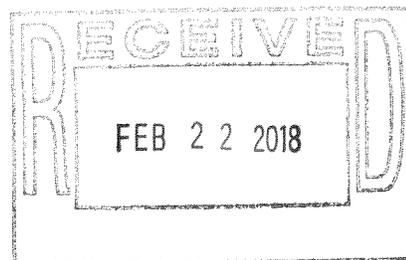


THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
WETLANDS COUNCIL

Bryan J. Corr
Linda M. Corr
96 Payson Road, Belmont, Massachusetts 02478



v.

State of New Hampshire
Department of Environmental Services
29 Hazen Drive, Concord, New Hampshire 03301

Docket No. 17-16 WtC – Bryan and Linda Corr Appeal

STATE’S MOTION TO DISMISS

The New Hampshire Department of Environmental Services (the “Department” or “DES”), by and through their counsel, the Office of the Attorney General (collectively the “State”), hereby moves the Council to dismiss this appeal for failure to state a claim upon which relief may be granted. The State respectfully requests that this motion be ruled on by the Hearing Officer pursuant to RSA 21-M:3, IX(e). In support of the motion to dismiss, the State asserts as follows:

I. Introduction

This appeal arises from Bryan and Linda Corr’s (the “appellants”) appeal of Administrative Order No. 17-028 WD (the “Order”), which was issued by DES on November 3, 2017. Appellants seek to overturn the Order by alleging: (1) that the DES Commissioner is without statutory authority to regulate the height of accessory structures within the waterfront buffer; (2) the reconstructed boathouse at issue in this appeal has now been built to such a large size that is no longer “small” and, therefore, is outside DES enforcement; (3) that the

Commissioner lacks authority to regulate prior non-conforming structures; and, (4) DES should have granted a “vested rights exemption” or waiver because of appellants’ incurred expenses and are willing to provide what they characterize as mitigation. In an appeal to the Wetlands Council, the appellant bears the burden of proving that the decision of the department that is being appealed was unlawful or unreasonable. Env-WtC 206.07(b).

II. Statement of Facts¹

1. Bryan and Linda Corr own property located on Lake Winnepesaukee at 46 Deerhaven Road, Moultonborough, New Hampshire (“Property”). Administrative Order No. 17-028 WD, ¶ 1. The two structures on the property were built in the 1950s, one a primary building and the other near the water and frequently referred to as a “dry boathouse.” *See* Appellant’s Petition to Appeal at ¶ 10-14.

2. Around March 2015, this accessory structure collapsed from snow loads. *Id.* at ¶ 14.

3. On December 22, 2015 appellants sent DES a Wetlands Permit by Notification (“PBN”) in which they sought to “replace an existing shoreland structure which was collapsed by snow load with a new structure in exact location and height.” AO at ¶ 7.

4. DES accepted this PBN as #2016-00009, conditioned upon work being completed in accordance with an 11/2/15 plan attached to appellants’ PBN. One of the project descriptions states “REPLACE PREVIOUSLY EXISTING NON-CONFORMING ACCESSORY STRUCTURE WHICH COLLAPSED FROM SNOW LOAD IN MARCH 2015 WITH NEW STRUCTURE IN EXACT LOCATION AND HEIGHT.” *Id.* (emphasis added).

¹ The Department accepts the facts pleaded in appellant’s Petition for Appeal as true for purposes of this motion to dismiss only and reserves the right to challenge them at a later date.

5. On April 21, 2016, the Town of Moultonborough ZBA granted the appellants the approvals for re-building the boathouse ten feet back from the reference line. Appellant's Petition to Appeal at ¶ 25.

6. A condition of the variance required that the Corrs obtain an "approved shore land permit by notification [by resubmitting] to NH DES [an amended application that is in line with the variance approval]." Town of Moultonborough ZBA Variance Notice of Decision, April 21, 2016 (Exhibit A).²

7. On May 16, 2016 the appellants submitted and DES subsequently accepted, a Shoreland PBN (#2016-01498), wherein the appellants sought to replace the December PBN by describing the project as:

A PREVIOUSLY EXISTING GRANDFATHERED STRUCTURE COLLAPSED FROM SNOW LOAD. A PREVIOUS WETLANDS APPROVAL WAS GRANTED (FILE #2016-00009) TO REPLACE THE STRUCTURE IN KIND. THIS APPLICATION IS TO REPLACE THE STRUCTURE BY MOVING IT BACK 10' AS A RESULT OF A VARIANCE GRANTED BY THE MOULTONBOROUGH ZBA. THE PROJECT WOULD INVOLVE 1,480 SF OF TEMPORARY DISTURBANCE BUT RESULT IN NO ADDITIONAL IMPERVIOUS AREA BECAUSE THE NEW STRUCTURE WILL BE THE EXACT FOOTPRINT OF THE ORIGINAL STRUCTURE. THE RESULT WOULD BE A MORE NEARLY CONFORMING STRUCTURE.

AO at ¶ 9-10; PBN 2016-01498.

8. The Shoreland PBN included the certification in which Mr. Corr acknowledged that he "understand[s] that project proposals that do not meet minimum standards of RSA 483-B and Administrative Rules Chapter Env-Wq 1400 as explained within the Summary of the Minimum Standards Fact Sheet...shall be rejected." Shoreland PBN #2016-01498 (G)(3), (Exhibit B).

² For a motion to dismiss, the council may also consider documents beyond the complaint, including "official public records, or documents sufficiently referred to in the writ." *Ojo v. Lorenzo*, 164 N.H. 717, 721 (2013).

9. Env-Wq 1405.03 states that accessory structures located between the reference line and the primary building line shall not exceed 12 feet in height. Env-Wq 1405.03(a)-(b)(1).

10. The appellants then submitted construction plans to the Town which “referenced a maximum height of 27 feet.” Appellant’s Petition to Appeal at ¶ 27.

11. The Town issued a building permit on June 9, 2016 and the appellants began construction on or around September 12, 2016. *Id.* at ¶ 28-29.

12. DES received pictures on or around February 9, 2017 showing the new building under construction. The pictures revealed that the structure’s height would exceed the 12-foot maximum under the regulations and the 17-foot height of the pre-existing grandfathered structure. AO at ¶ 12.

13. The next day, DES sent the appellants and their consultant an email with this concern suggesting they take corrective action before they completed construction. *Id.* at ¶ 14. On February 22, 2017 DES conducted a compliance inspection and found that the structure under construction would exceed the 17-foot grandfathered structure. AO at ¶ 15. Two days later, DES sent a letter to the appellants notifying them of a complaint that expressed concerns that the appellants were building a structure beyond what DES permitted. *Id.* at ¶ 16.

14. On April 5, 2017 DES issued the appellants a Letter of Deficiency (“LOD”), which noted that the appellants had built their accessory structure to a height of 27 feet, which was 10 feet taller than the height of the grandfathered structure. AO. at ¶ 18. DES then requested that the appellants retain an environmental consultant to submit restoration plans detailing how the appellants would lower the height of the building to 17 feet or lower. *Id.* LOD (Exhibit C).

15. DES subsequently met with the appellants and their attorney and on June 29, 2017, the appellants’ attorney sent DES a follow-up letter that proposed a landscaping plan

around the structure but asserted that they could not lower the height of the roof without demolishing the entire building. AO at ¶ 21-22.

16. DES required, however, that the appellants observe the in-kind permit requirements and ensure that the structure did not exceed the 17-foot height of the grandfathered structure. *Id.* at ¶ 23.

III. Argument

A. Appellants Have Not Demonstrated that DES Acted Unlawfully and Unreasonably in Regulating the Size of Accessory Structures in the Waterfront Buffer

The appellants argue that RSA 483-B:17 does not provide DES with the ability to regulate the height of accessory structures because height is not within the definition of size. Secondly, they argue that because the legislature has differentiated height from size in the zoning context, the legislature’s decision not to do the same with regard to accessory structures prohibits DES from regulating height.

DES has not acted unlawfully or unreasonably in promulgating and enforcing the height restriction because of the plain meaning of size and the long-standing implementation of that restriction without legislative interference.

1. Statutory Authority to Regulate Height

The appellants first argue that DES does not have the statutory authority to regulate the height of accessory structures. Appellant’s Petition to Appeal at ¶ 51. RSA 483-B:17, IV states that the commissioner shall adopt rules relative to “[p]rocedures and criteria for the size and placement of small accessory structures such as storage sheds and gazebos, which are consistent with the intent of this chapter, between the reference line and the primary building line [the waterfront buffer].” Env-Wq 1405.03(b)(1) states that accessory structures shall not exceed 12

feet in height. The appellants are attempting to remove “height” from the plain meaning of “size” under RSA 483-B:17.

“In matters of statutory interpretation...[the courts] first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning.” (*State v. Maxfield*, 167 N.H. 677, 679 (2015) (quoting *Appeal of Local Gov’t Ctr.*, 165 N.H. 790, 804 (2014)). Webster’s dictionary defines “size” as “the physical magnitude, extent, or bulk : the actual, characteristic, normal, or relative proportion of a thing : relative or proportionate dimensions....” Webster’s Third New International Dictionary 2130 (unabridged ed. 2002). It further states that “size usu. applies to things having length, width, and depth or height....” *Id.* Further, “dimension” is defined as “measure in a single line (as length, breadth, height, thickness, or circumference.” *Id.* at 634. Finally, Thesaurus.com lists “height” as a synonym for “size.” *Size Synonym*, Thesaurus.com, <http://www.thesaurus.com/browse/size?s=t> (last visited Feb. 2, 2018). Taken together, this indicates that the plain meaning of size includes height in common usage, which supports the Department’s long-standing interpretation as such.

Next, the height restriction has an unblemished history of enforcement without legislative interference. Env-Wq 1405.03(b)(1) has existed since 1996. *See* JLCAR document #6383 attached as Exhibit D. The rule was adopted again in 2004 and 2008. *See* JLCAR document #8219 and #9349 attached as Exhibit D. As a result, the accessory structure height limitation has been in place for over 21 years.

Including height within the regulation of “size” is an administrative interpretation not in conflict with the statute. *N.H. Retirement Sys. v. Sununu*, 126 N.H. 104, 109 (1985). “It is well established in our case law that an interpretation of a statute by the agency charged with its administration is entitled to deference.” *Appeal of Town of Seabrook*, 163 N.H. 635, 644 (2012)

(citing *Appeal of Morton*, 158 N.H. 76, 78-79 (2008); *Appeal of Weaver*, 150 N.H. 254, 256 (2003); *Appeal of Salem Regional Med. Ctr.*, 134 N.H. 207, 219 (1991); and *N.H. Retirement Sys.*, 126 N.H. at 108). In addition, “the long-standing practical and plausible interpretation applied by the agency responsible for its implementation, without any interference by the legislature, is evidence that the administrative construction conforms to the legislative intent.” *N.H. Retirement Sys.*, 126 N.H. at 109 (citing *Hamby v. Adams*, 117 N.H. 606, 609 (1977)). This “doctrine of ‘[a]dministrative gloss is placed upon an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference.’” *Town of Carroll v. Rines*, 164 N.H. 523, 527 (2012) (quoting *Anderson v. Motorsports Holdings*, 155 N.H. 491, 502 (2007)).

Here, not only is there statutory authority that supports DES’ regulation, but there is also no record of legislative interference with DES’ authority to regulate the height of accessory structures. Additionally, the Joint Legislative Committee on Administrative Rules (JLCAR) approval process has approved this rule, after public notice and comment, on three separate occasions. The Hearing Officer should find that the regulation of the height of accessory structures is a long-standing agency interpretation that shall be afforded substantial deference in this appeal because it has not been subject to legislative interference and is not in clear conflict with the express language of the statute, which demonstrates its conformity therewith.

2. The Legislature Does Not Always Differentiate Size from Height

Next, the legislature does not always differentiate height from size as the appellants contend; nor has the Supreme Court of the United States found that exclusively to be the case. *See Maurer v. Hamilton*, 309 U.S. 598, 615-6 (1940) (finding that “size” in the Motor Carrier

Act meant not only “overall length, width, and *height* of loaded cars” but similar attributes of items in the car (emphasis added)). On the contrary, the legislature has found occasion to specifically include height within the definition of size in RSA 266:16. That statute, entitled “Penalty for Exceeding Permitted Size,” states that “[a]ny person who shall drive or cause to be driven on the ways of this state a vehicle whose height, length or width is in excess of that herein prescribed shall be guilty of a violation....” RSA 266:16 (emphasis added). In this context, the legislature directly defines size as height, length or width. Further, the Moultonborough ordinances and policies relating to the size of head stones also states that “headstones may be upright but not exceed one per two-casket lot in the size of 48” L x 40” H x 14” W.” Moultonborough, NH, Statement of Policy No. 14, 8(d)(i)-(ii) (2014) (emphasis added). Accordingly, there is no pattern within the legislature or rulemaking bodies to suggest that each time authority is given to regulate “height” it is differentiated from “size.”

B. The Statutory Authority to Regulate the Size of “Small Accessory Structures” Did Not Constitute an Invitation to Construct Large Buildings.

The appellants next recognize the reference to accessory structures within the Shoreland Water Quality Protection Act and DES’s authority to regulate them but they argue that DES did not have the authority to regulate the appellants’ particular accessory structure in this case. RSA 483-B:17, IV states that the commissioner shall adopt rules relative to the “[p]rocedures and criteria for the size and placement of small accessory structures such as storage sheds and gazebos, which are consistent with the intent of this chapter, between the reference line and the primary building line.” RSA 483-B:17, IV. The statute further defines accessory structure as a “structure...on the same lot and customarily incidental and subordinate to the primary structure...; or a use, including but not limited to paths, driveways, patios, any other improved surface, pump houses, gazebos, woodsheds, garages, or other outbuildings.” RSA 483-B:4, II.

The appellants, however, read RSA 483-B:17 to mean that the Commissioner cannot regulate anything in the waterfront buffer area that is not “small.” *See* Appellant’s Petition to Appeal at ¶ 69-73. As such, they claim that their newly built structure is not small but is, in fact, large and therefore outside DES regulatory authority. A plain reading of the statute, however, demonstrates the absurdity of appellants’ argument.

“It is a fundamental principle of statutory construction that whenever possible, a statute will not be construed so as to lead to absurd consequences. Thus, as between a reasonable and unreasonable meaning of the language used, the reasonable meaning is adopted.” *State v. Wilson*, 169 N.H. 755, 766 (2017)(citing *Appeal of Marti*, 169 N.H. 185, 190 (2016)). The appellants’ reading of the language is unreasonable and would most certainly lead to absurd results across all of New Hampshire’s recreational and residential waters. By appellants’ logic, all waterfront property owners could build large, sprawling structures within the waterfront buffer without any agency regulation whatsoever, merely because they are not small.

Contrary to their argument, a reasonable reading of the statute suggests that because the legislature gave the DES Commissioner the authority to regulate small accessory structures in the waterfront buffer, all such accessory structures must necessarily be small and all others shall be prohibited. In other words, the statute prohibits any large accessory structures but allows DES to promulgate rules allowing certain small ones. This interpretation conforms to the intent of the chapter and its minimum shoreland protection standards in which it is the State’s desire to “minimize shoreland disturbance so as to protect the public waters, while still accommodating reasonable levels of development in the protected shoreland.” RSA 483-B:9, I. Accordingly, because the appellants failed to comply with the Commissioner’s regulation of small accessory

structures by building a large structure, they have violated their PBN as well as RSA 483-B:17 and Env-Wq 1405.03.

C. The Administrative Order is Consistent with RSA 483-B:11

The appellants argue that DES cannot add additional requirements to RSA 483-B:11, which allows non-conforming structures to “be repaired, replaced in kind, reconstructed in place, altered or expanded” provided certain requirements are met. However, the DES action is consistent with RSA 483-B:11.

The appellants had three options with regard to their collapsed “boathouse:” First, they could have built and applied for a completely new accessory structure and complied with the 12 foot height requirement. Second, they could have reconstructed the building in-kind under RSA 483-B:11 and Env-Wq 1408. The result would have been a fully reconstructed 17’ tall “boathouse.” However, the undisputed facts show that the appellants constructed a different structure, with different dimensions in a different location. Therefore, the provision regarding replacement “in kind” is not relevant.

Finally, they could have altered or expanded the existing footprint of the structure as long as the structure was not moved closer to the reference line and the structure was made more nearly conforming than the original structure. RSA 483-B:11. More nearly conforming means “alteration of the location or size of the existing footprints, or redevelopment of the existing conditions of the property, such that the structures or the property are brought into greater conformity with the design standards of this chapter.” *Id.* Env-Wq 1405.03(b)(1) is a design standard enacted pursuant to the chapter.

While the appellants did move their pre-existing non-conforming accessory structure back away from the reference line, they did not make the structure less nonconforming as

required for alteration under RSA 483-B:11. The appellants allege that their act of moving the structure away from the reference line satisfies that requirement but they fail to recognize that they also made the structure more nonconforming at the same time by raising the height of the accessory structure's roof in violation of Env-Wq 1405.03. It is not enough that they perform one single act that is less nonconforming if they perform other equally nonconforming acts to create violations that did not exist previously. Doing so is contrary to the purpose of the nonconforming structure statute. As stated, the appellants could have moved the structure back as they did and kept the roof height at 17 feet. In that event, the structure would have been relocated and would be made less nonconforming because of its relocation away from the reference line. Instead, the appellants added an additional nonconforming element³ and, therefore, did not satisfy RSA 483-B:11.⁴

D. The Appellants Did Not Have a Vested Right to Construct the New Nonconforming Structure and DES Acted Lawfully in Not Granting a Waiver

Env-Wq 1406.03 exempts owners or developers from the shoreland permit requirement when “the property owner or developer can demonstrate to the department’s satisfaction, pursuant to [Env-Wq 1406.03(b) or (c)], that the property owner or developer has incurred substantial liabilities in a reasonable, good faith reliance on the *absence of a controlling law or regulation....*” Env-Wq 1406.03(a) (emphasis added). The appellants base their argument for a

³ The State has not addressed the appellants’ argument regarding the methodology used to measure height. Therefore, the State anticipates that the appellants may argue that any analysis based on a nonconforming height is not ripe for dismissal; however, the issue of the methodology for measuring height is independently dispositive. In other words, if the appellants convince the Council that their structure conforms to the height requirement, all other arguments are moot. If they do not, all other arguments remain relevant. The State is attempting to dispose of the arguments that would remain should the appellants be shown to have violated the height requirement. These arguments are being addressed in the same manner that they were raised; namely, as independent arguments given in the alternative. The State reserves the right to address methodology for measuring height in a subsequent motion.

⁴For the reasons described above, there is similarly no violation of state or federal equal protection rights or a “failure to provide just compensation,” i.e., an unlawful taking. DES has created and enforced a valid rule consistent with the terms of the statute.

vested rights violation on Env-Wq 1406.03 subsection (c), which states that if a property owner cannot show proof through one of the items explicitly listed in Env-Wq 1406.03(b), they “may submit other evidence to demonstrate that the property owner or developer has otherwise incurred substantial liabilities and that such liabilities: (1) Resulted from a reasonable, good faith reliance on the *absence of controlling law or regulation*; and (2) Are related to the provision of RSA 483-B from which the property owner or developer is seeking relief.” Env-Wq 1406.03(c) (emphasis added).

The appellants here, however, have not relied on any absence of regulations but have instead proceeded to incur construction costs despite explicitly acknowledging the existence of applicable regulations. Appellant Bryan Corr acknowledged provision G(3) on May 16, 2016 in the Shoreland PBN 2016-01498, which reads “I understand that project proposals that do not meet the minimum standards of RSA 483-B and Administrative Rules Chapter Env-Wq 1400 as explained within the Summary of the Minimum Standards Fact Sheet... shall be rejected.” *See* Exhibit B. Conveniently, appellants’ narrow interpretation of RSA 483-B and Env-Wq 1400 as demonstrated in the sections above does not extend to this vested rights provision. Here, because the appellants acknowledged the existence of the controlling regulation relating to accessory structures and nonconforming structures and because these regulations were not absent at any time during the appellants’ ownership of this property, the vested rights provision does not apply. Therefore, the appellants have not demonstrated that DES acted unlawfully and unreasonably in not applying it in this case.

Lastly, the appellants have not alleged sufficient facts to support their claim that DES acted unlawfully in not granting a waiver for their already built structure. Env-Wq 1409.01 sets out the criteria necessary for a waiver applicant. The applicant must submit a statement of the

waiver requested, which specifically references the applicable provision of RSA 483-B, an explanation of how the applicant meets Env-Wq 1409.02, and a verification that all abutters of the property have been notified of the proposed project. Here, the appellants have not alleged that they submitted an application for a waiver with the required documents. Furthermore, the appellants have not demonstrated that they would meet the requirements related to a waiver. Accordingly, it was not unlawful or unreasonable for DES not to grant a waiver where none was requested.

WHEREFORE, the State respectfully requests that the Council and Hearing Officer grant this motion to dismiss and make the following findings of fact and rulings of law:

- A. The Commissioner of DES has the authority to regulate the height of accessory structures under RSA 483-B:17;
- B. The Commissioner of DES has the authority to regulate the size, including height, of all permissible accessory structures within the waterfront buffer;
- C. The appellants do not qualify for relief pursuant to RSA 483-B:11 because the new structure is more nonconforming with respect to height than the pre-existing structure;
- D. DES acted lawfully and reasonably in not applying the vested rights exemption to the appellants because the appellants did not rely on the absence of a controlling law or regulation when they built the accessory structure; and
- E. The appellants have not alleged that they submitted a valid request for a waiver prior to construction and the facts alleged, taken in the light most favorable to the appellants, could never support issuance of a waiver. Therefore, appellants cannot

show that DES acted unlawfully and unreasonably in not granting a waiver.

Respectfully submitted,

State of New Hampshire
Department of Environmental Services
By its attorneys,

Gordon J. MacDonald
Attorney General

Dated: February 22, 2018

By:

 **COPY**

Joshua C. Harrison, NH Bar #269564
Attorney
Environmental Protection Bureau
33 Capitol Street
Concord, NH 03301
(603) 271-3679
joshua.harrison@doj.nh.gov

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been mailed first-class this day to John Cronin of Cronin, Bisson & Zalinsky, P.C., counsel for the appellants.

February 22, 2018

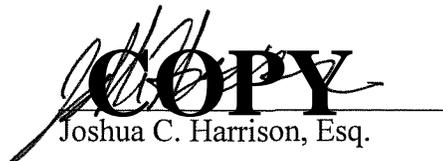
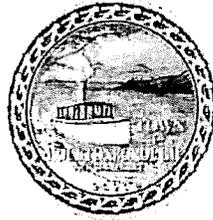
 **COPY**
Joshua C. Harrison, Esq.

EXHIBIT A



Town of Moultonborough Zoning Board of Adjustment

Notice of Decision

Request for Variance – Article III.B (3) & (4)
Bryan & Linda Corr/Map 270, Lot 4

April 21, 2016

Applicant: Bryan & Linda Corr
96 Payson Road
Belmont, MA 02478

Location: 46 Deerhaven Road, Moultonborough, NH (Tax Map 270, Lot 4)

On April 20, 2016, the Zoning Board of Adjustment of the Town of Moultonborough opened a public hearing on the application of Bryan and Linda Corr (hereinafter referred to as the “Applicant” and/or “Owner”) to obtain a Variance from MZO Article III. B (3) & (4), to construct a dry boathouse / accessory structure located 4.5 feet from the side property line where 20 ft. is required, and located 12.0 ft. from the reference line where 50-ft. is required on the parcel located in the Residential Agricultural (RA) Zoning District.

Based on the application, testimony given at the hearings, and additional documentation and plan(s), the Board hereby makes the following findings of fact:

- 1) The property is located at 46 Deerhaven Road (Tax Map 270, Lot 4).
- 2) The applicants are the owners of record for the lot.
- 3) The lot is located in the Residential Agricultural (RA) Zoning District, and the residential use is a use allowed by right in that district.
- 4) Bryan Corr presented the application to the Board.
- 5) The proposal is for the removal of an existing non-conforming structure located 4.5 feet from the side property line and located 2.0 ft. from the reference line, and new construction of a dry boathouse / accessory structure located 4.5 feet from the side property line where 20 ft. is required, and located 12.0 ft. from the reference line where 50-ft. is required.

- 6) The setbacks affected are the twenty foot (20') side line setback and the fifty foot (50') lake setback.
- 7) The applicant had received a Building Permit, #7393, to rehab the existing shore boathouse in place.
- 8) The applicant had received a NH DES Permit by Notification, #2016-00009, for the rehab of the existing boathouse, provided no change in location, configuration, construction type or dimensions. (The state cannot overrule the Town's Zoning Provisions)
- 9) The applicant stated the new structure will be the same dimensions as the prior structure and will be one story, not to exceed the 32' height limitation in the Moultonborough Zoning Ordinance.
- 10) Representatives of the abutting property located at 52 Deerhaven Road noted their concerns which included allegations of misrepresented information on the plan submitted with the application, use of the structure and erosion of the embankment.
- 11) Abutter Ed Mezzanotte, 44 Deerhaven Road, and Dan Kirker, 56 Deerhaven Road, each noted that they had no objections with the proposed plan as presented and spoke in favor of the proposed improvements.
- 12) Granting the Variance would not be contrary to the public interest as the proposed construction will not alter the essential character of the neighborhood because improve water quality through best practices, improve sight lines to the lake for abutters, and most importantly, it will be moved back ten (10) feet further from the lake than the existing structure.
- 13) Granting the Variance would be consistent with the spirit of the Ordinance because the variance will not alter the essential character of the neighborhood because it will improve water quality through best practices, and improve sight lines to the lake for abutters.
- 14) By granting the Variance, substantial justice would be done because there is no public benefit to be gained by requiring the accessory structure to rehabbed in its current non-conforming location, while the loss to the applicant and neighbors would be great because in its requested location, the structure will be moved back ten (10) feet improving water quality due to decreased run-off from structure and will be totally new construction.
- 15) Granting the Variance would not diminish the value of surrounding properties as the structure would be new and best management practices will be employed to protect the lake.
- 16) Special conditions exist such that a literal enforcement of the provisions of the Ordinance will result in unnecessary hardship as the applicant has a permit to rebuild the structure in its current location, two (2) feet from the lake, and moving it back ten (10) feet is a reasonable request. The applicant cannot meet the required side line and lake setbacks.

On April 20, 2016, the Zoning Board of Adjustment voted by a vote of five (5) in favor (Stephens, Nolin, Bickford, St. Peter, Hopkins), and none (0) opposed to grant the request for a variance with the following conditions: 1) That all best management practices be employed, such as drip edge filter strips or rain gutters that drain into a rain barrel; 2) The approved shore land permit by notification be resubmitted to NH DES as an amended application and be in line with this approval; 3) That a foundation certification be prepared prior to construction, and submitted to the Town, and further, to close the Public Hearing.

The Board of Adjustment, on May 4, 2016, approved this formal Notice of Decision language and authorized the Chairman to sign the Notice of Decision and send to the applicant and place same in the case file by a vote of (5) in favor (Stephens, Nolin, Bickford, DeMeo, Jenny), none (0) opposed.

The decision made to Approve the variance on April 20, 2016 shall not take effect until thirty (30) days have elapsed and no request for rehearing has been filed in accordance with RSA 677:2, or that if such request has been filed, it has been dismissed or denied, in accordance with RSA 677:3.



Robert H. Stephens
Chairman, Zoning Board of Adjustment

Date 5-6-16

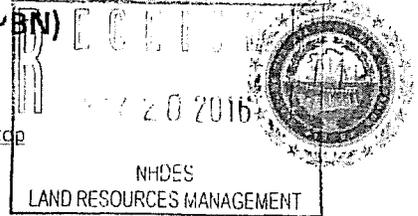
EXHIBIT B



SHORELAND PERMIT BY NOTIFICATION (PBN)

Water Division/ Shoreland Program
Land Resources Management

Check the Status of your Notification: www.des.nh.gov/onestop



RSA/Rule: RSA 483-B / Env-Wq 1400

This box is for office use only:

PBN Accepted **SHORELAND FILE NUMBER:** 2016 - 01494 expires: 5/27/21

PBN Rejected **If the notification is rejected, the fee is forfeited**

A. PROJECT LOCATION AND OWNER INFORMATION

Project Location Address		Town/City		State	Zip code
46 DEERHAVEN ROAD		MOULTONBOROUGH		NH	03254
Waterbody Name		Tax Map	Lot #	Block	Unit
WINNIPESAUKEE		270	4		
Property Owner Name	Phone No.	Email address -authorizes electronic communication of PBN status			
CORR, BRYAN	617-592-8266	bjcorr@verizon.net			
Mailing address		Town/City		State	Zip code
96 PAYSON ROAD		BELMONT		MA	02478

B. PROJECT DETAILS: PLEASE NOTE: This form **cannot** be used for the following project types: impacts to areas under the jurisdiction of RSA 482-A, the New Hampshire wetlands statute, including surface waters and their banks, docks, wetlands, tidal areas, including the 100 foot tidal buffer zone, sand dunes and beaches **AND** expanding the footprints of nonconforming primary structures within 50 feet of the reference line.

DESCRIPTION: A complete description of the proposed project **must** be stated here. It must **list** all proposed temporary and permanent impact areas. (See Section C for definition of temporary and permanent impacts). *A PREVIOUSLY EXISTING GRANDFATHERED STRUCTURE COLLAPSED FROM SNOW LOAD. A PREVIOUS WETLANDS APPROVAL WAS GRANTED (FILE #2016-00009) TO REPLACE THE STRUCTURE IN KIND. THIS APPLICATION IS TO REPLACE THE STRUCTURE MOVING IT BACK 10' AS A RESULT OF A VARIANCE GRANTED BY THE MOULTONBOROUGH ZBA. THE PROJECT WOULD INVOLVE 1,480 SF OF TEMPORARY DISTURBANCE BUT RESULT IN NO ADDITIONAL IMPERVIOUS AREA BECAUSE THE NEW STRUCTURE WILL BE THE EXACT FOOTPRINT OF THE ORIGINAL STRUCTURE. THE RESULT WOULD BE A MORE NEARLY CONFORMING STRUCTURE.*

C. DETERMINING THE TOTAL IMPACT AREA

Total impact area is calculated by determining the sum all temporary and permanent impact areas. Temporary and permanent impacts often include, but are not limited to: constructing new driveways, constructing new structures, areas disturbed when installing a new septic system or foundation and all excavation with mechanized equipment, adding fill, and regrading associated with landscaping activities.

Total Impact Area within 250 Of the Reference Line. = 1,480 (A) Square Feet

D. PERMIT CONDITIONS: Owner must acknowledge each permit condition by initialing within each box provided below: DO NOT LEAVE BLANK

<i>[Signature]</i>	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.
<i>[Signature]</i>	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.
<i>[Signature]</i>	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.
<i>[Signature]</i>	Any fill used shall be clean sand, gravel, rock, or other suitable material.

Upon receiving acceptance of this Permit by Notification via email, a copy of this page (page 1) of this form shall be posted on site prior to the start of work.

For office use only
 Check Amount \$ 248.00 Check No. 4313 Initials: DWR Date: 5/27/16

E. PBN CRITERIA: In order to qualify to use this form you must meet one of the following project types. Please check the appropriate box below:

- 1. This project will result in less than 1,500 square feet of total impact area, of which, no more than 900 square feet will be newly added impervious area.
 Total new impervious area = 0 Square Feet
- 2. This project is an activity that qualifies for a permit by notification under Shoreland Administrative Rule Env-Wq 1406.05.
 Drilling geotechnical borings Drilling test wells or installing monitoring wells
- 3. This project is directly related to stormwater management improvements, erosion control projects, environmental restoration, environmental enhancement and waste remediation activities
- 4. This is a public infrastructure maintenance or repair project (public utilities, public roadways and public access facility).

F. PERMIT APPLICATION FEE: Indicate the project type and fee by checking the appropriate box below:

<input checked="" type="checkbox"/>	1. This project will result in less than 1,500 square feet of total impact area, of which, no more than 900 square feet will be newly added <u>impervious area</u> . Impact area is determined by adding the sum of all temporary and permanent impacts. TOTAL IMPACT AREA FROM Page 1, Section C = <u>1,480</u> Square Feet Multiply the Total Impact Area By 10¢ and add \$100.00. [Total Impact Area X .10 + \$100.00] = \$ Permit Fee	Permit Fee \$ 248
<input type="checkbox"/>	2. This project meets the criteria of Section E3 above.	\$100.00
<input type="checkbox"/>	3. This project is a public infrastructure maintenance or repair project (Section E4 above).	Fee Exempt

G. REQUIRED CERTIFICATIONS and SIGNATURE: Carefully read each of the statements below. By signing below, you are certifying that you understand and agree to comply with each of the following statements:

- 1. I understand that any impacts completed under a Permit by Notification filed and accepted based on false, incomplete, or misleading information provided within the application, plans or attachments shall be subject to enforcement action.
- 2. I am aware that an accepted Shoreland Permit by Notification will not exempt the work I am proposing from other state, local or federal approvals.
- 3. I understand that project proposals that do not meet the minimum standards of RSA 483-B and Administrative Rules Chapter Env-Wq 1400 as explained within the Summary of the Minimum Standards Fact Sheet, including the minimum standard relative to impervious surfaces, as explained on **page 4**, shall be rejected.
- 4. I understand that failure to conduct the work in accordance with the plans submitted with this Notification shall be considered work without a permit and subject to enforcement action. I agree to conduct all work under this Permit by Notification in accordance with the conditions specified on **page 1, Section D**.
- 5. I understand that incomplete notifications will be rejected and the notification fee will be forfeited.

Signature of Owner:  Date: 5-16-16
 (agent may not sign on owner's behalf)

H. AGENT INFORMATION: If this form has been completed by an agent or any person acting on behalf of the property owner, said person shall provide the following information.

Agent Name	Phone No.	email address- authorizes electronic communication of PBN status	
JOHNSON, CARL R.	603-279-6752	surveyor794@yahoo.com	
Mailing address	Town/City	State	Zip code
121 NH ROUTE 25, UNIT #2	MEREDITH	NH	03253

I. INFORMATION REQUIRED FOR PERMIT BY NOTIFICATION ACCEPTANCE:

- DATED photographs, clearly showing the all area(s) to be impacted.
- Permit by Notification Fee - Check or Money Order made out to "Treasurer State of NH"
Check N/A if this is a public infrastructure maintenance or repair project (Section F3). N/A Fee Exempt

J. INFORMATION REQUIRED TO BE SHOWN ON ALL PLANS FOR PERMIT BY NOTIFICATION ACCEPTANCE:

Either the dimensions of the required items or the scale must be shown on all plans.

- Plans clearly indicating the locations of the subject property lines and that accurately depict the location(s) of the proposed impacts (as described within Section B of this form) relative to the reference line of the waterbody;
- The locations, and descriptions of all proposed **impervious areas**, including garages, sheds, home expansions, decks, patios, walkways and driveways and indicate the scale used on the plan;
- The locations and descriptions of all proposed **temporary impacts**; (refer to Section C for temporary impact definition).
- A legend that clearly indicates all symbols, line types and shadings used on the plans;
- The 50 foot primary structure setback line, the natural woodland buffer and the limits of the protected shoreland.

K. ADDITIONAL INFORMATION TO BE SHOWN ON ALL PLANS

Refer to the Supplemental Instructions on Page 4 When Completing this Section

1. INCREASES IN IMPERVIOUS AREA

- This project proposes **no** increase in impervious area. [proceed to section K4]
- This project proposes an increase in impervious area.

2. NEW IMPERVIOUS AREAS SHOWN ON PLANS

- My plans include the dimensions, locations, and areas of all **new** impervious areas.

3. STORMWATER MANAGEMENT SHOWN ON PLANS

When proposing an increase in impervious area, you must determine the percentage of **post-construction impervious area** of the lot within the protected shoreland. To calculate the percentage of post-construction impervious area, please refer to the supplemental instructions provided on **page 4**.

Indicate the project threshold category by checking the appropriate box below:

- The percentage of post-construction impervious area within the protected shoreland will not be greater than 20%.
- The percentage of post-construction impervious area within the protected shoreland is greater than 20% but, less than 30%, and therefore, my plans include the details of how a stormwater management system will be implemented.
- The percentage of post-construction impervious area within the protected shoreland is greater than 30%, and therefore, I have included stormwater management plans designed by a certified professional engineer **and**; my plans indicate that each 50 by 50 foot grid segment within the waterfront buffer at least meets the minimum required tree and sapling point score.

4. IMPACTING THE WATERFRONT BUFFER

- No impacts are proposed within 50 feet of the reference line.
- Impacts are proposed within 50 feet of the reference line but, no trees or saplings will be removed.
- Impacts are proposed within 50 feet of the reference line and trees and or saplings will be removed but, upon completion of the project, each impacted waterfront buffer grid segment will at least meet the minimum required tree and sapling point score.

shoreland@des.nh.gov or (603) 271-2147

NHDES Shoreland Program, 29 Hazen Drive, PO Box 95, Concord, NH 03302-0095

www.des.nh.gov

5. PVIOUS SURFACES

- A. No pervious surface technologies are associated with this project.
- B. PVIOUS surfaces will be installed and plans are included detailing their installation and maintenance.

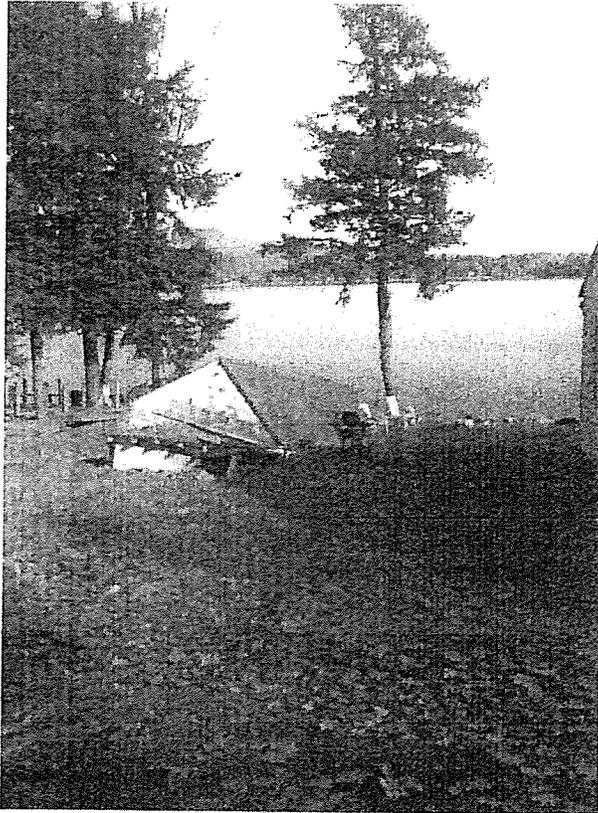


PHOTO #1 LOOKING TOWARDS COLLAPSED STRUCTURE 11-9-15



PHOTO #2 LOOKING SOUTH ALONG REFERENCE LINE 11-9-15



PHOTO #3 LOOKING NORTH ALONG REFERENCE LINE 11-9-15

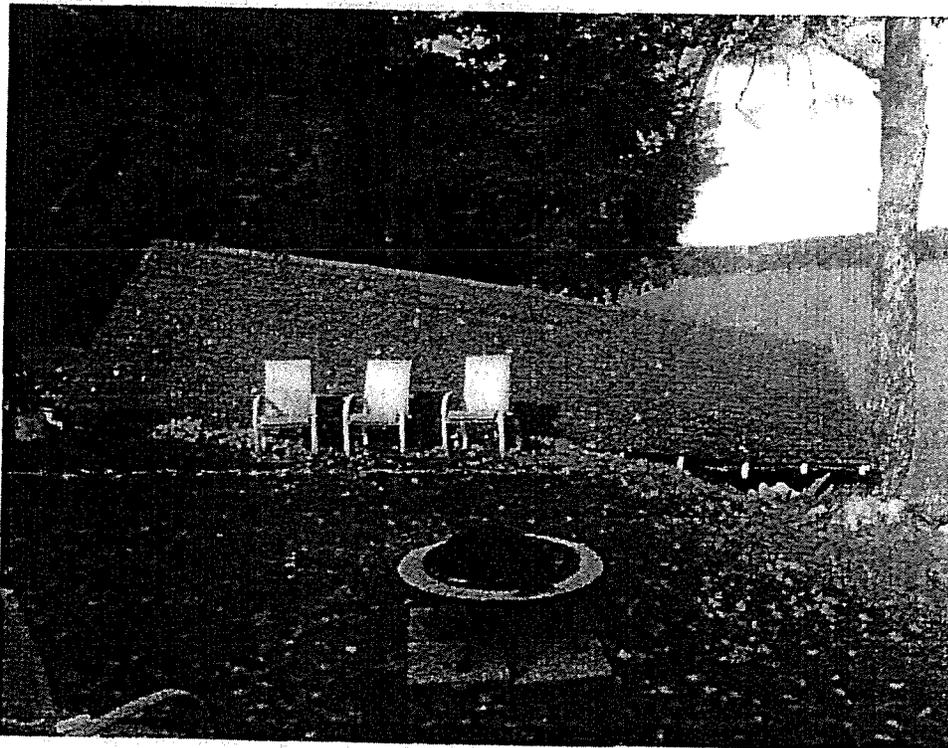
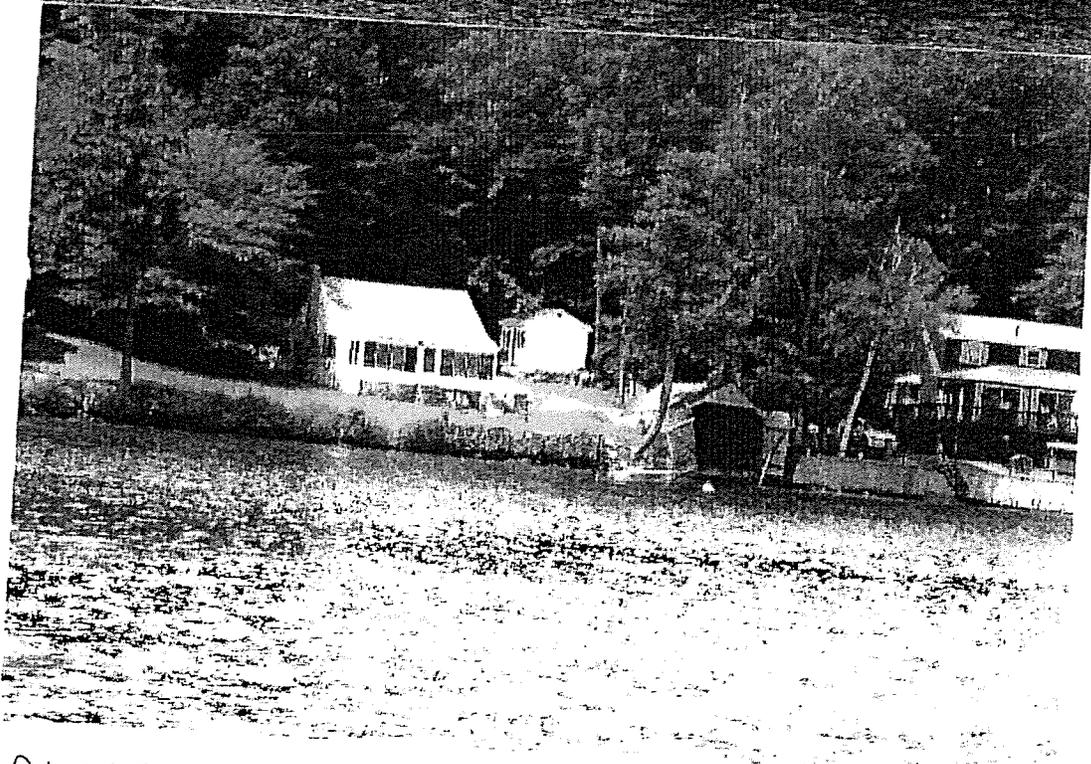


PHOTO #4 LOOKING NORTH TOWARDS COLLAPSED STRUCTURE 11-9-15



#5



#6

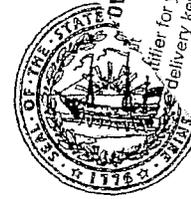
PHOTOS OF ORIGINAL STRUCTURE
DATE: UNKNOWN. ESTIMATE 2014

EXHIBIT C



The State of New Hampshire
Department of Environmental Services

Clark B. Freise, Acting Commissioner



LETTER OF DEFICIENCY
LRM 17-003

April 5, 2017

Bryan Corr
96 Payson Road
Belmont, MA 02478

RE: DES Land Resources Management File #2016-01498, 46 Deer Haven Road, Moultonborough

Dear Mr. Corr:

On February 22, 2017, personnel from the Department of Environmental Services ("DES") conducted an inspection of the above referenced property, more specifically identified on Town of Moultonborough Tax Map: 270 as Lot: 4 ("the Property"). The purpose of the inspection was to determine compliance with RSA 483-B, the New Hampshire Shoreland Protection statute, and NH Code of Admin. Rules Env-Wq 1400 *et seq* and RSA 482-A, the New Hampshire Wetlands statute and associated Administrative Rules Env-Wt 100-900.

As a result the site inspection and review of the "As-Built Plan" dated March 3, 2017, DES personnel has concluded the following:

1. An accessory structure was constructed with a height of 27 feet, 10 feet taller than the original accessory structure having a height of 17 feet.

In response, you are requested to take the following action(s):

1. By **May 1, 2017**, retain the service of a professional environmental consultant and submit a restoration plan detailing how the accessory structure will be reduced to a height no greater than 17 feet. Submit the following with the restoration plan:
 - a. A plan with dimensions, drawn to scale showing:
 - i. Existing conditions; and
 - ii. Proposed conditions; and
 - b. A description of the proposed construction sequence and methods for accomplishing the restoration and the anticipated restoration compliance date; and
 - c. Implement the restoration plan only after receiving written approval, and as conditioned by DES.

DES personnel may conduct additional site inspections to determine whether you have come into and are maintaining full compliance with the applicable statute and rules.

Postage and Fees Provided:
Postnet delivery kept by the Post Office.
Reminders:
Registered Mail may ONLY be combined with other mail services.
INSURANCE COVERAGE is not available for any other services.
For an additional fee, a Return Receipt (PS Form 3811) is available for purchase.
Endorsements are available for purchase.

Issuance of this letter shall not preclude further enforcement by DES. Failure to comply with the above-referenced regulations may result in further enforcement by DES, including but not limited to the issuance of fines, administrative orders, or referral to the New Hampshire Office of the Attorney General for imposition of civil penalties. If an order is issued to you, it may also be recorded with the county Registry of Deeds as an encumbrance against your property.

All documents submitted in response to this Letter of Deficiency should be addressed as follows:

Jay Aube, Compliance Inspector
Land Resources Management Program
Department of Environmental Services
29 Hazen Drive
PO Box 95
Concord, NH 03302-0095

Should you have any questions regarding this letter, please contact me at (603) 271-4054 or collis.adams@des.nh.gov.

Sincerely,

COPY

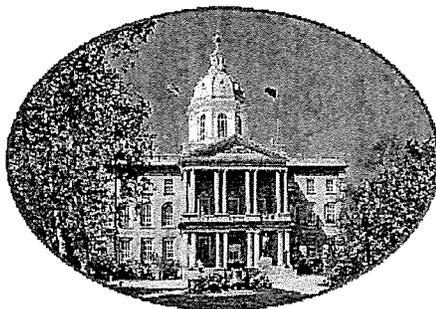
Collis G. Adams, CWS, CPESC
Administrator
Wetlands Bureau

CERTIFIED MAIL: 70120470000160699952

cc: DES Legal Unit

ec: Rene Pelletier, Asst. Director, Water Division
Jeff Blecharczyk, LRM Compliance Supervisor
Moultonborough Code Enforcement

EXHIBIT D



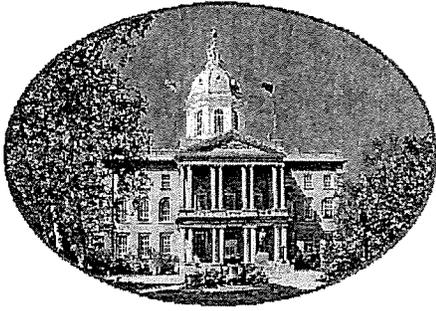
NEW HAMPSHIRE OFFICE OF LEGISLATIVE SERVICES

ADMINISTRATIVE RULES

Agency: [Env-Ws] Department of Environmental Services Division of Water	Rule Type or Ruling: Env-Ws 1400, 1002 various sections, 1003.04 and 1003.05
Notice Year: 1996	Agency Rule:
Document No.: 6383	Notice No.: 1996-94

Rule Title, Authority Rulemaking Notice Final Proposal Conditional Approval Objection Response

Date Final Proposal Filed: 8/2/1996	Missed Final Proposal Deadline: <input type="checkbox"/>
Incorporate Other Rules by Reference: <input type="checkbox"/>	Change from Original Filing: <input checked="" type="checkbox"/>
Original Deadline to File Final Proposal: 9/16/1996	Deadline to File Final Proposal Waived: <input type="checkbox"/>
30 day extension to file granted: <input type="checkbox"/>	New Final Proposal Deadline:
JLCAR Meeting Date: 8/16/1996	JLCAR Meeting Deadline: 9/16/1996
JLCAR Action: Objection/Final Objection	JLCAR Deadline Waived: <input type="checkbox"/>
Must be adopted and filed within 30 days of JLCAR final action due to <input type="checkbox"/>	
Back to list extension pursuant to RSA 541-A:14-a:	
Adopted Date: 11/20/1996	Effective Date: 11/26/1996
Filing Date: 11/25/1996	Expiration Date: 11/26/2004



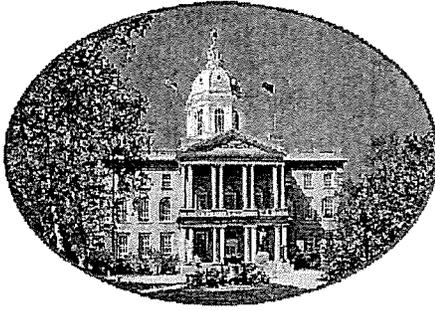
NEW HAMPSHIRE OFFICE OF LEGISLATIVE SERVICES

ADMINISTRATIVE RULES

Agency: [Env-Ws] Department of Environmental Services Division of Water	Rule Type or Ruling: Regular
Notice Year: 2004	Agency Rule: Env-Ws 1400
Document No.: 8329	Notice No.: 2004-211

Rule Title, Authority Rulemaking Notice Final Proposal Conditional Approval Objection Response

Date Final Proposal Filed: 3/4/2005	Missed Final Proposal Deadline: <input type="checkbox"/>
Incorporate Other Rules by Reference: <input type="checkbox"/>	Change from Original Filing: <input checked="" type="checkbox"/>
Original Deadline to File Final Proposal: 5/31/2005	Deadline to File Final Proposal Waived: <input type="checkbox"/>
30 day extension to file granted: <input type="checkbox"/>	New Final Proposal Deadline:
JLCAR Meeting Date: 4/15/2005	JLCAR Meeting Deadline: 4/18/2005
JLCAR Action: Approval	JLCAR Deadline Waived: <input type="checkbox"/>
Must be adopted and filed within 30 days of JLCAR final action due to <input type="checkbox"/>	
Back to list extension pursuant to RSA 541-A:14-a:	
Adopted Date: 4/21/2005	Effective Date: 4/23/2005
Filing Date: 4/22/2005	Expiration Date: 4/23/2013



NEW HAMPSHIRE OFFICE OF LEGISLATIVE SERVICES

ADMINISTRATIVE RULES

Agency: [Env-Wq] Department of Environmental Services Water Quality and Quantity Programs	Rule Type or Ruling: Env-Wq 1402-1406 various sections & paras. & 1412.03(e)
Notice Year: 2008	Agency Rule:
Document No.: 9349	Notice No.: 2008-194

Rule Title, Authority Rulemaking Notice Final Proposal Conditional Approval Objection Response

Date Final Proposal Filed: 12/4/2008	Missed Final Proposal Deadline: <input type="checkbox"/>
Incorporate Other Rules by Reference: <input type="checkbox"/>	Change from Original Filing: <input checked="" type="checkbox"/>
Original Deadline to File Final Proposal: 3/23/2009	Deadline to File Final Proposal Waived: <input type="checkbox"/>
30 day extension to file granted: <input type="checkbox"/>	New Final Proposal Deadline:
JLCAR Meeting Date: 12/18/2008	JLCAR Meeting Deadline: 1/20/2009
JLCAR Action: Approval	JLCAR Deadline Waived: <input type="checkbox"/>
Must be adopted and filed within 30 days of JLCAR final action due to extension pursuant to RSA 541-A:14-a: <input type="checkbox"/>	
Adopted Date: 12/19/2008	Effective Date: 12/20/2008
Filing Date: 12/19/2008	Expiration Date: 12/20/2016