

Memorandum to House Natural Resources, Fish & Wildlife Committee re H. 108

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1. What is the Need? -- Vermont May Not Have a Say on Federal Permit Applications Affecting Vermont Wetlands Because the VWQS Do Not Mention Wetlands

Federal Clean Water Act section 401 Water Quality Standards Certification grants every state the right to approve of or reject any federal permit application that involves waters of the US in that state. Existing Vermont WQS are the sole regulation that implements that authority, and they do not mention or incorporate by reference the Vermont Wetland Rules. The VWQS refer to and regulate streams, rivers, ponds and lakes. ANR practice has been to apply the Wetlands Rules, and a written policy guidance affirms this. VNRC petitioned ANR two years ago to promulgate a regulation to fill this gap. ANR Secretary promised action in 2019. Nothing ever happened.

2. Why Isn't the Existing Vermont Practice Good Enough? – The NY Example

Recent litigation by interstate energy companies has involved multimillion dollar legal teams challenging every aspect of state authority under section 401, particularly in NY. NY won. Following the NY victory, the energy industry asked President Trump for help and he issued an Executive Order directing the EPA to try to limit state 401 authority – which EPA was not able to do. Every interstate energy developer's legal team knows 401 law inside and out.

Were an interstate energy project to be proposed for Vermont, the company's legal team could focus on the lack of explicit reference to wetlands in the VWQS and argue that Vermont is not authorized to impose 401 Certification conditions regarding wetland contamination, excavation, draining, or other impacts -- unlike NY. Wetlands impacts are often among the principal impacts of interstate energy projects. ANR has indicated that the lack of reference to wetlands in the VWQS does not create a legal risk. However, ANR does not explain why this obvious omission does not create any legal risk. We hope they are right. We would sleep better if this risk were eliminated which is easily done with language in the standards as we have suggested.

3. Don't Act 250, Section 248 and Vt Wetlands Statutes Protect Wetlands from Federally Licensed Projects? -- Federal Preemption.

Interstate natural gas pipeline projects are completely exempt from all state laws. The PUC, the District Commissions and ANR have zero jurisdiction, with only one exception – ANR's section 401 Certification. If Vermont's 401 regulations continue to remain silent about wetlands, Vermont may have no say about wetlands impacts associated with these projects.

Similarly, the Federal Energy Regulatory Commission has ruled that its authority over hydro-electric generation preempts all state environmental laws. That leaves only 401.

This bill would guarantee that large interstate energy projects – that, because of federal preemption, are exempt from the Vermont Wetlands Rules that farmers and other Vermonters must obey -- must consider wetlands impacts despite federal preemption.

ANR has opposed or resisted changing its regulations to fill this gap for two years, since VNRC asked for this correction. An earlier version of this bill was submitted last session – and ANR still made no change.

This raises the question if ANR's practice is to consider wetlands covered under the VWQS, why contest efforts to clarify this issue?

4. Will H. 108 Subject Farmers to New Regulation? No.

401 only governs the State's role when a federal permit is applied for. As noted, ANR's position is that it already considers wetlands when granting or denying 401 Certifications for federal permits. Accordingly, if a farm operation already has to obtain a federal permit, ANR is already looking at wetlands impacts. H.108 will not change the current practice of addressing wetland impacts when a farm must obtain a 401 because a federal permit is required. The purpose of H.108 is to clarify this practice and protect Vermont against an applicant who attempts to exploit the fact that wetlands are not explicitly listed as being part of the VWQS.

5. Don't Existing ANR Rules Require Consideration of Alternatives? – Not Really.

This question assumes that ANR has authority to review wetlands impacts. Unless the VWQS are changed, this will remain open to question in 401 cases.

Assuming ANR does have a role, ANR's Wetland Rules do require consideration of mitigation alternatives. They also say if an applicant's analysis shows that mitigation alternatives won't work and the project is still going to cause harm the answer is not denial of the permit, but paying money to purchase "compensation." This means buying into the Army Corps of Engineers/Ducks Unlimited wetland mitigation program, i.e., allowing wetlands to be destroyed by paying money to set aside wetlands somewhere else, even when practicable alternatives exist. In practice, ANR does not even consider alternatives, and just relies on compensation.

The June 9, 2014 DEC decision in the Addison Natural Gas Project is an example of how ANR applies 401 without considering alternatives, and just relies on compensation. The decision stated that 430 different wetlands would be affected by the project, with impacts on over one million square feet of wetlands. The ANGP 401 Certification did not even mention alternatives - - much less whether less harmful alternatives were considered or were practicable. Instead, ANR relied on cash payments as compensation. The ANGP decision stated: *The Permittee will purchase 119,203 square feet of mitigation credits from the Vermont in-lieu fee program, administered by Ducks Unlimited, Inc. for Vermont, as compensation for unavoidable impacts which would result from Project construction.*

H.108 would overrule the compensation loophole in the Wetlands Rules whenever the Wetlands Rules are used for 401 Certification in cases affecting 3 or more acres of wetland. In other cases (not involving any federal permitting, which is what triggers 401, or in 401 cases involving less than 3 acres) the Wetlands Rules will continue to allow compensation even though a practicable alternative was not considered or could have been used.

H. 108 also would overrule the loophole in the existing VWQS which exempts from alternatives analysis any project the stormwater impacts of which are proposed to be mitigated by Best Management Practices. Again, the exemption would continue to apply to non-401 cases and to 401 cases involving less than 3 acres of wetlands.

6. What Do Other States Do?

We have not had time to catalog all 49 other states. This issue has come to a head because NY and Connecticut require consideration of alternatives, and the federal courts upheld their right to do so under 401 when considering interstate energy pipelines. If NY and CT had not required consideration of alternatives, interstate gas pipelines would have been constructed that, according to those state's officials, posed unacceptable risks to the environment. We hope Vermont can stand up for itself just as well.

7. Must the Changes in the VWQS Be Set Forth in Statute? No – the Bill Could Mandate that ANR Promptly Make These Changes Through Rule-Making.

VNRC would support amendment of the bill as follows:

1. Keep Sections 1, 2 and 3 as written. These changes in statute are needed.
2. Delete Section 4, 5 and 6 (the rewriting of the VWQS).
3. Adopt a new Section 4 as follows: "The Secretary shall submit to the Vermont Secretary of State proposed amendments to the VWQS to implement this Act within 90 days of passage of this Act, shall report to the General Assembly on the progress of the rule changes by January 15, 2022 and shall adopt final rules implementing this Act by March 1, 2022 ."