

Chapter 2

Regulation & Permitting

This chapter identifies regulatory programs that address the protection of water quality through the implementation of construction phase erosion and sediment controls. It offers a brief summary of state and federal permitting programs that include specific erosion and

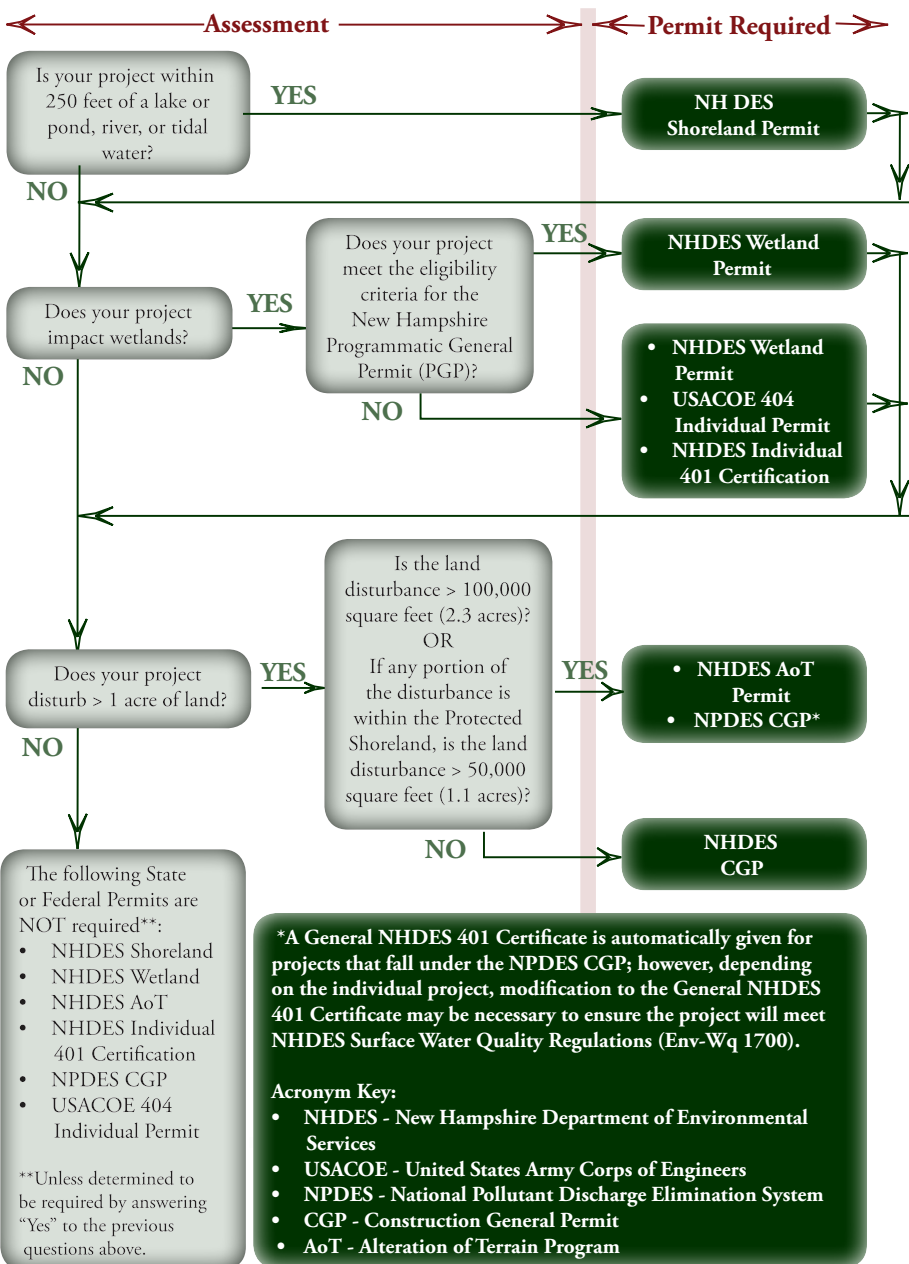
sediment controls. In addition to the federal and state requirements described here, local zoning, site planning, and subdivision development requirements may also include provisions for site management during project construction to prevent impacts from erosion and sedimentation.

Project owners typically apply for applicable permits under the various programs described below, and should carefully advise contractors of the obligations imposed by these permits. Project contractors should understand their obligations and responsibilities as specified in applicable permits; under some programs, contractors may also be required to file for applicable permit coverage (as under the *NPDES Construction General Permit* discussed in Section 2-2).

State and federal programs are briefly described below and in Figure 2-1. Further information about these programs is presented in Chapter 4 of the *NH Stormwater Manual, Volume 1 – Stormwater and Antidegradation*.



Figure 2-1. Applicability of Permit Programs



2-1. New Hampshire Regulatory Programs

Applicable New Hampshire regulatory programs include the following:

NH Statutes

There are several NH statutes applicable to land disturbance and development activities, and water quality. NH Revised Statutes Annotated (RSA) 672 – 677 describe the authority given to municipal governments to develop, implement, and enforce planning, zoning, and related regulations. In addition, RSA 481 – 488 detail water management and protection. Of particular importance are RSA 482-A: Fill and Dredge in Wetlands; RSA 483-B: Comprehensive Shoreland Protection Act; RSA 485-A: Water Pollution and Waste Disposal; and RSA 485-A:8: Classification of Waters. The NH RSAs are available on the NH General Court website at: <http://www.gencourt.state.nh.us/RSA/html/indexes/default.html>.

NH Surface Water Quality Regulations

New Hampshire Surface Water Quality Regulations (Env-Wq 1700) implement federal Clean Water Act (CWA) state water pollution control statute requirements and are intended to protect the state's surface waters. The NH Surface Water Quality Regulations are implemented through various state permitting and certification programs, including the 401 Water Quality Certification and the Alteration of Terrain Permit.

401 Water Quality Certification

Several federal permits may be required in order to conduct an activity that could result in a discharge to navigable waters. Common examples include dredge or fill of wetlands under the NH Programmatic General Permit (PGP) issued by the Army Corps of Engineers (ACOE), and construction activity under the EPA NPDES program. Section 401 of the federal Clean Water Act requires that an applicant for such federal permits must provide the permitting agency with a 401 Certification from the state before the permit is issued. The 401 Certification verifies that the discharge from the permitted activity will meet

the NH Surface Water Quality Regulations. It may include specific conditions for construction, operation, water quality monitoring, and reporting. In New Hampshire, the 401 Certification is issued by the NHDES Watershed Management Bureau with the exception of NPDES permits, where the 401 Certificate is issued by the NHDES Wastewater Engineering Bureau.

Examples of common federal permits (also see Section 2-2) that require 401 Certification include:

- US Environmental Protection Agency (EPA) NPDES Construction General Permit (CGP).
- US Environmental Protection Agency (EPA) NPDES Construction Dewatering General Permit.
- US Army Corps of Engineers (ACOE) New Hampshire State Programmatic General Permit (NH PGP), for projects that are expected to have a minimal impact on the aquatic environment. NHDES issues “general 401 Certifications” for the NH PGP that includes general provisions for protecting water quality. Most projects under NH PGP do not require an individual 401 Certification review since water quality is addressed through the general 401 Certification. However, NHDES can modify the general 401 Certification, or revoke and issue an individual 401 Certification for any project included under the general permit. In New Hampshire, the NHDES Wetlands Bureau contacts the ACOE to determine if a project falls under the NH PGP and the general 401 Certification, or if a separate 401 Certification is required.

NH Alteration of Terrain Permit

The NH Alteration of Terrain permit is issued by the Alteration of Terrain (AoT) Program within NHDES. This permit is intended to protect New Hampshire surface waters and groundwater by controlling soil erosion and managing stormwater runoff from developed areas. An Alteration of

Terrain permit is required whenever a project proposes to disturb more than 100,000 square feet of contiguous terrain (50,000 square feet, if a portion of the project is within the protected shoreland).

This permitting program applies to industrial, commercial, and residential developments as well as to earth moving operations, such as gravel pits. Permits are issued by NHDES after a technical review of the application. For projects falling within jurisdiction, the AoT regulations include specific requirements governing the extent and duration of exposure of site soils, and the implementation of erosion and sediment control measures during construction.

NHDES Wetlands Bureau Dredge and Fill Permit

The Wetlands Rules (Env-Wt 100-800) address activities in both tidal wetlands and waters and freshwater bodies. The laws do not include a minimum threshold of size for wetlands or impacts under the act; therefore, most dredge or fill impacts require a wetlands permit from the NHDES Wetlands Bureau, regardless of the size of the impact. The Wetlands Bureau classifies projects according to the potential impacts: minimum, minor, or major. Program staff members closely review applications to ensure that projects meet the current rules.

Projects permitted under this program will likely include provisions for erosion and sediment controls applicable to land disturbance associated with the permitted activity. Note that these projects not only may involve land disturbance, but also work within a water resource.

The information in this Volume of the Manual does not specifically address work (including temporary measures) within wetlands, streams, and other water bodies. The design of temporary works for such projects should be documented in the permitting process, and included in the construction drawings and specifications. Such measures will vary depending on the type of construction, area disturbed, and the affected water body's quality and habitat features. Measures to isolate the work area, control turbidity, control water levels, and

remove water from excavations, and other temporary protective measures should be implemented in strict accordance with approved construction drawings and specifications, as well as applicable conditions of the Fill and Dredge Permit.

NHDES Shoreland Permit

The NH Shoreland Rules (Env-Wq 1400) implement the Comprehensive Shoreland Protection Act (RSA 483-B) and are intended to protect the shorelands of the state to maintain the integrity of the public waters they surround. The shoreland provides a natural woodland buffer, consisting of trees and other vegetation located in areas adjoining public waters. These buffers are important to intercept surface runoff, wastewater, subsurface flow, and deeper groundwater flows from upland sources of pollution and to reduce the effects of nutrients, sediment, pesticides, and other pollutants as well as to moderate temperature and protect nearby surface waters from thermal impacts of development.

The Comprehensive Shoreland Protection Act and the Shoreland Rules were substantially revised and became effective July 1, 2008. One of the major changes was the creation of a Shoreland Permit

The NH Shoreland Permit is issued by the NHDES Wetlands Bureau. This permit protects the shorelands surrounding state surface waters by managing disturbance within the protected shoreland area. The protected shoreland is defined as the land within 250 feet of the reference line. The reference line is defined as the natural mean high water level for fresh water bodies, the highest observable tide line for coastal waters, and the ordinary high water mark for rivers. A Shoreland Permit is required whenever a project proposes construction, excavation, or filling within the protected shoreland. Permits are issued by NHDES after a technical review of the application, which includes a narrative description of the project, the project plans, a detailed worksheet, and supporting documents.

2-2. Federal Permit Programs

The primary federal permit programs include the following:

National Pollutant Discharge Elimination System Program

The Clean Water Act authorized the US EPA to regulate point sources that discharge pollutants into waters of the United States through the National Pollutant Discharge Elimination System (NPDES) permit program. In New Hampshire, this program is administered by the U.S. EPA. The program regulates “point sources” generated from a variety of municipal and industrial operations, including treated wastewater, process water, cooling water, and stormwater runoff from drainage systems. It also regulates discharges associated with construction activities under the *NPDES Construction General Permit (CGP)*.

The CGP is the primary federal permit involved in land disturbance activities. It is required for construction activity that disturbs one or more acres of land. If the construction activity creates less than one acre of disturbance, but is part of a larger common plan of development totaling over one acre of disturbance (e.g., a single lot within a planned subdivision), a permit is needed. It is important to note that the one-acre threshold is for the total disturbance and does not need to be a contiguous (or connected) disturbed area to be included in the total disturbance.

EPA and NHDES define “construction activity” to include clearing, grading, excavation and other land disturbance activities related to projects such as landscaping, demolition, and building homes, office buildings, factories, roads and other development activities. Because the NPDES CGP is a federal permit, projects are required to first obtain a 401 Certification from NHDES (See Section 2-1).

To obtain coverage under the NPDES CGP, the “Operator” of a construction site must file a notice of intent (NOI) with the EPA, and must prepare a Storm Water Pollution and Prevention Plan (SWPPP) to govern construction activities. The SWPPP must address the management of site activities

that could result in pollution of receiving waters. Thus, erosion and sediment controls comprise key components of the SWPPP.

The CGP requires application for coverage by parties who meet one or both parts of the definition of “Operator.” An “operator” has operational control over either the construction plans and specifications, including the ability to make modifications to those plans and specifications (e.g., owner or developer of project), or has operational control of those activities at a project which are necessary to ensure compliance with a SWPPP for the site or other permit conditions (e.g., general contractor). There may be more than one party at a site performing tasks related to “operational control” and hence, more than one operator must submit an NOI. Examples of scenarios for permit coverage include:

- “Owner” as sole permittee. In this situation, the property owner designs the structures for the site, develops and implements the SWPPP, and serves as general contractor (or has an on-site representative with full authority to direct day-to-day operations). The “Owner” is the only party that needs permit coverage, with other parties working on-site considered subcontractors (and not needing separate permit coverage).
- “Contractor” as sole permittee. In this case, the property owner hires one company (i.e., a contractor) to design the project and oversee all aspects of the construction project, including preparation and implementation of the SWPPP and compliance with the permit. Under this arrangement, the contractor would likely be the only party needing a permit. This would be the typical scenario for an individual having a personal residence built for his own use (e.g., not those to be sold for profit or used as rental property), in which case the individual would not be considered an operator. However, individuals would meet the definition of “operator” and require permit coverage

in instances where they perform general contracting duties for construction of their personal residences.

- Owner and contractor as co-permittees. In this scenario, the owner retains control over any changes to site plans, SWPPPs, or storm water management design. However, the contractor is responsible for overseeing actual earth disturbing activities and daily implementation of SWPPP and other permit conditions. This is the most common scenario and, in this case, both parties need to apply for coverage.

Note the NPDES CGP was originally issued in 2003 and re-issued in 2008. The 2008 CGP is issued for only two years to allow for modifications when construction activity effluent limitation guidelines become available. For more extensive information about this permit, who must apply, permit forms and procedures, and the specific requirements for the SWPPP, interested persons are referred to the following US EPA website: <http://cfpub.epa.gov/npdes/stormwater/cgp.cfm>.

Department of the Army Programmatic General Permit - State of New Hampshire

The New England District of the U.S. Army Corps of Engineers (ACOE) has issued the Programmatic General Permit (PGP) to expedite review of projects involving minimal impact work in coastal and inland waters and wetlands within the State of New Hampshire. This New Hampshire PGP is intended to minimize duplication between New Hampshire's Regulatory Program governing work within coastal and inland waters and wetlands and the ACOE Regulatory program.

Subject to certain exclusions and conditions, the PGP eliminates the need to apply for separate approval from the ACOE for minor, non-controversial work in New Hampshire when that work is authorized by the NHDES Wetlands Bureau.

The PGP establishes specific conditions applicable to such projects, in order for them to be eligible for coverage. These conditions include provisions for erosion and sediment

controls, work site restoration, and other requirements for work adjacent to and in water bodies under ACOE jurisdiction.

Further information regarding the permit is available at the following website: <http://www.nae.usace.army.mil/reg/NHPGPpermit.PDF>