

# The Vermont Statutes Online

The statutes were updated in November, 2018, and contain all actions of the 2018 legislative session.

## Title 10: Conservation And Development

### Chapter 41: Regulation Of Stream Flow

#### *Subchapter 1: General Provisions*

#### **§ 1001. Purpose**

The Department of Environmental Conservation is created to administer the water conservation policy of this State. It is in the public interest that the waters of the State shall be protected, regulated, and where necessary controlled under the authority of the State. The proper administration of the water resources now and for the future require careful consideration of the interruption of the natural flow of water in our watercourses resulting from the construction of new, and the operation of existing dams, diversion, and other control structures. This subchapter is intended to identify this need, to provide a means for the investigation of the cause and effect of intermittent or diverted flow, and for the consideration of corrective actions required to assure as nearly continuous flow of waters in the natural watercourses as may be possible consistent with reasonable use of riparian rights. (1965, No. 37, § 1; amended 1981, No. 222 (Adj. Sess.), § 24; 1987, No. 76, § 18.)

#### **§ 1002. Definitions**

Wherever 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) "Bed" means the maximum area covered by waters of the stream for not less than 15 consecutive days in one year.

(4) "Board" means the Natural Resources Board.

(5) "Cross section" means the entire channel to the top of the banks.

(6) "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) "Department" means the Department of Environmental Conservation.

(8) "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.

(9) "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.

(10) "Watercourse" means any perennial stream. "Watercourse" shall 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.

(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. (Added 1965, No. 37, § 2; amended 1975, No. 150 (Adj. Sess.), § 1; 1981, No. 222 (Adj. Sess.), § 24; 1983, No. 193 (Adj. Sess.), § 9, eff. April 27, 1984; 1987, No. 67, § 10; 1987, No. 76, § 18; 1997, No. 106 (Adj. Sess.), § 1, eff. April 27, 1998; 2003, No. 115 (Adj. Sess.), § 18, eff. Jan. 31, 2005; 2009, No. 110 (Adj. Sess.), § 13, eff. March 31, 2011; 2011, No. 138 (Adj. Sess.), § 2, eff. May 14, 2012.)

### **§ 1003. Conference; recommendations**

Whenever, in the opinion of the Department, it appears that the artificial regulation of stream flow as maintained by any person threatens the public interest or welfare or an emergency exists or is threatened, the Department may call to conference the owner or owners of the dam causing the artificial regulation and other persons having an interest therein, for the purpose of seeking cooperation in altered regulation to minimize damage to the public interest under the policy of this chapter. As a result of the conference, the Department may require action be taken by the person owning the dam with respect to the release of water as it may consider necessary and proper in the public interest, and shall issue findings of fact developed at the conference. For dams or diversions not licensed under 16 U.S.C. § 800, existing permits may be amended where those permits do not contain conditions with respect to minimum stream flow. For federally licensed facilities, the Secretary may negotiate the modification of stream flow, and if the Secretary's recommendations are not agreed to, the Secretary may petition the Federal Energy Regulatory Commission (FERC) for license amendments. (Added 1965, No. 37, § 3; amended 1981, No. 222 (Adj. Sess.), § 24; 1987, No. 67, § 11.)

**§ 1004. State's agent**

The Secretary shall be the agent to coordinate the State interest before the Federal Energy Regulatory Commission in all matters involving water quality and regulation or control of natural stream flow through the use of dams situated on streams within the boundaries of the State, and it shall advise the Federal Energy Regulatory Commission of the amount of flow considered necessary in each stream under consideration. The Agency of Natural Resources shall be the certifying agency of the State for purposes of Section 401 of the federal Clean Water Act and the Secretary's determinations on these certifications shall be final action by the Secretary appealable to the Environmental Division. The Secretary shall be the agent of the State and shall represent the State's interest under the provisions of the Federal Power Act, including those that protect State-designated outstanding resource waters. However, the Secretary's authority shall not infringe upon the powers and duties of the Public Utility Commission or the relations of that Commission to the Federal Energy Regulatory Commission as set forth in the Federal Power Act respecting water used for the development of hydroelectric power or projects incident to the generation of electric energy for public use as part of a public utility system. (Added 1965, No. 37, § 4; amended 1981, No. 222 (Adj. Sess.), § 24; 1983, No. 193 (Adj. Sess.), § 3, eff. April 27, 1984; 1987, No. 67, § 12; 1987, No. 76, § 18; 1991, No. 81, § 1; 2003, No. 115 (Adj. Sess.), § 19, eff. Jan. 31, 2005.)

**§ 1005. Repealed. 1991, No. 174 (Adj. Sess.), § 2, eff. May 15, 1997.**

**§ 1005a. Agency of Natural Resources; hydroelectric escrow fund**

(a) The Secretary of Natural Resources, with the approval of the Secretary of Administration, shall have the authority to enter into one or more written contracts with persons or entities to fund certifications under Section 401 of the federal Clean Water Act and State reviews and comments on Federal Energy Regulatory Commission (FERC) hydroelectric licensing as undertaken by or at the direction of the Agency of Natural Resources as the State's agent under section 1004 of this title. Funding provided under this section for such studies shall not exceed \$300,000.00 in the aggregate in any fiscal year. Such contracts shall establish mutually agreed upon study budgets, provide a means for tracking costs as they are incurred by the Agency in conducting the studies, establish a procedure for rendering periodic billings to the persons or entities contracting with the Agency for the payment of such costs, and provide for an annual accounting of all such expenditures through the annual State budget process. The term of any such contract may not exceed three years. The Agency of Natural Resources may enter into one or more contracts with more than one person or entity providing for payment of such costs through an agent, provided such agent is mutually agreed upon by the participating persons or entities and the Agency.

(b) All payments made to the Agency under such contracts shall be deposited into a special escrow fund created by the persons or entities with whom the Agency has contracted, to be known as the Hydroelectric Licensing Fund. All unencumbered balances in the Fund at the end of any fiscal year shall revert to the persons or entities contracted

with on a prorated basis. Disbursements from the Fund shall be made to the Agency of Natural Resources to support those programs of the Agency of Natural Resources incurring the costs of conducting the studies. (Added 1997, No. 59, § 39a, eff. June 30, 1997.)

### **§ 1006. Certification of hydroelectric projects; application process**

(a) As used in this section:

(1) "Bypass reach" means that area in a waterway between the initial point where water has been diverted through turbines or other mechanical means for the purpose of water-powered generation of electricity and the point at which water is released into the waterway below the turbines or other mechanical means of electricity generation.

(2) "Conduit" means any tunnel, canal, pipeline, aqueduct, flume, ditch, or similar constructed water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity.

(3) "Hydroelectric project" means a facility, site, or conduit planned or operated for the generation of water-powered electricity that has a generation capacity of no more than 1 megawatt and does not create a new impoundment.

(4) "Impoundment" means "riverine impoundment" as defined in the Vermont water quality standards adopted pursuant to chapter 47 and subdivision 6025(d)(3) of this title.

(b) On or before December 15, 2009, the Agency of Natural Resources, after opportunity for public review and comment, shall adopt by procedure an application process for the certification of hydroelectric projects in Vermont under Section 401 of the federal Clean Water Act.

(c) The application process adopted by the Agency of Natural Resources under subsection (b) of this section may include an application form for a federal Clean Water Act Section 401 certification for a hydroelectric project that meets the requirements of the Vermont water pollution control permit rules. The application form may require information addressing:

(1) a description of the proposed hydroelectric project and the impact of the project on the watershed;

(2) the preliminary terms and conditions that an applicant shall be subject to if a federal Clean Water Act Section 401 certification is issued for a proposed hydroelectric project; and

(3) time frames for the Agency of Natural Resources review of and response to an application for a federal Clean Water Act Section 401 certification of a hydroelectric project.

(d) In adopting the Clean Water Act Section 401 certification application process required by subsection (b) of this section, the Agency may, consistent with its authority to waive certifications under 33 U.S.C. § 1341(a)(1), adopt an expedited certification process for:

(1) hydroelectric projects when data provided by an applicant provide reasonable assurance that the project will comply with the State water quality standards;

(2) hydroelectric projects utilizing conduits; hydroelectric projects without a bypass reach; and hydroelectric projects with a de minimis bypass reach, as defined by the Agency of Natural Resources; and

(3) previously certified hydroelectric projects operating in compliance with the terms of a Clean Water Act Section 401 certification as demonstrated by existing administrative, monitoring, reporting, or enforcement data. (Added 2009, No. 54, § 39, eff. June 1, 2009.)

## ***Subchapter 2: Alteration Of Streams***

### **§ 1021. Alteration prohibited; exceptions**

(a) A person shall not change, alter, or modify the course, current, or cross section of any watercourse or of designated outstanding resource waters, within or along the boundaries of this State either by movement, fill, or excavation of ten cubic yards or more of instream material in any year, unless authorized by the Secretary. A person shall not establish or construct a berm in a flood hazard area or river corridor, as those terms are defined in subdivisions 752(3) and (11) of this title, unless permitted by the Secretary or constructed as an emergency protective measure under subsection (b) of this section.

(b) The requirements of subsection (a) of this section shall not apply to emergency protective measures necessary to preserve life or to prevent severe imminent damage to public or private property, or both. The protective measures shall:

- (1) be limited to the minimum amount necessary to remove imminent threats to life or property;
- (2) have prior approval from a member of the municipal legislative body;
- (3) be reported to the Secretary by the legislative body within 24 hours after the onset of the emergency; and
- (4) be implemented in a manner consistent with the general permit adopted under section 1027 of this title regarding stream alteration during emergencies.

(c) No person shall remove gravel from any watercourse primarily for construction or for sale.

(d) Notwithstanding subsection (c) of this section, a riparian owner may remove up to 50 cubic yards of gravel per year from that portion of a watercourse running through or bordering on the owner's property, provided:

- (1) the material shall be removed only for the owner's use on the owner's property;
- (2) the material removed shall be above the waterline;
- (3) at least 72 hours prior to the removal of 10 cubic yards, or more, the landowner shall notify the Secretary;

(4) however, if the portion of the watercourse in question has been designated as outstanding resource waters, then the riparian owner may so remove no more than 10 cubic yards of gravel per year, and must notify the Secretary at least 72 hours prior to the removal of any gravel.

(e) This subchapter does not apply to dams subject to chapter 43 of this title nor to highways or bridges subject to 19 V.S.A. § 10(12).

(f) This subchapter shall not apply to:

(1) accepted silvicultural practices, as defined by the Commissioner of Forests, Parks, and Recreation, including practices which are in compliance with the Acceptable Management Practices for Maintaining Water Quality on Logging Jobs in Vermont, as adopted by the Commissioner of Forests, Parks, and Recreation; or

(2) a farm that is implementing an approved U.S. Department of Agriculture Natural Resource Conservation Service streambank stabilization project or a streambank stabilization project approved by the Secretary of Agriculture, Food and Markets that is consistent with policies adopted by the Secretary of Natural Resources to reduce fluvial erosion hazards.

(g) Nothing in this chapter shall prohibit, in the normal use of land, the fording of or access to a watercourse by a person with the right or privilege to use the land.

(h)(1) Notwithstanding any other provisions of this section, recreational mineral prospectors:

(A) shall not operate suction dredges in any watercourse;

(B) may operate sluice boxes in any watercourse, provided:

(i) a request for approval to conduct mineral prospecting shall be filed with and approved by the Secretary; and

(ii) mineral prospecting shall not be conducted on private land without landowner permission, or on State land without permission from the Secretary.

(2) Hand panning prospecting techniques shall be exempt from this subchapter. (Added 1965, No. 111, § 1, eff. June 22, 1965; amended 1969, No. 281 (Adj. Sess.), § 6; 1975, No. 150 (Adj. Sess.), § 2; 1981, No. 222 (Adj. Sess.), § 24; 1983, No. 193 (Adj. Sess.), § 4, eff. April 27, 1984; 1987, No. 67, § 4; 1997, No. 106 (Adj. Sess.), § 2, eff. April 27, 1998; 1999, No. 156 (Adj. Sess.), § 32, eff. May 29, 2000; 2003, No. 42, § 2, eff. May 27, 2003; 2009, No. 110 (Adj. Sess.), § 14, eff. March 31, 2011; 2011, No. 138 (Adj. Sess.), § 3, eff. March 1, 2013; 2015, No. 64, § 22.)

### **§ 1022. Application for alteration**

A person proposing to change, alter, or modify the course, current, or cross section of a watercourse shall apply in writing to the Secretary for a permit to do so. The application shall describe the location and purpose of the proposed change and shall be accompanied by the maps and plans and other information the Secretary shall direct. When an application is filed under this section, the Secretary shall proceed in accordance with chapter 170 of this title and the requirements of this subchapter. (Added 1965, No. 111, § 2, eff. June 22, 1965; amended 1969, No. 281 (Adj. Sess.), § 7; 1975, No. 150 (Adj. Sess.), § 3; 1979, No. 159 (Adj. Sess.), § 12; 1981, No. 222 (Adj. Sess.), § 24; 1983, No. 193 (Adj. Sess.), § 5, eff. April 27, 1984; 1987, No. 67, § 5; 2015, No. 150 (Adj. Sess.), § 10, eff. Jan. 1, 2018.)

### **§ 1023. Investigation, permit**

(a) Upon receipt of an application, the Secretary shall cause an investigation of the proposed change to be made. Prior to making a decision, a written report shall be made by the Secretary concerning the effect of the proposed change on the watercourse. The permit shall be granted, subject to such conditions determined to be warranted, if it appears that the change:

(1) will not adversely affect the public safety by increasing flood or fluvial erosion hazards;

(2) will not significantly damage fish life or wildlife;

(3) will not significantly damage the rights of riparian owners; and

(4) in case of any waters designated by the Secretary as outstanding resource waters, will not adversely affect the values sought to be protected by designation.

(b) The reasons for the action taken under this section shall be set forth in writing to the applicant.

(c) If the local legislative body and planning commission determine in writing by majority vote of each that instream material in a watercourse is threatening life or property, due to increased potential for flooding, and that the removal of instream material is necessary to prevent the threat to life or property, and if a complete permit application has been submitted to the Secretary, requesting authority to remove instream material in the minimum amount necessary to remove threats to life or property, the local legislative body and the planning commission may request an expedited review of the complete permit application by notifying the Secretary and providing copies of their respective decisions. If the Secretary fails to approve or deny the application within 45 calendar days of receipt of notice of the decisions, the application shall be deemed approved and a permit shall be deemed to have been granted. Instream material removed shall be used only for public purposes, and cannot be sold, traded, or bartered. The fact that an application for a permit has been filed under

this subsection shall not limit the ability to take emergency measures under subsection 1021(b) of this title. For the purposes of section 1024 of this title, if a permit has been deemed to have been granted under this subsection, that permit shall constitute a decision of the Secretary.

(d)(1) The Secretary shall conduct training programs or seminars regarding how to conduct stream alteration, water quality review, stormwater discharge, fish and wildlife habitat preservation, and wastewater discharge activities necessary during:

(A) a state of emergency declared under 20 V.S.A. chapter 1;

(B) flooding; or

(C) other emergency conditions that pose an imminent risk to life or a risk of damage to public or private property.

(2) The Secretary shall make the training programs or seminars available to Agency employees in an Agency division other than the watershed management division, employees of other State and federal agencies, regional planning commission members and employees, municipal officers and employees, and State, municipal, and private contractors.

(e) The Secretary is authorized to enter into reciprocal mutual aid agreements or compacts with other states to assist the Secretary and the State in addressing watershed, river management, and transportation system issues that arise when a state of emergency is declared under 20 V.S.A. chapter 1. (Added 1965, No. 111, § 3, eff. June 22, 1965; amended 1969, No. 281 (Adj. Sess.), § 8; 1975, No. 150 (Adj. Sess.), § 4; 1981, No. 222 (Adj. Sess.), § 24; 1983, No. 193 (Adj. Sess.), § 6, eff. April 27, 1984; 1987, No. 67, § 6; 1999, No. 114 (Adj. Sess.), § 1, eff. May 19, 2000; 2011, No. 138 (Adj. Sess.), § 4, eff. May 14, 2012; 2013, No. 161 (Adj. Sess.), § 72; 2015, No. 150 (Adj. Sess.), § 11, eff. Jan. 1, 2018.)

#### **§ 1024. Appeals**

Appeals of any act or decision of the Secretary under this chapter shall be made in accordance with chapter 220 of this title. (Added 1965, No. 111, § 4, eff. June 22, 1965; amended 1971, No. 185 (Adj. Sess.), § 236, eff. March 29, 1972; 1975, No. 150 (Adj. Sess.), § 5; 1981, No. 222 (Adj. Sess.), § 24; 1983, No. 193 (Adj. Sess.), § 7, eff. April 27, 1984; 1987, No. 67, § 7; 1991, No. 81, § 2; 1997, No. 161 (Adj. Sess.), § 9, eff. Jan. 1, 1998; 2001, No. 94 (Adj. Sess.), § 2.; 2003, No. 115 (Adj. Sess.), § 20, eff. Jan. 31, 2005.)

#### **§ 1025. Penalty**

(a) A prosecution under this subsection may be commenced in the Superior Court of the county in which the alleged violation occurred. A person who violates a provision of this subchapter may be fined not more than \$10,000.00. Each violation may be a separate offense upon commission. In the case of a continuing violation, each day's continuance thereof may be deemed a separate offense, starting from the day the violator is served with notice of the violation. The service shall be by hand or by certified mail, return receipt requested.

(b) For a violation of this subchapter, the Secretary may order restoration, and the responsible party or parties will bear the cost of restoration. Restoration will be under the supervision of the Secretary and will be deemed satisfactory only after receiving the approval of the Secretary. (Added 1965, No. 111, § 5, eff. June 22, 1965; amended 1969, No. 281 (Adj. Sess.), § 9; 1975, No. 150 (Adj. Sess.), § 6; 1981, No. 222 (Adj. Sess.), § 24; 1987, No. 67, § 8.)

#### **§ 1026. Repealed. 1989, No. 98, § 4(b).**

#### **§ 1027. Rulemaking; emergency permit**

(a) The Secretary may adopt rules to implement the requirements of this subchapter.

(b) 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. Any rule adopted under this subsection shall comply

with National Flood Insurance Program requirements. A rule adopted under this subsection shall include a requirement that an activity receive an individual stream alteration emergency permit or receive coverage under a general stream alteration emergency permit.

(1) A rule adopted under this subsection shall establish:

(A) criteria for coverage under an individual permit and criteria for coverage under a general emergency permit;

(B) criteria for different categories of activities covered under a general emergency permit, including emergency protective measures under subsection 1021(b) of this title;

(C) requirements for public notification of permitted activities, including notification after initiation or completion of a permitted activity;

(D) requirements for coordination with State and municipal authorities; and

(E) requirements that the Secretary document permitted activity, including, at a minimum, requirements for documenting permit terms, documenting permit duration, and documenting the nature of an activity when the rules authorize notification of the Secretary after initiation or completion of the activity.

(2) A rule adopted under this section may:

(A) establish reporting requirements for categories of activities;

(B) authorize an activity that does not require reporting to the Secretary; or

(C) authorize an activity that requires reporting to the Secretary after initiation or completion of an activity.

(Added 2011, No. 138 (Adj. Sess.), § 5, eff. May 14, 2012.)

### ***Subchapter 3: Water Withdrawal For Snowmaking***

#### **§ 1031. Policy on water withdrawal for snowmaking**

(a) This subchapter is intended to establish a policy for snowmaking that supports and is consistent with section 1001 of this title and with chapter 47 of this title, including the water quality standards.

(b) This 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 functions;

(2) help to provide for and enhance the viability of Vermont's ski industry, which uses certain of the State's waters for snowmaking;

(3) permit water withdrawals, diversions, impoundments, and the construction of appurtenant facilities for snowmaking, based on an analysis of the need for water and a consideration of alternatives, consistent with this policy and other applicable laws and rules;

(4) recognize that existing users of the State's waters for snowmaking, which may have an adverse effect on water quality, should have time and opportunity to improve water quality. (Added 1995, No. 15, § 1.)

#### **§ 1032. Rulemaking on snowmaking withdrawals**

The Secretary shall adopt rules to determine conservation flow standards for snowmaking, to be used in relevant Agency of Natural Resources regulatory processes governing water withdrawals, diversions, impoundments, and the construction of appurtenant facilities, and to be used in developing positions to be asserted by the Agency in other State regulatory processes governing conservation flows for snowmaking. These rules shall not supersede water quality standards adopted by the Secretary pursuant to chapter 47 of this title. These rules shall achieve the purposes of this subchapter, and shall provide for the periodic review of any decision issued under the rules. All existing water



withdrawals, diversions, and impoundments for snowmaking that are permitted at instream flows below the standards shall be reviewed by July 1, 2000. (Added 1995, No. 15, § 1; amended 2003, No. 115 (Adj. Sess.), § 21, eff. Jan. 31, 2005; 2011, No. 138 (Adj. Sess.), § 27, eff. May 14, 2012.)