



STATE OF NEW HAMPSHIRE  
DEPARTMENT of NATURAL and CULTURAL RESOURCES  
DIVISION OF FORESTS AND LANDS

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January 18, 2019

Robert R. Scott, Commissioner  
Department of Environmental Services  
29 Hazen Drive; PO Box 95  
Concord, NH 03302-0095

**Re: Comments on initial proposal of DES Wetlands Rules Env-Wt 100-900**

Thank you for the opportunity to comment on the proposed wetlands administrative rules. Our department, and specifically the division of forests and lands, holds a unique relationship with DES regarding these rules. First, our Natural Heritage Bureau is an integral part of your department's permitting approval process. Second, we develop the Best Management Practices for Erosion Control on Timber Harvesting Operations to which your rules refer. Third, we manage more conservation lands for multiple uses, including the harvesting of timber, than any other state agency, and therefore frequently require wetlands permits to do myriad projects on behalf of the state. Fourth, our forest rangers serve as the enforcement branch for these rules as it pertains to timber harvesting. In 2018, our rangers took 41 law enforcement actions to enforce the provisions of these rules and the laws that govern them. Therefore, being involved from numerous angles, our comments intend to be reflective of this fact.

Our comments are set up in two sections: general and specific. General comments are not limited to a particular rule, but instead are meant to be overarching for all of the rules. The specific comments follow, and try to provide detailed suggestions/corrections. We would be happy to answer or clarify any questions you may have, and look forward to continuing to work with you and your staff.

**General Comments:**

Regardless of what the final version of these rules look like, we highly recommend a flow chart/user's guide, etc. to accompany them so they are more user-friendly. As they are currently written, they can be confusing, hard to follow, and sometimes contradictory in their interpretation. It is important from both an implementation and an enforcement aspect that they be clearly and succinctly articulated so a person knows exactly what they are supposed to do. Failure to do so will result in rules that do not protect the integrity of the wetland resource and instead create frustration and conflict.

We suggest looking at breaking the rules into two broad categories, such as "land management" and "conversion", or "temporary impact" and "permanent impact". It appears there could be some efficiency in separating land management or temporary impacts such as forestry, trail work, and agriculture from things that are a conversion or permanent impact such as construction of a building, road, septic system, etc. The difference of course being the scope and duration of the impact to the wetland resource. While we understand the desire to keep everything together, it becomes very cumbersome to understand with the

multiple references to other sections, exemptions, multiple permit levels, etc. Anything you can do to make the rules more clear would be beneficial, and breaking the rules apart into two broad categories may provide that clarity.

We recommend that the landowner of the property for which a permit is being sought should be provided with a copy of the NHB DataCheck results letter. Currently, only the project applicant or agent of the landowner receives the letter automatically from the DataCheck tool.

The current Memorandum of Agreement (MOA) between NHB, the NH Fish & Game Department's Nongame and Endangered Wildlife Program establishes the turn-around times for NHB and NHFGD to review permit applications. NHB has concerns about proposed the changes in turn-around times for review of certain permit applications. NHB may not have the capacity to achieve these accelerated timelines and further discussion is necessary to figure out how compliance can be accomplished.

We find it beneficial that you have incorporated the Coastal Risks and Hazards Commission (CRHC) 2016 report, as well as increasing climate change considerations in Env-Wt 600. We suggest additional incorporation of climate change considerations including state and region-wide vascular plant and wildlife migration corridors and other sensitive habitats and exemplary natural community systems.

### **Comments on Specific Rule Sections:**

#### **Section Env-Wt 100**

For clarification purposes, define the following terms and acronyms: PBN, SPN, "notification," and "registration."

Add the following definition of NHB and Natural Heritage Bureau: "'Natural heritage bureau' means the bureau, administered within the division of forests and lands of the department of natural and cultural resources which collects and analyzes data on the status, location, and distribution of native plant species and natural communities in the state, and develops and implements measures for the protection, conservation, enhancement, and management of native New Hampshire plants." (RSA 217A-3:XII)

*Env-Wt 102.33 "Corduroy road"* Suggest the following new wording: "*means logs, limbs or branches placed perpendicular to the direction of travel to provide support for logging equipment crossing a wet area that has no standing water and no defined channels. When used in accordance with the 2016 Logging BMPs "corduroy" shall be excluded from the definition of "fill" in Env-Wt 103.01.*" We suggest removing the word "road" and just use the term corduroy.

*Env-Wt 102.51 / Appendix B of Env-Wt 100* Include the following link to the "Level 2 Ecological Integrity Assessment Manual for New Hampshire: Wetland Systems", Nichols and Faber-Langendoen, 2015"  
[https://www.nhdf.org/DRED/media/Documents/Natural%20Heritage/L2-EIA-Manual\\_NHB\\_2018-7-11-Public.pdf](https://www.nhdf.org/DRED/media/Documents/Natural%20Heritage/L2-EIA-Manual_NHB_2018-7-11-Public.pdf)

*Env-Wt 103.52 "Priority resource area" means a jurisdictional area that: (a) Has documented occurrences of protected species or habitat for such species;* We are concerned with the inclusion of "habitat" in this definition, particularly as it pertains to timber harvesting. Some protected species, such as the Northern Long-eared bat or Canada Lynx, are generalists, and therefore any habitat could be considered a priority resource area under this definition. Timber harvesting is often used to create or expand beneficial habitat for wildlife, and while we understand the intent, we are concerned as written this could be abused.

*Env-Wt 103.55 (b)* Amend to include an additional citation at the end (in bold below), and read as follows: *Any federally-designated threatened or endangered plant species, any threatened species of plant as defined in RSA 217-A:3, XX, any endangered species of plant as defined in RSA 217-A:3, IV, or any exemplary*

*natural community as identified by the department of natural and cultural resources, division of forest and lands, NHB (RSA 217 A:3, VII).*

Suggest including the following new definitions to be consistent with other manuals:

Env-Wt 103.XX “Poled Ford” means a temporary stream crossing for skid trails constructed with logs or poles placed in the stream channel perpendicular to the direction of travel.

Env-Wt 104.XX “Skid Trail” means a temporary, unsurfaced, single lane travel-way used to remove forest products with a piece of logging equipment such as a skidder, forwarder, tractor, or horse.

Env-Wt 104.XX “Truck Road” means an improved road-way used to remove processed forest products from the log yard to a public highway with a log truck.

*Env-Wt 104.53* Clarify that Appendix C referenced here means Appendix C of Env-Wt 100. Each reference to an appendix throughout the rules would be clearer if it referenced the section where they are found.

*105.02 Access to files* – The NHB Datacheck is confidential per **RSA 217-A:2II - III**, and per consultation with the Attorney General’s office in December 2018 it remains confidential even if provided to DES. If DES receives a 91-A request, it can contact DNCR to determine whether DNCR is going to continue to assert confidentiality and DNCR can defend the confidentiality if challenged.

## **Section Env-Wt 200**

*Env-Wt 203.04(c)1(a)* Recommend adding “season,” as field work is dependent on seasonality.

## **Section Env-Wt 300**

*Env-Wt 300 Rulemaking Notice* states that two additional NH DES staff will be hired to achieve reduced PBN/EXP review timelines, we have concerns that other state agencies (i.e. NHB) involved in permit review may be impacted and may not have the capacity to achieve these accelerated timelines.

*Env-Wt 305.01 (a)* Recommend naming all potential permit categories that are mentioned in this section for clarity (SPN, PBN).

*Env-Wt 307.01 (b)* Recommend adding EXP and PBN/notification to this list so that a comprehensive permit type list is provided.

*Env-Wt 307.01 (b) 4&5, Section 300 Appendix B* All of the aforementioned sections use different names for a trail construction and maintenance manual. NHB recommends using the single correct name if this represents a single manual, or clarify if there are multiple manuals.

*Env-Wt 307.03 (c)5(c)* Clarify the certifying body that evaluates the “certified erosion control mix”.

*Env-Wt 307.05 (a)* At the end of this section, add “by a method and in a location that prevents spread to jurisdictional areas”.

*Env-Wt 307.10(h)* there is no timing listed in the 2016 BMP manual. Suggest rewording as “*logging shall not be subject to the time restraints in Env-Wt 307. 10(g) provided all work is conducted in accordance with the 2016 Logging BMPs to protect water quality.*”

*Env-Wt 307.11(a)2* Add “and does not contain invasive species material.”

*Env-Wt 307.11(f)* states corduroy must meet the requirements of (h)(1) and (h)(2) to be considered temporary fill. Under the 2016 BMP’s for timber harvesting, it says corduroy can be left in place. This rule would now contradict what the BMP manual says which is referenced in other parts of these rules.

*Env-Wt 307.16 and Env-Wt 307.17(a)(1)* do not mention SPN, notification, or registration; NHB recommends listing all permit types.

*Env-Wt 308.04(a)* Change [RSA 482-A:3, VI-a] to RSA 482-A:3, IV-a to be consistent with beginning of 308.04(a).

*Env-Wt 308.05* Activation of an SPN. (a)(2)(a) the wording in this section needs improving. It currently states “*recommendations that are necessary*”, which is contradictory. We suggest removing the words “that are necessary”.

*Env-Wt 308.05 (c)* Activation of an SPN This seems like an unnecessary burden for the applicant to notify the town when an email from DES would probably be much more reliable.

*Env-Wt 308.07* Post-Notification for SPNs Why is notification to the department that a project is complete necessary? Without a good reason we think this should be removed.

*Env-Wt 308.08* Conditions for SPNs (c) and (d) Do you need both of these? (c) states you must follow applicable BMP’s to protect cold-water fisheries, whereas (d) says “all SPN projects” shall follow BMP’s, so (d) already covers (c). Suggest removing (c).

*Env-Wt 309.02* Specifically refers to projects that are not subject to an SPN. However, 309.02(a)(4) refers to forestry SPN projects. Recommend removing this or rewording to avoid confusion.

*Env-Wt 309.02* Projects Conditionally Authorized By Rule. (a) What is the official basis of determining types of swamps? Where are these defined as natural communities? What about a White Ash swamp, Yellow Birch swamp, or a Cedar swamp; are these excluded? Suggest using the term “forested wetland” or just “swamp” instead of trying to determine specific swamp types.

*Env-Wt 309.02 (a)(4)* we don’t understand why floodplains would be treated differently than swamps for the purposes of timber harvesting. Without good justification of how this rule does a better job of protecting the floodplain forest we recommend this section be removed.

Table 311-1 Suggest adding “NHB DataCheck” in parentheses after “Protected species and Habitat” text, as this is what the tool pertains to and how it is referred to in the rules.

*Env-Wt 311.06(g)* the following statement is incorrect. “The NHB memo containing the NHB identification number and results and recommendations from NHB and the fish and game department.” The NHB memo does not contain NH Fish & Game’s recommendations, since NHB creates the letters. We refer the applicant to confer with Fish & Game, and coordination happens after receipt of the letter. Additionally, with NHB consultation, there are often several conversations that happen after receipt of the memo and the memo would not necessarily encompass final NHB recommendations. NHB suggests adding “as well as any written follow-up communication (additional memos or email communication) with either NHB or the fish and game department.”

*Env-Wt 313.01(c)(6)* Contains the phrase “reproduction areas for exemplary natural communities,” NHB suggests deleting “exemplary natural communities.”

Env-Wt 300 Appendix D, add language noting that “department of resources and economic development” means “department of natural and cultural resources.”

#### **Section Env-Wt 400**

Env-Wt 407.02(b)(3)(a) delete this wording.

Env-Wt 407.02(c) Resource Disqualifications. Should NHB recommendations be inserted?

Appx B 400 (see reference under Appx B 800) – please insert the following references and links to both of NHB’s manuals (one for natural community systems and the other to natural communities).

Natural Community Systems of New Hampshire (Second Edition 2011) - An updated version of Natural Community Systems of New Hampshire. This new edition includes several newly-described natural community systems, as well as a key to the natural community systems of New Hampshire in Appendix 3. Link: <https://www.nhdf.org/DRED/media/Documents/Natural%20Heritage/Web-Version-Systems-Report.pdf>

The Natural Communities of New Hampshire (Second Edition 2012) - An updated version of Natural Communities of New Hampshire. This new edition contains significant changes from the original version, including many community name changes and newly-described natural community types. These changes are summarized in this document in Appendix 2. Link: [https://www.nhdf.org/DRED/media/Documents/Natural%20Heritage/WebVersion\\_Tech-Manual.pdf](https://www.nhdf.org/DRED/media/Documents/Natural%20Heritage/WebVersion_Tech-Manual.pdf)

#### **Env-Wt 500**

The amount of time for NHB staff to review long, linear projects (e.g. utility maintenance projects) usually exceeds the projected turn-around times.

Env-Wt 520.04 Design and Construction Requirements (c) says corduroy can be left in place, but it also references “in addition to ...307” which 307.11 specifically says corduroy can’t be left in place. They contradict each other.

Env-WT 520.05 (a)(1) and (a)(2) this section needs further discussion. Do these rules intend to apply to both skid trails as well as truck/haul roads? The impacts are different and should probably be broken apart. These rules appear to apply to both defined channel crossings as well as forested wetland crossings, in which case there needs to be further clarification for the use of corduroy.

Env-Wt 520.05 (a)(2) This rule states “rock ford”. Should be switched to “stone ford” to be consistent with language in 2016 BMP’s for erosion control on timber harvesting manual.

Env-Wt 520.05 Forestry Project Classification Suggest adding a new section (4) using language developed by NHTOA

(4) Construction or repair of a permanent structure to cross wetlands, including streams, only if:

- a. Is not in or adjacent to prime wetlands or a duly-established 100-foot buffer unless a prime wetlands waiver has been obtained in accordance with Env-Wt 700;
- b. Is not located in a protected species habitat unless authorized under Env-Wt 407 or EnvWt 308.05(a) and Env-Wt 308.05(b);

- c. Is not used for access to property that has been converted to non-forestry uses, except that forestry uses may be combined with normal agricultural operations or trail construction or maintenance or both; and
- d. The structure disturbs less than 3,000 SF.

Env-Wt 521.03(a) occurs twice. Renumber **SPN Utility Notice and Application Requirements** Also, the language should be reworded to “A letter or memo from NHB and/or NHF&G indicating the project has been reviewed and provided recommendations.”

Env-Wt 521.04 change “except” to “exception.”

Env-Wt 521.05(a) refers to a section “e” but there is no “e” below.

Env-Wt 521.05(a) state or clarify that minimum impact project is an SPN

Env-Wt 526.05(e)(3) add “and the natural heritage bureau” after “nongame and endangered species program”

Appx B 500-ensure that references are consistent, e.g., link to pertinent BMP manuals.

#### **Env-Wt 600**

*Env-Wt 602.15* Replace the misspelled latin name with the following “*Artemisia stellariana*.” This species as well as *Rosa rugosa* are non-native ornamental plants. Also, insert the following native species to the definition of dune vegetation: *Rosa virginiana*

Recommend defining high salt marsh if it is to be used in the text (tidal marsh is defined).

Env-Wt 606.17 (a)(2) “Any maintenance, repair or replacement of an existing legal docking structure that requires **review by** fish and game department or national marine fisheries or natural heritage bureau ~~authorization~~ and impacts a protected species or habitat.”

Env-Wt 606.17(c)(2) change wording to “Requires review by fish and game department or national marine fisheries or natural heritage bureau but does not impact a protected species or habitat.”

Env-Wt 609.10(a) suggest adding “will not impact T&E species or has received recommendations from NHB and/or NHFG to avoid and/or minimize impacts.”

Env-Wt 610.04(f) and 611.04(h) Latin names of plant and wildlife species should be required, as common names can apply to a variety of species.

Env-Wt 611.02 Clarify that sand removal does not include vegetation removal.

Env-Wt 611.03(b) states: “...including reviewing the property for the presence of threatened or endangered dune vegetation or other exemplary natural community features that may require protection, relocation, or mitigation, or any combination thereof.” NHB suggests adding wording “For a list of species present on their property, the property owner should submit a Landowner request to the natural heritage bureau at [www.nhdf.org](http://www.nhdf.org).”

**Env-Wt 700** – no comment

**Env-Wt 800** – no comment

**Env-Wt 900 – no comment**

Once again, we encourage DES to focus on making these rules more easily understood and therefore more likely to be successfully implemented. Further, any changes from current rules that require additional process, steps, approvals, etc. should be closely scrutinized as to why they are necessary. New Hampshire's wetlands, with few exceptions, are highly functioning and of exceptional quality. This is due in large part to our ability to maintain an extensive forest cover and open space. We should work together to ensure these lands stay as forests, and a part of that is ensuring landowners can continue to manage their forestlands without undue costs or process, so they don't choose the path of conversion to development. In conclusion, we thank DES for the exhausting work the rewrite of these rules has entailed, and for your diligence in helping protect our wetlands. Forests and Lands looks forward to continuing to work closely through the details as this process moves forward.

Sincerely,



Brad W. Simpkins,  
Director

cc: Sarah Stewart, Commissioner, DNCR  
Clark Friese, Assistant Commissioner, DES  
Mary Ann Tilton, Wetlands Bureau Assistant Administrator

