The Legal Basis in New Hampshire: Adopting Stormwater Zoning Ordinances and Land Development Regulations

FEDERAL LAW

CLEAN WATER ACT

The Clean Water Act (CWA) originated as the Federal Water Pollution Control Act of 1972 in response to unchecked dumping of pollution into the nation’s surface waters. At that time, about 2/3 of U.S. waters had been declared unsafe for fishing and swimming. The CWA provides the basic structure for:

1) regulating discharges of pollution into the waters of the United States, and
2) regulating quality standards for the nation’s surface waters. Its objective is “to restore and maintain the chemical, physical, and biological integrity of the nation’s waters.”

The U.S. Environmental Protection Agency (EPA) administers the CWA and enforces its provisions. The EPA is authorized to implement water pollution control programs, like setting water quality standards for all surface waters (streams, lakes, and coastal waters).

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES)

The CWA made it illegal to discharge any pollutant from a point source into navigable waters without an NPDES permit. The NPDES Storm Water Program addresses non-agricultural sources of stormwater discharges. The program’s permitting mechanism requires dischargers to implement control measures that prevent pollution from being washed into surface waters by stormwater runoff. Control measures, like stormwater management programs, must use best management practices. The NPDES gives permitting authorities guidance on meeting stormwater pollution control goals as cost-effectively as possible. The CWA also requires NPDES permits to be consistent with applicable state water quality standards.

NPDES AND EPA

Through the Phase 1 and Phase 2 NPDES programs EPA sets water quality standards for point source and wastewater discharge permits. EPA administers NH’s NPDES permit program and permits for stormwater and sewer overflow discharges. Individual homes that are connected to a municipal system, use a septic system, or do not produce surface discharge do not need an NPDES permit. Industrial, municipal, and other facilities must obtain permits if their discharges go directly to surface waters.

NPDES STORMWATER PERMIT TYPES

The NPDES permit regulations cover 3 main classes of stormwater and wastewater discharges.

Municipal Separate Storm Sewer Systems (MS4s) Permits

EPA administers its Stormwater Program in two phases. Generally, under Phase I of the program, EPA issues NPDES permits for:

A) “medium MS4s” and “large MS4s”
B) certain construction activities; and
C) multiple categories of industrial activity.

Phase II extends coverage of the program nationwide to:

1) automatically include “small MS4s” in urbanized areas; and
2) include on a case-by-case basis small MS4s outside of EPA-designated urbanized areas.

MS4 permits are generally required for small, medium and large MS4s in urbanized areas. Any MS4 permit may include additional EPA requirements for pollution control. MS4 permits may be issued for a specific storm sewer system or an entire jurisdiction. MS4 permits prohibit non-stormwater discharges into storm sewers and require implementation of pollution reduction controls to the “maximum extent practicable” (MEP) using best management practices (BMPs).

The lack of a precise definition of MEP allows small MS4s flexibility in tailoring their programs to their actual needs.

The MEP standard requires small MS4s to satisfy the following six “minimum control measures”:

1) Public Education and Outreach
2) Public Participation
3) Illicit Discharge Detection and Elimination (IDDE) Program
4) Construction Site Runoff Controls
5) Post-Construction Runoff Controls
6) Good House Keeping and Pollution Prevention to Municipal Operations

Construction Activities Permits

All construction activities 1 acre or larger must obtain a permit, and those less than 1 acre must obtain a permit if they are part of a larger common development plan or sale that totals at least 1 acre. Small construction activities (less than 5 acres) may qualify for a waiver. In NH, where EPA is the permitting authority, operators must meet EPA’s Construction General Permit requirements.

Industrial Activities Permits

Industrial facilities (as defined by the facility’s Standard Industrial Classification code) that discharge to an MS4 or to waters of the U.S. must obtain a permit. Operators (excepting construction) may qualify for a waiver by certifying to a condition of “no exposure” if their industrial materials and operations are not exposed to stormwater. NH operators must meet the requirements of EPA’s Multi-Sector General Permit.

OTHER FEDERAL LAWS THAT MAY AFFECT NPDES PERMITS

Four federal acts apply to the EPA’s issuance of an NPDES permit to an MS4: the Endangered Species Act, the National Historic Preservation Act, the Magnuson-Stevens Fishery Conservation and Management Act, and the Coastal Zone Management Act.

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**STATE LAW**

Although many larger sites are subject to NH’s Alteration of Terrain permit requirements and the EPA’s stormwater management requirements under the CWA, local zoning ordinances and land development regulations provide municipalities the authority to act independently to address local problems and issues relating to water quality impacts and water resource management on a case-by-case basis. Often federal and state regulations apply to only the largest development projects and lack the oversight and enforcement for which municipalities are ultimately responsible. NH statutes provide the authority and legal mechanisms for municipalities to enforce standards for land use, the environment, and protection of life and property.

**GENERAL AUTHORITY AND ADMINISTRATION**

RSA 149-I:1-25 Sewers, RSA 432:3 State Plan, RSA 483-B:8 Municipal Authority, RSA 485-A:13 Water Discharge Permits, RSA 674:20 Districts, RSA 674:21-a Development Restriction Enforceable

**REGULATORY/PLANNING**

RSA 483:10 Rivers Corridor Management Plans, RSA 485-A:17 Terrain Alteration, RSA 674:2 Master Plan Purpose and Description, RSA 674:3 Master Plan Preparation, RSA 674:17 Purposes of Zoning Ordinances, RSA 674:44 Site Plan Review Regulations, RSA 674:36 Subdivision Regulations, RSA 674:16 Grant of Power

**ENVIRONMENTAL**


**MUNICIPAL LAW**

Vermont Law School Study: New Floodplain Maps for a Coastal New Hampshire Watershed and Questions of Legal Authority, Measures and Consequences

The Vermont Law School Study assessed the level of legal risk communities may face if they choose to adopt regulations and policies based on new floodplain maps that utilize projected future conditions. The study concluded that the level of risk of being successfully sued is very low, as long as the typical procedures and precautions are taken. The study may be found at [http://100yearfloods.org/resources](http://100yearfloods.org/resources).

The following sections outline the questions addressed by the Vermont Law School Study pertaining to the legal basis for adopting municipal zoning ordinances and land development regulations.

**MUNICIPAL LIABILITY**

What is the potential liability of a governmental entity that fails to take steps to reduce the vulnerability of its landowners and other citizens to flooding risks and storm damage as revealed by UNH’s research efforts and mapping information?

**Answer:** Municipalities are very unlikely to be held liable for actions related to adopting new floodplain maps.

**Recommendations:** At a minimum, always abide by the “reasonable person” standard – i.e., what a reasonable person would do under same circumstances. There is no need to take action related to municipal liability for failing to adopt floodplain maps. Acknowledge the unpredictability of future flood hazards in plans while emphasizing importance of taking action to protect the public despite uncertainty. Give the public meaningful opportunities to participate in the planning process.

**LEGAL AUTHORITY**

Do New Hampshire communities have the legal authority under state planning and zoning enabling legislation, or other state legislation, to design and implement regulatory controls based on current and predicted environmental conditions, specifically projected flooding levels?

**Answer:** Whether towns have the requisite enabling authority depends on the type of regulation being imposed; municipalities must clearly identify the enabling statute that allows the enactment of the ordinance or regulation.

**Recommendations:** Clearly identify the enabling statute(s) authorizing the ordinance/regulation. Check the language of the statute to make sure specific authorizations are not being exceeded. Show that your decision is reasonable by drawing from supporting data and documentation from trusted sources, like academic, state and federal reports and studies. When enacting new ordinances related to or referencing new floodplain maps, use the previous list of potential enabling statutes as a resource.

**USE OF PROJECTED DATA AND MAPS AS EVIDENCE**

What legal standard of scientific and technical reliability must planners and other officials meet in order to support regulatory measures that are based on current and projected future – as opposed to past – environmental conditions?

**Answer:** Scientific evidence is generally not needed to justify the enactment of ordinances or regulations.

**Recommendations:** To ensure the use of future climate conditions and related floodplain maps stands up in court, clearly identify and define in the ordinance the reason you are adopting or referencing the maps. Only use maps generated from reliable science. **Note:** Projected future conditions may include land conversion and impervious surface cover using a buildout analysis, or projected changes in environmental parameters such as precipitation or sea level rise.

**TAKINGS**

What is the potential regulatory takings exposure of New Hampshire communities if they impose regulatory controls that are designed at least in part to address anticipated future environmental conditions?

**Answer:** Though most takings are determined on a case-by-case basis, it is unlikely that a municipality could be successfully sued on the basis of a taking suit for imposing regulatory controls intended to reduce the risk of harm from future flooding events. Courts are much more likely to hold that a “harm preventing” (versus “benefit-conferring”) regulation does not constitute a compensable taking.

**Recommendations:** Enact regulations in a way that preserves some economically viable use of the land, such as for agricultural and recreational activities. Indicate that the purpose of the regulation is to promote hazard mitigation to protect the public health, safety and welfare, and make this clear in the master plan. Include a variance option to deal with requests on a case-by-case basis. Be sure that the potential harm of flooding to the community outweighs the regulatory restrictions. Use the principle of No Adverse Impact (NAI) as a standard when creating floodplain regulations (or to prevent harm to a body of water held in public trust). NAI is the principle that the action of one property owner may not adversely impact the flooding risk for other property owners. Stay consistent with the existing regulatory scheme to the extent possible; when the regulation aims to correct an unforeseen problem, existing landowners will have a much stronger argument for a taking.

**REFERENCES**


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