From: Mears, David
Sent: Monday, January 16, 2012 8:36 PM
To: Shems, Ron; MacLean, Alex; Markowitz, Deb; Recchia, Chris
CC: Gjessing, Catherine; Johnson, Justin
Subject: RE: Bullets.OTR&EDprocess

Alex, Deb, Chris, Ron: Two sets of thoughts responding to Ron's message below:

I. I spoke to Representative Deen on Friday late afternoon and came away with a few thoughts I wanted to share about permit appeals reform legislation:

(a) The water panel transfer from NRB is in his environmental review bill (H.513) and, at least at the moment, is tied to passage of that bill. We may be able to get that portion into a separate bill but for now the two are linked.
(b) Rep. Deen expressed concern about the Governor's statements about record review in his state of the state speech and indicated that an insistence on record review would impede passage of a permit appeals reform bill. I spent some time trying to understand and respond to Rep. Deen's concerns. I came away hopeful that there is an opportunity to engage in a discussion about this topic but it is going to take some dialogue to get to agreement on an approach that works for him.
(c) There are some good provisions in H.513 that we should support if pulled into a bill reforming the environmental court. For instance, there is a provision requiring the board to give ANR technical deference. On a related note, I have not had time to do a thorough read of H.513 and we need to do that. I assume that this review may already be underway. I will sort out who of my attorneys is doing or could do a review and we will coordinate with Ron and the NRB on getting a detailed analysis to Deb and Alex.

II. I also want to share a few thoughts to supplement or explain Ron's points from the message below in light of the dialogue I have been hearing at the statehouse and among the attorneys:

Record Review Means Different Things to Different People: Folks appear to have different legal models in mind when discussing record review. I suggest that we use the term, "modified record review," to make clear that we are envisioning something other than a traditional record review (where the record is developed after a full adjudicatory hearing with discovery and examination of witnesses). For ANR decisions, the record would be the application, correspondence between the applicant and the agency, any supplemental application materials, public comments and the agency's response to the public comments. The record could be supplemented for good cause such as to fill in gaps in the record where the agency left gaps as to its reasoning for its decision, or where expert testimony is necessary to explain complex concepts or terminology.

ANR Decisions are Different from District Commission Decisions: The legislation may and probably should distinguish between how district commission and ANR decisions are reviewed. I have heard many comments expressing concerns about local government and Act 250 District Commission decisions that are unique to those proceedings so would not apply to ANR.

Modified Record Review Does Not Increase the Burden on Applicants: One of the arguments against record review I have heard is that applicants will now have to anticipate every concern that might possibly be raised in order to protect their application from appeal. The legislation could be crafted to limit issues raised on appeal to those raised in the public comment period. If citizens are allowed to comment on the application, then the applicant can supplement their application to respond to those comments. That way, the appeal can be limited to the issues raised in the comments, and so can the applicants' supporting information. In any event, applicants should not be off the hook from making a basic showing that their applications meet all of the statutory criteria -- that is the agency's or the district commissions' jobs, to make sure that the applications satisfy the rules.

ANR Would Have to Modify its Procedures to Protect Citizen Appeal Rights: In order for the modified record review to work for citizens, they need the opportunity to have input into the record. For this reason, the application process should allow some period of time for citizens to comment on the application before a draft permit is issued as well as to comment on the draft permit decision. This will front end some of the process with attendant delay for permit application processing time, but with the benefit of reducing the risk of a lengthy appeal process.

Deference to ANR should not be unlimited: Deference to ANR on its interpretation of it own regulations or the statutes it is tasked with implementing would apply only where the statutes or regulations are ambiguous. This is the same approach used by the federal courts when reviewing federal agency decisions. Also, deference on technical matters does not mean blind obedience -- the standards governing deference should allow the court to overturn an agency technical determination where clearly at odds with accepted principles of science or engineering. Deference only comes into play where there is a reasonable difference of opinion among experts -- then the court should not substitute its judgment for that of the agency but should instead accept the agency's determination.

I hope this is helpful as these conversations progress. Sincerely, David

David K. Mears, Commissioner
Vermont Department of Environmental Conservation

From: Shems, Ron
Sent: Thursday, January 12, 2012 9:38 AM

To: MacLean, Alex
Cc: Markowitz, Deb; Recchia, Chris; Mears, David; Kehne, Melanie
Subject: Bullets.OTR&EDprocess

Hi Alex,

Suggested features of an enhanced Environmental Court are attached.

I also took the liberty of suggesting basic features for on-the-record review. We have the opportunity to set the standard for on-the-record review and need to have a standard in mind to help formulate a bill.

David Mears's thoughts are incorporated into the attached.

Please let me know if you have questions.

--Ron

Ronald A. Shems
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