Testimony in Opposition to Wetlands Rules 25-P040 as per EO-06-25
To: Legislative Committee on Administrative Rules (LCAR); Lindsey.Schreier@vtleg.gov
From: Laura Hill-Eubanks, Esq.
Date: 4-27-2026

I am providing this testimony to ask that the LCAR object to the amended Wetlands Rules 25-P040. I am a Vermont attorney with a master's degree in environmental law and policy. I have served as Chair of my town Planning Commission, Chair of my Regional Planning Commission, and as a member of our town Conservation Commission.

My perspective is that a reasonable but careful balance must be struck between the need for development and the need to protect valuable natural resources. Both are necessary for the health, safety, and welfare of our society. And it is the responsibility of our government to do its best to ensure that everyone that may be impacted by a potential policy is as safe from harm as is reasonably possible. This rulemaking does the opposite—it increases the risk of harm to our residents. And, considering the potential environmental and economic impacts the rule may cause through the loss of wetlands in densely populated areas, it is unlikely to achieve its stated goal of providing more affordable housing.

I previously submitted comments on the draft wetlands rule filing. This testimony updates those comments and is based on the lack of adequate responses from the Secretary of the Agency of Natural Resources (the "Secretary" of "ANR") to the comments submitted by myself and others.

Grounds for objection to the proposed rule are as follows and detailed more fully below: 1) the proposed rule is beyond the authority of the agency; 2) it is contrary to the intent of the Legislature; 3) it is arbitrary; 4) the economic impact analysis fails to recognize a substantial economic impact of the proposed rule; 5) the environmental impact analysis fails to recognize a substantial environmental impact of the proposed rule.

GROUNDS ON WHICH TO OBJECT TO WETLANDS RULES 25-P040

(1) The proposed rule is beyond the authority of the agency.

An important issue here is whether an administrative rule is valid when it is based on complying with an arguably invalid Executive Order. In other words, can the Secretary of the Agency of Natural Resources enact a rule that is not authorized by, and conflicts with, the relevant statute—based primarily on their decision to comply with an Executive Order that is itself not authorized by, and conflicts with, that statute? The answer in the state of Vermont should be No.

The Vermont Constitution expressly gives the power to legislate to the Senate and House of Representatives.[1] The Governor is given the Executive powers, and with those powers, the responsibility to see that "the laws be faithfully executed".[2] The legislative and executive powers are to be "separate and distinct" and only to be exercised by the branch of government to which they belong.[3]

1 Vt. Const. Ch. II, § 2
2 Vt. Const. Ch. II, §§ 3, 20
3 Vt. Const. Ch. II, § 5

The Vermont Constitution does not provide the Governor with the authority to issue Executive Orders. And Vermont statutes do not provide the Governor with a broad authority to issue Executive Orders, but may give specific authority when provided in certain statutes.[4]

The Governor does not have the power to create new law, but only to implement laws as enacted by the legislature.[5] Therefore, a Governor may order an agency to undertake a rulemaking to implement a statute, but they may not order a rulemaking that would contravene statute.[6]

In this case, the Governor issued an Executive Order that contravened the statute. The statute, Title 10, Chapter 37, is clear in its meaning and its intent: *the wetlands of the State shall be protected, regulated, and restored so that Vermont achieves a net gain of wetlands acreage;* and the *regulation and management of the water resources of the State, including wetlands, should be guided by science*. (10 V.S.A. § 901) An Executive Order that would allow houses to be built in wetlands is not based in the statute's requirement to protect wetlands so as to achieve a net gain, and is not based in science.

Nonetheless, the Secretary of the Agency of Natural Resources initiated a rulemaking in response to the Executive Order. And it is apparent from the rule filings, comments, and communications that the Secretary did not base the rules in the statute or in science (the Science Information form was not submitted with the rule filing.) The Secretary based the rulemaking on the decision to comply with a seemingly invalid Executive Order.[7]

As detailed more below, the rules submitted to the LCAR by the Secretary are invalid as they are not authorized by the statute, and in fact contravene it – just as the Executive Order does. The rules are beyond the authority of the Agency.

(2) The proposed rule is contrary to the intent of the Legislature.

Vermont state statutes require a) the protection and net gain of wetlands; and b) that the regulation of wetlands should be based in science. The proposed rules satisfy neither of these requirements and is contrary to the intent of the legislature.

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4 AG opinion No. 720 (1971), cited by Legislative staff in Authority for Executive Orders (2017); See for example, 3 V.S.A.§ 2002, 2001 (statute providing Governor with power to reorganize the Executive Branch by Executive Order)

5 VT Attorney General Charity Clark, Op. No. 2025-01, p. 2 (Nov. 20,2025) ("Generally, executive orders cannot make new laws or suspend existing ones. They can instead articulate how existing law is to be implemented.")

6 See VT Attorney General Charity Clark, Op. No. 2025-01, p. 1 ("This Office has concluded that the provisions [of Executive Order 06-25] related to wetlands and building energy standards are lawful to the extent they instruct agencies to begin rulemaking. To the extent they intend to announce new legal standards different from those in statute or current rule, they exceed the Governor's authority.")

7 See for examples: Responsiveness Summary at p 24: "This rulemaking amends the Vermont Wetland Rules (VWR) to support and accelerate housing development in designated growth areas, consistent with the goals of Executive Order 06-25 (2025)" . . . ; Response to Comment 1 at p 25: "In response to public comment, 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. Consistent with Executive Order 06-25, Promoting Housing Construction and Rehabilitation (Sept. 17, 2025) ("Executive Order"), impacts to unmapped Class II wetlands (i.e. wetlands not included in the Vermont Significant Wetland Inventory) in designated areas would not be subject to the compensation requirement"; See also Comments and Responses 8 & 9 at p. 28-29 of the Final Rule Filing Form.

a) The rules conflict with the statutory requirement to protect wetlands and achieve a net gain in wetland acreage.

The Secretary of ANR intends to amend the Vermont Wetlands Rules to remove protections for some wetlands, as ordered by the Governor (Executive Order 06-25). The rules would allow housing to be built in wetlands, located in certain designated growth areas around the state, without a permit.[8]

The Class II wetlands in these areas that have not yet been mapped on the state wetlands maps will no longer be fully protected.[9] There are likely to be a great number of wetlands that have not yet been mapped; and many mapped wetland boundaries may underestimate the size of those wetlands.[10] The new rules will mean that some of those wetlands and wetland buffers would lose protections from development.

The proposed changes to the wetlands rules would also reduce the buffer zones around all Class II wetlands in the designated growth areas: from the current 50 feet, down to 25 feet. This means that the protected area (and setback from development) would be only 25 feet.

Wetlands are protected under the laws of the state of Vermont, as set out in statute (Title 10, Chapter 37). The policy to be followed under the law is clearly stated:

> *It is hereby declared to be the policy of the State that:*
> *(2) the wetlands of the State shall be protected, regulated, and restored so that Vermont achieves a net gain of wetlands acreage;* (10 V.S.A. § 901)

The Vermont legislature recognized the need for protection of wetlands as part of an effort to protect people and property from the increasingly frequent and intense flooding caused by climate change. To that end, the legislature recently passed Act 121 ("The Flood Safety Act"). This law provides a clear mandate to not only prevent wetland loss in Vermont, but to achieve wetland gains as part of an effort to increase flood resilience. Under the new law, the Secretary of ANR "shall amend the Vermont Wetlands Rules . . . to clarify that the goal of wetlands regulation and management in the State is the net gain of wetlands to be achieved through protection of existing wetlands and restoration of wetlands that were previously adversely affected. . . . The Vermont Wetlands Rules shall prioritize the protection of existing intact wetlands from adverse effects." (10 V.S.A. § 918)

The statutes further require that the buffer zone for a Class II wetland "shall extend at least 50 feet from the border of the wetland" based on the functions and values listed in the statute. (10 V.S.A. §§ 902(9), 914) The buffer zone is not meant to be determined, or reduced—as these rules would, for an entire general category of wetland types (such as Class II wetlands in growth areas).[11] Those determinations are made based on the functions and values of each wetland.

Currently, wetlands that meet the criteria of Class II are protected by law, whether they are mapped or unmapped. The determination as to whether a wetland is a Class II and merits protection "shall be based upon an evaluation of the extent to which it serves the functions and values" listed in the statute,

8 https://dec.vermont.gov/watershed/wetlands/wetlands-rulemaking
9 See Vermont Significant Wetlands Inventory (VSWI)
10 See https://dec.vermont.gov/watershed/wetlands/wetland-maps
11 See VT Attorney General Charity Clark opinion, Op. No. 2025-01, p. 5 (Nov. 20, 2025)

or its identification on the Vermont significant wetlands inventory maps. (§§ 905b(18)(A); 914; 902(7)). Note that one of the important wetland functions included in the statute is flood control ("provides temporary water storage for flood water and storm runoff" (10 V.S.A. 905b(18)(A)(i))

As part of the effort to more effectively protect the state's wetlands, the statutes require that state wetland maps be updated annually; and, after all areas (or "basins") of the state have been mapped, every five years. (10 V.S.A. § 916) Mapping is an ongoing process and helps to identify and locate as many wetlands as possible, thereby raising awareness of their locations, and increasing the likelihood that they will be protected and that a net gain is achieved. But the intent of the laws is clearly that all wetlands that meet the criteria for Class II be protected, mapped or not.

The statutory goal of "net gain" of wetlands is intended to be achieved, in part, by requiring that any activity in a wetland that would adversely impact more than 5000 square feet, be compensated by the permit applicant through restoration, enhancement, or creation of a wetland or buffers. (10 V.S.A. § 918) But in this final rule filing, the Secretary acknowledges that the compensation provision will not apply to the wetlands in the designated growth areas:

> *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. Consistent with Executive Order 06-25, Promoting Housing Construction and Rehabilitation (Sept. 17, 2025) ("Executive Order"), impacts to unmapped Class II wetlands (i.e. wetlands not included in the Vermont Significant Wetland Inventory) in designated areas would not be subject to the compensation requirement, unless otherwise required under applicable local, state, or federal regulatory requirements.* (emphasis added)(Secretary, Response 1, in Final Rule Filing at p. 25)

This is not at all in keeping with the goal of a "net gain" of wetlands required to be met in the statute. In addition, if the wetlands that have been impacted have not been mapped, and therefore not delineated or their size determined, how is the "net gain" of wetlands to be calculated, and so achieved?

It's difficult to see how wetlands will be protected—and a net gain achieved—under rules that would allow for the destruction of some. In addition, the statute does not say that only mapped wetlands will be protected; the statute states very clearly that existing wetlands shall be given priority for protection. The rule amendments run counter to the statutes and their intent to protect existing Class II wetlands, and buffers of at least 50 feet. Wetlands determinations are made on a case by case basis based on their statutory functions and values. The Secretary has essentially given up jurisdiction and, in so doing, the protection of an entire category of those wetlands (all unmapped, and 25" of buffers, in designated growth areas) without any review of the functions and values of each. The statute does not authorize this action and it is contrary to the intent of the legislature.[12]

b) The rule amendments are not based in science, as the statute intends; they are based on the Executive Order.

The clear intent of the statute is that Vermont wetlands protections and regulation are to be based in science:

12 See VT Attorney General Charity Clark opinion, Op. No. 2025-01; citing In re Agency of Admin. State Blds. Div., 141 Vt. 68, 76 (1982) (agency cannot use rulemaking to enlarge statutory authority)

> *It is hereby declared to be the policy of the State that:*
> *(3) regulation and management of the water resources of the State, including wetlands, should be guided by science, and authorized activities in water resources and wetlands should have a net environmental benefit to the State.* (10 V.S.A. § 901)

In the rule filing, the Secretary omitted the Scientific Information form. (The *Scientific Information form identifies the scientific information upon which the rule has been based and explains the procedure for obtaining such studies and underlying research data from the agency if the rule depends on scientific information for its validity.* 3 V.S.A. § 838) When the Agency was asked by a member of the public why they omitted the form, the answer given was that the Scientific Information form was intentionally omitted because the proposed rules do not rely on scientific information for their validity —the rules are based on the Executive Order.

This runs completely counter to the intent of the statute. The wetlands determinations, and the statutory functions and values provided by each, are to be based in science. Without scientific information or analysis, it is impossible to tell where the wetlands are located, what the impacts on the state's wetlands are likely to be, and the environmental and economic impacts that could result. Yet the relevant scientific information has not been provided by the Secretary.

The impacts from the loss of wetlands will increase the risk of flooding, drought, lowered water quality, and loss of biodiversity. The impacts have been studied, much of the scientific information is publicly available, and some of that information is included throughout the public comments—including those from experts in the field—that accompany the rule filing. But they have not been provided by the Secretary.

As explained by one state wetlands ecologist:

The proposed rule change, which would rely solely on wetland mapping as the basis for jurisdiction, contradicts the intent of past and current legislation regarding Vermont wetlands. Vermont law defines "wetlands" as areas inundated by surface or groundwater sufficient to support vegetation or aquatic life that depend on saturated soils for growth and reproduction (10 V.S.A. § 902(5)). The methodology for wetland identification, established in the original 1990 Vermont Wetland Rules2 (VWRs, § 3.2) and maintained in subsequent rule updates, requires documentation of hydrology, hydric soils, and wetland vegetation. This methodology is recognized by both the State and the ACOE. The proposed EO and rule change, which would limit jurisdiction to mapped wetlands, ignores this scientific methodology and contradicts the established rules for wetland identification.
. . . What environmental analysis has been conducted to assess the acreage, type, and location of unmapped wetlands that could potentially be lost under this rule change, including the impacts of allowing fill placement or wetland conversion to upland, evaluated by town, watershed, and statewide?[13]

Some of the important statutory functions and values that wetlands can provide include:
> *(i) provides temporary water storage for flood water and storm runoff;*
> *(ii) contributes to the quality of surface and groundwater through chemical action;*
> *(iii) naturally controls the effects of erosion and runoff, filtering silt, and organic matter;*

13 Courage comment, Final Rule Filing at pp. 474, 477

(iv) contributes to the viability of fisheries by providing spawning, feeding, and general habitat for freshwater fish;
(v) provides habitat for breeding, feeding, resting, and shelter to both game and nongame species of wildlife;

The functions and values listed in the statute require scientific data and analysis in order to make a valid decision on the protections to be afforded each wetland, and the functions and values that would be lost if the wetlands were impacted or destroyed.

The Secretary of ANR oversees a veritable army of wetlands ecologists, hydrologists, and scientists and experts of all kinds related to water. I can only assume that they could have provided some of the information on the science that would underly as drastic a decision as one that would allow houses to be built in wetlands—if that information existed. But data and science has not been included in the information provided by the Secretary.

The Secretary may have some discretion in the implementation of the statute, but they cannot fully ignore its clear intent. The statute calls for regulations, based on science, to protect wetlands, and achieve a net gain in wetland acreage. The rules proposed by the Secretary here are not based in the statutory requirements and are contrary to the intent of the legislature.

(3) The proposed rule is arbitrary.

3 V.S.A. § 801(b)(13)(A): *"Arbitrary," when applied to an agency rule or action, means that one or more of the following apply: (i) There is no factual basis for the decision made by the agency; (ii) The decision made by the agency is not rationally connected to the factual basis asserted for the decision; (iii) The decision made by the agency would not make sense to a reasonable person.*

The Secretary has proposed amendments to the wetlands rules that would allow housing to be built in unmapped Class II wetlands, and all Class II wetland buffers, in certain designated growth areas of the state, without a permit. The Secretary states that this will increase housing that is affordable, and that any negative environmental or economic impacts will be balanced by the benefits of dense, compact "smart growth" in those areas. (See Final Rule Filing, p. 5-6, 10).

There is little to no evidence provided in the rule filing that would support the idea of allowing housing to be built in wetlands in order to achieve an increase in housing that is affordable. There is, however, a great deal of evidence provided in the public comments to suggest that building housing in wetlands would have potentially devastating effects on people and properties in those areas; and would likely be more costly in the short term and in the long term.

The Secretary asserts, however, that the rule is not arbitrary, in part, because it is supported by "data collected by state government, as well as Agency staff and wetland professionals." I find essentially no data from state government, or from Agency staff or professionals, in this rule filing that support these rule amendments. Quite the opposite seems to be the case. There are a number of wetlands ecologists and other relevant experts, from both inside and outside of the Agency, that have provided a great deal

of comment, scientific information, and expertise that in fact provides evidence and information that argues *against* enacting these rule amendments.[14]

Further, the Secretary asserts that the rule amendment "will allow for greater regulatory certainty to expedite the construction of housing in designated areas." (Final Rule Filing at P. 5-6). But, as comments from people in the field have pointed out, the rule could likely add time, effort, and confusion to the process of building due to conflicts with Federal law, and lead to houses being built in wet areas, if no wetland delineation is required:

- *The delineation process is currently used for both federal and state jurisdiction. Federal wetland jurisdiction is not based on the state classification system, and delineations will be required for Class I, II and III wetlands. The state will be challenged with administering two very uneven sets of regulations. It will also be challenged with trying* [to] *coordinate with federal partners where delineations will be ignored for housing projects in designated areas.*[15]

- *Relying on VSWI mapping as the current proposed rule change is written currently, there is obvious conflict with the federal wetland jurisdiction by the U.S. Army Corps of Engineers (USACE), there will be no efficiency gained as the projects will still require wetland delineations, and there will be an increased risk for violations under federal law.*

  … Application of the AU [Allowed Use] *as written will be difficult to apply to wetlands that are contiguous with mapped VSWI areas if there is not a delineation complete. It will also certainly result in projects being built within actual wetlands that will conflict with the state's new net wetland gain objectives, reduce wetland function and value on the landscape, and lead to structures being built in wet, unsuitable environments. If an intent of the EO is to streamline a housing project's ability to be built without having a wetland delineation, it only creates more problem and confusion.*[16]

The Secretary has proposed a rule to allow construction of housing to be built in wetlands in certain growth areas of the state in order to increase housing that is affordable. A reasonable person would find it very difficult, if not impossible, to review the information, or lack thereof, in this rule filing, and find a factual basis, or connection to a factual basis, to show that the approach proposed will achieve the stated goal.

As explained further in my comments here and in many other comments submitted, the rules are likely to cause an increase in environmental and economic risks and impacts; will likely increase the cost and time spent on building housing in wetland areas; and is not likely to increase affordable housing. The rule as proposed by the Secretary is arbitrary.

(4) The economic impact analysis fails to recognize a substantial economic impact of the proposed rule.

The Rule Filing requires an Economic Impact Analysis—an analysis of the costs and benefits of the

14 See comments in Final Rule Filing at: Bowman, p. 183; Stettner, p. 334; Toomey, p. 350; Greene-Swift; Benoit at p. 396; Hurley, p. 407; Sausville, p. 415; Groveman, p. 440; Courage, p. 472; VHB, at p. 493, 496 (need for delineations); Sleeper, p. 498; Schumacher, p. 500; Morrison, p. 502; Anderson, p. 512; Poli, p. 524; Follensbee; p. 529; Chalmers, p. 541

15 Morrison comment, Final Rule Filing at p. 570

16 VHB comment, Final Rule Filing at p. 496

proposed wetlands rule:

> *In completing the economic impact analysis, an agency analyzes and evaluates the anticipated costs and benefits to be expected from adoption of the rule; estimates the costs and benefits for each category of people enterprises and government entities affected by the rule; compares alternatives to adopting the rule; and explains their analysis concluding that rulemaking is the most appropriate method of achieving the regulatory purpose.* (Rule Filing Form at p. 9)

As pointed out in the public comments, the economic impact analysis failed to include information on the costs of impacts due to "changes in property values, business impacts, and the economic value of wetlands. Costs related to houses placed in wetlands, including flood damage, failed septic systems, and impacts to downstream communities are relevant and not sufficiently addressed."[17]

Building a house in a wetland will increase the impervious surface, while also removing the capacity for water storage in that wetlands area. This could increase runoff and flood risk, and impact the areas nearby. There will very likely be people and properties—including residential, business, and municipal —downstream and in the vicinity of the wetlands lost in these areas designated for growth. There are potential costs for those impacted by the resulting increase in flooding.

The Secretary acknowledged that "Additional investments may be needed to address truly wet areas that are unmapped and could require offsetting costs that may impact construction in these areas."[18] But provided no evidence as to the level of these costs, or that these added costs would result in an increase in affordable housing. When asked what studies had been done to assess the efficacy of the rule change, the response from the Secretary was that no specific studies had been done.[19]

The economic analysis also fails to include the costs that would result from the loss of the functions and values that wetlands provide and the benefits such as mitigating flooding, preventing drought, and safeguarding water quality. These functions would be costly for municipalities and members of the communities to replace.[20] But the response from the Secretary, while assuming a net economic gain, merely states that an analysis of these impacts would be nearly impossible and fails to provide evidence to support their claim:

> *It is expected that projects proposed in the designated areas identified by Executive Order 06-25 (2025) and the revised proposed rule, in cases where existing wetlands are not mapped, would have a net economic gain - primarily in terms of the cost and speed of project construction. Furthermore, any assessment of property values, business impacts, and the consideration of wetland monetary economic values, or the potential costs related to flood damage, failed on-site wastewater systems, and impacts to downstream communities would be nearly impossible*

17 Comment 9, Final Rule Filing at p. 29; also see Morrison at p 504

18 Response 33, Final Rule Filing at p. 37

19 Comment/Response 35, Final Rule Filing at p. 38

20 "Engineering solutions to offset these problems are expensive and only as good as they are maintained. The claim that stormwater systems can offset impacts does not consider that installing stormwater in wetland areas is problematic. Design may take soil type into account, but does not account for saturated soils. Digging a dry pond that fills up with water due to soil saturation is not effective for flood storage. Replacing a natural system that filters and stores water with an artificial one does not create a net gain of capacity. And since water needs to go somewhere, it is often the downstream neighbors that foot the bill as water is collected and shunted elsewhere." (Morrison, state wetlands ecologist, comment at p 504)

absent specific project and resource information. (Secretary, Response 8, Final Rule Filing at p. 29-28)

However, information on the cost of impacts and the benefits of wetlands that mitigate those impacts has been presented to the Secretary through public comments; and that information is largely publicly available and accessible. For example:

> *The EPA estimates that 15% of a watershed that is maintained as wetland can reduce flood peaks by as much as 60%. One study found that wetlands and floodplains prevented 84-95% in flood damages to buildings in Middlebury during Tropical Storm Irene, saving them as much as $1.8 million. Another study of the upper Midwest found that in Indiana, for example, residential flood mitigation from wetlands is valued at $477 million per year. These values can be much higher when all flood damages (in addition to impacts on residential buildings) are taken into account. Tropical Storm Irene alone caused flood damages in Vermont estimated at more than $600 million.* (footnotes omitted)[21]

> *Projects that reduce climate risks, like protecting natural lands and restoring floodplains and wetlands, provide direct economic value. For example, restoring the Otter Creek floodplains and wetlands near Middlebury is estimated to deliver at least $126,000, and possibly as much as $450,000, in flood protection every year.*[22]

This information was not included in the rule filing or used to develop an even rudimentary estimate of possible impacts. If the Secretary had undertaken an adequate economic analysis, they would likely have found that building housing in wetlands is more costly than building on more suitable dry land—and may not result in an increase of housing that is affordable. The Secretary failed to provide information on substantial economic impacts of the rule.

(5) The environmental impact analysis fails to recognize a substantial environmental impact of the proposed rule.

The Rule Filing requires an Environmental Impact Analysis:

> *In completing the environmental impact analysis, an agency analyzes and evaluates the anticipated environmental impacts (positive or negative) to be expected from adoption of the rule; compares alternatives to adopting the rule; explains the sufficiency of the environmental impact analysis. … Examples of Environmental Impacts include but are not limited to: ... Impacts on the flow of water. ...* (Final Rule Filing, p. 14)

Act 121 ("The Flood Safety Act") was enacted in 2024. The law requires protection of wetlands so as to achieve a net gain in wetlands as part of an effort to increase flood resilience. (10 V.S.A. § 901)

In the filing of the proposed rule, the Secretary of ANR points to specific parts of state planning documents to make the case that we should allow housing to be built in wetlands to support smart

21 Hill-Eubanks comment, Final Rule Filing at p. 318; citing various publicly available sources.
22 Vermont Resilience Implementation Strategy, pp. 5-6, at https://outside.vermont.gov/agency/anr/climatecouncil/Shared%20Documents/Vermont_Climate_Council/CAP2025_ChapterDrafts/ClimateActionPlanUpdate_2025.pdf

growth in compact growth areas. ("*The Vermont Climate Action Plan (CAP) and the Resilience Implementation Strategy (RIS) support smart growth. ... Both the Vermont Climate Action Plan and Resilience Implementation Plan advocate for compact growth*." (Secretary, in Final Rules Filing, at pp. 4, 10)

But the Secretary fails to recognize two key points: 1) "smart growth" is defined as growth that includes protections for the State's important natural resources, including wetlands (24 V.S.A. § 2791(13,14); and 2) the plans and policies the Secretary cites (CAP and RIS) strongly recommend protecting wetlands for their value in increasing climate change resilience by providing flood protection, clean water, habitat for wildlife, and protections from drought. The plans recognize that safe and effective development strategies in the face of climate change will require policies that strike a balance and work to accomplish both objectives: compact growth AND flood resilience.

The Secretary acknowledges that development in wetlands may degrade water quality, introduce invasive species through fill and disturbance, negatively affect wetland functions and values, alter water flow, reduce natural flood storage capacity, and increase flooding and erosion, including impacts to adjacent properties and increased erosion along streams.[23] But the Secretary answered all of those concerns by stating:

> *that is why the allowed use is only for a limited area of the state for a limited timeframe. The proposed rule aims to balance the compelling housing demands and the environmental benefits of compact settlement against environmental risk in the limited areas of Vermont eligible to utilize the proposed Allowed Use.* (emphasis added)(Secretary in Final Rule Filing at p 32-33)

But the impacts would *not* be for a limited time—they would be for many years, and potentially forever if houses continue to remain in those wetlands and/or the wetlands are not ultimately restored.

Further, the Secretary provides no evidence or science to show that it should be assumed that the balance of the environmental benefits of compact settlement would be worth the environmental risks or impacts of the loss of the wetlands.

The loss of wetlands increases the risk of harms due to flooding. When addressing the possibility of increased flooding, the Secretary pointed out that the rule would only impact 3% of the Vermont land area. But the Secretary fails to recognize that the 3% of land area impacted is in densely populated areas; flooding would very likely impact a greater number of people and properties per square mile in dense areas than it would in rural areas. In fact, the VT Department of Environmental Conservation has recognized the importance of wetlands in their ability to prevent increased flooding and its impacts, especially in the more densely settled urban areas:

> *Many wetlands, particularly floodplain wetlands, have the capacity to temporarily store flood waters during high runoff events. ... As flood waters recede, the water is released slowly from the wetland soils. By holding back some of the flood waters and slowing the rate that water re-enters the stream channel, wetlands can reduce the severity of downstream flooding and erosion.*
> *In watersheds where wetlands have been lost, flood peaks may increase by as much as 80 percent. Wetlands within and upstream of urban areas are particularly valuable for flood*

23 Final Rule Filing, Responses 18-20, at p. 32-33

> *protection. The impervious surface in urban areas greatly increases the rate and volume of runoff, thereby increasing the risk of flood damage.* (emphasis added) (https://dec.vermont.gov/watershed/wetlands/functions/wetland-functions-and-values-water-storage-flood-water-and-storm)

Loss of wetlands in these more densely developed areas could significantly increase the flooding and its impacts in those areas.

But the Secretary claims that the impacts would be minimized because "proposed housing projects in designated areas that utilize the Allowed Use remain subject to applicable floodplain and stormwater permitting requirements that address flood and erosion impacts."[24] However, as explained in one comment, stormwater and floodplain regulation will not mitigate flood risk from all the wetlands impacted.

> *Where wetlands are co-located in floodplains, there may be protection in the way the growth centers were designated. However, wetlands throughout the landscape, not just those adjacent to perennial streams and rivers, act collectively to absorb and mitigate stormwater and floodwaters. As wetlands disappear along smaller tributaries and drainage ways, floodwater and stormwater will increase. Much of the flash flooding we see are highly developed areas like St. Johnsbury and Barre where these smaller wetlands at higher elevations have disappeared. Promoting growth that will eliminate these types of wetlands will put people in harms way. Stormwater regulations are not designed to replace the cumulative functions that wetlands have on the landscape.*[25]

It has been estimated that Vermont has already lost at least 35% of its wetlands. The function that wetlands provide in helping to prevent flood impacts seems justification alone to protect them for the increased safety and welfare of Vermonters—especially since we are seeing more flooding due to climate change. Building housing in wetlands, and thereby increasing the risk of flooding and its impacts, seems a misguided and arguably reckless proposal. The rules as proposed by the Secretary would increase the risk of flooding and the risk to the safety and welfare of the residents of our state.

The rule filing was required to include a comparison of alternatives to the rule. The only alternative offered was no change to the rule. There must be other alternatives available that do not involve destroying a natural resource as valuable as wetlands—one that provides us with the means to keep areas of development safer and more resilient. For one, I suggest the Secretary request resources that would allow ANR to identify and map the remaining wetlands in the designated growth areas before building houses in them.

For all the reasons stated above, the proposed rules should be objected to and rejected.

24 Final Rule Filing at p. 16

25 Morrison, wetlands ecologist, Final Rule Filing, at p. 507-508