



NATURAL RESOURCES BOARD

National Life Drive
Dewey Building
Montpelier, Vermont 05620-3201
Telephone: 802-828-3309
www.nrb.state.vt.us

DATE: February 18, 2014

TO: Senator Robert Hartwell, Chair, Senate Committee on
Natural Resources & Energy
Senator Jeanette White, Chair, Senate Committee on Government
Operations
Representative Tony Klein, Chair, House Committee on Natural
Resources & Energy
Representative Donna Sweaney, Chair, House Committee on
Government Operations
Representative David Deen, Chair, House Committee on Fish,
Wildlife & Water Resources

TO: Governor Peter Shumlin

FROM: Ron Shems, Chair *RS*
Louis Borie, Executive Director *LB*

RE: Natural Resources Board Annual Report for Calendar Year 2013

This report is prepared pursuant to 10 V.S.A. Section 6083(d), which requires that the Natural Resources Board (NRB) submit a report annually to the General Assembly.

A. NRB Structure and Functions

1) Introduction

The Natural Resources Board consists of a full-time Chair and four citizen volunteer members, and up to five alternates. NRB Members, are appointed by the Governor to four-year staggered terms, except the Chair who serves at the pleasure of the Governor. Its members are Vice Chair William Boyd Davies (Barton), Elizabeth Wilkel (Walden), Don Sargent (Colchester) and Marty Illick (Charlotte). The alternates are Pat Moulton-Powden (South Londonderry), Julie Wolcott (Enosburg Falls), Gail Fallar (Tinmouth) and Chuck Haynes (East Montpelier). Ron Shems is the NRB Chair. All must be confirmed by the Senate.

The Natural Resource Board's primary function is to administer Act 250. This includes supporting the nine District Commissions who review Act 250 applications, procedural

and substantive rulemaking and enforcement of Act 250 before the Environmental Division of the Superior Court (Court).

The District Commissions sit as three-member quasi-judicial bodies to review Act 250 applications. The District Commissions issue permit decisions based on the application and other filings if no hearing is requested. They will hold a contested case hearing if facts are disputed or unclear. Staff support is provided by District Coordinators, administrative staff, and NRB attorneys and staff. NRB staff assist the Commissions and Coordinators on procedural and substantive issues that arise in Act 250 proceedings, including legal counsel and research, and drafting. NRB staff organizes and participates in ongoing training of Commissioners and staff, and updates the training manual as necessary. Similarly, NRB staff provide legal and procedural assistance as needed to the District Coordinators in writing jurisdictional opinions. See 10 V.S.A. § 6007(c).

To help assure program integrity and consistent application of policy, the NRB participates as a party to Act 250 appeals before the Superior Court, Environmental Division.

The NRB also reconsiders jurisdictional opinions (JO) at the request of a person aggrieved by the JO issued by a district coordinator. The NRB received and reviewed two such requests in 2013. The NRB is also authorized to hear appeals from the District Commission related to permit application fees and, certain applications for requests for findings of fact and conclusions of law under specific Act 250 criteria for Designated Growth Centers.

Less formally, NRB staff work with Commissions and Coordinators to assure consistent treatment of emerging state-wide issues, while at the same time, respecting the Commissions' independence and regional perspective.

Effective July 1, 2013, the former panels of the Natural Resources Board, the Land Use Panel and the Water Resources Panel, were eliminated. The functions of the former Land Use Panel were transferred to the Natural Resources Board effective July 1, 2013. The rulemaking and policy functions of the former Water Resources Panel were transferred to the Agency of Natural Resources in 2012.

2) NRB Legal and Administrative Staff

The full-time Chair of the NRB is charged with the overall administration of Act 250. The duties include the NRB budget, procedural and substantive rulemaking, enforcement of Act 250 and mixed Act 250/ANR violations, general oversight of court appeals, oversight of the offices and employees of the NRB and the District Commissions, stakeholder relations, and coordination with other state agencies. The

Chair is also a member of the Downtown Development Board and Growth Center Subcommittee and as such participates in all Downtown Board and Growth Center Subcommittee decision making.

The NRB Executive Director manages the NRB budget, district office functions, information technology systems, statistical tracking and management of Act 250 district caseloads, and directly assists with selected difficult Act 250 cases with major regional or statewide impacts. The Executive Director is also responsible for recruitment, training and supervision of the regionally based District Environmental Coordinators and Assistant Coordinators. He also organizes District Commission training.

The NRB General Counsel supervises a legal staff of two which provides a wide array of legal services for the Board, the District Commissions and District Environmental Coordinators. NRB attorneys represent the NRB in environmental enforcement matters and Act 250 appeals before the Superior Court, Environmental Division. They also staff Jurisdictional Opinion reconsiderations for the NRB. The attorneys also draft the Act 250 Rules and shepherd those rules through the rulemaking process (ICAR, public hearings and LCAR).

The NRB Administrative Manager manages the administrative functions of the Montpelier and District Offices, is responsible for handling permit fees and agency accounting, and supervises the administrative staff in Montpelier. The Administrative Manager also assists with budget development, report preparation, IT support, intra-agency communications, business services, and the VISION management system. The Administrative Manager is also responsible for assuring that Commissioner per diems and expenses are managed and paid – a critical function for an agency dependent on citizen appointees.

The NRB's management team consists of the Chair, Executive Director, General Counsel and Administrative Manager.

The NRB Permit Compliance Officer monitors compliance with Act 250 permits, investigates permit violations, issues citations, works with the legal staff to prosecute violations, and assists permittees and applicants with compliance.

Two administrative secretaries support the Montpelier office staff. In summary, 9 NRB employees are located in the Montpelier office and 18 are located in five regional offices (with other state agency staff) for a total of 27 employees. The Board's staff has been reduced by 4 positions, or 12%, since July 2009.

Most importantly, the NRB consists of 8 volunteer members and alternate members, and 63 volunteer members and alternate members of the nine District Commissions, all appointed by the Governor. The NRB's management and administrative support of

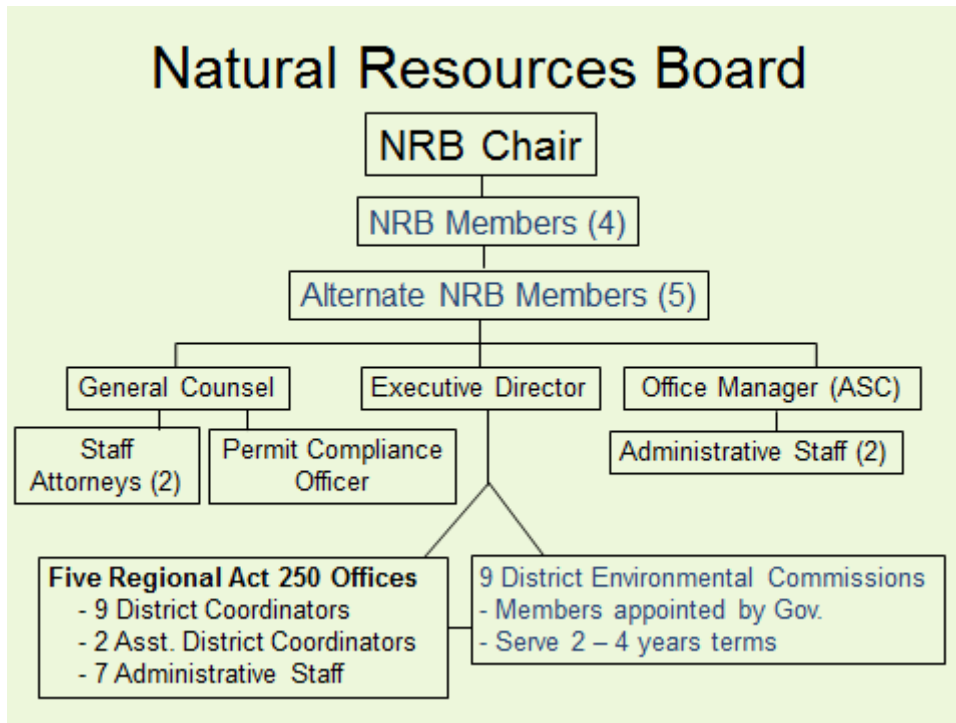
Commissioners and Board Members includes training, per diems, expenses, ethics support, and assisting the Governor's office with nominations. There are approximately 100 people in the NRB organization as a whole, including District Coordinators, District Commissioners, NRB Members and Alternates, legal and administrative staff. See organization chart below.

3) District Environmental Commissions

The District Environmental Commissions are responsible for assuring that developments or subdivisions comply with Act 250's ten criteria. There are nine District Commissions, each composed of a chair, two members and four alternates and each serving one of nine districts. Commissioners reside in the districts served by their Commission. All Commissioners are appointed by the Governor. There are a total of 63 Commissioners. The nine Commissions are staffed by nine District Coordinators, two Assistant District Coordinators and seven administrative assistants that provide professional and administrative support.

Commission offices are located in five Regional Offices: Springfield, Rutland, Essex, St. Johnsbury and Barre. With the assistance of the District Coordinators, Assistant District Coordinators, and administrative staff, the Commissions process, on average, 340 Land Use Permit (Act 250) applications per year representing nearly \$480,000,000 in annual development activity. The District Coordinators also provide assistance to Act 250 applicants, parties, and the general public who seek to participate in the Act 250 process. This assistance is critical to maintaining an open, transparent and citizen-friendly quasi-judicial process. Another important responsibility of the District Coordinators is the issuance of Jurisdictional Opinions regarding Act 250 jurisdiction. These Jurisdictional Opinions are subject to appeal to the Environmental Division of Superior Court. Effective July 1, 2013, prior to appeal to the Environmental Division, a District Coordinator's Jurisdictional Opinion is subject to reconsideration by the Natural Resources Board.

NRB Organizational Chart



B. Annual Report

This report is based upon a statistical analysis of NRB and District Environmental Commission activity during Calendar Year 2013 (CY 2013). Fiscal Year (FY) data has been used for the fee revenue analysis.

1) Act 250 Application Volume

	CY2010	CY2011	CY2012	CY2013
Major (Hearing Required)	60	61	73	62
Minor (No Hearing)	<u>295</u>	<u>269</u>	<u>267</u>	<u>233</u>
Total	355	330	340	295

2) Appeals and Reconsiderations

JO Reconsiderations				2
JO Appeals	6	3	2	2
District Comm. Decision Appeals	<u>21</u>	<u>12</u>	<u>10</u>	<u>10</u>
Total	27	15	12	14

**3) Processing Time
 (Date Complete to Date Issued)**

<30 Days	25%	23%	19%	18%
<60 Days	66%	60%	57%	51%
<90 Days	80%	73%	71%	67%
<120 Days	86%	82%	81%	76%
>119 Days	14%	18%	19%	24%

In CY 2013, 295 Act 250 permit applications were filed with the nine District Commissions, compared to 340 the previous year, a decrease of 13%. This decrease is likely the result of several factors. First, overall economic activity has not returned to the level prior to the recession which began in 2008. Second, statutory and rule changes exempted or shifted regulation of certain types of development activities, including telecommunications, on-farm composting, home occupations, electrical and communications lines, and projects that involve *de minimus* construction of improvements.

Of the 295 applications filed in CY 2013, 79% were processed as “minor” applications, with no contested-case hearing, while the remaining 21% of applications were processed as “major” applications. These percentages are consistent with long-term

averages. A public hearing is required for major applications, to review the project's conformance to the 10 Criteria of Act 250.

In addition to the above statistics, 157 applications were processed as administrative amendments in 2013, compared to 144 administrative amendments processed in 2012. Administrative amendments are issued "for record keeping purposes or to provide authorization for minor revisions to permitted projects raising no likelihood of impacts under the criteria of the Act." Act 250 Rule 34(D). Administrative Amendments are processed without a hearing, typically within several days; the amendment is distributed to all statutory parties and adjoining property owners with opportunity for reconsideration within 15 days.

The median processing time for all major and minor decisions in CY 2013 was 57 days from the date the application was deemed complete until a decision was rendered, compared to 51 days in CY 2012. (These figures do not include Administrative Amendments, which are typically issued within one week.) In CY 2013, 51% of all major and minor permit decisions were issued within 60 days and 76% were issued within 120 days.

Five permit applications were denied in CY 2013, a rate of 1.5% overall (majors and minors combined) and 8% of the majors decided. This compares to three permit denials in CY 2012. Ten (10) Commission decisions (majors), or 16%, were appealed in 2013. This compares to an appeal rate of 13% for majors in 2012. In addition, there were two (2) Jurisdictional Opinions (JO) appealed in 2013, the same number as 2012.

4) Performance Standards

Statutory and internal performance standards guide the performance of the District Coordinators and District Commissions. Average CY 2013 performance is listed below.

<u>Category</u>	<u>Standard</u>	<u>CY 2013 Performance</u>
a) Application Completeness Review	7 days	3.9 days
b) Minor Applications -- Days to Issue After End of Comment Period Or Last Permit Submitted	10 days	2.8 days
c) Major Applications – Days to Issue After Adjournment (Act 250 Rule Standard)	20 days	4.5 days
d) Days to Schedule Hearing (Majors) (Statutory standard)	40 days	34 days

5) NRB Special Fund - Permit Application Fees

The NRB is funded with a combination of General Funds and Special Funds generated by Act 250 application fees. Generally, Act 250 permit application fees are based on the estimated cost of construction for each development at \$5.40 per \$1,000.00 of construction cost and \$100.00 per subdivided lot. (Not including land acquisition costs.) State and municipal projects are exempt from paying fees. 10 V.S.A. § 6083a. Fees are deposited into the Act 250 Special Fund (SF).

In FY 14, the Board is relying on Special Funds to cover 70% of its annual expenditures for personal service and operating costs, with the remaining 30% covered by General Funds. Fees collected in the last six fiscal years are as follows:

FY 2008	\$ 1.669M
FY 2009	\$ 1.393M
FY 2010	\$ 1.458M
FY 2011	\$ 1.580M
FY 2012	\$ 1.961M
FY 2013	\$ 2.214M

Special Fund spending authority for the last six fiscal years:

FY 2008	\$1.612M
FY 2009	\$1.911M
FY 2010	\$1.748M
FY 2011	\$1.965M
FY 2012	\$1.965M
FY 2013	\$1.965M

Since the end of FY 2006, the NRB has experienced a 29% decrease in General Funds - \$1.066M in FY 2006 to \$.751M in FY 2013. Consequently, the NRB has increased its reliance on the Special Fund (Act 250 fees) from a budgeted \$1.674M in FY 2007 to \$1.965M in FY 2013. Due to the economic downturn, actual fee receipts for Fiscal Years 2009 – 2012 did not meet our target, resulting in a significant deficit in the NRB Special Fund. (This deficit was eliminated as part of the 2012 Budget Adjustment Act.) In FY 2013 NRB exceeded its Special Fund target by \$249,000, the first time our target has been exceeded since FY 2008.

6) Act 250 Fees/Post Construction Certificates

Permittees are required to file a post construction certification (PCC) of actual construction costs and pay any additional fees due. The Permit Compliance Officer reviews the estimated construction costs listed in all Act 250 applications and compares

this information with the project's PCC that must now be filed upon substantial completion of the development. Permit fees collected in response to the post construction certification for the last five years are shown below:

CY 2009	\$177,095.00
CY 2010	\$ 64,922.00
CY 2011	\$ 96,166.00
CY 2012	\$ 60,130.00
CY 2013	\$ 44,172.00

7) Downtown Development Board

The Chair of the NRB is a member of the Downtown Development Board, which is responsible for designating downtown development districts, village centers, new town centers, growth centers and neighborhood development areas, and for awarding financial incentives, pursuant to 24 V.S.A. Chapter 76A. The NRB is responsible for providing staff support to the Downtown Board's Growth Center Subcommittee, along with staff of the Department of Housing and Community Development (DHCD). The Chair of the NRB is a member of the Subcommittee.

In 2013, the Chair and NRB staff worked with the Department of Housing and Community Development (DHCD) on DHCD's Act 59 interagency and stakeholder process for improving the Growth Center designation process and statute. The NRB also worked closely with VTrans and the Agency of Natural Resources as part of this process.

This process resulted in two bills presently pending before the Legislature. One of these bills – H.823 – could result in important changes to Criteria 5 and 9(L) and Act 250's regulation of projects in designated centers.

8) Participation in Court Appeals (CY 2013)

The NRB has statutory authority to participate as a party in Act 250 appeals to the Environmental Division. In CY 2013, the NRB reviewed 15 Act 250 permit decisions and jurisdictional opinions appealed to the Environmental Division. The NRB voted to participate as a party in 14 of these appeals.

9) Environmental Rulemaking and Policy Work

In 2013, the NRB adopted amendments to the Act 250 Rules, and adopted new rules for Civil Citations. The proposed rules were discussed at several public meetings and the NRB received input from state agencies, business groups, and Act 250 staff. Both the revised Act 250 Rules and the new Civil Citations rules became effective on

October 1, 2013. They are available on the Board's website:
<http://www.nrb.state.vt.us/>.

The NRB also prompted a stakeholder process coordinated by VTrans to address and modernize mitigation of traffic impacts of developments and subdivisions. The Agency of Commerce and Community Development also participated in this process. This work resulted in H.740 presently pending before the Legislature. This bill would establish factors for a formula that would be used to set traffic mitigation fees, and authorize the District Commissions and VTrans to require these fees.

11) Enforcement and Compliance

Program background

The NRB has a successful, comprehensive, and even-handed enforcement program that enhances the integrity of Act 250 and protects the state's public health, safety, welfare, and the environment. The enforcement program staff consists of one permit compliance officer, one general counsel, and two attorneys who dedicate roughly one-third to one-half of their time toward enforcement matters. The Chair of the Board directs the enforcement program's day-to-day decisions.

The NRB's jurisdiction over enforcement matters derives from Title 10, Chapter 201, subchapter 3. Additionally, through Act 11, effective July 1, 2013, the NRB has direct authority to issue Administrative Orders and Emergency Administrative Orders, which previously required authorization from the Secretary of Natural Resources.

The NRB exercises its enforcement authority when (1) activity occurs prior to the issuance of a required Land Use Permit or permit amendment, or (2) activity violates a condition of an existing permit. The Environmental Enforcement Act provides a number of legal tools to enforce violations of and ensure compliance with Act 250, including:

1. *Notices of Alleged Violation (NOAV)*

These warning letters instruct a violator to cease operation and become compliant. An NOAV cannot assess a penalty.

2. *Civil Citations*

Citations are akin to traffic tickets and are issued by the NRB's Permit Compliance Officer. Citations may levy fines of up to \$3,000 for violations of Act 250, but do not include compliance directives.

3. *Assurances of Discontinuance (AOD)*

These settlement agreements often require the respondent to pay a civil penalty, apply for a permit, and/or become compliant with an existing permit.

4. *Administrative Orders (AO)*

These enforcement directives require a respondent to pay a civil penalty and become compliant with Act 250. If a hearing is requested, the AO serves as a complaint, and the matter is tried before the Environmental Division of the Superior Court. If no hearing is requested, the AO becomes a judicial order.

5. *Emergency Administrative Orders (EAO)*

The NRB presents these orders to the Superior Court, Environmental Division to obtain immediate relief to stop a violation of Act 250. If the Court issues the EAO, a hearing may be requested.

Annual Activity

The Board, through its Permit Compliance Officer (PCO) and enforcement attorneys, continues to diligently investigate complaints received from the general public, District Coordinators, and the Agency of Natural Resources' Environmental Enforcement Officers and program staff. This year the PCO investigated approximately seventy-five complaints. Some of those complaints were not deemed violations. Others were referred to the Agency of Natural Resources (seven) and the Attorney General's Office (two). The Permit Compliance Officer referred thirty-five investigations to the NRB attorneys for formal enforcement.

The NRB enforcement program resolved nineteen cases this year through AODs and AOs. Approximately 50% of the resolved cases involved the violation of permit conditions. The remaining 50% involved commencement of construction without an Act 250 permit. Although the number of resolved cases did not change from the previous year, the amount of assessed penalties increased significantly. In CY 2013, the Board assessed \$220,740 in total penalties as compared to \$183,180 in 2012 and \$72,380 in 2011. Unlike previous years, the NRB did not receive any penalty assessments from the Attorney General's Office. The program issued nine NOAVs in six different Act 250 Districts in 2013. For comparison, the program issued only one NOAV the previous year. The NRB enforcement program conscientiously recovered its enforcement costs, which is authorized under 10 V.S.A. §8010. The NRB's recovery of enforcement costs in CY 2013 increased by greater than \$2,000 from the previous year.

In CY 2013 the NRB adopted an Act 250 Citations Rule as authorized under 10 V.S.A. §8019. The Citations Rule became effective October 1, 2013, and the Permit Compliance Officer issued four citations. Although the cost of enforcement is incorporated into the penalty assessed under the citations statute, those costs recovered through receipt of citation penalties are remitted to the State's General Fund, rather than into the NRB's Special Fund. Costs assessed through other enforcement mechanisms (AODs and AOs are remitted to the NRB's Special Fund.

Enforcement and Compliance Activity Summary

	CY 2011	CY 2012	CY 2013
Investigations Opened	90	102	75
Investigations Referred to NRB Enforcement	27	20	35
Resolved Enforcement Actions	7	19	19
Total Penalties Assessed	\$72,380	\$183,180	\$220,740
Total Penalties Collected	\$46,375	\$82,421	\$177,890
Total Enforcement Costs Assessed	\$700	\$5,912	\$8,021

12) Technology Initiatives

The NRB recognizes the need for electronic filing of permit applications and improved access to permit information and documents. Several initiatives are currently being implemented, with oversight by the Executive Director, including the use of PDF “smart form” technology, an interactive map of Act 250 permits throughout the state, a new Act 250 web portal, and a paperless application pilot project.

Application Smart Form: The new PDF smart form application will replace several forms currently in use by Act 250 applicants. The new form reduces the size and complexity of the present hard form by allowing applicants to customize the form for the particular type of Act 250 application being submitted and the issues presented by the specific project. The form also facilitates submittal of an electronic copy of the application. Issues regarding statewide licensing of PDF smart forms slowed the deployment of the new Act 250 application form in 2013. Now that these issues have been resolved, we expect to deploy this new technology in early 2014.

Permit Mapping: In 2013 NRB accelerated the development of an online map showing the location of all Act 250 permitted properties in the state. This map is being populated by the District Office staff and is currently complete for approximately half of the state. Our goal is to complete this map by the end of 2014. This map will become an integral part of the new Act 250 web portal (see below).

New Act 250 Web Portal: In 2013 NRB contracted with an outside vendor to gather the requirements for a new Act 250 database web portal. This portal will include information and search capabilities for all Act 250 permits issued since 1970, including

a complete record of permit documents for more recent permits. This portal will replace the current Act 250 database portal hosted by ANR on its website.

Paperless Application Pilot Project: NRB has been implementing electronic filing and distribution procedures for Act 250 permit applications for several years. The primary goal of this effort is to facilitate the filing of permit application documents by applicants and other participants and to make these documents available on line. This effort has also reduced the filing of paper documents by Act 250 applicants, parties, and state agencies, resulting in savings in postage, copying costs, and, most importantly, our forest resources.

We are currently launching a pilot project in District 2 (Windham and Southern Windsor Counties) to eliminate all paper from Act 250 filings in that district. This pilot project is being developed by the District 2 Commission and the Springfield office staff, which have been successfully promoting electronic filing and distribution procedures in this region. Applicants will file only an electronic copy of the application; the 8 complete paper copies of the application (four submitted to the Act 250 office and four distributed to the town, regional planning commission, and Agency of Natural Resources) will not be required during the pilot project. All documents will be uploaded to the online Act 250 database (a current procedure for all districts) where they can be viewed by the District Commission, towns, regional planning commissions, state agencies, and the public. All follow-up submissions will also be in electronic format only. The pilot project will be implemented for six months, after which time we will survey participants in District 2 to determine whether the pilot was a success and whether to extend this procedure statewide.