VCE's Comments and Observations on Vermont's PSB, ANR, and Act 250 permitting processes

VCE History and Experience

VCE has been working with citizens and towns in the regulatory arena in Vermont since 1999. Our experience is from the perspective of public participation.

We have been involved in "permit reform" discussions in 2001-02, 2003-04, 2005-06, 2007-08, and 2011-12 and actively participated in the proceedings of the Agency of Natural Resources (ANR)Restructuring Committee in 2005-06.

PSB case experience:

- 1999-2000, two power plants and two pipelines proposed for southwestern Vermont
- 2004, VELCO NRP
- 2009 to present – multiple cases for wind, biomass, and solar generation projects
- 2011-12, smart meter dockets
- 2012, tracking first instance of PSB hearing appeal of ANR permits

ANR experience working with the following Departments and Divisions on permits and impacts from proposed or operating projects:

- Department of Environmental Conservation (DEC): Air Pollution, Solid Waste, Hazardous Waste, Water Supply, Water Quality
- Fish and Wildlife
- Forests and Parks
- Department of Health (as relevant to ANR permits)

Act 250 District Commission experience:

- Representing or advising citizens in Districts 1, 2, 4, 8, and 9.
- In 2003 we held focus groups around the state with citizens who had participated in Local Zoning and Act 250 processes and appeals to the Environmental Board.
- Appeals of Act 250 permits to Environmental Court (now called Vermont Judiciary Environmental Division)

Our comments are organized by permit – first PSB, then ANR, then Act 250 and the Environmental Division. For each section, comments address the following issues:

a) Process
b) Standing
c) Coordination
d) The Filing Process
e) Participation by other Boards/RPCs
f) The Public Record
g) Expense
h) Enforcement
i) Result

1. Public Service Board (PSB)

a) Process

It is often said that the PSB's process to review applications for Certificates of Public Good (CPGs) under Section 248 is very legalistic. What that means in practice is that it is not possible for the public or towns to participate effectively without lawyers and experts. Formal discovery processes and standards of evidence apply. Field site visits and public hearings are held but decisions are made only on the basis of the formal, on-the-record technical hearings at the PSB. *Pro se* parties are allowed, but are rarely effective. Some attorneys have indicated to us that the PSB process is grueling and several have said they do not want to do any more PSB work. Unlike Act 250 District Commission hearings, VCE cannot represent citizens' interests before the PSB.

The timeline of a typical PSB CPG permitting case is very quick for parties other than the developer. Generally the developer has been working on their project for more than a year, preparing materials and hiring experts far in advance. For most projects, the permitting process gives a minimum of 45 days' notice to town select boards and planning commissions, but no notice to abutters is required until after the CPG application is filed with the PSB. Some net metering and met tower projects have even shorter notice requirements. In one case, a developer satisfied notice requirements by mailing a letter to a select board introducing himself and making very general comments about his plans.

This timing makes it difficult to near impossible for parties other than the developer to put on a full case in response to the application. At best, parties other than the developer will hire experts on a few issues, but not participate on all the issues before the Board.

Once the application is filed with the Board, a determination is made for its completeness. In recent years it has been rare for an application to be deemed incomplete. This is an issue that has been raised repeatedly and needs to be addressed, in the interests of fairness to Intervenors who are expected to respond to an incomplete application. Citizens have described the PSB as "coddling" developers by allowing them to submit applications over and over again, creating a "major problem" for other parties.

> *Example:* In the Derby wind turbine application, the PSB accepted and moved ahead with the application even though it did not contain a decommissioning plan or a post-construction noise monitoring plan, among other deficiencies. Intervenors are deprived of critical time necessary to hire their own experts to respond to the developer's studies, if an incomplete application is accepted and moved forward in the process.

Soon after the application is accepted as complete by the PSB, the Board holds a pre-hearing conference where abutters, people with interests affected, towns' select boards, and local and regional planning commissions need to be present. For towns and regional planning commissions that meet monthly or less frequently, the timing may mean that the pre-hearing conference will be held before they have had a chance to discuss it. Most local boards do not have staff, meaning citizen volunteers must make the time to participate in hearings during the work day in Montpelier.

In some CPG cases, the developer fails to notify all the abutters initially. Citizens who are challenging the project are often the ones who have to do the detail-oriented investigations to determine if all required parties have in fact been notified – not regulators or the PSB. Inadequate notice to abutters has been an issue in several recent renewable energy cases.

> *Examples:* Sheffield, and Seneca Mountain Wind (SMW), which is on its third round of attempting to correctly notify abutters.

These challenges to adequate notice unnecessarily create an adversarial, challenging tone from the very start of projects. A project that has been developed with active community engagement before the filing process begins would avoid these unnecessary stresses.

At the **pre-hearing conference**, a schedule for filing for party status is discussed and then a schedule is set for parties to apply to intervene. The scope of each party's intervention is prescribed (and limited) by the PSB.

In several cases, we have observed that the first round of discovery has occurred before people or entities that have applied for party status have been approved by the PSB. This needs to be changed in the interests of fairness to all parties. The process should not start until the parties and their scope of intervention have been decided by the PSB.

Once party status is decided, citizens and towns become immersed in a process that involves a lot of paperwork and time hiring lawyers and experts, raising money, and forming organizations. It becomes a full time job for citizens for many months or years, dealing with unwanted projects that divide communities. One project neighbor described it this way,

> …the neighborhood, friendships and families have been fractured. Because of stress from hundreds of hours taken off from work, the financial burden and tough decisions that have to be made....the sacrifice as *pro se* intervenors have made cannot be measured. We did not ask for this life, it was forced upon us.

There may be "rolling discovery" (as was the case for the Sheffield project—very expensive because the developer's attorneys kept asking more questions) but usually there are three rounds of discovery and prefiled testimony, rebuttal testimony, and surrebuttal testimony from technical experts. By comparison, Act 250 may occasionally use prefiled testimony at the District Commission level but usually uses direct, live testimony with live cross-examination.

Citizens quickly become by-standers devoted to raising hundreds of thousands of dollars as the lawyers and experts take the lead. Neighbors and people whose interests are affected work with a lawyer to prepare their prefiled testimony.

At some point early in their adjudication of a CPG application, the PSB holds a **site visit**. This term is misleading, at least with wind cases.

> *Example:* In the Lowell wind case, the ANR asked the PSB to go up on the mountain and see one of the met tower sites and the nearby wetlands. The PSB instead took a

> bus ride around the mountain. The three members of the Board never set foot on top of the Lowell Mountains where the construction would actually occur prior to issuing the CPG.

It was not until the site visit for the stormwater appeals, more than a year after the CPG was issued, that the Board did an actual site visit to the top of the mountain where the turbines were already being constructed.

The Board's **public hearing** is also a source of complaints from the public. Testimony offered in these setting does not become part of the hearing record upon which the decision must be based, meaning that the hearing literally has no legal role in the Board's decision-making process. Board members sit impassively at the front of the room making no comment while citizens speak, with no interaction or reaction.

There are also questions about fairness and consistency in how the public hearings are run.

> *Example:* The PSB held its public hearing in Lowell after parties had been decided. A selectman from Lowell (the Town of Lowell was a party) was allowed to speak at the public hearing. But when Ben Rose, representing the Green Mountain Club (GMC), stepped up to speak, he was sternly told by the Chair that GMC was a party and they would have their chance in the hearings. Ben objected and was still refused an opportunity to speak in public. Several of the citizens who were neighbors and parties wanted to speak but could not because of the Board's determination that only non-parties could speak at the public hearing. They were all told that "you will have your turn at the technical hearings."

Citizens now refer to the public hearings as a meaningless joke. Since they are not considered in the PSB decisions, the public has repeatedly indicated they do not feel that their voices are being heard or considered by the PSB.

The **technical hearings** come after a ruling has been made on party status, the site visit (such as it is), a public hearing has been held, and the three rounds of discovery and written testimony have occurred. In several cases, the project size and scope has been changed by the developer between the initial filing and the technical hearings, requiring more work and expense for the other parties.

An example is the UPC/First Wind Sheffield case. Initially, the project involved smaller wind turbines, some in Sheffield and some in Sutton. However, the towns of Barton and Sutton voted overwhelmingly to oppose the wind project, and Sutton already had a changed Town Plan to formally oppose industrial wind development. After the project application was filed and expert witness testimony was completed based on the initial design, UPC/First Wind redesigned the project, eliminating the turbines in Sutton and putting larger turbines just over the town line in Sheffield.

The change had a number of impacts, none good for the citizens or the neighboring town. The changes required a whole new round of analysis for other parties. Perhaps most

ironic, noise and visual impacts to Sutton and Barton if anything increased because the project was on the defining ridgeline for those now non-host towns.

The Sheffield project was redesigned many times after the original application was submitted and deemed complete by the PSB, including moving the substation from one watershed to another and extensively redesigning the road access system and turbine locations. This required the other parties to essentially start over in their analysis, and added an enormous amount of expense and stress.

In the end, though, it did not matter. Citizens spent huge amounts of money retaining lawyers and experts in order to participate "effectively" and then the PSB summarily dismissed their work, as they accepted the testimony of the developer's "experts" at face value. It was as if the intervenors had never participated.

The Board's legalistic process places no value on a **citizen's voice.** Hearing someone speak out – in their own words, tone, and sentiment – about the impacts of a project is different than reading their written comments. Citizens who are involved in a PSB process are led to believe that they will get "their day in court" – a chance to literally speak, and expand on whatever has been filed. They travel to attend a hearing, get time off from work, and spend hours preparing. But in most cases, they never get to speak, because no one cross-examines them. Citizen parties to the wind dockets have complained that no citizens have ever been cross-examined by the Board, state agency staff, or other parties, and as a result they say their voices are not being heard.

> *Example:* This short video from the Lowell technical hearings shows the public's frustration with the PSB's process https://vimeo.com/26499335 when a citizen broke the rules and asked the Board members questions.

The **Public Service Department's participation** in the large renewable energy cases has been limited and disappointing to the public, especially in the technical hearings where it is rare that a PSD attorney asks probing questions of witnesses. The public has also noted that politics appears to play a role in the PSD's involvement.

> *Example:* In the Lowell wind case, PSD initially testified (during the Douglas administration) that the project would not be in the public good based on its economic analysis. When the new administration came in, PSD's same expert changed his testimony and found the project would be in the public good based on the economic analysis, even though the economic analysis had not changed.

ANR's role in the technical hearings has also been problematic. ANR staff scientists had numerous issues with the UPC/First Wind Sheffield project and found undue adverse impacts during the technical hearings. Then ANR signed a Memorandum of Understanding (MOU) with First Wind that was accepted by the PSB after only 20 minutes were allowed for Intervenors' cross examination, eliminating further discussion of the ANR issues.

> *Example:* In the permitting process for the Green Mountain Power (GMP) Lowell project, ANR's staff scientists filed testimony indicating an undue adverse impact.

> Near the end of the technical hearings, ANR came into the PSB with an "in concept" MOU which contained few details. The PSB was asked to accept it, and they did.

In the presentations to the Siting Commission last month, VCE was left with the impression that the PSB does not just take the MOU at face value but does its own analysis. That is not what the experience has been in the Sheffield or Lowell wind projects where ANR came in with an MOU that was essentially accepted by the PSB as a done deal.

The Lowell wind case saw several instances of a **failure of due process**, especially on issues of wildlife habitat fragmentation and connectivity.

Because of the rushed and incomplete review of the ANR MOU, there was never an opportunity for parties to cross-examine ANR witnesses on the details during the technical hearings. Part of the MOU involved conservation easements to mitigate habitat fragmentation on lands leased by GMP on the western side of the mountain. After the CPG was granted, GMP notified the PSB that the landowner had done clearing along a road within the habitat fragmentation mitigation parcels. Parties asked the PSB to re-open the hearings to allow testimony on the damage done to the habitat fragmentation value of the conservation easements. In a split 2-1 decision, the PSB denied the request.

In his dissent, Board Member Burke acknowledged the economic and time considerations, but wrote, "that does not legitimize the abrogation of the parties' constitutional rights." The Vermont Supreme Court grappled with the issue and sided with the PSB, but their decision left open the possibility of a *certiorari* petition to the U.S. Supreme Court on the due process issue.

The **determination of substantive issues after a CPG has been granted** has also been a major issue in wind cases.

One example from the Lowell wind case involved the PSB's determination (opposed by the Towns and Lowell Mountains Group) allowing GMP to finalize the habitat connectivity easements by the end of 2011 rather than prior to commencement of construction as the PSB originally required in the CPG. GMP argued for more time and, as with everything in the PSB's rulings on the Lowell Wind case, the PSB agreed with GMP and reversed itself and modified the CPG to allow the habitat connectivity easements to be finalized after the commencement of construction. GMP provided minimal evidence of its finalized easements by the deadline, and the Towns had to press to get actual maps showing the details.

When the details were finally known, the parties were surprised to find that there was a mile gap between the Lowell wind project and the parcels that GMP secured to mitigate the loss of habitat connectivity. The PSB clearly stated that the limited hearings on the habitat connectivity easements would cover only the mitigation parcels themselves, and would not allow testimony on the connectivity of the area. This meant that there was never any testimony before the PSB about the overall habitat connectivity from south to north. There is a mile-long gap between parcels south of the Lowell project that were secured to address habitat connectivity and the Lowell Mountain Wind project which has numerous roads on the western side that are deterrents to wildlife movement. The eastern side of the

mountain is not conserved. The result is that habitat connectivity has not been secured along the Lowell Mountain range.

For Georgia Mountain, the issue of setbacks from neighboring property lines was not addressed until after the CPG was granted by the PSB. The CPG was issued in November 2010. The setback hearings were held March 2011 and an Order was released in June 2011. The Georgia Mountain site is very constrained and if the PSB had required turbines to be more than 200 feet from neighboring property lines, the project could not have been built.

The developer requested a setback of 188 feet, and brought in experts to testify that the request was safe based on a risk assessment analysis. The PSD submitted testimony advocating for what is the setback norm (where ice throw is not an issue) throughout the United States, which is 1.1x the total height of the wind turbine with blade extended. Neighbors participated with lawyers and experts in the hearings on the matter, and advocated for 1.5x the total height, which is the national norm for an appropriate setback for safety when there is potential for ice throw. That distance would have been at least 600 feet, far greater than 200 feet the developers not only requested but had to have. The PSB ignored the neighbors and PSD, and gave developers exactly what they wanted, setbacks of 188 feet for 400+ foot tall turbines.

Approval of ridiculously small setbacks was also an issue in the Lowell wind case, where the PSB approved a setback 196 feet from the neighboring property line. In both Georgia Mountain and Lowell wind, the small setbacks have resulted in flyrock being thrown onto neighboring property and neighbors in both areas have been served with Temporary Restraining Orders (TRO) and lawsuits to keep them off their own land for 1000 feet from the border while blasting was taking place. In the Lowell wind case, this meant that the neighbors were enjoined from being on 150 acres of their own property, which interfered with plans to harvest firewood.

In the Georgia Mountain wind case, more than a month before being served with the TRO and lawsuit, neighbors wrote to the PSB imploring them to address the flyrock being thrown and the threat it presented to neighbors and their livestock. The PSB took more than one month to respond, and neighbors were left to try to defend their property interests by physically being present on their land so that flyrock could not be thrown. This incident has resulted in enormous stress to neighbors who are being called "protesters" by being on their own property trying to stop the flyrock in the absence of any regulatory oversight.

Throughout their blasting and construction activities, the Georgia Mountain wind developer repeatedly denied flyrock was being thrown. After a site visit by PSD and the Department of Public Safety, it was determined without a doubt that flyrock was being thrown across property lines that was dangerous to public safety. A settlement between the wind developer and neighbors is currently being negotiated (by an attorney paid for by the wind company) after the PSB indicated it would take the issue of violations of the CPG seriously. The PSB's delay in responding to the neighbors' complaints gave the wind developer time to complete the blasting that was the subject of the complaint. In other

words, action was not taken until the dangerous activity in question had concluded, leaving neighbors at risk and wondering why regulators are not holding permit-holders accountable or protecting Vermonters.

In neither case did the PSB require the developers to prove that they had secured control or access to normal safety buffers for blasting. The wind developers assumed they could use 1000 feet of the neighbors' properties as blasting zones, without ever raising the issue of their right to take neighboring property.

The lack of a **definition of commencement of construction** has been an issue in several wind cases, including Georgia Mountain and SMW.

Post-CPG but before all conditions were met, neighbors of Georgia Mountain noticed tree clearing, road building and blasting were occurring on lands owned by the wind developer. A PSB hearing officer conducted one site visit, and later the full PSB conducted a second site visit. One of the PSB members commented to one of the neighbors that it was "clever" that the developer happened to be harvesting firewood in the area where portions of the wind project would require clearing. But the Board found that the landowner had a right to cut firewood, blast a road, and conduct other activities that the landowner claimed had nothing to with the wind development.

> *Example:* In the case of SMW, a very large road has been constructed through conserved land, purportedly for wood harvesting. The road appears to perfectly connect up two areas of land desired for wind turbines by SMW. We understand ANR is looking at developing standards for logging roads that would address the problem with "logging roads" that have been occurring on the mountains targeted for wind development.

The **legislature** has contributed to creating the poor process that neighbors have experienced where wind projects are concerned. Wind developers have pushed the legislature to streamline the permitting process in multiple and rather subtle ways. One result has been that developers can receive CPGs from the PSB without having identified specific models of turbines they are using, even though models can vary greatly in size and impacts. Wind developers have also sought "one stop shopping", and the legislature responded by moving appeals of ANR permits to the PSB instead of the Environmental Division, ironically over objections from the Board and with little support from the court.

Despite their oft-stated desire for "one stop shopping", developers have used a range of legal venues when it suited them.

In both Lowell and Georgia Mountain wind cases, rather than utilize the PSB's process of condemnation that is available to take a neighbors' property for a blasting zone and compensate the neighbors for the use of their property, the wind developers instead jumped to Superior Court to get TROs without any hearing or notification to neighbors, and filed lawsuits against neighbors in Superior Court.

Article 2 of **Vermont's Constitution** calls for compensating landowners when their properties are used for the public good. Developers have routinely ignored this requirement.

After the very public debacle involving the Nelsons in Lowell, GMP did seek condemnation of one parcel to the south, and paid money to that neighbor for use of the property as a blast zone.

The PSB says it has no role to play in property issues, despite having a condemnation process. The PSB enables the violation of Vermonters' property rights by issuing CPGs with inadequate setbacks, not requiring or even encouraging developers to go through the condemnation process, and telling neighbors to go to Superior Court if they want to protect their property rights.

The PSB's willingness to allow developers to make post-CPG changes to key aspects of projects, as enabled by the legislature, can be seen in their post-CPG decisions for the Lowell project.

GMP's application for a CPG identified two different types of wind turbines for possible use in the development. The largest was the Vestas v90, which are 443 feet tall. All of the aesthetic, noise, and economic testimony was based on wind turbines no taller than 443 feet, including viewshed analyses. Post-CPG, GMP came back to the PSB with a plan to instead use the Vestas v112 turbines, which are 459 feet tall. The Towns asked the PSB to re-open the hearings to consider the changes. The PSB denied the request, as they did with all but one request by the Towns.

The change in turbines resulted in a $20 million dollar increase in cost, which GMP said would be offset by an increased capacity factor that would result in more electricity being produced. No evidence was provided by GMP or required by the PSB to support that claim.

The difference in the height of the turbines was longer blades. Longer blades are well documented to increase low frequency noise (LFN). Noise had already been an issue in the Lowell wind case with the turbines that were considered in the technical hearings. The PSB's initial decision identified that the noise would likely exceed their standard in some portions of neighboring properties, such that they required GMP to come up with a plan to compensate neighbors if the neighbors can prove that the noise is exceeding the allowable noise levels on their properties.

Nevertheless, the PSB refused to allow further hearings to take testimony on the impacts of the increase in turbine height and blade length on noise and aesthetics or the overall economics of the project.

For three years, the legislature has refused to take up a siting and setback bill that was drafted in 2009 to look at appropriate distances from wind turbines to protect public health and safety.

Recent events indicate the legislature's refusal to take testimony on setbacks and the PSB's lax attitude were misplaced and clearly detrimental to the public interest.

> *Example:* Noise has already been "horrendous" for neighbors of the Lowell wind project, something that was predicted in testimony by two noise experts and one doctor who testified to the PSB on behalf of the Towns and the Lowell Mountains Group. Even the doctor who testified for GMP said that personally he would want lower noise standards than the PSB set in other cases (PSB standard is 45 dBA exterior Leq, the expert for GMP said 35 to 40 dBA exterior Leq would be his preference if a wind turbine was located near where he lived).

No process has been set up by any state agency to address the noise complaints and resulting public health issues that are already being experienced by Vermonters. The Vermont Department of Health has not engaged in the issue in any meaningful way. The PSB has accepted at face value the noise monitoring reports provided by the developer of the Sheffield project and has ignored (failed to respond at all to) the noise complaints filed by neighbors.

b) Standing

The PSB has been relatively good in granting party status to the public in renewable energy cases but has carefully limited their scope of intervention. The PSB has denied the public the opportunity to present evidence on energy cost/benefit issues, deferring instead entirely to the PSD (which seems to have forgotten about selecting the least cost option).

c) Coordination

The PSB has no "front door" for the public, and treats most attempts at interaction, even requests for information, as a formal legal activity. The PSB has a clerk and an assistant clerk who receive submissions and send out Board orders.

d) The Filing Process/Communications

The PSB is currently deciding between requiring paper filings or allowing electronic ones on a case by case basis. Some cases use digital filings, but they all require paper filings, too. The PSB often corresponds with the applicant via electronic media but corresponds with the intervening parties only via hard copy. There is substantial expense for Intervenors as they must mail paper copies to extensive "service lists" in order to comply with the PSB process.

> *Example:* In the Lowell case, a neighbor who was also an Intervenor observed blasting occurred after approved hours, and hand delivered a letter to the PSB noting the lack of compliance with the CPG. A day or so later, the Intervenor was notified by the Clerk of the Board that a hard copy of the complaint had to be mailed to all 27 parties.

This kind of requirement may be relatively easy for a law firm with many staff (and an expense account charged to their client), but presents significant and unequal burdens for citizen Intervenors.

VCE often recommends that neighbors find non-Intervenors to file a complaint as a public comment to the PSB, so they do not have to go through the ridiculous time and expense of mailing hard copies to all the parties.

e) Participation by town select boards and planning commissions and Regional Planning Commissions (RPCs)

Town and regional boards and commissions are not automatic parties and must petition to intervene. RPCs are expected to participate according to their governing statute. Towns participate by hiring lawyers and experts, either paid for by private citizen fundraising or at taxpayer expense. RPC executive directors have participated in VELCO NRP and Vermont Yankee cases in limited ways, usually involving asking questions at the technical hearings.

f) The Public Record

Until a few months ago, the various wind dockets have been on 3 different servers.

- East Haven: http://publicservice.vermont.gov/dockets/6911/
- Sheffield: http://www.state.vt.us/psb/document/7156upc/upc-main.htm and http://psb.vermont.gov/docketsandprojects/electric/7156 and http://psb.vermont.gov/docketsandprojects/electric/7156/ordersandmemos and http://www.sheffieldwind.com/sheffield/permitting.cfm
- Deerfield: http://www.state.vt.us/psb/document/7250Deerfield/deerfield-main.htm and http://psb.vermont.gov/docketsandprojects/electric/7250 and http://www.iberdrolarenewables.us/deerfield/index.html
- Georgia Mountain: http://www.state.vt.us/psb/document/7508GeorgiaMtn/7508_main.htm and http://psb.vermont.gov/docketsandprojects/electric/7508 and http://www.georgiamountainwind.com/permitting.htm
- Lowell: http://psb.vermont.gov/docketandprojects/electric/7628 and http://www.kingdomcommunitywind.com/home/section-248-permit-filing-for-wind-towers/ and http://energizevermont.org/2010/01/lowell-vt-green-mountain-power-kingdom-community-wind-information/

Sometime recently, the state eliminated the state.vt.us/psb server, so those documents are no longer available and are lost to the public. Additionally, First Wind has removed the Sheffield permitting documents from its site. It is no longer possible to review all the wind docket filings, and even when all the sites were up, they were incomplete. The PSB posts the initial filings by the applicants and sometimes posts the Intervenor's initial filings, but rebuttal and surrebuttal testimony is not usually posted by the PSB.

The PSB site also contains errors sometimes.

> *Example:* A search for the CPG for GMP's Vergennes NPS 100 turbine turned up nothing. It was listed as a solar project, not a wind project. The CPG was there, but only if you knew to look for solar, not wind.

For some months now, the PSB website's search function has contained this message:

> **Please note that we are experiencing technical difficulties with the search function. Currently, the search function does not work. The State is working on fixing this problem. We apologize for the inconvenience.**

Public hearings and the technical hearings are recorded by court reporters. In theory, the material is then available to the public. However, court reporters are fiercely protective of their work product, and retain ownership. Additional copies must be purchased which becomes very expensive for the hundreds of pages of hearing record. If one of their transcripts is posted on a website, reporters object and demand that it be removed. Therefore, the only public record that is freely available is at the PSB office, where the public can go and read the hard copy of the record. This is unacceptable in this era of digital recording technologies.

In essence, right now the PSB public record is not a public record at all, and is only really available to the lawyers who pay for the transcripts, and at great cost.

g) Expense

Average cost of participation in large cases at the PSB is well over $100,000 for citizens and towns.

Examples:

- VELCO NRP: numerous towns hired lawyers, some hired the same firm but were then double billed. Total cost was at least $700,000 for participation by the towns.
- Sheffield Wind: Town of Sutton and Ridge Protectors participated on numerous issues, total expense more than $700,000, not including appeals of stormwater permits to Environmental Court which cost more than $100,000.
- Lowell Wind: Towns of Albany and Craftsbury participated in a limited way because of limited resources, spent more than $150,000. Lowell Mountains Group hired attorney and experts, limited participation, spent more than $100,000. Energize Vermont appealed stormwater permits to the PSB, cost more than $100,000.

Towns do not have budgets or resources set aside for these purposes, so in most cases when the towns agree to participate, fundraising and paying for lawyers and experts is done by citizens, not through the town budgeting process.

The Town of Newark has just been sued over their town plan amendment process by a landowner who has leased land to Eolian Wind for the SMW project, so that town is going to be running up some very large legal fees, with nothing in the budget for them.

A Selectboard member from another small town being pushed to "host" a wind project puts these numbers in perspective:

> [T]he front loader is leaking from a front seal ….Our grader is over 22 years old and badly in need of replacement. The estimated figures for lease-to-buy deal for these two is around $40,000/year. And we don't have that. Add to that an as-yet-unknown amount for legal fees and it begins to appear likely that [our town] will not

be able to maintain our roads adequately. We just cannot expect to raise sufficient money from property taxes.

h) Enforcement

The PSB has no enforcement capabilities and does not perform compliance inspections. Experience shows that for large generation projects, post-CPG condition compliance has been impossible to enforce. The PSB appears to simply accept everything the developer reports at face value.

i) Result

VCE has been working with citizens and towns dealing with wind projects since 2009. In more than three years we have seen hundreds of thousands of dollars spent on participation in the PSB process. We have followed the legal processes and read the PSB's CPGs and post-certification determinations.

Without exception, the public and towns have been ignored. "It was as though we were not even there," is a phrase used repeatedly by neighbors and town officials. Another citizen observed that they invested "thousands of hours" to be a party in the PSB hearings, " with the outcome predetermined."

The PSB has ignored credible testimony from national and state experts on noise and health, birds and bats, appropriate distances from property lines for safety, appropriate distances from homes to protect public health, and has instead approved everything the wind developers have requested.

We have come to the point where we can no longer ethically advise citizens and towns to raise the money and hire the lawyers and experts to participate in a charade of a process that has proven to completely ignore all testimony except that provided by applicants.

2. Agency of Natural Resources (ANR)

a) Process

As a regulatory agency, ANR's primary purpose is to issue permits to applicants. The "customer" is the regulated community, not the public or the environment. This perspective is evidenced by the relatively limited public process that surrounds ANR's permits.

Since VCE began working on environmental issues in 1999, we have dealt with seven different ANR Secretaries. VCE's relationship with ANR changes depending on the administration and agency leadership. Our most positive experiences have involved collaboration with Agency staff about rule-making for solid waste and groundwater issues during the Douglas administration. Our least positive experiences have surrounded the stormwater permits issued for wind projects under the Shumlin administration.

VCE's primary mode of interaction with ANR is via the filing of **public records requests.** Because applicants often interact with ANR staff for months and even years prior to the public learning about a proposal, accessing public records enables us to get up to speed

quickly on the history of the interactions and the most recent status of the issues. However, once a developer files an application with the PSB, ANR then withholds documents related to those cases as a product of litigation.

Over the last 13+ years, we have observed that ANR staff are making fewer written reports.

> *Example:* While the Sheffield Wind project was under construction in 2011, we received regular DEC site inspection reports, which contained photos and written observations. When we began receiving those reports for the Lowell wind project in 2012, we noted that the reports no longer contained any written observations. It was at times impossible to understand the meaning and importance of photographs contained in the reports without knowing where it was taken or what it was showing, none of which was stated.

The quality of the response to public records requests changes depending on who is serving as General Counsel. We once waited more than six months for response to a public records request. While ANR is now mostly being responsive in a timely manner, the material that is being withheld has increased, and we do not automatically receive a letter itemizing and identifying the materials that are being withheld.

In one instance in the Lowell wind case, we were told that we would have to pay more than $1000 just for the redaction report. In general, the information we are receiving in response to our public records requests has declined in both quantity and quality.

In response to the relatively late notice that project neighbors receive to large projects that go through Act 250 and require ANR permits, about 10 years ago the legislature passed a **scoping process** that is still in statute: http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=03&Chapter=051&Section=02828. It is voluntary on the part of the applicant, and refers only to Act 250, but could be a **useful model** for renewable energy projects. It provides the opportunity for notice to municipalities, abutters, town and regional boards so that there is increased notice and ability to discuss the substantive issues well in advance of formal regulatory proceedings. Based on recent discussions with other environmental organizations and current ANR and Act 250 senior staff, this process has never been utilized.

In the normal course of permitting renewable energy projects that require ANR permits, developers and their experts meet repeatedly with ANR staff. ANR staff offer guidance to the developers on what they need to do to receive permits. Sometimes there is rigorous back and forth, sometimes not. Eventually the permits get issued. It appears that ANR never denies a permit.

At the first public hearing ANR held on the Lowell wind stormwater permits, the public asked if ANR had ever denied a stormwater permit, and the answer was "no". ANR also admitted during the Sheffield stormwater appeal hearings that ANR has never denied a permit.

Not all ANR permits require **public notice, public hearings**, or offer the opportunity for **public comments** and **ANR response to comments**. For those that do, it is increasingly viewed as a pro forma, meaningless exercise. Draft permits are issued after much consultation with the applicant and no public knowledge or input. A public hearing may include a presentation by the developer's expert, not ANR staff. ANR does not make itself available to the public's experts during the internal development of the permits. ANR legal counsel and staff attend public hearings to listen to public comment but not necessarily to respond.

There is never an opportunity for a member of the public or their hired expert to engage in a discussion or examine the decision-making that went into the draft permit prior to the issuance of that draft permit. The draft permit is essentially offered up as a fait accompli, with minimal opportunity for the public to have meaningful input after all the work that went into it behind closed doors. The public's experts can offer substantive written comment, but not engage in dialogue with ANR's staff (even though the developer's experts have had many hours of interactions with the same staff). After the permits are issued, ANR issues a response to public comment.

> *Example:* In the St. Albans Wal-Mart case where VNRC's counsel (now ANR's General Counsel) had to subpoena the stormwater expert in Environmental Court in order to be able to question him about the decisions that went into the issuance of the permit. Note this action took place in the appeal process, as only then was it possible to subpoena and question ANR staff.

Another example is in the Lowell wind stormwater permits, where the public's experts put on a presentation at the second ANR public hearing, and then filed extensive comments with ANR. They noted that up to nine headwater streams were going to be filled by the project. In its response to public comment, ANR simply noted that they disagreed that headwater streams would be filled. In VCE's work in the previous administration, had we had that kind of substantive difference of facts with ANR's draft permits, we would have had the opportunity to sit down with ANR staff and discuss it. Instead, ANR chose to dismiss comments from the public's experts and followed the developer's expert's desires, giving them everything they wanted.

During the construction of the Lowell wind project, we noted that the field reports identified headwater streams that were "being taken for the project", confirming that the public's experts had been correct.

Yet another example from Lowell of ANR's poor process is what happened when the landowner who GMP leased the land from cut trees and widened a road in the habitat fragmentation mitigation parcels. After GMP disclosed to the PSB that the landowner had conducted work on lands set aside with easements for habitat fragmentation mitigation, ANR deferred to GMP's "expert" to provide a report to the PSB. GMP's "expert" report was written by Jeff Nelson, a stormwater consultant who has no credentials in wildlife habitat or the impacts of habitat fragmentation.

The public provided the PSB with evidence contradicting what was reported by GMP (and supported by ANR). The PSB gave ANR 24 hours to submit evidence from their experts about the damage and whether it harmed the value of the parcels to fulfill their purposes of mitigating the fragmentation of wildlife habitat. Instead of providing sworn testimony in the form of affidavits, ANR's counsel wrote a two-page letter to the PSB paraphrasing phone conversations he had with two ANR experts.

Over the objections of parties, the PSB never required any sworn testimony from the experts, and accepted the phoned-in hearsay provided by ANR's counsel. It was this incident that led PSB member Burke to issue a dissenting opinion citing the abrogation of the public's constitutional rights (referenced on page 6, above).

ANR has avoided having a meaningful public component of the permit review process for far too long. With fewer notes and reasoning being written down, there is no administrative record to enable the public who may want to challenge the permits to understand what went into the decision-making process for issuing a permit. The first and only opportunity the public has to question ANR staff is through the appeal process, which is expensive and legalistic whether it is via the renewable energy appeal path to the PSB, or via the Vermont Judiciary Environmental Division.

ANR's permitting process necessitates appeals because it is closed to discussions with the public or their experts until after the permits are issued.

b) Standing for appeals

Party status for appealing permits has become an issue.

> *Example:* It is not clear who has standing to appeal the permit issued by ANR to First Wind to allow killing bats at the Sheffield wind site. Those appeals now go to the PSB. But they were not appealed because nobody could figure out how to show that they have interests that are distinct from the interests of the general public.

c) Coordination

ANR has no "front door" for the public. ANR has permit coordinators for applicants who are clearly identified. VCE has experience calling ANR staff who sound genuinely surprised that we called them directly. In general we do not contact staff, as it is obvious they do not feel comfortable speaking to members of the public. Therefore our relationships with ANR are almost entirely with agency lawyers who process our public records requests (which would often be unnecessary if communications with staff were more direct).

ANR has regional offices out of which watershed, wastewater, enforcement and other staff work. VCE has interacted with them in their jobs, usually on sites rather than in the office, but they do not seem to have any relevance in the current regulatory scheme.

d) Filing process

Citizens may file public comment by email or mail. ANR's responses come in the mail with a paper copy.

e) Participation by town select boards and planning commissions and Regional Planning Commissions

There is no requirement for standing to offer comments on ANR permits. Towns may offer comments on permits related to renewable energy projects. ANR permits are not reviewed by RPCs. Towns may appeal ANR permits to the PSB. The Towns of Albany and Craftsbury appealed ANR's stormwater permits for the Lowell Wind project, and that decision is currently before the PSB.

f) The Public Record

ANR's public records are sometimes only available for review by going to wherever they are located, after filing public records requests. In other cases, after making a public records request, ANR may provide hard copies by mail or digital files by email or on a CD or by posting them on a password-protected website.

Interaction with the staff actually responsible for creating the documents is rarely part of the public process. Many documents are withheld by ANR as work product for litigation during the PSB process, and are only made available after all appeals have run their course. For an example of what ANR does make available, ANR's Environmental Notice site http://www.anr.state.vt.us/dec/enb/cfm/viewenb.cfm shows only that an application has been submitted (type in Readsboro to see the status of the Deerfield Wind stormwater permits) but no further information is included; most notably the application documents are not available.

ANR's record is the least transparent of all the processes being reviewed by the energy siting commission

g) Expense

The primary expense in dealing with ANR is the charge for public records. The most VCE has ever paid is about $1300 for documents relating to outdoor wood boilers. We have declined to pursue public records requests for wind projects and the redacted material when we have been given rough estimates of "over $1000". The expense of getting public records from ANR has been prohibitive in wind cases.

Appealing ANR permits relating to renewable energy projects to the PSB is highly litigious. They follow the same process as a CPG application review process, requiring lawyers and experts, several rounds of discovery and prefiled testimony. The process is similar with non-renewable energy ANR permits, but instead goes to Vermont Judiciary Environmental Division, which is another dauntingly expensive process for citizens.

h) Enforcement

ANR's enforcement division was until recently best characterized as a "black hole". The public was not even allowed to know if a case was sent to enforcement. The public learned about the enforcement result only when it was noticed to Environmental Court. The legislature recently has improved the situation somewhat, so now there is notice and the opportunity for comment prior to the finalization of an enforcement action. It is not known if the public's input is being considered or is resulting in changes to the enforcement action.

VCE has provided comment on one enforcement action and saw no change as a result of our comment.

Vermonters do not have the right to bring citizens suits, and the Attorney General's office rarely brings enforcement actions against environmental violators.

VCE has brought what we considered to be serious violations of ANR permits related to renewable energy projects to the attention of ANR's enforcement division on several occasions. As far as we know, no actions have ever been taken. ANR's enforcement chief has told us they do not have the time or staff to get back to people who bring complaints to their attention to provide status reports.

> *Example:* There has been no rigorous follow-up to ensure the provisions of the Sheffield MOU – the "project mitigation" provisions – have been carried out. The land at issue was already in Current Use and the timber management plan was not changed as a result of the 2700 acres being designated as "project mitigation." The whole proposal appears to be a fig leaf to make the project acceptable to ANR.

i) Result

In the renewable energy cases VCE has observed for the last three-plus years, ANR has made closed door deals with developers with no public process or opportunity for input. ANR works for the developers and their experts, not the public or the environment.

3. Act 250 District Commission and Vermont Judiciary Environmental Division

a) Process

VCE's 2003 focus groups identified major problems with notification to adjoiners in local zoning permits, which was fixed in revisions to Chapter 117. Most of the major cases that were appealed stemmed from poor public notice for local zoning permits. Our focus groups also identified the universal support for the Act 250 District Commission process. Expense was an issue with large, contested cases, and inadequate preparation time was also a common problem, but members of the public who participated in our focus groups who had experience with the District Commission process all said it is by far the best public process in Vermont.

Because of regionally located offices and District Coordinators, Act 250 provides a human being for the public to call or go see in person. While coordinators may spend most of their time answering applicants' questions and meeting with applicants, they are just as accessible to members of the public.

Developers routinely make presentations on projects they are considering to the relevant RPCs in advance of filing for an Act 250 permit. As a result, informal conversations in the community often serve to get the word out about what may be coming to the regulatory process at some time in the future. It is still not possible for people whose interests are affected to prepare until an application is filed. Act 250 applications are publicized in newspapers and there is a good record of adjoiner notice. Act 250 is good at identifying stakeholders.

Once filed, Act 250 permit applications are reviewed by RPCs for compliance with the regional plan, and local commissioners have an opportunity to identify specific issues and offer comments to assist the Commission in its decision.

The original vision for Act 250 involving participation by a variety of state, regional and local parties has not worked (see graphic and discussion, p. 21, below), so it is not unusual for there to be no other party to an Act 250 proceeding except the applicant. Unless neighbors have issues with a project's design, impacts, scope or location, District Commissioners may only hear the applicant's presentation and have no other parties present to raise substantive questions. Unlike the PSB process which has both the PSD and ANR as statutory parties, Act 250 hearings lack a public advocate to assure that the process protects the public interest.

In recent years ANR has begun participating again in Act 250 hearings where its permits are involved. Over the last 12 years there have been permit reform discussions about improving the efficiency of ANR and Act 250 permits, with the goal of eliminating "two bites at the apple" as developers have called it. State statute currently allows for ANR permits to be brought into Act 250 for hearings. No change in the law is necessary to combine the two permitting processes. Doing so would give the public the missing opportunity to question ANR staff about the reasoning behind their decisions, and would address the developer's complaints about duplication of process.

Most Act 250 applications are now handled as Minor. Act 250 cases have public notice in newspapers and notice to abutters and interested parties. Some commissions hold only daytime hearings, others hold hearings at night. District Commissions hold site visits prior to the hearings, or on the day of a pre-hearing conference. Some hold a pre-hearing conference to take and rule on applications for party status. Others do the site visit, take applications for party status, and conduct the hearings all on the same day. Some allow anyone who took the time to attend the opportunity to ask questions. Others limit participation to parties.

At the hearings for the permit application itself, citizens can represent themselves, be represented by other citizens or advocates, or hire lawyers to represent their interests. Businesses can have their engineering firm or some other consulting firm present their project without using lawyers. In our experience, the Act 250 District Commission process works best when there are no lawyers.

After a hearing, it is common for the District Commission to issue a recess order giving all parties time to submit requested information or offer rebuttals to information presented at the hearings. After a decision is issued, parties can file a Motion to Alter requesting the Commission to reconsider some elements of their decision, and/or they can appeal the final decision to Vermont Judiciary's Environmental Division (formerly known as Environmental Court).

VCE has observed wide inconsistencies in process and quality of the different District Commissions throughout the state. More details are available upon request. Also, because

commissioners are political appointees, the decisions can reflect the goals of the administration.

Whether or not to use lawyers and experts in the District Commission process is something that we advise citizens to consider on a case by case basis. If there are not large areas of dispute, the District Commission is the best place to get a permit that is fair to all parties. Public input often results in changes to projects. However, in contested cases, the District Commissions can become a mini-courtroom at great expense. Citizens who have participated in major cases at the District Commission level complain they do not have time to get their case together.

Appeals to the Environmental Division require putting on the case *de novo* – that is, starting over. Developers argue this requirement is not fair to them, as they have to put on the same case twice. Citizens, however, often need the District Commission process to learn about large projects that are being proposed and understand what kind of expertise they need to hire (and pay for) and what issues may require legal assistance. Even if citizens know something is coming, developers' initial applications for an Act 250 permit can be relatively short on details, and sometimes the public has described it is like pulling teeth to get them to disclose information.

VCE advises parties to use a less formal process at the District Commission, enabling all parties to get the facts out on the table, see what more information might be needed, and to determine if there are substantive issues worthy of a contested case at the appeal level. VCE does not support one idea floated last year in the permit reform discussion that would require major contested cases to go through a more formal process on the state level, unless there is either Intervenor Funding or a Public Advocate so the public's interests can be represented without bankrupting the communities.

The Environmental Division has a requirement that when an appeal is filed with them, the parties must engage in mediation. VCE has assisted some citizens with the mediation process and found that it has been productive in only a few cases. The mediation requirement further stresses citizens attempting to participate *pro se*, as they are expected to pay for a portion of the mediator's expenses, and usually find they need to be represented by legal counsel to adequately protect their interests in mediation.

b) Standing

Over time, public participation has been limited so now it is people whose property interests are directly affected who are most likely to get party status and be able to appeal the decision. Getting standing in Act 250 is now a "hunt for adjoiners." If there are wildlife habitats threatened, it is difficult if not impossible for entities that advocate for non-humans to find a way to get party status, to protect bears or butterflies, for example.

Requests for party status in Act 250 have been routinely contested. Act 250 is the one permitting process in Vermont where the issue of standing has been fiercely contested, usually to the detriment of the public interest.

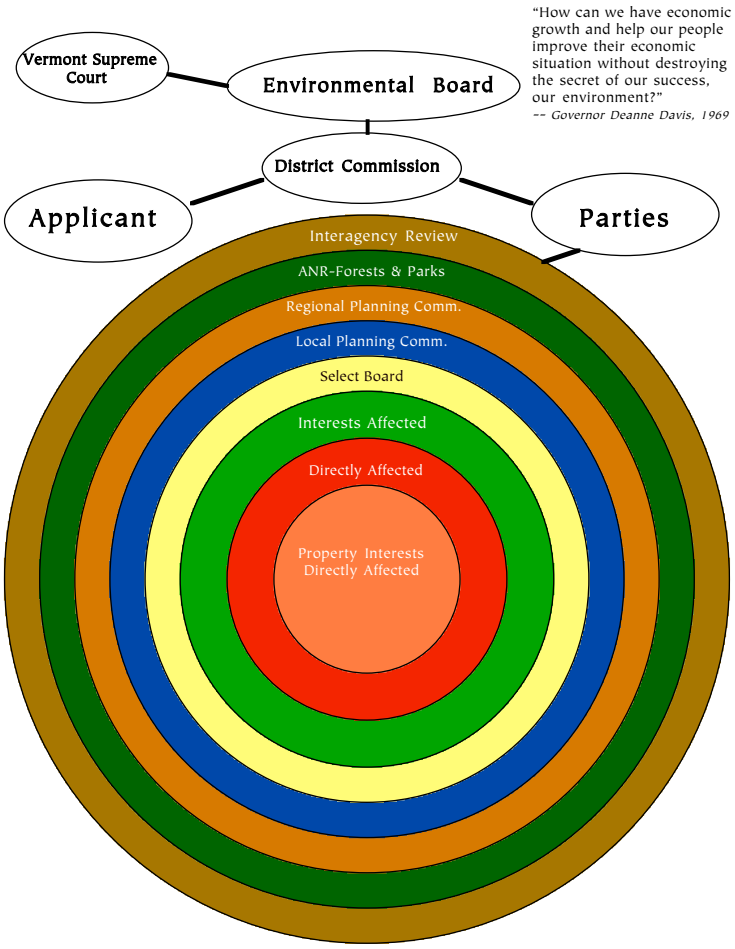
After objections over appeals by "materially assisting parties", the legislature changed the law to limit participation by environmental groups like VCE to "friends of the commission" which lacks appeal rights. The hurdle for participation was supposed to be liberal. However, the first time VCE sought party status as a friend of the commission, we were denied the opportunity to participate and provide the commission with factual information we had accumulated in other similar cases around the state.

c) Coordination
Act 250 has District Coordinators that are accessible to all parties and provide a front door for the public.

d) Filing process
Citizens can file digitally.

e) Participation by town select boards and planning commissions and Regional Planning Commissions
They are automatic parties to the process and do not need to petition to intervene. However, they generally do not have any funds to put into participation in a meaningful way.

Act 250 was initially intended to be a forum for participation by state, regional, local and direct interests. VCE created the graphic at the right about 10 years ago after reviewing the history of Act 250.



The Interagency Review process as been discontinued. ANR's participation is limited and usually does not include testimony by ANR staff scientists.

RPCs may weigh in with comments on specific applications, but choose not participate in hearings. Some RPCs do participate, others do not, or they might send a comment letter. RPCs are charged through statute at looking at cumulative impacts, but generally do not take that as far as testifying in Act 250. One example where RPCs are participating is in the current proposal for Killington's Master Plan, where three RPCs are participating on traffic. Local planning commissions and select

board participation has been limited due to limited resources by these volunteer boards. The burden of providing (and paying for) expert witness testimony usually falls to the neighbors whose interests are affected.

f) Public Records
Act 250's public records are available at their regional offices and are openly available to the public for inspection. Act 250 also has a relatively good online application database http://www.anr.state.vt.us/site/cfm/act250/index.cfm where the public can access project applications. District Commissioners now use digital recording devices so the audio record is available.

g) Expense
In major cases where applicants use lawyers and experts at the District Commission, the cost of participation can be high if citizens also choose to use lawyers and experts. In some cases it makes sense to go this route. In others it does not. Once a case is appealed to the Environmental Division, the issues of cost are similar to those with the PSB. Only people who can raise hundreds of thousands of dollars can afford to bring appeals.

> *Example:* The "Moretown Quarry" case shows the expense in an Act 250 case. The proposed development was contested first on the local level at a cost of about $40,000. The town board declined to issue a permit, but the developer continued and applied to Act 250 anyway, where it was again contested at an expense of about $70,000. Again the permit was denied. The developer appealed to the Environmental Division, where the case was hotly contested and legal expenses were likely more than $100,000 (VCE does not have the final number on that part of the case). The permit was again denied by the court.

h) Enforcement
Act 250 has at least one staff person dedicated to enforcement. It is not clear to VCE how effective Act 250's enforcement efforts are in practice. In theory, at least, Act 250 does have the ability to bring enforcement actions and respond to complaints from the public.

Act 250 has a definition of commencement of construction, unlike the PSB.

i) Result
Act 250 has the best public process for reviewing land use development proposals in the state, and is one that we recommend be used as a foundation for other permitting processes. It has a coordinator, automatic standing for town and regional boards and commissions, effective abutter notice provisions, access to public records, and enforcement.

Expense is a major issue in contested cases requiring lawyers and experts, especially at the appeal level.