

Procedure Statement:

Appeals of the Commissioner of Public Service Energy Compliance Determinations under 24 V.S.A. § 4352

(Adopted: May 9th, 2017)

The Natural Resources Board (“Board”) adopts this appeal procedure pursuant to 24 V.S.A. § 4352 (“Statute”) and in accordance with the Vermont Administrative Procedures Act (3 V.S.A. Ch. 25). Under the Statute, the Board adjudicates appeals of energy compliance determinations as issued by the Commissioner of Public Service under 24 V.S.A. §4352(a). The purpose of this procedure statement is to create an orderly process for appellate review.

A. Preliminaries.

1. The Board hearing shall be *de novo*. 24 V.S.A. § 4352 (f).
2. As the Statute requires a final decision to be rendered within 90 days of the filing of an appeal, the Board requires strict adherence to all filing deadlines. 24 V.S.A. § 4352 (f).

B. Appeal Process

1. *Who may appeal.* A regional planning commission (“Appellant”) aggrieved by an act or decision of the Commissioner of Public Service under section 4352 of title 24 may file an appeal to the Board. Municipalities that have submitted a plan for determination by the Commissioner of Public Service pursuant to 24 V.S.A. § 4352 (g) prior to July 1, 2018 may also appeal.
2. *Time.* Time shall be counted in accordance with the V.R.C.P. Rule 6.
3. *When Filed.* An appeal must be filed within 30 days of the act or decision.
4. *How filed.* Unless the Chair of the NRB (“Chair”) determines electronic filing to be unduly burdensome on an appellant, all filings shall be made by electronic means as follows:
 - i. All appeal documents required by subsection 5. below shall be uploaded to the Board’s File Transfer Protocol (FTP) site [<ftp://ftp.anr.state.vt.us>] in a folder labeled as follows: [“Regional Planning Commission Name-Energy Compliance Determination Appeal” or “Municipality Name-Energy Compliance Determination Appeal”] as applicable. See **Attachment A** for FTP Filing Instructions and call the NRB mainline at (802) 828-3309 for assistance.

- ii. An email shall be sent to the following address: Act250.comments@vermont.gov to alert the Board that an appeal has been filed. This email shall be sent the same day as the appeal documents are uploaded to the FTP site.
- iii. The Appeal Email shall be carbon copied (cc'd) to the following entities:

Commissioner of Public Service Department

[\[PSD.publicadvocacy@vermont.gov\]](mailto:PSD.publicadvocacy@vermont.gov);

Secretary of Agriculture, Food and Markets

[\[AGR.Notice@vermont.gov\]](mailto:AGR.Notice@vermont.gov);

Secretary of Commerce and Community Development

[\[Chris.cochran@vermont.gov\]](mailto:Chris.cochran@vermont.gov) and [\[Faith.Ingulsrud@vermont.gov\]](mailto:Faith.Ingulsrud@vermont.gov);

Secretary of the Agency of Natural Resources

[\[ANR.notice@vermont.gov\]](mailto:ANR.notice@vermont.gov);

Secretary of the Agency of Transportation

[\[john.dunleavy@vermont.gov\]](mailto:john.dunleavy@vermont.gov); and

Any other parties to the Commissioner's Determination of Energy Compliance.

5. *Documents required by Appellant.* An appeal filed on the Board's FTP site shall include the following in PDF format and labeled as indicated:
 - i. *Statement.* Provide a short and plain statement of the specific issue(s) on appeal including the identification of the specific subsection(s) of 24 V.S.A. § 4352 that are at issue. In addition, this statement may include legal argument regarding those subsections.
 - ii. *Prior Decision(s).* Provide a copy of all decisions or acts subject to the appeal.
 - iii. *New Determination Statement.* Include a statement as to whether the appellant requested a new determination from the Commissioner following a negative determination as allowed under 24 V.S.A. § 4352. If a request for a new determination was not made prior to filing an appeal, the appellant shall state why no request was made to the Commissioner.
 - iv. *Hearing/Oral Argument Request or Waiver.* Indicate whether the Appellant waives a hearing or oral argument such that the evidence may be reviewed solely on the written documents. If a hearing is requested, the reason for requesting a hearing or oral argument shall be provided.
 - v. *Evidence.* Supply all evidence relevant to the issue on appeal. This evidence may include pre-filed testimony. Include a statement as to whether the appeal includes any new evidence not submitted to the Commissioner. If the appellant intends to submit such additional new evidence a statement shall be included outlining the reasons this evidence was not available for review by the Commissioner either at the original filing or as a submission for a new determination under 24 V.S.A. §

4352 (e). All evidence shall be included, identified, and labeled. Any any newly filed evidence, shall be identified and labeled as newly filed evidence.

- vi. *Signature and Contact Information.* Signature and electronic contact information for the Regional Planning Commission, Municipality, or their designated legal representative(s).
 - vii. *Certificate of Service.* Provide an indication that all entities listed in section B. 4. iii. have been emailed a copy of the filing.
6. *Dismissal.* If the filing does not comport with the above as substantially complete, the Board may, within its discretion, dismiss the appeal. All untimely filed appeals shall be dismissed.
 7. *Response and Evidence.* No later than 15 days from the filing of the appeal unless extended by the Chair for good cause shown, but in no event to exceed 30 days, the Commissioner of Public Service and any other interested entity listed in 24 V.S.A. § 4352 (d)(4) shall have an opportunity to respond to the appeal. A response shall include, as applicable, any request for a hearing or oral argument and the reasons supporting such request, any objection to the addition of new evidence, and any other relevant legal arguments. If the response includes a request to add new evidence, then the response shall include a statement outlining the reasons this new evidence was not presented during the review by the Commissioner either at the original filing or as a submission for a new determination under 24 V.S.A. § 4352 (e). All evidence shall be included, identified, and labeled. Any newly filed evidence shall be identified and labeled as newly filed evidence.
 8. *Discovery and Depositions.* This procedure intentionally excludes a formal opportunity for depositions or discovery. Parties are encouraged to engage in such mechanisms informally to the extent they do not result in a modification of the timeframes in this procedure.

C. Hearing/Oral Argument Process

1. *Notice.* If the Appellant or any other interested entity listed in § 4352 (d)(4) (“the Requestor”) requests a hearing or oral argument, and the Board grants such a request; then the Board will issue a Notice of Hearing via electronic means to the address provided under sections B. The Notice will include the date, time, and manner of the hearing (electronic, telephonic, or in-person). Hearings shall be recorded. If a transcription is requested, then the requestor of such transcription shall bear all related costs. The Board shall issue a Notice of Hearing electronically and on their website at least 10 days in advance of the scheduled hearing, unless an earlier date is agreed upon by the parties.

2. *Pre-hearing Conference.* The Chair, or staff member designated by the Chair, may conduct a pre-hearing conference with all parties to further narrow the scope of hearing, and resolve other pre-hearing issues.
3. *Evidence and Arguments.* Appellant and any entity properly filing a response in accordance with section B.7. above, shall have the opportunity to present their evidence (previously filed with the Board) and present arguments in front of the Board. The presentation of new evidence at the hearing will not be admitted unless, at the sole discretion of the Board, the Board finds that (1) a good showing is made as to why the information was not previously available, and (2) that the mover of such newly acquired evidence has made such evidence available to all parties and the Board, or has made all efforts to make such evidence available to other parties and the Board prior to hearing.
4. The Board, at its sole discretion, may limit the proceedings to a reasonable length of time dependent on the complexity of the issue(s) at bar. The Board, at its discretion, may require or allow parties to file proposed findings with the Board no later than 5 business days following the hearing/argument.

D. Record

A record will be maintained, which shall include:

1. the Documents filed under this procedure and all evidence received and considered;
2. the Notice of Appeal;
3. any audio recording related to a hearing or an oral argument;
4. all questions and offers of proof, objections, and rulings thereon;
5. any proposed findings and exceptions; and
6. a final decision of the Board.

E. Findings and Decision

1. Findings and a Decision will be based exclusively on the evidence in the record. In accordance with 24 V.S.A. § 4352 (f), the Board is required to issue a decision within 90 days of the filing of the appeal. A late decision will not be considered a grant or denial of the appeal.
2. Decisions will be issued electronically by the Board and posted to the Board's website.

3. The Board may affirm, deny, alter, or remand the Commissioner's Determination of Energy Compliance, or provide any other remedy relevant to such proceeding.

F. Appeals

Any party aggrieved by an adverse final determination of the Board under this procedure may appeal the Board's decision within 30 days of issuance of that decision to the Superior Court- Environmental Division. See 10 V.S.A. § 8503 (c).

Version (5/1/2017)

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Attachment A

Instructions for uploading appeal documents to the FTP site

1. Use a PC for this process. Unfortunately, FTP is incompatible with Macintosh computers. However, all Act 250 District Offices ([map/contact information](#)) maintain kiosks available to the public, which can be utilized to upload files for this purpose.
2. On your computer, create an electronic folder that includes all materials required for filing an appeal under Section B. 5. above.
3. Open Windows Explorer (not to be confused with Internet Explorer) by right clicking the "windows start" button. Click, "open windows explorer".
4. In the Address bar of Windows Explorer, type "<ftp://ftp.anr.state.vt.us>", then click "Go". You will be prompted for a case-sensitive username and password. They are:

Username: A250
Password: Simple1

5. Click "Log On".
6. Transfer your appeal materials folder (i.e., ["Regional Planning Commission Name-Energy Compliance Determination Appeal"]) onto the FTP site by dragging and dropping the folder into the open window of the FTP site or by making a copy of the folder and pasting it into the FTP site.
7. Send an email to Act250.comments@vermont.gov as required by Section B. 4. to notify the Natural Resources Board and all potential parties that the Appeal has been filed.

8. Note: You will not be able to view the content of your documents once you have moved them to the FTP site but you can verify that you have moved them by opening the directory and subfolders.