Arthers, Elexandra

From: Bruce Markwell <BMarkwell@efwall.com>
Sent: Wednesday, August 30, 2017 12:27 PM
To: NRB - Comments
Subject: Comment regarding the Lamoille Valley Rail Trail

My wife and I live at 86 Vermont route 215 in Walden Station, VT. We purchased this home in 2009 from an owner who did not disclose to us the planned potential Lamoille Valley Rail Trail (LVRT) project. When we became aware of the project, we requested and were awarded final party status to the LVRT during the Act 250 proceedings. We are an adjacent land owner to phase 3 of this project.

Our lot is somewhat rectangular in shape and consists of approximately 1 acre with the long (west) side, approximately 260 lf along and adjacent to the old railroad bed. The old railroad be right of way is 50' wide. This places the rear side of our house less than 10' from the right of way. (see link below).

https://www.google.com/maps/place/86+VT-215,+West+Danville,+VT+05873/@44.4511923,-72.2575915,139m/data=!3m1!1e3!4m5!3m4!1s0x4cb5b492cb083c1f:0x8dcf6aaaceab5da4!8m2!3d44.4508744!4d-72.2577764

We are not opposed to the use of existing railroad beds for recreational trails. We are concerned about the proximity of this trail in relation to our house. We are especially concerned about noise and smell from snowmobiles. There is no way that this will not have an affect us. We are asking for help in mitigating to lessen the impact.

Bruce & Molly Markwell
86 Vermont Route 215
West Danville, VT 05873

Arthers, Elexandra

From: Laird Macdowell <laird.macdowell@gmail.com>
Sent: Sunday, August 6, 2017 9:03 PM
To: NRB - Comments
Subject: Comment regarding the Lamoille Valley Rail Trail

I fully support the conditional agreement between VAST and the State of Vermont relative to not requiring further Act 250 permits for the Phase 2 and 3 portions of the Lamoille Valley Rail Trail (LVRT). I was an original member of the Lamoille Valley Rail Trial Committee (LVRTC) and served as chair on the committee for six years, ending in 2013. My entire six year term was spent obtaining permits for construction of the LVRT, including the Act 250 permit for Phase 1. The original jurisdictional opinion from the three Act 250 coordinators representing the three counties through which the LVRT would pass was that an Act 250 permit was NOT needed, similar to the Missisquoi Valley Rail Trail. Then the environmental group Conservation Law Foundation (CLF) got involved and used their political power to reverse the original jurisdictional opinion so an Act 250 permit was required for the LVRT. VAST strongly opposed this decision but in the end went through the Act 250 process for Phase 1.

The Phase 1 Act 250 permit process required notification of all adjecent landowners on the entire 93 mile railbed, not just the Phase 1 sections. There were over 900 adjacent landowners and only one presented evidence of harm at the Act 250 hearings. For this reason there Act 250 permits are completely unneccesary for Phase 2 and 3 of the LVRT project. I still feel that the Phase 1 Act 250 permit was not needed and was a waste of time and money. Money spent on lawyers that could have been used to build the trail.

I now serve as chair of the Cambridge Rail Trail Committee and our mission is summer maintenance of the 4 mile long Cambridge section of the LVRT, the new trailhead in Cambridge Junction and the 20 year old Cambridge Greenway Path which connects to the LVRT. We have heard nothing but praise from users of these trails and the trailhead and have seen an increase in tourists in Cambridge specifically for using these facilities and providing economic benefit to the Town of Cambridge. Once the entire 93 mile LVRT is completed the economic benefit to the State of Vermont will include bicycle touring groups using the trail along with snowmobile tours in the winter, all spending money at the businesses in the towns along the trail. There should not be any further impediments to construction of the LVRT to realize these econonmic benefits.

Laird MacDowell
19 MacDowell Drive
Jeffersonville, VT 05464

Arthers, Elexandra

From: Taylor Newton <tnewton@nrpcvt.com>
Sent: Tuesday, August 29, 2017 11:03 AM
To: NRB - Comments
Cc: Bethany Remmers
Subject: Comment regarding the Lamoille Valley Rail Trail

The following comments are from NRPC regarding the VAST, VTrans, and NRB Settlement Agreement:

-NRPC is generally supportive of the settlement agreement and having this project be managed through a lease agreement between VTrans and VAST and not via Act 250.

-What will be the process to renew the lease with VTrans? This should be spelled out in the settlement agreement.

-Hours of operation should be clearly defined in lease and specify that trail maintenance should occur within hours of operation except for emergency repairs.

-The lease should clearly state that ATVs are not allowed except for in specific circumstances (and those circumstances should be listed).

-Who will receive citizen comments, questions, and complaints? VAST? VTrans? Should the process be made clear in the settlement agreement? Is there a process to deal with repetitive violations of the lease agreement (even if those violations are due to the actions of individual citizens and not VAST)?

-A general comment: It would have been great to have seen all previous lease amendments available on the website since to have a more complete sense of what the lease agreement says in totality.

Taylor Newton | *Senior Planner*
Northwest Regional Planning Commission | 75 Fairfield Street, St. Albans, VT 05478
Phone: 802.524.5958 | **Fax:** 802.527.2948 | **Website:** www.nrpcvt.com

Arthers, Elexandra

From: Nancy Jacques <njacques074@gmail.com>
Sent: Wednesday, August 9, 2017 7:23 PM
To: NRB - Comments
Subject: LVRT rocks!

Hello

My family and I just travelled the LVRT via bicycle from St J to Danville yesterday with a stop at Marty's for lunch. What an awesome addition to Vermont's recreational options. How great to see the existing RR infrastructure put to such positive public use. We plan to travel it again before the season is up in the hopes of making it to West Danville next time. Looking forward to the further expansion of the LVRT across and throughout VT connecting communities and getting folks outdoors and active.

Nancy J
Brookfield, VT

Sent from my iPhone

Arthers, Elexandra

From: Nancy Jacques <njacques074@gmail.com>
Sent: Wednesday, August 9, 2017 7:24 PM
To: NRB - Comments
Subject: Comment regarding the Lamoille Valley Rail Trail - LVRT rocks!

> Hello
>
> My family and I just travelled the LVRT via bicycle from St J to Danville yesterday with a stop at Marty's for lunch. What an awesome addition to Vermont's recreational options. How great to see the existing RR infrastructure put to such positive public use. We plan to travel it again before the season is up in the hopes of making it to West Danville next time. Looking forward to the further expansion of the LVRT across and throughout VT connecting communities and getting folks outdoors and active.
>
> Nancy J
> Brookfield, VT
>
>

Arthers, Elexandra

From: Stephanie Kaplan <skaplan@jackhill.org>
Sent: Tuesday, September 5, 2017 5:02 PM
To: NRB - Comments
Subject: PDF of LVRT Settlement Agreement Comment
Attachments: LVRT COMMENTS-SK.pdf

Please substitute this pdf document for the comments I sent a little while ago in Word. Thanks.

Stephanie J. Kaplan, Esq.
1026 Jack Hill Road
East Calais, VT 05650
802-456-8765

STEPHANIE J. KAPLAN
Attorney at Law
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Diane B. Snelling, Chair
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National Life Drive
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T.J. Donovan, Attorney General Office of Attorney General
109 State Street
Montpelier, Vermont 05609-1001

Joe Flynn, Secretary
Agency of Transportation
1 National Life Drive
Montpelier, Vermont 05633-5001

Re: Proposed LVRT Settlement Agreement

As the author of the Motion for Reconsideration submitted to the District Commission that resulted in the assertion of jurisdiction over the construction of the Lamoille Valley Rail Trail (LVRT), and as the former Executive Officer and General Counsel of the former Environmental Board and author of numerous legal decisions on behalf of that Board, and former Assistant Attorney General representing the former Environmental Board and Agency of Natural Resources, I feel that I must respond to the Settlement Agreement concerning the LVRT entered into by the State, the NRB, VTrans, and VAST.

There are several aspects to the Settlement Agreement that are of great concern, both in terms of the integrity of the Act 250 program, the rights of the parties, the terrible precedent that would be set, and the undermining of a legal process set in place by the legislature and followed for the last fifty years.

This Settlement Agreement, which essentially dissolves Act 250 jurisdiction outside of any existing legal process, is the most blatant political interference in the Act 250 process that I'm aware of in my more than 30 years of professional involvement with Act 250.

I am aware of no legal authority that would allow jurisdiction to be undone, and the Settlement Agreement contains no legal citations to support this action. In fact, there is a long line of legal decisions that have held that once Act 250 jurisdiction "attaches," it cannot be "detached," that is it cannot be undone or waived, absent certain specified situations, none of which exists here. *See, e.g., In re Eustance Act 250 Jurisdictional Opinion*, 2006 VT 16 (2009); *In re Wildcat Construction Co., Inc.*, 160 Vt 631 (1993); *In re John Rusin*, 162 Vt. 185 (1994), *affirming Re: John Rusin,* #8B0393-EB, Findings of Facts, Conclusions of Law and Order at 5 (Vt. Envtl. Bd. June 20, 1993).

Federal and state jurisdiction over the LVRT was already litigated and a final decision rendered. When VAST and VTrans withdrew their appeal, the Coordinators' Jurisdictional Opinion asserting jurisdiction became final. Furthermore, the District Commission's permit and 72 pages of findings were not appealed, therefore becoming final after 30 days from the date of their issuance, October 25, 2012.

Any challenge to jurisdiction brought now is barred by the legal principles of *res judicata* or *collateral estoppel*. Thus rather than caving to whatever political pressure that might be applied to let VAST get out of having to submit the remaining portions of the trail to Act 250 jurisdiction, the State should be making the appropriate legal arguments to support and uphold the jurisdiction that was finally adjudicated in 2012.

This Settlement Agreement also abrogates the rights of the parties, including those who spent substantial amounts of time and money litigating the jurisdictional questions and then participating in the Act 250 process that included preparation for and attendance at substantive hearings and the preparation of legal briefs, and also those who would be affected in the future and who would have the right to participate under Act 250. The silence concerning past and future parties in Settlement Agreement is highly disturbing, to say the least. The rights for affected members of the public for notice of and to participate in the processes involving proposed land use activities is a basic tenet of Act 250 that is wholly undermined by the Settlement Agreement.

Perhaps even more damaging is the undermining of the basic legal principle of finality. Numerous court decisions have held that an unappealed lower court or administrative body decision is final. This has been upheld specifically in the context of Act 250 with respect to the rights of parties, other interested persons, and the district commissions themselves to reasonably rely on permit conditions in making decisions. *See, e.g., In re Nehemiah Associates, Inc.*, 168 Vt. 288, 294 (1998). *See also In re Eustance Act 250 Jurisdictional Opinion*, 2006 VT 16 (2009); *In re: Maggio*, No. 166-7-06 Vtec (Vt. Envtl. Ct. at 8) (4/20/07); *Re: Green Mountain Railroad*, #2W0038-3B-EB, Findings of Fact, Conclusions of Law and Order at 8 (3/22/02).

The precedent that this Settlement Agreement will set is deeply dismaying. Imagine how delighted Act 250 permit holders around the state will be when they learn that despite having submitted to Act 250 jurisdiction, any further development on their jurisdictional tracts can be dissolved by political fiat if enough of the right kind of pressure is applied. Furthermore, the message being sent by this Settlement Agreement is sure to demoralize the Act 250 staff, the hard-working volunteers who serve on the local Act 250 commissions, and the public throughout the state who may be affected by land development, when they all realize that whatever they do in the Act 250 process can be undone by a stroke of the political pen.

I urge you to reconsider the wisdom of this Settlement Agreement in light of the many negative consequences as outlined in this comment.

Very truly yours,

Stephanie J. Kaplan

Stephanie J. Kaplan, Esq.

Arthers, Elexandra

From: Stephanie Kaplan <skaplan@jackhill.org>
Sent: Tuesday, September 5, 2017 3:56 PM
To: NRB - Comments
Subject: LVRT Settlement Agreement Comments
Attachments: LVRT COMMENTS-SK.doc

Attached are my comments concerning the LVRT settlement agreement among the State, the NRB, VTrans and VAST. Having just returned from a month out of the country, I did not have time to write more extensive comments, but I believe I have summarized my main concerns. I would appreciate a confirmation that you received my comments. Thank you for your consideration.

Stephanie J. Kaplan, Esq.
1026 Jack Hill Road
East Calais, VT 05650
802-456-8765

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Dewey Building
National Life Drive
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T.J. Donovan, Attorney General Office of Attorney General
109 State Street
Montpelier, Vermont 05609-1001

Joe Flynn, Secretary
Agency of Transportation
1 National Life Drive
Montpelier, Vermont 05633-5001

Re: Proposed LVRT Settlement Agreement

As the author of the Motion for Reconsideration submitted to the District Commission that resulted in the assertion of jurisdiction over the construction of the Lamoille Valley Rail Trail (LVRT), and as the former Executive Officer and General Counsel of the former Environmental Board and author of numerous legal decisions on behalf of that Board, and former Assistant Attorney General representing the former Environmental Board and Agency of Natural Resources, I feel that I must respond to the Settlement Agreement concerning the LVRT entered into by the State, the NRB, VTrans, and VAST.

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affirming Re: John Rusin, #8B0393-EB, Findings of Facts, Conclusions of Law and Order at 5 (Vt. Envtl. Bd. June 20, 1993).

Federal and state jurisdiction over the LVRT was already litigated and a final decision rendered. When VAST and VTrans withdrew their appeal, the Coordinators' Jurisdictional Opinion asserting jurisdiction became final. Furthermore, the District Commission's permit and 72 pages of findings were not appealed, therefore becoming final after 30 days from the date of their issuance, October 25, 2012.

Any challenge to jurisdiction brought now is barred by the legal principles of *res judicata* or *collateral estoppel*. Thus rather than caving to whatever political pressure that might be applied to let VAST get out of having to submit the remaining portions of the trail to Act 250 jurisdiction, the State should be making the appropriate legal arguments to support and uphold the jurisdiction that was finally adjudicated in 2012.

This Settlement Agreement also abrogates the rights of the parties, including those who spent substantial amounts of time and money litigating the jurisdictional questions and then participating in the Act 250 process that included preparation for and attendance at substantive hearings and the preparation of legal briefs, and also those who would be affected in the future and who would have the right to participate under Act 250. The silence concerning past and future parties in Settlement Agreement is highly disturbing, to say the least. The rights for affected members of the public for notice of and to participate in the processes involving proposed land use activities is a basic tenet of Act 250 that is wholly undermined by the Settlement Agreement.

Perhaps even more damaging is the undermining of the basic legal principle of finality. Numerous court decisions have held that an unappealed lower court or administrative body decision is final. This has been upheld specifically in the context of Act 250 with respect to the rights of parties, other interested persons, and the district commissions themselves to reasonably rely on permit conditions in making decisions. *See, e.g., In re Nehemiah Associates, Inc.*, 168 Vt. 288, 294 (1998). *See also In re Eustance Act 250 Jurisdictional Opinion*, 2006 VT 16 (2009); *In re: Maggio*, No. 166-7-06 Vtec (Vt. Envtl. Ct. at 8) (4/20/07); *Re: Green Mountain Railroad*, #2W0038-3B-EB, Findings of Fact, Conclusions of Law and Order at 8 (3/22/02).

The precedent that this Settlement Agreement will set is deeply dismaying. Imagine how delighted Act 250 permit holders around the state will be when they learn that despite having submitted to Act 250 jurisdiction, any further development on their jurisdictional tracts can be dissolved by political fiat if enough of the right kind of pressure is applied. Furthermore, the message being sent by this Settlement Agreement is sure to demoralize the Act 250 staff, the hard-working volunteers who serve on the local Act 250 commissions, and the public throughout the state who may be affected by land development, when they all realize that whatever they do in the Act 250 process can be undone by a stroke of the political pen.

I urge you to reconsider the wisdom of this Settlement Agreement in light of the many negative consequences as outlined in this comment.

Very truly yours,

Stephanie J. Kaplan

Stephanie J. Kaplan, Esq.

Arthers, Elexandra

From: Edward Stanak <stanakvt@gmail.com>
Sent: Wednesday, August 30, 2017 9:17 PM
To: NRB - Comments
Subject: Comment regarding the Lamoille Valley Rail Trail
Attachments: VAST-STB2-2.pdf; Edfedpreemption.doc.pdf

The two attachments to this email constitute my comments concerning the settlement agreement.

Ed Stanak
stanakvt@gmail.com

Ed Stanak
58 Pleasant Street
Barre City Vermont 05641
802-479-1931
stanakvt@gmail.com

August 30 , 2017

Diane B. Snelling, Chair
Natural Resources Board
Dewey Building
National Life Drive
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T.J. Donovan, Attorney General
Office of Attorney General
109 State Street
Montpelier, Vermont 05609-1001

Joe Flynn, Secretary
Agency of Transportation
1 National Life Drive
Montpelier, Vermont 05633-5001

RE : Proposed Settlement Agreement Between Vermont Association of Snow Travelers and the State of Vermont for Lamoille Valley Rail Trail

Dear Chair Snelling, Attorney General Donovan and Secretary Flynn:

This letter provides comments on the content of the undated settlement agreement entered into by the State of Vermont (State), the Natural Resources Board (NRB), the Agency of Transportation (VTRANS) and the Vermont Association of Snow Travelers (VAST) concerning the Lamoille Valley Rail Trail (LVRT) and as was announced in a press release dated August 3, 2017. In effect, the agreement dissolves Act 250 jurisdiction over future phases of the LVRT infrastructure project and severely limits enforcement of the terms of a land use permit for the initial phase of the project. These comments are provided from my perspective as a former Act 250 district coordinator, having administered the program for 32 years within the 33 town region identified as district # 5. Attached to this letter is a copy of an analysis on federal pre-emption over the LVRT project which I had authored in 2009 and which I hereby incorporate by reference as a component of my comments. *

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* This analysis was part of the collaborative effort with the coordinators for districts 6 and 7 which resulted in the issuance of Jurisdictional Opinions 5-06, 6-005 (2009) and 7-267 dated June 1, 2009 as well as the Reconsideration Opinions dated September 30, 2009.

Jurisdiction

VAST challenged the conclusions of the Jurisdictional Opinions dated September 30, 2009 by filing an appeal with the Environmental Division of the Superior Court. That appeal is not referenced in the "Background" section of the settlement agreement, nor are the Jurisdictional Opinions which stated specific conclusions on federal pre-emption. The fact that the jurisdictional determination over the LRVT was the subject of judicial review by a Vermont court is an integral and material element of the history of regulatory review of the LVRT. More to the point, the procedural history of that appeal supports a view that the subject matter of Act 250 jurisdiction was decided with finality and cannot be dissolved through an agreement among some of the parties.

The Environmental Division of the Superior Court issued two decisions on the appeal petition. The first one – dated July 10, 2010- dealt with grants of party status for many individuals and an issue of service involving service of documents. The second and final decision – dated November 5, 2010 - acknowledged the withdrawal of the appeal by VAST. The Court's entry order was premised on VAST's material representation "to apply for an Act 250 permit" – thus a concession of jurisdiction under Act 250. These critical points are absent from the positions taken by the State, the NRB and VTRANS in the settlement.

The petition filed by VAST with the federal Surface Transportation Board (STB) attempts to assert complete pre-emption. The settlement agreement states that "...the Parties desire to resolve and settle all disputes relating to the Trail with regard to Act 250 jurisdiction over the Trail." One is at a loss to understand why the State, the NRB and VTRANS have disregarded the state adjudication of the fundamental jurisdictional questions and, instead of defending the results of that adjudication by at least taking a stance that federal pre-emption is at best partial and that later phases of the LVRT remain squarely subject to review under Act 250, the representatives of the state have chosen to capitulate on jurisdiction under Vermont law over the later phases of the LVRT. There is no valid "dispute" about Act 250 jurisdiction over the LVRT in 2017. The dispute was resolved by means of appellate proceedings in 2010 in which VAST conceded state jurisdiction. <u>The Attorney General, the NRB and VTRANS must acknowledge and defer to that judicial outcome.</u>

Rights of the Parties

As reflected in the content of the Jurisdictional Opinions and District Commission 7 Findings of Fact 7C1321, several individuals participated as parties in the underlying Act 250 proceedings having sufficiently demonstrated "particularized interests". A long line of Environmental Board and Environmental Court precedents have established that such parties having continuing rights under

Vermont law to rely upon the outcome of those proceedings. The settlement agreement is silent as to whether these parties were provided notice of the settlement negotiations. There is no indication that they were afforded an opportunity for substantive input. State agencies must not take action to abrogate or negate the rights of such parties.

Diminished Reviews of Impacts by Federal Government

Given the history of a strong environmental ethic embedded in legislation enacted in Vermont during the last half century, one has to question the fundamental decision making that led to yielding to complete federal pre-emption over the LVRT and the dissolving of Act 250 jurisdiction over the later phases of the project. Every indication from the current presidential administration is that meaningful reviews of environmental impacts under the array of programs administered by the federal government are being diminished if not eliminated. There is no rational basis upon which Vermonters can assume that there will be an effective evaluation by the STB or any other federal agency of the impacts from the construction and use of the LVRT as would have taken place under the criteria of Act 250 .

Potential Project Impacts

VAST seeks, in effect, the deregulation of its project from Vermont's landmark land use and development review process as is codified in 10 VSA Chapter 151.* One might ask what are the impacts which will escape review without Act 250 jurisdiction? There can be no dispute that substantive impacts on adjoining landowners are real under criterion 8 of Act 250 as was acknowledged in the District 7 Environmental Commission decision. During the vetting of the LVRT in 2009 by the three district coordinators, potential impacts were identified under multiple criteria such as criterion 8(A) with respect to habitat functions such as travel corridors . The secondary growth effects of the LVRT that will result from the build out of trailheads in multiple towns [identified as later phases of the LVRT "larger undertaking" (See Act 250 Rule 2(C)(5)(a)) in VAST's early submittals describing the overall project] which will take place over the years are ignored along with associated commercial development that may sprawl in the vicinity of the trailheads. All impacts must remain subject to scrutiny under Act 250 .

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* VAST has a record of hostility toward the provisions of 10 VSA Chapter 151 as evidenced by the proceedings in 2004 for Jurisdictional Opinion 5-04-1 and in 2005 for Declaratory Ruling # 430 ("Phen Basin") which involved multi-season recreational trails in the Town of Fayston. In that decision the Environmental Board asserted jurisdiction over the construction and use of the trails. A review of the filings in that matter suggests a strong anti-regulatory stance by VAST which is accentuated in the LVRT matter and will, in effect, be endorsed by the State, the NRB and VTRANS by virtue of their consent to VAST's brazen assertion of complete federal pre-emption.

Request for Public Documents

The link on the NRB web site to information concerning the settlement agreement does not provide access to any documentation as to the legal analyses undertaken by the State, NRB and/or VTRANS on the underlying jurisdictional topics framed in this letter. The public has no way of being informed about the consideration of Vermont law, including applicable Environmental Board and Court precedents, that were undertaken in formulating the positions of the state entities memorialized in the settlement agreement. One would like to think that such analyses exist as the basis for understanding why the State, NRB and VTRANS have cast aside the conclusions established in the 2009-2010 state jurisdictional proceedings and why they have concurred with VAST that a compelling case has been made for complete pre-emption. In this context, pursuant to the provisions of 1 VSA Subchapter 3, I request copies of documents produced by counsel for the State, the NRB and VTRANS in which analyses and conclusions are stated in support of dissolving Act 250 jurisdiction, diminishing enforcement under the terms of the District 7 land use permit and joining with VAST in its claim that federal pre-emption should be complete .

Recommendations

The State, NRB and VTRANS should not enter into the settlement agreement with VAST. The State, NRB and VTRANS should actively participate in the STB proceedings with the objective of obtaining a ruling that federal pre-emption is partial and that Act 250 jurisdiction continues fully over phase 1 of the LVRT and will apply to all subsequent phases of the project including proper consideration of secondary growth impacts consistent with applicable Act 250 precedents.

Respectfully,

Ed Stanak

Claim of Federal Preemption Over Act 250 Jurisdiction

Counsel for VAST asserts a claim of federal preemption over Act 250 jurisdiction with respect to the proposed Lamoille Valley Rail Trail construction of improvements pursuant to the provisions of the National Trails System Act ("Trails Act") as codified in 16 USC Chapter 27.

Over time, the former Environmental Board, the Vermont Supreme Court, the United States District Court in Vermont and the United States Court of Appeals for the Second Circuit, have had cause to consider claims of federal preemption over proposed developments that may have been subject to jurisdiction under Act 250.

In 1981, the Board first considered federal preemption claims in its Town of Springfield Hydroelectric Project decision (DR 111: January 19, 1981). That case involved a proposed hydroelectric generating project, along with several other improvements viewed as not being integral to a power generation project that was subject to licensing by the Federal Energy Regulatory Commission (FERC). In that case, the Board rejected an argument that it was barred from even considering the question of federal preemption. In response, the Board held that "we are obliged by §808 of the Administrative Procedure Act, as well as Act 250 and our own Rules to address the question of federal preemption when it is raised before us" (at page 3). The Board then went on to hold that "the existence of a federal program in a field does not automatically exclude concurrent state review of some or all of the activities in that field..." and that the corollary improvements in the proposed project were not "used and useful" in connection with the generation of electricity (at page 4).

The Board's decision in DR 111 was the subject of a collateral suit in the federal district court in Vermont. On appeal, the Court articulated "a three-pronged inquiry to ascertain the parameters of federal preemption: pervasiveness of the federal regulatory scheme, federal occupation of the field as necessitated by the need for uniformity, and serious danger of conflict between state laws and the administration of the federal program". Based upon an analysis of the specific facts and applicable statutory and regulatory provisions in the record before the Court, the Court held that federal preemption applied because of "the pervasiveness of the federal [FERC] scheme" and no component of the Springfield project was subject to Act 250 jurisdiction. [See Town of Springfield v. State of Vermont Environmental Board 421 F. Supp. 243 (1981)].

The Board also considered federal preemption in the matter of Green Mountain Power Corp. (DR 120: November 14, 1980). That case dealt with the construction of a proposed meteorological tower in the Green Mountain National Forest at an elevation above 2,500 feet. The project was to be built with federal funds and the federal Department of Energy had direct involvement and control over the research project. In its conclusions, the Board stated "our obligation to consider the claim [of federal preemption] within our normal procedure for determining declaratory ruling requests" (at page 3)* The Board held that preemption was clear based on the facts of the case -

* Although Declaratory Ruling 120 was docketed after Declaratory Ruling 111, Declaratory Ruling 120 was issued first and its holding is cited in Declaratory Ruling 111.

"a federal project to be located exclusively on federal land" with "no grant of concurrent state regulation" (at page 4). In dicta, the Board commented that it believed the federal agencies involved had the authority to exercise their jurisdiction concurrently with state agencies and that "...we must protest the implementation of federal energy programs in the State of Vermont without the full application of our environmental statutes and without the full participation of the citizens of Vermont as provided in those statutes" (at page 4).

In a later case - Burlington Broadcasters, Inc. (4C01004R-EB: August 8, 2003), involving a proposed telecommunications facility with Radio Frequency Radiation (RFR) issues and consideration of jurisdiction by the Federal Communications Commission (FCC), the Board affirmed the federal preemption of RFR standards relative to personal wireless services facilities concluding "But this is the extent of federal preemption" (at page 5) and established that claims to federal preemption are subject to narrow interpretation. The Board found "no binding legal authority" preempting jurisdiction under Act 250 with respect to the regulation of RFR resulting from other sources, such as radio broadcasting towers (at page 5).

The Vermont Supreme Court first first considered the doctrine of federal preemption in an Act 250 setting in Vermont Agency of Natural Resources vs. Duranleau ___ Vt. ___ (1992). This was an enforcement case brought with respect to a quarry commenced without benefit of a land use permit. Preemption was claimed under the federal Disaster Relief Act (42 USC 5150). The Court framed the preemption issue under the Supremacy Clause of the US Constitution (Article VI, §2) and stated:

> State law may run afoul of the Supremacy Clause in two ways: the law may regulate the federal government directly or discriminate against it, or the law may conflict with an affirmative command of Congress (at page ___).

Based upon the facts of that case and the specific federal statutory provisions, the Court concluded there was no conflict with federal law as the language of 42 USC 5121(b)(5) "expressly encourages the states to develop land use and construction regulations" (at page ___).

In 1995, the Supreme Court again considered federal preemption of Act 250 jurisdiction in In re Stokes Communications Corp. ___ Vt. ___ (1995). The case involved a telecommunications tower and the interface of Federal Aviation Administration (FAA) regulation of safety lights and criterion 8 of Act 250. The Court discussed circumstances when a claim of conflict between a federal agency's determination and Act 250 jurisdiction is "purely speculative". The Court found:

> State law is pre-empted to the extent that it actually conflicts with federal law...but there is no actual conflict where a collision between two regulatory schemes is not inevitable (at page __)

In Stokes the Court concluded that there "was no evidence that compliance with both regulatory

schemes would be impossible" and "Because there had been no showing of an inevitable collision between the Board's order and an FAA ruling, there is nothing to prevent the Board from imposing an otherwise lawful [permit] condition" (at page __)

The Court ruled in 1999 on another appeal involving the FAA in a case regarding an airport. In In re Commercial Airfield __ Vt. __ (1999), the Court explained "there are four ways in which federal law can preempt state law: explicit or implicit statutory language, actual conflict, or occupation of the field" (at page __). The Court noted that the appellant had argued that the federal regulations "pervasively and fully occupy the field of aviation, thereby preempting all state laws related to aviation" (at page __). The Court wrote that "the appropriate and narrower question is whether the federal government has fully occupied the field of land use as it relates to aircraft operation" (at page ___). Noting that the FAA regulation relative to airport construction or deactivation "does not relieve the proponent of responsibility for compliance with any local law, ordinance or regulation, or state or other federal regulation", the Court held that "these regulations demonstrate that environmental impact and land use compatibility are matters of local concern and will not be determined by the FAA" (at page __). The Court then affirmed the Environmental Board's conclusion [See Declaratory Ruling 368] that while the federal government preempted certain aspects of aircraft and airport operation, it did not preempt land use issues such as zoning and environmental review (at page __). The Vermont Supreme Court also commented that a case from the federal 9th circuit court relied upon by the appellant was an "unhelpful" "cursory review" of the preemption issue and declined to follow the 9th Circuit's holding (at page __)

The United States Court of Appeals for the Second Circuit adjudicated a case in 2005 that involved the federal preemption of Act 250 with respect to the jurisdiction of the federal Surface Transportation Board (STB) and its role in regulating rail carriers and the construction of related facilities. [Green Mountain Railroad Corporation v. State of Vermont 404 F. 3d 638 (April 14, 2005)]. This case involved review of a land use permit that had been issued by a District Commission for construction of improvements by a railroad corporation of railroad transloading facilities on lands owned by the railroad corporation. The decision first restated the fundamental tests of preemption, as had been recognized by the Vermont Supreme Court in its Commercial Airfield decision: when 1) preemptive intent is explicitly or 2) implicity contained in a federal statue, 3) state law actually conflicts with federal law or 4) federal law thoroughly occupies a legislative field. Applying the specific provisions of the federal Termination Act (49 USC 10101 et seq), statutory provisions vesting the STB with exclusive jurisdiction over "transportation by rail carriers" and construction of rail carrier facilities, the Court concluded Act 250 was "preempted for two reasons: (i) it "unduly interefere[s] with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or construct operations" and "(ii) it can be time-consuming allowing a local body to delay construction of railroad facilities almost indefinitely" (at page ___). In a summary statement, the Court wrote "the plain language of Section 10501 reflects clear congressional intent to preempt state and local regulation of integral rail facilities" (at page __).
Consistent with the holdings of the former Environmental Board in the Springfield and Green Mountain Power decisions, it appears that district coodinators are "obliged" to address a question

of federal preemption in the issuance of a Jurisdictional Opinion under Natural Resources Board Rule 3. Thus, the claim of VAST to preemption must be evaluated.

The Environmental Board consistently held, in its decisions concerning claims to exemptions from Act 250 jurisdiction, that the person claiming such an exemption has the burden of proving such an exemption and that the standard is a high one involving perhaps clear and convincing proof.

VAST relies on the provisions of 49 USC 10501(b)(2) to support its claim that the federal Surface Transportation Board (STB) has exclusive jurisdiction with respect to the proposed all season recreational trail to be situated within a railbanked corridor. 49 USC 10501(b)(2) reads:

> The jurisdiction of the Board over...the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks or facilities, even if the tracks are located, or intended to be located, entirely in one state...is exclusive.

VAST cites the United States Supreme Court's decision Preseault v ICC 494 US 1 (1990) in support of its argument for preemption under the statutory provisions governing the functions of the federal STB. As a case originating in Vermont, this case would have profound precedential impact if its facts and the applicable law squared with the LVRT facts and applicable law. However, Preseault is primarily a decision on an action to quiet title and perhaps also described as a "takings" case. While the decision includes references to some provisions of the National Trails System Act, they are read as passing references perhaps best classified as dicta

VAST also relies on the federal Second Circuit's Green Mountain Railroad Corporation decision. While that decision specifically addressed Act 250 jurisdiction over a proposal involving the exclusive jurisdiction of the STB, the facts of that case involved a railroad corporation proposing construction of improvements for railroad transloading facilities on lands owned by the railroad corporation. The facts of that case are distinguishable from the LVRT facts involving proposed construction of improvements by entities which are not railroads and not involving any proposed railroad facilities. The LVRT nonrailroad related development is merely proposed to be situated within a railroad right of way that has not been adjudged abandoned by the STB. It is not a proposal by a rail carrier and does not involve construction of any rail carrier facility.

16 USC Chapter 27 contains the statutory provisions of the National Trails System. Within that chapter is 16 USC 1247(d) upon which LVRT counsel also relies. This statutory provision applies to "interim uses of railroad rights of way". A parsing of the language in that statute reflects that Congress wanted the chairman of the STB (along with the secretaries of the Departments of Transportation and Interior) to encourage the establishment of the national trail system. The statute goes on to note the

> "furtherance of the national policy to preserve established railroad rights of way

> for future reactivation of rail service, to protect rail transportation corridors.." and that "...if such [trail] interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights of way for railroad purposes..." and.... "If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

The statutory provisions quoted above cannot be interpreted to prohibit jurisdiction by a state environmental regulatory program over the interim nonrailroad use. It would be a misreading of the law to suggest that Act 250 jurisdiction somehow implies, or is the equivalent of, a declaration of the abandonment of the railroad use of the corridor in the future if required by the national interest. And it is not reasonable to conclude that assertion of Act 250 jurisdiction will result, ipso facto, in undue interference with interstate commerce by denying any rail carrier the right to construct facilities or conduct operations and, secondly, that Act 250 review will delay construction of any railroad facilities almost indefinitely (See Green Mountain Railroad Corporation).

A readily available remedy for fears that Act 250 jurisdiction over the LVRT construction and use may somehow thwart a future railroad use of the corridor is a condition in any land use permit stating that jurisdiction under Act 250 over the rec trail improvements and its land use dissolves at such time as any railroad facility is proposed within the corridor.

To reiterate, the LVRT project does not involve either a project proposed by a railroad corporation or construction of improvements for a railroad facility.

VAST cites the two sole existing federal district court cases which have had cause to interpret the provisions of 16 USC 1247(d) with respect to the review under zoning regulatory programs of proposed recreational trail projects within railbanked corridors. Neither of those district courts include Vermont within their jurisdictional limits and neither case was taken to the relevant circuit court on appeal. We are left with the opinions of two federal judges in the states of Washington (Friends of the East Lake Sammamish Trail v City of Sammamish) and Idaho (Blendu v Friends of the Wessier River Trail, Inc) interpreting statutory provisions. It is submitted that while those cases cannot be merely disregarded, they are neverthless from distant jurisdictions and their interpretations of the law can be distinguished by a plain reading of the statutes, the Green Mountain case and the facts of the LVRT project.

In conclusion, in light of the available facts and the statutory provisions relied upon by VAST, federal preemption is not explicitly or implicitly contained in a federal statute. Secondly, there is

no conflict between the provisions of 10 V.S.A. Chapter 151 and the US code provisions cited by VAST. And finally, federal law does not thoroughly occupy the environmental regulation of impacts from the construction and use of a regional recreational trail.

[District 5 Environmental Coordinator Ed Stanak – 2009]

u:\docs\Federal preempt.wpd

Arthers, Elexandra

From: jamey <jfidel@vnrc.org>
Sent: Tuesday, September 5, 2017 5:20 PM
To: NRB - Comments
Subject: Comment regarding the Lamoille Valley Rail Trail
Attachments: VNRC Comments on Proposed LVRT Settlement .pdf

Please find the attached comments from VNRC regarding the proposed LVRT settlement agreement.

Please do not hesitate to contact me with any questions.

Best,

Jamey

Jamey Fidel
General Counsel/
Forest and Wildlife Program Director
Vermont Natural Resources Council
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VNRC Vermont Natural Resources Council

COMMON SENSE SOLUTIONS
FOR A CHANGING VERMONT

Diane B. Snelling, Chair
Natural Resources Board
Dewey Building
National Life Drive
Montpelier, Vermont 05620-3201

September 5, 2017

Dear Chair Snelling,

Please accept the following comments from Vermont Natural Resources Council (VNRC) regarding the Proposed Settlement Agreement Between Vermont Association of Snow Travelers (VAST) and the State of Vermont for Lamoille Valley Rail Trail (LVRT). Yesterday was a federal holiday and Natural Resources Board (NRB) General Counsel, Greg Boulbol, confirmed that it would be acceptable to file comments today.

VNRC believes the LVRT is a valuable recreational trail that should be built in Vermont, and VNRC appreciates the time and resources that it takes to develop a 93-mile trail. VNRC has never taken the position that the trail should not be built, but rather that Act 250 review has a role to play in reviewing and mitigating impacts that fall under Act 250 jurisdiction.

By way of background, VNRC invested a significant amount of time and resources representing Kate Scarlott, Rob McLeod and other landowners when VTrans and VAST appealed the Reconsidered Jurisdictional Opinion establishing Act 250 jurisdiction over the LVRT to the Environmental Court in 2009. VTrans and VAST withdrew their appeal on October 29, 2010, and Judge Wright approved the Appellants' withdrawal on the basis that "Appellants plan to apply for an Act 250 permit." *See* Entry Regarding Request, Vermont Superior Court, Environmental Division, Docket No. 208-10-09 (Nov. 1, 2010). VAST did apply for, and secure, a land use permit for Phase 1 of the LVRT in 2012.

Just recently, we learned about the proposed settlement agreement after reading VAST's press release on VT Digger dated August 3, 2017. VNRC is surprised and concerned that we were not notified of the proposed settlement, or the opportunity to comment, especially since we represented affected landowners during the appeal process of the JO that is now the subject of VAST's Petition for Declaratory Order to the Surface Transportation Board (Petition).

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Except for compliance with Permit #7C1321 "to the extent reasonably possible," the proposed settlement will extinguish Act 250 jurisdiction over Phase II and Phase III of the LVRT (2/3rds of a 93-mile trail), and any proposed amendments for work done in the LVRT right-of-way for the completed section of the LVRT. This is a serious concession being that the District Coordinators found that the LVRT should be subject to Act 250 review. While the coordinators acknowledged that a trail permit could not be denied because of the federal preemption concerns, certain impacts could be reviewed under the state's traditional police powers.

We have reviewed VAST's petition to the Surface Transportation Board (STB) and we believe VAST's reliance on the holding found in *Green Mountain Railroad Corporation v. Vermont*, 404 F.3d 638 (2005) does not support total preemption of Act 250 jurisdiction. The *Green Mountain* case addressed Act 250 jurisdiction over a railroad-related construction improvement proposed by a railroad corporation for railroad transloading facilities on lands owned by the railroad corporation. *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 639 (2d Cir. 2005).

VAST is correct in pointing out the Second Circuit found the pre-construction permitting requirements in Act 250 were preempted by the Termination Act under the aforementioned facts. However, it is important to note two key points: (1) the Termination Act contained an express preemption clause of which the Court heavily relied upon in its analysis, *Id.* at 641-43, and (2) the Court carved out a "traditional police powers" exception to the federal preemption argument. *Id.* at 643. The Court acknowledged the district court's observation, stating, "not all state and local regulations are preempted; local bodies retain certain police powers which protect public health and safety." *Id.* (*citing Green Mountain R.R. Corp.*, No. 01-CV-181, at *13 (D. Vt. Dec. 15, 2003). Moreover, the Court found "states and towns may exercise traditional police powers over the development of railroad property to the extent that:

> (1) the regulations protect public health and safety,
> (2) are settled and defined,
> (3) can be obeyed with reasonable certainty,
> (4) entail no extended or open-ended delays,
> (5) can be approved (or rejected) without the exercise of discretion on subjective questions." *Id.*

Among the list of state regulations that withstand preemption are "electrical, plumbing, and fire codes, *direct environmental regulations enacted for the protection of the public health and safety*, and other generally applicable, non-discriminatory regulations and permit requirements." *Id.* (emphasis added). As the District Coordinators founds in their original Jurisdiction Opinion, the Surface Transportation Board harmonizes with the Second Circuit's analysis in finding "a trail use must comply with State and local land use plans, zoning ordinances, and public health and safety legislation. . . Nothing in our Trails Act rules or procedures is intended to usurp the right of state, regional, and local entities to impose appropriate safety, land use, and zoning regulations on recreational trails." Jurisdictional Opinion #5-06, #6-005 (2009), #7-267, Lamoille Valley Rail Trail,

(June 1, 2009) at p. 16 *citing Iowa Southern R.R., Co.*, STB Decision, dated March 20, 1998, p. 10.

VAST acknowledges the STB's limitation of authority with regard to this point. VAST Petition for Declaratory Order, No. AB-444, (April 6, 201) at p. 13. VAST, however, argues that land use regulations such as Act 250 that frustrate the development of a trail through increased or significant delay are preempted. *Id.* at 13-14. VAST also claims that regulations that impose burdensome costs have been found to be preempted. *Id. citing Miami County Bd. Of Com'rs v. KanzaRail-Trails Conservancy, Inc.*, 255 P.3d 1186, 1201 (Kan. 2011). VAST cites the "need for endless amendments, the difficulty in tracking all improvements along the 93- mile Trail (119 miles once the Trail is connected to the Missisquoi Valley Rail Trail), the burden of giving notice to all adjoining landowners, the resulting delays, and the associated cost" to argue that Act 250 is frustrating the development of the trail. *Id.* at 14.

It is important to note that the case that VAST cities for the proposition that regulations that impose burdensome costs have been found to be preempted held that the "federal government has not traditionally regulated the sort of public health and safety issues that arise from use of a railroad right-of-way as a recreation trail" and "traditional public health and safety issues related to the use of recreational trails are not issues that are uniquely federal in nature." *Miami County Bd. Of Com'rs v. KanzaRail-Trails Conservancy, Inc.*, 255 P.3d 1186, 1199 (Kan. 2011). The Court also noted that "federal law is not sufficiently comprehensive nor the federal interest so dominant for us to find an intent to preempt state or local laws that regulate land use and health and safety issues related to the maintenance of a rail-trail." *Id.* The Court ended up disclosing that the "STB did not make findings regarding the expenses that are anticipated or a threshold where the total expenses would be deemed burdensome," and the Court ultimately found that a bond requirement did not create a conflict with the National Trails System Act. *Id.* at 1202.

Many of the VAST's assertions are based on speculative concerns that may or may not come to fruition, such as future project amendments being deemed major, or future potential appeals of decisions. VAST's petition acknowledges that all the permit amendments so far have been deemed minor projects, and the exhibits suggest that the projects have only required "limited adjoiner notification per District 5 staff." *Id.* at 9 and Exhibit 1.

We do not believe the NRB should absolve itself of Act 250 jurisdiction based on speculative concerns that are based on potential worst-case scenarios playing out in the future. While it may be true that Act 250 compliance, environmental permitting, and engineering have cost VAST a certain amount money, the project is a large expensive project, and it does not seem unreasonable that these expenses could equal 5-6% of the total $16 million project cost as forecasted by VAST in its petition. This kind of cost for environmental compliance should not equate to Act 250 being preempted by federal law.

It is our position that Act 250 may regulate the development of the LVRT project and its continued use within the purview of the state's "traditional police powers" and we do not understand how the NRB can absolve itself of this authority, especially when a project meets the statutory definition of development. Act 250 criteria involving such issues as the impact of water quality, safety, noise, and conformance with town and regional plans are exercises of regulatory authority the state maintains under its police powers, and we are concerned that the NRB is absolving itself of this authority through a settlement.

Furthermore, we are concerned that the NRB is signaling that Act 250 jurisdiction is something that can be negotiated away through settlement, especially when there is the specter of federal litigation. Future parties may look for leverage by claiming federal preemption, or may simply point to this settlement as an indication that accumulated, or some speculative future cost of Act 250 administration, should be negotiated.

We are sympathetic to the effort and level of fundraising that is required to build the LVRT, but we believe in the bedrock principle of applying Act 250 to projects that meet the definition of development - and complying with state regulation is a necessary part of project cost. Since we only learned about this settlement recently, we have not had time to fully understand the legal basis for agreeing to this settlement. We acknowledge that the NRB will maintain some level of Act 250 oversight by agreeing to this settlement, but we believe the settlement creates a slippery slope, and we wanted to register our serious concerns. Thank you for considering our comments.

Best,

Jamey Fidel,
General Counsel,
Vermont Natural Resources Council

Arthers, Elexandra

From: Alan M Robertson <pfalz@kingcon.com>
Sent: Sunday, September 3, 2017 1:38 PM
To: NRB - Comments
Subject: Comment regarding the Lamoille Valley Rail Trail
Attachments: Comments on the 2017 agreement.docx

Comments Attached

Alan M Robertson
Phone: 802.626.3590
E-mail: pfalz@kingcon.com
Sheffield, Vermont

RE: Conditional Agreement between NRB, VTRANS, and VAST:

While the consummation of this agreement will be welcome news to VAST and all Vermont trail users a quick review of the history and background behind this agreement brings home how broken the Act 250 process truly can be.

While VAST was granted by the Vermont legislature the right to develop the rail trail (the only trails organization in Vermont with the size and financial strength to tackle such a project), the reception VAST received from many of the parties involved in the permitting and development of the trail beginning in 2007 was less than pleasant. It quickly became evident that snowmobilers were not "politically correct" folks in Vermont and that the organization was to be treated as a pariah with respect to dealings with regulators, VTrans, and other organizations wishing to see the trail developed.

I came to the project as a volunteer; a retired federal engineer from New Hampshire with extensive experience in project development and construction, a hiker/biker/kayaker, and a snowmobiler, and was surprised at the negative reception that VAST seemed to attract. Early meetings with all the regulatory agencies seemed to be devoted to telling VAST what how hard the regulators would make it to build the trail.

In any case VAST followed the rules and complied will all requests and requirements for meetings, reviews, public meetings, FHWA processes, VTrans project development processes, and all permitting requirements.

VAST did have detractors and those included individuals in one of the involved district commissions, and some landowners who had issues with the local club's handling of local snowmobile trail issues. Also, one of the state's premier "environmental" organizations was to become involved.

In 2009 VAST was forced into the Act 250 process by one of the district commissions, and on 1 June was granted a Jurisdictional Opinion by the three district commissions involved that **it didn't need to go through Act 250**. That summer one disgruntled landowner along the trail began the process of seeking a reconsideration of the first JO and on 30 September of that year the first JO was reversed and VAST was told they needed an Act 250 permit for the project.

(It should also be noted that one of the three district commissioners involved in the reconsideration dissented and provided an opinion that the project could hardly qualify for a permit based on the nature of the repair and maintenance work to be accomplished and the lesser use of a trail as opposed to the potential reuse as a railroad as allowed by the federal Railbanking process)

Helping that landowner was an environmental organization that publically believes that all projects in Vermont should go through Act 250.... The impact of the Act 250 permitting process, involving lawyers, environmental specialists, and engineers hired by VAST, cost the project over $400,000, three years of progress, and almost destroyed VAST itself. That money was federal taxpayer funding along with VAST matching funding... The cloud created by the Act 250 process contributed to a poor public perception of the effort, and contributions to the trail never materialized. Both newspapers and other media treated VAST as if the trail would spoil the landscape and hurt all the abutting landowners...

The permit granted by the NRB was also only for phase I of a three phase project. The requirements in the permit include only the permits **already required** under the rules in place from the FHWA, for accepting federal funds, and VTrans, for their construction process. Based on the language in

the permit, and the "investigation" VAST would have to accomplish to construct the remaining two phases, the trail would never be finished- too much cost and time...

Jump to the present. Two portions of the three in phase I are complete and the public sees for itself what was accomplished. Gosh, it's really a great trail! Everybody's now excited and on-board and wants to see the trail completed! And it has virtually NO IMPACT on "development" in the state, or the more than 700 landowners along the route.

Actually, the trail did have several positive impacts for the state besides the economic potentials. Many abutters had abused their contact with the state land and had polluted, dumped, and built illegally. All of that is getting cleaned up. The repair of the ditches along the trail now allow the trail to help keep Vermont's adjacent streams cleaner as the ditches help remove silt and sediment from storm flows off farms and properties along the route. None of this information was allowed to be a mitigating factor in the Act 250 process.

So, my question is why, in 2009, the state didn't step in and ask the same questions it sees now on the questionable process that led VAST into Act 250. The STB arguments were around then, too.

In fact, the decision to force VAST into Act 250 had nothing to do with "development". It had to do with politics, ideology, and nimbyism. And until the state has a change to the Act 250 process which identifies when projects are being wrongly indicted the state will continue to lose good projects, tax revenue and credibility.

Alan M. Robertson, PE (ret)
LVRT Volunteer Engineer for VAST, 2007-2015

Arthers, Elexandra

From: Rob MacLeod <farmerteacher986@gmail.com>
Sent: Monday, September 4, 2017 5:54 PM
To: NRB - Comments
Subject: Comments from Rob MacLeod
Attachments: LVRT settlement response (1).pdf

Enclosed please find attachment which contains comments from Rob MacLeod regarding the proposed settlement agreement between the State of Vermont and VAST

Rob MacLeod
3881 Ward HIll Rd
East Hardwick, VT 05836
farmerteacher986@gmail.com

To Whom it May Concern,

This letter provides comments on the proposed settlement agreement between the State of Vermont (the state), the Natural Resources Board (NRB), the Agency of Transportation (VTRANS), and the Vermont Association of Snow Travelers (VAST) regarding Act 250 jurisdiction over the development of the Lamoille Valley Rail Trail.

I first need to establish some contextual details. I live in East Hardwick along a section of the trail designed as Phase Three. The LVRT runs 55 feet from my house and farmyard. The trail bisects my property, which abuts approximately ½ mile of the trail corridor. Additionally, the trail crosses Ward Hill Road directly in front of my house. Let the record clearly show that I support the development of the the LVRT and most of the projected uses of the trail. Along with Katherine Scarlott, I initiated the request for an ACT 250 jurisdictional opinion as a result of multiple failures on the part of VAST and the state to address legitimate concerns regarding snowmobile use of the trail in such close proximity to occupied dwellings.

I have experienced all manner of pedestrian, bicycle, and equestrian users of the trail. None of these have any negative impact on my ability to quietly enjoy my property. Indeed, they have afforded me numerous pleasant interactions with users of the trial. Snowmobile traffic, however, presents an entirely different experience. The noise level represents a significant trespass onto my property, especially at night. The fumes from the snowmobiles are also a significant irritant. These invade the entry shed of my house and all of my farm buildings.

I am aware that Ed Stanak has submitted a detailed response outlining technical issues with the proposed settlement. I wish to reinforce Ed's comments that some important and germane background information is omitted from the proposed settlement language. These details are essential to fully understanding the true nature of the development of the rail trail by VAST, their relationship with adjoining landowners, and why strong state oversight of VAST is critical. The proposed settlement agreement will remove substantive state oversight to the detriment of the rights of adjacent landowners.

Below are several significant background facts that relate to my experience with VAST and the LVRT:

For a number of years after VAST entered into agreement to develop the LVRT, the section of trail in front of my house was not used. Instead, the trail detoured over my property around my house. I did not ever deny VAST access to my land, rather they chose to close that trail rather than address my concerns about persistent trespass off the trail onto my property. I have notes of meetings with various VAST officials about my efforts to construct a new trail on other parts of my property that would have resolved my trespass concerns. VAST consistently rejected all efforts to resolve this issue. Along with Katherine Scarlott, I worked with state officials at every level, over the course of years, to resolve this issue. None of these efforts were successful. The funds to develop the trail to its current extent was the result of an earmark in the Federal budget by Senator Sanders. MacLeod and Scarlott worked with Senator Sanders office to draft a settlement agreement, to which I and several neighbors agreed. VAST refused to agree to the proposed settlement. This resulted in MacLeod and Scarlott filing the request for the ACT 250 jurisdictional opinion. During the March 29, 2012 hearing pursuant to #7C1321, professional expert witness evidence was presented that proved snowmobile use regularly exceeded state permitted noise levels. That the state chose to interpret this data in light of sustained noise impact criteria does not in any way refute the fact that snowmobile use of the trail creates significant noise problems for adjoining landowners.

In a footnote in his testimony Ed Stanak notes "VAST has a record of hostility toward the provisions of 10 VSA Chapter 151." I argue that the history of VAST's relations with adjacent landowners is proof of a hostility to working in good faith toward effective resolution of legitimate concerns regarding snowmobile use of the VRT. The only entity capable of assisting adjoining landowners in these matters is the state. This proposed settlement ensures that the state will play no role in defending the rights of citizens against the asserted privileges of a special interest. It is inconsistent with the history and character of Vermont for asserted privileges (motorized recreation) to trump clearly established Constitutional rights (quiet enjoyment of property).

The propose settlement agreement will also *directly* impact me by eliminating my right to due process. The terms of the District 7 ACT 250 permit specifically included language that there would be a hearing at such time as Phase 3 was constructed so that issues on which I was granted standing, but which were deferred because the section of trail in front of my house was not currently under construction, could be fairly

heard and decided. It seems to me that denial of due process in a legal proceeding is hardly Constitutional, or something which the State can, in good conscience, promote.

The manner in which the proposed settlement agreement was developed is an abrogation of Article 6 of the Vermont Constitution, cited below:

> Article 6th. **Officers servants of the people**
> That all power being originally inherent in and consequently derived from the people, therefore, all officers of government, whether legislative or executive, are their trustees and servants; and at all times, in a legal way, accountable to them.

The fact that no abutting landowner was consulted as part of the settlement negotiations, when they will be so directly impacted, and have registered protest to the specific use of snowmobiles over the course of many years, is entirely inconsistent with state officials acting as trustees and servants of the people. It is a matter of public record that curfew violations on the trail are an ongoing issue that neither VAST nor the state has ever effectively addressed.

It is my position that the State, NRB and VTRANS should not enter into the settlement agreement with VAST. The detrimental effects on adjacent landowners will be significant, and the proposed settlement will remove the possibility for them to achieve any genuine redress of grievances.

Sincerely,

Rob MacLeod