

From: Johnson, Justin
Sent: Saturday, March 05, 2011 2:26 PM
To: Mears, David
CC: MacLean, Alex; Markowitz, Deb; Recchia, Chris; Kessler, Gary; Gjessing, Catherine
Subject: Re: H 258

One thing I would add is that wouldn't make sense to limit the involvement only to Clean Water Act actions because our Federally delegated programs all share similar public participation language; and we are currently deficient in all of them. At a minimum we would needful apply H258 to all federal programs.

Justin

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On Mar 5, 2011, at 2:08 PM, "Mears, David" <David.Mears@state.vt.us> wrote:

Dear Alex, Deb, and Chris: Attached is a message from Tom Torti responding to my explanations for why we are currently supporting legislation allowing for greater public participation in enforcement actions. To address his concerns would require a new piece of legislation – we cannot simply tinker with the current bill language to get to agreement with the business community if they remain loyal to Tom's concerns.

The thrust of Tom's message is that the LCRCC would only support legislation narrowly crafted to address the known and undisputed deficiency in Vermont law with regard to public participation in Clean Water Act enforcement actions, and only as necessary to resolve the de-delegation petition filed by CLF. H.258 would currently apply to enforcement actions under other federal and state environmental laws, not just the Clean Water Act, and so – if our goal is solely to resolve the Clean Water Act de-delegation petition – the current bill goes further than is necessary. For this reason, Tom suggest narrowing the bill to apply only to claims brought under the Clean Water Act.

Also, the current bill gives more rights to citizens than are strictly required by the Clean Water Act. Of the two options offered by the Clean Water Act, H.258 currently chooses the one that gives a more substantive participation right to citizens, a relatively narrow right of intervention. The other option is to offer an even more limited public comment option – which is what Tom suggests. The public comment option, if chosen, also comes with a requirement that the state take other procedural steps, steps that increase our paperwork (requiring a written response to every complaint) without offering much substantive benefit.

I find Tom's arguments unpersuasive and believe that he and his organization are making more of the risks associated with allowing citizens to intervene in an enforcement action than is warranted. It is, however, hard to engage in a debate over this as we have little experience in Vermont with the intervention approach taken in the current bill so have no data. My own perspective is informed by my experience with the federal government where intervention is allowed and almost never results – my personal experience is not much to work with in terms of concrete information but I am confident of my conclusion. I have not done any research but am unaware of any studies on the number of times citizens intervene in federal enforcement actions that could help us be certain.

With all of that in mind, I do have a real policy disagreement with the perspective offered by Tom. I think that it is good policy to allow a more substantive right to citizens to identify and complain to a court about deficiencies in state enforcement actions. Doing so ensures that state enforcement actions are both transparent and that the courts can hold agencies accountable for ensuring that their enforcement actions and settlements comport with the law.

This is a relatively small step and does not go as far as creating a state citizen suit. The H.258 approach does not allow citizens to force the state to take enforcement, nor does it allow citizens to enforce the law themselves. Under H.259, citizens are only empowered to make sure that any state enforcement action that is taken comports with the substantive environmental law being enforced.

Ultimately, however, allowing greater citizen rights to intervene in enforcement action may create pressure on the system such that the state seeks, and violators agree, to more stringent enforcement orders. Such a result, while largely

theoretical and impossible to prove one way or the other, is not a bad one from the perspective of trying to ensure an effective regulatory enforcement program.

On another policy front, I also think that it makes little sense to change our enforcement procedures for only one kind of action, Clean Water Act cases, and not for all of the different kinds of enforcement actions. We need to streamline our procedures, not create further permutations that are confusing to staff and the public.

On these policy issues, the differences between my perspective and that offered by LCRCC are real.

For a path forward, I see two options:

- (1) Craft a new bill, narrowly crafted as recommended by Tom, and seek to get CLF and the relevant committees to support it. I do not know how CLF will respond and I do not have a sense of how a vote on a narrow bill would turn out in the event that CLF opposed it.
- (2) Make some minor revisions to the bill, such as narrowing the definition of aggrieved person, as a gesture to the LCRCC's concerns, but not proposing a whole new approach. I assume we could persuade CLF to support such a bill but it would likely result in opposition to the bill from the business community. Again, I do not have a real sense of how a vote on this bill would turn out if that were the case.

Perhaps we could have a brief conversation about this early next week to determine a strategy going forward. Sincerely, David

David K. Mears, Commissioner

Vermont Department of Environmental Conservation

From: Tom Torti [mailto:tom@vermont.org]
Sent: Friday, March 04, 2011 5:57 PM
To: Mears, David
Cc: Recchia, Chris; Kessler, Gary; Dawn Francis; Ernie Pomerleau; Warren Coleman; Frank Cioffi
Subject: H 258

All:

Memo attached. Have a good weekend and let's work on this next week.

Tom T

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