

3/16/2019 Jim McCullough

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BILL AS INTRODUCED  
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H.513  
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1 H.513  
2 Introduced by Representatives Deen of Westminster and Klein of East  
3 Montpelier  
4 Referred to Committee on  
5 Date:  
6 Subject: Land use; environment; conservation; Act 250; agency of natural  
7 resources; environmental permit appeals and enforcement;  
8 environmental division  
9 Statement of purpose: This bill proposes to replace the natural resources board  
10 with an environmental review board that would hear the appeals and  
11 enforcement cases related to state environmental permits that currently are  
12 heard by the environmental division of the superior court. The new board  
13 would have the administrative oversight and rulemaking authority for the Act  
14 250 program presently assigned to the natural resource board's land use panel.  
15 The rulemaking authority of the natural resources board's water resources  
16 panel would be transferred to the secretary of natural resources. The  
17 environmental division of the superior court would continue to hear appeals  
18 and enforcement cases related to local land use bylaws, except that an appeal  
19 of a local land use decision would be to the environmental review board if the  
20 underlying project is also subject to state environmental permit requirements.

Been Done

1           An act relating to an environmental review board that hears appeals and  
2           enforcement actions concerning state environmental permits

3           It is hereby enacted by the General Assembly of the State of Vermont:

4                           \* \* \* Environmental Review Board \* \* \*

5           Sec. 1. REPEAL

6                   10 V.S.A. chapter 220 (consolidated environmental appeals) is repealed.

7           Sec. 2. 10 V.S.A. chapter 219 is added to read:

8                   CHAPTER 219. STATE ENVIRONMENTAL REVIEW BOARD; STATE

9                           ENVIRONMENTAL PERMIT APPEALS

10                                   Subchapter 1. General Provisions

11           § 8401. PURPOSE

12                   It is the purpose of this chapter to:

13                   (1) create an administrative board to hear and decide enforcement  
14                   actions under chapter 201 of this title and appeals under this chapter with  
15                   respect to state environmental permits;

16                   (2) consolidate appeal routes for acts or decisions of the secretary and  
17                   the district commission;

18                   (3) standardize the appeal periods, the parties who may appeal these acts  
19                   or decisions, and the ability to stay any act or decision upon appeal, taking into  
20                   account the nature of the different programs affected;

21                   (4) encourage people to get involved in the Act 250 permitting process  
22                   at the initial stages of review by a district commission by requiring

1 participation as a prerequisite for an appeal of a district commission decision to  
2 the environmental review board; and

3 (5) provide clear appeal routes for acts and decisions of the secretary.

4 § 8402. DEFINITIONS

5 As used in this chapter:

6 (1) "Board" means the environmental review board, except when used  
7 in section 8415 of this title.

8 (2) "District commission" means a district commission established  
9 under chapter 151 of this title.

10 (3) "Environmental review board" means the Vermont environmental  
11 review board established under section 8403 of this title.

12 (4) "Person" means any individual, partnership, company, corporation,  
13 association, unincorporated association, joint venture, trust, municipality, the  
14 state of Vermont or any agency, department, or subdivision of the state, any  
15 federal agency, or any other legal or commercial entity.

16 (5) "Person aggrieved" means a person who alleges an injury to a  
17 particularized interest protected by the provisions of law listed in section 8410  
18 of this title, attributable to an act or decision by a district coordinator, district  
19 commission, the secretary, or the environmental review board that can be  
20 redressed by the board or the supreme court.

1           (6) "Secretary" means the secretary of the agency of natural resources or  
2           the secretary's duly authorized representative. For the purposes of this chapter,  
3           "secretary" shall also mean the commissioner of the department of  
4           environmental conservation, the commissioner of the department of forests,  
5           parks and recreation, and the commissioner of the department of fish and  
6           wildlife with respect to those statutes that refer to the authority of that  
7           commissioner or department.

8                           Subchapter 2. Environmental Review Board

9           § 8403. VERMONT ENVIRONMENTAL REVIEW BOARD

10           (a) Creation. A Vermont environmental review board is created. The  
11           board shall consist of a chair, two members, and two alternate members.

ADDITIONAL  
2 MEMBERS  
FROM VARIOUS  
DISTRICT COMM.  
CHAIRS; NOT  
INVOLVED

AND SEATED  
MEMBERS

12           (b) Appointment. The chair, members, and alternate members shall be  
13           nominated, appointed, and confirmed in the manner of a superior judge.

14           (1) No member shall be required to be admitted to the practice of law in  
15           this state. However, in making appointments, the governor shall seek  
16           candidates with experience, expertise, or skills relating to the environment,  
17           land use, or applicable law.

18           (2) Initial appointments to the board shall be made so that the terms of  
19           the chair and the members expire in a staggered manner. The initial  
20           appointment of the chair shall be for a term of four years. The initial  
21           appointment of one of the members and one of the alternate members shall be

1 for a term of two years and the initial appointment of the other member and  
2 other alternate member shall be for a term of six years.

3 (c) Terms; vacancy; succession. The term of each appointment subsequent  
4 to the initial appointments described in subdivision (b)(2) of this section shall  
5 be six years. Any appointment to fill a vacancy shall be for the unexpired  
6 portion of the term vacated. A member wishing to succeed himself or herself  
7 in office may seek reappointment under the terms of this section.

8 (d) Use of alternates. When a member of the board is unavailable to hear a  
9 case, the chair may appoint an alternate member to hear the case.

10 (e) Disqualification; conduct.

11 (1) The provisions of 12 V.S.A. § 61 (disqualification for interest) shall  
12 apply to the chair and the members of the board.

13 (2) No person who receives or during the previous two years has  
14 received a significant portion of his or her income directly or indirectly from  
15 permit holders or applicants for a permit under chapter 47 of this title may hear  
16 appeals from acts or decisions of the secretary relating to permits issued under  
17 chapter 47.

18 (3) The chair and each member of the board shall conduct the affairs of  
19 his or her office in such a manner as to instill public trust and confidence and  
20 shall take all reasonable steps to avoid any action or circumstance that might  
21 result in any one of the following:

- 1           (A) Undermining his or her independence or impartiality of action.
- 2           (B) Taking official action on the basis of unfair considerations.
- 3           (C) Giving preferential treatment to any private interest on the basis  
4 of unfair considerations.
- 5           (D) Giving preferential treatment to any family member or member  
6 of his or her household.
- 7           (E) Using his or her office for the advancement of personal interest or  
8 to secure special privileges or exemptions.
- 9           (F) Adversely affecting the confidence of the public in the integrity  
10 of the environmental review board.
- 11           (4) A person may request that the chair or other member of the board  
12 recuse himself or herself from a matter in which the person has party status.  
13 Should the chair or other member determine that recusal is not warranted, the  
14 party may seek review of that determination by the other members of the  
15 board. The chair or other member whose recusal is sought shall not participate  
16 as a member of the board in the review of his or her determination. Alternate  
17 members who are not recused shall participate in the review as necessary to  
18 ensure that the board has a quorum and can make a decision by a majority  
19 vote. The board may remove the chair or other member whose recusal is  
20 sought under this subdivision from a matter pending before the board if the

1 board determines that removal is necessary to ensure compliance with  
2 subsection (a) of this section.

3 (5) For one year after leaving office, a former appointee to the  
4 environmental review board shall not, for pecuniary gain:

5 (A) Be an advocate before the board on any matter; or

6 (B) Be an advocate before any other public body or the general  
7 assembly or its committees regarding any matter in which, while an appointee,  
8 he or she exercised any official responsibility or participated personally and  
9 substantively.

10 (f) Removal for cause. Notwithstanding 3 V.S.A. § 2004 or any other  
11 provision of law, the chair and members of the board may be removed only for  
12 cause.

13 (g) Retirement from office. When a board member who hears all or a  
14 substantial part of a case retires from office before the case is completed, he or  
15 she shall remain a member of the board for the purpose of concluding and  
16 deciding that case, and signing the findings and judgments involved. A  
17 retiring chair shall also remain a member for the purpose of certifying  
18 questions of law if a party appeals to the supreme court.

19 (h) Completion of case. A case shall be deemed completed when the board  
20 enters a final decision even though that decision is appealed to the supreme  
21 court and remanded by that court.

1        (i) Chair; general charge. The chair, subject to the direction of the board,  
2        shall have general charge of the offices and employees of the board, including  
3        those employees assigned to assist the district commissions, and the offices of  
4        the district commissions.

Two SEATED

5        (j) The annual salary of the chair and the members of the board, except  
6        alternate members, shall be the same as fixed for each superior judge under  
7        32 V.S.A. § 1003. The alternate members shall receive reimbursement at the  
8        per diem rate set in 32 V.S.A. § 1010 plus mileage and actual and necessary  
9        expenses.

→ DISTRICT COMM  
MEMBERS AN.

10        § 8404. POWERS OF SINGLE BOARD MEMBER OR OTHER OFFICER  
11        OR EMPLOYEE

12        (a) One board member or any officer or employee of the board duly  
13        appointed by the chair of the board may inquire into and examine any matter  
14        within the jurisdiction of the board.

15        (b) A hearing officer may hold any hearing in any matter within the  
16        jurisdiction of the board. Hearings conducted by a hearing officer shall be in  
17        accordance with 3 V.S.A. §§ 809–814. A hearing officer may administer oaths  
18        and exercise the powers of the board necessary to hear and determine a matter  
19        for which the officer was appointed.

20        (c) A hearing officer shall report his or her findings of fact in writing to the  
21        board in the form of a proposal for decision. A copy shall be served upon the



1 parties pursuant to 3 V.S.A. § 811. However, judgment on those findings shall  
2 be rendered only by a majority of the board.

3 (d) At least 10 days prior to a hearing before the board or a hearing officer,  
4 the board shall give written notice of the time and place of the hearing to all  
5 parties to the case and shall indicate the name and title of the person designated  
6 to conduct the hearing.

7 (e) Upon written request to the board at least five days prior to the hearing  
8 by all parties to the case, the chair shall appoint at least a majority of the board  
9 to conduct the hearing.

10 § 8405. COURT OF RECORD; PROCESS

11 (a) The board shall have the powers of a court of record in the  
12 determination and adjudication of all matters within its jurisdiction. It may  
13 render judgments and enforce the same by any suitable process issuable by  
14 courts in this state. An order issued by the board on any matter within its  
15 jurisdiction shall have the effect of a judicial order.

16 (b) All processes issued by the board shall state the time and place of return  
17 in those cases where return is to be made to the board. Notices and other  
18 processes issued by the board shall be served on all parties personally or by  
19 first class mail, except that the board may direct that service be made by  
20 registered or certified mail. If the whereabouts of a person are unknown or if  
21 the number of parties or interested persons, as the case may be, is so great that

1 personal service or service by mail is impracticable, service may be made by  
2 publication.

3 (c) Except as provided in subsections (d) and (e) of this section, the board  
4 shall give 10 days' notice of all hearings.

5 (d) A prehearing or procedural conference may be held on written notice  
6 issued no less than 24 hours in advance, unless the prehearing or procedural  
7 conference is need to respond to an unforeseen occurrence or condition  
8 requiring immediate attention by the board or hearing officer, in which case  
9 notice shall be given as soon as possible under the circumstances. Unless  
10 otherwise ordered by the board, all nonevidentiary hearings may be conducted  
11 by telephone or video conferencing using an audio or video record.

12 (e) An evidentiary hearing, once commenced upon proper notice, may be  
13 continued to a subsequent date upon any reasonable notice. An evidentiary  
14 hearing shall be held in the county in which all or a portion of the land which  
15 is the subject of the case is located, unless the parties agree to another location.

16 (f) The board shall publish and maintain all notices on its website for no  
17 less than the period that applies to such notice (e.g., 10 days in advance of the  
18 noticed hearing). At the time the board issues notice, it shall provide a copy of  
19 the notice to an editor, publisher, or news director of a newspaper or radio  
20 station serving the area of the state in which the subject of the hearing is  
21 located.

1           (g) The forms, pleadings, and rules of practice and procedure before the  
2           board shall be prescribed by it. The board shall ensure that the rules provide  
3           for each of the following:

4           (1) Expeditious proceedings that give due consideration to the needs of  
5           unrepresented litigants.

6           (2) The ability of the board to hold prehearing conferences by telephone.  
7           If a party objects to a telephonic prehearing conference, the board may require  
8           a personal appearance.

9           (3) The use of scheduling orders to provide for that amount of discovery  
10           necessary for a full and fair determination of the proceeding.

11           (4) The appropriate use of site visits by the board in rendering a  
12           decision.

13           (h) In a proceeding before the board under this chapter or chapter 201 of  
14           this title, each party shall provide all other parties with all written statements  
15           and information in the possession, custody, or control of the party relevant to  
16           the proceeding, including any technical studies, tests, and reports; maps;  
17           architectural and engineering plans and specifications; drawings; graphs;  
18           charts; photographs; data compilations from which information can be  
19           obtained; the names and addresses of the party's witnesses; and any other  
20           information that the board deems necessary to a full and fair determination of  
21           the proceeding.

1        (i) The board shall hear appeals on all acts or decisions specified in section  
2        8410 of this title and make its findings of fact and conclusions of law.

3        § 8406. EXPERTS AND PERSONNEL

4        With the approval of the <sup>chair</sup>~~governor~~, the board may appoint and employ, at  
5        the expense of the state, legal counsel, scientists, engineers, and such number  
6        of experts, clerks, stenographers, and temporary employees as it deems  
7        necessary in the performance of its duties, the provision of personnel to assist  
8        the district commissions, and the investigation of matters within its  
9        jurisdiction.

10       § 8407. PARTICULAR PROCEEDINGS; PERSONNEL

11       (a)(1) The board may authorize or retain legal counsel, official  
12       stenographers, expert witnesses, advisors, temporary employees, and other  
13       research services:

14                (A) to assist the board in any proceeding before it under this chapter  
15                or chapter 201 of this title;

16                (B) to monitor compliance with any formal opinion of the board;

17                (C) to assist other state agencies that are named parties to the  
18        proceeding where the board determines that they are essential to a full  
19        consideration of the case; and

20                (2) The personnel authorized by this section shall be in addition to the  
21        regular personnel of the board or other state agencies and, in the case of other