

H.688

Rulemaking & Cause of Action
(Sec. 4, 10 V.S.A. § 494)

House Committee on Energy & Technology

JAN. 17, 2020

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How Law Would Work / Key Steps

GHG reduction requirements
(2025, 2030, 2050)

Vermont Climate Council
(Fall 2020)

Vermont Climate Action Plan
(July 1, 2021)

ANR Rulemaking to implement plan &
achieve GHG reductions

Cause of action if ANR fails to engage in
rulemaking / rules fail to achieve GHG reductions

Sec. 4 of H.688 (new 10 V.S.A. §§ 593 & 594)

- § 593: ANR shall adopt rules
 - Consistent with specific initiatives, programs, and strategies in Action Plan
 - Achieve GHG emissions reductions
 - In doing so, develop & file a detailed record & conduct public hearings
 - 2022 (2025 reductions); 2026 (2030 reductions); 2040 (2050 reductions)
- § 594: Cause of action
 - Scenario (a): ANR fails to adopt or update rules
 - Scenario (b): ANR does adopt rules, but those rules fail to achieve GHG reductions

TOC for Today's Discussion

- Background: Rulemaking process
- Background: Role of LCAR
- Background: Time frames & costs
- Review remedies under existing law
- H.688: Discuss cause of action section

Background: Rules

- VT's Administrative Procedure Act
- Rules have “the force of law” (3 V.S.A. § 845)
- However, no implicit rulemaking authority and no agency may use rulemaking process to (3 V.S.A. § 845(c)):
 - Provide for penalties, fines or imprisonment not authorized by other law
 - Enlarge the authority of any agency to impose requirements on any member of the public
 - Allow an agency by rule to require permits licenses or fees unless authorized by other law

Background: Rulemaking Process

- Agency prefiles rule with Interagency Committee on Administrative Rules (3 V.S.A. §§ 820, 837)
- File proposed rule with Secretary of State (3 V.S.A. § 838).
- SOS publishes notice of proposed rule online & in print (3 V.S.A. § 839)
- Agency holds public hearing(s) & provides reasonable opportunity to submit data and views (3 V.S.A. § 840)
- Agency file final proposed rule with SOS & LCAR (3 V.S.A. § 841)
- LCAR reviews rule (3 V.S.A. § 842)
- Filing adopted rule & rule becomes effective (3 V.S.A. § 843)
- Emergency rules (3 V.S.A. § 844)

Background: LCAR (3 V.S.A. § 842)

- LCAR can approve a rule, approve a rule with modifications agreed to by the agency, take no action, or object to a rule
- LCAR can object to a rule on 7 grounds, including rule beyond authority of the agency, contrary to intent of the legislature, arbitrary (which is defined in 3 V.S.A. § 801(13))
- LCAR can object and recommend that the agency amend or withdraw the rule
- Agency shall respond to objection and may revise the rule; agency does not have to amend or withdraw the rule
- If LCAR's objection is not withdrawn after the agency responds, LCAR can vote to certify its objection and file with the SOS
- However, rule can still be adopted; an objection switches the burden of proof

Background: Time Frames & Cost

➤ Time frame

- At least 4 months (not including time developing draft rule)
- Complex rules often take longer

➤ Cost

Summary Time Frames Within H.688

- Bill effective on passage
- Climate Council appointed w/in 60 days of bill becoming law and 1st meeting within 30 days (by end summer 2020?)
 - Climate Council can therefore start meeting fall 2020?
- Council adopt Plan on or before July 1, 2021
- ANR develop rules (July 2021 - Jan 2022)
 - **Rules to Council** at least 45 days before filed with ICAR (~ mid-Jan 2022)
 - **Rules to House & Senate Committees** at least 30 days before filed with ICAR (~ Feb. 1 2022)
- Rules filed with ICAR March 1, 2022
 - ICAR / LCAR process March – July 2022
- Rules adopted by July 1, 2022 (to meet 2025 GHG reduction goals)

Remedies Current Law

- Participation in rulemaking process
- 3 V.S.A. § 806: Person may submit a written request that an Agency adopt, amend, or repeal a rule
- Action Pursuant to Rule 75
- 3 V.S.A. § 807: Declaratory judgment on validity or applicability of rule
- 3 V.S.A. § 846: Action based on procedural failure such as failure file with SOS, failure file with LCAR, etc.

Remedies Current Law

- Participation in rulemaking process
- 3 V.S.A. § 806: Person may submit a written request that an Agency adopt, amend, or repeal a rule
 - Within 30 days Agency must adopt, amend, or repeal the rule or deny request in writing

Remedies Current Law: Rule 75

(a) Availability of Review. **Any action or failure or refusal to act by an agency of the state** or a political subdivision thereof ... may be reviewed in accordance with this rule ...

(b) Mode of Review. Proceedings under this rule shall ... be governed by the Rules of Civil Procedure as modified by this rule. **The complaint and summons shall be served upon the agency and all parties in accordance with the provisions of Rule 4. The complaint shall include a concise statement of the grounds upon which the plaintiff contends the plaintiff is entitled to relief, and shall demand the relief to which the plaintiff believes the plaintiff to be entitled. No responsive pleading need be filed** unless required by statute or by order of the court....

(c) Time Limits; Stay. The time within which review may be sought shall be as provided by statute, except that **if no time limit is specified by statute, the complaint shall be filed within 30 days** after notice of any action or refusal to act of which review is sought unless the court enlarges the time in accordance with Rule 6(b), and, in the event of a failure to act, **within six months after expiration of the time in which action should reasonably have occurred....**

(d) Trial or Hearing; Judgment. Any question as to which there is a right to trial by jury shall be tried to a jury if one is demanded ... Otherwise all questions ... shall be tried to the court. **The judgment of the court shall affirm, reverse, or modify the decision under review as provided by law.**

(e) Review by the Supreme Court. Unless by statute or otherwise the decision of the superior court is final, **review by the Supreme Court shall be by appeal ...** and no other method of appellate review shall be permitted.

Remedies Current Law: 3 V.S.A. § 807

- 3 V.S.A. § 807: Declaratory judgment on validity or applicability of rule
 - “The validity or applicability of a rule may be determined in an action for declaratory judgment in the Washington Superior Court if it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff....”

Remedies Current Law: 3 V.S.A. § 807

- Grounds Court invalidate a rule:
 - Rule exceeds legislative grant of authority
 - Rule contrary to legislative intent
 - Arbitrary, unreasonable, contrary to law
 - Procedural defects Remedies Current Law: 3 V.S.A. § 807
- Arbitrary, unreasonable, or contrary to law
 - Statutory definition arbitrary & case law

Cause of Action Sec. 4 of H.688 (new 10 V.S.A. § 594)

- Scenario (a): ANR fails to adopt or update rules
 - Rule 75
 - Time frame & notice
 - Remedy
- Scenario (b): ANR does adopt rules, but those rules fail to achieve GHG reductions
 - Time frame & notice
 - Remedy, “substantial cause,” “prompt and effective” action to comply
- Awarding of costs & fees

Differences § 594 (a) & Rule 75

- § 594 expressly refers to Rule 75
- Time to bring action:
 - Rule 75: 30 days after notice; for failure to act w/in 6 mos.
 - § 594: 1 year
- Notice provision in § 594
- Question: Is § 594 necessary?
 - Certainty, standing & particularized harm

Differences § 594 (b) & Current Law

- Time period to bring action
 - 3 V.S.A. § 807: Within 1 year effective date of rule (3 V.S.A. § 846(e))
 - § 594(b): 1 year after filing Emissions Inventory; notice provision
- § 594(b) perhaps more limited than § 807; requires “substantial” cause & “prompt and effective” action
- Catch-all § 594(d)

Miscellaneous Issues

- H.688 grants ANR very broad rulemaking authority
 - Clarify all areas ANR may promulgate rules?
- Time frames & resources sufficient?
- Interaction / conflict jurisdiction other Agencies?
 - Example: Transportation
- Interaction / conflict with existing GHG reduction programs, structures, rules & entities
 - Examples: Building standards & codes, EEU's, RES
- Areas rulemaking authority insufficient & still need legislative action
 - Appropriations, TCI, amend RES

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