
MEMORANDUM

TO: Attorney Quarles
FROM: Keelan Forey
DATE: August 13, 2019
SUBJECT: HB 645-FN

Introduction:

This memorandum investigates the impact of proposed House Bill 645-FN on the process to obtain a permit—if necessary—to construct, replace, or repair a permanent dock, seasonal dock, or existing legal dock.

Background:

Under the present version of RSA 482-A:3, any person planning to install or construct a *new dock* within or on the banks of surface waters of New Hampshire must obtain a wetlands permit prior to installation or construction. An *existing legal dock* is a dock that was constructed after obtaining a Department of Environmental Services' (DES) permit or a dock that existed prior to DES's requirement to obtain a permit, meaning the dock was "grandfathered" in as an *existing legal dock*. The grandfathered status also requires that the dock has been continuously maintained with no change to its location, size, and configuration, and has not been abandoned. The permit requirement was established in 1967 for docks adjacent to tidal waters; 1969 for permanent docks in freshwater; and 1978 for seasonal docks in freshwater.

Conclusion:

The crux of the proposed amendments to RSA 482-A:3, A:1, and A:12 are a dock registration requirement. The confusion lies in the permitting exemption for the repair and replacement of legally existing docks under the proposed language in RSA 482-A:3. To qualify for the exemption, the dock must be registered. The proposed amendment states that the registration is voluntarily. Nonetheless, this voluntarily registration becomes a requirement if a dock owner wants to repair or replace his or her existing dock without a permit. The details of the registration procedure are not developed in the proposed amendment; however, the commissioner is given authority under proposed amendment RSA 482:A1 to develop administrative rules related to the registration process.

There are several issues present in the proposed language of RSA 482-A:3. First, throughout the proposed amendment the words “repair” and “replace” are used together at times, but often only the word “repair” is used. Therefore, it is unclear if certain requirements are necessary for a repair only, a replacement only, or either a repair or replacement. In order for a dock owner to understand how to qualify for an exemption under the proposed amendment, the requirements for a repair should be outlined under one section and the requirements for a replacement should be outlined under another section. If the requirements are the same for both repair and replacement, then both words should be used consistently throughout the proposed amendment, i.e., to replace or repair a legally existing dock one must provide the tax map.

Secondly, the concept of “replacing” a legally existing dock is unclear. According to the proposed amendment, a dock owner would not need to obtain a permit to replace his or her existing dock if the dock was registered and qualified under the specific requirement of the statute.

However, the amendment language suggests a bypass to the new dock construction permit requirement. Essentially, as long as a new dock was replacing an existing dock, was registered, and complied with the other requirements of the proposed amendment, the dock owner would be exempt from obtaining a permit. If the amendment drafters intended for the word “replacement” to only incorporate small-scale or repair-like replacements—and not an entire dock replacement—the word “replacement” should be defined appropriately in RSA 482-A:2¹. The proposed amendment would make it so that the entire permitting process for new dock construction outlined in RSA 482-A:3 (and not eliminated in the proposed amendment) would only be applicable to a new dock on property where a dock had not previously existed, a new dock in an entirely different place than a previously existing dock, or a new dock replacing an existing dock where the size, location, and configuration of the new dock is different than the existing.

The proposed amendment to RSA 482-A:3 still grants a seasonal dock permitting exception, but does add a few additional requirements to qualify as a seasonal dock. The amendment also drops the word “temporary” that is used in the existing law. Dropping “temporary” makes sense as it is duplicative to write “temporary seasonal dock” because the qualifications for a seasonal dock include that the dock be removed from water for at least five months of the year.

Legal support:

I. Obtaining a permit, if necessary, under the existing law

A. Permanent Dock/Existing Legal Dock

¹ RSA 482-A:2 Definitions

To construct a *new dock* or change an *existing legal dock* in size, location, or configuration one must obtain a permit from DES. Under RSA 482-A:3, in order to obtain the permit from DES, a person must submit:

- 1) A complete application form signed by the town or city clerk of the municipality in which the property is located (or by each city or town clerk if located in more than one municipality) certifying that municipality has received four copies of the required forms and attachments;
- 2) The information required by rules adopted by the commissioner pursuant to RSA 482-A:11²; and
- 3) A nonrefundable application fee.

At the time the person files the application with DES, he or she shall provide written notice of the proposed project to:

- 1) All abutters via certified mail or delivery that provides proof of receipt³; and
- 2) The local river management advisory committee if the project is within a river corridor or segment via certified mail or delivery that provides proof of receipt.

B. Seasonal Dock

Under RSA 482-A:3, IV-a, temporary *seasonal docks* are exempt from the permitting requirements of RSA 482-A:3, provided that a notification⁴ is sent to DES by the owner of the property that includes the name and address of the property owner, the municipality, the waterbody, and tax map and lot number on which the proposed dock will be located. To qualify as a temporary seasonal dock, the dock shall be:

- 1) The only docking structure on the frontage;
- 2) Constructed to be removed during non-boating season;
- 3) Removed from the lake bed for a minimum of five months per year;
- 4) Configured to be narrow, rectangular, and erected perpendicular to the shoreline;
- 5) No more than six feet wide and forty feet long if the water body is 1,000 acres or larger, or no more than 30 feet long if the water body is less than 1,000 acres;

² Under administrative rule Env-Wt 303.03 and 303.04 a dock is either a minor project or minimum impact project, thus additional information must be provided to DES according to Env-Wt 302.03 and 302.04.

³ Receipts should be retained in order to provide copies to DES upon request.

⁴ See https://www.des.nh.gov/organization/commissioner/pip/forms/wetlands/documents/seasonal_dock.pdf

- 6) Located on a parcel of land that has 75 feet or more of shoreline frontage;
- 7) Located at least 20 feet from an abutting property line or the imaginary extension of the property line over the water;
- 8) Installed in a manner which requires no modification, regrading, or recontouring of the shoreline, such as installation of a concrete pad for construction of a hinged dock;
- 9) Installed in a manner which complies with RSA 483-B⁵; and
- 10) Installed in a location that is not in, or adjacent to, an area that has been designated as a prime wetland.

II. Obtaining a permit, if necessary, under the proposed law

A. Permanent Dock/Existing Legal Dock

The proposed amendments to RSA 482-A:3 do not change the permit requirement to construct a *new dock*. The proposed amendments require additional documentation for a seasonal dock exemption from permitting, and exempt the repair or replacement of an *existing legal dock* from permitting pending certain qualifications are met. Based on the statutory language it is unclear if “replacing” an *existing legal dock* is the same as constructing a *new dock* thus prompting the requirement for a permit. The proposed use of the word “replace” is extremely unclear because it could mean the replacement of a portion of the dock or the dock in its entirety. The way the proposed amendment is currently written suggests that someone would not need to obtain a permit to replace his or her entire dock with a new dock (that would likely need to be constructed), so long as it satisfied the other requirements.

a. Proposed Amendment: RSA 482-A:3, I

Under the proposed amendment to RSA 482-A:3, I, an owner may choose to voluntarily register an *existing legal dock*. The proposed language indicates that an owner is not required to register an existing legal dock with DES. If, however, the owner chooses to register the dock with DES, he or she must submit a nonrefundable fee of \$200. This section does not elaborate on the purpose or benefit of registering the dock with DES.

b. Proposed Amendment: RSA 482-A:3, IV

Under the proposed amendment to RSA 482-A:3, IV, the repair or replacement of an *existing legal dock* in non-tidal water shall be exempt from permitting requirements, provided that the dock has a valid registration filed with

⁵ Shoreland Water Quality Protection Act

DES by the owner of the property in accordance with RSA 482:11, XI⁶. The registration would include the name and address of the property owner, the municipality, the waterbody, the tax map and lot number on which the proposed dock⁷ will be located, photographs of all existing structures constructed or installed in the waterbody, and plans of the waterfront and structures to be repaired⁸ showing that the requirements of this paragraph will be met.

The proposed amendment also requires the owner of the dock to provide evidence that the dock to be repaired⁹ has been:

- 1) Constructed and maintained in compliance with a permit issued under RSA 482-A or its preceding statutes or maintained in their current size, location, and configuration since January 1, 2000¹⁰;
- 2) Not constructed to make land in public waters;
- 3) Not subject to RSA 482-A:26¹¹; and
- 4) Not the subject of a department administrative order, consent decree, or court order that limits any aspect of the construction or use of the dock¹².

The proposed amendment also states that the registrations for the repair or replacement of an *existing legal dock* shall be effective on the date issued and are valid for five years or until ownership of the property changes, whichever occurs first. Within ten days of receipt of a registration filing, DES shall issue a written notice to the owner stating that the registration has either been accepted and issued a registration number, or rejected. If DES does not respond within the 10-day period, the property owner or agent may submit a written request for a response. If DES fails to respond to the written request within an additional five days, the owner or agent shall be deemed to have submitted a complete and qualifying registration and may proceed with repair or replacement of the *existing legal dock* as presented in the registration filing. The authorization shall not relieve the applicant of complying with all requirements applicable to the project, including but not limited to any other requirements of RSA 482-A and the

⁶ RSA 482-A:11, XI, is itself a proposed amendment granting the commissioner authority to adopt rules to establish registration forms, a renewal process, the display of registration numbers, the registration process for the installation of seasonal docking structures and the repair or replacement of legally existing docking structures.

⁷ It is unclear what "proposed" dock means here, but one can only assume that this refers to the replacement of a legally existing dock. If so, it should also include language to incorporate the existing dock because repairs are also permissible under the earlier language.

⁸ This should likely also say "or replaced."

⁹ The language here suggests that this section only applies to existing legal docks that are to be repaired, and not replaced. Thus, the words "or replaced" should be added.

¹⁰ Footnote for TQ

¹¹ RSA 482-A:26 Dwellings Over Water

¹² Footnote for TQ

requirements of RSA 485-A relative to water quality¹³. Finally, docks registered and maintained in accordance with this section “shall be considered to be in compliance” with RSA 482-A.

B. Seasonal Dock

a. Proposed Amendment: RSA 482-A:3, IV

Under the proposed amendment to RSA 482-A:3, IV, *seasonal docks* are still exempt from the permitting requirements of RSA 482-A:3, just as they are under the existing law. The proposed amendment also still requires that to be exempt the owner must provide notification¹⁴ to DES and includes the name and address of the owner, the municipality, the waterbody, and tax map and lot number on which the proposed dock will be located. The proposed amendment requires some additional documentation that was not required under the existing law including a copy of the deed for the property on which the dock is to be installed and plans of the waterfront and structure to be installed showing that the requirements of this paragraph will be met.

The proposed amendment also makes slight changes to the qualifications as a *seasonal dock*.

To qualify as a *seasonal dock*, the dock shall be:

- 1) The only docking structure on the frontage;
- 2) Constructed to be removed during the non-boating season;
- 3) Removed from the lake bed for a minimum of 5 months of each year;
- 4) Configured to be narrow, rectangular, and erected perpendicular to the shoreline of a lake or pond or parallel to the bank of a river¹⁵;
- 5) No more than 6 feet wide and no more than 40 feet long if the water body is 1,000 acres or larger, or no more than 30 feet long if the water body is a river¹⁶ or less than 1,000 acres in size;
- 6) Located on a parcel of land that has 75 feet or more of shoreline frontage;

¹³ RSA 485-A:8 classifies surface waters into two categories: Class A and Class B. Each class has specific standards of water quality that must be achieved and cannot have sewage or waste discharged into the waters. Under RSA 485-A:11, all lakes and ponds defined as public waters must be classified as not less than Class B for standards of surface waters of the state.

¹⁴ See https://www.des.nh.gov/organization/commissioner/pip/forms/wetlands/documents/seasonal_dock.pdf

¹⁵ This proposed requirement changes what was previously required for rivers (previously “[c]onfigured to be narrow, rectangular, and erected perpendicular to the shoreline”).

¹⁶ The proposed language adds the river specification.

- 7) Located at least 20 feet from an abutting property line or the imaginary extension of the property line over the water;
- 8) Installed in a manner which requires no modification, regrading, or recontouring of the shoreline, such as installation of a concrete pad for construction of a hinged dock;
- 9) Installed in a manner which complies with RSA 483-B; and
- 10) Installed in a location that is not in, or adjacent to, an area that has been designated as a prime wetland in accordance with RSA 482-A:15.

C. All Docks

a. Proposed Amendment: RSA 482-A:1

The proposed amendment to RSA 482-A:11, adds an administrative provisions section stating that the commissioner has authority to adopt rules establishing registration forms, the registration renewal process, and the display of registration numbers; and the registration process for the installation of a *seasonal dock* and the repair or replacement of an *existing legal dock*.

b. Proposed Amendment: RSA 482-A:12

The proposed amendment to RSA 482-A:12 adds the requirement that any registration number issued by DES must be “prominently display on the lakeward face” of the dock.

KBF:

cc: CCNameList