



## STATE OF VERMONT

### MEMORANDUM

To: Legislative Study Committee on Wetlands  
From: Michael O'Grady  
Date: October 8, 2019  
Subject: Issues before the Committee

At the September 17, 2019 meeting of the Legislative Study Committee on Wetlands, Committee members asked for a memorandum elaborating on the decision points that the Committee may want to address, including any existing issues with those decision points. As Rep. Sheldon noted at the September 17 meeting, the decision points that the Committee may want to address generally follow the legislative charge to the Committee in Act No. 64 of 2019. Consequently, this memorandum sets forth the Committee's legislative charge and then individually discusses the issues under each specific charge.

#### A. Act No. 64 Legislative Charge

(d) Report. On or before January 15, 2020, the Legislative Study Committee on Wetlands shall submit a written report to the General Assembly to update and clarify the requirements for the regulation of wetlands under State statute. The Study Committee shall submit the report in the form of draft legislation and shall include:

(1) whether the definition of "wetlands" should be amended, including whether the definition of wetlands under State wetlands law should be based on objective criteria such as size or location;

(2) the standard by which the State shall review a permit application for the disturbance of a wetland or wetland buffer;

(3) proposed exemptions from regulation under State wetlands law for specific activities, including:

(A) whether land on which farming or a subset of farming is conducted should be excluded from the definition of "wetlands" subject to State regulation or should be exempt from wetlands permitting under State law; and

(B) whether the exemptions under State wetlands law should be consistent or similar to the exemptions under federal wetlands law; and

(4) proposed permitting fees for wetlands permits.

**B. Whether the Definition of “Wetlands” Should Be Amended, Including Whether the Definition of Wetlands under State Wetlands Law Should Be Based on Objective Criteria Such as Size or Location**

The definition of “wetlands” under Vermont and federal law is very similar,<sup>1</sup> but Vermont law also includes a definition of “significant wetland.” If a wetland is significant, an activity in that wetland or its buffer must: obtain a permit from the Agency of Natural Resources (ANR); be an exempt or an excluded activity; or be an allowed use under the ANR rules. A “significant wetland” is defined as any Class I or Class II wetland.<sup>2</sup>

A “Class I wetland” is a wetland listed on Vermont significant wetlands inventory maps as a Class I wetland, a wetland that the former Water Resources Board identified in rules of the Board as a Class I wetland, or:

a wetland that the Secretary [of Natural Resources], based upon an evaluation of the extent to which the wetland serves the functions and values set forth in subdivision 905b(18)(A) of this title, determines is exceptional or irreplaceable in its contribution to Vermont’s natural heritage and, therefore, merits the highest level of protection.<sup>3</sup>

A “Class II wetland” is a wetland identified on the Vermont significant wetlands inventory maps that is not a Class I wetland, or a wetland that:

the Secretary determines to merit protection, pursuant to section 914 of this title, based upon an evaluation of the extent to which it serves the functions and values set forth in subdivision 905b(18)(A) of this title and the rules of the Department.<sup>4</sup>

Under 10 V.S.A. § 905b(18), the identification of a wetland as significant results from an evaluation of at least the following functions and values that a wetland serves:

- i. whether the wetland provides temporary water storage for flood water and storm runoff;
- ii. whether the wetland contributes to the quality of surface and groundwater through chemical action;
- iii. whether the wetland naturally controls the effects of erosion and runoff, filtering silt, and organic matter;

<sup>1</sup> The Vermont definition of “wetland” can be found at 10 V.S.A. § 902(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.

The federal definition of “wetlands” used by the U.S. Army Corps of Engineers can be found at 40 C.F.R. § 230.3(o)(3)(iv):

(iv) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater 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.

It should also be noted that the State definition refers to areas inundated by surface or groundwater, while the federal definition refers to areas inundated or saturated. Many wetlands in Vermont are saturated but never fully inundated.

<sup>2</sup> 10 V.S.A. § 902(11).

<sup>3</sup> 10 V.S.A. § 902(6).

<sup>4</sup> 10 V.S.A. § 902(7).

- iv. whether the wetland contributes to the viability of fisheries by providing spawning, feeding, and general habitat for freshwater fish;
- v. whether the wetland provides habitat for breeding, feeding, resting, and shelter to both game and nongame species of wildlife;
- vi. whether the wetland provides stopover habitat for migratory birds;
- vii. whether the wetland contributes to an exemplary wetland natural community, in accordance with the rules of the Secretary;
- viii. whether the wetland provides for threatened and endangered species habitat;
- ix. whether the wetland provides valuable resources for education and research in natural sciences;
- x. whether the wetland provides direct and indirect recreational value and substantial economic benefit; and
- xi. whether the wetland contributes to the open-space character and overall beauty of the landscape.

Many of these functions and values arguably are subjective—i.e., whether a wetland is valuable, or substantial, or contributes.

It has been argued that a determination of whether a wetland meets one of the subjective functions and value depends on who is evaluating the wetland. Consequently, it has been asserted that there can be a lack of regulatory predictability in determining whether an activity requires a permit. The ANR Wetlands Rules do provide functional criteria for evaluating whether a wetland is significant under the statutory functions and values,<sup>5</sup> but it has been argued that these criteria require substantial analysis or documentation and are still based on subjective review.<sup>6</sup>

In contrast, the federal Clean Water Act and the U.S. Army Corps of Engineers do not base the need for a federal dredge and fill permit in a wetland on the significance of the wetland or its functions and values. Federal permits are triggered by the nature of the activity; a federal Clean Water Act § 404 permit is required whenever there is dredging or filling of a water of the United States. The type of permit required is determined by the scope of disturbance or impact to the wetland. For example, under the U.S. Army Corps of Engineers General Permits for the State of Vermont, a person can self-verify a discharge of dredged or fill material for the construction or expansion of developments of less than 5,000 square feet of permanent or temporary impacts in waterways or wetland provided that the dredge or fill is not located in Lake Champlain, Lake Memphremagog, Wallace Pond, or adjacent wetlands.

<sup>5</sup> Vermont Agency of Natural Resources, Vermont Wetlands Rules § 5, available at [https://dec.vermont.gov/sites/dec/files/documents/wsmd\\_VermontWetlandRules\\_2018.pdf](https://dec.vermont.gov/sites/dec/files/documents/wsmd_VermontWetlandRules_2018.pdf)

<sup>6</sup> ANR's methodology for evaluating and classifying wetlands, specifically the use of the Wetland Evaluation Form to determine whether a wetland exhibits any significant function or value, has been determined by the Environmental Division of the Superior Court to be an appropriate tool for evaluating and classifying wetlands, see Hinesburg Hannaford Wetland Determination, 73-5-14 Vtec, 2016 WL 1569324, at 6 (Vt. Super. Apr. 12, 2016) (Walsh, J.).

The ANR proposal to amend the wetlands permitting scheme includes a proposal to define wetlands according to the definition relied upon by the Army Corps and a proposal to define Class II wetlands according to a set of objective physical characteristics.<sup>7</sup> In addition, ANR proposes to narrow the scope of activities requiring a permit to four distinct types of alterations. ANR offers these proposals to make it easier to identify wetlands on the landscape and to make it easier for the regulated community to know when a permit is needed. Using a set of objective criteria to identify Class II wetlands also would allow ANR to develop and rely on self-verifying general permits, similar to those used by the U.S. Army Corps of Engineers.

*i. Summary of Potential Questions Regarding the Definition of “Wetlands”*

- 1. Should the definition of “wetlands” under State law remain the same, including whether significant wetlands should be determined according to review of the functions or values of the wetland?*
- 2. Should the standard of whether a permit is required for activity be based on objective criteria, similar to the standards employed by the U.S. Army Corps of Engineers?*
- 3. Should the activities requiring a permit be narrowed or categorized according to distinct types of alterations, similar to the ANR proposal?*

**C. The Standard by Which the State Shall Review a Permit Application for the Disturbance of a Wetland or Wetland Buffer**

Similar to the question of how to define a wetland is the question of what standard should be used to determine if an activity in a wetland should be allowed under a permit. Current statute does not provide a permitting standard. Instead, 10 V.S.A. § 913 provides that, except for allowed uses, no person shall conduct or allow to be conducted an activity in a significant wetland or buffer zone of a significant wetland except in compliance with an ANR permit or conditional use determination.

The ANR Wetlands Rules do provide a permitting standard in the form of a burden of proof that must be met by an applicant. Specifically, a permit application must show that a proposed activity in any Class I or Class II wetland or its buffer zone complies with Wetlands Rules and will have no undue adverse effect on protected functions and values.<sup>8</sup> In determining whether this burden has been met, the potential effect of any proposed activity shall be evaluated on the basis of both its direct and immediate effects as well as on the basis of any cumulative or ongoing effects on the significant wetland.<sup>9</sup>

In its most recent proposal to amend the wetlands statues, ANR has proposed including a permitting standard in statute. Similar to the existing wetlands rules that review the impact on the functions and values of a wetland, ANR proposes to prohibit an activity if it is

<sup>7</sup> See Secretary Julie Moore, Memorandum to the Legislative Study Committee on Wetlands, re Proposed Revisions to Title 10, Chapter 37—Wetlands Protection and Regulation (Sept. 20, 2019).

<sup>8</sup> Vermont Agency of Natural Resources, Vermont Wetlands Rules § 9(a), available at [https://dec.vermont.gov/sites/dec/files/documents/wsmid\\_VermontWetlandRules\\_2018.pdf](https://dec.vermont.gov/sites/dec/files/documents/wsmid_VermontWetlandRules_2018.pdf)

<sup>9</sup> *Id.*

demonstrated to have an undue adverse impact to any of the functions and values of a wetland.<sup>10</sup> Thus, the first question for the committee is whether the permitting standard for activity in a wetland should be whether the activity has an undue adverse effect or impact on the functions and values of the wetland.

The second decision regarding the permitting standard is whether to allow an activity in a wetland even if it has an undue adverse effect on a wetland. Under the current ANR wetlands rules, any adverse effect on any protected wetland function, other than a minimal impact, shall be presumed to constitute an undue adverse effect that would not qualify for a permit unless the permit applicant can demonstrate that it meets what is referred to as the mitigation sequence. Specifically, an activity that has an adverse effect on a wetland may be allowed if the applicant shows all of the following sequentially:

1. The proposed activity cannot practicably be located outside the wetland or on another site owned or controlled by the applicant or reasonably available to satisfy the basic project purpose; and
2. If the proposed activity cannot practicably be located outside the wetland, all practicable measures have been taken to avoid adverse impacts on protected functions; and
3. If avoidance of adverse effects on protected functions cannot be practically achieved, the proposed activity has been planned to minimize adverse impacts on the protected functions and a plan has been developed for the prompt restoration of any adverse impacts on protected functions.<sup>11</sup>

If a permit applicant can meet the mitigation sequence under both existing wetlands rules and the ANR proposed legislation, the Secretary may issue a permit for the activity in the wetland. If a person cannot meet the wetlands mitigation sequence, the ANR rules allow a permit applicant to pay “compensation” in order to be issued a permit. Compensation measures may include establishing new wetlands or enlarging the boundaries of an existing wetland to compensate for the adverse impact of the proposed activity. The compensation may also include payment of fees to a federal “in-lieu fee” program or mitigation bank approved by the Secretary.<sup>12</sup>

However, under the wetland rules, compensation to avoid undue adverse impacts on wetlands or their buffer zones is only allowed to reduce adverse impacts on those protected functions that are compensable. Compensation is presumed to be possible for adverse impacts on certain wetlands functions, including, generally, water storage for flood water; enhancing water quality, by reducing nutrients; and support of waterfowl habitat.<sup>13</sup> For any other functions and values, the applicant must show that compensation will be successful in achieving no net loss in any protected function.

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<sup>10</sup> See New Wetlands Language, on file with author (Apr. 23, 2019).

<sup>11</sup> Vermont Agency of Natural Resources, Vermont Wetlands Rules § 9(b), available at [https://dec.vermont.gov/sites/dec/files/documents/wsmid\\_VermontWetlandRules\\_2018.pdf](https://dec.vermont.gov/sites/dec/files/documents/wsmid_VermontWetlandRules_2018.pdf)

<sup>12</sup> Vermont Agency of Natural Resources, Vermont Wetlands Rules § 9(c), available at [https://dec.vermont.gov/sites/dec/files/documents/wsmid\\_VermontWetlandRules\\_2018.pdf](https://dec.vermont.gov/sites/dec/files/documents/wsmid_VermontWetlandRules_2018.pdf)

<sup>13</sup> Id.

In addition, a person seeking to utilize compensation must satisfy the requirements of a compensation plan. A compensation plan must meet all of the following:

1. there will be no net loss of the protected functions or acreage of significant wetlands;
2. the compensation measures will be fully implemented prior to, or concurrently with, the proposed activity;
3. the compensation measures shall be monitored and managed for a period necessary to insure full replacement of the protected functions in question and any additional period that may be required by subsequent remedial measures but in no event for less than five years;
4. measures shall be designed to be self-sustaining following the period for which monitoring or management is required;
5. adequate financial surety is provided to carry out the proposed compensation including any necessary remedial measures; and
6. any replacement wetland will be permanently preserved by a conservation easement or deed restriction conveyed to a suitable party or by other appropriate means.<sup>14</sup>

The ANR proposed legislation does not include a reference to compensation. The ANR proposal provides that the Secretary shall not issue a permit unless the applicant demonstrates that they have met the requirements of the wetland mitigation sequence set forth in rule. Although ANR's legislative proposal does not specifically reference compensation as an alternative, the Agency asserts that compensation will be available as an alternative under the mitigation sequence. Consequently, the Committee may need to decide whether they want to recommend reference to compensation in statute or recommend other options for the use of compensation as an alternative for permitting.

*i. Summary of Potential Questions Regarding the Permit Standard for Activities in a Wetland*

1. *Should the standard for issuing a permit for an activity in a wetland be set forth in statute or only included in rule?*
2. *Should the standard for denying a permit for an activity in a wetland be that the activity will have no undue adverse effect on the functions and value? Will have no undue adverse impact on functions and values? Or some other standard?*
3. *If a proposed activity has an undue adverse effect or impact, should a person still be able to obtain a permit if they complete the mitigation sequence?*
4. *If a person cannot complete the mitigation sequence, can certain activities obtain a permit through use of compensation? If yes, should compensation be referenced in statute?*

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<sup>14</sup> Id.

## D. Proposed Exemptions from Regulation under State Wetlands Law

### i. Proposed Exemptions from Regulation—Regulation of Farming

As stated under subsection B of this memo, the definition of “wetlands” under State and federal law is similar, but not exact. The Vermont definition of “wetlands” includes a significant phrase that is not included in federal law. State law excludes from the definition of wetlands “such areas as grow food or crops in connection with farming activities.”<sup>15</sup> A key issue is the use of the term “exclude” or “excluding” instead of “exempt” or “allowed.”

The use of the term “exclude” is important, because, as the Environmental Division of the Superior Court noted in *Agency of Natural Resources v. McGee*, land that falls under the “exclusion” is, by definition, not a wetland, and therefore activities on that land are beyond the scope of the Wetlands Rules.<sup>16</sup> If an activity is beyond the Wetlands Rules, it would not be subject to ANR authority and would not need a permit for that activity. In contrast, an exemption would be authorized by the Wetlands Rules and the land and activity would still be subject to ANR jurisdiction and oversight.

The question of whether “areas as grow food or crops in connection with farming activities” are beyond the jurisdiction of the Wetlands Rules is important, because the Wetlands Rules impose conditions on exercise of the exclusion. Statute does not define the term “farming activities” for the purposes of the wetlands exclusion. The Wetlands Rules do define “farming activities,” but as a subset of those activities that are defined as farming under Title 6 (the farming statutes), the Required Agricultural Practices (RAPs), and Act 250.<sup>17</sup>

Similarly, the Wetlands Rules provide that the exclusion for areas that grow food or crops in connection with farming activities is only available to:

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.<sup>18</sup>

<sup>15</sup> 10 V.S.A. § 902(5).

<sup>16</sup> *Agency of Natural Resources v. McGee* (Env. Div., Oct. 9, 2015) at p.5.

<sup>17</sup> See, Wetlands Rules § 3.1(a)(2) definition of “farming activities”:

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.

In contrast, the definition of “farming” under 6 V.S.A. § 9602, the RAPs, and 10 V.S.A. § 6001(22) is:

(22) “Farming” means:

- (A) the cultivation or other use of land for growing food, fiber, Christmas trees, maple sap, or horticultural [viticultural] and orchard crops; or
- (B) the raising, feeding, or management of livestock, poultry, fish, or bees; or
- (C) the operation of greenhouses; or
- (D) the production of maple syrup; or
- (E) the on-site storage, preparation, and sale of agricultural products principally produced on the farm; or
- (F) the on-site storage, preparation, production, and sale of fuel or power from agricultural products or wastes principally produced on the farm; or
- (G) the raising, feeding, or management of four or more equines owned or boarded by the farmer, including training, showing, and providing instruction and lessons in riding, training, and the management of equines.

<sup>18</sup> Vermont Agency of Natural Resources, Vermont Wetlands Rules § 3.1(a)(3), available at [https://dec.vermont.gov/sites/dec/files/documents/wsmnd\\_VermontWetlandRules\\_2018.pdf](https://dec.vermont.gov/sites/dec/files/documents/wsmnd_VermontWetlandRules_2018.pdf)

The effective date of the Wetlands Rules was 1990. Thus, the farming “exclusion” is only available to areas that were growing food or crops in 1990 and remained in ordinary rotation since that time. For example, an area that was not used for farming until after 1990 is not excluded from the definition of wetlands. Similarly, an area that was in ordinary rotation prior to 1990 but is taken out of rotation for the purpose of constructing a building is no longer being used to grow food or crops and is no longer excluded from the definition of a wetland.

ANR’s proposed legislation would remove the wetlands exclusion and instead provide that a wetland permit is not required—i.e., the activity is exempt—for growing of food or crops in connection with farming, consistent with certain specific conditions.<sup>19</sup> Although the ANR legislative proposal for a permit exemption applies to “farming” and not “farming activities” as provided in the current statute and rules, the ANR proposal would define “farming” as a subset of “farming” under Title 6, the RAPs, and Act 250.

In addition, Act No. 64 of 2019 authorized the Secretary of Agriculture, Food and Markets to amend the RAPs to include requirements for activities occurring in areas that are excluded from ANR’s wetlands regulation because the area is used to grow food or crops in connection with farming activities. Because the Agency of Agriculture, Food and Markets’ authority over the RAPs applies to all “farming” and not a subset as with ANR’s rules, there is an argument that in Act No. 64 of 2019 the General Assembly intended for the Agency of Agriculture, Food and Markets to regulate all farming in wetlands.<sup>20</sup>

Some argue that this interpretation creates confusion as to who regulates wetlands used to grow food or crops in connection with farming, while others argue that it clarifies the role of the Agency of Agriculture, Food and Markets in regulating farming in areas that are excluded from the definition of wetlands.

*ii. Proposed Exemptions from Regulation—Consistency with Federal Law*

The Committee is also tasked with investigating whether the State exemptions to State wetlands permits should be consistent with or similar to the permitting exemptions under federal law for dredge and fill permits issued by the U.S. Army Corps of Engineers. In addition to the exclusion for areas that grow food or crops in connection with farming activities, the ANR Wetlands Rules include 25 allowed uses—i.e., activities that do not require a wetlands permit from ANR.<sup>21</sup>

Some of the activities that are exempt from State law permitting are exempt from the U.S. Army Corps dredge and fill permit, but many of the activities are not. For example, specific activities related to farming, road construction, and “minor drainage” are exempt under the federal rules, but likely not exempt under State law.<sup>22</sup> Interested parties have argued that the lack of consistency between the State and federal exemptions creates uncertainty for the

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<sup>19</sup> See New Wetlands Language, on file with author (Apr. 23, 2019).

<sup>20</sup> See Letter from Sen. Robert Starr to Sec. Anson Tebbetts (Aug. 14, 2019).

<sup>21</sup> See Vermont Agency of Natural Resources, Vermont Wetlands Rules § 6, available at [https://dec.vermont.gov/sites/dec/files/documents/wsmnd\\_VermontWetlandRules\\_2018.pdf](https://dec.vermont.gov/sites/dec/files/documents/wsmnd_VermontWetlandRules_2018.pdf)

<sup>22</sup> See 40 C.F.R. § 232.3.



regulated community, especially when an activity would require a State permit, but the U.S. Army Corps of Engineers first indicates the activity does not need a federal permit.

The ANR legislative proposal would include many of the federal exemptions as part of State law, but not all of the exemptions or subject to different criteria. For example, ANR proposes to clarify that cultivating, harvesting, plowing, grazing, and seeding are exempt under State law as those activities are exempt under federal law.<sup>23</sup> However, the ANR proposal would exempt repair and maintenance, but not construction, of farm roads located in wetlands,<sup>24</sup> where the federal rules exempt construction and maintenance of farm roads in wetlands.<sup>25</sup>

*iii. Summary of Potential Question for Wetlands Exemptions*

*1. Should the “farming exclusion” from the State definition of wetlands be retained under State law so that areas that grow food or crops in connection with farming activities are outside ANR’s jurisdiction? Or should growing of food or crops be subject to ANR authority, but exempt from wetlands permitting?*

*2. Regardless of whether the “farming activity” exclusion is retained, or farming exemption adopted, what criteria should apply to qualify for the exclusion or the exemption? Should it apply to all “farming”? To “growing food or crops in connection with farming”? Should the definition of “farming” for the purpose of the exclusion or exemption be retained as drafted under the ANR Wetlands Rules or should it be consistent with Title 6, the RAPs, and Act 250? Should there be limitations on the farming exclusion or exemption such as the area must have been in production in 1990, must be in ordinary rotation, or must comply with the RAPs?*

*3. Should the allowed uses under the ANR Wetlands Rules be amended to be consistent with or more similar to the U.S. Army Corps of Engineers’ dredge and fill permit exemptions under State law?*

**E. Proposed Permitting Fees for Wetlands Permits**

Under ANR’s fee statute, 3 V.S.A. § 2822, a person applying for a wetland permit or coverage under a wetlands general permit pays an administrative processing fee and an application fee of: \$0.75 per square foot of proposed impact to Class I or II wetlands; and \$0.25 per square foot of proposed impact to Class I or II wetland buffers.<sup>26</sup> Certain activities have a capped permit fee of \$200.00 per application.<sup>27</sup> These capped activities include conversion of Class II wetlands or wetland buffers to cropland use, installation of a pipeline in a wetland for transport of manure for the purpose of farming, and construction of specific water quality improvement projects in a Class II wetland or buffer.<sup>28</sup>

<sup>23</sup> See New Wetlands Language, on file with author (Apr. 23, 2019).

<sup>24</sup> Id.

<sup>25</sup> 40 C.F.R. § 232.3.

<sup>26</sup> 3 V.S.A. § 2822(j)(26).

<sup>27</sup> 3 V.S.A. § 2822(j)(26)(C) and (H).

<sup>28</sup> Id.

Part of the question regarding wetlands permitting fees is whether the fee structure is appropriate for executive branch agency fees. Statute provides requirements for the executive branch fees, including what constitutes a fee.<sup>29</sup> Specifically, a “fee” is defined under 32 V.S.A. § 602 as “a monetary charge by an agency or the Judiciary for a service or product provided to, or the regulation of, specified classes of individuals or entities.” Some interested parties have commented that the wetlands fees are not entirely related to the service or product provided, in that for some proposed projects the permit fees can be tens of thousands of dollars and the agency service or product does not correlate with that fee.

ANR maintains that the fees assessed on permitted projects are based on the cost of the services provided by the Wetlands Program as a whole, which entails more than permit issuance. The Program provides wetland delineations, classification determinations, restoration of resources, mapping and assessment of significant wetlands, and monitoring and compliance with existing rules. Overall costs for individual permit applicants would potentially increase substantially if ANR did not provide these services.

Moreover, although not specifically recognized under the statutory provisions for executive fees, fees can also serve a regulatory purpose of being a disincentive to an activity. When a person knows that disturbance of a wetland will result in high fees, they may adjust the proposed activity to avoid the wetland and its buffer. In addition, under the fee statutes, if a person disturbs a wetland without obtaining a permit, the subsequently required permit is subject to higher permit fees of \$1.50 per square foot of impact to Class I or II wetlands.<sup>30</sup> Again, if a person is aware of this fee, they might make sure to obtain a permit prior to engaging in an activity in a wetland.

In addition, there is a question of whether certain activities should be exempt from permitting fees or subject to capped fees. ANR’s wetland program does rely on the permitting fees as part of their budget. Thus, any significant exemption or cap may have an effect on the program’s budget.

*i. Summary of Potential Question for Permitting Fees for Wetlands Permits*

- 1. Should the wetlands permitting fees be amended to more closely track the costs of permitting services provided by ANR personnel, or should permitting fees be left as is to pay for the service of the Wetlands Program as a whole and to retain some incentive for persons to avoid wetland disturbance.*
- 2. Whether certain activity should be exempt from permitting fees and, if so, what activity should be exempt or capped, and what is an appropriate fee cap?*
- 3. Should there be fees for the provision of other services provided by the Wetlands Program, including mapping, Class determinations, and pre-application review?*

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<sup>29</sup> See 32 V.S.A. chapter 7, subchapter 6.

<sup>30</sup> 3 V.S.A. § 2822(j)(26)(E).