



The State of New Hampshire
Department of Environmental Services



Robert R. Scott, Commissioner

January 11, 2018

The Honorable Sharon Carson
Chair, Executive Departments and Administration Committee
Legislative Office Building, Room 101
Concord, NH 03301

RE: SB 330, An Act requiring the department of environmental services to give certain persons time to cure violations before imposing a penalty

Dear Chair Carson and Members of the Committee:

Thank you for the opportunity to testify on SB 330. This bill would require the N.H. Department of Environmental Services (NHDES) to give people time to cure violations before imposing a penalty under certain environmental statutes. NHDES opposes this bill.

Fines imposed by NHDES and civil penalties imposed by the Superior Courts for environmental violations are important tools to assure compliance with New Hampshire's laws and rules. Sometimes, it is appropriate to seek fines or penalties even when a specific violation has ended and the individual or company has achieved compliance. Correcting an environmental violation does not change the fact that unlawful activity has already occurred. Moreover, for many violations, subsequent correction or cessation of unlawful activity does not remedy the environmental harm.

It is important to note that fines and civil penalties are not the only tools used by NHDES in furtherance of ensuring compliance and protecting health and the environment. As described in NHDES's Compliance Assurance Response Policy (CARP), the agency is committed to a consistent, predictable, and appropriate compliance assurance program to protect health and the environment. The CARP emphasizes the importance of education and outreach, compliance assistance, and compliance monitoring in achieving compliance, as well as the need for formal enforcement. The CARP already directs NHDES to always focus first on early identification and correction of environmental violations in order to minimize impacts to public health and the environment. Further, and most relevant to the proposed bill, the CARP already directs NHDES to take the following, among other considerations, into account when determining the most appropriate compliance action:

- Degree of Cooperation,
- Economic Benefit¹ - Whether an economic benefit was realized as a result of the violation,
- Harm - Actual harm or significant threat of harm to public health or the environment,

¹ Addressing the economic benefit is particularly important because the vast majority of companies in New Hampshire are meticulous about maintaining compliance with environmental regulations and they deserve a level playing field on which to compete.

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- History of Non-Compliance²,
- Knowledge and Intent, and
- Prompt Remediation.

SB 330 would unreasonably limit NHDES's ability to impose administrative fines and seek civil penalties in certain cases. For example, under current law, NHDES may seek to impose a civil penalty on a company that was responsible for an oil leak pursuant to RSA 146-C:2, the prohibition on discharging oil onto the land or water. In some cases, a penalty may be appropriate even though the discharge was halted and the company was subsequently brought back into full compliance. Section 5 of proposed SB 330, by amending RSA 146-C:10, would require NHDES to first inform the facility of the potentially knowing and ongoing oil discharge and then wait to see if the discharge is stopped within 30 days. Only if the discharge continued past the thirtieth day would NHDES be authorized to seek to impose a civil penalty.

In addition, SB 330 may result in increased oversight and direct enforcement in New Hampshire by the U.S. Environmental Protection Agency (EPA). If sufficient fines or penalties are not imposed by NHDES in particular cases, EPA could seek to impose federal civil penalties in federal court. These additional court actions are known as "overfiling." Second, and more drastically, if NHDES's authority to impose fines and civil penalties is reduced or effectively eliminated, EPA may withdraw its approval of New Hampshire's delegated and authorized environmental programs under the various federal environmental statutes. As a result, businesses and individuals would be required to communicate and negotiate with EPA directly, rather than with the local NHDES office.

In summary, NHDES is opposed to SB 330. We remain willing to work with the Committee to address any issues or concerns the Committee may have with NHDES's compliance policies.

Thank you again for the opportunity to comment on SB 330. Should you have further questions or need additional information, please feel free to contact either me (robert.scott@des.nh.gov, 271-2958) or Evan Mulholland, Air Resources Division, Compliance Bureau Administrator (evan.mulholland@des.nh.gov, 271-0882).

Sincerely,



Robert R. Scott
Commissioner

cc: Sponsor of SB 330: Senator Gary Daniels

² Repeat violators warrant additional enforcement.