



STATE OF VERMONT
LEGISLATIVE STUDY
COMMITTEE ON WETLANDS

January 8, 2020

Senate Pro Tem Tim Ashe
Vermont Senate

Speaker of the House Mitzi Johnson
Vermont House of Representatives

Re Report of the Legislative Study Committee on Wetlands

Dear Senate Pro Tem Ashe and Speaker Johnson:

We are writing to provide you with the recommendations of the Legislative Study Committee on Wetlands (Study Committee). The Study Committee was established by Act 64 of 2019 to recommend to the General Assembly how to update and clarify the requirements for regulation of wetlands under State statute. The Study Committee voted to recommend that no legislative action be taken at this time to amend the wetlands statutes. Instead, the Study Committee recommends that State agency efforts described below be allowed to proceed in an effort to bring clarity, consensus, and cooperation to the regulation of wetlands in the State.

History of Enactment of Act 64

The Study Committee established by Act 64 evolved from issues presented to the Senate Committee on Agriculture and the House Committee on Agriculture and Forestry over the past two years. During that time, both Agriculture Committees learned of tension between the Agency of Natural Resources (ANR) and the Agency of Agriculture, Food and Markets (AAFM) regarding the regulation of farming in wetlands. After discussion between the Secretary of Natural Resources Moore and the Senate Committee on Agriculture in 2018, ANR in 2019 submitted to both Agriculture Committees proposed amendments to the State's wetlands statutes in the hope of clarifying statute and resolving the tension between the agencies.

ANR's proposed amendments, however, did not resolve the tension between ANR and AAFM. Both Agriculture Committees held several meetings and took testimony from multiple witnesses on alternatives or amendments to ANR's proposal. There was some consensus and agreement among the parties regarding a proposal to amend wetlands permitting fees for certain agricultural water quality projects, and language to implement this proposal was enacted under Section 22 of Act 64. However, no consensus was reached on the larger question of how to clarify wetlands statutes, especially with regard to the regulation of farming in wetlands.

As a result of this failure to reach broad consensus, the General Assembly enacted the Study Committee. The General Assembly also amended the authority of AAFM to regulate farming in wetlands under the Required Agricultural Practices (RAPs). Specifically, Act 64 amended 10 V.S.A. § 4810a to authorize AAFM to include requirements under the RAPs for activities occurring in an area that is excluded from ANR regulation under the statutory definition of wetlands because the area is used to grow food or crops in connection with farming activities.

AAFM Regulation of Farming in Wetlands Under RAPs

The authority granted to AAFM in Act 64 to regulate farming activities under the RAPs was intended as an effort to clarify what is referred to as the “farming exclusion” under the definition of “wetlands” in statute. Statute excludes from ANR’s wetlands jurisdiction “areas that grow food or crops in connection with farming activities.” However, the wetlands statutes do not define what constitutes “farming” for the purposes of this exclusion. ANR has adopted by rule a definition of “farming” for the purposes of the exclusion, but that definition conflicts with the definition of “farming” under agriculture statutes and the RAPs. Moreover, under either definition of “farming,” ANR and AAFM disagree on whether some activities constitute “farming” that are excluded from ANR’s jurisdiction.

The authority granted to AAFM to amend the RAPs to regulate farming activities in wetlands is rulemaking authority, and AAFM is currently drafting proposed rules. There may be some anxiety at ANR or among interested parties regarding what the AAFM rules will allow. However, the AAFM rules likely will be tailored to specific “farming” activities in wetlands and, consequently, could resolve many of the tensions or disagreements between ANR and AAFM. The Study Committee believes that AAFM should be afforded the opportunity to propose RAP rule amendments to address farming activities in wetlands. If the proposed rules do not bring consensus or are otherwise controversial, the General Assembly can legislate to address the issue.

In addition, the Study Committee believes that activities that farmers are required to implement under the RAPs or other water quality rules, such as the Medium Farm Permit Rules, should be regulated by AAFM. Such authority is not unfettered and would not allow AAFM to allow any activity or structure in a wetland, but only those activities authorized under the RAPs rules. This, in the opinion of the Study Committee, is another reason to wait to review the rules proposed by AAFM to amend the RAPs to regulate farming activities in wetlands.

ANR Wetlands Stakeholder Group

ANR also has reconvened a Wetlands Stakeholder Group that advises the Agency on proposed changes to wetlands statute and rule. This stakeholder group could provide significant helpful input into the technical and legal issues that arise under the requirements for regulation of wetlands in the State. For example, the Stakeholder Group could opine on the issue of whether the definition of “wetlands” under statute and rule should be amended. Thus, the Study Committee believes it wise not to pursue legislation to amend wetlands statutes while the Wetlands Stakeholder Group continues to meet.

The Study Committee understands that the Stakeholder Group is composed of a diverse array of wetland professionals, environmental advocates, and agency personnel. However, the Study Committee learned through testimony that farmers or other representatives of the

agricultural community were not adequately represented on the Stakeholder Group. The Study Committee has requested that ANR make the Stakeholder Group more inclusive of the agricultural community, and we expect the Agency to comply with this request.

Cooperation Among Agencies

The Study Committee has learned through testimony before it and before the Agriculture Committees during the legislative session that ANR and AAFM have not been adequately cooperating to address the issues that have arisen regarding the regulation of farming in wetlands. The members of the Study Committee are frustrated by this lack of cooperation, as we believe that some of the issues that have arisen could have been addressed through professional coordination. The Study Committee insists that the agencies mend their relationship and improve cooperation and coordination, especially with regard to the regulation of farming in wetlands. To emphasize this request, the Study Committee will send a copy of this report letter to the Governor and the Secretary of Administration.

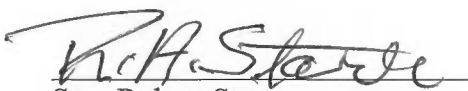
Conclusion

The wetlands of Vermont serve multiple, valuable purposes, such as water storage, flood control, water quality, wildlife habitat, and erosion control. The Study Committee strongly believes that wetlands should be protected and activities in wetlands should be regulated. However, existing allowed uses in wetlands, including farming, should continue to be allowed, subject to regulation by appropriate State agencies, and there could be greater clarity as to how to conduct such activities.

However, before the General Assembly moves to legislate a greater clarity, the Study Committee believes that the AAFM should be allowed to propose rules under the RAPs to address farming in wetlands and that ANR's Wetlands Stakeholder Group should be given time to make recommendations on the legal and technical questions arising around wetlands regulation. Moreover, improved cooperation and coordination between the agencies regarding farming in wetlands should improve the predictability of regulation of the wetlands in the State.

Successful implementation of these agency actions should clarify the regulation of wetlands in the State. If the agencies fail, the General Assembly can pursue clarity in future legislative sessions. If you need more information, please do not hesitate to contact us or the other members of the Study Committee.

Sincerely,



Sen. Robert Starr
Chair, Legislative Study Committee
on Wetlands



Rep. Amy Sheldon
Vice-Chair, Legislative Study Committee
on Wetlands

CC: Governor Philip B. Scott
Secretary of Administration Susanne Young

