

## NEW HAMPSHIRE<sup>1</sup>

### *State Authority for Marine Protection*

#### Summary of State Authorities

New Hampshire primarily protects the marine environment through its Fish and Game Department’s fisheries management tools. The state has created other notable area-based protections through two types of federal-state partnerships: No Discharge Areas and the Great Bay National Estuarine Research Reserve. Finally, the Department of Environmental Services utilizes permitting requirements to protect coastal land and estuaries, and all state-issued permits are required by statute to be consistent with certain policies that aim to protect marine habitat.

	Great Bay National Estuarine Research Reserve	Fisheries Management, Area Closures	No Discharge Areas	Nongame Management Act	Shoreland Water Quality Protection Act
Legal requirement	Protects Great Bay National Estuarine Research Reserve	Allows restrictions for fisheries management	Allows designation of No Discharge Areas	Authorizes marine habitat acquisitions to protect nongame species	Land-use planning policies
Citation <sup>2</sup>	Memorandum of Understanding Between National Oceanic and Atmospheric Administration Administrator & Governor of New Hampshire (1989)	N.H. REV. STAT. ANN. § 211:65 (1965)	70 Fed. Reg. 56,465 (Sept. 27, 2005)	N.H. REV. STAT. ANN. § 212-B (1988)	N.H. REV. STAT. ANN. § 483-B (1991)
Designation authority	National Oceanic and Atmospheric Administration	New Hampshire Fish and Game Department	U.S. Environmental Protection Agency (after petition by New Hampshire Department of Environmental Services)	New Hampshire Fish and Game Department	New Hampshire Department of Environmental Services
Management &	New Hampshire	New	New Hampshire	New	New

<sup>1</sup> This state chapter is part of a 23-state assessment of state and local authority for marine protection. It should be read in conjunction with the Executive Summary, Introduction and Methodology Chapters in order to fully understand the scope and approach. Other chapters are available at [www.eli-ocean.org/mpa](http://www.eli-ocean.org/mpa).

<sup>2</sup> The citation date provided is the earliest date of enactment and does not reflect subsequent amendments unless otherwise noted. The enactment date is meant to inform the reader of how long the protection authority has existed.

	Great Bay National Estuarine Research Reserve	Fisheries Management, Area Closures	No Discharge Areas	Nongame Management Act	Shoreland Water Quality Protection Act
enforcement authority	Fish and Game Department	Hampshire Fish and Game Department	Department of Environmental Services, U.S. Coast Guard	Hampshire Fish and Game Department	Hampshire Department of Environmental Services, local governments (see below)
Jurisdiction & boundaries	Specifically designated estuarine lands and waters	All state waters	All state waters	All state waters	Estuaries, coastal lands, beaches and dunes, ocean resources
Prohibited uses	Property-specific restrictions within the Reserve	New Hampshire Fish and Game Department has authority to develop rules related to use	Discharge of boat sewage (treated and untreated)	None specified	Determined through permitting process
Permitted uses	Recreational uses, such as fishing, hunting, and boating	None specified	None specified	None specified	None specified

New Hampshire’s jurisdiction over its coastal waters extends three nautical miles seaward from the shoreline.<sup>3</sup> The state holds its public waters in trust and “has jurisdiction to control the use of the public waters and the adjacent shoreland for the greatest public benefit.”<sup>4</sup> New Hampshire also retains jurisdiction over all submerged lands under the state’s coastal waters.<sup>5</sup>

### Great Bay National Estuarine Research Reserve

In 1989, Great Bay was designated a National Estuarine Research Reserve (“NERR”).<sup>6</sup> Like other NERRs, the Great Bay Research Reserve is federal-state partnership that operates under the auspices of the National Oceanic and Atmospheric Administration (“NOAA”) within the authority of the Coastal Zone Management Act (“CZMA”). NOAA provides funding, national guidance, and technical assistance. Each reserve is managed by a lead state agency or university with input from local partners, including nonprofit organizations. The New Hampshire Fish and Game Department (“NHFG”) manages the Great Bay NERR. The agency allows licensed fishing, hunting, and shellfishing within the reserve.

<sup>3</sup> See Submerged Lands Act of 1953, 43 U.S.C. §§ 1301–1315. These waters are known as the “Marginal Sea.” N.H. REV. STAT. ANN. § 1:14(I) (1973). New Hampshire also claims jurisdiction over the “High Sea,” which extends two hundred nautical miles from the coastal baseline of the state or to the base of the continental shelf (whichever is greater); however, this jurisdiction is limited by the jurisdiction exercised by the United States and other limits recognized by international law. *Id.* § 1:14(II).

<sup>4</sup> *Id.* § 483-B:1(II) (1991).

<sup>5</sup> *Id.* § 1:14(III).

<sup>6</sup> N.H. Fish & Game Dep’t, Great Bay National Estuarine Research Reserve Management Plan 2006–2010 (2005), [http://www.wildlife.state.nh.us/marine/GBNERR\\_mgt\\_plan\\_2006\\_2010.pdf](http://www.wildlife.state.nh.us/marine/GBNERR_mgt_plan_2006_2010.pdf) (last visited Apr. 4, 2013); Coastal Zone Management Act, 16 U.S.C. §§ 1451–1465.

## Fisheries Management, Area Closures

The Division of Marine Fisheries, housed within NHFG, is responsible for the regulation and promotion of both recreational and commercial marine fishing.<sup>7</sup> NHFG has authority to restrict the taking of marine species.<sup>8</sup> The Fish and Game Commission's Executive Director has rulemaking authority over the protection of marine species, which includes the power to close and open fisheries and to issue other area-based restrictions.<sup>9</sup>

For example, there are restrictions on taking river herring from New Hampshire state waters.<sup>10</sup> The Taylor River is closed to the taking of river herring by netting of any method,<sup>11</sup> and portions of the Oyster River and its tributaries are closed to the taking of river herring by any method.<sup>12</sup> Similarly, taking of river herring is restricted in the Squamscott River.<sup>13</sup> NHFG created a river herring sustainable fishing plan in 2011 "to ensure river herring populations in New Hampshire remain stable and fishing opportunities continue to exist."<sup>14</sup> Other species, like bluefish, are protected through seasonal restrictions on all waters within the state's jurisdiction.<sup>15</sup> Still other species, like quahogs, cannot legally be harvested during any season in New Hampshire's state waters.<sup>16</sup>

The Executive Director may also close an area to fishing if "it is in his opinion dangerous to human life to hunt or fish thereon," and may temporarily "close any season for the taking of fish in any area for not over 60 days for stocking or conservation purposes . . . when in his opinion such action shall be necessary for the protection or preservation of the fish in such area."<sup>17</sup>

## No Discharge Areas

All coastal waters in New Hampshire have been classified as a "No Discharge Area" since September 30, 2005.<sup>18</sup> The federal Clean Water Act allows states to prohibit all boat sewage

<sup>7</sup> N.H. REV. STAT. ANN. § 211:65 (1965). New Hampshire also established an advisory committee on marine fisheries "to recommend programs and policies regarding marine fisheries to the fish and game commission." N.H. REV. STAT. ANN. § 211:60 (1957). Its authority is limited to holding hearings and recommending rules or regulations. *See id.* §§ 211:60–61.

<sup>8</sup> *Id.* § 211:62(II)(b) (1957). "Rules relating to the taking, inspection, and processing of marine species may be made by the executive director of the fish and game department with the approval of the fish and game commission, and upon the advice and cooperation of the advisory committee on marine fisheries." *Id.* § 211:62(I), *see also id.* § 206:10 (1935) ("The executive director shall . . . have the power and authority to adopt and enforce rules . . . for the adequate and effective control, management, restoration, conservation, and regulation of the fish, game, bird and wildlife resources of the state . . . Such power and authority shall include the right to open and close the season for taking fish, game, birds, and wildlife, the right to fix the size, number and weight limits, and other conditions governing the method and manner of taking the same. Such power and authority may be exercised with reference to the state as a whole, or for any specified county or part thereof, or for any lake, pond, stream or part thereof.").

<sup>9</sup> *Id.* § 211.62(II) ("The agency's protections may include, but are not limited to, the following: (a) the size, number, sex, and quantity that may be taken; (b) the areas to be opened or closed to their taking; and (c) the manner of their taking.").

<sup>10</sup> *Id.* at Fis. 603.01(a).

<sup>11</sup> *Id.* at Fis 604.03.

<sup>12</sup> *Id.* at Fis 604.05.

<sup>13</sup> *Id.* at Fis 604.04.

<sup>14</sup> N.H. Fish & Game Dep't, New Hampshire ASMFC River Herring Sustainable Fishing Plan 6 (Mar. 2011), [http://www.asmfc.org/uploads/file/NH\\_RiverHerring\\_SFMP.pdf](http://www.asmfc.org/uploads/file/NH_RiverHerring_SFMP.pdf) (last visited Dec. 12, 2013).

<sup>15</sup> From October 1 to June 30, Fish and Game rules prohibit taking bluefish by any method from waters under the jurisdiction of the state for purpose of sale. *Id.* at Fis 603.15(b).

<sup>16</sup> *Id.* at Fis 606.01.

<sup>17</sup> *Id.* § 206:15-a (1959).

<sup>18</sup> New Hampshire Sanitation Device Standard; Notice of Determination, 70 Fed. Reg. 56,465 (Sept. 27, 2005).

discharges by creating No Discharge Areas if a state— in this instance through the New Hampshire Department of Environmental Services (“NHDES”)—provides evidence to the U.S. Environmental Protection Agency that its coastal waters require greater protection than current legal protections afford.<sup>19</sup> The discharge of all boat sewage is prohibited in these areas, including raw sewage and sewage treated by an approved marine sanitation device. NDAs do not restrict the discharge of gray water.

### Nongame Species Management Act

The Nongame Species Management Act gives the NHFG Executive Director, with the consent of the NHFG Commission, rulemaking authority to regulate the taking, possession, and handling of nongame species.<sup>20</sup> Nongame species only include species that are not protected under other statutes or regulations.<sup>21</sup> NHFG’s powers under the Nongame Species Management Act include the authority to establish programs to conserve nongame species through land or aquatic habitat acquisitions.<sup>22</sup> However, it does not appear that NHFG has used the Act to conserve marine habitat.

### Shoreland Water Quality Protection Act

New Hampshire’s Shoreland Water Quality Protection Act is administered at the state level by NHDES, and applies to “all *land* areas within 250 feet, horizontal distance, of . . . [t]he highest observable tide line, for coastal waters.”<sup>23</sup> State and local authorities “shall” only issue permits for work in the protected shoreland zone when consistent with the policies in the Act.<sup>24</sup> The Act sets permitting requirements and establishes minimum standards for the subdivision, use, and development of shorelands adjacent to the state’s public water bodies.<sup>25</sup>

The Act lists the state’s policies, which include “[p]rotecting fish spawning grounds, aquatic life, and bird and other wildlife habitats; . . . [p]rotecting freshwater and coastal wetlands; . . . [p]reserving the state’s lakes, rivers, estuaries and coastal waters in their natural state; . . . [p]romoting wildlife habitat, scenic beauty, and scientific study; . . . [and c]onserving natural beauty and open spaces.”<sup>26</sup>

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<sup>19</sup> N.H. Dep’t of Envtl. Servs., Environmental Fact Sheet: No Discharge Areas in New Hampshire (2006), <http://des.nh.gov/organization/commissioner/pip/factsheets/wmb/documents/wmb-22.pdf>.

<sup>20</sup> N.H. REV. STAT. ANN. § 212-B (1988).

<sup>21</sup> *Id.* § 212-B:3(III).

<sup>22</sup> *Id.* § 212-B:5.

<sup>23</sup> N.H. ADMIN. R. ANN. Env-Wq 1401.02(d) (2008) (emphasis added).

<sup>24</sup> *Id.* at Env-Wq 1411.02.

<sup>25</sup> N.H. REV. STAT. ANN. § 483-B (1991). The Fill and Dredge Wetlands Act is New Hampshire’s primary instrument for regulating activities that affect wetlands. *See id.* § 482-A (1989); *see also* N.H. ADMIN. R. ANN. Env-Wt 100 to 900. The Act contains permitting requirements and governs tidal wetlands and tidal buffer zones; it contains no minimum threshold size for wetlands or wetlands impacts. *See* N.H. REV. STAT. ANN. § 482-A. For more on New Hampshire law and policy pertaining to wetlands, *see generally* Environmental Law Institute, *State Wetland Program Evaluation: Phase IV*, Appendix: New Hampshire, at 116 (Oct. 2007).

<sup>26</sup> N.H. REV. STAT. ANN. § 483-B:2.

*Evaluation of State Authorities<sup>27</sup>*

FACTORS	Great Bay NERR	Fisheries Management, Area Closures	No Discharge Areas	Nongame Management Act	Shoreland Water Quality Protection Act
<b>Legal Regime</b>	Regulatory ★★★★★	Regulatory ★★★★★	Regulatory ★★★★★	Regulatory ★★★★★	Planning ★★★★★
<b>Ocean Jurisdiction</b>	Estuarine ★★	All marine waters ★★★★★	All marine waters ★★★★★	All marine waters ★★★★★	Beach, tidal ★
<b>Durability</b>	In-perpetuity ★★★★★	Indeterminate ★★	Indeterminate ★★	Indeterminate ★★	Indeterminate ★★
<b>Consistency</b>	Mandates year-round protection ★★★★★	Authorizes year-round protection ★★★★★	Mandates year-round protection ★★★★★	Indeterminate ★★	Authorizes year-round protection ★★★★★
<b>Habitat</b>	Habitat protection goal ★★★★★	Byproduct is habitat protection ★★	Byproduct is habitat protection ★★	Species-specific ★	Habitat protection goal ★★★★★
<b>Sector</b>	Authorizes multi-sector protection ★★★★★	Authorizes single-sector protection ★	Mandates multi-sector protection ★★★★★	Authorizes multi-sector protection ★★★★★	Authorizes multi-sector protection ★★★★★
<b>Enforcement</b>	Grants NHFG authority to enforce chapter & arrest offenders or issue citations ★★★★★	Grants NHFG authority to enforce chapter & arrest offenders or issue citations ★★★★★	Some MPA-specific enforcement ★★	No current marine examples	No MPA-specific enforcement ★
<b>Extent (Scope)</b>	Single site, expansion possible ★★★★★	Multi-site, potential expansion ★★★★★	All state waters ★★★★★	No marine examples	Single site permitting ★
<b>Process for designation or expansion</b>	No MPA-specific public process ★★	No MPA-specific public process ★★	No MPA-specific public process ★★	No MPA-specific public process ★★	No MPA-specific public process ★★

*Local Authority for Marine Protection*

**Summary of Local Authorities**

Under New Hampshire’s Shoreland Water Quality Protection Act (above), municipalities may regulate the development of shorelands by adopting land-use control ordinances. Local ordinances may require more stringent protections than does the state, and the Act requires local permits for work within protected shorelands to be consistent with the state policies contained in the Act.

<sup>27</sup> For an explanation of the evaluation matrix and criteria, please see the Introduction and Methodology Chapters.

	Shoreland Water Quality Protection Act
Legal requirement	Land-use planning policies
Citation <sup>28</sup>	N.H. REV. STAT. ANN. § 483-B (1991).
Designation authority	New Hampshire Department of Environmental Services
Management & enforcement authority	Local governments
Jurisdiction & boundaries	Coastal lands, beaches and dunes
Prohibited uses	Determined through permitting process
Permitted uses	None specified

### Shoreland Water Quality Protection Act

The Shoreland Water Quality Protection Act sets permitting requirements and establishes minimum standards for the subdivision, use and development of shorelands adjacent to the state’s public water bodies.<sup>29</sup> Local government jurisdiction does not extend into the state’s submerged waters,<sup>30</sup> but instead applies to “all *land* areas within 250 feet, horizontal distance, of . . . [t]he highest observable tide line, for coastal waters.”<sup>31</sup>

Municipalities have the authority to regulate development of shorelands through adoption of land-use control ordinances, which may be more stringent than the state’s minimum standards.<sup>32</sup> Local permits “shall” only be issued for work in the protected shoreland zone when consistent with the policies contained in the Act (above).<sup>33</sup> Local governments have four options to regulate development for shoreland and riparian purposes:

- They may rely solely on the state’s **Shoreland Water Quality Protection Act (SWQPA)** to protect the specific types of surface water bodies that fall under the jurisdiction of the SWQPA; or
- (1) They may elect to adopt regulations that extend protection to the streams and surface water bodies that are not covered by the SWQPA; or
  - (2) The municipality may adopt more stringent regulations than the minimum standards of the SWQPA as provided for [by statute]; or
  - (3) The municipality may elect to develop separate stream corridor (watershed) regulations to protect the riparian buffers along first, second and third order streams and rivers within the community leaving the SWQPA or a more stringent local shoreland ordinance to regulate the lakes, ponds, and higher order streams and rivers within the community.<sup>34</sup>

<sup>28</sup> The citation date provided is the earliest date of enactment and does not reflect subsequent amendments unless otherwise noted. The enactment date is meant to inform the reader of how long the protection authority has existed.

<sup>29</sup> N.H. REV. STAT. ANN. § 483-B (1991).

<sup>30</sup> N.H. REV. STAT. ANN. § 483-B:8(II) (1991) (“Municipalities are encouraged to adopt land use control ordinances for the shorelands of water bodies and water courses other than public waters.”). Public waters are defined to include “[c]oastal waters, being all waters subject to the ebb and flow of the tide, including the Great Bay Estuary and the associated tidal rivers.” *Id.* § 483-B:4(XVI)(b).

<sup>31</sup> N.H. ADMIN. R. ANN. Env-Wq 1401.02(d) (2008) (emphasis added).

<sup>32</sup> N.H. REV. STAT. ANN. § 483-B:8 (1991)

<sup>33</sup> *Id.* at Env-Wq 1411.02.

<sup>34</sup> N.H. DEP’T OF ENVTL. SERVS., INNOVATIVE LAND USE PLANNING TECHNIQUES: A HANDBOOK FOR SUSTAINABLE DEVELOPMENT 237–38 (Oct. 2008), [http://des.nh.gov/organization/divisions/water/wmb/repp/documents/ilupt\\_chpt\\_2.6.pdf](http://des.nh.gov/organization/divisions/water/wmb/repp/documents/ilupt_chpt_2.6.pdf) (citing N.H.

Municipalities have little control over fisheries in New Hampshire’s coastal waters. The planning and zoning statute states that “fisheries are a beneficial and worthwhile feature of the New Hampshire landscape and tradition and should not be discouraged or eliminated by use of municipal planning and zoning powers or the unreasonable interpretation of such powers.”<sup>35</sup>

### *Evaluation of Local Authorities*

FACTORS	Shoreland Water Quality Protection Act
Legal Regime	Planning
Ocean Jurisdiction	Beach (tidal only)
Durability	Indeterminate
Consistency	Authorizes year-round protection
Habitat	Habitat protection
Sector	Authorizes multi-sector protection
Enforcement	No MPA-specific enforcement
Extent (scope)	Shoreland-by-shoreland, local management
Process for expansion	No MPA-specific public process

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REV. STAT. ANN. § 483-B). The report also contains a model ordinance for shoreland and riparian protection. *Id.* at 243–61.

<sup>35</sup> *Id.* § 672:1(III-f) (1983).