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Representative William Hatch, Chair
Joint Legislative Committee on Administrative Rules
Office of Legislative Services
25 Capitol Street, Room 219
Concord, NH 03301-6312

July 8, 2019

Dear Representative Hatch and Members of the Committee,

I am writing to request that the Joint Legislative Committee on Administrative Rules (JLCAR) postpone consideration of the rules submitted by the Department of Environmental Services (DES) related to establishing standards for drinking water and groundwater for PFAS chemicals, specifically, rules related to:

- Env-Dw 700 & 800 (FP 2019-16), establishing maximum contaminant levels (MCLs) for four PFAS;
- Env-Or 603.03 (FP 2019-15), establishing ambient groundwater quality standards (AGQS), for the four PFAS; and
- Env-Wq 402 (FP 2019-14), establishing water quality standards and procedures for discharges to groundwater of wastewater containing any of the four PFAS.

We applaud DES for addressing the PFAS issue and for all the scientific investigations they have carried out over the past three years. We strongly support protection of public health – it is what we do on the ground every day, as water quality professionals.

But we are concerned about the implications of the proposed DES PFAS MCL regulations. As we stated in comments to DES, if low numerical standards are absolutely needed for public health protection, then we all need to recognize and forthrightly address the fact that they could dramatically disrupt wastewater, septage, and biosolids (and other) operations throughout the state and impose significant, unexpected costs on public utilities, municipalities, and other stakeholders. We have not seen plans to address this from DES. Instead, we have just received the new proposed MCLs for four PFAS in the past week – and our concerns are heightened. These MCLs would be the only such formal, enforceable standards in the U. S. (other than one number in New Jersey). This is a big step that no other state has taken, despite years of discussion and pressure on some of them. The cost implications are large when going from DES's current *de facto* enforcement value of 70 parts per trillion (ppt) for PFOA + PFOS to the proposed standards in the teens of ppt. Routine municipal waste management activities – including septic systems, septage and biosolids management, wastewater treatment, and landfills – critical public health functions – will be impacted with hundreds of millions of dollars of unanticipated costs in the next few years. If this is necessary to protect public health,

then so be it. But the money has to come from somewhere, and DES has not done what was required of it and identified all the costs of its proposed rules, nor proposed a plan for where the money will come from.

Given the serious cost implications, we all need to work together to understand the impacts and ensure these rules get it right. Otherwise, we will be irresponsibly spending ratepayer and taxpayer money.

We urge the Committee to delay formal review of these DES rules for the following reasons:

- These final proposed PFAS MCL rules and their justification are significantly different than DES's initial proposal (DES, *Summary Report...*, Jan 4, 2019). They have had no public or independent peer review (other than one by a DES-contracted expert from Univ. of Florida who worked for DES on the proposed rule and is, therefore, arguably not independent). The significant new modeling approach used by DES has not been used by any other regulatory agency except Minnesota, where it was developed, and is not reviewed and approved by U. S. EPA. And the standards DES proposes are significantly lower than equivalent values set by Minnesota using the same model. In addition, we have already identified a faulty assumption in the calculations in this new modeling that, if corrected, would result in MCLs nearly double the proposed values.
- DES released the proposed final rules on the Friday before the July 4th holiday week. DES will be providing further information at a July 9th stakeholder meeting, and municipal stakeholders will be hearing from DES on July 15th regarding the Department's plans for implementation. The JLCAR meeting is July 18th. This short time frame for review of such a major proposed rule change is untenable.
- We believe that the current proposed rules and the process by which they were developed breach JLCAR's rules, justifying a JLCAR objection, including, most significantly, the proposed rules having "a substantial economic impact not recognized in the fiscal impact statement." The proposed rules, while important for public health protection related to the narrow scope of PFAS, may also not "be in the public interest" and may be "beyond the authority of the agency" and "contrary to the intent of the legislature" because of unintended consequences of disruptions and costs to other vital public health and environmental programs.

The cost question is important. But it is hard to argue, because some people interpret our raising it as meaning we are against public health. Not so. Our members are the ones who actually implement public health related to water quality. Even DES seems to dismiss the cost issue by arguing that any costs related to establishing the standards in the proposed rules are attributable to the Legislature and the law of 2018 (SB 309) that required DES to "initiate rulemaking... to adopt a maximum contaminant level" for four specific PFAS chemicals by January 1, 2019. (Note that the law is mute on when the final MCLs must be in place.) The law requires consideration of various factors, including feasibility and "costs and benefits to affected parties." But, as we have stated previously in comments to DES, the Legislature and *the law did not specify at what level the MCLs be set*. If DES were proposing MCLs similar to those, for example, recently adopted in Canada (200 ppt for PFOA and 600 ppt for PFOS), then the compliance costs for municipalities, utilities, and other stakeholders would be dramatically lower - reasonable and moderate. It is DES's decision to set unprecedentedly low MCLs that is causing the dramatic cost implications – costs that DES itself has estimated at up to \$267 million over the first year or two.

Traditionally, the formal MCL-setting process takes health-based target values (MCL goals, or MCLGs) and adjusts the final MCLs based on feasibility and costs – a balanced approach. The rationale for this is that health-based value goals involve layers of conservative assumptions and application of uncertainty factors. The exact number at which health impacts are certain is unknowable. In comparison, spending \$267 million in the next two years on addressing PFAS likely means that some other important public health needs will not be addressed. While considering costs and benefits seems insensitive when people have contaminated wells and are legitimately worried, balancing public health needs in a world of limited resources is a reality that you and DES have to deal with.

And DES's \$267 million estimate is inadequate, as it does not take into consideration full cost impacts on all wastewater treatment systems – including the management of biosolids, septage, and other residuals – that will be borne by both public and private entities. And there is no mention in DES's report regarding costs to "responsible parties" for PFAS contamination, which include not only cleanup and remediation costs, but also loss of income, legal fees, insurance costs, etc. Who are these responsible parties? The state has sued several, including 3M and Chemours. But that is not who we are talking about here. We are talking about NH businesses. Already, in one recent specific PFAS enforcement action, DES has imposed tens of thousands of dollars of cost on a small business

that managed routine, ordinary septage for several decades – a service fully permitted by DES and benefitting the public good - in the same way public wastewater treatment serves the public good. DES has identified that NH family business as a “responsible party.” Where is the fairness of putting a private company out of business for a broad, societal mistake (using PFOA and PFOS)? When asked who else may be seen as “responsible parties,” DES has stated that municipalities and utilities and the entities with whom they contract for supportive services will be held liable as “responsible parties,” just like Dupont and 3M – except DES expects the local “responsible parties” to pay right away, whereas it will take as much as 10 years for those ultimately responsible – those manufacturers – to pay (and only if the state’s suit is successful). With such low proposed MCLs and the ubiquitous nature of PFAS in our daily living environments, many small businesses and even individual homeowners may be identified as “responsible parties” and charged with cleanup costs. While DES may not intend this, they have set a precedent now that may lead to neighbors suing neighbors over PFAS. Has this been adequately thought out?

For the above reasons, we urge JLCAR to postpone consideration of the PFAS MCL rules. More consideration and discussion are needed.

We look forward to working with JLCAR, DES, and other stakeholders in further understanding the implications of the proposed MCL rules and how they should be adjusted and/or how they may be implemented thoughtfully, with as little disruption as possible and with reasonable costs shared equitably. NEBRA will be providing further detailed comments to JLCAR at the meeting when this topic is taken up for consideration. Those comments will further explain, with additional examples, why a JLCAR objection is necessary in accordance with JLCAR’s rules. And if DES produces additional documents and arguments between now and the JLCAR meeting, we will consider those to be added evidence for the need for further formal public review and stakeholder discussion before the rules are finalized.

Thanking you for your consideration of these comments, I am,

Sincerely yours,



Ned Beecher
Special Projects Manager

cc. JLCAR members
Governor Chris Sununu
Commissioner Robert Scott, DES
Executive Councilor Michael Cryans
Senator Jeb Bradley
Representative Ed Butler
Representative Susan Ticehurst
Representative Jerry Knirk

The North East Biosolids and Residuals Association (NEBRA) is a 501(c)(3) non-profit professional association advancing the environmentally sound and publicly supported recycling of biosolids and other organic residuals in New England, New York, and eastern Canada. NEBRA membership includes the environmental professionals and organizations that produce, treat, test, consult on, and manage most of the region’s biosolids and other large volume recyclable organic residuals. NEBRA is funded by membership fees, donations, and project grants. Its Board of Directors are from CT, MA, ME, NH, VT, and Nova Scotia. NEBRA’s financial statements and other information are open for public inspection during normal business hours. For more information: <http://www.nebiosolids.org>.