

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

August 3, 2009 12:00 PM
NH Legislative Office Building, Room 305, Concord, NH

Members Present:

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| Chair: David Cedarholm | NH Public Works Association |
| Vice Chair: Judith Spang | NH House of Representatives |
| Karen Ebel | The Nature Conservancy |
| Donald Sienkiewicz | Home Builders and Remodelers Association |
| Michael Trainque | American Council of Engineering Companies |
| Newb LeRoy | Associated General Contractors of NH |
| Paul Currier | NH Department of Environmental Services |
| Joe Robertie | NH Timber Owners Association |
| Rob Roseen | University of New Hampshire Stormwater Center |
| Amy Manzelli | Business and Industry Association of NH |
| Eber Currier | NH Farm Bureau |

Members Absent:

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| Dari Sassan | NH Office of Energy and Planning |
| Charlie Hood | NH Department of Transportation |
| Carl Paulsen | NH Rivers Council |
| Chris Devine | NH Local Government Center |
| Steve Kahl | NH Lakes Association |
| L. Mike Kappler | NH House of Representatives |
| Rep. David Borden | NH House of Representatives |
| Sen. Jacalyn Cilley | NH Senate |
| Dave Danielson | NH Association of Regional Planning Commissions |

Commission Staff Present:

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| Jillian McCarthy | NH Department of Environmental Services |
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Non-Members Present:

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| Beth Sargent | Pennachuck Water Works |
| Susan Gottling | NH House of Representatives |
| Matthew Deane | NH Department of Environmental Services Intern |

I. CALL TO ORDER

Chairperson Cedarholm called the meeting to order at 12:10pm and announced a change in the order of the agenda.

II. DEFINITION OF STORMWATER

Mr. Leroy: requested that the Commission define stormwater.

Mr. P. Currier: Stormwater is not defined in legislation.

Chairperson Cedarholm: The definition of stormwater from the DES *Innovative Land Use Planning Techniques Handbook* (Oct. 2008), is *Stormwater runoff is water from rain or melting snow that does not soak into the ground.*

The Commissioners agreed to remove the word “runoff” from the definition and to research a federal definition of stormwater that could be used.

III. NEEDS MATRIX DISCUSSION

Chairperson Cedarholm explained that he inserted an additional section in the Needs Matrix to identify infrastructure needs and read his additions. He agreed to resend the Needs Matrix to the Commissioners with his additions. The Commission went through the Needs Matrix line-by-line for comments.

Ms. Manzelli: The Regulatory Authority subcommittee is working on researching all of the stormwater regulations that will address some of the regulatory needs identified in the matrix. The second task of the subcommittee will be to draft any new or revised legislation once the Commission decides on recommendations.

Rep. Spang: Where do TMDLs fit into regulating existing development.

Mr. P. Currier: TMDLs have broad authority, but it is an arduous process to implement.

Ms. Manzelli: Is there authority to go to properties that already have a permit?

Mr. LeRoy: If a property is not polluting, there is no authority.

Mr. P. Currier: TMDLs apply to properties that have existing permits and hydrology is also a factor in impairments, along with pollutants.

Rep. Spang: What about the authority to regulate large parking lots?

Mr. P. Currier: EPA extends authority through Residual Designation Authority (RDA), and gave the Charles River Watershed in Massachusetts as an example.

Ms. Manzelli: Does the RDA exclude residential subdivisions?

Dr. Roseen: The Charles River RDA is based on impervious cover and there are some exclusions.

Chairperson Cedarholm: Is RDA is a solution?

Mr. P. Currier: It is a solution only if we want EPA to regulate it. EPA Region 1 is the only region implementing RDA and the recent change in Region 1 administration may mean changes in how frequently RDA is used in the future.

Ms. Manzelli: When RDA came up before, the Commission decided that it would be better to come up with a New Hampshire specific solution.

Mr. P. Currier: EPA may not be able to handle the workload associated with RDAs.

Chairperson Cedarholm: The state regulates the 401 Water Quality Certification Program. Can RDA be similarly incorporated into state law?

Mr. P. Currier: A lot of authority already exists to regulate impaired waters. Antidegradation can always be used, but that it is difficult to implement.

Rep. Spang: Implementation is more likely if there is an active association like in the Charles River Watershed.

Mr. P. Currier: DES is funding a project in the Newfound Lake watershed to designate the lake as high quality with exceptional significant. This would require an antidegradation review and alternatives analysis for every development project, and social and economic justification if degradation was proposed. The Water Quality Standards Advisory Committee is working on Social and Economic Justification guidance. DES is currently using the EPA guidance, but that probably isn't what we want to use.

Ms. Manzelli: Would RDA only apply to impaired waters and do the measures have to be related to the impairment.

Mr. P. Currier: Yes, it would only apply to impaired waters, but there is a process for high quality waters that could work for other waterbodies.

Dr. Roseen: Are you [Mr. P. Currier] confident that RSA 485 a:12 gives sufficient authority to use the high quality water approach?

Mr. P. Currier: Would be happy to talk about impaired waters protection and high quality water protection at a later meeting.

IV. INTRODUCTIONS

Introductions were made around the room.

V. APPROVAL OF MINUTES

Chairperson Cedarholm explained that the minutes from the 6/09 meeting were not approved at the last meeting.

Mr. Trainque motioned to accept the minutes from the 6/1/09 meeting. **Mr. P. Currier** seconded. **All approved, none opposed.**

Ms. Ebel made motion to accept the minutes from the 7/6/09 meeting. **Mr. LeRoy** seconded. **All approved, none opposed.**

VI. LAND USE COMMISSION UPDATE

Rep. Gottling presented an update of the Land Use Commission Progress to the Commission.

The first task was getting all Commission members up to speed with the issues. They heard from three developers for different scales of development. They found gaps and overlap in local, state, and federal permitting.

The Land Use Commission has two focus areas:

- 1). Wetland setbacks – wetlands have sporadic setbacks and there may be a need to a state setback system.
- 2). Habitat fragmentation for wildlife – mid-level development found that local regulations stood in the way of developing.

They had presentations by:

- Tom Irwin & Will Abbott – Greenland decision, which they felt impacted DES jurisdiction over wetlands.
- DES
- DOT
- Jeff Taylor (EPA)
- OEP
- The Jordan Institute
- North Country field trip to Mt. Washington – this showed the Commission a lot more than was interpreted from paper and presentation and caused a few members to change their minds.

The Land Use Commission broke into three sub-committees:

- 1.) To report on on-going legislation
- 2.) To research other state and federal programs and policies in 10 areas (overall environmental policy, wetland regulations, smart growth, etc.) This is proving to be a monumental task and they may pare down to the areas that are most crucial to the issue.
- 3.) To work with HB 222 to determine wetland jurisdiction setbacks. They are looking at secondary effects and are struggling to come up with a way to look at any development within a to-be-determined proximity to a wetland and determine the potential to impact the wetland. They are hoping to use the update of the NH Method so that wetlands are consistently assessed.

Mr. P. Currier: The NH Method was developed by UNH Cooperative Extension as a way to rank categories of wetlands. It looks at the function and values of wetlands and sets thresholds for the values that come out of it to rank each wetland as low, mid, and high. Certain requirements may be triggered depending on the value.

Rep. Gottling: Many municipal maps showing wetlands are outdated. There are significant changes in hydrology and permits being issued for development in wetlands because the maps did not show wetlands in the project location. Not knowing where the wetlands are and having outdated wetland maps is a big problem.

Chairperson Cedarholm: Municipal planning boards have the authority to require wetland delineation by the applicant during site plan review.

Rep. Spang: What triggers a secondary impact review? Would they only do a secondary impact review on a certain value of wetland?

Rep. Gottling: No, a proximity to the wetland would have to be determined and if a project was within that proximity, a secondary impact review would be triggered. Depending in the value and ranking of the wetland, the development may need to meet certain requirements.

Mr. LeRoy: Is it anticipated that recommendations that come out of the Land Use Commission will require an increase in DES staff and if so how will this be funded?

Rep. Gottling: That needs to be answered, but the burden would most likely fall on the developer. The Commission has not focused on the funding issue yet. They have focused on how to determine appropriate buffers.

Ms. Ebel: How does the NH Method ranking work?

Mr. P. Currier: It's a scoring system of 1 through 10 in each category and then the score is aggregated.

Ms. Ebel: Some wetlands have long fingers and there may be a single wetland system with high value sections and low value sections. Buffers may need to be adjusted on the same wetland system.

Chairperson Cedarholm: It is anticipated that BMP requirements will be incorporated, including LID.

Rep. Gottling: It depends on how much detail goes into the legislation and how much goes into the rules. The CSPA [shoreland protection act] has been faulted because it was considered too specific, which has resulted in frequent amendments.

Ms. Manzelli: One reason the Stormwater Commission wanted an updated from the Land Use Commission was to see how the two are working in relation to each other. How many of the secondary impacts to wetlands are related to stormwater?

Rep. Gottling: Many of them are related to stormwater, but the focus of the Land Use Commission has been how development will trigger requirements.

Mr. P. Currier: A hope of the NH Method is to also quantify what might be lost of buffers are not protected.

Rep. Gottling: It would be helpful if the Stormwater Commission came up with buffers or restrictions that might cover a gap the Land Use Commission is not filling and send it to the Land Use Commission.

Ms. Ebel: Will the Land Use Commission determine what activities can be done within the buffer?

Rep. Gottling: There will need to be a balance between the state law and the rules.

Dr. Roseen: Will the buffers be limited to wetlands or apply to other surface waters as well?

Rep. Gottling: They will not apply to first, second, or third order streams.

Dr. Roseen: Maybe the Stormwater Commission could look at the gap between the Land Use Commission buffer recommendations and the CSPA.

Mr. P. Currier: The NH Method can be applied to all surface waters including vernal pools. The Surface Water Quality Standards apply to vernal pools, intermittent and ephemeral streams and wetlands.

Rep. Gottling: The Land Use Commission does not know where the funding will come from, but if we do not know where the wetlands are, the outcome of the Land Use Commission's work will not be effective.

Chairperson Cedarholm: Are prime agricultural wetlands included under the Land Use Commission?

Rep. Gottling: They were not specifically mentioned. The list of duties was enormous, so the Commission prioritized. In reality, the Land Use Commission should be integrated with the Stormwater Commission and environmental policy development like is being done in other states.

VII. NEEDS MATRIX DISCUSSION

Dr. Roseen: If 485 A:12 is an arduous process, is there something less arduous?

Mr. LeRoy: Is this where a utility would come up?

Chairperson Cedarholm: If a municipality sets up a utility can it be used to regulate?

Mr. P. Currier: Not everyone's stormwater system is attached to the municipal stormwater system.

Rep. Spang: Isn't a utility a funding system with funding incentives?

Chairperson Cedarholm: There need to be special provisions for re-development and infill development because the trigger is often lower than 100,000 square feet. It is easy to make improvements to urban areas that are already 100% impervious. For example, roof runoff can be piped directly to a brook instead of running over a parking lot, picking up pollutants and then entering the brook. It doesn't get at the hydrology issue, but it does get at pollutants. Re-development might be to be separate from new development.

Dr. Roseen: What is the re-development threshold? They are facing this challenge in Massachusetts. Something is considered re-development if there is a certain percentage of increase in property value or if there is a reconfiguration of 5,000 square feet or more. This is in the Massachusetts and the Rhode Island statutes.

Ms. Manzelli: Projects are still limited to the one acre threshold.

Dr. Roseen: There might be a lower threshold for re-development.

Ms. Manzelli: Lowering the AoT threshold does not matter if it is new or re-development.

Dr. Roseen: We need some time to think about the re-development issue.

Mr. LeRoy: What about a situation like re-doing the Wal-mart parking lot or another activity that doesn't need an AoT permit?

Ms. Ebel: What about situations when there is the potential for drainage improvements to be made when re-doing parking lots, but there is no permit. It would be good for municipalities to have some authority to request improvements.

Mr. P. Currier: There needs to be incentives to owners for improving drainage.

Ms. Manzelli: It would be nearly impossible to pass legislation for impervious cover limitations in state law.

Mr. Sienkiewicz: It would be good to get the correlation between impervious cover and water quality.

Rep. Spang: Even if the Stormwater Commission doesn't draft impervious cover legislation as a recommendation, it would still be good for other groups and commissions to see this information as a finding and be able to use it. It would be very difficult to limit impervious cover on a watershed basis, but there might be a better change on a site basis.

Mr. P. Currier: Impervious cover is included in Antidegradation. Tier 1 waters are required to have a 10% Percent impervious cover can be derived from aerial photography. A project in a watershed that the aerial photography analysis shows to have greater than 10% impervious cover would require an analysis showing no additional loading for development activities.

Ms. Manzelli: This doesn't impact re-development.

Mr. P. Currier: Re-development wouldn't be difficult, but it gets more difficult with new development.

Chairperson Cedarholm: Instead of requiring limits on impervious cover, there should be incentives to lower impervious cover.

Mr. P. Currier: Impervious cover is a rough estimate. What we should really care about is connected impervious cover. The 10% analysis could be used to see where the impervious cover is.

Dr. Roseen: Who would do the assimilative capacity analysis?

Mr. P. Currier: If there is only 10% undisturbed cover left, it would assume that the assimilative capacity is used up and an analysis would not be necessary.

Ms. Manzelli: This could introduce cap and trade. If someone needs to pave on their own property, they need to remediate elsewhere in the watershed.

Ms. Ebel: The overall goal is to facilitate watershed level stormwater planning. Impervious cover is only one component of it.

Ms. McCarthy: The country of New Zealand re-zoned all of their political boundaries to coincide with watershed boundaries in the early 1990's.

Ms. Ebel: We can't do that, but it does stress the importance of watershed scale management.

Chairperson Cedarholm: This is similar to the Southeast Watershed Alliance, which serves the purpose of getting all municipalities in a watershed together.

Ms. Ebel: It is consensus to say that we want to encourage watershed level planning.

Mr. P. Currier: RSA 483 envisions watershed planning. The statute was expanded from corridor plans to watershed plans. It has not worked very well because the local advisory committees haven't been able to lobby the planning boards.

Mr. Sienkiewicz: What do the counties do? Some states have abolished county level government. It is good to not forget that there is another level of government in the state.

Mr. Trainque: Watershed-based management is not unprecedented in this country. There are numerous examples out west and in Massachusetts with its inter-basin transfer program.

Ms. Ebel: Is there a regulatory need to encourage or require watershed planning?

Chairperson Cedarholm: There was some pretty innovative language in the original Southeast Watershed Alliance that included a scoring mechanism. A high score made a municipality eligible for additional funding, but it was removed.

Mr. Sienkiewicz: The Needs Matrix lists re-delineation of RPC boundaries to watershed boundaries, but RPCs don't have much authority.

Rep. Spang: Some RPCs have circuit riders. What about a stormwater circuit rider?

Ms. Ebel: But municipalities have to choose to use a circuit rider.

Dr. Rosen: A circuit rider is a good idea, but the qualifications would need to be specified to get the right people for the job.

Rep. Spang: There is a general problem that municipalities do not understand the importance of LID.

Ms. Ebel: DES should develop LID guidance.

Mr. P. Currier: The REPP [Regional Environmental Planning Program] is funded through DES and was set up to provide assistance to municipalities. Assistance could be provided through REPP.

Ms. Manzelli: The REPP program could be used for outreach for the *Innovative Land Use Techniques Handbook*.

Ms. Ebel: The problem is always funding at the local level. We can throw model ordinances at municipalities, but if they don't adopt and implement the ordinance it doesn't work.

Mr. P. Currier: Antidegradation could be incorporated into local ordinances, but it would still require funding.

Ms. Ebel: If you make people adopt a local ordinance, it doesn't cost anything except to enforce it.

Chairperson Cedarholm: If DOT does the 6” aerial photography, it wouldn’t take much to do a hydrologic analysis from that data.

Mr. P. Currier: The concept with Great Bay is to produce a model for nitrogen and determine how much an individual parcel contributes to the bay given its land use and placement in the watershed.

Mr. Sienkiewicz: Does it make sense to recommend that the state develop watershed-based hydrology models based on DOT aerials?

Mr. P. Currier: It sounds like with a little more money to post-process the aerial photos and do an impervious cover analysis would be very beneficial.

Chairperson Cedarholm: Mr. Hemmerlen might not have meant 6” topography. Usually LiDAR is used for topography.

Mr. P. Currier: The NH Geological Survey would like to do LiDAR for the entire state.

Chairperson Cedarholm: Is the Residual Designation Authority [RDA] based on the federal Clean Water Act?

Mr. P. Currier: Yes, it goes EPA authority to implement NPDES permitting where there are impairments.

Dr. Roseen: The 401 Certification applies to federal permitted activities. RDA has the authority to over unpermitted activities.

Dr. Roseen: The Massachusetts re-development trigger is an increase of 50% in fair market value or if pavement is rehabbed, reconstructed, repaired, or improved, and is greater than 5,000 square feet or 5% paved surface. This is in the Mass general stormwater permit.

Rep. Spang: The first page of the Needs Matrix includes maintenance of stormwater LID practices.

Mr. LeRoy: DES enforcement personnel need more training.

Mr. P. Currier: We need a framework for contractors & other parties involved.

Chairperson Cedarholm: The MS4 permit requires training.

Mr. P. Currier: The federal Antidegradation rules could be made into state law. This would raise the profile and make NH consistent with the federal language. He will circulate the federal rule language.

Mr. P. Currier: AoT could review projects in flood plains up to a half acre foot.

Mr. Sienkiewicz: How is AoT the correct mechanism? Is it practical to replace storage capacity when the floodplain is developed?

Dr. Roseen: You can increase the ability of the soil to store with below surface storage.

Mr. P. Currier: The Flood Commission report deals with a lot of this. They identify a bandwidth around a stream and prohibit development within the bandwidth for state owned buildings. We could scratch the words “state owned”.

Mr. Sienkiewicz: We should tell the legislature to keep people out of the floodplains.

Mr. E. Currier: Floodplains are seasonal. Farms use them while they are inactive.

Mr. Sienkiewicz: There are no performance standards for best management practices. The stormwater manual contains guidelines, not mandates. There needs to be clean performance standards that are checked after implementation.

Chairperson Cedarholm: Specifications are different than performance criteria.

Ms. Manzelli: We should put off this point and determine clear terminology and more specific wording in a later meeting.

Mr. P. Currier: This point includes existing and proposed development. Existing development is less clear.

Mr. Sienkiewicz: It's fine for municipalities to have a role in a state scheme, but municipalities shouldn't be making their own rules.

Ms. Manzelli: The new MS4 permit requires municipalities to do something they may not have the power to do.

Chairperson Cedarholm: Municipal authority doesn't exist to manage stormwater, but is required when referring to impaired waterbodies without a TMDL.

Chairperson Cedarholm: In regard to the need to reduce the stormwater impacts from road construction and maintenance activities, road crews remove vegetation, but do not replace it. Post-construction BMP maintenance should be applied to road crew operations.

Mr. Sienkiewicz: AoT has exemptions for roadwork. DOT is exempt from AoT.

Mr. P. Currier: There have been improvements, but the main issue is the incentive to work despite rain. An erosion control certification program might help DOT and public works. Contractors can hire erosion control experts.

Mr. LeRoy: Contractors hire erosion control experts because the state doesn't want to do it.

Chairperson Cedarholm: Can minimum performance criteria be adopted through legislation or amending existing legislation? The real solution would be enabling municipalities to incorporate innovative land use planning as alternatives.

Mr. Sienkiewicz: Performance standards need greater uniformity and to be outcome-based.

Chairperson Cedarholm: Performance standards are more important with high quality water. Durham was re-zoned haphazardly and now some sections are light industrial. They are trying to incorporate performance standards for the newly zoned area and are struggling. Is there an existing mechanism to require performance standards?

Mr. P. Currier: There are eight criteria that DES can use their discretion to determine if a waterbody is high quality.

Dr. Roseen: Certain BMPs on the list of acceptable BMPs should be eliminated based on performance standards.

Rep. Spang: Is there research on problem streams?

Mr. P. Currier: There is a 3-5 year report that combines all the data that is being made more user friendly.

Rep. Spang: Can Antidegradation be used to go after communities that are failing to enact measure to improve water quality?

Mr. P. Currier: Not really. Generally, Antidegradation is applied on a project-specific basis. The town has no responsibility to implement it.

Dr. Roseen: Towns have an opportunity to impose it, but the authority issues need to be addressed.

Rep. Spang: It's not really useful to research the extent of LID. Why are municipalities resistant?

Dr. Roseen: We know why they are resistant, but we don't necessarily know how to overcome the resistance.

Chairperson Cedarholm: I'm afraid that requirements for LID may discourage development within municipalities.

IV. FUTURE MEETING DATES AND TOPICS

Revisions to the Needs Matrix will be made for the next meeting.

| Date | Time | Location |
|--------------------|--------------------|----------|
| September 14, 2009 | 12:00 PM – 4:00 PM | LOB 305* |
| October 5, 2009 | 12:00 PM – 4:00 PM | LOB 305* |
| November 2, 2009 | 12:00 PM – 4:00 PM | LOB 305* |

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

V. ADJOURNMENT

The meeting adjourned at 4:00pm