

January 17, 2019

Ms. Mary Ann Tilton
Assistant Bureau Administrator
29 Hazen Drive Concord
PO Box 95
Concord, NH 03302-0095

Re: Comment on Proposed Wetlands Rules-
Env-Wt 100 through Env-Wt 900.

Dear Mary Ann;

Public Service of New Hampshire d/b/a Eversource Energy ("Eversource") appreciates the opportunity to provide comment on the revised wetlands rules. Our comments begin on page 2 of this letter. Please contact me at your earliest convenience if you have any questions or would like to discuss our comments provided herein at kurt.nelson@eversource.com or 603-714-3031.

Sincerely,

Eversource Energy



Kurt I. Nelson
Sr. Licensing and Permitting Specialist

Cc: Catherine Finneran, Eversource Director Environmental Affairs
Marvin Bellis, Eversource Senior Counsel

The following corrects a minor typo in the original proposed regulations and clarifies that the definition of “abutting property” as to projects involving utility ROWs applies only for purposes of notification requirements.

Env-Wt 102.04 “Abutting property” means:

(a) For a subject property other than a utility right-of-way (ROW), any property immediately contiguous to the property on which a project has occurred or is proposed, provided that:

(1) The term does not include any property that is separated by a public road, or surface water from the property on which a project has occurred or is proposed, or that is more than ¼-mile from the limits of the work or proposed work; and

(2) If an abutting property is owned in whole or in part by the person who undertook the work or is proposing to undertake the work or is necessary to meet a frontage requirement, the term includes the next contiguous property, subject to the ¼-mile limitation; or

(b) Only for purposes of any abutter notification that is required by statute or regulation as to projects involving utility ROWs, properties directly adjacent to the utility ROW easement where work is proposed and within 200 feet of a ROW corridor where work is proposed.

Correction to address minor typographical error.

Env-Wt 103.52 “Priority resource area” means a jurisdictional area that:

(a) Has documented occurrences of protected species or habitat for such species;

(b) Is a bog;

(c) Is a floodplain wetland contiguous to a tier 3 or higher watercourse;

(d) Is a designated prime wetland or a duly established 100-foot buffer zone;

(e) Is a sand dune, tidal wetland, tidal water, or undeveloped tidal buffer zone; or

(f) Is any combination of (a) through (fe), above.

As proposed, 307.03(h) specifies NO equipment staging and refueling in wetlands. That is inconsistent with 307.15(a) which states: “Mobile heavy equipment shall not be stored, maintained or repaired in wetlands except that repairing or refueling in a wetland is allowed if equipment cannot practicably be removed and secondary containment is provided;”

We propose the following clarification to address the inconsistency:

“Equipment shall be staged and refueled in upland areas only, where spills will not reach groundwater, surface water or wetlands or in accordance with Env-Wt 307.15”

We understand that state law allows for setbacks in limited circumstances involving dock projects. It is also our understanding that the Department is proposing to expand upon that setback limitation as a means of avoiding a requirement that applicants perform boundary surveys that will serve to ensure that all permitted work is performed on land owned or controlled by the applicant. Utilities are in a different position for two reasons. First, utility work is most often performed within rights-of-way (ROWs) that traverse multiple properties of others, and utilities (i) have specifically acquired the right to fully use such ROWs from edge to edge, and (ii) are often required to perform vegetation

removal/maintenance from edge to edge in order to satisfy federal standards (among others). The ROWs are of limited dimension in terms of width and any setback requirement would substantially reduce a utility's property rights, and irreparably harm a utility's ability to serve its customers. Moreover, given that ROWs are most often of limited width, a setback requirement could have the unintended consequence of triggering greater impacts to wetlands and other jurisdictional resources since all activity would need to occur in a smaller area thus limiting avoidance and minimization options. Second, due to the nature of a ROW with a limited width, utilities routinely perform boundary surveys in order to ensure that all work is performed within the specified physical limits of the applicable ROW. This avoids the problem the Department appears interested in addressing, namely avoiding the need to require boundary line surveys in order to prevent conflicts. The following clarifying language would avoid the unintended consequences outlined above.

Env-Wt 307.13 Property Line Setbacks.

(a) As required by RSA 482-A:3, XIII(a), all boat docking facilities shall be at least 20 feet from the abutting property line, whether in tidal or in non-tidal waters.

(b) Subject to (c), below, dredging, filling, or construction activity within a jurisdictional area that is not covered by (a), above, that is covered by an LSA or for which an EXP or permit is required shall occur at least 10 feet from an abutting property line. The foregoing shall not apply to proposed utility projects in a utility ROW or for projects for which a boundary survey has or will be performed prior to commencing work.

(c) Subject to (d), below, if an applicant wishes to extend an activity that is covered by (b), above, closer than 10 feet to an abutting property line, the applicant shall obtain written consent from the affected abutter or provide a boundary survey plan with the permit application that demonstrates that all work is confined to the applicant's property.

(d) The applicant for a bank stabilization project shall not be required to obtain consent from the affected abutter.

(e) The department shall increase the setback to property lines if it determines that the location proposed for an activity:

(1) Represents a danger to other waterfront activities due to its size or character, or both, being inconsistent with the size and character of the surrounding area;

(2) Is likely to create a navigation hazard due to its size or proximity to other existing legal structures; or

(3) Is likely to interfere with an abutter's access to or use of the abutter's property.

(f) If the department determines pursuant to (e), above, that a larger set-back is required, the department shall increase the set-back only the distance required to abate the danger, hazard, or interference, as applicable.

While the primary focus of our comment here is with respect to vegetation management, the absence of a defined term for the concept of when a project is complete may cause some confusion. Is a project complete upon the conclusion of construction work, at the conclusion of restoration work, at the point when all revegetation performed as part of restoration has successfully taken hold, or some other point (e.g., removal of all temporary storm water controls)? With respect to vegetation maintenance activities, such activities do not always occur in a well-defined distinct timeframe as there may be follow up work throughout the course of the year. We suggest the following proposed rewording to address this issue.

Env-Wt 308.07 Post Notification Requirements for SPNs ~~other than Utilities~~

308.07(b) “Within 10 days following completion of the work covered by the SPN, with the exception of an SPN for utility vegetation maintenance, the person responsible for the project shall submit to the department confirmation of completion of the project, either by paper copy or electronically.”

**For linear utility projects, imposing a requirement that effectively requires production of each easement and other document that shows the utility’s legal interest in a ROW would require the production of hundreds of pages of easement documents, many of which may have been acquired at different points in time. We recommend that utilities be allowed to (i) provide a certification or other statement to the effect that the utility owns all rights to use the properties on which work is proposed, or (ii) provide a list of book and page documents to attest to their legal rights rather than provide exhaustive easement documentation
We proposed the following rewording.**

311.06 (f) “If the applicant is not the owner in fee of the subject property, documentation of the applicant’s legal interest in the subject property. For utility ROW projects, documentation of such legal interest may be provided in the form of a (i) certification by a person with actual knowledge of the utility’s legal interest in the subject ROW, or (ii) list of Registry of Deed Book and Page Number references to the easements or other recorded instruments documenting the legal interest.

It is unclear what falls within or outside the term probable. We believe that the narrative should address those permanent and temporary impacts proposed in an application. We propose the following changes to reflect that suggestion, as well as one adding a reference to permanent impacts to maintain consistency with issues raised elsewhere in these comments.

311.07 (a) Avoidance and Minimization Narrative

(a) The applicant shall submit with the application a written narrative that explains how all ~~probable permanent and temporary~~ impacts to functions and values of all jurisdictional areas have been avoided and minimized to the maximum extent practicable, ~~for permanent and temporary impacts~~, as required by Env-Wt 313.03(a).

(b) The explanation required by (a), above, shall include the following:

(1) Whether the primary purpose of the proposed project is water-dependent or requires access through wetlands to reach a buildable lot or portion thereof;

(2) For industrial or commercial development, for project impacts that would be required to create a buildable lot, for proposed permanent impacts over one acre or for proposed projects that impact a priority resource area whether any other properties reasonably available to the applicant, whether already owned or controlled by the applicant or not, could be used to achieve the project’s purpose without altering the functions and values of any jurisdictional area, in particular wetlands, streams, and priority resource areas;

(3) Whether alternative designs or techniques, such as different layouts, different construction sequencing, or alternative technologies could be used to avoid impacts to jurisdictional areas or their functions and values on the subject property or on other property that is reasonably available to the applicant as described in the “Wetlands Best Management Practice Techniques For Avoidance and Minimization” (2018); and

(4) Whether the feasible alternatives would have less adverse impacts to the functions and values of any jurisdictional area on the subject property or on property that is reasonably available, if incorporated in the proposed project, and would not adversely affect public health, public safety, or the environment.

We have encountered a circumstance in which it became impossible to identify a conservation organization to take ownership of land and easements in advance of the filing of an application and receipt of permits. In that circumstance, we proposed, and the Department accepted, the Eversource Land Trust as an alternative to hold the land and easements until such time as a permanent entity could be identified. The addition of (c)(5) below affords the Department some additional flexibility with which to address such circumstances.

Env-Wt 312.04 Complete Mitigation Proposal Components. The applicant shall provide the following information in order for a compensatory mitigation proposal to be deemed a complete mitigation proposal:

(c) For any proposal calling for a transfer of easements or fee simple ownership, documentation showing that the proposed grantee is one of the following:

- (1) A state natural resource agency such as the fish and game department or the department of cultural and natural resources;
- (2) A municipality with a conservation commission in the town where the property is located; or
- (3) A conservation organization such as a state-wide, regional, or local conservation organization that can provide documentation from the United States Internal Revenue Service stating that it is an income tax-exempt, publicly supported corporation, pursuant to 501(c)(3) of the United States Internal Revenue Code; ~~and~~
- (4) A local river management advisory committee as established by RSA 483:8-a, authorized to accept and expend funds under RSA 483:13, whose tax exempt status is pursuant to the United States Internal Revenue Code Section 170(a)(1); or
- (5) A conservation organization that otherwise meets the requirements of Env-Wt 312.04(d) and that the department determines is an acceptable alternative to a conservation organization meeting the requirements of (c)(3).

(d) For any proposal calling for a transfer of easements or fee simple ownership to a conservation organization, documentation showing that the conservation organization has:

- (1) Accepted the Land Trust Alliance (LTA) standards and practices as specified in "LTA Standards and Practices", revised 2017, or adopted equivalent standards and practices; or
- (2) A record of holding easements and managing them in a manner that is consistent with the purposes of the easements;

While we understand that Section 313.01(a)(6) is intended to address RSA 482-A:11, II, the proposed language is inconsistent with, and goes well beyond, the language of the statute. In relevant part, that statute provides: "No permit to dredge or fill shall be granted if it shall infringe on the property rights or unreasonably affect the value or enjoyment of property of abutting owners." The effect is to bar issuance of a permit to dredge or fill under the limited circumstance where the dredge or fill activity would infringe on property rights of an abutting property owner or would unreasonably affect the value or enjoyment of the abutting property. A reasonable interpretation of the statute would be that it prevents issuance of a permit where an abutting property owner shows that such would cause some

physical change to that abutting property in the form of a material increase or decrease drainage that causes an unreasonable effect or infringement. The statutory provision does not impose a burden of proof on an applicant. Since the Department is an agency of limited jurisdiction, specifically one that, in this case, is responsible for regulating wetlands, the scope of the statute should be interpreted as being similarly bounded. It is entirely within the Department's expertise to evaluate proposed wetland and watercourse impacts. It is entirely outside the Department's expertise to evaluate property rights, value and use issues associated with structures or other improvements that would be constructed in connection with the permitted dredge and fill activity (whether it would be located within or outside a jurisdictional resource are). Beyond the limited scope of the statutory provision, in order for the Department to perform a broader infringement/value/use evaluation the Department would need to adopt specific application and review criteria requirements so that applicants could be in a position to reasonably understand the nature and scope of the information and the process involved. As proposed, the language could turn the Department into a form of site evaluation committee or zoning board, where it would be called upon to adjudicate claims by abutting property owners as to each and every structure's alleged infringement or unreasonable effect, all without the benefit of any zoning-type or formal siting regulations. Moreover, the proposed language is unreasonable inasmuch as it would place on an applicant the burden of proving the negative as to largely subjective issues, instead of placing the burden on the abutting property owner of showing a permitted dredge or fill activity would infringe on their rights, or unreasonably affect the value or use of their property. In the example of a utility ROW project of some length that may involve hundreds of individual abutting properties of varying types (it is unclear whether the Department would intend this to include underlying owners of the servient estate from which the utility acquired the rights to build and maintain utility facilities), the proposed language would appear to require a utility applicant to provide some form of documentation as to infringement, value and use with respect to each of those varied properties. It is not at all clear what form(s) of documentation might be required or on what bases a utility could make the required demonstration. As an example, how would the Department determine whether any one or more utility structures (wood, steel lattice, or monopole, each of varying heights and configurations) cause or do not cause some infringement or unreasonable use or enjoyment? To address the foregoing issues we propose the language inserted below.

Env-Wt 313.01 Criteria for Approving Standard Permit Applications.

- (a) The department shall not approve an application for a standard permit and issue the permit unless:
- (1) The applicant has met the requirements of Env-Wt 311.10 regarding functional assessments;
 - (2) The applicant has met the requirements to avoid, minimize, and mitigate as specified in Env-Wt 313.03 and as subject to (c), below;
 - (3) All applicable conditions specified in Env-Wt 307 have been met;
 - (4) Any resource-specific criteria established in Env-Wt 400, Env-Wt 500, Env-Wt 600, Env-Wt 700, or Env-Wt 900 have been met;
 - (5) Any project-specific criteria established in Env-Wt 500, Env-Wt 600, or Env-Wt 900 have been met; and
 - (6) ~~The applicant has demonstrated that neither the work covered by the permit nor the resulting structure or conditions will have an unreasonable adverse impact on the ability of abutting owners to enjoy and use their properties. The department determines that the proposed dredge and fill will not infringe on the property rights or unreasonably affect the value or enjoyment of abutting property owners. Documentation that the proposed dredge and fill activity will be located entirely within the boundary of the applicant's property, easement, lease or license area(s) and will not~~

result in any material change in surface water levels or flows shall serve as prima facie evidence that the proposed dredge and fill will not infringe on the property rights or unreasonably affect the value or enjoyment of abutting property owners. In making this determination, the department shall consider any documentation prepared by certified wetlands scientists or professional engineers, including any such documentation provided by an abutting property owner.

We believe that the proposed regulations would benefit from a change that clarifies that the limitation on access road work applies to work permanent roads in jurisdictional areas as follows below.

406.03(b)(2)c1 – “No new permanent access roads will be established in wetlands or streams.”

There are inconsistencies in Section Env-Wt 521.02(a)(1) which specifies that a utility SPN must meet the minimum impact criteria under Env-Wt 521. Env-Wt 521.05(a)(3) states that a minimum impact project does not include any fill in bogs, tidal surface waters, tidal wetlands, prime wetlands, floodplain wetlands contiguous to a water course, or navigable waters. This is contradicted by Env-Wt 308.04 which rightfully allows for utility maintenance activities to take place in “any jurisdictional area” as provided under RSA 482-A:3, XV. To resolve this inconsistency we propose the following deletion and rewording

~~Env-Wt. 521.02(a)(1) The project meets the minimum impact criteria in Env-Wt 521.~~

Env-Wt 521.05 Utility Project Classification

(a) Subject to (e) [NOTE: there is no 521.05 (e) only (a) through (c)], below, a utility project that does not qualify for an SPN under Env-Wt 308.04 shall be a minimum impact project if:

We believe some clarifying language is needed to allow for some permanent impact associated with structure replacement work. This is consistent with the Army Corps of Engineers State General Permit GP-6 for Utility Line Activities. We proposed the following rewording:

521.02(a)(2) “the project has only temporary impacts associated with inspections, maintenance and repair of existing utility assets and rights of way, and less than 3,000 SF of permanent impacts for replacement of existing utility assets; and “-

We believe language clarifying that the limitation on access road work applies to permanent roads located in jurisdictional areas should be added as shown in the following.

521.02(b)(1) – “Establishes new permanent access roads in streams and wetlands;”

We propose the following language for consistency with other proposed revisions.

521.03(d) A project that involves greater than one acre of contiguous permanent wetland or stream impact shall require an off-site alternatives analysis that is consistent with the requirements of Env-Wt 527.03(h).

Given the size and scale of linear utilities and the need to site new utility assets in existing rights of way, it is extremely burdensome and likely impossible in many cases to completely avoid permanent impacts to all priority resource areas. We believe that the Utility Design and Construction Requirements under Env-Wt 521.04 (b) which completely prohibits work in priority resource areas should be reworded as follows:

521.04(b) ~~Construction access or work shall be prohibited in priority resource areas unless the work is authorized as an SPN, a project type except under Env-Wt, or causes only temporary impacts. The project shall be designed to avoid or minimize construction access or work in priority resource areas;~~

We believe this proposed language should be struck as overly restrictive. In addition to wetlands permitting, utility projects with over one acre of land disturbance are subject to EPA CGP SWPPP and potentially AOT permitting which all have significant requirements for erosion control and protection of resource areas. We suggest the following deletion:

521.04(d) ~~Construction of new roads shall occur only between October 15 and April 15 or during very dry weather conditions at other times of the year;~~

As stated above, our opinion is that the purpose of section 521.05(a) should be to define the minimum impact criteria for non-SPN utility work, therefore, we believe the following language, which is descriptive of SPN work, should be deleted”

521.05(a)(1) ~~The project meets the BMP practices in the utility BMPs and will have temporary impacts associated with inspection, maintenance, repair, replacement, or removal of existing utility facilities the project has only temporary impacts associated with inspections, maintenance and repair of existing utility assets and rights of way;~~

521.05(a)(2) ~~The project does not include establishing new access roads, installing permanent stream or wetlands crossings, constructing new utility corridors or rights of way or establishing new utility assets within existing corridors or rights of way.—~~

To allow for electrical safety that may be required for small scale non-SPN projects that would otherwise qualify as minimum impact projects we suggest the following revision to Env-Wt 521.05:

521.05(a)(6) Does not cause a permanent conversion of more than 3,000 SF of forested wetlands to emergent or scrub shrub wetlands with or without permanent fill.

We propose the following for consistency with other comments to ensure reference to a single standard for off-site alternatives analysis.:

524.02 (a) A project that involves greater than one acre of permanent wetland impact shall perform an off-site alternatives analysis that is consistent with the requirements of Env-Wt 527.03(h)~~require an off-site alternatives.~~

We understand that existing mechanisms for calculating mitigation include some consideration for impacts to priority resource areas, but do not ascribe specific values for loss of function. Given that there is no mechanism in the existing mitigation requirements for assigning a value for loss of wetlands function, we propose the following rewording.

524.02 (d) A new residential or commercial or industrial development shall not ~~be located in~~have a permanent impact on a priority resource area without compensatory mitigation ~~for loss of function.~~

As proposed, the language would arguably create an absolute requirement that may not be capable of being achieved and impose an obligation that may not be capable of being measured with certainty. The following proposed revisions address this concern while maintaining a very protective standard:

524.04(g) The project shall maintain or restore fishery spawning, feeding or cover habitat and fish passage necessary to maintain then current fishery or habitat or populations to the maximum extent practicable; and

524.04(h) The project shall maintain or restore wetland-dependent wildlife habitat and its associated migratory pathways, reproductive sites, and associated wetland complex or wetland community systems to the maximum extent practicable.

We believe it would be prudent to have a single definition for what an off-site alternatives analysis comprises that could be referenced as applicable in other regulatory provisions. We propose the following as a revised definitional reference point:

527.03(h) An off-site alternatives analysis, consisting of an evaluation of whether the proposed permanent impacts of the project would be reduced if the project were located on other property that is reasonably available to the applicant and that would serve the project's purpose, for any project that proposes:

- (1) Wetland impacts of more than one acre of permanent impact;
- (2) To impact protected species or habitat; or
- (3) Alignments that impact significant function wetlands.

We believe the clarifying language provided below would prevent the regulations as proposed from being construed as effectively providing local conservations commissions veto authority over a

project, a result that does not appear to be intended and is not authorized by statute.

Change Section 704.03(c) as follows:

704.03 (c) The applicant shall make reasonable efforts to obtain concurrence from the local conservation commission, if any, or the local governing body for any proposed mitigation plan for impacts to designated prime wetlands/buffer and shall provide the Department with documentation of such efforts.

Change Section 704.03(d) as follows:

704.03(d) If the applicant is not able to obtain concurrence as specified in (c), above, the department shall hold a public hearing to receive comments, impact analysis and wetland evaluation on the mitigation proposal, and shall determine whether the proposed mitigation proposal adequately addresses the proposed impacts to the designated prime wetlands/buffer.