

Town of Windham, New Hampshire

Excavation Regulations

I. General Statement of Purpose & Authority

Pursuant to authority granted under RSA 155-E:11, the Town of Windham has adopted these Excavation Regulations for the purposes of insuring a sustainable local supply of earth products remain available for public and private infrastructure construction, while balancing that need with the desire to: minimize safety hazards created by open excavations; safeguard public health and welfare; preserve the Town of Windham's natural assets of soil, water, forests and wildlife; maintain aesthetic quality of the Town's environment; prevent land and water pollution; and to promote soil stabilization.

II. Definition of Words & Terms

For the purposes of these Excavation Regulations, the words and terms specified below shall be defined as follows:

- A. Abandoned Excavation: Shall be as defined in RSA 155-E:2, II(a).
- B. Abutter: Shall be as defined in RSA 672:3.
- C. Commercial Excavation: Any use of Earth material for sale or resale on or off an Excavation Site. In addition, Excavation shall be considered Commercial if Earth materials are transported to land other than from which the Earth was excavated. Excavations which use Earth materials in the processing or manufacturing of other material such as, but not limited to: concrete; asphalt; and other construction materials shall be considered Commercial.
- D. Contiguous: Land situated in the Town of Windham, whose perimeter can be circumscribed without interruption in common ownership except for streets.
- E. Dimension Stone: Pursuant to RSA 155-E:1, IV, Dimension Stone shall mean: "rock that is cut, shaped, or selected for use in blocks, slabs, sheets, or other construction units of specified shapes or sizes and used for external or interior parts of buildings, foundations, curbing, paving, flagging, bridges, revetments, or other architectural or engineering purposes. Dimension Stone includes quarry blocks for which sections of dimension stone are to be produced. Dimension Stone does not include Earth as defined in RSA 155-E:1, I."

- F. Earth: Pursuant to RSA 155-E:1, I, Earth shall mean: “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: Pursuant to RSA 155-E:1, II, Excavation shall mean: “a land area which is used, or has been used, for the Commercial taking of earth, including all slopes.”
- H. Excavation Area: Pursuant to RSA 155-E:1, VI, Excavation Area shall mean: the surface area within an Excavation Site where Excavation has occurred or is eligible to occur under the provisions of Chapter 155-E of the New Hampshire Statutes Annotated and these Excavation Regulations.
- I. Excavation Site: Pursuant to RSA 155-E:1, V, Excavation Site shall mean: “any area of Contiguous land in common ownership upon which Excavation takes place.”
- J. Regulator: Shall mean the Windham Planning Board, which hereinafter may be referred to as the Planning Board or Board.

III. Excavation Permit Required

No owner shall permit any Excavation of Earth on his/her premises without first obtaining an Excavation Permit from the Windham Planning Board except as follows:

- A. Existing Excavations: The owner of an 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 two-year period before August 24, 1979, may continue such existing Excavation on the Excavation Site without an Excavation Permit, subject to the provisions and limitations of RSA 155-E:2, I.
- B. Stationary Manufacturing Plants: The owner of an existing Stationary Manufacturing Plant eligible for exemption pursuant to RSA 155-E:2, III may continue such plant Stationary Manufacturing Plant operations subject to the provisions and limitations of that section.
- C. Highway Excavations: No Excavation Permit shall be required for Excavation which is performed exclusively for the lawful construction, reconstruction, or maintenance of a Class I, II, III, IV or V highway by a unit of government having jurisdiction for the highway or an agent of the unit of government which has a contract for the construction, reconstruction, or maintenance of the highway subject to the provisions and limitations of RSA 155-E:2, IV.

D. Other Exemptions:

1. Excavation that is exclusively incidental to the construction or alteration of a building or structure or the construction or alteration of a parking lot or way including a driveway on a portion of the premises where the removal occurs; provided, however that no such Excavation shall be commenced without an Excavation Permit under these Excavation Regulations unless all State and local permits required for the construction or alteration of the building, parking lot, or way have been issued.
2. Excavation that is incidental to agricultural or silvicultural activities, normal landscaping, or minor topographical adjustment.
3. Excavation from a granite quarry for the purposes of producing Dimensional Stone, if such Excavation requires a permit under RSA 12-E.
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 Windham Planning Board.

IV. Abandoned Excavations

- A. Pursuant to the provisions of RSA 155-E:2, II, those Excavation Permit exemptions specified in Section III of these Excavation Regulations shall not apply to any Abandoned Excavation as defined in RSA 155-E:2, II(a).
- B. In addition to enforcement remedies available pursuant to RSA 155-E:10, the Windham Planning Board may, pursuant to RSA 155-E:2, II(b), order the owner of any land upon which an Abandoned Excavation is located to either file a reclamation timetable, to be approved by the Planning Board, and post a bond or other surety, in an amount and form acceptable to the Board, or to complete reclamation in accordance with the requirements of these Excavation Regulations within a stated reasonable time. Such an order by the Planning Board shall only be made following a hearing for which notice has been given in accordance with RSA 155-E:7, if the Board finds the public health, safety, or welfare requires such reclamation. If the owner fails to complete reclamation within the time prescribed in the order, the Planning Board may request that the Board of Selectmen cause reclamation to be completed at the expense of the Town. The Town's costs shall constitute an assessment against the owner, and shall create a lien against the real estate on which the Excavation is located. Such

assessment and lien may be enforced and collected in the same manner as provided for real estate taxes under New Hampshire law. The site of an Excavation which ceased commercially useful operations prior to August 24, 1977, but for which the affected area has not been brought into compliance with the reclamation standards of RSA 155-E:5, may be made subject to the remedy prescribed in RSA 155-E:2(b) only if the Planning Board finds in writing that specified reclamation measures are necessary to eliminate or mitigate an identified hazard to public health or safety.

V. Prohibited Projects

Pursuant to RSA 155-E:4, the Windham Planning Board shall not approve an application for an Excavation Permit under these Regulations in the following instances:

- A. If and when the Planning Board determines such Excavation would not conform to Minimum and Express Operational Standards specified under RSA 155-E:4-a and Section VII of these Regulations.
- B. If and when Excavation is proposed within 50-feet of the boundary of a disapproving abutter or within 10-feet of the boundary of an approving abutter unless such approval is requested in writing by said abutter.
- C. When and where the Excavation is not permitted by applicable provision of the Windham Zoning Ordinance.
- D. If and when the Planning Board determines issuance of an Excavation Permit would be unduly hazardous or injurious to public welfare;
- E. If and when the Planning Board determines inadequate or ineffective visual barriers to adjacent public highways or abutting properties would be retained or otherwise provided, except where necessary to facilitate proper access to the Excavation;
- F. If and when the Planning Board is presented with compelling evidence suggesting the Excavation would substantially damage a known aquifer, so designated by the United States Geological Survey.
- G. If and when the Excavation requires land use permits from State or Federal agencies which the applicant has failed to obtain.
- H. If and when the Excavation cannot comply with Minimum and Express Reclamation Standards and requirements for Incremental Reclamation specified in RSA 155-E:5, RSA 155-E:5-a and Section VIII of these Regulations.

VI. Application for Excavation Permit

Any owner or owner's agent subject to these Excavation Regulations shall, prior to commencement of Excavation on the owner's land, apply to and be granted an Excavation Permit by the Windham Planning Board. Upon receipt of an application for an Excavation Permit under these Excavation Regulations, the Community Development Department shall promptly forward a copy of the same to the Windham Conservation Commission. Any such application shall be signed and dated by the applicant and shall contain the following information:

1. General Information:

- a) The name, address, phone number and email address of: the property owner; the applicant, if different from the property owner; and all agents of the owner or applicant to whom communication may be directed by the Town in regard to matters related to administration of the application;
- b) The name and address of the person or entity who will actually perform the Excavation;
- c) The names and mailing addresses of all Abutters; and
- d) Payment of reasonable application fees and reimbursement for the cost of any professional consultant fees incurred by the Planning Board as part of their review and consideration of the application, as authorized by RSA 155-E:11, III.

2. Excavation Plans:

All applications submitted to the Windham Planning Board for approval under these Excavation Regulations shall include five copies of an Excavation Plan, drawn to a scale of not less than 1" = 50', and prepared and stamped by a Licensed Professional Engineer. Such Excavation Plans shall accurately depict or identify:

- a) A title block specifying: the name and address of each owner and/or applicant; the location of the property by both street address and assessor's map and lot number; the date(s) of plan preparation and any subsequent revisions; the scale of the plan; and the name of the principal design consultant who prepared the plan;
- b) A location map, which accurately identifies the location of the Excavation Site, drawn at a scale of not more than 1" = 1,000';
- c) A Planning Board Approval Block corresponding to specifications provided in the Windham Subdivision Control Regulations;
- d) The name and mailing address of each abutting parcel together with corresponding tax map and lot number;

- e) The name, classification, right-of-way and pavement width of each abutting street;
- f) Relevant zoning information affecting the subject parcel;
- g) Boundary survey information for the subject parcel either prepared and sealed by a Licensed Land Surveyor, or taken from a boundary plat of the subject parcel previously prepared and recorded at the Rockingham County Registry of Deeds, as well as a corresponding north arrow;
- h) Identification of any existing or proposed easements encumbering or benefiting the subject parcel;
- i) The names of streams or water bodies on or adjacent to the subject premises together with the limits of any flood hazard areas as may be designated on current FEMA Flood Insurance Rate Mapping;
- j) Topographical survey mapping of the subject parcel, prepared by a Licensed Land Surveyor and having a contour interval of not more than 5-feet, including a minimum of one benchmark;
- k) Site Specific Soil Survey mapping of the lot, prepared and stamped by a Certified Soil Scientist;
- l) The location and results of any test pits or borings taken on the premises, together with information documenting subsurface water table elevation;
- m) Mapping of the lot, which depicts the location of any wetland areas delineated and defined by the Certified Wetland Scientist whose stamp shall appear on the plan together with a note specifying when, by whom and under what criteria those areas of wetland shown thereon were delineated and defined;
- n) The extent of all existing manmade site improvements, including buildings/structures, driveways, utilities, wells, septic systems and similar improvements, both on and within 100-feet of the perimeter of the subject parcel;
- o) The location of all tree lines, specimen trees, bedrock outcroppings and similar relevant natural features;
- p) The limits of land clearing proposed for each phase of excavation, including specifications for proper disposal of trees, undergrowth, stumps and other waste created by land clearing and grubbing operations;
- q) The full extent (length, width, depth) of the planned Excavation for which the permit is sought. The extent of the proposed Excavation shall be defined by the use of contour lines having a maximum interval of 5-feet and where appropriate spot design elevations;
- r) The location and design of all proposed access ways, vehicle parking areas, equipment installations, buildings and other manmade improvements proposed in order to facilitate excavation operations;

- s) The location and design of all proposed stormwater management facilities;
- t) A detailed Erosion and Sedimentation Control Plan with corresponding notes and details;
- u) A Phasing Plan, if applicable;
- v) A detailed Excavation Schedule identifying the estimated disturbance area and volume of material to excavated during each phase of the overall excavation process;
- w) The location and design of any proposed or required mitigative measures for the control of noise, visual impact, stormwater management, site access, human safety, etc.; and
- x) The location of a topsoil stockpile area for each phase of the excavation.

3. Reclamation Plan

All applications submitted to the Windham Planning Board for approval under these Excavation Regulations shall include five copies of a Reclamation Plan, drawn to a scale of not less than 1" = 50', and prepared and stamped by a Licensed Professional Engineer. Such Reclamation Plan shall accurately depict or identify:

- a) The proposed finish grade and contour of all land impacted by excavation activities;
- b) The design of all permanent stormwater management facilities;
- c) Detailed specifications for installation of loam and vegetative ground cover(s); and
- d) Detailed design information for any permanent improvements or mitigative measures proposed by the applicant or required by applicant regulatory authorities having jurisdiction.

4. Additional Information:

In addition to the foregoing, each application submitted to the Windham Planning Board for approval under these Excavation Regulations shall include:

- a) Three copies of test pit and/or geotechnical boring logs in sufficient quantity and location to accurately estimate groundwater and bedrock depth;
- b) Three copies of a Stormwater Management Report, prepared and stamped by a Licensed Professional Engineer, conforming to the specifications of Section 610 of the Windham Subdivision Control Regulations;
- c) Five copies of a detailed narrative discussing proposed excavation operations. Such narrative shall document the applicant's

- intentions relative to: excavation schedule, including length of time estimated to complete and reclaim each phase of the proposed excavation and hours of operation; a description of each Earth product to be excavated and the applicant's proposal for commercial use or sale of the same; a description of trucking routes, including estimated number of trips by vehicle type on an average daily basis; the estimated number and function of employees to be on site during excavation operations and the applicant's proposed means of providing adequate parking, safety and comfort facilities for use by employees; identification and description of all excavation and material processing equipment to be used during excavation operations, as well as a detailed description of how each piece of equipment is to be stored, serviced, fueled and operated during excavation operations; a detailed description of access, safety and environmental controls to be implemented and maintained by the applicant during excavation operations; and any other relevant information requested by the Planning Board or the Community Development Department Staff;
- d) Three copies of any special studies requested or required by the Windham Planning Board, including but not necessarily limited to: a traffic impact assessment; a hydrogeological study; and/or an environmental impact assessment. In the event the Planning Board, in its review of any application submitted for approval under these Regulations, requests a special study be prepared, the Board, in conjunction with the Community Development Department Staff and its consultants, shall direct the applicant as to the scope of each special study so required.

VII. Minimum and Express Operational Standards

Pursuant to RSA 155-E:4-a, it shall be a violation for any person to Excavate, or for any owner to permit Excavation on his/her Excavation Site, when such Excavation is subject to an Excavation Permit under these Regulations, without complying with the following Minimum and Express Operational Standards, or when such Excavation is not subject to an Excavation Permit under Article III of these Regulations without complying with the following Minimum and Express Operational Standards:

- A. 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.
- B. No Excavation shall be permitted within 50-feet of the boundary of a disapproving abutter, within 150-feet of any dwelling which either existed or for which a building permit has been issued at the time the Excavation is commenced.

- C. 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 surface area or within 25-feet of any other stream, river or brook which normally flows throughout the year, or 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 New Hampshire Department of Environmental Services.
- D. No Excavation shall be permitted closer than 4-vertical feet to estimated seasonal high water table elevation absent specific approval from the Planning Board to do so pursuant to RSA 155-E:11, II.
- E. Vegetation shall be maintained or provided within the peripheral areas required under Paragraphs A & B above.
- F. Drainage shall be maintained so as to prevent the accumulation of free-standing water for prolonged periods. Excavation practices which result in continued siltation or surface waters or any degradation of water quality of any public or private water supplies shall be prohibited.
- G. No fuels, lubricants, or other toxic or polluting materials shall be stored on-site unless in compliance with applicable State Laws or Administrative Rules pertaining to such materials.
- H. Where temporary slopes will exceed a grade of 1:1, a fence or other suitable barricade shall be erected to warn of danger or limit access to the Excavation Site.
- I. Prior to the removal of topsoil or other overburden material from any land area that has not yet been excavated; the Excavator shall file a reclamation bond or other surety, in an amount and form acceptable to the Town of Windham, sufficient to secure reclamation of the land area to be excavated.
- J. Excavation shall be phased and performed such that not more than 5-acres of active Excavation Area on any single Excavation Site exist at any single point in time unless otherwise authorized or approved by the Planning Board.
- K. Best management practices for proper erosion and sedimentation control shall be installed and maintained throughout the Excavation period. In addition, appropriate controls for the maintenance of water and air quality shall be integrated into the excavation process.

- L. Topsoil shall be stripped from the Excavation Area and stockpiled on-site for use in subsequent reclamation of the Excavation Site. No topsoil shall be removed from the Excavation Site until each Excavation Area has been fully reclaimed in accordance with the Excavation Permit. Any excess topsoil remaining at that time may then be removed from the Excavation Site.

VIII. Minimum and Express Reclamation Standards

Within 12-months of the expiration date of any Excavation Permit issued under these Excavation Regulations, or of completion of any Excavation, whichever occurs first, the owner of the excavated land shall have completed the reclamation of all areas affected by the Excavation in accordance with the following minimum and express standards:

- A. Except for exposed bedrock, all areas which have been affected by the Excavation or otherwise stripped of vegetation shall be spread with topsoil or other soil capable of sustaining vegetation, and shall be planted with seedlings or grass suitable to prevent erosion. Areas visible from a public way, from which trees have been removed, shall be replanted with tree seedlings, furnished and installed in accordance with accepted horticultural practice.
- B. Earth and vegetative debris resulting from the Excavation shall be removed or otherwise lawfully disposed of.
- C. All slopes, except for exposed bedrock, shall be graded to a slope not steeper than 3:1 unless otherwise specified on the approved Excavation Plan.
- D. All land subject to reclamation shall be graded so as to prevent unintended ponding of surface water caused by the Excavation.
- E. The topography of reclaimed land shall be graded such that water draining from the Excavation Site leaves the property at original, natural discharge points and at peak discharge rates not greater than that what existed at each point prior to commencement of the Excavation.
- F. Except for Excavation Sites having operating stationary manufacturing plants, any excavated area of 5-contiguous acres or more, which becomes 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 any 2-year period, shall be reclaimed in accordance with these minimum and express reclamation standards, within 12-months following such depletion or two consecutive years of non-use, which ever comes first.

IX. Waivers

The Planning Board may grant, upon application and following a public hearing held in accordance with RSA 155-E:7, one or more waivers from the specific requirements of Sections VI, VII and VIII of these Excavation Regulations for good cause shown. In such instances, the Planning Board shall issue a written Notice of Decision, which shall identify each specific standard, if any, being relaxed or waived, and when appropriate, identify reasonable alternative conditions or standards required by the Board. The Planning Board's decision in regard to any waiver request may be appealed in accordance with RSA 155-E:9.

X. Application for Excavation Permit Amendment

When the scope of a project for which an Excavation Permit has been issued is proposed to be altered so as to affect the size or location of the Excavation, the rate of removal or the plan for reclamation, the owner shall submit an application for permit amendment. Such application for permit amendment shall be subject to approval in the same manner as provided for an Excavation Permit.

XI. Hearing

Within thirty days of receipt of an application for an Excavation Permit, or an application for renewal or amendment of an Excavation Permit, the Planning Board shall conduct a public hearing on such application. A notice of such hearing shall be sent to all abutters and shall specify the grounds for the hearing as well as the date, time and place; and at least 10-days notice of the time and place of such hearing shall be published in a paper of general circulation; and a legal notice thereof shall also be posted in at least three public places; the 10-days shall not include the day of publication nor the day of the hearing, but shall include any Saturdays, Sundays and legal holidays within said period. Within 20-days and said hearing or any continuation thereof, the Planning Board shall render a decision approving or disapproving the application, giving reasons for disapproval.

XII. Issuance and Renewal of Excavation Permits

- A. If the Windham Planning Board, after conducting a public hearing, votes to approve an application for an Excavation Permit, it shall, upon receipt of payment all fees, fulfillment of all conditions of such approval, and the posting of a performance bond or other such surety in an amount sufficient to guarantee compliance with the permit, issue an Excavation Permit to the applicant. The performance bond or other surety given shall be valid for the duration of permit, plus one additional year. All Excavation Permits issued shall specify the date of permit expiration, which shall not exceed one year from the date of issuance.

- B. An Excavation Permit may be annually renewed by the Planning Board if upon receipt of an application from a Permit holder, the Board determines all excavation activities remain in full compliance with the terms and conditions of the Excavation Permit including the maintenance of any required performance guarantee or surety. An Excavation Permit holder may apply for permit renewal by making such a request in writing not less than 45-days prior to the scheduled date of Permit expiration.
- C. No Excavation Permit shall be assignable or transferable without prior approval of a Permit Amendment by the Planning Board.
- D. The Planning Board may include in an Excavation Permit such reasonable conditions as are consistent with the purpose of these Excavation Regulations. A standard condition of all Excavation Permits shall be payment of an excavation compliance monitoring fee prior to permit issuance, amendment or renewal. The sum of such fees shall be determined by the Planning Board after consultation with the Community Development Department. The sum of all excavation compliance monitoring fees collected shall be equal to the Town's anticipated cost of performing periodic Excavation Permit compliance monitoring by the Community Development Department and/or its designated agents and consultants.

XIII. Appeal

Pursuant to the provisions of RSA 155-E:9, any interested person affected by a decision made by the Planning Board in regard to an application for an Excavation Permit or an amendment thereto may appeal to the Planning Board for a rehearing on such decision. The motion for rehearing shall fully specify every ground upon which it is alleged that the decision or order complained of is unlawful or unreasonable and said appeal shall be filed within 10-days of the date of the decision appealed from. The Planning Board shall either grant or deny the request for rehearing within 10-days, and if the request is granted a rehearing shall be scheduled within 30-days. Any person affected by the Planning Board's decision on a motion for rehearing may appeal in conformity with the procedures specified in RSA 677:4-15.

XIV. Enforcement

- A. Pursuant to authority of RSA 155-E:10, the Planning Board or its duly authorized agent may suspend or revoke the Excavation Permit of any person who has violated any provision of his/her permit or these Excavation Regulations or made a material misstatement in the application upon which the permit was granted. Such suspension or revocation shall be subject to a motion for rehearing thereon and appeal in accordance with RSA 155-E:9.

- B. Fines, penalties, and remedies for violations of these Excavation Regulations shall be the same as for violations of RSA title LXIX, as stated in RSA 676:15, 676:17, 676:17-a and 676:17-b. In addition, the Planning Board or a person directly affected by such violation may seek an order from the Superior Court requiring the violator to cease and desist from violating any provision of the permit or these Regulations and to take such action as may be necessary to comply with the permit and these Regulations. If the Superior Court issues such an order, the Superior Court in its discretion may award all costs and attorney's fees incurred in seeking such an order to the Planning Board or person directly affected by such violation.

- C. To ascertain if there is compliance with the requirements of these Excavation Regulations, a permit issued hereunder, or an order issued hereunder, the Planning Board or its duly authorized agent may enter upon and land on which there is reason to believe an Excavation is being conducted or has been conducted since August 24, 1979.

XV. Severability

In the event any article, section, paragraph, sentence or other provision of these Excavation Regulations shall be held to be invalid or unconstitutional by any court of competent jurisdiction, such holding shall not affect, impair, or invalidate any other article, section, paragraph, sentence or other provision of these Regulations.