

Intro

Thank you for the opportunity to testify.

If you're amenable I'd like to provide a quick overview of ANR's role in Act 250, provide comments on the governance aspects of the bill, then make a few brief comments related to other aspects of H.492.

ANR's Role in Act 250:

- ANR is a statutory party in Act 250 proceedings – we are not a decision maker – District Commissions issue Act 250 permits, but ANR is an automatic party for any project that raises potential impacts under Act 250's environmental criteria.
- In that capacity we receive and review every minor and major Act 250 permit that is filed, identify potential natural resource impacts, engage with applicants in an effort to avoid or minimize those impacts, file written comments with Act 250 district commissions for minor applications, and participate in hearings before district commissions for major applications. We also engage in pre-application review and project scoping, participate in site visits, and for larger projects may initiate in project review a year or more prior to the filing of an application.
- ANR manages this body of work centrally through the Office of Planning, which I lead.
- We coordinate review of Act 250 and PUC Cert of Public Good applications across all three of our Departments – DEC, Fish and Wildlife, and FPR.
- Technical staff across all three departments review new applications for questions, concerns and impacts that fall under their expertise and work through the planning office to request additional information, set up site visits, and ultimately file comments and propose permit conditions to the Act 250 district commission.
- The Planning office also works internally to reconcile any disagreements between ANR programs that may arise during the review of an application so that the Agency speaks with one voice to applicants and district commissions.
- The Agency, through our Department of Environmental Conservation, also issues several permits that provide a presumption of compliance for certain Act 250 criteria. The Planning Office helps coordinate with DEC permit programs to align their work with broader Agency interests in any given Act 250 project.
- All in this is a major enterprise. Across the Agency's central office and three departments we dedicate at least 8 FTE's per year to Act 250 work at a cost of over \$1M per year. Those FTE's are spread across dozens of staff that spend a portion of their day working on Act 250, but in total it represents a significant investment in time, capacity and resources to support the day to day operations of Act 250.

H.492 and Governance:

- Given the Agency's role and investment in the Act 250 process, governance is a critical issue that directly affects our work. A governance structure that establishes clear policy precedent that applies clearly in all 9 Act 250 districts, especially on emerging issues, is necessary for the Agency to effectively participate in the Act 250 process.
- Increased governance is especially important as we look to the future and the potential introduction of new Act 250 criteria and changes in jurisdiction, as well as the environmental and land use challenges the state will face with a changing climate and ensuing development pressure anticipated from climate refugees.

- Given that context, the Agency appreciate this Committee's focus on Governance as an important aspect of Act 250 modernization and the work done to develop H.492 – it is certainly a step in the right direction.
- Many of you will recall the previous governance proposal to establish a professional NRB that would join one member of a regional commission to hear major Act 250 applications on the record, and where the decision rendered by that tribunal would be appealed directly to the Vt Supreme court.
- That governance model had the twin benefits of direct involvement of a professional board at the district level in major cases – bringing the resources and experience of the professional members to support district commissioners and allowing for more regular, direct application of policy precedent – and the benefit of reducing a step in the appeal process by holding major cases on the record.
- As you know Vermont averages roughly 40-50 major applications a year, while the number of appeals is much lower, so relying solely on the appellant function of a professional board to establish policy, as set forth in H.492, may have limitations.
- That said, I see H.492 as an improvement over the status quo. Creating a professional board that provides some level of policy guidance over the Act 250 enterprise is critical to support any comprehensive Act 250 modernization and this bill provides a good basis for discussion.
- With that introduction I have a few specific comments regarding H.492.
- Since the ERB will hear appeal of District Commission decisions, firewalls will need to be established between the ERB, District Commissions and District Coordinators. This can be accomplished in a number of ways, for instance creating an executive director position that does not directly participate in the appeal process and can act as a cross walk between the ERB and district commissions to communicate policy guidance, however, this internal firewalling is not an easy task maintain and may have the unintended consequence of LESS direct engagement between the ERB and District Commissioners, rather than more. To ensure that does not happen, the details of how the ERB does and does not interface with District Commissions and Act 250 staff is a critical element that warrants further discussion.
- Previous witnesses have compared the H.492's ERB model to the former Environmental Board, which also exerted governance and policy guidance through an appeal function. I caution you not to make too direct a comparison to the Environmental Board for a couple reasons.
- First, the former Environmental Board operated with long tenured executive directors and general counsels that had well established relationships and means of communication with district commissioners and Act 250 staff. My understanding is that those roles and relationships allowed for the effective communication and execution of Environmental Board policy decisions at the District Commission Level. You may want to hear from witnesses who participated in the process at that time, but I'm concerned that without those positions and relationships, the governance effect of ERB appellant decisions alone may not be as effective as intended.
- Second, the Environmental Board grew with Act 250 from nearly the beginning and had a constant governance presence across the Enterprise – its role was well established, known and largely effective within the organization.
- However, the Environmental Board was disbanded almost 15 years ago and District Commissions have operation without a central policy authority for that time, resulting in a more independent and decentralized Act 250.
- Dropping a new professional board into that independent and decentralized framework without other levers to impart policy guidance and governance may not be as successful as the former

Environmental Board model that essentially grew up with the District Commission from the beginning.

- To put it another way, relying on the power of ERB appellant decisions alone, may not be a wholly effective means to exert policy guidance across the Act 250 enterprise given 15 years of no governance framework.
- One solution to this challenge is a **hybrid model** – a model where the ERB performs the appellant function set forth in H.492, AND where a single ERB board member joins 2 District Commissioners to hear Major cases at the District level.
- This model has the dual benefits of the ERB establishing policy guidance through appellant decisions AND the benefit of individual, professional board members joining District Commissions on Major cases, to provide policy guidance, depth of experience on ERB precedent, a statewide context on emerging issues, and assistance with developing a complete record.
- This model will also make the ERB a better appellant body, because Board members will have had the experience sitting with District Commissions to hear cases and understand the process more fully from the perspective of applicant and those who may challenge permits on appeal.
- If this committee endeavors to restructure Act 250 governance, I ask you to consider this model seriously.

Finally, I have a few remaining comments on the bill as it relates to ANR:

- First, as parties to Act 250 proceedings ANR often participates in appeals. H.492 does away with consolidated appeals of Act 250 and ANR permits before the Environmental Court and will require ANR legal staff to appear before multiple tribunals in some instances. This may have a capacity impact on the Agency that will affect our staffing and budget.
- Second, the Environmental Court has established deference to ANR for certain administrative and permitting decisions made by the agency. We would expect that deference to extend to appeals before the ERB, but it's unclear how or if H.492 addresses that issue.
- Lastly, I recommend the committee review existing NRB rule making authority and ensure that the ERB is authorized to promulgate not only procedural rules, but also rules that have a direct bearing on policy.

Thank you for your focus on the issue of Act 250 Governance.