

No. 135. An act relating to surface water withdrawals and interbasin transfers.

(H.466)

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

Sec. 1. 10 V.S.A. chapter 41 is amended to read:

CHAPTER 41. REGULATION OF STREAM FLOW

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§ 1002. DEFINITIONS

~~Wherever As used or referred to in this chapter, unless a different meaning clearly appears from the context:~~

(1) “Artificial regulation of stream flow” means the intermittent or periodic manipulation of water levels and the intermittent or periodic regulation of discharge of water into the stream below the dam.

(2) “Banks” means that land area immediately adjacent to the bed of the stream, which is essential in maintaining the integrity thereof.

(3) “Basin” means the third-level, six-digit unit of the hydrologic unit hierarchy as defined by the U.S. Geological Survey (USGS), Federal Standards and Procedures for the National Watershed Boundary Dataset, Chapter 3 of Section A, Book 11. “Basin” is also referred to as “Hydrologic Unit Code 6” or “HUC-6”.

(4) “Bed” means the maximum area covered by waters of the stream for not less than 15 consecutive days in one year.

(5) “Berm” means a linear fill of earthen material on or adjacent to the bank of a watercourse that constrains waters from entering a flood hazard area or river corridor, as those terms are defined in subdivisions 752(3) and (11) of this title.

~~(4)~~(6) “Board” means the Natural Resources Board.

(7) “Capacity” means the maximum volume of water capable of being withdrawn by the water withdrawal system.

~~(5)~~(8) “Cross section” means the entire channel to the top of the banks.

~~(6)~~(9) “Dam” applies to any artificial structure on a stream, or at the outlet of a pond or lake, that is utilized for holding back water by ponding or storage together with any penstock, flume, piping, or other facility for transmitting water downstream to a point of discharge, or for diverting water from the natural watercourse to another point for utilization or storage.

~~(7)~~(10) “Department” means the Department of Environmental Conservation.

(11) “Existing surface withdrawal” means a surface water withdrawal that exists prior to January 1, 2023.

(12) “Frequency” means how often water will be withdrawn from a surface water over a period of time.

~~(8)~~(13) “Instream material” means:

(A) all gradations of sediment from silt to boulders;

(B) ledge rock; or

(C) large woody debris in the bed of a watercourse or within the banks of a watercourse.

(14) “Interbasin transfer” means the conveyance of surface water withdrawn from a basin for use in another basin.

(15) “Large woody debris” means any piece of wood within a watercourse with a diameter of 10 or more inches and a length of 10 or more feet that is detached from the soil where it grew.

~~(9)~~(16) “Person” means any individual; partnership; company; corporation; association; unincorporated association; joint venture; trust; municipality; the State of Vermont or any agency, department, or subdivision of the State; any federal agency; or any other legal or commercial entity.

(17) “Rate of withdrawal” means the volume of surface water that is withdrawn over a period of time, as reported in gallons per minute.

(18) “Reasonable and feasible” means available and capable of being implemented after consideration of cost, existing technology, logistics in light of the overall project purpose, environmental impact, and ability to obtain all necessary approvals for implementation.

(19) “Secretary” means the Secretary of Natural Resources or the Secretary’s duly authorized representative.

(20) “Surface water” means all rivers, streams, creeks, brooks, reservoirs, ponds, lakes, and all bodies of surface waters that are contained

within, flow through, or border upon the State or any portion of it. “Surface water” does not include the following:

(A) groundwater as defined in section 1391 of this title;

(B) artificial waterbodies as defined under section 29A-101(d) of the Vermont Water Quality Standards;

(C) treatment ponds, lagoons, or wetlands created solely to meet the requirements of a permit issued for a discharge; and

(D) constructed off-stream farm ponds or other off-stream impoundments that are used for irrigation for farming or watering of livestock.

(21) “Vermont Water Quality Standards” means the standards adopted pursuant to chapter 47 and subdivision 6025(b) of this title.

~~(10)~~(22) “Watercourse” means any perennial stream. “Watercourse” ~~shall~~ does not include ditches or other constructed channels primarily associated with land drainage or water conveyance through or around private or public infrastructure.

~~(11) “Secretary” means the Secretary of Natural Resources, or the Secretary’s duly authorized representative.~~

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

(24) “Withdrawal” means the intentional diversion from a surface water by pumping, gravity, or other method for the purpose of being used for irrigation, industrial uses, snowmaking, livestock watering, water supply,

aquaculture, or other off-stream uses. “Withdrawal” does not include hydroelectric projects that are regulated by the Federal Energy Regulatory Commission or the Public Utility Commission. “Withdrawal” does not include direct consumption of surface water by livestock.

~~(12) “Berm” means a linear fill of earthen material on or adjacent to the bank of a watercourse that constrains waters from entering a flood hazard area or river corridor, as those terms are defined in subdivisions 752(3) and (11) of this title.~~

~~(13) “Large woody debris” means any piece of wood within a watercourse with a diameter of 10 or more inches and a length of 10 or more feet that is detached from the soil where it grew.~~

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Subchapter 4. Surface Water Withdrawals and Interbasin Transfers

§ 1041. POLICY ON SURFACE WATER WITHDRAWALS FOR
OFF-STREAM USES OTHER THAN SNOWMAKING

(a) This subchapter is intended to establish policy and standards for surface water withdrawals that are consistent with section 1001 of this chapter and chapter 47 of this title, including the Vermont Water Quality Standards.

(b) The policy established under this subchapter is to:

(1) assure the protection, maintenance, and restoration of the chemical, physical, and biological water quality, including water quantity, necessary to sustain aquatic communities and stream function;

(2) help to provide for and enhance the viability of those sectors and industries that rely on the use of surface waters and are important to Vermont's economy;

(3) permit surface water withdrawals and the construction of appurtenant facilities and related systems for uses other than snowmaking, based on an analysis of the need for water and the consideration of alternatives and consistent with this and related policies and other applicable laws and rules; and

(4) recognize that existing users of the State's waters for off-stream uses that may have an adverse effect on water quality should have time and opportunity to improve water quality.

§ 1042. REGISTRATION AND REPORTING; EXCEPTIONS

(a) Registration. Beginning on January 1, 2023, any person withdrawing 10,000 gallons or more of surface water within a 24-hour period or 150,000 gallons or more of surface water over any 30-day period shall register with the Secretary:

(1) the location of each withdrawal, including each impacted surface water;

(2) the frequency and rate of each withdrawal;

(3) a description of the use or uses of the water to be withdrawn;

(4) the capacity of the system to be used for the withdrawal; and

(5) a schedule for the withdrawal.

(b) Report. Beginning on January 1, 2023, a person that is required to register a surface water withdrawal pursuant to subsection (a) of this section shall file an annual report with the Secretary. Reports shall be filed annually by January 15 of the following year. The report shall be made on a form provided by the Secretary and shall include all of the following information:

(1) the total amount of water withdrawn each month;

(2) the location of each withdrawal, including each impacted surface water;

(3) the daily maximum withdrawal for each month;

(4) the date of daily maximum withdrawal; and

(5) any other information required by the Secretary.

(c) Methods of reporting withdrawals. The following methods shall be used to report the amounts of withdrawn surface water required to be reported under subsection (b) of this section:

(1) For withdrawals of between 10,000 and 50,000 gallons of surface water within a 24-hour period or 150,000 gallons or more of surface water over any 30-day period, the person shall either provide an estimate of total volume withdrawn or provide meter data. The report shall describe how any estimate was calculated.

(2) For withdrawals of 50,000 gallons or more of surface water within a 24-hour period or 1,500,000 gallons or more of surface water over any 30-day

period, the person shall provide meter data or measured data by a technically appropriate method approved by the Secretary.

(d) Exceptions. The following withdrawals shall not be subject to the requirements of subsection (a) or (b) of this section:

(1) surface water withdrawals for fire suppression or other public emergency response purposes;

(2) surface water withdrawals required to report under subchapter 3 of this chapter for snowmaking uses;

(3) surface water withdrawals approved pursuant to chapter 56 of this title on public water supply and the rules adopted thereunder for use as a public drinking water supply;

(4) surface water withdrawals for irrigation for farming, livestock watering, or other uses for farming, as the term “farming” is defined in 6 V.S.A. § 4802; and

(5) a surface water withdrawal reported to the Secretary under any project that requires the reporting of substantially similar data.

§ 1043. PERMIT REQUIREMENT; PROGRAM DEVELOPMENT

(a) Program development. On or before July 1, 2026, the Secretary shall implement a surface water withdrawal permitting program that is consistent with section 1041 of this subchapter. The program shall be developed to:

(1) require a permit or other authorization for surface water withdrawals based on potential impacts to surface waters or other factors, and establish

conditions of operation necessary to protect surface waters and the Vermont

Water Quality Standards;

(2) consider surface water withdrawal registration and reporting information submitted pursuant to section 1042 of this chapter in the

establishment of permitting thresholds and other permitting requirements;

(3) require efficient use and conservation of surface water;

(4) ensure that withdrawals comply with the Vermont water quality standards;

(5) establish limitations on withdrawals based on low flow or drought conditions and the development of potential alternatives to meet surface water withdrawal needs in such cases; and

(6) require assessment of any reasonable and feasible alternatives to proposed withdrawals that may have less of an impact on surface water quality.

(b) Application. Application for a permit to withdraw surface water under the program established under subsection (a) of this section shall be made on a form provided by the Secretary, and shall include the following information:

(1) the location of each withdrawal, including the identification and type of each impacted surface water;

(2) a description of the use or uses of the water to be withdrawn;

(3) a description of the proposed method of water withdrawal;

(4) the frequency and rate of the withdrawal;

(5) an estimated schedule for the withdrawal;

(6) the capacity of the system to be used for the withdrawal;

(7) the location of the proposed return flow of the withdrawn water, and whether the withdrawal is an interbasin transfer;

(8) an estimate of the volume of water needed for the proposed use or uses;

(9) a description of the alternative means considered for the proposed uses of water that will have less of an impact on surface water quality; and

(10) any other information required by the Secretary.

(c) Permits.

(1) The Secretary may issue a general permit to authorize certain withdrawal activities.

(2) The Secretary shall issue a general permit under this chapter for the withdrawal of surface water for State or municipal infrastructure projects. The general permit shall establish a rate and withdrawal volume that only requires notification of the Secretary and does not require Secretary approval prior to withdrawal.

(3) A permit issued under this subchapter shall be for a period of not longer than 10 years from the date of issuance.

(d) Exceptions. A permit required under this subchapter shall not be required for:

(1) surface water withdrawals for fire suppression or other public emergency response purposes; or

(2) surface water withdrawals for irrigation for farming, livestock watering, or other uses for farming, as the term “farming” is defined in 6 V.S.A. § 4802.

(e) Existing surface water withdrawals.

(1) Snowmaking withdrawals. Existing withdrawals approved pursuant to subchapter 3 of this chapter for snowmaking shall be reviewed pursuant to subdivision (f)(1) of this section.

(2) Nonsnowmaking withdrawals.

(A) A permit required under this subchapter shall not be required until July 1, 2030 for an existing surface water withdrawal for nonsnowmaking purposes, provided that:

(i) the existing surface water withdrawal is both registered and reported to the Secretary pursuant to section 1042 of this title on an annual basis; and

(ii) no expansion of the existing surface water withdrawal occurs on or after January 1, 2023.

(B) For purposes of this subdivision (2), an expansion includes an increase in reported surface water withdrawal rate or volume or increase in reported capacity of the system.

(f) Surface water withdrawals for snowmaking.

(1) Existing withdrawals. Existing surface water withdrawals for snowmaking purposes that have been reviewed and approved pursuant to

subchapter 3 of this chapter shall not require additional technical review by the Secretary under this subchapter, provided that the approved snowmaking activity is operated in compliance with the terms and conditions of the Secretary's approval. For such activities, the Secretary may issue a permit under the rules adopted pursuant to this subchapter.

(2) New withdrawals. Proposed surface water withdrawals for new snowmaking activities that require review pursuant to subchapter 3 of this chapter shall be reviewed by the Secretary in accordance with the rules adopted pursuant to section 1032 of this title. If the Secretary determines that the proposed activity is consistent with those rules, the Secretary shall issue a permit required by section 1043 of this section for that activity.

(g) Enforcement.

(1) The Secretary may require a person to obtain a permit under this subchapter when the Secretary, in the Secretary's discretion, determines that a withdrawal or other action circumvents the requirements of this subchapter.

(2) If the Secretary finds that a withdrawal subject to this subchapter results in the construction, installation, operation, or maintenance of any facility or condition that results in or can reasonably be expected to result in a violation of the Vermont Water Quality Standards, the Secretary may issue an order establishing reasonable and proper methods and procedures for the control of that activity in order to reduce or eliminate the violation.

(h) Reservation. Nothing in this subchapter shall be interpreted to supersede, limit, or otherwise effect the Secretary's authority to take action pursuant to section 1272 of this title or other applicable provision of law or rule.

§ 1044. INTERBASIN TRANSFERS OF SURFACE WATERS

(a) Review of HUC 6 interbasin transfers. The Secretary shall review any interbasin transfer pursuant to the Vermont Water Quality Standards and other requirements of State law listed in subdivision 1253(h)(1) of this title. This review shall be in addition to any applicable standards and permitting requirements adopted pursuant to subsection 1043(a) of this title.

(b) Review of other transfers likely to violate Vermont Water Quality Standards. The Secretary may review any other surface water withdrawal that includes the transfer of surface water from one watershed to another watershed under the requirements of subsection (a) of this section if the Secretary determines that the activity is likely to result in a violation of the Vermont Water Quality Standards. The Secretary shall make a determination under this subsection based on a review of information set forth under subsection 1043(b) of this title that is readily available to the Secretary.

§ 1045. REPORT TO GENERAL ASSEMBLY

Beginning February 15, 2023 and annually thereafter, the Secretary of Natural Resources, after consultation with the Secretary of Agriculture, Food and Markets, shall submit to the Senate Committees on Agriculture and on

Natural Resources and Energy and the House Committees on Agriculture and Forestry and on Natural Resources, Fish, and Wildlife the data submitted to the Secretary pursuant to subsections 1042(a) and (b) of this title, data submitted as part of a permit required under section 1043 of this title, and the data submitted to the Secretary of Agriculture, Food and Markets under 6 V.S.A. § 4927.

§ 1046. RULEMAKING

The Secretary shall adopt rules to implement the requirements of this subchapter.

Sec. 2. 10 V.S.A. § 1253(h)(1) is amended to read:

(h)(1) The Secretary shall administer a Clean Water Act Section 401 certification program to review activities that require a federal license or permit or activities subject to regulation under chapter 41, subchapter 4 of this title to ensure that a proposed activity complies with the Vermont Water Quality Standards, as well as with any other appropriate requirement of State law, including:

(A) 10 V.S.A. chapter 37 (wetlands protection and water resources management);

(B) 10 V.S.A. chapter 41 (regulation of stream flow);

(C) 10 V.S.A. § 1264 (stormwater management);

(D) 29 V.S.A. chapter 11 (management of lakes and ponds); and

(E) the Agency of Natural Resources Rules for Water Withdrawals for Snowmaking.

Sec. 3. 10 V.S.A. § 8003(a)(4) is amended to read:

(4) 10 V.S.A. chapters 41 and 43, relating to dams, surface water withdrawals, interbasin transfers, and stream alterations;

Sec. 4. 10 V.S.A. § 8503(a)(1)(C) is amended to read:

(C) chapter 41 (relating to dams, surface water withdrawals, interbasin transfers, and stream alterations, and regulation of stream flow);

Sec. 5. 6 V.S.A. chapter 215, subchapter 6A is added to read:

Subchapter 6A. Surface Water Withdrawals for Farming

§ 4926. DEFINITIONS

As used in this subchapter:

(1) “Surface water” means all rivers, streams, creeks, brooks, reservoirs, ponds, lakes, and all bodies of surface waters that are contained within, flow through, or border upon the State or any portion of it. “Surface water” does not include the following:

(A) groundwater as defined in 10 V.S.A. § 1391;

(B) artificial waterbodies as defined under section 29A-101(d) of the Vermont Water Quality Standards;

(C) treatment ponds, lagoons, or wetlands created solely to meet the requirements of a permit issued for a discharge; and

(D) constructed off-stream farm ponds or other off-stream impoundments that are used for irrigation for farming or watering of livestock.

(2) “Withdrawal” means the intentional diversion from a surface water by pumping, gravity, or other method for the purpose of being used for irrigation for farming, livestock watering, or other uses for farming.

“Withdrawal” does not include direct consumption of surface water by livestock.

§ 4927. REPORT OF SURFACE WATER WITHDRAWALS FOR

IRRIGATION, LIVESTOCK WATERING, OR OTHER FARMING

USE

(a) Report of withdrawal. Beginning on January 15, 2023 and annually thereafter, any person who withdrew 10,000 gallons or more of surface water within a 24-hour period in the preceding calendar year or 150,000 gallons or more of surface water over any 30-day period in the preceding calendar year shall file a report with the Secretary of Agriculture, Food and Markets. The report shall be made on a form provided by the Secretary and shall include all of the following information:

(1) an estimate of the total amount of water withdrawn in the preceding calendar year;

(2) the location of the withdrawals;

(3) the daily maximum withdrawal for each month;

(4) the date of each daily maximum withdrawal; and

(5) any other information related to surface water withdrawal required by the Secretary of Agriculture, Food and Markets.

(b) Sharing of data. Beginning February 1, 2023 and annually thereafter, the Secretary of Agriculture, Food and Markets shall submit to the Secretary of Natural Resources the data collected under this section for the purposes of the report to the General Assembly required by 10 V.S.A. § 1045.

Sec. 5a. IMPLEMENTATION; RULEMAKING

The Secretary of Natural Resources shall conduct public input and outreach with interested parties prior to initiating formal rulemaking pursuant to the Administrative Procedure Act for surface water withdrawals as set forth in 10 V.S.A. § 1046. The public input and outreach shall include an opportunity for interested parties to comment on a draft rule for surface water withdrawals.

Sec. 6. EFFECTIVE DATE

This act shall take effect on July 1, 2022.

Date Governor signed bill: May 24, 2022