Bill Bartlett's concerns about the H. 175 Committee of Conference and the replacement of citizen boards with a so-called professional board. 11/19/03

1. Use of a professional board model is likely to make the environmental permit appeals process more political.

A professional appeals board will concentrate enormous power into the hands of a very few. Critical environmental cases currently decided by 5 or 9 member independent citizen board members would now be decided by one or two Executive branch employees. Such a concentration of power will make each appointment and reappointment critical to that Board's future performance and thus highly political.

Use of the judicial nominating process for appointments to a professional board will not be sufficient to prevent appointments, and reappointments to such a board from becoming highly political.

The judicial nominating process works for judicial appointments to an independent and co-equal branch of government where each judge is a relatively small fraction of the judiciary as a whole. However this same process will have an entirely different dynamic when used for appointments to a three member professional environmental appeals board in the Executive branch that hears all appeals of state and local development permits.

Even if appointed via the judicial nominating process, all members of the initial professional board will be appointed by the Douglas Administration. Such appointees may be "legally qualified" but will nonetheless reflect the "jobs, jobs, jobs, permits-R-us" philosophy of an Administration that has turned the DPS into a cheer leader for lowering IBM's electric rates by raising the rates of small businesses and ordinary Vermonters. A Douglas Administration appointed professional board will not have the commitment to following the law regardless of the political consequences that has repeatedly been demonstrated in the stormwater issue by the WRB.

A brand new, Douglas Administration appointed professional board will adopt new rules of procedure, decide which legal staff from the former EB and WRB to retain and will otherwise define the culture of this new board in its formative stages.

Once appointed professional board members will have a strong career interest in being reappointed and/or favorably considered for future employment opportunities either in the private sector or elsewhere in state government. This could easily color rulings in high profile cases, especially those decided by a single judge or board member

Vermont's environmental regulatory process needs to be made less, not more, subject to political influence!

As discussed in paragraph 6 below, I believe an Enhanced Citizen Board model would be the best choice for consolidating appeals. However, if the choice is between an Enhanced

Environmental Court and a professional appeals board, I believe the Court model would be less political and no more legalistic!

2. The professional board model will make the appeals process more legalistic and less accessible to Vermont citizens

Sending all appeals to a court or a court-like "professional" board will make the appeals process more legalistic and thus more expensive for Vermont citizens than it is currently.

A professional board hearing all state and local appeals will need to become conversant with the wide spectrum of highly specialized and often highly technical and complex state and federal environmental law dealing with wetlands, water quality, solid waste, air quality, ground water, drinking water supply, public trust doctrine, etc

Vermont will lose the efficiency benefits of specialized boards specializing on discrete areas of environmental law, a key to consistent and informed decision making.

3. Elimination of citizen boards as appeals bodies will significantly diminish citizen participation.

While citizen participation thru expanded appeal rights in Act 250 is important, so is citizen participation in the most high-value aspect of the appeals process, making the decisions.

Deciding appeals regarding the protection of Vermont's environment has long been the highest and most important form of citizen participation in Vermont's environmental regulatory process. The loss of such high-value citizen involvement will make Vermont's environmental regulatory process less innovative and responsive (see paragraph 4 below). Elimination of citizen board as appeals bodies will eliminate a critical feedback mechanism that currently informs and energizes the rulemaking functions of citizen boards.

4. Preserving critical rulemaking functions in a vestigial citizen board is simply a holding pattern for the eventual transfer of these functions to ANR.

The experience and insights gained by having citizen borad members hear appeals in a quasi-judicial capacity plays a critical role by informing their important rulemaking functions as well as informing the independent perspective such boards provide to the Legislature on environmental policy issues.

The citizen board model has worked well in Vermont for over 30 years. Why are we "fixing" the part of the permit process that has worked the best (the WRB) and leaving the part of the permit process that clearly is broken (ANR) unaddressed?

Hearing appeals gives citizen board members insight into how Vermont's environmental regulatory process works and where there are opportunities for innovation and

improvement. A short and very incomplete list of recent examples limited to my WRB experiences includes:

The adoption of the numeric phosphorus criteria in the VWQS (over ANR's objections) which currently serve as the basis for cleaning up Lake Champlain's impairment.

The WRB initiated critical evaluation of the Vermont Wetlands Program which resulted in a number of reforms including a rocket docket-like method of reclassifying wetlands protected due to mapping limitations and errors.

The adoption by the WRB of a summary judgement provision in its rules of procedure allowing it to promptly dismiss frivolous appeals.

The opening of a docket on stormwater management thereby providing leadership in seeking to break the current impasse on stormwater regulation.

5. Elimination of the WRB as punishment for its recent stormwater decisions will send a chilling message to future decision makers.

The focus in H. 175 on "consolidated appeals" is a red herring. The facts are under H. 175 virtually no appeals will be consolidated. There are better, less disruptive and costly ways to consolidate appeals and improve citizen boards in the limited areas where this is needed (see paragraph 6 below)**.**

"Consolidation of appeals" was been the cover story for the proponents of H. 175 real goal, the elimination of the appeals function of citizen boards generally and the WRB specifically for having been too zealous, in applying the law regarding stormwater regulation.

While I recognize and respect the fact that some of the VBA participants have other arguments in favor of a professional board (which I think should be fully considered by the SNRC and the SJC) it would be naive to ignore the obvious link between the phantom issue of "consolidation of appeals" in H. 175 and the on-going ANR created stormwater crisis.

There is no documented performance based reason for eliminating citizen boards as appeals bodies. While I agree there should be a better appointment process and some professionalization of the boards so that every appeal is chaired by a legally qualified person this can be done in a much better way (see paragraph 6 below).

Why are we scraping a 30+ year tradition of citizen participation in the decision making process without even discussing why we're doing this and if the alternatives being put forward are actually improvements?

There is no record of decisions by citizen boards being found to be legally deficient by reviewing Courts at an unacceptable frequency. All WRB decisions have been appealable to the Supreme Court for over 30 years. The WRB, despite having to make many legally complex and highly controversial decisions, has been reversed only once in the last ten years, a better record than many "professional" appeals tribunals.

The fact is the WRB is being punished by the proponents of H.175 for having had the courage of their convictions and issued decisions that are unpopular in some portions of the regulated community but which also haven't even been challenged on appeal. This legacy will not be lost on future appeals bodies, especially those more vulnerable to political pressure such as a professional appeals board.

6. The enhanced citizen board model combines the best feature of citizen and professional boards.

The use of the judicial nominating process is a good idea but will be most effective at insulating decision makers from political pressure if applied to citizen boards.

Citizen board members serve as a civic duty and not for income or career considerations. Appointed via the judicial nominating process, citizen board members would be much less vulnerable to political pressure.

Consolidating all state level permit appeals in a Consoldated Appeals Board could be achieved at no substantial additional cost and with minimal disruption to the established appeals process (see attached document "Enhanced Citizen Appeals Board Model").

The estimated annual cost of H. 175 in new monies is $300,000 annually. These new monies should instead be invested strategically in ANR and elsewhere to imporve the performance of Vermont's environmental regulatory porcess.

7. H. 175 and the recent VBA proposal do not address the two major problems with Vermont's environmental regulatory process.

Major problem # 1 - ANR's inability to meet its statutory obligations in a manner consistent with Vermont and federal law.

Major problem # 2 - ANR's myriad permit programs have never been statutorily integrated either internally or with Act 250 to provide a coherent system of environmental management with clear lines of responsibility and authority.

Until the two problems outlined above are addressed in a comprehensive manner, Vermont's environmental regulatory process will not achieve its environmental protection purposes and as a result will continue to be a source of uncertainty for future economic development.

8. Passing "Permit Reform" legislation limited to the narrow focus of H. 175 via the Committee of Conference will eliminate or severely limit prospects for redefining this issue in the Senate and passing broader permit reform initiatives in 2004 and perhaps beyond.

If some variation of H. 175 is agreed to in the Committee of Conference the environmental community will have lost, or seriously weakened, the opportunity to redefine "Permit Reform" in our terms. This needs to be done by shining a spotlight on ANR and connecting the dots between their poor performance and the resultant regulatory uncertainty for both environmental protection and economic development.

If some variation of H. 175 is agreed to (the details will be relatively unimportant to the Administration as long as the politics are on-message), the Governor will declare victory on "Permit Reform", declare victory and go home on this issue until after the 2004 election. When its opportune, the Governor can criticize the D's and environmentalists for delaying permit reform and argue that H.175 is just a down payment.

Enacting Permit Reform legislation via the H. 175 Committee of Conference will serve to validate the view of the Administration and the regulated community that "permit reform" is synonymous with making it easier for applicants to get permits. The Administration and the regulated community will then be able to resurrect the need for further "permit reform", meaning further limiting citizen participation, whenever its politically expedient to do so, perhaps after the 2004 election.

Even if the Senate where to pass "son-of-Permit Reform" legislation in 2004, its hard to see what incentive there would be for the House or Administration to seriously consider such an effort.