

Commission to Study the Comprehensive Shoreland Protection Act

Minutes of September 19, 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
NH DES
Office of Energy and Planning
Regional Planning Commissions
NH Lakes Association
At large waterfront owner
At large waterfront owner
NH Farm Bureau Federation
NH Home Builders and Remodelers
UNH (estuary experience required)
NH Association of Realtors
NH Municipal Association
NH Rivers Council
NH Timberland Owners
Landscaping Consultant
NH Conservation Commissions
NH Attorney General
NH Wildlife Federation
NH Natural Resource Scientists

Representative

David Currier
Steve Couture (designee)
Jennifer DeLong (designee)
Robert Snelling
William Smith PhD
Eric Herr
Michele Grennon
John McPhail
Joe Landers
Jeff Schloss
Tom Howard
Carol Granfield
Kathryn Nelson
Tom Hahn
George Pellettieri
Diane Hanley
Jennifer Patterson (designee)
James Kennedy
Cindy Balcius

Members absent

Senate
Senate
House of Representatives
NH Marine Trades Association
NH Waterworks Association

Carl Johnson
John Gallus
Michael Whalley
Paul Goodwin
Stephen Del Deo

Others in Attendance

Representing

Staff
DES Shoreland
NH Fish & Game
DES Limnology Center
House Committee Research
NHLA
CLF
NHRC
RR&D Committee
Sheehan, Phinney, Capitol Group

Name

D. Forst
Arlene Allen
John Magee
Jody Connor
Joel Anderson
Derek Durbin
Brad Kuster
Carl Paulsen
REP Judith Spang
Elizabeth Sargent

Minutes

10: 00 am Meeting opened by Chairman Currier.

Rep. Currier asked the members to review the minutes of the August meeting.

Mr. Snelling moved to accept the minutes. Ms. Delong seconded the motion. The minutes were approved unanimously.

Rep. Currier explained that the day's discussion would begin with the topic of jurisdiction and what river orders would be covered under the CSPA. He asked Mr. Couture to explain what the maps posted along the walls illustrated.

Mr. Couture explained that the 4 maps showed the current inclusion of 4th order and higher streams, excluding the Pemi and Saco rivers, the streams that would be covered if jurisdiction was 3rd or and higher, 2nd order and higher, and finally 1st order and higher. He explained that the maps were based on the NH Hydrologic Dataset. The NH Dataset uses the conventional Strahler method which does not differentiate between seasonal and perennial streams when determining stream order. He explained how data was cross referenced to be more accurate and explained that New Jersey had just done a similar update but found that 255 of streams were still missed

Ms. Nelson asked if the stream identification was based only on USGS maps.

Mr. Couture explained that the current method was but that the NH Dataset used aerial photography and modeling as well.

Mr. Schloss explained that in the southwest tier of the state there had been a separate technician reviewing the data and when UNH had checked the dataset for consistency using models and topography they noted that the area over dense and corrected it. He explained that the Dataset was proofed and tested and thus, while not perfect, was more reliable.

Mr. Kennedy asked how this affected jurisdiction.

Mr. Couture explained that adding 3rd order streams would add 2,190 miles to the coverage. Currently 7% of the state's river-miles are in jurisdiction. By including the Saco and Pemi and adopting the NH Dataset the coverage increases to 13%; adding 3rd order increases the coverage to 25%; adding 2nd order would increase coverage to approximately 45%.

Mr. Kennedy and Mr. Couture had a brief side discussion on how to interpret the river-miles spread sheet originally distributed at the August meeting.

Mr. Snelling stated that no one seemed opposed to the use of the NH Dataset but as yet had not been voted on. He asked if there should be a vote.

Rep. Currier stated that at some point there need to be a vote.

Mr. Snelling asked if it was time to vote on the use of the NH Dataset.

Rep. Currier asked if that was a motion.

Mr. Snelling stated that it was a motion.

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Mr. Pellettieri seconded the motion.

Mr. Currier asked if there was any discussion on the motion.

Ms. Nelson asked if the Dataset was used for the river-miles handout.

Rep. Currier asked for the appropriate name of the dataset.

Ms. Forst read the name off the map as "NH Hydrologic Database".

Mr. Howard asked if the Database was consistent with the method of determining stream order in other states.

Rep. Currier stated it was consistent.

Ms. Nelson stated that Mr. Pelletier had previously said yes, so it must be consistent.

Rep. Currier asked if a roll call was necessary and decided it was not.

The motion passed unanimously.

Rep. Currier stated that they should discuss river orders to be jurisdictional. He noted that a 35 ft no cut zone as recommended by the NH Rivers Council would be contentious.

Mr. Schloss suggest the Commission should address the exempted rivers first.

Rep. Currier asked if the law need to be change to include these rivers.

Mr. Anderson from House Committee research stated that a change to the law would be required.

Ms. Nelson noted that the policy director for the NH Rivers Council was present.

Rep. Currier asked if everyone understood the history of the exemption.

Mr. Snelling made a motion to remove the exemption of the Pemigewasset and Saco Rivers and include them under the CSPA.

Ms. Balcius seconded the motion.

Mr. Howard asked if they could expect any opposition to the legislation.

Mr. Paulsen, Policy Director for the NH Rivers Council, addressed the Commission from the audience and stated that the Pemi River Local Advisory Committee (PRLAC) was in favor of inclusion and there was no group on the Saco to oppose. The law allowing the designation of rivers clearly states that if there was no implementation of a management plan, then there would be no exemption.

Mr. Couture noted that a management plan had only been implemented on the center portion of the Pemi.

Mr. Schloss noted that removing the exemption would not prevent local control.

Mr. Howard asked if this had ever been done in the past.

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Mr. Anderson noted that 5 other previously exempted rivers had been include under the CSPA by 2 earlier pieces of legislation.

Mr. Paulsen noted that the Saco had no advisory group to request inclusion and the Pemi group had not been ready when the previous legislation was introduced.

Ms. Nelson noted that the Commission had received a white paper from the PRLAC requesting inclusion of the Pemi.

Rep. Currier stated that the exemption no longer made sense.

The vote was requested and the motion passed unanimously.

Rep. Currier asking for suggestions on how to approach the ordering issue and asked how there would be to cover the additional jurisdiction.

Ms. Forst stated that there was only one staff member currently and that would need to change with the additional jurisdiction.

Mr. Howard stated that the Commission was supposed to be trying to simplify the CSPA and that they were only complicating the Act and he feared that it would kill any legislation proposed.

Ms. Balcius stated that while the issue may be politically tough it need to be addressed. She noted that John Magee from the NH Dept of Fish & Game was present and stated that she would be interested to know how Fish & Game felt the CSPA could affect wildlife issues.

Rep. Currier noted that the Commission would only be making a report as to its findings. That report would then serve as the basis for legislation to change the CSPA. Multiple pieces of legislation could be introduced so that everything is not lost because one issue is contentious.

Mr. Herr stated that the Commission needed to consider the resources available because adding a lot of river-miles to the jurisdiction without adding staff to cover them would not work.

Rep. Currier agreed.

Ms. Nelson agreed but stated that she had heard a lot about increasing local involvement that might help as a resource. She stated that there needed to be better local coordination and better teeth fro DES. She noted that there is now better science available to justify the improved controls and she reiterated that Rivers Council had advocated a 75 ft no cut buffer on 3rd and 4th order streams and a 40 ft no cut buffer on 1st and 2nd order streams.

Ms. Granfield stated that communities with Conservation Commissions and/or Code enforcement Officers could handle local enforcement. She said that the state could not handle because they did not have enough staff and noted that the towns without local governments were the problem.

Rep. Currier asked where these towns were and if they were in areas that had little development ongoing.

Various member answered north and/or west.

Ms. Granfield stated that the towns could contract with the Regional Planning Commissions.

Mr. Kennedy stated that he wanted to hear from Mr. Magee.

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Rep. Currier recognized John Magee representing NH Fish & Game and asked if he could comment on Wildlife issues.

Mr. Magee explained that there was new information supporting the values of buffers to water quality. Buffers help to maintain lower water temperatures necessary for cold water species such as Brook Trout. Studies in western Maine have found that as buffers are removed, water temperatures rise and populations decline.

Rep. Currier asked in what stream orders these fish could typically be found.

Mr. Magee stated that in the lower portions of the state they could be in 1st and 2nd order streams while in northern areas 3rd and 4th order streams were more likely. He stated that colder water was a must but that he had found trout in a 1st order stream in Durham..

Ms. Grennon asked about nutrient removal.

Mr. Magee stated that there was definitely evidence that buffer were important for nutrient removal.

Mr. Connors, State Limnologist with DES, added from the audience that buffers played an important role by removing significant amount of phosphorus in addition to maintaining water temperatures.

Mr. Couture explained that if they could keep the water in the 1st and 2nd order streams clean it would be easier to maintain clean water in the 3rd and 4th order streams.

Ms. Nelson noted that Cold water was important to trout species and if buffers help maintain water temps then they were of added importance.

Rep. Currier asked how they should get to the next step.

Ms. Balcius asked about the maintenance of local primary building setbacks.

Ms. Patterson stated that the Commission had agreed to remove the exemption.

Ms. Forst stated that no vote had been taken.

Ms. Grennon stated that it the Commission had voted to remove the setback exemption.

Ms. Patterson concurred.

Mr. Howard read aloud from the July 10, 2006 minutes that the Commission had conducted a straw poll with regards to removing the exemption.

Ms. Grennon made a motion that the Commission recommend that the minimum primary building setback in all towns shall be 50 without exception.

Ms. Balcius seconded the motion.

Ms. Nelson asked for the motion to be repeated.

Ms. Patterson stated that the motion was for the legislature to adopt a uniform 50 ft primary building setback to apply to all communities even those that have an existing lesser setback.

Mr. Her asked if “communities” would cover all land or if there could still be exceptions.

Ms. Patterson stated that it should cover all land and eliminate exceptions.

Mr. Herr asked if there would be a provision to allow exceptions.

Ms. Patterson stated that the waiver provision allowed for some expansion provided the structure did not get closer to the reference line.

A commission Member asked what portions of the Act could be varied.

Ms. Paterson explained that DES could only grant variances to those standards found in RSA 483-B:9, V.

Mr. Howard complained that the change would create new unbuildable lots.

Ms Patterson stated that the current language of RSA 483-B:10 included a provision to allow construction on nonconforming lots. She stated that section B:11 covered non-conforming structures.

Mr. Herr asked if the change would encourage smaller lot sizing.

Ms. Patterson stated that it would apply to pre-existing lots.

Rep Currier stated that he did not want to prohibit building on existing lots.

Ms. Balcius asked how these lots were currently handled.

Ms. Forst explained that the owners would submit plans and an explanation of how they have met the intent of the Act to the maximum extent possible and then if appropriate the commission would send a written approval with conditions.

Rep. Currier asked for the vote.

The motion passed unanimously.

Rep. Currier asked what was next.

Mr. Smith stated that stream order jurisdiction needed to be addressed.

Mr. Schloss suggest that local advisory committees could assist in covering areas not covered under the CSPA.

Mr. Paulsen agreed.

Mr. Schloss as if the Commission could recommend putting all streams under the CSPA but with only portions of the Act applying to the smaller streams.

Mr. Paulsen stated that the Rivers Council had only recommended a 25 ft no cut buffer on 1st and 2nd order streams, not the full protection of the Act.

Mr. Schloss suggested that it could be easier to do only a 25 ft no cut buffer only on the 1st and 2nd order streams, with no further restrictions. He asked if the Commission should start with the smaller streams.

Rep. Currier asked if Mr. Hahn could describe how this would impact forestry.

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Mr. Hahn stated that forestry had a specific exemption and was covered under the existing forestry regulations.

Rep. Currier asked if there would be impacts to agriculture.

Mr. McPhail explained that agriculture was also currently exempted provide that best management practices were followed. He explained that the Best Management Practices manuals had been recently updated and that at the last meeting Mr. Quarles of the Rivers Council had advocated maintaining the exemption of forestry and agriculture.

Rep. Currier asked if there was anything else left other than development.

Mr. Hahn Explained the forestry also had to be conducted in accordance with Best Management Practices (BMP's) and follow the wetlands rules. He stated that they must maintain buffers of 150 ft along great ponds and 4th order or larger streams and 50 ft buffers along smaller ponds and all other perennial streams.

Mr. Herr asked if there was any science available pertaining to the impacts related to agriculture and the cost of those impacts.

Ms. Balcius stated that she did not know the cost but stated that the BMP's were significant.

Mr. Herr reiterated his question.

Mr. Schloss stated that the BMP's limited both the production of pollutants as well as the transport of those that were produced. He stated that those in the agriculture field do not over utilize fertilizer and pesticides because the cost made waste unaffordable. Research was currently ongoing in the northeast to look at the effectiveness of buffers in limiting phosphorus transfer. Impact monitor has shown that water quality impacts are occurring but the agriculture is not a significant contributor. Development is a contributor in part due to the associated roads. Roads are the biggest contributors and increased paving associated with development and the resulting road run-off is the biggest concern.

Mr. Herr stated that the Commission's recommendations should be based in science and he had seen science regarding pesticide contamination in the mid-west and gulf states that was concerning.

Mr. Schloss stated that the farming type and history in NH was different and did not lead to the same problems.

Mr. Herr noted that it was not the development but the roads that had been described as the problem.

Mr. Schloss stated that impervious surface was impervious surface. The developments also required new roads for access.

Mr. Herr agreed.

Mr. Schloss noted that the Commission needed to maintain it focus on the protected shoreland area and not extend out into the watershed.

Mr. McPhail noted that there were on-going studies of the agricultural impact on water quality being conducted by the Farm Bureau.

Mr. Schloss noted that most pollution being found was old farm pollution.

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Rep. Currier asked how it could be identified as “old pollution” rather than new.

Mr. Schloss stated that the pesticides being identified were outdated and no longer in use.

Mr. Snelling stated that he thought it made sense to offer some protection to 1st and 2nd order streams as a logical extension of the larger streams but approving a no cut zone was a whole different discussion. He stated that 2 concepts had been discussed: no cut and limited cut. He felt the Commission should pick one and be consistent.

Rep. Currier agreed with the need for consistency.

Ms. Nelson asked if a motion should be made to approve buffer along 1st and 2nd order streams noting that they have value.

Ms. Balcius agreed that they had value but suggest that the Commission recommend that the town adopt the buffers on the smaller streams.

Rep. Currier noted that this issue should be separate legislation.

Ms. Patterson recommended that the Commission should start with the higher order streams to get the best possible consensus the move to the smaller streams. If the Commission could not reach consensus on 3rd order streams then there was no point in discussing 1st and 2nd order streams.

Ms Grennon suggested a straw poll on 1st and 2nd order streams.

Ms. Nelson agreed with Ms. Patterson that it was best to reach consensus on the larger streams first.

Ms. Nelson made a motion to extend the full protection of the CSPA to the 3rd order streams.

Ms. Balcius seconded the motion.

Mr. Howard stated that he would need more information before he could support the motion.

Ms. Patterson asked Mr. Couture if he thought the average person would recognize a 3rd order stream.

Mr. Couture used the Exeter River as an example and stated that most people should understand.

Rep. Currier asked if Amy Brook would be covered.

Mr. Couture stated that he was not familiar with Amy Brook.

Mr. Howard cited a property he had dealt with in Enfield as an example of how confusing it could become. The property was located at the point where the river order went from 3rd to 4th and the owners could not figure out if the CSPA applied.

Rep. Currier stated that a better way to ask the question may be to ask if the owner would have been able to recognize that he was on a river.

Mr. Howard stated that the river was navigable, so yes, the owner knew he was on a river.

Mr. Landers asked what the additional jurisdiction who mean in terms of staffing.

Mr. Schloss suggested empowering communities to assist DES and offer better support.

Mr. Landers noted that the Commission had yet to address local enforcement issues.

Mr. Del Deo noted that if DES was charged with enforcement and not staffed then the job may not get done. He stated that education needed to be done and more staff would be needed.

Mr. Pellettieri noted that the CSPA was supposed to be comprehensive not exclusive. He further stated that they needed to base their recommendations on science not politics and funding needs.

Rep. Currier agreed.

Mr. Snelling expressed concern that the Commission was trying to make a watershed act out of the shoreland act and that may be going too far.

Ms. Grennon suggested the Commission recommend 1st order streams and let the legislature sort it out.

Ms. Nelson stated that the motion pertained to 3rd order streams. She stated that these were waterbodies that most people would recognize as rivers and in Nashua most were designated as prime wetlands. She stated that funding for staff was important but education should come first. She noted that people would begin to recognize the importance of 3rd order streams simply by their inclusion under the CSPA.

Ms. Balcius stated that it was surprising to see what rivers were not already covered by the CSPA. She asked if the reference line could be consistent with the bank which was the limit of jurisdiction for the Wetlands Bureau.

Mr. Couture asked that the Commission keep the dynamic nature of rivers in mind.

Mr. Hahn stated that he would need to know that the current exemption for forestry was continued if he was to support the motion. Mr. McPhail echoed this need as it pertained to the agricultural exemption.

Ms. Nelson amended the motion to retain the exemption for agriculture and forestry.

Ms. Forst read the full motion aloud.

The vote was taken and the amended motion passed with 1 abstention and all others present voting in favor.

Ms. Nelson made a motion that a subcommittee be formed to start drafting the final report and identify any duties the Commission had yet to fulfill.

Ms. Balcius seconded the motion.

Rep. Currier stated that he and Mr. Smith would be on the subcommittee.

Mr. Snelling stated that there were too many issues left that still need to be covered.

Rep. Currier stated that it would be beneficial to have a draft of the report to help identify areas needing attention.

Rep. Spang addressed the Commission from the audience and suggested they consider extending the Commission beyond the November 30th deadline to address the remaining issues.

Rep. Currier stated that this was something the Commission may need to consider.

Ms. Forst stated that if the Commission was going to be extended then they should identify alternative personnel to staff and be secretary for the Commission. She explained that one of the biggest concerns of the Commission was the lack of staffing and that currently a third of that staff was dealing with the additional responsibility of being staff and secretary and this was a manpower demand that the program could not continue to maintain.

Ms. Nelson stated her concern that attendance would begin to fall off if the Commission was extended. She stated they should go through points 1 – 10 as listed and provide whatever report they could provide.

Ms. Patterson asked if the Report would include information from the Commission's discussions.

Rep. Currier stated that it would include the minutes which cover the discussions.

Ms. Patterson noted that this would allow time for the Supreme Court to settle the boathouse issues.

Mr. Snelling noted that the Commission had originally identified 17 points of concern and had only addressed a few of them. He suggested that the Commission was close to resolution and that they should be able to address the remaining issues in maybe half a day's discussion.

Ms. Balcius agreed that the Commission had not address everything on the original list of concerns but stated that she did not feel this was an issue because the list had evolved over time. She felt that there was a need to start outline the report.

Ms. Forst stated that she did not believe there was any way that the Commission was going to address the remaining 9-10 concerns on the list in a half day's discussion since it had taken months and the Commission had yet to approve the woodland buffer proposal and the issues of having a permit and assessing fees were still on the table to be discussed.

Rep. Currier stated that the Commission could have an additional meeting in October or that they could have 1 longer meeting instead of 2. He asked for potential dates for a second meeting and suggested the 23rd.

Ms. Patterson stated that she would not be available on the 23rd. It was noted that Ms. Patterson needed to abstain on most votes due to conflicts with her duties with the Attorney General's Office anyway.

Rep. Currier determined that there was not another suitable meeting date in October so there would only be one meeting on the 16th which would be longer. The meeting would begin at 9:00 and go until 12:00 or whenever members had to leave. Rep. Currier noted that the motion on forming a final report subcommittee was still on the floor. He noted that the next item on the agenda was the Woodland Buffer and Fee Proposal. He asked where the "Fee Proposal" came from.

Mr. Snelling stated that they were separate issues but that he had asked for both to be on the agenda.

Mr. Smith called attention to the chart comparing the woodland buffer proposal to the current requirements.

Mr. Landers asked if this would apply to streams also.

Mr. Smith stated that he felt that consistency was necessary.

Rep. Currier noted that the Rivers Councils was requesting that protection be extended to 1st and 2nd order streams.

Ms. Nelson noted that the Rivers Council recommendations were consistent with the Lakes Management Advisory Committee's recommendations.

Mr. Smith stated that she meant the NH Lakes Association and that those recommendations were in fact different. He asked the NHLA Policy Director who was in attendance to forward a copy of the NHLA white paper to Ms. Nelson.

Ms. Nelson stated that she did in fact mean the Lakes Management Advisory Committee's recommendations and produced a copy of the LMAC's white paper.

Mr. Smith apologized for the confusion stating that NHLA had also submitted a white paper.

Ms. Patterson asked if the revised language for RSA 483-B:6 was ok or if corrections were necessary.

Mr. Schloss stated that corrections were necessary.

The vote was taken and the motion regarding the formation of a report committee passed with 1 against, 1 abstention, and all others remaining voting in favor.

Ms. Patterson suggested that a list of the outstanding issues on which motions and votes would be necessary should be compiled and emailed to the members with a notification that attendance was important due to the voting to take place.

Ms. Hanley asked if they should go through the list of 17 concerns.

Rep Currier stated that the subcommittee would cover that and come back with the relevant issues. The subcommittee membership would be Rep. Currier, Mr. Smith, Mr. Kennedy, Mr. Snelling, Ms. Nelson, and Ms. Balcus.

Meeting adjourned at 12:20

Next meeting will be October 16, 2006 at 9:00 in Rm 305 of the Legislative Office Building.