


STATE OF NEW HAMPSHIRE
Inter-Department Communication

DATE: July 1, 2008

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

SUBJECT: Stormwater Discharges and Transfers of Surface Waters

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

QUESTIONS PRESENTED

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

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

SHORT ANSWERS

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

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

ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

- water-carried waste products from buildings, public or private, together with such groundwater infiltration and surface water as may be present (definition of sewage);
- industrial waste (definition of waste);
- garbage, municipal refuse, decayed wood, sawdust, shavings, bark, lime, ashes, offal, oil, tar, chemicals and other substances other than sewage or industrial wastes, and any other substance harmful to human, animal, fish or aquatic life (definition of other wastes³);
- dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water (definition of pollutant).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (a) water-carried waste products from buildings, public or private, together with such groundwater infiltration and surface water as may be present (definition of sewage);
- (b) industrial waste (definition of waste);
- (c) garbage, municipal refuse, decayed wood, sawdust, shavings, bark, lime, ashes, offal, oil, tar, chemicals and other substances other than sewage or industrial wastes, and any other substance harmful to human, animal, fish or aquatic life (definition of other wastes⁷);
- (d) dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water (definition of pollutant).

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

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

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

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

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

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

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

CONCLUSION

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

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

cc: Harry Stewart
Gretchen Hamel

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

RSA 485-A:8 (emphasis added):

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

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

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

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

Other wastes means garbage, municipal refuse, decayed wood, sawdust, shavings, bark, lime, ashes, offal, oil, tar, chemicals and other substances other than sewage or industrial wastes, and any other substance harmful to human, animal, fish or aquatic life. RSA 485-A:2, VIII.

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

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

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

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

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

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

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

PART Env-Wq 1708 ANTIDEGRADATION

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

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

Env-Wq 1708.02 Applicability. Antidegradation shall apply to:

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

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

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

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

Env-Wq 1708.04 Protection of Existing Uses.

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

Env-Wq 1708.05 Protection of Water Quality in ORW.

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

Env-Wq 1708.06 Protection of Class A Waters.

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

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

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

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

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

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

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

Env-Wq 1708.08 Assessing Waterbodies.

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

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

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

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

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

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

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

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

Env-Wq 1708.09 Significant or Insignificant Determination.

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

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

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

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

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

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

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

Env-Wq 1708.10 Demonstration of Economic or Social Development.

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

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

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

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

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

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

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

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

Env-Wq 1708.11 Public Participation and Intergovernmental Coordination.

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

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

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

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

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

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

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

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

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

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

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