

1 **Judiciary Budget: Draft Provisions, Environmental Appeals**

2 * * * Act 250 Appeals * * *

3 Sec. E.713 10 V.S.A. § 6001(38) is added to read:

4 (38) “Aggrieved person” means a person who alleges an injury to a
5 particularized interest protected by this chapter, attributable to an act or
6 decision by a district coordinator or District Commission, that the Board or
7 Supreme Court can redress.

Comment [AA1]: Modeled on definition of
“person aggrieved” in 10 V.S.A. chapter 220
(consolidated environmental appeals)

8 Sec. E.714 10 V.S.A. § 6007(d) is amended to read:

9 (d) ~~A~~ An aggrieved person who seeks review of a jurisdictional opinion
10 issued by a district coordinator may ~~request consideration by~~ file an appeal
11 with the Board ~~of~~ on the issues addressed in the opinion.

12 (1) If the opinion was served on the person when issued, the ~~person’s~~
13 ~~request under this subsection shall be submitted~~ person shall submit the appeal
14 to the Board within 30 days of the opinion’s issuance.

15 (2) If the opinion was not served on the person when issued, the ~~request~~
16 ~~shall be submitted~~ person shall submit the appeal to the Board:

17 (A) within 30 days from the date on which the opinion was served on
18 the ~~requestor~~ person; or

19 (B) at any time, if the opinion is never served on the ~~requestor~~
20 person.

1 (3) The Board shall give notice of the ~~request~~ appeal and conduct its
2 review on appeal in the same manner specified for appeals from District
3 Commissions under section 6089(a)(2) of this title.

4 (A) The Board shall serve the notice on all persons listed in
5 subdivisions 6085(c)(1)(A)-(D) of this title and post the notice on its website.

6 (B) If the ~~request~~ appeal pertains to a jurisdictional opinion for which
7 a final determination was requested under subsection (c) of this section, the
8 Board shall:

9 (i) serve the notice on all persons on the approved subdivision
10 6085(c)(1)(E) list; and

11 (ii) publish at the expense of ~~the requestor~~ the appellant a notice in
12 a local newspaper having general circulation in the area where the land which
13 is the subject of the ~~request~~ appeal is located.

14 (4) An act or decision of the Board under this subsection may be
15 appealed to the ~~Environmental Division~~ Supreme Court pursuant to ~~chapter~~
16 ~~220~~ section 6089 of this title.

17 Sec. E.715 10 V.S.A. § 6086(f) is amended to read:

18 (f) Prior to any appeal of a permit issued by a District Commission, any
19 aggrieved party may file a request for a stay of construction with the District
20 Commission together with a declaration of intent to appeal the permit. The
21 stay request shall be automatically granted for seven days upon receipt and

1 notice to all parties and pending a ruling on the merits of the stay request
2 pursuant to Board rules. The automatic stay shall not extend beyond the
3 30-day appeal period unless a valid appeal has been filed with the
4 ~~Environmental Division Board~~. The automatic stay may be granted only once
5 under this subsection during the 30-day appeal period. Following appeal of the
6 District Commission decision, any stay request must be filed with the
7 ~~Environmental Division Board~~ pursuant to the provisions of chapter 220
8 section 6089 of this title. A District Commission shall not stay construction
9 authorized by a permit processed under Board's minor application procedures.
10 Sec. E.716 10 V.S.A. § 6089 is amended to read:

11 § 6089. APPEALS

12 (a) Appeals of Appeal from District Commission. An aggrieved person
13 may appeal any act or decision of a District Commission under this chapter ~~or~~
14 to the Natural Resources Board under section 6007(d) of this title shall be
15 made to the Environmental Division in accordance with chapter 220 of this
16 title on or before 30 days from the act or decision. For the purpose of this
17 section, a decision of the Chair of a District Commission under section 6001e
18 of this title on whether action has been taken to circumvent the requirements of
19 this chapter shall be considered an act or decision of the District Commission.

20 (1) Notice of appeal. On filing an appeal from an act or decision of the
21 District Commission, the appellant shall notify all parties who had party status

1 as of the end of the District Commission proceeding and all friends of the
2 Commission. In addition, the appellant shall publish notice not more than 10
3 days after providing notice as required under this subdivision, at the
4 appellant's expense, in a newspaper of general circulation in the area of the
5 project which is the subject of the decision.

6 (2) Review on appeal. The Board, applying the substantive standards
7 that were applicable to the District Commission, shall review those issues that
8 have been appealed. In making its decision, the Board shall apply its
9 independent judgment to the District Commission's record and may allow
10 additional evidence as provided in this subdivision.

11 (A) The record on appeal shall consist of all documents, materials,
12 and testimony reviewed or considered by the District Commission and shall
13 include an audio or video recording of each hearing before the District
14 Commission.

15 (B) The Board may allow a party to present additional evidence on
16 motion by the party and a determination by the Board that the new evidence is
17 material and good cause exists for the party's failure to present the additional
18 evidence to the District Commission. Should the Board conduct a hearing, it
19 shall allow parties sufficient time to prepare and opportunity for discovery on
20 the new evidence under the Vermont Rules of Civil Procedure.

Comment [AA2]: Moved here from consolidated environmental appeals chapter, 10 V.S.A. § 8504(c)(1)

1 (C) The contested case provisions of 3 V.S.A. chapter 25 shall apply
2 to the Board’s review on appeal, except that the opportunity for hearing shall
3 be in the form of oral argument unless the Board determines to hear additional
4 evidence. One Board member or an employee of the Board appointed by the
5 Chair of the Board may conduct the appeal, subject to the provisions of 3
6 V.S.A. § 811.

7 (3) Requirement for participation. An aggrieved person shall not appeal
8 an act or decision that was made by a District Commission unless the person
9 was granted party status by the District Commission pursuant to subdivision
10 6085(c)(1) of this title, participated in the proceedings before the District
11 Commission, and retained party status at the end of the District Commission
12 proceedings. In addition, the person may only appeal those issues under the
13 criteria with respect to which the person was granted party status. However,
14 the Board may allow an aggrieved person who does not meet one or more of
15 these requirements to appeal an act or decision of the District Commission if
16 the Board determines that:

17 (A) there was a procedural defect which prevented the person from
18 obtaining party status or participating in the proceeding;

19 (B) the decision being appealed is the grant or denial of party
20 status; or

1 (C) some other condition exists which would result in manifest
2 injustice if the person’s right to appeal was disallowed.

Comment [AA3]: Moved here from consolidated environmental appeals chapter, 10 V.S.A. § 8504(d).

3 (4) Limitations on appeals. Notwithstanding any other provision of this
4 section:

5 (A) There shall be no appeal from a District Commission decision
6 when the Commission has issued a permit and no hearing was requested or
7 held, or no motion to alter was filed following the issuance of an
8 administrative amendment.

9 (B) If a District Commission issues a partial decision under subsection
10 6086(b) of this title, an aggrieved person must file an appeal of that decision on
11 or before 30 days from the date of that decision.

Comment [AA4]: Moved here from consolidated environmental appeals chapter,

12 (5) Stays. The filing of an appeal under this subsection shall not
13 automatically stay the act or decision. On motion of a party or on its own
14 motion for a stay of an act or decision, the Board shall perform initial review
15 of the request and may grant a stay. Any decision under this subdivision to
16 issue a stay shall be subject to appeal to the Supreme Court according to the
17 Rules of Appellate Procedure.

Comment [AA5]: Modeled on consolidated environmental appeals chapter, 10 V.S.A. § 8504(f).

18 (6) Precedent. The Natural Resources Board shall give prior decisions
19 of the Environmental Board and the Environmental Division the same weight
20 and consideration as its own prior decisions.

Comment [AA6]: Modeled on 10 V.S.A. § 8504(m).

1 (b) Appeal from Natural Resources Board. An aggrieved person may
2 appeal a decision of the Board under subsection (a) of this section or
3 subsection 6007(d) of this title to the Supreme Court, which shall review the
4 appeal on the record.

5 (1) Preservation. The Supreme Court shall not consider an objection
6 that has not been urged before the Board, unless the failure or neglect to urge
7 the objection is excused by extraordinary circumstances.

8 (2) Findings; conditions. The findings of the Board with respect to
9 questions of fact shall be conclusive if supported by substantial evidence on
10 the record as a whole. The Court shall allow an appeal from the Board for all
11 usual reasons, including the unreasonableness or insufficiency of the
12 conditions attached to a permit.

13 (c) Exclusion. This section does not authorize appeals of rulemaking or
14 of enforcement actions under chapters 201 and 211 of this title.

15 Sec. E.717 24 V.S.A. § 2793c(f)(3) is amended to read:

16 (3) The Natural Resources Board shall review the request in accordance
17 with and shall issue findings of fact and conclusions of law under the
18 applicable criteria of 10 V.S.A. § 6086(a) which are deemed to have been
19 satisfied by the applicant's submissions during the formal designation process,
20 any additional submissions, as well as associated municipal plan policies,
21 programs, and bylaws. Findings and conclusions of law shall be effective for a

Comment [AA7]: This language is modeled on 10 V.S.A. § 6089 as it applied to appeals to the former Environmental Board, before those appeals were moved to the Environmental Division.

Comment [AA8]: From 10 V.S.A. § 8503(e).

1 period of five years, unless otherwise provided. The Natural Resources Board,
2 before issuing its findings and conclusions, may require specific changes in the
3 proposal, or regulatory changes by the municipality, as a condition for certain
4 findings and conclusions. These findings and conclusions shall be subject to
5 appeal to the ~~Environmental Division~~ Supreme Court pursuant to 10 V.S.A.
6 ~~chapter 220 § 6089~~ within 30 days of issuance.

7 * * * ANR Appeals * * *

8 Sec. E.718 10 V.S.A. chapter 170 is added to read:

9 CHAPTER 170. APPEALS OF AGENCY OF NATURAL

10 RESOURCES DECISIONS

11 § 7701. DEFINITIONS

12 As used in this chapter:

13 (1) “Agency” means the Agency of Natural Resources.

14 (2) “Aggrieved person” means a person who alleges an injury to a
15 particularized interest protected by the provisions of law under which the
16 Agency issues a permit if the injury is attributable to an act or decision by the
17 Agency that the Agency or Supreme Court can redress.

18 (3) “Party” means the Secretary or designee, a person aggrieved by an
19 act or decision of the Secretary, and a person who meets the standard for
20 intervention established in the Vermont Rules of Civil Procedure.

Comment [AA9]: See note 1 above.

1 (4) “Permit” means any permit, certification, license, registration,
2 determination, or similar form of permission or approval required from the
3 Agency by law.

4 (5) “Person” means any individual; partnership; company; corporation;
5 association; joint venture; trust; municipality; the State of Vermont or any
6 agency, department, or subdivision of the State, any federal agency, or any
7 other legal or commercial entity.

8 (6) “Secretary” means the Secretary of Natural Resources or designee.
9 As used in this chapter, “Secretary” shall also mean the Commissioner of
10 Environmental Conservation, the Commissioner of Forests, Parks and
11 Recreation, and the Commissioner of Fish and Wildlife, with respect to those
12 statutes that refer to the authority of that commissioner or department.

Comment [AA10]: Same definition as in consolidated environmental appeals chapter, 10 V.S.A. § 8502.

13 § 7722. APPEAL WITHIN AGENCY; HEARING OFFICER

14 (a) Appeal. On or before 30 days from an act or decision of the Agency on
15 the issuance, denial, or revocation of a permit or on the need to obtain a permit,
16 or on any other matter for which a statute authorizes appeal in accordance with
17 this chapter, the Secretary or any person aggrieved by the act or decision of the
18 Agency may file an appeal of the act or decision within the Agency. This
19 chapter does not authorize appeals of rulemaking or of enforcement actions
20 under chapters 201 and 211 of this title. Any appeal of an authorization or
21 coverage under the terms of a general permit shall be limited in scope to

Comment [AA11]: Same definition as in consolidated environmental appeals chapter, 10 V.S.A. § 8502.

Comment [AA12]: From 10 V.S.A. § 8503(a).

1 whether the permitted activity complies with the terms and conditions of the
2 general permit.

Comment [AA13]: From 10 V.S.A. § 8504(j).

3 (b) Appointment of hearing officer. On receipt of a petition for an
4 administrative appeal, the Secretary shall appoint a hearing officer to conduct
5 the administrative appeal.

6 (1) In connection with such a petition, the hearing officer shall not
7 communicate, directly or indirectly, in connection with any issue of fact or
8 issue of law with any person aggrieved, other party, or the Secretary, except
9 upon notice and opportunity for all parties to participate. The hearing officer
10 may solicit the advice of one or more personal assistants.

11 (2) A hearing officer appointed under this section shall be able to carry
12 out all duties assigned to the officer without being subject to any retaliatory
13 action.

14 § 7723. REQUIREMENT FOR PRIOR PARTICIPATION

15 Under this chapter, an aggrieved person shall not appeal an act or decision
16 unless the person submitted a comment during the comment period, if a
17 comment period was provided, and participated in the public hearing, if a
18 public hearing was held. In addition, the person may only appeal issues related
19 to the comment that was filed by that person. In the case of an appeal by the
20 applicant, the hearing officer shall consider information contained in the
21 application to be a comment made during the comment period. However, the

1 hearing officer may allow an aggrieved person who does not meet one or more
2 of these requirements to appeal an act or decision if the officer determines that:

3 (1) there was a procedural defect which prevented the person from
4 submitting a comment or participating in the public hearing; or

5 (2) some other condition exists which would result in manifest injustice
6 if the person's right to appeal were disallowed.

7 § 7724. NOTICE OF APPEAL

8 On filing of an appeal under this chapter, the appellant shall provide notice
9 of the filing of an appeal to the following persons: the applicant before the
10 Agency, if other than the appellant; the owner of the land where the project is
11 located if the applicant is not the owner; the municipality in which the project
12 is located; the municipal and regional planning commissions for the
13 municipality in which the project is located; if the project site is located on a
14 boundary, any adjacent Vermont municipality and the municipal and regional
15 planning commissions for that municipality; any State agency affected; the
16 solid waste management district in which the project is located, if the project
17 constitutes a facility pursuant to subdivision 6602(10) of this title; all persons
18 required to receive notice of receipt of an application or notice of the issuance
19 of a draft permit; and all persons on any mailing list for the decision involved.

20 In addition, the appellant shall publish notice not more than 10 days after
21 providing notice as required under this section, at the appellant's expense, in a

Comment [AA14]: Modeled on language from the consolidated environmental appeals chapter, 10 V.S.A. § 8504(d).

1 newspaper of general circulation in the area of the project which is the subject
2 of the decision.

Comment [AA15]: Moved here from 10 V.S.A. § 8504(c)(2)

3 § 7725. STAYS

4 The filing of an appeal under this section shall automatically stay the act or
5 decision if it involves a stream alteration permit or shoreline encroachment
6 permit. Otherwise, the act or decision shall remain in effect unless the hearing
7 officer grants a stay. The hearing officer may grant such a stay on petition by a
8 party or on the officer's own motion.

Comment [AA16]: Modeled on 10 V.S.A. § 8504(f).

9 § 7726. REVIEW; DECISION

10 (a) Hearing officer; final decision. A hearing officer appointed under this
11 section shall have authority to issue a final decision.

12 (b) Conduct and standard of review. On an appeal filed under this chapter,
13 a hearing officer shall provide an opportunity for hearing and shall proceed in
14 accordance with 3 V.S.A. chapter 25. The hearing shall be de novo. The
15 hearing officer shall apply the same standards that were applicable to the act or
16 decision on appeal.

Comment [AA17]: See comment 2 above.

Comment [AA18]: See comment 3 above.

17 (c) Precedent. The hearing officer shall give prior decisions of the Water
18 Resources Board, Waste Facilities Panel, and Environmental Division the same
19 weight and consideration as decisions under this chapter.

Comment [AA19]: Modeled on 10 V.S.A. § 8504(m).

20 § 7727. APPEAL TO SUPREME COURT

1 An aggrieved person may appeal a decision of a hearing officer under this
2 chapter to the Supreme Court, which shall review the appeal on the record.

3 (1) Preservation. The Supreme Court shall not consider an objection
4 that has not been urged before the hearing officer, unless the failure or neglect
5 to urge the objection is excused by extraordinary circumstances.

6 (2) Findings; conditions. The findings of the hearing officer with
7 respect to questions of fact shall be conclusive if supported by substantial
8 evidence on the record as a whole. The Court shall allow an appeal from the
9 hearing officer for all usual reasons, including the unreasonableness or
10 insufficiency of the conditions attached to a permit.

11 Sec. E.719 STATUTORY REVISION

12 (a) The Office of Legislative Council, in its statutory revision capacity,
13 shall make those revisions to the Vermont Statutes Annotated that are
14 necessary to effect this act’s substitution of the appeal routes set forth in Secs.
15 E.715 and E.718 of this act for the current appeal routes of the same acts or
16 decisions to the Environmental Division, including:

17 (1) In 3 V.S.A. § 2809(f), the Office shall revise the reference to “10
18 V.S.A. § 8504” to cite “10 V.S.A. chapter 170.”

19 (2) In all chapters of Title 10 except for chapter 151 (Act 250), the
20 Office shall revise each statute that provides for appeal “in accordance with

Comment [AA20]: This language is modeled on 10 V.S.A. § 6089 as it applied to appeals to the former Environmental Board, before those appeals were moved to the Environmental Division.

1 chapter 220 of this title” to provide for appeal “in accordance with chapter 170
2 of this title.”

3 (3) In 29 V.S.A. § 406, the Office shall revise the reference to “chapter
4 220 of Title 10” to cite “10 V.S.A. chapter 170.”

5 * * * Revisions to Environmental Division Appeals * * *

6 Sec. E.720 10 V.S.A. chapter 220 is redesignated to read:

7 CHAPTER 220. ~~CONSOLIDATED~~ ENVIRONMENTAL APPEALS

8 Sec. E.721 REPEALS

9 (a) The following are repealed: 10 V.S.A. §§ 8501; 8502 (1), (2), (4), (8);
10 8503(a), (b), (e), (g); 8504(a), (c)(1) and (2), (d), (e), (g), (i), (j), (k)(1) and (3),
11 (l), (m), (n)(3), (o); and 8506.

12 Sec. E.722 10 V.S.A. § 8504(f) is amended to read:

13 (f) Stays.

14 (1) The filing of an appeal shall automatically stay ~~the~~ an act or decision
15 in the following situations:

16 ~~(A) Acts or decisions involving stream alteration permits or shoreline~~
17 ~~encroachment permits issued by the Secretary.~~

18 ~~(B) The~~ involving the denial of interested person status by a board of
19 adjustment, planning commission, or development review board.

20 (2) Upon petition by a party or upon its own motion for a stay of an act
21 or decision, the Environmental Division shall perform the initial review of the

1 request and may grant a stay. Any decision under this subsection to issue a
2 stay shall be subject to appeal to the Supreme Court according to the Rules of
3 Appellate Procedure.

4 Sec. E.723 10 V.S.A. § 8504(h) is amended to read:

5 (h) De novo hearing. The Environmental Division, applying the
6 substantive standards that were applicable before the tribunal appealed from,
7 shall hold a de novo hearing on those issues which have been appealed, except
8 in the case of:

9 (1) a decision being appealed on the record pursuant to 24 V.S.A.
10 chapter 117;

11 ~~(2) a decision of the Commissioner of Forests, Parks and Recreation~~
12 ~~under section 2625 of this title being appealed on the record, in which case the~~
13 ~~court shall affirm the decision, unless it finds that the Commissioner did not~~
14 ~~have reasonable grounds on which to base the decision.~~