

**ATTORNEY GENERAL  
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET  
CONCORD, NEW HAMPSHIRE 03301-6397

GORDON J. MACDONALD  
ATTORNEY GENERAL



JANE E. YOUNG  
DEPUTY ATTORNEY GENERAL

December 27, 2019

Robert R. Scott, Commissioner  
N.H. Dept. of Environmental Services  
29 Hazen Drive  
Concord, New Hampshire 03301

Re: Enforcement Authority over "Dwellings Over Water"

Dear Commissioner Scott:

On November 12, 2019, the N.H. Dept. of Environmental Services ("Department") referred a case to our office regarding a small expansion (exterior egress consisting of a stairway and deck) of a dwelling over water. The Department referred the case believing it did not have the authority to pursue the issue administratively. The referral included a copy of, and references to, an opinion authored by Senior Assistant Attorney General Jennifer Patterson dated July 31, 1995. That opinion is also a published Opinion of the Office of the Attorney General. 1995 N.H. AG LEXIS 2. The opinion discussed various aspects of dwellings over water which are addressed specifically by RSA 482-A:26 and 27. It asserted that, because "a more specific statute controls over a general statute," actions of the Wetlands Board could not contradict the express provisions of RSA 482-A:26 and 27. *Appeal of Plantier*, 126 N.H. 500, 510 (1985); *State v. Bell*, 125 N.H. 425, 432 (1984). Nothing in that portion of the opinion has changed.

The opinion went further, however, stating that the subdivision of RSA ch. 482-A consisting of RSA 482-A:26 and A:27 was "separate ... from the Board's permitting and enforcement authority, and operates independently." It asserted that any permitting authority was wholly inapplicable to dwellings over water and that the Wetlands Board had no authority to issue administrative fines against a person in violation of RSA 482-A:26 and A:27. Finally, it stated that the Wetlands Board could not issue an order requiring compliance with RSA 482-A:26 and A:27. The opinion supported this position only by referencing the overall structure of the statute. The opinion did not address the fact that the Wetlands Board's authority to issue orders under RSA 482-A:6 at the time referred specifically to violations of the "chapter," not just certain subdivisions. RSA 482-A:26 and A:27 are located within the Chapter.

In 1996, the legislature created the Water Division at the N.H. Dept. of Environmental Services ("Department") and shifted the responsibilities of the Wetlands Board to the Division.

Letter to Commissioner Robert R. Scott  
December 27th, 2019  
Page 2

It then created the Wetlands Council to hear appeals from the Division's decisions. At the same time, the legislature provided the Division with responsibility previously granted to many other State authorities.

In 1998, the legislature made significant changes to RSA 482-A:26 and A:27. Through those changes, the legislature attempted to further integrate RSA 482-A:26 and A:27 with the rest of the Chapter. For the first time, the legislature specifically referenced the need for permit approval under RSA 482-A:3 for any reconstruction of a dwelling over water. It further referenced the need for Department subsurface (septic) approval. RSA 482-A:26, III. It also included references to the chapter's penalty provisions, including administrative fines, when discussing penalties in RSA 482-A:27. The changes make no specific reference to administrative order authority one way or the other but, as stated above, RSA 482-A:6 already used the word "chapter" to describe the extent of Division's authority to issue orders. The word "chapter" in RSA 482-A:6, together with the legislature's purposeful integration of both permitting and enforcement related to dwellings over water in 1998 and the overall restructuring that centralized enforcement authority in one State agency, indicates that the Department may apply its authority to issue administrative orders under RSA 482-A:6 to dwellings over water. However, as stated in the original opinion, neither the Department, nor the Wetlands Council on appeal, may provide greater leniency than what is provided by statute.

I hope that this answers any questions you may have had.

Sincerely,



K. Allen Brooks  
Senior Assistant Attorney General  
Chief, Environmental Protection Bureau  
(603) 271-3679  
[allen.brooks@doj.nh.gov](mailto:allen.brooks@doj.nh.gov)

KAB/cmc  
Enclosures  
2600663