

February 20, 2018

Ms. Mary Ann Tilton, Administrator
NH 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 opportunity to comment on the draft wetlands rules. As a participant in the development of the draft rules since 2014, we are pleased to see this process move forward.

Forest management is more than a desirable land use. Our managed timberlands help maintain clean water, clean air, and wildlife habitat, and they provide the raw material for the state's third-largest manufacturing sector – forest products. Few regulations influence forest management operations as much as the N.H. Department of Environmental Services' (NHDES) regulations for stream and wetlands crossings. It is in this context that the NHTOA provides its comments on the proposed rules.

In the Spring of 2014, the NHTOA and NHDES hosted a series of public forums (a.k.a. "Timber Talks") on the state's wetland rules. The NHTOA and its members provided comments (attached -- NHTOA's May 8, 2014 comments letter). The NHTOA also participated in a two-year stakeholder work group. Throughout this process the NHTOA and its members consistently commented that new rules should:

- I. Be easy to understand – Any landowner, or land manager should be able to read them and know what approvals their project will require.
- II. Recognize the unique nature of forest management -- The rules should recognize the uniqueness (e.g. ephemeral impacts, habitat enhancement, etc.) of forest management projects.
- III. Be outcome-based – Focus on resource protection, not numeric details for crossing widths and structure dimensions.

We do not believe the proposed rules released on January 31st address any of these suggestions.

Easy to Understand

I have personally spent more than 15 hours reading and re-reading the Department's draft wetlands proposal, and I still cannot determine what approvals (i.e. Category 1, Low-Scrutiny Approval, "low impact", Statutory Permit-by-Notification) I need for a pole ford to cross a jurisdictional area for a timber harvesting project. In addition to confusing footnotes, the cross-references also make it difficult to know what standards will apply.

Using my pole ford as a case study – I believe it would qualify as a "Statutory Permit-by-Notification" under Env-Wt 308.04, subject to Part 524's FORESTRY, Project-Specific Requirements. But Part 524 is still confusing. Env-Wt 524.01 Applicability exempts statutory permits-by-notification, yet Env-Wt 524.05(a)(3) Forestry Project Classification classifies my pole ford as a "Category 1" project and Env-Wt 524.02(a) Criteria for Approval lists "forestry projects."

Another good case study illustrating the cross-references problem would be a winter timber harvest in a Red Maple stand that is, by definition, a forested wetland. I believe this project would qualify as a "Low Scrutiny Approval (LSA)" under Env-Wt 306.01, because it is listed in Env-Wt 309. As an LSA, it does not require an application to the NHDES. But the footnote on Env-Wt 306.01 identifies LSA projects as "low impact," Category 1, and formerly "minimum impact." Category 1 "forestry projects" as identified in Env-Wt 524 require an application process. Also, to qualify as an LSA the project must comply with all the conditions in Env-Wt 307. Env-Wt 307.15 Logging or Forestry Activities requires adherence with all the conditions in Env-Wt 500, which includes Env-Wt 524.

Beyond the circular permit references, the cross-references also create operational problems for our demonstration Red Maple forestry project. To qualify as an LSA, the project must comply with all the standard conditions in Env-Wt 307. These include:

- 1) Env-Wt 307.03(b) -- Natural vegetation and filter strips around wetlands and surface waters shall be retained and maintained wherever practical. This would prevent our project.
- 2) Env-Wt 307.04(b) -- Suspend activities that might discharge sediment to spawning or nursery areas or to amphibian and migratory bird breeding areas during spawning or breeding season. The use of the word "might" is a problem.
- 3) Env-Wt 307.04 (e)(f) -- These are water quality monitoring requirements. This would be problematic if our Red Maple wetland abuts a cold water fishery or other waterbody. To demonstrate compliance with these standards, our Red Maple project will need to perform water quality monitoring.
- 4) Env-Wt 307.07 -- Any shoreline vegetation disturbed during a project shall be re-established as specified in Env-Wq 1400 relative to a planting matrix for shoreland restoration. This would be a problem if our Red Maple wetland abuts a waterbody.
- 5) Env-Wt 307.11 – This paragraph defines fill and it is not clear if this section regulates corduroy.

- 6) Env-Wt 307.13(b) – This section establishes setbacks from neighbors. Although much of the language in the section applies to docks, it does appear to have some connection to non-dock projects. A 10-foot setback is a problem for many forestry operations.

These are just two examples illustrating the added complexity and confusion the proposed rules create for forest management projects. To address this, the NHTOA suggests that the Department create a new Part 524 specific to forest management and eliminate the cross references.

This will make compliance easier to understand, but it will also recognize the unique nature of forest management as a land use. The NHTOA would be interested in helping put together a subcommittee of forestry professionals to redraft this part of the draft rule.

Outcome-based

Forest management activities and their wetland impacts are typically ephemeral. A stand of timber being managed as part of an ongoing timber stand improvement program will see activity (e.g. logging, skidding, timber processing) for two to six weeks every 10 to 15 years. In the case of a clear cut or patch cut, entry back into one of these stands typically won't occur for at least 30 or 40 years. Because of the ephemeral nature of forest management activities, science and experience emphasize two goals:

- 1) Prevent erosion while working on the project; and
- 2) Stabilize the site when the project is finished.

Throughout the rulemaking process, the NHTOA and its members urged the NHDES to consider an outcome-based rule that focuses on minimizing environmental impacts and uses New Hampshire's Best Management Practices (BMP) for Erosion Control instead of having fixed numeric sizes and distances for crossings. The most notable comment in this regard is the removal of the 50-foot limit for wetland crossings (currently Env-Wt 303.04, proposed in Env-Wt 524.04(a)(2)d.). Today, a common practice on wet sites and in forested wetlands is to limb and lop the timber in the forest to create a mat, or "corduroy," to operate on. To limit the length of this corduroy to 50 feet is impractical and fails to recognize the advancements that have been made with timber harvesting equipment, specifically, in reducing ground pressure.

In addition to the 50-foot limit referenced above, the NHTOA is disappointed to see all the numeric sizes and distances we discouraged in our May 8, 2014, letter remain in the proposed rule. Moreover, it appears several of the numeric sizes and distances became more restrictive. For example:

- 1) Proposed: Env-Wt 524.05(2)h. - Category 1 stream crossing width went from the current width of eight-foot scoured channel to five feet,

- 2) Removal of a number of existing stream crossing criteria currently in Env-Wt 303.04 (g);
 - Cross a perennial or intermittent stream of any width,
 - Structure can incorporate one pier or post for every 15 feet of span,
 - Structure can incorporate one or more abutments in the bank(s).

Unique nature of forest management

Many things motivate people to own timberland. Although an individual or company may “own” a piece of timberland, they are also the steward of the natural resources growing on their property. Imposing additional regulatory burdens on landowners can shift their real estate from being an asset, with all its natural resources, to a liability. This shift will ultimately compel the landowner, or their family, to sell the property to the highest bidder, who often will have plans for more intense use of the property and thus remove it as a timberland. Of particular concern is imposing additional regulatory burdens around specific elements such as rare plants/animals and cultural resources. Where a unique plant or animal was considered an asset worth protecting by the landowner, it now brings an additional regulatory burden (e.g. expanded permit, bigger buffer areas, additional reporting criteria, etc.). These additional burdens make that plant or animal a liability.

New Hampshire landowners have a long tradition of keeping land open for outdoor recreation (hunting, hiking, fishing, etc.). This is great for the state’s travel and tourism economy, and it is the product of a long and productive relationship with the N.H. Department of Natural and Cultural Resources (DNCR) and the N.H. Fish and Game Department (F&G). Many of these same landowners also work with these agencies in voluntary biodiversity programs that inventory and catalog rare, threatened, and endangered plants and animals. Incorporating this biodiversity information into permitting programs that will negatively impact the landowner’s ability to manage their land is problematic at several levels:

- i. It will have a chilling effect on landowners and land managers familiar with their client’s land for volunteering to participate in the state’s biodiversity programs.
- ii. It will encourage landowners to restrict access to their land (e.g. posting the land) for fear a rare, threatened, or endangered species is found and reported.
- iii. It makes the location of these plants and animals public and could attract illegal collection.
- iv. Places another regulatory burden on the timberland which will actually hurt the species, as the burden further tips the economic scale towards land subdivision or conversion to another use.

Today, a forestry project seeking an NHDES wetlands permit is obligated to conduct a Natural Heritage Bureau Data Check. The Data Check is performed on the jurisdictional areas being impacted. The applicant provides proof the Data Check was completed as part of their application to the NHDES. When something is found, the landowner is notified and there is a private consultation with the DNCR or F&G. The applicant is not obligated to follow any of their

recommendations. Neither the Data Check findings nor the recommendations become a part of the application. This process was the product of a long deliberative process between the NHTOA, DNCR, F&G, and NHDES. But the proposed rules do not recognize this process, as Env-Wt 308.05 requires the applicant to produce a copy of their Data Check results and certify all recommendations will be followed. The NHTOA advocates the rules be modified to respect the process.

Other specific examples of where the proposed rules add a regulatory burden to landowners include:

- 1) Elevating a forestry project to a Category 3 if it impacts a “special resource area.” Several of the areas identified in the definition of a “special resource area” in Env-Wt 103.58 grow merchantable timber:
 - Crossings on a tier 3 stream containing a cold water fishery,
 - Any crossings in a flood plain.
 - The crossing has a documented occurrence of a rare or protected species or habitat.
 - Designated Prime Wetlands.

- 2) Disqualifying a forestry project from a project-type exception under Env-Wt 407.02 and classifying it as a Category 3 if it impacts:
 - Exemplary natural communities;
 - Floodplain wetlands;
 - Riverine wetlands;
 - Designated river corridor;
 - Habitat for species of special concern, threatened/endangered species, or species of greatest conservation need;
 - Tier 3 stream or any wetlands hydrologically connected to a tier 3 stream;
 - Forested wetlands greater than 10 acres where at least 50% is very poorly drained;
 - Any wetlands whose function is protection of wildlife habitat and ecological diversity by providing diverse wetland types and structural vegetation diversity and size;
 - Any wetland that provides water quality;
 - Designated Prime Wetland;
 - Any wetlands that provide groundwater recharge;
 - Any high scoring wetland (wetland scientist); or
 - Any stream that has a woody corridor.

- 3) Requiring landowners to notify town clerks under Env-Wt 308.05(c),

- 4) Requiring a USGS topographic map and a United States Natural Resource Conservation Service soils drainage map to ensure the project meets a Category 1 under Env-Wt 406.03(b)(2)3.

- 5) Requiring landowners to certify their lands are open to for inspection by the local Conservation Commission under Env-Wt 308.05(b)(1), which references Env-Wt 311.11(e).

As I review these rules more thoroughly in consultation with the NHTOA membership, I will forward any comments I receive. Again, thank you for the opportunity to provide comments on these proposed rules.

We look forward to working with the Department throughout this rule-making process.

Sincerely,

Jasen A. Stock
Executive Director

Attach.

CC: Bob Scott, Commissioner
Collis Adams, Director