THE STATE OF NEW HAMPSHIRE

SUPREME COURT

NO. 2020-0058

PLYMOUTH VILLAGE WATER & SEWER DISTRICT, RESOURCES MANAGEMENT, INC., CHARLES G. HANSON, AND 3M COMPANY,

v.

ROBERT R. SCOTT AS COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES,

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Interlocutory Appeal Pursuant to Rule 8 from an Order of the Merrimack County Superior Court

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BRIEF OF AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION AND BUSINESS & INDUSTRY ASSOCIATION OF NEW HAMPSHIRE IN SUPPORT OF PLAINTIFFS

NEW ENGLAND LEGAL FOUNDATION AND BUSINESS & INDUSTRY ASSOCIATION OF NEW HAMPSHIRE,

By their attorney,

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QUESTION PRESENTED

When a New Hampshire statute mandates that the Department of Environmental Services (NHDES) set maximum levels of a toxic contaminant in all public water supplies only after "consideration of . . . the costs and benefits to affected parties that will result from establishing the standard," what is the meaning of the requirement to consider costs and benefits?

INTEREST OF AMICI CURIAE

Amicus curiae New England Legal Foundation (NELF) is a nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. NELF's membership consists of corporations, law firms, individuals, and others who believe in its mission of promoting balanced economic growth, protecting the free enterprise system, and defending economic rights throughout New England. NELF's more than 130 members and supporters include a cross-section of large and small businesses and other organizations from all six New England states. NELF has regularly appeared as amicus curiae in federal and state cases that raise issues of general concern to the New Hampshire and the wider New England business communities.

Amicus curiae Business & Industry Association of New Hampshire (BIA) is a nonprofit business advocate and New Hampshire's statewide chamber of commerce, founded in 1913 and located in Concord, New Hampshire. BIA's membership consists of more than 400 members in a diverse set of industries, including advanced manufacturing, technology, professional services, financial

services, health care, hospitality and tourism, public utilities, higher education, and insurance. BIA's mission is to promote a healthy climate for job creation and a strong New Hampshire economy.

An important part of both NELF and BIA's mission is to advocate for the reasonable interpretation of statutes and regulations governing businesses and economic activity generally. In this case, NELF and BIA are concerned about the interpretation given to RSA 485:3 by NHDES. Specifically, NELF and BIA take issue with NHDES's reading of the statute's clear, unqualified mandate that NHDES consider costs and benefits before it sets maximum contaminant levels (MCLs) for per- and polyfluoroalkyl substances (PFAS) found in New Hampshire's drinking water and ambient groundwater.

By NHDES's own admission, the final MCLs it set come with a staggering compliance cost of "at least $190 million" over the first two years.[1] Yet, as discussed in this brief, at each stage of setting the MCLs NHDES was aware that the methods it adopted of considering costs and benefits were inadequate to provide a sound and comprehensive understanding of what the New Hampshire public would be buying for its dollars. It is small wonder that NHDES still cannot identify what benefits $190 million will buy that some smaller expenditure of

[1] "Final PFAS drinking water standards established," *Environmental News: Newsletter of the New Hampshire Department of Environmental Services* (September-October 2019) at 2. The article appears in the Commissioner's Column. It is found in the State's Appendix Vol. 2, 152 (hereafter, App. Vol. __, __).

dollars would not buy. As the trial judge aptly concluded, it is "absurd" to believe that the Legislature intended such a costly and uninformed result.

NELF and BIA therefore believe that their brief provides an additional perspective which may aid the Court in determining whether to affirm the trial court's issuance of an injunction.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

N.H. Const., Part I, Art. 28-a Mandated Programs.

The state shall not mandate or assign any new, expanded or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the state or unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision.

N.H. RSA 485:3 Drinking Water Rules.

I. The commissioner shall adopt under RSA 541-A, following public hearing, drinking water rules and primary drinking water standards which are necessary to protect the public health and which shall apply to all public water systems. Such rules shall include:

> (a) identification of contaminants which may have an adverse effect on the health of persons;
>
> (b) After consideration of the extent to which the contaminant is found in New Hampshire, the ability to detect the contaminant in public water systems, the ability to remove the contaminant from drinking water, and the costs and benefits to affected parties that will result from establishing the standard, a specification for each contaminant of either:
>
> > (1) A maximum contaminant level that is acceptable in water for human consumption; or
> >
> > (2) One or more treatment techniques or methods which lead to a reduction of the level of such contaminant sufficient to protect the public health, if it is not feasible to ascertain the level of such contaminant in water in the public water system; and
>
> (c) criteria and procedures to assure compliance with the levels or methods determined under subparagraph (b), including quality control monitoring and testing procedures and standards to ensure compliance with such levels or

> methods; criteria and standards to ensure proper operation and maintenance of the system; requirements as to the minimum quality of water which may be delivered to the consumer; and requirements with respect to siting new facilities. Such rules shall be no less stringent than the most recent national Primary Drinking Water Regulations in effect, as issued or promulgated by the United States Environmental Protection Agency.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

NELF and BIA adopt the Statement of the Case and Statement of the Facts set forth in Plaintiffs' brief.

SUMMARY OF THE ARGUMENT

The judge's reading of the statute is justified both by the text and by the relevant constitutional and statutory background.

From the earliest phase of its rule-making, NHDES determined that a qualitative narrative of costs and benefits, though falling far short of an adequate cost-benefit analysis, would suffice to meet the statute's mandate that it consider costs and benefits before setting MCLs.

The very costly final MCLs set by NHDES were properly enjoined by the trial court because they are plainly not the product of a cost-benefit analysis mandated by law.

ARGUMENT

The Injunction Was Fully Warranted By NHDES's Admitted Failure To Engage In The Cost-Benefit Analysis Required By Law.

The present dispute about the correct reading of RSA 485:3, I(b) should be viewed not only textually, but also against the background history of the costs NHDES imposes by its regulations.

As recounted in the Plaintiffs' Memorandum in Support of Motion for Temporary and Preliminary Injunction, App. Vol. 2, 286-95, NHDES has a history of skirting Article 28-a's ban on unfunded mandates imposed on political subdivisions of this state. In the past, it argued that functions such as water and sewer, because they are undertaken by private entities as well as by municipalities, are excluded from the constitutional ban. In response, the Legislature felt compelled to enact RSA 541-A:25, in which it reinforced and broadened Article 28-a's prohibition and explicitly extended the protection against unfunded mandates to "sewer and water" functions. *See* App. Vol. 2, 289.

The statute being considered by the Court in this case is RSA 485:3, which also involves costly impositions arising out of the mandated regulation of water and sewer standards. The statute reads in relevant part:

> I. The commissioner shall adopt . . . drinking water rules and primary drinking water standards which are necessary to protect the public health and which shall apply to all public water systems. Such rules shall include:
>
> ****
>
> (b) After consideration of the extent to which the contaminant is found in New Hampshire, the ability to detect the contaminant in public water systems, the ability to remove the contaminant from drinking water, and the costs and benefits to affected parties that will result from establishing the standard, a specification for each contaminant of . . . :
>
> (1) A maximum contaminant level that is acceptable in water for human consumption;

RSA 485:3, I(b).

It is consistent with the background discussed in the Plaintiffs' Memorandum now to read the text of RSA 485:3, I(b) as the trial judge read it,

i.e., as requiring NHDES to account in the most punctilious and most thoroughly documented manner for any proposed fiscal impositions upon the public stemming from the MCL values it sets. That interpretation necessarily requires that NHDES's consideration of costs and benefits be in the form of an adequately quantified cost-benefit analysis. The judge was therefore entirely correct when he said of NHDES's predominantly qualitative treatment of "costs and benefits," "Any rational interpretation of the statute requires more." Order (November 26, 2019) at 21 (Addendum [Add.] to State's brief at 68).

Indeed, from its first step in the rule-making process, in January 2019, NHDES readily acknowledged that its methodology would fall far short of a proper and adequate cost-benefit analysis. It stated then, as it has done openly throughout the course of this dispute, that the data necessary for such a cost-benefit analysis are lacking, and yet it proceeded to impose huge compliance costs undaunted by this critical shortcoming.

In its *Summary Report on the New Hampshire Department of Environmental Services Development of Maximum Contaminant Levels*, issued that January, under the heading "Cost to Affected Parties," NHDES told all "affected" stakeholders what to expect and what not to expect:

> NHDES used available water quality data to estimate potential costs to affected parties of compliance with the MCLs/AGQSs. For certain types of waste and groundwater discharge sites, this involved determining the frequency of exceeding the proposed standards for the sites sampled and applying that to the universe of sites. For other types of sites for which there are limited data, a *qualitative description of anticipated costs is provided*. *As noted previously, with existing resources and expertise,*

> NHDES *was unable to analyze costs in keeping with EPA and Office of Management and Budget guidance, which entails determining costs associated with a number of different potential standards and capturing marginal costs*.

App. Vol. 1, 14 (emphasis added).

Similarly, on the benefits side of the analysis, NHDES announced that its informed rulemaking would be analytically hobbled there, too. "In general," NHDES wrote, "it is difficult to quantify the monetized benefits for environmental and public health standards." App. Vol. 1, 19. It went on to say:

> *Contingent valuation*, which is a survey-based economic method for valuing non-market resources[,] . . . is a widely accepted economic method to evaluate benefits in such cases as establishing a MCL when reduction in risk can be reasonably quantified. . . . Unfortunately, the type of information needed to use contingent valuation is not yet available for PFAS. While PFOA, PFOS, PFHxS and PFNA have clearly been associated with numerous adverse health outcomes in animals, the mechanism for, and risks related to, similar outcomes in humans are not well understood. Accordingly, NHDES currently has *no quantified value of benefit*, although there is *likely significant benefit* to reducing exposure to these compounds through drinking water . . . . *Qualitatively*, given the potential for direct health care treatments costs, associated losses of economic production and income of those impacted, and associated impacts to families and caregivers, limiting exposure to PFOA, PFOS, PFNA and PFHxS at unsafe levels *may result in numerous and significant avoided costs*.

Id. (initial emphasis in original; remaining emphasis added). The qualitative character of NHDES's approach to costs and benefits is unmistakably apparent in these passages.

Equally apparent was its decision to buy those vague, qualitative benefits with little regard to cost.

> Under State law, development of MCLs necessitates evaluation of, and possible modification based on, the availability and accuracy of detection and treatment technology, as well as the costs associated with compliance. While these factors were considered, NHDES *has determined* that, for these compounds at this time, *adjustments to the standards based on detection/treatment technology or projected compliance costs are not warranted*, as both technology challenges and compliance costs can be addressed by means other than standards that do not adequately protect health.

App. Vol. 1, 11 (emphasis added).

NHDES's approach remained unchanged in June 2019, when it issued the final MCLs, with their hugely increased costs compared to those of the MCLs proposed in January. In its sparse four-page "Update on Consideration of Costs and Benefits" of June 28, 2019, NHDES wrote:

> As was the case for the initial proposal, the emerging nature of PFAS contamination limits the availability of certain information that would be needed for a complete quantification of all the costs and benefits that will result from adopting these rules. . . . Consideration of the updated information was performed and due to the clear, although difficult to quantify, health benefits in limiting exposure, the department chose to not alter the health based standards, despite recognizing the significant implementation costs.

App. Vol. 1, 91.

Similarly, in the June 28, 2019, *Summary of Comments on the Initial Proposals with NHDES Responses*, to which the Update was attached, the NHDES of June echoed the NHDES of January even more strongly. Despite the analytical vacuum its approach had necessarily created, NHDES once again confidently declared that "after considering what currently is known about costs and benefits

NHDES believes that the benefit of adopting these rules is not outweighed by the costs of implementing the proposed health based standards." App. Vol. 2, 48.

And of course, once again, in the absence of an adequate cost-benefit analysis, DES was singularly unable to provide a sound, reliable, objective basis for what had now ballooned into a $190 million belief in "the benefit of adopting these rules." Its pledge of six months earlier that "[f]urther exploration on quantifying benefit to affected parties will also occur," App. Vol. 1, 8; *see also* 19, had proven feckless.

In response to public comments that "[t]he costs and benefits to affected parties that will result from establishing the new standards were not adequately quantified, did not follow federal requirements related to adopting MCLs, and did not identify the marginal costs and benefits at different MCL levels for each contaminant," NHDES laid the responsibility for that state of affairs at the door of the Legislature itself. App. Vol. 2, 49. "Because NHDES was mandated by the Legislature to establish the MCLs and AGQS," it replied, "any costs attributable to the standards are directly attributable to the law, not the rules." *Id*.

The trial judge later criticized NHDES's myopic notion of what it means to consider costs and benefits in this statutory context, rightly calling the rudderless standard NHDES used "a standard different from that established by the statute itself." Order at 20 (Add. 67). Taking a very different view of the Legislature's intentions from that adopted by NHDES, he developed the point further:

> [I]t would be absurd to assume that in enacting RSA 485:3, I(b) the Legislature intended that DES could responsibly carry out its Legislative mandate and impose millions dollars of costs on citizens and municipalities in New Hampshire without assessing the benefit from doing so, and particularly, the benefit at the various levels compared to the correlative cost. The entire point of the Legislature referring complex technical issues to an agency with expertise in dealing with those issues is so that the agency can consider the complexity of the technical issues and make a reasoned determination about the benefit of imposing them.

Id. at 22 (Add. 69).

NHDES should not have been surprised when the judge granted the injunction, for it had repeatedly, from the initiation of its rule making, declared that it lacked the data needed to conduct the statutorily mandated cost-benefit analysis; yet, undeterred, it had proceeded to issue extraordinarily costly MCLs in the unmoored, unsubstantiated belief that the costs do not outweigh the benefits. The injunction was therefore justified by NHDES's signal failure to abide by the statute's mandate before issuing regulations.

CONCLUSION

For all of the foregoing reasons and for the further reasons set out in the Plaintiffs' brief, the Court should affirm the trial court's issuance of an injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitation set out in Supreme Court Rule 16(11) and contains 2,643 words.

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CERTIFICATE OF SERVICE

I certify that a copy of this brief will be served on all counsel of record in this case through the New Hampshire Supreme Court's electronic filing system.

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