

Draft Vermont Wetland Rule Stakeholder Update

Purpose

The purpose of this document is to provide to stakeholder members a much-needed update on the analysis of stakeholder comments and other Agency of Natural Resource activities since the June 2018 stakeholder meeting in preparation for discussion of proposed Statutory changes. This document summarizes the findings of the stakeholder meetings, the stakeholder-identified areas in need of improvement, provides an update on Agency activities, and proposes substantive areas to focus on in terms of wetland rule and statute changes for the coming year. The focus of the upcoming stakeholder meeting will be to solicit feedback regarding an emergent need to revise the Wetland Statute in order to meet DEC and Stakeholder group goals. The last section of this document describes the proposed statutory changes for discussion at the November 2018 stakeholder meeting.

Background

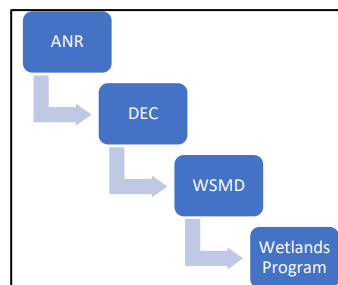
The Department of Environmental Conservation (DEC) was granted statutory authority to adopt and revise the Vermont Wetland Rules (Rules, VWR) in 2012, when the Water Resources Panel of the Natural Resources Board was dissolved (see Vermont Act No. 138 of 2012).

The Wetland Rules in effect at the time were last amended in 2010.

While the 2010 revisions to wetland statute and rule increased the Department's ability to protect unmapped wetlands, they did not allow for a clear and efficient process for implementation of the Department's authority over significant unmapped wetlands.

Because of the changes and the inherent complexity of wetland resources, the Agency of Natural Resources (ANR, which houses DEC)

has received complaints about wetland regulations. The changes have also led to issues with enforcing the protection of significant wetlands.



The Vermont Wetlands Program convened a group of stakeholders in November of 2016 to receive feedback from the regulated, environmental, and technical community about the effectiveness of the Program under the current Rules. The impetus behind convening a stakeholder group was an interest on the part of the Watershed Management Division (WSMD, within DEC) to revise the Rules to improve clarity, efficiency, and protection. The group includes representatives from developers, consultants, governmental, and non-profit groups. The group has met 9 times thus far, and a meeting is scheduled for early November, 2018.

General Stakeholder Feedback

In the 2016-2017 series of meetings, there was general feedback from the stakeholders that the Vermont Wetland Rules do a decent job of protecting wetlands but could use more clarity regarding when a wetland is state jurisdictional, when a permit is obtainable, and could use faster more efficient services from the Wetlands Program. In 2018 several proposed concepts were presented to the stakeholders, such as 404 assumption, and further feedback was solicited. Many stakeholders commented that the details and specifics of working proposals would need to be conveyed in order for them to provide additional feedback.

Wetland Management Tools

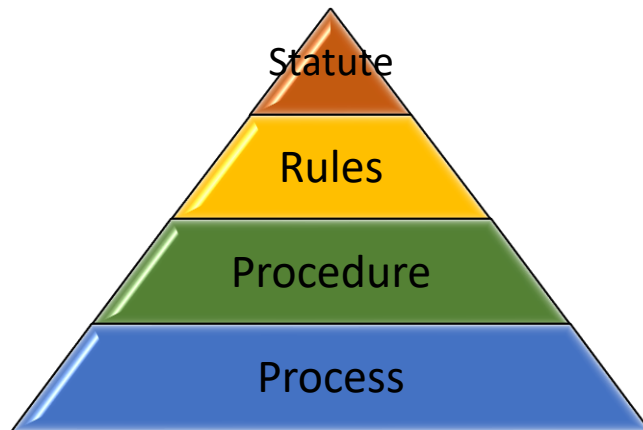
There are various tools that can be used to improve the framework of wetland management at the State level (see graphic below). Whereas most of the information about day-to-day wetland management is set in Program processes, the intended regulatory authority is outlined by the State legislature in statute. Many stakeholders were concerned about opening Rule or Statute unless it was absolutely needed to meet the goals of the group which are to improve clarity, efficiency, and protection. Below is a description of each tool.

Statute – Adopted by the Vermont Legislature. Provides legislative intent (ie. What effect the Legislature intends the Statute to have) and gives authority to various State agencies. No other tool can override statute. The statute now states that ANR has a duty to identify significant wetlands, protect significant wetland functions and values through the Vermont Wetland Rules, and update the Vermont Significant Wetlands Inventory.

Rules – Created by a State Agency with a robust public process. An Agency’s rulemaking authority must be authorized by statute. Cannot overstep statutory intent. The Vermont Wetland Rules give greater detail on how we identify significant wetlands and outlines the wetland permitting process.

Procedure – Approved by the Commissioner, does not require a public process. Provides interpretation of rules where greater clarity is needed.

Processes – Created by the administrating Program. Includes standard operating procedures (SOP) and public facing guidance documents.



Key Components

Both the Program and various Stakeholders throughout the two-year process raised particular issues with the current construct of the Vermont Wetland Rules and identified and discussed how changes to certain components of the Rules could address those issues. While other components were discussed and contemplated, the following have been identified as the key items to focus on to improve the clarity, efficiency, and protection of the Vermont Wetland Rules: Wetland mapping, Allowed Uses and exemptions, identification and classification of wetlands, the permitting process, and application fees. Below is a description of the issues, and needs discussed within the stakeholder group.

[Wetland Mapping](#) - All too often, the VT Wetlands Program staff encounter landowners who inadvertently impacted significant wetlands because they relied on aerial photo-interpreted mapping. Mapping is good for identifying where wetlands are in general, but cannot be reliably relied on to identify specific boundaries for jurisdictional purposes. The inclusion of mapping in the definition of Class II wetlands can be confusing to the regulated public and creates the impression that the maps can

be relied upon to know definitively when they are within or outside of the resource on their property. Wetland mapping in Vermont is dated and often incorrect, which leads to unintentional wetland violations, requires a large portion of staff time to be spent on wetland location identification, and reduces the effectiveness of restoration and conservation modeling.

The VWR started as a mapping-based regulatory program, meaning only wetlands identified on the Vermont Significant Wetlands Inventory (VSWI) were protected, and has since evolved to a “mapping-plus” based regulation starting with the Rules updates in 2010 (mapped wetlands plus wetlands found to be significant). State statute requires that significant wetlands be mapped, and under the Rules, additions to the map require a 30-day public notice period for comment and notification to each adjacent landowner of the map addition. Given that there is no simple way to obtain mailing addresses of numerous wetland landowners, the maps are not being updated nearly as frequently as Wetlands Program Staff find significant wetlands. The Program has been updating a Wetland Advisory map which displays improved wetland mapping that cannot be easily transferred to the VSWI. Even with nimble mapping, given the abundance and dynamic nature of wetland resources, statewide desktop wetland mapping will never be able to replace the identification of wetland extent in the field.

Many/All Stakeholder group members find wetland mapping to be an important informational tool for finding where wetlands generally are on the landscape. Many Stakeholders also feel that the VSWI map is too outdated to be useful and gives a false sense that there are fewer wetlands that are protected by the state than there actually are. Stakeholders generally agree to remove the jurisdictional tie of wetland mapping to make the maps more nimble as an informational tool only.

Allowed Uses – State statute currently prohibits any activity in a Class I or II wetland or buffer zone without a wetlands permit unless that activity is an allowed use. As a result, there is a lengthy, often sector specific list of activities that do not require a permit. The allowed uses terminology dates back to a previous regulatory regime where activities in a wetland were either allowed, or conditionally allowed pursuant to a conditional use determination. These Allowed Uses can be categorized as either: passive, beneficial to wetlands, minimal impact, management of existing structures, or larger land management practices. Many Stakeholders find the Allowed Uses give incomplete explanations of what is allowed, and that the list is biased by sector. Some Stakeholders like the simplicity of the list. The Wetlands Program finds that allowed uses are sometimes misinterpreted, causing harm to the resource and resulting in a Wetland Rule violation. A stakeholder suggested that we might not need to list as many “allowed uses” or exemptions to the Rule if the Statute/Rule stated more clearly what activities do need a permit, such as those activities which cause an alteration to the landscape.

Classification – State statute defines wetland classification based on wetland “significance” and defines what functions and values must be considered to determine if a wetland is significant. While survey results and stakeholder conversations support the protection of functions and values, the significance test is often critiqued as subjective, and this subjectivity creates uncertainty for the regulated community. Program staff meet weekly for an hour to discuss project decision-making and often the time is spent discussing the classification of a wetland that is close to the distinction between significant and non-significant. Because of the diversity of wetland types, conditions, and functions, there is no numeric way to classify wetland significance. Nationally there is no accepted numeric scoring system to compare and classify wetlands based on function. The only wetlands which are undisputed as jurisdictional today are those that are mapped. Many stakeholders find that there is inconsistency

within the Program on which wetlands are considered significant, and wetland consultants do not always agree with Program calls. The Wetlands Program presented a draft proposal to remove the classification system and make all wetlands jurisdictional for the sake of joint permitting with the Army Corps of Engineers. Some stakeholders were not interested in more wetlands under state jurisdiction if there was no joint federal permitting. Upon further review of the state assumption of the federal program and programmatic general permitting, state assumption was found to be a very complex process, likely requiring years of evaluation to accomplish. Some stakeholders suggested that a refined presumption of significance list be used to determine classification.

Permitting – Once state wetland jurisdiction is established by identifying wetland significance and if the activity is not an allowed use, the permitting process begins. A General Permit (GP) allows applicants meeting certain thresholds and certain guidelines to obtain a streamlined authorization under the GP. Individual permitting requires individualized conditions and a thorough application analysis of efforts to avoid and minimize impact to wetland and buffer zones. Because all activities require an analysis of avoidance and minimization based on the specifics of the project, there is a degree of uncertainty involved in applying for a wetland permit. Many Stakeholders feel the uncertainty of permitting is too great and the time it takes to identify the resource and obtain the permit is too lengthy, especially for projects which may be beneficial for water quality. Other stakeholders feel that there should be a robust review of requests to impact wetlands.

Application Fees – Wetland permit application fees are set in Statute and some are based on the square footage of impacts to wetland or buffer zone. The statute does not specify lower fees for less-impactful activities (e.g. vegetation clearing instead of wetland fill) or for activities which are required by a new state regulation such as RAPs or MS4s. Several stakeholders feel the fees are too high, others have voiced that it should be expensive to alter wetlands.

Additional Findings

Over the course of the stakeholder meeting process, the DEC found that there were serious jurisdictional and enforcement issues that needed to be addressed. These issues cannot be addressed without making statutory changes. Specifically, there is a need to correct the inconsistency between the statute and Rules regarding the Program's jurisdiction over wetlands that do not appear on the Vermont Significant Wetlands Inventory (VSWI) map. The Rules give the Program the ability to assert jurisdiction over wetlands that exhibit certain physical characteristics and are therefore presumed to be significant, Class II wetlands. The statutory definition of a Class II wetland is limited to those wetlands that have been formally determined to be Class II based on an assessment of wetland functions and values and have then (theoretically) been added to the VSWI map. When impacts to those unmapped significant wetlands occur, enforcement can be problematic because those wetlands have not been formally "determined" to be significant and added to the map.

Additionally, the statutory definition of a wetland is scientifically inaccurate and includes an exemption for a single industry. The VWR refers to the federal manual for identifying wetlands, which uses a more concise definition of wetland and does not distinguish between land uses. The Program feels strongly that an exemption should not be included in the definition of the resource, and that the exemption as written creates confusion for farmers and impedes the Program's ability to exercise their statutory authority over significant wetlands on farms. Because of this, the Program is initially proposing to revise the statutory definition of a wetland to a federally recognized, science-based definition, removing the

explicit exemption for “the growing of food or crops.” The strawman for discussion includes the concept of a clear farming exemption elsewhere.

Addressing these additional concerns will necessitate statutory revisions to codify the Program’s jurisdiction over presumptive wetlands, and clarify the Program’s jurisdiction over wetlands on farms. Additionally, ANR suspects other wetland statute change proposals will be submitted this legislative session. This has prompted a serious Agency-wide discussion about the need to introduce proposed statutory changes during the upcoming legislative session. As a result, the Program was instructed to refocus its efforts on drafting proposed statutory revisions to work on with the stakeholders. Revisions to the Rules themselves are still necessary, but the first step is to clarify the legislative intent. The Program’s intention in introducing these working draft statutory changes is not to undercut the stakeholder process, but to get candid feedback about what to change. Some of the working draft proposed changes reflect necessary compromises that resulted from inter- and intra-agency discussion.

Working Draft Proposed Changes

The following changes to the management of Vermont’s wetlands are being preliminary proposed to the Stakeholder group for consideration. Specific working draft changes to wetland statute have been written for stakeholder review and comment at the November 2018 meeting. Mapping, allowed uses, classifications, permitting and fees were all identified by the stakeholder group as components in need of improvement. Each of these stakeholder-identified components are proposed to be addressed in the upcoming Statute and/or Rule revision.

Wetland Definition: The Agency is proposing to align with the U.S. Army Corps of Engineer’s definition of a wetland which is effectively how the Program is operating because the Rule specifies the use of the ACOE methodology for identifying wetlands. The Agency is also proposing to remove the exception of areas used to grow food or crop from the definition of a wetland, and create a clear exemption for certain agricultural activities.

Mapping: The jurisdictional use of mapping is stated in Statute, and therefore requires a statutory change to eliminate. ANR is proposing to modify the definition of a Class II wetland so that the classification is no longer dependent on the wetland appearing on the VSWI map. Instead, Class II wetlands will be identified on the ground by the presence of distinct physical characteristics, as defined by statute. ANR is also committed to improving state mapping to be used as a helpful advisory tool, starting with the Missisquoi Basin in the Northwest portion of the state (underway). Along with improving wetland mapping, ANR is exploring the option of mapping “wetland potential” areas to help the public understand the need to not only rely on mapping but to look for wetlands on the ground.

Allowed Uses: ANR is proposing to shift from an activity-based jurisdictional trigger to an alteration-based jurisdiction that specifically lists the type of alterations that are prohibited without a permit (unless the alteration is the result of an exempt activity). ANR is also committing to improve the allowed uses and agricultural exemption by updating the terminology, and reconsidering what should and should not be exempt from permitting requirements. Most of the allowed uses are proposed to be improved in Rule rather than statute. By shifting from a prohibition on all activities to a prohibition on certain alterations, many of the current “allowed uses” will no longer need to be listed and thus considered by landowners, since they don’t result in one of the prohibited alterations to a wetland.

Classification: ANR is proposing to redefine Class II wetlands based on a list of physical characteristics that can be identified on the landscape. Using plain-language descriptors, anyone observing the wetland and the extent of the wetland (enhanced by improved mapping) should be able to determine if a wetland is protected by the Wetlands Program.

Permitting: The details of wetland permit review is within the Vermont Wetland Rules. The Program will refine the mitigation sequence, to provide greater clarity to the regulated community about what a permit applicant needs to demonstrate in order to receive a permit, and provide greater protection to particularly sensitive wetland resources by denoting certain wetland types and functions as “non-compensable,” giving the Program clear grounds for denying permits in those areas. As the Rules are currently written, there is no clear path for denial of a permit, as compensation can theoretically mitigate impacts to even the most sensitive Class II wetlands. To strengthen the mitigation sequence, ANR intends to incorporate compliance with the mitigation sequence into the statutory requirements for obtaining a permit. ANR is also committed to refining the mitigation sequence in the Rule, aligning the sequence with the federal 404 program whenever reasonable, and will work on guidance documents that describe what is required of applicants to demonstrate compliance with the sequence.

Fees: ANR is committed to reporting to the legislature on whether fees should be reduced for water quality related projects that impact wetland resources. The draft report will be shared with stakeholders.

Timeline

The Agency is working on a tight timeframe to have a statute proposal ready for this legislative session. After the November stakeholder meeting, the Agency will review comments, make necessary changes and share a revised draft to the stakeholder group. The Agency intends to submit the package by the end of November to be deliberated on through the 2019 legislative session. Stakeholders and the public will have ample opportunity to provide comments on the proposal through the session which ends in May 2019.