



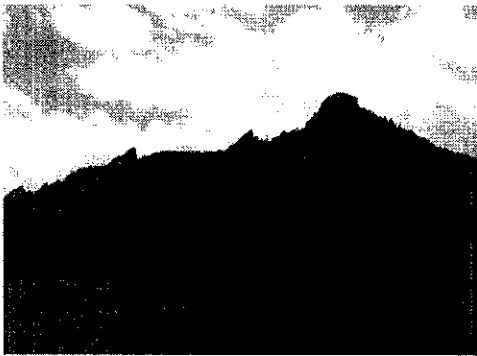
## HB 222: INDIRECT IMPACTS TO WETLANDS

Presentation to the  
HB 222 Subcommittee of the House Resources,  
Recreation and Development Committee,  
and

HB 1579 Land Development Commission

Judith Spang, Chair, RR&D  
• November 16, 2009

What is an "upland" ?



WHY IS THIS AN IMPORTANT  
ISSUE?

### Importance of uplands to wetland values

- Wetlands generally show sharp declines in the diversity of native plant species and animal communities when adjacent uplands are developed (Wright et al., 2006).
- The development of adjacent uplands is a concern because many wildlife species need both wetlands and uplands for survival. (NH Water Resources Primer)

### Uplands are critical for wetland wildlife

- Approximately 66 percent of New Hampshire's species of greatest conservation concern are wetland- or surface water-dependent. ***These and other wetland-dependent species need both wetlands and natural upland areas to survive.*** (NHFS&G, 2006)
- Many species that inhabit uplands for most of the year depend on wetlands for seasonal breeding habitat. In particular, many amphibian species depend on seasonally flooded vernal pools to provide essential breeding areas but live in upland areas the remainder of the year.
- Additionally, some species that spend their entire lives in upland areas depend on a food source that is wetland-dependent.

### Uplands can degrade water quality

- "Indirect impacts to wetlands from upland development include increased loads of sediments, nutrients, chlorides (road salt), and other pollutants carried by stormwater.
- Sedimentation can interfere with a wetland's water storage and flood control values." (NH Water Primer)

### Land adjoining wetlands are not protected in New Hampshire

"Unless a wetland is designated a "prime wetland," or is contiguous to a lake, river or stream protected by the Comprehensive Shoreland Protection Act or is a tidal wetland, there are no state regulations that ... provide for wetland buffers or the indirect impact to a wetland's function or value from upland development."

*DES New Hampshire Water Resources Primer*

- What is the urgency of protecting wetlands from indirect impacts?

### The 2006 Court case undermined wetland protection in NH

- Before the Greenland case, DES asserts it routinely looked at indirect impacts by:
- requiring buffers around wetlands for wildlife species or habitats of concern,
- requiring lots to be removed to preserve habitat connectivity, and
- Addressing water quality impacts.

"The 2006 New Hampshire Supreme Court decision interpreted RSA 482-A as not allowing consideration of impacts to wetlands caused by those portions of a project that are adjacent to, but not directly within, wetlands,

nor

Impacts to wetlands caused by the post-construction use of the structures built directly in the wetlands, such as road maintenance and use." *(DES Water Primer)*

**"EPA-NE has been keenly interested in assisting the State with remedying this gap (in the lack of authority to consider indirect impacts) in its wetlands protection program. HB 222 would clearly grant DES that authority.**

- **We urge the legislature to close this gap by adopting HB 222 during this session. ... we believe the legislature should adopt HB 222 now.**
- *(January 27, 2009 S. Perkins, EPA director of the Office of Ecosystem Protection)*

### Consistency with federal regulations saves effort and money

- When DES permitting considers the same factors as the federal agencies, it can save developers from having to undergo both federal and state application processes.

### Inconsistency with EPA/Army Corps permitting

“The Corps and EPA are required, pursuant to 40 C.F.R. Sect. 230.11 (h) to consider the aquatic impacts that would result from... the future use or operation of a structure built on fill... {or} impacts of upland construction.”

In contrast, the NH Supreme Court flatly states that RSA 482-A does not authorize DES to consider such impacts.”

*(June 4, 2009 letter to T. Burack, DES from I. Leighton, EPA and P. Feir, Corps)*

### HB 222 Amendment GOALS

- **The critical issue is: can we protect NH's wetlands, as intended by our statutes, if we do not protect them from indirect impacts?**
- The primary goal is to restore to DES its former ability to consider indirect impacts on wetlands when granting wetland permits.
- The bill strives to focus on those projects which pose the greatest threats to the most valuable wetlands.

HB 222, SECTION BY SECTION.....

(Stay with me here.....)

## Parag. 1 (b)

- The "functions and values" are those enumerated in RSA 482-A:1, such as water quality, wildlife, etc.
- the department shall assess the changes in the functions and values of wetlands and aquatic resources that are reasonably likely to be caused by the construction and post-construction use and operation of those portions of a project proposed to be located in an indirect-impact evaluation area.

## I (b), definition of "indirect-impact evaluation area" (IIEA)

- It is critical to this approach to understand that the IIEA is NOT a no-touch setback or buffer area.
- The IIEA is an area in which the impact of a land use is reviewed. If a land use occurs outside that boundary, it will NOT undergo any review.
- Land uses with NO impact on the wetland will be allowed unconditionally.
- *"indirect-impact evaluation areas" are areas surrounding or bordering wetlands or other aquatic resources, the width of which shall be determined on an application-specific basis as follows:*

## Establishing the IIEA limits

- The NH Comparative Evaluation Methodology is being revised, with an uncertain completion date.
- Rather than delay DES's ability to consider indirect impacts, this "old" method will be used.
- DES, the Land Use Commission and interested parties will develop Rules for setting the size of the IIEA as soon as a suitable methodology is determined.
- *and until such time as the department adopts rules pursuant to paragraph IV, the width of indirect-impact evaluation areas shall be determined using the functional value indices ... using the methodology in the Comparative Evaluation of Nontidal Wetlands in New Hampshire.*

## IIEA for water quality protection

- IIEA's will vary from 0 feet to 50 feet for wetlands with low value.
- Those with value for water quality will have a 100-foot "assessment area", as suggested by scientific data.

*Road- side ditches.....shall have no indirect-impact evaluation area.*

*Freshwater wetlands that have a functional value index of 0.5 or more for "Flood Control Potential," "Groundwater Use Potential," "Sediment Trapping," or "Nutrient Attenuation" shall have an indirect-impact evaluation area 100 feet wide*

## Wildlife Protection—300 feet

Scientific research indicates that many wildlife species depend on a protected area of 300 feet or more to nest, breed or forage.

This number "splits the difference" among the wildlife species.

AGAIN – this is NOT a "no touch" zone, but a zone in which the impact on wildlife must be evaluated.

*Freshwater wetlands that have a functional value index greater than 0.5 for "Ecological Integrity," "Wetland Wildlife Habitat," "Finfish Habitat," or "Noteworthiness," shall have an indirect-impact evaluation area 300 feet wide.*

## Special Conditions.....

- Special site or construction characteristics may require more scrutiny to protect water quality.

Or, similarly, a rare/endangered species

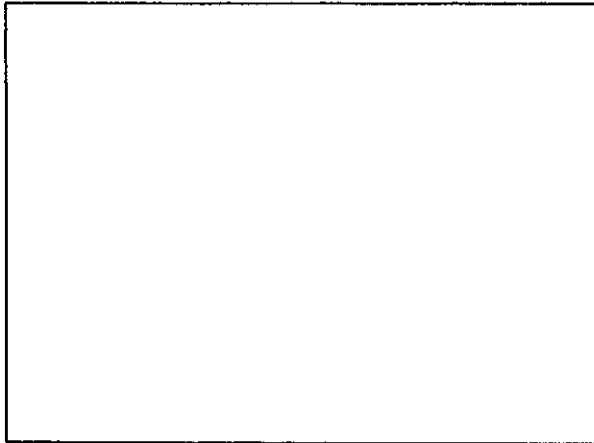
*The department may, in its discretion, establish indirect-impact evaluation areas with (greater) widths .... where necessary to address issues of special concern*

## Burden on DES minimized

- The burden is being placed on applicants to provide information relative to the wetlands on their property.....



*Applicants shall depict in permit application materials any applicable indirect-impact evaluation area for every wetland and aquatic resource located on the property on which the project is proposed, and shall describe the analysis by which they calculated the width of such areas.*



- DES should not have a substantial additional burden to implement HB 222 if applicants must provide all data, and show clearly how they reached their conclusions.

*Applicants shall be responsible for providing information and analyses needed by the department for its assessment of direct and indirect impacts.*

### Exemptions from the statute

- Exemptions include agriculture, forestry and utility maintenance
- Smaller projects (PBN) also exempt.

*Agriculture performed in accordance with best management practices ... involving only temporary impacts to wetlands and aquatic resources;*

- (b) Forestry conducted in compliance with (RSAs) and involving only temporary impacts to wetlands and aquatic resources;
- (c) Utility maintenance activities
- (d) Projects subject to permit by notification.

### In Rules, determine which wetlands to protect

- This allows the Land Use Commission, the group developing the new "NH Method" and DES to determine the best way to evaluate wetlands.
- The idea -- not all wetlands merit the same degree of protection and IIEAs.

*No later than 12 months after the effective date of this section, the department shall adopt rules establishing an **evaluation methodology** that shall be used *in place of* the New Hampshire Method for...determining... indirect-impact evaluation area widths*

In Rules  
determine how IIEA activities will be regulated

- With the LUC and others, the regulation of activities in wetland areas will be worked out in Rules.
- *The department may adopt rules setting forth the criteria to be used in applying its assessment of impacts, both direct and indirect, to its determinations whether to approve or deny permit applications.*

Uses current wetland regs. to minimize impacts to wetlands

The underlined factors are the essence of current wetland permitting....avoid, minimize, mitigate.

*The department shall use its assessment of impacts, both direct and indirect, to render determinations relative to avoidance, minimization, and compensatory mitigation, and, for major and minor projects, to determine whether the project proposal is the alternative with the least adverse impact to wetlands and aquatic resources*

No Dredge and Fill in wetland = NO HB 222

- IF THERE IS NO PERMIT REQUIRED for a direct dredge and fill on a project, HB 222 does not come into effect !!!
- Nothing in this section shall be construed to require a dredge and fill permit, or a wetlands impact assessment, for projects occurring entirely outside of areas subject to the department's jurisdiction under this chapter.*

KEY QUESTIONS.....

***Does the bill place an unreasonable burden on applicant's?***

The bill does not extend the wetlands review beyond that which would already be required for Army Corps/EPA permits.

***On DES?***

No, DES has followed these procedures in the past.

***Why does HB 222 need to be passed now?***

*It is three years since the Court decision that took away NH's ability to consider indirect impacts to wetlands ---an essential component of its protection of wetland resources.*

*Some basic legislation must be passed to reverse this, without awaiting the fine-tuning.*

***What is the Role of the Land Use Commission?***

***HB 222 is a start in implementing the Commission's basic premise that activities in uplands have an effect on wetland values.***

HB 222 incorporates the Wetland Evaluation method developed by the Land Use Commission.

The Land Use Commission will be able to establish how "indirect" and "cumulative" impacts should be regulated by the State, through Rulemaking and future legislation.



