

REGULATIONS GOVERNING EARTH EXCAVATIONS

SECTION I: AUTHORITY

Chapter 155-E of the New Hampshire Revised Statutes Annotated stipulates that, with some exceptions, all earth excavations in the State are subject to regulation from the local municipality in which the operation occurs. Pursuant to the authority vested in the Planning Board by the voters of the Town of Bennington and RSA 155-E, the Planning Board adopts the following regulations to govern the excavation of earth materials in the Town of Bennington.

SECTION II: PURPOSE AND SCOPE

The goals of this regulation are: to provide for reasonable opportunities for excavation; to minimize safety hazards which can be created by open excavations; to ensure that the public health and welfare will be safeguarded; to protect natural resources and the environment; and to maintain the aesthetic features of the Town. For the purpose of achieving these goals, no earth materials in the Town shall be removed except in conformance with these regulations.

SECTION III: DEFINITIONS

- A. **Abutter** means: (1) any person whose property is located in New Hampshire and adjoins or is directly across the street or stream from the land under consideration. (2) For the purposes of receiving testimony only, and not for purposes of notification, the term “abutter” shall include any person who is able to demonstrate that his land will be directly affected by the proposal under consideration. (3) For the purposes of notification and receiving testimony, abutter means all affected towns and the regional planning commission(s) in the case of a development having regional impact, as determined by the Board. (4) In the case of an abutting property being under a condominium or other collective form of ownership, the term “abutter” means the officers of the collective or association, as defined in RSA 356-B: 3, XXIII.B.
- B. **Applicant** means the owner of the property to be excavated or the owner’s agent, so designated in writing as part of the excavation application.
- C. **Board** means the Planning Board of Bennington.
- D. **Contiguous** means land whose perimeter can be circumscribed without interruption in common ownership except for roads or other easements, in a single town, except in the case of stationary manufacturing plants, whose perimeter cannot be defined by town boundaries.
- E. **Dimension Stone** means rock that is cut, shaped or selected for use in blocks, slabs, sheets, or other construction units of specified shapes or sizes and is used for external or interior parts of buildings, foundations, curbing, paving, flagging, bridges, revetments, or for other architectural or engineering purposes. Dimension stone includes quarry blocks from which sections of dimension stone are to be produced. Dimension stone does not include earth as defined below.
- F. **Earth** means sand, gravel, rock, soil or construction aggregate produced by quarrying, crushing or any other mining activity or such other naturally-occurring unconsolidated materials that normally mask the bedrock.

- G. **Excavation** means a land area which is used, or has been used, for the commercial taking of earth, including all slopes.
- H. **Excavation Area** means the area within an excavation site where excavation has occurred or is eligible to occur under the provision of RSA 155-E.
- I. **Excavation Site** means any area of contiguous land in common ownership upon which excavation takes place.
- J. **Existing Excavation** means any excavation which lawfully existed as of August 24, 1979, from which earth material of sufficient weight or volume to be commercially useful has been removed during the 2-year period before August 24, 1979.
- K. **Expansion:**
 - 1) of **existing excavations** means excavation beyond the limits of the Town and the area which on 8/24/79 had been contiguous to and in common ownership with the excavation site and has been appraised and inventoried for tax purposes as part of the same tract as the excavation site.
 - 2) of **stationary manufacturing plants** means to any contiguous land which were in common ownership with the site of the plant on 8/4/89.
- L. **Express Standards** means those operational and reclamation standards as outlined in this regulation.
- M. **Minimum Standards** means that the operational and reclamation standards outlined in this regulation are considered to be the minimum standards applied to any excavation that requires a permit.
- N. **Reclamation** means the restoring of an excavation site to a standard at least equal to those outlined in Section X of these regulations
- O. **Stationary Manufacturing and/or Processing Plants** means facilities which are permanently placed on a site for the purposes of sorting, washing, screening, crushing, classifying, drying or processing excavated earth materials.

SECTION IV: PROJECTS REQUIRING A PERMIT

- A. Those that commenced operations since August 24, 1979 without first obtaining a permit, unless specifically exempted by Section V below.
- B. Any excavation proposing to begin operation after the effective date of these regulations.
- C. Those that have lawfully operated prior to August 24, 1979 and wish to expand the excavation area beyond the limits of the town in which it is situated and the area which on August 24, 1979 and at all times subsequent thereto has been contiguous to and in common ownership with the excavation site of that date and has been appraised and inventoried for property tax purposes as part of the same tract as the excavation site as of that date.

- D. Those excavations from an area which on August 4, 1989 was contiguous to or was contiguous land in common ownership with stationary manufacturing and processing plants which were in operation as of August 24, 1979 and wish to expand to any non-contiguous lands.

SECTION V: PROJECTS EXEMPT FROM A PERMIT

- A. The following projects do not require a permit, but are nevertheless subject to Sections IX, X and XI of these regulations. In the event of a question regarding compliance, the Board may require the owner/operator to come before the Board and submit such information as may be necessary to demonstrate compliance with said standards.
 - 1. Excavations which lawfully existed as of August 24, 1979 from which earth material of sufficient weight or volume to be commercially useful has been removed during the 2-year period before August 24,1979, subject to the following:
 - a. Such an excavation shall be exempt from local zoning or other ordinances regulating the location of the excavation site, provided that at the time operation began it was in compliance with any local ordinances that may have been in effect.
 - b. The owner operator of such an excavation area shall have filed an excavation report per RSA 155-E:I(d) with the Board no later than August 4, 1991. Any existing excavation that failed to file this report shall no longer be considered to be grandfathered and must obtain a permit from the Board before continuing excavation of the site.
- B. The following projects do not require a permit, but are nevertheless subject to Sections IX, X, and XI of these regulations. Compliance with these standards is mandatory in order to retain the non-permit status. Loss of such non-permit status can occur only after the Board has given written notice that the excavation is not in compliance and the owner has failed to bring it into compliance within 30 days of receipt of such notice, as per RSA 155-E:2,III(a).
 - 1. Excavation from a site which on August 4, 1989 was contiguous to or was contiguous land in common ownership with stationary manufacturing and processing plants which were in operation as of August 24, 1979 and which use earth obtained from such excavation site.
 - 2. Excavation from a site which on August 4, 1989 was contiguous to or contiguous land in common ownership with stationary manufacturing and processing plants for which local or state permits have been granted since August 24, 1979 and before August 4, 1989, which used earth obtained from such site. The operation and reclamation of such excavations shall continue to be regulated by such permits and any renewals or extensions thereof by the permitting authority or authorities.
 - 3. An excavation performed exclusively for the lawful construction, reconstruction, or maintenance of a Class I, II, III, IV, or V highway. A copy of the pit agreement executed between the pit owner and the governmental unit shall be filed with the Board; in addition, the provisions of Section VII of this regulation are to be complied with. Exemptions from local zoning or other regulations are provided for in RSA 155-E:II,IV(c).

- C. The following projects are exempt from a permit and are not subject to regulation by the Board.
1. Excavation that is exclusively incidental to the lawful construction or alteration of a building or structure, a parking lot or way including a driveway on a portion of the premises where removal occurs. This excavation cannot be started, however, until any required state and local permits have been issued.
 2. Excavation that is incidental to agricultural or silvicultural activities, normal landscaping or minor topographical adjustment. In the event of questions, the Board shall determine what is incidental.
 3. Excavation from a granite quarry for the purpose of producing dimension stone, if such excavation requires a permit under RSA 12-E (Mining and Reclamation).
 4. A person owning land abutting a site which was taken by eminent domain or by any other governmental taking upon which construction is taking place may stockpile earth taken from the construction site and may remove the earth at a later date after written notification to the Board.

SECTION VI: ABANDONED EXCAVATIONS

The following provisions do not apply to excavations connected with stationary manufacturing and processing plants:

- A. Any excavation for which the affected area has not been brought into complete compliance with the reclamation standards of this regulation shall be considered abandoned if:
1. No earth material of sufficient weight or volume to be commercially useful has been removed from that site during any 2-year period either before, on, or after August 4, 1989. The owner or operator may extend this time period if, prior to the end of the time period, the Board approves a reclamation timetable, and a bond or other surety is posted in a form and amount prescribed by the Board sufficient to cover the costs of reclaiming the entire site.
 2. The excavation is in use, but either has not, as of August 4, 1992, been brought into compliance with the incremental reclamation standards of the regulation, or a bond has not been posted and a reclamation timetable has not been approved by the Board.
 3. The owner or operator of the excavation has neither secured a permit pursuant to these regulations nor filed an excavation report with the Planning Board within the prescribed period.
- B. In the event the Board determines that any abandoned excavation presents a hazard to the public health, safety or welfare, the owner may be required, following a public hearing, to comply with the timetable and bonding requirements outlined above, or to complete reclamation within a reasonable period of time. Should reclamation not be completed, the Board may request the Town to authorize reclamation at the Town's expense. The Town's costs shall constitute an assessment against the owner, and shall create a lien against the property. Such assessment and lien may be enforced and collected in the same manner as provided for real estate taxes.

- C. The provision of Paragraph B above also apply to any excavation which ceased commercially-useful operation prior to August 24, 1977, but for which the affected area has not been brought into compliance with the reclamations standards, if the Board determines in writing that a danger to public health or safety exists.

SECTION VII: PROHIBITED PROJECTS

- A. For excavations within 50 feet of the boundary of a disapproving abutter or within 10 feet of an approving abutter unless approval is requested by said abutter.
- B. Where existing visual barriers would be removed, except to provide access to the excavation.
- C. Where the issuance of the permit would be unduly hazardous or injurious to the public welfare. The Board shall give particular consideration to such factors as noise, traffic, dust, fumes, or danger from operation.
- D. Where the excavation would substantially damage a known aquifer, as designated by the United States Geological Survey.
- E. When the excavation cannot receive necessary land use permits from state or federal agencies.
- F. Where the excavation is not permitted by zoning or other applicable ordinances, provided, however, that reasonable opportunities for excavation exist in town, as described in RSA 155-E:4,III.
- G. Where the project cannot comply with the requirements of Sections IX, X, and XI of these regulations.

SECTION VIII: CRITERIA FOR NON-CONFORMING EXPANSIONS

Expansion of existing excavations located in an area in which excavations are no longer permitted by local zoning in effect on August 4, 1989 may be restricted or modified with conditions by the Board if after notice to the owner and a public hearing, the Board finds that the expansion will have a substantially different and adverse impact on the neighborhood. Any potential impacts will be determined by the Board during a duly-noticed public hearing. Impacts will vary depending upon the particular neighborhood, nevertheless, the following criteria will be taken into consideration.

- The excavation will not cause a diminution in area property values or unreasonably change the character of the neighborhood.
- The excavation will not create any nuisance or create health or safety hazards.
- The excavation will not unreasonably accelerate the deterioration of highways or create safety hazards in the use thereof.

SECTION IX: MINIMUM AND EXPRESS OPERATIONAL STANDARDS

For excavations not requiring a permit, the following express standards apply. For those excavations requiring a permit, these standards as considered to be the minimum; more stringent standards such as are consistent with the purpose of these regulations may be applied, as deemed necessary by the Board.

- A. No excavation shall be permitted closer than 150 feet to an existing dwelling or to a site for which a building permit has been issued at the time the excavation permit is granted.
- B. No excavation shall be permitted below road level within 50 feet of the right-of-way of any public highway as defined in RSA 229:1 unless such excavation is for the purpose of said highway.
- C. Vegetation shall be maintained or provided within the peripheral areas of paragraphs A and B of this section.
- D. No fuels, lubricants or other toxic or polluting chemicals shall be stored on-site unless in compliance with State laws or rules pertaining to the storage of such materials.
- E. Where temporary slopes will exceed a 1:1 grade, a fence or other suitable barricade shall be erected to warn of danger and/or to limit access to the site.
- F. Appropriate drainage shall be provided to prevent the accumulation of freestanding water for prolonged periods. Excavation practices which result in continued siltation of surface waters or any degradation of water quality of any public or private water supplies are prohibited.
- G. No excavation shall be permitted within 75 feet of any great pond, navigable river, or any other standing body of water 10 acres or more in area, or within 25 feet of any other stream, river or brook which normally flows throughout the year, or any naturally-occurring standing body of water less than 10 acres, prime wetland as designated in accordance with RSA 482-A:15,I or any other wetland greater than 5 acres in area as defined by the Wetlands Board.

SECTION X: MINIMUM AND EXPRESS SITE RECLAMATION STANDARDS

For excavations not requiring a permit, the following express standards apply. For excavations requiring a permit, these standards are considered to be the minimum; more stringent standards such as are consistent with the purpose of these regulations may be applied, as deemed necessary by the Board. Within 12 months following the expiration date of a permit issued under these regulations, or the completion of any excavation, whichever occurs first, the excavated area shall be reclaimed in accordance with the following standards:

- A. Areas visible from a public way, from which trees have been removed, shall be replanted with tree seedlings, set out in accordance with acceptable horticultural practices.
- B. Except for exposed rock ledge, all disturbed areas shall be spread with topsoil or any other soil capable of maintaining vegetation, and shall be planted with seedlings or grass suitable to prevent erosion.
- C. All earth and vegetative debris resulting from the excavation shall be removed or otherwise lawfully disposed of.

- D. All slopes, except for exposed ledge, shall be graded to natural repose for the type of soil of which they are composed so as to control erosion or at a ratio of horizontal to vertical proposed by the owner and approved by the Board. Changes of slope shall not be abrupt, but shall blend with the surrounding terrain.
- E. Any standing bodies of water created by the excavation that are judged to constitute a hazard to health and safety shall be eliminated.
- F. The topography of the land shall be left so that water draining from the site leaves the property at the original, natural drainage points and in the natural proportions of flow.
- G. For excavation projects requiring a permit from the Division of Water Supply and Pollution Control, the provisions of RSA 485-A: 17 shall supersede this regulation. Copies of all such permits shall be filed with the Board.

SECTION XI INCREMENTAL RECLAMATION

Except for excavation sites of operating stationary manufacturing plants, any excavated area of 5 contiguous acres or more which is depleted of commercial earth materials, excluding bedrock, or any excavation from which earth materials of sufficient weight or volume to be commercially useful have not been removed for a 2-year period, shall be reclaimed in accordance with Section X of these regulations within 12 months following such depletion or non-use, regardless of whether other excavation is occurring on adjacent land in contiguous ownership. A reclamation plan, including a reclamation timetable for the depleted areas within the reclamation site, shall be submitted to the Board for approval.

SECTION XII: PERFORMANCE GUARANTEE

Prior to the granting of any permit, or to the removal of topsoil or other overburden material from a new area within an existing excavation site, the applicant shall submit to the Selectmen a bond with sufficient surety, as determined by the Board, to guarantee reclamation of the area and compliance with the permit. Off-site improvements for potential damage of Town roads or facilities caused by the transportation of earth materials shall be discussed at this stage.

The surety may be in the form of a performance bond, cash or mortgages or property escrow, irrevocable letter of credit, or any other form approved by the Board. The surety may be phased to coincide with the phasing of work, in an amount sufficient to guarantee reclamation of the applicable section, to be released as sections are completed. Prior to a new section being opened, new securities shall be posted. The surety shall not be released until the Board is satisfied that all conditions of the site reclamation plan have been complied with.

SECTION XIII: EXCEPTIONS

Due to the diverse nature of excavation operations which vary in scale and scope, and due to the varying conditions of the land to be excavated, the Board may, upon application and following a duly-noticed hearing, grant any exception in writing to the standards contained in Sections IX, X, XI, and XII for good cause shown. The written decision shall state specifically what requirements are being waived and include any reasonable alternatives.

SECTION XIV: APPLICATION FOR EXCAVATION

The applicant for an excavation permit shall submit to the Board a completed application form, an excavation and a reclamation plan, any other submission documents as requested, and the filing fee. At least three copies of all plans shall be filed with the Board prior to a scheduled Board meeting, and one copy shall be sent to the Conservation Commission. The plans shall be at a scale of 1" = 100'.

A. Excavation Plan

The excavation plan shall address specific actions to be taken on the site relative to fuel and chemical handling and storage, dust control, traffic, noise control and abatement, and comprehensive site safety of unauthorized persons. The plan shall show or be accompanied by the following items, unless waived by the Board.

1. name and address of the owner, the excavator (if different) and all abutters;
2. name, address, and signature of the person preparing the plan; date, bar scale and north arrow;
3. zoning district boundaries of the proposed area and within 200 feet of the boundary of the project;
4. sketch and description of the location and boundaries of the proposed and any existing excavations, the area in square feet and acres, and affected towns;
5. the location of existing buildings, structures, septic systems and wells within 200 feet of the boundary;
6. lot lines, public streets, driveways, intersections, rights-of-way, and all easements within 200 feet;
7. topography at contour intervals of five feet or less;
8. all surface drainage patterns including wetlands and standing water;
9. sketch and description of existing and proposed access roads, including width and surface materials;
10. the breadth, depth and slope of the proposed excavation and the estimated duration of the project;
11. the elevation of the highest annual average ground water table within or next to the proposed excavation;
12. test pits that extend to either the seasonal high water table, ledge, or a minimum of six feet below the maximum proposed excavation depth, including location and soils data; boring logs may be submitted separately;
13. proposed fencing, buffers or other visible barriers, including height and materials;

- 14 all measures to control erosion, sedimentation, water pollution, air pollution, and hazards to human safety; and
15. copies of all necessary state and federal permits.

B. RECLAMATION PLAN

The reclamation plan shall address the effects of the proposed excavation on soil, surface and groundwater, vegetation, overburden, topography, and fill material, and should address future land use consistent with the Master Plan. The plan shall show or be accompanied by the following items, unless waived by the Board:

1. name, address, and signature of the person preparing the plan; date, bar scale and north arrow;
2. all boundaries of the area proposed for reclamation and the land within 200 feet of the boundary of this site;
3. final topography of the area proposed for reclamation, at contour intervals of five feet or less;
4. final surface drainage pattern, including the location and physical characteristics of all artificial and/or modified drainage facilities;
5. timetable as to fully-depleted sites within the excavation area; and
6. schedule of final reclamation activities including seeding mixtures, cover vegetation, fertilizer types and application rates.

C. OTHER INFORMATION

The board reserves the right, per RSA 155-E:3,VII to request any other information it deems necessary to make an informed decision, or to have plans reviewed by an outside agency. According to the authority vested in the Board by RSA 676:4,I(g), any reasonable expenses incurred for such information or reviews shall be charged to the applicant. Failure to pay such costs constitutes valid grounds for the Board to deny the application.

SECTION XV: APPLICATION PROCEDURES

Prior to the Board rendering a decision for an excavation permit, a public hearing shall be held, with due notification of all abutters and the public. The procedure for holding these public hearings is as follows:

A. Filing of the Application

1. Applications for excavation permits shall be submitted to the Board at a regularly-scheduled meeting.
2. The application will be reviewed with the applicant at the meeting, and will be accepted by the Board only if it is found to meet all requirements for a completed application.

B. Board Action on Application

1. Providing that the application is complete, the Board shall vote to accept the application, after which time the Board has 30 days to schedule a public hearing. Should the application not be accepted as complete, another meeting must be scheduled for submission.
2. Within 20 days of the close of the hearing on the application, or any continuation thereof, the Board shall make a decision. Notice of this decision shall be recorded in the minutes of the meeting and placed on file in the Town offices within 72 hours.
3. The applicant shall receive a written copy of the minutes along with the decision. If the application was approved with special conditions, these conditions shall also be stated. In the event the application is disapproved, the reasons for the disapproval shall be given.

C. Notices Required for Public Hearing

1. All abutters will be notified by certified mail, not less than 14 days prior to the meeting at which the application will be submitted for acceptance. Names and addresses of abutters must be taken from Town records not more than 5 days before filing the application.
2. Public notice will appear in a newspaper of general circulation and in at least three public places not less than 14 days prior to the meeting.
3. The notice must include the location and general description of the proposal, as well as the date, time and place of the meeting.

D. Fees

1. A filing fee of \$50 plus postage shall be paid upon submission of an application for permit, to defray the costs of posting notice for the public hearing. Failure to pay such cost shall constitute grounds for the Board to not accept the application.
2. A permit fee of \$50 shall be paid upon the issuance of a permit, to defray the costs of permit compliance.
3. Additional reasonable fees shall be charged should the Board require the advice of an engineer or other expert to review plans or inspect the site to determine permit compliance.

SECTION XVI: ADMINISTRATION AND ENFORCEMENT

- A. *Permits:*** Permits shall be issued only to the owner or his agent and shall not be transferable without the prior written consent of the Board. A copy of the permit shall be prominently displayed at the site or the principal access to the site. A permit shall be valid for three years, with a written progress report, including a map, to be submitted to the Planning Board eighteen months after the starting date on the permit. A permit is automatically withdrawn if no substantial work is done on the site for a period of two years from the date of issuance of the permit. Failure to file for a permit shall be considered a violation and operators who fail to file will be issued a cease and desist order. The Board may include in the permit any reasonable conditions as are consistent with the purpose of these regulations.

- B. *Amendments and Renewals:*** Permit holders wishing to renew or amend a permit by altering the size or location of the excavation, the rate of removal or the plan for reclamation shall follow the same procedures as those required for an excavation permit.
- C. *Inspections:*** The Board or its designated agent may make periodic inspections of all excavation sites to determine if the operations are in conformance with these regulations and the approved plans.
- D. *Suspensions and Revocations:*** The Board may suspend or revoke a permit if the Board determines that any provision of the permit has been violated, a material misstatement made in the application upon which a permit was granted, or any unsafe or hazardous conditions are determined by a site inspection to exist. Such suspension or revocation shall be subject to a motion for rehearing thereon and appeal in accordance with these regulations.
- E. *Appeals:*** Any person affected by the Board's decision to approve or disapprove an application or an amendment thereto or any suspension or revocation of a permit, may appeal to the Board for a rehearing on such decision or any matter determined thereby. The motion for rehearing shall be filed within ten (10) days of such decision and shall fully specify every ground upon which it is alleged that the decision or order complained of is unlawful or unreasonable. The Board shall either grant or deny the request for rehearing within ten (10) days, and if the request is granted, a rehearing shall be scheduled within thirty (30) days. Any person affected by the Board's decision on a motion or rehearing may appeal in accordance with RSA 677:4-15.
- F. *Penalties:*** Fines, penalties and remedies for violations of this regulation shall be the same as for violations of RSA 676:15 and RSA 676:17. Whoever violates any provision of this regulation, a permit or a valid order issued hereunder shall be guilty of a misdemeanor.

SECTION XV11: SEPARABILITY

The invalidity of any provision, sentence, paragraph, etc. of this regulation shall not affect the validity of any other provision, sentence, paragraph, etc.

SECTION XVIII: EFFECTIVE DATE

These regulations shall take effect upon adoption by the Board and as amended.