



NATURAL RESOURCES BOARD
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DATE: February 15, 2017


TO: Governor Phil Scott

TO: Senator Chris Bray, Chair, Senate Committee on Natural Resources & Energy

Senator Jeanette White, Chair, Senate Committee on Government Operations

Representative David Deen, Chair, House Committee on Natural Resources, Fish and Wildlife

Representative Maida Townsend, Chair, House Committee on Government Operations

FROM: Diane B. Snelling, Chair 

RE: Natural Resources Board Annual Report for Calendar Year 2016

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:

(d) The Board and Commissions shall make all practical efforts to process matters before the Board and permits in a prompt manner. The Board shall establish time limits for the processing of land use permits issued under section 6086 of this title as well as procedures and time periods within which to notify applicants whether an application is complete. The Board shall report annually by February 15 to the General Assembly by electronic submission. The annual report shall assess the performance of the Board and Commissions in meeting the limits; identify areas which hinder effective performance; list fees collected for each permit; summarize changes made to improve performance; and describe staffing needs for the coming year. The annual report shall list the number of enforcement actions taken by the Board, the disposition of such cases, and the amount of penalties collected. The provisions of 2 V.S.A. § 20(d)(expiration of required reports) shall not apply to the report to be made under this subsection.

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 in 2016 were Chair Diane B. Snelling (Hinesburg), Vice Chair William Boyd Davies (Barton), Dominic Cloud (Essex), Don Sargent (Colchester), and Marty Illick (Charlotte). The alternates in 2016 were Julie Wolcott (Enosburg Falls), Gail Fallar (Tinmouth), Chuck Haynes (East Montpelier), and Elizabeth Courtney (Montpelier). All must be confirmed by the Senate.

The Board's primary function is to administer Act 250. This includes supporting the nine District Environmental Commissions who review Act 250 applications, procedural and substantive rulemaking, participation in Act 250 appeals, and enforcement of Act 250 before the Environmental Division of the Superior 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 Environmental Coordinators, administrative staff, and NRB attorneys and staff. The NRB attorneys assist the District Commissions and Coordinators as needed on procedural and substantive issues that arise in Act 250 proceedings, including legal counsel, research, and drafting. NRB staff organizes and participates in the ongoing training of District Commissioners and staff and updates the training manual as necessary.

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

Until July 1, 2016, the NRB also heard requests to reconsider Jurisdictional Opinions (JO) made by District Coordinators at the request of a person aggrieved by the JO. The NRB received and reviewed four such requests in 2016. Appeals from a District Coordinator's decision on a JO now go directly to the Superior Court, Environmental Division. 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. As of the passage of Act 174 in 2016, the NRB will soon be hearing appeals of energy compliance determinations issued by the Commissioner of the Department of Public Service under 24 V.S.A. §4352(a).

Less formally, NRB staff work with District Commissions and Coordinators to ensure consistent treatment of emerging state-wide issues related to the 10 Criteria of Act 250, while concurrently respecting the District Commissions' independence and regional perspective.

2) NRB Legal and Administrative Staff

The full-time Chair of the NRB is charged with the overall administration of Act 250. These duties include the NRB budget, procedural and substantive rulemaking, enforcement of Act 250 and mixed Act 250/ANR violations, general oversight of court appeals; and oversight of the offices and employees of the NRB and the District Commissions, stakeholder relations, coordination with other state agencies, and legislative matters. The Chair is also a member of the Downtown Development Board and as such participates in all Downtown Board decision making.

The NRB Executive Director manages the NRB budget, district office functions, information technology systems, and the statistical tracking and management of Act 250 district caseloads and directly assists with select Act 250 cases with major regional or statewide impacts. The Executive Director is also responsible for the recruitment, training, and supervision of the 10 regionally based District Coordinators and for the coordination of District Commission training.

The NRB General Counsel supervises a legal staff of one Associate General Counsel and one Enforcement Officer. The legal staff provide a wide array of legal services for the Board, District Commissions, and District Coordinators. NRB attorneys represent the NRB in environmental enforcement matters and Act 250 appeals before the Superior Court, Environmental Division. They also draft Act 250 Rules at the direction of the Board and shepherd these rules through the rulemaking process (ICAR, public hearings, and LCAR), and will soon be staffing appeals of the Public Service Board's energy compliance determinations.

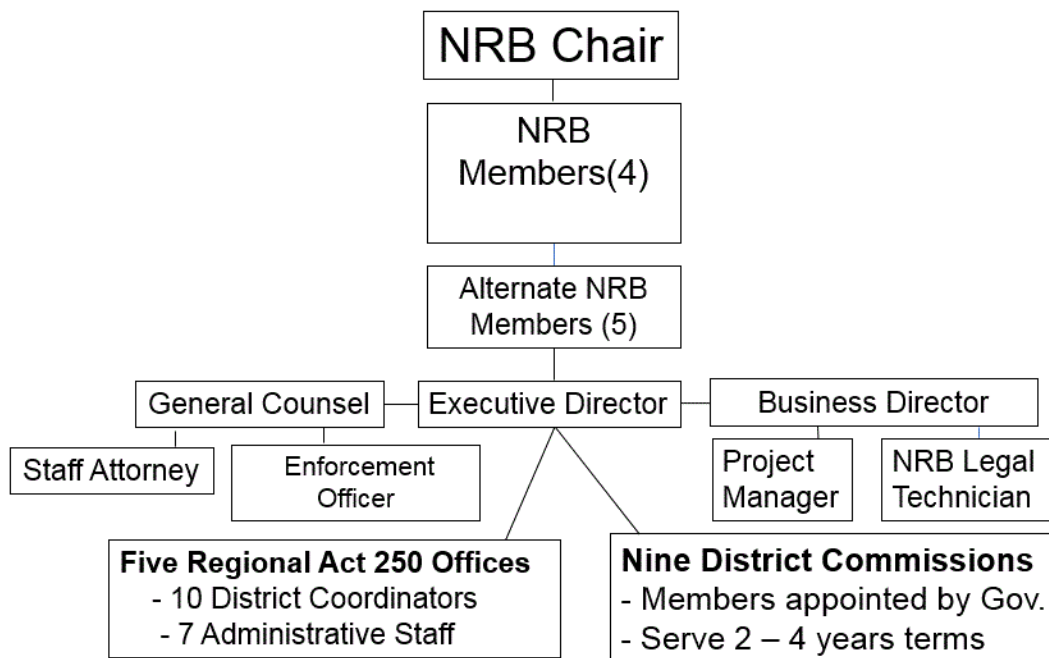
The NRB Enforcement Officer investigates Act 250 violations, issues citations and notices of alleged violation, works with the legal staff to prosecute violations, and assists permittees and applicants with compliance.

The NRB Business Director manages the business, operations, and administrative functions of the Montpelier and District Offices. The Business Director supervises the Legal Technician in Montpelier. The Business Director assists with budget development, report preparation, information technology systems, and intra-agency communications. The Business Director is also responsible for coordinating administrative support staff training.

One NRB Legal Technician supports the Montpelier office staff. In summary, seven full-time and one part-time NRB employees are located in the Montpelier office and 17 are located in five regional offices (with other state agency staff) for a total of 24 employees in 2016.

Most importantly, the NRB organization includes eight volunteer Board members and alternates and 63 volunteer members and alternates of the nine District Commissions, all appointed by the Governor. The NRB's management and administrative support of District 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, including District Coordinators, District Commissioners, Board members and alternates, and legal and administrative staff. See the organizational chart below.

Natural Resources Board



3) District Environmental Commissions and Staff

The District Commissions are the heart of the Act 250 process. The nine District Commissions are responsible for assuring that developments and subdivisions comply with the 10 criteria of Act 250. Each District Commission is composed of a chair, two members, and four alternates, all residing in the district they serve. All District Commissioners are appointed by the Governor. In 2016, the nine District Commissions were staffed by 10 District Coordinators and seven administrative staff that provide professional and administrative support.

District Commission offices are located in five Regional Offices: Springfield, Rutland, Essex, St. Johnsbury, and Barre. With the assistance of the District Coordinators and administrative staff, the District Commissions process, on average, 450 Land Use Permit (Act 250) applications per year, representing \$600,000,000 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 District Coordinators is issuing Jurisdictional Opinions regarding Act 250 jurisdiction. These JOs are subject to appeal to the Superior Court, Environmental Division. The District Coordinators also collaboratively work with the NRB Enforcement Officer and attorneys to enforce the Act 250 statute and land use permits.

B. Annual Report

This report is based on a statistical analysis of NRB and District Commission activity during Calendar Year 2016 (CY2016). Fiscal Year (FY) data has been used for the fee revenue analysis.

	CY2013	CY2014	CY2015	CY2016
1) Act 250 Applications (Complete applications)				
Major (Hearing Required)	70	90	51	46
Minor (No Hearing)	235	223	258	218
Administrative Amendments	<u>168</u>	<u>143</u>	<u>143</u>	<u>201</u>
Total	473	456	452	465

2) Appeals and Reconsiderations

JO Reconsiderations		6	9	4
JO Appeals	2	1	4	6
District Comm. Decision Appeals	<u>11</u>	<u>16</u>	<u>6</u>	<u>9</u>
Total	13	23	19	19

3) Processing Time

(Date Complete to Date Issued)

0 - 30 Days	45%	45%	50%	47%
31 - 60 Days	23%	19%	19%	25%
61 - 90 Days	10%	11%	11%	8%
91 - 120 Days	5%	7%	5%	4%
>120 Days	17%	18%	15%	16%

In CY2016, 465 permit applications were filed with the nine District Commissions, compared to 452 the previous year; an increase of 4%.

Of the 465 applications filed in CY2016, 90% were processed as “minor” applications or administrative amendments, with no contested-case hearing, while the remaining 10% of applications were processed as “major” applications. A public hearing is required for major applications to review the project’s conformance to the 10 Criteria of Act 250.

The average processing time for all decisions in CY2016 was 88 days from the date the application was deemed complete until a decision was issued, compared to 62 days in CY2015. It is important to note that processing times include the time needed for applicants to obtain underlying permits from other agencies, which are used to demonstrate compliance with several Act 250 criteria. This time can vary from several weeks to several months. The increase in average processing time from 2015 to 2016 is a result of applications which had been pending for a significant period of time (up to 9 years) due to applicant inactivity. In 2016, these applications were approved by the District Commission after the applicant completed the record, were dismissed by the District Commission due to continued inactivity, or were withdrawn by the applicant. Without these inactive cases, average processing times in 2016 were comparable to the previous year.

In CY2016, 72% of all major and minor permit decisions were issued within 60 days, and 84% were issued within 120 days. These statistics are comparable to 2015 statistics for permit processing times.

Four (4) permit applications were denied in CY2016; a rate of 8% of major decisions issued. (Minor applications and administrative amendments cannot be denied.) This compares to five (5) permit denials in CY2015.

Nine District Commission major decisions, or 15%, were appealed in CY2016. This compares to an appeal rate of 10% of major decisions in 2015. In addition, there were six (6) NRB Jurisdictional Opinions appealed in 2016. (See Section 1 Introduction for more information.)

4) Performance Standards

Statutory and internal performance standards guide the performance of the District Coordinators and Commissions. Average CY2016 performance is listed below.

Category	Standard	CY2016 Performance
a) Application Completeness Review	7 Days	2.9 Days
b) Minor Applications – Days to Issue After End of Comment Period or Last Permit Submitted	10 Days	7 Days
c) Major Applications – Days to Issue After Adjournment (Act 250 Rule Standard)	20 Days	15 Days
d) Days to Schedule Hearing (Majors) (Statutory Standard)	40 Days	38 Days*

* This average does not include two cases where the District Commission granted the applicant and parties additional time to resolve contested issues prior to scheduling a hearing.

5) NRB Special Fund - Permit Application Fees

The NRB is funded by a combination of General Funds and Special Funds generated by Act 250 application fees. Several Act 250 fees were increased in FY2016 as part of the Executive Fee Bill. Generally, Act 250 permit application fees are based on the estimated cost of construction for each development at \$7.40 per \$1,000.00 of construction cost. Of that total, \$0.75 is directed to the Agency of Natural Resources to help offset the cost of ANR's participation in the Act 250 process. Other fees include \$125.00 per subdivided lot and a minimum application fee of \$150.00 for new Act 250 applications. State and municipal projects are exempt from fees (10 V.S.A. § 6083a). Fees are deposited into the Act 250 Special Fund.

In FY2017, the NRB is relying on Special Funds to cover 79% of its annual expenditures for personal service and operating costs, with the remaining 21% covered by General Funds. Fees collected in the last five fiscal years are as follows:

FY 2012	\$1.961M
FY 2013	\$2.214M
FY 2014	\$2.035M
FY 2015	\$2.407M
FY 2016	\$2.397M

Special Fund spending authority for the last five fiscal years is as follows:

FY 2012	\$1.965M
FY 2013	\$1.965M
FY 2014	\$2.017M
FY 2015	\$2.017M
FY 2016	\$2.330M

6) Act 250 Fees/Post Construction Certificates

Permittees are required to file post construction certification (PCC) of actual construction costs and pay any additional fees due. The NRB Enforcement Officer reviews the estimated construction costs listed in all Act 250 applications and compares this information to the project's PCC that must now be filed upon substantial completion of the development.

Permit fees collected in response to the PCC for the last five years are as follows:

CY2012	\$ 60,130.00
CY2013	\$ 44,172.00
CY2014	\$ 29,253.00
CY2015	\$ 72,894.00
CY2016	\$133,611.00

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.

8) Participation in Court Appeals (CY2016)

The NRB has statutory authority to participate as a party in Act 250 appeals to the Superior Court, Environmental Division. In CY2016, the NRB reviewed 9 Act 250 permit decisions and 6 JO reconsiderations appealed to the Superior Court, Environmental Division. The NRB decided to participate as a party in 15 of these appeals. One appeal was withdrawn by the appellant and re-filed as a JO reconsideration. The Board voted to participate in all four appeals related to JO reconsideration decisions.

9) Environmental Rulemaking and Policy Work

As directed by S.138, the NRB worked in conjunction with ACCD and ANR to revise its guidance related to Criterion 9(L) of Act 250. Criterion 9(L) was amended in 2014 to address settlement patterns and strip development. After a stakeholder process, a final draft was submitted to the NRB for review in January 2016. The Board adopted the guidance at its March 2016 meeting.

In accordance with Act 171, the Board Chair participated in the Forest Integrity Study Committee. The Committee issued a report on February 3, 2017 that did not result in definitive or consensus recommendations for the Legislature. As a result, the Board recommended that the Legislature establish a Commission on the Vermont Landscape to develop an educational outreach process to engage an open discussion about how Vermont looks. This Commission would result in proposed legislation that balances the common good of the Vermont landscape with opportunities for smart growth.

As a result of Act 174 (energy siting), the Legislature designated the Board as the appellate body responsible for reviewing appeals of determinations of energy compliance issued by the Commissioner of Public Service who has begun to develop a

process, in accordance with the Vermont APA, that will be followed by the NRB and by parties for all such appeals.

10) Enforcement and Compliance

The NRB is authorized to enforce Act 250 pursuant to the Environmental Enforcement Act, Title 10, Chapter 201. The NRB has direct authority to issue Administrative Orders, Emergency Administrative Orders, Assurances of Discontinuance, and Civil Citations with respect to violations of Act 250; and cooperates with ANR on mixed Act 250/ANR enforcement matters. The NRB's enforcement staff consists of one General Counsel, one Associate General Counsel, and one Enforcement Officer. The Chair of the Board directs the enforcement program.

2016 Enforcement Activity

This year, the NRB's Enforcement Officer investigated approximately 98 complaints. Some of these complaints were not deemed violations. Others were referred to the Agency of Natural Resources. The Enforcement Team initiated 24 formal enforcement actions and resolved 23 violations through formal enforcement.

The NRB enforcement program resolved 18 cases this year through Assurances of Discontinuance, and 5 were resolved through Civil Citations. Assurances of Discontinuance are settlement agreements that often include civil penalties and compliance requirements. Civil Citations are tickets issued by the Enforcement Officer that levy fines of up to \$3,000 per citation. The enforcement program issued 27 Notices of Alleged Violation in eight different Act 250 Districts in 2016. Notices of Alleged Violation are warning letters that set out the facts of an alleged violation and invite a response. These often include compliance directives and may be followed up with further enforcement action.

Act 250 violations fall into two general categories: (1) activities commenced prior to the issuance of a required Land Use Permit or permit amendment and (2) activities that violate a condition of an existing permit. About 50% of the resolved cases involved violations of permit conditions, and the remaining 50% involved commencement of construction without an Act 250 permit. The number of resolved cases maintained the running average.

The Board assessed over \$143,000 in penalties this year and recovered enforcement costs of approximately \$16,000. Several enforcement cases resulted in environmental protection, such as restoration or reclamation activity not reflected in penalty amounts.

Enforcement Activity Summary

	CY2013	CY2014	CY2015	CY2016
New Investigations Opened	75	132	102	98
Formal Enforcement Actions Initiated	35	29	19	24
Violations Resolved through Formal Enforcement	19	23	19	23
Violations and Complaints Resolved without Formal Enforcement				39
Total Penalties Assessed	\$220,740	\$103,264	\$78,950	\$143,302
Total Penalties Collected*	\$177,890	\$90,000	\$61,982	\$72,366
Enforcement Costs Assessed	\$8,021	\$5,282	\$7,267	\$16,342

* Total penalties collected does not reflect outstanding payments not yet due or those penalties paid in 2017.

11) Information Technology and Business Process Improvement

Permit Mapping: In 2016, the NRB made progress toward completing an online map showing the location of all Act 250 permitted properties in the state. This map is populated by District Office staff. This mapping has currently been completed for approximately 90% of the state. The NRB goal is to complete mapping in its entirety by July 1, 2017. **This map will become an integral part of the new Act 250 web portal (see section here below).**

New Act 250 Database and Online Application Form: The NRB is currently working with the IT staff of the Agency of Natural Resources to develop a new Act 250 database website and online Act 250 application form. The web portal will include information and search capabilities for all of the Act 250 permits that have been issued since 1970, including a complete record of permit documents for more recent permits. The portal will replace the current Act 250 database portal hosted by ANR on its website. The new online application form will enable applicants to complete the Act 250 application online, including payment of the associated fee. Applicant and project information will populate the Act 250 database described above.

Paperless Application Project: In 2016, the NRB implemented a paperless application process. Applicants now submit their Act 250 application forms electronically. This procedure follows a successful pilot study in District #2 in Springfield. This effort reduces the filing of paper documents from 7 copies to 1 backup paper copy. District Commissions now have access to tablet computers for hearings, enabling District Commissioners to view permit application documents during hearings.

Business Process Improvement

The NRB participated in a LEAN event in 2015. The week-long event focused on the current Act 250 permit application process. NRB staff are currently working through an extensive 24-month implementation plan to carry out the improvement recommendations. Key Performance Indicators are being tracked to measure the success of these changes. Significant progress has been made by improving the applicant's application guidance documents. The NRB also adopted a state-wide application processing manual for administrative support staff to use. In addition, the NRB has established and defined consistent roles and responsibilities for District Office support staff and established standard notice periods, including an earlier deadline for ANR and other state agency comments.

Overall completion of the Business Improvement Plan to date is 38%. Progress is reported to the Legislature as part of ANR's regular Lean Reporting.