



The State of New Hampshire
Department of Environmental Services



Robert R. Scott, Commissioner

January 30, 2019

The Honorable Marjorie Smith
Chair, House Judiciary Committee
Legislative Office Building, Room 208
Concord, NH 03301

RE: HB 661 An Act relative to a private right of action for toxin exposure

Dear Chair Smith and Members of the Committee:

Thank you for the opportunity to testify on HB 661. This bill would establish a private right of action for any person to bring suit against persons who are alleged to be in violation of any permit, regulation, condition, requirement, or order issued or required under RSA 147-A or RSA 149-M, New Hampshire's Hazardous Waste Management and Solid Waste Management laws, respectively. HB 661 would also establish a private right of action for individuals to sue the NHDES Commissioner when there is an alleged failure to perform any act or duty under RSA 147-A or RSA 149-M that is not discretionary. The bill further provides that persons who release a toxic substance shall be held strictly, jointly and severally liable for any harm resulting from such release. The New Hampshire Department of Environmental Services (NHDES) has concerns about the potential impacts and costs associated with this bill, and believes that careful evaluation of potential unintended consequences is warranted. NHDES respectfully suggests that a fiscal note should be prepared for this bill, and believes that the bill would benefit from assignment to a subcommittee. NHDES would welcome the opportunity to assist a subcommittee in exploring these concerns.

The first section of the bill, establishing a private right of action, appears to be an attempt to adopt the "citizens suit" provisions of the federal Resource Conservation and Recovery Act of 1976, the federal law governing management of solid and hazardous wastes. However, the bill as drafted lacks many of the limiting controls contained in the federal law, including controls on when an action can be commenced, and required notice provisions. The bill also differs from the federal law relative to the authority that it grants the court to award litigation costs, limiting such awards only to the person bringing suit, regardless of the disposition of the case.

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29 Hazen Drive • PO Box 95 • Concord, NH 03302-0095
(603) 271-3503 • Fax: 271-2867 TDD Access: Relay NH 1-800-735-2964

NHDES has concerns that this first section of the bill could direct significant staff time away from vital solid and hazardous waste program activities. In addition to any lawsuits filed directly against NHDES, we find it likely that NHDES would be expected, or could be compelled through subpoena, to participate in lawsuits between non-NHDES parties enabled under proposed RSA 147-G:2,1 (a) and (b). Participation in such lawsuits would likely require allocation of significant NHDES technical and legal resources, on a schedule directed by the court. While, in concept, NHDES does not oppose a citizen's right to sue alleged violators or to hold NHDES accountable to its obligations, we feel that such suits, without limits, could have the effect of diverting limited NHDES resources in a manner that would negatively impact mission-critical activities.

The second and third sections of the bill establish strict, joint, and several liability for harm resulting from releases of toxic substances, and a private right of action for medical monitoring damages. NHDES is concerned that these provisions, coupled with the expansive definitions of "release" and "toxic substance" in the bill, could have significant and far reaching consequences in both the public and private sectors, including for parties who acted lawfully with respect to their management of substances addressed by the bill. Public sector parties who might be impacted by these provisions include a host of municipalities that own operating or closed landfills, or that, by necessity, use hazardous materials in their operation of drinking water systems, wastewater systems, and in road maintenance.

In summary, NHDES believes that the bill could have significant legal and budgetary impacts, not only for NHDES, but also across state, local, and county governments. Accordingly, we respectfully suggest that a fiscal note be prepared for the bill. While it would be difficult to attach specific cost estimates, preparation of fiscal note worksheets for the bill would at least allow for potential categories of costs to be identified. NHDES also believes that there is the potential for adverse impacts on NHDES resources and its ability to achieve its mission, and impacts across the public and private sectors. We respectfully suggest that assignment of the bill to a subcommittee would allow for a more detailed examination of the potential impacts. NHDES would welcome the opportunity to assist in the work of a subcommittee, as appropriate.

Thank you again for the opportunity to comment on HB 661. NHDES is committed to working with the legislature to discern potential consequences of the bill and whether it appropriately balances myriad concerns of private individuals, societal interests, and the protection of public health and the environment.

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Should you have further questions or need additional information, please feel free to contact either Pamela Hoyt-Denison, Administrator of Waste Programs (Pamela.Hoyt-Denison@des.nh.gov, 271-2945), or Michael Wimsatt, Director of Waste Management Division (Michael.Wimsatt@des.nh.gov, 271-1997).

Sincerely,

A handwritten signature in black ink, appearing to read "Robert R. Scott". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Robert R. Scott
Commissioner

cc: Sponsors of HB 661: Representatives Cushing, Stack, Thomas, Murphy, Keans, Grassie, Meuse, Janvrin, Oxenham; Senators Feltes, Sherman, Chandley, Fuller Clark