

1 TO THE HOUSE OF REPRESENTATIVES:

2 The Committee on Natural Resources, Fish, and Wildlife to which was
3 referred House Bill No. 108 entitled “An act relating to Vermont standards for
4 issuing a Clean Water Act section 401 certification” respectfully reports that it
5 has considered the same and recommends that the the bill be amended by
6 striking out all after the enacting clause and inserting in lieu thereof the
7 following:

8 Sec. 1. FINDINGS

9 The General Assembly finds that:

10 (1) Preserving, protecting, and restoring the water quality of surface
11 waters, including wetlands, are necessary for the clean water, recreation,
12 economic opportunity, wildlife habitat, and ecological value that surface
13 waters provide.

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

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

1 (4) Based on ANR practice and duly adopted guidance documents, the
2 VWQS apply to wetlands when the State conducts a Clean Water Act section
3 401 certification review. However, the applicability of the VWQS to wetlands
4 should be clarified.

5 (5) Wetlands serve to protect water quality and reduce the risk of flood
6 hazards by temporarily storing floodwaters and storm runoff and slowly
7 releasing waters downstream, thereby improving Vermont communities’
8 resilience to the impacts from climate change, and are a source of carbon
9 sequestration.

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

17 (7) To ensure that CWA section 401 certifications issued by ANR are at
18 least as protective of State waters as the certification processes used in other
19 states, the Vermont General Assembly should amend the VWQS to clarify that
20 the standards apply to wetlands and to require that permit applicants that
21 require a CWA section 401 certification conduct analyses of alternatives to the

1 proposed activity subject to the certification in order to demonstrate that an
2 activity meets the VWQS.

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

4 § 1250. STATE WATER QUALITY POLICY

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

6 (1) protect and enhance the quality, character, and usefulness of its
7 surface waters and to assure the public health;

8 (2) maintain the purity of drinking water;

9 (3) control the discharge of wastes to the waters of the State, prevent
10 degradation of high quality waters, and prevent, abate, or control all activities
11 harmful to water quality;

12 (4) assure the maintenance of water quality necessary to sustain existing
13 aquatic communities;

14 (5) provide clear, consistent, and enforceable standards for the
15 permitting and management of discharges;

16 (6) protect from risk and preserve in their natural state certain high
17 quality waters, including fragile high-altitude waters, and the ecosystems they
18 sustain;

19 (7) manage the waters of the State to promote a healthy and prosperous
20 agricultural community; to increase the opportunities for use of the State's

1 forest, park, and recreational facilities; and to allow beneficial and
2 environmentally sound development; ~~and~~

3 (8) seek over the long term to upgrade the quality of waters and to
4 reduce existing risks to water quality; and

5 (9) apply the Vermont Water Quality Standards to wetlands and to apply
6 Clean Water Act section 401 water quality certifications to an activity that
7 requires a federal license or permit that may result in a discharge to a wetland
8 unless otherwise exempted.

9 Sec. 3. AGENCY OF NATURAL RESOURCES; VERMONT WATER

10 QUALITY STANDARDS; RULEMAKING

11 (a) The Secretary of Natural Resources shall amend by rule the Vermont
12 Water Quality Standards (VWQS) to clarify that VWQS certifications required
13 under Clean Water Act section 401, 33 U.S.C. § 1341, shall apply to activities
14 that require a federal license or permit that may result in a discharge to waters
15 or a discharge to wetlands, unless otherwise exempt.

16 (b) The amendments to the VWQS shall include the following:

17 (1) a requirement that a Clean Water Act section 401 certification issued
18 by the State for an activity that requires a federal license or permit due to
19 potential to result in a discharge to a water or wetland shall include:

20 (A) an evaluation of water quality impacts under the Vermont
21 Wetlands Rules, Environmental Protection Rules, Chapter 30;

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

4 (C) an evaluation of the cumulative impacts of the proposed activity.

5 (2) A provision prohibiting the Secretary of Natural Resources from
6 issuing a Clean Water Act section 401 certification for an activity in a water or
7 wetlands that requires a certification unless the Secretary determines that the
8 activity complies with the VWQS. In order to demonstrate that a proposed
9 activity that requires a Clean Water Act section 401 certification complies with
10 the VWQS, an application for a certification shall demonstrate that:

11 (A) there is no practicable alternative to the proposed activity that
12 will minimize potential impacts on waters or wetlands; and

13 (B) the cumulative impacts of the proposed activity will not violate
14 the VWQS.

15 (3) Exemptions from the requirements of subdivisions (b)(1) and (2) of
16 this subsection for proposed activities that will have a minor impact on a water
17 or wetland, including:

18 (A) a water or wetlands restoration project;

19 (B) activities that cumulatively would affect less than one-half acre
20 of Class 2 wetlands; and

1 (C) activities that cumulatively would affect less than 300 linear feet
2 of a surface water other than a wetland.

3 (c) The analysis of alternatives required under this section shall consider a
4 range of alternatives that would avoid or minimize the impacts of a proposed
5 activity on water quality, including the water quality impacts on wetlands. As
6 used in this section, “practicable” means technologically possible, able to be
7 put into practice, and economically viable, regardless of whether the applicant
8 for a Clean Water Act section 401 certification owns or controls alternative
9 locations at the time of the application. Activities that are not water dependent
10 are presumed to have a practicable alternative, unless the applicant for the
11 Clean Water Act section 401 certification demonstrates otherwise. For the
12 purposes of this section, compensatory mitigation is not considered an
13 acceptable alternative.

14 Sec. 4. IMPLEMENTATION; TIMING

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

18 (b) On or before January 15, 2022, the Secretary of Natural Resources shall
19 submit to the House Committee on Natural Resources, Fish and Wildlife and
20 the Senate Committee on Natural Resources and Energy a report regarding the

1 status of the rulemaking required under Sec. 3 of this act. The report shall
2 include a draft of the rules.

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

6 Sec. 5. EFFECTIVE DATE

7 This act shall take effect on passage.

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11 (Committee vote: _____)

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Representative _____

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FOR THE COMMITTEE