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NEW HAMPSHIRE REVISED STATUTES ANNOTATED
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*** STATUTES CURRENT THROUGH CHAPTER 381 OF THE 2007 SESSION ***
*** ANNOTATIONS CURRENT THROUGH CASES DECIDED AUGUST 17, 2007 ***

TITLE L Water Management And Protection
CHAPTER 485-A Water Pollution and Waste Disposal
Classification of Waters

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RSA 485-A:8 (2007)

485-A:8 Standards for Classification of Surface Waters of the State.

It shall be the overall goal that all surface waters attain and maintain specified standards of water quality to achieve the purposes of the legislative classification. For purposes of classification there shall be 2 classes or grades of surface waters as follows:

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.

III. The waters in temporary partial use areas established under paragraph II shall be free from slick, odors, turbidity, sludge deposits, and surface-floating solids of unreasonable kind or quantity, shall contain not less than 5 parts per million of dissolved oxygen; shall have a hydrogen ion concentration within the range of pH 6.0 to 9.0 except when due to natural causes; and shall be free from chemicals and other materials and conditions inimical to aquatic life or the maintenance of aquatic life. These criteria shall apply during combined sewer overflow discharges and up to 3 days following cessation of said discharge. At all other times the standards and uses specified in paragraph II shall apply.

IV. Notwithstanding anything contained in this chapter, the department in submitting classifications relating to interstate waters to the New England Interstate Water Pollution Control Commission for review and approval, as provided for under the terms of Article V of the compact whereby the interstate commission was created by *RSA 484*, shall submit such classifications in accordance with the standards of water quality as currently adopted by said interstate water pollution control commission provided, however, that the standards for any classification thus submitted for review and approval shall not be less than, nor exceed the standards of the classification duly adopted by the General Court as provided for in *RSA 485-A:9* or 10.

V. Tidal waters utilized for swimming purposes shall contain not more than either a geometric mean based on at least 3 samples obtained over a 60-day period of 35 enterococci per 100 milliliters, or 104 enterococci per 100 milliliters in any one sample, unless naturally occurring. Those tidal waters used for growing or taking of shellfish for human consumption shall, in addition to the foregoing requirements, be in accordance with the criteria recommended under the National Shellfish Program Manual of Operation, United States Department of Food and Drug Administration.

VI. Notwithstanding anything contained in this chapter, the commissioner shall have the authority to adopt such stream classification criteria as may be issued from time to time by the federal Environmental Protection Agency or its successor agency insofar as said criteria may relate to the water uses specified in *RSA 485-A:8*, I and II, provided, however, that the criteria thus issued shall not result in standards that are less than nor exceed the standards of the classification duly enacted by the general court as provided for in *RSA 485-A:9* or *485-A:10*.

VII. All tests and sampling for the purposes of examination of waters shall be performed and carried out in a reasonable manner and whenever practicable, in accordance with the commonly accepted scientific method as selected by the department. The waters in each classification shall satisfy all the provisions of all lower classifications. The minimum treatment for the lowest classification shall be as follows:

(a) For sewage, secondary treatment and disinfection as necessary to comply with water quality standards.

(b) For industrial wastes and combined sewer overflows, such treatment as the department shall determine. Appeal from any such determination shall be in the manner provided for in *RSA 21-O:14*.

VIII. In prescribing minimum treatment provisions for thermal wastes discharged to interstate waters, the department shall adhere to the water quality requirements and recommendations of the New Hampshire fish and game department, the New England Interstate Water Pollution Control Commission, or the United States Environmental Protection Agency, whichever requirements and recommendations provide the most effective level of thermal pollution control.

IX. Subject to the provisions of *RSA 485-A:13*, I(a), the fish and game department may use rotenone or similar compounds in the conduct of its program to reclaim the public waters of the state for game fishing.

HISTORY: 1989, 339:1. 1991, 371:3-5, eff. Aug. 31, 1991. 1996, 228:77, 106, 110, eff. July 1, 1996. 1998, 63:1, eff. July 11, 1998.

NOTES:

Revision note.

Substituted " *RSA 485-A:8*, I, II, and III" for " *RSA 485-A:3*, I, II, and III" in the first sentence of par. VI to correct an error in the reference.

Amendments**-1998.**

Deleted the last sentence in par. II and the third sentence in par. III.

-1996.

Substituted "department" for "division" in the sixth sentence of par. II, preceding "in submitting" in par. IV, in the first sentence of the introductory paragraph of par. VII, in the first sentence of par. VII(b) and in par. VIII, "commissioner" for "division" following "chapter, the" in par. VI and " *RSA 21-O:14*" for " *RSA 21-O:7*, IV" in the second sentence of par. VII(b).

-1991.

Added the first sentence of the introductory paragraph.

Paragraph I: Rewrote the first sentence and substituted "adequate treatment" for "disinfection" following "after" in third sentence.

Paragraph II: Rewrote the first sentence, inserted "biological" preceding "physical" and substituted "aquatic" for "fish" preceding "life" in two places in the second sentence, inserted "water diversions, or releases" following "cooling water" in the fourth sentence, substituted "fishing, swimming" for "bathing" following "acceptable for" in the fifth sentence, and added the sixth and seventh sentences.

Paragraph III: Rewritten to the extent that a detailed comparison would be impracticable.

Paragraph V: Rewritten to the extent that a detailed comparison would be impracticable.

Paragraph VI: Substituted "I and II" for "I, II, and III" following " *RSA 485-A:8*" and "485-A:10" for "10" following " *RSA 485-A:9*".

Paragraph VII: Rewritten to the extent that a detailed comparison would be impracticable.

Cross References.

Shellfish certificate fees, see *RSA 143:22-a*.

NOTES TO DECISIONS

Debt limitation

Debt limitation

Legislature has recognized imperative necessity for prevention of water pollution under this section by providing that cost shall not be subject to ordinary limitations upon public debt. *State v. Goffstown*, 100 N.H. 131, 121 A.2d 317, 1956 N.H. LEXIS 13 (1956). (Decided under prior law.)

RESEARCH REFERENCES

New Hampshire Bar Journal

Mechanics of the State certification provisions under the Federal Water Pollution Control Act, *18 N.H.B.J. 142*
(*Dec. 1976*).

HIERARCHY NOTES:

Tit. L Note

Tit. L, Ch. 485-A Note

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TITLE L Water Management And Protection
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RSA 485-A:9 (2007)

485-A:9 Classification Procedure.

The department shall follow the procedures provided in this section and recommend to the legislature a classification for all streams, lakes, ponds, and tidal waters or section of such water.

I. A notice setting forth the contemplated classification of any stream, lake, pond, tidal water or section of such water, shall be published for 3 successive weeks in a newspaper circulated within the county or counties in which the surface water in question is situated. The last notice shall be published at least 7 days before the hearing date. The notice shall stipulate the time and place where a public hearing on the contemplated classification shall be held.

II. A public hearing shall be conducted by the department, at which hearing all interested parties shall be heard relative to their views on classification of the area or areas in question.

III. Following the hearings the department shall review the pertinent evidence and data presented.

IV. After such hearing and review of evidence the department shall determine which classification is for the best interest of the public giving consideration to the health, industrial, economic, geographical and social factors involved.

HISTORY: 1989, 339:1, eff. Jan. 1, 1990. 1996, 228:106, eff. July 1, 1996.

NOTES:

Amendments

-1996.

Substituted "department" for "division" in the introductory paragraph and in pars. II-IV.

NOTES TO DECISIONS

1. Public benefit 2. Reasonableness

1. Public benefit

Classification of a stream for the purpose of fixing the limit of pollutability is not unreasonable where its waters are used for bathing and recreation by the public, although some individuals may also be especially benefited. *Shirley v. New Hampshire Water Pollution Commission*, 100 N.H. 294, 124 A.2d 189, 1956 N.H. LEXIS 55 (1956). (Decided under prior law.)

2. Reasonableness

Fact that tax rate would be increased does not demonstrate that commission's order is unreasonable or confiscatory. *State v. Goffstown*, 100 N.H. 131, 121 A.2d 317, 1956 N.H. LEXIS 13 (1956). (Decided under prior law.)

HIERARCHY NOTES:

Tit. L Note

Tit. L, Ch. 485-A Note

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RSA 485-A:10 (2007)

485-A:10 Reclassification Procedure.

After adoption of a classification for any surface water or section of such water by the legislature, the department may, by its own motion, or upon the petition of not less than 100 persons, legal inhabitants of the county or counties in which the surface water in question is situated, reinvestigate the conditions of pollution in said surface water or section of such water by following the procedure above outlined, and may at any time make recommendation to the legislature for reclassification.

HISTORY: 1989, 339:1, eff. Jan. 1, 1990. 1996, 228:106, eff. July 1, 1996.

NOTES:

Amendments

-1996.

Substituted "department" for "division".

NOTES TO DECISIONS

Relief from orders

Relief from orders

This section provides a method of relief from order of water pollution commission if order works a hardship. *Plymouth Fire District v. Water Pollution Comm'n*, 103 N.H. 169, 167 A.2d 677, 1961 N.H. LEXIS 8 (1961); *State v. Goffstown*, 100 N.H. 131, 121 A.2d 317, 1956 N.H. LEXIS 13 (1956); *Shirley v. New Hampshire Water Pollution Commission*, 100 N.H. 294, 124 A.2d 189, 1956 N.H. LEXIS 55 (1956). (Decided under prior law.)

HIERARCHY NOTES:

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RSA 485-A:11 (2007)

485-A:11 Public Waters Classified.

All lakes and ponds defined as public waters of the state by *RSA 271:20* shall be classified by the passage of this section as not less than Class B, as set forth in *RSA 485-A:8* relating to standards for classification of surface waters of the state.

HISTORY: 1989, 339:1, eff. Jan. 1, 1990. 1999, 232:2, eff. Jan. 1, 2000.

NOTES:

Amendments

-1999.

Deleted "and 21" following "*RSA 271:20*".

HIERARCHY NOTES:

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TITLE L Water Management And Protection
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Enforcement

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RSA 485-A:13 (2007)

485-A:13 Water Discharge Permits.

I. (a) It shall be unlawful for any person or persons to discharge or dispose of any sewage or waste to the surface water or groundwater of the state without first obtaining a written permit from the department of environmental services. Applications for permits shall be made upon forms prescribed by the department of environmental services and shall contain such relevant information as the department of environmental services may require. The department of environmental services shall include in such permits effluent limitations, which may be based upon economic and technological factors, upon the classification enacted by the legislature, upon the projected best use of the surface water downstream or upon the requirements of the Federal Water Pollution Control Act as amended from time to time, and all regulations, guidelines and standards promulgated thereunder, whichever provides the most effective means to abate pollution. The department of environmental services may also prescribe such other reasonable conditions as may be necessary or desirable in order to fulfill the purpose of this chapter or applicable federal law. Such permits may contain, in the case of sources not in compliance with such effluent limitations at the time the permit is issued, compliance schedules, including interim requirements necessary or desirable in order to fulfill the purposes or requirements of this chapter, and any such compliance schedules may be imposed without regard to the time limits for abatement of pollution referred to in *RSA 485-A:12*, II and shall be consistent with the purposes and requirements of applicable federal law. The department of environmental services may prescribe a monitoring program to be performed by the applicant with periodic reports to the department of environmental services, including, where appropriate in terms of the nature of the effluent, continuous monitoring. Permits shall be issued for a fixed term, not to exceed 5 years. The department of environmental services may revise, modify or suspend in whole or in part or terminate any permit, following hearing, upon a finding that just cause exists for such action. Further, whenever in its judgment the purposes of this chapter will be best served, the department of environmental services may require as a condition to the granting of such permits that either the ownership and operation of the collection and treatment facilities involved be vested in the municipality or any subdivision thereof in which the system is located, if said municipality by legal action agrees thereto, or such other reasonable conditions as will ensure continuous and continuing operation and maintenance of the facilities. No permit shall be granted to utilize the entire assets of the surface water, or in any other case in which the department of environmental services determines that the grant of a permit would be inconsistent with the purposes of this chapter. Any determination by the department of environmental services under this paragraph shall be subject to appeal as provided for in *RSA 485-A:19*.

(b) Notwithstanding any other provision of law, no permit to discharge sewage or waste shall be issued

authorizing any of the following discharges:

- (1) The discharge of any radiological, chemical or biological warfare agent or high level radioactive waste.
- (2) Any discharge into navigable waters which the secretary of the army of the United States acting through the chief of engineers determines would substantially impair anchorage and navigation.
- (3) Any discharge to which the regional administrator of the United States Environmental Protection Agency, or his successor in jurisdiction, has objected in writing pursuant to any right to object each provided such official in section 402(d) of the Federal Water Pollution Control Act, as amended from time to time; provided, that this subparagraph and subparagraph (2) above shall not preclude the department of environmental services or any other person from availing itself of the judicial review of any such objection, or any determination by the secretary of the army, available under applicable federal law.
- (4) Any discharge from a point source which is in conflict with a plan or amendment to such plan approved pursuant to section 208(b) of the Federal Water Pollution Control Act, as amended from time to time.
- (c) Any person responsible for a bypass or upset at a wastewater facility shall give immediate notice of the bypass or upset to all public or privately owned water systems drawing water from the same receiving water and located within 20 miles downstream of the point of discharge. The permittee shall maintain a list of persons, and their telephone numbers, who are to be notified immediately by telephone. In addition, written notification, which shall be postmarked within 3 days of the bypass or upset, shall be sent to such persons.

II. On application of the department of environmental services, the superior court or any justice of such court, in term time, or in vacation may enjoin any act in violation of any lawful order of the department of environmental services.

III. In the interim between the effective date of classification legislation hereafter enacted affecting any surface water of the state or section of such water, and the time limit for abatement of pollution set thereafter either by the department of environmental services under *RSA 485-A:12, II* or by the legislature, it shall be unlawful for person or persons to dispose of any sewage or waste into said surface water of the state in excess of the maximum quantity or of a different character, than that being disposed of during the period of one year prior to the effective date of such legislative classification without first obtaining written permission from the department of environmental services.

HISTORY: 1989, 339:1. 1990, 248:3, eff. June 27, 1990. 1996, 228:108, eff. July 1, 1996.

NOTES:

References in text.

The Federal Water Pollution Control Act, referred to in subpar. I(a), is classified to *33 U.S.C.S. § 1251* et seq.

Section 402(d) of the Federal Water Pollution Control Act, referred to in subpar. I(b)(3), is classified to *33 U.S.C.S. § 1342(d)*.

Section 208(b) of the Federal Water Pollution Control Act, referred to in subpar. I(b)(4), is classified to *33 U.S.C.S. § 1288(b)*.

Amendments

-1996.

Substituted "department of environmental services" for "division of water supply and pollution control" throughout

par. I(a) and in pars. I(b)(3), II and III.

-1990.

Paragraph I(c): Rewritten to the extent that a detailed comparison would be impracticable.

Codification.

Pursuant to 1989, 339:34, former RSA 149:8, III(c), as added by 1989, 405:2, eff. Aug 4, 1989, was redesignated as par. I(c) of this section.

NOTES TO DECISIONS

1. Scope of liability 2. Enforcement of orders

1. Scope of liability

Owner of land leased to another for use as a facility for processing chemical waste who did not participate in the unlicensed discharge of hazardous wastes into the surface water and groundwater of the site was not guilty of violating this section since liability is not extended to mere nonparticipatory landowners. *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1985 U.S. Dist. LEXIS 13023 (D.N.H. 1985). (Decided under prior law.)

2. Enforcement of orders

This section authorizes the enforcement of an order of the commission by an injunction, contempt or by fines authorized by RSA 149:19, and superior court may use its equitable powers to enforce the principal provisions of any decree that it may issue. *State v. Goffstown*, 100 N.H. 131, 121 A.2d 317, 1956 N.H. LEXIS 13 (1956). (Decided under prior law.)

Cited

Cited in N.H. Dep't of Envtl. Servs. v. Mottolo, - N.H. -, 917 A.2d 1277, 2007 N.H. LEXIS 26 (Mar. 6, 2007).

RESEARCH REFERENCES

New Hampshire Code of Administrative Rules

Rules of the Department of Environmental Services-Water Quality and Quantity Programs, Env-Wq 715, New Hampshire Code of Administrative Rules Annotated.

HIERARCHY NOTES:

Tit. L Note

Tit. L, Ch. 485-A Note