

ANR + NRB  
Enforcement mou  
Revised 12/7/09

**MEMORANDUM OF UNDERSTANDING  
AND DELEGATION OF AUTHORITY**

This document sets forth the understanding between the Secretary of the Agency of Natural Resources (Secretary) and the Land Use Panel of the Natural Resources Board (Panel) with respect to certain aspects of enforcement of violations of 10 V.S.A. Chapter 151 (Act 250). This document further delegates to the Chair of the Panel certain authority vested in the Secretary pursuant to 10 V.S.A. Chapter 201 (authority to issue Administrative Orders under 10 V.S.A. Sections 8008 and 8009) and delegates to the Panel certain authority vested in the Secretary pursuant to 10 V.S.A. Chapter 201 (authority to issue Warnings and NOAVs under 10 V.S.A. Section 8006 (a) & (b)).

1. **Background and Purpose.** Chapter 201 of Title 10, V.S.A., establishes a mechanism for enforcing many of Vermont's environmental laws, regulations, and permits and orders issued there under, including Act 250. Among other things, it empowers the Panel to negotiate Assurances of Discontinuance (AODs) regarding Act 250 violations and requires the Secretary, when requested by the Panel, to issue Administrative Orders (AOs) to enforce against Act 250 violations.

Chapter 201 also empowers the Secretary to pursue enforcement of a host of programs administered by the Agency of Natural Resources (ANR). In many cases, a regulated party in Vermont is subject to regulation under Act 250 in addition to one or more ANR programs.

The Secretary and the Panel are committed to effective, efficient, consistent and fair enforcement of Vermont's environmental laws. In order to achieve that objective, and in view of the overlapping jurisdictions and shared responsibilities described above, the Secretary and Panel believe it is important to clarify and standardize the procedures that will be used by their respective delegates and employees to investigate, negotiate and litigate all violations of Vermont's environmental laws, regulations and permits. This document sets forth those procedures. It is not intended to establish substantive enforcement policies or dictate any particular results, nor should it be so construed.

2. **Act 250 Related Investigations.** The process of investigating alleged Act 250 violations, in general, shall be as follows:

a. **Complaint.** Any complaint of, or information constituting notice of, an Act 250 violation shall be routed to the Act 250 District Coordinator in whose district the violation is alleged to have occurred or to the Land Use Panel's Permit Compliance Officer (PCO). The District Coordinator or PCO shall preliminarily evaluate whether the matter deserves further investigation. If investigation of the relevant facts will not require a substantial amount of time, the District Coordinator or PCO may conduct the investigation or, after consultation with the Panel General Counsel or Panel Enforcement Attorney, refer the matter to the Environmental Enforcement Officer (EEO) assigned to his or her district for investigation. After a preliminary investigation, the District Coordinator, EEO or

PCO as the case may be, may issue an NOAV pursuant to 10 V.S.A. § 8006. Each shall promptly forward a copy of the NOAV to the other. If investigation of the relevant facts will require a substantial amount of time, the District Coordinator, PCO, Panel General Counsel or Panel Enforcement Attorney, EEO, and Chief EEO (at the EEO's discretion) shall consult as to whether the complaint merits further investigation, the nature of that investigation and who will conduct it. If an EEO, District Coordinator or PCO investigating a complaint determines that the complaint involves both ANR and Act 250 violations, at the outset or during the course of the investigation, he or she shall inform the other promptly and cooperate as necessary.

b. *Investigation.* It is the EEO's role to investigate the facts of a complaint referred to the EEO, and the District Coordinator's or PCO's role to do so in matters to be investigated by the District Coordinator. In any case, it is the District Coordinator's or PCO's role (in consultation with Panel legal staff as appropriate) to identify the legal requirements allegedly violated and ascertain the scope of Act 250 jurisdiction. The EEOs, District Coordinators and PCO shall cooperate closely in the course of an investigation to ensure that investigative resources are used efficiently. The Panel will make available secretarial resources to assist the EEOs in preparing investigative reports, provided that this does not result in an undue burden. Upon completion of an EEO investigation, the EEO shall deliver to the District Coordinator the EEO's investigative report. Reasonable follow-up investigation within the scope of the complaint shall be performed by the EEO if requested by the District Coordinator.

c. *Report to Panel Counsel.* Upon receipt of an EEO investigative report or completion of his or her own investigation, if the District Coordinator believes that a formal enforcement action needs to be commenced, the Coordinator shall submit a summary, with recommendations, to the Panel General Counsel or Panel Enforcement Attorney for evaluation. Such summary shall include a discussion of the recommended relief to be sought.

d. *EEO Resources.* The Secretary shall make available up to 35% of the aggregate time worked by the field EEOs (excluding training time), on an annual basis, as necessary to investigate alleged Act 250 violations. Within his or her discretion, the Secretary may make additional time available. In the event that investigations of Act 250 violations are approaching the 35% range, the Director of the ANR Environment Division (Director) shall so inform the Panel General Counsel or Panel Enforcement Attorney, so that a fully informed decision can be made about the prioritization of investigative resources for Act 250 violations.

c. *Permit Compliance Officer.* The principal role of the Permit Compliance Officer (PCO) is to perform Act 250 compliance and enforcement functions as determined by the Land Use Panel. When those functions include investigative duties that may involve a potential ANR violation, the PCO shall consult with the appropriate EEO at the outset of such investigation or promptly upon learning of the involvement of a potential ANR violation and will cooperate with that EEO as necessary.

3. *Case Evaluation and Assignment.* The Panel General Counsel or Panel Enforcement Attorney shall review all matters referred to him or her by District Coordinators or PCO after investigation, for purposes of determining whether to proceed further, and if so in what manner. The Director shall review all matters referred to the Enforcement Division by the EEO staff, for the same purposes. In general, the decision how to proceed will be made as follows:

a. *Pure vs. Mixed Cases.* Initially, the matter will be evaluated to determine if it consists solely of Act 250 violations or solely of ANR violations. If it is unclear, the Panel General Counsel (or Panel Enforcement Attorney) and the Director shall confer. If the matter is a "mixed" case -- i.e., it consists of Act 250 and ANR violations -- the Panel General Counsel (or Panel Enforcement Attorney) and the Director shall confer promptly to determine which type of violation predominates. This determination shall be based on all of the factors present in the case, including but not limited to the comparative number of violations, the nature of the violations, their legal and factual complexity, the severity of harm or threat of harm, and the alleged violator's record of compliance and degree of culpability. As a general matter, the Secretary and the Panel agree that Act 250 and ANR violations should be pursued jointly where feasible (as further described below). However, for various reasons, including strategic concerns, both parties recognize that in some matters Act 250 and ANR claims will be pursued separately.

b. *Pure Act 250, and Act 250-predominant Cases.* If a case raises only Act 250 violations, or if the Act 250 violations are determined to predominate, the Panel Chair will assign the case to the Panel Enforcement Attorney for the purpose of attempting to negotiate a settlement in cooperation with the District Coordinator. If negotiations are unsuccessful, the Panel General Counsel may refer the case to the Attorney General's office for litigation under 10 V.S.A., Ch. 211, or direct the Panel Enforcement Attorney to commence litigation under 10 V.S.A., Ch. 201. In the latter event, the Panel Enforcement Attorney shall consult with the Director to ensure that the case is handled in a manner consistent with other Ch. 201 enforcement cases handled by the Enforcement Division.

The Secretary hereby authorizes the Panel Chair, by and through his or her attorneys, to litigate pure Act 250 and Act 250 predominant cases, provided such consultation occurs. The Secretary further authorizes the Panel Chair to commence that litigation in the name of the Panel. To facilitate such litigation, the Secretary hereby delegates to the Panel Chair certain authority vested in the Secretary pursuant to 10 V.S.A. Ch. 201, as set forth in § 13 of this Memorandum.

c. *ANR-predominant Matters.* A "mixed" matter in which ANR violations are determined to be predominant shall be assigned by the Director to an Enforcement Division attorney.

d. *Criminal Matters.* In the event that the Panel General Counsel determines that a pure Act 250 or Act 250-predominant case should be considered for criminal prosecution he or she shall consult with the Director prior to making any referral. In the event the Director determines such a case should be referred for criminal prosecution he or she shall first obtain the approval of the Panel General Counsel.

4. *Negotiation.* The Secretary and the Panel recognize that most cases will be resolved through the negotiation of an AOD. Whether negotiated by Panel staff or ANR staff, these AODs should be consistent in their general terms and approach, and also in their results, recognizing that each case is different and that many factors help determine the course of any negotiation. Furthermore, in mixed cases it is necessary that the entity whose violations do not predominate (e.g., ANR in an Act 250-predominant mixed case) has meaningful input into the negotiation process and the result, as regards the portion of the case that concerns it, without unduly interfering with the overall result desired by the entity whose violation predominates. To this end, the Panel General Counsel, the Panel Enforcement Attorney, and the Director shall cooperate on an on-going basis in an effort to ensure consistency and open communication. In addition, with respect to specific cases, the following process, in general, shall be followed:

a. *Pure Act 250 Cases.* In pure Act 250 cases the Panel General Counsel or Panel Enforcement Attorney shall consult with the Director during the course of the cases as necessary to determine that the Panel's treatment of the case is consistent with the treatment that would have been applied by ANR had the case consisted solely of similar ANR violations.

b. *Act 250-predominant Cases.* In Act 250-predominant cases the Panel General Counsel or Panel Enforcement Attorney shall consult with the ANR program person assigned to the matter during the course of negotiations as

necessary in order to ensure consistency and to receive input regarding the appropriate treatment of ANR violations in the case. Communication early in the negotiation process is encouraged. The Panel shall not sign any AOD without first giving the Director advance notice of its terms and a reasonable opportunity to object, through the Secretary if necessary, to the proposed resolution. If the above procedures are followed, the Panel is authorized to sign Act 250-predominant AODs without the Secretary's signature. The Secretary and Panel agree that in some mixed cases it may be advisable for both to sign AODs, and agree to cooperate to that end.

c. *ANR-predominant Cases.* In ANR-predominant cases the assigned Enforcement Division attorney shall consult with the Panel General Counsel or Panel Enforcement Attorney during the course of negotiations as necessary in order to ensure consistency and to receive input regarding the appropriate treatment of Act 250 violations in the case. Communication early in the negotiation process is encouraged. The Secretary shall not sign any AOD without first giving the Panel General Counsel or Panel Enforcement Attorney advance notice of its terms and a reasonable opportunity to object, through the Panel General Counsel and Panel Chair if necessary, to the proposed resolution. If the above procedures are followed, the Secretary is authorized to sign ANR-predominant AODs without the signature of the Panel or its designee.

5. *Litigation.* The Panel General Counsel or Panel Enforcement Attorney litigating pure Act 250 or Act 250-predominant cases remains a Panel employee with an attorney-client relationship running to the Panel (as well as the Secretary). In order to ensure that such cases are handled consistent with other cases handled by the Enforcement Division, and to promote the development of the law under Chapter 201 in a direction that is in the best interests of the Secretary, the Panel and the State, the Panel General Counsel or Panel Enforcement Attorney shall seek the advice of, and consult with, the Director when an Administrative Order is filed as necessary. In all environmental enforcement cases -- pure and mixed -- all Panel and ANR staff, including District Coordinators and EEOs, shall cooperate fully with the trial attorney as necessary in preparing and presenting the case.

6. *Client Decisions.* The Secretary and the Panel retain to themselves or their delegates the right to make all decisions within the purview of a "client" as that concept is embodied in the law of professional legal ethics. Those decisions include, but are not limited to, whether to commence an action, whether to settle and on what terms, and major strategic decisions in the life of a case. All attorneys involved in Act 250/ANR enforcement shall respect this right, and shall consult with the designated point persons of the Panel and Secretary as appropriate. In ANR-predominant cases, the Panel continues to have a right to make "client" decisions with

respect to Act 250 violations being addressed in the case (although it recognizes the need to reasonably accommodate the Secretary's wishes in such a case). Similarly, in Act 250-predominant cases, the Secretary continues to have a right to make "client" decisions with respect to ANR violations being addressed in the case (although the Secretary recognizes the need to reasonably accommodate the Panel's wishes in such a case). The aforementioned "need to reasonably accommodate" the interests of the entity with the predominant stake in a case is based on the shared view of the Panel and the Secretary that Act 250 and ANR violations should be pursued and resolved jointly, whenever possible.

7. **Formats.** The Panel and Secretary agree it is preferable to use similar forms for such documents as NOAVs, AODs, and other significant enforcement documents that the public will receive. The Director and the Panel General Counsel will take steps to ensure that similar formats are used, and that necessary boilerplate or other language is included in all such documents issued in the name of each party.

8. **Dispute Resolution.** Any dispute over a consultation or decision described in this document is to be resolved at the lowest level possible, with involvement by the supervisors of the individuals involved in the dispute, as necessary.

9. **Communications and Publicity.** All information pertaining to an enforcement matter is to be considered confidential (subject to the requirements of the Access to Public Records Act). Once an attorney is assigned to a matter, for negotiation or litigation, all case-related communications outside of Act 250 or ANR staff shall be made only by the attorney or with the attorney's approval. This includes communications to the Respondent or the Respondent's agents. All formal publicity relating to an enforcement case shall be disseminated by the Panel or Secretary, or their delegates.

10. **Delegates.** Except as limited by §13 of this Memorandum, any authority referred to in this document as pertaining to an individual or entity, such as the Secretary, the Panel, the Panel General Counsel or the Director, may be exercised by any duly authorized and lawful delegate thereof, without affecting the validity of this Memorandum.

11. **Accounting of Time, Expenses and Revenues.** As directed by the Director or the Panel General Counsel, as the case may be, all staff involved in an enforcement matter shall keep a record of all time spent on and expenses incurred in particular cases, and shall make such information available to the assigned attorney upon request. The purpose of collecting this information is to compile and preserve the evidence of the costs of enforcement for inclusion in penalty calculations. The Director and the Panel General Counsel or Panel Enforcement Attorney shall confer as to the most practical and cost-effective way to collect the appropriate amount of

such information. In addition, the Secretary shall keep an accounting of EEO hours spent on Act 250 investigations, and shall make such information available to the Panel on a periodic basis, or upon request. Finally, the Secretary and the Panel shall keep an accounting of revenues received as a result of the conclusion of enforcement cases, and shall share such information on a periodic basis, or upon request.

**12. Training and Oversight.** The Secretary and the Panel agree to undertake all training necessary to ensure that all affected employees (a) have the understanding and skills needed to conduct efficient and effective environmental enforcement of Act 250 and ANR violations, and (b) understand one another's responsibilities under this Memorandum. The Secretary and Panel agree to work toward developing mutually acceptable modifications to this Memorandum in the course of its life as necessary in light of experience and changing circumstances.

**13. Delegation of Authority by the Secretary to the Chair of the Land Use Panel: Issuance of Administrative Orders for Act 250 Cases**

a. *Purpose and Legal Authority.* To: (a) delegate the authority contained in 10 V.S.A. §§8008 and 8009 to issue and seek administrative orders for violations of 10 V.S.A., Ch. 151 (pure Act 250 cases); and (b) delegate the authority to issue administrative orders in mixed ANR-Act 250 cases (cases involving violations of 10 V.S.A. Ch. 151 and violations of other environmental laws enumerated in 10 V.S.A. §8003(a) where the Land Use Panel takes the lead).

This delegation supplements, and does not supercede, other delegations of authority by the Secretary to the Director of the Enforcement Division and to the Commissioner of the Department of Environmental Conservation regarding Title 10 chapter 201. This delegation does not alter or otherwise affect any other terms in this Memorandum of Understanding.

b. *To Whom Delegated.* The Chair of the Land Use Panel of the Natural Resources Board.

c. *Sub-delegation Authority.* This authority may not be subdelegated.

d. *Limitations.* This authority shall be exercised subject to any applicable policies established by the Secretary. Prior to the issuance of each administrative order, and subject to the relevant provisions of this Memorandum of Understanding, the Land Use Panel Chair or the Chair's designee shall consult

with the Director in order to ensure that the case is handled in a manner consistent with chapter 201 enforcement cases handled by the Enforcement Division, and in order to promote the development of the law under chapter 201 in a direction that is in the best interests of the Agency, the Land Use Panel, and the State of Vermont.

Determinations of whether the Enforcement Division or the Land Use Panel will take the lead in a mixed ANR-Act 250 case will continue to be governed by this Memorandum of Understanding (MOU).

e. *References*

- \* 10 V.S.A. Chapter 201.
- \* 10 V.S.A. §8002(7) (Definition of "Secretary").
- \* 10 V.S.A. §8002(10) (Definition of "Land Use Panel")
- \* 10 V.S.A. §8006 (Notice of Alleged Violation)
- \* 10 V.S.A. §§8008 and 8009 (Administrative Orders and Emergency Orders).
- \* 3 V.S.A. §214 (Delegation of Authority).

**14. *Delegation of Authority by the Secretary to the Land Use Panel of the Natural Resources Board: Issuance of Warnings and Notices of Alleged Violations (NOAVs) for Act 250 Cases and Mixed Cases***

a. *Purpose and Legal Authority.* To: (a) delegate the authority contained in 10 V.S.A. §§8006 (a) & (b) to issue warnings and NOAVs for violations of 10 V.S.A., Ch. 151 (pure Act 250 cases); and (b) delegate the authority to issue warnings and NOAVs in mixed ANR-Act 250 cases (cases involving violations of 10 V.S.A. Ch. 151 and violations of other environmental laws enumerated in 10 V.S.A. §8003(a) where the Land Use Panel takes the lead.)

This delegation supplements, and does not supersede, other delegations of authority by the Secretary to the Director of the Enforcement Division and to the Commissioner of the Department of Environmental Conservation regarding Title 10 chapter 201. This delegation does not alter or otherwise affect any other terms in this Memorandum of Understanding.

b. *To Whom Delegated.* The Land Use Panel of the Natural Resources Board.



c. *Sub-delegation Authority.* This authority may be sub-delegated pursuant to paragraph 10 of this Memorandum of Understanding.

d. *Limitations.* This authority shall be exercised subject to any applicable policies established by the Secretary and by the terms of this agreement.

Determinations of whether the Enforcement Division or the Land Use Panel will take the lead in a mixed ANR-Act 250 case will continue to be governed by this MOU.

15. *Term.* This MOU shall be effective on the last date of signature below, for a period of two (2) years (Initial Term). This MOU shall be automatically renewed for an additional two (2) years upon expiration of the Initial Term, unless either party provides written notice to the contrary not less than ninety (90) days prior to the Initial Term's expiration. If written notice is timely provided, then this Memorandum shall expire at the end of the Initial Term.

16. *Modification.* This MOU may be modified only by written agreement of the parties, except that the Delegation of Authority contained in this MOU may be modified or withdrawn by the Secretary at any time.

17. *Prior MOU.* This MOU supersedes and replaces a MOU dated 9/1/06.

This MOU is hereby approved.

AGENCY OF NATURAL RESOURCES

LAND USE PANEL

By: 

Jonathan L. Wood, Secretary

By: 

Peter F. Young, Jr., Chair

December-4.-2009

Date

12/7/09

Date