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Formal Opinion No. 2025-01
November 20, 2025

Hon. Philip Baruth
President Pro Tem of the Senate

Hon. Jill Krowinski
Speaker of the House of Representatives

Re: Executive Order 06-25

Dear President Pro Tem Baruth and Speaker Krowinski:

On October 1, 2025, you requested a formal opinion related to Executive Order 06-25, titled "Promoting Housing Construction and Rehabilitation" ("the Order"). Specifically, you asked if "policy changes" in the Order related to environmental regulations and building energy standards "effectively repeal or modify existing legislative enactments, including 10 V.S.A. § 914 and 2024 Acts and Resolves Nos. 151 and 181."

This Office has concluded that the provisions related to wetlands and building energy standards are lawful to the extent they instruct agencies to begin rulemaking. To the extent they intend to announce new legal standards different from those in statute or current rule, they exceed the Governor's authority.

I understand that rulemaking related to some of the Order's objectives has started. I also understand that, by its terms, the Order is not intended to conflict with statutes, and its implementation involves an on-going, interactive process of internal review. Agencies in the Governor's administration have rulemaking authority in the relevant areas of law, and some of the Order's stated objectives may be advanced through rulemaking.

I. Executive Order 06-25

On September 17, 2025, the Governor issued Executive Order 06-25, Promoting Housing Construction and Rehabilitation. The Order took effect immediately and remains in effect "unless modified or extended by subsequent executive action." EO 06-25, § IX.

The Order aims to address Vermont’s affordable housing shortage. It mainly does so through directives to the Governor’s administration and bodies that have housing-related authority and a majority of governor-appointees. It requires reports and recommendations, creates advisory groups, expedites agency reviews, and requires updates to working procedures.

The Order has several qualifiers, including that it is not “intended to contravene the intent of the Legislature.” EO 06-25, § 8.2. Agencies must “[i]dentify statutory clarifications needed for effective implementation” and “[r]ecommend emergency rulemaking where appropriate.” EO 06-25, § 8.2.¹ Agencies “unable to implement specific provisions due to legal constraints” must notify the Governor’s Office immediately and recommend alternatives. *Id.* § IX.

Finally, as discussed below, the Order states regulatory policy objectives in two areas.

II. Focus of Our Review

You ask whether the Order effectively repeals or modifies statutes. Generally, executive orders cannot make new laws or suspend existing ones. They can instead articulate *how* existing law is to be implemented. Read with its qualifiers, most sections of the Order can, on their face, be implemented in a manner consistent with statutory law.

For example, Section 2.2 directs “deferred payment of fees until project completion” in certain circumstances. This Office does not read this (or any) provision in the Order as a source of new law. *See, e.g.*, 32 V.S.A. § 710 (payment of agency fees); 3 V.S.A. § 2822 (permit fees); 10 V.S.A. § 6083a (Act 250 fees). To the extent the Order directs deferral of fees as allowed by existing law, it is lawful; to the extent it intends to direct action contrary to existing law, it is not.

Two sections warrant more analysis.

a. Section 1.1 – Reinstatement of 2020 Building Energy Standards as an Option

The first is section 1.1, part of Section I, titled “Building Energy Code Reform.” It states:

[a]ll 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.

EO 06-25, § 1.1. The RBES and CBES are energy efficiency standards for residential and commercial buildings. The “Stretch Code” is an optional, higher residential standard.

¹ The Order also states it is not intended to “limit the authority” of agencies and boards. *Id.* § 8.1.

b. Section 3.1 – Wetlands Modifications

The second part of the Order that states regulatory policy objectives is section 3.1, which relaxes wetland permitting requirements and reduces buffer zones.² The Order provides that certain development projects need wetlands permits only for impacts to wetlands “identified on the most current [Vermont State Wetland Inventory] maps.” EO 06-25, § 3.1. In other words, “no state wetland permits are required for impacts to unmapped Class II wetlands” in certain areas. *Id.* The Order also states an intent to reduce protective buffer zones around Class II wetlands. *Id.*

The Order directs the Agency of Natural Resources to engage in rulemaking to ensure that objectives related to wetlands are established in rule. *Id.*

III. Analysis

a. Separation of Powers Considerations

Separation of powers is a fundamental principle of Vermont’s Constitution. The “Supreme Legislative power” belongs to the General Assembly. Vt. Const. ch. II, § 2. The “Supreme Executive power” belongs to the Governor, *id.* § 3, who “is also to take care that the laws be faithfully executed,” *id.* § 20. Judicial power is vested in a “unified judicial system.” *Id.* § 4. Vermont’s Constitution further instructs that the three “shall be separate and distinct, so that neither exercises the powers properly belonging to the others.” *Id.* § 5.

The separation is not “absolute.” *In re D.L.*, 164 Vt. 223, 229 (1995). It permits response to “complex challenges and problems faced by today’s state government.” *Hunter v. State*, 2004 VT 108, ¶ 21. “Practical realities of daily government require ... a certain amount of overlapping or blending” of powers. *Id.* (citing *In re D.L.*, 164 Vt. at 228-29). Overlap is permissible, but one branch cannot eclipse or “usurp” constitutional power of another. *In re D.L.*, 164 Vt. at 229.

This Office has applied these principles to executive orders before. In 1981, for example, this Office reiterated the limitations of an executive order as follows:

Unlike the words “statute” or “duly adopted rule,” which denote rules of law of known dimension ... [an] executive order is simply the documentary rendering of a governor’s formal action as chief executive. . . . Where an executive order responds to a specific constitutional or statutory authority it is valid and enjoys the status of a rule of law, not because it is an executive order but because the governor possessed the power to take the action in question. Every question of the validity of an executive order is at base a question of the scope of gubernatorial power.

Atty. Gen. Op. No. 81-61 at 3-4, 1981 WL 873001, at *2 (Vt. A.G. Mar. 23, 1981).

² These apply to residential and mixed-use housing projects in listed areas. EO 06-25, § 3.1.

Review of executive orders thus poses reoccurring questions, such as whether “the order create[s] new law or execute[s] an existing legislative or constitutional mandate,” and whether a governor is “the proper state official to execute a particular law.” Atty Gen. Op. No. 60-76 at 4, 1976 WL 531592, at *2 (Vt. A.G. Mar. 15, 1976) (“no new law can be created by the governor”). Governors and agencies have “specifically enumerated duties, and it is a fair conclusion that the governor is not the *alter ego* of agency secretaries or department commissioners, and cannot act in their stead, even if he is responsible for their appointment.” *Id.* at 4-5, 1976 WL 531592, at *2; *see also id.* (“specific agencies, rather than the governor, must adopt administrative rules”).

That said, governors have “Supreme Executive power” and must ensure laws are faithfully executed.³ Presumptions of validity likely apply to their orders, as is true elsewhere. *See, e.g., In re Handy*, 144 Vt. 610, 612 (1984) (agency action presumed valid); *Trybulski v. Bellows Falls Hydro-Electric Corp.*, 112 Vt. 1, 10 (1941) (every doubt resolved in favor of statute’s validity). Several courts interpret executive orders under principles used for statutes. *See Mills v. Hartford Healthcare Corp.*, 298 A.3d 605, 615-16 (Conn. 2023) (collecting cases).

b. Rulemaking Considerations

Importantly, part of the Order directs the Agency of Natural Resources to commence rulemaking, EO 06-25, § 3.1, and the Agency has already complied. *See* Rule No. 25P040 (“Vermont Wetland Rules”), <https://dec.vermont.gov/watershed/wetlands/wetlands-rulemaking>.

Nothing bars the Governor from instructing agencies with rulemaking authority to commence rulemaking. That said, while an agency can enter the process with a clear vision, it must also keep an open mind. *See, e.g., In re Highlands Master Plan*, 25 A.3d 1172, 1180 (N.J. Super. App. Div. 2011) (executive order may not direct agency to contravene statute); *In re Agency of Admin. State Blds. Div.*, 141 Vt. 68, 76 (1982) (agency cannot use rulemaking to enlarge statutory authority). This opinion takes no position on the substance of potential rules.

With these principles in mind, our analysis of two provisions in the Order follows.

c. Section 3.1 (Wetlands)

Section 3.1 states two objectives related to wetlands: relaxation of certain permitting requirements and reduction of certain buffer zones. Each is addressed below.

i. Permitting Limitations

Section 3.1 first provides that “Class II wetlands are limited to those features identified on the most current VSWI maps and no state wetland permits are required for impacts to unmapped Class II wetlands.” EO 06-25, § 3.1.

³ Executive orders issued within constitutional limits can help fulfill constitutional duties. *See, e.g., Communc’ns Workers of Am., AFL-CIO v. Christie*, 994 A.2d 545, 561 (N.J. App. Div. 2010) (governor may ensure faithful execution of law through order); *Markham v. Wolf*, 190 A.3d 1175, 1183 (Pa. 2018) (order “that, in essence, creates law, is unconstitutional,” but those implementing law are valid).

Wetlands permitting is required by 10 V.S.A. § 913(a). Unpermitted activity is prohibited, except as provided by Department of Conservation rule. *Id.* This statute applies to “significant wetlands,” which include a Class II wetland, *id.* § 902(11), defined as either one identified on the inventory maps or one that the Secretary determines requires protection. 10 V.S.A. § 902(7).

As authority for its objective, the Order points to the Secretary’s existing discretion. EO 06-25 at 3. It appears to construe the Secretary’s authority to make wetlands determinations as including the authority to categorically decline to classify certain, unmapped wetlands as Class II wetlands and thereby exempt them from permitting. *Id.* at 2-3 (citing 10 V.S.A. § 914(a), providing that Secretary may determine whether any wetland is a Class II or Class III wetland).

The Secretary has discretion regarding wetlands classification in particular cases.⁴ Neither the Secretary nor the Governor, however, can unilaterally create a new, categorical exception to wetlands permitting requirements because statute requires that permitting exemptions be created by rule. *See* 10 V.S.A. § 913(a) (“[e]xcept for allowed uses adopted by the Department by rule,” permits required).

ii. Buffer Zones

Section 3.1 purports to reduce to 25 feet the protective “buffer zones” around Class II wetlands impacted by housing projects in certain areas.

The width of buffer zones for Class II wetlands “shall extend at least 50 feet . . . unless the Secretary determines otherwise under section 914” of title 10. 10 V.S.A. § 902(9); *see also* Vt. Wetland Rules § 4.2. Under § 914, the Secretary “may establish the necessary width of the buffer zone of any Class II wetland as part of any wetland determination pursuant to the rules of the Department.” 10 V.S.A. § 914(b); *see also* Vt. Wetland Rules § 4.3(b)(3).

These provisions afford the Secretary certain discretion. They do not, however, give the Secretary authority to immediately and categorically halve the statutory 50-foot presumptive buffer zone around Class II wetlands.

d. Section 1.1 (Building Energy Standards)

Section 1.1 of the Order addresses building energy standards. It states that anyone starting building construction on or after July 1, 2024, has the “option” of complying with either the 2020 *or* the 2024 standards, which were both adopted via APA rule. EO 06-25, § 1.1.

The residential and commercial building energy standards are governed by similar statutes. Residential construction must comply with the RBES, and the Public Service Commissioner must “amend and update” the RBES via rulemaking. 30 V.S.A. § 51(b), (c). The same is true for the CBES. 30 V.S.A. § 53(b), (c). Certain considerations are unique to RBES

⁴ The Department, like the Secretary, must make determinations under § 914. 10 V.S.A. § 905b(18).

amendments. They include consistency with “duly adopted” energy *and* housing policy, and “cost-effective[ness] and affordab[ility]” from a consumer’s perspective. 30 V.S.A. § 51(c)(1).⁵

Prior to June 3, 2024, the Commissioner had to update the RBES and CBES on a certain schedule; now updates are discretionary. *Id.* §§ 51(c), 53(c).

The Department of Public Service last revised the RBES and CBES in 2023, following a corresponding update to international standards which, at the time, required Vermont updates. The most recent RBES and CBES administrative rules became effective on July 1, 2024.

The statutes are explicit about which version of the rules govern. While people commencing construction “before the effective date of the amended” rules have the “option” of complying with the amended or existing rules, once new rules take effect, “any person commencing residential construction shall comply with the most recent version.” 30 V.S.A. § 51(c)(2); *see id.* § 53(c)(2) (same, CBES). This is restated in Act 250. 10 V.S.A. § 6086(a)(9)(F) (applicants seeking affirmative finding under Criterion 9(F) “shall provide evidence” that development “complies with the applicable building energy standards under 30 V.S.A. § 51 or 53”). The Order’s statement that all persons have the option of complying with superseded rules is inconsistent with these statutes.⁶

The statutory requirement to “comply with the most recent version” of the rules impacts private parties in multiple ways. Builders and others must certify that projects comply with the RBES and CBES. 30 V.S.A. §§ 51(f)(1), 53(d). Citizens can sue those making these certifications for damages. 30 V.S.A. §§ 51(g), 53(e). Anyone relying on the Order as a source of new law that modifies the need to comply with the most recent building energy standards does so at the risk of being non-compliant with binding, statutory law.

The Order may question if the latest rules are valid. For instance, Act 151 of 2024 took effect upon passage in June 2024, a month before the 2024 rules. It made rule updates discretionary instead of mandatory. *See* 2023, No. 151 (Adj. Sess.), §§ 3, 4. Thus, updates that were required when rulemaking was pending became discretionary before amendments took effect. In addition, Act 47 of 2023 required that regional plans include a “housing element” resulting in building-code-compliant homes “where most households spend not more than 30 percent of their income on housing.” 2023, No. 47, § 11 (amending 24 V.S.A. § 4348a(a)(9)).

This opinion concludes only that statutes require compliance with the most recent version of the rules and here, those are the rules that took effect in 2024. When an agency believes a statutory change impacts its rulemaking authority, the APA provides a process for determining if rule revisions are required. *See* 3 V.S.A. § 848(d)(1). Here, once the 2024 rules took effect, and unless and until they are revised through rulemaking, they are the only ones with legal effect.

⁵ Amendments to the CBES must be consistent with state energy policy; the statute does not reference affordability. *Compare* 30 V.S.A. § 53(c)(1) *with* 30 V.S.A. § 51(c)(1) (considerations for RBES).

⁶ *See also* 3 V.S.A. § 800(6) (prohibiting adoption of policy that avoids rules required by statute).

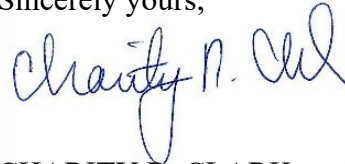
IV. Conclusion

The Order does not exceed the Governor's authority to the extent it directs agencies to commence rulemaking related to wetlands and building energy standards.

The Order exceeds the Governor's authority to the extent it intends to immediately change any law related to wetlands and building energy standards without rulemaking.

Reliance on the Order as a source of new law carries legal risk and may delay desired residential and commercial development outcomes.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Charity R. Clark", is written over a light gray rectangular background.

CHARITY R. CLARK
Attorney General