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The Role of Citizens in Environmental Decision-Making

Nicole M. Rovner

ENVIRONMENTAL ARTICLES

THE ROLE OF CITIZENS IN ENVIRONMENTAL DECISION-MAKING

Nicole M. Rovner[*]

I. INTRODUCTION

During the 2007 and 2008 sessions of the Virginia General Assembly, the legislature considered legislation that would have restructured the roles, responsibilities, and composition of the Commonwealth's three pollution control boards: the State Water Control Board, the Air Pollution Control Board, and the Waste Management Board, in relation to the roles and responsibilities of the Department of Environmental Quality (DEQ) and its director. Much of the debate surrounding this legislation centered on the role of citizens in environmental decision-making. This article will trace the history of the legislation, identify the different views of citizens' proper roles in such decision-making reflected in various versions of the bill, and draw some conclusions about the perspective that ultimately prevailed in the legislation enacted in 2008.

One's view on the proper role of citizens in environmental decision-making depends on beliefs regarding the nature of the decision itself, as well as the ability of citizens to ensure that the public interest is protected when the decision is made. This article will focus on a particular kind of decision—the issuance of environmental permits—because these decisions have received the most attention from stakeholders, legislators, and the

[*] Deputy Secretary of Natural Resources, Commonwealth of Virginia. B.S., 1991, Pennsylvania State University; J.D., 1994, University of Richmond: T.C. Williams School of Law.

press while the DEQ legislation has been under consideration.[1] It should be noted, however, that the bills also addressed other types of decisions, such as those related to enforcement of environmental laws.[2]

Questions about the proper role of citizens can be asked both about citizens who may wish to influence that decision—that is, the public—and about citizens who are themselves making a decision—that is, citizens appointed by the Governor to serve on the Air, Water, and Waste boards. A key question regarding both sets of citizens is how their roles interrelate with those of the staff and director of the DEQ, public servants who are in the employ of the Commonwealth.[3]

This article will describe five versions of the DEQ legislation from the bill's legislative journal: the bill as introduced, the bill that passed the General Assembly in 2007 with a reenactment clause, the bill introduced on behalf of proponents of board restructuring at the beginning of the 2008 session, the bill introduced on behalf of the restructuring bill's opponents, and the legislation that was enacted and will become effective on July 1, 2008. For each version of the bill, this article seeks to identify views regarding the nature of permitting decisions and the role of citizens in making those decisions.

II. THE BILL AS INTRODUCED

As introduced, the legislation would have consolidated the State Air Pollution Control Board, the State Water Control Board, and the Waste Management Board into one eleven-member citizen board called the Virginia Board of Environmental Quality.[4] The Board of Environmental Quality

1. *See, e.g.*, VA. DEP'T OF ENVTL. QUALITY, CITIZEN BOARD LEGISLATION – HOUSE BILL 3113/SENATE BILL 1403: A PROGRESS REPORT ON THE EFFORTS OF THE HB 3113/SB1403 STAKEHOLDER GROUP 7-8 (2007), *available at* http://www.deq.state.va.us/export/sites/default/regulations/pdf/HB_3113_Report_Final_111607.pdf.

2. H.B. 3113, Va. Gen. Assembly (Reg. Sess. 2007) (as introduced, Jan. 18, 2007).

3. An interesting observation about those public servants was made by one of the proponents of the legislation, Former Virginia Secretary of Natural Resources John W. Daniel, II, during a recent presentation. Mr. Daniel stated that employees of natural resources agencies are unique in state government because their vocations and their avocations are one and the same. John W. Daniel, II, former Va. Sec'y of Natural Res., Remarks at the Virginia Bar Association and Virginia Code Commission Administrative Law Conference (Nov. 30, 2007). In general, people who work in the field of environmental protection have a deep personal commitment to the idea that the environment should be protected, and that commitment is embodied not only in their careers, but also their personal lives. This does not necessarily mean that employees of environmental agencies are more dedicated to their jobs or more proficient than other government workers, but their personal commitment to environmental protection is worth considering when comparing their roles with those of the public and appointed board members.

4. H.B. 3113, Va. Gen. Assembly (Reg. Sess. 2007) (as introduced, Jan. 18, 2007). Note that the same legislation was also introduced in the Senate as Senate Bill 1403. S.B. 1403, Va. Gen. Assembly (Reg.

would have had authority to adopt regulations under the State Water Control Law, the State Air Pollution Control Law, and the Virginia Waste Management Act.[5] All other responsibilities of the existing boards, including the authority to issue permits, would be vested in DEQ and its director.[6]

While describing the way the bill would have changed the law requires relatively few words, the legislation itself was 140 pages,[7] which is a rather long bill for the General Assembly. In contrast to the legislative drafting conventions employed by Congress and some states, Virginia's legislative customs require an entire section of the *Code of Virginia* to be set out, even when a bill only changes a few words. Many of the sections in the DEQ board legislation were changed only by replacing "board" with "director" or by replacing the references to the Air, Water, or Waste boards with Board of Environmental Quality.[8] Nevertheless, some legislators and opponents of the bill argued that such a long bill required more study than could be devoted to it during a short legislative session.[9] Representatives of the business community initiated the bill's introduction, and DEQ and the Governor expressed support forit.[10] Environmental groups generally opposed the legislation, and this opposition seemed to grow in intensity throughout the legislative process. [11] Ultimately, the bill was enacted with a reenactment clause stating that the bill would not become effective unless reenacted by the 2008 General Assembly.[12]

A. The Nature of the Decision

As introduced, the bill would have clearly tipped the balance of authority away from the boards and towards the DEQ and the director:

> All powers and duties conferred or imposed upon the State Air Pollution Control Board, the State Water Control Board, and the Virginia Waste Management Board and are not expressly granted to the Virginia Board of Environmental Quality are continued and conferred or imposed upon the Director of the De-

Sess. 2007).

5. H.B. 3113, Va. Gen. Assembly (Reg. Sess. 2007).

6. *Id.*

7. *See id.*

8. *Id.*

9. *See, e.g.*, VA. DEP'T OF ENVTL. QUALITY, *supra* note 1, at 1.

10. VA. DEP'T OF ENVTL. QUALITY, *supra* note 1, at 1. This article refers generally to the bill's proponents and opponents in citing arguments used in favor and against particular legislative provisions. It should be noted that, while the author serves in Governor Kaine's administration, the views in this article do not necessarily represent those of Governor Kaine, DEQ, or others in state government.

11. The divisions between the business community and environmentalists were the same as in the 2008 session. *See* Editorial, *Business Demands Foul Air in Richmond*, THE VIRGINIAN-PILOT, Feb. 2, 2008, at B8.

12. Act of Apr. 10, 2007, ch. 838, 2007 Va. Acts. 1339.

> partment of the Department of Environmental Quality. Wherever in this title and in the Code of Virginia reference is made to a board or the head of a board, division, department or agency whose authority hereinafter transferred to this Department, it shall mean the Director of the Department of Environmental Quality.[13]

In particular, the bill would have ensured that permitting decisions were made by the director rather than the consolidated board.[14] The extent to which this would change existing practice varies among the boards because the three boards operate under different statutes and have adopted different regulations and customs. Under existing practice, the Waste Board has no role in issuing permits;[15] the Air Board and the Water Board, however, both have statutory authority to consider permits.[16] While both allow DEQ staff to handle most permits, the trigger for direct board involvement in a permit decision is different.[17] For the Air Board, permitting authority is presumed to have been delegated to the staff unless the Board makes an affirmative decision to hear the permit. [18] For the Water Board, all permit decisions are delegated to the staff except those for which a public hearing has been requested by the public.[19] It is this diversity of procedures regarding board authority over permits that has been cited as one of the reasons supporting legislative change.[20] Many companies are required to have more than one type of permit for a single facility, and a consistent process for applying for and receiving permits would improve efficiency for those companies, as well as for DEQ.[21] In addition, businesses would prefer to know the ultimate decision-maker's identity at the time of the permit's application, rather than waiting to see whether a public hearing is requested or whether the Air Board decides to take on the role of decision-maker.[22]

Proponents of eliminating the boards' roles in permitting decisions characterize such decisions as administration of the law—a technical application of law and science to facts.[23] Opponents of the legislation, on the other hand, argue that the results of permitting decisions affect members of the

13. H.B. 3113, Va. Gen. Assembly (Reg. Sess. 2007) (as introduced, Jan. 18, 2007).
14. *Id.*
15. VA. DEP'T OF ENVTL. QUALITY, *supra* note 1, at 3.
16. *See* VA. CODE ANN. §§ 10.1-1307(E), 62.1-44.15(5) (Repl. Vol. 2006).
17. VA. DEP'T OF ENVTL. QUALITY, *supra* note 1, at 3.
18. *Id.*
19. *Id.*
20. *Id.*
21. *See id.* at 2-3.
22. *See id.*
23. *See, e.g.*, Rex Springston, *Slashing Environmental Boards' Power Debated*, RICH. TIMES-DISPATCH, Jan. 5, 2008, at B8; Frank W. Wagner, Op-Ed, *Too Much Power Invested in an Unelected Few*, ROANOKE TIMES (Va.), Jan. 18, 2008.

public in the vicinity of the facility, and that such decisions can establish precedents which will affect future cases, and are, at least in some instances, more akin to actions establishing policy.[24] Both sides also debate whether permit decisions are a form of art, involving judgment that should be exercised by representatives of the public, or a form of science, which should be applied by the expert staff at DEQ.[25] It was clear that some opponents of the legislation view permit decisions as a way for government to hold the line on industrial excess or corporate greed, and those opponents felt a board was better able to stand up to such private interests.[26]

While both sides of the debate agree that most air and water permits are already handled by DEQ staff without the involvement of the boards, the significance attached to this fact differs.[27] One side suggests that the rarity of board involvement in permits indicates that a desirable balance already exists and questions the need for a change.[28] The other side downplays the significance of the change, contending that the benefits of efficiency and consistency outweigh any negative effect from altering only a few permits.[29]

B. Public Input in Public

Opponents also contend that the public's ability to weigh in on permit decisions is important and that such decisions should be made in full public view.[30] To evaluate this argument, it is important to recognize that, as introduced, the legislation did not explicitly address the *process* by which permitting decisions would be made at all. Instead, the legislation only addressed *who* would be making the decisions. An unintended consequence of assigning all permitting decisions to the director is that it would increase the number of decisions that would be made in an office setting in the normal course of business, rather than in a public forum.[31] Interested persons

24. *See* Springston, *supra* note 22; *see also* Bill Tanger, Op-Ed, *Politics vs. Science*, ROANOKE TIMES (Va.), Feb. 7, 2008, at B9 (discussing the effect of board decisions on various localities).

25. *See, e.g.*, Tanger, *supra* note 23. Tanger argues that often citizen board members have more scientific credentials than the governor-appointed director. *Id.*

26. *See id.*

27. *See* VA. DEP'T OF ENVTL. QUALITY, *supra* note 1, at 3 (describing the limited instances when boards are involved in permit decisions even under the status quo).

28. *See, e.g.*, Robert G. Burnley, Op-Ed, *A Grave Challenge to Virginia's Environment*, ROANOKE TIMES (Va.), Jan. 13, 2008; Editorial, *supra* note 11.

29. *See, e.g.*, Wagner, *supra* note 22.

30. *See, e.g.*, Editorial, *Keep Citizen Votes on Environmental Panels*, THE VIRGINIAN-PILOT, Nov. 27, 2007, at B8.

31. Because the Virginia Freedom of Information Act (FOIA) requires that public bodies such as appointed regulatory boards be take action only at public meetings, the boards must make permitting decisions in a public forum. VA. CODE ANN. § 2.2-3710 (Repl. Vol. 2005). Decisions assigned to a direc-

could, of course, still provide comments in writing during public comment periods on permits.[32] However, seeing a Board's decision-making process and being able to make oral comments at a time contemporaneous to that process is deemed by some to be extremely important.[33]

C. Board Membership: Citizens or Experts?

As introduced, the bill contained no requirements regarding qualifications of members of the consolidated board. It only provided the following: "The members of the Board shall be citizens of the Commonwealth and shall be selected on the basis of merit without regard to political affiliation."[34] This language, which is similar to existing law governing the selection of Water Board members,[35] would give the Governor a great deal of flexibility to appoint members of the consolidated board. The bill's lack of qualifications suggests that board members should be ordinary citizens, as opposed to experts in a particular area or representatives of current constituencies.

Some opponents of consolidation contend that board members could not reasonably be expected to have sufficient expertise to competently deal with all three media.[36] Proponents of consolidation contend that the board members' status as ordinary citizens is, in fact, what qualifies them to represent the public interest.[37] As a statutory matter, existing law does not require expertise on any of DEQ's three boards.[38] Certainly, some level of expertise is gained through service on a board, but that experience more likely renders the board member an informed citizen rather than an expert. Many of the proponents of the legislation argue that only the staff of DEQ can be expected to have the expertise necessary to fully understand all the issues needed to make permitting decisions.[39] They believe consolidating the boards would improve consistency and efficiency in the decision-making process for permits, enforcement, and other actions, and that a consolidated board would be better able to address multimedia issues such as

tor, however, do not have to satisfy the requirements of FOIA. *See id.*

32. *See, e.g.*, VA. CODE ANN. § 10.1-1307.01 (Repl. Vol. 2006). House Bill 3113 would have modified this section, but would not have eliminated the public comment periods. H.B. 3113, Va. Gen. Assembly (Reg. Sess. 2007) (as introduced, Jan. 18, 2007).

33. *See, e.g.*, Springston, *supra* note 22; *Citizen Role Vital on Pollution Boards*, THE VIRGINIAN-PILOT, Jan. 14, 2008, at B8.

34. H.B. 3113, Va. Gen. Assembly (Reg. Sess. 2007) (as introduced, Jan. 18, 2007).

35. *Compare id.*, *with* VA. CODE ANN. § 62.1-44.9 (Repl. Vol. 2006).

36. *See* Wagner, *supra* note 22.

37. *See Citizens Role Vital on Pollution Boards*, *supra* note 32.

38. *See* VA. CODE ANN. §§ 10.1-1301, 10.1-1401, 62.1-44.9 (Repl. Vol. 2006).

39. *See, e.g.*, Wagner, *supra* note 22.

air pollution impacts on water quality in the Chesapeake Bay.[40]

Statutory language governing some of the other boards within the Natural Resources Secretariat seeks to ensure that board members possess particular expertise, represent identified stakeholders, or are distributed geographically across the Commonwealth. For the Board of Conservation and Recreation, for example, "the Governor shall endeavor to select persons suitably qualified to consider and act upon the various special interests and problems related to the programs of the Department."[41] The Marine Resources Commission includes members who are "representative of all areas of interest in Virginia's marine resources, including commercial, recreational, and environmental interests."[42] The board also includes at least one member who has earned his livelihood as a commercial fisherman for at least five years and one who is a representative of the sport fishing industry or a recreational fisherman.[43] The Board of Soil and Water Conservation's membership requirements speak not only to expertise and affiliation, but also provide a specific methodology for identifying candidates for appointment to the Board:

> At least two of the three at-large members should have a demonstrated interest in natural resource conservation with a background or knowledge in dam safety, soil conservation, water quality protection, or urban point or nonpoint source pollution control. Additionally, four members shall be farmers and two members shall be farmers or district directors, appointed by the Governor from a list of two qualified nominees for each vacancy submitted by the Board of Directors of the Virginia Association of Soil and Water Conservation Districts and the Soil and Water Conservation Board in joint session....[44]

The Board of Game and Inland Fisheries, on the other hand, has no affiliation requirements, but does require that one member be appointed from each of Virginia's congressional districts.[45] There are also no qualification requirements regarding the Board of Historic Resources, but the law requires the Governor to consult with both historic preservation organizations and agencies, and those representing business interests that may be affected by the Board's activities.[46] Interestingly, federal regulations require approved state historic preservation programs to use a state review board "represent[ing] the professional fields of American history, architectural history,

40. *See* Julian Walker, *Plan to Weaken Citizen Boards Draws Backlash from Environmentalists*, THE VIRGINIAN-PILOT, Jan. 5, 2008, at B1.

41. VA. CODE ANN. § 10.1-105 (Repl. Vol. 2006).

42. VA. CODE ANN. § 28.2-102 (Repl. Vol. 2004).

43. *Id.*

44. VA. CODE ANN. § 10.1-502 (Repl. Vol. 2006).

45. VA. CODE ANN. § 29.1-102 (Repl. Vol. 2004 & Supp. 2007).

46. VA. CODE ANN. § 10.1-2203 (Repl. Vol. 2006).

historic architecture, prehistoric and historic archeology, and other professional disciplines" to review and approve nominations to the National Historic Landmarks Register.[47] Therefore, in addition to the Board of Historic Resources established in the Virginia Code, the Department of Historic Resources established a State Review Board consisting of experts appointed by the director.

III. THE LAW THAT (SORT OF) PASSED IN 2007

Amending a bill by adding a reenactment clause is generally considered to be a polite way of defeating a legislative proposal. The General Assembly has rarely, if ever, reenacted such a bill in a form identical to the bill with the reenactment clause in subsequent years. In this particular case, however, there was an indication that some action on the subject would occur in 2008; the Chairs of the House Committee on Agriculture, Chesapeake, and Natural Resources and the Senate Committee on Agriculture, Conservation, and Natural Resources sent a letter to the director of DEQ asking him to convene stakeholders to make recommendations on the proposal.[48] The final version of the 2007 bill contained concessions to some of the objections raised against the bill. This section describes the ways in which the final version was different from the introduced version. The basic components of the bill, however, did not change: The final version still consolidated the boards, and it still transferred permitting authority to the director of DEQ.[49]

A. Decision-Makers

Existing law contains no requirements regarding qualifications that the director of DEQ must possess, and as introduced, the DEQ board legislation would not have added any such requirements. After a great deal of discussion during the 2007 session about the merits of investing significant authority in one person—the DEQ director—the legislation that emerged added a requirement that the director must be "an experienced administrator with knowledge of environmental protection and shall have demonstrated expertise in management and environmental science, law[,] or policy."[50]

47. 36 C.F.R. § 60.3 (2007).

48. VA. DEP'T OF ENVTL. QUALITY, *supra* note 1, at 1.

49. Act of Mar. 26, 2007, ch. 838, 2007 Va. Acts 1339. The consolidated board was given authority over one type of permit in the final version of the bill: general permits. *Id.* A discussion of the similarities and differences among individual permits, general permits, and regulations is beyond the scope of this article.

50. *Id.*

These requirements depart from past expectations of agency heads, as no other agency head within the Natural Resources Secretariats is required to have particular credentials or expertise, except the Commissioner of Marine Resources, who must "be an experienced administrator with knowledge of seafood and marine affairs."[51]

As the bill made its way through the legislative process, legislators added another provision in an effort to address concerns about concentrating power in the director: the establishment of an Environmental Appeals Board (hereinafter Appeals Board). The Appeals Board would consist of five members, two of whom had to be attorneys meeting qualifications of hearing officers set forth in the Administrative Process Act.[52] After reviewing a decision of the director, the Appeals Board would have the power to recommend a change to that decision if a majority found the director erred.[53] However, the decision whether to allow the appeal and whether to follow the Appeals Board's recommendations would have rested with the director.[54] The purpose of the Appeals Board was to provide a check on the director's authority by allowing those who disagree with his decision to challenge it.[55]

The question of whether a director or a board is the preferred decision-maker is complicated by the fact that many actions assigned by statute to either the board or the director will, in practice, be carried out by the staff of the department. While the board or the director may have the ultimate responsibility for a final decision, by necessity almost all of the preparation for that decision must be carried out by DEQ. Further, the staff of the department will recommend a course of action. The fact that the *Code of Virginia* often does not explicitly recognize the role of the agency and its staff is, at least partially, a relic of the time prior to the DEQ's establishment pursuant to 1992 legislation consolidating the functions of the Department of Air Pollution Control, the Department of Waste Management, and the State Water Control Board.[56] It is reasonable to conclude that many of the

51. VA. CODE ANN. § 28.2-102 (Repl. Vol. 2004). Such requirements do exist elsewhere in the *Code of Virginia*; the director of the Division of Legislative Services must be an experienced attorney, for example, and the Health Commissioner must be a licensed physician. VA. CODE ANN. §§ 30-28.12, 32.1-17 (Repl. Vol. 2004).

52. Act of Mar. 26, 2007, ch. 838, 2007 Va. Acts 1339.

53. *Id.*

54. *Id.*

55. Those disagreeing would have to meet standing requirements set forth in the legislation. *Id.*

56. *See* Act of Apr. 15, 1992, ch. 887, 1992 Va. Acts 1667. Note that before DEQ existed, "State Water Control Board" was the name used to refer to both the board itself and the agency—that is, there was no way of referring to the department separately. This likely explains why House Bill 3113 contained so many more changes in the State Water Control Law than for the Waste Management Act or the Air Pollution Control law. Indeed, over half the pages of the bill were consumed by changes to the State Water

references to the boards in that legislation were retained as an indication of ultimate responsibility, but much of the statutory language should be recognized as descriptions of actions taken by the department. A related point to be considered in judging the wisdom of investing power in one person or a group of people is the extent to which that one person or group of people has access to expertise beyond what they personally possess. The director of DEQ has hundreds of staff members to assist him on a daily basis. The boards, by contrast, have only limited time and opportunity to interact with the staff.

B. Decision-Making

Proponents of the legislation likely underestimated the importance of public decision-making for the legislation's opponents throughout the debates on DEQ board legislation. The final version of the bill did, however, attempt to address the desire for public comment opportunities by requiring the director to hold a public meeting to receive comment for any permit application that "generates significant public interest and raises substantial environmental issues."[57] The director would have been required to personally attend such meetings and issue a report to explain "the legal and factual basis of the permit determination and changes made to the permit in response to public comment."[58] The legislation also provided an opportunity for the permits to be discussed with the consolidated board, presumably at public meetings, but only in the form of semiannual briefings by the director.[59]

Pursuant to the request of the committee chairs, DEQ convened a stakeholder group that met three times in the autumn of 2007.[60] The stakeholder group, which consisted of representatives of organizations that had supported the legislation (e.g., the Virginia Chamber of Commerce), groups that had opposed the legislation (e.g., the Southern Environmental Law Center and the Sierra Club), and groups that had not taken a position (e.g., the Virginia Coal Association and the Virginia Farm Bureau), was unable to reach complete consensus on a legislative proposal that all could support.[61] However, the group made some progress on identifying potential areas of agreement. There was general agreement, for example, that the legislation

Control Law. *See id.*

57. Act of Mar. 26, 2007, ch. 838, 2007 Va. Acts 1339.

58. *Id.*

59. *Id.*

60. VA. DEP'T OF ENVTL. QUALITY, *supra* note 1, at 2.

61. *See id.* at 1-2.

should address greater procedural predictability and consistency; active and meaningful participation by permit applicants, advocates, and affected parties; simplicity and timeliness in the permit consideration process; and the need to encourage early collaboration among interested parties.[62] In addition, while several stakeholders expressed a continued preference for consolidating the boards, discussions of the group indicated that retaining the three boards was acceptable to the majority of participants.[63] Finally, there was a great deal of discussion about a new role for the boards in permitting decision: that of advisor. Many members of the group expressed support for the idea that, if permitting decisions are going to be made by the director, the boards should be able to weigh in on significant permits by providing advice to the director.[64] There was a detailed discussion about the kind of deference the director should give to advice provided by the board, and the need for documentation of the director's consideration of that advice, but these issues were not fully resolved by the stakeholder group.[65]

IV. THE 2008 LEGISLATION

A. Decision-Makers

DEQ issued a progress report on the stakeholder group's efforts in November 2007.[66] On January 4, 2008, the House Committee on Agriculture, Chesapeake, and Natural Resources and the Senate Committee on Agriculture, Conservation, and Natural Resources held a joint public hearing. Most of the speakers during the hearing opposed consolidating the boards as well as shifting authority away from the boards,[67] and many in the audience wore stickers that said, "Save Our Citizen Boards." When the 2008 session began the following week, two different versions of legislation regarding the three boards' authority over permitting decisions were introduced: one supported by the proponents of vesting all permitting authority in the director[68] and one supported by the opponents of shifting authority away from the boards.[69]

The proponents' bill did not attempt to reenact the 2007 legislation, but

62. *Id.* at 3.
63. *Id.* at 6.
64. *Id.* at 5-6.
65. *Id.* at 6.
66. VA. DEP'T OF ENVTL. QUALITY, *supra* note 1, at 1.
67. *See* Springston, note 22.
68. H.B. 1332, Va. Gen. Assembly (Reg. Sess. 2008).
69. H.B. 650, Va. Gen. Assembly (Reg. Sess. 2008).

instead included variations on some of the potential compromise positions that had been discussed during the stakeholder process. The bill did not propose to consolidate the boards, for example, but retained the three existing boards.[70] Two members would be added to the Air Board so the three boards were consistent in size.[71] The bill also added both qualifications and language regarding constituency representation for each of the boards.[72] Interestingly, the qualifications were particular to the subject matter assigned to the board; for example, Air Board members must, "by their education, training[,] or experience, be knowledgeable of air quality control and regulation and shall be fairly representative of conservation, public health, business, and agriculture."[73] This represents a reversal of the proponents' position that expertise in one particular medium is not required for effective service on a board.

The bill would have transferred all permitting authority from the Air Board and the Water Board to the director.[74] Unlike the 2007 bill, however, all three boards would have been given an advisory role in permits.[75] The director could, upon request, hold a public hearing over which he would preside personally or through a designee to receive public comment.[76] After a public hearing, the director could call a meeting of the appropriate board to receive the board's advice regarding the permit after making a finding, among other things, that "the [d]irector's ability to address and resolve [significant] issues would be enhanced by the Board's participation and advice."[77] Under this scenario, the permit applicants' desires for certainty regarding the decision-maker would be satisfied while the goals of those who want the boards to play a role in permit decisions would be partially satisfied.

The opponents' bill was more modest in scope. That bill would have reconfigured the membership of the three boards by requiring that each one include one member of each of the other two boards.[78] Presumably, this was an attempt to address some of the concerns raised about consistency among the three boards' procedures and policies that might also have increased the boards' ability to address cross media issues. The bill would

70. *See, e.g.*, H.B. 1332, Va. Gen. Assembly (Reg. Sess. 2008) (as introduced, Jan. 9, 2008).
71. *See id.*
72. *Id.*
73. *Id.*
74. H.B. 1332, Va. Gen. Assembly (Reg. Sess. 2008) (as introduced, Jan. 9, 2008).
75. *Id.*
76. *Id.*
77. *Id.*
78. H.B. 650, Va. Gen. Assembly (Reg. Sess. 2008) (as introduced, Jan. 8, 2008).

have standardized some processes, but would have left the boards' authority intact.

B. Decision Making

Under the proponents' bill, the board meeting called to provide input on a permit decision would include an opportunity for public comment, and the director would be required to make a good faith effort to notify those members of the public who had participated in prior comment periods.[79] Again, this was intended to partially satisfy the concerns of those who believe the permit decision should be discussed in public, with members of a citizen board, in a setting that affords opportunity for public input. The desire for the final decision to be made in public, however, was not addressed. The director would be required to consider any recommendation by the board within its statutory jurisdiction, but the circumstances under which the director would be expected to incorporate recommended conditions were described rather narrowly:

The Director may incorporate conditions in the permit based upon Board recommendations if he determines that such conditions: (i) are within the statutory authority of the Department; (ii) were not addressed by the Department in preparing the draft permit, (iii) either provide substantial additional protection to the environment, public health, or natural resources or provide substantially the same level of protection in a more effective or efficient manner; (iv) are consistent with the statutory and regulatory program under which the permit is issued; (v) are technologically and economically feasible; and (vi) do not unfairly or unreasonably burden the applicant with costs or delays that would, in the Director's judgment, be disproportionate to the benefits reasonably to be expected from them. The Director shall incorporate conditions in the permit based upon recommendations adopted by the Board if he determines that such conditions are necessary to comply with applicable laws and regulations administered by the Department.[80]

The director would have been required to prepare a written record of his final determination on each board recommendation.[81]

Even though the legislation would have invested permitting authority in the director, the bill did not include a provision establishing an Environmental Appeals Board. It became clear during discussions after the 2007 session that none of the stakeholders were enamored with the idea of this

79. H.B. 1332, Va. Gen. Assembly (Reg. Sess. 2008) (as introduced, Jan. 9, 2008).
80. *Id.*
81. *Id.*

new board. Indeed out of the nine decision-making models discussed by the stakeholder group, only one contained an Appeals Board.[82]

The opponents' bill did not change the Air Board's or the Water Board's authority regarding permits, but instead laid out an identical set of standards for the boards to use in determining whether to delegate permitting authority to the director.[83] Specifically, the bill provided that the board should consider the level of public interest, whether there are substantial and disputed issues, whether resolution of such issues is within the scope of the board's statutory authority, and whether the board would be able to act in a timely and efficient manner.[84] The bill did not make any changes to the authority of the Waste Board. This is interesting in light of the fact that the proponents' bill would have, for the first time, allowed for public hearings and board meetings on solid permits under the Waste Management Act.[85] The status quo that does not allow citizen input or citizen decision-making on such permits is apparently acceptable to those seeking to protect the permitting authority of the Air and Waste Boards.

C. The Result

While the bill introduced on behalf of the proponents was the one eventually enacted, the final version represented a victory for the opponents of reducing the authority of Virginia's three pollution control boards. Chapter 557 of the 2008 Acts of Assembly, comprising a relatively scant six pages, retains the three boards as well as their authority over permits.[86] The director is required to "be an experienced administrator with knowledge of environmental protection and government operation and shall have demonstrated expertise in organizational management and environmental science, environmental law, or environmental policy."[87] Qualifications for board members mirror the requirements in the bill as introduced.[88]

The bill also establishes a uniform process for consideration and issuance

82. *See* VA. DEP'T OF ENVTL. QUALITY, *supra* note 1, at 3-5.

83. H.B. 650, Va. Gen. Assembly (Reg. Sess. 2008) (as introduced, Jan. 8, 2008).

84. *Id.*

85. H.B. 1332, Va. Gen. Assembly (Reg. Sess. 2008) (as introduced, Jan. 9, 2008). It is questionable, however, how much this would have expanded the Waste Board's authority given that the director only has to consider issues within the board's statutory jurisdiction and the bill did not change the fact that the Waste Board's statutory jurisdiction does not include authority over solid waste permits. *See id.*

86. *See* Act of Mar. 11, 2008, ch. 557, 2008 Va. Acts ____, *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?081+ful+CHAP0557+pdf.

87. *Id.*

88. *Compare id.*, *with* H.B. 1332, Va. Gen. Assembly (Reg. Sess. 2008) (as introduced, Jan. 9, 2008).

of air and water permits.[89] During the public comment period on a permit action, any interested person may submit a request for a public hearing or reconsideration of the permit action.[90] The director must grant the requested public hearing or board consideration if he finds that (i) there is significant public interest in the action demonstrated by a minimum of twenty-five such requests, (ii) that the requesters raise "substantial, disputed issues," and (iii) that the action requested is not on its face inconsistent with relevant laws and regulations.[91] If a majority of board members wish to review the director's determination of whether to grant the request, a meeting may be called for that purpose.[92] The public hearing, if granted, must occur between forty-nine and seventy-five days from the time the director notifies the requester and the permit applicant of the decision to grant the hearing.[93] The board then has ninety days to act on the permit.[94] If less than a quorum of the board was present at the public hearing, the board must allow public comments in response to the department staff's summary of public comments prior to acting.[95] The board must explain in writing the basis of its decision. Finally, the bill increases the Air Board's membership to seven members as of July 1, 2008.[96]

V. CONCLUSION

Fundamentally, the DEQ boards legislation was about something different to each side of the debate. To the proponents, the bill was about consistency and efficiency in DEQ's decision-making process, goals that they felt had been only partially achieved by the consolidation of the air, water and waste agencies into one department 15 years ago. To the opponents, the bill was about the transparency of the decision-making process, and the role of citizens in making decisions. The view that citizens, both as decision-makers and persons hoping to influence decisions, have an important role to play in environmental decision-making is the one that finally prevailed at the end of two legislative sessions of debate on these bills. Those articulating and defending these roles for citizens were able mobilize activist sup-

89. Act of Mar. 11, 2008, ch. 557, 2008 Va. Acts ____, *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?081+ful+CHAP0557+pdf.

90. *Id.*

91. *Id.*

92. *Id.*

93. Act of Mar. 11, 2008, ch. 557, 2008 Va. Acts ____, *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?081+ful+CHAP0557+pdf.

94. *Id.*

95. *Id.*

96. *Id.*

port and to capture the attention of the press. Explaining the need for the change in a compelling way was a challenge the proponents were unable to overcome. Whether the final legislation will result in a substantial improvement in the permit consideration process remains to be seen. That greater consistency among the processes of the Air and Water boards has been achieved is clear, and this may in the end be looked upon as progress for which the two sides can share credit.