CONFIDENTIAL

LEGISLATIVE BILL REVIEW FORM: 2013

Bill Number:_____H. 27 & S.58_____ Name of Bill:__ An act relating to Act 250 and oil pipelines_____

Agency/ Dept:___NRB_____ Author of Bill Review:___John Hasen, General Counsel _____

Date of Bill Review:_ Jan. 29, 2013_____ Status of Bill: (check one):

__X__Upon Introduction _____ As passed by 1st body _____As passed by both bodies _____ Fiscal

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Recommended Position:

___Support _____Oppose __X__Remain Neutral _X Support with modifications identified in #8 below (as directed)

Analysis of Bill

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1. **Summary of bill and issue it addresses.** *Describe what the bill is intended to accomplish and why.*

These bills (H. 27 and S. 58 are identical) would grant Act 250 jurisdiction over new oil pipelines and over any physical change to an existing oil pipeline. From the testimony of Rep. Deen, the sponsor of the House bill, it is apparent that the intent of H. 27 is to provide a forum for the review of the possible use of pipelines to carry tar sand oils through Vermont.

2. **Is there a need for this bill?** *Please explain why or why not.*

There is a need for these bills if one believes that Act 250 should review the possible use of pipelines to carry tar sand oils through Vermont. It appears that any spill of tar sands oil is impossible to clean and extremely expensive to address. Further tar sands oil is more likely to spill because it is more corrosive than other oils and has to be heated to properly flow through a pipeline. It would be appropriate to assess this under Act 250, particularly in light of the sensitive lands around the pipeline. That said, Act 250 may be able to assert jurisdiction without this bill. However, this bill would help.

Some may see a need for this to address climate change. However, Act 250 jurisdiction over an international pipeline is a terrible way for Act 250 to address climate change because any Vermont climate change impacts stemming from tar sands oil and this pipeline are quite attenuated. This need is not stated in the bill, but is lurking out there.

3. **What are likely to be the fiscal and programmatic implications of this bill for this Department?**

There are unlikely to be much in the way of fiscal or programmatic implications for the NRB as a result of these bills. Act 250 reviews hundreds of cases each year; these bills would add only a few cases (and possibly only one case) to that number, albeit it might be a complex and resource intensive case.

4. **What might be the fiscal and programmatic implications of this bill for other departments in state government, and what is likely to be their perspective on it?**

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There are likely no significant fiscal or programmatic impacts on other departments, although they would have to consider whether to participate in any hearings held on permits for the covered oil pipelines.

5. What might be the fiscal and programmatic implications of this bill for others, and what is likely to be their perspective on it? (f*or example, public, municipalities, organizations, business, regulated entities, etc)*

These bills would place increased burden on companies that run the oil pipelines that would be covered under this expansion of Act 250 jurisdiction.

6. Other Stakeholders:

6.1 Who else is likely to support the proposal and why?

Environmental groups support these bills, as they would likely wish to see increased oversight over these pipelines.

6.2 Who else is likely to oppose the proposal and why?

Given their generally unfavorable view of the expansion of Act 250 jurisdiction, it is possible that business groups might oppose these bills, although it would have little direct impact on their business operations unless they were pipeline companies.

7. Rationale for recommendation: *Justify recommendation stated above.*

The NRB is neutral on these bills and therefore does not have a recommendation. We can support if it furthers other policies or goals.

There could be some rationale for supporting these bills, as they could have a *very attenuated* impact on climate change impacts to Vermont. The impact, however, is quite speculative and indirect, and in the end, it is likely that the requirement that an oil pipeline would have little effect on climate change.

Act 250 review of a new pipeline or an alteration to an existing pipeline would assess the environmental risks of a spill – an important environmental issue aside from climate change.

8. Specific modifications that would be needed to recommend support of this bill*: Not meant to rewrite bill, but rather, an opportunity to identify simple modifications that would change recommended position.*

There are some technical legal improvements that could be made to the bill in order to accomplish its purpose as regards existing pipelines; it should be drafted to reflect more closely Act 250 Rule 2(C)(7) ("substantial change"). The bills require a permit for *any physical change.* This language could require a permit for changes that have positive or no environmental impacts, unlike the present Act 250 Rule, which only requires permits or permit amendments when changes will have significant negative environmental impacts. Further, because the bills focus on physical changes, a *change in the use* of a pipeline would not trigger Act 250 review.

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There is also a somewhat odd provision in the bill that appears to evidence a legislative concern that the extension of Act 250 jurisdiction over pipelines not interfere with any vested rights that an pipeline owner may have in a Jurisdictional Opinion (JO) that has been issued by a District Coordinator. Although the bill states that the new provisions will apply to changes that are made after the act's effective date regardless of whether a JO was issued prior to that date, the bill's "Application" section also states that the change in law will not apply to a JO issued before the effective date, if the JO has undergone the "final determination" process that is set out in 10 V.S.A. § 6007(c). That process, however, is not process that is intended to create vested rights as against the state from asserting jurisdiction; that process was established as a way for a requestor to prevent everyone and his brother from requesting *ad infinitum* a new JO on the same issue as is covered by an existing JO. Thus, under the §6007(c) process, if a JO is "served" on certain nearby neighbors and if notice of its existence is published in appropriate newspapers, then the JO is final as against any person who might want to ask the Coordinator to issue another JO on the same project at some future time.

The concept of vested rights embodies, in its most basic form, the principle that people are entitled to have the law that exists at the time they take an action apply to that action; thus, changes in the law that occur after the action is taken cannot be applied retroactively. In Act 250, we see this most frequently in the application of a Town Plan. A person who applies is entitled to have the Town Plan that is in effect on the date of his application apply to his project; a change in a Town Plan that occurs after his complete application has been filed cannot be used to prevent his project.

To give effect to the "Application" section of H.27 and S.58, we need to view that provision within the concepts embodied in the doctrine of estoppel. In its most basic elements, a person should be able to argue that Act 250 should be "estopped" (precluded) from asserting jurisdiction over his pipeline if (1) he has obtained a JO from a Coordinator which says that there is no jurisdiction over his project; (2) he has reasonably relied on that JO; (3) he would suffer from harm because he did something in reliance on that JO; and (4) public policy weighs in favor of preventing Act 250 from asserting jurisdiction. Thus, a change in the law (such as the one proposed by H.27 and S.58) should not retroactively take away his reliance on a JO which found no jurisdiction.

If the legislature wants to respect vested rights, H.27 and S.58 should state they do not apply to a pipeline owner who has received a JO and who has relied on that JO before these bills were introduced (i.e. taken an action such as investing money in planned construction or commencing construction on changes to the pipeline). Because a claim of reliance has to be reasonable, and these bills have now been introduced, the legislature can effectively state that, because all pipeline owners are now on notice that the law might change, any reliance on an existing JO is deemed not to be reasonable, if the action taken in reliance was taken after the bills were introduced.

Such language would discourage a pipeline owner from jumping to start construction today in order to beat the effective date of the act in the hope of being able to make the claim that the change in law cannot not apply to him. As an example, the legislature could add a provision to, H.27 and S.58 that states that, to form the basis for a reliance claim, a JO concerning a pipeline had to be issued before January 1, 2013. Similar language already exists in many laws; e.g., 10 V.S.A. §6001(D)(iv), which was enacted in 2011, only exempts from Act 250 jurisdiction buildings at agricultural fairs that were construction before January 1, 2011. This would be a better way to address vested rights issues than the "final determination" process that currently appears in the bills.

These modifications would not change the NRB's position on the bills.

It is important to note that the bills specifically exempt safety aspects of the pipelines from Act 250 review, as safety is regulated by the federal government, and the sponsors no doubt want to avoid the claims that have been made in the Vermont Yankee litigation.

Secretary/Commissioner has reviewed this document: Ron Shems Date: February 11, 2013.

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