

February 18, 2021

Sent via email to: chris.rottler@vermont.gov

Mr. Chris Rottler, Environmental Analyst VI
Water Investment Division, Vermont Dept. of Environmental Conservation

Dear Chris,

Thank you for the opportunity to provide comments on the draft Clean Water Service Provider Rule. On behalf of our member municipalities and partners in water quality we would like to also thank you and the other DEC staff for the extensive consultation and outreach you conducted during the development of the draft rule.

The following comments were first developed by our Clean Water Advisory Committee at its February 2nd meeting and then reviewed and adopted by the CCRPC Board at its February 17th meeting. We suggest the following clarifying edits with additions noted in ***italics, bold and underlined*** and deletions in **strikethrough**:

§ 39-201. Definitions.

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- (8) “Co-benefit” 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.

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§ 39-306. Fiscal Management.

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- (i) 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 quotes sent to*** ~~of~~ at least three ~~quotations from~~ qualified entities. Purchasing of goods shall require the solicitation of at least two different quotations, except when purchasing items valued at \$1,000.00 or less. Records related to the procurement of services shall be retained for the term of the contract plus three years. Records related to the procurement of goods shall be retained for one year after the audit covering the period of purchase of those goods. Procurement of a good or category of goods totaling \$15,000.00 or greater from one vendor in one year shall be by written contract. Equipment and other durable assets purchased by a CWSP shall be maintained.
- (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 shall obtain Errors and Omissions insurance

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

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§ 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 *as part of the basin plans*:

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- (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*.

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§ 39-403. Clean Water Projects.

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- (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.

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- (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.*

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Our major concerns are with Subchapter 5. Basin Water Quality Councils and Subchapter 6 Conflicts of Interest. The currently proposed language will render the BWQCs inoperable.

§ 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.~~ The CWSP will coordinate assignment or replacement of BWQC members for those entities named in 10 V.S.A. §§ 924(g)(2)(D-E).

We are proposing the deletion above as without this it would mean that if one additional member is authorized, eight additional members would have to be added to maintain proportionality. The language earlier in the paragraph requiring BWQC unanimity and Secretary approval provides more than sufficient safeguards.

(b) For the purposes of selecting members pursuant to 10 V.S.A. § 924(g)(2), the following definitions apply:

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(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.

Subchapter 6. Conflicts of Interest.

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 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 easements 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 project in an open meeting of the BWQC.

FOR REFERENCE, HERE IS THE MAIN POINT WE MADE BACK IN OCTOBER (WHICH THEY DID NOT INCORPORATE). GIVEN THAT THEY ARE UNLIKELY TO BUDGE I THINK THE THREE CARVE-OUTS ABOVE MAKE BETTER SENSE.

- (c) A CWSP or other BWQC member that proposes to implement a project must disclose any potential conflict of interest to the BWQC when the project will be considered by the BWQC. 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. 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.

Please feel free to call me (802-735-3500) or email me at cbaker@ccrpcvt.org if you have any questions or would like to discuss these comments. Thank you again for your consideration.

Best regards,



Charlie Baker
Executive Director

cc: Catherine Dimitruk, NRPC
Bonnie Waninger, CVRPC
Adam Lougee, ACRPC
Ed Bove, RRPC
Peter Gregory, TRORC
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