Testimony of Jon Groveman, Policy and Water Program Director, Vermont Natural Resources Council House Natural Resources and Wildlife Committee On Act 250 Appeals March 12, 2019

I. Introduction

I am Jon Groveman, Policy and Water Program Director for the Vermont Natural Resources Council (VNRC). Thank you for the opportunity to testify today on Act 250 appeals.

I would like to provide you with a description of my experience that is relevant to my testimony today. I have worked on and participated in Act 250 since 1995. I served as the Act 250 Attorney for ANR from 1995-1999. In that capacity I represented ANR and other state agencies before every Act 250 District Commission and before the former Environmental Board.

I was the Executive Director of the former Water Resources Board in 2003 when the Water Resources Board was eliminated along with the Environmental Board. Prior to 2004, the Water Resources Board heard appeals of ANR water permits. Accordingly, I had a front row seat for the permit reform bill of 2002/2003 that moved appeals out of the Environmental Board and can provide insight into why the change in the appeals process was made, what the concerns were about moving appeals out of the Environmental Board to a court and what the impact of moving Act 250 appeals to the court has been.

Since the Environmental Court was expanded to hear Act 250 and ANR appeals I have participated in numerous appeals before the Court. Accordingly, my experiences before both the Environmental Court and the former Environmental Board informs my testimony.

As I will outline today, VNRC strongly supports moving back to a Board model for hearing Act 250 appeals and administering Act 250. We believe that eliminating the Environmental Board was a major mistake that has harmed the effectiveness of Act 250 and it is one of the most important improvements that this Committee can make in this vital effort to modernize Act 250.

The reasons why VNRC supports returning to a Board model of hearing appeals and administering Act 250 include:

- Moving appeals from the Environmental Board has hampered consistency in Act 250 and has weakened the administration of the Act 250 program.

- A Board is a better fit to render decisions on the numerous technical criteria of Act 250: A Board can develop expertise in technical issues not just law; and can have multiple members with varied qualifications.

- A Board process would be more nimble, less expensive and more efficient for applicants and parties concerned about the impacts of projects.

II. 2003 Change to Appeals Process

In 2002 Governor Douglas in his first term in office made reforming the permit process a top priority. He had campaigned on the issue vowing to create a more efficient permit process. His administration introduced a bill that that would have completely overhauled the zoning and Act 250 processes at the District Commission, local zoning level and altered the appeals process for Act 250, zoning and ANR permits.

After significant review, no agreement could be reached in 2002. Much like I have heard during the review of Act 250 you are engaged with, we heard in 2002 that District Commissions function pretty well, and most of the concern had to do with the local zoning process. Accordingly, there was not an interest in significantly altering the entire process, and the focus turned to how to make the appeals process work better.

In my view, there were a couple of factors driving the interest in revising the appeals process. One is that attorneys that practiced before the Boards expressed frustration with the lack of ability to discover information and complained about the lack of strict adherence to the rules of evidence and procedure. These attorneys were looking for a more formal process than the process administered by a 9 member citizen Environmental Board.

Another factor was that the 9 member citizen Environmental Board was seen as unwieldy by some. One of the benefits of the Board, from my perspective, was having multiple people that can brainstorm on a decision bringing their various backgrounds and expertise to the table. However, for applicants and government agencies, arguing before a 9 member panel created uncertainty. The Board members could all ask questions at hearings, which makes the proceeding harder to control and manage. As an advocate for citizens before the Board, I welcomed the questions and varied perspectives. Board questions typically expounded on concerns about a project being raised and opened up inquiries into how a criteria should work to address an issue.

In addition, after more than 30 years of decision-making under its belt, the Environmental Board (and Water Resources Board) had made decisions that upset applicants and other parties to proceedings alike. In other words, the Board had made everybody unhappy at one point or another – applicant, government agency and citizen party. This contributed to a willingness to consider changes to the appeal process.

Finally, there was concern that there were multiple appeal routes that would benefit from consolidation. In 2002, Act 250 permits were appealed to the Environmental Board, ANR permits to the Water Resources Board, other ANR permits to court or the Waste Facility Panel and zoning permits to the Environmental Court. Some advocates believed that the varied forums and processes for appeals created confusion and uncertainty, and efficiencies could be gained if appeals could be consolidated.

I will address the issue of consolidation later in my testimony. And while I don't agree that consolidation creates inherent efficiencies in the appeals process, it was a factor driving the effort to alter the appeals process in 2002/2003.

As the Legislature focused on changes to the appeal process, the question that emerged was did the Environmental Board need to be changed or eliminated? The question became whether concerns about the appeals process could be addressed by creating a smaller professional board that allowed for discovery, more strictly followed the rules of evidence or move appeals to the court?

At the very end of the session in 2003, a compromise was reached to move all environmental appeals to court and alter the rules for obtaining party status in Act 250 (something the Administration wanted) in exchange for no weakening of any Act 250 criteria and providing appeal rights under Act 250 to all parties to the Supreme Court.

In moving the appeals process to court there were concerns expressed that the Environmental Board would lose its ability to shape policy and address questions about the interpretation of Act 250 criteria among the District Commissions, that there would be much lost in having one judge make decisions as opposed multiple members of a board that can brainstorm and bring their different backgrounds and perspectives to the table, and that the court process would be more formal, complicated and expensive for citizen groups in particular. In VNRC's opinion, all of these concerns have come to fruition.

Below is an analysis of the impact of moving appeals from the Environmental Board to the court.

III. Moving appeals from the Environmental Board has hampered consistency in Act 250 and has weakened the administration of the Act 250 program.

Until 2004, the Environmental Board through its decision on appeals was able to address questions about how various criteria should be interpreted and implemented. The clarity and depth of the Environmental Board decisions was able to communicate to District Commissions, applicants and parties to Act 250 how a criteria worked.

Take for example the aesthetic criterion of Act 250. The Act 250 statute states that to obtain a permit, an applicant may not have an undue adverse effect on aesthetics. How should a District Commission judge what an undue adverse effect on aesthetics is? What does it mean to have an undue adverse effect on aesthetics?

To answer these questions and provide clarity about how to implement this criterion the Environmental Board set forth the meaning of the aesthetic criterion in a case involving a residential development in Quechee, Vermont. The test, known famously as the Quecchee analysis, details how a District Commission should go about determining if a project meets this criterion. The Board adopted a test that examines whether a project first is adverse, and then undue adverse based on the context of its surroundings. If the Board determines

a project is adverse, it examines if the project is undue adverse by looking at whether the project violates a clear community standard, is shocking or offensive and if these impacts have been mitigated.

My point is not to get you to know the Quechee analysis, but to convey how the Board breathed life in a criterion that simply said a project may not have an undue adverse impact on aesthetics by creating a reasoned test for addressing the criteria.

Creating these type of tests is something administrative boards are set up to do, where courts are not. A court is structured to examine expert testimony and evidence and determine how an application should be processed. It is not set up to create ways to address technical issues like the Board did in the Quechee case and so many others.

I am attaching a link to the E-Note index. It is a recitation of the major decisions that the Environmental Board made over the years to explain how Act 250 issues should be addressed. See https://nrb.vermont.gov/documents/e-notes. In the absence of a Board that can provide direction to parties and the Act 250 program, it is very difficult to address issues that arise about how the criteria should be interpreted.

In 2003, the Legislature smartly directed the court to treat Environmental Board decisions as precedent in its proceedings. This has allowed the court and parties to look to decisions like the *Quechee* decision to guide it in reviewing applications. However, what we have lost is the ability for these decisions to evolve and for new ways of interpreting and implementing criteria to address questions that arise in the course of appeals. This is because courts are not designed to work in this way.

As a result, to address issues that were handled through appeals and precedent at the Board, rule changes are necessary. Rulemaking is a slow process that does not allow the program to react to issues before it in a nimble and efficient way, and create consistency throughout District Commissions regarding how to deal with issues under Act 250 through its decisions.

Having a board hear appeals integrates hearing appeals with program administration in a way that does not occur by moving appeals to a court. This integration was key to the early success of Act 250.

There was a theory that what Act 250 lost in having a strong board making decisions to address issues could made up by having NRB attorneys provide advice to Commissions on legal issues. The problem with this is that advice is just advice – it is not a decision and it is not being made by a Board that is making a dispositive ruling on an issue. Rather, it is the opinion of one attorney.

Actually, when the Environmental Board existed, we had the best of both worlds – an attorney dedicated to providing advice to District Commissions and a Board clarifying Act 250 issues. These two functions are not mutually exclusive. The lawyer providing advice

to District Commissions simply must be walled off from discussing the issue with Board members. But it can and has been done.

Similarly, having the NRB as a party to Act 250 proceedings does not resolve the issue. The NRB as a party is not the decision maker. It has no more authority than any other party, and it's positions in an appeal is determined by the Board Chair – not an entire Board deliberating on what a position on an issue should be.

Finally, I submit that if the Committee modernizes Act 250, as is necessary to ensure the program address the challenges of the 21st century, a strong Board will be required to interpret Act 250 to let District Commissions and parties know how new and amended provisions of Act 250 should be implemented.

IV. A Board is a better fit to render decisions on the numerous technical criteria of Act 250: A Board can develop expertise in technical issues not just law; and can have multiple members with varied qualifications.

One reason a Board is better suited than a court to hear Act 250 appeals is that it allows multiple people from varied backgrounds to decide the varied technical issues that may be presented in Act 250 appeals. As you know, Act 250 criteria address issues form water and air pollution, to traffic and aesthetics, to impacts on community services etc. Having Board members from different backgrounds, who can deliberate and learn from each other is better suited to addressing these technical issues that one judge sitting in a court.

A board can be staffed with experts or hire experts to assist it in addressing complex issues so both the legal and technical issues that may be raised in an Act 250 appeal can be resolved. Again, courts are not structured to do this. Having a board that can address both legal and technical issues is how you get the myriad of decisions demonstrated by the E-Note index.

The concerns about the unwieldy nature of a 9 members citizen board could be addressed by constituting a smaller professional board. There have also been concerns about ensuring that a board operate outside of the executive branch of government and be free from political influence. Proponents of a court model point to the fact the judiciary branch is separate from the executive branch, which creates independence needed to make fair decisions.

I think we all want a fair, independent board free of political influence. To ensure this the Legislature in making the change back to a Board can:

- Declare that the board is independent of the Governor; and
- Institute a judicial nominating type process; and
- Clarify that the Board Chair has a term but can only be removed for cause and that all Board members can only be removed for cause.

V. A Board process would be more nimble, less expensive and more efficient for applicants and parties concerned about the impacts of projects.

A Board process can be more efficient the Court process. Staff can be used as hearing officers for less complex cases.

A board process could be less formal that appearing in court. It could be a middle ground between a court and a citizen board – having professionals appointed who are paid for their service with rules that would allow discovery with limits, and follow the rules of evidence with an ability to be flexible. This would cut down on the expense and complexity of appeals, which currently is significant**.** I have been involved in two and three week trials in Environmental Court that are incredibly expensive.

VI. Consolidation

I would like to take a moment to discuss consolidation of appeals. As I indicated, this was one factor driving the reform effort in 2002/2003. The theory is, if appeals with overlapping issues can be addressed at one time, it will be more efficient for all parties.

In practice, I don't think this has turned out to be true. I have been involved in cases where Act 250, zoning and an ANR permit have been appealed. For example, an appeal could involve stormwater. So you could consolidate the appeals. But you may have to wait for all permits to be issued to start the consolidated appeal. While you were waiting, you could have begun an appeal on one of the permits.

If you do wait, then there will very likely be a different standard for stormwater in each decision – Act 250, zoning and ANR. So the court and the parties must keep 3 different standards through the appeal, and the decision must address the differing standards.

In addition, the consolidation will likely create one large long trial. Sometime it is more efficient and less expensive to handle the matters separately.

Having said this, I understand that there is interest in consolidation among some Legislators and advocates. Accordingly, I want to put out there that consolidation can be achieved with a professional board model. I will send a link to a 2012 bill introduced by Representatives Deen and Klein that shows how this can be done.