



The State of New Hampshire
Department of Environmental Services



Robert R. Scott, Commissioner

February 25, 2021

The Honorable Kevin Avard
Chairman, Energy and Natural Resources Committee
State House, Senate Chamber
Concord, NH 03301

RE: SB 146 – Part V – An Act regarding tidal waters

Dear Chairman Avard and Members of the Committee:

Thank you for the opportunity to comment on SB 146, Part V. This bill proposes to change the surface water quality standards for fecal bacteria as they relate to shell fishing uses. The NH Department of Environmental Services (NHDES) supports this legislation but believes that the language should be amended.

This issue stems from the recent issuance of discharge permits from the National Pollutant Discharge Elimination System (NPDES) for facilities in the seacoast area. Through EPA, the NPDES program issues permits for the discharge of pollutants into waters of the state. In the case of the 13 facilities (primarily municipal waste water treatment plants) that discharge to tidal waters, of particular concern with that discharge is contaminants that could impact the health of humans who consume shellfish. Fecal bacteria are one such concern. New Hampshire state law and regulations state that those tidal waters where shellfish could potentially be harvested are subject to the requirements of the National Shellfish Sanitation Program (NSSP), as administered by NHDES. This is an important requirement so that harvested shellfish can be sold by New Hampshire's nascent and rapidly expanding shellfish aquaculture industry. Certain regulations (see Env-Wq 1703.06 and Env-Wq Appendix E) require that limitations on fecal bacteria at these facilities be applied at the discharge point, or "end of pipe".

For many years the permittees in the seacoast, based on information from NHDES and upon a permit waiver from EPA, have been testing for fecal bacteria in their discharge using a particular laboratory method called Colilert-18. This is a method that is approved by EPA for NPDES compliance. Unfortunately, it is not a method approved by the NSSP. A strict interpretation of the state's rules and statutes requires that only an NSSP-approved method can be used to be in compliance with NPDES requirements in tidal waters. The proposed statute change in this bill will address this situation. Because the proposed language includes specific fecal bacteria criteria but does not specifically require a particular laboratory method, NHDES and EPA agree that the language will allow for greater flexibility in laboratory method selection, including the use of Colilert-18.

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It is important that the permittees be allowed to continue to use this method for several reasons: 1) All of them have invested in the equipment and training to be able to apply this method in their own facilities without taking them to an outside laboratory; 2) the only lab in the state that is certified to perform the NSSP methods is the State Public Health Lab. This means that, on a daily basis, permittees would be required to employ expensive courier services to take their samples either to Concord or to out-of-state private labs. Furthermore, the state lab may have limited capacity. And, 3) the Colilert-18 method returns sample results faster than other methods, and because it is done in-house, alerts the facility to any lapses in treatment. This means that should a problem arise, the facility will immediately call the Shellfish Program and begin the process of testing and potentially recalling any shellfish that may have been contaminated. This helps to ensure the safety of the consumer and the viability of the industry.

Finally, NHDES has had multiple conversations with EPA and their attorneys about the proposed language. The consensus amongst those parties is that the current language in the bill will not be sufficient to solve the problem. In order to truly move past this issue, the language must demonstrate a way that dischargers can meet the requirements of both the EPA and the NSSP. Having now discussed this with EPA, we believe that replacing the proposed language with the following will allow for the more rational sampling approach to prevail:

“485-A:8 Standards for Classification of Surface Waters of the State. –

V. Tidal waters utilized for swimming purposes shall contain not more than either a geometric mean based on at least 3 samples obtained over a 60-day period of 35 enterococci per 100 milliliters, or 104 enterococci per 100 milliliters in any one sample, unless naturally occurring. Those tidal waters used for growing or taking of shellfish for human consumption shall, ~~in addition to the foregoing requirements, be in accordance with the criteria recommended under the National Shellfish Program Manual of Operation, United States Department of Food and Drug Administration,~~ **not exceed a geometric mean Most Probable Number (MPN) of 14 organisms per 100 ml for fecal coliform, nor shall more than 10% of the samples exceed an MPN of 28 per 100 ml for fecal coliform, or other values of equivalent protection based on sampling and analytical methods used by the NHDES Shellfish Program and approved in the latest revision of the National Shellfish Sanitation Program, Guide For The Control of Molluscan Shellfish.”**

The state is also pursuing two other avenues to solve this issue. First, we have commenced a project to compare the EPA and NSSP methods to see if they yield similar results. This may ultimately result in having the Colilert-18 method approved for use in the NSSP. Second, we will look for any research that might exist that could determine the methods' equivalency so that communities could potentially seek a waiver in their current permit testing requirements. The first of these avenues is very lengthy and the second is uncertain, so this proposed statute change is necessary.

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Thank you again for the opportunity to comment on SB 146, Part V. Should you have questions or need additional information, please feel free to contact Ted Diers, Watershed Management Bureau Administrator at ted.diers@des.nh.gov or 603-271-3289.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert R. Scott", with a stylized flourish extending to the right.

Robert R. Scott
Commissioner

cc: Sponsors of SB 146, Part V:
Senators Watters, Sherman, Perkins Kwoka; Representatives Cushing, Simpson.