

Atkinson Conservation Commission Minutes
Wednesday, January 29, 2020
Kimball Library

Approved February 3, 2020

Members Present:

Paul Wainwright, Chair
Jeff Nenart
Dan Kimball
Pete McVay, Secretary
Bill Steele (Alternate, voting)

Others Present:

1) Call to Order & Attendance:

Chair Wainwright called the meeting to order at 6:00PM on Wednesday, January 29, 2020. Chair Wainwright reviewed the attendance list and declared that a quorum was present. Chair Wainwright stated that this special meeting has been posted in two places more than 24 hours ago. Chair Wainwright also declared that Alternate Steele would be voting since not all regular members are in attendance.

The reason for this special meeting is to consider submitting comments to DES about a proposed rules change, and these comments are due before our next regular meeting.

2) Proposed Changes to DES Administrative Rule Env-Wq 1503-19 (h) :

Chair Wainwright distributed the attached summary of the changes that DES is proposing to their Administrative Rule **Env-Wq 1503_19 (h)**, which pertains to the protection of Threatened and Endangered Species when considering Alteration of Terrain Permits. This summary is attached to these minutes.

Chair Wainwright also distributed a draft letter to DES opposing the change.

The Commission discussed the impact that the proposed changes would have on our efforts to protect Atkinson's natural resources, especially wildlife habitat known to support both Blanding's and Spotted Turtles, which are declared by the State to be Threatened and Endangered.

Member Nenart made a motion to provide written input to DES opposing the proposed change to Administrative Rule Env-Wq 1503_19 (h). Member McVay seconded the motion. Five (5) members of the Atkinson Conservation Commission voted in favor. Vote: 5/0/0.

A copy of our final letter to DES is attached to these minutes.

3) Adjournment:

Chair Wainwright requested a motion to adjourn.

Member McVay made a motion to adjourn the January 29, 2020 special meeting of the Atkinson Conservation Commission. Alternate Steele seconded the motion. Five (5) members of the Atkinson Conservation Commission voted in favor. Vote: 5/0/0.

The meeting adjourned at 6:15 PM.

Attachments:

- a) Summary of DES's proposed changes to Env-Wq 1503_19 (h)
- b) Final letter to DES stating our opposition

DES Proposed Change to Administrative Rule: Env-Wq 1503_19 (h) January, 2020

Here is the current rule

(this is one of the criteria that must be met before DES can issue an AoT):

(h) The project has been designed in a manner that will not result in adverse impacts to state- or federally listed threatened or endangered species or habitat for such species that has been determined by the executive director of the New Hampshire fish and game department to be critical pursuant to RSA 212-A:9; NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES 27 Env-Wq 1500

Here is the proposed new wording:

(h) As required by RSA 212-A:9, III, the project has been designed in a manner that will not jeopardize the continued existence of state- or federally-listed threatened or endangered species or result in the destruction or modification of habitat of such species that is determined by the executive director of the New Hampshire fish and game department to be critical pursuant to RSA 212-A:9;

For reference, here is the RSA that this rule is intended to implement:

RSA 212-A - Endangered Species Conservation Act

Section 212-A:9 - Conservation Programs

RSA 212-A:9, III - All other state departments and agencies, to the extent possible, consistent with their authorities and responsibilities, shall assist and cooperate with the executive director in the furtherance of the purposes of this chapter for the conservation of endangered or threatened species. They shall take such action as is reasonable and prudent to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such species or result in the destruction or modification of habitat of such species which is determined by the executive director to be critical. The provisions of RSA 212-A or any rule promulgated under this chapter shall not be applicable to a state department or agency when that state department or agency, in the process of undertaking an action, is required by federal law or regulation to address the environmental impact on wildlife or wildlife habitat, of that action.

TOWN OF ATKINSON CONSERVATION COMMISSION
21 Academy Avenue
Atkinson, New Hampshire 03811

January 30, 2020

Mr. Ridgely Mauck, P.E.
Administrator, Terrain Alteration Bureau
Dept. of Environmental Services
29 Hazen Drive; P.O. Box 95
Concord, NH 03302-0095

Re: Amendment to Criteria for Issuance of Alteration of Terrain Permits (rule Env-Wq 1503.19 (h))

Dear Ridge –

At a meeting of the Atkinson Conservation Commission on January 29, 2020, we voted unanimously to oppose the proposed change to Env-Wq 1503.19 (h), for which you held a Public Hearing on January 24, 2020, and at which we were unable to attend.

The reasons for our opposition to the proposed new wording are:

1. We are in opposition because “**...not jeopardize the continued existence of...**” seems too poorly defined to be unambiguously applied. For example, an applicant could claim that his project does not jeopardize the continued existence of T&E because the little critters can still exist on some other piece of land in the area, and his project only has a small impact. My reaction to this reminds me of the old question: how do you eat an elephant? The answer, of course, is that in order to eat an elephant all you need to do is take one bite at a time. A little nibble here, a little bite there, and before you know it the elephant is dead. We believe the same is true for all wildlife habitat, and especially for T&E. It is especially true if a proposed project would bifurcate a contiguous habitat, making it difficult for wildlife to travel from one part to the other.
2. Projects that are allowed to adversely impact T&E set a precedent for others to do the same. Permits that are granted in such situations will thus have a larger impact than just the project being proposed.
3. The original wording “**...not result in adverse impacts of...**” is clear, and the NH Supreme Court (in the Milford case) has stated that projects should still be

able to obtain AoT permits as long as a study of the T&E is first performed, and the projects are designed around the T&E habitat.

4. The language does not address the possible long-term impact of a project on T&E after the earthmoving is done because, under the proposed language, an applicant could design a project to avoid disturbing T&E habitat (after a T&E study is done), yet the ongoing use of the land that results from the project could have a lasting impact on T&E. For example, if the project were a condo development, the use of road salt could have an impact on T&E if the project's storm water management directs runoff onto T&E habitat. This would be especially true if the roads were private, with no municipal oversight into the use of road salt.
5. The purpose of the Endangered Species act was not just to prevent extinction of a species, but also to allow it to recover to the point that the law's protections are no longer needed. The DES Administrative Rules need to support this purpose.
6. Another concern is the wording "**As required by RSA 212-A:9, III**" – not being attorneys, as far as we can tell there is nothing in the law that requires an Administrative Rule to exactly echo the law that it is intended to implement, nor did the NH Supreme Court in its decision in the Milford case require this. On the contrary, it seems to us that the Administrative Rule should add specificity to the law by stating how the law should be implemented in practical, unambiguous terms.
7. This Administrative Rule has been in existence for at least 15 years, and has been re-approved several times by JLCAR. There is nothing illegal about it.

Thank you for your careful consideration of our comments. Please feel free to contact me if you have any questions.

Sincerely,



Paul Wainwright,
Chair, Atkinson Conservation Commission

email: conservation@atkinson-nh.gov

home phone: (603) 362-6589

Copy to:

Mark Ellingwood, Chief of the Wildlife Division, NH F&G

Michael Marchand, Nongame & Endangered Wildlife Program, NH F&G

Melissa Doperalsk, Nongame & Endangered Wildlife Program, NH F&G