

P. O. Box 512
Montpelier, Vermont 05601
April 21, 2021

Senate Committee on Natural Resources and Energy
meeting virtually

Subject: H.439 the FY22 budget: governor's proposed Act 250 exemptions (ARPA and non-ARPA funding)

Dear Committee:

I am a civil engineer with experience in permitting at the State and federal levels. I also support an Act 250 that allows meaningful participation by individuals. As an engineer I have had to read, understand, and interpret contracts and construction specifications and rules and regulations. I apply that aspect of my engineering to try to understand the governor's proposal.

This proposal to exempt more projects from Act 250 is, to me, another attack by the governor on the integrity of Act 250 and on the ability of individuals to meaningfully participate. I oppose the exemptions and ask that you do not support them. I do not think they are even worthy of a broader hearing as part of a larger Act 250 bill.

Context

First, I would like to put this proposed expediting of permits and ARPA exemptions into context as I see it.

This proposal is part of a multi-pronged attack, by the administration and its supporters, to exempt more and more activities from Act 250, to reduce the effectiveness of Act 250, and to reduce the ability of individuals to participate in the decisions that affect their local environment. I believe that you are aware of most or all of them. The parts that I am aware of are:

- E. O. 21-02
- H.439 the budget bill, part I - the governor's request to include money for the NRB re-organization in the FY22 budget. That came out in the House. I hope it stays out in the Senate.
- H.439 the budget bill, part II - which you will be hearing today. The governor now proposes ARPA and non-ARPA exemptions, the subject of today's hearing.
- H.433 the transportation bill. An amendment proposed by Sen. Parent would exempt airports from mitigation of agricultural lands. This is not in the latest draft (3.1) of that bill.
- H.433 the transportation bill. The amendment proposed by VTrans is not in the latest draft (3.1) of the transportation bill to be voted on today. VTrans is again on the witness there.
- H.446 - miscellaneous natural resources and development subjects.
- S.112/H.400/S.112 proposed changes to Act 250, which is being considered by House Natural Resources, Fish and Wildlife.

Expedited permits

The expediting portion is a problem if it rushes things. As proposed, it seems to rush things. The draft seems to give district commissions adequate time for the hearings. Then it rushes things for a major permit (maybe minors, too, I have no experience there). The draft sets a maximum of 60 days for a decision after the end of hearings. From my experience, a limit of 60 days is likely to be insufficient. For a major permit the time between close of hearings and the decision is taken up with draft findings of fact and conclusions of law; responses to the drafts, draft permit, comments on the draft. And sometimes more than one round. I can easily see this phase being rushed. A party that wants the permit, might delay responses if the decision seems likely to be unfavorable. In that case, the district commission (or development review board) cannot issue its likely unfavorable decision in time and the permit is issued without conditions.

The investment plan calls for \$375,000 in FY22 for the Natural Resources Board to fund limited service positions to ensure ARPA projects are prioritized, and all other projects continue to move forward. That amount of money will fund perhaps three district co-ordinators. Those positions will be needed through FY 26. There are no assurances that future sessions will appropriate the funds needed in the other four years.

With the attacks on Act 250 that I have pointed out in the section on Context, I am not confident in the willingness of the administration to actually support these positions. As a result, I oppose the establishment of a

maximum time before a permit is automatically granted.

Act 250 proceeds quickly in the three chapter 76A designations. According to the Act 250 database, in 2019 and 2020, there were 5 minor applications and 1 major application in downtown development districts and neighborhood development areas. In 2020 there were five administrative amendments. (I first did the research for 2019 without recording administrative amendments. When I updated the research to include 2020, I also recorded administrative amendments for 2020.)

- The fastest administrative amendment was issued in 7 days, the longest in 24 days.
- Permits of four minor applications were issued in 27 to 33 days. The fifth took 163 days, being issued May 27, 2020.. Again, this is a case of delay due to ANR and VTrans. The Wastewater System and Potable Water Supply permit was not received until April 3, 2020; the stormwater general permit was not received until April 21, 2020. VTrans comments were received May 12, 2020. ANR comments were received May 13, 2020. VTrans follow-up comments were received May 20, 2020. The last document received was on May 21, the applicant's response to the VTrans follow-up. So the Act 250 permit was issued 6 days after the district commission received the last document.
- The permit of the one major application was issued in 309 days on March 17, 2020. Again the delay was caused by an outside agency, in this case the development review board. The application was received May 13, 2019. A site visit and hearing were held July 19, and a recess order was issued July 23 pending receipt of additional information. Action then moved out of Act 250 to the development review board. The development review board issued its permit on March 4, 2020. The Act 250 permit was issued 13 days later.

So I do not see how this proposal expedites permits. Project delays are too often caused by outside agencies. This proposal does nothing to eliminate those delays. Under this proposal, someone applies to Act 250. The district commission takes testimony and then recesses the hearing. ANR, VTrans, and Fire Safety are given an infinite amount of time under this proposal to issue their permits. So Act 250 is in recess until the other agencies finally issue their permits and the applicant gets them to the district commission. The proposed legislation does nothing to shorten the permit processing time by VTrans or ANR or Fire Safety.

Exempting projects in ARPA development zones

The exemptions portion is in section 6 of the draft legislation. The exemptions will apply to any project funded in part by ARPA money that is located entirely in ARPA zones. These zones are three of the chapter 76A designations plus existing industrial parks. (Chapter 76A refers to title 24 and also includes growth centers and new town centers, which are not in the ARPA zones.)

ARPA zones with Chapter 76A designations

- downtown development districts (23 of them)
- village centers (with a municipal plan, permanent zoning and subdivision bylaws, and the bylaws must include flood hazard and river corridor bylaws) (204 village centers per the 2021 annual report; I do not know how many of them meet the requirements).
- neighborhood development areas (7 of them)

Existing industrial parks (probably dozens of them)

Act 250 has little presence in the three chapter 76A designations. That is because the following are already exempt from Act 250 jurisdiction:

- parcels less than 10 acres for commercial, industrial, municipal, county, or State purposes any where in a town that has zoning and subdivision regulations.
- priority housing projects (mixed income or mixed use) within all chapter 76A designations, including the three chapter 76A ARPA zones and with fewer than the specified numbers of units for each project, based on the population of the municipality. Much, if not all, of the funding for housing appears to be designated for affordable, or mixed income, or mixed use. And there is no limit on the total number of priority housing units as long as each project has fewer than the limit.

I'll give some information on Springfield. I choose Springfield because this was used as an example yesterday at House Natural Resources, Fish and Wildlife by Mr. Hanford (commissioner of housing and community development). Mr. Hanford used it as an example in relation to housing. Springfield has a downtown development district. Springfield is listed as a 10-acre town. Springfield's population is between 6,000 and

10,000. Together, these mean that up to 74 priority housing units can be added in the designated downtown in one project, and they are already exempt from Act 250 under existing statutes. That means that essentially any project eligible for ARPA funding on less than 10 acres is already exempt. So I fail to understand the need for a new exemption.

Any projects within these zones that are not exempt already are ones that would be on more than 10 acres or would have more than the exempt number of housing units. These are projects with greater potential for adverse impacts and should not be exempted from Act 250.

I do not have information on Act 250 in industrial parks. However, many industrial parks have master plans. A search of the Act 250 database for "industrial park" turned up 57 permit series. I have found in the past that the database is incomplete and does not show all projects. However, I suggest that even 57 is too large a number to be eligible for an exemption.

For these reasons, I see no reason to allow the proposed exemption from Act 250 for ARPA development zones.

Exempting transportation projects

The proposal is to exempt all federally funded (not just ARPA-funded) highway transportation and structures projects for which a public hearing has commenced before December 21, 2027. This likely means almost every highway project now on the books will be exempt. The only ARPA funding for the Agency of Transportation in the governor's draft legislation is \$3,500,000 for stormwater retrofits.

This is the fifth straight year in which VTrans has requested exemptions to Act 250 of varying kinds.

In 2017 and again in 2018 VTrans requested the Commission on Act 250: the Next 50 Years for an exemption. That exemption would apply to any VTrans projects with any federal funds from Act 250. The Commission rejected the proposal in its final report in 2019 (pp. 44 and 45).

In 2019 VTrans proposed the same exemption to Senate Transportation. The proposal was not included in the transportation bill.

In 2020 VTrans made a more modest proposal to House Natural Resources, Fish and Wildlife at least thrice. That committee rejected the proposal each time. The proposal did not make it into H.926 as it passed out of that committee or out of the House itself. Yesterday you opposed a similar proposal in the transportation bill.

Here, the administration has slipped this wider exemption into the ARPA funding proposal, even though the exemption has nothing to do with ARPA funding. The ARPA bill is being used as a carrier to get this exemption which has been denied the past four years. I'll show how the proposed exemptions are not necessary and are detrimental to Act 250 and to the criteria to be protected by Act 250.

As you heard yesterday, VTrans claims that all the other permits it needs to get are an adequate substitute for Act 250. The agency provides a permit matrix to support this claim. The matrix lists the act 250 criteria and subcriteria in order. It then lists the applicable permits that AOT claims are adequate substitutes. (This matrix is page 14 of yesterday's VTrans submittal.

The matrix shows to me something different than what VTrans claims. It shows no other permit that applies to almost half the criteria and subcriteria. Other permits fail to adequately apply to other criteria. One example is for the criterion on productive forest soils (criterion 9C): the only permit cited is from the Green Mountain National Forest, which does not apply to the vast majority of Vermont's forests outside the National Forest. A second example is waste disposal (criterion 1B): one of the permits cited is for an underground injection permit when the criterion specifically prohibits injection of hazardous or toxic materials into groundwater or injection wells. A third example is water conservation (criterion 1C): the criterion requires using the best available water conservation technology; the rules for the cited permit do not require that best available technology.

As the Commission on Act 250: The Next 50 Years rightly pointed out, the environmental review under the National Environmental Policy Act is not a permit. I quote from the commission's final report.

VTrans project proposal. The Vermont Agency of Transportation (VTrans) presented a proposal to the Commission that the Agency be exempt from Act 250 jurisdiction for all of its projects that use federal

aid. VTrans is one of the largest landowners in the State. The Agency testified that its projects are large, complex, and undertaken in the public interest. It further testified that its projects that use federal aid are subject to extensive oversight, from both the State and the federal government. The Agency believes that Act 250 oversight generally results in little or no change in a proposed project. For these reasons, VTrans proposed that its projects with federal aid be exempt from Act 250 jurisdiction.

The Commission received testimony from VTrans that nearly all State and municipal transportation projects receive federal aid. The Agency also testified that multiple aspects of the Act 250 process are time consuming, particularly when there is citizen input. The Commission received multiple public comments about the importance of citizen participation in transportation projects through Act 250. In addition, the Commission is concerned about relying on the federal government under the current circumstances, particularly in the area of environmental protection.

In addition, VTrans in part relies on the National Environmental Policy Act (NEPA) for its argument on federal scrutiny. But NEPA is an environmental analysis requirement and not a process that results in a permit or approval with enforceable obligations. Under NEPA, as long as the requisite analysis is done, the project may move forward, even if there are environmental concerns.

Accordingly, the Commission does not recommend adopting the proposal from VTrans.

Another case of placing blame on Act 250 for problems with other permits.

Too often, Act 250 is blamed for problems with other permits. One example is interchange 17 on I-89. I choose this one because VTrans used it as an example in its testimony.

VTrans testified that Act 250 had delayed the project 18 months and \$100,000. However, Act 250 has not delayed the project. The record shows me that VTrans and the Department of Environmental Conservation have delayed Act 250 in its function. And right of way issues are unresolved and still in court.

VTrans submitted the Act 250 application on October 17, 2019. The permit was issued October 8, 2020. Almost one year you say? It's more like seven days.

The last document from VTrans received by the district commission was on October 1, 2020. This means that the Act 250 permit was issued 7 days after VTrans made its last submission. That last submission was the draft transportation management plan, dated September 30, 2020.

The next-to-last document received was the Vermont wetlands permit on July 21, 2020. VTrans did submit its application for the wetlands permit on October 8, 2019. DEC determined that the application was not technically complete until May 8, 2020.

When asked the status, VTrans responded to Senate Transportation that there are right-of-way issues being resolved in court.

So it appears that even had Act 250 been issued late in 2019, there are other issues that VTrans needs to resolve. Thus, I fail to see how Act 250 truthfully can be blamed for delaying the project.

Given what I found relating to the permit matrix and to the Act 250 permit schedule, I would want a lot more information before accepting that the Act 250 permit cost \$100,000.

Then there is a permit whose applicant understood Act 250 and worked with it. Back in 2002, the Town of Pownal applied for an Act 250 permit to build a sewer system connecting its three villages: Pownal, Pownal Center, and North Pownal. The wastewater was to be treated at a facility in North Pownal with a direct discharge to the Hoosic River. This was a major application. The application is dated December 5, 2002. The hearing occurred on January 16 and 30, 2003. The Act 250 permit was issued March 18, 2003. Why the difference? Because the people involved with the Pownal project understood Act 250 and worked with it.

Exemption deprives potential parties from participating

Every exemption from Act 250 reduces the ability of potential parties to influence a project that affects them. Act 250 is the permit that is most responsive to the parties. Exempting those projects means abutters and other potential parties lose their ability to participate in the permit process. Public participation under NEPA or under

State permits is not the same as being a party to an Act 250 case. I have participated as a member of the public in both Act 250 hearings and the NEPA public comment process.

Public participation under NEPA and other permits is typically limited to one-way communications at specific times in the process, often only after the review has been done and a draft is ready. There is no direct interaction. There might be a public hearing, and my experience is that public hearings do not lead to dialogue. The public submit comments and get no direct feedback. Some time later there will be a summary of the comments and what, if anything, about the project was changed as a result of the comments.

Temporary is really permanent

This is in two senses.

The first sense has to do with adverse effects. The adverse effects caused by a project last a long time. As you know, Act 250 is intended to reduce or prevent adverse effects by having a proposal modified or placing conditions on it. Exempting projects from Act 250 means that those potential adverse effects will not be identified. And the adverse effects will be allowed to take place. So even though the exemption is temporary, the adverse effects will last a long time.

The other sense of "temporary is really permanent" is that temporary statutes have a habit of becoming permanent. Many are extended one or more years at a time. Some are made permanent after a period of time. An effective way to keep this from happening is not to allow the exemptions on even a temporary basis.

Summary and request to disapprove sections 5 and 6

This proposal for more exemptions to Act 250 is part of a multi-pronged attack, by the administration and its supporters, to exempt more and more activities from Act 250, to reduce the effectiveness of Act 250, and to reduce the ability of individuals to participate in the decisions that affect their local environment.

The cap on time for Act 250 and municipalities between the end of a hearing and the decision is too short for complex, major permits. There is no cap on time on ANR, VTrans, or the Department of Fire Safety. My research shows that it often is information from ANR or VTrans that delays Act 250 permits.

Most or all of the ARPA funds in ARPA zones are dedicated to projects already exempt from Act 250. Any projects that are not exempt are the larger ones with more potential for adverse affects.

Other permits in their entirety do not match the coverage of Act 250. Also, Act 250 does not allow some activities for which ANR is allowed to issue permits.

For these reasons, I ask you to oppose the expedited permitting and exemptions from Act 250.

Thank you for taking the time to read this testimony.

Sincerely,
Thomas Weiss
resident. Montpelier