

Law Office of James A. Dumont, Esq., P.C.

15 Main St., P.O. Box 229, Bristol VT 05443
802-453-7011; Toll Free: 866-453-7011; fax 802-505-6290
email: dumont@gmavt.net; website: dumontlawvt.com

James A. Dumont, Esq.

Caroline F. Engvall, Legal Assistant

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Hon. Anthony Klein, Chairman, and Members
House Committee on Natural Resources and Energy
Statehouse
Montpelier VT

Re: On the Record Review of ANR Permits – S.123

Dear Chairman Klein and Members of the Committee:

Thank you for inviting me to testify about S.123. The existing permitting and appeal processes pertaining to Agency of Natural Resources permits are dysfunctional and unfair. They need to be overhauled. However, I agree with the strong opposition to the initial version of the bill that Attorney Jamey Fidel, of the Vermont Natural Resources Council, summarized in his memorandum dated April 28, 2015. That version of the bill would have been a step backwards.

I understand that the Agency is in the process of substantially revising the bill. I have not yet seen the redraft.

However, I have shared with the Agency my thoughts on what I believe are the absolute minimum elements of any reform bill that replaces de novo review in the Environmental Division of the Superior Court with on-the-record review. If de novo review is to be repealed, the Agency's internal appeal processes must: **1) include the opportunity for appeal within the agency to an independent hearing officer or hearing panel that is governed by the Vermont Administrative Procedure Act, including the A.P.A.'s right of cross-examination; and 2) guarantee the right to pretrial discovery, including depositions.**

Under the A.P.A., prefiled written testimony, with live cross-examination, may be ordered by the hearing officer or panel in lieu of direct live testimony, but the opportunity for cross-examination must be provided. Under the A.P.A., the record of those proceedings, including the hearing officer or panel's findings of fact and conclusions of law, would be appealable on the record to the Environmental Division, subject to the same standards of review as apply to any other A.P.A. appeal. These A.P.A. standards include deference to the agency in interpretations of its statutory mandate, and the rule that a factual finding cannot be overturned so long as there is some evidence in the record to support it, regardless of the reviewing Court's views on credibility¹.

¹ This "contested case" treatment under the A.P.A. would not be needed, of course, for applications that have not been challenged. A small minority of ANR permits will be subject to A.P.A. procedures.

The need for depositions and cross-examination may not be obvious to persons who do not practice in this area. ANR permits usually require expert studies. Under the current ANR process, the project applicant's experts often will have spent months, sometimes years, working with the agency's staff to prepare an application, communicating repeatedly with the agency's staff. After months or years of communication and information-sharing, the agency decision-maker eventually issues a draft permit. Each of the reports and all of the data submitted to and relied upon by the decision-maker have been prepared by experts who are being paid by the applicant and whose sole goal is obtaining a permit. After the draft permit is issued, a limited time period is provided to affected members of the public in which to learn the details of the permit and the application, hire their own experts and perhaps lawyers, and then submit comments in the hope of changing the mind of the decision-maker.

Reports by experts often are highly partisan. An expert whose report is not going to be helpful to an applicant isn't going to be hired. Expert witness reports often are written, edited or rewritten by lawyers.

The only effective means of finding out the critical theories or assumptions upon which an applicant's expert's opinion is based (which often are not stated in an expert's report), or whether the expert possesses data or facts that disagree with his or her conclusion or report, or what the expert's actual area of expertise is or is not, or what are really the expert's opinions and not those of the lawyers who have hired the expert and helped write the report, is to take the expert's deposition. Only after this is done can opposing parties constructively prepare for a fair hearing. At the hearing, these critical issues, usually absent from the expert's report, can be raised on cross-examination and can be responded to by opposing experts.

At present, it is only by obtaining de novo review in the Environmental Division that the opportunity to inquire of and effectively challenge the applicant's experts arises, by means of deposition and cross-examination. If de novo review is to be replaced by on-the-record review, the agency's procedures must allow the same opportunities for pretrial discovery and cross-examination as now are offered in the Environmental Division. Just as in the Environmental Division, abusive or unnecessary discovery can be limited by the presiding officer. **Any bill that does not guarantee the opportunity for deposition and for cross-examination should be rejected.**

I also want to repeat a point made by Attorney Fidel about the initial draft. S.123 should not be used as a vehicle to restrict public participation. Persons should be allowed to obtain an Administrative Procedure Act hearing so long as they have participated in the agency's process to the same extent as is required by existing law. The appeal period must be a realistic 30-day window, not 15 days. And the hearing officer should have no discretion to curtail appeals by requiring a preliminary showing of likelihood of success – an Orwellian concept, given that permits often are based upon hundreds or thousands of pages of reports and data submitted by the applicant's paid experts and there has been no discovery or cross-examination before the appeal.

Finally, I understand that a component of the Agency's redraft is the creation of a web-based searchable portal that will include all documents involved in a permit application, including those created prior to the public notice. The public will be able to learn of and access these

files prior to public notice of a draft permit decision. The public will be better able to participate prior to public notice of a draft permit decision. Regardless of whether Environmental Division de novo review is to be supplanted by a fair hearing process within the agency, this proposal should be adopted².

Sincerely,

JAD

James A. Dumont, Esq.

² If adopted, the portal will reduce but not remove the need for discovery of documents during the fair hearing process. The portal will include only documents filed with the Agency, not documents held by a project applicant or the applicant's experts and not filed with the Agency (nor would it include documents held by intervenors or their experts, and not filed with the Agency).