

CHAPTER 256
SB 121 - FINAL VERSION

03/23/2017 0862s
1Jun2017... 1484h
06/22/2017 2364CofC
06/22/2017 2389EBA

2017 SESSION

17-0878
08/10

SENATE BILL 121

AN ACT establishing a commission to determine if the department of environmental services should request delegation of the National Pollutant Discharge Elimination System from the Environmental Protection Agency.

SPONSORS: Sen. Sanborn, Dist 9; Sen. Watters, Dist 4; Rep. Cordelli, Carr. 4

COMMITTEE: Energy and Natural Resources

AMENDED ANALYSIS

This bill establishes a commission to determine if the department of environmental services should request delegation of the National Pollutant Discharge Elimination System from the Environmental Protection Agency, and if so, to recommend a fee structure that would pay for the department to hire the required number of employees to manage the issuance of permits.

Explanation: Matter added to current law appears in ***bold italics***.
Matter removed from current law appears ~~[in brackets and struck through]~~
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

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STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Seventeen

AN ACT establishing a commission to determine if the department of environmental services should request delegation of the National Pollutant Discharge Elimination System from the Environmental Protection Agency.

Be it Enacted by the Senate and House of Representatives in General Court convened:

256:1 New Section; National Pollutant Discharge Elimination System Study Commission. Amend RSA 483-B by inserting after section 7 the following new section:

483-B:7-a National Pollutant Discharge Elimination System Study Commission.

I. There is established a commission to determine if the department of environmental services should request delegation of the National Pollutant Discharge Elimination System from the Environmental Protection Agency, and

if so, to recommend a fee structure that would pay for the department to hire the required number of employees to manage the issuance of permits.

II. The members of the commission shall be as follows:

- (a) One member of the senate, appointed by the president of the senate.
- (b) One member of the house of representatives, appointed by the speaker of the house of representatives.
- (c) The commissioner of the department of environmental services, or designee.
- (d) One person representing affected nuclear facilities, appointed by the speaker of the house of representatives.
- (e) The executive director of the fish and game department, or designee.
- (f) One person recommended by the Business and Industry Association, appointed by the governor.
- (g) One person representing the Pease development authority, appointed by the executive director.
- (h) One person representing conservation, jointly appointed by the New Hampshire Rivers Council and New Hampshire Lakes Association.
- (i) Three people representing affected water and sewer facilities, appointed by the New Hampshire Municipal Association.

III. Legislative members of the commission shall receive mileage at the legislative rate when attending to the duties of the commission.

IV. The commission shall determine if the department of environmental services should request delegation of the National Pollutant Discharge Elimination System from the Environmental Protection Agency, and if so, to recommend a fee structure that would pay for the department to hire the required number of employees to manage the issuance of permits.

V. The members of the study commission shall elect a chairperson from among the members. The first meeting of the commission shall be called by the senate member. The first meeting of the commission shall be held within 45 days of the effective date of this section. Six members of the commission shall constitute a quorum.

VI. The commission shall report its findings and any recommendations for proposed legislation to the president of the senate, the speaker of the house of representatives, the senate clerk, the house clerk, the governor, and the state library on or before November 1, 2017.

256:2 Repeal. RSA 483-B:7-a, relative to the National Pollutant Discharge Elimination System study commission, is repealed.

256:3 Effective Date.

I. Section 2 of this act shall take effect November 1, 2017.

II. The remainder of this act shall take effect upon its passage.

Approved: July 18, 2017

Effective Date:

I. Section 2 effective November 1, 2017

II. Remainder effective July 18, 2017



***NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM STUDY COMMISSION
RSA 483-B:7-a – SB 121 – Chapter 256:1 – Laws of 2017***

Establishing a commission to determine if the department of environmental services should request delegation of the National Pollutant Discharge Elimination System from the Environmental Protection Agency.

Considerations for New Hampshire Delegated Authority

BACKGROUND

Under terms of the federal Clean Water Act (CWA), end-of-pipe wastewater discharges into water bodies are regulated by the National Pollutant Discharge Elimination System (NPDES) program. The NPDES program can be administered either by states or federally by the US Environmental Protection Agency (EPA). EPA currently administers the program in New Hampshire.

Massachusetts (along with New Hampshire and Idaho) is one of only three remaining states that do not have delegated authority to issue NPDES permits. This means that EPA maintains control over permits, compliance, and enforcement for the NPDES permit holders in New Hampshire. When states assume control of permitting, EPA continues to monitor performance to ensure the program is at least as stringent as the federal requirements. And, the agency can withdraw its authorization if the state fails to meet delegation obligations.

States must have adequate legal authority and procedures and be able to administer the program. Other key considerations in granting a state's request for delegation are feasibility and cost. In New Hampshire's case, NHDES must have more financial resources to provide adequate support for the science that's behind setting permit limits – data collection, analysis, and modeling. Additional resources are also necessary for the agency to keep up with the ever-changing federal requirements, properly evaluate rapidly changing treatment technologies, and have sufficient, sound scientific evidence for legal challenges. Staffing requirements will also increase significantly with delegation.

NHDES will need to assign enough staff to meet permitting, compliance, and enforcement needs. Finally, the agency must enhance its information technology capabilities to streamline information sharing, including filing reports and analyzing information to identify permittees that are out of compliance. Without these improvements, NHDES's ability to effectively administer the NPDES program is limited.

Cost is another factor. After further evaluation, the most recent estimates of the agency's annual funding needs to afford delegation costs is about \$2-3 million. To meet this need, NHDES could charge permit fees, receive appropriations, or collect an assessment fee from ratepayers based on wastewater flow. The latter would be the most reliable source, but it's more likely that the agency would have to use a combination of these funding sources to meet its needs.

Potential Advantages to Delegation

NHDES already has delegated authority for drinking water, air quality, and other programs that it is effectively managing. Having NHDES manage this program would ensure consistency with other state-run environmental initiatives.

Delegating authority to NHDES does not remove EPA from the permit process

NHDES has a better understanding of local conditions and can focus specifically on New Hampshire.

NHDES already issues a state permit, so delegating would eliminate the duplicative process and create efficiencies.

If funded sufficiently, delegation would lead to better science and improved permitting and protection for resources.

A locally-managed process would make it easier for municipalities to implement integrated planning of all water resources (including drinking water, wastewater, and stormwater), since EPA does not regulate programs such as those for drinking water.

Better management of all pollution sources in a watershed would result from a redesigned program supported by realistic funding.

EPA's one-size-fits-all approach to permitting does not consider location-specific environmental, social, and economic factors whereas NHDES is more familiar and in tune with the various regions, watersheds, and ecosystems in New Hampshire. Its water quality standards would be more site-specific and based on current scientific knowledge.

NHDES management of the program would provide greater opportunity for municipalities to successfully implement integrated water resource planning and address multiple regulatory requirements and community infrastructure needs.

Delegation of authority would simplify and reduce the overlapping administrative responsibility of the federal and state agencies, potentially reducing legal and administrative expenses for the permittees.

Potential Disadvantages to Delegation

To assume delegation of the program will cost New Hampshire and its tax or rate payers millions of dollars every year; rather than having the federal government bear those costs.

NHDES could be subject to more political pressure as a state agency.

Capacity to administer the program would need to be created quickly.

It could be difficult to return the program to EPA, should the state decide it no longer wants to administer it. The risk of inconsistent or funding shortfalls is high and could cause a backlog of science, permitting, and compliance and enforcement. In those instances, NHDES would not be able to adequately fulfill its responsibility to protect New Hampshire's waters.

SOMERSWORTH, NEW HAMPSHIRE

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September 25, 2017

Mr. Timothy W. Fortier
Communications and Member Services Coordinator
New Hampshire Municipal Association
Concord, New Hampshire 03301

Re: NPDES Study Commission – Wednesday September 27, 2017 NHMA Members meeting

Dear Timothy:

Thank you for your assistance with arranging this meeting to discuss and share information about SB 121, which establishes a Commission to determine if the Department of Environmental Services should request delegation of the National Pollutant Discharge Elimination System (NHPDES) from the Environmental Protection Agency. The Commission has been established and it is understood that the Commission is asked to report its findings and recommendations to the State Legislature and the Governor on or before November 1, 2017. We are unable to join you at the meeting on Wednesday September 27 due to schedule conflicts. However, while City staff continues to research the subject and has yet to formalize a recommendation to our City Council, many aspects of obtaining delegated authority are attractive to us and worth pursuing.

To that end, the following are key reasons to support a State request for delegated authority from EPA:

- New Hampshire is one of four (4) states that are non-delegated for NHPDES. Other states with delegated authority have found success with implementing key elements of the Clean Water Act (CWA) by continuing to have direct ties to EPA, yet due to knowledge of the various local water and sewer authorities in the State, are better suited to understand the specific needs of Cities and Towns working toward implementing CWA requirements for drinking water, wastewater treatment and stormwater discharges. New Hampshire can be equally successful with delegated authority.
- New Hampshire municipalities have established working relationships with State DES officials who are close to municipal operations and needs and are able to be much more responsive to local situations.
- State officials have historically been more sensitive and aware of the cost-effective nature of implementing CWA requirements while enforcing overall goals of the NHPDES.

Proud past, bright future

-New Hampshire DES has knowledgeable and accessible staff, with offices in nearby Concord and District offices rather than in Washington DC or Boston, Massachusetts. In addition, State DES staff are aware and involved with efforts over the recent years to introduce more science and regional collaboration into the formulas and requirements to meet new pollution control standards such as with the new MS4 Stormwater Discharge Permits. Examples include the State DES's active participation in the Seacoast Stormwater Coalition created to share implementation requirements with affected communities.

-Any delegation to NH DES would not preclude the respect of any final authority role of EPA. EPA continue to serve as a final say over top policy matters but can rely on a strong State Agency to be effective and responsive in implementing regulations.

-Delegated authority is better for private business in the State in that it allows businesses to work with a State Agency on implementing and enforcing CWA standards rather than with EPA, and for similar reasons it is more advantageous to local governments as they have both an advantageous distance and familiarity to support a more cooperative working approach.

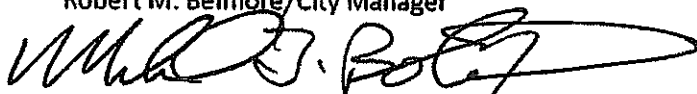
- Again, our view is that a State Agency is better suited to implement NPDES permits due to the working knowledge of city and town's water and wastewater treatment facilities, in part due to administering SRF loan funds, managing plant operator licenses and working relationships built over the years from site inspections and tours, professional networking opportunities and responding to City/Town officials questions and concerns about pollution control infrastructure operations and improvements.

Thank you for your efforts in this matter.

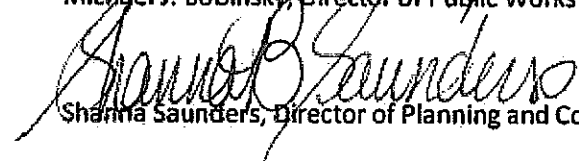
Sincerely,



Robert M. Belmore, City Manager



Michael J. Bobinsky, Director of Public Works



Shanna Saunders, Director of Planning and Community Development

ENVIRONMENTAL Fact Sheet



29 Hazen Drive, Concord, New Hampshire 03301 • (603) 271-3503 • www.des.nh.gov

WD-WEB-08

2017

Federal Stormwater Permits

Background

The Federal Water Quality Act of 1987 recognized that runoff from urban areas and industrial sites pollutes surface waters and required the U.S. Environmental Protection Agency (EPA) to address stormwater discharges with National Pollutant Discharge Elimination System (NPDES) permits using a two-phased approach. The Phase I and Phase II regulations were published in 1990 and 1999, respectively.

Who Is Required To Apply For A Permit?

In Phase I, EPA required "large and medium municipal separate storm sewer system" (MS4) operators to obtain permit coverage. These MS4s, none of which are located in New Hampshire, generally serve areas with populations of 100,000 or more. Dischargers of "stormwater associated with industrial activity" are also required to apply for permits.

The Phase I industrial sources, which are described in detail in [40CFR122.26\(b\)\(14\)](#) generally include heavy and light manufacturing facilities, hazardous/solid waste processing, recycling facilities, transfer stations, junkyards, mining (including sand and gravel), timber processing, power plants, vehicle maintenance, marinas, sewage/sludge treatment plants and construction activities that disturb more than 5 acres.

Phase II regulates "small municipal separate storm sewer system" or "small MS4" discharges in urbanized areas; "stormwater discharge associated with small construction activity"; and municipally owned industrial activities that were exempted from regulation during Phase I.

How do I Apply for a Federal Stormwater Permit?

New or unpermitted Phase I facilities and all Phase II facilities must either submit federal forms 1 and 2F for an individual NPDES permit or file a Notice of Intent (NOI) application form for coverage under a general NPDES permit. For most New Hampshire facilities, the general NPDES permit is the preferred option. The following describes the three general NPDES permits for stormwater discharges in New Hampshire.

Construction General Permit (CGP)

EPA reissued the CGP on January 11, 2017 for five years. The reissued CGP covers both the Phase I, large construction sites greater than 5 acres; and "stormwater discharge associated with small construction activity," which includes construction sites from 1 to 5 acres (or smaller than 1 acre if part of a larger common plan of development or sale that totals 1 acre). The permit contains new requirements that implement technology-based Effluent Limitation Guidelines and New Source Performance Standards, which were issued by EPA for the construction and development industry on December 1, 2009. The permit requires the owner and operator of the construction site to, among other things:

- Develop and implement a stormwater pollution prevention plan (SWPPP).
- Post a visible public notice at the main entrance of the construction site, containing confirmation of permit coverage and details on where the SWPPP may be viewed.
- As part of the SWPPP, develop a site map showing surface waters, disturbed areas, best management practices (BMPs), etc.
- Have “qualified personnel” inspect all erosion and sediment control BMPs, maintain BMPs after storm events and keep records in the SWPPP of all inspections and maintenance performed.
- Control wastes, such as discarded building materials, concrete truck washout and sanitary wastes.
- Take corrective actions (e.g., fix stormwater controls, clean up spills and sediment deposits, etc.).
- File a Notice of Termination (NOT) form when the construction site is stabilized/revegetated.

The CGP, including information on applying electronically, can be found at <https://www.epa.gov/npdes/stormwater-discharges-construction-activities-2017-cgp#overview>.

Multi-Sector General Permit (MSGP)

This permit covers stormwater discharges from 29 different industry sectors. The MSGP covers not only the Phase I industries described on page 1, but also municipally owned industrial activities that with the implementation of Phase II are now regulated. Municipally owned facilities needing permit coverage include sand and gravel pits, transfer stations, school bus maintenance, and publicly owned treatment works (design flow >1 MGD or with a pretreatment program). Municipally owned power plants, airports and uncontrolled sanitary landfills are regulated under Phase I.

EPA reissued the MSGP on June 4, 2015. It requires, among other things, the development and implementation of a SWPPP, employee training, record keeping, discharge monitoring and annual reports to EPA. The MSGP, including the NOI and guidance materials on the permit requirements can be found at <https://www.epa.gov/npdes/stormwater-discharges-industrial-activities#msgp>. The MSGP will expire on June 4, 2020 and will be administratively extended for current permittees until it is reissued by EPA.

Phase I and II facilities with stormwater discharges associated with industrial activity, which eliminate the exposure of pollutants (such as from raw materials, finished products and by-products) to stormwater, may be able to opt out of the need for permit coverage if they file a “No Exposure Certification” (NEC) form every five years with EPA. NEC forms and guidance can be found at the website listed in the above paragraph.

Small Municipal Separate Storm Sewer System General Permit (MS4GP)

The MS4GP was reissued by EPA on January 18, 2017. See https://www3.epa.gov/region1/npdes/stormwater/MS4_NH.html for the final permit. Small MS4 owners and operators in urbanized areas (based on 2010 census) in the following 61 New Hampshire municipalities are required to apply or reapply for coverage under the 2017 MS4GP, unless granted a waiver by EPA:

- ❖ Allenstown, Amherst, Atkinson, Auburn, *Barrington*, Bedford, *Bow*, *Brentwood*, *Candia*, *Chester*, Danville, Derry, Dover, Durham, *East Kingston*, *Epping*, Exeter, *Fremont*, Goffstown, Greenland, Hampstead, Hampton, *Hampton Falls*, Hollis, Hooksett, Hudson, Kingston, *Lee*, Litchfield, Londonderry, *Lyndeborough*, *Madbury*, Manchester, Merrimack, Milford, Milton, *Mont Vernon*, Nashua, New Castle, *Newfields*, *Newington*, Newmarket, Newton, North Hampton, Pelham, Pembroke, Plaistow, Portsmouth, Raymond, Rochester, Rollinsford, Rye, Salem, Sandown, Seabrook, Somersworth, *South Hampton*, Stratham, Wilton and Windham.

Communities in the above list in *italics* were granted waivers pursuant to 40CFR122.32(d) by EPA in 2013.

In addition to the MS4s in urbanized areas in the municipalities listed above, EPA may designate additional MS4s

outside of urbanized areas for permit coverage, if they are contributing to water quality problems.

The owners/operators of Small MS4s may include municipalities; county facilities, such as prisons/hospitals; districts; federal facilities, such as military bases; and state facilities, such as highways. The MS4GP requires MS4 operators to develop a stormwater management program that controls pollutants from all of the MS4 discharge points to the "Maximum Extent Practicable." The MS4GP requires that the stormwater program include the six minimum control measures listed below as well as an annual report to EPA summarizing progress toward achieving specific measurable goals:

- Public education and outreach on stormwater impacts.
- Public involvement/participation during program development.
- Illicit discharge detection and elimination.
- Construction site storm water runoff control.
- Post-construction storm water management in new development and redevelopment.
- Pollution prevention/good housekeeping for municipal operations.

The 2017 MS4GP contains many new, more prescriptive, requirements necessary to protect water quality as compared to the first MS4GP issued in 2003. These include, among other things, the requirements to employ or install non-structural and structural best management practices in catchment areas draining to impaired surface waters.

Where to Obtain More Information

EPA's NPDES Stormwater Program website is at <https://www.epa.gov/npdes/npdes-stormwater-program> and the EPA New England address is <https://www3.epa.gov/region1/npdes/stormwater/index.html>. Thelma Murphy is the federal stormwater coordinator for EPA New England and may be reached at **(617) 918-1615**.

The NHDES website on the Federal Stormwater Program, which contains guidance materials including a timeline for the requirements of the 2017 MS4GP, is at <http://des.nh.gov/organization/divisions/water/stormwater/index.htm>. Jeff Andrews is the NHDES contact on the federal stormwater permits and may be reached at **(603) 271-2984**.

The Clean Water Act (CWA) and the National Pollutant Discharge Elimination System (NPDES) program

The principal law governing pollution of the nation's surface water is the Clean Water Act.

The Clean Water Act provided for the National Pollutant Discharge Elimination System (NPDES) program, which requires that the discharge of pollutants be regulated through a permitting process in order to protect overall water quality.

EPA issues NPDES permits for all parts of the NPDES program in New Hampshire, including NPDES permits for municipal treatment plants, industrial discharges, and stormwater discharges.

The New Hampshire Department of Environmental Services (NHDES) certifies that permits drafted and issued by EPA comply with New Hampshire Water Quality Standards.

NPDES Permits and State Surface Water Discharge Permits

In accordance with State Law (RSA 485-A:13, I(a)), NHDES adopts all NPDES permits associated with the discharge of sewage or waste.

Currently there are 145 State Surface Water Discharge permits, for municipal wastewater treatment plant discharges, and industrial discharges.

These 145 State Surface Water Discharge permits are the same document as their federal NPDES permit.

New Hampshire does not adopt federal stormwater permits.

Compliance Inspection and Enforcement

EPA and DES have a partnership agreement regarding compliance inspection and enforcement.

DES conducts inspection of the entities holding both a NPDES and State Surface Water Discharge permit.

DES typically inspects major (larger and more significant) facilities on an annual basis, and minor (smaller and less significant) facilities every two years.

DES and EPA share enforcement responsibilities.

How a NPDES Permit is Issued

In general terms, this is how a NPDES permit is issued:

EPA drafts a permit and shares it with NHDES. Along with a permit, EPA also drafts a “fact sheet”, which is a document that explains what is in the permit, and how the content of the permit (such as numerical limits, terms and conditions) was derived.

EPA and DES, and perhaps other regulatory agencies, edit the permit and fact sheet. DES must ensure that the permit will meet surface water quality standards in New Hampshire. At this point, it is said that DES has made a preliminary determination that they can “certify” the permit (meaning that the permit will meet state surface water quality standards).

The permit is then opened to the public, for comment. This is the “public notice” period, and typically lasts for 30 days, though some permits have taken much, much longer, due to the complexity of issues. During the public notice period, everybody can comment on the permit.

After the close of the public notice period, responses to the comments are written, and the permit is modified, as appropriate.

The response to comments and the final permit are issued, with a projected effective date for the permit (typically, about 60 days from the release of the final permit).

Anyone who made comment on a draft permit during the public notice period, who still disagrees with the content of the permit, can file an appeal of the final NPDES permit. If the appeal is of an individual NPDES permit (as opposed to one of the general permits), the appeal must be filed with the Environmental Appeals Board within the 30-day appeal period. If the appeal is of a general NPDES permit, the appeal must be filed with the Circuit Court of Appeals within 120 days issuance of the notice of the final permit.

During an appeal, the issues that are being appealed are typically “stayed” (meaning that they do not go into effect) while they are being worked out in the appeal process.

Once the issues are worked out, and the NPDES permit eventually becomes effective, DES adopts the NPDES permit as a State Surface Water Discharge permit (see below for which permits DES adopts, and which ones it does not).

For the current 145 regulated entities, they have one permit document which is both their NPDES permit and their State Surface Water Discharge permit.

Who makes up the NPDES regulated community

To begin with, the 145 NPDES permits that the State adopts as State Surface Water Discharge permits consist of the following:

- 53 Municipal Wastewater Treatment Plant Individual Permits
- 29 Industrial (non-municipal) Individual Permits
- 17 Municipal Wastewater Treatment Plant (MWWTP) General Permits
- 2 Non-Contact Cooling Water (NCCW) General Permits
- 31 Hydroelectric Generating Facilities General Permits (HydroGP)

5 Potable Water Treatment Facility (PWTF) General Permits, and
8 Remediation General Permits (RGP).

Beyond the 145 NPDES permits that the State adopts as State Surface Water Discharge permits, there are a number of other permits currently issued by EPA without NHDES co-issuance. They are the following:

Pesticide General Permit (PGP)

Multi-Sector General Permit (MSGP)

Vessel General Permit (VGP)

Small Vessel General Permit (sVGP)

Construction General Permit (CGP), and

Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (MS4)

If New Hampshire were to be delegated the NPDES program, these permits would have to be issued by New Hampshire, and monitoring, compliance and enforcement of the terms of the permits, would be part of the NPDES program for New Hampshire. However, these permits would have to be no less stringent than if the permits were issued by EPA. EPA would maintain the ability to issue their own permit in situations where, in their opinion, New Hampshire did not issue an appropriate permit.

The MS4 general permit applies to 44 communities in New Hampshire. The multi-sector general permit (MSGP) and the construction general permit apply to (on the order of) 300-600 MSGP and 1,500-1,900 CGP, according to an EPA database. (These numbers are transient, particularly for the often short-lived CGP.)

The MSGP apply to a wide variety of industrial sectors, where stormwater associated with the industrial facility may be regulated. These industrial sectors

include the following (as identified in the MSGP): timber products, paper and allied products, chemicals and allied products manufacturing, asphalt paving and roofing materials, primary metals, automotive salvage yards, scrap metal recycling facilities, steam electric generating facilities, leather and tanning and finishing, fabricated metal products, and others. At this point, only EPA issues the MSGP for stormwater associated with these (and other) industries.

What changes if the State of New Hampshire takes delegation of the NPDES program

To begin with there are three broad issues to be considered when taking delegation. They are the following:

scientific support

information technology, and

resources.

Scientific support: To begin with, EPA has a vast expanse of scientific resources available. This allows them to deal with technical questions about the hazards of such things as pesticides and pharmaceutical products, PFOA (perfluorooctanoic acid), aluminum, and others. The discussion on how to properly regulate discharges requires strong scientific support. Without it issuing permits can come to a stand-still, and the process becomes a legal battle, as much as it is a scientific issue. While EPA is still an available resource, it is unclear what New Hampshire will need in terms of scientific staff and legal staff, to issue permits in a timely manner.

Information technology: New Hampshire will need to create a database, like other states have, to maintain the monitoring, compliance and enforcement information generated by the NPDES program.

Resources: Staffing at NHDES will need to be increased dramatically. With delegation of the NPDES program, a fee structure will need to be developed to

maintain the resources needed (personnel, hardware and other). Currently, there is no fee for any of the NPDES permits.

How do we continue this discussion?

A Capacity Building Plan (the Plan) may be helpful in tackling some of the questions about taking delegation of the NPDES program. Part of the Plan needs to address what resources are needed for an effective program, how much it will cost for an effective program, and how will it be paid for. These questions do not need to wait for the writing of the Plan.

DRAFT