



INSTRUCTIONS FOR PRELIMINARY NOTICE OF APPEAL AND OFFER TO ENTER INTO SETTLEMENT DISCUSSIONS for appeals of Department of Environmental Services permitting decisions

Introduction:

RSA 21-O:14 was amended effective June 18, 2012 (Laws of 2012, 246:3-5; full text of section as amended reprinted below). Under the revised statute, a person aggrieved by a DES permitting decision may file either a standard Notice of Appeal (NOA) or a Preliminary Notice of Appeal and Offer To Enter Into Settlement Discussions (PNA). Whichever form of appeal is chosen, the **notice must be filed within 30 days of the date of the decision being appealed**. Also regardless of which form is chosen, the appeal **must fully state every ground** upon which the appeal is based -- that is, the appeal must state each reason for the person's claim that the decision being appealed is unlawful or unreasonable. **Only those grounds set forth in the notice of appeal or preliminary notice of appeal shall be considered by the council**. By statute, a PNA must be filed on a form provided by DES. That form is available separately; the instructions for completing the form are below.

PNA FORM:

Top: Check the box corresponding to the Council that has jurisdiction to hear the appeal. A chart showing which council hears appeals from which statutes follows these instructions.

A. Appellant (person who is aggrieved by DES's decision):

Name: Enter the **full legal name** of the individual or entity who is appealing the decision. If co-owners are appealing, enter the full legal name of each individual.

Address: Enter the mailing address of the individual(s) or entity identified as the Appellant.

Telephone: Enter the daytime telephone number of the individual(s) or entity identified as the Appellant.

Fax (if available): Enter a fax number to which appeal-related correspondence can be sent to the individual(s) or entity identified as the Appellant. If no fax number is available, enter "N/A".

Email (if available): Enter an email address to which appeal-related correspondence can be sent to the individual(s) or entity identified as the Appellant. If no email address is available, enter "N/A".

B. Appellant's Representative (if applicable):

Name: Enter the name of the individual who is representing the Appellant for purposes of the appeal. If the Appellant is an individual and does not have a representative, enter "N/A" and go to Section C (if applicable) or Section D (if Section C is not applicable). **If the Appellant is an entity, an individual must be identified.** The individual must be a duly-authorized official of the entity or an attorney who has been engaged by the entity as its representative for the appeal.

Address: Enter the mailing address of the individual identified as the Appellant's Representative.

Telephone: Enter the daytime telephone number of the individual identified as the Appellant's Representative.

Fax (if available): Enter a fax number to which appeal-related correspondence can be sent to the individual identified as the Appellant's Representative. If no fax number is available, enter "N/A".

Email (if available): Enter an email address to which appeal-related correspondence can be sent to the individual identified as the Appellant's Representative. If no email address is available, enter "N/A".

C. Permittee (if other than Appellant):

Complete this section ONLY IF the Appellant IS NOT the applicant or permittee.

Name: Enter the name of the permittee (individual or entity to whom the permit was issued) as shown on the issued permit.

Address: Enter the address of the permittee as shown on the issued permit.

D. Decision being appealed:

Date of Decision: Enter the date the decision being appealed was issued, as shown on the decision. If the decision itself does not have a date, enter the date on the cover letter that was sent with the decision.

Decision signed by: Enter the name of the individual who signed the decision for DES.

Permit or File Number (if any): If the decision being appealed relates to a permit that was issued, enter the permit number as shown on the issued permit. If the decision being appealed relates to the denial of an application for a permit, enter the file number if one was assigned.

E. Reason(s) why decision/action was unlawful or unreasonable:

Enter EVERY REASON why the Appellant claims that the decision is unlawful or unreasonable. If more space is needed, attach additional page(s). If settlement discussions are not successful in resolving all of the issues and a standard NOA is filed, **THE COUNCIL CAN CONSIDER ONLY THOSE REASONS THAT ARE LISTED IN THE PNA.**

F. Offer to enter into settlement discussion (check one):

The Appellant must indicate whether the Appellant is offering to enter into settlement discussions that are mediated (that is, with the assistance of a neutral third party) or unmediated (that is, with just the Appellant and DES and, if applicable, the Permittee) or both (that is, the Appellant is willing to engage in either mediated or unmediated discussions).

G. Statement of Service

Enter the date on which the PNA was served and the method of service. If the PNA was served by U.S. Mail, enter the date the PNA was mailed. If the PNA was delivered in hand, whether by the Appellant or by a private delivery service such as FedEx® or UPS®, enter the date the PNA was delivered to DES as shown on the delivery service receipt.

If the decision being appealed relates to a permit that was issued, **also enter the date** the PNA was served on the Permittee and the method of service as described above for the Commissioner. If the decision being appealed does NOT relate to a permit that was issued, enter “N/A” in the date line.

Name (print or type): Print or type the name of the individual who is signing the PNA. If the Appellant is an unrepresented individual, enter the Appellant’s name. Otherwise, enter the name of the Appellant’s Representative.

Signature: The individual whose name is printed or typed must sign the PNA.

Date: Enter the date on which the PNA is signed.

Council Jurisdiction:

Appeal goes to:	If the decision was made under:
Air Resources Council <u>See</u> RSA 21-O:11, IV	RSA 125-C, Air Pollution Control RSA 125-D, Acid Rain Control Act RSA 125-I, Air Toxic Control Act RSA 125-J, Emissions Reduction Trading Programs RSA 125-M, Mercury Emissions Reduction and Control Program RSA 125-R, Outdoor Wood-Fired Hydronic Heaters RSA 141-E, Asbestos Management and Control
Waste Management Council <u>See</u> RSA 21-O:9, V	RSA 146-A, Oil Discharge or Spillage in Surface Water or Groundwater RSA 146-C, Underground Storage Facilities RSA 147-A, Hazardous Waste Management RSA 149-M, Solid Waste Management
Water Council <u>See</u> RSA 21-O:7, IV	RSA 482, Dams, Mills, and Flowage RSA 485, New Hampshire Safe Drinking Water Act RSA 485-A, Water Pollution and Waste Disposal RSA 485-C, Groundwater Protection Act RSA 487, Control of Marine Pollution and Aquatic Growth RSA 488, Water Management
Wetlands Council <u>See</u> RSA 21-O:5-a, V	RSA 482-A, Fill and Dredge In Wetlands RSA 483-B, Shoreland Water Quality Protection Act

RSA 21-O:14 Administrative Appeals. – [as effective June 18, 2012]

I. (a) For purposes of this chapter, “department permitting decision” means the department’s final action to grant in whole or in part, with or without conditions, or to deny an application or other request for a license as defined in RSA 541-A:1, VIII, whether the action is taken by the commissioner or by the department official who has statutory authority to take such final action or to whom the commissioner has properly delegated the authority to take such final action.

(b) For purposes of this section, “department enforcement decision” means:

(1) The issuance of an administrative order issued under specific statutory authority for such an order, whether described as an order, an administrative order, a cease and desist order, a notice of violation and order of abatement, or other similar name, which specifies the facts and law that support the department’s determination that one or more violations are occurring or have occurred and orders the recipient to cease on-going violations and to take such remediation actions as are necessary to come into compliance with applicable requirements.

(2) The revocation of or the refusal to renew a license as defined in RSA 541-A:1, VIII based on the permit holder’s non-compliance with the statute, rules, or terms and conditions of the license or on other good or just cause as defined in rules adopted relative to the license.

(c) “Department decision” means a department permitting decision, a department enforcement decision, and any other decision made by the department that is expressly appealable to a council under the statute granting authority to the department to make the decision. The term does not include rulemaking or an agency declaratory ruling as provided for in RSA 541-A.

I-a. Any person aggrieved by a department decision may, in addition to any other remedy provided by law, appeal to the council having jurisdiction over the subject matter of the appeal within 30 days of the date of the decision and shall set forth fully in a notice of appeal every ground upon which it is claimed that the decision complained of is unlawful or unreasonable. Only those grounds set forth in the notice of appeal shall be considered by the council. On any such appeal, the council shall determine whether the department decision was unlawful or unreasonable by reviewing the administrative record together with any evidence and testimony the parties to the appeal may present.

I-b. As an alternative to filing an appeal under paragraph I-a and in addition to any other remedy provided by law, any person aggrieved by a department permitting decision may, within 30 days of the date of the decision, file with the council having jurisdiction over the subject matter of the appeal a preliminary notice of appeal and an offer to enter into settlement discussions. Filings made under this paragraph shall be made on forms maintained by the department and shall be governed by the following:

(a) Notwithstanding any other provision of law prescribing the contents of a notice of appeal, a preliminary notice of appeal shall contain only information identifying the appellant, the decision being appealed, and a list of every ground on which the appellant claims that the decision is unlawful or unreasonable.

(b) The preliminary notice of appeal and offer to enter into settlement discussions shall be served on the commissioner and, if not filed by the applicant, on the applicant on the same day as they are filed with the council.

(c) The offer to enter into settlement discussions shall propose mediated settlement discussions, unmediated settlement discussions, or both.

(d) The department and, if applicable, the applicant shall notify the appellant in writing within 7 days whether they accept the offer to enter into settlement discussions. Any such notification accepting the offer shall propose dates within the ensuing 30 days on which to hold the settlement discussions, and if the appellant’s offer proposed both mediated and unmediated settlement discussions the notification shall elect one or the other.

(e) A notice of appeal that complies fully with the council’s rules shall be filed no later than 45 days after the preliminary notice of appeal was filed by the appellant under this paragraph. No notice of appeal shall raise grounds for appeal beyond those contained in the preliminary notice of appeal.

(f) If the department and, if applicable, the applicant accept the offer to enter into settlement discussions the appeal shall be stayed until a notice of appeal is filed under subparagraph (e).

(g) If the parties enter into mediated settlement discussions under this paragraph, the provisions of paragraph I-c (a), (b), and (d) shall apply.

I-c. For all mediations ordered pursuant to RSA 21-M:3, IX(b):

(a) The mediator shall be selected by the participants.

(b) The cost of the mediation shall be borne equally by the participants unless the department elects not to pay its share of the cost of the mediation, in which case the appellant and any person who has been allowed to intervene may either agree to bear the cost of the mediation or be excused from the obligation to mediate.

(c) The pre-hearing order issued by the hearing officer shall specify a time period not to exceed 45 days within which the parties shall mediate. The parties may jointly request a specific amount of additional time if they have not reached a complete agreement within the time period specified by the hearing officer but believe a complete agreement can be reached within the additional time.

(d) If the parties and any intervenors reach agreement as a result of mediation and the agreement includes the issuance of a new or revised permit, only persons who did not participate in the mediation and who are aggrieved by the new or revised permit shall be entitled to appeal the issuance of such permit.

I-d. In any appeal of a department enforcement decision filed pursuant to paragraph I-a, the hearing officer shall not order the department to participate in mediation pursuant to RSA 21-M:3, IX(b). The department may participate in mediation in such cases in its sole discretion.

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

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

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