

Effective December 15, 2019, Env-Wt 200 reads as follows:

CHAPTER Env-Wt 200 HEARINGS, APPEALS, AND WAIVER REQUESTS

Statutory Authority: RSA 482-A:11, I; RSA 541-A:16, I(b)

PART Env-Wt 201 PURPOSE; APPLICABILITY

Env-Wt 201.01 Purpose. The purpose of this chapter is to establish procedures for actions arising under RSA 482-A relative to:

- (a) Permit application hearings;
- (b) Procedures for processing remands from the New Hampshire wetlands council (council);
- (c) Requests for waivers of requirements established in subtitle Env-Wt; and
- (d) Requests for waivers under RSA 482-A:26, III(b).

Env-Wt 201.02 Applicability. This chapter shall apply to actions arising under RSA 482-A.

PART Env-Wt 202 PERMIT APPLICATION HEARINGS

Env-Wt 202.01 Permit Application Hearings: When Held. The department shall conduct a hearing on a permit application:

- (a) Whenever the department determines that a hearing would be helpful in clarifying the application, as contemplated by RSA 482-A:3, XIV(a)(3)(C) or RSA 482-A:3, XIV(a)(4)(C), as applicable; or
- (b) As required by RSA 482-A:8, for any project that:
 - (1) Would have a significant environmental impact, as defined in Env-Wt 104, on the resources protected by RSA 482-A; or
 - (2) Is of substantial public interest, as defined in Env-Wt 104.

Env-Wt 202.02 Permit Application Hearings: Timing.

- (a) The department shall issue a hearing notice for any hearing held under Env-Wt 202.01(a) within the time established in RSA 482-A:3, XIV(a)(3)(C) or RSA 482-A:3, XIV(a)(4)(C), as applicable.
- (b) The department shall issue a hearing notice for any hearing held under Env-Wt 202.01(b) within 10 calendar days of determining that the project would have a significant environmental impact or is of substantial public interest, as applicable.
- (c) The date for any hearing scheduled pursuant to (a) or (b), above, shall be no sooner than 7 working days and no later than 25 working days from the date of the hearing notice.

Env-Wt 202.03 Permit Application Hearings: Procedures. The department shall conduct any hearing held pursuant to Env-Wt 202.01 in accordance with the provisions of Env-C 200 that apply to non-adjudicative proceedings.

PART Env-Wt 203 APPEALS OF DECISIONS MADE UNDER RSA 482-A

Env-Wt 203.01 Definitions. For purposes of this part, the following definitions shall apply:

- (a) "Appeal ombudsman" means the department employee designated by the commissioner to review a remand order and to:

(1) Work with program staff to determine whether additional field work, additional information from any party to the appeal, or consultation with legal counsel is required; and

(2) Assist program staff with preparing a decision on remand;

(b) “Appellant” means “appellant” as defined in rules adopted by the council;

(c) “Party to the appeal” means the appellant and any intervenor(s) and, in an appeal of an issued permit, the permit holder if other than the appellant;

(d) “Program staff” means the professional technical department staff who implement the program established under RSA 482-A and subtitle Env-Wt; and

(e) “Remand order” means an order of the council directing the department to reconsider its decision in light of the findings, rulings, and other directives of the council.

Env-Wt 203.02 Appealing an Enforcement Decision. Any person aggrieved by a department enforcement decision, as defined in RSA 21-O:14, I(b), that is issued under authority established in RSA 482-A who wishes to appeal the decision shall proceed as specified in RSA 482-A:10 and RSA 21-O:14.

Env-Wt 203.03 Appealing a Permitting Decision. Any person aggrieved by a department permitting decision, as defined in RSA 21-O:14, I(a), that is made under RSA 482-A who wishes to appeal the decision shall proceed as specified in RSA 482-A:10 and RSA 21-O:14.

Env-Wt 203.04 Action on Remand: Initial Review, Determination of Additional Information Required.

(a) If a department decision is appealed to the council and the council remands the matter to the department, the commissioner shall designate an appeal ombudsman for that remand order.

(b) The appeal ombudsman shall review the remand order within 10 working days of:

(1) The end of the time period for filing a motion for reconsideration of the council’s remand order, if a motion is not filed; or

(2) If a motion for reconsideration of the council’s remand order is filed, the date any order on reconsideration, including any appeal thereof, becomes final.

(c) If the appeal ombudsman, in consultation with program staff, determines that preparing a new decision on remand necessitates field work, additional submissions from any party to the appeal, or consultation with legal counsel, or any combination thereof, then:

(1) Program staff shall:

a. Conduct such field work as soon as reasonably possible, taking into account weather conditions, site accessibility, and staff availability; and

b. Identify and request the additional information from any party to the appeal;

(2) The appeal ombudsman, in coordination with program staff, shall:

a. Identify the issues on which legal advice is needed; and

b. Request a consultation with legal counsel within 10 working days of determining the need for the consultation; and

(3) Consultation with legal counsel shall be completed no later than the completion of the field work and review of additional information, as applicable.

Env-Wt 203.05 Action on Remand: Decision.

(a) After conducting the review required by Env-Wt 203.04(a), if the appeal ombudsman in consultation with program staff determines that no additional field work is needed, no additional information is needed, and no consultation with legal counsel is required, the appeal ombudsman, in consultation with program staff, shall:

- (1) Prepare a draft revised decision for internal review within 10 working days of the review; and
- (2) Prepare and issue a final decision no later than 25 working days after completion of the draft revised decision.

(b) After conducting the review required by Env-Wt 203.04(a), if the appeal ombudsman in consultation with program staff determined that preparing a new decision on remand necessitated field work, additional submissions, or consultation with legal counsel, or any combination thereof, the appeal ombudsman in consultation with program staff shall:

- (1) Prepare a draft revised decision for internal review within 10 working days of:
 - a. Completing the field work;
 - b. Receiving all required information information; and
 - c. Consulting with legal counsel; and
- (2) Prepare and issue a final decision no later than 25 working days after preparation of the draft revised decision.

(c) If the remand is of a permitting decision, the department shall send a copy of the final decision to:

- (1) The council;
- (2) The appellant;
- (3) The permit holder, if other than the appellant; and
- (4) Each intervenor.

(d) If the remand is of an enforcement decision, the department shall send a copy of the final decision to:

- (1) The council;
- (2) The appellant;
- (3) Each person to whom a copy of the original enforcement decision was sent; and
- (4) Each intervenor who is not covered by (3), above.

PART Env-Wt 204 WAIVERS

Env-Wt 204.01 Purpose. The purpose of these rules is to establish the procedures for requesting and the criteria for granting or denying the following:

(a) Waivers to requirements established in subtitle Env-Wt, to accommodate those situations where strict adherence to the requirements would not be in the best interest of the public or the environment; and

(b) Waivers requested under RSA 482-A:26, III(b).

Env-Wt 204.02 Procedures.

(a) A request for a waiver shall be filed in accordance with this part by:

- (1) A person who is or would be directly and adversely affected by the strict application of a requirement established in subtitle Env-Wt; or
- (2) A person seeking a waiver under RSA 482-A:26, III(b).

(b) Each request for a waiver shall be submitted in writing to the following address:

DES Wetlands Bureau
29 Hazen Drive
P.O. Box 95
Concord, NH 03302-0095

(c) Each request for a waiver shall:

- (1) Include the information specified in Env-Wt 204.03; and
- (2) Be signed as specified in Env-Wt 204.04.

(d) Any request submitted in conjunction with an application for a permit under RSA 482-A:3 or RSA 483-B:5-b shall be submitted with the permit application or as soon thereafter as the need for the waiver to a requirement established in subtitle Env-Wt is identified by the applicant or the department.

Env-Wt 204.03 Content of Waiver Requests. The person requesting the waiver (requestor) shall provide the following information:

(a) The name, mailing address, daytime telephone number including area code, and email address of the requestor, and, if no email address is available, the requestor's fax number;

(b) If the requestor is making the request on behalf of someone else, the name, mailing address, daytime telephone number including area code, and email address of the person the requestor represents, and, if no email address is available, a fax number for that person;

(c) The location of the property to which the waiver request relates, if other than the mailing address of the requestor or the person the requestor represents;

(d) If the request is to waive a requirement established in subtitle Env-Wt, the number of the specific section of each rule for which a waiver is sought;

(e) If the request is for a waiver under RSA 482-A:26, III(b), identification of the specific standard(s) to which a waiver is being requested;

(f) A complete explanation of why a waiver is being requested, including:

(1) For a waiver to a requirement established in subtitle Env-Wt, an explanation of the operational and economic consequences of complying with the requirement and, if the requested waiver would extend the duration of a permit, the reason(s) why the permit holder was not able to complete the project within the specified time; or

(2) For a waiver under RSA 482-A:26, III(b), a complete explanation of how the statutory criteria of RSA 482-A:26, III(b) will be met;

(g) If applicable, a complete explanation of the alternate that is proposed to be substituted for the requirement in subtitle Env-Wt, including written documentation or data, or both, to support the alternative;

(h) Whether the waiver is needed for a limited duration and, if so, an estimate of when the waiver will no longer be needed; and

(i) A complete explanation of why the applicant believes that having the waiver granted will meet the criteria in Env-Wt 204.05 or Env-Wt 204.06, as applicable.

Env-Wt 204.04 Signature Required.

- (a) The requestor shall sign and date the request.
- (b) If the requestor is making the request on behalf of someone else, the person represented shall:
 - (1) Sign and date the request; or
 - (2) Sign and date a separate authorization for the requestor to act on the person's behalf in connection with the request.
- (c) The signature(s) shall constitute certification that:
 - (1) The information provided is true, complete, and not misleading to the knowledge and belief of the signer; and
 - (2) The signer understands that:
 - a. Any waiver granted based on false, incomplete, or misleading information shall be subject to revocation; and
 - b. He or she is subject to the penalties for falsification in official matters, currently established in RSA 641.

Env-Wt 204.05 Criteria for Waivers to Rules.

- (a) The department shall grant a waiver to a requirement established in subtitle Env-Wt that will not extend the duration of a wetlands permit only if:
 - (1) Granting a waiver will not result in:
 - a. An avoidable adverse impact on:
 - 1. The environment or natural resources of the state, including but not limited to jurisdictional areas and protected species or habitat; or
 - 2. Public health or public safety;
 - b. An impact on abutting properties that is more significant than that which would result from complying with the rule; or
 - c. A statutory requirement being waived; and
 - (2) Any benefit to the public or the environment from complying with the rule is outweighed by the operational or economic costs to the applicant.
- (b) The department shall grant a waiver that has the effect of extending the duration of a wetlands permit that does not qualify for the statutory extension under RSA 482-A:3, XIV-a only if:
 - (1) The permit holder:
 - a. Was precluded from proceeding under the permit due to actions taken by persons opposed to the project; or
 - b. Rationally refrained from proceeding under the permit due to reasonable uncertainties surrounding the project's legal viability, which shall not include uncertainties regarding the project's financial viability;

- (2) If other permits are required for the project, at least one other permit already has a duration that extends beyond the expiration of the wetlands permit or, if the other permit expires concurrently or prior to the wetlands permit, the permit holder reasonably anticipates that an extension will be obtained; and
- (3) Extending the permit will not result in:
 - a. Adverse impacts on public health or safety, or the environment or natural resources of the state, that would be greater than those accounted for in the permit that was issued; or
 - b. Adverse impacts on abutting properties that is more significant than that which would have resulted if the project had been initiated in time to be completed during the permit term.

Env-Wt 204.06 Criteria for Waivers under RSA 482-A:26, III(b). The department shall grant a waiver under RSA 482-A:26, III(b) if:

- (a) The waiver will not result in:
 - (1) An avoidable adverse impact on the environment or natural resources of the state, public health, or public safety;
 - (2) Any interference with the public trust in waters held by the state; or
 - (3) An adverse impact on abutting properties that is more significant than that which would result from complying with the rule; and
- (b) The following criteria from RSA 482-A:26, III(b) are met:
 - (1) The effect of the requested repair or reconstruction represents greater protection of public water or the environment;
 - (2) Such repair or reconstruction does not change a recreational, water-based activity to a land-based, residential or commercial activity;
 - (3) There will be no expansion of the existing footprint, outside dimensions, or square footage of floor space; and
 - (4) There will be a net reduction in the total square footage of kitchen, bathroom, shower, and toilet facilities.

Env-Wt 204.07 Decisions.

- (a) The department shall notify the requestor of the decision in writing. If the request is denied, the department shall identify the specific reason(s) for the denial.
- (b) If a waiver is granted, the department shall impose such conditions, including time limitations, as the department deems necessary to ensure that the activities conducted pursuant to the waiver will be consistent with the applicable criteria.

Env-Wt 204.08 Suspension, Revocation, or Modifications of Waivers.

- (a) Any waiver to a rule or under RSA 482-A:26, III(b) that is issued by the department shall be issued based on the presumption that the information submitted to obtain the approval is true, complete, and not misleading.
- (b) If the department receives credible information, after the time has run for requesting reconsideration, which indicates that the information upon which the waiver was based was false, incomplete, or misleading, the department shall notify the person to whom the waiver was issued of:

- (1) The department’s intention to suspend, revoke, or modify the waiver, as applicable;
- (2) The basis for the proposed action; and
- (3) The date, time, and place of a hearing on the proposed action at which the person to whom the waiver was issued shall be given an opportunity to show cause why the proposed action should not be taken.

(c) The hearing shall be conducted in accordance with RSA 541-A:31 and the provisions of Env-C 200 that apply to adjudicative proceedings.

(d) After the hearing, the department shall revoke the waiver if the department determines that:

- (1) The waiver would not have been issued if the information submitted had been true, complete, and not misleading; and
- (2) The project or activities to which the waiver relates cannot be conducted lawfully even with the waiver.

(e) After the hearing, the department shall suspend the waiver if the department determines that:

- (1) The waiver would have been issued if the information submitted had been true, complete, and not misleading; and
- (2) The project or activities to which the waiver relates can be conducted lawfully with the waiver.

(f) If a waiver is suspended pursuant to (e), above, the department shall reinstate the waiver upon receiving proof from the recipient that the project meets applicable requirements for approval.

(g) If as a result of the hearing the department determines that a modification to the waiver is required in order to bring the waiver and the project into compliance with applicable requirements, the department shall issue a modified waiver.

(h) The department shall notify the recipient in writing of its decision. If the decision is to suspend, revoke, or modify the waiver, the department shall specify the reason(s) for the decision.

(i) Any person aggrieved by the decision who wishes to contest the decision shall proceed as specified in Env-Wt 203.03.

APPENDIX A TO ENV-WT 200: STATE STATUTES IMPLEMENTED

Rule(s)	State Statutes Implemented
Env-Wt 200 (see additional statutes for specific part below)	RSA 482-A:1; RSA 482-A:3; RSA 482-A:8; RSA 482-A:10; RSA 482-A:11
Env-Wt 204	RSA 482-A:26, III(b); RSA 541-A:22, IV