



**STATE OF VERMONT  
GENERAL ASSEMBLY**

**REPORT OF THE COMMISSION ON ACT 250:  
THE NEXT 50 YEARS  
PURSUANT TO 2017 ACTS AND RESOLVES NO. 47**

January 11, 2019

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## I. SUMMARY

### A. Structure of report

This report is submitted by the Commission on Act 250: The Next 50 Years (the Commission), which was created by 2017 Acts and Resolves No. 47 (Act 47).<sup>1</sup> The report concerns the statutes and program originally established by 1970 Acts and Resolves No. 250, now known as “Act 250” and codified at 10 V.S.A. chapter 151.

The report includes the following sections: this summary; a description of the Commission’s charge; a description of the Commission’s activities, including its public engagement process; and four sections on the tasks assigned to it by Act 47. These four sections consist of: (1) tasks related to the original goals of Act 250 and overarching issues, (2) issues on the Act 250 criteria, (3) issues on jurisdiction, and (4) issues on process, interface with other permitting programs and appeals.

### B. Summary of charge and process

Act 47 created a commission of six legislators to “review the vision for Act 250 adopted in the 1970s and its implementation with the objective of ensuring that, over the next 50 years, Act 250 supports Vermont’s economic, environmental, and land use planning goals.”<sup>2</sup> The Act also appointed advisors to provide assistance to the Commission, including representatives of State agencies, regional and municipal entities, and development and environmental interests. The list of appointed advisors is attached as Appendix 1.

As directed by Act 47, the Commission’s process included three phases that are described in Sections II and III of this report: a phase of gathering information on Act 250’s purpose, history, and implementation; a public engagement phase; and a phase of deliberation and report preparation.

Major themes that emerged from the public engagement process included the protection of Vermont’s ecosystems, supporting its pattern of compact centers surrounded by a rural landscape, and economic development that is consistent with these goals.

### C. Conclusions and recommendations

As explained below, the Commission’s conclusions are as follows:

Since Act 250 was enacted in 1970:

- Vermont’s per capita income, adjusted for inflation, has nearly tripled.

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<sup>1</sup>2017 Acts and Resolves No. 47 (Act 47), Sec. 2(a).

<sup>2</sup>Act 47, Sec. 1(b).

- Vermont's ranking among U.S. states for per capita annual income rose from 33 to 19.
  - Vermont's population has grown by nearly half and its workforce by more than half.
  - Vermont's unemployment rate has dropped from 8.7 percent in 1976 to 2.8 percent in August 2018.
- Vermont's rate of land development has substantially exceeded its rate of population growth, with land development growing at a rate of from 2.5 to six times its population growth since 1982.
  - The number of impaired waters has significantly increased, from 126 in 2002 to 224 in 2018.
  - Vermont also is experiencing significant creation of small parcels. From 2004 to 2016, 8,645 new parcels between zero and 10 acres in size were created in the State.
  - The effects of climate change are manifesting in Vermont, with warmer winters, longer summers, and an increase in major flood events such as Tropical Storm Irene.

The Commission recommends:

- Amending Act 250 to explicitly reference the goals of the Capability and Development Plan and the goals of municipal and regional planning contained in 24 V.S.A. § 4302(c).
- Amending the Capability and Development Plan to include a climate change goal and a goal regarding the utilization of natural resources.
- Amending the statutes to require that the county-level Capability and Development Plan maps created in the 1970s be updated for reference in Act 250 review.
- Reactivating the Development Cabinet.
- Requiring that regional plans be reviewed for consistency with the statutory goals for municipal and regional planning and that, to be used in Act 250, the regional plans must be approved as consistent with those goals.
- Amending the statute to require that municipal plans be consistent with those same statutory goals and that, to be used in Act 250, the plans must obtain approval from the regional planning commission as consistent with those goals.
- Three criteria be amended to address climate change issues.

- Updating Act 250's floodways criterion so that it applies to flood hazard areas and river corridors.
- Act 250's definitions of flood hazard area and river corridor be identical to those that govern the Agency of Natural Resource's (ANR) work and that the revised criterion specifically address fluvial erosion.
- Amending the energy conservation criterion to specifically reference energy efficiency.
- The standing committees of jurisdiction review the Act 250 criteria to determine if any can be updated to address climate change.
- Amending the transportation criterion to: (a) include review of the safety and congestion impacts to bicycle, pedestrian, and other transit infrastructure and (b) better define when it is appropriate for Act 250 to require projects to incorporate transportation demand strategies and require connectivity to transit services other than single-occupancy vehicles.
- Amending the public investment criterion, 9(K), to specifically refer to investments made through the State designation program, the Vermont Housing and Conservation Board, and similar programs that have been enacted since the criterion was written.
- Improving Act 250's plan conformance criterion by requiring that local plans must be consistent with the statutory goals for municipal and regional planning.
- Criteria be added to protect forest blocks and connecting habitat from fragmentation by adopting the changes contained in H.233 of 2017.
- That the applicant have the burden of proof on criterion 8(A).
- Establishing a multitiered approach toward Act 250 jurisdiction over commercial and industrial development, subdivisions, and housing units.
- Extending Act 250 jurisdiction to cover projects in interstate interchange areas.
- Clarifying the definition of "commercial purpose."
- The establishment of baselines for preexisting gravel pits and quarries.
- That the registered slate quarries be required to give notice of their operations to neighboring property owners.
- That registered slate quarries be added to the ANR Natural Resources Atlas.



- The exemption for slate quarries be repealed.
- The provision that allows quarries to be held in reserve without being considered abandoned be repealed.
- The repeal of the exemption for farming, logging, and forestry below 2,500 feet when these occur in areas that have been designated as critical resource areas.
- Consideration of a process under which release from jurisdiction could be obtained under specific circumstances.
- Further data collection, better permit tracking, addressing delayed applications, improving annual reports, and addressing District Commission variances in order to address the difficulties of conducting an Act 250–related statistical analysis.
- Raising the per diem amount paid to District Commissioners.
- Conformance of local and regional plans with future land use and facility maps.
- Clarifying criterion 10 to indicate that the written provisions should be applied unless they are shown not to meet the same standards of specificity that applies to statutes.
- Assigning risk of nonpersuasion to the appellant in an appeal.
- The Natural Resources Board (NRB) or its successor work with the other State agencies to create a predictable timetable for the permitting process.
- Act 250 appeals be heard by an administrative board that also has the existing functions of the NRB and that the board also hear appeals of ANR permit decisions.

The Commission’s recommended legislation is attached as Appendix 4. The draft legislation contains sections that require further discussion by the General Assembly.

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## II. DESCRIPTION OF CHARGE

As set forth in Act 47, the Commission's charge included three phases. The first was to undertake a "preliminary meeting phase" under which it became informed on the history, provisions, and implementation of Act 250.

The second phase was to conduct a public discussion phase, to be a series of informational and interactive meetings to engage Vermonters on their priorities for the future of Vermont's landscape, including how to maintain Vermont's environment and sense of place, and address relevant issues that have emerged since 1970.

The third phase was a deliberation and report preparation phase in which the Commission, with assistance from the appointed advisors, was to review and make recommendations related to a lengthy list of issues related to Act 250's goals, criteria, jurisdiction, and process.

The General Assembly added tasks to the third phase when it passed 2018 Acts and Resolves No. 194 (Act 194). Secs. 3 and 7 of that act assigned tasks to the Commission related to recreational trails and forest processing operations.

Through Sec. 22, Act 194 also required the Agency of Commerce and Community Development (ACCD) to consult with the Commission as part of ACCD's preparation of a report to other committees of the General Assembly on industrial park designation in rural areas of the State. However, Sec. 22 did not assign the Commission any specific tasks.

The full text of Act 47 is attached as Appendix 2. The text of Secs. 3, 7, and 22 of Act 194 is attached as Appendix 3.

In addition, in Sec. IV of this report, each of the tasks assigned to the Commission includes the relevant language from Act 47 and Act 194.

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### III. COMMISSION PROCESS

This section summarizes the process undertaken by the Commission. Minutes of the Commission's meetings are included in Appendix 7.

*Phase 1: Preliminary Meetings.* The Commission conducted Phase 1, the preliminary meeting phase, during adjournment between the 2017 and 2018 legislative sessions, with additional meetings during the 2018 session to prepare for the second phase of its work.

Starting in September 2017, the Commission met four times prior to the 2018 session. During these meetings, the Commission received information and recommendations from the Executive Branch working group referenced in Act 47<sup>3</sup>; data relating to the Act 250 program from the Natural Resources Board (NRB)<sup>4</sup>; information from the appointed advisors<sup>5</sup>; presentations by legislative counsel; and comments from members of the public. It also received input on conducting a public engagement process.

The Commission also met five times during the 2018 session. During this period, the Commission created subcommittees to inform the public engagement process and the Commission's deliberations. These subcommittees were: Appeals and Structures, Climate Change, Fragmentation and Settlement Patterns, Jurisdiction and Exemptions, and Water Quality. Each subcommittee included one Commission member as chair and multiple advisors. The Commission also issued a request for proposals for professional assistance in the public engagement process, met to discuss proposals received, and met with the selected contractor. The decision on the selected proposal was not unanimous. One member dissented.

*Phase 2: Public Discussion.* The Commission conducted Phase 2, the public discussion phase, after adjournment of the 2018 session. Public engagement meetings were conducted in Burlington, Island Pond, Manchester, Rutland, South Royalton, and Springfield. The combined attendee total for the meetings was 423.

At each public engagement meeting, a member of the Commission presented on the purpose of the forum and on the background of Act 250. Additional information was provided on Act 250 criteria, jurisdiction, and process. The selected contractor, Cope and Associates, explained the priority setting tool it uses, and facilitators led groups of forum participants in engagement on Act 250 using that tool. Forum attendees were also asked to complete individual preference surveys. If time allowed after completing the use of the tool and the survey, opportunity was provided for responses to participant questions.

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<sup>3</sup>Act 47, Sec. 1(c), 2(B)(iii).

<sup>4</sup>*Id.*, Sec. 2(B)(iv).

<sup>5</sup>*Id.*, Sec. 2(B)(v).

The Commission also conducted a web survey consisting of 28 questions related to Act 250 generally and specifically to participation in the application and appeals processes, to issues related to future resources that should be protected and to climate change, and to jurisdiction and exemptions. The Commission received 905 responses to the web survey.

In addition, the Commission offered the opportunity for submission of written comments by e-mail and received approximately 60 written comments.

Appendices 8 and 9 to this report are, respectively, the overall Community Input Report dated October 17, 2018 and received by the Commission from Cope and Associates at the conclusion of the public engagement process and the “Public Forum Commission Debriefs” sent by Cope and Associates to the Commission after each public engagement meeting.

Many written comments were received by the Commission outside of the public engagement process. They are posted on the Commission’s web page at the following link:

<https://legislature.vermont.gov/committee/document/2018.1/333/Subject/4206681#documents-section>

*Phase 3: Deliberation and Report Preparation.* After completing the public discussion phase, the Commission met nine times during the fall of 2018 to deliberate and prepare its report.

During this period, the Commission heard from Cope and Associates on its report of the public engagement process, legislative counsel on land use regulations in other jurisdictions and the relationship of Act 250 to ancillary permitting programs and presumptions created in Act 250 by other permits and approvals. It heard from witnesses on the development of the Capability and Development Plan in the 1970s and on the current development of the Vermont Conservation Design. The Commission also received a report from a State working group on recreational trails pursuant to Act 194, a copy of which is attached as Appendix 18.<sup>6</sup>

The Commission provided an opportunity for advisors to submit proposals and included the advisors in its deliberations. The Commission received proposals from the Vermont League of Cities and Towns, the Vermont Natural Resources Council, and the Vermont Planners Association. It also received various proposals from the Executive Branch, including a conceptual proposal presented by Diane Snelling, Chair of the NRB, and Peter Walke, Deputy Secretary of the Agency of Natural Resources (ANR), on behalf of multiple agencies; a proposal from ACCD regarding industrial parks in rural areas; a proposal from the Agency of Transportation (VTrans) to exempt its federally funded projects; and a proposal from the Agency of Agriculture, Food and Markets (AAFV) to exempt accessory on-farm businesses.

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<sup>6</sup>Act 194, Sec. 3 requires appending this report.

The Commission also solicited data on permit processing from the NRB, ANR, and municipalities.

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#### IV. TASK GROUP 1: THE FINDINGS AND THE CAPABILITY AND DEVELOPMENT PLAN; OVERARCHING ISSUES

##### A. Charges

Successful or unsuccessful in meeting goals. Act 47, Sec. 2(e)(2)(A) – “An evaluation of the degree to which Act 250 has been successful or unsuccessful in meeting the goals set forth in the Findings and the Plan.”

Changes since 1970. Act 47, Sec. 2(e)(2)(D) – “An examination of changes that have occurred since 1970 that may affect Act 250, such as changes in demographics and patterns and structures of business ownership.”

Revisions to plan. Act 47, Sec. 2(e)(2)(B) – “An evaluation of whether revisions should be made to the Plan.”

##### B. Facts/Background

###### 1. The 1970 Findings and 1973 Capability and Development Plan

In Act 47, “the Findings” means the four findings adopted in the eponymous “Act 250,” that is, Sec. 1 of 1970 Acts and Resolves No. 250.<sup>7</sup> Act 47 also defines “the Plan” to mean a series of 19 further legislative findings adopted in 1973, which the General Assembly stated constitutes the Capability and Development Plan called for by the 1970 legislation.<sup>8</sup>

In summary, the Findings from 1970 concluded that:

- unplanned and uncontrolled land use has resulted in development that may be destructive to the environment and unsuitable to the needs of Vermonters,
- comprehensive planning is necessary to guide the use of land,
- it was necessary to establish State commissions with authority to regulate the use in the State of the land and the environment, and
- the use of the land and the environment must be regulated to ensure that those uses are not unduly detrimental to the environment, promote orderly growth and development, and are suitable to the needs of Vermonters.

These findings were included verbatim in Act 47, which is attached as Appendix 2.

The 19 legislative findings from 1973 that constitute the Plan are more detailed and address the following topics:

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<sup>7</sup>2017 Acts and Resolves No. 47, Sec. 1(a)(3).

<sup>8</sup>Id., Sec. 1(a)(4); 1973 Acts and Resolves No. 85, Sec. 6.

- the capability of the land to support development;
- the use of natural resources, including agricultural and forest productivity, mineral resources, conservation of the recreational opportunities, and protection of the beauty of the landscape;
- public and private capital investment, including the demands placed on public services by development;
- planning for growth, including the issues of strip development and keeping village and town centers vital;
- seasonal home development;
- general policies for economic development;
- specific areas for resource development;
- planning for housing, including housing for residents of low or moderate income;
- resource use and conservation, including those resources protected under Act 250's Criteria 1 (air and water pollution) and 9 (capability and development plan);
- preserving the value and availability of outdoor recreational opportunities;
- protecting special areas, such as sites of historic, cultural, or archaeological value;
- controlling adverse effects on scenic resources;
- encouraging energy conservation;
- taxation of land;
- planning government facilities and public utilities based on reasonable growth projections;
- public facilities or services adjoining agricultural or forestry lands;
- planning for transportation and utility corridors;
- planning for integrated transportation systems; and
- planning for waste disposal.

The General Assembly also stated that the findings that constitute the Plan “shall not be used as criteria in the consideration of applications . . . ”<sup>9</sup> A copy of the Plan is attached in Appendix 5.

On the settlement patterns issue discussed later in this report, the Plan found that strip development and scattered residential development have economic and environmental costs, including costs to government and loss of agricultural land. It also found that village and town centers should be renovated for commercial and industrial development, where feasible, and that residential and other development should be located off the highways, near the village center.<sup>10</sup>

Act 250's ability to achieve the goals contained in the Findings and the Plan is necessarily limited because its jurisdiction is limited.<sup>11</sup> It is estimated that about 75 percent of development in Vermont is not subject to Act 250.<sup>12</sup>

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<sup>9</sup>1973 Acts and Resolves No. 85, Secs. 7, 10.

<sup>10</sup>*Id.*, Sec. 7(a)(4)(A), (B).

<sup>11</sup>10 V.S.A. §§ 6001, 6081.

With respect to planning goals enunciated in the Findings and the Plan, Act 250's authority to perform land use planning was repealed in 1984.<sup>13</sup> Its ability to facilitate achieving planning goals is primarily through a review criterion that requires conformance with local and regional plans.<sup>14</sup>

## 2. Changes Since 1970

Vermont's population grew from approximately 447,000 in 1970 to 627,000 in 2016.<sup>15</sup>

In January 1976, Vermont had a labor force population of 213,677, with 195,099 employed and 18,658 unemployed. The unemployment rate was 8.7 percent.<sup>16</sup>

In August 2018, Vermont had a labor force population of 348,192, with 338,297 employed and 9,895 unemployed. The unemployment rate was 2.8 percent.<sup>17</sup>

From 1970 to 2017:

- In constant dollars (2009, adjusted for inflation), Vermont's per capita annual income rose from approximately \$16,500 to approximately \$45,400.<sup>18</sup>
- In current dollars (not adjusted for inflation), Vermont's per capita annual income increased from approximately \$3,700 to approximately \$51,100.<sup>19</sup>
- As a percentage of U.S. annual per capita income, Vermont's annual per capita income increased from 88 to 101 percent.<sup>20</sup>

During that same period, Vermont's ranking among U.S. states for per capita annual income rose from 33 to 19.<sup>21</sup>

<sup>12</sup>R.M. Sanford and H.B. Stroud, "Evaluating the Effectiveness of Act 250 in Protecting Vermont Streams," *Journal of Environmental Planning and Management*. Vol. 43, No. 5 (2000).

<sup>13</sup>1984 Acts and Resolves No. 114, Sec. 5.

<sup>14</sup>10 V.S.A. § 6086(a)(10).

<sup>15</sup>Vt. Dept. of Health, Population of Vermont Towns 1930–2016 (Dec. 1, 2017); retrieved from [http://www.healthvermont.gov/sites/default/files/documents/xls/STAT Population of Vermont towns 1930-2016.xls](http://www.healthvermont.gov/sites/default/files/documents/xls/STAT%20Population%20of%20Vermont%20towns%201930-2016.xls), Nov. 2, 2018.

<sup>16</sup>U.S. Bureau of Labor Statistics, Data for Vermont, retrieved from <https://www.bls.gov/eag/eag.vt.htm> (click on back data), Nov. 2, 2018. January 1976 is the earliest date available from this site.

<sup>17</sup>*Id.*

<sup>18</sup>Regional Economic Analysis Project, Vermont vs. United States Comparative Trends Analysis: Per Capita Personal Income Growth and Change, 1958–2017, retrieved from <https://united-states.reaproject.org/analysis/comparative-trends-analysis/per-capita-personal-income/tools/500000/0/>, Nov. 5, 2018.

<sup>19</sup>*Id.*

<sup>20</sup>*Id.*

<sup>21</sup>Vt. Dept. of Labor, Economic and Labor Market Information, Per Capita Personal Income (Sep. 2018), retrieved from <http://www.vtlmi.info/pcpivt.xlsx>, Nov. 2, 2018.



Vermont's rate of land development has substantially exceeded its rate of population growth. Vermont land was developed at approximately 2.5 to three times the State's rate of population growth between 1982 and 2003.<sup>22</sup> From 2002 to 2007, the land development rate was approximately four times the rate of population growth, and from 2007 to 2012, it was approximately six times the rate of population growth.<sup>23</sup>

Impairment of Vermont waters remains significant:

- In 2002, the General Assembly found that in Vermont 126 surface waters were listed as impaired under the Clean Water Act.<sup>24</sup> In 2018, there are approximately 224 surface waters on ANR's lists of impaired waters prepared under that act.<sup>25</sup>
- The overall miles of Vermont rivers and streams impaired for one or more uses was reported as 311 in 2004 and 365.2 in 2016.<sup>26</sup>
- In January 2010, ANR reported that 17 of Vermont's waters were principally impaired for stormwater runoff.<sup>27</sup> In 2018, 17 Vermont waters are listed as principally impaired for stormwater runoff.<sup>28</sup>

Vermont also is experiencing significant creation of small parcels. From 2004 to 2016, 8,645 new parcels between zero and 10 acres in size were created in the State.<sup>29</sup>

Environmental regulation and permitting has changed since Act 250 was first enacted. Major federal environmental permit programs like the Clean Air Act, the Clean Water Act, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) went into effect after Act 250. Act 250 was the primary environmental protection law during the early 1970s. Since then, both the federal and State permitting processes have expanded.

### C. **Discussion and Recommendation**

Vermont has prospered since Act 250 passed in 1970. Its per capita income, adjusted for inflation, has nearly tripled. Its population has grown by nearly 50 percent

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<sup>22</sup>Vt. Forum on Sprawl, Exploring Sprawl, Issue 6 at 2 (Aug. 1999); V. Bolduc and H. Kessel, Vermont in Transition: A Summary of Social Economic and Environmental Trends at 36 (Dec. 2008).

<sup>23</sup>B. Shupe, Powerpoint Presentation (Oct. 26, 2018).

<sup>24</sup>2002 Acts and Resolves No. 109, Sec. 1(7).

<sup>25</sup>State of Vermont, 303(d) Lists of Impaired Waters, Parts A, B, and D (Sep. 2018).

<sup>26</sup>Vt. Dept. of Environmental Conservation (DEC), 2004 Water Quality Assessment Report (305b Report) at 27; 2016 Water Quality Integrated Assessment Report at 28. The 2018 Vermont water quality assessment or 305b report is not readily comparable to the 2004 305b report because the 2018 report: (a) is based on a splitting of one former aquatic use into separate uses and a renaming of several other uses and (b) does not state overall impairment data for rivers and streams. DEC, State of Vermont Water Quality Integrated Assessment Report 2018 at 25, 26.

<sup>27</sup>Vt. ANR, Annual Report on the Management of Stormwater Impaired Waters in Vermont at 2 (Jan. 2010).

<sup>28</sup>State of Vermont, 303(d) Lists of Impaired Waters, Parts A and D (Sep. 2018).

<sup>29</sup>J. Fidel, K. McCarthy, and B. Voight, Tracking Parcelization Over Time: Updating the Vermont Database to Inform Planning and Policy (Phase III Report) at 17 (Sep. 2018).

and its labor force by more than 50 percent. The State's unemployment rate has dropped from 8.7 percent in 1976 to 2.8 percent today.

At the same time, Vermont has developed land at a much faster rate than its population has grown. It has seen the creation of thousands of new, smaller parcels across the State and, as discussed in Sec. V.C., below, it is now experiencing a decline in the acreage covered by forests. The number of Vermont waters that are impaired for one or more pollutants has increased substantially and the State's efforts to achieve and maintain water quality standards have not reversed that trend. In addition, as discussed in Sec. V.A.3. below, Vermont has begun to experience significant impacts from climate change.

Act 250 has had limited success at addressing these trends or achieving the goals of the Findings and the Capability and Development Plan. It was not set up to address climate change. The removal of its planning function in the 1970s has required the Act 250 program to rely on its regulatory functions to achieve the goals of the Act, but its regulatory authority is necessarily limited by the scope of its jurisdiction.

The Commission recommends several measures to increase Act 250's ability to achieve its goals and to address emerging trends such as climate change. They include:

- *Referencing goals in statute.* Act 250 should explicitly reference the goals as stated in the Capability and Development Plan. In addition, Act 250 should reference the specific goals for municipal and regional planning contained in 24 V.S.A. § 4302(c). These goals should guide the interpretation and implementation of the Act.
- *Climate change.* The General Assembly should amend the Capability and Development Plan to include a goal for climate change. The goal would be to minimize emissions of greenhouse gases and ensure that the design and materials used in development enable projects to adapt to climate change. The General Assembly also should amend the Act 250 criteria specifically to address issues related to climate change. These recommendations are discussed further in Sec. V.A.4., below.
- *Ecosystem protection.* The General Assembly should amend the Capability and Development Plan's goal regarding utilization of natural resources to also include ecosystem protection. The Plan should recognize that the environment does not only provide resources to be used. It also provides an integrated system of services that clean water, purify air, maintain soil, regulate the climate, recycle nutrients, and provide food and other benefits. Healthy ecosystems support multiple forms of life and sustain human civilization and economic activity.
- *Forest fragmentation.* The General Assembly should add criteria to Act 250 that protect forest blocks and connecting habitat. This recommendation is discussed further in Sec. V.C., below. Protecting forest blocks not only protects the forests and their ecosystems, but also relates to climate change because it protects areas that capture and absorb carbon dioxide.
- *Revising jurisdiction.* The General Assembly should increase the alignment of Act 250 jurisdiction with the goals of supporting Vermont's settlement pattern of

compact centers surrounded by rural countryside and of protecting the State's ecosystems and natural resources. It should also provide for Act 250 jurisdiction in the area of interstate interchanges. These recommendations are discussed further in Sec. VI.A.3., below.

- *Role of land use planning; coordination.* To improve not only Act 250's ability to achieve statutory goals, but also consistency and predictability in the process:
  - The General Assembly should amend the statutes to require that the county-level Capability and Development Plan maps created in the 1970s be updated for reference in Act 250 review to include environmental constraints, existing settlements, critical resource areas, facilities and infrastructure, and areas targeted for conservation, public investment, and development.
  - The Executive Branch should reactivate the Development Cabinet established by statute.<sup>30</sup>
  - The General Assembly should pass a statutory amendment requiring that regional plans be reviewed for consistency with the statutory goals for municipal and regional planning and that, to be used in Act 250, the regional plans must be approved as consistent with those goals.
  - The General Assembly should amend the statute to require that municipal plans be consistent with those same statutory goals and that, to be used in Act 250, the plans must obtain approval from the regional planning commission as consistent with those goals.
  - The Natural Resources Board or its successor should work with the other State agencies to create a predictable timetable for the permitting process. Applicants must receive multiple permits when seeking an Act 250 permit and having a consistent timetable for all permits needed would make the Act 250 permitting process more predictable.

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<sup>30</sup>3 V.S.A. § 2293.

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## V. TASK GROUP 2: ISSUES ON THE CRITERIA

### A. Revising criteria with respect to issues emerging since 1970 such as climate change

#### 1. Charge

Act 47, Sec. 2(e)(2)(C)(i) – “Whether the criteria reflect current science and adequately address climate change and other environmental issues that have emerged since 1970. On climate change, the Commission shall seek to understand, within the context of the criteria of Act 250, the impacts of climate change on infrastructure, development, and recreation within the State, and methods to incorporate strategies that reduce greenhouse gas emissions.”

#### 2. Summary List of Criteria

A summary list of the criteria is as follows, with their full text attached as Appendix 6:

- (1) Undue water or air pollution
  - (A) Headwaters
  - (B) Waste disposal
  - (C) Water conservation
  - (D) Floodways
  - (E) Streams
  - (F) Shorelines
  - (G) Wetlands
- (2) Sufficient water available
- (3) Unreasonable burden on an existing water supply
- (4) Unreasonable soil erosion or reduction in the capacity of the land to hold water
- (5) Traffic
  - (A) Unreasonable congestion or unsafe conditions with respect to transportation
  - (B) Incorporate transportation demand management strategies
- (6) Unreasonable burden on the ability of a municipality to provide educational services
- (7) Unreasonable burden on the ability of the local governments to provide municipal or governmental services
- (8) Undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas
  - (A) Necessary wildlife habitat and endangered species
- (9) Capability and development plan
  - (A) Impact of growth
  - (B) Primary agricultural soils

- (C) Productive forest soils
  - (D) Earth resources
  - (E) Extraction of earth resources
  - (F) Energy conservation
  - (G) Private utility services
  - (H) Costs of scattered development
  - (J) Public utility services
  - (K) Development affecting public investments
  - (L) Settlement patterns
- (10) Conformance with local or regional plan or capital program

The Vermont Supreme Court has ruled that the Act 250 program may go beyond the criteria listed above and may consider any factor related to the environmental impacts of the project before it. “[W]e note that the purposes of Act 250 are broad: “to protect and conserve the environment of the state.” [Citation omitted.] To achieve this far-reaching goal, the Environmental Board is given authority to conduct an independent review of the environmental impact of proposed projects, and in doing such, the Board is not limited to the considerations listed in Title 10. See 10 V.S.A. § 6086(a)(1).”<sup>31</sup>

### 3. Facts

Climate change poses serious risks to human health, functioning ecosystems that support a diversity of species and economic growth, and Vermont’s agricultural, forestry, tourist, and recreation industries. These risks include an increase in extreme weather events, the frequency and intensity of flooding, and record-breaking high temperatures, as well as in tick-borne diseases and invasive species.<sup>32</sup>

Vermont also may become a receiving state for climate refugees as Northeast coastal populations are increasingly impacted by rising sea levels.<sup>33</sup>

Climate change is now affecting Vermont, with significant and accelerating increases in the state’s average temperature; longer, hotter summers and shorter winters; increased annual precipitation; and more frequent major storm and flooding events, such as 2011’s Tropical Storm Irene.<sup>34</sup>

The primary driver of climate change in Vermont and elsewhere is the increase of atmospheric carbon dioxide from the burning of fossil fuels, which has a warming effect

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<sup>31</sup>In re Hawk Mountain Corp., 149 Vt. 179, 184 (1988).

<sup>32</sup>30 V.S.A. § 255(a)(2); Vermont Climate Action Commission, Final Report at 1–2 (July 31, 2018); U.S. EPA, “What Climate Change Means for Vermont” (Aug. 2016); Gund Institute, Vermont Climate Assessment at 10–14 (2014).

<sup>33</sup>Gund Institute, Vermont Climate Assessment at 122.

<sup>34</sup>Id. at 10–11.

that is amplified because atmospheric water vapor, another greenhouse gas, increases as temperature rises.<sup>35</sup>

Major sources of Vermont's greenhouse gas emissions are the consumption of fossil fuels for transportation, for residential and commercial uses such as heating buildings and water, and for agriculture and industrial processes. Vermont's greenhouse gas emissions increased from approximately nine million metric tons (MMT $\text{CO}_2$ ) in 1990 to 10 million MMT $\text{CO}_2$  in 2015, with a peak of just under 11 million MMT $\text{CO}_2$  in 2004.<sup>36</sup>

For developments and subdivisions within Act 250's jurisdiction, the statute provides, through its review criteria, authority over the construction, operation, and maintenance of a project, including its buildings and uses. This authority includes air pollution, energy use, and traffic generated. Only the energy conservation criterion references greenhouse gas emissions, doing so through a statement that the principles of energy conservation include reducing greenhouse gas emissions from energy use. Otherwise, this authority does not specifically address greenhouse gas emissions from the project or its associated traffic or the ability of the project to adapt to climate change impacts.<sup>37</sup>

Act 250 does have authority to review issues related to projects in floodways through its floodways subcriterion, which has not been amended since 1973.<sup>38</sup> This criterion therefore does not necessarily reflect recent work by the Agency of Natural Resources (ANR) on river corridor and floodplain protection and flood readiness.<sup>39</sup>

#### 4. Discussion and Recommendation

Act 250 currently *may* consider issues related to climate change through the existing criteria and its ability to go beyond the criteria in assessing environmental impacts. But the ability to review these issues is not the same as a required review. Climate change is an overarching global trend that carries significant ramifications for Vermont. Its impacts are being felt now.

The Commission therefore recommends that Act 250's criteria be amended with respect to climate change issues. The Commission recommends amending three criteria at this time, with the possibility of exploring other criteria for future amendment.

First, the Commission recommends separating Act 250's air pollution criterion from its water pollution criterion and including, within air pollution, an initial subcriterion that

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<sup>35</sup>30 V.S.A. § 255(a)(1); 2013 Acts and Resolves No. 89, Sec. 1; U.S. EPA, "What Climate Change Means for Vermont" (Aug. 2016); Vt. Dept. of Public Service, 2016 Comprehensive Energy Plan at 28, Sec. 3.2.

<sup>36</sup>2013 Acts and Resolves No. 89, Sec. 1; Vermont Climate Action Comm., Final Report at 2-3 (July 31, 2018).

<sup>37</sup>10 V.S.A. § 6086(a).

<sup>38</sup>10 V.S.A. § 6086(a)(1)(D); 1973 Acts and Resolves No. 85, Sec. 10.

<sup>39</sup>10 V.S.A. chapter 32; Vt. ANR, River Corridor and Flood Protection, program description, retrieved from <https://dec.vermont.gov/watershed/rivers/river-corridor-and-floodplain-protection>, Nov. 7, 2018; State of Vermont, Flood Ready Vermont, retrieved from <https://floodready.vermont.gov/>, Nov. 7, 2018.

addresses compliance with air pollution control regulations and another subcriterion that addresses climate change specifically.

The climate change subcriterion would establish a hierarchy of avoiding, minimizing, and mitigating greenhouse gas emissions from the construction, use, operation, and maintenance of the development or subdivision and the vehicular traffic that it generates. The applicant would first seek to avoid greenhouse gas emissions from the project. To the extent avoiding them is not feasible, they would be minimized. If it is not feasible to avoid or minimize the greenhouse gas emissions, mitigation would be required. This standard would allow for the use of offsets, such as carbon sequestration in Vermont, if they are verifiable and enforceable. Such a standard therefore could provide additional value to maintaining land as working forest.

The climate change subcriterion also would require the use of design and materials that are sufficient to enable the improvements to be constructed, including buildings, roads, and other infrastructure, to withstand and adapt to the effects of climate change reasonably projected at the time of application.

Second, because climate change increases the risk of major flood events in Vermont, the Commission recommends updating Act 250's floodways criterion so that it applies to flood hazard areas and river corridors. In response to the actualization of this climate change risk through recent events such as Tropical Storm Irene, ANR's work on flood readiness has focused not only on flood hazard areas, but also on river corridors, including, particularly, the issue of fluvial erosion events in those corridors. The Commission proposes that Act 250's definitions of flood hazard area and river corridor be identical to those that govern ANR's work and that the revised criterion specifically address fluvial erosion.

Third, the Commission recommends amending Act 250's energy conservation criterion to specifically reference energy efficiency.

Some stakeholders have recommended a further study committee that might result in additional suggested changes to Act 250 with respect to climate change. The Commission recommends that the standing committees of jurisdiction review other Act 250 criteria that might be updated to address climate change and consider further amendments.

B. **Settlement patterns and the criteria**

1. **Charge**

Act 47, Sec. 2 (e)(2)(C)(ii) – “Whether the criteria support development in areas designated under 24 V.S.A. chapter 76A, and preserve rural areas, farms, and forests outside those areas.”

2. **Facts/Background**

a) *Overview*

Vermont statute and policy seek to maintain a pattern of compact village and urban centers surrounded by countryside because of that pattern’s contribution to the character of the State and its economic and environmental benefits when contrasted with development that is scattered across the landscape. For example, the Department of Housing and Community Development (DHCD) has provided an estimate that the total annual cost to a Vermont town to provide services to a household is \$1,416 in a downtown as opposed to \$3,462 in rural and suburban areas.<sup>40</sup>

DHCD also has provided estimates showing that median annual household vehicle miles decrease significantly for residents of designated downtowns and neighborhoods and those living within a half mile of downtowns.<sup>41</sup> One can therefore infer that promoting this settlement pattern avoids fossil fuel emissions such as greenhouse gases. Total energy costs for households living within one-half mile of designated downtowns are reduced by 16 to 31 percent in comparison to other households.<sup>42</sup>

Land in urban and village centers tends to support greater numbers of individuals and jobs and to be more valuable for property tax purposes than land outside those centers. It is estimated that an acre of impervious surface inside the centers supports 12 individuals and 10.67 jobs, while an acre of impervious surface outside the centers supports five individuals and 2.23 jobs.<sup>43</sup> For example, a mixed use property on 0.12 acres in a downtown district had \$154,820 per acre property tax value while the same value for box stores on 65.8 acres outside an urban center was \$4,310 per acre.<sup>44</sup>

Vermont has long recognized the importance of settlement patterns.<sup>45</sup> As described above, the 1973 Capability and Development Plan included findings directly relevant to this issue. Further, in 1988’s Act 200, the General Assembly adopted a goal for regional and municipal planning to support Vermont’s historic settlement pattern of compact village and urban centers surrounded by countryside. This goal is one of the goals for regional and

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<sup>40</sup>C. Cochran and D. Azaria, Powerpoint: State Designation Programs (Dec. 13, 2017)

<sup>41</sup>Id.

<sup>42</sup>J. Adams, Powerpoint, Settlement Patterns in Vermont (Oct. 26, 2018).

<sup>43</sup>Id.

<sup>44</sup>Id.

<sup>45</sup>Vt. Council on Planning, Vermont By Design, at 7 (Jan. 2006)



municipal planning codified at 24 V.S.A. § 4302.<sup>46</sup> As subsequently amended, this goal includes encouraging intensive residential development in areas related to community centers, discouraging strip development along highways, and encouraging economic growth in existing village and urban centers and in designated growth centers.<sup>47</sup>

b) *State Designation Program*

In 1998, the General Assembly adopted a designation program under 24 V.S.A. Chapter 76A, which states a purpose to support the State's historic downtowns and villages through the designation process and its benefits and to encourage a large percentage of future growth in designated growth centers.<sup>48</sup>

The program provides for designations of downtowns, village centers, new town centers, growth centers, and neighborhood development areas. It seeks to provide incentives, align policies, and give Vermont communities the technical assistance needed to encourage new development and redevelopment in compact, designated areas. The program's incentives are for both the public and private sector within the designated area, including tax credits for historic building rehabilitations and code improvements, permitting benefits for new housing, funding for transportation-related public improvements and priority consideration for other state grant programs.<sup>49</sup>

To obtain designations under the program, the municipal planning process for the relevant town must be confirmed by the regional planning commission as consistent with the planning goals of 24 V.S.A. § 4302.<sup>50</sup>

As of 2017, the program had designated 23 downtowns, 124 village centers, two new town centers, six growth centers, and five neighborhood development areas.<sup>51</sup>

c) *Act 250 and State Designation Program Interface*

Act 250 currently interfaces with the State designation program in several ways. First, Act 250 provides for offsite mitigation of primary agricultural soils if the project is in a designated downtown district, growth center, new town center designated on or before January 1, 2014, or neighborhood development area associated with a downtown development district.<sup>52</sup>

Second, in 2014, the General Assembly created a settlement patterns criterion within Act 250 that states a goal to promote Vermont's historic settlement pattern. This

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<sup>46</sup>1988 Acts and Resolves, No. 200, Sec. 7, amending 24 V.S.A. § 4302.

<sup>47</sup>24 V.S.A. § 4302(c)(1).

<sup>48</sup>24 V.S.A. § 2790(b)(1), (d)(1).

<sup>49</sup>24 V.S.A. chapter 76A; Vt. DHCD, State Designation Programs, overall description, retrieved from <https://accd.vermont.gov/community-development/designation-programs>, Nov. 7, 2018.

<sup>50</sup>24 V.S.A. §§ 2793(b)(3), 2793a(a), 2793b(b)(1), 2793c(c)(3), 2793e(a), 4350.

<sup>51</sup>Vt. DHCD, State Designation Programs Overview (2017).

<sup>52</sup>10 V.S.A. § 6086(a)(9)(B), (C).

criterion, known as Criterion 9(L), requires Act 250 projects outside “existing settlements” to make efficient use of land, energy, and infrastructure and to show that they will not contribute to strip development. The statute defines “existing settlement” to include areas designated under the State designation program as well as other existing compact centers.<sup>53</sup> 10 V.S.A. § 6001 states in relevant part:

(16)(A) “Existing settlement” means an area that constitutes one of the following:

(i) a designated center; or

(ii) an existing center that is compact in form and size; that contains a mixture of uses that include a substantial residential component and that are within walking distance of each other; that has significantly higher densities than densities that occur outside the center; and that is typically served by municipal infrastructure such as water, wastewater, sidewalks, paths, transit, parking areas, and public parks or greens.

(B) Strip development outside an area described in subdivision (A)(i) or (ii) of this subdivision (16) shall not constitute an existing settlement.

In turn, “designated center” means “a downtown development district, village center, new town center, growth center, Vermont neighborhood, or neighborhood development area designated under 24 V.S.A. chapter 76A.”<sup>54</sup>

Third, an Act 250 project that is not physically contiguous to an “existing settlement” as defined above must meet the criterion on the costs of scattered development, known as Criterion 9(H). This criterion requires the applicant to show that the direct and indirect public costs of the project do not outweigh its public benefits including tax revenue and employment opportunities.<sup>55</sup>

Fourth, development in a designated downtown district that is subject to Act 250 may seek findings of fact and conclusions of law in lieu of issuance of a permit or permit amendment using an expedited process that does not require an application fee and that reviews the project under many but not all of the Act 250 criteria.<sup>56</sup>

Fifth, a municipality may seek findings of fact and conclusions of law under Act 250 from the NRB for a designated growth center within the municipality. A master plan permit also may be sought for all or part of a growth center.<sup>57</sup>

Sixth, projects in a designated neighborhood development area that are subject to Act 250 pay 50 percent of the otherwise required application fee.<sup>58</sup>

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<sup>53</sup>2014 Acts and Resolves No. 147, Secs. 1 and 2, amending 10 V.S.A. §§ 6001(16) and 6086(a)(9)(L).

<sup>54</sup>10 V.S.A. § 6001(30).

<sup>55</sup>10 V.S.A. § 6086(a)(9)(H).

<sup>56</sup>10 V.S.A. § 6086b.

<sup>57</sup>24 V.S.A. § 2793c(f), (i)(5).

<sup>58</sup>10 V.S.A. § 6083a(d).

Finally, the Act seeks to encourage mixed income housing and mixed use development in designated areas through its provisions regarding “priority housing projects,” which are mixed income housing or mixed use projects located in areas designated by the State designation program.<sup>59</sup> These provisions exempt priority housing projects located in designated downtowns and several of the other available designations if the municipality has population of 10,000 or more. They also reduce Act 250 jurisdiction over priority housing projects in designated areas located in smaller municipalities.<sup>60</sup>

As of 2017, DHCD estimated that the “priority housing project” provisions supported the development of 586 housing units, saved an average of \$50,000 in permit fees per project, and reduced permit timelines an estimated average of seven months.<sup>61</sup>

d) *Outside Designated Areas and Existing Centers*

DHCD indicates that the areas designated by the State designation program comprise 1/400th of the total area of Vermont.<sup>62</sup>

The NRB has provided a map entitled “Vermont Act 250 Permit Distribution.” When compared to a map of areas designated by the State designation program, the NRB’s map indicates significant distribution of Act 250 permits outside the designated areas. The NRB’s map also indicates scattered distribution of Act 250 permits across the State, with linear distributions that appear to correspond to highways or valley locations and clusters in and around various parts of the State that are more urbanized.<sup>63</sup>

Two of the Act 250 criteria specifically address development outside the areas designated by the State designation program: Criterion 9(H) on the costs of scattered development and Criterion 9(L) on settlement patterns. Each of these criteria applies if a project subject to Act 250 is outside an existing settlement, and the term “existing settlement” includes the areas designated by the program as well as other existing compact centers.<sup>64</sup>

When Act 250 has jurisdiction over a project outside the designated areas and other existing centers, various additional criteria may act to provide protection to farms and forests affected by the project as well as the rural qualities of the project area, if any. These criteria include wetlands, scenic beauty and aesthetics, rare and irreplaceable natural areas, necessary wildlife habitat, primary agricultural soils, and productive forest soils.<sup>65</sup>

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<sup>59</sup>10 V.S.A. § 6001(35).

<sup>60</sup>10 V.S.A. § 6001(3)(A)(iv), (3)(D)(viii), (27), (28), (29), (35).

<sup>61</sup>C. Cochran and D. Azaria, Powerpoint: State Designation Programs (Dec. 13, 2017)

<sup>62</sup>*Id.*

<sup>63</sup>Vt. Natural Resources Board, map. “VT Act 250 Permit Distribution (produced Aug. 30, 2017); Vermont Planning Atlas Map, Designation Layer (generated Oct. 24, 2018).

<sup>64</sup>10 V.S.A. §§ 6001(16), 6086(a)(9)(H), (9)(L).

<sup>65</sup>10 V.S.A. § 6086(a)(1)(G), (8), (8)(A), (9)(B), (9)(C).

When Act 250 does not have jurisdiction over a project outside the designated areas and existing centers, the Act 250 criteria do not apply, although a municipality may choose to adopt them for conditional use review.<sup>66</sup>

Available data show that, statewide from 2008 to 2018, 83 percent of new residential structures and 60.63 percent of commercial structures were located outside existing centers.<sup>67</sup> The spread of residential development outside the centers is underscored by map comparisons of Vermont's population distribution, which show that Vermont's daytime population is much more concentrated in the centers than its 24-hour population distribution.<sup>68</sup>

Available data also show that, statewide from 2004 to 2016, Vermont lost 147,684 acres or approximately 15 percent of its undeveloped woodland parcels, and 53,406 acres, or 9.3 percent, of its farmland parcels to public ownership or another land classification.<sup>69</sup> During the same period, the acreage classified as residential use increased by 162,670 acres, or seven percent.<sup>70</sup>

### 3. Discussion and Recommendation

Many of Vermont's downtowns and village centers remain vibrant and have been assisted in doing so by the State designation program. But the data above suggest that Vermont is not meeting its settlement pattern goals, with the majority of development occurring outside existing centers and with the loss of significant percentages of woodland and farmland in recent years.

The Act 250 criteria themselves support achievement of those goals in many ways that are detailed above. There are also a number of changes that could be made to the criteria to improve this support.

First, the Commission recommends that criteria be added to protect forest blocks and connecting habitat from fragmentation. These criteria would increase the protection of the working forests that form an important part of the settlement patterns goal. This recommendation is detailed in Section V.C.3., below.

Second, other criteria can be enhanced in ways that are relevant to supporting Vermont's desired settlement patterns. The Commission recommends amending the transportation criterion to: (a) include review of the safety and congestion impacts to bicycle, pedestrian, and other transit infrastructure and (b) better define when it is appropriate for Act 250 to require projects to incorporate transportation demand strategies and require connectivity to transit services other than single-occupancy vehicles.

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<sup>66</sup>10 V.S.A. §§ 6001, 6081, 6086; 24 V.S.A. § 4414(3)(C).

<sup>67</sup>J. Adams, Powerpoint, Settlement Patterns in Vermont (Oct. 26, 2018).

<sup>68</sup>Id.

<sup>69</sup>Fidel, McCarthy and Voight, Phase III Report at 24. A portion of the undeveloped woodland parcels was transferred to public land.

<sup>70</sup>Id.

The Commission also recommends amending the public investment criterion to specifically refer to investments made through the State designation program, the Vermont Housing and Conservation Board, and similar programs that have been enacted since the criterion was written.

Third, the Commission recommends improving Act 250's plan conformance criterion by requiring that, to be used in Act 250, local plans must be consistent with the statutory goals for municipal and regional planning, which include supporting compact centers surrounded by rural countryside. Such a change would strengthen the nexus between local plans used in Act 250 and that goal.

Although these changes to the criteria can improve Act 250's support for Vermont's settlement patterns goal, Act 250 only applies its criteria to projects over which it has jurisdiction. In Sec. VI.A.3., below, the Commission recommends a multitiered approach to changes to Act 250 jurisdiction that encourages the settlement goals.

### C. **Forest fragmentation**

#### 1. Charge

Act 47, Sec. 2(e)(2)(C)(iii) – “Whether the criteria support natural resources, working lands, farms, agricultural soils, and forests in a healthy ecosystem protected from fragmentation and loss of wildlife corridors.”

#### 2. Facts

The area in Vermont covered by forests is declining. The U.S. Forest Service reports that Vermont lost five percent of its forest parcels over 100 acres between 2001 and 2006<sup>71</sup> and an estimated 2.2 percent, or 102,000 acres, of forestland between 2012 and 2017.<sup>72</sup> In Vermont, between 2004 and 2016, the amount of undeveloped woodland in parcels 50 acres or larger decreased by 124,845 acres.<sup>73</sup> As stated above, between 2004 and 2016, Vermont lost 147,684 acres of its undeveloped woodland parcels to public ownership or other land classifications.<sup>74</sup>

In addition, land subdivision is on the increase. From 2002 to 2009, 2,749 lots were created from 925 subdivisions affecting a total of 70,827 acres of land in 22 case study towns. Based on spatial analysis in four case study towns, between 50 percent and 68.8 percent of those subdivisions were located within wildlife habitat blocks mapped by the Agency of Natural Resources.<sup>75</sup> Between 2004 and 2016, the number of parcels of land between zero and 10 acres increased by 8,695 parcels.<sup>76</sup> During the same period, the per-acre value of land in Vermont nearly doubled.<sup>77</sup> As land values increased, the number of parcels less than 50 acres increased as well, further dividing the land.<sup>78</sup>

“Forest fragmentation is the breaking of large, contiguous, forested areas into smaller pieces of forest. Typically, these pieces are separated by roads, agriculture, utility corridors, subdivisions, or other human infrastructure development.”<sup>79</sup> Fragmentation isolates forest patches and prevents the movement of plants and animals. This interrupts natural processes, like breeding and gene flow, leading to population decline.<sup>80</sup>

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<sup>71</sup>Vermont Forest Partnership Memorandum at 2 (Sep. 14, 2018).

<sup>72</sup>Morin et al (2017). Forests of Vermont, 2016. Resource Update FS-119, available at [https://www.fs.fed.us/nrs/pubs/ru/ru\\_fs119.pdf](https://www.fs.fed.us/nrs/pubs/ru/ru_fs119.pdf).

<sup>73</sup>Fidel, McCarthy, and Voight, Phase III Report at 27.

<sup>74</sup>*Id.* A portion was transferred to public land.

<sup>75</sup>VNRC, Informing Land Use Planning and Forestland Conservation Through Subdivision and Parcelization Trend Information at 15 (May 2014).

<sup>76</sup>Fidel, McCarthy and Voight, Phase III Report at 17.

<sup>77</sup>*Id.* at 44.

<sup>78</sup>*Id.* at 45.

<sup>79</sup>Vt. Dept. of Forests, Parks and Recreation, 2015 Forest Fragmentation Report at 23.

<sup>80</sup>*Id.* at 33.

Fragmented forest patches run a higher risk of shifting toward edge-adapted and invasive species. This puts the health of trees and other plants at significant risk.<sup>81</sup>

Poor forest health hurts Vermont’s economic interests, including particularly its forest products and tourism industries. “Fragmentation of Vermont forests presents a significant threat to the operability and economic viability of the forest products economy. As forest fragments become ever smaller, practicing forestry within them becomes operationally impractical, economically non-viable, and culturally unacceptable.”<sup>82</sup> Tourism in Vermont often centers on the natural beauty of the state. “Changes in scenic quality and recreational opportunities—owing to loss of open space, decreased parcel size, and fragmentation—degrades the recreational experience and lead to increased likelihood of land-use conflicts.”<sup>83</sup>

### 3. Discussion and Recommendation

In 2017, the House passed H.233, entitled an act relating to protecting working forests and habitats. The bill proposed to amend the Act 250 criteria in order to protect forest resources and support the forest economy, water quality, and habitat connectivity. It proposed adding criteria 8(B) and (C), which would require projects subject to the Act to avoid, minimize, or mitigate fragmentation of, respectively, forest blocks and habitat connectors. The Commission recommends that the changes to Act 250 contained in H.233 be adopted in order to protect against further fragmentation of Vermont’s shrinking forests and habitat.<sup>84</sup>

H.233 included a proposal that the applicant should have the burden of proof on the new criteria 8(B) and (C). However, some witnesses have pointed out that today the party opposing the application has burden of proof under criterion 8(A), necessary wildlife habitat, and argue that this burden of proof should be on the applicant as well. Currently, under 8(A), a party opposing the application must prove that a development or subdivision will destroy or significantly imperil necessary wildlife habitat or an endangered species.<sup>85</sup> Placing the burden on a concerned party is unfair because the applicant has control over the property and understands the nature of the proposed project. Mapping and data related to significant wildlife habitat has improved and is readily available to applicants through the ANR Natural Resources Atlas. The Commission recommends that the applicant have the burden of proof on criterion 8(A) because it has control over the property and an understanding of the proposed project.

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<sup>81</sup>Id. at 34.

<sup>82</sup>Id.

<sup>83</sup>Id. at 43.

<sup>84</sup>The Commission has received comments to the effect that the term “connecting habitat” should be used instead of “habitat connector,” which is a reasonable suggestion.

<sup>85</sup>10 V.S.A. § 6086 (a)(8)(A).

## D. Forest products processing, permit conditions

### 1. Charge

Act 194, Sec. 7 – “The Commission on Act 250: the Next 50 Years (Commission) established under 2017 Acts and Resolves No. 47 (Act 47) shall review whether permit conditions in permits issued under 10 V.S.A. chapter 151 (Act 250) to forest processing operations negatively impact the ability of a forest processing operation to operate in an economically sustainable manner, including whether Act 250 permit conditions limit the ability of a forest processing operation to alter production or processing in order to respond to market conditions. If the Commission determines that Act 250 permit conditions have a significant negative economic impact on forestry processing operations, the Commission shall recommend alternatives for mitigating those negative economic impacts. The Commission shall include its findings and recommendation on this issue, if any, in the report due to the General Assembly on December 15, 2018 under Act 47.”

### 2. Facts

Vermont’s forest economy is currently experiencing significant economic issues due to external factors such as the collapse of the paper industry in Maine and the growth of sawlog exports to China. Vermont’s forest commodities are largely transported out of the State for processing rather than to enterprises in the State.<sup>86</sup>

There are 19 sawmills in Vermont producing one million board feet or more per year. There is only one pellet mill. In the last five years, there have been seven Act 250 applications for wood processing facilities. All seven were granted permits. The average length of time to receive the permit was 110 days. Only one of the new permits contained conditions related to traffic. Two of the permits contained conditions related to hours of operation.<sup>87</sup>

The wood harvest season is approximately 180 days long, most of which is during the winter. “Working lands operations are weather dependent. The harvesting and delivery of forest products must take place when the ground conditions are suitable for heavy equipment, typically meaning dry or frozen conditions. As our climate changes, these conditions are less prevalent or predictable, which creates short windows in which site conditions and available markets must be paired.”<sup>88</sup>

“Hours of operation and truck traffic are primary concerns as these businesses receive raw materials that must be removed from the forest and hauled on gravel roads when appropriate frozen or dry conditions prevail or deliver wood energy products to

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<sup>86</sup>M. Snyder, Commissioner, to Rep. A. Sheldon, Chair, Memorandum re Act 250 and forest products value adding, Appendix (Nov. 7, 2018).

<sup>87</sup>G. Boulboul, Vt. Natural Resources Board, testimony (Oct. 11, 2018).

<sup>88</sup>M. Snyder and S. Lincoln, Vt. Dept. of Forests, Parks and Recreation, Forest Products Processing and Act 250 Memorandum, at 2 (Dec. 8, 2017).



customers, and this is often at night or can be on weekends or holidays for which these applicants have found themselves limited in permit conditions and concerned that they must make choices between operating their business or violating those permit conditions.”<sup>89</sup>

The Commission has not received statistics that demonstrate and quantify negative impacts to forest processing operations specifically caused by Act 250 permit conditions. The Commission has received anecdotal testimony regarding those impacts.

### 3. Discussion and Recommendation

The issues facing Vermont’s forest industries are broad market issues that are interstate and international in scope. They are not the result of Act 250 regulation.

In this regard, the Commission’s charge under Sec. 7 of Act 194 is to review whether Act 250 permit conditions negatively impact the ability of forest processing operations to “operate in an economically sustainable manner” and to recommend alternatives for mitigating those negative economic impacts “if it determines that Act 250 permit conditions have a significant negative impact on forest processing operations.”

As stated above, the Commission does not have data before it that specifically demonstrates and quantifies the negative impacts to forest processing operations from Act 250 permit conditions, let alone show that those conditions render the operations economically unsustainable. The Commission therefore does not determine that Act 250 permit conditions have a significant negative impact on forest processing operations.

Instead, the information before the Commission is that forest processing operations are nearly always granted permits when they apply and that they only sometimes receive permit conditions that limit traffic or hours of operation.

It has been argued that forest processing operations need flexibility in their hours of operation and permitted amount of traffic in order to respond to market conditions, and that therefore, Act 250 should be amended to provide such flexibility by allowing “for at least 60 days per year where off-hour (between 6 p.m. and 7 a.m., or on weekends and holidays) delivery of raw materials can occur” and also allowing “for trucks leaving with wood energy products and returning to these enterprises during off-hours.”<sup>90</sup>

This proposal is unnecessary because the Act already provides the ability to craft permit conditions that allow for flexibility. The relevant criteria of the statute give the District Commissions the ability to decide, based on the facts and circumstances, whether the impacts are “undue” or “unreasonable.”<sup>91</sup> In deciding whether an application presents such an impact, the District Commission is given latitude on how to craft permit conditions

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<sup>89</sup>Id. at 3.

<sup>90</sup>M. Snyder, Commissioner, Memorandum re Act 250 and forest products value adding at 2.

<sup>91</sup>See, e.g. 10 V.S.A. § 6086(a)(5), (8).

to ensure that the impact is not undue or unreasonable. The conditions must be “reasonable”<sup>92</sup> and “appropriate”<sup>93</sup> with respect to the criteria.

The statute thus does not state that the District Commission must impose limits on the hours of operation or on traffic generation and does not forbid the Commission from issuing a permit that includes periods of the year when such limits, if imposed, are lifted or reduced. Instead, a forest processing applicant may request conditions that are tailored to the facts and circumstances of its operation.

The forest products processing industry is important to Vermont, but it has particular aspects that have the potential to cause undue impacts under the criteria, including noise and traffic from the operations.

The Commission therefore does not support interfering with the District Commissions’ ability to issue case-specific permit conditions for these operations. Permit conditions “ensure that the values sought to be protected under Act 250 will not be adversely affected.”<sup>94</sup> “A permit condition is included to resolve an issue critical to the issuance of the permit if the Project would not comply with one or more Act 250 criteria without the permit condition.”<sup>95</sup> The addition of conditions often prevents a permit from being denied.

The Commission also is concerned that removing or altering the conditioning authority in regard to a single industry will cause unfairness to all other industries that regularly seek Act 250 permits. The Commission does not recommend a specific statutory mandate or limit on how Act 250 permit conditions are crafted for forest processing operations.

Member of the Commission, Representative Paul Lefebvre, disagrees with the above discussion and objects to the Commission’s recommendations under this section.

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<sup>92</sup> 10 V.S.A. § 6087(b).

<sup>93</sup> Act 250 Rule 32 (A).

<sup>94</sup> Act 250 Rule 60 (B).

<sup>95</sup> Act 250 Rule 34 (E)(1).

## VI. TASK GROUP 3: ISSUES ON JURISDICTION

### A. Revising jurisdiction to achieve goals

#### 1. Charges

Achieving Goals. Act 47, Sec. 2(e)(2)(G)(ii) – “Potential revisions to Act 250’s definitions of development and subdivision for ways to better achieve the goals of Act 250, including the ability to protect forest blocks and habitat connectivity.”

Promoting desired settlement patterns. Act 47, Sec. (2)(e)(2)(C)(iv) – “Whether Act 250 promotes compact centers of mixed use and residential development surrounded by rural lands.”

Protecting important natural resources. Act 47, Sec. (2)(e)(2)(C)(v) – “Whether Act 250 applies to the type and scale of development that provides adequate protection for important natural resources as defined in 24 V.S.A. § 2791.”

The phrase “important natural resources” means “headwaters, streams, shorelines, floodways, rare and irreplaceable natural areas, necessary wildlife habitat, wetlands, endangered species, productive forestlands, and primary agricultural soils, all of which are as defined in 10 V.S.A. chapter 151.”<sup>96</sup>

#### 2. Background

Act 250 only applies to projects that meet one of its jurisdictional thresholds. The statute prohibits, without a permit, the sale or offer for sale of any interest in a subdivision in the State, commencing construction on a subdivision or development, or commencing development.<sup>97</sup>

In general, Act 250 will apply to a project if it constitutes: (a) a “development” as defined in the Act, (b) a “subdivision” as defined in the Act; (c) a “substantial change” to a preexisting development or subdivision, or (d) a “material change” to a permitted project.<sup>98</sup> Exemptions to Act 250 jurisdiction are discussed in the next section.

##### a) *“Development”*

The term “development” applies to multiple categories of projects that are variously defined in terms of type, purpose, size, elevation, the existence or nonexistence of

<sup>96</sup>24 V.S.A. § 2791(14).

<sup>97</sup>10 V.S.A. § 6081(a).

<sup>98</sup>10 V.S.A. §§ 6001, 6081(a), (b); Act 250 Rule 34(A), (B).

permanent and zoning and subdivision bylaws in the town, or a combination of factors. “Development” includes:

- The construction of improvements for a commercial, industrial, or residential use above the elevation of 2,500 feet.
- The construction of improvements for any commercial or industrial purpose on more than 10 acres of land, or on more than one acre of land if the municipality does not have both permanent zoning and subdivision bylaws.
- The construction of 10 or more housing units, or the construction or maintenance of mobile homes or trailer parks with 10 or more units, within a radius of five miles.
- The construction of improvements for a governmental purpose if the project involves more than 10 acres or is part of a larger project that will involve more than 10 acres of land.
- The construction of a support structure that is primarily for communication or broadcast purposes and that extends 50 feet, or more, in height above ground level or 20 feet, or more, above the highest point of an attached existing structure.
- The exploration for fissionable source materials beyond the reconnaissance phase or the extraction or processing of fissionable source material.
- The drilling of an oil or gas well.
- Any withdrawal of more than 340,000 gallons of groundwater per day from any well or spring on a single tract of land or at a place of business, independent of the acreage of the tract of land.<sup>99</sup>

*Priority housing projects.* The 10-unit threshold for a housing project does not apply to a “priority housing project,” which, as stated above, is defined to include mixed income housing or mixed use located in areas designated by the State designation program.<sup>100</sup> Priority housing projects are entirely exempt if located in municipalities of 10,000 or more.<sup>101</sup> For smaller municipalities, the jurisdictional thresholds are: (a) 75, if the population is 6,000 to 10,000; (b) 50, if the population is 3,000 to 6,000, and (c) 25, if the population is less than 3,000.<sup>102</sup> However, a priority housing project consisting of 10 or more units will require an Act 250 permit if it involves the demolition of a listed historic building, unless the State Division for Historic Preservation makes certain determinations listed in statute.<sup>103</sup>

*Commercial purpose.* The “commercial purpose” definition of development includes more than establishments engaged in sales for profit. Under the Act 250 rules:

“Commercial purpose” means the provision of facilities, goods, or services by a person other than for a municipal or state purpose to others in exchange

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<sup>99</sup>10 V.S.A. § 6001(3)(A).

<sup>100</sup>10 V.S.A. § 6001(35).

<sup>101</sup>10 V.S.A. § 6001(3)(D)(viii).

<sup>102</sup>10 V.S.A. § 6001(3)(A)(iv).

<sup>103</sup>10 V.S.A. § 6001(3)(A)(iv), (D)(viii).

for payment of a purchase price, fee, contribution, donation, or other object or service having value.<sup>104</sup>

In 1984, the Vermont Supreme Court ruled that this definition is not limited to situations in which a person is required to make a payment to receive a facility, good, or service because that would render the terms “contribution” and “donation” superfluous. By definition, those terms connote “giving” or the voluntary transfer of value without consideration.<sup>105</sup>

In the case, the Court determined that the construction of a church was for a commercial purpose because “there is a de facto exchange of the Church’s facilities and services for donations and contributions.” In so doing, the Court cited statements from the trial court, below, that the majority of the church’s income was derived from the contributions and donations of its members and the church could not provide services without those contributions and donations.<sup>106</sup> It did not state that its ruling was limited to situations in which contributions and donations were essential to providing the services.

However, in a recent 3–2 decision, the Court held that a shooting range was not for a commercial purpose because it does not charge for its services and, though it has solicited and received donations for several years, it “would continue to make the range available for use even without donations.”<sup>107</sup> In other words, the donations were not “essential to sustain the enterprise indefinitely.”<sup>108</sup> The shooting range in question is open seven days a week, 10 to 11 hours per day, and receives nearly \$20,000 annually in donations.<sup>109</sup>

The Court’s recent qualification to “commercial purpose” was not derived from any change in statute or rule. To determine Act 250 jurisdiction, the new holding requires inquiry into the internal finances of a company or operation, raising issues of administrative complexity, privacy, and a lack of relationship to the purposes of the statute. It could allow significant land uses for education, religious, or other nonprofit purposes to avoid review for compliance with Act 250’s environmental and land use criteria based on an argument that donations or other consideration received are not essential to the provision of facilities and services.

b) *“Subdivision”*

The term “subdivision” applies to three categories related to the creation of lots:

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<sup>104</sup> Act 250 Rule 2(C)(4).

<sup>105</sup> In re Baptist Fellowship of Randolph, Inc., 144 Vt. 636, 639 (1984).

<sup>106</sup> Id.

<sup>107</sup> In re Laberge Shooting Range, 2018 VT 84, ¶ 34.

<sup>108</sup> Id., ¶ 37 (Robinson, J. and Reiber, C.J., dissenting).

<sup>109</sup> Id.

- Creation of 10 or more lots of any size, by a person on tracts that the person owns or controls, within a five-mile radius or within the jurisdictional limits of a District Commission within a continuous period of five years.
- Within a town that does not have both permanent zoning and subdivision regulations, the creation of six or more lots of any size, by a person on tracts that the person owns or controls, within a continuous period of five years.
- The sale, by public auction, of any interest in a tract or tracts of land, owned or controlled by a person, that have been partitioned or divided for the purpose of resale into five or more lots within a radius of five miles and within any period of 10 years.<sup>110</sup>

The term “person” is broadly defined and includes individuals or entities affiliated with each other for profit, consideration, or any other beneficial interest derived from the partition or division of land.<sup>111</sup>

c) *“Substantial change”/Preexisting Development or Subdivision*

Act 250 exempts so-called preexisting developments and subdivisions, which can be thought of as projects that predate the Act but would meet the Act’s definition of development or subdivision if they were undertaken today.<sup>112</sup> The next section contains more specifics on these exemptions.

The Act requires a permit for a “substantial change” in a preexisting development or subdivision.<sup>113</sup> “Substantial change” is defined by rule to mean “any cognizable change to a preexisting development or subdivision which may result in significant adverse impact with respect to any of the criteria specified in 10 V.S.A. § 6086(a)(1) through (a)(10).”<sup>114</sup>

In turn, “cognizable change” means “any physical change or change in use, including, where applicable, any change that may result in a significant impact on any finding, conclusion, term or condition of the project’s permit.”<sup>115</sup>

d) *“Material change”/Permitted Project*

When a project has received an Act 250 permit, the Act 250 rules require a permit amendment for a “material change”<sup>116</sup> because, generally, jurisdiction is permanent once it attaches. See further discussion in Sec. VI.C.3. The term “material change” is defined as:

[A]ny cognizable change to a development or subdivision subject to a permit under Act 250 or findings and conclusions under 10 V.S.A. § 6086b, which

<sup>110</sup>10 V.S.A. § 6001(19).

<sup>111</sup>10 V.S.A. § 6001(14).

<sup>112</sup>10 V.S.A. § 6081(b); Act 250 Rule 2(C)(8), (9).

<sup>113</sup>10 V.S.A. § 6081(b).

<sup>114</sup>Act 250 Rule 2(C)(7).

<sup>115</sup>Act 250 Rule 2(C)(26).

<sup>116</sup>Act 250 Rule 34(A).

has a significant impact on any finding, conclusion, term or condition of the project's permit or which may result in a significant adverse impact with respect to any of the criteria specified in 10 V.S.A. § 6086(a)(1) through (a)(10).<sup>117</sup>

### 3. Discussion and Recommendation

As discussed in Section V.B., above, the goal of maintaining a settlement pattern of compact centers surrounded by rural countryside has been a long-standing policy of the State of Vermont, and the data indicate that, while the State has had some success, it is not achieving this goal. Similarly, as discussed in Section V.C., above, the fragmentation of forests and habitat threatens Vermont's ecosystems and natural resources.

The Commission finds that Act 250's jurisdictional thresholds are not necessarily related to the goal of compact settlement surrounded by rural landscape or to protecting important natural resources. There are a few instances in which there is a relationship. For example, Act 250's jurisdiction over commercial, industrial, and residential uses above 2,500 feet protects natural resources in locations that are outside compact centers. In addition, the definitions of "substantial change" and "material change" require, among other things, consideration of the potential for impact on the natural resources protected by the Act. But Act 250 jurisdiction is largely triggered by such factors as the size of the tract and the purpose of the project, the number of lots to be created, or the number of housing units to be built.

As part of an overall balancing of interests to support economic development in compact centers while promoting a rural countryside and protecting important natural resources, the Commission recommends establishing a multitiered approach toward Act 250 jurisdiction over commercial and industrial development, subdivisions, and housing units. This approach would include the following tiers, with jurisdictional thresholds running from lowest to highest:

- A tier of "critical resource areas" containing ecosystems, natural resources, and habitat that are priorities for protection. These areas could include river corridors, elevations above 2,000 feet, significant wetlands, and areas characterized by steep slopes and shallow soils. Act 250's jurisdiction would be increased by lowering the existing jurisdictional thresholds for critical resource areas. Regional and municipal planning processes could assist in identifying critical resource areas. This tier would include protection of these areas even if they are located within existing settlements.
- A "rural and working lands" tier, consisting of lands that are neither critical resource areas nor existing settlements as currently defined in Act 250. Jurisdictional thresholds would be higher in this tier than the critical resource areas tier but, in order to protect forests, connecting habitat, and agricultural soils, potentially lower than they are today.

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<sup>117</sup>Act 250 Rule 2(C)(6).

- A tier for “existing settlements” as defined under current law, which includes not only existing compact centers, but also areas designated under the State designation program. This tier would include multiple sub-tiers and jurisdictional thresholds that might be increased from where they are today for some of these sub-tiers. One sub-tier might be for areas receiving an enhanced designation created within the State designation program. Under the enhanced designation process, the municipality would require compliance with the Act 250 criteria instead of application review by the District Commission. Because of the implications for Act 250 jurisdiction, designation decisions would become appealable.

Taken together, these proposals should support the desired settlement patterns by encouraging development in desired areas and encouraging thoughtful, careful planning in natural resource areas that require more protection.

The Commission also finds that achieving the desired settlement patterns could be supported by increasing Act 250 jurisdiction at interstate interchanges. This would protect against sprawl and ensure protection of roadway functions, aesthetics, and state investments in these important areas. The Commission recommends that language be adopted that would provide for Act 250 jurisdiction in interstate interchange areas. Such language can be found in S.214 and H.784 of the 2017–18 biennium.

Further, protection of important natural resources would be supported by clarifying that the phrase “commercial purpose” does not require inquiry into whether a donation or other consideration received is essential to a project or its operation. The essentiality of a donation or other consideration is not necessarily related to a project’s environmental and land use impacts.



## B. **Exemptions**

### 1. Relationship to Findings and the Plan

#### a) *Charge*

Act 47, Sec. 2(e)(2)(C)(iii) – “Whether the exemptions from Act 250 jurisdiction further or detract from achieving the goals set forth in the Findings and the Plan, including the exemptions for farming and for energy projects.”

#### b) *Facts/Background*

Many types of projects are explicitly exempt from Act 250 jurisdiction. In other words, the projects do not need an Act 250 permit even if they would otherwise meet one of the jurisdictional thresholds discussed in the preceding section. Appendix 10 to this report is a memorandum that lists these exemptions and includes their statutory text. The exemptions can be grouped into the following categories:

- **Energy:** electric generation and transmission, natural gas facilities

No permit is required for the construction of improvements for an electric generation or transmission facility that requires a certificate of public good or a natural gas facility as defined in the statute.<sup>118</sup>

- **Fairs:** agricultural fairs, equine fairs

Provided certain statutory factors are met, development does not include the construction of improvements for: (a) an agricultural fair that is registered with the Agency of Agriculture, Food and Markets<sup>119</sup> or (b) equine events.<sup>120</sup>

- **Government services and infrastructure:** solid waste facilities, wastewater treatment facilities, water supply improvements, public schools, government buildings, water or sewer lines

No permit or permit amendment is required for a solid waste management facility subject to a provisional certification under 10 V.S.A. § 6605d.<sup>121</sup> No permit is required for preexisting municipal, county, or State wastewater treatment facility enhancements that do not expand capacity by more than 10 percent; preexisting municipal, county, or State water supply enhancements that do not expand capacity by more than 10 percent; public school expansion that does not expand capacity by more than 10 percent; and municipal, county, or State building renovation or reconstruction that does not expand capacity by more than

<sup>118</sup>10 V.S.A. § 6001(3)(D)(ii).

<sup>119</sup>10 V.S.A. §§ 6001(3)(D)(iv), 6081(u).

<sup>120</sup>10 V.S.A. § 6001(3)(D)(v).

<sup>121</sup>10 V.S.A. § 6081(c).

10 percent.<sup>122</sup> No permit is required for municipal water or sewer line replacement that does not expand capacity by more than 10 percent when part of the municipality's regular maintenance or replacement of facilities.<sup>123</sup>

- **Landfills:** earth removal sites associated with landfill closing, closure of a landfill that began prior to July 1, 1992

No permit is required for earth removal sites associated with a landfill closing, if a municipal zoning permit is obtained.<sup>124</sup> No permit or permit amendment is required for closure operations at an unlined landfill which began disposal operations prior to July 1, 1992, as defined in statute.<sup>125</sup>

- **Lots conveyed to the State or conservation organizations:** Long Trail lots, conservation rights and interest lots

No permit is required for lots created to convey land to the State or an organization, in order to preserve the Long Trail.<sup>126</sup> No permit is required for lots created to convey to the State or a qualified organization for "conservation rights and interest."<sup>127</sup>

- **Preexisting development or subdivision:** preexisting developments, preexisting subdivisions, State highways

No permit is required for subdivisions that were exempt under Department of Health regulations that were in effect on January 21, 1970 or that received a permit from the Board of Health prior to June 1, 1970; for construction of a development that began before June 1, 1970 and was finished by March 1, 1971; or for State highways that had a hearing held prior to June 1, 1970.<sup>128</sup>

- **Projects in designated centers:** certain priority housing projects, mixed use and mixed income housing within designated center

As defined in Act 250, "priority housing projects" include "mixed income" projects in which at least 20 percent of the units are affordable to people earning 80 percent of area median income and "mixed use" projects that devote at least 40 percent of the floor area to housing that meets the mixed income housing definition.<sup>129</sup>

No permit is required for construction of a priority housing project in a designated center within a municipality of at least 10,000 people.<sup>130</sup> For smaller municipalities,

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<sup>122</sup>10 V.S.A. § 6081(d)(1)-(4).

<sup>123</sup>10 V.S.A. § 6081(e).

<sup>124</sup>10 V.S.A. § 6081(g).

<sup>125</sup>10 V.S.A. § 6081(h).

<sup>126</sup>10 V.S.A. § 6001(19)(B)(i).

<sup>127</sup>10 V.S.A. § 6001(19)(B)(ii).

<sup>128</sup>10 V.S.A. § 6081(b).

<sup>129</sup>10 V.S.A. § 6001(27)-(29), (35)

<sup>130</sup>10 V.S.A. § 6001(3)(D)(viii).

permits are only required for these projects if they exceed a size threshold that increases as the size of the municipality increases.<sup>131</sup>

In designated downtowns, no permit amendment is needed for a project that would create a priority housing project on property that is already subject to Act 250.<sup>132</sup> In the other designated centers, no permit amendment is needed provided certain statutory requirements are met.<sup>133</sup>

Other projects in a designated downtown are exempt from Act 250 if they have received positive findings under 10 V.S.A. § 6086b.<sup>134</sup>

- **Remedial action:** remedial action authorized by ANR, including if the site already has a permit

No permit or permit amendment is needed for the construction of improvements for remedial action authorized by ANR, as well as any abatement, removal, or corrective action taken for water pollution control, waste management, or development soils.<sup>135</sup>

- **Special exemptions:** slate quarry, railroad repairs, shooting range, de minimis improvements

A slate quarry in operation prior to June 1, 1970, if lying unused, is deemed held in reserve and not abandoned, provided it met statutory requirements for registering the quarry by January 1, 1997.<sup>136</sup> No permit or permit amendment is required for a change to a shooting range that has been in operation since January 1, 2006, provided certain statutory requirements are met.<sup>137</sup> No permit is required for railroad repairs with no expansion, if they are part of the railroad's maintenance. No permit amendment required for de minimis improvements, as defined by rule.<sup>138</sup>

- **Telecommunications facilities:** improvements not ancillary to broadcast/communications structure; replacement, repair, and routine maintenance of telecommunications facilities built prior to July 1, 1997 and of permitted facilities; telecommunication facilities obtaining a certificate of public good

No permit is required for future improvements that are not ancillary to the support structure to a broadcast/communication structure.<sup>139</sup> No permit is required for the

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<sup>131</sup>10 V.S.A. § 6001(3)(A)(iv).

<sup>132</sup>10 V.S.A. § 6081(p)(1).

<sup>133</sup>10 V.S.A. § 6081(p)(2).

<sup>134</sup>10 V.S.A. § 6081(v).

<sup>135</sup>10 V.S.A. §§ 6001(3)(D)(vi)(I)(aa)-(ff), 6081 (w) (aa)-(ff).

<sup>136</sup>10 V.S.A. § 6081(j).

<sup>137</sup>10 V.S.A. § 6081(w).

<sup>138</sup>Act 250 Rule 2(C)(3)(c).

<sup>139</sup>10 V.S.A. § 6001(3)(A)(ix)(I)(bb).

replacement, repair, or routine maintenance of a telecommunications facility in existence prior to July 1, 1997, except in the case of a replacement that constitutes a material or substantial change.<sup>140</sup> No permit amendment is required for the replacement, repair, or routine maintenance of a permitted telecommunications facility, except in the case of a replacement that constitutes a material or substantial change.<sup>141</sup> “Development” does not include a telecommunications facility for which the Public Utility Commission (PUC) issues a certificate of public good.<sup>142</sup>

- **Working lands:** farming, logging, forestry, farming on primary agricultural soils, composting

No permit required for the construction of improvements for farming, logging, and forestry purposes below the elevation of 2,500 feet.<sup>143</sup> No permit amendment is required for farming that will occur on primary agricultural soils.<sup>144</sup> No permit is required for construction of improvements for storage, preparation, and sale of compost, provided certain statutory requirements are met.<sup>145</sup>

### c) *Discussion and Recommendation*

*Exemptions not presenting significant issues.* The Commission believes that, as specifically worded in the statutes, the following exemptions or categories of exemptions described above do not detract from achieving the goals of the Findings and the Plan: agricultural and equine fairs; solid waste facilities under a provision certification and the various government service and facility enhancements within the 10 percent limit; earth removal sites associated with landfill closing, and closure of a landfill that began prior to July 1, 1992; lots conveyed to the State or conservation organizations; remedial action authorized by ANR; railroad repair; and de minimis improvements.

*Electric generation and transmission and natural gas facilities.* In 1988, the General Assembly opted for the PUC (then the Public Service Board) to retain siting jurisdiction over electric generation and transmission and natural gas facilities, with the addition of requiring due consideration of the Act 250 criteria set forth at 10 V.S.A. § 6086(a)(1)–(8) and (9)(K). The PUC siting statute does not require due consideration of Act 250 criteria 9(A) through (J), 9(L), or 10.<sup>146</sup>

The PUC regulates and supervises Vermont’s electric and natural gas utilities and, in 1988, it was typically utilities that built and operated the relevant electric and natural gas

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<sup>140</sup>10 V.S.A. § 6081(m).

<sup>141</sup>10 V.S.A. § 6081(n).

<sup>142</sup>10 V.S.A. § 6001(3)(D)(ii).

<sup>143</sup>10 V.S.A. § 6001 (3)(D)(i).

<sup>144</sup>10 V.S.A. §6081 (s)(1).

<sup>145</sup>10 V.S.A. § 6001(3)(D)(vii).

<sup>146</sup>30 V.S.A. § 248(b)(5); 1988 Acts and Resolves No. 273, Sec. 1; In re Glebe Mountain Wind Energy, LLC (Appeal of JO #2-227), No. 234-11-05VTEC, 2006 WL 4087912 (Vt. Env’tl. Ct. May 18, 2006).

facilities.<sup>147</sup> Since then, there has been a significant increase in electric generation built by non-utility actors, such as merchant generators, due to the creation of a wholesale market for electric generation and to renewable energy policies such as Vermont’s net metering and standard offer programs and renewable portfolio standards in the New England states.<sup>148</sup>

Increased siting of electric generation in Vermont has led to some statutory changes. For example, on primary agricultural soils, the General Assembly amended the PUC siting statute in 2016 to require due consideration of impacts to primary agricultural soils, although due consideration of Act 250’s Criterion 9(B) is still not required.<sup>149</sup>

A similar change was made on the role of local and regional planning. Instead of requiring conformance with local and regional plans, the PUC siting statute requires due consideration of the land conservation measures in the local plan and of the recommendations of the municipal legislative body and the municipal and regional planning commissions. The 2016 legislation amended the statutes to allow local and regional plans to obtain affirmative determinations of energy compliance and to provide increased weight in the PUC siting process to plans that obtain those determinations by requiring substantial deference to land conservation measures and specific policies contained in them.<sup>150</sup>

The Environmental Division has concluded that siting electric generation on land already subject to Act 250 does not require a permit amendment if the generation is subject to PUC siting jurisdiction, but questions remain about the relationship between the PUC certificate of public good and any conditions on the land previously imposed by Act 250.<sup>151</sup>

The Commission spent considerable time on this issue and discussed many possible recommendation options, but there was no consensus. Although reviewed under Section 248, energy generation facilities are “development” as understood under Act 250 and in the last 50 years there have been changes in the ways energy is generated. Therefore, the Commission believes that the permitting process needs to be further discussed and evaluated.

*Preexisting developments and subdivisions; gravel pits and quarries.* While the Commission does not conclude that the exemptions for preexisting developments and subdivisions significantly detract from achieving the goals of the Findings and the Plan,

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<sup>147</sup>30 V.S.A. § 203(1) and (2).

<sup>148</sup>*In re Promoting Wholesale Competition by Pub. Utilities*, 168 P.U.R. 4th 590 (F.E.R.C. Apr. 24, 1996) (known as FERC Order 888); 30 V.S.A. §§ 8004, 8005; 8005a, 8010; National Conference of State Legislatures, State Renewable Portfolio Standards and Goals (July 20, 2018); retrieved from <http://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx>, Nov. 18, 2018.

<sup>149</sup>30 V.S.A. § 248(b)(5); 2016 Acts and Resolves No. 174, Sec. 11.

<sup>150</sup>24 V.S.A. § 4352; 30 V.S.A. § 248(b)(1)(C); 2016 Acts and Resolves No. 184, Secs. 6, 11.

<sup>151</sup>*In re Glebe Mountain Wind Energy, LLC* (Appeal of JO #2-227), No. 234-11-05VTEC; G. Boulbol, testimony (Nov. 15, 2018).

there is a substantial issue with respect to preexisting gravel pits and quarries. As time moves on from June 1, 1970, it becomes increasingly difficult with these operations to establish a baseline for determining whether a substantial change has occurred in the extraction rate or the scope of operation, such as whether a crusher was used prior to 1970. The State has never enacted or implemented a process to establish a baseline for preexisting gravel pits and quarries against which to measure changes in operation.<sup>152</sup> Therefore, the Commission recommends that such baselines are established.

*Projects in designated centers.* The existing exemptions related to projects in designated centers appear to support the goals of the Findings and the Plan without also detracting from them. However, the question has been raised of whether more should be done within Act 250 to promote projects in designated centers, a settlement pattern of compact centers surrounded by a working landscape, and protection of important natural resources outside those centers.

*Slate quarries.* The Commission considered the specific requirements of the exemption for slate quarries. In order to qualify for this exemption, slate had to have been removed from the quarry prior to June 1, 1970<sup>153</sup> and then those quarries were required to register with the District Commissions by January 1, 1997.<sup>154</sup> Unlike other earth extraction sites, the exemption for a registered slate quarry includes “ancillary activities” other than crushing even if the activities were not part of the quarry operation prior to June 1, 1970. Examples of ancillary activities include blasting, drilling, sawing and cutting stone, and use of buildings and equipment exclusively for ancillary activities. The buildings can have been built after 1970.<sup>155</sup>

Slate mining only takes place in the southwestern Vermont region, along the Vermont/New York state line.<sup>156</sup> The slate industry is a significant part of the economy of that region. Further, there are a finite number of exempt slate quarries. The NRB reported that District 1 has 110 tracts of land registered under the slate quarry exemption.<sup>157</sup>

There are a number of environmental and aesthetic concerns associated with slate quarries. The Commission received anecdotal testimony about conflicts that arise with those who live adjacent to slate quarries, including those who move near a registered quarry hole during decades in which the quarry is not in active use.<sup>158</sup> Lack of Act 250 jurisdiction reduces the recourse available to nearby landowners with concerns about slate quarries, whether they are related to water quality, effect on water supply, blasting, or traffic.

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<sup>152</sup>S. Murray, testimony (Nov. 15, 2018); G. Boulbol, testimony (Nov. 15, 2018).

<sup>153</sup>10 V.S.A. § 6081(j).

<sup>154</sup>10 V.S.A. § 6081(l).

<sup>155</sup>10 V.S.A. § 6081(k).

<sup>156</sup>VT DEC website, Slate, citing Industrial Minerals: 200 Years and Going Strong; D. Conrad and D. Vanacek, 1990; updated 2005 (S. King) and 2016, retrieved from <https://dec.vermont.gov/geological-survey/resources-energy/minres/slate> (Nov. 26, 2018).

<sup>157</sup>G. Boulbol, testimony (Nov. 15, 2018).

<sup>158</sup>G. Tarrant, testimony (Nov. 15, 2018).

Requiring slate quarries to obtain Act 250 permits would not bar them from operating under a permit. Currently, both Criteria 9(D)<sup>159</sup> and 9(E)<sup>160</sup> address earth resources. Criteria 9(D) seeks to ensure that projects will not interfere with the future ability to extract earth resources, demonstrating the importance of earth resources industry to Vermont. Criteria 9(E) seeks to prevent specific environmental damage that may be caused by the extraction of earth resources, implying that Act 250 permits extraction operations that are thoughtfully planned and do not harm the environment. In addition, the broad exemption for ancillary activities places slate quarries on a different footing from other earth resource extraction operations.

The Commission has several recommendations in regard to slate quarries. The Commission recommends that the registered slate quarries be required to give notice of their operations to neighboring property owners. The Commission also recommends that the registered slate quarries be added to the ANR Natural Resources Atlas so that the location of quarries can be easily discovered online. The Commission recommends that the exemption for slate quarries be repealed. The exemption should be phased out over a number of years so that the quarries have time to obtain Act 250 permits. Further, the Commission recommends that the provision that allows quarries to be held in reserve without being considered abandoned be repealed.

*Telecommunications facilities.* There are effectively four exemptions related to telecommunications facilities. The first three of these exemptions do not appear to detract from goals of the Findings and the Plan. The first exemption ensures that Act 250 jurisdiction does not extend to otherwise nonjurisdictional activities on the same tract when jurisdiction is triggered by construction of a broadcast or support structure.

The second and third exemptions allow for repair and routine maintenance of these structures and ancillary equipment, as well as for replacement that does not constitute a material or substantial change. As discussed above, the analysis of material and substantial change requires consideration of the potential impact on the Act 250 criteria.

The fourth exemption relates to telecommunications facilities that obtain a certificate of public good (CPG) from the PUC in lieu of an Act 250 permit or local land use approval, or both. The relevant statute initially applied to networks of three or more telecommunications facilities. It was enacted to further telecommunications deployment through the Vermont Telecommunications Authority, with the PUC's authority to accept new applications expiring on July 1, 2010. The statute was subsequently amended to apply to a single telecommunications facility and the period for accepting new applications has been extended multiple times. The PUC's authority to accept applications for telecommunications facility CPGs currently expires on July 1, 2020. The statute requires that the PUC give due consideration to Act 250's Criteria 1 through 8 and 9(K) and substantial deference, "unless there is good cause to find otherwise," to the plans of the

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<sup>159</sup> 10 V.S.A. § 6086(a)(9)(D).

<sup>160</sup> 10 V.S.A. § 6086(a)(9)(E).

affected municipalities and to the recommendations of the municipal and regional planning commissions and the municipal legislative body.<sup>161</sup>

*Working lands.* The exemptions within the category of working lands include the exemptions for farming, logging, and forestry below 2,500 feet, as well as the exemption for farming on primary agricultural soil and specific composting projects.

The Commission finds that the exemption for farming both detracts and supports the goals of Act 250. The ongoing concerns over the water quality issues in Vermont raise questions about agricultural runoff. Without Act 250 oversight, the Commission is concerned about water quality and climate change impacts caused by farming. From this perspective, the Commission believes that the exemption detracts from the environmental protection aspect of Act 250. However, farming is a traditional and essential part of Vermont. In this way, the farming exemption furthers the goals of Act 250, which include “Preservation of the agricultural and forest productivity of the land, and the economic viability of agricultural units.”<sup>162</sup> It also furthers one of the statute’s overarching goals of compact development separated by rural countryside.<sup>163</sup>

However, exempting farming from Act 250 jurisdiction does not mean that farms are unregulated. Recent changes to water quality regulations applicable to farms may mitigate the lack of Act 250 jurisdiction. The Required Agricultural Practices (RAPs) are a relatively new set of regulations aimed at protecting water quality from agricultural runoff. Legislation in 2015 changed the former Accepted Agricultural Practices to the RAPs and the new RAPs went into effect in 2016.<sup>164</sup> They establish nutrient, manure, and waste storage standards and regulate farms based on their size. Therefore, while aspects of the farming exemption detract from the goals of Act 250, the farming industry in Vermont is still adjusting to the new regulations, which may sufficiently address water quality concerns.

The Commission recommends repealing the exemption for farming, logging, and forestry below 2,500 feet when these occur in areas that have been designated as critical resource areas. To implement this recommendation, the definition of “construction of improvements” should be amended so that it only includes the construction of permanent structures, in regard to these working lands activities. This recommendation is intended to protect critical resource areas and improve water quality, while still supporting working lands.

AAFM asked the Commission to further extend the exemption for farming to include accessory on-farm businesses. AAFM would define such businesses in the same way as 2018 Acts and Resolves No. 143 (Act 143), which amended the statutes pertaining to municipal land use regulation. Act 143 defines an accessory on-farm business as activities that are accessory to a farm subject to the RAPs. The activities may include storage,

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<sup>161</sup>2007 Acts and Resolves No. 79, Secs. 1, 17; 2009 Acts and Resolves No. 54, Sec 44; 30 V.S.A. § 248a.

<sup>162</sup>1973 Acts and Resolves No. 85, Sec. 7(a)(2).

<sup>163</sup>10 V.S.A. § 6086(a)(9)(L).

<sup>164</sup>2015 Acts and Resolves No. 64, Sec. 4.



processing, preparation, and sale of qualifying products, as well as educational, recreational, or social events. The activities must have a nexus to agriculture and must be in addition to a farming operation.<sup>165</sup> Vermont farms are seeking to diversify their revenue stream by participating in agritourism and adding other activities to their farm.

However, Act 143 does not exempt accessory on-farm businesses from regulation. Instead, the Act authorizes and limits municipal land use regulation of such accessory businesses. It allows municipalities to conduct site plan review of these businesses and to apply the same performance standards to them that it applies to similar commercial uses.<sup>166</sup>

Exemption from Act 250 would be different from limited regulation and could result in differential treatment of similar businesses based on whether they are or are not accessory to a farm. The Commission is concerned that extending the farming exemption in this way would not be fair because it would exempt what currently could be commercial developments. Therefore, the Commission does not recommend adopting the proposal from AAFM.

*Rural industrial parks proposal.* ACCD presented the Commission with a proposal regarding industrial parks in rural areas. The proposal was to incentivize the use of master plan permits in rural industrial parks and to reduce the Act 250 permit fee. Under this proposal, “rural” refers to any county outside of Chittenden.

The specifics of the proposal included allowing subsequent development within industrial parks to be administrative amendments and allowing a master plan permit even if the site already contains development.<sup>167</sup> Treating subsequent development as an administrative amendment would mean that the development is not reviewed for compliance with the Act 250 criteria.

The Commission finds that while rural economic development is important, reducing Act 250 review in areas outside of existing settlements is contrary to the settlement pattern goals discussed throughout this report. The Commission does not recommend adopting the proposal from ACCD regarding rural industrial parks.

*VTrans project proposal.* The Vermont Agency of Transportation (VTrans) presented a proposal to the Commission that the Agency be exempt from Act 250 jurisdiction for all of its projects that use federal aid. VTrans is one of the largest landowners in the State. The Agency testified that its projects are large, complex, and undertaken in the public interest.<sup>168</sup> It further testified that its projects that use federal aid are subject to extensive oversight, from both the State and the federal government. The Agency believes that Act 250 oversight generally results in little or no change in a proposed

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<sup>165</sup>2018 Acts and Resolves No. 143, Sec. 2, enacting 24 V.S.A. § 4412(11).

<sup>166</sup>Id.

<sup>167</sup>T. Brady, ACCD, written testimony (Nov. 8, 2018).

<sup>168</sup>D. Dutcher, VTrans, Key Points written testimony, at 1 (Dec. 6, 2017).

project.<sup>169</sup> For these reasons, VTrans proposed that its projects with federal aid be exempt from Act 250 jurisdiction.

The Commission received testimony from VTrans that nearly all State and municipal transportation projects receive federal aid. The Agency also testified that multiple aspects of the Act 250 process are time consuming, particularly when there is citizen input. The Commission received multiple public comments about the importance of citizen participation in transportation projects through Act 250. In addition, the Commission is concerned about relying on the federal government under the current circumstances, particularly in the area of environmental protection.

In addition, VTrans in part relies on the National Environmental Policy Act (NEPA) for its argument on federal scrutiny. But NEPA is an environmental analysis requirement and not a process that results in a permit or approval with enforceable obligations. Under NEPA, as long as the requisite analysis is done, the project may move forward, even if there are environmental concerns.

Accordingly, the Commission does not recommend adopting the proposal from VTrans.

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<sup>169</sup>Id. at 2.

## 2. Ridgelines

### a) *Charge*

Act 47, Sec. 2(e)(2)(G)(iii) – “The scope of Act 250’s jurisdiction over projects on ridgelines, including its ability to protect ridgelines that are lower than 2,500 feet, and projects on ridgelines that are expressly exempted from Act 250.”

### b) *Facts*

Based on a review of dictionary definitions, a ridgeline can be described as a long, narrow section of the earth’s surface, such as a chain of mountains or hills that form a continuous elevated crest or the divide between adjacent valleys, or as an area of higher ground separating two adjacent streams or watersheds.<sup>170</sup>

Currently, Act 250 governs the construction of improvements for commercial, industrial, or residential use above 2,500 feet.<sup>171</sup> There are exempt categories of projects that may affect areas above 2,500 feet, such as electric generation and telecommunications facilities permitted by the PUC.<sup>172</sup> Elevations below 2,500 feet are susceptible to logging, farm, and forestry projects, as well as other projects that are exempt from jurisdiction.

Act 250’s headwaters criterion applies to lands above 1,500 feet in elevation, among other lands.<sup>173</sup>

Vermont’s mean elevation is 1,000 feet above sea level.<sup>174</sup> Vermont has 223 mountains that rise above 2,000 feet.<sup>175</sup> It has 35 mountains that top 3,500 feet.<sup>176</sup>

Wind energy projects at high elevations have been an issue in Vermont. In general, the strength and persistence of the wind typically increases with elevation, such that the strongest winds are often found at the highest mountain summits.<sup>177</sup> Research into the best locations for wind power found that the areas that were the windiest and on public

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<sup>170</sup>American Heritage Dict., ridge, retrieved from <https://ahdictionary.com/word/search.html?q=ridge>; Cambridge Dict., ridge, retrieved from <https://dictionary.cambridge.org/us/dictionary/english/ridge>; Dictionary.com, ridgeline, retrieved from <https://www.dictionary.com/browse/ridgeline>; all Nov. 2, 2018.

<sup>171</sup>10 V.S.A. § 6001 (3)(A)(vi).

<sup>172</sup>10 V.S.A. § 6001(3)(D)(ii).

<sup>173</sup>10 V.S.A. § 6086(a)(1)(A).

<sup>174</sup>Ereference desk, Almanac Quick Facts, Vermont State Facts and Figures, retrieved from <http://www.ereferencedesk.com/resources/almanac/vermont.html>, Nov. 2, 2018.

<sup>175</sup>World Atlas: Vermont, retrieved from <https://www.worldatlas.com/webimage/countrys/namerica/usstates/vtland.htm>, Nov. 2, 2018.

<sup>176</sup>Encyclopedia Britannica, Vermont, retrieved from <https://www.britannica.com/place/Vermont>, Nov. 2, 2018.

<sup>177</sup>Vt. Dept. of Public Service, Wind Energy Planning Resources for Utility-Scale Systems in Vermont (October 2002) at 7.

land were above 2,500 feet and that this constituted less than one percent of the total land area in Vermont.<sup>178</sup>

The relative rarity of these high elevation sites makes them a concern for those seeking to protect unique habitat and the scenic beauty of Vermont. “For instance, with wind energy projects sited along high ridgelines, it’s not uncommon to encounter multiple rare, unique and high quality natural communities supporting rare plant and animals.”<sup>179</sup>

Ridgeline locations are highly susceptible to damage due to their generally remote locations. They typically support interior forests, which are the most at risk from fragmentation. Further, the physical characteristics of ridgelines often make them important corridors for the movement of a wide range of species.<sup>180</sup>

c) *Discussion and Recommendation*

Ridgelines are an important geographical feature that contribute to the distinctive character and scenic beauty of Vermont and that contain important habitat and natural communities. The State has long had a policy of protecting its ridgelines.

The building of wind energy facilities in these sensitive areas has presented a policy conflict for Vermont because the facilities can advance the goals of reducing greenhouse gas emissions while at the same time potentially affecting the environment and scenic beauty of the ridgelines, including the clearing of forested areas and the placement of impervious surfaces and resulting stormwater discharges.

The importance of ridgelines for interior forests suggests that reducing Act 250’s 2,500-foot elevation threshold to 2,000 feet could improve its ability to protect forests from fragmentation. As discussed above, Vermont has 223 mountains that rise above 2,000 feet. However, as discussed above in Sec. VI.B., the Commission could not reach a consensus on this issue, particularly in regard to siting energy generation projects.

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<sup>178</sup>Vermont Environmental Research Associates, Inc., Estimating the Hypothetical Wind Power Potential on Public Lands in Vermont (December 2003) at 14.

<sup>179</sup>Vt. ANR, Report on the Environmental and Land Use Impacts of Renewable Electric Generation in Vermont in Response to Act 56 of 2015 at 14.

<sup>180</sup>*Id.* at 21.

### C. Release from jurisdiction

#### 1. Charge

Act 47, Sec. 2(e)(2)(G)(i) – “Circumstances under which land might be released from Act 250 jurisdiction.”

#### 2. Facts

Under Act 250, with three exceptions, all permits are issued for an indefinite time period.<sup>181</sup> In addition to being permanent, all permits run with the land and are enforceable against the permit holder and all successors in interest.<sup>182</sup>

The three exceptions are for projects involving mineral resource extraction, solid waste disposal facilities, and logging above 2,500 feet.<sup>183</sup> The permits granted for these types of projects must contain a specific date for completion of the project, a plan for the reclamation of the land used, and the expiration date of the permit.<sup>184</sup> When a permit expires, the land is no longer subject to Act 250 jurisdiction if the permitted improvements are removed, the operation has ceased, the land is reclaimed according to the plan, and there is no other activity to trigger the statute’s application.<sup>185</sup>

In the case of the exceptions, the permit’s duration is set based on the time during which the land is suitable for the stated use.<sup>186</sup> The duration must extend through this period at a minimum.<sup>187</sup>

Permits can be abandoned prior to construction, which also releases the land from Act 250 jurisdiction. If a permit is issued and construction of the project does not begin within three years, the permit is considered abandoned. This is known as involuntary abandonment.<sup>188</sup> However, a permit is not considered abandoned if the project is subject to litigation that prevents construction.<sup>189</sup> A permit can also be voluntarily abandoned by the holder of the permit any time before construction of the project begins.<sup>190</sup>

#### 3. Discussion and Recommendation

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<sup>181</sup>10 V.S.A. § 6090(b)(2).

<sup>182</sup>Act 250 Rule 33(C)(3).

<sup>183</sup>10 V.S.A. § 6090(b)(1).

<sup>184</sup>Act 250 Rule 33(b).

<sup>185</sup>*In re Huntley*, 2004 VT 115, ¶¶ 9–11, 15.

<sup>186</sup>10 V.S.A. § 6090(b)(1).

<sup>187</sup>Rule 32(b)(2).

<sup>188</sup>Rule 38(A).

<sup>189</sup>10 V.S.A. § 6091(b).

<sup>190</sup>Rule 38(B).

There is currently no process to release land from jurisdiction when a permit was not abandoned but the land use subsequently changes to a use that would not have triggered Act 250 jurisdiction in the first place. The Commission recommends consideration of a process under which release from jurisdiction could be obtained if the following apply:

- The use of the land as of the date of the application for release from jurisdiction is not the same as the use of the land that caused the obligation to obtain an Act 250 permit.
- This use does not constitute development or subdivision as defined in the Act and would not require a permit or permit amendment but for the fact that the land is already subject to an Act 250 permit.
- The permittee or permittees are in compliance with the permit and their obligations under Act 250.
- If there is a subsequent proposal on the same land of a project that requires an Act 250 permit, it would be subject to Act 250 as if the land had never previously received an Act 250 permit.

D. **Projects in multiple towns**

1. **Charge**

Act 47, Sec. 2(e)(2)(G)(iii) – “Potential jurisdictional solutions for projects that overlap between towns with and without both permanent zoning and subdivision bylaws.”

2. **Facts/Background**

As discussed above, when a project involves the construction of improvements for a commercial or industrial purpose, an Act 250 permit is required if the project involves more than 10 acres of land or, if the municipality does not have both permanent zoning and subdivision bylaws, more than one acre of land.

The radius for determining involved land is five miles from any point on any involved land.<sup>191</sup>

The same project may involve lands in two towns if the lands are within a radius of five miles. It is therefore possible that one of the towns has both permanent zoning and subdivision bylaws (a “10-acre town”) and the other town does not (a “one-acre town”).

In such a situation, the project’s total amount of involved land could exceed one acre and be less than 10 acres. The project would then trigger Act 250 because of the one-acre town and jurisdiction would apply to the entire project.

The Commission has not received data on how often this situation occurs.

3. **Discussion and Recommendation**

The Commission has not received information that indicates this issue represents a significant problem or why. The Commission therefore recommends that no jurisdictional solutions be pursued.

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<sup>191</sup>10 V.S.A. § 6001(3)(A)(i); Act 250 Rule 2(C)(5).

## E. Jurisdiction over trails

### 1. Charge

Act 194, Sec. 3 (a) “In addition to the currently assigned tasks under 2017 Acts and Resolves No. 47 (Act 47), the Commission on Act 250: the Next 50 Years (the Commission) established under that act shall evaluate the strengths and challenges associated with regulation of recreational trails under 10 V.S.A. chapter 151 (Act 250) and alternative structures for the planning, review, and construction of future trail networks and the extension of existing trail networks. The Commission shall include recommendations on this issue in its report to the General Assembly due on or before December 15, 2018 under Act 47.”

### 2. Facts

Act 250 jurisdiction is governed primarily by its definitions of “development” and “subdivision.” These definitions do not contain language that is specific to when a recreational trail becomes subject to Act 250.<sup>192</sup>

Instead, a recreational trail project may require an Act 250 permit in one of three situations. First, if the trail project is for a commercial purpose, it will trigger Act 250 if it is on a tract of tracts of land totaling 10 or more acres in a town with zoning or subdivision bylaws or more than one acre in a town that does not have both of these bylaws.<sup>193</sup> For a commercial project, the entirety of the tract or tracts would be counted for the purpose of determining jurisdiction, though if a permit is required Act 250 would only regulate the trail corridor and the area directly or indirectly affected by the trail.<sup>194</sup>

Second, if the trail project is for a municipal, county, or State purpose, including a trail that is part of the Vermont Trails System, it will trigger Act 250 if the land physically altered as part of the project and any land incidental to the use totals more than 10 acres.<sup>195</sup>

Third, if the trail project is on land already subject to an Act 250 permit for other reasons, it will trigger Act 250 if it constitutes a material change to the permitted project.<sup>196</sup>

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<sup>192</sup>10 V.S.A. §§ 6001, 6081.

<sup>193</sup>10 V.S.A. § 6001 (3)(A).

<sup>194</sup>Act 250 Rules 2(C)(5), 71(A).

<sup>195</sup>10 V.S.A. § 6001(3)(A); Act 250 Rules 2(C)(5), 71(B).

<sup>196</sup>Act 250 Rules 2(C)(6), 34(A).



Trail projects vary in type, use, and potential impact.<sup>197</sup> In the last five years, there have been 31 permit applications for recreational trails. All of them were granted. Eighty percent of the applications were processed within 60 days.<sup>198</sup>

Also, in the last five years, the Act 250 program issued 38 jurisdictional opinions concerning recreational trails. Of these opinions, 32 found that jurisdiction did not attach.<sup>199</sup> Some of the reasons for the conclusions of nonjurisdiction were: there was no material change to the permitted project, the trail project was determined to be routine maintenance, or the trail project did not reach the required acreage threshold.<sup>200</sup>

### 3. Discussion and Recommendation

Act 194 established the Recreational Trails Working Group. This Working Group was required to submit a report to the Commission on Act 250 with information and recommendations regarding recreational trails by October 1, 2018. The Working Group submitted the results of a survey on or about October 1, 2018 that indicated it was not the Group's final report and that the Group would continue to work together during the fall of 2018.

The Commission received testimony on December 7, 2018 that the Recreational Trails Working Group had not yet unanimously decided on what to recommend. The Working Group met regularly since the passage of Act 194, but had not finished their work. The Working Group reported that they are developing a proposal on the creation of an alternative review process for trail permits. The Working Group plans to present their findings and recommendations to the General Assembly, after they have concluded their work, by March 1, 2019.<sup>201</sup>

Lack of a final report from the Recreational Trails Working Group hinders the Commission's ability to make recommendations on Act 250's jurisdiction over recreational trails, and therefore, the Commission does not make such recommendations at this time.

The Commission does note three concepts that have emerged from the testimony on this issue:

- Clarifying Act 250 terms such as "public purpose," "involved land," the definition of "trail," and "area of impact" in regard to trails.

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<sup>197</sup>Act 194 Recreational Trails Working Group, Report to the Act 47 Commission regarding Act 250 and Recreational Trail Regulation in Vermont at 3 (Oct. 1, 2018).

<sup>198</sup>G. Boulboul, Vt. Natural Resources Board, testimony (Oct. 11, 2018).

<sup>199</sup>Id.

<sup>200</sup>Id.

<sup>201</sup>D. Snelling, Recreational Trails Working Group, testimony (Dec. 7, 2018).

- Removing recreational trails from Act 250 jurisdiction in favor of an alternative regulatory structure.
- Creating a specific definition of “development” in Act 250 for recreational trails in order to provide clarity and uniformity as to when Act 250 does and does not apply to recreational trails.

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## VII. TASK GROUP 4: ACT 250 PROCESS; INTERFACE WITH OTHER PERMITTING; APPEALS

### A. Application and review process before the District Commissions; role of Natural Resources Board

#### 1. Statistical analysis

##### a) *Charge*

Act 47, Sec. 2(e)(1) – “A statistical analysis based on available data on Vermont environmental and land use permitting in general and on Act 250 permit processing specifically, produced in collaboration with municipal, regional, and State planners and regulatory agencies.”

##### b) *Facts/Analysis*

The Joint Fiscal Office (JFO) utilized permitting data from the Natural Resources Board in completing the statistical analysis of permitting activities. Most of the data came from annual reports, but in some cases, the NRB provided updated numbers due to noted inconsistencies in the data between report years. The analysis reflects a ten-year reporting period, from calendar year 2008 through calendar year 2017. After reviewing the data submitted by NRB, ANR, and some municipalities, JFO decided to focus the statistical analysis on Act 250 permitting activity only because of the unique nature of the program and the lack of comparability across data sources (i.e., staffing differences, varying administrative complexity, and application volume).

Figure 1,<sup>202</sup> below, shows the total number of Act 250 applications (bars) processed by the NRB over a ten-year period as well as major and minor applications and administrative amendments (lines).<sup>203</sup> The total annual applications dropped steadily through most of this period with a slight uptick in the past two years, driven by an increase in administrative amendments. Major applications have dropped, while minor applications have remained relatively stable.

As major and minor applications typically require greater effort than administrative amendments, Figure 2 highlights total major and minor applications with an overlay of the median processing times<sup>204</sup> for each application type over a ten-year period. An important

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<sup>202</sup>All figures were derived using data provided by the Natural Resources Board.

<sup>203</sup>The numbers for each year, save for 2008, were taken directly from the Natural Resources Board annual report for that particular year. Major and minor applications for 2008 were taken from the 2009 report, while the administrative amendments were taken from the report titled “The Next 50 Years,” which was produced by the NRB.

<sup>204</sup>Median processing times were provided by the Natural Resources Board (NRB) and may differ from median times shown in annual reports.

note is that the processing times are not exclusive of periods when an application resides outside of NRB control (i.e., ANR, applicant, etc.). The NRB does not currently have the capability to break out the time an application spends within its possession from total processing time. Overall, as major and minor applications have dropped over the ten-year period, median processing times have crept up. 2016 stands out significantly in this figure and in Figure 3, but the NRB has stated that the permitting numbers are accurate. Median times were used rather than average times due to the presence of a small number of applications in a typical year that take a very long time to process, and which skews the average significantly. Figure 3 reflects the disparity between average and median processing times.

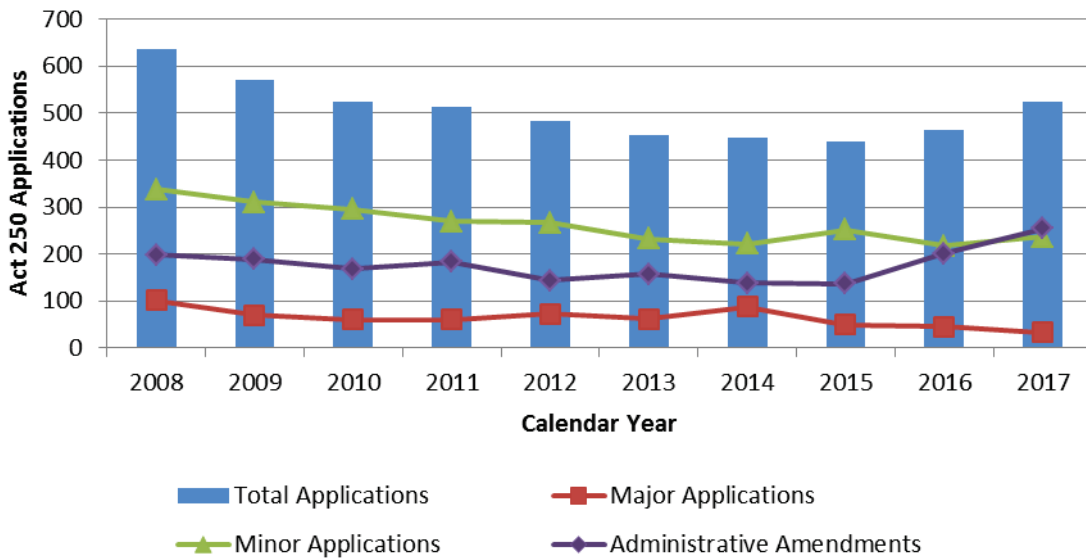
The two primary metrics presented by the NRB in its annual reports to indicate the timeliness of application processing are 1) processing times arranged within date ranges and 2) Performance Standards. Figure 4 shows a ten-year look at processing times based on the percent of applications processed within five date ranges. Over ten years, the percent of applications exceeding 119 days for processing has increased while the percentages in other ranges have decreased slightly. The performance standards maintained by the NRB are as follows:

1. Application Completeness Review (internal standard): **7 days**
2. Minors—days to issue after end of comment period (internal standard): **10 days**
3. Majors—days to issue after adjournment (Act 250 rule): **20 days**
4. Majors—days to schedule a hearing (statutory rule): **40 days**

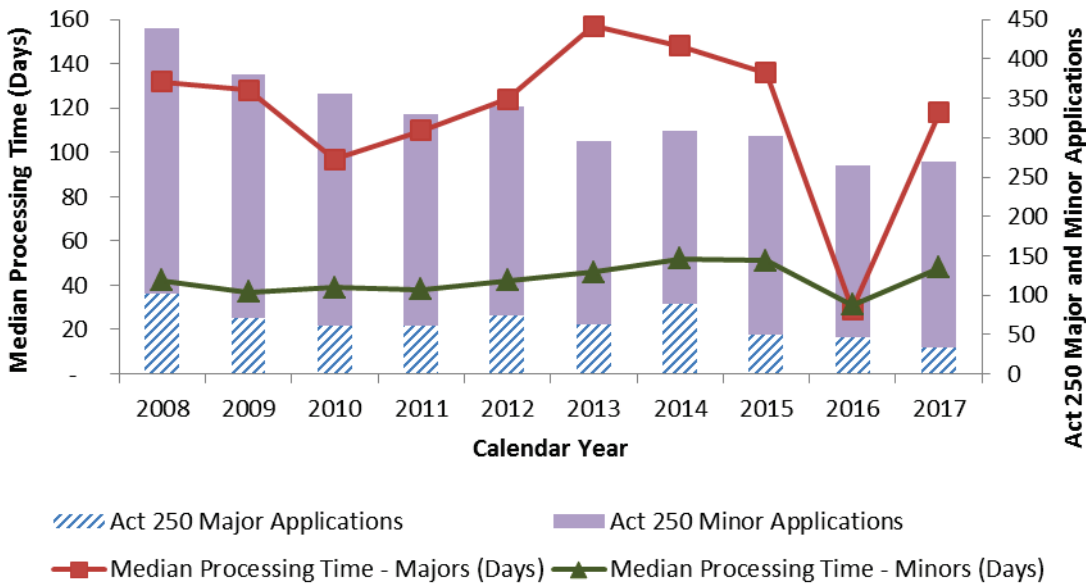
Figure 5 shows how actual application processing results compare to the standards. The standards are represented by dashed lines while actual results are represented by solid lines. This figure represents nine years of performance data rather than ten years because two of the four metrics were not given in the 2017 annual report.

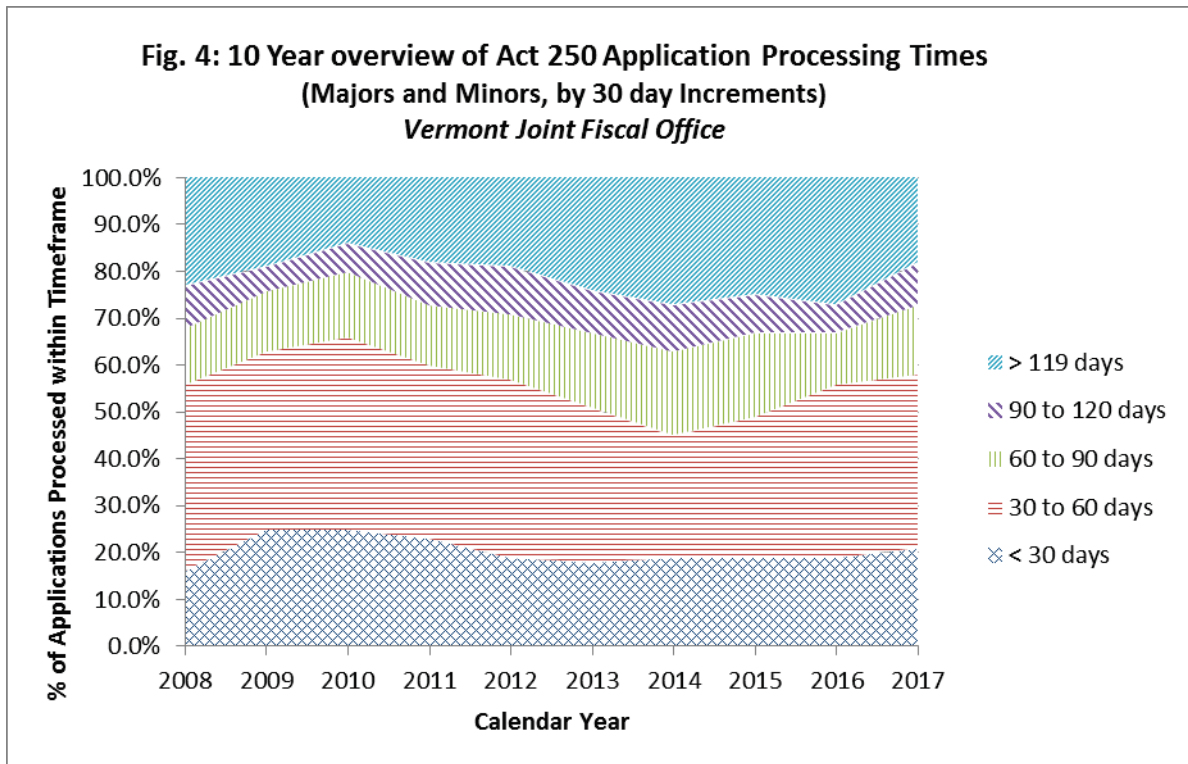
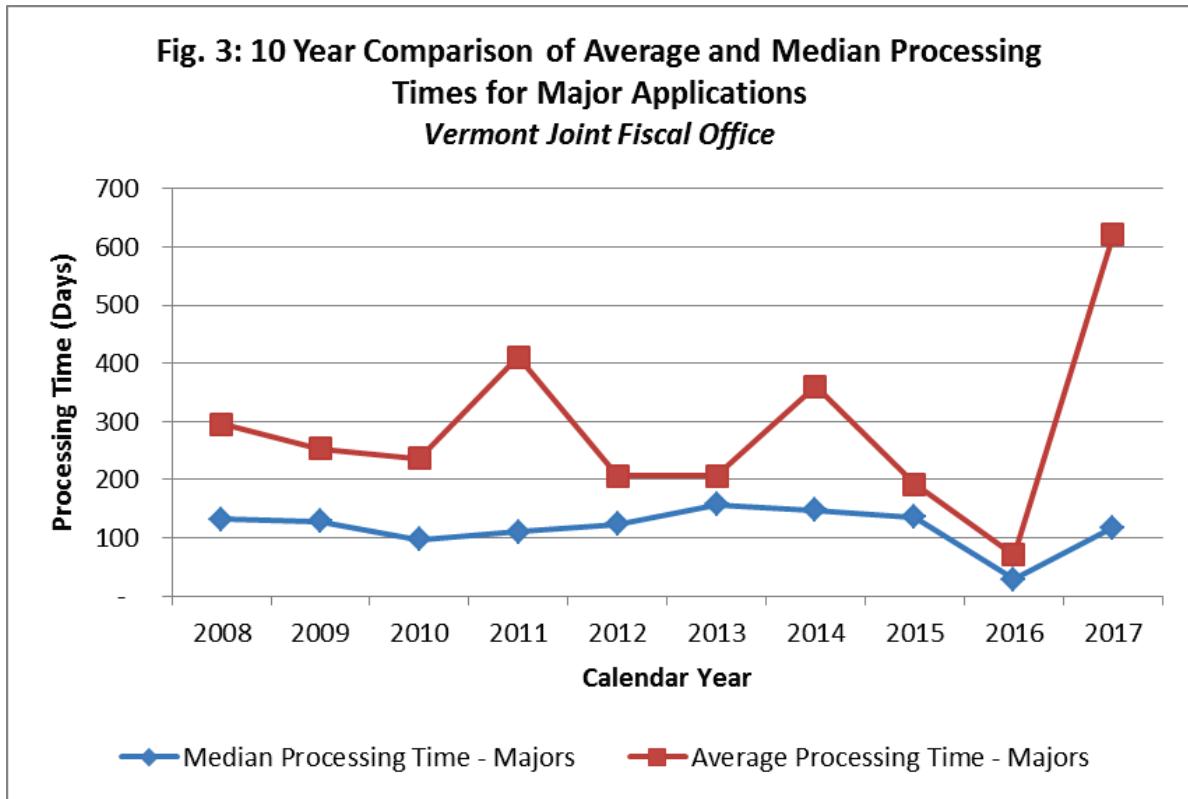
The process of performing the statistical analysis was complicated by several factors that should be addressed by the NRB going forward. The annual reports often were inconsistent from year to year. For example, prior to 2016, processing times were calculated based on major and minor applications only, but in 2016 and 2017, processing times included administrative amendments. Processing times dropped dramatically from prior years, but no explanation was given for the change. Additionally, annual numbers given in the report “The Next 50 Years,” which was drafted by the NRB, do not match the numbers in past annual reports. The NRB has also indicated that for any given Act 250 application there is no way of singling out the time an application is in NRB possession from the time it might be awaiting action from another party. The NRB has indicated that it is taking actions to address many of these challenges.

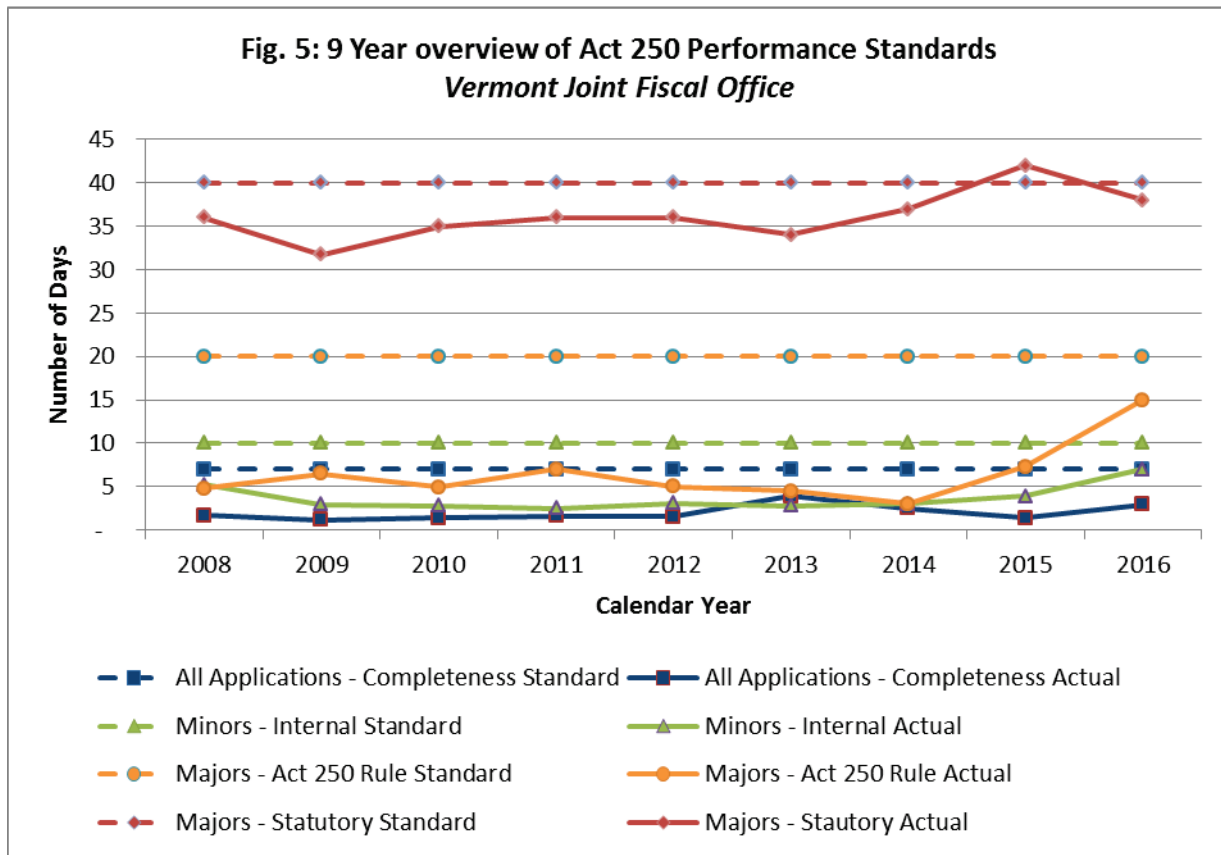
**Fig. 1: 10 Year overview of Act 250 Applications**  
(total and by type)  
*Vermont Joint Fiscal Office*



**Fig. 2: 10 Year overview of Act 250 applications and Processing Times**  
(major and minor)  
*Vermont Joint Fiscal Office*







### c) Recommendation

The Commission recommends the following:

- Further Data Collection.* The current data submitted to the Commission does not reflect the back-and-forth nature of the application process, where applicants communicate with the agencies to compile the information needed for a complete permit application. Further, the existing data does not reflect the variation in municipal capacity to process land use permit applications. The Commission recommends that further data collection is needed in order to better understand the permitting process.
- Better Permit Tracking.* The Commission recommends that the NRB database be updated to allow point-to-point monitoring of applications as they move through the review process. If an application goes back to the applicant for revision or to ANR for additional permitting, then the database should reflect who possesses an application at a given time.
- Address Delayed Applications.* Some Act 250 applications have taken years for a final decision, in one case over 16,000 days (almost 44 years). These outliers significantly complicate any effort to accurately analyze average permitting results. In some cases, these are abandoned applications, and in others, there may be

ongoing litigation. A better permit tracking system would allow NRB to isolate these outliers more easily and explain the circumstances surrounding any delay in its reports to the public. The Commission recommends that the NRB also consider adopting a rule to periodically “check in” on delayed applications to determine whether action might be taken to move it along or close it out.

- *Improve Annual Reports.* Past reports often contain inconsistencies with how permitting data is presented year to year. This reality created significant complications for JFO in performing a statistical analysis. The Commission recommends that the NRB be more transparent in highlighting major changes to the presentation of its permitting statistics and provide data in a more consistent format in general going forward.
- *Address District Commission variances.* The NRB’s testimony suggested that some District Commissions may track permit applications differently in regard to the performance standards. This would skew the actual processing performance in relation to the standards. The Commission recommends that these variations between District Commissions be resolved.



## 2. Evaluation

### a) *Charge*

Act 47, Sec. 2(e)(2)(F) – “An evaluation of how well the Act 250 application, review, and appeals processes are serving Vermonters and the State’s environment and how they can be improved, including consideration of:

(i) Public participation before the District Environmental Commissions and in the appeals process, including party status.

(ii) The structure of the Natural Resources Board. . . .”

### b) *District Commissions*

Nine District Environmental Commissions serve Vermont. Each consists of a chair, two members, and up to four alternate members. The members are removable for cause only, except the Chair who serves at the pleasure of the Governor.<sup>205</sup> District Commissioners are not salaried. They receive a \$50 per diem and expenses.<sup>206</sup> Each District Commission is served by one or more District Coordinators and other staff, all employed by the NRB.<sup>207</sup>

The public may participate in District Commission proceedings related to permit applications and in the issuance of jurisdictional opinions by District Coordinators.<sup>208</sup>

For permit applications, the statute specifies the following parties: the applicant; the landowner if other than the applicant; the municipality; the municipal and regional planning commissions; any State agency affected by the proposed project; and any adjoining property owner or other person “who has a particularized interest protected by this chapter that may be affected by an act or decision by a District Commission.”<sup>209</sup>

If a person seeks party status under this last category, “particularized interest,” the statute requires either an oral or written petition to the District Commission and specifies information to be included in the petition.<sup>210</sup> A decision on party status is appealable.<sup>211</sup>

The statute requires that District Commissions reexamine party status before the close of hearings and consider the extent to which a person continues to qualify for party

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<sup>205</sup>10 V.S.A. § 6026.

<sup>206</sup>10 V.S.A. § 6028, 32 V.S.A. § 1010.

<sup>207</sup>Natural Resources Board, District Staff and Environmental Commissions, retrieved from <https://nrb.vermont.gov/act250-program/district-staff-and-commissions>, Nov. 5, 2018.

<sup>208</sup>10 V.S.A. §§ 6007(c), (d), 6085(c).

<sup>209</sup>10 V.S.A. § 6085(c).

<sup>210</sup>Id.

<sup>211</sup>10 V.S.A. § 8504(d)(2)(B).

status.<sup>212</sup> Loss of party status because of such reexamination would affect a person's ability to appeal on the merits.<sup>213</sup>

The statute allows a person to participate as a friend of the commission rather than as a party. Friend of the commission status does not carry the ability to appeal.<sup>214</sup>

If the District Commission processes an application as a minor, parties have the right to comment and request a hearing.<sup>215</sup> A hearing request must include a petition for party status if made by a person who is required to demonstrate qualification for "particularized interest" status.<sup>216</sup>

Hearings are held for major applications and for minor applications when the District Commission grants a hearing request or determines to hold a hearing on its own motion.<sup>217</sup> When hearings are held, parties have the right to present and respond to evidence and conduct cross-examination.<sup>218</sup>

Before a hearing is held, a District Commission may conduct a prehearing conference to: determine preliminary party status, make preliminary rules on procedural matters, clarify the issues in controversy, and set a schedule for future proceedings; identify evidence, documents, and witnesses to be presented at a hearing by any party; or promote nonadversarial resolution of issues.<sup>219</sup>

Jurisdictional opinions are issued by District Coordinators rather than District Commissions. They pertain to whether Act 250 applies to a project or to whether a permit application is complete. Any person may request a jurisdictional opinion. After issuance, reconsideration of the opinion may be requested.<sup>220</sup>

### c) *Natural Resources Board*

The NRB consists of five members and five alternate members appointed by the Governor. The members are removable for cause only, except that the Chair serves at the pleasure of the Governor. The Chair is a full-time, salaried position.<sup>221</sup> Other NRB members are not salaried. They receive a \$50 per diem and expenses.<sup>222</sup>

The NRB has the following functions:

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<sup>212</sup>10 V.S.A. § 6085(c)(6).

<sup>213</sup>10 V.S.A. § 8502(7), 8504(a), (d).

<sup>214</sup>10 V.S.A. §§ 6085(c)(5), 8502(7), 8504(a).

<sup>215</sup>10 V.S.A. § 6084(b), (c).

<sup>216</sup>Act 250 Rule 51(B)(3)(e).

<sup>217</sup>10 V.S.A. § 6084.

<sup>218</sup>10 V.S.A. § 6002; 3 V.S.A. §§ 809–810.

<sup>219</sup>Act 250 Rule 16.

<sup>220</sup>10 V.S.A. § 6007(c); Act 250 Rules 3, 10(D).

<sup>221</sup>10 V.S.A. § 6021; 32 V.S.A. § 1003(b)(1)(CC).

<sup>222</sup>10 V.S.A. § 6028, 32 V.S.A. § 1010.

- adopting rules of procedure for the District Commissions and itself;
- adopting substantive rules for the Act 250 program;
- overseeing the administration and enforcement of Act 250;
- initiating permit revocation proceedings before the Environmental Division;
- participating in proceedings before the Environmental Division in all matters relating to Act 250;
- hearing appeals from decisions on whether municipal and regional plans should be given an affirmative determination of energy compliance.<sup>223</sup>

d) *Discussion and Recommendation*

*Per diems.* The District Commissions have a complex and difficult job yet only receive a \$50 per diem, which has not been changed in many years. The Commission recommends that the General Assembly increase the per diem paid to the District Commissioners.

*Preapplication engagement.* Several witnesses have recommended that there be a required preapplication engagement process for at least some Act 250 projects. Such a process would involve the applicant, affected adjoining property owners and neighbors, the town, the regional planning commission, ANR, and other affected State agencies. It might be convened by the District Coordinator and might involve the District Commission itself in some way.

The Commission supports, in principle, the suggestion for a preapplication engagement process. Since not every project will be controversial or have significant impacts, appropriate thresholds for triggering this process will need to be determined. Such thresholds could be based on construction costs or the number of lots or housing units to be built. In addition, the involvement of the District Commissioners and District Coordinators will need to be carefully considered in light of the applicable requirements of the Administrative Procedure Act, such as the stricture against ex parte contacts and the requirement that findings be based exclusively on the record.<sup>224</sup> Further, there are aspects of a project that parties do not have the right to bargain away during informal meetings, such as environmental values. The Commission believes that more details are required before it can fully recommend this process.

*NRB structure.* The Commission has discussed the structure of the NRB, including the possibility of turning it into or replacing it with a professional board. This consideration is interwoven with the possibility of changing the current appeals structure for decisions of the District Commissions and District Coordinators from a judicial to an administrative structure, which the Commission recommends below.

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<sup>223</sup>10 V.S.A. §§ 6025, 6027, 8004, 8504(n); 24 V.S.A. § 4352(f).

<sup>224</sup>3 V.S.A. §§ 809–814.

**B. Interface with other permit processes**

1. Charge

Act 47, Sec. 2(e)(2)(E) – “An examination of the interface between Act 250 and other current permit processes at the local and State levels and opportunities to consolidate and reduce duplication. This examination shall include consideration of the relationship of the scope, criteria, and procedures of Act 250 with the scope, criteria, and procedures of Agency of Natural Resources permitting, municipal and regional land use planning and regulation, and designation under 24 V.S.A. chapter 76A.”

2. Facts/Background

a) *Supervisory Authority*

When the Act 250 program has jurisdiction over a project, it has primary or supervisory authority over any other applicable environmental or land use review process.<sup>225</sup> “Act 250 itself explicitly proclaims its primacy over, without preemption of, ancillary permit and approval processes.”<sup>226</sup> The program “sits as the final decision maker in environmental matters in Vermont.”<sup>227</sup>

b) *Other Permits; Presumptions*

The NRB is enabled by rule to allow other State and municipal permits and approvals to create presumptions of compliance with various Act 250 criteria if they satisfy the requirements of those criteria.<sup>228</sup> Presumptions take the place of evidence and typically may be rebutted by evidence contrary to the presumed fact.<sup>229</sup>

Current Act 250 rules place a high bar on a party seeking to rebut another permit, effectively requiring a party to produce affirmative testimony that the criterion is not met.<sup>230</sup> The statute also requires that the District Commissions give substantial deference to the technical determinations of ANR.<sup>231</sup>

The Act 250 program is required to give presumptive weight to determinations of municipal development review boards (DRB) resulting from local Act 250 review of a project’s municipal impacts under 24 V.S.A. § 4420.<sup>232</sup>

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<sup>225</sup>In re Hawk Mountain Corp., 149 Vt. 179, 184–85 (1988).

<sup>226</sup>In re Agency of Transp., 157 Vt. 203, 208 (1991).

<sup>227</sup>Southview Assocs., Ltd. v. Individual Members of Vermont Env'tl. Bd., 782 F. Supp. 279, 283 (D. Vt. 1991), aff'd sub nom. Southview Assocs., Ltd. v. Bongartz, 980 F.2d 84 (2d Cir. 1992).

<sup>228</sup>10 V.S.A. § 6086(b).

<sup>229</sup>VRE 301(a), applicable in Act 250 proceedings through 10 V.S.A. § 6002 and 3 V.S.A. § 810; Tyrrell v. Prudential Ins. Co. of Am., 109 Vt. 6, 23–24 (1937); Black’s Law Dict. (10th ed. 2014).

<sup>230</sup>Act 250 Rule 19(F)(2).

<sup>231</sup>10 V.S.A. § 6086(d).

<sup>232</sup>Id.

Under the relevant statutes, the local Act 250 review of municipal impacts corresponds directly with the District Commissions in terms of criteria and procedures. The criteria for which this review is available are worded nearly identically to the Act 250 criteria for educational services, local governmental services, and conformance with the local plan.<sup>233</sup>

Similarly, both the DRBs engaging in local Act 250 review and the District Commissions are required to follow quasi-judicial procedures that: (a) direct that all parties be given notice and an opportunity to respond and present evidence on all issues involved, (b) require testimony under oath or affirmation and the use of the Vermont Rules of Evidence, (c) prohibit ex parte communications, and (d) require that decisions be in writing with findings of fact based exclusively on the record and conclusions of law based on those findings.<sup>234</sup>

State permits and approvals given presumptive weight do not employ quasi-judicial procedures and instead use a less formal notice and comment process. For example, applications for ANR permits typically involve notice of the application, notice of a draft decision, and an opportunity to submit comment and request a public meeting. The rules of evidence do not apply to what is contained in the record and what may be relied on, testimony is not taken under oath, and ex parte communications are not prohibited. Decisions must contain a concise statement of their legal and factual basis rather than findings of fact and conclusions of law.<sup>235</sup>

The scope of other State permits and approvals is typically more limited than Act 250, which involves a comprehensive review of a development or subdivision under a suite of criteria related to the environment, land use, and economic impacts to governments.<sup>236</sup> In contrast, ANR's permits usually relate to specific activities, resources, and environmental media, such as discharges to waters, wetlands, and air emissions.<sup>237</sup>

The criteria or standards used for application review by Act 250 and other State permits differ in their complexity and focus. On a statutory level, Act 250 requires a set of findings under 10 criteria of moderate specificity that take up approximately six pages of statute, with criteria 1 and 9 encompassing detailed lists of seven and 11 subcriteria, respectively.<sup>238</sup>

In contrast, statutes requiring permits from ANR typically require a permit from the Secretary of Natural Resources, who is given general policy direction and the authority to adopt rules. For example, the General Assembly has provided approximately half a page of factors to consider in determining which wetlands are significant enough to be protected,

<sup>233</sup>Compare 10 V.S.A. § 6086(a)(6), (7), (10) with 24 V.S.A. § 4420(c)(1)–(3).

<sup>234</sup>3 V.S.A. chapter 25, subchapter 2; 10 V.S.A. § 6002; 24 V.S.A. § 4420(b)(1), chapter 36.

<sup>235</sup>See 10 V.S.A. chapter 170 generally, and specifically 10 V.S.A. §§ 7711, 7713.

<sup>236</sup>10 V.S.A. §§ 6001, 6081, 6086(a).

<sup>237</sup>10 V.S.A. §§ 556, 556a, 913, 1259.

<sup>238</sup>10 V.S.A. § 6086(a)(1)–(10).

given the Secretary authority to adopt wetland rules, and, except for certain uses, prohibited activity in a significant wetland or its buffer zone without approval by the Secretary.<sup>239</sup>

ANR's rules implementing these statutes often consist of detailed technical and engineering-based provisions that address the specific environmental impact or resource regulated by ANR. For example, the Stormwater Management Rule consists of 26 pages that address such matters as applicability, exemptions, and permitting standards that vary according to the type of permit sought and whether the discharge is to an impaired or unimpaired water. This rule in turn incorporates the Vermont Stormwater Management Manual, which consists of 113 pages that address in detail such matters as the design of stormwater treatment measures and the treatment standards to be met.<sup>240</sup>

Act 250 criteria that incorporate ANR regulations often require additional inquiry by the District Commission. For example, the Act 250 criterion on air and water pollution begins with language that requires the District Commission to consider several factors such as the land's elevation, slope, and ability to support waste disposal as well as applicable ANR regulations.<sup>241</sup>

Similarly, the subcriterion on waste disposal requires the applicant to show that the project will comply with applicable ANR regulations and "will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells."<sup>242</sup>

### c) *Local and Regional Planning*

As discussed above, Act 250 is a regulatory program that no longer has responsibility to perform land use planning. It has limited jurisdiction. When a project is subject to Act 250, it is reviewed through a quasi-judicial process for compliance with a comprehensive set of criteria on the environment, land use, and economic impacts to governments.

Under 24 V.S.A. chapter 117, regional and municipal planning commissions engage in land use planning that is comprehensive for the area to which the planning applies and which may, in the case of a municipality, lead to adoption of regulatory bylaws that affect nearly all land use in the municipality.<sup>243</sup> The plans are adopted through notice and comment procedures.<sup>244</sup>

Act 250 intersects with local and regional planning primarily through a criterion requiring that a project conform with the local and regional plans. It does not contain a

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<sup>239</sup>10 V.S.A. §§ 905b(18), 913.

<sup>240</sup>Vt. ANR, Environmental Protection Rule Chapters 18 (Stormwater Management Rule) and 36 (Vermont Stormwater Management Manual) (July 1, 2017).

<sup>241</sup>10 V.S.A. § 6086(a)(1).

<sup>242</sup>10 V.S.A. § 6086(a)(1)(B).

<sup>243</sup>24 V.S.A. §§ 4348a, 4382, 4410–4414.

<sup>244</sup>24 V.S.A. §§ 4348, 4384, 4385.

definition or other language indicating how that conformance is to be determined, except to state that the town's bylaws are consulted only if the District Commission finds town plan provisions to be ambiguous and only to the extent that the bylaws implement and are consistent with the plan provisions.<sup>245</sup>

In a series of cases starting with In re Molgano, the Vermont Supreme Court ruled that plan provisions cannot be applied in Act 250 unless they enunciate a specific policy rather than a "nonregulatory abstraction."<sup>246</sup> In Molgano, the Court enunciated no constitutional or statutory basis for creating these rules.<sup>247</sup>

However, In re B & M Realty, a recent Supreme Court decision on this issue, refers to constitutional case law under the due process clause. This case law requires that statutes and regulations be sufficient to place citizens on notice of what activities are allowed or prohibited.<sup>248</sup> As the Court stated: "[A] statute must be sufficiently clear to give a person of ordinary intelligence a reasonable opportunity to know what is proscribed."<sup>249</sup>

While Act 250 requires conformance with local and regional plans, it does not incorporate the statutory goals for regional and municipal planning set forth in 24 V.S.A. § 4302. In this regard, local plans may but do not have to be consistent with those goals.<sup>250</sup> Regional plans must be consistent with these goals.<sup>251</sup>

In an Act 250 proceeding, if there is a conflict between the local and regional plans, the local plan takes precedence unless the project has a substantial regional effect.<sup>252</sup>

#### d) *State Designation Program*

The State designation program is described in detail above, including its interface with Act 250. The program is not a regulatory process. It is a program under which land area designations conferring various benefits are granted to municipalities by a State board called the Vermont Downtown Development Board. The governing statutes require application by the municipality and typically specify the application requirements in detail. The Board grants the determination if it determines that the statutory requirements are met. There is no appeal from this decision, but reconsideration may be requested.<sup>253</sup>

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<sup>245</sup>10 V.S.A. § 6086(a)(10).

<sup>246</sup>In re Molgano, 163 Vt. 25, 29, 31 (1994); In re Kisiel, 172 Vt. 124, 130 (2000); In re John A. Russell Corp., 2003 VT 93, ¶ 19.

<sup>247</sup>See, e.g., Molgano, 163 Vt. at 29.

<sup>248</sup>In re B & M Realty, LLC, 2016 VT 114, ¶ 33; In re Appeal of JAM Golf, LLC, 2008 VT 110, ¶ 17; In re Handy, 171 Vt. 336, 347 (2000); Brody v. Barasch, 155 Vt. 103, 110 (1990).

<sup>249</sup>Brody, 155 Vt. at 110.

<sup>250</sup>10 V.S.A. § 6086(a)(10); 24 V.S.A. § 4382.

<sup>251</sup>24 V.S.A. § 4348a(a).

<sup>252</sup>24 V.S.A. § 4348(h).

<sup>253</sup>24 V.S.A. chapter 76A.

### 3. Discussion and Recommendation

*Interface with local and regional plans.* The Commission has received proposals with respect to improving Act 250's criterion on conformance with local and regional plans. As discussed above, the Commission recommends requiring that the plans applied in Act 250 first be approved as consistent with the statutory planning goals. The Commission also recommends that Act 250 require conformance not only with the written provisions of those plans but also with their future land use and facility maps, since those maps represent the land use choices of, respectively, the town and the region. In addition, the criterion should be clarified to indicate that the written provisions should be applied unless they are shown not to meet the same standard of specificity that applies to statutes.

*Interface with other permits and approvals.* The Commission has received proposals to: (1) deny the ability to rebut presumptions created in Act 250 by other permits and approvals unless "new" evidence is presented or (2) make the existing presumptions conclusive or dispositive. The Commission disagrees with these proposals.

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.

The jurisdiction of the District Commissions is therefore purposefully concurrent with other centralized State agencies staffed by engineers and scientists.

- In contrast to centralized agencies, the District Commissions are independent, regionally based citizen commissions more in touch with local conditions and circumstances.
- The District Commissions make their decisions based on a comprehensive project review rather than a compartmentalized evaluation of a particular impact or activity such as a stormwater discharge.
- They provide a clear avenue for citizens to participate in project review in a manner that provides a greater and more meaningful role than simply submitting or voicing concerns after an agency has decided to issue a draft permit based on back and forth between its staff and the applicant's experts.
- They act as a safeguard against agency decisions in case they are flawed.

The Act 250 program is enabled, but not required to accept other permits and approvals as demonstrating compliance with the relevant Act 250 criteria, except in the case of local Act 250 review through a quasi-judicial process. Under this authority, the



program has chosen to adopt rules that allow for presumptions and that set a high bar to rebut the presumption. The rules effectively require a party to demonstrate that the criterion is not met and do not allow rebuttal simply by pointing out irregularities in or underlying the other permit.

Making presumptions conclusive or dispositive would negate the citizen-based supervisory authority of the District Commissions by, in effect, removing their authority over the issue addressed in the permit or approval creating the presumption. In this regard, conclusive presumptions are not true presumptions but rather are rules of law that direct a particular outcome whether or not there is conflicting evidence.<sup>254</sup>

Proposals to deny the ability to rebut presumptions created by permits unless there is new evidence would have nearly the same effect on the supervisory authority of the District Commissions, which could not review the issue addressed in the permit or approval unless a party discovers and offers new evidence. Their jurisdiction therefore would be restricted to a narrow circumstance rather than being truly concurrent.

Negating or reducing Act 250's supervisory authority is particularly troubling in light of the significant water quality issues that continue to vex the State. As discussed above, the number of Vermont waters that are impaired for one or more pollutants has increased and, despite conscientious and hard work by ANR staff, the State's efforts to achieve and maintain water quality standards have not reversed that trend. ANR permits and approvals related to water quality constitute a significant number of the permits and approvals used as rebuttable presumptions in Act 250.<sup>255</sup> The ability of the District Commissions to question these permits should not be reduced at a time when it appears important for the District Commissions to more vigorously exercise their supervisory authority over the water quality impacts of projects within their jurisdiction.

The District Commissions' ability to exercise their supervisory authority could be strengthened by reaffirming that authority in statute, requiring that permits and approvals may be given presumptions only if the relevant program reliably achieves its goals, and not giving presumptive weight to permits that allow discharges into impaired waters of a pollutant that causes or contributes to the impairment.

The Commission also recommends, as stated in Sec. IV.C., that the NRB or its successor work with the other State agencies to create a predictable timetable for the permitting process.

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<sup>254</sup>2 McCormick on Evid. § 342 (7th ed.).

<sup>255</sup>Act 250 Rule 19(E).

## C. Appeals

### 1. Charge

Act 47, Sec. 2(e)(2)(F) – “An evaluation of how well the Act 250 application, review, and appeals processes are serving Vermonters and the State’s environment and how they can be improved, including consideration of:

\* \* \*

(iii) De novo or on the record appeals.

(iv) Comparison of the history and structure of the former Environmental Board appeals process with the current process before the Environmental Division of the Superior Court.

(v) Other appellate structures.”

### 2. Facts/Background

#### a) *De Novo and On the Record*

The term “de novo” means “anew.”<sup>256</sup>

When there is an appeal from a decision of a District Commission or of a jurisdictional opinion by a District Coordinator, the statute calls for a “de novo hearing”: “The Environmental Division, applying the substantive standards that were applicable before the tribunal appealed from, shall hold a de novo hearing on those issues which have been appealed . . .”<sup>257</sup>

In a de novo hearing, the Environmental Division is required to hear the issues on appeal as if there had been no prior proceedings in the District Commission.<sup>258</sup> A de novo hearing therefore involves a trial to establish a factual record on the appealed issues through the presentation of testimony and cross-examination of witnesses. The Court decides what the facts are and reaches its own conclusions of law.

In contrast, when appeal is “on the record,” the appellate body reviews the record established by the tribunal below rather than creating a factual record through a trial process.<sup>259</sup> Typically, the parties are given an opportunity to file legal briefs and to present legal argument orally.

In an appeal on the record, the appellate body typically will uphold the lower tribunal’s findings of fact unless they are “clearly erroneous,” meaning “they are supported by no credible evidence that a reasonable person would rely upon to support the

<sup>256</sup>Black’s Law Dict. (10th ed. 2014).

<sup>257</sup>10 V.S.A. § 8504(h) (emphasis added).

<sup>258</sup>In re Killington, Ltd., 159 Vt. 206 (1992).

<sup>259</sup>State Dep’t of Taxes v. Tri-State Indus. Laundries, Inc., 138 Vt. 292, 295 (1980).

conclusions.”<sup>260</sup> In other words, the appellate body does not substitute its judgment of what the facts are and instead makes sure the findings are reasonably supported by evidence.

However, in on-the-record review, an appellate court typically does apply its own judgment on questions of law or statutory interpretation, reviewing them “de novo.”<sup>261</sup> As stated above, this term means “anew.” If no error of law or statutory interpretation is found, the lower court’s conclusions of law will be affirmed if “reasonably supported by the findings.”<sup>262</sup>

But when an on-the-record appeal is from an administrative body to an appellate court, the court typically will defer to that body’s interpretation of its enabling statutes and the rules it has adopted, unless there is a compelling indication of error. For example, “when reviewing the PSB’s [Public Service Board] interpretation of a statute within its particular expertise, we look for a compelling indication of error, and in its absence, we will uphold the PSB’s decision.”<sup>263</sup>

#### b) *Comparison: Prior and Current Appeal Processes*

Before January 31, 2005, appeals of District Commission decisions went to the former Environmental Board.<sup>264</sup> Similarly, appeals of District Coordinator jurisdictional opinions went to that board by means of petition for declaratory ruling.<sup>265</sup> Today, appeals from District Commission decisions and District Coordinator jurisdictional opinions go to the Environmental Division of the Superior Court.<sup>266</sup>

The Environmental Board was an administrative body in charge of the Act 250 program that consisted of nine members and up to five alternate members appointed by the Governor with the advice and consent of the Senate. It was a citizen board. Only the Chair was full time. There were no statutorily specified qualifications for appointment. In addition to its authority to hear appeals, the Environmental Board heard petitions for revocation and had rulemaking and overall management authority for the implementation and enforcement of the Act 250.<sup>267</sup>

The Environmental Board made decisions as a body, by majority vote, including appeals and declaratory rulings.<sup>268</sup> The appeal and declaratory ruling procedures were governed by the Administrative Procedure Act (APA), which requires notice to parties of

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<sup>260</sup>In re Zaremba Grp. Act 250 Permit, 2015 VT 88, ¶ 6.

<sup>261</sup>In re Vill. Assocs. Act 250 Land Use Permit, 2010 VT 42A, ¶ 7.

<sup>262</sup>Zaremba, 2015 VT 88, ¶ 6.

<sup>263</sup>In re Proposed Sale of Vermont Yankee Nuclear Power Station, 2003 VT 53, ¶ 5. The Public Service Board is now the Public Utility Commission. 30 V.S.A. § 3.

<sup>264</sup>2004 Acts and Resolves No. 115, Sec. 58.

<sup>265</sup>Id., Sec. 47.

<sup>266</sup>10 V.S.A. § 6089.

<sup>267</sup>2004 Acts and Resolves No. 115, Secs. 48–52, 67–69.

<sup>268</sup>1 V.S.A. § 172.

the issues and the hearing and gives parties the right to present and respond to evidence and conduct cross-examination.<sup>269</sup> The rules of evidence were applicable, but in a relaxed manner to ensure that all material or relevant evidence could be received.<sup>270</sup>

A party appealing to the Environmental Board was required to file the appeal within 30 days and to include a statement of the issues to be addressed, a summary of the evidence to be presented, and a preliminary list of witnesses. Cross-appeals were permitted within 14 days.<sup>271</sup>

The Environmental Board would then hold a de novo hearing on the issues identified by appeal and cross-appeal.<sup>272</sup> Therefore, the Environmental Board heard only the criteria raised by the appeal documents.

The Environmental Board typically proceeded by convening a prehearing conference to identify the parties, clarify the issues, and set a schedule for the case. It could hear the case itself or assign the hearing to a member or subcommittee of the Board, who would then issue a proposed decision subject to presentation by the parties of oral argument and written objections to the full Board.<sup>273</sup>

There was no discovery in Environmental Board proceedings other than through issuance of subpoena to compel a person to appear and testify or produce books and records.<sup>274</sup> However, to provide information to the parties about each other's case and to expedite the hearing process, the Board typically required the parties to file their testimony in written form prior to the hearing, called "prefiled testimony."

Appeal from the Environmental Board was to the Vermont Supreme Court, which reviewed the appeal on the record and sustained the Board's findings if they were supported by substantial evidence on the record as whole.<sup>275</sup> Unless there was a "compelling indication of error," the Court deferred to the Board's interpretation of Act 250 and its own rules.<sup>276</sup>

During the period 1999 through 2004, the former Environmental Board addressed 154 appeals from the District Commissions, with an average processing time of approximately 269 days.<sup>277</sup> During the same period, the Environmental Board addressed

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<sup>269</sup>10 V.S.A. § 6002; 3 V.S.A. §§ 809–10.

<sup>270</sup>3 V.S.A. § 810(1); *In re Desautels Real Estate, Inc.*, 142 Vt. 326, 335 (1982).

<sup>271</sup>2014 Acts and Resolves No. 115, Sec. 58; C. Argentine, Vermont Act 250 Handbook at 57–58 (1st ed. 1993).

<sup>272</sup>2014 Acts and Resolves No. 115, Sec. 58.

<sup>273</sup>*Id.*, Sec. 50; 3 V.S.A. § 811.

<sup>274</sup>3 V.S.A. 809(h).

<sup>275</sup>2014 Acts and Resolves No. 115, Sec. 58.

<sup>276</sup>*In re BHL Corp.*, 161 Vt. 487 (1994).

<sup>277</sup>NRB, Summary of the quantity and duration of appeals for the last 6 years (1999–2004) of the Environmental Board (undated).

65 appeals from District Coordinator jurisdictional opinions, with an average processing time of approximately 298 days.<sup>278</sup>

The Environmental Division of the Superior Court is a division within the Vermont Judiciary. It consists of two full-time judges, “each sitting alone.”<sup>279</sup> In other words, the judges each hear and decide cases by themselves and the Division does not decide a case as one body.

The Environmental Judges must be attorneys admitted to the Vermont bar and are appointed through the judicial nominating process.<sup>280</sup>

Unlike the former Environmental Board, the Environmental Division does not have rulemaking authority for the Act 250 program or a responsibility to manage the program. It is a trial court that, overall, hears two kinds of cases: environmental enforcement and environmental appeals.

With respect to enforcement, if an administrative order is issued to enforce Act 250 or statutes administered by the Secretary of Natural Resources, the respondent may request a hearing before the Environmental Division.<sup>281</sup> The Division’s approval also must be obtained for the settlement of an alleged violation, known as an assurance of discontinuance.<sup>282</sup>

With respect to appeals, in addition to Act 250, the Environmental Division hears appeals from acts and decisions of the Secretary of Natural Resources, and from decisions in municipal land use proceedings under 24 V.S.A. chapter 117.<sup>283</sup>

Like the former Environmental Board, the Environmental Division is required to hold a de novo hearing on Act 250 appeals. The same is true on most of the other appeals the Division hears.<sup>284</sup>

When a project subject to Act 250 also requires permits from ANR or local land use authorities, or both, the Environmental Division has authority to, and often does, consolidate hearing the different appeals.<sup>285</sup> The former Environmental Board did not hear appeals other than Act 250 and did not have this authority.

The consolidation authority has the advantage of one trial on the various permits that may apply to a project, with all the parties and witnesses appearing in that one trial. It

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<sup>278</sup>Id.

<sup>279</sup>4 V.S.A. § 1001(a).

<sup>280</sup>4 V.S.A. § 1001(c).

<sup>281</sup>10 V.S.A. §§ 8008, 8012.

<sup>282</sup>10 V.S.A. § 8007.

<sup>283</sup>10 V.S.A. § 8504(a), (b).

<sup>284</sup>10 V.S.A. § 8504(h).

<sup>285</sup>10 V.S.A. § 8504(g).

carries the disadvantage of delaying resolution of appeals already filed while the Division awaits potential appeals of other permits.

A party appealing to the Environmental Division must file a notice of appeal within 30 days of the decision. Within 21 days of that filing, the appellant must file a statement of questions to be determined. Cross-appeals also may be filed.<sup>286</sup> The three-week period to file a statement of issues is different from the former Environmental Board process, under which the statement was to be filed at the time of appeal.

Unlike the former Environmental Board process, discovery is available in appeals before the Environmental Division, with the Division directed to issue scheduling orders “to limit discovery to that which is necessary for a full and fair determination of the proceeding . . .”<sup>287</sup>

Prefiled testimony is rarely used in the Environmental Division, although that procedure is available.<sup>288</sup>

In an appeal, the Division conducts a pretrial conference and issues an order. Issues discussed at the pretrial conference include party status, consolidation with other appeals involving the same project, the potential for resolution of the appeal without trial, and potentially other issues such as sequence of discovery and scheduling.<sup>289</sup> The Division may schedule additional conferences and issue additional orders to manage the appeal.<sup>290</sup>

Appeals before the Division may be decided on legal and procedural grounds rather than reaching the merits of a project’s compliance with the criteria. Motions available before the Division include motions to dismiss some or all of the questions on appeal, to dismiss for lack of jurisdiction or failure to state a claim on which relief can be granted, and for summary judgment.<sup>291</sup>

As with the former Environmental Board, appeals from the Environmental Division are to the Supreme Court, which reviews the case on the record. As discussed above, the Supreme Court applies the “clearly erroneous” standard to the Division’s factual findings and considers questions of law de novo. Since the Division is not an administrative agency, there is no standard of deferring to the Division’s interpretation of enabling statutes or adopted rules absent a compelling indication of error.

Based on data from 2013 to December 2018 supplied by the Superior Court through the Vermont Bar Association, the Environmental Division received 63 appeals from District Commissions and resolved 59 of them. Excluding resolved District Commission appeals

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<sup>286</sup>VRECP 2(b), (f).

<sup>287</sup>4 V.S.A. § 1001(g)(3).

<sup>288</sup>VRECP 2(e)(2).

<sup>289</sup>VRECP 2(d), 5(g).

<sup>290</sup>4 V.S.A. § 1001(g), VRECP 2(g).

<sup>291</sup>VRECP 5(2), (f); VRCP 12, 56.

that were consolidated with non-Act 250 appeals on the same project, the average number of active days for the resolved appeals was approximately 293.<sup>292</sup>

Based on the same data for the same period, the Environmental Division received 21 appeals from District Coordinator jurisdictional opinions and resolved 20 of them. Excluding the one resolved jurisdictional opinion appeal that was consolidated with non-Act 250 appeals on the same project, the average number of active days for the resolved jurisdictional opinion appeals was approximately 309.<sup>293</sup>

These average time frames are not significantly different from the averages set forth above for the former Environmental Board.

### c) *Other Appellate Structures*

Potential other appellate structures include an administrative body similar to the PUC, an administrative body similar to the Environmental Appeals Board (EAB) of the U.S. Environmental Protection Agency (EPA), appeal to a generalist rather than a specialized lower court, and direct appeal from the District Commissions to the Vermont Supreme Court.

The PUC is a three-member administrative body that has broad supervisory authority over Vermont's utilities. It is the decision-maker on utility matters, including rate cases and siting cases for electric generation and transmission and natural gas facilities. It also currently hears appeals from ANR relating to renewable energy and telecommunications facilities, with a requirement to hold a de novo hearing. The PUC Chair is full time and the two other members are two-thirds time. In most cases before it, the PUC proceeds under the APA in a manner similar to the former Environmental Board. Unlike that board, however, the PUC has a staff of lawyers and experts who can serve as hearing officers. It also has the ability to retain its own outside experts and allocate the cost to the petitioning utility or other applicant. Appeal is on the record from the PUC to the Vermont Supreme Court, and the principles the Court applies in those appeals are similar to those it applied to appeals from the former Environmental Board.<sup>294</sup>

The EAB "is a permanent, impartial, four-member body that is independent of all [EPA] components outside the immediate Office of the Administrator. It is the final [EPA] decisionmaker on administrative appeals under all major environmental statutes that EPA administers."<sup>295</sup> It consists of four Environmental Appeals Judges and a staff of lawyers and other assistants.<sup>296</sup> Each case is typically decided by majority vote of a three-

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<sup>292</sup>Data source: G. Tarrant, E-mail and Attachments sent to F. Brown re Update of Environmental Court data - number of JO and Act 250 Dist. Commission Appeals (Dec. 6, 2018).

<sup>293</sup>Id.

<sup>294</sup>30 V.S.A. §§ 3, 8-12, 20, 21, 203, 209, 218, 225, 248; 8010; 10 V.S.A. § 8506; 32 V.S.A. 1012; Vt. PUC, Employee List, retrieved from <https://puc.vermont.gov/about-us/employee-list>, Nov. 14, 2018; In re Petition of E. Georgia Cogeneration Ltd. P'ship, 158 Vt. 525, 531 (1992).

<sup>295</sup>EPA Environmental Appeals Board Practice Manual at 1 (Aug. 2013).

<sup>296</sup>A Citizen's Guide to EPA's Environmental Appeals Board at 11 (July 2018).

member panel of the Environmental Appeals Judges based on a hearing conducted by a presiding officer, who is typically an EPA administrative law judge.<sup>297</sup> The EAB conducts de novo review of both the factual and legal conclusions of the presiding officer.<sup>298</sup> Appeal from the EAB is generally to federal court under the federal Administrative Procedure Act, which would apply a standard of whether the EAB decision is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .”<sup>299</sup>

Many states route appeals of environmental or land use decisions by an administrative agency to its generalist lower court rather than a specialized court such as the Environmental Division. For example, decisions of the State of Maine Land Use Planning Commission are appealable to the Maine Superior Court. The Court does not substitute its judgment for the Commission on questions of fact and instead reviews the Commission’s record for legal error such as exceeding statutory authority, making findings that are unsupported by substantial evidence on the record as a whole, or acting in a manner that is arbitrary or capricious or an abuse of discretion.<sup>300</sup>

A further option is direct appeal from the District Commissions to the Vermont Supreme Court, without intermediate appeal, under the same type of standards courts usually apply to appeals from administrative agencies. Direct appeal exists today to the Vermont Supreme Court from several administrative bodies, including the PUC, the Green Mountain Care Board, and the Labor Relations Board.<sup>301</sup>

### 3. Discussion and Recommendation

The two options for appeal structure that appear viable to the Commission are: (1) retaining and potentially modifying the current judicial appeal structure and (2) routing Act 250 appeals to an administrative board that also has the current functions of the NRB. This board might also hear appeals from ANR. The board could be fully professional or could be semiprofessional, meaning a mix of full-time professional members and citizen members.

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.

Of the options that appear viable, the Commission has received conflicting testimony, with strong opinions voiced for retaining the current systems of judicial appeals,

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<sup>297</sup>EPA Environmental Appeals Board Practice Manual at 5, 21.

<sup>298</sup>*Id.* at 29.

<sup>299</sup>5 U.S.C. §§ 704, 706.

<sup>300</sup>5 M.R.S.A. § 11001, 11007; 12 M.R.S.A. § 689. The Maine Land Use Planning Commission adopts and administers land use regulations for Maine’s unorganized areas. 12 M.R.S.A. chapter 206-A.

<sup>301</sup>18 V.S.A. § 9381; 21 V.S.A. §§ 1623, 1729; 30 V.S.A. § 12.



potentially with modifications, and strong opinions for moving appeals to an administrative board. An advantage of the judicial structure is that, by lodging appeals in a branch of government separate from the Executive, the decision-makers are part of an independent judiciary.

On the other hand, the former Environmental Board was a core component of Act 250 when it was enacted. The Board issued decisions that set forth analytical frameworks for addressing the complex issues that shaped growth in Vermont and provided certainty to applicants. These issues included water quality, wildlife habitat, aesthetics, and the growth criteria of the Act. Because it 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.

Routing appeals to an administrative board that is also charged with supervising the Act 250 program would mean that policy decisions inherent in any appeals are being made by the administrative body charged with those decisions. It would mean that the interpretation of the Act and the rules issued under it are informed by those policy decisions and a practical understanding of the day-to-day administration of the program. It would endow that body with the greater ability to provide direction to the District Commissions that was possessed by the former Environmental Board. The strictures of the Vermont Administrative Procedure Act, such as the prohibition on ex parte communications, would support the independence of such a board, and appointment and removal structures could be devised to protect that independence.

After consideration of the testimony, the Commission recommends that Act 250 appeals be heard by an administrative board that also has the existing functions of the NRB.

The Commission also recommends that this board hear appeals of ANR permit decisions because both sets of programs are State programs with concurrent jurisdiction in several areas and because appeals from both sets of programs in many cases involve policy decisions that are more appropriately delegated to an administrative board rather than the Judicial Branch.

Further work is needed on the specific composition of this administrative board, such as whether it is a full-time professional board or a semiprofessional board that includes some part-time, citizen appointees.

Under this proposal, the Environmental Division would continue to hear environmental enforcement cases and appeals of local land use decisions.

The Commission does not support changing from de novo hearing to on-the-record appeals. While such a change might speed the appeals process, like direct appeals to the Supreme Court, the change likely would result in a loss of accessibility to citizens through increased formalization of the District Commissions.

Instead, the Commission believes there is merit in exploring changing the burden of proof on appeal so that the appellant, whether the applicant or another party, bears that burden on the issues the appellant raises in its appeal. In this regard, the term “burden of proof” primarily refers to which party bears the risk of nonpersuasion, and means that in the absence of evidence on an issue, or where the evidence is indecisive, the issue must be decided in favor of the party that does not bear the burden.<sup>302</sup> In Act 250, even when an opponent is assigned the burden of proof, the applicant still bears a burden of production to establish at least a “prima facie case” of compliance.<sup>303</sup>

In a *de novo* appeal, the decision-maker will still need to understand the essential details of a proposed project and its context and impacts, and the applicant is the party best placed to produce this information, whether or not the applicant is an appellant. The Commission therefore specifically recommends consideration of assigning the risk of nonpersuasion to the appellant and requiring that the applicant continue to bear on appeal a burden to produce basic evidence on the nature, elements, context, and impacts of its proposed project.

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<sup>302</sup>In re Denio, 158 Vt. 230, 237 (1992); In re Quechee Lakes Corp., 154 Vt. 543, 553(1990).

<sup>303</sup>In re N. E. Materials Grp., LLC, 2017 VT 43, ¶ 36; In re Champlain Parkway, 2015 VT 105, ¶ 15.

**D. Misuse of opportunity to participate and appeal**

1. Charge

Act 47, Sec. 2(e)(2)(G)(v) – “The potential of a person that obtains party status to offer to withdraw the person’s opposition or appeal in return for payment or other consideration that is unrelated to addressing the impacts of the relevant project under the Act 250 criteria.”

2. Facts/Background

Under current law, an adjoining property owner or other person who is not a statutory party may be admitted as a party if the person demonstrates a particularized interested protected by Act 250.<sup>304</sup> If the person is unable to demonstrate such an interest, party status may be denied. In addition, at the close of the proceeding, the person’s party status is reexamined and the person may be disqualified from party status.<sup>305</sup>

In order to appeal an Act 250 decision, a person must have party status and be aggrieved by the decision and may only appeal issues under those criteria on which the person was granted party status.<sup>306</sup> The grant or denial of party status also may be appealed.<sup>307</sup>

Appeals before the Environmental Division are subject to the Vermont Rules of Civil Procedure and the Vermont Rules for Environmental Court Proceedings. Under these rules, sanctions are available if an appeal or document filed in an appeal is submitted for an improper purpose.<sup>308</sup>

The Commission has not received data demonstrating the occurrence or extent of misuse of the opportunities to participate or appeal.

3. Discussion and Recommendation

The Commission was not presented with data quantifying instances of misuse of party status. The Commission also does not believe that such data currently exists. While data exists relating to party status and appeals, it would be difficult to assess whether a party’s participation the permit process was in bad faith. The anecdotal testimony presented to the Commission on this issue included conversations related to proving a party’s motive.

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<sup>304</sup>10 V.S.A. § 6085(c)(1)(E).

<sup>305</sup>10 V.S.A. § 6086(c)(6).

<sup>306</sup>10 V.S.A. § 8504(a), (d). An environmental judge nonetheless may allow an appeal to proceed in limited circumstances involving procedural defects in the proceeding or a demonstration of manifest injustice. 10 V.S.A. § 8504(d).

<sup>307</sup>Id.

<sup>308</sup>VRCP 11; VRECP 5(a)(2). VRCP 11 also states other potential grounds for sanctions.

The Commission has received a significant number of public comments praising Act 250's current system of public participation. Any attempt to reduce party status thresholds would reduce the amount of participation available to the public.

As discussed above, current law contains safeguards that place limits on who can obtain party status and how this status can be used. The Commission does not recommend any action on this issue at this time.