

Options to Address COVID-19 Solid Waste Concerns

1. Variance. 10 V.S.A. § 6613

(a) A person who owns or is in control of any plant, building, structure, process, or equipment may apply to the Secretary for a variance from the rules adopted under this chapter. The Secretary may grant a variance if he or she finds that:

- (1) The variance proposed does not endanger or tend to endanger human health or safety.
- (2) Compliance with the rules from which variance is sought would produce serious hardship without equal or greater benefits to the public.
- (3) The variance granted does not enable the applicant to generate, transport, treat, store, or dispose of hazardous waste in a manner which is less stringent than that required by the provisions of Subtitle C of the Resource Conservation and Recovery Act of 1976, and amendments thereto, codified in 42 U.S.C. Chapter 82 subchapter 3, and regulations promulgated under such subtitle.

(b) A person who owns or is in control of any facility may apply to the Secretary for a variance from the requirements of subdivision 6605(j)(2) or (3) [leaf residuals and food residuals] of this title if the applicant demonstrates alternative services, including on-site management, are available in the area served by the facility, the alternative services have capacity to serve the needs of all persons served by the facility requesting the variance, and the alternative services are convenient to persons served by the facility requesting the variance.

- Requires notice and opportunity for public meeting, and ANR must consider the relevant interests of the applicant, interested parties, and the general public.
- The variance is granted for time periods and under conditions consistent with the reasons and subject to statutory limitation based on the reasons it was issued.
- ANR asserts that it historically has never issued variances from statutes under § 6613.
- ANR asserts it traditionally only considers variances to requirements it has adopted using its discretionary authority to protect human health and the environment or prevent nuisances.
- Normally, variances have been from setback requirements or other operational controls, not to clear articulation of legislative policy.

2. Waiver from Commercial Hauler Collection Requirements. 10 V.S.A. § 6607a

(g)(1) Except as set forth in subdivisions (2), (3), and (4) of this subsection, a commercial hauler that offers the collection of municipal solid waste:

(A) Beginning on July 1, 2015, shall offer to collect mandated recyclables separate from other solid waste and deliver mandated recyclables to a facility maintained and operated for the management and recycling of mandated recyclables.

(B) Beginning on July 1, 2020, shall offer to nonresidential customers and apartment buildings with four or more residential units collection of food residuals separate from other solid waste and deliver to a location that manages food residuals in a manner consistent with the priority uses established under subdivisions 6605k(a)(2)-(5) of this title. Commercial haulers shall not be required to offer collection of food residuals if another commercial hauler provides collection services for food residuals in the same area and has sufficient capacity to provide service to all customers.

(2) In a municipality that has adopted a solid waste management ordinance addressing the collection of mandated recyclables or food residuals, a commercial hauler in that municipality is not required to comply with the requirements of subdivision (1) of this subsection and subsection (h) of this section for the material addressed by the ordinance if the ordinance:

(A) is applicable to all residents of the municipality;

(B) prohibits a resident from opting out of municipally provided solid waste services;
and

(C) does not apply a variable rate for the collection for the material addressed by the ordinance.

(3) A commercial hauler is not required to comply with the requirements of subdivision (1)(A) or (B) of this subsection in a specified area within a municipality if:

(A) the Secretary has approved a solid waste implementation plan for the municipality;

(B) for purposes of waiver of the requirements of subdivision (1)(A) of this subsection (g), the Secretary determines that under the approved plan:

(i) the municipality is achieving the per capita disposal rate in the State Solid Waste Plan; and

(ii) the municipality demonstrates that its progress toward meeting the diversion goal in the State Solid Waste Plan is substantially equivalent to that of municipalities complying with the requirements of subdivision (1)(A) of this subsection (g);

(C) the approved plan delineates an area where solid waste management services required by subdivision (1)(A) or (B) of this subsection (g) are not required; and

(D) in the delineated area, alternatives to the services, including on-site management, required under subdivision (1)(A) or (B) of this subsection (g) are offered, the alternative services have capacity to serve the needs of all residents in the delineated area, and the alternative services are convenient to residents of the delineated area.

(4) A commercial hauler is not required to comply with the requirements of subdivision (1)(A) or (B) of this subsection for mandated recyclables or food residuals collected as part of a litter collection.

3. Emergency Authority—Generally

- Under 20 V.S.A. ch. 1, statute grants the Emergency Management Division and the Governor certain authorities in times of emergency to protect the public peace, health, and safety.
- Pursuant to 20 V.S.A. § 9 “...in the event of an all-hazards event in or directed upon the United States or Canada that causes or may cause substantial damage or injury to persons or property within the bounds of the State in any manner, the Governor may proclaim a state of emergency within the entire State or any portion or portions of the State.”
- An “all-hazards event” includes incidents such as natural disasters, civil insurrection, terrorist attacks, and a “health or disease-related emergency.” 20 V.S.A. § 2(1).
- Once a state of emergency is declared, the Governor is authorized to exercise certain powers “for as long as the Governor determines the emergency to exist.” 20 V.S.A. § 9.
- These powers are set forth in 20 V.S.A. §§ 8, 9, and 11 and include general and specific authority, including: employing measures and giving directions to the State or local boards of health.

4. Emergency Authority—Solid Waste Facilities; 10 V.S.A. § 6605d(h)

(h) If the Secretary finds that emergency action is required for the disposal of solid waste in Vermont facilities, the Secretary may issue an emergency provisional certification. Notwithstanding any contrary requirement of chapter 170 of this title, notice of a proposed emergency provisional certification shall be published at least seven calendar days prior to the meeting and the public comment period shall end no sooner than three calendar days after the meeting. An emergency provisional certification granted in accordance with this subsection shall be issued no more than once and shall terminate 60 days after issuance, unless the Secretary reissues the certification under this section as a provisional certification. Except as otherwise required by this subsection, an emergency provisional certification shall be subject to requirements that apply to provisional certification.

5. Enforcement Discretion

- Enforcement discretion is a constitutional and common law precept--not statutory
- Enforcement discretion extends from the take care clause and separation of powers.
 - The take care clause provides that the governor has the authority to take care that the laws be faithfully executed. Vt. Const. Ch.II, Sec. 20.
 - It has been interpreted to allow enforcement agencies discretion in enforcement of a law.
 - Thus, in many cases, agencies have discretion to determine if, when, and how to enforce violation of law.
- Exercise of enforcement discretion is generally unreviewable by courts, provided that the agency is acting constitutionally and is not violating the general precepts of discretion.
- One of the precepts of enforcement discretion is that it is supposed to be on a case-by-case basis according to the facts of each potential violation.
 - Enforcement discretion is not supposed to be used categorically to undermine policymaking.
 - E.g., the Obama era DAPA policy not to enforce immigration violations and to grant deferred action status to immigrants. The decision to categorically not enforce immigration laws undermined the congressional law and policy making authority.

6. Rulemaking

- 10 V.S.A. § 6603 grants ANR the authority to adopt rules to implement the solid waste chapter—including the universal recycling requirements. Agencies with rulemaking authority can adopt emergency rules under 3 V.S.A. § 844 when there is an imminent peril to public health, safety, or welfare.
 - Emergency rules have a maximum duration of 180 days.
 - LCAR can object if beyond agency authority or inconsistent with legislative intent.
- Certain ANR program have been delegated authority to adopt rules regarding the expedited permitting or allowance of otherwise regulated activities during emergencies.
- See, e.g., stream alteration, 10 V.S.A. § 1027--the Secretary shall adopt rules regarding the permitting of stream alteration activities under this subchapter during a state of emergency declared under 20 V.S.A. chapter 1 or during flooding or other emergency conditions that pose an imminent risk to life or a risk of damage to public or private property.