SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS
SINCE 1901

54 Portsmouth Street
Concord, NH 03301

Tel. 603.224.9945
Fax 603.228.0423

info@forestsociety.org
www.forestsociety.org

January 18, 2019

Mary Ann Tilton
NH Department of Environmental Services
Wetlands Bureau
29 Hazen Drive
Concord, NH 03302

Dear Ms. Tilton:

Thank you considering these comments from the Society for the Protection of New Hampshire Forests regarding the proposed revisions to the State's wetlands rules.

As you know, the Purpose Statement in RSA 482-A concisely summarizes why protecting and preserving the State's "submerged lands under tidal and fresh waters and its wetlands" is in the public interest. Our April 19 comment letter emphasized that any set of new rules should lead to a greater protection of wetland resources than is the case under present rules. In order to meet that responsibility, the rules need to be as clear and simple to follow as possible. Regulations that are clear and practicable will result in more compliance and therefore a higher level of protection of the resource.

As a general observation, we believe that the proposed rules as drafted should not be adopted, for two reasons. First, the draft rules are too difficult for a lay person or a member of the regulated community to read, to fully understand and to comply with. Second, the enactment of HB 1104 in the 2018 session of the Legislature unreasonably truncates DES review times for wetland applications in a way that no re-write of the wetland rules can successfully accommodate. For these two reasons, we believe that the draft rules as presented are fatally flawed. We suggest that DES scrap these proposed rules, work with the Legislature to revisit the changes imposed by HB 1104 and then start over with the task of updating the wetland rules. Certainly much of the feedback already received by DES can be used to inform a new draft of wetland rules.

In the event that DES elects to move forward with the on-going revision process, we have several specific comments and recommendations concerning the proposed rules, especially how they address forestry operations. The suggested language additions are highlighted and underlined in blue. Recommendations concerning definitions are *italicized*. Other proposed changes are explained with supporting comments. Our comments and recommendations:

Chapter Env-Wt 100 DEFINITIONS; ACCESS TO RECORDS:

Add these definitions:

- "Forester" - means "NH licensed professional forester" as defined in RSA 310-A:98
- SPN - Statutory Permit-by-Notification – *this term should be clearly defined*
- PBN - Permit By Notification – *this term should be clearly defined, so that the reader can distinguish the between SPN and PBN*
  Comment:
  It's unclear between 308.04 (SPN) and 309.08 (PBN) if and when a PBN might will be needed rather than an SPN, particularly as they relate to forestry projects. The rules should be clearer about this.
- "Skid Trail" – define as: an unsurfaced, temporary single-lane trail used to skid wood (as written in the NH Best Management Practices for Erosion Control on Timber Harvesting Operations BMP Manual)
- "Temporary Forest Road" – define as: a road that is not meant to be used after the timber harvest is complete therefore, BMPs like bridges and culverts may be removed
  Comment:
  The suggested new definitions from the 2016 BMP manual will help distinguish between a forestry truck road and a forestry skid trail.

- "Corduroy" - logs, limbs or branches placed to provide support for logging equipment crossing a wet area that has no standing water and no defined channel, is used principally for skid trails, and shall not be considered "fill" when used as a BMP for forest management activities.

  Comment:

  The highlighted additional language to the corduroy definition clarifies that corduroy is not fill and can be left intact at the close of a harvest. This is clearly stated in 520.04(c). However, 307.11 (f) as written is contrary to 520.04(c) and appears to incorrectly state that it shall be removed.

Chapter Env-Wt 300 PERMITS AND OTHER AUTHORIZATIONS; CONDITIONS APPLICABLE TO ALL WORK IN JURISDICTIONAL AREAS

307.03(b)(4) & (5)

Comment:

These should be combined and the referenced document clarified (it now makes reference to the same document with slightly different titles).

307.04(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;

Comment:

The highlighted language clarifies that forestry BMPs for these temporary crossings minimize impacts to fish spawning and breeding and protect water quality. The timeframe between October and March is important for forestry practices to be able to operate on frozen ground and outside of other species' breeding seasons.

307.11 (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) and (h)(4), below;
(h)(4) corduroy may be left intact at the close of a forestry timber harvest.

Comment:

The highlighted language clarifies that corduroy for harvest operations may be left intact which meets the 2016 BMPS. 520.04 and 307.11 contradict as written in the current draft rules. Additionally, corduroy left intact will continue to stabilize the soil and quickly degrade back into the soil. Removal could cause damage, erosion and siltation and would work against the purpose of protecting the resource. Removing the "roads" language clears up confusion with forestry trucking roads, which don't use corduroy.

308.05 (b)(2)(a) - The project, other than activities that meet the requirements of Env-Wt 308.04 (e), Env-Wt 308.04 (d), and Env-Wt 308.04 (b), is not located in a PRA, except as provided for in Env-Wt 407;

Comment:

The highlighted language includes forestry and trail projects which follow BMPs and which meet criteria for minimum impacts should be able to occur in a PRA under an SPN.

308.05 ~~(c)~~ ~~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 post on its website and e-mail a link to the permittee and the clerk of each town or city in which work on the project under the SPN will occur:

Comment:

The Department should e-mail the notice to the permittee and the Town that the permit is listed on their website. Also, the Department should continue to mail the Tyvec notices to the person responsible for the cutting. These notices posted on the site are what give the public confidence that the laws and BMPs are being followed and proper permitting is taking place. This is very important from a public outreach standpoint.

308.07 (a)(1) A copy of the SPN posted by the department on its web site; and or

(2) If applicable, the notice of forestry projects.

Comment:

This clarifies that either the forestry notice of a copy of the permit can be posted on the landing, but both are not needed.

308.07 (b)

Comment:

This section should be removed from the rules. This extra step adds unnecessary burden to permittee and the Department. These SPNs already expire in 2 years [see 314.04(d)]. This also does not provide any added protection to the resource. However, if the Department will require this, then they should also allow the permittee to submit completion on the website as well as e-mail and paper.

311.11(e) Each signature provided pursuant to (a) or (b), above shall constitute authorization for the municipal conservation commission and the department to inspect the site of the proposed project, except for minimum impact forestry and trail SPN projects, where the signature shall authorize only the department to inspect the site pursuant to RSA 482-A:6,II.

Comment:

Allowance for a Conservation Commission to inspect a site appears to be a new authorization. As suggested in the highlighted language, we feel a trail SPN should be exempted along with forestry as these projects are minimally impactful and often benefit the public. Landowners may not comply if this rule allows often untrained conservation commission members to inspect a site.

314.08(a) Except for projects meeting 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 under the permit.

Comment:

This rule is redundant with Env-Wt 308.07(b). This adds an undue burden to forestry SPN projects and the department. SPN projects all expire within 2 years. Requirement for photos of the completed project probably does not apply well to forestry SPN projects because these projects are often in remote locations and permitted individual activities (crossings) are often spread across 100s of acres. It's impractical to take individual photos of a pulled crossings. The weather and time of year will also result in many poor quality photos. The suggested highlighted language will address these concerns.

Chapter Env-Wt 400 DELINEATION AND CLASSIFICATION OF JURISDICTIONAL AREAS; CLASSIFICATION OF PROJECTS

406.03(b)(2) Delineation of wetlands, including vernal pools, shall not be required outside the limits of wetland impact if:

(d) A minimum impact trail project in accordance with Env-Wt 517 where:

Comment:

Forestry, Agriculture, and Utility minimum impacts are included. We suggest as suggested in the highlighted language the Department also include trails projects as also exempt when they meet similar requirements of a, b, and c.

407.04(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 or Env-Wt 517.

Comment:

The highlighted language ensures that forestry and trails projects are granted PTEs based on the size of the project.

407.04(c) – *we recommend adding this to the proposed rule:*
(3) Any projects that meet the requirements for an SPN under Env-Wt 308 and Env-Wt 517 or Env-Wt 520, however such projects remain subject to Env-Wt 307 and all other qualifying criteria

Comment:
The highlighted language ensures that forestry and trail crossings are granted "Project-Type Exemptions" based on the size and resources impacted (i.e. PRA)

Chapter Env-Wt 500 PROJECT-SPECIFIC REQUIREMENTS

517.02 (a) (2) "...Be located away from lakes rivers, river banks, tidal waters, marsh and scrub-shrub wetlands"

Comment:
This is too vague and conflicts with the siting of recreational trails since many trails lead to and parallel shorelines of rivers and lakes.

517.02(b) "the entire boardwalk shall be open to public access through public ownership or public easement or agreement"

Comment:
This criteria to require a trail be open to the public to get a approval is an overreach and will discourage private landowners from applying for permits and following BMPs. We request that this requirement be removed from the rules. If not, then DES needs to define how this requirement would be enforced and defined. It also needs to clarify if this requirement includes all private landowners.

517.04(a) "…keep footpaths to 3-5 feet wide"

Comment:
This is inconsistent with 517.05(c) which is 3-6 feet. We also note that accessible trail standards require that passing lanes be up to 6 feet wide. Therefore, we recommend the allowed width be set at 6 feet.

517.05(a) "…would disrupt wildlife"

Comment:
The Department should clarify how it will conclude a boardwalk will disrupt wildlife. Does it intend to develop a BMP or will it reference the NH Fish and Game trails tool to make that determination?

520.02 criteria for Approval. In addition to the criteria established in Env Wt 313 where applicable, the following criteria shall apply to forestry activities:

Comment:
Env-Wt 313 are the Standard Permit criteria and most forestry falls under SPN. The highlighted language will clarify this requirement.

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

Comment:
This clarifies that skid and truck roads are eligible for SPN.

520.05(a)(1)(h) Skid trails utilizing corduroy are allowed if they do not exceed 1,000 linear feet.

Comment:
If the department chooses not address our concerns of corduroy being defined as "fill" and subject to the regulatory impacts, we suggest the highlighted language as an alternative solution. In forested wetlands a common BMP during timber harvests is to place "corduroy" in the skid trail. This is a preventative measure to avoid rutting, prevent soil compaction, and as it decomposes releases nutrients back into the soil. 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.

520.05(a)(2)(e)(4) Are not located in a protected species habitat unless authorized under Env-Wt 407 or Env-Wt 308.05(a) and Env-Wt 308.05(b)

520.05(a)(3)(b) Is not located in a protected species habitat unless authorized under Env-Wt 407 or Env-Wt 308.05(a) and Env-Wt 308.05(b).

Comment:
The highlighted references make the NHNHB reporting consistent for forestry projects.

520.05(a) – ***we recommend adding this language to the proposed rule***:

(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;

d. The structure disturbs less than 1,500 SF;

e. The structure is not on a Designated River, and

f. The structure is not on a 4th order or greater stream.

Comment:
The highlighted suggested language provides for forestry bridge projects to use an SPN when the channel is greater than 8' wide and less than 1,500 SF of impact. This could also include language to allow this under an SPN when applicant or the agent for the applicant is a forester. Foresters are licensed professionals with experience and specialized knowledge who must maintain a certain level of continuing education.

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

(3) The project exceeds 1,000' linear feet of skid trail corduroy.

Comment:
The highlighted language clarifies that the impacts described refer to permanent wetland impacts and not temporary crossings or corduroy skid trails less than 1,000 feet.

520.05(c)(1) The project permanently impacts 10,000 feet or greater of wetlands or 200 feet or greater of streams and surface waters.

Comment:
The highlighted language clarifies that the impacts described refer to permanent wetland impacts and recognizes the ephemeral nature of forestry impacts and that permanent impacts are what determine if the project is major.

Chapter 700 PRIME WETLANDS

706.01 Availability for Forestry Waivers:

Comment:
This section states a landowner can request a waiver for forestry in the forested portion of a "prime buffer/wetland". DES should clarify for the benefit of an applicant whether this means that a waiver is possible for both the prime wetland buffer and the wetland or just the buffer.

706.03 (a)

Comment:
This rule states "The department shall not issue a waiver prior to 14 days after receipt of the waiver, provided however a municipal conservation commission may request an extension on such a waiver issuance, not to exceed 14 days." This section does not indicate specifically when DES would issue a waiver or when the conservation commission could request an extension. DES should establish a maximum time frame for action on a waiver request.

Chapter 900 Env-Wt STREAM CROSSINGS; CERTIFIED CULVERT MAINTAINER PROGRAM

901.03 (b)(2) Env-Wt ~~407.03~~ 520 for installation of a structure and associated fill to cross wetlands, including streams:

Comment:
This appears to be an incorrect reference.

901.03 (d) - Minimum impact trail activities conducted in accordance with Env-Wt ~~521~~ 517

Comment:
Incorrect reference for trails.

In closing, the wetlands rules (current and proposed) are very impactful on the practice of forestry. Unlike development projects which result in the permanent loss, conversion and/or disturbance of wetland resources, planned disturbances created by forestry operations are temporary. When practiced responsibly by following Best Management Practices (BMPs) during forest harvests, the result of a planned, temporary forestry disturbance is to sustain the protection of important natural communities, water quality and open space.

Unfortunately, given the absence of clarity where it is most needed in the proposed rules, and given the confusion concerning which provisions apply to forestry, and how they apply, the proposed rules may have the unintended consequence of undermining the ability of landowners and forest managers to conduct responsible forest harvests that avoid or minimize adverse impacts on wetland resources. If DES established a completely separate Natural Resources Section that focused on forestry, agriculture and trails, we believe that the outcome would be better compliance among forest landowners, less work for DES to explain how forestry operations are intended to comply with the proposed rules, and, as a result, better protection of the State's wetland resources.

Thank you again for considering our comments. We remain interested in continuing to work with the Department and other stakeholders to improve the capacity of the Department to more effectively protect New Hampshire's wetland resources.

Sincerely,

Wendy Weisiger, LPF
Managing Forester

Matt Leahy
Public Policy Manager