

Memorandum to Senate Committee on Natural Resources & Energy re: H. 108

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1. The House Bill Is a Consensus Bill Supported by VNRC, ANR and Industry, and Was Supported 11-0-0 by the House NRF&W Committee

H.108 meets a pressing need – protection of the State of Vermont’s authority in Federal Clean Water Act Section 401 Certification proceedings pertaining to wetlands.

Federal Clean Water Act section 401 Water Quality Standards Certification grants every state the right to approve 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. But no statute or formally adopted regulations makes this authority explicit.

Following multiple House NRF&W Committee hearings, representatives of VNRC, ANR and industry worked out a consensus bill that all supported. Those who participated in the meetings included ANR General Counsel Matt Chapman, Warren Coleman, Jon Groveman and James Dumont for VNRC, Pete LaFlamme of ANR, Jeff Nelson of VHB consultants, and several other consultants or staff for Vermont utilities.

The consensus bill addresses three important aspects of 401 Certification of federally permitted projects affecting Vermont wetlands. First, and most importantly, the bill explicitly authorizes ANR to protect wetlands under section 401. Second, the bill continues in effect the exemptions for small projects – such as those Vermont farmers typically engage in. Third, the bill clarifies that a 401 Certification will not be granted for harmful impacts to non-exempt wetlands unless there is no practical alternative.

House NRF&W Committee member Harvey Smith raised important questions about the effect of the bill on agriculture. Legislative Council Attorney Michael O’Grady and ANR’s General Counsel Matt Chapman both submitted memoranda to Representative Smith. The memoranda assured him that the bill would not impose additional burdens on agriculture. Representative Smith’s support for the bill resulted in a 11-0-0 vote of the Committee.

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

Wetlands impacts are often among the principal impacts of interstate energy projects.

Under the federal Natural Gas Act, 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. Because section 401 is a federal law, review of wetlands pursuant to section 401 is not preempted by the Natural Gas Act. Vermont may not be able to protect its wetlands, however, unless H. 108 is adopted.

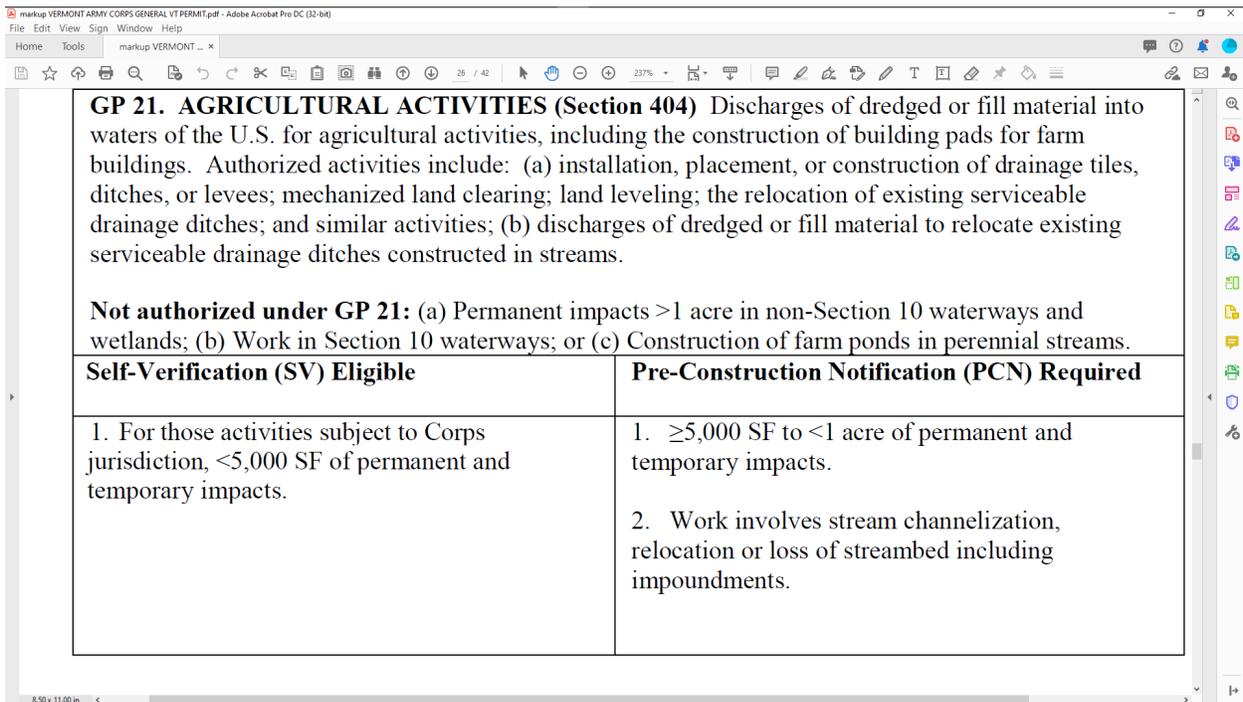
Recent litigation by interstate energy companies has involved multimillion dollar legal teams challenging every aspect of state authority under section 401, particularly in NY. NY won. Every interstate energy developer’s legal team knows 401 law inside and out.

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 statutes and regulations pertaining to 401 Certification. They will argue that ANR is not authorized to impose 401 Certification conditions regarding wetland contamination, excavation, draining, or other impacts -- unlike NY. This bill would guarantee that large interstate energy projects must consider wetlands impacts despite federal preemption.

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

Nationally, under section 404 of the Federal Clean Water Act one must obtain a permit for any activity that dredges or fills wetlands. The Army Corps of Engineers Vermont “General Permit” or GP governs dredging or filling of Vermont wetlands in situations where impacts are likely to be small. The GP states that for the listed activities, no permit needs to be applied for – the GP is that permit. It was issued in 2017.

Part 21 of the GP sets forth the agricultural activities that are pre-permitted under the GP. Here is screenshot of part 21,, which is referred to as “GP 21.”



As you can see, there are three categories of agricultural uses:

- 1) those for which “Self-Verification” suffices (those with less than 5,000 SF of impacts);
- 2) those for which Pre-Construction Notice to the Army Corps is required (those with more than 5000 SF and less than one acre, and any stream channelization); and

3) those which fall outside of the GP and for which an individual Army Corps 404 permit application must be filed (any activity with permanent impacts greater than 1 acre, or any work in “navigable” waterways, or construction of farm ponds in perennial streams).

H. 108 would not change any of this. An agricultural project that does not require an Army Corps individual permit does not trigger section 401. That project already has its permit – GP 21.

Only category 3 routinely triggers 401 certification. Before H.108 and after H.108 a farm activity affecting more than an acre of wetlands had to and would have to go through both Army Corps 404 permitting and therefore Vermont 401 certification.

4. What About ANR’s 401 Certificate for the Army Corps VT General Permit?

When the GP was issued by the Army Corps of Engineers, the Army Corps itself had to first obtain an ANR 401 Certificate. That 401 Certificate said, in effect, OK, the Army Corps’ GP meets Vermont Water Quality Standards. That means that all of the listed activities – such as the two categories of agricultural activities listed in GP 21 – do not require individual Army Corps permits and therefore do not require ANR 401 certification.

However, the Vt ANR 401 Certificate for the Army Corps VT GP stated that the Secretary of ANR has the discretion, on a case-by-case basis, to take any individual proposed action out of the GP and require an individual permit application to the Army Corps (and therefore an individual ANR 401 Certificate).

H. 108 would not change any of this either.

5. H. 108 Would Make Two Changes in the Law But Only One Significant Change to How Individual 404 Permits Are Handled – and This Is Unlikely to Affect Farmers

H.108 would make two significant changes in the law.

The first change clarifies that wetlands are indeed covered by the 401 process, as noted above. This is not a change for Vermont farmers, or Vermonters in general, because ANR has been acting as if the rules clearly did provide that jurisdiction. In interstate gas pipeline cases, this could become a critical question, because Vermont wetlands rules do not apply to these cases (no Vermont statutes apply to these cases, because of federal preemption). Only 401 gives Vermont a say. If Vermont’s 401 regulations are not clear, there may be no say about what happens to Vermont wetlands.

Second, H.108 would also change how *some* individual 401 Certifications are handled by ANR. In some cases, certificates will not be granted unless the applicant shows there is no practicable alternative to the proposed use of the wetland.

For those projects which are not exempt, the original draft of H. 108 excluded from the alternatives analysis all activities affecting less than 3 acres of Class 3 wetlands or less than a half-acre of Class 2 wetland. That language has now been replaced by language authorizing ANR to promulgate its own small-impacts exemption from alternatives analysis. State and municipal highway projects

also are exempt from alternatives analysis (in part, this is because federal law already imposes alternatives analysis on federally funded highway projects).

Again, however, this bill will not affect any project already permitted under the Army Corps General Permit. Because of the General Permit and ANR's 401 Certificate for that GP, agricultural activities that affect less than an acre of wetlands are already exempt from alternatives analysis, because they are exempt from permitting under Army Corps VT GP 21. Legally speaking, these activities already have been granted their federal permits and therefore already have their 401 Certification.

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

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 harmed by paying money to set aside wetlands somewhere else, even when practicable alternatives exist. In practice, ANR sometimes 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 has applied 401 without considering alternatives, and just relied 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 mention alternatives -- much less whether less harmful alternatives were considered or were practicable. (During the permitting process alternatives were discussed with the applicant, but the actual decision did not include any alternatives analysis or alternatives findings.) 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.

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