

**Summary of Comments by Vermont Natural Resources Council (VNRC), Conservation Law Foundation (CLF), Lake Champlain Committee (LCC), Connecticut River Conservancy (CRC) and Vermont Conservation Voters (VCV) (hereinafter “Commenters”) on the Agency of Natural Resources Proposed Amendments to the Vermont Wetland Rules**

**LCAR should object to the proposed rule because it is contrary to legislative intent, beyond the authority of the Agency, and arbitrary.**

The legislature has declared that the “wetlands of the State shall be protected, regulated, and restored so that Vermont achieves a net gain of wetlands acreage” and that management of wetlands should be guided by science, with a net environmental benefit to the state. The Agency's rulemaking authority is limited to protecting the functions and values of significant wetlands, whether mapped or unmapped. The legislature provided that the buffer for Class II wetlands shall extend 50 feet, unless the secretary determines the necessary width as part of a wetland determination. Allowing housing development to occur unpermitted in unmapped Class II wetlands and in mapped wetland buffers is not guided by science and does not provide a net environmental benefit to the state.

**A. The Agency does not have the authority to adopt “allowed uses” not reasonably related to the legislature's intent.**

To discern legislative intent, the court starts with the plain language of the statute. The statute in its entirety prohibits activities in significant wetlands without a permit. The portion referring to the “allowed uses” adopted by the department does not grant the Agency broad authority to create expansive exemptions that conflict with the legislature's explicit intent. Classifying housing development as an “allowed use” in unmapped Class II wetlands without consideration of their functions and values is not “reasonably related” to the Legislature’s intent. Rather, it directly contradicts the legislature’s expressed intent to protect and restore the wetlands of the state.

**B. The Secretary’s authority to determine buffer zones is site-specific.**

While the legislature granted the Agency the authority to determine the buffer zone for Class II wetlands, considering the entire statutory scheme, such determination must be made based on the functions and values of a specific wetland, not broad categorical exemptions based on the geographic location of the Class II wetland.

The Agency's proposed regulation reducing the buffer zone to 25 feet in growth areas is contrary to the legislature's intent to protect wetlands and buffer zones as a strategy for floodwater mitigation and for other purposes.

**C. The Agency's rulemaking authority is limited to protecting the functions and values of significant wetlands.**

Section 905(b)(18) of the Vermont Wetlands Statute grants the Agency the authority to adopt rules to address: identifying significant wetlands that merit protection, reclassifying wetlands, and protecting significant wetlands through rules that provide for the issuance or denial of permits, and the issuance of wetland determinations, "provided, however, that the rules may only protect the values and functions sought to be preserved by the designation." The proposed rule, which is not based on wetland functions and values, is contrary to legislative intent and beyond the Agency's authority.

**D. The proposed regulation is arbitrary because the Agency was not guided by science or data in developing it.**

The Agency has not offered any information on the extent of wetlands that could be impacted by the proposed rule, except to say that by limiting the rule to "designated areas" it is a maximum of 3% of the state. The Agency has not identified how many wetlands lie within these regions nor what their functions or values are. Many community members raised concerns that the proposed rules may negatively impact water quality, reduce flood storage capacity, and increase erosion, including impacts to adjacent properties. The Agency "agree[d] that the listed issues are a concern." They justified the decision to forge ahead with the rule by noting that the proposed rule will be in place "only for a limited area of the state for a limited timeframe." This seems like the very definition of an arbitrary decision.

**E. Administrative inefficiency does not grant the Agency authority to establish policy unauthorized by statute.**

The Agency attempts to justify the proposed regulation because it would "reduce the regulatory burden associated with housing unit generation in designated areas in Vermont." However, the Vermont Supreme court has rejected that argument in the past, noting that "[a]gencies generally may not choose to ignore 'their statutory mandate because they believe it is administratively inefficient or infeasible.'" The Agency was mandated to protect and restore wetlands, issue regulations to protect the functions and values of significant wetlands, and not allow activities to occur in

significant wetlands without a permit issued by their department. The Agency cannot ignore its statutory mandate by creating an expansive permitting exemption to reduce the regulatory burden associated with housing development, which is a policy decision that the legislature must decide.