The Erosion of Vermont’s Act 250
by Ed Stanak

While attention has been focused over the last few years on the problematic reviews of utility projects by the Vermont Public Service Board (now Public Utility Commission), serious erosion has occurred in the fair and effective administration of Vermont’s workhorse land use control and environmental protection administrative process known as Act 250.

Enacted in 1969, the regionally administered Act 250 program became well known and respected for ensuring quality development and subdivision of land in the Green Mountains, protecting finite natural resources and providing forums where residents were able to participate in a meaningful way in the evaluation of projects and their impacts. The program was overseen by a nine member Environmental Board that established policy through appellate case precedents and strictly enforced violations of the law and permit conditions.

In 2004 the Vermont legislature, responding to allegations of unreasonable delays in the processing of applications and obstruction tactics by citizens who were parties to proceedings before the district commissions, enacted “permit reform” which replaced the Environmental Board with a Natural Resources Board (NRB) and transferred appeals to the Superior Court. Thus began the slow but steady transformation of Act 250 from a fact-based assessment of impacts to a labyrinth of legal procedure which has discouraged public participation and worn away the standards of quality control created during the initial 30 years of the program’s administration.

In 2017 the legislature established a study commission which will report back to the general assembly by 2019 with recommendations for the enhancement of Act 250 for the 21st century. (see p. 7) Citizen activists have begun to gather data and case studies to present to the study commission about the weakened administration of Act 250 along with suggestions on how to renew the original strengths and successes of the program. Here are some examples of the detrimental effects of the 2004 legislation and the role of the NRB:

* The NRB has largely consisted of individuals who have had little, if any, prior experience in the administration of Act 250. Most have never attended a district commission hearing. It has failed to adopt transparent policies or promulgate rules to guide its role as a party to appeals of coordinator jurisdictional determinations and district commission substantive decisions.

* Act 250 jurisdiction over different categories of development and land subdivision has been whittled away by incremental legislative amendments without verification by the NRB that intended beneficial results have been accomplished and what unintended adverse results may have occurred.

* The NRB has repeatedly misused settlement agreements as a means to “resolve” violations and appeals often without any evidentiary basis and undercutting decisions of coordinators and commissions. The Superior Court has failed to meet its responsibility to conduct an independent inquiry of whether settlement agreements between developers and the NRB uphold the values sought to be protected under the Act 250 environmental criteria.

* Enforcement of the law is uneven at best. Disproportionate financial penalties are imposed on small scale violators. In some instances, the NRB has turned a blind eye to large scale violators on a premise that enforcement is contrary to “economic growth”. Act 250 has only one enforcement officer whose caseload is consistently greater than 50 open cases.

* The NRB has not provided adequate ongoing training of staff and commissions. The result has been the loss of a collective institutional memory as staff retires and the terms of commission members expire. Supervisory authority over local support staff has been eliminated and transferred to the NRB. Emphasis has shifted to recordkeeping: i.e. processing times for applications. In the past two years, four coordinators have retired or quit, and one new hire has been made. Coordinators have been assigned to handle multiple districts.

* The NRB has undermined public participation in Act 250 proceedings. Citizens are overwhelmed by process and discouraged due to the increasing perception that it is necessary to retain legal counsel in order to raise concerns as parties.

So what is to be done? (continued on page 6)
Message from the Director

VCE’s Executive Director Annette Smith speaks to reporters at a press conference in the Statehouse in October.

For VCE, much of 2017 has been dominated by the Public Utility Commission’s development of rules for wind turbine noise. The second half of the year required us to testify twice before LCAR (see p. 6), leading to our first ever Public Records Act request of legislators. We did not know legislators were required to respond to PRA requests, so it was a new experience and one that we did not do lightly as we viewed it as an extreme circumstance.

The responses we got confirmed that David Blittersdorf continues to hold great sway over legislators as he claimed to them that the proposed rule would be a impediment to future wind development in Vermont. He told Sen. Ginny Lyons in a text message, “I have 3 Community Wind projects in various stages of development in VT. They meet the existing 45 dBA rules but will fail the horrible new rule. I will lose over $1m in development cost to date. I will also need to build the $50m in turbines in MA, RI and NY. Wind in VT will be stopped completely.”

While the wind industry did not succeed in their goal of establishing 45 dBA as the standard, they did succeed in gutting the rule. Meanwhile, Blittersdorf’s front people indicated recently that he intends to file for the Irasburg/Lowell wind project any day now. Apparently the death of wind in Vermont was all bluff on his part.

It would be nice to think we have made some progress on this topic in the 8 1/2 years VCE has been working on the problems with noise from wind turbines. The reality is we have not gained much. But public opinion is changing, Governor Scott understands, and we will continue with our educational and investigative efforts to bring justice to neighbors, not just with wind turbines but all the areas VCE has been working for 18 years. Thank you for your continuing support of this unique organization. Annette

Problems with Solar (Developers)

Solar energy is currently the best renewable technology for Vermont, with the potential to power our communities in a new energy paradigm using batteries and back-up small generators in micro-grids or off-grid.

Under Gov. Shumlin, that potential was squandered by his support for building everything everywhere, and in particular by opening the doors to solar developers for whom it is all about the money, while claiming to save the planet.

VCE has been consulting with neighbors of two problematic developers’ projects, Allco/Écos Energy and groSolar, each of which are proposing poorly sited projects.

In the “you can’t make this up” category, Allco’s Chelsea Solar project in Bennington, which is the only solar project denied by the PUC until recently, has been allowed to resubmit an amended application for the same 2 MW project at the same site. Apple Hill Solar, the contiguous 2 MW project, has also been given more opportunity for discovery and hearing by the PUC. Both project plans have reduced the amount of forest to be cleared, however taken together they violate the town plan’s restriction of no more than 10 acres. Allco’s owners, a father/son lawyer team from NYC, have served Public Records requests on all Bennington Select Board and Planning Commission members and one legislator, and is making demands on the neighboring homeowner’s association after they recently moved to intervene.

groSolar’s Orchard Road Solar is high up on a north facing hillside (below tent in photo, right) in Middletown Springs. Neighbors participated in the PUC process at great expense and await a Proposal for Decision. The power contract is for Goddard College.

Both of these solar projects represent lost opportunities to serve Vermont communities with renewable energy.

Green Blindness and VCE’s Focus on Global Environmental Health

by John Brabant, Regulatory Affairs Director

In Vermont and elsewhere in the United States, environmental organizations have been focused on ratcheting up legal protections against disposal of industrial waste products from factories, coal plants and mining operations.

A first order priority here in the states needs to bring attention to the plight of communities and the environment in far flung places such as China where dumping and environmental pollution is taking place on a massive scale. Our environmental community is turning a blind eye, as if we are somehow not part of the same global environment.

The problems being faced by China are the direct result of consumer demand for many of the technologies that have been labeled by Vt. and U.S. environmental organizations as green.

The manufacture and widespread use of chemicals used in the production of Teflon and PTFE has been largely banned in the U.S. due to their high toxicity at extremely low levels. This has resulted in the relocation of this industry to China, where upwards of 96% of these toxic chemicals are now manufactured with few if any safeguards regarding their handling and disposal. A number of these chemical compounds are utilized in large quantities during the manufacture of Chinese wind turbines that are then exported to the U.S. and Vermont. Wastes from the mining of rare earth and other minerals critical to the manufacture of wind turbines, solar panels, and electric vehicles have devastated vast areas of farmland and polluted lakes, rivers and drinking water sources in China’s Inner Mongolia region.

Efforts to bring this issue to the attention of Vt.’s mainstream environmental organizations as they blindly promote green technologies claimed as key to resolving our climate carbon dilemma have been met with outright avoidance. The renewable technologies they promote as “green” are anything but.

So what can we do? VCE will be working to promote a policy discussion statewide to educate the Vermont public regarding the dirty secret behind the manufacture of renewable technologies.

VCE will be working to develop a program for vetting renewable technologies and the companies installing them for their “greenness” and respect of worker and human rights. In other words, how these technologies are manufactured and the sources of the raw materials from which they are manufactured together with how they are transported and installed will be investigated with an eye toward rating various manufacturers of these technologies.
United States

**Swanton Wind Winds Down**

Residents of Swanton, St. Albans and Fairfield got an unexpected early Christmas present when, on November 27, 2017, Swanton Wind, LLC filed with the PUC a notice of withdrawal and voluntary dismissal, withdrawing its petition to erect seven 500 foot tall wind turbines on a low elevation ridgeline in known as Rocky Ridge.

Developers Travis and Ashley Belisle, their attorneys Leslie Cadwell, Anthony Iarappino and VERA consultants Martha Staskus and John Zimmerman spent more than a year lobbying for their project and then filed the petition with the PUC in September 2016. More than 60 parties intervened in opposition. About 1000 discovery questions were asked and answered. In June 2017, DPS filed a motion pointing out that some of the prefiled testimony was inadequate to fulfill the criteria of Section 248, which led to the PUC’s June 22 order staying the proceeding until Swanton Wind submitted a Final System Impact Study (SIS) with the PUC. SIS’s are conducted by ISO-NE and can take 10 months or more to complete.

Swanton Wind did not have a power purchase agreement at the time the project was withdrawn. It had bid into the Request for Proposals issued by Connecticut and Massachusetts and had succeeded in getting a contract to sell the Renewable Energy Credits to Connecticut. The results of the Mass. bid process will be released in January. The announcement that the project is being withdrawn was made by a new employee at VERA, Nick Charyk, who previously worked for the Planned Parenthood PAC and Matt Dunne’s gubernatorial campaign in the last election. None of the people mentioned above who have been out in front publicly promoting the project have said anything in public since the announcement the project was withdrawn.

The spin put on the withdrawal places blame on a hostile political climate and federal and state tax policies, however it is more likely that the System Impact Study identified an expensive transmission line upgrade would be needed, or perhaps it just cost too much to do the study. Other wind projects have been pulled after finding the cost of interconnection would be too high, as happened with Seneca Mountain Wind when they learned the cost of upgrading the transmission line would be $86 million. However, that project had not yet filed with the PUC. It was Swanton Wind’s choice to move forward with its petition without having completed the work necessary to determine whether expensive transmission line upgrades would be needed. The vindustry made a big mistake with Swanton Wind, igniting huge opposition. Congratulations!

**UPDATE ON WIND PROJECTS IN VERMONT**

*Sheffield Wind* has new owners, Brookfield Renewable Partners (BRP), which also owns “Granite Reliable” wind in Coos County, New Hampshire. BRP is a subsidiary of Brookfield Asset Management, Inc., a global alternative asset manager with approximately $250 billion of assets under management, focusing on the real asset sectors of property, renewable energy, and infrastructure.

*GMP’s Lowell Wind* project’s stormwater system continues to show signs of failure, with new stream channels cutting deeper into the soil and down the mountain, >unmitigated toxic iron floc< and changes to water flows.

Avangrid/Iberdrola’s *Deerfield Wind* is alleged by a neighbor to have damaged his home due to blasting for the wind turbine project. The PUC has opened an investigation.

Travis Belisle’s *Swanton Met Tower* erected without a CPG is winding its way through a long two+ year process at the PUC. DPS recommended a $15,000 fine. The Hearing Officer recently issued a decision recommending a $10,000 fine. A final decision from the full Commission will come after parties file comments and possibly engage in oral argument.

Blittersdorf’s *Georgia Mountain Wind* has been fined $7500 by the PUC for violating its winter operating protocol by running the wind turbines under icing conditions twice. A third complaint is under investigation.

Blittersdorf’s *Irasburg/Lowell Wind* submitted a petition to the PUC that was rejected as incomplete. Blittersdorf’s project managers at VERA, Martha Staskus and Nick Charyk, have indicated in meetings with the Lowell Select Board the intention to re-file for two 2.5 MW wind turbines to be located in Lowell in the near future.

Blittersdorf’s *Met Tower* erected without a CPG at his cabin in Irasburg is still in the investigation phase.

Blittersdorf’s *Small Net-Metered Turbines* at his cabin in Irasburg have been voluntarily removed. The investigation into violations are pending before the PUC. The two turbines were found to have been erected hundreds of feet from where the application indicated, and the application misleadingly stated that there were no homes within a mile. There are many homes within a mile.
Wind Energy Development on USFS Land in Readsboro and Searsburg is Mountaintop Quarrying

**Blasts of 11,000 and up to 23,000 pounds were used on the two ridgelines that are critical bear habitat next to the George D. Aiken Wilderness**

VCE Board President and Artist Steve Halford Speaks the Truth
Avangrid/Iberdrola’s Deerfield Wind Project Gets Ready to Roar

The Green Mountain National Forest got a New Superhighway for Trucks Carrying Loads of more than 200,000 pounds to Elevations above 3000 feet

The Bears Got a New Bridge

Avangrid/Iberdrola’s Deerfield Wind Project Gets Ready to Roar
Wind Turbine Noise Rule

Vermonters with an interest in the standards used to regulate wind turbine noise have been put through a surreal year-long process that resulted in a draft rule that got it right and an end result that may be worse than the previous standards used by the PUC in a case by case basis; or it may be better. Nobody knows. Time will tell.

What we do know is the windustry has a powerful hold on legislators who have spent more than a decade catering to the interests of the windustry while ignoring or ridiculing the interests of the people who have to live around the huge noisy machines. (see http://gatehousenews.com/windfarms)

Why it might be worse? The prior standard, in place for Sheffield, Georgia Mountain and Lowell, set an interior standard of 30 dBA averaged over an hour (windows open and closed in all four seasons) and an exterior standard of 45 dBA averaged over an hour. The final rule establishes a nighttime standard of 39 dBA measured 100 feet from the home and a daytime standard of 42 dBA. The standard still involves averaging using a complicated formula and a “binning” method that only acousticians seem to understand. We know from testing done at the Brouha home in Sheffield that the home only attenuates 1 - 3 dBA from inside to outside with windows open, yet the PUC persuaded itself that the home and the 100 foot distance would reduce sound levels 9 dBA. The prior 30 dBA interior standard is arguably more protective, if enforced, which has not happened so far.

Why it might be better? The PUC believes that the new pre-construction modeling and post-construction monitoring requirements will result in better planned projects that more accurately predict the final noise levels and will prevent applicants from filing for projects that cannot meet the new standards. VCE is skeptical.

What it should have been? Wind turbine noise is complex and several courts, including most recently an Australian appeals tribunal, find that dBA is not relevant to regulating wind turbine noise. The PUC’s draft rule set the nighttime standard at 35 dBA plus a 10x total height setback. Those two pieces combined would have resulted in far greater protections to Vermonters, and the 35 dBA nighttime standard is an acceptable proxy for the lower frequencies that the PUC refuses to regulate and are more problematic for neighbors.

What the PUC got wrong? The rule continues to place neighbors in the role of enforcers, requiring them to file complaints to DPS and the PUC. This is the system that has not worked in the past. People need to sleep, yet the PUC’s rule requires neighbors to wait days, weeks, months and even years for the complaint process to run its course. So far only one noise complaint has been taken up and resolved, and the resolution was “no action” because of a .5 dBA difference in what the model identified. One other complaint is still being heard at the PUC, at a cost so far to the neighbor of more than $300,000. Why bother complaining?

What is missing from the rule? The rule does not set standards for property boundaries, seasonal residences, low frequencies, or amplitude modulation. It should require real time continuous sound monitoring for the life of the project to remove the neighbors from the role of enforcers.

The Erosion of Vermont’s Act 250 (cont’d. from p. 1)

The NRB should be replaced with a suitable entity along with the return of appellate reviews from the Superior Court — case studies will show that appeals to the Court have substantially increased the time for issuance of final decisions and have emphasized issuance of permits with conditions rather than strict adherence to the environmental criteria and Environmental Board precedents.

Resistance must be built against efforts to repeal some Act 250 criteria in favor of yielding reviews to other state agencies and municipal panels; the criteria must be strengthened to include specific considerations of project effects in light of climate change. Public participation must be encouraged through amendments to relevant statutory and regulatory provisions concurrent with a well-planned effort for public education about Act 250 in the curricula of the state’s secondary and post-secondary institutions as well as through the media.

Ed Stanak was the District 3 Act 250 Coordinator from 1980 through 2011
**Act 250 Gets a Checkup, by Bruce Post**

Had septic waste not been flowing down a Wilmington, Vermont, hillside in June, 1969, I might not be writing this story, Act 250 might not have been born. But it flowed, I am and Act 250 exists.

While it might seem inelegant to open with effluent, that's exactly how the idea for Vermont’s long-standing land use law got started: on a hastily-built sub-division road in Windham County. Then, Vermont's new — and the nation's oldest — Governor told his driver to stop. Deane Davis stepped out of his car, took one look and, in shock and dismay, said, “Look at that house. Where is its sewerage going? It’s on a hillside! And there’s another house right below it. Where do they get their water? How does the school bus get up here?” Legal historian Paul Gillies calls this “our creation myth.” Out of the chaos of second-home fever in the Deerfield Valley, Governor Davis and others brought order to the land and “turned back a wave of unwelcome, unplanned subdivision development just in time.” If only it were that simple.

Now, nearly fifty years later, Act 250 has gone in for a midlife tune-up, poked and prodded by the “Commission on Act 250: the Next 50 Years,” which is tasked with “ensuring that, over the next 50 years, Act 250 supports Vermont’s economic, environmental, and land use planning goals.” Sometime next spring, the Commission will take its show on the road and ask what you think. Therefore, this little primer.

Rep. Amy Sheldon of East Middlebury chairs the Commission, and its six members, all legislators, are equally divided between the House and the Senate. Act 47, the establishing legislation, stipulates the criteria for naming fifteen advisors to help guide the Commission. As of this writing, the Commission has held four meetings. In this initial phase, the Commission members have been going to school, being briefed on Act 250’s history and its procedural, decision-making and judicial framework and beginning to identify major issues. At its December meeting, the Commission planned the second phase of its work: listening to Vermonters once the Legislature is adjourned. The final phase — deliberation and report preparation — has as its ultimate goal the submission of the Commission’s report and recommendations to the appropriate legislative committees on or before December 15, 2018. (Further information on the Commission’s work can be found here: http://legislature.vermont.gov/committee/document/2018/333/Date)

Having sat through each of the Commission’s meetings, some of my thoughts are:

- I have yet to get the palpable sense that Act 250 is about protecting Vermont’s overall environment, first, foremost and emphatically. Over time, its mission has been muddled by other objectives, becoming, as Paul Gillies has written, “a tool for social and economic policy in never-intended ways.”
- One District Environmental Commission Chair wisely warns, “We need to remember that these are environmental commissions, not economic development commissions.”
- Buried in an avalanche of papers, reports, “death by Powerpoint”, diagrams and statistics during their learning phase, Commission members could easily lose sight of the forest for the trees. I hope they do not (see my previous point).

- The Commission membership, including its advisors, is not as broadly representative of Vermont as was Deane Davis’ Commission on Environmental Control (popularly known as the Gibb Commission). Of the seventeen members of the Gibb Commission, only three were legislators; the six Act 47 Commission members are all legislators. This, however, has not stopped them from asking informed and important questions through the first three meetings, and Rep. David Deen’s institutional memory regarding environmental legislation is a critical asset. The advisory members are relatively narrowly drawn, much more characteristic of what some call “the Montpelier-Burlington bubble” of insider politics. This makes the broader outreach of the public engagement phase that much more important, and the Commission seems dedicated to getting it right.

- Environmental science is under-represented. Among the members, Chair Amy Sheldon and member David Deen hold graduate degrees in natural resources planning and environmental science respectively. Among the advisors, only one — a UVM forest ecosystem scientist — has significant scientific bona fides. By contrast, the Gibb Commission’s advisors included a geologist, a zoologist and two botanists, including the internationally-known Hub Vogelmann, a prominent defender of Vermont’s mountain ecology.
- Issues such as public trust resources, critical state needs and resource-based jurisdiction have been prominently mentioned, without extensive definition at this point. Climate change’s effect on flora, fauna and land use hangs over the Commission’s deliberations. I hope, however, that the Green Mountains’ sensitive ecosystems will not be expediently sacrificed on the altar of Vermont’s much-hyped climate economy.

Fundamentally, the Act 47 Commission can serve as a long overdue “environmental gut check,” assessing whether our actions, our culture and our laws are consonant with our oft-advertised love for Vermont’s environment. The six Commission members have a challenging task. We can help them meet it. This admonition by Aldo Leopold, author of “The Sand County Almanac,” should be inscribed on our collective consciousness:

> "Much of the damage inflicted on land is quite invisible to laymen. An ecologist must either harden his shell and make believe that the consequences of science are none of his business, or he must be the doctor who sees the marks of death in a community that believes itself well and does not want to be told otherwise."

Tough medicine, tough love.

Thank You, Elizabeth!

After six years working for VCE as our Community Outreach Coordinator, Elizabeth Cooper has decided to focus her work on her expertise in landscape design, specializing in playgrounds.

If your school or community is in need of a more child-friendly play space, Elizabeth has creative and environmentally friendly design solutions. We highly recommend her.

Elizabeth video recorded and witnessed an incredible amount of frustrating and often depressing interactions between developers and the public as renewable energy has played out in our communities.

We wish her well!

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December 2017
www.vce.org

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Yes, I want to be a member of VCE and make a difference, too!

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THANK YOUS

We are grateful for support from the Rodgers Family Foundation, numerous donations via the Vermont Community Foundation, and many contributions from individuals. Thank You!!
We met Annette Smith at a Swanton Town/Village Meeting re our clear opposition to Swanton Industrial Wind, over two years ago. She is unassuming, obviously, understanding of the subject, professional, and, had come to share her knowledge with people she hardly knew. Her credibility, confirmed in no small way by her background, and, the fact that she, herself, lives off the grid.

This has been a tedious, more than two-year journey. Annette has never wavered, despite being in the critical forefront of the discussion, remaining focused and working selflessly! There is no question, our success in defending our basic rights would not have happened without her and Vermonter's for a Clean Environment.

VCE does not charge for its services. The entire group works with Annette’s standards. We gladly give our support and encourage others to, also, do what they can.

Patty Rainville
John A. Smith
St. Albans, Vt.
Vermonters for a Clean Environment

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