

April 6, 2016

Testimony of John Brabant, VCE Director of Regulatory Affairs
House Fish, Wildlife & Water Resources Committee
Re: ANR Stipulated Settlement Agreement Issues and Solutions

Thank you members of the Fish, Wildlife and Water Resources Committee for allowing me the opportunity to address some of the issues that have been brought before your committee over the past weeks and today associated with settlement agreements commonly employed as a de facto regulatory tool. I am providing to you today a broad overview of the problems associated with the often used settlement agreements with developers, also known as Stipulated Settlement Agreements together with what I see as a needed change to the current regulatory landscape at the Departments of Fish & Wildlife, Forests & Parks, and the Agency of Natural Resources (ANR). These ANR departments together with the ANR Department of Environmental Conservation have been all too often employing Stipulated Settlement Agreements in the course of engaging in the Public Service Board and Act 250 regulatory processes. These agreements are not provided for under governing statutes; rather they have evolved as an approach to improve the predictability of the outcome of projects permitted within these tribunals. While they may be the best that can be expected given the authorities provided these ANR departments under current law, they have their share of problems as I will discuss.

Issues/ Problems:

1. Unlike the Vermont Department of Environmental Conservation, ANR's Forests & Parks (F&P) and Fish and Wildlife (F&W) Departments have little to no regulatory authority when it comes to impacts upon habitat and core forest fragmentation. F&W have bear maps, but do not directly regulate the preservation or development of bear and other wildlife habitat. The Fish and Wildlife and Forest and Parks Departments are statutory parties in Act 250 and 30 V.S.A. Section 248 proceedings, but have no direct ability to regulate projects and have little to no authority outside of these tribunals to protect against forest and habitat destruction and fragmentation. This lack of regulatory say leads to desperate measures which lead to the compromising and destruction of the very forest and wildlife resources ANR is responsible to protect.
2. Stipulated Settlement Agreements (a.k.a. Stipulation Agreement) are arrived at outside of any public process, in secret, with the discussions and related documentation exempt from disclosure as a public record. While these agreements are primarily driven by the need to improve F&W's / F&Ps level of control or predictability over the outcome in an Act 250 or Section 248 decision-making process.

3. Stipulated Settlement Agreements are broadened beyond the Departments of Forests & Parks/ Fish & Wildlife to include the regulatory programs at the ANR Department of Environmental Conservation.
4. A conflict of interest is established, where ANR will work against or (best case) remain silent on any party's position taken in the Act 250 / Section 248 tribunals which would argue that the terms of the Stipulation Agreement are not protective (or protective enough), having reached its "compromise" with the developer. Compounding this problem, the Department of Public Service will orchestrate its own Stipulation Agreement or MOU with the same developer that mirrors that of ANR's, resulting in 4 departments arguing this position of compromise. While the focus of the presentation is on the processes within ANR which I would ask the committee focus on, the DPS has a track record of engaging in the very same practices which suffer from the very same shortcomings.
5. Due to its lack of regulatory control over impacts of development upon forests and wildlife habitat, outside of the Act 250 and Section 248 processes, ANR can do almost very little to protect the resource. With the unpredictability (e.g. Deerfield Wind) of the 250/248 processes, ANR finds itself compelled to barter with developers, trading off resources and levels of resource protection in exchange for a guarantee from the developer to limit the level of impact to a level both parties can accept. The quid pro quo for the developer is that he receives ANR's commitment to support the project at the tribunal and defend against any and all parties who might seek greater, more appropriate protections of the resource.
6. As discussed above, Stipulation Agreements are negotiated and entered into in secret and the records developed during these meetings are treated as confidential contract negotiations. ANR has taken the position, despite its role a regulatory agency, that when it enters into a Stipulated Agreement, that:
 - a. Such agreements are contracts between the parties;
 - b. Since ANR is now involved in a contractual relationship with the developer, all the attendant obligations between contractual parties apply ahead of ANR's statutory and regulatory obligations to the public. Essentially they become partners in the project under review, losing objectivity and compromising ANR's ability to bring enforcement actions against permit violations after the project is permitted;
 - c. ANR asserts that public records directly or indirectly related to these "contractual matters" are exempt from disclosure under the VT public records act;
 - d. ANR permit application materials related to the subject matter of the Stipulated Agreement, normally provided to the public upon request as part of the ANR permit application files, as well as documents involving filings to be made at the PSB or Act 250 are confidential;
 - e. These agreements skew the regulatory processes in favor of one member of the regulated community over the interests of the interested public and parties who are working to protect the natural resources that will be impacted. It also calls into

question the objectivity of ANR when it comes time to evaluate the impacts of a project that is the subject of the Stipulated Agreement.

- f. ANR relies on Stipulated Agreements as a de facto regulatory tool or decision, an authority developed from whole cloth together in secret with developers and without the public, the true owners of the natural resources to be compromised or eliminated, having any legitimate say in the process leading to the decision. Rather than seek authority from the legislature to provide it the regulatory tools and authorities necessary to protect the resources under their purview, ANR continues to defend this questionable practice as a standard way of conducting its business, failing to acknowledge the attendant problems.

SOLUTION:

- I. Require through statutory change that ANR Forest & Parks and Fish & Wildlife Departments develop a Forest & Habitat Protection permit process to review and control development projects in consideration of a development's impacts upon an established list of resources requiring protection. Provide these ANR departments the rulemaking authority needed to accomplish this end.
- II. Require that Stipulated Agreements be used as a last resort once regulatory authority is established through rulemaking, to be used in only limited circumstances where there might continue to be regulatory gaps in protecting the resource. Where regulatory gaps are found, require ANR to reengage in rulemaking to correct out these regulatory gaps.
- III. In the interim, until such time that ANR establishes this new regulatory authority in rule, require that drafts of all Stipulation Agreements go through a public notice and hearing process before being finalized. There is such a process in statute under 10 V.S.A. Section 201, which requires drafts of ANR settlements of environmental enforcement actions (aka Assurances of Discontinuance) be made available for public comment prior to finalization. Require that these agreements be subject to appeal under the APA as currently applicable to any decision of an Administrative Agency. Require that any such agreement include a clause that the terms of the agreement will not become final and effective until the appeal periods have run or relevant appeals resolved.

In sum, Vermont is under immense pressure by large scale developments that are fragmenting core forests and disrupting wildlife habitat. ANR has been utilizing what should be seen as a stop-gap measure as standard operating procedure that is outside of any statutory directive. These settlement agreements should be viewed as an attempt to correct out deficiencies in their regulatory authorities and as a call for long overdue reform and improvement of how the Departments of Fish & Wildlife and Forests & Parks regulates the state resources under their respective jurisdictions. It is long past time that the ANR Departments of Forests & Parks and Fish & Wildlife are provided the regulatory tools to manage and protect these remaining resources before they are gone.