



NATURAL RESOURCES BOARD

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ACT 250 NOTICE OF EMERGENCY RESPONSE TO THE CORONAVIRUS DISEASE 2019 (COVID-19) (COVID-19: NRB Statement #4)

May 28, 2020

I. Preliminary Statement

On March 13, 2020, the Governor of the State of Vermont issued [Executive Order No. 01-20](#) declaring a State of Emergency in response to COVID-19. The Governor has since issued several Addenda to and Directives related to the Executive Order. The Executive Order and all the Addenda and Directives (collectively “the Executive Order”) are available on the Governor’s Office [website](#).

The NRB has issued three statements to inform its members, its employees, District Commissioners, and the public how the NRB will continue to administer Act 250 while complying with the Executive Order. These statements are respectively dated March 18, 2020, March 20, 2020, and March 26, 2020. The present document is the NRB’s fourth statement and supersedes the previous three statements in their entirety. The NRB has concluded that the measures and protocols contained in this statement are consistent with the existing Act 250 statutes (10 V.S.A. Ch. 151) and rules.

II. Access to District Commission Offices and Act 250 Permit Files

To ensure the continued health and safety of NRB employees and the public, the NRB has closed its offices to general access. NRB staff are working remotely to the maximum degree possible and can be reached by phone or email. Consequently, District Offices and Act 250 permit files that are not available through the NRB’s public database, are no longer generally available to in-person visitation and inspection. Signs to this effect have been posted on District Office doors and the [NRB’s website](#).

Individuals wishing to access Act 250 permit files should first check to see whether the documents they want to inspect are available on the [Act 250 database](#), available at: <https://anrweb.vt.gov/anr/vtanr/Act250.aspx>. If the documents are not available on the Act 250 database, individuals should contact the appropriate District Office, using the contact information on the NRB’s [website](#), to see whether District Office staff can otherwise make the documents available electronically. If an office visit is necessary, the protocol below must be followed once the NRB has finished procuring the necessary personal protective equipment. Until the NRB has finished procuring the necessary personal protective equipment, in person office visits by individuals other than NRB members, NRB staff, and District Commissioners are not allowed.

1. The requestor must schedule an appointment to inspect the requested records at a time when he or she will be the only one inspecting records.

2. Prior to the appointment, the requestor must confirm in writing, which may be via email, that he or she will abide by this protocol.
3. At a screening location to be designated at each District Office, the requestor will be asked if he or she:
 - a. Has displayed any of the following [CDC recognized symptoms of COVID-19](#): cough, shortness of breath, difficulty breathing, fever, chills, muscle pain, sore throat, and/or new loss of taste or smell. The requestor must submit to a no-contact temperature test to confirm that he or she does not have a temperature of 100.4 degrees Fahrenheit or greater.
 - b. Has had contact with a person diagnosed with COVID-19 and, if so, whether the requestor has self-quarantined for 14 days following such contact.
 - c. Has traveled from Florida, Louisiana, Detroit, Chicago, New York, New Jersey, or Connecticut to visit the District Office.
 - d. Has traveled from any other location outside of Vermont to visit the District Office and, if so, whether they will self-quarantine for 14 days following such travel.

If the answers to any of these questions is unsatisfactory, the requestor will not be allowed inside the District Office. To ensure the safety of the requestor, the NRB representative asking these questions and conducting the no-contact temperature test will have a cloth face mask, disposable safety gloves, goggles or a face shield, an alcohol-based hand sanitizer or easy access to a hand washing station, a lined trash can, and surface cleaner. Where practical, the NRB representative may be located behind a plexiglass shield, sneeze guard, or other impermeable barrier in which case he or she may not be wearing goggles or a face shield. In addition, any surfaces touched by a requestor will be cleaned and disinfected before the next requestor is permitted to enter the District Office. In some situations, this may mean only one requestor per day may visit any individual District Office.

4. The requestor must, to the maximum degree possible, observe strict social distancing of six feet.
5. The requestor must wear face coverings over their nose and mouth at all times.
6. The requestor must have completed a VOSHA-approved and employer-sponsored training program regarding COVID-19. Additional information about VOSHA-approved training may be found on the Vermont Agency of Commerce and Community Development's website. See <https://accd.vermont.gov/covid-19/business/restart> (last visited May 21, 2020).
7. The requestor must refrain from touching any communal objects unless it is necessary to do so to access the records that he or she has made an appointment to inspect.
8. The requestor must consent to provide the NRB with their name, phone number, physical address, mailing address, and telephone number. The NRB will maintain a log of all visitors to its offices for the purposes of assisting the State in any necessary contact tracing.

III. Permit Proceedings

Until further notice, the following guidelines shall apply to all Act 250 permit proceedings.

A. Priority of Applications

Given the economic and public health consequences of COVID-19, the NRB anticipates that it might be difficult and in some situations impossible for some Act 250 permittees to operate consistently with the terms of their Act 250 permits, public expectations, and business needs. In addition, the NRB anticipates that as the Governor allows business operations to resume and, in an effort to recapture lost revenue or fulfill certain contractual obligations, some businesses may choose to seek a permit amendment to allow for short-term (or long-term) changes to their Act 250 permit.

The NRB encourages District Commissions to expect amendment applications that are the result of the COVID-19 pandemic, and to treat those applications swiftly while making certain that these applications continue to receive a robust review. To this end, Act 250 Rule 13(C) states: “To the extent reasonable, the initial hearings shall be scheduled in the order that completed applications are filed, unless an applicant waives this priority right.” The language of this Rule expressly provides District Commissions with the discretion to determine, under certain circumstances, that it would be *unreasonable* to process applications in the usual course and to assign some priority to applications that are a result of the COVID-19 pandemic.¹ Furthermore, Act 250 Rule 13(C) permits District Commissions to affirmatively seek waivers from certain non-COVID-19 related applicants from processing their applications in the usual course.

B. Act 250 Fees

Also, with respect to applications that result from the COVID-19 pandemic, the NRB reminds District Commission Chairs that 10 V.S.A. § 6083a(f) grants them some discretion to waive fees when the impacts of a project have already been reviewed:

In the event that an application involves a project or project impacts that previously have been reviewed, the applicant may petition the Chair of the District Commission to waive all or part of the application fee. If an application fee was paid previously in accordance with subdivisions (a)(1) through (4) of this section, the Chair may waive all or part of the fee for a new or revised project if the Chair finds that the impacts of the project have been reviewed in an applicable master permit application, or that the project is not significantly altered from a project previously reviewed, or that there will be substantial savings in the review process due to the scope of review of the previous applications.

Pursuant to this language, District Commission Chairs may waive fees, fully or partially, for Act 250 permit applications related to COVID-19 if they determine that the Commission has previously reviewed impacts resulting from the proposed project. For example, if an entity seeks only to modify its operating hours (or some similar modification), it is more than likely that these impacts have already been reviewed, which would be a favorable consideration when a Chair reviews a fee waiver request.

C. Rule 34(E)

¹ At their discretion, District Commissions may require an affidavit from applicants who wish to have their application prioritized, indicating sufficiently how the need for a permit amendment is related to the COVID-19 emergency.

Act 250 District Commissions should review Act 250 permit applications related to COVID-19 under Act 250 Rule 34(E) as they would any other permit application. However, if and when Commissions reach the step in the Rule 34(E) analysis where they are considering the factors in subsection (3) of the rule, they should be mindful that the COVID-19 pandemic constitutes a change in fact beyond the permittee's control and presents several important policy considerations, including but not limited to how business must abide by the federal and state emergency declarations and executive orders.

D. Service of Documents

In all permit proceedings, the NRB recommends that District Commissions discuss with parties at a prehearing conference whether they will waive the service requirements in Act 250 Rule 12 and agree to receive materials both from other parties and the District Commission via email.

E. Administrative Amendments and Minor Permit Proceedings

Generally, administrative amendments and minor permit proceedings will proceed in accordance with [10 V.S.A. Ch. 151](#) and the [Act 250 Rules](#) without alteration. However, it is possible that in minor permit proceedings Commissions may choose to:

1. Impose the seven-day minimum deadline for requesting hearings pursuant to Act 250 Rule 51(B)(3)(A). Doing so may be appropriate for projects designed to respond to or help address the public health crisis COVID-19 has created.
2. Exercise, on a more frequent basis than usual, their existing authority to hold prehearing conferences pursuant to Act 250 Rule 16. Commissions may require those wishing to attend any such prehearing conferences to do so via telephone or video conference (instructions to participate in any such conference will be included with the Notice).

F. Major Permit Proceedings

For permit applications where District Commissions either have decided to hold or are considering holding hearings on their own motion pursuant to 10 V.S.A. § 6084(d), the NRB recommends that Commissions:

1. Consider whether they can obtain sufficient information through Act 250 Rule 20 requests for supplemental information to ameliorate the concerns that led them to conclude that a hearing was needed; and
2. Assuming they can obtain the necessary supplemental information, re-notice the applications as minors following all the same statutes and rules pertaining to minor applications.

For permit applications where either District Commissions have granted a hearing at a party's request or the Commissions cannot obtain all necessary supplemental information to ameliorate their own desire to have a hearing, the NRB recommends that Commissions:

3. Schedule a telephone prehearing conference within the initial 40-day deadline to satisfy the Commissions' obligations under 10 V.S.A. § 6084(d); and
4. At the prehearing conference, discuss whether:
 - a. The parties will agree to the use of pre-filed testimony pursuant to Rule 17(D), as well as submitting and responding under oath to written cross-examination for the witnesses, all in lieu of an in-person hearing and live cross-examination.
 - b. The parties have the technology necessary to participate in a virtual (video-based) merits hearing. The NRB also suggests that prior to conducting any such virtual hearing, the District Coordinator convene a practice hearing with the parties to confirm that all the technology needed for all participants works.
 - c. The NRB reminds participants that each party should be aware of the Executive Order and should determine on their own whether or not their participation is consistent with the Executive Order (for instance, parties should determine how many people may be permitted in one office space, and what protocol is necessary to follow for such a meeting).

G. COVID-19 Related Increases in Permit Applications

The NRB anticipates that there could be a short-term increase in permit applications in response to the COVID-19 pandemic, both with and without the assistance of COVID-19 stimulus funds. In addition to the other measures outlined in this document, the NRB is prepared to respond to that potential increase in the following ways:

1. The NRB will continue its existing practice of distributing workload equitably among District Coordinators through the use of work share.
2. The NRB State Coordinator and NRB attorneys will be available, as needed, to provide additional resources in permit proceedings.
3. The NRB will request that the Governor's Office fill vacancies on our District Commissions, in order to increase their capacities.
4. The NRB recommends that Commission Chairs increase the assignment of Alternate Commissioners to maximize the number of applications being reviewed and adjudicated at any given time in each district.
5. The NRB has drafted guidelines for district commissions that articulate how prehearing conferences can be held and address the use of technology for remote video conferencing (Microsoft Teams).

IV. **Site visits**

Until further notice, enforcement inspections, jurisdictional opinion-related site visits, and pre-application site visits shall be conducted at the discretion of the NRB's Compliance and Enforcement Officer and District Coordinators. Such site visits, and site visits related to merits hearings, shall only be conducted if the following protocol is followed:

1. Prior to the site visit, all potential attendees must confirm in writing, which may be via email, that they will abide by this protocol.
2. If the site visit will be conducted completely outside, no more than 10 people may attend the site visit.

3. If any portion of the site visit will be conducted inside, no more than 2 people may attend that portion of the site visit unless the NRB representative determines, in his or her sole discretion, that the indoor space has sufficient air circulation to accommodate up to 10 people, and that this protocol can be adhered to once inside.
4. No one may attend the site visit who has displayed the following [CDC-recognized symptoms of COVID-19](#): cough, shortness of breath, difficulty breathing, fever, chills, muscle pain, sore throat, and/or new loss of taste or smell.
5. No one may attend the site visit if they have had contact with a person diagnosed with COVID-19 unless they have self-quarantined for 14 days following such contact.
6. No one may attend the site visit if they must travel from Florida, Louisiana, Detroit, Chicago, New York, New Jersey, or Connecticut to do so.
7. No one may attend the site visit if they must travel from any other location outside of Vermont to do so, unless they have self-quarantined in Vermont for 14 days following such travel.
8. Everyone attending the site visit must observe strict social distancing of six feet.
9. Everyone attending the site visit must wear face coverings over their nose and mouth when in the presence of others.
10. Everyone attending the site visit must have access to either a hand washing station, consisting of soap and water, or hand sanitizer.
9. Everyone attending the site visit must have completed a VOSHA-approved and employer-sponsored training program regarding COVID-19. Additional information about VOSHA-approved training may be found on the Vermont Agency of Commerce and Community Development's website. See <https://accd.vermont.gov/covid-19/business/restart> (last visited May 21, 2020).
11. No more than two people shall occupy any single vehicle traveling to or from the site visit.
12. Everyone attending the site visit must refrain from touching communal objects, including but not limited to site plans, unless they are cleaned and disinfected between each touch.

V. Enforcement

As a result of the considerations set forth in the first paragraph of Section III(A) above, the NRB recognizes that some businesses may choose or need to temporarily operate inconsistently with the conditions of their Act 250 permits. In response to this challenge, the NRB intends to consider all of its available options with respect to Act 250 violations that are germane to the COVID-19 pandemic, with a focus on obtaining the maximum compliance reasonably possible. The NRB will continue to make all enforcement decisions on a case-by-case basis, and with consideration to the specific circumstances that each permittee faces.

VI. Other Issues

The NRB acknowledges that the COVID-19 pandemic and Vermont's response thereto are continually evolving and presenting new hurdles to overcome. Members of the public, including but not limited to Act 250 permittees and parties to Act 250 proceedings, are encouraged to bring any new hurdles to the attention of the NRB and the applicable District Coordinator and/or Commission as soon as possible, so that suitable solutions can be developed and implemented as quickly and consistently as possible.

VII. Conclusion

The NRB asks all individuals to act responsibly and in the interest of their own safety and the safety of others in the Vermont community. The NRB also thanks the Vermont community for its patience and cooperation while it works to ensure that permit applications continue to be processed.