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August 30 , 2017

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

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 LRVT. 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 LRVT 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 LRVT. There is no valid “dispute” about Act 250 jurisdiction over the LRVT in 2017. The dispute was resolved by means of appellate proceedings in 2010 in which VAST conceded state jurisdiction. The Attorney General, the NRB and VTRANS must acknowledge and defer to that judicial outcome.

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.

* 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