

P. O. Box 512  
Montpelier, Vermont 05601  
April 19, 2021

Senate Committee on Natural Resources and Energy  
meeting virtually

Subject: H.433 Act 250 exemptions proposed for the transportation bill.

Dear Committee:

Please oppose adding sections 28a and 28b to H.433. As you are aware, these are two sections that Senate Transportation is proposing to add to H.433. Also please oppose Sen. Parent's proposal to exclude airport projects from the requirements for mitigation of agricultural soils under Act 250.

When talking about the VTrans exemption, Senator Bray stated Friday "this issue has been around and sort of vexing people for a period of time". He is correct. VTrans and the administration are causing the vexation (and it is more than "sort of" vexing people). VTrans has been vexing me and others on this issue over a period at least five years. I am outraged that I and others have had to speak up time and time again, year after year, to oppose this attack on the integrity of Act 250.

I'll get into my reasons in a bit.

### **Context**

First, I would like to put these sections 28a and 28b into context.

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. The parts that I am aware of are:

- E. O. 21-02, which your committee disapproved. Thank you.
- S.112 / H.400 proposed changes to Act 250 (These bills are identical and much of their content is a repeat of the administration's defeated proposal from 2020.) H.400 is being considered by House Natural Resources, Fish and Wildlife as part of its Act 250 bill (H.120). (Your committee had a brief introduction of your version, S.112 back on March 17.)
- H.439 the budget bill. The governor's original request included funds needed to implement the executive order. Those funds were not included in H.439 when it passed the House. This bill is now in Senate Appropriations.
- H.439 the budget bill. The governor now proposes to exempt all work in designated downtowns and neighborhoods from Act 250 and to expand that exemption to designated village centers (some 208 of them I believe is the current number). The governor also proposes to exempt almost every transportation project now on the books from Act 250. (The exemption would be for a project with any federal money that has had any type of public hearing.) I acknowledge that the exemption is "temporary", until July 1, 2027. Yet you know that "temporary" provisions are often extended and are often made permanent. This bill is now in Senate Appropriations. I do not yet know which chamber will be the first to consider the governor's proposal.
- H.433 the transportation bill. A proposal by Sen. Parent would exempt airports from mitigation of agricultural lands. This proposal is now in Senate Transportation (and hopefully being considered by you, too).
- H.446 miscellaneous natural resources and development subjects. This bill was developed out of the proposals that Peter Walke and Greg Boulbol presented to your committee on February 9. The proposals contained two features that would have removed two barriers to future implementation of the governor's executive order on the Natural Resources Board. (I described those barriers to your committee in a letter on February 16.) House Natural Resources, Fish and Wildlife removed those provisions. This bill is now in House Appropriations.

I ask that you oppose consideration of Act 250 issues in the budget bill (H.439), the transportation bill (H.433), and the housekeeping bill (H.446, if and when it gets to the Senate). I hope you agree that the rightful place to consider them is in an overall Act 250 bill.

### **Effects of a project are based on total disturbance**

Secs. 28a and 28b propose to reduce the area of involved land of a transportation project that receives any

federal aid. (The amount of involved land is what counts toward the 10 acres required for jurisdiction.) They would do this by not counting the area that was previously disturbed by a transportation facility. The two sections are identical to sections 18 and 19 of S.112 and of H.400. House Natural Resources, Fish and Wildlife is now considering these provisions as part of an Act 250 bill that it is developing.

Here are some examples of impacting less than ten acres. Ten acres contain 435,600 sq. ft. Or more conveniently (for me at least) 82.5 mile-feet. This means that a project one mile long and disturbing up to 82.5 feet more width, would not meet the proposed 10-acre threshold for new disturbance. Or at two miles long, the disturbance could be up to 41.25 feet and not meet the threshold. The minimum lane width on a highway maintained by VTrans is 14 feet.

VTrans claims that such projects are adequately covered by all the other permits the project needs and by the review required by the National Environmental Policy Act. The other permits and NEPA are not comparable and are not complete. Such an exemption will reduce the effectiveness of act 250.

Exempting those projects means abutters and other parties lose their ability to participate in the permit process. VTrans testified that they expect half of their projects that now need an Act 250 permit would be exempt under this provision. Public participation under NEPA is not the same as being a party to an Act 250 case. I have participated as a member of the public in Act 250 hearings and in the NEPA public comment process. Public participation under NEPA is typically limited to one-way communications at specific times in the process, usually after the review is done. 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.

Some effects of a transportation facility are based on the entirety, not just the incremental part. Air quality, runoff, water quality, aesthetics, scenic or natural beauty, and habitat connectivity are examples of criteria that depend, in part, on a highway's total width and total area.

During construction, the previously disturbed areas usually are disturbed again. The impacts during construction, also considered under Act 250, include runoff, erosion, and water quality and will be based on the total area disturbed, not just the incremental area.

If this exemption is granted to transportation facilities, other types of projects receiving federal assistance will want the exemption, too. Granting exemptions to those other types of projects will reduce further the effectiveness of Act 250.

### **Other permits are not a substitute for Act 250**

The Agency of Transportation has testified in the past, and at Senate Transportation this year, 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.

The matrix shows to me something different than what VTrans claims. There is 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.

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.

In 2020 VTrans made a similar proposal to House Natural Resources, Fish and Wildlife at least thrice. HNRFW rejected the proposal each time. The proposal did not make it into H.926 as it passed out of HNRFW or out of the House itself.

**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 to Senate Transportation.

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 still in court.

**Some dates:**

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 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.

**Reasons to exclude Sen. Parent's proposal from H.433**

I do not know what Senate Transportation plans to do about Sen. Parent's proposed amendment. I bring it up here so that you are aware of it and can take a position on it. Sen. Parent's proposal would exempt State-owned airports from having to mitigate impacts on primary agricultural soils. This would be an amendment to §6093 Mitigation of primary agricultural soils.

I believe that we need to maintain our agricultural soils. We cannot afford to allow their agricultural value to be destroyed by development or subdivision. Look at the last year. One year ago we were concerned about food shortages. Many staples were missing from grocery shelves. Other stocks were thin. We were concerned about an inability to bring in food from away.

Since then we have seen an influx of people to Vermont for multiple reasons, putting further pressure on converting our agricultural soils.

Our resilience and sustainability require that we maintain our agricultural land.

**Conclusion**

For these reasons, I ask that you do not support Sen. Parent's amendment and that you do not support the proposed exemption for transportation projects based on the amount of new project area.

Thank you for taking the time to read this testimony.

Sincerely,  
Thomas Weiss  
resident. Montpelier