

48

**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

JOHN M. FORMELLA
ATTORNEY GENERAL

JAMES T. BOFFETTI
DEPUTY ATTORNEY GENERAL



156

January 26, 2024

His Excellency, Governor Christopher T. Sununu
and the Honorable Council
State House
Concord, NH 03301

Your Excellency and Members of the Council:

REQUESTED ACTION

Authorize the New Hampshire Department of Justice (NHDOJ) to enter into a Memorandum of Understanding with the New Hampshire Department of Environmental Services (NHDES), Concord NH (Vendor #201164-B001), for the purpose of appointing qualified applicants to serve as hearing officers for all NHDES administrative enforcement matters and to assure that NHDOJ will supply all clerical and technical support for appeals of department decisions pursuant to RSA 21-M:3, VIII and VIII-a, effective upon Governor and Executive Council approval. 100% Agency Income.

Funds will be transferred from the Department of Environmental Services, from accounts to be determined, subject to the availability of sufficient appropriations.

Funds will be deposited into the Department of Justice account, Civil Law, as follows:

02-20-20-201010-26200000-001-484944

EXPLANATION

Chapter 79:18 Laws of 2023 amended RSA 21-M:3, VIII-a, to provide, among other things, that upon the request of the Commissioner of NHDES, the Attorney General shall appoint qualified applicants to serve as hearing officers for all NHDES administrative enforcement matters. Chapter 79:18 was also amended to include language that allows the Attorney General and Commissioner of NHDES to enter into a memorandum of understanding to fund the hearing officers appointed for hearings, appeals, or any of the councils established under RSA 21-O. The NHDOJ will invoice the NHDES quarterly for expenses related to the hearing officers. It is estimated that NHDES will pay NHDOJ approximately \$50,000 annually for this service.

His Excellency, Governor Christopher T. Sununu
and the Honorable Council
January 26, 2024
Page 2 of 2

Chapter 79:19 Laws of 2023 amended RSA 21-O:3 to remove, among other things, the Commissioner of NHDES responsibility to provide all necessary clerical and technical support for appeals of department decisions to any council established under RSA 21-O and added language that provided the Commissioner of NHDES the authority to enter into a memorandum of understanding with the Attorney General pursuant to RSA 21-M:3, VIII and VIII-a to fund the hearing officer positions clerical and support personnel and services and related expenses. To satisfy the clerical support funding for Chapter 79:19 Laws of 2023, NHDES transferred a 100% Generally funded, full time permanent classified Legal Assistant to NHDOJ through the budget process effective July 1, 2023.

Please let me know if you have any questions concerning this request. Your consideration is greatly appreciated.

Respectfully submitted,



John M. Formella
Attorney General



Robert Scott
Commissioner
Department of Environmental Services

#4356901

State of New Hampshire

Interagency Memorandum of Understanding

Whereas, the New Hampshire Department of Environmental Services ["NHDES"] is a duly constituted agency of the State of New Hampshire;

Whereas, the New Hampshire Department of Justice ["NHDOJ"] is a duly constituted agency of the State of New Hampshire;

Whereas, Chapter 79:18 of the Laws of 2023 (HB2), amended RSA 21-M:3, VIII-a, to provide among other things, that upon request of the Commissioner of NHDES, the Attorney General shall appoint qualified applicants to serve as hearing officers for all NHDES administrative enforcement matters under any provision of law, including, but not limited to, adjudicative proceedings for administrative fines and license actions;

Whereas, Chapter 79:18 of the Laws of 2023 (HB2), amended RSA 21-M:3, VIII and added a new paragraph VIII-a, to among other things, provide that the Attorney General and the Commissioner of NHDES may enter into a memorandum of understanding to fund the hearing officers appointed for appeals to any of the councils established under RSA 21-O; the hearing officers appointed for administrative fines and license actions, as well as clerical support and personnel services, and related expenses;

Whereas, Chapter 79:19 of the Laws of 2023 (HB2), amended RSA 21-O:3, VIII, to among other things, remove from the duties of the Commissioner of NHDES the responsibility to provide all necessary clerical and technical support for appeals of department decisions to any council established under RSA 21-O (Air, Waste, Water, and Wetlands); and also adopted a new paragraph RSA 21-O:3, VIII-a, that provided the Commissioner of NHDES with the authority to enter into a memorandum of understanding with the Attorney General pursuant to RSA 21-M:3, VIII and VIII-a, to fund the hearing officer positions, clerical and support personnel and services, and related expenses;

Whereas, pursuant to the authorities listed above, NHDES desires to fund hearing officers for appeals of department decisions to the councils established under RSA 21-O; and upon request of the commissioner, the hearing officers appointed by the Attorney General for all administrative enforcement matters authorized under any provision of law, including, but not limited to, administrative fines and license actions.

Whereas, pursuant to the authorities listed above, NHDOJ, desires to appoint qualified hearing officers for appeals of NHDES decisions to the councils established under RSA 21-O; and upon request of the commissioner, appoint qualified hearing officers for all NHDES administrative enforcement matters authorized under any provision of law, including, but not limited to, administrative fines and license actions.

NOW, THEREFORE, NHDES and NHDOJ enter into this Memorandum of Understanding to their mutual benefit, the benefit of the State and in furtherance of statutory authority and objectives.

1. NHDES agrees to pay NHDOJ for the services described in the attached MOU Exhibit A, and provide funding as detailed in MOU Exhibit B, which is hereby incorporated by reference.
2. NHDOJ agrees to perform the services described in the attached MOU Exhibit A, which is hereby incorporated by reference.
3. The method of payment for the above-referenced services is described in the attached MOU Exhibit B, such exhibit being hereby incorporated by reference.
4. All obligations hereunder are contingent upon the availability and continued appropriation of funds. The agencies shall not be required to transfer funds from any other account if funds are reduced or unavailable.
5. This MOU is effective until it is amended by an instrument in writing signed by both agencies. Either agency may terminate this MOU by providing at least 60 days written notice to the other agency.
6. The agencies agree that the obligations, agreements, and promises made under this MOU are not intended to be legally binding on the agencies and are not legally enforceable.
7. Disputes arising under this MOU should be resolved by agreement between NHDES and NHDOJ to the extent possible.
8. This MOU shall be construed in accordance with the laws of the State of New Hampshire.
9. The agencies hereto do not intend to benefit any third parties and this MOU shall not be construed to confer any such benefit.
10. In the event any of the provisions of this MOU are held to be contrary to any state or federal law, the remaining provisions of this MOU will remain in full force and effect.
11. This MOU, which may be executed in a number of counterparts, each of which shall be deemed an original, constitutes the entire MOU and understandings between the agencies and supersedes all prior MOUs and understandings relating hereto.
12. Nothing herein shall be construed as a waiver of sovereign immunity such immunity being hereby specifically preserved.

13. FOR the New Hampshire Department of Environmental Services:



Robert R. Scott, Commissioner

Date: 12/5/23

14. FOR the New Hampshire Department of Justice:



John M. Formella, Attorney General

1/19/24
Date

I hereby certify that the foregoing MOU was approved by the Governor and Executive Council of the State of New Hampshire at the Meeting on: _____ (date of meeting)

Office of the Secretary of State

Name, Title

Date

Exhibit A

1. *As necessary, the Attorney General agrees to appoint qualified applicants to serve as hearing officers pursuant to RSA 21-M:3, VIII and VIII-a.*
2. *NHDOJ hearing officers assigned to NHDES administrative enforcement matters, shall perform all enumerated functions as set forth in RSA 21-M:3, VIII-a, and to the greatest extent possible, consistent with Env-C 200.*
3. *NHDOJ hearing officers assigned to Council Appeals, shall perform all enumerated functions as set forth in RSA 21-M:3, IX and as established in the procedural rules applicable to each Council.*

Exhibit B

1. *NHDOJ agrees to provide NHDES, on a quarterly basis, an invoice detailing all appointed hearing officer time spent executing the functions set forth in Exhibit A.*
2. *NHDES agrees to fund, on a pro rata basis, the salary and benefits of any NHDOJ employees who serve as hearing officers appointed under RSA 21-M:3, VIII and VIII-a for the hours spent conducting the functions described in Exhibit A. Should an appointed hearing officer not be a NHDOJ employee, NHDES agrees to provide funding for the non-NHDOJ employee hearing officer conducting the functions described in Exhibit A as detailed in an approved contract.*
3. *NHDOJ and NHDES agree that in all cases funding of appointed hearing officers shall be in accordance with and subject to any limitations of the State's biennium budget or any continuing resolution then in effect.*