

AGC of New Hampshire

Building Forward. Constructing Change.



April 18, 2018

Ms. Mary Ann Tilton, Administrator
NH Department of Environmental Services
Water Division, Wetlands Bureau
29 Hazen Drive
Concord, NH 03302

RE: Draft Wetlands Rule Changes

Dear Administrator Tilton,

The Associated General Contractors of New Hampshire (AGC of NH) appreciates this opportunity to comment on the draft wetlands rules. We are committed to helping develop a more streamlined wetlands permitting process that utilizes the most modern resources and expertise available. We understand the importance of protecting the environment and we believe the best way to do so is to ensure that it is protected by a practical and coherent permitting process.

Since the draft wetlands rules were released, AGC's Environment Committee has reviewed it closely. We've attached a list prepared by Chairman Jim Gove that goes into more detail about our concerns, as well as comments made by the NH DOT because their points also affect our members. Below is an outline of some of our main concerns.

- I. Increased complexity in the rules creates ambiguities and confusion.** It was our understanding that the goal of reviewing the rules was to make the process clear, understandable, and fair. The mission statement on the wetlands webpage cites "clarity and consistency" as the Department's main goal in revising the rules. AGC believes that it is possible to overhaul the rules by simplifying the concepts, strategies, and processes in play. The current draft further complicates the process and will undoubtedly lead to confusion and potential loopholes, leading to non-compliance.
- II. Confusing and contradictory terminology.** The new rules create over 50 new definitions that cause redundancies and a lack of a coherent flow. For example, the rules introduce a new term, "special resource areas", which does not appear in the RSA and hasn't been vetted by other organizations or agencies. The term is also not consistent with the Army Corps' SGP. This is but one of many new terms that may lead to confusion.

- III. No concrete utilization to determine the practicable minimization of direct impacts.** In the draft, certain wetlands being called “special resource areas” are being elevated to virtual state-wide prime wetland status. But the rest of the wetlands, regardless of function and value, must still go through the stringent avoidance and minimization criteria. There should be a recognition that some wetlands do not have the functions and values of others – some are so minimal that they function more as uplands than wetlands.
- IV. Expansion of jurisdiction beyond that allowed under the law or case law.** An example of the disconnect between the new rules and law is found in Env-Wt 601.03: Resolution of Conflicts. “If the requirements of this chapter conflict with any other applicable requirements, whether in subtitle Env-Wt or in any local, state, or federal ordinance, rule, or regulation, the requirements that are more protective of the resource being impacted shall apply.” A state permit cannot be modified, changed, or controlled by any other entity, whether local or federal. This is not supported by case law and is unlawful. This section raises questions about whether this would be legal, as it puts state and federal law in conflict.

Lastly, AGC is concerned about too many industries being covered under one rule set. To stay in line with “clarity and consistency”, AGC recommends that the Department consider separating rules by industry/activity with separate goals for each. For example, the commercial rules can be a separate document with a number of its own goals, such as improving the ARM Fund. While we support the forestry industry, we don’t need to wade through the timber rules to determine what needs to be done for permitting a residential subdivision.

Again, AGC appreciates the opportunity to present our comments and suggestions during this process. The association is committed to working with the DES to identify and develop specific goals/guidance for improving the draft rules and is confident that other relevant stakeholders are willing to provide similar contributions. We believe that although these rules currently lack clarity and consistency and will likely lead to confusion, a concerted effort by DES to revise the rules based on specific input from stakeholder organizations can result in a simpler, streamlined, and practical set of rules that are fair and workable. At this time, the association cannot support the proposed rules.

Sincerely,

Gary Abbott,
Executive Vice President

CC: Commissioner Robert Scott