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TO: **The Honorable Members of the House Committee on Natural Resources, Fish and Wildlife**

FROM: **James P.W. Goss, Esq.**

DATE: **April 12, 2018**

RE: **H.665**

I appreciate the opportunity to offer my comments on H.665, a bill which proposes some modest changes to the Act 250 process which may have great benefit to applicants proceeding through that process. By way of background, I am an attorney practicing in Rutland, Vermont. For the past 34 years the majority of my practice has involved representing applicants in our various state and local permitting processes, including local zoning approvals, various Agency of Natural Resources permitting programs and Act 250. Probably 60% or more of my practice has specifically been representing applicants in the Act 250 process. Over my career, I have represented dozens of applicants before the Act 250 Commissions, the former Environmental Board, the Environmental Court and Vermont Supreme Court.

My office represents people and businesses pursuing commercial and industrial projects in Vermont from "beginning to end," including contract negotiation, title clearance, permit due diligence, project design consulting, permitting/appeals, financing and final conveyancing of land. My particular interest in supporting H.665 evolves from a change that I have seen in the potential clients who have approached me regarding permitting new projects over the last 3 years or so. Previously, a potential applicant would come into my office with a concept and would seek guidance on how to navigate their way from contract to actually breaking ground. However, in recent years, I have found that when new clients come into my office, the first topic of conversation has been the reputed onerousness of Vermont's permitting regime. In several recent circumstances, I have found myself having to do a "selling job" to try and allay "stories" that potential applicants have heard anecdotally regarding that process. Matters have now developed to the point where for every applicant which I take through the permit process, 1 or 2 others have elected to go elsewhere exclusively because of the reputation that the process has acquired. This phenomenon is not reflected in the much vaunted statistics showing how many

Act 250 Permits are granted, versus how many are denied, or how many are treated as Minor Permits that are granted without ever having a hearing. These are circumstances where a permittee never pursues a project to begin with simply because of the reputation, deserved or not, which the process has.

In light of this fact, it behooves all persons involved in the process, from legislators, to agency appointees, to State employees, to eliminate as much inefficiency and redundancy from the process as possible. Two particular aspects of H.665 accomplish this and I believe are worth the Committee's attention. The first of these concerns the way certain other Agency of Natural Resources permits are treated in the Act 250 process. Presently under Act 250 Rule 19, a number of State permits establish presumptions of compliance with certain of the Act 250 Criteria. Thus, a project which has received an Air Pollution Control Permit from the Agency is presumed to comply with Criterion 1, Air Pollution. A project which has received a Wastewater Disposal and Water Supply Permit from the Agency is deemed to have an adequate water supply and to adequately dispose of waste and therefore complies with Criterion 1B, Waste Disposal, and 2, adequate water supply. A number of other Agency permits create similar presumptions of compliance under other Criteria. However, the way Act 250 is presently structured, these presumptions are rebuttable. That is, even though an Agency permit on one of these subjects may be final and unappealed, a party to an Act 250 proceeding in which the permit is being considered can attempt to attack it collaterally by claiming it was improvidently issued.

The foregoing is problematic for two reasons. Firstly, the Agency permits and the regulations which they implement by and large are highly technical in nature. The applications for those permits are prepared by engineers and others with highly specialized training and are considered by technical professionals within the Agency with similar training who have no dog in the fight other than to comply with the regulations. Those regulations also are the product of juried, nationally accepted science in areas such as air pollution, erosion control, water pollution and water supply.

Our Act 250 Commissions, although composed of dedicated individuals, are by and large populated by lay people who do not have the scientific training or understanding to truly assess whether highly technical permits have been properly issued or not. In one recent case where an Air Pollution Control Permit was submitted in the underlying Act 250 proceeding to show that a project would not result in undue air pollution, two Agency professionals and their lawyer attended multiple evening hearings endeavoring to defend proper issuance of a permit which was already final and unappealed. I would submit that this is a poor use of State resources and totally unnecessary where a comprehensive review has already occurred in the Agency permit process itself.

Formerly, the argument was that individuals in the vicinity of a project would not be aware of consideration of the subordinate State Agency permits and that the Act 250 hearing would be the first opportunity where they would have a chance to challenge them. As the Committee is aware, the Vermont legislature recently passed a comprehensive overhaul of how applications for ANR permits are noticed to the general public and how approvals of those

permits are handled. Thus, potential opponents to a project now have ample opportunity to challenge State permits in the course of the Agency permit proceeding itself rather than in Act 250. Given this fact, it makes sense now to make final Agency permits conclusive proof of compliance as to the Act 250 Criteria that they pertain to. This is a goal which H.665 accomplishes and which I believe is well worth the Committee's time to consider.

The second aspect of H.665 which I believe merits special attention has to do with the mechanics of issuing an Act 250 Permit. As noted above, most projects proceeding through the Act 250 process also require one or more subordinate ANR permits. As a general matter, even though the Agency of Natural Resources permits may be applied for prior to the Act 250 Permit, they often do not issue until many weeks after the Act 250 hearing has essentially concluded due to workload and other reasons within ANR. As a consequence, issuance of the Act 250 Permit is held up until the subordinate State permits are issued, which can sometimes be many weeks after all of the Act 250 proceedings have concluded.

The foregoing creates a serious logistical issue for projects as generally a bank will not even consider an application for financing for a project until its Act 250 Permit has been issued; there is less emphasis on the subordinate ANR permits which are also required. H.665 affirmatively allows a District Commission to go ahead and issue an Act 250 Permit, subject to receipt of other needed State permits after the fact. While seemingly a distinction without a difference, this has the effect of issuing the Act 250 Permit which lenders wish to see before considering financing and so allowing project applicants to proceed with that financing. It has no practical effect on the environment as construction of the project itself cannot proceed until all of the subordinate State permits are in hand. However, it at least allows a potential permittee to proceed with obtaining their financing and moving their project along while waiting for the Agency to issue the other State permits.

The foregoing two changes to Act 250 proposed in H.665 should be supported by persons on all sides of the environmental and natural resources debate. In the case of the Agency permit presumptions, it keeps arguments about subordinate Agency permits where they belong, within the Agency itself, without having Act 250 Commissions with little technical training or expertise second guessing Agency decisions when a full permit review has already occurred. In the case of issuance of Act 250 Permits pending receipt of other Agency permits, again no construction will occur until those Agency permits are issued. However, an applicant's financing application will not be delayed weeks or months simply due to the fact that the Act 250 Permit for a project has not been issued.

While there are other changes proposed in H.665 which I believe would also benefit the process, I would urge you to particularly consider the foregoing as I believe it would promote greater efficiency in the process without causing any concomitant harm to natural resources. I would respectfully thank the Committee for its attention and consideration of these comments.

JPWG:clk