

STATE OF NEW HAMPSHIRE
Inter-Department Communication

DATE April 10, 2008

COPY

FROM Michael J. Walls
Assistant Commissioner

AT (OFFICE) DES

SUBJECT Request for opinions re: stormwater and transfers of surface water

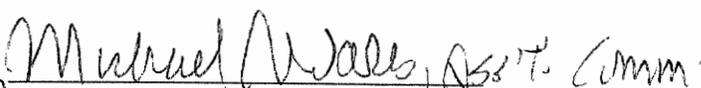
TO Richard Head, Associate Attorney General
NH DOJ - AGO

DES requests an opinion on each of the following questions:

1. Do discharges of storm water runoff that carry pollutants from areas altered by development qualify as discharges of "sewage or waste" under RSA 485-A?
2. 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?

An explanation of the questions and reprints of relevant statutes and rules is attached. Please let us know to whom this request is assigned. If you have any questions, please contact Gretchen Hamel at 271-3137 or gretchen.hamel@des.nh.gov.

Approved:


for Thomas S. Burack, Commissioner

cc: Gretchen Hamel, Administrator, DES Legal Unit
Paul Currier, Administrator, DES WD Watershed Management Bureau

Questions

1. Do discharges of storm water runoff that carry pollutants from areas altered by development qualify as discharges of "sewage or waste" under RSA 485-A?
2. 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?

Discussion

Question #1 is central to DES administration of surface water quality statutes and regulation of stormwater, both in terms of regulation of activities that may impact water quality in the short-term, such as alteration of terrain (AOT) during site development, and in terms of protecting water quality from on-going impacts, such as run-off from developed impermeable areas such as roads and parking lots. Short-term impacts typically are addressed under wetlands and/or AOT permits, while on-going impacts typically have been addressed under §401 water quality certifications (but will be covered by the new AOT rules that are about to enter rulemaking).

DES believes a logical distinction can be made between classifying all storm water (*i.e.*, all rain water) as "waste" as defined in RSA 485-A: 2, XVI and classifying storm water runoff from areas altered by development as "waste" as defined in RSA 485-A: 2, XVI. The DES AOT program (authorized by RSA 485-A:17) in particular routinely asserts jurisdiction over runoff from development sites based on the runoff being a "waste" as defined in the statute. However, the DES watershed management program has (apparently) routinely been issuing §401 water quality certifications for projects where stormwater runoff from developed areas will discharge to a Class A water. Thus, unless some other distinction can be made (*e.g.*, based on federal definitions?), either the AOT program or the §401 program will need to make adjustments.

Question #2 is related to Question #1 in that Class B waters, by definition, contain more pollutants than Class A water, most of which comes from runoff from developed areas. If storm water runoff from developed areas does constitute "waste", then the underlying question is whether Class B water becomes as "waste" based on its assimilation of storm water runoff, at least for purposes of RSA 485-A:8, I. Note that Concord, Exeter, Hanover, New Hampton, and Rochester currently transfer Class B surface water to class A waters, and Salem proposes to.

Relevant provisions from New Hampshire statutes and rules and federal regulations are reprinted below.

RSA 485-A:2 Definitions.

VI. "Industrial waste" means any liquid, gaseous or solid waste substance resulting from any process of industry, manufacturing trade or business or from development of any natural resources.

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

X. "Sewage" means the water-carried waste products from buildings, public or private, together with such groundwater infiltration and surface water as may be present.

XVI. "Waste" means industrial waste and other wastes.

RSA 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. (Emphasis added.)

RSA 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. ...

Water Quality Standards (state rules):

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

Env-Wq 1702.40 "Pollution" means the man-made or man-induced alteration of the chemical, physical, biological, or radiological integrity of water.

Definitions from 40 CFR 122.2

Discharge when used without qualification means the "discharge of a pollutant."

Discharge of a pollutant means:

(a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or

(b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger."

Indirect discharger means a nondomestic discharger introducing "pollutants" to a "publicly owned treatment works."

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.

Note: Radioactive materials covered by the Atomic Energy Act are those encompassed in its definition of source, byproduct, or special nuclear materials. Examples of materials not covered include radium and accelerator-produced isotopes. See *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976).

Storm water is defined at Sec. 122.26(b)(13).

Storm water discharge associated with industrial activity is defined at Sec. 122.26(b)(14).

Definitions from 40 CFR 122.26(b):

(13) **Storm water** means storm water runoff, snow melt runoff, and surface runoff and drainage.

(14) **Storm water discharge associated with industrial activity** means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process waste waters (as defined at part 401 of this chapter); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and final products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water. For the purposes of this paragraph, material handling activities include storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product, by-product or waste product. The term excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots as long as the drainage from the excluded areas is not mixed with storm water drained from the above described areas. Industrial facilities (including industrial facilities that are federally, State, or municipally owned or operated that meet the description of the facilities listed in paragraphs (b)(14)(i) through (xi) of this section) include those facilities designated under the provisions of paragraph (a)(1)(v) of this section. The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14):

(i) Facilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 40 CFR subchapter N (except facilities with toxic pollutant effluent standards which are exempted under category (xi) in paragraph (b)(14) of this section);

(ii) Facilities classified as Standard Industrial Classifications 24 (except 2434), 26 (except 265 and 267), 28 (except 283), 29, 311, 32 (except 323), 33, 3441, 373;

(iii) Facilities classified as Standard Industrial Classifications 10 through 14 (mineral industry) including active or inactive mining operations (except for areas of coal mining operations no longer meeting the definition of a reclamation area under 40 CFR 434.11(1) because the performance bond issued to the facility by the appropriate SMCRA authority has been released, or except for areas of non-coal mining operations which have been released from applicable State or Federal reclamation requirements after December 17, 1990) and oil and gas exploration, production, processing, or treatment operations, or transmission facilities that discharge storm water contaminated by contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations; (inactive mining operations are mining sites that are not being actively mined, but which have an identifiable owner/operator; inactive mining sites do not include sites where mining claims are being maintained prior to disturbances associated with the extraction, beneficiation, or processing of mined materials, nor sites where minimal activities are undertaken for the sole purpose of maintaining a mining claim);

(iv) Hazardous waste treatment, storage, or disposal facilities, including those that are operating under interim status or a permit under subtitle C of RCRA;

(v) Landfills, land application sites, and open dumps that receive or have received any industrial wastes (waste that is received from any of the facilities described under this subsection) including those that are subject to regulation under subtitle D of RCRA;

(vi) Facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as Standard Industrial Classification 5015 and 5093;

(vii) Steam electric power generating facilities, including coal handling sites;

(viii) Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under paragraphs (b)(14) (i)-(vii) or (ix)-(xi) of this section are associated with industrial activity;

(ix) Treatment works treating domestic sewage or any other sewage sludge or wastewater treatment device or system, used in the storage treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated to the disposal of sewage sludge that are located within the confines of the facility, with a design flow of 1.0 mgd or more, or required to have an approved pretreatment program under 40 CFR part 403. Not included are farm lands, domestic gardens or lands used for sludge management where sludge is beneficially reused and which are not physically located in the confines of the facility, or areas that are in compliance with section 405 of the CWA;

(x) Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;

(xi) Facilities under Standard Industrial Classifications 20, 21, 22, 23, 2434, 25, 265, 267, 27, 283, 285, 30, 31 (except 311), 323, 34 (except 3441), 35, 36, 37 (except 373), 38, 39, and 4221-25;