Vermonters for a Clean Environment
789 Baker Brook Road, Danby VT 05739
(802) 446-2094 www.vce.org vce@vce.org

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Testimony of John Brabant, VCE Director of Regulatory Affairs
House Fish, Wildlife & Water Resources Committee
Re: Administration / VNRC Legislative Draft

Thank you members of the Fish, Wildlife and Water Resources Committee for allowing me the opportunity to address some of the problems and benefits with the proposed changes to the Act 250 law presented by the Administration/VNRC legislative draft.

1. Changes to administrative structure
   - current Natural Resources Board comprised of 5 members and 9 district environmental commissions
   - former environmental board of 9 (?) members
   - Administration /VNRC proposal - Full time, 3 member Natural Resources Board with 2 regional commissioners with one alternate for each of 6 regions; no requirement to be licensed to practice law ; eliminates district environmental commissions; replaces de novo appeals to Environmental Division(court) with on the record appeals to the VT Supreme Court; Board Chair is nominated, appointed and confirmed much like a Superior Court judge, with the 2 other permanent board members filled through the judicial nominating process ; commissioners appointed by the Governor.
   - Board may appoint hearing officers
   - Process proposed is nearly identical to that at the PUC
   - Difficult to impossible to navigate without hiring an attorney
   - Cost shift from developer to citizen and municipal parties
   - Loss of accessibility, loss of community voice and regional flavor
   - Addresses supposed inconsistencies in decisions across district commissions; Environmental Board and Environmental Division Court are there to true up harmful inconsistencies
   - Maintains de novo hearings for ANR permits, but looks toward future changes that would require appeals of ANR permits to the Environmental Division to be on the record.

Recommendation(s): Revert back to former Environmental Board structure and process, 5 member board, hearing appeals de novo from the 9 district commissions (best option) or leave current process in place. Address costs / unnecessary litigation / delays with facilitated community stakeholder process and intervenor funding. Maintain ANR/DEC permits as rebuttable presumptions. I have developed proposed language which I will cover further down.

2. Jurisdictional changes - Downtowns

   - Maintains 250 exemption for designated downtown development districts, designated pursuant to 24 V.S.A. § 2793 and adds a new exemption for neighborhood development areas designated pursuant to 24 V.S.A. § 2793e
   - VCE supports these changes in general

3. Forest Based Enterprises – As with the idea of VCE supports in concept the idea of making changes generally to Act 250 to support Vermont's forest products industry to increase its viability and incentivize the construction of new state of the art saw mills to process lumber in state. VCE will need more time to review proposed changes in this regard and consider best ways to accomplish these ends.
4. VTRANs Exemptions – VCE does not support the exemptions and changes to Act 250 law with regard to exempting Vermont Agency of Transportation projects from the definition of development.
5. Flood hazard / River Corridor language changes – VCE supports these language changes
6. Criterion 8 – VCE supports changes the added protections for wildlife habitat, core forest blocks and wildlife connecting corridors.
7. Climate Adaptation – support this language as presented
8. 1500' Elevation Jurisdictional Trigger – VCE supports a 1500' jurisdictional trigger and protection of ridgelines from development, but the language proposed on page 2 of the Administration/VNRC proposal is weak and does very little to protect our mountains, our mountain ridgelines and our mountain flanks. VCE recommends that the language provided in House Bill H. 633, which does a better job in addressing development above 1500'. **(attached)**

As I have stated, the changes to Act 250 permitting process in the Administration /VNRC proposal take us in the wrong direction in many respects making the process more difficult and costly for citizens and municipalities to navigate. In addition, the bill neglects to address the issues and environmental repercussions associated with parallel process for reviewing commercial and industrial projects that fall under Public Utility Commission jurisdiction. Under Title 30, Section 248, the PUC is required to apply the Act250 criteria, but often does so in a manner inconsistent how Act 250 is applied by the District Environmental Commissions and the Environmental Division Court. The PUC has ignored Environmental Board precedent regarding aesthetics (Quechee Decision) and routinely approves projects that it finds fail to meet Act 250 criteria, using a determination that an energy project is nevertheless in the "public good" to override what should be a denial.

In the interest of ensuring that the Act 250 criteria are consistently applied, that the process is citizen friendly and not overly burdensome to citizens and municipalities, VCE proposes the following changes to the Act 250 (Title 10, Chapter 151) and Public Utility Commission (Title 30 Section 248) processes:

FACILITATED STAKEHOLDER PROCESS:

1. **Act 250**:

10 V.S.A.§ 6085 is amended to read:

§ 6085 Hearings; party status; facilitated community stakeholder process

(e) ~~The Natural Resources Board and~~ Any District Commission, acting through one or more duly authorized representatives at any prehearing conference or at any other times deemed appropriate by ~~the Natural Resources Board or by the~~ District Commission, shall promote expeditious, informal, and nonadversarial resolution of issues, require the timely exchange of information concerning the application, and encourage participants to settle differences.

At or within 15 days of a prehearing conference, upon request by the petitioner, established parties or friends of the commission, or as may be required by the District Commission, the Commission, acting through one or more duly authorized representatives, shall facilitate a community stakeholder process prior to holding evidentiary hearings, The Commission representative shall facilitate discussions regarding issues of concern and work toward resolution of issues, continuing to do so until the Commission representative determines that resolution has either been reached or upon a determination that discussions have reached an impasse on one or more issues. Participants shall work toward resolution of issues where possible within 60 calendar days of commencement of the stakeholder process unless extended by mutual agreement of participants.

No District Commissioner who is participating as a decisionmaker in a particular case may act as a duly authorized representative for the purposes of this subsection. These efforts at dispute resolution shall not affect the burden of proof on issues before a Commission or the Environmental Division, nor shall they affect the requirement that a permit may be issued only after the issuance of affirmative findings under the criteria established in section 6086 of this title.

(f) A hearing shall not be closed until a Commission provides an opportunity to all parties to respond to the last permit or evidence submitted. Once a hearing has been closed, a Commission shall conclude deliberations as soon as is reasonably practicable. A decision of a Commission shall be issued within 20 days of the completion of deliberations. (Added 1969, No. 250 (Adj. Sess.), §§ 10, 11, eff. April 4, 1970; amended 1973, No. 85, § 9; 1989, No. 234 (Adj. Sess.), § 3; 1993, No. 82, § 4; 1993, No. 232 (Adj. Sess.), §§ 30, 31, eff. March 15, 1995; 2003, No. 115 (Adj. Sess.), § 55, eff. Jan. 31, 2005; 2009, No. 154 (Adj. Sess.), § 236; 2013, No. 11, § 25.)

2. PUC

§ 248. New gas and electric purchases, investments, and facilities; certificate of public good

30 V.S.A. § 248(a)(4)(A) is amended to read:

(4)(A) With respect to a facility located in the State, in response to a request from one or more members of the public or a party, the Public Utility Commission shall hold a nonevidentiary public hearing on a petition for such finding and certificate in at least one county in which any portion of the construction of the facility is proposed to be located. The Commission in its discretion may hold a nonevidentiary public hearing in the absence of any request from a member of the public or a party. From the comments made at a public hearing, the Commission shall derive areas of inquiry that are relevant to the findings to be made under this section and shall address each such area in its decision. Prior to making findings, if the record does not contain evidence on such an area, the Commission shall direct the parties to provide evidence on the area. This subdivision does not require the Commission to respond to each individual comment.

Upon request within 15 days of a nonevidentiary public hearing by the petitioner, the Director of Public Advocacy at the Department of Public Service, the legislative body or planning commission of the town where a facility is planned to be located or an adjoining town, or any prospective parties to the case, or as may be required by the Commission, the Commission shall facilitate a community stakeholder process prior to holding evidentiary hearings, The Commission shall facilitate discussions regarding issues of concern and work toward resolution of issues, continuing to do so until the Commission determines that resolution has either been reached or upon a determination that discussions have reached an impasse on one or more issues. Participants shall work toward resolution of issues where possible within 60 calendar days of the commencement of the stakeholder process unless extended by mutual agreement of participants.

INTERVENOR FUNDING

Act 250

10 V.S.A. § 6029 is amended to read:

§ 6029. Act 250 Permit Fund; Intervenor Fund

There **are** ~~is~~ hereby established two **separate** ~~a~~ special **funds** to be known as the Act 250 Permit Fund **and Act 250 Intervenor Fund** for the purposes of implementing the provisions of this chapter. Revenues to the ~~fund~~ **Funds** shall be those fees collected in accordance with section 6083a of this title, gifts, appropriations, and copying and distribution fees. The Board shall be responsible for the ~~Fund~~ Funds and shall account for revenues and expenditures of the Board. At the Commissioner's discretion, the Commissioner of Finance and Management may anticipate amounts to be collected and may issue warrants based thereon for the purposes of this section. Disbursements from the **Act 250 Permit** Fund shall be made through the annual appropriations process to the Board, and to the Agency of Natural Resources to support those programs within the Agency that directly or indirectly assist in the review of Act 250 applications. **The Act 250 Intervenor Fund is established for the purposes of funding the costs of private citizen and municipal party participation in Environmental Division hearings. Fund dispersal by the Board shall equitably distributed based upon availability upon request by private citizen or municipal parties. Fund management and dispersals shall be in accordance with Board rule adopted for this purpose no later than January 1, 2021.** ~~This~~ **These Funds** ~~Fund~~ shall be administered as provided in 32 V.S.A. chapter 7, subchapter 5. (Added 1989, No. 279 (Adj. Sess.), § 2, eff. June 30, 1990; amended 1993, No. 70, § 1; 1997, No. 59, § 41, eff. June 30, 1997; 2003, No. 115 (Adj. Sess.), § 51; 2003, No. 163 (Adj. Sess.), § 25.)

10 V.S.A. § 6083a is amended:

§ 6083a. Act 250 fees

(a) All applicants for a land use permit under section 6086 of this title shall be directly responsible for the costs involved in the publication of notice in a newspaper of general circulation in the area of the proposed development or subdivision and the costs incurred in recording any permit or permit amendment in the land records. In addition, applicants shall be subject to the following fees for the purpose of compensating the State of Vermont for the direct and indirect costs incurred with respect to the administration of the Act 250 program **and to compensate for the costs of private citizen or municipal intervenor funding**:

(1) For projects involving construction, $6.65 for each $1,000.00 of the first $15,000,000.00 of construction costs, and $3.12 for each $1,000.00 of construction costs

above $15,000,000.00. **A $3.00 Intervenor Fund fee for each 1.000 of construction costs shall be remitted at time of application.** An additional $0.75 for each $1,000.00 of the first $15,000,000.00 of construction costs shall be paid to the Agency of National Resources to account for the Agency of Natural Resources' review of Act 250 applications. **Act 250 Intervenor Fund fees will be refunded to the applicant where no permit appeal is filed at the Environment Division and up to 75% of the Fund fees refunded to applicant where appeals are settled prior to the commencement of Environmental Division hearings.**

(2) For projects involving the creation of lots, $125.00 for each lot.

(3) For projects involving exploration for or removal of oil, gas, and fissionable source materials, a fee as determined under subdivision (1) of this subsection or $1,000.00 for each day of Commission hearings required for such projects, whichever is greater.

(4) For projects involving the extraction of earth resources, including sand, gravel, peat, topsoil, crushed stone, or quarried material, the greater of: a ~~**fee**~~ **fees** as determined under subdivision (1) of this subsection; or a **application** fee equivalent to the rate of $0.02 per cubic yard of the first million cubic yards of the total volume of earth resources to be extracted over the life of the permit, and $.01 per cubic yard of any such earth resource extraction above one million cubic yards. **In addition, an Act 250 Intervenor Fund fee of $0.01 per cubic yard of of the total volume of earth resources to be extracted over the life of the permit, to be reimbursed as provided in section (1) of this subsection.** Extracted material that is not sold or does not otherwise enter the commercial marketplace shall not be subject to the **application** fee. The **fees** ~~**fee**~~ assessed under this subdivision for an amendment to a permit shall be based solely upon any additional volume of earth resources to be extracted under the amendment.

(5) For projects involving the review of a master plan, a fee equivalent to $0.10 per $1,000.00 of total estimated construction costs in current dollars in addition to the fee established in subdivision (1) of this subsection for any portion of the project seeing construction approval

(6) **Repealed** ~~**In no event shall a permit application fee exceed $165,000.00.**~~

(b) Notwithstanding the provisions of subsection (a) of this section, there shall be a minimum fee of $187.50 for original applications and $62.50 for amendment applications, in addition to publication and recording costs. These costs shall be in addition to any other fee established by statute, unless otherwise expressly stated.

(c) **Application** Fees shall not be required for projects undertaken by municipal agencies or by State governmental agencies, except for publication and recording costs. **Act 250 Intervenor Fund fees shall be remitted, and fee refunding allocated, as provided in sections (1) and (4) where a permit for a municipal project is appealed to the Environmental Division.**

(d) Neighborhood development area fees. Fees for residential development in a Vermont neighborhood or neighborhood development area designated according to 24 V.S.A. § 2793e shall be no more than 50 percent of the fee otherwise charged under this section. The fee shall be paid within 30 days after the permit is issued or denied.

(e) A written request for an application fee refund shall be submitted to the District Commission to which the fee was paid within 90 days of the withdrawal of the application.

(1) In the event that an application is withdrawn prior to the convening of a hearing, the District Commission shall, upon request of the applicant, **refund the Act 250 Intervenor Fund fee in full,** refund 50 percent of the **application** fee paid between $100.00 and $5,000.00, and all of that portion of the fee paid in excess of $5,000.00 except that the District Commission may decrease the amount of the refund if the direct and indirect costs incurred by the State of Vermont with respect to the administration of the Act 250 program clearly and unreasonably exceed the fee that would otherwise be retained by the District Commission.

(2) In the event that an application is withdrawn after a hearing, the District Commission shall, upon request of the applicant, **refund the Act 250 Intervenor Fund fee in full,** refund 25 percent of the fee paid between $100.00 and $10,000.00 and all of that portion of the fee paid in excess of $10,000.00 except that the District Commission may decrease the amount of the refund if the direct and indirect costs incurred by the State of Vermont with respect to the administration of the Act 250 program clearly and unreasonably exceed the fee that would otherwise be retained by the District Commission.

(3) The District Commission shall, upon request of the applicant, increase the amount of the refund if the application of subdivisions (1) and (2) of this subsection clearly would result in a fee that unreasonably exceeds the direct and indirect costs incurred by the State of Vermont with respect to the administration of the Act 250 program.

(4) District Commission decisions regarding application fee refunds may be appealed to the Natural Resources Board in accordance with Board rules.

(5) For the purposes of this section, a "hearing" is a duly warned meeting concerning an application convened by a quorum of the District Commission, at which parties may be present. However, a hearing does not include a prehearing conference.

(6) In no event may an application fee or a portion thereof be refunded after a District Commission has issued a final decision on the merits of an application.

(7) In no event may an application fee refund include the payment of interest on the application fee.

(f) In the event that an application involves a project or project impacts that previously have been reviewed, the applicant may petition the Chair of the District Commission to waive all or

part of the application fee. If an application fee was paid previously in accordance with subdivisions (a)(1) through (4) of this section, the Chair may waive all or part of the fee for a new or revised project if the Chair finds that the impacts of the project have been reviewed in an applicable master permit application, or that the project is not significantly altered from a project previously reviewed, or that there will be substantial savings in the review process due to the scope of review of the previous applications.

(g) A Commission or the Natural Resources Board may require any permittee to file a certification of actual construction costs and may direct the payment of a supplemental **fees** ~~fee~~ in the event that an application understated a project's construction costs. Failure to file a certification or to pay a supplemental fee shall be grounds for permit revocation.

(h) The costs of republishing a notice due to a scheduling change requested by a party shall be borne by the party requesting the change. (Added 1997, No. 155 (Adj. Sess.), § 27; amended 2003, No. 163 (Adj. Sess.), § 26; 2003, No. 115 (Adj. Sess.), § 53, eff. Jan. 31, 2005; 2007, No. 176 (Adj. Sess.), § 8; 2009, No. 134 (Adj. Sess.), § 33; 2011, No. 161 (Adj. Sess.), § 8; 2013, No. 11, § 25; 2013, No. 59, § 12; 2015, No. 57, § 18.)

PUC

Subchapter 001 : General Powers

(Cite as: 30 V.S.A. § 248c)

- **§ 248c. Fees; Department of Public Service and Public Utility Commission; participation in certification and siting proceedings; PUC Intervenor Fund and Fees**

  (a) Establishment. This section establishes **application** fees for the purpose of supporting the role of the Department of Public Service (Department) and the Public Utility Commission (Commission) in reviewing applications for in-state facilities under section 248 of this title. Companies that pay the gross receipts tax as provided in section 22 of this title shall not be subject to the fees established in this section. **In addition, a special fund is established known as the PUC Intervenor Fund and a PUC Intervenor Fund fee established for the purposes of funding the costs of private citizen and municipal party participation in Commission evidentiary hearings for electric generation facilities. The PUC Intervenor Fund shall be administered as provided in 32 V.S.A. chapter 7, subchapter 5, with funds dispersed as may be available on an equitable basis to parties. The Commission shall adopt a rule for the management of and dispersal of Fund monies by no later than January 1, 2021.**

  (b) Payment. The applicant shall pay the **application** fee into the State Treasury at the time the application for a certificate of public good is filed with the Commission in an amount calculated in accordance with this section. The fee shall be deposited into the

gross revenue fund. Of the fees deposited into the gross revenue fund, 60 percent shall be allocated to the Department and 40 percent shall be allocated to the Commission.

(c) Definitions. As used in this section, "kW" and "plant capacity" have the same meaning as in section 8002 of this title.

(d) Electric and natural gas facilities. This subsection sets fees for applications under section 248 of this title.

(1) There shall be a registration fee of $100.00 for each electric generation facility less than or equal to 50 kW in plant capacity, or for a rooftop project, or for a hydroelectric project filing a net metering registration, or for an application filed under subsection 248(n) of this title.

(2) There shall be a fee of $25.00 for modifications for each electric generation facility less than or equal to 50 kW in plant capacity, or for a rooftop project, or for a hydroelectric project filing a net metering registration, or for an application filed under subsection 248(n) of this title.

(3) There shall be a fee for electric generation facilities that do not qualify for the lower fees in subdivisions (1) and (2) of this subsection, calculated as follows:

(A) $5.00 per kW; and

(B) $100.00 for modifications.

(4) There shall be a PUC Intervenor Fund fee for electric generation facilities over 150KW of $3.00 for each 1.000 of construction costs to be remitted at time of application. Intervenor Fund fees will be refunded to the petitioner upon resolution of all intervenor issues prior to the commencement of evidentiary hearings.

(e) Report. On or before the third Tuesday of each annual legislative session, the Department and Commission shall jointly submit a report to the General Assembly by electronic submission. The provisions of 2 V.S.A. § 20(d)(expiration of required reports) shall not apply to this report. The report shall list the fees collected and refunds approved, if any, under this section and under section 248d of this title during the preceding fiscal year. (Added 2019, No. 70, § 10.)

FOREST FRAGMENTATION / CORE FOREST /WILDLIFE PROTECTIONS

See attachment

1. **Act 250**

§ 6002. Procedures

The provisions of 3 V.S.A. chapter 25 shall apply unless otherwise specifically stated. For the purposes of this chapter, the underlying process shall be considered to be a process of review for the purposes of permitting or licensing and shall not be construed as litigation, except in cases of appeal to the Vermont Supreme Court. As such, all relevant state agency documents and records shall be a matter of public record not subject to exemptions under 3 V.S.A. chapter 5. Settlement agreements, stipulated settlements or memorandums of understanding shall only be established between state agencies and non-state parties where all parties to the proceedings have been included in all discussions and by full agreement of all parties to the proceedings. (Added 1969, No. 250 (Adj. Sess.), § 26, eff. April 4, 1970.)

§ 6087. DENIAL OF APPLICATION

* * *

(b) A permit may not be denied solely for the reasons set forth in subdivisions 6086(a)(5), (6), and (7) of this title. ~~However, reasonable~~

Reasonable conditions and requirements allowable in subsection 6086(c) of this title may be attached to alleviate the burdens created. However, a permit may be denied under subdivision 6086(a)(5) of this title if the permit is for development in an interchange area that is not within an existing settlement. A permit may also be denied under subdivision 6086(a)(8)(A-C) where the permit is for development that would significantly impair wildlife or its historic use of, or access to habitat critical for breeding or survival, impair habitat quality and productivity, impair habitat connectivity, cause harassment or worrying of wildlife. Cumulative impacts of

development upon wildlife habitat and forest blocks in the area or region shall be considered. Wildlife takings permits issued by the Secretary may not be taken into consideration when rendering a decision to issue or deny a permit under these subdivisions.

§ 6094. MITIGATION OF FOREST BLOCKS AND CONNECTING HABITAT

(a) A District Commission may consider a proposal to mitigate, through compensation, the fragmentation of a forest block or connecting habitat if the applicant demonstrates that it is not feasible to avoid or minimize fragmentation of the block or connector in accordance with the respective requirements of subdivision 6086(a)(8)(B) or (C) of this title. A District Commission may approve the proposal only if it finds that the proposal will

1. meet the requirements of the rules adopted under this section and will preserve

2. a forest block or connecting habitat of ~~similar~~ equal or higher quality and character to the block or connector affected by the development or subdivision No permit shall be issued nor any development commenced prior to either the completion of habitat acquisition and protection required under this section or the securing of such habitat under an irrevocable and fully financed contractual agreement.

PUC

30 V.S.A. § 248(b)(5) amended as follows:

(5) With respect to an in-state facility, will not have an undue adverse effect on aesthetics, historic sites, air and water purity, the natural environment, the use of natural resources, and the public health and safety, with due consideration having been given to the criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8) and (9)(K), impacts to primary agricultural soils as defined in 10 V.S.A. § 6001, and greenhouse gas impacts. The Public Utility Commission shall not issue a certificate of public good to an in-state plant as defined in section 8002 of this title that generates electricity from wind where it fails to fully meet all criteria under 10 V.S.A. §6086(a)(1) through (8) and (9)(K), will negatively impact Class A waters, threaten rare and endangered species or will result in the fragmentation or degradation of connecting habitat and core forest blocks.

Attachments:

Testmony of John Brabant to the House Natural Resources, Fish & Wildlife Committee – April 6, 2016