

Readopt with amendment Env-Wr 900, eff. 09-24-13 (Document #10417), to read as follows:

CHAPTER Env-Wr 900 OFFICIAL LIST OF PUBLIC WATERS

PART Env-Wr 901 PURPOSE AND APPLICABILITY

Env-Wr 901.01 Purpose. The purpose of these rules is to establish the procedures for the publication and maintenance of the official list of public waters required by RSA 271:20.

Env-Wr 901.02 Applicability. These rules shall apply to the creation and maintenance of the official list of public waters.

PART Env-Wr 902 DEFINITIONS

Env-Wr 902.01 “Department” means the New Hampshire department of environmental services.

Env-Wr 902.02 “Official list” means the official list of public waters required by RSA 271:20.

Env-Wr 902.03 “Status” means whether a water meets one or more of the categories listed in Env-Wr 903.01 and, if so, which one(s).

Env-Wr 902.04 “Water” means a surface water body or water course.

PART Env-Wr 903 CONTENTS AND DETERMINATIONS

Env-Wr 903.01 Waters Listed.

(a) The official list shall include the following:

- (1) “Great pond” as defined by RSA 4:40-a, as reprinted in Appendix B;
- (2) “Public water” as defined in RSA 215-A:1, as reprinted in Appendix B;
- (3) “Public bodies of water” as defined in RSA 233-A:1, as reprinted in Appendix B;
- (4) “State-owned public waters” as described in RSA 271:20, I, as reprinted in Appendix B;
- (5) “Public waters” as defined in RSA 371:17, as reprinted in Appendix B;
- (6) “Public waters” as defined in RSA 482-A:16 and RSA 482-A:21, as reprinted in Appendix B;
- (7) “Publicly-owned bodies of water” or “public-owned water bodies” as defined in RSA 482-A:16, as reprinted in Appendix B;
- (8) “Public waters” as defined in RSA 483-B:4, XVI, as reprinted in Appendix B;
- (9) Public tidal waters as described by the New Hampshire supreme court in Purdie v. Attorney General, 143 N.H. 661 (1999); and
- (10) Public rivers or streams as described by the New Hampshire supreme court in St. Regis Paper Co. v. New Hampshire Water Resources Board, 92 N.H. 164 (1942).

(b) The official list shall indicate which statute(s) each listed water is subject to.

Env-Wr 903.02 Determinations. The department shall determine the status of water in New Hampshire based on best available evidence, including the following:

- (a) Geographical information system database sets created or maintained by:
 - (1) The department;
 - (2) The U.S.D.A. Natural Resources Conservation Service;
 - (3) The United States Geological Survey (“USGS”);
 - (4) The United States Environmental Protection Agency;
 - (5) The complex systems research center of the university of New Hampshire; or
 - (6) Any combination of the above.
- (b) Current and historic USGS topographic mapping;
- (c) Other historic maps;
- (d) Historic photographs, including aerial photographs;
- (e) Depth contour mapping;
- (f) Physical evidence such as shoreline soil, slope and vegetative conditions;
- (g) Historical public uses of the water; ~~and~~
- (h) Historic documents from the fish and game department;***
- (i) Historic documents from the department of natural and cultural resources; and***
- ~~(h)~~***(j) Any other data collected by the department to determine the status of a water.***

Env-Wr 903.03 Publication of the Official List.

- (a) The department shall make paper copies of the official list available at its offices.
- (b) The department shall post the official list ~~on its internet site~~ **at: [Official List of Public Waters \(nh.gov\)](http://Official List of Public Waters (nh.gov))**
- (c) The department shall identify ***on the list***, the date the official list was last updated ~~on the list~~.

PART Env-Wr 904 REVIEW AND REVISION OF THE OFFICIAL LIST

Env-Wr 904.01 Official List Maintenance and Updates.

- (a) The department shall maintain the official list to reflect the most accurate information, as listed in Env-Wr 903.02, that becomes available.
- (b) The department shall publish each revised official list as specified in Env-Wr 903.03.

Env-Wr 904.02 Initiation of Investigation. The department shall conduct an investigation into the listed status of a water whenever:

- (a) It receives conflicting information from credible sources regarding the status of a water; or

(b) ~~So~~ ***When*** requested by the attorney general.

Env-Wr 904.03 Posting of Notice.

(a) ~~If~~ ***When*** the department initiates an investigation pursuant to Env-Wr 904.02, it shall issue a notice that identifies the following:

- (1) The name(s) of the water and the town(s) in which the water is located;
 - (2) The current listed status of the water;
 - (3) The sources of the conflicting information and a summary of the conflict;
 - (4) The deadline for submitting factual information for consideration in its decision, which shall be no sooner than 30 days from the date the notice is issued; and
 - (5) The name, ***email address***, and telephone number of the contact person at the department.
- (b) The department shall ***post on its website and*** send a ***an electronic*** copy of the notice to:
- (1) The attorney general;
 - (2) The department of ~~resources and economic development~~ ***natural and cultural resources***;
 - (3) The fish and game department;
 - (4) The ~~office~~ ***department*** of energy ~~and planning~~;
 - (5) The department of safety;
 - (6) The department of transportation; ***and***
 - ~~(7) The public utilities commission; and~~
 - ~~(8)~~(7) The governing body of each community in which the water is located.

~~(c) The department also shall post the notice on its website.~~

Env-Wr 904.04 Time for Public Comment. Any person may provide factual information pertaining to the status of the water to the department prior to the deadline specified in the notice.

Env-Wr 904.05 Decision.

(a) The department shall issue a final determination on the status of the water within ~~120 days of the posting of the notice~~ ***180 days of the deadline for submitting factual information established in the notice issued in accordance with Env-Wr 904.03(a).***

(b) The department shall send a copy of the decision to all who were sent a copy of the notice pursuant to Env-Wr 904.03(b).

(c) The department shall post a copy of the decision on the department's website.

(d) If the decision results in a change to the official list, the department also shall revise the official list by publishing an updated list as specified in Env-Wr 903.03.

Appendix A: Statutes Implemented

Rule Section(s)	State Statute(s) Implemented
Env-Wr 900	RSA 271:20, II

Appendix C: Statutory Definitions

RSA 4:40-a

The governor and council, upon petition and upon recommendation of the department of environmental services, and after consultation with the fish and game commission and such other state agencies as may be involved, may, for such consideration as they deem just, convey sand and gravel which is on the bed of any navigable water or great pond, in accordance with the provisions of this subdivision. For the purposes of this section great pond is defined as a public water of more than 10 acres.

RSA 215-A:1

XI. " Public water " means any public body of water as defined by RSA 271:20 which has been frozen over and is sufficient to hold any person or vehicle, whatsoever. Such public waters shall be deemed a public way and any violation shall be treated as if it took place on land.

RSA 233-A:1

V. "Public bodies of water" means public waters as defined in RSA 271:20 and any impoundment of a stream, lake, pond, or tidal or marine waters of 10 acres or more, or any other body of water owned by the state or by a state agency or department.

RSA 271:20. I

I. All natural bodies of fresh water situated entirely in the state having an area of 10 acres or more are state-owned public waters, and are held in trust by the state for public use; and no corporation or individual shall have or exercise in any such body of water any rights or privileges not common to all citizens of this state; provided, however, the state retains its existing jurisdiction over those bodies of water located on the borders of the state over which it has exercised such jurisdiction.

RSA 371:17

Whenever it is necessary, in order to meet the reasonable requirements of service to the public, that any public utility should construct a pipeline, cable, or conduit, or a line of poles or towers and wires and fixtures thereon, over, under or across any of the public waters of this state, or over, under or across any of the land owned by this state, modify a previously licensed installation, or license a previously constructed installation, it shall apply to the department of energy for a license to construct and maintain the same. For the purposes of this section, "public waters" are defined to be all ponds of more than 10 acres, tidewater bodies, and such streams or portions thereof as the department of energy may prescribe. Every corporation and individual desiring to cross any public water or land for any purpose herein defined shall apply to the department of energy for a license in the same manner prescribed for a public utility. The department of energy may condition any license issued under this paragraph in any manner necessary to assure that the license may be exercised without substantially affecting the public rights in public waters or state-owned lands. Using a non-adjudicative process, the department of energy may reject incomplete or improperly

filed applications, and shall, also using non-adjudicative process, issue or deny the license within 90 days of receiving a complete application and all information subsequently requested of an applicant.

RSA 482-A:16

No person shall place or cause to be placed any fill in any area below the mean high water level of any public waters or below the artificially-created high water level of publicly-owned bodies of water in this state with the intent or with the effect of creating or forming filled land adjacent to such bodies of water, except as provided in this subdivision. For the purposes of this subdivision, "public waters" means all natural ponds of more than 10 acres, and "publicly-owned bodies of water" or "public-owned water bodies" means those bodies of water whose artificial high water level is maintained by the state's exercise of its flowage rights on these ponds. The provisions of this subdivision shall not apply to such minor improvements of shorelines as the department, by rules adopted by the commissioner under RSA 541-A, may allow.

RSA 482-A:21

I. No person shall excavate, remove, or dredge any bank, flat, marsh, swamp, or lake bed that lies below the natural mean high water level of any public waters of this state, except as provided in this subdivision. For the purposes of this subdivision, "public waters" are defined as all natural ponds of more than 10 acres. Upon the request of the owner of land abutting any public waters, the division shall determine the natural mean high water level of the abutting public water.

II. The provisions of this subdivision shall not apply to:

- (a) Any land above the natural mean high water level of public waters.
- (b) Any land below any artificially created high water level of any body of water.
- (c) Projects classified as minor or minimum impact under rules adopted by the commissioner under RSA 482-A:11 which exclusively involve excavation or dredging within a great pond, and no other associated major project activities requiring a permit pursuant to RSA 482-A.

RSA 483-B:4. XVI

XVI. "Public waters" shall include:

- (a) All lakes, ponds, and artificial impoundments greater than 10 acres in size.
- (b) Coastal waters, being all waters subject to the ebb and flow of the tide, including the Great Bay Estuary and the associated tidal rivers.
- (c) Rivers, meaning all year-round flowing waters of fourth order or higher and all rivers and river segments designated as protected under RSA 483:15. Stream order shall be determined using the New Hampshire hydrography dataset archived by the geographically referenced analysis and information transfer system (GRANIT) at the complex systems research center of the university of New Hampshire, and developed by GRANIT in collaboration with the department of environmental services. A listing of the streams of fourth order and higher shall be prepared and periodically updated by the GRANIT at the complex systems research center of the university of New Hampshire and delivered to the commissioner 30 days after the effective date of this subparagraph.