October 15, 2025

Julie Moore
Secretary, Vermont Agency of Natural Resources
1 National Life Drive, Davis 2
Montpelier, VT 05620-3901

Kerrick Johnson
Commissioner, Vermont Department of Public Service
112 State Street
Montpelier, VT 05602

Janet Hurley
Chair, Vermont Land Use Review Board
10 Baldwin Street
Montpelier, VT 05633-3201

VIA ELECTRONIC MAIL

Re: Provisions of Executive Order 06-25 Violate Separation of Powers

Dear Secretary Moore, Commissioner Johnson and Chair Hurley:

The Vermont Natural Resources Council (VNRC), Conservation Law Foundation (CLF), Sierra Club - Vermont, Vermont Conservation Voters, Vermont Public Interest Research Group (VPIRG) and ACLU of Vermont are writing because we are deeply concerned that provisions in Executive Order 06-25 (EO) instruct the Agency of Natural Resources, Department of Public Service, and Land Use Review Board to take actions which you do not have authority to take.

All of our organizations strongly support more housing for Vermonters – including more affordable housing – but solving this problem must not involve violating the rule of law. This EO directly undermines the authority of the legislature and the separation of powers as established in Vermont's Constitution. The Governor and executive branch agencies may not simply choose to ignore or amend statutory mandates and duly adopted rules they disagree with by issuing and implementing an Executive Order.

Pursuant to EO Section 8.2, we request that the Agency of Natural Resources (ANR), the Department of Public Service (Department) and the Land Use Review Board (LURB) determine that there is no statutory authority to implement the sections of the EO identified below and that your agencies instead "identify statutory clarifications needed for effective implementation" of

the EO. *EO Section 8.2.* We also request that your agencies do not act on implementing these provisions until any necessary statutory or rule changes have been duly adopted.

ANR Does Not Have the Authority to Implement EO Section 3.1 Related to Wetlands

ANR does not have the legal authority to implement provisions of EO Section 3.1 that would alter or repeal provisions of Vermont statute and the Vermont Wetland Rules (VWRs) that provide for the protection of all unmapped wetlands in the areas identified in the EO and, by fiat, reduce the protective wetland buffer zones in these areas.

Under 10 V.S.A. § 914 (a), ANR may determine if a wetland not on the official state of Vermont wetland maps should be legally protected as a Class II wetland "based on an evaluation of the functions and values" of a wetland. The functions and values are set forth in 10 V.S.A. § 905b (18) (A).

In addition, the VWRs flesh out the process for determining whether an unmapped wetland provides functions such that the wetland should be protected as a Class II wetland. Under VWR § 4.6, wetlands that have characteristics listed in the VWRs but are not mapped are protected as Class II wetlands. VWR § 4.6 provides:

> *Wetlands with the following characteristics have been determined by the Secretary to be significant for one or more of the functions and values listed in Section 5 of these Rules, and have been determined to be categorical Class II wetlands. These categories of wetlands shall be regulated as Class II wetlands unless determined otherwise by the Secretary on a case-by-case basis.*

The EO nullifies and repeals this provision of the Vermont Wetland Rules because the EO states that "no state wetland permits are required for impacts to unmapped Class II wetlands." Accordingly, under the terms of the EO, ANR is prohibited from protecting wetlands with characteristics set forth in the VWRs because the wetlands are not on the official Vermont wetland maps. ANR does not have the authority to alter these provisions of statute without legislative approval, nor do they have authority to alter the VWRs without complying with the requirements for amending or repealing rules in 3 V.S.A. § 817 et. seq.

In addition, both 10 V.S.A. § 914 and the VWRs create a process for a person to petition ANR to determine if an unmapped wetland should be protected as a Class II wetland. VWR § 8.2 lists the requirements for petitions, which include information as to the functions and values of the wetland. VWR § 8.3 requires that the petitioner and ANR provide notice of the petition and requires that ANR provide notice of a final decision on the petition. VWR § 8.4 allows the petitioner, anyone who received notice of the decision, and any person who commented on the

decision to request that ANR reconsider its decision. VWR § 8.4 notes that ANR's final decision may be appealed.

The language in the EO regarding wetlands that are not on the current official Vermont wetland maps creates additional questions. Section 3.2 of the EO provides that "no state wetland permits are required for impacts to unmapped Class II wetlands." However, the Whereas clause at the bottom of page 3 of the EO states that "permitting oversight" over wetlands will be limited to "only mapped Class II wetlands as they currently appear in the most-current Vermont Significant Wetlands Inventory (VSWI) when issuing wetland permitting decisions."

Read one way, the EO could be interpreted to interfere with the right of a person to petition to have an unmapped wetland protected by ANR. If a permit is not required for impacts to an unmapped wetland, how could a person file a petition to protect a wetland before construction occurs? We request that ANR clarify how the EO will affect the ability of a person to petition to protect a wetland before the wetland is harmed. Neither ANR nor the Governor has the authority to effectively eliminate the right to petition to protect wetlands before the wetland is harmed without altering statute or the VWRs (if this is the effect of the EO).

The EO also rewrites Vermont statute in an effort to reduce wetland buffer zones from 50 feet to 25 feet in certain areas outlined in the EO. But the legislature established a more protective buffer, and the Governor and agency staff are not free to disregard clear statutory language. 10 V.S.A. § 902 (9) provides that a "buffer zone for a Class II wetland shall extend at least 50 feet from the border of the wetland unless the Secretary determines otherwise under section 914 of this title." 10 V.S.A. § 914 requires that the size of a buffer be established as part of the functions and values determination for a specific wetland. The EO alters Vermont statute and the VWRs that require buffer determinations be made based on a function and values analysis. ANR does not have the authority to alter these provisions of statute without legislative approval and to alter the VWRs without complying with the requirements for amending or repealing rules in 3 V.S.A. § 817 et. seq.

Lastly, 10 V.S.A. § 913 (b) provides that wetlands that are contiguous to mapped wetlands are legally protected as Class II wetlands. The EO purports to repeal this provision of Vermont statute. ANR does not have the authority to repeal this statutory provision without legislative approval.

The Department Does Not Have the Authority to Implement EO Section 1.1 Related to Energy Codes

EO Section 1.1 provides:

> *All persons commencing building construction projects on July 1, 2024 or after shall have the option of complying with the 2020 Vermont Residential Building Energy Standards (RBES), Commercial Building Energy Standards (CBES), including the 2020 Stretch Code, or the 2024 RBES and CBES.*

The RBES and CBES are set by the Department in duly adopted rules. The EO illegally amends the duly adopted RBES and CBES standards without complying with the requirements for amending or repealing rules in 3 V.S.A. § 817 et. seq. Accordingly, the Department does not have the authority to implement EO Section 1.1.

ANR, the Department, and the Land Use Review Board Do Not Have the Authority to Implement EO Sections 2.1 and 2.2 Related to Permit Decisions and Fees

EO Section 1.1 provides that "[A]ll state agencies and departments, and boards and commissions with a majority of members appointed by the Governor with housing-related permitting authority" take actions to expedite action on certain permits. Some of the actions directed by the EO violate Vermont statute including directing how the LURB processes applications. The LURB is an independent entity and the Act 250 District Commissions that process Act 250 permits are independent quasi-judicial bodies, which the Governor has no authority over.

In addition, the EO appears to provide that if permit decisions on certain projects are not issued within 60 days, the permit will be deemed approved. *EO Section 2.1*. While executive agencies can set performance standards for permitting, the Governor has no authority to require that permits be deemed approved without legislative approval. In addition, as noted above, the Governor has no authority over how the LURB processes Act 250 permits.

Finally, EO Section 2.2 directs agencies to modify fee structures. This provision exceeds your agencies' authority. 30 V.S.A. § 601 provides:

> *It is the purpose of this subchapter to establish a uniform policy on the creation and review of Executive and Judicial Branch fees and to require that any such fee be created solely by the General Assembly.*

EO Section 2.2 violates this general statutory scheme that vests authority to establish revenues with the Vermont Legislature by modifying fees without legislative approval.

Conclusion

While we all recognize the critical need for more housing, for the reasons laid out above, your agencies do not have the authority to implement the provisions in the EO we have identified. The

legislative and rulemaking processes are vital to provide checks and balances to the adoption of laws and rules, and the EO directly usurps the rule of law, the authority of the legislature, and the public process for amending duly adopted rules, including approval of rules by the Legislative Committee on Administrative Rules (LCAR). Accordingly, pursuant to EO Section 8.2's mandate that you "identify statutory clarifications needed for effective implementation," we request that your agencies determine that you do not have the authority to implement these provisions of the EO without the legislature amending statute and/or your agency promulgating new administrative rules through the process required by law. *EO Section 8.2.* We further request that your agencies do not implement these provisions until the necessary statutory or rule changes have been duly adopted. Any action to implement EO provisions that are beyond your agency's statutory authority would be a clear violation of law.

We look forward to your response.

Sincerely,

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