

1 H.258

2 Introduced by Representatives Klein of East Montpelier and Deen of

3 Westminster

4 Referred to Committee on

5 Date:

6 Subject: Conservation and development; environmental law enforcement;

7 public participation

8 Statement of purpose: This bill proposes to require the secretary of natural  
9 resources, the land use panel, or the natural resources board to provide at least  
10 20 days during which an aggrieved person may comment on a draft assurance  
11 of discontinuance or administrative order. The bill also requires a draft  
12 assurance of discontinuance or administrative order to be published for notice  
13 on the relevant website of the secretary of natural resources, the land use panel,  
14 or the natural resources board. In addition, the bill would prohibit the  
15 environmental division from signing an assurance of discontinuance or  
16 administrative order until any additional filings or proceedings are complete,  
17 including those filings or proceedings subsequent to a timely motion for  
18 intervention. The bill would also allow for public notice and comment on  
19 certain environmental tickets issued by the secretary of natural resources.

20 An act relating to public participation in environmental enforcement  
21 proceedings

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

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

3 § 8002. DEFINITIONS

4 As used in this chapter:

5 (1) “Board” means the natural resources board defined by subdivision  
6 6001(1) of this title.

7 (2) “Compliance” means compliance with the statutes specified in  
8 section 8003 of this title, and with any related rules, permits, assurances, or  
9 orders.

10 (3) “Investigator” means an investigator designated and duly authorized  
11 by the secretary or the board.

12 (4) “Person” means any individual, partnership, company, corporation,  
13 association, unincorporated association, joint venture, trust, municipality, the  
14 state of Vermont or any agency, department, or subdivision of the state, federal  
15 agency, or any other legal or commercial entity.

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

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

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

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

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

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

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

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

14           (13) “Aggrieved person” means any person or persons having an interest  
15 that is or may be adversely affected by a violation subject to an enforcement  
16 action under this chapter.

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

1 Sec. 2. 10 V.S.A. § 8007 is amended to read:

2 § 8007. ASSURANCES OF DISCONTINUANCE

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

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

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

13 \* \* \*

14 (c) An assurance of discontinuance shall be in writing and signed by the  
15 respondent and shall specify the statute or regulation alleged to have been  
16 violated. The draft assurance of discontinuance shall be simultaneously  
17 published for public notice and filed with the attorney general and the  
18 environmental division. ~~The secretary or the land use panel shall post a final~~  
19 ~~draft assurance of discontinuance to its website and shall provide a final draft~~  
20 ~~assurance of discontinuance to a person upon request. When signed by the~~  
21 ~~environmental division, the assurance shall become a judicial order. Upon~~  
22 ~~motion by the attorney general made within 10 days of the date the assurance~~

1 ~~is signed by the court and upon a finding that the order is insufficient to carry~~  
2 ~~out the purposes of this chapter, the court shall vacate the order. The~~  
3 environmental division shall not sign the final draft of the assurance of  
4 discontinuance until at least 20 days have passed from the date the draft  
5 assurance was filed and published for public notice. The date the draft  
6 assurance was filed shall be noted with the filing. During the time period  
7 between the filing of a draft assurance and the environmental division's  
8 signing of a final draft, the environmental division shall allow an aggrieved  
9 person or the attorney general to intervene as a matter of right under the  
10 Vermont Rules of Civil Procedure. The environmental division shall allow an  
11 aggrieved person or the attorney general to request a hearing under section  
12 8012 of this title and shall grant a hearing at its discretion. The environmental  
13 division shall not sign an assurance of discontinuance until it has reviewed any  
14 additional filings and evidence presented at any hearing granted under section  
15 8012 of this title and any filings or proceedings subsequent to a timely motion  
16 for intervention from an aggrieved person or the attorney general. After such  
17 review, the environmental division may sign the assurance of discontinuance  
18 unless the environmental division makes a finding that the order is insufficient  
19 to carry out the purposes of this chapter.

20 (d) If the respondent complies with an assurance of discontinuance signed  
21 by the division, the respondent shall not be liable for additional civil or

1 criminal penalties with respect to the facts set forth in the assurance of  
2 discontinuance.

3 Sec. 3. 10 V.S.A. § 8008 is amended to read:

4 § 8008. ADMINISTRATIVE ORDERS

5 (a) The secretary may issue an administrative order when the secretary  
6 determines that a violation exists. The order shall be served as provided for  
7 under the Vermont Rules of Civil Procedure. ~~A copy of the order also shall be~~  
8 ~~delivered to the attorney general.~~ An order shall be effective on receipt unless  
9 stayed under subsection 8012(e) of this title.

10 (b) An order shall include:

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

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

15 (3) a statement that the respondent, the attorney general, or an aggrieved  
16 person has a right to a hearing under section 8012 of this title, and a  
17 description of the procedures for requesting a hearing;

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

20 (5) if applicable, a directive that the respondent take actions necessary to  
21 achieve compliance, to abate potential or existing environmental or health

1 hazards, and to restore the environment to the condition existing before the  
2 violation; and

3 (6) a statement that unless the respondent, the attorney general, or an  
4 aggrieved person requests a hearing under this section, the order becomes a  
5 judicial order when filed with and signed by the environmental ~~court~~ division.

6 (c) An order may include:

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

12 (2) a stay of the effective date or processing of a permit under section  
13 8011 of this title; and

14 (3) a proposed penalty or penalty structure.

15 (d)(1) The administrative order and proof of service shall be  
16 simultaneously published for public notice and filed with the attorney general  
17 and the environmental ~~court~~ division. The environmental division shall not  
18 sign the administrative order until at least 20 days have passed from the date of  
19 filing and public notice. The date the administrative order is filed shall be  
20 noted with the filing. During the time period between the filing of a draft order  
21 and the environmental division’s signing a final draft, the environmental  
22 division shall allow an aggrieved person or the attorney general to intervene as

1 a matter of right under the Vermont Rules of Civil Procedure and shall allow  
2 an aggrieved person or the attorney general to request a hearing under section  
3 8012 of this title. The ~~court~~ environmental division shall sign the  
4 administrative order in the event that:

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

7 (B) The respondent, the attorney general, or an aggrieved person does  
8 not request a hearing in accordance with subsection (b) of this section; ~~and~~

9 (C) Any additional filings or proceedings are complete, including  
10 those subsequent to a timely motion for intervention; and

11 ~~(C) the~~ (D) The order otherwise meets the requirements of this  
12 chapter.

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

18 Sec. 4. 10 V.S.A. § 8012 is amended to read:

19 § 8012. REQUEST FOR HEARING

20 (a) A respondent, an aggrieved person, or the attorney general may request  
21 a hearing on an administrative order or an assurance of discontinuance issued  
22 by the secretary. Notice of a request for hearing shall be filed with the



1 environmental division and the secretary. ~~Upon receipt of the notice, the~~  
2 ~~secretary shall forward a copy of the order to the environmental division.~~

3 (b) The environmental division shall have authority to:

4 (1) for an administrative order, determine whether a violation has  
5 occurred. An administrative order shall be reversed when it is determined that  
6 a violation has not occurred;

7 (2) affirm, or vacate and remand to the secretary an order or assurance  
8 issued under subdivision 8007(a)(2) or 8008(b)(5) of this title. The  
9 environmental division shall vacate and remand an order or assurance under  
10 this subdivision when a violation is found to exist but the procedure contained  
11 in the order or the assurance is not reasonably likely to achieve the intended  
12 result or is insufficient to carry out the purposes of this chapter;

13 (3) to affirm, modify, or reverse any provision of any order or assurance  
14 issued by the secretary except those identified by subdivision (2) of this  
15 subsection. In deciding whether to affirm or reverse a stop work order under  
16 this subdivision, the environmental division shall consider the economic effect  
17 of the order on individuals other than the respondent;

18 (4) to review and determine anew the amount of a penalty by applying  
19 the criteria set forth in subsections 8010(b) and (c) of this title; and

20 (5) to affirm, modify, or dissolve an emergency order.

21 (c) Notice of the request for hearing shall be filed within 15 days of receipt  
22 of the order or within 20 days of the order's filing and publication for public

1 notice. The hearing shall be held before the environmental division within 30  
2 days of receipt by the division of the notice, unless continued for good cause.  
3 The environmental division shall issue a written decision within 20 days of the  
4 conclusion of the hearing, and no later than 60 days from the request for  
5 hearing, unless the hearing process is extended for good cause. The decision  
6 shall be sent to the parties by certified mail, return receipt requested, and shall  
7 include:

8 (1) a statement of conclusion as to whether a violation exists and  
9 findings of facts in support of the conclusion;

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

12 (3) the order or assurance to be imposed or penalty to be assessed, or  
13 both, if a violation is determined to exist;

14 (4) a statement that the respondent, an aggrieved person, the secretary,  
15 and the attorney general have a right to appeal the decision, and a description  
16 of the procedures for requesting an appeal; and

17 (5) a warning that the decision will become final if no appeal is  
18 requested within 10 days of the date the decision is received.

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

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

3       Sec. 5. 10 V.S.A. § 8013 is amended to read:

4       § 8013. CONDUCT OF HEARINGS; APPEAL; STAY

5       (a) The secretary, the attorney general, or an aggrieved person shall have  
6       the burden of proof by a preponderance of the evidence.

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

11      (c) An appeal from a decision of the environmental division may be taken  
12      by the secretary or the respondent to the supreme court. The attorney general  
13      or an aggrieved person also may appeal if the attorney general or aggrieved  
14      person has appeared as a party.

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

18      Sec. 6. 10 V.S.A. § 8019 is amended to read:

19      § 8019. ENVIRONMENTAL TICKETING

20      (a) The secretary and the board each shall have the authority to adopt rules  
21      for the issuance of civil complaints for violations of their respective enabling  
22      statutes or rules adopted under those statutes that are enforceable in the judicial

1 bureau pursuant to the provisions of chapter 29 of Title 4. Any proposed rule  
2 under this section shall include both the full and waiver penalty amounts for  
3 each violation. The maximum civil penalty for any violation brought under  
4 this section shall not exceed \$3,000.00 exclusive of court fees.

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

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

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

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

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

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

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

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

10 (e) For violations of statutes that implement a federally authorized or  
11 delegated program, or any implementing rule, permit, assurance, or order:

12 (1) The secretary shall publish a notice of its intent to issue a civil  
13 complaint, along with the contents of the proposed civil complaint. The public  
14 shall have 30 calendar days to submit comments prior to the issuance of the  
15 civil complaint. At the close of the comment period, the secretary shall  
16 evaluate the appropriateness of the civil complaint in light of any and all  
17 comments received.

18 (2) A civil complaint shall not be considered diligent prosecution for the  
19 purpose of precluding a private right of action.

1       Sec. 7. 10 V.S.A. § 8020 is added to read:

2       § 8020. PUBLICATION FOR NOTICE

3       When the secretary, the board, or the land use panel is required under this  
4       chapter to publish a draft or final assurance of discontinuance, an  
5       administrative order, a civil complaint, or any other information, the  
6       information shall be posted to the relevant website of the secretary, the board,  
7       or the land use panel and shall be provided to any person upon request.

8       Sec. 8. EFFECTIVE DATE

9       This act shall take effect on July 1, 2011.