

NOTE ON WETLANDS REVIEW, 2018

Winston Sims

17 January 2019

Wetlands and lakes are a public trust.

It is a paramount objective of NH and almost all NH lake associations that wetlands and lake waters are to be maintained as clean as possible. It is well known that wetlands are critical to the health and well-being of lakes. It appears a contradiction that in the drafts of the Wetlands , however, no steps are posited as being of critical importance for the achievement, protection and maintenance of clean water. There appears to be no mention of public trust nor, it appears is there any mention of a goal or objective of clean water. There should be a reaffirmation of these objectives.

Cost and staff: simplification

The wetlands review has been undertaken with the stated aim of “simplification” so as to reduce “cost and processing time”. These have become necessary because of the lack of high-level professional DES staff at the state level to undertake the “most important” tasks.

“Simplification” is based largely on reductions of “turn-around” time or PBN times from 10 days to 5 days, 30 days to 10 days; 75 days to 5 days. These are very significant reductions in processing time. Many, if not most, of these reductions in processing times come at the expense of town government with its correspondingly reduced opportunity for thoughtful consideration as to how best to protect the state’s waters. The state’s capacity for protection of waters, however, is also reduced. “Simplification” therefore makes it easier and faster for DES to “process” an expanded list of PBN applications with its diminished high-level professional workforce.

The diminished workforce should be seen as a DES policy objective since salaries are paid by permit fees, not from the general budget.

A contradiction may be seen in that “simplification” is achieved primarily by increased centralization of processes at the state level, precisely that level where there is little excess capacity to address the ever-increasing numbers of applications, and the creation of processes and procedures while minimizing or negating the contributions of the towns’ undertaking a review of the applications, hearing the applications, ignoring the towns’ local knowledge, the making of site visits, and undertaking the mediating process; denying the roles of the abutters and the conservation commissions. Given the decreased emphasis on towns, there should be no such increased centralization.

Perhaps the designing-out of important in-puts from towns is made on the assumption towns have little to contribute to important land-use questions.

One means for the achievement of "simplification" is the expansion in the numbers of issues to be addressed by PBNs. This has been done primarily to enable DES to minimize attention to be given to the PBNs, often letting them be approved by default within the passing of a few days.

At the same time this would yield fewer PBN issues to be handled at the local level.

The state seems to be down-playing the most effective use of towns' volunteer-citizens with their superior knowledge of local conditions and local ordinances, for the processing of applications.

Through the use of permit fees instead of general budget for DES enforcement and other staff, does DES seem to be failing to make every effort to ensure the availability of the highest-level professional staff for the full range of its responsibilities to address public trust responsibilities.

The proposing of such short response times suggests DES may neither want nor need towns' responses.

Is there any empirical evidence that towns have failed to discharge their responsibilities and that they deserve such treatment?

Diminished role for towns

It would seem to be a contradiction given the "shortage" of staff for the "most important" applications at the state level, that towns are not given much more responsibility. Instead, towns which are the earliest lines of communication with the applicants, which offer the earliest opportunities to bring designs into compliance with codes; which engage in modifying and mediating individual (abutters and applicant's interests) and community interests, as well as the conservation commission's responsibilities for wetlands, shorelands and steep slopes are, in effect, being sidelined. Shortcomings on the part of towns, if any, are not empirically established. The revisions offer little or nothing to improve the capabilities and authority of town governments.

This has been made clear in several ways: the already significant number of PBNs or applications are being significantly increased. As noted above, the times for addressing the PBNs are so short as to often preclude thoughtful town or even state consideration of applications.

Towns enjoy many advantages. They: have the time usually required for meeting with the applicant; listen to his/her interests; confirm that the application is consonant with town ordinances; make site visits to become familiar with the terrain; mediate with the applicant to see if plans could be made more suitable;

Assumptions also seem to include that towns have little if anything to contribute to the process.

The state also seems to be making the assumption that for the most part applications are made in keeping with fact and science, are free of flaws and need little in the way of mediation or modification to meet local and state laws. This assumption would not seem to be supported by fact.

Explicitly, DES calls for no role for conservation commissions in addressing these wetlands applications; nor are abutters to have any voice in the process. These have been and should remain two of the key channels by which a town and the state are informed of important analyses and perspectives.

Given that many conservation commissions see themselves or are seen as “keepers” of shorelands, wetlands and steep slopes, the proposed wetlands rules could foster a by-passing of many of the RSAs and standards set forth under its ordinances. This would be the case especially where town ordinances are stricter than state regulations. It has been and is true that these are key elements in the addressing of applications to be sure that local conditions are taken into account.

This raises the question as to whether DES could propose a less town friendly procedural environment?

Is it merely a coincidence that most measures for simplification also yield a result of increased centralization at the DES level?

Fundamental Confusion as to the RSA’s Guidance as to Wetlands and Shoreland

This is revealed most clearly in DES’ contradictions as to the water front buffer (RSA 483-B) and proposed uses of the shoreline for decks. Any such usage of shoreline for decks would in effect discard accumulated wisdom as reflected in 483-B related to the reservation of 0 -50’ as the waterfront buffer. This is of critical importance for up-take of stormwater flows and erosion. Such decks must be avoided and any deck seen as an impervious surface as nothing will grow under it.

Public Trust

These measures have been said to enable the very limited numbers of DES staff to devote their time and attention not to the 14 PBNs that is, those issues it believes call for little or no oversight but instead to “more serious” issues.

Could DES really be proposing that simply the passage of time...many fewer days...would ensure the most effective governance and the most effective discharge of its public trust?

In general, steps seem to be taken primarily for purposes of enabling and facilitating development and developmental uses of lakes rather than promoting those conditions under which lakes enjoy their greatest health cleanliness and well-being.

At no point have clean water or the public trust been cited as rationales for any of the proposed recommendations.

Might this be seen as DES’s effective relinquishing of responsibility for consideration of many of the PBNs and for the effective discharge of the state’s public trust for the care of its waters?

Contrary to what might be expected, there is no mention of the public trust doctrine and how each step would be related to the effective discharge of its responsibilities, indeed, there is no mention of what those responsibilities would be.

DES' WETLANDS REVIEW should ensure towns and DES have adequate time to effectively implement its public trust for its care of the lakes.

From a governance perspective, attention should be given to strengthening the capacities and authority of local government for fostering local participation, local perspectives, and their balancing and mediating functions. Instead, in the absence of any authority to do so, there is the explicit call for the exclusion of conservation commissions and abutters. There is no mention of planning boards. Nor do there seem to be proposals for the enhanced engagement by the state in providing assistance for town's volunteers and addressing their issues.

Nor is there any mention of the NH Lakes Management Advisory Committee. Is it really believed the LMAC could not positively contribute to the wetlands review?

Rather than minimizing the roles and importance of towns, DES should see the towns as the front lines and the principal enablers and facilitators of the state's work at the towns' level. This does not seem to be reflected in anything the state says regarding the addressing of the town's ordinances, their natural resource inventories, their master plans, and the earliest resolution of appeals. The Planning Board is not mentioned. Towns should be seen more as partners or resources in the processing of applications rather than as obstacles.

CCs should be notified earliest of any applications to DES to enable their earliest replies.

Simplification almost becomes code for relinquishing of engagement.

Prior Notification / Towns' Status

In reply to a question, it was stated explicitly that there is to be no role for the "prior notification" process whereby towns make their decisions regarding applications prior to state decisions and only following that, the state can take its decisions. Processing of applications by towns is implicitly seen as being dysfunctional.

Modification of Standards

It has been pointed out by DES that there has been little or no modification of the standards applied to the decisions taken by DES, only the processes by which those decisions are taken. but there have been modifications of standards involving docks, beaches, setbacks, logging roads.

But is this disingenuous? Even where there are no proposed reductions in standards, with such dramatic changes in times and resources for the analysis and the application of existing standards, can it be said there is no effective reduction in the standards themselves? Of course there is.

There should be no reduction in standards, effective or otherwise.