

# Wetland Zoning Review

NH Association of Conservation Commissions

November 4, 2023

Marc Jacobs, NH Certified Wetland Scientist

## Wetland Zoning can:

- Be weak or strong
- Provide additional protection beyond state and federal laws
- Empower Conservation Commissions
- Create more involvement and/or require more activity by CC's

# Wetlands defined

Wetlands means 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.  
NH RSA 482-A:2,X. and Env-Wt 104.54.

## (Not) Normal Conditions

- Atypical situations where human activities have altered normal vegetation, soils and/or hydrology conditions or eliminated typical indicators of same:
- Trees cleared / Stumps removed
- Conversion to lawn
- Regular / routine mowing
- Grazing
- Plowing / Tilling
- Artificial drainage (French drains, subdrains, ditches, culverts etc.)
- Filling
- Excavation

# Wetlands defined - As amended?

**Wetlands** – 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 as defined by RSA 482-A:2.X and as it may be amended. (3/08, 3/11)

# Wetlands defined - As amended?

**WETLANDS:** Wetlands means 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. As adopted by reference to RSA 48-A:2, X, which will incorporate any future Statute changes.

# Wetland Conservation Overlay Zones or Districts

## ARTICLE XIX - WETLANDS

(Added March 13, 1990) (Amended March 14, 2023)

Please see NHDES Chapter 482-A: FILL AND DREDGE IN WETLANDS

# Wetland Conservation Overlay Zones or Districts

## ZONE BOUNDARIES

### 1. Wet Soils Conservation Zone

Wet Soils: All wet soils shall be delineated by a certified NH Soil Scientist in good standing. It shall mean those soils classified as poorly or very poorly drained as defined by the Soil Drainage Class Interpretive Limits section of Site-Specific Soil Mapping Standards for New Hampshire and Vermont, Version 5.0 February 2017, published by the Society of Soil Scientist of Northern New England (SSSNNE Special Publication #3), or the current version of this publication. The Wet Soils Conservation Zone also includes those areas such as swamps, marshes, and bogs that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

# Wetland Conservation Overlay Zones or Districts

## Section 2. District Boundaries

The Wet Areas Conservation Overlay District includes all areas identified as wetland, as defined by the State, poorly drained and very poorly drained soils, and vernal pools. Poorly drained and very poorly drained soils are those areas identified in the publication, "Soil Survey of Strafford County, New Hampshire" issued March 1973, as updated. All pertinent notations, soil mapping unit designations and other information shown in the publication shall be as much a part of this Article as if the matters and things set forth by this document were fully described herein. This publication is on file with the Town Clerk, the Planning Board, and the Zoning Board of Adjustment. In addition other currently mapped general locations of wet area resources is shown on the Town of Madbury Wet Areas Conservation Overlay District Map and is a supplement to the Town of Madbury Zoning Map as amended. This map also is on file with the Town Clerk, the Planning Board, and the Zoning Board of Adjustment.

If a Wet Area Conservation Overlay District boundary is uncertain or contested, the boundary in question shall be determined by a New Hampshire certified wetland scientist or certified soil scientist, where appropriate, and acceptable to the Planning Board. The owner of the property where the boundary is in question shall pay for such determination.

# Wetland Conservation Overlay Zones or Districts

**The Wetlands Conservation District (WCD)** includes tidal wetlands, freshwater wetlands, areas of very poorly drained soils and poorly drained soils, 1<sup>st</sup> through 4<sup>th</sup> order streams or rivers and their buffers. In case of any question, the precise location of a wetland boundary or stream edge in any particular case must be determined by on-site inspection of soil types and vegetation.

# Applicability / Exemptions?

The provisions of **this Article shall apply to all wet areas and their adjacent upland buffer area, except** the following:

- A. Isolated, non-tidal wet areas with a contiguous surface area of less than three thousand (3,000) square feet that are not vernal pools or are not associated with any surface water, drainage way, or other wet area, and

# Applicability / Exemptions?

(2) Limits of wetlands covered under this section are:

- (a) Wetland areas 1/2 acre or more in size;
- (b) Wetland areas of any size if contiguous to or containing surface waters (such as lakes, ponds, and streams) or very poorly drained soils as defined by the Corps of Engineers Wetland Delineation Manual and any current regional supplemental manuals; and

# Applicability / Exemptions?

Any **inland wetland**, other than a **vernal pool**, that is 10,000 square feet or more in area;

# Applicability / Exemptions?

- (1) District boundaries.
  - (a) The WWPO District shall be comprised of **all land within 100 feet** from the edge of:
    - [1] All water bodies, excluding Great Ponds, which are covered under the Shoreline Protection Overlay District; and certain man-made water bodies, such as fire ponds, agricultural/irrigation ponds, sedimentation/detention basins, and sewerage lagoons;
    - [2] All year-round watercourses;
    - [3] All wetland areas of **three or more contiguous acres**, excluding constructed or legally altered wetlands that are not part of a wetland mitigation plan, and **vegetated swales and roadside ditches**;

# Applicability / Exemptions?

- Minimum size thresholds (e.g. 3,000 SF) for 'isolated' wetlands encourage applicants to find or imagine 'breaks' between wetlands that may not actually exist
- Other minimum size thresholds often require scientists to trespass on abutting properties to confirm wetland size
- Minimum size thresholds often cannot be confirmed definitively (GIS resources can help)
- Minimum size thresholds are anathema to wetland protection and often incentivize illegal activity

# Applicability / Exemptions?

- B. Wet Areas associated with currently functioning and maintained, non-abandoned, man-made:
1. Ditches and swales.
  2. Sedimentation and/or detention basins or ponds.
  3. Agricultural and irrigation ponds and swales.
  4. Fire ponds, cisterns, and related facilities.



# Applicability / Exemptions?

- (a) A constructed vegetated swale, roadside ditch, or driveway ditch.
- (b) A sedimentation, detention, or retention basin.
- (c) An excavated agricultural, irrigation, or fire pond.

## Key language re: Exemptions

- Was feature legally constructed (with permits, plans on file)?
- 'Roadside' ditches? (What constitutes roadside?)
- Feature was not constructed as compensatory mitigation
- Feature was not created in what were previously jurisdictional wetlands
- Be specific about who makes the final determination on features or activities are exempt
- Proof or explanation of 'man-made' determinations
- Time frames for abandonment
- 'Grassed stormwater treatment swales' is preferred over grassed swales
- NH RSA 482-A:3,IV(b) is recommended reading

# Applicability / Exemptions?

1. Where the Wetlands Conservation District is suspected to have been illegally filled, since March 12, 1985, its condition shall be confirmed by digging through the fill by hand or backhoe and the presence of poorly or very poorly drained hydric soils beneath the fill shall be considered evidence of filling. The determination of the soil conditions shall be made by a New Hampshire certified soil or wetlands scientist, and paid by the applicant. (Amended 1998, 2003, March 2012)
2. Where a site's vegetation has been cleared, the presence of hydric soils shall be evidence of a wetland. (Amended 1998)

# Applicability / Exemptions?

Any area which may have been a **wetland** but was filled prior to January 1, 1970 or pursuant to properly issued federal, state and local permits granted prior to the adoption of this Ordinance shall be judged according to the conditions existing at the time an application for a **building permit** or subdivision is filed or submitted.

# Buffers and Setbacks

- Lots of confusion regarding buffers vs. setbacks and the terms are unfortunately often used interchangeably
- Setbacks usually refer to the distance required between wetlands and structures (often including impervious surfaces)
- Buffers usually refer to the distance required between wetlands any activity that involves disturbance (temporary or permanent) of vegetation and/or soils
- Your zoning should **explicitly state how much of the buffer is expected to remain natural** and un-cut (in perpetuity)
- Buffer and setback distances vary widely by town
- Appropriate buffer and setback distances is a topic for another day

## Buffer & Setback Example

### Section 5. Design and Development Standards

- A. **Wet Area Buffer.** Wet areas shall be protected by adjacent **undisturbed, naturally vegetated,** contiguous upland buffers of at least twenty-five (25) feet from the reference line of the surface water or delineation of the wet area, except as otherwise permitted in this Article. **The buffer shall not be mowed** and will be **allowed to re-establish naturally occurring vegetation.** The application of fertilizers, pesticides, or herbicides within the buffer shall be prohibited except in conjunction with allowed agricultural activities.
- B. **Building and Septic Setback.** Any construction altering the surface configuration of the land including the installation of a wastewater treatment system shall be setback from the reference line of the surface water or delineation of the wet area by an amount that includes the wet area buffer as follows:
1. **Bogs, prime wet areas and rare and exemplary wet area communities:** **75 feet.**

# Buffer & Setback Example

Setback. For all wetlands, residential driveways are exempt from this regulation. Also exempt is access to a property, not including parking spaces, and road crossings approved under the Subsection I(1) conditional use permit criteria.

# Buffer & Setback Example

Shoreline and wetland setbacks.

- (1) Each structure shall have a seventy-five-foot minimum setback from the edge of the water or edge of wetland, whichever is farther landward. Boat storage sheds, however, may be set back a minimum of 50 feet from the edge of the water or edge of wetland. In the Residential/Agricultural District, storage sheds shall be set back a minimum of 50 feet from the edge of water or edge of the wetland. Only one storage shed is allowed per lot within the buffer. Avoidance & Minimization?
- (2) Special provisions.
  - (a) No septic tank or leach field may be constructed or enlarged closer than 100 feet to any wetland.

Shoreline and wetland buffer. There shall be a fifty-foot-wide vegetated buffer along the edge of the water or edge of wetland, whichever is farther landward. This buffer serves as a natural filter to protect the waters and wetlands from contaminated surface runoff, provides habitat for terrestrial wildlife, protects aesthetic qualities of the water and wetland environment and helps prevent erosion of the shoreline. The following restrictions shall apply to the buffer:

# Conditional Uses & Special Exceptions

- Conditional Uses are typically issued by Planning Boards
- Special Exceptions are typically issued by Zoning Boards
- Critical to have thorough list of Conditions for Approval

## Conditional Uses & Special Exceptions

- (4) Wetland or stream crossing: the construction of a wetland or stream crossing for purposes of streets, roads and other access ways and utility right-of-way easements, including power lines and pipelines. A special exception for these uses may be granted if the following conditions are met:
  - (a) The use is essential to the productive use of land not in the district; and
  - (b) The use is so located and constructed as to minimize the detrimental impact upon the wetlands.

# Conditional Uses & Special Exceptions

## Criteria for Approval

Any proposed **development**, other than installation of utilities within a right-of-way, shall comply with all of the following criteria:

- (1) The land is reasonably suited to the **use**, activity or **alteration**.
- (2) There is no alternative location outside the **wetland buffer** that is feasible and reasonable for the proposed **use**, activity or **alteration**.
- (3) There will be no adverse impact on the **wetland** functional values of the site or surrounding properties;
- (4) **Alteration** of the natural vegetative state or managed woodland will occur only to the extent necessary to achieve construction goals; and
- (5) The proposal is the alternative with the least adverse impact to areas and environments under the jurisdiction of this Section.
- (6) Any area within the **vegetated buffer strip** will be returned to a natural state to the extent feasible.

# Conditional Uses & Special Exceptions

## Public and Private Utilities within Rights-of-Way in Wetlands and Wetland Buffers

The installation of utilities (including power lines and pipelines) within a right-of-way in an **inland wetland** or **wetland buffer** shall comply with all of the following criteria

- (1) The proposed construction is in the public interest;
- (2) Design, construction, and maintenance methods will utilize **best management practices** to minimize any detrimental impact of such **use** upon the **wetland** and will include restoration of the site as nearly as possible to its original grade, condition and vegetated state;
- (3) No alternative feasible route exists which does not cross or alter a **wetland** or have a less detrimental impact on a **wetland**; and
- (4) **Alterations** of natural vegetation or managed woodland will occur only to the extent necessary to achieve construction goals.

# Things you can do

- The real power lies with the Planning Board so try to maintain or improve relations with them
- Even if your town and boards are sensitive to environmental issues, start small and propose a few changes every year
- Start with low hanging fruit like elimination of minimum size thresholds and obsolete references
- Review your existing zoning language closely for applicability on **every** application – seemingly minor words and even punctuation often make a difference – many CC's unwittingly pass on jurisdiction or ability to positively influence a project / application
- If relations w/PB are marginal, try to get separate ability to require peer review of wetland delineations

## Things you can do cont.

- Require written delineation reports - from the scientist - with each application / project etc.
- Conduct site walks of all properties / projects
- Request independent peer review of wetland delineations
- Require that the all plans show / label all wetland flags for geo-referencing during site walks
- Require the scientists **stamp , signature and date** on all site plans that depict wetlands (What if the plan does not depict any wetlands?)

# Thank you for your time

- Marc Jacobs
- Certified Wetland Scientist
- Certified Soil Scientist
- Certified Professional in Erosion and Sediment Control
- P.O. Box 417
- Greenland, NH 03840
- 603-534-SOIL (7645)
- [jacobs2wetsoil2004@yahoo.com](mailto:jacobs2wetsoil2004@yahoo.com)