



For a thriving New England

CLF New Hampshire 27 North Main Street  
Concord, NH 03301  
P: 603.225.3060  
F: 603.225.3059  
www.clf.org

January 18, 2019

Mary Ann Tilton, Assistant Administrator  
Wetlands Bureau, Water Division  
NH Department of Environmental Services  
29 Hazen Drive  
Concord, NH 03301

Re: Comments on Proposed Wetland Rules Revisions

Dear Ms. Tilton:

Thank you for the opportunity to provide comments on the proposed New Hampshire Wetland Rules.

Conservation Law Foundation (CLF) is a non-profit, member supported environmental advocacy organization dedicated to the protection and responsible use of New England's natural resources. CLF has approximately 3,300 members, approximately 450 of whom reside in New Hampshire, including members who have a deep interest in the important role that wetlands play in protecting and preserving our natural communities and our state's quality of life.

Consistent with its mission to promote thriving, resilient communities, CLF is dedicated to advancing solutions that strengthen New England's – and New Hampshire's – environmental and economic vitality. CLF has a long history of working to protect and restore important land resources, water quality, and ecosystem health around the state, including in the Great Bay estuary, which has been designated an estuary of national significance. CLF's work to protect these essential natural resources has included advocacy before the New Hampshire Wetlands Bureau, the New Hampshire Water Council, the New Hampshire Energy Facility Site Evaluation Committee, the United States Environmental Protection Agency ("EPA"), and the EPA's Environmental Appeals Board. CLF has strong expertise in matters pertaining to water quality in the Great Bay estuary and around the state through its legal and regulatory advocacy, and through its Great Bay-Piscataqua Waterkeeper program, which is devoted to restoring and protecting the health of the Great Bay estuary.

Wetlands protection is a key part of the mission of the Department of Environmental Services (DES), and necessary to protect public health, the environment, and the state's economy. The DES Wetland Bureau has recognized the many values of wetlands in its current Program Plan:

New Hampshire's wetlands are of great importance for flood control, water purification, water storage and recharge for both groundwater and surface waters.

These functions are more valuable with the expected increase in occurrence and severity of storm events associated with climate change. Wetlands also support the food chain, providing food and shelter for a variety of aquatic and upland plants and animals. Although New Hampshire has lost fewer wetlands to filling and dredging than many coastal states, landscape change poses a significant challenge to the protection of New Hampshire's wetlands.<sup>1</sup>

In its Program Plan, DES goes on to recognize that "New Hampshire's natural resources provide the foundation for many of the activities that drive New Hampshire's economy. Residents, businesses and visitors enjoy New Hampshire's wetlands, streams, lakes and seacoast because of their natural beauty and recreational opportunities."<sup>2</sup> DES also recognizes that climate change poses serious risks to the state, and that wetlands play an important role in helping the state adapt to and prepare for climate change, and minimize its impacts:

Climate change is real, serious, and substantially anthropogenic and is responsible for many of the changing environmental conditions that put our New Hampshire's residents, communities, and sensitive natural resources and wildlife and their habitats at risk. Working with local, state and federal partners and within our intra-agency programs to address climate change issues is more important than ever.<sup>3</sup>

In addition, DES set an objective in its Program Plan to "[c]ontinue to develop [a] strong regulatory program by strengthening regulations, policies, and guidance documents, and develop and operate under consistent application procedures."<sup>4</sup> This objective should result in new rules that are more protective to wetlands in order to ensure that DES is complying with RSA 482-A and protecting wetlands in the public interest.

#### *CLF's Comments*

CLF acknowledges and supports several new aspects of the proposed rules that recognize the impacts that climate change is having on our state's wetlands and other natural resources. We commend DES for including requirements related to preparing for and addressing climate change impacts in the wetlands permitting process in order to protect water resources and public safety.

Specifically, in Chapter 600, we support DES's requirement that proposals in coastal areas utilize the best available science, including the NH Coastal Risk and Hazards Commission Science and Technical Advisory Panel report, in assessing a project's vulnerability and impacts

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<sup>1</sup> 2017-2023 New Hampshire Wetland Program Plan, at p. 3, available at <https://www.des.nh.gov/organization/divisions/water/wetlands/documents/epa-plan-2017-23.pdf>.

<sup>2</sup> Id.

<sup>3</sup> Id. at p. 4.

<sup>4</sup> Id. at p. 6 (emphasis added).

due to sea level rise, flooding, storm surge and extreme precipitation events over the project's design life.

We also strongly support the requirements in Chapter 600 that require projects in tidal surface waters or tidal wetlands to optimize the natural functions of tidal wetlands, and that they must be designed with a preference for living shorelines over hardened stabilization practices. In order to incentivize such projects, we urge the Department to categorize living shorelines and oyster reefs as minimum impact projects if they are designed in consultation with DES staff.

CLF is pleased that language requiring avoidance and minimization is included prominently throughout the draft rules. For example, at 607.02(g), we endorse the requirement that dredging activities avoid areas that support shellfish beds, and both current and historic eelgrass beds. Another example, section Env-Wt 313.03(a)(1) in the draft rules, includes important language requiring that a party seeking to impact a wetland “demonstrate[ ] that the potential impacts to jurisdictional areas have been avoided to the maximum extent practicable” and directs an applicant to utilize the NEIWPCC BMP for Avoidance and Minimization. Avoidance and minimization of impacts to wetlands should be the primary goal of the DES wetlands rules, and we are pleased to see those concepts retained and enhanced in some cases.

CLF has several concerns with the proposed rules. First, the rules reduce the important role of local Conservation Commissions in ways that will increase harm to wetlands and undermine the statutory requirements of RSA 482-A to protect wetlands and to preserve their many values and services. As the NH Association of Conservation Commissions (NHACC) points out in their comments on the rules, “local conservation commissions are often the most knowledgeable source of wetland information in their towns.” CLF agrees with the NHACC that the opportunity for municipal Conservation Commissions to participate in the wetlands permitting process should not be reduced, even for the smallest proposed impacts. We believe that reducing the role of Conservation Commissions will make wetlands permitting and enforcement more burdensome for DES, and will undermine the important local tools that citizens use to protect the many benefits that wetlands provide for water quality, flood control, and habitat, among others. Therefore, we recommend that DES require consultation with the local Conservation Commission prior to submitting any wetlands permit application, and that Conservation Commissions participate in the wetlands permitting process for any type of proposed impact. In the case of the smallest proposed impacts, a reasonable amount of notice to a Conservation Commission should be provided at a minimum, so that local bodies can provide information necessary to DES to understand the potential impacts to a wetland, even in the smallest cases or when a waiver of any requirements is requested.

CLF is concerned that reduced timeframes for decisions in the rules will negatively impact DES staff, risking approvals that are not warranted, or which are not properly conditioned. CLF is also concerned with how the proposed rules would impact the NH Fish and Game Department. Fish and Game plays an important role in wetlands protection, and CLF

believes that the rule revisions could impact Fish and Game staff time and the agency's budget, but note that such impacts are not currently clear under the draft rules. CLF urges DES to ensure that impacts to its own staff and budget, as well as those to Fish and Game, are fully identified so that the agencies can seek the resources necessary to perform their vital roles under these rules.

Finally, CLF agrees with the comments of The Nature Conservancy and respectfully requests that DES address the additional issues raised in their comments in the final rules. We agree with TNC's overall assessment that these proposed rules will expedite permitting decisions at the expense of protecting wetlands, and eliminate or constrain the opportunity for those who know their communities best to be an integral part of permitting decisions. This is contrary to DES's stated objective, noted above, to "[c]ontinue to develop [a] strong regulatory program by strengthening regulations, policies, and guidance documents, and develop and operate under consistent application procedures."<sup>5</sup> New Hampshire should not streamline wetlands permitting at the expense of one of our most important resources to protect water resources and prepare for the impacts of climate change.

We appreciate the opportunity to provide these comments, and we urge DES to revise the draft Wetland Rules to ensure that they strengthen protections to wetlands so they can provide their many critical functions and ecosystem benefits and help New Hampshire communities prepare for and mitigate the impacts of climate change.

Sincerely,



Tom Irwin  
V.P. and CLF New Hampshire Director



Melissa Paly  
Great Bay – Piscataqua Waterkeeper

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<sup>5</sup> Id. at p. 6 (emphasis added).