

Discussion paper for the FOURTH information meeting covering the last two Parts on developing new Instream Flow Rules – September 19, 2017

1 PART Env-Wq 1906 ADMINISTRATION OF WATER MANAGEMENT PLANS

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3 Env-Wq 1906.01 Protected Instream Flows and Water Quality Criteria. Protected instream flows
4 established by the commissioner shall serve as water quality criteria for the purpose of administration of
5 water quality standards by the department under the federal Clean Water Act and RSA 485-A.

6
7 Env-Wq 1906.02 Compliance with Water Quality Standards.

8
9 (a) Affected water users and affected dam owners shall comply with the provisions of an adopted
10 water management plan and its implementation schedule.

11
12 (b) Any affected water user or affected dam owner that complies with the provisions of an adopted
13 water management plan shall be deemed to be in compliance with water quality standards, with respect to
14 stream flow, established in RSA 485-A and Env-Wq 1700.

15
16 Env-Wq 1906.03 Time extension for implementation plan schedules.

17
18 (a) Within 4 years of the date of adoption of a water management plan, an affected water user or
19 affected dam owner may request a 5-year extension to their implementation plan schedule on the basis of
20 unsustainable financial consequences or other difficulties.

21
22 (b) A request for a 5-year extension of an implementation plan schedule shall be submitted in
23 writing by the affected water user or affected dam owner to the department and shall contain the
24 following:

25
26 (1) Name of the facility, and name and contact information for the person requesting the
27 extension;

28
29 (2) Copies of annual progress reports submitted to the department;

30
31 (3) A description of recent progress since the previous annual progress report and a
32 description of the plans for the remainder of the initial implementation period;

33
34 (4) Documentation of financial or other difficulties that preventing the affected water user or
35 affected dam owner from meeting their implementation schedule; and

36
37 (5) A plan for completing the implementation schedule within the 5-year extension period.

38
39 (c) The department shall grant the extension request if:

40
41 (1) The extension request demonstrates financial or other difficulties preventing the affected
42 person from meeting their implementation schedule;

43
44 (2) The affected water user's or affected dam owner's reporting demonstrates by its content
45 and regularity that the affected party is working in good faith, within their capability, to
46 complete the implementation plan on schedule; and

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1
2 (3) The affected water user or affected dam owner has provided a plan which the department
3 determines will result in implementation of their water management plan within the 5-year
4 extension period.
5

6 PART Env-Wq 1907 WAIVERS
7

8 Env-Wq 1907.01 Purpose. The purpose of these waiver rules is to identify the procedural
9 requirements for waivers specific to the contents of an affected water user's or affected dam owner's
10 water management plan.
11

12 Env-Wq 1907.02 Applicability. The requirements set forth in Part Env-Wq 1907 shall apply to any
13 affected water user or affected dam owner who is or would be adversely affected by the application of a
14 water management plan, or its implementation schedule, undertaken pursuant to RSA 483:9-c and the
15 rules for the protection of instream flow on designated rivers.
16

17 Env-Wq 1907.03 Pre-request meeting. Prior to submitting a waiver request, a prospective requester
18 will meet with the department to identify possible amendments to the water management plan, or its
19 implementation schedule, which might eliminate the need for a waiver.
20

21 Env-Wq 1907.04 Waiver requests.
22

23 (a) An affected water user or an affected dam owner may request a waiver of specific provisions of
24 an adopted water management plan developed under Env-Wq 1905, or of its implementation schedule, on
25 the grounds of unsustainable financial consequences within:
26

- 27 (1) Four years of adoption of the water management plan; or
28
29 (2) Within 4 years of an extension granted under Env-Wq 1906.03.
30

31 (b) An affected water user or affected dam owner may request a waiver of specific provisions of an
32 adopted water management plan developed under Env-Wq 1905 on the grounds of negative impacts to
33 public health or safety at any time after adoption of the water management plan.
34

35 (c) A waiver request shall:
36

- 37 (1) Be submitted in writing to the department by certified mail, return receipt requested;
38
39 (2) Include in the request:
40
41 a. The name and water user or dam identification number of the facility to which the
42 request relates;
43
44 b. The name of the designated river to which the waiver request relates;
45
46 c. A full explanation of why a waiver is being requested including:

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- 1
- 2
- 3 1. Specific reference to, and description of, the water management plan
- 4 provision(s) for which a waiver is being sought;
- 5
- 6 2. For a waiver for unsustainable financial consequences, documentation of the
- 7 practicable extent to which the affected party has met or is able to meet their water
- 8 management plan; and, either:
- 9
- 10 3. Documentation of the negative consequences on either public health or safety
- 11 resulting from complying with the specified water management plan provision(s);
- 12 or
- 13
- 14 4. Documentation of the operational or economic consequences on the affected
- 15 water user's or affected dam owner's facility, resulting from complying with the
- 16 specified water management plan provision(s), or both.

17 Env-Wq 1907.05 Waiver review.

18

19 (a) The department shall, within 60 days of its receipt, make an initial review to determine whether

20 to review a waiver request.

21

22 (b) If the department's initial review finds that the waiver request does not contain the elements

23 required by Env-Wq 1907.04 (c)(2) above, or if the department requires additional information in order to

24 make a decision, the department shall notify the person requesting the waiver and request that the person

25 submit specific, additional information.

26

27 (c) If the department's initial review finds that the waiver request contains the elements required by

28 Env-Wq 1907.04 (c)(2) above, the department shall:

29

- 30 (1) Notify the requester that the department shall conduct a waiver review;
- 31
- 32 (2) Publicize the waiver request on the department's website;
- 33
- 34 (3) Notify the other affected water users and affected dam owners within the WMPA that a
- 35 waiver has been requested.
- 36

37 (d) For a waiver request from an affected water user concerning unsustainable financial

38 consequences, the requester shall address the conditions constituting unsustainable financial consequences

39 by demonstrating that:

40

- 41 (1) The water use is necessary for sustaining their business;
- 42
- 43 (2) No feasible alternatives exist to reducing their water use to meet the water management
- 44 plan provisions ; and either
- 45

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1 (3) No feasible alternative sources for water supply are available or might be developed to
2 meet the water management plan provisions; or
3

4 (4) The implementation schedule for the water management plan is too short to allow for
5 sustainable funding.
6

7 (e) For a waiver request from an affected dam owner concerning unsustainable financial
8 consequences, the requester shall address the conditions constituting unsustainable financial consequences
9 by demonstrating that:
10

11 (1) Their hydropower or other operations would be reduced to an unprofitable condition; and
12 either:
13

14 (2) No feasible management alternatives exist; or
15

16 (3) The implementation schedule for their water management plan is too short to allow for
17 sustainable funding alternatives.
18

19 (f) For a waiver request concerning public health and safety, the requester shall address the
20 conditions constituting unsustainable financial consequences by demonstrating that:
21

22 (1) The implementation of the water management plan would result or has resulted in a public
23 safety concern; or
24

25 (2) The implementation of the water management plan would result or has resulted in a
26 violation of water quality standards.
27

28 (g) If the department's initial review finds that the waiver request contains the elements required by
29 Env-Wq 1907.04 (c) above, the department shall review the waiver request with respect to whether:
30

31 (1) The requester has demonstrated by clear and convincing evidence that compliance with
32 their water management plan would result in a negative impact on public health or safety; or
33

34 (2) The requester has demonstrated by clear and convincing evidence that compliance with
35 their water management plan, or its implementation schedule, would result in unsustainable
36 financial consequences.
37

38 Env-Wq 1907.06 Waiver decisions.
39

40 (a) The department shall issue a written decision in response to a request for a waiver. The written
41 decision shall amend the applicable water management plan.
42

43 (b) The department shall notify the requester of the decision by certified mail, return receipt
44 requested, and shall post the decision on its website.
45

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1 (c) If the department finds that the requester has demonstrated by the criteria in Env-Wq
2 1907.05(d), (e) or (f) that implementation of the specified provision(s) of the water management plan, or
3 its implementation plan, have resulted or would result in unsustainable financial consequences, or in
4 negative impacts to public health or safety, the department shall grant the waiver and shall waive
5 compliance with the specified provisions of the water management plan, or its implementation schedule.
6

7 (d) If the department grants the waiver, the department shall include conditions to the water
8 management plan, or its implementation schedule, in the written decision, as necessary to support
9 protected instream flows so long as those conditions do not create unsustainable financial consequences or
10 negative impacts to public health or safety.
11

12 (e) Any affected water user or dam owner granted a waiver shall comply with the conditions set
13 forth in the waiver's written decision.
14

15 (f) If the department denies the waiver request, the department shall specify the reason(s) for the
16 denial in the written decision.
17

18 (g) A waiver granted to one affected water user or affected dam owner shall not obviate the
19 management actions of the water management plans of other water users in the watershed.
20

21 (h) A waiver shall be in effect until the department amends the water management plan, as
22 described in Env-Wq 1905.11.
23

24 (i) Any person aggrieved by a waiver decision may appeal to the N.H. Water Council by filing an
25 appeal that meets the requirements specified in RSA 21-O:14 and the rules adopted by the Council, Env-
26 WC 100-200.
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