

**Water Quality Standards Advisory Committee  
Meeting Minutes  
NH Department of Environmental Services  
June 22, 2010**

**Members Present:**

Dan Blais	NH Home Builders Association
John Hodsdon	Farm Bureau, also NH Conservation Districts (for Eileen Miller)
Diane Hanley	NH Association of Conservation Commissions and Lakes Management Advisory Committee
Mike Metcalf	Underwood Engineers (representing Phil Bilodeau)
Larry Morse	NH Association of Natural Resource Scientists
Allan Palmer	Rivers Management Advisory Committee
Ken Rhodes	Associated General Contractors
William Schroeder	NH Lakes Association
Jasen Stock	NH Timberland Owners Association
Ellen Weitzler	US Environmental Protection Agency Region 1

**Others Present:**

Joel Anderson	NH House, Resources, Recreation, and Development Committee (RR&D) Staff
John Boisvert	NH Waterworks Association, Pennichuck Water
Ms. Bourgeois	NH Realtors Association
Neil Cheseldine	Wright-Pierce Engineers
Sue Gottling	NH House RR&D Committee
Mark Hutchins	Normandeau Associates
Mike Kappler	NH House RR&D Committee
Jim McClammer	NH House RR&D Committee
Marcia Moody	NH House RR&D Committee
Susan Olsen	NH Municipal Association
Elizabeth Sargent	Sheehan & Phinney Capitol
Bill Solomon	Canobie Lake Protective Association
Judith Spang	NH House RR&D Committee
Toby Stover	US Environmental Protection Agency Region 1
Donald Ware	NH Waterworks Association

**DES Staff Present:**

Jacquie Colburn	NHDES for Bud Berry of LMAC
Gregg Comstock	NHDES Watershed Management Bureau
Shane Czsiki	NHDES Geological Survey
Paul Currier	NHDES Watershed Management Bureau, Administrator
Ken Edwardson	NHDES Watershed Management Bureau
Lisa Fortier	NHDES Watershed Management Bureau
Wayne Ives	NHDES Watershed Management Bureau
Brandon Kernon	NHDES Drinking and Groundwater Bureau
Paul Susca	NHDES Drinking and Groundwater Bureau
Phil Trowbridge	NHDES Watershed Management Bureau

**1:30 – 1:35 Introductions****William Schroeder**

Introductions were made around the room.

**1:35 – 1:40 Approval of 3/24/2010 Meeting Minutes****William Schroeder**

**Ken Rhodes** – On page 2, the explanation that Paul gave in the middle of the page, should that be HB1305?

**Phil Trowbridge** – Is that in the middle of page?

**Ken Rhodes** – Yes. On page 7, the second sentence says “you can have a dam but if it does not meet the definition of surface water, it isn’t covered”. A question mark would be better because I think it is more of an inquiry than a statement. Just for context, it has to be both. You can have a dam but if it doesn’t meet the definition of surface water, it isn’t covered. That ties it to your explanation.

**Bill Schroeder** – In the previous minutes someone has taken the trouble to go through and edit what was said for clarity and I don’t think that happened this time.

**Lisa Fortier** – That was Bob Estabrook because he was more likely to understand what you were talking about.

**Bill Schroeder** – I have a few comments and the first are the update and revisions to Env-Wq 1700. I read the sentence and it didn’t make sense. A little more careful review of what was said would be helpful.

1. On page 2 Paul Currier is speaking and towards the end of it says, “previously, what we have proposed was that the transfer to receiving waters shall be considered important for the purposes on antidegradation.” I think that ‘important’ should be ‘significant’ because significant is a very meaningful word.
2. The remainder of the sentence is what I had trouble understanding. It says “review and on legal review they established change to withdraw from source water and transfer to receiving water and so forth”. I think what it means “on legal review it was changed to withdrawal from source water and transfer to the receiving water shall both have been reviewed as significant impacts under the process.” I think that would make it a little clearer and acceptable. That would be “they established change” to “it was changed to withdrawal from source water.”
3. At the top of the next page Paul was speaking again, it says “not yet, when we filed a request for a financial impact statement, we will e-mail everybody.” Was that supposed to be “when we file we will” and now has that been filed?  
**Paul Currier** – No.
4. Further down the page there was some discussion about transferring water from Arlington Pond to Canobie Lake. I thought that was unclear. The first sentence, “Take phosphorus, for example, if the proposed transfer contains phosphorus then it is a straight forward argument to say that phosphorus is not naturally occurring to Canobie Lake because it was transferred to Arlington Pond.” You should change the word “to” to “from”. Part of the next sentence can be deleted and begin with the phrase “however, because the Canobie Lake watershed has development in it, every storm delivers phosphorus to Canobie Lake and that is not naturally occurring. We have a quandary.”
5. I was speaking on page three, “I was trying to understand the Commissioner’s objection and I am still confused. I thought that it was clear with the procedures that we have in place now that the development of a project in a Class A watershed had a significant hurdle to be approved because it was a Class A watershed. There is no difference.” I think that what I said is that now there is no difference between A and B. I would like it to be changed back.
6. On the top of page four near the top, Paul Currier is speaking. “I just want to make sure that what you see is what we take to rulemaking.” I think it means that you will see what we take to rulemaking.

7. In the middle of the page there is something attributed to Bob Ball and Paul Currier responds, I think that the last couple of sentences might have been you (Paul Currier). “This is something that we had a consensus on. The terms of reference are supposed to agree unless you give a significant reason why and it sounds like the reason is that the Commissioner didn’t like it. Is that the reason? The reason I state it is that it will blindsides people.”

**Paul Currier** – Yes.

**Allan Palmer** – I think right below that a similar thing happened below that.

**Bill Schroeder** – Where is that?

**Allan Palmer** – Beyond Mark Hutchins, you have Paul Currier answering Paul Currier. I know he is really good but I think the question at the very end of it is from someone else.

**Bill Schroeder** – So you are saying that “it wasn’t the attempt on antidegradation to apply the whole Classification” was a question?

**Allan Palmer** – I am guessing that was someone else. I would like to take credit for it but I wasn’t here.

**Lisa Fortier** – It may be that somebody said something in between that I just deleted because it was a one word comment. I try to shorten minutes so they aren’t twenty pages long.

**Paul Currier** – “I think there wasn’t the attempt to antidegradation to apply to all classifications, not just Class A waters.” That is probably is someone else because that is the question I answered.

**Bill Schroeder** – So let’s just say an unknown person asked that question.

**Lisa Fortier** – What page is that?

**Bill Schroeder** – Page four.

**Allan Palmer** – On the presentation on phosphorus, starting on page 10, that Dave Neils gave, I don’t understand if it is numbers or units but something doesn’t run right when you read the two highs/too lows and match the numbers together. For instance, he talks about 0.1 and 0.12, seemingly being too high but then later in the discussion we start talking about numbers such as 35 and 5 and 9, which are higher than 0.1.

**Unknown** - 0.1 should be milligrams per liter.

**Allan Palmer** – Is that the 0.1 and the 0.12?

**Unknown** – Yes.

**Allan Palmer** – On page 10, if you go seven lines up it says that EPA used 0.1.

**Paul Currier** – Dave is switching units in his presentation.

**Allan Palmer** – Those smaller units of 0.1 and 0.12 are all milligrams per liter?

**Unknown** – Yes.

**Robert Schroeder** – We could approve the minutes as they are but I have a feeling there may be more. How do you feel about reviewing them offline and resubmitting them next time? These go into the record and if there is confusion and so one tries to go back and make sense of it, it isn’t good. I would suggest that we not approve the minutes as they are done. We have a number of corrections and would ask DES to review them and resubmit them at the next meeting, if that is ok with everyone.

**Ken Rhodes** – It resolves my discomfort with the difference between a transcription and minutes. If this is a transcription, which is what is attempted. Whether or not you said it or didn’t say it or meant it or didn’t mean it. The next thing you have to do is do a logical interpretation. You are either going to interpret or you are going to transcribe.

**Bill Schroeder** – I think what we are going to try to do is interpret and make them reflective of what we meant to say and accomplish.

**Ken Rhodes** – I spent six years as the chairman of the Auburn School Board and we had one situation that got very testy about the subject of transcript versus interpretation. Your interpretation is your interpretation. Don’t tell me what I said. I agree that a for a more contiguous process such as this, where transcription is not what has been done before, you should go back and make it a set of minutes.

**Lisa Fortier** – These were always done as transcription because that is what they wanted and Bob would go through and interpret some of the things that didn’t make sense.

**Paul Currier** – Bob Estabrook, who retired between the last meeting and now, made sure that the words made sense and reflected minutes. We dropped the ball because Bob wasn't around to make that happen but we will pick the ball back up.

**1:40 – 1:55 Summary of HB 1305 & 1348 Working Group Meetings**

**Paul Currier**

**Paul Currier** – I don't want to talk a lot, I want to let the working group chairs report out. We had four working groups that were working on the original HB 1305. We had a working group on HB 1348 and three working groups on parts of HB 1305. We had a group on definitions, designated uses and antidegradation. Those working groups have been very busy since the Advisory Committee agreed to work with the RR&D on the interim study process and they will report today. This is basically a report out process of the working groups to the full Advisory Committee. What we would like to have is for the Advisory Committee to ask questions of the working group chairs and members that are here; and then act to ratify the work and recommendations of the working groups so that we may continue with the interim study process and transmit things to RR&D. I think the working groups are ahead of schedule and that we are mostly done.

**Bill Schroeder** – We will move to item 4 because Larry is not here yet.

**2:00 – 2:30 Report Out from Working Group on “Antidegradation”**

**Ken Rhodes**

**Motion: To approve recommendations of subcommittee**

With staff help and a lot of good discussion we covered the general issue of antidegradation in statute, relatively thoroughly. In the handout, a comparison was made between the original bill text and the new proposed bill text. In the original presentation on HB1305, there was some concern from the Association of General Contractors and others that some of the wording may, particularly in areas of existing and tie-ins to definitions. The presentation this spring was pretty much a copy of the Clean Water Acts regulation 40 CFR 131.12. Let's talk about how some of these phraseologies may work out. After the meetings that were held, and this was remanded for interim study, we were working on some of the items and eliminating Item 5 altogether and trimming up some of the words in (items) 1-4. Staff came back at the last session and they have collapsed the proposed language to one sentence shown as RSA 485-A:9-a, “The Departments shall adopt rules that implement the antidegradation provisions of the federal Clean Water Act as required by 40 CFR section 131.12.” The inquiries were along the lines of does the staff feel that the words were a strong enough tie-in. The answer at that point was yes and that it essentially accomplishes the task. The opening here on antidegradation specifically are that there are a number of rules already in place and that there have been concerns raised whether or not the statute has allowed the Department to promulgate rules, in essence, a cart ahead of the horse scenario. If this moves forward, this proposed language attempts to resolve that cart/horse problem. The details of exactly how to implement antidegradation in the context of the rules in place, as I am reminded continuously, and how all the nuts and bolts work can be worked through even more in rulemaking. But, to accomplish the antidegradation portion of HB 1305, the subcommittee, at its last meeting, vetted this language rather well and this is where we would like to land. As chairman, that was my summary/introduction and I would like ask Paul if there are any other comments he would like to make.

**Paul Currier** – I think that covers it pretty well. We feel we need specific authorization to write rules if it is to be put in rule. We discovered that there are some pitfalls to putting the federal rule 40 CFR 131.12 directly into statute verbatim. As Ken said we already have rules that implement the federal antidegradation policy that have been reviewed by EPA in the last review of our WQ Standards. We don't have to create new rules. The proposed bill text gives us the clear statutory authority to adopt the rules that are in effect.

**Ken Rhodes** – I am asking for additional comment and review.

**John Hodsdon** – Is it proposed that the original bill text be eliminated and the text labeled with 485-A:9-a will replace the text labeled 485-A:9-b, or will they both be eliminated?

**Phil Trowbridge** – It will be just stuff on right hand, where it says proposed bill text. That is what we are proposing.

**John Hodsdon** – You are proposing to eliminate the text shown on the left-hand side labeled with 485-A:9-b?

**Phil Trowbridge** – That is not in statute now. That was the original bill to put that into statute. It doesn't exist now. It will just disappear.

**Ken Rhodes** – John, on the left-hand side the text is referred to as 485-A:9-b and on the right-hand side is the text is referred to as 485-A:9-a. We should use the same label. Is that where you were going?

**Phil Trowbridge** – There are issues with numbering (i.e. 485-A:9-a or 485-A:9-b) that will be sorted out with Legislative Services.

**Rep Kappler** – The last sentence, where it says, “as required under 40 CFR Section 131.12”. Wouldn't it be better if we just said “The Federal Clean Water Act, as required under 40 CFR.” If EPA comes out and changes that section and comes out with a different number for the antidegradation regulation it will require legislation to change it.

**Ken Rhodes** – We did ask that question and I can't remember if we had any strong feelings.

**Paul Currier** – I think we ought to note that comment and defer action on that to working with legislative services to draft the bill language.

**Rep Kappler** – Make a note there. If they make a change to their rules then you would have to go back with another bill to change the legislation.

**Allan Palmer** – Conversely, if you just open it all up to 40 CFR you are taking a whole lot of regulations under the realm of this one and I don't think you want to do that.

**Ken Rhodes** – The previous presentation was 40 CFR 131.12. I think Rep. Kappler's comment is don't create a situation where, if something changes, you have to page back six drawings and change every detail and do it all the way through. The discussion is that once you have tied the statutory authority down that you shall adopt rules to implement antidegradation provisions. DES feels comfortable that the approval of the rules by EPA Region I becomes the tie-in to how you are going to implement the statute. EPA has approved the existing antidegradation rules before, so therefore, that is where it landed. If you don't have to change the language of authority, you can wrestle with the nuts in the bolts in the rules.

**Allan Palmer** – I would think that there would something put in there, and I am surprised that it hasn't been done already. You reference that CFR section so if it gets changed you can follow it.

**Bill Schroeder** – I have seen that kind of language before, “or as amended in the future.”

**Ken Rhodes** – I would suggest Paul's recommendation to ask Legislative Services the best way to do that. I think the mood of the commentary is along the lines of not making everybody go back later on if there is a good way to do that.

**Bill Schroeder** – What will these rules apply to? I think one of the original questions was do you have the authority to apply antidegradation rules to AoT procedures. They might not have been challenged if you could only apply antidegradation to some other Clean Water regulation. But can you apply it to AoT? Is it clear where it goes in RSA 485-A and what it applies to?

**Ken Rhodes** – I think so because RSA 485-A is AoT.

**Paul Currier** – Yes, AoT is further down in RSA 485-A. That is the question that will be answered by the Definitions Working Group. RSA 485-A covers surface waters. We are proposing to change the definitions around somewhat. The EPA Clean Water Act requirement for WQ Standards is that they apply to at least all the waters of the United States., Antidegradation needs to apply to all waters of the United States. The waters of the United States include those things that the statute defines as surface waters plus other wetlands which you could interpret as not included in the definition of surface waters. Antidegradation needs to apply as one of the three parts of WQ Standards.

Antidegradation needs to apply to all the waters of the United States as a minimum. That is the Definitions Workgroup. Antidegradation is one of the three parts of Water Quality Standards. Virtually all Alteration of Terrain Permits, which is a state permit, for example, require a EPA

NPDES Construction General Permit and a Notice of Intent be filed, that is a federal permit. All federal permits that may involve a discharge to surface waters of the US require a 401 WQ Certification that the construction and operation of the activity, which is the subject of the permit, will not violate WQ Standards. Antidegradation applies to Alteration of Terrain, Wetlands Permits, FERC licenses and anything that gets a NPDES Permit, either a specific permit or a general permit.

**Ken Rhodes** – That has been part of sorting the jigsaw puzzle together. One piece is to what are we going to apply all this to? There are two definitions. There are surface waters and then there are waters of the state. That tells you where antidegradation through RSA 485 and the AoT plus you still have the federal level. That is where they all tie together.

**Rep. McClammer** – You are saying that these antidegradation provisions are applicable where we have a federal action.

**Paul Currier** – No, they apply to all of the waters defined in RSA 485-A and they apply all the time to all of the waters. What we do when there is a federal action that involves a discharge is ask the question looking forward, “In the event that this permit is granted, will water quality standards still be met?” That is the certification process.

**Rep. McClammer** – The certification is only when it is the federal action but you can apply these antidegradation standards to other requirements under your surface water regulations that are adopted by DES. You don’t have a certification process at the state level. The question is, “Do you have authorization or an enabling legislation to allow you to establish antidegradation standards for your regulations at the state level?”

**Paul Currier** – This would be the authorization.

**Ken Rhodes** – That is the authorization. The applicability of it is the definitions portion of it, which then got into tracking, references to surface waters and waters of the state. Put the NPDES aside for a second, those two definitions track including, in RSA 485, which says that if you are affecting waters of the state in these particular matters you are within jurisdiction of antidegradation laws. It definitively applies to waters of the US when you get into that federal level permit. That is the minimum requirement. HB1305 goes back to the definition of what waters of the state are. As we have clarified some of that. It is more expansive. It covers the area that you are referring to. There is that linkage.

**Rep. McClammer** – I would like to rephrase this to clarify it. What we have here is some impact on waters, whether it will be a discharge, diversion or withdrawal. These are all activities that would all be looked at by the state agency but only when there is a federal action involved such as a NPDES or wetlands permit. Will a certification be required under federal authorities? I have been playing around with it for years and never quite understood it. It is becoming a little bit clearer now. You have regulations at the state level that are more restrictive than those at the federal level in terms of what you comply water quality standards to.

**Paul Currier** – I don’t believe so. The intent is to have the population of waters to which WQ Standards apply to be identical to the federal waters of the US. The way it is now in rule Env-wq 1700, we say the rules, which include antidegradation provisions, apply to surface waters as defined in RSA 485-A and waters of the US.

**Ken Rhodes** – Is that in the state or the US?

**Paul Currier** – In the US, that is in rule. It was brought to our attention that we may not have had the authority to apply those rules to anything other than surface waters, as defined by state statute.

**Ken Rhodes** – So the antidegradation statute provides that tie in. The definition clarifies the jurisdiction.

**Paul Currier** – If you read the federal antidegradation rules, which are mirrored in our rules, it is clear that the federal rule envisions that there will be a review related to permits before something happens. But, it is possible to apply the antidegradation principal in the absence of permit. For example, if we have a period of record on a lake that indicates water quality that water clarity has a declining trend, you might apply the antidegradation provision to say that WQ is down. That is a violation of the provisions of the Clean Water Act that says water quality of high quality waters shall be maintained and protected unless there has been a Department decision to allow degradation.

**Rep. McClammer** – In my mind, federal rules become effective when there is a federal action. Where someone is cutting trees along shoreline, which is causing some thermal alteration, there is no federal action involved. What gives the state the authority to monitor that activity or be involved in regulating it?

**Paul Currier** – The state statute.

**McClammer** – Has that been authorized by the federal statute or does it need authorization by state statute to say that DES can establish WQ standards and antidegradation, irrespective of the federal law?

**Paul Currier** – It needs authorization in the state statute, irrespective of the federal law.

**Rep. McClammer** – That is what I am getting at. We are saying that antidegradation is authorized for situations governed by the Clean Water Act. Do we also need antidegradation standards that would be applicable to state statutes?

**Paul Currier** – I don't think so.

**Ken Rhodes** – I think it will all work out ok. I think that this works relatively well. What struck me when staff came back with just one sentence was that we put rules and regulations together years ago. The Attorney General reviewed the rules and said the tie-in to RSA 485-A that said that you will enforce the Clean Water Act was good enough at the time. What seems to have evolved is that there are a whole bunch of rules and regulations. The question has come out about it being weak. It is probably better that you put in RSA 485-A that you do have the authority to make rules about antidegradation specifically. That is one more modernizing step from what was decided 15 or 17 years ago. In that context, the next part of this is where exactly does all this apply? I am pretty comfortable that Env-wq 1700 is pretty comprehensive. If we then get to the next step of HB 1305 and modify some definitions, so we don't have to go through parsing words through Env-Wq 1700 and know exactly what those definitions are, I think we are pretty well covered if this finds it way into the antidegradation tie-in. It takes the Env-Wq 1700 rules and gives them that first bit of tie-back and then in practice and application. I think that you are going to see that most everything is covered. It is pretty clear overall that, if someone is saying that they are not within jurisdiction, then that person has to prove that they are not.

**Rep. McClammer** – You are saying that the jurisdiction is the surface waters because you are in surface waters, irrespective of the type of activity. What you are doing to the surface waters is not going to trigger the federal process, except when there are federal actions involved.

**Ken Rhodes** – I am thinking of your example of tree line. If you change the character of a surface water right now, I will bet you that DES has a very strong case that you can't do that in the waters. I think that authority already exists. There is a paper by the former legal counsel of EPA that he wrote about two years ago saying that he could make a case that if a hog farm even thinks that it wants to pollute the pond next door that he could take them out right now.

**Rep. McClammer** – We don't have state statutes that may necessarily allow that but you are saying that we go back to the Clean Water Act.

**Paul Currier** – It all has to be in state statute. The Clean Water Act says that it has to be in statute or rule. Rules that are adopted by the agency, upon authorization of the General Court, have an effect of law.

**Rep. McClammer** – As an example, when you talk about the shading of trees, that is an action that is probably not going to come under the umbrella of the Clean Water Act because there isn't that federal action involved.

**Ellen Weitzler** – I would like to explain a little bit. If you look at the antidegradation requirement on page 4, the text mirrored the federal text precisely. It requires that high quality waters be maintained. In state regulations you can define what activities fall under that. Some states have a very long list and some states have a narrower list but ultimately it is required that you maintain high quality. It does, and in Section 4, requires you implement limitations and conditions for point source discharges and use management techniques for non-point discharges. It doesn't say that you should control septic system discharges, tree cover and channelization. All those things that you may need to do would fall under the antidegradation provision but those activities may not require a federal permit of some kind. Those would be state managed activities. If you have to do something to protect water

quality, whether or not it requires a federal authorization, it can be done under the requirements of the antidegradation language that is in the federal statute. By referring to 40 CFR 131.12, you are talking about any activity that you choose as a state to maintain high quality waters. Does that make sense?

**Rep. McClammer** – I think it makes a lot of sense. I just think the feds enable the state to have a classification system. We then establish the standards for the classification system and the antidegradation standards for those and any activity that has an impact on those standards is, in essence, authorized by federal statute.

**Ellen Weitzler** – Not every one of those activities would have federal involvement.

**Rep. McClammer** – Right, but the statutory authority goes back to the feds as opposed to state statutes.

**Ellen Weitzler** – Not the authority, but the requirement to maintain water quality is a federal regulation.

**Bill Schroeder** – Isn't it as simple as the Clean Water Act essentially sets the bar that all the states need to meet. If the states want to establish higher or more stringent standards and apply it to more waterbodies, that is fine with the feds but there is a minimum standard that the Clean Water Act wants to see the states employ.

**Ellen Weitzler** – Yes, but it is not explicit about what those are.

**Bill Schroeder** – But is clear that the state has to do it as opposed to the feds.

**Ellen Weitzler** – That is the way it has been interpreted.

**Ken Rhodes** – I think that overall, what was pointed out over several inquiries, unless you have linkage like this, the state never adopted that authority. If you put this in place you have the linkage back. I think that if you make rules and something comes up that is violating WQ Standards or degrading high quality waters, you may not have to have a section in Env-wq 1700. You can't degrade by the Clean Water Act and if you can make a case to say that it is not working then the state has the authority to act if they tied it down in a specific antidegradation piece of statute. Without more specificity, what I learned is that actual rules and regulations will govern a lot of the application of this and how it goes forward and is reviewed by EPA. How do you meet that statute and how do we meet that statute linkage? That doesn't mean that if something is getting out of control, you don't have the authority to go back in there and do it anyway without a permit.

**Ellen Weitzler** – I think that in Env-Wq 1708 antidegradation requirements that you already have apply to new discharges or activities for high quality waters.

**Paul Currier** – There are two parts of Env-Wq 1700. Let me read the applicability section for the entire set of rules including antidegradation: "These rules shall apply to any person who causes point or non-point discharges or pollutes the surface waters or undertakes hydrologic modifications such as dam construction or water withdrawals or who undertakes any other activity that affects the beneficial uses or the level of water quality of surface waters." That is, I think, all inclusive.

**Ken Rhodes** – It doesn't leave much out. The basis of the antidegradation portion is that the staff felt comfortable that this adaptation of 485-A:9-a or 485-A:9-b, whatever is chosen, would provide linkage back to that. It re-enables it and closes that piece. We can have another discussion down the line about Env-Wq 1708 but I think this would work. Ellen, if you are comfortable, I think this works out pretty well.

**Don Ware** – I think that the question has been answered. The purpose of this legislation is to ensure that the state has the authority to implement the Clean Water Act so that retains primacy. Without this, my understanding is that there is some question as to the state's authority to implement in rulemaking, the necessary statute to the necessary rules to retain primacy over the Clean Water Act.

**Ken Rhodes** – In essence, it fills that gap and keeps the state of NH implementing the rules that comply with the Clean Water Act. Mr. Chairman, can you recommend that this move forward.

**Bill Schroeder** – For this item and several others, it is suggested that there be a motion to accept the recommendations of the Subcommittee. In this case, the recommendation is that the proposed bill text would be the short version that we were just talking about.

**Ken Rhodes** – That would be a motion that I would entertain as that chair.

**Bill Schroeder** – What is the implication if we approve the recommendation of the Subcommittee? What does that mean?

**Paul Currier** – That means it will be transmitted to the RR & D Committee for action or possible legislation. RR & D has an interim subcommittee and all of the members are here. Our recommendation will be passed to that Subcommittee which will then work on legislation.

**Bill Schroeder** – Then our working group that has been focusing on this particular issue will be done?

**Paul Currier** – Yes.

**Ken Rhodes** – Where we were in the spring, the interim study where this group got together and said maybe this line doesn't work try this the next time?

**Bill Schroeder** – The WQSAC would be ratifying the work of the Subcommittee and say that the issue has been dealt with.

**Judith Spang** – You will all show up at public hearing and speak in support of it otherwise, speak now or forever hold your peace.

**Mike Metcalf** – Does this mean that there won't be any more rulemaking, or does this just mean that you now have statutory authority for the rules you had.

**Paul Currier** – The latter.

**Allan Palmer** – Paul, do you expect that 40 CFR 131.12 is going to show up in Env-wq 1700?

**Paul Currier** – It is already there.

**Allan Palmer** – All the words that are on the left-hand side.

**Paul Currier** – Virtually all the words on the left-hand side are presently in our regulations.

**Allen Palmer** – The rules, for the most part, won't be changing as a result of this.

**Paul Currier** – They won't be changing at all.

**Judith Spang** – We have the original bill text on the left and the proposed bill text on the right. Does that assume that everything on the left is being thrown out?

**Paul Currier** – Yes.

**Judith Spang** – If the stuff in the left is in Env-Wq 1700 and will stay in Env-Wq 1700, if something is on the left, how do we know, on the other pages, what is going to be thrown out and what is going to be remaining?

**Paul Currier** – In all cases, the left is completely replaced by the words on the right.

**Judith Spang** – Yes, in the statute, but in the rules it will still remain.

**Ken Rhodes** – The rules are not being touched by these actions.

**Judith Spang** – You told Allen that all of the stuff on the left is in rules now.

**Paul Currier** – Yes.

**Ken Rhodes** – The other part of this 40 CFR 131.12, the left-hand side is almost a verbatim. You still have that tie-in as well. I think these guys didn't want to write it down twice if it was already there.

- **Motion to made by Ken Rhodes and seconded by Bill Schroeder to make a recommendation to the RR & D Committee to accept the proposed bill text language as presented on the right. A vote was taken. All were in favor. Ellen Weitzler abstained from vote because of a conflict of interest.**

**Judith Spang** – In each of these subcommittees there were other things that were discussed that needed to continue to be discussed. What happens to those that are still up in the air that need to be resolved?

**Bill Schroeder** – One possibility is that in the Subcommittee can recommend future topics for review to hear and discuss in the future.

**Judith Spang** – Would we be getting that report in time for prospective legislation to come forward that would open the door for further discussion?

**Bill Schroeder** – Would you be doing what report?

**Judith Spang** – If something was worth doing but we haven't come to a resolution, a bill could be brought forward that would present the opportunity to work on that issue further. The other dynamic would be for the WQSAC to take it on as part of their work in the coming year.

**Bill Schroeder** – I goes this gets into one of the recommendations of your committee that certain subjects should be discussed more. You actually want to pass some session legislation relative to that. Is that correct?

**Judith Spang** – We would be acting within the context of these two bills. We would just be saying what we would propose for future legislation, specifically relative to these two bills. Some of these other issues that were important but don't appear in these two bills specifically I would hate to see get lost.

**Allan Palmer** – I would think that the working groups would bring them forward as part of their recommendation to our group to continue to work on. For example, I think in here they talk about manmade ponds for wetlands mitigation. Is that one of the ones was brought forth and not finish?

**Paul Currier** – Yes.

**Ken Rhodes** – The way that I approached my piece of this is that this time around under HB 1305 and HB 1348 there were questions raised that went to interim study. It was divided into four pieces. Let's see how they all fit together. Don't lose that list but let's finish the task in front of us now and see how that fits. I suspect that water quality in the state of NH is going to be a living discussion.

**Bill Schroeder** – Later in the meeting we will be setting meeting dates for next year and I don't think that an agenda of topics has been put out but typically DES does that in the September WQSAC meeting. Maybe we can not things that we would like to be on WQSAC's agenda for next year. DES can work those things around whatever other things are on your list for us to do.

**2:30 – 3:25 Report Out from the Working Group on “Definitions”**

**Larry Morse**

**Motion: To approve recommendations of Subcommittee**

Everything revolves around the definition of surface waters that was proposed in HB 1305, which on page one of the hand-out was one short paragraph in the statement on the bottom of the left-hand side, which took the existing definition of surface water in RSA 485-A: 2,XIV and added swamps and all wetlands that were under state jurisdiction under RSA 482-A, which is the Wetlands Program statute, and designated them as surface waters. There was a considerable amount of concern with respect to that concept and some potential unintended consequences. I think that has been the focus of the discussion topics in this work group and has extended beyond the meetings of the workgroup in-house with DES working with the Timberland Owners Association, NH Associated of Natural Resource Scientists with respect to the concept of that. We came out with new proposed text, which is larger than one paragraph and is shown on right hand of the hand-out. I think there was an important concept here which I don't see in here. As part of the proposed bill text, we need to change the reference to “surface waters” in RSA 485-A to “waters of the state”.

**Paul Currier** – Yes, Joel from Legislative Services reminded that we had not made that clear.

**Bill Schroeder** – Can you repeat that again? We need to change what?

**Larry Morse** – All references to surface water in RSA 485-A, with the exception of the definition of surface water, need to be changed to “waters of the state”, which be defined under subparagraph XIV-d down below. I think that is the concept we went to.

**Phil Trowbridge** – I think we did talk about a few cases where we could not do that, particularly around withdrawals.

**Larry Morse** – I think that the focus of the discussions that we had and the concerns that were raised were the common understanding, outside the regulatory aspect, of what surface waters were. There is something different from what lay people understand versus what is embodied in the regulations under Env-Wq 1700, where it included wetlands. The focus here was to bring that concept of wetlands back in under the definition. When we got talking about it and some of the areas within the regulatory framework within the Department that surface water has a different connotation in several different areas, i.e. particularly subsurface system rules with regards to setbacks, which is different from wetlands. I believe we made the determination that instead of talking about the surface waters and to get rid of that confusion, as far water quality standards, what would be considered would be waters of the state. They would be defined in here to match with waters of the US so that we have the same subset of waterbodies in the landscape that we are applying the standards to at the federal and

state level. Hence, we start with the definition of surface water. We are going to keep the definition of it in there because it is used elsewhere in RSA 485-A I think in a different context, as Phil talked about, to include simply fresh waters, tidal waters, including wetlands with standing or flowing waters. Those are the wetter components of the wetlands systems, which act more like surface waters and are appropriate for those areas of the landscape that are regulated by under sections of RSA 485-A.

**Allan Palmer** – Does that mean that there are wetlands that are not surface wetlands?

**Larry Morse** – Correct, this would be primarily wetlands that may not be connected to surface or may not have standing water. They all get saturated from the surface. Farm fields have poorly drained soils and there is a differentiation between those two areas of the landscape and the subsurface system in their rules and setbacks. This definition coincides with theirs and lets the general public understand that there are wetlands that act like surface waters from other standpoints other than water quality.

**Ellen Weitzler** – I wanted to make sure I understood that the purpose of the definition for wetlands is to be not greater than the federal definition.

**Larry Morse** – That is right.

**Ellen Weitzler** – Under the federal definition of waters of the US, wetlands without the nexus would not be protected and the intention of NH is to also not protect those waters.

**Paul Currier** – Yes.

**Ellen Weitzler** – We had the opposite discussion.

**Larry Morse** – The discussion started here and there was a real desire by the subcommittees to get away from that nexus concept because it was too hard to understand in the first place.

**Ellen Weitzler** – You are going to have to get to that because you are falling back on the federal definition here, unless I am misunderstanding that.

**Larry Morse** – We left the federal definition in here, but from a practical standpoint there is no such thing unless you want to spend six months and a whole bunch of money to make that determination. A jurisdictional determination by the Corps required four levels of process and is very time consuming to get that determination made that there is no nexus. I think that there is a feeling that, at least from what we've seen, most wetlands are likely to get covered and identified as assessment units as far as wetlands for water quality. I am not going to go beyond that anyway. Also, we understand that there is federal legislation in the works that may or may not deal with that issue and that issue may change. We wanted to make sure that we at least had the federal requirements covered. Waters of the state is now a concept that we are using to apply in water quality standards. It is stated a little further down in the definition and that is probably where we ought to start. It will be defined to meet waters of the state and waters means tidal waters, fresh waters and wetlands. They define freshwaters under subparagraph A. Fresh water means wherever fresh water flows or stands, excluding groundwater. Tidal waters are where the tide ebbs and flows. A fairly general definition would be supported by a little more. In the regulatory aspect of RSA 485-A there is probably a condition for that but I think for surface waters this is fine. I think we recently talked about Wetlands. The classic definition of wetland qualifies it so it would have to be considered waters of the United States for the Clean Water Act. As far as water quality standards, Paul can you jump in here?

**Paul Currier** – We haven't talked about it. We are not sure if the words water standards are used anywhere else in RSA 485-A. The idea was to do away with the word "quality" because people often think that water quality means things that you measure in the water column and the standards are substantially broader than that. There does seem need to do some further work on that. We may not need that definition if we don't use it in RSA 485-A. I think it is the same thing with the definition for "waterbody". I know that it is used in the statute but I am not sure that the definition needs to be there.

**Bill Schroeder** – To be clear then, under the proposed bill text the definitions for Item E and Item F, water standards and waterbody, may need more work?

**Paul Currier** – Right.

**Larry Morse** – I think that completes the work that we did. I will open it up for discussion.

**Allan Palmer** – The wetlands definition is what we are living under today and Collis Adams was part of the group.

**Paul Currier** – The wetlands, freshwater and the tidal definitions are virtually identical to the definitions statute RSA 482-A. The definition of wetlands in RSA 482-A is not limited to waters of the United States under the federal Clean Water Act. So the state wetlands statute (RSA 482-A) has, in fact, broader jurisdiction than the Clean Water Act.

**Larry Morse** – One of the things that the Committee was concerned about was that, under the state Wetlands Program, things like constructed roadside drainage ditches and detention ponds that have developed wetlands characteristics, are defined as wetlands. These man-made waterbodies were excluded by qualifying the definition as being waters of the United States.

**Mark Hutchins** – It seems structurally awkward that wetlands get their own category but wetlands are actually subsets of fresh and tidal waters. The freshwater definition doesn't even look like a definition to me. Freshwater means freshwater? It seems like we have waters of the state, surface waters, ground water and non-jurisdictional water and under the surface waters we have tidal waters and non-tidal waters and there are subsets of those categories and wetlands fall in both. Maybe I am just looking at it from a classification standpoint and it seems awkward to me. In waters of the state we have three categories, tidal, freshwater and wetlands. It is waters of the state because that is what is jurisdictional. There are other waters of the state that are non-jurisdictional such as groundwater.

**Bill Schroeder** – What is the difference between waters of state and surface waters?

**Larry Morse** – There are a whole subset of wetlands that are not completely under the surface water definition that are under waters of the state definition.

**Bill Schroeder** – In other words, wetlands that do not have standing or flowing water.

**Larry Morse** – Correct, through the discussion of surface water came the story of 9 acres that can be crossed without sneakers never getting wet. How did that get in the definition? There is no surface water and no standing or flowing water in that wetland. If you are going to pick that one up somewhere in your definition you should make a distinction. It doesn't have any surface water but it is still a water of the state.

**Bill Schroeder** – Are water standards supposed to apply to waters of the state?

**Paul Currier** – Yes.

**Bill Schroeder** – Then how do you apply a water standard to a wetland that doesn't have flowing or standing water?

**Larry Morse** – That was another big question and I think we have another section in here in the presentation where we will talk about that outside of the definition aspect of it.

**Paul Currier** – That is one of the reasons to get rid of the word quality in there. For an example, we had one of these wetlands that doesn't have flowing or standing water and the tide does not ebb and flow on it but it has biota and a requirement for biological integrity so that aquatic wildlife can be supported. There are ways of measuring that integrity and that is a water standard. That is how that would work and if it seems odd to apply the word water where there isn't any.

**Ellen Weitzler** – What if it is not water all the time but it is enough to keep biological environment?

**Ken Rhodes** – One of the challenges, which is yet in rulemaking and is why some of the distinction is there, is in doing something out there. One of the provisions is that if you are going to do a project you may have to not degrade the waters of the state. How do you measure that you have been successful in that pursuit when you can't establish the baseline to begin with? At least by pulling a cup of water up, you can test a parameter for degradation. There has to be another conversation about what does all that mean? That is part of the part of definition. You at least have to get your sneakers wet to call it surface water. Then there are waters of the state. How do you measure and get to those things? What Jim, Larry and I run across in many ways has nothing to do with a lake, stream, channel or most anything. It is a pocket in the forest. Now I need an AoT permit and I need to tie all that together and not degrade. That has become an interesting challenge.

**John Hodsdon** – What this is saying now is that my vernal pool, which has no outlet and has water in spring, is now a water of the state but not a water of the US? What does that imply for what needs to be maintained for water quality?

**Larry Morse** – It is a wetland, as defined by the State of NH, under RSA 482-A so any activities would be regulated under that statute, but RSA 482-A does not regulate water quality. It will depend on where the vernal pool is in the landscape and whether the period of time is sufficient to develop the conditions of a wetland. It will depend on whether or not it is a water of the US, and by this definition, waters of the state. Wetlands that we see and are identifying out in the field, most of them are associated with other wetlands systems that have nexuses and would fall under this definition. If you have a vernal pool that has the shading and water temperature to promote the activities that occur. If it doesn't have the other characteristics it wouldn't be a wetland and regulated under RSA 482-A. It is a vernal pool however, but it might not be for water quality standards, and there is a chance that the water quality standards, if someone wanted to go through the Nexus process, might not apply to it but otherwise, it would. What those standards are is yet to be determined and that is part of the other discussion. One of the concerns, as it is currently stated in the Env-Wq 1700 rules, is that wetlands don't qualify for the water quality standards that are currently in statute, which means the parameters of DO, total suspended solids and chemical composition. You can't measure those in wetlands so what they are is what they are. When you start applying antidegradation to the standard then current conditions is the standard that they are held to and you can't change it. You can't lower it which leaves one with the thought that you can no longer get a wetlands permit to do a driveway or do anything because you can't touch the wetland and you can't cut any trees in the wetland or walk through the wetland anymore and that is not the intent. Looking at the classification system and how we use that there has been a couple of uses associated with each of them. We will start to address that situation so that some measures that Paul is talking about as far as biotic and vegetative composition can be applied there so there is a standard which isn't what the condition is now but is a normal standard that can be applied from a water quality standpoint and whether permitting requirements are made. I am not really sure how that relates back to definitions but I think it got us back into where we went with the definitions in some aspect and I understand that we are going to be talking about that issue further in trying to identify what we are trying to cover here. I understand that when you look at this it kind of makes sense to me, but from a different set of eyes it doesn't. To you, it may seem strange and I am not necessarily sure that changing the concept from surface waters of the state to waters of the state required us to throw some of those definitions in there just so we wouldn't have a definition where the term are undefined. I think that is primarily why we did that.

**Paul Currier** – There are still some loose ends. Larry mentioned the details of where we are going to change the words surface waters to waters. There are some additional checks that we need to make sure where these definitions may interface with other statutes so we don't have a conflict. We did research the subsurface definition that Larry mentioned as a result of the working group meeting the last time. I think we are ok there but we have some loose ends and what we like is a concurrence from the Advisory Committee pending further work and a report out by the next meeting on the loose ends.

**Bill Schroeder** – That is suggesting a concurrence with the direction and a listing of loose ends and looking for a further report?

**Paul Currier** - Yes.

**Dan Blais** – When moving forward in this does the Department feel that it is necessary to include language that exempts artificial impoundments. For instance, as we start designing for antidegradation we are going to start seeing wet ponds and things like that that are water quality practices that are being designed. When we are all gone from the Committee and moved on to other things twenty years down the road I think it needs to be known that when these things were designed, they were designed to be exempt from someone saying, ten years down the road, that you can't put dirty water into them. Are you comfortable that the text that is in there now that does exempt these sites or should the Committee include it?

**Paul Currier** – We are comfortable with that. I don't believe it is in rule but in guidance, and you can go to the EPA website, where EPA has said that waters of the US don't include treatment ponds and they don't include construction ditches and you can argue when something stops being a constructive ditch and starts being a natural ditch but those have never been included and with the words "and or waters of the US" we would continue to not include those. We are comfortable with them.

**Dan Blais** – When I looked at the bill as it arrived, the last words, natural or artificial, kind of jump out of the page at some of the designs.

**Paul Currier** – We are taking those words away.

**Ken Rhodes** – This is one of things that Representative Spang referred to that we really need to keep on the list. I will amend Paul's statement a bit. I agree that the EPA guidance refers to man-made ditches. We don't actually want to but your obligation, Jim's obligation and all of your colleagues obligations are, in certain situations, to still flag as wetlands because they do meet the four-part criteria now. Whether or not, you are doing maintenance. There is still work to do and we need to get specific about tying into the definitions. We never really meant that if you created a detention pond that you would need a permit ten years later to clean the thing out or modify it. DES says you can clean it without a general permit but it doesn't say you can modify it bit even if you resized it because you didn't think that it needed to be quite that big. The man-made definition can be varied and Dan, with very much respect, you guys are making man-made ditches all day long at Exit 3. How do they live in the next context?

**Allan Palmer** – If you undersize it in your original design and you want to make it larger so it is more functional then you have to get wetlands permit.

**Ken Rhodes** – You then have to apply antidegradation requirements to that and to create a pond that is naturally created to degrade to begin with.

**Allan Palmer** – It makes sense that the things that are specifically exempted be called out in these definitions.

**Ken Rhodes** – The challenge becomes that unraveling that knot as part of this got to be something that probably would not allow this to take on any context. Yes, there is still a portion of this environment between man-made and naturally occurring wetlands. Everybody seems to know what they want to do but it is going to take a little more time to think about how you want to unravel it.

**Allan Palmer** – If it is being created for stormwater treatment for wastewater treatment it makes sense to me that it is not part of these definitions.

**Bill Schroeder** – What I am thinking is that there are still a number of open items and areas of concern in these definitions. I am thinking that maybe we should ask the Subcommittee that is working on this to keep on working.

**Paul Currier** – My thought is that this is a definitely an issue and it is not the issue that we set out to fix. I don't believe that we have ever tried to apply water quality standards to treatment ponds or roadside ditches. We don't do that and we don't try to go out and try to assess them as to whether they support swimming or aquatic life and we haven't asked anyone to fix one and we didn't ask anyone to fix one because we didn't think they supported some designated use and we don't intend to do that. We don't have to fix that situation. It is good enough for us to read the federal guidance and say we are not going to apply water quality standards to man-made structures like treatment ponds and ditches and that is entirely consistent with past practices.

**Judith Spang** – I went out with Jim Gove and the Land Use Commission saw this wetland that looked entirely natural but had been created by a road that went through and the banks went right down. You could see that it had never been there before but it was a fully functioning wetland that had been there for a long time.

**Larry Morse** – Was it constructed as a storm water facility?

**Judith Spang** – No, but you are talking about a man-made wetland. I think we have to make sure that we don't throw in that kind of a situation. There are other man-made wetlands that have become fully functioning wetlands.

**Larry Morse** – I think we go back to the guidance. The guidance doesn't specify that, and I think that the guidance is fairly specific to what they would not consider a wetland. It is constructed roadside ditches and storm water treatment systems that were constructed for those purposes.

**Judith Spang** – Would it also tell you LID created systems that could become fully functioning?

**Ken Rhodes** – Following up on the triangular discussion, I don't disagree that if you put a road through somewhere thirty-some odd years ago and all of a sudden it is backed up and it is doing some stuff.

**Larry Morse** – I do believe that situation you discussed is exempt.

**Judith Spang** – Relative to the problem of how you decide the function or value of that wetland. You are saying that it doesn't make sense to be measuring DO, for example?

**Larry Morse** – There are some wetlands that are more of surface waters that you could do that. The question is will you ever meet the DO quality.

**Judith Spang** – I was thinking, this might be more appropriate to the designated uses discussion and particularly the tiered uses, I was wondering if the measurement should be, instead of DO or pH for example, what use does it support? No matter what the chemical, physical, etc., if it is able to support full diverse plant or animal species.

**Larry Morse** – My understanding is that the Committee is in agreement with that but that is another road and whole different situation that is separated from what we are doing here, which is the development of quantitative classifications systems for these areas of the landscape, which we don't have. There are some that we talked about but we are not there yet. They need to be developed by the rulemaking process and the legislative process when it comes time for them to accept the classification. That is a whole another issue and process that is probably going to continue for years down the road. No one wants to see it get lost and I don't think that the intent is to forget that. Paul is not going to forget that.

**John Hodsdon** – In previous discussions here, talking about my irrigation pond, you have all been very supportive of continued use of it but I am wondering where does it say that I can continue to pump water and use it for irrigation if that might detrimentally affect the bass in it that my father put in twenty years ago? The primary reason it was built was for irrigation, not fishing and it is not part of the public waters as far as I am concerned. Spring peepers use it and there was a turtle there that I didn't put in and maybe there will be another one someday. The Subcommittee's have been very supportive and they want me to be able to use it and continue farming and use it for irrigation but where does it say that I can do that? Will there be somebody that comes in and says that you can't do that because the wildlife needs it.

**Paul Currier** – I think that will be part of our discussion on tiered uses later on in the meeting.

**Larry Morse** – Bill, I would like to respond to your suggestion. I feel comfortable that the definitions that we put out here covers what we intended to do. That is not to say that other work may not need to be done to clarify certain sets of circumstances but I think some of that work involves looking at the regulatory framework that is outside of the scope of the WQSAC. I am not sure that the subcommittee should continue on it. I think that there is consensus of the group that at least the definitions work, although they seem awkward to some. We should move forward with that and let Paul and his group finish the vetting. We may have one more meeting and then we are done.

**Paul Currier** – I think we can do that and report to the next WQSAC meeting in September. I think that will be in time for the RR & D Committee to do its work.

**Bill Schroeder** – The suggestion is that the Committee would not meet more and DES would look into some of the issues. At this meeting we would not be seeking to approve this proposed text. Does that sound good to the rest of the Committee? If it does then I don't think we don't need a vote.

**Allan Palmer** – Paul, in the original you had three definitions (High Quality Water, Outstanding Resource Water, Surface Waters). One of them you tacked to the new proposal and the other two just disappeared. Is that because they are covered sufficiently?

**Paul Currier** – Those were associated to antidegradation and when that language was changed we didn't need them anymore.

**3:25 – 3:30 Break**

**3:30 -3:35 Report Out from the Working Group on 'Enforcement' Phil Trowbridge**  
**Motion: To approve recommendations of Subcommittee**

**Phil Trowbridge** – All of the enforcement language was in HB 1348 and on page 4 of your handout about the proposed bill text. The group decided that HB 1348 should be determined inexpedient to legislate. The reason for that is that we determined that DES already had the enforcement authority that this bill text was going to give us. The bill was just clarifying existing authority and there was no

need for it. Given all the complicated discussions around definitions and antidegradation, we decided it wasn't worth the effort to try to add clarifying language. Since it didn't do anything we decided to ITL this one.

- **Motion to recommend as Inexpedient to Legislate made by Phil Trowbridge and seconded by Jasen Stock. A vote was taken and all were in favor. Ellen Weitzler abstained.**

**3:35 – 3:50      Presentation on Revising the Classification of Surface Waters in RSA 485-A:8**

**Paul Currier**

**Paul Currier** – We are talking about a proposal to replace or start a process that would replace the existing classification system, which has Class A and Class B waters with a system of tiered designated uses. We talked about this at the last working group meeting. As you recall, water quality standards have three essential components, and this is straight out of the Clean Water Act: Designated uses, which are goal uses and answer the question, “What do we want to use the waters of the state for?” Another way of putting that is what is valuable to us. There then needs to be criteria to support the uses that are measurable attributes that we can go out and measure to determine if designated uses being supported. The third is an antidegradation policy. Designated uses usually have some sort of narrative description. These are words out of our rules and statute like acceptable for fishing. Criteria can be either narrative or numeric. We have a mixture of both and they occur both in the statute and our rules. This is the narrative for biological integrity that is in our rules. An example of a numeric standard is, and this is in the rules, the pH shall be 6.5 to 8.0. WQ Standards are in two places, the first part of RSA 485-A in the statute and in the Code of Administrative Rules. We also have guidance associated with water quality standards. These are not officially part of the standards and are just guidance documents issued by the Department in order to implement the law and the rules. The important one is probably the Consolidated Assessment and Listing Methodology (CALM) which describes in detail the numeric and quantitative measures that we apply to assessment units in NH in order to determine whether water quality standards are met. In NH the statute says that there are two kinds of waters, Class A and B. It has a description of it. The legislature is responsible for assigning classifications to waters. There is a process whereby the Department makes recommendations to the legislature and the legislature passes laws that establishes classifications. The two page memo has a PDF copy of the map. If you want to read it you can blow it up on your computer screen. The legislature, since 1949, has made a number of waterbodies Class A. There is a hundred and some odd of them, everything else the legislature has classified B and that includes all kinds of waters, rivers and lakes, impoundments, wetlands, estuaries and oceans. We have a water body catalog. We started it in 2000 and it is now in its second iteration. The waterbody catalog assigns assessment units to all the mapped waters of the state. This is a picture from the 2008 catalog that is based on the 1:100,000 national hydrography dataset and it has no wetlands in it at all. In 2010, we moved the whole catalog to the 1:24,000 NH hydrography dataset and we added wetlands. The map got better. Each different color blob on the map is a different wetland assessment unit and we didn't have that in 2008 in our catalog. All together we have 60,000 assessment units, counting the wetlands, and about 50,000 of those assessment units are wetlands. You may wonder what the difference is between Class A and Class B waters. There are relatively small differences. The top ones are in statute and the rest are in rule. There is a difference in bacteria numeric criteria. There is a provision in Class A that says no discharge of any sewage or waste. There is a bunch of “not unless naturally occurring things” that are in the statute. Those are the differences, practically speaking, they are relatively minor. In fact, based on the CALM, which is based on guidance which interprets the rule and regulation, whether the water is Class A or Class B, the designated uses, the desirable things to society that those waters should support, are exactly the same. We spend a lot of time trying to evaluate aquatic life, primary contact recreation (swimming). We don't spend any time on water supply. Fish and shellfish consumption we do some with and wildlife we do nothing with because we have no criteria. That is what we have in place right now. Think about designated uses instead of Classes. Instead of thinking what

classification should the surface water be, think surface waters by surface water, assessment unit by assessment unit, what designated uses do we want our surface waters to support. Each waterbody will be assigned its own designated use and each designated use could possibly have tiers and each tier could have different criteria. This topic has been explored by EPA in the context of tiered aquatic life where you go from the natural condition, with no human beings around, and no human impact on the aquatic ecosystem through the scale, through benign change, through significant change due to human activity due to impaired or unacceptable change due to human activity. This is called tiered aquatic life use support. Maine has adopted this. They still keep classes and they put the scale in the classes and they have a narrative description of each class and they have some quantitative criteria in there. Ohio has also done this. They have a tiered system and words that describe the tiers. The tiers for aquatic life are called warm water, exceptional warm water, modified warm water, two tiers of cold water, inland trout streams, native fauna and limited resource water which have sub-categories of acid drainage and small drainage way maintenance. These are examples of how other states have done it, leading to a conceptual matrix, which the working group folks have all seen before. We have added geomorphic integrity to the existing designated uses, which was proposed in the original HB 1305. For aquatic life, you might have tiers along that scale relative to aquatic life use support. These words mimic the kinds of designated reaches for a designated river in RSA 483. You might have a tier that is natural and essentially undisturbed, rural, moderately disturbed, community, more disturbed and urban, if you have a stream that runs through a city and is pretty well hammered for aquatic life but it still supports the kind of biota that you would expect in an urban stream. You can create tiers for all of the designated uses and some of them don't look like aquatic life. Another example is swimming. You might create tiers for swimming and in fact this is essentially what the statute has done already. If you expect frequent swimming, you might have a higher quality, a lower expectation for bacteria that can cause illness. There can be a tier for occasional swimming. You don't expect people to be swimming a lot except off of a boat. You might think that you can allow a little more risk of illness if they did fall in. Then you might have a rare category where no one would swim on an intentional basis but they still might fall in. Swimming is full body contact. You can do the same thing for all the designated uses. This is just something conceptual to start the thinking process and is not a recommendation. Some examples are the twelve digit hydrologic unit code around Concord and the matrix I just showed you. How might we assign things based on how we do things now? Let's look at the ones we are familiar with, aquatic life, swimming and drinking water supply. Let's look at the drinking water assessments in the vicinity of Concord. We are taking about that HUC12 and we are going to zoom in on Horseshoe Pond. You can see from the aerial photo that there is development around it and there is some agriculture use. We might assign that to the community category for aquatic life because the landscape is used by humans for various things so we would expect the aquatic life in Horseshoe Pond to reflect that and set our criteria accordingly. Swimming might be occasional and there are no drinking water intakes in the immediate vicinity but Horseshoe Pond goes out and drains in the Merrimack River, which goes on downstream and provides drinking water for the City of Nashua. The City of Manchester has been planning to tap the Merrimack River for some time so it could be potential source water. It is the same thing for the Merrimack River. You take each assessment unit and ask where would we assign it on one of these tiers and then develop criteria that go along with the tier. Another example is an unnamed wetland that is adjacent to the Merrimack River. Based on the landscape setting and human activity we might assign that to a community status for aquatic life. We don't expect there to be any swimming and we might say that there is no water supply potential for the wetland. That is how the system that assigns designated uses directly to assessment units might work. Practically speaking, how would we do this? If we were to transition from the Class A and B system we have now, which is basically a historical construct that started when the legislature first adopted their Classification system in 1947 and has been built on over time, including the passage of the Clean Water Act and some changes, how would we do it? The legislature may ask DES to explore this system and report in the fall of 2011 in time for introduction of legislation for the 2012 session. We started working out the details and continue to work with the WQSAC as a sounding board for ideas and we stay in touch with RR&D. There are also some issues we need to start talking to EPA about if we are going to start thinking in terms of how to transition.

That is the first step and what we would like consideration of now. There might be two phases. In the next phase, the Legislature would receive the DES report. If they were favorable to the proposal, they would then adopt the new classification system and direct DES to proceed with reclassification. DES would develop that, with lots of stakeholder interaction, and bring it back to the Legislature with recommendation for reclassification that would map all the waterbodies in the state, all 60,000 assessment units, from the classification they have now, either A or B, with designated use support with the criteria we have now into a matrix, where each assessment unit would be assigned a set of designated uses and a tier for each designated use and that would have associated criteria.

**3:50 – 4:10 Report Out from Working Group on “Designated Uses”**

**Judith Spang**

**Motion: To Approve recommendations of subcommittee**

**Judith Spang** - That goes a long way in reviewing what it was we were talking about terms of implementing our designated uses. Paul mentioned that we are thinking of adding geomorphic integrity as a designated use. I think that the rest of our designated uses are pretty much what EPA has suggested and has been adopted by many other states across the country. The actual designated uses wouldn't change much. It is just how we would apply them in a more specific way to every water body. So instead of having a classification where the same designated uses gets assigned to a whole padre of rivers and waterbodies, the designated uses would be customized to each one. If you look on page 2, we have taken out the whole section from the original HB 1305 on the left-hand side and instead have put it into session law, which is not an RSA but is still a bill never the less. We are saying the General Court requests a comprehensive review of water quality standards, including the assignment for designated uses for waters of the state, numeric criteria, and the antidegradation policy. We are taking the step that is necessary to implement something like this and tying the state in with the EPA. The Commissioner is going to be asked to review WQ Standards and come up with a report by September 2011.

**Jasen Stock** – Going back to John's farm pond, the one with the turtle, I noticed in some of the other states classifications there was an agricultural classification or use. You will see it under AA, the second from the bottom. I am curious, to get to the other irrigation ponds, even on the Merrimack River I know. Gold Star Sod is an example where they used the river for irrigation and some of the floodplain. I am curious if there is enough activity or call for such the addition for such a column on this table. I think that is one of the places we would start. I think in the June 8<sup>th</sup> memo there is an example of other states. Other states get more detail about designated uses than we do. That is something to think about. If you look back at the history of our reports, NH, at least one time or another, had an agricultural designated use we reported out on that. Bill Schroeder mentioned that aesthetics might be one that would be worth considering. Let's use John's farm pond for an example. If you have agricultural use out there, you would rate that fairly high because it is going to get a lot of agricultural use. You might put it down in the fairly highly disturbed category for aquatic life because we don't expect it to be natural. John's grandfather made it for a farm pond and it isn't natural. Depending on how frequently John goes to cool off in it we can assign a class here. With this kind of a system you can tailor it so that farm ponds and things like that fit into the system and we don't create unreasonable expectations for him by having a one size fits all.

**Judith Spang** – That is when the existing natural conditions conflict with the desired uses. At our last meeting, Representative McClammer said that he thought we needed to broaden beyond the seven that we have identified. This really moves us down the road in terms of doing a more comprehensive look at how we deal with land use in the state. You would have to be thinking about what waterbodies we want available for recreation. Where do we want our industrial uses? It sounds like what we are going to allow on different waterbodies but it is also is going to guide growth and where those uses will occur statewide. It can be a very powerful tool for developing a comprehensive look at our landscape and I think the Commissioner is very big on, watershed-wide and beyond.

**Paul Currier** – I think what DES would do is, if the Advisory Committee thinks it is a good idea and wants to recommend to RR & D, that they report this out as legislation as a result of interim study.

DES will continue to work on this over the summer and begin putting more detail on what are sketchy ideas right now.

**Bill Schroeder** – I think we have struggled in WQSAC over the years with shortcomings of our existing system, Class A and Class B, and how some things don't seem to make a whole lot of sense. We have talked about how there must be a better classification system we could have that would serve us better. I for one, as a member of the Committee, would like to take this on and if passing some session law gives the Department the necessary resources, requirements or deadlines to try to make that happen, then I would like to see that be a major focus in the next year or so. I think this is going to take a lot of work. An aggressive schedule is good. Some of the things are asked for here in the review, a history of standards and shortcomings and what we hope to get out of the new system. All of that I think would be good for motivation.

**Judith Spang** – Would it be appropriate to ask for a vote on the recommendation of the Subcommittee to move forward?

**Bill Schroeder** – Are there any other questions or comments?

**John Hodsdon** – On the irrigation side the rivers people get involved in this and I was involved in the instream flow twenty years ago and there was a lot of talk. I am not sure what got done but there is always a conflict there because those who are irrigating out of the river need the irrigation when the flow is low just because of the climatic nexus and that should be taken into consideration.

**Bill Schroeder** – Are you suggesting that should be an item thought about in this classification system?

**John Hodsdon** – Yes, add to it an agricultural classification too.

**Judith Spang** – That is one of the designated uses that need to be protected, which I think that it is. Agriculture is generally one of those beneficial uses that are considered one of the seven things to be protected.

**Ken Rhodes** – Under the proposed bill text, I am going back to a previous conversation we had two hours ago. You used the phraseology of “The General Court finds that administration of WQ Standards”, which is used several times in here. Your previous commentary under definitions was maybe water standards instead. I just want to note the paradox between the two. If you are going to go forward, and I think it is essential to do this exercise if you want to get out of the Class A/Class B system, what do you want to define things as and how do you put those rules in place? I think there is a lot of conversation, even amongst some of the things we thought about so far. The seven, the six plus one, is nice. There are a couple of others here that we talked about and I think each has its own conversation that will be real important in this. The only other thing that I don't know but I think is part of it, whatever phase it is, there will be conflicts. For John's farm pond what I try to get my mental arms around is the antidegradation part of that. In the using of a farm pond for irrigation he is kicking the living hell out of aquatic life. You are not allowed to degrade anything. Even though you define them as different tiers there is the resolution of those inter-use conflicts that I think is going to be very important to the whole discussion, to the point, as the story goes, of his neighbors objection over aesthetic uses. The devil is in the details.

**Judith Spang** – Yes, I am glad that I am not on Subcommittee anymore.

**Unknown** - In terms of designated uses, tiers and resolving conflicts: who is doing that? Are we doing that, or is DES doing that? I am listening to the irrigation thing and I am representing water supply and I am thinking the same thing, that the time you want to use water for irrigation, we want to use water for drinking water. That has an impact on aquatic resources. There are many competing interests at the same time? How does that work?

**Paul Currier** – The same way it works now. The difference here is that there is some flexibility in the assignment of tiers so for example, you don't have the highest expectation of the same waterbody for all of the uses all of the time. Relative to withdrawals, it always remains that a certain amount of water has to be left in the stream or waterbody for aquatic life and some water can be taken out for off stream uses. What the designated use process states is that water has to be suitable quality for the designated uses. When a water supplier takes water out of the stream and takes it off to become drinking water, the water in the stream needs to be of suitable quality so they can make drinking water out of it. When John takes water out of his pond to irrigate, it has to be suitable quality so he can use

it to grow crops and he has to leave enough water in the pond so everything doesn't die. Durham has to leave enough water in the Lamprey River so everything doesn't die. There is some flexibility in that tiered system where you can adjust the expectations.

**Bill Schroeder** – I think that we have segued into discussion on the motion on the floor.

- **The Motion to move was made by Chair Judith Spang to move the Subcommittee's report and John Hodsdon seconded. A vote was taken and all were in favor. Ellen Weitzler of EPA abstained.**

**Bill Schroeder** – We are now ready for discussion on that new motion John.

**John Hodsdon** – I probably should have had another use for the farm pond in conjunction with the Meredith Fire Department and water department. There is a dry hydrant there, which they use for training every year and a couple times in the past they have extensively withdrawn from the pond to help control fires up the hill. There were a whole bunch of them down around Neil's shore. They found it easy to talk a walk around my pond and take it out of there to put out the fires than to take it out of the lake. Water levels went down some but the spring is feeding it.

**Bill Schroeder** – The new sections that were proposed in the original bill text. If I understand this motion, we wouldn't be doing that? The left-hand column is not going to be done and the right-hand is the proposal instead. Is that right? If it takes us several years to get a new classification system in place, do we have any sort of problem in the near term by not putting these designated beneficial uses into law? I guess that is the question for DES?

**Paul Currier** – I don't think so. They are there but you have to read between the line, which is what we have done and published in the CALM. The EPA has always been satisfied that we had a sufficient number and level of designated uses to meet the requirement of the Clean Water Act. I think the legislature has always been satisfied because we report to them at the same time we are reporting to EPA that we are assessing our waters for the right thing. We can just keep doing what we are doing in the interim.

#### 4:10 – 4:20      **Decide schedule for future HB 1305 & 1348 Meetings**

**Phil Trowbridge**

**Judith Spang** – We need to have the Interim Study for the final report in for November 1<sup>st</sup> and I noticed is that October 31<sup>st</sup> is when DES will submit a report that will summarize everything that happened here. Paul, were you intending that would be everything that happened at the Subcommittees or RR&D Committee?

**Paul Currier** – Yes, the idea is that we would provide a report that would serve as your report.

**Judith Spang** – Moving backwards from November 1<sup>st</sup>, if we could have the entire vote of the RR&D Committee on October 26<sup>th</sup>, we would have a final meeting of the Subcommittee that would vote on its recommendation to the full Committee on October 4<sup>th</sup>. September 21<sup>st</sup> would be the Subcommittee's first formal meeting. We had discussed having a public hearing at that point for the public and affected parties to come and express their opinions about this and that would give the opportunity for anyone from RR&D who wanted to get up to speak on it and for us to hear from people who are not around this table about how they feel about it. That would be September 21<sup>st</sup>. Phil, way back in May you set October 13<sup>th</sup> as the next of WQSAC but this is the schedule that would probably work smoothly for us.

**Phil Trowbridge** – September 21<sup>st</sup> would be hearing?

**Judith Spang** – Yes, and our first Subcommittee meeting. Are we thinking that there is still some more work to be done on the definitions and can we have those done by September 21<sup>st</sup>?

**Paul Currier** – Yes.

**Phil Trowbridge** – Would there be a need for another WQSAC meeting before then for would we just go straight to that?

**Judith Spang** – We are going to need to know what it is we are bringing to the hearing. It would be good to have those definitions. I don't know if you need to have agreement on the definitions before then.

**Paul Currier** – What if we schedule a full Advisory Committee meeting for early on in September?

**Judith Spang** – That would be the week of September 13<sup>th</sup>? The week before that is Labor Day.

**Phil Trowbridge** – Are there any known conflicts on the week of September 13<sup>th</sup>?

**Judith Spang** – You generally like to meet on Wednesdays?

**Phil Trowbridge** – We are proposing the second Wednesday of the month.

**Judith Spang** – That would be the 15<sup>th</sup> then?

**Bill Schroeder** – Wednesday has been our traditional meeting day. I believe that the WQSAC has met on Wednesday afternoons.

**Phil Trowbridge** – We have met Wednesday afternoons or mornings, one or the other.

**Bill Schroeder** – Dan and I have weekly meetings on Wednesdays in the middle of the day but everybody else has issues too. Does Wednesdays seem like a good time for people or is there another day of the week they would like to propose? A part of that may be if you already did some research to see if meeting rooms are available.

**Phil Trowbridge** – We didn't check meeting rooms, just holidays and things like that. Wednesdays are good.

**Lisa Fortier** – We ended up with Wednesday because you can almost never get a meeting room on Tuesday because they are already booked by people who have reoccurring meetings who book the rooms a year ahead of time. That is a limiting factor.

**Ken Rhodes** – Would this time be a little more limited because we are just talking about a report back on definitions?

**Phil Trowbridge** – We would like it to be two hours at the most.

**Ken Rhodes** – You can talk about that for two hours?

**Bill Schroeder** – I am just trying to find out about Wednesdays in general. How would you like to keep it on Wednesdays? It sounds like there is a meeting room to keep it on Wednesdays?

**John Hodsdon** – We could also inquire tomorrow.

**Bill Schroeder** – If we know if this is morning or afternoon we can shift occasionally so I think we are ok.

**Lisa Fortier** – The meeting rooms tend to be open more on Monday and Friday because no one wants to have meetings then.

**Judith Spang** – The sixth is Labor Day.

**John Hodsdon** – The mornings of the third Wednesday is the Waukegan Watershed Advisory Committee, which will be on the 15<sup>th</sup> but if you schedule it at the same time I will be here instead of there.

**Bill Schroeder** – So the third Wednesday is not good for you.

**Larry Morse** – The third Wednesday is not good for me either because I have pre-hearing conferences for the Wetlands Council that today.

**Phil Trowbridge** – So the rest of the dates are second Wednesdays. What is the second Wednesday in September?

**Phil Trowbridge** – Is afternoon or morning better.

➤ **A vote was taken for afternoon or morning meetings. Afternoons won.**

**Phil Trowbridge** – That would be a 1:30 to 3:30 time slot.

**Bill Schroeder** – Back to September, do you want to make it the 8<sup>th</sup>? Does that work for people? The main business should be the Report on Definitions. Should that be the only business and then we move into other business in October?

**Phil Trowbridge** – Yes. I think this meeting should just finalize the new legislative stuff and we will finalize the new agenda items.

**Bill Schroeder** – That will be on Wednesday the 8<sup>th</sup> at 1:30.

**Paul Currier** – If we need a workgroup meeting on definitions, I will give you a call.

**Judith Spang** – I mentioned October 4<sup>th</sup> and it should be October 5<sup>th</sup>. We have a lot of Commission meetings between legislators on Mondays. That would be just the Subcommittee that would be voting.

**Phil Trowbridge** – Our schedule from here on out is September 8<sup>th</sup> at 1:30 for the WQSAC, just dealing with legislative stuff and September 21<sup>st</sup> would be the RR&D hearing. October 5<sup>th</sup> is the RR&D Subcommittee vote to recommend to the full Committee. October 26<sup>th</sup> would be the vote by the RR&D on the proposed legislation. The final report is due on November 1<sup>st</sup>.

**Judith Spang** – The hearing will be in the morning at 10:00 am.

**Phil Trowbridge** – For the next year we choose the second Wednesdays every other month. In the e-mail I sent I put down the dates of October 13<sup>th</sup>, December 8<sup>th</sup>, February 9<sup>th</sup>, April 13<sup>th</sup> and June 8<sup>th</sup>. It will probably be dominated by this designated tiered aquatic life use classification discussions. We will propose what the topics are in our first couple of meetings.

**Bill Schroeder** – Those will probably all be at 1:30 in the afternoon and if we have a room problem we will all shift to the morning.

#### 4:25 – 4:30 Other Business

**William Schroeder**

**Bill Schroeder** – In the March meeting we talked about revisions to the Env-Wq 1700. Are they basically on hold at this point? What are the plans for that?

**Paul Currier** – They have been on hold because we haven't known what to do with the "not unless naturally occurring". We are thinking we will let HB 1305 play out a bit. It has played out a bit now so I think that we are ready to move forward with that proposal. The proposed legislative changes have no affect on the proposed changes for Env-Wq 1700 so we can move forward with the proposal. We owe the Advisory Committee some additional explanation.

**Bill Schroeder** – My sense of the discussion that we had back in March was that there were changes to the revisions to Env-Wq 1700 and we would like to take a look at that again and talk about it.

**Paul Currier** – Maybe we can do that in a September meeting?

**Bill Schroeder** – We wanted to just focus on just focus on the legislative.

**Mike Kappler** – Maybe we can do it in the October meeting?

**Paul Currier** – Yes.

**Ken Rhodes** – September is going to be dominated by the completion of definition?

**Paul Currier** – Yes.

- **Motion to adjourn from mike Metcalf and Dan Blais seconded. A vote was taken and all approved.**

**Adjourned at 3:45**