

NEW HAMPSHIRE

Enforceable Provisions Applicable to Nonpoint Source Water Pollution

DISCHARGE PROHIBITIONS

Water Pollution Control Law

New Hampshire's water pollution control law has several provisions that may be used to take enforcement action against nonpoint source water pollution. Two of these provisions prohibit disposal of "wastes" or discharges of "pollution" that result in violation of water quality classifications. A third prohibits the discharge of "wastes" to any waters of the state without a written permit. And a fourth, more narrowly defined prohibition, identifies some specific substances that may not be placed into the state's waters or onto the banks of such waters. None of these provisions is expressly limited to point sources.

- "After adoption of a given classification for a stream, lake, pond, tidal water, or section of such water, the department [of environmental services] shall enforce such classification by appropriate action in the courts of the state, and it shall be unlawful for any person or persons to dispose of any sewage, industrial, or other wastes, either alone or in conjunction with any other person or persons, in such a manner as will lower the quality of the waters of the stream, lake, pond, tidal water, or section of such water below the minimum requirements of the adopted classification...."¹

- "If, after adoption of a classification of any stream, lake, pond, or tidal water, or section of such water...it is found that there is a source or sources of pollution which lower the quality of the waters in question below the minimum requirements of the classification so established, the person or persons responsible for the discharging of such pollution shall be required to abate such pollution within a time to be fixed by the department...."²

- "It shall be unlawful for any person or persons to discharge or dispose of any sewage or waste to the surface water or groundwater of the state without first obtaining a written permit from the department of environmental services. Applications for permits shall be made upon forms prescribed by the department..."³

For purposes of these prohibitions, "Waste" means "industrial waste and other wastes;" while "other wastes" means "garbage, municipal refuse, decayed wood, sawdust, shavings, bark, lime, ashes, offal, oil, tar, chemicals and other substances other than sewage or industrial wastes, and any other substance harmful to human, animal, fish or aquatic life."⁴

Enforcement of these prohibitions is by the department of environmental services, which may establish the period for abatement, issue a cease and desist order, or seek injunctive relief in court.⁵ "On application of the department of environmental services, the superior court or any justice of such court...may enjoin any act in violation of any lawful order of the department of environmental services."⁶ "The department shall issue a written cease and desist order against any discharge or act in violation of this subdivision...or lawful regulation of the department...or any condition of any

permit lawfully issued by the department, and any such discharge or act may be enjoined by the superior court upon application of the attorney general..."⁷ "The written cease and desist order...shall be recorded by the department in the registry of deeds for the county in which the property is situated and, upon recordation, said order shall run with the land..."⁸ Enforcement against timber operations in violation of this chapter is conducted by the director of the division of forests and lands, department of resources and economic development.⁹ Violators are subject to civil penalties of up to \$10,000 per day; or administrative penalties of not more than \$2,000 per offense. Willful or negligent violations, or knowing failure to obey a lawful order subjects the violator to a fine of up to \$25,000 per day and/or imprisonment for up to 6 months.¹⁰

- A separate, and more narrow water pollution provision may be applicable to a limited set of nonpoint problems. "It shall be unlawful for any person to put or place, or cause to be put or placed into a surface water of the state or on the ice over such waters, or on the banks of such waters, any bottles, glass, crockery, cans, scrap metal, junk, paper, garbage, tires, old automobiles or parts thereof, tree, or similar litter."¹¹ Enforcement is by abatement order, abatement and cost recovery, injunction, and fine.¹²

In interpreting and applying its laws to nonpoint source water pollution, New Hampshire may rely in part upon its law declaring a public trust in the waters of the state, creating obligations for all of its land management and regulatory agencies: "[T]he water of New Hampshire whether located above or below ground constitutes a limited and, therefore, precious and invaluable public resource which should be protected, conserved and managed in the interest of future generations. The state as trustee of this resource for the public benefit declares that it has the authority and responsibility to provide careful stewardship over all the waters lying within its boundaries. The maximum public benefit shall be sought, including the assurance of health and safety, the enhancement of ecological and aesthetic values, and the overall economic, recreational and social well-being of the people of the state. *All levels of government within the state, all departments, agencies, boards and commissions, and all other entities, public or private, having authority over the use, disposition or diversion of water resources, or over the use of the land overlying or adjacent to, the water resources of the state, shall comply with this policy and with the state's comprehensive plan and program for water resources management and protection.*"¹³ Under the water pollution law, state law provides that the department of environmental services shall be governed solely by criteria related to a more narrowly defined purpose: "to protect water supplies, to prevent pollution in the surface and groundwaters of the state and to prevent nuisances and potential health hazards."¹⁴

Other Discharge Limitations

Public health and nuisance-type provisions also provide enforceable mechanisms applicable to some forms of nonpoint source pollution.

- "The health officers of towns may make regulations for the prevention and removal of nuisances, and such other regulations relating to the public health as in their judgement the health and safety of the people require, which shall take effect [upon approval by the selectmen, and publication]."¹⁵ The department of health and human services has the same power, with enforcement by the department or by local boards of health.¹⁶ These may extend to some forms of nonpoint source water pollution.

Agricultural operations are not abatable as a public or private nuisance "if such agricultural operation has been in operation for one year or more and if it was not a nuisance at the time it began operation." However, this provision does not apply "when any aspect of the agricultural operation is determined to be injurious to public health or safety under [the health officer provisions noted above]."¹⁷ Also, the exemption does not apply "if a nuisance results from the negligent or improper operation of an agricultural operation. Agricultural operations shall not be found to be negligent or improper when they conform to federal, state and local laws, rules and regulations."¹⁸ This appears to say that unless agricultural operations are in violation of a law, they cannot be abated as a nuisance apart from the public health risk provisions cited above.

- "No privy, toilet, sink, drain, cesspool, septic tank, or the discharges from such facilities, and no pen or sty for swine, shall be erected or continued in such place or condition as, in the judgment of the health officers, to be a nuisance or injurious to the public health. The health officer may make, in the manner provided in RSA 147:1, such regulations as necessary to ensure the safety and adequacy of subsurface sanitary disposal systems within the municipality..."¹⁹

- Whoever places "any animal or other substance liable to become putrid or offensive, or injurious to the public health, or deposits garbage or refuse on premises not designated as public dumping facilities...shall be guilty of a violation."²⁰

- "If a person shall place, leave, or cause to be placed or left, in or near a lake, pond, reservoir or stream tributary thereto, from which the domestic water supply of a city, town or village is taken, in whole or in part, any substance or fluid that may cause such water to become impure or unfit for such purposes he shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person."²¹ "The health officer of the town or the water commissioners having charge of the water supply, or the proprietors of the water supply, may remove such substance or fluid; and they may recover the expense of removal from the person who placed the same, or caused it to be placed."²² It is also a criminal offense to knowingly and willfully poison, defile, or pollute a water supply "in such a manner as to affect the purity of the water or ice so supplied at the point where the water or ice is taken for such domestic use" or to put "the carcass of any dead animal or other offensive material into said waters or upon the ice."²³

Fish/Fisheries Laws

- "Whoever unlawfully discharges contaminants into the inland or coastal waters of the state shall be liable to the state for any damage to the fish, other aquatic life and wildlife or their habitat in said waters caused by such contamination."²⁴

OPERATIONAL REQUIREMENTS

Forestry Requirements

The Director of the Division of Forests and Lands, within the Department of Resources and Economic Development, enforces provisions on timber harvesting on private and public lands; the Director also makes rules on "the cutting of timber near

certain waters and public highways."²⁵ These provisions create some enforceable obligations related to nonpoint source water pollution.

- The timber harvesting law requires filing of a notice of intent to cut.²⁶ The law requires cross-compliance with the state's wetlands permitting program including implementation of best management practices; and it requires compliance with the state's alteration of terrain program. Licensing of professional foresters also provides some basis for enforcement.²⁷

- The law prohibits the felling in any 12 month period of more than 50 percent of the basal area of trees within 150 feet of any great pond, standing body of water 10 acres or more, or any fourth- or high-order stream, or within 50 feet of any perennial stream.²⁸ However, the director may grant a variance from these geographical harvest prohibitions; and the prohibitions do not apply to timber cutting for land conversion purposes, rather than for timber, if all relevant local permits have been secured.²⁹

- The law also prohibits disposal of slash and mill residue in any perennial stream or standing body of water, within 25 feet of any fourth order stream, or within 50 feet of any great pond or standing body of water 10 acres or more in area.³⁰

A cease and desist order is to be issued by the department against any timber operation in violation of the law; violations may also be enjoined by superior court.³¹ In addition, the department must "[i]ssue cease and desist orders to temporarily suspend logging or other operations in forest areas when the director determines that such actions have resulted in, or are likely to result in, pollution of surface water or groundwater." The cease and desist order remains in effect while the director notifies the department of environmental services, which will conduct its own investigation and determine what, if any, orders to issue.³² Administrative fines may be also assessed for any offense, not to exceed \$2,000 per offense.³³ The limits on harvesting adjacent to bodies of water are enforceable as misdemeanors by the local municipality, with notice to the director of forests and lands, who may act to assure uniform statewide enforcement.³⁴ Violations of these harvest limits or of the prohibitions on disposal of slash and mill residue are misdemeanors (each 200 linear feet or fraction thereof on the affected water body is a separate offense).³⁵

- Apart from the forest practices law, the Alteration of Terrain program (described in detail under "Development and Other Earth-Disturbing Activities") also provides some basis for enforcement. Timber harvesting operations are entitled to a permit under this program provided they have filed the notice of intent to cut. The regulations require loggers to obtain the site specific permit by signing a statement on the notice of intent to cut that expresses familiarity with legal obligations and "hereby agree to abide by appropriate Best Management Practices to include all state laws pertaining to logging operations."³⁶ "Appropriate Best Management Practices" means "those contained in the manual 'Best Management Practices for Erosion Control on Timber Harvesting Operations in New Hampshire' prepared by the New Hampshire department of resources and economic development."³⁷

- Persons who have filed the necessary notice of intent to cut wood and have given written notice to the department of environmental services and the department of resources and economic development also satisfy the requirements for "minimum

impact activities" under the state's wetland fill and dredge permit program.³⁸ Under this program, however, logging operations must locate all skid trails, truck roads, and log landings far enough from streams and ponds so that waterborne particles will settle out before reaching the streams or ponds. Skid trails and roads, culverts, bridges, crossings, etc must be installed in accordance with Best Management Practices, and crossings must be removed when logging is complete; permanent crossings must handle the 25-year flood.³⁹ Erosion and siltation measures must be installed and maintained.⁴⁰ Wetland enforcement measures are described below under "Development and Other Earth-Disturbing Activities."

- Comprehensive shoreland protection is partly applicable to forestry activities;⁴¹ it requires maintenance of a natural woodland buffer within 150 feet (limiting harvest to not more than 50 percent of basal area and 50 percent of saplings within a 20 year period).⁴² However, forest management not associated with shoreland development or land conversion is exempt from these provisions if conducted in compliance with the forest practices provisions described above limiting the cut adjacent to waters to 50 percent of basal area in any year.⁴³

Agriculture Requirements

- The commissioner of agriculture, markets, and food is to consult with other agencies and publish best management practices "so as to permit the maximum use of nutrient and soil conditioning values, while achieving the least possible adverse impact upon the environment or human, animal and plant health."⁴⁴ These are voluntary/advisory in the first instance, and must rely on other authorities for enforceability. The commissioner is to investigate complaints of improper handling and application of manure, compost, or chemical fertilizer, and if the commissioner "has reason to believe such handling is a nuisance caused by failure to use best management practices," must notify the responsible person of the changes needed to conform to BMPs and require a plan for compliance if the changes are not made within 10 days of the notification. If the person fails to implement the recommended changes, the commissioner must notify local health officers and the department of environmental services "*who shall take such action as their authority permits.*"⁴⁵

- The commissioner also has rulemaking power over storage, use, and application of fertilizers.⁴⁶ Mislabeling and registration violations are misdemeanors (if committed by a natural person) or felonies (if by other, such as corporation); civil forfeitures are not to exceed \$5,000 per violation per day, and administrative fines are not to exceed \$1,000 per violation. These provisions offer limited utility for nonpoint source pollution unless the commissioner has adopted rules proscribing certain uses and applications aimed at water bodies.

- The pesticide control board may make rules for the times, places, and conditions of use of pesticides in different areas of the state if "such pesticides may be injurious to persons, animals, or crops" other than the target pests, and may require that pesticides be used only under permit of the board.⁴⁷ Regulations prohibit application of pesticide by commercial applicator or homeowner within 25 feet of surface waters; special permits are required under special conditions such as aerial applications, public water supply watersheds, etc.⁴⁸ Enforcement sanctions and penalties are like those for fertilizer registration violations.⁴⁹

The Alteration of Terrain erosion control program (described below under "Development and Other Earth-Disturbing Activities") does *not* apply to "normal agricultural practices." Likewise, the Comprehensive Shoreland law exempts all agricultural activities and operations "provided such activities and operations are in conformance with the most recent best management practices determined by...[USDA's Natural Resources Conservation Service, USDA's Cooperative Extension Service] and the [state's] department of agriculture, markets, and food."⁵⁰

Development and Other Earth-Disturbing Activities

Apart from any programs for the control of urban stormwater under the federal Clean Water Act or that may be authorized by general land use regulation such as zoning, state law provides the following authorities.

- The Alteration of Terrain program provides some enforceable mechanisms. "Any person proposing to dredge, excavate, place fill, mine, transport forest products or undertake construction in or on the border of the surface waters of the state, and any person proposing to significantly alter the characteristics of the terrain, in such a manner as to impede the natural runoff or create an unnatural runoff, shall be directly responsible to submit to the department [of environmental services] detailed plans concerning such proposal and any additional relevant information requested by the department, at least 30 days prior to undertaking an such activity. The operations shall not be undertaken unless and until the applicant receives a permit from the department. The department shall have full authority to establish the terms and conditions under which any permit may be exercised, giving due consideration to the circumstances involved and the purposes of this chapter, and to adopt such rules as are reasonably related to the efficient administration of this section, and the purposes of this chapter..."⁵¹

The regulations require a permit if "dredging, excavation, filling, mining, transporting of forest products, earth moving or other significant alteration of the characteristics of the terrain" will occur "in or on the border of the surface waters of the state"; and if "construction, earth moving or other significant alteration of the characteristics of the terrain" when the contiguous disturbed area is 50,000 or more square feet if within the protected shoreline as defined by RSA 483-B, or 100,000 or more square feet in any other area.⁵² "Significantly alter..." is defined as activity that "changes or disturbs the terrain so as to impede the natural runoff or create an unnatural runoff that has the potential to adversely affect water quality in the state's surface waters."⁵³ Regulations provide that permit applications (except for general permit applications) must be reviewed for "(a) Water quality protection measures proposed to be used during the construction phase of the proposed activity for the prevention of soil erosion; (b) Permanent water quality protection measures to be constructed as part of the project...; and (c) Impacts due to changes in runoff hydrology...[calculated for 2-year and 10-year storms]."⁵⁴ Regulations establish detailed design and performance criteria for various kinds of stormwater and erosion control features.⁵⁵ Enforcement provisions and sanctions are the same as those provided for violation of the state's water pollution control laws.

- The Comprehensive Shoreland Protection Act, administered by Dept. of Env. Services, provides a variety of enforceable mechanisms.⁵⁶ It provides for "establishment of standards for the subdivision, use, and development of the shorelands of the state's public waters. The development standards provided in this chapter shall be the minimum standards necessary to protect the public waters of the state of New Hampshire. These standards will serve to.....prevent and control water pollution..."⁵⁷ Protected shoreland includes all land within 250 feet of public waters. The law requires persons engaged in excavation, land disturbance, subdivision, and onlot septic system installation, within the protected shoreland to obtain required permits under other programs...but allows department to grant, deny, or attach reasonable conditions "to protect the public waters or the public health, safety or welfare."⁵⁸ The law prohibits the establishment or expansion of "salt storage yards, automobile junk yards, and solid or hazardous waste facilities"; requires a setback of 50 feet for primary structures; prohibits use of fertilizer within 25 feet; requires a natural woodland buffer within 150 feet (limiting removal for land conversion purposes to not more than 50 percent of basal area and 50 percent of saplings within a 20 year period); specifies minimum setbacks for septic systems; and requires all new structures within protected shorelands to meet terrain alteration rules (and requires permits for disturbances exceeding 50,000 square feet); and sets minimum lot size and frontage standards.⁵⁹ The law does not apply within any municipality that has adopted an ordinance that is at least as stringent as the state law and that has been certified as such.⁶⁰ The comprehensive shoreland law is enforced by the commissioner of environmental services.⁶¹ Enforcement tools include cease and desist orders, injunctive relief, civil penalties of up to \$20,000, and administrative fines of up to \$5,000.⁶² Municipalities may also enforce.⁶³ A knowing violation is misdemeanor (if natural person), or felony (if other person).⁶⁴

- The River Management and Protection Program is managed by the department of environmental services. "The state shall....regulate the quantity and quality of instream flow along certain protected rivers or segments of rivers to conserve and protect outstanding characteristics including recreational, fisheries, wildlife, environmental...[etc.]"⁶⁵ Designations are "natural rivers", "rural rivers", "rural-community rivers," and "community rivers."⁶⁶ Protections of all 4 types of designated rivers include 250-foot setbacks of land application of solid waste (but not including "manure, lime and wood ash used for fertilizer, and sludge and septage")⁶⁷ Channel alterations are not allowed on natural rivers, but the commissioner may approve temporary alterations in connection with repair or maintenance of bridges, roads, or riprap. Also, channel alterations are not allowed on the latter 3 types of rivers that alter the flow characteristics of the river or adversely affect the resources for which the river is designated, but the commissioner may approve alterations necessary for construction, repair or maintenance of a project including public water supply intake facilities.

- The Lakes Management and Protection program administered by the department of environmental services develops "management criteria" for the state's lakes to "provide the basis for state agency decisions regarding lakes management and protection."⁶⁸ Criteria are to "ensure that (a) Water quality shall not be degraded from existing water quality standards...(b) Potential sources of pollution, whether point or non-point sources on the land or deriving from activity on the lake, shall be managed in such a way as to minimize their adverse impact on water quality. No significant adverse impact or cumulative adverse impact on water quality shall be permitted." The program results in the development of plans, while the implementation is by

cooperation of state agencies. Thus, any enforcement is based on use of other statutory and regulatory authorities.

- The wetlands program requires permitting, and use of erosion and siltation control measures.⁶⁹ The department of environmental services has emergency order authority to direct the cessation of activities posing "immediate risk" to wetlands; and compliance order authority.⁷⁰ A wetland violation is a misdemeanor (if natural person) or felony (if other person).⁷¹

Endnotes

- ¹ N.H. Rev. Stat. Ann. § 485-A:12.I.
- ² N.H. Rev. Stat. Ann. § 485-A:12.II.
- ³ N.H. Rev. Stat. Ann. § 485-A:13.I.(a).
- ⁴ N.H. Rev. Stat. Ann. §§ 485-A:2.XVI, 485-A:2.VIII.
- ⁵ N.H. Rev. Stat. Ann. §§ 485-A:12.I, 485-A:12.II.
- ⁶ N.H. Rev. Stat. Ann. § 485-A:13.II.
- ⁷ N.H. Rev. Stat. Ann. § RSA 485-A:22.III.
- ⁸ N.H. Rev. Stat. Ann. § 485-A:22.IV.
- ⁹ N.H. Rev. Stat. Ann. § 485-A:22-a.
- ¹⁰ N.H. Rev. Stat. Ann. 485-A:22.
- ¹¹ N.H. Rev. Stat. Ann. § 485-A:15.I.
- ¹² N.H. Rev. Stat. Ann. §§ 485-A:15; 485-A:13.II.
- ¹³ N.H. Rev. Stat. Ann. § 481:1.
- ¹⁴ N.H. Rev. Stat. Ann. § 485-A:1.
- ¹⁵ N.H. Rev. Stat. Ann. § 147:1.
- ¹⁶ N.H. Rev. Stat. Ann. § 147:2.
- ¹⁷ N.H. Rev. Stat. Ann. § 432:33.
- ¹⁸ N.H. Rev. Stat. Ann. § 432:34.
- ¹⁹ N.H. Rev. Stat. Ann. § 147:10.
- ²⁰ N.H. Rev. Stat. Ann. § 147:13.
- ²¹ N.H. Rev. Stat. Ann. § 485:17.
- ²² N.H. Rev. Stat. Ann. § 485:18.
- ²³ N.H. Rev. Stat. Ann. § 485:19.
- ²⁴ N.H. Rev. Stat. Ann. § 211:71.
- ²⁵ N.H. Rev. Stat. Ann. § 227-G:3,4.
- ²⁶ N.H. Rev. Stat. Ann. § 227-J. The notices is required by RSA 97:10 for real estate tax purposes, and the notice is used for cross-compliance with environmental and other programs.
- ²⁷ N.H. Rev. Stat. Ann. § 227-J:4.
- ²⁸ N.H. Rev. Stat. Ann. § 227-J:9.
- ²⁹ N.H. Rev. Stat. Ann. § 227-J:9.
- ³⁰ N.H. Rev. Stat. Ann. § 227-J:10.
- ³¹ N.H. Rev. Stat. Ann. § 227-J:II(c).
- ³² N.H. Rev. Stat. Ann. § 227-J:II(d).
- ³³ N.H. Rev. Stat. Ann. § 227-J:14.
- ³⁴ N.H. Rev. Stat. Ann. § 227-J:9.
- ³⁵ N.H. Rev. Stat. Ann. §§ 227-J:9, 227-J:10.
- ³⁶ N.H. Code Admin. R. Env-Ws-415.04.
- ³⁷ N.H. Code Admin. R. Env-Ws-415.02(b).
- ³⁸ N.H. Rev. Stat. Ann. § 482-A; see § 482-A:3.V.
- ³⁹ N.H. Code Admin. R. Ann. Env-Wt 304.05 (1997).
- ⁴⁰ N.H. Code Admin. R. Ann. Env-Wt 304.06 (1997).
- ⁴¹ N.H. Rev. Stat. Ann. § 483-B.

42. N.H. Rev. Stat. Ann. § 483-B:9.
43. N.H. Rev. Stat. Ann. § 227-J:9.
44. N.H. Rev. Stat. Ann. § 431:34.
45. N.H. Rev. Stat. Ann. § 431:35.
46. N.H. Rev. Stat. Ann. §§ 431:13; 431:32.
47. N.H. Rev. Stat. Ann. § 430:31.
48. N.H. Code Admin. R. Ann. Pes 1001.
49. N.H. Rev. Stat. Ann. § 430:45.
50. N.H. Rev. Stat. Ann. § 483-B:3.III.
51. N.H. Rev. Stat. Ann. § 485-A:17.
52. N.H. Code Admin. R. Ann. Env-Ws 415.03.
53. N.H. Code Admin. R. Ann. Env-Ws 415-02(y).
54. N.H. Code Admin. R. Env-Ws 415.07.
55. N.H. Code Admin. R. Env-Ws 415.11.
56. N.H. Rev. Stat. Ann. § 483-B.
57. N.H. Rev. Stat. Ann. § 483-B:2.
58. N.H. Rev. Stat. Ann. § 483-B:6.
59. N.H. Rev. Stat. Ann. § 483-B:9.
60. N.H. Rev. Stat. Ann. § 483-B:19.
61. N.H. Rev. Stat. Ann. § 483-B:5.
62. N.H. Rev. Stat. Ann. § 483-B:18.
63. N.H. Rev. Stat. Ann. § 483-B:8.
64. N.H. Rev. Stat. Ann. § 483-B:18.III.
65. N.H. Rev. Stat. Ann. § 483:1.
66. N.H. Rev. Stat. Ann. § 483:7-a.
67. N.H. Rev. Stat. Ann. §§ 483:9, 9-a, 9-aa, 9-b.
68. N.H. Rev. Stat. Ann. § 483-A:5.
69. N.H. Rev. Stat. Ann. § 482-A; N.H. Code Admin. R. Env-Wt 304.06.
70. N.H. Rev. Stat. Ann. § 482-A:6.
71. N.H. Rev. Stat. Ann. § 482-A:23.