

# Legislative Task Force Meeting #15

**Tuesday, November 18, 2014**

8:00 AM – 10:00 AM

Department of Environmental Management  
235 Promenade St, Providence, RI



**Task Force members in attendance:** James Boyd (Coastal Resources Management Council), Russell Chateaufneuf (Civil Engineer Representative), Janet Coit (DEM), Thomas D'Angelo (Builder's Trade Association), Gary Ezovski (Business Community Representative), Kevin Flynn (DOP-Associate Director), Lorraine Joubert (Environmental Entity Representative), Tom Kutcher (Wetlands Biologist), Scott Moorehead (Business Community Representative), Doug McLean for Vincent Murray (Municipal Representative-S Kingstown) Eric Prive (Civil and Environmental Engineering Representative), and Nancy Scarduzio (DOA-Office of Regulatory Reform).

**Agency staff members present:** from DOP; Sean Henry and Nancy Hess, from DEM; Sue Kiernan, Carol Murphy, Ernie Panciera, Brian Moore, and Marty Wencek.

**Comments on Meeting Notes:** K. Flynn called for any changes, addition or notations to the October 31, 2014 meeting notes. There were none.

## **Discussion of Task Force Comments:**

K. Flynn began the meeting with addressing the letter from the RI Builder's Association (attached). He then handed off the reins to N. Hess to go over the draft final report. She updated the Task Force on the comments received from the group, the additional information being added, and the remaining discussion points. N. Hess reviewed the 5 new pages dated 11.18.14 for Part 4 consisting of a synthesis of the last meeting and comments from the Task Force. Comments were submitted by members; Vin Murray, Tom Kravitz, and Nancy Scarduzio. She gave an overview of the revised text for Part 4: Conclusions /Recommendations. A highlight was given to 3 discussion points raised by the comments.

Discussion took place on the 3 points. The first point discussed was the definition for the word setback. All agreed that the definitions should address. The second point discussed was how long shall the time period be to the sunset date for current rules and ordinances. Everyone agreed that one year from the final enactment of the amended law to phase out current law would be adequate. J. Boyd made the point that it should be as specific as possible. There was some doubt expressed over which would happen first- new legislation or changes to DEM's regulations. The third discussion point was whether a municipal notification requirement should be included in the Law or in regulations? R. Chateaufneuf suggested that it should be required in the Law, but left to the regulations as to how it will be applied to provide flexibility. That way, the Statute does not restrict DEM in instances where there is minimal impact. Consensus was it should be in the Law but how it will be done should be within the Regulations to implement without causing delay and additional notification expenses. The example of the RI Cesspool Phase Out act was used. A requirement and time was set for DEM to act on in the Law but how it is handled administratively by DEM.

T. Kutcher offered his draft analysis of implications of the proposed scenario to the current law that would result (attached). It contained new wetlands definitions along with definitions for special aquatic sites and vernal pools, which the current law omits. His analysis spurred much discussion by the Task Force on the jurisdictional areas enforced by DEM and buffers. Based on discussion of these ideas, **members agreed again that it was important that municipalities should have a role in the new process where all wetlands setback regulations would remain at the State level.** The input of the municipalities on their local resources could

inform the State for better and more consistent protection of similar resources across the State.

Another issue of discussion was whether or not to recommend specific numbers for setback distances to be included in the proposed legislation. There was concern that regulatory changes could be seen as a "power grab". Most members agreed that the distances should be included in Regulations in order to provide flexibility based on science. It would also prevent arbitrary changes in the Legislature based on non-science matters or misunderstanding of the complexity of the issue. S. Moorehead voiced the concern that the Legislature could choose not to follow the recommendations of the Task Force and change the numbers. J. Coit summed up the changes as an increase in State (DEM or CRMC) jurisdiction for better protection. Regulation would be only at the State level but providing a balance because there will no longer be the need for review at the municipal level for additional protection.

J. Coit asked if there was a consensus with the recommendations after looking at all the science and that DEM/CRMC will set buffers based on science as appropriate through regulations within the jurisdictional areas to protect wetland resources. K. Flynn called for a show of hands for consensus to reflect agreement on the recommendations. The show of hands was to determine if there was consensus on the core recommendations to:

- establish a jurisdictional area of 200 feet from all rivers and streams regardless of size and from drinking water supply reservoirs
- establish a jurisdictional area of 100 feet from all vegetative wetlands and standing bodies of water, and
- establish a provision to enable petition by local communities for the identification of "Critical Resource Areas" and a jurisdictional area of up to 300 feet that may need added protection.

**The result showed the majority supported the recommendations, with only 1 out of 15 members dissenting. The dissenting member was T. D'Angelo as RIBA did not agree with the 300 foot for critical areas as critical areas already have their own protection.** There was discussion of the dissention and S. Moorehead suggested that there be a definition of critical resource areas included in the report.

There was also discussion on Page 4 of Part 4 concerning "areas subject to storm flow" that was added by comment. There was agreement to delete the "areas subject to storm flow" because they do not have wetland vegetation in them. They do receive review under the current regulations.

There was more discussion of impacts to the existing Wetlands Act and the charge set forth by the Law. The charge is to the Division of Planning in consultation with the Task Force to submit then report. Subsequently, legislation is to be developed by DEM and the Office of Regulatory Reform (ORR). Concern was expressed on keeping the protection of the existing act. J. Coit advised that there most likely be amendments to the Wetlands Act not a rewrite and further advised that will be a new Governor and new head of the ORR that will review the work of the Task Force. J. Boyd suggested that the report should contain the specific statutory changes agreed to and a short outline of the proposed regulatory changes envisioned. N. Hess reminded the Task Force that the report is due in 42 days, all of which will be needed to complete the report. Much debate took place on the suggestion but the reality is limited time will prevent execution of the suggestion.

The final matter brought up before the Task force was one of the topics presented by the RIBA letter. The matter discussed briefly was how changes would impact existing lots of record. It is much more difficult to minimize impacts and protect wetlands on existing lots than when carving up larger parcels. R. Chateaufort suggested that there should be a different process for existing lots than subdivisions but pointed out how difficult a task that would be. G. Ezovski agreed out that the matter is complex and there are thousands of existing lots all over the State that need a flexible not rigid system. There was recognition along the way that there would be increases in jurisdiction in order to provide protection and the proposal is a chance to make things clearer and more predictable. The topic and letter will be included in the Appendix of Other Topics and can be taken up by CRMC/DEM at a later date.

Afterwards, N. Hess outlined the remaining schedule for completing the final report by December 31<sup>st</sup> and how members could provide additional input electronically before it is finalized. The Division of Planning is charged with writing and delivering the final report to the Governor, Senate President, and Speaker of the House. The following schedule was set:

- Nancy will circulate the word files for the report to members later today
- Members should send comments back in track changes format by Friday Dec 5<sup>th</sup>
- Nancy will make revisions and recirculate to members by Fri Dec 12<sup>th</sup>
- Last comments by members are due by Fri Dec 19<sup>th</sup>
- Revised and final report will be completed and forwarded by Wed Dec 31<sup>st</sup>
- Next steps after that are DEM and the ORR will write legislation by Jan 31<sup>st</sup>

Also N. Hess advised that there will be an informational session on Nov 19<sup>th</sup> for municipal planners by DOP to inform them of the progress to date of the Task Force and solicit feedback on the proposed recommendations. Members will be invited to the session.

To conclude, K. Flynn closed the meeting by thanking the Task Force members and agency staff for their participation and hard work over the past year. Completing this task would not have been possible without the variety of voices that came to the table to work on this. J. Coit thanked her staff especially, Carol Murphy, for all their work on the project. Task Force members complimented N. Hess who put in hours and hours to make the meetings so organized and productive.

**Adjourn:** 10:00 AM

Analysis of the implications of the currently-discussed scenario of municipal petition and 300-200-100 foot jurisdiction on the Wetlands Act

Tom Kutcher, Wetlands Scientist Representative  
11/18/2014

The following would allow the changes we have discussed, while retaining process within DEM and minimizing changes to the law.

- No alterations are allowed within identified jurisdictional areas without consent of the Director, i.e. remains the same with formal applications rather than variances.
- **"Freshwater Wetlands"** are defined to include marshes, swamps, bogs, ponds, rivers, perennial and intermittent streams, special aquatic sites, and emergent and submergent plant communities, but **NOT** (upland) buffers, floodplains, and riverbanks.
- **Wetland Buffers** are defined to buffer Freshwater Wetlands only (as defined above); something to this effect:

Exception to draft report (X)

"Wetland Buffer" is an area of undeveloped vegetated land adjacent to a Freshwater Wetland and retained in its natural undisturbed condition, or created to resemble a naturally occurring vegetated area, that mitigates the negative impact of human activities on, and/or directly contributes to wetland functions and values. The Wetland Buffer extends 100 feet from any Freshwater Wetland unless the Director, through rule, regulation, or individual project review, determines that a greater buffer zone is required to protect fresh water wetland functions and values. Under no circumstances shall the wetland buffer extend beyond 300 feet.

- **Floodplains** and **Riverbanks** defined as previous, except all rivers get 200' jurisdiction.
- **"Freshwater Wetland Resources"** are defined to include Freshwater Wetlands, Flood Plains, River Banks, Areas Subject to Flooding\*, Areas Subject to Storm Flow\*, and Wetland Buffer Zones as defined in this section. So, these all get jurisdictional protection as they do now (i.e. need permission of director to alter), although they are not defined as Freshwater Wetlands per se.

\*these are currently protected in regulations

- Language added to define the municipal petition process might look like this:

§ 2-1-20.1 Rules and regulations. –

(a) The director is authorized to adopt, modify, or repeal rules and regulations that are in accord with the purposes of §§ 2-1-18 – 2-1-24 and are subject to the administrative procedures act, chapter 35 of title 42, except for those wetlands located in the vicinity of the coast as set out in chapter 23 of title 46 of the general laws which shall be regulated consistent with the provisions of chapter 23 of title 46.

**(b) The Town Council of a municipality may petition the Director requesting an amendment to the Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act (Regulations) requesting additional protection for particular Freshwater Wetland Resources located partially or fully within its borders.**

Bold text = additions to the law

**(i) The petition shall set forth the specific need for the additional protection requested and contain a detailed description of the functions and values provided by the identified Freshwater Wetland Resources.**

**(c) The Director shall determine whether additional protection is required to preserve the functions and values of the Freshwater Wetland Resources based on the information submitted by the municipality and his/her review of the Freshwater Wetland Resource and surrounding area; provided however that the Freshwater Wetland Resource extends no more than 300 feet from any associated Freshwater Wetland(s).**

**(i) If the Regulations are amended pursuant to a municipal petition, the municipality shall receive notice of any application for a project that will alter the Freshwater Wetland Resources associated with the petition.**

**(d) The procedure for all Petitions for Amendment to the Regulations shall be in accordance with R.I. Gen. Laws § 42-35-3.**

11.18.14

#15

November 17, 2014

Dear Kevin,

Through Representative Legislative action, it was acknowledged that the mechanism by which Rhode Islanders receive permit approvals was flawed. This sentiment was bolstered by a report authored by Bryant University economist Edinaldo Tebaldi. In it he expressed the importance of expanding construction activities to turn the State's economy around. The report recommends policy changes to bring back the construction industry that is so vital to our economy. Those policy changes were noted to be:

- \*Review and implement reforms in the construction permitting process.
- \*Identify issues that delay development and increase construction costs.
- \*Assess opportunities to build/ remodel public and private properties across cities and towns.

The LTF and its recommendations will be a vital part of these needed reforms and as the Association representing the construction industry, its consumers, and indirectly landowners, we want workable rules that provide balance and make economic sense.

RI DEM has long had the resources and scientific basis by which existing setbacks and buffers have been regulated. Over time, the process has become burdensome, in terms of time and financial impact, not only to the regulated but the State of Rhode Island as a whole. Once individual communities became involved, the ability to have reliable and predictable outcomes to the regulated community was lost.

The Rhode Island Builders Association (RIBA)'s internal committees on Land Use and Environmental issues have discussed the standards issue and currently support the existing setbacks and buffers - as do some professionals who have presented to the LTF that increases to some setbacks may reach a point of diminishing return. Further, it has been noted in the LTF conclusions and recommendations draft document that, in general, the setbacks for OWTS established in the State OWTS regulations are felt to be sufficiently protective of the State's water resources; and that these setbacks are greater for critical resource areas (drinking water supplies and coastal salt ponds) and for systems with large design flows. That said, it is RIBA's position that the recommended increased jurisdiction to 200 ft - without defined setbacks - adds another layer of uncertainty to the process. Going forward, without legislative specificity, the regulated professional community would be unable to determine the viability of a development project with any certainty. This would be contrary to the task of the LTF. Even if the proposed activity is outside the regulated buffer, we make application or are requested to in most cases. RIDEM's applications ask if the OWTS is within 200 feet of a wetland.

Therefore, the committees at RIBA believe that most of the current setbacks/buffers are sufficiently protective of the State's water resources as stated in the LTF findings. Nevertheless,

below are the recommendations that we would like to offer be part of the final proposal / recommendation:

1. Changes that would be further protective than the current setbacks

- A. Certain wetlands under 3 acres and vernal pools that are greater than 1000 sq. /ft. should have a 25 foot buffer applied – currently no buffer is needed. (Existing OWTS's setbacks from these are 50 feet currently).
- B. Credit/reduction of buffers for projects employing the use of storm water BMP's
- C. Increase OWTS setbacks by 25' to 75 feet in category 1 soils unless alternative technology treatment is utilized.

2. Changes to the existing setbacks as follows:

- A. Reduction of setbacks should be considered in all cases where alternative technology treatment is utilized.
- B. No need to meet drinking water quality standards by increased setbacks to many wetlands.
- C. Existing identified critical resource areas, setbacks as existing are sufficient. DEM may include additional critical wetlands designations once scientifically substantiated and may promulgate in future regulations. This would be similar to drinking water reservoirs being included in prior regulatory changes.

3. Institute a mechanism in the regulations to further reduce setbacks/buffers or credit future advances in advanced treatment systems of wastewater. Moving forward, we expect treatment technology to progress as future environmental considerations grow nationally.

4. Define regulations using advanced treatment OWTS's and/or storm water BMP's to avoid/minimize variances. (1B)

5. Existing lots of record and parcels with existing homes/buildings should be exempt from any increased setbacks considered to enhance the streamlined permitting process, avoiding the need to seek variances. These variances are typically approved but contribute to property owners' financial burden and loss of time, both of which are in turn a burden on the state's overall economy. This exemption would be in concert with the state of Washington which, when

increasing some wetland setbacks, exempts existing lots/uses as presented at the last LTF meeting.

Submitted to you on behalf of RIBA's Land Use and Environmental Committees

John Marcantonio  
Executive Director  
RI Builders Association