

9. Criterion 1(G) (Wetlands)

I. Requirements for Issuance of Permit

Criterion 1(G) requires that the project “will not violate the rules of the board, as adopted under this chapter, relating to significant wetlands.” 10 V.S.A. § 6086(a)(1)(G).

II. Burden of Proof

The applicant bears the burden of proof on Criterion 1(G). 10 V.S.A. § 6088(a).

III Analysis

Criterion 1(G) requires compliance with the Vermont Wetland Rules. The Vermont Wetland Rules protect only “significant” wetlands and associated buffers. A “significant” wetland is one that appears on the Vermont Significant Wetland Inventory (VSWI) maps as a Class I or Class II wetland, or one that is determined, pursuant to 10 V.S.A. § 914, to be significant by the Agency of Natural Resources in a wetland determination. See 10 V.S.A. §§ 902(11)(defining “significant wetland” as a Class I or Class II wetland); 902(6)(defining “Class I wetland”); 902(7)(defining “Class II wetland”); see *also* Vermont Wetland Rules § 1.1 (purpose of Wetland Rules is to protect significant wetlands).

Note, however, that a wetland that is not a Class I or II “significant” wetland may still be protected by Act 250 under other criteria, such as Criteria 1(F) or 8.

The Vermont Wetlands Rules require certain projects to obtain a Wetland Permit –formerly called a Conditional Use Determination or “CUD” – from the Agency of Natural Resources. If a project has a Wetland Permit or CUD, the activity covered by that permit is entitled to a presumption that it complies with the Vermont Wetland Rules, and thus Criterion 1(G). Act 250 Rule 19(E)(5). In addition, technical determinations made by ANR in issuing such a permit or CUD are entitled to substantial deference. 10 V.S.A. § 6086(d). Any evidence of noncompliance with the Vermont Wetland Rules is sufficient to rebut the Rule 19 presumption, but the substantial deference due ANR technical determinations may only be overcome by clear and convincing evidence.

If the project may impact a wetland that does not appear on the VSWI maps, the applicant may request a wetland determination from ANR to establish whether the wetland is significant and protected under the Vermont Wetland Rules. See 10 V.S.A. § 914. To be clear, Criterion 1(G) only considers compliance with the Vermont Wetland Rules. It does not consider compliance with federal regulations, which apply to all wetlands.

IV. Historical Note

Before 2010, the Vermont Wetland Rules protected only those wetlands that

appeared on the VSWI maps as Class II wetlands, and Class I wetlands (as of 2012, there were only four Class I wetlands). Much of the Act 250 case precedent on Criterion 1G is based on this principle. However, in 2010, the statutes governing wetland protection and the Vermont Wetland Rules were amended to protect significant wetlands even if they do not appear on the VSWI maps. The ANR wetland determination process was established in this set of amendments. See 10 V.S.A. §§914, 916 – 917.

In 2012, the Legislature transferred authority for amending the Vermont Wetland Rules and for classifying Class I wetlands from the Water Resources Panel to ANR.

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