

**RI DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
OFFICE OF WATER RESOURCES**

Following are responses to comments regarding the *R/R Governing the Administration and Enforcement of the Freshwater Wetlands Act* that were received during the Public Notice period, January 31, 2007 through March 16, 2007. The Department appreciates all of the comments and thanks those individuals and organizations that provided them. All comments were considered, and many changes were made to the Rules as a result of the comments. Some comments that were presented by stakeholders for the first time that targeted rules that were not otherwise being revised or that may have required time-consuming internal and stakeholder discussion and further rule development in order to properly consider, were not addressed at this time. No comments were received regarding the jurisdictional boundary maps. Comments (C) are summarized below, followed by the responses (R).

Rule 2.00 – Administrative Findings

C (1) The Rules lack protection for the function of vernal pools.

R (1) The RI Freshwater Wetlands Act limits the degree of protection afforded to vernal pools (special aquatic sites) in that the Act does not establish an upland perimeter around pools, unless the pool also meets the definition of pond. Rule 2.02 B is primarily about those freshwater wetlands (swamp, marsh, bog, pond and flowing bodies of water) where the Department does regulate a perimeter or riverbank wetland; the Department does not directly regulate forested ecosystems despite their importance to wetland wildlife species.

The scientific literature clearly establishes that protection of upland forest buffer is critical to the protection of vernal pool indicator amphibians. The Department is planning to work with partners to outline and develop a policy supporting vernal pool protection. Also, the Department will be undertaking non-regulatory efforts to educate local officials and landowners about potential vernal pools that are mapped in the Pawcatuck River watershed during this year. The Department will also seek EPA funding for mapping of potential vernal pools in the northwest part of the state, building on mapping that the USFWS has undertaken statewide. On the regulatory side, The Department wishes to note that, in response to federal interests in the protection of vernal pools, the U.S. Army Corps of Engineers has added provisions in the State of Rhode Island Programmatic General Permit (PGP) (effective Feb. 13, 2007) regarding projects within specified distances of vernal pools that will affect projects submitted for permitting and review by the Department and the Corps through the PGP process.

C (2) One commenter expressed concern about the change in current language to “cumulative impact of multiple alterations.”

R (2) Minor wording changes were made to Rule 2.02 D regarding cumulative impact to clarify that the area of concern is limited to incremental alteration affecting the same wetland system. We also retained the word ‘incremental’ to address a commenters concern that the proposed language exceeded the Department’s statutory authority. No such change was intended, nor is it the Department’s opinion that the change would have had that effect.

- C (3) The Rules should recognize the benefits of dam removal for habitat restoration purposes.
- R (3) The Department recognizes the ecological benefits of restoring riverine habitats by the removal of dams and believes those projects can be evaluated fairly on their merits under the Rules. The purpose of Rule 2.02 F is to recognize that dam safety needs established in other state law must be balanced with wetland protection.

Rule 3.00 – General Administration

- C (4) Does Rule 3.02 B imply that a permit issued prior to August 18, 1999, which does not contain a specific expiration data, remains valid indefinitely?
- R (4) This rule refers to the renewal, transfer, etc. of permits relative to CRMC jurisdiction of freshwater wetlands in the vicinity of the coast. DEM permits that do not have expiration dates are not specifically addressed in 3.02 (B). However, such permits would have been issued prior to April 7, 1994 and are now expired according to Rule 9.04.
- C (5) Regarding Rules 3.03 (A)(1) and (2), a commenter suggested that the wetland alteration boundary should be used to determine the reviewing agency for linear projects rather than the project.
- R (5) These rules as written are intended to minimize those circumstances where both agencies are involved in application review for projects on or crossing the boundary.
- C (6) The agencies should provide the official freshwater wetland jurisdictional maps online.
- R (6) The freshwater wetland jurisdictional maps are available on the Department’s website at www.dem.ri.gov/ and they have been for some time. The Department ensures that the maps are up-to-date including the boundary revisions effective June 1, 2007 in Cranston and in Providence. While the online maps are intended to be identical to the hard copy maps maintained and available at the Department (and CRMC) offices, the hard copy maps are the “official” maps.

Rule 4.00 – Definitions

- C (7) The lack of individual rule numbers for the defined terms is inconvenient for referring a reader to a specific term within the rule.
- R (7) The terms are arranged in alphabetical order which is commonly understood. The rules could be cited as ... Rule 4.00 – Aquatic Base Flow – (A).
- C (8) The term *Accessory structure* could include structures on commercial or public properties. The term “pervious” should be defined using a maximum runoff coefficient to avoid inconsistencies in reviews.
- R (8) The Department will consider revising the rules in response to these comments in the future.
- C (9) The definition of *Alter* deletes the reference to cumulative impacts, which is essential to the protection of wetlands. The suggestion was made to add “individually or cumulatively” to the definition in two places so that the words modify the overall impact,

not the activities. Another comment was made to restore the words “function/values” to the definition.

- R (9) The definition was revised to address the several issues raised by this comment. The Department had intended that, for definitional purposes, the term “individually or cumulatively” apply to the activities that “change” the character of wetlands, not the impacts. Admittedly, the original definition proposed was not clear in this regard. The definition has been revised so that “individually or cumulatively” modifies “change the character.” Secondly, while the Freshwater Wetlands Act and these Rules do recognize the functions/values of wetlands, the term “alter” is not limited only to a function and value assessment. The common meaning of “alter” is change and the Department wishes to simplify the decision regarding what is an alteration and what is not. The decision step to determine whether an alteration has occurred or may occur need not require or be limited to an assessment of impacts to functions/values.
- C (10) Regarding *Aquatic base flow*, commenters suggested the defined term be “minimum water level” rather than aquatic base flow, and that only one of the current subrules actually refers to aquatic base flow.
- R (10) The Department concluded that there are multiple expressions of aquatic base flow and that the current definition is consistent with the New England US Fish and Wildlife Service definition. As such we did not revise the definition in response to comments received. Rule E provides the option to accommodate revisions to the definition to address other methods that may be required should the circumstance arise.
- C (11) In reference to the differences between DEM and CRMC definitions of wetlands, a commenter emphasized the importance of considering the entire wetland complex including perimeter wetland, riverbank wetland, and floodplains when evaluating *Cumulative impacts*, and in rule definitions.
- R (11) The definition of “freshwater wetland” includes the main body of the wetland (swamp, marsh, etc.) as well as the associated perimeter wetland, riverbank wetland, and floodplain. The CRMC definition for *freshwater wetlands in the vicinity of the coast* is not as inclusive and refers only to the main body of the wetland and not the adjacent buffers or floodplain. Because of the confusion around referring to upland areas as wetlands, CRMC decided to approach the definition differently. That is why the CRMC Rules repeats ... area of land within 50 feet, riverbank, and floodplain throughout. The level of protection afforded to all these areas is intended to be equivalent.
- C (12) The definitions of *dam* and *dike* overlap or conflict with one another, specifically the word divert in the definition of *dam*.
- R (12) The definition of *dam* is adopted from the Department’s draft dam safety regulations.
- C (13) *Detention* and *Retention facilities* should be properly managed to control sedimentation and turbidity, thereby protecting downstream wetlands.
- R (13) The Stormwater Manual (under development) will address requirements for maintenance of basins and facilities; therefore no changes were made to these definitions.

- C (14) Should the term *Growing season* have a more flexible definition to allow for projections of climate change?
- R (14) The Department is not aware of sufficient data that indicates how this definition might be revised to address projections of climate change. The definition may be revisited at a future date when the effect of climate change on the growing season in the state is better understood.
- C (15) Commenters advised us to define *Invasive species*.
- R (15) A definition of invasive species has been added to the Rules. It is a federal definition that is also used by the RI Natural History Survey (RIHNS). The DEM will consult with staff experts, the RINHS, and the New England Invasive Plant group to identify species that may be considered invasive to RI freshwater wetlands and provide further guidance.
- C (16) The combined presentation of the terms and definitions of random alteration, unnecessary alteration, and undesirable alteration is an improvement; however, the standards within those definitions should not be relaxed in their new form.
- R (16) The Department did not intend to relax any standards with respect to these definitions by combining them into a single term “*random, unnecessary or undesirable alteration*” or by editing the definitions to better reflect current practice. The definitions have been further revised. The reference to negligible impacts has been removed because, as was pointed out, many small impacts can result in a cumulatively large impact. The third part of the definition has also been revised (closer to the current definition) by adding back the concept that an undesirable alteration is one that is likely to degrade as well.
- C (17) The definition of *rare* should refer to the Division of Planning and Development website.
- R (17) The Department feels that the added reference is unnecessary and potentially confusing. Note that the location or number of database(s) for Natural Heritage data is subject to change.
- C (18) A reviewer commented on the different methods that DEM and CRMC employ to measure *riverbank wetlands*: the DEM measures the riverbank from the ordinary high water and CRMC measures from the top of bank or change in slope.
- R (18) The agencies recognize different methods and will revisit this in the future regarding buffer zone protection and the possible need for a transition zone.
- C (19) *Special aquatic sites* lack protective buffers. “Temporary or permanent” could be added and modify the words “standing water during most years.”
- R (19) The Department agrees that the lack of a buffer zone for *special aquatic sites* is an important issue for adequate protection of these vulnerable wetlands. As stated above, the presence of a buffer of any size is limited by the Freshwater Wetland Act. The point about the language change has been noted. The Department decided not to make any changes to this definition at this time.

Comments were provided on other definitions that were not otherwise changed. These comments will be considered in the future.

Rule 5.00 – Regulated Activities

- C (20) The Rules should specify a water withdrawal threshold of 3 million gallons per year as a trigger for water quality certification.
- R (20) The Department has developed guidance that specifies application protocol for water withdrawals greater than 10,000 gallons per day (which is approximately the commenters threshold). The guidance is available at the Department’s webpage at <http://www.dem.ri.gov/programs/benviron/water/withdraw/index.htm>. It combines the wetland application and water quality certificate review processes and specifies pre-application requirements and review protocol. Applicants proposing to withdraw less than 10,000 gallons per day must adhere to the standard wetland application requirements. (Note that individual water withdrawal wells less than 500 gallons per day are exempt under certain circumstances – Rule 6.05.)
- C (21) Perhaps Rule 5.01 B should specify that “close proximity” be determined on a project specific basis to avoid development of a jurisdictional precedent.
- R (21) There is flexibility built into Rule 5.01 B (size, nature of actions, etc.) to avoid concern about litigation.

Rule 6.00 – Exempt Activities

- C (22) Should maintenance of detention and retention facilities be covered in Rule 6.00?
- R (22) Maintenance requirements for basins and facilities that include protection of downstream wetlands will be covered in the Stormwater Manual. Maintenance of these structures is not an exempt activity, but rather it is a regulated and approved activity. Rule 9.04 (C) states that the permittee or subsequent transferee is responsible for maintenance.
- C (23) Regarding the proposed Rule 6.02 E for clearing and cutting at airports, numerous comments were received: the FAA regulations and guidelines do not parallel local or state goals; FAA regulations are complex; there is ongoing water quality degradation around TF Green airport; there is an ongoing FAA-driven EIS process at TF Green airport; clarification is needed regarding approval process for vegetation management plans; guidelines are not available for development of vegetation management plan; consider treating clearing at airports as an activity eligible for a long-term permit rather than an exemption; RIAC needs more environmental oversight not less; the permit process is an important tool for verifying compliance for any applicant; and there should be a prohibition for the fall migration of juvenile fish. One commenter spoke in favor of the exemption.
- R (23) The draft Rule 6.02E has been omitted at this time. The Department will continue to explore the merits of conditional exemptions for airport clearing similar to those adopted in nearby states and will attempt to address concerns raised by commenters.
- C (24) Another state agency suggested that the ‘exemption after approval’ approach proposed for clearing and cutting at airports also be extended to other entities in similar circumstances.

- R (24) The situations raised by the commenter do not parallel the situation at airports with respect to safety, which prompted the proposed Rule 6.02 E.
- C (25) Referring to the new exemption (Rule 6.02 L) for invasive species control projects, would multiple approvals of the water quality/wetland restoration team be required for those projects that required multiple treatments?
- R (25) It may be possible to present a plan to the Team that spans multiple years of treatment.
- C (26) The commenter requested that Rule 6.03 (D) be revised to allow some type of programmatic approval for cleaning areas subject to storm flowage.
- R (26) The Department will consider this in the future.
- C (27) A commenter suggested that, for the sake of clarity, Rule 6.03 (G) read “docks and/or footbridges...”
- R (27) The Department does not agree that addition of the term “and/or” provides clarity in this context.
- C (28) Rule 6.03 I should be reworded to allow for construction equipment placement within previously disturbed areas.
- R (28) Because of the potential for harm, the Department does not agree about routinely allowing placement of equipment in jurisdictional areas regardless of condition (under this exemption).
- C (29) Technical revisions were suggested to Rules 6.03 1, 2, and 5 and Rule 6.14 regarding clearing limits, withdrawal limits, etc.
- R (29) The reviewer raised good points but they were considered beyond the scope of this rule change. The suggestions will be revisited in a future rule development phase.
- C (30) It was suggested that Rules 6.05 and 6.06 should refer only to the FEMA 100-year floodplain that can be determined by a building official, versus the 100-year floodplain associated with all watercourses, one reason being the expense of hiring a professional to calculate flood elevations in order to undertake otherwise exempt activities.
- R (30) The comment about the expense is noted; however, loss of non-FEMA mapped floodplains can also cause harm, and the Department is not aware that this floodplain requirement has caused noticeable problems in the ~10 years that it has been in place. The definition of floodplain is applied consistently throughout the rules, and any deviation would essentially redefine floodplain for the purpose of the exemptions only, which is not desirable.
- C (31) A commenter suggested a section relating to *accessory structures* on public properties (Rules 6.05 and 6.06).
- R (31) Addition of an accessory structures’ exemption for public properties is difficult due to the widely different purposes and uses of public property. The Department will consider this in the future.

- C (32) According to Rule 6.05 a property owner could add multiple accessories, all as exempt activities, and create up to 2400 square feet of additional impervious surface. The Rule does not specify a 600 square foot limit.
- R (32) The Department recognizes that Rule 6.05 is not limiting with respect to the number of different accessory structures that may be constructed. However, the Department feels that it is not likely that multiple accessory structures will be built on most lots. In those instances where multiple structures are desired by the homeowner, provided the size and separation to wetlands requirements are met, along with other standard conditions, the Department still believes that the changes should be exempted in light of the proximity to the existing activities and scope of existing alteration.
- C (33) Is it the intent to allow an exemption for planting projects (Rule 6.18) only in a perimeter wetland or a riverbank wetland?
- R (33) Yes. In response to this and other comments received about this exemption, minor language revisions were made to clarify the exemption.

Rule 7.00 – General Application Requirements

- C (34) A commenter advised making application forms available on the website.
- R (34) Wetland application forms have been available on the DEM website for many years and continue to be available. The new forms may be downloaded, filled in electronically, and printed.
- C (35) The comment was made that site plans should be developed at larger scales to enable the showing of physical features adequately (1 inch = 10 or 25 feet was suggested).
- R (35) Site plan details at the suggested scales are provided to the Department when necessary. Field visits by DEM staff also allow physical features to be viewed.
- C (36) Rule 7.03 B (3) should not limit signatory authority to CEOs or limit other agency Director's from delegating signatory authority.
- R (36) The Rule is not intended to change current practice. It does not disallow delegation of signatory authority or change current practice for other agencies.
- C (37) The representation of parcel boundaries, dimensions, and features on site plans, as well as identification of survey class (Rules 7.03 I (4) and 7.03J) are the jurisdiction of the professional land surveyor and as such any design mapping must be stamped by a surveyor.
- R (37) The requirements regarding professionals, including professional land surveyors are contained in Rule 7.06 A.
- C (38) The requirement in wetland Rules 7.03 M and 7.06 C (I) of requiring that registered professional engineers stamp all site plans submitted for an Application to Alter (in addition to the stamps of a professional surveyor or landscape architect where required) contradicts statutes governing design professionals.

- R (38) Section 2-1-22 of RI General Law requires that applications involving a significant alteration to wetlands include “the plans and drawings to be prepared by the registered professional engineer to a scale of not less than one inch (1”) to one hundred feet (100’).”
- C (39) The comment was made that water-related characteristics are not included in Rule 7.03 J.
R (39) “Wetland edges” have been added to this rule.
- C (40) Per Rule 7.04 A (2) will it no longer be acceptable to delineate the centerline of an ASSF?
- R (40) The rule does not change the previous practice although it is important to note that while flagging the centerline of an ASSF is acceptable for general location purposes, it does not identify jurisdictional limits.
- C (41) Regarding Rule 7.04 B (3), a comment was made that stating that a wetland has a well defined edge is misleading and that prior edge manipulations should not be implied to mean that this is natural.
- R (41) DEM does not accept wetland edges that have been altered illegally as natural edges. It was important for us to include this rule in order to clarify for applicants when wetland edges must be flagged in the field and when not. Wetland edges are still required to be depicted on plans even if they are not flagged in the field.
- C (42) Eliminating the requirement for flagging various hydrologic features (Rule 7.04 B (4)) does not seem consistent or protective.
- R (42) The hydrologic features are required to be depicted on site plans. This rule stipulates that they are not required to be flagged in the field. Their location is determined by field surveying or other means, and they are accurately depicted on the site plans and evaluated. The plans serve as the long-term record of the field conditions at time of the filing of the application.
- C (43) Reviewers commented that DEM should provide specifications or require applicants to provide specifications of GPS grade used (especially because of limitations under tree canopy). Another commenter questioned why the rules address GPS technology as a method to locate wetland edges at all, and that the methodologies should be left to the design professionals.
- R (43) The Department felt a need to address the use of GPS technology with respect to wetland edges based on our experience on applications where its use resulted in grossly flawed edge representations. Since this is an evolving technology, the Department does not wish to establish a separate standard at this time. The rule now requires disclosure of use of GPS technology, which allows DEM to better track overall acceptability of the plan through its usual field inspection practices.
- C (44) The rules refer to guidance for the use of wetland and wildlife professionals. They do not explicitly define required qualifications for wetland scientists (Rule 7.06 D). A commenter suggested that projects of a certain threshold should require that wetland professionals with minimum credentials should be required and that national organizations could be relied upon for certification.

- R (44) The Department's guidance documents for professionals are explicit enough to capture most general circumstances as to when a wetland professional is needed to identify and flag wetlands and to evaluate impacts. Depending on the wetland types and the specifics of a proposed project, an applicant may be required to obtain other scientific experts in addition to the wetland professional, such as a fishery biologist, an aquatic ecologist, etc. The rules are not limiting in this regard.
- C (45) A commenter encouraged a holistic approach with respect to permitting ISDS and wetlands in sensitive areas.
- R (45) The Department included Rule 7.07 C that provides for concurrent submission of wetland and ISDS applications to the Department.
- C (46) Rule 7.08 seems to limit the Department with respect to how it discovers or learns about unauthorized alterations that may trigger the Department suspending the application.
- R (46) Rule 7.08 is the same as the current rule, and it is clear regarding when the Department can suspend an application. It is not enough that an unauthorized alteration be alleged.
- C (47) Regarding ease of access to Department approved site plans, a commenter suggested that the Department scan the plans to facilitate their being available electronically. The Department could charge an applicant a nominal fee.
- R (47) Scanning approved site plans would facilitate information sharing and is an objective the Department wishes to pursue. However, the Department does not presently have the equipment required for this effort.
- C (48) A commenter suggested that the Department develop a GIS database of all land parcels in RI to facilitate tracking of Department actions and to allow for links to site plans, decisions, etc.
- R (48) The cities and towns create and maintain information on land parcels within their municipal jurisdictions. Not all are in electronic format and only a portion of the communities openly share parcel data in such format... Wetland and other permits are tied to municipal plat and lot numbers, which facilitates tracking and location of files, etc. While the Department is developing a data management system to link all actions on a property, it is unlikely to duplicate the functions that are properly the purview of local governments, but will continue to coordinate with local governments as such information databases become available.

Rule 9.00 – Request for Preliminary Determination

- C (49) Commenters stated that Rule 9.02 (F) regarding water quality certificates differs from the current rule, could be confusing with respect to triggers and requirements for certifications, and could possibly weaken the current rules.
- R (49) The Department agrees that the draft Rule 9.02 (F) was not correct, and it has since been corrected. The Rule now states that applicants must comply with the water quality regulations and standards. A similar rule has been added to Rule 10.00.

C (50) One reviewer/agency provided numerous comments and questions on Rules 9.03 B/C.

R (50) This rule is largely unchanged from the rule it is derived from. The comments will be considered in the future.

C (51) A commenter asked about mechanisms for notifying interested parties about permit decisions and rationale. Also, is there opportunity for parties to comment on appeals?

R (51) The wetland applications and decisions can be tracked on the RI.gov website and all files are available for public review. RI watershed organizations are notified via letter of Application to Alter decisions within their watershed. A party must be given intervenor status to comment on appeals.

C (52) One agency repeated that the permit term conditions are restrictive and suggested that permit renewals be available for the life of public projects.

R (52) The Department does not support limitless renewals for projects, including public projects, that are significantly delayed after permits are issued and do not begin construction during a reasonable period (i.e beyond six years). There are changes that may occur over time that necessitate that a project and site be reassessed with respect to these Rules. In such cases, the Department will ordinarily tailor its review to focus on changed conditions and any new rule or standards that may have been adopted since the original project was permitted, so as to minimize unnecessary or repetitive work.

Rule 10.00 - Application to Alter A Freshwater Wetland

C (53) RIDOT does not have ability to provide certified copies of deeds for rights of way as specified in Rule 10.02 B (4).

R (53) There will be no change in current practice in response to this rule. The Department maintains a flexible policy where state ownership is self-evident and Rights-of-way deeds do not exist.

C (54) Most of the review criteria in Rule 10.05 C are incredibly subjective and applicants may feel frustrated by this without a definition for “significant reduction.” The commenter suggested development of some long-term landscape goals to guide success or failure of the regulations.

R (54) The review criteria have been thoroughly vetted through the public review process and have been used with success for 13 years. We are not aware of specific criteria that would improve upon those in current use.

C (55) Not all permittees are required to record permit letters in the land evidence records.

R (55) Rules 10.07 D and J have been reworded to say, “where required” the permit letter shall be recorded.

Rule 11.00 – Other Application Types

C (56) The Rules need to provide for unforeseen conditions or circumstances that arise during construction of a permitted project, and permittees need to seek and obtain a permit

modification readily. The commenter advised that the Army Corps of Engineers, New England Division have such a process that is effective and could be modeled.

- R (56) The Department acknowledges the comment and agrees that a more timely modification approval mechanism may have merit in some cases. However, the Department could not research it and develop a new process within the timeline for completion of these Rules. The Department will continue to further investigate the potential for adopting a Corps-type modification procedure.

General comments

- C (57) Cumulative impacts to wetlands are important to prevent, and the state does not have clear methodology identified.
- R (57) The issues associated with cumulative impacts to wetlands are technically complex and challenging. The Department agrees that the matter deserves serious consideration and further policy development. To that end, the Department is embarking on a research task to identify if and how other agencies may assess cumulative impacts to wetlands.
- C (58) The Department must make a stronger effort to identify and curtail unauthorized alterations independent of the complaint system.
- R (58) The Department has identified several program areas needing improvement such as identification of unauthorized alterations, including those that may be associated with permitted projects. The Department has embarked on a research project to investigate the long-term effectiveness of permits over time specifically looking at the extent of any unauthorized alterations associated with permitted projects and compliance with permit conditions. The Department will continue to seek these and other avenues to improve compliance with the Wetlands Regulations and the overall mandate in statute, including augmenting resources to support or assist in these efforts.