



STATE OF VERMONT
HOUSE OF REPRESENTATIVES
115 STATE STREET
MONTPELIER, VT
05633-5201

February 7, 2020

To: Chair Tim Briglin

From: Chair Maxine Grad

Re: House Judiciary Committee's comments re: H.688

The Judiciary Committee has reviewed the cause of action in section 594 in H.688 as introduced and the Attorney General's proposed amendment to that section dated January 29, 2020. A majority of the Committee supports section 594 and the proposed amendment.

We understand that without this section individuals would still be able to sue the Agency of Natural Resources (ANR) for noncompliance with the deadlines and rulemaking obligations under H.688. Under Rule 75 of the Vermont Rules of Civil Procedure, individuals could sue ANR if it failed to meet the deadlines in the bill. Under the Vermont Administrative Procedure Act, plaintiffs could challenge any rulemaking undertaken pursuant to H.688. Nevertheless, the cause of action at section 594 serves important functions, including narrowing and clarifying the scope of any litigation taken to enforce the mandates of H.688, and should be a part of the bill.

Section 594 modifies the timelines associated with actions brought to enforce the deadlines and mandates included in the bill. It provides that a person must notify ANR of its intent to sue the Agency 60 days before commencing a lawsuit, an obligation that does not exist in Rule 75. This allows ANR the opportunity to cure any deficiency before a lawsuit commences, which may eliminate the need for the plaintiff to pursue the lawsuit.

The cause of action also provides guidance to courts in considering a lawsuit against ANR. In a missed-deadline case, section 594(a)(3) makes clear that the court can allow ANR reasonable time to issue rules if it finds that ANR is taking prompt and effective action in complying with the law. Without this provision, a court would be able to exercise its discretion in fashioning a remedy without any statutory guidance.

The same guidance is provided to the courts in cases brought pursuant to 594(b) alleging the failure to meet the reductions requirements under section 578. Again, the bill provides guidance in determining the remedy, allowing a court to determine if ANR is taking prompt and effective action in order to determine whether to provide the Agency with additional time to comply with the bill's requirements.

In addition, under subsection 594(b)(3), plaintiffs must prove that the rules adopted under section 593 are a substantial cause of the failure to achieve the reductions requirements. This provision clarifies for the Court and the parties that plaintiffs have this additional burden in seeking relief under the bill. Without the provision, it ANR's obligations under the bill would be less clear for plaintiffs and defendants.

The phrases "substantial cause of failure," "prompt and effective action," and "reasonable period of time" are terms that should not be further defined in the bill. These are the types of terms that judges are familiar with and are capable of applying to a case's facts and the totality of the circumstances in issue a ruling.

The Attorney General's proposed amendment to 594(b)(3) helps to clarify the scope of the remedy that a Court may grant if it finds that the reduction requirements have not been met. The Court is not to order its own solution to meet the law's requirements. Rather, it must remand to ANR, which possess the technical expertise to come into compliance with the reduction requirements.

Section 594(c) appropriately includes provisions related to attorney's fees and costs. To avoid baseless lawsuits, section 594(c)(2) provides that a defendant may be awarded reasonable costs if the action is frivolous or lacks a reasonable basis in law or fact. To ensure ANR's accountability, section 594(c)(1) provides that a court award a prevailing plaintiff with reasonable costs and attorney's fees unless doing so would not serve the interests of justice. Providing attorney's fees and costs to plaintiffs is a common method for the legislature to ensure that certain lawsuits, particularly involving environmental matters, are pursued. Such provisions allow Vermonters who do not have the means to hire an attorney to access justice. This is particularly important in cases involving the public interest and that do not include an award of damages from which attorney's fees can be paid on a contingency basis.

Courts are familiar with applying the "prevailing party" and "interest of justice tests," so any further definition of these terms is unnecessary.

We do not anticipate that the bill will generate many cases. The Chief Administrative Judge testified that the bill would not create a burden on the courts. Indeed, over the next ten years, if ANR is not complying with H.688, there would likely be few lawsuits. For example, if the greenhouse gas inventory shows that the 2025 reduction requirements are not met, it is possible that several lawsuits could be filed. But it is likely that those cases would involve common questions of law or fact, causing the court to exercise its broad authority under Rule 42 of the Vermont Rule of Civil Procedure to organize proceedings to avoid unnecessary costs or delays. The court may order joint hearings, joint trials, consolidate the actions with the consent of the parties, and make any other orders "to avoid unnecessary costs or delay." VRCP 42(a). The purpose of Rule 42(a) "is to give the court broad discretion to decide how cases on its docket are to be tried so that the business of the court

may be dispatched with expedition and economy while providing justice to the parties." Wright & A. Miller, Federal Practice and Procedure, § 2381 (1971).

Actions brought under section 594 of the bill would involve common questions of both law and fact. The State of Vermont would likely request consolidation of these cases, and, the court may order consolidation with the consent of the parties. The court would also have the authority and incentive (conservation of judicial resources) to order joint hearings or trials and issue other procedural orders even if it does not consolidate the cases.