

Wetlands Program Rulemaking and Process Improvement Effort

Discussion Guide: Background and Overview of Concepts and Topics Under Evaluation

March 21, 2014

[NOTE: This guide will be updated as more information is available on specific topics.]

Under the Wetlands Program Rulemaking and Process Improvement Effort, the Department of Environmental Services (DES) is examining all aspects of the program and undertaking a comprehensive rewrite of the rules governing the program. Phase 1 is the Research and Listening Phase, which runs from October 2013 through May 2014. During Phase 1, DES staff is conducting research on a wide variety of topics and soliciting input from the broad array of stakeholders.

DES is interested in hearing all thoughts and ideas for improving the Wetlands Program rules and processes. The purpose of this discussion guide is to provide some background and share information on some of the concepts and topics that are being evaluated as a starting point for conversation and to generate constructive input and ideas.

I. Overall Goals and Objectives

New Hampshire statute ([RSA 482-A:1](#)) identifies the public value of aquatic resources to:

- Provide nutrients for finfish, crustacea, shellfish and wildlife of significant value;
- Serve as habitat and reproduction areas for plants, fish and wildlife of importance;
- Support commerce, recreation, and aesthetic enjoyment by the public;
- Ensure adequate groundwater levels;
- Maintain stream channels and their ability to handle the runoff of waters; and
- Absorb flood waters and silt and prevent general flood damage and silting of open water channels.

To protect these functions, the statute calls for the protection and preservation of aquatic resources from despoliation and unregulated activities and requires that anyone seeking to excavate, remove, fill, dredge, or construct any structures obtain a permit from DES. DES has adopted rules ([Env-Wt 100-900](#)) to implement the requirements of the statute. Over the years the statute and rules governing the Wetlands Program have been amended and revised numerous times. The last comprehensive rewrite of the rules was in 1991.

The overarching goals of the Wetlands Program Rulemaking and Process Improvement Effort are to:

- Enhance transparency and predictability,
- Increase consistency and standardization, and
- Ensure that decisions made are scientifically-based and protective of New Hampshire's sensitive and important natural resources.

Q. Are there additional goals or objectives you would like to see achieved with respect to improving the Wetlands Program?

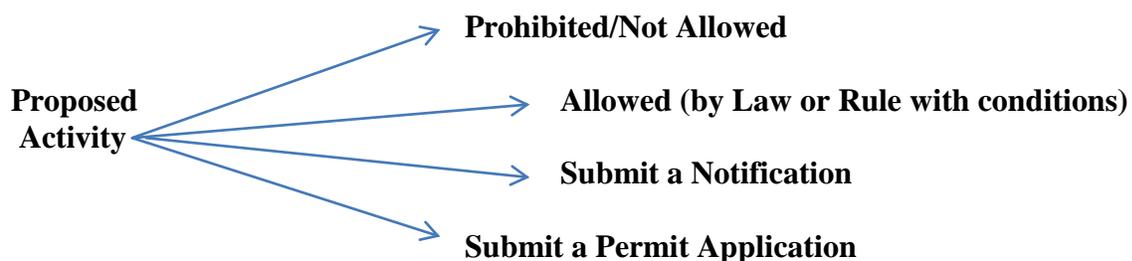
Q. Are there general or overarching suggestions for providing for better consistency, standardization, transparency, and predictability to program operations and decisions?

Q. Are there ways that the Wetlands Program may incorporate new information or science that improves evaluation and decision-making on applications?

II. The Permitting Process – Redesigning the Path to Approval and Other Procedures

The scope of activities covered under the Wetlands regulations, and the associated permitting requirements, has evolved over time, resulting in a varied collection of requirements and forms. There are currently 9 different notification and application forms, with three classifications of projects under the Standard Application (minimum, minor, and major) as well as an option for expedited review of a minimum impact project.

DES is evaluating how various activities and/or impacts to different resources should be regulated in order to simplify the permitting options (e.g., by rule, by notification, or by permit) and evaluation standards, and to clarify when each approach applies.



DES wants the regulatory approach, the effort required of applicants, and the allocation of staff time for technical review to reflect the potential threat of proposed activities to aquatic resources. In this way, more investment of resources and effort by applicants and DES staff would be focused on minimizing impacts and threats to the most valuable or threatened resources. Activities expected to have lesser impacts should not be subject to the same submission requirements and should require a lower level of technical review.

- DES wants to provide for more efficient and less burdensome regulation of less impacting activities by simplifying the notification process. DES needs to determine the thresholds or conditions under which a permit-with-notification approach would be appropriate. The intent is to identify activities that would have no more than minimal adverse effects on the aquatic resources.
- DES is considering establishing more precise definitions of "important species" and "important resources." Impacts to an important species or resource could be a factor when determining the type of permit or notification process an applicant would use, whether a more in-depth analysis is required, what information is required to be submitted as part of a notification or application, as well as the amount and type of mitigation required.
- DES has frequently heard that people would like a clear list of specific activities that would not be approved under any circumstances (also referred to as a "prohibited list"). DES is considering whether there are certain activities that are so potentially damaging or certain resource types or areas that are so important or rare that the activity should be completely prohibited.

Q. Are there ways that applicants and DES can better determine specific project impacts other than total square foot of temporary and permanent impacts?

Q. Are there certain activities that are so potentially damaging or certain resource types that are so important or rare that the activity or impact should be completely prohibited?

- *What activities or criteria for projects would you put on a list of items that should be completely prohibited?*
- *Should there be exceptions for extraordinary circumstances? Should these cases be subject to a more stringent evaluation? Should these cases require additional mitigation?*

Q. How should "important species" and "important resources" be defined and used in determining the appropriate approach for review and approval of a proposed activity affecting such a species or resource?

Notifications/Permit-by-Notification

There are currently several types of activities specified by statute that require notifications to be submitted as well as additional activities that qualify for "permit-by-notification." These include:

- Forestry Notification
- Recreational Mineral Dredging Notification
- Routine Roadway and Railway Maintenance Activities Notification
- Seasonal Dock Notification for Lakes and Ponds

- Trails Notification
- Utility Maintenance Notification
- Permit By Notification (for list of activities specified in rule)

There are differences in the information required, associated fees, and procedures, some of which are dictated by statute.

To reduce the burden on applicants and the program, DES is considering:

- Ways to more clearly define the criteria and limitations for qualifying for a notification process;
- Ways to simplify the notification process – for example an accept/reject approach using checklists and thus requiring only administrative completeness review; and
- Ways for reducing and standardizing the submission requirements across different activities.

DES is also considering providing a written response to notifications submitted (e.g., written response of acceptance). This will provide applicants with documentation of DES approval and should help prevent the premature initiation of work.

Q. How should DES define what would qualify for “permit-by-notification” versus what would require submission of a full permit application?

Q. What works well with the current notifications (e.g., forestry, routine roadway, trails, utility notification) or “Permit-by-Notification” (PBN) option? What should be changed?

Standard Permitting Process and Requirements

- Using Better Information and Clearer Evaluation Standards for Improved Outcomes

DES is looking for ways to improve the permit application submission and review processes. Much of the time spent by DES staff reviewing applications is spent interpreting non-standardized data and verifying the accuracy of that data.

DES is interested in designing a process that relies on standardized data requirements and specific data collection and evaluation methodologies as a way to improve the information submitted with an application and reduce staff time spent verifying that the information submitted is complete and accurate. DES is also considering ways to make it easier for applicants to understand what is required to prepare an application that meets all of the program requirements. Some of the ideas and suggestions under evaluation include:

- Using worksheets and checklists focused on specific activities and/or specific types of resources (e.g., tidal, river, lake, forested wetland) to solicit information to evaluate a proposed project;

- Specifying methods to be used for functional assessment of wetlands and analysis of impacts from proposed activities (i.e., for the evaluation of functions and values provided by wetlands resources and an assessment of the impact of a project on those functions and values); and
- Clarifying the definitions or criteria for demonstrating “need,” “avoidance,” “minimization,” and “least impacting alternative,” as well as the requirements of an alternatives analysis, and defining a standard methodology that DES staff would apply to determine if an applicant meets the criteria for approval. For example, DES is evaluating whether an alternatives analysis should include consideration of alternative properties for the project that may have reduced impacts.

Another idea would be to require pre-application meetings for projects requiring standard application permitting to reduce requests for more information and to better understand, evaluate, and recommend alternatives for a proposed project.

Q. What works well within the Wetlands standard application permitting process that should NOT change?

Q. What do you see as the most difficult part of the application process to navigate or understand?

Q. In terms of streamlining the application process - what ideas do you have for how that can be accomplished?

Q. What factors should be considered in evaluating "need," "avoidance," "minimization," and "least impacting alternative?"

Q. How should "need" be defined?

Q. How should “minimization and “avoidance” of impacts be defined?

Q. When should avoidance and consideration of the least impacting alternative include considering alternative properties for the project that may have reduced impacts?

Q. Should "minimization of impacts" mean just dredging or filling the least square footage of jurisdiction?

Q. What minimization measures should be considered that would address impacts to aquatic resources function or water quality?

Mitigation

DES is evaluating when mitigation is required. Currently, mitigation is required when wetland impacts are greater than 10,000 square feet or stream impacts are greater than 200 linear feet. The 10,000 square foot wetland threshold is inconsistent with current requirements at the Federal

level and in other New England states, most of which require mitigation for any project with impacts greater than 5,000 square feet.

DES is also evaluating whether total square foot or linear foot of impact is the best determinant for when mitigation should be required and also whether there might be situations for which a greater amount of mitigation might be appropriate, such as projects impacting “important species” and “important resources.”

Applications often do not contain the required mitigation, which can lead to delays in permitting. DES is looking for ways to help applicants to identify an acceptable mitigation proposal. DES is also considering identifying specific minimization measures to reduce overall project impacts, which could possibly reduce the need for additional mitigation. Such minimization measures may be the incorporation of best management practices specific to a particular project type or resource.

- Additional best management practices (“BMPs”) to reduce impacts to wetlands and surface waters could be identified to assist applicants in the design and construction of a project. The Department is reviewing existing BMP manuals referenced by other DES programs as well as those adopted in other states as a tool for improved project design.
- Applicants could be required to “pre-qualify” their mitigation proposal prior to submission of a permit application.

Q. At what level of impact should mitigation be required?

Q. Is total area impacted the most appropriate measure of impact for determining when mitigation is required?

Q. What are the benefits/concerns with adjusting the threshold at which mitigation is required?

Q. Should minimization measures be considered in the overall mitigation proposal?

Q. How could a "pre-qualification" step for mitigation proposal review work effectively?

Other Process-Related Topics

Emergency Authorization

Permit Amendments

Enforcement

III. Specific Topics and Technical Design Standards

In the course of defining new procedures discussed in Section II above, DES has to consider a wide variety of resource types and specific activities that may be involved. DES is evaluating all of the technical design standards including those applied more generally to all projects as well as those that are specific to a certain type of project (such as forestry or roadway maintenance). Many technical standards are specific to the type of resource involved, such as coastal/tidal areas, rivers and streams, or shorelines. For certain activities there are detailed Best Management Practice (BMP) manuals which are relied upon to ensure impacts to aquatic resources are avoided and minimized. DES wants to update the technical design standards and BMP manuals to cover additional activities as appropriate and reflect the best available information on least-impacting techniques and designs

DES is working with our partners to define the appropriate regulatory approach and requirements and to update the technical design standards and BMP manuals.

Some of the major topics include:

A. Coastal Resources

Coastal resources, including sand dunes, tidal marshes, the tidal buffer zone, tidal flats, and tidal waters, are among New Hampshire's most precious natural resources with unique characteristics. As part of this effort, DES is working to define specific standards for the design, construction, and maintenance of projects impacting coastal resources.

1. **Tidal Dredging:** tidal dredging encompasses a variety of activities, including:

- Navigational dredging for federal and municipal projects, such as shipping lanes, turning basins, and anchorages;
- Maintenance dredging of areas around structures, such as outfalls, berths, and marinas; and
- Proposals for new dredging of existing natural areas.

Q. Are there situations and/or conditions under which dredging should not be allowed?

Q. Should minimal maintenance dredging be allowed under a permit-by-notification process? Or should all tidal dredging projects require submission of a full permit application?

2. **Tidal Docks** and related structures: tidal docks are constructed differently from those in freshwater bodies, due to the tidal regime and usage. Types of tidal docks include:

- Industrial use docking, serving cargo ships up to 800' in length, at various marine terminal locations, including the NH Division of Ports and Harbors, for the loading/off-

loading of salt, scrap metal, gypsum, fuel oil and liquid propane gas; mooring cell structures (not the same as boat moorings); cargo conveyor structures and pipelines; and control buildings situated on piers;

- Public safety facility docking such as US Coast Guard cutter facility docking and boat houses, Homeland Security response docking, potential future Oil Spill Incident response facility, and large scale research vessel berthing;
- Commercial use docking serving commercial fishing vessel fleets, including large net trawlers, State Fish Pier or DRED public harbor facilities, and public municipal transient docks such as Prescott Park; and
- Residential docking serving individual homeowners or homeowners associations.

Q. Should public and private marine terminals be treated the same or differently?

Q. What are the possible economic development needs/expectations for municipal commercial waterfront projects?

Q. What should be the maximum length for a residential dock in order to reach a reasonable water depth over a specific range of the tidal cycle? Current max is 200', for a "usable" portion of the tidal cycle.

Q. Should light-weight freshwater dock structures susceptible to damage and displacement be allowed in tidal waters at the discretion of the property owner?

3. **Aquaculture** occurs in both the open ocean and in the estuary of Great Bay. Types of aquaculture include:

- Public research projects including long-line finfish and mussel aquaculture;
- Public restoration projects, such as restoration of natural oyster reefs by placement of crushed shell on estuary bottom; and
- Private commercial shell-fish aquaculture in cages currently covering acres of the estuary bottom.

Q. Should the NH Fish and Game License suffice as the only regulatory oversight of private commercial aquaculture? How should other partner agencies be engaged?

Q. Do the water quality impacts (positive and negative) of private aquaculture outweigh the extensive use of public trust submerged lands for private benefit?

Q. What approach would adequately protect the public trust while allowing this type of private use of public land?

Q. What are the competing public users? Boaters? Swimmers/divers? Fishermen? How are they affected?

4. **Other Tidal Structures** such as rip rap armoring seawalls, large scale tidal energy turbines, river-walks, and commercial restaurant deck seating over water.

Q. Should public benefit be a determining factor in approving these types of projects?

5. **Tidal Buffer Zone** is the area 100 feet landward from highest observable tide. This zone overlaps with the first 100 feet of the 250 feet protected shoreland under RSA 483-B. Both require a permit; each has different exemptions, requiring some duplicative permitting.

Q. Should the tidal buffer zone be addressed under the shoreland program (RSA 483-B)?

Q. How should climate change/sea level rise be considered in permitting projects?

6. **Sand Dunes** are defined as “hills and ridges of sand piled up by the wind and commonly found on the seacoast” but, geo-morphologically speaking, consist of NH’s barrier beach system, or remnants thereof. Activities currently allowed include:

- Removal of sand from around dwellings without a permit;
- Construction of dwellings; and
- Removal of sand to expose seawalls.

Q. Are there areas of dunes that should be preserved from any development, due to their rarity and function?

Q. How do we reconcile private lot ownership rights with preservation of undeveloped foredune or backdunes?

Q. How should dune preservation inter-relate with beach management techniques?

Q. How should flood hazard protection and future climate change /sea level rise be factored into regulations?

B. Freshwater Shoreline Structures

DES is considering more flexibility in dock designs and revised design and construction standards for beaches and dug-in boathouses.

Q. What specific standards or design criteria should be applied to shoreline structures on non-tidal waters, freshwater beaches, boathouses, and docks? Should there be an allowable “building envelope” for docking structures? Should there be an absolute maximum dock length or total dock surface area?

Q. Do you have concerns related to the navigability or access to public waters by the general public? What things do you see encroaching on navigation or public access?

Q. What is a reasonable expectation for access to public water for private waterfront owners? For commercial owners?

Q. Should dredging of natural areas for access to single family residential property be allowed?

Q. Should the excavation of natural, stable shorelines for beach or dug-in boathouse construction be allowed? Should these structures be allowed given the adoption of the Shoreland Protection standards under RSA 483-B?

Q. Should decks be considered as an alternative to beach construction?

C. Bank Stabilization

Freshwater shorelines, also known as riparian areas, have come under increasing pressure from development and are increasingly subjected to more frequent high-intensity storm events. Riparian areas provide valuable benefits to wildlife, water quality, and mankind for flood control, removal of pollutants, wildlife habitat, and recreational activities. Inappropriate development of these areas can have significant consequences, including loss of life and property. Changing weather patterns have resulted in numerous flood events in recent years, highlighting the need to take well thought-out, environmentally-appropriate approaches to bank stabilization. Standards for bank stabilization should properly address and balance water quality, wildlife habitat, property ownership rights, and public health and safety concerns.

DES is considering more rigorous standards for permitting shoreline stabilization projects on non-tidal streams and rivers and is evaluating the design and construction criteria for bank stabilization along rivers and streams, lakes and ponds, and coastal shorelines to take into consideration geomorphology, changing weather patterns (e.g., more frequent high-intensity storm events), and the use of bioengineering technologies.

Q. What standards should be applied to shoreline stabilization projects?

Q. Should these projects be designed by PEs with qualifications and experience in this type of project design?

Q. What specific design and construction criteria for bank stabilization should the Department evaluate?

Q. Do you see river or stream bank erosion as a significant problem or threat?

Q. What factors should be given priority consideration when designing river or stream bank stabilization?

Q. What qualifications should be required for those designing bank stabilization projects?

Q. What would you consider to be examples of bad bank stabilization design?

Q. What methods or steps should DES allow or require to stabilize eroding areas?

Q. Should all bank stabilization on lakes include a vegetation component?

D. Stormwater Management

DES is evaluating the requirements for projects to adequately collect, treat, and discharge stormwater runoff from developed impervious surfaces when the project does not also require an individual Alteration of Terrain permit. DES is considering establishing specific standards and design criteria to address stormwater management on these smaller projects.

Q. How should stormwater management be addressed through the wetlands permitting process?

Q. What requirements for stormwater treatment should be required of projects covered under a notification or permit-by-notification? Or for projects requiring a standard wetlands permit?

E. Maintaining and Modifying Past Projects

There are many properties where past impacts to jurisdictional areas or structures have occurred that would not meet current standards. The activities may have occurred prior to state jurisdiction, may have been completed under a permit issued under a less stringent standard, or may simply have been illegal. These are factors that need to be considered when evaluating applications for new activities or for applications to maintain or modify these areas or structures. DES is considering developing standards for the maintenance and modification of these pre-existing, non-conforming, areas and structures that are equitable to both current and future owners.

Q. What standards do you think should be applied in these situations?

Q. When should additional impacts be allowed or disallowed?

Q. If structures such as docks exceed the current allowable dimensions, should further expansion of those structures be allowed?

Q. Should additional but physically separate structures be allowed on the same frontage?

Q. If the project involves culverts that may now be considered under-sized, should those culverts be required to be upgraded?

Q. How should DES address "after the fact approvals (i.e., projects for which applicants did not seek prior permit approval)?" Should there be a penalty of some sort?

F. Best Management Practices (BMP) Manuals

DES relies on standards in BMP manuals published by other agencies and advocates, and in some instances even requires, adherence to the BMPs, under its regulatory approach. Reliance on good BMP manuals can reasonably assure that certain activities covered by rule or by notification will have only minimal impact to aquatic resources.

It is important that the BMPs are current, effective, and practicable. Current BMP manuals relied on by the Wetlands Program include:

- [Best Management Practices Manual for Utility Maintenance in and Adjacent to Wetlands and Waterbodies in New Hampshire](#) 
- [Best Management Practices Manual for Erosion Control on Timber Harvesting Operations in NH](#) 
- [Best Management Practices for Routine Roadway Maintenance Activities in New Hampshire](#) 
- [Best Management Wetland Practices for Agriculture](#) 
- [Best Management Practices for Erosion Control During Trail Maintenance and Construction](#) 

Q. Should DES continue to rely on BMP manuals?

Q. Do you have concerns associated with allowing individuals to rely upon existing BMP manuals?

Q. Are there any BMP manuals that are used inappropriately?

Q. Are there additional project types that you think should be covered by a BMP manual?

Other Specific Topics

Man-made Ponds

Dams

Restoration Activities

Stream Crossing

Dredging – Freshwaters

Prime Wetlands