

FINAL MINUTES
HB 1295 COMMISSION TO STUDY THE ISSUE OF
STORMWATER MANAGEMENT

December 1, 2008 1:00 PM
NH Legislative Office Building, Room 305, Concord, NH

Members Present:

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| Chair: Dari Sassan | NH Office of Energy and Planning |
| Vice Chair: Judith Spang | NH House of Representatives |
| Eber Currier | NH Farm Bureau |
| Karen Ebel | The Nature Conservancy |
| Donald Sienkiewicz | Home Builders and Remodelers Association |
| Newb LeRoy | Associated General Contractors of NH |
| Dave Danielson | NH Association of Regional Planning Commissions |
| Chris Devine | NH Local Government Center |
| Rob Roseen | University of New Hampshire Stormwater Center |
| Carl Paulsen | NH Rivers Council |
| David Cedarholm | NH Public Works Association |
| David Borden | NH House of Representatives |
| Charlie Hood | NH Department of Transportation |
| Michael Trainque | American Council of Engineering Companies |
| Paul Currier | NH Department of Environmental Services |
| Joe Robertie | NH Timber Owners Association |
| Amy Manzelli | Business and Industry Association of NH |

Members Absent:

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| Jacalyn Cilley | NH Senate |
| Steve Kahl | NH Lakes Association |
| Eric Stohl | NH House of Representatives |

Others Present:

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| Barbara McMillan | NH Department of Environmental Services |
| Jeff Andrews | NH Department of Environmental Services |
| Peter Abdelmaseh | Northeast Concrete Products Association |
| Joel Anderson | NH House of Representative Staff |

Commission Staff Present:

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| Jillian McCarthy | NH Department of Environmental Services |
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I. ROLL CALL AND INTRODUCTIONS

Chairperson Sassan called the meeting to order at 1:08 PM. Chairperson Sassan summarized the meeting agenda. Noting new members and attendees, he

requested that Commissioners, staff and attendees introduce themselves by name and representation. Introductions were made around the room.

II. APPROVAL OF MINUTES FROM NOVEMBER 3, 2008 MEETING

Ms. McCarthy reviewed the following recommended changes to the draft minutes:

- Corrections to the section numbering.
- The addition of Ms. Ebel's edits to clarify her statements on page 8 and 9 of the draft minutes.

Rep. Spang brought the motion forward to accept the minutes as amended as per Ms. Ebel's comments from the November 3, 2008. **Mr. Danielson** seconded the motion. **All approved and none opposed.**

III. PRESENTATION 1

Ms. Barbara McMillan, from the Department of Environmental Services, presented a slideshow titled "Small MS4 General Permit". Ms. McMillan works in the Watershed Management Bureau doing watershed outreach and education in the Watershed Assistance Section. Over the last four years, she has been involved with the stormwater coalitions on outreach and education.

http://www.nh.gov/oep/legislation/2008/hb1295/documents/small_ms4_general_permit.pdf

The presentation focused on federal stormwater permits, primarily the Municipal Separate Storm Sewer System (MS4) permit, and included information on the New Hampshire Stormwater Coalitions, which formed as a result of the MS4 permit.

Ms. McMillan provided a summary on the federal Phase I Stormwater Regulations, which included industrial activities associated with stormwater discharges, large municipal separate storm sewer systems (defined as $\geq 250,000$ people), and medium municipal separate storm sewer systems (defined as between 100,000 – 250,000 people). New Hampshire didn't fall under Phase I due to the smaller size of the municipalities. **Ms. McMillan** then provided background on the federal Phase II stormwater permits, which began in 2003 with 3 five-year permits. All permits in New Hampshire are issued and overseen by the US Environmental Protection Agency (EPA) because New Hampshire is not a designated state. There are about five states in the country that are not delegated. Massachusetts is also not a delegated state. New Hampshire does not oversee the permit, but does keep track of what is going on some level.

The Phase II Stormwater Program includes the Construction General Permit (CGP), the Multi-Sector General Permit (MSGP), and the MS4 permit. The CGP is required for construction activities with a disturbance of one acre or greater and

requires that the owner/operator develop a stormwater pollution prevention plan (SWPPP). The MSGP is required for municipal industrial facilities, such as municipal transfer stations or recycling stations or vehicle maintenance facilities. In 2008, the MSGP will also be required to do a SWPPP, similar to the CGP. For construction activities, the SWPPP identifies the type of pollutants potentially discharged from the site and involves coming up with BMPs to manage the pollutants coming off of the site. **Ms. McMillan** introduced Mr. Jeff Andrews of the NHDES Waste Management Bureau, who reviews the permits that come in and is the point of contact for the permits she is discussing in her presentation.

Mr. Sienkiewicz asked if the MSGP applies to only industrial activities conducted by a municipality or if private industrial activities are subject to the permit as well. **Ms. McMillan** deferred the question to Mr. Andrews. **Mr. Andrews** explained that Phase I is the original part that included heavy manufacturing, light manufacturing, and a few other things that EPA defined as having stormwater associated with industrial activity. This includes vehicle salvage yards and recycling facilities, for example. Phase II is when municipalities were brought in and currently, only the transfer stations that do recycling, are included.

Ms. McMillan continued her presentation with a more detailed discussion of the MS4 or small MS4 permit. There are 45 municipalities that fall under the small MS4 permit (handout, available online at http://www.nh.gov/oep/legislation/2008/hb1295/documents/phase_II_handout.pdf). These are municipalities that have “urbanized areas” as defined by the 2000 census. Seven towns received waivers. 38 towns are involved in the permit and 4 non-traditional municipalities such as DOT and UNH. The original MS4 permit was a five-year permit and expired on May 1, 2008. Municipalities are still following their old permit until the new permit is issued. **Ms. McMillan** pointed out that there are many municipalities that fall under the permit that are not what is typically considered urban. Many of them are actually fairly rural. In addition, some urbanized municipalities, such as Concord and Franklin, are not included under the permit. EPA has recognized this and plans on redoing the census data in , changing the configuration to include the larger municipalities. **Mr. Sienkiewicz** asked if the more urbanized municipalities were not part of the permit because of they had lower densities. **Ms. McMillan** answered yes and explained that some of the coalition members were not happy about it because they are large cities and have many of the same stormwater issues that the other members have.

Ms. McMillan explained that, under the MS4 permit, municipalities must develop a stormwater management program, which includes the submittal of a notice of intent (NOI) to EPA and describes how they intend on meeting the requirements of the permit. The permit requirements include six minimum control measures and a timeline for reporting. The six minimum control measures include:

- 1) Public education and outreach;

- 2) Public involvement and participation;
- 3) Illicit discharge detection and elimination;
- 4) Construction site storm water runoff control;
- 5) Post-construction management; and
- 6) Pollution prevention and good housekeeping.

Annual reporting is required to EPA.

Ms. McMillan then discussed the stormwater coalitions in New Hampshire. There are three coalitions, Nashua, Seacoast, and Manchester. The coalitions are made up of municipal representatives who coordinate stormwater within the municipality. This could be a town stormwater coordinator if they have one, the DPW director, or recycling coordination. The coalitions meet approximately once a month. The primary focus of the coalitions is meeting the permit requirements. The coalitions allow for opportunities for networking, collaboration and coordination. They also are able to vent and bond over the permit requirements. Initially the coalition members got together and complained about the permit, calling it an unfunded mandate and saying that there was no support in the communities to do it. It slowly transformed at later meetings into a couple of towns saying that they had submitted their NOIs. Then it became an opportunity to report on success stories on what they were accomplishing. **Ms. Ebel** asked if the coalitions are created by state statute. **Ms. McMillan** answered that they are not. There is no jurisdiction. Originally, NH DOT took the lead on forming these groups to help meet their permit requirements by facilitating these groups, but there is no formal jurisdiction. Towns appoint representatives and are then able to check off on their permit that they participated in these coalition meetings. **Ms. McMillan** explained that there are no other venues for these municipalities to get together to discuss this particular issue. Coalitions have worked on collaborative projects, conferences, presentations, roundtables, and legislation, including the recent stormwater utility legislation.

Ms. McMillan went through each of the minimum control measures to better get the point across that the MS4 permit is more than just a permit that is issued; it is a program. An important note is that Section 319 Nonpoint Source funding to address nonpoint source pollution problems is no longer available for MS4 communities to implement components of their permit. The public education and outreach component of the new permit will require a more targeted, local message specific to the municipality, such as a particular pollutant of concern in that area and they must have a method to evaluate the effectiveness of their education and outreach efforts. The new permit may also require wet weather monitoring in addition to dry weather illicit discharge investigations. This requires much more time, work, and expertise and will be challenging for the municipalities to achieve. **Ms. McMillan** described the requirements for the construction site runoff control and post-construction runoff control and stated that they are similar to the requirements of the CGP. They have been advised by EPA to do this through regulation and ordinances as well as training to local contractors. A

major barrier to the two construction-related control measures has been presenting to the community that an ordinance or regulation is needed to control stormwater. The support from decision makers has been lacking.

Ms. Manzelli asked how this requirement fits into the CGP or the state Alteration of Terrain permit. She asked if there is overlap. **Ms. McMillan** explained that these two construction-related control measures are a local control for the construction general permit. There has been coordination between the MS4 permit construction-related controls and the alteration of terrain permit showing how the permits work together. **Mr. Andrews** added that he believes EPA's long term goal with this is to have the MS4 communities have their own erosion and sediment control programs to mirror the construction general permit so that projects in those communities will only need to do what the municipality requires and won't need to do anything more than file and NOI for the federal permit. The towns can regulate smaller than the one-acre size as well. **Mr. Sienkiewicz** asked for clarification that the towns can regulate a smaller disturbance than one acre, but that the CGP only regulates down to one acre. He asked if there is an upper limit. **Mr. Andrews** confirmed that towns can regulate smaller than one acre and that there is not an upper limit. For the CGP, if a project disturbs more than one acre, it requires a permit. **Ms. Manzelli** asked if the towns, regardless of the size of a construction project, could regulate projects more stringently, but not more lax than the federal regulations require. **Mr. Andrews** confirmed this. **Rep. Spang** asked what would happen if a town refused to comply with implementing the construction and post-construction ordinances. **Ms. McMillan** responded that this question is often the first asked by the City Council. If a town did not comply with one of the control measures, it would mean that they weren't meeting the permit requirements. To date, EPA has sent out letters indicating that the town is not meeting the permit requirements and directing them to meet the requirements and they have issued one fine to the town of Atkinson due to failing to file their annual reports. It is uncertain if additional enforcement will come.

Dr. Roseen asked that since New Hampshire is not a delegated state, if the towns meet the federal requirements, they don't have to develop a construction site runoff control program. **Ms. McMillan** confirmed. **Dr. Roseen** then asked how many MS4 towns have complied with this part of the permit. **Ms. McMillan** said that she polled the stormwater coalitions to get rough numbers and estimated that about 50-70% have something going on toward addressing the erosion and sediment control requirement. She mentioned that this requirement and the post-construction requirement seem to be the most difficult for municipalities. She added that around 20% actually have ordinances adopted. **Dr. Roseen** asked if the estimates for the MS4 towns was reflective of what municipalities are doing statewide. **Ms. McMillan** stated that she thinks non-MS4 communities are doing less than MS4 communities. There is a lack of awareness and the lack of requirements for municipalities that are not MS4 communities. In her outreach and working with municipalities on the seacoast, she has experienced that there is a lot less awareness in communities that are not MS4-communities.

Chairperson Sassan asked for clarification that there is only a percentage of MS4 towns that have erosion and sediment control programs in place currently. **Ms. McMillan** answered that many MS4 towns have programs in place, but may not have ordinances adopted. She explained that if they don't have an ordinance in place, they are automatically out of compliance with the permit. **Mr. Cedarholm** clarified that it doesn't necessarily have to be an ordinance; it could be regulation to satisfy the permit requirement. **Ms. McMillan** added that some municipalities went through their existing regulations to determine where there may be holes to fill to meet this requirement. She has a list of what EPA is looking for in the ordinance or regulation to meet the permit requirement.

Mr. Danielson explained that he is troubled by the lack of enforcement if a town does not meet a permit requirement. He said that it sounds like, with the exception of the Atkinson example, very little is done. **Ms. McMillan** stated that there have been other notifications to towns, but she only knows of one other letter to Seabrook. **Dr. Roseen** stated that it sounds like 80% of the permits are potentially out of compliance. **Ms. McMillan** explained that, technically, they are out of compliance, but if they are able to report to EPA and describe how they are working toward compliance, EPA is satisfied. **Mr. Danielson** stated that the MS4 permit seems to use moral tools for their enforcement as opposed to punishment. The moral tactic is that the permit requirements are good things to do. If you don't do it, there is no punishment. **Ms. McMillan** responded that there is still a fear that EPA will do enforcement and **Mr. Danielson** responded that it is only an implied threat. He asked what if Atkinson tells EPA that they are not going to pay the fine. This is important to understand as the Commission goes forward and tries to determine how to deal with this. **Dr. Roseen** mentioned that this discussion is about compliance with the first permit, which was much easier than what the new permit is going to be. **Mr. Cedarholm** added that with the first permit, EPA didn't really have enforcement in place. It has been made clear by EPA that the second permit will have increased enforcement actions. **Mr. Danielson** added that in Worcester, MA has estimated that in order to come into compliance with the new regulation they will have to spend over one billion dollars. The Public Works Director said that there is something wrong and that they can't do this. He asked to come up with a more holistic look at what they're doing instead of a regulation type approach.

Ms. McMillan continued her presentation explaining the post-construction requirements of the MS4 permit. She stated that around 20-30% of the towns have adopted ordinances and recognize that they need to look at low impact development (LID). She stated that the barriers to this requirement are a lack of support from communities, lack of enforcement from EPA, and lack of on-the-ground examples of LID. One barrier that seems to be going away is that the science of LID is new. There is more information out there and the work that the UNH Stormwater Center is doing is filling that need.

Ms. McMillan summarized her general observations and comments and stated that the needs of municipalities are diverse. There is a different level of knowledge between towns, planning boards, and councils. The coordinators lack support from the state and from EPA. The municipal priorities for water are often first comes drinking water, second comes wastewater, and last comes stormwater. The MS4 permit falls short because it does not require controls for construction activities under one acre. In order to regulate less than one acre, municipalities have to develop their own programs. She also stated that MS4 communities are just a small part of the state. There are many towns that contribute to stormwater problems, but they aren't regulated under the MS4 permit. When listing ideas that may help support municipalities meet the MS4 permit requirements, stormwater utilities were discussed. She mentioned that although this is listed as an idea that may help, many towns might oppose stormwater utilities because they feel it discourages development. **Ms. McMillan** also explained that there is a question of the authority of municipalities to regulate stormwater.

Dr. Roseen mentioned that the Commission has previously discussed the issue of authority and asked how that can be resolved. He asked if we need a formal interpretation of the Rules or a clarification of the Rules. **Ms. McMillan** responded that the authority issue has been a problem all along. The Local Government Center (LGC) was the first group to say that they didn't see the legal authority for municipalities adopting these ordinances. She stated that she isn't sure if it is just education that needs to be done, or if actual changes to the Rules need to be made to give municipalities the authority. **Dr. Roseen** asked if the federal Phase II stormwater program gives the authority for municipalities to regulate stormwater through ordinance. **Ms. McMillan** responded that state authority is needed as well. **Mr. P. Currier** explained that municipalities only have the authority given to them by the legislature and it is not clear that there is any authority for stormwater that meshes with the Phase II requirements. **Mr. Danielson** mentioned that the comment that was made previously about stormwater utilities makes it clear that some do not understand what the stormwater utility legislation was. It was an enabling act, which means that they can establish a utility if they choose, but do not have to. The legislature has to understand who is going to pay for stormwater. Is it going to be that everyone pays equally or that everyone pays proportionally to the amount that they contribute? That is what the stormwater utility does, but it is voluntary.

Mr. P. Currier stated that independent of a utility, the issue is whether a municipality, in the absence of a utility, has the authority to adopt ordinances. **Chairperson Sassan** added that the most comprehensive answers on authority came from Eric Williams from NH DES, who assisted with the development of the Innovative Land Use Techniques Handbook, which includes model ordinances for stormwater. Mr. Williams listed in his email the legislation that he believes enables municipalities to manage stormwater. **Chairperson Sassan** suggested that the Commission might want to invite him to the next meeting. He questioned if the Commission is dealing with two issues. The first being the issue of local

stormwater ordinance separate from the Phase II Program and the second being whether EPA has given municipalities the authority to create ordinances. **Mr. Danielson** clarified that EPA cannot give that authority. **Chairperson Sassan** gave the example that if EPA stated municipalities of a certain population density in the United States may regulate road salt application rates so as not to degrade public waters, would it still require the NH legislature's okay for towns to do this? **Mr. P. Currier** answered that in virtually all cases, the state legislature needs to take appropriate action to be able to implement the federal regulation. This involves the creation of enabling legislation at the state level. **Mr. Danielson** added that the Commission is talking about ordinances and his understanding is that the planning board can adopt regulations, not necessarily ordinances, and can waive or not waive. And ordinance is something that a planning board cannot adjust unless it goes to the zoning board of adjustments. **Mr. P. Currier** explained that there are two things, the land use and subdivision regulations, which the planning board has authority to adopt, involve development and change of the landscape. Regulation of stormwater on the existing landscape in the absence of a planning board action or a site plan review, the mechanism for the authority is much less clear. **Ms. Ebel** agreed with Mr. P. Currier and added that in New London, they passed LID regulations pursuant to the authority given to municipalities by the state to regulate developments, which includes drainage. The LID regulations were an extension of the drainage regulations. She revisited the statute regarding site plan regulations and found very specific language about drainage. **Rep. Spang** stated that an LSR was filed for fluvial erosion hazard zoning that came out of the flood commission. There is an opportunity to expand to be more general to cover stormwater. **Mr. P. Currier** asked if it would be appropriate for the Commission to ask the Attorney General's office to give assistance in understanding the authority. **Mr. Anderson** responded that the Attorney General has gone before other commissions. They may not provide a formal opinion, but instead would present to the Commission. **Ms. Ebel** asked what Commissions do in this situation when there is a legal question. **Rep. Spang** explained that the Groundwater Commission has had the Attorney General speak. They have also contacted a few different attorneys to give their differing opinions about specific groundwater regulations. The Stormwater Commission can do what they want to get a legal opinion. **Dr. Roseen** stated that the topic of authority is a very important one and that he doesn't know if the Commission can go forward with studying and making recommendations until authority is determined.

Chairperson Sassan recommended that authority be the topic of the next Commission meeting. He added that he feels like there are two issues. The first being the authority issue being discussed and the other being that EPA has not clearly sent the message to the state legislature as to what it should be enabling. **Mr. P. Currier** responded that EPA assumes that municipalities have the ability to do what the federal law requires. **Chairperson Sassan** asked if that is the case in most states. **Mr. P. Currier** responded that he believes that is the case in most states. **Mr. Sienkiewicz** added that the cheat sheet for the Phase II permit,

provided by Ms. McMillan, says an ordinance or other regulatory mechanism to require erosion and sediment control as well as sanctions to ensure compliance to the extent allowable under state, tribal, or local law. EPA assumes that municipalities have state authority to do what the federal law requires, but maybe the state doesn't want municipalities to have that authority. This is an interesting potential tug of war. **Mr. P. Currier** explained that the Town of Milford is regulating stormwater under the authority of public health statutes. The Milford Public Health Officer thought this was a stretch to take sewers, drains, and sewage to regulating stormwater, where there is no sewage involved.

Ms. Ebel stated that the issue of authority is important, but there is also a lot of work to do to understand what happens with stormwater in the state that she hopes the Commission will spend most of their time on that and not too much on the authority issue. **Mr. Danielson** responded that the MS4's under EPA are what people are focusing on, but what Ms. McMillan pointed out in her presentation is that a lot of the problems are in municipalities that are not included in the MS4 areas. If the Commission agrees that stormwater is important, it shouldn't be confined to just the MS4 area, but the entire state. Then the next issue is the authority. It comes back to the moral issue. Stormwater management should be done because it is good to do, but who is going to pay for it. There is going to have to be a balance between studying stormwater and understanding authority. **Ms. Ebel** clarified that of the remaining Commission meetings, she would like to see one meeting spent on the issue of authority and the rest of the meetings using the agreed upon approach to meet the duties of the Commission. **Rep. Spang** notified the Commission that she put in a bill to extend to Commission another year. **Ms. Manzelli** stated that the Commissioners have had an opportunity to express their opinions on the authority issue and that additional discussion on the topic by the Commission without outside guidance. She recommended getting in touch with the Attorney General's office, DES, and towns who have been through this issue. **Chairperson Sassan** agreed and noted that the Attorney General, Eric Williams from DES, and the Local Government Center will be conferred with. **Ms. Manzelli** added that she feels the question to be asked is "What, if any, authority do New Hampshire municipalities have to regulate stormwater." **Mr. Roseen** added, "...and what do we need to ensure that", stating that the comment in the earlier email dialog was that it might not yet understand what needs to be done to move forward for enabling legislation. **Chairperson Sassan** asked the Commission if EPA has given clear enough information for the state legislature to allow towns to comply with the Phase II program. **Mr. Cedarholm** stated that EPA has given information to the MS4's. **Dr. Roseen** added that there is a disparity on the state element versus the federal element. Even though the state doesn't implement regulations or ordinances, it does not mean that the federal government can't come and enforce it. There is still a federal enforcement component even if the towns don't have the authority to enact a stormwater ordinance it doesn't obviate the requirement for Phase II compliance.

Ms. McMillan continued her presentation and described the potential availability of funds from the Section 319 program to award to four municipalities to conduct a feasibility study for the development of a stormwater utility in each of those municipalities. Manchester and Franklin have done feasibility studies and there is a great need for such studies in other towns, but the cost can be \$20,000 to \$30,000. In addition, Manchester spent another \$225,000 to put the utility in place. **Ms. McMillan** explained that she is currently involved with the Clean Watershed Needs Survey, which typically comes every four years from EPA and has to do with the state revolving loan fund and other legislative activities. The needs and the costs for NH communities for wastewater treatment are assessed. EPA encourages the inclusion of stormwater in these assessments and to also allow the state revolving loan funds to go toward stormwater capital needs. She is working with the stormwater coalitions to determine what the needs are. She believes a Rule change will need to be made. In addition, there may be an increase in funding to the Department of Public Works and an opportunity to pass through funds and the Clean Water Needs Survey may be used to allocate the funds.

Ms. McMillan moved to the topic of enforcement of the MS4 permit and explained that it is her understanding that with the new permit, there will be more enforcement. She added that there might be an increase in the number of New Hampshire regulated communities in the future. She emphasized that although this is called a permit, it is not as simple as getting a one time permit and being done. It is an ongoing process. It is a five-year permit with annual reporting. **Rep. Spang** asked Ms. McMillan to clarify her statement that the number of New Hampshire regulated communities will increase, did she mean the number of communities subject to the MS4 permit. **Ms. McMillan** responded yes, that EPA will use the new census in 2012 or 2013 and they will change the definition. **Dr. Roseen** asked if Ms. McMillan has a feel for what the substantive changes are with the new permit. **Ms. McMillan** responded that Thelma Murphy from EPA has been good at getting the information out to the communities. There is a continuation of what communities are doing under the old permit, completion of their illicit discharge program with the addition of wet weather monitoring, and they need to be a lot more targeted with their outreach. One that she didn't mention is that communities need to consider including any approved total maximum daily load studies (TMDLs) into their permit. **Mr. Roseen** asked if there is a water quality monitoring component in the post-construction runoff controls for the new permit. **Ms. McMillan** and **Mr. Andrews** indicated that the wet weather monitoring was the only monitoring that they new would be included, but that Thelma Murphy is available to ask questions. **Chairperson Sassan** asked if the same issue of authority come up in regard to TMDLs. If a TMDL calls for a reduction in a certain pollutant do the towns have their hands tied by what is enabled. **Mr. P. Currier** stated that he believes the answer is yes, and explained that DES has always held the position that if you own a pipe, you own what comes out of that pipe. State law requires that discharges comply with state water quality standards. Therefore, if a municipality owns a drainage

system, they are responsible for meeting water quality standards where that system discharges to a surface water. He explained that there are, however, many places in a municipality where there is no community owned drainage system, but nevertheless there is stormwater that is discharged to surface waters that should be managed. That is where the gray area is. **Chairperson Sassan** asked for clarification that if a community owns a pipe, there is clear authority for a municipality to regulate land use. **Mr. P. Currier** stated that DES's position is that the municipality can do whatever they need to do to ensure that the discharge from the pipe complies with water quality standards. **Mr. Cedarholm** asked if that also applies to culverts. **Mr. P. Currier** responded yes and then clarified that culverts are a gray area.

Chairperson Sassan asked the Commissioners to refer to the questions listed on the agenda and asked that the Commission run through the questions regarding the MS4 permit. He recognized that the authority issue is obvious and the Commission can plan to address that at the next meeting. He asked, based on the presentation by Ms. McMillan and the discussion, what is working and what is not working with the MS4 program related to stormwater management. **Dr. Roseen** suggested that the current programs are really at the beginning in some ways even after the first five-year permit. There is still no real water quality monitoring, which is a basic element of Clean Water Act compliance, and he is waiting to see if any water quality monitoring will be required with the next permit, particularly related to TMDLs. Currently, compliance is based on whether communities are, for example, stenciling storm drains and doing their outreach and education. Compliance is not based on whether water quality is better, which is ultimately the purpose. He feels there is a long way to go still. **Mr. Sienkiewicz** responded that he doesn't disagree with Dr. Roseen. He mentioned Dr. Roseen's earlier comment that regardless of the authority issues, municipalities are still subject to federal law and federal enforcement of the law. As a practical matter, the Stormwater Commission has to determine the most effective and most efficient way to get the water cleaned up as it relates to stormwater. EPA may never have enough funding or staff to do clean water enforcement here. The law might be the law, but it just sits on the books. **Mr. P. Currier** brought two points. The first is the regimen that EPA calls for in the MS4 notice of intent is somewhat artificially constraining to urban compact areas; the same regimen is good for everyone. The second is related to TMDLs. He offered to circulate a map of NH surface water from the 2008 assessment that were determined to be impaired by stormwater and subject to a no additional loading requirement. There are a substantial number of waters that do not meet water quality standards, primarily concentrated in the southern tier and the seacoast, and the reason is directly related to stormwater. He explained that the issue can be separated into two pieces 1) how do we keep the waters that are not on the impaired waters list from getting on the impaired waters list, and 2) how do we reduce the impact of stormwater on areas already impaired by stormwater. The first is easier to deal with and the Commission already discussed the idea of putting requirements on landscape change, regulated by town boards, to the effect

that when the landscape changes there is to be no additional loading, no increase in volume, and no increase in peak. The second is a more difficult question because the areas with existing impairments are already built areas. **Rep. Spang** asked how we can assure communities that by enacting some of the no impact regulations that we're suggesting that it won't kill development and their tax base. **Mr. P. Currier** responded that, at least for state Alteration of Terrain regulated projects, there are provisions which implemented the no additional loading, no increase in volume and peak runoff, and ended up removing them for further work based on feedback DES received during development of the regulations. DES's experience has been that it is perfectly possible to develop the landscape and meet those requirements. It does result in less dense development in the landscape. This may mean that in order to level the playing field, it would be highly desirable to have some statewide standardization of landscape change so that a community who decides to implement that is not placing themselves at a disadvantage for development. **Rep. Spang** asked if the AoT Rules would provide that statewide level playing field when it is resolved in the Rules. **Mr. P. Currier** said that when the issue is resolved and added back into the AoT Rules, there would be a level playing field for projects subject to the AoT permit, projects that disturb greater than 100,000 square feet or 50,000 square feet in the protected shoreland. There are many projects that go before the local boards that are much smaller than 100,000 square feet. The impact on stormwater is cumulative. If there are a lot of smaller projects that are under the state radar, there will be deterioration of surface water quality. **Rep. Spang** formally identified two barriers being:

- 7) There is a myriad of small projects that are not consistently regulated, and
- 8) There is a potential impact on the economy from bringing in stormwater controls and specifically,

There needs to be a level the playing field among the communities. The broader context of this is that people will say that NH is driving business out of the state. **Dr. Roseen** commented that the Commission needs to educate itself on some of these issues and stated that there is a lot of good information out there. He added that New Hampshire is slow to implement some of this, but it is being done in a lot of other areas. He explained that he was in the Pacific Northwest last week and the city of Portland was estimating that 35% of their development is done using this type of development strategies. They use these strategies as cost effective approaches for combined sewer overflow (CSO) controls, and many other things. The Commission needs to frame the argument that this can be done in ways that can benefit all. These strategies will allow for development and maintained water quality, and give developers increased value to their properties. **Ms. Ebel** explained they have not had much resistance from developers in response to the LID regulations in New London. She stated that developers are actually embracing the regulations. They have not found LID to be more expensive than what they would have to do otherwise. In New London they have seen an increase in the density of development because developers have been able to use the LID regulations to keep more drainage on site than they would have been able to otherwise. This was a surprising result and developers have

not argued against LID. **Ms. Ebel** explained that she revisited the pervious concrete parking lot at the New London Hospital and had an opportunity to ask about cost. It was more expensive to install, but they avoided detention ponds and other practices that they would have had to use. She asked about salt, maintenance costs, and other things and it turned out that overall, it was not that much more costly to install. She isn't sure that economically, the push for LID and other regulations it will be that bad. The Commissioners agreed that this information, and examples like it, needs to be readily available. **Dr. Roseen** stated that cost is the number one question that people ask about LID. **Mr. P. Currier** added that there is a difference between residential projects and commercial projects and it depends a lot on the value of the land. **Ms. Ebel** stated that it couldn't be assumed that LID will invariably have a greater cost over conventional treatment. **Mr. Sienkiewicz** commented that the Commission should be wary of having environmental protection be the only land use driver. For example, it isn't always going to be the case that LID is cheaper. If that was the case, LID would have been done all along, but it is cheaper to pipe the water off onto a neighbor's site. He stated that he is a residential developer and in residential development, if environmental quality is the primary driver, it will result in less density. He explained that he is developing a hilltop site and has found that LID is very difficult. He has run numbers and found that using 100% LID compared to piping it off site is dramatically more expensive, primarily because it is a hilltop site. In terms of land use planning, there are a lot of good reasons to put people densely together in places that might be difficult or impossible to mitigate up to perfect water quality. The Alteration of Terrain Rules that said basically there would be no water quality deterioration, which the homebuilders pushed back hard, was basically saying that some lots are developable and some lots are not, depending on the density. In his opinion, that is not the way to do land use planning. Existing infrastructure needs to be considered along with other existing benefits to guide development. Preserving or improving water quality in those locations is a very important consideration, but not the only consideration. He is concerned that the Commission is at risk of letting the environmental quality consideration be the only driver and stated that we are too cowardly to do land use planning otherwise. **Mr. P. Currier** responded that, within the context of water quality, there is a mechanism to work through situations like that. The federal Clean Water Act allows degradation of high quality waters as long as there is a good reason to do it. There is also a possibility of trading within a watershed where there is a site that makes sense to develop for a number of reasons, none of which have to do with water quality. If you look at the watershed as a whole, you can figure out where some tradeoffs would allow certain localized degradation while preserving something else. He thinks that it can work within the current mechanisms, but stated that there is a need for a standardized process to make it work at the local level.

Mr. Cedarholm stated that a program that does work is the land development practices and involving land use planning boards and land use regulations. There are intelligent people on planning boards really thinking about how to manage and

plan the community, but management of existing infrastructure falls short. Without that site plan review and the opportunity to involve the planning board, there is a limited opportunity to improve water quality. As a follow up to what Mr. Sienkiewicz was saying about putting development where it makes sense, encouraging redevelopment is a way to bring areas back to life and at the same time incorporates LID and the opportunity to improve water quality.

Chairperson Sassan asked how the Commission could integrate this concept with its work. **Mr. Roseen** responded that the Commission needs to put stormwater in the context of the larger land use decisions. Stormwater is one small piece. He has heard LID described as candy for developers because it does exactly what Mr. Cedarholm and Mr. Sienkiewicz described. It enables projects to go forward that would otherwise have been limited for other reasons in many cases. It is a tool for developers. His opinion is stormwater needs to be kept in the context of the larger land use planning. It is not going to replace other elements such a land conservation or good infrastructure planning for example. **Rep. Spang** asked Mr. P. Currier if he would explain “residual designation authority”. **Mr. P. Currier** explained that there are a number of projects in New England where impairments exist and therefore the existing, developed landscape needs to be retrofitted with BMPs. It is happening around Lake Champlain and in the upper Charles River watershed, and in South Portland, Maine in the Long Creek watershed. There is a provision of the federal Clean Water Act that allows EPA or the delegated NPDES permit authority to permit stormwater lot by lot in areas where there are water quality violations. EPA is doing that in Massachusetts in the Upper Charles River watershed for phosphorus. EPA is the permitting authority in Massachusetts and they are issuing a general permit that gives a phosphorus allocation for each commercial lot over two acres and leaves it up to the owner of the lot how they retrofit BMPs in order to achieve the loading reductions. **Rep. Spang** stated that the astonishing thing is that it is existing uses. It is not a permit for new uses. **Mr. P. Currier** added that the Great Bay watershed is going to be identified as impaired for nitrogen, which is a stormwater component. This will basically put the entire Great Bay watershed in the same situation as the Upper Charles. Half of the loading of nitrogen into Great Bay comes from nonpoint sources from the existing landscape. Much of the Great Bay watershed does not have a lot of development currently. There is going to be a push in the watershed for reduction in loading from stormwater. **Rep. Spang** asked how this would be pushed. **Mr. P. Currier** responded that potential residual designation could be used, but he thinks a better idea is to figure a way to enhance the education and outreach component and create a mechanism that levels the playing field so municipalities can administer their land use regulations for nitrogen reduction with technical assistance and specifications provided at the state level. He stated that the first thing to do is implement a no additional loading requirement to not make the situation worse while determining what to do to reduce the impact from existing development. The next step is to find mechanisms to actually reduce those loadings as projects come up for redevelopment and have to go before the planning board. **Mr. Paulsen** stated that

holding the loading is not just a good thing to do; it is required by the Clean Water Act. A project may contribute a pollutant that is causing an impairment to an impaired waterbody. He added that one of the issues Mr. Sienkiewicz alluded to is that if there is an impairment, there is no permitting of any new activities that involve those pollutants. That is a problem from a development standpoint. If you clean up the waterbody or prevent the pollution in the first place, then you maintain the ability to develop there. If it is impaired, the ability to develop there is lost. **Mr. Sienkiewicz** asked if it is possible to impair a non-impaired waterbody if there is a good economic reason to do so and what the mechanism is to do that. **Mr. P. Currier** responded that the mechanism for all of this is the Antidegradation policy, but that a non-impaired water is not allowed to be impaired. The New Hampshire regulations require a 10% reserve. You can use up the assimilative capacity of a waterbody to the 10% reserve.

Ms. Ebel asked Ms. McMillan if EPA uses a watershed approach to implementing the MS4 permit or is it municipality by municipality. **Ms. McMillan** stated that they are trying to by incorporating TMDLs into their permits. She thinks they would like to approach it for a watershed point of view. Their outreach is encouraging more of a watershed approach, but this is difficult since they are regulating the individual municipalities. **Mr. Andrews** added that EPA can issue general NPDES permits based on political boundaries or geographic areas of states. If they wanted to, they could issue a permit based on a watershed and they might get there in future permits. There was a recent National Resource Council report that came reporting that there are a lot of flaws in the current federal stormwater program. One of their recommendations was to have a watershed-based NPDES permit in the future. **Ms. Ebel** explained that she feels a watershed approach would be better to manage stormwater instead of municipality by municipality. She would like the Commission to keep the idea of watershed planning in mind. **Mr. P. Currier** agreed that it is a great idea and stated that the problem is the political boundaries getting in the way. **Ms. Manzelli** added that it would be easier if there were a level regulatory playing field at the state level with uniform regulations. **Mr. P. Currier** elaborated on his earlier suggestion that if the state could provide technical specifications and, possibly for smaller municipalities that don't have a planning staff or engineering staff, could provide some circuit rider assistance, it would level the playing field. It would also allow facilitate watershed-level perspective because a circuit rider would have the ability to look across municipalities. **Ms. Ebel** added that the Commission had previously discussed using the RPCs to help with that. **Rep. Spang** asked if 319 money could be used to test the idea of a circuit rider. **Ms. McMillan** responded that the 319 program has become very strict in how funds can be spent and that it isn't likely. **Mr. P. Currier** suggested that maybe Coastal Program funding could be used if the Great Bay watershed was used as a pilot.

Chairperson Sassan brought the Commission back to the list of questions to be answered and recognized that they have moved through the first two. He requested feedback from the Commission as to whether they should continue

going through the questions today or at a future meeting. **Mr. LeRoy** offered his opinion to hear from the Attorney General's office before going on to discussing possible solution. **Dr. Roseen** recommended also hearing from a representative of the Flood Commission and the Land Use Commission. **Rep. Spang** said that the Land Use Commission is also requesting an extension.

Chairperson Sassan informed the Commission that it has been difficult to coordinate a presentation from NH Fish and Game. John Magee of Fish and Game sent a few scientific journal articles to Ms. McCarthy and asked if the Commission would be comfortable with having those circulated and reviewed to serve as the education on stormwater impacts to fish and wildlife. **Ms. Ebel** asked if they could review the articles first and then decide if they were sufficient. **Chairperson Sassan** will have the articles distributed to the Commission members. **Chairperson Sassan** requested the opinion of the Commission on having a dam and road construction and maintenance sub-committee. He explained that Ms. Ebel had pointed out that there are some gaps in the land use scenario the Commission is using and this sub-committee would serve to fill that gap. He added that roads area a huge source stormwater and the Commission currently doesn't have a meeting topic designated for that. **Mr. Sienkiewicz** clarified what Ms. Ebel stated earlier in the meeting about studying stormwater, that she meant investigating what is really happening and what activities are contributing to the problem the most. He asked if the stormwater impact from various activities on water quality degradation is known. **Dr. Roseen** and **Mr. P. Currier** answered yes, there is good information on that. It is land use specific and there is a decent understanding of what the pollutant loadings are by land use type. **Mr. Sienkiewicz** stated that he would feel more comfortable making a decision on the need for sub-committees if he was presented more information on what activities should be looked at more closely and what activities should possibly be let off the hook. **Mr. P. Currier** responded that it would be a fairly simple presentation to put together. **Chairperson Sassan** asked if roads were a big enough issue to form a sub-committee. **Dr. Roseen** proposed that the Commission keep the discussion of roads in the full Commission because of the time extension. Response was favorable.

Ms. Manzelli recalled that the five scenarios to look at are MS4 permits, Alteration of Terrain permits, the Construction General Permit, the Multi-sector General Permit, and activities less than one acre that are not subject to state or federal stormwater regulations. Even though roads do not exactly fit less than one acre, it could be discussed there. In the interest of filling the gaps, **Ms. Manzelli** asked if there are other topics that should be discussed. **Chairperson Sassan** agreed that the fifth scenario was intended to be a catch all and that the expertise of the Commission would be used to make sure there are no gaps.

Rep. Borden expanded on Ms. Ebel's comment regarding things that the Commission still needs to know. He stated that the situation is not static. The Commission is not trying to learn everything possible about the existing state of

stormwater, and noted that we are living in a world where the amount of carbon in the atmosphere is accelerating. He stated that problem is not on a straight line. What might be perfectly acceptable to build in a place right now, might be a very unwise place to have put development in ten years. The Commission needs to be thinking about the world we are emerging into where the flood-drought patterns are likely to change or increase over time. The flood-drought pattern is new now, but it's not static and it's likely to get worse. The Commission needs to be thinking about "what-if" scenarios for rougher times.

Chairperson Sassan stated that he has received emails with good information on what is going on in other states. He asked the Commission how the activities going on in other states should be addressed. **Ms. Ebel** asked if DES monitors other states. **Mr. P. Currier** offered for Ms. McCarthy to put together a summary of what other states are doing. **Chairperson Sassan** mentioned that Jen Cysz, the OEP Representative to the Land Use Commission has discussed doing a similar project for the Land Use Commission and possibly having representatives from those states present. **Mr. LeRoy** asked if those emails could be forwarded to the committee. **Mr. P. Currier** said that they would organize the emails and send them out.

IV. DISCUSSION OF FUTURE MEETING TOPICS AND DATES

Chairperson Sassan asked the Commissioners to confirm that the first Monday of the month at 1:00 PM works to schedule regular meetings. All agreed to this day and time. He notified the Commission that if the Concord School District is closed due to inclement weather that the Commission will not meet.

Mr. P. Currier asked if the lawyers would be coming to the next meeting. **Chairperson Sassan** asked if the Commission wants a presentation or if a written response would be sufficient. The Commission agreed that getting a written response from the AG's office is unlikely, and that a list of specific questions should be provided. **Chairperson Sassan** said that we would request that a representative from the Flood Commission also come to the next meeting. **Ms. Ebel** asked why John Magee from Fish and Game is not coming. **Chairperson Sassan** responded that it was in part due to a scheduling issue, but also that the topic isn't something that Fish and Game feels they have addressed head on. He added that Mr. Magee was willing to present and is willing to present in the future. **Rep. Spang** mentioned an article on the impact of sediment on eel grass and aquatic life that might be useful. She feels that it covers the topic very well and doesn't feel that a separate presentation would be necessary. **Mr. Cedarholm** added that Phil Trowbridge of DES wrote a report on nutrient loading in Great Bay that he will send to Ms. McCarthy and Chairperson Sassan.

| Date | Time | Location |
|------------------|--------|----------|
| January 5, 2009 | 1:00pm | LOB 305* |
| February 2, 2009 | 1:00pm | LOB 305* |

*NH Legislative Office Building, 33 North State Street, Concord, NH

V. ADJOURNMENT

Representative Spang made a motion to adjourn. And **Mr. Sienkiewicz** seconded. All approved.