January 31, 2020

Ridge Mauck, Administrator, Terrain Alteration Bureau
New Hampshire Department of Environmental Services
29 Hazen Drive
Concord, NH 03301

Dear Mr. Mauck,

Thank you for this opportunity to provide comments on the Department's proposed Water Quality/Quantity Rule Env-Wq 1503.19(h) - Amendments to Criteria for Issuance of AOT Permits. Our organizations have serious concerns with the proposed language.

The changes proposed by the Department have the potential to drastically reduce protections for state and federally listed threatened and endangered species. We urge the Department to form a working group of stakeholders to formulate changes to the existing rules that are more consistent with statute, provide clear guidance on Department decision-making to all parties in the permitting process, and continue to protect the resources most at risk.

Background

In New Hampshire, there are 51 species[1] identified as state or federally threatened or endangered wildlife. According to the New Hampshire Department of Fish and Game[2], endangered wildlife are those native species whose prospects for survival in New Hampshire are in danger because of a loss or change in habitat, over-exploitation, predation, competition, disease, disturbance or contamination. Assistance is needed for these species to ensure their continued existence as a viable component of the state's wildlife community. Threatened wildlife are those species which may become endangered if conditions surrounding them begin, or continue, to decline. In most cases, the primary reason that species have reached this point is because of continued habitat loss and/or degradation.

The State of New Hampshire is required to protect state and federally listed threatened and endangered (T&E) species and their habitats. NH RSA 212-A establishes the Endangered and Threatened Species Conservation Act under the Department of Fish and Game. In RSA 212-A:3, the Legislature articulated two specific findings:

> *I. Species of wildlife normally occurring within this state which may be found to be in jeopardy should be accorded such protection as is necessary to maintain and enhance their numbers.*
>
> *II. The state should assist in the protection of species of wildlife which are determined to be threatened or endangered elsewhere pursuant to the endangered species act*

[1] https://www.wildlife.state.nh.us/nongame/documents/endangered-threatened-wildlife-nh.pdf
[2] https://www.wildlife.state.nh.us/nongame/endangered-list.html

by prohibiting the taking, possession, transportation or sale of endangered species and by carefully regulating such activities with regard to threatened species.

To assist the Fish and Game Department in fulfilling its responsibilities under the statute, RSA 212-A:9, III, requires that all state agencies and departments:

"shall assist and cooperate with the executive director in the furtherance of the purposes of this chapter for the conservation of endangered or threatened species. They shall take such action as is reasonable and prudent to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such species or result in the destruction or modification of habitat of such species which is determined by the executive director to be critical."

The Department of Environmental Services, through its permitting authority, must implement the protections articulated in the Endangered and Threatened Species Conservation Act. In their rules for Alteration of Terrain (AOT) applications, the Department of Environmental Services has provided clear standards for how they apply RSA 212-A:9 in their permitting process. Env-Wq 1503.19(h) reads:

(h) The project has been designed in a manner that will not result in adverse impacts to state- or federally listed threatened or endangered species or habitat for such species that has been determined by the executive director of the New Hampshire fish and game department to be critical pursuant to RSA 212-A:9;"

A New Hampshire Supreme Court ruling in November 2019 found that the Department has not been conducting its AOT permitting process in compliance with the plain meaning of Env-Wq 1503.19(h). The court found that the Department's permitting process allowed for projects to be permitted that had adverse impacts on T&E species. In response to the Supreme Court ruling, on December 20th the Department filed an Emergency Rule with the Joint Legislative Committee on Administrative Rules (JLCAR) changing its permitting standard from the existing "will not result in adverse impacts" to a new standard "will not jeopardize the continued existence of" T&E species.

On January 17th, JLCAR requested that the Department repeal the emergency rule, stating that the circumstances did not rise to the level for a rule under emergency rulemaking to prevent "substantial fiscal harm to the state or its citizens."

Following the filing for an emergency rule, on December 27, 2019 the Department announced its initial proposal for rulemaking, the language of which is identical to the language of their proposed emergency rule:

"Env-Wq 1503.19 Criteria for Issuance of AOT Permits. The department shall not issue an AOT permit unless the applicant demonstrates that all of the following criteria are met:

(h) As required by RSA 212-A:9, III, the project has been designed in a manner that will not jeopardize the continued existence of state- or federally-listed threatened or endangered species or result in the destruction or modification of habitat of such species that is determined by the executive director of the New Hampshire fish and game department to be critical pursuant to RSA 212-A:9;"

Discussion

For our organizations, the two primary issues at hand are 1) whether the Department's proposed rule provides the necessary protections for T&E species as articulated in RSA 212-A, and 2) whether the proposed rule provides clear guidance to applicants, the public, and state agencies for how DES will implement its statutory obligations.

In each instance, we find the proposed rule lacking in both substance and clarity.

The existing rule governing AOT permits and a project's impacts to T&E species both provides adequate protection of T&E species and provides project applicants and the public with clear direction for how permitting decisions will be made by the Department. There is no ambiguity in the rule – if a project will have an adverse impact to T&E species, the application is denied. This rule meets the standard set forth in RSA 212-A, providing "such protection as is necessary to maintain and enhance" T&E species numbers. We understand and support the existing rule as it provides the greatest protection for these important natural resources most at risk.

The Department's proposed language abruptly and dramatically shifts how the Department regulates the impacts of projects on T&E species. Applying the standard that projects "will not jeopardize the continued existence of" is such a low bar for individual project impacts to meet that it renders the rule, and the Department's protections for T&E species under RSA 212-A, essentially meaningless.

It is unlikely that any one project would jeopardize the continued existence of a species – making this rule basically irrelevant in permitting decisions. This new standard would mean that the Department is making decisions at the species range scale, no longer at the proposed project site scale. If permitting staff can make a reasonable case that an affected threatened or endangered species will continue to exist somewhere, the project can be permitted even if it would lead to the elimination of the affected population of the threatened or endangered species or effect its existing distribution.

In our judgement, the proposed rule does not adhere to the standard established in RSA 212-A, that T&E species be accorded such protection as is necessary to maintain and enhance their numbers. In fact, the proposed rule does just the opposite by allowing site-specific impacts of T&E species to be permittable. In addition, the rule provides no guidance to permitting staff or the public on how impacts to T&E species will be evaluated.

With the proposed rule the Department would no longer be regulating to a standard of maintaining and advancing the numbers of T&E species. Rather, the Department would be regulating to an undefined, much lower standard that does not consider the welfare of individual species and the population impacted by a proposed project. The proposed rule shifts the Department's focus from "protection" of local T&E populations, to "not jeopardizing" the existence of a species in an undefined context without identified geographic limitations, scientific analysis or other means of determining how permitting staff would make a determination on the continued existence of a T&E species. This rule as proposed would leave these resources at significantly greater risk.

The proposed rule language does not give project developers, municipalities, conservation organizations, New Hampshire residents, or Department permitting staff the necessary guidance or any clear direction when making permitting decisions. In fact, the rule is so general in nature that it provides the Department with little to no direction on how to make project level determinations.

It is clear that the Department, and this rulemaking process, would benefit from the creation of a workgroup of stakeholders tasked with exploring the issue, determining whether or not there is a valid reason to amend the existing rule, and if so, how to accomplish this in a manner that still adheres to the findings and language of RSA 212-A. We understand that the Department was potentially caught off guard by the recent Supreme Court ruling, but do not feel the proposed removal of protections for T&E species is justified. The Department should take a step back and engage a broad set of stakeholders on this issue before proposing a significant change in standards that may lead to a weakening of protections for species at greatest risk.

Finally, in reviewing the rules and statutory language on this issue, we find that it is not clear how the Fish and Game Director makes a determination of "critical habitat" under either the existing or the proposed rules. While we understand that this issue may be outside the purview of DES' rulemaking, it would seem important to the

Department's regulatory approach to understand the criteria that the Director of Fish and Game would use to make such a determination.

Currently, there are no rules or information available that establishes a procedure, guidelines, criteria, or other methods for the Director of Fish and Game to reach such a conclusion. Without such criteria, applicants, the public and the Department are left with no guidelines for how determinations are made. Without such information, decisions by the Director could be made on an ad hoc and arbitrary manner, further reducing the protections afforded to T&E species. We suggest that the Department of Fish and Game consider adopting rules on how it interprets "critical habitat" for threatened and endangered species.

Thank you for this opportunity to provide these comments on the Department's draft rules. We look forward to providing additional information as the rulemaking process continues.

Sincerely,

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