



STATE OF VERMONT
OFFICE OF LEGISLATIVE COUNSEL

MEMORANDUM

To: Legislative Committee on Administrative Rules
From: Office of Legislative Counsel; Michael O'Grady; Bradley Showman
Date: July 20, 2026
Subject: ANR Proposed Amendments to Wetlands Rules in Response to LCAR Objections

A. Overview

On May 21, 2026, the Legislative Committee on Administrative Rules voted by a majority to object to the Agency of Natural Resources (ANR) proposed amendments to the Vermont Wetlands Rules. On June 4, 2026, ANR initially disagreed to the LCAR objections and asked for LCAR to withdraw its objections.¹ However, at the June 18, 2026, meeting of LCAR, Chair Trevor Squirrel noted that ANR had requested additional time to respond to the LCAR objections not only to address the concerns of the Committee but to also address the concerns of interested parties who potentially would litigate. LCAR granted ANR the additional time.

On July 14, 2026, ANR submitted proposed changes to the Vermont Wetlands Rules to address LCAR's previous objections. That letter indicated that ANR was not "speaking for" other interested parties, but the letter indicated there was an agreement among interested parties on draft changes to the Vermont Wetlands Rules. The ANR letter then described the proposed changes and responded to each of LCAR's previous objections to the Vermont Wetlands Rules.

After review of ANR's proposed changes, Legislative Counsel notes that the scope of the proposed construction of residential housing projects in wetlands has narrowed by eliminating allowed construction in unmapped Class II wetlands and by reducing the allowed construction outside of designated areas. ANR also clarifies construction of linear utility corridors in wetlands and the practices to be applied for construction in corridors. In addition, ANR proposes to eliminate reliance on the Vermont Significant Wetlands Inventory (VSWI) maps.

However, Legislative Counsel notes that there are still bases for LCAR to maintain its objection to the proposed rules. Set out below are condensed summaries of LCAR's objections to the ANR proposed Vermont Wetlands Rules. After each objection summary, this memorandum summarizes ANR's response to the LCAR objection and how proposed changes to the Vermont Wetlands Rules would address the LCAR objection.

¹ See Letter from Commissioner of Environmental Conservation, Misty Sinsigalli to Chair of the Legislative Committee on Administrative Rules, Trevor Squirrel re Proposed Final Vermont Wetlands Rules, 25-P040 (June 4, 2026), available at <https://legislature.vermont.gov/Documents/2026/Workgroups/LCAR/25-P040%20-%20Vermont%20Wetland%20Rules/W~Misty%20Sinsigalli-VANR%20Response%20to%20LCAR%20Objection%20of%2025-P040-6-4-2026.pdf>.

B. Responsiveness to LCAR Objections to Proposed Vermont Wetlands Rules

I. Section 6.26 and Appendix B of the Proposed Rules are Contrary to Legislative Intent

LCAR objected to adding construction of residential housing² as an allowed use within Class II wetlands as provided in Section 6.26 and Appendix B of the proposed Vermont Wetlands Rules because the changes are contrary to the intent of the General Assembly. LCAR noted that it is the policy of the State that there should be a net gain of wetlands acreage, that regulation and management of wetlands should be guided by science, and that authorized activities should have a net environmental benefit to the State. Similarly, LCAR stated that “the goal of wetlands regulation and management in the State is the net gain of wetlands to be achieved through protection of existing wetlands and restoration of wetlands that were previously adversely affected.”

LCAR concluded that in contrast to the stated intent of the General Assembly, the proposed Rules permit significant and permanent construction in Class II wetlands as an “allowed use” that will likely result in permanent loss of wetlands and does not require those losses to be compensated elsewhere. Further, LCAR stated that because the proposed Rules do not require loss of wetlands due to construction of residential housing to be offset elsewhere, the proposed Rules likely will result in a net loss of wetlands acreage. LCAR concluded that this loss of wetlands acreage is directly contrary to the intent of the General Assembly.

In addition, LCAR noted that ANR testified that part of the basis for the proposed Rules is to promote housing. However, LCAR further noted that the promotion of housing does not directly support the State policy to increase wetlands acreage through regulation and management based on scientific considerations, with permitted activities providing a net environmental benefit to the State. LCAR stated that ANR lacks discretion to weigh the benefit of wetlands versus the economic cost in preserving the wetlands or potential economic benefits of removing wetlands to construct housing or other uses.

a. ANR Proposal to Address LCAR Objection

In response to LCAR’s objection that the proposed rule is inconsistent with legislative intent regarding net gain, ANR stated that proposed changes filed with its response letter eliminated any credible allegation that the allowed uses associated with housing will be inconsistent with net gain. ANR stated that this lack of consistency with the net gain requirements is because the proposed rules would no longer contain allowed uses for residential housing projects in unmapped Class II wetlands and because the proposed allowed use would require a wetlands delineation of the wetland within the prior 10 years.

² The allowed use proposed by ANR is for residential housing. However, as defined by Section 2.34 of the proposed rules, “residential housing project” means a “project located on a single tract or multiple contiguous tracts of land for the construction of one or more dwelling units and includes access and utility infrastructure necessary for construction or use of the residential function of the project. The term includes duplexes, emergency shelters, multiunit or multifamily dwellings; and mixed-use projects.” The term “mixed-use projects” is defined by Section 2.27 of the proposed rules to mean “a project that includes both residential uses and nonresidential uses provided that the nonresidential uses are limited to retail, office, services, artisan, and recreational or community facilities, do not include industrial uses, and not less than 40 percent of the total gross floor area of all buildings within the project is designated for dwelling units.” Consequently, the allowed use would not just be for residential housing but for residential and commercial development.

However, Legislative Counsel notes that there are still potential bases for LCAR to maintain this objection. The net gain requirement is established under statute and is not dependent on the whether a Class II wetland is mapped or delineated in the last 10 years. Instead, net gain of wetlands is required as the statutorily created policy for the management of wetlands under 10 V.S.A. § 901. Whether wetlands are mapped or unmapped is irrelevant to the statutory requirement of net gain. As proposed, ANR's Vermont Wetlands Rules would still allow the permanent conversion of Class II significant wetlands and would not require any mitigation to offset those permanent conversions so that there is a net gain of wetlands as required under 10 V.S.A. § 901.³

In addition, the ANR response does not specify how the proposed allowed use for residential housing projects is science based. ANR clearly states in its overview letter for the proposed changes that the rules are intended to facilitate housing development, which ANR has indicated is an important policy issue. Further, ANR stated that the proposed changes in response to LCAR's objections are to minimize the risk of litigation and avoid diversion of resources from the complex problem of housing. These are policy-based proposals and not backed by science as required by the legislative policy of wetlands management set forth under 10 V.S.A. § 901.

Consequently, LCAR still has a basis to maintain that the proposed rules are inconsistent with the statutory legislative intent in 10 V.S.A. § 901 that wetlands be protected, regulated, and restored so that Vermont achieves a net gain of wetlands acreage. Similarly, LCAR has the basis to maintain that the rules are inconsistent with the legislative intent in 10 V.S.A. § 901 that the regulation and management of wetlands should be guided by science.

II. Section 6.26 and Appendix B of the Proposed Rules Exceed Statutory Authority

LCAR further objected to Section 6.26 and Appendix B of the ANR proposed Vermont Wetlands Rules on the grounds that the sections exceed statutory authority. LCAR stated that 10 V.S.A. § 902(9) provides that the buffer for a Class II wetland shall extend at least 50 feet from the border of the wetland unless the Secretary otherwise determines pursuant to 10 V.S.A. § 914. However, LCAR noted that determinations regarding wetlands buffers made pursuant to section 914 must be individualized. Section 914 does not authorize the Secretary to categorically halve the width of a Class II buffer zone; any reduction in the buffer zone must be done "as part of any wetland determination pursuant to the rules of the Department." Because the ANR proposed rules modified the size of a wetland buffer categorically and not based on the statutorily required individual determination, LCAR objected to the rule.

a. ANR Proposal to Address LCAR Objection

In ANR's letter requesting changes in response to the LCAR objections, ANR stated that statute explicitly grants the Agency authority to adopt wetlands rules under 10 V.S.A. § 905b(18)

³ Wetland mitigation to achieve net gain is required under 10 V.S.A. 918 when there is 5,000 square feet of adverse effects to wetlands that cannot be avoided. When there is 5,000 square feet of adverse effect, the applicant for a wetlands permit must enhance, or create wetlands or buffers to compensate for the adverse effects on a wetland. The proposed rules do not have a square foot limitation on the allowed use for residential housing projects constructed in Class II wetlands. It is very possible that the allowed use for residential housing projects in certain wetlands will exceed 5,000 square feet. ANR previously testified that net gain is not required for an allowed use because a permit is not required for such uses.

and that statute further allows ANR to adopt allowed uses by rule under 10 V.S.A. § 913(a). ANR noted that the conditions on the proposed allowed use for residential housing projects are unique to allowed uses, but there is no prohibition on imposing conditions. Additionally, ANR argues that the proposed allowed use in the outer 25 feet of a Class II buffer is consistent with statute and an Attorney General Opinion as the allowed use was created by rule. Further, ANR argues that there are other categorical determinations in the Vermont Wetlands Rules, such as the categorical determination of certain wetlands, such as vernal pools, as Class II wetlands without a delineation.⁴

Legislative Counsel notes that ANR does have statutory authority to adopt rules and allowed uses under 10 V.S.A. §§ 905b(18) and 913(a), respectively. Legislative Counsel also notes that the Attorney General did state that the proper method for ANR to adopt an exemption to wetlands permitting is through rulemaking. Similarly, the existing Vermont Wetlands Rules do include categorical designation of certain natural features as protected Class II wetlands without a delineation.

However, despite ANR's assertions being correct, Legislative Counsel notes that they may be irrelevant to LCAR's review. The size of the buffer for a Class II wetland is specifically set in statute under 10 V.S.A. § 902(9). The statute states "[t]he buffer zone for a Class II wetland shall extend at least 50 feet from the border of the wetland unless the Secretary determines otherwise under section 914 of this title." Section 914 of Title 10 is the authority for the Secretary of Natural Resources to conduct evaluation of individual wetlands to determine if a wetland is a protected Class II wetland. Further, under 10 V.S.A. § 914, the Secretary of Natural Resources may "establish the necessary width of the buffer zone of any Class II wetland as part of any wetland determination pursuant to the rules of the Department."

The Secretary of Natural Resources has not conducted any individual wetlands determination under the proposed rules. Similarly, there has been no buffer width established by the Secretary as part of an individual wetlands determination to allow for residential housing projects. ANR has argued that the individual determinations are not necessary because the rules proposed the reduction in buffer width of the relevant Class II wetlands as an allowed use. However, rulemaking must maintain consistency with statutory authority, and there is an argument that the categorical halving of wetlands buffers by rule as an allowed use or otherwise is inconsistent with the required statutory width of a Class II buffer and how that buffer width may be adjusted.

Further, while 10 V.S.A. § 905b(18) permits the Secretary to adopt rules, subdivision (C) of § 905b(18) provides an important framework for those rules. Subdivision (C) states for wetlands that have been designated so significant that they merit protection, the Secretary may adopt rules, but the "rules may only protect the values and functions sought to be preserved by the designation." Subdivision (C) goes on to provide that the rules cannot constrain agricultural or silvicultural activities without the consent of the Secretary of Agriculture, Food and Markets or the Commissioner of Forests, Parks and Recreation, respectively.

⁴ See Agency of Natural Resources, Vermont Wetlands Rules, Sec. 4.6.

In this context, rules should aim to protect wetland values and functions, and any rulemaking should be constrained by that principle. Allowing rulemaking without this constraint could, theoretically, lead to future illogical results where things beyond the construction of residential housing projects could be determined to be an allowed use. Further, subdivision 905b(18)(C) provides special consideration for rules that restrain agricultural and silvicultural activities, but it does not provide similar consideration for the construction of residential housing projects. Arguably, if the General Assembly wanted to authorize special consideration for rules that address housing construction, it could have done so. In this statutory context, 10 V.S.A. § 905b arguably does not grant the Secretary of Natural Resources unlimited authority to adopt rules that designate allowed uses. That rulemaking authority is likely limited by the principle of protecting wetland values and functions.

Consequently, LCAR maintains a basis for objecting to the rule as exceeding statutory authority. ANR's characterization of development of residential housing projects in the outer 25 feet of the buffer of certain Class II wetlands as an allowed use can be argued to be indistinct from the categorical halving of the buffers for these wetlands. Regardless of whether the activity is characterized as an allowed use or not, allowing the permanent development in the outer 25 feet of the buffer potentially conflicts with the required statutory buffer width, the statutory process for adjusting that width, and the statutory constraints on ANR rulemaking.

III. Section 6.26 and Appendix B of the Proposed Rules are Arbitrary

LCAR objected to the Vermont Wetlands Rules because of the proposed use of the Vermont Significant Wetlands Inventory (VSWI) maps to delineate the boundaries of wetlands where mixed-use housing could be constructed. LCAR noted that the VSWI maps are insufficient to delineate wetlands boundaries for purposes of allowing the proposed mixed-use housing because the existing Vermont Wetlands Rules provide that the VSWI maps are insufficient to delineate a wetlands boundary. LCAR further noted that because the proposed Rules rely on maps that are unreliable without individualized determination in the field, the proposed Rules were arbitrary because they lacked a factual basis to support the proposed change and would not make sense to a reasonable person.

a. ANR Proposal to Address LCAR Objection

ANR's proposed change in response to the LCAR objection is to no longer rely on the VSWI maps as the threshold for where construction of residential housing projects will be an allowed use in Class II wetlands under the proposed rules. Instead, ANR proposes to eliminate unmapped Class II wetlands as an area where mixed use housing would be allowed under the rules without a permit. In addition, the allowed mixed-use development in the buffer that is more than 25 feet from the wetland would no longer be based on the VSWI mapped wetlands, but on the wetlands boundary determined by a delineation. Under the ANR proposal, residential housing projects would be allowed more than 25 feet from a Class II wetland that "is or was" delineated by the Secretary of Natural Resources within the last 10 years.

Similarly, the original proposal to allow linear utility lines to cross the mapped areas of Class II wetlands is proposed to apply to all Class II wetlands and not just those that are unmapped. Legislative Counsel notes that, superficially, this proposal may seem to have the result of expanding the scope of wetlands that can be crossed by linear utility lines. However, ANR argues that the newly proposed allowed uses are more stringent than initially proposed

because the allowed use, as proposed, would no longer apply to unmapped Class II wetlands. Moreover, Legislative Counsel notes that the area in which residential housing projects would be allowed would be narrower because ANR proposes to limit the allowed use outside of designated areas to within one-half mile of the designated area and 51 percent of the parcel proposed for a residential housing project must be located within one half mile of the boundary of the designated center.

Legislative Counsel notes that because ANR is no longer proposing to rely on the VSWI maps and because of the reduced scope of the area where the allowed use for residential housing projects will be authorized, LCAR's basis for objecting to the proposed Vermont Wetlands Rules as arbitrary based on usage of the VSWI maps is reduced or even eliminated.⁵

⁵ LCAR may want to request an additional clarification regarding the scope of where the allowed use for residential housing projects will occur. Specifically, ANR made the argument that the allowed use for residential housing projects would be allowed in designated areas that encompass only three percent of the State. However, three percent is a Statewide summary. The designated areas are not equally divided across all counties. In certain counties, such as Chittenden County, the percentage of area where construction of residential housing projects in Class II wetlands would be allowed could be substantially higher than three percent. In other counties, such as Essex County, the percentage of designated area for the allowed use for residential housing projects in Class II wetlands likely would be smaller than three percent.