



The State of New Hampshire
Department of Environmental Services



Robert R. Scott, Commissioner

February 6, 2023

The Honorable Kevin Avard
Chair, Energy and Natural Resources Committee
State House, Room 103
Concord, NH 03301

RE: SB 60, An Act relative to water quality

Dear Chair Avard and Members of the Committee:

Thank you for the opportunity to comment on SB 60. Many of the provisions in the bill further define or clarify existing statutes, specifically water quality certifications. The New Hampshire Department of Environmental Services' (NHDES) goal for this legislation is to clarify existing requirements and provide additional flexibility for water withdrawals while still protecting water quality.

This bill would:

- 1) Define the ability to waive certifications required under state law at RSA 485-A:12, III as afforded by section 401 of the Clean Water Act (CWA) and associated federal regulations.
- 2) Define the processing time and how the department would act on requests for water quality certifications required under RSA 485-A:12, III and section 401 of the CWA and under RSA 485-A:12, IV for surface water withdrawals.
- 3) Defines in RSA 485-A:12, IV the withdrawal rates and conditions of surface water withdrawals that require a water quality certification, including certain surface water withdrawals that propose to increase and potentially cause a significant lowering of water quality.
- 4) Clarify that rules that must be adopted by the department for reviewing requests for water quality certification include public notice and public hearing requirements.
- 5) Define the applicability of the water conservation rules on surface water withdrawals requiring a water quality certification under RSA 485-A:12, IV.
- 6) Remove language that prohibits the use of the flow statistic 7Q10 in the calculation of nutrient effluent limits under RSA 485-A:8.

NHDES supports SB 60 but recommends changes to the bill. Senate Bill 60 will provide consistency with federal law; define the applicability of the statute in terms of large surface water withdrawals; define NHDES application review and processing times of requests for required certifications; and apply the water conservation rules to large surface water withdrawals. Water quality certificates protect surface water quality and uses by ensuring compliance with NH Surface Water Quality Standards through inclusion of enforceable conditions on the certified activity. The proposed changes to the law presented in SB 60 will further define the state's role in federal processes under

www.des.nh.gov

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

section 401 of the CWA, provide clear applicability of the laws, improve the predictability of the process for applicants, and further define the processes related to water quality certifications and wastewater permitting.

Relative to point number 6 above, SB 60 removes language that was adopted in 2017 into RSA 485-A:8, Standards for Classification of Surface Waters of the State, that prohibits the use of a flow statistic commonly used in the calculation of nutrient effluent limits. The proposed change to RSA 485-A:8 is critical because of the following reasons:

- 1) The United State Environmental Protection Agency (EPA) is using 7Q10 for total phosphorus limits in permits whether it is allowable in state law or not as the 2017 language prohibiting the use of 7Q10 was not approved by EPA and therefore not usable in CWA actions [i.e., National Pollutant Discharge Elimination System (NPDES) permits].
- 2) The department is updating the Surface Water Quality Standards Rules Env-Wq 1700 and eliminating the restriction on using the 7Q10 which may benefit some communities relative to permitting while others will benefit from the flexibility in the draft rule revisions.

Senate Bill 60 will remove the restriction against using the 7Q10 flow statistic from state law. This change then allows for proposed rule revisions that may result in potentially less stringent effluent limits, although still protective of human health and aquatic life, for the regulated communities.

NHDES would like to note that since the creation of SB 60, NHDES has recognized that certain changes would improve SB 60. NHDES respectfully requests the following changes be incorporated:

- 1) Amending the proposed changes to RSA 485-A:12, IV:

In the current version of SB 60, changes to RSA 485-A:12, IV include removing a reference to the registration requirement under RSA 488:3. NHDES recommends keeping the reference to RSA 488:3 to retain the intent of the original law and the paragraph's connection to the definition of "withdrawal" as defined under RSA 488:2, VIII. This is accomplished by keeping "requires registration under RSA 488:3" and adding "and" prior to that phrase. In addition, "of surface water" should be deleted since it had modified "or diversion", which would be deleted; and the term "volumes" should be replaced with "withdrawal rates" to more accurately reflect the unit of measurement that requires certification.

A more substantive change that NHDES recommends to SB 60 is relative to the proposed language of RSA 485-A:12, IV that would require a water quality certification for an increased surface water withdrawal that would cause a significant lowering of water quality. Currently, RSA 485-A:12, IV does not require a surface water withdrawal that was in active operation prior

to the effective date of RSA 485-A:12, IV (i.e., September 5, 2008) to obtain certification. Upon further reflection and discussions with stakeholders, we believe that this provision should be more thoroughly vetted with stakeholders. The original intention of this language was to simply clarify the law but NOT to add new requirements. The language as written could be interpreted as a new mandate and may have unintended consequences on current surface water users. Therefore, NHDES recommends striking "...or would be increased to cause a significant lowering of water quality..." from SB 60 to allow for additional internal review by NHDES and further stakeholder involvement.

3 Enforcement of Classification. Amend RSA 485-A:12, IV to read as follows:

IV. No activity that involves surface water withdrawal ~~[or diversion of surface water]~~ that **exceeds 20,000 gallons per day over a 7-day period or more than 600,000 gallons over a 30-day period and** requires registration under RSA 488:3, that does not otherwise require the certification required under paragraph III, and **which did not exceed such withdrawal rates before** ~~[was not in active operation as of]~~ the effective date of this paragraph may commence unless the department certifies that the surface water withdrawal or diversion of surface water complies with state surface water quality standards applicable to the classification for the surface water body. The certification shall include any conditions on, modifications to, or monitoring of the proposed activity necessary to provide reasonable assurance that the proposed activity complies with applicable surface water quality standards. The department may enforce compliance with any such conditions, modifications, or monitoring requirements as provided in RSA 485-A:22.

- 2) In the current version of SB 60, amendments to RSA 485-A:12 are proposed by adding paragraphs III-a and IV-a. NHDES recommends adding the following sentence at the end of each of those paragraphs to provide applicants with an adequate opportunity to submit a written request to NHDES for an extension to submit additional application information requested by NHDES: "Upon a written request of the applicant prior to the end of this 120-day time period, the department shall grant an extension of this 120-day time period."

2 New Paragraph; Enforcement of Classification; Request for Certification. Amend RSA 485-A:12 by inserting after both paragraph III and IV the following new paragraph:

III-a (and IV-a). In processing a request for certification under paragraph III (and IV):

(a) Within 50 days of receipt of the request for certification, the department shall either notify the person who submitted the request that the request is complete or request any additional information required to complete its evaluation of the request. Any request for additional information shall specify that the person requesting certification submit such information as soon as practicable and shall notify the person that if all of the requested information is not received within 120 days of the request, the department shall deny the

The Honorable Kevin Avard
Chair, Energy and Natural Resources Committee
February 6, 2023
Page 4 of 4

request. Upon a written request of the applicant prior to the end of this 120-day time period, the department shall grant an extension of this 120-day time period.

Thank you again for the opportunity to comment on SB 60. Should you have questions or need additional information, please feel free to contact either Ted Diers, Assistant Director of the Water Division (theodore.e.diers@des.nh.gov, 271-2951) or Erin Holmes, Watershed Bureau Administrator (erin.holmes@des.nh.gov, 271-3289).

Sincerely,

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

Robert R. Scott
Commissioner

ec: Sponsors of SB 60: Senators Gray, Watters, Avard; Representatives Renzullo, Hill