VNRC Vermont Natural Resources Council

Date: January 22, 2016

From: Jamey Fidel, General Counsel, VNRC

Re: S.123

Last year, Vermont Natural Resources Council testified in opposition to S.123. We understand that the Agency of Natural Resources has proposed some changes to S.123, and we have been providing input to the ANR regarding the bill as originally proposed. We remain concerned about rushing to on-the-record review without building some level of consensus about how to do it right, with the adequate amount of resources, and in a manner that protects citizen's rights.

There are certain aspects of the bill that we support, such as streamlining the amount of permits, and improving access to permit applications and the information contained in the permits. We do want to make sure that a member of the public has an adequate amount of time to comment on the permits, and we are still reviewing the suggested time allotments for the streamlined permits.

Our main concerns with S.123 pivot around the appeal process and going to on-the-record review (OTR review). It is important that the public and interested parties have the ability to probe the underlying basis of a permit decision. Through de novo review at the Environmental Court, this probing and examination occurs through discovery and cross-examination of witnesses so there is a full and fair determination provided in the proceeding. If the permit moves to on-the-record review, and the record is built without full and fair discovery, then questions regarding the underlying assumptions in the permit, and the methodology used to form the basis of a permit decision, may not be adequately probed. Our belief is a permit decision should only be reviewed through OTR review if the parties have had the opportunity to probe the rationale and underlying support for the permit determination through the full discovery rights currently afforded at the Environmental Division of the Superior Court (Environmental Court).

It is our understanding that the ANR is exploring allowing more party participation during the permit review timeframe. This would allow parties to ask the ANR and the permit applicant questions about the permit, and potentially address the concerns of a party. This could have the positive effect of limiting the need for discovery, or an appeal; however, this up front participation should not override the discovery process that is currently allowed at the Environmental Court. Discovery and cross-examination should be permitted before the record is deemed complete.

In regard to the version of S.123 as currently drafted, we will outline our greatest concerns:

- 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 as an interim step before review at the Environmental Court. 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. We understand that ANR would work to create the proper independence for the hearing officer from the political process, but we remain very concerned that the hearing officer will not have the full scale of independence that would be needed to maintain the full integrity of appellate level review, and remain intact from political pressure. A better option would be an administrative law judge that is housed independently from the ANR, or an independent professional board that was made up of technical experts and members with legal background that could issue decisions while maintaining a certain level of consistency before the OTR review by the Environmental Court. We understand that ANR is currently considering allowing parties the ability to choose a hearing officer from a list of practitioners, but we remain concerned that a practicing attorney may bring a certain bias to the process, and utilizing different practitioners may not foster consistent legal holdings.

- 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. 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. Our understanding is the ANR is open to modifying this standard for participation in front of a hearing officer.

- 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 potentially 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 subject to the discretion of the hearing officer, potentially limiting the ability of a concerned party to examine the underlying assumptions in a permit application, or the factual basis of an ANR decision.

- 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.

- We remain concerned about creating standards of review that allow too much discretion and deference to the ANR. It is important to understand the current level of deference that the ANR may enjoy through legal precedent, but we remain concerned about elevating the level of deference to the ANR in statute.

- It is our understanding that few DEC permits are actually appealed, and most appeals of DEC permits are likely consolidated with appeals related to an Act 250 or municipal permit. The Environmental Court would still review other permits through a de novo proceeding. If there is the desire to expand the on-the-record review to all permits, including Act 250 permits, we would be even more concerned, because this would severely impact a citizen's ability to participate at the Act 250 District Commission level in an informal way, without potentially needing to hire an attorney, and create a formal record for review at the appellate level.

In conclusion, we have many concerns with S.123 as drafted. We believe it is helpful to streamline the number of permits, and create a more open process for citizens to engage in the permit process before a decision is rendered. Moving to on-the-record for permits is a more complicated policy that requires a much greater conversation to ensure that it would not curtail citizen rights, or create a process that unduly insulates the ANR and the permit applicant from a full and fair examination of permit decisions.