

1 H.108

2 Introduced by Representatives Cordes of Lincoln, Dolan of Waitsfield,

3 Sheldon of Middlebury, and Squirrell of Underhill

4 Referred to Committee on

5 Date:

6 Subject: Conservation and development; water quality; water quality

7 standards; certification

8 Statement of purpose of bill as introduced: This bill proposes to amend the
9 Vermont Water Quality Standards (VWQS) to clarify that the standards apply
10 to wetlands and discharges to wetlands. The bill also would amend the VWQS
11 to require that any federal Clean Water Act (CWA) section 401 certification
12 issued by the State for waters or for wetlands shall include: an evaluation of
13 water quality impacts on waters and wetlands and an evaluation of alternative
14 means of accomplishing the proposed action for which certification is sought.
15 The bill would require that the State conduct a cumulative impacts analysis of
16 the water quality impacts on waters and wetlands of an activity subject to the
17 CWA section 401 certification. A CWA section 401 certification would not be
18 granted unless the Secretary of Natural Resources determines that the proposed
19 activity meets the VWQS.

1 An act relating to Vermont standards for issuing a Clean Water Act
2 section 401 certification

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

4 Sec. 1. FINDINGS

5 The General Assembly finds that:

6 (1) Preserving, protecting, and restoring the water quality of surface
7 waters, including wetlands, are necessary for the clean water, recreation,
8 economic opportunity, wildlife habitat, and ecological value that surface
9 waters provide.

10 (2) The Vermont Water Quality Standards (VWQS) are State rules, the
11 implementation of which is intended to achieve the water quality goals of the
12 State.

13 (3) The federal Clean Water Act section 401, 33 U.S.C. § 1341, requires
14 an applicant for a federal permit for a proposed activity that may result in a
15 discharge to waters to obtain a certification from the Agency of Natural
16 Resources (ANR) that the proposed activity will comply with the State's water
17 quality laws, including the VWQS.

18 (4) Based on ANR practice and duly adopted guidance documents, the
19 VWQS apply to wetlands when the State conducts a Clean Water Act section
20 401 certification review. However, the applicability of the VWQS to wetlands
21 should be clarified.

1 ~~(5) Wetlands serve to protect water quality and reduce the risk of flood~~
2 ~~hazards by temporarily storing floodwaters and storm runoff and slowly~~
3 ~~releasing waters downstream, thereby improving Vermont communities'~~
4 ~~resilience to the impacts from climate change, and are a source of carbon~~
5 ~~sequestration.~~

6 ~~(6) In order to adequately protect wetlands when the State conducts a~~
7 ~~Clean Water Act section 401 certification review, an applicant should be~~
8 ~~required to conduct analyses of alternatives to the activity proposed in the~~
9 ~~permit application. Alternatives analyses are required to address wetland~~
10 ~~impacts in other states as part of their Clean Water Act section 401~~
11 ~~certification review and are currently part of the review of wetland impacts~~
12 ~~under the Vermont Wetland Rules.~~

13 ~~(7) To ensure that CWA section 401 certifications issued by ANR are at~~
14 ~~least as protective of State waters as the certification processes used in other~~
15 ~~states, the Vermont General Assembly should amend the VWQS to clarify that~~
16 ~~the standards apply to wetlands and to require that permit applicants subject to~~
17 ~~CWA section 401 conduct analyses of alternatives to the proposed activity~~
18 ~~subject to the certification in order to demonstrate that an activity meets the~~
19 ~~VWQS.~~

1 ~~Sec. 2. 10 V.S.A. § 1250 is amended to read:~~

2 § 1250. STATE WATER QUALITY POLICY

3 It is the policy of the State of Vermont to:

- 4 (1) protect and enhance the quality, character, and usefulness of its
5 surface waters and to assure the public health;
- 6 (2) maintain the purity of drinking water;
- 7 (3) control the discharge of wastes to the waters of the State, prevent
8 degradation of high quality waters, and prevent, abate, or control all activities
9 harmful to water quality;
- 10 (4) assure the maintenance of water quality necessary to sustain existing
11 aquatic communities;
- 12 (5) provide clear, consistent, and enforceable standards for the
13 permitting and management of discharges;
- 14 (6) protect from risk and preserve in their natural state certain high
15 quality waters, including fragile high-altitude waters, and the ecosystems they
16 sustain;
- 17 (7) manage the waters of the State to promote a healthy and prosperous
18 agricultural community; to increase the opportunities for use of the State's
19 forest, park, and recreational facilities; and to allow beneficial and
20 environmentally sound development, and

1 ~~(8) seek over the long term to upgrade the quality of waters and to~~
2 ~~reduce existing risks to water quality; and~~

3 ~~(9) apply the Vermont Water Quality Standards and section 401 water~~
4 ~~quality certifications under the federal Clean Water Act to an activity that may~~
5 ~~result in a discharge to a wetland, other than for restoration projects and~~
6 ~~activities that would affect less than three acres of Class III wetlands and no~~
7 ~~other waters or wetlands.~~

8 Sec. 3. 10 V.S.A. § 1251a is amended to read:

9 § 1251a. WATER POLLUTION ADMINISTRATION

10 (a) The Secretary may adopt rules, in accordance with the procedures in
11 the Administrative Procedure Act, that are necessary for the proper
12 administration of the Secretary's duties under this subchapter, including a
13 planning process approvable under Public Law 92-500, as amended.

14 (b) The Secretary shall establish by rule requirements for the issuance of
15 permits under subsection 1259(e) of this title, including in-stream water
16 quality parameters necessary to establish permit conditions and performance
17 monitoring; however, these in-stream water quality parameters shall not
18 supersede water quality standards adopted by the Secretary.

19 (c) On or before July 1, 2016, the Secretary of Natural Resources shall
20 adopt by rule an implementation process for the antidegradation policy in the
21 ~~water quality standards of the State. The implementation process for the~~

1 ~~antidegradation policy shall be consistent with the State water quality policy~~
2 established in section 1250 of this title, the Vermont Water Quality Standards,
3 and any applicable requirements of the federal Clean Water Act. The
4 Secretary of Natural Resources shall apply the antidegradation implementation
5 policy to all new discharges that require a permit under this chapter.

6 (d)(1) The Vermont Water Quality Standards certifications required by
7 section 401 of the federal Clean Water Act shall apply to activities that may
8 result in a discharge to waters and to all activities that may result in a discharge
9 to a wetland, other than for restoration projects.

10 (2) A section 401 water quality certification issued by the State under
11 the federal Clean Water Act for an activity in a water or a wetland that may
12 result in a discharge shall include all of the following:

13 (A) an evaluation of water quality impacts on wetlands under the
14 Vermont Wetlands Rules, Environmental Protection Rules, Chapter 30;

15 (B) an evaluation of alternative means of accomplishing the proposed
16 action that demonstrate that there is no practicable alternative that will
17 minimize impacts on wetlands; and

18 (C) an evaluation of cumulative impacts.

19 (3) The Secretary shall not issue a water quality certification under
20 section 401 of the federal Clean Water Act for an activity in a water or wetland
21 that may cause a discharge unless the Secretary determines that the project

1 ~~meets the VWQS. In order to demonstrate that a project meets the VWQS as~~
2 ~~part of the section 401 of the federal Clean Water Act review, an applicant~~
3 ~~shall demonstrate that there is no practicable alternative that will minimize~~
4 ~~impacts on wetlands and that the cumulative impacts of the project will not~~
5 ~~violate the VWQS.~~

6 Sec. 4. The Department of Environmental Conservation's Vermont Water
7 Quality Standards Environmental Protection Rule Chapter 29A,
8 Sec. 29A-102 is amended to read:

9 § 29A-102. Definitions

10 For the purposes of these Water Quality Standards, the terms below shall
11 have the following meanings unless a different meaning clearly appears from
12 the context.

13 * * *

14 (50) "Waters" include all rivers, streams, creeks, brooks, reservoirs,
15 ponds, lakes, springs and all bodies of surface waters, artificial or natural,
16 which are contained within, flow through, or border upon the State or any
17 portion of it.

18 (51) "Watershed" means a region containing waters that drain into a
19 particular brook, stream, river, or other body of water.

20 ~~(52) "Wetlands" has the same meaning as in 10 V.S.A. § 902(5).~~

1 ~~(53) "Restoration project" means activities associated with the~~
2 ~~restoration and enhancement of wetlands, rivers and streams, lakes and ponds,~~
3 ~~and riparian areas for the purposes of re-establishing natural hydrology,~~
4 ~~floodplain connectivity, natural stream connectivity and morphology, or fish~~
5 ~~and wildlife habitat.~~

6 ~~(54) "Water quality impacts on wetlands" means those impacts on the~~
7 ~~functions and values of wetlands set forth in the most current version of the~~
8 ~~Department of Environmental Conservation's Vermont Wetland Rules,~~
9 ~~Environmental Protection Rule, Chapter 30.~~

10 Sec. 5. The Department of Environmental Conservation's Vermont Water
11 Quality Standards Environmental Protection Rule Chapter 29A,
12 Sec. 29A-103 is amended to read:

13 § 29A-103. General Policies

14 (a) These rules are intended to achieve the goals of the State's water
15 quality policy (10 V.S.A. § 1250), set forth below, as well as the objective of
16 the federal Clean Water Act (33 U.S.C. § 1251 et seq.), which is to restore and
17 maintain the chemical, physical, and biological integrity of the Nation's
18 waters.

19 (b)(1) Water Quality Policy. It is the policy of the State of Vermont to:

20 (A) protect and enhance the quality, character, and usefulness of its
21 ~~surface waters and wetlands and to assure the public health,~~

1 ~~(2) an evaluation of alternative means of accomplishing the purposes of~~
2 the proposed activity for which certification is sought that demonstrate that
3 there is not practicable alternative that will minimize impacts on wetlands.

4 (c) The following applications for a CWA section 401 certification are not
5 subject to the requirements of subsections (b), (e), (f), and (g) of this section
6 unless the Secretary determines that an application for a certification that is
7 otherwise exempt shall comply with the requirements:

8 (1) a certification for a restoration project; and

9 (2) a certification of an activity that would affect less than three acres of
10 Class III wetlands and no other waters or wetlands.

11 (d)(1) The following applications for a CWA section 401 certification are
12 not subject to the requirements of subdivision (b)(2) of this section and
13 subsection (f) of this section, unless the Secretary determines an application
14 for a certification that is otherwise exempt shall comply with the requirements:

15 (A) a certification for an activity that would affect less than one-half
16 acre of Class 2 wetlands, cumulatively; and

17 (B) a certification of a project that would affect less than 300 linear
18 feet of stream, river, lake, or pond, cumulatively.

19 (2) If the Secretary determines under subdivision (1) of this subsection
20 that a certification that is otherwise exempt shall comply with the requirements
21 of subdivision (b)(2) of this section and subsection (f) of this section, the

1 ~~applicant for the certification also shall comply with the requirements of~~
2 ~~subdivision (b)(1) of this section and subsections (e) and (f) of this section.~~

3 ~~(e) The analysis of water quality impacts required under this section,~~
4 ~~including the analysis of water quality impacts on wetlands, shall include an~~
5 ~~evaluation of the cumulative impacts of the proposed activity for which~~
6 ~~certification is sought and an evaluation of other reasonably foreseeable~~
7 ~~activities for which a CWA section 401 certification may be sought.~~

8 ~~(f) The analysis of alternatives required under this section shall consider a~~
9 ~~range of alternatives that would avoid or minimize the impacts of a proposed~~
10 ~~activity on water quality, including the water quality impacts on wetlands. As~~
11 ~~used in this section, “practicable” means technologically possible, able to be~~
12 ~~put into practice, and economically viable, regardless of whether the applicant~~
13 ~~owns or controls alternative locations at the time of the application. Activities~~
14 ~~that are not water dependent are presumed to have a practicable alternative,~~
15 ~~unless the applicant demonstrates otherwise. For the purposes of this section,~~
16 ~~compensatory mitigation is not considered an alternative.~~

17 ~~(g) An application for a CWA section 401 certification shall not be granted~~
18 ~~unless, after an analysis of water quality impacts, including water quality~~
19 ~~impacts on wetlands, and of alternatives, where required, the Secretary~~
20 ~~determines, based on substantial evidence in the record, that the activity~~
21 ~~complies with the VWQS.~~

1 ~~Sec. 7. EFFECTIVE DATE~~

2 ~~This act shall take effect on passage.~~

Sec. 1. 10 V.S.A. § 1253(h) is added 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 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 quality management);

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

(C) 10 V.S.A. chapter 49A (lakeshore protection standards);

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

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

(F) The Agency of Natural Resources Rules for Water Withdrawals for Snowmaking.

(2) The Secretary of Natural Resources shall deny any application for certification under Section 401 of the Clean Water Act, unless the applicant demonstrates all of the following:

(A) there is no practicable alternative to the proposed activity that would have a less adverse impact on waters and wetlands of the State, and

provided that any proposed alternative shall not have other significant adverse human health, safety, or environmental consequences;

(B) the proposed activity will not result in the violation of any applicable water quality criteria established in the Vermont Water Quality Standards; and

(C) the proposed activity will not result in a violation of the State's antidegradation policy.

(3)(A) An alternative is considered practicable under subdivision (2)(A) of this subsection (h) if it is available and capable of being completed after taking into consideration cost, existing technology, and logistics in light of overall purposes of the proposed activity.

(B) Failure to comply with the requirements of subdivision (2)(A) of this subsection (h) shall not be the basis for denial of an application for a certification under Section 401 of the Clean Water Act if the proposed activity is exempt from those requirements under a rule adopted by the Secretary.

(4) The Secretary may issue a certification required by this subsection to any general permit or authorization issued by a federal agency. An applicant's compliance with that federal permit or authorization shall be presumed to be in compliance with the certification, unless the Secretary determines that an individual review of the applicant's activity is necessary to

assure compliance with the Vermont Water Quality Standards and other applicable State laws.

*Sec. 2. AGENCY OF NATURAL RESOURCES; VERMONT WATER
QUALITY STANDARDS; RULEMAKING*

The Secretary of Natural Resources shall amend the Vermont Water Quality Standards (VWQS) to include the following:

(1) An amendment to the Classification of State Waters to clarify that with regard to all Class I and II wetlands, as defined in 10 V.S.A. § 902, the uses to be protected include the functions and values of the wetland as described in Section 5 of the Vermont Wetland Rules.

(2) An amendment to the antidegradation policy to clarify that wetlands and their functions and values shall be protected as described by the Vermont Wetland Rules.

(3) Any additional provisions that the Secretary of Natural Resources determines are necessary to implement the requirements of 10 V.S.A. § 1253(h), including any exemptions to the requirements of 10 V.S.A. § 1253(h)(2)(A) for projects that are not likely to have significant impacts on water quality or wetland functions or values. State or municipal road or highway projects that require a certification under Section 401 of the Clean Water Act shall be exempt from the requirements of 10 V.S.A. § 1253(h)(2)(A)

when a separate alternatives analysis is otherwise required under State or federal law.

Sec. 3. RULEMAKING IMPLEMENTATION; TIMING

(a) The Secretary of Natural Resources shall file with the Secretary of State under 3 V.S.A. § 838 a copy of the proposed rules required by Sec. 2 of this act within 90 days from the effective date of this act.

(b) On or before January 15, 2022, the Secretary of Natural Resources shall submit to the House Committee on Natural Resources, Fish, and Wildlife and the Senate Committee on Natural Resources and Energy a report regarding the status of the rulemaking required by Sec. 2 of this act. The report shall include a draft of the rules.

(c) On or before March 1, 2022, the Secretary of Natural Resources shall file with the Secretary of State under 3 V.S.A. § 841 a final proposal of the rules required by Sec. 2 of this act.

Sec. 4. EFFECTIVE DATES

(a) This section and Secs. 2 and 3, VWQS rulemaking, shall take effect on passage.

(b) Sec. 1, certification program, shall take effect on the effective date of the rules required to be adopted under Sec. 2.