

Appendix 9. Act 250

Act 250 Protections with Regard to Wild and Scenic River Designation

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Vermont's Land Use and Development Law, "Act 250" was adopted in 1970 and constitutes the main land-use regulation that applies statewide. Act 250 is a permit program that directly or indirectly protects several of the Missisquoi and Trout River Outstandingly Remarkable Values (ORVs – please see the ORV chapters of this Management Plan for further explanation and description of these resources). In order to have certain projects approved, a project proponent must satisfy 10 Criteria and receive a permit from the Act 250 authorities.

Within Act 250 the State of Vermont is divided into several District Commissions based on a common geography. For our purposes, the Missisquoi and Trout River watersheds fall within Districts 6 & 7 with offices in Essex Junction and St. Johnsbury, respectively. In order to participate in a hearing or permit proceedings, party status must be obtained. Parties who are automatically granted party status include towns in which the project is located, state government agencies, abutting property owners, and, in some cases, those who have a "particularized interest" in a project.

Only larger projects are reviewed under Act 250. For example: any subdivisions of land with the intent of building houses (6-10 houses depending on whether towns have zoning), industrial or commercial developments involving more than 1 acre of land, and logging or agricultural development above 2,500 feet in elevation. Consult the Act 250 rules and regulations for other jurisdictional projects.¹

There are a total of 10 Criteria that Applicant's must satisfy to receive an Act 250 permit which allows a project to be built. It should be mentioned that there are other town and state permits that have to be obtained before many development projects can commence (ex. septic permits, wetlands permits, subdivision permits...). However in some cases, gaining a necessary state or local permit creates a rebuttable presumption that a Criterion has been partially or fully satisfied.

The 5 Criteria and sub-criteria (further subdivisions of the Criteria) that apply most directly to the Wild and Scenic River designation and Missisquoi and Trout ORVs are as follows: Project

1. Will not result in undue water or air pollution. Included are the following considerations: (A) Headwaters; (B) Waste disposal (including wastewater and stormwater); (C) Water Conservation; (D) Floodways; (E) Streams; (F) Shorelines; and (G) Wetlands.
4. Will not cause unreasonable soil erosion or affect the capacity of the land to hold water.
8. Will not have an undue adverse effect on aesthetics, scenic beauty, historic sites or natural areas, and (A) will not imperil necessary wildlife habitat or endangered species in the immediate area.
9. Conforms with the Capability and Development Plan which includes the following considerations: (A) The impact the project will have on the growth of the town or region; (B) Primary agricultural soils; (C) Productive forest soils; (D) Earth resources; (E) Extraction of earth resources; (F) Energy conservation; (G) Private utility services; (H) Costs of scattered developments; (J) Public utility services; (K) Development affecting public investments; and (L) Rural growth areas.
10. Is in conformance with any local or regional plan or capital facilities program

Criteria 1: Water

Criterion 1 seeks to protect headwaters, floodways, shorelines, and wetlands of streams and rivers. It also protects waterways from the potential negative effects of improper wastewater disposal and stormwater runoff. In general, through Act 250, the State of Vermont seeks to implement 25-50 foot vegetated buffers for streams and rivers (depending on the size and year-round nature of water flow).

Criterion 1A, the headwaters provision, protects small streams and their shorelines above 1,500 feet in elevation. The headwaters provision will help to protect water quality within the higher elevations of the Wild and Scenic River watersheds.

Criterion 1B, addresses waste disposal (often septic systems) and stormwater runoff. Projects must meet Vermont Water Quality Standards and applicable health and environmental standards. Wastewater disposal sites along the Missisquoi and Trout Rivers could be covered.

Criterion 1D protects floodplains; it recognizes their importance both in preventing floods but also as significant natural communities. The Act 250 definition of floodways has expanded to include flood corridors beyond the 100 year floodplain. This criterion seeks to protect the dynamic nature of these floodplains and has not granted permits for projects that seek to stabilize the shorelines of floodplains with rip-rap. Projects that significantly increase the peak discharge of waterways or endanger the health, welfare, or safety of the public and riparian owners are further cause to deny permits under Criterion 1D.

Criterion 1E protects streams. Streams are defined as “a current of water which is above 1,500 feet above sea level or which flows at any time at a rate of less than 1.5 cubic feet per second. Act 250 has applied this criterion to other larger stream and rivers as well. Depending on site-specific conditions, 50-100 foot buffers between disturbed land and streams are typically protected.

Criterion 1 F protects shorelines. This provision seeks to maintain shorelines and shoreline vegetation in their natural condition, stabilize stream banks and prevent erosion, and continue to provide public access to waterways. Act 250 does not allow projects on shorelines unless it can be proved that the project cannot be located elsewhere and is dependent on the shoreline to fulfill its purpose.

Criterion 1G incorporates the Vermont Wetland Rules which protects wetlands and their functions and values. In general, VT wetlands are afforded a 50 foot protective buffer and most types of human development activities within that buffer area or the wetland itself require a state wetlands permit. Projects that require an Act 50 permit must also meet the requirement of the state wetland regulations. Act 250 can also seek to protect wetlands that are considered Class III and outside of the jurisdiction of the Vermont Wetland Rules. These Class III wetlands may receive protection as well as a buffer that is generally 25-50 feet in extent.

Criterion 1A, 1B, 1D, 1E, and 1F collectively work to protect water quality through maintaining clean water, preventing shoreline and floodplain encroachments, and maintaining the public trust in Vermont’s waters. Criterion 1G protects wetlands and vernal pools within the Wild and Scenic River basins. These criteria collectively protect the physical, chemical, and biological integrity of the Missisquoi and Trout Rivers and their tributaries. ORVs that are focused on water quality including recreational use such as canoeing, swimming, fishing, and continued public access to the water are dependent on the continuing quality of the Trout and Missisquoi Rivers.

Criterion 4: Soil Erosion

Criterion 4 ensures that regulated construction activities do not result in erosion of soil and help maintain water quality.

This criterion helps maintain the water quality that enhances and maintains ORVs such as swimming, fishing and scenic beauty.

Criterion 8: Historic and Archeological Resources

Criterion 8 protects historic, archeological, and paleontological resources. Act 250 imparts a 3-tier approach to protecting historic, archeological, and paleontological resources. Act 250 first asks “Is a historic or archeological site present?” If so, it then determines if a project’s impact is “adverse”, and, if in the affirmative, are the project’s impacts “undue”?

In Act 250, a “historic site” is defined as any site, structure, district, or archeological landmark which has been officially included in the National Register of Historic Places or which is established by testimony of the Vermont Advisory Council on Historic Preservation as being historically significant. Such a site has to be able to yield information important to history or prehistory. Typically a building or structure can be listed on or eligible for historic register if it is at least 50 years old.

If a site is not currently listed as an archeological site but evidence suggests that the site was occupied by Pre-Europeans, Act 250 can require that an archeological investigation be conducted at the site previous to any land development and granting of an Act 250 permit.

ORVs that could be protected under the historic rubric include covered bridges, old dam sites, remains of old buildings, old bridges, and archeological sites.

Criterion 8: Aesthetics and Natural Beauty

Act 250 seeks to determine if a project will have an undue, adverse effect upon the scenic or natural beauty of an area. To determine if impacts are “adverse” Act 250 considers the following: 1) the nature of the project’s surroundings; 2) whether the project’s design is compatible with its surroundings; 3) whether the colors and materials selected for the project are suitable to the surroundings; 4) from where the project is visible; and, 5) what the impacts are on open space. If it’s determined that a project has adverse impacts, an assessment occurs to determine whether or not a project’s impacts are “undue.” Essentially, a project is “undue” when a project: 1) violates a clear written community standard intended to preserve the aesthetics or scenic beauty of the area; or 2) offends the sensibilities of the average person, or is shocking or offensive and out of character with its surroundings, or significantly diminished the scenic qualities of the area; or 3) the Applicant has failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the project with its surroundings. If undue impacts are assessed, the project can be denied an Act 250 permit or have conditions attached which alter the project and mitigate the aesthetic impacts.

In terms of the Wild and Scenic River designation, any ORV that is dependent upon the quality of the aesthetic resource might be protected under the aesthetic criterion. If the aesthetic resources of the immediate Missisquoi and Trout Rivers are important to the overall quality of the wild and scenic experience, a broad

range of potential developments that are regulated under Act 250 could be subject to aesthetic interpretations under the law.

Criterion 8A: Necessary Wildlife Habitat

Necessary wildlife habitat has become defined as “concentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a species of wildlife at any period in its life including breeding and migratory periods.” In effect, protecting “necessary wildlife habitat” protects habitat that if removed from the Vermont landscape would cause the decline and eventually the loss of a species of wildlife (both game and hunted species but also non-game or non-hunted species). Habitats such as deer wintering forests, Bicknell’s thrush habitat, beech stands, wetlands that serve as important seasonal feeding habitats for bears, heron rookeries, gravel, vernal pools, and stream and river waters have been protected as important wildlife habitat.

Act 250 seeks to determine if a regulated activity “destroys or significantly imperils wildlife habitat” and balances that loss with attempts by the developer to lessen or “mitigate” the loss of habitat and to measure the benefit to the public of the wildlife habitat.

Types of ORVs that are protected under Criterion 8A include: in-stream fish habitat; high elevation (generally over 2,700 feet) spruce-fir forests that harbor unique high-elevation birds species (including the Bicknell’s thrush breeding habitat); peregrine falcon and heron rookeries; deer wintering habitat (typically conifer forests); bear habitat (beech/oak stands and certain wetlands); and vernal pools. Rare, threatened and endangered animal species that are currently, or will be identified in the Wild and Scenic River basin in the future, will also be protected under this criterion. Any newly identified significant natural community will also be protected under Criterion 8A. The State of Vermont Natural Heritage Program tracks these communities as well as rare plants and animals (Please see the Natural Heritage Information Project through the VT Fish and Wildlife Department (<http://www.vtfishandwildlife.com/>) for more information.

Criterion 8A: Endangered Species

The State of Vermont and federal government maintain lists of legally Threatened and Endangered Species of plants and animals. Criterion 8A protects these species. Some of these species are part of natural communities, such as the Serpentine Outcrop ORVs, and significant natural communities within the Wild and Scenic Study area. Other state Threatened or Endangered species and their habitats also enhance the biological diversity of the region and are also ORVs.

Criterion 8A: Rare and Irreplaceable Natural Areas

Rare and irreplaceable natural areas are essentially defined as areas where 1) natural processes dominate over human process; 2) areas with identifiable vegetation; and 3) areas which are unlikely to reoccur in the foreseeable future. Unusual or uncommon natural communities and significant geological features have been protected under Act 250 Criteria. Alpine plant communities, bogs, fossil quarries, and ledge communities are examples of areas protected under Criterion 8A. Unusual geological features can also be protected such as a significant paleontological site, or important area for interpreting geologic history or processes. If a site contains rare, threatened, or endangered species it may qualify for protection. Under this criterion, the public’s enjoyment of a protected natural area can also be protected, and Act 250 has provided isolation buffers, both auditory and visual, to protect the public’s enjoyment of these natural areas.

In the Missisquoi and Trout River basin, some ORVs that may be protected under this criterion include: numerous Serpentine Outcrops, Haystack Mountain alpine flora, and Waterfalls and Gorges (see the Natural Resources ORV chapter for more information).

Criterion 9: Primary Agricultural Soils

Criterion 9 protects productive agriculture soils from conversion to development. In as much as the Missisquoi and Trout River landscape is dependent upon a healthy and vibrant farm economy, maintaining the agricultural land uses in the basin is important.

Criteria 10: Local and Regional Plans

Criteria 10 mandates that projects be in compliance with duly (under Vermont State law) adopted local (municipal) and regional plans (multi-town plans). The town plans of the Missisquoi and Trout River basin area are the primary documents that compliance would be based upon regardless of designation. In addition, the regional plans of Orleans and Franklin Counties would be considered under this Criterion as well. The regional plan for Franklin County towns is called the Plan for the Northwest Region 2007-2012 developed by the Northwest Regional Planning Commission, and the regional plan for Orleans County is called the Regional Plan for the Northeast Kingdom adopted in 2006 and developed by the Northeastern Vermont Development Association.

Local and regional planning documents encompassing the 10 basin towns and villages variously address and seek protection of many of the ORVs addressed in this document. Wildlife habitats, forests, alpine areas, wetlands, waterfalls, gorges, covered bridges and historic structures are some of the ORVs that are protected in town and regional planning documents within the Wild and Scenic River region.

Geoffrey Green,² Coordinator for District 6, Franklin and Grand Isle Counties, when asked if this Missisquoi and Trout River Wild and Scenic River Management Plan would hold force as a regional plan under Criteria 10 of Act 250 (considered a duly adopted regional plan or capital program, and thus help guide projects which fall under Act 250 permitting) stated the following:

In order for your [this Management] Plan to have regulatory effect in Act 250 under Criterion 10 your Management Plan must be included in the town or regional plan and compliance with the plan must be specifically mandated in the town or regional plan.

However, this does not preclude your participation or your organization's participation in any Act 250 application where a nexus or particularized interest can be established between your organization's goals and interests and any impacts the project may have on said interests.

Endnotes

1. The website of the Land Use Panel of the VT Natural Resources Board has the most current information regarding Act 250 (<http://nrb.state.vt.us/lup/index.htm>). Information may also be obtained by contacting the appropriate District Commission members and staff (http://nrb.state.vt.us/lup/commission_members.htm).
2. Geoffrey W. Green; 879-5657, geoffrey.green@state.vt.us; http://nrb.state.vt.us/lup/commission_members.htm#district6