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Senate Committee on Natural Resources and Energy
State House
Montpelier, Vermont

Subject: S.234, changes to Act 250

Dear Committee:

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

I am a civil engineer with experience in permitting of projects and in performing environmental reviews. I apply that experience in developing these comments.

I suggest that some sections of the bill be modified and others be removed from the bill. I give my reasons below with a summary of my recommendations at the end.

You know portions of what I write. I include them because they are fundamental to my comments.

Supervisory authority

The concept of having District Commissions issue Act 250's Land Use Permits conditionally is an attempt to undercut and remove Act 250's supervisory authority to independently review whether a proposed project satisfies the Act 250 criteria. This concept was presented by multiple witnesses at your hearings.

This independent review is a key element of Act 250. (Another key element is the ability of the public to participate meaningfully.) Act 250 is the only permit in Vermont that considers the entirety of a project. Looking at the criteria:

- Criteria (1) , (2), (4), (8), and parts of (9) [(B), (C), (E), and (F)] consider the effects of the project on the environment.
- The remaining criteria consider the effects of the project on infrastructure and on the ability of municipalities and the State to provide services.

Other permits focus on individual environmental issues. They do not consider the interactions between permits. They do not consider the effects on infrastructure and the ability to provide services.

The request that you undermine supervisory authority came from:

- the Natural Resources Board (with its "notwithstanding" language)
- the Agency of Natural Resources (by supporting the "notwithstanding" language and with its proposal to have Act 250 and ANR run in parallel)
- the Agency of Transportation (supporting the "notwithstanding" language and parallel processing).

<u>The "notwithstanding" language</u>

The "notwithstanding" idea conflicts with the concept of supervisory authority. The "notwithstanding" idea would have District Commissions issue an Act 250 permit with conditions that all other permits be obtained later. As you know, the criteria for other permits are not the same as the act 250 criteria. I do not see how a district commission can use other permits to find that a project satisfies all the criteria without knowing the conditions and contents of the other permits. Yes, Act 250 permits do contain conditions that require compliance

with other permits. Those conditions are imposed because the district commission knows what is in those permits and that those permits satisfy some portion of the criteria of Act 250.

There are times when those other permits do not satisfy the Act 250 criteria. So the "notwithstanding" idea would require District Commissions to issue Act 250 permits that they do not know will satisfy the criteria.. I do not see how a district commission can issue an Act 250 permit that is conditioned on unknown, unissued permits. District Commissions cannot claim that a project will satisfy the criteria unless they know the conditions of the other permits; and that those permits satisfy Act 250 criteria.

ANR's processing in parallel

Act 250 and ANR can be in parallel now. My experience with Act 250 shows that many applicants choose to use parallel processes. ANR pointed that out in testimony on the 20th: in some cases Act 250 starts, then pauses for DEC permits, then back to Act 250. That sounds like parallel to me: both processes are occurring simultaneously on their separate paths and then come together at the end in the District Commissions. I think that he is using "parallel" as jargon meaning "independently". What he appears to mean is to remove the supervisory authority of the District Commissions over Act 250's criteria. The result of such an interpretation is to change other permits from "rebuttable presumptions" to "dispositive".

The order of applying for permits is a choice that the applicant makes. The applicant can choose to run the permitting in parallel or in sequence. So there is no need to amend Act 250 relating to parallel processing.

Act 250 can result in substantial changes to projects

The question of whether Act 250 is worth it comes up too often. It should have been answered a long time ago with a resounding "Yes!" The context of the question is whether Act 250's independent review causes substantial changes to projects. The question should not be "How many times did changes not occur?" The question should be "What substantial changes have occurred because of Act 250 review?"

The answer should be a discussion of those projects where Act 250 did make a difference. What change was made. And, when a change occurred, why that change was necessary based on the Act 250 criteria. And why the rebutted permit did not satisfy the criteria of Act 250. And, how Act 250 treats the individuals who become parties, compared with the treatment given to the public in public processes required by other permits.

Recommendation

Retain Act 250's independent review of whether a proposed project satisfies the Act 250 criteria. The Vermont Supreme Court has affirmed this principle of supervisory authority multiple times, going back at least as far as 1985. That means that district commissions must determine whether a project satisfies the criteria independently of determinations made by other permits.

Act 250 in downtown development districts and neighborhood development areas

There is little or no benefit to municipalities or to projects by removing Act 250 jurisdiction from downtown development districts and neighborhood development areas. This is based on a review of Act 250 permits issued during the years 2019 through 2021. The Act 250 database is the source of the information.
[https://anrweb.vt.gov/anr/vtanr/Act250.aspx]

Vermont has 23 downtown development districts and 9 neighborhood development areas. During those three years there were 20 Act 250 permits issued in those designations.

- 2 with hearings (aka major projects)
- 10 without hearings (aka minor projects)
- 8 administrative amendments

Act 250 permits were issued for projects in:

Municipality	with hearing	without hearing	admin. amend.
Brandon	0	1	0
Brattleboro	0	1	0
Burlington	2	2	1
Rutland City	0	1	0
St. Albans City	0	0	1
St. Johnsbury	0	0	1
South Burlington	0	0	2
Waterbury	0	0	1
Winooski	0	5	2
Total	2	10	8

S.234 proposes to set up a quasi-equivalent municipal process to succeed Act 250 in the downtown development districts and neighborhood development areas. The work to create the process for municipalities, and then to review applications from municipalities to adopt that process just is not worth it. There are too few Act 250 projects in those designations to consider this process further.

Recommendation
Retain Act 250's existing jurisdiction in downtown development districts and neighborhood development areas.

Placing permits in context with other permits

Study on wastewater and potable water supply permits with information on Act 250 permits
You asked for data. In order to evaluate the claims of delay due to Act 250, one needs to place the Act 250 permits into the context of all other permits. Only then can one evaluate whether a given permit delayed a project. The greater question is whether the permit program delays projects. I got into this question on claims of barriers imposed by a different program. Three of the projects included in that study included Act 250 permits.

That study, which I am providing, places the wastewater and potable water supply (WW) permits into context. I conducted the study over the summer of 2021 in response to S.201, now back at Senate Economic Development, Housing and General Affairs. That bill proposed to allow municipalities sole source authority to issue water and sewer connection permits. The unfounded objections to the WW permits are that they were barriers to housing. The study looks at 16 housing projects in four municipalities with both water and sewer systems. The study looks at whether the program as a whole is a barrier to housing and whether individual WW permits might have delayed a project.

The study found that the WW permit program delayed none of the 16 projects, had minor costs, and discovered a design problem. A water service line had been designed to be too close to the sewer service line. Finding this error in the WW permit review enabled an easy design change on paper and avoided a costly change during construction.

Act 250 permits were needed for three of the projects. One of them, in Brattleboro, was issued only one day after the building permit issued by the Fire and Safety Division of the Department of Public Safety. Act 250 did not delay the project.

The other two Act 250 permits were in Rutland City. Act 250 did not delay either of these projects. In one instance the Act 250 permit was the last permit issued. The Act 250 permit took 54 days. It was issued 7 days after the WW permit and two weeks after the building permit. The WW permit was not the last item needed before the Act 250 permit could be issued. These later submissions were the applicant's request to remove a condition from the proposed permit; the comments from the Division for Historic Preservation; and the survey for the boundary line adjustment. The last submission was on a Friday and the Act 250 permit was issued the following Monday. Act 250 did not delay this project.

The other Act 250 permit in Rutland was issued in 24 days. It was issued 11 days after the WW permit. And it was issued 31 days before the application for the City's building permit was submitted. Act 250 did not delay this project.

Removing Act 250 jurisdiction for ARPA housing money

The committee asked witnesses how much housing is needed and how soon do we need it? I was disappointed that none of the witnesses gave any indication of projects in the pipeline that can use the ARPA funds, how much of the ARPA money the projects could use, and the ability of those projects to meet the ARPA time frames with no changes to Act 250. Act 250 rarely delays projects. Projects have a time schedule that is controlled by the permitting process in its entirety. Removing one permit from the process does not speed up the project.

Taking Act 250 out of designations, or Act 250 out of housing won't speed up projects, because of the other permitting. And taking Act 250 out of those areas will remove the benefits of Act 250 from those projects.

Recommendation

Here, too, the recommendation is to retain Act 250's existing jurisdiction in downtown development districts and neighborhood development areas.

Forest blocks and connecting habitat

S.234 is ambiguous on the importance of forest blocks and connecting habitat. The bill declares that forest blocks are so important that they need to be added to the criteria now. At the same time, it declares that their value is so low that we can afford another two years (until well into 2023) of losses to forest blocks and connecting habitat before the district commissions can actually consider them.

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

My primary objection to the mitigation portion is that connecting habitat cannot be mitigated by conserving habitat elsewhere. Connecting habitat allows species to move between areas that they occupy. Summer range and winter range. Breeding grounds and living grounds. Connecting habitat is often a narrower band allowing movement between two larger habitat areas, 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.

The definition of connecting habitat goes a long way to ensuring that connecting habitat will be adversely affected. The definition will allow *new* recreational trails and *new* improvements for farming. 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 that the criterion for connecting habitat needs to be separated from forest blocks. The criterion for forest blocks could remain "Will not result in an undue adverse impact".

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."

Projects can damage a lot of forest blocks and connecting habitat in the two years until the criterion becomes effective. That loss without review by Act 250 is needless. The forces that lead to adverse impacts to forest blocks are increasing due to the rising influx of climate refugees and COVID refugees into Vermont.

Definitions of connecting habitat and forest blocks

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.

Regarding new recreational trails: I think of moving at a speed too fast to avoid the small wildlife trying to cross the trail. I think of openings in the forest canopy allowing suitable conditions for invasive plants.

Regarding new improvements: I think of changes for farming: roads, buildings, clearing.

I suggest removing the second sentence of each definition. It seems that the second sentence automatically gives those uses a pass. By removing those uses from the definition, the applicant will have to prove that they won't have an adverse effect. (Or if you retain the process of "avoid, minimize, mitigate", those uses will also have to go through that process.)

Definition of fragmentation
The proposed definition determines that some fragmentation is OK and other fragmentation is not. Under that definition, a new farmhouse will not fragment the forest block. A new residence that is not a farmhouse will fragment the forest block. The ownership of the house should not determine whether the forest has been fragmented or not.

The concept of the second sentence (that the purpose determines whether it is fragmentation or not) is not needed in this definition. The concept is adequately covered in the definitions of forest block and connecting habitat; and in the criteria on forest blocks and connecting habitat. This comment comes from my experience with contracts: write it once. If you write it twice, and they are not exactly the same, then it has two meanings and you're in for trouble somewhere down the line.

I suggest removing the second sentence to avoid the repetition and to eliminate the possibility of confusion.

Rulemaking
As I point out above, there is no time for rule-making. The criterion on forest blocks and connecting habitat should be brought into Act 250 as soon as possible, without waiting for rule-making. This means the bill will need specifics on what is needed to meet the criteria of avoid, minimize, and mitigate.

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.

Recommendation
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","forest block" and "fragmentation" so that all *new* incursions are covered by Act 250.

Place the requirements for connecting habitat and fragmentation into the criteria. Avoid rulemaking for them.

Resource mapping
Please do not start a laundry list of layers in this section. 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.

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. The mapping shall identify natural resources and other information throughout the State, ~~that may be~~ including those that are 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."

Study committee

We do not need another study committee. The Commission on the Future of Act 250 recommended that the NRB hear appeals of decisions of the District Commissions. House Natural Resources, Fish and Wildlife is working on H.492, structure of the Natural Resources Board. That bill is proposing a Board structure to hear appeals, defining the membership of the Board and the appointment process, and leaving the responsibilities and authorities of the District Commissions alone. The only thing not in that bill is the funding issue.

A more productive study would be on the topic of substantial changes resulting from Act 250.

I ask that you get behind H.492 and support its proposal for the Board.

Recommendations:

Retain Act 250's independent review of whether a proposed project satisfies the Act 250 criteria.

Retain Act 250's existing jurisdiction in downtown development districts and neighborhood development areas.

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","forest block" and "fragmentation" so that all *new* incursions are covered by Act 250.

Place the requirements for connecting habitat and fragmentation into the criteria. Avoid rulemaking for them.

Do not place specific layers into the resource mapping statute.

Remove the study and get behind H.492, structure of the Natural Resources Board, and support its proposal for the Board.

Thank you for taking the time to read this letter.

Sincerely,
Thomas Weiss, P. E.

Encl:
"Wastewater and Potable Water Supply Permits in Relation to Other Permits"