

Bill as Introduced

SB 480 - AS INTRODUCED

2010 SESSION

10-2780
08/04

SENATE BILL **480**

AN ACT relative to appeals of decisions by the department of environmental services.

SPONSORS: Sen. Fuller Clark, Dist 24; Sen. Merrill, Dist 21; Sen. Cilley, Dist 6; Sen. Lasky, Dist 13; Sen. Bradley, Dist 3; Rep. Kappler, Rock 2

COMMITTEE: Energy, Environment and Economic Development

ANALYSIS

This bill allows the various councils in the department of environmental services to hear appeals in their subject areas.

This bill is a request of the department of environmental services.

Explanation: Matter added to current law appears in ***bold italics***.
Matter removed from current law appears [~~in brackets and struck through.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Ten

AN ACT relative to appeals of decisions by the department of environmental services.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 New Paragraph; Administrative Appeals; Hearing Officer. Amend RSA 21-M:11 by inserting
2 after paragraph II the following new paragraph:

3 III. The attorney general shall appoint one or more individuals within the bureau to serve as
4 a hearing officer for the appeal panels established under RSA 21-O:14. Such individual or
5 individuals shall be qualified by education and experience in the conduct of administrative
6 adjudicative hearings and the application of law to facts. When designated as the hearing officer for
7 a particular appeal, the hearing officer shall:

8 (a) Regulate all procedural aspects of a proceeding, including presiding over the hearing
9 and any prehearing conferences;

10 (b) Decide all questions of law based on the facts as found by the appeal panel; and

11 (c) Prepare and issue all written decisions on behalf of the appeal panel.

12 2 Duties of Commissioner. Amend RSA 21-O:3, VIII to read as follows:

13 VIII. Provide all necessary clerical and technical support [~~requested by~~] **to** any council
14 established by this chapter. At a minimum, the commissioner shall:

15 (a) Provide all necessary clerical and support personnel and services in order to:

16 (1) Prepare notices and other documents required under RSA 541-A [~~as directed by~~
17 ~~the particular council~~] and distribute such notices and documents [~~upon the approval of~~] **after**
18 **consultation with** the particular council involved;

19 (2) Schedule the conduct of all council administrative appeal proceedings, **after**
20 **consultation** with [~~the approval of~~] the particular council so as to ensure timely and efficient
21 conduct of such proceedings;

22 (3) Prepare and maintain the record, required by RSA 541-A, of all adjudicative
23 proceedings conducted by councils.

24 (b) Provide comfortable and adequate space for the use of all councils in performing their
25 official duties; and

26 (c) Prepare, maintain as a public record, and continuously update [~~a document~~] **one or**
27 **more documents** which shall summarize the findings and decisions of all councils supported by the
28 department.

29 3 Wetlands Council. Amend RSA 21-O:5-a, V to read as follows:

1 V. The wetlands council shall hear and decide all *disputed issues of fact for* appeals from
2 department decisions relative to the functions and responsibilities of the department which relate to
3 wetlands and protected shorelands, in accordance with [~~rules adopted by the council~~] *RSA 21-O:14.*

4 4 Water Council. Amend RSA 21-O:7, IV to read as follows:

5 IV. The water council shall hear and decide all *disputed issues of fact for* appeals from
6 department decisions relative to the functions and responsibilities of the division of water other than
7 department decisions made under RSA 482-A relative to wetlands, and RSA 483-B relative to
8 shoreland protection, in accordance with RSA 21-O:14.

9 5 Waste Management Council. Amend RSA 21-O:9, V to read as follows:

10 V. The waste management council shall hear and decide all *disputed issues of fact for*
11 appeals from department decisions relative to the functions and responsibilities of the division of
12 waste management, in accordance with RSA 21-O:14.

13 6 Air Resources Council. Amend RSA 21-O:11, IV to read as follows:

14 IV. The air resources council shall hear and decide all *disputed issues of fact for* appeals
15 from department decisions relative to the functions and responsibilities of the division of air
16 resources in accordance with RSA 21-O:14.

17 7 Administrative Appeals. Amend RSA 21-O:14 to read as follows:

18 21-O:14 Administrative Appeals.

19 I. For purposes of this chapter, “department decision” means the final action on an
20 application, petition, order or request taken by the commissioner or any department official who has
21 statutory authority to make such final decision or to whom the commissioner has properly delegated
22 the authority to take such final action. “Department decision” shall not mean rulemaking or an
23 agency declaratory ruling as provided for in RSA 541-A, and shall not include any decisions of [~~the~~
24 ~~wetlands~~] *any* council.

25 II. *Appeal* hearings before [~~all~~] *any* councils established by this chapter shall be conducted
26 in accordance with the provisions of RSA 541-A governing adjudicative proceedings *by an*
27 *administrative hearing officer assigned by the department of justice, who shall be*
28 *responsible for all legal aspects of each appeal hearing.*

29 III. Persons aggrieved by the disposition of administrative appeals before any council
30 established by this chapter may appeal such results in accordance with RSA 541.

31 IV. The councils established under this chapter [~~may~~] *shall* adopt rules under RSA 541-A to
32 govern the conduct of administrative appeals under this section. *To the extent possible, the rules*
33 *of the councils shall be consistent with each other.*

34 8 Effective Date. This act shall take effect upon its passage.

SB 480 - AS AMENDED BY THE SENATE

03/24/10 1106s

2010 SESSION

10-2780

08/04

SENATE BILL **480**

AN ACT relative to appeals of decisions by the department of environmental services.

SPONSORS: Sen. Fuller Clark, Dist 24; Sen. Merrill, Dist 21; Sen. Cilley, Dist 6; Sen. Lasky, Dist 13; Sen. Bradley, Dist 3; Rep. Kappler, Rock 2

COMMITTEE: Energy, Environment and Economic Development

ANALYSIS

This bill allows the various councils in the department of environmental services to hear appeals in their subject areas.

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1 1 New Paragraph; Attorney General; Hearing Officer. Amend RSA 21-M:3 by inserting after
2 paragraph VII the following new paragraph:

3 VIII. The attorney general shall appoint one or more individuals to serve as a hearing officer
4 for the appeal panels established under RSA 21-O:14. The attorney general and the commissioner of
5 the department of environmental services may enter into a memorandum of understanding to
6 transfer funds sufficient to fund the hearing officer position and related expenses. Such individual
7 or individuals shall be qualified by education and experience in the conduct of administrative
8 adjudicative hearings and the application of law to facts. When designated as the hearing officer for
9 a particular appeal, the hearing officer shall:

- 10 (a) Regulate all procedural aspects of a proceeding, including presiding over the hearing
- 11 and any prehearing conferences;
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- 13 (c) Prepare and issue all written decisions on behalf of the appeal panel.

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15 VIII. Provide all necessary clerical and technical support [~~requested by~~] *to* any council
16 established by this chapter. At a minimum, the commissioner shall:

- 17 (a) Provide all necessary clerical and support personnel and services in order to:
 - 18 (1) Prepare notices and other documents required under RSA 541-A [~~as directed by~~
 - 19 ~~the particular council~~] and distribute such notices and documents [~~upon the approval of~~] *after*
 - 20 *consultation with* the particular council involved;
 - 21 (2) Schedule the conduct of all council administrative appeal proceedings, *after*
 - 22 *consultation* with [~~the approval of~~] the particular council so as to ensure timely and efficient
 - 23 conduct of such proceedings;
 - 24 (3) Prepare and maintain the record, required by RSA 541-A, of all adjudicative
 - 25 proceedings conducted by councils.

26 (b) Provide comfortable and adequate space for the use of all councils in performing their
27 official duties; and

28 (c) Prepare, maintain as a public record, and continuously update [~~a document~~] *one or*
29 *more documents* which shall summarize the findings and decisions of all councils supported by the
30 department.

1 3 Wetlands Council. Amend RSA 21-O:5-a, V to read as follows:

2 V. The wetlands council shall hear and decide all *disputed issues of fact for* appeals from
3 department decisions relative to the functions and responsibilities of the department which relate to
4 wetlands and protected shorelands, in accordance with ~~[rules adopted by the council]~~ ***RSA 21-O:14.***

5 4 Water Council. Amend RSA 21-O:7, IV to read as follows:

6 IV. The water council shall hear and decide all *disputed issues of fact for* appeals from
7 department decisions relative to the functions and responsibilities of the division of water other than
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17 resources in accordance with RSA 21-O:14.

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19 21-O:14 Administrative Appeals.

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21 application, petition, order or request taken by the commissioner or any department official who has
22 statutory authority to make such final decision or to whom the commissioner has properly delegated
23 the authority to take such final action. "Department decision" shall not mean rulemaking or an
24 agency declaratory ruling as provided for in RSA 541-A, and shall not include any decisions of ~~[the~~
25 ~~wetlands]~~ ***any*** council.

26 II. ***Appeal*** hearings before ~~[all]~~ ***any*** councils established by this chapter shall be conducted
27 in accordance with the provisions of RSA 541-A governing adjudicative proceedings ***by an***
28 ***administrative hearing officer assigned by the department of justice, who shall be***
29 ***responsible for all legal aspects of each appeal hearing.***

30 III. Persons aggrieved by the disposition of administrative appeals before any council
31 established by this chapter may appeal such results ~~[in accordance with RSA 541]~~ ***within 30 days***
32 ***of a decision by such council. The appellant may choose to appeal to the superior court or***
33 ***the supreme court.***

34 IV. The councils established under this chapter ~~[may]~~ ***shall*** adopt rules under RSA 541-A to
35 govern the conduct of administrative appeals under this section. ***To the extent possible, the rules***
36 ***of the councils shall be consistent with each other.***

37 8 Effective Date. This act shall take effect upon its passage.

CHAPTER 354
SB 480 - FINAL VERSION

03/24/10 1106s
13May2010... 1737h
06/02/10 2244CofC
06/02/10 2424eba

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STATE OF NEW HAMPSHIRE

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AN ACT relative to appeals of decisions by the department of environmental services.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 354:1 New Paragraphs; Attorney General; Hearing Officer. Amend RSA 21-M:3 by inserting
2 after paragraph VII the following new paragraphs:

3 VIII. The attorney general shall appoint one or more individuals to serve as a hearing officer
4 for appeals to any of the councils established under RSA 21-O. The attorney general and the
5 commissioner of the department of environmental services may enter into a memorandum of
6 understanding to transfer funds sufficient to fund the hearing officer position and related expenses.
7 Such individual or individuals shall:

8 (a) Be qualified by education and experience in the conduct of administrative
9 adjudicative hearings and the application of law to facts; and

10 (b) Be fully screened by the attorney general from the outset of any such appeal from
11 any attorney representing the department.

12 IX. When designated as the hearing officer for a particular appeal, the hearing officer shall:

13 (a) Regulate all procedural aspects of a proceeding, including presiding over the hearing
14 and any prehearing conferences;

15 (b) Adopt all findings of fact made by the council except to the extent any such finding is
16 without evidentiary support in the record;

17 (c) Deliberate with the council before reaching conclusions on mixed questions of law and
18 fact;

19 (d) Decide all questions of law presented during the pendency of the appeal; and

20 (e) Prepare and issue written decisions on all motions and on the merits of the appeal
21 within 90 days of the conclusion of the hearing on the merits. The hearing officer shall provide the
22 council with a proposed written decision on the merits within 45 days of the conclusion of the
23 hearing on the merits. If requested to do so by the members of the council participating in the
24 discussion, the hearing officer shall meet with those members within the 90 day period to discuss the
25 decision.

26 X. The hearing officer may issue a subpoena, upon the request of any party to an appeal
27 filed after the effective date of this paragraph, and only to the extent the information or testimony

CHAPTER 354
SB 480 – FINAL VERSION
- Page 2 -

1 sought is reasonably necessary for the determination of matters within the council's jurisdiction. A
2 subpoena may be requested for purposes of discovery as may be allowed by the council's rules or to
3 provide testimony at any hearing conducted in the proceeding, or both. All costs associated with the
4 issuance of any subpoena issued by the hearing officer shall be paid by the party requesting the
5 subpoena.

6 354:2 Duties of Commissioner. Amend RSA 21-O:3, VIII to read as follows:

7 VIII. Provide all necessary clerical and technical support [~~requested by~~] *to* any council
8 established by this chapter. At a minimum, the commissioner shall:

9 (a) *For any appeal from a department decision before any such council* provide
10 all necessary clerical and support personnel and services in order to:

11 (1) Prepare notices and other documents required under RSA 541-A [~~as directed by~~
12 ~~the particular council~~] and distribute such notices and documents [~~upon the approval of the~~
13 ~~particular council involved~~] *as directed by the hearing officer appointed under RSA 21-M:3,*
14 *VIII;*

15 (2) Schedule the conduct of all council administrative appeal proceedings, [~~with the~~
16 ~~approval of the particular council~~] *as directed by the hearing officer appointed under RSA 21-*
17 *M:3, VIII* so as to ensure timely and efficient conduct of such proceedings;

18 (3) Prepare and maintain the record, required by RSA 541-A, of all [~~adjudicative~~
19 ~~proceedings conducted by councils~~] *such appeals, which shall include the decisions issued in*
20 *such proceedings.*

21 (b) Provide comfortable and adequate space for the use of all councils in performing their
22 official duties; and

23 (c) [~~Prepare, maintain as a public record, and continuously update a document which~~
24 ~~shall summarize the findings and decisions of all councils supported by the department.~~] *Provide*
25 *all necessary clerical and support personnel and services in order to:*

26 (1) *Prepare and distribute notices and other documents required under RSA*
27 *91-A for council meetings; and*

28 (2) *Prepare and maintain as public records the official minutes of the*
29 *meetings of all councils supported by the department.*

30 354:3 Wetlands Council. Amend RSA 21-O:5-a, V to read as follows:

31 V. The wetlands council shall hear [~~and decide~~] all *administrative* appeals from
32 department decisions [~~relative to the functions and responsibilities of the department which relate~~
33 ~~to~~] *made under RSA 482-A relative to wetlands [and protected shorelands], or under RSA 483-B*
34 *relative to shoreland protection and shall decide all disputed issues of fact in such*
35 *appeals, in accordance with [rules adopted by the council] RSA 21-O:14.*

36 354:4 Water Council. Amend RSA 21-O:7, IV to read as follows:

CHAPTER 354
SB 480 – FINAL VERSION
- Page 3 -

1 IV. The water council shall hear [~~and decide~~] all *administrative* appeals from department
2 decisions relative to the functions and responsibilities *within the expertise* of the division of water
3 other than department decisions made under RSA 482-A relative to wetlands[,] and RSA 483-B
4 relative to shoreland protection, **and shall decide all disputed issues of fact in such appeals**, in
5 accordance with RSA 21-O:14.

6 354:5 Waste Management Council. Amend RSA 21-O:9, V to read as follows:

7 V. The waste management council shall hear [~~and decide~~] all *administrative* appeals from
8 department decisions relative to the functions and responsibilities of the division of waste
9 management, **and shall decide all disputed issues of fact in such appeals**, in accordance with
10 RSA 21-O:14.

11 354:6 Air Resources Council. Amend RSA 21-O:11, IV to read as follows:

12 IV. The air resources council shall hear [~~and decide~~] all *administrative* appeals from
13 department decisions relative to the functions and responsibilities of the division of air resources
14 **and shall decide all disputed issues of fact in such appeals**, in accordance with RSA 21-O:14.

15 354:7 Administrative Appeals. Amend RSA 21-O:14 to read as follows:

16 21-O:14 Administrative Appeals.

17 I. For purposes of this chapter, “department decision” means the final action on an
18 application, petition, order or request taken by the commissioner or any department official who has
19 statutory authority to make such final decision or to whom the commissioner has properly delegated
20 the authority to take such final action. “Department decision” shall not mean rulemaking or an
21 agency declaratory ruling as provided for in RSA 541-A, and shall not include any decisions of [~~the~~
22 ~~wetlands~~] *any* council.

23 *I-a. Any person aggrieved by a department decision may, in addition to any other*
24 *remedy provided by law, appeal to the council having jurisdiction over the subject matter*
25 *of the appeal. On any such appeal, the council shall determine whether the department*
26 *decision was unlawful or unreasonable by reviewing the administrative record together*
27 *with any evidence and testimony the parties to the appeal may present.*

28 II. *Appeal* hearings before [~~all~~] *any* [~~councils~~] *council* established by this chapter shall be
29 conducted in accordance with the provisions of RSA 541-A governing adjudicative proceedings *by an*
30 *administrative hearing officer assigned by the department of justice, under RSA 21-M:3,*
31 *VIII. All issues shall be determined as specified in RSA 21-M:3, IX.*

32 III. Persons aggrieved by the disposition of administrative appeals before any council
33 established by this chapter may appeal such results in accordance with RSA 541.

34 IV. The councils established under this chapter [~~may~~] *shall* adopt rules under RSA 541-A to
35 govern the conduct of administrative appeals under this section. *To the extent possible, the rules*
36 *of the councils shall be consistent with each other.*

CHAPTER 354
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- Page 4 -

1 **354:8** Report Required. No later than April 1, 2011, the attorney general shall submit a report,
2 including any recommendations that the attorney general may deem appropriate for consideration as
3 legislation in the 2012 legislative session to modify or otherwise alter current processes of appeals
4 from administrative decisions issued by executive branch agencies to the president of the senate, the
5 speaker of the house of representatives, and to the chairpersons of the senate and house committees
6 with jurisdiction over the subject matter contained in RSA 21-M:3 and RSA 21-O.

7 **354:9** Effective Date. This act shall take effect 60 days after its passage.

8 Approved: July 20, 2010

9 Effective Date: September 18, 2010

Amendments



Amendment to SB 480

1 Amend the bill by replacing section 1 with the following:

2

3 1 New Paragraph; Attorney General; Hearing Officer. Amend RSA 21-M:3 by inserting after
4 paragraph VII the following new paragraph:

5 VIII. The attorney general shall appoint one or more individuals to serve as a hearing officer
6 for the appeal panels established under RSA 21-O:14. The attorney general and the commissioner of
7 the department of environmental services may enter into a memorandum of understanding to
8 transfer funds sufficient to fund the hearing officer position and related expenses. Such individual
9 or individuals shall be qualified by education and experience in the conduct of administrative
10 adjudicative hearings and the application of law to facts. When designated as the hearing officer for
11 a particular appeal, the hearing officer shall:

12 (a) Regulate all procedural aspects of a proceeding, including presiding over the hearing
13 and any prehearing conferences;

14 (b) Decide all questions of law based on the facts as found by the appeal panel; and

15 (c) Prepare and issue all written decisions on behalf of the appeal panel.

16

17 Amend RSA 21-O:14, III as inserted by section 7 of the bill by replacing it with the following:

18

19 III. Persons aggrieved by the disposition of administrative appeals before any council
20 established by this chapter may appeal such results [~~in accordance with RSA 541~~] *within 30 days*
21 *of a decision by such council. The appellant may choose to appeal to the superior court or*
22 *the supreme court.*

Committee Minutes

SENATE CALENDAR NOTICE
ENERGY, ENVIRONMENT AND ECONOMIC DEVELOPMENT

Senator Martha Fuller Clark Chairman
 Senator Amanda Merrill V Chairman ✓
 Senator Jacalyn Cilley ✓
 Senator Bette Lasky ✓
 Senator Bob Odell ✓
 Senator Jeb Bradley ✓

For Use by Senate Clerk's Office ONLY	
<input type="checkbox"/>	Bill Status
<input type="checkbox"/>	Docket
<input type="checkbox"/>	Calendar
Proof: <input type="checkbox"/>	Calendar <input type="checkbox"/> Bill Status

10:12 open
 11:04 close

Date: January 27, 2010

HEARINGS

Thursday

2/4/2010

ENERGY, ENVIRONMENT AND ECONOMIC DEVELOPMENT LOB 102 8:30 AM

(Name of Committee) (Place) (Time)

EXECUTIVE SESSION MAY FOLLOW

8:30 AM	SB411	relative to permitting of large groundwater withdrawals.
8:50 AM	SB369	relative to the expiration of large groundwater withdrawal permits.
9:10 AM	SB335	relative to wetland impact assessments in construction permit applications.
9:30 AM	SB480	relative to appeals of decisions by the department of environmental services.

Sponsors:

SB411

Sen. Jacalyn Cilley	Sen. John Barnes, Jr.	Sen. Martha Fuller Clark	Sen. Amanda Merrill
Sen. Bette Lasky	Rep. Marcia Moody	Rep. Frank Tupper	Rep. Maureen Mann
Rep. Susi Nord			

SB369

Sen. John Barnes, Jr.	Rep. Frank Case	Sen. Martha Fuller Clark	Rep. L. Mike Kappler
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SB335

Sen. Harold Janeway	Sen. Amanda Merrill	Sen. Martha Fuller Clark
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SB480

Sen. Martha Fuller Clark	Sen. Amanda Merrill	Sen. Jacalyn Cilley	Sen. Bette Lasky
Sen. Jeb Bradley	Rep. L. Mike Kappler		

Energy, Environment and Economic Development Committee

Hearing Report

TO: Members of the Senate

FROM: Michael Rollo, *Legislative Aide*

RE: Hearing report on **SB 480** -An act relative to appeals of decisions by the department of environmental services.

HEARING DATE: February 4, 2010

MEMBERS OF THE COMMITTEE PRESENT: Senators Merrill, Cilley, Lasky, Odell, and Bradley.

MEMBERS OF THE COMMITTEE ABSENT: Senator Fuller Clark

Sponsor(s): Sen. Fuller Clark, Dist 24; Sen. Merrill, Dist 21; Sen. Cilley, Dist 6; Sen. Lasky, Dist 13; Sen. Bradley, Dist 3; Rep. Kappler, Rock 2

What the bill does: This bill allows the various councils in the department of environmental services to hear appeals in their subject areas.
This bill is a request of the department of environmental services.

Who supports the bill: Sen. Fuller Clark, Dist. 24, Sen. Bradley, Dist. 3, Sen. Merrill, Dist. 21, Rep. Mike Kappler, Rock. 2, Mike Walls, NH DES, Gretchen Hamel, NH DES, Joel Harrington, NH Water Council, Cathy Corkery, NH Sierra Club, Art Cunningham, NH Sierra Club, Rep. Judith Spang, Straff. 7, Ari Pollack, NH Homebuilders Association, Ken Clifton, NH Homebuilders Association, Jed Callen, Self.

Who opposes the bill: None

Neutral position: Michael Brown, NH Attorney Generals Office

Summary of testimony received:

Senator Fuller Clark, Dist 24- Prime Sponsor of SB 480

- Hearing called to order at 10:15am

- Greg Whitman introduced on behalf of Sen. Fuller Clark
- The bill authorizes and clarifies the right of various councils in DES to hear appeals of permit denials in their subject areas.
- The bill provides for the appointment of one or more hearing officers by the Attorney General and delineates the duties and responsibilities of said officers.
- The bill directs the commissioner of DES to consult with the appropriate councils before undertaking the necessary administrative steps for the hearing of such appeals.
- The purpose of this legislation is to streamline the appeals process.

Gretchen Hamel, NH Department of Environmental Services

- DES in support.
- SB 480 is enabling legislation that will provide those going before one of the four environmental councils for administrative hearings the opportunity to appear before an individual with experience with the adjudicative process.
- The environmental councils are made up of skilled volunteers in their subject matter, but do not necessarily have members with legal training.
- Councils will still hold current statutory responsibilities to make decisions, but actual preparation of reports will be the responsibility of an Assistant Attorney General acting as a hearing officer.
- Sen. Cilley asked why there was not a fiscal note associated with the bill and whether or not the Attorney General's office currently gives counsel to these councils. Ms. Hamel said that the AG's office does assist, but the goal is to have legal expertise assigned in conducting the hearings. The lack of a fiscal note was noted. Deferred to AG's office.

Mike Brown, NH Attorney General's Office

- AG's Office neutral on bill. Appearing to provide information only.
- Offered an amendment to answer the question of funding. Grants authority to the Attorney General and the Commissioner of DES to transfer funds to cover expenses.
- Individuals serving on the councils are not necessarily versed in legal issues or procedures.
- The AG's office is willing to work to help.
- Sen. Cilley asked if members of councils are not trained in legal proceedings if businesses suffer if decisions are not returned in a timely manner. Mr. Brown responded that he is aware of only anecdotal evidence and that council members do the best that they can.
- Sen. Bradley asked that if the bill doesn't call for general fund dollars to be expended then is the money coming from existing funds. Mr. Brown believes that money will come from fees that already charged.
- Sen. Bradley asked if applicants can expect a more streamlined process if these changes are enacted. Mr. Brown was confident that it would help.

Joel Harrington, Member, State Water Council

- In support.
- Issues coming before these councils are technical and at times controversial.
- As a member of one of the councils in question, more “professional” help could only aid the process. Concerned that personal opinion can at times be substituted for facts in writing decisions.
- Sen. Lasky asked if decisions can be appealed. Mr. Harrington replied that decisions can be appealed to the Supreme Court.

Rep. Judith Spang, Straff. 7

- Acknowledged there are problems with environmental enforcement issues. Delays in appeals is troubling to businesses and unfair to developers waiting to formulate projects.

Catherine Corkery and Art Cunningham, NH Sierra Club

- In support.
- These changes will be an asset to all parties involved
- Suggested adding a mechanism for clear enforceable discovery disclosures and subpoena powers.
- Sen. Lasky asked about costs associated with subpoenas. Mr. Cunningham replied that just as with Superior Court, the costs would and should be borne by those making the request.

Ari Pollack, NH Home Builders.

- In support.
- Will expedite the process.
- Suggested perhaps allowing decisions to be appealed to the Superior Court.
- Sen. Cilley inquired as to whether applicants would be trading technical expertise for legal expertise if appealed directly to Superior Court. Mr. Pollack conceded that the change could trade knowledge for efficiency.

Ken Clinton, NH Home Builders

- In support.
- Supports the concept of going to Superior Court as each side must present expert witnesses.
- Streamline process.

Jed Callen, Attorney, representing self.

- In support.
- Delays in process are bad for all involved.
- Lack of legal expertise on councils can present issues.
- The changes proposed in SB 480 have the potential to save time and resources.

Hearing was closed at 11:05am.

Funding: *Not applicable.*

Future Action: Executive action pending.

MSR

File: SB 480

Date: February 4, 2010

me

Date: February 4, 2010
Time: 10:12 a.m.
Room: LOB Room 102

The Senate Committee on Energy, Environment and Economic Development held a hearing on the following:

SB 480 relative to appeals of decisions by the department of environmental services.

Members of Committee present: Senator Merrill
Senator Cilley
Senator Lasky
Senator Odell
Senator Bradley

The Vice Chair, Senator Amanda Merrill, opened the hearing on SB 480 and invited the prime sponsor, Senator Martha Fuller Clark, to introduce the legislation.

Senator Amanda Merrill, D. 21: I will open the hearing on Senate Bill 480, relative to appeals of decisions by the Department of Environmental Services.

Senator Jacalyn L. Cilley, D. 6: Do you want me to introduce that?

Senator Amanda Merrill, D. 21: Yeah, that would be great.

Greg Whitman, Legislative Aide: (Speaking from the back of the room) I can introduce it, Senator.

Senator Amanda Merrill, D. 21: Oh, okay.

Senator Jacalyn L. Cilley, D. 6: Oh.

Senator Amanda Merrill, D. 21: I recognize Greg Whitman.

Mr. Whitman: Good morning, Madam Chair, members of the Committee. My name is Gregory Whitman. I am here on behalf of Senator Fuller Clark, who is unable to be here today.

Please see Attachment #1 – Senator Fuller Clark’s typewritten testimony that is read into the record by Mr. Whitman.

Senator Amanda Merrill, D. 21: Thank you very much.

Mr. Whitman: I have copies of her testimony I can distribute.

Senator Amanda Merrill, D. 21: Okay. Great. Gretchen? I’ll call on Gretchen Hamel, from DES. Good morning.

Attorney Gretchen Hamel: Good morning, Madam Chair, members of the Committee. My name is Gretchen Hamel. I am the administrator for the legal unit for the Department of Environmental Services, and I’m here to testify in support of Senate Bill 480.

The letter that Commissioner Burack has prepared is being circulated. There is some information there on why we think this bill is so important.

Please see Attachment #2 - Letter from Commissioner Burack.

We have four councils that hear appeals, not actually just for permitting decisions, but also of administrative orders that are issued by the various DES programs. The councils are volunteers; they are appointed by the Governor to serve a particular term, and they typically represent a particular interest. And there is an attachment to the letter that shows the current council members and the interests they represent. For the most part, none of these council members have any legal training; we sometimes are fortunate enough to have an attorney in one of these positions, as we do, currently, on the Water Council. But, for the most part, the others are not well versed in things like due process and how to run a hearing.

The bill would essentially separate the functions in a hearing, so that the councils would continue to bring their expertise to bear on the substance of an appeal by determining all of the factual issues, but someone appointed by the Attorney General’s Office, who has expertise in the legal proceedings and in preparing decisions, would have that responsibility. We’re hoping that this would allow the process to work more smoothly.

There are some figures in the letter that show that even for 2009, there’s quite a backlog of cases; there are still cases pending that were filed in previous years. And the trend over the last ten years is, generally, that we are seeing more appeals. So, I think that under the system as it currently stands, the backlog is only going to get worse, and it is difficult to ask, again,

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all of these volunteers, to spend extra time, taking away from their own jobs, their own livelihoods, to spend a great deal of time preparing the decisions, running pre-hearing conferences, things like that, which this is intended to address.

So, we hope that you will view this favorably. I will mention, perhaps out of order, that the Attorney General has drafted an amendment, which we also fully support. It would give a little bit more flexibility in terms of who was appointed, and also allow the funding issues to be worked out.

Please see Attachment #3 - e-mail and draft amendment from Attorney Hamel.

So, thank you. If you have any questions, I will try to answer them.

Senator Amanda Merrill, D. 21: Senator Cilley.

Senator Jacalyn L. Cilley, D. 6: Thank you, Madam Chair. And you just touched on one of my most, you know, salient questions, and that's ...I don't see a fiscal note attached to this.

Attorney Hamel: Right.

Senator Jacalyn L. Cilley, D. 6: And I would ask, along with that, it's my understanding that the AG's Office provides legal expertise to any of our boards, these regulatory boards. So, what are we asking beyond that, and what about the costs of that?

Attorney Hamel: Okay. I'll take those in that order, if you don't mind.

Senator Jacalyn L. Cilley, D. 6: Okay.

Attorney Hamel: What we're asking, beyond what happens now, is for someone with that expertise to actually conduct the hearing, actually conduct the pre-hearing. It happens occasionally that people who are appealing decisions are not represented by counsel, and so they don't know when their rights are being trampled on, for instance, which has happened. Somebody with legal training, we would expect, would be more neutral, would be more objective. The additional piece would be preparing the decisions. We've had cases where a decision was made at a meeting in April of '09, and the decision still hasn't been issued in writing.

So, that process would, we believe would, go faster, because we'd have someone that was used to that kind of writing, and understood the

importance of making sure that the rationale for the decision was written down, which would also make it better if somebody wanted to appeal a decision, because the reasons would be explained, which doesn't always happen well under the current system.

The funding is something that the amendment that is coming in would address, which would allow the Attorney General and the Commissioner to figure that out, I guess is the best way of putting it. There are a lot of different options that could be considered, and it may be that, you know, over time it would change or develop. I think it is important to move forward with this and let those issues be worked out, simply because the system we have now is broken, and the public is not being well served by it.

Senator Jacalyn L. Cilley, D. 6: Thank you. I have just one more follow-up question. These are not - I should know this, having worked on both committees to repeal committees, and committee to, you know, consolidate regulatory committees - These are not 125 committees; they don't actually contribute their own ... Most of ours are, but these aren't, are they?

Attorney Hamel: No. The councils are not licensing boards; they are strictly administrative councils. They are charged with providing advice to the Department, to the Commissioner, on the various topics that we deal with, which is why they have their different areas of expertise, and with hearing appeals, and reviewing rules; so, policy and appeals.

Senator Jacalyn L. Cilley, D. 6: So, we're lucky to have the volunteers. Are there other questions for Gretchen? Okay. With that, I'll say thank you.

Attorney Hamel: Thank you.

Senator Jacalyn L. Cilley, D. 6: Mike Walls left, right? So, let's see. We have Mike Brown, from the AG's Office.

Attorney Michael Brown: Good morning, Madam Chair, members of the Committee. My name is Michael Brown. I'm a senior assistant Attorney General. I work in the Civil Bureau of the AG's Office, and I happen to be the chief over there.

I've been asked to come over and testify, to provide information. And the information I'm going to provide sounds very much like I support this bill. There are, in its current configuration, there are a couple of issues that kind of jump out at the AG's Office that need to be addressed. One is that the bill calls for the appointment of hearings officers to come out of a particular bureau; that would be the Civil Bureau of the Attorney General's Office.

I am going to pass around in a minute a proposed amendment, which will allow the Attorney General to pick an AG employee who is not just limited to the Civil Bureau. The Civil Bureau, as you may know, provides legal counsel to all state agencies, including many of these environmental boards. And so, to avoid a potential conflict or an appearance of conflict, it would simply just be better to choose someone from within our office but not necessarily within our bureau.

The second issue is the funding issue, and of course this bill, as I understand it, would be a significant impact on existing resources in the Attorney General's Office; my understanding is that the workload would be pretty significant. And so, we're going to have to work out a way to make this work.

I'm going to pass out a proposed amendment that really addresses these two very issues. One is it modifies RSA 21-M just slightly to allow the Attorney General to choose individuals beyond just the Civil Bureau. And the second thing it does is that it authorizes the Attorney General and the Commissioner to enter into an agreement to transfer funds sufficient to support the hearings officer obligations. Both the Attorney General and the Commissioner of Environmental Services have committed to working together to try to figure out a way to make this happen.

Please see Attachment #4 – proposed amendment to SB 480.

And you know, we have an excellent working rapport, and I feel very strongly that, ultimately, our efforts will be successful. I'll also say, too, that the notion of having a hearings officer perform the functions, as articulated in the bill, I think will go a long way to providing a great service to the public, who are dependent upon operation of these environmental councils. Many of the individuals who sit on these boards now are not lawyers, they're not legally trained. And what we're asking them to do, in essence, in many instances, is to act as a judge, to make findings of fact and rulings of law and issue orders, write and issue orders. And that is particularly technical and demanding work, and I think as a result of that, our office is quite aware of delays in getting opinions out and orders out in a timely way. So, both of our agencies recognize there's a need, there's a larger issue out there, and we see that this is one good step in addressing that larger issue.

I'll be glad to take any questions you might have.

Senator Jacalyn L. Cilley, D. 6: Are there questions? Would you like to take the gavel back, Madam Chair? I actually have a question.

Senator Amanda Merrill, D. 21: Okay. Senator Cilley.

Senator Jacalyn L. Cilley, D. 6: Thank you. I probably should have asked this of Gretchen, and can do so after, if you're unable to answer it. But she noted that the system is broken, and you noted that these people are asked to do yeoman's work, and that the decision doesn't get issued in a timely manner. Is there any way to estimate the impacts on ...because this is primarily the business community, isn't it? That suffers from not having a decision rendered and unable to...

Attorney Brown: It does have significant impact on the business community and on citizens who are dependent upon work. So, I don't know. I only know anecdotally; I don't know that I've ever seen any supportive statistics. I do know, from time to time, we become cognizant of very significant backlogs and delays, and our office works with Administrative Services to try to figure out a way to unsnarl those delays. But we're doing that on an *ad hoc* basis, and, for the most part, it all stems to volunteer board members trying to do the best that they absolutely can but being overwhelmed by the technical nature of the work.

Senator Jacalyn L. Cilley, D. 6: Okay. Thank you.

Senator Amanda Merrill, D. 21: Other questions? Senator Bradley.

Senator Jeb E. Bradley, D. 3: Yes, thank you. I'm assuming, from this amendment, that you're not proposing any increase in General Fund expenditures; no new fees to pay for this; that it will be handled within your existing budget?

Attorney Brown: As I understand it, and I'm not the budget expert within the Attorney General's Office, so, you have to pardon me a little bit. But my understanding is that the Department of Administrative Services in fact does collect permitting fees and various other types of fees, and some of that money is already transferred into the Attorney General's Office to support the work that our Bureau of Environmental Protection does already, who provide, kind of, prosecutorial services and advice to the Department of Environmental Services. So, I think what the plan here would be is to go back and take a look at that, and see if we can reallocate and work through the, kind of the minutiae and detail of it.

Senator Jeb E. Bradley, D. 3: So, as a sponsor of the legislation, would I be correct in assuming - thank you for the question - that it's likely the Department of Administrative Services or DES would see commensurate

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reductions in their budgets, and that applicants would hopefully see a much more expedited process and avoidance of litigation down the road?

Attorney Brown: Well, I can absolutely say yes, avoidance of the litigation, and yes, in terms of kind of the backload issues. The exact funding mechanism and its impact I can't speak to right at this moment. All I can tell you is that the Commissioner and the Attorney General have committed to work together to work on that very issue.

Senator Jeb E. Bradley, D. 3: Perfect. Thank you.

Senator Amanda Merrill, D. 21: Any other questions? Thank you very much.

Attorney Brown: Thank you.

Senator Amanda Merrill, D. 21: I'll call on Joel Harrington, Water Council member. Good morning, Joel.

Attorney Joel Harrington: Good morning, Madam Chair. My name is Joel Harrington. I'm here today as a member of the State's Water Council. As Gretchen pointed out, I'm actually the only attorney that sits on this council.

The purpose of the Water Council is really to inform the Department and advise the Department on policy that they set, but our main function is an adjudicatory process. We actually act as judge and jury to citizens that file appeals to the Department's decision. And it's a fundamental problem, I think, with the structure of all of our councils - Air Council, Water Council - to have citizens sit as a judge, but on the other hand, also sit as a jury. And also, the presiding officer, who typically is a member of the council with no legal training, is writing the decision, which is also sort of interesting because, you know, the jury makes the decision - the Council - but yet a member from the Council writes the decision; it really often doesn't make sense.

Just to give you an example of the types of things that we're hearing right now, we're hearing a number of cases that have resulted from the Mother's Day flood. Property owners that had their properties washed out from fill, we typically hear cases on alteration of terrain. We also are ... One of the more controversial dockets before the Water Council is the Lake Sunapee Protective Association, the New Hampshire Fish and Game issue, regarding Wild Goose, and the boat launch construction there. To have ordinary citizens with no background training to hear some of these really controversial cases, I think, doesn't do justice to the issues.

I think, to your question, Senator Cilley, on the businesses, whether a lot of this is really impacting businesses: I think it's really a 50/50. I mean, most of what I think we've seen in the last year are mostly property owners and rights that are affected by activities that go on in the surrounding areas of those properties.

I outline, in the back of my testimony, there are five issues here that I think are inherent problems. One, which, as I already mentioned, is the laypeople serving as presiding officers of appeals. They sometimes mistakenly take a position, or offer their own opinion, regarding one of the positions of the party's. And that is ...You are an impartial judge over this proceeding; you cannot do that. And that's an appealable issue to the court. And I've seen this over and over again and have to bite my tongue sometimes.

Senator Bradley, to your question about efficiency and expedition: the pre-hearing conference process really offers that. If somebody with legal training can facilitate a settlement before it goes to an appeal ...Appeals can last two, three days sometimes. That's staff from the Department, sometimes several staff from the Department, the AG's Office, several state employees that are spending two days sitting in an appeal. If it can be settled in the pre-hearing conference, we're far more expeditious, we're far more efficient. And I think that can happen.

Issues on appeal ...Sometimes the Water Council will hear issues that do not relate to the Water Council's jurisdiction, such as wetlands. We do not hear anything regarding wetlands, but I've seen cases where the presiding officer will let a wetlands issue be discussed in the hearing, and that's not allowed. We cannot discuss those issues. And that's, again, issues of fact that could affect the Council's decision that shouldn't have come before the Council.

The writing decisions issue is more of ...I would agree with the Attorney General's Office that getting these opinions out expeditiously is important. But often, these citizens have appeals pending before other councils, such as the Wetlands Council, and are waiting for a decision to move forward with their appeal on the Wetlands Council. So, getting that decision written and done really affords them an opportunity to get going on the other appeals, and, I think, just general due process considerations, ensuring that the parties have opportunities to present witnesses, evidence, and arguments before the council, and not restraining them from having those due process requirements.

The only issue, I think, going forward - and I wouldn't say this should stop you from passing the bill - is how the Attorney General will reconcile their

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position in being a presiding officer over appeals and yet representing the State on the other side on an appeal. And I think ...Maybe the Attorney General has a better perspective on that, but that might be an issue to the parties, particularly the citizens who are on the other side of the Department on this case.

But in any event, I do think if those issues can be addressed, this bill should be passed by your committee. Thank you.

Please see Attachment #5 - Attorney Harrington's typewritten testimony.

Senator Amanda Merrill, D. 21: Senator Cilley. I mean, Senator Lasky.

Senator Bette R. Lasky, D. 13: Thank you, Madam Chair. Good morning. Are you the end of the road? In other words, if appeal is made to the Water Council, is that the end of it, or can that be appealed somewhere else?

Attorney Harrington: A council appeal can be appealed to the Supreme Court.

Senator Bette R. Lasky, D. 13: Supreme Court. Okay.

Attorney Harrington: Yes. Which, most...

Senator Bette R. Lasky, D. 13: And that's Supreme Court, not Superior Court?

Attorney Harrington: Supreme Court. Bu, most folks who come before the Water Council are not represented by attorneys; they can't afford attorneys. I think, you know, I've been doing this for almost three years. I think once have I seen an attorney represent a party.

Senator Bette R. Lasky, D. 13: So, pretty much, in reality, you're the end of the road.

Attorney Harrington: Right.

Senator Bette R. Lasky, D. 13: Thank you.

Senator Amanda Merrill, D. 21: Any other questions? Senator Bradley.

Senator Jeb E. Bradley, D. 3: Thank you very much, Joel. Just curious about your thought, the concern you just brought up, about the same person

both being the hearings officer and then, potentially, representing the State. Would one way of resolving that be a provision in the legislation that makes sure that they're not the same person?

Attorney Harrington: Or ...Yeah, I think something to that effect. I would leave it to the Attorney General's Office.

Senator Jeb E. Bradley, D. 3: Okay.

Attorney Harrington: But the question is: Could that person, in the future, represent the Department, or should it be just a person designated that never represents the Department and is always a presiding officer? I think we need to perhaps figure that out; I don't know.

Senator Jeb E. Bradley, D. 3: Thank you.

Senator Amanda Merrill, D. 21: Any other questions for Joel? Thank you.

Attorney Harrington: Thank you.

Senator Amanda Merrill, D. 21: Okay. Representative Spang, did you want to get in for a minute?

Representative Judith Spang: Just a second, yeah. Well, we're exec'ing, so I just have a second, but I'm very committed to this bill. I don't know ...Probably the Senate doesn't know this, but Representative McClammer and I worked very hard this fall to try to get to the bottom of the whole problem of enforcement of environmental regulations. We're hearing a lot of complaints at every level. It starts, you know, with conservation commissions or neighbors who are saying, you know, "Somebody's doing something next door that's in clear violation, but DES isn't coming to inspect or do anything about it."

We're hearing from developers and their consultants saying, you know, "We have appeals before the Wetlands Council, and we haven't heard for a year the decision on this, so we don't know whether to go forward with our project or not; we're hearing that things got hung up in the AG's Office." So, we tried to get a performance audit to find out where the problems are with the whole process. Because, I mean, obviously, one of the key problems is a lack of funding and a lack of staff. But we were also hoping that we might be able to also uncover some ways that - with very little cost, but changes - adjust the way of doing things at the agency, that things could be much more efficient.

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And to tell you the truth, one of the reasons that I got involved with this bill is because I think it's grossly unfair to developers that things should be done in a somewhat arbitrary way, by people who do not have the legal background to be making the degree of significance of the decisions that they are making. And, also, these decisions have got to get out if we are going to alleviate some of the anger that the development community is feeling toward the Department that they're holding up their applications. So, I ...And I also have had, as part of our discussions in researching this, had extensive conversations with Larry Morse, who's the head of the Council, and he is also very much in favor of doing something like having a hearing officer to make it a truly adjudicative proceeding, which it is, in terms of its impact.

So, I'm taking this time out of my exec'ing to come and say that I think that this is very important. Thank you.

Senator Amanda Merrill, D. 21: Okay. Thank you very much. Questions for Representative Spang? No? Thank you very much. Okay. Next, I have both Cathy Corkery and Art Cunningham from the Sierra Club. I wonder if, in the interest of time...

Cathy Corkery: (Speaking from the back of the room) Yes.

Senator Amanda Merrill, D. 21: ...you can do a duo? Thank you.

Ms. Corkery: (Speaking from the back of the room) I crossed the box after I realized Art was going to be the one who ...He's the original.

Very quickly, I'm Cathy Corkery from New Hampshire Sierra Club. New Hampshire Sierra Club has about 4,000 members in the State, and we are concerned about environmental issues, air, water, and public safety. And we support this bill, but I want to introduce Arthur Cunningham. He is our pro bono lawyer who has been working on specific cases, but he, luckily, is the expert on this issue. So, go ahead.

Attorney Arthur Cunningham: Senator Merrill, members of the Committee. I'll be brief. Most everybody has explained, I thought quite well, to the Committee that the responsibility of these councils is adjudicative. So, they have the fundamental responsibility to not only determine issues of law but to find disputed issues of fact.

My particular ...I'm an attorney, and my particular experience is largely with the Air Resources Council. And something about the issues that come before the Air Resources Council is, you need to understand, it involves the enforcement of the Clean Air Act. And the facts and issues that grow out of

the cases and permits involving the Clean Air Act are extremely complex. The law is complex; the facts are complex; and disputes arise between permittees and challengers about the evidence, about the law. All those matters require professional attention. These councils are composed of volunteers, well-meaning volunteers, that bring certain expertise to the table, but in balance and unbalance. The idea of having a legally trained presiding officer to make decisions on evidence, make decisions on procedural issues, and to write decisions, I think, will serve both the permittees and the challengers in the long run.

Senator Bradley asked a question about the potential conflict of interest between someone at the Attorney General's Office representing the State, for example, defending a permit, and the presiding officer being on the same case. The Attorney General's Office has always assured me that there's a Chinese Wall between the person who advises the councils - and, ultimately, the person who is the presiding officer of the council - and the person that's defending a permit, for example. And I trust that. It would be nice to have separation, legal separation. That's an extremely good question, a good point. But I trust the Attorney General's Office to insure that there is a Chinese Wall between the person who's an advocate for the permit and the person who has to remain impartial in terms of acting as a presiding officer.

One thing I would suggest - and we have extensive experience before the Air Resources Council - this bill should include, for example ...Since these councils have adjudicative authority and have to make decisions on facts, the bill should include clear cut, enforceable discovery provisions, so access to all the material and relevant documents and information can be brought before the council. At the present time, the discovery mechanism in the council bill, in the council legislation, is totally inadequate for applicants and for challengers to get access to all the facts. Now, we can file 91-A requests on the State, for example, but we cannot get access to a permittee's materials, which may be genuinely an issue.

So, what I would suggest is that the law be strengthened to provide definitive discovery mechanisms for both sides of the case and to provide for the subpoena power. One of the most shocking things to me, as a lawyer - you know, I've been in this game for 48 years - is that these councils, even though they have adjudicative responsibility and have to find facts, there's no subpoena power available to the people through an appeal. That, to me, is a fundamental flaw, in the prosecutorial sense. So, in our testimony, in the Sierra Club testimony, we make these suggestions. But let there be no mistake about it; we fully support this idea, this concept. I think it will work for everybody's benefit.

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Please see Attachment #6 – Letter from the Sierra Club.

Senator Amanda Merrill, D. 21: Thank you. Senator Lasky.

Senator Bette R. Lasky, D. 13: Thank you, Madam Chair. You bring up, and I agree with you, about the subpoena power, but wouldn't that add a cost to this bill?

Attorney Cunningham: Well, it should not. For example, if the Sierra Club wanted to subpoena a witness ...

Senator Bette R. Lasky, D. 13: Then they'd pay for this.

Attorney Cunningham: And, certainly, in the rulemaking process, they can establish a fee schedule.

Senator Bette R. Lasky, D. 13: What about the applicant? You know, the citizen that's coming forth to appeal, and the council itself feels it needs ...

Attorney Cunningham: I would analogize it like it is in the court system. If you want a subpoena, if you want a subpoena in the Superior Court, for example, the applicant for the subpoena has to pay for it, both for the service charges and for the preparation.

Senator Bette R. Lasky, D. 13: Right.

Attorney Cunningham: So, that could be taken care of, I think, very simply, in the rules.

Senator Bette R. Lasky, D. 13: Okay. Thank you.

Attorney Cunningham: Sure.

Senator Amanda Merrill, D. 21: Anything else? Thank you very much. Okay, we're just about done here. We have two representatives from the Home Builders, and I'm wondering if they can combine forces, or are they both ...

Ari Pollock: We can certainly go up together.

Senator Amanda Merrill, D. 21: Okay, that would be great. Thanks.

Mr. Pollock: I'm Ari Pollock. I'm a representative of the Home Builders Group. I'm with Gallagher, Callahan and Gartrell, a Concord law firm.

The Home Builders Association supports this bill because we recognize that these councils staffed with volunteers, frankly, need some way to expedite their process. They do a great job; they deal with very limited resources, and anything would help that cause. I'm here, after hearing the testimony, to just supply you with an additional suggestion, which is there's nothing wrong with having the appeal go from the Department to this council or these multiple councils. But it would also work to have the alternative of going directly to the Superior Court for an appeal; that's the way tax abatements work.

For example, if you file your abatement request with the selectmen and the selectmen of the town deny your request, it is the taxpayer's election to go either to the board of Tax and Land Appeal to prosecute their further abatement request or to go to Superior Court. I'm not suggesting that the councils do anything wrong or that they're not staffed with quality people working hard, but they are a group of volunteers. They meet on a very irregular schedule. They do not have, oftentimes, procedural expertise to make sure that some of the procedural discovery remedies or rights that have been discussed by other folks testifying are accounted for. And I'm not suggesting we eliminate that appellate option; I'm suggesting we add an option to go directly to the Superior Court.

Senator Amanda Merrill, D. 21: Senator Cilley.

Senator Jacalyn L. Cilley, D. 6: Thank you, Madam Chair, and thank you, Mr. Pollock, for that suggestion. I think one of the things I'd like to do is look at RSA 485:C, which is our large groundwater withdrawal permitting statute that has provisions about Superior Court. But having been part of the conversation several times about the process, and Gretchen's behind you, actually. I could probably ask her pretty quickly. It seems to me that there were concerns about jumping right from the permitting process, and, in this instance ...Well, it would be, because you'd go ...It'd be the permitting process, then appeals. Jumping right from the permitting process to a court, asking almost the same thing; now you're asking the courts, who may have legal proceedings down well but certainly don't know the technical aspects and areas of the case. And so, that raised many concerns, I recall, at the committee level. We heard it a few times before we addressed it in that statute. And as I said, unless Gretchen knows off the top of her head, I'm going to have to take a look at it.

Mr. Pollock: Yeah, I can't speak to the groundwater withdrawal context. But in the Wetlands Council context and the Water Council context, I think that you would be, in some fashion, trading the expertise of some of the folks

who specialize on these boards for a court process. And the tradeoff, whereas you might lose some of that expertise, you would pick up some efficiency; you would pick up a dispute resolution mechanism that is proven, that is staffed with people who are paid to administer the court system. And that's why I say don't eliminate one option or the other; add the option as exists in the tax abatement scenario. You know, all of the reasons why this bill is necessary in terms of addressing efficiency, getting a decision to a developer or to an appellant who is challenging a project in some fashion, those efficiencies require some adjustments. And I understand that there might be some sacrifice of expertise, but I would leave that decision to the applicant.

Ken Clinton: If I could add a point to that ... my name is Ken Clinton. I'm a land surveyor from New Boston. And as much as I'm also representing the Homeowners Association (sic), I'm in private practice as a land use and development consultant, which means I actually make the applications on behalf of my clients and submit them to DES for wetlands approvals, alternation of terrain, subdivision, et cetera. And as Ari has pointed out that if you have the ability to go to Superior Courts, each side of the argument has an obligation to provide the expert witnesses to provide the professional testimony of the fact; that's their responsibility. So, there may not be a reduction in the quality of the factual presentations. In fact, it actually might be increased in that option.

Senator Amanda Merrill, D. 21: Senator Lasky.

Senator Bette R. Lasky, D. 13: Thank you, Madam Chair. I'm not sure if you're the right ones to answer this, but how many cases, again, were heard a year? Do you know?

Mr. Pollock: At the Wetlands Council?

Senator Bette R. Lasky, D. 13: Yeah.

Mr. Pollock: It wouldn't be unusual to have 50 or 60 matters filed. I don't know how many they would resolve in a given year.

Senator Bette R. Lasky, D. 13: Appeals? Appeals? Or, technically appeals.

Mr. Pollock: Put onto their docket. Do you have the statistics?

Ms. Hamel: (Speaking from the back of the room) It's not that, quite that, many. In 2009, we had 40 cases.

Mr. Pollock: Forty? Okay. I can only tell you I have a matter pending right now that I think has a docket number of 56 from the year that it was filed in.

Senator Bette R. Lasky, D. 13: Thank you. Approximate is fine. Thank you.

Mr. Pollock: But 40 was the answer Gretchen provided.

Senator Bette R. Lasky, D. 13: Thank you.

Mr. Pollock: So, if there are questions, that's just purely my suggestion. And I would be happy to work with Committee members, if anyone was interested in it.

Senator Amanda Merrill, D. 21: Okay. Thank you very much.

Mr. Pollock: And I don't know if you had anything more ...

Mr. Clinton: No. I have nothing further. Thank you.

Senator Amanda Merrill, D. 21: Okay. Great. Thank you for your testimony. The last speak I have signed up is Jed Callen.

Attorney Jed Callen: Good morning, still, Madam Chairman and members of the Committee. My name is Jed Callen. I'm an attorney with the firm of Baldwin and Callen, here in Concord. And that's sort of unique, as a speaker, in that I don't come speaking on behalf of my employer or association or group, but I am an attorney in New Hampshire who handles primarily environmental and land use cases. And, at the moment, or driving here this morning, I was able to identify five that I currently have pending before various councils, and possibly, there is one or two others, and may not have been able to remember them because of the issue of the docket being so slow. And they're in the ether somewhere, and I'll be reminded of them, if we hear from the council.

I am unfamiliar with the process of testifying on a bill that may actually pass, because I'm zero for some large number of cases that I've come to this building to speak on, but I do ... did think it was worth my while to do, because I'm one of those rare consumers of this service. Because I represent permittees who are appealing the denials of their permits and also abutters or interested parties who are appealing the issuance of permits, I absolutely are (sic) before all the councils and on both sides. You know, it's not like I'm the environmental side or the development side. We've heard from each of

ML

those. I respect them both, but they have a constituency. I do not. I'm private practice. I oppose permits; I seek permits for various clients.

And very quickly, I'll just say - because I think the testimony's been excellent and very much on point - that this is a bill that needs to pass, because the system is, as Gretchen said, broken for the two reasons you've heard. And again, I don't want to belabor it. One, the delays are bad for everyone: developers and abutters; and two, the lack of expertise in the volunteer boards makes for poor decisions or poor written decisions. I'm not going to say that the council's decisions are necessarily poor, but, without sounding self-serving as an attorney, I think we all know that every profession has its area of expertise. And this process of adjudication of complex issues of fact and law and the interchange of fact with law is the area of expertise of lawyers. And we are asking non-lawyers to do very much a lawyer's job to sit as a hearing officer and administrative judge.

So, I think placing that responsibility in the hands of trained lawyers who are familiar with the process, the procedural rules, the substantive rules, and the basic rules cannot but help the quality, the speed, the focus, the chance of settlement, and everything else about it. And a final point is, when the decision is rendered, if it is written better and focused better and supported better, it will save everybody a lot of time on the subsequent appeal to the Supreme Court, where it may be the underlying decision was right, but the decision is so poorly crafted or reasoned or supported that it can be attacked. And I say that from great experience, having been the loser in the Supreme Court appeal of a wetlands council; I think you heard of that from Senator Janeway, who thought the Greenland's council case that resulted in a definition of what the jurisdiction of the DES is over wetlands.

And if you read that decision - and again, I'm not here to argue that decision - you'll find that, besides the substantive findings in that case, the court took its time to lambast the council for a poorly written and reasoned decision, then said, "We support it, anyhow," because, underlying, they were right. But it's an example, one of many, that could have certainly not needed to be that way had the decision been written by somebody with legal training. So, I see advantages for everyone. I see this as a true win-win, and I hope you'll move ahead.

Senator Amanda Merrill, D. 21: Thank you very much. Any questions for Mr. Callen? Senator Bradley.

Jeb E. Bradley, D. 3: The last presenters talked about the option of the applicant being able to go straight to superior court. As somebody's who's been on both sides of that issue, what's your reaction to that?

Attorney Callen: Well, I wondered if I'd be asked. I decided not to volunteer on that. It's somewhat separate and quite a different question than the expertise and procedure before the council. I would love it, myself. I, honestly, would feel far more comfortable appealing on behalf of either denied permit applicant or a (sic) aggrieved abutter, who thinks the permit ought not have issued, before the superior court because I'm familiar with that milieu. We know how to present fact; you know how to argue law; we know that the docket, even though it's slow, has some momentum and end point.

I find appeals to the councils to be stepping into a morass or into the ether. They disturb me. It's where I have to go, so I go there, but you don't know what you're going to get. You get a bunch of laypeople, who may have great expertise in their substantive area of their job. They are appointed from various constituencies, but almost none of them are expert on the law relating to water permits or wetlands permits or terrain alteration permits. They're there temporarily, and then they're gone. So, if I had the option, I would always go to superior court.

Senator Amanda Merrill, D. 21: Follow up.

Jeb E. Bradley, D. 3: It would seem to me, sir, that one of the things that would be achieved by that is ... Well, one of the goals of the over-riding legislation is that you have the opportunity to bring people together, even if you're going to court. There's always the opportunity to settle when you're in court. I ... Your thoughts on that?

Attorney Callen: Well, one of the things the courts have gotten good at is forcing people to try to settle; you know: alternative dispute resolution mediation. The councils ought to do that better. And I think Ari spoke to this, or somebody did - maybe it was Joel - that pre-hearing conferences, run right even at the administrative ... at the council level, could force or ... not force, but aid in settlement. But again, that takes somebody who has an ability to identify which issues are contentious, which are not, and to sort of urge the parties towards settlement.

And again, I find that that's lacking in the current council system, because we let clerks, who aren't lawyers, and chairmen or the officer, who is not a lawyer, and I think they had a lawyer from the AG's Office running the pre-hearing might well achieve more settlements. That would be really efficient.

Senator Amanda Merrill, D. 21: Other questions? Thank you very much.

Attorney Callen: Thank you very much.

Senator Amanda Merrill, D. 21: Oh, Senator Cilley?

Senator Jacalyn L. Cilley, D. 6: Before you close the hearing, could we have Gretchen come back up? I have a couple of questions that she may not be able to address here, but I'd like to think about.

Senator Amanda Merrill, D. 21: Sure, if Gretchen's willing. It looks like she is.

Ms. Hamel: I knew I should have left!

Senator Jacalyn L. Cilley, D. 6: You know, this one and, I think, Senator Bradley brings up a good point, and we just heard from Jed Callen that he would love to go to ... well, right now, it's superior ... well, Supreme Court. But I think under RSA 485-C, in the large groundwater withdrawal, we made it superior court. And did we make that ... Do you recall, off the top of your head, if we made that an option or is that the next step, because we didn't have a next step in that ... in appeals process?

Ms. Hamel: My recollection is that, in the groundwater context, you do not have the option of going to a council; that the appeal is to the superior court.

Senator Jacalyn L. Cilley, D. 6: Interesting. Follow up, then?

So, we obviously felt, at that time, that, despite the technical nature of this, that it would be appropriate for the applicant to take the issue to superior court. And I think the fundamental reason that we did that was this whole issue of discovery and having a paper trail. I think that was the thing behind the ... So, it's not an option. It is what you do.

Ms. Hamel: That's what I'm remembering, but I haven't read that statute this morning, so...

Senator Jacalyn L. Cilley, D. 6: Okay. I will take ... And then I have another question, if I may?

There is something in all of the testimony here that speaks to a more systemic problem, if you will, with these councils. We probably don't have time this session, but would you recommend that the structure and the composition of these councils be reviewed at some point in the future? I mean, when you say the system's broken, it sort of suggests that. And I hate to put you on the spot. These are great volunteers that we have, but is this a process that should simply be left in volunteer hands?

Ms. Hamel: Well, I think that the function that the councils serve on the policy issues that the Department deals with is very helpful and very valuable, and I don't think that anyone has any issues with that. If we didn't have the councils for those reasons, we'd create something to provide that kind of input, so I think that, for the policy and advisory functions, I don't think that's broken at all.

I do think that there's a problem with asking those same people who are very good at offering advice on policy issues to, again, serve in the quasi-judicial capacity that they're asked to serve in. And I think, especially ... I have numbers just for the last ten years. You know, the number of appeals is going up. They are getting more complex. It is more difficult to keep people on the councils, in part because of the time commitments. So, I am ... That may not make so much of a difference in the policy arena, but when you're in the adjudicative process arena, I think it is very significant.

Senator Jacalyn L. Cilley, D. 6: Thank you. That's helpful.

Senator Amanda Merrill, D. 21: Okay. Other questions for Gretchen? Thank you very much.

Ms. Hamel: Thank you.

Senator Amanda Merrill, D. 21: Does anybody have the need to speak a second time? Okay. Anybody else who wants to speak who isn't signed up? Okay. I would just note that Representative Kappler signed up in support of the bill. I think that's it. Okay. I will close the hearing on Senate Bill 480.

Hearing concluded at 11:04 a.m.

Respectfully submitted,



Marty Cote
Senate Secretary
3/12/10

6 Attachments

TESTIMONY: SB480

**SENATE ENERGY, ENVIRONMENT AND ECONOMIC
DEVELOPMENT COMMITTEE**

February 4, 2010

Prime, SB480, appeals of decisions by the department of environmental services.

Thank you for allowing my legislative aide/intern to present my testimony on SB480.

This bill authorizes and clarifies the right of the various councils in the Department of Environmental Services to hear appeals of permit denials in their subject areas. It was requested by the Department of Environmental Services. It provides for the appointment of one or more hearing officers by the Attorney General and delineates the duties and responsibilities of said officers. The bill also directs the Commissioner of Environmental Services to consult with the appropriate councils before undertaking the necessary administrative steps for the hearing of such appeals.

The purpose of this legislation is to streamline the appeals process at DES and to insure consistency regarding the hearings and ruling of such appeals by all the councils within DES.

Members of the Department are here to testify and answer any questions you may have regarding SB 480.

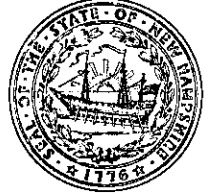
Thank you. Senator Martha Fuller Clark



The State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES

Thomas S. Burack, Commissioner

Attachment #2



February 4, 2010

The Honorable Martha Fuller Clark, Chairman
Energy, Environment, & Economic Development Committee
Legislative Office Building, Room 102
Concord, New Hampshire 03301

Re: SB 480, relative to appeals of decisions by the department of environmental services

Dear Chairman Fuller Clark and members of the Committee:

Thank you for the opportunity to testify on SB 480, relative to appeals of decisions by the Department of Environmental Services. SB 480 proposes to amend various provisions of RSA 21-O, the enabling legislation for DES and its related Councils, to adjust the role of the Councils in administrative appeals of DES decisions. The bill proposes to require persons who are qualified to conduct administrative hearings be appointed from the Civil Bureau of the Attorney General's Office to serve as hearing officers for such administrative appeals. DES supports this bill.

Under the current statute, four environmental councils hear appeals from DES's permitting decisions and administrative orders; the Wetlands Council, the Water Council, the Waste Management Council and the Air Resources Council. Members are appointed to represent state agencies, the public at large and particular industrial, academic, commercial, recreational, or conservation interests. (A list of Council members and the interest(s) represented is attached.) While the knowledge and experience of the members can be invaluable when considering substantive issues, for the most part council members are not experienced or well-versed in the conduct of adjudicative hearings or in writing appeal decisions. As a result, many cases are not heard or decided promptly -- which raises serious due process concerns.

Case data for all four councils show that, of the 23 appeals that were filed in the first half of 2009, 2 cases were withdrawn, 2 cases are on hold at the request of the parties, 2 cases were dismissed for lack of standing, and 1 case was summarily denied, leaving 16 cases still active. Of those 16 cases, prehearing conferences (PHCs) have been held in 7, PHCs have been scheduled but not yet held in 6, and PHCs have not yet been scheduled in 3. Of the 7 cases for which PHCs have been held, a hearing has been held in only 1. Of the 4 cases awaiting decisions (2 dismissed, 1 denied, and 1 heard), no decisions have been issued. Of the 15 appeals filed in the last half of 2009, 14 cases are still active (1 withdrawn); of those 14, PHCs have been scheduled in 2, no PHCs or hearings have been held, and no decisions have been issued.

DES Web site: www.des.nh.gov

P.O. Box 95, 29 Hazen Drive, Concord, New Hampshire 03302-0095

Telephone: (603) 271-3503 • Fax: (603) 271-2867 • TDD Access: Relay NH 1-800-735-2964

The Honorable Martha Fuller Clark, Chairman
February 4, 2010
Page Two

Under the proposed bill, the Councils would continue to hear all appeals and would retain the authority to decide all issues of fact, but the legal issues and the preparation of the actual decisions would be the responsibility of an Assistant Attorney General who is trained and educated specifically to have such expertise. In this way, the Council members will continue to be responsible for the substantive aspects/outcomes of appeals, where their expertise is most useful -- while the burden of ensuring that the proceedings meet all legal requirements will rest with someone who is well qualified to bear it.

Thank you again for the opportunity to comment on this bill. If you have any questions, please call me or Gretchen Hamel of my staff at 271-3137.

Sincerely,



Thomas S. Burack
Commissioner

cc: Senator Merrill
Senator Cilley
Senator Laskey
Senator Bradley
Representative Kappler
Representative Spang

Member	Interest Represented
Air Resources Council (RSA 21-O:11; 11 members; no vacancies)	
Robert Duval, Chair	Public Interest
David Collins, Vice Chair	[Fuel] Oil Industry
William Smagula	Steam Power Generating Industry
Debra I. Hale	Natural Gas Industry
Steven Walker	Manufacturing Component of Industry
Raymond R. Donald	Municipal Government
Robert Hickey, M.D.	Public Interest/Licensed Practicing Physician
Terry Callum	Public Interest/Recreation
Georgia Murray	Public Interest/Environmental Interests
J. Ryan Bielagus	Public Interest
Linda Garrish Thomas	Public Interest
Waste Management Council (RSA 21-O:9; 13 members; 1 vacancy)	
G. Bradley Richards, Chair	Public Interest
Ronald Allard, Vice-Chair	Private Industries that Generate Hazardous Waste
Charles Connell	Municipal Official
Stephen R. Crean	Elected Municipal Official
Elaine M. Lauterborn	Elected Municipal Official
Michael B. Blayney	Public Health Expert
Duncan Watson	Local Conservation Commission Member
Nancy E. Kinner	Associate Prof. Env'l Sciences or Sanitary Engineering
David J. Tooley	Private Solid Waste Management Industry
Arthur J. Cunningham	Licensed Sanitary or Environmental Engineer
Carl L. Quiram	Municipal Public Works Field
<i>Vacant</i>	<i>Business or Financial Community</i>
Mike Durfor	Community that Recycles or Recovers Solid Waste
Water Council (RSA 21-O:7; 16 members; no vacancies)	
John F. Bridges, Chair	Public
Nancy E. Christie, Vice Chair	Public
James Varotsis	Industrial
Christopher Rawsley	Industrial
Ray S. Cowan	Vacation Homes/Recreation
Stanley Rastallis	Agriculture
Stephen J. Densberger	Water Works
Robert S. Phillips	Septage Haulers
Joel Harrington	Statewide Nonprofit Conservation or Env'l Organization
Malcolm R. Butler	Wastewater Treatment Plant Operators
Bruce Barnard	Granite State Designers & Installers
Nicholas Toumpas, Commissioner (by designee)	NH Dept. of Health and Human Services
Glenn Normandeau, Commissioner (by designee)	NH Fish & Game
Ted Austin, Director of Parks (by designee)	NH Div. of Parks & Recreation
Joanne Morin, Director (by designee)	Office of Energy & Planning
John Barthelmes, Commissioner (by designee)	NH Dept. of Safety
Wetlands Council (RSA 21-O:5-a; 14 members; 2 vacancies)	
Lawrence E. Morse, Chair	Natural Resource Scientist
Dennis Lydon, Vice Chair	[Non-Marine] Construction Industry
Glenn Normandeau, Executive Director (by designee)	NH Fish & Game
George Campbell, Commissioner (by designee)	NH Dept. of Transportation
George Bald, Commissioner (by designee)	NH Dept. of Resources and Economic Development
Joanne Morin, Director (by designee)	NH Office of Energy & Planning
Lorraine Merrill, Commissioner (by designee)	NH Dept. of Agriculture, Markets & Foods
John J. Barthelmes, Commissioner (by designee)	NH Dept. of Safety
Paul Dionne	Municipal Conservation Commission
David A. Thompson	County Conservation Districts
Lawrence Ballin	Elected Municipal Official
<i>Vacant</i>	<i>Marine Industry</i>
<i>Vacant</i>	<i>Environmental Protection and Resource Management</i>
George Kimball	Farm/Forest Landowner

Murphy, Patrick

From: Hamel, Gretchen [Gretchen.Hamel@des.nh.gov]
Sent: Thursday, February 04, 2010 8:24 AM
To: Fuller Clark, Martha
Cc: Murphy, Patrick; Walls, Michael J.; bud.fitch@doj.nh.gov
Subject: SB 480 - Amendment suggested by AG

Importance: High

Attachments: Amend SB 480 section 1 as follows.doc



Amend SB 480
section 1 as foll...

Good morning-

Attached is an amendment to section 1 of SB 480 that was prepared by the Attorney General's office, which is intended to (1) give the AG broader discretion in appointing a hearing officer (since the best appointee may not be someone who is working in the Civil Bureau), and (2) give the Commissioner and the AG authority to work out funding. DES supports this amendment. I am forwarding it to you in advance of the hearing at the request of Mike Walls, so that you might have a chance to review and consider it as well.

<<Amend SB 480 section 1 as follows.doc>> Mike Walls and I are planning to attend the hearing this morning.

Thank you,
Gretchen

Gretchen Hamel, Administrator
DES Legal Unit
29 Hazen Drive; P.O. Box 95
Concord, NH 03302-0095
Tel: 603-271-3137 (direct)
Fax: 603-271-8805 (direct)
Gretchen.Hamel@des.nh.gov

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Attachment #3

Amend SB 480 section 1 as follows:

1 New Paragraph; Administrative Appeals; Hearing Officer. Amend RSA 21-M: ~~3(11)~~ by inserting after paragraph II the following new paragraph:

VIII. The attorney general shall appoint one or more individuals [~~within the bureau~~] to serve as a hearing officer for the appeal panels established under RSA 21-O:14. *The Attorney General and the Commissioner of the Department of Environmental Services are authorized to enter into an agreement to transfer funds sufficient to fund the hearing officer position and expenses.* Such individual or individuals shall be qualified by education and experience in the conduct of administrative adjudicative hearings and the application of law to facts. When designated as the hearing officer for a particular appeal, the hearing officer shall:

- (a) Regulate all procedural aspects of a proceeding, including presiding over the hearing and any prehearing conferences;
- (b) Decide all questions of law based on the facts as found by the appeal panel; and
- (c) Prepare and issue all written decisions on behalf of the appeal panel.

Amend SB 480 section 1 as follows:

1 New Paragraph; Administrative Appeals; Hearing Officer. Amend RSA 21-M:3[11] by inserting after paragraph II the following new paragraph:

VIII. The attorney general shall appoint one or more individuals [~~within the bureau~~] to serve as a hearing officer for the appeal panels established under RSA 21-O:14. *The Attorney General and the Commissioner of the Department of Environmental Services are authorized to enter into an agreement to transfer funds sufficient to fund the hearing officer position and expenses.* Such individual or individuals shall be qualified by education and experience in the conduct of administrative adjudicative hearings and the application of law to facts. When designated as the hearing officer for a particular appeal, the hearing officer shall:

- (a) Regulate all procedural aspects of a proceeding, including presiding over the hearing and any prehearing conferences;
- (b) Decide all questions of law based on the facts as found by the appeal panel; and
- (c) Prepare and issue all written decisions on behalf of the appeal panel.

Testimony of Joel M. Harrington, Member, Water Council
Senate Bill 480
An Act Relative to Appeals of Decisions by the Department of Environmental Services
Senate Energy, Environment and Economic Development Committee
February 4, 2010

Madam Chair and Members of the Committee:

Thank you for the opportunity to testify this morning in support of Senate Bill 480, An Act Relative to Appeals of Decisions by the Department of Environmental Services. Approximately two years ago, Commissioner Burack and Water Division Director Harry Stewart asked me to serve on the state's Water Council. Recommendations for serving on most of our state's councils are made to the Governor who formally nominates the individual and brings the nomination to the Executive Council for approval.

The purpose of the Water Council is to consult with and advise the director of the Water Division with respect to the policy, programs, goals, and operations of the division other than those relating to wetlands, with particular emphasis on long-range planning for the division and on education of the public relative to the functions of the division. The Council hears and decides all appeals from the department's decisions as well as reviews rules proposed by the division other than wetlands. The Council is an adjudicatory body whereby a Presiding Officer regulates the course of the appeal proceeding (see p. 18 of Env-WC 100). Parties to an appeal proceeding include the: Attorney General's office typically represented the Department, Appellant (citizens who are challenging the Department's decision against them) who are sometimes represented by counsel but most likely are not, and an intervenor, (citizen(s) who are aggrieved by the Appellant's actions). The Council members act as the jury and render a decision, the Presiding Officer is to run the hearing according to the administrative rules but is to be impartial. Once the hearing is over and a decision is rendered, the Presiding Officer writes the decision.

The Council was particularly active after the Mother's Day Flood. Some of the more controversial dockets before the Water Council include the dispute between the Lake Sunapee Protective Association and N.H. Fish & Game Department relative to the construction of a boat launch at the Wild Goose property on Lake Sunapee, determination of lake levels for the Ashuelot Pond Dam Village District, and as a general matter appeals that are related to Alteration of Terrain.

Recently I was asked by the Department to be 1 of 2 individuals on the Council to preside over appeals, particularly because I am the only individual on the council who holds a law degree and has an appreciation for the adjudicatory process. Prior to this role, I observed a process whereby

individuals who serve on the Council with no legal background presided over appeals hearings. While I have much respect for my colleagues who serve on the Council, I often participated in a hearing where I felt the Presiding Officer was not impartial or infringed upon the Due Process rights of individuals, particularly those who were not represented by an attorney. Which leads me to several fundamental problems with the current appeals proceeding structure:

1. Lay people serving as Presiding Officers of Appeals: Lay people on the Council who have no legal training often do not understand their role as an impartial chairperson of the appeal proceeding, sometimes they mistakenly take the position of one of the parties or offer opinion that would raise substantial questions of an impartial proceeding.
2. Prehearing conferences: A representative from the AG's office could facilitate and expedite the settlement between the Department and the Appellant to avoid costly appeal hearings and overextending staff resources.
3. Issues on Appeal: A lay person is sometimes unable to distinguish the Council's limitations with issues that are on appeal versus other issues that may be before other council's such as wetland. It is important that the Presiding Officer conduct the hearing such that the parties are focused on the issue on appeal.
4. Writing Decisions: Council members are not timely in getting written decisions to the parties. Often parties have pending cases before the Wetlands Council and will need a written decision before they can proceed with the wetlands portion of their case.
5. General Due Process Considerations: General concerns with ensuring that all individuals have an opportunity to present their witnesses, evidence, and arguments before the Council. A Presiding Officer who is not impartial could effect the Due Process nature of the appeals proceeding.

The issue going forward is if this bill passes, is how the Attorney General will reconcile their statutory requirement to represent the state in appeals and also be the Presiding Officer of those appeals.

In any event, I believe that passing SB 480 as written will provide much needed relief to a process that has fundamental structure issues.

Thank you.



February 3, 2010

Senator Martha Fuller Clark
New Hampshire State Senate
Energy, Environment and Economic Development Committee

RE: SB480

Honorable Senator and Committee Chairman Martha Fuller Clark and Committee Members:

The New Hampshire Sierra Club fully supports Senate Bill 480.

The appointment of an administrative hearing officer by the Department of Justice responsible for the legal aspects of adjudicative appeal hearings is a sound proposal. A legally trained hearing officer can determine procedural matters and rule on issues of law without impairing Council responsibility to resolve factual disputes.

New Hampshire Sierra Club suggests that the Bill be amended to include provisions that will enable the Councils to have full access to all the information and witnesses necessary to fulfill their adjudicative fact finding responsibilities.

The information request provisions of the current law and regulatory framework should be strengthened to provide full access to all facts that are material to the appeal; including from permit applicants.

The law should also provide for subpoena power for both the information gathering process and for the adjudicative hearings on the merits of appeals.

Passage of SB480 will enable the Councils to fully, fairly and promptly meet their adjudicative appeal responsibilities.

Very truly yours,

Arthur B. Cunningham
NH Sierra Club Attorney
gilfavor@comcast.net

Catherine M. Corkery
NH Sierra Club Chapter Director
catherine.corkery@sierraclub.org

The Sierra Club's members are 700,000 of your friends and neighbors. Inspired by nature, we work together to protect our communities and the planet. The Club is America's oldest, largest and most influential grassroots environmental organization.

New Hampshire Sierra Club 40 North Main Street, Second Floor Concord, NH 03301
603/224-8222 FAX: 603/224-4719

www.sierraclub.org

www.nhsierraclub.org

Speakers

Testimony



Sen. Fuller Clark, Dist. 24
March 17, 2010
2010-1077s
08/04

Amendment to SB 480

1 Amend the bill by replacing section 1 with the following:

2

3 1 New Paragraph; Attorney General; Hearing Officer. Amend RSA 21-M:3 by inserting after
4 paragraph VII the following new paragraph:

5 VIII. The attorney general shall appoint one or more individuals to serve as a hearing officer
6 for the appeal panels established under RSA 21-O:14. The attorney general and the commissioner of
7 the department of environmental services may enter into a memorandum of understanding to
8 transfer funds sufficient to fund the hearing officer position and related expenses. Such individual
9 or individuals shall be qualified by education and experience in the conduct of administrative
10 adjudicative hearings and the application of law to facts. When designated as the hearing officer for
11 a particular appeal, the hearing officer shall:

12 (a) Regulate all procedural aspects of a proceeding, including presiding over the hearing
13 and any prehearing conferences;

14 (b) Decide all questions of law based on the facts as found by the appeal panel; and

15 (c) Prepare and issue all written decisions on behalf of the appeal panel.

16

17 Amend RSA 21-O:14, III as inserted by section 7 of the bill by replacing it with the following:

18

19 III. Persons aggrieved by the disposition of administrative appeals before any council
20 established by this chapter may appeal such results [~~in accordance with RSA 541~~] *within 30 days*
21 *of a decision by such council. The appellant may choose to appeal to the superior court or*
22 *the supreme court.*

Voting Sheets

Senate Energy, Environment & Economic Development Committee EXECUTIVE SESSION

Bill # SB480

Hearing date: 2/4/10

Executive session date: ~~2/11/10~~ 3/18/10

Motion of: OTP/A

VOTE: 6-0

Made by	Fuller Clark <input type="checkbox"/>	Seconded	Fuller Clark <input type="checkbox"/>	Reported	Fuller Clark <input checked="" type="checkbox"/>
Senator:	Merrill <input checked="" type="checkbox"/>	by Senator:	Merrill <input checked="" type="checkbox"/>	by Senator:	Merrill <input type="checkbox"/>
	Lasky <input type="checkbox"/>		Lasky <input type="checkbox"/>		Lasky <input type="checkbox"/>
	Cilley <input type="checkbox"/>		Cilley <input checked="" type="checkbox"/>		Cilley <input type="checkbox"/>
	Odell <input type="checkbox"/>		Odell <input type="checkbox"/>		Odell <input type="checkbox"/>
	Bradley <input checked="" type="checkbox"/>		Bradley <input type="checkbox"/>		Bradley <input type="checkbox"/>

<i>Committee Member</i>	<i>Present</i>	<i>Yes</i>	<i>No</i>	<i>Reported out by</i>
Senator Fuller Clark, Chairman	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Merrill, Vice-Chair	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Lasky	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Cilley	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Odell	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Bradley	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Amendments: suggested - 1077s - 6-0
1106s

Notes: _____

Committee Report

STATE OF NEW HAMPSHIRE
SENATE
REPORT OF THE COMMITTEE

Date: March 18, 2010

THE COMMITTEE ON Energy, Environment and Economic Development
to which was referred Senate Bill 480

AN ACT relative to appeals of decisions by the department of
environmental services.

Having considered the same, the committee recommends that the Bill:

OUGHT TO PASS WITH AMENDMENT

BY A VOTE OF: 6 - 0

AMENDMENT # 1106s

Senator Martha Fuller Clark
For the Committee

Marty Cote 271-3045

New Hampshire General Court - Bill Status System

Docket of SB480

Docket Abbreviations

Bill Title: relative to appeals of decisions by the department of environmental services.**Official Docket of SB480:**

Date	Body	Description
01/21/2010	S	Introduced and Referred to Energy, Environment and Economic Development; SJ 3 , Pg.46
01/28/2010	S	Hearing: February 4, 2010, Room 102, LOB, 9:30 a.m.; SC5
03/18/2010	S	Committee Report: Ought to Pass with Amendment 1106s, 3/24/10; SC12
03/24/2010	S	Committee Amendment 1106s, AA, VV; SJ 11 , Pg.203
03/24/2010	S	Ought to Pass with Amendment 1106s, MA, VV; OT3rdg; SJ 11 , Pg.203
03/24/2010	S	Passed by Third Reading Resolution; SJ 11 , Pg.256
03/24/2010	H	Introduced and Referred to Judiciary; HJ 30 , PG.1521
03/31/2010	H	Public Hearing: 4/6/2010 11:00 AM LOB 208
04/07/2010	H	Subcommittee Work Session: 4/15/2010 9:30 AM LOB 208
04/15/2010	H	Subcommittee Work Session: 4/22/2010 1:00 PM LOB 208
04/22/2010	H	Subcommittee Work Session: 4/27/2010 10:30 AM LOB 208
04/27/2010	H	Subcommittee Work Session: 4/29/2010 9:45 AM LOB 208
04/27/2010	H	Executive Session: 4/29/2010 10:00 AM LOB 208
05/03/2010	H	Majority Comm Report: Ought to Pass with AM #1737h for May 12 (Vote 13-5; RC); HJ 37 , PG.1745-1746
05/03/2010	H	Proposed Majority Committee Amendment #1737h; HJ 37 , PG.1841-1842
05/03/2010	H	Minority Committee Report: Inexpedient to Legislate; HJ 37 , PG.1745-1746
05/12/2010	H	Special Order to Next Session Day, Without Objection; HJ 41 , PG.2097
05/13/2010	H	Amendment #1737h Adopted, VV; HJ 42 , PG.2105-2108
05/13/2010	H	Floor Amendment #2052h (Rep W.O'Brien) Failed, RC 144-179 ; HJ 42 , PG.2108-2111
05/13/2010	H	Ought to Pass with AM #1737h: MA DIV 199-125; HJ 42 , PG.2105-2111
05/19/2010	S	Sen. Fuller Clark Moved Nonconcur with House Amendment 1737h; Requests C of C, MA, VV
05/19/2010	S	President Appoints: Senators Fuller Clark, Merrill and Bradley; SJ 20 , Pg.646
05/19/2010	H	House Accedes to Request for Comm of Conf (Rep Hess): MA VV; HJ 46 , PG.2241
05/19/2010	H	Speaker Appoints: Reps G.Richardson, Wall, L.Weber & Rowe; HJ 46 , PG.2241
05/19/2010	S	Committee of Conference Meeting: 5/24/2010 1:00 p.m., Room 104, LOB
05/24/2010	S	C of C Meeting: == RECESSED === May 24, 2010, Room 104, LOB, 1:00 p.m.
05/24/2010	S	C of C Meeting: == RECONVENE === May 25, 2010, Room 104, LOB,

		2:00 p.m.
05/26/2010	H	Conferee Change: Rep Cote Replaces Rep Rowe; HJ 46 , PG.2247
05/26/2010	S	C of C Meeting: == RECESSED === May 25, 2010, Room 104, LOB, 2:00 p.m.
05/26/2010	S	C of C Meeting: == RECONVENE === May 26, 2010, Room 104, LOB, 8:00 a.m.
05/27/2010	H	Conference Committee Report #2244, House Amendment + New Amendment, Filed; HC 43 , PG.2159
06/02/2010	H	Conference Committee Report #2244 Adopted, RC 197-159 ; HJ 51 , PG.2282-2285
06/02/2010	S	Conference Committee Report 2244; Adopted, VV; SJ 21 , Pg.722
06/02/2010	H	Enrolled Bill Amendment #2424 Adopted; HJ 51 , PG.2326
06/02/2010	S	Enrolled Bill Amendment #2424 Adopted; SJ 21 , Pg.753
06/02/2010	S	Enrolled; SJ 21 , Pg.776
06/02/2010	H	Enrolled; HJ 51 , PG.2332
07/20/2010	S	Signed by the Governor on 07/20/2010; Effective 09/18/2010; Chapter 0354

 NH House

NH Senate

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Other Referrals

COMMITTEE REPORT FILE INVENTORY

SB480 ORIGINAL REFERRAL

RE-REFERRAL

1. THIS INVENTORY IS TO BE SIGNED AND DATED BY THE COMMITTEE SECRETARY AND PLACED INSIDE THE FOLDER AS THE FIRST ITEM IN THE COMMITTEE FILE.
2. PLACE ALL DOCUMENTS IN THE FOLDER FOLLOWING THE INVENTORY IN THE ORDER LISTED.
3. THE DOCUMENTS WHICH HAVE AN "X" BESIDE THEM ARE CONFIRMED AS BEING IN THE FOLDER.
4. THE COMPLETED FILE IS THEN DELIVERED TO THE CALENDAR CLERK.

DOCKET (Submit only the latest docket found in Bill Status)

COMMITTEE REPORT

CALENDAR NOTICE on which you have taken attendance

HEARING REPORT (written summary of hearing testimony)

HEARING TRANSCRIPT (verbatim transcript of hearing)

List attachments (testimony and submissions which are part of the transcript) by number [1 thru 4 or 1, 2, 3, 4] here: Attachment 1-6

SIGN-UP SHEET

ALL AMENDMENTS (passed or not) CONSIDERED BY COMMITTEE:

- AMENDMENT # 1106s _____ - AMENDMENT # _____
_____ - AMENDMENT # _____ _____ - AMENDMENT # _____

ALL AVAILABLE VERSIONS OF THE BILL:

AS INTRODUCED _____ AS AMENDED BY THE HOUSE
 FINAL VERSION AS AMENDED BY THE SENATE

PREPARED TESTIMONY AND OTHER SUBMISSIONS (Which are not part of the transcript)

List by letter [a thru g or a, b, c, d] here: Submission a

EXECUTIVE SESSION REPORT

_____ OTHER (Anything else deemed important but not listed above, such as amended fiscal notes):

IF YOU HAVE A RE-REFERRED BILL, YOU ARE GOING TO MAKE UP A DUPLICATE FILE FOLDER

DATE DELIVERED TO SENATE CLERK

8/4/10

Mandy Code
COMMITTEE SECRETARY