March 31, 2020

Ridge Mauck, P.E.
Administrator, Terrain Alteration Bureau
Dept. of Environmental Services
29 Hazen Drive
P.O. Box 95
Concord, NH 03302-0095

Dear Mr. Mauck,

Thank you for this opportunity to provide comments on the Department's draft final proposed rule Env-Wq 1503.19(h) regarding criteria for issuance of Alteration of Terrain permits. We appreciate the Department's attempt to redraft the proposed rule, taking into consideration comments submitted to the Department on January 31, 2020.

Overview

The draft final proposed rule is an improvement over the Department's initial proposed rule. However, we believe that the draft final proposed rule is fatally flawed as it only provides a pathway to "yes"; without some path to "no," even the worst projects with egregious and unnecessary impacts will be permitted. We are concerned that too many ambiguities remain around the Department's decision-making process on Alteration of Terrain (AOT) permits that adversely impact Threatened and Endangered Species (T&E) and their habitat.

The Department's existing rule does not allow for AOT permits to be issued when there will be an impact to T&E, and establishes clear guidelines on what is, and is not, permittable. Our organizations feel strongly that any permanent rule that replaces the existing rule must provide the public with the same level of clarity as the existing rule, and should not result in a weakening of protections for T&E. The draft final proposed rule falls short under both tests.

The Supreme Court ruled against the Department not because the existing rule was flawed; rather, the Court ruled that the Department's permitting decisions were not in keeping with the plain language of the existing rule. Rather than regulate to its own existing standard, the Department was, in fact, permitting projects that had negative impacts to T&E. If the Department now wants to rewrite its rules to change the existing standard, it is important that a new rule be clear, fair, and transparent in its application, and continue to provide the maximum protection possible for the state's T&E.

Our organizations oppose the draft final proposed rule, and again urge the Department to organize a series of stakeholder meetings now (utilizing web-based technology), and not wait until 2021 as is being proposed. The purpose of the stakeholder meetings is to find an approach that meets the needs of the public and the regulated community, will lead to consistent permitting decisions, and adequately protects New Hampshire's T&E. We do not support the Department rushing ahead with a flawed permanent rule now, only to then gather stakeholders to redraft the newly enacted rule a year from now.

Draft Final Proposed Rule only provides guidance for projects to get to a "yes" decision

The draft final proposed rule identifies only one path for a permit application – the path to "yes," in the form of the issuance of an Alteration of Terrain permit by the Department of Environmental Services.

The draft final proposed rule provides that the DES and the Department of Fish and Game (F&G) coordinate on a mitigation plan. However, no guidance is offered as to what level of impacts to T&E is unacceptable, and how mitigation, versus a permit denial, for those impacts would be reached.

Under the draft final proposed rule, there is no definition of unacceptable impacts, therefore, the only remedy seems to be a mitigation plan for a project to compensate for those impacts to T&E, rather than a clear limit to impacts, above which a permit cannot be issued. Evidently, as long as these impacts are documented and mitigation agreed to by the F&G executive director, the project will be permitted. There is no language in the rules that requires studies, scientific evidence, or other guidance that would reassure the public that permitting decisions are being made based on science, and in the best interest of protecting the resource.

The standard of "greatest extent practicable" is vague and not found in either statute or rule.

The draft final proposed rule states that a project needs to be designed "to avoid and minimize, to the greatest extent practicable, adverse impacts to state or federally listed threatened or endangered species." The term "greatest extent practicable" does not appear to be a common standard for decision making in wildlife conservation or wildlife management. Not having a definition of the only standard underpinning the permitting rule will inevitably lead to inconsistency in decision making and permitting– the flaw at the heart of the recent Supreme Court ruling. Because the term's vagueness and subjectivity make a precise definition impossible, we believe the term should not be used at all.

The definition and meaning of "greatest extent practicable" will be especially important as decisions of the Department are appealed. The Department must ensure that permitting decisions are consistent. Given the inherent vagueness of this term, the Department is in essence leaving it up to the Appeal Boards and the Courts to determine what is meant by "greatest extent practicable." We believe that it would be more prudent for the Department to rely on a clearly defined standard, based on conservation science.

The US Fish and Wildlife Service (USFWS) has a scientifically based standard – "maximum extent practicable"- that it applies when considering Habitat Conservation Plans (HCPs). HCPs are planning documents required as part of an application for an incidental take permit affecting endangered species. HCPs describe the anticipated effects of the proposed taking; how those impacts will be minimized, or mitigated; and how the HCP is to be funded.

In Chapter 9 of the HCP Handbook[1], the USFWS provides a detailed definition of the "maximum extent practicable" standard and how the agency determines if a mitigation proposal fits the definition.

The Department needs to find and enumerate an acceptable and established standard such as the one used by USFWS that can be followed so that it is clearly understood by all stakeholders how project decisions are arrived at.

The Department is delegating its regulatory authority to two non-regulatory agencies

We are concerned that the regulatory agency, in this case the Department of Environmental Services, is giving two non-regulatory agencies – New Hampshire Heritage Bureau (NHB) and F&G – the task of determining what potential project impacts may be, and what project mitigation would be sufficient to count as the "greatest extent practicable" for permitting decisions.

The draft final proposed rule requires the New Hampshire Heritage Bureau to provide a letter stating that:

> ***a. No threatened or endangered species were documented in the vicinity of the project; or***
>
> ***b. There was an NHB record of a threatened or endangered species in the vicinity, but no impacts to the species are expected to occur as a result of the proposed project; or***

The New Hampshire Heritage Bureau does not necessarily collect or hold data on some or all private lands. While the state does have data on the presence of T&E where surveys have been conducted, large areas of the state, particularly private lands, have not been surveyed at all, or in the recent past. As such the lack of documentation of a threatened or endangered species in the data held by the Natural Heritage Bureau does not mean that species are absent. While we believe that the inclusion of the Heritage Bureau is well intentioned, without clear guidance and definitive requirements, we are not confident that the existing data will be adequate to identify private lands where T&E and habitat are located.

To overcome this reality, NHNHB should have the option to request a survey, at the applicant's expense, when on-site conditions may indicate species are present. Without such a requirement, the Department will be relying on incomplete data when making permitting decisions. The burden of proving there are no T&E on a property should fall on the applicant, not on a non-regulatory state agency.

Another problem is that the draft final proposed rule references RSA 212-A (Endangered Species Conservation Act), but fails to consider RSA 217-A, which includes the state's native plant protection statute, and identification of rare and exemplary natural communities. The recently redrafted NH Wetland rules include reference to RSA 217-A so that impacts to rare and exemplary communities are regulated through the wetland permitting process. To be consistent, the Department should reference both RSA 212-A and RSA 217-A in this rule to ensure the protection of both T&E and their habitat.

The draft final proposed rule further requires:

> ***(2) After coordination with the NHF&G on potential impacts of the project on identified threatened and endangered wildlife species, documentation of final project design relative to the avoidance and minimization of adverse impacts to threatened or endangered wildlife species approved by NHF&G, which may include conservation measures within or beyond the project area, or both, to the benefit of the affected species;***

[1] https://www.fws.gov/endangered/esa-library/pdf/HCP_Handbook-Ch9.pdf

It is unclear what criteria NH Fish and Game will apply in deciding on appropriate mitigation measures for a project's impacts. NH F&G does not have any statutory guidance or rulemaking to follow, so it is unclear how the department would determine what is an appropriate, or practicable, mitigation plan for affected T&E.

We feel strongly that if the Department delegates project mitigation decisions to the executive director of F&G , the Department must ensure that F&G is using consistent, transparent, and scientifically defensible criteria in determining project-specific mitigation. The rule needs to reflect this approach.

For example, in their HCP handbook, the USFWS provides that:

> *"minimalization impacts shall also be mitigated. To meet this issuance criterion, the applicant must:*
>
> > *1. estimate the type and amount of take expected from covered activities, and the impacts of such taking on the species and/or its habitat;*
> >
> > *2. determine from a biological perspective how conservation measures in the HCP will minimize the impacts of the taking on the species' status and/or its habitat; and*
> >
> > *3. determine from a biological perspective how conservation measures in the HCP will mitigate the remaining impact of the taking on the species' status and/or its habitat*
>
> *The combination of minimization and mitigation in the HCP leaves no remaining impacts of the taking on the species that could be further mitigated or minimized, that is all impacts will be fully offset. OR If the applicant cannot fully offset the impacts of the taking, they must demonstrate that it is not practicable to carry out any additional minimization or mitigation.*
>
> *Ultimately, the Service must provide a clear rationale (supported in the record) for concluding that the minimization and mitigation measures are adequate, and if the impacts of the taking are not fully offset, to determine whether additional minimization and mitigation is practicable the impacts that are likely to result from the taking, the measures the permit applicant will undertake to minimize and mitigate such impacts, and the funding that will be available to implement such measures."*

If the AOT rule is changed, we feel strongly that the Department, and F&G, need to establish clear guidance governing mitigation decisions and what standards will be applied. As developed, the draft final proposed rule does not adequately address this essential part of the permitting process.

Rush to Rewrite the Rules

Finally, we object to the Department's rush to rewrite these rules because of the recent Supreme Court ruling. The Department first put forward an emergency rule in December that was rejected by the Joint Legislative Committee on Administrative Rules. The Department moved forward anyway, citing economic harm to a small number of permit applicants. The Department's rationale was silent about the impacts to the resources it is obligated to protect.

This draft final proposed rule, while an improvement over the initial proposal, also feels rushed, and the apparent guiding philosophy flawed with many important details not defined. In our January letter, we called for the Department to organize stakeholders to reach consensus on an approach that will work. The Department has instead signaled that they would organize a stakeholder-driven process to potentially conclude in the spring of 2021, after completing the current drive to put in place a "permanent rule."

We believe that the Department, the state, and most importantly, the natural resources, including T&E, that are stewarded in the public trust by the State of New Hampshire, will be better served by suspending the current rulemaking and immediately convening a stakeholder process that will enable the Department to bring forward a comprehensive rule that is clear, consistent, and provides meaningful protections for the state's T&E. We again offer our assistance to DES as you work to meet this goal.

Sincerely,

Susan Arnold
Vice President for Conservation
Appalachian Mountain Club

Doug Bechtel
President
NH Audubon

Matt Leahy
Public Policy Manager
Society for the Protection of NH Forests

Jim O'Brien
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Tom O'Brien
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Barbara Richter
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