

January 18, 2019

Ms. Mary Ann Tilton, Administrator
N.H. Department of Environmental Services
Water Division, Wetlands Bureau
29 Hazen Dr., P.O. Box 95
Concord, NH 03302-0095

RE: Proposed forestry wetlands rule change – New Hampshire Timberland Owners Association (NHTOA) comments

Dear Administrator Tilton,

The New Hampshire Timberland Owners Association (NHTOA) appreciates the time and effort the N.H. Department of Environmental Services' (NHDES) has put into the proposed rules and the opportunity to comment on them. As a participant in the development of the draft rules since 2014, we are pleased to see this process move forward.

From a water quality perspective, working forests are the most desirable land use. But to maintain this land use, landowners need reasonable tax policy, timber markets, and a regulatory framework that is easy to understand, cost-effective, and recognizes the unique management techniques (i.e. Forestry Best Management Practices – BMPs) that have evolved over centuries.

With the exception of tax policy/regulations (i.e. timber tax and Current Use assessment), the N.H. Department of Environmental Services' (NHDES) wetlands rules probably have the greatest impact on how timberland is managed in New Hampshire. In addition to influencing the installation and maintenance of forest management infrastructure (i.e. truck bridges), these rules also directly and indirectly influence where and how timber harvesting can occur.

It is in this context the NHTOA provides our comments and recommended changes to the department's proposed wetland rule change.

We look forward to continuing to work with the department in this rule-making process and we welcome the opportunity to answer any questions.

Sincerely,

Jasen A. Stock
Executive Director

Attach.

CC: Bob Scott, Commissioner
Collis Adams, Director

NHTOA Wetland Rule comments

January 18, 2019

General Comments

The NHTOA is commenting on the NHDES's "initial proposal" dated 10/30/18. The NHTOA still believes a section of the rule dedicated to "forest management" or "natural resource land uses" (i.e. forest management, agriculture, and recreational trails) would make these rules easier to understand.

This document contains the NHTOA's proposed language changes, and in the "Comments" paragraph following each proposal an explanation for why the change is necessary.

Definitions: Chapter 100

Env-Wt 102.33 "Corduroy~~road~~" means logs, limbs or branches placed to provide support for logging equipment crossing a wet area that has no standing water and no defined channels.

Comments:

Corduroy is a Best Management Practice and is used principally on skid trails. Keeping "road" in this definition creates confusion.

Env-Wt 103.01 "Fill" as a noun means any rock, soil, gravel, sand, or other natural or man-made material that has been deposited or caused to be deposited by human activity. ["Fill" shall not include "Corduroy" when used as a Best Management Practice \(BMP\) for forest management activities.](#)

Comments:

This additional language provides clarity for forest owners and managers that corduroy can be left in place to decompose. This is common practice and a desirable management practice, as removing the corduroy creates more environmental impact than allowing it to remain in place and naturally decompose.

Env-Wt 103.52 "Priority resource area" means a jurisdictional area that:

- (a) Has documented occurrences or protected species or habitat for such species;
- (b) Is a bog;
- (c) Is a floodplain wetland contiguous to a tier 3 or higher watercourse;
- (d) Is a designated prime wetland or a duly established 100-foot buffer zone;
- (e) Is a sand dune, tidal wetland, tidal water, or undeveloped tidal buffer zone; or
- (f) Is any combination of (a) through (ef), above.

Comments:

The department should fix the typo in (f).

Proposed new definition

Env-Wt 102.XX “Skid trail” means a temporary, unsurfaced, single lane trail used for skidding harvested forest products.

Comments:

This is an added new definition needed for references to BMP use, specifically the use of corduroy.

Chapter 300

Env-Wt 307.04 Protection of Fisheries and Breeding Areas Required. Work such as excavations, deposition of dredged or fill material, or suspended sediment-producing activities in jurisdictional areas that provide value as bird migratory areas or fish and shellfish spawning or nursery areas, shall be done so as to:

- (a) Avoid and minimize discharges of dredged material or placement of fill material during spawning or breeding seasons by using appropriate water quality protection techniques in Env-Wt 307 and timing of project as provided by Env-Wt 307.10(g) and Env-Wt 307.10(h), as applicable;
- (b) Suspend activities that might discharge sediment to spawning or nursery areas or to amphibian and migratory bird breeding areas during spawning or breeding seasons, as applicable; and
- (c) Protect high quality waters as specified in Env-Wt 1708.06.

Comments:

This clarifies that the forest management BMPs apply to the timing of projects in fish spawning and breeding areas. The time restriction in Env-Wt 301.10(g) (October 1 to March 1) will not work for forestry, as it will prohibit any work during prime logging weather. Adding the reference to Env-Wt 307.10(h) ensures logging operations and stream crossings occurring between October 1 and March 1 can occur so long as forest management BMPs are followed.

Env-Wt 307.06 Protection of Rare, Threatened or Endangered Species and Critical Habitat. No activity shall impact a threatened or endangered species, a species proposed for listing as threatened or endangered, or designated or proposed critical habitat under the:

...

Comments:

Allowing “proposed” species or habitats to qualify under this section is inappropriate. Only those species and habitats that have undergone a proper review and vetting by the botany or wildlife agencies charged with their study and cataloging should determine if the species or habitat merits the protections afforded this section of rule. The NHTOA suggests removing “proposed” from this section.

Env-Wt 307.11 Filling Activity Conditions. The following conditions apply to all temporary and permanent filling activities, in addition to all other applicable conditions in this part:

...

(b) Limits of fill shall be marked by construction fence or its equivalent prior to commencement of work to ensure that fill does not spill over or erode into any area where filling is not authorized;

...

(f) Swamp mats, construction mats, and corduroy roads shall not be deemed temporary fill for new authorizations unless they meet the requirements of (h)(1) and (h)(2) below;

...

(h) Temporary fill shall be:

- (1) In place no longer than one growing season;
- (2) Removed immediately upon completion; and
- (3) disposed of at an upland location in a manner that prevents its erosion into a surface water or wetland;

...

(k) No fill shall take place in a priority resource area unless specifically authorized by the department.

Comments:

These conditions (which apply to all temporary and permanent filling activities) are examples of why corduroy, when used as a BMP for forest management, should not be considered fill. Marking the limits of corduroy use on a forest management project with construction fence (Env-Wt 307.11(b)) is impractical and unnecessary.

Moreover, the proposed “corduroy” definition does not distinguish whether it is considered temporary or permanent fill. This ambiguity creates confusion over whether the corduroy must be removed. Lastly, prohibiting corduroy (“fill”) in a priority resource area will discourage its use as a BMP during forest management activities in these areas. An example is a forested wetland where a natural heritage occurrence exists. In these wetlands the department should be encouraging the use of Best Management Practices, such as corduroy.

Env-Wt 308.05 Activation of an SPN.

(a) The person responsible for a project that includes an activity listed in Env-Wt 308.04 shall provide the required notification by submitting the following to the department on or with the applicable information collection document as listed in Env-Wt 308.06, table 308-1:

- (1) The information specified in the applicable statutory provision; and
- (2) Proof that the project conforms to the statutory requirements and limitations, including but not necessarily limited to the following:

a. The identification number of an NHB DataCheck, including any recommendations that are necessary for the project to proceed as an SPN or affirmation that recommendations have been received in (b) (2)(b) below; and

b. If the activity, except for minimum impact utility projects, is within a prime wetland or a duly-established 100-foot buffer, a map to scale of the designated prime wetland or duly established 100-foot buffer with the location of the activity clearly delineated.

(b) The person responsible for the activity shall:

(1) Sign and certify the notification in accordance with Env-Wt 311.11; and

(2) Affirm that:

a. The project, other than activities that meet the requirements of Env-Wt 308.04(e) and Env-Wt 308.04(b), is not located in a priority resource area, except as provided for in Env Wt- 407;

~~(e) The person responsible for the project shall provide the clerk of each town or city in which work on the project under the SPN will occur, with a copy of the notice submitted to the department.~~

(d) If the department determines that an SPN form is complete and that the project as described meets the requirements for an SPN, the department shall notify the town electronically to view the approval on its website where it shall ~~post on its website~~:

(1) A notice that the notification form was complete and that the project as described conforms with all applicable requirements; and

(2) The effective date of the SPN, which shall be the date the notification is posted by the department on its website.

Comments:

Because forest management can occur in a priority resource area (i.e., documented occurrences of protected species or habitat for such species) the reference to Env-Wt 308.04(b) is needed in Env-Wt 308.05 (b)(2).

The remaining changes to the proposed activation process (paragraphs (c) and (d)) remove unnecessary new administrative requirements and help streamline the department's approval process utilizing their proposed electronic format. If an electronic notice is sufficient for the applicant, then it should be for the town. Also, we would like to see a timetable for when an applicant can expect to receive a notification on their pending application.

Env-Wt 308.07 Post-Notification for SPNs other than Utilities

(a) Prior to commencing the work covered by the SPN, the person responsible for a project other than a utility project shall post at the site:

- (1) A copy of the SPN posted by the department on its web site; ~~and/or~~
- (2) If applicable, the notice for forestry projects.

~~(b) Within 10 days following completion of the work covered by the SPN, the person responsible for the project shall submit to the department confirmation of completion of the project, either by paper copy or electronically.~~

And

Env-Wt 314.08 Notice of Completion and Certificate of Compliance Required

(a) ~~Except for activities that meet the requirements of Env-Wt 308.04(b) and Env-Wt 520,~~ the permittee shall file a completed notice of completion and certificate of compliance with the department within 10 working days of completing the work authorized by the permit.

...

Comments:

As the department moves to an electronic notification process for applicants, we request that forest managers be allowed to post a copy of the electronic approval or the TYVEK approval that arrives in the mail at the site.

The post project notification processes in Env-Wt 308.07 and Env-Wt 314.08 are redundant and add an administrative burden to forest managers and landowners. Moreover, the short duration of a forest management SPN (24 months) make this requirement unnecessary. If the department insists on a post project notification process, allow the permittee to file an electronic notice (i.e., email or on the department's web site) to the department when the project is complete without the need to also submit photos.

Env-Wt 309.02 Projects Conditionally Authorized By Rule. As authorized by RSA 482-A:11, VII, the following activities that are not prohibited or exempted by RSA 482-A and are not subject to an SPN may be undertaken without notifying the department or registering the activity with the department and without obtaining a standard permit or an EXP, provided the conditions stated in Env-Wt 307 and the conditions stated below are met:

(a) Mowing or other cutting of vegetation in a wet meadow, red maple swamp, hemlock swamp, or white pine swamp, subject to the following conditions:

(1) The roots of the vegetation shall not be disturbed;

(2) The ground shall be frozen or sufficiently dry to avoid making ruts;

(3) The project shall not be located in an area of jurisdictional bog, a designated prime wetlands or its duly authorized buffer, marsh, or a tidal buffer zone; and

~~(4) A forestry SPN shall be filed and activated pursuant to Env-Wt 308.05 prior to cutting under non-frozen conditions in a forested floodplain wetland adjacent to a Tier 3 watercourse;~~

Comments:

This new restriction adds an administrative burden to land managers managing timber in a flood plain forest. NHDES has failed to demonstrate why this additional requirement for forest management activities is necessary.

Moreover, Env-Wt 309.02 (a) (1) and (2) ensure the wetland is protected, and there are other parts of New Hampshire's timber harvesting laws, specifically the basal area laws, that already provide additional protections to floodplain forests.

Chapter 400

Env-Wt 407.04 Project-Type Exceptions (PTEs).

(a) Classification based on size as established in Env-Wt 407.03 shall not apply to any project that meets the requirements for an SPN under Env-Wt 308 [and Env-Wt 520](#), however such projects remain subject to Env-Wt 307 and all other qualifying criteria.

Comments:

This clarifies forestry crossings are granted “Project-Type Exemptions” based on the size of the crossing.

(c) Classification based on resource type impacted shall not apply to:

(1) Maintenance, repair and replacement in-kind of existing legal shoreline structures, whether tidal or non-tidal, ~~and~~

(2) Repair, but not replacement of slip lining, of existing legal stream crossings;

[\(3\) Any projects that meet the requirements for an SPN under Env-Wt 308 and Env-Wt 520, however such projects remain subject to Env-Wt 307 and all other qualifying criteria-](#)

Comments:

This clarifies forestry crossings are granted “Project-Type Exemptions” based on the type of the resources impacted (e.g., priority resource area).

Chapter 500

Env-Wt 520.02 Criteria for Approval. ~~In addition to the criteria established in Env-Wt 313,~~
The following criteria shall apply to forestry activities:

....

(b) ~~Travel ways~~ Skid trails and truck roads associated with forestry projects shall be exclusively for the purpose of accessing viable tree stands and conducting forestry projects.

Comments:

Env-Wt 313 comprises the procedures and criteria for standard permit decisions. This part of the rules requires mitigation and criteria for standard permit applications. These criteria and mitigation requirements are inappropriate for forest management projects.

Travel ways are not defined. This clarifies that skid trails and truck roads are eligible for SPN status.

Env-Wt 520.03 Forestry Notice and Application Requirements.

(a) For an SPN forestry project, the applicant shall submit the following to the department:

- (1) A forestry operation plan that shows:
 - a. Crossing locations;
 - b. Wetland or surface water types, such as marsh, swamp, bog, or stream, within the project area; and
 - c. Proposed log landing areas; and
- (2) A NRCS soils map or USGS map on which property boundaries, access points, and proposed crossings are clearly marked; and
- (3) For any work proposed to be performed within a designated prime wetland or duly established 100-foot buffer, a waiver issued in accordance with Env-Wt 706.

(b) An applicant for a standard permit for a forestry project ~~that does not qualify for a SPN shall be prepared by a licensed forester or a certified wetland scientist and~~ shall include the following:

- (1) Wetland delineation, functional assessment, and impact assessment as required by Env-Wt 311 and Env-Wt 313;
- (2) Construction sequence, water quality techniques to be used, and schedule; and
- (3) Narrative showing how the project meets the water quality techniques and avoidance and minimization techniques of the New Hampshire Best Management Practices for Erosion Control on Timber Harvesting Operations, department of natural and cultural

resources, 2016 (2016 Logging BMPs) printed by UNH Cooperative Extension and available as noted in Appendix B.

Comments:

This is confusing. Why is NHDES requiring any standard permit applications be prepared by a forester or wetland scientist? Why couldn't a private landowner hire the necessary expertise and prepare the application? It should not matter who submits the application. What matters is that the application is technically correct and the resources are protected.

Env-Wt 520.05 Forestry Project Classification.

(a) The following forestry projects shall be considered minimum impact and are eligible for SPN, LSA, or EXP in accordance with Env-Wt 407 and as follows:

(1) Roadway construction through forested wetlands for the purpose of conducting forest management activities, only if:

a. Activities are conducted only during frozen conditions;

b. Roads are cleared only by felling timber in and adjacent to the roadway;

c. The road base is constructed using no fill other than:

1. Snow pushed on the and frozen over the road base; or

2. Stumps inverted in places where support of the road base is necessary;

d. The minimum length and number of ditches necessary to create and maintain adequate drainage are constructed in accordance with the logging BMPs and water quality protection measures;

e. Each road crossing is no more than 15 feet wide and no more than 200 feet long;

f. Stream crossings incorporate pole fords with no stumping with the stream banks; ~~and~~

g. Spring retirement of winter roads includes soil stabilization and drainage, including water bars, necessary to prevent the roadway from becoming a channel for surface water runoff; and

[h. The maximum length of a corduroy skid trail in a forested wetland is no more than 2,400 feet.](#)

(2) Installation of a culvert, pole, or rock ford, and associated fill, to permit vehicular access to a parcel for forest management, only if:

- a. Access is not used for subdivision, development, or other land conversion to non-forestry uses, except that forestry uses may be combined with normal agricultural operations or trail construction or maintenance, or both;
- b. Roadway width at the crossing does not exceed 20 feet;
- c. Fill width, measured at the toe of the roadway side slopes shall be minimized and not exceed 50 feet;
- d. Fill for any single wetland crossing does not exceed 50 feet in length, measured along the proposed access way;
- e. Wetland crossings shall be limited to those that:
 - 1. Do not impact any bogs, marshes, sand dunes, tidal wetlands, or undisturbed tidal buffer zone;
 - 2. Are not located in a prime wetlands or duly-established 100-foot buffer unless a prime wetlands waiver has been obtained in accordance with Env-Wt 700;
 - 3. Only cross a swamp or wet meadow if such swamp or wet meadow has no standing water for 10 months per year or more; and
 - 4. Are not located in a protected species habitat unless authorized under Env-Wt 407 or Env-Wt 308.05(a) or Env-Wt 308.05(b); and
- f. For stream crossings, the scoured stream width is no wider than 8 feet; ~~and~~

(3) Construction of a temporary crossing of a non-tidal watercourse of any width for the transportation of forest products, only if the temporary crossing:

- 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);

(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.

(b) Forestry projects shall be considered minor impact only if:

(1) The project exceeds the criteria for a minimum impact project and does not meet the criteria for a major project; or

(2) The project exceeds 3,000 SF per crossing but does not exceed 10,000 SF of permanent wetland impacts.

(c) Forestry projects shall be considered major impact only if:

(1) The project permanently impacts 10,000 feet or greater of wetlands or 200 feet or greater of streams or surface waters;

Comments:

If the department chooses not to address our concerns of corduroy being defined as “fill” and therefore subject to regulation, the NHTOA suggests an alternative solution with the addition of Env-Wt 520.05(a)(1)h. In forested wetlands, a common Best Management Practice during timber harvests is to place brush and slash “corduroy” in the skid trail. This prevents rutting, helps prevent soil compaction, and as it decomposes the corduroy releases nutrients back into the soil. In larger ownerships, particularly those in northern New Hampshire with large, flat Spruce stands (which may qualify as a forested wetland) and low road density, a standard used by many forest managers when designing timber sales is to maintain skidding distances less than 2,400 linear feet. The addition of Env-Wt 520.05(a)(1)h. allows these land managers to use corduroy on these skid trails when the trail crosses a large forested wetland.

Adding the 308.05 (a) and (b) references to Env-Wt 520.05(a)(2)e.4. and Env-Wt 520.05(a)(3)b. makes the heritage reporting consistent for forestry projects (i.e. provide proof that NHB was checked).

The new language in Env-Wt 520.05(a)(4) is the bridge SPN language to provide conditions that will allow repair and construction for forestry truck bridges where the channel is greater than 8’ wide. The 3,000 SF is consistent with what the department uses elsewhere in these rules (such as 520.05(b)(2)) to determine minimum impact.

The addition of “permanent” to 520.05(b) and (c) recognizes the ephemeral nature of forest management projects and clarifies that permanent impacts are the determinant of whether a project permit status is elevated.

Chapter 700

Env-Wt 706.03 Issuance of Waivers for Forestry Activities

(a) As provided in RSA 482-A:11,IV(b)(3), the department shall not issue a waiver prior to 14 days after receipt of the waiver request, provided however that the municipal conservation commission may request an extension on such waiver issuance, not to exceed 14 days.

...

Comments:

This rule establishes a minimum timeframe for department action on a waiver request. The NHTOA requests the rules also include a maximum time frame for department action on a waiver request.

Chapter 900

| **Env-Wt 901.03 Exemptions**. The following activities and crossings shall be exempt from Env-Wt 903 and Env-Wt 904, provided they are conducted in accordance with all applicable conditions:

...

(b) Minimum impact projects to allow vehicular access to a piece of property for forest management activities, conducted in accordance with:

(1) Env-Wt 520 for roadway construction through forested wetlands; or

| (2) Env-Wt ~~407.03~~[520](#) for installation of a structure and associated fill to cross wetland including streams:

Comments:

The reference to Env-Wt 407.03 in Env-Wt 901.03(b)(2) is confusing, as Env-Wt 407.03 references jurisdictional area size thresholds; measuring watercourse lengths. It appears the correct reference should Env-Wt 520.

Mary Ann,

In reviewing the NHTOA comments I noticed a point I missed with respect to corduroy use on skid trails. In the NHTOA comments we suggest adding a new criteria to Env-Wt520.05(a)(1);

h. The maximum length of a corduroy skid trail in a forested wetland is no more than 2,400 feet.

Because this paragraph is for frozen conditions, and timber harvesting occurs in these Spruce forests during non-frozen conditions, The same language should be added to Env-Wt 520.05(a)(2). This would be a new sentence "g" which would read

g. The maximum length of a corduroy skid trail in a forested wetland is no more than 2,400 feet.

Of course, neither of the changes to Env-Wt 520.05(a) (1) and (2) are necessary if the department decides to adopt our earlier suggestion to modify the 'fill' definition to not include corduroy when used as a BMP for a forest management project.

Sorry for the last minute catch, but I wanted to make sure I got this in before the 4pm deadline.

Jasen