

TO THE HOUSE OF REPRESENTATIVES

The Committee on Fish, Wildlife and Water Resources, to which was referred House Bill H.685, entitled “AN ACT RELATING TO ENFORCEMENT OF ENVIRONMENTAL LAWS”

respectfully report that they have met and considered the same and recommend that the bill be amended by striking all after the enacting clause and inserting in lieu thereof the following:

Sec. 1. 10 V.S.A. § 8002 is amended to read:

§ 8002. DEFINITIONS

As used in this chapter:

- (1) “Board” means the natural resources board defined by subdivision 6001(1) of this title.
- (2) “Compliance” means compliance with the statutes specified in section 8003 of this title, and with any related rules, permits, assurances, or orders.
- (3) “Investigator” means an investigator designated and duly authorized by the secretary or the board.
- (4) “Person” means any individual, partnership, company, corporation, association, unincorporated association, joint venture, trust, municipality, the

state of Vermont or any agency, department or subdivision of the state, federal agency, or any other legal or commercial entity.

(5) “Permit” means any permit, license, certification or transitional operational authority issued under any of the statutes specified in section 8003 of this title.

(6) “Respondent” means a person who has committed or is alleged to have committed a violation.

(7) “Secretary” means the secretary of the agency of natural resources, or the secretary’s duly authorized representative.

(8) “Stop work order” means an order to cease construction or other activity.

(9) “Violation” means noncompliance with one or more of the statutes specified in section 8003 of this title, or any related rules, permits, assurances, or orders.

(10) “Land use panel” means the land use panel of the board, as established under chapter 151 of this title.

(11) “Economic benefit” means a reasonable approximation of any gain, advantage, wrongful profit, or delayed avoided cost, financial or otherwise, obtained as a result of a violation. Economic benefit shall not be limited to only competitive advantage obtained.

Sec. 2. 10 V.S.A. § 8006 is amended to read:

§ 8006. WARNING; NOTICE OF ALLEGED VIOLATION

(a) When the secretary determines that a violation will or is likely to occur, the secretary may issue a written warning which shall be served on the respondent in person or by certified mail, return receipt requested. The warning shall include a brief description of the prospective violation, identification of the statute, rule, permit, assurance, or order that is the subject of the prospective violation and a brief description of the potential enforcement actions which may be taken if the violation occurs.

(b) When the secretary determines that a violation exists, the secretary may issue a written notice of the alleged violation. The notice shall be served on the respondent in person or by certified mail, return receipt requested. The notice shall include a brief description of the alleged violation, identification of the statute, rule, permit, assurance, or order that is the subject of the violation ~~and~~, a brief description of the secretary's intended course of action to address the alleged violation, and, if appropriate, specific time lines and directives to achieve compliance.

Sec. 3. 10 V.S.A. § 8007 is amended to read:

§ 8007. ASSURANCES OF DISCONTINUANCE

(a) As an alternative to administrative or judicial proceedings, the secretary, or the land use panel, may accept from a respondent an assurance of discontinuance of a violation. An assurance of discontinuance shall include:

(1) a statement of the facts which provide the basis for claiming the violation exists and a description of the alleged violation determined by the secretary or the land use panel; and

(2) an agreement by the respondent to perform specific actions to prevent, abate or alleviate environmental problems caused by the violation, or to restore the environment to its condition before the violation, including financial responsibility for such actions.

(b) An assurance of discontinuance may include:

(1) prevention, abatement, alleviation, or restoration schedules;

(2) contribution toward other projects related to the violation, which the respondent and the secretary or the land use panel agree will enhance the natural resources of the area affected by the violation, or their use and enjoyment. A contribution under this subdivision shall be subject to the following:

(A) the respondent shall disburse all required contributions to the project or shall be in full and continuing compliance with a payment schedule

established by the assurance of discontinuance no later than 180 days after the effective date of the assurance discontinuance requiring the funding of such project;

(B) in the event that a respondent fails to comply with subdivision (A) of this subdivision (2), the respondent shall place the funds into either an attorneys' interest on lawyers' trust account (IOLTA) or an escrow account;
and

(C) unless otherwise contrary to requirements of federal law, a contribution is not permissible where the project primarily benefits the respondent, including activities:

(i) that are required by law, likely to be required by law, or reasonably associated with the respondent's usual course of business; or

(ii) which the respondent has planned, budgeted for, initiated, or completed prior to or during the current enforcement action.

(3) payment of monetary penalties, including stipulated penalties for violation of the assurance.

(c) An assurance of discontinuance shall be in writing and signed by the respondent and shall specify the statute or regulation alleged to have been violated. The assurance of discontinuance shall be simultaneously filed with the attorney general and the environmental court. The secretary or the land use panel shall post a final draft assurance of discontinuance to its website and

shall provide a final draft assurance of discontinuance to a person upon request. When signed by the environmental court, the assurance shall become a judicial order. Upon motion by the attorney general made within 10 days of the date the assurance is signed by the court and upon a finding that the order is insufficient to carry out the purposes of this chapter, the court shall vacate the order.

* * *

Sec. 4. 10 V.S.A. § 8008 is amended to read:

§ 8008. ADMINISTRATIVE ORDERS

(a) The secretary may issue an administrative order when the secretary determines that a violation exists. The order shall be served on the respondent in person or by ~~certified mail, return receipt requested~~ acceptance of service, in accordance with court rules, by a person designated by the respondent. A copy of the order also shall be delivered to the attorney general. An order shall be effective on receipt unless stayed under subsection 8012(e) of this title.

(b) An order shall include:

(1) a statement of the facts which provide the basis for claiming the violation exists;

(2) identification of the applicable statute, rule, permit, assurance or order;

(3) a statement that the respondent has a right to a hearing under section 8012 of this title, and a description of the procedures for requesting a hearing;

(4) a statement that the order is effective on receipt unless stayed on request for a hearing filed within 15 days; and

(5) if applicable, a directive that the respondent take actions necessary to achieve compliance, to abate potential or existing environmental or health hazards, and to restore the environment to the condition existing before the violation.

(c) An order may include:

(1) a “stop work” order that directs the respondent to stop work until a permit is issued, compliance is achieved, a hazard is abated, or any combination of the above. In issuing such an order, the secretary shall consider the economic effect of the order on individuals other than the respondent;

(2) a stay of the effective date or processing of a permit under section 8011 of this title; and

(3) a proposed penalty or penalty structure.

(d)(1) The administrative order and proof of service shall be simultaneously filed with the attorney general and the environmental court.

The court shall sign the administrative order in the event that:

(A) The administrative order is properly served on a respondent in accordance with subsection (a) of this section;

(B) The respondent does not request a hearing in accordance with subsection (b) of this section; and

(C) the order otherwise meets the requirements of this chapter.

(2) When signed by the environmental court, the administrative order shall become a judicial order. Upon motion by the attorney general made within 10 days of the date the administrative order is signed by the court and upon a finding by the court that the order is insufficient to carry out the purposes of this chapter, the court shall vacate the order.

Sec. 5. 10 V.S.A. § 8010 is amended to read:

§ 8010. ADMINISTRATIVE PENALTIES

(a) An administrative penalty may be included in an administrative order issued under section 8008 of this title or in an emergency administrative order issued under subdivision 8009(a)(1) or (3) of this title. An order assessing administrative penalties shall be accompanied by an affidavit setting forth the facts establishing the date of violation.

(b) In determining the amount of the penalty, the secretary shall consider the following:

(1) the degree of actual or potential impact on public health, safety, welfare and the environment resulting from the violation;

(2) the presence of mitigating circumstances, including unreasonable delay by the secretary in seeking enforcement;

(3) whether the respondent knew or had reason to know the violation existed;

(4) the respondent's record of compliance;

(5) ~~the economic benefit gained from the violation;~~

(6) the deterrent effect of the penalty;

(7) the state's actual costs of enforcement; and

(8) the length of time the violation has existed.

(c)(1) A penalty of not more than ~~\$25,000.00~~ \$42,500.00 may be assessed for each determination of a separate violation. In addition, if the secretary determines that a violation is continuing the secretary may assess a penalty of not more than ~~\$10,000.00~~ \$17,000.00 for each day the violation continues. The maximum amount of penalty assessed under this subsection shall not exceed ~~\$100,000.00~~ \$170,000.00.

(2) In addition to a penalty assessed under subdivision (1) of this subsection, the secretary may assess a penalty for the economic benefit gained from a violation.

(d) Notwithstanding the provisions of subsection 8003(b) of this title, imposition of an administrative penalty under this section precludes imposition

of any other administrative or civil penalty under any other provisions of law for the same violation.

(e) Penalties assessed under this section shall be deposited in the general fund, except for those penalties which are assessed as a result of a municipality's enforcement action under chapter 64 of this title, in which case the municipality involved shall receive the penalty monies.

Sec. 6. 10 V.S.A. § 8011(a) is amended to read:

(a) An administrative order may stay the effective date or processing of a permit:

(1) when any activity has been commenced illegally without a permit. The order may stay the effective date of the permit for a period of time up to the number of days that the activity was commenced before the permit was issued. This period of time shall not include the time from the date that work was stopped until the date a permit is issued; or

(2) when an applicant for a permit, or for an amendment to a permit, is not in compliance with an administrative order or an assurance of discontinuance with respect to a violation that is directly related to the activity which is the subject of the application; or

(3) when an applicant for a permit, or for an amendment to a permit, has one or more current violations, ~~which when viewed together constitute~~ ~~substantial noncompliance.~~

Sec. 7. 10 V.S.A. § 8014 is amended to read:

§ 8014. ENFORCEMENT OF FINAL ORDERS; COLLECTION ACTIONS

(a) The secretary may seek enforcement of a final administrative order or a landfill extension order in the superior or district court or before the environmental court.

(b) If a penalty is assessed and the respondent fails to pay the assessed penalty within the time prescribed, the secretary may bring a collection action in any superior or district court. In addition, when a respondent fails to pay an assessed penalty or fails to pay a contribution under subdivision 8007(b)(2) of this title within the prescribed time period, the secretary or the land use panel shall stay the effective date or the processing of any pending permit application or renewal application in which the respondent is involved until payment in full of all outstanding penalties has been received. The secretary or the land use panel may collect interest on an assessed penalty that a respondent fails to pay within the prescribed time. The secretary or the land use panel shall collect interest on a contribution under subdivision 8007(b)(2) of this title that a respondent fails to pay within the prescribed time.

(c) ~~The~~ Notwithstanding 32 V.S.A. § 502, the secretary may contract with private collection agencies, or with attorneys engaged for similar purposes, for the collection of penalties or other monetary awards owed pursuant to assurances of discontinuance, final administrative orders, emergency

administrative orders, or judgments after hearing or other judicial rulings. The cost of collection shall be assessed against and added to the penalty assessed against a respondent. The secretary may agree to pay private collection agencies or attorneys a fixed rate for services rendered or a percentage of the amount actually collected by the agencies or attorneys and remitted to the secretary. ~~Notwithstanding 32 V.S.A. § 502, the secretary may charge against collections an agreed upon fixed rate or percentage of collections, for the purpose of making payments to private collection agencies or attorneys.~~

Sec. 8. 10 V.S.A. § 8015 is amended to read:

§ 8015. STATUTE OF LIMITATIONS

Notwithstanding any other provision of law, actions brought under this chapter or chapter 211 of this title shall be commenced within the ~~latter~~ later of:

(1) six years from the date the violation is or reasonably should have been discovered; or

(2) six years from the date a continuing violation ceases.

Sec. 9. 10 V.S.A. § 8017 is amended to read:

§ 8017. ANNUAL REPORT

The secretary and the attorney general shall report annually to the president pro tempore of the senate, the speaker of the house, the house committee on fish, wildlife and water resources, and the chairs of the senate and house

committees on natural resources and energy. The report shall be filed no later than January 15, on the enforcement actions taken under this chapter, and on the status of citizen complaints about environmental problems in the state. The report shall describe, at a minimum, the number of violations, the actions taken, disposition of cases, the amount of penalties collected, and the cost of administering the enforcement program.

Sec. 10. 10 V.S.A. § 8221(b)(6) is amended to read:

(b) The court may grant temporary and permanent injunctive relief, and may:

* * *

(6) levy a civil penalty as provided in this subdivision. A civil penalty of not more than ~~\$50,000.00~~ \$85,000.00 may be imposed for each violation. In addition, in the case of a continuing violation, a penalty of not more than ~~\$25,000.00~~ \$42,500.00 may be imposed for each day the violation continues. In fixing the amount of the penalty the court shall apply the criteria set forth in subsection 8010(b) of this title. The cost of collection of penalties or other monetary awards shall be assessed against and added to a penalty assessed against a respondent.

Sec. 11. 10 V.S.A. § 6083(d) is amended to read:

(d) The panels of the board and commissions shall make all practical efforts to process matters before the board and permits in a prompt manner.

The land use panel shall establish time limits for the processing of land use permits issued under section 6086 of this title as well as procedures and time periods within which to notify applicants whether an application is complete. The land use panel shall report annually by February 15 to the house and senate committees on natural resources and energy and on government operations, and the house committee on fish, wildlife and water resources. The annual report shall assess the performance of the board and commissions in meeting the limits; identify areas which hinder effective performance; list fees collected for each permit; summarize changes made to improve performance; and describe staffing needs for the coming year. The annual report shall list the number of enforcement actions taken by the land use panel, the disposition of such cases, and the amount of penalties collected.

Sec. 12. DATABASE OF ENVIRONMENTAL ENFORCEMENT ACTIONS

On or before January 15, 2009, the agency of natural resources, after consultation with the attorney general and the land use panel, shall report to the house committee on fish, wildlife and water resources and the house and senate committees on natural resources and energy with a recommendation for establishing a publicly available, searchable database of enforcement actions initiated by the agency of natural resources or the land use panel under chapter 201 of Title 10 and enforcement actions initiated by the attorney general under chapter 211 of Title 10. The report shall include:

(1) A recommendation on how to establish the database, including coordination among the agency of natural resources, the attorney general, and the land use panel;

(2) A recommendation of the type of documents that should be posted to the database;

(3) An estimate of the cost to the agency of natural resources, the attorney general, and the land use panel of establishing and maintaining the database; and

(4) An estimate of the time necessary to develop the database so that it is available for public use.

Sec. 13. ENVIRONMENTAL ENFORCEMENT OFFICERS

The commissioner of fish and wildlife shall deputize environmental enforcement officers employed by the agency of natural resources as deputy game wardens of the state, and environmental enforcement officers so deputized shall have the same powers and immunities as those conferred to deputy game wardens under 10 V.S.A. §§ 4193 and 4198, provided that the environmental enforcement officer shall comply with any additional requirements for certification under these sections.

Sec. 14. AGENCY OF NATURAL RESOURCES REPORT ON IMPLEMENTATION OF THE GENERAL PERMIT FOR POTABLE WATER SUPPLIES AND WASTEWATER SYSTEMS

On or before January 15, 2009, the agency of natural resources shall submit to the house committee on fish, wildlife and water resources and the senate committee on natural resources and energy a status report regarding implementation of the potable water supply and wastewater system general permitting program authorized under No. 32 of the Acts of 2007. The report shall include:

(1) The number of persons seeking coverage under the general permit for potable water supplies and wastewater systems;

(2) The number of site visits completed by agency of natural resources personnel to review applications for coverage under and compliance with the general permit for potable water supplies and wastewater systems; and

(3) The number of and disposition of actions brought by the agency of natural resources to enforce the requirements of the general permit for potable water supplies and wastewater systems.

Sec. 15. AGENCY OF NATURAL RESOURCES REPORT ON

IMPLEMENTATION OF STORMWATER GENERAL PERMITS

As part of the report required under 10 V.S.A. § 1264(f)(3), the agency of natural resources shall submit to the house committee on fish, wildlife and water resources and the senate committee on natural resources and energy on or before January 15, 2009 a status report on implementation of the stormwater general permits issued under chapter 47 of Title 10. The report shall include:

(1) The number of persons seeking coverage under each general permit issued under chapter 47 of Title 10;

(2) The number of site visits completed by agency of natural resources personnel to review applications for coverage under and compliance with a general permit issued under chapter 47 of Title 10; and

(3) The number of and disposition of enforcement actions brought by the agency of natural resources to enforce the requirements of a general permit issued under chapter 47 of Title 10.

Sec. 16. AGENCY OF NATURAL RESOURCES REPORT ON
ENFORCEMENT BY THE DEPARTMENT OF FORESTS,
PARKS AND RECREATION

On or before January 15, 2009, the secretary of natural resources shall report to the house and senate committees on natural resources and energy, and the house committee on fish, wildlife and water resources with a proposal to increase enforcement of the existing laws and regulations within the jurisdiction of the department of forests, parks and recreation. The report shall include:

(1) An evaluation and recommendation of whether violations of laws and rules within the jurisdiction of the department of forests, parks and recreation should be enforced as judicial bureau offenses under 4 V.S.A. § 1102.

(2) An analysis of whether effective enforcement of the laws and rules within the jurisdiction of the department of forests, parks and recreation requires additional enforcement authority not currently included in 10 V.S.A. chapter 201 or 29 V.S.A. chapter 11.

(3) A recommendation of whether authority beyond the ability of filing a civil action should be granted to the department of forests, parks and recreation to enforce encroachments on state land boundaries, including the unauthorized cutting of trees.

(4) An assessment of the feasibility and necessity for statutory or regulatory changes to enhance compliance with state park rules;

(5) A proposal to clarify public access rights along state forest highways; and

(6) A proposal to use rulemaking by the department of forests, parks and recreation to establish enforceable standards and increased fines and penalties where appropriate.