

## COVER SHEET FOR FINAL PROPOSAL

Notice Number 2022-19 Rule Number Env-Wq 1402.08, Env-Wq 1405.02, Env-Wq 1405.03, Env-Wq 1406.04, Env-Wq 1406.15, Env-Wq 1406.20, & Env-Wq 1406.21

1. Agency Name & Address:

**Department of Environmental Services  
29 Hazen Drive  
P.O. Box 95  
Concord, NH 03302-0095**

2. RSA Authority: RSA 483-B:17, I, IV, IX, X

3. Federal Authority: N/A

4. Type of Action:

- ☐ Adoption  
☐ Repeal  
☐ Readoption  
☒ Readoption w/amendment

5. Short Title: **Amendments Related to Cross-Program Consistency and Accessory Structures under RSA 483-B**

6. Contact person for copies and questions:

Name: **Darlene Forst**

Title: **Administrator**

Address: **Department of Environmental  
Services  
29 Hazen Drive  
P.O. Box 95  
Concord, NH 03302-0095**

Phone #: **(603) 271-4067**

7. Yes ☐ No ☒ Agency requests review by Committee legal staff in the Office of Legislative Services and delayed Committee review pursuant to RSA 541-A:12, I-a

8. The rulemaking notice appeared in the Rulemaking Register on **February 17, 2022**.

**SEE THE INSTRUCTIONS--PLEASE SUBMIT 2 COPIES OF THIS COVER SHEET  
AND 2 COPIES OF THE FOLLOWING:  
(and numbered correspondingly)**

9. The "Final Proposal-Fixed Text", including the cross-reference table required by RSA 541-A:3-a, II as an appendix.

10. Yes ☐ N/A ☒ Incorporation by Reference Statement(s) because this rule incorporates a document or Internet content by reference for which an Incorporation by Reference Statement is required pursuant to RSA 541-A:12, III.

11. Yes ☒ N/A ☐ The "Final Proposal-Annotated Text" indicating how the proposed rule was changed because the text of the rule changed from the Initial Proposal pursuant to RSA 541-A:12, II(e).

12. Yes ☐ N/A ☒ The amended fiscal impact statement because the change to the text of the Initial Proposal affects the original fiscal impact statement (FIS) pursuant to RSA 541-A:5, VI.

Notice Number

**2022-19**

Rule Number

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1. Agency Name & Address:  <b>Department of Environmental Services 29 Hazen Drive P.O. Box 95 Concord, NH 03302-0095</b>	2. RSA Authority: <b>RSA 483-B:17, I, IV, IX, X</b> 3. Federal Authority: <b>N/A</b> 4. Type of Action: Adoption _____ Repeal _____ Readoption _____ Readoption w/amendment <b>X</b>
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5. Short Title: **Amendments Related to Cross-Program Consistency and Accessory Structures under RSA 483-B**

6. (a) Summary of what the rule says and of any proposed amendments:

**Env-Wq 1400 implements RSA 483-B, the Shoreland Water Quality Protection Act. The Department is proposing amendments to:**

- **Revise the definition of fertilizer;**
- **Clarify that approval from the Department for accessory structures shall not override applicable local requirements that are more stringent;**
- **Revise the limitations on accessory structures to reflect a Supreme Court ruling (N.H. Wetlands Council, No. 2018—0650, May 22, 2020); and**
- **Clarify the activities in the protected shoreland that do not require a permit; and clarify the requirements in the event an applicant has a permit by default.**

6. (b) Brief description of the groups affected:

**Those affected by the proposed rules are owners of property subject to RSA 483-B.**

6. (c) Specific section or sections of state statute or federal statute or regulation which the rule is intended to implement:

<b>Rule Section(s)</b>	<b>State Statute(s) Implemented</b>
Env-Wq 1402.08	RSA 483-B:17, IX
Env-Wq 1405.02, Env-Wq 1405.03	RSA 483-B:17, IV
Env-Wq 1406.04, 1406.15, 1406.20, 1406.21	RSA 483-B:5-b; RSA 483-B:17, I and X

7. Contact person for copies and questions including requests to accommodate persons with disabilities:

Name:	<b>Darlene Forst</b>	Title:	<b>Administrator</b>
Address:	<b>Department of Environmental Services 29 Hazen Drive P.O. Box 95 Concord, NH 03302-0095</b>	Phone #:	<b>(603) 271-4054</b>
		Fax#:	<b>(603) 271-6588</b>
		E-mail:	<a href="mailto:darlene.c.forst@des.nh.gov">darlene.c.forst@des.nh.gov</a>
		TTY/TDD Access:	Relay NH 1-800-735-2964 or dial 711 (in NH)

The proposed rules also can be viewed in PDF in the Public Comment Opportunities section of the NHDES website at <https://www.des.nh.gov/public-comment-opportunities?category=Rulemaking>

8. Deadline for submission of materials in writing or, if practicable for the agency, in the electronic format specified: **4:00 p.m. on March 18, 2022**

☒ Fax ☒ E-mail ☐ Other format (specify):

9. Public hearing scheduled for:

Date and Time: **March 11, 2022 Time 1:00 P.M.**

**Room 208C, DES Offices, 29 Hazen Drive, Concord NH**

**NOTE: NHDES security procedures require all visitors to sign in and present photo identification (such as a driver's license). If you plan to attend the public hearing in person, please bring photo identification with you.**

**You also may attend the hearing via Webex, which can be accessed through the following link:**

<https://nhgov.webex.com/nhgov/j.php?MTID=mbd3ca23c1ff11d3a243a1b21e48fcc2a>

Place: **Meeting number (access code): 2310 826 4029**

**Meeting password: RULEMAKING140206 (78536255 from phones)**

**You also may join the meeting by phone:**

**Call in Number: +1-415-655-0001 US Toll**

**Access Code: 2310 826 4029**

**Contact Sarah Richos at (603)271-2915 you have any questions or technical issues connecting to the hearing.**

10. Fiscal Impact Statement (Prepared by Legislative Budget Assistant):

FIS # **22:004** , dated **01/19/2022** :

**1. Comparison of the costs of the proposed rule(s) to the existing rule(s)**

There is no difference in cost when comparing the proposed rules to the existing rules.

**2. Cite the Federal mandate. Identify the impact on state funds:**

No federal mandate, no impact on state funds.

**3. Cost and benefits of the proposed rule(s):**

There is no cost or benefit attributable to the proposed rules. Any cost or benefit associated with these rules is due to RSA 482-A and not the rules.

**A. To State general or State special funds:**

None.

**B. To State citizens and political subdivisions:**

None.

**C. To independently owned businesses:**

None.

11. Statement Relative to Part I, Article 28-a of the N.H. Constitution

**The rules do not mandate or assign any new, expanded, or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision, and so do not violate Part I, Article 28-a of the N.H. Constitution.**

**CONSENT****Readopt with amendment Env-Wq 1402.08, eff. 12-17-16 (Document #12062), to read as follows:**

Env-Wq 1402.08 “Fertilizer” as used in RSA 483-B:9, means any substance, other than limestone, that contains any recognized plant nutrient which is designed or intended for use in promoting plant growth or health or claimed to have value in promoting plant growth or health, or which is used with the intent of prompting plant growth or health.

**Readopt with amendment Env-Wq 1405.02, eff. 12-15-19 (Document #12810), to read as follows:**

Env-Wq 1405.02 Construction of Accessory Structures. Approval from the department to construct an accessory structure shall not override any applicable more stringent local requirements relating to zoning or building standards.

**Readopt with amendment Env-Wq 1405.03, eff. 12-15-19 (Document #12810), to read as follows:**

Env-Wq 1405.03 Limitations on Accessory Structures within the Waterfront Buffer.

(a) The limitations in this section shall apply only to accessory structures located between the reference line and the primary building line.

(b) Subject to (c) below, the total area of accessory structures shall be no greater than 7.5 square feet per linear foot of shoreline.

(c) The construction of the accessory structure shall not cause or otherwise result in any violations of the point score requirement of RSA 483-B:9, V(a)(2)

(d) Accessory structures shall be located so as to avoid the need to remove ground cover to the maximum extent practicable.

(e) Water access structures shall account for not more than 50% of the total area of accessory structure allowed for a given frontage.

(f) No accessory structure shall be modified or constructed so as to be serviced by piped water.

(g) All new paths, walkways, and patios shall be constructed using pervious surface.

**Readopt with amendment Env-Wq 1406.04, eff. 12-17-16 (Document #12062), to read as follows:**

Env-Wq 1406.04 Activities in Protected Shoreland That Do Not Require a Shoreland Permit.

(a) A person shall not be required to obtain a permit under RSA 483-B:5-b, I(a) prior to undertaking any activity listed in (c) or (d), below, in the protected shoreland, provided that the activity is conducted in accordance with the conditions noted.

(b) In any enforcement action against a property owner or contractor for actions arguably covered by (a), above, the burden of proving that the exemption applies shall be on the property owner or contractor, as applicable.

(c) Activities exempt pursuant to (a), above, because the activity does not constitute construction, excavation, or filling shall be as follows:

(1) Trimming, pruning, and thinning of branches to the extent necessary to protect structures, maintain clearances, and provide views, as allowed by RSA 483-B:9, V(a)(2)(D)(vi);

(2) Removal of trees, limbs, saplings, or shrubs in accordance with Env-Wq 1403.04 or

- removal of trees or saplings in accordance with Env-Wq 1403.05;
- (3) Maintenance, repair, or modification of an existing, legal, primary structure that does not:
    - a. Alter the footprint or impervious area of the structure;
    - b. Require, or result in, the alteration of previously unaltered areas;
    - c. Result in an increase in loading to an onsite sewage disposal system; or
    - d. Require, or result in, any excavation or filling within the protected shoreland;
  - (4) Maintenance, repair, or modification of an existing, legal, accessory structure that does not:
    - a. Alter the footprint or impervious area of the structure;
    - b. Require, or result in, the alteration of previously unaltered areas;
    - c. Result in an increase in loading to an onsite sewage disposal system;
    - d. Require, or result in any excavation or filling within the protected shoreland; or
    - e. Exceed the criteria of Part Env-Wq 1405, if it is located within the waterfront buffer;
  - (5) Maintenance of a grandfathered or altered open area, such as by mowing a lawn, raking leaves or pine needles, or mulching landscaped areas;
  - (6) Hand-pulling or use of hand tools to remove invasive species or other noxious or harmful plants such as poison ivy, including root systems, provided that any area exceeding 10 square feet left without vegetation shall be subject to replanting with non-invasive, non-harmful species;
  - (7) Hand-removal or use of hand tools to remove rocks and stones beyond the 50-foot setback; and
  - (8) Placement or installation of readily removed items, such as picnic tables, lawn chairs and swing sets.
- (d) Activities exempt pursuant to (a), above, because the activity constitutes de minimis construction, excavation, or filling shall be as follows:
- (1) Use of hand-held tools, whether motorized or not, such as augers or tile spades, to install monitoring wells, piezometers, and flow meters, for:
    - a. Evaluating site conditions as necessary for the submittal of information required by a permit application under RSA 482-A relating to wetlands, RSA 485-A:29 relating to subdivisions or septic systems, or RSA 485-A:17 relating to alteration of terrain;
    - b. Educational or research purposes; or
    - c. Monitoring hydrology;
  - (2) Planting of non-invasive vegetation or maintenance of existing gardens within the allowable disturbed or altered area using hand-held tools;
  - (3) Placement of stepping stones, provided no root systems are removed to accommodate the placement;

- (4) Construction or installation of a fence using hand-held tools;
- (5) Digging test pits for the purposes of determining suitability for wastewater disposal under RSA 485-A:29 relating to subdivisions or septic systems, provided:
  - a. There is no disruption of groundcover within 50 feet of the reference line; and
  - b. No test pits are dug within 75 feet of the reference line unless required in order to evaluate eligibility for replacement under Env-Wq 1003.10;
- (6) Planting one or more trees within existing open areas more than 50 feet from the reference line using mechanized equipment;
- (7) Replacing utility poles and guy wires using mechanized equipment, provided that appropriate siltation and erosion controls are used and all temporary impacts are restored;
- (8) Repair or replacement of an existing individual sewage disposal system as defined in Env-Wq 1002.57 either in-kind or under a new approval, that meets all applicable requirements of RSA 483-B:9, V, provided there is no increase in sewage loading from the structure(s) served by the system;
- (9) Placement of a single structure more than 50 feet from the reference line, provided that:
  - a. The footprint of the structure is less than 150 square feet;
  - b. No excavation or filling using mechanized equipment will occur in conjunction with the construction or placement of the structure;
  - c. The structure will not be heated;
  - d. The structure will not have electricity or plumbing; and
  - e. The structure will not be used as living space for humans; and
- (10) Activities required to abate an imminent threat to public safety or public health or to stabilize property during or immediately following an emergency, provided the procedures specified in Env-Wq 1407 are followed.

**Readopt with amendment Env-Wq 1406.15, eff. 12-17-16 (Document #12062), to read as follows:**

Env-Wq 1406.15 Decisions on Shoreland Permit Applications.

- (a) Upon receipt of an application for a shoreland permit, the department shall proceed in accordance with RSA 483-B:5-b, V.
- (b) The department shall approve an application for a shoreland permit if all of the following are true:
  - (1) The application is complete as specified in Env-Wq 1406.06; and
  - (2) The project, during and after construction if constructed as proposed, will comply with all applicable criteria of these rules and RSA 483-B.
- (c) If the department determines that the project as proposed will not comply with all applicable criteria of these rules and RSA 483-B but that reasonable project-specific conditions could be imposed to bring the project into compliance, the department shall approve the application with such conditions as are

necessary to ensure compliance.

(d) If the department determines that the project as proposed will not comply with all applicable criteria of RSA 483-B and that reasonable project-specific conditions cannot be imposed that would bring the project into compliance, the department shall deny the application.

(e) The department shall notify the applicant in writing of its decision. If the application is denied, the notice shall specify the reason(s) for the denial.

(f) If a permit is issued, all work shall be done in accordance with the plans approved by the department, which shall be considered part of the issued permit.

(g) All permits issued shall be subject to the conditions specified in Env-Wq 1406.20.

(h) Written confirmation issued by the department that the applicant has a permit by default pursuant to RSA 483-B:5-b, V(e)(3), shall not relieve the applicant of any obligation to comply with all of the requirements applicable to the project, including but not limited to the requirements established in or under RSA 483-B and RSA 485-A relating to water quality.

**Readopt with amendment Env-Wq 1406.20, eff. 12-17-16 (Document #12062), to read as follows:**

Env-Wq 1406.20 Conditions Applicable to All Projects in the Protected Shoreland. The following conditions shall apply to all projects in the protected shoreland, in addition to any project-specific conditions included pursuant to Env-Wq 1406.15 and regardless of whether a permit is obtained:

(a) Erosion and siltation control measures shall:

- (1) Be installed prior to the start of work;
- (2) Be maintained throughout the project; and
- (3) Remain in place until all disturbed surfaces are stabilized;

(b) Erosion and siltation controls shall be appropriate to the size and nature of the project and to the physical characteristics of the site, including slope, soil type, vegetative cover, and proximity to wetlands or surface waters;

(c) No person undertaking any activity in the protected shoreland shall cause or contribute to, or allow the activity to cause or contribute to, any violations of the surface water quality standards established in Env-Wq 1700, and the requirements in Env-Wq 1404.01(a) and(b);

(d) Any fill used shall be clean sand, gravel, rock, or other suitable material; and

(e) For any project where mechanized equipment will be used, orange construction fence shall:

- (1) Be installed prior to the start of work at the limits of the temporary impact area as shown on the plans approved as part of a permit or accepted as part of the permit by notification;
- (2) Be maintained throughout the project; and
- (3) Remain in place until all mechanized equipment has been removed from the site;

**Readopt with amendment Env-Wq 1406.21, eff. 12-17-16 (Document #12062), to read as follows:**

Env-Wq 1406.21 Issuance, Acceptance, and Transferability.



(a) Subject to (b), below, the department shall issue a shoreland permit in the name of the owner(s) of the property on whose land the project is located.

(b) If the applicant is not the property owner or the agent for the property owner, but has a financial or other legal interest in the property that will arise after issuance of the permit but prior to commencement of the activity covered by the permit, the department shall issue the permit in the applicant's name directly if so requested in writing signed by the property owner and the applicant.

(c) All permits issued pursuant to RSA 483-B, shall not be valid unless signed prior to the start of construction by the permittee and the principal contractor that will be responsible for the project, if any.

(d) The department shall transfer a shoreland permit for a project that is not completed from one owner to a new owner upon request of the new owner in accordance with (e) through (f), below.

(e) Prior to requesting a transfer of the shoreland permit, the new owner(s) shall:

(1) Read, view, and possess the original or a legible copy of the shoreland permit, including all plans and conditions included pursuant to Env-Wq 1406.15; and

(2) Agree to abide by the terms and conditions of the shoreland permit.

(f) To request the transfer of a shoreland permit, the new owner(s) shall submit the following to the department in writing:

(1) The shoreland permit number;

(2) Identification of the owner(s) listed on the issued shoreland permit;

(3) Identification of the person(s) to whom the shoreland permit is being transferred;

(4) Recording information of the deed that transferred ownership of property, including the names of the grantor, grantee, town, county, and registry with book and page numbers;

(5) The location of the property, by tax map, lot number, street address, and municipality; and

(6) The following statement, agreed to and signed by the new owner(s):

"I/we, the undersigned, certify that I am/we are the present owner(s) of the property formerly of (name of former owner) and that I/we possess and have read the shoreland permit, including all plans and conditions included pursuant to Env-Wq 1406.15(c). I/we agree that I/we will abide by the previously-issued permit. I/we fully understand that the activities covered by the permit must be completed in strict accordance with the permit unless an amendment is applied for and granted. My/Our Title Reference is Book (number) Page (number), (County) Registry of Deeds, and briefly is for land at (street address) in (town), New Hampshire."

#### APPENDIX A: STATE STATUTES IMPLEMENTED

Rule Section(s)	State Statute(s) Implemented
Env-Wq 1402.08	RSA 483-B:17, IX
Env-Wq 1405.02 and 1405.03	RSA 483-B:17, IV
Env-Wq 1406.04, 1406.15, 1406.20, 1406.21	RSA 483-B:5-b; RSA 483-B:17, I and X