NATURAL RESOURCES BOARD
National Life Drive
Dewey Building
Montpelier, Vermont 05620-3201

November 18, 2014

Public Records Legislative Study Committee
115 State Street
Montpelier, VT 05633-5301

Re: Quasi-judicial deliberation exception to Public Records Act

Dear Members of the Public Records Legislative Study Committee:

The Natural Resources Board supports 1 V.S.A. § 317(c)(24) that exempts "records of, or internal materials prepared for, the deliberations of any public agency acting in a judicial or quasi-judicial capacity." The Natural Resources Board administers Act 250. Act 250 permits and related decisions are made through a quasi-judicial process that routinely requires internal materials such as draft decisions for our deliberations. This exemption is important to our work because it allows the free exchange of ideas and drafts before the decision is issued.

First, it is important to note that Section 317(c)(24) goes hand-in-hand with, and cannot be viewed separately from, the Open Meeting Law, 1 V.S.A. § 312(e), providing that quasi-judicial deliberations are not public meetings.

Our reliance on these provisions of the public records and open meeting laws is important and critical to the public interest we serve. We see no need to alter these provisions.

Act 250 permitting decisions are made by nine independent quasi-judicial District Environmental Commissions, each one serving its geographically distinct district. The Commissions' charge is to make permitting decisions through the "contested-case" process. 3 V.S.A. §§ 809-813. A contested case is the quasi-judicial process established by the Vermont Administrative Procedure Act. Commissions are bound by ex parte rules and the Executive Code of Ethics.

Commissioners and Board members are citizens appointed by the Governor. They receive per diems, but this is really a volunteer appointment.

Commissioners and Board member deliberations rely extensively on e-mail, documents posted on SharePoint, conference calls, and draft permits and decisions written by staff at the Commissions' or Board's direction. Permitting decisions made after hearing address the facts and issues arising under Act 250 and are often quite complex. The advice provided by the District Coordinators and NRB

staff to the nine Commissions, much of which is in support of quasi-judicial decision making, is often by e-mail or memo.

The Supreme Court confirmed the quasi-judicial nature of Act 250 decision making in an April, 2012 decision, *Rueger v. NRB and District 9 Environmental Commission*. Records were sought relating to a Commission's decision to recuse itself because of potential conflicts of interest. The Supreme Court recognized that emails between the NRB staff and the Commission advising the Commission on this conflict-of-interest issue were part of its quasi-judicial deliberations.

The Court held:

> The reasons for protecting such deliberations is evident. . . : [c]onfidential communications between judges and between judges and the court's staff certainly originate in a confidence that they will not be disclosed. Judges frequently rely upon the advice of their colleagues and staffs in resolving cases before them and have a need to confer freely and frankly without fear of disclosure. If the rule were otherwise, the advice that judges receive and their exchange of views may not be as open and honest as the public good requires. In order to protect the effectiveness of the judicial decision-making process, judges cannot be burdened with a suspicion that their deliberations and communications might be made public at a later date.
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> 2012 VT 33, ¶ 11.

The Commission reached the right result. The process worked. Any change to the exemption could provide reason for Commissioners not to reach out to staff for advice, or not to exchange ideas in writing. This would have a negative impact on the Act 250 process.

I have extensive experience with this process. For over ten years at the Attorney General's Office, I represented the Environmental Board before the Vermont Supreme Court and also counseled the Board. For twelve years in private practice, I represented applicants, municipalities and citizen groups in the Act 250 process. I have been the NRB Chair for three years. Never have I had any experience other than with dedicated citizen volunteers trying their best to fairly discern facts and properly apply the law. Commissioners and Board members take their responsibilities very seriously, including all ethics and ex parte requirements.

I want to share some of my other experience with you. I am an attorney admitted to the State of Maine where I have practiced before its Board of Environmental Protection (BEP) – a citizen panel that reviews environmental permits. Maine law requires that the BEP deliberate in open session. When they do so, particularly in complex, contested cases, concern about appearing to ask a dumb question or otherwise appearing to not fully understand a situation inhibits and distracts Board members from comprehensive and candid discussion. Quasi-judicial decision makers are properly held accountable for the content and quality of their decisions. But opening up deliberations to the

public could have a chilling effect on the quasi-judicial deliberative process, which could actually reduce the quality of decisions. The citizens that make up the Board and Commission members should be encouraged to exchange thoughts and ideas freely. The resulting decision is open to public scrutiny.

Long-standing Vermont law allows Commissioners to candidly email each other and staff, and develop draft decisions. It works, and nothing I have seen compels a change in law. The notion that lawyers could seek drafts and communications and then try to manipulate the process would impede the Act 250 process. It would also force greater reliance on the attorney-client privilege rather than communication with staff.

We want to encourage citizen service on Commissions and the Board. Current law helps and, again, I do not see any need for change. Any change to the above could have an important impact on the Act 250 process, and place further burdens on this citizen-based process. It could also have an adverse impact on the quality of decisions.

Also important is that Act 250 is held in high regard for its transparency and public involvement. The quasi-judicial deliberation exception does not impede transparency or citizen participation. In short, the Commissions and Board rely extensively on internal documents and legal advice prepared for their quasi-judicial deliberations, and they often deliberate by phone or e-mail and with a draft decision that guides the deliberation. Our current law fosters comprehensive and candid deliberations, with the final decisions open to public scrutiny. This works well for the Act 250 process.

Thank you for this opportunity to comment. Please let me know if you have questions.

Sincerely,

Ronald A. Shems
Chair