

**Joint Testimony of Peter Walke, Deputy Secretary, Agency of Natural Resources, and Brian Shupe, Executive Director, Vermont Natural Resources Council, before the Vermont House Natural Resources, Fish, and Wildlife Committee on 1/7/20**

For the record, Peter Walke, Deputy Secretary, Agency of Natural Resources.

For the record, Brian Shupe, Executive Director, Vermont Natural Resources Council

We appreciate the opportunity to come before you on the first day of session. We want to thank Chair Sheldon and the Committee for immediately launching back into hearings on the future of one of the most consequential laws in Vermont's history.

Your work last session that built on the work of the Act 47 Commission raised critical challenges and opportunities to modernize Act 250 to meet our contemporary issues 50 years after Act 250 was enacted.

Over the course of the summer and fall, the Administration and the Vermont Natural Resources Council (VNRC) held a series of conversations and engaged other stakeholders. Our goal was to further develop the policy considerations you debated last session and to see if we could reach consensus on a package of modernizations that maintain and enhance the environmental and land use protection outcomes of Act 250 while addressing critical challenges. In conducting that work, we have relied heavily on your deliberations and intent.

We also worked to address the issues that prompted the Legislature to establish the Commission on the Future of Act 250. These include:

- An erosion of consistency in decision making among the various regions of the state since the Environmental Board was eliminated 2005;
- Changes in state permitting, municipal and regional planning, and the establishment of state land use designation programs since Act 250 was established;
- Act 250 is not adequately addressing contemporary environmental issues that were not widely recognized 50 years ago, such as forest fragmentation and climate change;
- Projects have gotten increasingly complex, and the process has grown more complicated and less accessible to all parties.

Consequently, we agreed that, relying heavily on the Committee's work, we would agree to explore possible compromises and take a fresh look at Act all aspects of the law, even if it means reexamining previously held positions.

The Chair asked us to come in and present the package of Act 250 changes we jointly propose. Today, we will walk you through the high-level themes. Matt Chapman, Greg Boubol, and Jon Groveman will walk you through the proposed language if you are interested in exploring this package further.

We will organize this presentation into five categories: the modernization of Act 250 jurisdiction, modernization of Act 250 criteria, structure/function of the board, updates to Act 250 permitting and permit conditions, and additional changes or study we believe to be necessary.

□ **Modifications to Act 250 jurisdiction**

During the Act 47 Commissions and this Committee’s work last session, you heard significant testimony and had detailed conversations about which types of projects should come under Act 250 jurisdiction. You identified ways we could support compact development in our built environment and the need for additional review of projects planned for sensitive areas. We have different challenges than we faced in 1970, and it’s appropriate to update where Act 250 should apply. The proposal we are putting forward today builds on the work that you did and would do the following:

- Last session, the Administration proposed exempting development in designated centers that have gone through an enhanced designation process. We discussed it further and think allowing an **exemption to development in designated downtowns and neighborhood development areas** without creating a new designation process is a more effective and straightforward way to support compact development patterns in all of our cities, towns, and villages.
- We also heard the committee and many voices in the housing community and propose **maintaining priority housing exemptions for new town centers, designated growth centers, and designated village centers.**
- One of the critical issues that the legislature has been grappling with for several years is how to address forest integrity and prevent fragmentation. We explored a number of measures the committee contemplated and also considered an update to an historic approach. We propose to address fragmentation and connectivity habitat through **bringing back a road length trigger for jurisdiction and expanding Act 250 jurisdiction to ridgelines.**
- Another critical jurisdictional question you discussed last year were interstate interchanges. We agreed that the best outcome was a transparent planning process to address appropriate forms of development in and around interchanges. Therefore, we propose setting a **jurisdictional trigger for commercial and industrial development within 2000 feet of an interchange and to enable a planning process to modify that default buffer.**
- In the Administration’s bill from last year, H.197, the Administration proposed to exempt certain transportation projects from Act 250 jurisdiction based on the existing environmental evaluation under federal and state statutes. In your deliberations, you did not choose to add this to the language you were working on, but it remains an important topic to the Administration, so we developed a reasonable solution with which we think the Committee will be comfortable. Therefore, we propose to **exempt the acreage from areas previously disturbed by a transportation project from the jurisdictional calculation** for state projects under Act 250.

□ **Modifications to Act 250 criteria**

This Committee spent a significant amount of time considering and updating the criteria by which projects are evaluated under Act 250. One of the main topics you considered was how to update Act 250 to speak to the challenge of a changing climate. We propose some modifications to ensure that the projects we build in this state meet stringent energy standards and are built to withstand and adapt to the extreme weather events we are already seeing. Our proposal in this section largely reflects the work that you’ve already done with some additional implementation clarity:

- Update Criterion 1D to **incorporate river corridor and flood hazard area concepts.**
- Update Criterion 5 (Transportation) to **explicitly consider impacts to walking, biking, and transit.**
- **Add protection of Forest Blocks and Connecting Habitat to Criterion 8.** In our discussions, we also determined that it would be useful to setup a process for the Board to make clear how to comply with this new criterion. Therefore, we propose that the Board, in consultation with the Secretary of Natural Resources, will adopt rules on the implementation of this criteria, including guidance for avoidance, minimization, and mitigation, when appropriate.
- Update Criterion 9(K) (Public Investment) to include **protection of facilities or lands receiving benefits from the Vermont Housing and Conservation Board.**
- Update Criterion 10 to **require that only town plans approved by an RPC are considered under Criterion 10.**
- As mentioned above, we propose **various updates to the criteria to address climate change.** Specifically, we propose requiring use of the stretch code for residential building development, requiring climate resilient building material, and adoption of new RBES and CBES codes as soon as they are adopted (which address vehicle charging, thermal efficiency. Adoption date in 9/20).

□ **Modifications to Act 250 Permitting and Permit Conditions**

This Committee took considerable testimony from former applicants, current and former administrators of Act 250, and many others on the Act 250 permitting process and the conditions placed upon projects. We have built upon that work and relied upon the experience in other permitting programs to add to this package of recommendations:

- You heard testimony last session about the need to **address permit conditions for forest-based enterprises** to address the challenges they face operating in a climate change-shortened harvest season. We have built upon the proposal that is in H.197 to address this Committee’s concerns about private property rights of abutting landowners while still addressing the need to create a reasonable expansion of hours of operation when winter road conditions permit. We also propose to provide an advantage to these businesses for prime agricultural soil mitigation in the context of forest-based enterprise projects.
- We propose a new requirement that we don’t believe came up during your deliberations last session. Under Section 248, which reviews energy and telecommunication projects, certain projects are required to provide 45 days notice prior to filing a permit. That process works to allow various parties to the permit to come together in advance of formal filing to identify and ideally work through any potential challenges that may exist. We propose to add a **30 day advance notice requirement for certain Act 250 permits.** Based on comments, there may be an advance public meeting. This requirement would not apply to administrative amendment and some types of projects

that would normally be considered minors. Under this proposal, the Board would determine which projects would require this notice requirement by rule.

- Include **provisions to encourage industrial park master planning** proposed in H.197.
- One topic we heard from stakeholders was a concern about the amount of time it can take to get local feedback on Criterion 6, Educational Services and 7, Municipal or Government Services . Therefore, we propose to **establish a timeline for municipal and school feedback on Criterion 6 and 7**. Under this proposal, schools and municipalities would have 60 days to respond from the date of receipt of a request.
- In H.197, the Administration proposed to change the process of rebutting presumptions created by Agency of Natural Resource (ANR) permits; however, the Committee did not signal support for that approach. Currently only certain ANR permits are included. Rather than changing the process as was proposed in H.197, we now propose to simply **expand the existing presumption to all Agency permits**.

#### □ **Creating an Enhanced Natural Resources Board**

This Committee spent significant time exploring potential changes to how to create consistent review of Act 250 permits and to address appeals of those permits. You proposed to create the VERB that would hear appeals from the District Commissions. After significant discussion, we have a different approach that we think addresses the intent behind your discussion: consistent application of criteria statewide, an accessible and fair process for Vermonters, and increased governance over the Act 250 enterprise. Our proposal includes the following:

- **Create a new “professional” NRB with three members**, recommended / screened by the judicial nominating board, appointed for a term of six years, removable for cause.
- The **E-NRB would also have two regional members** from the region of the proposed project who, along with the permanent members would create the factual findings for the permit record.
- The E-NRB would have original jurisdiction over all major permit application review and would hold hearings in the region where the project is proposed. **Appeals of these permits would be to the Supreme Court.**
- **District Coordinators would review minor permit applications and administrative amendments.** A party could petition to have a minor treated as a major with a hearing by the Board. Currently, minors are for all intents and purposes issued by the Coordinators.
- **Eliminates review of permits by District Commissions.**

#### □ **Complementary Non-Act 250 Changes and Topics for further discussion**

Under this section, we propose to address through changes to programs outside Act 250 and through additional deliberation many of the topics the Committee and Commission discussed. We believe these changes and processes will address many of the concerns voiced by and in the Committee:

- One area of significant concern was about development within river corridors. As part of the Committee bill, you proposed to expand Act 250 jurisdiction to all river corridors. We

believe that we should **address development in river corridors through an expansion of the permitting program administered by the ANR's River Program in the Department of Environmental Conservation.** We propose to do that in a three-step manner that aligns with a current process to map high priority river corridors. The first step would be to have the permitting program mirror Act 250 jurisdiction, requiring a state flood hazard and river corridor permit for any project that would otherwise trigger review under Act 250. Within three years, following the completion of the high priority river corridor mapping project, the jurisdiction would expand to development proposed in those designated high priority river corridors. Once that step is complete, we would propose to study further jurisdictional expansion and make recommendations. These permits would provide a rebuttable presumption of compliance under the Act 250 floodway criteria 1D.

- During our discussions around the presumption of ANR permits, we discussed several topics that have been part of the legislative discourse around environmental permits for some years. Under Act 150 of 2016, the Legislature directed the Agency to standardize permitting processes and enhance public participation. The Agency has made significant changes, and we believe it's now appropriate to further evaluate whether ANR permits should be appealed on the record. Therefore, we propose a **stakeholder process for evaluating on the record review and any potential changes to the presumption of ANR permits under Act 250.**
- This Committee and the Commission before it considered significant planning issues as they relate to Act 250. These topics include the status of the capability and development plan, whether that plan should be updated, and the approval of regional plans. In our deliberations, we also considered whether certain planning and designation approvals should be appealable. The breadth and depth of these topics are significant and worthy of deliberate attention by experts in the field. We, therefore, propose, that the Agency of Commerce and Community development **conduct a stakeholder process to provide recommendations to the Legislature on several planning topics.**

We also want to ensure the Committee that addressing Act 250 jurisdiction over trails is a critical component of this package. The stakeholders continue to make progress to develop a proposal. The Administration has and will continue to provide technical support and feedback to this group. We believe the topic can be resolved in time to move on this Committee's timeline.

Thank you, Chair Sheldon and Committee, for allowing us the time to go over this proposal. We are happy to take questions now and provide further testimony with the specific statutory language of our proposal.