

P. O. Box 512  
Montpelier, Vermont 05601  
January 24, 2020

House Committee on Natural Resources, Fish, and Wildlife  
State House  
Montpelier, Vermont

Re: Comments on the joint VNRC/Administration proposal of 1/14/2020

Dear Committee:

I am a civil engineer with many years experience working with environmental reviews, training, permitting, and Act 250. Based on my experience, I ask you to reject the following portions of the joint proposal.

- the enhanced natural resources board
- the exemption for certain transportation projects
- the granting of presumptions to all State permits.

### **Enhanced Natural Resources Board**

The Vermont Natural Resources Council and the Agency of Natural Resources jointly propose doing away with the successful, citizen-based district commissions and substituting in their places one centralized enhanced natural resources board. The proposed enhanced board would hear and decide on Act 250 permits.

### **Claims for the proposed enhanced natural resources board**

The proposed enhanced natural resources board is intended to provide "consistent application of criteria statewide, an accessible and fair process for Vermonters, and increased governance over the Act 250 enterprise". (VNRC/ANR January 7, 2020 written testimony., p. 4)

The regional members of the proposed professional, enhanced board are intended to provide a regional perspective to an otherwise centralized board. (VNRC/ANR January 14 discussion document, p. 45)

In their testimony, the joint partners claimed that an enhanced board would be more accessible and that the current appeals process is time-consuming and expensive.

### **I rebut these claims.**

Consistent application of criteria statewide can be achieved by training for district commissioners, district staff and NRB staff at a fraction of the cost of the jointly proposed enhanced natural resources board.

From my experience, the current process with district commissions is fair and accessible.

The proposed appeals process is likely to eliminate an average of three appeals each year (those appeals from the first appeal to the second appeal). That will have little effect on the time and costs of appeals.

### **District commissions**

The district commissions need to be retained as recommended by the commission on the future of act 250 and the VNRC (on January 31, 2019). The district commissions, citizen-based and local, have been an integral and necessary component of the success of Act 250.

The hearings of the proposed board would not be local, even if they would be held in the municipality. Three of

the members would swoop in for the hearings and then depart to their homes and office outside the region. Those three members would not have the same ties to the area as the district commissioners now have. The two regional members would be unable to out-vote the three central members on matters of importance locally.

The two regional members would be token members compared with district commissioners. They would only be able to work on findings of fact. They would be prohibited from working on anything resembling a conclusion of law.

The joint proposal notes that the proposers are still trying to figure out how citizens not represented by attorneys would be treated fairly and still have access, which is an important principal that they *think* can be achieved through this board. However, we *know* from experience that citizens not represented by attorneys are treated fairly by the district commissions. So the simple solution to supporting citizens not represented by attorneys is to retain the district commissions.

My experience with participation in hearings before a district commission was not daunting. I found that the process was accessible and fair.

Participation at the more formal environmental division was less comfortable and more rigid. It seems that the proposed board will require a more formal, more rigid structure than the district commissions. Five board members instead of three commissioners (more people leading to more formality).

These are why I recommend retaining the district commissions.

### Appeals

The justification for eliminating one level of appeal is to save time and money for parties in Act 250. That justification is not supported by the numbers.

There were 87 appeals to the environmental division in the years 2012 through 2017, according to a slide show provided by Greg Boulbol on March 12, 2019. According to the Natural Resources Board's 2018 annual report (2014 - 2017) and a document submitted by Diane Snelling on September 20, 2017 to the commission (1970 - 2016), there were 1781 major and minor applications and an additional 1077 administrative amendments during those same years of 2012 through 2017. (The two sources show different numbers for the overlapping years of 2014 - 2016.) A review of the Supreme Court's decisions for those same six years shows 17 decisions regarding appeals of Act 250 permits or jurisdictional opinions. So the data show that appeals to the environmental division amounted to 5% of the number of major and minor applications filed and appeals to the Supreme Court only 1%.

People likely would still make appeals to the first level. Thus, under the proposed change in appeal process, those 87 appeals (an average of 14 per year) would go directly to the Supreme Court instead of to the environmental division. And the proposal would eliminate only the 17 second-level appeals (average of 3 per year), an almost insignificant number compared to the number of cases filed (average of 297 per year). The 3 per year that would have been appealed to the second level have no second level under the proposal. Thus, 99% of applicants would see no savings in cost or time by the altered appeals process. Only the 1% of applicants who appealed to the Supreme Court as the second level of appeal would see a reduction in costs and time, at the loss of the second level of appeal.

### Consistency

One of the claims for the proposed enhanced board is to increase consistency in decisions at the permit level.

Inconsistency could be reduced more easily and less expensively by rejecting the proposed enhanced board and providing training instead. The joint proposers testified (January 16, 2020) that the enhanced board would cost

an extra half-million dollars per year. Instead of spending that money on an enhanced board, one could spend a smaller portion of that money on increased training for the district commissioners and district co-ordinators. That training could include consistency and discussions among districts about how they resolve issues and look at criteria. That could go a long way toward improving consistency among districts statewide.

During my career I have attended a lot of training and given a lot of training. I find that training works best when the people receiving the training are physically present and the trainer is there as well. My experience is that training over the telephone is much less effective than training in person. The board's testimony is that little of its training is done in person. Giving a new district commissioner three hours of training seems insufficient for the topics noted by the board: what *ex parte* is about, running a meeting, and all the criteria.

The e-notes prepared by the board are an excellent source of precedent that can be used to reduce inconsistency.

The Act 250 commission's report covered inconsistency among the district commissions with: "Because it [the former Environmental Board] also administered the program, it was able through its appellate decisions, rules, and guidance to provide consistent and unified direction to the District Commissions, a consistency that has been lost by splitting those functions between the Environmental Division and the Natural Resources Board."

The proposers have not been particularly consistent. On January 7, 2020 they stated that a study of planning would involve a stakeholder process. On January 14, they stated that only a State agency will study planning, with a comment period after the draft has been created. A true stakeholder process would involve stakeholders in the development of both the draft report and the final report.

The same thing happens for evaluating any changes to the presumption of ANR permits. On January 7, 2020, they proposed a stakeholder process; on January 14 they made no mention of a stakeholder process and instead propose presumption for all ANR permits.

#### Other negative aspects of the proposed enhanced board

The ability of an enhanced board to have three agencies retain additional assistance would increase the cost to the applicant, reducing accessibility.

There is an inherent conflict of interest in having the district co-ordinator decide on which applications are minor and then requiring that same person to decide on that application.

For all of these reasons, I ask that you reject the proposal of an enhanced natural resources board. All the problems with an enhanced natural resources board can be "corrected" by something like the board proposed in your draft 9.2. Rather than correcting the problems with an enhanced board, let your 9.2 be the basis of a board.

#### **Exemption for certain transportation projects**

The Vermont Natural Resources Council and the Agency of Natural Resources jointly propose reducing the area that counts toward the 10 acres required for jurisdiction of a transportation project that receives any federal aid. They would do this by not counting the area that was previously disturbed by a transportation facility. The justification has been that such projects are covered by the review required by the National Environmental Policy Act. Such an exemption will reduce the effectiveness of act 250.

Exempting those projects means abutters and other parties lose their ability to participate in the permit process. Public participation under NEPA is not the same as being a party to an Act 250 case. Public participation under NEPA is typically limited to one-way communications at specific times in the process, usually after the review is done. There is no direct interaction. There might be a public hearing, and my experience is that public hearings do not lead to dialogue. The public submit comments and get no direct feedback. Some time later there will be a summary of the comments and what, if anything, about the project was changed as a result of the comments.

Some effects of a transportation facility are based on the entirety, not just the incremental part. Effects on air quality, runoff and water quality, aesthetics, scenic or natural beauty, and habitat connectivity depend, in part, on a highway's total width and total area.

During construction, the previously disturbed areas usually are disturbed again. The impacts during construction, including runoff, erosion, and water quality, will be based on the total area disturbed, not just the incremental area.

If this exemption is granted to transportation facilities, other types of projects receiving federal assistance will want the exemption, too. Granting exemptions to those other types of projects will reduce further the effectiveness of Act 250.

For these reasons I ask that you reject the proposed exemption for transportation projects based on the amount of *new* project area.

### **Presumptions for ANR permits**

The joint proposal is to grant presumption to all permits of all State agencies. This is an overly broad sweeping of any and all permits into the category of presumption.

One advantage of the present system of determining presumptions by rule is that it requires the Natural Resources Board to evaluate each permit as to whether it should be granted presumption. The rule then matches permits with criteria.

Non-applicant parties are placed at a disadvantage by the use of permits as presumptive evidence. If the permits are not presumptive evidence, then an applicant would have to provide documents to the district commission that show how the proposed project would meet the requirements of the criteria. However, State permits are developed behind closed doors between the applicant and the State agency. Thus, if the permits are taken presumptively, parties have no ability to see the information used to develop the permit, making it more difficult for parties to rebut a presumption.

For these reasons, I ask that you reject the proposal to grant presumption to all State permits. The provisions on presumptions proposed in §6086(d) of your draft 9.2 are much preferable to those in the joint proposal.

### **Summary**

In summary, I ask you to reject the following portions of the VNRC/ANR joint proposal.

- the enhanced natural resources board.
- the exemption for certain transportation projects
- the granting of presumptions to all State permits.

I have misgivings about other items in the joint proposal and lack the familiarity with the topics to present an informed opinion to you.

Thank you for this opportunity to share my thoughts on this subject with you.

Sincerely,

Thomas Weiss