ANR Permitting and Act 250 -- Facts vs Fiction

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Facts v. Fiction – the Fiction

- ANR rigorously reviews applications for water and air permits
- It is unfair to applicants to have to undergo ANR's rigorous review process and then prove their case all over again in the Environmental Division of the Superior Court

Facts v. Fiction – the Facts – Applicant's Experts Call the Shots

- Permits routinely rely upon computer modeling and other highly technical expert submissions, e.g. hydrocad stormwater modelling, cadna noise modelling, and wetland delineation.
- If the expert's computer modeling or field work does not support the application, the applicant hires another expert.
- ANR's rules impose no requirement of full disclosure; only the data that supports the application is submitted.
- The expert and the applicant's lawyers or development consultants engage in a collaborative process with the agency to reach an agreed upon permit. However, it is a relationship built on **trust – without verification**. The agency does **not** perform its own hydrocad or cadna modeling or its own wetlands delineation.

Facts v. Fiction – the Facts -- All Behind Closed Doors

- The collaborative process can take months or years.
- Under prior and current law (effective 2018), the public receives **no notice** of the collaborative, unverified permit development process.
- Only when the applicant and the agency have reached an agreement on what the permit will contain, is the public notified. The public then has between 15 and 30 days to submit a Public Records Act Request to obtain all of the documents supporting the permit, find their own experts, and rebut the agreed-upon permit.

Facts v. Fiction – the Facts – Even During "Public Comment" the Doors Remain Closed

- There is no requirement in prior or current law that usable data ("native format") from computer modeling be provided by the applicant to the public. This makes it impossible to effectively comment -- even if members of the public obtain the agency's complete file and obtain their own experts within 30 days.
- The applicant has no obligation to provide its modeling in native format until the permit has been appealed to the Environmental Division.
- The applicant has no obligation to allow members of the public onto its land for a site visit during the ANR process. Again, informed public comment is impossible.
- The applicant has no obligation to allow members of the public onto its land for a site visit until the permit has been appealed to the Environmental Division.

Facts v. Fiction – the Facts – Act 250 Cases Then Are Decided Based on These Closed Door Permits

- The collaboratively developed, unverified, permit forms the basis for Act 250 approval on the key water and air criteria.

Facts v. Fiction – the Facts – citizens enter the arena with both hands tied behind their backs

- Parties to Act 250 must establish "standing" and identify the issues they wish to address – before they have had access to the applicant's computer data or the applicant's land.
- The District Commission's rules promote "nonadversarial exchange of information." There is no requirement of expert witness disclosure or depositions of experts as in a court case under Civil Rule 26(b).
- District Commissions almost always rely on the expertise of the applicant's as-yet unchallenged experts and the permits they have obtained. It is extraordinarily difficult to challenge experts without expert witness disclosures and depositions.

Facts v. Fiction – the Facts -- in the Environmental Division, one hand is untied

- Citizens finally have access to expert witness disclosures and can depose the applicant's experts and ANR's experts!
- Citizens, however, then confront court "deference" to ANR's experts. Under court precedent, the agency's "expertise" must be deferred to, even if the "expertise" shows up in an ANR lawyer's brief and has never been through rulemaking or discovery.
- The expense of hiring an expert is a tax-deductible business expense for the applicant. For citizens, the $10-$50,000 expense requires the proverbial bake sale. Many citizens throw up their hands.

ANR Permits and Act 250 -- some solutions

- Amend Act 250 to bar the presumption unless: 1) the agency conducted its own computer modeling and data collection and 2) all modeling and data was made available to the public, along with a site visit, with sufficient time to utilize the modeling and data.
- Amend Act 250 to return de novo review to the Environmental Board/NRB, with application of the court rules for expert witness disclosure and deposition. Return to the EB/NRB will restore the expert development of Act 250 policies and procedures as occurred prior to abolition of the EB – witness the EB's Quechee test and its refinement, and the EB's development of noise standards.