

**State of Vermont
Agency of Natural Resources
Department of Environmental Conservation
Watershed Management Division
Wetlands Program**

Agency Guidance for Applying Allowed Use 6.12 of the Vermont Wetland Rules

I. Introduction

The purpose of this guidance document is to provide the Agency of Natural Resources' (ANR) interpretation and application of the Vermont Wetland Rules (VWR) Allowed Use Section 6.12. Allowed use Section 6.12 applies to maintenance, reconstruction, routine repair, and non-substantial expansion or modification of structures and facilities in wetlands and buffer zones. In instances where activities in Class I and II wetlands and buffer zones qualify as an allowed use under a different subpart of Section 6, no wetlands permit is required. In all cases, the Section 6.12 allowed use applies only to structures and facilities currently in compliance with the VWR.

II. Allowed Use 6.12

“The following uses shall be allowed in a Class I or Class II wetland and in its buffer zone without a permit, provided that the configuration of the wetland’s outlet or the flow of water into or out of the wetland is not altered and that no draining, dredging, filling, or grading occurs except as may be provided for in subsections 6.01, 6.02, 6.03, 6.04, 6.07, 6.08, 6.12, 6.13, 6.14, 6.15, 6.16, and 6.22 below. Designation of allowed uses in these rules shall not provide relief from liability for violations that commenced prior to the effective date of such allowed uses.

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“6.12 The maintenance, reconstruction, or routine repair of structures and facilities (including ski trails, public transportation facilities, bulkheads, docks, piers, pilings, paved areas, houses, or other buildings) in compliance with the Vermont Wetland Rules in existence as of the date of their construction or in existence as of February 23, 1990 or additions to such structures or facilities which do not involve substantial expansion or modification in a wetland or buffer.”

III. Application of Allowed Use 6.12

A) **Structures and facilities** means an existing assembly of materials for occupancy or use, including the area above a buried pipe, extending to the toe of the exterior slope of a pond berm, and the edge of grading for any in-ground systems. Structures and facilities include ski trails, bulkheads, docks, piers, pilings, paved areas, houses, other structures or public transportation facilities, including roadways, runways, park-and-ride lots, sidewalks, recreation paths, curbs, and their associated ditches.

- B) Maintenance** means scheduled and unscheduled activity, including tests, measurements, cleanings, replacements, adjustments and repairs, intended to maintain functionality or correct deficiencies in an existing functional structure or facility so it may continue to be used for its intended purpose at its original or designed capacity and efficiency. Maintenance does not apply to structures or facilities that have been abandoned and for which the features of the original intended structure or facility are no longer evident as the intended structure, and does not include the expansion of an existing structure or facility. Maintenance includes vegetation management within and adjacent to (within 10 feet) the structure or facility (see part III(H)).
- C) Routine repair** means the fixing, mending or replacement of an existing structure or facility that was built in compliance with the Vermont Wetland Rules in the normal and ordinary course of operation. Routine repair includes vegetation management within and adjacent to the structure or facility (see part III(H)). Routine repair does not apply to structures or facilities that have been abandoned and for which the features of the original intended structure or facility are no longer evident as the intended structure, and does not include the expansion of an existing structure or facility.
- D) Reconstruction** means the rebuilding or replacement of structures or facilities that have been damaged or destroyed. The allowed use applies when: (1) a structure or facility has been damaged, destroyed or temporarily removed (for example, as a result of fire, flood, wind, or dam safety concerns), (2) the features of the original structure or facility are evident and usable as a structure or facility prior to being removed, and (3) it is reconstructed within five years of the date of damage, destruction or temporary removal, unless reconstruction is required pursuant to an Unsafe Dam Order or dam inspection report, in which case reconstruction may occur more than five years from the date of the issuance of the Order or report. If the number of years since removal is unknown, then the location of the structure must be clearly evidenced by the presence of physical features of the original structure. Reconstruction does not apply to structures or facilities that have been abandoned and are no longer recognizable as the intended structure (see part III(I)). Reconstruction does not include the substantial expansion of the structure.
- E) Non-substantial expansion.** Expansion of existing structures and facilities is permitted as an allowed use under 6.12 as long as those expansions are not substantial. A non-substantial expansion means a one-time expansion of an existing structure resulting in additional impacts to a Class II wetland or buffer of 250 square feet or less, or a one-time ditch expansion up to 20% of the original width and depth of the ditch, in order to stabilize with rip-rap. The use of “swamp mats” for temporary access is not included in the calculation of the 250 square foot threshold so long as there is no cutting of woody vegetation, minimal soil compaction, and the mats are in place for less than one growing season.
- F)** D and E above may be combined and still qualify as an allowed use under Section 6.12 of the Vermont Wetland Rules.

- G) Non-substantial modification** includes purposeful deconstruction and rebuilding of an existing structure or facility entirely contained within the footprint of the original structure or facility as long as the modification to the structure creates no more than 250 square feet of additional impervious surface in a wetland or buffer, the structure or facility is not graded in such a way as to alter the hydrology of the wetland, the modification does not result in additional impacts to Class II wetland or buffer, and there is no substantial increase in the frequency of vegetation management activities. A structure may be both expanded and modified and qualify as an allowed use so long as the thresholds described above in part E are not exceeded.
- H) Vegetation management** means the cutting of vegetation within 10 feet of an above ground structure or in a corridor up to 10 feet wide centered above underground pipes for the purposes of maintaining or repairing existing structures or facilities, unless a vegetation management plan is otherwise documented in a previous state permit. Cutting vegetation outside of an existing lawn is not considered adjacent vegetation management and requires a permit.
- I) Abandonment.** A structure or facility is considered abandoned if its original features are not evident, and/or it cannot be easily distinguished from the adjacent area (e.g. is the same or similar to native ground). Roads are considered abandoned when the road surface cannot be easily distinguished from the adjacent area (e.g., is the same or similar to the native ground) or if the road is impassable as a result of woody vegetation growth within the traveled way. Abandonment also includes the relinquishment of a structure or facility that was not timely reconstructed (see part D).
- J) Allowable temporary work zone.** Temporary impacts to Class II wetlands and buffers may be necessary in order to conduct routine repair, maintenance, and reconstruction of existing structures and facilities. Work associated with the routine repair, maintenance and reconstruction of existing structures and facilities may be conducted in a temporary work zone extending up to 10 feet beyond the edge of an existing above-ground structure or 20 feet centered over an underground pipe without a wetland permit. All temporary work zones shall be restored to natural grade and revegetated upon project completion. The use of “swamp mats” for temporary access to perform the allowed activities is not considered in the calculation of the 10-foot temporary work zone, so long as there is no cutting of woody vegetation, minimal soil compaction, and the duration of use is less than one growing season.

Listed below are examples of activities that *qualify* as Section 6.12 allowed uses when the activity occurs within Class I or II wetland or associated buffer zone:

- i) An in-ground stormwater pond that is retrofitted to hold more water with expansions beyond the edge of the pond’s grading of less than 250 square feet. This qualifies as a “non-substantial expansion” because the pond’s size is not expanded more than 250 square feet.

- ii) The addition of a new underground utility line in an existing drive, road, or mowed/managed man-made road shoulder. This qualifies as a “non-substantial modification” as long as the area is restored to the original grade and revegetated upon completion of installation of the utility line, and the activity was properly stabilized so that a substantial amount of sediment did not reach the wetland. .
- iii) Cleaning out sediment from an existing ditch. This qualifies as “maintenance” because the cleaning does not expand the ditch’s original dimensions.
- iv) A gravity sewer line is buried within the road shoulder and the area is restored to the original grade and revegetated upon completion of installation, and the activity was properly stabilized so that a substantial amount of sediment did not reach the wetland. This qualifies as a “non-substantial modification” because the above ground road shoulder stays the same.

The following list are examples of activities that do not qualify as a Section 6.12 allowed use when within Class I or II wetland or associated buffer zone:

- i) A house built on lawn in the wetland buffer zone. Lawn may be maintained by mowing but construction of new structures could increase erosion and increase the use of the buffer zone.
- ii) A parking lot built on a lawn in the wetland buffer zone, including wetland buffer zone that was historic wetland fill, as it could increase erosion, increase pollutants, changing the use of the buffer and the buffer’s ability to protect the adjacent wetland’s functions. Although a lawn buffer is less protective than a natural buffer, it still slows and absorbs waters, and has a less intensive use than a parking lot.
- iii) A lawn created in a hayfield wetland or buffer zone. Conversion of hayfield to lawn does not constitute maintenance, reconstruction, or repair of an existing facility. The mowing of lawns is substantially more frequent and impactful than hay harvest. Additionally, the growing of hay is exempt from the rules as the growing of food or crops (see the Vermont Wetland Rules & Agriculture Applicability Procedure 2018).

IV. Unsafe trees

A tree over three feet in height that has been damaged to the extent that it poses an immediate risk of falling, and is within striking distance (a distance of up to 1.5 times the height of the tree) of a structure or facility, may be removed and be considered maintenance under this allowed use. Before removal, damage should be documented by photograph or written recommendation by a forest professional (i.e. arborist, forester). Due to the presence of Emerald Ash Borer in Vermont, ash trees will be significantly impacted by this forest pest. An ash tree within an area infested with Emerald Ash Borer may be considered for removal under this allowed use when within striking distance of a structure or facility. Areas of infestation are mapped on the Vermont Atlas.

V. Permitting considerations

When a structure or facility is substantially expanded within the wetland and buffer, the entire expansion in the wetland and buffer, including the first 250 square feet of the project and any temporary workspaces beyond the structure or facilities original location, shall require permit coverage. For example, if a project expands a driveway by 500 square feet into a wetland the full 500 square feet of expansion needs permit coverage, not just the 250 square feet over the threshold for a "non-substantial expansion." Activities that qualify as maintenance, reconstruction or routine repair, or non-substantial modification shall not require a permit, or be included in the square-footage calculation of the application fee, even if another portion of the project does need a permit.

VI. Public notice

This guidance document will be subject to public notice and comment prior to any amendment or revocation.

Signed this 3rd of February, 2020

By Emily Boedecker

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