

H.688 · As Passed by House
“Vermont Global Warming Solutions Act of 2020”

Cause of Action

Senate Committee on Judiciary

JUNE 25, 2020

LUKE MARTLAND, DIRECTOR & CHIEF COUNSEL

How Law Would Work / Key Steps

GHG reduction requirements
(2025, 2030, 2050)

Vermont Climate Council

Vermont Climate Action Plan

ANR Rulemaking to implement plan &
achieve GHG reductions

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

Cause of action; 10 V.S.A. § 594

(a) Scenario: ANR fails to adopt or update rules

- Rule 75
- Time frame & notice
- Remedy

(b) Scenario: ANR adopts rules, but fail to achieve GHG reductions

- Time frame & notice
- Remedy, “substantial cause”, “prompt and effective” action to comply

(c) Awarding of costs & fees

(d) Does not limit existing remedies

H.688, 10 V.S.A. § 594(a) (p. 21)

§ 594. CAUSE OF ACTION

(a) Any person may commence an action based upon the failure of the Secretary of Natural Resources to adopt or update rules pursuant to the deadlines in section 593 of this chapter.

(1) The action shall be brought pursuant to Rule 75 of the Vermont Rules of Civil Procedure in the Civil Division of the Superior Court of Washington County.

(2) The complaint shall be filed within one year after expiration of the time in which the Secretary of Natural Resources was required to adopt or update rules pursuant to section 593 of this chapter. However, a person shall not commence an action under this subsection until at least 60 days after providing notice of the alleged violation to the Secretary.

(3) If the court finds that the Secretary has failed to adopt or update rules pursuant to the deadlines in section 593 of this chapter, the court shall enter an order directing the Secretary to adopt or update rules. If the court finds that the Secretary is taking prompt and effective action to adopt or update rules, the court may grant the Secretary a reasonable period of time to do so.

H.688, 10 V.S.A. § 594(b) (p. 22)

- ▶ (b) Any person may commence an action alleging that rules adopted by the Secretary pursuant to section 593 of this chapter have failed to achieve the greenhouse gas emissions reductions requirements pursuant to section 578 of this title.
- ▶ (1) The action shall be brought in the Civil Division of the Superior Court of Washington County.
- ▶ (2) The complaint shall be filed within one year after the Vermont Greenhouse Gas Emission Inventory and Forecast published pursuant to section 582 of this title indicates that the rules adopted by the Secretary have failed to achieve the greenhouse gas emissions reductions requirements pursuant to section 578 of this title. However, a person shall not commence an action under this subsection until at least 60 days after providing notice of the alleged violation to the Secretary.
- ▶ (3) If the court finds that the rules adopted by the Secretary pursuant to section 593 of this chapter are a substantial cause of failure to achieve the greenhouse gas emissions reductions requirements pursuant to section 578 of this title, the court shall enter an order remanding the matter to the Secretary to adopt or update rules that achieve the greenhouse gas emissions reductions requirements consistent with this chapter. If the court finds that the Secretary is taking prompt and effective action to comply, the court may grant the Secretary a reasonable period of time to do so.

H.688, 10 V.S.A. § 594(c) – (d) (p. 23)

(c) In an action brought pursuant to this section, a prevailing party or substantially prevailing party:

(1) that is a plaintiff shall be awarded reasonable costs and attorney's fees unless doing so would not serve the interests of justice; or

(2) that is a defendant may be awarded reasonable costs if the action was frivolous or lacked a reasonable basis in law or fact.

(d) Nothing in this section shall be construed to limit the rights, procedures, and remedies available under any law, including the Vermont Administrative Procedure Act pursuant to 3 V.S.A. chapter 25.

Remedies Current Law

- Action Pursuant to Rule 75
- 3 V.S.A. § 807: Declaratory judgment on validity or applicability of rule

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....”

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
- Arbitrary, unreasonable, or contrary to law
 - Statutory definition arbitrary & case law

Differences H.688 [§ 594 (a)] & Rule 75

- § 594(a)(1) expressly refers to Rule 75
- Time to bring action:
 - Rule 75: 30 days after notice; for failure to act w/in 6 mos.
 - § 594(a)(2): 1 year
- Notice provision: 60 days

Differences H.688 [§ 594 (b)] & 3 V.S.A. §807

- Time period to bring action
 - 3 V.S.A. § 807: Within 1 year effective date of rule (3 V.S.A. § 846(e))
 - H.688 § 594(b)(2): 1 year after filing Emissions Inventory; notice provision
- § 594(b), unlike 3 V.S.A. § 807, requires court to find “substantial” cause and court may grant delay if ANR taking “prompt and effective” action

Take - aways

- Is § 594 necessary?
 - Remedies already exist as to both scenarios
 - Standing & particularized harm would still need to be established regardless of 'vehicle'
 - However, provides certainty & basis of action under (b) slightly different
- (d) makes clear all current remedies remain available
- Therefore, a “menu” of options & multiple causes of action / alternative pleadings

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