

Commission to study the Comprehensive Shoreland Protection Act

**Minutes of February 13, 2006 Meeting
Rm 305, Legislative Office Building, Concord, NH
10:00 am – 12:00 pm**

Members Present

Interest Represented

House of Representatives
House of Representatives
NH DES
Office of Energy and Planning
Regional Planning Commissions
NH Lakes Association
At large waterfront owner
NH Farm Bureau Federation
NH Home Builders and Remodelers
UNH (estuary experience required)
NH Association of Realtors
NH Rivers Council
NH Timberland Owners
Landscaping Consultant
NH Conservation Commissions
NH Marine Trades Association
NH Attorney General
NH Wildlife Federation
NH Waterworks Association
NH Natural Resource Scientists

Representative

Michael Whalley
David Currier
Rene Pelletier (designee)
Jennifer DeLong (designee)
Robert Snelling
William Smith PhD
Michele Grennon
John McPhail
Joe Landers
Jeff Schloss
Tom Howard
Kathryn Nelson
Tom Hahn
George Pellettieri
Diane Hanley
Paul Goodwin
Jennifer Patterson (designee)
James Kennedy
Stephen Del Deo
Cindy Balcius

Members absent

Senate	Carl Johnson
Senate	John Gallus
At large waterfront owner	Eric Herr
NH Municipal Association	Carol Granfield

Others in Attendance

Representing

	Name
Staff	D. Forst
NH Lakes Assoc.	Jared Teutsch
Pillsbury Lake Management	M. J. Turcotte

Minutes

10: 10 am Meeting opened.

Chairman David Currier called the meeting to order and introduced Jennifer DeLong as the new designee representing the Office of Energy and Planning replacing Benjamin Frost. Mr. Currier directed the Commission members to view a document distributed at the beginning of the meeting be the NH Lakes Association Representative. He ceded to the NH Lakes Association representative, William Smith to explain the document's purpose and content and open the commission's discussion.

William Smith directed the commission members to newspaper article about a warrant article relative to a new shoreland ordinance proposed in his hometown of Moultonborough which included the adoption of the Maine system of maintaining a vegetative buffer and funding for enforcement. He stated that the town had 65 miles of shoreline and that the proposed ordinance was the result of discontent with the enforcement of the CSPA.

Rep. David Currier asked if in fact this ordinance was the result of frustration with the current CSPA.

Mr. Smith stated the article stated it was.

Rene Pelletier noted that reference to the Department of Environmental Services' handling of the Act as "abysmal" by one of the individuals cited in the article would seem to indicate that frustration with DES had play a role in the drafting of the ordinance.

Mr. Smith stated that the funding portion of the ordinance might result in its failure.

James Kennedy asked if the Moultonborough ordinance would require that every homeowner within the protected Shoreland wanted to do work.

Mr. Smith stated that they would only need to apply if they would be cutting vegetation.

Mr. Smith introduced the NHLA document titled "New Hampshire Lakes Association, Comprehensive Shoreland Protection Act: Problems and Solutions." He explained that he was not the sole author and that the document was compiled to represent the ideas and opinions of NHLA's Government Action Committee. He encouraged other members to meet with others within the groups they represent to develop and provide similar documents by the next meeting. The NHLA document raises 5 main points.

Tom Howard explained that one month was not sufficient time to for him to meet with other realtors whom he represents to compile a similar document.

Rep. Currier stated that the deadline was flexible and that no submittal would be refused but encouraged members to respond quickly.

Robert Snelling suggested that if the Commission agreed on which points the requested documents would cover it might be easier for the commission members to meet with their representative groups and provide a response.

Rep. Currier noted the diversity of groups represented on the commission, stated they would likely have varying concerns and perspectives and that limiting the points they could consider would be inappropriate.

Mr. Snelling suggested that the commission could simply identify baseline points and that the member's groups would be able to add points of concern if they had others.

Rep. Currier suggested that this was a subject that could be discussed further before the close of the meeting.

Mr. Smith summarized the NHLA document. The opening paragraphs explain the NHLA's position on the need for, and importance of, the CSPA and are followed by 5 areas of concern identified as priorities with suggested solutions or changes. The first point of concern is the lack of enforcement and funding. It was felt that the lack of a permit requirement contributed to this problem. NHLA was suggesting a permit be required for which there would be an application which would be reviewed by the state but with final approval from the town and a \$200 filing fee shared between the state and town. The second point of concern is the lack of clarity within the statute which could be addressed in part through changes to the law itself but also needed increased education geared towards the municipalities, with outreach materials similar to those offered by the State of Maine, perhaps through partnerships with organizations such as NHLA. The third point of concern was the use of confusing or unclear terms such as "basal area" which is good for forestry but not for homeowners. NHLA favors the use of a system which incorporates a limit on % of impervious surface area, but notes that what "impervious" means should be discussed and defined. Their fourth point of concern is the lack of a consistent, defined, statewide buffer. There is a clear need to keep shoreline vegetation in place and the most simple, clearest way to accomplish this is by establishing a "no cut zone". NHLA suggests a 75 foot no cut zone that would match the septic setback. The fifth point of concern is the potential permitting of dug-in boathouses. It is the position of the NHLA that dug-in boathouses are an egregious disturbance and should be prohibited.

Discussion of the document was opened by Rep. David Currier.

Rep. Currier stated that fees requested for any state required application are limited to 125% of operating costs for the program. He asked how the Wetlands Program fees were calculated.

Mr. Pelletier explained that Wetlands application fees were based on the square footage of impact with a \$100 base fee.

Rep. Currier asked about Subsurface application fees.

Mr. Pelletier stated that a \$150 flat fee was required with Subsurface applications.

Rep. Currier asked if there were any DES programs where the state and the town shared the fees.

Mr. Pelletier stated there were not.

Rep. Currier stated that he doubted the towns would like a process where they issued the permit and the state receives the fee.

Mr. Pelletier stated that he thought the state's portion of the fee would go to cover enforcement.

Mr. Snelling asked if accessory structures and cutting vegetation would require a permit. He also suggested that DES' role might only be to hear appeals.

Mr. Smith stated that NHLA envisioned a system similar to the Wetlands Board process.

Jennifer Patterson pointed out that the Wetlands Board no longer existed but had been replaced by the Wetlands Council, that the Wetlands Bureau reviewed and issued decisions on all wetlands applications, and that this was a state issued permit as opposed to the local issued permit that the NHLA seemed to want. She questioned the ability of DES to serve in an appellate role and stated that the Wetlands Council members are volunteers and may be overwhelmed by the increased role. She asked if the intent was to have the staff hear appeals and point out that the staff was more geared toward handling technical issues.

Mr. Smith asked if there was a need to address legal and technical issues separately. He also asked how courts could handle technical issues.

Ms. Patterson stated that courts address technical issues by hearing testimony from technical witnesses.

Mr. Snelling asked what issues would be subject to appeal and whether the staff could use best professional judgment.

Ms. Patterson explained that the use of best professional judgment should be limited as shorefront property tends to lend itself to litigation.

Paul Goodwin stated that he had recently been appointed to the Wetlands Council. He stated that the process was a very awkward process as there is no evidentiary hearing. He stated that there were about 3,000 wetland permits and 1,200 permits last year and that adding tree cutting permits to that burden would be overwhelming. He said it would be a good way to raise funds but there would just be too many applications.

Mr. Smith asked Mr. Goodwin if he liked the idea of having the permit issued at the town level.

Mr. Goodwin stated that he felt the lack of clarity would cause consistency issues but also noted that the towns have to look at all of these projects anyway.

Mr. Pelletier stated that DES would not be upset about getting out of the "building permit business" but if the permits were to be issued by the towns then the commission would need to be certain that the CSPA incorporated more empirical, set, limits to take emotions out of the permitting process. If the fee and process were assigned to the towns it would be ok, but there would have to be hard and fast standards set. There is not currently enough DES staff to administer a new permitting process.

Diane Hanley agreed that there would have to be clear, set standards. She stated that combining permits at the local level would be easier for the town and the general public but things would need to be simplified.

Kathryn Nelson stated that this sounded like a state mandated local permit and asked if this had ever been done before. She stated that using Wetlands as a model didn't seem appropriate since that was a state issued permit. She asked if the towns would be responsible for enforcement.

Mr. Smith stated that towns would review and approve the applications but copies could be sent to the state for review and comment as they do in the wetlands application process. He stated that towns that did not have an existing review process or the local government boards needed could fall back on the state for review and permitting.

Ms. Nelson asked again if this meant the town would be forced to issue a permit based on a state established standard.

Ms. Patterson asked if NHLA intended for the roles of the local conservation commission and DES to be reversed in this process.

Mr. Smith stated that the towns would be required to issue permits based on state established standards.

Cindy Balcius asked if the process could work like the PBN process in which the project is considered approved if a certain amount of time passes and the project is not denied or disqualified.

Mr. Pelletier stated that the process could be similar to one used by Subsurface.

Mr. Snelling stated that he didn't see where there was any value added to the process by going to the state for review.

Ms. Patterson stated that the state would provide consistency in the application of a statewide law. She asked again what the state's responsibility in the appeals process would be.

Rep. Currier asked why or what anyone would ever want to appeal.

Ms. Patterson stated that owners may want to appeal denials and disgruntled neighbors may want to appeal.

Ms. Nelson stated that if DES maintained a role as a "backstop" to the permitting process it could counter any possible issues related to local politics.

Mr. Pelletier pointed out that the current language of the CSPA allows towns to either adopt their own regulations or enforce the CSPA on their own and only one or two towns have opted to do so he doubted that many towns would embrace this new process. DES is not truly comfortable with the concept of statewide zoning but will accept it. He also noted that despite the current law some towns continue to issue building permits they shouldn't issue.

Mr. Smith stated that he felt that since surface waters are the state's to protect there is no way the state can get out of the process set up to protect them.

Mr. Howard stated that he was very concerned about the idea of statewide zoning, but also recognized the value of the resource. He noted that of the 3 parties that would be involved: the owner; town; and state, the owner and town were the most heavily invested in the outcome of the project and therefore it seems best that permits be done at the local level. In addition he did not want to overload the system and felt that the \$200 fee would not be enough.

Ms. Hanley suggested that DES could just be copied on the permit and could then handle appeals.

Mr. Snelling stated that having the state as a backstop ensuring consistency would be value added but asked if it would be possible to ensure consistency with a cursory review of 40,000 permits. He suggested that the town would be the primary contact for most permits but that certain complicated or significant projects could be assigned to the state.

Ms. Patterson agreed that the state did not have to see all projects and referred to the system that is used in Massachusetts using local Conservation Commissions.

Rep. Currier asked if there was agreement that a permit was necessary.

Joe Landers stated that he was not sure that a permit was necessary and that it seemed that if the CSPA requirements were made clear enough and the state educated the towns and followed up with enforcement against the towns when appropriate a permit would not be needed. He stated that right now if the town issues a permit incorrectly the owner is held responsible and that didn't seem fair.

Rep Currier stated that there was too much opportunity for finger pointing between agencies under the current system with no permits. A permit would eliminate some of this by showing that everyone had signed off.

Ms. Patterson stated that currently some towns are still issuing permits that are not in compliance with the requirements of the CSPA and it makes enforcement extremely difficult when this happens. It is very hard on the owner trying to do the right thing at times.

Mr. Landers asked if the state could stop the towns from issuing these permits and pursue enforcement against the towns that continued to do so.

Ms. Patterson said the state could enforce against the towns but had not done so to this point.

George Pellettieri stated that the timing of the passage of the CSPA is a result of the building boom of the 80's and that it is possible that there may have been some amount of overreaction as a result and possibly a need to pull back a little. He stated that there was a no cut zone in New London which was locally enforced and which address many of the same problems address by the CSPA. There were local agencies and processes to be navigated which ensured that things were done properly and people understood what was needed. He stated that this showed that local control was possible and, he thought, the better alternative, although he did feel that some amount of state oversight and support would be necessary.

Ms. Nelson pointed out that not all towns had personnel capable of handling the technical review that a local permit process would require.

Mr. Pellettieri stated that many Conservation Commissions had very capable, qualified people.

Mr. Snelling asked how the commission could bring the ideas to a result.

Rep. Currier asked if the commission felt it was necessary to develop an application process.

Mr. Smith asked if the Commission was ready to move on to the second point of concern.

Rep. Currier stated that many problems seemed to arise when neighbors don't really understand the CSPA and that perhaps this could be corrected through increased education.

Mr. Pelletier noted that the commission members seemed to be leaning towards requiring a permit. He reiterated his belief that if the permit were to be locally issued then the requirements would have to be very clear and offered that perhaps DES could develop a program to identify which towns were capable of administering the permit process locally.

Mr. Snelling offered to pass around educational materials he had received from the State of Maine relative to the Maine Shoreland program and which he found to be very helpful and well done.

Mr. Pelletier offered that DES would attempt to acquire and distribute copies of these materials to the Commission members.

Steve Del Deo stated that Ted Diers was compiling data relative to impervious surface area in the coastal region for the Coastal Program and that this information may be of interest and use to the commission.

Mr. Howard mentioned the Guide to Redeveloping Shorefront Properties was a useful document available to NH property owners.

Ms. Nelson stated that it might be necessary to have a percent of vegetative cover requirement and not just a limit on the percent of impervious surface allowed.

Mr. Smith agreed and stated that a definition of impervious would be helpful.

Mr. Goodwin disagreed that impervious surface areas should be limited to 10% of the lot as most lots were just too small and the people buying properties in the Winnepesaukee wanted to build bigger house than that would allow. He stated the big homes had to be allowed because land is valuable. He also stated the basal area restriction was no good because no one could say when the 20 year period started. He stated that most towns have limits on impervious surface related to commercial development now but he believed the limit was closer to 40 %. He stated that there were many ways that surface run-off issues could be addressed.

Mr. Pellettieri agreed that the basal area and 20 year provision currently in the law are unenforceable. He felt that there should be strict limits on impervious surfaces but the law should also allow for innovative solutions.

Ms. Nelson recognized that there are innovative solutions to handling run-off but she expressed concerns over the ability of town officials to assess the effectiveness of mitigation techniques and new technologies.

James Kennedy noted that the Maine regulations set limits on structures, impervious surfaces, and non-vegetated surfaces.

Ms. Nelson asked if the commission could review any of the studies on impervious surface impacts and limits that other commission members may have mentioned.

Jeff Schloss cited studies and findings by Tom Schuler, of Washington DC. The studies looked at the effects of increases in impervious surface area on first and second order streams in areas of Maryland near DC that had relatively shallow gradients. These studies found that at 10 % coverage the streams began to experience degradation in the form of decreased water quality and increased erosion. Mr. Schloss began to conducted similar studies on streams in NH and found that the local topography which tends to have steeper gradients than those in the original study area influenced the results. His studies found that in areas with steeper gradients as little as 2 or 3% coverage could result in degradation of the stream. Based on other studies similar to that of Mr. Schloss, Mr. Schuler is considering withdrawing his original findings and lowering the threshold for damage from 10%. He stated that while he understood that people have property rights those people who own shorefront property need to realize that they hold the last available area buffering the surface water. Yes, run-off can be mitigated but runoff is not the only issue. Mr. Schloss point out that consideration also needs to given to wildlife habitat issues. Removal of shoreland vegetation can lead to increased nutrients reaching the water and less shade which results in warmer water temps. This combination can result in increased weed growth and other habitat changes.

Ms. Balcius stated that stormwater management plans would need a higher level of review and more complicated systems would require maintenance plans. She stated that these projects may require the

involvement of a professional engineer. She asked what would be done in the towns that had pre-existing, lesser setbacks.

Rep. Currier stated that there were no towns with lesser setbacks.

Mr. Pelletier explained that there were approximately 65 towns with lesser setbacks and that the changes to the CSPA made in 2002 eliminated the ability of towns that did not have existing lesser setbacks to adopt lesser setbacks but those towns that had them already were allowed to maintain their lesser setback.

Ms. Nelson asked what would happen to existing structures that were closer than 50 ft to the water if the setbacks in those towns were moved back to 50 ft.

Michelle Grennon asked if the state could take enforcement against towns that had a setback of less than 50 ft.

Ms. Patterson explained that the law allowed the lesser setbacks to remain there for those towns had done nothing wrong.

Rep. Michael Whalley asked if DES encouraged towns with lesser setbacks to move there setbacks back to the state setback.

Darlene Forst responded that the state does encourage towns to move back to the state's 50 ft setback.

Rep. Currier asked if there was agreement amongst the commission that boathouses should not be allowed.

Mr. Goodwin state that he did not believe that boathouses were contrary to the current CSPA and that they did not present environmental or erosion issues since once construction was completed the shoreline was completely stabilized.

Rep. Currier asked if anyone ever requested to construct a dredged inlet without a boathouse over it.

Mr. Goodwin stated that it was rare but it happened.

Mr. Snelling stated that he was opposed to dug-in boathouses but if they are to be allowed then all impacts associated with them should be considered.

Mr. Pelletier noted that if boathouses were allowed then they would factor into the percent of impervious surface area allowed.

Rep. Whalley stated that banning boathouses was never the intent of the people who drafted the original language of the CSPA.

Ms. Forst asked that the Commission members keep a couple of points in mind during their discussions the first being that there are two definition of water dependent structures in the CSPA on of which states that water dependent structures are those which are constructed on, over, or in the water and perhaps this was evidence that when the CSPA was drafted the intent was that boathouses over the water would be allowed. The second thing to be considered related to the issue of building density. Under the current language of the CSPA all limits on building density and lot sizes are removed if an area is serviced by municipal sewer.

Mr. Pelletieri stated that the lack of building density limits on areas that were on public sewer system indicated that wastewater and stormwater issues were being given strong consideration than some other issues such as habitat and that this seem to conflict with other aspects of the act.

Ms. Nelson asked if the term “operational necessity” had open up DES to any legal arguments.

Ms. Patterson stated that she had not been involved with drafting that definition and she could not say that it had or had not created any legal issues.

Ms. Balcius asked if DES knew what the NH Dept. of Fish and Game’s position was on boathouses.

Ms. Forst stated that she understood their position to be opposed to boathouse construction.

Ms. Balcius asked why Fish and Game was not represented on the commission.

Ms. Forst stated that she did not know why they were not included.

Mr. Kennedy stated that the NH Wildlife Federation intended to solicit Fish and Game’s input and incorporate it into their own comments.

Mr. Howard asked if the 75 ft no cut zone proposed by NHLA would effectively be a new setback.

Mr. Smith stated that since you couldn’t remove the vegetation then yes, it would effectively be a new setback.

Mr. Howard stated that the realtors would be opposed to a 75 ft setback as it would be unfair.

Mr. Currier stated that a 75 ft setback might be considered a taking.

Mr. Snelling suggested that they could keep the no cut zone at a 50 ft and allow some cutting for access.

Rep. Whalley stated that they need to allow owners to have reasonable use of their land.

Mr. Smith stated that the NHLA wanted a law that was transparent and clear and that they felt that a no cut buffer was the clearest possible solution.

Rep. Whalley suggested that the commission should not just scrap the law and start over but should focus on reviewing the law point by point and correct the deficiencies like the setback issue as they go.

Rep. Currier stated that they need to make sure they drafted legislation that had a chance to pass.

Mr. Smith stated that the non-legislative commission members would be looking to the legislative members for assistance in that regard.

Ms. Patterson agreed with Rep. Whalley that it would be beneficial to review the existing law point by point and stated that she felt that a permit process would help increase clarity.

Rep. Currier stated that he was very concerned to learn that as many 65 towns may have lesser setback.

Mr. Pelletier and Rep Whalley explained why those towns had been allowed to retain their lesser setbacks.

Ms. Nelson agreed with the idea of reviewing the existing law rather than trying to start over.

Mr. Whalley stated that no one had ever intended throwing out the existing statute. It simply needs to be reviewed and clarified.

Mr. Currier asked if other commission members could have documents outlining their areas of concern with the CSPA and suggested solutions or changes for the next meeting.

Mr. Snelling stated that he thought he could meet that request.

Mr. Currier reminded everyone that the next meeting of the commission would be Monday, March 13th from 10:00 – 12:00 in Rm 305 of the Legislative Office Building.

12:15 The meeting was closed

Next Meetings Rm 305, Legislative Office Building, Concord
March 13, 2006, 10:00 – 12:00
April 10, 2006, 10:00 – 12:00