MEMORANDUM

TO: Rep. Amy Sheldon
FROM: Ellen Czajkowski, Legislative Counsel
RE: COVID-19 impacts on Act 250 Permit Conditions
DATE: 24 April 2020

Questions Presented:

- Does the Natural Resources Board have authority to be more flexible on permit conditions when social distancing is behind us and businesses are working to accommodate a resulting backlog?
- Can Act 250 permit conditions addressing the number of events within a certain time frame be relaxed to respond to the cancellations and rescheduling due to COVID-19 so that individual permits would not have to be amended (for example wedding venues)?
- Is legislative action is required to accomplish these goals?

Short Answers:

- Most likely. The Board has discretion when it comes to permit enforcement and there is precedence for it to be more lenient during emergencies. Also, District Commissions have the authority to amend permit conditions, particularly when there have been circumstances beyond a permittee's control.
- Maybe. It was done after Tropical Storm Irene, but only focused on one industry and required individuals to request specific exemptions. More industries are impacted by the current State of Emergency, and it is unclear if economic hardship is a compelling enough reason to potentially cause undue impacts under the criteria.
- Potentially, depending on the specific goal.

Introduction:

On March 13, 2020, the Governor of Vermont issued Executive Order No. 01-20 declaring a State of Emergency in response to the Coronavirus (also called COVID-19) pandemic. The Governor issued six addendums to the Executive Order directing non-essential businesses to close, limiting gatherings to 10 people or fewer, and, with certain exceptions, requiring the public to stay at home. As a result, many businesses are closed or have modified their hours of operation. Events across the State and the nation have been canceled.

When a person applies for an Act 250 permit, the permit may be granted, denied, or granted with conditions.[1] Conditions may be attached to the permit in order to mitigate burdens under the criteria. Conditions that relate to the frequency of events held at the development or to the hours of operation for the business may be added to address impacts under criterion 5 (traffic) or 8 (aesthetics, noise). For example, Condition 19 of the permit for Burlington's Waterfront Park states that the park can be used for events for up to 27 days between May 27 and September 15 each year.[2] Another example is Conditions 9 and 10 of the permit for the Scott Farm in Dummerston. The permit limits the farm to holding 12 large events, 15 medium events, and 30 small events each year.[3]

The current State of Emergency has changed the way that many businesses operate and has reduced the number of gatherings that may take place. These changes may lead some permit

[1] 10 V.S.A. § 6086(c).

[2] In re Waterfront Park Act 250 Amendment, 2016 VT 39, ¶ 7 (2016). The permit has since been amended to extend the event season.

[3] Scott Farm Land Use Permit 2W1280-1 at 2 (10/6/11).

holders to seek to operate in ways that differ from the terms of the conditions of their Act 250 permits.

Discussion:

Act 250 permit conditions

When a person applies for an Act 250 permit, the permit may be granted, denied, or granted with conditions.[4] Before issuing a permit, the District Commission must make affirmative findings under all ten criteria.[5] If it has determined that a proposed project causes undue adverse impacts under a criterion, the District Commission must impose reasonable conditions to ensure the project complies with the criterion.[6] A District Commission decides on a case-by-case basis whether to impose mitigating conditions and which conditions to impose.[7] The District Commission will deny a permit if permit conditions cannot be drafted to alleviate the undue adverse impact.[8]

Generally, "[w]ith respect to conditions, it has long been recognized that permit conditions are necessary where, in their absence, a permit denial would be required."[9] The District Commissions have broad authority to tailor permit conditions to reduce project impacts, as long as there is an appropriate relationship to the criterion involved.[10] However, conditions must be "reasonable"[11] and "appropriate."[12] A District Commission has no authority to require permit conditions without a finding that it is necessary for compliance with any of the ten criteria.[13] Conditions that have been added allow the permit to be approved and the project to move forward.

There are many different types of conditions, but some examples include "limiting development to areas of land subject to Act 250 jurisdiction, establishing hours of operation, directing the placement of specific machinery, and requiring reclamation following completion of a project."[14] The questions presented at the beginning of this memo ask specifically about conditions that limit the frequency of events.

Permit conditions are compulsory

A permittee is required to conform to permit conditions for the entire duration of the permit.[15] Violating a permit condition is grounds for revocation of a permit and may result in an enforcement action.[16] Therefore, permit holders must remain in compliance with their permit conditions.

The Natural Resources Board has the authority to bring an enforcement action against a permit holder and the ability to petition the Environmental Division of the Superior Court for a permit revocation.[17] The District Commissions do not have authority to initiate enforcement

[4] 10 V.S.A. § 6086(c).
[5] In re Treetop Dev. Co. Act 250 Dev., 2016 VT 20, ¶ 11 (2016).
[6] In re North East Materials Group, LLC, 205 Vt. 490 (2017).
[7] In re Hinesburg Hannaford Act 250 Permit, 206 Vt. 118 (2017).
[8] Re: McLean Enters. Corp., #2S1147-1-EB, FCO at 62 (11/24/04).
[9] Bull's-Eye Sporting Center, No. 5W0743-2-EB (Altered), 1997 WL 369448, at *4 (5/8/97).
[10] J. Philip Gerbode, #6F0357R-EB (3/26/91).
[11] 10 V.S.A. § 6087(b).
[12] Act 250 Rule 32(A).
[13] Trapper Brown Corp. (TBC Realty), #4C0582-15-EB (12/23/91).
[14] In re Treetop Dev. Co. Act 250 Dev., 2016 VT 20, ¶ 12, (2016).
[15] In re Wildcat Constr. Co., Inc., 160 Vt. 631, 633 (1993).
[16] 10 V.S.A. 6027(g).
[17] 10 V.S.A. 6027(g).

actions.[18] The Agency of Natural Resources (ANR) also has the ability to enforce Act 250 violations under 10 V.S.A. § 8003. This authority gives the Board and ANR discretion in initiating enforcement and in deciding the remedy.[19]

Act 250 Rule 34

Permit conditions are added so a project will comply with the ten criteria of Act 250 and the permittee must always comply with them. A permittee may seek to amend those conditions however. "Act 250 permits are written on paper, not carved in stone."[20] Rule 34 of the Act 250 Rules governs the procedure for amending permits and permit conditions. Rule 34(A) requires a permittee to seek an amendment when there is a material change to a permitted development.[21]

"Not all changes are material, nor do all changes require a permit amendment. In order to determine if a change is material, we must consider the scope of the project as originally permitted by the District Commission."[22] The rules define "material change" as "any change to a permitted development or subdivision which 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. Section 6086(a)(1) through (a)(10)."[23]

A change that is not material may qualify as an administrative amendment and would go through an expedited process.[24] An administrative amendment is only appropriate when there is no likelihood of an impact under the criteria. The process involves no notice or hearings.[25]

The Burlington Waterfront Park has an Act 250 permit that contains conditions limiting the number of events it may hold. The permit conditions related to the number of events have been amended multiple times. The District 4 Coordinator issued an administrative amendment in April 2009 to allow the Park to exceed its limit on hosting events three weekends in a row. In 2014, the Park sought to extend its event season by one week, and this was also done through administrative amendment. Later, in 2015, the Park sought to hold events year-round and this was found to be a material change.[26]

If the change is a material change, then Rule 34(E) governs. Rule 34(E) codified the Vermont Supreme Court's analysis in In re Stowe Club Highlands in which the Court determined "under what circumstances ... permit conditions may be modified."[27] The Court affirmed the factors that had been identified by the former Environmental Board. These factors are intended to "assist in assessing the competing policies of flexibility and finality in the permitting process."[28] One of the goals is to ensure that the grant of an Act 250 permit is not "merely a prologue to continued applications for permit amendments." [29]

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[18] In re Treetop Dev. Co. Act 250 Dev., 2016 VT 20, ¶ 14 (2016).
[19] Natural Resources Board v. Stratton Corp., No. 106-7-14 Vtec, Decision Regarding Scope of Hearing at 3 (4/10/15).
[20] Waterfront Park Act 250 Amendment, No. 138-9-14 VTEC, 2015 WL 2451197, at *3 (5/8/15) quoting Re: Dr. Anthony Lapinsky and Dr. Colleen Smith, Nos. 5L1018-4 and 5L0426-9-EB, Findings of Fact, Conclusions of Law, and Order, at 18 (10/3/03).
[21] Act 250 Rule 34(A).
[22] In re Big Rock Gravel Act 250 Permit (Appeal of Jurisdictional Opinion), No. 116-8-12 Vtec at 2 (11/28/12).
[23] Act 250 Rules 2(C)(6).
[24] Act 250 Rule 34(D).
[25] Rule 34(D).
[26] Waterfront Park Act 250 Amendment, No. 138-9-14 VTEC, 2015 WL 2451197, at *2 (5/8/15).
[27] In re Stowe Club Highlands, 166 Vt. 33, 37 (1996).
[28] In re Nehemiah Assocs., 168 Vt. 288, 294 (1998).
[29] The Scott Farm Act 250, No. 148-11-17 VTEC, 2018 WL 4200934, at *3 (8/6/18) quoting Stowe Club Highlands, 166 Vt. at 39.

When evaluating an application for a permit amendment under Rule 34(E), the first question is "whether the applicant proposes to amend a permit condition that was included to resolve an issue critical to the issuance of the permit."[30] A condition is not a critical condition solely by virtue of being imposed by the District Commission.[31] The determination is made on a case-by-case basis."[32] If the condition was not included to resolve a critical issue, then the applicant is entitled to seek an amendment without going through the rest of the test.[33]

If it is a critical condition, the District Commission must "consider whether the [applicant] is merely seeking to relitigate the permit condition or to undermine its purpose and intent."[34] If the applicant is only seeking to relitigate or undermine the condition, the analysis ends, and the applicant is not entitled to seek an amendment. If not, the District Commission moves to the third step in the analysis.[35]

The District Commission weighs the competing goals of permit finality and flexibility. The balancing is done by looking to the following list of factors in Rule 34 (E)(3):

(a) changes in facts, law, or regulations beyond the permittee's control;

(b) changes in technology, construction, or operations which necessitate the amendment;

(c) other factors including innovative or alternative design which provide for a more efficient or effective means to mitigate the impact addressed by the permit condition;

(d) other important policy considerations, including the proposed amendment's furtherance of the goals and objectives of duly adopted municipal plans;

(e) manifest error on the part of the District Commission, the Environmental Board, or the Environmental Court in the issuance of the permit condition; and

(f) the degree of reliance on prior permit conditions or material representations of the applicant in prior proceeding(s) by any party, the District Commission, the Environmental Board, the Environmental Court, or any other person who has a particularized interest protected by 10 V.S.A. Ch. 151 that may be affected by the proposed amendment.[36]

It seems likely that factor (a) under Rule 34(E)(3), which looks at changes in facts beyond the permittee's control, weighs in the permittee's favor due to the COVID-19 State of Emergency.

However, it is unclear if allowing permittees to hold more events would be the proper remedy for everyone. A recent article in Sevendays about Vermont's wedding industry stated that wedding venues are encouraging people to reschedule their events for weeknights. The article quoted Nancy Jeffies-Dwyer an event planner, ""One of the interesting, creative things we're doing is convincing people that getting married on a Thursday or Sunday isn't so bad," she noted with a laugh. There are only so many Saturdays in wedding season, after all."[37] Depending on the location, weeknight weddings may have undue adverse impacts on noise.

It is difficult to answer the questions presented because they do not give enough information about the types of development or industries at issue. The two examples above that mention permits with conditions related to frequency of events are for different types of

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[30] Act 250 Rule 34(E)(1).
[31] The Scott Farm Act 250, No. 148-11-17 VTEC, 2018 WL 4200934, at *5 (8/6/18).
[32] Act 250 Rule 34(E)(1).
[33] The Scott Farm Act 250, No. 148-11-17 VTEC, 2018 WL 4200934, at *3 (8/6/18).
[34] Hinesburg Hannaford Act 250 Permit, No. 113-8-14 VTEC, 2016 WL 1569326, at *17 (4/12/16).
[35] The Scott Farm Act 250, No. 148-11-17 VTEC, 2018 WL 4200934, at *3 (8/6/18).
[36] Act 250 Rule 34(E)(3)(a)–(g).
[37] Polston, Pamela, Postponed Nuptials, and Revenue, in Vermont's Wedding Industry (4/8/20). https://www.sevendaysvt.com/vermont/postponed-nuptials-and-revenue-in-vermonts-wedding-industry/Content?oid=30146784

development. Waterfront Park illustrates that adding one single event or one week to the event season may only require an administrative amendment, while making the event season year-round is a material change. Scott Farm sought to increase the number of large events from 12 to 14 and added the new category of medium events, of which 30 could be held. This was found to be a material change.

Conditions related to the frequency of events at a location are not uniform. They are specific to the permit and may be critical to mitigating impacts under different conditions (traffic or noise), so it seems unlikely that the Board will broadly allow permittees to be flexible on the number of events they can hold once the State of Emergency is over. However, there are some similarities between the current State of Emergency and the one that happened after Tropical Storm Irene. The Board's actions in 2011 may be instructive as to what will happen here.

What happened after Tropical Storm Irene

Tropical Storm Irene hit Vermont on August 28 and 29, 2011. In response, the Natural Resources Board suspended Act 250 permitting needs for gravel and quarry operators due to the increased need for road-building material to rebuild infrastructure destroyed in the storm.[38]

In its 2011 Annual Report to the General Assembly, the Board described the procedures it adopted for quarries and pits. The Board issued an Emergency Exemption Order and stated that it would exercise enforcement discretion to assure the adequate supply of gravel and stone to promptly repair damage from Tropical Storm Irene. The Report stated the following:

> "The NRB developed a policy and protocol providing that the Board would not enforce permit restrictions if a pit or quarry operator contacted the District Coordinator and demonstrated an emergency need for the material. The operator and District Coordinator would immediately decide the limits that would be exceeded. The NRB's efforts successfully assured prompt and adequate supply of aggregate while assuring public safety and protection of natural resources. Permit conditions that the NRB agreed to not enforce on a project-specific basis were, for the most part, related to noise, truck trips, hours of operation, and extraction rates. Some pits were allowed to exceed grandfathered limits without being required to seek a permit (assuming a timely return to grandfathered limits). Some closed pits were allowed to reopen on condition of timely reclamation. New pits were allowed to open in agreed upon locations with the condition that the pit would be closed and reclaimed after the emergency or the operator would promptly apply for a permit for continued operation. The NRB closely coordinated its post-Irene efforts with VTrans and ANR, in particular to determine when to cease suspension of permit requirements and conditions."[39]

The NRB terminated the Emergency Exemption Order on November 15, 2011, and all gravel and rock quarries were required to come into full compliance with Act 250.[40]

This emergency order lasted only approximately 75 days and was limited to the earth extraction industries. It was intended to support public safety as repairs were made to roads that had been washed away by the storm. While it was a broad exemption for a specific industry, the Board required individual permittees to comply with relaxed conditions specific to their operation after consultation with a District Coordinator.

[38] N.E. Materials Group LLC., No. 1431012, 2014 WL 1877032, at *4 (4/28/14).
[39] 2011 Annual Report, Natural Resources Board, page 11 (2/16/12).
[40] In re Chaves Londonderry Gravel Pit, No. 60-4-11 VTEC, 2011 WL 5910135, at *1 (11/11/11).

The COVID-19 State of Emergency differs in that the change in permit conditions would not relate to public safety. It would relate to economic hardship as businesses seek to make up for lost revenue. Also, the number of industries may be broader. A brief (but incomplete) search of the Act 250 permit database revealed that developments with restrictions on the number of events per year include parks, wedding venues, hotels, and a winery. However, it seems possible that the Natural Resources Board may issue a similar emergency exemption that would require individual permittees to apply for permit amendments. The Board may also exercise enforcement discretion and not enforce permit conditions related to the number of events.

Conclusion:

The recently passed legislation related to the COVID-19 pandemic (Acts 91 and 92) did not grant the Natural Resources Board any additional powers related to flexibility with permit conditions. However, additional authority may not be necessary.

The District Commissions have the ability to amend permits and conditions under Rule 34 of the Act 250 rules. Rule 34(E) establishes the three-step analysis for whether a critical permit condition can be amended. The District Commission weighs the need for flexibility in the face of changing circumstances versus the need for finality. One of the factors is whether there has been changes in fact beyond the permittee's control. The State of Emergency has required businesses to be closed. There is very little precedence for this type of situation, but it does seem that this would weigh in favor of amending the permit to change the number or schedule of events for businesses.

Further, in 2011, the Natural Resources Board used its enforcement discretion to grant broad flexibility to the gravel and earth resources industry in order to respond to Tropical Storm Irene. If the General Assembly had specific outcomes it would like to see in reference to restrictions on the number of events, a bill could be drafted, but more details would be needed. However, the ability of the District Commissions to amend permit conditions as administrative amendments and the Natural Resources Board existing enforcement discretion likely give the program sufficient flexibility when responding to permit conditions after the State of Emergency related to COVID-19 ends.