VNRC Vermont Natural Resources Council

Date: April 28, 2015

From: Jamey Fidel, General Counsel, VNRC

Re: S.123

Vermont Natural Resources Council opposes S.123.

S.123 would establishes a new appeal process for Department of Environmental Conservation (DEC) permits that would strip the public of existing rights, and promote a permitting system that gives the DEC an unparalleled level of deference and discretion in issuing permits, while minimizing both the DEC and a permit applicant's accountability to the public.

S.123 is so problematic, that VNRC is outright opposed to its passage. Rather than comment on each section of the bill, we will outline our greatest concerns, in hopes that the bill will be scrapped, especially at this juncture of the legislative session.

- S.123 would create an additional level of appellate review for a DEC permit. Under the bill, a person aggrieved by a permit decision could petition for an administrative appeal, but would only have fifteen days to file a petition. Typically a person aggrieved has thirty days to file an appeal.

- A hearing officer appointed by the Secretary of Natural Resources (or a designee) would hear a petition for an administrative appeal. That hearing officer would apparently be housed in the Agency of Natural Resources, raising questions about the objectivity or impartiality of the hearing officer. In effect, the same party issuing a permit would be charged with reviewing the legality of the decision.

- S.123 sets an inappropriately high bar for participating in an administrative appeal. According to S.123, the hearing officer shall grant a petition to hear an administrative appeal only if the officer determines that the petitioner "presents specific allegation based on the administrative record, that of taken true, would show that the act or decision should be reversed." This sets up an onerous burden for the petitioner to essentially present evidence and put on a case demonstrating why the decision should be reversed just in order to have the right to APPEAL. This is a much higher bar for participation than is currently employed by the Environmental Court. For example, in order to participate in an appeal in an Act 250 proceeding, the Environmental Court has clarified that a heightened evidentiary standard, more akin to a merits review, is not required when seeking

to participate as a party. The standard for participating is that a party must show a reasonable possibility that a decision on the proposed project may affect a person's particularized interest. In S.123, beyond alleging an injury to a particularized interest, a petitioner would need to present specific allegations that would show that the act or decision should reversed. This is akin to a merits review, and creates a high, and presumably expensive, threshold for participating at the hearing officer level. According to Aaron Adler, the ANR wanted this test in order to distinguish more credible appeals from less credible appeals. This shows that there is a desire to limit the public's ability to participate by passing judgment on the credibility of an appeal as some kind of gatekeeping function. Furthermore, a party would only have 15 days to present evidence to the hearing officer to show that an act or decision should be reversed. In a nutshell, the process would drive up costs for citizens seeking an administrative appeal, make it more formal, and make it less likely a party would even want to avail themselves to this optional venue.

- Assuming the hearing officer approves an appeal -- which is left to that person's discretion -- a party can submit written memoranda and present oral argument, but there is no discovery (no requests to produce information, no interrogatories, etc.), and no cross-examination of a project applicant's experts, or the ANR's experts. These longstanding rights would be stripped, limiting the ability of a concerned party to question the basis of information in a permit application, or the basis of an ANR decision.

- The traditional appeal of a permit to the Environmental Court would now be on the record, and the hearing officer's review of a petition would also be based on the administrative record. This means citizens will need to lawyer up at the permit stage to make sure that the record adequately reflects all the proper issues and arguments. This will make the permitting process more formal and less citizen friendly.

- Any Environmental Court review of a permit will now be on the record, instead of de novo review. According to S.123, the Environmental Court shall review the record and apply the following standards of review:

    - The Environmental Division shall affirm the decision's statements or findings of fact unless they are clearly erroneous.
    - The Division shall affirm an exercise of discretion unless the Secretary, hearing officer, or Commissioner abused that discretion.
    - The Division shall defer to the decision's interpretation of the Agency's enabling legislation and its rules unless there is a compelling indication of error.

- Taken together, these standards of review create a firewall of protection for the DEC decision. The DEC will be given unbridled discretion and deference in interpreting its enabling legislation, reducing accountability to the public and creating unprecedented opportunities for administrations to politicize the permitting process.

- S.123 adds an additional layer to the appeals process (the hearing officer), and moves the majority of the process to on-the-record review, creating a more formal, front loaded process that will favor the Agency and permit applicants because citizens will longer have the ability to conduct discovery or question the applicants or the DEC's witnesses.

- In a nutshell. S.123 strips citizen rights from the appeal process, and sets up a new regime that is designed to favor the DEC and applicants, leading to less accountability to the public. For these reasons, VNRC strongly opposes S.123.