



Wetlands Laws and Clarification of Local, State, and Federal Jurisdiction



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NHACC Wetlands Training - 2

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Jurisdiction for “Wetlands” (or wetlands-related) Permitting in NH



State
RSA 482-A



and the overlap
with
RSA 483-B

Federal



- Clean Water Act
 - Section 404, 401
- Rivers and Harbors Act

Local



RSA 674:21, I (j)
Environmental
characteristics zoning

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State Authority: RSA 482-A:1

It is found to be for the public good and welfare of this state to protect and preserve its **submerged lands under tidal and fresh waters** and its **wetlands**, (both salt water and fresh water), as herein defined, from despoliation and unregulated alteration...



RSA 482-A:4, I Wherever the tide ebbs and flows...

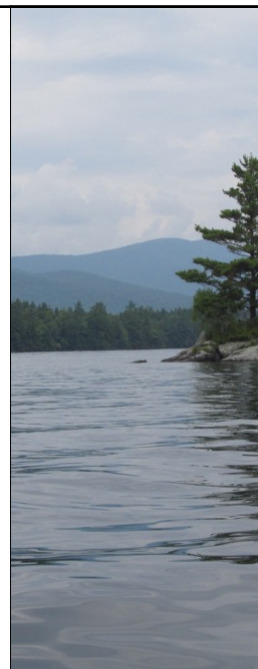
... this chapter shall apply to all lands **submerged or flowed by mean high tide** as locally determined, any **sand dune or vegetation thereon** in the state of New Hampshire, and, in addition, to those **areas within 100 feet of the highest observable tide line** which border on tidal waters, such as, but not limited to, banks, upland areas, bogs, salt marsh, swamps, meadows, flats or other lowlands subject to tidal action.



RSA 482-A:4, II Wherever fresh water flows or stands...

... and in all areas above tidal waters not included in paragraph I of this section, it **shall apply**

- (in addition to **great ponds or lakes of 10 acres or more in natural area**, as provided for in RSA 482-A:16-20 and RSA 482-A: 21-25)
- to **those portions of great ponds or lakes** created by the raising of the water level of the same ...
- and to **all surface waters of the state** as defined in **RSA 485-A:2** which contain fresh water, including the portion of any **bank or shore which borders such surface waters**, and to any **swamp or bog subject to periodical flooding** by fresh water including the surrounding shore.



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Jurisdictional Area (Env-Wt 103.25)

An area that is subject to regulation under RSA 482-A.

Including but not limited to:

- Surface waters, streams, lakes, rivers, ponds
- Wetlands
- Banks
- Flats
- Shores
- Sand dunes
- Upland tidal buffer zones
- Duly-established 100-foot buffers



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Activities Regulated in Jurisdictional Areas

RSA 482-A-3, I(a) No person shall **excavate, remove, fill, dredge, or construct any structures** in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state without a permit from the department.

Dredge - to dig, excavate, or otherwise disturb the contour or integrity of the bank or bed of a wetland, surface water, or other jurisdictional area. Env-Wt 102.60

Fill, as a noun - any rock, soil, gravel, sand, or other natural or man-made material that has been deposited or caused to be deposited by human activity. Env-Wt 103.04

Fill, as a verb - to place or deposit, or cause or allow to be placed or deposited, materials in or on a wetland, surface water, or bank, or otherwise in or on a jurisdictional area. Env-Wt 103.05



Jurisdiction: Wetlands (Env-Wt 406)

An area that is inundated or **saturated** by surface **water** or groundwater at a frequency and duration sufficient to support, and that **under normal conditions** does support, a prevalence of **vegetation typically adapted for life in saturated soil conditions**.

- **Water** at or near the surface (wetland hydrology)
- Hydric **soils**
- Prevalence of wetland (hydrophytic) **vegetation**

1987 Corps of Engineers *Wetlands Delineation Manual*

2012 *Regional Supplement to the Wetlands Delineation Manual: Northcentral and Northeast Region, Version 2.0.*

Field Indicators for Identifying Hydric Soils in New England 2017, v4

Northcentral and Northeast Regional Wetland Plant List, 2016/2020



Indicators of Wetland Hydrology (some)



drift deposits



water-stained leaves



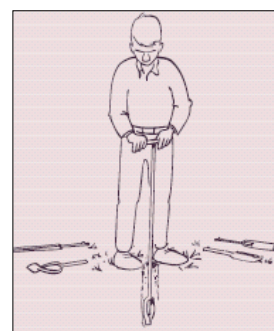
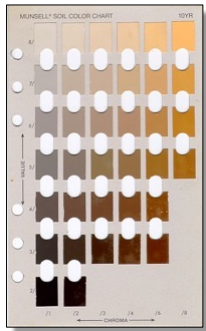
aquatic fauna



High water table

Hydric Soils (Env-Wt 103.16)

- Soil that is saturated or flooded during a sufficient portion of the growing season to develop anaerobic conditions in the upper soil layers.
- Depletion of oxygen by microbes in saturated soil conditions creates distinctive soil features that are observable during both wet and dry conditions.



Wetland Vegetation (Hydrophytes)

Includes:

- Grass-like plants (grasses, sedges and rushes)
- Herbaceous plants, including ferns, aquatic plants, etc.
- Woody plants – shrubs and trees
- ❖ Morphological adaptations



Winterberry



Bladder sedge



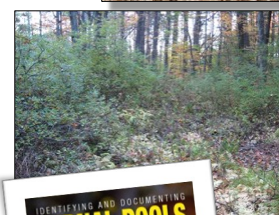
Red maple



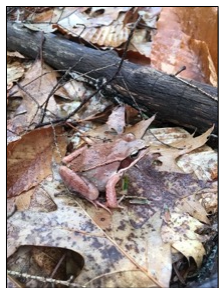
Cinnamon fern

Jurisdiction: Vernal Pools (Env-Wt 104.44)

- Provides breeding habitat for amphibians and invertebrates that have adapted to the unique environments provided by such pools.
- Cycles annually from flooded to dry conditions
- Forms in a shallow depression or basin
- Has no permanently flowing outlet
- Holds water for at least two continuous months following spring ice-out
- Lacks viable fish population; and
- Supports one or more primary vernal pool indicators, or three or more secondary vernal pool indicators.



Primary Vernal Pool Indicators (Env-Wt 103.64)

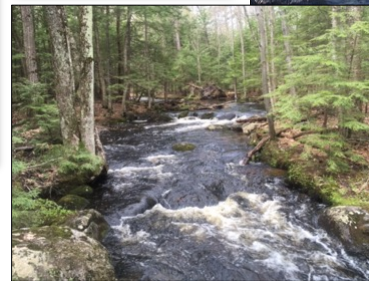
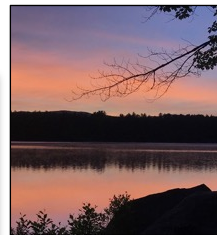


Secondary Vernal Pool Indicators (Env-Wt 104.15)



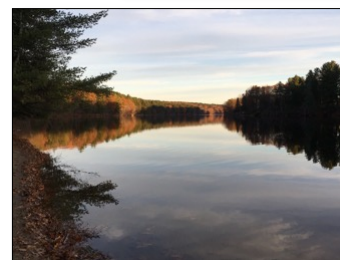
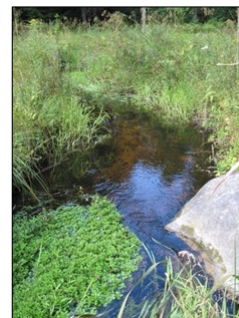
Jurisdiction: Surface Waters (Env-Wt 406.04 and 406.05)

- Perennial Streams
 - Limit of the banks
 - Ordinary high water mark
- Intermittent Streams
- Ephemeral streams
- Lakes and Ponds
 - Limit of the bank
 - Normal high water mark



Watercourse (Env-Wt 104.48)

- Any surface water that develops and maintains a defined scoured channel, with evidence of sediment transport, **or** that is a continuous channel that flows to or from a wetland or other surface water. The term includes rivers and streams.



Watercourses

Perennial stream Env-Wt 103.53	A watercourse that is in the groundwater table for most of the year and so has groundwater as its primary source of water for stream flow, with runoff from rainfall and snowmelt as a supplemental source of water, so that it contains flowing water year-round during a typical year.
Intermittent stream Env-Wt 103.21	A watercourse that is fed by groundwater but is not in the groundwater table throughout the year, where runoff from rainfall and snowmelt is a supplemental source of water for flow, such that the stream typically does not have flowing water during dry portions of the year.
Ephemeral stream Env-Wt 102.65	A watercourse that is located above the water table year-round and is not fed by groundwater, such that runoff from rainfall and snowmelt is the primary source of stream flow and so the stream has flowing water only during, and for a short duration after, precipitation or spring thaw events, but which has less flow than an intermittent stream and no evidence of riffles, meander bends, point bars, or braiding.



Bank

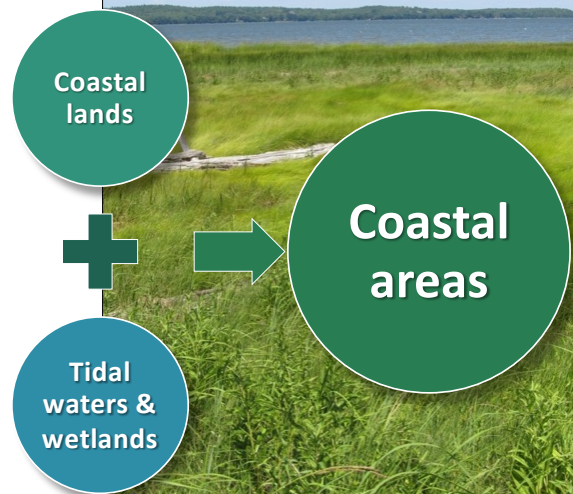
- The transitional slope adjacent to the edge of a surface water body, the upper limit of which is usually defined by a break in slope... (Env-Wt 102.15)



Jurisdiction: Coastal Areas

(Env-Wt 600)

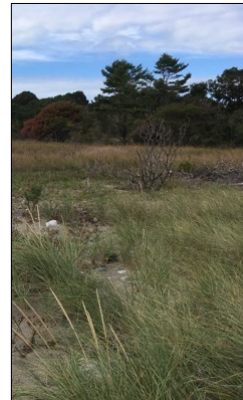
- Coastal / Tidal Features
- Delineated based on their definitions.
Such as back dune, high salt marsh, protected tidal zone, tidal flats...



Coastal Lands (Env-Wt 602.09)

Includes vegetated and non-vegetated tidal areas and:

- **Tidal buffer zone** - the area identified in RSA 482-A:4, I as bordering on tidal waters within 100 feet of the highest observable tide line... (Env-Wt 602.52)
- **Sand dunes** - as defined in RSA 482-A:2, VII.



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Priority Resource Area

(Env-Wt 103.66)

A jurisdictional area with:

- Documented occurrences of **protected species or habitat** for such species, using the **DataCheck Tool**.
- Bog.
- Floodplain wetland contiguous to a Tier 3 (watershed > 1 square mile) or higher watercourse.
- **Designated prime wetland** or a duly-established 100-foot buffer.
- Sand dune, tidal wetland, tidal water, or undeveloped tidal buffer zone.



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Bog

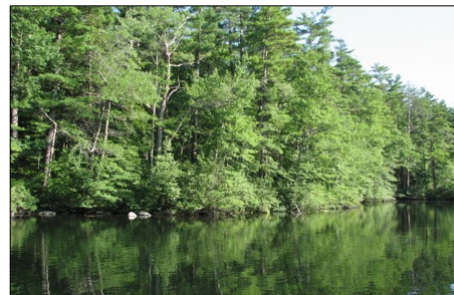
A wetland distinguished by stunted evergreen trees and shrubs, peat deposits, poor drainage, highly acidic soil conditions, highly acidic water conditions, or any combination thereof, as determined using Natural Communities of New Hampshire ... dated 2011. (Env-Wt 102.30)

- Peatland vs. bog



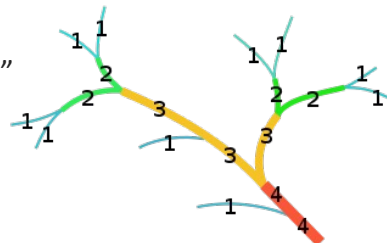
“Land along a shore, specifically beaches. Also see: *shorefront*.”

Merriam-Webster Dictionary



Where is the State’s Jurisdiction for Shoreland?

- Lakes and Ponds
 - Any open water body > 10 acres, a.k.a. “Great Pond”
- Rivers
 - Any fourth order stream /river or larger.
- Streams
 - Any third order stream that has been designated
- Within 100 feet of the highest observable tideline.



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Shoreland Water Quality Protection Act

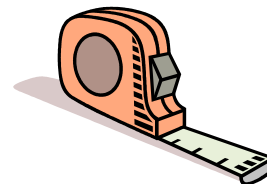
- First enacted in 1991 as the Comprehensive Shoreland Protection Act (RSA 483-B).
- Intended to protect the water quality of our rivers and lakes.
- 50-foot Waterfront Buffer (significant limitations)
- 150-foot Natural Woodland Buffer (moderate limitations)
- 250-foot Shoreland Zone (some limitations)



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What Jurisdictional Restrictions Apply to Shoreland Areas?

- Alteration of Terrain - WQ standards
- Shoreland Water Quality Protection Act
 - Basal area reduction provisions (50%)
 - Lawn and plant fertilizer restrictions
 - Building and impervious surface limits
 - Septic tank and leachfield setbacks
- Subsurface Rules
 - Septic system setbacks 50 ft (poorly drained) and 75 ft (very poorly drained)
 - 100 feet from tidal wetlands
- Local Regulations
 - Often more restrictive than state.
 - Setbacks vary from 25 feet to 400 feet.



U.S. Army Corps of Engineers



- The U.S. Army Corps of Engineers (USACE) regulates construction and other work in navigable waterways under [Section 10 of the Rivers and Harbors Act of 1899](#), and has authority over the discharge of dredged or fill material into "waters of the United States" (a term which includes wetlands and all other aquatic areas) under [Section 404 of the Clean Water Act](#).
- New England District has issued regional general permits for certain activities with no more than minimal adverse effects on the aquatic environment. [Authority – 33 USC 1344(e) to issue general permits].
- Operates in New Hampshire under a Statewide General Permit (latest re-authorization: 9/29/2022).

U.S. Army Corps of Engineers - Rivers and Harbors Act



- **The Rivers and Harbors Act of 1899** (RHA) (33 U.S.C. Sec. 401 et seq.) is the initial authority for the U.S. Army Corps of Engineers (ACOE) regulatory permit program to protect navigable waters in the development of harbors and other construction and excavation.
- Initially developed for coastal ports and interstate commerce between them.
- Any other work affecting the course, location, condition, or physical capacity of such waters is unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army.

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What are Navigable Waters ?

- Navigable waters of the United States are those waters that are subject to the **ebb and flow of the tide** and/or are presently used, or have been used in the past, or may be susceptible for use to transport **interstate or foreign commerce**. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.



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U.S. Army Corps of Engineers - Clean Water Act of 1972



- Initially prescribed by the Federal Water Pollution & Control Act of 1968.
- Addresses both Water Quality (Section 401) and the discharge of Dredge and Fill material into waters of United States (Section 404).
 - Section 401 gives states and authorized tribes the authority to grant, deny, or waive certification of proposed federal licenses or permits that may discharge into waters of the United States.
 - <https://www.epa.gov/cwa-401/overview-cwa-section-401-certification>

U.S. Army Corps of Engineers - Section 404



- The basic premise of the program is that no discharge of dredged or fill material may be permitted if: (1) a practicable alternative exists that is less damaging to the aquatic environment or (2) the nation's waters would be significantly degraded.
- When you apply for a permit, you must first show that steps have been taken to avoid impacts to wetlands, streams and other aquatic resources; that potential impacts have been minimized; and that compensation will be provided for all remaining unavoidable impacts.

What are Waters of the United States?

Types of Waters	Features	Examples of Waters Likely to Be Jurisdictional Under the Final Rule	Regulatory Text Paragraph
Traditional Navigable Waters	Large rivers and lakes that could be used in interstate or foreign commerce, as well as waterbodies affected by tides.	Mississippi River, Erie Canal, Great Lakes	(a)(1)
Territorial Seas	Territorial seas that extend three miles out to sea from the coast.	Atlantic Ocean, Pacific Ocean	(a)(1)
Interstate Waters	Includes waters like streams, lakes, or wetlands that cross or form part of state boundaries.	Lake Tahoe, portions of the Columbia River, portions of Savannah River	(a)(1)
Impoundments	Impounded bodies of water created in or from "waters of the United States," like reservoirs and beaver ponds.	Bear Gulch Reservoir in California	(a)(2)
Tributaries	Branches of creeks, streams, rivers, lakes, ponds, ditches, and impoundments that ultimately flow into traditional navigable waters, the territorial seas, interstate waters, or impoundments of jurisdictional waters. Tributaries are jurisdictional if they meet either the relatively permanent standard or significant nexus standard.	Wolftrap Run in Virginia, Puppy Creek in Arkansas	(a)(3)
Adjacent Wetlands	These wetlands can be next to, abutting, or near other jurisdictional waters or behind certain natural or constructed features. They are most often within a few hundred feet of jurisdictional waters. Adjacent wetlands are jurisdictional if they meet either the relatively permanent standard or the significant nexus standard, or where the wetland is adjacent to a traditional navigable water, the territorial seas, or an interstate water.	Parts of the Florida Everglades, Horicon Marsh in Wisconsin	(a)(4)
Additional Waters	These lakes, ponds, streams, or wetlands do not fit into the above categories. They are jurisdictional if they meet either the relatively permanent standard or the significant nexus standard.	Certain local lakes, streams, wetlands, etc.	(a)(5)

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Standards for Determining Jurisdiction



▪ Relatively Permanent Test

Water bodies must be...

- Relatively permanent standing waters
- Perennial flowing waters
- Connected to navigable (a)(1) waters
- Connected to any surface water that has a continuous connection to (a)(1) waters

Significant Nexus Test

- Tributaries and Wetlands that are subject to the CWA on the basis of their connection and effect on larger downstream waters.
- Waterbody must significantly affect the "chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters."

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Exclusions

- Prior Converted Cropland
- Waste Treatment Systems
- Ditches
- Artificially Irrigated Areas
- Artificial Lakes & Ponds
- Artificial Pools
- Water-filled Depressions
- Swales & Erosional Features



Basis for Municipal Land Use Regulation

RSA 674:17 Purposes of Zoning Ordinances.

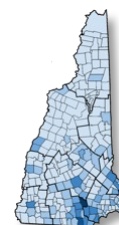
I. Every zoning ordinance shall be adopted in accordance with the requirements of RSA 674:18. Zoning ordinances shall be designed:

- (c) To promote health and the general welfare;
- (h) To assure proper use of natural resources and other public requirements.

RSA 674:21 Innovative Land Use Controls.

- I. Innovative land use controls may include, but are not limited to:
- (j) Environmental characteristics zoning

Example: Wetland overlay district with condition use permit reviewed by Planning Board (with recommendations from Conservation Commission).



Municipal Land Use Regulations Must Use the "Standard" Wetlands Definition When Referring to Wetlands

RSA 674:55 Wetlands: Wherever the term is used in regulations and ordinances... such term shall be given the meaning in RSA 482-A:2, X.

RSA 482-A:2, x - An area that is inundated or **saturated** by surface **water** or groundwater at a frequency and duration sufficient to support, and that under normal conditions does support, a prevalence of **vegetation** typically adapted for life in **saturated soil** conditions.



This definition does not include most surface waters!

For Buffers that Protect RSA 482-A Resources, Ensure your Ordinance References Surface Waters

Your ordinance should reference *wetlands* and *surface waters*.

Definition:

Surface Waters: Those portions of waters of the state as defined by RSA 485-A:2, XIV.



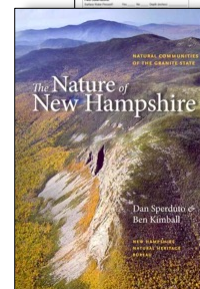
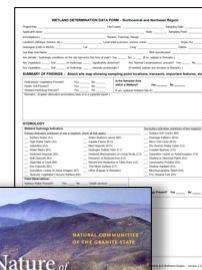
Recommendations

- Take the time to read a blank Standard Dredge and Fill application to become more familiar with the required resources, requirements and information.
- Develop a Natural Resources Inventory for your town -- or if you have an old one, update it.
- Review your zoning ordinance for potential improvements to better protect wetlands and surface waters.
- Designate prime wetlands (if you're able) and recognize these high-value wetlands in your zoning ordinance (wetland overlay district).
- Check out the remaining training sessions for more information!



For Further Information

- [RSA 482-A Fill and Dredge in Wetlands](#)
- [NHDES Shoreland Protection](#)
- [Corps Wetland Determination Data Form](#)
- [The Nature of New Hampshire - Natural Communities of the Granite State](#)
- [NHDES Wetlands Permitting Resources](#)
- [Corps - Vernal Pools](#)
- [EPA 401 Water Quality Certification](#)
- [RSA 674 Local Land Use Planning and Regulatory Powers](#)



In Review

- “Wetlands” and related jurisdiction and jurisdictional areas.
 - Federal
 - State
 - Local
- Shoreland jurisdiction
- Recommendations
- Further information

