

Preserving the Heart of Act 250 into the 21st Century

Testimony before the House Natural Resource Committee, Friday January 24th 2020

I realize that this committee is nearing completion of testimony as a second phase to what was begun by “The Commission of the Future of Act 250” over a two-year process. I offered testimony to the Commission, which I have re-submitted for the benefit of this current committee process.

For 50 years, Act 250 has allowed for some citizen’s democratic participation in preserving ecosystems and shaping the rural working landscape of Vermont. As so well documented in [Greening Vermont: The Search for a Sustainable State](#), by Elizabeth Courtney & Eric Zencey, published by VNRC & Thistle Hill Publications, Act 250 is at the heart of Vermont’s history of environmental protection and rural preservation. (<https://www.indiebound.org/book/9780970551153>)

Act 250 has served to preserve the character of rural Vermont—the working landscape and community-based culture that we all know and love. My testimony today will refer to expert conclusions and analyses, including those from the Commission on the Future of Act 250, and my own experiences as an engaged participant in the Act 250 process to preserve a natural recreational resource for residents of central Vermont and their guests in the Town of East Montpelier. I support many of the original recommendations of that Commission and want to express concern for some of the current proposals that are not in alignment with those recommendations, with the goals of Act 250, or with the initial stated recommendation of the Vermont Natural Resources Council (November 2018) which has been, to date, the most important environmental advocacy organization in the state.

Protecting Coburn Pond: Used for decades for swimming, fishing and various year-round recreation

VTrans has repeatedly testified about some nameless project that cost an exaggerated amount of money. I’ve heard that they’ve called it “The poster-child” for why, they think, Act 250 should be weakened. They are quite specifically referring to the Rt. 2-Cabot-Danville highway expansion project which—I agree—is a perfect “poster child” of **how Act 250 can work to benefit the public and the environment**; at least partially.

Some of what I discovered through the Act 250 process:

There were decades of citizen opposition before I even got involved, in 2005, to protect the swimming hole. VTrans wanted to fill it in to create constructed wetlands to mitigate for those they would destroy during highway expansion. Starting around 1983, a group of citizens opposed the expansion of Highway Segment 1 on Rt. 2 across the Marshfield Reservoir for well-substantiated ecological reasons. The professionals supporting that citizens’ group believed that the VTrans project—expansion of Rt.2 from Montpelier to Danville—should have gone through a federal

NEPA review. I later learned that developing the project in segments allowed VTrans to avoid the legal requirement of NEPA review, a strategy used across the country.

VTrans memo documents, also going back to the '80s, revealed that almost every time Coburn Pond was discussed (as the old gravel pit, or Caledonia quarry) as a possible site for wetland mitigation, someone in that working group asked or said: "But isn't that used as a swimming hole?" The reply was consistent: "Don't worry about that."

So, given that VTrans knew of **existing public use** as a swimming hole going back to the eighties, whose fault is it that SAID PUBLIC opposed its use as a wetlands? Every time you hear how much money this case cost VTrans (really, it has cost Vermont taxpayers), please remember: They knew about public opposition to the highway expansion that would require wetland mitigation and they knew about the existing use of Coburn Pond as a swimming hole.

In the initial permit application—that was denied as an outcome of citizen action effectively using the Act 250 process—proposed wetland mitigation for four highway segments that would require the filling in of the swimming hole plus constructed wetlands south of the existing pond. VTrans believed that they could power through the will of the people. **That's** what cost so much money. In the end, instead of a full appeal, environmental court ordered that a negotiated settlement be reached. Through that process VTrans was permitted to construct wetlands south of the protected swimming hole to compensate for expansion across the most contested highway segment—Segment 1. The negotiated settlement, which became the permit, was specifically designed to protect the water quality and existing use of the pond and the shorelines while allowing for a limited amount of constructed wetlands to compensate only for highway segment 1.

The Rt. 2 Cabot-Danville/ Coburn Pond project **IS**, In fact, "the poster child" for Act 250 ... as VTrans has been testifying; BUT it is the poster child that illustrates exactly why **District Commissions need to stay in place, why enforcement reviews and remediation need to be outside the purview of government agencies, and why Act 250 needs to remain strong, especially in empowering citizens to protect natural resources in their communities**: Because government agencies with their large budgets and singular focus need to account to the PUBLIC that they are supposed to be serving. (For corporate development projects, it is far too often the money and related political powers that sway decisions away from what might be most ecologically wise.) VTrans' repeated testimony illustrates, each time, the NEED for Act 250 to empower the public whose tax dollars have been wasted by the arrogance of single focused engineers with their fleet of attorneys.

Enforcement issues are not addressed in the proposal:

To be brief, VTrans violated their permit in two significant ways: 1-Using glyphosate in the wetlands; and 2- excavating deeper than allowed between three existing wetlands and excavating on the shoreline of the pond at the southernmost end which caused a breach.

The first violation was “enforced” only to disallow any further use of glyphosate. Most significant to those supposedly protected existing uses—swimming and fishing—is that the once contained pond has been violated. There are now seasonal inflows/ outflows depending on water levels. The breach of the pond has not been enforced and not been remediated. It alters the water quality of the pond and causes ecological damage. Most obvious is that during high water in the spring and early summer, fish wash out into the wetlands. After a few drier weeks, they become trapped in the wetlands and eventually die. Shifting weather patterns due to climate change make conditions caused by the breach in the shoreline even more severe and unpredictable.

The NRB has been ineffective and unwilling to meet its obligations to enforce.

One state agency should not be the arbiter of violations affected by another state agency. Enforcement should be under the purview of an independent environmental board.

District Commissions are the Heart of Act 250: In eliminating the District Commissions and centralizing the process into a more bureaucratic state-run system, the VNRC/ ANR/ Scott proposal undermines what VNRC called “The heart of Act 250”. VNRC originally recommended (Nov’18) “policies that will ... provide more capacity, training, and resources to District Commissioners in order to improve the review process for the 21st century.” VNRC’s documents elaborate: “The District Commission process is the heart of Act 250. It was designed so decision makers from the region where a project is located decide on projects in manner that provides due process, while allowing citizens to address questions or concerns about a project without having to be represented by an attorney. District Commissions have, by and large, functioned as intended.”

(<https://vnrc.org/wp-content/uploads/2019/08/Whats-Next-for-Act-250.pdf>)

The final report of Future of Act 250 Commission echoes this and offers explanations as to why.

I urge this committee to follow these recommendations. Eliminating the District Commissions and consolidating the review of statewide proposals by centralized state-employed staff will—in effect—repeal some of the more important aspects of the Act 250 structure and process.

Regarding appeals directly to the Vermont Supreme Court: The Commission on the Future of Act 250 wrote, “The Commission has not received testimony supporting other options, such as appeal to a generalist rather than the current specialized court or direct appeal from the District Commissions to the Vermont Supreme Court. The Commission does not support these two options. In particular, direct appeal from the District Commission to the Supreme Court likely would cause increased formalization of the District Commission with a resulting of loss of accessibility to citizens.”

Again, I urge this committee to follow these recommendations.

I have deep and serious concerns that the recommendations by the Commission are being over-ruled for political reasons. The final report of the Commission offered serious consideration, analysis, explanations, and recommendations that should be at the core of the current process. I am concerned that the current legislative committee—which clearly has less time and depth of focus to examine a law that has shaped the landscape of the Vermont that we know and love for 50 years—is rushing to complete a process currently being manipulated by political undercurrents.

Act 250—while perhaps less than perfect—is the reason why Vermont looks like Vermont and not NH or NJ. Small and **notably incremental changes**, based on the recommendations of the Commission on the Future of Act 250, might be far more important to preserve at least what we have. Dismantling what has been identified as “the heart of Act 250” and shifting away from citizen access and empowerment are the opposite of what we hope for from your committee.

Finally, in reviewing online testimony, I want to echo the testimony you have recently heard from previous District Commissioners & Act 250 coordinators, especially that of Ed Stanak, Karl Johnson, & Tim Taylor; and also environmental advocates Annette Smith and John Brabant. I especially support the institution of a fund to support citizens who become parties to effectively argue their case through the Act 250 process. Informed by my experience as a party in the Act 250 process, I find that I am in full alignment with their testimony.

Thank you for your time and careful considerations.