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House Committee on Natural Resources, Fish, and Wildlife
State House
Montpelier, Vermont

Subject: S.234, changes to Act 250

Dear Committee:

Thank you for the opportunity to present these comments on S.234.

I am a civil engineer with experience in permitting of projects and in performing environmental reviews; hydrology and flood studies; evaluation and design of sewer systems; and certification as a Class I designer under the Wastewater System and Potable Water Supply System rules.

My interest is to preserve and expand the ability of individuals to participate meaningfully in decisions that affect them and their surroundings. Act 250 is the only permitting process that I have seen or worked with that allows meaningful participation by individuals.

These comments point out troubling aspects of this bill and suggestions for amending them.

Section 1 (neighborhood development areas)

Do not scrap existing flood hazard bylaws for an unfamiliar process
Section 1 adds unnecessary complexity in its proposals for municipal management of flood hazard areas.

The process that is familiar to municipalities is within Chapter 117 of Title 24. That familiar process:
- requires municipalities to include a flood resilience element in its municipal plans (§4382 (a)(12)).
- allows municipalities to regulate flood hazard areas and river corridors using zoning or freestanding bylaws.

S.234 instead proposes to require municipalities to develop bylaws using an unfamiliar process. That unfamiliar process uses the Agency of Natural Resources' Vermont Flood Hazard Area and River Corridor Rule. Those rules are found in chapter 29 of the Environmental Protection Rules. Those rules are designed to allow the State to regulate development that municipalities are prohibited from regulating.

This bill would penalize those municipalities that have already developed bylaws regulating flood hazard areas and river corridors. They will have to scrap their existing bylaws and start over to conform to the unfamiliar process.

In addition, the bill would require that "local bylaws shall contain provisions consistent with" the ANR rules. I'm not sure how to interpret that. I do not understand how municipal bylaws can be consistent with rules that cover activities that municipalities are prohibited from regulating.

The Agency of Natural Resources does have model bylaws for erosion and flood hazard areas. These bylaws are not based on the chapter 29 rules. The model bylaws are based on several sections in chapter 117. The only references to section 754 or chapter 29 relate to the exemptions in the model bylaws.

The two processes don't even use the same definition of infill. Municipalities have developed their neighborhood development areas around Chapter 76A's definition of infill.

" 'Infill' means the use of vacant land or property within a built-up area for further construction or development."

S.234 would require municipalities to alter the definition of "infill" for flood hazard purposes within neighborhood development areas to be the one from the ANR rules"

§ 29-201 " 'Infill development' means, for the purposes of designated centers, construction , installation, modification, renovation, or rehabilitation of land, interests in land, buildings, structures, facilities, or other improvements in an area that was not previously developed but is surrounded by existing development. For the purposes of farm production areas, infill development means construction on a vacant area within the farm production area." [NOTE: How does one get a farm production area intoa designated center?]

Do not put individuals in harm's way by allowing infill housing in flood hazard areas

I have experience in hydrology, river hydraulics, and preparing flood maps and flood studies. This experience goes back to and before the earliest days of the National Flood Insurance Program. I worked at a company that created some of Vermont's first Flood Insurance Studies and the maps that defined what we now call flood hazard areas. My focus was the computer modeling, although I worked on all aspects of the studies.

Allowing infill development in flood hazard areas puts individuals in harm's way. Infill development does little or nothing to expedite housing or reduce its cost. On the contrary, it increases the cost of housing because of the extra expense of floodproofing. And damage to the infill structures increases the amount spent on recovery after a flood .

There are always larger floods than are protected by the design standards. After floods we too often hear things like "That's the third 500-year flood in the last ten years." With the increased and more intense rainfall that we are experiencing, a given flood depth will occur more often. The flood insurance program has always been more about letting people know that they are living or working in areas that flood frequently. And about requiring those building owners to have insurance to help pay for recovery. Getting people out of harm's way is mostly through a buyout program after repeated flooding.

Our long-range goal needs to be to move people and buildings out of the flood hazard areas. We should not, in the name of short-term expediency, be putting more buildings and people into flood hazard areas.

On-site sewage treatment allows uncompensated encroachment on a neighbor's property

S.234 proposes to allow on-site sewage treatment in neighborhood development areas. On-site sewage treatment requires isolation zones to function properly and to protect public health.

The intent of infill development is to allow more development in areas with small lot sizes. This can cause problems for neighbors, when isolation zones extend into a neighbor's property. Isolation zones restrict what can be done in them.

The rules for Wastewater System and Potable Water Supply Permits (WW permits) are in Chapter 1 of ANR's Environmental Protection Rules. They allow a permittee to encroach on a neighbor's property with no compensation to the neighbor. The only requirement is to send the neighbor a form that says, in effect: "The isolation zone for my on-site system will extend into your property. This notice gives you a chance to talk to me before the permit is issued. If I decide to make no changes, you cannot stop the WW permit." The notice indicates that the neighbor can build in the isolation zone. The notice doesn't point out that the isolation zone inhibits other uses on the neighbor's property. If the neighbor builds a cellar in the isolation zone, there is a potential for leachate entering the cellar. The neighbor might not want to plant a vegetable garden or fruit trees in the isolation zone.

I am not asking in this bill that the entire system be changed. I am asking that you require that all isolation zones in neighborhood development areas be within the parcel containing the on-site system.

If you choose to put more people in harm's way by allowing infill development in flood hazard areas, then keep it simple. Require that municipalities work within what they already know: their chapter 117 instead of an unfamiliar chapter in a different title.

Section 4 (exemptions from Act 250 for priority housing projects)
This section proposes to raise the number of units in a priority housing project in communities with a population less than 3,000 people. The cap is now 25 and this will raise it another 25.

Permitting is an interrelated process. There are also municipal permits, ANR permits, and Fire Safety Division building permits. Permitting typically occurs in parallel. My research shows that removing Act 250 from the permitting process has a negligible effect on the time it takes for a project to receive all its permits.

The relevant factor is how long it takes between receipt of the last permit or other document needed by the district commission and the time that Act 250 issues its permit. The median time is 6 days.

The Natural Resources Board provided Senate Natural Resources and Energy a list of the 55 housing projects that received Act 250 permits, 2017 through 2021. There were five administrative amendments. Forty-one permits were issued without a hearing. Nine permits were issued after hearings.

The five administrative amendments were issued within 3 days of the receipt of a complete application. The median time was 1day.

There were 41 projects without hearings that received permits. The median time between a complete application and issuing the Act 250 permits was 60 days. I then looked at the 20 permits where the time between a complete application and the Act 250 permit exceeded the median. The median time between receipt of the last permit or document needed by the district commissions was six days for these projects. The maximum time was 34 days. Only six of the projects had a time more than 10 days. This shows that Act 250 does not delay housing projects.

The Act 250 database has insufficient information to evaluate projects with hearings. The database lacks key documents needed for that evaluation. So I can make no informed comment on projects with hearings. Most of the projects (75%) were without hearings.

The majority of last documents received in the cases studied were: ANR documents or permits.

stormwater permit (ANR)	8
historic preservation letter	3
Wastewater System and potable water supply permit (ANR)	3
water system construction permit (ANR)	2
development review board	2

One time each for: wetlands permit (ANR); municipal comments; revised site plans; resolution of location of bus stop with VTrans; ANR comments (ANR), construction waste reduction plan, planting plan, and sign diagram. The total is more than 20 because multiple permits sometimes were received on the same day.

Projects have a schedule that is controlled by the permitting process in its entirety. Removing one permit from the process does not expedite a project.

If the permit fee is a concern, then consider reducing or waiving the fee for the Act 250 permit.

Section 5 (criterion on flooding)
Please do retain the proposed amendment to bring river corridors and flood hazard areas into the criterion. This is decades overdue.

Sections 7 through 9 (forest blocks and connecting habitat)
S.234 sends mixed messages on the importance of forest blocks and connecting habitat. Sections 7 and 8 declare that forest blocks are so important that they need to be added to the criteria now. At the same time, section 9 declares that their value is so low that we can afford another two years (until well after June 15, 2024) of losses to forest blocks and connecting habitat before the district commissions can actually consider them.

The bill proposes to allow both forest blocks and connecting habitat to use the process of "avoid. minimize, mitigate".

Connecting habitat cannot be mitigated by conserving habitat elsewhere. It allows species to move between areas that they occupy. Summer range and winter range. Breeding grounds and living grounds. Connecting habitat is often a narrow band allowing movement between two larger habitat areas. It is relatively easy to disrupt because it is narrower. When the connecting habitat is adversely affected, species cannot move as they need to move in order to live.

I fail to see how the integrity of connecting habitat and forest can be maintained when disrupted by *new* recreational trails and *new* improvements constructed for farming, logging, or forestry purposes. These disruptions can have a significant adverse effect, yet they are defined here as being benign. Species really don't care about whether a new house that is disrupting their connecting habitat is used for farming or not. The house has the same disruptive effect in either case. Either a project allows the connecting habitat to function or the project severs the connecting habitat. If a project severs the connecting habitat, then no amount of mitigation elsewhere will protect the populations whose flourishing, or even survival, depends on the connecting habitat.

I suggest amending the definitions to require new recreational trails and new improvements for farming, logging, or forestry purposes to be subject to review under the criteria

I suggest that the criterion for connecting habitat needs to be separated from forest blocks. The criterion for forest blocks might remain "Will not result in an undue adverse impact" followed by the "avoid, minimize, and mitigate" process.

The criterion for connecting habitat would be something like "Will not sever connecting habitat and will not result in an adverse impact on connecting habitat." It would not allow "avoid, minimize, or mitigate".

Rulemaking
Projects can damage a lot of forest blocks and connecting habitat in the two years until the criterion becomes effective through rulemaking. That loss without review by Act 250 is needless.

Instead, forest blocks and connecting habitat should be brought into Act 250 as soon as possible, without waiting two years for the rules. This means the bill will need specifics on what is needed to meet the criteria established for forest blocks and connecting habitat. Or, it will require the same leap of faith that was required of the Environmental Board at the start of Act 250. The Environmental Board and the District Commissions began functioning within two months. Act 250 was passed and signed on the last day of the session, April 4, 1970. The governor was required to appoint board members and district commissioners by June 1, 1970. Permits were required for any development or subdivision beginning June 1, 1970. The Administrative Procedures Act was created two years earlier, in 1968.

The Commission on the Future of Act 250 provided specifics in its draft bill (appendix 4 of the Commission's report). That is a reasonable start, and it will need some work to conform to my comments here.

Section 10 (resource mapping)
Please do not start a list of data layers in this section. Rep. McCullough's question on why connecting habitat was left out illustrates why a list is a poor idea. People will want to add layers to the list. The Natural Resources Atlas and the Planning Atlas have a good set of layers without any legislative lists of specific layers at all. The data layers are used for many purposes by many bodies. Rather than enumerating specific data layers, I suggest a broad approach: identifying users and uses instead of identifying layers.

The proposed amendment to use "other technology" gives too much discretion to those making the choice. Whatever technology is used needs to be open source and non-proprietary, to allow access by the public.

This approach might look something like:
(a) ~~On or before January 15, 2013, the~~ The Secretary ~~of Natural Resources~~ shall complete and maintain resource mapping based on the Geographic Information System (GIS) or other technology that is open source and non-proprietary. The mapping shall identify natural resources and other information throughout the State, including those that may be relevant to the Agency of Natural Resources, the Agency of Commerce and Community Development, the District Environmental Commissions, the Public Utilities Commission, municipalities, and regional planning commissions ~~the consideration of energy projects~~. The Center for Geographic Information shall be available to provide assistance to the Secretary in carrying out the resource mapping.

If you choose to name specific layers, I suggest you add them in session law, to the effect of "This act adds criteria for forest blocks and connecting habitat to chapter 151 of title 10. For these reasons, the Secretary shall add layers of forest blocks and connecting habitat to the natural resource mapping."

Section 11 (roads and driveways)
There seems to be general agreement that the intent of this section is to avoid forest fragmentation, loss of habitat, and loss of connecting corridors. Yet this easy-to-get-around rule on roads and driveways keeps resurfacing. S.234 uses really complex language to implement this simple concept.

Under the proposed statute, one can get almost 2000' into a forest. One builds a road just under 800'. At the end of the road, one builds two driveways. One is 100' long to a tiny house, barn, shed, sugar house, pond, whatever. The other is 1100' to the main house. And, bingo, 1900' into the forest and is exempt from Act 250.

An alternative might be something like the distance of development into a forest. A distance of more than 100' or 200' feet or some other distance (well short of 2,000 feet) into a forest, on a lot of one acre or more, is development covered by Act 250. I am not saying that these are the right numbers. Merely that the concept seems to avoid the problems with the bill's complex proposal for roads and driveways.

Sections 12 and 13 (wood products manufacturers)
Yesterday you raised some of my concerns with the sections. These sections provide special treatment to wood products manufacturers. Special treatment just isn't a good idea.

Section 14 (no longer needed Snowstone correction)
You had some hearings on H.509, the Snowstone correction. Then you set the bill aside pending the Supreme Court's amended decision. That amended decision was issued February 11, 2022. I am not a lawyer. I do read the legal columns and articles in my engineering magazines. I have read them many years now. What I have gotten out of reading them is that every change opens up the potential for more disputes as to meaning. It seems that if you leave this in the bill, someone will eventually challenge the amendment. The grounds would be

something like "The legislature made this amendment because they found something wrong with the Supreme Court's amended decision. Let's see how we can take advantage of the amendment." I acknowledge that your counsel yesterday suggested an intent statement if you choose to leave the section in the bill. It seems it would be easier and cleaner to just remove the section.

Section 17 (study committee)
We do not need another study committee. H.492 is much better than another study.

Recommendations:
Section 1 (neighborhood development areas)
- Leave §2793e(c)(5) as it is now in statute.
- Do not repeal §2793e(c)(6). If you choose to allow an alternative for on-site systems in neighborhood development areas, then add §2793e(c)(6)(C) along the lines of: "(C) an on-site system where the isolation zone for the system is totally contained on the parcel containing the on-site system."

Section 4 (exemptions from Act 250 for priority housing projects)
- Do not change the caps. Act 250 does not hinder projects.
- If cost is a concern, then perhaps waive or reduce the Act 250 fee for priority housing projects.

Section 5 (criterion on flooding) Retain section 5 in the bill.

Sections 7 through 9 (forest blocks and connecting habitat)
- Separate the criteria of forest block from connecting habitat. They have separate functions and needs and should not be lumped together.
- Amend the definitions of "connecting habitat" and "forest block"so that all *new* incursions are covered by Act 250.
- Remove section 9. Instead, place the requirements for connecting habitat and forest blocks into the criteria. Act 250 permits were required 2 months after the law was signed. We can do the same for forest blocks and connecting habitat.

Section 10 (resource mapping)
- Amend §127(a) as suggested above.
- Place specific data layers in session law.

Section 11 (roads and driveways) Use a direct incursion distance instead of total length of roads and driveways.

Sections 12 and 13 (wood products manufacturers) Remove sections 12 and 13.

Section 14 (no longer needed Snowstone correction) Remove section 14.

Section 17 (study committee) Remove section 17.

Thank you for taking the time to read this letter.

Sincerely,
Thomas Weiss, P. E.