

January 17, 2019

Proposed Wetland Rules

Comments by: Suzanne L. Fournier of Milford NH

RE: Wetlands: Permits And Other Authorizations; Conditions Applicable To All Work In Jurisdictional Areas

Dear Ms. Tilton, Wetlands Bureau Assistant Administrator

I was pleased to be able to provide in-person comments at the hearing held in December 2018. In addition to those comments, I submit the following for your consideration.

As the agency is aware, rules must meet certain criteria in order to be accepted by the Joint Legislative Committee on Administrative Rules (JLCAR). Among the rules of particular concern for the present proposed wetland rules are these:

- A rule must not be designed to benefit the administrative convenience of the agency to the detriment of the public. [JLCAR criterion 403.01 (g)]
- The agency must be able to provide evidence that public comment was overruled on the merits. [JLCAR criterion 403.01 (a) (2)]
- A rule must not violate a statutory purpose clause. [JLCAR 402.01 (b)] And a rule must not violate the overall purpose of the statute. [JLCAR 402.01 (c)]

So how well do the proposed rules stack up to the JLCAR criteria? I will explain how the proposed rules fail to meet each of the JLCAR criteria listed above.

>>> A rule must not be designed to benefit the administrative convenience of the agency to the detriment of the public. [JLCAR criterion 403.01 (g)]

The agency has overtly expressed that it is short on staff and resources and gave that as an important part of the motivation for proposing many of the rules.

- In a written document called "Wetlands Rulemaking Initial Proposal" and sub-headed "Streamlined/Improved Process" [dated 11-13-18, version 1.0], DES summarizes the dramatic reduction in "processing time" for many types of projects. Many projects would be processed within a very short 5 days, others in 10. These are reductions of review periods currently that are 10, 30 and 75 days. This results in much less review time for the agency, convenient for DES, but potentially harmful to wetlands.
- It was explained by DES that there would be staff that would process the paperwork very quickly, checking for administrative completeness, but that staff would not be

spending time actually reviewing the project. The reduction in “processing time” is not just that, but is an elimination of review on the merits of the specific proposed impact to wetlands, a very detrimental result for the public indeed.

- The document explains that the proposed rules increases the number of qualifying projects to be processed in 5 days and 10 days. The increase in number of projects means that many more projects would receive processing of paper by staff with little to no review of the merits of the specific wetland impact.
- A further agency “efficiency” would occur because the proposed rules would eliminate review in many cases by the local Conservation Commission and abutters, leading to the detriment of the wetland resource and the affected abutters.
- The proposed rules also eliminate the requirement for wetland delineation in some instances – a bad idea.

I will detail the above further for JLCAR and demonstrate to JLCAR that many parts of the proposed rules are much more for the convenience of the agency and not for the benefit of the public.

>>> The agency must be able to provide evidence that public comment was overruled on the merits. [JLCAR criterion 403.01 (a) (2)]

- Many valid comments for protection of wetlands have been presented to DES by the NH Association of Conservation Commissions as well as individual commissions. Those comments, notably ones related to keeping the notification requirement for the commissions to have a chance to provide input, and giving the commissions a reasonable time period for their review, have great merit that I cannot imagine DES would not recognize and affirm. A change in the proposed rules is called for so as not to eliminate conservation commission review within a reasonable time period for the commissions to do the reviews.
- Other comments received by DES are meritorious, for example my own oral comment that Vernal Pools are special wetlands that must not be lost in the proposed regulations, is one that the agency should act upon. Vernal Pools need greater protection, not less. Tiny crustacea called Fairy Shrimp only live in vernal pools. Small is beautiful (and extremely vulnerable). Under the proposed rules, NH would stand to lose many more vernal pools.

I will be reviewing the entire record of public comments (i.e. those made at the hearings and those submitted in writing) received by DES and match those against the Final Proposal to determine if any comments suggesting changes to the proposed rules were rejected regardless of their being meritorious and supportive of the purposes of RSA 482-A and RSA 212-A. The results will be presented to JLCAR.

>>> A rule must not violate a statutory purpose clause. [JLCAR 402.01 (b)] And a rule must not violate the overall purpose of the statute. [JLCAR 402.01 (c)]

Chapter 482-A -- Fill and Dredge in Wetlands

The purpose of RSA 482-A is to protect wetlands from despoliation and unregulated alteration, but what the proposed rules would do in many parts is to provide for Under-regulation, Liberal-regulation, or Self-regulation to pass as regulation.

- The statute requires regulation for the purpose to not “adversely affect the value of such areas as sources of nutrients for finfish, crustacea, shellfish and wildlife of significant value” as that “will damage or destroy habitats and reproduction areas for plants, fish and wildlife of importance” etcetera. By the way, Fairy Shrimp are tiny crustacea that live in vernal pools that first must be identified and then protected. That’s the sort of focus that new rules should have to help meet the purpose of RSA 482-A.
- I’m objecting to allowing additional projects and many with greater impacts under Permit by Notification (PBN) because the new definition of “minimum” is much too broad leading to more adverse impacts occurring. As one commenter already noted, wetlands in NH would die from a thousand cuts.

I will give detailed testimony to JLCAR about how the proposed rules violate the purpose of RSA 482-A in numerous ways.

Chapter 212-A -- Endangered Species Conservation Act

The purpose of RSA 212-A is to maintain and enhance the population sizes of NH’s threatened and endangered wild animal species. Section 9 of RSA 212-A specifically requires the agency to do the following:

“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.” [emphasis added]

However, the proposed rules (as well as existing rules) fail miserably to protect T&E wildlife as follows:

- The rules utilize the construct of Priority Resource Area in order to flag important wetlands. But the definition relies on the Natural Heritage Bureau’s (NHB) database that has major flaws (that at least one commenter has already noted). NHB reports have severe shortcomings because of the database that can only report what has been reported to NHB, which is spotty reporting at best.

The Priority Resource Area definition is faulty also because:

- It excludes Vernal Pools even though they are vitally important to certain dependent species and are among the most overlooked and vulnerable wetlands due to drying up and because they are typically of small size.
- It relies on only DOCUMENTED occurrences of protected species or habitat for such species rather than requiring surveys; relies on the insufficient reports of the Natural Heritage Bureau.
- Instead, as other commenters have noted, the presence of protected species (i.e. rare, threatened or endangered species – RTE – ought to be determined with the help of the state’s Wildlife Action Plan maps and related resources at the Taking Action for Wildlife program and staff at UNH Cooperative Extension as well as NH Fish & Game’s Nongame & Endangered Wildlife Program (N&EWP). Only in this smart way would DES be working to insure that there’s no jeopardizing of survival of RTE, as required by 212-A.
- Furthermore, when RTE are found, the recommendations from F&G’s N&EWP ought to be requirements, not treated as suggestions for optional compliance by applicants, but requiring concerted efforts to meet the requirements of the N&EWP. Treating them as recommendations instead of requirements undermines the statutory requirement for DES under RSA 212-A.

I will give testimony to JLCAR about how the proposed rules violate the purpose of RSA 212-A and explain how DES is failing to insure that wetlands impacted under the new regulatory scheme do not jeopardize the existence of NH’s T&E wildlife.

Finally I wish to express an opinion that it is troubling to me that DES is using rulemaking to make “current practice” legal, rather than retrain employees towards making the practices at the agency align better with the statutes that are intended, after all, to protect wetlands. While RSA 482-A is about protection of wetlands and regulations to accomplish that, it seems more that DES is concerned about approving projects – wetland impacts included.

For all the above reasons related to JLCAR criteria, I urge DES/Wetlands Bureau to re-visit the proposed wetland rules in order to assure that they meet JLCAR’s requirements of responsiveness to the public and that they are consistent with legislative intent of both RSA 482-A and RSA 212-A.

Thank you for the opportunity to comment.

Sincerely,

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