

**STATE  
ENVIRONMENTAL LAWS AFFECTING  
NEW HAMPSHIRE AGRICULTURE**

*(See NASDA's website for  
Federal Environmental Laws Affecting U.S. Agriculture)*

**A Project of the**

**National Association of State Departments  
of Agriculture Research Foundation**

**through the**

**National Center for Agricultural Law  
Research and Information**



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# STATE ENVIRONMENTAL LAWS AFFECTING NEW HAMPSHIRE AGRICULTURE

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## **The Project Participants**

### **National Association of State Departments of Agriculture Research Foundation**

The National Association of State Departments of Agriculture (NASDA) is a nonprofit, nonpartisan association of public officials comprised of the Commissioners, Secretaries, and Directors of the fifty State Departments of Agriculture in the fifty states and the territories of Puerto Rico, Guam, American Samoa, and the Virgin Islands. NASDA's mission is to represent the State Departments of Agriculture in the development, implementation, and communication of sound public policy and programs which support and promote the American agricultural industry while protecting consumers and the environment. The NASDA Research Foundation is a 501(c)(3) nonprofit, tax-exempt corporation for educational and scientific purposes.

### **National Center for Agricultural Law Research and Information**

The National Center for Agricultural Law Research and Information (NCALRI) was created in 1987 under Public Law 100-202, 101 Stat. 1329-30 to address the complex legal issues that affect American agriculture. The NCALRI focuses its efforts on research, writing, publishing, development of library services, and the dissemination of information to the public. The NCALRI is located at the University of Arkansas School of Law in Fayetteville, Arkansas.

### **Natural Resources Conservation Service**

The Natural Resources Conservation Service (NRCS), formerly known as the Soil Conservation Service (SCS), is a federal agency within the United States Department of Agriculture (USDA). NRCS conservationists work with private landowners and operators to help them protect their natural resources.

### **United States Environmental Protection Agency**

The United States Environmental Protection Agency (U.S. EPA) is a federal agency with primary responsibility for implementation of most federal laws designed to protect, enhance, and conserve the nation's natural resources.

## **Disclaimer**

This guide is designed for use by farmers, ranchers, landowners, and their consultants in understanding the effect environmental laws have on agricultural operations. It is not a substitute for individual legal advice. Agricultural producers should always confer with their own attorneys, consultants, or advisors as well as federal, state, and local authorities responsible for the applicable environmental laws.

This guide has been prepared in part with funding from the Natural Resources Conservation Service (NRCS) cooperative agreement number NRCS 68-75-5-174 and the United States Environmental Protection Agency (U.S. EPA) grant number CX-825088-01-0 and otherwise supported by the United States Department of Agriculture (USDA), under Agreement No. 59-8201-9-115. Any opinions, findings, conclusions, or recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the view of the USDA, NRCS, or U.S. EPA.

Although every effort has been made to ensure the accuracy of the information contained in this book, environmental statutes, regulations, and ordinances are constantly changing. In addition, the overwhelming complexity and extent of environmental law make it impossible for a single book to describe in complete detail and depth all of the environmental laws and regulations impacting agricultural operations. The following material is simply a basic primer on environmental law for agricultural producers. For these reasons, the utilization of these materials by any person constitutes an agreement to hold harmless the authors, the National Center for Agricultural Law Research and Information (NCALRI), the University of Arkansas, USDA, the NASDA Research Foundation, the NRCS, and the U.S. EPA for any liability, claims, damages, or expenses that may be incurred by any person or organization as a result of reference to, or reliance on, the information contained in this book.

The background research and final documents were completed in June 2002. Updates of the information contained in the guide will occur on an as needed basis and be available on the internet.

Anyone with comments concerning the guide should contact the NASDA Research Foundation at 1156 15th Street, N.W., Suite 1020, Washington, D.C. 20005, or phone (202) 296-9680.

## Quick Reference Guide

**Producer Note:** The following chart is intended as a quick reference guide to permits which may be necessary for a particular operation. If a permit is necessary, refer to the page numbers listed referencing this document for further information and contact the agencies listed in the final column information on applications and procedures for securing a permit for an operation. A list of agencies and contact information is also provided in Appendix A.

Regulatory Area	Type of Activity	Permit Required	Agency
Water Quality <i>pp. 1 to 26</i>	Livestock and aquaculture operations, depending on size Waste or sewage discharges	National Pollutant Discharge Elimination System (NPDES) permit and state discharge permit	U.S. Environmental Protection Agency (U.S. EPA) and Water Resources (WR) Division within New Hampshire Department of Environmental Services (DES)
	Wetlands dredge and fill activity or dam or bridge building activities	Section 404 Clean Water Act (CWA) permit, state wetland permit	U.S. Army Corps of Engineers with U.S. EPA and WR within DES
	Surface water or borderland activities with potential to discharge into surface waters that create unnatural runoff	State permit and detailed plan required, normal agricultural operations are exempt but state detailed plan required	WR within DES
	Water well construction and use	Water well contractors, drillers, and pump installers and must be licensed. Noncommercial farming and private use wells are exempt from regulation except for well records and safety compliance	WR within DES

<b>Regulatory Area</b>	<b>Type of Activity</b>	<b>Permit Required</b>	<b>Agency</b>
Groundwater <i>pp. 26 to 37</i>	Groundwater protection	Groundwater management zone permit and groundwater release detection permit required, best management practices (BMPs) must be followed	WR within DES and DOS
Air Quality <i>pp. 37 to 46</i>	Construct or modification of facilities with potential to release air emissions	Title V permit for existing major sources, temporary permit for new construction or installation of non-Title V sources, and permit to operate (PTO) for non-Title V operation; enhanced environmental performance agreements agreement for pilot programs if approved	Air Resources (AR) Division within DES
	General agricultural operations including odor, dust, or flies	No permit required, but may be subject to nuisance suits	U.S. EPA or AR within DES
	Burning	Burning permit usually required	AR within DES
Solid Waste and Hazardous Waste <i>pp. 46 to 66</i>	Construction, operation, or initiation of closure of solid waste facility; storage, treatment, and disposal of solid waste	Permit required	Waste Management (WM) Division within DES
	Underground storage tank (UST) requirements: technical, financial responsibility, and release - preventing, detecting, and clean-up	Excludes: tanks 110 gallons or less, non-commercial motor fuel tanks 1100 gallons or less, residential heating oil tanks, and septic tanks	U.S. EPA (no state program, only federal program)
	Storage, treatment, and disposal of hazardous waste	Interim permit prior to construction plus permit required for disposal, treatment, transfer, and storage	WM within DES

<b>Regulatory Area</b>	<b>Type of Activity</b>	<b>Permit Required</b>	<b>Agency</b>
Pesticides and Chemigation <i>pp. 66 to 78</i>	Application and use of pesticides	No permit required, but a license may be required	U.S. EPA and New Hampshire Division of Pesticide Control (DPC) within Department of Agriculture, Markets, and Food (DAMF)
	Use of pesticides around farmworkers	No permit required, but training and notification is required	DPC within DAMF
	Record keeping	No permit required, but all requirements must be met	DPC within DAMF
Wildlife Protection <i>pp. 79 to 84</i>	Taking of wildlife	Permit required if endangered or threatened species may be affected	U.S. Fish and Wildlife Service and New Hampshire Department of Fish and Game (DFG) within DES

# STATE ENVIRONMENTAL LAWS AFFECTING NEW HAMPSHIRE AGRICULTURE

**Producer Note:** The information on environmental regulation provided in this guidebook is presented for the purpose of educating agricultural producers on the breadth and scope of environmental laws which may impact their daily production activities. Environmental regulation is a complex area with both federal and state and often local government involvement. Rapid changes in industrialization, computer-based technology, and market dynamics also affect agricultural producers in a number of ways and present many challenges. Staying informed is the producer's most useful tool for meeting these challenges.

## I. WATER QUALITY

**Producer Note:** In order for agricultural producers to maintain compliance with water quality legislation, they must be aware of not only federal water quality standards and discharge liability issues but also state water quality standards, state point source discharge permit requirements, state and local nonpoint source pollution programs, state environmental liability issues, and whether there are any waters requiring special protection in the producer's area. The states take active roles in ensuring that agricultural producers comply with environmental requirements.

### A. New Hampshire Water Quality Laws

#### 1. *New Hampshire Water Quality*

Most states including New Hampshire have enacted clean water legislation. While these state statutes usually contain provisions similar to those found in parallel federal legislation, there may be significant differences. In fact, state statutes may impose requirements that are even more restrictive than federal law. In all cases regarding water quality, the federal Clean Water Act (CWA)<sup>1</sup> requirements must be followed and enforced along with any state enacted statutes and state agency rules and regulations.

#### 2. *New Hampshire's Discharge Elimination Permit Program*

Under the CWA, discharges from point sources into waters of the United States are regulated through a permit system known as the National Pollutant Discharge Elimination System (NPDES). The CWA prohibits discharge of any pollutant from point sources into navigable waters without a permit or in violation of the terms or conditions of any valid permit.

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<sup>1</sup> 33 U.S.C. §§ 1251 to 1387 (1994).

The CWA provides that the United States Environmental Protection Agency (U.S. EPA) has authority either to issue the NPDES permits to approved applicants or to delegate the NPDES permit program to an individual state after the U.S. EPA approves that state's version of the NPDES program. The U.S. EPA has not delegated the NPDES permit program to New Hampshire. Thus, the U.S. EPA is the sole permitting authority that administers the NPDES program in New Hampshire. The U.S. EPA regulates pollutant discharges into navigable waters within the boundaries of New Hampshire. The DES requires applicants seeking discharge permits to send duplicate U.S. EPA applications to the DES.

The CWA requires each state to assess its waters and classify them by category according to their beneficial use, for example, drinking water supply, fishing, industrial, recreational, or agricultural. The water quality of the water must match or exceed the water quality standard established for that beneficial use category. Waters with a water quality that is below the water quality standard of its beneficial use must eventually achieve the proper water quality standard for that beneficial use category.

### ***3. New Hampshire Water Management & Protection Policy***

An adequate supply of water is indispensable to the health, welfare, and safety of the people of New Hampshire. Because water resources are subject to an ever increasing demand for new and competing uses, it is the overall policy of New Hampshire to declare that the water of New Hampshire above and below ground is a limited, precious, and invaluable public resource which should be protected, conserved, and managed in the public's interest but at the same time should reflect assurance of health and safety, ecological and aesthetic values and enhancement, and the overall economic, recreational, and social well-being of the people.<sup>2</sup>

### ***4. New Hampshire Water Needs***

The New Hampshire legislature established statewide water needs for the following uses:

- For conservation and distribution of water;
- For regulation of the flow of rivers and streams;
- For development and promotion of hydroenergy resources; and
- For the construction of projects for the conservation, development, storage, distribution, and utilization of water such as dams, reservoirs and hydroenergy facilities to:
  - Regulate river and stream flow;

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<sup>2</sup> N.H. REV. STAT. ANN. § 481:1 (2001).

- Lessen flood damages; and
- Promote the state's industrial and economic welfare with water power.<sup>3</sup>

**5. *New Hampshire Department of Environmental Services***

The Department of Environmental Services (DES) has authority to engage in the water management projects<sup>4</sup> including the authority to issue bonds for paying the cost of its project.<sup>5</sup> Other sanctioned DES activities include the authority:

- To investigate and identify the facilities for storing, conserving, controlling, and distributing surplus water;
- To investigate and identify facilities for the production and utilization of hydro-energy;
- To acquire, hold, and dispose personal property for DES purposes;
- To acquire by purchase, condemnation, lease, or otherwise any real property including all property rights and easements necessary or desirable for its purposes as well as and to sell, lease, and dispose any real property including all property rights and easements not needed for its purposes;<sup>6</sup>
- To construct, reconstruct, maintain, and operate projects;
- To charge and collect fees, rents, and tolls for water and water use, supply, storage, and hydrogeneration facilities and for other related services according to agreements with water users, operators, developers, and bondholders;

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<sup>3</sup> N.H. REV. STAT. ANN. § 481:1-a (2001). The Department of Environmental Services (DES) carries out these provisions.

<sup>4</sup> The water management projects are those described in section 3 immediately above.

<sup>5</sup> N.H. REV. STAT. ANN. § 481:15 (2001).

<sup>6</sup> All property and rights acquired by the DES are tax exempt. However, to lessen the negative revenue impact of this provision, the DES makes payment to towns and cities where property rights were acquired by the DES. The payment amount paid is the average of the assessed valuation for the five (5) years prior to the property's acquisition. When new valuations are assessed, the determination becomes the amount that would have been assessed without the betterments, changes in land, and added structures. For the dam in Pittsburg and Clarksville, each towns' apportioned share of forty thousand dollars (\$40,000.00) according to the dam and appurtenances located in that town; *see* N.H. REV. STAT. ANN. § 481:14 (2001).

- To borrow money, make and issue negotiable notes, bonds, and other obligations including securing the payment by pledge of its revenue;
- To seek and hold all necessary permits and licenses to meet all Federal Energy Regulatory Commission requirements when developing hydroenergy facilities in conjunction with the Division of Economic Development within the Department of Resources and Economic Development (DRED);
- To provide technical assistance requested by the DRED for hydroenergy projects; and
- To conduct or do all things necessary or incidental related to the foregoing.<sup>7</sup>

**B. New Hampshire Water Pollution Policy**

The overall water pollution policy of New Hampshire is to protect water supplies, prevent pollution in the surface and groundwaters of the state, and prevent nuisances and potential health hazards. The DES is charged with the responsibility of enforcing this policy and is authorized to exercise any and all powers necessary to do so.<sup>8</sup> To ensure implementation of its policy, the legislature identified four (4) primary objectives for water pollution control:

- Secure the installation of primary treatment for all discharges of sewage and industrial wastes;
- Require the installation of secondary treatment whenever additional treatment is necessary to protect the respective stream segment’s beneficial use classification;
- Install other forms of treatment to maintain the quality of all surface waters of the state;
- Advance the development and application of innovative or alternative waste treatment systems with guidelines, procedures, pilot projects, demonstration projects, community projects, or in any other manner the DES may elect.<sup>9</sup>

**C. New Hampshire Water Classifications**

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<sup>7</sup> Except the DES may not collect the surplus amounts in any bondholder agreement amounts needed for maintenance, upkeep, repair, and operation plus amounts to discharge any obligations due; *see* N.H. REV. STAT. ANN. § 481:3 (VII) (2001).

<sup>8</sup> N.H. REV. STAT. ANN. § 485-A:1 (2001).

<sup>9</sup> The state allows sludge or biosolids to be land applied provided the substance does not exceed the maximum concentrations for specific chemical contaminants contained in DES rules or the rules of the state in which the sludge was generated, whichever are more stringent; *see* N.H. REV. STAT. ANN. § 485-A:3, 5-d (2001).

New Hampshire classifies its surface water into two classes or grades:

- Class A waters are the highest quality and considered acceptable for drinking water supply; class A waters must not receive any discharge of sewage or wastes; and
- Class B waters are considered acceptable for fishing, swimming, other recreational purposes, and drinking water supply after adequate treatment; class B waters may receive treated discharges of sewage or waste but may not have any objectionable physical characteristics.<sup>10</sup>

Public notice regarding a classification for any stream, lake, pond, or tidal water is required for three successive weeks in a newspaper of general circulation beginning four weeks before the public hearing date for the matter. After all pertinent evidence and data are presented at the hearing, the DES determines the water classification basing it on best interests of the public considering the health, industrial, economic, geographical, and social factors.<sup>11</sup> After the initial classification by DES and approval by the legislature, subsequent reclassifications may be commenced by a DES motion or a petition with one hundred (100) or more signatures of legal inhabitants in the county where the water is located. The DES then reinvestigates the water conditions and may make a recommendation to the legislature for reclassification depending on the outcome of its inquiry.<sup>12</sup>

Any discharge into a water that lowers the water quality standard of the water is unlawful. If noncompliance continues and DES determines that thirty (30) days have passed after their notice to the violator to abate the discharge, the DES may enforce water classifications utilizing appropriate action in the state courts.

#### **D. New Hampshire Water Discharge Permits**

Discharges of waste or sewage into surface water or groundwater without a written DES permit is prohibited. An application for a discharge permit must be submitted on a DES form. An issued permit mandates effluent limitations, and the limitations may be based upon economic and technological factors, classification of the affected waters, projected best use of the surface water downstream, state and federal laws and regulations, and other reasonable conditions the DES may determine are necessary or desirable. An issued permit is effective for a maximum of

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<sup>10</sup> Classification of waters is the responsibility of the DES. Specific criteria for *Escherichia coli*, oxygen saturation, pH, and other solids are set out at 485-A:8(I to III) (2001). Criteria for tidal waters for swimming and harvesting shellfish for human consumption are set forth at 485-A:8(V) (2001) and criteria for thermal wastes are set forth at N.H. REV. STAT. ANN. § 485-A:8(VIII) (2001).

<sup>11</sup> N.H. REV. STAT. ANN. § 485-A:9 (2001).

<sup>12</sup> N.H. REV. STAT. ANN. § 485-A:10 (2001).

five (5) years. Although DES decisions are subject to appeal, the DES may revise, modify, or suspend a permit upon its finding that just cause exists for such action.<sup>13</sup>

Although the DES has authority to allow discharges of sewage or waste into surface water or groundwater for a reasonable time in an emergency or following a casualty to pollution control facilities,<sup>14</sup> the following types of discharges are strictly prohibited:

- Discharges containing any radiological, chemical, or biological warfare agent or high level radioactive waste;
- Discharges that would substantially impair anchorage and navigation in navigable waters;
- Discharges to which U.S. EPA provides written objections; and
- Discharges in conflict with an approved discharge plan.<sup>15</sup>

Petroleum-powered vehicles that become submerged in surface waters are prohibited, whether fallen through the ice or skidded off the road. Removal costs incurred by the state to remove a submerged vehicle when the person responsible refuses to do so are recoverable.

Other prohibited discharges in surface waters or on ice above surface waters include the placement of bottles, glass, crockery, cans, scrap metal, junk, paper, garbage, tires, old automobiles or parts, and trees or similar litter. Failure to remove any such item following a DES order to do so subjects the violator to misdemeanor or felony charges plus the cost of its removal by the DES or other authorized agency.<sup>16</sup>

Although normal agricultural operations are exempt, agricultural producers should note the following activities require submittal of a detailed plan and any other DES requested information thirty (30) days in advance of the proposed undertaking:

- Proposals to dredge, excavate, place, fill, mine, undertake construction, or transport forest products in or on the border of the surface waters of the state; and

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<sup>13</sup> N.H. REV. STAT. ANN. § 485-A:13(a) (2001).

<sup>14</sup> N.H. REV. STAT. ANN. § 485-A:16 (2001).

<sup>15</sup> N.H. REV. STAT. ANN. § 485-A:13(b) (2001).

<sup>16</sup> N.H. REV. STAT. ANN. § 485-A:15 (2001).

- Proposals to significantly alter the characteristics of the terrain such as to impede the natural runoff or create an unnatural runoff.<sup>17</sup>

The DES has authority to enter upon any land or premises to obtain information for the purpose of investigation and inspection relating to water pollution control matters. The DES may enter into or upon premises at reasonable times to access any records and monitoring equipment and to sample effluents. Upon a reasonable DES written request, a person must provide the information to the DES regarding any activities related to water pollution control.<sup>18</sup>

Violations of water pollution control laws including any false statements, records, plans, or other documents are punishable by imprisonment up to six (6) months, fines up to twenty-five thousand dollars (\$25,000.00), or both for each day of violation.<sup>19</sup> Additionally, violators may also be subject to an administrative fine up to ten thousand dollars (\$10,000.00) for each day of violation. The administrative fine may also be imposed for violations of related DES orders or regulations<sup>20</sup> plus violations of cease and desist orders may be enjoined by DES application to the attorney general by the superior court.

## **E. New Hampshire Prohibited Use of Stored Water**

The flow of stored water<sup>21</sup> may be used only in or as the exercise of riparian rights or littoral proprietor. Willful and unlawful use or interference of stored water is charged as a misdemeanor to individuals and as a felony to other persons for each day of violation. Superior courts sitting in equity have jurisdiction over these matters, and the attorney general prosecutes for enforcement.<sup>22</sup>

## **F. New Hampshire Wetlands**

### ***1. New Hampshire Wetland Policy***

The New Hampshire wetland policy is set forth by the legislature. The statutes establish that the protection and preservation of New Hampshire wetlands and submerged lands from

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<sup>17</sup> N.H. REV. STAT. ANN. § 485-A:17(I) (2001). Timber harvesting operations are exempt from DES fees; *see* 485-A:17(III) (2001).

<sup>18</sup> N.H. REV. STAT. ANN. § 485-A:18 (2001).

<sup>19</sup> N.H. REV. STAT. ANN. § 485-A:22 (2001).

<sup>20</sup> N.H. REV. STAT. ANN. § 485-a:22 (2001).

<sup>21</sup> Water from storage is defined as stored water.

<sup>22</sup> N.H. REV. STAT. ANN. § 481:12 (2001).

despoilation and unregulated alteration that benefits the public good and welfare because to do otherwise might result in:

- An adverse effect on areas that provide nutrients for finfish, crustacea, shellfish, and wildlife of significant value;
- Damage or destruction of habitats and reproduction areas for plants, fish, and wildlife of importance;
- Elimination, depreciation, or obstruction of commerce, recreation, and public aesthetic enjoyment of the public;
- Injury to adequate groundwater levels;
- Adverse affects on stream channels and their ability to handle the runoff of waters; and
- Disturbances and reduction of the natural ability of wetlands to absorb flood waters and silt, thus increasing general flood damage and the silting of open water channels.<sup>23</sup>

## **2. *New Hampshire Wetland Permits***

New Hampshire prohibits excavating, removing, filling, dredging, or constructing any structures in or on any bank, flat, marsh, or swamp of waters of the state without a permit from DES.<sup>24</sup> The DES permit application requires four (4) copies of a detailed plan and map showing the exact location of the proposed project, notice by certified mail to all project abutters, and a filing fee submitted to the affected town or city clerk. The clerk then signs and forwards the application to the DES, the local governing body, the municipal planning board, if any, and the municipal conservation commission. Fees vary according to the total area of dredge, fill, or construction proposed and the number of boat slips requested.<sup>25</sup> Major projects located in public-owned water bodies or great ponds must be approved by the governor and the wetlands council.

The following may be cleaned out when necessary to preserve their usefulness without a permit from the DES:

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<sup>23</sup> N.H. REV. STAT. ANN. § 482-A:1 (2001)

<sup>24</sup> The replacement or repair of existing structures which does not involve excavating, removing, filling, or dredging is exempt from these wetland provisions; *see* N.H. REV. STAT. ANN. § 482-A:3 (2001)

<sup>25</sup> Projects by agencies of the state are filed directly with the DES; *see* N.H. REV. STAT. ANN. § 482-A:3(I), (II) (2001).

- Nontidal drainage ditches, culverts, catch basins, and man-made detention ponds that have been legally constructed to collect and convey storm water and spring run-off and that have been maintained so that wetlands vegetation has not become dominant; and
- Fire ponds and intake areas of dry hydrants that have been legally constructed to provide water for municipal firefighting purposes. Cleaning may be by hand or machine provided that:
  - The facility is neither enlarged nor extended into DES wetlands;
  - Dredged spoils are deposited in areas other than DES wetlands; and
  - Wetlands or surface waters outside the limits of the constructed drainage facility, fire pond, or intake area of a dry hydrant, are neither disturbed nor degraded.<sup>26</sup>

Cutting wood in wetland areas is considered a minimum impact activity, and generally, that activity is permitted when proper notice of intent to cut wood is provided to the DES and DRED along with payment of the filing fee.<sup>27</sup> Small motor mineral dredging, limited to five (5) horsepower, is classified as minimum impact and requires a DES permit.<sup>28</sup>

Activities on sand dunes are limited. It is unlawful to destroy, raze, deface, reduce, alter, build upon or remove any sand or vegetation from any New Hampshire sand dune unless that activity is covered by a specific DES permit.<sup>29</sup> Riding off highway recreational vehicles on sand dunes is prohibited although certain vehicles used by commercial fishermen related to fishing or lobstering are allowed.<sup>30</sup>

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<sup>26</sup> N.H. REV. STAT. ANN. § 482-A:3(IV) (2001).

<sup>27</sup> DES permits that grant activities in wetland areas must be filed in the county's land records in the county where the wetland area is located; *see* N.H. REV. STAT. ANN. § 482-A:3(VI, V) (2001).

<sup>28</sup> N.H. REV. STAT. ANN. § 482-A:3(XI) (2001).

<sup>29</sup> Removal of drifted sand on areas such as lawns, driveways, buildings, and boat ramps is allowed without a permit; *see* N.H. REV. STAT. ANN. § 482-A:3(VII) (2001).

<sup>30</sup> N.H. REV. STAT. ANN. § 482-A:3(VIII), (IX) (2001).

Any person<sup>31</sup> aggrieved by a DES decision or DES order regarding wetland areas, both applicants or any person required to be notified by mail, may apply to DES for reconsideration<sup>32</sup> within twenty (20) days of the issuance of the decision or order. Subsequent appeals may be directed to the wetlands council<sup>33</sup> and to the superior court.<sup>34</sup>

Permits in wetland areas must be prominently posted at the project site.<sup>35</sup> Failure to do so is a violation. Violators must remove any fill, spoil, or structure placed or erected that caused the violation and restore any wetlands disturbed.<sup>36</sup> Violators are subject to administrative fines up to two thousand dollars (\$2,000.00) for each offense along with other penalties.<sup>37</sup> Misdemeanor charges attach for reckless violations including knowing noncompliance of any wetland provision or DES order or condition of a DES permit and misrepresentation of a material fact.<sup>38</sup> Civil penalties up to ten thousand dollars (\$10,000.00) for each violation and each day of violation may also attach. Violators of cease and desist orders issued by the Division of Forests and Lands (DFL) or the DRED against timber operations may be enjoined by the superior court. Applications for cease and desist orders must be directed through the attorney general's office.<sup>39</sup>

The New Hampshire legislature enables municipalities to designate sensitive or prime wetlands within its boundaries. Agricultural producers should note that these wetlands are more highly regulated because of their fragile condition, unspoiled character, size, or other relevant factor and take precautions by ascertaining whether any prime wetlands are near their agricultural activities.<sup>40</sup>

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<sup>31</sup> The term "person" means any individual, partnership, association, corporation, company, organization, or legal entity of any kind; *see* N.H. REV. STAT. ANN. § 482:2(VIII) (2001).

<sup>32</sup> Any new or additional evidence may be presented. Decisions to grant or deny applications for reconsideration must be issued within thirty (30) days after submission of the application; *see* N.H. REV. STAT. ANN. § 482-A:10 (2001).

<sup>33</sup> Appeals following DES reconsiderations must be filed within thirty (30) days of the DES decision; *see* 482-A1-(IV). Appeals for reconsideration by the wetland council may be filed within twenty (20) days of the council's decision; *see* N.H. REV. STAT. ANN. § 482-A:1-(VII) (2001).

<sup>34</sup> Any person aggrieved by the decision of the wetland council following reconsideration may appeal by petition within thirty (30) days of that decision to the superior court in the county where the land in question is located; *see* N.H. REV. STAT. ANN. § 482-A:10(VIII) (2001).

<sup>35</sup> N.H. REV. STAT. ANN. § 482-A12 (2001).

<sup>36</sup> N.H. REV. STAT. ANN. § 482-A:14b (2001).

<sup>37</sup> N.H. REV. STAT. ANN. § 482-A:13 (2001).

<sup>38</sup> N.H. REV. STAT. ANN. § 482-A:14(I) (2001).

<sup>39</sup> N.H. REV. STAT. ANN. § 482-A14a (2001).

<sup>40</sup> N.H. REV. STAT. ANN. § 482-A:15 (2001).

It is unlawful to excavate, remove, or dredge any bank, flat, marsh, swamp, or lake bed that lies below the natural mean high water level of any public waters.<sup>41</sup> Violators are charged with a misdemeanor and may be compelled by the superior court to return the area to its original condition.<sup>42</sup>

Dwellings or structures suitable as dwellings may not extend beyond the shoreline of any public water or water body.<sup>43</sup>

## **G. New Hampshire Rivers Management**

New Hampshire considers that its rivers and streams are one of its most important natural resources and that they are historically vital to the quality of life as well as to its commerce, industry, and tourism.<sup>44</sup> In implementing its river management policy, the state:

- Encourages the development of river corridor management plans and
- Regulates the quantity and quality of instream flows to conserve and protect outstanding characteristics including recreational, fisheries, wildlife, environmental, cultural, historical, archaeological, scientific, ecological, aesthetic, community significance, agricultural, and public water supply.

The DES administers New Hampshire's river management and protection program. The management and protection program is intended to complement and reinforce existing state and federal water quality laws.<sup>45</sup> The river coordinator heads the office of planning within the DES and is responsible for administering the rivers management and protection program.<sup>46</sup>

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<sup>41</sup> The term "public waters" means natural ponds of more than ten (10) acres. Minor or minimum impact projects are excluded from this restriction; *see* N.H. REV. STAT. ANN. § 482-A:21 (2001).

<sup>42</sup> N.H. REV. STAT. ANN. § 482-A:23 (2001).

<sup>43</sup> N.H. REV. STAT. ANN. § 482-A:26 (2001).

<sup>44</sup> N.H. REV. STAT. ANN. § 483:1 (2001).

<sup>45</sup> N.H. REV. STAT. ANN. § 483:2 (2001).

<sup>46</sup> N.H. REV. STAT. ANN. § 483:3 (2001).

The river coordinator in conjunction with the advisory committee<sup>47</sup> publicly hears and makes determinations upon requests for protection of various segments of rivers. After this review, a nomination is forwarded to the general court for review and legislative approval. Rivers included in the protection program may be classified as natural rivers, rural rivers, rural-community rivers, and community rivers. The factors considered are whether the river segment contains or represents an example of:

- Scenic or recreational resource;
- Open space or natural resource;
- Fisheries, wildlife, vegetation, or rare species or habitat;
- Cultural, historical, or archaeological resource;
- Hydrological or geological resource;
- Outstanding water quality;
- Scientific resource;
- Community resource; and
- Withdrawals or discharges by public utilities and commercial or industrial users.<sup>48</sup>

For each designated river segment, a corresponding local river management committee must be established. Members are appointed by the DES commissioner and represent each municipality the rivers flows through. These committees advise the DES and the advisory committee, and the other river municipalities on matters pertaining to the management of the river or segment. Municipal officers, boards, and agencies must inform the local river management advisory committees of any actions which they are considering to manage and regulate within the designated rivers.<sup>49</sup> State statutes set forth the protection measures that apply to the various types

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<sup>47</sup> A rivers management advisory committee exists to assist in the river management and protection program. Membership includes representatives of public water supplier, municipal officer, fish and game commission, Business and Industry Association, Granite State Hydropower Association, conservation commission, conservation community recreational interests, historic/archaeological interests, and agricultural community. Non-voting members include the director or commissioner of the State Planning Office, the Fish and Game Department, DRED, and Department of Agriculture (DOA); *see* N.H. REV. STAT. ANN. § 483:8 (2001).

<sup>48</sup> N.H. REV. STAT. ANN. § 483:6(IV) (2001).

<sup>49</sup> N.H. REV. STAT. ANN. § 483:8-a (2001).

of designated rivers.<sup>50</sup> Dam development and channel alteration activities, other than those authorized by DES for hydroelectric power facilities, are considered violations of the CWA<sup>51</sup> and are not allowed on managed rivers.<sup>52</sup>

The river corridor management plan includes detailed guidelines and model shoreline protection ordinances. The river coordinator holds public hearings on these matters and works with the regional planning commissions, municipalities, and river corridor commissions to encourage the development and implementation of river corridor management plans. River management plans address:

- Authorized recreational uses and activities;
- Authorized non-recreational uses and activities;
- Existing land uses;
- Protection of flood plains, wetlands, wildlife and fish habitat, and other significant open space and natural areas;
- Dams, bridges, and other water structures;
- Access by foot and vehicle;
- Setbacks and other location requirements;
- Dredging, filling, mining, and earth moving; and
- Prohibited uses.

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<sup>50</sup> N.H. REV. STAT. ANN. § 483:9-a, -aa, -b, and 483:10-a (2001).

<sup>51</sup> 33 U.S.C. § 1341.

<sup>52</sup> Dam or channel alteration activities, activities addressed in section 401 of the federal CWA, are not licensed or permitted; *see* N.H. REV. STAT. ANN. § 483:10-b (2001).

## H. New Hampshire Lake Management and Protection

New Hampshire lakes are also one of the state's most important natural resources, and they are considered vital to its wildlife, fisheries, recreation, tourism, and the quality of life of its citizens. The state policy is to ensure the continued vitality of its lakes because it is recognized they represent key environmental, social, and economic assets of the state. Outstanding lake characteristics are conserved and protected such as recreational, aesthetic, and meaningful community characteristics so that they may be enjoyed by the citizens of New Hampshire.<sup>53</sup> The lake management and protection program is intended to complement and reinforce state and federal water quality laws plus maintain the scenic beauty and recreational potential, protect wildlife habitat, and ensure public enjoyment.<sup>54</sup>

The lakes coordinator within the DES administers the lakes management and protection program.<sup>55</sup> In consultation with the advisory committee<sup>56</sup> and the DES, the lakes coordinator sets forth the state's lake management criteria to ensure:

- Water quality is not degraded below established standards;
- Potential pollution sources are managed to minimize adverse impact on water quality;
- No significant or cumulative adverse impact is allowed;
- Wildlife environment is maintained or improved;
- Lakes are protected as water supply sources and flood protection;
- Public access is provided and maintained according to the suitable uses of the lakes; and

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<sup>53</sup> N.H. REV. STAT. ANN. § 483-A:1 (2001).

<sup>54</sup> N.H. REV. STAT. ANN. § 483-A:3 (2001).

<sup>55</sup> N.H. REV. STAT. ANN. § 483-A:4 (2001).

<sup>56</sup> A Lakes Management Advisory Committee exists to provide consultation to the Lakes Coordinator to develop detailed guidelines for lake management and shoreline protection plans along with plan implementation and to adopt rules for awarding financial grants for support of the lakes management policy; *see* N.H. REV. STAT. ANN. § 483-A:7(I), (II) (2001). Lake management plans address the same issues listed above describing the river management plans; *see* N.H. REV. STAT. ANN. § 483-A:7(V) (2001).

- Recreational uses are consistent with the capacity and character of each lake and provide opportunities for the safe enjoyment of lake experiences.<sup>57</sup>

## **I. New Hampshire Shoreland Protection Act**

The Shoreland Protection Act (SPA)<sup>58</sup> was enacted to recognize:

- That shorelands are valuable and fragile natural resources and their protection is essential to maintain the integrity of public waters;
- That protection of public waters and adjacent shorelands involves the greatest public benefit;
- That shorelands and their effect on state waters is of great state concern; and
- That without the SPA, uncoordinated, unplanned, and piecemeal development could occur along the state's shorelines that could cause significant negative impacts on public waters.<sup>59</sup>

The SPA sets forth minimum use, development, and subdivision standards for New Hampshire shorelands. The standards:

- Establish continued safe and healthful conditions;
- Provide wise utilization of resources;
- Prevent and control water pollution;
- Protect fish spawning grounds, aquatic life, wildlife habitats, archaeological and historical resources, commercial fishing, maritime industries, wetlands, and public use of waters;
- Protect against flooding and erosion;
- Control building sites and structures and land use;
- Conserve shoreline cover, points of access, natural beauty, and open spaces;

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<sup>57</sup> N.H. REV. STAT. ANN. § 483-A:5 (2001).

<sup>58</sup> N.H. REV. STAT. ANN. § 483-B:1 to 20 (2001).

<sup>59</sup> N.H. REV. STAT. ANN. § 483-B:1 (2001).

- Preserve the natural state of lakes, rivers, estuaries, and coastal waters;
- Promote wildlife habitat, scenic beauty, and scientific study;
- Anticipate development impacts; and
- Provide harmonizing economic development proximate to shoreline waters.<sup>60</sup>

The DES utilizes permits to ensure compliance with the SPA. Permits are necessary for any shoreland development activity including earth excavations, construction of structures, bank alteration, beach modifications, septic system installations, subdivisions of land for development, and activities disturbing an area greater than fifty thousand (50,000) square feet.<sup>61</sup> The DES permitting process may be administered by local municipal officials.<sup>62</sup> Municipalities may also adopt local land use control ordinances to protect shorelands which are more stringent than the state's guidelines. Municipalities may also issue cease and desist orders and seek injunctive relief or civil penalties for violation of these shoreland ordinances.<sup>63</sup>

Agricultural activities and operations are exempted from the restrictions of the SPA as long as the agricultural activities and operations conform with the most recent best management practices (BMPs).<sup>64</sup>

The SPA standards<sup>65</sup> for protected shoreland areas include:

- Prohibition of salt storage yards, automobile junk yards, solid or hazardous waste facilities;
- Setbacks for structures;
- Required DES approval for docks, wharfs, piers, breakwaters, or similar structures;

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<sup>60</sup> N.H. REV. STAT. ANN. § 483-B:2 (2001).

<sup>61</sup> N.H. REV. STAT. ANN. § 483-B:6 (2001).

<sup>62</sup> N.H. REV. STAT. ANN. § 483-B:7 (2001).

<sup>63</sup> N.H. REV. STAT. ANN. § 483-B:8 (2001).

<sup>64</sup> As determined by the U.S. Department of Agriculture Natural Resources Conservation Service, the Cooperative Extension Service, and the New Hampshire Department of Agriculture, Markets, and Food; *see* N.H. REV. STAT. ANN. § 483-B:3(III) (2001).

<sup>65</sup> Private water supply facilities are allowed without a permit and public water supply and sewage treatment facilities, hydroelectric facilities, public utility lines are allowed only by permit; and solid waste facilities within two hundred fifty (250) feet of public waters are not allowed; *see* N.H. REV. STAT. ANN. § 483-B:9 (2001).

- Restricted fertilizer use;
- Buffers of natural woodlands;
- Setback requirements for septic systems;
- Controls for erosion and siltation;
- Minimum lot and residential development; and
- Common owner development.<sup>66</sup>

Local municipalities may request the DES to exempt shoreland within the municipality's boundaries for special urbanization conditions.

The DES is responsible for adopting rules for application and permitting procedures<sup>67</sup> and enforcing the SPA with advice and assistance from the state planning office, DRED, and DOA. Provided cause exists, DES representatives may enter at any reasonable time upon any land to perform oversight and enforcement duties. The DES, to encourage enforcement coordination, notifies affected municipalities of any of its relevant administrative orders issued.<sup>68</sup> Violations including failure to comply, failure to obey, and misrepresentation of a material fact are punishable by administrative fines up to five thousand dollars (\$5,000.00) for each offense, civil penalty fines up to twenty thousand dollars (\$20,000.00) per day of each violation plus criminal charges and imprisonment.<sup>69</sup>

## **J. New Hampshire Oil Discharges**

### ***1. New Hampshire Oil Discharges or Spillage in Surface Water or Groundwater***

In New Hampshire, any person, regardless of fault, who directly or indirectly causes or suffers the discharge of oil into or onto any surface water or groundwater or in a land area where oil will ultimately seep into such water in violation of oil spillage laws is strictly liable for costs resulting from the violation for:

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<sup>66</sup> N.H. REV. STAT. ANN. § 483-B:9 (2001).

<sup>67</sup> N.H. REV. STAT. ANN. § 483-B:17 (2001).

<sup>68</sup> N.H. REV. STAT. ANN. § 483-B:5 (2001).

<sup>69</sup> N.H. REV. STAT. ANN. § 483-B:19 (2001).

- Containment of the discharged oil;
- Removal of the oil;
- Cleanup and restoration of the site and surrounding environment; and
- Corrective measures.<sup>70</sup>

When an oil discharge or spillage occurs, the DES must be notified immediately. Upon notification, the DES assumes primary jurisdiction of the cleanup operation.<sup>71</sup> Failure to immediately notify the DES is a criminal act itself subject to misdemeanor charges if the person is a natural person or felony charges if the person is any other person.<sup>72</sup>

Landowners or operators of land where underground storage facilities or other petroleum storage facilities are not in compliance with oil spillage provisions are strictly liable for the costs of removal. The DES may impose a lien upon the real property for all cost incurred by the department in removing these facilities including any interest that accrues from costs not being paid as required. The lien arises when costs are incurred and continues until the liability for the costs is satisfied. The lien is effective and valid upon the DES's recordation of a notice of lien in the registry of deeds in the county where the real property is located. The DES provides a copy of the notice of lien to the legal owner by certified mail, return receipt requested.<sup>73</sup>

The installation or replacement of underground storage facilities or other petroleum storage facilities which may contain gasoline or diesel is prohibited on real property subject to a lien imposed for payment of costs.<sup>74</sup> Without more, ownership of the real property where an oil discharge or spill occurs does not necessarily imply liability.<sup>75</sup> A holder who has not assumed ownership of a facility or vessel but takes title by foreclosure or other similar means and does not assume responsibility for the operation of the facility or vessel is not liable for oil discharges and spillage. However, a holder who has assumed ownership of a facility or vessel and takes title by foreclosure or other similar means or assumes responsibility for the operation of the facility or vessel is liable for oil discharges and spillage unless the holder limits the holder's liability to actual damages caused by the holder and the holder's employees, the value of the secured property, or the amount of the outstanding indebtedness secured by the facility or vessel by:

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<sup>70</sup> N.H. REV. STAT. ANN. § 146-A:3(I) (1996 & Supp. 2001).

<sup>71</sup> N.H. REV. STAT. ANN. § 146-A:4 (1996 & Supp. 2001).

<sup>72</sup> N.H. REV. STAT. ANN. § 146-A:5 (1996 & Supp. 2001).

<sup>73</sup> N.H. REV. STAT. ANN. § 146-A:3-a:(I-a) (1996 & Supp. 2001)

<sup>74</sup> N.H. REV. STAT. ANN. § 146-A:3-a(I-b) (1996 & Supp. 2001).

<sup>75</sup> N.H. REV. STAT. ANN. § 146-A:3-a(IV) (1996 & Supp. 2001).

- Reporting to the DES known or suspected discharges or spillage of oil;
- Undertaking emergency response measures to stop or prevent further discharge of oil and addressing any imminent health hazard created;
- Securing the facility or vessel as necessary to prevent exposure to oil by fencing or limiting access;
- Conducting all lawfully required actions or corrective measures; and
- Providing DES access to the facility or vessel for inspection, testing, response, and remedial activity.<sup>76</sup>

Unless it is determined that their acts or omissions amount to gross negligence or willful misconduct, persons acting to cleanup an oil incident are not liable for removal costs, penalties, fines, or damages provided their acts are consistent with the national contingency plan or directed by the federal on-scene coordinator or the other person acted upon the request of the DES or its designee pursuant to the DES response procedures.<sup>77</sup>

Persons who negligently or intentionally discharge or spill oil into or on waters of any lake, pond, river, stream, or into tidal waters or groundwater and cause damage to property of another are liable in tort for one and a half (1 ½) times the damages sustained to that party. Persons strictly liable for an oil incident or who willfully fail to comply with a DES order<sup>78</sup> to take remedial or corrective measures is liable to the state for double the state's cost of corrective measures.<sup>79</sup> Persons who willfully discharge or spill oil into surface water or groundwater or where the oil will ultimately seep into such waters or persons who willfully violate oil discharge provisions are criminally charged with a misdemeanor if a natural person and a felony for any other person and are subject to a civil penalty up to ten thousand dollars (\$10,000.00) for each day of each violation. Failure to comply with any oil discharge provisions subjects the violator to a civil penalty up to four thousand dollars (\$4,000.00) for each day of each violation although fines do not accrue until the DES provides notification to the violator. The attorney general has

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<sup>76</sup> N.H. REV. STAT. ANN. § 146-A:3-c(I, II) (1996 & Supp. 2001). Limited liability does not extend to non-employee agents of the holder, independent contractors hired by the holder, and holders whose negligent acts or omissions or intentional misconduct causes the oil incident; *see* N.H. REV. STAT. ANN. § 146-A:3-c(IV) (1996 & Supp. 2001).

<sup>77</sup> N.H. REV. STAT. ANN. § 146-A:7 (1996 & Supp. 2001).

<sup>78</sup> The DES is authorized to issue administrative orders directing persons to cease any activity that violates oil discharge provisions or to take necessary actions to comply with the provisions; *see* N.H. REV. STAT. ANN. § 146-A:16 (1996 & Supp. 2001).

<sup>79</sup> N.H. REV. STAT. ANN. § 146-A:10 (1996 & Supp. 2001).

authority to bring an action for injunctive relief including a mandatory injunction against violators.<sup>80</sup>

In cases of an oil disaster or catastrophe, the governor or his designee may proclaim that an emergency exists and exercise the authority to make necessary orders, rules, and regulations to bring the situation under control.<sup>81</sup>

## 2. *New Hampshire Cleanup Funds for Petroleum Products*

An oil pollution control fund exists as a revolving fund to pay the salaries and expenses of DES personnel stationed at inspection and enforcement ports within the state as well as other necessary and additional personnel for containment or corrective measures. Monies may also be used to mitigate adverse effects, provide emergency water supplies, establish potable water sources to injured third parties, conduct research<sup>82</sup> for development and improvement of preventative and cleanup measures, plus train and equip personnel.<sup>83</sup> The DES, with approval of the governor and council, may spend additional funds for cleanup purposes. Once the oil pollution control fund reaches a five million dollar (\$5,000,000.00) amount, collection of license fees must stop. Reestablishment of license fees may occur when the fund's balance drops twenty percent (20%) below the five million dollar (\$5,000,000.00) balance.<sup>84</sup>

Persons who import oil or cause it to be imported must be licensed. Exceptions exist for those using pipelines, railroads, and highways and are licensed by the Department of Safety (DOS). The annual license fee is \$.001 per gallon of imported oil. The fee is paid monthly to the DOS and deposited into the oil pollution control fund.<sup>85</sup> Monthly reports are due with the license fee payments. Penalties accrue for untimely payments.<sup>86</sup> Violations involving import license fees subject the violator to criminal charges, misdemeanor charges for a natural person and felony charges for any other person.<sup>87</sup>

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<sup>80</sup> N.H. REV. STAT. ANN. § 146-A:14 (1996 & Supp. 2001).

<sup>81</sup> N.H. REV. STAT. ANN. § 146-A:12 (1996 & Supp. 2001).

<sup>82</sup> Up to ten percent (10%); *see* N.H. REV. STAT. ANN. § 146-A:11-a(I) (1996 & Supp. 2001).

<sup>83</sup> Up to ten percent (10%); *see* N.H. REV. STAT. ANN. § 146-A:11-a(I) (1996 & Supp. 2001).

<sup>84</sup> N.H. REV. STAT. ANN. § 146-A:11-a(II) (1996 & Supp. 2001).

<sup>85</sup> N.H. REV. STAT. ANN. § 146-A:11-b(II) (1996 & Supp. 2001). Any hazardous material transporter license fee paid is credited against any oil import license fee due; *see* N.H. REV. STAT. ANN. § 146-A:11-b(III) (1996 & Supp. 2001).

<sup>86</sup> N.H. REV. STAT. ANN. § 146-A:11-b(IV) (1996 & Supp. 2001).

<sup>87</sup> N.H. REV. STAT. ANN. § 146-A:11-b(V) (1996 & Supp. 2001).

A separate fund called the oil discharge and disposal cleanup fund exists in addition to the oil pollution control fund to provide a funding source for cleanup of discharges of gasoline and diesel fuels in surface water, groundwater, and soils and for reimbursement to damaged third parties.<sup>88</sup> The fund is capitalized by an assessment on retail sales of \$.015 per gallon of oil and \$.014 per gallon of diesel fuel and \$.0115 per gallon of gasoline for wholesale oil distributors.<sup>89</sup> When the fund reaches ten million dollars (\$10,000,000.00), the collection of the fee is discontinued. Upon reaching a balance of less than five million dollars (\$5,000,000.00), the collection of the assessment is resumed.<sup>90</sup>

Other funds exist to protect New Hampshire's water quality:

- The fuel oil discharge cleanup fund exists to provide cleanup funding for fuel oils discharges from bulk storage facilities when the fuel oil is for on-premise heating purposes and not for motor vehicles;<sup>91</sup> to be eligible for these funds, the owner must have properly registered the bulk storage facility with the DES;<sup>92</sup> and
- The motor oil discharge cleanup fund makes cleanup funds available to owners of oil storage facilities (OSF) and owners of land upon which OSFs are located; owners of OSFs are liable for initial cleanup costs but may be eligible for reimbursement of court-ordered damages to third parties for bodily injury or property damage and cleanup costs up to five hundred thousand dollars (\$500,000.00) as excess insurance coverage;<sup>93</sup> and
- The gasoline remediation and elimination of ethers fund provides cleanup funds for the mitigating and cleaning up ethers from gasoline that escape into the surface waters and groundwaters of New Hampshire; the fund may also be used to provide financial reimbursement to owners of water supplies for the treatment and removal of gasoline ethers or emergency water supplies.<sup>94</sup>

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<sup>88</sup> N.H. REV. STAT. ANN. § 146-D:1 (1996 & Supp. 2001).

<sup>89</sup> N.H. REV. STAT. ANN. § 146-D:3 (1996 & Supp. 2001).

<sup>90</sup> N.H. REV. STAT. ANN. § 146-D:3 (1996 & Supp. 2001).

<sup>91</sup> N.H. REV. STAT. ANN. § 146-E.1, 2 (1996 & Supp. 2001).

<sup>92</sup> N.H. REV. STAT. ANN. § 146-E:5 (1996 & Supp. 2001).

<sup>93</sup> N.H. REV. STAT. ANN. § 146-F:5 (1996 & Supp. 2001).

<sup>94</sup> N.H. REV. STAT. ANN. § 146-G:1, 6 (1996 & Supp. 2001). The fund is capitalized by license fees of \$.010 per gallon of neat gasoline ether assessment collected monthly by the DOS; *see* N.H. REV. STAT. ANN. § 146-G:7 (1996 & Supp. 2001).

## **K. New Hampshire Underground Storage Facilities (USFs)**

### ***1. New Hampshire USF Registration***

All underground storage facilities (USF) must be registered with the DES by the owner.<sup>95</sup> The owner must also demonstrate financial responsibility and document the results of previous tank testings including the most current tightness test, previous owners and lessees, detailed description of the facility, estimated USF life expectancy, past discharges, remedial actions, monitoring results, and closure plans as well as a site plan. Changes to any of the information submitted to DES regarding the USF including new ownership must be provided within ten (10) days of the change.<sup>96</sup> The requirements for USFs remain in place until the USF is properly and lawfully closed.<sup>97</sup> After presenting the proper credentials, the DES is authorized at all reasonable time to have access to USF, conduct monitoring or testing, and to inspect and copy USF records.<sup>98</sup>

### ***2. New Hampshire USF Permits***

It is unlawful to own or operate an underground storage facility in New Hampshire without a DES permit. The DES may revoke a permit for just cause including a violation of DES rules. However, the permit may not be revoked until the owner or operator has had an opportunity to be heard by the Water Supply and Pollution Control Council provided the request is made within twenty (20) days of the issuance of the DES decision to revoke the permit.<sup>99</sup> Although the permit is effective up to five (5) years, annual permit fees are assessed and must be paid to the DES.<sup>100</sup> Operators of USFs must keep accurate inventory records at least for three (3) years in order to detect potential leaks.

## **L. New Hampshire Subsurface Sewage Systems**

Businesses that install subsurface sewage or waste disposal systems require an installer's permit from the DES. An annual licensing fee is charged. Installations of these systems must be in accordance with the approved plan. The DES maintains the authority to suspend, revoke, or

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<sup>95</sup> A holder of an USF who takes title by foreclosure or by other similar means but has not assumed ownership or control is not liable for damages arising from the USF; *see* N.H. REV. STAT. ANN. § 146-C:11-a (1996 & Supp. 2001).

<sup>96</sup> N.H. REV. STAT. ANN. § 146-C:6 (1996 & Supp. 2001). Construction or installation of a new USF or substantial modification of an existing USF requires submittal of plans and specifications approved by a New Hampshire licensed engineer to the DES for approval; a fee of one hundred dollars (\$100.00) is required for the DES review; *see* N.H. REV. STAT. ANN. § 146-C:7 (1996 & Supp. 2001).

<sup>97</sup> N.H. REV. STAT. ANN. § 146-C:3 (1996 & Supp. 2001).

<sup>98</sup> N.H. REV. STAT. ANN. § 146-C:5 (1996 & Supp. 2001).

<sup>99</sup> N.H. REV. STAT. ANN. § 146-C:4 (1996 & Supp. 2001).

<sup>100</sup> N.H. REV. STAT. ANN. § 146-C:4 (1996 & Supp. 2001).

refuse to renew an installer's permit for just cause after notice and an opportunity to be heard. Exceptions to the requirement for an installer's permit exist for any person who desires to install or repair a waste disposal system for his own domicile provided the person complies with DES rules relating to such systems.<sup>101</sup> A subsurface system is required to be operated and maintained in a manner as to avoid or prevent a nuisance or potential health hazard. Failure to do so is a violation subject to fines up to one thousand dollars (\$1,000.00) per day of violation. The DES is authorized to enter any and all premises at reasonable hours for the purpose of inspecting and evaluating the operation and maintenance conditions of sewage or waste disposal facilities.<sup>102</sup> DES compliance orders may issue for violations. Privies, toilets, sinks, drains, cesspools, septic tanks, or the discharges from such facilities and swine pens or stys that are determined to be a nuisance or injurious to the public health are prohibited.<sup>103</sup>

Any person aggrieved or dissatisfied with a DES decision may appeal such decision by filing a motion for reconsideration stating the grounds with the DES within twenty (20) days after the DES issued the decision and the DES may reconsider and revise its decision if the DES determines there is good reason stated in the motion to do so. Failure to make a request for reconsideration or to state all grounds with the DES precludes further appeal unless the court determines that good cause exists for the appeal on additional grounds. Further appeal of a denial for reconsideration by the DES may be pursued by petition to the superior court. The burden of proof lies with the party seeking to set aside the DES decision. Decisions are not set aside by the court unless the evidence before it persuasively shows the balance of probability exists that it is more likely than not that the DES decision was unjust or unreasonable. Upon filing the appeal with the court, the clerk of the court issues an order of notice requiring a certified copy of the record appealed from to be filed with the court.<sup>104</sup>

The DES has authority to adopt rules after public hearings on matters of water pollution control laws and to adopt rules that grant waivers of all rules if a just result is effected except no waivers are allowed for site loading or set-back distances to ground or surface waters for sewage or waste disposal systems.<sup>105</sup>

In enforcing water pollution control laws, the DES is authorized to issue orders for violation of related law, rule, or condition stated in a permit. The DES is also authorized to require any remedial measures necessary to correct the violation. DES orders are recorded in the registry of deeds for the county in which the property is situated, and the order runs with the land.

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<sup>101</sup> N.H. REV. STAT. ANN. § 485-A:36 (2001).

<sup>102</sup> N.H. REV. STAT. ANN. § 485-A:37 (2001).

<sup>103</sup> N.H. REV. STAT. ANN. § 147:10 (1996 & Supp. 2001).

<sup>104</sup> N.H. REV. STAT. ANN. § 485-A:40 (2001).

<sup>105</sup> N.H. REV. STAT. ANN. § 485-A:41 (2001).

Orders must provide the accurate name of the land and the appropriate land description. The cost of discharge of an order is the same as for the discharge of a real estate lien.<sup>106</sup>

Penalties in the form of criminal charges are imposed for violations of water pollution control laws or related DES orders including knowing false statements of material fact or false data in connection with an application for DES approval. Natural persons are charged with a misdemeanor, and all other persons are charged with a felony. Besides criminal charges civil penalties in the form of fines up to five thousand dollars (\$5,000.00) may be imposed for violations involving misstatements. A further independent DES administrative fine up to two thousand dollars (\$2,000.00) may be imposed for each offense after notice and a hearing.<sup>107</sup> The superior court and its justices have authority to enjoin any act in violation of water pollution control laws.<sup>108</sup>

#### **M. New Hampshire Water Pollution Control Compact**

The DES is authorized to enter into a compact with one or more of the following states of Maine, Vermont, Rhode Island, Connecticut, New York, and Massachusetts in order to further the control and abatement of water pollution of interstate streams, ponds, lakes, and tidal waters resulting from the growth of population and development.<sup>109</sup>

#### **N. New Hampshire Marine Pollution**

Boats<sup>110</sup> are prohibited from placing, leaving, or discharging, directly or indirectly, any sewage into waters of the state and may not cause any sewage or container of sewage to be placed, left, or discharged in or near any water of the state.<sup>111</sup> Additionally, no graywater from sink or showers on boats may be discharged into waters of the state either directly or indirectly.<sup>112</sup> The launching of a boat into the fresh waters of the state that is not compliant with the water pollution control provisions is unlawful.<sup>113</sup>

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<sup>106</sup> N.H. REV. STAT. ANN. § 485-A:42 (2001).

<sup>107</sup> N.H. REV. STAT. ANN. § 485-A:43 (2001).

<sup>108</sup> N.H. REV. STAT. ANN. § 485-A:44 (2001).

<sup>109</sup> N.H. REV. STAT. ANN. § 484:17 (2001).

<sup>110</sup> The term “boat” means any vessel or water craft whether moved by oars, paddles, sails, or other power mechanism or any other vessel or structure floating upon the water whether or not capable of self locomotion; *see* N.H. REV. STAT. ANN. § 487:1 (2001).

<sup>111</sup> N.H. REV. STAT. ANN. § 487:2 (2001).

<sup>112</sup> N.H. REV. STAT. ANN. § 487:3 (2001).

<sup>113</sup> N.H. REV. STAT. ANN. § 487:6 (2001).

To enforce marine violations, the DES has authority to adopt rules for the operation and inspection of oil terminal facilities, vessels, and railcars and for methods for preventing and reporting oil incidents.<sup>114</sup> The DES may inspect all boats located upon the waters of the state at any time for the purpose of determining whether the boat is equipped in compliance with water pollution control provisions.<sup>115</sup> Upon the discovery of a violation, the DES requires the surrender of the boat's certificate and plate of registration. If after forty-eight (48) hours from the surrender of documents, the violation is not remedied, the DES endorses the document and forwards it to the Division of Motor Vehicles (DMV) where it is held until the violation is remedied.<sup>116</sup> If the surrenderer of the registration is not the owner, the DMV gives written notice of the suspension to the registered owner.<sup>117</sup>

The DES issues written cease and desist orders in response to marine violations. Upon application by the attorney general, the superior court may enjoin any activities involved in a violation. Persons committing marine violations are subject to penalties including civil fines up to ten thousand dollars (\$10,000.00) per day of violation, administrative fines up to two thousand dollars (\$2,000.00) per violation, and criminal charges. If the person is a natural person, the violation is a misdemeanor. Otherwise, the charge is a felony. Any fine that may be imposed constitutes a lien against the boat related to the violation whether or not the violator is the registered owner or operator of the boat unless the boat was used without permission of the owner.<sup>118</sup>

## **O. New Hampshire Clean Lakes Program**

The state recognizes that escalating shorefront development and recreational uses of public waters places strains upon lake resources and accelerates the eutrophication process which poses a threat to water quality. The need exists to restore, preserve, and maintain the state's lakes and ponds to protect these assets benefits the social and economic well-being of the state's citizens.<sup>119</sup> The New Hampshire Clean Lakes Program is the state's response to protect water quality in lakes and ponds. This legislation prohibits the importation, introduction, propagation, transportation, distribution, sale, and purchase of exotic aquatic weeds<sup>120</sup> and imposes penalties

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<sup>114</sup> N.H. REV. STAT. ANN. § 146-A:11-c (1996 & Supp. 2001).

<sup>115</sup> N.H. REV. STAT. ANN. § 487:8 (2001).

<sup>116</sup> N.H. REV. STAT. ANN. § 487:10 (2001).

<sup>117</sup> N.H. REV. STAT. ANN. § 487:11 (2001).

<sup>118</sup> N.H. REV. STAT. ANN. § 487:7 (2001).

<sup>119</sup> N.H. REV. STAT. ANN. § 487:15 (2001).

<sup>120</sup> The DES may exempt any exotic aquatic weed consistent with the purpose of the statute prohibiting such weeds; *see* N.H. REV. STAT. ANN. § 487:16-a (2001).

for violations that are committed purposefully, recklessly, or knowingly.<sup>121</sup> The three primary purposes of the Clean Lakes Program are:

- To diagnose degraded lakes and ponds and implement long term solutions;
- To diagnose lakes and ponds and implement methods for long term preservation of the water quality; and
- To provide short term remedial actions which effectively maintain water quality conditions adequate for public recreation and enjoyment.<sup>122</sup>

Toward these three goals, the DES is authorized to engage in education efforts related to exotic aquatic weed control, eradicate small new infestations, develop an emergency response protocol, and designate restricted use of exotic aquatic weed control areas in conjunction with the Department of Fish and Game (DFG), Division of Safety Services (DSS), and the DOS.<sup>123</sup>

## **II. GROUNDWATER**

### **A. New Hampshire Groundwater**

#### ***1. New Hampshire Groundwater Protection Act***

The legislative purpose of New Hampshire's Groundwater Protection Act (GPA)<sup>124</sup> is to protect the natural quality of the groundwater resource by assisting local protection efforts and by establishing procedures and standards for the classification and remediation of groundwater.<sup>125</sup> Because groundwater constitutes an integral part of the hydrologic cycle and the protection of groundwater quality is necessary to preserve the integrity of surface water, the legislature intended the GPA to provide consistent, protective management and remediation of groundwater affected by regulated contaminants.<sup>126</sup> The legislature recognized that the natural quality of the

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<sup>121</sup> N.H. REV. STAT. ANN. § 487:16-b (2001).

<sup>122</sup> N.H. REV. STAT. ANN. § 487:17(I) (2001).

<sup>123</sup> N.H. REV. STAT. ANN. § 487:17(II) (2001).

<sup>124</sup> N.H. REV. STAT. ANN. § 485-C:1 to 21 (2001).

<sup>125</sup> The term "groundwater" means subsurface water that occurs beneath the water table in soils and geologic formations; *see* N.H. REV. STAT. ANN. § 485-C:2(VIII) (2001).

<sup>126</sup> The term "regulated contaminant" means any physical, chemical, biological, radiological substance or other matter, other than naturally occurring substances at naturally occurring levels, in water which adversely affects human health or the environment; *see* N.H. REV. STAT. ANN. § 485-C:2(XIII) (2001).

groundwater resources must be preserved and protected in order that groundwater may be used for drinking water supply.<sup>127</sup>

As one of its duties, the DES maintains a statewide map identifying the classes of groundwater. The DES also has a duty to assist local and regional entities in the development and administration of wellhead protection programs including the delineation of wellhead protection areas plus inventory and manage activities which have a potential effect on groundwater quality. Other duties of the DES related to groundwater include:

- Cooperating with the Office of State Planning and providing technical assistance for local groundwater and wellhead protection programs under the water protection assistance program;
- Maintaining an inventory of wells that serve public water supply systems;
- Establishing a priority system for delineation of wellhead protection areas and reclassification of these areas to class GAA,<sup>128</sup>
- Providing for the investigation, management, and remediation of contaminated groundwater;<sup>129</sup>
- Adopting rules relative to:
  - Criteria and procedures for delineating classes of groundwater;
  - Criteria and procedure for reclassifying groundwater;
  - Ambient groundwater quality standards;
  - Criteria and procedures for conducting and maintaining inventories of potential contamination sources and managing potential contamination sources;
  - Criteria and procedures for the issuance of groundwater release detection permits;

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<sup>127</sup> N.H. REV. STAT. ANN. § 485-C:1(I) (2001).

<sup>128</sup> The term “class GAA” means groundwater that is the most protected class; *see* N.H. REV. STAT. ANN. § 485-C:5 (2001).

<sup>129</sup> N.H. REV. STAT. ANN. § 485-C:3 (2001).

- Fees for groundwater release detection permits;<sup>130</sup>
- Best management practices;<sup>131</sup>
- Criteria and procedures for the investigation, management, and remediation of contaminated groundwater;
- Criteria and procedures for the notification of owners of affected properties and for the recordation of permits governing groundwater management zones;
- Criteria and procedures for the imposition of groundwater use restrictions relative to groundwater management zones;
- Criteria and procedures for accepting adopted municipal land use controls in lieu of recordation requirements; and
- New groundwater withdrawals,<sup>132</sup> requirements relative to conservation management plans for withdrawals, and procedures that the DES may deny permission for withdrawals or order the withdrawal applicant to provide a response policy for an alternative water supply to persons whose well may be adversely affected by the withdrawal.<sup>133</sup>

The GPA sets forth that groundwater is primarily a local resource. The GPA allows cities and towns to have the first opportunity to institute a program for groundwater protection and establishes that the state has a general responsibility for groundwater management and should develop groundwater protection programs not developed by a local governmental unit.<sup>134</sup>

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<sup>130</sup> A five (5) year groundwater permit fee of \$1,000.00 is imposed to cover the processing and subsequent inspections and monitoring; *see* N.H. REV. STAT. ANN. § 485-A:13a (2001).

<sup>131</sup> Except those practices for agricultural operations and pesticide use which are developed, administered, and enforced by the New Hampshire Department of Agriculture, Markets, and Food; *see* N.H. REV. STAT. ANN. § 485-C:4(VII) (2001).

<sup>132</sup> Withdrawals of fifty-seven thousand six hundred (57,600) gallons or more in any twenty-four (24) hour period including requirements for identification and impacts of withdrawals within the anticipated zone of contribution to surface waters, subsurface waters, water-related natural resources, and public, private, residential, and farm wells; *see* N.H. REV. STAT. ANN. § 485-C:4 (2001). Withdrawals of fifty-seven thousand six hundred (57,600) gallons or more of water in any twenty-four (24) hour period from a well, established after August 1, 1998, require written notice to the governing body of any municipality in which the well is located and to each supplier of water within the anticipated zone of contribution to the well; *see* N.H. REV. STAT. ANN. § 485-C:14a (2001). Applications for water withdrawals larger than fifty-seven thousand six hundred (57,600) gallons in any twenty-four (24) hour period from a well sited after August 1, 1998 must be approved by the DES; *see* N.H. REV. STAT. ANN. § 485-C:21 (2001).

<sup>133</sup> N.H. REV. STAT. ANN. § 485-C:4 (2001).

<sup>134</sup> N.H. REV. STAT. ANN. § 485-C:1(II) (2001).

## 2. *New Hampshire Groundwater Classifications*

Groundwater is classified into one of four classes in order to further the protection and management practices:

- Class GAA groundwater is the most protected class; the groundwater within the wellhead protection area of wells that is identified as drinking water supply for public water systems should meet the criteria for the GAA class;
- Class GA1 is assigned to groundwater in a defined zone of high value for drinking water supply; GA1 groundwaters must have potential contamination sources inventoried and have a management program implemented;
- Class GA2 is assigned to groundwater within aquifers identified as highly productive for potential use as a public water supply,<sup>135</sup> and
- Class GB is assigned to all other groundwater not assigned to a higher class.<sup>136</sup>

Wellhead protection areas classified as GAA may not contain:

- Solid or Hazardous waste disposal facilities;
- Road salt or deicing chemical storage;
- Junk or salvage yards;
- Snow dumps; and
- Wastewater or septage lagoons.<sup>137</sup>

## 3. *New Hampshire Groundwater Standards*

The DES establishes ambient groundwater quality standards. These standards represent maximum concentration levels for regulated contaminants in groundwater which result from human operations or activities and adversely affect human health or the environment. Ambient groundwater quality standards are the water quality basis for issuing groundwater discharge

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<sup>135</sup> Zones of stratified drift with a saturated thickness greater than twenty (20) feet and a transmissivity greater than one thousand (1,000) feet squared per day must be designated GA2 as are zones of bedrock with average well yields greater than fifty (50) gallons per minute; *see* N.H. REV. STAT. ANN. § 485-C:5(I)(c) (2001).

<sup>136</sup> N.H. REV. STAT. ANN. § 485-C:5 (2001).

<sup>137</sup> N.H. REV. STAT. ANN. § 485-C:12 (2001).

permits. Violation of ambient water quality standards is prohibited except for discharges of domestic wastewater regulated otherwise.<sup>138</sup>

Potential contamination sources include:

- Vehicle service and repair shops;
- General service and repair shops;
- Metalworking shops;
- Manufacturing facilities;
- Storage facilities for oil and hazardous substances;
- Waste and scrap processing and storage;
- Transportation corridors;
- Septic systems;
- Laboratories and professional offices;
- Areas of agricultural chemical use;
- Salt storage areas and areas of winter salt use on roads and parking lots;
- Snow dumps;
- Stormwater catch basins and ponds;
- Cleaning services;
- Food processing plants;
- Fueling and maintenance of excavation and earthmoving equipment;
- Concrete, asphalt, and tar manufacture;
- Cemeteries; and

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<sup>138</sup> N.H. REV. STAT. ANN. § 485-C:6 (2001).

- Hazardous waste facilities regulated under Resource Conservation and Recovery Act (RCRA).<sup>139, 140</sup>

Inventory and management of potential contamination sources is required in areas designated as class GAA or GA1. The inventory is based on physical inspections of potential contamination sources and must include the landowner's name and address, tax map and lot number, operator's name and address if applicable, and estimates of the type and quantities of regulated substances used or generated in the activity. Inventories must be updated at intervals not exceeding three (3) years. Owners of property having potential contamination sources must receive DES notice that contaminating activities are subject to best management practices.<sup>141</sup>

#### **4. *New Hampshire Groundwater Management Zone Permits***

Groundwater management zones are designated and function as a component of the remediation of contaminated groundwater. Permits or other similar controls addressing these zones must establish a time period and process for groundwater remediation.<sup>142</sup> Notice of groundwater management zone permits must be recorded in the registry of deeds in the chain of title for each property unless the DES approves the use of municipal land use controls as an alternative form of notice.<sup>143</sup>

#### **5. *New Hampshire Groundwater Release Detection Permits***

Groundwater release detection permits are required for hazardous waste disposal facilities, lined solid waste landfills, lined wastewater lagoon, and facilities that process soils contaminated with petroleum products. The five (5) year permits are issued by DES and require compliance with all applicable state and local laws and regulations and include periodic monitoring and reporting of groundwater quality by the permittee and any other reasonable condition consistent with groundwater laws the DES determines is necessary.

#### **6. *New Hampshire Groundwater Enforcement***

The DES and local health officers have concurrent authority to issue cease and desist orders. Local health officers provide notice to DES upon their issuance of any order, and the DES is responsible for further actions and uniform enforcement. Persons issued orders by local health officers may request review of the order by DES. The failure of DES to review the order

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<sup>139</sup> 42 U.S.C. § 6901 *et seq.*

<sup>140</sup> N.H. REV. STAT. ANN. § 485-C:7 (2001).

<sup>141</sup> N.H. REV. STAT. ANN. § 485-C:8 (2001).

<sup>142</sup> N.H. REV. STAT. ANN. § 485-C:6-a. (2001)

<sup>143</sup> N.H. REV. STAT. ANN. § 485-C:6-b (2001).

within fifteen (15) days or a DES finding the order has insufficient basis results in the order no longer being effective. An effective order runs with the land and is recorded in the registry of deeds in the county in which the property is situated. A fee is not charged for recording, but a fee is charged for the discharge of an order at the same rate as a discharge of a lien on real property.<sup>144</sup>

An administrative fine may be imposed upon violators of groundwater provisions, including related rules and permits or orders, up to two thousand dollars (\$2,000.00) for each offense. An administrative fine does not preclude the imposition of other penalties. Rules for administrative fines and including notice and hearings prior to the imposition of the fines are adopted by the DES.<sup>145</sup>

Violators of groundwater provisions and related rules, permits, or orders are subject to a civil penalty up to ten thousand dollars (\$10,000.00) for each violation and each day of violation.<sup>146</sup>

Knowing violations of groundwater laws and related rules, permits, or orders results in harsher penalties. Knowing violation brings criminal misdemeanor charges if the violator is a natural person and felony charges for any other person plus a civil penalty of twenty-five thousand dollars (\$25,000.00) for each violation or day of violation may be imposed. The violations include:

- Knowing or reckless false statements of a material fact in any required document;
- False or inaccurate information provided in lieu of required information;
- Tampering with a monitoring device or method; and
- Knowing failure, neglect, or refusal to obey any lawful DES order.<sup>147</sup>

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<sup>144</sup> N.H. REV. STAT. ANN. § 485-C:16 (2001).

<sup>145</sup> N.H. REV. STAT. ANN. § 485-C:18 (2001).

<sup>146</sup> N.H. REV. STAT. ANN. § 485-C:19(II) (2001).

<sup>147</sup> N.H. REV. STAT. ANN. § 485-C19(I) (2001).

## **B. New Hampshire Safe Drinking Water Act**

The purpose of the New Hampshire Safe Drinking Water Act (SDWA)<sup>148</sup> is to provide a comprehensive drinking water protection program consistent with the federal Safe Drinking Water Act standards.<sup>149</sup> The New Hampshire SDWA sets out duties for the DES including;

- Monitoring the water quality of public water supplies;
- Providing technical assistance to water operators and the general public;
- Reviewing the design of public water system plans and alterations;
- Conducting surveys of public water systems to ensure proper safety and operation;
- Requiring state and federal statute and rule compliance by public water supplies;
- Educating citizens on the need and methods for providing safe and adequate drinking water; and
- Approving manufactured bottled water sources.<sup>150</sup>

The DES is responsible for adopting drinking water rules and standards to protect the public health.<sup>151</sup> The DES may also adopt rules for:

- Secondary drinking water rules;<sup>152</sup>
- Variances and Exemptions;
- Notice of water quality noncompliance;
- Contaminant monitoring for public water systems for U.S. EPA unregulated contaminants;

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<sup>148</sup> N.H. REV. STAT. ANN. § 485:1 to 60 (2001).

<sup>149</sup> 42 U.S.C. § 300f *et seq.* (1994).

<sup>150</sup> N.H. REV. STAT. ANN. § 485:1 (2001).

<sup>151</sup> N.H. REV. STAT. ANN. § 485:3 (2001).

<sup>152</sup> These rules apply to a contaminant in drinking water which may adversely affect the color, odor, taste, or appearance of the water but do not compromise the protection of the public welfare and the supply of aesthetically adequate drinking water; *see* N.H. REV. STAT. ANN. § 485:3(II) (2001).

- Filtration and disinfection treatment for public water systems;
- Best available technology and treatment techniques;
- Wellhead protection program;
- Underground Injection Control Program;
- Water quality standards and procedures for obtaining a bottled water source permit; and
- Significant groundwater withdrawals.<sup>153</sup>

Construction plans to build or modify any supply water for domestic uses must first be approved by permit by the DES prior to such activities.<sup>154</sup>

Water pollution caused by placing or leaving any substance or fluid in or near a lake, pond, reservoir, or stream tributary for the domestic water supply of a city, town, or village that results in impure or unfit drinking water is prohibited, and violators are criminally charged with a misdemeanor if a natural person or a felony if any other person.<sup>155</sup> Under these circumstances, restitution for the expense of removing such polluting substances may be charged to the person causing the pollution.<sup>156</sup> Willful or knowing pollution violations subject the violator to further criminal charges.<sup>157</sup> Reasonable local rules may be adopted for regulating public water supply lakes, ponds, and reservoirs regarding fishing, boating, and ice racing. Violation of local rules after receipt of notice of violation brings criminal misdemeanor charges.<sup>158</sup>

Use of a well, spring, or other water supply that is used for domestic purposes that becomes polluted by such use so as to endanger the public health and warrants being prohibited from use constitutes a criminal misdemeanor violation for each day of such prohibited use.<sup>159</sup>

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<sup>153</sup> N.H. REV. STAT. ANN. § 485:3 (2001).

<sup>154</sup> N.H. REV. STAT. ANN. § 485:8 (2001).

<sup>155</sup> N.H. REV. STAT. ANN. § 485:17 (2001).

<sup>156</sup> N.H. REV. STAT. ANN. § 485:18 (2001).

<sup>157</sup>This includes the placement of a carcass of any dead animal or other offensive material into said waters; *see* N.H. REV. STAT. ANN. § 485:19 (2001).

<sup>158</sup> N.H. REV. STAT. ANN. § 485:21 (2001).

<sup>159</sup> N.H. REV. STAT. ANN. § 485:35 (2001).

Landowners or occupiers of land must not allow any well<sup>160</sup> within five hundred (500) feet of a dwelling or two hundred (200) feet of a highway to remain open unless there is a substantial fence or protection at least three (3) feet high so that no child can crawl through or under it. Any well with a covering not strong enough to support one thousand (1,000) pounds and not heavy enough to be easily removed by children is considered an open well. Open and unfenced wells are declared nuisances and may be ordered abated by any court of competent jurisdiction on the complaint of any prosecuting officer.<sup>161</sup> Violation is a misdemeanor if an individual and a felony if any other person.<sup>162</sup>

## **C. New Hampshire Water Wells**

### ***1. New Hampshire Water Well Laws***

In New Hampshire, a water well board (WWB) exists to:

- Protect groundwater resources;
- Regulate the construction of water wells and the installation of water pumps;
- License water well contractors and pump installers;
- Provide public water well records; and
- Establish penalties for violations of water well provisions.<sup>163</sup>

The WWB consists of seven (7) members appointed by the governor and the commissioner or designee of the DES who administers the WWB. The other members include the state geologist plus two (2) water well contractors, an active water pump installer, and an active technical driller all with a minimum of ten (10) years experience and a member of the public with demonstrated concern regarding water resources management.<sup>164</sup> The WWB is authorized to adopt rules for qualifications for license holders and license application

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<sup>160</sup> The term “well” means an artificially made hole in the surface of the earth which is more than four (4) feet deep and more than eight (8) inches in diameter and less than sixteen (16) square feet in area at its top and its sides are steeper than a sixty (60) degree slope; *see* N.H. REV. STAT. ANN. § 485:37 (2001).

<sup>161</sup> N.H. REV. STAT. ANN. § 485:38 (2001).

<sup>162</sup> N.H. REV. STAT. ANN. § 485:39 (2001).

<sup>163</sup> N.H. REV. STAT. ANN. § 482-B:1 (2001).

<sup>164</sup> N.H. REV. STAT. ANN. § 482-B:3 (2001).

procedures.<sup>165</sup> The WWB has authority to revoke or suspend an issued license and to impose a reprimand and administrative fine.<sup>166</sup>

Water wells constructed for farming or private use are exempted from water well laws and regulations provided the well is:

- On the person's own or leased property and
- Intended for use only for noncommercial farming purposes or
- If the water is not intended for use by the public or by persons in any residence other than the person's own permanent residence.

The exemption, however, does not apply to the well records which must be submitted to the WWB.<sup>167</sup> Replacement and maintenance of pump installations by one's regular maintenance and repair employee is also exempted from water well licensing provisions provided the repair, replacement, and maintenance conforms to all other laws and safety regulations.<sup>168</sup> A water well requirement may be exempted under situations of undue hardship, but a hardship exemption must be requested.<sup>169</sup>

## ***2. New Hampshire Water Well Enforcement***

To enforce water well provisions, the DES has authority to issue administrative orders and administrative fines up to two thousand dollars (\$2,000.00) for each violation including any material false statements relating to water well documents. The imposition of any administrative fine does not preclude any further penalties. Any person aggrieved by a DES order or fine may appeal to the WWB within thirty (30) days of the DES decision.<sup>170</sup> Criminal penalties are imposed if the violation is committed while possessing knowledge that the activity is prohibited.<sup>171</sup>

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<sup>165</sup> N.H. REV. STAT. ANN. § 482-B:4 (2001).

<sup>166</sup> N.H. REV. STAT. ANN. § 482-B:8 (2001).

<sup>167</sup> N.H. REV. STAT. ANN. § 482-B:12 (2001).

<sup>168</sup> N.H. REV. STAT. ANN. § 482-B:17 (2001).

<sup>169</sup> N.H. REV. STAT. ANN. § 482-B:13 (2001).

<sup>170</sup> N.H. REV. STAT. ANN. § 482-B:16(I - III) (2001).

<sup>171</sup> N.H. REV. STAT. ANN. § 482-B:16(IV) (2001).

### 3. *New Hampshire Wellhead Protection*

The DES is authorized to institute a wellhead protection program consistent with the federal SDWA<sup>172</sup> that includes:

- Determination of responsibilities of state and local governmental units and public drinking water supply systems;
- Extent of the wellhead protection area;
- Potential anthropogenic sources of contaminants;
- Technical and financial assistance, implementation of control measures, education, training, and demonstration projects to protect the water supply from contamination within the wellhead protection areas;
- Contingency plans for alternate drinking water supplies following wellfield contamination; and
- Procedures establishing technical and citizens' advisory committees to encourage the public participation.<sup>173</sup>

## III. AIR QUALITY

**Producer Note:** While most agricultural operations are not air pollution sources under the federal Clean Air Act (CAA), complaints concerning odor and dust resulting from agricultural operations may arise. These complaints may lead to legal actions filed under state law as against an agricultural producer as a nuisance claims.

### A. **New Hampshire Air Quality Laws**

#### 1. *New Hampshire Air Policy*

The policy of New Hampshire regarding air is one that seeks to achieve and maintain a reasonable degree of purity of the air resources of the state in order to:

- Promote the public health, welfare, and safety;
- Prevent injury or detriment to human, plant, and animal life, of the people;

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<sup>172</sup> 42. U.S.C. § 300h-7 (1994).

<sup>173</sup> N.H. REV. STAT. ANN. § 485:48 (2001).

- Promote the economic and social development of the state; and
- Facilitate the enjoyment of the natural attractions of the state.<sup>174</sup>

In New Hampshire, the term “air contaminant” means soot, cinders, ashes, any dust, fume, gas, mist (other than water), odor, toxic or radioactive material, particulate matter, or any combination thereof.<sup>175</sup> The term “air pollution” means the presence in the outdoor atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as are or are likely to be injurious to public welfare, to the health of human, plant, or animal life, or to cause damage to property or create a disagreeable or unnatural odor or obscure visibility or which unreasonably interfere with the enjoyment of life and property.<sup>176</sup> The term “stationary source” means any building, structure, facility, or installation which emits or which may emit any regulated air pollutant.<sup>177</sup>

## 2. *New Hampshire Air Permits*

Generally, under the federal Clean Air Act (CAA),<sup>178</sup> the national air pollution control program requires only “major sources” of air emissions to obtain a permit called a Title V air operating permit. If the state does not elect to have an air pollution control program or the state program is not approved by the U.S. EPA, the U.S. EPA will operate the CAA program within the state. The state air permitting program of New Hampshire meets the federal air pollution control program guidelines set forth in the federal CAA. Because the New Hampshire air permitting program is approved, the state of New Hampshire is authorized by the U.S. EPA to issue Title V air operating permits within the state.

In addition to the federal Title V air operating permit, the state of New Hampshire issues two other types of state required air permits, a temporary permit, and a permit to operate (PTO). For any new or modified non-Title V source or device:

- A temporary permit is required prior to the commencement of its installation or construction; and
- A state PTO, also called a final permit, is required prior to its operation.

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<sup>174</sup> N.H. REV. STAT. ANN. § 125-C:1 (1996).

<sup>175</sup> N.H. REV. STAT. ANN. § 125-C:2(II) (1996 & Supp. 2001).

<sup>176</sup> N.H. REV. STAT. ANN. § 125-C:2(III) (1996 & Supp. 2001).

<sup>177</sup> N.H. REV. STAT. ANN. § 125-C:2(XI) (1996 & Supp. 2001).

<sup>178</sup> 42 U.S.C. § 7401 *et seq.* (1994).

A temporary permit and a PTO or final permit may both contain emission conditions. Each type of permit must contain or list all emission or pollutant limitations the source or device is required to meet. This comprehensive approach helps prevent confusion for the emitting source and piecemeal regulation for the DES. A PTO or final permit generally follows a temporary permit subsequent to the DES finding that operation testing, when required, meets the applicable emission limits and its operation does not result in a violation of any state imposed air quality standard or regulation. State review requirements must be no less stringent than review requirements prescribed in the CAA.<sup>179</sup>

The permit system simplifies and clarifies obligations of air pollution sources for cleaning up air pollution and, over time, can reduce paperwork. For instance, an air pollution source has its acid rain, hazardous air pollutant, and non-attainment (smog) parts of the CAA all on one permit.

### **3. *New Hampshire DES Air Resources Division***

The DES, and more precisely the Air Resources Division within DES, is responsible for enforcing the New Hampshire laws and adopting rules relating to state air pollution provisions. The DES establishes and operates the New Hampshire system of air permits for the construction, installation, operation, or material modification of air pollution devices and sources. The DES may grant or deny a permit or revoke or modify any permit already issued which would cause the ambient air pollution level in the locality of the emission activity to exceed limits for ambient concentrations established by the New Hampshire state implementation plan pursuant to the CAA<sup>180</sup> or violate any provision of any land use plan established by the state implementation plan.<sup>181</sup> The DES also is responsible for developing a comprehensive program for the study, prevention, and abatement of air pollution, and it establishes a replacement program for air quality monitoring equipment consistent with the U.S. EPA guidelines.<sup>182</sup> The DES advises, consults, and cooperates with the cities and towns as well as other state and federal agencies and affected groups in matters relating to air quality.<sup>183</sup> The DES is authorized to implement a program to control the emissions of air contaminants from consumer products by establishing limits on the manufacture, use, or sale of such products provided such limits are not less stringent than those in the federal CAA and its related regulations.<sup>184</sup>

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<sup>179</sup> N.H. REV. STAT. ANN. § 125-C:11 (1996 & Supp. 2001).

<sup>180</sup> 42 U.S.C. § 7401 *et seq.* (1994).

<sup>181</sup> N.H. REV. STAT. ANN. § 125-C:6(XIV) (1996 & Supp. 2001).

<sup>182</sup> N.H. REV. STAT. ANN. § 125-C:6(XVI) (1996 & Supp. 2001).

<sup>183</sup> N.H. REV. STAT. ANN. § 125-C:6 (1996 & Supp. 2001).

<sup>184</sup> N.H. REV. STAT. ANN. § 125-C:6(XVII) (1996 & Supp. 2001).

The DES has authority to enter private or public property at all reasonable times for the purpose of inspecting or investigating any condition believed to be related to an air pollution source or violation.<sup>185</sup> In an air pollution emergency that requires immediate action to protect the public's health, welfare, or safety, the commissioner of the DES has authority with consent of the governor and the air resources council (ARC)<sup>186</sup> to issue any order necessary to meet the emergency.<sup>187</sup> The commissioner may issue subpoenas to produce witnesses and evidence plus administer oaths to take testimony. Other duties and powers of the commissioner of the DES include the adoption of air pollution rules relating to;

- Air pollution prevention, control, abatement, and limitation from mobile, stationary, and open air sources;
- Ambient air quality standards, primary and secondary;
- Air pollution emergencies; and
- Statewide air pollution permit system for non-Title V sources and devices including exemptions and procedures for notifications, fees, application review, testing and monitoring, recordkeeping, violation complaints, variances, and the manufacture, use, or sale of consumer products related to air pollution.<sup>188</sup>

In New Hampshire, it is unlawful:

- To install or operate any non-Title V source or device which contributes to air pollution; or
- To construct, operate, or modify any stationary source except as allowed by state statute which requires a temporary or final DES permit or exemption.<sup>189</sup>

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<sup>185</sup> N.H. REV. STAT. ANN. § 125-C:6(VII) (1996 & Supp. 2001).

<sup>186</sup> The air resources council provides advice and consultation to the DES regarding policies and plans for the control and prevention of air pollution.

<sup>187</sup> N.H. REV. STAT. ANN. § 125-C:9 (1996 & Supp. 2001).

<sup>188</sup> N.H. REV. STAT. ANN. § 125-C:4 (1996 & Supp. 2001).

<sup>189</sup> A temporary permit is required prior to the commencement of construction or installation of any new or modified non-Title V source or device; the temporary permit may be replaced by a final permit following and meeting any required DA operation testing such that operation of the source or device will not violate any air quality standard or regulation in force. Furthermore, an air permit applicant is required to conduct preconstruction or premodification review procedures prior to the commencement of construction of any new major stationary source or modification to any existing major stationary source; *see* N.H. REV. STAT. ANN. § 125-C:10, 11 (1996 & Supp. 2001).

To operate an affected source,<sup>190</sup> an air permit to operate (PTO) consistent with the federal CAA is necessary. An applicant for a PTO is required to conduct preconstruction or premodification review procedures prior to commencing the construction of any affected source. A fee schedule for the PTOs may be imposed by the DES to cover the reasonable costs of reviewing applications, renewals, modifications plus implementing and enforcing the terms and conditions of a permit as well as any public notification.<sup>191</sup>

The director of the DES may require any information on an air permit application that would assist in the determination of the air pollution potential for any non-Title V source or device. Public notice is required in at least one newspaper of general circulation before action on an air permit occurs that would not have an insignificant effect on air quality. Any person aggrieved by an air permit decision may file an appeal with the ARC provided it is lodged within ten (10) days of the decision. Upon an appeal, the ARC must promptly hold a hearing and issue a decision upholding, modifying, or abrogating the DES decision. The applicant pays an air permit fee, the schedule of which is determined by the director of the DES, and bear the cost for any public notification. All fees and costs collected relating to air permits and PTOs are deposited to the state treasury. Funds available for air pollution control must be appropriated to the DES.<sup>192</sup>

Reasons that would justify a denial for a final or temporary permit include:

- Device or non-Title V source would result in violation of an air standard or air rule;
- Device or non-Title V source would disproportionately contribute to air pollution in comparison with other similar devices performing the same functions; and
- Device or non-Title source is located in a “clean air” area and is reasonably likely to cause significant deterioration of the existing air quality in part of the area.<sup>193</sup>

An air permit may be suspended or revoked after a hearing for the following reasons:

- Permit holder has committed a air pollution violation including any statute, rule, order, or permit condition; or

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<sup>190</sup> The term “affected source” means any stationary source whereby the construction, installation, operation, and modification of which is subject to Title V, CAA, 42 U.S.C. § 7401 *et seq.* (1994).

<sup>191</sup> N.H. REV. STAT. ANN. § 125-C:12(V) (1996 & Supp. 2001).

<sup>192</sup> N.H. REV. STAT. ANN. § 125-C:12(IV) (1996 & Supp. 2001).

<sup>193</sup> N.H. REV. STAT. ANN. § 125-C:13(I) (1996 & Supp. 2001).

- Emissions from the permitted device or non-Title V source presents an immediate danger to the public health.<sup>194</sup>

An air permit may be modified following a hearing on the matter for the following reasons:

- Device or non-Title V source fails to meet existing state or federal emission limits; or
- Device or non-Title source is or is reasonably likely to result in a violation of an air quality standard.<sup>195</sup>

#### ***4. New Hampshire Enhanced Environmental Performance Agreements***

Enhanced Environmental Performance Agreements (EEPAs) operate in lieu of existing permits. The EEPA program involves a voluntary pilot program whereby the commissioner of the DES may enter into EEPAs with persons to implement innovative environmental measures not otherwise recognized or allowed under existing laws and rules of the state:

- When innovative measures may achieve reductions in emissions, discharges, or wastes which equal or exceed those required under applicable statutes and rules;
- To test innovative strategies for achieving enhanced environmental results.<sup>196</sup>

In the event of deficient performance of any term or condition in the EEPA, the commissioner may, after written notice to the other EEPA party, terminate any agreement. The decision to terminate the EEPA is not appealable, and the other EEPA party has thirty (30) days to apply for any necessary permits before becoming subject to enforcement to the applicable provisions and rules.<sup>197</sup>

For any just cause, an air PTO may be terminated, modified, revoked, or reissued prior to its expiration provided the DA's decision is consistent with the federal CAA.<sup>198</sup>

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<sup>194</sup> N.H. REV. STAT. ANN. § 125-C:13(II) (1996 & Supp. 2001).

<sup>195</sup> N.H. REV. STAT. ANN. § 125-C:13(III) (1996 & Supp. 2001).

<sup>196</sup> N.H. REV. STAT. ANN. § 125-C:6-a (1996 & Supp. 2001). Approaches in EEPAs are intended to promote pollution prevention, source reduction, environmental innovation, and transferability to other applicable entities, without increasing the overall level of pollution emitted to the air, water, and land; *see* N.H. REV. STAT. ANN. § 125-C:6-a(I) (1996 & Supp. 2001).

<sup>197</sup> N.H. REV. STAT. ANN. § 125-C:6-a(VI) (1996 & Supp. 2001).

<sup>198</sup> N.H. REV. STAT. ANN. § 125-C:13(IV) (1996 & Supp. 2001).

## 5. *New Hampshire Air Enforcement*

Whenever the DES finds that any source of air pollution violates a state statute or a condition of a state required permit, notification must be provided when possible along with an order of abatement establishing a compliance schedule to be followed. The DES may impose an administrative fine up to two thousand dollars (\$2,000.00) for a violation including a material false statement relating to any document or information required to be submitted to DES. An administrative fine does not preclude any other penalty from being imposed. An aggrieved person may appeal an order of abatement provided it is lodged with the ARC within thirty (30) days of the order's issuance. Otherwise, the abatement order becomes final. Upon an appeal to the ARC, a hearing is promptly held and a ARC decision follows upholding, modifying, or abrogating the DES order. The ARC decision becomes final ten (10) days after it is issued.<sup>199</sup>

Violations of air pollution provisions are subject to:

- Enforcement by injunction including mandatory injunction issued by the superior court upon application of the attorney general;
- Criminal charges;<sup>200</sup> and
- Civil fines up to twenty-five thousand dollars (\$25,000.00) for each violation and each day of violation.<sup>201</sup>

## 6. *New Hampshire Air Pollution Variances*

Following a hearing, the commissioner of the DES may suspend the enforcement of any air pollution statute or rule provided:

- A person can show that the enforcement would produce serious economic hardship on such person and no benefits, either equal or greater, are realized or gained by the public;

The commissioner of the DES in making a variance decision must give due recognition to:

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<sup>199</sup> If imminent and substantial endangerment exists the order of abatement requires immediate compliance and the order is considered final and enforceable upon issuance, but may be appealed to the ARC within thirty (30) days of its issuance; *see* N.H. REV. STAT. ANN. § 125-C:15(I) (1996 & Supp. 2001). Stop use orders regarding gasoline dispensing facilities subject to stage II vapor recovery system requirements are final and enforceable upon issuance but may be appealed to the ARC within ten (10) days of its issuance; *see* N.H. REV. STAT. ANN. § 125-C:15(I-a) (1996 & Supp. 2001).

<sup>200</sup> Misdemeanor charges if the person is a natural person or felony charges if any other person; *see* N.H. REV. STAT. ANN. § 125-C:15(III) (1996 & Supp. 2001).

<sup>201</sup> N.H. REV. STAT. ANN. § 125-C:14(II) (1996 & Supp. 2001).

- Progress the requesting person has made in eliminating or preventing air pollution;
- Character and degree of injury or interference to the health and physical property of the people;
- Social and economic value of the source of air pollution;
- Whether a variance based upon a partial abatement or progressive abatement is reasonable; and
- Whether the variance may cause a danger to public health, welfare, or safety.<sup>202</sup>

### **7. *New Hampshire Acid Rain Control Act***

Certain air pollutant emissions, especially sulfur dioxide and nitrous oxide, combine with moisture in the air and form compounds that are considered harmful to the natural chemistry and biology of lakes, stream, forests, and other ecosystems. Programs to reduce this phenomenon are called acid rain programs and are developed under Title IV of the CAA. The acid rain program targets major sources, those that emit large amounts of specific pollutants, to obtain a permit. An acid rain permit sets forth how the major source plans to comply with air pollutant reductions. The permit eventually becomes part of the Title V permit.

The state of New Hampshire through its Acid Rain Control Act (ARCA) charges the DES with the responsibility of developing an acid deposition control program that targets a twenty-five percent (25%) reduction of sulfur dioxide in the air from sulfur dioxide levels measured on December 31, 1991. The enforcement, variances, penalties, and fines are similar to air pollution emissions listed above. This program affects only major sources such as large power plants.<sup>203</sup>

### **8. *New Hampshire Air Toxic Control Act***

In an effort to promote public health and to reduce human exposure to toxic chemicals, New Hampshire enacted the Air Toxic Control Act (ATCA).<sup>204</sup> Toxic air pollutants are also referred to as hazardous air pollutants (HAPs). At sufficient concentrations and exposure, HAPs are known or suspected of causing cancer or other harmful conditions to humans. HAPs are identified in Title III of the CAA.<sup>205</sup> Some common HAPs are compounds found in gasoline and

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<sup>202</sup> N.H. REV. STAT. ANN. § 125-C:16 (1996 & Supp. 2001). A variance may be granted for a period up to one year; any variance does not relieve any liability imposed by law caused by a nuisance; *see* N.H. REV. STAT. ANN. § 125-C:16(III) (1996 & Supp. 2001).

<sup>203</sup> N.H. REV. STAT. ANN. §§ 125-D:2 to 6 (1996 & Supp. 2001).

<sup>204</sup> N.H. REV. STAT. ANN. §§ 125-I:1 to 8 (1996 & Supp. 2001).

<sup>205</sup> N.H. REV. STAT. ANN. § 125-I:4 and 42 U.S.C. § 7412

dry cleaning fluids as well as compounds used in industry as solvents and heavy metals such as mercury, lead, chromium, and others. Many HAPs are emitted from the combustion or burning of wastes and fossil fuels such as coal.

There are many sources of HAPs, but automobiles and other types of motor vehicles are called mobile sources. All other sources are considered stationary sources but may be subdivided for discussion purposes into natural sources such as volcanoes and forest fires; area sources such as print shops, dry cleaners, gasoline stations, and furniture manufacturers; and major sources such as large industrial operations that emit many tons of HAPs per year.

The DES is responsible for establishing a statewide permit system and adopting rules that prevent, control, abate, and limit HAPs. The ATCA specifically exempts:

- Normal agricultural operations and the application of pesticides otherwise regulated by state statute;
- Emissions from mobile sources;
- Combustion of virgin petroleum products by stationary sources; and
- HAPs otherwise adequately regulated by state or federal law that pose little risk to human health.<sup>206</sup>

### ***9. New Hampshire Emissions Reduction Trading***

The DES is authorized by the New Hampshire legislature to establish a trading and bank program regarding discrete emissions reductions, nitrous oxide budget allowances, or other reduction credit mechanisms to facilitate compliance with the CAA. This system is designed to log and maintain records of emissions reduction data for each major source in the state.<sup>207</sup>

An air pollution advisory committee conducts ongoing evaluations of the effectiveness of related vehicle emission portions of the motor vehicle safety inspection and the emissions reductions credits trading program.<sup>208</sup>

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<sup>206</sup> N.H. REV. STAT. ANN. § 125-I:3 (1996 & Supp. 2001).

<sup>207</sup> N.H. REV. STAT. ANN. §§125-J:1 to 14 (1996 & Supp. 2001).

<sup>208</sup> N.H. REV. STAT. ANN. § 125-J:11 (1996 & Supp. 2001).

## 10. *New Hampshire Greenhouse Gases*

In order to help protect the interests of New Hampshire sources and the state's economy under a future federal regulatory scheme relating to greenhouse gas<sup>209</sup> emissions and to help encourage the voluntary reduction of greenhouse gas emissions by New Hampshire sources, the DES, guided by state statutes, administers a registry where sources of greenhouse gas emissions may record and register voluntary greenhouse gas emissions reductions beginning after 1990. This registry serves to establish a baseline against which any future federal greenhouse gas emissions reduction requirements may apply.<sup>210</sup>

### IV. **SOLID WASTE AND HAZARDOUS WASTE**

**Producer Note:** There are several laws which control the use, disposal, and cleanup of both solid wastes and hazardous wastes. Agricultural producers who use hazardous chemicals, petroleum, or other products stored in storage tanks should be aware of requirements governing their actions.

#### A. **New Hampshire Solid and Hazardous Waste Laws**

##### 1. *New Hampshire Solid Waste Policy*

New Hampshire has legislation that establishes the management of solid waste in order to protect human health, preserve the natural environment, and conserve precious and dwindling natural resources.<sup>211</sup> The state of New Hampshire is aware that environmental and economic issues arise from the disposal of solid waste in landfills and incinerators, and, thus, strives to reserve landfill and incinerator capacity for solid wastes which cannot be reduced, reused, recycled or composted.<sup>212</sup> Furthermore, New Hampshire is working toward a goal to significantly reduce the amount of waste sent to landfills and incinerators through recycling, reusing, composting, or any combination of such methods. The DES administers and enforces solid waste management. Disposal of recyclable materials in landfills or incinerators is discouraged. New Hampshire supports integrated solid waste disposal solutions that are environmentally safe and economically sound. The following waste management methods are listed in order of preference:

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<sup>209</sup> The term "greenhouse gas" means such gases as carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, or sulfur hexafluoride; *see* 125-L:1(IV)b (1996 & Supp. 2001).

<sup>210</sup> N.H. REV. STAT. ANN. § 125-L:2 (1996 & Supp. 2001).

<sup>211</sup> N.H. REV. STAT. ANN. § 149-M:1 (1996 & Supp. 2001).

<sup>212</sup> N.H. REV. STAT. ANN. § 149-M:2 (1996 & Supp. 2001).

- Source reduction;
- Recycling and reuse;
- Composting;
- Waste-to-energy technologies (including incineration);
- Incineration without resource recovery; and
- Landfilling.<sup>213</sup>

It is the state's position that it is responsible for:

- Meeting the solid waste management needs of the state and its citizens;
- Ensuring adequate management capacity within the state for the solid waste generated within New Hampshire;
- Providing facilities necessary to meet state solid waste needs that protect public health and the state's natural environment;
- Providing an integrated system of solid waste management including materials which can be recycled, recovered, reused, and composted as well as disposed as residuals; and
- Addressing solid waste needs through the exercise of its police power granted to by the New Hampshire Constitution.<sup>214</sup>

## ***2. New Hampshire Solid Waste Management***

The state's position is that solid waste management and solid waste regulation benefits its citizens by providing for solid waste disposal management options to meet the capacity of the state while minimizing adverse environmental, public health, and long-term economic impacts.<sup>215</sup>

Responsibilities of the DES related to solid waste management are:

- Establishing solid waste management policies and goals;

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<sup>213</sup> N.H. REV. STAT. ANN. § 149-M:3 (1996 & Supp. 2001).

<sup>214</sup> N.H. REV. STAT. ANN. § 149-M:11(I)(e) (1996 & Supp. 2001).

<sup>215</sup> N.H. REV. STAT. ANN. § 149-M-11(II) (1996 & Supp. 2001).

- Regulating facilities through administration of a permit;
- Entering at reasonable times to inspect any facility or investigate any condition when there is cause to believe a violation of solid waste management rules or orders exists or there is a substantial threat to human health or the environment;
- Issuing notices of hearings, holding hearings, and taking testimony;
- Preparing the state's solid waste plan;
- Providing technical assistance and information;
- Reviewing local solid waste plans;
- Administering grants to carry out solid waste management responsibilities;
- Cooperating with other government agencies and nonprofit organizations for solid waste management purposes;
- Collecting a surcharge on first point disposal of out-of-state solid waste at one dollar (\$1.00) per ton;
- Determining whether the taking of land by eminent domain is necessary and appropriate and acting upon decisions to do so;
- Establishing and administering an annual certification program for solid waste operators that includes training sources and, if desired, testing;
- Recording any orders issued by the DES upon the registry of deeds for the land in the county where the solid waste facility is located; and
- Conducting any other activity necessary for the purpose of administering the provisions, rules, permits, and orders.<sup>216</sup>

The DES adopts rules setting forth:

- Criteria for approving local solid waste plans;
- Criteria for solid waste facilities including standards for proper receipt, reclamation, or disposal of separated motor vehicle wastes;

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<sup>216</sup> N.H. REV. STAT. ANN. § 149-M:6 (1996 & Supp. 2001).

- Administration of the permit system including a schedule of fees and terms for issuance, modification, suspension, revocation, denial, and transfer of permits;
- Standards for permit exemptions or waivers;
- Administration of a solid waste facility operator program;
- Administration and standards for the out-of-state solid waste disposal surcharge;
- Administrative fines for violations related to solid waste;
- Administration of the solid waste cleanup sites and aid to municipalities;
- Program to reduce toxic wastes;
- Standards for closing different types of solid waste facilities according to the types of wastes disposed plus closure guidelines for facility owners and operators including necessary monitoring, restoration, correction, and compliance procedures; and
- Any other rules that are deemed necessary to implement state statutes related to solid waste.<sup>217</sup>

Appeals from DES decisions or orders are made to the waste management council.<sup>218</sup>

### ***3. New Hampshire Solid Waste Permits***

Solid waste permits issued by the DES are required to construct, operate, or initiate the closure of a solid waste facility. Permits are also required to transport solid waste for disposal at any facility other than an approved facility. No permit is necessary, however, for hauling or storing manure if the manure is used as a fertilizer. Application for solid waste permits must be submitted on DES forms. The information required for the permit application includes:

- Identification of all facilities owned or operated by the applicant;
- Name and address of the permit applicant if an individual or the state of incorporation, principal place of business, names and addresses of any directors, officers, and shareholders if a corporation;

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<sup>217</sup> N.H. REV. STAT. ANN. § 149-M:7 (1996 & Supp. 2001).

<sup>218</sup> N.H. REV. STAT. ANN. § 149-M:8 (1996 & Supp. 2001).

- Performance history of the applicant<sup>219</sup> and of any officers or directors relative to the ownership, operation, and financial security of each facility;
- Separate statement of management provisions for any motor vehicle waste;
- DES certification of the facility operator;
- Local governmental approval related to land use and facility siting;<sup>220</sup>
- Site where the applicant intends to conduct the business for which the permit is sought; and
- Any financial information as the DES may require.<sup>221</sup>

The DES provides public notification by newspaper publication for all applications for solid waste permits and individual written notice to abutting landowners regarding the opportunity for a hearing. The requirement for notification and opportunity for a hearing for facilities or activities that have an insignificant effect on environmental quality is determined by the DES.<sup>222</sup>

Reasons that the DES may deny a solid waste permit include:

- Failure to demonstrate sufficient reliability, expertise, integrity, and competence to operate a solid waste facility;
- Conviction, guilty plea, or no contest plea to a felony by the applicant during the five (5) year period prior to the application date for any individual applicant or, if the applicant is a corporation or business entity, by any of its officer, directors, partners, key employees, or entities; and
- Non-compliance with DES solid waste rules including monitoring, contingency plans, closure, and financial responsibility sufficient to:
  - Protect the public's health and welfare and the environment; and

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<sup>219</sup> A background investigation of criminal record and performance history may be performed by the attorney general upon request by the DES. The cost of any investigation is borne by the applicant.

<sup>220</sup> N.H. REV. STAT. ANN. §§ 149-M:9(I to VII) (1996 & Supp. 2001).

<sup>221</sup> N.H. REV. STAT. ANN. § 149-M:10 (1996 & Supp. 2001).

<sup>222</sup> N.H. REV. STAT. ANN. § 149-M:9(VIII) (1996 & Supp. 2001).

- Ensure that appropriate measures are taken to prevent present and future damage to public health and safety or the environment if operations at the facility are abandoned, interrupted, or stopped.<sup>223</sup>

Requests for the transfer of permits are filed on DES forms by the transferee. Transferees must attest to a statement that the solid waste facility is consistent with the provisions of the district plan.<sup>224</sup> Applications for a permit transfer must also include:

- Performance history of the applicant, or its officer and directors if a corporate or business entity, relative to operation, financial security, and ownership of all facilities owned or operated by the applicant;<sup>225</sup> and
- Affirmation that applicant notified landowners of property abutting the solid waste facility regarding the proposed permit transfer.<sup>226</sup>

#### ***4. New Hampshire Criteria for a Solid Waste Facility***

The DES determines whether a proposed solid waste facility provides a substantial public benefit based upon:

- Short and long term needs for a solid waste facility of the proposed type, size, and location to provide capacity to accommodate solid waste generated within New Hampshire;
- Capability of the proposed facility to assist the state in achieving implementation of its waste reduction goals, particularly within the hierarchy or order of preference for goal attainment; and
- Capability of the proposed facility to assist the state in achieving the goals of the solid waste management plans.<sup>227</sup>

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<sup>223</sup> N.H. REV. STAT. ANN. § 149-M:9(IX) (1996 & Supp. 2001).

<sup>224</sup> N.H. REV. STAT. ANN. § 149-M:9 (XII)(a) (1996 & Supp. 2001).

<sup>225</sup> The DES may request that the attorney general conduct a background investigation and criminal record check, and any costs incurred must be borne by the applicant; *see* N.H. REV. STAT. ANN. § 149-M:9(XII)(a) (1996 & Supp. 2001).

<sup>226</sup> Based upon written comments of property abutters, the DES, at its discretion, holds a public hearing within thirty (30) days of any permit transfer decision and provides public notice two (2) weeks prior to the hearing by newspaper publication; *see* N.H. REV. STAT. ANN. § 149-M:9(XII)(b) (1996 & Supp. 2001).

<sup>227</sup> N.H. REV. STAT. ANN. § 149-M:11(III) (1996 & Supp. 2001).

Any property, including all proceeds, used in violation of solid waste provisions may be seized by the state and taken to preserve evidence of a violation or to secure it prior to forfeiture proceedings.<sup>228</sup> Within thirty (30) days of seizure of the property, the attorney general must file a petition requesting forfeiture, and the court issues an order of notice to the owner or the person that appears to have an interest. If no petition is filed during this time period, the property must be returned.

An appeal of DES orders to comply with solid waste provisions, rules, orders, or permits must be lodged with the WMC.<sup>229</sup> A person who violates any solid waste provision, rule, order, or permit is guilty of a misdemeanor if the person is a natural person or guilty of a felony if the person is any other person and subject to a civil penalty up to twenty-five thousand dollars (\$25,000.00) for each violation or for each day of a continuing violation; a criminal penalty up to twenty-five thousand dollars (\$25,000.00) for each day of violation; and imprisonment, probation, or conditional discharge for each day of violation.<sup>230</sup> An administrative fine up to two thousand dollars (\$2,000.00) may be imposed by the DES upon a violator after proper notice and a hearing prescribed in DES rules.

Each New Hampshire town must provide a solid waste facility or access to an approved solid waste facility for its residents. A New Hampshire town has authority to either provide a disposal facility or contract up to forty (40) years with disposal facility owners and operators for the disposal of solid waste. Access costs and a reasonable rate schedule for disposals at solid waste facilities are at the discretion of the town.

State statutes authorize towns to levy civil penalties up to three thousand dollars (\$3,000.00) for violation of the town's bylaws related to its solid waste facilities.<sup>149</sup> A town which collects the additional motor vehicle waste fee must provide for disposal of the town's motor vehicle waste.<sup>150</sup> Selectmen of towns, county commissioners for counties where incorporated or unincorporated towns or places exist, plus the mayor and the council of each city within the county are authorized to

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<sup>228</sup> N.H. REV. STAT. ANN. § 149-M:14(I) (1996 & Supp. 2001).

<sup>229</sup> N.H. REV. STAT. ANN. § 149-M:15(I) (1996 & Supp. 2001).

<sup>230</sup> N.H. REV. STAT. ANN. §§ 149-M:15(III, IV, V) (1996 & Supp. 2001). Violations may also be enjoined by the superior court following application to a justice by a municipality and notice of its action to the attorney general and the DES thirty (30) days prior to the commencement of any action unless an emergency exists whereby immediate action is necessary to prevent irreparable environmental damage or other serious public harm, in which case, notice must be given as soon as practicable; *see* N.H. REV. STAT. ANN. §§ 149-M:15(VI, VIII) (1996 & Supp. 2001).

<sup>149</sup> N.H. REV. STAT. ANN. § 149-M:17 (1996 & Supp. 2001).

<sup>150</sup> The term "motor vehicle waste" means used residential motor oil, residential motor vehicle batteries, and tires from residential motorized vehicles. The term "residential" used here means any motor vehicle registered in a municipality which collects the fee assessed; *see* N.H. REV. STAT. ANN. § 149-M:18 (1996 & Supp. 2001).

- Enter cooperative agreements with other town, cities, unincorporated towns, unorganized places, and counties;
- Provide a regional solid waste facility for the management of solid waste at mutually agreed upon sites.<sup>151</sup>

For unincorporated towns or unorganized places, counties in New Hampshire have the same solid waste disposal responsibilities as a town and its governing body.<sup>152</sup> If a town fails to provide the proper approved disposal facility as required, the DES may conduct an investigation, make a report of findings, and either reach an agreement and order the town to participate in an existing or planned approved facility or upon reaching no agreement within sixty (60) days of the findings, hold a hearing after public notice by posting. Then, if no agreement is reached within forty-five (45) days, the DES must order the town to participate in an existing or planned approved facility or recommend that land within the town be taken by eminent domain for the establishment of an approved facility.<sup>149</sup> The DES has authority to institute eminent domain proceedings and the responsibility for the facility's design and construction.<sup>150</sup> Upon completion, the solid waste facility is operated by the town in accordance with its facility plan.<sup>151</sup>

It is unlawful to dispose of wet-cell batteries in a solid waste landfill, compost, or incinerator facility.<sup>152</sup> Disposal of mercuric oxide batteries are also prohibited unless the manner is approved by DES. Leaf and yard waste are prohibited from disposal at landfill or incinerator facilities.<sup>153</sup>

The DES prepares or updates the state's solid waste plan and waste reduction report every six years beginning in 1998. The report addresses the generation of solid waste, progress toward the forty percent (40%) solid waste reduction goal, disposal figures, projected capacity needs,

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<sup>151</sup> N.H. REV. STAT. ANN. § 149-M:19 (1996 & Supp. 2001).

<sup>152</sup> N.H. REV. STAT. ANN. § 149-M:20 (1996 & Supp. 2001).

<sup>149</sup> N.H. REV. STAT. ANN. §§ 149-M:21(I to IV) (1996 & Supp. 2001).

<sup>150</sup> N.H. REV. STAT. ANN. §§ 149-M:21(V to VI) (1996 & Supp. 2001).

<sup>151</sup> N.H. REV. STAT. ANN. § 149-M:22 (1996 & Supp. 2001). Each town is responsible for continued and ongoing planning for solid waste management within its boundaries. In its planning, the town must consider environmental impact, economic impact, and area impact meaning the plans, processes, and practices of other area towns as to solid waste; *see* N.H. REV. STAT. ANN. § 149-M:23 (1996 & Supp. 2001). Towns may participate in a district solid waste management plan instead of a town plan; *see* N.H. REV. STAT. ANN. § 149-M:24 (1996 & Supp. 2001).

<sup>152</sup> N.H. REV. STAT. ANN. § 149-M:27 (1996 & Supp. 2001).

<sup>153</sup> Some municipalities are exempted from this prohibition if the activity would cause the municipality to violate solid waste provisions or incur a penalty; *see* N.H. REV. STAT. ANN. § 149-M:27(III) (1996 & Supp. 2001).

trends, federal laws, DES efforts, programs, and organizations that can assist solid waste management.<sup>154</sup>

## **B. New Hampshire Hazardous Waste Laws**

### ***1. Hazardous Waste Management***

Although New Hampshire state statutes completely preempt the field of hazardous waste legislation in the state, New Hampshire courts have determined that the regulatory scheme adequately considers the local economic effects of proposed hazardous waste facility siting by providing for:

- Consideration by the municipal review committee<sup>155</sup> of the local economic effects when making recommendations on permit applications to the DES and
- Public findings of facts and rulings of law.<sup>156</sup>

The term “hazardous waste management” means the systematic control of the generation, collection, sorting storage, processing, treatment, recovery, and disposal of hazardous waste. The term “hazardous materials” means those substances or materials in such quantity and form which may pose an unreasonable risk to health and safety or property when transported in commerce. Hazardous material includes explosives, radioactive materials, etiologic agents flammable liquids or solids, combustibles, poisons, oxidizing or corrosive materials and compressed gases. The term “hazardous waste” means a solid, semi-solid, liquid, or contained gaseous waste, or any combination of these wastes which because of either quantity, concentration, or physical, chemical, or infectious characteristics may:

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<sup>154</sup> N.H. REV. STAT. ANN. § 149-M:29 (1996 & Supp. 2001).

<sup>155</sup> When the DES receives an application for a new hazardous waste facility whether it is for treatment, storage, or disposal, the DES immediately notifies the governing body of the municipality where the facility is proposed to be located. The governing body then may appoint a municipal hazardous waste facility review committee. If a committee is appointed, the committee represents the town in the public hearing process relating to the proposed facility’s permit application, studies the effects of a proposed facility on health and welfare of people in the vicinity, the environment, and the economy of the area where the facility would be located and submits a report of recommendation to the DES within thirty (30) days as to whether the permit should be granted to the facility. Other responsibilities of the municipal review committee regarding a proposed hazardous waste facility include providing public notice and individual notice to landowners abutting the proposed facility site and holding public hearings on the matter; *see* N.H. REV. STAT. ANN. § 147-C:4 (1996 & Supp. 2001). The municipal review committee may appeal to the WMC if it believes that DES has issued a permit which does not adequately protect the health and safety of the residents of the municipality; *see* N.H. REV. STAT. ANN. § 147-C:7 (1996 & Supp. 2001). The owner of a facility submits a report on the amount of hazardous waste received and stored, treated, or disposed at the facility and pays fees accordingly to the town treasurer for the use of the town; *see* N.H. REV. STAT. ANN. § 147-D:3 (1996 & Supp. 2001). Unpaid fee amounts may be pursued by a town by notice to the facility owner after making a determination utilizing DES records; *see* N.H. REV. STAT. ANN. § 147-D:4 (1996 & Supp. 2001).

<sup>156</sup> N.H. REV. STAT. ANN. § 147-A (1996 & Supp. 2001) annotations.

- Cause or contribute to an increase in mortality or an increase in irreversible or incapacitating reversible illness; or
- Pose a present or potential threat to human health or the environment when improperly treated, stored, transported, disposed, or otherwise mismanaged.<sup>157</sup>

Hazardous waste is also that identified as hazardous waste by the DES under agency rules adopted by the DES.<sup>158</sup> The state limits toxic heavy metals such as lead, cadmium, mercury, and hexavalent chromium in packaging materials because these heavy metals are likely to be present in the leachate of landfills or in emissions when incinerated.<sup>159</sup> Manufacturers and suppliers packaging materials must provide a certificate of heavy metal compliance to the DES.<sup>160</sup> Violators having knowledge of this prohibition are subject to imprisonment, probation, or conditional discharge plus fines up to twenty-five thousand dollars (\$25,000.00) per day of violation. An administrative fine up to two thousand dollars (\$2,000.00) may be imposed without regard to any other penalty or fine.<sup>161</sup>

## ***2. New Hampshire Division of Waste Management***

The DES, and specifically the Division of Waste Management within the DES, administers the state and federal statutes and agency rules regarding hazardous waste. The DES is also responsible for adopting state rules that:

- Relate to hazardous waste management;<sup>162</sup>
- Establish standards and procedures for the safe operation and maintenance of hazardous waste facilities including qualifications for personnel of hazardous waste facilities;
- Establish proper criteria for storage, treatment, containerization, transportation, and disposal of hazardous wastes;

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<sup>157</sup> N.H. REV. STAT. ANN. § 147-B:2(VII) (1996 & Supp. 2001).

<sup>158</sup> N.H. REV. STAT. ANN. § 147-B:2(VIII) (1996 & Supp. 2001).

<sup>159</sup> N.H. REV. STAT. ANN. § 149-M:32 (1996 & Supp. 2001).

<sup>160</sup> N.H. REV. STAT. ANN. § 149-M:36 (1996 & Supp. 2001).

<sup>161</sup> N.H. REV. STAT. ANN. § 149-M:38 (1996 & Supp. 2001).

<sup>162</sup> After seeking public comment on those matters.

- Track hazardous wastes from point of generation to the point of treatment, storage, or disposal using a manifest system;
- Establish procedures and requirements for the record keeping and reporting of the generation, storage, treatment, or disposal of hazardous wastes;
- Establish procedures for the immediate reporting of hazardous waste spills;
- Establish the information required in operator permit applications and transporter registrations;
- Establish the terms and conditions under which the DES issues, modifies, suspends, revokes, denies, or approves the transfer of required permits or registrations;
- Establish criteria for determining the suitability of proposed hazardous waste facility sites;
- Establish application fees and compliance schedules for operator permits;
- Establish qualifications and procedures for persons providing hazardous waste cleanup, emergency response, or other effective implementation services;
- Establish standards, operating procedures, registration requirements, compliance schedules, enforcement, inspection requirements, closure requirements, financial responsibility, and corrective actions for tanks and appurtenances used to transfer or contain hazardous wastes and other regulated substances pursuant to the Federal Resource Conservation and Recovery Act (RCRA);<sup>163</sup>
- Establish procedures, standards, and time frames for certification of laboratories including provisional and expanded certification, disclosable testing information, alternate testing methodology, and fee accounting;
- Establish standards for maximum contaminant levels for unregulated contaminants; and
- Establish conditional exemptions from the permitting, registration, and siting requirements.<sup>164</sup>

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<sup>163</sup> 49 U.S.C. § 1801 *et seq.* (1994).

<sup>164</sup> N.H. REV. STAT. ANN. § 147-A:3 (1996 & Supp. 2001). 42 U.S.C. § 6901

The DES administers a hazardous waste operator permit program. In New Hampshire, it is unlawful for any person to construct, substantially alter, or operate a hazardous waste facility or dispose of hazardous waste without a DES permit unless the person is conditionally exempted by state agency rules.<sup>165</sup>

The DES notifies the governing body of the municipality in which the facility is proposed to be located when a new permit application for treatment, storage, and disposal facilities is received.<sup>166</sup> The DES may charge a fee up to five thousand dollars (\$5,000.00) for issuance of a hazardous waste facility permit, its modification, or its renewal provided it reflects the relative effort necessary for review of for a permit application.<sup>167</sup> Applicants for a hazardous waste operating permit are subject to a background check for a criminal record as well as performance history, financial security, and ownership of any other facilities. The cost of any investigation is borne by the applicant.<sup>168</sup>

### ***3. New Hampshire Hazardous Waste Permits***

A hazardous waste permit is valid for five (5) years unless it is modified, suspended, or revoked by the DES subsequent to notice to the permit holder regarding the intended permit action and the opportunity for a hearing.<sup>169</sup> Transfers of permits are not allowed without prior written approval of the DES subsequent to public notice, abutter notification,<sup>170</sup> and a public hearing on the matter of the transfer.<sup>171</sup>

Reasons the DES may deny a permit application include:

- Failure to demonstrate reliability, expertise, integrity, and competence to operate a hazardous waste facility; or

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<sup>165</sup> N.H. REV. STAT. ANN. § 147-A:4(I) (1996 & Supp. 2001).

<sup>166</sup> N.H. REV. STAT. ANN. § 147-A:4(I-a) (1996 & Supp. 2001).

<sup>167</sup> N.H. REV. STAT. ANN. § 147-A:4(II) (1996 & Supp. 2001).

<sup>168</sup> N.H. REV. STAT. ANN. § 147-A:4(II-c) (1996 & Supp. 2001).

<sup>169</sup> N.H. REV. STAT. ANN. §§ 147-A:4(III, IV) (1996 & Supp. 2001).

<sup>170</sup> The term “abutter” means the landowner of land that abuts the land in question.

<sup>171</sup> N.H. REV. STAT. ANN. § 147-A:4(IV-a) (1996 & Supp. 2001). The term “abutter” means any person who owns property adjacent to or across a road, railroad, or stream from the property on which a hazardous waste facility will be permitted; *see* N.H. REV. STAT. ANN. § 147-A:2(I-a) (1996 & Supp. 2001).

- Past conviction, guilty plea, or no contest plea to any felony charge during a period up to five (5) years prior to the permit application date;<sup>172</sup>

An interim permit may be issued by the DES when compliance with permit requirements would cause undue hardship without benefit, equal or greater, to the public and compliance will simply occur at a later time on a different compliance schedule. Renewal or extensions of the compliance schedule may be given only after providing an opportunity for public hearing and comments in the town or city affected.<sup>173</sup> Interim permits are also required prior to construction of a hazardous waste facility.<sup>174</sup>

A hazardous waste facility siting board (HWSB) consisting of five (5) members of the general public and one (1) member chosen by the regional planning committee for any area where a proposed hazardous waste facility is proposed to be located. The HWFSB reviews permit applications for new, proposed hazardous waste facility sites for storage, treatment, or disposal. The HWFSB holds two (2) or more public hearings in the respective area for each permit application, an informative meeting, and a comment meeting, each preceded by public notice seven (7) days prior to the hearing date.<sup>175</sup>

#### **4. *New Hampshire Hazardous Waste Enforcement***

Strict liability exists for containment costs, cleanup costs, and waste removal costs for any owner, operator, generator, or transporter who causes a violation related to hazardous waste treatment, storage, transportation, or disposal.<sup>176</sup> Generators, owners, operators, transporters, and employees of a hazardous waste facility must immediately provide notice of a violation to the DES upon becoming aware of any storage, treatment, or disposal violation related to hazardous waste. Failure to give notice is a misdemeanor if the person is a natural person and a felony if the person is any other person. Each day of a continuing violation is a separate offence.<sup>177</sup> Discrimination by an employer against any employee for reporting a hazardous waste violation is

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<sup>172</sup> Or in case of a corporate or business entity, if any of its officers, directors, partners, key employees or persons or business entities holding ten percent (10%) or more of its equity or debt liability has a conviction, guilty plea, or no contest plea to a felony during the five (5) years preceding the permit application date; *see* N.H. REV. STAT. ANN. § 147-A:4(II-d) (1996 & Supp. 2001).

<sup>173</sup> N.H. REV. STAT. ANN. § 147-A:4(V) (1996 & Supp. 2001).

<sup>174</sup> N.H. REV. STAT. ANN. § 147-A:4(VI) (1996 & Supp. 2001).

<sup>175</sup> N.H. REV. STAT. ANN. § 147-A:4-a (1996 & Supp. 2001).

<sup>176</sup> N.H. REV. STAT. ANN. § 147-A:9 (1996 & Supp. 2001).

<sup>177</sup> N.H. REV. STAT. ANN. § 147-A:11 (1996 & Supp. 2001).

unlawful and may bring an action against the employer. An action for injunctive relief is also available as well as compensatory and exemplary damages plus reasonable attorney fees.<sup>178</sup>

The DES has authority to take any action it deems necessary to protect human health or the environment when the generation, storage, treatment, transportation, or disposal of any waste may present an imminent and substantial hazard to human health or the environment. This includes the issuance of a DES order to eliminate the hazard or to cease operations. Orders are effective immediately and compliance is mandated; however, appeal of an order may subsequently be brought before the waste management council.

The DES may contract for and supervise the cleanup of a hazardous waste spill or direct the attorney general to bring an injunction action including mandatory injunction. Through the attorney general, the DES may request that a civil action in superior court, including temporary or permanent injunction or both, be brought to enforce any hazardous waste state statute, provision, permit, rule, or order issued.<sup>179</sup> Any order issued by the DES may be recorded in the registry of deeds in the county in which the subject hazardous waste facility is situated. A recorded order runs with the land provided there is an appropriate description of the land. No fee is incurred for recording an order; however, a fee may be incurred for discharging a recorded order.<sup>180</sup>

Any person aggrieved by an action of the DES may appeal to the WMC for review of the decision to grant, deny, modify, suspend, or revoke an operator or transporter permit or any other DES order related to hazardous waste. The WMC may affirm, deny, or modify the DES decision or order. Appeals of the WMC decision are in accordance with the state's Administrative Procedure Act.<sup>181</sup>

Hazardous waste violations include the violation of any state statute, agency rule, term, or condition on a permit or order, certification of any materially false statement on a required document, and tampering or non-compliance with a monitoring device. Violations may subject the person to criminal charges, imprisonment, and fines up to fifty thousand dollars (\$50,000.00) per day of violation. Penalties and fines are deposited to the New Hampshire hazardous waste cleanup fund.<sup>182</sup>

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<sup>178</sup> N.H. REV. STAT. ANN. § 147-A:12 (1996 & Supp. 2001).

<sup>179</sup> N.H. REV. STAT. ANN. § 147-A:14 (1996 & Supp. 2001).

<sup>180</sup> N.H. REV. STAT. ANN. § 147-A:14-a (1996 & Supp. 2001).

<sup>181</sup> N.H. REV. STAT. ANN. § 541-A:1 to 41.

<sup>182</sup> N.H. REV. STAT. ANN. § 147-A:16 (1996 & Supp. 2001).

Any person who engages in a knowing violation that places another in imminent danger of death or serious bodily injury is guilty of knowing endangerment.<sup>183</sup> The penalty for a knowing endangerment violation includes a class A felony and a fine up to two hundred fifty thousand dollars (\$250,000.00) per day of violation if the person is a natural person or a fine up to one million dollars (\$1,000,000.00) if committed by any other person plus the felony charges.<sup>184</sup>

State statutes encourage interstate cooperation, uniform state laws relating to hazardous wastes, and compacts among states for improved management of hazardous wastes.<sup>185</sup>

The hazardous waste cleanup fund is a nonlapsing, revolving special fund continually appropriated to be expended by the DES in carrying out its duties related to hazardous waste cleanup.<sup>186</sup>

Defenses available for strict liability situations include:

- An act of God;
- An act of war; or
- An act or omission of a third party other than an employee, agent, or independent contractor of the defendant provided the defendant establishes by a preponderance of the evidence that due care was exercised with respect to the hazardous substance concerned.<sup>187</sup>

A landowner is not strictly liable for the treatment or cleanup of hazardous waste or hazardous materials discovered on the landowner's property if:

- In no way did the landowner cause or materially contribute to the hazardous substance problem;
- The landowner reported the existence of the hazardous substance to the appropriate authorities within a reasonable time of discovery; and

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<sup>183</sup> N.H. REV. STAT. ANN. § 147-A:16-a (1996 & Supp. 2001).

<sup>184</sup> N.H. REV. STAT. ANN. § 147-A:16(II) (1996 & Supp. 2001).

<sup>185</sup> N.H. REV. STAT. ANN. § 147-A:18 (1996 & Supp. 2001).

<sup>186</sup> N.H. REV. STAT. ANN. § 147-B:3 (1996 & Supp. 2001).

<sup>187</sup> N.H. REV. STAT. ANN. § 147-B:10-a (1996 & Supp. 2001).

- The landowner can prove that there was no knowledge or reason to know of the hazardous substance problem prior to ownership of the property.<sup>188</sup>

Furthermore, a landowner or former landowner is not strictly liable for the treatment or cleanup of hazardous waste, hazardous material, or hazardous substance that is discovered on the property if:

- The landowner did not in any way cause or materially contribute to the contamination of the property; and
- The contamination migrated onto the property from a source that at the time of discovery of the contamination was located on another property.<sup>189</sup>

When a lien is necessary and it is properly recorded in the registry of deeds or filed with the secretary of state by the DES, the DES secures a first priority lien:

- Upon a person's business revenues generated from the hazardous waste or material located on the facility site and
- Upon the real property where the hazardous material is located.

The lien becomes effective as of the date and time of recording or filing against all other real or personal property and business revenues for the hazardous waste liability for all costs that may be recoverable by the DES in its response to cleanup of the hazardous waste spills or hazardous waste mismanagement.<sup>190</sup>

It is a criminal violation to refuse to pay the hazardous generator fee or to knowingly give or knowingly cause false information to be given for any hazardous waste reports, records, or documents required by DES. A generator guilty of a violation is charged with a misdemeanor. Each day of violation is a separate offense and the violator is fined up to one hundred dollars (\$100.00) per day.<sup>191</sup>

## ***5. New Hampshire Hazardous Waste Cleanup***

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<sup>188</sup> N.H. REV. STAT. ANN. § 147-B:10-a(II) (1996 & Supp. 2001).

<sup>189</sup> N.H. REV. STAT. ANN. § 147-B:10-a(III) (1996 & Supp. 2001).

<sup>190</sup> N.H. REV. STAT. ANN. § 147-B:10-b(III) (1996 & Supp. 2001).

<sup>191</sup> N.H. REV. STAT. ANN. § 147-B:11 (1996 & Supp. 2001).

A hazardous waste facility siting program exists in New Hampshire to facilitate proper hazardous waste management. The DES must set aside sixty thousand dollars (\$60,000.00) to develop and implement this program. The funds are used for the purpose of providing adequate and safe containment and cleanup of sites where hazardous wastes or hazardous materials have been stored or disposed which threaten the environment or the public health and welfare. The funds may also be used for household hazardous waste cleanup projects throughout the state.<sup>192</sup> The DES uses some of the siting program funds to conduct significant public education programs and brownfield cleanup.

In New Hampshire, hazardous waste generators are charged a fee according to the amount of hazardous waste generated. These fees also help capitalize the cleanup fund.

Exemptions from generator fees include:

- Sludge from publicly owned treatment works;
- Bottom boiler ash and flyash from incinerators which process solely municipal waste;
- Hazardous wastes which are recycled and exempted by state statute;
- Soil that is considered a hazardous waste due to lead contamination resulting from the use as a shooting range provided that the cleanup is initiated and completed by the owner in accordance with all applicable laws and DES requirements.
- Wastes resulting from the remediation of environmentally contaminated property where the person:
  - Is not liable by state statute and is either a prospective purchaser of environmentally contaminated property or one holding a mortgage or other security interest in environmentally contaminated property on which overdue real estate taxes are due to the municipality or
  - Is a current owner of environmentally contaminated property and liability exists solely on the owner status and the current owner did not generate the hazardous waste which contaminates the property nor operate, manage, or control the hazardous waste facility on the property.<sup>193</sup>

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<sup>192</sup> N.H. REV. STAT. ANN. §§ 147-B:4, 6 (1996 & Supp. 2001).

<sup>193</sup> N.H. REV. STAT. ANN. § 147-B:9 (1996 & Supp. 2001).

## 6. *New Hampshire Oil Import Fees*

Importers of oil into New Hampshire must be licensed by the Department of Safety (DOS). The annual license fee is prorated at one-tenth of one cent (\$.001) per gallon of imported oil. The licensing fee funds the oil pollution control fund. An additional automotive oil fee of two cents (\$.02) per gallon is assessed at the time of import. This fee funds the hazardous waste cleanup fund. The DES is authorized to use up to ten thousand dollars (\$10,000.00) from the cleanup fund to dispose contaminated used oil from a political subdivision of the state.<sup>194</sup> Cleanup funds are also used to:

- Award grants to pay for the costs associated with the establishment, improvement, or operation of used oil collections at public facilities such as fire stations, police barracks, highway departments, county garages, solid waste facilities, and other suitable locations;
- Provide technical assistance persons who organize collection programs;
- Provide grants to political subdivisions and other government entities, nonprofit organizations, and private businesses to establish or improve used oil collections;<sup>195</sup>
- Develop educational programs on proper use, handling, and disposal of used oil; and
- Provide personnel, equipment, and services to administer and enforce proper use, handling, and disposal of used oil.<sup>196</sup>

Transporters of used oil must be registered and submit annual reports to the DES detailing the amount and type of used oil handled.<sup>197</sup> The DES must submit annual reports to the House Environment and Agriculture Committee and the Senate Environment Committee regarding the activities and finances of the used oil collection program.<sup>198</sup>

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<sup>194</sup> N.H. REV. STAT. ANN. § 147-B:13(II) (1996 & Supp. 2001).

<sup>195</sup> Grants up to two thousand five hundred dollars (\$2,500.00).

<sup>196</sup> N.H. REV. STAT. ANN. § 147-B:13(I) (1996 & Supp. 2001).

<sup>197</sup> N.H. REV. STAT. ANN. § 147-B:14 (1996 & Supp. 2001).

<sup>198</sup> N.H. REV. STAT. ANN. § 147-B:15 (1996 & Supp. 2001).

## **7. *New Hampshire Brownfields Program***

New Hampshire supports a brownfields<sup>199</sup> program that encourages the redevelopment of industrial, commercial, residential, and other properties that have been subject to environmental contamination. The program was established after the legislature acknowledged that the strict liability policy under existing environmental statutes had the unintended result of discouraging the repurchase and reuse of some contaminated properties. These contaminated properties, called brownfields, are frequently abandoned or underused.

The DES administers the brownfields program and is assisted by the DOH for health risk assessments. The New Hampshire Department of Justice assists with covenants not to sue.<sup>200</sup> The intent of the brownfields program is to:

- Give incentives to redevelop contaminated properties by:
  - Facilitating the remedial process; and
  - Providing comprehensive liability protection to parties that do not have preexisting liability for cleanup or whose existing liability is premised solely upon the landowner status and who wish to assume responsibility for remediation or cleanup; and
- Expedite the voluntary cleanup of all contaminated properties by:
  - The remedial process; and
  - The comprehensive liability protection approach when the contaminated property or the party conducting the remediation does not qualify for comprehensive liability protection.<sup>201</sup>

## **8. *New Hampshire Hazardous Material Transportation Advisory Board***

A hazardous material transportation advisory board provides oversight and advise to the DES regarding the transportation of hazardous materials. The board consists of representatives of the DOS, the DOT, the DES and emergency management, public utilities commission, the New Hampshire legislators, hazardous materials users, transporter industries, manufacturers or distributors, fireman, and policeman. A recycling market development steering committee exists

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<sup>199</sup> The term “brownfields” means properties which have been environmentally contaminated; further detailed at N.H. REV. STAT. ANN. §§ 147-F:3, 4 (1996 & Supp. 2001).

<sup>200</sup> N.H. REV. STAT. ANN. §§ 147-F:2, 6 (1996 & Supp. 2001).

<sup>201</sup> N.H. REV. STAT. ANN. § 147-F:1 (1996 & Supp. 2001).

to guide the state in recycling efforts such as promote the establishment and expansion of recycling-related industries in New Hampshire and to:

- Advocate and secure funding for recycling market development;
- Facilitate close communication among the state's recycling and economic development agencies and organizations; and
- Provide continuity to market development efforts by reviewing and revising priorities, evaluating impact of initiatives, and recommending new directions for its efforts.<sup>202</sup>

The steering committee consists of the director of the governor's recycling program and representatives or designees of the New Hampshire legislature, the recycling coordinator of the DES, DRED, Northeast Resource Recovery Association, Division of Plant and Property Management within the Department of Administrative Services, New Hampshire Business Development Corporation or other similar statewide organization, the environmental community, the New Hampshire Municipal Association, and DOT.<sup>203</sup> The committee prepares an annual report for the legislature and the governor.<sup>204</sup>

## V. PESTICIDES AND CHEMIGATION

**Producer Note:** Use of pesticides and other farm chemicals is regulated by both federal and state statutes, and most states have some form of licensing or certification requirements controlling those who use pesticides. In addition, most states, including New Hampshire, have laws that address safety concerns about pesticide use by agricultural employees or around agricultural employees.

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<sup>202</sup> N.H. REV. STAT. ANN. §§ 149-O:1, 2 (1996).

<sup>203</sup> N.H. REV. STAT. ANN. § 149-O:3 (1996 & Supp. 2001).

<sup>204</sup> N.H. REV. STAT. ANN. § 149-O:5 (1996).

## A. New Hampshire Pesticide Laws

### 1. *New Hampshire Pesticide Authority*

The New Hampshire Department of Agriculture, Markets, and Food (DAMF) through the state entomologist has responsibility for pest<sup>205</sup> suppression and control in New Hampshire.<sup>206</sup> Together the commissioner of DAMF and the state entomologist may undertake the suppression or control of any insect pest or plant disease which in their judgment seriously threatens the state, and they may adopt any rules that are reasonable and proper to employ such control measures. In carrying out these responsibilities, representatives of DAMF and the state entomologist have authority to enter upon any lands in this state. For control measures involving forest pests, there must be coordination with the director of forests and lands.<sup>207</sup>

The following acts are considered misconduct:

- Any resistance or obstruction formed or placed against a representative of the state lawfully engaged in carrying out pest control;
- Any violation of DAMF rules; and
- Wilful transportation into the state or dissemination or propagation of any destructive insect pest or plant disease within the state.<sup>208</sup>

The DAMF commissioner and the state entomologist have the authority to require any town to take reasonable and proper measures toward pest suppression and control.<sup>209</sup> A town which fails to take these recommended measures must forfeit one hundred dollars (\$100.00) in an action initiated by a petition of information brought by the county's attorney general where the town is situated.<sup>210</sup> Additionally, the DAMF commissioner and the state entomologist may

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<sup>205</sup> The term "pest" means any plant, insect, rodent, fungi, animal, weed, other forms of plant or animal life, virus, bacteria, or other microorganism, except those living in man or animal, which exist in a place where it is not wanted or in a quantity not wanted; *see* N.H. REV. STAT. ANN. § 430:29(XXV) (1996 & Supp. 2001).

<sup>206</sup> N.H. REV. STAT. ANN. § 430:1 (1996 & Supp. 2001).

<sup>207</sup> N.H. REV. STAT. ANN. § 430:2 (1996).

<sup>208</sup> N.H. REV. STAT. ANN. § 430:3 (1996).

<sup>209</sup> Up to a dollar amount equal to one tenth of one percent (0.1%) of the tax valuation of the town; otherwise, the work may be conducted under the direction of the DAMF and recovered from the town; *see* N.H. REV. STAT. ANN. § 430:4 (1996).

<sup>210</sup> N.H. REV. STAT. ANN. § 430:5 (1996).

require any landowner where any destructive insect pest or plant disease is present to take reasonable and proper measures toward pest suppression and control.<sup>211</sup>

The state of New Hampshire recognizes the benefits of chemical pesticides<sup>212</sup> in the state's economy when the pesticides are used in a safe, scientific, and proper manner. State pesticide statutes help safeguard public health, welfare, and assets such as soils, waters, forests, wildlife, and other natural resources of the state by insuring proper application of chemical pesticides. State pesticide statutes also provide for scientific measuring and monitoring of pesticide residues in the waters and other natural resources plus accurate records of pesticide use.<sup>213</sup>

The pesticide control board (PCB) has responsibilities that include:

- Establishing policies and goals relative to the sale and use of pesticides
- Holding hearings related to rulemaking as well as hearings for grievances regarding DAMF decisions concerning pesticide permits, certificates of registration, violations, and DAMF administrative penalties and orders;
- Administering federal grants and other funds or gifts;
- Adopting pesticide rules regarding registration, use, annual permits, experimental-use permits, special permits, certification of applicators, restrictions on use or sale, authorized commercial sales establishments, standards for packaging, pesticide samples, labeling requirements, restricted-use pesticides, dealer licensing, administrative appeal procedures, eligibility criteria for applicators, applicator recordkeeping requirements, required financial responsibility, local regulation, coloration, uniformity regarding state and federal statutes, and safe handling, transportation, and disposal;
- Developing and administering state management plans to protect groundwater from restricted-use pesticide contamination; and

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<sup>211</sup> Up to a dollar amount equal to one-half of one percent (0.5%) per year of the assessed valuation of the infested land and buildings and improvements; otherwise, the work may be conducted directly under the DAMF and assessed to the land for collection as ordinary taxes where nonpayment would cause a lien upon said land; *see* N.H. REV. STAT. ANN. § 430:6, 7 (1996).

<sup>212</sup> The term "pesticide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest and any chemical or biological agent or substance or mixture of substances of such agents, intended to control a pest or for use as a plant regulator, defoliant, or desiccant; *see* N.H. REV. STAT. ANN. § 430:29(XXVI) (1996 & Supp. 2001).

<sup>213</sup> N.H. REV. STAT. ANN. § 430:28 (1996).

- Advising the DAMF commissioner regarding the administration and enforcement of pest statutes.<sup>214</sup>

The Division of Pesticide Control (DPC) within the DES administers and enforces pest suppression statutes. The DAMF offers a pesticides training program to provide education assistance to commercial pesticide applicators, pesticide dealers, registrants, producers, sellers, and others except private applicators regarding the PCB administrative rules on pest suppression.<sup>215</sup> Training includes advances in equipment, handling techniques, best management practices (BMPs), and integrated pest management (IPM). Fees may be collected for the training in order to support the training program. The DPC goal is to provide the greatest benefits while posing the least risks to New Hampshire citizens. The DPC prepares an annual report on the training program for review by the legislature and the governor.<sup>216</sup>

## 2. *New Hampshire Pesticide Applicator's Certificate of Registration*

Private applicators of restricted-use pesticides and commercial pesticide (general-use and restricted-use) applicators must possess a valid certificate of registration from DPC. The pesticide control board (PCB) establishes the criteria for eligibility for pesticide use according to the three types of applicators:

- Private applicator;
- Commercial applicator; and
- Commercial applicator for hire.<sup>217</sup>

Eligibility criteria regarding certificates of registration include applicator qualifications, proposed or intended activities, measurement of competency and ability by examination, proof of financial responsibility, maintenance of application records, and renewal procedures of certificate registration.<sup>218</sup> State statute prescribes a twenty dollar (\$20.00) fee for commercial applicators, except governmental or nonprofit entities.

Only commercial applicators and exempted persons may apply pesticides in New Hampshire without a written permit. Pesticide application exemptions include:

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<sup>214</sup> N.H. REV. STAT. ANN. § 430:32 (1996 & Supp. 2001).

<sup>215</sup> N.H. REV. STAT. ANN. § 430:31-b (1996 & Supp. 2001).

<sup>216</sup> N.H. REV. STAT. ANN. § 430:31-b(III) (1996 & Supp. 2001).

<sup>217</sup> N.H. REV. STAT. ANN. § 430:33(I) (1996 & Supp. 2001).

<sup>218</sup> N.H. REV. STAT. ANN. § 430:33(II) (1996 & Supp. 2001).

- Research or experimental work under the direction of the DAMF, USDA, or University of New Hampshire Agriculture Experiment Station, except the requirement mandating pesticide use recordkeeping is not excepted and records must be kept;
- Household use by an occupant as long as any crops raised there are not offered for sale, any restricted-use pesticides are applied according to FIFRA provisions, and no pesticides are allowed to enter any stream or body of water from the application;
- Commercial applicators other than for hire when applying pesticides other than restricted-use pesticides if the manner does not constitute a threat to public health or the environment;
- Janitorial service contractors applying general-use disinfectants, sanitizers, and mildew control agents exclusively labeled for such purposes to nonliving entities provided the application is not applied as a space spray.<sup>219</sup>

The DPC may revoke, suspend, or modify a certificate of registration or a permit after the holder has an opportunity for a hearing if it finds the holder:

- Is no longer qualified;
- Has engaged in fraudulent business practices in the application of pesticides;
- Has made any application in a careless or negligent manner;
- Has violated any state pest provisions, rules, or orders; or
- Has a conviction or is subject to a final order imposing a civil penalty under FIFRA or state pest provisions.<sup>220</sup>

Applications for certificates of registration or permits are submitted to DPC on DPC forms. Fees must accompany the application for proper processing and examination for the commercial or private applicator.<sup>221</sup> Information required for applications include:

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<sup>219</sup> N.H. REV. STAT. ANN. § 430:33(II), :46 (1996 & Supp. 2001).

<sup>220</sup> N.H. REV. STAT. ANN. § 430:33(III) (1996 & Supp. 2001).

<sup>221</sup> N.H. REV. STAT. ANN. § 430:34(III) (1996 & Supp. 2001); fees collected from registration for commercial or private applicators constitutes a special pesticides control fund that may be used to carry out pest provisions including groundwater protection; *see* N.H. REV. STAT. ANN. § 430:34(IV) (1996 & Supp. 2001).

- Name<sup>222</sup> and address<sup>223</sup> of applicant and the in-state agent to accept summons or legal notice if it is different from the applicant;
- Pesticide equipment type and type of application, ground or air, to be used; and
- Any other information prescribed by the DPC.

### 3. *New Hampshire Aerial Pesticide Application*

It is unlawful to make an aerial application of pesticides without prior written approval from the DPC. If the treatment area is within two hundred (200) feet of residential areas or residential, commercial, or institutional buildings, written notice must be submitted in person to all landowners and persons using the area or buildings at least fourteen (14) days in advance of the intended application but not more than sixty (60) days in advance. The notice must contain the following information:

- Adequate treatment area description to inform those in the vicinity;
- Name and address of applicator or an informed contact person including a phone number to call for more specific application information;
- Purpose of the proposed application;
- Pesticides proposed for use;
- Date or range of dates for proposed application;
- DPC phone number and New Hampshire Poison Control Center phone number; and
- Public precautions printed on the pesticide label.<sup>224</sup>

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<sup>222</sup> The full name of each member of a firm or partnership or the names of an association, corporation, or group, and the persons charged with responsibility for the application; *see* N.H. REV. STAT. ANN. § 430:34(II)(b) (1996 & Supp. 2001).

<sup>223</sup> Every address change or place of business change must be immediately reported to DPC; *see* N.H. REV. STAT. ANN. § 430:35(V) (1996).

<sup>224</sup> N.H. REV. STAT. ANN. § 430:34-a(II) (1996 & Supp. 2001).

#### **4. *New Hampshire Pesticide Dealer License***

An annual license must be obtained from the DPC using a DPC form in order to engage in business as a pesticide dealer. Each employee or agent of a pesticide dealer who sells or recommends restricted-use pesticides must obtain a dealer license.<sup>225</sup> The license must be secured for each dealer location or outlet from which pesticides are distributed, sold, held for sale, or offered for sale.<sup>226</sup> An accompanying fee of twenty dollars (\$20.00) must be charged for each license. The information required for the dealer license includes:

- Name<sup>227</sup> and address of applicant and the in-state agent to accept summons or legal notice if it is different from the applicant;
- Principal business address in New Hampshire and elsewhere; and
- Any other information prescribed by the DPC.<sup>228</sup>

Each dealer license is subject to denial, suspension, or revocation after a hearing for any violation of pest provisions.<sup>229</sup>

#### **5. *New Hampshire Pesticide Product Registration***

All pesticides distributed, sold, or offered for sale within the state or delivered for shipment or transported in intrastate commerce between points within the state from any point outside the state must be registered and renewed annually.<sup>230</sup> Registration is not required when a pesticide is shipped in-state from one plant to another plant and used solely as a constituent part to make an other pesticide which is registered or has an experimental use permit or when

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<sup>225</sup> A pesticide dealer is responsible for the acts of those employed by him regarding pesticide sales, solicitations, claims, and recommendations; *see* N.H. REV. STAT. ANN. § 430:35(III) (1996).

<sup>226</sup> N.H. REV. STAT. ANN. § 430:35(I) (1996).

<sup>227</sup> The full name of each member of a firm or partnership or the names of an association, corporation, or group, and the persons charged with responsibility for the application; *see* N.H. REV. STAT. ANN. § 430:34(II)(b) (1996 & Supp. 2001).

<sup>228</sup> A dealer's license is not required for a pesticide applicator who sells pesticides only as an integral part of his pesticide application service and the pesticides are dispensed through application apparatuses, nor is it required for federal, state, or county agency programs; *see* N.H. REV. STAT. ANN. § 430:35(II) (1996).

<sup>229</sup> N.H. REV. STAT. ANN. § 430:35(IV) (1996).

<sup>230</sup> For renewal as a single pesticide, products must have the same formula, have the same label with the same claims and pesticide identity designation, and be manufactured by the same person; otherwise, additional names and labels must be added by supplemental statements during the current period of registration; *see* N.H. REV. STAT. ANN. § 430:36 (1996).

nematodes and beneficial insects are used as biological control agents which are exempt by the U.S. EPA and are under a permit issued by USDA.<sup>231</sup>

Information required for pesticide product registration includes:

- Name and address of the registrant and person whose name will appear on the label if different from the registrant;
- Pesticide name;
- Copy of pesticide label including all claims and directions for use;
- Full description of all tests and results, if requested by DPC, upon which the claims are based as well as the complete formula,<sup>232</sup> and
- Any other information deemed necessary by the DPC.<sup>233</sup>

The registration fee and renewal fee is fifty dollars (\$50.00) for each pesticide product.<sup>234</sup> The DPC must register the pesticide if the composition warrants the proposed claims, it appears that the pesticide would not cause unreasonable adverse effects on the environment, and the registrant complies with all other pest suppression provisions.<sup>235</sup> Although a pesticide may be federally registered, the New Hampshire legislature has given the DPC the authority to refuse to register or suspend or cancel the pesticide registration within the state if the claims are not warranted or the pesticide would cause unreasonable adverse effects on the environment.<sup>236</sup> Pesticides intended solely for export to a foreign country and prepared or packaged according to the purchaser are excluded from pest suppression provisions.<sup>237</sup>

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<sup>231</sup> N.H. REV. STAT. ANN. § 439:37 (1996 & Supp. 2001).

<sup>232</sup> N.H. REV. STAT. ANN. § 430:38(I, IV) (1996 & Supp. 2001).

<sup>233</sup> N.H. REV. STAT. ANN. § 430:38(V) (1996 & Supp. 2001).

<sup>234</sup> N.H. REV. STAT. ANN. § 430:38(III) (1996 & Supp. 2001).

<sup>235</sup> N.H. REV. STAT. ANN. § 430:38(VI) (1996 & Supp. 2001).

<sup>236</sup> Provided the state is certified by the U.S. EPA to register pesticides to meet special local needs pursuant to section 24(c) of FIFRA and a special local need exists; *see* N.H. REV. STAT. ANN. §§ 430:38(VII), :39 (1996 & Supp. 2001).

<sup>237</sup> N.H. REV. STAT. ANN. § 430:38(VIII) (1996 & Supp. 2001).

## 6. *New Hampshire Pesticide Experimental-Use Permits*

Provided the state is authorized by the U.S. EPA, the DPC may:

- Issue experimental use permits in New Hampshire for pesticides when applicant needs the permit in order to accumulate information necessary to register a pesticide for special local needs;
- Refuse to issue an experimental-use permit if it determines that a permit is not warranted or that the proposed terms and conditions may cause unreasonable adverse effects on the environment;
- Prescribe terms, conditions, and a period of time for the experimental-use permit to be under DPC supervision; or
- Revoke or modify any experimental use permit if it is found that the permit terms or conditions are being violated or that terms or conditions are inadequate to avoid adverse unreasonable effects on the environment.<sup>238</sup>

## 7. *New Hampshire Pesticide Prohibitions*

It is unlawful in New Hampshire to distribute, sell, offer for sale, or deliver for transportation or transport in intrastate commerce between points within the state or through any point outside the state:

- Any unregistered pesticide;
- Any pesticide having composition, claims, or directions for use that differ in substance from the representation of its registration unless the DPC has allowed the labeling change within the registration period without requiring re-registration of the product;
- Any pesticide not in the registrant's or manufacturer's unbroken immediate container labeled bearing:
  - The name and address of the manufacturer, registrant, or person for whom it was manufactured;
  - The name, brand, or trademark under which the pesticide is sold;
  - The net weight or measure of contents; and

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<sup>238</sup> N.H. REV. STAT. ANN. § 430:40 (1996).

- A skull and crossbones with the word “poison” prominently in red against a distinct contrasting color and a statement of antidote if the substance is toxic to man;
- Pesticides that are white powders<sup>239</sup> that have not been distinctly colored as required unless the DPC has exempted them; and
- Any adulterated or misbranded pesticide.<sup>240</sup>

It is also unlawful to:

- Detach, alter, deface, or destroy any label or to add to or remove from a pesticide any substance that would defeat its purpose;
- Use for one’s advantage or to reveal to unqualified persons any information relating to formulas of pesticide products acquired by a position of authority;
- Handle, transport, store, display, or distribute pesticides so as to endanger man or his environment or to endanger food, feed, or any other products that may be transported, stored, displayed, or distributed with such pesticides; and
- Dispose, discard, or store any pesticides or pesticide containers in a manner that would cause injury to humans, vegetation, crops, livestock, wildlife, pollinating insects or pollute any water supply or waterway.<sup>241</sup>

The DPC has authority to issue administrative orders to cease and desist for violation of any provision or related rule, permit, or certificate of registration. Orders are effective immediately and require compliance. Any person so ordered may appeal the order to the PCB.

The DPC reviews whether pesticide products comply with registration requirements. The DPC holds hearings concerning the issuance of its pesticide permits and certificates of registration and enforces those issued. When it is believed that a pesticide or a pesticide device is being distributed unlawfully or is in violation of any provision or rules, the DPC may issue a “stop sale, use, or removal” order upon the owner or custodian of the pesticide or device. Once this order is imposed, the pesticide or device must not be sold, used, or removed until compliance is restored and the pesticide or device has been released by the DPC or otherwise disposed by a court of competent jurisdiction. The DPC has authority to seize for forfeiture any pesticide that is

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<sup>239</sup> Such as lead arsenate, basic lead arsenate, calcium arsenate, magnesium arsenate, zinc arsenate, zinc arsenite, sodium fluoride, sodium fluosilicate, or barium fluosilicate; *see* N.H. REV. STAT. ANN. § 430:41(I)(d) (1996).

<sup>240</sup> N.H. REV. STAT. ANN. § 430:41(I) (1996).

<sup>241</sup> N.H. REV. STAT. ANN. § 430:41 (1996).

distributed, sold, or offered for sale in New Hampshire if it is adulterated or misbranded, not registered, or fails to bear the proper information on its label. The DPC has authority to impose administrative fines upon a violator in the enforcement of pest suppression statutes.<sup>242</sup>

The DPC or its agent has authority to enter upon any premises at reasonable times for the purpose of determining compliance with pest suppression statutes and related rules, permits, certificates of registration, and orders to:

- Obtain samples and inspect property, surrounding areas, aircraft, ground equipment, crops, animals, pesticide storage, distribution, sales, or disposal buildings, and related records; and
- Issue and seize pesticides.<sup>243</sup>

Any person aggrieved by any order or decision of the DPC may appeal to the PCB for a review of such order or decision. The PCB may affirm, deny, or modify the DPC order. Rehearings from any decision must follow the Administrative Procedures Act.<sup>244</sup>

### ***8. New Hampshire Pesticide Penalties***

It is a criminal misdemeanor violation if committed by a natural person and a felony violation for:

- Any other person who violates any pest suppression statutes or related rules or orders;
- Any other person who falsifies any required records; or
- Any other person who obtains a pesticide certification or pesticide permit on the basis of a misrepresentation of a material fact.

Besides criminal charges, violators are susceptible to the imposition of a civil forfeiture up to five thousand dollars (\$5,000.00) for each violation and each day of violation collected in connection with an action for injunctive relief or by a civil action brought by the attorney general. Additionally, an administrative fine may be imposed by the DPC up to one thousand dollars (\$1,000.00) for each violation.<sup>245</sup>

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<sup>242</sup> N.H. REV. STAT. ANN. § 430:42 (1996).

<sup>243</sup> N.H. REV. STAT. ANN. § 430:43 (1996 & Supp. 2001).

<sup>244</sup> N.H. REV. STAT. ANN. § 541-A: 10 to 41 (1996).

<sup>245</sup> N.H. REV. STAT. ANN. § 430:45 (1996).

The DPC is authorized and empowered to cooperate with and enter into agreements with any other agency of the state as well as the U.S. EPA and any other state's agency for the purpose of carrying out the pest suppression statutes and securing uniformity of rules.<sup>246</sup>

### **9. *New Hampshire Integrated Pest Management Program***

The state of New Hampshire through the DAMF administers an Integrated Pest Management Program (IPMP). The purpose of this program is to bring about the broadest possible application of principles of integrated pest management to areas where economic poisons are employed. Some of these areas include agriculture, horticulture, arboriculture, landscape, and building maintenance. Wherever possible, the DAMF works cooperatively with the New Hampshire Agricultural Experiment Station, Cooperative Extension, College of Life Sciences and Agriculture, other educational institutions in related disciplines, commodity and trade organizations, conservation groups, other governmental agencies, and private individuals and corporations. Support for this program comes from a ten percent (10%) allocation of the pesticide registration fees collected. Each year the DAMF reports to the legislature on the program as to the work accomplished, funds used, and effectiveness achieved to broaden the program statewide.<sup>247</sup>

The state recognizes the adverse environmental and economic effects of invasive plant, insect, and fungal species<sup>248</sup> upon the state and its need to:

- Promote research and educational activities;
- Achieve the best possible protection for agricultural, forest, wildlife, and other natural resources and for human health; and
- Prevent and control their spread in the state.<sup>249</sup>

With regard to the IPMP, the DAMF has a duty to:

- Conduct research and educational activities and solicit support from other governmental agencies to carry out these activities which address the environmental and economic effects of invasive species;

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<sup>246</sup> N.H. REV. STAT. ANN. § 430:47 (1996).

<sup>247</sup> N.H. REV. STAT. ANN. § 430:50 (Supp. 2001).

<sup>248</sup> The term “invasive species” means an alien species whose introduction causes or is likely to cause economic or environmental harm or harm to human health; the term “alien species” means with respect to a particular ecosystem, any species including its seeds, eggs, spores, or other biological material capable of propagating or reproducing that species that is not native to that ecosystem; *see* N.H. REV. STAT. ANN. § § 430:52(I, VII) (Supp. 2001).

<sup>249</sup> N.H. REV. STAT. ANN. § 430:51 (Supp. 2001).

- Disseminate information regarding the control of invasive species:
- Prepare and publish an annual list of invasive species that present an immediate danger after consulting with the invasive species committee,<sup>250</sup>
- Prohibit the collection, possession, importation, transportation, sale, propagation, transplantation, or cultivation of any invasive species listed on the New Hampshire prohibited invasive species list;
- Prepare and publish an annual list of invasive species where the potential may be reduced or eliminated by cultural or biological practices called the New Hampshire restricted invasive species list; and
- Apply for and accept grants, gifts, bequests, and donations which support the IPMP.<sup>251</sup>

The DAMF has authority to adopt correspondent rules to carry out the provisions of the IPMP statutes. The DAMF also has authority to access any place, building, or vehicle at reasonable hours where prohibited species may harbor. The DAMF has authority to administer and enforce the IPMP statutes and related rules and may prosecute violators.<sup>252</sup> Upon the determination of any violation, the DAMF must send notice of the violation along with the DAMF findings to the alleged violator and provide an opportunity for a hearing on the matter.<sup>253</sup>

A violator is subject to criminal misdemeanor charges for first and subsequent offenses if the violator is an individual and felony charges for subsequent offenses if the violator is other than an individual. Civil penalties may be imposed as fines up to five thousand dollars (\$5,000.00) for each violation and each day of violation. Administrative fines may also be imposed upon the violator by the DAMF up to one thousand dollars (\$1,000.00) for each violation.<sup>254</sup>

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<sup>250</sup> The invasive species committee consists of three (3) persons appointed by the governor to represent interests in horticulture, the environment, and the general public plus the state entomologist, the commissioners or designee of environmental services, resources and economic development, and transportation plus the executive director of fish and game and the dean of the University of New Hampshire College of Life Sciences and Agriculture; the committee advises the DAMF on invasive species matters; *see* N.H. REV. STAT. ANN. § 430:54 (Supp. 2001).

<sup>251</sup> N.H. REV. STAT. ANN. § 430:53 (Supp. 2001).

<sup>252</sup> N.H. REV. STAT. ANN. § 430:55 (Supp. 2001).

<sup>253</sup> N.H. REV. STAT. ANN. § 430:56 (Supp. 2001).

<sup>254</sup> N.H. REV. STAT. ANN. § 430:57 (Supp. 2001).

## VI. PROTECTION OF WILDLIFE

**Producer Note:** Agricultural producers have responsibilities concerning wildlife and migratory birds which may have habitat on the producer's property. Federal and state laws contain measures designed to protect or enhance wildlife as well as wildlife habitat.

### A. New Hampshire Wildlife Protection Laws

**Producer Note:** Many states have laws and regulations that either enhance the protections under federal laws or address issues peculiar to wildlife found within the state. States also may address frequent problems caused by wildlife. New Hampshire has laws protecting wildlife.

#### 1. *New Hampshire Wildlife Protection*

Under the Endangered Species Conservation Act (ESCA),<sup>255</sup> the New Hampshire legislature recognizes that:

- Any of the state's wildlife species which normally occur in the state but may be in jeopardy as to their existence should be accorded the protection necessary to maintain and enhance their numbers;
- The state should assist in the protection of species of wildlife determined to be threatened<sup>256</sup> or endangered<sup>257</sup> elsewhere by prohibiting the taking, possession, transportation, or sale of endangered species and carefully regulating these same activities with regard to the threatened species.<sup>258</sup>

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<sup>255</sup> N.H. REV. STAT. ANN. § 212-A:1 to 15 (1995).

<sup>256</sup> The term "threatened species" means any species of wildlife which within the foreseeable future appears likely to become endangered; the term also includes any species of wildlife determined to be a threatened species under the U.S. Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (2000); *see* N.H. REV. STAT. ANN. § 212-A:2(V) (1995).

<sup>257</sup> The term "endangered species" means any species of native wildlife whose continued existence as a viable component of the state's wild fauna is determined to be in jeopardy and includes any species of wildlife determined to be in jeopardy and includes any species of wildlife determined to be an endangered species pursuant to the U.S. Endangered Species Act; *see* N.H. REV. STAT. ANN. § 212-A:(IV) (1995).

<sup>258</sup> Exceptions to taking, possession, transportation, or sale activities may be excepted when such activities are part of an effort to enhance the species conservation; *see* N.H. REV. STAT. ANN. § 212-A:3 (1995).

The Department of Fish and Game (DFG) within the DES promulgates, administers, and enforces the rules related to the ESCA provisions.<sup>259</sup> These rules also establish limitations on taking, possession, transportation, or sale in order to conserve the threatened or endangered species. It is unlawful to violate a limitation rule. The DFG has a duty to conduct ongoing investigations on wildlife species and develop information relating to their population, distribution, habitat needs, limiting factors, and other biological and ecological data in order to assist in determining conservation measures that are necessary for the wildlife species to sustain themselves successfully. From these investigations, the DFG then designs and adjusts programs to insure the wildlife species perpetuate themselves successfully. The DFG has authority along with the DSS to adopt and enforce temporary boat traffic restriction rules on waters of the state to protect a threatened or endangered wildlife species in its early stages of life.<sup>260</sup>

The ESCA recognizes all endangered and threatened species under the federal Endangered Species Act (ESA)<sup>261</sup> definitions. The ESCA allows the DFG to designate a federal threatened species as a state endangered species and to designate other wildlife species as endangered or threatened based on the following factors:

- Present or threatened destruction, modification, or curtailment of its habitat or range;
- Overutilization for commercial, sporting, scientific, education, or other purposes;<sup>262</sup>
- Disease or predation; and
- Other natural or man-made factors affecting its continued existence<sup>263</sup> within the state.<sup>264</sup>

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<sup>259</sup> N.H. REV. STAT. ANN. § 212-A:4 (1995).

<sup>260</sup> N.H. REV. STAT. ANN. § 212-A:5 (1995).

<sup>261</sup> 16 U.S.C. § 1531 *et seq.* (2000).

<sup>262</sup> Provided the legislature ratifies the DFG action within two (2) years when the utilization is for commercial and sporting purposes; *see* N.H. REV. STAT. ANN. §§ 212-A:6(I, II) (1995).

<sup>263</sup> However, no species is determined as endangered or threatened based solely on rarity of the species; *see* N.H. REV. STAT. ANN. § 212-A(II)(d) (1995).

<sup>264</sup> N.H. REV. STAT. ANN. § 212-A:6(II) The DFG must use the best scientific, commercial, and other data available to make these determinations and only after consultation with other interested federal and state agencies, organizations, and persons; the DFG may not add or remove a species from a published list except to move a threatened species to an endangered species unless (1) the governors of bordering states are first notified or in an emergency the DFG may publish public notice including supporting facts for the action and (2) considered other governmental actions or imminent actions which may affect the species ; *see* N.H. REV. STAT. ANN. § 212-A:6(III) (1995).

The DFG is responsible for preparing the state's endangered and threatened species lists that show both the scientific and common names of each and the portion of its range that is threatened with extinction. The DFG must review any substantial evidence presented that reveals a species should be removed or added to the state lists. The DFG provides public notice of its review.<sup>265</sup>

Regarding any endangered or threatened species, it is unlawful to:

- Export such species from this state;
- Take such species within this state:
- Possess, process, sell, or offer for sale, deliver, carry, transport, or ship such species; and
- Violate any rule related to ESCA provisions.<sup>266</sup>

The DFG establishes conservation programs, including the acquisition of land or aquatic habitat, for the conservation of endangered or threatened species. Where appropriate the DFG consults with other states having a common interest and enters agreements for administration and management of wildlife endangered or threatened. The DFG may utilize all its authority in carrying out the ESCA. The state expects all state agencies to cooperate with the DFG in its conservation and preservation efforts.<sup>267</sup>

Penalties for ESCA and related rule and DFG permit violations include criminal criminal misdemeanor charges.<sup>268</sup>

Any equipment, merchandise, wildlife, or records seized in the enforcement of the ESCA is held by the DFG until a court issues its disposition. A violator must forfeit seized property to the state. The costs of any transfer of seized wildlife to a qualified zoological, educational, or scientific institution for safekeeping are assessed to the violator.<sup>269</sup> Wildlife which is unlawfully imported into the U.S. or unlawfully taken and removed from another state is prohibited in New

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<sup>265</sup> N.H. REV. STAT. ANN. § 212-A:6(IV) (1995).

<sup>266</sup> The DFG may allow by issuance of a permit acts otherwise prohibited for scientific or propagation or survival purposes; *see* N.H. REV. STAT. ANN. § 212-A:7 (1995).

<sup>267</sup> N.H. REV. STAT. ANN. § 212-A:9 (1995).

<sup>268</sup> N.H. REV. STAT. ANN. § 212-A:10 (1995).

<sup>269</sup> N.H. REV. STAT. ANN. § 212-A:11 (1995).

Hampshire.<sup>270</sup> This provision, however, does not apply to marine or estuarine species of wildlife.<sup>271</sup>

The ESCA provisions and related rules are not to cause undue interference with normal agricultural and silvicultural practices, nor are they to interfere with the siting or construction of any bulk power supply facility or any energy facility.<sup>272</sup>

The DFG must publish or disseminate well in advance of any action any scientific data to organizations representing farmers and other landowners whose land includes habitat used by an endangered or threatened species when the DFG determines that DFG action is contemplated to preserve such species.<sup>273</sup>

In carrying out the ESCA and related rules, the DFG uses no funds from license fees of hunters, fishermen, or trappers or taxes on the sale of equipment of the same unless the species has been hunted within the previous five (5) year period except for authorized expenditures from the fish and game fund.<sup>274</sup>

## **2. *New Hampshire Nongame Species Management Act***

In New Hampshire, the Nongame Species Management Act (NSMA)<sup>275</sup> was enacted to maintain and manage the state's wildlife resources that include more than three hundred (300) vertebrate species which normally breed in the state and an additional one hundred twenty (120) bird species which occur as transients, migrants, or wintering populations. Of these species, about sixty (60) are furbearers, game birds, mammals, or sport fish. The state recognizes these species as an invaluable natural resource with ecological, scientific, educational, historical, recreational, economic, and aesthetic values to the state.<sup>276</sup> The term "nongame species" means any member of any nondomesticated species of the animal kingdom including any mammal, fish, bird, amphibian, reptile, mollusk, arthropod or other invertebrate plus any of its products, eggs, offspring, or its dead body or parts of its dead body.<sup>277</sup>

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<sup>270</sup> N.H. REV. STAT. ANN. § 212-A:12 (1995).

<sup>271</sup> N.H. REV. STAT. ANN. § 212-A:13(I) (1995).

<sup>272</sup> N.H. REV. STAT. ANN. § 212-A:13(II, III) (1995).

<sup>273</sup> N.H. REV. STAT. ANN. § 212-A:14 (1995).

<sup>274</sup> N.H. REV. STAT. ANN. § 212-A:15 (1995).

<sup>275</sup> N.H. REV. STAT. ANN. § 212-A:1 (1995).

<sup>276</sup> N.H. REV. STAT. ANN. § 212-A:2 (1995).

<sup>277</sup> Except furbearers: beaver, otter, marten, sable, mink fisher or fisher cat, raccoon, bobcat, fox, weasel, skunk, and muskrat; game animals: moose, bear, caribou, elk, deer, wild rabbit, hare, and gray squirrel; game birds: ruffed grouse or partridge, spruce grouse or spruce partridge, pheasant, quail, European partridge, chukar partridge, and turkeys; small

The DFG has authority to adopt rules related to the taking, possession, and handling of nongame species as well as the enhancement, protection, and propagation of nongame species.<sup>278</sup> The executive director of the DFG has a duty to develop and implement a comprehensive nongame species management program. Although the management program is not specified or restricted, the program may include:

- Public education regarding the nongame resources;
- Research to determine the populations, distribution, future trends, and needs of nongame populations; and
- Management measures to maintain and promote the health of self-sustaining nongame populations.<sup>279</sup>

Other types of programs that DFG may establish include programs for acquisition of land or aquatic habitat and related interests that are determined to be necessary for the conservation of nongame species.<sup>280</sup> Where it is appropriate, the DFG may consult with other states with similar interests and enter agreements with governmental agencies, other states, political subdivisions of New Hampshire, private individuals, organizations, and corporations in the effort to conserve nongame species.<sup>281</sup>

The state has a fund known as the nongame species account which must be used exclusively for the development and management of the nongame species management program. Federal monies, state appropriations, and donations primarily capitalize the account. However, no other monies may be used for nongame management. The state may match donations by individuals each year up to fifty thousand dollars (\$50,000.00).<sup>282</sup>

### **3. *New Hampshire's Salmon Compact***

Together with Massachusetts, Connecticut, and Vermont, the state of New Hampshire joins the U.S. Fish and Wildlife Service and the National Marine Fisheries Service in the

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game, not previously listed above include: wild rabbit and migratory birds subject to federal regulations; unprotected birds: English sparrows, European starlings and the common feral pigeon commonly known as the rock dove, and Columba live; fish: Cyclostomata, elasmobranchii, and pisces; and marine species regulated by DFG rules that address the taking, inspection, and processing of marine species; *see* N.H. REV. STAT. ANN. § 212-B:3 (1995).

<sup>278</sup> N.H. REV. STAT. ANN. § 212-B:4 (1995).

<sup>279</sup> N.H. REV. STAT. ANN. § 212-B:5(I) (1995).

<sup>280</sup> N.H. REV. STAT. ANN. § 212-B:5(II) (1995).

<sup>281</sup> N.H. REV. STAT. ANN. § 212-B:5(III) (1995).

<sup>282</sup> N.H. REV. STAT. ANN. § 212-B:6 (1995).

Connecticut River Atlantic Salmon Compact (CRASC). The CRASC promotes the restoration of anadromous Atlantic salmon in numbers as near as possible to their historical abundance by studying and ascertaining proper methods, practices, circumstances, and conditions for Atlantic salmon. Stocking programs, management procedures, and research are also targeted. The CRASC established regulations regarding fishing times, seasons, methods, and limits such as size and number. The regulations governing Atlantic Salmon fishing may vary by river section. The CRASC is responsible for establishing overall guidelines for the issuance of fishing licenses that each state individually process.<sup>283</sup>

## VIII. OTHER NEW HAMPSHIRE STATUTES AFFECTING AGRICULTURE

**Producer Note:** Many other state statutes have the potential of impacting agricultural operations and their relationship to the environment. The following is a brief discussion of some of these state laws in New Hampshire.

### A. New Hampshire Right to Farm

No agricultural operation in New Hampshire can lawfully be found or determined to be a public or private nuisance as a result of changed conditions in or around the locality of the agricultural operation if:

- Agricultural operation has been in operation for one year or more and
- Agricultural operation was not a nuisance at the time it began operation.<sup>284</sup>

Agricultural operations cannot be found to be negligent or improper when they conform to federal, state and local laws, rules, and regulations.<sup>285</sup> The protection provided by the right to farm statutes do not apply if a nuisance results from the negligent or improper operation of an agricultural operation. The term "agricultural operation" when used in relation to right to farm legislation means any farm or agricultural or farming activity.<sup>286</sup>

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<sup>283</sup> N.H. REV. STAT. ANN. § 213-A:1 (1995).

<sup>284</sup> Unless the agricultural operation is determined to be injurious to public health or safety under health officers of towns according to the local regulations for the prevention and removal of nuisances; *see* N.H. REV. STAT. ANN. § 432:33 (1995).

<sup>285</sup> N.H. REV. STAT. ANN. § 432:34 (1995).

<sup>286</sup> The word "farm" means any land, buildings, or structures on or in which agriculture and farming activities are conducted and include residences of owners, occupants, or employees; buildings or structures include those used in the care of livestock and in the production and storage of fruit, vegetables, or nursery stock; maple syrup; annual or perennial plants; as well as others. The word "agriculture" means all operations of a farm, including cultivation, conservation, and tillage of the soil; use of and spreading of commercial fertilizer, lime, wood ash, sawdust, compost, animal manure, septage, and other lawful soil amendments; use of and application of agricultural chemicals; raising and sale of livestock

## B. New Hampshire Land Preservation

The state of New Hampshire recognizes the importance of its farmlands and other lands such as scenic and historic landscapes, open space, and wildlife habitat. Through a program referred to as agricultural preservation, the state allows a landowner to sell one of the rights in the “bundle of rights”<sup>287</sup> that is associated with land ownership. This right is the right to develop or improve agricultural land to a higher use. This use is often developed for commercial or residential use. This right is called the agricultural development right. The state allows the agricultural development right to be severed from the other land ownership rights in the “bundle of rights” which causes or results in a restriction of any development on the land or, in other words, preserves the agricultural land.<sup>288</sup> Restriction of development or agricultural preservation means a restraint is placed on the development rights of agricultural land. The restriction may be stated in the form of a restriction, easement, covenant, or condition in any deed, will, or other legal instrument executed by or on behalf of landowner. The restriction can limit construction or placement of buildings except those used for agricultural purposes or for dwellings of the landowner, his immediate family or employees. The restriction can also limit any excavation, dredging, or removal of loam, sod, peat, gravel, soil, rock, or other mineral substance in such a manner that would adversely affect the land's future agricultural potential or any other acts or uses detrimental to the land for agricultural use.<sup>289</sup>

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such as dairy cows and the production of milk, beef animals, swine, sheep, goats, as well as domesticated strains of buffalo or bison, llamas, alpacas, emus, ostriches, yaks, elk (*Cervus elephus canadensis*), fallow deer (*Dama dama*), red deer (*Cervus elephus*), and reindeer (*Rangifer tarandus*); breeding, boarding, raising, training, riding instruction, and selling of equines; commercial raising, harvesting, and sale of fresh water fish or other aquaculture products; raising, breeding, or sale of poultry or game birds; raising of bees; raising, breeding, or sale of domesticated strains of fur-bearing animals; production of greenhouse crops; production, cultivation, growing, harvesting, and sale of any agricultural, floricultural, forestry, or horticultural including berries, herbs, honey, maple syrup, fruit, vegetables, tree fruit, flowers, seeds, grasses, nursery stock, sod, trees and tree products, Christmas trees grown as part of a commercial Christmas tree operation, trees grown for short rotation tree fiber, or other plants legally grown and harvested extensively for profit or subsistence; preparation of products or materials from the farm for market, delivery to storage, or to market, or to carriers for transportation; transportation of supplies and materials to the farm; transportation of farm workers; forestry or lumbering operations; marketing or selling products from the farm, wholesale or retail, on-site and off-site; irrigation of growing crops; farm roadside stands when at least thirty-five (35) percent of the product sales in dollar volume is attributable to farm products by the stand owner; and other farm related practices and technologies recommended from time to time by the university of New Hampshire cooperative extension, the New Hampshire department of agriculture, markets, and food, and appropriate agencies of the United States Department of Agriculture; *see* N.H. REV. STAT. ANN. § 432:32 (1995).

<sup>287</sup> The “bundle of rights” may also be referred to as the fee simple right.

<sup>288</sup> N.H. REV. STAT. ANN. § 432:18(I) (1995 & Supp.2001).

<sup>289</sup> The term “agricultural use” means use of land for agriculture, farming, dairying, pasturage, horticulture, floriculture, or animal or poultry husbandry; *see* N.H. REV. STAT. ANN. § 432:18(II, III) (1995 & Supp. 2001).

The agricultural lands preservation committee (ALPC) evaluates and accepts or rejects sites<sup>290</sup> proposed by a landowner for the agricultural preservation program.<sup>291</sup> The ALPC evaluates:

- The degree to which the acquisition would serve to preserve the agricultural potential of the state;
- The suitability of land as to soil classification and other criteria for agricultural use; and
- The difference in the fair market value of such land if it were developed<sup>292</sup> and the fair market value of such land when used for agricultural purposes.<sup>293</sup>

The ALPC also establishes and adopts the criteria and procedures to define and classify agricultural lands and associated land rights, particularly the agricultural land development rights including the release of a site from agricultural preservation restrictions.

The acquisition of agricultural land development rights is conducted only on a voluntary basis with the landowner. Proposed sites for agricultural preservation restriction area must be submitted by the landowner for approval. The agricultural landowner is paid an amount that represents the difference between the land's fair market value at its highest and best developed use and the land's fair market value at agricultural land use. The development rights purchased are held in the name of the state.<sup>294</sup> The rights acquired must not be sold or otherwise conveyed to a third party without consent of the landowner. The rights acquired also do not grant the public any right of access or right of use of the affected property. The ALPC reviews each land site subject to agricultural preservation restriction not less than once every two (2) years to assure that its use complies with state law and the ALPC rules. The ALPC may delegate responsibility for monitoring of the agricultural preservation restriction to the conservation commission in the municipality where the land is located or to the conservation district in which the land is situated. A report of inspection must be submitted to the ALPC after the agricultural land is reviewed.<sup>295</sup> The ALPC or representatives may enter upon the land at reasonable times to assure compliance

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<sup>290</sup> Site means a specific land area for agricultural purposes in which agricultural land development rights are acquired in order to preserve land suitable for agricultural production; *see* N.H. REV. STAT. ANN. § 432:18(IX) (1995 & Supp. 2001).

<sup>291</sup> N.H. REV. STAT. ANN. § 432:18(V) (1995 & Supp.2001).

<sup>292</sup> As determined by an independent appraisal.

<sup>293</sup> N.H. REV. STAT. ANN. § 432:20 (1995 & Supp. 2001).

<sup>294</sup> Development rights of agricultural lands may be acquired by any governmental body or charitable corporation or trust which has the authority to acquire interests in land; *see* N.H. REV. STAT. ANN. § 432:22(I) (1995).

<sup>295</sup> N.H. REV. STAT. ANN. § 432:22 (1995).

with the development restriction. The restrictions imposed upon the land arising from the acquisition of the development rights may be enforced by the court through injunctions or other proceedings.<sup>296</sup>

The development restrictions are reversible. The restrictions may be released, in whole or in part, by payment to the holder for an amount determined by entity, the governmental body or charitable corporation or trust that purchased the development rights. Prior to release of restriction by a governmental body, a public notice is provided, and a public hearing is held in the municipality in which the agricultural land is located.

Although agricultural preservation restrictions are created to exist in perpetuity, the restrictions may also be released by the ALPC if the site is no longer suitable for agricultural purposes. In these situations, the landowner of an agricultural preservation site must request ALPC approval to release the restriction for the public good. Prior to the release of the agricultural land development rights, a public hearing must be conducted. Development rights of agricultural land purchased with public funds may only be released upon repayment by the landowner of a reasonable value which must not be less than the amount originally paid for the restriction.<sup>297</sup>

Purchase of the developmental rights or a subsequent release of the preservation restrictions on agricultural land must be recorded in the appropriate registry of deeds. Recording costs are paid by the affected landowner.<sup>298</sup>

Public utility companies may obtain easements by eminent domain on sites designated agricultural preservation restriction areas for the purpose of utility services provided, however, the utility:

- Gives thorough consideration to alternative areas before such land is taken;
- Guarantees the minimum practicable interference with agricultural operations with respect to width of the easement, pole locations and other pertinent matters;
- Obtains all necessary licenses, permits, approvals, and other authorizations from the appropriate government agencies; and
- Compensates the landowner in the same manner and at the same fair market value as if the land were not designated as an agricultural preservation site.<sup>299</sup>

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<sup>296</sup> N.H. REV. STAT. ANN. § 432:23 (1995 & Supp. 2001).

<sup>297</sup> N.H. REV. STAT. ANN. § 432:24 (1995).

<sup>298</sup> N.H. REV. STAT. ANN. § 432:27 (1995).

<sup>299</sup> N.H. REV. STAT. ANN. § 432:29 (1995).

The ALPC may use federal funds and use or dispose of money, services, and property received from contributions and gifts for agricultural land preservation purposes.<sup>300</sup> The governor and ALPC must approve the purchase of any agricultural land preservation restrictions or development rights in the name of the state of New Hampshire or their release.

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<sup>300</sup> N.H. REV. STAT. ANN. § 432:31 (1995).

## Appendix A - Agencies

**Producer Note:** State and federal agencies are available to answer questions regarding environmental matters and a producer's compliance with environmental laws and regulations. The following is a list of agencies which should be able to answer questions or provide materials for a producer.

### State Agencies:

#### Attorney General's Office

33 Capitol Street  
Concord, NH 03301  
(603) 271-3658  
(603) 271-2110 fax  
<http://webster.state.nh.us/nhdoj/>

#### Department of Agriculture, Markets, and Food

P. O. Box 2042  
Concord, NH 03302 or  
25 Capitol Street, 2nd Floor  
Concord, NH 03301  
(603) 271-3551  
(603) 271-1109 fax  
<http://www.state.nh.us/agric/>

4 Divisions within DAMF

1. Division of Agricultural Development
2. Division of Animal Industry
3. Division of Pesticide Control
4. Division of Plant Industry

#### Department of Environmental Services (DES)

6 Hazen Drive  
P. O. Box 95  
Concord, NH 03301  
(603) 271-3503  
(603) 271-1381 fax  
<http://www.des.state.nh.us/>

3 Divisions within DES

##### 1. Air Resources Division

(603) 271-1370 or  
(800) 498-6868 toll free  
(603) 271-1381 fax  
<http://www.des.state.nh.us/ard/>

##### 2. Waste Management Division

(603) 271-2900 or

(800) 273-9469 toll free  
(603) 271-2456 fax  
<http://www.des.state.nh.us/waste/>

#### 3. Water Resources Division

(603) 271-3503  
(603) 271-2982 fax  
<http://www.des.state.nh.us/water/>

Wetlands Bureau

P. O. Box 95  
Concord NH 03302  
(603) 271-2147  
(603) 271-6588  
<http://www.des.state.nh.us/wetlands/>

#### Department of Resources and Economic Development (DRED)

172 Pembroke Street  
Concorde, NH 03301  
(603) 271-2411  
(603) 271-2629 fax  
<http://www.dred.state.nh.us/>

5 Divisions within DRED

##### 1. Division of Forests and Lands

(603) 271-2214  
(603) 271-6488 fax  
<http://www.nhdf.com/>

##### 2. Division of Parks and Recreation

(603) 271-3556  
(603) 271-2629 fax  
<http://www.nhparks.state.nh.us/>

##### 3. Division of Economic Development

(603) 271-2341  
(603) 271-6784 fax  
<http://www.nheconomy.com/>

**4. Division of Travel and Tourism**

Development

(800) FUN-IN-NH, (800-386-4664)

(603) 271-6870 fax

<http://www.visitnh.gov/>

**5. Division of Development and Maintenance**

**Section**

(603) 271-2606

(603) 271-2629 fax

<http://www.dred.state.nh.us/ddm/>

**Department of Safety**

James H. Hayes Safety Building

10 Hazen Drive

Concord, NH 03305

(603) 271-2575 or

(800) 852-3411 toll free

(603) 271-2527 fax

<http://webster.state.nh.us/safety/>

**Fish and Game Department**

2 Hazen Drive

Concord, New Hampshire 03301

(603) 271-3211

(603) 271-1438 fax

<http://wildlife.state.nh.us/>