

Ms. Mary Ann Tilton, Administrator  
NH Department of Environmental Services  
Water Division, Wetlands Bureau  
29 Hazen Drive  
Concord, NH, 03302

18 January 2019

RE: Comments on Proposed Wetlands Rules

Dear Administrator Tilton,

I am writing on behalf of New Hampshire Audubon regarding the Proposed Wetlands Rules Env-Wt 100-900. We are a statewide non-governmental organization dedicated to protecting New Hampshire's environment for wildlife and for people.

I first want to commend you and your colleagues for the herculean effort expended in revising these rules. We appreciate the opportunity to provide comments on the current proposal.

#### **CHAPTER Env-Wt 100 DEFINITIONS**

##### **Definitions of wetland types**

A number of definitions in this section (i.e., "bog," "marsh," "swamp," wet meadow") refer to the Federal classification method, which is defined at Env-Wt102.59 as the method in

Classification of Wetlands and Deepwater Habitats of the United States, Adapted from Cowardin, Carter, Golet and LaRoe (1979), Wetlands Subcommittee, Federal Geographic Data Committee, August 2013.

The above document does not define all these terms per se. In fact, it states in a note on p. 19:

"The initial attempts to use familiar terms such as marsh, swamp, bog, and meadow at the Class level were unsuccessful primarily because of wide discrepancies in the use of these terms in various regions of the United States. In an effort to resolve that difficulty, we based the Classes on the fundamental components (life form, water regime, substrate type, water chemistry) that give rise to such terms. This approach has greatly reduced the misunderstandings and confusion that result from the use of the familiar terms."

We concur that the familiar terms are appropriate for the audience of these rules. However, we recommend that the definitions refer directly to the corresponding classifications in Cowardin et al. and in some cases have further suggestions for improving these definitions. Our suggested rewordings of these definitions follow.

##### Env-Wt 102.20 "Bog"

"Bog" means a wetland distinguished by a mat of *Sphagnum* moss in which stunted evergreens and shrubs may grow, the presence of peat deposits, poor drainage, highly acidic soil conditions, highly acidic water conditions or any combination thereof. "Bog" refers to the Moss Subclass of the Moss-Lichen Wetland Class in the federal classification method.

We note that the proposed rules make no reference to fens, which are common wetlands in New Hampshire and similar to bogs. We suggest substituting “peatland” for “bog” throughout the rules, and defining peatland as follows:

“Peatland” means a wetland whose soil is composed almost entirely of dead and decaying plant material. Peatlands include both bogs and fens, both of which are included in the Moss Subclass of the Moss-Lichen Wetland Class in the federal classification method.

Env-Wt 103.27 “Marsh” means a wetland that is dominated by soft-stemmed, herbaceous plants such as grasses, sedges, and rushes and that lacks trees and shrubs. The term includes fresh water marshes and tidal marshes. “Marsh” refers to the Emergent Wetland Class in the federal classification method.

Env-Wt 104.13 “Scrub-shrub wetland” means a wetland dominated by woody vegetation less than 20 feet tall, such as tree shrubs, young trees, and trees or shrubs that are small or stunted because of environmental conditions. “Scrub-shrub wetland” refers to the Scrub-Shrub Wetland Class in the federal classification method.

Env-Wt 104.34 “Swamp” means a forested wetland that is dominated by live or dead trees at least 20 feet tall. “Swamp” refers to the Forested Wetland Class in the federal classification method.

Alternatively, we recommend replacing “swamp” with “forested wetland” throughout the document to reduce confusion, since the rules already include “scrub-shrub wetland.” Informal usage in New Hampshire commonly refers to any wetland with woody vegetation as a swamp (e.g., a buttonbush swamp is a scrub-shrub wetland).

Env-Wt 104.49 “Wet meadow” means an herb-dominated jurisdictional area typically with non-woody vegetation less than 3 feet in height, saturated for long periods during the growing season, but seldom flooded. Wet meadows develop on predominantly drier, poorly drained soils. “Wet meadow” refers to the Palustrine Persistent Emergent Wetland Subclass with “Continuously Saturated” as a Water Regime Modifier in the federal classification method.

### **Other Definitions**

Env-Wt 102.54 The definition for “Erosional features caused by proximate human activity” includes low volume as a characteristic of flows. While infrequency and short duration are appropriate descriptors, flows adequate to create gullies are unlikely to be “low volume.” To ensure what we assume to be the intended application of this term, we recommend eliminating “low volume” from the definition.

Env-Wt 103.52 “Priority resource area”

The Proposed Rules introduce the concept of “Priority Resource Areas,” which would require thorough scrutiny of any potential impacts from project activities. The definition of such areas includes documented occurrences of protected species or their habitats, bogs, floodplain wetlands contiguous to a tier 3 or higher watercourse, designated prime wetlands or their buffer zones, sand dunes, tidal wetlands, tidal waters, undeveloped tidal buffer zones, or any combination of the above.

With respect to (a), “documented occurrences of protected species or habitat for such species,” we strongly recommend clarification as to the nature of the documentation, e.g., by rewording to “Has

occurrences of protected species or habitat for such species as documented by the natural heritage bureau, the fish and game department, or a certified wildlife biologist.”

We also recommend addition of the following categories to this definition:

- a) S1 or S2 wetland natural communities based on criteria established by the department of natural and cultural resources, natural heritage bureau
- b) Exemplary wetland natural communities based on criteria established by the natural heritage bureau
- c) Highly ranked wetland habitats in the state and in biological regions as identified in the current New Hampshire Wildlife Action Plan produced by the fish and game department.

Env-Wt 103.55 “Protected species or habitat”

The citation for the federal endangered species act is 16 U.S.C. § 1531 et seq.

The correct citation for the bald and golden eagle protection act is 16 U.S.C. 668-668d.

Env-Wt 104.16 This definition states that “ ‘Sedimentation’ means the creation of water-borne particles that settle on the bottom of a surface water as sediment.” We believe that a more appropriate definition would be: “Sedimentation” means the deposition of water-borne particles on the bottom of a surface water.”

Env-Wt 104.54 We assume that you mean “restoring” rather than “restorating.”

### **Permits by Notification (PBN)**

We are very concerned about the proposed streamlining of permits by notification. These small projects present prime opportunities for cumulative impacts that could ultimately have significant adverse impacts on local wetlands but would escape detection under the proposed system. Retaining abutter notification and conservation commission would provide an opportunity for valuable local knowledge to provide important input to the permitting process. Retain the review period of 10 days provides adequate time for local review and input.

We are also concerned about some of the projects that are newly proposed to be eligible for permit by notification. We feel that the potential for substantial damage to the resource during aquatic vegetation removal, bank stabilization activities, boardwalk construction, residential and commercial access construction, and culvert maintenance could be avoided or reduced with a higher level of review.

For these reasons, we strongly recommend that the revised rules for permits by notification

- Retain the 10 day review period
- Retain abutter notice
- Retain conservation commission review
- Eliminate the following from the list of new PBN projects
  - Aquatic Vegetation Removal
  - Bank Stabilization
  - Boardwalk Construction

- Residential Access for 2 and 3 lot subdivisions
- Commercial Access
- T3 Stream Crossing Repair
- Culvert invert/outlet maintenance

### **Expedited Permits**

We are concerned about the extreme reduction of review time for expedited permits. We recommend a compromise review period of 30 days, which constitutes a substantial reduction from the current 75 days, but provides a more reasonable opportunity for review than the proposed 10 days.

We are also concerned about the inclusion of Wildlife Ponds in new expedited projects. Practicality suggests that many such ponds are likely to be excavated in existing topographical depressions, which may naturally accumulate water seasonally and serve as vernal pools. We recommend retaining the standard permitting process for wildlife ponds to ensure that such projects do not destroy vernal pools.

Thank you for the opportunity for the opportunity to comment on the proposed rule revisions. If you have questions about any of the above comments, don't hesitate to contact me.

Sincerely,

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