

**VERMONT AGENCY OF NATURAL RESOURCES  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
WATERSHED MANAGEMENT DIVISION**

**Vermont Wetlands Section  
Class II and Class III Wetland Determination Procedure  
March 2013**

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**I. Wetland Determination Procedure**

The purpose of this document is to present the Vermont Agency of Natural Resources' (ANR) interpretation of Section 4.6 and Section 8 of the Vermont Wetland Rules (VWR). Section 4.6 of the VWR describes wetlands that are presumed to be significant and therefore treated as Class II wetlands under the VWR. Section 8 of the VWR outlines the determination procedure for reclassifying wetlands and for making changes to the Vermont Significant Wetland Inventory (VSWI) maps. In addition to a general interpretation of these sections, this document describes different scenarios of mapping, presumption

and significance to further clarify how jurisdiction, process and mapping will be implemented by the Vermont Wetlands Program (VWP).

### **A. Section 4.6 and Section 8 Procedure**

- Wetlands that meet the presumptions in Section 4.6 (See Appendix I) will be treated as Class II wetlands unless determined otherwise by the Secretary, and will be subject to the VWR. The significance of a presumptive wetland will be confirmed by DEC during the permitting process through an evaluation of the functions and values of the wetland. Under the VWR, permits are only issued for significant Class II wetlands that have undergone a functions and values analysis. A property owner may challenge the Section 4.6 presumption at any time by filing a petition for a formal wetland determination under Section 8 of the VWR. This challenge may be filed prior to filing of a permit application, during application review or at any other time. In addition, Wetlands Program staff will still be available to conduct site visits to discuss the status of a particular wetland with the property owner.
  - For presumption triggered under Section 4.6a of the VWR, wetlands that meet the general type and size threshold (0.5 acres) commonly seen on VSWI maps are presumed to be significant. The wetland types listed in Section 4.6a are non-exhaustive examples of what is commonly found on the VSWI maps. The list of types is inclusive, and any combination of these types that meets the threshold size should also be presumed to be significant.
  - The size threshold (0.5 acres) does not apply to the presumptions listed in Section 4.6b-4.6i.
  - For presumptions triggered under Sections 4.6b and 4.6c, the inference is that wetlands adjacent to streams, rivers or open bodies of water will provide one or more of the following: water quality protection, a nexus between groundwater and surface water, erosion protection, flood storage and/or wildlife habitat. Such a presumption may be rebutted if the Secretary is satisfied that the wetland does not provide these functions.
  - For the presumption triggered under Section 4.6d, the wetland must meet the definition of “vernal pool” in the VWR and provide amphibian breeding habitat:

**§2.36 Vernal Pool** means a small wetland in a shallow natural depression that typically fills with water during the spring and/or fall and may dry during the summer. Vernal pools have no permanent inlet stream and no viable populations of fish. Vernal pools are typically sparsely vegetated with herbaceous

*plants and are shaded by trees from the surrounding upland forest. Many vernal pools provide critical breeding habitat for amphibians.*

- For the presumption under Section 4.6e to apply, the wetland must meet the definition of headwater wetland as described in the VWR:

**§2.16 Headwater Wetland** means a naturally occurring wetland that is above 2,500 feet in elevation and contributes to a stream.

- For the presumption triggered under Section 4.6f, the wetland must meet the definition of impaired waters as described in the VWR, and the impairment must be related to wetland water quality functions:

**§2.19 Impaired Waters** means surface waters which have been identified by the Secretary as impaired pursuant to Section 303(d) of the federal Clean Water Act and which have been listed on the most recent Vermont 303(d) list, approved by the federal Environmental Protection Agency, as waters which may need a Total Maximum Daily Load (TMDL).

- The presumption under Section 4.6i will apply when the wetland does not meet any of the other presumptions, but is deemed significant based on field verification and has received a preliminary determination from ANR pursuant to Section 8.1 of the VWR (See Appendix II).
  - For unmapped wetlands that are significant but do not meet any of the presumptions listed in Section 4.6, a preliminary wetland determination may be issued to protect the wetland in the interim until a formal determination can be made. In contested situations, a notice of preliminary determination will be issued to the landowner by a registered letter and will be valid for 60 days. The preliminary determination will afford Class II protection to the subject area within this time frame. The formal determination process should begin within this 60-day period. The formal determination process begins when a written petition is received in accordance with Section 8.2 or when the Agency initiates the determination process and lists it on the Agency website according to the notice process set forth in Section 8.3.
  - In uncontested situations where an application is pending, or where no work is proposed, a preliminary determination

may be issued in a less formal way, and will not be subject to the 60-day deadline.

- Unmapped wetlands that meet the presumptions in Section 4.6 but need to be added to the VSWI map will undergo the notice requirements under Section 8.3.
  - This may occur separately but simultaneously with the permit process with an associated 30-day notice period.
  - In situations where no permit is requested, or where a general permit is requested, map additions may be performed at a later date when the contents of the petition are received or when ANR initiates the determination process.
- Contiguous wetlands that require map corrections will meet the notice requirements listed in Sections 8.5b(ii) or 8.5b(iii), depending on whether a permit is requested.
- Unmapped wetlands that meet the presumptions set forth in Section 4.6 but are determined not to be significant based on field verification by Agency staff will receive a letter from the Agency stating such and will include a five year expiration date due to the dynamic nature of wetlands. If desired, an applicant may submit a petition for a formal determination of Class III status according to Section 8.2 and subject to the notification requirements in Section 8.3.

## II. Scenarios of Jurisdiction

### A. Significant Wetlands

#### 1. VSWI Mapped Wetlands That Are Significant

- a. **Jurisdiction:** Wetlands that are mapped on the Vermont Significant Wetland Inventory (VSWI) maps are considered significant and do not need to undergo any determination under Section 8.1 to retain that status.
- b. **Process:** No special process is required to verify that these wetlands are under the jurisdiction of the VWR.
- c. **Mapping:** Any corrections to the maps will comply with Section 8.5b of the VWR. This information will be made available to the public through the Vermont Center for Geographic Information (VCGI) and the ANR Environmental Interest Locator.

#### 2. Unmapped Portions of Wetlands Contiguous to VSWI Mapped Wetlands That Are Significant

- a. **Jurisdiction:** If a wetland is contiguous to a mapped wetland, it is presumed to be significant pursuant to Section 4.6, and does not need to undergo any determination under Section 8.1 to retain that status.
- b. **Process:** No special process is required to verify that these wetlands are under the jurisdiction of the VWR. The significance of a presumptive wetland will be confirmed by DEC during the permitting process through an evaluation of the functions and values of the wetland. Under Section 9.5 of the VWR, permits are only issued for significant Class II wetlands that have undergone a functions and values analysis. A property owner may challenge the Section 4.6 presumption at any time by filing a petition for a formal wetland determination under Section 8 of the VWR. This challenge may be filed prior to filing of a permit application, during application review or at any other time. In addition, Wetlands Program staff will still be available to conduct site visits to discuss the status of a particular wetland with the property owner.
- c. **Mapping:** Any updates to the maps will comply with Section 8.5b(ii) and (iii) of the VWR. This information will be made available to the public through VCGI and the ANR Environmental Interest Locator.

### 3. Unmapped Wetlands That Meet the Section 4.6 Presumption(s) and Are Significant

**a. Jurisdiction:** If a wetland meets any of these presumptions, it is considered Class II without needing to go through a formal determination as outlined in Section 8.1. The wetland will be treated as a Class II wetland for purposes of permitting.

**b. Process:** The significance of a presumptive unmapped wetland will be confirmed by DEC during the permitting process through an evaluation of the functions and values of the wetland. A property owner may challenge the Section 4.6 presumption at any time by filing a petition for a formal wetland determination under Section 8 of the VWR. The notification requirements outlined in Section 8.3 will be required to add the wetland to the VSWI map.

1. Individual Permit: If this type of wetland has a project associated with it and there is an application for a permit, the documentation and notification requirements for Section 8.2 and 8.3 will be met through the permit application and notification process. The agency will provide two notices - one for the permit and one for the determination with 15-day and 30-day notification periods, respectively.

2. General Permit: Unmapped wetlands that meet the Section 4.6 presumption(s) will be eligible for the General Permit. In order to promote a streamlined application and permit review process, the Secretary will provide general permit coverage without requiring a formal wetland determination process if an unmapped wetland meets a presumption under Section 4.6 and the proposed activity is eligible for general permit coverage. The application will require confirmation of the existence of the types of wetland functions and values that make a wetland significant and general permit coverage will be granted based on the information provided in the application. This will allow general permit coverage to be granted within the 10-day NOI comment period without having to add an additional 30-day public comment period for a formal wetland determination process. If a property owner seeking general permit coverage seeks rebuttal of the Section 4.6 presumption of significance, the owner may file a petition for a formal determination process or request a site visit by Wetland Program staff to discuss the status of a particular wetland prior to applying for general permit coverage.

- a. Unmapped wetlands that qualify under a Section 4.6 presumption and obtain general permit coverage will not be formally added to the wetlands map, but will be marked by latitude/longitude on a GIS project map developed by the Wetlands Program. This will avoid a need to require that the applicant for general permit coverage provide the names and addresses of other owners of the affected wetland which is required in adding new wetlands to the VSWI map under Section 8. This will allow the general permitting application process to remain streamlined and user friendly.

3. **Determination Request with No Associated Permit:** A person may request a formal wetlands determination for an unmapped wetland that meets the 4.6 presumption(s) at any time. The applicant shall provide the information required for the Determination Petition in the VWP Wetland Application including a map of the proposed wetland, and an evaluation of functions and values. Once a complete application is received, the application will be subject to the 30 day notification requirements outlined in Section 8.2 and 8.3. A determination notice may be issued after the end of those 30 days. The Secretary at his/her discretion may also initiate a formal wetlands determination process at any time to add an unmapped wetland to the VSWI maps that meets the presumptions and is significant.

4. **No Determination Request and No Permit:** If there is no permit requested for an activity in the wetland or buffer zone, the addition of the wetland to the VSWI map can occur at a later time, when the information in Section 8.2 and 8.3 can be obtained.

**c. Mapping:** The notice requirements outlined in Section 8.3 for determinations will be followed for map updates. A map showing the location and general boundaries of the wetland proposed to be mapped will accompany the petition notice. The new wetland will be added to the map following the final notice of determination. In situations where no determination is requested and no permit is applied for, map updates may be batched by the Agency on a quarterly or bi-annual schedule to reduce associated costs and to streamline workload. At a minimum, the VSWI maps will have a project location mark on the VSWI map that indicates the approximate location of the Class II wetland until the polygon can be formally added. VT GIS Wetland Mapping Standards will be followed for remote mapping of these types of wetlands. This information will be made available to the public through VCGI and the ANR Environmental Interest Locator.

#### **4. Unmapped Wetlands That Do Not Meet the Section 4.6 Presumptions and Are Significant**

**a. Jurisdiction:** If an unmapped wetland does not meet the presumptions, but provides significant functions and values, the determination process outlined in Section 8.1 will be followed to make the determination that the wetland is significant and should be classified as Class II.

**b. Process:** The determination process as outlined in Section 8 will be followed. A hybrid wetland permit/determination process can be followed in this case.

1. In contested situations a notice of preliminary determination will be issued to the landowner by a registered letter and will be valid for 60 days. The formal determination process should begin within this 60-day period. The formal determination process begins when a written petition is received pursuant to Section 8.2 or when the Agency initiates the determination process and lists it on the Agency website pursuant to Section 8.3.

2. In uncontested situations where an application is pending, or where no work is proposed a preliminary determination may be informally issued, and will not be subject to the 60-day deadline.

**c. Mapping:** The notice for the determination process as outlined in Section 8 will be followed. A map showing the location of the wetland proposed to be mapped will accompany the petition notice. The new wetland will be added to the map following the final notice of determination. This information will be made available to the public through VCGI and the ANR Environmental Interest Locator.

### ***B. Non-Significant Wetlands***

#### **1. Mapped Wetlands That Are Not Significant**

**a. Jurisdiction:** VSWI mapped wetlands are considered Class II wetlands unless determined otherwise by the Secretary. If a VSWI mapped wetland is not significant upon field verification of the functions and values within the entire limits of the wetland, it may be reclassified on the VSWI maps to Class III using the process outlined in Section 8.1. Contiguous portions of larger wetlands can not be evaluated separately from the larger wetland. A notice of preliminary determination will be issued by a registered letter in accordance with Section 8.1. The formal

determination process begins when an application for a determination is received or when ANR lists the petition on the Agency website.

**b. Process:** The determination process as outlined in Section 8 will be followed.

**c. Mapping:** The determination process as outlined in Section 8 will be followed, and the map shall be corrected and listed as Class III at the conclusion of this process. This information will be made available to the public through VCGI and the ANR Environmental Interest Locator.

## **2. Unmapped Wetlands That Meet the Presumptions and Are Not Significant**

**a. Jurisdiction:** Wetlands that meet the presumptions are considered Class II wetlands unless determined otherwise by the Secretary. If an unmapped wetland that meets the presumptions listed in Section 4.6 is not significant upon field verification of the functions and values within the entire limits of the wetland, it may be classified as Class III. An informal determination will consist of a letter from the Agency with a written evaluation of function and value. This letter will be valid for five years. The wetland may need to be reassessed after five years. A formal wetland determination requires an application for a VWP Determination Petition as outlined in Section 8.

**b. Process:** The determination process as outlined in Section 8 will be followed.

**c. Mapping:** The determination process, as outlined in Section 8, will be followed, but map updates may be limited to a project location mark on the VSWI map that indicates the approximate location of the Class III wetland. This information will be made available to the public through VCGI and the ANR Environmental Interest Locator.

## **3. Unmapped Wetlands That Do Not Meet the Presumptions and Are Not Significant**

**a. Jurisdiction:** If the wetland does not meet a presumption and is not significant based on field verification, a formal determination process will not be required.

**b. Process:** No specific process is required, but documentation regarding the outcome of the function and value assessment will be part of the file.

**c. Mapping:** At a minimum, the VSWI maps may have a project location mark on the VSWI map that indicates the approximate location of the Class III wetland. This information will be made available to the public through VCGI and the ANR Environmental Interest Locator.

## ***C. Other Determinations***

### **1. Mapped Areas That Are Not Wetlands**

**a. Jurisdiction:** Areas that do not meet the definition of a wetland according to Section 2.38 of the VWR, and can not be delineated according to Section 3.2a are outside the jurisdiction of the VWR.

**b. Process:** Notice of map corrections removing a polygon from the VSMI map will be provided to Town Clerk offices and to a list of interested parties, if any, in accordance with Section 8.5a of the VWR. Documentation regarding the three parameters that define a wetland will be retained as part of the file.

**c. Mapping:** The wetland polygon will be removed from the VSWI maps in accordance with Section 8.5a of the VWR. This information will be made available to the public through VCGI and the ANR Environmental Interest Locator.

### **2. Buffer Zone Adjustments**

**a. Jurisdiction:** A buffer zone to a wetland may be adjusted to a larger or smaller width in accordance with the process in Section 8 of the VWR.

**b. Process:** The documentation and notification requirements as outlined in Section 8 will be followed, with information about how the change in buffer width will add to, or not detract from, the ability of the wetland to provide its current functions and values.

#### **1. 60-day Notice:**

a) In contested situations, a notice of preliminary determination will be issued to the landowner by a registered letter and will be valid for 60 days. The formal determination process should begin within this 60-day period. The formal determination process begins when a written petition is received or when the Agency initiates the determination process and lists it on the Agency website.

b) In uncontested situations where an application is pending, or where no work is proposed a preliminary determination may be issued informally, and will not be subject to the 60-day deadline.

2. Individual Permit: If this type of wetland has an associated project and there is an application for a permit, the documentation and notification requirements for Sections 8.2 and 8.3 will be met through the permit application and notification process. The agency will provide two notices for the permit and for the determination with 15-day and 30-day notification periods, respectively.

3. Non-Permit: If there is no permit requested for the wetland, the buffer adjustment must undergo a stand alone determination process pursuant to Section 8.

**c. Mapping:** Map updates will comprise of a note about the adjusted buffer width in the attribute table for the wetland polygon. This information will be made available to the public through VCGI and the ANR Environmental Interest Locator.

Signed this 20<sup>th</sup> day of March, 2013

By   
David K. Mears, Commissioner  
Department of Environmental Conservation

## APPENDIX I: SECTION 4.6 PRESUMPTIONS

All wetlands contiguous to wetlands shown on the Vermont Significant Wetland Inventory maps are presumed to be Class II wetlands, unless identified as Class I or III wetlands, or unless determined otherwise by the Secretary or Panel pursuant to Section 8. In addition, each of the following wetlands shall be presumed to be Class II wetlands unless determined otherwise by the Secretary or Panel:

- a. The wetland is of the same type and threshold size as those mapped on the VSWI maps: i.e.; open water (pond); emergent marsh; shrub swamp; forested swamp; wet meadow; beaver pond or beaver meadow; bog or fen; or greater than 0.5 acres.
- b. The wetland contains woody vegetation and is adjacent to a stream, river or open body of water.
- c. The wetland contains dense, persistent non-woody vegetation and is adjacent to a stream, river or open body of water.
- d. The wetland is a vernal pool that provides amphibian breeding habitat.
- e. The wetland is a headwater wetland.
- f. The wetland is adjacent to impaired waters and the impairment is related to wetland water quality functions.
- g. The wetland contains a species that appears in the NNHP database as rare, threatened, endangered or uncommon; or is a natural community type that is rare or uncommon.
- h. The wetland has been previously designated as a significant wetland.
- i. It is within sixty (60) days after the landowner has received notice of a preliminary wetland determination pursuant to Section 8.1 of these rules.

## **APPENDIX II: SECTION 8 WETLANDS DETERMINATIONS BY THE SECRETARY**

### **8.1 General**

The Secretary may, upon a petition or on his or her own motion, determine whether any wetland is a Class II Wetland or a Class III wetland, pursuant to 10 V.S.A. § 914 and these rules. Such determinations shall be based on an evaluation of the functions and values set forth in statute and these rules. The Secretary may establish the necessary width of a buffer zone of any Class II wetland as part of any wetland determination pursuant to these rules. Any wetland proposed by the Secretary to be designated as a Class II wetland shall be presumed to be a significant wetland until the Secretary determines otherwise. This presumption shall become effective upon receipt by the landowner of a registered letter from the Secretary giving notice of a preliminary wetland determination, and shall last sixty (60) days thereafter.

### **8.2 Contents of Petitions**

Any request by a person for the Secretary to make a determination pursuant to Section 8.1 shall be in writing and must contain the following:

- a. a description of the specific location of the subject wetland or buffer zone and the location on a USGS topographic map or the relevant portion of the VSWI map;
- b. a detailed narrative of the action(s) sought by the petitioner and why the action(s) are consistent with these rules, including a description of the wetland and each wetland function and value (Section 5) at issue;
- c. copies of all documents which the petitioner intends to rely upon in support of the request;
- d. the names and complete mailing addresses of all persons owning property within or adjacent to the wetland area and buffer zone in question.
- e. all determinations and decisions, if any, issued by the Secretary, Panel or former Water Resources Board, pertaining to the wetland or buffer at issue; and
- f. such other information as the Secretary may require.

### **8.3 Notification Requirements**

- a. The Petitioner shall provide written notice of a petition for a determination

under this section to the owner of each parcel of land within or adjacent to the wetland area or buffer zone being considered, and shall certify to the Secretary in writing that such notice has been provided, and shall state in the written certification the name and address of each person notified and the date and manner that notice was provided.

- b. The Secretary shall provide by mail written notice of a proposed determination to the owner of each parcel of land within or adjacent to the wetland area or buffer zone being considered. The Secretary shall publish notice on the Agency website and provide an electronic notice to persons who have requested to be on a list of interested persons. Such notice shall include the date of the Secretary's proposed determination and shall provide no fewer than thirty (30) days from the date of the Secretary's proposed determination within which to file written comments or to request that the Secretary hold a public meeting on the proposed determination. The Secretary will provide notice of any public meeting in the same manner as the proposed determination.
- c. The Secretary shall provide, in person, by mail, or by electronic notice, a written copy of a final wetland determination under this Section to the petitioner and to those receiving notice pursuant to Section 8.3(a).

#### **8.4 Reconsideration of Wetland Determinations**

Within 15 days of the date of the decision, the applicant, any person entitled to notice under Section 8.3(a), or any person who filed written comments regarding the permit application may request in writing reconsideration by the Secretary. Such a request shall specify all action(s) for which reconsideration is sought and shall provide an explanation of the reason(s) why the request is filed. Where a request for reconsideration has been properly filed, additional evidence may be submitted concerning the functions and values of the wetland, and any other material issue as deemed appropriate by the Secretary. The Secretary may appoint a designee who shall be at the Division Director level or higher to render a decision on the request for reconsideration. The Secretary's written reconsideration decision shall be issued as expeditiously as possible under the circumstances, and shall be distributed in accordance with Section 8.3(c). The Secretary's written reconsideration decision shall constitute a final act or decision of the Secretary, subject to appeal pursuant to 10 V.S.A. § 8504 and Section 10 of these Rules.

No request for reconsideration may be filed concerning or resulting from a request for reconsideration. If the Secretary fails to act on a request for reconsideration within 20 days of its filing, the request shall be deemed to be denied.

Filing a timely request for reconsideration with the Secretary tolls the 30-day period for filing an appeal with the Environmental Court. The full time for appeal shall commence to run and shall be computed from the date of the issuance of the Secretary's decision on the reconsideration request.

## **8.5 Mapping Corrections**

The Secretary shall have the authority to make the following mapping corrections, which are not wetland determinations pursuant to 10 V.S.A. § 914. VSWI map updates based on these determinations will be reflected on the VSWI map located on the Department of Environmental Conservation's Environmental Interest Locator website.

- a. The Secretary may, upon request or on his or her own motion, determine whether a polygon on the VSWI map is not a wetland. Such determinations shall be based on the methodology for identifying wetlands in Section 3.2.a of these rules. Section 8.3 notification requirements do not apply to such map corrections. The Secretary shall provide notice of such map corrections to Town Clerk offices on a periodic basis, and to a list of interested parties, if any
- b. The Secretary may determine that a polygon on the VSWI map is inaccurate and may change the configuration of the polygon to more accurately reflect the location of a wetland, as determined from aerial photos, field visits, field delineations and other relevant information. Section 8.3 notification requirements shall not apply to such changes. These types of changes do not alter the classification of the wetland, but enhance the accuracy of the VSWI maps. These map corrections generally fall into the following three categories:
  - i. Registration errors: Wetland polygons that do not line up with the underlying base layers. The most common error in this category are small ponds that do not line up with visible ponds on ortho-photos. A notice of map changes made based on these determinations will be sent to Town Clerk offices on a periodic basis and to a list of interested parties, if any.
  - ii. Corrections based on field verified contiguity: This type of mapping correction is based on field verified information of the general size and location of the wetland, and adjusts the wetland boundary of an already designated Class II wetland. Wetland delineations that are not part of a permitting action are included in this category. A notice of map changes

based on these determinations will be sent to Town Clerk offices, to the affected landowners and to a list of interested parties, if any.

- iii. Corrections based on wetland delineation associated with a permit action. This type of mapping correction is based on a field delineated wetland boundary location of an already designated Class II wetland. The notice of map change will be included in notifications required under Sections 9.2, 9.3 and 9.8.

## **APPENDIX III: SECTION 10 APPEALS**

Appeals from any act or decision of the Secretary under these rules are governed by 10 V.S.A. § 8504.