

Wetlands: How Farming in Wetland is Regulated Under Prior Law, Existing Law, ANR Proposal

	Applicable Law	General Summary of Concerns or Issues
<p>Law Prior to Act 64</p>	<p>10 V.S.A. § 902(5) defines wetlands:</p> <p>(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, <u>but excluding such areas as grow food or crops in connection with farming activities.</u></p> <p>ANR Wetland Rule § 3.1a sets the parameters of the wetlands exclusion:</p> <p>3.1 Exemptions. The following <u>shall not be regulated as wetlands</u> under the Vermont Wetland Rules, but may be subject to regulation under federal law:</p> <p>a. Farming Exemption</p> <p>(1) Statutory guidance. Section 902(5) of 10 V.S.A. defines wetlands to exclude “such areas as grow food or crops in connection with farming activities.” Section 905b(18)(C) of 10 V.S.A. requires that any rules “that restrain agricultural activities” must have the consent of the Secretary of the AAFM.</p> <p>(2) Definition. <u>Farming activities</u> 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.</p> <p>(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 <u>effective date of these rules (1990)</u>. The exemption will expire whenever the area is no longer used to grow food or crops or in ordinary rotation.</p> <p>ANR Rule § 6.6 Allowed Uses</p> <p>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 . . . Designation of allowed uses in these rules shall not provide relief from liability for violations that commenced prior to the effective date of such.</p> <p align="center">* * *</p> <p>6.6. The growing of food or crops in connection with farming activities when:</p> <p>a. threatened or endangered species are protected; and</p> <p>b. No clearing of existing vegetation occurs in deer wintering yards mapped by Fish and Wildlife; and</p> <p>c. In compliance with the most recent Required Agricultural Practices adopted by the AAFM.</p>	<ul style="list-style-type: none"> • A key issue is the use of the term “exclude” or “excluding” instead of “exempt” or “allowed.” <ul style="list-style-type: none"> ○ State law excludes from the definition of wetlands “such areas as grow food or crops in connection with farming activities.” ○ The use of the term “exclude” is important, because, as the Environmental Division of the Superior Court noted, land that falls under the “exclusion” is, by definition, not a wetland, and therefore activities on that land are beyond the scope of the Wetland Rules.” ○ If an activity is beyond the Wetlands Rules, it is not subject to ANR authority and would not need a permit unless it otherwise triggers the need for a permit. ○ 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. • Another key issue is that the “farming” exemption applies to land used to grow food or crops in connection with farming activities and not the broader, generally-used term of “farming” <ul style="list-style-type: none"> ○ “Farming” as defined under Act 250, agricultural water quality statutes, and the RAPs is broader in scope than the growing of food or crops. ○ This leads to the need for ANR to interpret what constitutes the growing of food or crops. ○ There is a difference of opinion between ANR and agricultural interests as to whether some activities qualify for the exemption or not. • Consistency in ANR interpretation and application of law. <ul style="list-style-type: none"> ○ There is concern that certain farming activities that were never regulated or permitted by ANR in the past are now being regulated by ANR. ○ This inconsistency in regulation could lead to legal issues for those that were not previously regulated.
<p>Existing Law</p>	<p>Required Agricultural Practices—6 V.S.A. § 4810(c)</p> <p>The same statute, 10 V.S.A. § 902(5), and the same ANR Wetland Rules §§ 3.1a and 6.6 apply that applied prior to 2019 would continue to apply (see above), but 2019 Acts & Resolves No. 64, Sec. 6 amended 6 V.S.A. § 4810 to add 6 V.S.A. § 4810(c) to read:</p> <p>(c) The Secretary shall amend the required agricultural practices to include requirements for activities occurring in areas that are excluded from regulation by the Agency of Natural Resources under 10 V.S.A. §902 because the area is used to grow food or crops in connection with farming activities.</p>	<ul style="list-style-type: none"> • As indicated in letters from the chairs of the Committees on Agriculture, this language was intended to authorize AAFM to regulate all “farming” in wetlands. • But, ANR authority was not amended and there is ambiguity and difference of opinion as to whether the language in Act 64 achieved the stated intent of the Agriculture Committee chairs. • There is also the question of how AAFM would regulate farming in wetlands, as Act 64 is a grant of rulemaking authority and the rules have not yet been proposed.
<p>ANR Proposed Legislation</p>	<p>Proposed 10 V.S.A. § 902(5): Would amend existing definition of wetlands:</p> <p>(5) “Wetlands” means those areas of the State that are inundated <u>or saturated</u> by surface or groundwater at a frequency <u>and duration</u> sufficient to support <u>significant vegetation or aquatic life that depend on saturated or seasonally saturated soil conditions for growth and reproduction.</u> 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, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. <u>Wetlands generally include swamps, marshes, bogs, and similar areas.</u></p>	<ul style="list-style-type: none"> • Amends the definition of “wetlands” to remove the exclusion language. <ul style="list-style-type: none"> ○ The growing of food or crops in connection with “farming” would be subject to ANR authority—not excluded—but exempt under certain specified conditions. ○ How will this apply to previously excluded land, especially land that may not qualify for the permit exemption? Will there be a grandfathering?

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	<p>Proposed 10 V.S.A. § 913: Permitting and Exemption of Farming</p> <p>Sec. 3. 10 V.S.A. § 913 is amended to read:</p> <p>(a) Except for allowed uses adopted by the Department by rule, 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 a permit, conditional use determination, Except as provided in subsection (e) below, the following alterations within a Class I or Class II wetland or its buffer zone are prohibited without an individual permit, authorization under a general permit, or an order issued by the Secretary:</p> <p><u>(1) dredging or removing soil or other material;</u> <u>(2) draining, dewatering, or otherwise altering the hydrology of the wetland;</u> <u>(3) filling; and</u> <u>(4) cutting or removing vegetation.</u></p> <p style="text-align: center;">* * *</p> <p>(e) A permit shall not be required under this section for:</p> <p>(1) <u>The growing of food or crops in connection with farming, consistent with the following requirements:</u></p> <p>(A) <u>The growing of food or crops when conducted in connection with farming, on land that has been converted for the purpose of growing food or crops in ordinary rotation, provided that the conversion of a Class II wetland to an area used to grow food or crops is not exempt and shall require a wetland permit under this section.</u></p> <p>(B) <u>As used in this section, the growing of food or crops includes cultivating, harvesting, plowing, grazing, and seeding, but does not include the construction of any permanent structure located partially or wholly outside an agricultural production area and its associated buffer. A permanent structure includes a barn, bunker silo, waste storage facility, or sugarhouse.</u></p> <p>(C) <u>Land is no longer considered to be growing food or crops in ordinary rotation if it is converted to a use other than the growing of food or crops, or requires mechanized clearing or modifications to the hydrological regime to resume the growing of food or crops.</u></p> <p>(2) <u>Activities conducted entirely within an agricultural production area and its associated buffer.</u></p> <p>(3) <u>The implementation of best management practices on farms for the purpose of improving water quality, when those practices are implemented in compliance with the required agricultural practices or the NRCS Practice Standards. Exempt practices include:</u></p> <p>(A) <u>installation of fencing, including livestock watering systems;</u> (B) <u>construction or maintenance of trails and walkways up to 16 feet wide, including attendant stream crossings;</u> (C) <u>maintenance of existing trails and walkways, including stream crossings, or maintenance, but not construction, of drainage ditches;</u> (D) <u>maintenance of existing buildings and structures;</u> (E) <u>maintenance, restoration, reconstruction, rehabilitation, or upgrading of existing roads in wetlands, provided that work on existing roads results in an overall net increase in road width of no more than 20 percent beyond the original road width;</u> (F) <u>construction or maintenance of farm ponds;</u> (G) <u>construction or maintenance of grassed waterways;</u> (H) <u>construction of stream crossings; and</u> (I) <u>the installation of manure pipelines or other temporary impacts that do not result in any change to the original grade of the wetland and that allow for the impacted area to revert back to wetland, including the reestablishment of the existing wetland vegetation, within one year.</u></p> <p>Proposed 10 V.S.A. § 902(10) and (12)</p> <p>(10) “Panel” means the Water Resources Panel of the Agency of Natural Resources. “Agricultural production area” means an area in existence as of January 1, 2019 where animals, agricultural inputs, or raw agricultural products are confined, housed, stored, or prepared within or without structures, and includes a 200-foot buffer around such areas. Agricultural production areas include barnyards, raw materials storage areas, heavy use areas, fertilizer and pesticide storage areas, waste storage and containment areas, egg washing or egg processing facilities, or milk houses. For the purpose of this chapter, agricultural production areas do not include areas used in the storage, handling, treatment, or disposal of mortalities.</p> <p><u>(12) “Permanent structure” means a nonmovable structure that is designed, planned, and constructed to remain at one location and that is securely attached to its location, including residential dwellings, commercial and industrial buildings, farm structures, and wastewater systems.</u></p>	<ul style="list-style-type: none"> • Adds exemptions that are more consistent with exemptions under federal law. <ul style="list-style-type: none"> ○ However, the proposed exemptions and federal law are not the same. Consequently, inconsistency would remain between State and federal wetlands laws. ○ Questions have been offered as to whether the proposed exemptions would allow more conversion of wetlands than is allowed under current State law. • There is concern from some interested parties that under this proposal more agricultural activities will require a permit than are currently required to be permitted under application of current law. • The issue of ANR interpretation of what constitutes the growing of food or crops or farming remains, provided that ANR’s proposal includes specific actions or activities that qualify or do not qualify for the exemption, which brings some clarity, but may not address all the questions