

Senate Committee on Transportation

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Vermont Agency of Transportation

Exempting Federal-Aid Transportation Projects from Act 250

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I. Introduction and Overview (Dan Dutcher, Environmental Policy Manager)

A. Introduction

Good morning and thank you for this opportunity to testify about Act 250 and transportation projects in Vermont. For the record, my name is Dan Dutcher, Environmental Policy Manager at the Agency of Transportation.

B. Panel

With me today are:

- Andrea Wright,
Environmental Services Manager;
- Ken Robie,
Highway Division Project Delivery Bureau Director;
- John Dunleavy,
Assistant Attorney General and Chief Transportation Attorney;
- Michele Boomhower,
Policy, Planning, and Intermodal Development Division Director; and
- Wayne Symonds,
Highway Division Director and Chief Engineer.

I will provide an overview of the Administration's recommendation to exempt federal-aid transportation projects from Act 250. Andrea Wright will then provide the Committee with some information about planning and developing transportation projects to help put Act 250 in context. Ken Robie will walk the Committee through some case examples of Act 250 and transportation. I will then wrap up at the end with an explanation of the specific effects of the proposed

amendments to Act 250 to carry out the transportation exemption. The full panel is here to help with any questions that may arise along the way.

C. Summary of Why Act 250 Should Not Apply to Federal-Aid Transportation Projects

The Environmental Protection Agency (EPA) had just begun in 1970, when Act 250 was enacted. Hence, the comprehensive system of environmental oversight and controls in place today was virtually non-existent when Act 250 was enacted—nearly 50 years ago.

The Executive Branch seeks an exemption from Act 250 for federal-aid transportation projects for the following reasons:

- Comprehensive planning and regulation under state and federal laws—other than Act 250—that have emerged since Act 250 was enacted nearly 50 years ago—including significant and meaningful opportunities for public input;
- Little or no added value to the environment from Act 250 jurisdiction over federal-aid transportation projects—these projects are not contributing to the fragmentation, sprawl, and unplanned development that Act 250 is intended to address;
- The addition of significant expense, delay, and uncertainty from Act 250, especially where Act 250 is used as a means of advancing personal or commercial interests or rehashing well-considered policy, planning, and permitting decisions that were already made in other forums; and
- The public interest in the State’s public transportation network—all federal-aid transportation projects are undertaken in the public interest and undergo legislative review.

An important part of VTrans’ mission is environmental stewardship. VTrans works actively to protect the environment across all its programs. This includes work in water resources, solid waste, hazardous materials, wildlife habitat, archaeology, historic preservation, climate and energy, and land use planning. Through all this, VTrans is also responsible for getting critical infrastructure projects completed for the safety and convenience of the traveling public in a cost-effective manner.

VTrans has provided the Committee with a list of state and federal regulations that apply to federal-aid transportation projects and has also provided a multi-page

Excel chart that compares the Act 250 criteria with state and federal transportation standards.

Andrea Wright and Ken Robie would like to share some case examples with the Committee in the context of transportation planning and development:

II. Planning and Permitting for Transportation Projects (Andrea Wright)

A. Transportation Planning

Effective land use controls come from a coordinated combination of planning, regulation, and enforcement. Federal-aid transportation projects go through comprehensive planning, mandated by state and federal law. As part of this process, VTrans works with the Regional Planning Commissions through the Transportation Planning Initiative (19 V.S.A. § 10l) to consider input from municipalities and local interests.

B. Redundancy of Act 250 with other Regulatory Programs and Non-Regulatory Initiatives

Much of Act 250 review of federal-aid transportation projects is redundant with other state and federal regulatory programs. In a handful of instances, Act 250 covers, or may in the future cover, subject areas beyond the scope of these other regulatory programs. Examples may be climate and energy, habitat for wildlife that is not threatened or endangered, and prime agricultural soils. In these subject areas, it would be far more effective for VTrans to continue to incorporate these considerations into its planning processes and construction standards and to work directly with other agencies to address issues as they arise than to extend new criteria or sub-criteria into the transportation sector.

VTrans already works extensively with other agencies on climate and energy issues, including accelerating vehicle electrification. In addition, VTrans continues to work on incorporating climate resilience/adaptation into its project prioritization and planning processes.

Further, VTrans collaborates closely with the Vermont Department of Fish and Wildlife on habitat issues. This collaboration includes active membership by both agencies in the international Staying Connected Initiative. The Staying Connected Initiative is dedicated to linking habitat blocks in the Northeastern United States

and the Southeastern Canadian Provinces. A significant part of that work involves making the transportation network in these areas more porous to wildlife.

VTrans is helping the Department of Fish and Wildlife develop a workplan for the New England Governors and Eastern Canadian Premiers Resolution on Ecological Connectivity, Adaptation to Climate Change, and Biodiversity Conservation.

For the last several years, VTrans has been funding research by the University of Vermont Transportation Research Center and the Nature Conservancy into means of reducing wildlife mortality on Vermont highways.

III. The Continuum of Project Development (Ken Robie)

A. Act 250 and the Project Continuum

The process of developing a federal-aid transportation project follows an orderly continuum beginning with planning and then proceeding to scoping, design, state and federal permitting, right-of-way acquisition, and finally construction that conforms with all the prior steps. Not all projects comply with all these steps, which depend on the project's size and environmental impacts, but all steps prior to construction offer ample opportunities for public input. Also, all projects are constructed in the public interest and are subject to legislative oversight through the appropriations process.

Compared to other state and federal environmental hurdles that a transportation project must clear, Act 250 is uniquely challenging for several reasons. Act 250's criteria are so subjective that Act 250 can be very difficult to prepare for, and the generalized nature of the criteria lends Act 250 to obstructionist tactics. Act 250 proceedings typically take place after other regulatory processes have been resolved and allows project opponents to raise issues that were addressed or could have been addressed in prior proceedings, with Act 250 issues sometimes argued years after prior opportunities to raise them have gone by.

B. Case Studies

Some examples can help illustrate these points:

1. Lamoille Valley Rail Trail

The Lamoille Valley Rail Trail is a ready example of how Act 250 does not function effectively with respect to federal-aid transportation projects. VTrans may have

spent around a million dollars to get the Lamoille Valley Rail Trail through Act 250. This money came right out of the federal earmark for the project. Perhaps one third of this sum went to an argument over jurisdiction. VAST, which manages the rail trail, spend an additional half million dollars in trail user fees on Act 250 litigation.

VTrans was represented in the matter by a former Chair of the Environmental Board. A threshold jurisdictional question eventually went to the Environmental Court, where it sat for so long that VTrans and VAST finally decided to submit to jurisdiction to get on with the project. Even if VTrans and VAST had prevailed in Environmental Court on jurisdiction, the handful of adjoining landowners who opposed the project and the environmental group aligned with them may have then appealed to the Vermont Supreme Court, thus delaying work on the project even more.

After another prolonged battle, the Act 250 permit ended up ratifying the other permits for the project and imposing hours of operation that differed slightly from the statewide rules for snow machines. The State and the Natural Resources Board have since entered a stipulation under which Act 250 has agreed not to take jurisdiction over the rail trail, provided the State incorporates the hours of operation for the trail into its lease with VAST.

The LVRT was endorsed by the Legislature and partially funded by Congress. It is a valuable recreational amenity that is enjoyed by many and boosts the economy. Rail trails are carefully planned projects on existing footprints that involve minimal environmental disturbance—primarily removing rails and grading. Potential environmental impacts that do arise (for example bridge and culvert replacements) are adequately handled through other regulatory programs, including stream alteration, stormwater, wetlands, and river corridor regulations. In fact, rail trails help the environment by repairing existing flood damage and reducing erosion. In the case of the LVRT, Act 250 served the personal interests of a small number of project opponents while doing nothing to protect Vermont against unchecked development.

2. Bennington and Morrisville Bypasses

The Bennington Bypass, which was completed in 2012, did not need to go through Act 250 because VTrans held a public hearing relating to right-of-way acquisition for the project prior to 1970, and the project was therefore grandfathered. The Morrisville Bypass, completed in 2014, was contested under Act 250. The issues in the Act 250 case were traffic and noise. However, the project opponent used Act 250

to try to exact additional compensation from VTTrans for property rights that VTTrans needed to acquire for the project, even though the law provides a separate process for resolving right-of-way disputes. In the end, the Morrisville Bypass and the Bennington Bypass were both constructed using modern practices following public input, and Act 250 made no difference to the environment.

3. Cabot-Danville Segment of Route 2

The reconstruction of the Cabot-Danville segment of U.S. Route 2 was opposed in Act 250 by a group of citizens, aligned with an environmental group, who wanted to continue swimming in a portion of a gravel pit that VTTrans proposed to convert to a wetland with excess materials from the project. VTTrans had received state and federal wetlands permits for this work, but none of the project opponents spoke up at that time, or in earlier phases of the project. In general, the State and the Nation are losing wetlands but gaining open water, so converting an open-water quarry to a wetland with extra materials from the project was a well-reasoned environmental decision. The new wetlands were also intended to mitigate unavoidable wetlands impacts from the project.

The project opponents persuaded the District Commission that swimming at the quarry was an existing use that needed to be protected. As a result, VTTrans had to redesign a portion of the project at a high cost to the taxpayer (several hundred thousand dollars). While some may look at this case as an example of how Act 250 works well, it is an example of how inefficient it is to argue over issues in Act 250 that could have and should have been resolved earlier. Even though Act 250 changed the project slightly, Act 250 did not stop unplanned, unregulated development that threatens Vermont's rural landscape. And, ironically, by preventing a wetlands restoration project in favor of open water, Act 250 may have increased the projects' environmental impacts.

4. Diverging-Diamond Crossover at I-89 Exit 16

As many of you know, the interchange reconstruction at Exit 16 of Interstate 89 in Colchester continues to be the subject of protracted Act 250 proceedings. VTTrans received favorable decisions from the District Commission and the Environmental Court that project opponents have appealed to the Vermont Supreme Court. Project opponents have challenged other permits as well.

While VTTrans cannot subscribe motives to the project opponents, the environmental challenges presented through Act 250 and other forums might benefit the project

opponents by delaying the completion of competing businesses. Wetlands issues raised through Act 250 could have and should have been resolved through wetlands permitting. Here again, Act 250 is not saving Vermont's nature but is obstructing a critical project that has been through comprehensive planning. One repeating criticism of Act 250 is that it lacks a planning component, whereas major transportation projects like this one are subject to extensive planning under both state and federal law.

IV. Summary and Proposed Amendments to Act 250 (Dan Dutcher)

The uptake from all this is that federal-aid transportation projects are undertaken in the public interest, do not benefit from Act 250, and are sometimes obstructed and delayed where Act 250 applies. Act 250 was created to fill a void where other land use controls were not in place. Federal-aid transportation projects do not occupy a regulatory void. These projects are not destroying the character and culture of Vermont. On the contrary, they help make it possible for people to live, do business, and visit Vermont. Act 250 adds process, cost, delay, and uncertainty to federal-aid transportation projects without adding environmental value, and Act 250 jurisdiction over these projects should therefore be eliminated.

The Administration's bills on Act 250 (H.0197 and S.0104) contain two simple amendments to Act 250 that would exempt federal-aid transportation projects. VTrans has drafted an additional line (in red) to be added to one of these amendments to clarify that the exemption extends to amendment jurisdiction:

Sec. 2. 10 V.S.A. § 6001 is amended to read:

§ 6001. DEFINITIONS

~~In~~As used in this chapter:

* * *

(D) The word "development" does not include:

* * *

(ix) The construction of improvements for transportation projects

that are supported, in whole or in part, by federal aid for municipal, county, or State purposes.

Sec. 3. 10 V.S.A. § 6081 is amended to read:

§ 6081. PERMITS REQUIRED; EXEMPTIONS

* * *

(z) No permit or permit amendment is required for the construction of improvements for municipal, county, or State transportation projects that are supported, in whole or in part, by federal aid. **This includes construction of transportation improvements supported, in whole or in part, by federal aid, to a permitted development or subdivision that would be required to obtain a permit amendment for any material change or administrative change in the terms and conditions of its land use permit.**

The intent of this language, taken together, is that the State and municipalities would be exempt from having to obtain Act 250 permits or permit amendments for lands they own or control and would also be exempt from having to obtain Act 250 permit amendments for adjacent lands they would materially change. The adjacent landowner would need to obtain the Act 250 permit amendment for any material change, and the State and municipalities would be responsible under the law of eminent domain for mitigating the costs of those amendments and compensating the landowner for permitting or noncompliance if compliance is not practicable or possible. However, the Act 250 permitting process would not represent a condition of project development. With respect to federal-aid transportation projects, Act 250 would be treated the same way as local zoning, which is not applicable to linear transportation projects. However, the State and municipalities would be responsible for paying adjacent landowners just compensation for damages resulting from material changes to their lands, including the costs to cure Act 250 permitting violations. Thank you for your consideration.