

**From:** Grace, Sheila [Sheila.Grace@vermont.gov]

**Sent:** Wednesday, October 17, 2012 8:11 PM

**To:** gsymington@vermontcf.org; jan07@fairpoint.net; jimmatteau@gmail.com; louisemccarren@gmavt.net; sjohnstone@veic.org; Markowitz, Deb; Miller, Elizabeth

**CC:** lindamcginnis0@gmail.com; Coster, Billy; lpelletier@veic.org; Margolis, Anne; Hofmann, Sarah; Hughes, Michelle; Percival, Penny

**Subject:** Energy Generation Siting Policy Commission

**Attachments:** Memorandum Siting 10 17 2012.pdf; EGSPC Timeline\_101112\_final.pdf; Title 30 Section 248.pdf; Overview of the Section 248 Process.pdf; Citizens' Guide to 248 February 14 2012.pdf; Act 250.pdf; Comparison Table 248-250.pdf; Wind Commission Final Report-12-15-04.pdf; RegulatoryBackgroundReport.pdf; Improving Envir. Final Report 121611.pdf

Energy Generation Siting Policy Commission:

Attached please find a memorandum regarding the Department's recommended process for carrying out the charge contained in Executive Order No. 10-12 and some

preliminary background materials. We will also be mailing a hard copy of these materials to you. Please let us know how we can be of further assistance.

Best,

Sheila



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## MEMORANDUM

To: Gaye Symington  
Jan Eastman  
Jim Matteau  
Louise McCarren  
Scott Johnstone

From: Department of Public Service

Date: October 17, 2012

Re: Energy Generation Siting Policy Commission: Proposed Process and Background Materials

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In advance of your first meeting, the Department would like to recommend a process for carrying out the charge contained in Executive Order No. 10-12 and to provide you with some preliminary background materials. The process we propose is detailed in the attached timeline and is geared toward four primary activities: information sessions with presentations by experts; public hearings and public comments; deliberations; and report writing. The Vermont Energy Generation Siting Policy Commission website found at <http://sitingcommission.vermont.gov/home> is currently soliciting public comments.

The following documents are attached:

- Governor's Energy Siting Policy Commission Project Timeline – Draft 10/11/2012
- 30 V.S.A. § 248
- Overview of the Section 248 Process
- Citizen's Guide to the Public Service Board's Section 248 Process
- Act 250 (10 V.S.A. Chapter 151)
- Comparison of Substantive Requirements of Act 250 and 30 V.S.A. § 248
- Vermont Commission on Wind Energy Regulatory Policy Findings and Recommendations; Regulatory Background Research Report, 2004
- Report on Improving Vermont's Environmental Protection Process

Additionally, the Agency of Natural Resources is preparing background materials.

Please let us know how we can be of further assistance with this matter.

Tasks*	2012												2013																				
	October			November			December			January			February			March			April														
	7-13	14-20	21-27	(10/28)-3	4-10	11-17	18-24	(11/25)-1	2-8	9-15	16-22	23-29	(12/30)-5	6-12	13-19	20-26	(1/27)-2	3-9	10-16	17-23	(2/24)-2	3-9	10-16	17-23	24-30	(3/31)-6	7-13	14-20	21-27	28-30			
	Information Gathering												Hearings/Comments												Deliberation			Reporting					
Planning																																	
Scheduling setup call/poll with Commissioners																																	
Set up website, including comments form																																	
Set up Commissioner, state agency, and stakeholder listservs																																	
Set up public meetings/VIT/PAT/court reporter																																	
Hire additional temporary staff/engage facilitator																																	
Compile background material on VT and other states' processes																																	
Engage other state agencies																																	
Meetings																																	
Information Sessions with Presentations by Experts																																	
#1: Current VT energy siting processes overview																																	
#2: Other states' energy siting processes overview/comparison																																	
#3: Perspectives from participants in VT's energy siting processes																																	
#4: Perspectives from participants in VT's energy siting processes (cont.)																																	
#5: Meeting with VT legislators																																	
Public Hearings																																	
Multiple hearings (no fewer than three) to be held at various locations around the state, locations TBD																																	
Deliberations																																	
Deliberation Meeting #1																																	
Deliberation Meeting #2																																	
Reporting																																	
Deadline for public comments																																	
Compile, sort, and summarize comments																																	
Write draft report																																	
Complete draft report																																	
Send draft report to Commissioners for review																																	
Convene Commissioners for final review																																	
Finalize report and submit to Governor & Legislature																																	
Post report on website, issue press release, hold press conference																																	

# The Vermont Statutes Online

## Title 30: Public Service

### ***Chapter 5: POWERS AND DUTIES OF DEPARTMENT OF PUBLIC SERVICE AND PUBLIC SERVICE BOARD AS TO COMPANIES OTHER THAN RAILROADS AND AIRCRAFT***

#### **30 V.S.A. § 248. New gas and electric purchases, investments, and facilities; certificate of public good**

##### **§ 248. New gas and electric purchases, investments, and facilities; certificate of public good**

(a)(1) No company, as defined in section 201 of this title, may:

(A) in any way purchase electric capacity or energy from outside the state:

(i) for a period exceeding five years, that represents more than three percent of its historic peak demand, unless the purchase is from a plant as defined in subdivision 8002(12) of this title that produces electricity from renewable energy as defined under subdivision 8002(2); or

(ii) for a period exceeding ten years, that represents more than ten percent of its historic peak demand, if the purchase is from a plant as defined in subdivision 8002(12) of this title that produces electricity from renewable energy as defined under subdivision 8002(2); or

(B) invest in an electric generation or transmission facility located outside this state unless the public service board first finds that the same will promote the general good of the state and issues a certificate to that effect.

(2) Except for the replacement of existing facilities with equivalent facilities in the usual course of business, and except for electric generation facilities that are operated solely for on-site electricity consumption by the owner of those facilities:

(A) no company, as defined in section 201 of this title, and no person, as defined in 10 V.S.A. § 6001(14), may begin site preparation for or construction of an electric generation facility or electric transmission facility within the state which is designed for immediate or eventual operation at any voltage; and

(B) no such company may exercise the right of eminent domain in connection with site preparation for or construction of any such transmission or generation facility, unless the public service board first finds that the same will promote the general good of the state and issues a certificate to that effect.

(3) No company, as defined in section 201 of this title, and no person, as defined in 10

V.S.A. § 6001(14), may in any way begin site preparation for or commence construction of any natural gas facility, except for the replacement of existing facilities with equivalent facilities in the usual course of business, unless the public service board first finds that the same will promote the general good of the state and issues a certificate to that effect pursuant to this section.

(A) For the purposes of this section, the term "natural gas facility" shall mean any natural gas transmission line, storage facility, manufactured-gas facility, or other structure incident to any of the above. For purposes of this section, a "natural gas transmission line" shall include any feeder main or any pipeline facility constructed to deliver natural gas in Vermont directly from a natural gas pipeline facility that has been certified pursuant to the Natural Gas Act, 15 U.S.C. § 717 et seq.

(B) For the purposes of this section, the term "company" shall not include a "natural gas company" (including a "person which will be a natural gas company upon completion of any proposed construction or extension of facilities"), within the meaning of the Natural Gas Act, 15 U.S.C. § 717 et seq.; provided however, that the term "company" shall include any "natural gas company" to the extent it proposes to construct in Vermont a natural gas facility that is not solely subject to federal jurisdiction under the Natural Gas Act.

(C) The public service board shall have the authority to, and may in its discretion, conduct a proceeding, as set forth in subsection (h) of this section, with respect to a natural gas facility proposed to be constructed in Vermont by a "natural gas company," for the purpose of developing an opinion in connection with federal certification or other federal approval proceedings.

(4)(A) With respect to a facility located in the state, the public service board shall hold a nontechnical public hearing on each petition for such finding and certificate in at least one county in which any portion of the construction of the facility is proposed to be located.

(B) The public service board shall hold technical hearings at locations which it selects.

(C) At the time of filing its application with the board, copies shall be given by the petitioner to the attorney general and the department of public service, and, with respect to facilities within the state, the department of health, agency of natural resources, historic preservation division, agency of transportation, the agency of agriculture, food and markets and to the chairperson or director of the municipal and regional planning commissions and the municipal legislative body for each town and city in which the proposed facility will be located. At the time of filing its application with the board, the petitioner shall give the byways advisory council notice of the filing.

(D) Notice of the public hearing shall be published and maintained on the board's website for at least 12 days before the day appointed for the hearing. Notice of the public hearing shall be published once in a newspaper of general circulation in the county or counties in which the proposed facility will be located, and the notice shall include an Internet address where more information regarding the proposed facility may be viewed.

(E) The agency of natural resources shall appear as a party in any proceedings held under this subsection, shall provide evidence and recommendations concerning any findings to be made under subdivision (b)(5) of this section, and may provide evidence and recommendations concerning any other matters to be determined by the board in such a

proceeding.

(b) Before the public service board issues a certificate of public good as required under subsection (a) of this section, it shall find that the purchase, investment or construction:

(1) with respect to an in-state facility, will not unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality. However, with respect to a natural gas transmission line subject to board review, the line shall be in conformance with any applicable provisions concerning such lines contained in the duly adopted regional plan; and, in addition, upon application of any party, the board shall condition any certificate of public good for a natural gas transmission line issued under this section so as to prohibit service connections that would not be in conformance with the adopted municipal plan in any municipality in which the line is located;

(2) is required to meet the need for present and future demand for service which could not otherwise be provided in a more cost effective manner through energy conservation programs and measures and energy-efficiency and load management measures, including but not limited to those developed pursuant to the provisions of subsection 209(d), section 218c, and subsection 218(b) of this title;

(3) will not adversely affect system stability and reliability;

(4) will result in an economic benefit to the state and its residents;

(5) with respect to an in-state facility, will not have an undue adverse effect on esthetics, historic sites, air and water purity, the natural environment and the public health and safety, with due consideration having been given to the criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8) and (9)(K);

(6) with respect to purchases, investments, or construction by a company, is consistent with the principles for resource selection expressed in that company's approved least cost integrated plan;

(7) except as to a natural gas facility that is not part of or incidental to an electric generating facility, is in compliance with the electric energy plan approved by the department under section 202 of this title, or that there exists good cause to permit the proposed action;

(8) does not involve a facility affecting or located on any segment of the waters of the state that has been designated as outstanding resource waters by the water resources board, except that with respect to a natural gas or electric transmission facility, the facility does not have an undue adverse effect on those outstanding resource waters;

(9) with respect to a waste to energy facility, is included in a solid waste management plan adopted pursuant to 24 V.S.A. § 2202a, which is consistent with the state solid waste management plan; and

(10) except as to a natural gas facility that is not part of or incidental to an electric

generating facility, can be served economically by existing or planned transmission facilities without undue adverse effect on Vermont utilities or customers.

(c)(1) Except as otherwise provided in subdivision (j)(3) of this section, in the case of a municipal plant or department formed under local charter or chapter 79 of this title or a cooperative formed under chapter 81 of this title, any proposed investment, construction or contract which is subject to this section shall be approved by a majority of the voters of a municipality or the members of a cooperative voting upon the question at a duly warned annual or special meeting to be held for that purpose. However, in the case of a cooperative formed under chapter 81 of this title, an investment in or construction of an in-state electric transmission facility shall not be subject to the requirements of this subsection if the investment or construction is solely for reliability purposes and does not include new construction or upgrades to serve a new generation facility.

(2) The municipal department or cooperative shall provide to the voters or members, as the case may be, written assessment of the risks and benefits of the proposed investment, construction, or contract which were identified by the public service board in the certificate issued under this section. The municipal department or cooperative also may provide to the voters an assessment of any other risks and benefits.

(d) Nothing in this section shall be construed to prohibit a company from executing a letter of intent or entering into a contract before the issuance of a certificate of public good under this section, provided that the company's obligations under that letter of intent or contract are made subject to compliance with the requirements of this section.

(e)(1) Before a certificate of public good is issued for the construction of a nuclear energy generating plant within the state, the public service board shall obtain the approval of the general assembly and the assembly's determination that the construction of the proposed facility will promote the general welfare. The public service board shall advise the general assembly of any petition submitted under this section for the construction of a nuclear energy generating plant within this state, by written notice delivered to the speaker of the house of representatives and to the president of the senate. The department of public service shall submit recommendations relating to the proposed plant, and shall make available to the general assembly all relevant material. The requirements of this subsection shall be in addition to the findings set forth in subsection (b) of this section.

(2) No nuclear energy generating plant within this state may be operated beyond the date permitted in any certificate of public good granted pursuant to this title, including any certificate in force as of January 1, 2006, unless the general assembly approves and determines that the operation will promote the general welfare, and until the public service board issues a certificate of public good under this section. If the general assembly has not acted under this subsection by July 1, 2008, the board may commence proceedings under this section and under 10 V.S.A. chapter 157, relating to the storage of radioactive material, but may not issue a final order or certificate of public good until the general assembly determines that operation will promote the general welfare and grants approval for that operation.

(f) However, plans for the construction of such a facility within the state must be submitted by the petitioner to the municipal and regional planning commissions no less than 45 days prior to application for a certificate of public good under this section, unless the municipal and regional planning commissions shall waive such requirement. Such municipal or

regional planning commission may hold a public hearing on the proposed plans. Such commissions shall make recommendations, if any, to the public service board and to the petitioner at least seven days prior to filing of the petition with the public service board.

(g) However, notwithstanding the above, plans involving the relocation of an existing transmission line within the state must be submitted to the municipal and regional planning commissions no less than 21 days prior to application for a certificate of public good under this section.

(h) The position of the state of Vermont in federal certification or other approval proceedings for natural gas facilities shall be developed in accordance with this subsection.

(1) A natural gas facility requiring federal approval shall apply to the public service board for an opinion under this section (on or before the date on which the facility applies for such federal approval in the case of a facility that has not applied for federal approval before January 16, 1988). Any opinion issued under this subsection shall be developed based upon the criteria established in subsection (b) of this section.

(2) If the board conducts proceedings under this subsection, the department shall give due consideration to the board's opinion as to facilities of a natural gas company, and that opinion shall guide the position taken before federal agencies by the state of Vermont, acting through the department of public service under section 215 of this title.

(3) If the board conducts proceedings under this subsection, it may consolidate them, solely for purposes of creating a common record, with any related proceedings conducted under subdivision (a)(3) of this section.

(i)(1) No company, as defined in sections 201 and 203 of this title, without approval by the board, after giving notice of such investment, or filing a copy of that contract, with the board and the department at least 30 days prior to the proposed effective date of that contract or investment:

(A) may invest in a gas-production facility located outside this state; or

(B) may execute a contract for the purchase of gas from outside the state, for resale to firm-tariff customers, that:

(i) is for a period exceeding five years; or

(ii) represents more than 10 percent of that company's peak demand for resale to firm-tariff customers.

(2) The department and the board shall consider within 30 days whether to investigate the proposed investment or contract.

(3) The board, upon its own motion, or upon the recommendation of the department, may determine to initiate an investigation. If the board does not initiate an investigation within such 30 day period, the contract or investment shall be deemed to be approved. If the board determines to initiate an investigation, it shall give notice of that decision to the company proposing the investment or contract, the department, and such other persons as the board



determines are appropriate. The board shall conclude its investigation within 120 days of issuance of its notice of investigation, or within such shorter period as it deems appropriate. If the board fails to issue a decision within that 120 day period, the contract or investment shall be deemed to be approved. The board may hold informal, public or technical hearings on the proposed investment or contract.

(4) Nothing in this subsection shall prohibit a company from negotiating or adjusting periodically the price of other terms of supply through a supplement to such a contract, provided that the supplement falls within the terms specified in such a contract, as approved. The board's authority to investigate such adjustments under other authorities of this title shall not be impaired. Such a company shall file with the department and the board a copy of any such supplement to the contract or other documentation that states any terms that have been renegotiated or adjusted by the company at least 30 days prior to the effective date of the renegotiated or adjusted price or other terms.

(5) Nothing in this subsection shall be construed to prohibit a gas company from executing a development contract, a contract for design and engineering, a contract to seek regulatory approvals for a gas-production facility, or a letter of intent for such purchase of gas that makes the company's obligations under that letter of intent subject to the requirements of this subsection, prior to the filing with the board and department of such notice or proposed contract or pending any investigation under this subsection.

(j)(1) The board may, subject to such conditions as it may otherwise lawfully impose, issue a certificate of public good in accordance with the provisions of this subsection and without the notice and hearings otherwise required by this chapter if the board finds that:

(A) approval is sought for construction of facilities described in subdivision (a)(2) or (3) of this section;

(B) such facilities will be of limited size and scope;

(C) the petition does not raise a significant issue with respect to the substantive criteria of this section; and

(D) the public interest is satisfied by the procedures authorized by this subsection.

(2) Any party seeking to proceed under the procedures authorized by this subsection shall file a proposed certificate of public good and proposed findings of fact with its petition. The board shall give written notice of the proposed certificate to the parties specified in subdivision (a)(4)(C) of this section, to any public interest organization that has in writing requested notice of applications to proceed under this subsection and to any other person found by the board to have a substantial interest in the matter. Such notice shall be published on the board's website and shall request comment within the board's website and shall request comment within 28 days of the initial publication on the question of whether the petition raises a significant issue with respect to the substantive criteria of this section. If the board finds that the petition raises a significant issue with respect to the substantive criteria of this section, the board shall hear evidence on any such iss

ue.

(3) The construction of facilities authorized by a certificate issued under this subsection shall not require the approval of voters of a municipality or the members of a cooperative, as would otherwise be required under subsection (c) of this section.

(k)(1) Notwithstanding any other provisions of this section, the board may waive, for a specified and limited time, the prohibitions contained in this section upon site preparation for or construction of an electric transmission facility or a generation facility necessary to assure the stability or reliability of the electric system or a natural gas facility, pending full review under this section.

(2) A person seeking a waiver under this subsection shall file a petition with the board and shall provide copies to the department of public service and the agency of natural resources. Upon receiving the petition, the board shall conduct an expedited preliminary hearing, upon such notice to the governmental bodies listed in subdivision (a)(4)(C) of this section as the board may require.

(3) An order granting a waiver may include terms, conditions and safeguards, including the posting of a bond or other security, as the board deems proper, considering the scope and duration of the requested waiver.

(4) A waiver shall be granted only upon a showing that:

(A) good cause exists because an emergency situation has occurred;

(B) the waiver is necessary to provide adequate and efficient service or to preserve the property of the public service company devoted to public use;

(C) measures will be taken, as the board deems appropriate, to minimize significant adverse impacts under the criteria specified in subdivisions (b)(5) and (8) of this section; and

(D) taking into account any terms, conditions and safeguards that the board may require, the waiver will promote the general good of the state.

(5) Upon the expiration of a waiver, if a certificate of public good has not been issued under this section, the board shall require the removal, relocation or alteration of the facilities subject to the waiver, as it finds will best promote the general good of the state.

(1) Notwithstanding other provisions of this section, and without limiting any existing authority of the governor, and pursuant to 20 V.S.A. § 9(10) and (11), when the governor has proclaimed a state of emergency pursuant to 20 V.S.A. § 9, the governor, in consultation with the chair of the public service board and the commissioner of the department of public service or their designees may waive the prohibitions contained in this section upon site preparation for or construction of an electric transmission facility or a generation facility necessary to assure the stability or reliability of the electric system or a natural gas facility. Waivers issued under this subsection shall be subject to such conditions as are required by the governor, and shall be valid for the duration of the declared emergency plus 180 days, or such lesser overall term as determined by the governor. Upon the expiration of a waiver under this subsection, if a certificate of public good has not been issued u

nder this section, the board shall require the removal, relocation, or alteration of the facilities, subject to the waiver, as the board finds will best promote the general good of the state.

(m) In any matter with respect to which the board considers the operation of a nuclear energy generating plant beyond the date permitted in any certificate of public good granted under this title, including any certificate in effect as of January 1, 2006, the board shall evaluate the application under current assumptions and analyses and not an extension of the cost benefit assumptions and analyses forming the basis of the previous certificate of public good for the operation of the facility.

(n)(1) No company as defined in section 201 of this title and no person as defined in 10 V.S.A. § 6001(14) may place or allow the placement of wireless communications facilities on an electric transmission or generation facility located in this state, including a net-metered system, without receiving a certificate of public good from the public service board pursuant to this subsection. The public service board may issue a certificate of public good for the placement of wireless communications facilities on electric transmission and generation facilities if such placement is in compliance with the criteria of this section and board rules or orders implementing this section. In developing such rules and orders the board:

(A) may waive the requirements of this section that are not applicable to wireless telecommunication facilities, including but not limited to criteria that are generally applicable to public service companies as defined in this title;

(B) may modify notice and hearing requirements of this title as it deems appropriate;

(C) shall seek to simplify the application and review process as appropriate; and

(D) shall be aimed at furthering the state's interest in ubiquitous mobile telecommunications and broadband service in the state.

(2) Notwithstanding subdivision (1)(B) of this subsection, if the board finds that a petition filed pursuant to this subsection does not raise a significant issue with respect to the criteria enumerated in subdivisions (b)(1), (3), (4), (5), and (8) of this section, the board shall issue a certificate of public good without a hearing. If the board fails to issue a final decision or identify a significant issue with regard to a completed petition made under this section within 60 days of its filing with the clerk of the board and service to the director of public advocacy for the department of public service, the petition is deemed approved by operation of law. The rules required by this subsection shall be adopted within six months of the effective date of this section, and rules under this section may be adopted on an emergency basis to comply with the dates required by this section. For purposes of this subsection, "wireless communication facilities" include antennae, relate


d equipment, and equipment shelter, but do not include equipment used by utilities exclusively for intra- and inter-utility communications.

(o) The board shall not reject as incomplete a petition under this section for a wind generation facility on the grounds that the petition does not specify the exact make or dimensions of the turbines and rotors to be installed at the facility as long as the petition

provides the maximum horizontal and vertical dimensions of those turbines and rotors and the maximum decibel level that the turbines and rotors will produce as measured at the nearest residential structure over a 12-hour period commencing at 7:00 p.m. (Added 1969, No. 69, § 1, eff. April 18, 1969; amended 1969, No. 207 (Adj. Sess.), § 12, eff. March 24, 1970; 1971, No. 208 (Adj. Sess.), eff. March 31, 1972; 1975, No. 23; 1977, No. 11, §§ 1, 2; 1979, No. 204 (Adj. Sess.), § 31, eff. Feb. 1, 1981; 1981, No. 111 (Adj. Sess.); 1983, No. 45; 1985, No. 48, § 1; 1987, No. 65, § 1, eff. May 28, 1987; No. 67, § 14; 1987, No. 273 (Adj. Sess.) § 1, eff. June 21, 1988; 1989, No. 256 (Adj. Sess.), § 10(a), eff. Jan. 1, 1991; 1991, N

o. 99, §§ 3, 4; 1991, No. 259 (Adj. Sess.), §§ 6, 7; 1993, No. 21, § 10, eff. May 12, 1993; 1993, No. 159 (Adj. Sess.), § 1a, eff. May 19, 1994; 2003, No. 42, § 2, eff. May 27, 2003; 2003, No. 82 (Adj. Sess.), §§ 2, 3; 2005, No. 160 (Adj. Sess.), §§ 2, 3; 2007, No. 79, § 16, eff. June 9, 2007; 2009, No. 6, §§ 1, 2, 3, eff. April 30, 2009; No. 45, § 7, eff. May 27, 2009; 2009, No. 146 (Adj. Sess.), § F30; 2011, No. 47, § 5; No. 62, § 26.)

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# Overview of the Section 248 Process

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# What is Section 248?

- Requires energy, gas, telecom, and water developers to obtain a **Certificate of Public Good (CPG)** from the Public Service Board
- Board considers 10 statutory criteria, including environmental criteria from Act 250 plus issues like need, reliability, economic benefit



<http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=30&Chapter=005&Section=00248>

# Who is the Public Service Board?

**Public Service Board** = the judges



**PSB Mission:** To ensure the provision of high quality public utility services in Vermont at minimum reasonable costs, consistent with the long-term public good of the state....

*<http://psb.vermont.gov/>*

# What do we mean by “Public Interest” and “Public Good?”

- Balanced good of all consumers in state
- To receive CPG, projects must meet these criteria:
  - **Orderly development** of the region
  - **Demand for service** (present and future)
  - **System stability & reliability**
  - **Economic benefit** to state & residents
  - **No undue adverse effect on esthetics, historic sites, air and water purity, the natural environment, and public health and safety**



# Participating in 248: Formal Parties and Members of the Public

- Formal Party to a Case

- May provide testimony
- May participate in hearings
- Must follow Board rules
- Subject to discovery and cross-examination

- Members of the Public

- May speak at public hearings
- May send the Board written comments
- May *not* participate in hearings
- May petition Board to become formal parties

# Automatic Formal Party #1: PSD

**The Public Service Department** = represents the interests of the people of the state as a whole



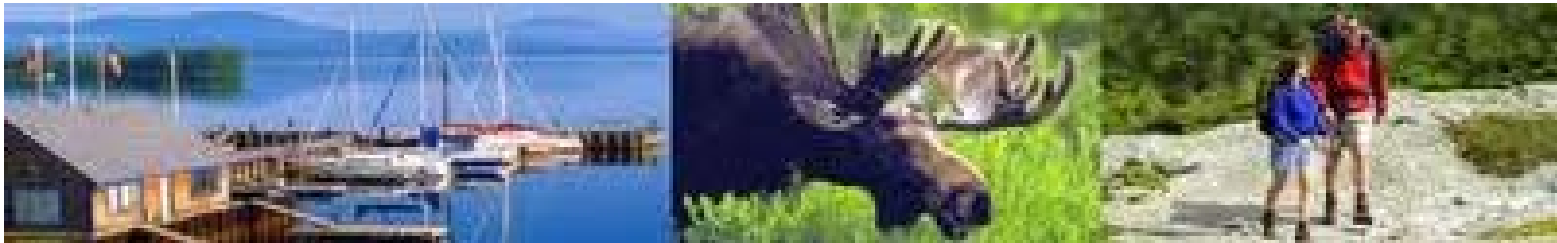
- Represents public interest in utility cases
- Provides long-range planning for the state's energy and telecom needs
- Ensures all Vermonters share in the benefits of modern communications
- Administers federal energy programs
- Resolves utility customer complaints
- Informs public about utility-related matters
- Makes and administers power purchase contracts

*<http://publicservice.vermont.gov/>*



# Automatic Formal Party #2: ANR

**Agency of Natural Resources** = protects the environment



**ANR Mission:** To draw from and build upon Vermonters' shared ethic of responsibility for our natural environment, an ethic that encompasses a sense of place, community and quality of life, and understanding that we are an integral part of the environment and that we must all be responsible stewards for this and future generations.

*<http://www.anr.state.vt.us/>*

# Other Formal Parties

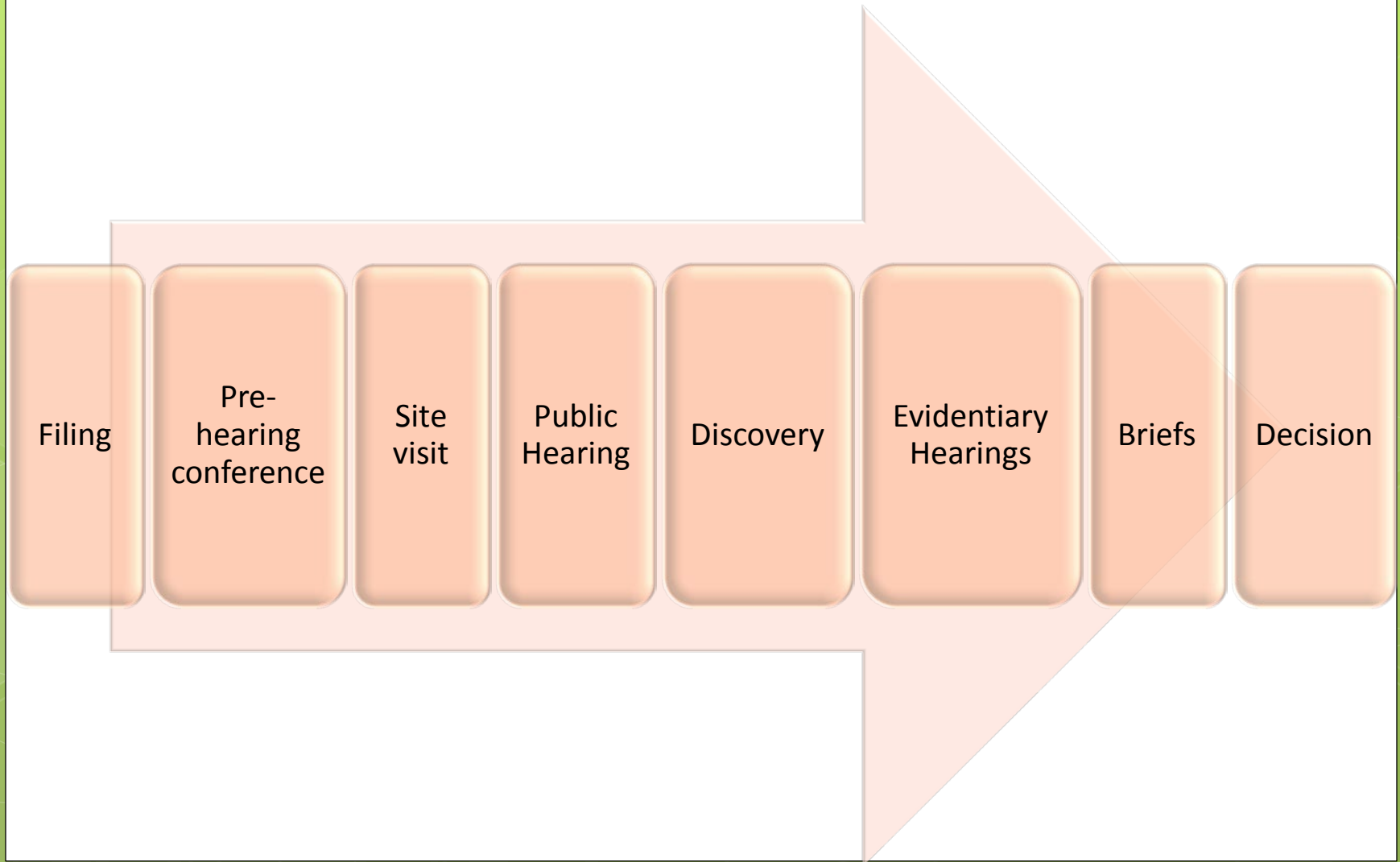
**The utilities or project developers** = automatic formal parties

**Intervenors** = must be granted party status by the Board via the formal “intervention” process; e.g. landowners, environmental organizations, public interest groups, business organizations.

# Who Receives Notice & Other Information?

- *Construction plans 45 days prior to petition filing:* **municipal and regional planning commissions**
- *Notice when petition is filed:* Certain **state agencies and affected towns, local and regional planning commissions, adjoining landowners**
- *Notices and orders from Board:* **Individuals and organizations** that have asked to be added to the Board's mailing list as an **"interested person"**
- *Everything:* **Formal parties, including those granted intervenor status**

# 248 Process: Step by Step



# 248 Process: Filing

- 45-day notice period
- Developer files petition, along with supporting testimony and exhibits
- Board assigns a docket number

**STATE OF VERMONT  
PUBLIC SERVICE BOARD**

Petition of Beaver Wood Energy Pownal, LLC ) for a Certificate of Public Good, pursuant to 30 ) V.S.A. § 248, to install and operate a Biomass ) Energy Facility and an integrated wood pellet ) manufacturing facility located north of the old ) Green Mountain Racetrack in Pownal, Vermont, ) to be known as the "Pownal Biomass Project" )	Docket No. ____
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**PETITION FOR CERTIFICATE OF PUBLIC GOOD**

NOW COMES Beaver Wood Energy Pownal, LLC ("BWE"), and files this Petition, pursuant to 30 V.S.A. § 248 and Public Service Board (the "Board") Rule 5.400, requesting that the Board issue a Certificate of Public Good for the Beaver Wood Energy Pownal Biomass Facility (the "Project") and requests the expedited scheduling of a pre-hearing conference to address BWE's request for permission to initiate certain limited construction activity in December of 2010 as set forth in the Motion for Preliminary Approval filed simultaneously herewith.

By this Petition, BWE represents as follows:

1. BWE is a Delaware limited liability company registered to do business in the State of Vermont with an office located at 230 West Street, Rutland, Vermont 05701. Its members are Thomas Emero, William Bousquet, and Ted Verrill.
2. BWE has developed a project plan to build and operate a 29.5 MW biomass electric generation facility and fully integrated wood pellet manufacturing plant on certain leased premises consisting of 45 acres of land located north of the old Green Mountain Racetrack in Pownal, Vermont.

# 248 Process: Prehearing Conference



- At the beginning of a case
- To identify parties, issues, schedule – including intervention, filing deadlines
- May set date for a public hearing and site visit
- Board issues Prehearing Conference Memorandum addressing issues above and including “service list” of all parties and interested persons.



# 248 Process: Determining Parties

- Person or organization may file a motion to intervene, “as of right,” based on **substantial individualized interest** which:
  - may be adversely affected
  - is not protected by other parties or alternative means
  - won’t unduly delay proceedings or prejudice parties/public
- Person or organization may also file a motion to intervene “permissively,” within reason

**TIP:** Read Board Rule 2.209

([http://psb.vermont.gov/sites/psb/files/rules/OfficialAdoptedRules/2000 Rules of Practice.pdf](http://psb.vermont.gov/sites/psb/files/rules/OfficialAdoptedRules/2000_Rules_of_Practice.pdf))

# Determining Parties, cont.

- Motion to intervene must be filed with the Board and all parties
- Board will issue order granting or denying motion; may restrict intervenor's participation to particular issues or require party cooperation
- Intervenors often represented by an attorney, though are allowed to represent themselves ("pro se"). Pro se intervenors have both rights and responsibilities of an attorney



# 248 Process: Site Visit

- May include discussion of:
  - Description of project
  - Viewing of existing conditions
  - Explanation of how conditions will be altered
  - Identification of relevant landscape features, discussion of potential effects
  - Identification/visits to potential alternative locations
- Not part of evidentiary record unless Board grants entry of observations or facts into evidentiary hearings



# 248 Process: Public Hearing

- Allows Board to hear comments and concerns from general public
  - Transcribed by court reporter, becomes part of public file
  - Not part of evidentiary record
  - Raises new issues/perspectives that Board can consider and ask parties to present evidence on
  - Public also encouraged to submit written comments to Board by email or mail





## 248 Process: Discovery

- Parties ask petitioner questions about pre-filed testimony, file their own written testimony & exhibits
- Testimony & exhibits admitted into evidentiary record
- Parties ask each other questions about their testimony & exhibits, in order to understand positions, formulate responsive testimony, and prepare cross-examination
- Not automatically part of the evidentiary record

**TIP:** All testimony should provide facts – i.e., opinions should be accompanied by some basis of fact.

# 248 Process: Evidentiary Hearings (aka Technical Hearings)

- Like a trial, except testimony prefiled in writing before the hearing
- Prefiled testimony entered into evidentiary record under oath
- Witnesses called to testify under oath and may be cross-examined
- Parties may not provide new testimony unless authorized



## 248 Process: Briefs



- Filed by parties at close of evidentiary hearings, typically in two rounds – initial and reply
- Not evidence, and no new issues may be raised
- Opportunity for parties to cite facts from the record and applicable statutes, rules, regulations, precedent and explain their position for Board to consider

# 248 Process: Decision



- Issued by Board after briefs submitted
- Must be based on evidentiary record
- Includes findings of fact from 248 criteria and conclusions of law
- If issued by hearing officer, parties can file written comments on the proposal and ask for oral argument before Board
- Subject to motions for reconsideration
- May be appealed to Vermont Supreme Court



# Alternative 248 Procedures

## 248(j)

- Expedited review of certain projects of limited size & scope
- Board may issue order without holding public or evidentiary hearings

## 248(k)

- Allows Board to temporarily waive CPG requirement if certain conditions met – usually emergency situations

# Recap: Ways to Participate in a § 248 Case

## Obtain “party” status by following PSB rule 2.209

- Being a party has rights and responsibilities (you get to cross-examine witnesses; you get all the filings but also have to serve on everyone else; you have to respond to discovery; you can file motions; you have to advocate within the rules)

## Become an “interested person”

- You get the major notices and pleadings in the case

## Provide public comment


- You appear at a public hearing and voice your questions, concerns, or comments on the project

Resource:

*Citizens Guide to the Vermont Public Service Board's Section 248 Process:*

<http://psb.vermont.gov/sites/psb/files/publications/Citizens%27%20Guide%20to%20248%20February%2014%202012.pdf>

[Or go to <http://psb.vermont.gov> and search: "citizens' guide"]



248

# Vermont Agency of Natural Resources (ANR) Role in 248

ANR consists of four branches that provide a range of services to Vermonters:

- Central Office
- Department of Fish and Wildlife
- Department of Environmental Conservation (DEC)
- Department of Forests, Parks and Recreation

ANR is required by law to conduct environmental review of Sec. 248 applications.

# VT ANR

- 30 V.S.A. § 248 (a)(4)(E): The agency of natural resources shall appear as a party in any proceedings held under this subsection, shall provide evidence and recommendations concerning any findings to be made under subdivision (b)(5) of this section, and may provide evidence and recommendations concerning any other matters to be determined by the board in such a proceeding.

# VT ANR

- 30 V.S.A. § 248 (b)(5): with respect to an in-state facility, will not have an undue adverse effect on esthetics, historic sites, air and water purity, the natural environment and the public health and safety, with due consideration having been given to the criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8) and (9)(K);

# VT ANR

- No Undue Adverse Impact On:
  - Air and Water Quality
    - Headwaters, streams, wetlands, etc.
  - Historic Sites
  - Rare and Irreplaceable Natural Areas
  - Necessary Wildlife Habitat
  - Habitat Fragmentation
  - Endangered Species
- Applicants may not jeopardize or interfere with the public's use, enjoyment or access to public lands, facilities or services.

# VT ANR

- In order to confirm 'No Undue Adverse Impact', ANR requires a comprehensive pre-construction resource assessment.
  - ANR reviews proposed site based on available data and provides applicant initial observations.
  - ANR staff work with applicant's consultants to design field studies and wildlife monitoring protocols to gather additional information about the site.
  - If a project is permitted, ANR may require post-construction monitoring to track actual impacts on wildlife and resources.



# VT ANR

- Natural Resource Assessment may require more than two years of field work.
- ANR requires this assessment prior to the filing of a petition.
- ANR staff have typically invested significant time and resources in reviewing a proposed sites well before a permit application is filed.

# VT ANR

- As information is gathered about a site, ANR shares any concerns or 'red flags' with applicant – informs them of resource attributes that potentially may be unduly impacted by the proposed project.
- By assessing the resource values early in the process, ANR gives the applicant as much information possible to decide whether to go forward with the project, revisit the design, or explore an alternative site.

# VT ANR

- If a petition is filled, ANR participates fully in the proceedings and provides expert testimony per the request of the PSB.
- In the course of the proceedings ANR may reach agreement with the applicant on certain measures or modifications to the project that minimize its impact to particular resource values.
  - ANR would recommend the PSB adopt those measures as a condition of the CPG.

# VT ANR

- If ANR believes a project poses an undue adverse impact to the natural environment that cannot be mitigated, it will recommend the PSB find against the petition on those grounds.
- If a CPG is granted, the applicant may still need to obtain additional stand-alone permits from the Department of Environmental Conservation (DEC).

# VT ANR

- ANR Resources

- Environmental Interest Locator
  - <http://www.anr.state.vt.us/site/html/maps.htm>
- Sec. 248 Docket Website:
  - <http://www.anr.state.vt.us/site/cfm/legal/dockets.cfm>
- Natural Resources Map:
  - Available January 2013
- Available to answer question and take comments regarding the resource attributes of a given site.

# Supplementary Slides

# Criteria of §248 (b)(1) – (5)

- (b) Before the public service board issues a certificate of public good as required under subsection (a) of this section, it shall find that the purchase, investment or construction:
- (1) with respect to an in-state facility, will not unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality. However, with respect to a natural gas transmission line subject to board review, the line shall be in conformance with any applicable provisions concerning such lines contained in the duly adopted regional plan; and, in addition, upon application of any party, the board shall condition any certificate of public good for a natural gas transmission line issued under this section so as to prohibit service connections that would not be in conformance with the adopted municipal plan in any municipality in which the line is located;
- (2) is required to meet the need for present and future demand for service which could not otherwise be provided in a more cost effective manner through energy conservation programs and measures and energy-efficiency and load management measures, including but not limited to those developed pursuant to the provisions of subsection 209(d), section 218c, and subsection 218(b) of this title;
- (3) will not adversely affect system stability and reliability;
- (4) will result in an economic benefit to the state and its residents;
- (5) with respect to an in-state facility, will not have an undue adverse effect on esthetics, historic sites, air and water purity, the natural environment and the public health and safety, with due consideration having been given to the criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8) and (9)(K);

# Criteria of § 248(b)(6)-(10)

- (6) with respect to purchases, investments, or construction by a company, is consistent with the principles for resource selection expressed in that company's approved least cost integrated plan;
- (7) except as to a natural gas facility that is not part of or incidental to an electric generating facility, is in compliance with the electric energy plan approved by the department under section 202 of this title, or that there exists good cause to permit the proposed action;
- (8) does not involve a facility affecting or located on any segment of the waters of the state that has been designated as outstanding resource waters by the water resources board, except that with respect to a natural gas or electric transmission facility, the facility does not have an undue adverse effect on those outstanding resource waters;
- (9) with respect to a waste to energy facility, is included in a solid waste management plan adopted pursuant to 24 V.S.A. § 2202a, which is consistent with the state solid waste management plan; and
- (10) except as to a natural gas facility that is not part of or incidental to an electric generating facility, can be served economically by existing or planned transmission facilities without undue adverse effect on Vermont utilities or customers.



**Citizens' Guide to the Vermont Public Service Board's  
Section 248 Process**

Vermont Public Service Board  
112 State Street  
Montpelier, VT 05620  
802-828-2358  
<http://psb.vermont.gov>

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Several people contributed time and effort reviewing drafts of this Guide. The Board extends its gratitude to these individuals. The Board especially appreciates the contribution of Carter Scott, a former legal intern with the Board, who was responsible for the early drafts of this Guide.

Any thoughts or questions regarding this Guide should be directed to the Clerk of the Board: 802-828-2358 or [psb.clerk@state.vt.us](mailto:psb.clerk@state.vt.us).

## **Overview**

The Vermont General Assembly, by enacting Section 248 of Title 30, required companies to obtain approval from the Public Service Board (Board) before beginning site preparation or construction of electric transmission facilities, electric generation facilities and certain gas pipelines within Vermont. Section 248 also requires Board approval for some long-term contracts for purchasing power from outside Vermont and for some investments in transmission and generation facilities outside Vermont.

This Guide provides a general introduction to the process used by the Board to consider requests for approval pursuant to Section 248. It is not intended to provide all information necessary to participate in a Section 248 proceeding. The Board is a quasi-judicial agency that is required to function in a manner similar to a court. Participation in a particular case would require a review of legal requirements as applied to the unique circumstances of that case. It is not possible to distill the numerous possible situations into an introductory guide. It would likely prove helpful for those interested in participating in a Section 248 proceeding to visit the Board's offices and review the file of a previous Section 248 case. This review would provide examples of the various documents and processes discussed in this Guide.

## **The Public Service Board**

The Public Service Board (Board) is a quasi-judicial agency that regulates electric power companies, telephone service providers, cable television providers, pipeline gas companies and some private water companies. As a quasi-judicial body, the Board conducts evidentiary hearings and issues decisions (typically referred to as Orders) that can be appealed to the Vermont Supreme Court. The Board also has the authority to promulgate rules on utility matters. The Board's rules include procedural requirements applicable to anyone who participates in Board proceedings, and substantive requirements that Vermont utilities must comply with.

The Board itself consists of a full-time Chairman and two part-time Board Members, all of whom are appointed for staggered six-year terms by the Governor. The Board is staffed by attorneys and experts, including: financial analysts, environmental analysts, engineers, and policy analysts. For a majority of the cases, the Board assigns its staff to serve as Hearing

Officers. In such cases, the Hearing Officer presides over the case and prepares a Proposal for Decision (PFD) for the Board's consideration and ultimate determination.<sup>1</sup>

Due to the quasi-judicial nature of the Board, certain types of communication between Board members or staff and other persons, referred to as "ex parte" communications, are prohibited by the following Vermont state law:

members or employees of any agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor; in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate.<sup>2</sup>

### Section 248

Section 248 establishes requirements for the approval of in-state electric transmission and generation construction projects, as well as certain other types of projects. Prior to beginning site preparation or constructing a proposed project, the petitioner must receive a certificate of public good from the Board.<sup>3</sup> When determining whether to grant a certificate of public good for a proposed project, the Board considers whether the proposed project meets ten statutory criteria (see 30 V.S.A. § 248, Appendix A, attached). These criteria include site-specific environmental criteria incorporated from Act 250, in addition to general issues such as need, reliability, and economic benefit.

### **How to Participate in the Section 248 Process**

There are two ways to participate in the 248 process: as a formal party to a case, and as a member of the public. Formal parties may provide testimony and participate in evidentiary hearings. All formal parties must follow the Board's procedural rules,<sup>4</sup> and are subject to the

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<sup>1</sup>While this guide will refer mostly to the Board, the Hearing Officers perform many of the functions outlined in this guide.

<sup>2</sup>30 V.S.A. § 813.

<sup>3</sup>In addition to Section 248 approval, the petitioner must also obtain all other required state and federal environmental permits.

<sup>4</sup>The Board's rules can be found at the Board's website:  
<http://psb.vermont.gov/statutesrulesandguidelines/currentrules>.

rules governing discovery and cross-examination. The Board's rules incorporate the Vermont Rules of Civil Procedure<sup>5</sup> and the Vermont Rules of Evidence.<sup>6</sup> Members of the public may speak at public hearings and send the Board written comments, but may not participate in evidentiary hearings. More information about how members of the public may participate in the Section 248 Process is included in the section below titled "Public Hearing."

Some entities are automatically formal parties to the Section 248 cases. These include:

- the company that filed the request for Board approval (the "Petitioner");
- the Department of Public Service, which represents the public interest in cases before the Board and is responsible for long-range utility planning for the State: and
- the Agency of Natural Resources, which manages the State's natural resources and oversees Vermont's environmental regulations.

Members of the public and organizations may become formal parties to the case through the intervention process described below. People and organizations that meet these criteria may be granted party status by the Board, and are known as "intervenors." Examples of intervenors are landowners, environmental organizations, public interest groups and business organizations. The process for becoming an intervenor is described in the section below titled "Intervention - Becoming a Party to a Case."

Although not automatically parties to the case, certain state agencies and affected towns and local and regional planning commissions are required by statute to receive notice, pursuant to 30 V.S.A. § 248(A)(4)(C). In addition, plans for construction of facilities covered by Section 248 must be provided by the petitioner to the relevant municipal and regional planning commissions at least 45 days prior to the date that the petition is filed with the Board.<sup>7</sup> Board Rule 5.400 provides for individual notice to adjoining landowners.

Individuals and organizations can also request that they be added to the Board's mailing

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<sup>5</sup>Vermont Rules of Civil Procedure can be found at:  
<http://198.187.128.12/vermont/lpext.dll?f=templates&fn=fs-main.htm&2.0>

<sup>6</sup>Vermont Rules of Evidence can be found at:  
<http://198.187.128.12/vermont/lpext.dll?f=templates&fn=fs-main.htm&2.0>

<sup>7</sup>See Section 248(f).

list as an "interested person," in which case they would receive notices and orders that the Board issues in the case. However, interested persons typically do not receive copies of other documents, such as filings made by parties to the proceeding. Notices and orders issued by the Board are posted on the Board's website, [www.psb.vermont.gov](http://www.psb.vermont.gov).

There are several steps between the filing of a petition for a certificate of public good and the final order from the Board approving, denying or modifying the proposed project. These are described below.

### Petition

The Board's Section 248 process begins when the utility or individual seeking to construct the proposed project files a petition for a certificate of public good with supporting prefiled testimony and exhibits. Once the Board has accepted a petition, it assigns a docket number to the case. This docket number should be referenced in all correspondence and inquiries regarding the case.

### Prehearing Conference

The Board holds a prehearing conference to determine how the case will be managed. The Board will generally identify potential parties, identify the issues necessary to resolve the case, and establish a schedule for the case, which includes: the site visit, public hearing, deadlines for the filing of motions to intervene, discovery, the filing of prefiled testimony, the evidentiary hearings, and briefs.

Following the prehearing conference, the Board will issue a Prehearing Conference Memorandum that addresses the issues described above. The Prehearing Conference Memorandum will also include a "service list," which is a list of all parties and interested persons.

When filing letters, testimony, briefs, and all other materials provided to the Board as a part of the proceedings, all parties (but not interested persons) on the service list must be provided with copies. All correspondence and filings must be addressed to the Clerk, Public Service Board, and must refer to the Docket number.

### Site Visit

The Board will generally conduct a site visit to the affected area in order to get a better sense of possible impacts from the proposed project. The site visit will typically include a discussion of the following matters: a description of the proposed project and its location(s); a viewing of the existing conditions at the location(s) of the proposed project; and an explanation of how the existing conditions would be altered by the proposed project. The site visit may also include identification of relevant landscape features, discussion of how such landscape features have affected or potentially should affect the project design and location, identification of and visits to potential alternative locations for the proposed project, and any other relevant matters for which a first-hand viewing of the site(s) may assist in understanding the issues before the Board. These site visits are not a part of the evidentiary record and are not relied upon in the final order, unless the Board, enters observations or facts from the site visit into the record at the evidentiary hearings on its own motion, or grants a party's request to do so.

### Public Hearing

Section 248 requires the Board to hold a public hearing in at least one county in which the project is proposed. The purpose of the public hearing is to allow the Board to hear comments and concerns regarding the proposed project from the general public. The comments are transcribed by a court reporter for later reference and become part of the case's public file. While these comments do not become part of the evidentiary record (under Vermont law the Board's decision must be based upon the evidence presented by formal parties during the evidentiary hearing), public comments play an important role by raising new issues or offering perspectives that the Board should consider and ask parties to present evidence on.

In order for those attending to become more familiar with the proposed project, the Board usually asks the petitioner to provide a brief description of the proposed project at the beginning of the public hearing. In order to provide for an efficient and orderly comment period, there will generally be a sign up sheet for individuals who wish to speak. The time allotted for each individual to speak will depend on several factors, including the number in attendance and any scheduling limitations on the Board's ability to use the available location.

The public is also encouraged to submit written comments to the Board electronically or via regular mail. Such written comments are treated the same way as public comments made at the public hearing. Please reference the Docket number when submitting a written comment.

Email:           psb.clerk@state.vt.us  
Mail:            Vermont Public Service Board  
                  112 State Street, Drawer 20  
                  Montpelier, VT 05620-2701

### Intervention — Becoming a Party to a Case

Typically, the next step after the prehearing conference is to determine who the formal parties to the case are. As explained earlier, some entities are automatically formal parties to a case. Other individuals or organizations may become formal parties as intervenors, if they meet certain criteria. Intervenors have the same rights and obligations as the other formal parties, including the requirement that parties follow the Board's procedural rules.<sup>8</sup> An intervenor may provide testimony<sup>9</sup> and participate in the evidentiary hearings and will be subject to the rules governing discovery and cross-examination.

In order to intervene one must file a motion to intervene explaining the nature of the interest which may be affected by the outcome of the proceeding. Typically, motions to intervene must address the following standards, as described in Board Rule 2.209(A) and (B) (See Appendix C, attached):

- (1) the person demonstrates substantial interest which may be adversely affected by the outcome of the case;
- (2) whether the applicant's interest will be adequately protected by other parties;
- (3) whether alternative means exist by which the applicant's interest can be protected; and
- (4) whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or the public.

Persons wishing to intervene in a Board case should read closely Board Rule 2.209

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<sup>8</sup>The Board's procedural rules can be found at the Board's website:  
<http://psb.vermont.gov/statutesrulesandguidelines/currentrules>.

<sup>9</sup>See Board Rule 2.213(C) which describes the required format for written testimony.



(Appendix C of this Guide) and tailor any motion to intervene to their particular circumstances.

The motion to intervene, as well as any other filings in the case, must be filed with the Board and all parties.<sup>10</sup> Existing parties may comment on the intervention requests and the Board will issue an order granting or denying the motion to intervene.

In order to manage the case efficiently, the Board may restrict an intervenor's participation to the specific issues in which the intervenor may be affected, or may require that parties work cooperatively. See Board Rule 2.209(C) (Appendix C).

Often intervenors are represented by an attorney. Individuals may, however, represent themselves without the assistance of counsel (a "pro se" representation). Additionally, the Board may allow partnerships, corporations, and associations to be represented by an officer or an employee designated in writing by an officer of the corporation or association.<sup>11</sup> It is important to understand that when individuals appear pro se, they have most of the rights and responsibilities of an attorney.<sup>12</sup> If a pro se representative is unable to comply with its obligations under Board rules and Vermont law, the Board retains authority to require the party to retain counsel.

A motion to intervene must be accompanied by a Notice of Appearance, which lists the name and contact information for the individual or group.

### Prefiled Testimony

The petitioner files written testimony and exhibits with the original request for a certificate of public good. Other parties are provided the opportunity to file written testimony and exhibits after an opportunity to ask the petitioner about its filing during a process called "discovery" (explained below), and before the evidentiary hearing. Parties' ability to present evidence is generally limited to their prefiled testimony and exhibits. Any factual matters that a party wishes to convey to the Board must be contained in its prefiled testimony and exhibits. Witnesses who provide testimony should also provide some basis for the opinions they express.

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<sup>10</sup> Potential intervenors should request a service list for the docket from the Clerk of the Board.

<sup>11</sup> See Board Rule 2.101(B).

<sup>12</sup> See Board Rule 2.201(B).

For complex cases there may be additional rounds of testimony to respond to what other parties have submitted, referred to as "rebuttal" and "surrebuttal" testimony. The scope of prefiled testimony is narrowed with each round of testimony such that it may address only the testimony filed in the previous round. While rebuttal and surrebuttal testimony is normally submitted in the same manner as prefiled direct testimony, there are occasions when such testimony is conducted live during the evidentiary hearings.

Any objections to the admissibility of prefiled testimony or exhibits must be filed with the Board in writing no more than 30 days from the date the testimony or exhibit was prefiled, or five days before the date on which the testimony or exhibit will be offered into the evidentiary record, whichever occurs sooner.<sup>13</sup> Assuming the testimony is entered into the record, the witness is then subject to cross-examination on the testimony. Intervenors are also allowed to cross-examine the witnesses of the other parties.<sup>14</sup> The parties' testimony and exhibits, if admitted,<sup>15</sup> become part of the evidentiary record upon which the Board may rely in its final order.

### Discovery

Discovery is an opportunity to ask parties about what their witnesses have said and the exhibits they have provided. Discovery can be either written, called "interrogatories" or "requests for information," or oral, called "depositions." Written discovery is served on parties by mail or by hand (parties may also agree to conducting discovery through e-mail), and is typically in the form of written questions (e.g., What is Ms. Smith's basis for her belief that . . . ) or document requests (e.g., Please provide all the documents Mr. Johnson relied on in coming to the conclusion that . . . ). Depositions are an opportunity to ask questions of other parties'

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<sup>13</sup>See Board Rule 2.216(C).

<sup>14</sup>In larger cases with a significant number of parties, the Board may require the parties to propose a schedule for presenting witnesses and to provide estimates for the amount of time they each will need to conduct cross-examination of the others' witness(es). In such cases, once a schedule for witnesses is adopted by the Board, parties will be required to adhere to the schedule. Accordingly, being organized and prepared prior to cross-examining a witness is important.

<sup>15</sup>The testimony and exhibits of all parties are subject to evidentiary rules and may be admitted only if they are in conformance with these rules.

witnesses before the hearing and outside the presence of the Board. In certain circumstances, transcripts of depositions can be entered into evidence at the hearing. The purpose in asking these questions is many-fold, including understanding a party's position, formulating responsive testimony, and preparing cross-examination.

When a party has a good faith reason to believe that it does not need to provide answers or documents, they may object to the question or request. At that point parties are obligated under the Vermont Rules of Civil Procedure to work in good faith to resolve the dispute. If no such agreement can be reached, parties may go to the Board for resolution of the issue. Discovery is not automatically part of the evidentiary record, although parties may seek to introduce it as evidence either in prefiled testimony or seeking to introduce a witnesses' written responses to discovery questions during the cross-examination of that witness.

### Evidentiary Hearings

The evidentiary hearings are very much like a trial, except that testimony is prefiled in written form in advance of the hearing. During the evidentiary hearing, the prefiled written testimony is entered into the evidentiary record under oath in lieu of it actually being given live at the hearing. During the evidentiary hearings, witnesses are called to testify under oath and may be cross-examined by parties and the Board. Unless specifically authorized by the Board, parties may not use the evidentiary hearings to provide new testimony, not already included in their prefiled testimony and exhibits, from their witnesses.

### Briefs

At the close of the evidentiary hearings parties may file briefs with the Board. Briefs are not evidence. Rather, they provide the parties an opportunity to cite pertinent facts from the record, cite applicable statutes, rules, regulations, and precedent, and explain their position for the Board to consider including in the final order. Typically, two rounds of briefs are filed, an initial brief, and a reply brief. A reply brief, if needed, is limited to responding to arguments raised by other parties in their initial briefs. It is not an opportunity to raise new issues.

### Decision

Once the evidentiary hearings have been completed and the parties have been given the opportunity to submit briefs, the Board will issue a decision. This final Order must be based on the evidentiary record, and will include findings of fact under the Section 248 criteria (including the incorporated Act 250 criteria) as well as conclusions of law.

If the Board does not hear the case directly, the Hearing Officer will issue a proposal for decision. Parties will then have the opportunity to file written comments on the proposal for decision and ask for oral argument before the Board. The proposal for decision and any comments on it are submitted to the members of the Board for review and issuance of a final order.

Final Board Orders are subject to motions for reconsideration under the Rules of Civil Procedure. Any final decision by the Board may be appealed to the Vermont Supreme Court. Any appeals from a Board Order are governed by the Rules of Appellate Procedure.

## **Alternative Section 248 Procedures — Subsections 248(j) and 248(k)**

### Subsection 248(j)

This subsection provides for expedited review of proposed projects which meet certain criteria. Under the circumstances described in 30 V.S.A. § 248(j), if the Board finds that the project is of limited size and scope, does not raise a significant issue according to the requisite criteria, and the public interest is satisfied by the Section 248(j) procedures, the Board may issue an order without holding public or evidentiary hearings. Interested parties identified by statute, or those that request notification of specific types of petitions, will receive notice of a Section 248(j) petition. The Board also posts notice of Section 248(j) petitions on its website. The notice issued by the Board provides a deadline by which public comments on the petition may be filed. Specifically, the comments should address whether the petition raises a significant issue with respect to the criteria of Section 248(b). If the Board determines that the petition does raise a significant issue with respect to these criteria, it will hold evidentiary hearings on the criteria at issue.

### Section 248(k)

The statute allows the Board to waive, for a limited time, the requirement to obtain a certificate of public good prior to site preparation or construction if the following conditions are met:

- (A) good cause exists because an emergency situation has occurred;
- (B) the waiver is necessary to provide adequate and efficient service or to preserve the property of the public service company devoted to public use; and
- (C) taking into account any terms, conditions, and safeguards that the board may require, the waiver will promote the general good of the state.

Upon the filing of a petition under Section 248(k), the statute requires that the Board hold an expedited preliminary hearing. The statute provides the Board with flexibility in determining the appropriate notice of the hearing to affected municipalities, regional planning commissions, and state agencies.

This subsection applies only to emergency situations and is not intended to circumvent the usual review process pursuant to Section 248. Generally, a project that receives approval under Section 248(k) must receive a certificate of public good, filed for through the regular Section 248 or Section 248(j) process. If a certificate of public good is not granted in this later process, the project must be removed and the site returned to its prior condition.

### **Appendices**

Attached are appendices that include the full text of 30 V.S.A. § 248 (including the incorporated environmental criteria, Board Rule 2.201 – Practice Before the Board, Board Rule 2.209 – Intervention. The statutes and rules may change from time to time. Therefore parties may want to consult the Vermont Legislature's website for the most recent version of Section 248 (<http://www.leg.state.vt.us/statutes/statutes2.htm>)<sup>16</sup> and the Board's website for the most recent version of its rules (<http://psb.vermont.gov/statutesrulesandguidelines/currentrules>).

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<sup>16</sup>Please note that Section 248 is contained within Chapter 5 of Title 30.

## **Appendix A 30 V.S.A. §248**

(Also Available at Public Service Board Website <http://psb.vermont.gov>; “Vermont Statutes”)

30 V.S.A. § 248. New gas and electric purchases, investments, and facilities; certificate of public good.

(a) (1) No company, as defined in section 201 of this title, may:

(A) in any way purchase electric capacity or energy from outside the state, for a period exceeding five years, that represents more than one percent of its historic peak demand, or

(B) invest in an electric generation or transmission facility located outside this state unless the public service board first finds that the same will promote the general good of the state and issues a certificate to that effect.

(2) Except for the replacement of existing facilities with equivalent facilities in the usual course of business, and except for electric generation facilities that are operated solely for on-site electricity consumption by the owner of those facilities:

(A) no company, as defined in section 201 of this title, and no person, as defined in 10 V.S.A. § 6001(14), may begin site preparation for or construction of an electric generation facility or electric transmission facility within the state which is designed for immediate or eventual operation at any voltage, and

(B) no such company may exercise the right of eminent domain in connection with site preparation for or construction of any such transmission or generation facility, unless the public service board first finds that the same will promote the general good of the state and issues a certificate to that effect.

(3) No company, as defined in section 201 of this title, and no person, as defined in 10 V.S.A. § 6001(14), may in any way begin site preparation for or commence construction of any natural gas facility, except for the replacement of existing facilities with equivalent facilities in the usual course of business, unless the public service board first finds that the same will promote the general good of the state and issues a certificate to that effect pursuant to this section.

(A) For the purposes of this section, the term "natural gas facility" shall mean any natural gas transmission line, storage facility, manufactured-gas facility, or other structure incident to any of the above. For purposes of this section, a "natural gas transmission line" shall include any feeder main or any pipeline facility constructed to deliver natural gas in Vermont directly from a natural gas pipeline facility that has been certified pursuant to the Natural Gas Act, 15 U.S.C. § 717a et seq.

(B) For the purposes of this section, the term "company" shall not include a "natural gas company" (including a "person which will be a natural gas company upon completion of any proposed construction or extension of facilities"), within the meaning of the Natural Gas Act, 15 U.S.C. § 717a, et seq., provided however, that the term "company" shall include any "natural gas company" to the extent it proposes to construct in Vermont a natural gas facility that is not solely subject to federal jurisdiction under the Natural Gas Act.

(C) The public service board shall have the authority to, and may in its discretion, conduct a proceeding, as set forth in subsection (h) of this section, with respect to a natural gas facility proposed to be constructed in Vermont by a "natural gas company," for the purpose of developing an opinion in connection with federal certification or other federal approval proceedings.

(4) (A) With respect to a facility located in the state, the public service board shall hold a nontechnical public hearing on each petition for such finding and certificate in at least one county in which any portion of the construction of the facility is proposed to be located.

(B) The public service board shall hold technical hearings at locations which it selects.

(C) At the time of filing its application with the board, copies shall be given by the petitioner to the attorney general and the department of public service, and, with respect to facilities within the state, the department of health, agency of natural resources, historic preservation division, scenery preservation council, state planning office, agency of transportation, the agency of agriculture, food and markets and to the chairperson or director of the municipal and regional planning commissions and the municipal legislative body for each town and city in which the proposed facility will be located.

(D) Notice of the public hearing shall be published in a newspaper of general circulation in the county or counties in which the proposed facility will be located two weeks successively, the last publication to be at least 12 days before the day appointed for the hearing.

(E) The agency of natural resources shall appear as a party in any proceedings held under this subsection, shall provide evidence and recommendations concerning any findings to be made under subdivision (b)(5) of this section, and may provide evidence and recommendations concerning any other matters to be determined by the board in such a proceeding.

(b) Before the public service board issues a certificate of public good as required under subsection (a) of this section, it shall find that the purchase, investment or construction:

(1) with respect to an in-state facility, will not unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality. However, with respect to a natural gas transmission line subject to board review, the line shall be in conformance with any applicable provisions concerning such lines contained in the duly adopted regional plan; and, in addition, upon application of any party, the board shall condition any certificate of public good for a natural gas transmission line issued under this section so as to prohibit service connections that would not be in conformance with the adopted municipal plan in any municipality in which the line is located;

(2) is required to meet the need for present and future demand for service which could not otherwise be provided in a more cost effective manner through energy conservation programs and measures and energy-efficiency and load management measures, including

but not limited to those developed pursuant to the provisions of sections 209(d), 218c, and 218(b) of this title;

(3) will not adversely affect system stability and reliability;

(4) will result in an economic benefit to the state and its residents;

(5) with respect to an in-state facility, will not have an undue adverse effect on esthetics, historic sites, air and water purity, the natural environment and the public health and safety, with due consideration having been given to the criteria specified in 10 V.S.A. § 1424a(d) and § 6086(a)(1) through (8) and (9)(K);

\* \* \*

#### **INCORPORATED CRITERIA OF SECTION 248(b)(5)**

10 V.S.A. §1424a(d): Outstanding Resource Waters

(d) In making its decision, the board may consider, but shall not be limited to considering, the following:

(1) existing water quality and current water quality classification,

(2) the presence of aquifer protection areas,

(3) the waters' value in providing temporary water storage for flood water and storm runoff,

(4) the waters' value as fish habitat,

(5) the waters' value in providing or maintaining habitat for threatened or endangered plants or animals,

(6) the waters' value in providing habitat for wildlife, including stopover habitat for migratory birds,

(7) the presence of gorges, rapids, waterfalls, or other significant geologic features,

(8) the presence of scenic areas and sites,

(9) the presence of rare and irreplaceable natural areas,

(10) the presence of known archeological sites,

(11) the presence of historic resources, including those designated as historic districts or structures,

(12) existing usage and accessibility of the waters for recreational, educational, and research purposes and for other public uses,

(13) studies, inventories and plans prepared by local, regional, statewide, national, or international groups or agencies, that indicate the waters in question merit protection as outstanding resource waters,

(14) existing alterations, diversions or impoundments by permit holders under state or federal law.

10 V.S.A. §6086. Issuance of permit; conditions and criteria

(a) Before granting a permit, the board or district commission shall find that the subdivision or development;

(1) Will not result in undue water or air pollution. In making this determination it shall at least consider: the elevation of land above sea level; and in relation to the flood plains, the nature of soils and subsoils and their ability to adequately support waste disposal; the slope of the land and its effect on effluents; the availability of streams for disposal of effluents; and the applicable health and environmental conservation department



regulations.

(A) Headwaters. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision will meet any applicable health and environmental conservation department regulation regarding reduction of the quality of the ground or surface waters flowing through or upon lands which are not devoted to intensive development, and which lands are:

- (i) headwaters of watersheds characterized by steep slopes and shallow soils; or
- (ii) drainage areas of 20 square miles or less; or
- (iii) above 1,500 feet elevation; or
- (iv) watersheds of public water supplies designated by the Vermont department of health; or
- (v) areas supplying significant amounts of recharge waters to aquifers.

(B) Waste disposal. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision will meet any applicable health and environmental conservation department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells.

(C) Water conservation. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the design has considered water conservation, incorporates multiple use or recycling where technically and economically practical, utilizes the best available technology for such applications, and provides for continued efficient operation of these systems.

(D) Floodways. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria:

- (i) the development or subdivision of lands within a floodway will not restrict or divert the flow of flood waters, and endanger the health, safety and welfare of the public or of riparian owners during flooding; and
- (ii) the development or subdivision of lands within a floodway fringe will not significantly increase the peak discharge of the river or stream within or downstream from the area of development and endanger the health, safety, or welfare of the public or riparian owners during flooding.

(E) Streams. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision of lands on or adjacent to the banks of a stream will, whenever feasible, maintain the natural condition of the stream, and will not endanger the health, safety, or welfare of the public or of adjoining landowners.

(F) Shorelines. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other criteria, the development or subdivision of shorelines must of necessity be located on a shoreline in order to fulfill the purpose of the development or subdivision, and the development or subdivision will, insofar as possible and reasonable in light of its purpose:

- (i) retain the shoreline and the waters in their natural condition,
- (ii) allow continued access to the waters and the recreational opportunities provided by the waters,
- (iii) retain or provide vegetation which will screen the development or subdivision from the waters, and
- (iv) stabilize the bank from erosion, as necessary, with vegetation cover.

(G) Wetlands. A permit will be granted whenever it is demonstrated by the applicant, in addition to other criteria, that the development or subdivision will not violate the rules of the water resources board, as adopted under section 905(9) of this title, relating to significant wetlands.

- (2) Does have sufficient water available for the reasonably foreseeable needs of the subdivision or development.
- (3) Will not cause an unreasonable burden on an existing water supply, if one is to be utilized.
- (4) Will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.
- (5) Will not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed.
- (6) Will not cause an unreasonable burden on the ability of a municipality to provide educational services.
- (7) Will not place an unreasonable burden on the ability of the local governments to provide municipal or governmental services.
- (8) Will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.

(A) Necessary wildlife habitat and endangered species. A permit will not be granted if it is demonstrated by any party opposing the applicant that a development or subdivision will destroy or significantly imperil necessary wildlife habitat or any endangered species, and

- (i) the economic, social, cultural, recreational, or other benefit to the public from the development or subdivision will not outweigh the economic, environmental, or recreational loss to the public from the destruction or imperilment of the habitat or species, or
- (ii) all feasible and reasonable means of preventing or lessening the destruction, diminution, or imperilment of the habitat or species have not been or will not continue to be applied, or
- (iii) a reasonably acceptable alternative site is owned or controlled by the applicant which would allow the development or subdivision to fulfill its intended purpose.

(9)(K) Development affecting public investments. A permit will be granted for the development or subdivision of lands adjacent to governmental and public utility facilities, services, and lands, including, but not limited to, highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe

lines, parks, hiking trails and forest and game lands, when it is demonstrated that, in addition to all other applicable criteria, the development or subdivision will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands.

#### **END OF INCORPORATED CRITERIA**

\* \* \*

- (6) with respect to purchases, investments, or construction by a company, is consistent with the principles for resource selection expressed in that company's approved least cost integrated plan;
  - (7) except as to a natural gas facility that is not part of or incidental to an electric generating facility, is in compliance with the electric energy plan approved by the department under section 202 of this title, or that there exists good cause to permit the proposed action;
  - (8) does not involve a facility affecting or located on any segment of the waters of the state that has been designated as outstanding resource waters by the water resources board, except that with respect to a natural gas or electric transmission facility, the facility does not have an undue adverse effect on those outstanding resource waters;
  - (9) with respect to a waste to energy facility, is included in a solid waste management plan adopted pursuant to 24 V.S.A. § 2202a, which is consistent with the state solid waste management plan; and
  - (10) except as to a natural gas facility that is not part of or incidental to an electric generating facility, can be served economically by existing or planned transmission facilities without undue adverse effect on Vermont utilities or customers.
- (c) In the case of a municipal plant or department formed under local charter or chapter 79 of this title or a cooperative formed under chapter 81 of this title, any proposed investment, construction or contract which is subject to this section shall be approved by a majority of the voters of a municipality or the members of a cooperative voting upon the question at a duly warned annual or special meeting to be held for that purpose. The municipal department or cooperative shall provide to the voters or members, as the case may be, written assessment of the risks and benefits of the proposed investment, construction or contract which were identified by the public service board in the certificate issued under this section. The municipal department or cooperative also may provide to the voters an assessment of any other risks and benefits.
- (d) Nothing in this section shall be construed to prohibit a company from executing a letter of intent or entering into a contract before the issuance of a certificate of public good under this section, provided that the company's obligations under that letter of intent or contract are made subject to compliance with the requirements of this section.
- (e) Before a certificate of public good is issued for the construction of a nuclear fission plant within the state the public service board shall obtain the approval of the general assembly and the assembly's determination that the construction of the proposed facility will promote the general welfare. The public service board shall advise the general assembly of any petition submitted under this section for the construction of a nuclear fission plant within this state, by written notice delivered to the speaker of the house of representatives and to the president of the senate.

The department of public service shall submit recommendations relating to the proposed plant, and shall make available to the general assembly all relevant material. The requirements of this subsection shall be in addition to the findings set forth in subsection (b) of this section.

(f) However, plans for the construction of such a facility within the state must be submitted by the petitioner to the municipal and regional planning commissions no less than 45 days prior to application for a certificate of public good under this section, unless the municipal and regional planning commissions shall waive such requirement. Such municipal or regional planning commission may hold a public hearing on the proposed plans. Such commissions shall make recommendations, if any, to the public service board and to the petitioner at least 7 days prior to filing of the petition with the public service board.

(g) However, notwithstanding the above, plans involving the relocation of an existing transmission line within the state must be submitted to the municipal and regional planning commissions no less than 21 days prior to application for a certificate of public good under this section.

(h) The position of the state of Vermont in federal certification or other approval proceedings for natural gas facilities shall be developed in accordance with this subsection.

(1) A natural gas facility requiring federal approval shall apply to the public service board for an opinion under this section (on or before the date on which the facility applies for such federal approval in the case of a facility that has not applied for federal approval before January 16, 1988). Any opinion issued under this subsection shall be developed based upon the criteria established in subsection (b) of this section.

(2) If the board conducts proceedings under this subsection, the department shall give due consideration to the board's opinion as to facilities of a natural gas company, and that opinion shall guide the position taken before federal agencies by the state of Vermont, acting through the department of public service under section 215 of this title.

(3) If the board conducts proceedings under this subsection, it may consolidate them, solely for purposes of creating a common record, with any related proceedings conducted under subdivision (a)(3) of this section.

(i) (1) No company, as defined in sections 201 and 203 of this title:

(A) may invest in a gas-production facility located outside this state, or

(B) may execute a contract for the purchase of gas from outside the state, for resale to firm-tariff customers, that

(i) is for a period exceeding five years, or

(ii) represents more than ten percent of that company's peak demand for resale to firm-tariff customers, without approval by the board, after giving notice of such investment, or filing a copy of that contract, with the board and the department at least 30 days prior to the proposed effective date of that contract or investment.

(2) The department and the board shall consider within 30 days whether to investigate the proposed investment or contract.

(3) The board, upon its own motion, or upon the recommendation of the department, may determine to initiate an investigation. If the board does not initiate an investigation within such 30 day period, the contract or investment shall be deemed to be approved. If the board determines to initiate an

investigation, it shall give notice of that decision to the company proposing the investment or contract, the department, and such other persons as the board determines are appropriate. The board shall conclude its investigation within 120 days of issuance of its notice of investigation, or within such shorter period as it deems appropriate. If the board fails to issue a decision within that 120 day period, the contract or investment shall be deemed to be approved. The board may hold informal, public or technical hearings on the proposed investment or contract.

(4) Nothing in this subsection shall prohibit a company from negotiating or adjusting periodically the price of other terms of supply through a supplement to such a contract, provided that the supplement falls within the terms specified in such a contract, as approved. The board's authority to investigate such adjustments under other authorities of this title shall not be impaired. Such a company shall file with the department and the board a copy of any such supplement to the contract or other documentation that states any terms that have been renegotiated or adjusted by the company at least 30 days prior to the effective date of the renegotiated or adjusted price or other terms.

(5) Nothing in this subsection shall be construed to prohibit a gas company from executing a development contract, a contract for design and engineering, a contract to seek regulatory approvals for a gas-production facility, or a letter of intent for such purchase of gas that makes the company's obligations under that letter of intent subject to the requirements of this subsection, prior to the filing with the board and department of such notice or proposed contract or pending any investigation under this subsection.

(j)(1) The board may, subject to such conditions as it may otherwise lawfully impose, issue a certificate of public good in accordance with the provisions of this subsection and without the notice and hearings otherwise required by this chapter if the board finds that:

(A) approval is sought for construction of facilities described in subdivision (a)(2) or (3) of this section;

(B) such facilities will be of limited size and scope;

(C) the petition does not raise a significant issue with respect to the substantive criteria of this section; and

(D) the public interest is satisfied by the procedures authorized by this subsection.

(2) Any party seeking to proceed under the procedures authorized by this subsection shall file a proposed certificate of public good and proposed findings of fact with its petition. The board shall give written notice of the proposed certificate to the parties specified in subdivision

(a)(4)(C) of this section, to any public interest organization that has in writing requested notice of applications to proceed under this subsection and to any other person found by the board to have a substantial interest in the matter. Such notice shall be published on the board's website and shall request comment within the board's website and shall request comment within 28 days of the initial publication on the question of whether the petition raises a significant issue with respect to the substantive criteria of this section. If the board finds that the petition raises a significant issue with respect to the substantive criteria of this section, the board shall hear evidence on any such issue.

(3) The construction of facilities authorized by a certificate issued under this subsection shall not require the approval of voters of a municipality or the members of a cooperative, as would otherwise be required under subsection (c) of this section.

(k) (1) Notwithstanding any other provisions of this section, the board may waive, for a specified and limited time, the prohibitions contained in this section upon site preparation for or construction of an electric transmission facility or a generation facility necessary to assure the stability or reliability of the electric system or a natural gas facility, pending full review under this section.

(2) A person seeking a waiver under this subsection shall file a petition with the board and shall provide copies to the department of public service and the agency of natural resources. Upon receiving the petition, the board shall conduct an expedited preliminary hearing, upon such notice to the governmental bodies listed in subdivision (a)(4)(C) of this section as the board may require.

(3) An order granting a waiver may include terms, conditions and safeguards, including the posting of a bond or other security, as the board deems proper, considering the scope and duration of the requested waiver.

(4) A waiver shall be granted only upon a showing that:

(A) good cause exists because an emergency situation has occurred;

(B) the waiver is necessary to provide adequate and efficient service or to preserve the property of the public service company devoted to public use;

(C) measures will be taken, as the board deems appropriate, to minimize significant adverse impacts under the criteria specified in subdivisions (b)(5) and (8) of this section; and

(D) taking into account any terms, conditions and safeguards that the board may require, the waiver will promote the general good of the state.

(5) Upon the expiration of a waiver, if a certificate of public good has not been issued under this section, the board shall require the removal, relocation or alteration of the facilities subject to the waiver, as it finds will best promote the general good of the state.

(l) Notwithstanding other provisions of this section, and without limiting any existing authority of the governor, and pursuant to subdivisions 9(10) and (11) of Title 20, when the governor has proclaimed a state of emergency pursuant to section 9 of Title 20, the governor, in consultation with the chair of the public service board and the commissioner of the department of public service or their designees may waive the prohibitions contained in this section upon site preparation for or construction of an electric transmission facility or a generation facility necessary to assure the stability or reliability of the electric system or a natural gas facility.

Waivers issued under this subsection shall be subject to such conditions as are required by the governor, and shall be valid for the duration of the declared emergency plus 180 days, or such lesser overall term as determined by the governor. Upon the expiration of a waiver under this subsection, if a certificate of public good has not been issued under this section, the board shall require the removal, relocation, or alteration of the facilities, subject to the waiver, as the board finds will best promote the general good of the state.

**Appendix B Public Service Board Rule 2.201 Practice Before the Board**

**(Also available at <http://psb.vermont.gov/statutesrulesandguidelines/currentrules>).**

(A) Notice of appearance. Attorneys shall file a written notice of appearance with respect to any matter in which they are representing a party. Except in the case of a consumer filing a consumer complaint, pro se representatives shall likewise file a notice of appearance. Except as otherwise provided by law, a party whose attorney has failed to comply with this requirement, or a party appearing by a pro se representative who has failed to comply with the requirements of this rule, shall not be entitled to notice or service of any document in connection with such matter, whether such notice or service is required to be made by the Board, by a party or by a person seeking party status. A copy of each notice of appearance shall, on the same day on which it is filed, be served by the party filing the same upon all persons or parties on whose behalf a notice of appearance has been filed. A list of such persons and parties will be provided by the clerk upon request.

(B) Pro se appearances. For purposes of these rules a person appearing pursuant to the authority of this section shall be known as a pro se representative. In its discretion, the Board may permit persons who are not attorneys to appear before it as follows: a partnership may be represented by a partner, and a corporation, cooperative or association may be represented by an officer thereof or by an employee designated in writing by an officer thereof. Such permission shall be given in all proceedings unless, because of their factual or legal complexity or because of the number of parties, the Board is of the opinion that there is a substantial possibility that the participation of a pro se representative will unnecessarily prolong such proceeding or will result in inadequate exposition of factual or legal matters. Notwithstanding the foregoing, any individual may be a pro se representative in his or her own cause. This rule shall in no respect relieve any person or party from the necessity of compliance with any applicable rule, law, practice, procedure or other requirement. Except as provided in Rule 2.201(D), anyone appearing as a pro se representative shall be under all the obligations of an attorney admitted to practice in this state with respect to the matter in which such person appears.

### **Appendix C Public Service Board Rule 2.209 Intervention**

**(Also available at <http://psb.vermont.gov/statutesrulesandguidelines/currentrules>).**

(A) Intervention as of right. Upon timely application, a person shall be permitted to intervene in any proceeding (1) when a statute confers an unconditional right to intervene; (2) when a statute confers a conditional right to intervene and the condition or conditions are satisfied; or (3) when the applicant demonstrates a substantial interest which may be adversely affected by the outcome of the proceeding, where the proceeding affords the exclusive means by which the applicant can protect that interest and where the applicant's interest is not adequately represented by existing parties.

(B) Permissive intervention. Upon timely application, a person may, in the discretion of the Board, be permitted to intervene in any proceeding when the applicant demonstrates a substantial interest which may be affected by the outcome of the proceeding. In exercising its discretion in this paragraph, the Board shall consider (1) whether the applicant's interest will be adequately protected by other parties; (2) whether alternative means exist by which the applicant's interest can be protected; and (3) whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or of the public.

(C) Conditions. Where a party has been granted intervention, the Board may restrict such party's participation to only those issues in which the party has demonstrated an interest, may require such party to join with other parties with respect to appearance by counsel, presentation of evidence or other matters, or may otherwise limit such party's participation, all as the interests of justice and economy of adjudication require.

(D) Procedure. An application to intervene shall be by motion made in accordance with these rules. The motion shall be made within a reasonable time after the right to intervene first accrues and shall specifically state the manner in which the condition of this rule are satisfied.



**ACT 250**

**Vermont's**

**Land Use and Development Law**

**Title 10, Chapter 151**

**Including all Legislative Amendments**

Incorporating all amendments through July 1, 2012

## **State Land Use and Development Plans**

### **Findings and Declaration of Intent**

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# **Act 250**

## **Title 10: Conservation and Development**

### ***Chapter 151: STATE LAND USE AND DEVELOPMENT PLANS***

**Incorporating all amendments through July 1, 2012**

#### **§ 6001. Definitions**

When used in this chapter:

- (1) "Board" means the natural resources board.
- (2) "Capability and development plan" means the plan prepared pursuant to section 6042 of this title.
- (3)(A) "Development" means:
  - (i) The construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial or industrial purposes in a municipality that has adopted permanent zoning and subdivision bylaws.
  - (ii) The construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality that has not adopted permanent zoning and subdivision bylaws.
  - (iii) The construction of improvements for commercial or industrial purposes on a tract or tracts of land, owned or controlled by a person, involving more than one acre of land within a municipality that has adopted permanent zoning and subdivision bylaws, if the municipality in which the proposed project is located has elected by ordinance, adopted under chapter 59 of Title 24, to have this jurisdiction apply.
  - (iv) The construction of housing projects such as cooperatives, condominiums, or dwellings, or construction or maintenance of mobile homes or trailer parks, with 10 or more units, constructed or maintained on a tract or tracts of land, owned or controlled by a person, within a radius of five miles of any point on any involved land, and within any continuous period of five years.
  - (v) The construction of improvements on a tract of land involving more than 10 acres that is to be used for municipal, county or state purposes. In computing the amount of land involved, land shall be included that is incident to the use such as lawns, parking areas, roadways, leaching fields and accessory buildings.

(vi) The construction of improvements for commercial, industrial or residential use above the elevation of 2,500 feet.

(vii) Exploration for fissionable source materials beyond the reconnaissance phase or the extraction or processing of fissionable source material.

(viii) The drilling of an oil and gas well.

(B)(i) Smart Growth Jurisdictional Thresholds. Notwithstanding the provisions of subdivision (3)(A) of this section, if a project consists exclusively of any combination of mixed income housing or mixed use and is located entirely within a growth center designated pursuant to 24 V.S.A. § 2793c or within a downtown development district designated pursuant to 24 V.S.A. § 2793, “development” means:

(I) Construction of mixed income housing with 200 or more housing units or a mixed use project with 200 or more housing units, in a municipality with a population of 15,000 or more.

(II) Construction of mixed income housing with 100 or more housing units or a mixed use project with 100 or more housing units, in a municipality with a population of 10,000 or more but less than 15,000.

(III) Construction of mixed income housing with 50 or more housing units or a mixed use project with 50 or more housing units, in a municipality with a population of 6,000 or more and less than 10,000.

(IV) Construction of mixed income housing with 30 or more housing units or a mixed use project with 30 or more housing units, in a municipality with a population of 3,000 or more but less than 6,000.

(V) Construction of mixed income housing with 25 or more housing units or a mixed use project with 25 or more housing units, in a municipality with a population of less than 3,000.

(VI) Historic Buildings. Construction of 10 or more units of mixed income housing or a mixed use project with 10 or more housing units where the construction involves the demolition of one or more buildings that are listed on or eligible to be listed on the state or national register of historic places. However, demolition shall not be considered to create jurisdiction under this subdivision if the division for historic preservation has determined the proposed demolition will have: no adverse effect; no adverse effect provided that specified conditions are met; or, will have an adverse effect, but that adverse effect will be adequately mitigated. Any imposed conditions shall be enforceable through a grant condition, deed covenant, or other legally binding document.

(ii) Mixed Income Housing Jurisdictional Thresholds. Notwithstanding the provisions of subdivision (3)(A) of this section, if a project consists exclusively of mixed income housing and is located entirely within a Vermont neighborhood, but outside a growth center designated

pursuant to 24 V.S.A. § 2793c and outside a downtown development district designated pursuant to 24 V.S.A. § 2793, “development” means:

(I) Construction of mixed income housing with 200 or more housing units, in a municipality with a population of 15,000 or more.

(II) Construction of mixed income housing with 100 or more housing units, in a municipality with a population of 10,000 or more but less than 15,000.

(III) Construction of mixed income housing with 50 or more housing units, in a municipality with a population of 6,000 or more and less than 10,000.

(IV) Construction of mixed income housing with 30 or more housing units, in a municipality with a population of 3,000 or more but less than 6,000.

(V) Construction of mixed income housing with 25 or more housing units, in a municipality with a population of less than 3,000.

(VI) Historic Buildings. Construction of 10 or more units of mixed income housing where the construction involves the demolition of one or more buildings that are listed on or eligible to be listed on the state or national register of historic places. However, demolition shall not be considered to create jurisdiction under this subdivision if the division for historic preservation has determined the proposed demolition will have: no adverse effect; no adverse effect provided that specified conditions are met; or will have an adverse effect, but that adverse effect will be adequately mitigated. Any imposed conditions shall be enforceable through a grant condition, deed covenant, or other legally binding document.

(C) For the purposes of determining jurisdiction under subdivisions (3)(A) and (3)(B) of this section:

(i) Incentive for Growth Inside Designated Areas. Notwithstanding subdivision (3)(A)(iv) of this section, housing units constructed by a person partially or completely outside a designated downtown development district or designated growth center, or designated Vermont neighborhood shall not be counted to determine jurisdiction over housing units constructed by that person entirely within a designated downtown development district, designated growth center, or designated Vermont neighborhood.

(ii) Five Year, Five Mile Radius Jurisdiction Analysis. Within any continuous period of five years, housing units constructed by a person entirely within a designated downtown district, designated growth center, or designated Vermont neighborhood shall be counted together with housing units constructed by that person partially or completely outside a designated downtown development district, designated growth center, or designated Vermont neighborhood to determine jurisdiction over the housing units constructed by a person partially or completely outside the designated downtown development district, designated growth center, or designated

Vermont neighborhood and within a five-mile radius in accordance with subdivision (3)(A)(iv) of this section.

(iii) Discrete Housing Projects in Designated Areas and Exclusive Counting for Housing Units. Notwithstanding subdivisions (3)(A)(iv) and (19) of this section, jurisdiction shall be determined exclusively by counting housing units constructed by a person within a designated downtown development district, designated growth center, or designated Vermont neighborhood, provided that the housing units are part of a discrete project located on a single tract or multiple contiguous tracts of land.

(iv) Railroad Projects. In the case of a project undertaken by a railroad, no portion of a railroad line or railroad right-of-way that will not be physically altered as part of the project shall be included in computing the amount of land involved. In the case of a project undertaken by a person to construct a rail line or rail siding to connect to a railroad's line or right-of-way, only the land used for the rail line or rail siding that will be physically altered as part of the project shall be included in computing the amount of land involved.

(v) Permanently Affordable Housing. Notwithstanding subdivisions (3)(A)(iv) and (19) of this section, jurisdiction shall be determined exclusively by counting affordable housing units, as defined by this section, that are subject to housing subsidy covenants as defined in 27 V.S.A. § 610 that preserve their affordability for a period of 99 years or longer, provided the affordable housing units are located in a discrete project on a single tract or multiple contiguous tracts of land, regardless of whether located within an area designated under 24 V.S.A. chapter 76A.

(D) The word "development" does not include:

(i) The construction of improvements for farming, logging or forestry purposes below the elevation of 2,500 feet.

(ii) The construction of improvements for an electric generation or transmission facility that requires a certificate of public good under 30 V.S.A. § 248, a natural gas facility as defined in 30 V.S.A. § 248(a)(3), or a telecommunications facility issued a certificate of public good under 30 V.S.A. § 248a.

(iii) [Repealed.]

(iv) The construction of improvements for agricultural fairs that are registered with the agency of agriculture, food and markets and that are open to the public for 60 days per year, or fewer, provided that, if the improvement is a building, the building was constructed prior to January 1, 2011 and is used solely for the purposes of the agricultural fair.

(v) The construction of improvements for the exhibition or showing of equines at events that are open to the public for 60 days per year, or fewer, provided that any improvements constructed do not include one or more buildings.

(vi) The construction of improvements for any one of the actions or abatements authorized in subdivision (I) of this subdivision (vi):

(I)(aa) A remedial or removal action for which the secretary of natural resources has authorized disbursement under section 1283 of this title.

(bb) Abating a release or threatened release, as directed by the secretary of natural resources under section 6615 of this title.

(cc) A remedial or removal action directed by the secretary of natural resources under section 6615 of this title.

(dd) A corrective action authorized in a corrective action plan approved by the secretary of natural resources under section 6615b of this title.

(ee) A corrective action authorized in a corrective action plan approved by the secretary of natural resources under subchapter 3 of chapter 159 of this title.

(II) The exemption provided by this subdivision shall not apply to subsequent development.

(vii) The construction of improvements below the elevation of 2,500 feet for the onsite storage, preparation, and sale of compost, provided that:

(I) The compost is produced from no more than 100 cubic yards of material per year; or

(II) The compost is principally produced from inputs grown or produced on the farm; or

(III) The compost is principally used on the farm where it was produced; or

(IV) The compost is produced on a farm primarily used for the raising, feeding, or management of livestock, only from:

(aa) manure produced on the farm; and

(bb) unlimited clean, dry, high-carbon bulking agents from any source; or

(V) The compost is produced on a farm primarily used for the raising, feeding, or management of livestock, only from:

(aa) manure produced on the farm;

(bb) up to 2,000 cubic yards per year of organic inputs allowed under the agency of natural resources' acceptable management practices, including food residuals or manure from off the farm, or both; and

(cc) unlimited clean, dry, high-carbon bulking agents from any source; or

(VI) The compost is produced on a farm primarily used for the cultivation or growing of food, fiber, horticultural, or orchard crops, that complies with the agency of natural resources' solid waste management rules, only from up to 5,000 cubic yards per year of total organic inputs allowed under the agency of natural resources' acceptable management practices, including up to 2,000 cubic yards per year of food residuals.

***(Note: § 6001(3)(D)(vii) shall be repealed July 1, 2014.)***

(E) When development is proposed to occur on a parcel or tract of land that is devoted to farming activity as defined in subdivision 6001(22) of this section, only those portions of the parcel or the tract that support the development shall be subject to regulation under this chapter. Permits issued under this chapter shall not impose conditions on other portions of the parcel or tract of land which do not support the development and that restrict or conflict with accepted agricultural practices adopted by the secretary of agriculture, food and markets. Any portion of the tract that is used to produce compost ingredients for a composting facility located elsewhere on the tract shall



not constitute land which supports the development unless it is also used for some other purpose that supports the development.

(4) "District commission" means the district environmental commission.

(5) "Endangered species" means those species the taking of which is prohibited under rules adopted under chapter 123 of this title.

(6) "Floodway" means the channel of a watercourse which is expected to flood on an average of at least once every 100 years and the adjacent land areas which are required to carry and discharge the flood of the watercourse, as determined by the secretary of natural resources with full consideration given to upstream impoundments and flood control projects.

(7) "Floodway fringe" means an area which is outside a floodway and is flooded with an average frequency of once or more in each 100 years as determined by the secretary of natural resources with full consideration given to upstream impoundments and flood control projects.

(8) "Productive forest soils" means those soils which are not primary agricultural soils but which have a reasonable potential for commercial forestry and which have not been developed. In order to qualify as productive forest soils, the land containing such soils shall be of a size and location, relative to adjoining land uses, natural condition, and ownership patterns so that those soils will be capable of supporting or contributing to a commercial forestry operation. Land use on those soils may include commercial timber harvesting and specialized forest uses, such as maple sugar or Christmas tree production.

(9) "Historic site" means any site, structure, district or archeological landmark which has been officially included in the National Register of Historic Places and/or the state register of historic places or which is established by testimony of the Vermont Advisory Council on Historic Preservation as being historically significant.

(10) "Land use plan" means the plan prepared pursuant to section 6043 of this title.

(11) "Lot" means any undivided interest in land, whether freehold or leasehold, including but not limited to interests created by trusts, partnerships, corporations, cotenancies and contracts.

(12) "Necessary wildlife habitat" means concentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a species of wildlife at any period in its life including breeding and migratory periods.

(13) "Plat" means a map or chart of a subdivision with surveyed lot lines and dimensions.

(14)(A) "Person":

(i) shall mean an individual, partnership, corporation, association, unincorporated organization, trust or other legal or commercial entity, including a joint venture or affiliated ownership;

(ii) means a municipality or state agency;

(iii) includes individuals and entities affiliated with each other for profit, consideration, or any other beneficial interest derived from the partition or division of land;

(iv) includes an individual's parents and children, natural and adoptive, and spouse, unless the individual establishes that he or she will derive no profit or consideration, or acquire any other beneficial interest from the partition or division of land by the parent, child or spouse;

(B) The following individuals and entities shall be presumed not to be affiliated for the purpose of profit, consideration, or other beneficial interest within the meaning of this chapter, unless there is substantial evidence of an intent to evade the purposes of this chapter:

(i) a stockholder in a corporation shall be presumed not to be affiliated with others, solely on the basis of being a stockholder, if the stockholder and the stockholder's spouse, and natural or adoptive parents, children, and siblings own, control or have a beneficial interest in less than five percent of the outstanding shares in the corporation;

(ii) an individual shall be presumed not to be affiliated with others, solely for actions taken as an agent of another within the normal scope of duties of a court appointed guardian, a licensed attorney, real estate broker or salesperson, engineer or land surveyor, unless the compensation received or beneficial interest obtained as a result of these duties indicates more than an agency relationship;

(iii) a seller or chartered lending institution shall be presumed not to be affiliated with others, solely for financing all or a portion of the purchase price at rates not substantially higher than prevailing lending rates in the community, and subsequently granting a partial release of the security when the buyer partitions or divides the land.

(15) "Primary agricultural soils" means soil map units with the best combination of physical and chemical characteristics that have a potential for growing food, feed, and forage crops, have sufficient moisture and drainage, plant nutrients or responsiveness to fertilizers, few limitations for cultivation or limitations which may be easily overcome and an average slope that does not exceed 15 percent. Present uses may be cropland, pasture, regenerating forests, forestland, or other agricultural or silvicultural uses. However, the soils must be of a size and location, relative to adjoining land uses, so that those soils will be capable, following removal of any identified limitations, of supporting or contributing to an economic or commercial agricultural operation. Unless contradicted by the qualifications stated in this subdivision, primary agricultural soils shall include important farmland soils map units with a rating of prime, statewide, or local importance as defined by the Natural Resources Conservation Service (N.R.C.S.) of the United States Department of Agriculture (U.S.D.A.).

(16) "Rural growth areas" means lands which are not natural resources referred to in section 6086(a)(1)(A) through (F), section 6086(a)(8)(A) and section 6086(a)(9)(B), (C), (D), (E) and (K) of this title.

(17) "Shoreline" means the land adjacent to the waters of lakes, ponds, reservoirs and rivers. Shorelines shall include the land between the mean high water mark and the mean low water mark of such surface waters.

(18) "Stream" means a current of water which is above an elevation of 1,500 feet above sea level or which flows at any time at a rate of less than 1.5 cubic feet per second.

(19) "Subdivision" means a tract or tracts of land, owned or controlled by a person, which the person has partitioned or divided for the purpose of resale into 10 or more lots within a radius of five miles of any point on any lot, or within the jurisdictional area of the same district commission, within any continuous period of five years. In determining the number of lots, a lot shall be counted if any portion is within five miles or within the jurisdictional area of the same district commission. The word "subdivision" shall not include a lot or lots created for the purpose of conveyance to the state or to a qualified organization, as defined under section 6301a of this title, if the land to be transferred includes and will preserve a segment of the Long Trail. The word "subdivision" shall not include a lot or lots created for the purpose of conveyance to the state or to a "qualified holder" of "conservation rights and interest," as those terms are defined in section 821 of this title. "Subdivision" shall also mean a tract or tracts of land, owned or controlled by a person, which the person has partitioned or divided for the purpose of resale into six or more lots, within a continuous period of five years, in a municipality which does not have duly adopted permanent zoning and subdivision bylaws.

(20) "Fissionable source material" means mineral ore which

(A) is extracted or processed with the intention of permitting the product to become or to be further processed into fuel for nuclear fission reactors or weapons; or

(B) contains uranium or thorium in concentrations which might reasonably be expected to permit economically profitable conversion or processing into fuel for nuclear reactors or weapons.

(21) "Reconnaissance" means:

(A) a geologic and mineral resource appraisal of a region by searching and analyzing published literature, aerial photography and geologic maps; or

(B) use of geophysical, geochemical, and remote sensing techniques that do not involve road building, land clearing, the use of explosives, or the introduction of chemicals to a land or water area; or

(C) surface geologic, topographic or other mapping and property surveying; or

(D) sample collections which do not involve excavation or drilling equipment, the use of explosives or the introduction of chemicals to the land or water area.

(22) "Farming" means:

(A) the cultivation or other use of land for growing food, fiber, Christmas trees, maple sap, or horticultural and orchard crops; or

(B) the raising, feeding, or management of livestock, poultry, fish, or bees; or

(C) the operation of greenhouses; or

(D) the production of maple syrup; or

(E) the on-site storage, preparation and sale of agricultural products principally produced on the farm; or

(F) the on-site production of fuel or power from agricultural products or wastes produced on the farm; or

(G) the raising, feeding, or management of four or more equines owned or boarded by the farmer, including training, showing, and providing instruction and lessons in riding, training, and the management of equines.

(23) "Adjoining property owner" means a person who owns land in fee simple, if that land:

(A) shares a property boundary with a tract of land where a proposed or actual development or subdivision is located; or

(B) is adjacent to a tract of land where a proposed or actual development or subdivision is located and the two properties are separated only by a river, stream, or public highway.

(24) "Solid waste management district" means a solid waste management district formed pursuant to section 2202a and chapter 121 of Title 24, or by charter adopted by the general assembly.

(25) "Slate quarry" means a quarry pit or hole from which slate has been extracted or removed for the purpose of commercial production of building material, roofing, tile, or other dimensional stone products. "Dimensional stone" refers to slate that is processed into regularly shaped blocks, according to specifications. The words "slate quarry" shall not include pits or holes from which slate is extracted primarily for purposes of crushed stone products, unless, as of June 1, 1970, slate had been extracted from those pits or holes primarily for those purposes.

(26) "Telecommunications facility" means a support structure which is primarily for communication or broadcast purposes and which will extend vertically 20 feet, or more, above the highest point of an attached existing structure or 50 feet, or more, above ground level in the case of a proposed new support structure, in order to transmit or receive communication signals for commercial, industrial, municipal, county or state purposes.

(27) "Mixed income housing" means a housing project in which the following apply:

(A) Owner occupied housing. At the option of the applicant, owner-occupied housing may be characterized by either of the following:

(i) at least 15 percent of the total housing units are affordable housing units have a purchase price which at the time of first sale does not exceed 85 percent of the new construction, targeted area purchase price limits established and published annually by the Vermont housing finance agency; or

(ii) at least 20 percent of the housing units have a purchase price which at the time of first sale does not exceed 90 percent of the new construction, targeted area purchase price limits established and published annually by the Vermont housing finance agency;

(B) Affordable Rental Housing. At least 20 percent of housing that is rented by the occupants whose gross annual household income does not exceed 60 percent of the county median income, or 60 percent of the standard metropolitan statistical area income if the municipality is located in such an area, as defined by the United States Department of Housing and Urban Development for use with the Housing Credit Program under Section 42(g) of the Internal Revenue Code, and the total annual cost of the housing, as defined at Section 42(g)(2)(B), is not more than 30 percent of the gross annual household income as defined at Section 42(g)(2)(C), and with a duration of affordability of no less than 30 years.

(28) "Mixed use" means construction of both mixed income housing and construction of space for any combination of retail, office, services, artisan, and recreational and community facilities, provided at least 40 percent of the gross floor area of the buildings involved is mixed income housing. "Mixed use" does not include industrial use.

(29) "Affordable housing" means either of the following:

(A) Housing that is owned by its occupants whose gross annual household income does not exceed 80 percent of the county median income, or 80 percent of the standard metropolitan statistical area income if the municipality is located in such an area, as defined by the United States Department of Housing and Urban Development, and the total annual cost of the housing, including principal, interest, taxes, insurance, and condominium association fees, is not more than 30 percent of the gross annual household income.

(B) Housing that is rented by the occupants whose gross annual household income does not exceed 80 percent of the county median income, or 80 percent of the standard metropolitan statistical area income if the municipality is located in such an area, as defined by the United States Department of Housing and Urban Development, and the total annual cost of the housing, including rent, utilities and condominium association fees, is not more than 30 percent of the gross annual household income.

(30) “Designated growth center” means a growth center designated by the Vermont downtown development board under the provisions of 24 V.S.A. chapter 76A.

(31) “Farm,” for purposes of subdivisions (3)(D)(vii)(V) and (VI) of this section, means a parcel of land devoted primarily to farming, as farming is defined in subdivision (22)(A) or (B) of this section, and:

(A) from which parcel, annual gross income from farming, as defined in subdivision (22) of this section, exceeds the annual gross income from a composting operation on that parcel. For purposes of this subdivision, a federal, state, or municipal highway or road shall not be determined to divide tracts of land that are otherwise physically contiguous;

(B) for purposes of subdivision (3)(D)(vii)(V) of this section, uses no more than 10 acres or 10 percent of the parcel, whichever is smaller, for commercial compost management, not including land used for liquid nutrients management;

(C) for purposes of subdivision (3)(D)(vii)(VI) of this section, uses no more than four acres or 10 percent of the parcel, whichever is smaller, for commercial compost management, not including land used for liquid nutrients management.

*(Note: § 6001(31) shall be repealed July 1, 2014.)*

(32) “Livestock” means cattle, sheep, goats, equines, fallow deer, red deer, American bison, swine, water buffalo, poultry, pheasant, chukar partridge, courtinix quail, camelids, ratites (ostriches, rheas, and emus), llamas, alpacas, yaks, rabbits, cultured trout propagated by commercial trout farmers, or other animal types designated by the secretary of agriculture, food and markets by procedure.

(33) “Compost” means a stable humus-like material produced by the controlled biological decomposition of organic matter through active management, but shall not mean sewage, septage, or materials derived from sewage or septage.

(34) “Agricultural fair” means an event or activity that is intended to promote farming by:

(A) exhibiting a variety of livestock and agricultural products;

(B) exhibiting arts, equipment, and implements related to farming; or

(C) conducting contests, displays, and demonstrations designed to advance farming, advance the local food economy, or train or educate farmers, youth, or the public regarding agriculture.

(Added 1969, No. 250 (Adj. Sess.), § 2, eff. April 4, 1970; amended 1973, No. 85, § 8; 1979, No. 123 (Adj. Sess.), §§ 1-3, eff. April 14, 1980; 1981, No. 240 (Adj. Sess.), § 6, eff. April 28, 1982; 1983, No. 114 (Adj. Sess.), § 1; 1985, No. 64; 1987, No. 64, § 2; 1987, No. 273 (Adj. Sess.), § 2, eff. June 21, 1988; 1989, No. 154 (Adj. Sess.); No. 231 (Adj. Sess.), § 1, eff. July 1, 1991; No.

234 (Adj. Sess.), § 4; 1993, No. 200 (Adj. Sess.), § 1; No. 232 (Adj. Sess.), § 24, eff. March 15, 1995; 1995, No. 10, § 1; No. 30, § 1, eff. April 13, 1995; 1997, No. 48, § 1; 1997, No. 94 (Adj. Sess.), § 5, eff. April 15, 1998; 2001, No. 40, § 1; 2001, No. 114 (Adj. Sess.), §§ 6, 7, eff. May 28, 2002; 2003, No. 66, § 217c; 2003, No. 115 (Adj. Sess.), § 46, eff. Jan. 31, 2005; 2003, No. 121 (Adj. Sess.), §§ 75, 76, eff. June 8, 2004, and amended 2007, No. 79, § 13, eff. June 9, 2007; 2009, No. 54 (Adj. Sess.), § 52, eff. June 1, 2009; 2010, No. 141, § 1a, 2, 3, eff. May 29, 2010; 2011, No. 18 (Adj. Sess.) § 1, 2, eff. May 11, 2011)

#### **§ 6001a. Public auctions**

As used in this chapter "development" shall also mean the sale of any interest in a tract or tracts of land, owned or controlled by a person, which have been partitioned or divided for the purpose of resale into five or more separate parcels of any size within a radius of five miles of any point on any such parcel, and within any period of ten years, by public auction; and "public auction" means any auction advertised or publicized in any manner, or to which more than ten persons have been invited. However, if the sales described under this section are of interests that, when sold by means other than public auction, are exempt from the provisions of this chapter under the provisions of subsection 6081(b) of this title, the fact that these interests are sold by means of a public auction shall not, in itself, create a requirement for a permit under this chapter. (Added 1973, No. 256 (Adj. Sess.), eff. April 11, 1974; amended 1991, No. 111, § 4, eff. June 28, 1991.)

#### **§ 6001b. Low-level radioactive waste disposal facility**

Any low-level radioactive waste disposal facility proposed for construction under chapter 161 of this title shall be a development, for purposes of this chapter, independent of the acreage involved. Any construction of improvements which is likely to generate low-level radioactive waste is a development, for purposes of this chapter, independent of the acreage involved. The criteria and procedures for obtaining a permit shall be the same as for any other development. (Added 1989, No. 296 (Adj. Sess.), § 6, eff. June 29, 1990.)

#### **§ 6001c. Jurisdiction over broadcast and communication support structures and related improvements**

In addition to other applicable law, any support structure proposed for construction, which is primarily for communication or broadcast purposes and which will extend vertically 20 feet, or more, above the highest point of an attached existing structure or 50 feet, or more, above ground level in the case of a proposed new support structure, in order to transmit or receive communication signals for commercial, industrial, municipal, county or state purposes, shall be a development under this chapter, independent of the acreage involved. If jurisdiction is triggered for such a support structure, then jurisdiction will also extend to the construction of improvements ancillary to the support structure, including buildings, broadcast or communication equipment, foundation pads, cables, wires, antennas or hardware, and all means of ingress and egress to the support structure. To the extent that future improvements are not ancillary to the support structure and do not involve an additional support structure, those improvements shall not be considered a development, unless they would be considered a development under this chapter in the absence of

this section. The criteria and procedures for obtaining a permit under this section shall be the same as for any other development. (Added 1997, No. 48, § 2 and amended 2007, No. 79, § 12, eff. June 9, 2007.)

#### **§ 6001d. Large Volume Groundwater Withdrawal**

In addition to all other applicable law, any withdrawal of more than 340,000 gallons of groundwater per day from any well or spring on a single tract of land or at a place of business, independent of the acreage of the tract of land or place of business, shall be a development under this chapter if the withdrawal requires a permit under section 1418 of this title or is by a bottled water facility regulated under chapter 56 of this title. (Added 2007, No. 169 (Adj. Sess.), § 6, eff. June 9, 2008)

#### **§ 6001e. Commercial Composting Facility; Circumvention**

Notwithstanding subdivisions 6001(3)(D)(vii)(I)–(VI) of this title, a permit under this chapter may be required for the construction of improvements below the elevation of 2,500 feet for the onsite storage, preparation, and sale of compost if the chair of the district commission, based on the information available to the chair, determines that action has been taken to circumvent the requirements of this chapter. (Added, 2010, No. 141, § 1b, eff. May 29, 2010)

*(Note: § 6001e shall be repealed July 1, 2014.)*

#### **§ 6002. Procedures**

The provisions of chapter 25 of Title 3 shall apply unless otherwise specifically stated. (1969, No. 250 (Adj. Sess.), § 26, eff. April 4, 1970.)

#### **§ 6003. Penalties**

A violation of any provision of this chapter or the rules promulgated hereunder is punishable by a fine of not more than \$500.00 for each day of the violation or imprisonment for not more than two years, or both. A person who completely transfers ownership and control of property that is the subject of a permit under this chapter shall not be liable for later violations of that permit by another person. (1969, No. 250 (Adj. Sess.), § 28, eff. April 4, 1970; amended 2001, No. 40, § 2.)

**§§ 6004-6006. Repealed. 1989, No. 98 § 4(b).**

#### **§ 6007. Act 250 disclosure statement; jurisdictional determination**

(a) Prior to the division or partition of land, the seller or other person dividing or partitioning the land shall prepare an "Act 250 Disclosure Statement." A person who is dividing or partitioning land, but is not selling it, shall file a copy of the statement with the town clerk, who shall record it in the land records. The seller who is dividing or partitioning land as part of the sale shall provide the buyer with the statement within 10 days of entering into a purchase and sale agreement for the



sale or exchange of land, or at the time of transfer of title, if no purchase and sales agreement was executed, and shall file a copy of the statement with the town clerk, who shall record it in the land records. Failure to provide the statement as required shall, at the buyer's option, render the purchase and sales agreement unenforceable. If the disclosure statement establishes that the transfer is or may be subject to 10 V.S.A. chapter 151, and that information had not been disclosed previously, then at the buyer's option the contract may be rendered unenforceable. The statement shall include the following, on forms determined jointly by the board and the commissioner of the department of taxes:

(1) the name and tax identification number of the seller's or divider's or partitioner's spouse, and parents and children, natural or adoptive, and whether or not any of the individuals named will derive profit or consideration, or acquire any other beneficial interest from the partition or division of the land in question. However, this information will be required only to the extent that:

(A) the individuals in question have been sellers or buyers of record with respect to the partition or division of other land within the previous five years, and

(B) that other land is located within five miles of any part of the land currently being divided or partitioned, or is located within the jurisdictional area of the same district environmental commission;

(2) the name and tax identification number of all individuals and entities affiliated with the seller or divider or partitioner for the purpose of deriving profit or consideration, or acquiring any other beneficial interest from the partition or division of the land, as that affiliation is conditioned and limited according to the definition of "person" in section 6001(14) of this title;

(3) a statement identifying any partition or division of land which has been completed:

(A) within the preceding five years;

(B) by any of the entities or individuals identified under subdivisions (a)(1) or (2) of this section as deriving profit or consideration or acquiring any other beneficial interest from the partition or division of the land;

(C) within five miles of any part of the land being divided or partitioned, or within the jurisdictional area of the district environmental commission in which the land is located;

(4) notice that a permit may be required under this chapter.

(b) If, before the transfer of title, facts contained in the disclosure statement change, the seller shall provide the buyer with an amended statement in a timely manner.

(c) With respect to the partition or division of land, or with respect to an activity which might or might not constitute development, any person may submit to the district coordinator an "Act 250 Disclosure Statement" and other information required by the rules of the board, and may request a

jurisdictional opinion from the district coordinator concerning the applicability of this chapter. If a requestor wishes a final determination to be rendered on the question, the district coordinator, at the expense of the requestor and in accordance with rules of the board shall publish notice of the issuance of the opinion in a local newspaper generally circulating in the area where the land which is the subject of the opinion is located, and shall serve the opinion on all persons listed in subdivision 6085(c)(1)(A) through (D) of this title. In addition, the requestor who is seeking a final determination shall consult with the district coordinator and obtain approval of a subdivision 6085(c)(1)(E) list of persons who shall be notified by the district coordinator because they are adjoining property owners or other persons who would be likely to be able to demonstrate a particularized interest protected by this chapter that may be affected by an act or decision by a district commission. A jurisdictional opinion of a district coordinator shall be subject to a request for reconsideration in accordance with rules of the board and may be appealed to the environmental court pursuant to chapter 220 of this title. (Added 1987, No. 64, § 3; amended 1991, No. 111, § 3, eff. June 28, 1991; No. 111, § 7, eff. Oct. 1, 1991; 1993, No. 232 (Adj. Sess.), § 25, eff. March 15, 1995; 1999, No. 49, § 155; 2003, No. 115 (Adj. Sess.), § 47, eff. Jan. 31, 2005.)

#### **§ 6021. Board; vacancy, removal**

(a) A natural resources board is created with a land use panel and a water resources panel. The board shall consist of nine members appointed by the governor, with the advice and consent of the senate, so that one appointment on each panel expires in each odd numbered year. In making appointments, the governor and the senate shall give consideration to experience, expertise, or skills relating to the environment or land use. The governor shall appoint a chair of the board, a position that shall be a full-time position. The other eight members shall be appointed by the governor, four to the water resources panel of the board and four others to the land use panel of the board. The chair shall serve as chair on each panel of the board. Following initial appointments, the members, except for the chair, shall be appointed for terms of four years. The governor shall appoint up to five persons, with preference given to former environmental board, water resources board, natural resources board or district commission members, with the advice and consent of the senate, to serve as alternates for board members. Alternates shall be appointed for terms of four years, with initial appointments being staggered. The board chair may assign alternates to sit on specific matters before the panels of the board, in situations where fewer than five panel members are available to serve. No person who receives or, during the previous two years, has received a significant portion of the person's income directly or indirectly from permit holders or applicants for one or more permits under chapter 47 of this title may be a member of the water resources panel.

(b) Any vacancy occurring in the membership of the board shall be filled by the governor for the unexpired portion of the term.

(c) Notwithstanding the provisions of 3 V.S.A. § 2004, members shall be removable for cause only, except the chair, who shall serve at the pleasure of the governor.

(d) The chair, upon request of the chair of a district commission, may appoint and assign former commission members to sit on specific commission cases when some or all of the regular members and alternates are disqualified or otherwise unable to serve. (1969, No. 250 (Adj. Sess.), § 3, eff. April 4, 1970; amended 1989, No. 234 (Adj. Sess.), § 2; 1991, No. 111, § 1, eff. June 28, 1991; 1993, No. 82, § 1; amended 1993, No. 232 (Adj. Sess.), § 26, eff. March 15, 1995; 2003, No. 115 (Adj. Sess.), § 48, eff. Jan. 31, 2005.)

#### **§ 6022. Personnel**

The board may appoint legal counsel and administrative personnel, as it finds necessary in carrying out its duties, unless the governor shall otherwise provide. (1969, No. 250 (Adj. Sess.), § 4, eff. April 4, 1970; amended 1993, No. 82, § 2.)

#### **§ 6023. Grants**

The board may apply for and receive grants from the federal government and from other sources. (1969, No. 250 (Adj. Sess.), § 4, eff. April 4, 1970.)

#### **§ 6024. Intragovernmental cooperation**

Other departments and agencies of state government shall cooperate with the board and make available to it data, facilities and personnel as may be needed to assist the board in carrying out its duties and functions. There shall be established a regular schedule of project review that shall assure that all affected departments and agencies recognize and pursue their respective responsibilities. State employees whose job is to assist applicants in the permitting process established under this chapter, shall endeavor to assist all applicants regardless of the size and value of the projects involved. (1969, No. 250 (Adj. Sess.), § 4, eff. April 4, 1970; amended 2001, No. 40, § 3.)

#### **§ 6025. Rules**

(a) The board may adopt rules of procedure for the panels, the district commissions, and the board itself.

(b) The land use panel may adopt substantive rules, in accordance with the provisions of chapter 25 of Title 3, that interpret and carry out the provisions of this chapter that pertain to land use regulated under section 6086 of this title. These rules shall include provisions that establish criteria under which applications for permits under this chapter may be classified in terms of complexity and significance of impact under the standards of subsection 6086(a) of this chapter. In accordance with that classification the rules may:

(1) provide for simplified or less stringent procedures than are otherwise required under sections 6083, 6084 and 6085 of this chapter; and

(2) provide for the filing of notices instead of applications for the permits that would otherwise be required under section 6081 of this chapter; and

(3) provide a procedure by which a district commission may authorize a district coordinator to issue a permit that the district commission has determined under land use panel rules is a minor application with no undue adverse impact.

(c)(1) This subsection shall apply to lots within a subdivision:

(A) that were created as part of a subdivision owned or controlled by a person who may have been required to obtain a permit under this chapter; and

(B) with respect to which a determination has been made that a permit was needed under this chapter; and

(C) that were sold to a purchaser prior to January 1, 1991 without a required permit.

(2) The rules shall provide for a modified process by which the sole purchaser, or the group of purchasers, of one or more lots to which this subsection applies may apply for and obtain a permit under this chapter that shall be issued in light of the existing improvements, facts, and circumstances that pertain to the lots; provided, however, that the requirements of this chapter shall be modified only to the extent needed to issue those permits. For purposes of these rules, a purchaser eligible for relief under this subsection must not have been involved in creating the lots, must not be a person who owned or controlled the land when it was divided or partitioned, as a person is defined in this chapter, and must not have known at the time of purchase that the transfer was subject to a permit requirement that had not been met.

(3) [Deleted.]

(d) [Repealed, 2012, Act No. 138 § 24]

(e) [Repealed, 2012, Act No. 138 § 24]

(1969, No. 250 (Adj. Sess.), § 25, eff. April 4, 1970; amended 1973, No. 85, § 2; 1979, No. 123 (Adj. Sess.), § 4, eff. April 14, 1980; 1985, No. 52, § 3, eff. May 15, 1985; 1987, No. 186 (Adj. Sess.), eff. May 5, 1988; 1991, No. 111, § 5, eff. June 28, 1991; 2003, No. 115 (Adj. Sess.), § 49, eff. Jan. 31, 2005; 2012, No. 138, § 24, eff. May 14, 2012)

## **§ 6026. District commissioners**

(a) For the purposes of the administration of this chapter, the state is divided into nine districts.

(1) District No. 1, comprising administrative district 1 as provided in section 4001 of Title 3.

(2) District No. 2, comprising administrative district 2 as provided in section 4001 of Title 3.

- (3) District No. 3, comprising administrative district 3 as provided in section 4001 of Title 3.
- (4) District No. 4, comprising administrative district 4 as provided in section 4001 of Title 3, excluding the towns of Addison, Bridport, Bristol, Cornwall, Ferrisburg, Goshen, Leicester, Lincoln, Middlebury, Monkton, New Haven, Orwell, Panton, Ripton, Salisbury, Shoreham, Starksboro, Vergennes, Waltham, Weybridge and Whiting.
- (5) District No. 5, comprising administrative district 5 as provided in section 4001 of Title 3.
- (6) District No. 6, comprising administrative district 6 as provided in section 4001 of Title 3.
- (7) District No. 7, comprising administrative district 7 as provided in section 4001 of Title 3.
- (8) District No. 8, comprising administrative district 8 as provided in section 4001 of Title 3.
- (9) District No. 9, comprising the towns of Addison, Bridport, Bristol, Cornwall, Ferrisburg, Goshen, Leicester, Lincoln, Middlebury, Monkton, New Haven, Orwell, Panton, Ripton, Salisbury, Shoreham, Starksboro, Vergennes, Waltham, Weybridge, and Whiting.
- (b) A district environmental commission is created for each district. Each district commission shall consist of three members from that district appointed in the month of February by the governor so that two appointments expire in each odd numbered year. Two of the members shall be appointed for a term of four years, and the chair (third member) of each district shall be appointed for a two-year term. In any district, the governor may appoint not more than four alternate members from that district whose terms shall not exceed two years, who may hear any case when a regular member is disqualified or otherwise unable to serve.
- (c) Members shall be removable for cause only, except the chairman who shall serve at the pleasure of the governor.
- (d) Any vacancy shall be filled by the governor for the unexpired period of the term. (1969, No. 250 (Adj. Sess.), § 5, eff. April 4, 1970; amended 1971, No. 74, § 1; 1973, No. 54; 1985, No. 107 (Adj. Sess.), eff. March 14, 1986; 1993, No. 232 (Adj. Sess.), § 27, eff. March 15, 1995.)

## **§ 6027. Powers**

- (a) The panels of the board and district commissions each shall have the power, with respect to any matter within its jurisdiction, to:
  - (1) Administer oaths, take depositions, subpoena and compel the attendance of witnesses, and require the production of evidence.
  - (2) Allow parties to enter upon lands of other parties for the purposes of inspecting and investigating conditions related to the matter before the panel or commission.

(3) Enter upon lands for the purpose of conducting inspections, investigations, examinations, tests, and site evaluations as it deems necessary to verify information presented in any matter within its jurisdiction.

(4) Apply for and receive grants from the federal government and from other sources.

(b) The powers granted under this chapter are additional to any other powers which may be granted by other legislation.

(c) The land use panel may designate or establish such regional offices as it deems necessary to implement the provisions of this chapter and the rules adopted hereunder. The land use panel may designate or require a regional planning commission to receive applications, provide administrative assistance, perform investigations, and make recommendations.

(d) At the request of a district commission, if the board chair determines that the workload in the requesting district is likely to result in unreasonable delays or that the requesting district commission is disqualified to hear a case, the chair may authorize the district commission of another district to sit in the requesting district to consider one or more applications.

(e) The land use panel may by rule allow joint hearings to be conducted with specified state agencies or specified municipalities.

(f) The board may publish or contract to publish annotations and indices of the decisions of the environmental court, and the text of those decisions. The published product shall be available at a reasonable rate to the general public and at a reduced rate to libraries and governmental bodies within the state.

(g) The land use panel shall manage the process by which land use permits are issued under section 6086 of this title, may initiate enforcement on related matters, under the provisions of chapter 201 and 211 of this title, and may petition the environmental court for revocation of land use permits issued under this chapter. Grounds for revocation are:

(1) noncompliance with this chapter, rules adopted under this chapter, or an order that is issued that relates to this chapter;

(2) noncompliance with any permit or permit condition;

(3) failure to disclose all relevant and material facts in the application or during the permitting process;

(4) misrepresentation of any relevant and material fact at any time;

(5) failure to pay a penalty or other sums owed pursuant to, or other failure to comply with, court order, stipulation agreement, schedule of compliance, or other order issued under Vermont statutes and related to the permit; or

(6) failure to provide certification of construction costs, as required under subsection 6083a(a) of this title, or failure to pay supplemental fees as required under that section.

(h) The land use panel may hear appeals of fee refund requests under section 6083a of this title.

(i) The chair, subject to the direction of the board, shall have general charge of the offices and employees of the board and the offices and employees of the district commissions.

(j) The land use panel may participate as a party in all matters before the environmental court that relate to land use permits issued under this chapter.

(k) The water resources panel may participate as a party in all matters before the environmental court that relate to rules adopted by the panel under the authority of section 6025 of this title.

(l) A district commission may reject an application under this chapter that misrepresents any material fact and may after notice and opportunity for hearing award reasonable attorney's fees and costs to any party or person who may have become a party but for the false or misleading information or who has incurred attorney's fees or costs in connection with the application.

(m) After notice and opportunity for hearing, a district commission may withhold a permit or suspend the processing of a permit application for failure of the applicant to pay costs assessed under 3 V.S.A. § 2809 related to the participation of the agency of natural resources in the review of the permit or permit application. (1969, No. 250 (Adj. Sess.), § 25, eff. April 4, 1970; amended 1973, No. 85, § 3; 1979, No. 123 (Adj. Sess.), § 8, eff. April 14, 1980; 1991, No. 111, § 6 eff. June 28, 1991; 1993, No. 232 (Adj. Sess.), § 28, eff. March 15, 1995; 2003, No. 115 (Adj. Sess.), § 50, eff. Jan. 31, 2005; 2009, No. 54 (Adj. Sess.), § 46, eff. June 1, 2009; 2010, No. 146, § F20, eff. July 1, 2010.)

## **§ 6028. Compensation**

Members of the board and district commissions shall receive per diem pay and all necessary and actual expenses in accordance with 32 V.S.A. § 1010. (1969, No. 250 (Adj. Sess.), § 31, eff. April 4, 1970; amended 1993, No. 82, § 3.)

## **§ 6029. Act 250 permit fund**

There is hereby established a special fund to be known as the Act 250 permit fund for the purposes of implementing the provisions of this chapter. Revenues to the fund shall be those fees collected in accordance with section 6083a of this title, gifts, appropriations, and copying and distribution fees. The board shall be responsible for the fund and shall account for revenues and expenditures of the board. At the commissioner's discretion, the commissioner of finance and management may anticipate amounts to be collected and may issue warrants based thereon for the purposes of this section. Disbursements from the fund shall be made through the annual appropriations process to the board, and to the agency of natural resources to support those programs within the agency that directly or indirectly assist in the review of Act 250 applications.

This fund shall be administered as provided in subchapter 5 of chapter 7 of Title 32. (Added 1989, No. 279 (Adj. Sess.), § 2, eff. June 30, 1990; amended 1993, No. 70, § 1; 1997, No. 59, § 41, eff. June 30, 1997; 2003, No. 115 (Adj. Sess.), § 51; No. 163 (Adj. Sess.), § 25.)

#### **§ 6030. Map of wireless telecommunications facilities**

The board shall maintain a map that shows the location of all wireless telecommunications facilities in the state. (Added 1997, No. 94 (Adj. Sess.), § 1, eff. April 15, 1998.)

#### **§ 6041. Omitted.**

#### **§ 6042. Capability and development plan**

The board shall adopt a capability and development plan consistent with the interim land capability plan which shall be made with the general purpose of guiding and accomplishing a coordinated, efficient and economic development of the state, which will, in accordance with present and future needs and resources, best promote the health, safety, order, convenience, prosperity and welfare of the inhabitants, as well as efficiency and economy in the process of development, including but not limited to, such distribution of population and of the uses of the land for urbanization, trade, industry habitation, recreation, agriculture, forestry and other uses as will tend to create conditions favorable to transportation, health, safety, civic activities and educational and cultural opportunities, reduce the wastes of financial and human resources which result from either excessive congestion or excessive scattering of population and tend toward an efficient and economic utilization of drainage, sanitary and other facilities and resources and the conservation and production of the supply of food, water and minerals. In addition, the plan may accomplish the purposes set forth in section 4302 of Title 24. (1969, No. 250 (Adj. Sess.), § 19, eff. April 4, 1970.)

#### **§ 6043. Repealed. 1983, No. 114 (Adj. Sess.), § 5.**

#### **§ 6044. Public hearings**

(a) The board shall hold public hearings for the purpose of collecting information to be used in establishing the capability and development plan, and interim land capability plan. The public hearings may be held in an appropriate area or areas of the state and shall be conducted according to rules to be established and published by the board.

(b) The board may, on its own motion or on petition of an interested agency of the state or any regional or local planning commission, hold such other hearings as it may deem necessary from time to time for the purpose of obtaining information necessary or helpful in the determination of its policies, the carrying out of its duties, or the formulation of its rules and regulations.

(c) At least one public hearing shall be held in each district prior to adoption of a plan pursuant to section 6042 of this title. Notice of a hearing shall be furnished each municipality, and municipal



and regional planning commission in the district where the hearing is to be held not less than fifteen days prior to the hearing.

(d) The provisions of chapter 25 of Title 3 shall not apply to the hearings under this section. (1969, No. 250 (Adj. Sess.), § 21, eff. April 4, 1970; amended 1983, No. 114 (Adj. Sess.), § 2.)

**§ 6045. Repealed. 1983, No. 114 (Adj. Sess.), § 5.**

**§ 6046. Approval of governor and legislature**

(a) Upon approval of a capability and development or interim land capability plan by the board, it shall submit the plan to the governor for approval. The governor shall approve the plan, or disapprove the plan or any portion of a plan, within 30 days of receipt. If the governor fails to act, the plan shall be deemed approved by the governor. This section shall also apply to any amendment of a plan.

(b) After approval by the governor, plans pursuant to section 6042 of this title shall be submitted to the general assembly when next in session for approval. A plan shall be considered adopted for the purposes of section 6086(a)(9) of this title when adopted by the act of the general assembly. No permit shall be issued or denied by a district commission or environmental board which is contrary to or inconsistent with a local plan, capital program or municipal bylaw governing land use unless it is shown and specifically found that the proposed use will have a substantial impact or effect on surrounding towns, the region or an overriding interest of the state and the health, safety and welfare of the citizens and residents thereof requires otherwise. (1969, No. 250 (Adj. Sess.), § 23, eff. April 4, 1970; amended 1973, No. 85, § 5; 1983, No. 114 (Adj. Sess.), § 3.)

**§ 6047. Changes in the capability and development plan**

(a) After final adoption, any department or agency of the state or a municipality, or any property owner or lessee may petition the board for a change in the capability and development plan.

(b) Within 10 days of receipt, the board shall forward a copy of the petition to the district commission and regional planning agency for comments and recommendations. If no regional planning commission exists, the copy shall be sent to the affected municipal planning commissions and municipalities.

(c) After 60 days but within 120 days of the original receipt of a petition, the board shall advertise a public hearing to be held in the appropriate county. The board shall notify the persons and agencies that have an interest in the change of the time and place of the hearing and the procedures established for initial adoption of a plan shall apply.

(d)-(f) [Repealed.] (1969, No. 250 (Adj. Sess.), § 24, eff. April 4, 1970; amended 1983, No. 114 (Adj. Sess.), § 4.)

## **§ 6081. Permits required; exemptions**

(a) No person shall sell or offer for sale any interest in any subdivision located in this state, or commence construction on a subdivision or development, or commence development without a permit. This section shall not prohibit the sale, mortgage or transfer of all, or an undivided interest in all, of a subdivision unless the sale, mortgage or transfer is accomplished to circumvent the purposes of this chapter.

(b) Subsection (a) of this section shall not apply to a subdivision exempt under the regulations of the department of health in effect on January 21, 1970 or any subdivision which has a permit issued prior to June 1, 1970 under the board of health regulations, or has pending a bona fide application for a permit under the regulations of the board of health on June 1, 1970, with respect to plats on file as of June 1, 1970 provided such permit is granted prior to August 1, 1970. Subsection (a) of this section shall not apply to development which is not also a subdivision, which has been commenced prior to June 1, 1970, if the construction will be completed by March 1, 1971. Subsection (a) of this section shall not apply to a state highway on which a hearing pursuant to section 222 of Title 19 has been held prior to June 1, 1970. Subsection (a) of this section shall not apply to any telecommunications facility in existence prior to July 1, 1997, unless that facility is a "development" as defined in subdivision 6001(3) of this title. Subsection (a) of this section shall apply to any substantial change in such excepted subdivision or development.

(c) No permit or permit amendment is required for activities at a solid waste management facility authorized by a provisional certification issued under 10 V.S.A. § 6605d; however, development at such a facility that is beyond the scope of that provisional certification is not exempt from the provisions of this chapter.

(d) For purposes of this section, the following construction of improvements to preexisting municipal, county, or state projects shall not be considered to be substantial changes and shall not require a permit as provided under subsection (a) of this section:

(1) municipal, county, or state wastewater treatment facility enhancements that do not expand the capacity of the facility by more than 10 percent, excluding the extension of a wastewater collection system or an expansion of the service-area boundaries of a wastewater treatment facility.

(2) municipal, county, or state water supply enhancements that do not expand the capacity of the facility by more than 10 percent.

(3) public school reconstruction or expansion that does not expand the student capacity of the school by more than 10 percent.

(4) municipal, county, or state building renovations or reconstruction that does not expand the floor space of the building by more than 10 percent.

(5) *construction of improvements to preexisting municipal, county, or state roads and bridges, provided such construction receives funding through the federal American Recovery and Reinvestment Act of 2009, Pub.L. No. 111-5. (See below)*

***Note: The exemption in § 6081(d)(5) sunsetted on July 1, 2011. Projects commenced before July 1, 2011 under this section may continue without the need for an Act 250 permit. See Act 54, § 54 (2009).***

(e) For purposes of this section, the replacement of water and sewer lines, as part of a municipality's regular maintenance or replacement of existing facilities, shall not be considered to be substantial changes and shall not require a permit as provided under subsection (a) of this section, provided that the replacement does not expand the capacity of the relevant facility by more than 10 percent.

(f) A permit application for a development for which a certificate of need pursuant to section 6606a of this title is required shall be accompanied by such certificate.

(g) The owners or operators of earth removal sites associated with a landfill closing, other than the landfill site itself, shall obtain a municipal zoning permit in lieu of a permit under this chapter, unless the municipality chooses to refer the matter to the district environmental commission having jurisdiction. At the district commission level, the matter will be treated as a minor application. If municipal zoning bylaws do not exist, the excavation application shall be subject to the provisions of this chapter as a minor application.

(h) No permit or permit amendment is required for closure operations at an unlined landfill which began disposal operations prior to July 1, 1992 and which has been ordered closed under section 6610a or chapter 201 of this title. Closure and post-closure operations covered by this provision are limited to the following on-site operations: final landfill cover system construction and related maintenance operations, water quality monitoring, landfill gas control systems installation and maintenance, erosion control measures, site remediation and general maintenance. Prior to issuing a final order for closure for landfills qualifying for this exemption, a public informational meeting shall be noticed and held by the secretary with public comment accepted on the draft order. The public comment period shall extend no less than seven days before the public meeting and 14 days after the meeting. Public comment related to the public health, water pollution, air pollution, traffic, noise, litter, erosion and visual conditions shall be considered. Landfills with permits in effect under this chapter as of July 1, 1994, shall not qualify for an exemption as described under this section.

(i) The repair or replacement of railroad facilities used for transportation purposes, as part of a railroad's maintenance, shall not be considered to be substantial changes and shall not require a permit as provided under subsection (a) of this section, provided that the replacement or repair does not result in the physical expansion of the railroad's facilities.

(j) With respect to the extraction of slate from a slate quarry that is included in final slate quarry registration documents, if it were removed from a site prior to June 1, 1970, the site from which slate was actually removed, if lying unused at any time after those operations commenced, shall be deemed to be held in reserve, and shall not be deemed to be abandoned.

(k)(1) With respect to the commercial extraction of slate from a slate quarry, activities that are not ancillary to slate mining operations may constitute substantial changes, and be subject to permitting requirements under this chapter. "Ancillary activities" include the following activities that pertain to slate and that take place within a registered parcel that contains a slate quarry: drilling, crushing, grinding, sizing, washing, drying, sawing and cutting stone, blasting, trimming, punching, splitting and gauging, and use of buildings and use and construction of equipment exclusively to carry out the above activities. Buildings that existed on April 1, 1995, or any replacements to those buildings, shall be considered ancillary.

(2) Activities that are ancillary activities that involve crushing, may constitute substantial changes if they may result in significant impact with respect to any of the criteria specified in subdivisions 6086(a)(1) through (10) of this title.

(1)(1) By no later than January 1, 1997, any owner of land or mineral rights or any owner of slate quarry leasehold rights on a parcel of land on which a slate quarry was located as of June 1, 1970, may register the existence of the slate quarry with the district commission and with the clerk of the municipality in which the slate quarry is located, while also providing each with a map which indicates the boundaries of the parcel which contains the slate quarry.

(2) Slate quarry registration shall state the name and address of the owner of the land, mineral rights or leasehold rights; whether that person holds mineral rights, or leasehold rights or is the owner in fee simple; the physical location of the same; the physical location and size of ancillary buildings; and the book and page of the recorded deed or other instrument by which the owner holds title to the land or rights.

(3) Slate quarry registration documents shall be submitted to the district commission together with a request, under the provisions of subsection 6007(c) of this title, for a final determination regarding the applicability of this chapter.

(4) The final determination regarding a slate quarry registration under subsection 6007(c) of this title shall be recorded in the municipal land records at the expense of the registrant along with an accurate site plan of the parcel depicting the site specific information contained in the registration documents.

(5) With respect to a slate quarry located on a particular registered parcel of land, ancillary activities on the parcel related to the extraction and processing of slate into products that are primarily other than crushed stone products shall not be deemed to be substantial changes, as long as the activities do not involve the creation of one or more new slate quarry holes that are not related to an existing slate quarry hole.

(m) No permit is required for the replacement of a preexisting telecommunications facility, in existence prior to July 1, 1997, provided the facility is not a development as defined in subdivision 6001(3) of this title, unless the replacement would constitute a substantial change to the telecommunications facility being replaced, or to improvements ancillary to the telecommunications facility, or both. No permit is required for repair or routine maintenance of a

preexisting telecommunications facility or of those ancillary improvements associated with the telecommunications facility.

(n) No permit amendment is required for the replacement of a permitted telecommunications facility unless the replacement would constitute a material or substantial change to the permitted telecommunications facility to be replaced, or to improvements ancillary to the telecommunications facility, or both. No permit is required for repair or routine maintenance of a permitted telecommunications facility or of those ancillary improvements associated with the telecommunications facility.

(o) If a downtown development district designation pursuant to 24 V.S.A. § 2793 is removed, subsection (a) of this section shall apply to any subsequent substantial change to a project that was originally exempt pursuant to subdivision 6001(3)(B) of this title.

(p) No permit or permit amendment is required for any change to a project that is located entirely within a downtown development district designated pursuant to 24 V.S.A. § 2793, if the change consists exclusively of any combination of mixed use and mixed income housing, and the cumulative changes within any continuous period of five years, commencing on or after the effective date of this subsection, remain below the jurisdictional threshold specified in subdivision 6001(3)(B) of this title.

(q) For the purposes of reviewing any combination of electrical distribution and communications lines and subsidiary facilities that, standing alone, constitutes a development for purposes of this chapter, the actual and potential impacts considered by the board or district commission under subsection 6086(a) of this title shall not include actual or potential impacts of the construction of other improvements to be served by those lines and subsidiary facilities.

(r) In situations in which the construction of improvements for any combination of electrical distribution and communications lines and subsidiary facilities, standing alone, constitutes a development subject to the jurisdiction of the board or district commission under this chapter, subsequent construction of improvements for any combination of electrical distribution and communications lines and subsidiary facilities not identified or reasonably identifiable at the time construction commences, standing alone, shall be considered new construction of improvements and shall not be considered a material or substantial change to that previously permitted development.

(s)(1) No permit amendment is required for farming that:

(A) will occur on primary agricultural soils preserved in accordance with section 6093 of this title; or

(B) will not conflict with any permit condition issued pursuant to this chapter.

(2) Permits shall include a statement that farming is permitted on lands exempt from amendment jurisdiction under this subsection.

(t) (1) The following improvements associated with the construction or installation of a communications line shall not be considered a substantial change to a utility line cleared and in use for electrical distribution or communications lines and related facilities and shall not require a permit under subsection (a) of this section:

(A) The attachment of a new or replacement cable or wire to an existing electrical distribution or communications distribution pole.

(B) The replacement of an existing electrical distribution or communications distribution pole with a new pole, so long as the new pole is not more than 10 feet taller than the pole it replaces.

(2) In this subsection, “communications line” means a wireline or fiber-optic cable communications facility that transmits and receives signals to and from a local, state, national, or international network used primarily for two-way communications for commercial, industrial, municipal, county, or state purposes.

(3) Nothing in this subsection shall be construed to expand the scope of jurisdiction under this chapter over electric distribution and communications lines as interpreted and applied prior to the effective date of this act by the district commissions and the land use panel of the natural resources board.

***(Note: Section 6081(t) shall be repealed on July 1, 2014.)***

(u) A building constructed prior to January 1, 2011 in accordance with subdivision 6001(3)(D)(iv) of this title shall not be subject to an enforcement action under this chapter for:

(1) construction or any event or activity at the building that occurred prior to January 1, 2011; and

(2) any event or activity at the building on or after January 1, 2011 if the building is used solely for the purpose of an agricultural fair.

(Added 1969, No. 250 (Adj. Sess.), §§ 6, 7, subsec. (a), eff. June 1, 1970, subsec. (b), eff. April 4, 1970; amended 1989, No. 218 (Adj. Sess.), § 2; No. 276 (Adj. Sess.), §§ 17a, 17b, eff. June 20, 1990; No. 282 (Adj. Sess.), § 7, eff. June 22, 1990; 1991, No. 256 (Adj. Sess.), § 30, eff. June 9, 1992; 1993, No. 200 (Adj. Sess.), § 2; No. 208 (Adj. Sess.), § 4; 1995, No. 30, § 2, eff. April 13, 1995; 1999, No. 93 (Adj. Sess.), §§ 1, 2; 2001, No. 114 (Adj. Sess.), § 7c, eff. May 28, 2002; No. 133 (Adj. Sess.), § 1; 2009, No. 54 (Adj. Sess.), § 52, eff. June 1, 2009; 2011, No. 18 (Adj. Sess.) § 3, eff. May 11, 2011; 2011, No. 53 (Adj. Sess.) § 4, eff. May 27, 2011.)

## **§ 6082. Approval by local governments and state agencies**

The permit required under section 6081 of this title shall not supersede or replace the requirements for a permit of any other state agency or municipal government. (1969, No. 250 (Adj. Sess.), § 27, eff. April 4, 1970.)

### **§ 6083. Applications**

(a) An application for a permit shall be filed with the district commissioner as prescribed by the rules of the board and shall contain at least the following documents and information:

(1) The applicant's name, address, and the address of each of the applicant's offices in this state, and, where the applicant is not an individual, municipality or state agency, the form, date and place of formation of the applicant.

(2) Four copies of a plan of the proposed development or subdivision showing the intended use of the land, the proposed improvements, the details of the project, and any other information required by this chapter, or the rules adopted under this chapter.

(3) The fee prescribed by section 6083a of this title.

(4) Certification of filing of notice as set forth in 6084 of this title.

(b) An applicant or petitioner shall grant the appropriate panel of the board or district commission, or their agents, permission to enter upon the applicant's or petitioner's land for these purposes.

(c) Where an application concerns the extraction or processing of fissionable source material, before the application is considered the district commission shall obtain the express approval of the general assembly by act of legislation stating that extraction or processing of fissionable source material will promote the general welfare. The district commission shall advise the general assembly of any application for extraction or processing of fissionable source material by delivering written notice to the speaker of the house of representatives and to the president of the senate, and shall make available all relevant material. The procedural requirements and deadlines applicable to permit applications under this chapter shall be suspended until the approval is granted. Approval by the general assembly under this subsection shall not be construed as approval of any particular application or proposal for development.

(d) The panels of the board and commissions shall make all practical efforts to process matters before the board and permits in a prompt manner. The land use panel shall establish time limits for the processing of land use permits issued under section 6086 of this title as well as procedures and time periods within which to notify applicants whether an application is complete. The land use panel shall report annually by February 15 to the house and senate committees on natural resources and energy and government operations. The annual report shall assess the performance of the board and commissions in meeting the limits; identify areas which hinder effective performance; list fees collected for each permit; summarize changes made to improve performance; and describe staffing needs for the coming year.

(e) The district commissions shall give priority to municipal projects that have been mandated by the state through a permit, enforcement order, court order, enforcement settlement agreement, statute, rule or policy.

(f) In situations where the party seeking to file an application is a state agency, municipality, solid waste management district empowered to condemn the involved land or an interest in it, the application need only be signed by that party.

(g)(1) A district commission, pending resolution of noncompliance, may stay the issuance of a permit or amendment if it finds, by clear and convincing evidence, that a person who is an applicant:

(A) is not in compliance with a court order, an administrative order, or an assurance of discontinuance with respect to a violation that is directly related to the activity which is the subject of the application; or

(B) has one or more current violations of this chapter, or any rules, permits, assurances of discontinuance, court order, or administrative orders related to this chapter, which, when viewed together, constitute substantial noncompliance.

(2) Any decision under this subsection to issue a stay may be subject to review by the environmental court, as provided by rule of the supreme court.

(3) If the same violation is the subject of an enforcement action under chapter 201 of this title, then jurisdiction over the issuance of a stay shall remain with the environmental court and shall not reside with the district commission. (1969, No. 250 (Adj. Sess.), §§ 8, 15, eff. April 4, 1970; amended 1979, No. 123 (Adj. Sess.), § 6, eff. April 14, 1980; 1987, No. 76, § 10; 1989, No. 276 (Adj. Sess.), § 17, eff. June 20, 1990; No. 279 (Adj. Sess.), § 3; 1991, No. 109, § 7, eff. June 28, 1991; 1995, No. 186 (Adj. Sess.), § 35, eff. May 22, 1996; 1997, No. 155 (Adj. Sess.), § 26; 2001, No. 40, § 4; 2003, No. 151 (Adj. Sess.), § 1; No. 115 (Adj. Sess.), § 52, eff. Jan. 31, 2005; No. 146, § F21, eff. July 1, 2010.)

### **§ 6083a. Act 250 fees**

(a) All applicants for a land use permit under section 6086 of this title shall be directly responsible for the costs involved in the publication of notice in a newspaper of general circulation in the area of the proposed development or subdivision and the costs incurred in recording any permit or permit amendment in the land records. In addition, applicants shall be subject to the following fees for the purpose of compensating the state of Vermont for the direct and indirect costs incurred with respect to the administration of the Act 250 program:

(1) For projects involving construction, \$5.40 for each \$1,000.00 of the first \$15,000,000.00 of construction costs, and \$2.50 for each \$1,000.00 of construction costs above \$15,000,000.00.

(2) For projects involving the creation of lots, \$100.00 for each lot.

(3) For projects involving exploration for or removal of oil, gas and fissionable source materials, a fee as determined under subdivision (1) of this subsection or \$1,000.00 for each day of commission hearings required for such projects, whichever is greater.



(4) For projects involving the extraction of earth resources, including but not limited to sand, gravel, peat, topsoil, crushed stone, or quarried material, the greater of: a fee as determined under subdivision (1) of this subsection; or a fee equivalent to the rate of \$0.02 per cubic yard of the first million cubic yards of the total volume of earth resources to be extracted over the life of the permit, and \$.01 per cubic yard of any such earth resource extraction above one million cubic yards. Extracted material that is not sold or does not otherwise enter the commercial marketplace shall not be subject to the fee. The fee assessed under this subdivision for an amendment to a permit shall be based solely upon any additional volume of earth resources to be extracted under the amendment.

(5) For projects involving the review of a master plan, a fee equivalent to \$0.10 per \$1,000.00 of total estimated construction costs in current dollars in addition to the fee established in subdivision (1) of this subsection for any portion of the project seeking construction approval.

(6) In no event shall a permit application fee exceed \$150,000.00.

(b) Notwithstanding the provisions of subsection (a) of this section, there shall be a minimum fee of \$150.00 for original applications and \$50.00 for amendment applications, in addition to publication and recording costs. These costs shall be in addition to any other fee established by statute, unless otherwise expressly stated.

(c) Fees shall not be required for projects undertaken by municipal agencies or by state governmental agencies, except for publication and recording costs.

(d) Fees for residential development in a Vermont neighborhood designated according to 24 V.S.A. § 2793d shall be no more than 50 percent of the fee otherwise charged under this section, with 50 percent due with the application, and 50 percent due within 30 days after the permit is issued or denied.

(e) A written request for an application fee refund shall be submitted to the district commission to which the fee was paid within 90 days of the withdrawal of the application.

(1) In the event that an application is withdrawn prior to the convening of a hearing, the district commission shall, upon request of the applicant, refund 50 percent of the fee paid between \$100.00 and \$5,000.00, and all of that portion of the fee paid in excess of \$5,000.00 except that the district commission may decrease the amount of the refund if the direct and indirect costs incurred by the state of Vermont with respect to the administration of the Act 250 program clearly and unreasonably exceed the fee that would otherwise be retained by the district commission.

(2) In the event that an application is withdrawn after a hearing, the district commission shall, upon request of the applicant, refund 25 percent of the fee paid between \$100.00 and \$10,000.00 and all of that portion of the fee paid in excess of \$10,000.00 except that the district commission may decrease the amount of the refund if the direct and indirect costs incurred by the state of Vermont with respect to the administration of the Act 250 program clearly and unreasonably exceed the fee that would otherwise be retained by the district commission.

(3) The district commission shall, upon request of the applicant, increase the amount of the refund if the application of subdivisions (1) and (2) of this subsection clearly would result in a fee that unreasonably exceeds the direct and indirect costs incurred by the state of Vermont with respect to the administration of the Act 250 program.

(4) District commission decisions regarding application fee refunds may be appealed to the land use panel in accordance with board rules.

(5) For the purposes of this section, a "hearing" is a duly warned meeting concerning an application convened by a quorum of the district commission, at which parties may be present. However, a hearing does not include a prehearing conference.

(6) In no event may an application fee or a portion thereof be refunded after a district commission has issued a final decision on the merits of an application.

(7) In no event may an application fee refund include the payment of interest on the application fee.

(f) In the event that an application involves a project or project impacts that previously have been reviewed, the applicant may petition the chair of the district commission to waive all or part of the application fee. If an application fee was paid previously in accordance with subdivisions (a)(1) through (4) of this section, the chair may waive all or part of the fee for a new or revised project if the chair finds that the impacts of the project have been reviewed in an applicable master permit application, or that the project is not significantly altered from a project previously reviewed, or that there will be substantial savings in the review process due to the scope of review of the previous applications.

(g) A commission or the land use panel may require any permittee to file a certification of actual construction costs and may direct the payment of a supplemental fee in the event that an application understated a project's construction costs. Failure to file a certification or to pay a supplemental fee shall be grounds for permit revocation.

(h) The costs of republishing a notice due to a scheduling change requested by a party shall be borne by the party requesting the change. (Added 1997, No. 155 (Adj. Sess.), § 27; amended 2003, No. 163 (Adj. Sess.), § 26; No. 115 (Adj. Sess.), § 53, eff. Jan. 31, 2005; No. 134, § 33, eff. July 1, 2010; 2012, No. 161, § 8, eff. July 1, 2012)

#### **§ 6084. Notice of application; hearings, commencement of review**

(a) On or before the date of filing of an application with the district commission, the applicant shall send notice and a copy of the initial application to the owner of the land if the applicant is not the owner; the municipality in which the land is located; the municipal and regional planning commissions for the municipality in which the land is located; the Vermont agency of natural resources; any adjacent Vermont municipality and municipal and regional planning commission if the land is located on a municipal or regional boundary. The applicant shall furnish to the district

commission the names of those furnished notice by affidavit, and shall post a copy of the notice in the town clerk's office of the town or towns wherein the project lies. The applicant shall also provide a list of adjoining landowners to the district commission. Upon request and for good cause, the district commission may authorize the applicant to provide a partial list of adjoining landowners in accordance with board rules.

(b) Upon an application being ruled complete, the district commission shall determine whether to process the application as a major application with a required public hearing or process the application as a minor application with the potential for a public hearing in accordance with board rules.

(1) For major applications, the district commission shall provide notice not less than ten days prior to any scheduled hearing or prehearing conference to: the applicant; the owner of the land if the applicant is not the owner; the municipality in which the land is located; the municipal and regional planning commissions for the municipality in which the land is located; any adjacent Vermont municipality and municipal and regional planning commission if the land is located on a municipal or regional boundary; adjoining landowners as deemed appropriate by the district commission pursuant to the rules of the board, and any other person the district commission deems appropriate.

(2) For minor applications, the district commission shall provide notice of the commencement of application review to the persons listed in subdivision (1) of this subsection.

(3) For both major and minor applications, the district commission shall also provide such notice and a copy of the application to: the board and any affected state agency; the solid waste management district in which the land is located, if the development or subdivision constitutes a facility pursuant to subdivision 6602(10) of this title; and any other municipality, state agency, or person the district commission deems appropriate.

(c) Anyone required to receive notice of commencement of minor application review pursuant to subsection (b) of this section may request a hearing by filing a request within the public comment period specified in the notice pursuant to board rules. The district commission, on its own motion, may order a hearing within 20 days of notice of commencement of minor application review.

(d) Any hearing or prehearing conference for a major application shall be held within 40 days of receipt of a complete application; or within 20 days of the end of the public comment period specified in the notice of minor application review if the district commission determines that it is appropriate to hold a hearing for a minor application.

(e) Any notice for a major or minor application, as required by this section, shall also be published by the district commission in a local newspaper generally circulating in the area where the development or subdivision is located not more than ten days after receipt of a complete application.

(1) Notice of any hearing for a major application shall be published, as required by this section, not less than ten days before the hearing or prehearing conference.

(2) If the district commission determines that it is appropriate to hold a hearing for an application that was originally noticed as a minor application, then the application shall be renoticed as a major application in accordance with the requirements of this section and board rules, except that there shall be no requirement to publish the second notice in a local newspaper. Direct notice of the hearing to all persons listed in subdivisions (b)(1) and (3) of this section shall be deemed sufficient. (1969, No. 250 (Adj. Sess.), § 9, eff. April 4, 1970; amended 1991, No. 109, § 2 eff. June 28, 1991; 1993, No. 232 (Adj. Sess.), § 29, eff. March 15, 1995; 1995, No. 189 (Adj. Sess.), § 10, eff. May 22, 1996; 2003, No. 115 (Adj. Sess.), § 54; No. 146, § F22, eff. July 1, 2010.)

### **§ 6085. Hearings; party status**

(a), (b) [Deleted.]

(c)(1) Party status. In proceedings before the district commissions, the following persons shall be entitled to party status:

(A) The applicant;

(B) The landowner, if the applicant is not the landowner;

(C) The municipality in which the project site is located, and the municipal and regional planning commissions for that municipality; if the project site is located on a boundary, any Vermont municipality adjacent to that border and the municipal and regional planning commissions for that municipality; and the solid waste management district in which the land is located, if the development or subdivision constitutes a facility pursuant to subdivision 6602(10) of this title;

(D) Any state agency affected by the proposed project;

(E) Any adjoining property owner or other person who has a particularized interest protected by this chapter that may be affected by an act or decision by a district commission.

(2) Content of Petitions. All persons seeking to participate in proceedings before the district commission as parties pursuant to subdivision (c)(1)(E) of this section must petition for party status. Any petition for party status may be made orally or in writing to the district commission. All petitions must include:

(A) A detailed statement of the petitioner's interest under the relevant criteria of the proceeding, including, if known, whether the petitioner's position is in support of or in opposition to the relief sought by the permit applicant, or petitioner.

(B) In the case of an organization, a description of the organization, its purposes, and the nature of its membership.

(C) A statement of the reasons the petitioner believes the district commission should allow the petitioner party status in the pending proceeding.

(D) In the case of a person seeking party status under subdivision (c)(1)(E) of this section:

(i) If applicable, a description of the location of the petitioner's property in relation to the proposed project, including a map, if available;

(ii) A description of the potential effect of the proposed project upon the petitioner's interest with respect to each of the relevant criteria or subcriteria under which party status is being requested.

(3) Timeliness. A petition for party status pursuant to subdivision (c)(1)(E) of this section must be made at or prior to an initial prehearing conference held pursuant to board rule or at the commencement of the hearing, whichever shall occur first, unless the district commission directs otherwise. The district commission may grant an untimely petition if it finds that the petitioner has demonstrated good cause for failure to request party status in a timely fashion, and that the late appearance will not unfairly delay the proceedings or place an unfair burden on the parties.

(4) Conditions. Where a person has been granted party status pursuant to subdivision (c)(1)(E) of this section, the district commission shall restrict the person's participation to only those issues in which the person has demonstrated an interest, and may encourage the person to join with other persons with respect to representation, presentation of evidence, or other matters in the interest of promoting judicial efficiency.

(5) Friends of the commission. The district commission, on its own motion or by petition, may allow nonparties to participate in any of its proceedings, without being accorded party status. Participation may be limited to the filing of memoranda, proposed findings of fact and conclusions of law, and argument on legal issues. However, if approved by the district commission, participation may be expanded to include the provision of testimony, the filing of evidence, or the cross examination of witnesses. A petition for leave to participate as a friend of the commission shall identify the interest of the petitioner and the desired scope of participation and shall state the reasons why the participation of the petitioner will be beneficial to the district commission. Except where all parties consent or as otherwise ordered by the district commission or by the chair of the district commission, all friends of the commission shall file their memoranda, testimony, or evidence within the times allowed the parties.

(6) Re-examination of party status. A district commission shall re-examine party status determinations before the close of hearings and state the results of that re-examination in the district commission decision. In the re-examination of party status coming before the close of district commission hearings, persons having attained party status up to that point in the proceedings shall be presumed to retain party status. However, on motion of a party, or on its own motion, a commission shall consider the extent to which parties continue to qualify for party status. Determinations made before the close of district commission hearings shall supersede any preliminary determinations of party status.

(d) If no hearing has been requested or ordered within the prescribed period no hearing need be held by the district commission. In such an event a permit shall be granted or denied within 60 days of receipt; otherwise, it shall be deemed approved and a permit shall be issued.

(e) The land use panel and any district commission, acting through one or more duly authorized representatives at any prehearing conference or at any other times deemed appropriate by the land use panel or by the district commission, shall promote expeditious, informal, and nonadversarial resolution of issues, require the timely exchange of information concerning the application, and encourage participants to settle differences. No district commissioner who is participating as a decision maker in a particular case may act as a duly authorized representative for the purposes of this subsection. These efforts at dispute resolution shall not affect the burden of proof on issues before a commission or the environmental court, nor shall they affect the requirement that a permit may be issued only after the issuance of affirmative findings under the criteria established in section 6086 of this title.

(f) A hearing shall not be closed until a commission provides an opportunity to all parties to respond to the last permit or evidence submitted. Once a hearing has been closed, a commission shall conclude deliberations as soon as is reasonably practicable. A decision of a commission shall be issued within 20 days of the completion of deliberations. (1969, No. 250 (Adj. Sess.), §§ 10, 11, eff. April 4, 1970; amended 1973, No. 85, § 9; 1989, No. 234 (Adj. Sess.), § 3; 1993, No. 82, § 4; 1993, No. 232 (Adj. Sess.), §§ 30, 31, eff. March 15, 1995; 2003, No. 115 (Adj. Sess.), § 55, eff. Jan. 31, 2005.)

#### **§ 6086. Issuance of permit; conditions and criteria**

(a) Before granting a permit, the district commission shall find that the subdivision or development:

(1) Will not result in undue water or air pollution. In making this determination it shall at least consider: the elevation of land above sea level; and in relation to the flood plains, the nature of soils and subsoils and their ability to adequately support waste disposal; the slope of the land and its effect on effluents; the availability of streams for disposal of effluents; and the applicable health and environmental conservation department regulations.

(A) Headwaters. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision will meet any applicable health and environmental conservation department regulation regarding reduction of the quality of the ground or surface waters flowing through or upon lands which are not devoted to intensive development, and which lands are:

(i) headwaters of watersheds characterized by steep slopes and shallow soils; or

(ii) drainage areas of 20 square miles or less; or

(iii) above 1,500 feet elevation; or

(iv) watersheds of public water supplies designated by the agency of natural resources; or

(v) areas supplying significant amounts of recharge waters to aquifers.

(B) Waste disposal. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision will meet any applicable health and environmental conservation department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells.

(C) Water conservation. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the design has considered water conservation, incorporates multiple use or recycling where technically and economically practical, utilizes the best available technology for such applications, and provides for continued efficient operation of these systems.

(D) Floodways. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria:

(i) the development or subdivision of lands within a floodway will not restrict or divert the flow of flood waters, and endanger the health, safety and welfare of the public or of riparian owners during flooding; and

(ii) the development or subdivision of lands within a floodway fringe will not significantly increase the peak discharge of the river or stream within or downstream from the area of development and endanger the health, safety, or welfare of the public or riparian owners during flooding.

(E) Streams. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision of lands on or adjacent to the banks of a stream will, whenever feasible, maintain the natural condition of the stream, and will not endanger the health, safety, or welfare of the public or of adjoining landowners.

(F) Shorelines. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other criteria, the development or subdivision of shorelines must of necessity be located on a shoreline in order to fulfill the purpose of the development or subdivision, and the development or subdivision will, insofar as possible and reasonable in light of its purpose:

(i) retain the shoreline and the waters in their natural condition,

(ii) allow continued access to the waters and the recreational opportunities provided by the waters,

(iii) retain or provide vegetation which will screen the development or subdivision from the waters, and

(iv) stabilize the bank from erosion, as necessary, with vegetation cover.

(G) Wetlands. A permit will be granted whenever it is demonstrated by the applicant, in addition to other criteria, that the development or subdivision will not violate the rules of the board, as adopted under this chapter, relating to significant wetlands.

(2) Does have sufficient water available for the reasonably foreseeable needs of the subdivision or development.

(3) Will not cause an unreasonable burden on an existing water supply, if one is to be utilized.

(4) Will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.

(5) Will not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed.

(6) Will not cause an unreasonable burden on the ability of a municipality to provide educational services.

(7) Will not place an unreasonable burden on the ability of the local governments to provide municipal or governmental services.

(8) Will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.

(A) Necessary wildlife habitat and endangered species. A permit will not be granted if it is demonstrated by any party opposing the applicant that a development or subdivision will destroy or significantly imperil necessary wildlife habitat or any endangered species, and

(i) the economic, social, cultural, recreational, or other benefit to the public from the development or subdivision will not outweigh the economic, environmental, or recreational loss to the public from the destruction or imperilment of the habitat or species, or

(ii) all feasible and reasonable means of preventing or lessening the destruction, diminution, or imperilment of the habitat or species have not been or will not continue to be applied, or

(iii) a reasonably acceptable alternative site is owned or controlled by the applicant which would allow the development or subdivision to fulfill its intended purpose.

(9) Is in conformance with a duly adopted capability and development plan, and land use plan when adopted. However, the legislative findings of sections 7(a)(1) through 7(a)(19) of this act shall not be used as criteria in the consideration of applications by a district commission.



(A) Impact of growth. In considering an application, the district commission shall take into consideration the growth in population experienced by the town and region in question and whether or not the proposed development would significantly affect their existing and potential financial capacity to reasonably accommodate both the total growth and the rate of growth otherwise expected for the town and region and the total growth and rate of growth which would result from the development if approved. After considering anticipated costs for education, highway access and maintenance, sewage disposal, water supply, police and fire services and other factors relating to the public health, safety and welfare, the district commission or the board shall impose conditions which prevent undue burden upon the town and region in accommodating growth caused by the proposed development or subdivision. Notwithstanding section 6088 of this title the burden of proof that proposed development will significantly affect existing or potential financial capacity of the town and region to accommodate such growth is upon any party opposing an application, excepting however, where the town has a duly adopted capital improvement program the burden shall be on the applicant.

(B) Primary agricultural soils. A permit will be granted for the development or subdivision of primary agricultural soils only when it is demonstrated by the applicant that, in addition to all other applicable criteria, either, the subdivision or development will not result in any reduction in the agricultural potential of the primary agricultural soils; or:

(i) the development or subdivision will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential; and

(ii) except in the case of an application for a project located in a designated growth center, there are no lands other than primary agricultural soils owned or controlled by the applicant which are reasonably suited to the purpose of the development or subdivision; and

(iii) except in the case of an application for a project located in a designated growth center, the subdivision or development has been planned to minimize the reduction of agricultural potential of the primary agricultural soils through innovative land use design resulting in compact development patterns, so that the remaining primary agricultural soils on the project tract are capable of supporting or contributing to an economic or commercial agricultural operation; and

(iv) suitable mitigation will be provided for any reduction in the agricultural potential of the primary agricultural soils caused by the development or subdivision, in accordance with section 6093 of this title and rules adopted by the land use panel.

(C) Productive forest soils. A permit will be granted for the development or subdivision of productive forest soils only when it is demonstrated by the applicant that, in addition to all other applicable criteria, either, the subdivision or development will not result in any reduction in the potential of those soils for commercial forestry; or:

(i) the development or subdivision will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential; and

(ii) except in the case of an application for a project located in a designated growth center, there are no lands other than productive forest soils owned or controlled by the applicant which are reasonably suited to the purpose of the development or subdivision; and

(iii) except in the case of an application for a project located in a designated growth center, the subdivision or development has been planned to minimize the reduction of the potential of those productive forest soils through innovative land use design resulting in compact development patterns, so that the remaining forest soils on the project tract may contribute to a commercial forestry operation.

(D) Earth resources. A permit will be granted whenever it is demonstrated by the applicant, in addition to all other applicable criteria, that the development or subdivision of lands with high potential for extraction of mineral or earth resources, will not prevent or significantly interfere with the subsequent extraction or processing of the mineral or earth resources.

(E) Extraction of earth resources. A permit will be granted for the extraction or processing of mineral and earth resources, including fissionable source material:

(i) when it is demonstrated by the applicant that, in addition to all other applicable criteria, the extraction or processing operation and the disposal of waste will not have an unduly harmful impact upon the environment or surrounding land uses and development; and

(ii) upon approval by the district commission of a site rehabilitation plan which insures that upon completion of the extracting or processing operation the site will be left by the applicant in a condition suited for an approved alternative use or development. A permit will not be granted for the recovery or extraction of mineral or earth resources from beneath natural water bodies or impoundments within the state, except that gravel, silt and sediment may be removed pursuant to the rules of the agency of natural resources, and natural gas and oil may be removed pursuant to the rules of the natural gas and oil resources board.

(F) Energy conservation. A permit will be granted when it has been demonstrated by the applicant that, in addition to all other applicable criteria, the planning and design of the subdivision or development reflect the principles of energy conservation and incorporate the best available technology for efficient use or recovery of energy.

(G) Private utility services. A permit will be granted for a development or subdivision which relies on privately-owned utility services or facilities, including central sewage or water facilities and roads, whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the privately-owned utility services or facilities are in conformity with a capital program or plan of the municipality involved, or adequate surety is provided to the municipality and conditioned to protect the municipality in the event that the municipality is required to assume the responsibility for the services or facilities.

(H) Costs of scattered development. The district commission will grant a permit for a development or subdivision which is not physically contiguous to an existing settlement whenever it is demonstrated that, in addition to all other applicable criteria, the additional costs of public services and facilities caused directly or indirectly by the proposed development or subdivision do not outweigh the tax revenue and other public benefits of the development or

subdivision such as increased employment opportunities or the provision of needed and balanced housing accessible to existing or planned employment centers.

(J) Public utility services. A permit will be granted for a development or subdivision whenever it is demonstrated that, in addition to all other applicable criteria, necessary supportive governmental and public utility facilities and services are available or will be available when the development is completed under a duly adopted capital program or plan, an excessive or uneconomic demand will not be placed on such facilities and services, and the provision of such facilities and services has been planned on the basis of a projection of reasonable population increase and economic growth.

(K) Development affecting public investments. A permit will be granted for the development or subdivision of lands adjacent to governmental and public utility facilities, services, and lands, including, but not limited to, highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe lines, parks, hiking trails and forest and game lands, when it is demonstrated that, in addition to all other applicable criteria, the development or subdivision will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands.

(L) Rural growth areas. A permit will be granted for the development or subdivision of rural growth areas when it is demonstrated by the applicant that in addition to all other applicable criteria provision will be made in accordance with subdivisions (9)(A) "impact of growth," (G) "private utility service," (H) "costs of scattered development" and (J) "public utility services" of subsection (a) of this section for reasonable population densities, reasonable rates of growth, and the use of cluster planning and new community planning designed to economize on the cost of roads, utilities and land usage.

(10) Is in conformance with any duly adopted local or regional plan or capital program under chapter 117 of Title 24. In making this finding, if the district commission finds applicable provisions of the town plan to be ambiguous, the district commission, for interpretive purposes, shall consider bylaws, but only to the extent that they implement and are consistent with those provisions, and need not consider any other evidence.

(b) At the request of an applicant, or upon its own motion, the district commission shall consider whether to review any criterion or group of criteria of subsection (a) of this section before proceeding to or continuing to review other criteria. This request or motion may be made at any time prior to or during the proceedings. The district commission, in its sole discretion, shall, within 20 days of the completion of deliberations on the criteria that are the subject of the request or motion, either issue its findings and decision thereon, or proceed to a consideration of the remaining criteria.

(c) A permit may contain such requirements and conditions as are allowable proper exercise of the police power and which are appropriate within the respect to (1) through (10) of subsection (a), including but not limited to those set forth in sections 4414(4), 4424(2), 4414(1)(D)(i), 4463(b), and 4464 of Title 24, the dedication of lands for public use, and the filing of bonds to insure compliance. The requirements and conditions incorporated from Title 24 may be applied whether or not a local plan has been adopted. General requirements and conditions may be established by rule of the land use panel.

(d) The land use panel may by rule allow the acceptance of a permit or permits or approval of any state agency with respect to (1) through (5) of subsection (a) or a permit or permits of a specified municipal government with respect to (1) through (7) and (9) and (10) of subsection (a), or a combination of such permits or approvals, in lieu of evidence by the applicant. A district commission, in accordance with rules adopted by the land use panel, shall accept determinations issued by a development review board under the provisions of 24 V.S.A. § 4420, with respect to local Act 250 review of municipal impacts. The acceptance of such approval, positive determinations, permit, or permits shall create a presumption that the application is not detrimental to the public health and welfare with respect to the specific requirement for which it is accepted. In the case of approvals and permits issued by the agency of natural resources, technical determinations of the agency shall be accorded substantial deference by the commissions. The acceptance of negative determinations issued by a development review board under the provisions of 24 V.S.A. § 4420, with respect to local Act 250 review of municipal impacts shall create a presumption that the application is detrimental to the public health and welfare with respect to the specific requirement for which it is accepted. Any determinations, positive or negative, under the provisions of 24 V.S.A. § 4420 shall create presumptions only to the extent that the impacts under the criteria are limited to the municipality issuing the decision. Such a rule may be revoked or amended pursuant to the procedures set forth in 3 V.S.A., chapter 25, the Vermont Administrative Procedure Act. The rules adopted by the land use panel shall not approve the acceptance of a permit or approval of such an agency or a permit of a municipal government unless it satisfies the appropriate requirements of subsection (a) of this section.

(e) This subsection shall apply with respect to a development that consists of the construction of temporary physical improvements for the purpose of producing films, television programs, or advertisements. These improvements shall be considered "temporary improvements" if they remain in place for less than one year, unless otherwise extended by the permit or a permit amendment, and will not cause a long-term adverse impact under any of the 10 criteria after completion of the project. In situations where this subsection applies, jurisdiction under this chapter shall not continue after the improvements are no longer in place and the conditions in the permit have been met, provided there is not a long-term adverse impact under any of the 10 criteria after completion of the project; except, however, if jurisdiction is otherwise established under this chapter, this subsection shall not remove jurisdiction. This termination of jurisdiction in these situations does not represent legislative intent with respect to continuing jurisdiction over other types of development not specified in this subsection.

(f) Prior to any appeal of a permit issued by a district commission, any aggrieved party may file a request for a stay of construction with the district commission together with a declaration of intent

to appeal the permit. The stay request shall be automatically granted for seven days upon receipt and notice to all parties and pending a ruling on the merits of the stay request pursuant to board rules. The automatic stay shall not extend beyond the 30-day appeal period unless a valid appeal has been filed with the environmental court. The automatic stay may be granted only once under this subsection during the 30-day appeal period. Following appeal of the district commission decision, any stay request must be filed with the environmental court pursuant to the provisions of chapter 220 of this title. A district commission shall not stay construction authorized by a permit processed under the land use panel's minor application procedures. (1969, No. 250 (Adj. Sess.), § 12, eff. April 4, 1970; amended 1973, No. 85, § 10; 1973, No. 195 (Adj. Sess.), § 3, eff. April 2, 1974; 1979, No. 123 (Adj. Sess.), § 5, eff. April 14, 1980; 1981, No. 240 (Adj. Sess.), § 7, eff. April 28, 1982; 1985, No. 52, § 4, eff. May 15, 1985; 1985, No. 188 (Adj. Sess.), § 5; 1987, No. 76, § 18; 1989, No. 234 (Adj. Sess.), § 1; No. 280 (Adj. Sess.), § 13; 1993, No. 232 (Adj. Sess.), § 32, eff. March 15, 1995, 2001, No. 40, §§ 6-9; 2003, No. 115 (Adj. Sess.), § 56, eff. Jan. 31, 2005.)

#### **§ 6086a. Generators of radioactive waste**

No land use permit will be issued for a development which generates low-level radioactive waste unless it shows that it will have access to a low-level radioactive waste disposal facility and that the facility is expected to have sufficient capacity for the waste. (Added 1989, No. 296 (Adj. Sess.), § 7, eff. June 29, 1990.)

#### **§ 6087. Denial of application**

(a) No application shall be denied by the district commission unless it finds the proposed subdivision or development detrimental to the public health, safety or general welfare.

(b) A permit may not be denied solely for the reasons set forth in subdivisions (5), (6) and (7) of section 6086(a) of this title. However, reasonable conditions and requirements allowable in section 6086(c) of this title may be attached to alleviate the burdens created.

(c) A denial of a permit shall contain the specific reasons for denial. A person may, within 6 months, apply for reconsideration of his permit which application shall include an affidavit to the district commission and all parties of record that the deficiencies have been corrected. The district commission shall hold a new hearing upon 25 days notice to the parties. The hearing shall be held within 40 days of receipt of the request for reconsideration. (1969, No. 250 (Adj. Sess.), § 12, eff. April 4, 1970; amended 2003, No. 115 (Adj. Sess.), § 57, eff. Jan. 31, 2005.)

#### **§ 6088. Burden of proof**

(a) The burden shall be on the applicant with respect to subdivisions (1), (2), (3), (4), (9) and (10) of section 6086(a) of this title.

(b) The burden shall be on any party opposing the applicant with respect to subdivisions (5) through (8) of section 6086(a) of this title to show an unreasonable or adverse effect. (1969, No. 250 (Adj. Sess.), § 13, eff. April 4, 1970.)

### **§ 6089. Appeals**

Appeals of any act or decision of a district coordinator or a district commission under this chapter shall be made to the environmental court in accordance with chapter 220 of this title. (1969, No. 250 (Adj. Sess.), § 14, eff. April 4, 1970; amended 1973, No. 85, § 12; 1973, No. 193 (Adj. Sess.), § 3, eff. April 9, 1974; 1985, No. 52, § 1, eff. May 15, 1985; 1987, No. 76, § 10a; 1993, No. 232 (Adj. Sess.), § 34, eff. March 15, 1995; 1997, No. 155 (Adj. Sess.), § 28; 2003, No. 115 (Adj. Sess.), § 58, eff. Jan. 31, 2005.)

### **§ 6090. Recording; duration and revocation of permits**

(a) In order to afford adequate notice of the terms and conditions of land use permits, permit amendments and revocations of permits, they shall be recorded in local land records. Recordings under this chapter shall be indexed as though the permittee were the grantor of a deed.

(b)(1) Any permit granted under this chapter for extraction of mineral resources, operation of solid waste disposal facilities, or logging above 2,500 feet, shall be for a specified period determined by the board in accordance with the rules adopted under this chapter as a reasonable projection of the time during which the land will remain suitable for use if developed or subdivided as contemplated in the application, and with due regard for the economic considerations attending the proposed development or subdivision. Other permits issued under this chapter shall be for an indefinite term, as long as there is compliance with the conditions of the permit.

(2) Expiration dates contained in permits issued before July 1, 1994 (involving developments that are not for extraction of mineral resources, operation of solid waste disposal facilities, or logging above 2,500 feet) are extended for an indefinite term, as long as there is compliance with the conditions of the permits. (1969, No. 250 (Adj. Sess.), § 16, eff. April 4, 1970; amended 1985, No. 32; 1993, No. 232 (Adj. Sess.), § 35, eff. June 21, 1994.)

### **§ 6091. Renewals and nonuse**

(a) Renewal. At the expiration of each permit, it may be renewed under the same procedure herein specified for an original application.

(b) Nonuse of permit. Nonuse of a permit for a period of three years following the date of issuance shall constitute an abandonment of the development or subdivision and the permit shall be considered expired. For purposes of this section, for a permit to be considered "used," construction must have commenced and substantial progress toward completion must have occurred within the three-year period, unless construction is delayed by litigation or proceedings to secure other permits or to secure title through foreclosure, or unless, at the time the permit is

issued or in a subsequent proceeding, the district commission provides that substantial construction may be commenced more than three years from the date the permit is issued.

(c) Extensions. If the application is made for an extension prior to expiration the district commission may grant an extension and may waive the necessity of a hearing.

(d) Completion dates for developments and subdivisions. Permits shall include dates by which there shall be full or phased completion. The land use panel, by rule, shall establish requirements for review of those portions of developments and subdivisions that fail to meet their completion dates, giving due consideration to fairness to the parties involved, competing land use demands, and cumulative impacts on the resources involved. If completion has been delayed by litigation, proceedings to secure other permits, proceedings to secure title through foreclosure, or because of market conditions, the district commission shall provide that the completion dates be extended for a reasonable period of time. (1969, No. 250 (Adj. Sess.), § 17, eff. April 4, 1970; amended 1991, No. 111, § 2 eff. June 28, 1991; 1993, No. 232 (Adj. Sess.), § 36, eff. June 21, 1994; 2003, No. 115 (Adj. Sess.), § 59, eff. January 31, 2005.)

## **§ 6092. Construction**

In the event that the federal government preempts part of the activity regulated by this chapter, this chapter shall be construed to regulate activity that has not been preempted. (Added 1979, No. 123 (Adj. Sess.), § 7, eff. April 14, 1980.)

## **§ 6093. Mitigation of primary agricultural soils**

(a) Mitigation for loss of primary agricultural soils. Suitable mitigation for the conversion of primary agricultural soils necessary to satisfy subdivision 6086(a)(9)(B)(iv) of this title shall depend on where the project tract is located.

(1) Project located in growth center. If the project tract is located in a designated growth center, an applicant who complies with subdivision 6086(a)(9)(B)(iv) of this title shall deposit an offsite mitigation fee into the Vermont housing and conservation trust fund established under section 312 of this title for the purpose of preserving primary agricultural soils of equal or greater value with the highest priority given to preserving prime agricultural soils as defined by the U.S. Department of Agriculture. Any required offsite mitigation fee shall be derived by:

(A) determining the number of acres of primary agricultural soils affected by the proposed development or subdivision;

(B) multiplying the number of affected acres of primary agricultural soils by a factor resulting in a ratio established as follows:

(i) for development or subdivision within a designated growth center, the ratio shall be 1:1;

(ii) for residential construction that has a density of at least eight units of housing per acre, of which at least eight units per acre or at least 40 percent of the units, on average, in the entire

development or subdivision, whichever is greater, meets the definition of affordable housing established in this chapter, no mitigation shall be required. However, all affordable housing units shall be subject to housing subsidy covenants, as defined in 27 V.S.A. § 610, that preserve their affordability for a period of 99 years or longer. For purposes of this section, housing that is rented shall be considered affordable housing when its inhabitants have a gross annual household income that does not exceed 60 percent of the county median income or 60 percent of the standard metropolitan statistical area income if the municipality is located in such an area.

(C) multiplying the resulting product by a “price-per-acre” value, which shall be based on the amount that the secretary of agriculture, food and markets has determined to be the recent, per-acre cost to acquire conservation easements for primary agricultural soils in the same geographic region as the proposed development or subdivision.

(2) Project located outside designated growth center. If the project tract is not located in a designated growth center, mitigation shall be provided on site in order to preserve primary agricultural soils for present and future agricultural use, with special emphasis on preserving prime agricultural soils. Preservation of primary agricultural soils shall be accomplished through innovative land use design resulting in compact development patterns which will maintain a sufficient acreage of primary agricultural soils on the project tract capable of supporting or contributing to an economic or commercial agricultural operation and shall be enforceable by permit conditions issued by the district commission. The number of acres of primary agricultural soils to be preserved shall be derived by:

(A) determining the number of acres of primary agricultural soils affected by the proposed development or subdivision; and

(B) multiplying the number of affected acres of primary agricultural soils by a factor based on the quality of those primary agricultural soils, and other factors as the secretary of agriculture, food and markets may deem relevant, including the soil’s location; accessibility; tract size; existing agricultural operations; water sources; drainage; slope; the presence of ledge or protected wetlands; the infrastructure of the existing farm or municipality in which the soils are located; and the N.R.C.S. rating system for Vermont soils. This factor shall result in a ratio of no less than 2:1, but no more than 3:1, protected acres to acres of impacted primary agricultural soils.

(3) Mitigation flexibility.

(A) Notwithstanding the provisions of subdivision (1) of this subsection pertaining to a development or subdivision on primary agricultural soils within a designated growth center, the district commission may, in appropriate circumstances, require onsite mitigation with special emphasis on preserving prime agricultural soils if that action is deemed consistent with the agricultural elements of local and regional plans and the goals of section 4302 of Title 24. In this situation, the approved plans must designate specific soils that shall be preserved inside growth centers. For projects located within a designated growth center, all factors used to calculate suitable mitigation acreage or fees, or some combination of these measures, shall be as specified in this subsection, subject to a ratio of 1:1.



(B) Notwithstanding the provisions of subdivision (2) of this subsection pertaining to a development or subdivision on primary agricultural soils outside a designated growth center, the district commission may, in appropriate circumstances, approve off-site mitigation or some combination of onsite and off-site mitigation if that action is deemed consistent with the agricultural elements of local and regional plans and the goals of section 4302 of Title 24. For projects located outside a designated growth center, all factors used to calculate suitable mitigation acreage or fees, or some combination of these measures, shall be as specified in this subsection, subject to a ratio of no less than 2:1, but no more than 3:1.

(4) Industrial parks.

(A) Notwithstanding any provision of this chapter to the contrary, a conversion of primary agricultural soils located in an industrial park as defined in subdivision 212(7) of this title and permitted under this chapter and in existence as of January 1, 2006, shall be allowed to pay a mitigation fee computed according to the provisions of subdivision (1) of this subsection, except that it shall be entitled to a ratio of 1:1, protected acres to acres of affected primary agricultural soil. If an industrial park is developed to the fullest extent before any expansion, this ratio shall apply to any contiguous expansion of such an industrial park that totals no more than 25 percent of the area of the park or no more than 10 acres, whichever is larger; provided any expansion based on percentage does not exceed 50 acres. Any expansion larger than that described in this subdivision shall be subject to the mitigation provisions of this subsection at ratios that depend upon the location of the expansion.

(B) In any application to a district commission for expansion of an existing industrial park, compact development patterns shall be encouraged that assure the most efficient use of land and the realization of maximum economic development potential through appropriate densities. Industrial park expansions and industrial park infill shall not be subject to requirements established in subdivision 6086(a)(9)(B)(iii) of this title, nor to requirements established in subdivision (9)(C)(iii).

(b) Easements required for protected lands. All primary agricultural soils preserved for commercial or economic agricultural use by the Vermont housing and conservation board pursuant to this section shall be protected by permanent conservation easements (grant of development rights and conservation restrictions) conveyed to a qualified holder, as defined in section 821 of this title, with the ability to monitor and enforce easements in perpetuity. Off-site mitigation fees may be used by the Vermont housing and conservation board to pay reasonable staff or transaction costs, or both, of the board and agency of agriculture, food, and markets to preserve primary agricultural soils or to implement section 6086(a)(9)(B) or 6093 of this title.

**COMPARISON OF SUBSTANTIVE REQUIREMENTS  
OF ACT 250 AND 30 V.S.A. §248**  
September 27, 2004

Criterion	Act 250	30 V.S.A. §248
<b>I. PLANNING</b>		
<b>Local or Regional Plan/ Orderly Development</b>	10 V.S.A. § 6086(a)(10) Is in <b>conformance</b> with any duly adopted <b>local or regional plan or capital program</b> under chapter 117 of Title 24. In making this finding, if the board or district commission finds applicable provisions of the town plan to be ambiguous, the board or district commission, for interpretive purposes, shall consider bylaws, but only to the extent that they implement and are consistent with those provisions, and need not consider any other evidence.	30 V.S.A. § 248(b)(1) -- with respect to an in-state facility, will <b>not unduly interfere with the orderly development of the region</b> with <u>due consideration</u> having been given to the <u>recommendations of the municipal and regional planning commissions</u> , the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality.
	10 V.S.A. §6086(a)(9)(A) <b>Impact of growth.</b> In considering an application, the district commission or the board shall <u>take into consideration the growth in population</u> experienced by the <u>town and region</u> in question and whether or not the proposed development would <u>significantly affect their existing and potential financial capacity</u> to reasonably accommodate both the total growth and the rate of growth otherwise expected for the town and region and the total growth and rate of growth which would result from the development if approved. After considering <u>anticipated costs for education, highway access and maintenance, sewage disposal, water</u>	

	<p><u>supply, police and fire services and other factors relating to the public health, safety and welfare</u>, the district commission or the board shall impose conditions which <b>prevent undue burden upon the town and region</b> in accommodating growth caused by the proposed development or subdivision. Notwithstanding section 6088 of this title the burden of proof that proposed development will significantly affect existing or potential financial capacity of the town and region to accommodate such growth is upon any party opposing an application, excepting however, where the town has a duly adopted capital improvement program the burden shall be on the applicant.</p>	
	<p>10 V.S.A. § 6086(a)(9) Plan is in <b>conformance</b> with a duly adopted <b>capability and development plan, and land use plan</b> when adopted. However, the <u>legislative findings of sections 7(a)(1) through 7(a)(19) of this act shall not be used as criteria</u> in the consideration of applications by a district commission or the environmental board.</p>	
<b>Transportation</b>	<p>10 V.S.A. § 6086(a)(5) Will not cause unreasonable <b>congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways</b>, and other means of transportation existing or proposed.</p>	30 V.S.A. § 248(b)(5) incorporates 10 V.S.A. § 6086(a)(5)
<b>Education</b>	<p>10 V.S.A. § 6086(a)(6) Will not cause an <b>unreasonable burden</b> on the ability of a municipality to provide <b>educational services</b>.</p>	30 V.S.A. § 248(b)(5) incorporates 10 V.S.A. § 6086(a)(6)
<b>Municipal Services</b>	<p>10 V.S.A. § 6086(a)(7) Will not place an <b>unreasonable burden</b> on the ability of the local</p>	30 V.S.A. § 248(b)(5) incorporates 10 V.S.A. § 6086(a)(7)

	governments to provide <b>municipal or governmental services.</b>	
		30 V.S.A. 248 (b)(9) with respect to a <b>waste to energy facility</b> , is included in a solid waste management plan adopted pursuant to 24 V.S.A. § 2202a, which is <b>consistent with the state solid waste management plan</b>
<b>Private Utility Services</b>	10 V.S.A. §6086(a)(9)(G) A permit will be granted for a development or subdivision which relies on privately-owned utility services or facilities, including central sewage or water facilities and roads, whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the <b>privately-owned utility services or facilities are in conformity with a capital program or plan of the municipality involved</b> , or <u>adequate surety is provided</u> to the municipality and conditioned to protect the municipality in the event that the municipality is required to assume the responsibility for the services or facilities	
<b>Scattered Development</b>	10 V.S.A. §6086(a)(9)(H) The district commission or board will grant a permit for a development or subdivision which is not physically contiguous to an existing settlement whenever it is demonstrated that, in addition to all other applicable criteria, the <b>additional costs of public services and facilities</b> caused directly or indirectly by the proposed development or subdivision <b>do not outweigh the tax revenue and other public benefits</b> of the development or subdivision such as increased employment opportunities or the provision of needed and balanced housing accessible to existing or	

	planned employment centers.	
<b>Public Utility Services</b>	10 V.S.A. §6086(a)(9)(J) A permit will be granted for a development or subdivision whenever it is demonstrated that, in addition to all other applicable criteria, <b>necessary supportive governmental and public utility facilities and services are available</b> or will be available when the development is completed under a duly adopted capital program or plan, <u>an excessive or uneconomic demand will not be placed on such facilities and services</u> , and the provision of such facilities and services has been <u>planned on the basis of a projection of reasonable population increase and economic growth</u> .	
<b>Development affecting public investments</b>	10 V.S.A. §6086(a)(9)(K) A permit will be granted for the development or subdivision of lands <u>adjacent to governmental and public utility facilities</u> , services, and lands, including, but not limited to, highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe lines, parks, hiking trails and forest and game lands, when it is demonstrated that, in addition to all other applicable criteria, the <b>development or subdivision will not unnecessarily or unreasonably endanger the public or quasi-public investment</b> in the facility, service, or lands, <u>or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands</u> .	30 V.S.A. § 248(b)(5) incorporates 10 V.S.A. §6086(a)(9)(K)
<b>Rural Growth</b>	10 V.S.A. § 6086(a)(9)(L) Rural growth areas. A	

<b>Areas</b>	<p>permit will be granted for the development or subdivision of rural growth areas when it is demonstrated by the applicant that in addition to all other applicable criteria provision will be made in accordance with subdivisions (9)(A) "<b>impact of growth</b>," (G) "<b>private utility service</b>," (H) "<b>costs of scattered development</b>" and (J) "<b>public utility services</b>" of subsection (a) of this section for reasonable population densities, reasonable rates of <u>growth, and the use of cluster planning and new community planning designed to economize on the cost of roads, utilities and land usage.</u></p>	
<b>Water Supply</b>	<p>10 V.S.A. § 6086(a)(2) and (3) (2) Does have sufficient water available for the reasonably foreseeable needs of the subdivision or development.(3) Will not cause <b>an unreasonable burden on an existing water supply</b>, if one is to be utilized.</p>	30 V.S.A. § 248(b)(5) incorporates 10 V.S.A. § 6086(a)(2) and (3)
<b>Use of Resources</b>	<p>10 V.S.A. 6086(a)(9)(F) Energy conservation. A permit will be granted when it has been demonstrated by the applicant that, in addition to all other applicable criteria, the planning and design of the subdivision or development <b>reflect the principles of energy conservation and incorporate the best available technology for efficient use or recovery of energy.</b></p>	
<b>Water Conservation</b>	<p>10 V.S.A. § 6086(a)(1)(C) A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, <b>the design has considered water conservation, incorporates multiple use or recycling where technically and</b></p>	30 V.S.A. § 248(b)(5) incorporates 10 V.S.A. § 6086(a)(1)(C)

	economically practical, utilizes the best available technology for such applications, and provides for continued efficient operation of these systems.	
<b>Stability and Reliability</b>		30 V.S.A. § 248(b)(3) -- will <b>not adversely affect system stability and reliability</b>
<b>II. NEED/ECONOMICS</b>		
<b>Need</b>		30 V.S.A. § 248(b)(2) --is <b>required to meet the need for present and future demand</b> for service which could <b>not otherwise be provided</b> in a more cost effective manner through energy <b>conservation programs</b> and measures and energy-efficiency and load management measures, including but not limited to those developed pursuant to the provisions of sections 209(d), 218c, and 218(b) of this title (Title 30).
<b>Economic Benefit</b>		30 V.S.A. § 248(b)(4) -- will result in an <b>economic benefit to the state and its residents</b>
<b>IRP</b>		30 V.S.A. § 248(b)(6) – consistent with principles in utility’s <b>IRP</b>
<b>III. ENVIRONMENT</b>		
<b><u>General</u></b>		30 V.S.A. § 248(b)(5) -- will not have an <b>undue adverse effect on esthetics, historic sites, air and water purity, the natural environment and the public health and safety</b> , with <u>due consideration having been given to the criteria specified in 10 V.S.A. § 1424a(d) and § 6086(a)(1) through (8) and (9)(K); (Act 250 criteria)</u>
<b><u>Water/Air</u></b>		
<b>Water/Air Pollution</b>	10 V.S.A. § 6086(a)(1)Will <b>not result in undue water or air pollution</b> . In making this determination [the environmental board] shall <u>at least consider</u> : the	30 V.S.A. § 248(b)(5) incorporates 10 V.S.A. § 6086(a)(1)

	<p><u>elevation</u> of land above sea level; and in relation to the flood plains, the <u>nature of soils and subsoils</u> and their ability to adequately support waste disposal; the <u>slope</u> of the land and its effect on effluents; the <u>availability of streams</u> for disposal of effluents; and the applicable <u>health and environmental</u> conservation department <u>regulations</u>.</p>	
<b>Waste Disposal</b>	<p>10 V.S.A. § 6086(a)(1)(B) the development or subdivision will <b>meet any applicable health and environmental conservation department regulations regarding the disposal of wastes</b>, and will <u>not involve the injection of waste</u> materials or any harmful or toxic substances into ground water or wells.</p>	<p>30 V.S.A. § 248(b)(5) incorporates 30 V.S.A. § 6086(a)(1)(B)</p>
<b>Resource Waters</b>		<p>30 V.S.A. § 248(b)(8) -- does not involve a facility <b>affecting or located on any segment of the waters of the state that has been designated as outstanding resource waters by the water resources board</b>, except that with respect to a natural gas or electric transmission facility, the facility does not have an undue adverse effect on those outstanding resource waters</p>
		<p>30 V.S.A. § 248(b)(5) incorporates 10 V.S.A. § 1424a(d) – <b>outstanding resource waters</b> -- the board may consider, but shall not be limited to considering, the following:</p> <p>(1) <b>existing water quality</b> and current water quality classification, (2) the presence of <b>aquifer protection areas</b>, (3) the waters' value in providing <b>temporary water storage for flood water</b> and storm runoff, (4) the waters' value as <b>fish habitat</b>, (5) the waters' value in providing or maintaining habitat for <b>threatened or endangered plants or animals</b>, (6) the waters' value in providing habitat for <b>wildlife</b>, including stopover habitat for migratory birds, (7) the</p>



		presence of gorges, rapids, waterfalls, or other <b>significant geologic features</b> , (8) the presence of <b>scenic areas and sites</b> , (9) the presence of rare and irreplaceable <b>natural areas</b> , (10) the presence of known <b>archeological sites</b> , (11) the presence of historic resources, including those designated as <b>historic districts or structures</b> , (12) existing usage and accessibility of the waters for recreational, educational, and research purposes and for other <b>public uses</b> , (13) <b>studies, inventories and plans</b> prepared by <b>local</b> , regional, statewide, national, or international groups or agencies, that indicate the waters in question merit protection as outstanding resource waters, (14) existing alterations, diversions or impoundments by <b>permit holders</b> under state or federal law.
<b>Headwaters</b>	10 V.S.A. § 6086(a)(1)(A) The development or subdivision will meet any applicable health and environmental conservation department regulation regarding <b>reduction of the quality of the ground or surface waters</b> flowing through or upon lands which are not devoted to intensive development, and which lands are: (i) <u>headwaters</u> of watersheds characterized by steep slopes and shallow soils; or (ii) <u>drainage areas</u> of 20 square miles or less; or (iii) <u>above 1,500 feet</u> elevation; or (iv) <u>watersheds</u> of public water supplies designated by the Vermont department of health; or (v) areas supplying significant amounts of <u>recharge waters</u> to aquifers.	30 V.S.A. § 248(b)(5) incorporates 10 V.S.A. § 6086(a)(1)(A)
<b>Floodways</b>	10 V.S.A. § 6086(a)(1)(D) A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria: (i) the development or subdivision of lands within a floodway <b>will not restrict or divert the flow of</b>	30 V.S.A. § 248(b)(5) incorporates 10 V.S.A. § 6086(a)(1)(D)

	<p><b>flood waters, and endanger the health, safety and welfare of the public or of riparian owners during flooding;</b> and (ii) the development or subdivision of lands within a floodway fringe will <b>not significantly increase the peak discharge of the river or stream</b> within or downstream from the area of development and endanger the health, safety, or welfare of the public or riparian owners during flooding.</p>	
<b>Streams</b>	<p>10 V.S.A. § 6086(a)(1)(E) the development or subdivision of lands on or adjacent to the banks of a stream will, whenever feasible, <b>maintain the natural condition of the stream</b>, and <u>will not endanger the health, safety, or welfare of the public or of adjoining landowners.</u></p>	30 V.S.A. § 248(b)(5) incorporates 10 V.S.A. § 6086(a)(1)(E)
<b>Shorelines</b>	<p>10 V.S.A. § 6086(a)(1)(F) the development or subdivision of shorelines must of necessity be located on a shoreline in order to fulfill the purpose of the development or subdivision, and the development or subdivision will, insofar as possible and reasonable in light of its purpose: (i) <b>retain the shoreline and the waters in their natural condition</b>, (ii) <b>allow continued access</b> to the waters and the recreational opportunities provided by the waters, (iii) <b>retain or provide vegetation</b> which will <u>screen the development or subdivision from the waters</u>, and (iv) <b>stabilize the bank from erosion</b>, as necessary, with vegetation cover</p>	30 V.S.A. § 248(b)(5) incorporates 10 V.S.A. § 6086(a)(1)(F)
<b>Wetlands</b>	<p>10 V.S.A. § 6086(a)(1)(G) -- A permit will be granted whenever it is demonstrated by the applicant, in addition to other criteria, that the development or</p>	30 V.S.A. § 248(b)(5) incorporates 10 V.S.A. § 6086(a)(1)(G)

	subdivision <b>will not violate the rules of the water resources board</b> , as adopted under section 905(9) of this title, relating to significant wetlands.	
<b>Soils</b>		
<b>Soil Erosion</b>	10 V.S.A. § 6086(a)(4) Will not cause <b>unreasonable soil erosion</b> or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.	30 V.S.A. § 248(b)(5) incorporates 10 V.S.A. § 6086(a)(4)
<b>Agricultural Soils</b>	10 V.S.A. §6086(a)(9)(B) Primary agricultural soils. A permit will be granted for the development or subdivision of <b>primary agricultural soils</b> only when it is demonstrated by the applicant that, in addition to all other applicable criteria, either, the subdivision or development will <b>not significantly reduce the agricultural potential of the primary agricultural soils</b> ; or, (i) the applicant can realize a <u>reasonable return on the fair market value of his land only</u> by devoting the primary agricultural soils to uses which will <b>significantly reduce their agricultural potential</b> ; and (ii) there are <b>no nonagricultural or secondary agricultural soils</b> owned or controlled by the applicant <u>which are reasonably suited to the purpose</u> ; and (iii) the subdivision or development has been planned to minimize the reduction of agricultural potential by providing for <b>reasonable population densities, reasonable rates of growth, and the use of cluster planning</b> and new community planning designed to <u>economize on the cost of roads, utilities and land usage</u> ; and (iv) the development or subdivision will <b>not significantly interfere</b> with or jeopardize the	

	continuation of <b>agriculture or forestry</b> on adjoining lands or reduce their agricultural or forestry potential.	
<b>Forest and secondary agricultural soils</b>	10 V.S.A. §6086(a)(9)(C). A permit will be granted for the development or subdivision of <b>forest or secondary agricultural soils only</b> when it is demonstrated by the applicant that, in addition to all other applicable criteria, either, the subdivision or development will <b>not significantly reduce the potential of those soils for commercial forestry</b> , including but not limited to specialized forest uses such as maple production or Christmas tree production, of those or adjacent primary agricultural soils for commercial agriculture; i) <u>the applicant can realize a reasonable return on the fair market value of his land only</u> by devoting the forest or secondary agricultural soils to uses which will <b>significantly reduce their forestry or agricultural potential</b> ; and (ii) there are no <b>nonforest or secondary agricultural soils</b> owned or controlled by the applicant which are <u>reasonably suited to the purpose</u> ; and (iii) the subdivision or development has been planned to <b>minimize the reduction of forestry and agricultural potential</b> by providing for reasonable population densities, reasonable rates of growth, and the use of cluster planning and new community planning designed to <u>economize on the cost of roads, utilities and land usage</u> .	
<b>Earth Resources</b>	10 V.S.A. §6086(a)(8)(D) A permit will be granted if it is demonstrated by the applicant that development of lands with a high potential for extraction of mineral or earth resources <b>will not</b>	

	<b>prevent or significantly interfere with subsequent extraction or processing</b>	
<b>Extraction of Earth Resources</b>	10 V.S.A. §6086(a)(8)(E) A permit will be granted when the <b>extraction or processing operation and disposal of waste</b> will <b>not have unduly harmful impact on the environment</b> and surrounding land uses and development, and when a <b>site rehabilitation plan</b> is approved that insures that upon completion of extraction or processing, site will be left in a condition suitable for an approved alternative use or development, and no extraction permitted from beneath water except for gravel and silt pursuant to applicable regulations	
<b><u>Plants/</u> <u>Animals</u></b>		
<b>Wildlife habitat/ endangered species</b>	10 V.S.A. §6086(a)(8)(A) A permit will <b>not be granted if it is demonstrated</b> by any party opposing the applicant that a development or subdivision will destroy or significantly imperil necessary wildlife habitat or any endangered species, and (i) the economic, social, cultural, recreational, or other <b>benefit to the public from the development</b> or subdivision will <b>not outweigh</b> the economic, environmental, or recreational <b>loss to the public</b> from the destruction or imperilment of the habitat or species, or (ii) all feasible and reasonable means of <b>preventing or lessening the destruction, diminution, or imperilment of the habitat or species</b> have not been or will not continue to be applied, or (iii) a <b>reasonably acceptable alternative site</b> is owned or controlled by the applicant which <b>would</b>	30 V.S.A. § 248(b)(5) incorporates 10 V.S.A. §6086(a)(8)(A)

	<b>allow the development or subdivision</b> to fulfill its intended purpose.	
<b>Aesthetics</b>		
<b>Scenic and Natural Beauty, Aesthetics, Historic Sites, &amp; Rare, Irreplaceable Natural Areas</b>	<p>10 V.S.A. § 6086(a)(8) Will not have an <b>undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.</b></p> <p><i>Environmental Board applies Quechee Lakes analysis: (1) whether impact adverse, (2) if so, whether adverse impact undue (violates clear, written community standard, or is offensive or shocking because it is out of character with its surroundings, or significantly diminishes the scenic qualities of the area or applicant fails to take generally available mitigating steps that a reasonable person would take). “Natural beauty and aesthetics” are defined as those <u>currently existing in the area</u> where the project will be located taking into account both natural and man-made features. Quechee Lakes Corp., #3W0411-EB (Vt. Env. Bd. Jan. 13, 1986)</i></p>	<p>30 V.S.A. § 248(b)(5) incorporates 10 V.S.A. § 6086(a)(8)</p> <p><i>PSB applies Environmental Board’s Quechee Lakes analysis: decision. See Petition of Green Mountain Power Corporation Docket No. 6975 (Vt. Pub. Serv. Bd. Aug. 9, 2004).</i></p>

# VERMONT COMMISSION ON WIND ENERGY REGULATORY POLICY

## FINDINGS AND RECOMMENDATIONS

PREPARED PER EXECUTIVE ORDER 04-04  
DECEMBER 15, 2004

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## **Summary of Recommendations**

Governor Douglas created the Commission on Wind Energy Regulatory Policy (Commission) by Executive Order on July 12, 2004. The Commission was tasked with providing guidance and recommendations on whether 30 V.S.A. Section 248 provides a review process appropriate to commercial wind generation projects and, if not, to recommend regulatory or other appropriate changes to the regulatory process. The following is a summary of the Commission's recommendations:

- The recommendations apply only to proposed wind generation projects and not to other types of electricity generation and infrastructure, as that is outside the scope of the Commission's directive.
- The recommendations apply to proposed commercial wind generation projects [larger than net metered projects which are generally 150 kW or less] in Vermont that will sell and deliver power through the grid. Net-metered systems are treated separately by the Public Service Board (PSB).
- The recommendations should be implemented through rulemaking where possible, but the Commission defers to the PSB to determine how recommendations are best implemented.
- Section 248 is the appropriate vehicle for siting commercial wind generation projects. However, the Commission recommends several modifications to Section 248 for wind projects due to their unique characteristics (tower size, visibility from considerable distances, potential placement on ridgelines, etc.) and in response to concerns expressed in the public hearing process.
- To address the issue of overlapping jurisdiction, the Commission recommends the following statutory change to Section 248 (which was gleaned from suggestions by Pat Moulton Powden, Chair of the Environmental Board (EB) that were based on previous work developed by EB and PSB staff (but not Environmental Board Members):

*(1) When site preparation for, or construction of, a facility for wind generation proposed under this section will occur on lands subject to the continuing jurisdiction of 10 V.S.A. Chapter 151 (Act 250), the public service board shall give due consideration to any findings of fact and conclusions of law contained in any prior decision issued by a district environmental commission, the environmental board or the environmental court. If a successful review of such site preparation for, or construction of, a facility for wind generation requires the amendment, repeal or modification of any condition contained in a land use permit issued by a district environmental commission, the environmental board or the environmental court, the public service board shall give due consideration to the relevant criteria of Act 250 and applicable case precedent and take whatever action is reasonably necessary, consistent with the general good of the state, to prevent undue adverse impacts from occurring as identified in the prior findings and*

*conclusions of the district environmental commission, environmental board or the environmental court. Any public service board decision under this section shall supersede any prior decision of the district environmental commission, the environmental board or the environmental court but only to the extent that the proposed facility for wind generation subject to proceedings under this section has an impact on prior findings and conclusions described herein.*

- The PSB should host a minimum of two public meetings in the project site region, one of which will be an information session before proceedings begin to inform concerned parties about the Section 248 process, how it relates to the proposed wind project, as well as general information on the proposed wind project. The second meeting should convene later in the process, perhaps after the technical hearings, to receive additional public input on the project after more is known about the project and before a decision is made.
- The PSB should increase applicant's public notification requirements for proposed wind generation by requiring: 1) advertising advance notice in all towns that are wholly or partially within a radius of a minimum of 10 miles of each proposed turbine; 2) initial and ongoing mailings (e.g., of key events) to all municipal and regional planning commissions, and the town clerk in each town wholly or partially within a 10 mile radius of each proposed turbine; and 3) ongoing mailings to all stakeholders that sign-up to be on a mailing list (the list should be advertised and maintained by the applicant).
- The PSB should increase the advance notice period of filing "plans for construction" to municipal and regional planning commissions from 45 days to a minimum of 60 days.
- The PSB should develop requirements for what constitutes "plans for construction" for proposed wind generation projects. The requirements should ensure that applicants provide municipal and regional planning commissions with adequate user-friendly information to understand various elements of the proposed project, including but not limited to: identification of view shed impacts, project conceptual plans (including a schematic), general construction requirements, and plans for all new infrastructure related to the project (for example, transmission, sub station, roads, etc.).
- The PSB should implement measures to encourage developers to perform pre-planning and collaborative work with local stakeholders prior to initiating the Section 248 process. For example, applicants should be required to certify that they have submitted their plans for construction, and have made a best effort to meet with all municipal and regional planning commissions (as well as appropriate state agencies) wholly or partially within a 10-mile radius of each proposed wind turbine.

- The PSB should continue to apply its practice and history of facilitating the development of reasonable schedules and adhering to these schedules for each applicant. The PSB should also track its performance with regard to adhering to schedules for proposed wind generation projects.
- The ANR has the responsibility and resources to participate in wind cases and the PSB should encourage their participation.
- The PSB should define "affected communities" to include all towns or cities that are wholly or partially located within a minimum 10-mile radius of any proposed turbine.
- The PSB should give due consideration to the land use and energy elements of "affected" municipal and regional plans as standard practice.
- The PSB should ensure that unique impacts and needs associated with wind generation projects are considered under existing Section 248 criteria. These include but are not limited to: cumulative impacts of wind development (e.g., many wind farms within a view shed/area); safety issues (for example, ice throw); Federal Aviation Administration (FAA) lighting; flicker; noise and low frequency noise; wildlife issues identified by ANR; and decommissioning funds.
- The PSB should require wind developers to establish sufficient decommissioning funds so that sites will be restored to natural conditions if the projects are not repowered at the end of their useful life. The decommissioning funds should be kept in an escrow account associated with the property that is separate from the developer's general accounts. Self-insurance is not adequate.
- The PSB should establish a mechanism for monitoring escrow funds and determining when a project should be decommissioned (e.g., if it is not repowered or if it stops operating for an extended period of time before its expected operating life).
- The PSB and Department of Public Service (DPS) should increase public and local official education regarding the Section 248 process. Preparation and distribution of a "Citizen's Guide to Section 248" as well as the aforementioned local public information meeting are potential tactics.
- An ombudsperson should be appointed to serve as a point of contact for concerned parties in the Section 248 review process. The role of such an office might be to inform local officials and pro se parties about Section 248 process issues, filing requirements, etc. The Commission recommends that the ombudsperson be located in the DPS. The Commission recognizes that the DPS may not be able to fulfill this role based on its existing resources and recommends that the DPS and others identify and secure resources to ensure the adequate fulfillment of this position.

## **1. Introduction**

The introduction reviews the Commission purpose and contents of this report.

### **1.1 Commission Purpose**

Governor Douglas created the Commission on Wind Energy Regulatory Policy (Commission) by Executive Order on July 12, 2004.<sup>1</sup> The Commission was tasked with providing guidance and recommendations on whether the current regulatory approval process as prescribed in 30 V.S.A. Section 248 provides a review process appropriate to commercial wind generation projects and, if not, to recommend regulatory or other appropriate changes to the regulatory process. In addressing these questions the Commission was directed to:

- Gain an understanding of the history of the regulatory process, the state of the utility industry today, Vermont's current energy portfolio, how wind projects fit into that portfolio, and what wind projects are currently under consideration.
- Solicit input from project developers, utility regulators, utility managers, interested organizations and the general public; and
- Visit wind developments.

The seven Commissioners are:

- **Richard White**, Commission Chair, Derby Line  
Chairman and CEO of Community National Bank
- **John Ewing**, Burlington  
Former Chairman of the Vermont Environmental Board
- **Betsy Gentile**, Guilford  
Executive Director of the Brattleboro Area Chamber of Commerce
- **Sam Matthews**, South Hero  
Vice President of the GBIC
- **James Matteau**, Westminster  
Executive Director of the Windham Regional Planning Commission
- **RADM Richard W. Schneider**, Northfield  
President of Norwich University
- **Joan Loring Wing**, Rutland  
Attorney

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<sup>1</sup> To review the Executive Order creating the Commission, visit: [www.vermont.gov/governor](http://www.vermont.gov/governor).

## 1.2 Overview of Contents

This report includes the following sections:

- **Current Status of Wind Power and Related Regulations.** This section reviews the current status of wind power development and related regulations in Vermont.
- **Commission Activities.** This section summarizes Commission activities and deliberations.
- **Commission Findings and Recommendations.** This section details the Commission findings and recommendations with regard to the adequacy of Section 248 for commercial wind power.
- **Other Items to Consider.** This section reviews several considerations that are either outside of the purview of the Commission's mission, or for which there was no clear consensus, but that may be useful to the ongoing and broader discussion of public policy and wind development.

## 2. Status of Wind Projects and Related Regulations

### 2.1 Wind Project Status

Wind power technology is increasingly cost competitive with other sources of generation. There are over 6,000 MW of installed wind power capacity in the U.S. and some forecasts estimate that another 2,500 MW will be installed in 2005. Wind is one of the fastest growing sources of electricity generation in the U.S., but currently fulfills less than 1% of all U.S. electricity needs.

Some industry experts estimate that developing 6 to 10 wind sites in Vermont could produce around 10% of the state's electricity requirements. In addition, a number of Vermont utilities have already included wind power in their Integrated Resource Plans (long-term plans for needs and sources of electricity). At this time, one commercial wind project is operating in Vermont, the 6 MW Searsburg Wind Facility that was installed in 1997. There are currently several proposals in the planning stage for large-scale, commercial wind farms. A number of the proposed projects are listed below:

Developer	Location	Proposed Capacity (MW)
East Haven Wind Farm	Northeast Vermont	6
Endless Energy	Equinox Mountain	7.5
Catamount Energy/Marubeni	Glebe Mountain	Up to 50
UPC Wind Partners	Hardscrabble Mountain	30
enXco	Lowell Mountain	18
enXco / Green Mountain Power Corp.	Searsburg	up to 40
	<b>Total</b>	<b>~150 MW</b>

Several of these projects have already used Section 248, the statute regulating proposed energy projects, to install meteorological testing (MET) towers (see next section for more info on Section 248). To date, the East Haven Wind Farm is the only project that has submitted an application for construction of the turbines.

## 2.2 Status of Regulations<sup>2</sup>

Historically, large-scale utility projects have been regulated by a section of Vermont law known as 30 V.S.A. Section 248 (Section 248) with final approval by the Public Service Board (PSB), a quasi-judicial body. The Department of Public Service (DPS) is charged with representing the public interest in utility cases before the PSB. The following is a description of the PSB taken from its web site:

*The Public Service Board is a quasi-judicial board that supervises the rates, quality of service, and overall financial management of Vermont's public utilities: cable television, electric, gas, telecommunications, water and large wastewater companies. It also reviews the environmental and economic impacts of energy purchases and facilities, the safety of hydroelectric dams, the financial aspects of nuclear plant decommissioning and radioactive waste storage, and the rates paid to independent power producers.*

Currently under state law, projects that come under Section 248 are exempt from local zoning and Act 250 review. The purpose of these exemptions was to give authority to the PSB to be the sole governmental body responsible for assuring the reliable provision of electric service on a statewide basis. The rationale behind this regulatory structure was to assure that the statewide utility system would be efficiently and appropriately designed to safely and reliably meet the needs of the citizens of the state. Accordingly, local political bodies do not have direct authority over the siting of energy projects. The PSB considers the public good in determining whether or not a project would have an undue adverse effect on natural resources, aesthetics or scenic beauty, etc.

In contrast, Act 250 has a number of criteria (many of which are considered by the Section 248 process) that each proposed development must meet based on the decision of a district environmental commission. The district commissions do not consider the public good in assessing a proposed project's effects on Act 250 criteria. If a project is found to have an undue adverse effect it cannot proceed.

For purposes of this deliberation, the key differences between Section 248 and Act 250 are that: 1) the first step in the decision-making process resides with the PSB versus with district commissions; and 2) the PSB's assessment of whether or not a proposed project will have an undue adverse effect on natural resources, aesthetics or scenic beauty will be considered alongside the public good or overall societal benefits of the project.

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<sup>2</sup>It is important to note that the current Act 250 process will change starting on February 1, 2005. For example, the Environmental Board (EB) and the Water Resources Board (WRB) will be eliminated and the Natural Resources Board (NRB) will be created on that date for the purposes overseeing the Act 250 process, policy formulation and other duties. All appeals from Act 250 decisions will be directed to the Environmental Court with subsequent appeals to the Vermont Supreme Court. Any findings or recommendations in this report that apply to the EB should also apply to the NRB.

## **2.2.1 Section 248**

### **2.2.1.1 Process**

The Section 248 process is generally as follows:

1. The project developer files construction plans with the municipal and regional planning commissions. Town and regional planning commissions may hold public hearings.
2. The project developer files a petition seeking approval of a project, usually with supporting information in the form of written testimony by witnesses and other documents.
3. The PSB decides whether to assign the case to a hearing officer or hear the case itself.
4. A pre-hearing conference is held and the schedule is determined.
5. A pre-hearing order containing the schedule is issued.
6. Parties can file for intervention by a date set in the pre-hearing order. By law the parties to a Section 248 case include the applicant, the Department of Public Service (DPS), and the Agency of Natural Resources (ANR).<sup>3</sup>
7. At least one public hearing is held in the county where a proposed project is to be located.
8. Parties file direct testimony and exhibits with opportunity for discovery.
9. Parties file rebuttal testimony and exhibits with opportunity for discovery.
10. Technical hearings are held (parties present their evidence and cross-examine witnesses).
11. Briefs and reply briefs are filed.
12. Board issues a final decision (unless the case was assigned to a hearing officer).

If the case was assigned to a hearing officer, the officer issues a proposed decision, followed by a period for comment and requesting argument before the PSB. Then the PSB issues a final decision. There is also a “minor” application process for small net-metered projects under Section 248 (j). This has been applied to wind measurements towers but does not apply to commercial wind generation projects. Appeals of PSB decisions are to the Vermont Supreme Court.

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<sup>3</sup> As to the regional and municipal planning authorities the Public Service Board’s (PSB) past practice has been to allow such bodies to participate by filing a notice of appearance without the need for a formal motion to intervene. In a recent case, where both the municipality and the municipal planning commission sought to intervene, the PSB decided to allow only the municipality. The PSB may also grant party status to other persons or groups who qualify under the PSB’s rules. Under the rules intervenors must demonstrate that they have a substantial interest that may be affected by the outcome of the proceeding, the proceeding is the exclusive means by which they can protect that interest and the interest is not adequately represented by existing parties. In most instances this standard is not difficult to meet and the PSB routinely grants interventions. A party seeking intervention would make a written filing with the PSB explaining how they meet the requirements for intervenor status.



**2.2.1.2 Criteria**

The following is a brief summary of the 10 criteria of Section 248. In order to issue a Certificate of Public Good, the PSB must find that the project:

1. Will not unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal and regional planning commissions, municipal legislative bodies and land conservation measures contained in the plan of any affected municipality.
2. Is required to meet the need for present and future demand for service.
3. Will not adversely affect system stability and reliability.
4. Will result in an economic benefit to the state and its residents.
5. Will not have an undue adverse effect on aesthetics, historic sites, air, and water purity, the natural environment and the public health and safety, with due consideration having been given to certain criteria specified in the Act 250 statute (generally including Act 250 criteria 1 to 8 and a part of criterion 9). The PSB uses the Act 250 Quechee Test for aesthetic review. The two considerations for the Quechee test are whether the project has adverse impacts, and if so, whether the impacts undue. The PSB also takes into account a project's societal benefits in determining whether an adverse impact is undue.
6. Is consistent with the utility's approved least cost integrated plan (applies only to utility projects).
7. Is in compliance with the DPS electric energy plan.
8. Does not involve a facility affecting or located on any segment of the waters of the state designated as outstanding resource waters.
9. With respect to a waste to energy facility, is included in a solid waste management plan.
10. Can be served economically by existing or planned transmission facilities without undue adverse effect on Vermont utilities or customers.

## **2.2.2 Act 250<sup>4</sup>**

### **2.2.2.1 Process**

Act 250 (Chapter 151 of Title 10, Vermont's Land Use and Development Law) requires that certain kinds of development and subdivision plans first obtain a land use permit prior to construction.

1. To obtain a permit, developers or landowners apply to the district environmental commission administering the law in that particular district. Each of the nine District Commissions has three members and up to four alternates, all of whom are district residents appointed by the Governor.
2. Neighbors, town officials, and others can attend the site visit, which is held prior to the public hearing for a proposed development. Approximately 20 percent of Act 250 applications are scheduled for a public hearing, while the remaining 80 percent are processed as "minor" applications with no public hearing unless requested.
3. Based on the evidence presented, the district commission reviews each application carefully, then either grants a permit, generally with conditions, or denies it. The Commission can also make specific findings of fact and conclusions of law that explain its decision in detail.
4. The District Commission must base its review and decision on Act 250's 10 criteria (see next section). Which require that the development must conform to local and regional land-use plans.
5. By law, parties to an Act 250 hearing include the applicant, the municipality and its planning commission, the regional planning commission, and affected state agencies. The District Commission may also grant party status to adjoining property owners, and to other persons or groups who qualify under Environmental Board rules.

District Environmental Commissions make the decisions on Act 250 permit applications. The Vermont EB considers appeals of District Commission decisions; any party to the hearing on a particular application may appeal to the EB. Only statutory parties may appeal decisions of the EB to the Vermont Supreme Court. Act 250 permits do not supersede or replace the requirements of other local and state permits.

### **2.2.2.2 Criteria**

The 10 criteria described in this section must, by law, be the basis of all District Environmental Commission and EB decisions on applications for land use permits. Here are brief descriptions of the 10 criteria:

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<sup>4</sup> This Section is directly derived from "Act 250: A Guide to Vermont's Land Use Law" which is posted on the EB website. Refer to footnote 2 on page 2-4 for upcoming changes to the Act 250 process.

1. Water and Air Pollution. A development must not result in undue air or water pollution.
2. Water Supply. Applicants must show that sufficient water is available for the reasonably foreseeable needs of their development. This water must come from a private source, such as a spring or well, or from a municipal water system or other public source.
3. Impact on Existing Water Supplies. If a proposed project will use an existing water supply, it must not unreasonably burden that supply. This protects existing users of a private or public water supply from having that supply diminished.
4. Soil Erosion. Because soil erosion from development sites is a principal cause of water pollution in Vermont, a proposed project must not cause “unreasonable soil erosion or reduction in the capacity of the land to hold water.”
5. Traffic. Review under this criterion most often focuses on safety and congestion related to automobile traffic — but it can also involve traffic on waterways or railways, in airports or airways, or in any other means of transportation, current or proposed.
6. Educational Services. This criterion addresses the impact of a development or subdivision on the ability of a municipality to provide educational services. If a residential or commercial project will necessitate an expansion of the town’s educational facilities and if the tax revenues to be generated by the project will not cover the costs of this expansion, this may pose an unreasonable financial burden on the town’s ability to educate its students.
7. Municipal or Government Services. This criterion ensures that a proposed project will not place an unreasonable burden on the ability of a municipality to provide such vital services as waste disposal, fire and police protection, rescue services, water and sewage treatment, and road maintenance.
8. Scenic and Natural Beauty, Aesthetics, Natural Areas, Historic Sites. This criterion addresses a range of issues, from scenic quality to impact on historic areas. Under the first part of the criterion, the District Commission asks two essential questions: Will the project have any “adverse” aesthetic impacts on the scenic quality of the area? And, if so, Will those impacts be considered “undue” when taking into consideration the type of development proposed and its surroundings?
9. Conformance with Capability and Development Plan. This criterion covers a number of issues that relate to public and private infrastructure (including the utilities’ electrical systems), natural resource areas, and planning for orderly growth.

10. Local and Regional Plans. Any proposed project must conform with duly adopted local and regional plans. These plans are updated with public input in Vermont every five years, taking into account recent changes in population, land use, and public infrastructure.

### **3. Commission Activities**

Commission activities included information sessions, wind generation site visits, public hearings, supplemental research, deliberations, and preparation of this final report. The Commission first convened on July 27, 2004.

#### **3.1 Timeline**

7/27 – Information Session: <i>Orientation &amp; Section 248 and Act 250 Overview</i>	10/20 – Waymart Wind Site Visit
8/10 – Information Session: <i>Energy Supply &amp; Wholesale Power Market</i>	10/26 – Public Hearing in St. Johnsbury
8/31 – Information Session: <i>Wind Energy Overview</i>	11/4 – Deliberation
9/13 – Information Session: <i>Interested Parties</i>	11/9 – Deliberation
9/21 – Searsburg Wind Site Visit	11/16 – Public Hearing in Montpelier
10/12 – Public Hearing in Rutland	12/1 – Deliberation
	12/15 – Report submitted to Governor

#### **3.2 Information Sessions**

Consistent with the Commission’s directive to gain an understating of the current status of regulations, the energy industry, and wind development, the Commission held five information sessions. A broad range of stakeholders were represented at these sessions, including, the Department of Public Service, Environmental Board, Public Service Board, Vermont utilities (both municipal and investor owned), groups opposing specific wind projects (including the Glebe Mountain Group, Kingdom Commons Group, and Lowell Mountain Group), wind project developers, consultants, and advocate groups (i.e., Renewable Energy Vermont and Fairwind Vermont).

#### **3.3 Wind Farm Site Visits**

The Commission visited two commercial wind farm sites. The first trip was to the 6 MW Searsburg Wind Facility in Vermont that was installed in 1996. This is the site of a potential expansion that could increase the project to 40 MW. In addition, the Commission visited the 64.5 MW Waymart Wind Farm in Pennsylvania that was installed in 2003 and represents the current turbine technology used in wind development. This project consists of 43 turbines (1.5 MW GE) located on approximately seven miles of ridgeline in rural Pennsylvania. See Attachment 1 for Wind Farm Site Visit information.

### **3.4 Supplemental Research**

The Commission also requested supplemental research and information to further inform their deliberations. This included the following:

- Supplemental survey of stakeholders (included previously mentioned groups as well as regional and local planning commissions, economic development organizations, environmental groups, and chambers of commerce).
- Report on wind siting regulatory practices in other states.
- Report in response to specific Commissioner questions on wind technology, impacts, role in market, etc.

See Attachment 2 for the Supplemental Research Documents.

### **3.5 Public Meetings and Feedback**

The Commission also held three public hearings (10/12, 10/26, and 11/16). The first two public hearings asked for public feedback on the adequacy of Section 248 for reviewing commercial wind generation projects. These hearings were held in Rutland and in St. Johnsbury. At the third hearing, the Commission Chair presented draft recommendations and the public was given the opportunity to respond at the hearing or through written comments. Approximately 60 Vermont residents testified at the three hearings. See Attachment 2 for the Public Meeting Summary and Attachment 3 for the Summary of Written Comments.

### **3.6 Deliberations and Reporting**

The Commission held three formal deliberation sessions in Montpelier (11/4, 11/9, and 12/1) during which the draft and final recommendations were developed. These sessions included development of a framework for deliberations, review and discussion of information, and a systematic consideration of the issues with the goal of achieving consensus. See Attachment 4 for the Deliberations Framework.

## **4. Commission Findings and Recommendations**

The following section details the Commission's findings and recommendations and is organized based on the framework followed during deliberations:

1. What are the assumptions behind the recommendations?
2. Is Section 248 appropriate for commercial wind power?
3. Is the Section 248 regulatory process (e.g., timeline, intervention, etc.) appropriate for commercial wind power? Could it be improved?
4. Are the evaluation criteria and methods for evaluating projects against those criteria appropriate for commercial wind power? Could they be improved?
5. Is the general administrative support (e.g., public education) appropriate for wind power? Could it be improved?

### **4.1 Assumptions**

The Commission first explored the assumptions behind its recommendations. The Commission considered the following issues:

1. Is there clear guidance with regard to Vermont's position on wind development?
2. What is the scope of the Commission's charge?
3. What is the status and outlook for wind development in Vermont and elsewhere?
4. How should any recommended changes be implemented?

#### **4.1.1 Findings**

The Commission's findings are as follows:

1. There is not statewide consensus on the development of large wind generation projects in Vermont.
2. The Commission's charge is to examine the existing process for siting and permitting large wind farms in Vermont. The Commission has not been tasked with determining whether wind is desirable, whether or to what extent it should be included in a state energy plan, or where it should or should not be sited.

3. Wind technology is rapidly evolving and large wind generation projects are being developed across the United States and internationally. Vermont utilities already have included wind power in their Integrated Resource Plans (long-term plans for needs and sources of electricity). Given changes in wind technology and possible changes in policy, it is difficult to predict maximum wind power potential in Vermont (for example, public lands are currently closed to commercial development, but this is a policy decision that could be changed in the future).
4. The Commission anticipates that most changes could be accomplished through rulemaking, but that its recommendations should not be bound by this consideration.

#### **4.1.2 Recommendations**

Based on these findings, the Commission concludes the following:

- The recommendations apply only to proposed wind generation projects and not to other types of electricity generation and infrastructure, as that is outside the scope of the Commission's directive.
- The recommendations apply to proposed commercial wind generation projects [larger than net metered projects which are generally 150 kW or less] in Vermont that will sell and deliver power through the grid. Net-metered systems are treated separately by the PSB.
- The recommendations should be implemented through rulemaking where possible, but the Commission defers to the PSB to determine how recommendations are best implemented.

#### **4.2 Is Section 248 Appropriate?**

The Commission's primary task was to determine whether Section 248 was appropriate for large-scale wind generation projects. In doing so, the Commission examined the following issues:

1. Does the PSB, which administers Section 248, have the appropriate expertise to review applications for wind generation projects?
2. Is Section 248 comprehensive enough to address wind generation projects?
3. Is it appropriate for a single State board of three members to decide whether a wind generation project should be sited or not?
4. Does Section 248 allow for the adequate consideration of local and regional input?
5. Would Act 250 be more appropriate for reviewing wind generation projects?



6. Would a combination of Section 248 and Act 250 be more appropriate?
7. Does Section 248 adequately address the potential for overlapping jurisdiction with Act 250?

#### **4.2.1 Findings**

The Commission's findings are as follows:

1. The PSB and the Environmental Board (EB) are both experienced at examining environmental impacts. The PSB has significant expertise addressing environmental issues associated with energy infrastructure projects, including the Searsburg wind project. The PSB can also hire outside experts to provide additional technical expertise if necessary. Additionally, the PSB has the expertise and legal responsibility to consider other criteria associated with energy generation, Vermont energy consumers, and associated New England-wide power issues. The EB and local district commissions that are responsible for Act 250 may not be equipped to deal with these aspects of energy projects. In addition, in the Section 248 process, the Agency of Natural Resources (ANR) (which represents Vermont's environmental interests), the Department of Public Service (DPS) (which represents public interest), and Regional Planning Commissions are automatic parties to each proceeding. Others, such as community groups and individual citizens, may apply for intervenor status. This helps to ensure the participation of advocates for local and environmental concerns.
2. The PSB applies a rigorous, flexible, and comprehensive process that has been adapted and can be further adapted for wind cases. Section 248 also incorporates key Act 250 criteria. (30 V.S.A. Section 248 (b)(5))
3. Starting February 1, 2005, the Act 250 process will involve a three-person District Environmental Commission with appeals heard before an Environmental Court judge with subsequent appeals to the Vermont Supreme Court. Similarly, the PSB is a three-person board, and appeals go directly to the Vermont Supreme Court.
4. Overall, the PSB has demonstrated adequate consideration of local and regional input. The PSB has demonstrated that pro se parties (parties not represented by an attorney) can participate effectively, even in very technical and complicated cases (though prior experience and significant dedication and effort will help this process). However, these areas should be improved.
5. There was significant testimony that Act 250 is the appropriate vehicle for wind projects, especially for projects located on ridgelines over 2,500 feet. In addition to the reasons stated earlier, the Commission finds that Section 248 is more appropriate for reviewing proposed wind generation projects due to the requirement that the PSB consider "public good", including a project's impact on the state's energy needs. Act 250 does not include consideration of "public

good”. There also is precedent for applying Section 248 to energy projects over 2,500 feet, and continued use of Section 248 will ensure the consistent treatment of proposed wind generation projects across the state. In addition, the PSB examines statewide impacts of energy infrastructure and can examine the cumulative impacts of wind development.

6. Applying both Section 248 and Act 250 to proposed wind generation projects would result in a duplicative and inefficient process, and serve to diminish the PSB’s authority to consider statewide “public good” in its deliberations.
7. There are conflicting opinions and there is currently no definitive answer for how to deal with the potential for overlapping jurisdiction between Section 248 and Act 250 (e.g., on land that already falls under an existing Act 250 permit). For example, some wind turbines may be proposed on lands that are already subject to the jurisdiction of Act 250 with permit conditions that may be difficult to resolve without going through two regulatory processes. Section 248 should have jurisdiction in these cases but provide for consideration of the existing Act 250 permit conditions.

#### **4.2.2 Recommendations**

Based on the findings, the Commission recommends the following:

- Section 248 is the appropriate vehicle for siting commercial wind generation projects. However, the Commission recommends several modifications to Section 248 for wind projects due to their unique characteristics (tower size, visibility from considerable distances, potential placement on ridgelines, etc.) and in response to concerns expressed in the public hearing process. (These recommendations are detailed in subsequent sections.)
- To address the issue of overlapping jurisdiction, the Commission recommends the following statutory change to Section 248 (which was gleaned from suggestions by Pat Moulton Powden, Chair of the EB that were based on previous work developed by EB and PSB staff (but not Environmental Board members):

*(1) When site preparation for, or construction of, a facility for wind generation proposed under this section will occur on lands subject to the continuing jurisdiction of 10 V.S.A. Chapter 151 (Act 250), the public service board shall give due consideration to any findings of fact and conclusions of law contained in any prior decision issued by a district environmental commission, the environmental board or the environmental court. If a successful review of such site preparation for, or construction of, a facility for wind generation requires the amendment, repeal or modification of any condition contained in a land use permit issued by a district environmental commission, the environmental board or the environmental court, the public service board shall give due consideration to the relevant criteria of Act 250 and applicable case*

*precedent and take whatever action is reasonably necessary, consistent with the general good of the state, to prevent undue adverse impacts from occurring as identified in the prior findings and conclusions of the district environmental commission, environmental board or the environmental court. Any public service board decision under this section shall supersede any prior decision of the district environmental commission, the environmental board or the environmental court but only to the extent that the proposed facility for wind generation subject to proceedings under this section has an impact on prior findings and conclusions described herein.*

### **4.3 Is the Section 248 Process Appropriate?**

The Commission determined that Section 248 is appropriate for reviewing proposed commercial wind generation, but improvements are in order. Accordingly, the Commission examined whether the existing Section 248 regulatory process and timeframe are adequate for wind power. *The regulatory process* is defined as the rules for moving a wind project through Section 248, including public notification requirements, timeframe, intervention, etc. The Commission examined the following issues associated with the regulatory process.

1. Are the public notification requirements adequate? What is the appropriate view shed area that should be notified by a developer?
2. Should there be a defined timeline for reviewing wind generation projects?
3. Are the resources and requirements for party intervention adequate?
4. Is there adequate opportunity for pro se parties to intervene?
5. Is it appropriate to have an expedited process (30 V.S.A. Section 248 (j)) for meteorological testing (MET) towers? Should applicants be required to announce plans for siting wind turbines in an initial application for MET towers?

#### **4.3.1 Findings**

The Commission's findings are as follows:

1. There was significant feedback with regard to the lack of public and public official education on Section 248. This includes lack of notification and information to towns/cities that are within the view shed of a proposed wind generation project, but are not the host town/city. Other limitations that were cited include:

- Section 248 only requires one public hearing to take place in “at least one county in which any portion of the construction of the facility is proposed to be located.” (30 V.S.A. Section 248 (a)(4)(A)).
- Based on the current advance notice requirements, municipal and regional planning commissions may not have: 1) enough time to meet and hold a public hearing; or 2) adequate information to properly assess the need to comment or intervene in proposed projects. For example, one regional planning official noted that they received a brief letter that was intended to serve as the “plans for construction” for a proposed project. The current requirements include 45 days advance notice that includes undefined “plans for construction.” (30 V.S.A. Section 248 (f)).

The geographical notification requirements should be expanded because wind generation projects can have large view sheds that include a number of communities. Many aesthetics experts have used 10-mile view sheds for wind project visualization studies as view impact diminishes beyond this distance. In some cases there could be an argument made that the view impact extends beyond 10 miles.

Due to the lead time and pre-development work involved in wind project development, increasing advance notice requirements and specifying information requirements would not be overly burdensome for developers. In addition, several developers noted that they already perform stakeholder outreach prior to providing advance notice. Increased notification requirements would also help to inform a broad range of stakeholders about the proposed project. A significant increase in the advance notification period may not be merited for all projects, but the PSB has the authority to extend the request for intervention deadline and initial testimony deadline as appropriate for each proceeding.

Based on testimony from developers and local officials, advance planning and collaboration with the "affected communities" and stakeholders can promote a more efficient permitting process. It is also an opportunity for local citizens and other stakeholders to better understand and provide input into the proposed project prior to the Section 248 process.

2. The PSB currently facilitates the development of a schedule prior to each proceeding and has a history of adhering to the schedule. The process provides the flexibility to develop a schedule that allows for adequate time to address the issues associated with each unique case. This practice is appropriate for wind generation projects.
3. Any party can apply for intervention status in the Section 248 process. As mentioned before, the PSB does provide some assistance to pro se parties with regard to how to participate. The PSB also has a history of being flexible in considering and approving intervenor status applications.

4. Stakeholders expressed concern that the ANR and other interveners may not have adequate resources to participate effectively. Additional or specific funding for ANR and other interveners was not deemed necessary because ANR already has the authority and responsibility to participate, as well as the ability to fund its intervention through the DPS. In addition, the PSB has the authority to hire experts and lawyers to address any issue it believes is not being adequately addressed by the parties. (30 V.S.A. Section 248 (a)(4)(E) and Sections 20 & 21).
5. Regardless of whether a MET tower was issued a certificate of public good, any subsequent plans for development must still go through the Section 248 process. The same is true for any plans for expansion, which must also go through the Section 248 process regardless of whether or not there is an existing project. Accordingly, there is no reason to change the review process for MET towers.

#### **4.3.2 Recommendations**

Based on the findings, the Commission recommends the following:

- The PSB should host a minimum of two public meetings in the project site region, one of which will be an information session before proceedings begin to inform concerned parties about the Section 248 process, how it relates to the proposed wind project, as well as general information on the proposed wind project. The second meeting should convene later in the process, perhaps after the technical hearings, to receive additional public input after more is known about the project and before a decision is made.
- The PSB should increase applicant's public notification requirements for proposed wind generation by requiring: 1) advertising advance notice in all towns that are wholly or partially within a radius of a minimum of 10 miles of each proposed turbine; 2) initial and ongoing mailings (e.g., of key events) to all municipal and regional planning commissions, and the town clerk in each town wholly or partially within a 10 mile radius of each proposed turbine; and 3) ongoing mailings to all stakeholders that sign-up to be on a mailing list (the list should be advertised and maintained by the applicant).
- The PSB should increase the advance notice period of filing "plans for construction" to municipal and regional planning commissions from 45 days to a minimum of 60 days.
- The PSB should develop requirements for what constitutes "plans for construction" for proposed wind generation projects. The requirements should ensure that applicants provide municipal and regional planning commissions with adequate user-friendly information to understand various elements of the proposed project, including but not limited to: identification of view shed impacts, project conceptual plans (including a schematic), general construction requirements, and

plans for all new infrastructure related to the project (for example, transmission, sub station, roads, etc.).

- The PSB should implement measures to encourage developers to perform pre-planning and collaborative work with local stakeholders prior to initiating the Section 248 process. For example, applicants should be required to certify that they have submitted their plans for construction, and have made a best effort to meet with all municipal and regional planning commissions (as well as appropriate state agencies) wholly or partially within a 10-mile radius of each proposed wind turbine.
- The PSB should continue to apply its practice and history of facilitating the development of reasonable schedules and adhering to these schedules for each applicant. The PSB should also track its performance with regard to adhering to schedules for proposed wind generation projects.
- The ANR has the responsibility and resources to participate in wind cases and the PSB should encourage their participation.

#### **4.4 Are the Evaluation Criteria and Methods Appropriate?**

The Commission also examined whether the existing Section 248 criteria and methods for evaluating proposed projects against those criteria are adequate for wind power. *Criteria* are defined as the standards against which a project is evaluated. Section 248 criteria include planning impacts, need and economics, environment, Quechee, etc. The *evaluation method* is defined as the method for evaluating a wind project against each of the criteria (for example, requiring visual modeling as part of Quechee). The Commission examined the following issues with regard to criteria and methods.

1. Do Section 248 criteria, and methods for evaluating against the criteria, adequately address the unique characteristics of commercial wind generation projects?
2. Do the methods for evaluating a project against the criteria adequately consider local and regional concerns with wind generation projects?

##### **4.4.1 Findings**

The Commission's findings are as follows:

1. In general, the Section 248 criteria are comprehensive and the process is flexible enough to accommodate unique impacts and evaluation methods associated with proposed wind generation projects or related evaluation measures. There is public concern that certain impacts associated with wind development may not be adequately considered by Section 248, including but not limited to requiring the establishment and monitoring of decommissioning funds.

Aesthetics are a critical component of the review of proposed wind generation projects, and the Quechee standard developed by the Environmental Board is a valuable tool in considering these impacts.

2. Currently, Section 248 requires due consideration of the recommendations of the municipal and regional planning commissions. However, if there is no recommendation, there is no requirement that the PSB give any consideration to the plans themselves. (30 V.S.A. Section 248 (b)(1))

#### **4.4.2 Recommendations**

The Commission recommends the following to better adapt Section 248 criteria and methods for proposed wind generation projects:

- The PSB should define "affected communities" to include all towns or cities that are wholly or partially located within a minimum 10-mile radius of any proposed turbine.
- The PSB should give due consideration to the land use and energy elements of "affected" municipal and regional plans as standard practice.
- The PSB should ensure that unique impacts and needs associated with wind generation projects are considered under existing Section 248 criteria. These include but are not limited to: cumulative impacts of wind development (e.g., many wind farms within a view shed/area); safety issues (for example, ice throw); Federal Aviation Administration (FAA) lighting; flicker<sup>5</sup>; noise and low frequency noise; wildlife issues identified by ANR; and decommissioning funds.
- The PSB should require wind developers to establish sufficient decommissioning funds so that sites will be restored to natural conditions if the projects are not repowered at the end of their useful life. The decommissioning funds should be kept in an escrow account associated with the property that is separate from the developer's general accounts. Self-insurance is not adequate.
- The PSB should establish a mechanism for monitoring escrow funds and determining when a project should be decommissioned (e.g., if it is not repowered or if it stops operating for an extended period of time before its expected operating life).

#### **4.5 Is the Administrative Support Appropriate?**

The Commission also considered whether the general administration of Section 248 is adequate for wind power. General administrative support refers to the factors surrounding the implementation of 248 that

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<sup>5</sup> Flicker is caused by the sun rising or setting behind the rotating blades of a turbine. The shadow created by the rotating blades can cause alternating light and dark shadows to be cast on nearby premises.

may not necessarily require rule changes, such as providing public education on Section 248. The Commission examined the following issues with regard to criteria and methods.

1. Do public officials and the public, in general, understand the Section 248 process?
2. Are there adequate resources for them to learn about the Section 248 process?

#### **4.5.1 Findings**

Citizens and municipal and regional officials indicated that they have inadequate access to information and assistance about the Section 248 process or specific Section 248 proceedings. The PSB and DPS should take a greater role in addressing this issue based on their missions.

#### **4.5.2 Recommendations**

Based on the findings, the Commission recommends the following:

- The PSB and DPS should increase public and local official education regarding the Section 248 process. Preparation and distribution of a “Citizen's Guide to Section 248” as well as the aforementioned local public information meeting are potential tactics.
- An ombudsperson should be appointed to serve as a point of contact for concerned parties in the Section 248 review process. The role of such an office might be to inform local officials and pro se parties about Section 248 process issues, filing requirements, etc. The Commission recommends that the ombudsperson be located in the DPS. The Commission recognizes that the DPS may not be able to fulfill this role based on its existing resources and recommends that the DPS and others identify and secure resources to ensure the adequate fulfillment of this position.



## 5. Other Items to Consider

The Commission identified several concepts that were either outside of the purview of the Commission's mission, or for which there was no clear consensus, but could be useful to consider as the State continues to deliberate the future of wind related public policy in Vermont. These include the following:

- **Development of a Statewide Wind Site Assessment.** The Commission discussed the merits of completing a statewide wind assessment that would build upon existing studies of Vermont's wind resources. The assessment should identify those sites in Vermont that are most appropriate for large commercial wind power development through a systematic analysis of potential sites with regard to certain Section 248 criteria, such as aesthetics. The assessment could be developed and administered by the DPS in conjunction with ANR. This study should consider the following factors: the adequacy of the wind, proximity to existing transmission lines, whether there is existing development at a site, an analysis of the view shed, and environmental considerations that can be evaluated in a relatively straightforward manner. This information should be distributed to municipal and regional planning commissions so they can educate themselves about wind generation if there are areas identified as appropriate sites for wind in their jurisdiction.
- **Energy Plan with Specific Detail on Wind Power.** A number of states specifically include goals for wind power and measures for meeting those goals in their state energy plans. While the Vermont Energy Plan supports renewable energy, it does not currently prescribe specific technologies. Deliberation on whether or not to include wind would help better define public policy as well as help guide the state's utilities in the development of their Integrated Resource Plans.
- **Provide Funding for Affected Municipalities.** The Commission discussed the potential financial burden on municipalities when reviewing proposed wind projects and whether they may require funding reimbursement for review and to conduct their own investigation/studies as deemed necessary. Because the Commission has proposed expanding the definition of "affected communities" to include all towns/cities within a 10-mile radius of proposed wind turbines, the Commission could not reconcile how such funds would be distributed to many participating municipalities. It was also discussed that if all "affected" towns/cities within a 10-mile radius were allowed to apply for funding reimbursement it many become overly burdensome to the developer of a project. The Commission recommends that this issue be further researched and possible solutions be explored.

# Commission on Wind Energy Regulatory Policy

## **Regulatory Background Research Report**

December 2004

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## 1. Executive Summary

This report reviews the state and local wind permitting processes in four states, Minnesota, Oregon, New York, and Pennsylvania, that have all sited multiple wind projects and contrasts their processes with Section 248.

Minnesota and Oregon have state boards that permit wind projects using processes based on the general energy facility siting process but tailored specifically for wind power. New York also has a state energy facility siting board, but wind projects have typically been too small to fall under its jurisdiction. Accordingly, in New York, most wind projects are sited at the local level, but need to comply with state environmental requirements. Each of these three states has a formal appeal process. In Pennsylvania, all wind projects are permitted at the local level, but need to comply with certain state and federal requirements.

There are several notable differences between the process in each of these states and Section 248:

- Minnesota has a 180 day time limit for the entire process.
- Minnesota requires information mailings to all interested parties.
- Minnesota and Oregon's processes are based on the general energy facility process but tailored specifically for wind. They have developed specific criteria for wind projects.
- Oregon's visual impact test specifically applies to local and federal plans that designate scenic values. Other visual impacts are evaluated in a less objective and formal manner. The other states also have visual tests that are less developed or formal than Act 250 or Section 248 (i.e., Quechee test).
- Oregon allows for projects that are too small (less than 105 MW) for state jurisdiction to opt out of local siting and into the state siting process. In addition, projects under 300 MW can go through an expedited process.
- In Pennsylvania and New York (for projects less than 80 MW), wind siting is driven at the local level.
- In Pennsylvania, in many instances, public hearings are not a required part of the siting process.

Another key difference is that each of these four states has state policy that directly supports the development of large scale wind power. For example, New York recently enacted a renewable portfolio standard, and Minnesota's wind siting guidelines are based on the assumption that large wind development is good for the state.

This report also highlights the best practices developed by the National Wind Coordinating Committee. Section 248 is fairly in line with the NWCC permitting process principles and permitting criteria. Several areas where they differ include the following:

- **Significant Public Involvement.** The NWCC suggests several measures, such as, mailings to all abutters and stakeholders, and holding public information meetings at the beginning of the permitting process to inform the public of the project, the permitting process, possible issues, and ways they can provide input.

- **Advance Planning.** The NWCC encourages advance planning, e.g., collaborations to identify key issues prior to the permitting process. This is already done by many of the developers in Vermont, but not a formal part of the process.
- **Clear Decision Criteria.** While there are clear criteria associated with Section 248, there is no clear process for how those criteria are applied to the evaluation of wind power and its unique traits (for example, a specific requirement for the wind visual impact study to require detailed visualization and view shed modeling). The NWCC recommends developing a specific and clear set of criteria and evaluation measures for wind projects.
- **Reasonable Timeframes.** Section 248 does not set timeframes for its process. One measure suggested by NWCC is to work with stakeholders to establish timeframes for each component of the process and to actively communicate those timeframes to stakeholders.

## 2. Purpose and Methodology

The purpose of this report is to:

- Provide background on commercial wind development processes.
- Compare the current permitting and siting regulations for large wind projects and other developments in Vermont.
- Review permitting and siting regulations of states with wind development and “state” permitting regulations for energy projects (some states handle wind siting at local level, e.g., Pennsylvania).
- Review best practices (i.e., from the National Wind Coordinating Committee (NWCC)) for permitting and other issues associated with wind development.

The information provided in this report is drawn from a combination of literature reviews and interviews. Interviews were performed with stakeholders at the state level, including regulators, developers, and others (e.g., local stakeholders, such as opposition groups) to learn more about the efficacy of each state’s wind permitting process and lessons learned. Stakeholders involved in NWCC deliberations were also interviewed.

This report does not provide a critical review of the adequacy of Section 248, but is intended to provide background information to inform the Commission’s deliberation and review of Section 248.

## **3. Wind Power Overview**

### **3.1 Large vs. Small Scale Wind**

Wind turbines are typically categorized into two broad categories based on their rated capacity and application. Small wind turbines are generally less than 50 kW in size, but may be as large as 250 kW. In contrast, large wind turbines have capacities ranging from 660 kW to 1800 kW (1.8 MW) and are used to generate wholesale bulk electricity for delivery to the local transmission grid. They are most commonly developed in large arrays of multiple turbines, although large turbines can also be installed in distributed applications consisting of a single or a few turbines connected directly to a distribution line.

Although overlap exists, most of the technical issues, permitting requirements, and operational procedures are different for small versus large wind turbines. Large wind turbine applications are more likely to have a real or perceived widespread community impact. The development and permitting process for large wind turbines is the focus of this report.

### **3.2 Large Wind Development Process**

In regions without a history of wind energy development, large wind projects typically require two to six years to proceed from the initial site-prospecting phase through the development process to construction completion and operation. The most time-consuming elements of the development process are the wind resource assessment and the permitting tasks. Permitting timelines vary widely by location and the need for environmental assessments. A brief discussion of the key steps in the large wind development process is provided below.

#### **3.2.1 Site Selection**

There are three primary steps involved in the site selection process: prospecting; validation; and micrositing. Prospecting refers to the identification of potential sites with good wind resources and investigating the development potential of those sites for wind projects. Validation involves more detailed investigation and analysis, which frequently includes installing wind-monitoring stations to verify the magnitude and other characteristics of wind resources at a given site. Obtaining permission from landowners to install monitoring stations and negotiating land lease options is a key component of this stage. Micrositing is the process of collecting detailed wind data for purposes of identifying potential turbine locations and optimizing project layout.

#### **3.2.2 Permitting**

Virtually all wind projects are required to obtain permitting approval from appropriate government agencies. In the discovery process, developers must become familiar with relevant town, county, state, and in some instances, federal rules and regulations that may impact the wind project. The agencies and levels of government involved in a project may be affected by: the location of the wind turbines (as well as transmission lines, substation, access roads, etc.); the installed capacity of the facility; ownership of the land; and ownership of the project.

### **3.2.3      Financing**

Most wind developers require some form of project financing. Usually a developer is required to demonstrate to potential financiers that all necessary permitting approvals have been obtained, that the project design and energy production estimates are based on sound technical analysis, and that a market for the energy exists. Financiers often will require a power purchase agreement to be in place.

### **3.2.4      Construction**

Most large wind projects are built in 5 to 12 months, depending on size, location, and weather conditions. In addition to standard excavators, graders, and dump trucks, construction of large wind projects requires a large capacity crane to install the various sections at the top of the wind tower. As many as 7 trailers may be required to transport the components for one turbine, and the crane itself may require as many as 15 trailers for transport. As a result, local roads leading to the project sites must have a large bearing capacity and sufficient access.

### **3.2.5      Operation**

With a control system that automatically makes operational adjustments, monitors turbine performance, and initiates alarms when warranted, wind turbines operate automatically and independently. As a result, the bulk of site operation is handled remotely via computers. For maintenance, projects typically require one operator for every 10 to 20 turbines. Maintenance and repair work is typically performed inside the turbines, which requires significant climbing.

### **3.2.6      Repowering/ Decommissioning**

The design life of a typical turbine is 20 years. As turbines approach the end of their useful life, repowering turbines with new and improved technology may be a worthwhile investment for the owner of a wind project. To date, repowering in the U.S. has only taken place in California, where wind turbines have been installed since the 1980s.

Decommissioning refers to the removal of all evidence of a wind power project after it has reached the end of its design life. Decommissioning includes the removal of all turbines, towers, foundations (to some reasonable depth below grade) underground cables, power poles, substation equipment, met towers, and O & M buildings. Some permit requirements may require project owners to restore land to its original conditions as part of the decommissioning process.



## 4. Other State and Local Wind Permitting Processes

The following reviews the state and local wind permitting processes in four states, Minnesota, Oregon, New York, and Pennsylvania. Each of these states has experienced recent wind development as summarized in the following table:<sup>1</sup>

State	Existing (MW)	Announced (MW)
Minnesota	579.73	110.5
Oregon	260.06	0
New York	48.45	637.05
Pennsylvania	129.03	84.8

Minnesota and Oregon have state boards that permit wind projects using processes based on the general energy facility siting process but tailored specifically for wind power. New York also has a state energy facility siting board, but wind projects have typically been too small to fall under its jurisdiction. Accordingly, in New York, most wind projects are sited at the local level, but need to comply with state environmental requirements. In Pennsylvania, all wind projects are sited at the local level, but need to comply with certain state and federal requirements.

### 4.1 Minnesota

#### 4.1.1 Overview

The Minnesota Environmental Quality Board (MEQB) has permitted eight large wind energy conversion systems (LWECS) greater than 5 MW since 1995. Minnesota law stipulates that a site permit granted by the state Environmental Quality Board must be obtained prior to construction of a LWECS, defined as any combination of wind turbines and associated facilities with capacity of 5 MW or higher (Minnesota Session Laws 1995, chapter 203, codified at Minnesota Statutes sections 116C.691 to 116C.697). The permitting requirement was borne out of recommendations provided to the MEQB by a citizens' advisory task force in 1994. The task force, comprised of county commissioners, interested citizens, and others, was appointed by the MEQB following completion of an Environmental Assessment Worksheet for the state's first proposed wind energy installation (25 MW) in 1994.

The Minnesota wind siting act declared it to be the policy of the state to site LWECS in an orderly fashion compatible with the objectives of environmental preservation, sustainable development, and the efficient use of resources. The MEQB wind permitting process stipulated in the Minnesota wind siting act generally proceeds as follows:

1. The project developer submits a permit application that must contain, among other things: an analysis of potential environmental impacts; proposed mitigation measures; and any adverse environmental impacts that cannot be avoided.
2. The chair of the board makes a decision to accept, conditionally accept, or reject the application.
3. Within 45 days after acceptance of the application, the chair makes a preliminary determination of whether a permit should be issued or denied.

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<sup>1</sup> American Wind Energy Association. August 2004.

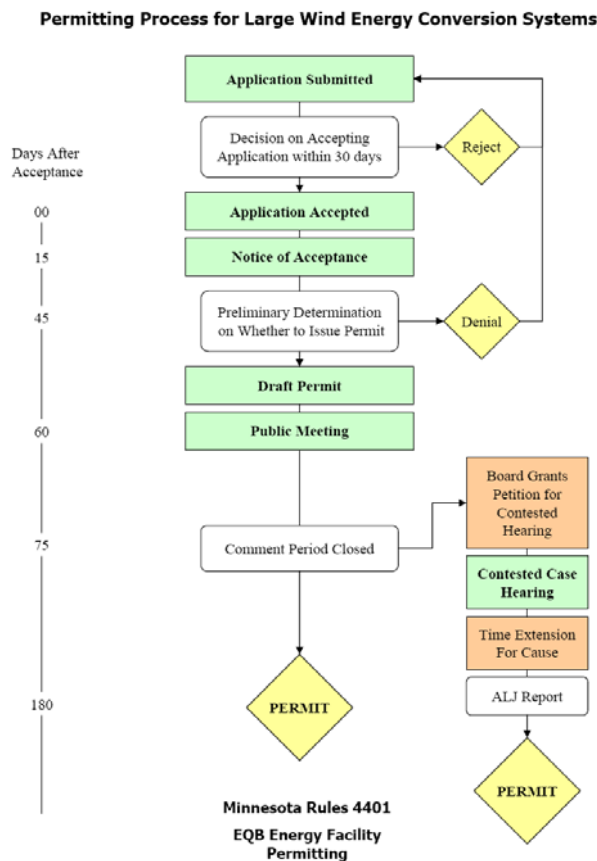
4. If the determination is to issue a permit, a draft site permit is prepared and made available for public review.
5. Public notice is made and a public information meeting is held.
6. The board makes a final decision within 180 days of the acceptance of the application. If the project is approved, a permit is issued with any conditions the board considers necessary to protect the environment, enhance sustainable development, and promote the efficient use of resources.

The permitting process is outlined in Figure 1.

Overall, key features of the Minnesota wind siting act include:

1. EQB authority to issue site permits for all wind energy facilities larger than 5 MW.
2. A streamlined regulatory and review process.
3. Issuance of a permit within 180 days (60 to 90 days is typical).
4. Environmental review as part of the permitting process. (no specific methodology for visual impact assessment)
5. MEQB rulemaking authority that establishes, among other things: uniform and consistent review procedures; conditions in the site permit for turbine type, design, site layout, and construction; and MEQB site permitting authority as the only site approval required.

**Figure 1: Minnesota Permitting Process Map**



### **4.1.2 Lessons Learned**

Wind projects permitted in Minnesota have been well accepted by the general public and residents, and have encountered few issues during the review and permitting process. In general, they have been sited in rolling or flat farm and pasture lands, where the landowners are eager to receive revenue for hosting turbines. Those issues that have arisen have been raised primarily by other wind developers, and have been in response to questions about topics such as wind rights acquisition and requirements for proceeding with a project. There has been some concern with siting wind projects without taking into consideration the proximity of other projects.

According to groups like the NWCC, Minnesota's site permit requirements have established high standards for wind farm projects and the protection of the interests of counties, communities, and residents. Importantly, the process also provides an environmental review for developers that is flexible, timely, and efficient, but is also capable of resolving issues proactively.

### **4.1.3 Minnesota Wind Siting Act vs. the Section 248 Process**

The Minnesota process is similar to section 248 in that authority rests with a state board and that decisions can be appealed through the courts. Differences include the following:

- A key element of the Minnesota wind permitting process is its streamlined timeframe. With a 180-day time limit for the entire process, and a 45-day maximum for initial acceptance by the board, the Minnesota process is unique from Vermont's Section 248 process and other states' permitting processes as well.
- The Minnesota process also requires the inclusion of sufficient information in the initial application to evaluate environmental impacts of the proposed project, thereby eliminating the need for additional environmental review at a later point in the permitting process.
- Minnesota does not require applicants to demonstrate the economic need or benefit of the proposed project. However, under the Minnesota process, construction is not authorized until power purchase agreements are obtained, and Minnesota state policy has determined that wind development is in the public good.
- Minnesota requires notice of public meetings to be mailed to parties known to be interested.
- Minnesota's determination of visual impact is not as evolved as the Quechee test.

## **4.2 Oregon**

### **4.2.1 Overview**

Oregon law requires developers of large energy facilities to obtain a site certificate before constructing or operating a proposed facility. The authority to issue site certificates is granted to the Energy Facility Siting Council, a seven-member board of citizen volunteers appointed by the Governor. The Oregon Office of Energy staffs the siting process and makes recommendations to the Siting Council based on uniform siting standards that apply to all large energy facilities throughout the state. As established under ORS 469.300(9), wind energy facilities with a nominal generating capacity of 105 MW or more (i.e., average generating capacity of 35 MW or more) must apply for a site certificate. Developers of smaller

wind facilities can obtain separate approvals from local land use planning authorities and individual state permitting agencies, but also have the option of obtaining a site certificate to take advantage of the consolidated process at the state level.<sup>2</sup>

Oregon's energy policy provides the context for siting large wind energy facilities in the state. Legislative policy statements that express a statewide preference for renewable energy have been codified for 25 years. Oregon is a state that cares that "future generations not be left a legacy of vanished or depleted resources" as a result of "growth in demand for nonrenewable energy forms" (ORS 469.010(1)). The energy facility siting policy calls for "protection of public health and safety" and "compliance with the energy policy and air, water, solid waste, land use and other environmental protection policies of this state" (ORS 469.310).

Rules adopted by the Siting Council govern the review of the application. The overall process unfolds as follows:

1. Developers of proposed wind facilities with nominal wind generating capacity of 300 MW or more must submit a notice of intent. Projects less than 300 MW can have an expedited review process meaning that they do not need to submit a notice of intent. Among other things, this would be followed by a public meeting at the proposed site.
2. The project developer applies for a site certificate, which provides details about the project.
3. If the certificate is deemed complete and in compliance with siting standards, the Office of Energy prepares a draft proposed order (typically subject to recommended conditions).
4. Comments are solicited at a public hearing. If an issue is not raised at the public hearing, it is waived from later consideration.
5. The Office of Energy presents the draft proposed order to the Siting Council and summarizes any comments from the public hearing.
6. The Office of Energy issues a proposed order, taking into account comments from the public hearing and instructions from the Siting Council. At the same time the Office of Energy issues a contested case notice.
7. If no one opposes the project, the proceeding is closed and referred to the Siting Council for final decision. If an eligible party with a stake in the outcome opposes the project and submits a petition for party status, a substantial contested case proceeding ensues. Following this legal proceeding, the matter is referred to the Siting Council for final decision.
8. The Siting Council may adopt, modify, or reject the proposed orders. The result of the Council's deliberation is a final order. If the council decides that the proposed facility meets the applicable standards, the final order will grant issuance of a site certificate.
9. The Oregon Supreme Court has exclusive authority to hear appeals. Appeals must be filed within 60 days of the final order, and can only be filed by parties in the contested case.

The permitting process is outlined in Figure 2.

Key features of the Siting Council's certificate process include:

1. Except as provided in ORS 469.504 for land use compliance and except for those statutes and rules for which the decision on compliance has been delegated by the federal government to a state agency other than the Council, facility compliance with all other Oregon statutes and

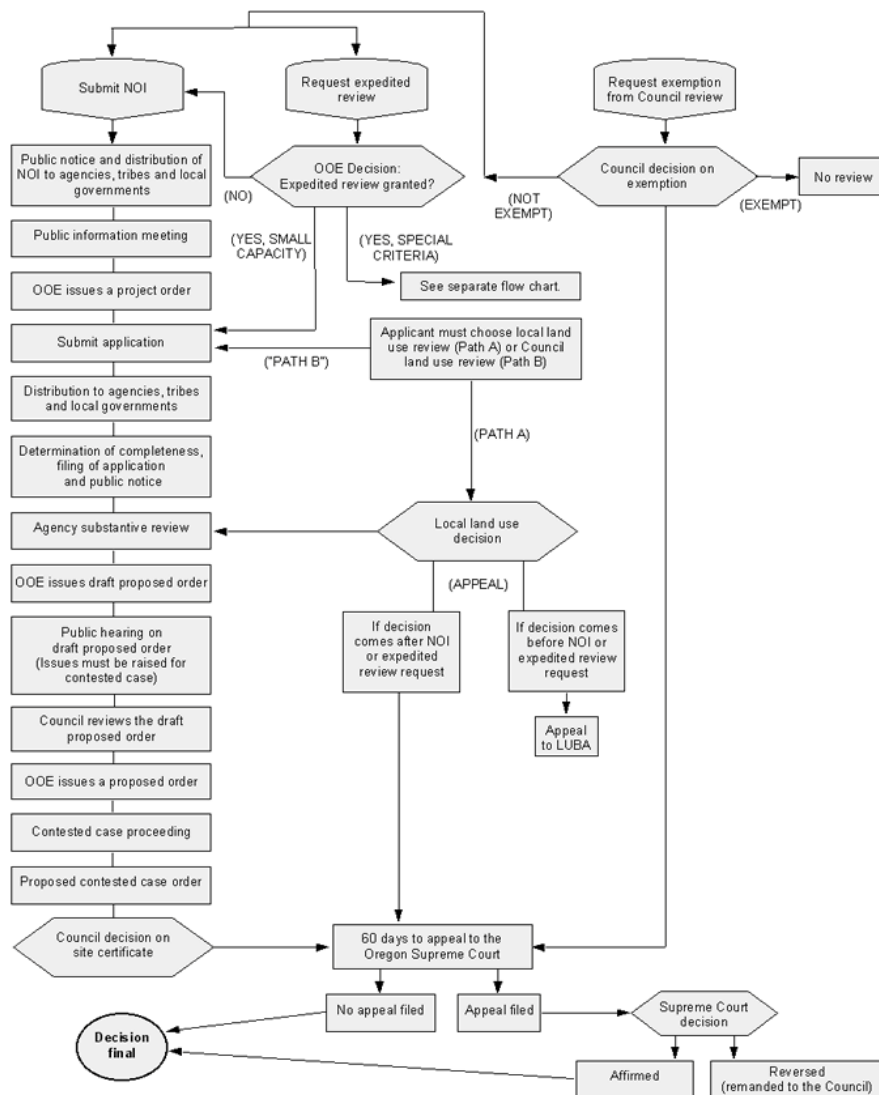
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<sup>2</sup> Additional information about the siting process for locally regulated energy facilities can be found in a draft Oregon Office of Energy handbook available at <http://www.energy.state.or.us/siting/EnergyGuide.PDF>.

administrative rules identified in the project order as applicable to the issuance of a site certificate for the proposed facility.

2. Facility compliance is based on the following specific standards:
  - Does the applicant have the appropriate abilities to build this energy facility?
  - Is the site suitable?
  - Would the facility have adverse impacts on the environment and the community? In making its findings, the Siting Council must answer two questions specifically concerning visual impacts on scenic values: 1) Have the applicable land use plans identified any “significant or important” scenic values? 2) Would the visual features of the facility be likely to result in “significant adverse impact” to those values? If there is a significant impact, the applicant must mitigate the impact through design measures or relocation of parts of the facility.
3. Certification is a "one-stop" process in which the Council determines compliance with specific standards of the Council and other state and local permitting agencies.
4. The process consists of public comment periods at the front end of the process, followed by a more formal contested case proceeding.
5. Appeals go directly to the Oregon Supreme Court for judicial review.

**Figure 2.: Oregon Permitting Process Map**



## 4.2.2 Lessons Learned

The Oregon energy facility siting process has been viewed both positively and negatively with regard to recent wind projects in the state. The value of the process is its ability to provide a deliberative structure in which difficult siting issues can be addressed and resolved. The process enables input from all affected parties, including the public.

Some developers have experienced frustration with the process. Resolution of issues requires the developer to respond to Siting Council staff requests for additional information, which means that developers must be prepared to commit additional resources to the process. In a recent instance, delays in the approval process (due to questions about potential avian impacts of the project), combined with pressure from the developer to complete construction prior to expiration of the production tax credit, put

unusual pressure on the Office of Energy to expedite the process. At the conclusion of its case study on the topic, the NWCC recommends the developer allow a minimum twelve months for completion of the Oregon state siting process.

### **4.2.3 Oregon Siting Process vs. the Section 248 Process**

In many ways the Oregon siting process is similar to the Section 248 process. Both include a state board and allow for appeals through the court. Both processes also require an initial public hearing to review the project, and both processes have a defined means of formal intervention against the project. In addition, there is no defined timeline for the process. Several differences include:

- Oregon siting process has a separate and specific permitting track for wind energy.
- Unlike 248, the Oregon process does not require documentation of public need for the facility. However, Oregon state policy strongly supports renewables.
- Oregon's visual impact test specifically applies to local and federal plans that designate scenic values. Other visual impacts are evaluated in a less objective manner.
- Wind projects that are less than 105 MW can opt out of local siting and into the state siting process.
- Wind projects less than 300 MW can undergo and expedited review process.

## **4.3 New York**

### **4.3.1 Overview**

Although there are no specific siting and permitting processes specifically established for wind energy projects in New York, the state does have a consolidated electric generating facility review process that applies to all types of large generation facilities. NYS Public Service Law, Article X – Environmental Compatibility and Public Need for Major Electric Generating Facilities, establishes the review and approval process for construction and operation of any generating facility with a capacity of 80 MW or more. The responsibility and authority for approval, or otherwise, of such projects belongs to the State's Public Service Commission (PSC). Projects within this size category must obtain a Certificate of Environmental Compatibility and Public Need from the PSC. The consolidated certification process was structured to eliminate the need for obtaining other approvals from state agencies or local municipalities.

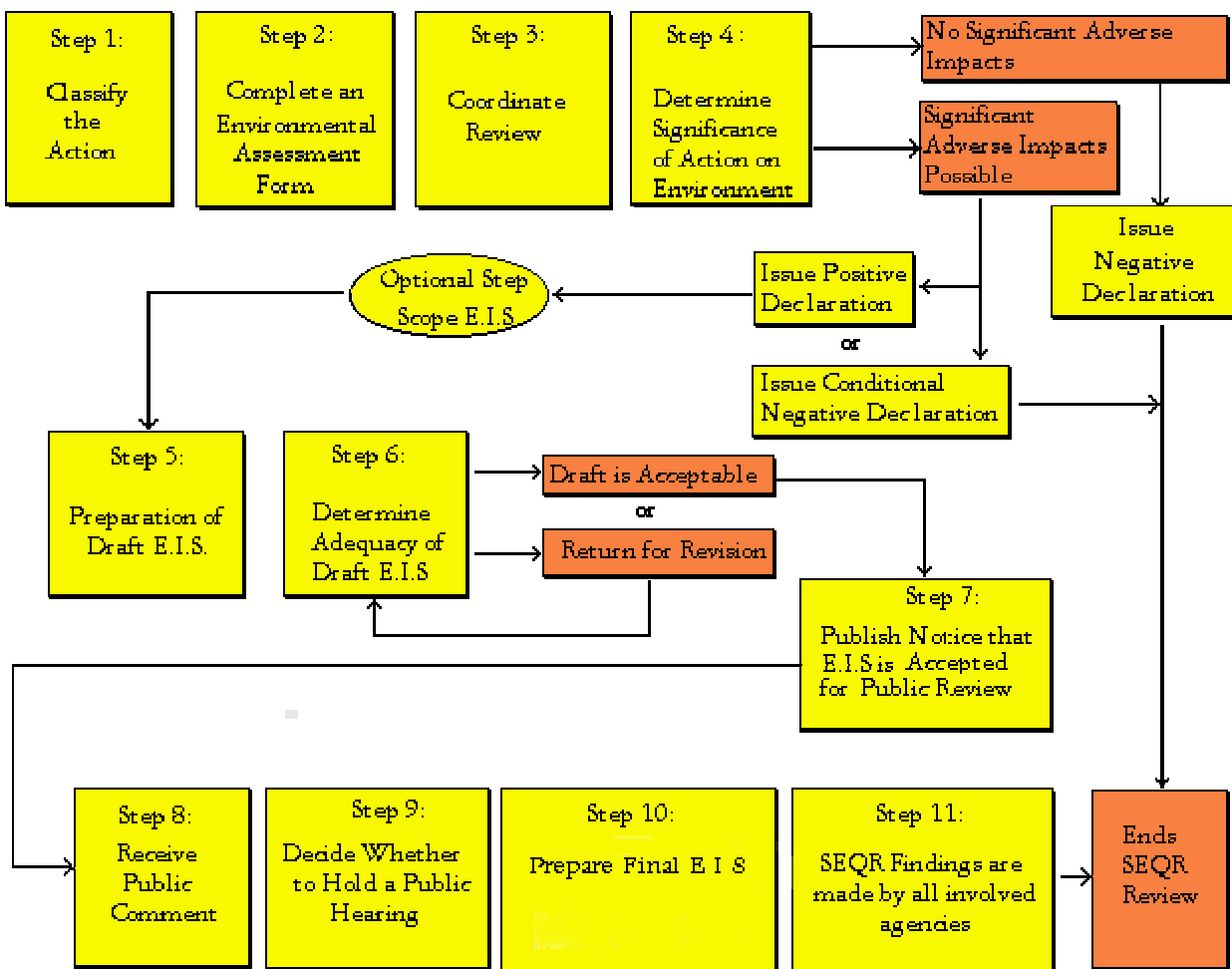
New York State has another consolidated review process, established in NYS Public Service Law, Article VII – Environmental Compatibility and Public Need for Electric and Gas Transmission Facilities. The certificate from this process is required for any electric generating project utilizing a transmission line with a design capacity of 125 kV or more and extending at least one mile. Similar to the Article X certificate process, qualifying transmission facilities are exempt from most other state or local review processes.

Because of the project size capacity associated with Article VII and X, the articles have impacted only a few projects in New York State. Land availability, wind resource variability, and other site-related characteristics generally lead to smaller project sizes (e.g., under 80 MW). Wind energy projects that do not meet the Article VII and X criteria are subject only to local siting and permitting procedures.

In New York State, the environmental impacts of a proposed wind energy project are typically assessed in accordance with the State Environmental Quality Review (SEQR) Act. The act requires that local and

state agencies give equal consideration to environmental protection, human and community resources, and economic factors when considering proposed projects. While the SEQR process does not result in a specific permit or certificate, it must be completed before any agency decides to approve, undertake, or fund the project. As can be seen in Figure 3 below, there are two key submittals in the SEQR process: the Environmental Assessment (EA) form and the Environmental Impact Statement (EIS). It is important to note that if the EA provides the governing agency with sufficient information as to the impacts and mitigation measures to be employed, it may be possible to obtain a *Negative Declaration of Significance*, which means that an EIS is not required.

**Figure 3: New York State Environmental Quality Review Process**



In the absence of PSC review (e.g., under 80 MW), siting and permitting regulation is left primarily to local government, assisted by the mandatory provisions of the SEQR. Town boards, regional planning commissions, county agencies, and other local authorities typically review and evaluate most wind energy projects. Under the “Home Rule” philosophy prevailing over most land use regulation in New York State, local municipalities have the freedom to adopt zoning or other land use law provisions – either of general applicability or applying specifically to commercial wind turbine projects – which may range from prohibitively hostile, to responsibly rigorous, to inapplicable, to unconditionally welcoming. In



areas where local land use or zoning rules do not exist, wind energy projects may only require a local building permit prior to construction.

Some local governments in New York State have established specific criteria for siting and permitting commercial or bulk generating wind energy facilities. Local requirements include adhering to zoning rules; obtaining building, grading, or special use permits; setback requirements; landscaping and screening; scenic view-shed impacts; and compliance with structural, mechanical, and electrical codes. Please see Attachment A for examples of wind turbine permitting requirements that have been established by several New York townships.

In addition, New York has state policy that supports wind development. New York recently enacted a Renewable Portfolio Standard.

#### **4.3.2 Lessons Learned**

Articles VII and X both involve lengthy pre-application, application, hearing and decision, and post-certification phases. Several wind developers have indicated that the schedule and cost of the process is prohibitive, and often causes significant delays in pre-development work. However, all three of the largest commercial wind projects up and running in New York State (11.5 MW, 6.6 MW, and 30 MW) fell well below the PSC threshold and didn't require Article VII or X certification. In the case of one proposed project (around 280 MW) that would have been subject to PSC review, local and County government prevailed upon the State legislature to waive the PSC permit and leave permitting to the local and State agencies that would normally decide on land use decisions. The review process has been going on, with delays and developer changes primarily due to the uncertainty over the future of the Federal Production Tax Credit.

The SEQR procedures have proven quite useful in eliciting information and providing a framework for relevant siting issues with regard to local wind turbine permitting. However, it does not apply in cases where there is neither local zoning nor other land use permitting authority, and cannot require a planning or zoning board to go beyond what its local enabling legislation authorizes in terms of making favorable or unfavorable land use decisions.

#### **4.3.3 New York Siting Processes vs. Section 248 Process**

The New York PSC process is very similar to Section 248, however, only applies to projects 80 MW or larger. Accordingly most of New York's existing wind projects have been permitted at the local level and only need to comply with mandatory provisions of the SEQR process. Several local permitting entities have developed guidelines for permitting wind.

The New York SEQR process is very similar to the Section 248 Process in that both processes incorporate adequate amounts of time for public response, do not provide a separate and specific track for permitting wind energy, and have defined a legal means of appealing siting decisions. In New York, if an agency makes an improper decision or allows a project that is subject to SEQR to start, without a proper review, citizens or groups who can demonstrate that they may be harmed by this failure may take legal action against the agency under Article 78 of the New York State Civil Practice Law and Rules.

## **4.4 Pennsylvania**

### **4.4.1 Overview**

Pennsylvania does not have a specific state "process" related to the siting and permitting of wind farms. Rather, individual counties and townships are responsible for determining development approval on their own (e.g., through county subdivision and land development or conditional use ordinances, planning commissions, and/or township supervisors). However, while wind turbines do not require special permits on their own, there are several federal and state requirements that may need to be addressed prior to land subdivision and development. Examples include:

- PA Dept. Environmental Protection – water quality permit, etc.
- PA Dept. of Transportation – highway access permits, etc.
- PA Public Utilities Commission – public water supplies.
- PA EPA – wetland encroachment.
- PA Fish Commission – stream changes.
- PA Farmland and Forestland Assessment Act 1974 (Act 319) [Clean and Green].
- Federal Communications Commission – tower height, etc.
- And more.

Since there really is no state agency that has the regulatory authority to specifically permit wind farms, the PA State Energy Program's Wind Working Group is attempting to work together to draft a "model" ordinance based on the Somerset County Ordinance (described below) that other municipalities can base ordinances on, if they choose to do so.

It is also important to note that Pennsylvania state policy supports wind. In addition, due in part to the state's support of wind power, Gamesa, a leading global manufacturer of wind turbines recently announced that it will open its U.S. headquarters and a manufacturing facility in Pennsylvania.

### **4.4.2 Somerset County Ordinance Summary**

In April of 2004, the Somerset County Planning Commission amended the Somerset County Subdivision and Land Development Ordinance of 1998 to establish setback and decommissioning requirements for wind energy towers. The amendment conditionally exempted leases of wind towers from the requirements of filing a subdivision plan, but stipulated filing requirements for a nonresidential development plan and other miscellaneous amendments.

The ordinance was originally amended to adopt appropriate siting and development standards for wind turbines, as long as it was "in the public interest and contribute[d] to the protection of public health, safety and welfare."

Recognizing that conflicts were likely to arise if wind energy development occurred within a certain vicinity of existing off-site residential and commercial developments without the consent of the adjoining property owners, the amendment established a minimum development distance from any adjoining structure. The ordinance established that no wind energy tower could be located within five times the height of the tower (base to hub of rotor) from any off-site occupied residence or occupied commercial structure, unless the owner of the structure executed a non-disturbance easement, covenant, or consent

agreement. The easement, at a minimum, needs to provide a waiver for any damages or losses resulting from higher noise levels, visual impacts or flickering reflections, and/or shadows which may arise as a result of turbine location. As part of the application, the developer/landowner must include the names of the owners of all abutting land and subdivisions.

#### **4.4.2.1 Application Process**

1. Developer files application with County Planning Commission.
2. Planning Commission reviews application.
3. If application has any variances, it is sent to the Commission's Board of Directors for final review.
4. No public hearings are required for subdivision and land development applications.

#### **4.4.3 Waymart Permitting Process**

Similarly, the township of Canaan (which hosts 20 of the Waymart Wind Farm turbines) adopted a Conditional Use Ordinance in 2002 that recognized the development of large-scale wind turbines as a potential development issue. Based on the newly revised ordinance the approval process for wind turbine development is as follows:

1. Wind farm developer files initial application with town zoning officer.
2. Zoning officer originally denies application and sends to Canaan's 5 member Planning Commission.
3. The Commission reviews the application to determine whether or not it is consistent with the above-mentioned Ordinance (e.g., noise levels, location, aesthetics, etc.).
4. In conjunction with the town Planning Commission, the County (Wayne) Planning Commission also reviews the application (similar to Somerset County, developers are subject to other federal and state regulations, including but not limited to, Federal height restrictions, and PA DEP wetlands issues). Proper legal documentation from landowner approving development must also be included in application.
5. Planning Commission then approves or denies the application.
6. If approved, the application is sent to the Canaan Township Supervisors.
7. The Township Supervisors review application and conduct public hearing on results.
8. Final approval/denial given to developer.

#### **4.4.4 Lessons Learned**

In general, Pennsylvania wind farm siting processes (for those counties/townships that have established them) do not include any specific aesthetic criteria and do not rely heavily on public hearings for input on development issues; rather, county or town planning commissions utilize internal review processes to determine project eligibility. There has been some minor public outcry with regard to wind turbine development in specific areas of Pennsylvania (e.g., Somerset County), but for the most part, Pennsylvanian's seem to embrace wind development in the state. Most projects have reported minor complaints from neighbors (including the need to install a TV tower in response to the project's impact on reception), but note that communities are generally supportive.

It is the responsibility of the project developer to work with local planning commissions and township supervisors to coordinate the application process and meet any development criteria the county or township may have.

#### **4.4.5 Pennsylvania Siting Process vs. the Section 248 Process**

There really are no distinct similarities between the siting processes established in Pennsylvania and those outlined in Section 248. Obviously, the key difference is that in Pennsylvania land-use decision-making is decided by each jurisdiction (county or township) within the state, and can vary based on the values of the local population. Furthermore, in most instances, public hearings are not an integral part of the development process in Pennsylvania. Pennsylvania also has state policy that clearly supports wind development.

## 5. NWCC Best Practices

These best practices were developed by the National Wind Coordinating Committee (NWCC), a consensus-based collaborative with a fairly diverse stakeholder base that is tasked with identifying and addressing issues surrounding wind development.

### 5.1 Permitting Process Principles

- **Significant Public Involvement (*and Education on Project and Process*).** Providing opportunities for early, significant, and meaningful public involvement is crucial to a successful process, but there is no one simple formula for achieving this.
- **Issue-Oriented Process.** An issue-oriented approach can help focus the debate, educate the public and decision-makers, and ensure an analytic basis for the eventual decision.
- **Clear Decision Criteria.** Decision-making criteria should be clear and consistently applied, and made known from the outset to all participants and interested parties.
- **Coordinated Permitting Process.** Where more than one agency has jurisdiction over permitting, agencies are encouraged to coordinate so that project review can proceed simultaneously and redundant, conflicting, or inconsistent requirements, standards, and processes can be avoided.
- **Reasonable Time Frames.** Delays and associated uncertainties can be minimized if permitting agencies establish reasonable time frames for each of the major phases of the permitting process, and manage the process to stay within those time frames.
- **Advance Planning.** Both developers and agencies should know as much as possible about the project, the process, the participants, and the issues prior to commencing the formal permitting process.
- **Timely Administrative and Judicial Review.** The use of established procedures designed to systematically narrow the issues of concern and produce factually based decisions can significantly limit any administrative or judicial appeals and allow them to proceed more efficiently.
- **Active Compliance Monitoring.** Most agencies include in their permits specific conditions that must be met during construction, operation and maintenance, and project decommissioning. These conditions can best be implemented if they are: specific, measurable, agreed upon by all parties, realistic, set within reasonable time frames, enforceable, and actually enforced.

### 5.2 Permitting Criteria

The following list identifies key issues that the NWCC thinks should be considered during the siting and permitting of a wind project.

- **Land Use.** Depending on the site, size and design of the project, wind development may be compatible with a variety of other land uses, including agriculture, grazing, open space preservation, and habitat preservation for some species. Other land uses and resource values need to be considered when siting large wind projects in remote areas. Stakeholders need to understand the full range of land use issues associated with a site before getting locked into development plans, permit conditions, or other requirements.
- **Noise.** Because noise emitted by wind turbines tends to be masked by the ambient (background) noise of the wind itself and falls off sharply with distance, noise-related concerns are likely to center on residences closest to the site, particularly those sheltered from prevailing winds. Advanced turbine technology and preventive maintenance can help minimize noise during project operation. It may also be useful to characterize other sound sources in the affected area for comparison purposes.
- **Birds and Other Biological Resources.** The potential for collisions between birds and bats and wind energy facilities has been a controversial siting consideration. Biological resource surveys (of birds and other wildlife) can help to determine whether or not serious conflicts are likely to occur. In most cases, biologically significant impacts are unlikely to occur, or can be adequately mitigated; if not, wind development may not be appropriate in a particular location.
- **Visual Resources.** There are a number of ways to reduce the visual impact of wind projects, but there may be tradeoffs to consider. For example, tubular towers may be more attractive at short distances than lattice towers, but they may also be more visible from a distance. Simulations using computer-aided graphics or artists' renderings can be developed to facilitate comparison of what the wind resource area looks like before and after the proposed turbines are installed.
- **Soil Erosion and Water Quality.** Like other construction activities, wind projects are subject to the Clean Water Act. If a project disturbs more than five acres, the developer must prepare a Storm Water Pollution Prevention Plan in order to obtain a National Pollutant Discharge Elimination System (NPDES) compliance permit, which is issued by the state's environmental quality agency.
- **Public Health and Safety.** Most of the safety issues associated with wind energy projects can be dealt with through adequate setbacks, security, safe work practices, and the implementation of a fire control plan.
- **Cultural and Paleontological Resources.** Wind farms, like other developments, are subject to legislation designed to protect important cultural and fossil resource sites. These include: the National Historic Preservation Act of 1966, the Federal Land Policy and Management Act (FLPMA) of 1976, and the American Indian Religious Freedom Act of 1978. Special care may need to be taken to preserve the confidentiality as well as the integrity of certain sensitive resources, or sites sacred to Native Americans.
- **Socioeconomic/Public Services/Infrastructure.** Developers and permitting agencies should coordinate with local public service agencies to determine whether and how the project may affect the community's fire protection and transportation systems, and nearby airports and communications systems.

- **Solid and Hazardous Wastes.** Wind farms, like other developments, are subject to the Resource Conservation and Recovery Act. Normal methods of managing solid waste should be adequate.
- **Air Quality and Climate Change.** Wind projects produce energy without generating any of the conventional pollutants or greenhouse gases produced by fuel combustion. New generation supplied by wind projects results in no additional air pollutant emissions. Temporary local emissions associated with project construction and maintenance can and should be minimized.

### 5.3 Lessons Learned and Next Steps

According to the NWCC, federal, state, and local natural resource, conservation and planning agencies are increasingly developing voluntary and mandatory wind siting guidelines. Development of these guidelines is in response to the growing demand for renewable energy. A variety of policy responses have been developed and a number of state and local jurisdictions are seeking information on what has worked and what has not worked. Until now there has not been an opportunity to discuss the pros and cons of the variety of guidelines being considered

Therefore, NWCC staff is proposing a workshop for December 2004/January 2005 on policy siting issues at the state and regional level. For many states, wind energy development is a new undertaking that gives rise to its own unique issues. The workshop will provide a forum for developers to share their perspectives, and for those states with specific wind permitting policies, such as Washington, Kansas and Minnesota, to share their various experiences. Questions to consider include:

- What agencies need to be involved?
- Who does the actual permitting?
- How does the public fit into the permitting process?
- Is it formulized for the state or county-by-county?
- What are the pros and cons of different approaches?

The audience would include: state fish and wildlife agencies; state natural resource departments; wind developers; community advocates; consumer advocates; and environmental organizations.<sup>3</sup>

### 5.4 NWCC Principles vs. the Section 248 Process

Section 248 is fairly in line with the NWCC permitting process principles and permitting criteria. Several areas where they differ include the following:

- **Significant Public Involvement.** The NWCC suggests several measures, such as, mailings to all abutters and stakeholders, and holding public information meetings at the beginning of the permitting process to inform the public of the project, the permitting process, possible issues, and ways they can provide input.
- **Advance Planning.** The NWCC encourages advance planning, e.g., collaborations to identify key issues prior to the permitting process. This is already done by many of the developers in Vermont, but not a formal part of the process.

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<sup>3</sup> National Wind Coordinating Committee Proposal for Siting Workshop December 2004/January 2005

- **Clear Decision Criteria.** While there are clear criteria associated with Section 248, there is no clear process for how those criteria are applied to the evaluation of wind power and its unique traits (for example, a specific requirement for the wind visual impact study to require detailed visualization and view shed modeling). The NWCC recommends developing a specific and clear set of criteria and evaluation measures for wind projects.
- **Reasonable Timeframes.** Section 248 does not set timeframes for its process. One measure suggested by NWCC is to work with stakeholders to establish timeframes for each component of the process and to actively communicate those timeframes to stakeholders.



## 6. Resources

General Information

[http://www.eere.energy.gov/windpoweringamerica/wpa/state\\_activities.asp](http://www.eere.energy.gov/windpoweringamerica/wpa/state_activities.asp)

NWCC Wind Permitting Handbook

<http://www.nationalwind.org/pubs/permit/permitting2002.pdf>

Minnesota Wind Siting

<http://www.eqb.state.mn.us/EnergyFacilities/wind.html>

Oregon Energy Facility Siting Standards

<http://www.energy.state.or.us/siting/standard.htm>

New York State Article X

[http://www.dps.state.ny.us/articlex\\_process.html](http://www.dps.state.ny.us/articlex_process.html)

New York State Energy Research and Development Authority Wind Energy Siting Guide

<http://www.nyserda.org/energyresources/wind.html>

<http://www.nyserda.org/energyresources/windguide.pdf>

Somerset County, PA Ordinance Amendment and Final Ordinance

<http://www.co.somerset.pa.us/windmill3-24-04.htm>

<http://www.co.somerset.pa.us/suborder.htm>

## **Appendix A: Examples of Township Permitting Procedures in New York**

Town of Martinsburg, Lewis County

# Regulation of Wind Power Generating Facilities

## Town of Martinsburg, Lewis County, NY

Town of Martinsburg Development Law contains regulations for wind power generating facilities. The law allows wind power generating facilities in the rural residential, agricultural and forest districts of the town as an overlay district. This use requires a special use review by the planning board. Below are the relevant sections of the law that address these regulations.

### ARTICLE 2. DEFINITIONS

#### Section 210. General

Except where specifically defined herein, all words used in this law carry their customary meanings. Words in the present tense include the future, words in the singular include the plural and the plural the singular, and the word "shall" is intended to be mandatory.

#### Section 220. Specific Definitions

**Essential Facilities:** The operation or maintenance by municipal agencies or public utilities of telephone dial equipment centers; electrical or gas substations; water treatment, storage and transmission facilities; pumping stations; telecommunications towers and similar facilities. The definition of essential facilities shall not include power generating facilities of any kind.

**Overlay District:** A district that encompasses one or more underlying districts and that imposes additional requirements above that required by the underlying district.

**Wind Power Generating Facilities:** Wind generating facilities which generate original power on site to be transferred to a transmission system for distribution to customers. The definition of wind power generating facilities shall not include individual wind power generating facilities erected and used primarily for private use.

#### Section 310. Types of Districts

For the purpose of this law, the Town of Martinsburg is hereby divided into the following districts:

<b>H – Hamlet:</b>	The areas within this district are now developed to some extent and include low or medium density residential uses with some commercial and industrial uses.
<b>A – Agricultural:</b>	The areas within this district are generally used for agricultural activities. Most of the land is open in character with some scattered spots of forest, wetland, and residential use.
<b>RR – Rural Residential:</b>	The areas within this district are sparsely settled, but generally accessible by highway. Some forest and agricultural use may be present.
<b>F – Forest Resources:</b>	The areas within this district are predominantly covered by dense vegetation and contain many wet areas and stream courses. They are relatively inaccessible by automobile and contain few permanent residences and some seasonal residences.
<b>WPO - Wind Power Overlay:</b>	Area(s) in the Town of Martinsburg where wind power generating facilities are allowed.

### ARTICLE 4. DISTRICT REGULATIONS

#### Section 410. Allowed Uses

All uses shall comply with the requirements as indicated on the following chart:

P = Development Permit Required	NONE = No Permit Required
SU = Special Use by Planning Board Approval Required	NA = NOT ALLOWED

LAND USE	DISTRICT			
	RR Rural Residential	H Hamlet	A Agricultural	F Forest
Wind Power Generation Facilities	SU	NONE	SU	SU

## Section 420. Land Use District Schedule

District	Specifications for All Uses	
WPO Wind Power Overlay	Lot Frontage:	same as underlying zone
	Lot Size:	same as underlying zone
	Setback of all wind power generating structures:	from centerline of any road - 100 feet plus height of structure from side and rear lot lines - 300 feet from any existing residential structures - 1500 feet
	Landscaping and Screening:	Appropriate landscaping is required to keep the site in a neat and orderly fashion. Appropriate screening is required to screen accessory structures from adjacent residences.

## Section 425. Wind Power Overlay District Procedure

1. A Wind Power Overlay may be applied in the Rural Residential District or the Agricultural District upon application to the town board.
2. Any application for a Wind Power Overlay to the town board must be in writing and must be duly signed by the applicant and contain:
  - a. the identity of the parcels to be affected, including tax map numbers and acreage;
  - b. a survey map showing the boundaries of the overlay area;
  - c. the consent of all property owners within the overlay;
  - d. sufficient acreage to comply with setbacks and other requirements set forth in Section 420 of this law;
  - e. distance to nearest residential structures;
  - f. proposal for landscaping and screening;
  - g. the identity of the applicant; and
  - h. an Environmental Assessment Form.
3. The town board shall hold a public hearing on any such application prior to permitting or denying such application. The notice shall be published in the official newspaper of the town at least 10 days prior to the hearing. In addition, written notices shall be sent to:
  - a. all adjoining property owners;
  - b. all other municipal entities within 500 feet of the project site; and
  - c. the Lewis County Planning Board.

The hearing shall be held within 62 days of receiving a complete application.

4. The Town Board shall make its determination within 62 days of when the public hearing is closed.

Town of Fenner, Madison County

## Wind turbine provisions in Town of Fenner Zoning

Zoning Map (District "C")

Zoning Schedule: Table of Dimensions (all setback requirements for wind turbines are in footnote h.)

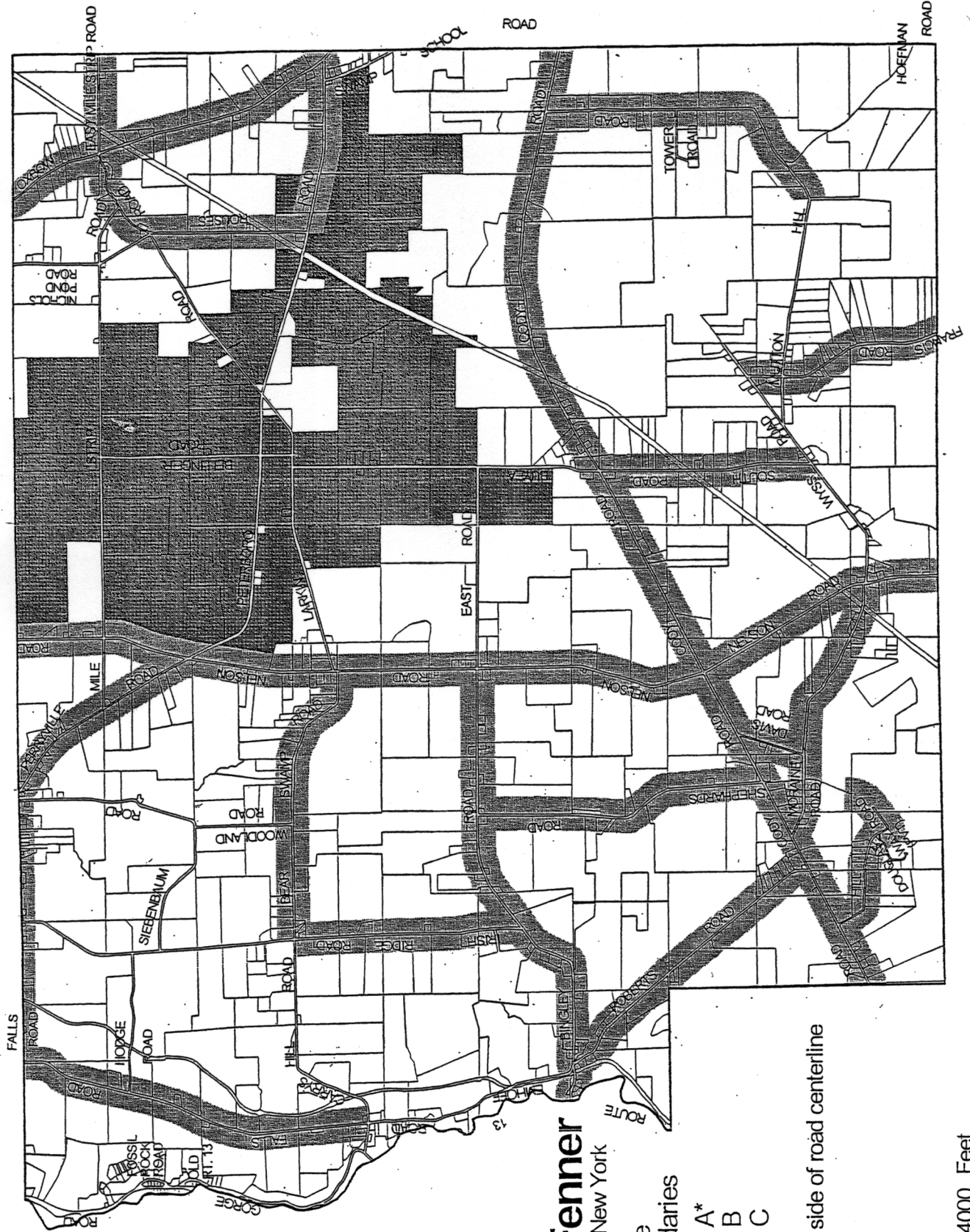
Zoning District "C" Uses Requiring a Special Permit (Sect. 303.3G) ('Wind power electricity generation and transmission facilities')

[Existing general Special Permit and Site Plan Review provisions applying to regulation of wind power electricity generation and transmission facilities Special Permits (Sect. 606.1), Application for Special Use Permit (Sect. 606.2), Standards for Granting Special Use Permits (Sect. 606.3), Submission of Site Plan and Supporting Data (Sect. 606.4), Site Plan Approval (Sect. 606.5)]

Additional Standards for Granting special Use Permits for Wind Power Electricity Generation and Transmission Facilities (Sect. 606.31)

Submission of Additional Supporting Data for Site Plan of Wind Power Electricity Generation and Transmission Facilities (Sect. 606.41)

NOTE: A 'public (or 'semi-public') utility' zoning definition that includes, as a necessary part of the definition that the service is licensed by the Public Service Commission does *not* cover a power plant or wind turbine facility generating under 80 megawatts maximum capacity. In the absence of a definition of 'public utility' that covered such a power generating facility, a zoning definition of 'industry' *might* or might not cover it, depending on how it was worded.



# **Town of Fenner** Madison County, New York

Land Use  
District Boundaries

- District A\*
- District B
- District C

\*500' on each side of road centerline



0 2000 4000 Feet



1:50,000



TABLE 1

LAND USE SCHEDULE  
Minimum Dimensions

	Lot Area	Lot		Yards*			Maximum Structure Height Ft.	Notes (see Page)
		Frontage Ft.	Depth Ft.	Front Ft.	Side Ft.	Rear Ft.		
"DISTRICT A"								
Single-family unit	1 acre **	200	200	50	40	50	35	a, b
Two-family unit	1.5 acre	200	200	50	40	50	35	b
Multi-family	1.5 acre							
	+ 10,000							
Farm	sq. ft/unit	200	200	50	40	50	45	d, e
	5 acres	200	200	50	40	50	None	c, g
"DISTRICT B"								
All "A", as above								
Mobile dwelling	1 acre	200	200	50	40	50	35	b
Mobile dwelling park *	5 acres	200	300	50	30	50		b, d, e, f
Individual Park Site	@ 10,000							
	sq. ft/unit	70	120	30	20	20	35	f
Business, professional, or industrial, on separate lots	1 acre	200	200	50	40	50	35	b, d, e
"DISTRICT C"								
All "B", as above								h

\* Corner lots are considered to have two front yards along the two roadways and two side yards.

\*\* Acre = 43,560 sq. ft.

\*\*\* Requirement of actual frontage along public highway, or, if applicable, private access easement

All non-farm accessory buildings shall conform to front and side yard requirements of the district in which they are located.

## Notes for Table 1

- a. Measured from the road right-of-way. Applies to each side of a lot that adjoins a public road.

An alternative front yard minimum dimension measurement is permissible from the center of road-ways where neither road right-of-way bounds nor surveys are available: (1) on three rod roads (generally, but not necessarily, Town roads) set buildings back at least 75 feet from the centerline of the road; and (2) on four rod roads (generally, but not necessarily, County roads) set buildings back at least 83 feet from the centerline of the road.

- b. Where community water supply and sewer are used, one-half lot area and smaller bordering yards are permitted. Lot: 100 feet front x 150 feet depth. Yards: 30 feet front x 20 feet sides x 50 feet rear.
- c. Accessory farm buildings (silos, barns, etc.) are exempt from height limits.
- d. Requires a special use permit issued by the Planning Board.
- e. A landscaped screening zone at least 15 feet wide shall be maintained by the owner on those sides of his lot that adjoin any residential property owned by another party.
- f. Each mobile dwelling site shall connect to an access road within the mobile dwelling park, and the front yard of each lot shall be measured from the edge of this access road.
- g. Upon the issuance of a special permit by the Planning Board, not more than two units of supplementary housing for relatives or hired hands employed by the farm; each unit must be provided with an adequate sewage disposal system; does not require separate lots.
- h. The minimum setback distance between each production line commercial wind power electricity generation unit (wind turbine tower) and: all surrounding property lines, overhead utility lines, any dwellings, and any other generation units, above-ground transmission facilities, and separate meteorological facilities, shall be equal to no less than 1.5 times the proposed structure height plus the rotor radius. [The property line setback requirement may be reduced by the Planning Board as an incident of special permit review when the Planning Board finds that the following circumstances apply: the property line in questions a) separates two properties that are both in the "C" District, and b) either, i) both properties on each side of the boundary line in question will have electricity generation or transmission facilities constructed on them as part of the project under review, or ii) the owner of the property for which the reduced setback is sought executes and presents for recording a development easement satisfactory to the Town in which the reduced setback is consented to, and construction within, and use of the easement area is appropriately restricted.
- No experimental, homebuilt, or prototype wind turbines shall be allowed without documentation by the applicant of their maximum probable blade throw distance in the event of failure and determination by the Planning Board of appropriate setback distances on the basis of that documentation.

Section VI.

Local Law 1997-1 is hereby amended to add a new Section 303 to read as follows:

Section 303 - DISTRICT C

The purpose of this district is to foster the development of the Town's windpower resource while preserving farmlands and adjoining settlements as compatible adjoining uses.

Section 303.1 - PRINCIPAL USES PERMITTED

- A. One and two-family dwellings built on a foundation, including modular dwellings.
- B. Farms and farm buildings for related agricultural activities.
- C. Mobile dwellings on individual lots.

Section 303.2 - ACCESSORY USES PERMITTED

- A. Same as Section 301.2.
- B. Home businesses conducted by the residents.
- C. Accessory buildings necessary to the principal use and which do not include any activity commonly conducted as a separate business.

Section 303.3 - USES REQUIRING A SPECIAL PERMIT

- A. Same as Section 301.3.
- B. Mobile dwelling parks.
- C. All retail sales, eating, service and professional establishments.
- D. Day camps, guest or vacation homes for pay, private clubs and seasonal camps.
- E. Commercial outdoor recreation such as ski runs, snowmobile parks, miniature golf courses, driving ranges, race tracks and hunting and fishing preserves.
- F. More than one residence structure on a lot for a farm (See note (g) to Table 1).
- G. Wind power electricity generation and transmission facilities. (See note (h) to Table 1).

Section 303.4 - USES PROHIBITED

All other uses prohibited in this district.

same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.

- E. Imposition of conditions. The Board of Appeals shall, in the granting of both use variances and area variances, have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property. Such conditions shall be consistent with the spirit and intent of the Land Use Regulations, and shall be imposed for the purpose of minimizing any adverse impact such variance may have on the neighborhood or community.

## Section 606 - PLANNING BOARD

The Town Board hereby affirms the existence of the Town of Fenner Planning Board consisting of seven (7) members and having all the authority conferred pursuant to Article 16 of the Town law. Specifically, the Planning Board shall have the following powers and duties:

1. To issue or deny Special Permits required by this law.
2. To undertake planning activities allowed by Town Law or as requested by the Town Board.
3. Subdivision Review and Approval.
4. Site Plan Review and Approval.

### Section 606.1 - SPECIAL PERMITS

A Special Permit gives some means of control of proposed new uses of land and buildings which are compatible with land uses permitted by right by the Land Use Regulations as long as the conditions applicable to special permit uses are satisfied. Specifically, it gives the Planning Board the opportunity to determine whether such proposed new development (in the particular location, at the particular scale, and of the particular site design contemplated) will create special problems which can be corrected or effectively minimized by specially devised conditions or which call for denial of permission.

When a Special Permit is granted, the Planning Board may prescribe conditions to be observed in order to ensure adherence to the standards specified in Sections 606.2 and 606.5.

No Special Permit shall be granted with respect to any property or any use on or for which a violation currently exists. (Non-conforming uses as outlined in Section 408 are not considered violations of this local land use law.)

Unless extended by the Planning Board, if a use or construction authorized by a Special Permit has not been started within one year, the Special Permit will expire.

Section 606.2 - APPLICATIONS FOR SPECIAL USE PERMITS

- A. An application to the Planning Board for a special use permit shall be submitted to the Town Clerk and shall be accompanied by three sets of preliminary site plans and other descriptive matter to show clearly the intentions of the applicant. These documents shall become a part of the record to determine if the proposed special use meets the requirements of this local law.

A public hearing shall be held by the Planning Board within sixty-two days from the date any application for a Special Permit is received.

- B. At least 10 days before the date of the public hearing, the Town Clerk shall transmit to the Planning Board a copy of the application, with supporting documents, and notice of hearing. The Planning Board shall render its decision within 62 days, of the date the public hearing is closed.

Section 606.3 - STANDARDS FOR GRANTING SPECIAL USE PERMITS

No special use permit shall be granted unless it is determined by the Planning Board that the proposed use meets all of the following criteria:

- A. The location, size and use of structure, nature and intensity of operations involved, size of site in relation to the proposed structure(s), and the location of the site with respect to roads giving access to it are such that the proposed use will be in harmony with orderly development of the district.
- B. The location, nature and height of buildings, walls and fences will not discourage the appropriate development and use of adjacent land and buildings, or impair their value.
- C. The proposed use shall not conflict with any master plan, or part thereof.
- D. Operations of any special use shall not be more objectionable to nearby properties than would be the operations of any unconditionally permitted use.
- E. A special use permit shall not be issued for a use on a property where there is an existing violation of this local law.
- F. The use shall not have an adverse effect on the agriculture of the area.
- G. The proposed use shall be in strict compliance with the requirements of Article 5, Existing Supplemental Regulations.

## Section VII.

Local Law 1997-1 is hereby amended to add a new Section 606.31 to read as follows:

### Section 606.31 - ADDITIONAL STANDARDS FOR GRANTING SPECIAL USE PERMITS FOR WIND POWER ELECTRICITY GENERATION AND TRANSMISSION FACILITIES

No special use permit shall be granted for commercial wind power electricity generation and/or transmission facilities unless it is determined by the Planning Board that the proposed use meets all of the following criteria, in addition to those general criteria listed in Section 606.3:

A. No individual tower facility shall be installed in any location along the major axis of an existing microwave communications link where its operation is likely to produce electromagnetic interference in the link's operation.

B. No individual tower facility shall be installed in any location where its proximity with existing fixed broadcast, retransmission, or reception antenna (including residential reception antenna) for radio, television, or wireless phone or other personal communication systems would produce electromagnetic interference with signal transmission or reception.

C. Use of nighttime, and overcast daytime condition, stroboscopic lighting to satisfy tower facility lighting requirements for the Federal Aviation Administration shall be subject to on-site field testing before the Planning Board as a prerequisite to that Board's approval with specific respect to Section 606.3(D) as it applies to existing residential uses within 2000' of each tower for which such strobe lighting is proposed.

D. No individual tower facility shall be installed in any location that would substantially detract from or block view of a portion of a recognized scenic viewshed, as viewed from any public road right-of-way or publicly owned land within the Town of Fenner, that extends beyond the border of the Town of Fenner.

E. Individual wind turbine towers shall be located with relation to property lines so that the level of noise produced during wind turbine operation shall not exceed 50 dbA, measured at the boundaries of all of the closest parcels that are owned by non-site owners and that abut either the site parcel(s) or any other parcels adjacent to the site parcel held in common by the owner of the site parcel as those boundaries exist at the time of special use permit application.

F. No wind turbines shall be permitted that lack an automatic braking, governing, or feathering system to prevent uncontrolled rotation, overspeeding, and excessive pressure on the tower structure, rotor blades, and turbine components.

G. The minimum distance between the ground and any part of the rotor blade system shall be thirty (30) feet.

H. All power transmission lines from the wind generation electricity generation facilities to on-site substations shall be underground.

I. Procedures acceptable to the Planning Board for emergency shut-down of power generation units shall be established and posted prominently and permanently on at least one location on the road frontage of each individual unit site.

J. Prior to issuance of a Building Permit, the applicant shall provide the Town proof, in the form of a duplicate insurance policy or a certificate issued by an insurance company, of liability insurance, of a level to be determined by the Town Board in consultation with the Town's insurer, to cover damage or injury which might result from the failure of a tower or towers or any other part(s) of the generation and transmission facility.

The Planning Board may impose additional standards on the special use to provide adequate safeguards to protect the health, safety, or general welfare of the public, to preserve the general character of the neighborhood in which such proposed special use is to be placed, and to minimize possible detrimental effects of use on adjacent property.

Section 606.4 - SUBMISSION OF SITE PLAN AND SUPPORTING DATA

A site plan and supporting data for a special use permit shall be submitted to the Planning Board. The owner shall submit a site plan and supporting data as required and shall include all or a portion of the following information presented in drawn form and accompanied by a written text. The amount of information will depend on the scope of the proposal.

- A. Survey of the property, showing existing features of the property, including contours, large trees, buildings, structures, streets, utility easement, right-of-way, land use, land use district and ownership of surrounding property.
- B. Site plan showing proposed lots, blocks, building locations, and land use area.
- C. Traffic circulation, parking and loading spaces, and pedestrian walks.
- D. Landscaping plans, including site grading, landscape design, and open areas.
- E. Preliminary architectural drawings for buildings to be constructed, including floor plans, exterior elevations, and sections.
- F. Preliminary engineering plans, including road improvements, storm drainage system, public utility extensions, water supply, and sanitary sewer facilities.
- G. Engineering feasibility studies of any anticipated problems which might arise due to the proposed development, as required by the Planning Board.
- H. Construction sequence and time schedule for completion of each phase for buildings, parking spaces, and landscaped areas.
- I. A description of the proposed uses, including hours of operations, number of employees, expected volume of business, and type and volume of traffic expected to be generated.
- J. A completed Environmental Assessment Form.



Section VIII.

Local Law 1997-1 is hereby amended to add a new Section 606.41 to read as follows:

Section 606.41      SUBMISSION OF ADDITIONAL SUPPORTING DATA FOR  
SITE PLAN OF WIND POWER ELECTRICITY  
GENERATION AND TRANSMISSION FACILITIES.

In addition to the site plan material listed in Section 606.4, the following material shall be submitted to the Planning Board for commercial wind power electricity generation and/or transmission facilities:

- A.      Digital elevation model-based project visibility map showing the impact of topography upon visibility of the project from other locations, to a distance radius of three miles from the center of the project. Scale used shall depict 3-mile radius as no smaller than 2.7 inches, and the base map used shall be a published topographic map showing cultural features.
- B.      No fewer than four and no more than the number of proposed individual wind turbines plus three color photos, no smaller than 3"x5", taken from locations within a 3-mile radius from it and to be selected by the Planning Board, and computer-enhanced to simulate the appearance of the as-built aboveground site facilities as they would appear from these locations.

Section 606.5 - SITE PLAN APPROVAL

The Planning Board shall review the site plan and supporting data before approval, rejection, or approval with stated conditions as given, and take into consideration the following:

- A. Harmonious relationship between proposed uses and existing adjacent uses.
- B. Maximum safety of vehicular circulation between the site and road network.
- C. Adequacy of interior circulation, parking and loading facilities, with particular attention to vehicular and pedestrian safety.
- D. Adequacy of landscaping and setbacks in regard to achieving maximum compatibility and protection to adjacent residential districts.

Should changes or additional facilities be required by the Board, final approval of the site plan shall be conditional upon the satisfactory compliance by the owner with the changes or additions.

Any owner wishing to make changes in an approved site plan shall submit a revised site plan to the Planning Board for review and approval.

Section 607 - CHANGES AND AMENDMENTS OF THE LAND USE LOCAL LAW

Section 607.1 - PERIODIC REVIEW

From time to time, the Town Planning Board may re-examine the provisions of this local law and the location of district boundary lines and may submit a report to the Town Board recommending such changes, or amendments, if any, which may be desirable in the interest of the safety, health, or welfare of the public.

Section 607.2 - PROCEDURE FOR AMENDMENTS

- A. Regulations, districts and boundaries established by this local law may be amended or repealed after official notice has been given and a public hearing has been held by the Town Board as required by law.
- B. Each petition requesting a change of land use regulations or district boundaries shall be typewritten, signed by the owner, and filed in triplicate with the Town Clerk accompanied by the required fee, which shall be determined from time to time by resolution of the Town Board.

Town of Stockbridge, Madison County

TOWN OF STOCKBRIDGE  
LAND USE LAW

First Draft Amendments: Proposed New Sections (4/18/02)  
(Italics indicate variation from Fenner language)

SECTION 303. – WIND POWER DISTRICT, WP

The purpose of this district is to foster the development of the Town's windpower resources while preserving farmlands and adjoining settlements as compatible adjoining uses.

SECTION 303.1 – PRINCIPAL USES PERMITTED

Same as Section 302.1

SECTION 303.2 – ACCESSORY USES PERMITTED

Same as Section 302.2

SECTION 303.3 – USES REQUIRING A SPECIAL USE PERMIT

- A. Same as Section 302.3
- B. Wind power electricity generation and transmission facilities (See Note H to Table 1)

SECTION 605.10.1 – ADDITIONAL STANDARDS FOR GRANTING SPECIAL USE PERMITS FOR WIND POWER ELECTRICITY GENERATION AND TRANSMISSION FACILITIES

No special use permit shall be granted for commercial wind power electricity generation and/or transmission facilities unless it is determined by the Planning Board, *on the basis of documentation submitted by the applicant or testing required by that Board*, that the proposed use meets all of the following criteria, in addition to those general criteria listed in Section 605.10.

- A. No individual tower facility shall be installed in any location along the major axis of an existing microwave communications link where its operation is likely to produce electromagnetic interference in the link's operation.
- B. No individual tower facility shall be installed in any location where its proximity with fixed broadcast, retransmission, or reception antenna (including residential reception antenna) for radio, television, or wireless phone or other personal communications systems would produce electromagnetic interference with signal transmission or reception.
- C. Use of nighttime, and overcast daytime condition, strobe tube aviation safety lighting to satisfy tower facility lighting requirements for the Federal Aviation Administration *may* be subject to on-site field testing before the Planning Board as a prerequisite to that Board's approval with specific respect to Section 605.10 D as it applies to existing residential uses within 1500' of each tower for which such strobe lighting is proposed *on property belonging to anyone other than the owner of the tower facility in question*.
- D. No individual tower facility shall be installed in any location that would substantially detract from or block view of *the major* portion of a recognized scenic *vista*, as viewed from any public road right-of-way publicly owned land within the Town of Stockbridge [~~delete '...that extends beyond the border of the Town of Stockbridge'.~~]
- E. Individual wind turbine towers shall be located with relation to property lines so that the level of noise produced *by* wind turbine operation shall not exceed 50 dbA, measured at the boundaries of all the closest parcels that are owned by non-owners of turbine sites and that abut either the turbine site parcel(s) or any other parcels adjacent to a site parcel and held in common by the owner of a site parcel, as those boundaries exist at the time of the special use permit application.
- F. No wind turbines shall be permitted that lack an automatic braking, governing, or feathering system to prevent uncontrolled rotation, overspeeding, and excessive pressure on the tower structure, rotor blades, and turbine components.
- G. The minimum distance between the ground and any part of the rotor blade system shall be thirty (30) feet.

- H. All power transmission lines from the wind electricity generation facilities to on-site electrical substations shall be underground.
- I. Procedures acceptable to the Planning Board for emergency shutdown of power generation units shall be established *as a part of any special use permit issued.*
- J. Prior to issuance of a Building Permit, the applicant shall provide the Town proof, in the form of a duplicate insurance policy or a certificate issued by an insurance company, of liability insurance, of a level to be determined by the Town Board in consultation with the Town's insurer, to cover damage or injury which might result from the failure of a tower or towers or any other part or parts of the generation and transmission facility.

SECTION 606.12.1 – SUBMISSION OF ADDITIONAL SUPPORTING DATA FOR SITE PLAN OF *COMMERCIAL* WIND POWER ELECTRICITY GENERATION AND TRANSMISSION FACILITIES

In addition to the site plan material listed in Section 606.12, the following material shall be submitted to the Planning Board for commercial wind power electricity generation and/or transmission facilities:

- A. A project visibility map, *based on a digital elevation model*, and showing the impact of topography upon visibility of the project from *surrounding* locations *out to a* radius of three miles from the center of the project. The Scale used shall depict the three-mile radius as no smaller than 2.7 inches, and the base map used shall be a published topographic map showing man-made features, such as roads and buildings.
- B. *Color photos, no smaller than 3"x 5", taken from locations, selected by the Planning Board, within a three-mile radius from the center of the project and computer-enhanced to simulate the appearance of the as-built site facilities as they would appear, as built, from these locations. No fewer than four, and no more than the number of proposed individual wind turbines plus three, such photo simulations shall be provided, the exact number and locations to be determined by the Planning Board.*

# Commission on Wind Energy Regulatory Policy

## Miscellaneous Information Request

October 28, 2004

### OVERVIEW

The following document provides information in response to various requests from Commissioners on specific wind energy topics, including:

- **Renewable Energy Certificates.** Information on Renewable Energy Certificates (RECs). What are RECs? How are RECs and electricity sold?
- **ANR Wildlife Studies.** Update on ANR's efforts to gather new bird and bat info (study expected this winter)
- **Visual Impact Assessment Information.** More info on visual impacts and assessment techniques and any measures to objectively quantify visual impact.
- **Noise and Low Frequency Noise.** Background and info resources on noise, specifically low frequency noise, and possible public health and environmental impacts.
- **Strobe Effect or Flicker.** Background and info resources on "strobe effect" or flicker experienced in the turbine's shadow.
- **USFWS Update.** Information on the US Fish and Wildlife Services "Interim Guidelines to Avoid and Minimize Wildlife Impacts from Wind Turbines".
- **European Offshore Project Failure.** Information in response to concerns that offshore wind projects are failing and being dismantled.

### RENEWABLE ENERGY CERTIFICATES

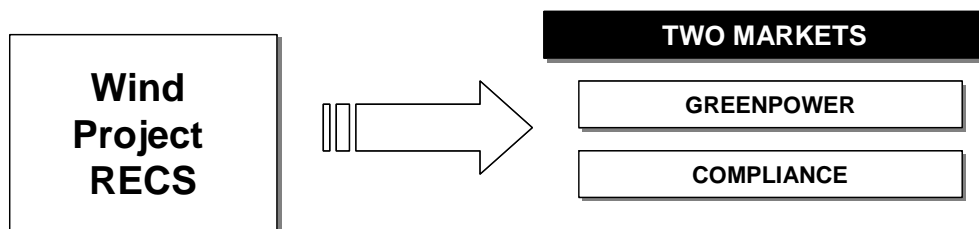
The following discussion is intended to clarify what is meant by the term "renewable energy certificates", or RECs, and to provide information about their value and function in the energy marketplace relative to electricity transactions.

Operational wind projects produce two commodities – electricity and attributes – and therefore have two corresponding revenue streams. Each of these revenue streams is important to a project's economic feasibility. As shown in the figure below, in the electricity marketplace wind power attributes can be transacted separately from their corresponding energy. Energy is sold in the form of kilowatthours (kWh); attributes are sold as renewable energy certificates, or RECs.

The same holds true for all of New England. In collaboration with the operator of the New England regional transmission grid, the New England states have created a regional market for RECs. All renewable electricity available in the region now also has these certificates (RECs) associated with it. Through this system, the renewable attributes are accounted for separately from the actual energy being generated. The additional value of these RECs provides an incentive for new renewable energy plants to be built. In those New England states that require power companies to sell a certain percentage of renewable energy to their customers, ownership of these RECs is how these companies certify what they are providing.

## How are RECs used?

As indicated in the figure below, RECs produced by wind projects can either be sold into green power markets or compliance markets. In the first instance, RECs from a wind project might be sold to a green power marketer that wants to sell wind energy to green power customers in Vermont. Alternatively, RECs from a wind project could be sold to electricity suppliers that need to comply with a Renewable Portfolio Standard (RPS).<sup>1</sup> Although unlikely, RECs could also be sold as a means of compliance with other environmental regulations, for instance to help electricity generators meet air emissions standards for NO<sub>x</sub> and SO<sub>2</sub> emissions.



REC trading maximizes the potential value of a renewable generation project because it allows the market to allocate the RECs and electricity to the buyers that value them most. For example, the most interested buyer of the RECs may have no need of the underlying electricity. The ability to sell the two commodities independently permits greater flexibility in forward contracts.

## What do RECs mean for Vermont?

Given the immature state of renewable energy markets, determining the future value of RECs is challenging. In spite of the current dynamic and nascent marketplace for RECs, one thing remains certain: RECs from a wind project will be sold to the highest bidder that is able to provide a viable long-term contract. At present, wind RECs generated in Vermont would likely be sold either into the green power market, or more likely to electricity suppliers in New England states with the most stringent RPS requirements, and therefore the highest willingness to pay for RECs. In either case, the REC transaction would support the development of wind energy in Vermont.

Some stakeholders have theorized that RECs from Vermont wind projects could be sold into Midwest compliance markets to allow heavily polluting coal-fired utilities to meet their emissions or RPS obligations. However, this is an unlikely scenario. RECs in the New England market are currently valued more highly than either RECs or emissions credits currently traded in Midwest states. The Midwest RPS markets are less developed and Midwest markets have access to lower cost and abundant Midwest wind projects. Other market rules aside (e.g., New England RPS's typically require New England RECs), it is therefore improbable that a Midwest electricity generator would pay a premium for out of region RECs (e.g., New England), when its REC obligation could be met most economically by purchasing RECs available within the region.

## Could electricity from Vermont wind projects be sold out of state?

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<sup>1</sup> In New England, renewable portfolio standards are in effect in Massachusetts, Connecticut, and Maine. A renewable portfolio standard is currently under consideration in Vermont.



In addition, some stakeholders have expressed concern that electricity from new wind power projects in Vermont will be sold to buyers outside of the state. While this is possible, it is more likely that electricity (from at least the first several projects) would be sold within the state, or at the very least, to buyers in New England. Vermont wind developers have indicated that agreements to sell electricity to Vermont utilities are in development. In addition, most major Vermont utilities have included wind in their long-term planning (Integrated Resource Plans), and there are complexities associated with selling electricity from a Vermont wind project to buyers outside of the New England market.

## **ANR'S WILDLIFE STUDIES**

Per a conversation with Forest Hammond, an ANR Biologist, ANR is preparing a new wind project wildlife study. The initial drafts of the study will not be available until this winter. To get a better idea of the scope of ANR's study for wildlife issues, he recommended that we check out ANR's position on wildlife studies from the discussion of wind development on state lands (it could be applicable to other lands as well). In summary, it identifies ANR's key areas of concern regarding wildlife:

- risk of mortality to migrating and resident birds;
- risk of mortality to migrating and resident bats;
- loss of significant wildlife habitat such as nesting habitat for Bicknell's thrush, wintering habitat for moose, or black bear and bobcat feeding habitat and den sites
- fragmentation of habitat and attendant effects on wildlife such as disruption of movement or migration, increased risk of nest predation or nest parasitism to forest interior birds; and
- disruption or displacement of wildlife with low tolerance for human activities and disturbance that might result from increased access to and use of remote forest habitats.

The ANR also finds that wind development sites should be assessed for potential negative impacts using the best science and technology available to identify any wildlife-related issues prior to the initiation of development. These pre-development wildlife investigations should be rigorous and be of up to three years duration with the costs borne by the applicant. Long term (ten year) post construction impacts may also need to be monitored at developed project sites. When detrimental impacts are identified, they should be avoided through appropriate placement and design changes or mitigation measures.

For more information:

[http://www.vermontwindpolicy.org/workingpapers/wildlife\\_impact.pdf](http://www.vermontwindpolicy.org/workingpapers/wildlife_impact.pdf)

## **VISUAL IMPACT ASSESSMENT INFORMATION**

The ANR also prepared a fairly detailed methodology for assessing the visual impact of wind sites (in the context of the Quechee analysis). The methodology included developing answers to various questions associated with detailed visual impact mapping and modeling as well as with the local community (including considerations of regional plans) and recreational visitors.

For more information on the ANR visual impact assessment methodology:

<http://www.vermontwindpolicy.org/workingpapers/aesthetics.pdf>

The following is several examples of the detail involved in visual impact analysis and modeling for wind sites:

<http://www.bwea.com/planning/presentations/hartlepool/Thomson.pdf>

The following is an example of a **quantitative** visual impact assessment of wind that uses calculations based on the visual impact of the turbines and neighboring population (most if not all assessments in the U.S. are **qualitative** based on varying degrees of visual modeling and assessments):

<http://www.uniovi.es/Areas/Mecanica.Fluidos/investigacion/publicaciones/atrpdf/Elservier2004.pdf>

## **NOISE AND LOW FREQUENCY NOISE<sup>2</sup>**

Ambient or audible noise was a serious issue with some early wind turbine designs, but it has been largely eliminated as a problem through improved engineering and through appropriate use of setbacks from residential and recreational areas. More information on wind and general noise issues can be found at:

UMASS. Wind Turbine Noise Issues.

<http://www.ceere.org/rerl/publications/whitepapers/WindTurbineNoiseIssues.pdf>

Low frequency noise has been associated with wind turbine developments, as well as road, rail, sea and air traffic and other industrial applications such as cooling towers. It creates a large potential for community annoyance, and it is most often experienced inside of homes and buildings where resonance amplifies the sound, which is less easily heard outside. Because the frequencies are so low, the noise is often “felt” as a vibration or a pressure sensation. Reported effects include annoyance, stress, fatigue, nausea and disturbed sleep. Low frequency noise can be a factor at much greater distances from the noise source than audible noise. While the phenomenon was originally believed to be associated with the older, down-wind designed turbines, the problem persists with newer wind farms. It has received particular attention in Europe.

Typically, low frequency noise can be addressed within regulations and setbacks. It is particularly important to define a standard for investigation and measurement. One standard was developed for the U.S. Department of Energy in 1987 (see below). Significant setbacks from residences might also be effective. However, it is likely that these setbacks would need to be measured in miles rather than feet. Software exists which can predict noise emissions and low frequency noise from wind developments. For more information see the following:

American Wind Energy Association Answer to Low Frequency Noise Issue. Also Reference to Study on Proposed Metric for Assessing the Potential of Community Annoyance from Wind Turbine Low-Frequency Noise Emissions:

<http://www.awea.org/faq/noise-lf.html>

UK Reviews of Low Frequency Noise and its Effects

<http://www.defra.gov.uk/environment/noise/lowfrequency/pdf/lowfreqnoise.pdf>

<http://www.scotland.gov.uk/library3/environment/lfn-00.asp>

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<sup>2</sup> Summary information on low frequency noise derived from Otsego County (Michigan) Planning Commission White Paper (2004).

Example of Media Coverage of Studies on Impacts of Low Frequency Noise From Wind (none of the references studies were found online):

<http://millennium-debate.org/suntel25jan042.htm>

Riverside, CA zoning ordinances prohibit wind within 2 miles of residents unless developer can demonstrate no low frequency impact:

[http://www.rcip.org/documents/general\\_plan/gen\\_plan/03\\_d\\_16.pdf](http://www.rcip.org/documents/general_plan/gen_plan/03_d_16.pdf)

## **STROBE EFFECT AND FLICKER<sup>3</sup>**

In summary, shadow flicker is caused by the sun rising or setting behind the rotating blades of a turbine. The shadow created by the rotating blades can cause alternating light and dark shadows to be cast on roads or nearby premises, including the windows of residences, resulting in distraction and annoyance to the residents. A related phenomenon, strobe effect, is caused by the chopping of sunlight behind moving blades, similar to the effect of the setting sun behind trees when driving along a roadway in the winter. Both of these phenomena are factors in the visual impact of a wind turbine project, and some argue that they are a threat to health and safety. They could also be considered a nuisance to nearby property owners.

Setbacks are one option for dealing with potential shadow casting problems. Establishing setbacks would still require calculation of “typical” shadow casting to determine appropriate distances unless the setbacks were substantial. Also, with the variability in wind turbine size, the setback distances would need to be based on some sort of formula using rotor diameter and hub height. Shadow casting studies, using existing technology, would be an alternative approach to protecting nearby locations from potential harmful impact. It is relatively straightforward to model and predict flicker and strobe impacts as part of a permitting process. Some additional resources:

Danish Wind Energy Association description of flicker:

<http://www.windpower.org/en/tour/env/shadow/>

Example of flicker modeling and methodology:

<http://www.efsec.wa.gov/wildhorse/deis/apendices/05%20Wind%20Engineers%2011-20-03%20memo.pdf>

## **U.S. FISH AND WILDLIFE UPDATE**

The U.S Fish and Wildlife Service (the Service) recently published interim guidelines to help energy companies avoid and minimize wildlife impacts from wind turbines. The guidelines were established to assist energy companies locate and design wind energy facilities in a manner that ensures protection of wildlife resources, while streamlining the site selection and facility design process and avoiding unanticipated conflicts after construction.

The guidelines primarily focus on three key areas: the proper evaluation and selection of potential wind energy development sites, the proper location and design of turbines and associated structures within sites selected for development, and pre- and post-construction research and monitoring to identify and assess impacts to wildlife.

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<sup>3</sup> Summary information derived from Otsego County (Michigan) Planning Commission White Paper (2004).

Examples of the guidelines include avoiding the placement of turbines in documented locations of any species protected under the Federal Endangered Species Act; avoiding fragmentation of large, contiguous tracts of habitat; using tubular supports with pointed tops to minimize bird perching; and avoiding solid red or pulsating red incandescent lights as they appear to attract night-migrating birds.

The Service is encouraging immediate use of the guidelines by the wind energy industry and soliciting comments on the effectiveness of the guidelines. The guidelines are being evaluated over a two-year period, and will be modified as necessary based on their performance in the field and on the latest scientific and technical discoveries. Comments on the interim guidelines must be postmarked by July 10, 2005.

A detailed copy of the guidelines can be found at:  
<http://www.fws.gov/r9dhcbfa/windenergy.htm>

## **EUROPEAN OFFSHORE PROJECT FAILURE**

There has been a series of comments related to the technical problems with offshore wind projects in Europe. Most of this could be related to problems at Horns Reef:

Following a series of problems with the operation of the Horns Reef offshore wind power project in Denmark (flagship large offshore wind project, 160 MW), Vestas decided to dismantle the nacelles installed at the site and transport them to land for testing and repair. Work on the units is completed and reinstallation is almost complete. For more information see:

Power Engineering Editorial:  
[http://pepei.pennnet.com/Articles/Article\\_Display.cfm?Section=CURRI&ARTICLE\\_ID=212217&VERSION\\_NUM=1&p=17](http://pepei.pennnet.com/Articles/Article_Display.cfm?Section=CURRI&ARTICLE_ID=212217&VERSION_NUM=1&p=17)

Innovations Report (German Magazine):  
[http://www.innovations-report.de/html/berichte/energie\\_elektrotechnik/bericht-31048.html](http://www.innovations-report.de/html/berichte/energie_elektrotechnik/bericht-31048.html)

**Report to the**

**House Committee on Fish, Wildlife and Water Resources  
House Committee on Natural Resources and Energy  
Senate Committee on Natural Resources and Energy**

**Report on Improving  
Vermont's Environmental  
Protection Process**

**JRH.19 (R-264)**

December 16, 2011

**Ronald A. Shems, Chair  
Natural Resources Board**

**Deb Markowitz, Secretary  
Agency of Natural Resources**

**Report on Improving Vermont's Environmental Protection Process**  
Legislative Report Prepared Pursuant to JRH.19 (R-264)

Ronald A. Shems, Chair  
Vermont Natural Resources Board

Deb Markowitz, Secretary  
Agency of Natural Resources

## **I. Executive Summary**

Consistent with JRH.19, from the outset of this process, the Natural Resources Board (NRB) and the Agency of Natural Resources (ANR) explored a variety of approaches and options for improving environmental protection in Vermont. The NRB and ANR heard from a wide cross-section of people from around the state, many of whom have experienced the permitting process first-hand. We also heard from other agencies and branches of state government. The public comments made clear that (1) Act 250, and in particular, the District Commission process works quite well; (2) ANR can improve some of its processes through internal changes; and (3) the appeals process needs major improvements.

This report presents several options to improve the process including:

- an enhanced Superior Court - Environmental Division with magistrates and streamlined procedures;
- a professional board for environmental appeals that could also exercise original jurisdiction for all state permits needed for major projects likely to be appealed;
- on the record review of District Environmental Commission decisions;
- in-house streamlining of the permit process, for example, procedures making greater use of technology, eliminating redundancy between applications, and assuring transparency;
- other improvements described below.

Some of the options require legislative action, while others can be accomplished through rulemaking or internal procedural changes at the NRB and ANR. Some improvements may be achieved at little or no cost; others will require additional resources.

## **II History**

The Water Resources Board was established in 1948. From its inception until 2005, the Water Resources Board heard appeals from permits issued by the Department of Environmental Conservation and engaged in rulemaking in the followings areas: Water Quality Standards, Outstanding Water Resources, Use of Public Waters, Wetlands, Surface Levels, and Mean Water Levels. In 2005, as a result of 2004 permit

reform amendments which abolished the Water Resources Board and created the Natural Resources Board, appeals from Department of Environmental Conservation permits were transferred to the former Environmental Court (now, the Superior Court, Environmental Division). The present Water Resources Panel of the NRB continues to engage in rulemaking and also appears as a party in water-related appeals in the Environmental Division, but has no other role in administering or overseeing any of the programs for which it promulgates rules.

The Environmental Board was created in 1970 with the adoption of Act 250 (10 V.S.A. Ch. 151). From 1970 through 2005, the Board heard appeals from permit decisions issued by the nine District Environmental Commissions and Jurisdictional Opinions issued by the Commissions' Coordinators. While these appeals are now heard by the Environmental Division, the Land Use Panel of the NRB continues to engage in the duties and responsibilities of the former Environmental Board; it administers and provides administrative and legal support to the Commissions, writes the Act 250 Rules, develops policy, coordinates the District Environmental Commissions, and enforces violations of Act 250. The Land Use Panel also appears as a party before the Environmental Division in appeals from Commission decisions and Coordinator opinions.

The Environmental Court was established in 1990 as a result of the enactment of the Uniform Environmental Enforcement Act (Act 98, 1989). Its initial responsibilities were limited to hearing enforcement actions brought by the ANR Secretary and the Environmental Board. In 1999, appeals of municipal zoning and planning decisions were transferred from the Superior Courts to the Environmental Court. The 2004 permit reform amendments transferred to the Environmental Court appeals from decisions of the ANR Secretary, the District Commissions and the Coordinators which were formerly heard by the Superior Courts, the Environmental Board and Water Resources Board. As result of the 2010 court reform amendments, as noted, the Environmental Court is now the Superior Court, Environmental Division.

### **III. 2011 Resolution – JRH.19 (R-264)**

In 2011 the Legislature adopted JRH.19 (R-264), a joint resolution “supporting the administration’s efforts to examine and provide recommendations for improving . . . the effectiveness of Vermont’s state and municipal environmental protection process.”

This resolution provides for the Secretary of ANR and Chair of the NRB to review the permit process and to develop recommendations intended to assure environmental protection, while making the process “more efficient, more effective, more user-friendly, more open, more predictable, better coordinated, and quicker for applicants and citizens.” The resolution provides for consultation with key legislators, representatives of the Agencies of Agriculture, Food and Markets, Commerce and Community Development, Transportation, the Environmental Division of Superior Court, and municipal permitting officials, as well as the gathering of public input.

Recommendations are to be reported to the Chairs of the House and Senate Committees on Natural Resources and Energy and the Chair of the House Committee on Fish, Wildlife and Water Resources by January 15, 2012.

A copy of JRH.19 is appended to this report.

#### **IV. Public Comment Process**

In carrying out the mandate of JRH.19, the NRB and ANR collected comments and suggestions on the environmental protection process from state agencies, municipal officials, and other focus groups and meetings with other stakeholders; a series of public meetings around the state; and through email on the Board's website.

##### *Focus Groups*

The NRB and ANR convened meetings with municipal officials, including permitting officials, municipal and regional planners, the Vermont League of Cities and Towns, the Superior Court - Environmental Division, the Court Administrator's Office, and the Attorney General's Office. Further input was obtained from focus groups of professional consultants, housing stakeholders, environmental interests, the business and development community, district commissioners and coordinators, the Vermont Chapter of the American Council of Engineering Companies, and environmental and land use attorneys. We also scheduled a focus group for citizens, but only one invitee attended. Fortunately, we were able to get input from more citizens at the October 29, 2011 Environmental Action Conference in Randolph, and through the public meetings and email comments.

The NRB and ANR also sought comments in several smaller meetings with stakeholders, including the Vermont Association of Snow Travelers, the Vermont Association of Realtors, Vermont Natural Resources Council, the Lake Champlain Regional Chamber of Commerce, the Greater Burlington Investment Corporation, the Vermont League of Cities and Towns, the Homebuilders and Remodelers Association of Northern Vermont, Vermont Businesses for Social Responsibility, and the Vermont Association of Planning and Development Agencies.

##### *State Agencies*

The NRB and ANR also met with representatives from state agencies including: the Agency of Agriculture, Food, and Markets; the Agency of Transportation; Agency of Commerce and Community Development (ACCD) and its Division of Economic, Housing and Community Development (DEHCD); and the Department of Buildings and General Services. This was accomplished through an interagency focus group, through meetings with Patricia Moulton Powden, Deputy Secretary of ACCD, and DEHCD Commissioner Noelle Mackay. We also met with the Court Administrator's Office and were in frequent contact with the Environmental Division. In addition, representatives of



ANR and the NRB have been participating in DEHCD's review of downtown and growth center designation programs, which include some discussion of the land use and environmental permit processes.

### *Public Meetings*

Public meetings were held in St. Albans (October 6, 2011), Williston (October 11, 2011), St. Johnsbury (October 18, 2011), Rutland (October 20, 2011), and Brattleboro (October 27, 2011). A broad cross-section of people attended the public meetings, and a variety of comments were received. General notes were taken from the public meetings, and some commenters submitted their suggestions in writing. As with the focus groups, these notes and comments have been posted on the NRB website.

### *NRB Website*

Early on, the NRB posted a webpage dedicated to carrying out the purpose of JRH.19. The webpage <http://www.nrb.state.vt.us/news.htm> includes an overall description of the mission and goals of the process, a schedule of the public hearings to be held around the state, notes from all the focus group and public meetings, and a means by which the public can post comments. We have received numerous comments through the website, and those comments, along with focus group and public meeting comments, are incorporated below.

## **V. Options**

The following options cover different aspects of the environmental protection process. They focus on the ANR and Act 250 processes, but also consider the interaction of those permitting processes with the municipal land use process.

### *A. Appeals*

Relatively few permit proceedings are appealed. However, comments indicate that this is the primary source of cost and delay in the permit process. Significant changes are warranted in the environmental appeals system to increase timeliness, decrease costs, and make the system more accessible to the public. Two options are set forth below.

#### *1. Improved Superior Court, Environmental Division*

To address the public's concerns that appeals at the Environmental Division of the Superior Court take too long, cost too much, and are inaccessible to neighbors and citizens, the process before the Court should be streamlined. Comments also indicate that the Court is less user-friendly and more legalistic and procedurally difficult to navigate than the former Environmental Board. Some commenters believe that they can only have meaningful access to the Court process if they hire an attorney. With

additional resources and significant procedural reform, steps could be taken to address some of these issues while staying within the constitutional constraints of a formal judicial entity.

*Hearing Officers; Limit Discovery; Encourage Prefiled Testimony and Exhibits*

Hearing officers or magistrates could be added to expedite the appeals process and decisions. Many who commented on the environmental appeals process were concerned about the slow pace of the legal process and the amount of time it takes to get a final decision, and many acknowledged that two judges is not enough to move the Court's docket efficiently. Adding magistrates could go a long way toward speeding up the process. Discovery could be limited<sup>1</sup> and prefiled testimony encouraged in order to allow for the free exchange of information without costly depositions, interrogatories or requests to produce. Prefiling testimony and exhibits can also reduce the time and resources needed for hearings. To make prefiling more citizen-friendly, unrepresented persons could possibly prefile testimony in narrative format, rather than the traditional question-and-answer format.

*Public Advocate's Office*

Members of the public commented that the judicial process was too complicated and legalistic for citizens to access, and several suggested that unrepresented parties need help in the Environmental Division. To this end, a public advocate office could be created to represent environmental interests (similar to the Department of Public Service in Public Service Board proceedings) or help unrepresented citizens navigate the legal system (to provide free or reduced fee legal services, like Legal Aid, only in the Environmental Division). The Environmental Division has already created a program where lawyers can provide limited *pro bono* assistance to unrepresented parties. <http://www.vermontjudiciary.org/GTC/environmental/MasterDocumentLibrary/pro%20bono%20flyer.pdf>. This program could be expanded because *pro bono* attorneys may not be available to assist an unrepresented party throughout a complex matter.

*Improve Use of Alternative Dispute Resolution*

The Court already encourages, and sometimes mandates, mediation to help resolve or narrow appeals. This should be continued, but fine tuned to allow other forms of ADR that may be more suitable for a particular matter.<sup>2</sup> It should also be

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<sup>1</sup> The Environmental Division may limit discovery under 4 V.S.A. § 1001(g)(3) and V.R.E.C.P 2(c). However, discovery allowed before the Environmental Division is broader and less streamlined than the automatic and limited discovery allowed in Federal District Court. See e.g. F.R.Civ.P. 26 and 33.

<sup>2</sup> For example, a judge or case manager can determine whether ENE, mediation, a conference with a magistrate or other judge, arbitration, referral of a critical issue to a magistrate for an advanced decision or firm "weather report," or a hybrid of these mechanisms is best for a particular matter. See, e.g., multi-option ADR program at <http://www.cand.uscourts.gov/adr>

recognized that some matters cannot be settled and that continued efforts to mediate result in delay and increased costs.

There is some concern about the cost of mediation, so the availability of free or reduced cost mediation would help people participate fully in environmental appeals, perhaps with the Court's case manager as a neutral third-party facilitator.

## *2. Professional Board for Appeals, Enforcement, and Consolidated Original Permits in Complex Matters*

Another option is a professional appeals board, modeled after similar boards in the States of Maine and Washington and similar to our present Public Service Board (PSB) and federal licensing tribunals. (The description below picks the aspects of these models best suited to Vermont's programs). The board would be comprised of a chair and two full-time members and two alternate members. All members and alternates would be nominated, appointed and confirmed either in the manner of Superior Court judges or of members of the PSB. Board members would have relevant environmental experience (e.g., science, law, engineering) and would serve for fixed and staggered terms to assure independent decision-making. Compensation for board members would be the same as for Superior Court judges. Alternates would be compensated on a *per diem* basis. Board members would have to be well qualified in this field.

The professional board would exercise the same appellate jurisdiction as the present Superior Court - Environmental Division. It would hear appeals from decisions of the ANR Secretary and from Act 250 permit decisions of the District Commissions and Jurisdictional Opinions of the Act 250 Coordinators and appeals from municipal zoning and planning decisions under 24 V.S.A. Ch. 117. The board would exercise original jurisdiction in hearing environmental enforcement matters brought under 10 V.S.A. Ch. 201. As explained below, however, it is anticipated that the board could review District Commission decisions on-the-record.

Importantly, as an administrative body, the board could act in an area not available to the Environmental Division: in a matter of significant public interest the board could hear, in a single proceeding, all ANR and Act 250 permit applications in the first instance, or without the requirement that those applications first be presented to ANR or the District Commissions. This original jurisdiction could also be extended to decisions from municipalities, although it is recommended such jurisdiction only be exercised at the request of the municipality. This unique administrative mechanism that is used successfully in Maine allows significant projects to obtain permitting decisions in a transparent, yet efficient manner. It is anticipated that the board would require the assistance from ANR staff and the District Coordinators in the drafting of permits.

There are other potential benefits of a professional board model. The hearing process before the board would be simpler and more cost effective than the process presently employed by the Environmental Division. Patterning its process after the

citizen-friendly District Commission proceedings, discovery would be limited, and the use of prefiled evidence would be expanded. Parties, witnesses, applications and appeals would be consolidated when appropriate.

Further, board staff attorneys and individual board members (as opposed to law clerks) would act as hearing officers in less complex appeals (rocket docket) and on preliminary issues and recommend decisions to the board. This would more than double existing decision-making capacity and significantly professionalize and expedite the appeals process. Staff attorneys/hearing officers would also play a central role in a robust alternative dispute resolution program.

The Environmental Division presently hears most appeals *de novo*, as if no proceeding before ANR, the District Commission, or the municipal body has occurred. It is suggested that appeals from decisions of the Commissions could be heard on-the-record or under a modified record review.

On-the-record review could also be extended to appeals from ANR permit decisions, should ANR develop a more formal hearing process for the issuance of its permits, ANR is committed to creating procedure to foster greater public notice and input upon the filing of an application. ANR is also committed to developing procedures to create a record for review.

We do not suggest that statutes governing record review of municipal decisions be altered. Currently, the law allows municipalities to opt-in to on-the-record review.

A modified record review process would allow the record that was prepared before the Commission or Coordinator to form the basis for the board's review on appeal. When appropriate, the board could allow the record presented below to be supplemented with additional evidence. This would allow parties on appeal to rely on the evidence, testimony and exhibits presented below, a process not available in *de novo* proceedings, where all such evidence must be presented again on appeal. In record review proceedings, the appellant bears the burden of convincing the reviewing body that the decision below was in error.

Appeals from the professional board would be to the Vermont Supreme Court, as is the case for matters appealed from the Environmental Division today.

Under this model, enforcement and certain water-related rulemaking duties would be transferred from the present NRB to the ANR Secretary. In other respects, however, the new professional board would retain the responsibilities and authority exercised by the present Land Use Panel concerning the administration of Act 250. The professional board would continue to promulgate Act 250 Rules and policies, provide legal and administrative support to District Commissions and staff, and exercise oversight of District Coordinators and staff. The board would also promulgate rules of procedure to govern matters before it.

Finally, there is no present mechanism to review the refusal of a District Commissioner or Coordinator to recuse himself or herself from a pending matter. In the judiciary, the Administrative Judge reviews such decisions of Superior Court judges. The board could hear motions which raise concerns about the service of a board member on a particular matter.

*B. Improve Use of Consolidation*

The Environmental Division has and exercises the authority to consolidate state and local environmental and land use permit appeals. However, consolidation is not always more efficient, as, on occasion, appeals are put on hold until related appeals reach the Court. Whether appeals remain at the Court or move to a professional board, the use of consolidation can be improved. Strategic refusal to consolidate can also be used to expedite the process, encourage settlement, and limit unnecessary delay.

*C. Standard of Review – On-the-Record Appeals*

The *de novo* standard of review drew considerable criticism from many developers, municipalities, environmental groups, District Coordinators, state agencies and citizen participants. The business community's concerns focus on the extra time and cost of a new trial before the Court, particularly since the applicant bears the burden of producing evidence in a *de novo* appeal, just as in the original permit application proceeding. Although some developers like the ability to make project changes in a *de novo* review (while opponents may view such changes as a "moving target,") some developers do not like the fact that project opponents have the opportunity to raise new arguments and provide new evidence in a *de novo* appeal.

Currently, municipal appeals can be taken on the record, if the municipality has complied with the requirements of the Municipal Administrative Procedures Act, 24 V.S.A. Ch. 36, although few municipalities have adopted MAPA, and some of those that have adopted the Act have had limited success creating a record for on-the-record appeals. Some municipal officials believe that *de novo* appeals deprive the municipality of a voice in the appeal unless it hires an attorney and participates as a party. These officials would prefer that municipal decisions be given weight or deference on appeal.

Business interests advocate a shifting of the burden on appeal to the appellant, so that the appellant must prove the claimed error. One way to do this would be to change the standard of review from *de novo* to on-the-record. In an on-the-record appeal, the decision on appeal is given deference, and the appellant bears the burden of demonstrating error in that decision. Act 250 permit proceedings are well-suited to such appeals, since they are recorded and staffed. It is worth exploring whether Act 250 jurisdictional opinions (administrative decisions by District Coordinators pursuant to 10 V.S.A. § 6007(c)) and some or all ANR permit decisions could be appealed on the record. Although it is certainly possible to expand and improve municipal use of on-the-

record appeals, it may be unrealistic to shift the standard of review in all municipal decisions from *de novo* to on-the-record at this time.

If the *de novo* standard for appellate review is not changed, shifting the burden of production and persuasion to the appellant could be done through legislation. However, citizen opponents cite a relative lack of access to project information and lack of resources to hire experts.

Under this option (improving the existing Environmental Division process), appeals from the Environmental Division would continue to be taken on-the-record to the Vermont Supreme Court.

#### *D. Transfer of Water Resources Panel's rulemaking responsibilities*

It has been suggested that the Water Resources Panel's rulemaking responsibilities should be transferred to ANR. Traditionally, to provide consistency between a rule and its application in the "real world," the agency that promulgates a rule also administers that rule. However, currently, under 10 V.S.A. §6025(d), the Water Resources Panel has the authority to adopt rules governing the protection and use of state waters, and ANR administers and develops the programs surrounding these adopted rules. ANR has the understanding of how these rules function on a practical level and has the technical expertise to make determinations about the effectiveness of these rules. Therefore, to fix this anachronism and improve the efficiency, understanding, and effectiveness of the water resources rulemaking process, authority to promulgate these rules should be transferred to ANR.

#### *E. Other Ideas*

Several other key concepts suggested by commenters are summarized below.

#### *Greater Weight to ANR Permits in Act 250*

Many commenters suggested giving ANR permits greater weight in Act 250 proceedings. Currently, many ANR permits and approvals give rise to rebuttable presumptions on certain criteria in Act 250 proceedings, see Act 250 Rule 19,<sup>3</sup> and a practical matter, Act 250 accepts many ANR permits as bases for making positive findings under relevant criteria. Because developers contend that they spend considerable time and money defending ANR permits in the Act 250 process, they suggest that ANR permits be treated as *dispositive* (not merely as rebuttable presumptions) in Act 250 review. However, because there is a relative lack of public process and transparency in the issuance of ANR permits under some programs, the public is denied the opportunity meaningfully participate in the ANR process in its initial

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<sup>3</sup> In addition, technical determinations that ANR makes in issuing such permits and approvals are entitled to substantial deference in Act 250 proceedings.

stages. Were the public to be given a greater role in the issuance of ANR permits – ideally, in a manner that does not delay those permits or increase costs – such ANR permits could be dispositive in Act 250 proceedings, and relitigation of such permits before Act 250 could be avoided.

### *Professional Certification*

Developer and consultant comments also favored increased professional certification in ANR permitting. This would shift more of the technical review to private professionals, such as engineers. It is already done effectively in several ANR permitting programs, such as the Construction General Permit for Stormwater Discharges, and in Wastewater permitting, both of which rely on engineer certifications. There was considerable discussion of the difficulty of policing professional competence, and the need for substantive review by the Agency. It is difficult to suspend a license for a certification error, and as a practical matter, very difficult to prove willful misrepresentation. However, there was considerable interest expressed in doing more with professional certification at ANR. On a related subject, some commenters suggested that ANR use its billback authority to allow applicants to pay for private experts to review and accelerate permit applications. ANR is interested in using this tool, but further legislative authority is required.

### *Greater Weight to Municipal Permits in Act 250*

Several commenters suggested giving greater weight to municipal zoning and subdivision permits in the Act 250 process, with the condition that those municipalities that have adopted the Act 250 criteria and that have a sophisticated review process. Comments reflect that some communities are very sophisticated, have their own planning staff, rigorous and substantive review processes; whereas, other communities have difficulty applying their own bylaws in a consistent and procedurally sound manner. Act 250 currently provides that certain municipal decisions give rise to a presumption under certain Act 250 Criteria. See 10 V.S.A. § 6086(d). This presumption only applies to municipalities that have adopted the Municipal Administrative Procedures Act (MAPA) and a development review board (DRB) process. Currently, fewer than 10 municipalities have adopted MAPA, so the municipal presumption is underused.

### *Improve Municipal Permitting*

Many comments were received about inconsistent quality and timing of municipal decisions, and the need for better training of municipal decision makers – not only on substance, but on ethics and process. What we heard is that some municipalities are so knowledgeable, resourced and sophisticated that their permitting processes rival Act 250, but many other municipalities struggle to get enough volunteers on their boards to review permit applications and lack staff and resources to handle those applications in an efficient and predictable manner. These are real issues affecting our municipalities,

developers and citizens. It is clear that the municipal permitting process remains a concern and requires further review.

Here are some of the suggestions we heard concerning the municipal permitting process:

- Better training for municipal zoning administrators and zoning board members. There was consensus that land use regulation and process has gotten very complex and difficult for part-time municipal officials and boards to administer effectively, properly and efficiently. State agencies such as ANR, ACCD, the NRB and the Secretary of State's Office can play a role in this training.
- Professional planning support for municipal zoning and planning boards. Providing a professional planner who would work for, and ride a circuit of specified municipalities. The planner could attend its municipalities' hearings to assist a DRB or planning commission with substantive and procedural issues and assure comprehensive decision making.
- Joint municipal/state hearings. See 10 V.S.A. § 6027(e). This idea was explored in some of the focus groups as a possible way to streamline the process and improve municipal decisionmaking. However, municipalities, Act 250 Commissioners and coordinators and others thought that there would be too many logistical difficulties because of differing scheduling, procedural and substantive requirements. Section 6027(e) has been in effect since 1970, and has only been used once or twice – without success.
- Apply the Municipal Administrative Procedures Act (MAPA) to all municipalities; make it state law. There was considerable support for this in the planning community, to provide basic procedural guidelines in every municipality. Currently, fewer than 10 municipalities have adopted MAPA. This tool has been on the books for many years, but it is underused.
- Use the Development Review Board process in all communities; make this state law. Many in the municipal official and planning focus group supported this as a way to improve the municipal process.
- Ethics rules. Set a statewide ethics rule and establish a process for administering it. Provide training to municipal officials to avoid conflict of interest issues.

#### F. *Permitting*

The public comment period resulted in hundreds of comments on the environmental protection process. Overwhelmingly, the public shared their appreciation



and respect for the principles of Act 250 and the District Environmental Commission process. The comments reflected four common themes for improving the environmental protection process: efficiency, transparency, and effectiveness of environmental protection.

### *Efficiency*

The public offered many suggestions to create a more efficient permitting system including the following:

- Improve the often redundant application process:
  - Allow online submissions
  - Use “smart” forms on applications to allow applicants to input their identification information (name, address, etc.) one time and let the system replicate the information for each state environmental application
  - Give the applicants the ability to upload required application forms and documents
  - Aspects of this initiative are already underway
- Encourage collaboration, consistency and cross-knowledge
  - Encourage applicants to discuss with regulators and neighbors before beginning the application process
  - Reinstitute the Act 250 club or a development sub-cabinet where interested agencies can meet regularly to discuss Act 250 and related applications
  - Increase collaboration and coordination among different ANR permitting programs
  - Reconcile any conflicting requirements between different permitting programs
  - Increase collaboration coordination among different state and federal agencies with jurisdiction over a project, and better coordinate state agency input into any federal NEPA process
- Use ANR discretion to give weighty “weather reports” on projects prior to submission of an application
  - Identify projects that would not succeed outright to save the applicants time and money in the long run
  - Focus the regulated community on feasible projects and not waste their time and money on projects with a low likelihood of success
- Restructure the appeals process and incorporate a professional board

- Issue permits without remand to the commissions
  - Hear evidence on-the-record
  - Provide technical expertise
  - Decide multiple permit applications for the same project at one time
  - Appeal directly to the Vermont Supreme Court
- Give greater weight to municipal permits issued by more sophisticated municipalities with robust Act 250 review process
- Make ANR permits dispositive in Act 250 proceedings with improved public process at ANR
- Allow professional certification in ANR permitting

#### *Transparency and Public Participation – Party Status*

The public expressed concern about the transparency of the environmental protection process and suggested ways in which increased public participation and modifications of the procedural structure could improve transparency including:

- Increase ANR notice of permits and applications to a wider range of potential participants (including adjoiners and other interested persons)
- Provide better opportunities for public participation, particular prior to ANR's "investment" in a draft permit
- Provide prompt notice of the filing of applications to allow more time for the public to comment on the application, not simply a draft permit
- Clarify party status and "particularized interest" through either trainings or an amendment to the Act 250 rules
- Standardize notice and comment periods across all permits
- Make ANR permit applications, permits, and related documents more readable, user-friendly, and easily accessible on the ANR website
- Move ANR procedures toward a process that allows for on-the-record review
- Develop procedures to ensure notice and opportunity for public input into formal Act 250 Jurisdictional Opinions
- Develop a rule to allow the reconsideration of formal Act 250 Jurisdictional Opinions by either the Board executive director or general counsel

Interestingly, comments from diverse participants in this process recognized that limiting party status does not really prevent the "NIMBYs" or those that use an environmental issue for other purposes, and that the process needs to be open and

accessible for it to have credibility. Further, participants noted a “20-minute rule” – an applicant usually knows within 20 minutes whether it can address a party’s concerns or whether the party’s opposition is intractable. In short, further restricting party status may not effectively limit inappropriate appeals and other solutions, such as greater process efficiency, should be considered to cull such appeals from legitimate issues.

### *Effective Environmental Protection*

Through the public comment process two suggestions emerged to increase the effectiveness of environmental protection:

- Develop additional training for Act 250 District Commissioners and their staff, ANR permit program staff and permit specialists, and municipal officials
- Increase environmental enforcement

## **VI. Initial Fiscal Analysis**

A preliminary fiscal analysis is being prepared and will be made available.

## **VII. Conclusion**

The bulk of comments reflect that: (1) Act 250, and in particular, the District Commission process works quite well; (2) ANR can improve some of its processes through internal changes, and (3) the appeals process needs major improvements. Options presented in this report, if properly resourced and implemented, will improve the environmental protection process. Consistent with the goals of JRH.19, these recommendations are “intended to maintain standards assuring the environmental quality so important to Vermonters while making Vermont’s land use and environmental permit process more efficient, more effective, more user-friendly, more open, more predictable, better coordinated, and quicker for applicants and citizens.” We look forward to assisting the Legislature in making its policy choices for improving the process.

**No. R-264. Joint resolution supporting the administration's efforts to examine and provide recommendations for improving and increasing the effectiveness of Vermont's state and municipal environmental protection process.**

(J.R.H.19)

Offered by: Committee on Natural Resources and Energy

Whereas, our environment is the sum of everything around us, our beautiful mountains and valleys, our streams and lakes, the air we breathe and the winter's snow and summer's green grass, and

Whereas, to date, Vermont has managed to preserve many aspects of the state's environment, but this protective process could be administered more effectively and with greater certainty and transparency, and

Whereas, since 1970, Vermont's system of state and municipal environmental and land use regulation has grown and changed, resulting in overlapping laws and programs under the administrative jurisdiction of multiple state offices that do not always share the same regulatory objectives or coordinate in an optimal fashion, and

Whereas, the state of Vermont and local municipalities should be encouraging appropriate development at specific locations, and

Whereas, for example, attempts to effectively enforce water quality standards in Lake Champlain, promote a settlement pattern of compact urban and village centers surrounded by a rural, working landscape, and reduce greenhouse gas emissions have not resulted in achieving compliance with

statutory goals and not infrequently have resulted in contentious disputes and litigation, and

Whereas, project developers and citizens concerned about projects often voice complaints expressing confusion about the specific permits required for a given project and objecting that the regulatory process can be expensive, daunting, and time-consuming and that it needs to be predictable, and

Whereas, Vermont must ensure that its permitting process appropriately utilizes the benefits of new technology to improve efficiency while simultaneously achieving protection of the natural environment, and

Whereas, Governor Shumlin has directed the chair of the natural resources board and the secretary of natural resources to review Vermont's environmental and land use permitting system and to provide recommendations for improving the system and increasing its effectiveness, and

Whereas, the General Assembly continues to propose policies that improve environmental permitting and ensure that development protects Vermont's working landscape and natural environment, now therefore be it

Resolved by the Senate and House of Representatives:

That the General Assembly supports the administration's efforts to examine and provide recommendations for improving and increasing the effectiveness of Vermont's environmental protection process, and be it further

Resolved: That the General Assembly requests that the chair of the natural resources board and the secretary of natural resources, in consultation with other state permitting officials including representatives of the agencies of agriculture, food and markets, commerce and community development, transportation, and the environmental division of superior court, and municipal permitting officials, and invite public input through public meetings, the use of the Internet, and other forms of outreach, and be it further

Resolved: That the General Assembly requests that the chair of the natural resources board and the secretary of natural resources regularly meet and consult with the chairs of the House and Senate Committees on Natural Resources and Energy and the House Committee on Fish, Wildlife and Water Resources during this review process, and be it further

Resolved: That the General Assembly requests that the chair of the natural resources board and the secretary of natural resources develop recommendations intended to maintain standards assuring the environmental quality so important to Vermonters while making Vermont's land use and environmental permit process more efficient, more effective, more user-friendly, more open, more predictable, better coordinated, and quicker for applicants and citizens, and be it further

Resolved: That the General Assembly requests the chair of the natural resources board and the secretary of natural resources to report to the chairs of the House and Senate Committees on Natural Resources and Energy and the

House Committee on Fish, Wildlife and Water Resources by January 15, 2012  
with recommendations to meet the intent of this resolution, and be it further

Resolved: That the Secretary of State be directed to send a copy of this  
resolution to the chair of the natural resources board and the secretary of  
natural resources.