditures. The CWSP shall follow generally accepted accounting principles (GAAP) in developing its financial statements and shall only provide financial statements prepared in accordance with GAAP.

- (e) Payments to the CWSP. Specific payment provisions shall be governed by the terms of the Formula Grant. The CWSP shall bill the State in accordance with the payment provisions established by the Secretary.
- (f) Internal Controls. The CWSP shall have an adequate Internal Controls Policy that includes, at a minimum:
 - (1) separation of duties for financial activities (paying invoices, approval to pay invoices, check issuance, reconciliation);
 - (2) an electronic accounting system;
 - (3) a process to regularly monitor budgeted vs. actual expenditures, to ensure accounts are not overspent or underspent;
 - (4) a system to track staff time spent on grants and projects;
 - (5) written procurement procedures that indicate which individuals are authorized to initiate a purchase request, the flow of documents, and the requested levels of approvals for procurement decisions; and
 - (6) internal control procedures for written accounting, financial reporting, and personnel policies that detail separation of duties, approvals/authorizations, and safeguarding of assets.

The Policy shall be subject to Department review and subject to a Corrective Action Plan if deemed inadequate. Annually, the Department will evaluate CWSP compliance with the Internal Controls Policy as part of its annual review. The CWSP shall also be subject to Department risk assessment every three years.

- (g) Procurement. The CWSP shall have a procurement policy for procuring goods and services. The policy shall outline the procedures that the CWSP shall follow when subgranting or subcontracting, and when the CWSP implements a clean water project directly.
- (h) Pre-qualification. Subgrantees and subcontractors may be pre-qualified through a request for qualifications process implemented by the CWSP. The outcome of the request for qualifications shall be valid for up to three years. CWSPs must open the pre-qualification process to new entities at least once per year.
- (i) Procurement, Services and Goods. Procurement of services by the CWSP or its subgrantees shall be by a competitive process, with a solicitation of quotations from at least three 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.

- (j) Insurance. The entity serving as CWSP shall comply with the insurance requirements of Water Quality Restoration Formula Grants. Professional liability insurance shall be required for any engineers or architects that are subgrantees or subcontractors, with the CWSP listed as additional insured. The CWSP may obtain Errors and Omissions insurance for BWQC members, the cost of which shall be considered an administrative cost.
- (k) Investment of CWSP funds. The CWSP shall deposit all funds into an accessible interest-bearing checking or savings account and monitor the interest earned. Funds may not be otherwise invested, such as in bonds, stocks, Certificates of Deposit, or any other non-approved manner, and shall be used only for allowed uses pursuant to the Formula Grant. Failure to comply with this provision is ground for immediate removal of assignment.
- (l) Insurance for deposits. Funds deposited at financial institutions for any account shall be insured against failure of the financial institution by the Federal Deposit Insurance Corporation (FDIC) or National Credit Union Administration (NCUA). Deposits that exceed the insurance limit of the FDIC/NCUA coverage shall be otherwise insured by the CWSP.
- (m) Leftover funds. Pursuant to 10 V.S.A. § 924(d), if a CWSP achieves its pollutant reduction goal or five-year target and has excess grant funding available, the CWSP may carry those funds forward into the next program year for the following uses: for other eligible projects; for operation and maintenance responsibilities for existing constructed projects; for projects within the basin that are required by federal or State law; or, for other work that improves water quality within the geographic area of the basin, including protecting river corridors, aquatic species passage, and other similar projects. Use of leftover funds is subject to applicable provisions of Subchapters 3, 4, 5, and 6 of this Rule.
- (n) Risk Reserve. A risk reserve may be held within the Clean Water Fund pursuant to 10 V.S.A. § 1389(d)(1), and subject to annual appropriations. Access to risk reserve funds shall follow the Risk of Loss provisions of § 39-404 of this Rule and the Secretary's guidance.
- (o) Secretary Access to Records and Programmatic Site Visits. With advance notice, the Secretary or the Secretary's authorized representative shall have access to the CWSP office during normal business hours for the purpose of ensuring compliance with all CWSP obligations.
- (p) CWSPs are not precluded from receiving funds from sources other than the Formula Grant to further improve water quality.

§ 39-307. Public Engagement and Records.

- (a) **BWQC Open Meetings.** The CWSP shall comply with the Vermont Open Meeting Law for all BWQC meetings.
- (b) **Public Records.** The CWSP shall comply with public records law for all CWSP and BWQC activities.
- (c) **Public Participation.** The CWSP shall comply with a public participation policy that, at a minimum: (1) ensures public notice of the CWSP and BWQC meetings, decisions, and actions; (2) promotes public participation in an open, competitive, and transparent process for identifying and selecting clean water projects, with specific consideration given to minority, limited English proficiency, and socioeconomically disadvantaged communities and stakeholders; and (3) complies with the Department's nondiscrimination policy.
- (d) **Website.** The CWSP shall maintain a website, used at least for noticing meetings, posting minutes, and other relevant documents and information on clean water project implementation as may be required by the Secretary's guidance.

§ 39-308. Reporting to the Secretary.

- (a) **Quarterly Reporting.** The CWSP shall report to the Secretary quarterly, as specified in applicable grant documents.
- (b) **Annual Reporting.** The Secretary shall set a schedule for CWSPs to submit an annual report, which, at a minimum, shall contain:
 - (1) A summary of all clean water projects completed, and in progress, for the period of performance;
 - (2) A summary of any inspection, verification, and operation and maintenance activities of previously implemented clean water projects and whether those projects continue to operate in accordance with their design;
 - (3) All costs incurred by the CWSP, including administrative, project development, design, construction, verification, inspection, operation and maintenance, and other costs incurred under Formula Grant awards;
 - (4) A list of all subgrants and subcontracts awarded by the CWSP in the basin for the period of performance; and
 - (5) All data necessary for the Secretary to determine the pollutant reduction achieved by the CWSP during the period of performance.

Subchapter 4. Technical Implementation.

§ 39-401. Secretary's Allocation of Pollutant Reduction Targets to CWSP.

(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:

- (1) An evaluation of whether implementation of existing regulatory programs will achieve water quality standards in the impaired water. If the Secretary determines that existing regulatory programs will not achieve water quality standards, the Secretary shall determine the amount of additional pollutant reduction necessary to achieve water quality standards in that water. When making this determination, the Secretary may express the pollutant reduction in a numeric reduction or through defining a clean water project that must be implemented to achieve water quality standards.
- (2) An allocation of the pollutant reduction identified under subdivision (a)(1) of this section to each basin and CWSP assigned to that basin pursuant to Subchapter 3 and Appendix A of this Rule. When making this allocation, the Secretary 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 as annual pollution reduction goals by sector where feasible, and five-year pollution reduction targets as checkpoints to gauge progress and adapt or modify as necessary. The Secretary shall publish these allocations in the applicable basin plans.
- (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 design, and project construction. When known, costs for project development may be included in the standard cost for pollutant reduction.

- (b) When implementing the requirements of subsection (a) of this section, the Secretary shall follow the type 3 notice process established in 10 V.S.A. § 7714 and applicable provisions of 10 V.S.A. § 923.

§ 39-402. Pollution Reduction and Design Life Methodologies.

- (a) **Pollution Reduction Methodology.** After listing a water as impaired on the list of waters required by 33 U.S.C. § 1313(d), the Secretary shall publish a methodology for calculating pollution reduction values associated with a clean

water project in that water for use by CWSPs. When establishing a pollutant reduction value, the Secretary shall consider pollution reduction values established in the TMDL; pollution reduction values established by other jurisdictions; pollution reduction values recommended by organizations that develop pollutant reduction values for a clean water project; applicable monitored data with respect to a clean water project, if available; modeled data, if available; or a comparison to other similar projects or programs if no other data on a pollution reduction value or design life exists. Pollution reduction values established by the Secretary shall be the exclusive method for determining the pollutant reduction value of a clean water project. When implementing this subsection (a), the Secretary shall follow the type 3 notice process established in 10 V.S.A. § 7714. The CWSP shall use the Secretary's pollution reduction methodology to assign pollutant reduction values to individual projects.

- (b) **Design Life Methodology.** After listing a water as impaired on the list of waters required by 33 U.S.C. § 1313(d), the Secretary shall publish a methodology for establishing a design life associated with a clean water project. The design life of a clean water project shall be determined based on a review of values established in other jurisdictions, values recommended by organizations that regularly estimate the design life of clean water projects, actual data documenting the design life of a practice, or a comparison to other similar practices if no other data exists. A design life adopted by the Secretary shall be the exclusive method for determining the design life of a best management practice or other control. When implementing this subsection (b), the Secretary shall follow the type 3 notice process established in 10 V.S.A. § 7714.
- (c) **Pollution Reduction and Design Life When No Methodology Exists.**
 - (1) Any person, in coordination with the applicable CWSP, may request a pollutant reduction value and design life for an eligible clean water project for which no pollution reduction value or design life methodology exists.
 - (2) A request for pollutant reduction value or design life shall be made on an application form provided by the Secretary and submitted to the Department's Watershed Planning Program.
 - (3) A pollution reduction value or design life established under this subsection (c) shall be based on a review of pollution reduction values established in the TMDL; pollution reduction values or design lives established by other jurisdictions; pollution reduction values or design lives recommended by organizations that develop pollutant reduction values or design lives for a clean water project; applicable monitored data with respect to a clean water project, if available; modeled data, if available; actual data documenting the design life of a clean water project; or a comparison to other similar projects or programs if no other data on a pollution reduction value or design life exists.

- (4) The Secretary shall establish the requested pollutant reduction value or design life within 60 days following such a request and post the result on the Agency's website.
- (5) When implementing this subsection (c), the Secretary shall follow the type 4 notice process established in 10 V.S.A. § 7715.
- (d) The Secretary shall periodically, and no less than every five years, review pollution reduction values and design lives established under this subsection to determine the adequacy or accuracy of a pollution reduction value or design life.

§ 39-403. Clean Water Projects.

- (a) 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.
- (b) On a schedule determined by the CWSP, and in consultation with the BWQC, the CWSP shall conduct an open process to solicit clean water projects for development and implementation in the basin.
- (c) Watershed Projects Database. All clean water projects proposed for Formula Grant funding shall be entered into the Agency's watershed projects database. For these clean water projects, the database shall contain information necessary for the prioritization of those projects, including pollution reduction values and basin plan priorities. The Agency shall provide means for projects to be entered into the database by CWSPs, to include project attributes as required by the Secretary. The Agency's database should provide data reflecting other water quality and environmental factors. This information shall be available to the project sponsor, CWSP, and BWQC for use in prioritization.
- (d) Clean Water Project Identification, Prioritization, and Selection.

When identifying, prioritizing, and selecting clean water projects to meet a basin's pollutant reduction target, the CWSP and BWQC shall:

- (1) develop and implement a project ranking schedule and scoring process to ensure that the highest priority projects are developed, designed, and implemented within the available funding provided by the Formula Grant;
- (2) consult with the Secretary to determine project eligibility before scoring and ranking projects;
- (3) for projects in the agriculture sector only, consult with AAFM quarterly on project eligibility, selection, and progress, as AAFM shall have the

authority to determine whether a proposed project in the agricultural sector qualifies as a clean water project;

- (4) consider empirical project-specific factors including the pollution reduction, cost effectiveness of that reduction, design life, cost of operation and maintenance of the project, and conformance with the basin plan;
 - (5) consider co-benefits provided by the project; and
 - (6) prioritize projects in accordance with any additional requirements imposed by the Secretary's guidance.
- (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 as drafted by the CWSP for both project development or implementation categories and make any adjustments to the co-benefits scoring as needed. The BWQC shall vote to advance clean water projects for both development and construction to fulfill pollution reduction goals. Individual clean water projects should not be voted for advancement outside of this selection process unless to address an urgent water quality concern with the concurrence of the Secretary.
- (f) **Limitation on Project Procurement.** The CWSP shall not be required to develop or construct clean water projects for which the Formula Grant is insufficient, based on standard costs.
- (g) **Methodology for Determining Project Eligibility.** Upon the request of a CWSP, the Secretary shall evaluate a proposed clean water project type and issue a determination as to whether the proposed clean water project type is eligible to receive funding as a part of a Water Quality Restoration Formula Grant. When making a determination, the Secretary shall consider the impact of the project 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.
- (h) **Permits.** For all clean water projects that are administered under CWSP oversight, the CWSP shall ensure that all local, state, and federal permits necessary for project completion are secured prior to implementation or construction.
- (i) **Operation and Maintenance.** The CWSP shall oversee operation and maintenance of clean water projects in accordance with best practices and permit requirements established by the Secretary and shall verify on-going functioning of projects by submitting information as determined by the Secretary.

- (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. Any site control in fee simple, easement, or agreement shall be documented on a form provided by the Secretary. Such fee simple interest, easement, or agreement may be secured by or assigned to a third party following Secretary approval.

§ 39-404. Risk of Clean Water Project Loss.

In the event of a total, partial, or temporary loss of a clean water project during installation or following completion, the CWSP shall cease counting the project's performance towards pollution reduction goals as of the date the performance issue is identified until the project is rehabilitated. Project losses shall be addressed as follows:

- (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 up to the date of such circumstances or Acts of God. Leftover funds are also allowed to cover such costs if such funds are available.
- (b) When a completed project was appropriately designed, installed, operated, and maintained, but inspection reveals lack of performance due to damage or unforeseen factors, not from negligence or intentional acts of others: The CWSP may use the Water Quality Restoration Formula Grant to rehabilitate the project, but will not receive continuing payment for operation and maintenance of the project for ongoing pollution reduction, unless that project is rehabilitated. Risk reserve and leftover funds are also allowed for rehabilitation if such funds are available.
- (c) When the project is removed due to the negligence or intentional acts of others and not the CWSP: Risk reserve and leftover funds are allowed for rehabilitation if such funds are available.
- (d) When the completed project is damaged or lost due to Acts of God: Risk reserve and leftover funds are allowed for rehabilitation if such funds are available.
- (e) When the project is installed but is damaged or lost due to a negligent or intentional act or omission: the Secretary may exercise authority pursuant to 10 V.S.A. § 924(f) and Subchapter 7 of this Rule.

Subchapter 5. Basin Water Quality Councils

§ 39-501. Membership and Structure.

- (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 either by membership or weighting of votes. The CWSP will coordinate assignment or replacement of BWQC members for those entities named in 10 V.S.A. §§ 924(g)(2)(D-E).
- (b) For the purposes of selecting members pursuant to 10 V.S.A. § 924(g)(2), the following definitions apply:
 - (1) “Natural Resources Conservation District” shall have the meaning set forth in 10 V.S.A. § 702(2).
 - (2) “Regional Planning Commission” shall have the meaning set forth in 24 V.S.A. § 4303(23).
 - (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 people with Vermont’s waters. Watershed protection organizations are open to all watershed constituents and shall not represent a specific constituency or interest group.
- (c) Organizations with a fiscal sponsor may serve on a BWQC. A fiscal sponsor organization and the sponsored organization shall not concurrently serve on the same BWQC.
- (d) Each BWQC member shall be knowledgeable on clean water topics for the basin(s) served and shall at all times act in good faith in the discharge of BWQC member duties.
- (e) If there is a disagreement among the appointing entities in 10 V.S.A. § 924(g)(2) as to who shall be the BWQC member, the CWSP shall select the BWQC member, but only from among eligible persons.
- (f) By majority vote, the BWQC shall appoint a Chair and Vice-Chair for one-year terms, renewable by majority vote. The Chair shall guide the planning and

facilitation of BWQC meetings in coordination with the CWSP. The Vice-Chair shall act as Chair in the absence of the Chair.

§ 39-502. Responsibilities.

- (a) The purpose of a 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.
- (b) When prioritizing clean water projects and prioritizing the most significant water quality impairments in the basin, the BWQC shall consult with the basin plan and CWSP and utilize the Agency's project selection protocols.
- (c) The BWQC shall participate in the basin planning process established in 10 V.S.A. § 1253(d).

§ 39-503. Meetings and Actions.

- (a) A BWQC shall convene at least four meetings per year, with a best practice of having one meeting per quarter.
- (b) Voting.
 - (1) A quorum shall be required in order to take a vote. A quorum shall be attained by the presence of a majority of the BWQC membership.
 - (2) Decisions shall be binding by a vote of the majority of the BWQC members, regardless of the number of members present for the vote, except that the BWQC may adopt and implement a decision making model requiring a greater proportion of votes.
 - (3) Each BWQC member shall have one vote.
 - (4) Proxy voting shall not be permitted.
- (c) BWQC members shall attend all BWQC meetings, unless good cause prevents attendance. Failure to attend one-half or more of the scheduled meetings per year without good cause shall constitute grounds for replacement of the member.
- (d) The BWQC appointing entities within 10 V.S.A. § 924(g) may designate one or more alternate statutory member(s) who may act in place of or replace their appointed member in the event of absence or disqualification of that appointed member. Alternate members shall be established at the first meeting of a BWQC and may be changed with reasonable prior written notice to the BWQC and CWSP.

- (e) The BWQC and BWQC subcommittee(s) are subject to the Vermont Open Meeting Law. Minutes of each meeting shall be retained by the CWSP and approved by a vote at a subsequent meeting.
- (f) The BWQC and BWQC subcommittee(s) shall comply with public records law. The CWSP assigned to the basin for which the BWQC serves shall assume the records retention responsibilities for the BWQC.
- (g) 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 in accordance with the Secretary's guidance and applicable grant agreements.

Subchapter 6. Conflicts of Interest.

Each CWSP shall adopt a conflict 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 interest, direct or indirect, financial or otherwise, of a person or entity with a CWSP or BWQC decision making role, or such an interest, known to such 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 person engaged in CWSP decision making must disclose any potential conflict of interest and shall recuse itself from any CWSP decision making subject to that conflict.
- (d) 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. Notwithstanding these limitations, the conflicted BWQC member may answer questions on the subject project in an open meeting of the BWQC.

Subchapter 7. Review of Adequate Progress and Maintenance; Corrective Action Plans.

§ 39-701. Review.

- (a) The CWSP shall be subject to the Secretary's review of adequate progress toward the CWSP's allocated pollution reductions and five-year target and adequate maintenance of clean water projects, pursuant to 10 V.S.A. § 924(f).

- (b) The CWSP shall allow the Secretary to conduct regular, scheduled oversight and compliance checks of the CWSP as set out in guidance and in grant agreements.
- (c) With advance notice, the Secretary or the Secretary's duly authorized representative shall have the right, during regular business hours, to enter the CWSP office location and to inspect CWSP documents to confirm compliance with 10 V.S.A. Chapter 37, Subchapter 5, and this Rule.
- (d) The CWSP shall ensure that the Secretary has the right to reasonably access and, if necessary, to inspect and verify maintenance of all projects established under Formula Grants and to take emergency measures if necessary to secure ongoing functioning of clean water projects. The Secretary's emergency measures shall not affect any CWSP obligation or liability.
- (e) Any person may, on a form provided by the Secretary, present information relevant to a CWSP review pursuant to § 39-701.
- (f) Adequate annual progress on pollutant reduction shall be achieved to retain assignment as a CWSP.

§ 39-702. Corrective Action Plans.

At any time, the Secretary may prepare a Corrective Action Plan for any CWSP, to address any deficiencies of service, including failure to achieve adequate progress, or failure to adequately implement or comply with applicable statute, rule, guidance, or grant terms. Issuance of a Corrective Action Plan is not a prerequisite of assignment removal. For any entity to which a Corrective Action Plan is issued, the Secretary may also limit all or part of the entity's Formula Grant funding, shift all or part of the implementation of that CWSP's pollution reduction target to a backup CWSP, require more frequent reports or oversight, modify the terms of the entity's terms of service, and take any other appropriate action.

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

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

- (a) Any entity assigned as a CWSP that seeks to renew its assignment shall undergo an evaluation and renewal process prior to the assignment expiration.
- (b) Within a reasonable timeframe prior to the expiration of its assignment term, the entity shall submit to the Secretary an assignment renewal application on the form prescribed by the Secretary or shall notify the Secretary of the entity's intent to terminate its service and provide a CWSP service transfer plan pursuant to § 39-803.
- (c) Upon receipt of a completed assignment renewal application, the Secretary shall publish on the Agency's website the entity's notice of intent to renew its

assignment. The Secretary shall receive and respond to public comment on the application. The Secretary shall specifically solicit BWQC comments.

- (d) Agency staff shall review the assignment renewal application using the criteria set forth in the Secretary's guidance and make a written recommendation to the Secretary for or against renewal, including consideration of any comments from the public and BWQC.
- (e) If the Secretary determines that the CWSP meets the criteria for renewal of assignment, the CWSP's term of assignment will be renewed.
- (f) If the Secretary determines that an entity has not fully met the requirements for assignment renewal, the Secretary may:
 - (1) reassign the entity to serve as a CWSP, subject to completion of a corrective action plan, for a period less than five years; or
 - (2) initiate the assignment process in § 39-301 to assign a new entity to the subject basin.

§ 39-802. Removal of Assignment.

- (a) At any time, the Secretary may remove an entity's CWSP assignment for the following reasons:
 - (1) The entity fails to make adequate annual progress towards achieving water pollution reduction goals.
 - (2) The entity has shown an inability or unwillingness to improve performance according to the terms of an applicable corrective action plan.
 - (3) The entity has failed to comply with 10 V.S.A., Chapter 39, Subchapter 5, this Rule, or the terms of any State of Vermont grant agreement.
 - (4) The collective weight of evidence from the BWQC and publicly submitted comments received under § 39-801 regarding the performance of the CWSP supports removal of assignment.
 - (5) The entity has violated any federal, state, or local law or regulation.
- (b) Removal process.
 - (1) The Secretary shall provide written notice of assignment removal to the subject entity, which shall include a process and timeline for implementing a CWSP service transfer plan pursuant to § 39-803.

- (2) An entity subject to assignment removal shall inform its stakeholders in its basin, including its BWQC, subcontractors, and subgrantees, of the change in the entity's status.

§ 39-803. CWSP Service Transfer Plan.

In the event an assigned entity's CWSP service will be terminated, either on the entity's or the Secretary's initiative, the terminated entity shall be responsible for preparing and implementing a CWSP service transfer plan that is approved by the Secretary and includes:

- (a) Notification to the BWQC, stakeholders, and contracted parties;
- (b) Accounting and transfer of clean water projects;
- (c) CWSP fund accounting and transfer of balance;
- (d) Accounting and transfer of assets purchased with CWSP funds to its designated successor in interest;
- (e) Identification and transfer of CWSP contracts to its designated successor in interest;
- (f) Identification and transfer of CWSP access agreements and property interests to its designated successor in interest;
- (g) Identification and production of all CWSP practices, policies, and procedures to its designated successor in interest; and
- (h) Identification and production of all CWSP documents and records to its designated successor in interest.

§ 39-804. Additional Secretary Actions to Address CWSP Deficiencies and Risks.

During the assignment removal process or as a part of the issuance of a Corrective Action Plan, the Secretary may:

- (a) Suspend or amend terms of other grants or contracts between the entity and the Agency;
- (b) Initiate the process to identify a new CWSP for the basin;
- (c) Assign another entity as the CWSP on an interim basis to ensure uninterrupted service provision and quality by administering the ongoing activities of the CWSP being replaced;

- (d) Take additional actions, as determined by the Secretary, to protect the investments, clean water projects, agreements, and grant funds within the basin.
- (e) In the event that a backup CWSP is established pursuant to subsection (c) of this section, and it is determined that the original CWSP that was relieved of service is unable to resume that service, the Secretary shall initiate the process for assigning a new CWSP within one year of establishment of the backup CWSP.

Appendix A. Clean Water Service Provider Assignments by Basin

Basin (ID)	CWSP	Backup CWSP	Initial Term
Memphremagog (Basin 17)	Vermont Housing & Conservation Board	Chittenden County Regional Planning Commission	July 1, 2022 through June 30, 2028
Missisquoi (06) and Lamoille (07)	Northwest Regional Planning Commission	Chittenden County Regional Planning Commission	July 1, 2022 through June 30, 2027
North Lake (05)	Chittenden County Regional Planning Commission	Northwest Regional Planning Commission	July 1, 2022 through June 30, 2026
Winooski (08)	Central Vermont Regional Planning Commission	Chittenden County Regional Planning Commission	July 1, 2022 through June 30, 2029
Otter Creek (03)	Addison County Regional Planning Commission	Chittenden County Regional Planning Commission	July 1, 2022 through June 30, 2025
South Lake (02 and 04)	Rutland Regional Planning Commission, in collaboration with the Poultney-Mettowee Natural Resources Conservation District	Chittenden County Regional Planning Commission	July 1, 2022 through June 30, 2028

VERMONT **GENERAL ASSEMBLY**

The Vermont Statutes Online

Title 10 : Conservation And Development

Chapter 037 : Wetlands Protection And Water Resources Management

Subchapter 005 : Water Quality Restoration And Improvement

(Cite as: 10 V.S.A. § 924)

§ 924. Clean water service provider; responsibility for clean water projects

(a) Clean water service providers; establishment.

(1) On or before November 1, 2020, the Secretary shall adopt rules that assign a clean water service provider to each basin in the Lake Champlain and Lake Memphremagog watersheds for the purposes of achieving pollutant reduction values established by the Secretary for the basin and for identification, design, construction, operation, and maintenance of clean water projects within the basin. For all other impaired waters, the Secretary shall assign clean water service provider no later than six months prior to the implementation of the requirements of this subchapter scheduled by the Secretary under subdivision 922(b)(2) of this title. The rulemaking shall be done in consultation with regional planning commissions, natural resource conservation districts, watershed organizations, and municipalities located within each basin.

(2) 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.

(3) The Secretary shall adopt guidance on a clean water service provider's obligation with respect to implementation of this chapter. The Secretary shall provide notice to the public of the proposed guidance and a comment period of not less than 30 days. At a minimum, the guidance shall address the following:

(A) how the clean water service provider integrates, prioritizes, and selects projects consistent with the applicable basin plan, including how to account for the co-benefits provided by a project;

(B) minimum requirements with respect to selection and agreements with subgrantees;

(C) requirements associated with the distribution of administrative costs to the clean water service provider and subgrantees;

(D) the Secretary's assistance to clean water service providers with respect to their maintenance obligations pursuant to subsection (c) of this section; and

(E) the Secretary's strategy with respect to accountability pursuant to subsection (f) of this section.

(4) In carrying out its duties, a clean water service provider shall adopt guidance for subgrants consistent with the guidance from the Secretary developed pursuant to subdivision (a)(3) of this section that establishes a policy for how the clean water service provider will issue subgrants to other organizations in the basin, giving due consideration to the expertise of those organizations and other requirements for the administration of the grant program. The subgrant guidance shall include how the clean water service provider will allocate administrative costs to subgrantees for project implementation and for the administrative costs of the basin water quality council. The subgrant guidance shall be subject to the approval of the Secretary and basin water quality council.

(5) When selecting clean water projects for implementation or funding, a clean water service provider shall prioritize projects identified in the basin plan for the area where the project is located and shall consider the pollutant targets provided by the Secretary and the recommendations of the basin water quality council.

(b) Project identification, prioritization, selection. When identifying, prioritizing, and selecting a clean water project to meet a pollutant reduction value, the clean water service provider shall consider the pollution reduction value associated with the clean water project, the co-benefits provided by the project, operation, and maintenance of the project, conformance with the tactical basin plan, and other water quality benefits beyond pollution reduction associated with that clean water project. All selected projects shall be entered into the watershed projects database.

(c) Maintenance responsibility. A clean water service provider shall be responsible for maintaining a clean water project or ensuring the maintenance for at least the design life of that clean water project. The Secretary shall provide funding for maintenance consistent with subdivision 1389(e)(1)(A) of this title.

(d) Water quality improvement work. If a clean water service provider achieves a greater level of pollutant reduction than a pollutant reduction goal or five-year target established by the Secretary, the clean water service provider may carry those reductions forward into a future year. If a clean water service provider achieves its pollutant reduction goal or five-year target and has excess grant funding available, a clean water service provider may:

(1) carry those funds forward into the next program year;

(2) use those funds for other eligible projects;

(3) use those funds for operation and maintenance responsibilities for existing constructed projects;

(4) use those funds for projects within the basin that are required by federal or

State law; or

(5) use those funds for other work that improves water quality within the geographic area of the basin, including protecting river corridors, aquatic species passage, and other similar projects.

(e) Reporting. A clean water service provider shall report annually to the Secretary. The report from clean water service providers shall be integrated into the annual clean water investment report, including outcomes from the work performed by clean water service providers. The report shall contain the following:

(1) a summary of all clean water projects completed that year in the basin;

(2) a summary of any inspections of previously implemented clean water projects and whether those clean water projects continue to operate in accordance with their design;

(3) all administrative costs incurred by the clean water service provider;

(4) a list of all of the subgrants awarded by the clean water service provider in the basin; and

(5) all data necessary for the Secretary to determine the pollutant reduction achieved by the clean water service provider during the prior year.

(f) Accountability for pollution reduction goals. If a clean water service provider fails to meet its allocated pollution reduction goals or its five-year target or fails to maintain previously implemented clean water projects, the Secretary shall take appropriate steps to hold the clean water service provider accountable for the failure to meet pollution reduction goals or its five-year target. The Secretary may take the following steps:

(1) include in grant agreements with the clean water service provider requirements, benchmarks, conditions, or penalty provisions to provide for ongoing accountability;

(2) enter a plan to ensure that the clean water service provider meets current and future year pollution reduction goals and five-year targets; or

(3) initiate rulemaking to designate an alternate clean water service provider as accountable for the basin.

(g) Basin water quality council.

(1) A clean water service provider designated under this section shall establish a basin water quality council for each assigned basin. The purpose of a basin water quality council 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 projects that will address those impairments based on the basin plan. A basin water quality council shall also participate in the basin planning process.

(2) A basin water quality council shall include, at a minimum, the following:

- (A) two persons representing natural resource conservation districts in that basin, selected by the applicable natural resource conservation districts;
- (B) two persons representing regional planning commissions in that basin, selected by the applicable regional planning commission;
- (C) two persons representing local watershed protection organizations operating in that basin, selected by the applicable watershed protection organizations;
- (D) one representative from an applicable local or statewide land conservation organization selected by the conservation organization in consultation with the clean water service provider; and
- (E) two persons representing municipalities within the basin, selected by the clean water service provider in consultation with municipalities in the basin.

(3) The designated clean water service provider and the Agency of Natural Resources shall provide technical staff support to the basin water quality council. The clean water service provider may invite support from persons with specialized expertise to address matters before a basin water quality council, including support from the University of Vermont Extension, staff of the Agency of Natural Resources, staff of the Agency of Agriculture, Food and Markets, staff of the Agency of Transportation, staff from the Agency of Commerce and Community Development, the Natural Resource Conservation Service, U.S. Department of Fish and Wildlife, and U.S. Forest Service. (Added 2019, No. 76, § 1.)

VERMONT **GENERAL ASSEMBLY**

The Vermont Statutes Online

Title 10 : Conservation And Development

Chapter 037 : Wetlands Protection And Water Resources Management

Subchapter 005 : Water Quality Restoration And Improvement

(Cite as: 10 V.S.A. § 930)

§ 930. Rulemaking

The Secretary may adopt rules to implement the requirements of this subchapter.
(Added 2019, No. 76, § 1.)



Proposed Rules Postings

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Deadline For Public Comment

Deadline: Feb 19, 2021

The deadline for public comment has expired. Contact the agency or primary contact person listed below for assistance.

Rule Details

Rule Number:	20P025
Title:	Clean Water Service Provider Rule.
Type:	Standard
Status:	Proposed
Agency:	Agency of Natural Resources
Legal Authority:	10 V.S.A. §§ 924 and 930, established by Act 76 of 2019.
Summary:	The Agency proposes this rule to assign a CWSP to each basin described in 10 V.S.A. § 922(a) for the purpose of achieving pollutant reduction values established by the Secretary. This rule also establishes requirements for the implementation of 10 V.S.A., Chapter 37, subchapter 5, related to the

operational, financial, managerial, and technical requirements associated with CWSP service, as well as the governance structure for Basin Water Quality Councils (BWQCs). The rule also proposes requirements related to conflicts of interest policy, oversight and evaluation of CWSP service, and renewal or removal of a CWSP assignment.

Persons Affected:

Landowners, including individuals, organizations and state agencies receiving funding for projects. Regional Planning Commissions, Natural Resources Conservation Districts, Municipalities, Watershed-based Organizations, and land conservation organizations. Engineers, designers, consultants, and contractors who are hired to design and construct water quality projects. The public at large, with an interest in water quality and outdoor educational and recreational opportunities.

Economic Impact:

The Agency of Natural Resources will annually issue a formula grant to each assigned CWSP, 85 of which shall be dedicated towards projects, and 15 of which is reserved for administrative costs. In aggregate, the value of these formula grants could range from an estimated \$6 million to \$9 million per year, depending on available and budgeted funds, which are subject to annual appropriation by the General Assmebly, based on recommendations of the Vermont Clean Water Board. The issuance of sustained investment at this scale for the implementation of non-regulatory water quality projects will have a positive economic impact on job creation and the Vermont economy as a whole. The improvement and maintenance of Vermont's water quality will also have a positive economic impact associated with recreational use of Vermont's waters (swimming, fishing, boating), tourism, and property values.

Posting date:

Dec 30,2020

Hearing Information

Information for Hearing # 1

Hearing date:

02-01-2021 10:00 AM 

Location:

Virtual Hearing via Microsoft Teams ID:
725822355#

Address:

Call in # +1 802-828-7667

City:

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State: VT
 Zip: n/a
 Hearing Notes: February 1, 2021 10:00 AM Virtual Hearing via Microsoft Teams with call-in option: meeting link at <https://dec.vermont.gov/water-investment/statues-rules-policies/act-76> Call in # +1 802-828-7667; Conference ID# 725822355#

Information for Hearing # 2

Hearing date: 02-03-2021 5:00 PM
 Location: Virtual Hearing via Microsoft Teams ID: 664390226#
 Address: Call in # +1 802-828-7667
 City: n/a
 State: VT
 Zip: n/a
 Hearing Notes: February 3, 2021 5:00 PM Virtual Hearing via Microsoft Teams with call-in option: meeting link at <https://dec.vermont.gov/water-investment/statues-rules-policies/act-76> Call in # +1 802-828-7667; Conference ID# 664390226#

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Keyword Information

Keywords:

Clean Water Service Providers
Basin Water Quality Councils
Water Quality
Regional Planning Commission
Watershed Organization
Natural Resources Conservation District
Vermont Housing and Conservation Board
Non-regulatory projects
Natural Resources projects
Natural Resource restoration
Rain gardens
Functioning Floodplain Initiative
Forestland
Clean Water Initiative
Clean Water Formula Grants



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	Vermont Lawyer (hunter.press.vermont@gmail.com)	Attn: Will Hunter

FROM: Louise Corliss, APA Clerk

Date of Fax: December 28, 2020

RE: The "Proposed State Rules " ad copy to run on

January 7, 2021

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PROPOSED STATE RULES

By law, public notice of proposed rules must be given by publication in newspapers of record. The purpose of these notices is to give the public a chance to respond to the proposals. The public notices for administrative rules are now also available online at <https://secure.vermont.gov/SOS/rules/>. The law requires an agency to hold a public hearing on a proposed rule, if requested to do so in writing by 25 persons or an association having at least 25 members.

To make special arrangements for individuals with disabilities or special needs please call or write the contact person listed below as soon as possible.

To obtain further information concerning any scheduled hearing(s), obtain copies of proposed rule(s) or submit comments regarding proposed rule(s), please call or write the contact person listed below. You may also submit comments in writing to the Legislative Committee on Administrative Rules, State House, Montpelier, Vermont 05602 (802-828-2231).

Clean Water Service Provider Rule.

Vermont Proposed Rule: 20P025

AGENCY: Agency of Natural Resources

CONCISE SUMMARY: The Agency proposes this rule to assign a CWSP to each basin described in 10 V.S.A. § 922(a) for the purpose of achieving pollutant reduction values established by the Secretary. This rule also establishes requirements for the implementation of 10 V.S.A., Chapter 37, subchapter 5, related to the operational, financial, managerial, and technical requirements associated with CWSP service, as well as the governance structure for Basin Water Quality Councils (BWQCs). The rule also proposes requirements related to conflicts of interest policy, oversight and evaluation of CWSP service, and renewal or removal of a CWSP assignment.

FOR FURTHER INFORMATION, CONTACT: Chris Rottler, Agency of Natural Resources, 1 National Life Drive, Davis 3, Montpelier, VT 05620 Tel: 802-461-6051 Email: chris.rottler@vermont.gov URL: <https://dec.vermont.gov/water-investment/statutes-rules-policies/act-76>.

FOR COPIES: Katelyn Ellermann, Agency of Natural Resources, 1 National Life Drive, Davis 3, Montpelier, VT 05620 Tel: 802-522-7125 Email: katelyn.ellermann@vermont.gov

Third Party Administrator Rule

Vermont Proposed Rule: 20P026

AGENCY: Department of Financial Regulation

CONCISE SUMMARY: The rule requires third party administrators (TPAs) for insurers, health reimbursement arrangements (HRAs), flexible spending accounts (FSAs), and health savings accounts (HSAs) to become licensed with the Department, maintain books and records of all transactions, and hold all funds for the payment of claims in a fiduciary capacity.

FOR FURTHER INFORMATION, CONTACT: E. Sebastian Arduengo, Department of Financial Regulation, 89 Main Street, Montpelier, VT 05620-3101 Tel: 801-828-4846 Email: Sebastian.Arduengo@vermont.gov URL: <https://dfr.vermont.gov/view/regbul>.

FOR COPIES: Jill Rickard, Department of Financial Regulation, 89 Main Street, Montpelier, VT 05620-3101 Tel: 801-828-1978 Email: Jill.Rickard@vermont.gov.
