

The State of New Hampshire
Department of Environmental Services

Thomas S. Burack, Commissioner



*Celebrating 25 Years of Protecting
New Hampshire's Environment*

January 23, 2012

The Honorable Stephen B. Stepanek, Chairman
House Ways and Means Committee
Legislative Office Building, Room 202
Concord, New Hampshire 03301

Re: HB 1226, directing department of environmental services administrative fine revenue to a special fund for environmental enforcement.

Dear Chairman Stepanek and members of the Committee:

Thank you for the opportunity to comment on HB 1226, directing administrative fine revenue collected by the Department of Environmental Services (DES) to a special fund for environmental enforcement. The bill would create an “administrative fine fund” into which the proceeds of administrative fines would be deposited and from which funds would be appropriated for enforcement purposes. A proposed amendment to the bill, 2012-0140h, would direct that sums in the fund be appropriated specifically for prosecuting violations by “large scale violators.” The Department of Environmental Services appreciates the sponsors’ intent to provide a dedicated funding source in support of its enforcement efforts, but has concerns about the proposed amendment because it is vague and appears to be premised upon a misunderstanding of DES’s enforcement prioritization process.

Different statutes administered by DES specify different uses of administrative fine revenues. Many of these statutes, such as RSA 125-C:15, I-b (Air Pollution Control) and RSA 485:58, V (Safe Drinking Water), require that the administrative fines collected by DES be deposited into the General Fund. Under other statutes, fines collected for certain violations are deposited into dedicated funds and are used for programs that have a nexus to the violation. For example, fines assessed for hazardous waste violations are deposited into the Hazardous Waste Cleanup Fund and are used for such important purposes as remediating contaminated sites for which there is no responsible party available to cover the costs. Fines related to dam safety violations are deposited into the Dam Maintenance Revolving Loan Fund, which was established in 2009 as a non-lapsing fund to provide low interest loans to private dam owners to help finance the cost of maintaining, repairing and reconstructing privately owned dams.

As introduced, HB 1226 would not interfere with these and other dedicated funds, but would redirect fine proceeds from the General Fund to a newly-created enforcement fund. The proposed amendment, 2012-0140h, is problematic in both its stated objective and its method of implementation. The proposed amendment, in its “Purpose” section, states that budget constraints “result in enforcement action decisions based partly upon the financial ability of the offender to challenge” DES’s enforcement decisions and that “a lesser standard of compliance and remediation is accepted from parties of financial means.” This is simply not the case.

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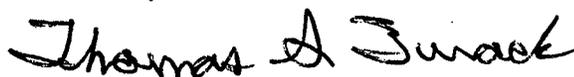
In determining whether to pursue an enforcement action, including an administrative fine, DES looks to the nature of the violation, not the status or financial resources of the alleged violator. DES adheres to the Department's Compliance Assurance Response Policy ("CARP"), adopted in September 2000, which sets forth criteria for determining whether a violation should result in enforcement action and, if so, whether an administrative fine is an appropriate enforcement mechanism. Prior to initiating enforcement action DES will consider, among other things, whether an alleged violation results in an economic benefit, whether the alleged violator failed to correct an alleged violation, or whether the alleged violator has a history of non-compliance. Continued non-compliance may result in a proposed fine if the fine that can be imposed will appropriately reflect the gravity of the violation, the economic benefit gained by the noncompliance, and is otherwise appropriate for its deterrent affect. Simply put, the alleged violator's financial ability to challenge the enforcement action is not a factor in determining whether to initiate or maintain an enforcement action.

It is true that DES has limited resources overall to allocate for enforcement purposes. However, as a matter of practice, DES's overall decision-making approach to enforcement would not change if enforcement resources were to change. In other words, if available funding for enforcement actions were to be increased as proposed by this bill, such funding would not cause DES to pursue more actions against violators that are larger in size or have ample finances as opposed to those that have limited funds. DES would not save any resources by declining to pursue an enforcement action against a "large scale violator." Furthermore, having a fund dedicated to pursuing enforcement actions against alleged violators based on their size or financial status rather than on the nature and severity of the underlying violation could be construed to require DES to make inappropriate distinctions based on who the violator is rather than on what the violator has done. This would be contrary to the objective approach taken by DES, as set forth in the CARP.

Additionally, DES has concerns with the proposed amendment because it does not define the term "large scale violator" and because it does not specify which fine proceeds would be directed to the new fund. Therefore, the proposed amendment could be interpreted to require that all administrative fine proceeds, including those currently deposited into dedicated funds, be deposited into the newly-created fund. This would result in the loss of funding for other environmental priorities previously identified by the Legislature. For all of these reasons, DES respectfully suggests that the Committee find this bill to be inexpedient to legislate.

Thank you again for the opportunity to comment on this bill. If you have any questions, please call me at 271-2958.

Sincerely,



Thomas S. Burack
Commissioner

cc: Representatives Abrami, Peckham, Shuler, Ohm, Ward