

## Commission on Act 250

December 6, 2017

### Key Points for Federal-Aid Transportation Projects

After the Commission on Act 250 met on November 15, 2017, Natural Resources Board Chair Diane Snelling and senior staff from the Commission's Executive Branch Working Group met with Commission Chair Sheldon and Vice Chair Pearson to discuss next steps. Based on the Commission's schedule and the phased timeline of its work, those present agreed that it would not be necessary for VTrans to present a detailed presentation of its proposals until after the Commission has gathered some additional information.

VTrans agreed to provide a short paper for the Commission in advance of its December 13, 2017 meeting, with the understanding that VTrans will have an opportunity to testify to the Commission before the Commission makes any definitive decisions relating to the Act 250-transportation nexus. This paper serves as a placeholder until VTrans has an opportunity to provide detailed testimony and answer any questions the Commission may have. Some key points relating to Act 250 and transportation follow:

- As the agency responsible for building and managing the state's transportation infrastructure and as one of the largest landowners in Vermont, VTrans is unique among the agencies in the Executive Branch Working Group. VTrans is also different from private developers in Vermont in that every project that VTrans undertakes is in the public interest. VTrans' projects are the result of extensive planning processes, which include frequent opportunities for public input. In addition, VTrans identifies its projects in its annual transportation bill. Permanent or temporary acquisitions of land or rights in land must comply with the state and federal laws of eminent domain, which require the State to establish reasonable necessity. Because VTrans is different from other stakeholders, both public and private, it is appropriate for the Commission to consider whether and to what extent to change Act 250's regulation of Vermont's transportation network.
- The Executive Branch Working Group's Report to the Commission (October 20, 2017) contains general information about VTrans and Act 250 on pages 2, 6-7, and 17. VTrans urges the Commission to consider this Report, and all of its work, in view of three core ideas:
  1. The environmental values underlying Act 250,
  2. Government modernization and efficiency, and
  3. Rethinking and revitalizing Vermont's approach to economic development.
- Act 47 charges the Commission with ensuring that "over the next 50 years, Act 250 supports Vermont's economic, environmental, and land use planning goals." (Act 47, § 1(b).) The Commission's charge is to determine Act 250's future role in fairly and effectively preserving and enhancing Vermont's natural and built environments.

- Out of the recommendations of the Executive Branch Working Group Report, VTrans is especially interested in eliminating the redundancies between Act 250 criteria (and sub-criteria) and other state permitting programs, many of which did not exist or existed only in nascent form when the Legislature first enacted Act 250 in 1970. It is inefficient for Act 250 to revisit environmental issues (for example, impacts to wetlands, stormwater runoff, etc.) that other regulatory programs have already addressed.
- VTrans is also interested in modernizing Act 250's jurisdiction. Federal-aid transportation projects are subject to extensive state and federal oversight, with opportunities for public input and legal appeals. From VTrans' experience, and data that VTrans has collected going back to 2010, Act 250 review tends to result in little or no change to federal-aid transportation projects, regardless of whether these projects go through Act 250 as minor or major proceedings, and regardless of whether the projects are subject to original jurisdiction or amendment jurisdiction under Act 250. VTrans therefore asks the Commission to consider whether federal-aid transportation projects should continue to require Act 250 review.
- VTrans (and others) can identify cases where Act 250 has led to significant project delays. Delayed transportation projects can cause or aggravate unsafe conditions, inconvenience to travelers, and economic disruption. However, the case for exempting VTrans from Act 250 does not rest on a small number of troublesome cases. VTrans must determine whether any particular project triggers Act 250 jurisdiction. Jurisdiction may arise from disturbing more than ten acres of land, materially changing lands that are governed by an existing Act 250 permit (whether issued to VTrans or a private landowner), or substantially changing developments that pre-existed the enactment of Act 250. Determining jurisdiction is not always an easy process. Once jurisdiction has been established, minor Act 250 cases (which do not require a hearing) often require detailed communications with a District Coordinator. Major cases (which may include original permits or amendments to existing permits) can go on for years. In the mythology of Vermont, Act 250 is a simple and informal, citizen-friendly process. For applicants, Act 250 is not simple. A labyrinthine body of law has evolved around Act 250, and the factual issues relating to projects can be technical. While project opponents may raise a breadth of objections without having to abide by formal legal process, applicants require the assistance of expert witnesses and legal counsel. The Commission on Act 250 needs to consider whether the environmental value that Act 250 might add to transportation projects justifies the costs to the taxpayers and traveling public.
- Preliminary statistics (VTrans Act 250 permits since 2010, not including Act 250 permits for VTrans-funded municipal projects):
  1. Highways:
    - a. Original permits - 2
    - b. Amendments to VTrans permits - 16
    - c. Amendments to other permits - 4

d. Administrative amendments – 6

2. Airports:

- a. Original permits - 1
- b. Amendments to VTrans permits - 40
- c. Amendments to other permits - 1
- d. Administrative amendments - 10

3. Totals:

- a. Original permits - 3
- b. Amendments to VTrans' own permits - 56
- c. Amendments to non-VTrans permits - 5
- d. Administrative amendments – 16
- e. Grand Total - 80

4. As noted, for virtually every highway or aviation project, VTrans must determine whether Act 250 jurisdiction applies.

- Conditions in Act 250 permits for federal-aid transportation projects tend to repeat conditions from other permits for these projects (state and federal), duplicate the requirements of VTrans' Standard Specifications for Construction, or involve Act 250 administration. VTrans is seeing little or no value added from Act 250 compared to other environmental controls over transportation projects.
- Nearly all state transportation projects, along with many municipal transportation projects, receive federal aid. (VTrans administers federal grants for various municipal projects.) The following is a partial list of federal environmental laws governing federal-aid transportation projects:
  - Section 4(f) of the Department of Transportation Act, which protects publicly owned parks, recreational areas, and wildlife and waterfowl refuges and public and private historic sites;
  - NEPA, which requires an environmental review of all major federal actions;
  - Section 404 of the federal Clean Water Act, which protects wetlands constituting waters of the United States;
  - Sections 9 and 10 of the Rivers and Harbors Act, which protect navigable waterways;
  - The Endangered Species Act, which protects threatened and endangered species and their habitats;
  - Section 402 of the federal Clean Water Act, which protects point-source discharges from construction sites and municipal, commercial, and industrial facilities;
  - Section 106 of the National Historic Preservation Act, which protects historic sites and archeology.
  - Federal Airport Improvement Program, which subjects airports to Grant Assurances designed to ensure aviation safety and reliability.

- Federal-aid transportation projects are also subject to a breadth of state regulations, including, for example, laws governing wetlands, operational and construction stormwater, stream alterations, hazardous material disposal, historical preservation, and endangered species. (A checklist of state and federal environmental clearances applicable to transportation projects is attached.)
- Certain design specifications of federal-aid transportation projects are legally required. For example, the Manual on Uniform Traffic Control Devices (MUTCD) governs traffic signs, signals, and lane striping. By way of further example, Federal Aviation Administration (FAA) standards control tree clearing around runways and approaches. Highway bridges and culverts comply with modern safety standards.
- The Transportation Planning Initiative (TPI), established by VTrans twenty-five years ago and now embodied in statute, provides funding to regional planning commissions (RPCs) for continuous coordination and collaboration with municipalities to ensure local needs and concerns are incorporated into the identification and design of transportation projects. RPCs develop regional transportation plans, provide technical assistance to municipalities to help evaluate and define transportation needs, and assist VTrans with gathering public input on specific projects. The RPCs establish and manage Transportation Advisory Committees (TACs) with representatives from member municipalities, VTrans, and other regional stakeholders that meet most months. The TACs provide a standing forum for dialogue on transportation issues and guide the RPC's TPI work program. Most importantly, the TACs prioritize transportation projects in their region, and by statute, these regional priorities are included in the project prioritization process that VTrans uses to develop the annual Transportation Capital Program.
- Although federal-aid transportation projects are subject to a wide array of state and federal regulations, it would be difficult to find complete overlap between these laws and Act 250. However, in VTrans' experience, Act 250 adds little to the environmental protections that other laws require from federal-aid transportation projects. To the extent Act 250 now or in the future adds significant environmental protection to transportation projects beyond that provided by other laws, VTrans could be subject to limited Act 250 jurisdiction or address these matters through programmatic agreements with other agencies or through amendments to Vermont's general laws relating to transportation. While transportation projects inevitably have an environmental footprint, these projects do not represent the unplanned development that Act 250 aims to control.
- The Legislature has long held the view that not all development requires Act 250 review. The exemptions from Act 250 jurisdiction rest on the idea that the value added from Act 250 would not be worth the administrative burdens, particularly in view of environmental controls other than Act 250. Federal-aid transportation projects are adequately regulated through means other than Act 250.