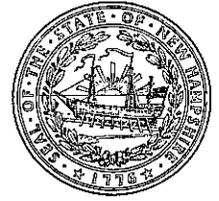




The State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES



Thomas S. Burack, Commissioner

April 6, 2010

The Honorable David Cote, Chairman
House Judiciary Committee
Legislative Office Building, Room 208
Concord, New Hampshire 03301

Re: SB 480, relative to appeals of decisions by the department of environmental services

Dear Chairman Cote and Members of the Committee:

Thank you for the opportunity to testify on SB 480, relative to appeals of decisions by the Department of Environmental Services (DES). Section 1 of the bill would authorize the Attorney General to appoint persons who are qualified to conduct administrative hearings to serve as hearing officers for administrative appeals of DES decisions. Sections 2 through 7 amend various provisions of RSA 21-O, the enabling legislation for DES and its related environmental appeals councils, to adjust the role of the councils in administrative appeals of DES decisions. DES supports this bill.

Under the current statute, four environmental councils hear appeals from DES's permitting decisions and administrative orders - the Wetlands Council, the Water Council, the Waste Management Council and the Air Resources Council. Members are appointed to represent state agencies, the public at large and particular industrial, academic, commercial, recreational, or conservation interests. A list of Council members and the interests they represent is attached. While the knowledge and experience of the members can be invaluable when considering substantive issues, for the most part council members are not well-versed or experienced in the conduct of adjudicative hearings pursuant to RSA 541-A, the Administrative Procedure Act, or in writing appeal decisions. While I believe that Council members generally make a good faith attempt to establish the facts and to apply the law in cases brought before them, I also believe it is fair to say that the DES environmental councils, taken as a whole, have not demonstrated a facility for processing the cases presented to them in a timely manner. As a result, many cases are not heard or decided within a reasonable period of time.

Case data for all four councils show that, of the 43 appeals that were filed in 2009, 4 cases were withdrawn, 5 cases are on hold at the request of the parties, 2 cases were dismissed for lack of standing, 4 were filed insufficiently, and 1 case was summarily denied, leaving 27 cases still active. Of those 27 cases, pre-hearing conferences have been held in 12 cases and have been scheduled but not yet held in 10 cases, and have not yet been scheduled in 5 cases. Of the 12 cases for which pre-hearing conferences have been held, a hearing on the merits has been completed in only one case and has been started, but not completed, in one more case. In the 27 active cases filed in 2009, only two decisions have been issued.

Under the proposed bill, the Councils would continue to hear all appeals and would retain the authority to decide all issues of fact, but the legal issues and the preparation of the actual decisions

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would be the responsibility of an Assistant Attorney General who is educated and trained to have such expertise. Thus, this bill would enable the Council members to do what they do best – to serve as a fact-finding body – while freeing them from addressing the procedural and legal issues that are best handled by trained professionals.

Thank you again for the opportunity to comment on this bill. If you have any questions, please call Assistant Commissioner Michael Walls at 271-8806, DES Legal Unit Coordinator Gretchen Hamel at 271-3137 or me at 271-2958.

Sincerely,

A handwritten signature in black ink that reads "Thomas S. Burack". The signature is written in a cursive style with a large, stylized "B".

Thomas S. Burack
Commissioner

cc: Senator Merrill
Senator Cilley
Senator Laskey
Senator Bradley
Representative Kappler
Representative Spang
Deputy Attorney General Bud Fitch
Senior Assistant Attorney General Michael Brown

| Member | Interest Represented |
|----------------------------------------------------------------------|---------------------------------------------------------|
| Air Resources Council (RSA 21-O:11; 11 members; no vacancies) | |
| Robert Duval, Chair | Public Interest |
| David Collins, Vice Chair | [Fuel] Oil Industry |
| William Smagula | Steam Power Generating Industry |
| Debra I. Hale | Natural Gas Industry |
| Steven Walker | Manufacturing Component of Industry |
| Raymond R. Donald | Municipal Government |
| Robert Hickey, M.D. | Public Interest/Licensed Practicing Physician |
| Terry Callum | Public Interest/Recreation |
| Georgia Murray | Public Interest/Environmental Interests |
| J. Ryan Bielas | Public Interest |
| Linda Garrish Thomas | Public Interest |
| Waste Management Council (RSA 21-O:9; 13 members; 1 vacancy) | |
| G. Bradley Richards, Chair | Public Interest |
| Ronald Allard, Vice-Chair | Private Industries that Generate Hazardous Waste |
| Charles Connell | Municipal Official |
| Stephen R. Crean | Elected Municipal Official |
| Elaine M. Lauterborn | Elected Municipal Official |
| Michael B. Blayney | Public Health Expert |
| Duncan Watson | Local Conservation Commission Member |
| Nancy E. Kinner | Associate Prof. Env'l Sciences or Sanitary Engineering |
| David J. Tooley | Private Solid Waste Management Industry |
| Arthur J. Cunningham | Licensed Sanitary or Environmental Engineer |
| Carl L. Quiram | Municipal Public Works Field |
| <i>Vacant</i> | <i>Business or Financial Community</i> |
| Mike Durfor | Community that Recycles or Recovers Solid Waste |
| Water Council (RSA 21-O:7; 16 members; no vacancies) | |
| John F. Bridges, Chair | Public |
| Nancy E. Christie, Vice Chair | Public |
| James Varotsis | Industrial |
| Christopher Rawnsley | Industrial |
| Ray S. Cowan | Vacation Homes/Recreation |
| Stanley Rastallis | Agriculture |
| Stephen J. Densberger | Water Works |
| Robert S. Phillips | Septage Haulers |
| Joel Harrington | Statewide Nonprofit Conservation or Env'l Organization |
| Malcolm R. Butler | Wastewater Treatment Plant Operators |
| Bruce Barnard | Granite State Designers & Installers |
| Nicholas Toumpas, Commissioner (by designee) | NH Dept. of Health and Human Services |
| Glenn Normandeau, Commissioner (by designee) | NH Fish & Game |
| Ted Austin, Director of Parks (by designee) | NH Div. of Parks & Recreation |
| Joanne Morin, Director (by designee) | Office of Energy & Planning |
| John Barthelmes, Commissioner (by designee) | NH Dept. of Safety |
| Wetlands Council (RSA 21-O:5-a; 14 members; 2 vacancies) | |
| Lawrence E. Morse, Chair | Natural Resource Scientist |
| Dennis Lydon, Vice Chair | [Non-Marine] Construction Industry |
| Glenn Normandeau, Executive Director (by designee) | NH Fish & Game |
| George Campbell, Commissioner (by designee) | NH Dept. of Transportation |
| George Bald, Commissioner (by designee) | NH Dept. of Resources and Economic Development |
| Joanne Morin, Director (by designee) | NH Office of Energy & Planning |
| Lorraine Merrill, Commissioner (by designee) | NH Dept. of Agriculture, Markets & Foods |
| John J. Barthelmes, Commissioner (by designee) | NH Dept. of Safety |
| Paul Dionne | Municipal Conservation Commission |
| David A. Thompson | County Conservation Districts |
| Lawrence Ballin | Elected Municipal Official |
| <i>Vacant</i> | <i>Marine Industry</i> |
| <i>Vacant</i> | <i>Environmental Protection and Resource Management</i> |
| George Kimball | Farm/Forest Landowner |