



# New Hampshire Fish and Game Department

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Glenn Normandeau  
Executive Director

January 18, 2019

Department of Environmental Services  
c/o Mary Anne Tilton  
29 Hazen Drive  
Concord, NH 03301

## **RE: COMMENTS ON DRAFT WETLANDS RULES**

Dear Mary Anne:

The New Hampshire Fish and Game Department (NHFGD) would like to commend the Department of Environmental Services' (DES) efforts to re-write the NH Wetlands Bureau rules, which has been long overdue. We also understand that the drafting of these rules has not come without challenges and we hope that continued conversations will address any outstanding issues within the current draft. Prior to submission of the Final draft to JLCAR, the NHFGD would be interested in meeting with DES to discuss any outstanding rule discrepancies relating to this Department's programs, if any. Please find the attached comments in response to the draft rules and we thank you for the opportunity to comment.

If you have any comments or questions, please do not hesitate to contact me at [carol.henderson@wildlife.nh.gov](mailto:carol.henderson@wildlife.nh.gov). Thank you.

Sincerely,

A handwritten signature in black ink that reads "Carol B. Henderson". The signature is written in a cursive style.

Carol Henderson  
Environmental Review Coordinator

## NHFGD COMMENTS ON NH WETLANDS RULES Env-Wt. 100-900

### General comments:

There are numerous references to documents throughout the rules that are required to be used as guides or as methods to follow when defining a feature or parameter. As there is no known timeline established for when the rules may be revised; it is recommended that it be noted in addition to a specific reference or dated document, that text be added to note “or current edition or current accepted scientific method”, if acceptable in rule.

There are multiple references to the New Hampshire Wildlife Action Plan. Please verify that the references are correctly referring to the 2015 version available on the NHFG website electronically at <https://www.wildlife.state.nh.us/wildlife/wap.html>. As this document is updated every 10 years, it is recommended that text also indicate “or most recent edition”.

There are multiple references throughout the rules that identify fish spawning areas, migratory bird habitats, avian nests, etc. Some examples of these are identified in Env.-Wt. 521.03(b) (6) and 524.04 (g), to name a few. What criteria and/or information source will DES be using to consistently identify these areas for permit applications? Is the intent to rely on NHFGD staff to provide this information? Unlike the NHB data check for Threatened and Endangered species, the NHFGD does not have a system in place to address these inquiries nor does the Department have the staff to commit to the possible requests that may ensue, especially within the new timeframes initiated by the Legislature regarding Wetlands permitting. In addition, the Department may just not have the information from surveys or mapping. The NH Wildlife Action Plan may help but it is only supposed to be used as a guideline.

The information provided in the Wetlands Best Management Practice Techniques for Avoidance and Minimization has been reviewed. There are some discrepancies with this document and the new rules, which should be corrected. For example, timing of projects within the BMP suggests low flow period from July to October; however, these rules requested a more stringent timeframe. Whichever is decided to take precedent should be reflected within the document. The low flow requirement has always been included within the rules and appear satisfactory for the majority of projects.

The standards that are identified within the rules regarding docks, boat launches, permanent piers, boardwalks should consider State projects differently under programs with statutory authority (RSA 233:A) and are designed to support the general public and physically challenged individuals (ADA compliance) than private projects. Further discussions need to be exercised regarding the NHFGD program requirements under /RSA 233:A and these Wetlands rules.

In addition, the rules regarding Prime wetlands need to be further reviewed for possible inconsistency with goals of wildlife habitat manipulation and wildlife management without jeopardizing the criteria for designating prime wetlands.

### Specific questions and/or comments:

- *Chapter Env-Wt 102.33 “Corduroy Road” means logs, limbs or branches placed to provide support for logging equipment crossing a wet area that has no standing water and no defined channels. Pertaining to the text “no standing water”, please clarify how this pertains to vernal pools and if a “corduroy road” could be placed*

in a vernal pool while no standing water? Vernal Pools are unique wetlands that provide critical habitat for numerous amphibian and reptile species, some which are considered protected species. Vernal pools are also highlighted in the Good Forestry in the Granite State: Recommended Voluntary Forest Management Practices for New Hampshire (2010 publication <https://extension.unh.edu/goodforestry/assets/docs/GoodForestry2010FINALreducedsizeSECURE.pdf>). Placement of corduroy roads within vernal pools would contradict recommended practices as detailed in Chapter 7.3: Vernal Pools and Surrounding Forest as placement of these materials and crossing these areas with machinery has the potential to alter water quality or temperature within pools, alter the length of time the pool holds water or the alter the hydrology by directing the water away from the pool or within the pool which affects the function and value of these areas as viable breeding and feeding habitats.

- *Chapter Env-Wt 102.43 "Director" means the director of the division of water within the department.* The term "Director" refers to other agency directors in different sections of the rules. Suggestion to add the text "...unless otherwise indicated for another agency". For example *Env-Wt 103.55* refers to the 'director of the fish and game department'.

*Env-Wt 102.53 "Erosion control"....* and other appropriate sections within the rules where relevant: NHFG recommends avoiding, whenever practicable, the use of welded plastic or 'biodegradable plastic' netting or thread with synthetic netting and thread in erosion control matting as these materials have been documented to entangle and kill snakes, birds and other wildlife. Instead NHFG recommends that project applicants use 'wildlife friendly' erosion control mesh such as woven organic material (e.g. coco or jute matting such as North American Green SC150BN or equivalent) or other materials that don't include a welded plastic component. This recommendation is especially important within "priority resource areas". This type of erosion control product should be included in the Wetlands Best Management Practice Techniques for Avoidance and Minimization handbook.

- *Env-Wt 102.47 "Dredge" and Env-Wt 102.55 "Excavate"* as currently defined are described very similarly and *excavate* is used in the definition of *dredge*. Please also clarify what is meant by "...or otherwise disturb" within the definition of "*Dredge*" and if fill qualifies under this definition.
- *Env-Wt 103.27 "Marsh" means a wetland that is distinguished by the absence of trees and shrubs...."* NHFG recommends revising the definition to say "...wetland that is **generally** distinguished by the absence of trees and shrubs..." so that the presence of several live or dead trees doesn't eliminate an area from being considered a marsh.
- *Env-Wt 103.52 "Priority resource area" - means a jurisdictional area that: (a) has documented occurrences of protected species or habitat for such species; **We would like to discuss this text with NHDES** further to ensure it has the intended effect on the review of protected species or habitat.*
- *Env-Wt 103.55 "Protected species or habitat means..."* – Recommend including the law/statute reference for the federal Endangered Species Act, similar to the other references. Also, if there are other federal and state laws that may be relevant under

this definition (e.g., U.S. Marine Mammal Protection Act), they could be added here or a general reference to “and other state and federal laws” could be referenced at the end of definition.

- *Env-Wt 104.15 "Secondary vernal pool indicators"* – NHFG recommends adding text to the end of definition that reads “...published by the fish and game department **or most current edition** (see General Comment above).
- Definitions pertaining to "Marsh", "Scrub shrub wetland", "Swamp" and "Wet meadow": Some of these wetland types can be dynamic based on the natural creation and/or abandonment of beaver dams and/or the action of humans breaching dams. **Further discussion is needed with DES.**
- "Statutory permit by Notification (SPN) definition is missing from Chapter Env-Wt 100.
- Env-Wt. 306.001 (d). The reference to Wt 530 is incorrect.
- Env-Wt 307.03 Protection of Water Quality Required.(f) A coffer dam or a turbidity control shall be used to enclose a dredging project conducted in or along the shoreline of a bog, marsh, lake, pond, stream, river, creek, or any other surface water, and shall be removed upon completion of the project. A coffer dam for restoration projects is simply a greater wetland impact than using solid BMPs on site. Also, in large flowing rivers, turbidity controls for restoration projects, including most dam removals, is not achievable.

Would recommend that restoration practitioners determine when coffer dams should not be required because they would be impossible to implement and/or be ineffective or actually cause more wetland or water quality impact than not using them.

- Env-Wt. 307.04 (a) Should reference the Wetlands BMP for Avoidance and Minimization.
- 307.04 (b) How will this be determined to warrant suspending the activity?
- *Env-Wt 307.06 Protection of Rare, Threatened or Endangered Species and Critical Habitat. No activity shall impact a threatened or endangered species, a species proposed for listing as threatened or endangered, or designated or proposed critical habitat under the: ....* New Hampshire Fish and Game does not maintain a list of ‘proposed’ species for listing that are protected under RSA 212-A. We recommend checking with the USFWS on whether species proposed for listing by the USFWS (Federal Registrar published) should be included. Env-Wt 307.06 is similar to the definition of *Protected Species or Habitat* (Wt 103.55) with a couple differences. We’re not certain whether those distinctions are intended or necessary. **We would also like further discuss alternatives** to the reference ‘impact’ under this section such as potentially adding ‘adversely’ preceding impact or alternatively indicate that ‘activities shall not violate state or federal laws and statutes for protected species or habitat.’

- *Env-Wt 307.09 Shoreline Structures...*Bridges do not appear to be included within exceptions and not sure whether this was the intent.
- Env- Wt. 307.10 (g) (1). Unless authorized by Fish and Game. This grants the permitting authority onto NHFGD to restrict the permit activity, which the NHFGD does not have the statutory authority to do, nor does the Department have a system or staff in place for these reviews.
- *Env-Wt 307.10 (g)* In addition to fish, dredging certain non-tidal waters during October – March can impact hibernating amphibians and reptiles. However, depending on the project, dredging during spring – summer could also impact active and/or breeding amphibian and reptile populations. Recommend that an evaluation of habitat values would be more useful in the application of timing restrictions.
- 307.10 (g) 2. This may be too inclusive to include an entire stream. May be prudent to refer to habitat evaluation to determine the extent of area that smelt may be spawning or distance from a large waterbody.
- 307 10 (i) This time restriction has been in place for many years and in the old set of Wetlands rules, however, it excludes larval stages of fish, which may have been an oversight.
- Env-Wt 307.11 Filling Activity Conditions. The following conditions shall apply to all temporary and permanent filling activities, in addition to all other applicable conditions in this part: *1a, It will not be easy to delineate the “submerged toe limit” of the fill (typically Class-C stone) that bounds the edges of our ramps. That said, the impact area resulting from the foot print of the ramp and stone filled-ramp shoulder areas should be well delineated within the project plans and controlled by the existing bathymetry of the area and not lead to excess placement of materials beyond the design-foot-print.*
- *Env-Wt.307.13.* Increase in setbacks. This should be based on some type of criteria so that it is not arbitrary to increase a setback.
- Env-Wt. 307.17 (c) do not understand this rule and how it applies.
- Env-Wt 308.01 Activities Exempted By Statute from Permit Requirement. A permit under RSA 482-A shall not be required prior to undertaking any of the following activities in any jurisdictional area: (e) As specified in RSA 482-A:3, VII and as clarified in Env-Wt 308.02(c), the removal of sand that has blown or drifted onto any lawn, driveway, walkway, parking or storage area, or boat ramp, or that has blown or drifted in, on, or around buildings or other structures owned by the person; (4) Wetlands or surface waters outside the limits of the exempted facility, area, or feature are not disturbed or degraded. Does the word “drifted” apply to river sediment that is transported by water and deposited on ramps? Clarification is needed here because the context of the sentences appears to imply wind energy and not water flow energy, further in c)(4), what would be considered the limit of a ramp? Would it include the rip-rap shoulder area edging the concrete plank surface?

- Env-Wt 308.02 Clarification of Statutory Exemptions.
  - (b) should be as defined in Env-Wt 102.56 for definition of existing structure
  - (c) Sand that has blown or drifted from a sand dune onto a lawn, driveway, walkway, parking area, storage area, or boat ramp, or that has blown or drifted into, onto, or around any structure may be removed by the owner without a permit pursuant to RSA 482-A:3, VII. See above comment.
  - (g) Unsure how DES would know that an NHB does not apply here.
    - Env.-Wt. 308.03 (a). How about biologists or UNH? This would exclude them from using an OHRV from installing fencing for plovers or other projects. Need to include scientific projects.
- Env-Wt 309.06 PBN Submission Requirements. To obtain a PBN, the applicant shall submit to the department the following, on or with a document to facilitate submitting the information, obtained from the department: (4) An accurate drawing with dimensions clearly shown to document existing site conditions and to show the location of the property; (5) An accurate drawing to show the impact of the proposed activity on jurisdictional areas, including the following: *Notwithstanding the list of requirements of the “accurate drawing,” the definition of an accurate drawing has the potential to be disputed. More clarification or a definition might help.*
- *Env-Wt 309.02 (c)* as stated would allow the temporary placement of a fabric barrier without requiring a SPN or EXP and without notification of the department provided conditions stated in *Env-Wt 307* are met. *Env-Wt 307* does include that protected species and habitat shall not be impacted by proposed activities; however, it is not specifically stated that the proposer of the activity should request a Natural Heritage Bureau Datacheck for the project site. Without requesting this information, the proposer of the activity would not likely be aware of the presence of a protected species or habitat and could result in take of an endangered wildlife species (e.g., eastern pond mussel). We are also not certain what timeframe ‘temporary’ covers in this section.
- *Env.-Wt 311.02 (f)* – NHFG recommends adding text here that reads “The NHB memo containing the NHB identification number and results and recommendations from NHB and the fish and game department.”
- Env-Wt 311.05 Required Project Plans. (a) The applicant shall provide the following information on one or more plan sheets that conform to (c), below: (15) All shorelines and surface waters on or within 250 feet of the nearest impact area and, if applicable. If the topography is to be permanently altered, existing and proposed final contours at intervals not greater than 2 feet in all areas to be disturbed and within 250 feet on site thereof, and a reference elevation referenced to the North American Datum of 1983 (NAD 83) or its successor. *Does this language mean our survey work and project plans must include offsite areas up to 250 away from our property lines/construction limits? That could require getting permission from abutters to go on to land we do not*

*control, which could provide an opportunity for abutters to delay the project by denying access.*

- *Env-Wt 311.05 Required Project Plans. (b) Plans depicting wetland boundaries that are submitted with an application for a standard permit shall: (1) Show the location and number of the individual wetland boundary flags or other markings, as located by survey or by GPS; How long must the “boundary flag: be maintained and available for review. This controls the quality of the material and perhaps how it must be secured, which impacts the cost of the placement process during the wetlands survey. Commonly the boundary is marked with ribbon flagging tied to a brush or tree limb. Will that still suffice?*
- *Env-Wt 311.05 Required Project Plans. (b) Plans depicting wetland boundaries that are submitted with an application for a standard permit shall: 1)) Show the location and number of the individual wetland boundary flags or other markings, as located by survey or by GPS; How long must the “boundary flag: be maintained and available for review. This controls the quality of the material and perhaps how it must be secured, which impacts the cost of the placement process during the wetlands survey. Commonly the boundary is marked with ribbon flagging tied to a brush or tree limb. Will that still suffice?*
- *Env.-Wt 406.02 A(b) Delineation of Wetlands Boundaries...pertaining to vernal pool delineations, NHFG recommends adding text here that indicates that additional information may be requested for vernal pool wetland delineations, particularly those delineations that occur outside of the wet season or in years where primary indicator species are low due to normal biological cycles.*
- *Env.-Wt 407.02 Resource Disqualifications (c)..., only if the applicant provides written documentation demonstrating implementation of recommendations from fish and game department.” If the project hasn’t commenced, a recommendation could not have been implemented, instead NHFG recommends the text be revised to “...only if the applicant provides written documentation committing to recommendations received from the fish and game department.”*
- *Env.-Wt 407.02 Resource Disqualifications (d)...regarding the impacted species or habitat...NHFG recommends to revise this text to “...regarding the protected species or habitat.”*
- *Env.-Wt 407.04 Project-Type Exceptions (PTEs) (b) (1) – Are there any other agencies that should qualify under this category such as FEMA, the US Forest Service, NOAA, others? This comment applies to text within Env.-Wt 525.05 as well.*
- *Env.-Wt 408.01 – This seems redundant with Env.-Wt 407.02.*

- Env.-Wt. 510.01 (a) question whether DES has jurisdiction to remove native plants since RSA 487.16 only applies to exotic species.

Env.-Wt. 513.04 Permanent Docking structures. This does not take into account State projects (NHFGD under 233: A, Public Boat Access Program) or the necessity to accommodate ADA compliance on State projects, including fishing piers.

- *Env.-Wt 517.06 (a) (7) (f) The proposed bridge footprint has not been identified by the natural heritage bureau as an exemplary natural community and does not have occurrences of state or federally listed endangered or threatened species;...NHFG recommends revising text to “The proposed bridge project site has not been identified by the natural heritage bureau to have occurrences of protected species or habitat.”*
- Env-Wt 518.06 Design Requirements for Boat Launches. the point of access to the surface water shall be located at least 50 feet from an abutting property line. (c) If an applicant wishes to locate a boat launch closer than 50 feet from an abutter’s property line, the applicant shall: (1) Obtain the written consent of the abutting property owner; and (2) Submit the written consent that has been signed by all parties and notarized with the application. *The properties that the NHFGD have now or are likely to acquire in the future will probably have small acreages and limited shore frontage. Requiring 50-foot setback added to the width a typical single ramp design (about 15 to 25 minimum depending on the slope of the lake bottom) would seriously impact the FG’s ability to build new ramps.* Abutters would have veto power over our options simply by refusing to sign a waiver/permission. The setbacks should not be any more than the 20-foot limits for docks for any other project within these rules and should not apply to State projects under RSA 233 since the boat launches are for the general public benefit versus a private individual. Further discussion with DES is warranted on this issue. .
- *Env.-Wt 519 Ponds...*
  - Fish and Game generally doesn’t promote the alteration or destruction of natural wetlands for the purposes of creating a “wildlife pond”. The Department prefers that such ponds be constructed in upland soils that aren’t in wetland soils. The Department is concerned about the long-term functionality of these systems as they often do not serve the intention of the wildlife pond and could result in the destruction natural wetlands that have functionality and value for wildlife. Legitimate restoration efforts or mitigation projects are exceptions to this statement.
  - Vernal pools are unique wetlands that provide critical habitat to many protected species. These may be connected to larger wetlands or streams under high water conditions or may be isolated. Because of the sensitivity of these wetlands and the importance of them to supporting numerous wildlife species, vernal pools should not be converted into Wildlife Ponds.
  - Wildlife Ponds should generally not be located within Priority Resource Areas unless the project is as a restoration or mitigation project;
  - As currently written, Wildlife Ponds is specifically mentioned in multiple places (e.g. *Env.-Wt 519.06* and *519.08*). It is confusing to follow and to determine what classification criteria apply to Wildlife Ponds as it pertains to

review project types (i.e. *Env.-Wt 519.06 (a), (b), (c) or (d)* minimum impact, minimum impact expedited, minor impact or expedited review (*Env.-Wt 519.08*).

- It is not clear how these rules consider *Env.-Wt 519.07 Maintenance and Repair*.
- It is noted that square footage for Wildlife Ponds is 20,000 SF where for other ponds minimums are 10,000 SF or less. It is not clear what the rationale for square footage differences is between Wildlife Ponds and fish, fire or other types of ponds.
- *Env.-WT 519.08 (f)* - A wildlife pond should not also be allowed to be used as a stormwater management treatment as this is inconsistent with the intent of a Wildlife Pond.
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- *Env.-Wt 520.05 Forestry Project Classifications (c) (3)* - NHFG recommends changing text to read “The project is located in an area with documented occurrences of a protected species or habitat where the responsible party has not received recommendations from NHB and or the fish and game department...” – see *Env.-WT 407.02 (d)*.
- *Env.-Wt 523.02 Criteria for Approval of Dredging Projects (a)* – NHFG recommends the inclusion of *Env.-Wt 307.04 Protection of Fisheries and Breeding Areas Required* and *Env.-Wt 307.06 Protection of Rare, Threatened or Endangered Species and Critical Habitat*.

*Env. - Wt. 526.02 (b)* How does this section address removal of dams which could cause or eradicate habitat. Many dams may have created a priority resource are but ultimately blocks AOP connectivity. So how would this play in the decision to remove or not remove a dam? Also, this section should reference 211:11 for notification to the NHFGD if a water level is going to be impacted by a drawdown for repair, removal or replacement of a dam

- *Env.-Wt 527.02 Criteria for Approval (f)* – NHFG recommends revising the text from “*The project will not jeopardize the continued existence of a threatened or endangered species or species proposed for such designation or the critical habitat of a species identified under the Endangered Species Act of RSA 212-A, and will avoid impacts and employ project minimization measures to protect critical habitats and populations of states’ species of conservation management concern as identified in the DataCheck tool:...*” to “*The project will not jeopardize the continued existence of a protected species or habitat, and will avoid adverse impacts and employ project minimization measures to protect rare species and protected species and habitats as identified in the DataCheck tool:...*”
- *Env-Wt 604.03 General Criteria for Tidal Waters/Wetlands. (3)* Be limited to public infrastructure or restoration projects that are in the interest of the general public, including a road, a bridge, energy infrastructure, or a project that addresses predicted sea level rise and coastal flood risk. Recommend to add “*public boat access area ramps*” to the list of approved/appropriate public infrastructure so that existing and future opportunities are covered for State projects that benefit the general public.”

- Env-Wt 806.04 Plans for Stream Restoration and Enhancement Projects. The applicant shall include the following in the report and plan required by Env-Wt 803, (a) Existing and proposed channel forms, including both cross section and profile; (c) Sediment transport model and the reference reach ;( h) If any invasive plant species are within 100 feet of each stream bank, identification of the type. It is essential that these State projects remain in the Minimum category such that the permit application fee remains low and at a fixed amount. In particular, some projects such as instream wood restoration, will not be done if the applicant is required to pay the impact fee per square foot. These projects require a very small amount of review time because they are small in nature (in terms of impact) and have a long track record of being defensible projects for the Public good. If all restoration projects were classified as minimum, the Nash Stream and Indian Stream Restoration Projects may never have happened (and DES 319 and ARM Programs were two of many funders of those projects). If these projects are included in Env.Wt. 407.04 Project –Type Excerptions that they would be beneficial but it is unclear.
- Many of the comments regarding this section in 806.04, are specific to stream crossings (and in particular to the complete removal of a crossing, regardless of whether or not a new bridge is placed there outside of wetlands jurisdiction) and instream wood restoration projects done with chainsaws and grip hoists. There is no reference to a monitoring plan for restoration projects. I would like to see that inclusion due to issues that may arise from a poorly constructed project. It's possible that this is covered elsewhere in the proposed rules.
- Regarding (a) above, the NHFGD does not recommend this requirement for instream wood restoration projects. It is physically possible for F&G, TU and other restoration partners to collect these data, but it will increase the costs of the project, especially if the reach is something fairly long, such as 1,000+ feet, which most instream wood restoration projects are. Importantly, such a requirement is truly unnecessary for instream wood projects.

A potential solution is for certain projects, such as instream wood and some crossing removal projects, should be exempt from this specific requirement. Also, some dam removal projects may not need a sediment transport model and I think the wetlands inspector can figure that out with the dam removal project partners.

- Regarding (c) above, the NHFGD does not recommend this requirement for the removal of stream crossings and for instream wood restoration projects. This requirement will effectively preclude all instream wood restoration projects and all stream crossing projects in which a culvert is removed and replaced with a bridge that is outside of wetlands bureau jurisdiction (because the removal of the culvert is the restoration project). Importantly, such a requirement is truly unnecessary for instream wood projects.
- Regarding (h) above, the Department does not recommend this requirement for instream wood restoration projects. This type of work has no effect on invasive species or the spread of them. Additionally, this would require an invasive species control plan, which is not necessary with instream wood restoration projects. All of that said, if the control plan can be as simple as: we identified an invasive species and we are going to do no work near it, then I think this requirement is OK.

- Chapter 900 (stream crossings): DES should continue with the practice of recommending that Aquatic organism passage (AOP) be addressed when a stream crossing is rehabilitated (this definition includes slip lining and lining the invert with concrete). This has worked very well with NHDOT, and AOP have been improved at a number of streams in the last several years because of this practice.