Responsible, Balanced, and Transformative Permit Reform

"When an employer has made the commitment to grow responsibly in Vermont, we must make the commitment to speed the process from permit application to shovels in the ground."

- Governor Jim Douglas, Inaugural Address, Thursday, January 8, 2009

Vermont requires a predictable, clear, fair, straightforward and efficient system that balances our noted ecological ethic with much-needed responsible development--a system that not only protects our environmental values but also recognizes other important public values such as a project's recreational, cultural, economic and social benefits.

Through a series of modifications and changes to the various permitting systems in the state, projects will be weighed with one eye toward the environment and the other to desired – and equally valued – outcomes that benefit all Vermonters.

Public Benefit

Currently, Act 250, Vermont's Land Use Law, only takes into consideration the concept of public benefit when it reviews a project under two of the 10 criteria: Criterion 8(A) (Necessary wildlife habitat and endangered species) and Criterion 9 (H) (Costs of scattered development).

Why limit this review to these two sub-criteria? Act 250 should equally weigh and balance all the issues associated with a proposed project. The following criteria would also benefit from a similar consideration of any evidence of economic, social, cultural, recreational or other benefit to the public from the subdivision or development in question:

Criterion 6 (Ability of a municipality to provide educational services)
Criteria 7 (Ability of a municipality to provide municipal services)
Criteria 8 (Aesthetics/historic sites)
Criteria 9 (A) (Impact of growth) (D) (Earth resources) (F) (Energy conservation) (G) (Private utility services), (J) Public utility services, (K) Development affecting public investments

On-the-record (OTR) review of District Commission decisions

"…Make no mistake: we must preserve and strengthen our gold standard of environmental protection, but we can do so while making it easier for companies to invest in Vermont and grow with certainty. We can build a better framework based on clear guidelines, professional assistance, a good dose of trust and strong penalties for non-compliance."

- Governor Jim Douglas, Inaugural Address, Thursday, January 8, 2009

Presently, the nine Act 250 District Commissions consider and decide many permit applications only after holding hearings at which evidence and exhibits are presented by the parties – the developers, neighbors, advocates, state scientists and others – who have a direct role in the

proceedings. The Act 250 Commissions allow cross-examination and the parties to the case offer argument.

The problems arise on appeal, because under Vermont law, the Environmental Court hears the proceedings again as if they never had occurred – the legal term is *de novo*. Where issues on appeal are heard *de novo* (from the Latin for 'anew' or 'afresh'), the Court tries the case as if no hearing had ever been conducted by the Commission and as if no decision had been rendered. The Environmental Court therefore hears the same evidence, witnesses and arguments again -- in essence, applicants must re-present – some would say, re-defend – their case from scratch.

The Administration proposes to amend Act 250 to allow, at an applicant's option and expense, the hearing before the Commission to be conducted with the creation of a formal record— evidence, arguments, findings and conclusions of the Commission are recorded and become the "on-the-record" account of the case.

If a decision is appealed to the Environmental Court, the Court's review is limited to whether the Commission's findings are supported by sufficient evidence and whether the Commission properly applied the law to those facts-- no witnesses or evidence would be presented to the Environmental Court. This is the same way civil appeals from the Superior Courts are reviewed by the Vermont Supreme Court. Under this approach, Act 250 applications will not be tried twice saving substantial time and expense for all parties to the proceedings.

ANR Permits in Act 250

"…We need to bring greater certainty and predictability to all interested parties by ensuring that once you've obtained your permit from an agency of state government, that permit will not be challenged in an Act 250 proceeding."

- Governor Jim Douglas, Inaugural Address, Thursday, January 8, 2009

Currently, permits granted by the Agency of Natural Resources (ANR) can be challenged in two separate forums. An ANR permit may be appealed directly to the Environmental Court, with a *de novo* standard of review and may also be challenged in Act 250 if the ANR permit is necessary to obtain an Act 250 permit. ANR staff and applicants routinely defend permits against challenges in Act 250.

ANR permits should have greater weight at the Act 250 Commission level – an ANR permit should be accepted on its face by the commission. This would streamline the process for applicants; provide greater predictability in the Act 250 process; and maximize staff resources because they would spend less time defending permits in multiple forums. The following conditions would apply:

- ANR permits may still be appealed to the Environmental Court, ensuring an appropriate forum is available to resolve any disputes over the permit;
- ANR permits will be "dispositive," or settled, in Act 250 proceedings, only with regard to the issues and technical determinations covered by the permit;

- Only those ANR permits that are currently subject to public notice requirements will be dispositive in Act 250 (the public notice requirements currently in place will remain the same). These include the following types of permits:
    - Air emissions
    - Storm water
    - Wastewater NPDES (National Permit Discharge Elimination System)
    - Indirect wastewater discharges
    - Wetlands Conditional Use Determinations
    - Solid Waste Certifications
    - Public Water Supply permits

Expansion of alternatives to traditional individual permitting

"Instead of complex front-end regulation, we can provide clear guidance to businesses and trust them to design appropriate systems with the help of a recognized professional, obtain a general permit, and move towards better and faster construction."

- Governor Jim Douglas, Inaugural Address, Thursday, January 8, 2009

A variety of Department of Environmental Conservation (DEC) programs utilize alternatives to the traditional individual permit as a regulatory tool. For example, permit by rule, general permits, and self-certifications are integral to the successful implementation of the many regulatory programs administered by the department. ANR will undertake an evaluation of all existing permitting programs to identify additional areas where these and other strategies may be appropriate and will implement them accordingly in an effort to further streamline the process and provide greater predictability for applicants; maximize staff resources; and ensure a greater ability to provide staff field presence and increase the environmental and public health benefits associated with that presence.

<u>General Permitting</u>

A General Permit is a permit that incorporates standard conditions issued after a full public process for a broad class of permittees, such as storm water discharges. Once the terms of the General Permit are established, there is a simplified process for adding an applicant to the general permit. This means less time and expense associated with issuing a permit for the applicant.

In addition, under current law, once the appeal period for a General Permit to discharge has expired, the terms and conditions of the General Permit can no longer be challenged. If the addition of a particular applicant under the General Permit is appealed, the appeal is limited in scope to whether the permitted activity complies with the terms and conditions of the general permit. The expansion of general permits to additional environmental programs may require specific statutory authority and amendments to ensure that appeals are appropriately limited. Compliance is verified through inspection and enforcement action taken where necessary.

Permit by Rule

A Permit by Rule is similar to the General Permit; however, the applicable design and environmental standards are adopted for a class of permittees as a rule. The agency conducts training and outreach, the regulated community is expected to comply with the rules and is subject to an inspection program. Enforcement is conducted where necessary. This approach streamlines the process and provides greater predictability; maximizes staff resources; and provides greater staff field presence. Examples of permit by rule are the air emission standards for dry cleaners and vapor recovery rules for gas stations.

Self-Certification

Self-certification takes a variety of forms. For example, in some programs an applicant may submit a permit application with detailed plans and a certification from a qualified professional indicating that the proposed project meets statutory and regulatory requirements. The permit is then issued based upon the certification. The agency places a heavy emphasis on the professional judgment of the qualified professional designing the project. Compliance is then verified through inspections, and enforcement conducted where necessary.

Broadening this approach will provide streamlined permitting and greater predictability; maximize staff resources; and provide greater staff field presence.

In other programs, such as the underground storage tank program, DEC is utilizing compliance self-certification. In this instance, the regulated entity conducts an inspection of its operations annually and certifies that it is in compliance with environmental regulatory requirements. If it is not in compliance, the regulated entity is required to submit a return-to-compliance plan. The agency conducts training and outreach and provides technical assistance to the regulated community. The agency also conducts follow-up inspections to "audit" and verify the certifications and ensure that return to compliance plans are implemented. The compliance certification process proactively engages industry in ensuring its environmental compliance.

Several factors will need to be considered in expanding the use of these regulatory alternatives. For example, to the extent programs do not currently provide for self-certification, i.e. wetlands, a licensing or certifying body may need to be created to set qualification standards and to oversee the private professionals conducting the work. In addition, with a decrease in upfront permit application reviews, staff resources would shift towards inspection, compliance and enforcement efforts to ensure a high level of compliance with environmental standards for both federally-delegated and state programs. ANR will need to collect the same level of permit fees to support administration of these regulatory programs – administration of the program will merely shift in its focus, but it will remain dedicated to this work.

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