

Report on Land Use Permitting Processes
Prepared Pursuant to Act 40 of the 2001 Legislative Session
By the Land Use Permitting Process Study Committee
(February 15, 2002)

Introduction and Statutory Charge

Section 10 of Act 40 of the 2001 Session Laws required a study on the land use permitting process, to be conducted by a committee comprised of the Secretary of Natural Resources, the Chairs of the Environmental Board and Water Resources Board, the Commissioner of Agriculture, the Secretary of Transportation (or their designees), two members each from the House and Senate Committees on Natural Resources and Energy, and one representative each from the business community, municipalities, environmental organizations, and the general public, as appointed by the Governor. The Study Committee was to conduct its work in no more than 6 meetings.

The purpose of the study was “to examine the land use permitting process for the purpose of recommending legislation that will accomplish the following, while assuring citizen participation and environmental protection”:

1. categorize the existing permits that have or should have similar processes, and identify the environmental protection goals that each process seeks to achieve;
2. list those permits which have or should have processes and underlying statutory criteria that should enable the permits to receive presumptive evidentiary weight in Act 250;
3. recommend, for a pilot project, permits or parts of permits that could be reviewed for approval by different regulatory units acting together;
4. recommend different permits that could be consolidated;
5. review common parts of the permitting processes for all land use permits, from the point of application on through the entire regulatory process, including an identification of those parts that make provision for public participation, for strategies that would result in standardization;
6. review the end result of the entire land use permitting process for overlap, redundancy, and efficiency, and for logical sequencing of appeal routes and appeal procedures; and report the positive and negative effects of allowing parties to appeal to the supreme court;
7. recommend strategies for “predictability” from the viewpoint of each participant, applicant, agency, or group that is involved in the land use permitting process.

The Study Committee consisted of the following members:

Scott Johnstone (Chair) – Secretary of Natural Resources
Marcy Harding – Chair, Environmental Board
David Blythe – Chair, Water Resources Board (represented by Bill Bartlett)
Micque Glitman – Deputy Secretary of Transportation
Leon Graves – Commissioner of Agriculture (represented by Marian White)
Richard McCormack, Chair, Senate Committee on Natural Resources & Energy
Philip Angell, Chair, House Committee on Natural Resources and Energy
Phil Scott, State Senator
Alice Nitka, State Representative
David Grayck, Governor’s appointee
Carl Spangler, Governor’s appointee
Rob Apple, Governor’s appointee
Robert Rushford, Governor’s appointee

Interagency Act 40 Staff Workgroup

In order to facilitate the work of the study committee prior to the first meeting, a work group comprised of staff from the Agency of Natural Resources (ANR), the Environmental Board (EB) and the Water Resources Board (WRB) formed in late June 2001 with a primary goal of providing background information and preliminary recommendations to the study committee. Following consideration of Act 40’s requirements and in anticipation of committee meetings beginning in November 2001, the work group decided to concentrate efforts in the following areas:

- creating a summary of previous and current efforts of ANR (including the Department of Environmental Conservation), EB, and WRB in improving environmental permitting, consistent with the “predictability” goals of Act 40;
- developing recommendations on whether additional ANR permits, beyond those specified in EB Rule 19, should provide a presumption of compliance with certain Act 250 criteria;
- developing recommendations on whether permit appeals processes, particularly those associated with ANR permits, could be more standardized; and
- developing recommendations that address environmental permitting processes and public access to those processes.

The interagency work group’s efforts were presented at the Study Committee meetings and are discussed below.

The Work of the Study Committee

The Study Committee met a total of five times between November 2, 2001 and January 14, 2002. The interagency staff work group attended all of the meetings and continued to provide support to the Study Committee. In addition, the meetings were posted on the Legislature's web page, and a list of interested persons received e-mail notices. In addition, various documents generated during the course of the Study Committee's work were posted on ANR's web page (meeting agenda and minutes, staff reports).

[<http://www.anr.state.vt.us/act40/act40study.htm>]

Meeting notes are provided in Attachment 1. A summary of each of the meetings is as follows:

November 2, 2001: The primary goal of the meeting was to determine the key issues to be evaluated by the Study Committee. The interagency staff workgroup presented the Study Committee with its *Act 40 Permit Study Workgroup Report* (October 24, 2001) [See Attachment 2]. This report is a summary of previous and current work by state agencies directed toward permitting system improvements.

The Study Committee selected the following areas or topics for further consideration: 1) expanding the list of ANR permits allowed as rebuttable presumptions under EBD Rule 19(E); 2) revising certain appellate statutes to achieve greater uniformity; and 3) standardization and categorization of permit processes, including public participation. Study Committee members also suggested a number of other topics which were ultimately not identified for further committee work, including consolidating the various boards and tribunals that deal with environmental permitting, converting the Environmental Board to a professional board, and public participation in ANR permit processes and in Act 250 appeals before the Supreme Court.

ANR Secretary Johnstone was selected to chair the Study Committee.

November 19, 2001: The primary goal of the meeting was to discuss the topic of potentially expanding the list of ANR permits allowed as rebuttable presumptions under Rule 19(E). The interagency staff workgroup presented several documents related to this issue including *EBR Rule 19: Presumptions of Compliance for ANR Permits* (no date); *Challenges to Rebuttable Presumptions* (11/19/01); *Calendar Year 2000 – ANR “Rule 19 Permits”* (no date); *Candidates for Act 250 Presumptions* (11/02/01); and *Challenges to Rebuttable Presumptions – a Case History* (rev.12/10/01). All of these documents are included as Attachment 3. A discussion of rebuttable presumptions and ANR permits followed, including comments from several members of the general public.

December 10, 2001: The primary goals of this meeting were to finish discussion on expanding presumptions and to discuss standardizing the ANR permit appeals process through revision of certain statutes related to appeals of ANR permits. The interagency staff workgroup presented the report *Recommended revisions to appellate statutes to achieve greater*

consistency (10/29/01; addendum 12/10/01) [See Attachment 4]. Public feedback was received both on the presumptions topic and the appeals process.

December 21, 2001: The primary goal was to finish discussion on the ANR permit appeals process and begin discussions on standardizing the permitting process. The staff workgroup presented the report *Permit Process and Public Participation Proposals* (dated 11/2/01) [See Attachment 5]. A discussion of this issue followed, including comments from several members of the general public.

January 14, 2002: The goal of the final meeting of the Study Committee was to determine the Committee's recommendations for inclusion in the final report to the House and Senate Natural Resources Committees. The recommendations are provided below.

Recommendations of the Study Committee

1. DEC Permit Study.

The majority of the Study Committee acknowledges and supports the Department of Environmental Conservation (DEC) for its intention to conduct a comprehensive study in the near term that will recommend alternative methods to DEC's current regulatory processes to more efficiently conduct permitting activities. This study, which is anticipated to take 1 to 1.5 years assuming adequate resources are available, will evaluate many aspects of the permitting process including the potential for permit consolidation and changes to the public participation processes. A number of Committee members suggested that a steering committee be formed, with representation from various stakeholder groups (e.g., the regulated community, other state agencies, citizen and environmental organizations) to provide input to DEC on planning the study and providing an independent critique of the study's findings and recommendations.

2. Standardizing Substantive Criteria.

The Study Committee recognizes that the proposed DEC permit study will not address whether and how to make the substantive environmental standards contained in ANR's permitting statutes and regulations and the environmental criteria of Act 250 more consistent. Consequently, the majority of the Study Committee supports a focused review of a limited number of ANR's water-related permits for the purpose of consolidating and integrating these permits and their substantive criteria. This review may be initiated as a regional pilot study for a few permit programs. Additional resources, possibly a consultant, would be required to complete this review in a timely manner and additional monies would need to be appropriated to support this effort.

3. Act 250 Partial Review.

The Study Committee considered the issue of partial review of a project under Act 250, as is presently allowed under the statute and Board rules. The purpose of partial review

is to give applicants an early indication on whether a project or parts of a project can satisfy certain Act 250 criteria. An intended benefit of partial review is to avoid the cost of a complete review by identifying major hurdles through a more focused review. At present, parties currently may appeal either when partial findings of fact and conclusions of law are issued for the partial review, or when a permit for the construction phase is issued. Providing multiple opportunities for appeals may be contributing to the limited use of the partial review option by applicants. At the same time, changing the law to only allow an appeal of partial findings once may not increase the use of the partial review process. This is due to the fact that any Act 250 criteria that are not dealt with in the partial review decision could still be appealed later in the process. Thus the issue of timing delay would still exist. Nonetheless, the majority of the Study Committee believes there should be more finality concerning appeals related to the partial review process.

4. Local Decisions and Act 250.

The discrepancies that can exist between town plans and local ordinances can allow a project to receive local approval, but not Act 250 approval under criterion 10 (Town Plans). Although a separate study is addressing issues surrounding municipal review processes under 24 V.S.A. Chapter 117, the Study Committee wishes to encourage towns to routinely update ordinances to be in accordance with their town plans.

5. Appeals of ANR Permits.

Under current law, many of ANR's water-related permits may be appealed to the Water Resources Board, and then further appealed to superior court and ultimately to the Vermont Supreme Court. The majority of the Study Committee endorses making the appeals processes under the various ANR permit statutes more consistent through the use of standard appeals provisions. The Committee also endorses eliminating appeals to superior court, such that appeals of WRB decisions would go directly to the Vermont Supreme Court. This change eliminates the redundancy of having two judicial appellate reviews of the WRB's decision, and thereby brings the system of ANR permit appeals in line with the Act 250 appeal process. To effectuate these recommended changes, the Study Committee endorses the model appellate language and revisions regarding elimination of superior court review that were developed by the interagency staff workgroup (see Attachment 4).

The Study Committee also considered the interagency staff workgroup's recommendations regarding the Air and Solid Waste Variance Board and the Environmental Court. Under this proposal, jurisdiction over variances to the air and solid waste regulations, and appeals of air permits currently heard by the Environmental Court, would be transferred to the Waste Facility Panel. The Variance Board would be eliminated. The rationale for this proposal was to consolidate functions of some of the tribunals in Vermont that have jurisdiction over environmental appeals and variances, with the goal of simplifying the environmental permitting process. The Committee did not fully consider this issue and thus could not reach consensus.

6. ANR Permits and Presumptions Under Act 250.

The Study Committee received information from the interagency staff workgroup concerning additional ANR permits that could serve as rebuttable presumptions under certain Act 250 criteria (see Attachment 3, table dated 11/2/01). The list of candidates included Lakes and Ponds Encroachment Permits, Stream Alteration Permits, Water Quality Certifications, and Endangered Species Permits. The Study Committee considered a number of issues on this subject, including the following: To what degree do the ANR permits align with the Act 250 criteria, or would statutory changes be needed? Is the existing system of rebuttable presumptions working? Is the existing system fair to opponents, particularly in light of the more limited public notice and comment requirements associated with ANR permits as compared with Act 250 permits? Is adding more permit presumptions needed? Do the candidate permits tend to arise much in the Act 250 process? Does the system of rebuttable presumptions even go far enough to reduce the potential duplication of review between ANR and Act 250?

The Study Committee has chosen not to endorse any changes to rebuttable presumptions. This is due to the serious question of whether the proposed changes add value to the process, and the need to consider the broader issue of aligning the substantive environmental criteria used in reaching ANR and Act 250 permit decisions and the public participation process associated with each.

7. Appeal rights of all parties to the Supreme Court from EB decisions.

This issue was raised several times by Study Committee members and by members of the public. The majority of the Study Committee decided against making recommendations for changes in appeal rights from EB decisions.

Input from the General Public

Comments received from several members of the general public who attended the Study Committee meetings are generally reflected in the meeting minutes [Attachment 2].

Final Comments from Committee Members

While the Study Committee makes the above recommendations and believes they will improve the permit process, the Study Committee was unable to identify more substantive changes which would "streamline the permit process," make it more predictable or timely and less duplicative. Numerous opportunities were provided for the public to make suggestions for such improvements but such suggestions were not forthcoming.

The Study Committee expresses its gratitude to Secretary Scott Johnstone, Chair, and the Staff Workgroup. Both played instrumental roles in the outcome of this Committee's work.