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Written Testimony by Joslyn Wilschek, Esq.

1. Background

I am an attorney in Montpelier with the law office Wilschek Iarrapino Law Office. Since 2005, I have worked with the Act 250 criteria in various ways. My practice focuses primarily on representing companies before the VT PUC, such as renewable energy companies, electric utilities, water companies, cable companies, etc. Some companies have 1 one employee, some have just a few and others have many. I have also represented applicants before Act 250 commissions and have represented companies before the Environmental Court and Supreme Court regarding Act 250 jurisdictional disputes.

In terms of my volunteer work that is related to this discussion:

Act 250: Appointed by Gov. Shumlin as an alternate District 5 Commissioner in 2016/2017 for a two-year term; Reappointed by Gov. Scott in Feb 1, 2019 and term expires Jan 31, 2020

Gov. Shumlin appointed me to the Human Services Board and I served one term - citizen panel to as a fair hearing board for appeals brought by y individuals who are aggrieved by decisions or policies of departments and programs within the Agency of Human Services. This is a regulatory board.

Vt Supreme Court appointed me to serve on the Vermont Board of Bar Examiners-entity charged with determining the eligibility of applicants as part of the admission process to the Vermont bar, in accordance with the Rules of Admission to the Bar of the Vermont Supreme Court. I have been a part of this Board for about 5 years.

2. The current system is not working for many reasons but two primary reasons I want to highlight: (1) there is no regional input in contested matters as once a party appeals a district commission (DC) decision, the DC decision goes into the recycling bin as the law does not require the NRB or the Court to give any deference to DC decision; (2) NRB inappropriately acts as rule maker, influencer, and party. See points below

3. About District 5 process and the substantial time. An alternate member in District 5 is no different than a Commissioner because D5 is so busy. I have revised dozens of permit applications and participated in about 5-8 hearings as Commissioner. I dedicate a substantial amount of time to reviewing applications and want to briefly tell you about the process. The district coordinator gets application and reviews for completeness. Once complete, that person sends application to us. The Commissioners determine whether a project is a minor or major. If a minor, we can still ask questions of the applicant; the district coordinator drafts permit and issues it. If it is a major, we generally issue a memo asking some questions of the applicant and often times of state agencies. We set a site visit and hearing date. For majors, it takes me about 3-4 hours to initially review the file to determine if there is additional info I need. To prepare for the hearing, we review the additional information and filing by other entities, and the Commissioners oftentimes will meet to prepare. This prep time takes about 2-5 hours. Then we go to the Site visit and hearings. The hearing can take anywhere from 1 hour to 5 hours, and in larger cases, hearings can occur over multiple nights. After the hearing, parties sometimes submit briefing or additional evidence. We review. The district coordinator writes the first draft of the final order and permit/or denial. I spent a substantial amount of time reviewing these drafts. So I would say I spend on larger cases, 20-40 hours on the case.

   There is no present requirement that district commissioners have any Act 250 experience, and many of them do not. The term limits in the current law result in a lack of institutional knowledge. Moreover, given that the time commitment is substantial if a commissioner if performing his/her job correctly, the retention time as a volunteer is low.

   Moving to a professional board will improve the lack of experience and institutional knowledge issue. To fully carry out the Act 250 goals, it is critical that the decision-makers, and not just the staff, have institutional knowledge.

   a. In appealed cases, District Commissioner's decisions have no role. In most contested cases (the cases where the public is most participatory), the Commissioners and parties spend a good amount of time and resources at the Commissioner level. But in most contested cases, the losing party appeals to the Env Court. When this occurs, all the work that the Commissioner have done as volunteers gets tossed aside. This is a disservice to the citizen volunteers and I also think at odds with the goal of having Commissioners, which is to provide a

regional perspective. Neither the NRB nor the Court needs to give any deference to any part of the Commission's decision. This process results in two primary problems: A waste of resources by all including state agencies such as ANR, Division of Historic sites, parties, Commissioners etc and if the legislature wants a regional perspective on a decision-maker level, it is not getting one.

One case example involves a review of a major project with many parties involved. The Commissioners spent a ton of time preparing for the hearing, the hearing occurred over a few nights, and working on the permit denial. I worked on it for about 40 hours all in. Lots of briefing by applicants' attorneys and opponents' attorneys, multiple nights hearings. Commissioners denied permit and went to ECourt. NRB did not defend Commissioners' decision. For efficiency, this project should have bypassed the Commissioners and review should have started at the E Court. In the new proposal, the new NRB Board could hear evidence in the first instance.

4. <u>The other primary tensions/problems that the Legislature needs to resolve is the NRB's role as rule maker, party/advocate, counselors.</u>

   a. NRB: The NRB acts as Act 250 rule maker-literally issues rules; they provide guidance to Commissioners in cases when requested, mostly on legal issues; they also act as a party. In a few situations, the NRB has instructed the Commissioners that they must issue a permit without any context such a permit must be issued because that is how every other District does things.

      If a party appeals an Act 250 Commission decision, or a jurisdictional decision, the NRB is a party in the Environmental Court. The NRB can settle a case-meaning if the Commission denied a permit-the NRB can decide not to defend the Commission and agree to issue the permit; or it can defend the Commission; or it can do something in between where it pushes for some condition and then settles; the Court then reviews the settlement.

      The NRB also acts a party outside of Act 250 proceedings. In the past year or so the NRB has sought to regulate renewable energy projects and all projects that need a Section 248 project where the Section 248 project is on land subject to an Act 250 permit. It moves to intervene in Section 248 proceedings and argues that the renewable energy project should not get a Section 248 CPG unless it complies with Act 250 permit conditions. There is a tension in the NRB acting as rule maker/advocate outside of Act 250 cases/advocate on appeal. The NRB has no expert staff such as scientists/ architects. The primary people are the director and attorneys. And yet, the NRB is making decisions in its role as a party in Act 250

appeals or a party in Section 248 proceedings on whether to oppose or support a project.

From a policy perspective, it is a waste of state resources for the NRB to participate in a PUC proceeding and contrary to the state's renewable energy goals. State policy for renewable energy is for these projects to be built on disturbed land, gravel sites, landfills, urban areas…many of which have Act 250 permits. The PUC is the judge and the legislature requires ANR and Agency of Ag to be parties. The Division of Historic sites is often a party. Towns and regional planning commissions can also be parties. All resources issues are being reviewed by experts such as ANR. The Environmental Court-Judge Durkin-ruled in 2006 that Section 248 applicants are not bound by Act 250 land use permits. Despite this ruling, and the fact that no statute authorizes the NRB to participate in Section 248 cases, the NRB asked the PUC to allow to be a party in all net-metering cases, and asked the PUC to require net-metering applicants to search for the Act 250 permits, and now the NRB is moving to intervene in any Section 248 case. Finding Act 250 permits is expensive for applicants given the unorganized nature of many of the Act 250 permits. Moreover, the NRB's actions essential forces renewable energy developers to settle or face years of litigation.

This makes no sense because the PUC should be reviewing the land anew with respect to how a Section 248 project will modify the land. It should not be tied to oftentimes outside Act 250 permit conditions nor should the applicant need to amend an Act 250 permit. For example, a decades-old Act 250 permit condition that requires a 50 foot stream buffer may not make sense anymore if the stream has dried up, if development has occurred in that buffer area, or in some instances, the buffer may need to be larger.

5. <u>Case example of how power is with NRB and Court.</u> As a commissioner, I reviewed an Act 250 application for a second family home subdivision. The proposal was to clear cut acres of trees on steep slopes about 15-30% and install a steep and long driveway. The Town Plan was very clear and stated that there shall be no roads or tree clearing on slopes greater than about 15% in this particular area. The commissioners denied the permit based on the town plan's clear language; spent a good amount of time reviewing case law and the town plan and took time writing the decision. The applicant appealed to the ECourt. All I saw ultimate was a one-two paragraph decision by Judge Walsh from the Court stating that the NRB had settled with the applicant and the permit was issued. The Court I recall said the parties agreed to one or two conditions none of which addressed the town plan. There was no discussion by the Court of the town plan. This example highlights a few things: the NRB acting as a party and ignoring the Commission's decision/no analysis by Court of town plan. Moreover, it begs the question of why did Commissioner's spend time on this? I also bring this up in terms of what is Act 250

supposed to protect. This development was the most impactful project I have seen as a commissioner. But now, Act 250 does not cover these types of projects any more because they are small subdivisions. I hope in terms of protecting forest fragmentation that Act 250 has jurisdiction over these projects.

New legislation addresses these tensions

As I read the new legislation, the NRB could not act as a party under any circumstances and I think that is an excellent move in terms of having a professional board that cannot discuss the matter with a party, removing redundancy in the PUC Section 248 review process of Act 250 criteria, and not having the NRB act as judge and party. In terms of renewable energy, the NRB should not be a road block. Even if the legislature does not do a major overhaul, it should remove NRB's ability to be a party.

The new NRB board could be more efficient for all if the most impactful major cases are heard by the full NRB. The new NRB board could make this decision at the outside, or in my experience at the PUC, sometimes the case will start off at the hearing officer level, and once the PUC realizes how major the case is, it will decide to step in a preside over the case/hear testimony. Other and most major cases are more run of the mill where the public does not participate and, can be heard by a hearing officer with final review by the NRB. In numerous cases before the PUC, the applicant and state agencies are the only parties and they settle, meaning they enter into memorandums of understanding (MOU). When this occurs, if the hearing officer decision does not materially differ from these settlements, there is no comment period on the hearing officer decision and the PUC can issue a permit quite promptly. The new NRB board can rely on MOUs as well to be efficient.

The issue with lack of retention and expertise would be addressed.

The lack of inconsistent decisions would be addressed, but note that hearing officers can also issue inconsistent decisions. However, the NRB board would address those decisions and should catch the bad decisions. The PUC, for example, has reversed hearing officers when a party raises the inconsistency.

The Public process can work even better under the new system. Prefiled testimony is a great vehicle for people who do not like to speak in public. It also helps organize a person's thoughts and allows the regulator to better understand someone's argument. The testimony can even be hand-written. If a public member does not want to be a party, they can submit a public comment that the NRB Board must consider. If that is not in the legislation, then it can be inserted.

In terms of various appeals to different entities, this is just a reality of doing business as many actions in Vermont require a permit. For most companies before the PUC that need a Section 248 CPG, they need to go to Vermont superior court for real estate issues such as boundary disputes or easement interpretation issues. Most Section 248 projects need a permit from ANR, such as a construction stormwater permit or wetland permit, A few years ago, the legislature

changed the law to require appeals of these permits or denials for certain Section 248 projects to go to the PUC (10 VSA section 8506). The legislature could consider doing something similar for Act 250. The reality is that very few ANR permits get appealed compared to the number of Act 250 applications, but perhaps the legislature could ask ANR for data on this point.

I am concerned about the opened ended bill back requirement as that is a problem for applicants before the PUC. There is no cap on bill backs, all agencies will bill back and the next thing you know, the case is very expensive for applicants. Consider capping bill back costs unless the agency can demonstrate to the NRB board the need to go over the cap and give the applicant the right to oppose. The initial burden to exceed the cap should be on the agency.