

No. 73. An act relating to public participation in environmental enforcement proceedings.

(H.258)

It is hereby enacted by the General Assembly of the State of Vermont:

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

§ 8002. DEFINITIONS

As used in this chapter:

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(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.

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(12) “Environmental court” or “environmental division” means the environmental division of the superior court established by 4 V.S.A. § 30.

(13) “Civil complaint” means an environmental citation issued by the secretary or the board for a violation of a statute listed under subsection 8003(a) of this title.

(14) “Federally authorized or delegated program” means an area of environmental regulation where the U.S. Environmental Protection Agency has authorized or delegated to Vermont primary regulatory responsibility, including the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act.

(15) "Post" means:

(A) placing a draft administrative order, assurance of discontinuance, or civil complaint or a final administrative order, assurance of discontinuance, or civil complaint on the website of the secretary if he or she initiates an enforcement action under this chapter or on the website of the board if it initiates an enforcement action; and

(B) providing public notice about the opportunity to:

(i) submit written comments regarding a draft administrative order, assurance of discontinuance, or civil complaint; or

(ii) request intervention in a final administrative order, assurance of discontinuance, or civil complaint.

Sec. 2. 10 V.S.A. § 8012 is amended to read:

§ 8012. REQUEST FOR HEARING

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(b) The environmental division shall have authority to:

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(2) affirm, or vacate and remand to the secretary an order issued under subdivision 8008(b)(5) of this title. The environmental division shall vacate and remand an order under this subdivision when a violation is found to exist but the procedure contained in the order is ~~not reasonably likely to achieve the intended result~~ insufficient to carry out the purposes of this chapter;

* * *

~~(d) The environmental division may grant party status to an aggrieved person for the purpose of providing evidence and legal arguments only in relation to the sufficiency of an order issued under the authority of section 8008 of this title. As used in this subsection, an “aggrieved person” means a person who demonstrates that the interest of that person is not adequately represented by any other party and who at the time of the alleged violation had:~~

~~(1) an ownership, leasehold or contractual interest in real property directly affected by the violation described in the order; or~~

~~(2) an interest in the outcome of the proceeding which is distinct from the interest of the public at large because of the person’s place of residence, place of employment or place of business.~~

~~(e)~~(d) Notice of a request for hearing shall stay the order and payment of the penalty, if imposed, pending the hearing. The secretary may issue an emergency order with regard to the alleged violation that is the subject of the hearing, if grounds for such an order develop during the hearing process.

~~(f)~~(e) Any claim a person may have under a private right of action which is not determined in a proceeding under this chapter shall be preserved.

Sec. 3. 10 V.S.A. § 8013 is amended to read:

§ 8013. CONDUCT OF HEARINGS; APPEAL; STAY

(a) The secretary shall have the burden of proof by a preponderance of the evidence.

(b) Parties may be represented by counsel in hearings before the environmental division. The agency of natural resources may represent itself. A party may conduct cross-examination required for a full and true disclosure of the facts.

(c) An appeal from a decision of the environmental division may be taken by the secretary, the board, or the respondent to the supreme court. The attorney general also may appeal if the attorney general has appeared as a party.

(d) An appeal by a respondent or the attorney general to the supreme court shall not stay an order, but shall stay payment of a penalty. A respondent may petition the supreme court for a stay of an order.

Sec. 4. 10 V.S.A. § 8014(a) is amended to read:

(a) The secretary may seek enforcement of a final administrative order, final orders pursuant to an assurance of discontinuance, or civil complaints pursuant to section 8019 of this title, or a landfill extension order in the civil, criminal, or environmental division of the superior court.

Sec. 5. 10 V.S.A. § 8019 is amended to read:

§ 8019. ~~ENVIRONMENTAL TICKETING~~ CIVIL COMPLAINTS

(a) The secretary and the board each shall have the authority to adopt rules for the issuance of civil complaints for violations of their respective enabling statutes or rules adopted under those statutes that are enforceable in the ~~judicial bureau pursuant to the provisions of chapter 29 of Title 4~~ environmental

division. Any proposed rule under this section shall include ~~both~~ the full, minimum, and waiver penalty amounts for each violation. The maximum civil penalty for any violation brought under this section shall not exceed \$3,000.00 exclusive of court fees.

(b) A civil complaint issued under this section shall preclude the issuing entity from seeking an additional monetary penalty for the violation specified in the complaint when any one of the following occurs: the waiver penalty is paid, judgment is entered after trial or appeal, or a default judgment is entered. Notwithstanding this preclusion, the agency and the board may issue additional complaints or initiate an action under chapter 201 of this title, including a monetary penalty when a violation is continuing or is repeated, and may also bring an enforcement action to obtain injunctive relief or remediation and, in such additional action, may recover the costs of bringing the additional action and the amount of any economic benefit the respondent obtained as a result of the underlying violation in accordance with subdivisions 8010(b)(7) and (c)(1) of this title.

(c) The secretary or board chair and his or her duly authorized representative shall have the authority to amend or dismiss a complaint by so marking the complaint and returning it to the ~~judicial bureau~~ environmental division or by notifying the hearing officer or judge at the hearing.

(d) Subsequent to the issuance of a civil complaint under this section and the conclusion of any hearing and appeal regarding that complaint, the

following shall be considered part of the respondent's record of compliance when calculating a penalty under section 8010 of this title:

(1) The respondent's payment of the full or waiver penalty stated in the complaint.

(2) The respondent's commission of a violation after the hearing before the ~~judicial bureau~~ environmental division on the complaint.

(3) The respondent's failure to appear or answer the complaint resulting in the entry of a default judgment.

(4) A finding, after appeal, that the respondent committed a violation.

(e) Penalties assessed under this section shall be deposited in the general fund.

Sec. 6. 10 V.S.A. § 8020 is added to read:

§ 8020. PUBLIC PARTICIPATION IN ENFORCEMENT

(a) Aggrieved person. As used in this section, an "aggrieved person" means a person who alleges an injury to a particularized interest protected by a statute listed under subsection 8003(a) of this section, and the alleged injury is attributable to a violation addressed by an assurance of discontinuance, administrative order, emergency order, or civil complaint issued under this chapter. An organization or association is an aggrieved person under this section when one or more of its members would be an aggrieved person in his or her own right, the interests at stake are germane to the purposes of the organization or association, and neither the claim asserted nor the relief

requested by the organization or association requires participation of the individual member.

(b) Draft and final action. Prior to issuing an administrative order, assurance of discontinuance, or civil complaint under this chapter and sending it to the environmental division, the secretary or the board shall post a draft copy of the administrative order, assurance of discontinuance, or civil complaint for public notice and written comment for 30 days. At the conclusion of the 30-day notice and written comment period, the secretary or the board shall evaluate the proposed action pursuant to the written comments received. After the evaluation of the written comments, the secretary or the board may withdraw an administrative order, assurance of discontinuance, or civil complaint. At the conclusion of the 30-day notice period, if no comments have been received, the secretary or the board shall file the draft as a final administrative order, assurance of discontinuance, or civil complaint with the environmental division, and the environmental division may review and approve as an order of the court the administrative order, assurance of discontinuance, or civil complaint as set out elsewhere in this chapter. When the secretary or board issues a final administrative order, assurance of discontinuance, or civil complaint, it shall be sent to the environmental division along with any written comments received during the 30-day comment period. Concurrent with filing with the environmental division, the

secretary or board shall post the final proposed action for public notice for 14 days.

(c) Filing with court. The environmental division shall hold the administrative order, assurance of discontinuance, or civil complaint for 14 days from the date of filing to allow any person who has filed written comments under subsection (b), who is not satisfied with the final action of the agency or the board, and who meets the definition of “aggrieved person” under subsection (a) of this section to file a motion for permissive intervention pursuant to the procedure in Rule 24(c) of the Vermont Rules of Civil Procedure.

(d) Court action without motion to intervene. At the conclusion of the 14-day period, if no motion to intervene has been filed, the environmental division shall take into consideration any comments received and in its discretion, with or without a hearing, shall issue an order to affirm, vacate, or remand the administrative order, assurance of discontinuance, or civil complaint.

(e) Condition precedent to intervention. In order for a person to intervene permissively in an administrative order, assurance of discontinuance, or civil complaint, the person shall have filed written comments with the agency or board setting out the specific objection to the proposed action during the 30-day comment period required under subsection (b) of this section.

(f) Court action upon motion to intervene. A motion for permissive intervention shall clearly state the basis for the claim that the administrative order, assurance of discontinuance, or civil complaint is insufficient to carry out the purposes of this chapter. A hearing may be held on the motion for permissive intervention in the discretion of the environmental division. When the environmental division determines that a motion to intervene fails to meet the requirements for permissive intervention, the court shall deny the motion.

(g) Emergency administrative order. When the secretary issues an emergency administrative order, the prefiling public notice and comment provisions contained in this section shall not apply. The environmental division, without comment or hearing, shall act on the emergency administrative order as required by section 8009 of this title and may issue its own order. The secretary shall publish the emergency administrative order concurrent with filing it with the environmental division. A person shall have 14 days from the date the emergency administrative order is filed to file a motion for permissive intervention. A motion to intervene shall not stay an emergency administrative order.

(h) Standard of review on motion to intervene. The environmental division shall evaluate a motion from an aggrieved person for permissive intervention in light of Rule 24(b)(1) of the Vermont Rules of Civil Procedure. When the environmental division permits an aggrieved person to intervene, it shall be for the sole purpose of establishing that the terms of an administrative order,

emergency administrative order, assurance of discontinuance, or civil complaint are insufficient to carry out the purposes of this chapter. The intervenor shall have the burden of proof by a preponderance of the evidence that the administrative order, emergency administrative order, assurance of discontinuance, or civil complaint is insufficient to carry out the purposes of this chapter. A hearing may be held on the claim that the administrative order, emergency administrative order, assurance of discontinuance, or civil complaint is insufficient to carry out the purposes of this chapter in the discretion of the environmental division. The environmental division upon finding that the proposed action is insufficient to carry out the purposes of this chapter shall inform the parties in writing and shall include the basis of its decision and shall vacate the proposed action.

(i) Authority of secretary to object. The secretary or board shall not oppose any motion filed for permissive intervention. When the environmental division permits a person to intervene, the secretary, the board, or the respondent may oppose the intervenor's claim that the proposed action is insufficient to carry out the purposes of this chapter.

(j) Response to citizen complaints. The secretary shall investigate all citizen complaints of a violation of a federally authorized or delegated program and shall respond to known complainants in writing.

Sec. 7. 10 V.S.A. § 8021 is added to read:

§ 8021. COST RECOVERY

(a) In addition to any existing authority, the secretary, in issuing an administrative order, emergency order, or assurance of discontinuance under this chapter, may recover monies expended from a special fund for a cleanup related to an environmental violation, provided that such recovered monies not exceed \$20,000.00.

(b) When monies are recovered under this section, they shall be deposited into the special fund from which they were expended.

Sec. 8. 4 V.S.A. § 1102 is amended to read:

§ 1102. JUDICIAL BUREAU; JURISDICTION

(a) A judicial bureau is created within the judicial branch under the supervision of the supreme court.

(b) The judicial bureau shall have jurisdiction of the following matters:

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(6) Violations of 24 V.S.A. § 2201, relating to littering, burning of solid waste, and illegal dumping.

* * *

~~(17) Violations of the statutes listed in 10 V.S.A. § 8003, any rules or permits issued under those statutes, and any assurances of discontinuance or orders issued under chapter 201 of Title 10, provided that a rule has been~~

~~adopted and a civil complaint issued concerning such a violation under 10 V.S.A. § 8019.~~

* * *

(d) Three hearing officers appointed by the court administrator shall determine waiver penalties to be imposed for violations within the judicial bureau's jurisdiction, except:

(1) Municipalities shall adopt full and waiver penalties for civil ordinance violations pursuant to 24 V.S.A. § 1979. For purposes of municipal violations, the issuing law enforcement officer shall indicate the appropriate full and waiver penalty on the complaint.

~~(2) The agency of natural resources and the natural resources board shall include full and waiver penalties in each rule that is adopted under 10 V.S.A. § 8019. For purposes of environmental violations, the issuing entity shall indicate the appropriate full and waiver penalties on the complaint.~~

Sec. 9. 4 V.S.A. § 1106 is amended to read:

§ 1106. HEARING

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(b) The hearing shall be held before a hearing officer and conducted in an impartial manner. The hearing officer may, by subpoena, compel the attendance and testimony of witnesses and the production of books and records. All witnesses shall be sworn. The burden of proof shall be on the state or municipality to prove the allegations by clear and convincing evidence.

As used in this section, “clear and convincing evidence” means evidence which establishes that the truth of the facts asserted is highly probable. Certified copies of records supplied by the department of motor vehicles, or the agency of natural resources, ~~or the natural resources board~~ and presented by the issuing officer or other person shall be admissible without testimony by a representative of the department of motor vehicles, or the agency of natural resources, ~~or the natural resources board~~.

* * *

(e) A state’s attorney may dismiss or amend a complaint, ~~except that dismissal or amendment of a complaint subject to subdivision 1102(b)(17) of this title shall be governed by 10 V.S.A. § 8019(e).~~

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Sec. 10. 4 V.S.A. § 1107 is amended to read:

§ 1107. APPEALS

(a) A decision of the hearing officer may be appealed to the criminal division of the superior court, ~~except for a decision in a proceeding under subdivision 1102(b)(17) of this title~~. The proceeding before the criminal division of the superior court shall be on the record, or at the option of the defendant, de novo. The defendant shall have the right to trial by jury. An appeal shall stay payment of a penalty and the imposition of points.

(b) ~~A decision of the hearing officer in a proceeding under subdivision 1102(b)(17) of this title may be appealed to the environmental division of the~~

~~superior court created under chapter 27 of this title. The proceedings before the environmental division shall be on the record. The defendant shall not have a right to a jury trial. An appeal shall stay the payment of a penalty.~~

(c) If a decision is appealed, the state's attorney of the county in which the violation occurred shall represent the state, and the state's attorney, grand juror, or municipal attorney shall represent the municipality. ~~In an appeal to the environmental division of the superior court from a decision under subdivision 1102(b)(17) of this title, an attorney from the agency of natural resources or the natural resources board shall represent the state.~~

(d) No appeal as of right exists to the supreme court. On motion made to the supreme court by a party, the supreme court may allow an appeal to be taken to it from the criminal ~~or environmental~~ division of the superior court.

Sec. 11. EFFECTIVE DATE

This act shall take effect on July 1, 2012.

Approved: February 16, 2012