

Thomas Weiss, P. E.
P. O. Box 512
Montpelier, Vermont 05601
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House Committee on Natural Resources and Energy
State House
Montpelier, Vermont

Subject: H.492 the structure of the Natural Resources Board
Comments on draft 2.2 and committee discussion

Dear Committee:

Thank you for the steps you have taken in draft 2.2 to improve this bill. I refer to

- the removal of hearing officers from the bill
- allowing offices of the district commissions to remain co-located with the ANR regional offices pending a study
- removing the proposed preapplication process
- leaving H.509 out of H.492, as long as you do report H.509 favorably
- limiting discovery and considering to further limit discovery

Your discussion on draft 2.2 raises additional points that I would like to comment on.

Nomination and appointment of Board members

Thank you for considering ways to reduce the political nature of appointments to the Board. Draft 2.2 considers using the Judicial Nominating Board. Upon testimony, you began thinking that was not a good match.

Now you are considering using the Cannabis Control Board as a model. The draft expected Wednesday the 9th seems likely to include a new board to solicit applicants, screen them, and send names of the well-qualified to the governor. The governor would make an appointment from the list.

As long as the Governor makes the appointments, the means of getting a list to the governor seems to make little difference. All a governor would need to do is have the preferred, well-qualified candidate apply. If the person truly meets the qualifications, then the nominating board would include that name on the list. And the governor would select that person out of all the names on the list.

Recommendation: Keep the nomination and selection process simple. And do allow self-nominations. I have a feeling that creating a new nominating board will merely create more negative sniping against Act 250.

Transition provisions - Two years are too long

Waiting two years to put the Environmental Review Board into action is way too long. We need the new structure sooner than that. The transition from the Environmental Board to the Natural Resources Board provides a better model for the transition. The Act creating the Natural Resources Board was signed May 13, 2004 and the NRB commenced operations on February 1, 2005. That is more in line with the schedule in H.492 as introduced. The transition provisions from 2004 are enclosed.

Discussion in your committee last week seemed to be headed toward this structure not being functional until July 1, 2024. The two-year delay was predicated on:

- creation of a nominating board
- formation of the Environmental Review Board

- taking time for rulemaking.

And somehow that ended up being July 1, 2024.

Using the existing rules during the transition

The delay for rulemaking could be eliminated by keeping the existing rules in effect (with some modifications). This is how the Natural Resources Board began operating less than nine months after its Act was passed. The same could be done in reverse.

The Natural Resources Board now has three rules.

- Rules of Procedure, adopted March 28, 2006 and effective May 1, 2006.
- Act 250 Rules, initially adopted April 7, 2006 and effective May 1, 2006. The current version became effective December 4, 2015. Those rules state "The Act 250 Rules adopted in 2006 were based on the former Environmental Board Rules."
- Environmental Citations Rule, effective October 1, 2013 (under chapter 201 of title 10)

The last Act 250 rules under the Environmental Board became effective January 12, 2004. The first rules of the Natural Resources Board became effective May 1, 2006. This means the Natural Resources Board operated a year and a quarter on the rules of the Environmental Board.

A comparison of the tables of contents of the last Act 250 rules of the Environmental Board and the current Act 250 rules of the Natural Resources Board is enclosed. Many of the Natural Resources Board's rules are the same now as the Environmental Board's rules were in 2004. Others are quite similar. Other rules dropped the Board because the Board no longer had the ability to hear appeals.

Having the Environmental Review Board use the current rules might go something like this:

"Rules. Rules adopted by the Natural Resources Board shall remain in effect until amended or repealed as provided under this act or superseded by this act."

The "District Commission" will be replaced by "District Commission and Board" in those rules where it is noted "Omits the board".

Return some rules from the 2004 EB rules relating to appeals. These rules do not now appear in the Act 250 rules. The rules are:

- 23. Summary Decision
- 30(B) Stay of Permit Issuance
- 31(B) Application for reconsideration of permit denial
- 38 Revocation and Abandonment of Permits
- 40 Appeals
- 42 Stay of Decisions
- 43 Appeals to the Board Before Final Decision of District Commissions

Consider removing Rule 70(F), Involved Land for Utility Line Jurisdiction. It is not clear where this came from.

Remove Rule 71, Jurisdiction over Trails. This does not seem to be grounded in statute.

Recommendation: Explore shortening the transition time by using the existing rules with modifications delineated in H.492.

Discovery

Removing barriers to public participation, such as discovery of experts during appeals, is important, as you discussed.

Recommendation: Limit that discovery to a list of witnesses and a summary of issues to be raised, as you discussed.

Reviews of jurisdictional opinions

H.492 proposes returning 6007(d) to the statutes. This section is on review of jurisdictional opinions. This was a short-lived statute (2013 - 2016). I do not know why it was added or why it was removed.

Recommendation: Before deciding to return 6007(d) to statute, determine why it had been removed.

Publishing documents

1. You discussed digital documents in connection with the proposed amendment of 6027(f). I have had a lot of experience with researching old documents. There are advantages to digital, searchable documents, and there are advantages to physical copies. Each serves a useful and necessary function.

The paper copy is needed for the historical record. A few copies floating around some office somewhere in a file folder are inadequate for the historical record. One needs physical copies that will be around 50 years (like the origins and early stages of Act 250) or 100 or 200 or more years. One needs original records that one can find and have access to. And records that one has confidence have not been altered during the intervening years. (Blockchain is not a solution for digital records in this world of climate change and the imperative of reducing energy (whether fossil fuel or the embodied energy of renewable energy generation)).

Digital copies are useful for the ease of searching documents. And for their widespread accessibility to individuals.

2. Also, it is difficult to find decisions on Act 250 cases on the judiciary's internet site. Not all Act 250 cases are filed under the Act 250 number. And I have not yet found a cross-index between case numbers assigned by the court and Act 250 permit numbers.

Recommendations:

- Do not require one form of record while prohibiting the other.
- Require the Board to provide a list of cases appealed. The list will contain both the Act 250 number (J. O. or permit) and the number assigned by the judiciary (Environmental Division or Supreme Court).

I hope that you find my recommendations worthwhile and that you incorporate them into H.492.

Thank your for taking the time to read this letter.

Sincerely,
Thomas Weiss, P. E.

Encl.:

Transition Provisions for Creation of the Natural Resources Board
Environmental Board Rules and Natural Resources Board Rules, Annotated Comparison of Tables of Contents

Transition Provisions for Creation of the Natural Resources Board

The Natural Resources Board was created by Act 115 of 2004. This act was approved May 13, 2004. Two sections are relevant to the transition:

- Sec. 121. TRANSITION, APPROPRIATIONS AND POSITIONS
- Sec. 122. IMPLEMENTATION OF THE NATURAL RESOURCES BOARD

Sec. 121. TRANSITION, APPROPRIATIONS AND POSITIONS

(a) Expanded environmental court. [Full text is not provided here.]

(b) Transition.

(1) Rules. Rules adopted by the environmental board and those adopted by the water resources board shall remain in effect until amended or repealed as provided under this act or superseded by this act.

(2) Completion of work.

(A) Notwithstanding the repeal of their respective enabling authorities, the environmental board, the water resources board, the waste facility panel, and the air and solid waste variance board shall continue to exist and have jurisdiction with their preexisting membership to complete their consideration of any action pending before them as of January 31, 2005, except that appeals, petitions, and requests for variances received before January 31, 2005 where the panel or board has not yet initiated proceedings shall be transferred to the environmental court or the secretary of natural resources in the case of variances, as provided under this act.

(B) [Deals with the transition within the Superior Court. Full text is not provided here.]

(c) Appropriations. In fiscal year 2005, there is appropriated to the judiciary from the general fund \$335,000.00 to implement the provisions of this act.

(d) Positions. [This deals with positions within the judiciary. The full text is not provided here.]

(e) Report. [This requires a report by the court administrator by January 15, 2007.]

Sec. 122. IMPLEMENTATION OF THE NATURAL RESOURCES BOARD

The natural resources board, as constituted in this act, shall commence operations on February 1, 2005. It shall consist of eight regular members and a chair of the board appointed by the governor by February 1, 2005, with the advice and consent of the senate. Initially, members of each panel shall be appointed for one year, two-year, three-year and four-year terms so that the term of one regular member of each panel expires in each ensuing year. To the extent there are sufficient numbers available to serve, initial appointments shall be made from the existing or former membership of the environmental board and the water resources board.

[NOTE: The Environmental Board had nine members. There was also a Water Resources Board and I do not remember how many members it had. Act 115 created the Natural Resources Board and abolished both the Environmental Board and the Water Resources Board. The Natural Resources Board was created with two five-member panels (the Chair was on both panels), making a total of nine people. The Land Use Panel took on Act 250. The Water Resources Panel took on the functions of the Water Resources Panel. Then Act 11 of 2013 abolished the Water Resources Panel and transferred its functions to the Agency of Natural Resources. This left the NRB with the five members that had been on the Land Use Panel (also abolished by that Act 11).]

Approved: May 13, 2004

Environmental Board Rules and Natural Resources Board Rules
Annotated Comparison of Tables of Contents
Thomas Weiss
February 7, 2022

ACT 250 ENVIRONMENTAL BOARD RULES EFFECTIVE: January 12, 2004	NATURAL RESOURCES BOARD ACT 250 RULES Effective: December 4, 2015
ARTICLE I. GENERAL PROVISION	Section A General Provisions
1. Description of the Organization	1. Scope and Applicability; Citation [This is not comparable with 2004's rule 1.]
2. Definitions	2. Development; Subdivision; Definitions
2(A) Development [a long list]	2(A) Development [Refers to statutes]
2(B) Subdivision	2(B) Counting of lots and cessation of a subdivision [similar to 2004]
-----	2(C) Definitions
2(C) Commencement of construction	(2) Commencement of construction [the same]
2(D) Construction of improvements	(3) Construction of improvements [excludes some home occupations and de minimis]
2(E) State, county or municipal purposes	(15) State, county or municipal purposes [the same]
2(F) Involved land	(5) Involved land [a and b the same; c different]
2(G) Substantial change	(7) Substantial change [weakened from "significant impact" to "significant adverse impact".]
2(H) Person	2(C)(1) Person [the same]
2(I) Dwelling	(10) Dwelling [similar]
2(J) Lot	(13) Lot [the same]
2(K) Party	-----
2(L) Commercial purpose	(4) Commercial purpose [the same]
2(M) Commercial dwelling	----- [This is incorporated in the definition of dwelling.]
2(N) Pre-existing subdivision	(8) Pre-existing development [the same]
2(O) Pre-existing development	(9) Pre-existing subdivision [the same]
2(P) Material change	(6) Material change [the same]
2(Q) Solid waste management district	(11) Solid waste management district [the same]
2(R) Adjoining property owner	-----
2(T) Electrical and communication lines	----- [This got moved into rule 70.]
2(U) Tract of land	(12) Tract of land [the same]
2(V) Municipality	(14) Municipality [the same]
2(W) Designated Downtown	-----

-----	(16) Emergency replacement: communication support structure [exempt until afterward]
-----	(17) Home occupation [exempt unless has potential for significant impact]
-----	(18) The farm [refers to the statute]
-----	(19) Principally produced [defines as > 50%]
-----	(20) Shoreline [refers to the statutes]
-----	(21) Of necessity [relating to shorelines. I'm not sure about this one.]
-----	(22) [repealed]
-----	(23) Unit [similar]
-----	(24) Principally used [relating to compost; >50%]
-----	(25) Construction costs [similar]
-----	(26) Cognizable change [similar]
-----	2(D) Jurisdiction by municipal election [ties to the statute]
3. Rulemaking, Jurisdictional Opinions and Declaratory Rulings	3. Jurisdictional Opinions [Has reconsideration, not appeal to Board. Does not cover rulemaking. Declaratory rulings had been used only with appeals of J.O.'s. They are no longer in statute, so not needed.]
4. Subpoenas	4. Subpoenas [Omits the board.]
6. Computation of Time	6. Computation of Time [Expanded.]
Article II. Procedures Before the District Commissions and Environmental Board	Section B Application Procedures; Hearings
10. Permit Applications	10. Permit Applications [similar, except omits solid waste management district; and allows a stay of hearing if proposed project has changed enough for a potential significant adverse impact.]
11. Fees	11. Fees [Had been repealed; returned with reference to statute and how to handle fees of subdivisions.]
12. Documents and Service Thereof; Page Limits, Motions, Replies	12. Documents and Service Thereof; Page Limits, Motions, Replies [Omits the board.] [Reduces page limits and allows documents to be single-spaced. Makes page limits advisory; they were mandatory.]
13. Hearing Schedules	13. Hearing Schedules [the same]
14. Parties and Appearances	14. Parties and Appearances [Omits the board throughout 14.]
14(A) Party Status	14(A) Party Status [This refers to statute.]
14(B) Petitions	----- [This had been a quote from statute.]
14(C) Timeliness	----- [This had been a quote from statute.]
14(D) Conditions	----- [This had been a quote from statute.]
14(E) Non-Party Participation	----- [This had been a quote from statute.]

14(F) Appearances	14(B) Appearances [the same]
14(G) Representatives	14(C) Representatives [the same]
14(H) Notice for Information Only	14(D) Notice for Information Only [the same]
14 (I) Preliminary Determinations	14(E) Preliminary Determinations and re-examination [similar]
15. Joint Hearings	15. Joint Hearings [the same]
16. Prehearing Conferences and Preliminary Rulings	16. Prehearing Conferences and Preliminary Rulings [Omits the board.]
17. Evidence at Hearings	17. Evidence at Hearings
17(A) Admissibility	17(A) Admissibility [similar]
17(B) Documents submitted for the record	17(B) Documents submitted for the record [Omits the board.]
17(C) Order of evidence	17(C) Order of evidence [the same]
17(D) Prefiled testimony	17(D) Prefiled testimony [the same]
17(E) Prehearing submissions	17(E) Prehearing submissions [Omits the board.]
18. Conduct of Hearings	18. Conduct of Hearings
18(A) Quorum and deadlocks	18(A) Quorum and deadlocks [similar]
18(B) Alternate commission members	18(B) Alternate commission members [similar]
18(C) Chair	18(C) District Commission Chair, Vice Chair and Acting Chair [similar]
18(D) Dismissal	18(D) Dismissal [the same]
18(E) Recording of proceedings	18(E) Recording of proceedings [Omits the board.]
18(F) Completion of deliberations	18(F) Completion of deliberations [the same]
18(G) Adjacent district	18(G) Adjacent district [the same]
18(H) Waiver of Requirements	18(H) Waiver of Requirements [Omits the board.]
19. Compliance with Other Laws - Presumptions	19. Compliance with Other Laws – Presumptions
19(A) Alternative procedures	19(A) Alternative procedures [the same]
19(B) Permits accompanying application	19(B) Permits accompanying application [the same]
19(C) Permits obtained after application	19(C) Permits obtained after application [the same]
19(D) No reliance on permits	19(D) No reliance on permits [the same]
19(E) Permits creating presumptions	19(E) Permits creating presumptions [similar.]
19(F) Effect of presumptions	19(F) Effect of presumptions [Omits the board.]
19(G) Changes requiring amendment	19(G) Changes requiring amendment [Omits the board.]
19(H) Terms "Permit" and "Certification"	19(H) Approvals [Omits the board.]
19(I) Municipal presumptions	19(I) Municipal presumptions [Refers to 4420 instead of 444.9] [Omits the board.]
20. Information Required	20. Information Required
20(A) Supplementary information	20(A) Supplementary information [Omits the board.]

20(B) Investigation	20(B) Investigation <u>[Omits the board.]</u>
-----	21. Master Plan and Partial Review <u>[This separated the limited amount of master planning out and expanded on master planing.]</u>
-----	21 I Master Plans <u>[The board is not in this one.]</u>
21. Order of Evidence - Partial Review	21 II Partial Review <u>[similar] [Omits the board.]</u>
-----	22. Designated Downtown Development District Findings and Conclusions <u>[This creates the process for dealing with findings under 6086b for designated downtowns.]</u>
23. Summary Decision	----- <u>[This had to do with summary decisions by the Board. This might have been removed because the board no longer heard appeals.]</u>
Article III. Land Use Permits	Section C Land Use Permits
30. Approval or Denial of Applications	30. Approval or Denial of Applications; Stay of Permit Issuance; Successive Applications
30(A) Issuance of Decisions	30(A) Issuance of Decisions <u>[Omits the board.]</u>
30(B) Stay of Permit Issuance	30(B) Stay of Permit Issuance <u>[This has appeals of stays go to the court instead of the board.]</u>
-----	30(C) Successive Applications <u>[New]</u>
31. Reconsideration of Decisions	31. Reconsideration of Decisions
31(A) Motions to alter decisions	31(A) Motions to alter decisions <u>[Omits the board.]</u>
31(B) Application for reconsideration of permit denial	31(B) Application for reconsideration of permit denial <u>[Refers to the court instead of to the board. Removes notice and time requirements.]</u>
32. Duration and Conditions of Permits	32. Duration and Conditions of Permits
32(A) Permit conditions	32(A) Permit conditions <u>[Omits the board.]</u>
32(B) Duration of permits	32(B) Duration of permits <u>[The conditions of being in substantial compliance have been removed. However, the referenced statutes do not cover substantial compliance.]</u>
33. Recording of Permits	33. Recording of Permits <u>[the same]</u>
34. Permit Amendments	34. New Permit Applications and Permit Amendments:Substantial and Material Change
34(A) Amendments required	34(A) Material change to a permitted development or subdivision <u>[Similar.]</u>
34(B) Substantial changes to a permitted project or permit	34(B) Substantial change to a pre-existing development or subdivision <u>[Similar.]</u>
34(C) Material changes to a permitted project or permit	34(C) Minor Applications <u>[This succeeded a simplified procedure by a reference to Rule 51 on minor projects.]</u>
34(D) Administrative amendments to a permit	34(D) Administrative amendments to a permit <u>[Similar.]</u>

34(E) Stowe Club Highlands Analysis	34(E) Balancing Flexibility and Finality of Permit Conditions (Stowe Club Highlands Analysis) [Similar.]
35. Renewal of Permits	35. Renewal of Permits [The same]
37. Certification of Compliance	37. Certification of Compliance [Omits the board.]
38. Revocation and Abandonment of Permits	38. Abandonment of Permits [This section had been rewritten and expanded because authority to revoke had been transferred to the court.]
38(A) Revocation for violations	38(A) Involuntary
38(B) Abandonment by non-use	38(B) Voluntary
38(B)(1) Initiation of proceeding	38(C) Initiation of Proceeding
38(B)(2) Procedure	38(D) Procedure
-----	38(E) Effect of Abandonment
-----	38(F) Recording
Article IV. Appeals	Section D Court Orders and Stays
40. Appeals	-----
-----	40. Filing of Stipulations and Court Orders [New]
41. Administrative Hearing Officer or Panel - Environmental Board	-----
42. Stay of Decisions	42. Stay of Decisions
42(A) Appropriate Filing of Stay Request: Board or District Commission	42(A) Filing of Stay Petition: District Commission [This has been modified to refer to the court. Omits the board.]
42(B) Seven (7) Day Automatic Stay by Petition to the District Commission Decision	42(B) Seven (7) Day Automatic Stay of District Commission Decision [This has been modified to refer to the court. Omits the board.]
42(C) Merit Review and Terms of Interim or Permanent Stay Petition as Determined by the District Commission or the Board	42(C) Merit Review and Terms of Interim or Permanent Stay Petition as Determined by the District Commission [Omits the board. There are other changes.]
43. Appeals to the Board Before Final Decision of District Commissions	-----
Article V. Substantive Review - Special Procedure	Section E Substantive Review - Special Procedures
51. Minor Application Procedures	51. Minor Application Procedures [The same]
60. Qualified Purchasers of Lots in a Subdivision Created Without the Benefit of a Land Use Permit as Required by 10 V.S.A. Chapter 151	60. Qualified Purchasers of Lots in a Subdivision Created Without a Land Use Permit [The same]
70. Utility Line Installations and Applications	70. Utility Line Jurisdiction, Installations and Applications
-----	70(A) Definition [New]
-----	70(B) Jurisdiction [New]
70(A) Installations	70(C) Installations [The same]

70(B) Permit applications	70(D) Permit applications [The same]
70(C) Care of right-of-way	70(E) Care of right-of-way [The same]
-----	70(F) Involved Land [Origin is not clear.]
-----	71. Jurisdiction over Trails [New. Does not appear grounded in statute.]

[Annotations comparing the contents of the two sets of rules are enclosed in square brackets.]

[Annotations with underlines are ones that either removed appeals functions from the Board or that seem to be unsupported by statutes.]