NATURAL RESOURCES BOARD
Dewey Building
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Montpelier, Vermont 05620-3201

DATE: January 16, 2015

TO: Secretary of State Jim Condos

FROM: Melanie Kehne, General Counsel, Vermont Natural Resources Board

RE: Proposed Act 250 Rule Amendments, 3 V.S.A. § 838 Filing

The Natural Resources Board proposes to amend the Act 250 Rules. The proposed revisions are described below.

General Revisions:

- Added references to the new Downtown Findings process at 10 V.S.A. § 6086b throughout.
- Revised references to District Commissions to add the Board, or deleted them, because Act 250 Rules apply in Reconsideration proceedings where the Board is the quasi-judicial decisionmaker, as well as to District Commission proceedings.
- District Commission is capitalized throughout.
- Other minor revisions to shorten or clarify throughout.

Rule 2(A)(Development). Clarifies that Act 250 jurisdiction also attaches to any material change to a permitted development.

Rule 2(B)(Subdivision). Clarifies that Act 250 jurisdiction also attaches to any material change to a permitted subdivision.

Rule 2(C)(1)("person"). Clarifies that the definition of "person" applies to substantial and material changes, as well as to development.

Rule 2(C)(3)("construction of improvements"). Clarifies that the construction of improvements initiates development or a substantial or material change. Existing language could be construed too broadly.

Rule 2(C)(5)("involved land"). Clarifies that the concept of involved land applies when determining jurisdiction based on acreage, for instance, for the construction of improvements on one or more acres.

Rule 2(C)(6)("material change"). Incorporates the concept of cognizable change, which is well-established in case law, and focuses the permit amendment requirement on cognizable changes with the potential for significant, adverse impact. A change with a significant impact on any finding, conclusion, term or condition of the permit will not require

a permit amendment unless it has the potential for significant adverse impact. Also, adds a reference to the new Downtown Findings process codified at 10 V.S.A. § 6086b.

Rule 2(C)(7)("substantial change"). Incorporates the case law requirement of cognizable change before jurisdiction can attach to grandfathered projects, and adds a reference to the 10% test for earth extraction projects, to provide notice in the rules of these legal requirements. It also simplifies how jurisdiction applies to formerly grandfathered projects, by providing that jurisdiction applies to the entire project tract. Current practice allows some grandfathered projects to obtain permits that are limited to a discrete substantial change (a single building, for instance), as long as the change does not have impacts that permeate the entire project. This leads to a patchwork of jurisdiction on a project tract and to some confusion over what requires a permit amendment or what constitutes a substantial change. This rule change will provide improved clarity for these (relatively few) projects. The proposed rule also revises language to make the rule easier to understand.

Rules 2(C)(14), (19) (24). Revised for consistency with format of other Act 250 Rule definitions; no change in meaning.

Rule 2(C)(18)("principally produced"). Renumbers from Rule 2(C)(19), corrects a citation error in subsection (b), clarifies that the principally produced test applies to more than one agricultural product (at a farmstand, for instance) in determining whether a project constitutes "farming" exempt from Act 250. Adds a new subsection (c) for the existing statutory exemption for biofuel production on the farm, correcting an omission in the rules.

Rule 2(C)(22)("rural growth areas"). Delete this definition because it is no longer used in Act 250 Criterion 9(L). Effective June 1, 2014, Criterion 9(L) was changed to protect settlement patterns, not rural growth areas.

Proposed Rule 2(C)(22)("confined to"). Adds new definition to explain when a project must infill under the new Act 250 Criterion 9(L)(settlement patterns). This limits the infill requirement to projects that abut existing strip development, and ensures that the requirement does not apply to projects in areas of scattered development. Projects that are not confined to existing strip cannot contribute to a pattern of strip development.

Proposed Rule 2(C)(26)("cognizable change").

- Adds new definition to incorporate longstanding case law into Act 250 Rules. Cognizable change must occur, along with a potential for significant impact, before a permit is required for a grandfathered project, and before a permit amendment is required for a permitted project.
- Provides that a cognizable change can be a physical change or change in use for both types of jurisdiction, clarifying that a change in use can constitute a cognizable

change to a preexisting project. A potential for significant, adverse impact would still be requiredfor jurisdiction to attach.

Proposed Rule 2(D)(Jurisdiction by Municipal Election). Adds new rule for municipalities with zoning and subdivision bylaws that elect to have 1-acre development jurisdiction. The rule:

- Requires these municipalities to file a copy of the ordinance and a certificate of adoption with the district coordinator. This requirement does not affect the municipality's legal status with regard to jurisdiction; it is simply a recordkeeping requirement to make it easier for NRB staff to determine the jurisdictional status of such municipalities.
- Clarifies that municipalities can elect to have more Act 250 jurisdiction outside any state-designated center.
- Explains that under current law, municipalities may only elect Act 250 jurisdiction over development based on acreage of involved land; not subdivision jurisdiction based on the number of lots. This has been a source of confusion, since generally one-acre towns are also 6-lot towns. One-acre towns by election, however, remain ten-lot towns.

Rule 3(Jurisdictional Opinions)
The revisions are intended to update Rule 3 in light of the 2013 statute requiring reconsideration by the Board prior to any appeal of a jurisdictional opinion. These revisions are based on the Interim Procedure on Jurisdictional Opinions and Reconsideration adopted by the Board on July 9, 2013. The limitation on the coordinator's and assistant coordinator's authority to reconsider jurisdictional opinions (only upon an adequate showing of fraud or of a failure to disclose material facts) is deleted, consistent with longstanding practice and with Vermont case law that holds that a decisionmaker has inherent reconsideration authority.

Rule 10 (Permit Applications)
Rules 10(E) and (F) were revised to better accommodate electronic filing, and were reorganized generally.

Rule 12 (Documents and Service)
Deleted the requirement in Rule 10(C) that filings be double-spaced and reduced the page limit from 25 to 20. Moved part of Rule 10(B) to become the new Rule 10(C), to govern method of service.

Rule 18 (Conduct of Hearings)

- Added the Board's quorum requirement to Rule 18(A).
- Amended Rule 18(E) to reflect current practice of audiorecording hearings, to eliminate the requirement of Commission permission for parties to hire a private

court reporter or stenographer, and to require those parties to provide the Commission with a transcript copy, which will be available to all other parties as a public record.

Rule 19 (Presumptions)
Rule 19(C) is amended to clarify the procedure for filing other permits obtained after an Act 250 application is filed. Specifically, to ensure that the applicant serves a copy of the other permit on all parties, and to clarify that only persons with party status on relevant criteria will receive notice from the Commission of an opportunity to request a reconvened hearing on the new permit. The current rule states that the Commission serves this notice on parties who have requested an opportunity to review the permit, and requires the Commission to send these parties another copy of the permit. This rule is also revised to conform to current practice, which is that the Commission may specify another timeframe for requests to reconvene hearings.

Rule 20(B)(Investigation)
Adds a provision to clarify that any Commission investigation must be conducted as a contested case in compliance with the APA. This ensures that all parties have an opportunity to respond to any evidence, and clarifies that Commission investigations must be within the context of an Act 250 application or amendment application, not in the context of compliance with a permit that has already been issued. Compliance issues are appropriately addressed by the Board, which is the enforcement authority for Act 250.

Rule 21 (Master Plan and Partial Review)
These rule revisions are the result of the Board-led stakeholder process required by Act 199. The goal is to make the master plan process more efficient, and to set out how both the master plan and partial findings processes work. Much of the Master Plan portion of the rule, Rule 21(A) is based on the Board's longstanding Master Plan Policy.

Rule 22 (Designated Downtown Development District Findings and Conclusions)
This is a new rule to govern the process for the new Downtown Decision statute, 10 V.S.A. § 6086b, which allows projects in state-designated Downtown Districts to opt for limited Act 250 review on criteria that are not adequately addressed by municipal review (those with state or regional impacts, or that require state expertise). The new statute sets strict timelines for notice, comments, and hearing requests. The process is very similar to the minor application process in Rule 51. Rule 22 is based on the Board's Interim Policy Guidance on Designated Downtowns, which was adopted in 2014.

Rule 32 (Duration and Conditions of Permits)
Added a reference to the new Section 6086b Downtown Findings process and changed environmental court to Superior Court, Environmental Division. Updated Rule 32(A) to reflect the Board's enforcement authority, which has evolved over the years since this rule

was first adopted. The authority to petition the Court for permit revocation still exists, but has been eclipsed by environmental enforcement, which is more a more efficient and cost-effective approach to compliance issues. The environmental enforcement statute has been amended in recent years to strengthen the Board's independent enforcement authority.

Deleted an extraneous sentence in Rule 32(B) that said what permits are for, because the rule deals with permit duration.

Deleted references in Rule 32(B) to the requirement of substantial compliance with the permit. This is a holdover from the time when Act 250 permits had to be renewed and compliance was required and revocation was envisioned as the means to obtain compliance. As stated above, enforcement is a more cost-effective approach to permit violations. Since the mid-1990s, most permits are of infinite duration. Case law concerning permits with limited duration is clear that substantial compliance is required for a permit to expire. The Board is working to amend the statutes for consistency with current law and practice.

Rule 34 (Permit Amendments)
Updated the rule to focus on amendments and to delete references to an old distinction between substantial and material changes to permitted projects. Replaced this with a reference to the minor application rule, Rule 51.

Amended Rule 34(A) to clarify that the Commission's continuing jurisdiction is to amend permits. This is consistent with principles of finality of permits, the Board's independent enforcement authority, which has increased in recent years, and recent case law.

Rule 34(E)(*Stowe Club Highlands*)
Rule 34(E)(1) is amended to specify which permit conditions are critical, and amended generally for brevity and clarity. Rule 34(E)(2) is deleted, and the "mere relitigation" test moved to the part of the balancing test because it is hard to determine whether a permittee has legitimate reasons to seek an amendment without considering the other factors in the balancing test. Subsections (E)(3) and (4) are renumbered accordingly and amended for clarity. If an amendment application does not comply with Rule 34(E), the Commission must dismiss it.

Rule 71 (Jurisdiction over Trails)
Minor revision of wording in Rule 71(B) to make the meaning more clear. This is not a substantive change.