

## State Wetlands Law

### A. STATUTES

#### 1. 10 V.S.A. § 902. Definition

(5) "Wetlands" means those areas of the State that are inundated by surface or groundwater with a frequency sufficient to support significant vegetation or aquatic life that depend on saturated or seasonally saturated soil conditions for growth and reproduction. Such areas include marshes, swamps, sloughs, potholes, fens, river and lake overflows, mud flats, bogs, and ponds, but excluding such areas as grow food or crops in connection with farming activities.

#### 2. 10 V.S.A. § 904. Wetlands Determinations

(a) The Secretary may, upon a petition or on his or her own motion, determine whether any wetland is a Class II or Class III wetland. Such determinations shall be based on an evaluation of the functions and values set forth in subdivision 905b(18)(A) of this title and the rules of the Department.

(b) The Secretary 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.

#### 3. 10 V.S.A. § 905b(18)(A). Functions and Values

(A) The identification of wetlands that are so significant they merit protection. Any determination that a particular wetland is significant will result from an evaluation of at least the following functions and values which a wetland serves:

- (i) provides temporary water storage for flood water and storm runoff;
- (ii) contributes to the quality of surface and groundwater through chemical action;
- (iii) naturally controls the effects of erosion and runoff, filtering silt, and organic matter;
- (iv) contributes to the viability of fisheries by providing spawning, feeding, and general habitat for freshwater fish;
- (v) provides habitat for breeding, feeding, resting, and shelter to both game and nongame species of wildlife;
- (vi) provides stopover habitat for migratory birds;
- (vii) contributes to an exemplary wetland natural community, in accordance with the rules of the Secretary;
- (viii) provides for threatened and endangered species habitat;
- (ix) provides valuable resources for education and research in natural sciences;
- (x) provides direct and indirect recreational value and substantial economic benefits; and
- (xi) contributes to the open-space character and overall beauty of the landscape.

#### 4. 10 V.S.A. § 905b(18)(C). Restraint on Agricultural and Silvicultural Activities

(C) The protection of wetlands that have been determined under subdivision (A) or (B) of this subdivision (18) to be significant, including rules that provide for the issuance or denial of permits and the issuance of wetland determinations by the Department under this chapter; provided, however, that the rules may only protect the values and functions sought to be preserved by the designation. The Department shall not adopt rules that restrain agricultural activities without the consent of the Secretary of Agriculture, Food and Markets and shall not adopt rules that restrain silvicultural activities without the consent of the Commissioner of Forests, Parks and Recreation.

## B. VERMONT WETLANDS RULES

### 1. Vermont Wetlands Rule § 3.1(a)(2)-(3)

The following shall not be regulated as wetlands under the Vermont Wetland Rules, but may be subject to regulation under federal law:

\* \* \*

#### (2) Definition

Farming activities means the cultivation or other use of land for growing food, fiber, Christmas trees, maple sap, or horticultural and orchard crops; and the growing of food and crops in connection with the raising, feeding, or management of livestock, poultry, equines, fish farms, or bees for profit.

#### (3) Limitation on Exemption

The farming exemption shall apply to all areas used to grow food or crops in connection with farming activities including areas in ordinary rotation, as of the effective date of these rules. The exemption will expire whenever the area is no longer used to grow food or crops or in ordinary rotation.

### 2. Vermont Wetlands Rules § 3.1(b)

The following shall not be regulated as wetlands under the Vermont Wetland Rules, but may be subject to regulation under federal law:

\* \* \*

#### (b) Existing Constructed Features

The following man-made features, which when constructed in uplands may exhibit wetland characteristics: (1) Stormwater conveyance, treatment and/or control systems. (2) Wastewater treatment ponds and sludge lagoons. (3) Manure storage and treatment ponds. (4) Irrigation and active farming-related ponds. (5) Snowmaking ponds. (6) Other similar constructed ponds created in uplands.

### 3. Vermont Wetlands Rules § 6. Allowed Uses

The following uses shall be allowed in a Class I or Class II wetland and in its buffer zone without a permit, provided that the configuration of the wetland's outlet or the flow of water into or out of the wetland is not altered and that no draining, dredging, filling, or grading occurs....

\* \* \*

6.2. The restoration, reconstruction, rehabilitation, or upgrading of existing roads used solely for silvicultural purposes provided that such roads are not increased in width by more than 20%.

6.3. The construction of new roads used solely for silvicultural purposes in buffer zones.

\* \* \*

6.6. The growing of food or crops in connection with farming activities when:

- a. Threatened or endangered species are protected; and
- b. No clearing of existing vegetation occurs in deer wintering yards mapped by the Vermont Fish and Wildlife Department; and
- c. In compliance with the most recent Required Agricultural Practices adopted by the Agency of Agriculture, Food and Markets.

## Federal Wetlands Law

### 1. Definition of Wetlands 33 C.F.R. § 300.5(3)

“Wetlands are areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.”

### 2. Delineation. Corps of Engineers Manual

The 1987 Corps of Engineers Wetlands Delineation Manual and Regional Supplements organizes characteristics of a potential wetlands into three categories:

Soils – wetlands have “hydric soils”, which means they are saturated with water and less oxygenated, but also less suitable for plant typical plant growth.

Vegetation – wetlands have “hydrophytic vegetation” or plant species that prefer to live in hydric soils where oxygen is low.

Hydrology – the presence of standing, pooled, or flowing water is also a good indicator of a wetland, but many wetlands do not have surface water present at some or all parts of the year. A wetland does not need to have surface water present at the time of the delineation to be considered a wetland, but it does need water present at some time during the year.

### 3. Proposed Waters of the United States Rule. 40 C.F.R. § 300.5

A. “Navigable waters” means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (2) of this section, the term “waters of the United States” means:

(i) Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide;

(ii) Tributaries of waters identified in paragraph (1)(i) of this section;

\* \* \*

(vi) Adjacent wetlands to waters identified in paragraphs (1)(i) through (v) of this section.

(2) The following are not “waters of the United States”:

\* \* \*

(v) Prior converted cropland;

(vi) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;

(vii) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (1)(iv) or (1)(v) of this section;

## **B. Adjacent Wetlands**

(i) Adjacent wetlands. The term adjacent wetlands means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (1)(i) through (v) of this section in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (1)(i) through (v) of this section. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (1)(i) through (v) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (1)(i) through (v) water. Wetlands physically separated from a paragraph (1)(i) through (v) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.