

## **ACT 250 and TRAILS QUESTIONS FOR COMMENT**

*Thank you for taking the time to complete this survey. Please only fill out **one survey** for your organization.*

*Act 250, Vermont's land Use and development law, was passed in 1970 to mitigate the effects of certain developments and subdivisions through a permitting process that addresses the environmental and community impacts of projects that exceed a certain threshold. Currently, recreational trails may be subject to Act 250 and a variety of permits issued by the Department of Environmental Conservation.*

*With respect to Act 250 only, the threshold for jurisdiction (meaning that a project will need an Act 250 permit) depends on certain factors:*

- 1) If the proposed trail is part of the Vermont Trail System, the key question is how much ground disturbance will occur as part of the project (10 acres of disturbance or more is the threshold)*
- 2) If the proposed trail is not part of the Vermont Trails System, jurisdiction is triggered only if the trail is commercial, and depending on the size of the tract (or tracts) where the trail will be located*
- 3) Jurisdiction over trails may also be triggered if the proposed trail is considered to be a "material change" to an already existing Act 250 permitted project.*

*The Vermont Natural Resources Board and the Vermont Department of Forests, Parks and Recreation are seeking input concerning state regulation of trails, and we hope you will take the time to complete this brief survey. Your answers will be collated into a report to [The Commission on Act 250: the Next 50 Years](#) for consideration.*

**PLEASE RETURN THIS SURVEY NO LATER THAN 5 PM ON SEPTEMBER 17<sup>TH</sup>, 2018**

- 1. Please indicate your name, name of organization, and contact information (including email address).**

Daniel Dutcher, Environmental Policy Manager  
Vermont Agency of Transportation  
1 National Life Dr.  
Montpelier, VT 05633-5001

Email: [daniel.dutcher@vermont.gov](mailto:daniel.dutcher@vermont.gov)  
Mobile: 802-498-4540

## 2. Is your entity a member of the Vermont Trails System?

Not to the best of our knowledge. A list of members of the Vermont Trails System does not appear to be available online. However, this information should be readily accessible to DFPR, which administers the Vermont Trails System under 10 V.S.A. Ch. 20 (§§ 441 – 449). DFPR's Recreation Program Manager, who would normally administer this list, is on extended leave. DFPR's Director of Lands Administration and Recreation reports, based on the information available, that VTrans is not a member of the Vermont Trails System.

Act 194 of 2018 allows “affected parties” an opportunity to submit information and recommendations to the recreational trails working group, and the scope of Act 194 is not expressly limited to members of the Vermont Trails System. Act 250 Rule 71 addresses jurisdiction over trails, including but not limited to trails within the Vermont Trails System. VTrans owns, and provides maintenance and operational support, for multiple rail trails around the state (including the Missisquoi Valley Rail Trail, the Lamoille Valley Rail Trail, the Delaware & Hudson Line Rail Trail, and the Beebe Spur). In that capacity, VTrans has been a party to protracted Act 250 proceedings relating to rail trails and represents a significant stakeholder in the issues that Act 194 has asked the working group to evaluate. It is VTrans' understanding that the Lamoille Valley Rail Trail is part of the Vermont Trails System.

Title 10 Chapter 20 makes VTrans a key stakeholder in trail policy. An annual transfer from the Transportation Fund supports the Recreational Trails Fund under section 446. It is state policy under sections 441(e) and 447(b) to acquire and railbank abandoned rail lines for interim trail use and for ANR and VTrans to coordinate with respect to the development of trails and bike and pedestrian paths. Under section 444(4), ANR is responsible for coordinating “the activities of all governmental units and bodies that desire to participate in the development of the Vermont trails system.” Thus, while VTrans may not be a member of the Vermont Trails System, VTrans plays an integral role in the network of recreational trails in Vermont and is significantly affected by Act 250 policy affecting rail trails. In addition, VTrans' responsibilities for the state transportation network has provided VTrans with extensive experience and considerable perspective on Act 250 in a breadth of contexts.

VTrans has previously recommended to the Commission on Act 250 that all federal-aid transportation projects, which include bicycle and pedestrian paths, should be exempt from Act 250. These projects are extensively planned; designed, constructed, and operated in the public interest; subject to legislative oversight; and comprehensively regulated by state and federal law. In addition, Act 250 has added significant

paperwork and at times considerable process to federal-aid transportation projects while adding little environmental value in the end.

**3. Have you experienced any challenges in obtaining Act 250 permits for trails (please explain)? Please limit your response to personal experiences that you or your organization have experienced.**

Yes. VTrans has consistently maintained that Act 250 jurisdiction over rail trails is preempted by the Interstate Commerce Commission Termination Act. Act 250 has nevertheless taken jurisdiction over rail trail projects. In some cases, this has led to protracted proceedings with little environmental benefit.

**4. If you or your organization has been through the Act 250 process with respect to trails, please recommend any changes including, but not limited to the following topics:**

**a. How to make the process more efficient**

Because rail trails are preempted from Act 250 jurisdiction under the Interstate Commerce Commission Termination Act, rail trails should be removed from Act 250 jurisdiction by statute or rule. Doing so would avoid additional litigation, expense, and delay arising from Act 250's assertion of jurisdiction over rail trail projects. Rail trails should also be removed from Act 250 jurisdiction because rail trails do not contribute to the unplanned and unregulated development that Act 250 is intended to address. Rail trails are subject to legislative oversight and are carefully planned projects on existing footprints that involve minimal environmental disturbance—primarily removing rails and ties and grading. Potential environmental impacts that do arise (e.g., bridge and culvert replacements) are adequately handled through other regulatory programs, including stream alteration, stormwater, wetlands, and river corridor programs.

**b. How to make the process a better fit for the unique development aspects of trails**

Certain ancillary projects like trailheads that lie outside the railroad right of way and federal railbanking jurisdiction are mostly small-scale and often do not trigger Act 250 jurisdiction. To the extent Act 250 applies to these projects, it would be helpful to clarify that Act 250 jurisdiction is limited to the ancillary project only. Aggregating acreage by linking these contiguous projects to the rail trail itself would not be reasonable for determining Act 250 jurisdiction. Act 250 precedent on this point has long existed for highway projects.

In cases where Act 250 does apply to recreational trails, VTrans suggests that publication notice of proceedings would be fairer, more cost effective, and more efficient than individual notice to every landowner along the trail. Hundreds of landowners may abut certain trails, and the list of abutting landowners constantly shifts as properties are transferred.

**5. Are Act 250 jurisdictional triggers with respect to trails clear?**

As noted above, federal law preempts Act 250 jurisdiction over rail trails. However, Act 250 has nevertheless taken jurisdiction.

The Act 250 program may not have fully integrated the principle that trailheads and other ancillary projects are jurisdictionally discrete from the railbanked right of way.

**a. If not, how should the jurisdictional triggers be clarified?**

Act 250 (10 V.S.A. Ch. 151) or the Act 250 Rules should clarify that rail trails are exempt from Act 250 jurisdiction. In addition, the statute or rules should clarify that jurisdictional triggers for ancillary projects, like trailheads, must consider only the acreage of the ancillary project, not lands within the railbanked right of way.

**6. What are the strengths of Act 250's regulation of trails?**

Act 250 was intended to provide a forum for citizens to participate in significant development decisions at a local level in an informal setting and to apply broad environmental requirements to projects not adequately regulated by other means. Since Act 250 was enacted nearly fifty years ago, its ten permitting criteria and numerous sub criteria have spawned a baroque body of case law that is inaccessible to ordinary folk. Nevertheless, Act 250 allows citizens to weigh in on proposed projects without having to participate in earlier planning and permitting processes. While providing citizens with some access to development decisions, this comes at a cost of procedural inefficiency and substantive redundancy in the case of rail trails and other state-run transportation projects. Moreover, Act 250 has increasingly become a foil for commercial, provincial, or political opposition to projects that are already carefully planned and heavily regulated by other means.

**7. How is Act 250 beneficial to the environmental quality of the state with respect to the regulation of trails?**

As noted, Act 250 does not provide significant environmental benefits with respect to rail trails.

**8. Which [Act 250 criteria](#) are most relevant with respect to the regulation of trails (please explain)?**

Rail trails do not constitute the unplanned, unregulated development that is contributing to sprawl in Vermont. It would be more efficient and effective not to apply Act 250 review to rail trails.

**9. Which [Act 250 criteria](#) are least relevant with respect to the regulation of trail projects (please explain)?**

See number 8, above. With regard to ancillary rail trail projects like trailheads (and all other projects), Act 250 should not apply to matters that could be covered by other regulatory programs (for example, wetlands and stormwater).

**10. Should all trail projects be exempt from Act 250 review? If so, what makes development of recreational trail projects different from other development that is subject to Act 250?**

Rail trails and federal-aid bicycle and pedestrian paths should be exempt from Act 250 review. As explained above, these projects are already adequately planned and regulated, and Act 250 does not add additional value to other applicable environmental requirements. In addition, federal railroad law preempts Act 250 jurisdiction over rail trails.

**11. Should some trail projects be exempt from Act 250 review?**

Yes. See number 10, above.

**a. If yes, please explain which types of trail projects should be exempt, and why.**

All rail trails and federal-aid bicycle and pedestrian paths should be exempt from Act 250 review for the reasons given above.

**12. Do you have any recommendations for an alternative regulatory scheme for trail projects in the State of Vermont? Please share your thoughts.**

Rail trails and federal-aid bicycle and pedestrian paths are already adequately planned and regulated. They are already subject to alternative regulatory schemes.

**a. Should trails be subject to some sort of “general permit”?**

A general permit for trailhead facilities should be considered.

**b. If so, what criteria should the general permit cover and how should terms of the general permit be enforced?**

A general permit should cover criteria that are not and cannot be addressed through other regulatory programs.

**c. Do you have any ideas about a possible trail development oversight program managed under the Agency of Natural Resources? Please explain.**

VTrans remains available to coordinate with ANR on recreational trail planning that intersects with VTrans plans, facilities, or projects.