

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0058

The Plymouth Village Water and Sewer District & a.

v.

Commissioner, New Hampshire Department of Environmental Services

RULE 8 INTERLOCUTORY APPEAL FROM RULING OF THE
MERRIMACK SUPERIOR COURT

BRIEF OF *AMICUS CURIAE*, NEW HAMPSHIRE MUNICIPAL
ASSOCIATION
IN SUPPORT OF THE PLYMOUTH VILLAGE WATER AND SEWER
DISTRICT & A.

NEW HAMPSHIRE MUNICIPAL
ASSOCIATION

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STATEMENT OF THE FACTS

The New Hampshire Municipal Association defers to the Statement of Facts and of the Case in the Briefs by the Plymouth Water and Sewer District & a. and relies thereon.

SUMMARY OF THE ARGUMENT

The New Hampshire Supreme Court has not previously reviewed RSA 541-A's notice and comment requirements, including the requirements of RSA 485:3, I(b), nor has the Supreme Court reviewed the applicability of the "logical outgrowth" doctrine developed under the federal Administrative Procedure Act to RSA 541-A. *See, e.g., Env'tl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). When the language of a statute is plain and unambiguous, this Court does not look beyond it for further indications of legislative intent, but where the statutory language is ambiguous or subject to more than one reasonable interpretation this Court will review legislative history to aid its analysis. *Franklin v. Town of Newport*, 151 N.H. 508, 510 (2004). In this case, the New Hampshire Department of Environmental Services (NHDES) was well acquainted with both the plain language of RSA 485:3 and the legislative history of the enabling legislation. NHDES knew or should have known that by incorrectly attributing the cost of the proposed standards to the law, and by failing to abide by the law's requirement to use a cost-benefit analysis prior to crafting the standards, the agency exceeded its rulemaking authority in promulgating standards creating maximum contaminant limits (MCLs) for the four per- and polyfluoroalkyl (PFAS) compounds specified in Chapter 368, Laws of 2018.

Although it is well settled that the legislature may delegate to administrative agencies the power to promulgate rules necessary for the proper execution of the laws, the authority to promulgate rules and regulations is designed only to permit the agency to fill in the details to effectuate the purpose of the statute. Thus, administrative rules may not add to, detract from, or modify the statute which they are intended to implement.

Bach v. N.H. Dep't of Safety, 169 N.H. 87, 94 (2016) (internal citations and edits omitted).

In crafting the PFAS MCLs, NHDES was required to consider: (1) “the extent to which the contaminant is found in New Hampshire”; (2) “the ability to detect the contaminant in public water systems”; (3) “the ability to remove the contaminant from drinking water”; and (4) “the costs and benefits to affected parties that will result from establishing the standard.” RSA 485:3, I(b). Failure to fulfill any of these four requirements makes the standards promulgated by NHDES *ultra vires*. *Bach v. N.H. Dep’t of Safety*, 169 N.H. at 94.

Here, the standards are *ultra vires* because NHDES did not correctly “consider . . . the costs and benefits to affected parties that will result from establishing the standard” as that phrase is understood in its plain and ordinary meaning. Instead, NHDES erroneously concluded that “any costs attributable to the standards are directly attributable to the [RSA 485:16-e], not the rules.” NHDES, RULES RELATED TO PER- AND POLYFLUOROALKYL SUBSTANCES (PFAS): FP 2019-14, ENV-WQ 402 AMENDMENTS, FP 2019-15, ENV-OR 603.03 AMENDMENTS, FP 2019-16, ENV-DW 700-800 AMENDMENTS: SUMMARY OF COMMENTS ON INITIAL PROPOSALS WITH NHDES RESPONSES, State Br. App. Vol. II, Ex. 2, pg. 49. Then, NHDES compounded the error by erroneously concluding that the phrase “consider . . . the costs and benefits to affected parties that will result from establishing the standard” meant the same thing as “describe[] the types of benefits that would result and provided information on large studies that had been done elsewhere.” *Compare id.* at 5 with Chapter 368, Laws of 2018. Given the plain and ordinary meaning of the words used by the legislature, crafting a cost and benefit analysis using accepted methodology was critical for the promulgation of legally valid standards.

ARGUMENT

I. NHDES erroneously attributed any costs associated with the standard to the law instead of the rules implementing the standard.

NHDES has consistently and erroneously maintained that “any costs attributable to the standards are directly attributable to [RSA 485:16-e], not the rules.” NHDES, SUMMARY OF COMMENTS ON INITIAL PROPOSALS WITH NHDES RESPONSES, State Br. App. Vol. II, Ex. 2, pg. 49. This would only be true if the law mandated a specific standard, but not where the law required the agency to establish a standard through the rulemaking process that was consistent with legislative directive.

For example, 2019’s HB 261, now codified as Chapter 208, Laws of 2019, directed NHDES to lower the arsenic standard in public drinking water systems from 10 parts-per-million (ppm) to 5 ppm or less. Thus, the law mandated the standard. The cost of compliance directly attributable to that law is the amount necessary to ensure that every public water system which currently tests at between 5 and 10 ppm of arsenic lowers that amount to 5 ppm (\$3,760,000 in capital costs and \$4,630,000 in maintenance costs). *Hearing on HB 261 Before the S. Energy and Natural Resources Comm.* (2019) (statement of Barbara T. Reid, Government Finance Advisor, NH Municipal Association (NHMA)). (Note that even though the law mandated the standard, the legislature still considered the marginal costs and benefits analysis conducted by NHDES prior to enactment. NHDES, REVIEW OF THE DRINKING WATER MAXIMUM CONTAMINANT LEVEL (MCL) AND AMBIENT GROUNDWATER QUALITY STANDARD (AGQS) FOR ARSENIC, Dec. 31, 2018, available at: <https://www.des.nh.gov/organization/commissioner/pip/publications/documents/r-wd-18-20.pdf>.)

In contrast to the arsenic standard, the law which mandated that NHDES adopt rules to regulate the four-named PFAS compounds, Chapter 368, Laws of 2018, merely

directed NHDES to “initiate rulemaking in accordance with RSA 541-A to adopt a maximum contaminant limit for [the four-named PFAS compounds].” That law does *not* direct NHDES to adopt a specific standard. *Id.* Instead, NHDES was required to do an analysis to determine the appropriate standard. *Id.* Obviously, if the standard allowed for a higher concentration of PFAS in drinking water, the costs of compliance would be lower because fewer systems would have to be modified to comply with the standard and the inverse would be true for a standard that required a lower allowable concentration of PFAS in drinking water. NHDES, UPDATE ON CONSIDERATION OF THE COSTS AND BENEFITS RELATED TO FINAL PROPOSED MAXIMUM CONTAMINANT LEVELS AND AMBIENT GROUNDWATER (SIC) QUALITY STANDARDS FOR PERFLUOROCTANESULFONIC ACID (PFOS), PERFLUOROCTANOIC ACID (PFOA), PERFLUORONONANOIC ACID (PFNA), AND PERFLUOROHXANESULFONIC ACID (PFHXS), State Br. App. Vol. II, Ex. 2, pg. 135 (showing a higher standard having estimated costs ranging from approximately \$1.85 million to \$5.2 million compared to enacted standard with estimated costs ranging from \$65 million to \$142.8 million). Thus, any costs associated with compliance are entirely attributable to the standards adopted via the administrative rules process, not RSA 485:16-e, because the law did not fix the standard, but gave NHDES discretion to adopt an appropriate standard. Therefore, NHDES’s contention that the costs are attributable to the law, not the rules, is in error.

II. NHDES failed to undertake the cost-benefit analysis required by statute despite NHDES’s knowledge of the law’s plain language and the legislative intent of RSA 485:3, I(b).

RSA 485:3, I(b), RSA 541-A:5, IV(a)-(b) and (e), and RSA 541-A:5, VI, all required NHDES to undertake a cost-benefit analysis weighing the costs against the benefits for any rules promulgated pursuant to their provisions.

As the Superior Court below recognized in its November 26, 2019 Order, NHDES “did not undertake a thorough cost-benefit analysis.” Pg. 21. Instead, NHDES relied on

its erroneous assertion that “any costs attributable to the standards are directly attributable to [RSA 485:16-e], not the rules.” NHDES, SUMMARY OF COMMENTS ON INITIAL PROPOSALS WITH NHDES RESPONSES, State Br. App. Vol. II, Ex. 2, pg. 49. Then, NHDES compounded this error by erroneously concluding that the phrase “consider . . . the costs and benefits to affected parties that will result from establishing the standard” meant the same thing as “describe[] the types of benefits that would result and provided information on large studies that had been done elsewhere.” *Compare id.* at 5 with Chapter 368, Laws of 2018. As a consequence, NHDES failed to undertake the analysis required by the applicable statutes. And it failed to undertake that analysis, despite the plain language of the statutes and rules, even though it was intimately familiar with the legislative intent of the language of Chapter 368, Laws of 2018, which modified RSA 485:3, I(b) and created RSA 485:16-e.

A. NHDES failed to undertake the cost-benefit analysis required by RSA 485:3, I(b).

NHDES failed to abide by the plain and ordinary meaning of RSA 485:3, I(b) and the other applicable statutes, and undertake the required cost-benefit analysis prior to adopting the presently challenged rules pertaining to drinking water. RSA 485:3, I(b) required NHDES to consider: (1) “the extent to which the contaminant is found in New Hampshire”; (2) “the ability to detect the contaminant in public water systems”; (3) “the ability to remove the contaminant from drinking water”; and (4) “the costs and benefits to affected parties that will result from establishing the standard.” *Id.* Ultimately, those four considerations are somewhat duplicative as a cost-benefit analysis aggregates all impacts to all affected parties at all points in time and converts them into common monetary units, where the criterion is simply a test of whether the benefits exceed the costs. Matthew Kotchen, *Cost-Benefit Analysis*, in ENCYCLOPEDIA OF CLIMATE AND WEATHER, (Stephen Schneider and Terry Root eds., 2nd Ed. 2010), available at: <https://environment.yale.edu/kotchen/pubs/CBAchap.pdf>.

Nevertheless, NHDES “concluded that the existing methodologies to quantify benefit were not appropriate to use in this case. Instead [NHDES] described the types of benefits that would result and provided information on large studies that had been done elsewhere which were not scalable to New Hampshire.” Affidavit of Sarah Pillsbury, State Br. App. Vol. III, pg. 45 (Ex. C to the State’s Obj. to M. for Prelim. Inj., ¶ 15). This imprecise and somewhat inscrutable explanation made it appear that the NHDES analysis was constructed within a metaphorical black box. NHDES started with what it called “[t]he critical health effects” for each of the four-named PFAS chemicals, then “described” some benefits of having lower PFAS levels. Then NHDES arbitrarily picked a concentration amount for those PFAS levels, levels which were similar to, but not the same as, those chosen by other states looking at the same data.. *See* NHDES, SUMMARY OF COMMENTS ON INITIAL PROPOSALS WITH NHDES RESPONSES, June 28, 2019, State Br. App. Vol. II, Ex. 2, pg. 49; VT DEP’T OF HEALTH, PFAS IN PUBLIC DRINKING WATER, July 2019, available at:

https://www.healthvermont.gov/sites/default/files/documents/pdf/ENV_DW_PFAS.pdf (setting a combined MCL of 20 parts-per-trillion (ppt) for PFOA, PFOS, PFHxS, PFHpA, and PFNA); MASS. DEP’T OF ENVTL. PROTE., DEVELOPMENT OF A PFAS DRINKING WATER STANDARD (MCL), PRESENTATION TO PFAS STAKEHOLDER GROUP MEETING, June 20, 2019, available at: <https://www.mass.gov/lists/development-of-a-pfas-drinking-water-standard-mcl> (proposing a combined MCL of 20 ppt for PFOA, PFOS, PFHxS, PFHpA, PFNA, and PFDA); WIS. DEP’T OF HEALTH SERVICES, PER- AND POLYFLOUROALKYL SUBSTANCES (PFAS), <https://www.dhs.wisconsin.gov/water/gws.htm> (proposing a combined MCL of 20 ppt for two PFOA and PFOS); N.J. DEP’T OF ENVTL. PROT., AFFIRMING NATIONAL LEADERSHIP ROLE, NEW JERSEY PROPOSES STRINGENT DRINKING WATER STANDARDS FOR PFOA AND PFOS, April 1, 2019, https://www.nj.gov/dep/newsrel/2019/19_0021.htm (adopting an MCL of 14 ppt for PFOA and 13 ppt for PFOS); MICH. DEP’T OF ENV’T, GREAT LAKES, AND ENERGY, MICHIGAN MOVES FORWARD ON DRINKING WATER STANDARDS FOR PFAS, PRESS RELEASE, Oct. 11, 2019, available at:

https://www.michigan.gov/egle/0,9429,7-135-3308_3323-509830--,00.html (proposing MCLs for several PFAS compounds, including PFOA at 8 ppt, PFOS at 16 ppt, PFHxS at 51 ppt, and PFNA at 6 ppt).

Although NHDES focused on describing what it deemed “[t]he critical health effects” of exposure to the four-named PFAS chemicals and attributing a particular adverse health effect to each substance, it is unclear how NHDES reached the conclusion that a particular health effect was the correct health effect to focus on for each substance. *See* NHDES, SUMMARY OF COMMENTS ON INITIAL PROPOSALS WITH NHDES RESPONSES, June 28, 2019, State Br. App. Vol. II, Ex. 2, pg. 49.

For example, NHDES focused on liver damage for PFOA. *See id.* at 49. Yet, PFOA has been linked in other courts to kidney and testicular cancer, ulcerative colitis, thyroid disease, pregnancy-induced hypertension, and high cholesterol. *In re E.I. Du Pont De Nemours and Company C-8 Personal Injury Litigation*, 2-13-MD-2433 (S.D. Ohio October 1, 2018). It is unclear how NHDES determined that, in the case of PFOA, liver damage was the appropriate measure for “critical health effect” rather than one of the other potential adverse health effects. *See, e.g.*, NHDES, SUMMARY OF COMMENTS ON INITIAL PROPOSALS WITH NHDES RESPONSES, June 28, 2019, State Br. App. Vol. II, Ex. 2, pg. 54, (“EPA and the New Jersey Drinking Water Quality Institute (NJDWQI) have developed different numerical cancer guidelines for PFOA based on testicular cancer set at a one-in-one million cancer risk for a 70-year exposure from drinking water . . . **Regardless of which value is more accurate**, the proposed PFOA MCL of 12 ng/L based on a non-cancer endpoint is below the more conservative of the aforementioned values.”) (emphasis added).

The same arbitrariness of assignment appears for the other chemicals as well: PFOS (immune suppression), PFNA (liver damage), and PFHxS (impaired female fertility). *See* NHDES, SUMMARY OF COMMENTS ON INITIAL PROPOSALS WITH NHDES RESPONSES, June 28, 2019, State Br. App. Vol. II, Ex. 2, pg. 49 (describing NHDES’s selection process as based entirely on what NHDES believed had been most studied health effects for the four-named PFAS compounds, not necessarily the most serious

adverse health effect or some aggregate of adverse health effects). Thus, what NHDES designed was a metaphorical black box. The input, as demonstrated above, was the almost arbitrarily chosen “critical health effect.” This “critical health effect” was then “described,” and the result of that description was, as far as has been disclosed, a standard rather than a common monetary unit. Thus, NHDES’s “analysis” made it impossible to compare the monetary units for the variety of health effects against the costs of implementation because the entire NHDES’s model simply fixed the standard to an arbitrarily assigned “critical health effect.”

On its own, this undermines any argument that NHDES engaged in an analysis even remotely resembling a cost-benefit analysis, but it gets more troubling. At the same time that NHDES was examining all available data to set a standard for the four-named PFAS compounds, a number of other states handed similar mandates to their appropriate state agencies, all of which looked at basically the same set of scientific studies and proposed standards that differed in some degree from the standards adopted by NHDES. *See, e.g.*, VT DEP’T OF HEALTH, PFAS IN PUBLIC DRINKING WATER, July 2019 (setting a combined MCL of 20 parts-per-trillion (ppt) for PFOA, PFOS, PFHxS, PFHpA, and PFNA); MASS. DEP’T OF ENVTL. PROT., DEVELOPMENT OF A PFAS DRINKING WATER STANDARD (MCL), PRESENTATION TO PFAS STAKEHOLDER GROUP MEETING, June 20, 2019 (proposing a combined MCL of 20 ppt for PFOA, PFOS, PFHxS, PFHpA, PFNA, and PFDA); WIS. DEP’T OF HEALTH SERVICES, PER- AND POLYFLOUROALKYL SUBSTANCES (PFAS (proposing a combined MCL of 20 ppt for two PFOA and PFOS); N.J. DEP’T OF ENVTL. PROT., AFFIRMING NATIONAL LEADERSHIP ROLE, NEW JERSEY PROPOSES STRINGENT DRINKING WATER STANDARDS FOR PFOA AND PFOS, April 1, 2019 (adopting an MCL of 14 ppt for PFOA and 13 ppt for PFOS); MICH. DEP’T OF ENV’T, GREAT LAKES, AND ENERGY, MICHIGAN MOVES FORWARD ON DRINKING WATER STANDARDS FOR PFAS, PRESS RELEASE, Oct. 11, 2019 (proposing MCLs for several PFAS compounds, including PFOA at 8 ppt, PFOS at 16 ppt, PFHxS at 51 ppt, and PFNA at 6 ppt).

NHDES has given the public no analytical basis to understand, for instance, why New Hampshire adopted a standard of 12 ppt for PFOA rather than New Jersey's higher 14 ppt or Michigan's lower 8 ppt. An ordinary cost-benefit analysis would demonstrate the relative values of each and show why New Hampshire's limit was appropriate for New Hampshire based on demographic, health, public water service, or other information unique to New Hampshire. By way of comparison, the analysis undertaken for arsenic generated a cost table for different standards as well as several benefits tables for various health effects for those different standards. NHDES, REVIEW OF THE DRINKING WATER MAXIMUM CONTAMINANT LEVEL (MCL) AND AMBIENT GROUNDWATER QUALITY STANDARD (AGQS) FOR ARSENIC, Dec. 31, 2018, available at: <https://www.des.nh.gov/organization/commissioner/pip/publications/documents/r-wd-18-20.pdf>. The result, of course was that when the legislature set the standard into law it was able to compare the differences between the then-current standard of 10 ppb with potential proposed standards of 6 ppb, 5 ppb, 4, ppb, and 3 ppb. *Id.* As a consequence, the legislature was able to effectively compare the varying costs for the different possible standards and weigh those against the health benefits. *Id.* In the end, the legislature determined that a 5 ppb standard, which prevented fewer adverse health effects than lower standards but more than higher standards, was appropriate given the estimated cost of compliance totaling several million dollars. *Hearing on HB 261 Before the S. Energy and Natural Resources Comm., (2019).*

Here, in contrast, no such comparison exists. While not strictly required, presumably, a proper cost-benefit analysis would include the relevant standards developed elsewhere, such as the EPA's combined standard of 70 ppt for PFOA and PFOS, and analyze those standards in relation to the costs of implementation in New Hampshire and the propriety of those standards in light of any new studies conducted since the promulgation of those standards. U.S. EPA, FACT SHEET: PFOA & PFOS DRINKING WATER HEALTH ADVISORIES, Nov. 2016, available at: https://www.epa.gov/sites/production/files/2016-06/documents/drinkingwaterhealthadvisories_pfoa_pfos_updated_5.31.16.pdf. Instead, as

argued above, NHDES created a metaphorical black box, which, at best, obscured the fact that NHDES abdicated its responsibility to meaningfully compare the costs of compliance and health benefits of a proposed standard to determine whether it was appropriate for New Hampshire. Thus, there was neither “logical outgrowth” of the final rules from the initially proposed rules nor any meaningful ability for the public to effectively provide input after promulgation of the final rules, even absent a formal public hearing.

B. NHDES understood the legislative intent behind RSA 485:3, I(b) as it was instrumental in crafting that statute and diverged from that intent in crafting the challenged rules.

NHDES’s usage of its black box analysis and its statement that the law required it to “merely...consider[]...costs and benefits” when setting the standards is in stark contrast with both the legislative history and NHDES’s statements to the legislature prior to the passage of SB 309, which later became Chapter 368, Laws of 2018. *See* App. 4 (statement of Sarah Pillsbury, Drinking Water and Groundwater Bureau Administrator, NHDES, and Barbara T. Reid, Government Finance Advisor, NHMA, at *Hearing on SB 309 Before the S. Energy and Natural Resources Comm.*, 2019).¹ As introduced, SB 309 was initially opposed by both NHDES and NHMA at the hearing before the Senate Energy and Natural Resources Committee because it did not contain some form of cost-benefit analysis. *Id.* at 3 (summarizing testimony from Pillsbury stating that the bill lacked, in part, “a full understanding of the impact and practicality of setting the standards” and Reid as stating, “[t]here should be a risk-benefit analysis.”). After the Senate Energy and Natural Resources Committee hearing, Commissioner of NHDES, Robert Scott, sent a letter dated March 27, 2018, now memorialized in the House Resources, Recreation and Development Committee Report as “Testimony” and

¹ NHMA’s Appendix will be referenced as “App. ____”

reproduced in NHMA’s Appendix at 6 – 7. The letter stated, in relevant part, “Our statute [RSA 485:3, I(b)] is silent on the considerations that should go into establishing an MCL, which include occurrence data, ability to reliably detect the contaminant, ability to remove the chemical from drinking water, **and costs to affected entities that will result from establishing the standard.**” (emphasis added). *Id.* at 6. Commissioner Scott then suggested that the language from HB 1101, which proposed to modify RSA 485:3, I(b) be added to SB 309. *Id.* at 6 – 7. A comparison of the portion of HB 1101 seeking to modify RSA 485:3, I(b) and the final version of SB 309 demonstrates that Commissioner Scott’s recommendation was accepted and the cost-benefit analysis language was added to SB 309 prior to its passage.

The multiple engagements of NHDES, including engagement at the highest level, with key legislative committees during the debate over modifying RSA 485:3, I(b) demonstrate that NHDES was keenly aware of the legislative intent behind RSA 485:3. The fact that NHDES advocated for RSA 485:3, I(b) to include the four criteria that it now includes and the statements representatives from NHDES made regarding those criteria, as well as NHDES’s knowledge of what others said regarding those criteria, demonstrates that NHDES’s current position, that it must merely consider the costs and benefits, not engage in an actual cost-benefit analysis, is starkly different from the position that it took during the passage of SB 309. *Compare id.* at 4, 6 – 7, with State Br. at 39.

The situation here is analogous to that presented in *Appeal of Suzanne Fournier & a.*, No. 2018-0617 (Nov. 14, 2019). In that case, as here, NHDES was well aware of the plain meaning of the regulations governing its conduct, yet it chose to employ a more stringent no adverse impact standard rather than the written rule requiring impacts be minimized. *Id.* at 3.

In *Fournier*, NHDES was interpreting its own regulations, which were subject to the “plain meaning” test. *Id.* (“The law is well settled that an administrative agency must follow its own rules and regulations, and that an agency’s interpretation of its own regulations is erroneous as a matter of law when it fails to embrace the **plain meaning** of

its regulations.”) (citations omitted) (emphasis added). Although this case largely involves statutory interpretation, the same test applies. *Appeal of Union Tel. Co.*, 160 N.H. 309, 317 (2010) (“In interpreting a statute, [this Court] first look[s] to the language of the statute itself, and, if possible, construe that language according to its **plain and ordinary meaning.**”) (emphasis added). Thus here, as in *Fournier*, NHDES should have applied the plain meaning standard to RSA 485:3, I(b)’s “costs and benefits” section.

Instead, NHDES took the position that the law which NHDES’s senior officials advocated for did not say what NHDES’s senior officials asked it to say. *Compare* App. at 4, 6 – 7, *with* State Br. at 39. That ignores not only the plain and ordinary meaning of the statute, but also the legislative history of the statutory changes, and reflects a material divergence from the standard set out in the law. *See* App. 4 (statement of Sarah Pillsbury, Drinking Water and Groundwater Bureau Administrator, NHDES, and Barbara T. Reid, Government Finance Advisor, NHMA, at *Hearing on SB 309 Before the S. Energy and Natural Resources Comm.*, 2019). Therefore, as in *Fournier*, NHDES chose to apply a different interpretation of the law than the one prescribed.

The present situation, however, is worse than *Fournier* because NHDES not only ignored the plain and ordinary language of RSA 485:3, I(b), but NHDES actively participated in and supported the inclusion of that language in the statute. Therefore, NHDES had not only the guidance of the plain language of RSA 485:3, I(b) but also intimate knowledge of the legislative intent behind the statute, including its own commissioner’s knowledge of and involvement in crafting that intent. *Compare* App. *with* HB 1101 (2018), *and* SB 309 (2018).

III. The enforcement date of NHDES’s PFAS MCL conflicts with the arsenic MCL and the standard federal rules on enforceability of new or revised MCLs.

Chapter 208, Laws of 2019, modifying RSA 208:1, gave public water systems until January 1, 2021, to come into compliance with the new, lower arsenic MCL. This

sensible delay in implementation allows municipalities time to resolve many funding issues related to testing as well as issues related to the design and construction of new or modified facilities.

In contrast, the NHDES MCLs on the four-named PFAS compounds went into effect on September 30, 2019 and were effective until issuance of the temporary injunction in this matter. This timeline gave municipalities no time to prepare for any additional testing costs and very little time to determine what funds will be needed to comply with these standards. Unfortunately, what that also means is that any municipality which must contend with both arsenic and PFAS should start to consider how to design a PFAS mitigation system that allows for arsenic mitigation, effectively abrogating the delay inherent in RSA 208:1.

By comparison, under U.S. EPA rules, drinking water MCLs go into effect three years after they are finalized. U.S. ENVTL. PROT. AGENCY, HOW EPA REGULATES DRINKING WATER CONTAMINANTS, available at: <https://www.epa.gov/dwregdev/how-epa-regulates-drinking-water-contaminants>. With an additional two-year extension that may be granted by U.S. EPA if capital improvements are required. *Id.* Under particular circumstances, exemptions may be given to allow extra time to seek other compliance options or financial assistance. *Id.* There is no indication in U.S. EPA's recent announcement regarding its intention to make a regulatory determination under 42 U.S.C. 300f *et seq.*, Safe Drinking Water Act, for PFOA and PFOS that any consideration would change the ordinary course of having a sensible transition period prior to the implementation of rules that carry significant capital costs. OFFICE OF INFO. AND REGULATORY AFFAIRS IN THE OFFICE OF MGMT. AND BUDGET, *Regulatory Determinations for Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfate (PFOS)*, REGINFO.GOV, available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=2040-AF93>. With final rules for PFOA and PFOS due January 4, 2021, U.S. EPA would not be able to take enforcement action after either January 4, 2024, or January 4, 2026, meaning

states and their subdivisions would have ample time to come into compliance before the threat of enforcement looms. *Id.*

CONCLUSION

For the foregoing reasons, the *amicus curiae* respectfully joins in the Plymouth Water and Sewer District’s requests for relief.

Dated: May 28, 2020.

Respectfully submitted,

NEW HAMPSHIRE MUNICIPAL ASSOCIATION

By: /s/Natch Greyes

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STATEMENT OF COMPLIANCE

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with New Hampshire Supreme Court Rule 26. Further, this brief complies with New Hampshire Supreme Court Rule 16(11), as it does not exceed 9,500 words.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May, 2020 a copy of this BRIEF OF THE NEW HAMPSHIRE MUNICIPAL ASSOCIATION AS *AMICUS CURIAE* has been transmitted via the NH Supreme Court's electronic filing system to the following: Christopher G. Aslin, Esq., K. Allen Brooks, Esq., Timothy Bishop, Esq., Nessa Horewitch Coppinger, Esq., Joseph A. Foster, Esq., Michael Quinn, Esq., Mark C. Rouvalis, Esq., Beth A. Deragon, Esq., Terri L. Pastori, Esq., Paul J. Twomey, Esq., and North East Biosolids and Residuals Association.

Date: 5/28/20

/s/ Natch Greyes

Natch Greyes, Esq.

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0058

The Plymouth Village Water and Sewer District & a.

v.

Commissioner, New Hampshire Department of Environmental Services

RULE 8 INTERLOCUTORY APPEAL FROM RULING OF THE
MERRIMACK SUPERIOR COURT

APPENDIX
OF *AMICUS CURIAE*, NEW HAMPSHIRE MUNICIPAL ASSOCIATION
IN SUPPORT OF THE PLYMOUTH VILLAGE WATER AND SEWER DISTRICT & A.

NEW HAMPSHIRE MUNICIPAL ASSOCIATION

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Senate Energy and Natural Resources Committee

Griffin Roberge 271-2878

SB 309-FN, relative to standards for perfluorochemicals in drinking water, ambient groundwater, and surface water.

Hearing Date: January 23, 2018.

Time Opened: 11:54 a.m.

Time Closed: 12:25 p.m.

Members of the Committee Present: Senators Avard, Bradley, Innis, Fuller Clark and Feltes.

Members of the Committee Absent: None.

Bill Analysis: This bill:

I. Requires the commissioner of the department of environmental services to adopt a state drinking water standard relative to perfluorochemicals.

II. Requires the commissioner of the department of environmental services to establish ambient groundwater quality standards relative to perfluorochemicals.

III. Requires the commissioner of the department of environmental services to establish surface water quality standards relative to perfluorochemicals.

Sponsors:

Sen. Innis

Sen. Bradley

Sen. Avard

Sen. Fuller Clark

Sen. Gannon

Sen. Ward

Sen. Carson

Sen. Birdsell

Sen. Feltes

Rep. Messmer

Rep. H. Marsh

Rep. Emerick

Rep. Bean

Rep. Murray

Who supports the bill: Senator Dan Innis (District 24), Senator Sharon Carson (District 14), Senator Kevin Avard (District 12), Senator Regina Birdsell (District 19), Senator Ruth Ward (District 8), Representative Jim McConnell (Cheshire - District 12), Representative Marjorie Shepardson (Cheshire - District 10), Representative Suzanne Smith (Grafton - District 8), Representative Mindi Messmer (Rockingham - District 24), Patricia Martin, Tom Irwin (Conservation Law Foundation).

Who opposes the bill: Sarah Pillsbury (DES), Stefanie Lamb (BIA), Barbara Reid (NH Municipal Association).

Who is neutral on the bill: None.

Summary of testimony presented in support:

Senator Dan Innis

Senate District 24

- SB 309-FN is a reintroduction of HB 463 (2017), which failed in a committee of conference because it did not have a fiscal note.
- SB 309-FN requires the DES to set a MCL on PFOA and PFOS in public water supplies. It requires the DES to review what other states have done and to use peer-reviewed science to create a standard.
- The bill provides for an annual review of the standard, allowing the standard to change. For example, the EPA once had an MCL of 700 parts per trillion (ppt) that is now 70 ppt.
- The fiscal note states that it costs \$180-\$400 per test per source in the state. There are 4,200 sites in the state. The overall cost may be high, but the cost to communities per well is low.
- Senator Fuller Clark asked if SB 309-FN is an important companion bill to her bill, SB 454. Senator Innis argued that one cannot be done without the other. There needs to be an appropriate standard and a continued monitoring of the growing science on the standard.
- Senator Fuller Clark said a main component of SB 309-FN is the annual review of current science on the issue of PFCs. SB 454 places a longer time line for DES to make a standard and initiate rulemaking. She asked if Senator Innis would have an opinion on adding other PFCs. Senator Innis said he did not have an opinion on that and would leave it to other testimony to address that issue.

Representative Mindi Messmer - provided written testimony

Rockingham - District 24

- Other states have sought to create more strict standards on PFCs.
- SB 309 would have DES initiate rulemaking to create standard for drinking water, surface water, and ambient groundwater.
- SB 309 should be amended to include the PFCs (PFNA and PFHxS) outlined in SB 454.
- In regards to opposing testimony, Vermont has set a lower standard and was challenged in court by Saint-Gobain. The state should not be getting concerned so much with legal proceedings. It should be focused on the public health. Coming to some agreement on a standard for a set of PFCs would be a great step. There is a cancer cluster in the Seacoast area where PFCs levels are high.
- Senator Fuller Clark said the EPA has set standards for drinking water, but no standards for surface water. She asked Representative Messmer to comment. Representative Messmer said water in the state is mostly derived from bedrock wells, which comes from surface water. Surface water is interconnected to drinking water. Many people on the Seacoast have bedrock wells. Looking at surface water in the state makes sense.

Tom Irwin

Director, New Hampshire Conservation Law Foundation

- Recommends bringing PFNA and PFHxS from SB 454 to SB 309. Many of the objections to SB 454 is that the MCL would be set in statute, removing it from DES's jurisdiction. The process in SB 309 makes sense and provides important guidance to DES.
- There should be a public comment period within the process of DES reviewing the standards.
- With respect to surface water quality, there have been samples in the Great Bay that record high levels of PFCs. DES has notified local legislators to inform them that the Coakley Landfill is a primary cause of these PFCs. However, in meetings with DES, DES states that they do not have a regulatory tool to set a surface water quality standard. SB 309 will offer policy guidance to the DES to set such a standard.
 - Senator Avard noted DES testimony where it was stated that DES cannot use a standard that is less protective of the EPA's standard. Thus, if the EPA does not have a surface water standard, DES cannot get any less protective.
 - Mr. Irwin argued DES can get more protective than the EPA, but DES cannot get less protective than the EPA. Taking the step to get more protective than the EPA on

- surface water would not jeopardize the state's role under the Clean Water Act.
- There is a role for the legislature to play in giving the DES some guidance in setting up standards for drinking water, surface water, and ambient groundwater.

Summary of testimony presented in opposition:

Stefanie Lamb

Vice President of Public Policy, Business & Industry Association (BIA)

- There is language in SB 309 that raises concern with the phrase "reasonably protect" and "reasonably supported." This language is broad on how to define "reasonable."
- The water quality standard should be based on sound science and methodology. DES does not currently have a criteria for setting up a standard.

Barbara Reid - provided written testimony

Government Finance Advisor, NH Municipal Association

- DES is the appropriate body to set a standard on water quality for PFCs. However, there is great financial uncertainty with SB 309. A fiscal note prepared by DES states the additional costs to municipalities, while indeterminate, could be "significant" and cost "millions of dollars." There should be a risk-benefit analysis.
- Limited local resources may not be able to keep up with these proposed standards. There is a prohibition of unfunded mandates in the state constitution.
- Senator Fuller Clark asked about NHMA's concerns of health care costs going forward if a standard is not created. Ms. Reid stated that the NHMA is concerned about societal costs as well. Other options should be explored to address water quality. She referenced the NH Drinking Water and Groundwater Trust Fund that can address water issues in the state.

Sarah Pillsbury - provided written testimony

Drinking Water and Groundwater Bureau Administrator, DES

- While appreciative of SB 309's intent, DES is supportive of HB 485 and HB 1101. These bills accomplish the same goals for AGQs and MCLs as SB 309. The HBs set and/or revise MCLs and AGQs for PFOA and PFOS, as well as PFNA and PFHxS, by the end of 2018.
 - HB 485 and HB 1101 will allow DES to review CDC studies on the PFCs.
 - Two new positions will be established to perform analysis of the science and the NH Safe Drinking Water Act would be amended to specify the other important considerations that are needed to set MCLs using methodology that is consistent with other states and the EPA.
- SB 309 also goes further in looking to establish a standard for surface water. If SB 309 passed, NH would be the first state to have its own surface water quality standard and would need approval from the EPA. The EPA does not have its own standard for surface water.
 - HB 1590 has a similar objective. Significant research would be required to identify if the science and studies exist to set surface water standards. Due to the Clean Water Act, NH must closely abide by EPA standards and get their approval for any changes.
- SB 309 does not contain all the components needed to establish the surface water, drinking water, and ambient groundwater standards (AGQs), such as: the use of the best peer-reviewed science available to establish health based criteria, a full understanding of the impact and practicality of setting the standards, and the resources and time for needed analysis.
- SB 309 also fails to align the process for setting a maximum contaminant limit (MCL) with other states and the EPA.
- Senator Avard asked if a new standard could be challenged in court. Ms. Pillsbury said it could. That is a reason why the standard should be set in accordance with federal and state laws.
- Senator Avard said surface water can also be contaminated from the air. Ms. Pillsbury said many cities emit pollutants that can carry all the way to NH.

Neutral Information Presented: None.

Future Action: Pending.

GJR

Date Hearing Report completed: January 23, 2018.



The State of New Hampshire
Department of Environmental Services



Robert R. Scott, Commissioner

March 27, 2018

The Honorable Chris Christensen, Chair
House Resources, Recreation and Development Committee
Legislative Office Building, Room 305
Concord, NH 03301

RE: SB 309, *AN ACT relative to standards for perfluorochemicals in drinking water, ambient groundwater, and surface water.*

Dear Chairman Christensen and Members of the Committee:

Thank you for the opportunity to comment on SB 309. This bill would require the New Hampshire Department of Environmental Services (NHDES) to review the current ambient groundwater quality standards (AGQS) for perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) and set an AGQS for perfluorononanoic acid (PFNA) and perfluorohexanesulfonic acid (PFHxS) by January 1, 2019. It also requires NHDES to set drinking water maximum contaminant levels (MCLs) for all four of these chemicals by January 1, 2019 and to set surface water standards for them by January 1, 2020. While NHDES has supported setting these standards in accordance with nationwide practices, provided there is sound science to base them on and there are the resources to do so, we are concerned that this bill, unlike HB 1101, does not include all these important considerations. Unless these considerations are addressed, NHDES cannot support this bill.

Specific recommendations that the committee may want to consider include:

- 1) NHDES has been reluctant to set MCLs for perfluorochemicals to date as we do not believe it is appropriate to set such standards using a different methodology than any other state or the USEPA. Our statute is silent on the considerations that should go into establishing an MCL, which include occurrence data, ability to reliably detect the contaminant, ability to remove the chemical from drinking water, and costs to affected entities that will result from establishing the standard. We recommend that the language from HB 1101 on how MCLs should be established be added to this bill so that MCLs are set in accordance with the balanced and scientifically based methodology used by all other states and USEPA. With such language in place, NHDES would be well positioned to determine and propose appropriate MCLs for PFOA, PFOS, PFNA and PFHxS as well as future contaminants.

www.des.nh.gov

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- 2) SB 309 would require NHDES to establish surface water quality standards for PFOA, PFOS, PFNA, and PFHxS. These compounds have been detected in NH waters, and it would be helpful to have surface water standards for them. However, there is significant complexity to a state independently setting surface water standards. The process includes determining the appropriate protective value(s), which requires specialized experience in federal Clean Water Act and aquatic life risk analysis; obtaining necessary federal approvals for incorporation into USEPA permits; and analyzing the impact to affected activities such as wastewater disposal. NHDES has never set a surface water standard. Attached is a set of frequently asked questions that provide additional information on this topic. Also, we believe it was the intent of the sponsor to provide January 1, 2020 as the date to initiate rulemaking and not the date for the standard to be adopted.
- 3) Finally, unlike HB 1101, this bill does not specify the resources that must be available to NHDES to perform the tasks the bill requires. Specifically, NHDES will need to hire a toxicologist and health risk assessor to develop and review the drinking water and groundwater standards. In addition, funding for a contract consultant would be needed to establish the surface water standards. As discussed above, this work requires specialized knowledge and experience, and NHDES does not have this capability in-house.

Thank you again for the opportunity to comment on this proposed legislation. If you have questions or need additional information, please contact Sarah Pillsbury, Drinking Water and Groundwater Bureau Administrator (Sarah.Pillsbury@des.nh.gov or 271-1168).

Sincerely,



Robert R. Scott
Commissioner

cc: Senators Innis, Bradley, Avard, Fuller Clark, Gannon, Ward, Carson, Birdsell and Feltes
Representatives Messmer, Marsh, Emerick, Bean, Murray