



NATURAL RESOURCES BOARD

10 Baldwin Street
Montpelier, VT 05633-3201

NATURAL RESOURCES BOARD MEETING **Wednesday, September 22, 2021** **11:00 am**

Board Members Present in Person:

Don Rendall, Chair

Board Members Present by Phone:

Brad Aldrich, Vice Chair; Steve Larrabee, Member; Don Turner, Member and Andrew Collier, Member

Staff Present in Person:

Katie Emerson, Legal Technician

Staff Present by Microsoft Teams:

Gregory Boulbol, General Counsel; Alison Stone, Associate General Counsel; Aaron Brondyke, State Coordinator; Micheala Stickney, Enforcement and Compliance Officer

Members of the Public Present by Teams/Phone:

Tracey Porter, Lori Bernier, Mimi Aoun, Emily Johnson, Mike Wesko, Jayne and Larry Nicklaw, John Brabant, Annette Smith

The Vermont Natural Resources Board convened at 11:00 a.m. via Microsoft Teams, Chair Don Rendall presiding.

I. 11:05 a.m. Welcome and Introductions

There was a brief interruption due to a power and internet outage at the Montpelier office. Chair Rendall and Katie Emerson rejoined the meeting via phone and the meeting proceeded to public comments.

II. 11:15 a.m. Public Comments

Tracy Porter – Danby, VT

Ms. Porter lives in close proximity to Fuller Sand and Gravel in Danby. She complained of being inundated with dust and smells from Fuller's asphalt plant that start at just after 4am and continue all day. Trucks entering and exiting the Fuller property pass by her home all day causing noise. She stated that she can't open windows because of dust, odor, and noise. The pit is permitted 10 blasts a year, and she stated that blasts shake and damage houses in the village.

Lori Bernier –Graniteville, Barre Town



Ms. Bernier lives near the North East Materials Group crusher and the Rock of Ages granite quarry. She stated that noise from the crusher starts early in the morning, waking up her family. They avoid going outside. Ms. Bernier stated that they were fortunate that District 5 had an engaged district commission, which included a diverse group of experts to review the project. She is concerned about a lack of training for other district commissions to objectively hear cases. Ms. Bernier also expressed concerns about the NRB's participation in the permit appeal in the Environmental Court.

Mimi Aoun, Irasburg

Ms. Aoun owns a farmhouse that shares a border with the Albany town gravel pit. She has suffered several medical issues that she attributes to dust and exhaust from the operation, such as eye irritation, nausea and headaches. Her home has cracks in the foundation that she attributes to passing trucks. She complained of difficulty reaching out to District 7 Environmental Commission staff and the Board's Enforcement Officer. Ms. Aoun is frustrated by long wait times and being left out of communications regarding a Notice of Alleged Violation, which the Board issued to the Town of Albany. She has hired attorneys and still has not found relief. Even though the pit was found to have violated its permit conditions the Town received a permit to operate the pit for an additional 20 years.

Emily Johnson, Pawlet

Ms. Johnson lives near the Roblee Farm gravel pit. The operators opened a phase of the pit near her property, and she stated that dust from the pit has encroached into every part of her property. Ms. Johnson stated that she has documented sandstorms in videos. Representatives from Act 250 and ANR's Air Quality Control Division (AQCD) have visited the property. Deadlines in AQCD enforcement actions have passed without action on the part of the pit owner. When contacting ANR Enforcement, they have at times been told that there are competing priorities for enforcement as there is a larger enforcement investigation underway. She notes that NRB staff typically contact landowners prior to inspections.

Mike Wesko, Pawlet

Mr. Wesko is an adjoining landowner to Roblee Farm and stated that he has been in contact with NRB staff for over 5 years. During this time, he has watched the quarry extract beyond permitted limits, encroach into his property, rip out trees and violate permitted buffers. He alleged that the quarry operators have entered into a sensitive riparian area and buried stumps and tree material in a non-designated area. He believes that there have been water quality violations and has made videos of silty, turbid runoff reaching waters of the State. Mr. Wesko noted that only recently have NRB enforcement efforts started to make an impact. He complained that the Town of Pawlet and neighboring towns purchase material from this pit, and are therefore funding the violations.

Jane and Larry Nicklaw, Castleton

Jane and Larry Nicklaw stated that when they moved to their Revolutionary War Era home in 1992, they knew about a quarry adjacent to their property, but they were told that it was abandoned and would not reopen. Since then, the quarry reopened. Now, there is an enormous pile of waste rock behind their house. Blasting has gotten crazy. Rock flew out of the quarry in 2003, 2006. Hit houses across the road. Their main concerns regard blasting. Rocks have landed on their property and recently went through the roof of one of their neighbors. They claim that the blasting has cracked their foundation and sheetrock. This quarry doesn't fall under Act 250 jurisdiction because of the statutory exemption for slate quarries.

John Brabant, Vermonters for a Clean Environment

Mr. Brabant read a press release issued by NRB in 2009 for fines issued in a 2009 enforcement case against Roblee Farm for gravel pit violations. At that time, they were assessed \$19,000 in fines for Clean Water Act and Act 250 violations. They paid the fine by donating gravel as part of a supplemental environmental project. Therefore, their out-of-pocket costs, according to Mr. Brabant, were only \$400. Mr. Brabant feels that offering SEPs is not an effective deterrent to violators, especially repeat violators. He urged the Board to take repeat offenses into account when formulating penalties, especially now that there is another pending enforcement case against Roblee Farm. He also urged the NRB to support Vermonters for a Clean Environment's efforts to amend Act 250 to eliminate the slate quarry exemption.

Annette Smith thanked the board for listening and taking the time to consider these accounts.

Chair Rendall thanked everyone for their thoughtful comments. He remarked that we take them seriously and are committed to reviewing the complaints and the range of Act 250's jurisdiction. We will keep the board apprised of results of review.

III. 11:57 a.m. Review and action on Minutes of July 13, 2021

A motion to approve the minutes of the Tuesday, July 13, 2021 meeting was made by Don Turner and seconded by Andrew Collier and approved unanimously.

IV. 11:15 a.m. NRB office and budget updates

Kimberley Lashua usually gives this update, but she left in the NRB in mid-August to pursue a position with the Cannabis Control Board. Chair Rendall had considered leaving the position open until the new permanent Chair can decide what to do with it. But he has concluded that waiting is not sustainable and will be posting the position to be filled soon.

One of our two enforcement officers, Katharine Servidio, has left to take a position in another department. Greg and Michaela are working to get that position posted and filled.

District coordinators and technicians are feeling the stress of keeping up with increasing numbers of permits, formal and informal jurisdictional opinions, and working with landowners. People are working very hard.

The enforcement team currently consists of Michaela Stickney, Greg Boulbol, and Alison Stone. There are many open investigations. We are looking to evaluate and improve the way we pursue enforcement efforts to be fair and effective.

Chair Rendall reported that we are in the process of developing a telework plan with guidance from the Administration. Staff have been working remotely over the past 18 months. The Administration is asking us to put together more formal telework plans by November. The goal is to make sure our work is accomplished with excellent customer service and access to applicants while maintaining flexibility for employees.

V. 12:06 Permit Metrics

Chair Rendall provided an update regarding permit processing times. The focus was on the time between receiving and issuing a permit. When applications arrive in our offices incomplete, it takes some time for our staff to work with applicants to ensure that applications provide sufficient information to review the proposal under each of the Act 250 criteria and sub-criteria. The timeframe to issue a decision is 40%-50% longer if you count from the date the application was received as opposed from the date the application was deemed complete.

Chair Rendall is confident that these numbers can be improved to a degree. In running the numbers regarding timeframes, he did not include outliers. He excluded about 10 out of 1,000 permits that took more than two years because the circumstances were unusual.

VI. Budget update

Chair Rendall provided a budget update. While there is no action for the Board to take at this time, he will be presenting the budget to the Department of Finance and Management on Friday. The administration has asked for a budget that is no more than 3% increase from FY22. Personnel cost will continue to grow at the rate they have been (cost of living increases, step increases, benefits) which more than 3%. Therefore, we have to be very focused on maintaining operating expenses.

The Act 250 program was originally designed to be funded through fee revenues. Over the past several years, fee revenues have fallen short of the funds needed to operate.

Three paths forward

- adjust General Fund appropriation
- adjust Act 250 fees dramatically
- adjust structure of NRB

Chair Rendall's recommendation will be to understand the deficit, and to take a look at appropriations. He is reluctant to recommend increasing Act 250 fees in light of the inflation that applicants are feeling, which is reflected in construction costs, and ultimately, in Act 250 fees, since the fees are based on the cost of construction.

VII. 12:20 pm Discussion RE: NRB's participation in Environmental Division



Appeals

Chair Rendall reminded everyone that in July we shared a memo from a former district coordinator regarding how the NRB participates in appeals to the Environmental Division.

Two concerns were raised in the memo, the first was the appropriateness of the NRB attorneys assisting the district coordinators and district commissions in their decisions and then participating in the appeal. When the decision is appealed to the Court, the NRB is a party to the appeal by statute. When the former Environmental Board heard appeals directly, the attorneys could be presumed to have a special access to the deciding tribunal. Since appeals are now heard by the Superior Court/Environmental Division, the attorneys have the same access to the Court as the other parties.

The second concern is whether the NRB should be representing the district commission or district coordinator before the Court as opposed to advocating for a particular result on behalf of the NRB. Given that matters at the Environmental Division are heard *de novo*, there is no reason that the Board should advocate on behalf of a coordinator or district commission, because that decision is set aside as a part of the appeal process.

The Board considers settlements to resolve matters as the most efficient and effective way to save time and resources. In some cases, the Board might put forward a specific solution, while in others, it might let the parties make their arguments and leave it to the Court to decide the outcome.

VIII. 12:35 p.m. Brief overview of NRB enforcement numbers

Michaela Stickney, Enforcement and Compliance Officer, gave the Board an update on the number of cases, actions taken, and penalties collected for the past year. There was agreement that the Board would like to revisit the topic of enforcement at a future meeting. Brad Aldrich suggested that the NRB might not always be the best entity to do enforcement.

IX. 12:42 p.m. Discussion of Appeals

Greg Boulbol, General Counsel, updated the Board on three recent decisions:

Costco LUP appeal: in 2012/2013 Costco obtained a permit to build gas pumps. The permit was contingent on construction of traffic improvements. More recently, Costco proposed to temporarily amend the permitted hours of operation for the gas pumps in a manner that would not necessitate the mitigation that resulted from the original proposal. After finding in favor of flexibility in the Rule 34(E) analysis, the Commission issued a permit for the proposed changes. That decision was appealed. The Environmental Division recently found in favor of Costco on the Rule 34(E) matter and will be addressing the merits as some point soon. However, the neighbors have sought permission to take an interlocutory appeal Courts' Rule 34(E) decision.

Burr and Burton Academy (BBA): The question was whether BBA is considered a municipal applicant and exempt from fees. BBA is unique that it is not a municipal public school, but

because the majority of the students attend through public funding, the court found that they are considered municipal. The court ordered the NRB refund the application fee of \$96,000.

Snowstone: The Supreme Court issued a decision regarding a stone quarry on a small parcel and a right of way across a much larger parcel in a "one-acre town." The total project site was under one acre and the initial question was whether the larger tract should be considered involved land for the definition of development. The Court found that involved land is absent from the definition of development in one-acre towns. The Court concluded that because the metric used to analyze development in one-acre towns is fundamentally different than the metric used in 10-acre towns, they should be treated differently. Rather than look at parcel size in one-acre towns, the correct method is to look at the area of land actually used. This is fundamentally different than how jurisdiction has previously been determined.

New appeal: Sugar Mountain Holdings:

Alison Stone, Associate General Counsel, gave an update on this new appeal. The project is the renovation and reuse of a ski area in Dummerston, VT as a brewery and tasting room. The appeal is about a coordinator's incomplete determination. Completeness determinations are considered jurisdictional opinions and can be appealed. There has been one status conference so far.

X. 1:00 p.m. Discussion of appeals, enforcement, and attorney-client memoranda in Executive Session

Chair Rendall recommended that the Board enter executive session. Steve Larrabee made a motion that the Board would be unfairly disadvantaged from premature disclosure of above matters. Andrew Collier seconded the motion, and it was unanimously approved by the Board.

Steve Larrabee then made a motion to enter executive session, seconded by Brad Aldrich and unanimously approved by the Board.

XI. 1:42 p.m. Return from Executive Session

Chair Rendall thanked everyone for their time as we've gone past the scheduled agenda.

XII. 1:46 p.m. Adjourn

At 1:46 p.m., Andrew Collier made a motion to adjourn, seconded by Don Turner, and unanimously approved by the Board.