House Natural Resources and Fish and Wildlife Committee
January 22, 2020 Hearing
Testimony of Ed Stanak
VNRC/Scott Administration Proposed Act 250 Amendments

My name is Ed Stanak and I am a resident of Barre City . I was employed for 32 years by the State of Vermont as an Act 250 district coordinator . I testified before this committee in 2019 regarding its draft 9.2 proposed Act 250 bill and incorporate that testimony by reference along with my submittals to the committee concerning the jurisdictional provisions of that bill . I appear today to provide perspective on the content of the VNRC/Scott Administration proposed Act 250 amendments ( "the proposal" ) which were provided to this committee on January 14, 2020. The references in my testimony to specific aspects of the VNRC/Scott Administration proposal are from their "Act 250 Discussion Document" .

**Elimination of District Commissions**

The proposal will eliminate District Commissions and replace that decision making process with a centralized board ( pages 44 et seq) for the review of applications for "major" projects . "Minor" projects would be reviewed by the public employees who are the district coordinators.

District Commissions have been the heart of Act 250 for 50 years. They constitute a process that practitioners ( ie engineers, consultants and lawyers) are familiar with and provides a "user friendly" forum for public participation by Vermonters. The VNRC/Scott Administration contend that this profound structural change to the administration of Act 250 is necessary in order to address "inconsistencies" and "unpredictability" that are allegedly inherent in the District Commission process. The proponents of the proposal provided no data or case studies in support of the allegations. When asked about this at the committee's January 16th hearing, the proponents indicated that they would provide some examples during the week of January 20th based upon experiences of ANR staff .

As this committee is well aware, it was presented with a report in January 2019 by the Act 47 legislative Act 250 study commission which was the result of an extensive public outreach effort over a two year period. The commission report stated three pages of detailed conclusions and recommendations ( pages 2-4 of report) . The report did not identify any significant problems in the process conducted by the District Commissions (pages 54-62 in the report) . <u>Nowhere in the report is there any reference to substantive "inconsistencies" and "unpredictability" in the Commission process and decision making.</u> VNRC and the Administration both had ample opportunity to bring such allegations to the attention of the study commission during its two year effort.

The study commission stated the following ( at page 67 ) :

*" A key feature of the Act 250 program is that it consists of decision-making bodies composed of informed citizens drawn from the region that have supervisory authority and the final say on projects within their jurisdiction.*
*They make their determination based on a comprehensive review of the environmental and land use impacts of a proposed project through an open, public hearing process in which citizens may be full parties with the right to present evidence and question the witnesses who support the application or the State's position on the application or an ancillary permit or approval "*

This House committee commenced a rigorous effort during the 2019 legislative session to weigh the report of the legislative study committee and prepare specific legislation . The House committee held numerous hearings, took testimony from many witnesses and received voluminous written submittals. I attended most of the committee's hearings. Nowhere in the committee's record is there any substantive evidence of "inconsistency" and "unpredictability " in the District Commission process. More to the point, nowhere in that record is there any recommendation to eliminate the District Commissions.

It is worth pointing out, on the other hand, that the legislative study commission and this committee did receive extensive testimony and recommendations about significant problems with the performance of the Natural Resources Board and the process and outcomes of appeals of District Commission decisions to the Environmental Division of the Superior Court.

The elimination of District Commissions will be the termination of the last remaining core component of Act 250 as enacted in 1970 , the other core component having been the Environmental Board ( arguably the backbone of Act 250 ) which was eliminated in 2005. The criteria of Act 250 may survive but there needs to be a frank admission that with the elimination of the District Commission process and establishment of a centralized state board, the General Assembly would in effect enact a new land use and development review and permitting process that replaces Act 250 .

District Commissions review the record for applications by testing the record against three evidentiary standards known as the burdens of proof, production and persuasion . There is wisdom in applying those burdens to the VNRC/Administration proposal. First, the proponents of eliminating the District Commissions have the burden of proof for providing clear and convincing evidence that such a deep structural change is warranted. Second, the proponents have the burden of producing facts, case studies and data in support of the proposal and not merely opinions, conjecture and argument. Finally, they must persuade this

committee that the change is necessary because the District Commissions have failed to implement the 1969 legislative findings and declaration of intent for Act 250 creating the District Commissions in order to ensure that the use of lands will not be "detrimental to the public welfare and interests."

The VNRC/Scott administration proposal to eliminate District Commissions is result oriented and is now followed by an attempt to backfill the record in an effort to rationalize the proposal.

There is no small irony in the provision of the proposal that will delegate authority to the District Coordinators to process "minor "applications which at present is approximately 90% of all applications . * The irony lies in the fact that this delegation is included in a proposal from some who over many years clamored that District Coordinators had "too much power" in administering Act 250 . During my career, I authored many jurisdictional opinions but was conservative in ensuring that all substantive decisions affecting proposed land uses and underlying property rights were the sole responsibility of the District Commission.
It is not an exaggeration to suggest that the delegation to the Coordinators will result eventually in "general permits" with the loss of hand tailored permits and mitigating conditions that have resulted from a strong role by the District Commissions . Act 250 was structured as a quasi judicial process for the reviews of all applications. The proposed delegation to Coordinators is inconsistent with this foundation notwithstanding the vague provisions in the proposal that a process will be put in place such that the new centralized board might convert a "minor" to a "major".

Rather than addressing problems correctly identified with the inept administrative performance of the NRB and the problems associated with the appeals of Act 250 cases – representing approximately 5% of the overall caseload – to the Environmental Division, the VNRC/Scott administration would topple the component of Act 250 which works well –the District Commissions. Instead, citizens would be forced to proceed through a new centralized board which, in my opinion, will perform in a manner similar to the former Public Service Board and

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* Act 250 Rule 51 governs the processing of applications as "minors". Over time the NRB has exerted its influence to increase the number of cases processed under the Rule and this has often exceeded the scope of the rule and also discouraged public participation. In my experience as a District Coordinator seemingly small projects benefitted from a public hearing scheduled on the District Commission's own motion. Many people are extremely reluctant to request a hearing under Rule 51 for varying reasons ( eg don't want to be perceived as a "troublemaker", fear of or lack of familiarity with governmental process, etc) . But if a hearing was scheduled by the Commission the public would attend and participate.

now Public Utility Commission . History may well assess such an outcome with a conclusion that "In order to enhance Act 250 for the 21st century it became necessary to destroy it."

In closing, there are compelling reasons to leave the District Commission process intact because it works quite well for the vast majority of cases . Furthermore , should the General Assembly enact new jurisdictional provisions along with strengthened criteria in 10 VSA 6086(a), the public interest would be well served by having an experienced District Commission administrative infrastructure in place to implement such amendments.

**Jurisdiction**

1) Lands Above 1,500 Feet

The VNRC/Scott Administration proposes a new jurisdictional provision that would encompass development in "ridgeline" areas above 1,500 feet in elevation. I applaud their recognition that finite natural resources above 1,500 feet require additional scrutiny and protection. While the legislative study commission report recommended a new jurisdictional provision for lands above 2,000 feet , that recommendation, in my view, would not adequately safeguard the range of natural resources in high elevation settings.

Having said that, the VNRC/Scott Administration proposal will be a jurisdictional provision with very limited effect. If I were still a District Coordinator and was asked to apply the new provision to a development proposed on a tract above 1,500 feet and in proximity to a ridgeline, I would opine that jurisdiction, and thus review under the Act 250 criteria of potential project impacts, would attach only to a 400 foot wide swath along the "crest" . Furthermore, principles of statutory construction –and I have no difficulty envisioning such an argument by counsel for an applicant- would appear to support a position that this new provision could actually reduce the scope of other existing jurisdictional provisions in the provisions of 10 VSA 6001(3) which precede the new provision. In other words, it would be contended that the General Assembly , in articulating the new ridgeline provision for reviews of projects above 1,500 feet, intended to limit jurisdiction to the 400 foot wide swath rather than the long standing practice of reviews based on the entire tract.

In my opinion, the jurisdictional provisions proposed in H.633 will be much more effective in ensuring appropriate reviews of developments and subdivisions above 1,500 feet. * In this context below I again share with the Committee relevant factual information about lands above 1,500 feet which I submitted in 2019 .

## Vermont Headwaters , Rare and Irreplaceable Areas, High Elevation Wildlife Habitats and Forests

| Table 1: Land Area by Category above 1500' Elevation in Vermont | |
|---|---|
| **Sector** | **Acres** |
| Federal | 383,426.7 |
| Municipal | 27,165.5 |
| Other/Unknown | 2,699.1 |
| Private | 226,501.3 |
| Public | 4,159.0 |
| State | 211,820.0 |
| | |
| Total | 855,771.6 |

| Table 2: Land Area by Category above 2500' Elevation in Vermont | |
|---|---|
| **Sector** | **Acres** |
| Federal | 97,832.8 |
| Municipal | 2,358.4 |
| Other/Unknown | 0.4 |
| Private | 18,519.8 |
| Public | 992.8 |
| State | 41,908.6 |
| | |
| Total | 161,612.9 |

## Total land mass of Vermont : 5.9 million acres

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* The VNRC/Scott Administration proposal includes a new "road rule" ( page 6) in an effort to address "fragmentation" . Consultants will produce designs to avoid this jurisdictional trigger just as happened with the old "road rule" . The new road rule is an anemic effort to prevent imprudent subdivisions in high elevation settings.

Today I submit to the Committee a map which corresponds with the above data . As you can see, the map depicts all lands above 1,500 feet . The areas in white are the public or otherwise conserved lands which, ostensibly, will safeguard finite natural resources. The areas in black are the 226,501 acres of privately owned lands above 1,500 feet in elevation that will be subject to increased growth pressures during the 21st century. The areas in black also provide reasonable representations of the most important remaining finite natural resources in Vermont and establish a compelling state interest for legislation to protect the public interest.

New jurisdictional provisions - such as those in H.633 – would NOT prohibit development and subdivision on lands above 1,500 feet . Instead, they will ensure prudent location and designs and quite likely will in the long term increase the economic value of such lands containing finite resources .

2) VTRANS Projects

The VNRC/Scott Administration proposal includes a provision to reduce Act 250 jurisdiction over certain transportation projects because VTRANS allegedly has a robust process for public input and Act 250 represents a redundant review process given many other layers of federal and state reviews. While much can be said about this proposal, I limit my comments to the following .

I asked NRB staff how many VTRANS projects have been subject to Act 250 review since 1970. There is no data available. I then reviewed the records for the District 5 Commission and ascertained that 16 VTRANS projects were subject to Act 250 review between 1970 and the present. Some of those projects were then subject to amendments over the years . For example, two of the VTRANS projects are the airports in Berlin and Morristown and over the years hangars and other improvements were added. An interesting aside : there came a point with the Morristown airport where incremental developments were occurring in an uncoordinated fashion and the District Commission required a master plan to ensure comprehensive reviews and designs.

Of the 16 projects in District 5 over 50 years, 9 of the projects took place during the 1970s –the first ten years of Act 250. Subtracting the two airports, that leaves a total of 5 VTRANS projects subject to Act 250 between 1980 and the present. Of all those projects, the only one which I have ever heard VTRANS complain about was the US RT 2 Cabot project which involved substantial public participation and complicated wetlands issues. Time does not allow an indepth analysis of this case. I am willing, if the Committee requests, to prepare a detailed presentation of what took place in that case ; it is an excellent case study of a Commission fulfilling its "oversight" function in its concurrent review with ANR of impacts on wetlands . At a

minimum, the Committee may wish to take administrative notice of the District Commission's substantive final decision ( application 5W1017) .

The VNRC/Scott Administration proposal is linked to projects subject to federal funds – implying a layer of thorough review under the National Environmental Policy Act (NEPA) such as an Environmental Impact Statement. Two observations are in order. First, an EIS is not a permitting process. Those familiar with NEPA caseload and legal commentaries understand that an EIS is seen as an "action forcing" process : that federal entities will undertake a review of project impacts and in theory select an option with the least impacts – but there is no such mandatory requirement. . Second, the scope and content of an EIS does not always track with the scope and content of Vermont's environmental laws. Here is just one example –not a VTRANS project but nonetheless relevant.

The US Forest Service issued an EIS for the industrial wind turbine project in SEarsburg Vermont. The EIS concluded that the project would destroy a critical black bear habitat but then stated positive conclusions for the project because, in sum, there were other black bear populations in the state that would not be disturbed by the loss of the habitat. That analysis and conclusion is explicitly contrary to how Act 250 criterion 8(A) is applied to necessary wildlife habitats . In an Act 250 case originating in the Bennington area , the District Commission, and then Environmental Board on appeal, concluded that criterion 8(A) applied strictly to the direct impacts on the population of the species in the specifically affected habitat. In other words, it was not permissible to sanction loss of habitat because members of the same species would survive elsewhere. This case was affirmed by the federal 2nd Circuit Court of Appeals in Southview Associates v Bongartz 980 F.2d 84 (1992). Thus, affirmative approval of a project by the federal government does not ensure consistency with Vermont law.

An additional comment is in order. The VNRC/Scott proposal would agree with VTRANS that federal reviews make Act 250 review duplicative. The Committee may want to take official notice of current media accounts in which the Trump administration has announced plans to severely reduce reviews under NEPA for all infrastructure projects - such as highways.

**Natural Resources Board ( NRB )**

To the extent that the NRB will continue as an administrative entity it is necessary to comment on its performance since its creation in 2005 .
The NRB was never able to define a clear sense of how to implement its responsibilities under the enabling legislation. In this context it is a failed administrative entity . The powers of the NRB are set out in 10 VSA 6027. The Board is also authorized to adopt rules pursuant to 10 VSA 6025 .

Many of the actions of the NRB over the last 15 years are characterized by "inconsistencies" and instances of " unpredicability" that escaped the consideration of the VNRC/Scott Administration effort.

A) Training of District Commissions is without substance. The evaluation of applications requires experiential learning. Given the significant diminishment of Commission hearings, Commission members are losing the "institutional memory" that ensured quality reviews.

B) Enforcement of Act 250 is uneven at best. Actions are brought disproportionately against small scale developers.

C) The number of jurisdictional and district commission decisions that are appealed has dwindled since "permit reform" legislation of 2005. At the same time, the length of time to process appeals by the Environmental Division has increased substantially when compared with performance statistics for the former Environmental Board. The Court has transformed appeals into extremely expensive and hyper-legalistic proceedings. The Natural Resources Board has misused its power as a statutory party to all appeals of Act 250 decisions. The NRB has not adopted rules or policies to establish standards to guide its role as a statutory party . Instead of playing an effective role by ensuring strict adherence to precedents , the NRB often casts aside jurisdictional determinations by staff and substantive decisions of the Commissions . Here are but a few examples of the ineffective or inappropriate role of the NRB on appeals : i) Mountain Top Inc "substantial change " jurisdictional determination as previously explained to the Committee by District 1 Coordinator William Burke ; ii)Smuggler's Notch Ski Resort where the NRB on appeal declined to support the District Commission effort to restore appropriate minimum flow in a high elevation stream being used for snow making withdrawals; iii) North East Materials Group Inc a case involving the introduction of an industrial scale aggregate crushing operation adjacent to the village of Graniteville and an erroneous "substantial change" jurisdiction determination requiring two appeals to the Supreme Court by residents lucky enough to have had *pro bono* representation by the Vermont Law School clinic.

D) The NRB has been less than proactive in utilizing its rule making authority and has acted in a manner inconsistent with the principles of transparent decision making and opportunity for public input under the Vermont Administrative Procedures Act . A current example is the effort to restructure the fundamental processing of applications as described in NRB Chair Snelling's December 13, 2019 memorandum to staff .