

P. O. Box 512  
Montpelier, Vermont 05601  
September 8, 2020

Senate Committee on Natural Resources and Energy  
meeting virtually out of the State House  
Montpelier (in theory) or who knows

Subject: H.926, an act relating to changes to Act 250

Dear Committee:

These comments are based on the draft amendment 1.1 9/3/2020, made public last Friday.

Thank you for removing the parts that you did remove.

### **Recommendations**

I ask that you bring forest blocks and connecting habitat into the criteria now. Don't wait two years.

I ask that you place into the draft the principles for evaluating forest blocks and connecting habitat. Do not leave them to the administration's rulemaking.

I ask that you provide more detail on what a forest block is in the definition.

I ask that you place into criterion (8) that mitigation and minimization are inappropriate for connecting habitat.

I ask that you eliminate the rulemaking.

I ask that the criterion of forest blocks and connecting habitat be reviewed for all applications for subdivision or development.

I ask that the criterion for forest blocks and for connecting habitat be that there will be no adverse effect.

I ask that the burden of proof be amended so that the applicant has the burdens of proof and persuasion for criterion (8).

I ask that the direction to the resource mappers on the forest blocks layer be placed into session law.

I request that you remove all the ambiguities in the rulemaking section by removing the requirement for rulemaking.

I ask that you leave the status quo on trails in place until after the stakeholders work out their recommendations.

### **Explanation of recommendations**

**Either forest blocks and connecting habitat are important or they are not. I ask you to come down on the side of them being important.**

This draft is ambiguous on the importance of forest blocks and connecting habitat.

This draft declares that forest blocks and connecting habitat are so important that they need to be brought into the Act 250 criteria now. At the same time it declares that their value is so low that we can afford two more years of losses to forest blocks and connecting habitat. This draft declares that they are so unimportant that district commissions will not be able to consider them until the Natural Resources Board has created rules two years from now.

You can add basic principles for evaluating criterion (8) to the draft. (The House had them until pressured by the administration to drop them in favor of rulemaking.)

The districts would use those basic principles when evaluating forest blocks and connecting habitat in permit proceedings and jurisdictional opinions. Which is what district commissions and co-ordinators have always done. The Act 250 criteria were interpreted and implemented by thoughtful consideration by the district in applying the facts of a situation to the criteria. Much of the body of precedent used now was created initially by the districts without rules for implementation by the Environmental Board or, now, the Natural Resources Board. Rules were a minor component, or non-existent, when the commissions first went into action.

Projects can damage a lot of forest blocks, Vermont can lose a lot of connecting habitat in the two years until the criteria become effective. That loss without review by Act 250 is needless. The forces that lead to adverse impacts to forest blocks are increasing due to the rising influx of climate refugees and COVID refugees into Vermont.

I ask that you bring forest blocks and connecting habitat into the criteria now.

I ask that you place into the draft the principles for evaluating forest blocks and connecting habitat.

**The proposed rulemaking is an abdication of legislative responsibility**

The concept of rulemaking for forest blocks and connecting habitat was added to H.926 in February under pressure from the administration. Until then, drafts of H.926 had specific requirements for forest blocks and for connecting habitat within criterion (8). Kicking the can to the administration is an abdication of your legislative authority.

You are allowing the administration to put off the start of the rulemaking process until one year from now and then allowing a second year until the rules are final.

What is the purpose of a forest block? (Protection of water quality? Logging? Wildlife habitat? Recreation? Carbon sequestration? All of these? None of these?) Unless you know what the purpose is, I cannot imagine how you would know if a rule does what you think it should do. Letting the administration define this is an abdication of your responsibility.

The rulemaking would allow the administration an unlimited authorization to further define forest blocks and connecting habitat.

The rulemakers would have unlimited authority to determine when mitigation is appropriate.

The Legislative Committee on Administrative Rules has few powers with respect to rules they find objectionable. If I remember correctly, the most the committee can do is send a proposed rule back for further consideration and then pout when the administration puts it out as a final rule without amending it. (Sens. MacDonald and Bray will have a more precise understanding of this process.)

I ask that you provide more detail on what a forest block is in the definition.

I ask that you place into criterion (8) that mitigation and minimizing are inappropriate for forest blocks and connecting habitat.

I ask that you eliminate the rulemaking.

**Mitigation and minimization are both inappropriate for connecting habitat.**

Mitigation was added to H.926 in February 2020 under pressure from the administration.

Mitigation is inappropriate in many instances. For example, connecting habitat needs to be where it is. Setting aside some land somewhere else as suitable mitigation for connecting habitat is ineffective. Connecting habitat is determined based on where species live and how they move. Connecting habitat allows species to move between areas that they occupy. Summer range and winter range. Breeding grounds and living grounds. When the connecting habitat is adversely affected, the species cannot move as they need to move in order to live. Saving something somewhere else does not help the population that is adversely affected.

The proposed amendment ought to be revised so that mitigation would not be allowed in connecting habitat when there is any adverse effect. The wildlife and plants that use a connecting habitat don't know the difference between a due adverse impact and an undue adverse impact. Adverse is adverse. Mitigation would not reduce the severity of the impact at all. Minimization would reduce the severity of the impact while still having an impact. For connecting habitat, an adverse impact needs to lead to a revised project to avoid the adverse impact. Neither minimize nor mitigate should be allowed in forest blocks or connecting habitat.

One of the provisions of H.926 as it came to the Senate has been dropped and should be added back.. That is the provision amending §6088, Burden of proof. That provision would give the applicant the burden of proof for the amended criterion (8). The reasoning for this change is that the applicant has the most knowledge of the property. And that other parties lack the ability to enter the property to gather information to show that there is an adverse effect.

Recreational trails, farming , and logging should not be getting a waiver from Act 250 in forest blocks or connecting habitat.

I ask that the criterion of forest blocks and connecting habitat be reviewed for all applications for subdivision or development.

I ask that the criterion be that there will be no adverse effect.

I ask that the burden of proof be amended so that the applicant has the burden of proof for criterion (8).

### **Resource Mapping**

It seems odd that this draft would add a specific layer into the resource mapping. And that this is the only resource layer that would be named in that section of statute. I ask that the direction to the resource mappers on the forest blocks layer be placed into session law.

### **Unambiguous direction for rulemaking**

Senator MacDonald pointed out elegantly and concisely that the direction given for the rulemaking needs to be unambiguous. I request that you remove all the ambiguities by removing the requirement for rulemaking.

### **The definition of fragmentation would allow too much fragmentation.**

There was discussion of adding fragmentation to the session law on rulemaking. Because I hope you will be taking out the requirement for rulemaking, then you will not need to include a definition. The definition that was in a previous draft allowed lots of fragmentation.

### **Recreational trails**

The definition of a recreational trail will allow 49% of its use to be for operation of a motor vehicle. That could be lots of cars and trucks on unpaved bike paths like the ones on old railroad beds.

Mountain bikers shred trails according to an article in the September 2020 *Seven Days* Staytripper, p. 25. Shredding trails seems at odds with trying to reduce impacts in forest blocks.

The first jurisdictional opinion on recreational trails was issued May 30, 2017. (The second on May 3, 2019.) It has taken the stakeholders three years to agree on asking to have one-and-a-quarter more years to work out details for having recreational trails avoid Act 250 in almost all instances. I think that recreational trails should be under Act 250 until then. The prospective repeal is intended as an incentive to get the stakeholders to come to an agreement. I think a bigger incentive would be to have the trails subject to Act 250 or not, as they are now, until they come up with an agreement that is approved by the legislature.

I ask that you leave the status quo on trails in place until after the stakeholders work out their recommendations. Then a future legislature can decide, based on a firm proposal, how Act 250 would treat recreational trails.

**Summary:**

I ask that you bring forest blocks and connecting habitat into the criteria now. Don't wait two years.

I ask that you place into the draft the principles for evaluating forest blocks and connecting habitat. Do not leave them to the administration's rulemaking.

I ask that you provide more detail on what a forest block is in the definition.

I ask that you place into criterion (8) that mitigation and minimization are inappropriate for connecting habitat.

I ask that you eliminate the rulemaking.

I ask that the criterion of forest blocks and connecting habitat be reviewed for all applications for subdivision or development.

I ask that the criterion for forest blocks and for connecting habitat be that there will be no adverse effect.

I ask that the burden of proof be amended so that the applicant has the burdens of proof and persuasion for criterion (8).

I ask that the direction to the resource mappers on the forest blocks layer be placed into session law.

I request that you remove all the ambiguities in the rulemaking section by removing the requirement for rulemaking.

I ask that you leave the status quo on trails in place until after the stakeholders work out their recommendations.

Thank you for taking the time to read this testimony.

Sincerely,  
Thomas Weiss, P. E.