

**STATE OF NEW HAMPSHIRE
OFFICE OF LEGISLATIVE BUDGET ASSISTANT, AUDIT DIVISION**

**PROPOSED PERFORMANCE AUDIT SCOPE
DEPARTMENT OF ENVIRONMENTAL SERVICES
LAND RESOURCES MANAGEMENT PERMITTING**

In November 2017, the Legislative Performance Audit and Oversight Committee approved an audit of the Division of Water (Division) within the Department of Environmental Services (DES) focused on concerns with: 1) permitting delays and 2) arbitrary interpretations of permitting-related rules. In January 2018, we discussed the impetus behind the topic with its originator and clarified concerns to focus the audit's scope. We held an entrance conference with the DES Commissioner and Division Director in February 2018 and again met with DES management in March 2018 to discuss the audit's scope.

BACKGROUND

In 1986, the Legislature established the DES. Its responsibilities included controlling water pollution and protecting water supplies. The Division was responsible for the former functions and duties of the water supply and pollution control commission and related requirements that dated back to at least the 1940s, operating programs and undertaking activities designed to protect State waters. Three bureaus responsible for permitting of activities potentially affecting State waters were managed by the Assistant Director and collectively called Land Resources Management (LRM) programs. LRM programs included the:

1. Wetlands Bureau (Wetlands), operating permit programs regulating dredging, filling, or placing structures on, or within, the banks of surface waters and wetlands, or impacting shorelands within 250 feet of State surface waters;
2. Alteration of Terrain Bureau (AoT), operating a permit program to control soil erosion and manage stormwater runoff for projects altering more than 50,000 square feet of terrain on a protected shoreland, or altering 100,000 square feet of terrain elsewhere; and
3. Subsurface Systems Bureau (Subsurface), operating permit programs for on-site wastewater disposal systems and subdivisions over five acres.

The Division was advised by the Wetlands and Water Councils on policy, programs, goals, and operations, with emphasis on long-range planning. The councils also heard and decided on appeals from agency decisions related to each council's jurisdiction, and reviewed proposed rules.

Through the end of February 2018, the DES partially fulfilled our initial information request, which, when combined with the substantial amounts of generally-available DES materials, informed our preliminary assessment. Indicators suggested the Division recognized opportunities to improve permitting process efficiency and reduce overlap and the burden placed on permit applicants. Reportedly, LRM programs were undergoing a major reorganization through at least calendar year (CY) 2017 to consolidate and integrate the three bureaus into a single LRM bureau. Three new sections were to "streamline LRM permit processes, enhance customer service, achieve greater consistency and provide better environmental outcomes." An intended

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result of reorganization was to develop one application form to cover five different impact types handled independently by the three bureaus and reduce permit turnaround times.

Regulatory Framework

Environmental regulations were increasingly complex and changed regularly. Numerous State and federal laws and rules regulated water resources. Federal regulations and program revisions increased in scope and required ongoing adaptation for implementation by the DES. New Hampshire's water rights system was based on common law, statutory laws, and administrative rules and limited private property rights by exerting public control over water resources and marginal lands in the public interest. State laws, rules, and regulatory strategies also evolved and expanded. As the lead regulatory agency, the Division was responsible for enforcing or had obligations under more than 30 separate State statutes and elements of at least five federal environmental acts.

State law delegated to the DES significant rulemaking authority and latitude in creating criteria affecting permit approvals. At least 17 chapters of rules affected relevant permits. Water-related rules were the subject of a multi-year DES effort to address previous piecemeal changes, with AoT rules readopted in CY 2017 and Subsurface and shoreland rules in CY 2016. Formal rulemaking for new wetlands rules was to start in the spring of 2018, and rules were expected to be finalized by the end of CY 2018. Rule changes were intended to reduce complexity, improve transparency and predictability, increase consistency and standardization, clearly define key terms, and ensure scientifically-based decisions. In addition to rules, nearly 60 guidance, best management practice, and other documents related to water were published by the DES, were subject to ongoing revision and expansion, and formed additional criteria affecting permitting processes.

Permitting

Aside from the outright prohibition of development projects due to size, scope, or other factors, permitting was the primary means the State used to control development to protect water resources. More than 75 DES permits and other forms of permission were directly or indirectly related to water. The DES public information and permitting unit was responsible for initial public contact related to permits and applications, assisting with filling out permit applications, and providing the information necessary for meeting permit requirements. The DES recognized individual LRM permit applications were then processed through one or more independent legacy systems relying on separate forms, separate plans, and separate processes by separate personnel and could result in "conflicting directives" received on application project plans and reviews. A decade-long quality improvement effort was focused on permitting process complexity, the potential for confusion, and unclear or ill-defined terms and regulatory standards.

The permitting process encompassed pre-application meetings, application review and acceptance processes, inspections, amendments, agency decision-making, appeals of agency decisions, and final decisions. LRM permitting was controlled by timelines for approval by

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several chapters of statute and rules. CY 2017 timeliness data indicated between 82 and 86 percent of the statutorily-allowed processing time for three major permit types was consumed by agency reviews, and processing time increased during that year. Available data for two of these major permit types indicated a decades-long downward trend in applications received through CY 2016. An average of nearly 180 AoT, nearly 1,440 Wetlands, and over 5,600 Subsurface permit applications were reportedly received each year during State fiscal years 2016 and 2017. Table 1 summarizes a CY 2016 analysis of Wetlands staff time expenditures.

Table 1. Wetlands Staff Time Expenditures.

Task	Percent
Permitting	33
Program development	23
Public assistance	15
Enforcement	12
Administration	10
Inspections	7

Source: Unaudited DES data.

Management reported additional context would help present a clearer picture of agency performance.

Strategy, Goals, And Outcomes

Department-wide and bureau-specific mission statements generally focused on achieving environmental outcomes, as seen in the DES-established mission to “help sustain a high quality of life for all citizens by protecting and restoring the environment and public health in New Hampshire.” The DES set seven strategic goals and numerous sub-goals, and framed 93 strategic actions in its *2010-2015 Strategic Plan*. Some goals and initiatives intended to operationalize the mission focused on economic development, customer service, efficiency, and effectiveness. Several initiatives were intended to address acknowledged complexity and inconsistencies with LRM, and particularly wetlands, permitting but with minimal or delayed progress. Further, quantifiable outcomes were inconsistently established, and some efforts did not achieve their intent. For example, a CY 2008 Customer Service in Environmental Permitting Initiative, requested by the then-serving Governor and DES Commissioner, was intended to improve customer service through interagency cooperation but was described by the DES as structurally “deteriorated” by September 2016.

Despite a stated commitment to use high-quality data to drive scientifically and technically sound, cost-effective, and environmentally appropriate solutions, measurement of relevant outputs, outcomes, and impacts did not always clearly occur. A decade and a half-long effort to develop well-defined outcomes and indicators was ongoing through CY 2017, with slow progress reported. The DES maintained an environmental dashboard and report card, but outcome measures did not clearly address administrative efficiency, timeliness of permitting processes, the consistency of rules interpretations, the effect on development, or customer service generally. A recently-developed LRM programs Balanced Score Card (BSC) was

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intended to enable strategic planning and operational management and contained metrics related to customer satisfaction, mission performance, and process operations. While the latest BSC, dated December 2016, contained baseline performance data, actual performance data for CY 2017 were not published through February 2018. Further, BSC output metrics did not clearly address relevant dashboard outcomes and impacts.

Prior Audits

The DES was the subject of four recent LBA audits, the most relevant being a performance audit issued in CY 2007 (2007 audit) and focused on AoT permits and three types of wetlands permits administered by LRM programs. The 2007 audit assessed: 1) compliance with certain State laws and rules; 2) permit handling, especially effectiveness in meeting statutory time limits; and 3) fairness and equity in permit processing. The 2007 audit identified multiple control weaknesses, making numerous recommendations. With the reemergence of concerns with LRM permitting processes, the DES appears to not have fully remediated at least some of the conditions leading to audit findings contained in the 2007 audit. Further, ongoing DES efforts to simplify, clarify, expedite, and otherwise improve LRM permitting processes juxtaposed against ongoing concerns with those processes and the apparent lack of effect agency improvement efforts had on those concerns, indicates a more fundamental problem may exist.

AUDIT SCOPE

We will design the audit to answer the following question:

How effectively did the DES manage LRM permitting during State fiscal years 2016 and 2017?

To address this question, we plan to:

- review relevant State and federal laws, rules, orders, rulings, policies, procedures, plans, studies, audits, guidelines, and similar materials;
- review relevant studies, plans, audits, guidelines, and related materials from academia, interest groups, other states, and similar entities;
- interview individuals with relevant responsibilities and external stakeholders; and
- obtain, review, and analyze relevant State records and data.

We expect to report to the Fiscal Committee of the General Court on this audit in the fall of 2018.