

1 H.828

2 Introduced by Representatives Cordes of Lincoln, Burke of Brattleboro,
3 Christensen of Weathersfield, Cina of Burlington, Hooper of
4 Burlington, Howard of Rutland City, Kitzmiller of Montpelier,
5 Ode of Burlington, Patt of Worcester, Sheldon of Middlebury,
6 Sullivan of Burlington, and Wood of Waterbury

7 Referred to Committee on

8 Date:

9 Subject: Conservation and development; water quality; water quality
10 standards; certification

11 Statement of purpose of bill as introduced: This bill proposes to amend the
12 Vermont Water Quality Standards (VWQS) to clarify that the standards apply
13 to wetlands and discharges to wetlands. The bill also would amend the VWQS
14 to require that any federal Clean Water Act (CWA) section 401 certification
15 issued by the State for waters or for wetlands shall include: an evaluation of
16 water quality impacts on waters and wetlands and an evaluation of alternative
17 means of accomplishing the proposed action for which certification is sought.
18 The bill would require that the State conduct a cumulative impacts analysis of
19 the water quality impacts on waters and wetlands of an activity subject to the
20 CWA section 401 certification. A CWA section 401 certification would not be
21 granted unless the Secretary of Natural Resources determines one of the

1 following: it is more likely than not that the proposed activity will not cause
2 significant impacts; or when an alternatives analysis is required, there may be
3 significant impacts but no practicable alternative exists.

4 An act relating to Vermont standards for issuing a Clean Water Act
5 section 401 certification

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

7 Sec. 1. FINDINGS

8 The General Assembly finds that:

9 (1) The Vermont Water Quality Standards (VWQS) are State rules the
10 implementation of which is intended to achieve the water quality goals of the
11 State.

12 (2) The federal Clean Water Act section 401, 33 U.S.C. § 1341, requires
13 an applicant for a federal permit for a proposed activity that may result in a
14 discharge to waters to obtain a certification from the Agency of Natural
15 Resources (ANR) that the proposed activity will comply with the State's water
16 quality laws, including the VWQS.

17 (3) The VWQS, however, do not adequately protect State waters when
18 the State conducts a Clean Water Act section 401 certification because the
19 VWQS do not clearly apply to wetlands and do not require a permit applicant

1 to conduct analyses of alternatives to the activity proposed in the permit
2 application.

3 (4) CWA section 401 certifications in other states do apply to wetlands
4 and do require alternative analyses.

5 (5) To ensure that CWA section 401 certifications issued by ANR are at
6 least as protective of State waters as the certification processes used in other
7 states, the Vermont General Assembly should amend the VWQS to clarify that
8 the standards apply to wetlands and that permit applicants subject to CWA
9 section 401 are required to conduct analyses of alternatives to the proposed
10 activity subject to the certification.

11 Sec. 2. 10 V.S.A. § 1250 is amended to read:

12 § 1250. STATE WATER QUALITY POLICY

13 It is the policy of the State of Vermont to:

14 (1) protect and enhance the quality, character, and usefulness of its
15 surface waters and to assure the public health;

16 (2) maintain the purity of drinking water;

17 (3) control the discharge of wastes to the waters of the State, prevent
18 degradation of high quality waters, and prevent, abate, or control all activities
19 harmful to water quality;

20 (4) assure the maintenance of water quality necessary to sustain existing
21 aquatic communities;

1 (5) provide clear, consistent, and enforceable standards for the
2 permitting and management of discharges;

3 (6) protect from risk and preserve in their natural state certain high
4 quality waters, including fragile high-altitude waters, and the ecosystems they
5 sustain;

6 (7) manage the waters of the State to promote a healthy and prosperous
7 agricultural community; to increase the opportunities for use of the State's
8 forest, park, and recreational facilities; and to allow beneficial and
9 environmentally sound development; ~~and~~

10 (8) seek over the long term to upgrade the quality of waters and to
11 reduce existing risks to water quality; and

12 (9) apply the Vermont Water Quality Standards and section 401 water
13 quality certifications under the federal Clean Water Act to an activity that may
14 result in a discharge to a wetland, other than for restoration projects and
15 activities that would affect less than three acres of Class III wetlands and no
16 other waters or wetlands.

17 Sec. 3. 10 V.S.A. § 1251a is amended to read:

18 § 1251a. WATER POLLUTION ADMINISTRATION

19 (a) The Secretary may adopt rules, in accordance with the procedures in the
20 Administrative Procedure Act, that are necessary for the proper administration

1 of the Secretary's duties under this subchapter, including a planning process
2 approvable under Public Law 92-500, as amended.

3 (b) The Secretary shall establish by rule requirements for the issuance of
4 permits under subsection 1259(e) of this title, including in-stream water quality
5 parameters necessary to establish permit conditions and performance
6 monitoring; however, these in-stream water quality parameters shall not
7 supersede water quality standards adopted by the Secretary.

8 (c) On or before July 1, 2016, the Secretary of Natural Resources shall
9 adopt by rule an implementation process for the antidegradation policy in the
10 water quality standards of the State. The implementation process for the
11 antidegradation policy shall be consistent with the State water quality policy
12 established in section 1250 of this title, the Vermont Water Quality Standards,
13 and any applicable requirements of the federal Clean Water Act. The Secretary
14 of Natural Resources shall apply the antidegradation implementation policy to
15 all new discharges that require a permit under this chapter.

16 (d)(1) The Vermont Water Quality Standards certifications required by
17 section 401 of the federal Clean Water Act shall apply to activities that may
18 result in a discharge to waters and to all activities that may result in a discharge
19 to a wetland, other than for restoration projects and activities that would affect
20 less than three acres of Class III wetlands and no other waters or wetlands.

1 (2) A section 401 water quality certification issued by the State under
 2 the federal Clean Water Act for an activity in a water or a wetland that may
 3 result in a discharge shall include all of the following:

4 (A) an evaluation of water quality impacts on wetlands under the
 5 Vermont Wetlands Rules, Environmental Protection Rules, Chapter 30;

6 (B) an evaluation of alternative means of accomplishing the proposed
 7 action; and

8 (C) an evaluation of cumulative impacts; and

9 (3) The Secretary shall not issue a section 401 water quality certification
 10 under the federal Clean Water Act for an activity in a water or a wetland that
 11 may cause a discharge unless:

12 (A) the proposed activity would cause no significant impact; or

13 (B) no practicable alternative to the proposed activity exists.

14 Sec. 4. The Department of Environmental Conservation’s Vermont Water
 15 Quality Standards Environmental Protection Rule Chapter 29A,

16 Sec. 29A-102 is amended to read:

17 § 29A-102. Definitions

18 For the purposes of these Water Quality Standards, the terms below shall
 19 have the following meanings unless a different meaning clearly appears from
 20 the context.

21 * * *

1 (50) “Waters” include all rivers, streams, creeks, brooks, reservoirs,
2 ponds, lakes, springs and all bodies of surface waters, artificial or natural,
3 which are contained within, flow through, or border upon the State or any
4 portion of it.

5 (51) “Watershed” means a region containing waters that drain into a
6 particular brook, stream, river, or other body of water.

7 (52) “Wetlands” has the same meaning as in 10 V.S.A. § 902(5).

8 (53) “Restoration project” means activities associated with the
9 restoration and enhancement of wetlands, rivers and streams, lakes and ponds,
10 and riparian areas for the purposes of re-establishing natural hydrology,
11 floodplain connectivity, natural stream connectivity and morphology, or fish
12 and wildlife habitat.

13 (54) “Water quality impacts on wetlands” means those impacts on the
14 functions and values of wetlands set forth in the most current version of the
15 Department of Environmental Conservation’s Vermont Wetland Rules,
16 Environmental Protection Rules Chapter 30.

17 Sec. 5. The Department of Environmental Conservation’s Vermont Water

18 Quality Standards Environmental Protection Rule Chapter 29A,

19 Sec. 29A-103 is amended to read:

20 § 29A-103. General Policies

1 (a) These rules are intended to achieve the goals of the State's water quality
2 policy (10 V.S.A. § 1250), set forth below, as well as the objective of the
3 federal Clean Water Act (33 U.S.C. § 1251 et seq.) which is to restore and
4 maintain the chemical, physical, and biological integrity of the Nation's
5 waters.

6 (b)(1) Water Quality Policy. It is the policy of the State of Vermont to:

7 (A) protect and enhance the quality, character, and usefulness of its
8 surface waters and wetlands and to assure the public health;

9 (B) maintain the purity of drinking water;

10 (C) control the discharge of wastes to waters and wetlands, prevent
11 degradation of high quality waters, and prevent, abate, or control all activities
12 harmful to water quality;

13 * * *

14 Sec. 6. The Department of Environmental Conservation's Vermont Water

15 Quality Standards Environmental Protection Rule Chapter 29A,

16 Sec. 29A-108 is added to read:

17 § 29A-108. Water Quality Certifications Under section 401 of the Clean

18 Water Act

19 (a) This section shall apply to certifications required by the federal Clean

20 Water Act (CWA) section 401, 33 U.S.C. § 1341, for activities that may result

1 in a discharge to waters and to all CWA section 401 certifications for activities
2 that may result in a discharge to a wetland.

3 (b) Except as provided under subsections (c) and (d) of this section, all
4 applications to the Secretary for a CWA section 401 certification from the
5 State shall include:

6 (1) an evaluation of the water quality impacts of the proposed activity
7 for which certification is sought, including the water quality impacts of the
8 proposed activity on wetlands, and

9 (2) an evaluation of alternative means of accomplishing the purposes of
10 the proposed activity for which certification is sought.

11 (c) The following applications for a CWA section 401 certification are not
12 subject to the requirements of subsections (b), (e), (f), and (g) of this section
13 unless the Secretary determines that an application for a certification that is
14 otherwise exempt shall comply with the requirements:

15 (1) a certification for a restoration project; and

16 (2) a certification of an activity that would affect less than three acres of
17 Class III wetlands and no other waters or wetlands.

18 (d)(1) The following applications for a CWA section 401 certification are
19 not subject to the requirements of subdivision (b)(2) of this section and
20 subsection (f) of this section, unless the Secretary determines an application for
21 a certification that is otherwise exempt shall comply with the requirements:

1 (A) a certification for an activity that would affect less than one-half
2 acre of Class 2 wetlands, cumulatively; and

3 (B) a certification of a project that would affect less than 300 linear
4 feet of stream, river, lake, or pond, cumulatively.

5 (2) If the Secretary determines under subdivision (1) of this subsection
6 that a certification that is otherwise exempt shall comply with the requirements
7 of subdivision (b)(2) of this section and subsection (f) of this section, the
8 applicant for the certification also shall comply with the requirements of
9 subdivision (b)(1) of this section and subsections (e) and (f) of this section.

10 (e) The analysis of water quality impacts required under this section,
11 including the analysis of water quality impacts on wetlands, shall include an
12 evaluation of the cumulative impacts of the proposed activity for which
13 certification is sought and an evaluation of other reasonably foreseeable
14 activities for which a CWA section 401 certification may be sought.

15 (f) The analysis of alternatives required under this section shall consider a
16 range of alternatives that would avoid or minimize the impacts of a proposed
17 activity on water quality, including the water quality impacts on wetlands. As
18 used in this section, “practicable” means technologically possible, able to be
19 put into practice, and economically viable, regardless of whether the applicant
20 owns or controls alternative locations at the time of the application. Activities
21 that are not water dependent are presumed to have a practicable alternative,

1 unless the applicant demonstrates otherwise. For the purposes of this section,
2 compensatory mitigation is not considered an alternative.

3 (g) An application for a CWA section 401 certification shall not be granted
4 unless, after an analysis of water quality impacts, including water quality
5 impacts on wetlands, and of alternatives, where required, the Secretary
6 determines, based on substantial evidence in the record, that:

7 (1) it is more likely than not that the application will not cause
8 significant impacts; or

9 (2) if there may be significant impacts, with regard to projects for which
10 analysis of alternatives is required, no practicable alternative exists.

11 Sec. 7. EFFECTIVE DATE

12 This act shall take effect on passage.