

**FINAL MINUTES**  
**HB 1579 COMMISSION TO STUDY LAND DEVELOPMENT**  
**REGULATIONS AND THE EFFECTS OF LAND DEVELOPMENT**  
**WITHIN UPLAND AREAS THAT MAY AFFECT WETLANDS AND**  
**SURFACE WATERS OF THE STATE**

November 18, 2008 \* 9:00 AM  
NH Office of Energy and Planning, Concord, NH

**Commissioners Present:**

Chairperson Representative Sue Gottling, NH House of Representatives, member of the  
Resources, Recreation and Development Committee  
Senator Harold Janeway, NH Senate  
Representative Chris Christensen, NH House of Representatives  
Jerry Little, representing NH Bankers Association  
Cheryl Killam, representing NH Municipal Association  
Peter Stanley, representing NH Association of Regional Planning Commissions  
Jennifer Czysz, representing NH Office of Energy and Planning  
Pat Corso, representing Business and Industry Association  
Peter Walker, representing NH Association of Natural Resource Scientists  
Charles Miner Jr., representing NH Fish and Game Department  
Paul Morin, representing Home Builders and Remodelers Association of NH  
Laura Deming, representing NH Audubon Association  
Jasen Stock, representing NH Timberland Owners Association  
John Doran, representing NH Association of Realtors  
Rene Pelletier, representing NH Department of Environmental Services

**Other Attendees:**

Representative Judith Spang, NH House of Representatives  
Jillian McCarthy, NH Department of Environmental Services  
Bruce Berke, Mount Washington Resort/Sheehan Phinney  
Charlie Hood, NH Department of Transportation  
Bill Cass, NH Department of Transportation  
Kathryn Fox, Environment NH  
Gary Abbott, Associated General Contractors of NH  
David Shulock, Brown, Olson & Gould, P.C. Biomass Group

**Commission Staff:**

Dari Sassan, NH Office of Energy and Planning

**I. ROLL CALL AND INTRODUCTIONS**

Representative Gottling called the meeting to order at 9:05 AM. Commissioners introduced themselves by name and representation. Agendas and draft minutes from the October 21, 2008 meeting were distributed to commissioners.

**II. APPROVAL OF MINUTES FROM OCTOBER 21, 2008 MEETING**

Mr. Stanley moved to accept the minutes of the October 21, 2008 meeting. Mr. Doran seconded. The minutes were accepted unanimously.

**III. PRESENTATIONS**

Mr. Irwin, representing the Conservation Law Foundation, explained that he would be discussing the “Fall’s Way” development in Greenland, NH as a case study in the current reach of Wetlands protections. Mr. Irwin’s presentation is available online at:

[http://www.nh.gov/oep/legislation/2008/hb1579/2008/documents/greenland\\_falls\\_way\\_project.pdf](http://www.nh.gov/oep/legislation/2008/hb1579/2008/documents/greenland_falls_way_project.pdf)

Mr. Irwin stated that, generally, one acre of fill would not generate tremendous concern. In the case of the Fall’s Way project, however, he stated that major concerns with stormwater, both from within the wetlands and from upland activity, came into play.

Senator Janeway asked if Mr. Irwin knew the area of land that would be converted to impervious surface. Mr. Irwin replied that he did not know the exact area. Senator Janeway asked if the homes in the development would utilize community sewer or on-site septic. Mr. Irwin replied that 79 septic systems would be used. Ms. Killam asked what size lots would be. Mr. Irwin replied that he was not certain but expected lots would be larger than one acre. He added that the project is currently under development.

Mr. Irwin stated that the extent of mitigation in the project included taking three lots out of development and creating some buffer areas. He indicated that the permitting and appeals process was lengthy, adding that it could likely be streamlined. He reported that the process consisted of consisted of:

- The Department of Environmental Services (DES) granting a wetlands permit to the developer;
- DES denying the permit following a reconsideration request from the Greenland Conservation Commission and the Conservation Law Foundation, and
- DES granting a permit following a reconsideration request from a project proponent.

Mr. Doran asked what the Conservation Law Foundation was seeking through its appeal. Mr. Irwin replied that his organization sought to have the project scaled back. Mr. Doran followed by asking if Mr. Irwin was proposing clustering of

homes and asked how many homes Mr. Irwin sought to scale development back to. Mr. Irwin replied that clustering was proposed and though he did not reach the level of detail regarding exact numbers of units, he felt that 30-35 units would have been appropriate.

Mr. Doran requested information regarding the price range of units. Mr. Irwin stated that 8-10 units would be affordable and that other units would sell for \$400,000 - \$500,000. Mr. Doran commented that there exists a need to balance environmental protections with the need to generate a supply of affordable housing units.

Mr. Irwin, referring to the NH Supreme Court decision that came about as a result of continued appeals by the Conservation Law Foundation and the Greenland, NH Conservation Commission, stated that the decision crystallized a legal question impacts within DES authority?"

Mr. Irwin explained that two previous rulings had set forth the precedent that:

- DES's geographic scope is limited to the exact area of a wetland in which fill is placed, and
- DES's temporal scope is limited to the time immediately surrounding the fill project - only impacts *during* should be considered.

Mr. Irwin stated that his organization was not seeking to expand the circumstances under which a wetlands permit is required. Rather, he continued, he sought to have the wetlands permitting process provide comprehensive protection. Mr. Doran asked if it would be correct to say, "You are not looking to change the trigger; you are asking to change the process that follows the trigger." Mr. Irwin concurred with Mr. Doran's reiteration.

Senator Janeway asked if the Court explained its decision making process within its ruling. Mr. Irwin answered that the ruling did indeed provide the court's reasoning, adding that he would assist the Commission in accessing the written ruling.

Mr. Walker said that his firm works for the owner of the Fall's Way subdivision though it was not involved in any of the permitting or the court case. He offered to recuse himself from further discussion. Chairperson Gottling stated that she did not feel Mr. Walker's recusal would be necessary, adding that many Commissioners are directly involved with issues being deliberated by the Commission.

Mr. Irwin read the following excerpt from RSA 482-A:1:

*"It is found to be for the public good and welfare of this state to protect and preserve its . . . wetlands . . . from despoliation and unregulated alteration, because such despoliation and unregulated regulation. . . will adversely affect the value of such areas . . . as sources of nutrients for finfish, crustaceans, shellfish and wildlife of*

*significant value, will damage or destroy habitats and reproduction areas for plants, fish and wildlife of importance, will eliminate, depreciate or obstruct the commerce, recreation and aesthetic enjoyment of the public, will be detrimental to adequate groundwater levels, will adversely affect stream channels and their ability to handle the runoff of waters, will disturb and reduce the natural ability of wetlands to absorb flood waters and silt, thus increasing general flood damage and the silting of open waters, and will otherwise adversely affect the interests of the general public.”*

Mr. Irwin stated that if the DES Wetlands Bureau is only allowed to focus on the *direct* areas of fill, then RSA 482-A:1 is undermined.

Mr. Stock recalled a presentation given by Mr. Pelletier at a previous Commission meeting in which Mr. Pelletier discussed the multitude of DES permits that are required for various development projects. Mr. Stock stated that as he looked through the various permits, it seemed to him that other permits would be triggered. He asked if other permit programs that may have addressed the problems at Fall’s Way were considered. Mr. Irwin said that the Court did consider the fact that Alteration of Terrain permitting was required for the development. Mr. Irwin went on to convey that his organization’s concern was that the specific attention to the functions and values of a wetland that are within the technical expertise of those in the Wetlands Bureau should be applied to such matters of wetlands impact. Mr. Irwin referred to a “stovepipe effect,” through which overall impacts to the ecosystem are not considered as a result of tight focus upon the regulatory processes prescribed within each regulatory division.

Mr. Morin asked if Mr. Irwin took any comfort in the fact that the new Alteration of Terrain rules go to what Mr. Morin considered “great lengths” to manage stormwater. Mr. Irwin replied that he did support the new measures but he reiterated his feeling that the Wetlands Bureau is specially equipped to address impacts to the functions and values of wetlands. Mr. Morin followed by stating that within the draft he had most recently seen, the new Alteration of Terrain rules specifically include anti-degradation language. Mr. Irwin stated the new draft of Alteration of Terrain does not enumerate habitat fragmentation protections, adding that enablement of regulators to look at the real impacts to wetlands would be a substantial improvement.

Mr. Walker asked if the Alteration of Terrain rules were in effect. Mr. Pelletier stated that the rules were in the process of being submitted to the Joint Legislative Committee on Legislative Rules and were not yet active.

Representative Christensen requested affirmation that a wetlands permit fee is indeed based upon the area that the applicant wishes to impact. Mr. Pelletier confirmed Representative Christensen’s statement. Next, Representative Christensen requested affirmation that, if the permit review process results in a

lesser area of impact, the fee is not reduced. Again, Mr. Pelletier affirmed Representative Christensen's statement. Representative Christensen suggested that the Supreme Court's ruling could possibly have been a means of calling for an alternative to the current system. Mr. Pelletier said that, in an attempt to gain a permit for the largest possible disturbance, some applicants seek a permit to impact a very large area of wetland. These folks, continued Mr. Pelletier, should be willing to pay the appropriate fee for the permit they seek.

Mr. Irwin said that, if DES's review authority does not include indirect impacts, then it is not truly possible to develop an alternative of least impact. Mr. Stanley asked Mr. Pelletier whether DES offers an opportunity for consultation between the builder and DES from the very outset of a project. Mr. Pelletier said that DES has received a grant to study a pre-application process, adding that, currently, individuals at DES are always available for consultation at any point and are available to attend project meetings at no cost to the developer.

Mr. Walker sought insight regarding the potential statewide losses that could result from a continuation of the status quo. He stated that numerous roads and lots were proposed within the area of the Fall's Way development and asked whether such a development is representative of what is occurring across the state or whether it is an aberration. Mr. Irwin stated that within the Fall's Way development, Blandings Turtle habitat would be lost and that the damages to the ecological system extend well beyond the 1.25 acres of wetlands disturbance for which permits were granted. Statewide, continued Mr. Irwin, wildlife mortality and habitat fragmentation are an inevitable result of the current regulatory system. Senator Janeway added that as tracts of land ideally suited for development become increasingly scarce, the State is bound to encounter even larger challenges than the one presented at Fall's Way.

Ms. Deming said that, in the case of vernal pools, one could protect the immediate area that they occupy, or even place a buffer around them, and still fail to protect the species that migrate between the pools and upland habitat that has become disconnected. Ms. Killam added that in addition to the issue of disconnection, the construction of homes and installation of impervious surfaces leads to increased nutrient loading and amplifies occurrences of flooding.

Mr. Morin asked if there exists any opportunity for compensatory mitigation of disturbance to vernal pools. Mr. Irwin stated that, at the Fall's Way development, mitigation occurred on site – three lots were set aside and buffers were established around certain lots.

Mr. Pelletier offered the statement paraphrased below as “food for thought:”

*If there were no wetlands impacts on this site, we would not be looking at this development at all. It would not have crossed our radar. Thus, if a developer finds a way to bridge wetlands, none of these topics - neither vernal pools, nor impervious surfaces, nor road salt, nor habitat*

*fragmentation – would ever come into the consideration of the Wetlands Bureau. We at DES are not convinced that it is within the wetlands statute that all these factors should be addressed.*

Mr. Walker followed, saying that indirect impacts can be very broad and that putting all such considerations upon the shoulders of the Wetlands Bureau may indeed not be the ideal solution. On the other hand, continued Mr. Walker, the issues raised are clearly ones that the State needs to be concerned with.

\* \* \* \* \*

Mr. Abbott, of the Society for the Protection of New Hampshire Forests, explained that he would be discussing RSA 482-A. His presentation is available online at:

[http://www.nh.gov/oep/legislation/2008/hb1579/2008/documents/spnhf\\_wetlands\\_overview.pdf](http://www.nh.gov/oep/legislation/2008/hb1579/2008/documents/spnhf_wetlands_overview.pdf)

After showing several slides representing growth trends in NH in recent decades, Mr. Abbott indicated that during the peak in new-home construction in the eighties, wetlands were not being heavily developed because land more suited to construction was readily available. Today, continued Mr. Abbott, land ideally suited to construction is scarcer and wetlands are therefore being developed to a much greater extent. Mr. Abbott stated that in this time of increased pressure upon natural resources, folks must not retreat from protecting these resources. He added that his organization wishes to see RSA 482-A amended to include provisions for the consideration of indirect impacts.

Mr. Abbott praised the efforts of DES in exploring opportunities for permit integration but added that such integration does not guarantee that indirect impacts will be considered. Mr. Walker said that he recognizes many compelling reasons for considering indirect impacts but pointed out that he struggles with the issues paraphrased as:

- 1. Where do property rights fit in? People may be cash poor and property rich. What effects will these expanded regulations have on them?*
- 2. How does the concept of regulating indirect impacts fit in to the state regulatory scheme?*

Mr. Corso expressed the opinion that 482-A creates so many hypothetical scenarios and is limitless in how it may be interpreted. He said that a highly effective means of protecting resources would be to foster “enlightened development.” Mr. Corso added that there exists a need to create a standard that works for business and the environment.

Mr. Abbott stated that wetlands laws should not be used as a tool for restricting development. He posed the question, “How do we protect what’s there in a way that serves current residents as well as newcomers?” Mr. Abbott added that the potential costs of not protecting natural resources are incalculable.

Mr. Doran asked if Mr. Irwin or Mr. Abbott had made any attempts at defining “direct impacts” and “indirect impacts.” M. Abbott responded that definitions had been drafted and said that he would provide the Commission with copies of the definitions.

Mr. Doran said that DES currently carries out enormous regulatory duties. He asked how a state with a \$250 million deficit could possibly address the proposed expansion of RSA 482 brought forth by Mr. Irwin and Mr. Abbott. He added that Chancellor Reno of the University System of NH had identified people ages 18-34 as a scarce natural resource because they cannot afford to live in NH, asking how expanding environmental protection through RSA 482 would impact the elderly and young people of NH. Mr. Abbott responded that regulations should not be prejudiced. He said that if the state must determine that it cannot afford to hire two additional DES employees to protect wetlands, then the legislature certainly has that option. He reiterated his opinion that the present is not a time to abandon wetlands protections and that, while an amended RSA 482 may add to the cost of development in some instances, it is still the right thing to do.

Mr. Irwin further responded by indicating that the Fall’s Way project was not addressing the housing affordability needs that 18-34 year olds and the elderly face. He emphasized that RSA 482 is not a land use regulation and should not be construed as one. Rather, he described it as a backstop to the impacts that had been discussed previously.

Senator Janeway said that even the best-written laws could only address a part of the overall purpose of protecting wetlands. He expressed a desire for the Commission’s final report to underscore the need for the State’s municipalities to adopt a new mindset about protecting wetlands. He listed affordability, appropriateness and cluster development provisions as examples of issues that municipalities must consider.

Mr. Corso stated that the current progression of development, in which a developer buys a piece of land first and then enters the push and pull of what she can and cannot do with the land, is, in his estimation, backward. He suggested that some benefit might come from a system that allows a developer to receive, for a fee, consultation prior to purchasing a tract. Mr. Corso indicated that such a practice may be worth consideration and restated that the current system seems illogical to him. Mr. Pelletier said that his agency would like to look at such an idea.

Mr. Pelletier said that the issue of creating a comprehensive regulatory process extends well beyond the wetlands statute. He added that the Land Use Commission was created as a result of SB 435 (2008), and the question that needs to be answered is, “How do we want New Hampshire to grow?”

Mr. Doran asked Mr. Abbot what he meant when he referred to “social benefit” in some of his earlier comments. Mr. Abbott replied that human beings have derived benefit from the environment. He said that trees purify the air, sequester carbon and attenuate water. Mr. Abbott said while people do not pay for these types of benefits, we certainly experience a cost when they are removed.

Mr. Abbott said that the issue of how to locate developments must be addressed by all stakeholders, including municipalities. He identified the site evaluation committee that deals with power plant location as a potential model for a group that can work to bring all interests - or “stovepipes” - to the same table.

Mr. Miner said that many of the people who are moving into new homes are coming to NH for the natural resources. If these folks understand that the regulations that impact new home siting and construction are in place to protect the natural resource values that they seek, he continued, they may be more amenable to the regulations. Mr. Miner added that more education is necessary.

Mr. Walker noted that NH is not the only state that has dealt with this issue and proposed that the Commission look at some of the successes and failures other states have experienced. Chairperson Gottling added that such work falls within the duties of the Commission.

Mr. Stock observed that, while it is indeed important not to create regulation that targets winners and losers, there are some other factors to consider. As timber managers, continued Mr. Stock, he and his colleagues need to be able to access trees. He said that timber manager’s activities do not cause the same disruptions that a subdivision causes. He said that he and his fellow timber managers must not be regulated out of business because development needs to be controlled. Mr. Irwin replied that Mr. Abbott and he were advocating for DES to gain the authority to review indirect impacts *with deference to the agency’s best professional judgment*, adding that his organization would be comfortable in relying upon DES to distinguish between uses.

#### **IV. DISCUSSION OF FUTURE MEETING TOPICS AND DATES**

Ms. Czysz circulated a handout proposing the following future course of action for the Commission:

*Based upon the commission’s duties (Chapter 294:3, I through V), the following is a summary of a proposed course of action toward completion of those duties.*

- I. *The effects of land development on surface and ground water quality and quantity, and terrestrial and aquatic habitat.*
  - *No additional presentations*

II. *The adequacy and consistency of local, state, and federal programs as they relate to the regulation and management of land development, including regulations of wetland buffers and setbacks, stormwater management, and cumulative effects of development.*

- *Presentation by the Department of Transportation – NHDOT Environmental Planning and Permitting Processes (Scheduled for January 2009)*
- *Presentation by the Office of Energy and Planning on Recent Growth Trends (Proposed for January 2009)*

*Informative presentations in fulfillment of duties I and II (above) establish the foundation the commission needs to precede through duties III through V. Additionally, duties III through V represent an ordered progression for the commission to complete its responsibilities.*

*To elaborate, once the commission has heard the impacts of land use development and has assessed the regulatory system, it can ultimately provide recommendations for improving that system and identify ways in which the state can better integrate land use development objectives with natural resource protection. Through process of formulating recommendations, the commission will naturally recognize specific obstacles to their achievement and any future legislation that may be necessary.*

III. *The opportunities for integration of land use controls, open space protection techniques, and environmental and public health protection laws to promote land development patterns that maintain ecosystem health and integrity while providing desirable communities in which to live and work. This shall include study of any programs of this kind underway in other states or nations.*

- *Presentation by the Office of Energy and Planning on the Housing and Conservation Planning Program*
- *Presentation by Steve Whitman on his research of sustainable development in other NH, around the country and in other nations.*
- *Commission members should engage in a visioning session similar to that done for a municipal master plan. Over the course of several meetings the commission should answer:*
  - *Where do we see our state in 10 years?*
  - *What do we want to look like?*

- *What objectives do we have for balancing community development and natural resource protection?*
  - *The commission, following, or concurrent to, the visioning session should develop a road map for how to achieve that vision which will naturally include a series of recommendations.*
- IV. The potential legal, fiscal, regulatory, and technical obstacles for creating an integrated approach to land development.*
- *Based upon the visioning and development of recommendations the commission will identify obstacles toward achieving those recommendations.*
- V. Legislation that may be necessary to implement the recommendations of the commission.*
- *The last step in the process will be to identify necessary legislation to achieving the commission's recommendations.*

Chairperson Gottling thanked Ms. Czysz for preparing the handout and for her contribution in completing the interim report. Mr. Stanley moved that the Commission approve the scheduling of presentations by the NH Department of Transportation and the NH Office of Energy and Planning in January and a presentation by Steve Whitman, planning consultant, in February. Mr. Walker seconded, all voted in favor.

Mr. Stock asked if it might be possible to conduct a presentation by DES about integrated permitting. Mr. Pelletier replied that, while DES has been fostering the development of an integrated for several months, such a presentation might be premature at the present time.

Chairperson Gottling announced that the Commission would not meet in December but would convene again on January 20 at 9:00 AM in room 305 of the NH Legislative Office Building, Concord.

## **V. OTHER BUSINESS**

Representative Gottling extended thanks to all Commissioners for their attendance and for their excellent questions and insights.

## **VI. ADJOURNMENT**

At 11:10 AM, Ms. Czysz moved that the meeting be adjourned. Mr. Pelletier seconded the motion, which carried unanimously.