



**MEETING MINUTES**  
**March 12, 2010**  
**DES Conference Rooms**  
**9:00 a.m. – 12:00 p.m.**

**Members present:**

Wendell Berry  
Jennifer Czysz  
Mark Gallagher  
Mark Hemmerlein  
Jim Haney, Ph.D.  
Eric Orff  
Robert Spoerl  
Larry Sunderland, Vice Chair

**Representing:**

NH Business and Industry Assn  
Director Rep, Office of Energy & Planning  
Commissioner Rep, DOS  
Commissioner Rep., DOT  
Scientific Community, UNH  
Fish & Game Commission  
Commissioner Rep. DRED  
Conservation Community

**Term:**

July 8, 2010  
Indefinite  
Indefinite  
Indefinite  
August 22, 2010  
August 22, 2012  
Indefinite  
September 19, 2010

**Members not present:**

Phil O'Brien, Ph.D., Chair  
Diane Hanley  
Fred Murphy  
Dennis Pavlicek  
Bo Quackenbos  
Ken P. Wilson  
Vacant  
Vacant  
Vacant

NH Lakes Association  
NH Assn. of Conservation Commissions  
Planning Boards  
Municipal Officials  
NH Association of Realtors  
NH Marine Dealers Association  
Tourism Industry  
Commissioner, Dept. of Agr., Markets & Food  
Ex. Dir. Rep. F&G

August 1, 2012  
August 22, 2010  
August 1, 2011  
August 1, 2011  
June 27, 2011  
August 22, 2011  
Expired  
Indefinite  
Indefinite

**Staff Present**

Jacquie Colburn  
Jenn Rowden

Lakes Coordinator, Watershed Management Bureau (WMB)  
P.T. Asst. Planner, WMB

**Guests:**

Richard "Dick" Smith,  
Don Kent

NH Bass Federation  
State Conservation Committee

**Opening**

Acting Chairman Sunderland called the meeting to order at 9:04 am, welcomed Don Kent, the State Conservation Committee nominee for LMAC membership, and introduced Dick Smith, conservation director of the NH Bass Federation and prospective member of the LMAC representing fishing interests if that position is established by SB 441. A quorum was not present.

**Minutes**

Minutes of the January 2010 meeting were not ready.

**Status of Committee Membership**

Travel Council – Jacquie contacted Jan Barker, NH Travel Council Director, regarding Jim Morash's interest to serve again as the tourism community representative to the LMAC. The Travel Council will be meeting this week and she is hoping to hear about any action taken regarding Jim Morash's nomination.

Fish and Game Dept. – Jacquie explained that the replacement F&G representative has not been named, but may be someone from the Inland Fisheries Division of F&G.

**Other Committee Business**

- 1) Water Quality Standards Advisory Committee – A replacement for Bud Berry on the WQSAC is needed. Jacquie will attend the March 24 WQSAC meeting to get a better sense of its work and will report back to the LMAC at the May meeting.

- 2) Committee on Committees – Jacquie, Laura Weit and DES Asst. Commissioner Walls attended the February meeting of the committee; the LMAC, RMAC and the Local River Advisory Committees are exempt from the sunset provisions. HB 1689, the bill listing exempted committees has passed the House; it still needs to be approved by the Senate.
- 3) Jacquie reminded the committee that we have to select a lake or lakes to visit for our July meeting. Jim Haney mentioned that he has a class working on Powwow Pond in Kingston, relating depth to amount of phosphorus going into the lake. He added, there could be cyanobacteria blooms from herbicide treatments that the residents want to use on native vegetation. Other suggested lakes to visit included Cobbetts Pond, Canobie Lake, and Kezar Lake.

### **Key Discussion Issues**

- 1) **Lake-Related Legislation** – Jacquie Colburn  
The list of pending legislation of interest was reviewed. Most bills setting up committees have been ITL'ed (killed) by the respective committees. HB 1305 and HB1348 (surface water designated uses and enforcement) and HB 1234 (disclosures in sale of shorefront property) are recommended for interim study. HB 1266 (notification requirements for lowering water levels) has passed. HB 1462 establishing a shoreland advisory committee has been drastically amended and simplified.
- 2) **Lakes Management and Protection Program (RSA 483-A)** – Jacquie Colburn  
Jacquie went over the recent changes in SB 441, with special attention to language pertaining to the carrying capacity definition and establishment of a carrying capacity methodology. NH Marine Trades Association and NH Fish & Game Commission have both expressed concern with the bill. An article from the "Hawkeye" newspaper was passed out, where Bill Carney who wrote the article characterized SB 441 as an "Anti Fishing Anti Boating" bill. Jacquie is working with Senator Merrill to amend SB 441 to remove the definition of carrying capacity and development of a carrying capacity methodology. She suggested holding a one-day forum, possibly this summer, to discuss carrying capacity and how it might be implemented. Dick Smith offered to help and suggested it be at Squam Lake since the Water Recreation Opportunity Spectrum (WROS) analysis has been conducted there.
- 3) **The Public Trust** - Jacquie Colburn and Captain Mark Gallagher  
Jacquie gave some background on the February 2006 State Agency Lake Forum where the LMAC and the NH Lakes Association met with Governor Lynch and several agency commissioners to discuss lake management in NH. Jacquie provided a list of attendees from the Forum, the Action Items Ranking Sheet, as well as the pages from the Forum minutes that contained the discussion regarding public trust.

Captain Gallagher pointed out that he had raised this issue at the Lakes Forum because different agencies, the Legislature, and the Governor's Office have different ideas about what the public trust means. There isn't a common understanding of the term, the activities that affect the public waters, or how we protect the public waters. What the LMAC accomplishes depends upon the Legislature's and Governor's understanding of what the public trust is and to a lesser degree the agencies. At some point we need to pull the areas of concern regarding public waters together, the fisheries, the water quality and the uses. He also cited the strain between the "rights" of lakeshore owners and the non-owning public that wants to use the lakes. We need a shared understanding, must anticipate changes and be able to react before the damage is done or the impact happens. Lake management must be consistent with the public trust, whatever that is, but we all need to be working toward the same goal. The development and growth (i.e. boating activity and shorefront development) that is going on regarding our lakes is ahead of what we are doing as a committee to ensure good lake management and protection.

Captain Gallagher referred to the Lakes Forum minutes indicating that he had raised the issue and Rich Tichko (who worked at F&G at the time) spoke up in agreement as did Director Barrett of the Dept. of Safety and Alice Chamberlin, from the Governor's Office. Alice's comment from the Forum was, "we can develop an agenda that moves forward; we have mentioned this issue of public trust, which frankly almost leaves me overwhelmed with how we would begin to address that." It was recognized that we need to move this forward, but it was also recognized that it is a difficult issue. But it is hampering our progress because we don't have a common understanding of what the public trust responsibility for the State is.

Jim Haney recalled a past meeting of the LMAC where an attorney from the Attorney Generals office spoke to the committee about public trust. He provided some perspective on what other states do, but it is not universal

across the country. Jim said he thinks there is not a lot of voice for public trust in the State, yet we don't know what it is but we know what the opposite is – privatization. We need to revive this periodically we recall that there is something here that we are trying to preserve and discuss it. Perhaps getting the perspective of what it came from, what it means today and what we can do about it. Captain Gallagher added the public is not represented; they don't know what the term means. But if the public is affected then they will get involved; he cited the headway speed issue on the Magalloway River in Errol. You must talk about these issues in advance – otherwise they can be a problem. We need to be proactive, and we should educate the public regarding issues pertaining to the public waters; we need to be sure to communicate with the public.

Acting Chairman Sunderland asked where do we start, we discussed it a few years ago and then it didn't go any further. So how do we get the word out to legislators and others, should we develop a white paper regarding the issue? We need something that we can review and agree on and then proceed from there. Mark Hemmerlein added that he is still somewhat confused about the Action Items regarding the Public Trust, because most of our regulations embody the public trust; it is based on riparian rights correct? Captain Gallagher added that when you get into the issues and uses then you get into conflicts or uses that aren't contrary to the public trust, but may favor one user group over another and the laws that allow some activities impact some user groups more than others; somewhere along the way there has to be a balance. We need to have the Legislature and agencies have the same understanding of what it means. We don't get to determine that it means what we think it should mean. If we are going to function in an environment where the public trust is equitably applied then the Legislature, the agencies, and the public cannot have different concepts of what the public trust is.

Captain Gallagher indicated that the placement of moorings and swim rafts in the water are often used to claim public waters for private use. Some concept of public trust exists for each user group, so we need to drill some more into that public trust concept and then someone needs to tell us what the balance is going to be in New Hampshire. It would help put us on the same page. It seemed to generate some interest at the Lakes Forum, but not much has happened since.

Jacque suggested having the agencies prepare a statement indicating what they think the public trust means in terms of their mission and responsibilities. Captain Gallagher responded that a common understanding among the agencies is important however, the Legislature and the Governor should probably be determining what the public trust is. For example, historically moorings were used to artificially delineate a private citizen's claim to the public water, so to prevent the proliferation of moorings the Legislature enacted laws to address this. Now, swim rafts are being used for this purpose, however, is it okay to allow swim rafts to be installed unregulated when they have the same impact; this is an inconsistency. How do you balance water level regulation to provide for existing flowage rights and downstream flows and at the same time accommodate the needs to support fisheries?

Bob Spoerl concurred that some resources are indeed set aside and should be managed and protected for the public. He saw the need for land issues and water issues coming together such as on Ossipee Lake. Captain Gallagher agreed that the Ossipee Lake Natural Area is a good example where a balance was struck and maybe not everyone got everything they wanted but at least there is an opportunity for everyone to enjoy the resource within limits. Eric Orff pointed out that some traditional uses of lakes have changed over time. Jim Haney suggested developing a white paper. Jim also suggested thinking about the concept of public trust and looking at a statewide basis so we promote the diversity of uses of lakes throughout the state. This is what led Vermont to the concept of visitor impact management. Not all uses can exist on all of the lakes so you designate different uses for lakes with different characteristics. This approach would satisfy the public trust; however, would not allow every use on every lake but can promote the public good.

Mark Hemmerlein said that it is all based on experience: what is the experience you are seeking. It does mean some rationing and regulation may be necessary. Bob Spoerl said that if we are bound to protect the rights and interests it is within our purview to recognize that potential impact and take action before it happens. He asked if we have the right to anticipate and make use designations. Mark Hemmerlein asked if this is the question/issue for the Legislature because they are charged with protecting the public trust. Captain Gallagher asked, as they are making their decision do they have a common understanding of what the public trust is or what their public trust responsibilities are? Mark Hemmerlein said that we can't dictate that and Captain Gallagher agreed, however it is not unusual that a common understanding of the public trust does not exist.

Jacque asked if we should select a lake with a public trust issue for our July visit and should we invite

the Attorney Generals Office to join us for that lake visit? Jim Haney recalled the public trust is determined by case law decisions. Mark Gallagher said it is a doctrine that gets decided by court cases. Don Kent said for all intent and purposes the public trust is defined – it is implicit in all of the statutes and rules that we have in place for each lake. Jim Haney asked Don if he means that the public trust refers to the limits that we set on lakes, which is the opposite of his interpretation, which is what is allowable. Don responded he thinks of it as acceptable use; the standard and criteria are in the statute and administrative rules outline what is okay and what is not okay – implicit in that is what is acceptable for use on that lake. Don said he doesn't think we can define the public trust, it is a moving target. Acting Chairman Sunderland recalled that when the AG spoke to the LMAC that he explained that the public trust is not related to lakes or any resource in particular and he then brought it up to the present based on various cases. Larry said that he thinks there is basically a definition but when you apply it to lakes you have different interpretations. Mark Gallagher said his recollection from the AG was that it is a general concept; it is not a hard and fast definition.

Acting Chairman Sunderland asked for ideas on how to start a discussion on this issue and suggested a white paper and he suggested giving ideas to Jacquie regarding how the LMAC can and should move forward to bring this issue to the different agencies. Mark Gallagher said there maybe a couple of different ways to approach this, he suggested that we ask the AG, the General Court or the Governor provide us with a definition of public trust or maybe we should develop and present a definition of public trust to these groups and get them to concur or something that articulates what the public trust is and get them to sign on to it and then we can get onto the same page.

#### **Update on the Sustainability Initiative** – Jenn Rowden

Jenn reviewed a handout updating the Sustainability Initiative, but she focused on 3 of the 8 issues identified in the document including: data improvement management, lack of a coordinated approach to managing watersheds, and control of aquatic plants. A summary of the 500 responses to the Water Resources Information survey is expected by April. Regarding aquatic plant control, the focus is to minimize rather than eradicate. Dick Smith said that anglers see weeds as fish habitat, while landowners see them as a nuisance. Dick added that anglers are concerned because they fish in areas where there was aquatic vegetation and then a few days later the vegetation is gone. He asked if there had been any LMAC attention to this issue. Jacquie said it is not specified in the Lakes Program statute to address the issue of herbicide applications, however RSA 483-A does reference “fishing” as a valued use. How does the public trust apply to this issue?

#### **Other Business:**

Jacquie reported the Lakes Program Workshop held on March 11th regarding the eligibility requirements pertaining to the federal stormwater discharge permit for marinas was well received by marina owners.

The first meeting this year for the Ossipee Lake Natural Area (OLNA) committee is scheduled for Saturday, May 8<sup>th</sup>, from 8am to 10am followed by a clean-up of the area. There may be some funding for floating toilets but the details have not yet been worked out.

Future agenda items: Jim will give a presentation regarding our lakes, their water quality, and their ability to support uses on May 21. Amy Smagula will be invited to talk to the committee about the exotics program, herbicides and funding for research.

➤ ***The meeting concluded at noon.***