

# Enforcement, Due Process and Administrative Hearings - Memo



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## Enforcement Options

The administrative appeal rights provided under the old Accepted Agricultural Practices (AAPs) have been repealed. The Agency did not provide anything in the actual Required Agricultural Practices (RAPs) that describes enforcement procedures, due process rights or hearing procedures. There is, however, a great deal of detail in Act 64. The VT Administrative Procedures Act is also relevant.

There are many enforcement options available to the Secretary under Act 64. The Act makes clear that if he determines there has been a violation he shall - not may - respond and require a discontinuance. The many options are as follows:

- Issue a Corrective Action Letter.
- Order a corrective action including a requirement that the removal of livestock from a farm or production area when the volume of waste produced by livestock on the farm exceeds the infrastructure capacity of the farm
- Issue an administrative cease and desist order
- Issue an emergency order
- Permit or certification revocation or conditioning
- Seek civil enforcement in Superior Court

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- Refer the case to Agency of Natural Resources (ANR)/ Department of Environmental Conservation (DEC) for enforcement (required when there has been a discharge)
- Seek administrative or civil penalties not to exceed \$5,000.00 for each violation, and a maximum assessed for separate and distinct violations of this chapter not to exceed \$50,000.00.
- Take other action, including consulting with the farmer “within the authority of the Secretary” to assure discontinuance and remediation.

## Certification Revocation or Condition Coverage

§4994 says that after due notice and hearing, the secretary may revoke or condition coverage under a general permit, an individual permit, a small farm certification or other permit or certification issued under the rules when the person fails to comply with the rules, or the requirements of the permit or certification.

When the Agency uses the permit or certification revocation or imposes a condition of coverage as an enforcement handle, then clearly an administrative hearing is required. §4994 goes on to say that the Secretary can use other enforcement and penalties available in the list above against anyone who fails to comply with any term, provision or requirement of a permit or certification.

This doesn't say anything about denial of a permit or initial certification. The RAPs likewise do not provide for a hearing if the Agency denies a permit or initial certification. It mentions a hearing if someone is required to adopt Best Management Practices (BMPs), or if smaller than a Certified Small Farm but still required to certify due to practices used on the farm but not for denial of certification.

The self-certification for small farms process has yet to be implemented. We should know more after forms are developed and the process is established in early 2017.

The Vermont Administrative Procedures Act sets out procedures for hearings of contested cases. I've provided this information at the end of this memo.

## Additional Enforcement Options:

§4992 addresses Corrective Action Letters

Upon a complaint, or without a complaint, when the Secretary determines there is a violation he may issue a written warning – sent by certified mail, return receipt requested. If a warning is issued, the letter must state:

- (1) a description of the alleged violation;
- (2) identification of this section;
- (3) identification of the applicable statute, rule, or permit condition violated;

- (4) the required corrective actions that the person shall take to correct the violation; and
- (5) a summary of federal and State assistance programs that may be utilized by the person to assist in correcting the violation

Under the old AAPs the letter included recommended corrective actions which provided some leeway to the farmer in choosing practices that would abate the problem. There is not much leeway here.

The farmer has 30 days to respond to the warning letter with a schedule of abatement for curing the violation and a description of the corrective actions to be taken.

§4992 does not require a hearing at the Corrective Letter stage to challenge whether there is in fact a violation or to argue for a menu of affordable abatement practices before the agency. The VT administrative procedures act only requires a hearing if the agency is required by law to provide one. If a CAL is issued in conjunction with permit revocation, then a hearing would be required.

Act 64 also provides that the Agency can impose an administrative penalty at any time<sup>1</sup> although the Agency has indicated that no penalty would be imposed at this stage. If the farmer responds within 30 days with an abatement schedule, and it is accepted by the agency, the farm will be monitored. If the farmer fails to follow the schedule, a penalty can be imposed and the Agency can proceed with other remedies under §4993 and §4995. See separate Agency penalty matrix for factors used in setting penalty amounts.

If the farmer does not respond in 30 days to the Corrective Action Letter, the Agency may respond using remedies outlined in §4993 (1 through 4 below) or respond under §4995. §4993 describes enforcement options to be used by the Agency and §4995 outlines civil enforcement remedies sought by the Agency in Superior Court.

§4993 describes Administrative Enforcement, Cease and Desist Orders and Emergency Orders.

If there is no response or an inadequate response to the Corrective Action Letter:

1. The Secretary may issue an administrative cease and desist order<sup>2</sup>, or
2. Issue an “emergency” administrative order when an alleged violation, activity or farm practice present the following:
  - There is an immediate threat of substantial harm to the environment, public health or welfare, or
  - A violation is likely to result in a threat to the above, or

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<sup>1</sup> §4993(a)

<sup>2</sup> Similar to an injunction, a C and D is an order by an administrative agency to stop doing something until its illegality can be determined by a hearing or by a court.

- An operator has commenced an activity or is continuing an activity without a permit or required permit amendment

That last bullet doesn't strike me as an emergency and we are still talking about an "alleged" violation.

At this stage, and only for cease and desist and emergency orders, the farmer has all of five days to request a hearing before the agency. The Secretary is directed to schedule a hearing promptly. The appeal request does not stay the cease and desist or emergency order.<sup>3</sup> Five days to find a lawyer.

### 3. Order mandatory corrective actions

The Secretary can require an owner or operator to sell or remove livestock from a farm or production area when the volume of waste produced by livestock on the farm exceeds the infrastructure capacity of the farm or production area to manage the waste or waste leachate in a manner that prevents runoff or leaching of wastes to waters of the state or groundwater.

There doesn't appear to be an administrative appeal available for this type of order.

4. Impose an administrative penalty (\$5,000 per violation/ \$50,000 max) (appealable to Superior Court) or seek civil penalties in Superior Court. If a penalty is imposed at any stage, there is an appeal to Superior Court.

### §4995 Civil Enforcement

If there is no response or inadequate response to the Corrective Action Letter, the Agency can seek enforcement in the civil division of the Superior Court to enforce Act 64, RAPs rules, or permits or certifications. The action will be brought by the Attorney General.

The Court can grant a temporary or permanent injunction and may:

- Enjoin future activities
- Order corrective actions including the selling or removal of livestock.
- Order the design, construction, installation, operation of facilities designed to mitigate or prevent a violation.
- Fix and order compensation for destruction or damage of private or public property.
- Revoke a permit or certification
- Levy a civil penalty of up to \$85,000 for each violation. In addition, in the case of a continuing violation, up to \$42,500 per day. Costs of collection are to be added to the

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<sup>3</sup> §4996(b) A person may request that the Secretary hold a hearing on a cease and desist order or an emergency order issued under this section within five days of receipt of the order. Upon receipt of a request for a hearing, the Secretary promptly shall set a date and time for a hearing. A request for a hearing on a cease and desist order or emergency order issued under this section shall not stay the order.

penalty. A continuing violation is generally any violation that persists for more than a day. Clock starts on first day of violation, regardless of when notice is given. There is no maximum overall limit. §4995(b)(7).

§4995(e) and (f) provide a set of criteria for the Court to use in setting the civil penalty:

- The degree of actual or potential impact on public health, safety, welfare, and the environment resulting from the violation;
- The presence of mitigating circumstances, including unreasonable delay by the Secretary in seeking enforcement;
- Whether the respondent knew or had reason to know the violation existed;
- The respondent's record of compliance;
- The deterrent effect of the penalty;
- The State's actual costs of enforcement; and
- The length of time the violation has existed.

In addition to any civil penalty assessed under the above criteria, the Secretary may also recapture economic benefit resulting from a violation. Economic benefit is often imposed for violations of environmental law. It is generally intended to prevent the unfair economic advantage obtained from non-compliance with environmental laws. "based on the compliance choice a rational business would make and should reflect the least costly means of compliance." A reasonable approximation will suffice, related to competitive advantage gained from the violation. ANR v. Deso, VT S.Ct, March 27, 2003 Economic benefit was the approximate cost of compliance.

## Appeals to Superior Court

§4996(a) says that anyone subject to an "administrative enforcement order, an administrative penalty, or revocation of a permit or certification who is aggrieved by a final decision of the Secretary may appeal to the Civil Division of Superior Court within 30 days of the decision. An environmental judge may be specially assigned to hear the appeal.

Final decision means, post appeal process, or if no administrative appeal available, then it's the initial decision.

## Administrative Enforcement Order

It's not clear that this would include a corrective action letter although I believe it should since the warning letter includes the corrective action that must be taken, which even though it isn't called an "order" is still an order. It would clearly include Cease and Desist and Emergency Orders. If an Emergency Order, the Court will consider the appeal on an expedited basis.

Revocation of a permit or certification, a Cease and Desist, and an Emergency Order all require an administrative hearing, so an appeal to Superior Court could not be taken until the appeal concluded and the Secretary's decision was final.

An administrative penalty that can be imposed at any time could be appealed to Superior Court.

The appeal to Superior Court is "on the record," meaning that the court will only look at the record developed before the agency and determine whether there is a reasonable basis for the finding. The Court will provide a great deal of deference to the administrative agency assuming the agency has special expertise. §4995(c) and Rhodes Salvage v. Town of Milton, 188 Vt. 629 (2010.) Thus, the agency record and an opportunity to develop a theory of the case and to back it up with evidence at the agency level will be crucial.

In addition to the above, the Secretary may transfer the case to ANR for enforcement at any time. If the violation involves a discharge, transfer to ANR/DEC is required.

Summary:

When is an administrative hearing required?

- Cease and desist orders
- Emergency orders
- Permit revocation or modification
- By rule, when BMPs are required, when smaller than CSFs are required to certify, when a farm seeks to be exempted from certification.

Not however - apparently - in the case of a corrective action letter or denial of certification.

## Current Use

Whenever, after an administrative hearing or a contested judicial hearing, a person is found to be in violation of RAPs, or who is not in compliance with the terms of an administrative or court order to remedy a violation of any permit or certification issued, then an entire parcel or parcels of agricultural land and buildings are to be removed from the use value appraisal program. If removed, the law says that it is considered development, or a land use change subject to a land use change tax. Currently, 10% of the full market value of the land. If Secretary later certifies that farmer has come in to compliance, he may re-apply for the program.

The VT Administrative Procedures Act provides requirements for the handling of contested cases before an administrative agency.

A "contested case" means a proceeding, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing. If the statute, in this case Act 64, does not require a hearing then it is not a contested case.

Under § 809 in a contested case, all parties shall be given an opportunity for hearing after reasonable notice.

The notice shall include:

- A statement of the time, place, and nature of the hearing.
- A statement of the legal authority and jurisdiction under which the hearing is to be held.
- A reference to the particular sections of the statutes and rules involved.
- A short and plain statement of the matters at issue. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished.
- Opportunity shall be given to all parties to respond and present evidence and argument on all issues involved.

Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

The Vermont APA presumes that the hearing official will be an employee or contract agent of the Agency. It does not require an independent hearing official or administrative law judge. Vermont utilizes a decentralized hearing officer model with each agency deciding how it will designate hearing officers.

"The most common criticism of the decentralized model is that there is an unavoidable appearance of partiality because the hearing officer is either employed or contracted by the same agency whose decision is being challenged and whose interests are at stake in the proceeding. In many cases, the hearing officer may even be physically located very close to the agency manager who made the decision. The relationship between the hearing officer and the agency creates a perception that the officer's continued employment or contract status may be dependent on whether or not the officer issues decisions that favor the agency's position. The appearance is that the same entity that decided against the person will now decide whether its own decision was correct, and it is understandable that a person affected by this process might not believe that he or she had received a fair and impartial ruling from a neutral decision maker. [Report of the VT Study Committee on Administrative Hearing Officers February 2014.](#)

The Agency has indicated that Diane Bothfeld, the Deputy Secretary for Dairy Policy will act as hearing officer although they are exploring the use of independent administrative law judges.

Rules of Evidence §810:

### Contested Cases:

- Irrelevant, immaterial, or unduly repetitious evidence shall be excluded.
- The Rules of Evidence as applied in civil cases in the Superior Courts shall be followed.
- When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.
- Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.
- Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original.
- A party may conduct cross-examinations required for a full and true disclosure of the facts.
- Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge.
- Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed.
- The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.

The decision or order is governed by §812.

The final decision or order:

- Shall be in writing or stated in the record.
- Shall include findings of fact and conclusions of law, separately stated.
- Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding.
- A copy of the decision or order shall be delivered or mailed forthwith to each attorney of record and to each party not having an attorney of record. That mailing shall constitute actual knowledge to that person or party.



The record in a contested case shall include:

- All pleadings, motions, intermediate rulings;
- All evidence received or considered;
- A statement of matters officially noticed;
- Questions and offers of proof, objections, and rulings thereon;
- Proposed findings (based exclusively on the evidence and on matters officially noticed) and exceptions; and
- Any decision, opinion, or report.

A party, at their own expense, may request a transcript of any oral proceedings. The Agency or an attorney representing the appellant may also issue subpoenas to compel appearance, testimony or production of records.

**Questions? Contact Us:**

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