ANR Permitting, Act 250 and the Need for an Administrative Board

House Committee on Natural Resources, Fish and Wildlife

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The Reality Today – Applicants' Experts Control the Process

- 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 and District Commission 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.

The Expert Process Occurs Behind Closed Doors

- This lawyer/expert/agency collaborative process at ANR 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.

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 allow members of the public onto its land for a site visit during the ANR process. Informed public participation is limited or impossible.

Act 250 Permits Then Are Granted Based on the Closed-Door Permits Negotiated by the Applicant's Experts

- The collaboratively developed, unverified, permit forms the basis for Act 250 approval on the key water and air criteria. Rebuttable presumptions arise – which are difficult to "rebut" without an opposing expert.

- Expert testimony also reigns over the Act 250 criteria that do not hinge on presumptions, such as traffic, visual and noise impacts. It is nearly impossible to challenge an applicant's expert testimony without an opposing expert.

In the Environmental Court, the Adversary Process Allows Only the Wealthy to Effectively Participate

- The expense of hiring an expert is a tax-deductible business expense for the applicant.
- For neighbors and citizen groups, the $10-$50,000 expense of a single expert is often an insurmountable obstacle. Only the wealthy can respond to and effectively question the applicant's experts.
- Judges are assisted by law clerks, not experts. Judges never hire their own experts.
- As a result, applicants' experts continue to determine the outcomes of many Act 250 cases.

Advantages of the Environmental Board Solution – The Board's Own Expertise

- The Environmental Board relied both on expert staff and experts retained for particular cases, both to decide particular factual disputes and to establish policy. See, e.g., In re Boisoneault (1/29/98, No. 6F0499-EB) ("The Board concludes that it does not have sufficient information on which to make a determination under Criterion 9(H). The Board has the discretion to require that the parties provide additional information, to call its own expert witness, and to reconvene the hearing as to Criterion 9(H).")
- In addition to its staff, the Environmental Board itself consisted of citizens from a wide range of backgrounds – not just law.
- The Board's broad experience, its staff, and its independent experts enabled the Board to flesh out Criterion 8 to develop the Quechee test.
- The Environmental Court's law-trained judges lack the authority to hire either expert staff or expert witnesses. Citizens and the Environmental Court are dependent on Applicants' experts in the absence of well-resourced intervenors.
- The PUC already relies on in-house experts and experts retained for particular cases.

Advantages of the Environmental Board Solution – Better Citizen Participation

- Act 250 was intended to facilitate participation by all potentially affected persons. 10 V.S.A. §§ 6084, 6085; *In re N. E. Materials Group LLC Act 250 Permit,* 2016 VT 87, ¶ 5, 202 Vt 588, 151 A.3d 766 (intent was to "enfranchise" local interests and encourage public participation).
- Despite best efforts by Environmental Court judges to welcome *pro se* participants, the nature of the court process deters citizen participation.
- Citizens often lack the training and knowledge to cross-examine experts, and judges do not see it as their role to cross-examine.

Proposed Fleshing Out of Bill

- Board should consist of nonlawyers as well as lawyers.
- To facilitate citizen participation, require a) routine pretrial sharing of reports, cadna files, data and other information relied on by experts; b) pretrial site visits upon request; c) prefiled testimony unless Board rules otherwise, and d) with Board approval if parties do not agree, depositions.
- Bill should explicitly state that Vermont Administrative Procedure Act contested case protections, such as prohibition on ex parte communications, apply. 3 V.S.A. sections 809-816.