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NEWS RELEASE
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Municipal interests sue New Hampshire for wrongful PFAS rule adoption

On September 30th, the day new water quality regulations for PFAS were to take effect in New Hampshire, a coalition of municipal, farm, and company interests sued to halt their implementation. PFAS is a family of commonly used chemicals that have been linked to potential negative health impacts and are being aggressively regulated by a few states, including New Hampshire. Plaintiffs in the suit are Plymouth Village Water & Sewer District, Resource Management Inc., Charles Hanson, and 3M Company.

The legal action is narrow. It argues that the NH Department of Environmental Services (NH DES):

- rushed the new regulatory standards, ignoring extensive input from municipalities and other stakeholders;
- failed to conduct adequately the required cost/benefit analysis;
- failed to provide adequate scientific justification for such low MCLs and groundwater standards; and
- ignored the unfunded mandate implications of the new regulations.

The coalition bringing the suit represents a wide variety of interests, and its goals are supported by an even broader set of water quality professionals and municipal interests. As a lawyer for the plaintiffs noted, "that there are divergent interests amongst the plaintiffs, who all believe this rulemaking was improperly done, emphasizes just how wrong NH DES has gotten it this time."

According to the complaint filed in Merrimack Superior Court on Monday, NH DES violated its own standard procedures and failed to adequately evaluate costs and benefits when it created new drinking water and groundwater standards for four PFAS substances earlier this year.

The coalition is seeking an injunction to halt the new standards from taking effect. They hope the court will require NH DES to complete a more deliberative process with public input and understand and plan for the cost impacts on all affected parties, including municipalities, utility rate-payers, businesses and individuals.

NEBRA and other stakeholders have commented repeatedly to NH DES and the legislature regarding the disruptions that overly aggressive PFAS regulations could have on municipalities and their drinking water and wastewater management systems, given widespread levels of PFAS in the environment and regulations looking at parts per trillion – very tiny levels. They emphasize that municipal systems are not sources of PFAS; they are receivers of it in waste streams.

"Our members – wastewater systems – are the people on the front lines of protecting public health and the environment," said NEBRA staff Ned Beecher. "We too worry about PFAS in the environment, and we are working, same as others, to reduce human exposures. But our municipal systems cannot be held liable and responsible for bearing the cost of addressing a society-wide issue that's taken 50 years to develop."

"We applaud the work NH DES has done so far to quickly address highly-contaminated sites and reduce risk around industrial and fire-fighting sites, like St. Gobain and Pease. But, the same rush doesn't work for widespread background levels of PFAS. So we also applaud two of our members – Plymouth and Resource Management – who are bravely stepping forward with this suit to ensure the state follows proper procedures and develops balanced PFAS policy and regulations that are won't destroy local budgets."

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Additional evidence supporting Plymouth Water & Sewer District et al. vs. NH DES:

NH DES rushed the new regulatory standards, ignoring extensive input from municipalities and other stakeholders. NH DES was to create maximum contaminant levels (MCLs) and equivalent groundwater standards for four PFAS chemicals, beginning the process by January 1, 2019, as directed by the Legislature in a 2018 law. The law did not set any deadline for *completing* the process and did not indicate at what levels the MCLs should be. NH DES rushed the regulations through, with minimal consideration of comments from water quality professionals, water and wastewater utilities, and municipalities. The Legislature's Joint Legislative Committee on Administrative Rules (JLCAR) furthered the insult by approving the regulations in a short meeting in July, ignoring comment letters delivered in advance and a room full of stakeholders ready to testify.

NH DES failed to adequately conduct the required cost/benefit analysis of the new PFAS drinking water and groundwater regulations. MCLs – maximum contaminant levels – are usually set at the federal level, through a multi-year process laid out by U. S. EPA that includes extensive evaluation not only of public health risks, but also the feasibility of meeting the MCLs and the costs and benefits. Public health protection is critical, and that is what water quality professionals at NEBRA and around the state perform 24/7/365. But protecting water quality requires money, and, for any risk concern, at some point reducing the risk incrementally more becomes overly expensive. NH DES made rough estimates of how much the new PFAS MCL regulations might cost municipalities and their residents – $267 million over the first two years. But that only included costs for drinking water and a few wastewater systems. Many more of the state's 70+ wastewater treatment facilities will be impacted, as will septage management businesses, and other municipal functions such as solid waste management.

NH DES failed to provide adequate scientific justification for such low MCLs and groundwater standards. The new NH standards, scheduled to be effective September 30th, 2019, are the lowest set of enforceable standards for PFAS in drinking water in the country. They are an order of magnitude lower than equivalent standards in Europe, 2.6 times lower than U. S. EPA's non-enforceable screening standard, and 17 to 40 times lower than Canada's drinking water standards.

NH DES ignored the unfunded mandate implications of the new regulations. In comments to JLCAR in advance of its July meeting, where the fate of the proposed regulations was to be decided, NEBRA wrote:

> "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… routine municipal waste management activities – including septic systems, septage and biosolids management, wastewater treatment, and landfills – critical public health functions…. 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."

The scale of the costs associated with this new regulation means that many communities will not be able to comply, creating disparities between communities. An unfunded mandate challenge is appropriate.

Additional considerations (provided to DES in NEBRA comments this year):

- PFAS are the only common chemicals being regulated in parts per trillion in drinking water. This means that regulatory limits are very close to feasibility limits, since diffuse releases of PFAS are widespread. This requires a very thoughtful, careful balancing act: protecting drinking water – absolutely – but also figuring out how to address all these diffuse, low levels – background levels – in many places.
- Parts per trillion of PFAS are in wastewater and will be for the foreseeable future, because they are in our daily lives…DES has not included estimates of costs if all of New Hampshire's WWTFs have to treat for PFAS. Which, by the way, is not currently feasible technically.
- And what about the benefits of setting any particular PFAS MCL levels? The debate in NH has been within the range of 70 ppt for PFOA + PFOS – the EPA health advisory value that DES has been using as an action level – and the teens of ppt (where the new regulations ended up). That range represents a factor of less than 5 (70 / 15). The health risk calculations involve uncertainty factors of more than 100 to 300. So the factor of 5 debated in NH and considered by DES is dwarfed by the uncertainty factors already in the health risk calculations. This means that the best a health risk assessor can say is that going from 70 to ~15 will reduce health risk somewhat. But there is no way of saying that there is a measurable benefit. And it is clear that there is a large cost and disruption difference in going from 70 to 15 ppt.
- The MCL process, including as defined in the NH 2018 law that instigated this process, requires consideration of health protection and feasibility, costs, and benefits…. DES, by its own admission, has not completed the formal process of evaluating benefits.
- In comments submitted April 12, 2019, NEBRA specifically requested "that DES release the details of any new proposed MCL levels and allow for additional public comment prior to establishing MCLs for these compounds." Other commenters requested the same. NH DES did not do so, even though the new regulatory MCLs are 2 to 5 times lower than those proposed at the beginning of the year. And JLCAR also ignored this request for proper procedure.