



Vermonters for a Clean Environment

Comments to House Natural Resources, Fish & Wildlife Committee
By Annette Smith, Executive Director

Citizen Participation in Act 250 Appeals, Environmental Court vs. Environmental Review Board

April 3, 2019

Background

Vermonters for a Clean Environment was founded in 1999 to address an energy project. Within a year, we were also asked by Vermont citizens to prepare to deal with what was considered to be “the mother of all Act 250 cases” (VPR), a large open pit quarry which had major issues in nearly all the Act 250 criteria.

As executive director, I had to get up to speed on both permitting processes, plus Agency of Natural Resources. In the last 20 years, VCE has assisted citizens in participation in PUC, Act 250, ANR, and Agricultural permitting processes (primarily large farms).

At the same time that VCE was developing as an organization, the legislature established study committees to look at proposed changes to Act 250. This activity recurred every two years, beginning in 2000-2001, through about 2009. I attended many of the various committee meetings as a member of the public.

In 2003, in preparation for another legislative attempt to change Act 250, I worked with New England Grassroots Environment Fund to do focus groups of citizens around the state. In total we met with citizens in half a dozen areas of the state, during which I interviewed a group of citizens and asked them to tell their stories, beginning with local zoning and continuing through District Commission process, and in most cases, the Environmental Board.

At that time, citizens had no right of appeal to the Vermont Supreme Court. If the petitioner/applicant did not appeal, the case ended for citizens with the Environmental Board decision.

Current status of public participation in land use issues

In the two decades that VCE has been in existence, we have seen a dramatic change in citizen participation in Act 250 cases, while much of our work’s focus has been at the Public Utility Commission due to their charge to evaluate the land use impacts of energy development, including solar and wind. Vermont is apparently the only state that has a PUC doing land use permitting, something we strongly encourage addressing in this Act 250 update.

Our experience with the legalistic process at the PUC is that it has been extremely detrimental to public participation.

Our experience with the Environmental Court process mirrors the problems with the PUC's public participation process.

2003 Focus Groups

During our 2003 focus groups, we heard from citizens who unanimously and enthusiastically supported the District Commission process, which enables all parties to participate without attorneys. Developers routinely complain about "two bites at the apple" when they have to put on a new case "de novo" at the next level. However the original intention of the Act 250 District Commission process envisioned a more informal process. A legalistic case at the District Commission level is generally the result of developers "lawyering up" early on, which results in the need for citizens to do so. A return to the more informal process at the District Commission would serve all parties well.

Citizens who participated in the 2003 focus groups did not complain about the Environmental Board. They were able to participate, with or without lawyers. They did complain about the political interference in some cases, usually involving the governor giving direction to the chair of the Environmental Board.

The Change from Environmental Board to Environmental Court

VCE supported the move to Environmental Court, for two reasons. The first reason was the legislation also allowed for the right of appeal by citizens to the Vermont Supreme Court. The second reason was to create a firewall that would distance cases from political interference. Some attorneys we spoke with also persuaded us that the decisions would benefit from a legal review rather than a citizen-based review.

What has happened with appeals of District Commission decisions since 2005 with the Environmental Court instead of Environmental Board has, from VCE's perspective, been a disaster for Vermont citizen participation. We have received a few calls, usually frantic, from citizens who have a short period of time to prepare to appeal. Often they have no money, no idea what to do, and, if they do succeed in filing *pro se*, they quickly get mired in a legal process that is not much different from the PUC's daunting process.

Pro Se Training

We appreciate that defenders of Environmental Court point to *pro se* training and mediation options. However, participation in "Court" requires mastering a host of rules that govern court procedures. It is the same with the PUC, and each entity also has its own set of rules. It is not possible to learn all the rules and be on an equal footing with skilled attorneys in either venue. I often have said that citizens lose rights as soon as they walk into the room at the PUC, and the same is true for Court. How do you train someone to be a lawyer in an hour? It is not possible.

Mediation

VCE has been asked to consult with some citizens before they go into Environmental Court mediation. However, those cases are confidential, so sharing any information with

me breaks confidentiality rules. Mediation has its benefits, but it is in no way an answer to the issues that Vermont citizens have in participation in legalistic Court proceedings.

VCE Supports new Vermont Environmental Review Board

From a citizen participation perspective, and also from a perspective of consistent decision on land use, VCE supports the creation of the Vermont Environmental Review Board that is made up of citizens with specific expertise – engineering, hydrology, aesthetics, wildlife, and forestry. One of those areas of expertise could be replaced with a lawyer, if the panel would benefit from the requirement that at least one member be a lawyer. Presumably the panel would be staffed by an attorney.

The appointed chair should not serve at the pleasure of the Governor, but rather be appointed through the judicial nominating process. This person should be viewed as a court judge where rules governing ex-parte conversations would apply.

This new Environmental Review Board would be able to take a more holistic view of land use development in Vermont if it heard appeals of all Act 250, ANR, Agriculture and energy siting decisions as they effect Vermont's land use. Only local zoning appeals would stay with Environmental Court.

Citizen participation is the foundation of protecting Vermont's environment

The legislature would be wise to ask the new VERB to develop a set of standards specific to citizen participation, which could include intervenor funding.

Whichever appeal route is chosen, the ability of Vermont citizens to effectively participate in appeals is seriously limited by the lack of money to hire lawyers and experts. It is long past time for the legislature to address this inequity.

Vermont citizens are the front line of protecting Vermont's environment. Many poorly planned or seriously detrimental projects have not happened because of Vermont citizen involvement. In the focus groups, one common theme was that the result of citizen participation did not stop the project, but resulted in redesigns that improved the project economically and saved environmental resources that were ignored by developers.

This legislative effort to update Act 250 would do well to acknowledge the important role citizens play in protecting Vermont's environment, and improve the process that enables citizen participation.

Respectfully submitted by,

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