

Commission to Study the Comprehensive Shoreland Protection Act

Minutes of August 14, 2006 Meeting
Room 305, Legislative Office Building, Concord, NH
10:00 a.m. – 12:00 p.m.

Members Present

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 Rivers Council
Landscaping Consultant
NH Conservation Commissions
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
Eric Herr
John McPhail
Joe Landers
Jeff Schloss
Kathryn Nelson
George Pellettieri
Diane Hanley
James Kennedy
Stephen Del Deo
Cindy Balcius

Members absent

Senate
Senate
At large waterfront owner
NH Association of Realtors
NH Municipal Association
NH Timberland Owners
NH Marine Trades Association
NH Attorney General

Carl Johnson
John Gallus
Michele Grennon
Tom Howard
Carol Granfield
Tom Hahn
Paul Goodwin
Jennifer Patterson (designee)

Others in Attendance

Name

Representing

Staff
Rivers Management Advisory Committee
NH Rivers Council
PRLAC

D. Forst
Kenneth Kimball
Tom Quarles
Max Stamp

Minutes

10: 05 am Meeting opened by Vice Chairman Smith.

Mr. Smith asked the members to review the minutes of the June and July meetings.

Mr. Kennedy moved that the June minutes be accepted, seconded by Mr. Pellettieri. No commission members offered items for discussion relative to the June minutes and they were approved unanimously.

Mr. Kennedy moved that the July minutes be accepted, seconded by Mr. Pellettieri. No commission members offered items for discussion relative to the July minutes and they were approved unanimously.

Mr. Smith noted the importance of the state's river and there inclusion under the CSPA and asked Ms. Nelson to begin the day's discussions relative the river related issues.

Ms. Nelson explained that she had requested that the commission dedicate a day to focus on river specific issues. She stated that the CSPA was of particular importance to rivers due to their dynamic nature and ability to transport nutrients and pollutants. The development first seen on the states lakes will now begin to move to the rivers. One can't discuss water quality within the state's lakes without talking about all of the tributaries that enter them. She cited the number of small unprotected streams entering Lake Winnepesaukee as an example. Many towns have local ordinances to protect wetlands but very few address streams and under the current situation future development could occur right to the edge of streams and rivers. She stated the 2 separate river organizations would be addressing the commission. Tom Quarles would be speaking on behalf of the NH Rivers Council and Ken Kimball would speak on behalf of the Rivers Management Advisory Committee.

Mr. Quarles distributed copies of a document originally sent to the Commission in May which outlined the recommendations of the Rivers Council. He stated that individual position papers had been submitted by the Rivers Management Advisory Committee, the Connecticut Joint Rivers Commission, and the local advisory Commissions for the Pemigewasset, Ashuelot, and Lamprey Rivers, each of which include some issues specific to themselves. Mr. Quarles explained that the Council's position incorporated those issues which were common to all of the groups mentioned. The major themes common to all were:

- The definition of which streams and rivers are included under the CSPA should be broadened. Currently only those streams that the fourth order under the Strahler Method are protected. That should be revised to include first order streams which would include all perennial streams but not intermittent streams. UNH is currently developing a database identifying these streams.
- A 50 ft – 75 ft no cut zone should be established.
- Limits on the amount of impervious surfaces within 250 ft of the reference line should be established.
- Although it was river specific he felt it important to include that the exemption of the Pemigewasset and Saco Rivers should be removed and that they should also be protected under the CSPA.

Expansion of Stream Inclusion – Mr. Quarles stated that the Council was in favor of the use of the normal Strahler Method and not the modified method. This will give consideration to all perennial streams. Currently no protection is afforded to small streams, all of which flow into the major larger, protected rivers. Rivers cannot be separated from the lakes into which they empty. He stated that he would not go into detail on the impact the change would have on the amount of "river miles" affected as he expected that Mr. Kimball would cover it.

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Woodland Buffer – Mr. Quarles prefaced his discussion of buffer issues by stating that the Rivers Council did not want to see any change in the exemptions within the CSPA afforded to agriculture and forestry as these industries were already well regulated and if conducted within the existing regulations were not adverse. The Council advocated the establishment of a 75 ft no cut zone along 4th order streams and a 50 ft no cut zone for 1st – 3rd order streams. He noted that these recommendations were consistent with those made by the Lakes Management Advisory Committee. Within the no cut zone unpaved paths would be allowed. Removal of dead trees provided the stumps remained and pruning of vegetation would also be allowed.

Impervious Surface Limits – Mr. Quarles explained that the Council was not opposed to development but did advocate that limits be placed on the amount of impervious surface allowed. The Council recommended that the limit be set between 10 – 15% within 250 ft of the reference line. Mr. Quarles cited existing studies which have shown that constructing impervious surfaces over more than 10% of the area is damaging. These restrictions should encourage the use of techniques such as pervious paving. The Council recognized that some lots will need, and should be given, variances. Mr. Quarles stated the Council believed that a system incorporating a percentage cut allowance would not be necessary in limits were set on the amount of impervious surface area allowed. He recognized both the amount and value of the woodland buffer workgroup's efforts but the Council believed the use of a limit on impervious surface in combination with a no cut zone was more simple and easier to understand.

Establishment of a Permit System – The Council believes that there permit required for building within the protected shorelands, but perhaps not for tree cutting alone. They believed that this may be coordinated through the existing Intent to Cut process. The process should include the local Conservation Commissions to help alleviate the lack of available staff at the Department of Environmental Services (DES). He stated that unlike the Wetlands permit process which requires a one time notice to abutters after which they are responsible for investigating the projects progress, any Shoreland permit should incorporate a standard for continued notice to abutters for notice and comments.

Mr. Smith asked if anyone had question for Mr. Quarles.

Mr. Snelling explained that the woodland buffer workgroup had difficulties with permeability standards and therefore had opted to utilize a method based on percentage to be maintained to avoid the need to define impermeable. He asked if Mr. Quarles believed this method could work.

Mr. Quarles stated that as an attorney, he believed it was important to keep it as simple as possible. He felt that the percentage methods required survey type detail, were too complicated and that it would be better to develop regulations on pervious/impervious surfaces to allow flexibility as technology changes. He stated it was important to try to allow reasonable use to avoid friction with landowners.

Mr. Snelling stated that the workgroup had attempted to keep the method simple. Their method would allow the owner to build what they wanted and retain a certain minimum amount of the remaining vegetation. It was possible that the house, driveway, and septic once completed could equal 30% and they needed to allow reasonable use.

Mr. Quarles pointed out that this would still allow trophy homes which could cover an unreasonable amount of the lot.

Mr. Snelling asked if Mr. Quarles was suggesting a limit on impervious surface that might limit the size house that could be built on a lot.

Mr. Quarles said that was possible.

Ms. Nelson stated that there is increasing commercial use such as parking along rivers. Steps should be taken to encourage new technologies such as pervious pavers and low impact designs.

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Mr. Quarles stated that the Council was open to the use of multiple "reference lines" meaning different standards could be established for different setbacks. Perhaps setbacks could be altered if low impact technologies were used. He stated that the Rivers Council intend to remain actively involve in the investigation of options and legislative process.

Ms. Hanley expressed support for the allowance of relaxed setbacks where innovative low impact methods were used.

Mr. Smith asked Mr. Quarles to confirm that the Council's was recommending a no cut zone adjacent to all perennial streams which would be 50 ft on 1st – 3rd order streams and 75 ft on streams 4th order or higher.

Mr. Quarles confirmed all three points.

Mr. Smith asked Mr. Quarles to confirm that they were recommending a permit requirement and that the permit would be state administered.

Mr. Quarles confirmed that the recommendation was for a state level permit but that is would be for construction only, not for tree removal.

Mr. Smith thanked Mr. Quarles and welcomed Mr. Kimball.

Mr. Kimball explained that he represented the Rivers Management Advisory Committee (RMAC) which was established through legislation in 1988 and consisted of representatives of several different interests. He explained that the RMAC was tasked by the legislature with the nomination of rivers for inclusion in the Designated Rivers Program, to assist in the development of local advisory committees, work towards the establishment of instream flow standards, and review proposals for the disposal of state owned lands adjacent to rivers. He stated that rivers were publicly held and that NH, as one of the fastest growing states in the east was seeing a shift in development towards its rivers. He attributed this, in part, to the success of efforts in the 70's and 80's to clean up the rivers and restore water quality making them more attractive to development. Mr. Kimball cited the list of beach closures by DES as evidence of rivers importance as a link to non-point source pollution. Non-point source contributors are the biggest source of pollutants. Mr. Kimball stated that the most effect way to limit non-point source pollution was through the establishment and maintenance of buffers. Buffers are also important to the successful implementation of the state's wildlife plan which noted the risk of habitat fragmentation and the importance of maintaining wildlife corridors. He stated that when considering rivers one could not just focus on science but had to consider politics as well. Towns along a river could not politically influence one another but the actions or lack of action by an upstream town could have a detrimental affect on the towns downstream. The state has been attempting to establish local advisory committees to develop and implement management plans along the state's rivers since 1988 without success. He stated the only way to develop consistent management plans on a river which inevitably flowed through multiple towns was to establish standards at the state level through a Comprehensive Shoreland Act. This was not a responsibility that the state could delegate to the towns. To do so would result in an unfunded mandate and a lack of consistency. He stated that the RMAC had seven recommendations which he would summarize.

First, all of the rivers that had been exempted from the CSPA due to the fact they were included in the Designated Rivers Program prior to the CSPA's effective date have been brought under the CSPA save two; the Saco and the Pemigewasset. That exemption should be removed. The law establishing the Designated Rivers Program states that if the local advisory committees fail to develop and implement a management plan then those rivers shall come under the jurisdiction of the CSPA. The advisory committees have not been successful.

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Second, the method for determining which streams are included should be changed to a modified method which considers intermittent streams and all perennial streams should be protected. UNH is developing a database of these streams.

The third and fourth points were interrelated and had a similar solution. The standards for the woodland buffer are confusing and weak. The RMAC advocates a 50 ft no cut zone on all first order streams and a 75 ft no cut zone adjacent along all streams 2nd order or higher in addition to a limit of no more than 10% impervious surface area allowed. He stated that while ideally each lot was different in that soils types and slopes might make some lots more vulnerable than other, it would be too complicated to try and develop a system that considered all of these factors. He used an analogy of attempting to establish a variable speed limit that considered the abilities of the driver and characteristics of the car. It would be too complicated and thus there is a 55 mph limit. He noted that the no cut buffer would help control thermal pollution and not just contaminants and nutrients. He noted that the definition of impervious could be addressed and that the use of a limit on impervious surface without the establishment of a no cut zone would result in a poorly placed buffer. He noted that at 10% one would be allowed approximately 4,300 sq ft of impervious area and with the use of pervious pavers on the driveway this would allow more of that area to be utilized for the building.

Recommendation five is the need to establish a state level permit. Perhaps this could be incorporated into existing permit programs. The fees from these permits could be used to fund state and local staff.

The sixth and seventh recommendations were also related. They are based on the need the increase education and enforcement of the CSPA. Accomplishing these goals will require funding. The fees from a state level permit could assist in this.

Mr. Kimball stated that he also wanted to take a minute to bring the river miles spreadsheet to the Commission's attention. Currently only 7% of the states river miles are protected under the CSPA. The proposed changes would bring 68 % of the state's river miles under the CSPA. The Saco and "Pemi" alone would add 100 river miles.

Mr. Kimball asked if there were any questions.

Mr. Smith asked if Mr. Kimball could explain the forestry BMP's.

Mr. Kimball stated that he could not go into detail but that he understood that some percent of cutting was allowed.

Mr. Pellettieri asked if Mr. Kimball knew what the development standards were in VT, ME and MA and what the potential was for the recommended standards to conflict with the standards in neighboring states.

Mr. Kimball stated that during his investigations for the development of instream flow standards he had researched the standards of the abutting states and all were more strict than NH. NH is behind and should bring its standards up to at least match those in neighboring states.

Mr. Pellettieri stated that he felt there should be consistency between states.

Mr. Kimball stated that while he agreed, he felt that getting consistency between towns need to be the first priority.

Mr. Schloss stated that ME's standard was a 75 ft no cut zone with a 25 % disturbance limit beyond 75 ft.

Ms. Nelson stated that the MA River Protection Act protected a 200 ft area. Some areas had a 25 no cut zone while others had a 100 ft no cut zone.

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Mr. Snelling asked what kind of permit should be required. He stated that if the town required a building permit then there was not much you could do now without a permit except cut trees. He suggested that perhaps a process to look at tree cutting was necessary.

Mr. Kimball noted that while building permits might be required now it certainly didn't seem like the minimum standards and goals of RSA 483-B were being accomplished.

Mr. Quarles suggested that the permit process should be modeled on the Wetlands permit process. He stated the implementation of Shoreland standards was just not something that most towns wanted to take on. He suggested that towns could be integrated through participation of local conservation commissions.

Mr. Snelling stated that asking the state to issue permits for tree cutting seemed like an unreasonable burden.

Mr. Quarles suggested that a permit by notification process would be more appropriate.

Mr. Schloss asked if anyone knew the rationale for the original decision to only cover 4th order or larger rivers and exempt the designated rivers.

Mr. Kimball stated that these were not the results of recommendations from the RMAC. The original drafters favored the concept of local control. Had the local advisory committees proved effective, then the CSPA would be redundant and unnecessary.

Mr. Schloss stated the he could not understand why the 4th order standard was used. The state may be able to set setbacks on what may be allowed but setbacks should include flexibility to consider allowing more impervious area if a larger buffer is retained.

Mr. Kimball suggested creating a tax incentive for creating easements

Mr. Schloss asked how many new landowners would be affected by the CSPA if the RMAC and river Council's recommendations were followed.

Mr. Kimball stated that he could not give a specific number but that certainly it would be a large number.

Mr. Schloss stated that most studies on the subject were done using low order streams but that the findings were difficult to apply on a lot by lot basis. He asked if there must be a 10% limit or if there could be flexibility. For instance could there be "mitigation banking" within the same watershed or an acceptable range of impervious surface relative to setback distance.

Mr. Kimball stated that the RMAC limited its recommendations to jurisdictional areas and had not considered areas in the watershed further than 250 ft from a waterway. They had felt the land closest to the surface waters were most important. He stated that most "technology" is actually common sense and that setting the ten percent limit would encourage intelligent design or innovative design.

Mr. Schloss suggested there was a line between strict science and practicality.

Ms. Nelson suggested that the "more nearly conforming" option in the current language of the CSPA would allow the necessary flexibility.

Mr. Pelletier explained that the "more nearly conforming" language only applied to existing non-conforming structures and was not applicable for new development.

Ms. Nelson stated that she was hoping to find a way to allow some give and take.

Mr. Pelletier stated that incentives make sense but that there should still be a no cut zone and impervious limits.

Mr. Smith asked if there were additional questions. There were none.

Mr. Smith asked if there should be a river sub committee to review the recommendations of the RMAC and Rivers Council.

Mr. Schloss suggested that the Commission should just seek consensus on what issues it could. Use of the Granit System (UNH database under development) seemed like a no brainer. The bigger question was what stream orders should be covered by the CSPA.

Rep. Currier asked what the legislative intent was behind choosing 4th order originally.

Mr. Smith asked when the UNH database would be completed.

Mr. Schloss stated it would be soon.

Mr. Smith asked if it change the definition of “perennial”.

Mr. Pelletier stated that it did not change the definition it simply better identified which streams met the definition.

Mr. Snelling noted that there seemed to be a conceptual shift to protect the small streams in order to protect the small streams.

Ms. Balcius stated that the answer to Rep. Currier’s question of “why 4th order” was political. Including 1st order streams would impact too much land.

Rep. Currier stated that could understand the political ramifications and agreed that could be the reason.

Ms. Nelson asked if the committee was in favor of a rivers subcommittee.

Mr. Pelletier acknowledged the role of streams in conveying pollutants and contaminants and expressed interest in the idea of implementing staggered buffers and setbacks. He questioned if there was any way that setback distances could be tied to flow rates.

Ms. Nelson asked if the Commission was comfortable with the concept of a 50 ft buffer along all streams, first order and higher.

Mr. Pelletier stated that he felt that if the legislature was ok with the concept of a 50 ft buffer adjacent to streams they should be able to understand and accept a 50 ft buffer along streams and rivers.

Mr. Schloss stated the while wildlife needed larger corridor widths, studies had shown that a 75 ft buffer could attenuate 90 % of nutrients, sediment, and pollutants.

Mr. Snelling stated that he believed that the vegetation closest to the waterbody was most important. He asked if there was any way to link the required setback distance to the amount of impervious surface requested.

Mr. Schloss pointed out that this was the same question he had been asking. He added that he recognized that too much variability would lead to difficulty in enforcement.

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Mr. Pelletier stated that it would never be easy if the impervious definition was not addressed.

Mr. Schloss agreed.

Mr. Snelling concurred but reiterated that he felt that the bigger the home was the further back it should be from the shoreline.

Mr. Smith pointed out that the Commission had also received the white paper from LMAC which recommended a 75 ft no cut zone.

Mr. Smith stated that the woodland buffer proposal was a work in progress and that the work group had met on August 2nd. At this time the proposal incorporates 2 zones. In the first zone vegetation less than 3 ft in height cannot be cut and there is a point system to determine vegetation to be retained for vegetation over 3 ft in height. Mr. Kennedy is testing the system and will continue to do so into September. In the second zone, which was between 50 and 150 ft from the reference line 50 % of the area outside the building envelope was to remain natural. He noted that the last straw vote favored the use of the point system but that the focus seems to have changed and asked if the Commission should re-vote.

Mr. Pelletier suggested the Commission consider using a no cut zone along the shore with a zone where a percentage cut was allowed behind it.

Ms. Nelson stated that she thought the proposal included a no cut buffer.

Mr. Snelling stated that the proposal had changed.

Ms. Nelson asked if there was a consensus among the Commission members to propose a 50 ft no cut buffer.

Rep. Currier asked if everyone was on the same page.

Ms. Forst summarized the differences between Mr. Pelletier's suggestion, Ms. Nelson's understanding of current woodland buffer proposal, and the actual details of the woodland buffer proposal.

Mr. Pellettieri suggested that the Commission conduct another vote when the attendance was higher.

Ms. Forst asked if conducting the vote through email responses would be acceptable.

Rep. Whalley stated that email would not be acceptable.

Mr. Snelling moved that a vote on the woodland buffer proposal should be on the next meeting's agenda.

Rep. Currier asked if the no cut provision would be retroactive and would require restoration of open areas.

Various members answered that it would not.

Mr. Pellettieri stated that he thought the September meeting should be structured around river issues.

Mr. Snelling amended his motion to state that the following 3 separate votes should be taken at the September meeting:

1. Should the Commission recommend a no cut buffer, a percentage or point system cut buffer, or a system that incorporates both a no cut zone and a percentage cut zone?

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2. If a no cut zone is recommended how wide should it be? Distances discussed thus far have been 50 and 75 ft.
3. What order of streams should be protected under the CSPA?

Mr. Snelling asked if there was any opposition to the use of the UNH database to determine stream ordering. There was none.

Mr. Smith seconded.

Ms. Nelson stated that she thought the woodland buffer group had only been comparing systems.

Mr. Smith explained that they had in fact been developing a system for use.

Ms. Nelson stated that she like the point system being developed but thought it should be applied in tandem with a no cut zone.

Mr. Landers expressed frustration that they had been developing a grid system and it had been acceptable but now evidently it was not and they were going backwards to a no cut zone. He did not feel the Commission was making progress and he felt they were simply throwing away the work group's work.

Mr. Snelling stated the initial straw vote result may have been swayed by low attendance on that day. They had taken an unofficial straw vote because the work group needed direction.

Ms. Nelson stated that if there was a quorum the Commission should vote.

Rep. Currier stated that quorum would be 14 members.

Mr. Schloss restated that the new buffer language would only affect new development.

Vote was taken on Mr. Snelling motion. The vote was unanimous in favor of the motion.

Rep. Currier noted that attendance would be important at the next meeting due to the votes to be conducted and asked the Commission members present if they had conflicts with the next scheduled meeting on September 11, 2006. There were no responses.

11:55 The meeting was closed.

The September 11, 2006 meeting was re-scheduled for September 19, 2006, 10:00-12:00 in room 305 of the Legislative Office Building.