

NOAA/EPA DECISIONS ON CONDITIONS OF APPROVAL NEW HAMPSHIRE COASTAL NONPOINT PROGRAM

FOREWORD

This document contains decisions on conditions of approval placed on the coastal nonpoint pollution control program submitted by the State of New Hampshire pursuant to Section 6217(a) of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA). The Findings for New Hampshire's coastal nonpoint program were issued on November 18, 1997. Since that time, New Hampshire has undertaken a number of actions to address conditions of approval on the coastal nonpoint program. Based on those actions and on supplemental material New Hampshire has provided to document how the conditions have been met, the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Environmental Protection Agency (EPA) have reached a decision that New Hampshire has satisfied the conditions of approval.

This document is organized in the same fashion as the Findings for New Hampshire's coastal nonpoint pollution control program. Where the original Findings included a condition, this document repeats the Finding and condition, includes the decision that the condition has been satisfied, and provides a rationale for the decision. For further understanding of terms in this document and the basis for these decisions, the reader is referred to the following:

Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters (EPA, January 1993)

Coastal Nonpoint Pollution Control Program: Program Development and Approval Guidance (NOAA and EPA, January 1993)

Flexibility for State Coastal Nonpoint Programs (NOAA and EPA, March 1995)

Final Administrative Changes to the Coastal Nonpoint Pollution Control Program Guidance for Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) (NOAA and EPA, October, 1998)

FINAL APPROVAL DECISION

NOAA and EPA find that New Hampshire has satisfied all conditions placed on approval of the New Hampshire coastal nonpoint pollution control program submitted to NOAA and EPA pursuant to Section 6217(a) of the Coastal Zone Act Reauthorization Amendments of 1990. Therefore, New Hampshire's coastal nonpoint pollution control program meets all program requirements and is hereby fully approved, constituting a final approval decision for the program.

Please note that the approval decision made for the New Hampshire coastal nonpoint program does not relieve the State of any requirements under the Endangered Species Act.

BACKGROUND

Under the Final Administrative Changes published on October 16, 1998, NOAA and EPA agreed to approve program elements for which states had proposed voluntary or incentive-based programs, backed by existing State enforcement authorities, if the State provided three items:

- (1) a legal opinion from the State that the authority can be used to prevent nonpoint pollution and require implementation of management measures;
- (2) a description of the voluntary or incentive based programs; and
- (3) a description of the mechanism or process linking the implementing agency with the enforcement agency and a commitment to use the enforcement authority where necessary.

New Hampshire opted to use this approach to meet conditions associated with enforceable policies and mechanisms. A legal opinion was developed by the office of the Attorney General of the State of New Hampshire certifying that three water protection statutes—the New Hampshire Water Pollution and Waste Disposal Act (N.H. Rev. Stat. Ann. Chapter 485-A), the New Hampshire Fill and Dredge in Wetlands Act (N.H. Rev. Stat. Ann. Chapter 482-A), and the New Hampshire Comprehensive Shoreland Protection Act (N.H. Rev. Stat. Ann. Chapter 483-B)—taken together provide broad legal authority to control water pollution, including nonpoint pollution. They may be used to prevent and abate nonpoint source pollution in the Section 6217 management area consistent with the management measures and require management measure implementation as necessary (see legal opinion dated June 6, 2000 by Jennifer J. Patterson, Assistant Attorney General for the State of New Hampshire). New Hampshire also provided information regarding programs applicable to activities for which the State proposes to use these authorities and explained the link between the implementing and enforcement agencies. Finally, New Hampshire indicated its commitment to use the enforcement authorities where necessary. Having provided these components, New Hampshire has met its enforceable policy and mechanism conditions. Specific analysis for each of the applicable conditions is provided below.

AGRICULTURE

CONDITION: Within two years, New Hampshire will include in its program management measures in conformity with the 6217(g) management measure for nutrient management. Within one year, New Hampshire will develop a strategy (in accordance with Section XIV, page 16) to implement the agricultural management measures throughout the 6217 management area.

DECISION: New Hampshire has satisfied these conditions.

RATIONALE: With regard to the nutrient management measure condition, the State needed to address the provision that farm operations have a nutrient management plan for the application of animal waste. NOAA and EPA have reviewed materials provided by New Hampshire to demonstrate that the State has management measures for nutrient management, including practices included in the “Manual of Best Management Practices for Agriculture in New Hampshire.” Specifically, the practices described in this document under the “Manure Best Management Practices” chapter are characterized by the State as planning considerations for the

application of animal waste that can be used when developing a nutrient management plan. The manual recommends that agricultural operations develop a “farm plan” that incorporates best management practices (BMPs) as appropriate for a farm, field, or site, including nutrient management plans.

New Hampshire’s legal opinion certified that the Manure, Compost, and Fertilizer Handling Program (N.H. Rev. Stat. Ann. Sections 431: 33-35) provides authority to require compliance with the nutrient management measures related to animal waste. (See legal opinion.) Pursuant to the Manure, Compost, and Fertilizer Handling Program (N.H. Rev. Stat. Ann. Sections 431: 33-35), the New Hampshire Department of Agriculture (NHDA) established BMPs regarding the handling and application of fertilizers. As noted in the supplemental materials for the legal opinion, having appropriate BMPs defined enables the NHDA to also define what constitutes “improper handling,” a necessary trigger for enforcement. The legal opinion further certifies that the NHDA has the authority to investigate violations of the best management practices; to require violators to submit plans for compliance; and to notify the NH Department of Environmental Services (NHDES) and local health officials of water quality violations, so that enforcement action can be taken.

More generally, the New Hampshire Water Pollution and Waste Disposal Act (N.H. Rev. Stat. Ann. Chapter 485-A) also gives the State authority to prevent and abate all types of water pollution, which includes nonpoint pollution from agriculture. Under Chapter 485-A problems would be dealt with as water quality violations, and although the law is not specific to agriculture, the State could compel violators to implement a broad range of means to correct the problem(s).

Finally, the need to develop a strategy was obviated by New Hampshire’s decision to submit a legal opinion.

URBAN – NEW DEVELOPMENT, SITE DEVELOPMENT, AND CONSTRUCTION SITE EROSION AND SEDIMENT CONTROL

CONDITIONS: Within two years, New Hampshire will include in its program enforceable policies and mechanisms to ensure implementation of these measures throughout the 6217 management area.

DECISION: New Hampshire has satisfied these conditions.

RATIONALE: The specific problem New Hampshire had in addressing these three management measures was that, while the State has a statute (new development) and program (site development, construction site erosion and sediment control) that fully meet the management measures, neither the statute nor the program apply to projects that disturb less than 100,000 square feet (sf) or 50,000sf within 250 feet of protected waters. New Hampshire’s legal opinion and the supplemental materials note that the Water Pollution and Waste Disposal Act includes a provision under Chapter 485-A:12 that the NHDES can require any person to correct water quality problems if they cause a water to not meet its classification standards set forth

under Chapter 485-A:8 of the statute. Enforcement matters within the jurisdiction of RSA 485-A are not limited with respect to the size of the disturbance; the only criterion is whether there has been a degradation of water quality. Thus, the Attorney General's office concludes that this authority can be used to prevent nonpoint pollution and require implementation of the new development, site development, and construction site erosion and sediment control management measures throughout the 6217 management area, as necessary.

The State also continues to promote education and outreach materials that help to raise awareness and promote implementation of these management measures, and in some cases has developed developed new materials since the time of the original submission. Examples of relevant materials include the *Stormwater Management and Erosion Control Handbook for Urban and Developing Areas in New Hampshire*, which describes acceptable best management practices; and factsheets such as *Soil Erosion and Sediment Control on Construction Sites* and *Impacts of Development on Stormwater Runoff*, which describe BMPs and how stormwater runoff and pollutants can be contained with proper planning, design, and construction. Further, the handbook is incorporated into applicable state regulations at Env-Ws 415.07.

URBAN – CONSTRUCTION SITE CHEMICAL CONTROL

CONDITION: Within one year, New Hampshire will include in its program management measures in conformity with the 6217(g) guidance for construction site chemical control.

DECISION: New Hampshire has satisfied this condition.

RATIONALE: The Office of State Planning and the NHDES jointly developed and submitted a brochure describing preferred construction site chemical control BMPs for limiting the application, generation and migration of toxic substances on site and ensuring proper storage and disposal of toxic materials and application of nutrients at appropriate rates, which are consistent with the (g) measures. In addition, New Hampshire has undertaken efforts to ensure broad distribution of the brochure. Copies of the brochure are available through the NHDES, NHDA, county conservation districts, and the NH Association of Conservation Commissions; and were handed out at a trade show on the new EPA stormwater regulations (Phase II) and a state environmental competition. Copies were sent directly to each of New Hampshire's 43 coastal communities. Finally, the brochure and its availability were promoted through the New Hampshire Coastal Program (NHCP) newsletter *Coastlines*.

ROADS, HIGHWAYS, AND BRIDGES

CONDITION: Within three years, New Hampshire will complete and implement its planned program to be in conformity with the operation and maintenance and runoff systems management measures for all non-NHDOT roads, highways and bridges. Also within three years, New Hampshire will include in its program enforceable policies and mechanisms to ensure implementation of the management measures in towns and municipalities throughout the 6217 management area.

DECISION: New Hampshire has satisfied these conditions.

RATIONALE: New Hampshire has addressed the condition for non-NHDOT roads, highways and bridges by submitting a new manual, *Erosion and Sediment Control and Stormwater Management Manual*. The State plans to communicate this new manual by developing and holding workshops for applicable local officials such as public road agents, and other municipal highway and road personnel in the communities that comprise the 6217 management area. The manual will be distributed both to workshop attendees and to other interested parties that cannot attend.

With regard to the enforceable policies and mechanisms condition, New Hampshire's legal opinion certified that the New Hampshire Water Pollution and Waste Disposal Act (N.H. Rev. Stat. Ann. Chapter 485-A) gives the State broad legal authority to abate all types of water pollution, which includes nonpoint pollution from local roads, highways, and bridges. Under Chapter 485-A identified problems would be dealt with as water quality violations, and although the statute is not specific to roads, highways and bridges, the State could use the statute to compel violators to implement best management practices such as those identified in NH Department of Transportation manuals: *Stormwater Management and Erosion and Sediment Control Handbook for Urban and Developing Areas in New Hampshire*, *Standard Specifications for Road and Bridge Construction*, and *Manual on Drainage Design for Highways*. Thus, the Attorney General's office concludes that this authority can be used to prevent nonpoint pollution and require implementation of the management measures throughout the 6217 management area, as necessary.

MARINAS AND RECREATIONAL BOATING

CONDITION: Within one year, New Hampshire will develop a strategy to implement the marina operation and maintenance management measures throughout the 6217 management area.

DECISION: New Hampshire has satisfied this condition.

RATIONALE: The need to develop a strategy was obviated by New Hampshire's decision to submit a legal opinion. As noted in the original findings, New Hampshire proposed to rely heavily on its Best Management Practices for New Hampshire Marinas. The State's water quality standards were proposed as a back up authority. Chapter 485-A:12 of the Water Pollution and Waste Disposal Act gives the State authority to require a person to correct water quality standard violations, and Chapter 485-A:15 prohibits the placing of debris or similar litter in the surface waters of the state. The Attorney General's office concluded that these authorities can be used to prevent nonpoint pollution and require implementation of the management measures throughout the 6217 management area, as necessary.

HYDROMODIFICATION

CONDITIONS: Within three years, New Hampshire will include in its program management measures for chemical and pollutant control at dams and a process to improve surface water quality and restore instream and riparian habitat through the operation and maintenance of existing modified channels. Within three years, New Hampshire will include in its program enforceable policies and mechanisms for dam operation.

DECISION: New Hampshire has satisfied these conditions.

RATIONALE: With regard to chemical and pollutant control at dams, as discussed in the Construction Site Chemical Control section above, New Hampshire has developed a BMP brochure consistent with the (g) guidance and has conducted outreach.

To address the lack of a process to process to improve surface water quality and restore instream and riparian habitat through the operation and maintenance of existing modified channels, New Hampshire has submitted supplemental information describing its efforts on these issues since the original program submittal. Although the extent of the problem in the State is not well quantified, both the update to NH's nonpoint source management plan (NSMP) and background research for the NH Estuaries Project comprehensive conservation management plan address habitat and/or hydrologic modification. In particular, the NSMP contains a number of goals and objectives related to improving water quality and restoring habitat, including identifying regions that should be targeted for funding. Since 1994, the NHCP has made restoration of salt water marshes impaired by restricted tidal flows a priority, and has managed to complete projects for a majority of sites identified by the NRCS as in need of improvement and suitable for restoration. The NHCP is now embarking upon a new coastal restoration initiative that will target wetlands, stormwater inflows, fill areas, dam removal, and other degraded systems. Identification of opportunities to restore instream and riparian habitat areas is an expected outcome of this initiative.

The NHCP, the Section 319 Program, and the NH Estuaries Project have all given grants and/or provided other technical assistance to communities and other local entities to perform streambank and marsh restoration, corridor studies, shoreline surveys and other inventories; to support the development and adoption of regulations that protect shoreland buffers; and to implement best management practices to reduce erosion and protect buffer areas and wetlands; among other examples. In addition, the NHCP is currently undertaking a project to further inventory/assess stream conditions throughout the coastal watershed to identify sites in need of restoration, and will ultimately develop a database of those sites to be used by all three programs in selecting projects for competitive grants or targeting by other funding sources.

Finally, New Hampshire's legal opinion certifies that the Water Pollution and Waste Disposal Act can be used to prevent nonpoint pollution and require implementation of the dam operation management measures. The Act (N.H. Rev. Stat. Ann. Chapter 485-A) gives the State broad authority to abate all types of water pollution, which includes nonpoint pollution from dams. Under Chapter 485-A problems would be dealt with as water quality violations, and although the statute is not specific to dam operation and maintenance, the State could compel violators to

implement a broad range of means to correct the problem(s), including the management measures.

WETLANDS, RIPARIAN AREAS AND VEGETATED TREATMENT SYSTEMS

CONDITION: Within three years, New Hampshire will eliminate or revise current exemptions to the Comprehensive Shoreland Protection Act or demonstrate that the exemptions do not preclude the State from fully implementing the management measures throughout the 6217 management area.

DECISION: New Hampshire has satisfied this condition.

RATIONALE: Exempted from the Comprehensive Shoreland Protection Act were the clearing of land for agricultural utilization under some circumstances and certain areas that local governing bodies found to have special local urbanization conditions, among others. New Hampshire's legal opinion certified that the New Hampshire Fill and Dredge in Wetlands Act (N.H. Rev. Stat. Ann. Chapter 482-A) and the New Hampshire Comprehensive Shoreland Protection Act (N.H. Rev. Stat. Ann. Chapter 483-B) provide authority to require compliance with the management measures related to wetlands, riparian areas, and vegetated treatment systems and that New Hampshire can fully protect its wetlands and riparian areas from adverse effects.

New Hampshire asserts that agricultural operations are only exempt so long as they are conforming to the use of applicable BMPs and do not cause water quality degradation. Should pollution result from an agricultural operation, it would become subject to enforcement under Chapter 485-A. At that point, NH DES would work jointly with the NHDA to address any practices from the operation that adversely impacted wetlands and riparian areas, and violators could be compelled to comply with applicable provisions of the Comprehensive Shoreland Protection Act.

Similarly, the local urbanized conditions exemption does not prevent full implementation of the management measures. New Hampshire actively promotes maintenance of riparian areas within the 6217 boundary and also utilizes a targeted approach to correcting nonpoint pollution problems in urban riparian areas. The state has undertaken planning processes that identified nonpoint pollution problems and steps for addressing those problems. For example, through the Section 306A program, the New Hampshire Coastal Program has made the restoration of degraded salt marshes a priority through re-establishing appropriate elevation and hydrology, removing dredge spoils, and eradicating invasive plant species. Healthy marshes can serve as natural filtration for polluted runoff. Failing such mechanisms, enforcement and corrective actions can be undertaken through Chapter 485-A.