



The State of New Hampshire  
**Department of Environmental Service**

**Thomas S. Burack, Commissioner**



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

January 19, 2012

The Honorable Sharon Carson, Chair  
Senate Executive Departments and Administration Committee  
State House Room 100  
Concord, New Hampshire 03301

RE: SB 213-FN, An act relative to the authority of state agencies to assess fines and penalties.

Dear Chairman Carson:

Thank you for the opportunity to comment on Senate Bill 213-FN. The Department of Environmental Services (DES) administers a variety of laws that provide critical protection of public health and the environment. DES is opposed to this bill because it would weaken the agency's efforts to assure compliance with New Hampshire's environmental laws, would inefficiently consume agency resources, and could ultimately have negative impacts on environmental and public health protection. While the bill applies broadly to virtually all laws and rules across state government, this testimony specifically addresses the potential impacts on laws administered by DES.

DES is committed to ensuring a consistent, predictable and appropriate compliance assurance program, which is protective of public health and the environment while also creating a credible deterrent against future violations. DES believes that compliance with environmental laws is best ensured by using a multi-tiered approach that includes education and outreach, compliance assistance, compliance monitoring, and when appropriate, formal enforcement. In order to ensure consistency in implementing its compliance and enforcement programs, DES developed, through an external stakeholder process, a comprehensive Compliance Assurance Response Policy (CARP). The CARP, which has been in place since September 2000, identifies the primary factors that DES considers in determining the appropriate compliance assurance and enforcement response to a violation. By way of example, DES considers the degree of cooperation, the economic benefit realized by the violator, the extent of the deviation from the requirements and the harm or threat of harm to public health or the environment. An additional consideration set forth in the CARP is whether the violator knew or should have known about the requirement that was violated. In order to determine this, DES assesses the regulatory sophistication and complexity of the facility, the complexity of the regulatory scheme, and the compliance assistance, education and outreach activities that have been provided by DES to that particular facility and business sector.

This bill would substantially undermine DES's ability to use its enforcement discretion and would prohibit DES from taking any action to require a source to come into compliance with environmental laws for a period of 90 days. Although the bill does provide a number of

[www.des.nh.gov](http://www.des.nh.gov)

29 Hazen Drive • PO Box 95 • Concord, NH 03302-0095  
(603) 271-3503 • Fax: (603) 271-2867 • TDD Access: Relay NH 1-800-735-2964

exceptions, including for situations that pose “a potentially significant threat to human health or the environment,” DES would have the burden of demonstrating whether a particular exception applied, based upon the facts of each case. DES is concerned that, as currently worded, the exceptions are ambiguous and subjective and would create a potential defense for any person against whom an enforcement action is brought or a penalty is proposed. Further, DES could be subject to a legal challenge in the event that it asserts its statutory enforcement authority without giving the requisite 90 day notice, if it determined in a particular case that an exemption did apply. Any delay in DES’s ability to ensure that the state’s environmental laws can be promptly enforced could result in significant environmental harm or risks to public health, including, for example, spills of oil or hazardous wastes causing fish kills, contamination of public water supplies, fires, or other unsafe or dangerous conditions.

Paragraph II of the bill would require DES to waive penalties for “first-time paperwork violations.” The term “paperwork violation” is defined as including both recordkeeping (collection and retention of information) and reporting requirements. While this term could be interpreted by some people to mean less important, even trivial regulatory matters, in fact recordkeeping and reporting requirements provide critical means to ensure that a source is in compliance with the law. For example, generators of hazardous waste are required to submit copies of a uniform hazardous waste manifest when shipping the waste for proper disposal. While a manifest is “paperwork,” it is the cornerstone of the “cradle to grave” responsibility that generators have to properly manage hazardous waste. Without it, DES cannot effectively monitor the local and interstate transportation and disposal of these dangerous materials. Similarly, reporting of air emissions and reporting of permitted discharges to surface waters are technically “paperwork,” but are also critical to ensuring effective compliance monitoring. By limiting DES’s authority to impose fines or penalties for even first-time significant violations of these requirements, this bill would undermine the agency’s ability to assure fundamental environmental and public health protections.

Similarly, Paragraph IV provides that nothing in the law may be construed to diminish the responsibility to apply for and obtain a permit (license). However, as currently worded, a paperwork violation could be interpreted to mean the requirement to first apply for and obtain a permit prior to commencing a regulated activity, thereby potentially invoking the 90 day notice requirement. DES is concerned that restricting the ability to enforce these requirements would create an uneven playing field for sources that comply with the applicable requirements. Accordingly, DES believes that the language in this paragraph should be strengthened and clarified as it relates to the requirement to first obtain a permit for all regulated activities.

DES believes that HB 213-FN would fundamentally change implementation of the environmental laws of the state by imposing an unnecessary and undue burden on the ability of the agency to ensure protection of public health and the environment. DES takes very seriously its obligation to provide compliance assistance, to educate our stakeholders regarding the regulatory requirements, and to provide the regulated community with the tools necessary to achieve and maintain compliance. DES believes that this approach is the most effective way to utilize its resources and to ensure compliance. However, time and experience has taught us that a credible enforcement presence is an important and necessary component of any effective compliance assurance program and SB 213-FN would severely undermine that authority.

For these reasons, DES respectfully requests that this legislation be made the subject of careful and thorough study by your committee to fully understand its impacts and potential unintended consequences prior to the committee taking any votes on the bill. DES would also appreciate being provided the opportunity to suggest amendment language that may help to address some of our concerns with this legislation.

Thank you for the opportunity to comment on this bill. If you have any questions or require additional information please contact me at 271-2958.

Sincerely,

A handwritten signature in black ink that reads "Thomas A. Burack". The signature is written in a cursive style with a large, prominent initial "T".

Thomas S. Burack  
Commissioner

Cc: Senator De Blois  
Senator Barnes  
Senator Boutin  
Senator Carson  
Senator Forrester  
Senator Forsythe  
Senator Gallus  
Senator Groen  
Senator Lambert  
Senator Sanborn  
Representative Warden  
Representative Manuse  
Representative Reagan