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To: Senator Anne Watson
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Representative Amy Sheldon
Chair, House Committee on Natural Resources

Representative Trevor Squirrell
Chair, Legislative Committee on Administrative Rules

From: Michael O'Grady
Office of Legislative Counsel

CC: Commissioner Misty Sinsigalli
Department of Environmental Conservation

Date: April 17, 2026

Subject: ANR Proposed Amendments to Wetlands Statutes and Rules

The Legislative Committee on Administrative Rules (LCAR) requires the Office of Legislative Counsel to review any draft rule presented to LCAR for consistency with the LCAR review factors in 3 V.S.A. § 842.¹ I have been asked to review the Agency of Natural Resources, Department of Environmental Conservation proposed amendment to the Vermont Wetlands Rules. To fully complete my review, I also must review the statutory authority for the Vermont Wetlands Rules in 10 V.S.A. chapter 37, including an amendment proposed by Deputy Commissioner Neil Kamman and General Counsel Catherine Gjessing to the House Committee on Environment that would enact session law amendments to the Secretary of Natural Resources' wetlands authority.²

After review of the draft rules, the codified statutory wetlands authority of the Agency, and the proposed session law amendments, I have multiple questions that I hope the Agency of Natural Resources can help me resolve prior to review of the rule by LCAR. If the Agency cannot resolve these questions, the issues below may be the basis for an LCAR objection to the rule. My questions for the Agency are in bold and follow a summary of the potential issue.

¹ LCAR may object to a draft rule for one or more of the following reasons: (1) a proposed rule is beyond the authority of the agency; (2) a proposed rule is contrary to the intent of the Legislature; (3) a proposed rule is arbitrary; (4) the agency did not adhere to the strategy for maximizing public input; (5) a proposed rule is not written in a satisfactory style in accordance with 3 V.S.A. § 833; (6) the economic impact analysis fails to recognize a substantial economic impact of the proposed rule, fails to include an evaluation and statement of costs to local school districts required under 3 V.S.A. § 838, or fails to recognize a substantial economic impact of the rule to such districts; or (7) the environmental impact analysis fails to recognize a substantial environmental impact of the proposed rule.

² See Neil Kamman, S.223: Agency of Natural Resources Amendment (April 10, 2026), available at <https://legislature.vermont.gov/committee/document/2026/12/Date/4-10-2026#documents-section>.

A. Consistency with Statutory Authority; Timing of Proposed Session Law

The Vermont Wetlands Rules cite 10 V.S.A. § 905b(18) as the Agency of Natural Resources' statutory authority to adopt wetlands rules.³ The text of section 905b(18) is attached as an appendix to this memo. Section 905b(18) provides the Agency with authority to adopt rules in three broad categories: 1) the identification of wetlands that are so significant that they merit protection; 2) the ability to reclassify wetlands, in general, or on a case-by-case basis; and 3) the protection of wetlands that have been determined to be significant, including rules for the issuance or denial of permits and the issuance of wetlands determinations, provided, however, that the rules may only protect the values and functions sought to be preserved by a designation.

In addition, although not cited as authority for the proposed amendments to the Vermont Wetlands Rules, statute also 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.”⁴ Consequently, statute provides the Agency with some authority to adopt allowed uses—more commonly referred to as exceptions.

However, the Agency has proposed to the House Committee on Environment an amendment to S.223 that would enact session law authority for the Agency to “adopt rules in accordance with Title 3 V.S.A. chapter 25 to establish allowed uses pursuant to 10 V.S.A. §913(a) for the construction of residential housing projects and related utilities in designated areas, including draining, dredging, filling, grading, and vegetation clearing.” Further, the proposed session law amendments would authorize the Wetlands Rules to include requirements for any allowed use, including requirements for “[t]he construction and installation of a residential housing project and linear utility project shall be an allowed use provided that the project meets the location requirements” and other requirements for the allowed use.⁵

These proposed session law amendments perplex me because the draft Vermont Wetlands Rules include very similar language, including a proposed allowed use for residential housing projects and linear utility projects, using almost the same exact language as included in the proposed session law amendment. Why? Is the Agency admitting it does not have the statutory authority for the proposed amendments to the Wetlands Rules, most specifically the allowed use for residential housing projects and linear utility projects? Moreover, if the proposed session law is an admission that the Agency lacks authority to adopt the proposed wetlands rules, the session law proposal (and its probable enactment after adoption of the rules) does not provide authority for the proposed rules that LCAR is currently considering.

Questions for the Agency: Please clarify the authority you assert for adoption of the allowed use for residential housing projects and linear utility projects. Specifically, if the Agency has existing authority to adopt the proposed rule amendments, why is the Agency proposing the session law amendments that purport to grant that authority? Does the Agency believe the session law amendments will control over the proposed rule changes.

In addition, the Agency’s proposed amendments to the Wetlands Rules would eliminate permitting for the construction of mixed use housing in unmapped wetlands and allow construction of utility corridors in mapped Class II wetlands. As the wetlands rules are required to “only protect the values and functions sought” in the designation of a

³ See Agency of Natural Resources, Vermont Wetlands Rules, Section 1.1.

⁴ See 10 V.S.A. § 913(a).

⁵ See Neil Kamman, S.223: Agency of Natural Resources Amendment (April 10, 2026), available at <https://legislature.vermont.gov/committee/document/2026/12/Date/4-10-2026#documents-section>.

wetland, how are the proposed rules consistent with the statutory requirement to protect wetlands and the specific values and functions set forth in 10 V.S.A. § 905b(18)(A)?

B. Arbitrariness of Reliance on Vermont Significant Wetlands Inventory Maps

Under the proposed draft rules, the allowed use of a wetlands for residential housing and related required utilities (or linear utilities depending on the section of the rule reviewed) must be located within one of three designated areas, but must not be located within 25 feet of the mapped area of a Class II wetland shown on the Vermont Significant Wetlands Inventory (VSWI) at the time of the residential housing project’s registration. The draft rules do not provide what information will be required in a registration. Apparently, the Agency will provide this information at a later date.⁶

Moreover, the draft rules also allow a linear utility to cross a mapped Class II wetland or within 25 feet of a mapped Class II wetland. Such a crossing must be practicably unavoidable (which is not defined), result in less than 5,000 square feet of permanent impact cumulatively or be offset according to best management practices proposed in the draft rules. The draft rules do not specify how any of the criteria for crossing a mapped Class II wetland shall be demonstrated.

However, in order for a person to demonstrate that a residential housing project is in an unmapped wetland or to demonstrate that crossing a mapped Class II wetland is practicably unavoidable, a person will need to demonstrate that the wetland is either mapped or unmapped, depending on the use at issue. This reliance on the VSWI maps and, in fact, any reliance on the maps, is problematic as recognized by the Wetlands Rules themselves. The existing Wetlands Rules indicate in several places that the VSWI maps should not be relied upon and are not sufficient for the delineation of a wetlands boundary.⁷

Specifically, Section 3.2(b) provides that the VSWI maps “denote the approximate location and configuration of significant wetlands. The actual boundaries of wetlands shown on the VSWI maps shall be determined in the field in accordance with the methodology [provided in rule].” Further, Section 4.4 provides that “[T]he VSWI maps should not be relied upon to provide precise information regarding the location or configuration of wetlands... The VSWI maps are intended to denote the approximate location or configuration of wetlands. It is critical to note that the wetland characteristics and boundaries are not static; wetlands boundaries may change as a result of landscape and climatic changes.”⁸

Question for the Agency: Under the Administrative Procedure Act, one of the ways that a rule is defined as “arbitrary” is that “[t]he decision made by the agency would not make sense to a reasonable person.”⁹ Could you explain how the Agency’s decision to rely on Class II VSWI maps for the identification of a wetland for purposes of the allowed use for residential housing and related required utilities would make sense to a reasonable person when the Vermont Wetlands Rules themselves deem the maps to be unreliable?

C. Modification of Buffer Zones Inconsistent with Statutory Authority

The Agency’s draft rules provide that a permit from the Agency shall not be required for residential housing or a linear utility within 25 feet of a mapped Class II wetland. This proposal amends the required distance for a Class II buffer set forth in both statute and rule. Specifically,

⁶ See Vermont Agency of Natural Resources, Department of Environmental Conservation, Vermont Wetland Rule Amendments (2026) - Responsiveness Summary (April 6, 2026), Response 41.

⁷ The proposed draft amendments to the Vermont Wetlands Rules do not reference the fact that under the existing Vermont Wetlands Rules, the maps are deemed unreliable for jurisdictional delineations.

⁸ See Vermont Wetlands Rules, Sec. 4.4.

⁹ See 3 V.S.A. § 801(13)(A)(iii).

10 V.S.A. § 902(a) 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.” Similarly, Section 4.2 of the Vermont Wetlands Rules provides that “[u]ntil otherwise designated by the Secretary, a fifty (50) foot buffer zone is established contiguous to the boundaries of a Class II wetland.”

On April 15, 2026, in a meeting of the House Committee on Environment, Representative Mike Hoyt asked Agency of Natural Resources General Counsel Catherine Gjessing what authority the Agency relied on in amending the buffer zones for residential housing or a linear utility.¹⁰ General Counsel indicated that the Secretary of Natural Resources has authority under 10 V.S.A. § 913 to allow uses or activity by rule in a significant wetland or buffer zone.¹¹ However, the Secretary’s authority to modify the buffer zone of a Class II wetland is not under the Secretary’s allowed use authority in 10 V.S.A. § 913.

The authority for the Secretary to establish the width of a buffer zone of a Class II wetland is provided under 10 V.S.A. § 914, not 10 V.S.A. § 913. In order for the Secretary to modify the buffer width under 10 V.S.A. § 914, the Secretary must do so as part of a wetland determination pursuant to the rules of the Department. Thus, a buffer width must be adjusted as part of an on-the-ground, case-by-case scientific determination. The fact that 10 V.S.A. § 914 references the rules of the Department is not authority for the Department to adjust buffer width under the rules. The reference to the rules in section 914 modifies the determination process and how the Secretary issues wetland determinations under the rules. It is not authority for the Secretary to categorically establish buffer widths by rule. In fact, the only deviation from the statutory buffer widths in the current Vermont Wetlands Rules are those provided for Class I wetlands, which the Secretary is authorized to modify by rule under 10 V.S.A. § 915, and in most cases increase the buffer width for the wetland.¹²

The Vermont Attorney General recognized the limits on Agency modification of buffers and the process the Agency must follow in modifying those buffers. Specifically, in response to a request from the Senate President Pro Tempore Philip Baruth and Speaker of the House Jill Krowinski, Attorney General Charity Clark issued Formal Opinion No. 2025-01 regarding Governor Scott’s Executive Order 06-25, which purported to amend administration of wetlands statutes and rules. The Attorney General stated that, with regard to buffer zones:

[t]he width of buffer zones for Class II wetlands “shall extend at least 50 feet . . . unless the Secretary determines otherwise under section 914”...Under § 914, the Secretary “may establish the necessary width of the buffer zone...as part of any wetland determination pursuant to the rules of the Department”...These provisions afford the Secretary certain discretion. They do not, however, give the Secretary authority to immediately and categorically halve the statutory 50-foot presumptive buffer zone around Class II wetlands.¹³

The Attorney General did note that the Agency has authority under the Vermont Wetlands Rules Sec. 4.3(b)(3) to determine the size of a buffer zone of a Class II wetland. But, that authority, as with the Agency’s statutory authority, is to be exercised during a wetlands determination by the Secretary, not as a categorical “halving” of a statutory and regulatory buffer width.

Questions for the Agency: Considering the plain language of the statute, the plain language of the current Vermont Wetlands Rule, General Counsel’s misstatement

¹⁰ Vermont House of Representatives Committee on Environment 2026 04 15 9:00 A.M., available at <https://www.youtube.com/watch?v=11RGpyJ5gSk>.

¹¹ Id.

¹² See 10 V.S.A. § 915; see also Vermont Wetlands Rules, Appendix A—Class One Wetlands.

¹³ See Attorney General Charity Clark Formal Opinion No. 2025-01, Re: Executive Order 06-25 (Nov. 20, 2025), available at <https://ago.vermont.gov/sites/ago/files/2025-11/2025-11-20%20AG%20Op.%202025-01.pdf>.

regarding the process and authority for modifying a buffer, and the Attorney General's Opinion, could you clarify the Agency's statutory or regulatory authority to modify the buffer zone of a Class II wetland as the Agency has proposed in the draft Vermont Wetlands Rules?

D. Legislative Intent and Statutory Policy for Regulation of Wetlands

The Office of Legislative Counsel generally does not opine on whether a proposed rule is consistent with legislative intent, as different legislators may maintain a different understanding of statute or a different intent as to how statute should be applied. However, in some statutes, the General Assembly incorporates the intent of the body or the purpose of a statute into the statute itself. The General Assembly has done so under the Wetlands Protection and Water Resources Management chapter of 10 V.S.A chapter 37.

Specifically, 10 V.S.A. § 901 provides the water resources management policy under 10 V.S.A. chapter 37. That policy includes the following two subdivisions:

- (2) the wetlands of the State shall be protected, regulated, and restored so that Vermont achieves a net gain of wetlands acreage; and
- (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.¹⁴

Questions for the Agency: How is the proposed rule allowing development in significant wetlands protecting, regulating, and restoring wetlands? How are the proposed amendments to the Vermont Wetlands Rules guided by science, as the proposed rules apply a categorical allowed use not based on science but on the proposed activities to be allowed?

E. Clarifications

In reading the proposed amendments to the Vermont Wetlands Rules, I had several questions that I think need clarification for review of the consistency of the draft rules with statutory authority, consistency with legislative intent, and determining whether the proposed rules are arbitrary or sufficiently provide for public notice. I list these issues below, with a question for the Agency for each issue:

1. Practicably unavoidable

Subsection 6.26(d)(i) of the draft rules would allow a linear utility or access infrastructure servicing residential housing to cross the mapped area of a Class II wetland or within 25 feet of the mapped area of a Class II wetland provided that the crossing is practicably unavoidable. There is no definition of or criteria provided for what constitutes “practicably unavoidable.” Apparently, that determination would be entirely within the discretion of the Secretary of Natural Resources. One of the ways that “arbitrary” is defined under the Administrative Procedure Act is that there is no factual basis for a decision made by an Agency.¹⁵

Question for the Agency: Can you provide the factual basis or criteria that would be used to determine what is “practicably unavoidable”? If not, can you explain how this provision is not arbitrary?

¹⁴ 10 V.S.A. § 901.

¹⁵ 3 V.S.A. § 801(13)(A)(i).

2. Permanent impact cumulatively 6.26(d)(ii)

Subsection 6.26(d)(ii) authorizes a linear utility or access infrastructure to cross a mapped Class II wetland or within 25 feet of a mapped Class II wetland if the impact would result in less than 5,000 square feet of permanent impact cumulatively. The draft rules do not define or provide criteria for what constitutes “permanent impact cumulatively.” One of the ways that “arbitrary” is defined under the Administrative Procedure Act is that there is no factual basis for a decision made by an Agency.¹⁶

Question for the Agency: Can you provide the factual basis or criteria that would be used to determine what is “permanent impact cumulatively”? If not, can you explain how this provision is not arbitrary?

3. Registration with ANR

Those mixed use residential housing projects that develop in Class II wetlands under the proposed allowed use are required to register with the Secretary. Subsection 6.26(e) provides that the “registrant shall notify the Secretary in writing within 30 days after construction commences.” Apparently, there would be no public notice of the development in a Class II wetland under the allowed use. Similarly, there apparently would be no notice to the Secretary prior to construction commencing under the allowed use.

Question for the Agency: Could you clarify what public notice, if any, would be provided prior to or after commencement of construction under the proposed allowed use for a residential housing project or linear access infrastructure? What opportunity will interested parties have to comment on or appeal construction under the allowed use? What role does the Agency play if the construction is allowed to commence 30 days prior to notification of the Secretary? If there is no public notice, no opportunity for interested parties to appeal, and no substantive review of the development by the Agency, how is the proposed allowed use consistent with the water resources management policy of the State to be “protected; regulated; and, where necessary, controlled under authority of the State in the public interest and to promote the general welfare”?¹⁷

F. Separation of Powers Concerns

“The Supreme Legislative power shall be exercised by a Senate and a House of Representatives.”¹⁸ “The Supreme Executive power shall be exercised by a Governor...”¹⁹ “The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others.”²⁰ “Briefly stated, the legislative power is the power that formulates and enacts the laws; the executive power enforces them; and the judicial power interprets and applies them.”²¹

However, the focus of a separation of powers inquiry is not whether one branch of government is exercising certain powers that may in some way pertain to another branch, but whether the power exercised so encroaches upon another branch’s power as to usurp from that branch its constitutionally defined function.²² It is true that the General Assembly may delegate

¹⁶ Id.

¹⁷ 10 V.S.A. § 901(1).

¹⁸ Vt. Const. CH II, § 2.

¹⁹ Vt. Const. CH II, § 3.

²⁰ Vt. Const. CH II, § 5.

²¹ See testimony of Jaye Pershing Johnson, Governor’s Legal Counsel S.203, An act relating to the appointment of State Board of Education members, citing *State v. Washington*, 83 Wis.2d 808, 266 N.W.2d 597, 606 n. 13 (1978), available at <https://legislature.vermont.gov/Documents/2024/WorkGroups/Senate%20Education/Bills/S.203/Witness%20Testimony/S.203-Jaye%20Johnson-Governor%27s%20Legal%20Counsel,%20Testimony~3-14-2024.pdf>.

²² Id., citing *In re D.L.*, 164 Vt. 223, 229 (1995).

its legislative, policy-making authority to an Executive Branch agency through a legislative grant of authority to the agency to adopt rules. Generally, once the delegation is made to a State agency, the General Assembly's role is to provide oversight²³ or repeal the delegation of authority.

But, the State agency must act within the confines of the delegated authority and cannot usurp the legislative and policy-making authority of a legislature that was not otherwise delegated. Expansion of a State agency's delegated authority must be obtained through legislation. The draft Vermont Wetlands Rules and the proposed session law amendments to the Agency of Natural Resources' authority appear to be an example of a State agency exceeding the delegated legislative authority for rulemaking.

The Executive Branch sought legislation in the previous legislative session to enact the allowed use authority proposed in the draft rules. The General Assembly did not enact authority for the allowed use. The Executive Branch nevertheless through an Executive Order and the proposed rules appears to usurp the authority of the General Assembly not to enact the allowed use.

Evidence of this violation of the legislative policy-making authority is found in the Agency of Natural Resources' solicitation of legislation to grant the authority for the allowed use that is proposed in the draft rules. Specifically, the Agency of Natural Resources has requested legislation authorizing the adoption of rules to establish allowed uses for the construction of residential housing projects and related utilities in designated areas. The proposed legislation includes authority and criteria for the allowed use for residential housing in almost the exact language that is proposed in the Agency's draft Vermont Wetlands Rules.

Question for the Agency: How are the proposed Vermont Wetlands Rules not a violation of the separation of powers? And, if you assert they are not, why are you seeking legislative authority to adopt the rules that you have already proposed?

²³ 3 V.S.A. § 842.

Appendix A. Text of 10 V.S.A. § 905b(18)

The Department shall protect and manage the water resources of the State in accordance with the provisions of this subchapter and shall:

* * *

(18) Study and investigate the wetlands of the State and cooperate with municipalities, the general public, other agencies, and the Board in collecting and compiling data relating to wetlands; propose to the Board specific wetlands to be designated as Class I wetlands; issue or deny permits pursuant to section 913 of this title and the rules authorized by this subdivision; issue wetland determinations pursuant to section 914 of this title; issue orders pursuant to section 1272 of this title; and in accordance with 3 V.S.A. chapter 25, adopt rules to address the following:

(A) The identification of wetlands that are so significant they merit protection. Any determination that a particular wetland is significant will result from an evaluation of at least the following functions and values which a wetland serves:

- (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;
- (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;
- (vi) provides stopover habitat for migratory birds;
- (vii) contributes to an exemplary wetland natural community, in accordance with the rules of the Secretary;
- (viii) provides for threatened and endangered species habitat;
- (ix) provides valuable resources for education and research in natural sciences;
- (x) provides direct and indirect recreational value and substantial economic benefits; and
- (xi) contributes to the open-space character and overall beauty of the landscape.

(B) The ability to reclassify wetlands, in general, or on a case-by-case basis.

(C) The protection of wetlands that have been determined under subdivision (A) or (B) of this subdivision (18) to be significant, including rules that provide for the issuance or denial of permits and the issuance of wetland determinations by the Department under this chapter; provided, however, that the rules may only protect the values and functions sought to be preserved by the designation. The 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.