

I. Introduction

The following are comments on the Agency of Natural Resources (hereinafter “ANR” or “the Agency”) proposed amendments to the Vermont Wetlands Rule (hereinafter “VWR”) submitted by the Vermont Natural Resources Council (VNRC), Conservation Law Foundation (CLF), Lake Champlain Committee (LCC), Connecticut River Conservancy (CRC) and Vermont Conservation Voters (VCV) (hereinafter “Commenters”). The Agency and the Department of Environmental Conservation (hereinafter “DEC”) issued a draft amendment to the VWRs, classifying residential housing development in Class II wetlands as an “allowed use” exempt from the permitting process mandated by statute.¹

The proposed regulation applies to housing projects located in Downtown Development Districts, Village Centers, New Town Centers, Growth Centers, or Neighborhood Development Areas, areas outside those areas located along the extension or terminus of a public sewer or water line available for connection that serves the designated area, or Tier 1A or Tier 1B areas under 10 V.S.A. §§ 6033–34.² The draft regulation proposes to reduce the wetland buffer from 50 to 25 feet in mapped Class II wetlands, and residential housing development from the state wetland permitting process in unmapped Class II wetlands located in the designated areas.³

The Commenters recognize that ANR states the reason for the rule is to address Vermont’s need for additional housing.⁴ While the Commenters support the need for housing in Vermont, we believe that building in significant wetlands will harm Vermonters and the environment.⁵ Wetlands perform numerous important functions, including minimizing flooding.⁶ Housing built in wetlands will be at increased risk from flooding, and building in wet areas will expose housing and infrastructure to water damage.⁷ Moreover, relevant to the Legislative Committee on Administrative Rules (hereinafter “LCAR”) charge, the proposed rule exceeds the Agency’s delegated authority, contradicts legislative intent, is arbitrary in violation of Vermont law, and adds provisions to the final rule that the public did not have the opportunity to comment on.⁸ LCAR should object to the regulation for the aforementioned reasons and as set forth below.⁹

II. The Agency’s draft rule exceeds its delegated statutory authority in violation of Vermont state and constitutional law.

¹ VT Wetland Rules, AGENCY OF NAT. RES, DEP’T OF ENV’T CONSERVATION, #25P040 (Proposed Nov. 12, 2025).

² VT Wetland Rules, AGENCY OF NAT. RES, DEP’T OF ENV’T CONSERVATION, ANNOTATED PROPOSED REVISED RULE, VT CODE R. 12 004 056 (Amended Apr. 2026).

³ *Id.*

⁴ *See infra* Part II § B.

⁵ *See infra* Part IV.

⁶ *See id.*

⁷ *See id.*

⁸ 3 VT. STAT. ANN. § 842 (3) (2019); *see infra* Part II–IV.

⁹ *See infra* Part II–IV.

The Constitution of the State of Vermont declares that the power to suspend or execute laws may only be exercised by the legislature.¹⁰ The Agency's regulation exceeds its statutory authority because the Agency's rulemaking authority is limited to protecting the functions and values of significant wetlands, administrative inefficiency does not grant the Agency the authority to establish policy unauthorized by law, and the Agency's promulgated regulation is inconsistent with its own prior interpretation of state wetland policy.¹¹ LCAR should object to the regulation on the basis that it exceeds the Agency's delegated statutory authority.¹²

A. The Agency's rulemaking authority is limited to protecting the functions and values of significant wetlands.¹³

The court looks to the enabling legislation to evaluate a claim that an Agency exceeded the scope of its statutory authority,¹⁴ as “[t]he touchstone of statutory interpretation is legislative intent.”¹⁵ The Agency asserted that 10 V.S.A. §§ 905(b)(18) and 930 grant them the authority to adopt rules to address the identification, classification, and protection of wetlands in the state, and that § 913(a) provides that allowed uses adopted by the department are not required to have a permit.¹⁶ For clarity, § 905(b)(18) grants the Agency the authority to adopt rules to address: identifying wetlands that are so significant they merit protection, reclassifying wetlands, and protecting wetlands determined to be significant, including 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.”¹⁷ Additionally, § 930 grants the Secretary the authority to adopt rules for water quality restoration and improvement projects.¹⁸ The allowed use §6.26 would not qualify as a water quality restoration project; this is limited to projects designed to improve water quality, whereas the

¹⁰ VT CONST. art. 15 (2021).

¹¹ See *infra* Part II, §§ A–C; 10 VT. STAT. ANN. § 905(b) (18) (2024); *Martin v. Agency of Transp. DMV*, 175 Vt. 80, 91–92, 819 A.2d 742, 753 (2003); *Pomerantz v. Cannabis Control Bd.*, 327 A.3d 807, 812 (2024) (citing *In re Conservation L. Found.*, 207 Vt. 309, 317, 188 A.3d 667, 672 (2018)).

¹² 3 VT. STAT. ANN. § 842 (3).

¹³ 10 VT. STAT. ANN. § 905(b) (18).

¹⁴ *In re Amendment #1 to FY23 Accountable Care Org. Budget Order*, 219 Vt. 461, 476, 323 A.3d 969, 981 (2024) (citing *In re Vt. Verde Antique Int'l, Inc.*, 174 Vt. 208, 211, 811 A.2d 181, 183 (2002)).

¹⁵ *Burnett v. Home Improvement Co. of Vt.*, 219 Vt. 514, 519, 325 A.3d 33, 37 (2024) (citing *Doyle v. City of Burlington Police Dep't*, 211 Vt. 10, 13 219 A.3d 326, 328 (2019)).

¹⁶ AGENCY OF NAT. RES, DEP'T OF ENV'T CONSERVATION, ADMIN. PROC. PROPOSED FILING COVERSHEET, JULIE S. MOORE, 3 (Nov. 7, 2025).

¹⁷ 10 VT. STAT. ANN. § 905(b) (18).

¹⁸ 10 VT. STAT. ANN. § 930 (2019).

proposed regulation is adverse to water quality improvements.¹⁹ Unmistakably, neither statute authorizes ANR to reduce Class II wetlands protections established by the legislature.²⁰

The Agency also attempts to derive its rulemaking authority for the proposed wetland rule from one provision of a statute guiding wetland management, which provides that “[e]xcept 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, or order issued by the Secretary.”²¹ The legislature explicitly granted the Agency rulemaking authority to protect the functions and values of significant wetlands, and construing the isolated provision of 10 V.S.A. §913 to allow the Agency to adopt an expansive range of “allowed uses” contrary to the legislature’s goal of protection goes directly against the entire statutory scheme.²² Rulemaking authority is “not a grant of power to change or modify statutory law by regulation,” despite the Agency’s attempt to do so.²³

Agencies cannot exercise their rulemaking power in an “unrestrained manner,” and a “regulation that compromises the intent of the authorizing statute is void.”²⁴ The legislature declared that the wetlands of the State shall be protected, regulated, and restored, and limited the Agency’s rulemaking authority to protect the functions and values of the wetland sought to be protected by the designation.²⁵ Unmapped Class II wetlands are significant and are determined to merit protection because of the functions and values they serve, such as providing flood mitigation and habitat for wildlife species.²⁶ The Agency justifies its draft regulation by the limited geographic range where the exemption applies (about 3% of Vermont’s land area), and the sunset date (expiring in 2030).²⁷ However, their justification is unsupported by data regarding the scope of unmapped Class II wetlands within this geographic range that would be affected by the regulation.²⁸ This was affirmed by the General Counsel of the Agency in her testimony to the

¹⁹ Compare 10 VT. STAT. ANN. § 921 (2019) (“Clean water project means a best management practice or other program designed to improve water quality,” these are projects used to clean up impaired water bodies.), with VT AGENCY OF NAT. RES, DEP’T OF ENV’T CONSERVATION, VT WETLAND RULE AMEND. (2026), RESPONSIVENESS SUMMARY, comment & response 20, 10 (Apr. 4, 2026). (“Commenters assert that increased development in wetlands may exacerbate flooding and water quality issues . . . [t]he Agency agrees that the listed issues are a concern.”); see generally 10 VT. STAT. ANN. § 922 (2019).

²⁰ See *id.*

²¹ 10 VT. STAT. ANN. §913(a) (2012).

²² See *Estate of Daniels v. Goss*, 216 Vt. 161, 169, 274 A.3d 832, 837 (2022) (citing *Holmberg v. Brent*, 161 Vt. 153, 155, 636 A.2d 333, 335 (1993)).

²³ *Martin v. Agency of Transp. DMV*, 175 Vt. 80, 92, 819 A.2d 742, 753 (2003).

²⁴ *Lemieux v. Tri-State Lotto Comm’n*, 164 Vt. 110, 113, 666 A.2d 1170, 1172–73 (1995) (citing *In re Club 107*, 152 Vt. 320, 322, 566 A.2d 966, 967 (1989); *In re Agency of Admin., State Bldgs. Div.*, 141 Vt. 68, 74–75, 444 A.2d 1359, 1351–52 (1982)).

²⁵ 10 VT. STAT. ANN. § 901 (2024); 10 VT. STAT. ANN. § 905(b)(18).

²⁶ See 10 VT. STAT. ANN. § 905(b)(18).

²⁷ VT AGENCY OF NAT. RES, RESPONSIVENESS SUMMARY, *supra* note 15, response 3 & 6, at 4–5.

²⁸ AGENCY OF NAT. RES, DEP’T OF ENV’T CONSERVATION, ADMIN. PROC. ENV’T IMPACT ANALYSIS 4 (Nov. 7, 2025); see VT AGENCY OF NAT. RES., DEP’T OF ENV’T CONSERVATION, CHECK FOR WETLANDS BEFORE YOU BUY OR BUILD, <https://dec.vermont.gov/watershed/wetlands/check-for->

House Environment Committee, when asked regarding the scope of unmapped wetlands affected by the regulation, she stated, “we do not know, um we would have to map them to actually figure that out.”²⁹ The Agency is exercising its rulemaking authority in an unrestrained manner by promulgating a regulation that allows housing development to occur in unmapped Class II wetlands, without having data regarding the scope of significant wetlands that will be impacted.³⁰ Regardless of the geographic scope of the growth areas, §6.26 of the proposed regulation compromises the intent of the authorizing statute to protect the functions and values of significant wetlands that merit protection.³¹

Likewise, 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.³² A wetland determination is site-specific and based on the functions and values that the wetland provides.³³ ANR has exceeded its statutory authority by creating a broad categorical exemption, reducing the buffer zone for Class II wetlands in a broad geographical area of the state, without determining whether it is appropriate to do so for each specific wetland based on the functions and values that the wetland provides.³⁴ The Agency exceeded its statutory authority to issue regulations that protect the functions and values of significant wetlands by promulgating a rule entirely contrary to this purpose.³⁵

B. Administrative inefficiency does not grant the Agency the authority to establish policy unauthorized by statute.³⁶

The Agency attempts to justify its adoption of such a broad category of “allowed use” because it would “reduce the regulatory burden associated with housing unit generation in designated areas in Vermont.”³⁷ However, the court has found reducing regulatory burden to be an unpersuasive argument, noting that “[a]gencies generally may not choose to ignore ‘their

wetlands#:~:text=About%20The%20Wetland%20Screening%20Tool,screen%20of%20the%20inventory%20maps (Where the DEC stated “studies have shown that up to 39% of Vermont wetlands may not be mapped at all.”)

²⁹ *S. 223 - An act relating to water quality of the waters of Vermont, ANR Amendment Walk-through: Meeting on S. 223 Before the H. Comm. on Env.*, 2026 Leg., 78th Biennial Sess. (Vt. 2026) (statement of ANR General Counsel, Catherine Gjessing, H. Comm. on Env).

³⁰ *See Lemieux v. Tri-State Lotto Comm'n*, 164 Vt. 110, 113, 666 A.2d 1170, 1172–73 (1995).

³¹ 10 VT. STAT. ANN. § 905(b)(18); *see Lemieux*, 164 Vt. at 113, 666 A.2d at 1172–73 (1995) (citing *In re Club 107*, 152 Vt. 320, 322, 566 A.2d 966, 967 (1989)); *In re Agency of Admin., State Bldgs. Div.*, 141 Vt. 68, 74–75, 444 A.2d 1359, 1351–52 (1982).

³² 10 VT. STAT. ANN. § 902(9) (2024) (Provides that “[t]he buffer zone for a Class II wetland shall extend at least 50 feet from the border of the wetland unless the Secretary determines otherwise under section 914 of this title.”); 10 VT. STAT. ANN. § 914 (2018) (Provides that “[t]he Secretary may establish the necessary width of the buffer zone of any Class II wetland as part of any wetland determination pursuant to the rules of the Department.”)

³³ 10 VT. STAT. ANN. § 914; 10 VT. STAT. ANN. § 905(b)(18) (Functions and values the department considers include water storage for flood water and storm runoff, providing important habitat, contributes to fisheries, etc.)

³⁴ *See* 10 VT. STAT. ANN. § 914.

³⁵ *See id.*

³⁶ *Martin v. Agency of Transp. DMV*, 175 Vt. 80, 91–92, 819 A.2d 742, 753 (2003).

³⁷ *See* VT AGENCY OF NAT. RES. RESPONSIVENESS SUMMARY, *supra* note 15, response 2, at 3.

statutory mandate because they believe it is administratively inefficient or infeasible.”³⁸ 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.³⁹ The Agency may not “claim the authority to establish policy unauthorized by statute solely because the task is fraught with difficulty.”⁴⁰ 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.⁴¹

C. The Agency’s interpretation is inconsistent with its prior interpretation of state wetland policy.

The Agency’s promulgated regulation is inconsistent with its own prior interpretation of the state wetland policy. In *Agency of Natural Resources v. Mcgee* the DEC alleged that the defendants violated the wetland rule by placing fill, and occasionally brush-hogging, in a Class II wetland without a permit.⁴² The court noted that “[t]his activity of placing fill in the wetland is prohibited under § 6, which explicitly states that allowed uses must not include “draining, dredging, filling, or grading.”⁴³ The Agency’s proposed regulation is inconsistent with its own prior interpretation, by allowing the dredge and fill of unmapped Class II wetlands, and the court declared that “we will not uphold an Agency’s interpretation that exceeds the Agency’s statutory authority, conflicts with the Agency’s prior interpretations of the same rule, ‘results in unjust, unreasonable or absurd consequences,’ or ‘demonstrates compelling indications of error.’”⁴⁴ Allowing Class II wetlands to be drained, dredged, filled, and graded is inconsistent with their own interpretation and enforcement.⁴⁵

The draft regulation significantly exceeds the scope of previous allowed uses adopted under the Agency’s statutory authority.⁴⁶ Previous allowed uses adopted by the Agency in Class I and Class II wetlands included activities that were explicitly authorized by statute, and de

³⁸ *Martin*, 175 Vt. at 91, 819 A.2d at 752 (quoting *Campbell v. United States Dep’t of Agric.*, 515 F. Supp. 1239, 1249 (D.D.C. 1981)).

³⁹ 10 VT. STAT. ANN. § 901; 10 VT. STAT. ANN. § 905(b)(18); 10 VT. STAT. ANN. §913(a).

⁴⁰ *Martin*, 175 Vt. at 91–92, 819 A.2d at 753.

⁴¹ 1 VT CONST. art. 15 (2021) (Agency declares that the power to suspend or execute laws may only be exercised by the legislature); see *Martin v. Agency of Transp. DMV*, 175 Vt. 80, 91, 819 A.2d 742, 752 (2003); 2 VT CONST. art. 5 (Emphasizing that the “[l]egislative, executive, and judiciary departments shall be distinct, so that neither exercise the powers properly belonging to the others.”)

⁴² See *Agency of Nat. Res. v. McGee*, 203 Vt. 115, 122, 151 A.3d 1240, 1245 (2016).

⁴³ *Id.*

⁴⁴ *Pomerantz v. Cannabis Control Bd.*, 327 A.3d 807, 812 (2024) (citing *In re Conservation L. Found.*, 207 Vt. 309, 317, 188 A.3d 667, 672 (2018)).

⁴⁵ See *id.*

⁴⁶ See generally *Pomerantz v. Cannabis Control Bd.*, 327 A.3d 807, 812 (2024) (citing *In re Conservation L. Found.*, 207 Vt. 309, 317, 188 A.3d 667, 672 (2018)); 10 VT. STAT. ANN. §913(a); VT. CODE R. 12 004 056 §§ 6.1–6.25.

minimis activities.⁴⁷ The legislature explicitly provided that the Agency’s wetland regulations may not constrict agricultural or silvicultural activities; accordingly those two sections were the largest range of allowed uses adopted under the VWR.⁴⁸ The other allowed uses adopted under the VWR were de minimis activities, including but not limited to hunting, birdwatching, hiking, fishing, snowmobiling, scientific research, the harvesting of wild food, the control of non-native species, the placement of barbecue pits, sandboxes, birdhouses, and the cleanup of oil spills.⁴⁹

Section 6.26 of the proposed regulation is the most extensive allowed use in comparison to any other adopted by the Agency, including those regarding silvicultural and agricultural practices, activities the legislature explicitly directed the Agency not to regulate.⁵⁰ Silvicultural activities are still required to follow Acceptable Management Practices for Maintaining Water Quality, and agricultural activities are required to follow Required Agricultural Practices.⁵¹ Other allowed uses that might have a more substantial impact, such as the routine repair of utility lines and constructed ponds, and even the placement, maintenance, and repair of duck blinds, were required to comply with Best Management Practices developed by the Secretary.⁵² In contrast, Section 6.26 of the proposed regulation establishes no requirements for Best Management Practices for building residential housing in unmapped Class II wetlands or in mapped buffer zones.⁵³ This would result in absurd consequences because it allows residential housing to dredge and fill in unmapped Class II wetlands and buffer zones without providing any guidance regarding protective management practices, in conflict with all prior allowed uses adopted by the Agency.⁵⁴ The Agency's promulgated regulation demonstrates a compelling indication of error, exceeding the Agency's delegated authority by allowing the dredge and fill of unmapped Class II wetlands in violation of their statutory authority to protect the functions and values of wetlands.⁵⁵

D. ANR’s use of the Vermont Significant Inventory Maps is erroneous and inconsistent with their own regulations.

⁴⁷ 10 VT. STAT. ANN. § 905(b)(18) (Explicitly states that “[t]he Department shall not adopt rules that restrain agricultural activities without the consent of the Secretary of Agriculture, Food and Markets and shall not adopt rules that restrain silvicultural activities without the consent of the Commissioner of Forests, Parks and Recreation.”); see VT. CODE R. 12 004 056 §§6.1–6.25 (Feb. 7, 1990) (amended 2023).

⁴⁸ See 10 VT. STAT. ANN. § 905(b)(18); VT. CODE R. 12 004 056 §§ 6.1–6.6.

⁴⁹ VT. CODE R. 12 004 056 §§ 6.1–6.25.

⁵⁰ Compare VT Wetland Rules, AGENCY OF NAT. RES, DEP’T OF ENV’T CONSERVATION, ANNOTATED PROPOSED REVISED RULE, VT CODE R. 12 004 056 §6.26 (Amended Apr. 2026), with VT. CODE R. 12 004 056 §§ 6.1–6.6.

⁵¹ VT. CODE R. 12 004 056 §§ 6.1 & 6.6.

⁵² VT. CODE R. 12 004 056 §§ 6.8, 6.14 & 6.16.

⁵³ VT Wetland Rules, ANNOTATED PROPOSED REVISED RULE, VT CODE R. 12 004 056 §6.26 (Amended Apr. 2026).

⁵⁴ See VT. CODE R. 12 004 056 §§ 6.8, 6.14 & 6.16 (Feb. 7, 1990) (amended 2023); *Pomerantz v. Cannabis Control Bd.*, 327 A.3d 807, 812 (2024) (citing *In re Conservation L. Found.*, 207 Vt. 309, 317, 188 A.3d 667, 672 (2018)).

⁵⁵ See generally *Pomerantz v. Cannabis Control Bd.*, 327 A.3d 807, 812 (2024) (citing *In re Conservation L. Found.*, 207 Vt. 309, 317, 188 A.3d 667, 672 (2018)).

Concerning the use of wetland maps, the VWRs explicitly highlight that the Vermont Significant Wetland Inventory (hereinafter “VSWI”) maps are an imprecise tool to locate wetlands.⁵⁶

The VSWI maps should not be relied upon to provide precise information regarding the location or configuration of wetlands (see Section 3.2). The VSWI maps are intended to denote the approximate location and configuration of wetlands. It is critical to note that wetland characteristics and boundaries are not static; wetland boundaries may change as a result of landscape and climatic changes.⁵⁷

The Agency's draft regulation relies on the VSWI maps to determine whether a Class II wetland is mapped, and the location of the buffer zone, yet this standard is inconsistent with the VWRs, which explicitly provide that the maps are not to be relied on for locating wetlands, as the VSWI simply approximates the location.⁵⁸ The draft regulation would result in unjust, unreasonable, and absurd consequences by utilizing the VSWI maps, a tool that the Agency describes as imprecise, to determine whether a Class II wetland may be developed in, and where the buffer zone is categorically reduced.⁵⁹ The draft rule demonstrates a compelling indication of error by ignoring its statutory directive to issue regulations that protect the function and values of significant wetlands, by using the approximate location of a wetland to facilitate development, without undergoing the traditional delineation process.⁶⁰ LCAR should object to the regulation because it exceeds the Agency's delegated statutory authority.⁶¹

III. The Agency's rule violates Vermont law because it is contrary to legislative intent.

The Agency's regulation is highly contrary to the legislature's unmistakable intent to protect the functions and values of significant wetlands.⁶² The “allowed uses” proposed under §6.26 are not reasonably related to the intent of the enabling legislation, the Secretary's authority to determine buffer zones is site-specific, the regulation is contrary to the reason and spirit of the law, and the net-gain provision fails to align §6.26 with the legislature's intent.⁶³ LCAR should object to the regulation on the basis that it is contrary to legislative intent.⁶⁴

⁵⁶ VT. CODE R. 12 004 056 §4.4 (Feb. 7, 1990) (amended 2023).

⁵⁷ *Id.*

⁵⁸ *See id.*

⁵⁹ *See Pomerantz*, 327 A.3d at 812 (citing *In re Conservation L. Found.*, 207 Vt. at 317, 188 A.3d at 67); VT. CODE R. 12 004 056 §4.4.

⁶⁰ *See id.*; *see generally* 10 VT. STAT. ANN. § 901; 10 VT. STAT. ANN. § 905(b)(18).

⁶¹ 3 VT. STAT. ANN. § 842 (3).

⁶² 10 VT. STAT. ANN. § 905(b) (18); *see supra* Part II.

⁶³ *See infra* §§ III. A–D.

⁶⁴ 3 VT. STAT. ANN. § 842 (3).

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 language of the statute and read[s] it according to its plain and ordinary meaning.”⁶⁵ The Agency has asserted that the plain and ordinary language “except for allowed uses adopted by the Department by rule” grants them the authority to adopt an expansive range of allowed uses, including housing development in unmapped Class II wetlands, and reducing the buffer zone from 50 to 25 feet in mapped wetlands.⁶⁶ The range of “allowed uses” the DEC has the discretion to adopt was not specified by the legislature, but “[w]hen the plain language is ambiguous, we construe statutes in light of the ‘entire statutory scheme.’”⁶⁷

The statute in its entirety prohibits activities in significant wetlands without a permit.⁶⁸ The portion referring to the “allowed uses” adopted by the department does not grant the Agency broad authority to create an expansive range of exemptions that conflict with the legislature’s overt intent.⁶⁹ The legislature was clear that the DEC’s rulemaking authority “may only protect the values and functions sought to be preserved by the designation.”⁷⁰ The court has routinely held that “[a]n Agency rule must be reasonably related to the intent of the enabling legislation.”⁷¹ Class II wetlands are either identified on the Vermont significant wetlands inventory maps or wetlands that the secretary determines to merit protection.⁷² Classifying housing development as an “allowed use” in unmapped Class II wetlands, wetlands that are significant or merit protection, to facilitate development is not “reasonably related” and goes directly against the legislature’s intent to protect and restore the wetlands of the state.⁷³

B. The Secretary’s authority to determine buffer zones is site-specific.⁷⁴

⁶⁵ *Brown v. W.T. Martin Plumbing & Heating, Inc.*, 194 Vt. 12, 22, 72 A.3d 346, 352 (2013).

⁶⁶ *S. 223 - An act relating to water quality of the waters of Vermont, ANR Amendment Walk-through: Meeting on S. 223 Before the H. Comm. on Env.*, 2026 Leg., 78th Biennial Sess. (Vt. 2026) (statement of ANR General Counsel, Catherine Gjessing, H. Comm. on Env).

⁶⁷ *Estate of Daniels v. Goss*, 216 Vt. 161, 169, 274 A.3d 832, 837 (2022) (citing *Holmberg v. Brent*, 161 Vt. 153, 155, 636 A.2d 333, 335 (1993)).

⁶⁸ 10 VT. STAT. ANN. § 913.

⁶⁹ *See id.*

⁷⁰ *See* 10 VT. STAT. ANN. § 905(b)(18).

⁷¹ *In re Vt. Verde Antique Int’l*, 174 Vt. 208, 211, 811 A.2d 181, 183 (2002) (citing *In re Baptist Fellowship of Randolph, Inc.*, 144 Vt. 636, 638, 481 A.2d 1274, 1275 (1984)).

⁷² 10 VT. STAT. ANN. § 902(7).

⁷³ *See generally In re Vt. Verde Antique Int’l*, 174 Vt. at 211, 811 A.2d at 183 (citing *In re Baptist Fellowship of Randolph, Inc.*, 144 Vt. at 638, 481 A.2d at 1275; 10 VT. STAT. ANN. § 901.

⁷⁴ *See* 2025 VT Op. Att’y Gen. No. 2025–01 (Nov. 20, 2025).

Construing the statute amidst the entire statutory scheme, the legislature's intent and grant of authority is apparent.⁷⁵ Class II wetlands merit protection, regardless of whether they are mapped or unmapped, and the DEC's rulemaking authority is specifically limited to protect the functions and value of such significant wetlands.⁷⁶ The legislature explicitly provided that "[t]he buffer zone for a Class II wetland shall extend at least 50 feet from the border of the wetland unless the Secretary determines otherwise based on an analysis of the functions and values and the wetland buffer based on a scientific review pursuant to section 914 of this title."⁷⁷ Section 914 permits the Secretary to establish the necessary buffer width of the buffer zone of "any" Class II wetland, during a wetland determination considering the functions and values that the wetland provides.⁷⁸ While the legislature granted the Agency the authority to determine the buffer zone for specific Class II wetlands, considering the entire statutory scheme, such determination is to be based on the functions and values of a specific wetland, rather than broad categorical exemptions based on the geographic location of the Class II wetland.⁷⁹ This distinction was affirmed by the Attorney General in her Formal Opinion No. 2025-01, finding that the provisions "do not, however, give the Secretary authority to immediately and categorically halve the statutory 50-foot presumptive buffer zone around Class II wetlands."⁸⁰ The Agency's promulgated regulation reducing the buffer zone to 25 feet in growth areas is highly contrary to the legislature's intent to protect wetlands and buffer zones as a strategy for floodwater mitigation.⁸¹

C. The legislature's intent must be discerned from the entire statute and the reason and spirit of the law.

The Agency alleges that the regulation is aligned with the legislature's intent because the policy provides that water resources "shall be protected; regulated; and, where necessary, controlled under authority of the State in the public interest and to promote the general welfare[.]"⁸² However, this portion must be understood in the context of the entire statutory scheme, and should not be read in isolation.⁸³ The provision regarding the state's authority to control in the public interest and to promote the general welfare was in reference to water resources, whereas the rest of the statute explicitly denotes that the "wetlands of the State shall

⁷⁵ 10 VT. STAT. ANN. § 901 (Providing that "the wetlands of the State shall be protected, regulated, and restored so that Vermont achieves a net gain of wetlands acreage").

⁷⁶ 10 VT. STAT. ANN. § 905(b)(18).

⁷⁷ 10 VT. STAT. ANN. § 902 (9); *see* 10 VT. STAT. ANN. § 914.

⁷⁸ 10 VT. STAT. ANN. § 914.

⁷⁹ *See id.*

⁸⁰ 2025 VT Op. Att'y Gen. No. 2025-01 (Nov. 20, 2025).

⁸¹ *See generally* Estate of Daniels v. Goss, 216 Vt. 161, 169, 274 A.3d 832, 837 (2022) (citing Holmberg v. Brent, 161 Vt. 153, 155, 636 A.2d 333, 335 (1993)).

⁸² 10 VT. STAT. ANN. § 901(1); VT AGENCY OF NAT. RES, RESPONSIVENESS SUMMARY, *supra* note 15, response 2, at 3.

⁸³ *See Estate of Daniels*, 216 Vt. at 169, 274 A.3d at 837 (citing *Holmberg*, 161 Vt. at 155, 636 A.2d at 335).

be protected, regulated, and restored so that Vermont achieves a net gain of wetlands acreage” and management of wetlands should be guided in science, with a net environmental benefit to the state.⁸⁴ The court has held that “we ascertain legislative intent through consideration of the entire statute, including its subject matter, effects and consequences, as well as the reason and spirit of the law.”⁸⁵ The legislature explicitly used the word “shall,” which means that the provision requiring the protection, regulation, and restoration of wetlands so that Vermont achieves a net gain of acreage is mandatory.⁸⁶ Providing the Agency the ability to control water resources in the public interest and to promote the general welfare “where necessary” was meant to be read in the context of the whole statute, and was not intended to confer the Agency with the authority to compromise wetlands for particular types of development favored by the ANR.⁸⁷ Considering the entirety of the statute, the reason and spirit of the law is to protect and restore wetlands, requiring management guided by science so that Vermont achieves a net gain of wetlands, not to balance the protection of wetlands against certain categories of development.⁸⁸

The legislature emphasized that the regulation and management of wetlands “should be guided by science, and authorized activities in water resources and wetlands should have a net environmental benefit to the State.”⁸⁹ Allowing development to occur unpermitted in Class II unmapped wetlands is a regulation not guided by science, and reducing the wetland buffer from 50 to 25 feet does not provide a net environmental benefit to the state.⁹⁰ Wetlands play a critical role in flood protection, absorbing floodwaters that would otherwise infiltrate communities and damage infrastructure.⁹¹ Developing in wetlands conflicts with science, deteriorating water quality, reducing flood control capacity, and harming terrestrial and aquatic ecosystems.⁹² The DEC acknowledged this, noting the multitude of ecological benefits that Class II wetlands provide.⁹³ Accordingly, it is clear that, looking at the statute in its entirety and the purpose of the statute, which is to protect and restore significant wetlands, ANR cannot use the authority to adopt “allowed uses” to authorize activities that reduce or eliminate functions and values of significant wetlands.⁹⁴

⁸⁴ 10 VT. STAT. ANN. § 901.

⁸⁵ *State v. Beldiman*, 350 A.3d 383, 385 (2025) (citing *State v. Lohr*, 212 Vt. 289, 295, 236 A.3d 1277, 1281 (2020)).

⁸⁶ *In re Green*, 180 Vt. 597, 597, 908 A.2d 453, 454 (2006) (Providing that the “[u]se of the word ‘shall’ in a statute indicates that a requirement is mandatory.”); *see also State v. Hemingway*, 196 Vt. 441, 445, 97 A.3d 465, 468 (2014); *Lohr*, 212 Vt. at 296, 236 A.3d at 1281.

⁸⁷ *See generally Estate of Daniels v. Goss*, 216 Vt. 161, 169, 274 A.3d 832, 837 (2022) (citing *Holmberg v. Brent*, 161 Vt. 153, 155, 636 A.2d 333, 335 (1993)).

⁸⁸ *See* 10 VT. STAT. ANN. § 901; *see generally Beldiman*, 350 A.3d at 385 (citing *Lohr*, 212 Vt. at 295, 236 A.3d at 1281).

⁸⁹ 10 VT. STAT. ANN. § 901.

⁹⁰ *See id.*

⁹¹ *See* ENV’T PROT. AGENCY, OFF. OF WATER, WETLANDS: PROTECTING LIFE & PROPERTY FROM FLOODING (Jun. 2006).

⁹² George Asumadu *et al.*, *Analysis risks factors associated with constr. projects urb. wetlands ecosystem*. 30 INT’L J. SUSTAINABLE DEV. (2) 198–210 (2023).

⁹³ *See* AGENCY OF NAT. RES. ADMIN. PROC. ENV’T IMPACT ANALYSIS, *supra* note 24 at 1–3.

⁹⁴ *See* 10 VT. STAT. ANN. §§ 901 & 905(b)(18).

D. The “Net Gain” provision does not align §6.26 with the legislature's intent.

The Agency attempts to align its regulation with the intent of the legislature by adding a net gain provision, requiring compensation for permitted activities where the project would result in adverse impacts to the protected functions and values of significant wetlands.⁹⁵ However, the allowed use exemptions under §6.26 wetlands would not be subject to this compensation requirement, as no permit is required.⁹⁶ While the Agency added a policy statement to their draft rule calling for the net gain, protection, and restoration of wetlands, their allowed use exemption undermines this goal, as no compensation or mitigation is required for allowed uses.⁹⁷ Thus, the regulation is still contrary to the legislature's intent, as the net gain provision would not apply to the categorical exemptions that the Agency is proposing.⁹⁸

Despite this, the Agency attempted to justify its decision, claiming “[t]he net gain in functions and values that accrue statewide vastly offsets the potential losses that may occur as a result of the proposed rule within the limited geographic extent of designated areas (roughly 3 percent of the total land area of the state) where some wetlands remain unmapped.”⁹⁹ However, the functions and values that a wetland serves are based on a particular wetland-specific determination, not a net gain in functions and values that allegedly accrue statewide.¹⁰⁰ Moreover, there is no guarantee that the wetland functions and values lost if the proposed rule goes into effect would be offset by overall restoration efforts, and ANR admits that it has no idea how the loss of wetlands as a result of the proposed rule would affect communities and the environment in areas covered by the proposed rule.¹⁰¹ Considering the entire statutory scheme, the DEC’s authority to adopt “allowed uses” cannot be so expansive as to go against the many statutory directives to protect and preserve wetlands, adopt regulations to protect the values and functions of significant wetlands, and make decisions well-founded in science.¹⁰²

Furthermore, the compensation regulations that call for net-gain fail to align with the legislature's intent to require permittees to conduct five years of post-restoration monitoring for

⁹⁵ VT AGENCY OF NAT. RES, DEP’T OF ENV’T CONSERVATION, VT WETLAND RULE AMEND. (2026), RESPONSIVENESS SUMMARY, *supra* note 15, response 1, at 2 (Providing that “the proposed Vermont Wetland Rules amendments were revised to include provisions that require mitigation to achieve a net gain of wetlands, consistent with the Flood Safety Act, Act 121 of 2024, when direct impacts to wetlands are proposed through permitting.”).

⁹⁶ VT Wetland Rules, AGENCY OF NAT. RES, DEP’T OF ENV’T CONSERVATION, ANNOTATED PROPOSED REVISED RULE, VT CODE R. 12 004 056 §9.5 (Amended Apr. 2026).

⁹⁷ *See id.* at §§1.1 & 9.5.

⁹⁸ *See id.*

⁹⁹ VT AGENCY OF NAT. RES, RESPONSIVENESS SUMMARY, *supra* note 15, response 1, at 2.

¹⁰⁰ *See* 10 VT. STAT. ANN. § 905(b)(18) (Providing that “[a]ny determination that a particular wetland is significant will result from an evaluation of at least the following functions and values which a wetland serves[.]”)

¹⁰¹ VT AGENCY OF NAT. RES, RESPONSIVENESS SUMMARY, *supra* note 15, response 18 & 19, at 9.

¹⁰² *See* 10 VT. STAT. ANN. § 905(b)(18); 10 VT. STAT. ANN. § 901; *Estate of Daniels v. Goss*, 216 Vt. 161, 169, 274 A.3d 832, 837 (2022) (citing *Holmberg v. Brent*, 161 Vt. 153, 155, 636 A.2d 333, 335 (1993)); *see also* *Lemieux v. Tri-State Lotto Comm’n*, 164 Vt. 110, 113, 666 A.2d 1170, 1172–73 (1995).

restored wetlands.¹⁰³ The agency’s oversight in drafting the compensation provision is troubling.¹⁰⁴ Moreover, as set forth below, the public did not have the opportunity to comment on the net gain part of the regulation because it was added to the final version of the proposed rule.¹⁰⁵ The Agency's regulation is contrary to the legislative intent of the net gain provisions of Vermont statute, and should be opposed by LCAR on that basis.¹⁰⁶

IV. The Agency’s draft rule violates Vermont law because the rule is arbitrary.

The Agency claims that the draft regulation is not arbitrary because it is “supported by both the Agency's enabling authority, and data collected by state government, as well as Agency staff and wetland professionals.”¹⁰⁷ Each of these statements is unsubstantiated on a factual basis.¹⁰⁸

The enabling authority directs the secretary not to allow any activity in a significant wetland without a permit, and specifies that the Agency's rulemaking authority may only protect the functions and values to be preserved in significant wetlands.¹⁰⁹ Allowing development to occur unpermitted in unmapped Class II wetlands, and reducing the buffer from 50 to 25 feet in mapped Class II wetlands, does not protect the functions and values of such significant wetlands.¹¹⁰ The legislature declared that the purpose of the water resources management policy is to protect, regulate, and restore wetlands, and that authorized activities in wetlands should have a net *environmental* benefit to the State.¹¹¹ Creating widespread categorical exemptions to allow housing development in unmapped Class II wetlands goes far beyond the enabling authority, as such development does not provide a net environmental benefit to the state.¹¹²

Data collected by the state government does not support the adoption of such an expansive regulation.¹¹³ The DEC has stated that “studies have shown that up to 39% of Vermont wetlands may not be mapped at all.”¹¹⁴ Furthermore the DEC acknowledged the wide range of environmental benefits of Class II wetlands, providing that “the preservation of significant wetlands in Vermont provides substantial public benefits though flood storage; surface,

¹⁰³ Compare VT. STAT. ANN. § 918 (c)(3)(G)(2024), with VT Wetland Rules, AGENCY OF NAT. RES, DEP’T OF ENV’T CONSERVATION, ANNOTATED PROPOSED REVISED RULE, VT CODE R. 12 004 056 §9.5 (Amended Apr. 2026).

¹⁰⁴ See generally VT Wetland Rules, ANNOTATED PROPOSED REVISED RULE, VT CODE R. 12 004 056 §9.5 (Amended Apr. 2026) (Note that there are additionally technical errors where § 9.5(c) refers to “9.2(b)(1)-(3),” but this should refer to § 9.5(b)(1)-(3) § 9.5(c)(5) is missing the reference after “subdivision” on line 3).

¹⁰⁵ See *infra* Part V.

¹⁰⁶ 3 VT. STAT. ANN. § 842 (3).

¹⁰⁷ AGENCY OF NAT. RES, ADMIN. PROC. PROPOSED FILING COVERSHEET, *supra* note 12 at 4.

¹⁰⁸ 3 VT. STAT. ANN. § 801(b)(13)(A) (2017) (Agency decisions are arbitrary when there is no factual basis for the decision.)

¹⁰⁹ 10 VT. STAT. ANN. § 913; 10 VT. STAT. ANN. § 905(b)(18)

¹¹⁰ See *id.*

¹¹¹ 10 VT. STAT. ANN. § 901.

¹¹² See *id.*

¹¹³ VT AGENCY OF NAT. RES., CHECK FOR WETLANDS BEFORE YOU BUY OR BUILD, *supra* note 24.

¹¹⁴ *Id.*

groundwater, and water quality protection; as well as other benefits such as wildlife habitat, recreation, open space and education.”¹¹⁵ The DEC also noted that without delineating unmapped wetlands “they are uncertain to what degree the recreational use of unmapped wetlands will be adversely impacted.”¹¹⁶ Recreation is a function and value of Class II wetlands that merits protection, and the legislature specifically mandated that the department may not issue regulations that compromise these functions and values.¹¹⁷ The Agency's promulgated regulation is arbitrary, as they lack a factual basis for the decision due to the substantial uncertainty regarding the potential impacts to unmapped wetlands.¹¹⁸

The Agency's promulgated regulation was not supported by its own wetland professionals, contrary to ANR's assertion.¹¹⁹ For example, a District Wetland Ecologist for the DEC commented:

“[t]he approach of basing the rule solely on estimated approximate locations of wetlands--“VSWI mapped” wetlands—is arbitrary. Mapped wetlands reflect the limits of available imaging technology and capacity to update the maps which estimate wetland location. Thus, the proposed rules’ decision about which areas receive protection is driven by data availability rather than by reality. This approach is arbitrary.”¹²⁰

Similarly, another District Wetland Ecologist for the DEC noted:

“[t]he proposed changes to VWRs under the EO are arbitrary and unsupported. The rule includes no data, studies, or analysis showing why these changes are necessary. It treats similar wetlands differently without justification, fails to advance the statutory purpose, relies on assumptions over evidence, and represents an unexplained departure from existing protections, such as removing permit requirements that previously safeguarded critical wetland functions.”¹²¹

While these staff members were not commenting in their professional capacity for the state, they eloquently articulate why the proposed regulation is arbitrary.¹²² A regulation is arbitrary when there is no factual basis for the decision, or the decision would not make sense to

¹¹⁵ AGENCY OF NAT. RES, ADMIN. PROC. ENV'T IMPACT ANALYSIS, *supra* note 24 at 1–3.

¹¹⁶ *Id.* at 4.

¹¹⁷ 10 VT. STAT. ANN. § 905(b)(18)

¹¹⁸ *See id.*; 3 V.S.A. § 801(b)(13)(A).

¹¹⁹ AGENCY OF NAT. RES, DEP'T OF ENV'T CONSERVATION, WRITTEN COMMENTS RECEIVED, 369 <https://Agency.vermont.gov/sites/Agency/files/wsm/wetlands/docs/Attachment-WrittenCommentsReceived.pdf>. (Comment of Shannon Morrison, District Wetland Ecologist denied this assertion, stating “I don't believe that data collected by the wetland program, or the staff in this program support this amendment. Data suggests wetlands within these growth areas provide important functions individually and cumulative.”); *see* AGENCY OF NAT. RES, DEP'T OF ENV'T CONSERVATION, CONTACT WETLANDS STAFF, <https://Agency.vermont.gov/watershed/wetlands/contact-wetlands-staff>.

¹²⁰ *Id.* at 406.

¹²¹ *Id.* at 349.

¹²² *See id.* at 337–50, 366–71, 393–96, 406–11.

a reasonable person.¹²³ The Agency utilizes a lack of data, whether the Class II wetland is mapped or unmapped, as the basis for whether a permit is required to dredge and fill in the wetland.¹²⁴ The Agency's own rules highlight that the VSWI maps should not be relied on to provide a precise location of a wetland.¹²⁵ In their professional capacity, DEC staff raised serious concerns to the Agency regarding the improper use of the VSWI maps as a basis for housing decisions, for example, one member wrote, "I probably know more about these maps and how they relate to development, and flooding than anyone else on the planet, and I believe this proposal puts lives at risk. . . . I want the maps I help make to save lives, not endanger them through improper use."¹²⁶ The Agency's reliance on the VSWI maps to determine whether a permit is required for a housing project in §6.26 of the proposed regulation is a decision that would not make sense to a reasonable person, and thus is arbitrary.¹²⁷ The DEC acknowledged there is a lack of factual basis driving their decision, noting that

“[a] comprehensive environmental impact analysis of the proposed rule . . . is not possible as it would require the Agency to have mapped all unmapped wetlands that are located in designated areas[.]. . . and the revised proposed rule, in cases where existing wetlands are not mapped, may result in some environmental impacts to those wetlands.”¹²⁸

The Agency's draft rule lacks a factual basis informing their decision, as they do not have data regarding the extent of wetlands and buffer zones that will be impacted.¹²⁹ The Agency attempts to defend its decision by referencing the geographic area where the permitting exemption applies, but this justification is arbitrary.¹³⁰ The regulation applies to unmapped Class II wetlands, significant wetlands that have not even been inventoried, therefore the Agency lacks a factual basis regarding the environmental impact of their proposed regulation.¹³¹ Additionally, Class II buffer zones have not yet been mapped on the VSWI, so the agency does not know the potential surface area of buffers affected.¹³² This regulation is arbitrary as the Agency lacks a

¹²³ 3 V.S.A. § 801(b)(13)(A); *see* Appendix A–C, Names Redacted, Emails to J.M & DEC Staff in response to the E.O. (Nov. 12–13, 2025) (Pursuant to Vermont’s Public Records Act we conducted a public records request of all records related to the proposed changes to the VWR’s from October 1, 2025 to April 9, 2026. We found comments from many concerned DEC Wetland Ecologists, who raised concerns in the professional capacity regarding the lack of data and science supporting the proposed rule. We have redacted their names for privacy and respect).

¹²⁴ VT Wetland Rules, AGENCY OF NAT. RES, DEP’T OF ENV’T CONSERVATION, ANNOTATED PROPOSED REVISED RULE, VT CODE R. 12 004 056 (Amended Apr. 2026).

¹²⁵ VT. CODE R. 12 004 056 §4.4 (Feb. 7, 1990) (amended 2023).

¹²⁶ *See* Appendix A, Name Redacted, Email to J.M & DEC Staff in response to the E.O., 3 (Nov. 12, 2025).

¹²⁷ *See id.*; 3 V.S.A. § 801(b)(13)(A).

¹²⁸ VT AGENCY OF NAT. RES, RESPONSIVENESS SUMMARY, *supra* note 15, response 9, at 6.

¹²⁹ *See id.*

¹³⁰ *See* 3 V.S.A. § 801(b)(13)(A).

¹³¹ *See* VT AGENCY OF NAT. RES, RESPONSIVENESS SUMMARY, *supra* note 15, response 9, at 6.

¹³² *See* AGENCY OF NAT. RES, DEP’T OF ENV’T CONSERVATION, WETLANDS INVENTORY MAP, https://anrmaps.vermont.gov/websites/WetlandProjects/default.html?_gl=1*1vyzdru*_ga*MTAxMDA1MzI3My4xNzY5MDk0NTIx*_ga_V9WQH77KLW*czE3NzczMjU0NjYkbzU1JGcxJHQxNzc3MzI1OTU2JGo2MCRsMCRoMA; *see also* Appendix D, Email from Neil Kamman Requesting GIS Calculation (Apr. 15, 2026).

factual basis guiding their decision.¹³³

Many community members raised concerns that the proposed rules may negatively alter water quality, introduce invasive species, reduce flood storage capacity, and increase erosion, including impacts to adjacent properties.¹³⁴ The Agency agreed “that the listed issues are a concern and that is why the allowed use is only for a limited area of the state for a limited timeframe.”¹³⁵ The Agency confirmed that their regulation would harm habitat, nearby infrastructure, water quality, and flood storage capabilities, yet attempted to justify this harmful building practice by limiting it to growth areas, for a narrow timeframe.¹³⁶ Streamlining development in wetlands that are significant and merit protection, areas that absorb stormwater, considering the detrimental flooding Vermont faced in 2023 and 2024, is a decision that would not make sense to a reasonable person.¹³⁷ Vermont needs to build housing that is safe and resilient in growth areas, residences built to withstand strong storm systems in the face of climate change.¹³⁸ It is unreasonable to streamline housing in significant wetlands, regardless of whether they are mapped or unmapped.¹³⁹ The Agency's regulation is arbitrary, and should be opposed by LCAR on that basis.¹⁴⁰

V. The Agency did not provide an adequate opportunity for public notice and comment on its final proposed rule.

ANR is required to afford all persons a reasonable opportunity to submit data, views, or arguments, orally or in writing.¹⁴¹ ANR provided the public with the opportunity to comment on portions of the proposed rule.¹⁴² However, the Agency amended the final rule, adding Appendix B, which provides a substantial list of Best Management Practices for the Installation of Linear Utilities and Access Infrastructure Servicing Residential Housing.¹⁴³ The original notice did not fairly apprise interested parties of the subject and issues that would be considered under Appendix B, so that parties would have the opportunity to comment on the Best Management

¹³³ 3 V.S.A. § 801(b)(13)(A).

¹³⁴ VT AGENCY OF NAT. RES, RESPONSIVENESS SUMMARY, *supra* note 15, comment 18 & 19, at 9.

¹³⁵ *Id.*, response 18 & 19, at 9.

¹³⁶ *Id.*

¹³⁷ *See id.*; *see generally* 3 VT. STAT. ANN. § 801(b)(13)(A); Appendix C, Name Redacted, Email to J.M & DEC Staff in response to the E.O. (Nov. 12, 2025).

¹³⁸ *See generally* 10 VT. STAT. ANN. § 901; Appendix B, Name Redacted, Email to J.M & DEC Staff in response to the E.O. (Nov. 13, 2025).

¹³⁹ *See generally* AGENCY OF NAT. RES, DEP’T OF ENV’T CONSERVATION, WRITTEN COMMENTS RECEIVED, <https://Agency.vermont.gov/sites/Agency/files/wsm/wetlands/docs/Attachment-WrittenCommentsReceived.pdf>.

¹⁴⁰ 3 VT. STAT. ANN. § 842 (3) (2019).

¹⁴¹ 3 VT. STAT. ANN. § 840 (c).

¹⁴² *See* VT Wetland Rules, AGENCY OF NAT. RES, DEP’T OF ENV’T CONSERVATION, #25P040 (Proposed Nov. 12, 2025).

¹⁴³ VT Wetland Rules, AGENCY OF NAT. RES, DEP’T OF ENV’T CONSERVATION, ANNOTATED PROPOSED REVISED RULE, VT CODE R. 12 004 056 (Amended Apr. 2026).

Practices.¹⁴⁴ The original notice stated that utility installation in mapped Class II wetlands shall be designed, maintained, and in compliance with Best Management Practices adopted by the secretary.¹⁴⁵ This statement did not put the public on notice that those practices would be adopted under this rulemaking amendment.¹⁴⁶ The only comment regarding Best Management Practices proposed in Appendix B highlighted “that it is unclear which specific Best Management practices are being referenced or implied here.”¹⁴⁷ Appendix B is not a “logical outgrowth” of the comments received from the proposed rule, as no interested party submitted any substantive comments on the Best Management Practices adopted in the amendment.¹⁴⁸ ANR should undertake a new round of notice and comment to provide the public with the statutorily required opportunity to comment on the Best Management Practices adopted under Appendix B.¹⁴⁹

ANR amended its proposed rule after the notice and comment period, adding a “Compensation” requirement for permitted projects that result in unavoidable adverse impacts on the functions and values of significant wetlands.¹⁵⁰ The original public notice did not fairly apprise interested parties of the subject and issues that would be considered under §9.5, so that interested parties could comment on the substantial list of compensation regulations in the amended rule.¹⁵¹ The Agency failed to include the statutorily required five years of post-restoration monitoring for permittee-designed restoration projects.¹⁵² The Agency’s regulation requires compensation for proposed projects that would result in adverse impacts to a wetland buffer that significantly affect the functions and values of the adjacent wetland, yet the statute requires compensation based on the effects of the impact on wetland function.¹⁵³ The addition of the modifying language “significantly affects the functions and values” is a provision that the public should have had the opportunity to comment on.¹⁵⁴ ANR should undertake a new round of

¹⁴⁴ *In re* Dep’t of Pub. Serv. Respecting in re Gen. Order 65, 161 Vt. 97, 100, 632 A.2d 1373, 1375 (1993) (Provides that “ a new comment period is not required (1) if the final rule is in character with the original scheme and was a logical outgrowth of the notice and comments stemming from the proposed rule, or (2) the notice fairly apprised interested persons of the subject and the issues that would be considered so that those persons had an opportunity to comment.”)

¹⁴⁵ VT Wetland Rules, AGENCY OF NAT. RES, DEP’T OF ENV’T CONSERVATION, #25P040, §6.26 (Proposed Nov. 12, 2025).

¹⁴⁶ VT Wetland Rules, ANNOTATED PROPOSED REVISED RULE, VT CODE R. 12 004 056, Appendix. B (Amended Apr. 2026).

¹⁴⁷ AGENCY OF NAT. RES, DEP’T OF ENV’T CONSERVATION, WRITTEN COMMENTS RECEIVED, Comment of VHB, 359.

¹⁴⁸ *In re Dep’t of Pub. Serv.*, 161 Vt. at 100, 632 A.2d at 1375.

¹⁴⁹ See VT Wetland Rules, AGENCY OF NAT. RES, DEP’T OF ENV’T CONSERVATION, ANNOTATED PROPOSED REVISED RULE, VT CODE R. 12 004 056, Appendix. B (Amended Apr. 2026); 3 VT. STAT. ANN. § 840 (c).

¹⁵⁰ VT Wetland Rules, ANNOTATED PROPOSED REVISED RULE, VT CODE R. 12 004 056 §9.5 (Amended Apr. 2026).

¹⁵¹ Compare VT Wetland Rules, AGENCY OF NAT. RES, DEP’T OF ENV’T CONSERVATION, #25P040 (Proposed Nov. 12, 2025), with VT Wetland Rules, ANNOTATED PROPOSED REVISED RULE, VT CODE R. 12 004 056 §9.5 (Amended Apr. 2026).

¹⁵² VT. STAT. ANN. § 918 (c)(3)(G).

¹⁵³ Compare VT Wetland Rules, ANNOTATED PROPOSED REVISED RULE, VT CODE R. 12 004 056 §9.5 (c)(1)(b) (Amended Apr. 2026), with VT. STAT. ANN. § 918 (b).

¹⁵⁴ See generally VT Wetland Rules, AGENCY OF NAT. RES, DEP’T OF ENV’T CONSERVATION, ANNOTATED PROPOSED REVISED RULE, VT CODE R. 12 004 056 §9.5 (c)(1)(b) (Amended Apr. 2026).

notice and comment to provide the public with the required opportunity by law to comment on the “Compensation” provisions for permitted activities.¹⁵⁵

VI. Conclusion

As noted, the Commenters recognize the need for additional housing in Vermont.¹⁵⁶ However, allowing building in significant wetlands is beyond ANR’s authority, not consistent with the intent of Vermont’s wetland statute, and will place housing built in wetlands in harm’s way and damage the environment.¹⁵⁷ LCAR should object to the proposed rule.¹⁵⁸ Furthermore, ANR should withdraw the proposed rule and work with stakeholders on solutions that will promote the building of housing in safe areas that will not harm the environment and are consistent with Vermont law.

¹⁵⁵ 3 VT. STAT. ANN. § 840 (c).

¹⁵⁶ *See supra* Part I.

¹⁵⁷ *See supra* Part II–IV.

¹⁵⁸ *See* 3 VT. STAT. ANN. § 842 (3).