

From: Chapman, Matt
To: House Natural Resources
Subject: Re: H.108

Please see my responses below.



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From: Rep. Harvey Smith
Date: Wednesday, February 24, 2021
To: Chapman, Matt
Subject: H.108

Hi Matt

I am trying to understand how H.108 may or may not impact agricultural projects. I have been reaching to the agricultural community and these are some of the concerns/questions they have. I wanted to share them with you before our meeting this afternoon to give you some time to think about your responses.

Thanks

I've heard repeated that the Section 401 review is only for large federal projects, but I have a question regarding how a 404 Army Corps of Engineers (ACOE) individual or general permit for a farm project would be handled under the proposed legislation (ANR Draft presented Tuesday) and 401 certification more broadly.

1. For [ACOE GP 21 Agricultural Activities \(Section 404\)](#) (page 25) that require Pre-Construction Notification (PCN) of more than 5,000 SF to <1acre (say a farm waste storage structure) how would 10 V.S.A. § 1253(h)(1) be applied?

Hopefully the language being offered today helps resolve this issue. It clarifies that the ANR can adopt a 401 for the ACE GP (for both the PCN and nonreporting categories), compliance with that GP is presumed to be compliance with the VWQS, and we reserve our ability to require individual review of a project based on its potential impact.

- a. Would ANR deny certification of the 404 GP 21 for an ag activity if the standards imposed by GP 21 don't meet 10 V.S.A. Chapter 37 and Vermont Wetland Rule (VWR) standards for wetlands?

See response above. The only time we might condition or deny a project outside the GP is if we exercised our individual review authority. I'll note that I cannot recall a time that we've done that.

- b. Say the GP 21 is of size (a farm waste storage structure) that it would meet the PCN standard for ACOE 404, but it is occurring in a Class III wetland – would ANR deny the 404 GP permit issuance as it does not meet 10 V.S.A. Chapter 37 standards for wetlands?

See response above. I think that it is unlikely that if there are not significant functions or values (designated as Class I or II) associated with a wetland that we would exercise our individual review authority under the GP.

- i. Would the addition of all 'wetlands' per ANR's draft to the states 'antidegradation policy' found in Section 2 of the bill prevent ANR from certifying the GP21 project as the waste storage structure would degrade the functions and values of the Class III wetland even though it is not protected by the VWRs?

No. See above.

An area that has not been discussed in depth is the proposed language found in [Section 2 of ANR's latest draft](#): this is a section that would add wetlands language to the Vermont Water Quality Standards (VWQS), specifically:

1. Classification of state wetlands to include Class I & Class II wetlands and that the uses to be protected include the functions and values as described in the Vermont Wetland Rules (VWRs)
2. Amendment to the antidegradation policy to add that wetlands and their functions and values shall be protected by the VWRs.

I believe the current classification of water uses and anti-deg policy can be found on page 11 of the VWQS https://dec.vermont.gov/sites/dec/files/documents/wsmnd_water_quality_standards_2016.pdf

My questions on H.108 Section 2 are as follows:

1. How can a Class II wetland that is not a surface water be a classified as a water and have a classified water use?

So we share this issue which is why we are proposing that the VWQS be amended to ensure that the standards we are reviewing are the Vermont Wetland Rules (not the criteria established in the WQS).

2. How can antidegradation policy be applied to Wetlands when they are not all surface waters? Isn't it already regulated under 10 V.S.A. Chapter 37?

So the antidegradation policy currently applies to wetlands. See Sec. X of the Antidegradation Implementation Policy, p. 26. Normally, the Agency has taken the view that our permit programs are designed to protect existing and designated uses under the VWQS. There is a fact specific inquiry but our review will be fact focused and is difficult to discuss generally.

See antidegradation implementation policy:

<https://dec.vermont.gov/sites/dec/files/wsm/Laws-Regulations-Rules/AntiDegredationImplementationProcedure-Interim.20101012.pdf>

3. How would the addition of Class I and Class II wetlands to the classification of state waters and all wetlands added to state anti-deg policy affect the implementation of the current Vermont Wetland Rules? Would it change how the State reviews functions and values of wetlands and applies exemptions and allowed uses?

It would not change our review under the Vermont Wetlands Rules.

4. Shouldn't the language regarding antidegradation policy apply only to those wetlands that are 'so significant they merit protection under the VWRs?' there are many 'wetlands' in the state that are not regulated or protected.

I think that issue gets resolved in Sec. 2(1) by requiring us to change the classifications to protect Class I and II wetlands and that the values we're protecting for are those protected under the Vermont Wetlands Rule. I think by focusing in on Class I and II wetlands we're focusing on Vermont "significant" wetlands as defined by 10 V.S.A. Ch 37 and the wetlands rule.