

**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**

February 23, 2009 \* 1:00 PM  
NH Department of Resources and Economic Development  
172 Pembroke Road, Concord, NH

**Commissioners Present:**

Chairperson Representative Sue Gottling, NH House of Representatives, member of the Resources, Recreation and Development Committee  
Vice-chairperson Erin Darrow, representing American Council of Engineering Companies of NH  
Representative Chris Christensen, NH House of Representatives  
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  
John Doran, representing NH Association of Realtors  
Johanna Lyons, representing NH Department of Resources and Economic Development  
James Gove, representing Associated General Contractors of NH  
Rene Pelletier, representing NH Department of Environmental Services

**Other Attendees:**

Representative Jim McClammer, NH House of Representatives  
Representative Judith Spang, NH House of Representatives  
Representative Frank Tupper, NH House of Representatives  
Bruce Berke, Mount Washington Resort/Sheehan Phinney  
Collis Adams, NH Department of Environmental Services  
Dana Bisbee, Mount Washington Resort  
Mike Brunetti, Celebration Associates/Mount Washington Resort  
Carolyn Russell, NH Department of Environmental Services  
Tom Irwin, Conservation Law Foundation  
Gina Rotondi, Rath, Young and Pignatelli  
Michael Licata, Business and Industry Association  
Joel Maiola, Granite Edge Consulting  
Carl Deloi, US Environmental Protection Agency  
Mark Kern, US Environmental Protection Agency  
Matt Schweisberg, US Environmental Protection Agency

**Commission Staff:**

Dari Sassan, NH Office of Energy and Planning

**I. ROLL CALL AND INTRODUCTIONS**

Chairperson Gottling called the meeting to order at 1:06 PM. Commissioners, speakers and audience members introduced themselves by name and representation. Agendas and draft minutes from the January 20, 2009 meeting were distributed to commissioners.

**II. APPROVAL OF MINUTES FROM JANUARY 20, 2009 MEETING**

Mr. Morin proposed the last two paragraphs on page 6 of the draft minutes be changed to read:

*Mr. Walker said that a hearing would be taking place on January 27, 2009 at 1:00 PM regarding HB 222 (2009 an act relative to fill and dredge permits in wetlands). Mr. Stock asked if such a bill might be premature given the fact that the Commission was formed to vet out the issue of secondary impacts. He asked if the Commission would give input or voice non-support for the bill. Mr. Morin said that his constituency feels that indirect impacts are not well defined in the bill. He added that, in his estimation, it would be appropriate for the Commission to oppose HB 222.*

*Senator Janeway said that the intent of the bill was to address the Supreme Court decision regarding the Fall's Way development. The bill, he continued, does not attempt to redefine indirect impacts, but to clarify the legislative intent that wetlands impacts should not be looked at so narrowly. Mr. Morin said that the court ruling found that there existed a jurisdictional limit and restated his feeling that this bill would be premature. Mr. Doran acknowledged Senator Janeway's good intentions in sponsoring the bill, but said that he also would view HB 222 as premature.*

Ms. Darrow proposed the following addition following the first sentence of the second full paragraph from page 7 of the draft minutes:

*The American Council of Engineering Companies of NH sees HB 222 as premature.*

Mr. Doran moved to approve the minutes of the January 20 meeting as amended. Ms. Czysz seconded. The minutes were accepted unanimously.

**III. PRESENTATIONS**

Mr. Gove introduces Carl Deloi, Matt Schweisberg and Mark Kern of the US Environmental Protection Agency (EPA). Mr. Deloi recognized the Commission's ambitious duties. He explained that he and his colleagues had not come to tell the Commission what to do, but to explain how the federal government handles similar issues.

Mr. Schweisberg and Mr. Kern gave a presentation entitled, “Secondary Adverse Impacts,” available online at:

[http://www.nh.gov/oep/legislation/2008/hb1579/2009/documents/secondary\\_adverse\\_impacts.pdf](http://www.nh.gov/oep/legislation/2008/hb1579/2009/documents/secondary_adverse_impacts.pdf)

Mr. Morin asked if the speakers could provide a definition of “significant degradation to wetland resources.” Mr. Schweisberg said that “significant impact” has been addressed through both case law and within the National Environmental Policy Act (NEPA). Within NEPA, said Mr. Schweisberg, anything detectable of less-than-minimal is considered significant. Mr. Morin asked Mr. Schweisberg if he could name some case law in which “significant impact” is addressed. Mr. Schweisberg said that while he could not provide such information at once, he could supply some such information to the Commission. Commission members expressed interest in obtaining such information.

Mr. Doran asked about a presentation slide in which a citation from federal code referenced secondary effects and a following comment referenced adverse impacts. Mr. Schweisberg said that the regulations are geared toward addressing negative impacts, thus within the context, assuming secondary impacts to be negative would not be presumptive.

Mr. Gove asked the speakers to address the subject of “buffers.” Mr. Kern said that it is important to place emphasis on the functions of a system. He said that establishing a set buffer for all wetlands suggests the assumption that all wetlands are the same. Mr. Kern said that it might be better to look at the functions of each wetland – at very least to consider size or sensitivity of each system. Mr. Schweisberg added that it also might be best not to treat all activities the same. As an example, he said that a nature trail could be treated differently than a highway.

Mr. Corso asked how one can identify impacts that are “associated with” an activity. Mr. Schweisberg answered by referring to the “but for” test. For example, he said that such-and-such would not occur *but for* such-and-such project. He said that in some instances, the “but for” clause can extend over considerable distance and time.

Ms. Demming asked how boundaries are drawn for cumulative impacts and whether consideration of secondary impacts is limited to a single project. Mr. Schweisberg said that he and his colleagues had come to present on secondary impacts and identified the issue of cumulative impacts as another issue which would require an entire discussion of its own. He said that while secondary impacts considerations are limited to a single project, his agency’s reviews also consider cumulative impacts. He said that most small programmatic general permits do not trigger a look at cumulative impacts.

Referring to HB 222, Mr. Walker asked if it is true that only uplands activities are relevant when addressing secondary impacts. Mr. Schweisberg said that his agency

is not in a position to say whether that is true or not. He again referred to the “but for” clause. Mr. Kern said that activities could take place in wetlands and uplands. Mr. Stanley said that his interpretation of HB 222 was that it adds uplands to the jurisdiction of secondary impacts considerations. Representative Spang said that HB 222 is specific in addressing impacts to wetlands. Representative Tupper said that bills such as HB 222 can be well vetted within the legislative process and need not be taken up by a commission.

Mr. Gove asked the presenters how they would describe their time working on secondary impacts. He asked if they would like it to be more specifically defined and asked if it has been challenged. Mr. Schweisberg said that it has been just right. He said that the language is not too specific and therefore allows for flexibility to overcome unintended consequences and to apply relevant scientific literature. Regarding case law, Mr. Schweisberg could not think of a case that turned on the definition of secondary impacts.

Mr. Corso referred to an example presented during the last Commission meeting in which the impacts of a project were mitigated by creating a vernal pool in the upland. He asked how EPA would view such a remedy. Mr. Schweisberg said that creating vernal pools is becoming more common. When no other options exist, such mitigation can be viable. He said that such projects must look carefully at unintended consequences and should make sure to provide all the other necessary elements that impacted organisms require throughout their life cycles.

Representative Spang addressed the definition of “upland,” saying that upland area can occur within a wetland buffer and can even occur just outside a wetland boundary. Chairperson Gottling said that definitions are very important.

Mr. Walker said that his earlier question about whether only upland impacts are to be considered was not meant to suggest his opinion. He stated that he believes that consideration of indirect impacts *should not* be limited to uplands. He emphasized that indirect impacts address not only spatial dimensions but temporal dimensions as well.

Ms. Darrow said that HB 222 could be interpreted as a call to look at every square inch. She added that the term “reasonably foreseeable” is unfair. She asked the presenters if they prefer any of the approaches they provided in their presentation. Mr. Schweisberg said that EPA is not in a position to recommend one method over another. He said that whatever approach a state takes, it will hopefully not be subject to broad-ranging interpretation. Mr. Schweisberg said that a line-in –the-sand approach points one toward the threshold approach. He said that his agency prefers the general approach because it allows for good science and good judgment.

Mr. Corso asked if EPA and the US Army Corps of Engineers (USACE) require the same secondary impacts analysis in all locations. Mr. Schweisberg said that the

regulations that he presented are the same for EPA and USACE nationwide. He added that there is certainly some variation in implementation.

Mr. Kern said that NH has a good program. Chairperson Gottling asked if it could be even better. Mr. Kern said that it could.

#### **IV. SUBCOMMITTEE PROCEEDINGS**

Chairperson Gottling proposed the formation of a subcommittee on definitions. Mr. Gove said that he would follow up on such a subcommittee. Ms. Darrow, Mr. Stanley and Mr. Walker expressed interest in participating.

Ms. Czysz said that the subcommittee to research other state's programs (for which she serves as chair) has met once to discuss the matrix she distributed at the previous Commission meeting. She said that discussion focused on coverages and gaps that exist in NH. Ms. Czysz said that the subcommittee would likely propose presentations in the months to come.

Chairperson Gottling asked Mr. Morin about local and state permits and programs. He said that he was unsure of whether research on the matter would overlap with work that the NH Department of Environmental Services (DES) has done. Mr. Morin said that he will report to the Commission on the work that DES is doing.

Mr. Morin read the following list of bills of potential relevance to the Commission:

HB 45	AN ACT relative to the water supply land conservation program
HB 222	AN ACT relative to fill and dredge permits in wetlands
HB 290	AN ACT authorizing fluvial erosion hazard zoning
HB 307	AN ACT allowing the construction of gray water systems on private property
HB 362	AN ACT relative to zoning districts
HB 384	AN ACT creating urbanization and timber harvesting exemptions for prime wetlands
HB 502	AN ACT modifying the definition of "dam"
HB 652	AN ACT relative to the impact of demolition and construction projects on the environment
HB 681	AN ACT relative to aquatic resource compensatory mitigation
SB 65	AN ACT relative to the acceptance of in lieu payments for the restoration or creation of wetlands
SB 134	AN ACT relative to the comprehensive shoreland protection act

Mr. Morin said that he will regularly report to the Commission on the status of the bills.

**V. DISCUSSION OF HB 222**

Mr. Morin said that he would like for the Commission to take a position on the HB 222. Chairperson Gottling asked what the Commission's procedure should be for determining a Commission position. Mr. Walker proposed a simple majority method. Mr. Corso agreed. Mr. Gove asked if there exists a precedent for Commissions taking a position on legislation. Representative Christensen said that it is not uncommon for Commissions to weigh in on legislation.

Representative Spang encouraged the Commission not to bother with taking a position on the bill and to instead continue to focus on the details of secondary impacts. She said if it is determined that the state can look at secondary impacts, the Commission will be called upon to hammer out the details. Representative Spang said that she felt it would be more meaningful for the Commission to vote on what the legislative subcommittee makes of the bill rather than to vote on the bill as it currently appears.

Chairperson Gottling said that by taking a position that the bill is premature the Commission appears to be against the bill. Mr. Morin said that such is not necessarily the case. He said that when its work is done, the Commission may well support the bill, but, right now, it is premature. Mr. Doran concurred with Mr. Morin. Ms. Czysz suggested that the motion should include language that indicates the Commission's consideration of the bill's timing.

Mr. Doran put forward the following motion:

*The Commission finds that HB 222 is premature in that the subject matter of the bill is central to the charge of the HB 1579 Commission.*

Mr. Gove seconded the motion. The motion passed with a vote of 10 in favor, none opposed, and 4 abstaining.

**VI. OTHER BUSINESS**

Ms. Darrow asked if the Commission might include a representative from the NH Department of Transportation in the future. Chairperson Gottling said that there was no bill to which the request could be attached. She added that it might be a possibility next year.

**VII. ADJOURNMENT**

At 3:38 PM Ms. Killam moved to adjourn the meeting. Mr. Corso seconded the motion, which passed unanimously.