

**Commission on Act 250**  
**Vermont State House, Room 11**  
**November 8, 2018**

**Vermont Agency of Transportation**  
**Testimony in Support of Exempting**  
**Federal-Aid Transportation Projects from Act 250**

**Introduction and Overview (Michele Boomhower) (5 minutes)**

A. Introduction

Good afternoon and thank you for this opportunity to testify about Act 250 and transportation projects in Vermont. For the record, my name is Michele Boomhower, Director of Policy, Planning, and Intermodal Development at the Agency of Transportation.

B. Panel

With me today are:

- Ken Robie,  
Highway Division Project Delivery Bureau Director;
- John Dunleavy,  
Assistant Attorney General and Chief Transportation Attorney;
- Joe Segale,  
Policy, Planning, and Research Bureau Director; and
- Dan Dutcher,  
Environmental Policy Manager.

I will provide a short overview of the Administration's recommendation to exempt federal-aid transportation projects from Act 250. Ken Robie and I will then provide the Commission with some case examples in the context of planning and developing transportation projects. The full panel is here to help with any questions that may arise.

### C. Summary of Why Act 250 Should Not Apply to Federal-Aid Transportation Projects

Why Act 250 should not apply to federal-aid transportation projects. Act 250 has taken on an iconic and fundamental status in Vermont. As a result, and over time, policy debates surrounding Act 250 have resulted—at times—in opposing encampments of supporters and opponents.

We thank the Committee for its review of Act 250 as Vermont looks to the next 50 years—and we are here today as supporters of the overall goals Act 250 envisions. Our request is not founded in disagreement about where we go; rather, we ask you to reconsider how we get there.

The Environmental Protection Agency (EPA) itself had just begun in 1970, when Act 250 was enacted. Hence, the comprehensive system of environmental oversight and controls in place today was virtually non-existent when Act 250 was enacted—nearly 50 years ago.

In view of these changes, a more nuanced approach to land use is needed if we are to preserve the unique character and culture of Vermont while ensuring fairness and efficiency in our regulatory system.

As you know from the Report Prepared by the Executive Branch Working Group filed last December, the Executive Branch seeks an exemption from Act 250 for federal-aid transportation projects.

The reasons for this proposed exemption are due to a combination of the following:

- Comprehensive planning and regulation under state and federal laws—other than Act 250;
- Little or no added value to the environment from overlaying Act 250 jurisdiction;
- The addition of significant expense, delay, and uncertainty from Act 250, especially where Act 250 is used as a means of advancing personal or commercial interests or rehashing well-considered policy, planning, and permitting decisions that were already made in other forums; and
- The public interest in the State's public transportation network.

An important part of VTrans' mission is environmental stewardship—and VTrans takes that seriously. We work actively to protect the environment across all our programs. This includes work in water resources, solid waste, hazardous materials, wildlife habitat, archaeology, climate and energy, and land use planning.

Through all this, VTTrans is also responsible for getting critical infrastructure projects completed for the safety and convenience of the traveling public in a cost-effective manner.

In view of the changes in the regulatory landscape since Act 250 was enacted, Act 250 is now reregulating already regulated federal-aid transportation projects, and on that basis, should no longer apply. These projects are not contributing to the fragmentation, sprawl, and unplanned development that Act 250 is designed to address. And all of these projects are in the public interest.

We have provided the Commission with a list of state and federal regulations that apply to federal-aid transportation projects, and we have also provided a multi-page Excel chart that compares the Act 250 criteria with state and federal transportation standards.

Ken Robie and I would like to share some case examples with the Commission in the context of transportation planning and development.

### **The Continuum of Project Development (Ken Robie) (10 minutes)**

I am Ken Robie, Highway Division Project Delivery Bureau Director for VTTrans.

#### **A. Act 250 and the Project Continuum**

The process of developing a federal-aid transportation project follows an orderly continuum beginning with planning and then proceeding to scoping, design, state and federal permitting, right-of-way acquisition, and finally construction that conforms with all the prior steps. Not all projects comply with all these steps, which depend on the project's size and environmental impacts, but all steps prior to construction offer ample opportunities for public input. Also, all projects are constructed in the public interest and are subject to legislative oversight through the appropriations process.

Compared to other state and federal environmental hurdles that a transportation project must clear, Act 250 is uniquely challenging for several reasons. Act 250's criteria are so subjective that Act 250 can be very difficult to prepare for, and the generalized nature of the criteria lends Act 250 to obstructionist tactics. Act 250 proceedings typically take place after other regulatory processes have been resolved and allows project opponents to raise issues that were addressed or could have been addressed in prior proceedings, with Act 250 issues sometimes argued years after prior opportunities to raise them have gone by.

## B. Case Studies

Some examples can help illustrate these points:

### 1. Bennington and Morrisville Bypasses

The Bennington Bypass, which was completed in 2012, did not need to go through Act 250 because VTrans held a public hearing relating to right-of-way acquisition for the project prior to 1970, and the project was therefore grandfathered. The Morrisville Bypass, completed in 2014, was contested under Act 250. The issues in the Act 250 case were traffic and noise. However, the project opponent used Act 250 to try to exact additional compensation from VTrans for property rights that VTrans needed to acquire for the project, even though the law provides a separate process for resolving right-of-way disputes. In the end, the Morrisville Bypass and the Bennington Bypass were both constructed using modern practices following public input, and Act 250 made no difference to the environment.

### 2. Cabot-Danville Segment of Route 2

The reconstruction of the Cabot-Danville segment of U.S. Route 2 was opposed in Act 250 by a group of citizens, aligned with an environmental group, who wanted to continue swimming in a portion of a gravel pit that VTrans proposed to convert to a wetland. VTrans had received state and federal wetlands permits for this work, but none of the project opponents spoke up at that time, or in earlier phases of the project. In general, the State and the Nation are losing wetlands but gaining open water, so converting an open-water quarry to a wetland with extra materials from the project was a well-reasoned environmental decision. The new wetlands were also intended to mitigate unavoidable wetlands impacts from the project.

The project opponents persuaded the District Commission that swimming at the quarry was an existing use that needed to be protected. As a result, VTrans had to redesign a portion of the project at a high cost to the taxpayer. While some may look at this case as an example of how Act 250 works well, it is an example of how inefficient it is to argue over issues in Act 250 that could have and should have been resolved earlier. And here again, even though Act 250 changed the project slightly, Act 250 did not stop unplanned, unregulated development that threatens Vermont's rural landscape.

### 3. Diverging-Diamond Crossover at I-89 Exit 16

As many of you know, the interchange reconstruction at Exit 16 of Interstate 89 in Colchester continues to be the subject of protracted Act 250 proceedings. VTrans received favorable decisions from the District Commission and the Environmental Court that project opponents have appealed to the Vermont Supreme Court. Project opponents have challenged other permits as well.

While VTrans cannot subscribe motives to the project opponents, the environmental challenges presented through Act 250 and other forums might benefit the project opponents by delaying the completion of competing businesses. Wetlands and other issues raised through Act 250 could have and should have been resolved through wetlands permitting. Here again, Act 250 is not saving Vermont's nature but is obstructing a critical project that has been through comprehensive planning. One repeating criticism of Act 250 is that it lacks a planning component, whereas major transportation projects like this one are subject to extensive planning under both state and federal law.

#### 4. Brattleboro Bridges

The Brattleboro Bridges now under construction on Interstate 91 are not subject to Act 250 because the District Coordinator ruled that they do not represent a substantial change to a preexisting development, even though the project may have triggered the ten-acre threshold for Act 250 jurisdiction. Had Act 250 jurisdiction been asserted, and had the projects been contested, these bridges would probably not be under construction today. Had the sixty-year-old bridges failed, the result would have been closing a segment of the Interstate and redirecting all Interstate traffic through downtown Brattleboro, which would have been disastrous.

The bridges being replaced shared the same design as the bridge that collapsed in Minneapolis in 2007, killing 13 people and injuring 145 others. In the planning phases for this project VTrans, with the assistance of the Regional Planning Commission, listened to local interests and made appropriate adjustments to the design. This is an example of how even major transportation projects are completed with respect for public input and without avoidable environmental impacts, even when Act 250 does not apply.

#### C. Summary

The uptake from all this is that federal-aid transportation projects are undertaken in the public interest, do not benefit from Act 250, and are sometimes obstructed and delayed where Act 250 applies. Act 250 was created to fill a void where other land use controls were not in place. Federal-aid transportation projects do not occupy a regulatory void. These projects are not destroying the character and culture of Vermont. On the contrary, they help make it possible for people to live, do business, and visit Vermont. Act 250 adds process, cost, delay, and uncertainty to federal-aid transportation projects without adding environmental value, and Act 250 jurisdiction over these projects should therefore be eliminated.

## **Land Use Planning for Transportation Projects and Federal Preemption (Michele Boomhower) (10 minutes)**

### **A. Transportation Planning**

Effective land use controls come from a coordinated combination of planning, regulation, and enforcement. Federal-aid transportation projects go through comprehensive planning, mandated by state and federal law. As part of this process, VTrans works with the Regional Planning Commissions through the Transportation Planning Initiative (19 V.S.A. § 10I) to consider input from municipalities and local interests.

### **B. Redundancy of Act 250 with other Regulatory Programs and Non-Regulatory Initiatives**

Much of Act 250 review of federal-aid transportation projects is redundant with other state and federal regulatory programs. VTrans has previously provided details of those redundancies to the Commission, and we have provided some additional materials with our pre-filed testimony. In a handful of instances, Act 250 covers, or may in the future cover, subject areas beyond the scope of these other regulatory programs. Examples may be climate and energy, habitat for wildlife that is not threatened or endangered, and prime agricultural soils. In these subject areas, it would be far more effective for VTrans to continue to incorporate these considerations into its planning processes and construction standards and to work directly with other agencies to address issues as they arise than to extend new criteria or sub-criteria into the transportation sector.

VTrans already works extensively with other agencies on climate and energy issues, including accelerating vehicle electrification. In addition, VTrans continues to work on incorporating climate resilience/adaptation into its project prioritization and planning processes.

Further, VTrans collaborates closely with the Vermont Department of Fish and Wildlife on habitat issues. This collaboration includes active membership by both agencies in the international Staying Connected Initiative. The Staying Connected Initiative is dedicated to linking habitat blocks in the Northeastern United States and the Southeastern Canadian Provinces. A significant part of that work involves making the transportation network in these areas more porous to wildlife.

VTrans is helping the Department of Fish and Wildlife develop a workplan for the New England Governors and Eastern Canadian Premiers Resolution on Ecological Connectivity, Adaptation to Climate Change, and Biodiversity Conservation.

For the last several years, VTTrans has been funding research by the University of Vermont Transportation Research Center and the Nature Conservancy into means of reducing wildlife mortality on Vermont highways.

### C. Case Study

I would like to point to an example of how Act 250 does not function effectively with respect to federal-aid transportation projects. As Dan Dutcher mentioned at a prior meeting of the Commission, VTTrans may have spent around a million dollars to get the Lamoille Valley Rail Trail through Act 250. This money came right out of the federal earmark for the project. Perhaps one third of this sum went to an argument over jurisdiction.

VTTrans was represented in the matter by a former Chair of the Environmental Board. A threshold jurisdictional question eventually went to the Environmental Court, where it sat for so long that VTTrans and VAST finally decided to submit to jurisdiction to get on with the project. Even if VTTrans and VAST had prevailed in Environmental Court on jurisdiction, the handful of adjoining landowners who opposed the project may have then appealed to the Vermont Supreme Court, thus delaying work on the project even more.

After another prolonged battle, the Act 250 permit ended up ratifying the other permits for the project and imposing hours of operation that differed slightly from the statewide rules for snow machines. The State and the Natural Resources Board have since entered a stipulation under which Act 250 has agreed not to take jurisdiction over the rail trail, provided the State incorporates the hours of operation for the trail into its lease with VAST.

The LVRT was endorsed by the Legislature and partially funded by Congress. It is a valuable recreational amenity that is enjoyed by many and boosts the economy. Rail trails are carefully planned projects on existing footprints that involve minimal environmental disturbance—primarily removing rails and grading. Potential environmental impacts that do arise (for example bridge and culvert replacements) are adequately handled through other regulatory programs, including stream alteration, stormwater, wetlands, and river corridor regulations. In fact, rail trails help the environment by repairing existing flood damage and reducing erosion. In the case of the LVRT, Act 250 served the personal interests of a small number of project opponents while doing nothing to protect Vermont against unchecked development.

### D. Federal Preemption of Act 250 Jurisdiction Over Railroads

Finally, I would like to very briefly address the matter of federal preemption of Act 250 jurisdiction over railroad projects. The United States Court of Appeals for the Second Circuit squarely decided in the Green Mountain Railroad case that federal railroad law preempts Act 250 on its face from regulating railroads. The Second Circuit preempted Act 250 on its face because Act 250 is so subjective and unpredictable. No other regulatory program in Vermont has earned this distinction.

Federal preemption exists so railroads are not burdened by a patchwork of local and state controls, which would make it impossible for the railroads, which crisscross multiple jurisdictions, to do business.

While VTrans appreciates that some landowners do not like rail cars stored near their properties, enabling these landowners to wield Act 250 against the railroads would not only be illegal, but also create yet another opportunity for people to make self-centered NIMBY arguments against projects that serve the overall public good. This would also lead to more time-consuming and costly legal proceedings around Act 250, which in the end would have no effect on rail operations and the environment. Rail sidings are not the threat to the character and culture of Vermont that this Commission should be addressing.

### **Questions and Answers (5 minutes)**