

Discussion paper for the THIRD information meeting covering the fourth and fifth Parts on developing new Instream Flow Rules – October 19, 2016

PART Env-Wq 1904 PROCEDURE FOR ESTABLISHMENT OF PROTECTED INSTREAM FLOWS

Env-Wq 1904.01 Elements of Protected Instream Flows. To establish protected instream flows on a designated river or designated river segment:

(a) The department shall:

(1) Conduct a protected instream flow study to propose protected instream flows, based on scientific methods, as provided in Env-Wq 1904.02;

(2) Publish the proposed protected instream flows for public review, and conduct a public hearing to receive comment on the study and the proposed protected instream flows, as provided in Env-Wq 1904.03.

(b) The commissioner shall issue a written decision regarding establishing the protected instream flows for the designated river, as provided in Env-Wq 1904.04.

Env-Wq 1904.02 Protected Instream Flow Study. The protected instream flow study for each river designated under RSA 483:15 shall:

(a) Identify and catalog all flow-dependent instream public uses on the designated river.

(b) Identify and quantify water use locations and monthly volumes for all affected water users in the WMPA.

(c) Include a field assessment of flow-dependent instream public uses of the designated river or designated river segment.

(d) Apply scientific analyses, as described in the 2015 final report of Impact of Water Withdrawals on Instream Flows Study Committee¹, to determine protected instream flows that conserve and protect the flow-dependent instream public uses identified in (a) above; and

(e) Create a document for public distribution containing the recommended, scientifically-based protected instream flows based on application of the method(s) identified in (d) above, and applicable water quality standards.

Env-Wq 1904.03 Publication, Hearing, and Opportunity for Public Comment on Protected Instream Flows.

(a) The department shall prepare a proposed protected instream flow study report describing

¹ [Note on this report: See <http://des.nh.gov/organization/divisions/water/wmb/rivers/instream/report.htm>. This report was submitted by the legislative committee and will be incorporated by reference in this rule.]

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1 (1) The methods applied to determine the protected instream flows;

2
3 (2) The protected instream flows proposed for the designated river; and

4
5 (3) The supporting information used to determine those flows.

6
7 (b) The department shall hold an information meeting to present the proposed protected instream
8 flow study report prior to the public hearing described in (c) below.

9
10 (c) After the protected instream flow study document has been prepared, and prior to establishment
11 of protected instream flows, the department shall make the study report, with the proposed protected
12 instream flows, available for public review and hold a public hearing, in accordance with Env-C 205, to
13 receive public comment.

14
15 (d) The hearing shall be held in a community in which the designated river flows.

16
17 (e) At least 30 days before the hearing, the department shall issue a notice of the public hearing,
18 including how a copy of the study report may be obtained.

19
20 (f) At least 30 days before the hearing, the department shall send notice of the public hearing and
21 study availability to, and solicit comment from, the following:

22
23 (1) Affected water users in the WMPA;

24
25 (2) Affected dam owners in the WMPA;

26
27 (3) Lake associations in the WMPA on lakes with affected dams;

28
29 (4) RMAC members;

30
31 (5) LMAC members;

32
33 (6) LRMAC members for the designated river;

34
35 (7) The governing body of each municipality in the WMPA;

36
37 (8) State senators and representatives representing the WMPA;

38
39 (9) The governor of any state which shares a designated river;

40
41 (10) The United States Environmental Protection Agency;

42
43 (11) The United States Fish And Wildlife Service;

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1
2 (12) The United States Geological Survey

3
4 (13) Federal Energy Regulatory Commission, for each WMPA with a licensed or exempted
5 hydropower site;

6
7 (14) The United States Forest Service, for each designated river inside the White Mountain
8 National Forest;

9
10 (15) The National Park Service;; and

11
12 (16) Persons who have requested in writing to be notified of the hearing.

13
14 (g) At the public hearing, the department shall specify a comment period which shall close at least
15 30 days after the hearing date, during which time the department shall accept written comments on the
16 factors pertaining to the proposed protected instream flows.

17
18 (h) The department shall use the comments received during the public hearing and comment period
19 to review the proposed protected instream flows relative to the following factors:

20
21 (1) The flow-dependent instream public uses identified in RSA 483:9-c;

22
23 (2) Water quality standards;

24
25 (3) Flows established pursuant to existing Federal Energy Regulatory Commission licensing
26 processes or state contracts;

27
28 (4) Whether there are wastewater discharges that require a certain instream flow for permit
29 compliance or maintaining water quality standards;

30
31 (5) Whether the river contains flow-regulating structures such as dams, and if so, how such
32 structures affect flow;

33
34 (6) Information relevant to flow conditions that will conserve, protect, maintain, or restore
35 aquatic life or habitat, or both;

36
37 (7) Information relevant to flow conditions that will conserve, protect, maintain, or restore
38 recreational uses;

39
40 (8) Information relevant to flow conditions that will conserve, protect, maintain, or restore
41 resources for which the river is designated;

42
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1 (9) Pertinent resource management plans including, but not limited to, fisheries management
2 plans, watershed management plans, and recreation management plans; and
3

4 (10) Other information relevant to the proposed protected instream flows.
5

6 Env-Wq 1904.04 Establishment of Protected Instream Flows.
7

8 (a) Following the comment period, the department shall:
9

10 (1) Review all comments received; and
11

12 (2) Revise the protected instream flow study report if the comments received demonstrate that
13 there are technical or factual errors.
14

15 (b) The commissioner shall issue a decision establishing protected instream flows for the designated
16 river that meet the criteria in RSA 483:1 and 483:2.
17

18 (c) The decision shall:
19

20 (1) Be in writing;
21

22 (2) State the scientific basis for the established flow(s);
23

24 (3) Include an assessment of how the established flows will meet applicable water quality
25 standards;
26

27 (4) Summarize the comments received; and
28

29 (5) Explain how the comments affected the decision.
30

31 (d) The department shall notify the following persons that a decision has been reached and how to
32 obtain a copy:
33

34 (1) Persons identified in Env-Wq 1904.03(f);
35

36 (2) Persons who submitted written comments on the proposed flows; and
37

38 (3) Persons who requested to receive a copy of the notice of the established flows.
39

40 (e) The commissioner shall establish the protected instream flows prior to adoption of that
41 WMPA's water management plan.
42

43 Env-Wq 1904.05 Petition for Change to an Established Protected Instream Flow.

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1
2 (a) An aggrieved person may file a petition with the commissioner for change to an established
3 protected instream flow.

4
5 (b) The petition shall be in writing.

6
7 (c) The petition shall include:

8
9 (1) The name, address, and daytime telephone number of the person requesting change;

10
11 (2) If the person requesting change is not an individual, the name of an individual who can be
12 contacted on behalf of the organization requesting the change;

13
14 (3) A clear and concise statement of the specific change requested to an established protected
15 instream flow;

16
17 (4) An explanation of how a change to the protected instream flows would meet water quality
18 standards;

19
20 (5) A full explanation of why protected instream flows should be changed on the designated
21 river;

22
23 (6) Data not available or not considered at the time the protected instream flow was
24 established.

25
26 (d) Within 30 days of receiving a petition for change to the protected instream flow, the department
27 shall:

28
29 (1) Deny the petition and affirm the established protected instream flow; or

30
31 (2) Grant the petition and begin reconsideration of the protected instream flow.

32
33 (e) The department shall grant the petition if the information in the petition or other information
34 reviewed by the department indicates that the established protected instream flows are not correct and if
35 the petition is complete as described in (c) above.

36
37 (f) The department's decision shall:

38
39 (1) Be in writing;

40
41 (2) Be sent to the person who petitioned for the change to the instream flow and to any other
42 person who has asked to be notified of the decision in writing;

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1 (3) Be made available to the public; and

2
3 (4) State the reason(s) for the decision, whether the decision is to deny the petition or to
4 reconsider established protected instream flows.

5
6 (g) If the department grants the petition, the department shall establish revised protected instream
7 flows by the process set forth in Env-Wq 1904.03 and 1904.04.

8
9 (h) As specified in RSA 483:9-c, X, the commissioner's decision on the petition may be appealed in
10 accordance with RSA 541.

11
12 Env-Wq 1904.06 Department initiated change to protected instream flows. The department shall
13 initiate action to reconsider a designated river's protected instream flows if the department determines that
14 there are changed conditions in the WMPA that warrant re-evaluation of the flows.

15
16 PART Env-Wq 1905 PROCEDURE FOR ADOPTION OF WATER MANAGEMENT PLANS

17
18 Env-Wq 1905.01 Elements of a Water Management Plan.

19
20 (a) The department shall compile a water management plan that sets forth how the protected
21 instream flows, established for a designated river or segment under Part Env-Wq 1904, shall be
22 maintained.

23
24 (b) The water management plan shall include:

25
26 (1) A water conservation plan, as provided in Env-Wq 1905.02, for each affected water user;

27
28 (2) A water use plan, as provided in Env-Wq 1905.03, for each affected water user; and

29
30 (3) A dam management plan, as provided in Env-Wq 1905.04, for each affected dam owner.

31
32 (c) The department shall prepare an estimate of the cost to implement each affected water user's
33 and affected dam owner's proposed plan that considers:

34
35 (1) The implementation schedules of each plan; and

36
37 (2) For affected water users engaged in agriculture or public water supply:

38
39 a. Any local, state, or federal financial assistance programs that could provide funding
40 for plan implementation; and

41
42 b. Estimates of the amount and timing of financial assistance available.

43
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1 Env-Wq 1905.02 Water Conservation Plans.

2
3 (a) Each affected water user in a WMPA that is subject to established protected instream flows
4 under Env-Wq 1904.02 shall have a water conservation plan as part of the water management plan.

5
6 (b) Notwithstanding subsection (a) above, a hydropower dam that is both an affected water user and
7 also an affected dam shall not have a water conservation plan, but instead shall have only a dam
8 management plan under Env-Wq 1905.04.

9
10 (c) Each affected water user in the WMPA shall prepare a water conservation plan in consultation
11 with the department for submittal to the department's drinking water and groundwater bureau for
12 approval.

13
14 (d) Each water conservation plan shall:

15
16 [PLACEHOLDER – The Instream Flow Program is coordinating with the Water Conservation
17 Program to develop language that will link the Env-Wq 2101 Water Conservation Rules with
18 the Instream Flow Rules. This is to avoid having two separate water conservation processes.]

19
20 (2) For each affected water user in the WMPA, include an implementation plan and schedule,
21 as provided in Env-Wq 1905.05.

22
23 Env-Wq 1905.03 Water Use Plans.

24
25 (a) Each affected water user in a WMPA subject to established protected instream flows under Env-
26 Wq 1904.02 shall have a water use plan as part of the water management plan.

27
28 (b) Notwithstanding subsection (a) above, a hydropower dam that is both an affected water user and
29 also an affected dam shall not have a water use plan, but instead shall have only a dam management plan
30 under Env-Wq 1905.04.

31
32 (c) The department shall identify all affected water users within the WMPA and shall prepare a
33 water use plan for, and with the assistance of, each affected water user in the WMPA.

34
35 (d) Each water use plan shall:

36
37 (1) For each affected water user in the WMPA, include a report of water use patterns and
38 anticipated needs based on specific water-use data and information from department records, site visits,
39 and meetings, which includes the following information:

40
41 a. The name of the affected water user facility;

42
43 b. The name of the town where the facility is located;

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1
2 c. The name, address, and telephone number of owner, operator or both;

3
4 d. The emergency contact person and phone number; and

5
6 e. A complete description of current and projected water use.

7
8 (2) Describe the affected water user's potential for water use modification to meet protected
9 instream flows, including water use patterns and needs as determined in (1) above;

10
11 (3) Apply management actions to affected water users only to the extent that their water use
12 affects the designated river stream flow, considering the location and timing of the affected
13 water user's withdrawal(s) and return(s);

14
15 (4) For each affected water user in the WMPA, include an individual water use plan so that
16 the net effect of implementation of all individual plans, in coordination with implementation of
17 the dam management plan, is maintenance of the protected instream flows; and

18
19 (5) For each affected water user in the WMPA, include an implementation plan and schedule,
20 as provided in Env-Wq 1905.05.

21
22 (e) As a part of the water use plan, the de minimis amount at any location on the designated river
23 shall always be available for use.

24
25 (f) The department shall:

26
27 (1) Determine the de minimis amounts for the designated rivers and publish the results.

28
29 (2) Determine the distribution of the de minimis amount among the affected water users in
30 order to best maintain the protected instream flows while supporting water use needs.

31
32 (3) Review, and revise as needed, the distribution of the de minimis amount if there are
33 changes in water use in the WMPA.

34
35 Env-Wq 1905.04 Dam Management Plan.

36
37 (a) Each affected dam owner in a WMPA that is subject to established protected instream flows
38 under Env-Wq 1904.02 shall have an individual dam management plan as part of the water management
39 plan.

40
41 (b) The department shall identify all affected dam owners within the WMPA and shall prepare a
42 dam management plan for, and with the assistance of, each affected dam owner in the WMPA.
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1 (c) Each individual dam management plan shall:
2

3 (1) Include data and information from department sources, site visits, and interviews with
4 each affected dam owner or their operator on characteristics and operational procedures of
5 affected dams within the WMPA including:
6

- 7 a. The name of the dam;
8
9 b. The name of the town where the dam is located;
10
11 c. The name, address, and telephone number of owner, operator or both;
12
13 d. The emergency contact person and phone number;
14
15 e. The dam's state ID number;
16
17 f. Any annual operations of the dam, such as fall drawdown and spring refilling.
18
19 g. The name of the water body impounded by dam and the downstream river;
20
21 h. The designated use(s) and primary use of the impoundment;
22
23 i. The elevation, in feet, of the recreational pool;
24
25 j. The elevation, in feet, of the invert of all spillways or outlets;
26
27 k. The elevation, in feet, of the streambed at the dam centerline or the height relative to
28 the lowest spillway
29
30 l. The elevation, in feet, of the top of the dam or dam height relative to the lowest
31 spillway;
32
33 m. The height of the dam, in feet, from toe to the highest point on the dam;
34
35 n. The volume of water in the top 2 feet of the lake at full pool.
36
37 o. The type and dimensions of spillway control(s) or outlet works;
38
39 p. The surface area, in acres of impoundment at recreational pool impoundment;
40
41 q. The drainage area, in square miles;
42

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- r. The maximum storage, in acre-feet, which is the volume of water which could be impounded above the natural pond or stream elevation, with the water level at the top of dam, or with the water level at the highest elevation which could be hydrologically attained, if this elevation is below the top of dam;
- s. The normal storage, in acre-feet, which is the volume of water impounded above the natural pond or stream elevation when the water level is at the spillway crest;
- t. Descriptions of the type, dimensions, invert elevation, and when available, discharge capacity at the water surface elevation of normal storage, or rating curves, or both, of each outlet structure of the dam;
- u. The maximum unoperated discharge, in cubic feet per second (cfs);
- v. The design storm discharge, in cfs;
- w. The estimated 50-year flood flow, in cfs;
- x. The estimated 100-year flood flow, in cfs;
- y. Any contractual obligations, minimum flow requirements and flowage rights;
- z. An operation and maintenance plan summary;
- aa. A description of any interests of riparian property owners to the impoundment; and
- ab. A description of any water quality standards factors related to the impoundment.

(2) Include a section describing:

- a. The potential water available for release to maintain protected instream flows;
- b. The ecological and other impacts to the impoundment and downstream river reaches which might restrict the use of such waters for augmentation flows; and
- c. The potential for dam management to meet instream flow requirements, including dam operation patterns, physical structure, and needs as determined in (c)(1) above.

(3) Include an implementation plan and schedule, as provided in Env-Wq 1905.05.

Env-Wq 1905.05 Implementation Plan and Schedule.

(a) Each conservation plan, water use plan and dam management plan shall have an implementation plan with a schedule to complete the provisions of their management plan.

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1
2 (b) Implementation schedules shall begin upon adoption of the water management plan.
3

4 (c) An affected water user or an affected dam owner shall have up to 5 years to complete the actions
5 under their implementation plan.
6

7 (d) Any affected water users or affected dam owners with implementation periods longer than 3
8 years shall make periodic progress reports to the department after the water management plan is adopted.
9

10 (1) The affected water users or affected dam owners shall submit written progress reports to
11 the department by October 1 each year.
12

13 (2) The affected water user or affected dam owner shall describe in the progress report:
14

15 a. The actions remaining to be implemented under their implementation plan;
16

17 b. The progress made on each action in the previous year, and
18

19 c. A schedule to complete the actions under the implementation plan.
20

21 (e) An affected water user or affected dam owner will submit a final report to the department when
22 they have completed the actions under their implementation plan schedule.
23

24 Env-Wq 1905.06 Publication, Hearing, and Opportunity for Public Comment on Water
25 Management Plans.
26

27 (a) Prior to adoption of a water management plan for a designated river or designated river segment,
28 the department shall:
29

30 (1) Prepare a proposed water management plan document specifying the water conservation
31 implementation plan and schedule, and the water use plans and dam management plans of
32 each affected water user and affected dam operator in the WMPA.
33

34 (2) Make the proposed water management plan document available for public review and
35 comment at least 30 days before the public hearing described in (4) below.
36

37 (3) Hold a public information meeting to present the proposed water management plan
38 document prior to the public hearing described in (4) below.
39

40 (4) Hold a public hearing, in accordance with Env-C 205, to receive public comment on the
41 water management plan.
42

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1 (b) The department shall use the comments received during the public hearing and comment period
2 to review the proposed water management plan relative to the following factors:

- 3
4 (1) The outstanding characteristics identified in RSA 483:1;
5
6 (2) The resources identified in RSA 483:6, IV(a);
7
8 (3) Instream public uses identified in RSA 483:9-c;
9
10 (4) Water quality standards;
11
12 (5) The extent to which implementation of the water management plan will maintain the
13 established protected instream flows;
14
15 (6) Whether there are affected water users or affected dam owners in the WMPA that have
16 failed to provide information or participate in good faith in negotiations for development of the
17 plan;
18
19 (7) The reasons affected water users or affected dam owners object to provisions of the
20 proposed plan;
21
22 (8) Information relevant to conservation, water use, or dam operation which has not been
23 considered in preparation of the proposed plan;
24
25 (9) Information relevant to implementation of the proposed plan; and
26
27 (10) Other information relevant to the proposed plan.

28
29 (c) The hearing shall be held in a community in which the designated river flows.
30

31 (d) At least 30 days before the hearing, the department shall issue a notice of the hearing and solicit
32 comment from the persons and agencies listed in Env-Wq 1904.03(f).
33

34 (e) At the public hearing, the department shall specify a comment period which shall close at least
35 30 days after the hearing date, during which time the department shall accept written comments on the
36 factors pertaining to the proposed water management plan.
37

38 Env-Wq 1905.07 Adoption of Water Management Plans.
39

40 (a) Following the comment period, the department shall:

- 41
42 (1) Review all comments received; and
43

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1 (2) Revise the plan if testimony received shows that the plan does not meet the criteria in (b)
2 below.

3
4 (b) The commissioner shall adopt the plan if:

5
6 (1) The plan contains the 3 elements described in Env-Wq 1905.01(b);

7
8 (2) Each of the elements in Env-Wq 1905.01(b) has a implementation plan and schedule;

9
10 (3) Implementation of the water management plan will result in maintenance of the
11 established protected instream flows; and

12
13 (4) Implementation of the water management plan will enhance or not diminish the enjoyment
14 of outstanding river characteristics of the river or segment.

15
16 (c) The commissioner shall issue a written decision regarding the adoption of the water
17 management plan for the designated river

18
19 (d) The adopted water management plan shall:

20
21 (1) Be in writing;

22
23 (2) Summarize comments received by the department; and

24
25 (3) Explain how the comments affected the adopted plan.

26
27 (e) The department shall provide notice that the adopted plan is available to:

28
29 (1) Persons identified in Env-Wq 1904.03(f);

30
31 (2) Persons who submitted written comments on the proposed plan; and

32
33 (3) Persons who requested notification of the adoption of the plan.

34
35 Env-Wq 1905.08 Petition for Change to an Adopted Water Management Plan.

36
37 (a) A person may file a petition with the department for change to an adopted plan when:

38
39 (1) There is a new affected water user in the WMPA; or

40
41 (2) There are changes by an affected water user or affected dam owner that impact stream
42 flow conditions at protected instream flow levels.

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1 (b) The petition shall be in writing.
2

3 (c) The petition shall include:
4

- 5 (1) The name, address, and daytime telephone number of the person petitioning for change;
6
7 (2) If the person petitioning for change is not an individual, the name of an individual who can
8 be contacted on behalf of the organization petitioning for change;
9
10 (3) A clear and concise statement of the specific change being sought to the plan;
11
12 (4) An explanation of how the change to the adopted plan is consistent with maintenance of
13 established protected instream flows and water quality standards;
14
15 (5) Documentation that all affected water users and affected dam owners to whom the change
16 applies have agreed to the change, or if all have not agreed, an explanation of the reasons for
17 failure to agree;
18
19 (6) If applicable, any factors the petitioner believes the department should reevaluate; and
20
21 (7) Data not available or considered at the time the plan was adopted.
22

23 (d) The department shall grant the petition if the information in the petition indicates that criteria in
24 (a) above for changes to a water management plan are met, and if the petition is complete as described in
25 (c) above.
26

27 (e) The department may deny a petition for change that is based on information available to the
28 requesting party when the water management plan was prepared, but not submitted to the department in a
29 timely fashion.
30

31 (f) Within 45 days of receiving a petition for change, the department shall:
32

- 33 (1) Deny the petition and affirm the adopted plan; or
34
35 (2) Grant the petition and begin reconsideration of the provisions of the plan requested in the
36 petition.
37

38 (g) The department's decision shall:
39

- 40 (1) Be in writing;
41
42 (2) Be sent to the person who requested the change to the water management plan and to any
43 other person who has asked to be notified of the decision in writing;

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1
2 (3) Be made available electronically to the general public; and
3

4 (4) State the reason(s) for the decision, whether the decision is to deny the petition or to grant
5 the petition and reconsider the specified provisions of the water management plan.
6

7 (h) If the department grants the petition, the department shall within 30 days of the decision, initiate
8 action to reconsider a water management plan by the processes described in Env-Wq 1905.01
9

10 Env-Wq 1905.09 Process for routine updates of Water Management Plans.
11

12 (a) The department may make changes to an affected water user's or an affected dam owner's water
13 management plan without a public hearing to update the following parts of a plan:
14

15 (1) Monthly and annual water use data,
16

17 (2) Affected dam owner or affected water user contact information;
18

19 (3) Corrections to or additions of measurements or technical information; or
20

21 (4) Other updates that do not affect operational management.
22

23 (b) The department shall make a public notice of its intent to make routine changes at least 10
24 business days prior to finalizing those changes to the water management plan.
25

26 Env-Wq 1905.10 Changes to the Water Management Plan as a Result of Changes in the WMPA.

27 The department shall initiate action to reconsider a water management plan by the processes described in
28 Env-Wq 1905.01 if there are changed conditions in the WMPA that warrant re-evaluation of the plan.
29

30 [END]

Discussion paper for the THIRD information meeting covering the fourth and fifth Parts on developing new Instream Flow Rules – October 19, 2016

- 1 [Parts to be discussed at fourth meeting]
- 2 PART Env-Wq 1906 ADMINISTRATION OF WATER MANAGEMENT PLANS
- 3 Protected Instream Flows and Water Quality Criteria.
- 4 Compliance with Water Quality Standards.
- 5 Time extension for implementation plan schedules.
- 6 ***[Legislative language for reference -*** Water management plans implementing instream flow protections shall be
- 7 effective and enforceable upon adoption. The department shall allow a period of up to 5 years for any party subject to the
- 8 instream flow program to implement the provisions of their water management plan. The department shall adopt rules,
- 9 pursuant to RSA 541-A, to allow for one 5-year extension for any party who files ongoing progress reports for and is working
- 10 in good faith on their water management plan but is unable to implement the provisions of their water management plan due to
- 11 financial or other hardship.]
- 12 Enforcement of Water Management Plans.
- 13
- 14 PART Env-Wq 1907 WAIVERS
- 15 ***[Legislative language for reference -*** The department shall adopt rules, pursuant to RSA 541-A, to allow for waivers
- 16 from the provisions of a water management plan. Such rules shall specify the waiver criteria based on negative impacts to
- 17 public health or safety or an undue financial hardship on a party subject to a water management plan. Should a party meet the
- 18 criteria for a waiver, and notwithstanding RSA 483:9-c, VI, the department shall waive, in whole or in part, the enforceability
- 19 of those components of the party’s water management plan until the department amends such plan to alleviate the negative
- 20 impacts to public health or safety or undue financial hardship.]
- 21

