

VCE Testimony to House Natural Resources, Fish & Wildlife Committee

January 14, 2020

My name is Annette Smith. I am Executive Director of Vermonters for a Clean Environment. Thank you Madam Chair and Committee members for hearing my testimony today on changes to update Act 250.

VCE is a grassroots citizens' organization. We have been involved in state regulatory processes for twenty years. We have assisted Vermonters in participation in Act 250, Agency of Natural Resources and Agriculture permit proceedings, and for the last decade our focus has been at the Public Utility Commission.

No other organization has the depth of experience with citizen participation in Vermont's regulatory processes as we do. In our experience it is Vermont citizens who are the front lines of environmental protection.

We were not included in any discussions about the Vermont Natural Resources Council/Scott Administration proposal.

Today I will respond to the VNRC/Administration proposal to eliminate District Commissions, provide my constructive ideas about how to improve that proposal, and briefly discuss mountain protections and slate quarry regulation.

A. VNRC/Administration proposal to eliminate District Commissions

In 2003, I conducted focus groups around the state with citizens who had participated without attorneys (*pro se*) in Act 250 proceedings. To a person, the citizens expressed overwhelming support for the District Commission process as THE place where citizens can be heard and have their interests addressed.

According to Bruce Post, who has researched Vermont's environmental history, Gov. Deane Davis was inspired by the vision and commitment of local people to their homes, communities, natural environment, and their willingness to tackle issues. Out of that grew the concept for the District Commissions – as a conversation among the interested parties akin to what happens in country stores sitting around the table or stove.

In Gov. Davis's environmental message to the State of Vermont 50 years ago, he said this about state and local governance:

“I hasten to point out that I do not advocate that all decision making should be concentrated in one agency in Montpelier. Here is an opportunity for us to apply our ‘creative localism’ theory and by utilizing local government, regional planning and development commissions and a few strategically located districted State offices, we will have people located in varying districts around the State. They can then work directly with developers, communities and other individuals to help implement our environmental control programs.”

-- Gov. Deane Davis, Environmental Control Message to the State of Vermont, January 8, 1970

I was surprised by the idea that Act 250 can be “improved” by eliminating the best place for Vermont citizens to protect the environment – at the regional level.

If you think the Agency of Natural Resources is protecting the environment, in my experience that is not the case. ANR is in the business of issuing permits, often with conditions that allow pollution, and the Agency views its “customer” as the regulated business community.

ANR has fine scientists committed to protecting the environment whose opinions are often superseded by political interference. For specific responses to the proposals about ANR, I recommend you take testimony from John Brabant, VCE’s Regulatory Affairs Director, who worked at the Agency for 25 years.

The purported reason for eliminating the District Commissions and shifting hearings to a state level board is “inconsistency.” We have seen no data or evaluation of this claim. And even if there is inconsistency, that is one of the beauties of the regional Act 250 program.

Each region of Vermont is different, and in my work I have observed that every town has its own personality. Nobody knows better how to address issues locally and regionally than the people who live there. Building community is all about building relationships. There is no reason to think that having a state level review process will result in consistency, and in fact given the very different regions in Vermont, consistency is not a worthwhile goal. As Ralph Waldo Emerson said, “consistency is the hobgoblin of little minds.”

I am concerned about what is happening right now with the Natural Resources Board’s merging of District Commissions, cutting staff support, closing regional offices, and soon to be implementing a major change to the program whereby the central NRB office will receive all applications and assign them to District Coordinators purportedly based on work load. This means that a project in the Northeast Kingdom might be handled by the Springfield District Office. This would totally eviscerate the existing – and important – accessibility of the local offices and staff to both the permit applicants and the affected citizens. Most Act 250 applications are handled as minors, and citizen participation is at an all-time low. The ongoing erosion of Act 250’s regional offices is very disturbing to see happening.

Updating Act 250 provides an opportunity to solve long-standing problems.

One problem is that District Commissioners are appointed by governors who go to their political parties for names of people to appoint. I have observed this phenomenon regardless of who the governor is or what party they represent. I recommend establishing standards for appointees or finding some way to insulate the District Commission appointments from politics.

Another problem with how the District Commission process has evolved is when parties lawyer up, turning what was intended to be an informal process into the equivalent of court. This has led to the “two bites at the apple” complaint by developers. It is no party for citizens, either, to have to participate in two full-blown cases. The District Commissions work best with no lawyers.

Act 250 has always had the problem that well-funded applicants represented by lawyers and so-called expert witnesses spend many months and sometimes years preparing their applications, and then citizens have to quickly scramble to figure out what is going on, what the proposed project is about, how to organize other interested people, how to find and hire experts, raise money, and put on their case all the while having to learn all the rules that apply to Act 250.

I experienced this problem firsthand when in 2000 I was tasked with putting together a case that Vermont Public Radio dubbed “the mother of all Act 250 cases” because almost all the criteria were major issues. The applicant spent more than four years in preparation, and I found that there was little we could do to prepare until the application was filed. A minimum of six months is necessary for major case preparation in response to a full application.

Five years ago I prepared a permit reform proposal to move land use issues from the Public Utility Commission to Act 250 because Vermont is the only state that has a PUC that decides land use, and because of the impossible public participation process at the PUC. Part of that proposal involved the creation of a five-member state Land Use Board. The VNRC/Administration proposal before you needs revisions to make it work.

Updating the process provides an opportunity to address the inequities between applicants and citizens.

VCE supports eliminating the Environmental Court except for enforcement and zoning appeals, as recommended by the VNRC/Administration proposal, and we also support creating a state level Land Use Board to hear contested cases in the first instance, with appeals to the Vermont Supreme Court. However, there is still a necessary role for the District Commissions.

Absent the District Commissions, what is being proposed is just like the Public Utility Commission which presents so many obstacles to citizen participation that few citizens and towns participate at all. It is litigation, and litigation means lawyers. A preliminary scoping process will not fix that.

Now I will take you through a proposal to update the District Commission process, perhaps as an option offered to parties instead of the current process, and the additions that are necessary make the state Land Use Board work for all Vermonters, not just those represented by lawyers with financial resources.

See 1_Act 250 Permit Reform Proposal

B. Mountain Protection

See 2_Guidelines for Planning and Managing Mountain Protected Areas

3. To accommodate climate change in order to protect biodiversity, mountain protected areas should be extended down slopes to the lowlands.
4. In view of the increasingly critical high-quality water shortage, mountain headwaters are particularly desirable sites for land/water protection.

Recommend taking testimony from Ed Stanak on ridgelines

C. Changes to Act 250 Criteria

Recommend amending Section 248 with directive to PUC to adopt

D. Slate Quarry Regulation

See 3_Act 250 9(E) Guidance for Completing an Earth Extraction Plan, Blasting Plan, and Reclamation Plan for Act 250 Projects

See 4_Federal Law Requiring Public Notice re PreBlast Surveys and Blasting Schedule, Hours of Blasting, etc.

See 5_Slate Quarry Waste Pile Images

“A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do. He may as well concern himself with his shadow on the wall. Speak what you think now in hard words, and to-morrow speak what to-morrow thinks in hard words again, though it contradict every thing you said to-day. — 'Ah, so you shall be sure to be misunderstood.' — Is it so bad, then, to be misunderstood? Pythagoras was misunderstood, and Socrates, and Jesus, and Luther, and Copernicus, and Galileo, and Newton, and every pure and wise spirit that ever took flesh. To be great is to be misunderstood.”

-- **Ralph Waldo Emerson**

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