

Appendix C – Regulatory Authority Subcommittee

Subcommittee Responsibility

The Regulatory Authority Subcommittee was tasked with:

- Identifying existing regulatory authority for federal, state, and local governments.
- Determining whether sufficient authority exists to implement potential solutions to stormwater needs (identified by the Needs Subcommittee).
- If regulatory authority is determined to be insufficient, to draft recommendations, based on feedback from the full Commission, for amended or new legislation to create appropriate authority.

Subcommittee Members and Participants

David Cedarholm, New Hampshire Public Works Association;

Paul Currier, Department of Environmental Services;

Steve Kahl, New Hampshire Lakes Association;

Rep. L. Mike Kappler, New Hampshire House of Representatives;

Newb LeRoy, Association General Contractors of New Hampshire;

Amy Manzelli, Business and Industry Association;

Donald Sienkiewicz, Home Builders & Remodelers Association of New Hampshire;

Jillian McCarthy, Department of Environmental Services

Robert Roseen, UNH Stormwater Center

Michael Trainque, American Council of Engineering Companies in New Hampshire

Karen Ebel, The Nature Conservancy

Subcommittee Findings and Recommendations

Subcommittee work documents are listed below and included in this appendix:

- C1. Regulatory Authority Subcommittee Report
- C2. Chart of Existing Federal and New Hampshire Laws Related to Stormwater
- C3. Questions Regarding Legal Authority to Regulate Stormwater in New Hampshire
- C4. Interdepartment Communication from Richard Head, Associate Attorney General Regarding Stormwater Discharges
- C5. RSA 149:I

C1 – Regulatory Authority Subcommittee Report

I. BACKGROUND AND OMNIBUS RECOMMENDATIONS

After having considered the needs the full Commission identified, the Regulatory Authority Subcommittee (“Regulatory Subcommittee”): (1) identified all existing laws that govern stormwater; and (2) developed recommendations for new legislation.

A. Meeting Dates

The Regulatory Subcommittee met on:

April 28, 2009
August 24, 2009
July 28, 2010
August 2, 2010
August 16, 2010
September 15, 2010

B. Membership

Amy Manzelli	Business and Industry Association of NH (Chair)
Rep. Judith Spang	NH House of Representatives
Paul Currier	NH Department of Environmental Services
Karen Ebel	The Nature Conservancy
Newb LeRoy	Associated General Contractors of NH
Mark Hemmerlein	NH Department of Transportation
Donald Sienkiewicz	NH Homebuilders and Remodelers Association.
Dave Cedarholm	NH Public Works Association
Robert Roseen	University of New Hampshire Stormwater Center
Eber Currier	NH Farm Bureau
Rep. L. Mike Kappler	NH House of Representatives
Michael Trainque	American Council of Engineering Companies
Dave Danielson	Association of Regional Planning Commissions
Jillian McCarthy	NH DES (Commission Staff)

C. Legislative Recommendations Should Stand Alone

Many of the individual recommendations for legislation are related. However, each concept should be proposed separately and not contain internal cross-referencing. That way, if any concept fails the legislative process, not all of the concepts will meet the same fate simply because of being contained in the same bill.

D. Possible Exemption for Agriculture and Forestry

The Commission and the Regulatory Subcommittee discussed whether agriculture and timber operations would be exempt from any new legislation concerning stormwater. The Commission was unable to reach consensus on this point. Some members felt that

because farmland and forested lands do not contribute, or contribute only slightly, to the stormwater problem, they should be exempt. Other members felt that agriculture and timber operations are too frequently exempted from environmental legislation and that it would not be too much of a burden for them to comply with any new legislation concerning stormwater. In particular, because these type of operations typically do not involve much or any impervious cover, the burden would be minimal. For example, under the recommended stormwater utility option, most operations would probably have no fee. One suggested approach was that agricultural operations be exempt only if they complied with the most recent best management practices, similar to the state's Comprehensive Shoreland Protection Act. RSA 483-B:3, III.

II. SUMMARY OF LAWS IN FORCE IN NEW HAMPSHIRE AFFECTING STORMWATER

The Regulatory Subcommittee prepared a chart that identifies and summarizes federal and New Hampshire laws that affect stormwater, both directly or indirectly. (Attached at Appendix C2). The chart includes federal code, state statutes, and federal and state rules. A comprehensive understanding of existing laws was required to assure that any legislative proposals resulting from the Commission's work would be consistent, complementary, and not redundant with the existing laws.

III. RECOMMENDATIONS FOR NEW LEGISLATION

A. Statewide Stormwater Utility

The Regulatory Subcommittee recommends a statewide stormwater utility because a solid economic plan is necessary for the successful implementation of new stormwater programs. Given current economic conditions, any proposed stormwater programs are likely to fail without a source of funding outside of the State's general fund. Any new programs will require a consistent and dedicated revenue stream to be viable and self-supporting. The current economic climate and lack of adequate funding for water, wastewater, and stormwater programs in general leaves little funding available. For this reason, action is needed on a state level, to assist communities at the local level.

The basic idea is for a statewide stormwater utility process that encourages creation of municipal or inter-municipal stormwater utilities, encourages municipal stormwater utilities to participate in the state program, and authorizes regional, watershed-based utilities under state government in areas not served by municipal utilities or utilities formed by inter-municipal agreements. The goal is to have the entire State of New Hampshire covered under either an individual municipal utility, an intermunicipal regional utility, or a state-administered watershed-based utility.

A utility fee would be collected from each property in the state, in proportion to the connected impervious surface on the property, or some similar metric. The fee would accomplish two main objectives: 1) finance the construction and management of stormwater best management practices ("BMPs"); and 2) create incentives, through the

utility fee structure, for property owners to install and maintain BMPs. The fee for developed properties with a high proportion of connected impervious surface and no BMPs would be high, and properties with a low proportion of connected impervious surface (maximum BMPs installed and maintained) would be assessed a low fee, or possibly no fee at all.

In the initial stage of the utility, a relatively minor fee would be charged to each property owner. However, by implementing stormwater controls, property owners may qualify for abatement of the fee. The utility would have to specify the type of stormwater control that would qualify for abatement, and the amount of the abatement that would be available for each type of stormwater control. Over time, the fee should be increased. This will make the incentive to install stormwater controls increasingly attractive. At the same time, it would increase the revenue of the utility when: (1) the utility is more mature and, presumably, has developed a capacity to manage funds; and (2) the easier stormwater controls have been installed, leaving remaining need for more costly stormwater controls.

The concept draft legislative language is based loosely on existing statutes, including RSA 149-I which enables formation of municipal stormwater utilities, and RSA 485-A:45-54, establishing the Winnepesaukee River Basin Program. The language is intended as a concept draft, and requires further work to be fully ready for the legislative process.

State stormwater utilities should be created on a watershed basis, using level 12 of the Hydrologic Unit Codes (“HUC-12”). *See* Figure 1 (report cover page). About 300 HUC-13 watersheds exist in NH. However, this does not mean that about 300 watershed-based stormwater utilities would be created, for several reasons. First, many of the watersheds would be combined within one municipal utility because they would lie mostly within that municipality. Second, provision is made for inter-municipal utilities. An inter-municipal utility would combine many HUC-12 watersheds. Third, some HUC-12 watersheds have little or no developed property and provision has been made for opting out of the stormwater utility requirement. Lastly, those municipalities that do not create or join a stormwater utility will be automatically included in a state-wide utility, also watershed based, which will include many HUC-12 watersheds.

As noted, municipalities would have three options. First, they could form their own stormwater utility. This would be a new municipal entity. It would operate on its own, pursuant to the statute. Second, they could band together with neighboring municipalities to form an inter-municipal stormwater utility. The inter-municipal stormwater utility would be a new entity with the legal status of a municipality. Some of the proposed legislative language for the inter-municipal stormwater utilities is based on RSA 53-B, which enables the formation of regional refuse disposal districts. If a municipality does not opt for either its own stormwater utility or an inter-municipal stormwater utility by a set time, the default option will apply. The default will be that each such municipality will become part of a larger, watershed-based stormwater utility, by operation of law. These default statewide stormwater utilities will be administered by

a stormwater commission. Regardless of whether a municipality had its own utility, joined an inter-municipal utility, or defaulted into the state-wide utility, each utility would operate under the same rules.

DES would develop and promulgate rules to administer and implement, to set utility fees, for BMP designs, specifications, and maintenance standards, for acceptable methods for disconnection of impervious surface, and other aspects of stormwater utility operation needed to create statewide consistency.

Undeveloped properties that do not constitute “developed property” pursuant to the recommended definition would not be subject to a utility fee.

Although the passage of RSA 149-I in 2008 enabled municipalities to create municipal stormwater utilities, none have been created. Some municipalities are studying the possibility of forming one. However, it appears that political and other obstacles may prevent those communities from forming a stormwater utility. Thus, additional legislation at the state level is needed to create stormwater utilities. Moreover, a state-wide approach would result in both more uniformity across the State and quicker improvement of escalating stormwater problems.

The creation of stormwater utilities should be phased in over a period of years, beginning with the watersheds that have most stormwater impairments to surface waters. The 305(b) report is a biennial report that the State prepares which assesses the water quality of the State’s waters. Based on the 2010 305(b) report, the HUC-12 watersheds with the most area tributary to impaired surface waters are the Coastal Watershed and the Lower Merrimack. See Figure 2 (report, p. 25).

Starting in the Coastal Watershed is ideal for several reasons. First, it is chronically the most impaired watershed in the State. Second, several MS4 communities are located there. The NPDES permit(s) issued under the EPA Stormwater Phase II Rule for the MS4 defines the required program (specific actions) and provides the incentive for taking action. A stormwater utility could then generate the needed revenues to implement the requirements of the NPDES permit. Third, the Coastal Watershed drains to the Great Bay estuary which has recently been reported as impaired for nitrogen pollution. Stormwater is a major source of nitrogen pollution. Fourth, the Seacoast Watershed Alliance has already been formed and would be an effective vehicle through which to organize utilities in the HUC-12 watersheds within the Coastal Watershed.

Every other year, the 305(b) report is updated. Following its being updated, the 10 most impaired HUC-12 watersheds which have not already come into the state-wide stormwater utility program should be required to do so. At that time, they would have the option to form their own utility, join an inter-municipal utility, or default into a state-wide utility.

The new law should contain an “opt out” provision whereby a municipality could petition DES to opt out of the stormwater utility requirement. The conditions for opt-out

should be prescribed in concept in the enabling legislation. DES should then promulgate by rule the particular conditions which would qualify a municipality to opt out. The thrust of the criteria to opt out should be that a community has little connected impervious surface, and therefore its impact to stormwater is negligible.

Revenues derived through a stormwater utility should be used to pay for administration of the utility, for operation and maintenance costs for municipally-owned BMPs, and to pay capital costs for utility expenditures that are specifically related to stormwater activities. A grant program could be established by the utility to assist property owners with installation of BMPs.

Additional information regarding details of the stormwater utility is provided in the funding subcommittee report.

i. Statewide Stormwater Discharge Permit

In absence of a statewide stormwater utility, the Regulatory Subcommittee recommends a statewide stormwater permit program. Permits would be required for all developed property in the state through permit by rule. General permits would be created and phased in by watershed to address the individual concerns and characteristics of each watershed. As with a utility, a phased approach is recommended beginning in the most severely impaired watersheds. Properties subject to a NPDES permit for stormwater should be exempt from a statewide permit.

The Regulatory Subcommittee recommends the statewide stormwater utility option over the statewide stormwater discharge permit option because it is incentives-based and has greater flexibility with respect to fee reduction. In addition, a utility is capable of applying for and receiving federal funds. Although the Regulatory Subcommittee recommends a statewide stormwater utility, if the legislature decides not to propose a statewide stormwater utility, the Regulatory Subcommittee would recommend a statewide stormwater discharge permit.

A permit fee should be the funding mechanism for the stormwater water discharge permit system. The Regulatory Subcommittee acknowledges that its recommendation that the stormwater discharge permit system be funded through permit fees may cause such a proposal to be inexpedient to legislate. However, the Regulatory Subcommittee has recommended the fee because the permit option will necessitate adding new positions at the Department of Environmental Services which will require funding outside of the State's general fund

B. Define the term "stormwater" in State law

RSA 485-A does not contain the words "stormwater". It is ambiguous whether or not the statutory definition of "other wastes" includes stormwater. Therefore, it is also ambiguous whether or not a discharge of stormwater requires a state permit under RSA 485-A:13. RSA 485-A should be amended to define stormwater, and clarify that

stormwater is not sewage or waste, and does not require a permit under existing law. The definition recommended here is also consistent with the federal definition contained in 40 CFR 122.26(b)(13): “*Stormwater* means stormwater runoff, snow melt runoff, and surface runoff and drainage.” It also incorporates concepts from the definition of stormwater contained in the Innovative Land Use Handbook. The recommended definition of stormwater in New Hampshire law is as follows:

Amend RSA 485-A:2 by inserting after paragraph XI-a the following new paragraph:

XI-b. “Stormwater” means water from precipitation that results, directly or indirectly, in stormwater runoff, snowmelt runoff, and surface runoff and drainage, together with debris, chemicals, sediment, or other substances that may be carried along with the water. Stormwater is not regulated as sewage, industrial waste, or other wastes.

To remove all ambiguity about the distinction between waste and stormwater, the definition of “other wastes” should also be amended as follows:

Amend RSA 485-A:2, VIII as follows:

VIII. “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 **waste** substance **which is** harmful to human, animal, fish or aquatic life, **other than sewage, stormwater, or industrial wastes.**

The Regulatory Subcommittee examined whether the term “runoff” was defined under federal or state law and if not, whether it should be. Several states define runoff or similar terms. Va. Code Ann. §10.1-560; Ark. Code Ann. §15-23-501, Sec. 3.01(n); Tex. Water Code Ann. §46.013, Sec. 3.01(n). Courts considering the issue have confirmed that neither federal code nor federal regulations define the term. Those cases have defined runoff as either “merely another term for surface water” or “the flow of excess precipitation (such as rain or snow) into a stream.” *See Georgetown Square v. United States Fidelity and Guaranty Company*, 523 N.W. 2nd 380, 385-86 (1994); *State of Missouri v. The Army Corps of Engineers*, 526 F.Supp. 660, 678 (1980). No definition of the term “runoff” is required in New Hampshire statute because its plain meaning is obvious.

C. Property Owner’s Responsibility For Stormwater

The stormwater management concepts in these recommendations are based on the idea that property owners are responsible for the effects on the state’s waters caused by stormwater emanating from their property. This concept is now in RSA 485-A:12 and the Surface Water Quality Regulations Env Wq 1700:

485-A:12 Enforcement of Classification. –

I. After adoption of a given classification for a stream, lake, pond, tidal water, or section of such water, the department 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. If the department shall set a time limit for abatement of pollution under paragraph II, and it becomes apparent at any time during the compliance period that full compliance with the adopted classification will not be attained by the end of such period due to the failure of any person to take action reasonably calculated to secure abatement of the pollution within the time specified, the department shall notify such person or persons in writing. If such person or persons shall fail or neglect to take appropriate steps to comply with the classification requirements within a period of 30 days after such notice, the department shall seek appropriate action in the courts of the state.

II. If, after adoption of a classification of any stream, lake, pond, or tidal water, or section of such water, including those classified by RSA 485-A:11, 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. If such pollution is of municipal or industrial origin, the time limit set by the department for such abatement shall be not less than 2 years nor more than 5 years. For good cause shown, the department may from time to time extend any time limit established under this paragraph. Any determination by the department under this paragraph shall be subject to appeal as provided for in RSA 485-A:19.

III. No activity, including construction and operation of facilities, that requires certification under section 401 of the Clean Water Act and that may result in a discharge, as that term is applied under section 401 of the Clean Water Act, to surface waters of the state may commence unless the department certifies that any such discharge complies with the state surface water quality standards applicable to the classification for the receiving surface water body. The department shall provide its response to a request for certification to the federal agency or authority responsible for issuing the license, permit, or registration that requires the certification under section 401 of the Clean Water Act. Certification shall include any conditions on, modifications to, or monitoring of the proposed activity necessary to provide assurance that the proposed discharge complies with applicable surface water quality standards. The department

may enforce compliance with any such conditions, modifications, or monitoring requirements as provided in RSA 485-A:22.

IV. No activity that involves surface water withdrawal or diversion of surface water that requires registration under RSA 488:3, that does not otherwise require the certification required under paragraph III, and which was not in active operation as of the effective date of this paragraph, may commence unless the department certifies that the surface water withdrawal or diversion of surface water complies with state surface water quality standards applicable to the classification for the surface water body. The certification shall include any conditions on, modifications to, or monitoring of the proposed activity necessary to provide reasonable assurance that the proposed activity complies with applicable surface water quality standards. The department may enforce compliance with any such conditions, modifications, or monitoring requirements as provided in RSA 485-A:22.”

“Env-Wq 1701.02 Applicability.

(a) These rules shall apply to all surface waters.

(b) These rules shall apply to any person who causes point or nonpoint source discharge(s) of pollutants to surface waters, or who undertakes hydrologic modifications, such as dam construction or water withdrawals, or who undertakes any other activity that affects the beneficial uses or the level of water quality of surface waters.”

To incorporate this concept into the statutes, RSA 485-A:12, which provides for the enforcement of water quality standards, should be amended by inserting after paragraph II the following new paragraph:

II-a. The owner of property shall be responsible for stormwater discharging from the property. Such stormwater discharge shall not cause or contribute to a violation of water quality standards, including antidegradation.

D. Definitions To Support Proposed Legislation

Definitions for “developed property”, “impervious surface”, and related concepts are needed for either a stormwater utility or permit legislative proposal. Definitions related to developed property would be consistent with terminology of the Comprehensive Shoreland Protection Act, and definitions related to impervious surface would be consistent with the terminology of the Alteration of Terrain rules as well. The following definitions should be added into the statute to which stormwater utility or stormwater permit provisions are added to support either a statewide stormwater utility system or statewide stormwater permit system, as follows:

- i. “Developed property” means land that has been altered by the construction, installation, or other placement of one or more structure(s) or other impervious surfaces on or in the land, such

that it no longer absorbs the same volume of stormwater that would have been absorbed had the property been left in an unaltered state.

- ii. "Unaltered state" means unaltered state as defined in RSA 483-B:4. That statute defines the term as "native vegetation allowed to grow without cutting, limbing, trimming, pruning, mowing, or other similar activities except as needed to maintain the health of the plant being trimmed, as allowed by rules of the department."
- iii. "Impervious surface" means impervious surface as defined in RSA 483-B:4. That statute defines the term as "any modified surface that cannot effectively absorb or infiltrate water. Examples of impervious surfaces include, but are not limited to, roofs, decks, patios, and paved, gravel, or crushed stone driveways, parking areas, and walkways unless designed to effectively absorb or infiltrate water."
- iv. "Disconnected impervious surface" means impervious surface that does not contribute directly to stormwater runoff from a property, but directs stormwater runoff to on-site pervious areas to infiltrate into the soil or be filtered by overland flow so that the net rate and volume of stormwater runoff from the disconnected impervious surface is not greater than the rate and volume from an equal area in an unaltered state. This definition is adapted from Env-Wq 1500 Alteration of Terrain rules.
- v. "Connected impervious surface" means impervious surface that is not disconnected.

E. Municipal authority to regulate stormwater

i. Federal Municipal Separate Storm Sewer System Permits

The current and newly proposed federal General Permit for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems ("MS4 Permit") requires municipalities to enact local stormwater regulations. Despite that requirement from the federal government, the Regulatory Subcommittee concluded that existing New Hampshire law does not clearly enable municipalities to generally regulate stormwater.

ii. Possible Sources of Municipal Authority in Existing State Law

To reach this conclusion, the Regulatory Subcommittee identified possible sources of such municipal authority, with the assistance of a memo from Eric Williams (N.H. Dept. of Environmental Services) dated January 30, 2009, titled "Questions Regarding Legal Authority to Regulate Stormwater in New Hampshire."

The Regulatory Subcommittee also consulted a July 1, 2008 interdepartmental communication from Richard Head, Associate Attorney General at the Department of

Justice to Michael J. Walls, Assistant Commissioner at the Department of Environmental Services regarding stormwater discharges and transfers of surface waters. (This memo discusses whether discharges of stormwater runoff that carry pollutants from areas altered by development qualify as discharges of “sewage or waste” under RSA 485-A.)

Using these two memos and the research and expertise of commissioners, the Regulatory Subcommittee identified the following statutes which it has been asserted enable municipalities to regulate stormwater:

1. “Towns may make bylaws for . . . [t]he collection, removal and destruction of garbage, snow and other waste materials” RSA 31:39, I(f);
2. “In municipalities where the sewage or stormwater is pumped or treated, the mayor and aldermen may adopt such ordinances and bylaws relating to the system, pumping station, treatment plant or other appurtenant structure as are required for proper maintenance and operation and to promote the objectives of the sewage system or stormwater utility” RSA 149-I:6;
3. “It is hereby declared . . . that the department shall, in the administration and enforcement of this chapter, strive to provide that all sources of pollution within the state shall be abated within such times and to such degrees as shall be required to satisfy the provisions of state law or applicable federal law, whichever is more stringent. . . [T]he department shall adhere to the following policies: [first, install primary treatment for all discharges of sewage and industrial wastes; second, install secondary treatment whenever necessary to protect the uses assigned to the particular stream classification; third, “after all stream classification requirements throughout the state have been satisfied, . . . continue the program of pollution abatement by installing other forms of treatment desirable to maintain all surface waters of the state in as clean a condition as possible, consistent with available assistance funds and technological developments” RSA 485-A:3, I-III;
4. “zoning ordinances shall be designed . . . to assure proper use of natural resources and other public requirements” RSA 674:17, I(h);
5. “Innovative land use controls may include . . . Environmental characteristics zoning” RSA 674:21, I(j);
6. “A municipality may . . . authorize the planning board to require preliminary review of subdivisions . . . and the manner in which streets within such subdivision shall be graded and improved and to which streets water, sewer, and other utility mains, piping, connections or other facilities . . . shall be installed” RSA 674:35;

7. “The site plan review regulations which the planning board adopts may provide for the safe and attractive development or change or expansion of use . . . and guard against such conditions as would involve danger or injury to health, safety, or prosperity by reason of inadequate drainage or conditions conducive to flooding of the property or that of another” RSA 674:44, II(a)(1); and
8. “The site plan review regulations of the planning board may stipulate . . . the extent to which and the manner in which streets shall be graded and improved and to which water, sewer, and other utility mains, piping, connections, or other facilities shall be installed” RSA 674:44, IV.

iii. New State Law Needed for Municipalities to Generally Regulate Stormwater

After consideration of these statutes, the Regulatory Subcommittee concluded that, at best, the municipalities have authority to regulate stormwater only: (a) as part of a stormwater utility if the municipality has followed the process in RSA 149-I:6-a to d; and (b) in connection with certain land use approval processes, such as subdivision, site plan and building permit approvals. But, such authority does not enable municipalities to regulate stormwater related to existing land uses in the absence of a stormwater utility or action by a municipal land use board. Moreover, the land use approval process typically governs construction activities during the development or redevelopment phase, and not activities afterwards over the lifetime of the resulting development, although the terms and conditions placed on the approvals can and frequently do extend over the lifetime of a development.

Thus, the Regulatory Subcommittee believes it is desirable to clearly authorize municipalities, particularly small MS4 municipalities, to regulate stormwater in general so that they may fully comply with requirements of the MS4 Permit.

In addition, municipalities are the best situated to know about their own communities, including where stormwater problems are the worst and the impact of these problems on the local environment, safety, and economy. Enabling the regulation of stormwater at the municipal level would most efficiently identify and resolve stormwater problems, as well as fill a gap in how stormwater is currently regulated. Stormwater management issues result in large part from local land use patterns and decisions. Municipalities generally govern local land use. So, it makes sense for municipalities to have clear authority to regulate stormwater, especially in light of the statewide need for stormwater management at the local level that the Commission has discerned.

Municipalities should be given authority to regulate stormwater originating from properties within municipal boundaries, including authority to set design requirements and performance standards for BMPs and to require property owners to put BMPs in place on their property and maintain them. DES should adopt rules for minimum performance standards for construction and maintenance of BMPs that could be adapted

by municipalities for local regulations. This enabling legislation would create a parallel process to a stormwater utility for municipalities required to regulate stormwater.

iv. New Law Should Create Uniformity Amongst Municipal Regulations

There was considerable discussion among both the Commission and the Regulatory Subcommittee about the merits of giving municipalities the power to regulate stormwater without prescribing the way the power is to be exercised. It is desirable that requirements placed upon property owners by municipal stormwater regulations be identical, or at least very similar from one municipality to another to avoid the patchwork of different regulations that exists now. For example, municipal zoning and subdivision regulations vary widely amongst municipalities. Any legislation must fully incorporate this idea.

Based on input received during Commission deliberations from development, environmental and government representatives, the Regulatory Subcommittee believes that it is crucial to assure that municipalities regulate stormwater consistently with each other. Consistency between municipal regulations will insure that natural resources are protected more equally across the state, regardless of political boundary. Consistency between municipal regulations will also insure better regulatory compliance during development, re-development, and post-construction stormwater management activities because developers and other stormwater managers will have a better understanding of uniform regulations.

To achieve consistent stormwater regulation amongst municipalities, the Regulatory Subcommittee recommends that enabling legislation task DES with developing by administrative rule a model stormwater control regulation incorporating minimum state performance specifications for stormwater control. DES should do this with advice from interested stakeholders. Similar to most other environmental standards set by the State, municipalities should be able to make their regulations more stringent, but not less stringent, than the State-developed model stormwater regulation.

v. Minimum Standards of Performance

Municipalities should be required to either: (1) adopt the state model; or (2) adopt a modified state model tailored to a particular municipality which is at least as stringent as the state model. A similar concept has been used in Maine for its shoreland protection laws. *See* Mandatory Shoreland Zoning Act, 38 M.R.S.A. sections 435-449 and Maine Department of Environmental Protection's Guidelines for Municipal Shoreland and Zoning Ordinances (Chapter 1000) (<http://www.maine.gov/dep/blwq/docstand/szpage.htm#state>).

This approach will set minimum standards of performance for developing consistent regulations statewide. The purpose of minimum standards is to ensure adequate protection of water quality and aquatic habitat. The purpose of consistency and uniformity of regulations is to improve the ease with which the development community

and property owners can comply with design and construction requirements. The intention is to provide a high degree of similarity among requirements of different municipalities, similar to fire and electrical codes, rather than regulations which are unique to each municipality.

The State model stormwater regulation should include a set of minimum standards which are developed to address the following:

1. Low impact development (“LID”) site planning and design requirements;
2. Groundwater recharge;
3. Water quality;
4. Conveyance and natural channel protection;
5. Overbank flood protection;
6. Redevelopment and infill projects;
7. Pollution prevention;
8. Groundwater protection; and
9. Operations and maintenance.

LID site planning and design strategies must be used to the maximum extent practicable in order to reduce the velocity and volume of storm water for both new and redevelopment projects. The objective is to ensure that LID is considered at an early stage in the planning process such that stormwater impacts are prevented rather than mitigated.

Stormwater control based on watershed drainage patterns is the most desirable. The Regulatory Subcommittee recommends that when DES develops model stormwater control regulations it encourage, if not require, watershed drainage analysis in connection with land development.

vi. Need for Prompt Action

In light of the need for prompt action to control stormwater in the state, the Regulatory Subcommittee recommends that DES be given specific deadlines in the enabling legislation that establish a rapid pace of developing the model regulation. After some discussion, the Regulatory Subcommittee generally agreed that no more than eighteen months should be allowed to issue the model regulations given the need for prompt Statewide action. Because municipalities will also have a role should they choose to tailor the State model, they should also be given specific prompt deadlines. Regional Planning Commissions could be tasked to work with municipalities in the adoption of the State model stormwater regulation. Municipal deadlines should be based on the Town Meeting calendar. Basing municipal compliance deadlines on a set number of years subsequent to the effective date of the legislation does not typically result in municipalities being able to meet deadlines.

vii. Article 28-a of the New Hampshire Constitution

The concept of requiring municipalities to regulate stormwater will likely be alleged to be in violation of Article 28-a of the State Constitution. The Regulatory Subcommittee considered this issue. The State Supreme Court has held only very few times that a law violates Article 28-a. So, despite frequent claims that a proposed law would violate Article 28-a, very few have been invalidated on those grounds. The likelihood that this law would violate it seems very low. Plus, this law could be analogized to workforce housing requirements or primary building setbacks from certain waters, both of which the State has required of municipalities.

viii. Accommodation for Municipalities with Existing Stormwater Laws

Some municipalities have already enacted stormwater regulations. These municipalities should not be penalized by having to abandon their existing laws. The Regulatory Subcommittee recommends that these municipalities be allowed to continue to use their existing regulations so long as they are at least as stringent as the new state model. The enabling legislation should contain a provision which allows such municipalities to examine their existing regulations against the new state standard and submit a form to DES certifying that they have done such an examination and have concluded that their regulations are at least as stringent. DES should have the option to either accept the municipality's letter on its face without investigation, or to undertake its own analysis of whether the municipality's regulations are stringent enough; the latter option being a permissive right of DES and not a mandatory obligation.

ix. Undesirable Legislation Due to Probable Lack of Uniformity

One possible method to enable municipalities to regulate storm water would be to simply add such authority to RSA 31:39, which lists most of the powers of cities and towns. Doing so could result in municipalities enacting regulations that varied widely amongst each other. Plus, some municipalities would do nothing. The resultant lack of uniformity would be undesirable to the business and construction industries and possibly others. Furthermore, research clearly indicates that better statewide stormwater management is necessary, therefore prompt action is needed. Also, many of the municipalities would welcome the development of a model storm water regulation by DES because they might have difficulty in promptly developing their own. So, the Regulatory Subcommittee opted to recommend the more comprehensive approach to enabling legislation for municipalities to manage storm water in a specified timeframe which is described in this report.

x. Many Sources for State Model Stormwater Regulation Exist Already

In developing the State model stormwater regulation, DES has numerous sources from which to work. The sources include the following:

1. Federal Energy Independence and Security Act of 2007 (“EISA”). Section 438 of EISA contains a concise, yet far-reaching, standard for stormwater runoff for federal development projects, as follows:

The sponsor of any development or redevelopment project involving a Federal facility with a footprint that exceeds 5,000 square feet shall use site planning, design, construction, and maintenance strategies for the property to maintain or restore, to the maximum extent technically feasible, the predevelopment hydrology of the property with regard to the temperature, rate, volume, and duration of flow.

2. New Hampshire Water Resources Primer published by DES, 2008.
3. Town of Durham Stormwater Regulations (Appendix F1).
4. City of Manchester Stormwater Ordinance (Appendix F2).
5. South Burlington, VT Ordinance Regulating the Use of Public and Private Sanitary Sewerage and Stormwater Systems (Appendix F3).
6. Innovative Land Use Planning Techniques: A Handbook for Sustainable Development published by NHDES, 2008.
7. U.S. Geological Survey Report, Effects of Urbanization on Stream Quality at Selected Sites in the Seacoast Region in New Hampshire, 2001-03.
8. Measuring the Impacts of Development on Maine Surface Waters written by Chandler Morse and Steve Kahl, 2003.

C2 - Chart of Existing Federal and New Hampshire Laws Related to Stormwater

<u>Program</u>	<u>Affects</u>	<u>Coverage</u>	<u>Entity/Enforc.</u>	<u>Comments</u>	<u>Statute</u>	<u>Regulations</u>
<i>National Pollutant Discharge Elimination System (NPDES):</i>						
Multi-Sector General Permit 2008	Any industrial site or facility that collects stormwater in conveyances from any portion of the site associated with manufacturing, processing, or storage of materials	plant yards; certain access roads; certain rail lines; material handling sites; refuse sites; sites used for the application or disposal of process waste waters; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas for raw materials and intermediate and final products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to stormwater; hazardous waste treatment, storage, or disposal sites under the Resource Conservation and Recovery Act; landfills under the same Act; recycling facilities; steam electric generation facilities; transportation facilities; sewage treatment facilities; and construction activities	EPA/EPA	Stormwater Pollution Prevention Plan (SWPPP) usually required	33 U.S.C. 1342(p)(3)	40 C.F.R. 122.26; Env-Wq 301*
Construction General Permit	Storm water discharge	Any construction where more than one acre is disturbed, including smaller disturbances that are part of a larger common plan of development or sale	EPA/EPA	Stormwater Pollution Prevention Plan (SWPPP) usually required	33 U.S.C. 1342(p)(3)	40 C.F.R. 122.26; Env-Wq 301*
General Permit for Construction Dewatering Activities in MA and NH	Pumped or drained discharges of groundwater or stormwater from excavations or other points of accumulation associated with construction			Stormwater Pollution Prevention Plan (SWPPP) usually required	33 U.S.C. 1342(p)(3)	40 C.F.R. 122.26; Env-Wq 301*

NPDES, cont.						
Remediation & Miscellaneous Contaminated Sites General Permit	Discharges from clean up of contaminated sites and dewatering of contaminated sites	Any construction	EPA/ EPA & DES	Stormwater Pollution Prevention Plan (SWPPP) usually required	33 U.S.C. 1342(p)(3)	40 C.F.R. 122.26; Env-Wq 301*
Small Municipal Separate Storm Sewer Systems General Permit (Small MS-4)	Storm water discharge	Amherst, Atkinson, Auburn, Bedford, Danville, Derry, Dover, Durham, Exeter, Goffstown, Greenland, Hampstead, Hampton, Hollis, Hooksett, Hudson, Kingston, Litchfield, Londonderry, Manchester, Merrimack, Milford, Milton, Nashua, New Castle, Newton, North Hampton, Pelham, Plaistow, Portsmouth, Rochester, Rollinsford, Rye, Salem, Sandown, Seabrook, Somersworth, Windham, UNH, NHDOT (Brentwood, Chester, East Kingston, Hampton Falls, Lee, Madbury, and Newington required but obtained waiver)	EPA/EPA	Stormwater Pollution Prevention Plan (SWPPP) usually required; also Municipal Stormwater Ordinances Required - but possibly no municipal authority to promulgate them	33 U.S.C. 1342(p)(3)	40 C.F.R. 122.26; Env-Wq 301*
Other Federal:						
Spill Prevention, Countermeasure and Control Plan (SPCC Plan)	Petroleum spills	Aboveground Storage Tanks	EPA & DES/ EPA & DES	A requirement of both the EPA and DES for ASTs	CWA; RSA 146-?	
Antidegradation	Discharges must not degrade water quality past certain standards	Impaired/TMDL	DES/EPA & DES		CWA 303; RSA 485-A:12	
404 Program						
Residual Designation Authority under the Clean Water Act	Stormwater discharges	Existing Development	EPA		33 U.S.C. 1342	
Section 401 Certification	Certification that the discharge will comply with the State's water quality standards	All discharges requiring a NPDES permit, including stormwater discharges, must get this	DES/DES		33 U.S.C. 1341(a)(1); RSA 485-A:12	Env-Wq 302*

State:						
Water Discharge Permits	Discharge	Sewage or waste	DES/DES	Not clear whether State jurisdiction limited to "waste"	RSA 485-A:13	Env-Wq 1700
Alteration of Terrain Permits	Land surface	New development	DES/DES	Construction/ Alteration over 2.5 acres (100,000 square feet), unless within 250' of protected shoreland, and then 50,000 square feet	RSA 485-A:17	Env-Wq 1500
Comprehensive Shoreland Protection Act	Indirect control of stormwater	Within 250' of protected shorelands	DES/DES		RSA 483-B	Env-Wq 1400
Wetlands	Indirect control of stormwater	Dredge and fill in wetlands	DES/ACE/EPA		CWA 404; RSA 482-A	Env-Wt 100-1100*
Municipal:						
Site Plan Review	Land Use	New development and redevelopment	Local/CEO	only if the town wishes to	RSA 674:44	
Subdivision Regulations	Land use	New development and redevelopment	Local/CEO	only if the town wishes to	RSA 674:36	
Municipal Ordinances (including those targeted at public health, stormwater, etc.)	Land Use	New development and redevelopment	Local/CEO	only if the town wishes to	RSA 674-676	
Stormwater Utilities	Storm water discharge	Municipalities	Local/?	Only if the town wishes to	RSA 149-I	

C3 – Questions Regarding Legal Authority to Regulate Stormwater in New Hampshire

November 2010

Questions Regarding Legal Authority to Regulate Stormwater in New Hampshire

What, if any, legal authority, do New Hampshire municipalities have to manage and regulate stormwater, and if they do have such authority, what is the source of that authority, including:

- a. Municipal authority without being specifically authorized or enabled by the state.
 - 1. Specifically, the municipal authority to require improved stormwater controls under the federal NPDES Phase II Stormwater Program without state or local authority to do so.
- b. The municipal authority to develop stormwater ordinances:
 - 1. Relative to “proper use of natural resources and other public requirements” under RSA 674:17-I(h).
 - 2. Relative to regulating subdivisions and streets under RSA 674:35.
 - 3. Relative to site plan regulations under RSA 674:44-II(a)(1).
 - 4. Relative to the “collection, removal and destruction of garbage, snow and other waste materials” under RSA 31:39-I(f).
 - 5. Relative to bylaws and ordinance for public health under RSA 149-I:6.
- c. The municipal authority to require implementation of innovative land use controls, if adoption of such controls is not explicitly supported in a Town’s master plan.
- d. The potential consequences to involved parties (i.e., states or municipalities) if the state has not enabled municipalities to follow federal stormwater laws.
 - 1. In instances where there is a conflict between state and local regulatory mechanisms and federal requirements, how are the conflicts resolved and where does the responsibility lie.
 - 2. Does the fact that New Hampshire is not delegated to issue permits under the federal National Pollutant Discharge Elimination System (NPDES) Program affect the jurisdiction.
 - 3. Is there a conflict between land use regulation (requirements) at the local level, state guidelines (i.e., compliance is optional at local level), and compliance with the NPDES Stormwater Phase II requirements?
- e. The difference, if any, that exists between the municipal authority to *manage* stormwater and the municipal authority to *regulate* stormwater.

* * * * *

Is it legal to alter the volume and direction of flow from one tract to another? Is this addressed is statute/rule or is it a matter of common law? Do developers, landowners, municipal public works departments, and state or federal highway departments have the legal right to drain stormwater over onto abutters’ property, without just compensation?

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The following statutes, with specific passages in large bold face type, were suggested to the Stormwater Legislative Commission, established under HB1285, to give the legal authority for municipalities to manage and regulate stormwater:

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:

- (a) To lessen congestion in the streets;
- (b) To secure safety from fires, panic and other dangers;
- (c) To promote health and the general welfare;
- (d) To provide adequate light and air;
- (e) To prevent the overcrowding of land;
- (f) To avoid undue concentration of population;
- (g) To facilitate the adequate provision of transportation, solid waste facilities, water, sewerage, schools, parks, child day care;

(h) To assure proper use of natural resources and other public requirements;

(i) To encourage the preservation of agricultural lands and buildings; and

(j) To encourage the installation and use of solar, wind, or other renewable energy systems and protect access to energy sources by the regulation of orientation of streets, lots, and buildings; establishment of maximum building height, minimum set back requirements, and limitations on type, height, and placement of vegetation; and encouragement of the use of solar skyspace easements under RSA 477. Zoning ordinances may establish buffer zones or additional districts which overlap existing districts and may further regulate the planting and trimming of vegetation on public and private property to protect access to renewable energy systems.

674:21 Innovative Land Use Controls. –

I. Innovative land use controls may include, but are not limited to:

- (a) Timing incentives.
- (b) Phased development.
- (c) Intensity and use incentive.
- (d) Transfer of density and development rights.
- (e) Planned unit development.
- (f) Cluster development.
- (g) Impact zoning.
- (h) Performance standards.
- (i) Flexible and discretionary zoning.
- (j) Environmental characteristics zoning.**
- (k) Inclusionary zoning.
- (l) Accessory dwelling unit standards.
- (m) Impact fees.
- (n) Village plan alternative subdivision.

674:35 Power to Regulate Subdivisions. –

I. A municipality may by ordinance or resolution authorize the planning board to require preliminary review of subdivisions, and to approve or disapprove, in its discretion, plats, and to approve or disapprove plans showing the extent to which and the manner in which streets within

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subdivisions shall be graded and improved and to which streets water, sewer, and **other utility mains, piping, connections or other facilities** within subdivisions shall be installed.

674:44 Site Plan Review Regulations. –

I. Before the planning board exercises its powers under RSA 674:43, it shall adopt site plan review regulations according to the procedures required by RSA 675:6.

II. The site plan review regulations which the planning board adopts may:

(a) Provide for the safe and attractive development or change or expansion of use of the site and guard against such conditions as would involve danger or injury to health, safety, or prosperity by reason of:

(1) Inadequate drainage or conditions conducive to flooding of the property or that of another;

(2) Inadequate protection for the quality of groundwater;

(3) Undesirable and preventable elements of pollution such as noise, smoke, soot, particulates, or any other discharge into the environment which might prove harmful to persons, structures, or adjacent properties; and

(4) Inadequate provision for fire safety, prevention, and control.

(b) Provide for the harmonious and aesthetically pleasing development of the municipality and its environs.

(c) Provide for open spaces and green spaces of adequate proportions.

(d) Require the proper arrangement and coordination of streets within the site in relation to other existing or planned streets or with features of the official map of the municipality;

(e) Require suitably located streets of sufficient width to accommodate existing and prospective traffic and to afford adequate light, air, and access for firefighting apparatus and equipment to buildings, and be coordinated so as to compose a convenient system;

(f) Require, in proper cases, that plats showing new streets or narrowing or widening of such streets be submitted to the planning board for approval;

(g) Require that the land indicated on plats submitted to the planning board shall be of such character that it can be used for building purposes without danger to health;

(h) Include such provisions as will tend to create conditions favorable for health, safety, convenience, and prosperity;

(i) Require innovative land use controls on lands when supported by the master plan; and

(j) Require preliminary review of site plans.

III. The site plan review regulations which the planning board adopts shall:

(a) Provide the procedures which the board shall follow in reviewing site plans;

(b) Define the purposes of site plan review;

(c) Specify the general standards and requirements with which the proposed development shall comply, including appropriate reference to accepted codes and standards for construction;

(d) Include provisions for guarantees of performance, including bonds or other security; and

(e) Include provision for waiver of any portion of the regulations in such cases where, in the opinion of the planning board, strict conformity would pose an unnecessary hardship to the applicant and waiver would not be contrary to the spirit and intent of the regulations.

IV. The site plan review regulations of the planning board may stipulate, as a condition precedent to the approval of the plat, the extent to which and the manner in which streets shall be graded and improved and to which water, sewer, and **other utility mains, piping, connections, or other facilities shall be installed.** The regulations or practice of the planning board:

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(a) May provide for the conditional approval of the plat before such improvements and installations have been constructed, but any such conditional approval shall not be entered upon that plat.

(b) Shall provide that, in lieu of the completion of street work and utility installations prior to the final approval of a plat, the planning board shall accept a performance bond, irrevocable letter of credit, or other type or types of security as shall be specified in the site plan review regulations. The planning board shall have the discretion to prescribe the type and amount of the bond or other security, require satisfactory evidence of the financial ability of any surety or financial institution to pay such bond or other type of security, and specify a period for completion of the improvements and utilities to be expressed in the bond or other security, in order to secure to the municipality the actual construction and installation of such improvements and utilities. The municipality shall have the power to enforce such bonds or other securities by all appropriate legal and equitable remedies.

V. The planning board may, as part of its site plan review regulations, require an applicant to pay all costs for notification of abutters and may provide for the assessment of reasonable fees to cover the board's administrative expenses and costs of special investigation and the review of documents and other matters which may be required by particular applications.

149-I:6 Bylaws and Ordinances. –

I. In municipalities where the sewage or stormwater is pumped or treated, the mayor and aldermen may adopt such ordinances and bylaws relating to the system, pumping station, treatment plant or other appurtenant structure as are required for proper maintenance and operation and to promote the objectives of the sewage system or stormwater utility.

II. Any person who violates any ordinance or bylaw adopted pursuant to paragraph I of this section shall be subject to a civil penalty not to exceed \$10,000 per day of such violation.

III. A municipality shall give notice of the alleged violation to the department of environmental services within 10 days of commencement of any action under this section.

* * * * *

The following statute was cited by the City of Manchester in adopting its stormwater regulations:

485-A:3 Policies. – It is hereby declared, as a matter of legislative intent, that **the department shall, in the administration and enforcement of this chapter, strive to provide that all sources of pollution within the state shall be abated within such times and to such degrees as shall be required to satisfy the provisions of state law or applicable federal law, whichever is more stringent.** To the extent not inconsistent with the foregoing nor the aims of any joint state-federal permit program that may from time to time be agreed upon and in force pursuant to this chapter and applicable federal law, the department shall adhere to the following policies:

I. Insofar as practicable, the initial objective of the control program will be to obtain the installation of primary treatment (with adequate disinfection where sewage discharges are involved) for all discharges of sewage and industrial wastes.

II. The second objective will be to require the installation of secondary treatment whenever such additional treatment is necessary to protect the uses assigned to the particular stream

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classification.

III. The third objective, after all stream classification requirements throughout the state have been satisfied, will be to continue the program of pollution abatement by installing other forms of treatment desirable to maintain all surface waters of the state in as clean a condition as possible, consistent with available assistance funds and technological developments.

IV. Until such time as appropriate methodology and reasonable levels of financial assistance are made available, municipalities with combined sewer systems shall not be required to provide treatment facilities with capacity greater than that necessary to handle anticipated peak dry weather flows.

V. A further objective will be to advance the development and application of innovative/alternative waste treatment systems with guidelines, procedures, pilot projects, demonstration projects, community projects or in any other manner the department may elect.

* * * * *

The following statute addresses infringements on water rights:

498:6 Water Rights. – Any legal right, public or private, infringed by a change in the water level of a natural lake or pond, or by the casting or dropping into a watercourse of sawdust **or other waste** of a saw or lumber mill or any other material, and the water rights of riparian proprietors on a stream may be ascertained and enforced in a constitutional manner on a bill in equity without prior ascertainment of the right by an action at law; and rights of boating, fishing and navigation may be enforced on a bill in equity brought by the attorney general in the name of the state.

Source. 1885, 87:1, 2. PS 205:3. PL 317:5. RL 371:6.

**C4 – Interdepartment Communication from Richard Head, Associate Attorney General
Regarding Stormwater Discharges**

STATE OF NEW HAMPSHIRE
Inter-Department Communication

RECEIVED

JUL 02 2008

DATE: July 1, 2008

DEPARTMENT OF
ENVIRONMENTAL SERVICES

FROM: Richard W. Head 
Associate Attorney General AT (OFFICE) Department of Justice

SUBJECT: Stormwater Discharges and Transfers of Surface Waters

TO: Michael J. Walls, Assistant Commissioner
Department of Environmental Services

QUESTIONS PRESENTED

You have asked for an opinion on the following two questions:

1. Are water transfers from a Class B water to a Class A water, for purposes of augmenting drinking water supplies, permissible under RSA 485-A:8, 1?
2. Do discharges of stormwater runoff that carry pollutants from areas altered by development qualify as discharges of "sewage or waste" under RSA 485-A?

SHORT ANSWERS

The answer to question 1 is a qualified yes. While allowed, the circumstances under which such a transfer would comply with the statute and rules are severely limited. Question 2 is not specifically limited to Class A waters, so I have assumed you intended the question to include both Class A and Class B waters.¹ The answer to question 2 requires, in part, a technical analysis. Generally, however, the answer is yes, although with regard to Class B waters, disposal of sewage or waste is allowed if the source water is subjected to "adequate treatment."

I have attached as Exhibit A sections from relevant statutes and rules.

ANALYSIS

- A. Transfers from a Class B water to a Class A water, for purposes of augmenting drinking water supplies, are permissible under limited circumstances
 1. Analysis based on statutory interpretation

¹ In your question, you include the word "discharge", which is a term applicable only to Class A waters. I am assuming, however, that the use of the word discharge was not intended to limit your question to Class A waters.

As a matter of statutory interpretation, the Department's interpretation of the statutes it is charged with regulating will be given substantial deference. *In re Weaver*, 150 N.H. 254, 256 (2003). Nevertheless, the interpretation of a statute is to be decided ultimately by the court. *Id.* The Court will review an agency's interpretation of a statute *de novo*. *Appeal of Regenesis Corp.*, __ N.H. __ (2007).

The Department has interpreted RSA 485-A:8, I as it relates to transfers of water to public water supplies. *See* Env-Wq 1708.12 (Transfer of Water to Public Water Supplies). Specifically, the Department's rules allow transfers of water to public water supplies, subject to four conditions: (1) both the source water and the receiving water shall be "acceptable for water supply uses after treatment"; (2) the chemical and physical water quality parameters of the source water shall be at least equal to the water quality of the receiving water; (3) the biological characteristics of the source water shall be compatible with those of the receiving water and shall not contain species of aquatic life that would adversely affect the species of aquatic life in the receiving water; and (4) the transfer and withdrawal shall comply with the antidegradation provisions of the water quality rules (Env-Wq 1708).

Thus, as a general matter, the Department has already rendered an interpretation of the statute and has concluded that water transfers are allowed, as long as the four conditions are followed. In order to answer the question presented, however, a more in depth analysis of the four conditions is required. As they relate to Class A waterbodies, conditions 2 and 4 are the most relevant.

The antidegradation rules (incorporated in condition number 4 above) include the following:

- The Department shall assure that the highest statutory and regulatory requirements shall be achieved for all new and existing point sources. Env-Wq 1708.01(b).
- A proposed discharge or activity shall not eliminate any existing uses or the water quality needed to maintain and protect those uses. Env-Wq 1708.04(b).
- Any discharge or activity that is projected to use 20% or more of the remaining assimilative capacity for a water quality parameter, in terms of either concentration or mass of pollutants, or volume or flow rate for water quantity, shall be considered a significant lowering of water quality. The department shall not approve such a discharge or activity unless the applicant demonstrates that the proposed lowering of water quality is necessary to achieve important economic or social development, in accordance with Env-Wq 1708.10, in the area where the waterbody is located. Env-Wq 1708.09(a).

The antidegradation rules also contain a specific provision addressing Class A waters. Rule Env-Wq 1708.06 (Protection of Class A Waters) states:

- (a) In accordance with RSA 485-A:8, I, discharges of sewage or waste to Class A waters shall be prohibited.
- (b) Proposed new or increased activities that the department determines do not involve the discharge of sewage or waste shall be reviewed in accordance with Env-Wq 1708.01 through Env-Wq 1708.12.

Thus, transfers of water to both Class A and Class B drinking water supplies are contemplated by the Department's rules, but discharges to Class A waters are limited by the more restrictive language of Env-Wq 1708.06. Unfortunately, Env-Wq 1708.06 does not interpret RSA 485-A:8, I as it relates to Class A waters, but simply restates it. Thus, the antidegradation rules do not assist with the interpretation of RSA 485-A:8, I.

RSA 485-A:8, I prohibits the discharge of any sewage or wastes into Class A waters. Discharge, sewage and wastes are all defined terms. In addition, the term "discharge" incorporates the term pollutant into its definition, which is itself a defined term.² Thus, the addition of pollutants, sewage or wastes to Class A waters are all prohibited. Using those three words as defined, the statute prohibits the following discharges to Class A waters:

- water-carried waste products from buildings, public or private, together with such groundwater infiltration and surface water as may be present (definition of sewage);
- industrial waste (definition of waste);
- 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 (definition of other wastes³);
- dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water (definition of pollutant).

With regard to water transfers of Class B waters to Class A waters, the most relevant of these prohibitions are likely to be "any other substances other than sewage or industrial wastes" and "heat".

The Department's rules include a long list of substances that are either banned from Class A waters or cannot exceed a certain threshold. Among the criteria governing Class A waters are the following (Env-Wq 1707.01; 1703.07-18, 20):

- dissolved oxygen content of at least 75% saturation, based on a daily average, and an instantaneous minimum of at least 6 mg/l at any place or time except as naturally occurs.
- no benthic deposits, unless naturally occurring.
- no oil or grease, unless naturally occurring
- no color, unless naturally occurring.
- no turbidity, unless naturally occurring.
- no slicks, odors, or surface floating solids unless naturally occurring.
- no change in temperature in class A waters, unless naturally occurring.
- no phosphorus or nitrogen unless naturally occurring.
- gross beta radioactivity in excess of 1,000 picocuries per liter.

² The addition of the defined term pollutant to the definition of discharge is by rule, not by statute.

³ "Other wastes" is incorporated into the definition of "waste".

- strontium-90 in excess of 10 picocuries per liter.
- no radium-226 in excess of 3 picocuries per liter.
- pH of Class A waters shall be as naturally occurring
- dioxin (2, 3, 7, 8 - TCDD) in excess of 0.001 ng/l,
- Mixing zones shall be prohibited

Taking this list of criteria for defining a Class A waterbody, combined with the definition of pollutant, sewage, wastes and other wastes, I conclude that the introduction of any substance to the receiving waterbody that would result in a decrease in water quality is prohibited. This conclusion is consistent with Env-Wq 1708.12(b)⁴, which says “[t]he chemical and physical water quality parameters of the source water shall be at least equal to the water quality of the receiving water.” Thus, while the rules contemplate transfers of water to Class A drinking water supplies, the practical effect of the statutory language, combined with the Department’s rules, is that few if any transfers would be allowed.⁵

2. Effect of EPA’s new rule governing water transfers

Recently, the Environmental Protection Agency modified its rules to specifically exclude from the NPDES permit requirement discharges associated with water transfers. 40 CFR §122.3(i). When it issued this rule, EPA specifically stated that the rule was not intended to interfere with regulation of water transfers by the states.

Based on the statute as a whole and consistent with the Agency’s longstanding practice, the interpretive memorandum concluded that Congress generally expected water transfers would be subject to oversight by water resource management agencies and State non-NPDES authorities, rather than the permitting program under section 402 of the CWA.

73 Fed. Reg.33699 (June 13, 2008).

The First Circuit has considered the issue of water transfers in the case of *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273 (1st Cir. 1996). That decision was issued before EPA’s new rule on water transfers, and was limited to whether a NPDES permit was required for a transfer of water from the East Branch of the Pemigewasset River to Loon Pond. Because New Hampshire’s definition of “pollutant” is identical to that used in the federal regulation, however, the Court’s decision is instructive on how a court might interpret New Hampshire’s statute and rules.

In the *Dubois* case, the Forest Service did not contest the assertion that there are at least some pollutants in the East Branch that do not exist naturally in Loon Pond. The Court thought it relevant that the East Branch had been designated as a Class B waterway and Loon Pond a Class A waterbody. This distinction was sufficient for the Court to conclude that the two water bodies were not of “like quality.” Even if both were Class A waters, the Court concluded that the analysis would not stop there.

⁴ Env-Wq 1708.12 contains the four conditions for transfer of water to public water supplies. See p. 2.

⁵ To the extent the Department did not intend this result, it should amend its rules to make explicit what transfers are allowed, consistent with the prohibition of discharges of any sewage or waste.

Even if the East Branch were rated in the same general class as Loon Pond (Class A), that would not mean the two bodies of water were identical in quality, such that an NPDES permit would be unnecessary. The East Branch contains different organisms than Loon Pond, *inter alia*, *Giardia lamblia*. Loon Pond is also colder overall than the East Branch, and its lower depths are significantly colder. The two bodies of water also have different chemistries, especially the low level of phosphorus in Loon Pond, which affects its biological composition. Nor has the Forest Service argued that all such pollutants would be eliminated before any East Branch water would be pumped up to refill Loon Pond after depletion by Loon Corp.'s snowmaking. The Service cannot say, therefore, that the discharge of East Branch water into Loon Pond would not result in "any pollutants" being added to the Pond.

Dubois, 102 F.3d at 1298-99. The Court, however, did not rule specifically on whether a NPDES permit was required. It concluded that it is the EPA's obligation to determine whether a permit is required, and whether permit conditions would be appropriate. *Dubois*, 102 F.3rd at 1301.

It is unlikely that a court interpreting RSA 485-A would conclude that, because EPA interpreted similar language to mean that no NPDES permit is required, that New Hampshire's statute should be given a similar meaning. Application of EPA's interpretation to New Hampshire's statute would mean that New Hampshire did not intend to regulate transfers of water between waterbodies. Such an interpretation would be inconsistent with the language of 485-A, and the interpretation given to the statute by the Department. The Department's rules clearly state that some water transfers are allowed, but that authorization is highly restricted. Furthermore, only a limited right to transfer water to a Class A waterbody is contemplated by the rules. As a practical matter, the standards for Class A waters may be so restrictive that most, if not all, water transfers to Class A waterbodies would likely violate the rules.

- B. Discharge or disposal of stormwater runoff that carry pollutants from areas altered by development under most circumstances will qualify as a discharge or disposal of "sewage or waste" under RSA 485-A

Your second question is not limited to Class A or Class B waters. RSA 485-A:8 has a key distinction affecting what can be released into Class A waters and Class B waters. With regard to Class A waters, the statute states that "[t]here shall be no discharge of any sewage or wastes into waters of this classification." For Class B waters, the statute states "[t]here shall be no disposal of sewage or waste into said waters except those which have received adequate treatment to prevent the lowering of the biological, physical, chemical or bacteriological characteristics below those given above, nor shall such disposal of sewage or waste be inimical to aquatic life or to the maintenance of aquatic life in said receiving waters."

The use of the word "discharge" in one, and "disposal" in the other, is important because discharge is defined in the rules to incorporate "pollutants." Disposal is an undefined word in RSA 485-A and the rules promulgated thereunder.

As noted in Section A of this memo, the following discharges are implicated by the definition of pollutant, sewage and waste⁶:

- (a) water-carried waste products from buildings, public or private, together with such groundwater infiltration and surface water as may be present (definition of sewage);
- (b) industrial waste (definition of waste);
- (c) 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 (definition of other wastes⁷);
- (d) dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water (definition of pollutant).

Paragraphs (a)-(c) are applicable to both Class A and Class B waters, while Paragraph (d) is applicable to Class A waters only. Unlike Class A waters, disposal of sewage and waste to Class B waters is allowed when there has been adequate treatment to prevent the lowering of the biological, physical, chemical or bacteriological characteristics below those described in RSA 485-A:8, II.

The first step in the analysis is to determine whether stormwater runoff that carries pollutants from areas altered by development fall within paragraphs (a) – (d). Although this is largely a technical analysis, not a legal one, paragraphs (c) and (d) appear to be the most likely to apply. Paragraph (c) includes the general restriction on “any other substance harmful to human, animal, fish or aquatic life....” Paragraph (d) (applicable only to Class A waters) includes, among other pollutants, “chemical wastes”, “biological materials”, “heat”, “rock”, and “sand”. I assume that all of these are likely to be found in stormwater runoff.

With regard to paragraph (c) (applicable to both Class A and Class B waters), the issue is a technical one as to whether the discharge or disposal is “harmful to human, animal, fish or aquatic life.” Paragraph (d) (applicable only to Class A waters) does not itself have qualifying language, but is an outright prohibition. In addition, as noted above, the statute governing Class B waters allows disposal of sewage or waste if adequately treated.

The Department’s rules state in relevant part that “[t]he presence of pollutants in the surface waters shall not justify further introduction of pollutants from point or nonpoint sources, alone or in any combination.” The rules also require “the Department shall assure that the highest statutory and regulatory requirements shall be achieved for all new and existing point sources....”

⁶ I will refer to these four paragraphs as paragraphs (a) – (d). The paragraph designations are mine, and are not used in the statute or rules.

⁷ “Other wastes” is used in the definition of “waste”.

Thus, if the Department finds that stormwater runoff contains any of the prohibited substances, then, as it relates to Class A waters, the discharge is prohibited. With regard to Class B waters, the statute allows the disposal to occur, so long as the runoff is adequately treated.

CONCLUSION

Your first question was "are water transfers from a Class B water to a Class A water, for purposes of augmenting drinking water supplies, permissible under RSA 485-A:8, I?" The Department's rules do define "discharge" to include pollutants. Taking the statutory definitions of sewage and waste, combined with the definition of discharge in the rules, RSA 485-A:8, I prohibits the addition of pollutants, sewage or wastes to Class A waters. I conclude that the introduction of any substance to the receiving waterbody that would result in a decrease in water quality is prohibited. Thus, while the rules contemplate transfers of water to Class A drinking water supplies, the practical effect of the statutory language, combined with the Department's rules, is that few if any transfers would be allowed. To the extent the Department did not intend this result, it should amend its rules to make explicit what transfers are allowed, consistent with the prohibition of discharges of any sewage or waste.

Your second question asked "do discharges of stormwater runoff that carry pollutants from areas altered by development qualify as discharges of "sewage or waste" under RSA 485-A?" The answer to this question requires, in part, a technical analysis which the Department is best able to answer. Assuming the stormwater runoff contains the prohibited pollutants, then with regard to Class A waters, such stormwater runoff would not be allowed as a discharge of pollutants, sewage or wastes. With regard to Class B waters, disposal of stormwater runoff would be considered of sewage or waste. The statute does, however, allow disposal of sewage or waste into Class B waters if such sewage or waste is subjected to adequate treatment.

cc: ✓ Harry Stewart
Gretchen Hamel

Memorandum on Transfers of Water and Stormwater Discharges
Exhibit A
Sections From Relevant Statutes And Rules

RSA 485-A:8 (emphasis added):

I. Class A waters shall be of the highest quality and shall contain not more than either a geometric mean based on at least 3 samples obtained over a 60-day period of 47 *Escherichia coli* per 100 milliliters, or greater than 153 *Escherichia coli* per 100 milliliters in any one sample; and for designated beach areas shall contain not more than a geometric mean based on at least 3 samples obtained over a 60-day period of 47 *Escherichia coli* per 100 milliliters, or 88 *Escherichia coli* per 100 milliliters in any one sample; unless naturally occurring. *There shall be no discharge of any sewage or wastes into waters of this classification.* The waters of this classification shall be considered as being potentially acceptable for water supply uses after adequate treatment.

II. Class B waters shall be of the second highest quality and shall have no objectionable physical characteristics, shall contain a dissolved oxygen content of at least 75 percent of saturation, and shall contain not more than either a geometric mean based on at least 3 samples obtained over a 60-day period of 126 *Escherichia coli* per 100 milliliters, or greater than 406 *Escherichia coli* per 100 milliliters in any one sample; and for designated beach areas shall contain not more than a geometric mean based on at least 3 samples obtained over a 60-day period of 47 *Escherichia coli* per 100 milliliters, or 88 *Escherichia coli* per 100 milliliters in any one sample; unless naturally occurring. *There shall be no disposal of sewage or waste into said waters except those which have received adequate treatment to prevent the lowering of the biological, physical, chemical or bacteriological characteristics below those given above, nor shall such disposal of sewage or waste be inimical to aquatic life or to the maintenance of aquatic life in said receiving waters.* The pH range for said waters shall be 6.5 to 8.0 except when due to natural causes. Any stream temperature increase associated with the discharge of treated sewage, waste or cooling water, water diversions, or releases shall not be such as to appreciably interfere with the uses assigned to this class. The waters of this classification shall be considered as being acceptable for fishing, swimming and other recreational purposes and, after adequate treatment, for use as water supplies. Where it is demonstrated to the satisfaction of the department that the class B criteria cannot reasonably be met in certain surface waters at all times as a result of combined sewer overflow events, temporary partial use areas shall be established by rules adopted under RSA 485-A:6, XI-c, which meet, as a minimum, the standards specified in paragraph III.

Sewage is defined as "the water-carried waste products from buildings, public or private, together with such groundwater infiltration and surface water as may be present." RSA 485-A:2, X.

Waste means industrial waste and *other wastes*. RSA 485-A:2, XVII.

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. RSA 485-A:2, VIII.

Discharge means (a) The addition, introduction, leaking, spilling, or emitting of a pollutant to surface waters, either directly or indirectly through the groundwater, whether done intentionally, unintentionally, negligently or otherwise; or (b) The placing of a pollutant in a location where the pollutant is likely to enter surface waters. Env-Wq 1702.18.

Pollutant means "pollutant" as defined in 40 CFR 122.2. Env-Wq 1702.39. 40 CFR 122.2 defines pollutant as:

Pollutant means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. It does not mean:

- (a) Sewage from vessels; or
- (b) Water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil and gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if the State determines that the injection or disposal will not result in the degradation of ground or surface water resources.

The Department of Environmental Services has also adopted revised water quality rules, Env-Wq. Those rules include:

Env-Wq 1708.12 Transfer of Water to Public Water Supplies. The transfer of waters from rivers, streams, lakes, or ponds to waters used as a public water supply shall be subject to the following conditions:

- (a) Both the source water in the area of the withdrawal and the receiving water shall be acceptable for water supply uses after treatment;
- (b) The chemical and physical water quality parameters of the source water shall be at least equal to the water quality of the receiving water;
- (c) The biological characteristics of the source water shall be compatible with those of the receiving water and shall not contain species of aquatic life that would adversely affect the species of aquatic life in the receiving water; and
- (d) The transfer and withdrawal shall comply with the antidegradation provisions of this part.

PART Env-Wq 1708 ANTIDEGRADATION

Env-Wq 1708.01 Purpose. The purpose of these antidegradation provisions is to ensure that the following provisions of 40 CFR 131.12 are met:

- (a) Existing uses and the level of water quality necessary to protect the existing uses shall be maintained and protected;
- (b) For significant changes in water quality, where the quality of the surface waters exceeds levels necessary to support propagation of fish, shellfish, and wildlife, and recreation in and on the water, that quality shall be maintained and protected unless the department finds, after full satisfaction of the intergovernmental coordination and public participation provisions that, in accordance with Env-Wq 1708.10, allowing lower water quality is necessary to accommodate important economic or social development in the area in which the surface waters are located. In allowing such degradation or lower water quality, the department shall assure water quality adequate to fully protect existing uses. Further, the department shall assure that the highest statutory and regulatory requirements shall be achieved for all new and existing point sources and that all cost effective and reasonable best management practices for nonpoint source control shall be implemented;
- (c) For insignificant changes in water quality, where the quality of the surface waters exceeds levels necessary to support propagation of fish, shellfish, and wildlife, and recreation in and on the water, that quality shall be maintained and protected. In allowing such degradation or lower water quality, the department shall assure water quality adequate to protect existing uses fully. Further, the department shall assure that the highest statutory and regulatory requirements shall be achieved for all new and existing point sources and that all cost effective and reasonable best management practices for nonpoint source control shall be implemented;
- (d) Where high quality surface waters constitute an outstanding resource waters (ORW), that water quality shall be maintained and protected; and
- (e) In those cases where a potential water quality impairment is associated with a thermal discharge, the antidegradation provisions shall ensure that the requirements of section 316 of the Clean Water Act are met.

Env-Wq 1708.02 Applicability. Antidegradation shall apply to:

- (a) Any proposed new or increased activity, including point source and nonpoint source discharges of pollutants, that would lower water quality or affect the existing or designated uses;
- (b) Any proposed increase in loadings to a waterbody when the proposal is associated with existing activities;
- (c) Any increase in flow alteration over an existing alteration; and
- (d) Any hydrologic modifications, such as dam construction and water withdrawals.

Env-Wq 1708.03 Submittal of Data. The applicant shall provide all information necessary to:

- (a) Identify all existing uses, including:
 - (1) Freshwater, estuarine, and marine aquatic life present in the affected surface waters;
 - (2) Other wildlife that use or are dependent on the affected surface waters;
 - (3) Presence of water quality and physical habitat that support, or would support, aquatic life or other animal or plant life;
 - (4) Presence of indigenous species and communities;
 - (5) Presence of a specialized use of the waterbody, such as a spawning area or as a habitat for a federally or state listed threatened or endangered species;

- (6) Use of the surface waters for recreation in or on the water, such as fishing, swimming, and boating, or use of the surface waters for commercial activity; and
- (7) Whether or not current conditions or uses of the surface waters conflict with achieving and maintaining goal uses of the CWA at Section 101(a)(2) and the primary CWA objective to restore and maintain the chemical, physical, and biological integrity of the nation's surface waters;
- (b) Determine the level of water quality necessary to maintain and protect those uses;
- (c) Evaluate the potential impacts on existing uses due to the proposed discharge or activity by itself, and in combination with other discharges or activities presently occurring;
- (d) Ensure that existing uses and the level of water quality necessary to protect those uses shall be maintained and protected.
- (e) Evaluate the magnitude, duration, and upstream and downstream extent of any lowering of high quality water due to the proposed discharge or activity by itself, and in combination with other discharges or activities presently occurring;
- (f) Evaluate other factors as necessary to determine whether the proposed activity would cause significant or insignificant degradation, in accordance with Env-Wq 1708.09;
- (g) If the discharge or activity is determined by the department to be significant, in accordance with Env-Wq 1708.08 and Env-Wq 1708.09, determine if a proposed lowering of water quality is necessary to achieve important economic or social development in accordance with Env-Wq 1708.10; and
- (h) Ensure that all water quality criteria applicable to the waterbody in question shall not be violated.

Env-Wq 1708.04 Protection of Existing Uses.

- (a) This section shall apply to all surface waters.
- (b) A proposed discharge or activity shall not eliminate any existing uses or the water quality needed to maintain and protect those uses.
- (c) Using the information provided at Env-Wq 1708.03, the department shall determine the existing uses for the waters in question.

Env-Wq 1708.05 Protection of Water Quality in ORW.

- (a) Surface waters of national forests and surface waters designated as natural under RSA 483:7-a, I, shall be considered outstanding resource waters (ORW).
- (b) Water quality shall be maintained and protected in surface waters that constitute ORW, except that some limited point and nonpoint source discharges may be allowed providing that they are of limited activity which results in no more than temporary and short-term changes in water quality. "Temporary and short term" means that degradation is limited to the shortest possible time. Such activities shall not permanently degrade water quality or result at any time in water quality lower than that necessary to protect the existing and designated uses in the ORW. Such temporary and short term degradation shall only be allowed after all practical means of minimizing such degradation are implemented

Env-Wq 1708.06 Protection of Class A Waters.

(a) In accordance with RSA 485-A:8, I, discharges of sewage or waste to Class A waters shall be prohibited.

(b) Proposed new or increased activities that the department determines do not involve the discharge of sewage or waste shall be reviewed in accordance with Env-Wq 1708.01 through Env-Wq 1708.12.

Env-Wq 1708.07 Protection of Water Quality in High Quality Waters.

(a) Subject to (b), below, high quality waters shall be maintained and protected, except that insignificant changes in water quality, as determined by the department in accordance with Env-Wq 1708.09, shall be allowed.

(b) Degradation of significant increments of water quality, as determined in accordance with Env-Wq 1708.09, in high quality waters shall be allowed only if it can be demonstrated to the department, in accordance with Env-Wq 1708.10, that allowing the water quality degradation is necessary to accommodate important economic or social development in the area in which the receiving waters are located.

(c) Economic/social benefits demonstration and alternatives analysis shall not be required for authorization of an insignificant lowering of water quality. However, in allowing a lowering of water quality, significant or insignificant, all reasonable measures to minimize degradation shall be used.

(d) If the waterbody is Class A Water, the requirements of Env-Wq 1708.06 shall also apply.

Env-Wq 1708.08 Assessing Waterbodies.

(a) The applicant shall characterize the existing water quality and determine if there is remaining assimilative capacity for each parameter in question.

(b) Existing water quality shall be calculated in accordance with Env-Wq 1705.02. Existing water quality shall be established based on point sources discharging at their allowed loadings and the highest loadings anticipated from nonpoint sources.

(c) Where flow alteration is involved, establishment of existing conditions shall be based on the existing maximum allowed water withdrawals or impoundment, diversion, or fluctuation of stream flow, as appropriate.

(d) Remaining assimilative capacity shall be evaluated by comparing existing water quality, as specified in (b) and (c), above, to the state's water quality criteria.

(e) If the type and frequency of the proposed discharge or activity causes the waterbody to be impacted at flows other than those listed in Env-Wq 1705.02, the department shall require the applicant to evaluate the impact of the proposed discharge at those other flows.

(f) Subject to (h), below, if the department determines, based on the information submitted, that there is no remaining assimilative capacity, no further degradation with regard to that parameter shall be allowed.

(g) Subject to (h), below, if the department determines, based on the information submitted, that there is some remaining assimilative capacity, then the department shall proceed in accord with Env-Wq 1708.09.

(h) The above determinations shall take into account Env-Wq 1705.01 which requires the department to reserve no less than 10% of a surface water's assimilative capacity.

Env-Wq 1708.09 Significant or Insignificant Determination.

(a) Any discharge or activity that is projected to use 20% or more of the remaining assimilative capacity for a water quality parameter, in terms of either concentration or mass of pollutants, or volume or flow rate for water quantity, shall be considered a significant lowering of water quality. The department shall not approve such a discharge or activity unless the applicant demonstrates that the proposed lowering of water quality is necessary to achieve important

economic or social development, in accordance with Env-Wq 1708.10, in the area where the waterbody is located.

(b) Subject to (d), below, those activities that cause an insignificant lowering of water quality shall not be required to demonstrate that they are necessary to provide important economic or social development.

(c) Activities under (b), above shall include, but not be limited to:

- (1) Short term or intermittent discharges such as hydrostatic testing of pipelines, fire pump test water, and uncontaminated stormwater discharges or site clean-up activities;
- (2) Permanent discharges such as uncontaminated noncontact or uncontaminated geothermal cooling water, uncontaminated groundwater seepage, or unchlorinated or dechlorinated swimming pool water;
- (3) Facilities whose nonpoint source runoff is controlled through the use of best management practices; and
- (4) Any discharge or activity that is projected to use less than 20% of the remaining assimilative capacity for a water quality parameter, in terms of either concentration or mass for pollutants.

(d) If the department determines that, because of the following factors, the effect of a discharge results in a greater impact to the water quality than that normally found in insignificant discharges, it shall determine that the proposed activity or discharge is significant, regardless of the proposed consumption of the remaining assimilative capacity, and require the applicant to demonstrate, in accordance with Env-Wq 1708.10, that a lowering of water quality is necessary to achieve an important economic or social development:

- (1) The magnitude, duration, and spatial extent of the proposed change in water quality;
- (2) The cumulative lowering of water quality over time resulting from the proposed activity in combination with previously approved activities;
- (3) The possible additive or synergistic effects of the activity in combination with existing activities;
- (4) The magnitude of the mass load independent of the total assimilative capacity or change in receiving water pollutant concentration;
- (5) The toxic or bioaccumulative characteristics of the pollutant(s) in question;
- (6) The potential to stress sensitive biological resources such as indigenous species, rare species, and threatened or endangered species and their habitat;
- (7) The potential to stress sensitive recreational uses or water supply uses; or
- (8) The quality and value of the resource.

Env-Wq 1708.10 Demonstration of Economic or Social Development.

(a) Unless the department determines from documentation provided by the applicant, or other available information, that a proposed new or increased discharge or other activity would result in an insignificant impact to the existing water quality of a high quality waterbody, the department shall require that the applicant provide documentation, in accordance with the procedures delineated in "Interim Economic Guidance for Water Quality Standards" EPA- 823-B-95-002, dated March 1995, that the:

- (1) Proposed project or activity will provide an important economic or social development in the area where the waterbody is located; and
- (2) Lowering of water quality is necessary to accommodate the development.

(b) Where the department finds, based on the information provided in Env-Wq 1708.10(a) that a proposed project would provide an important economic or social development, it shall require that an alternatives analysis be developed, in accordance with Env-Wq 1708.10(c), to determine if it is possible to realize those benefits either without lowering water quality or with a reduced degree of degradation.

(c) To determine if the lowering of water quality is necessary to accommodate an important economic or social benefit, the department shall require the applicant to evaluate the following

alternatives and submit technically and scientifically valid information describing the benefits and impacts of each alternative on water quality and the degree to which the economic or social benefits could be realized if the alternatives were implemented:

- (1) Alternative methods of production or operation;
- (2) Improved process controls;
- (3) Water conservation practices;
- (4) Wastewater minimization technologies;
- (5) Non-discharging alternatives;
- (6) Improved wastewater treatment facility operation;
- (7) Alternative methods of treatment, including advanced treatment beyond applicable technology requirements of the Clean Water Act; and
- (8) Alternative sites, and associated water quality impacts at those sites.

(d) The department shall make a preliminary determination, based on the information provided in Env-Wq 1708.10(a) and (c), to approve or deny the applicant's request.

(e) If the department approves the applicant's request, the department shall provide the opportunity for public comment on its preliminary decision in accordance with Env-Wq 1708.11.

Env-Wq 1708.11 Public Participation and Intergovernmental Coordination.

(a) The department shall provide the opportunity for public comment on preliminary decisions to allow any lowering of water quality.

(b) The department shall issue a written notice to the public, the municipality in which the activity is located or proposed to be located and all potentially affected municipalities. The notice shall invite written comments to be submitted to the department and shall provide an opportunity to request a public hearing. For activities related to state surface water discharge permits, this public notice shall be a part of the normal public participation procedures associated with the issuance of the permit.

(c) The notice shall be published in a newspaper of general circulation in the municipality where the proposed activity will occur and shall include the following information:

- (1) A description of the proposed activity;
- (2) A description of the surface waters involved and their use classification;
- (3) A statement of the department's antidegradation provisions;
- (4) A determination that existing uses and necessary water quality will be maintained and protected;
- (5) A summary of the expected impacts on high quality waters;
- (6) A determination that where a lowering of water quality is allowed, all applicable water quality criteria shall be met, designated uses protected, and any higher water quality achievable by the most stringent applicable technology-based requirements shall be maintained;
- (7) A discussion of any other information that is relevant to how the activity complies or does not comply with these provisions;
- (8) The summary of the important economic or social development, if applicable;
- (9) A summary of the alternatives analysis and a finding that the lowering of water quality is necessary; and
- (10) The name, address, and telephone number of the person in the department where all written comments or requests for public hearing can be sent.

(d) To fulfill intergovernmental coordination, the department shall submit a copy of the public notice to the following agencies and request comments:

- (1) NH department of resources and economic development;
- (2) NH department of health and human services;
- (3) NH fish and game department;
- (4) NH office of energy and planning;

- (5) US EPA Region I;
- (6) US Army Corps of Engineers;
- (7) US Fish and Wildlife Service;
- (8) National Marine Fisheries Service;
- (9) Local river advisory committees, if applicable;
- (10) National Park Service; and
- (11) Natural Resources Conservation Service.

(e) The department shall respond to all comments received as a result of public participation and intergovernmental coordination. If a request to hold a public hearing is received, the department shall hold a public hearing in accordance with the provisions of Env-C 200 that apply to non-adjudicative proceedings.

(f) Following this public participation process, the department shall, based on any further information submitted during the public hearing, make a final decision to allow or deny the proposed impact on water quality. If the application is denied, the applicant may revise the submittal to decrease or eliminate the projected impact to high quality waters and resubmit the application for consideration under the full review process.

Env-Wq 1708.12 Transfer of Water to Public Water Supplies. The transfer of waters from rivers, streams, lakes, or ponds to waters used as a public water supply shall be subject to the following conditions:

- (a) Both the source water in the area of the withdrawal and the receiving water shall be acceptable for water supply uses after treatment;
- (b) The chemical and physical water quality parameters of the source water shall be at least equal to the water quality of the receiving water;
- (c) The biological characteristics of the source water shall be compatible with those of the receiving water and shall not contain species of aquatic life that would adversely affect the species of aquatic life in the receiving water; and
- (d) The transfer and withdrawal shall comply with the antidegradation provisions of this part.

C5 - RSA 149 - I

**TITLE X
PUBLIC HEALTH
CHAPTER 149-I
SEWERS**

Section 149-I:1

149-I:1 Construction. – The mayor and aldermen of any city may construct and maintain all main drains or common sewers, stormwater treatment, conveyance, and discharge systems, sewage and/or waste treatment, works which they adjudge necessary for the public convenience, health or welfare. Such drains, sewers, and systems shall be substantially constructed of brick, stone, cement, or other material adapted to the purpose, and shall be the property of the city.

Source. 1870, 5:1, 6. GL 78:6, 11. PS 79:2. PL 95:3. RL 111:3. 1945, 188, part 22:4. RSA 252:4. 1961, 120:4. 1981, 87:2, eff. April 20, 1981. 2008, 295:1, eff. Aug. 26, 2008.

Section 149-I:2

149-I:2 Taking Land. – Whenever it is necessary to construct such main drains or common sewers, stormwater treatment, conveyance, and discharge systems, sewage and/or waste treatment facilities across or on the land of any person and the city cannot obtain for a reasonable price any land or easement in land required by it, the mayor and aldermen may lay out a sufficient quantity of such land for the purpose and assess the owner's damages in the same manner as in the case of taking land for highways pursuant to RSA 230 and the owner shall have the same right of appeal, with the same procedure.

Source. 1873, 29:1. GL 78:13. PS 79:3. PL 95:4. RL 111:4. 1945, 188, part 22:5. RSA 252:5. 1967, 300:3. 1981, 87:2, eff. April 20, 1981. 2008, 295:2, eff. Aug. 26, 2008.

Section 149-I:3

149-I:3 Water Pollution. – Any city which shall have received an order by the department of environmental services under the provisions of RSA 147, 485, or 485-A shall proceed forthwith to acquire whatever easements and lands as are necessary to comply with said order and may enter upon, for the purpose of survey leading to land description, any land of any person. In so proceeding the mayor and aldermen shall institute any necessary land taking in accordance with the provisions of RSA 149-I:2 and, anything contained in RSA 231 or in the statutes generally notwithstanding, the decision of the mayor and aldermen shall not be vacated and any subsequent appeal or other action by the owner or owners shall be based solely on the amount of damages assessed, and the mayor and aldermen or their duly appointed agents shall have full right of immediate entry for the purpose of detailed surveys, borings, or the conduct of any and all other actions necessary or desirable to aid the city in the implementation of the order by the department of environmental services.

Source. RSA 252:5-a. 1969, 377:4. 1981, 87:2. 1986, 202:6, I(a). 1989, 339:19. 1996, 228:108, eff. July 1, 1996.

Section 149-I:4

149-I:4 Contracts; Sewage or Waste Treatment Facilities. – The mayor and aldermen of any city may lease, enter into contracts to provide, sell, or purchase stormwater treatment, conveyance, and discharge systems, and sewage or waste treatment facilities to or from any other city, town, village district or person whenever they judge the same necessary for the public convenience, health and welfare.

Source. 1949, 77:1. RSA 252:6. 1961, 120:5. 1981, 87:2, eff. April 20, 1981. 2008, 295:3, eff. Aug. 26, 2008.

Section 149-I:5

149-I:5 Inconsistent Charter Provisions Repealed. – The provisions of any city charter inconsistent with the provisions of this chapter are hereby repealed as to the extent of such inconsistency.

Source. 1949, 77:2. RSA 252:7. 1981, 87:2, eff. April 20, 1981.

Section 149-I:6

149-I:6 Bylaws and Ordinances. –

I. In municipalities where the sewage or stormwater is pumped or treated, the mayor and aldermen may adopt such ordinances and bylaws relating to the system, pumping station, treatment plant or other appurtenant structure as are required for proper maintenance and operation and to promote the objectives of the sewage system or stormwater utility.

II. Any person who violates any ordinance or bylaw adopted pursuant to paragraph I of this section shall be subject to a civil penalty not to exceed \$10,000 per day of such violation.

III. A municipality shall give notice of the alleged violation to the department of environmental services within 10 days of commencement of any action under this section.

Source. 1941, 201:1. RL 111:5. 1945, 188, part 22:6. RSA 252:8. 1973, 531:83. 1981, 87:2. 1988, 241:1. 1994, 95:4. 1996, 228:108, eff. July 1, 1996. 2008, 295:4, eff. Aug. 26, 2008.

Stormwater Utilities

Section 149-I:6-a

149-I:6-a Definitions. – In this chapter:

I. "Equivalent residential unit" or "ERU" means the fee unit basis for all fees assessed by a stormwater utility.

II. "Stormwater" means stormwater runoff from precipitation, snow melt runoff, and street wash waters related to street cleaning or maintenance, infiltration, and drainage.

III. "Stormwater utility" means a special assessment district established to generate funding specifically for stormwater management.

IV. "Stormwater utility Commission" means the governing body managing the activities of the stormwater utility. When the utility encompasses more than one municipality, representation on the Commission shall be proportional to the number of fee units within each jurisdiction.

Source. 2008, 295:5, eff. Aug. 26, 2008.

Section 149-I:6-b

149-I:6-b Stormwater Utility Authorized. – The formation of a stormwater utility is hereby authorized upon approval by a majority vote of the legislative body of a municipality. In the case where a stormwater utility encompasses land within more than one municipality, the utility may be authorized by majority vote of the legislative bodies within each affected jurisdiction. Inter-municipal stormwater utilities shall be governed by a stormwater utility Commission.

Source. 2008, 295:5, eff. Aug. 26, 2008.

Section 149-I:6-c

149-I:6-c Criteria for Stormwater Utilities. – The stormwater utility shall address flood and erosion control, water quality management, ecological preservation, and annual pollutant load contained in stormwater discharge.

I. Utilities may collect reasonable fees that are directly related to the cost of providing services.

II. Properties charged assessments shall have equal opportunity to receive proportional benefit from the utility.

III. The utility shall offer credits or fee abatements based on on-site management of water quality impairment or peak runoff storage, or both. The utility shall adopt design standards to determine the amount of abatement.

IV. In assessing fees, the stormwater utility district shall forecast the annual cost of each component in the district's stormwater management program. This forecast shall be the basis for annual assessments distributed equally among the number of fee units within the district.

V. A minimum assessment may be established for fee units based on single family residences. This equivalent residential unit (ERU) can serve as the fee unit basis for all fees. Government property and non-profit organizations shall be subject to the fee structure.

VI. Boundaries of the district are not required to coincide with municipal boundaries.

Source. 2008, 295:5, eff. Aug. 26, 2008.

Section 149-I:6-d

149-I:6-d System for Fee Units. – Each stormwater utility Commission shall establish a system for fee units based on at least one of the following property-specific attributes:

I. Total impervious area.

II. Calculated lot runoff.

III. Total lot area.

IV. Land use classification developed for assessment of fees.

Source. 2008, 295:5, eff. Aug. 26, 2008.

Assessment for Sewers

Section 149-I:7

149-I:7 Levying. – The mayor and aldermen may assess upon the persons whose drains enter such main drains, common sewers, stormwater treatment, conveyance, and discharge systems, or treatment facilities, or whose lands receive special benefit therefrom in any way, their just share of the expense of constructing and maintaining the same or paying off any capital debt or interest incurred in constructing and/or maintaining the same.

Source. 1870, 5:2. 1872, 25:1. GL 78:7. PS 79:4. PL 95:5. RL 111:6. 1945, 188, part 22:7. RSA 252:9. 1961, 120:6. 1973, 483:1. 1981, 87:2, eff. April 20, 1981. 2008, 295:6, eff. Aug. 26, 2008.

Section 149-I:8

149-I:8 Sewer Rentals. – For the defraying of the cost of construction, payment of the interest on any debt incurred, management, maintenance, operation, and repair of newly constructed sewer systems, including newly constructed sewage or waste treatment and disposal works, the mayor and aldermen may establish a scale of rents to be called sewer rents, and to prescribe the manner in which and the time at which such rents are to be paid and to change such scale from time to time as may be deemed advisable. Except in the case of institutional, industrial or manufacturing use, the amount of such rents shall be based upon either the consumption of water on the premises connected with the sewer system, or the number of persons served on the premises connected with the sewer system, or whether the user is on a pressure or gravity system, or upon some other equitable basis.

Source. 1933, 98:2. RL 111:7. 1945, 188, part 22:8. RSA 252:10. 1961, 120:7. 1971, 289:1. 1981, 87:2. 1987, 142:1, eff. July 6, 1987.

Section 149-I:9

149-I:9 Combined Billing Permitted. – In municipalities which assess sewer rents, or have established fees for a stormwater utility, such assessments may be combined in a bill with assessments for other municipal services.

Source. RSA 252:10-a. 1975, 299:1. 1981, 87:2, eff. April 20, 1981. 2008, 295:7, eff. Aug. 26, 2008.

Section 149-I:10

149-I:10 Sewer Funds. –

I. The funds received from the collection of sewer rentals shall be kept as a separate and distinct fund to be known as the sewer fund. Such fund shall be allowed to accumulate from year to year, shall not be commingled with town or city tax revenues, and shall not be deemed part of the municipality's general fund accumulated surplus. Such fund may be expended only for the purposes specified in RSA 149-I:8, or for the previous expansion or replacement of sewage lines or sewage treatment facilities.

II. Except when a capital reserve fund is established pursuant to paragraph III, all sewer funds shall be held in the custody of the municipal treasurer. Estimates of anticipated sewer rental revenues and anticipated expenditures from the sewer fund shall be submitted to the governing body as set forth in RSA 32:6 if applicable, and shall be included as part of the municipal budget submitted to the local legislative body for approval. If the municipality has a properly-established board of sewer Commissioners, then notwithstanding RSA 41:29 or RSA 48:16, the treasurer shall pay out amounts from the sewer fund only upon order of the board of sewer Commissioners. Expenditures shall be within amounts appropriated by the local legislative body.

III. At the option of the local governing body, or of the board of sewer Commissioners if any, all or part of any surplus in the sewer fund may be placed in one or more capital reserve funds and placed in the custody of the trustees of trust funds pursuant to RSA 35:7. If such a reserve fund is created, then the governing body, or board of sewer Commissioners if any, may expend

such funds pursuant to RSA 35:15 without prior approval or appropriation by the local legislative body, but all such expenditures shall be reported to the municipality pursuant to RSA 149-I:25. This section shall not be construed to prohibit the establishment of other capital reserve funds for any lawful purpose relating to municipal water systems.

Source. 1933, 98:2. RL 111:8. 1945, 188, part 22:9. RSA 252:11. 1973, 483:2. 1979, 492:1. 1981, 87:2. 1994, 95:5, eff. July 8, 1994.

Section 149-I:10-a

149-I:10-a Stormwater Utility Fund. –

I. The funds received from stormwater utility fees shall be kept as a separate and distinct fund to be known as the stormwater utility fund. Such fund shall be allowed to accumulate from year to year, shall not be commingled with town or city tax revenues, and shall not be deemed part of the municipality's general fund accumulated surplus. Such fund may be expended only for stormwater treatment, conveyance, and discharge systems.

II. Except when a capital reserve fund is established pursuant to paragraph III, all stormwater utility funds shall be held in the custody of the municipal treasurer. Estimates of anticipated revenues and anticipated expenditures from the stormwater utility fund shall be submitted to the governing body as set forth in RSA 32:6 if applicable, and shall be included as part of the municipal budget submitted to the local legislative body for approval. If the municipality has a properly established stormwater utility Commission, then notwithstanding RSA 41:29 or RSA 48:16, the treasurer shall pay out amounts from the stormwater utility fund only upon order of the stormwater utility Commission. Expenditures shall be within amounts appropriated by the local legislative body.

III. At the option of the local governing body, or of the stormwater utility Commission if any, all or part of any surplus in the stormwater utility fund may be placed in one or more capital reserve funds and placed in the custody of the trustees of trust funds pursuant to RSA 35:7. If such a reserve fund is created, then the governing body, or stormwater utility Commission if any, may expend such funds pursuant to RSA 35:15 without prior approval or appropriation by the local legislative body, but all such expenditures shall be reported to the municipality pursuant to RSA 149-I:25. This section shall not be construed to prohibit the establishment of other capital reserve funds for any lawful purpose relating to municipal water systems.

Source. 2008, 295:8, eff. Aug. 26, 2008.

Section 149-I:11

149-I:11 Liens and Collection of Sewer Charges. – In the collection of sewer charges or stormwater utility fees under RSA 149-I:7 and 149-I:8, municipalities shall have the same liens and use the same collection procedures as authorized by RSA 38:22. Interest on overdue charges shall be assessed in accordance with RSA 76:13.

Source. 1870, 5:3. 1872, 25:1. 1875, 36:3. GL 78:3, 8. PS 79:5. PL 95:6. 1933, 98:3. RL 119:9. 1945, 188, part 22:10. 1949, 80:1. RSA 252:12. 1981, 87:2. 1985, 110:2. 1991, 269:12, eff. July 1, 1991. 2008, 295:9, eff. Aug. 26, 2008.

Section 149-I:12

149-I:12 Collection of Assessments or Rentals. – [Repealed 1985, 110:5, I, eff. July 9, 1985.]

Section 149-I:13

149-I:13 Municipalities With Over 80,000 Population. – [Repealed 1985, 110:5, II, eff. July 9, 1985.]

Section 149-I:14

149-I:14 Correction of Assessments. –

I. If any error is made in any assessment under RSA 149-I:7 or RSA 149-I:8, it may be corrected by the mayor and aldermen by making an abatement and a new assessment, or either, as the case may require. The same lien, rights, liabilities and remedies shall attach to the new assessment as to the original.

II. If any error is made in any assessment under RSA 149-I:6-c or RSA 149-I:7, it may be corrected by the governing body by making an abatement or a new assessment, or both. The same lien, rights, liabilities, and remedies shall attach to the new assessment as to the original.

Source. PS 79:6. PL 95:9. RL 111:12. 1945, 188, part 22:13. RSA 252:15. 1981, 87:2. 1985, 110:3, eff. July 9, 1985. 2008, 295:10, eff. Aug. 26, 2008.

Section 149-I:15

149-I:15 Petition to Court. – If the mayor and aldermen neglect or refuse to correct an assessment under RSA 149-I:14, any person aggrieved may apply by petition to the superior court for relief at any time within 90 days after notice of the assessment, and not afterwards. The court shall make such order thereon as justice may require.

Source. PS 79:7. PL 95:10. RL 111:13. 1945, 188, part 22:14. RSA 252:16. 1981, 87:2. 1985, 110:4, eff. July 9, 1985.

Section 149-I:16

149-I:16 Assessment Installments. – The mayor and aldermen of any city may, in their discretion, in making any assessment under this chapter, assess the same to be paid in annual installments extending over a period not exceeding 20 years, and in such case their assessment so made shall create a lien upon the land on account of which it is made and the lien of each installment so assessed shall continue for one year from October 1 of the year such installment becomes due.

Source. 1909, 24:1. PL 95:11. 1933, 98:4. RL 111:14. 1945, 188, part 22:15. 1949, 80:2. RSA 252:17. 1981, 87:2, eff. April 20, 1981.

Section 149-I:17

149-I:17 Assessment Not Required. – Nothing herein contained shall be construed to prevent any city from providing, by ordinance or otherwise, that the whole or a part of the expense of constructing, maintaining and repairing main drains, common sewers, stormwater treatment, conveyance, and discharge system, or sewage and waste treatment facilities shall be paid by such city.

Source. 1870, 5:5. GL 78:10. PS 79:8. PL 95:12. RL 111:15. 1945, 188, part 22:16. RSA 252:18. 1961, 120:8. 1981, 87:2, eff. April 20, 1981. 2008, 295:11, eff. Aug. 26, 2008.

Section 149-I:18

149-I:18 Abatement of Assessments. – For good cause shown, the mayor and aldermen may abate any such assessment made by them or by their predecessors.

Source. PS 79:6. PL 95:8. RL 111:11. 1945, 188, part 22:12. RSA 252:14. 1981, 87:2, eff. April 20, 1981.

Sewer Commissions

Section 149-I:19

149-I:19 Establishment; Duties. – Any town or village district which adopts the provisions of this chapter may, at the time of such adoption or afterwards, vote to establish a board of sewer Commissioners, consisting of 3 members, which board shall perform all the duties and possess all the powers in the town or district otherwise hereby conferred upon the selectmen.

Source. 1923, 16:1. PL 95:13. PL 111:16. 1945, 188, part 22:17. RSA 252:19. 1981, 87:2, eff. April 20, 1981.

Section 149-I:20

149-I:20 Election. – At the annual town or district meeting when such board is established, there shall be chosen, by ballot and by major vote, 3 sewer Commissioners, to hold office for 3 years, 2 years, and one year, respectively, and thereafter, at every annual meeting, one Commissioner shall be so chosen to hold office for 3 years; provided, that such election shall be by plurality vote in towns or districts which, under existing laws, elect officers in that manner.

Source. 1923, 16:1. PL 95:14. RL 111:17. 1945, 188, part 22:18. RSA 252:20. 1981, 87:2, eff. April 20, 1981.

Section 149-I:20-a

149-I:20-a Appointment. – The Commissioners may be appointed by the mayor and board of aldermen or city council, by the selectmen of the town, by the town council, or by the Commissioners of the district if the municipality fails to elect or votes to provide for appointment.

Source. 1996, 197:2, eff. Aug. 2, 1996.

Section 149-I:21

149-I:21 Compensation. – The compensation of such sewer Commissioners shall be fixed in towns by the selectmen, and in village districts by the Commissioners of the district.

Source. 1923, 16:1. PL 95:16. RL 111:19. 1945, 188, part 22:20. RSA 252:22. 1981, 87:2, eff. April 20, 1981.

Miscellaneous Provisions

Section 149-I:22

149-I:22 Entering Without Permit. – Any person who digs or breaks up the ground in any street, highway, lane or alley in any city, for the purpose of laying, altering, repairing or entering any main drain, stormwater treatment, conveyance, and discharge system, or common sewer therein, without permission from the mayor and aldermen, shall be guilty of a violation.

Source. 1870, 5:7. GL 78:12. PS 79:9. PL 95:17. RL 111:20. 1945, 188, part 22:21. RSA 252:23. 1973, 531:84. 1981, 87:2, eff. April 20, 1981. 2008, 295:13, eff. Aug. 26, 2008.

Section 149-I:23

149-I:23 Malicious Injury; Penalty. – Any person who shall wantonly or maliciously injure any part of any sewer system, stormwater treatment, conveyance, and discharge system, or sewage disposal plant shall be liable to pay treble damages to the owner thereof, and shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person.

Source. 1945, 188, part 22:22. RSA 252:24. 1973, 529:44. 1981, 87:2, eff. April 20, 1981. 2008, 295:14, eff. Aug. 26, 2008.

Section 149-I:24

149-I:24 Application of Chapter. – The provisions of this chapter shall be in force in such town and village districts as may adopt the same by vote of the legislative body; and the governing body shall perform all the duties and possess all the powers in the town or the district, as the case may be, conferred by this chapter upon the mayor and aldermen, and the rights of all parties interested shall be settled in the same way.

Source. 1870, 5:8. 1873, 29:1. GL 78:14. 1883, 77:1. PS 79:10. 1923, 16:1. PL 95:18. RL 111:21. 1945, 198, part 22:23. RSA 252:25. 1981, 87:2, eff. April 20, 1981. 2008, 295:12, eff. Aug. 26, 2008.

Section 149-I:25

149-I:25 Reports. – In towns and village districts adopting this chapter, the selectmen or district Commissioners, or board of sewer Commissioners if any, or stormwater utility Commission shall annually, at the time other town or district officers report, make a report to the municipality of the condition of the plant financially and otherwise, showing the funds of the department, the expenses and income thereof, and all other material facts. This report shall be published in the annual report of the municipality.

Source. 1994, 95:6, eff. July 8, 1994. 2008, 295:15, eff. Aug. 26, 2008.